

Montana State Senate



The Treasure State

December 23, 2024

Via email toni@teaselaw.com
and mailbox@montanabar.org

Antoinette M. Tease, President
Montana State Bar
Box 1902
Billings, MT 59103

Re: Montana State Bar Partisan Seminars

Ms. Tease:

We write to object to the Montana State Bar's implicit endorsement of partisan attacks on the Republican Party and elected Republican officials. If the state bar was a private, voluntary organization, it would not be our concern. However, the state bar was created by order of the Montana supreme court. It is a government entity. Furthermore, the supreme court forces lawyers to join the state bar in order to practice law. Membership is not voluntary. As a result, partisan attacks sponsored by a judicially-created entity that lawyers must join is our legitimate concern.

On April 12, 2024, at its annual state convention, the state bar sponsored a continuing legal education panel for lawyers called "Portraits in Courage-Unpopular Causes and Representing the Unrepresentable." The panel was moderated by Montana supreme court justice Laurie McKinnon and featured Montana attorneys Randy Cox, Jim Goetz and Mark Werner, along with retired Billings district judge Michael Moses. We attach a transcript of this state bar-sponsored seminar.

In the course of the presentation, Mr. Goetz called a recent Montana supreme court decision on the Judicial Nomination Commission "a piece of shit." He labeled laws that Republicans

recently enacted as “just pieces of garbage...[that] should be stricken.” He called our current Republican governor “Governor Gianforeskin.”

Mr. Goetz also described his attempt to engage in a secret telephone conversation with a supreme court justice or a supreme court justice's clerk on a pending supreme court case involving the supreme court itself, without the other parties or their counsel being present (this is an *ex parte* communication that court rules prohibit). We note this is the same case in which Justice McKinnon refused to recuse herself and wrote the court’s opinion, while fellow panelist Mr. Cox represented the judiciary. *See, McLaughlin v. Montana State Legislature*, 2021 MT 120-1.

In a continuing irony throughout this seminar, while Mr. Goetz himself was attacking the court, he implied that only the Republican Party attacks the courts. He proclaimed, “there’s only one party that’s really attacking the courts, and it’s despicable.” Apparently Mr. Goetz’s “portrait in courage” is his willingness to engage in hypocritical attacks on the Republican Party at a state bar-sponsored event while surrounded by a sympathetic panel, including a supreme court justice, retired judge and several hand-picked lawyers.

In her introductory remarks, Justice McKinnon stressed that lawyers “as members of the judicial branch of government have an obligation to protect and defend [the judiciary’s] integrity and independence.” Yet as Mr. Goetz attacked all three branches of Montana’s government, including the judicial branch, Justice McKinnon stood silent. She never objected to Mr. Goetz’s attacks. To the contrary, she laughed at Mr. Goetz’s statements and labeled him “a fierce defender of the Constitution,” noting that she personally invited him to speak.

In a related matter worth comparing, the Montana Office of Disciplinary Counsel (“ODC”) has filed a 35-page disciplinary complaint in the Montana supreme court against Attorney General Austin Knudsen. *See, In the Matter of Austin Miles Knudsen*, PR 23-0496. The statements that Attorney General Knudsen made (or that others in his office made) that the ODC considers rule-breaking are much less inflammatory than Mr. Goetz’s own statements. For instance, the ODC alleges that the following statement in a letter to the Montana supreme court on attorney general letterhead violates Rule of Professional Conduct 8.4(d) because it “is prejudicial to the administration of justice”:

The Court here lays claim to sole authority over provision of due process for all branches of government, which is ludicrous. The statement implies that the Legislature is not capable of providing a forum in which due process may be had by subjects of Legislative inquiry. This statement is wholly outside the bounds of rational thought, given that all branches and levels of government are bound to provide due process to citizens in every action taken, and which the Executive and Legislative branches do every day. *Id.*, Count 13, p. 18.

If statements that a court’s position “is ludicrous” or “wholly outside the bounds of rational thought” are considered “prejudicial to the administration of justice,” then certainly calling a

supreme court decision “a piece of shit” at a state bar-sanctioned event in front of a supreme court justice is similarly prejudicial. Accordingly, we are copying this letter to the Office of Disciplinary Counsel with a request that they investigate Mr. Goetz’s conduct for violations of the Rules of Professional Conduct using the same standard they applied to the Republican attorney general.

Of course, while we should expect a non-partisan ODC analysis, we have little confidence this will occur. This state agency is a wholly controlled subsidiary of the Montana Supreme Court. As the ODC website itself makes clear:

The Office of Disciplinary Counsel (ODC) is part of a comprehensive lawyer regulation system established by the Montana Supreme Court. The system consists of ODC and the Commission on Practice (COP). COP and ODC are under the direct supervision of the Montana Supreme Court. The Court appoints the Disciplinary Counsel.

The court appointed the current chief disciplinary counsel, Pam Bucy, who was the 2012 Democrat candidate for Montana attorney general and staffer in previous Democrat administrations.

