

The Advocate

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"Arrowleaf Balsamroot" was photographed by Boise attorney Weston Meyring near Hidden Springs, Idaho. He is clerking until 2007 for the Honorable Sergio A. Gutierrez of the Idaho Court of Appeals. He also practices whitewater kayaking and playing with his four-year-old son, and aspires to be a photographer like many of the great lawyers in Idaho. (wmeyring@gmail.com)

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This issue of *The Advocate* is sponsored by the Intellectual Property Section.

THERE WILL BE NO AUGUST ADVOCATE

There will be no *Advocate* printed in August.
The next issue of *The Advocate* will be September 2006.

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So Long!

Hon. Rick Canaroli



In the summer of 1974, I met a man who made a lasting impression on my life. George “Good Kid” Susce was one of my summer baseball coaches at the Ted Williams Baseball Camp in Lakeville, Massachusetts. George and I were both working at the camp. George was a coach and instructor. I was a junior counselor in charge of a cabin full of campers, umpiring, life guarding at the lake, and playing for the flag ship team that the camp sent barnstorming around New England to play local American Legion and summer teams to promote the camp.

It was an idyllic summer for me. At the end of the day, I would often spend time with George as he polished his long white Cadillac automobile. Polishing the Caddie was George’s nightly ritual and it looked as new as the day he received it. As I recall, the Chicago White Sox gave him his Caddie upon his retirement from professional baseball and he truly cherished that gift. On many of these summer evenings George would take the time to talk to me about baseball, friendship, family, and life.

George was a retired professional baseball coach. He had played both professional baseball as a catcher and professional football in his youth. You can look him up! He had to have been in his early seventies when I knew him. The fingers on his right hand, (the meat hand in the parlance of those of us who caught), were gnarled and pointed in all different directions. Foul tips and the catcher’s mitts of his era had turned his right hand into a mangled paw.

In 1974, I had decided to change positions. I decided to become a catcher because my high school team was

going to need a catcher the following season. George taught me from scratch. I firmly believe that the lessons he taught me on the ball field became my ticket to success in high school and college baseball and perhaps in many other endeavors later in life. He taught me that the catcher was in charge of the team—calling the pitches; lining up the defense; and keeping everyone’s head in the game. He often said, “The coach cannot lead the team from the bench. Between pitches, when the ball is not in play, the coach can be involved, but when the ball is in play, it is the catcher who leads the team on the field.” George taught me about the importance of being involved and about taking an active leadership role on a team.

So, now you are wondering, what’s this story about an old friend have to do with my last column? I loved that old man and my time with him. If I could have stayed in the moment of that summer the rest of my life, I might have been tempted to do so. I’m telling you about George not only because he introduced me to the idea that I could and should be involved in leadership, but because he also taught me about endings.

As I conclude my three-year term, I have so many people to thank for the opportunity to serve on the Idaho State Bar Commission. With this column, I wish to express my gratitude to my many new and old friends.

Thanks to the members of the Sixth and Seventh Districts who entrusted me with this leadership position. I thank the lawyers and law firms who went to bat for me when I ran for election to the position. You know who you are.

I thank my employers for the opportunity to serve on the Bar Commission. Mayor Roger Chase and

City Attorney Dean Tranmer of the City of Pocatello gave me their blessing to seek a position on the Bar Commission which they knew would take me out of the office for large chunks of time. Who would have thought that I’d change jobs and end up on the bench during my term? Thanks also to my administrative judge Sixth District Judge Randy Smith who advised he’d “kick my fanny” if I didn’t finish my term. Thanks also to my “Big Boss”, Chief Justice Gerald Schroeder who simply told me if I stayed on top of my work on the bench that I wouldn’t have a problem.

Thanks to my fellow Commissioners who have been a pleasure to work with. Together, we have been able to help maintain the example of excellence that is the trademark and tradition of the Idaho State Bar and I believe in many ways that we made a difference in the past three years. I have teamed up with some great lawyers who became fast friends as we traveled and did the work of the Bar Commission. I was truly privileged to work with Eric Peterson, Larry Hunter, Deb Kristensen, Russ Kvanvig, Jay Sturgell, Tom Banducci, Andy Hawes and Terry White.