The Montana Supreme Court has a long history of hostility toward the Republican Party and conservatives, most clearly demonstrated in the court’s appointments in the last three decades of known Democrat activists and donors to the redistricting commission. In each of at least the last three redistricting cycles, the Supreme Court-appointed member—not surprisingly—sided with the other two Democrat-appointed commissioners to draw state and house seats to favor Democrats. In the just concluded 2024 general election, Republicans lost nine house seats and two senate seats because of the new Democrat-drawn districts. Redistricting is the pinnacle of partisanship; the group who controls the redistricting pen controls election outcomes. The Supreme Court’s undeniable, consistent and intentional appointment of Democratic donors in this hyper-political process renders assertions that the court is “non-partisan” as patently false.

Regardless whether the ODC takes action against Mr. Goetz’s outrageous and offensive statements and partisan attacks on Republicans, the state bar certainly should not tolerate or sanction such conduct at its events. Accordingly, we call on the state bar to apologize to its members, the Republican Party and Governor Gianforte for Mr. Goetz’s conduct. We also request that the state bar publish guidelines for future bar presentations that encourage a diversity of offered viewpoints, including speakers who argue that separation of governmental powers is central to our constitution and the judiciary’s role is to say what the law is, not what it should be.

Given that the Montana Supreme Court forces lawyers to join your organization and pay dues in order to practice law, we think your membership should be made aware of how you intend to address Mr. Goetz’s offensive conduct at an event they paid for. Accordingly, we ask that you:

1. Respond to this letter by January 6, 2025 with the state bar's apology and guidelines for future bar-sanctioned seminars;
2. Publish this letter and your response in the next issue of The Montana Lawyer;
3. Email this letter and your response promptly to all state bar members. We note this broadcast email would be consistent with your unusual December 10, 2024 membership email stating the state bar is "fully prepared to engage constructively and effectively on legislative matters" in the upcoming legislative session when numerous Republican judicial reform bills are expected; and
4. At Chairman Usher's request, attend the Senate Judiciary Committee's January 7, 2025 meeting to discuss this letter and the bar's response to it. This request to come to the committee is made specifically of Ms. Tease, not a lobbyist or other designee, for 10:00AM on 1/7/in Room 303 of the Montana State Capitol.

Sincerely,



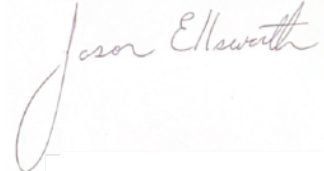
Sen. John Fuller

Sponsor of LC 44 to make membership in the State Bar voluntary



Sen.-Elect Matt Regier

President-Elect of the Montana Senate



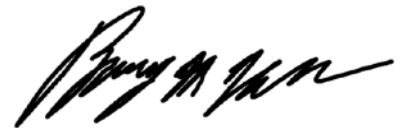
Sen. Jason Ellsworth

President of the Montana Senate



Sen. Ken Bogner

Senate President Pro Tempore



Sen. Barry Usher

Chair, Senate Judiciary Committee
Senate Majority Whip



Sen.-Elect Sue Vinton

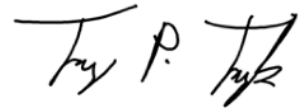
Senate Majority Whip



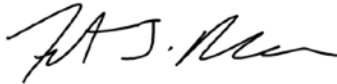
Sen.-Elect Vince Ricci



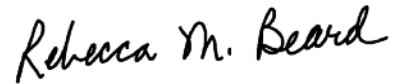
Sen.-Elect Bob Phalen



Sen.-Elect Tony Tezak



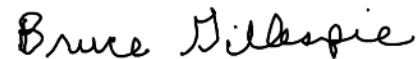
Sen. Forrest Mandeville



Sen. Becky Beard



Sen. Shelley Vance



Sen. Butch Gillespie



Sen. Daniel Emrich



Sen. Theresa Manzella



Sen. Carl Glimm

Sen. Greg Hertz
Sen. Jeremy Trebas
Sen. Mike Cuffe

c: Office of Disciplinary Counsel
Clerk of the Montana Supreme Court
Speaker-elect Rep. Brandon Ler
Attorney General Austin Knudsen
Governor Greg Gianforte

Attachment:

Transcript of State Bar of Montana's Bench Bar CLE "Portraits in Courage-Unpopular Causes and Representing the Unrepresentable"

THE STATE BAR OF MONTANA

BENCH BAR CLE

PORTRAITS IN COURAGE - UNPOPULAR CAUSES AND
REPRESENTING THE UNREPRESENTABLE

Friday, April 12, 2024
Bozeman, Montana

BENCH BAR CLE - PORTRAITS IN COURAGE

1 JUSTICE McKINNON: My name is Laurie
2 McKinnon, and good afternoon. Thank you for being
3 here, and thank you for your interest in this very
4 important and relevant topic.

5 While we have titled the panel Portraits in
6 Courage, and indeed this is a panel that will discuss
7 some of the challenges we face in defending the
8 Constitution, the Rule of Law. An unpopular cause for
9 the legally disadvantaged, our unifying message is the
10 need to defend and protect the independence of our
11 judiciary and its ability to make nonpartisan
12 decisions.

13 While the other two branches of government
14 are by their very Constitution partisan, the judiciary
15 protects the nonpartisan and guarantees the
16 fundamental rights of our social contract as embodied
17 in the Montana and Federal Constitutions. Very
18 simply, the judicial branch of government is our
19 pillar of democracy, and you as members of the
20 judicial branch of government have an obligation to
21 protect and defend its integrity and independence so
22 that democracy and the Republic can endure.

23 When we defend the unpopular cause, protect
24 the legally disadvantaged, or uphold the Rule of Law
25 through our advocacy and decisions, we are protecting

1 for the State of Montana; and Jim Goetz.

2 Mark, I had to look up a little bit of
3 information for you, and what I came across is, "I
4 want to be -- I want to be Mark Werner when I grow
5 up". And that was the message from Tony Gallagher,
6 previous Chief Federal Defender from Montana. Mark is
7 recognized as one of the most effective criminal trial
8 lawyers in Montana and endeavors to be the most
9 prepared lawyer in the courtroom. Juries love him,
10 judges respect him, and prosecutors admire his skill.

11 Randy Cox to my right has 40 successful
12 years with Boone Karlberg and serving the community.
13 Randy retired from the private practice of law and
14 continued working as vice-president and general
15 counsel for the Bozeman-based company, Wildfire
16 Defense Systems, Inc., the largest company in the US
17 providing qualified insurance resources devoted to
18 wildfire mitigation in evacuation settings. As a
19 lawyer though Randy focused on defense of claims
20 related to toxic exposure, product liability,
21 professional negligence, complex commercial
22 litigation, and railroad litigation. He represented
23 the Court Administrator Beth McLaughlin in proceedings
24 involving the legislature and the scope of the
25 legislature's subpoena power.

1 the integrity and independence of the judiciary as an
2 institution and a third nonpartisan branch of
3 government. The judicial branch is the stabilizing
4 force when the pendulum swings in the other branches
5 of government and threatens the terms of our social
6 contract. Its independence and ability to make
7 nonpartisan decisions is therefore critical to our
8 state and our nation.

9 Collectively -- and I have to add, Jim
10 Goetz I invited at the spur of the moment, but
11 collectively -- and I'm going to say we have 200 years
12 of legal experience here.

13 JUDGE MOSES: No. There's only about 40
14 years.

15 JUSTICE McKINNON: They are all standouts in
16 the law and in Montana because they have consistently
17 defended the unpopular cause, the Constitution or the
18 Rule of Law, which has enhanced and protected the
19 integrity and independence of Montana's judicial
20 branch.

21 So joining me today is retired Judge Mike
22 Moses -- and I didn't know where everyone was going to
23 be sitting -- from the Thirteenth Judicial District,
24 Yellowstone County; Randy Cox, retired partner from
25 Boone & Karlberg; Mark Werner, federal public defender

1 Judge Mike Moses was appointed by Governor
2 Bullock and sworn in as a judge of the Thirteenth
3 Judicial District in 2014. During his tenure Judge
4 Moses ruled on a number of high-profile cases, and I
5 do want you to explain how they all got to you. Last
6 year he temporarily blocked enforcement of a law that
7 required transgender people to have undergone a
8 surgical procedure before being allowed to change
9 their sex on their birth certificate. He also struck
10 down several laws regulating elections, saying they
11 severely burdened the right to vote, especially for
12 native Americans, students, the elderly, voters with
13 disabilities, which we recently affirmed in the
14 Montana Supreme Court. In his retirement Judge Moses
15 provides mediation services.

16 And then we have Mr. Goetz, Jim Goetz. And
17 we've already heard -- well, actually, Mr. Goetz,
18 you'll have to tell us a little bit more as we get
19 into discussion, but I have seen your name on briefs
20 very frequently, and one case in particular was Senate
21 Bill 144 which got rid of the Judicial Nomination
22 Commission, but Mr. Goetz has well represented
23 litigants in high-profile cases and is a fierce
24 defender of the Constitution.

25 So, Randy, why don't we start with you.

BENCH BAR CLE - PORTRAITS IN COURAGE

1 Part of the principle underlying independence of the
2 judiciary is its respect for the Rule of Law, and that
3 following the Rule of Law promotes consistency and
4 reasonable precedent. How does a practitioner
5 continue with these precepts and principles when
6 they're faced with a situation which he or she
7 believes has (inaudible)?