Past and present Bar Commissioners often say that the staff at the Idaho State Bar makes the Bar Commission look good. The fact is, together you make serving the Bar a pleasure. I know I will miss someone as I mention individual staff members below, but some of you I have come to know a little better than others. Thanks to Diane Minnich, our Executive Director. The longevity of our staff and the excellence of the service the Idaho State Bar office provides to our members is a tribute to your leadership. Thanks to Claudia Kopper who has so often made sure that I not only know

where I'm going, but that I get there too. Thanks to Carey Shoufler who has prevailed upon me to better support the Idaho Law Foundation. It gives me a good feeling to be a financial contributor. Thanks to Becky Jensen who made our efforts to step up law related public education through Citizens Law Academy, Mock Trial Competitions, and Lawyers in the Classroom a success this year. Bar Counsel's office has been outstanding to work with. Thanks to Brad Andrews, Julia Crossland, along with their investigators Robin Marker, Al Gill, and Connie Wold (now retired), who have kept the Bar Commission on top of disciplinary cases and critical admissions decisions. Thanks to Barbara Anderson, our Controller and her staff who have minded the store. Our financial situation is as good, if not better than when I arrived on the Commission for the fact that the balance in the Client Assistance Fund has grown. Membership, licensing and CLE reporting services run so smoothly under Annette Strauser's direction that we sometimes forget how much work they are doing with our growing numbers. Thank you, Annette. Thanks to Dayna Ferrero for being the perfect front desk receptionist. Thanks to Terri Muse, Kim Woods, and Dana Weatherby (now retired) who have done excellent work coordinating the efforts of virtually all of the staff members to make our annual meetings run like clockwork. Thanks also to Carol McDonald and Keri Stewart who have helped us work on an increasingly complex series of

admissions and bar examination issues over the past three years. Thanks to Carol Craighill, our Director of IVLP, who continues to bring volunteer lawyers in "to do the right thing" to perform pro bono legal service. And finally, my thanks to Jeanne Barker, our Communications Director, who has been my editor and personal ghost writer, who many times made sense of what I was trying to write and who patiently waited as I pushed every deadline out to near the last minute.

So, what about George? Well, I had to leave George at the end of the summer of 1974. We didn't know if or when we'd see each other again. I remember parting company with George was very, very difficult for us both. The very idea of saying "good bye" ate at my core. I knew that I'd miss him. But, George made it easier. He told me, "Never say, 'Good bye.' Say, 'So long.' 'So long' means that we will see one another again and hopefully soon."

There were times when the challenges at home made me consider resignation from the Bar Commission, particularly during the last year of my mother's life. Mom also encouraged me to finish what I started. But, with the end of my service on the Bar Commission comes another beginning at home with more time for my son Kyle, now heading into his senior year of high school and college bound, and my eighth grade daughter Krista, who is growing into a beautiful young lady and is no longer my baby. I also now will have more time with my steady gal

Drema and less time away to see where our relationship will lead next. I've been away from home a lot and overall, Kyle, Krista and Drema have understood and I owe them thanks for their support.

Parting from the Bar Commission and my close association with my many friends on the Commission and in the offices of the Idaho State Bar is very difficult for me. But, my moment on the Idaho State Bar Commission is over. I consider myself lucky and I want you all to know that I am grateful and have enjoyed every moment of the ride. There are so many of you that I will miss. To all of you I simply say, "So long."

Rick Carnaroli is serving a twelve-month term as president and has been a Bar commissioner representing the 6th and 7th Districts since 2003. He received his B.A. from Pacific University in 1980 and his J.D. from Willamette University College of Law in 1985. Rick was admitted to the Idaho State Bar in 1985. He was later admitted to practice in the United States Court of Appeals for the Ninth Circuit in 1993 and in the Supreme Court of the United States in 1999. Rick engaged in litigation practice in both the private and public sectors before taking the bench in October 2004 as a magistrate judge in Bannock County. He is the third member of the judiciary to serve on the Board of Commissioners. To contact President Carnaroli: 208-236-7322 or rickc@co.bannock.id.us

IDAHO LAWYER ASSISTANCE PROGRAM

The Idaho Lawyer Assistance Program (LAP) helps and supports lawyers who are experiencing problems associated with alcohol, drug and/or mental health issues. The program also focuses on educating legal professionals and their families and friends about the causes, effects and treatment of alcohol and drug dependency, depression, and mental health problems.

For further information, please contact the LAP by phone (208) 323-9555, or email: LAP@southworthassociates.net

John Southworth the LAP Program Coordinator, is available at (208) 891-4726.