8 MR. COX: So that's an interesting -- it's
9 an interesting question, and Justice McKinnon prompted
10 me on a particular case where I was representing BNSF.
11 The groundwork was being laid for an appeal to the
12 U.S. Supreme Court because no one other than me, like
13 the night before the oral argument, thought that we
14 had much of a chance of winning, but by then I was
15 convinced.

16 So I had to do a couple of things, one which
17 was to make sure that the record was clear. Second,
18 draw out things out of the court that might come in,
19 you know, through -- through answers, and see what
20 came out in the judicial opinion. And ultimately then
21 the case went to -- the Montana Supreme Court did in
22 fact rule against my position, my client's position.
23 Justice McKinnon was the sole dissent, and it did get
24 picked up on a petition for writ of certiorari to the
25 U.S. Supreme Court. The US Supreme Court -- I just

1 the cases you -- I know you've litigated more
2 high-profile cases -- how it worked and how you felt
3 about some of the results.

4 MR GOETZ: Okay. First of all, I'm 10
5 years -- 10 days older than Joe Biden, and I'm losing
6 my vocal cords. I'm trying to retire, but I can't
7 quite get there, but after that last presentation I
8 know I should very quickly.

9 Just this week I filed -- I caught an
10 opponent, and I won't get into details because it's
11 pending, but just made a horrible mistake in her reply
12 brief, mischaracterizing. And so I filed something,
13 and the response from the opposing counsel, among
14 other things, is, Well, everybody makes mistakes. And
15 I almost put this in the brief, but I didn't. By the
16 way, one of the big mistakes -- it says, Everyone
17 makes mistakes; even you, meaning me. And I agree
18 with that. One of the biggest mistakes I've made over
19 the years is not hiring Mr. Cox, who used to be an
20 intern before he went to law school.

21 MR. COX: I told you.

22 MR GOETZ: But what I thought about putting
23 in brief after agreeing that, yes, everybody makes
24 mistakes, but one of my favorite sayings is, Yes,
25 everybody makes mistakes, but some are bigger than

1 have to say, my client should have had me argue it,
2 but they didn't.

3 JUSTICE McKINNON: You'll have to explain.
4 You told me something on the phone about that, but go
5 ahead.

6 MR. COX: Okay. You're going to have to
7 remind me.

8 JUSTICE McKINNON: All right. I will.

9 MR. COX: But -- and it was argued there,
10 and it was pretty clear -- I listened to the argument.
11 It was clear that the Supreme Court thought that what
12 the Montana Supreme Court had decided was just simple
13 nonsense, and they cited Justice -- but they cited
14 Justice McKinnon's dissent four times.

15 JUSTICE McKINNON: And it was Justice
16 Ginsburg. But, no. You said to me that, I think in a
17 phone call after that, that the client had wanted a
18 particular attorney to argue it, and the junior
19 attorney argued, and then during argument they didn't
20 use their whole time on that --

21 MR. COX: I did not tell you that story. It
22 sounds -- I mean, it sounds like a really great story,
23 but it's not one that I know, so --

24 JUSTICE McKINNON: Okay. All right. So,
25 Jim, maybe you could talk a little bit about some of

1 others -- take my first marriage, for example -- but I
2 thought that might not be appropriate.

3 A couple things about the presentations
4 earlier today, and one was, oh, the county attorney
5 from Townsend, and talking about two sides to this --
6 these attacks on the courts. It's -- it's not
7 two-sided. There's one party that's really attacking
8 the courts, and it's despicable.

9 And the other thing that got my attention
10 was Judge Wilson complimenting the court on the
11 Judicial Nomination Commission case, which I and Cliff
12 Edwards handled. And we made a couple mistakes in
13 that case. Among other things, we filed the case on
14 original jurisdiction before the Supreme Court at a
15 time when there was incredible legislative partisan
16 pressure on the court. And when Judge Wilson said
17 that that was a -- an even opinion, it's a piece of
18 shit. And I can say that because I'm 10 years -- 10
19 days older than Biden.

20 But what Judge -- and, by the way, Justice
21 McKinnon filed a very cogent dissent, but she's right.
22 But what Justice Shea did -- and I frankly can't fault
23 the court. I think some of the members of the court
24 lost their courage, frankly. I can say that because
25 I'm 10 days older than Biden. But Justice Shea

BENCH BAR CLE - PORTRAITS IN COURAGE

1 authoring the opinion -- I was always taught you look
2 at the words first of the statute or Constitution, and
3 maybe secondarily or tertiarily the legislative
4 framer's history. Justice Shea started out with
5 framer history, and not only did he start out with
6 that instead of the words, but he used the wrong
7 legislative history, because he's a Butte guy and he
8 talked about Joyce and Colin from Butte on an issue
9 that really failed in the debates. But, nevertheless,
10 I don't want to argue the merits of the case.

11 But that was not a courageous decision by
12 the court other than the dissent, and it's too bad.
13 Again, I've said everybody makes mistakes; we should
14 have gone to the district court, let the issue fester.
15 I learned about that, so we then filed in district
16 court on the guns on campus issue, other issues.

17 But the main point I want to leave you with
18 is that, you know, there's a lot of attacks on the
19 judiciary, but let's face it -- and I'm not a big fan,
20 as some of you may have guessed, of Attorney General
21 Austin Knudsen. But, you know, you can say all you
22 want about them, and they've lost a lot of cases,
23 important cases, over the last couple years, but it's
24 not entirely that staff's fault because some of these
25 measures that have come out of the legislature are

1 you've had just in the amount of time you've been a
2 district court judge some of the most incredible cases
3 in my view in terms of Constitutional issues. But --
4 and we just ruled on the voter rights cases. Are
5 there any of those that you would like to highlight in
6 particular?

7 JUDGE MOSES: Yes. First of all, I
8 practiced law for 36 years in this state doing all
9 kinds of different things with the general practice.
10 We had great judges. We have great judges. All of
11 you have appeared in front of a lot of great judges,
12 most of who are a hell of a lot smarter than I am.
13 And I shouldn't say "hell". I can't say "shit", and I
14 can't say "crap" either.

15 MR GOETZ: I didn't say "crap", I don't
16 think. That's a weak word.

17 JUDGE MOSES: It is pretty weak. So I have
18 to be a little bit careful. But I had the pleasure of
19 sitting on a number of really interesting cases. What
20 I know about Constitutional law -- what I knew about
21 Constitutional law four years ago was about this much
22 of law school (indicating), but I had the privilege to
23 sit on the voting rights case, which was just recently
24 ruled on by the Montana Supreme Court -- what was it?
25 Three weeks ago or so. Fascinating case.

1 just pieces of garbage; they should be stricken. And
2 whatever the -- the legislators say, they should be
3 much more careful, much more informed about them.

4 For example, Cliff and I did the -- the
5 redistricting of the Supreme Court judges by seven
6 districts. Remember that case? And that case was
7 decided in 2011 against the legislature's position. I
8 forget the name. What was the name of that woman who
9 was on the Con Con --

10 MR. COX: (Inaudible.)

11 MR GOETZ: No. From Great Falls. Anyway,
12 she was leading that. There was a -- there was a
13 precedent exactly on point, but somehow the
14 legislature thought they should redo that. So I
15 thought it was a pretty easy case, and it was a pretty
16 easy case, and we won it.

17 But that's a waste of our time, it's a waste
18 of the court's time, but if you have obstinate
19 legislators, many who don't respect the courts, don't
20 respect the Rule of Law, that's what you're going to
21 get. And so I encourage all of you to pitch in, do
22 your part, because I see no sign of this letting up.
23 And Trump hasn't helped either.

24 JUSTICE McKINNON: (Inaudible.) Moving
25 right along. Mike, you -- I've said this to you, but

1 Interestingly enough, the two issues -- the
2 cases were consolidated in front of me. The native
3 American case issues were originally addressed almost
4 a year and a half before by another judge in the
5 Thirteenth Judicial District. Her ruling was about
6 the same as mine, or my ruling was about the same as
7 hers.

8 The others are issues with respect to -- the
9 native American voting rights issues was addressed by
10 Judge Harris, also in the Thirteenth Judicial District
11 Court, about a year and a half before I did my case.
12 We did nine days of hearings in that particular case,
13 and the question was really, really simple.

14 The question is, do the citizens of the
15 State of Montana who have a fundamental Constitutional
16 right to vote, should those voting rights be limited
17 by the legislature? One of them was the limit to
18 college students, so the ID that they could present,
19 because they tend to be more liberal. That was the
20 testimony at the legislature. That didn't seem very
21 Constitutional to me, and it seemed to me that our
22 rights to vote trump the legislature's right to make a
23 decision such as that because students tend to be more
24 liberal.

25 So I had a great opportunity to listen to

BENCH BAR CLE - PORTRAITS IN COURAGE

1 really, really good lawyers for nine days, and, Jim,
2 this goes to your point. We were able to establish a
3 tremendous factual record for the Supreme Court,
4 because this is not a district court decision. I'm
5 not the last living word on Constitutional law and
6 voting rights, etc., etc. It ultimately is a Supreme
7 Court decision and a Supreme Court question. And so
8 we laid nine days' worth of testimony, one side had
9 six days, the other -- about five and a half days, and
10 about three and a half days for the other side.

11 Wonderful witnesses, wonderful testimony, wonderful
12 questions by both sides, great lawyers presented that.
13 It was a privilege to sit on that case, because I like
14 watching kids play in the sand box, especially really
15 good kids, and these guys were excellent. So they
16 presented a spectacular record.

17 Great findings and conclusions that were
18 presented to me, though I did my own, and 199 pages
19 later I filed my opinion with findings and conclusions
20 finding these four issues unconstitutional.

21 My wife was a -- loves politics and loves
22 all those sorts of kinds of things, and I haven't been
23 involved in politics for a long, long time, got calls
24 from all kinds of people about all kinds of things
25 that were being said, some threatening things, some

1 JUSTICE McKINNON: So did Justice Gustafson.

2 JUDGE MOSES: Notwithstanding, the Supreme
3 Court was four for four correct on their decision in
4 the voting rights case.

5 And the background noise is just that; it's
6 background noise. It does not, will not, should not,
7 hopefully will never, affect the decision of judges
8 concerning very important questions such as these
9 Constitutional questions.

10 MR. COX: Can I put a point in right there?
11 Because Judge Moses can -- will sit there and say that
12 those comments, he didn't hear them, or if he would
13 have heard them they wouldn't have affected him.
14 That's not necessarily the case across the board when
15 there's a constant drumbeat of criticism. My concern
16 with that constant critic-- politically-driven
17 criticism is that it has a corrosive effect on the
18 public; the public begins to believe that judges are
19 partisan, that judges are in somebody's pocket, that
20 judges can be bought, and/or that they're -- or that
21 they're partisan. That's the danger, is that we then
22 start to slide down that hill because the Rule of
23 Law -- if we don't have the Rule of Law, we're done,
24 and there has to be a -- there has to be a flat
25 commitment by everyone to say, I hate that decision

1 other things, and I never heard any of that stuff. I
2 didn't pay any attention to that stuff. It's called
3 what I believe to be background noise, because a judge
4 cannot listen to partisan comments one way or the
5 other, and consider those in any way, shape, or form.
6 They cannot do that. That's not what judges do.

7 We take into consideration the law, we take
8 into consideration all of the facts, we put that
9 record together and we tell them what we think is the
10 best decision that we can present to them. And that's
11 what we did in the voting rights case.

12 The Supreme Court affirmed all four of my
13 decisions in that particular round. I disagreed with
14 them on two points. I believe because the right to
15 vote is a fundamental Constitutional right
16 specifically identified in our Constitution, the
17 standard is strict scrutiny, not some intermediate
18 standard which they applied in two of those issues. I
19 think it's strict -- because it's a fundamental right,
20 fundamental Constitutional right, and if you're going
21 to limit a fundamental Constitutional right you better
22 have a hell of a good reason to do it and it better
23 pass strict scrutiny.

24 JUSTICE McKINNON: I agreed with you.

25 JUDGE MOSES: And she did agree with me.

1 but I'm going to follow it.

2 JUDGE MOSES: To that point, us judges can't
3 respond to that background noise, should not respond
4 to that background noise. There just shouldn't be a
5 response, but the bar association should. Lawyers
6 should stand up and say what's real, and that is, Hey,
7 these judges are being independent, they're being
8 fair, they're being non-biased, they're trying to make
9 the best decisions they possibly can, and support the
10 judiciary, because without a fair and impartial
11 judiciary, it goes down, the whole thing goes down, as
12 we've heard earlier today.

13 JUSTICE McKINNON: Mark, I want to get in
14 and make sure we get to you. But on that point, Mike,
15 that you just made, Randy, in the McLaughlin case, you
16 had an opportunity to address the issues and what was
17 going on with the press; is that right?

18 MR. COX: Sure. I mean, the -- okay. So
19 not everybody knows what that case is, but what
20 happened was on a Friday -- background. Out of Jim's
21 case there was -- there had been some e-mails come out
22 that --

23 JUSTICE McKINNON: (Inaudible.)

24 MR. COX: Yeah, some -- well, there had been
25 some e-mails that came out where judges were saying

BENCH BAR CLE - PORTRAITS IN COURAGE

1 particular things about SB 40. And so that hopped the
2 legislature up, so they served a subpoena to get all
3 of the e-mails about judicial polling, but they didn't
4 serve it on the judicial branch; they served it on the
5 Department of Administration, and they didn't give
6 notice to Beth McLaughlin. And she learned about it
7 on a Friday, Friday evening, she called me on a Friday
8 evening, and on Saturday we filed an emergency
9 petition with the Montana Supreme Court, which we then
10 supplemented the next day when we learned that 5,000
11 e-mails had already been produced and the rest were
12 going to be produced.

13 And so we had -- I mean, that was one of the
14 problems, Jim, with your case, is, you got caught up
15 in this political maelstrom.

16 And so all of the -- when you're dealing
17 with a case like that, you have to deal with the law,
18 and it was an easy case on the law. You also have to
19 deal with the political side of it and the media side
20 of it, and, you know, reporters are going to call and
21 all those kinds of things, so -- so it was difficult.

22 And then very early of course in the
23 litigation the Attorney General sent a letter to the
24 Montana Supreme Court that said, As to your order, the
25 legislature will not abide it, which I could not

1 somebody -- maybe it was Judge Brown, who said, I
2 don't even know if I voted on that. If I did, I don't
3 remember. But anyway, that was -- they were just
4 waiting to pounce on that.

5 So this was like four-thirty on a Thursday
6 afternoon, and I said, Geez, we better -- and this was
7 a mistake probably, but, We better at least notify
8 Chief Justice McGrath on that so he's not ambushed.
9 And so we called, and he wasn't in, we left a message
10 with his clerk, and we never did talk to Judge -- and
11 I didn't think it was ex parte because he was off the
12 case. And I just thought he shouldn't be ambushed.

13 But anyway, so that surfaced that we tried
14 to backdoor the court, and that set the background for
15 all these subpoenas then and Mr. Cox's brilliant
16 representation.

17 JUSTICE McKINNON: Yeah, I'll just say
18 what's important, I think, as well to this discussion
19 is, from the court's perspective, we knew that at
20 least 5,000 e-mails had been released; we had no
21 assurance that they were going to stop. And so the
22 Department of Administration hired an attorney, and
23 the attorney entered the appearance, Dale
24 Schowengerdt, and indicated that, We will abide by
25 your order.

1 possibly imagine anybody saying ever.

2 MR GOETZ: I might add on that. What
3 happened -- what happened is, when we filed the
4 judicial nomination case, Justice -- Chief Justice
5 McGrath recused himself. I later learned it was
6 because he talked to Governor Gianforeskin about
7 the -- I mean Gianforte -- about the -- about that
8 bill before it even came up and tried to dissuade him.
9 So I didn't know that at the time, but then it was
10 clear that Jake "the snake" Eaton, who is now I think
11 running the campaign for the governor, but friend of
12 Knudsen, they had some of these e-mails disclosed from
13 one district court judge apparently, but -- and
14 whether they had any position on the nomination
15 commission issue -- and that's perfectly fine, by the
16 way, because judges are -- they lobby all the time;
17 they should lobby for their budgets, for things that
18 are important to the courts, but somehow that became
19 -- and I heard that earlier in one of the panels --
20 something that was a black mark on the judges. All
21 they were doing was polling to see if they could
22 take -- should take a position on this bill.

23 And Judge Krueger, who had been called in
24 to replace Chief Justice McGrath, was apparently --
25 and I don't think he even recalled it. I talked to

1 And that -- that was a member of the bar
2 standing up for the right thing to do against
3 potentially, you know, pressure to do otherwise, so --

4 Okay. I do want to get to you, Mark.

5 JUDGE MOSES: Let's get into Mark.

6 MR. WERNER: No. I'm listening. I'm
7 listening. I'm afraid my topic is quite a sidestep
8 from --

9 JUSTICE McKINNON: Mike, if you want to say
10 something.

11 JUDGE MOSES: Well, I'll follow up on
12 Randy's comment saying, We're not going to follow that
13 order, because I had the same problem in the LGBTQ+
14 case that you talked about earlier.

15 JUSTICE McKINNON: All right. So, Mark, I
16 know you have represented unpopular classes and had to
17 probably endure feedback that wasn't always pleasant.

18 MR. WERNER: Yeah. Well, you know, I think
19 the link here is that -- I guess what this is about
20 with me is of course the Sixth Amendment, the
21 requirement of a zealous representation of indigent
22 clients. And of course in the program it states, you
23 know, talking about representing un-representable
24 people. And, you know, the fact is, is that very few
25 un-representable people, but many, many difficult

BENCH BAR CLE - PORTRAITS IN COURAGE

1 people, get wound -- get thrust into the -- by their
2 own inaction -- into the -- into the criminal justice
3 system.

4 And of course I've been with the federal
5 system, but criminal justice is criminal justice, and
6 there have been times -- I mean, I can recite for
7 everyone for quite a while probably all the things
8 that I should do, and defenders and criminal --
9 criminal defense attorneys should do, to not make a
10 difficult client more difficult. I mean, you know,
11 you don't let them sit, there's contact, there's all
12 kinds of things you need to do, and it's very time
13 consuming and it's this, and it's that. And all those
14 things are important.

15 In terms of a client being an unbreakable,
16 and what do you do, there's never much publicity about
17 it because the Chief Federal Defender for the District
18 of Montana has to approve any assistant Federal
19 Defender talking with the media, and that never
20 happens, because he doesn't believe in it. He doesn't
21 believe that me talking about my client to a media
22 outlet -- he doesn't care whether it does me any good.
23 He doesn't believe it's going to do my client any
24 good.

25 And, you know, it's kind of ironic because

1 other than a severe criminal sentence, what criminal
2 clients fear the most -- it's not equal, but it's up
3 there -- is the publicity that follows them for being
4 a social leper, so to speak, you know.

5 And -- but the ones that have been
6 un-representable for me have -- and the three that I
7 have in mind when I was thinking about this, they all
8 devolved to a person who because of his broken nature,
9 or whatever it was that -- that brought him in -- into
10 the criminal world, is so controlling that he was not
11 going to allow his attorney to do what his attorney is
12 required to do, which is investigate and represent him
13 zealously.

14 And in one case I was physically threatened
15 over the phone, and I knew what it was about because I
16 was about ready to leave, and -- in the next couple of
17 days on an out-of-state trip with my investigator to
18 investigate things that we thought that could help
19 him. Obviously he -- his mind was that I was just
20 going to do him harm, and he didn't care that it was
21 my call about how things are investigated, and the
22 strategy. He didn't care about that, and so --

23 In another case, just a drug case, pretty
24 ordinary, federal distribution case, the client was
25 manipulating the witnesses that we had made contact

1 with who we felt who could help him at trial, and I
2 found out about it somehow, I think through some good
3 investigative work by our office, and I confronted
4 him. I said, This can't happen. You are -- you
5 are -- you are leading me to suborn perjury, and
6 that's not going to happen. And, you know, I can't --
7 I can't be your client and do this, because -- I can't
8 be your attorney and do this, because if I do, I'm
9 being complicit with you, so I'm going to ask the
10 court to relieve me, as I did in the -- in the first
11 case with the guy who threatened me.

12 And, you know, did they work out? Did they
13 ever get representation? Yeah, it -- they did. In
14 the second case, that fellow was a young fellow; he
15 kind of learned he couldn't do that or else he was
16 going to be doing more time. In the first case, with
17 the person who threatened me, the U.S. Attorney's
18 Office just kind of lost interest in that case. They
19 thought it was better if they prosecuted him for
20 threatening a federal officer, you know. So I went
21 from questioning government witnesses to being on the
22 stand while his attorney questioned me for two and a
23 half hours, you know. So -- but -- and then there was
24 a -- you know, there was a verdict and there was a
25 sentence. Those things get worked out.

1 And then the other one was along the same
2 lines. It was a native American case and, you know,
3 there was a grandmother who didn't -- you know,
4 thought that she had a better idea about how to
5 protect her grandson than I would, and I became aware
6 of how she was in the background manipulating things,
7 and evidence. You can't manipulate evidence.

8 So what do you do there? And I guess what I
9 decided to do, I said, Well, I'm going to talk to her;
10 she deserves to be talked to; she's obviously got a
11 brain; she's got quite a thing going here. So we
12 talked, and I said, you know, I want to know what's
13 your -- what's your thinking about how this case needs
14 to go, and can go, to benefit your grandson? And we
15 talked, and she told me what she thought of what we
16 were trying to do. And I said, Well, you know, Ma, is
17 what I called her, Ma, I can't, as your grandson's
18 attorney, allow you to keep going this way. And so
19 you have a couple choices, you know. I can let the
20 court know what I believe you're doing, or I can
21 withdraw from your son's -- your grandson's case, and
22 you better figure out a different way.

23 Well, all those things, you know, they get
24 messy and everything, but the main thing is to keep
25 him -- when you do that you kind of feel like, Gee, I

BENCH BAR CLE - PORTRAITS IN COURAGE

Page 26

1 didn't represent -- I didn't go all the way with this
2 guy, I didn't -- I did not zealously represent him.
3 Well, you did, and you represented the Constitution
4 too, you know, because things have to be done fairly
5 and according to the Rule of Law.

6 And of course you are an officer of the
7 court; you're just not, you know, a tough criminal
8 defendant's bag man. You are a -- you're an officer
9 of the court, and so --

10 JUSTICE McKINNON: And your reputation is
11 important.

12 MR. WERNER: And so that's kind of what --
13 you know, listening to these comments and trying to
14 link it to the Constitution, like I said, that's quite
15 a sidestep from these good discussions. But -- so
16 that's about what I'd add, you know.

17 JUSTICE McKINNON: Well, we're almost done.
18 Did either -- any of you have anything further to add?

19 MR. COX: I do on a --

20 JUSTICE McKINNON: I knew you did.

21 MR. COX: Yeah. Well, we're just going in
22 order here, so that's the luck of the draw.

23 So I really do want to stress the importance
24 of standing up for the judges. Judge Moses said that
25 they can't; that's true. But one of the things at the

Page 27

1 height of some of this stuff with some of this
2 litigation that we were involved in, one of the things
3 that ABOTA did -- and ABOTA is a terrific organization
4 devoted to protecting the right to jury trial and
5 judicial independence, and there's roughly 50 members
6 of it in the State of Montana; not easy to get into;
7 it's invitation only. And a letter was put together
8 to -- to defend the judiciary. And ABOTA has members
9 left to right and everywhere in between; every single
10 member of ABOTA signed that letter.

11 And I've got -- I urge you -- I'm going to
12 put these on the table here. I urge you to come get
13 it, because someday when you decide, I got to write a
14 letter to the editor, or, I got to do something, this
15 is a pretty good source to draw on. So that's all.

16 JUSTICE McKINNON: I guess we could have a
17 few questions, and we reserve the right not to answer
18 them. Any questions? Okay. Thank you.