NEWS BRIEFS

NEW IDAHO GOVERNOR

James E. Risch has been appointed as the thirty-first governor of Idaho. Governor Risch was sworn in on June 1, 2006. He received a bachelor's degree in forestry from the University of Idaho; and, he received his J.D. from the University of Idaho College of Law in 1968. He has been a member of the Idaho State Bar for 37 years. In addition to being an attorney he is a farmer and rancher, and small business owner. Governor Risch also taught Criminal Justice at Boise State University.

He has served 22 years in the Idaho Senate, serving as Majority Leader for 12 years, and President Pro Tem for 6 years. He has served three years as the Lieutenant Governor and President of the Senate. He was first elected to the Idaho Senate after serving two terms as Ada County Prosecuting Attorney and President of the Idaho Prosecuting Attorney's Association.

Governor Risch and his wife Vicki have been married for 38 years. They have both been committed community volunteers and advocates for strong and healthy families, and dedication and service to community. The Governor and his wife have three sons, James, Jason and Jordan, and six grandchildren.

2006 NOMINATIONS FOR KRAMER AND GRANATA AWARDS

Nominations are now open for the 2006 Kramer and Granata Awards. For more information on nominations and the opportunity to honor the excellent contributions of Idaho judges and court personnel please go to the Idaho Supreme Court website: www.isc.idaho.gov or email tgriffiths@idcourts.net.

AUGUST ADVOCATE

There will be no *Advocate* printed in August. The next issue of *The Advocate* will be the September 2006 issue.

IDAHO SUPREME COURT RULE AMENDMENTS

Two rule amendments have been entered effective July 1, 2006. The first is an amendment to I.C.R. 33.3 on evaluations of persons guilty of domestic assault or domestic battery to include language that evaluators review a NCIC through a local law enforcement agency. The second amendment is to I.R.C.P. 77(b) to make it clear the judge has discretion to close civil domestic violence hearings. Both amendments can be found on the Supreme Court website at <http://www.isc.idaho.gov/rulesamd.htm>.

DISCIPLINE

VIRGINIA S. LAUVER (Disbarment)

On June 2, 2006, the Idaho Supreme Court issued an Order of Disbarment disbarring north Idaho lawyer Virginia S. Lauver from the practice of law in the State of Idaho. The Idaho Supreme Court's Order followed a Professional Conduct Board order and recommendation of disbarment in a formal charge disciplinary proceeding filed by the Idaho State Bar. The Professional Conduct Board's order and recommendation was based on the parties' stipulated resolution of the matter whereby Ms. Lauver agreed to the sanction of disbarment.

The Idaho Supreme Court found that Ms. Lauver violated Idaho Bar Commission Rule 505(b) [Commission of a serious crime shall be grounds for imposition of sanctions], and Idaho Rules of Professional Conduct 8.4(b) [Commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects] and 8.4(c) [Conduct involving dishonesty, fraud, deceit or misrepresentation], with respect to her conviction in the state of Washington for felony forgery. In August 2005, Ms. Lauver, who practiced law primarily in Spokane, Washington, pled guilty to forging her law partner's signature on several business account checks made payable to Ms. Lauver. She also pled guilty to using her partner's notary stamp without consent and forging the partner's signature on the notary portion of a quitclaim deed purportedly conveying to Ms. Lauver certain real property located in Boise, Idaho, owned by Ms. Lauver's ex-husband.

With respect to the Spokane, Washington conviction, the Idaho Supreme Court further found that Ms. Lauver violated Idaho Bar Commission Rules 505(b) [Failure to report a conviction pursuant to Rule 512(b) shall also constitute grounds for imposition of sanctions] and 512(b) [Any member of the Idaho State Bar convicted of a serious crime in any jurisdiction shall report that fact to the Idaho State Bar within fourteen days of the occurrence of that conviction] for failing to report her August 2005 conviction of a serious crime to the Idaho State Bar.

The Idaho Supreme Court also found that Ms. Lauver violated Idaho Bar Commission Rule 505(b), and Idaho Rules of Professional Conduct 8.4(b) and 8.4(c), with respect to her conviction in the state of Idaho for felony forgery. In August 2005, Ms. Lauver pled guilty in Ada County to forging her ex-husband's signature on a quitclaim deed without his consent purportedly conveying certain real property located in Boise, Idaho, to Ms. Lauver.

With respect to the Ada County conviction, the Idaho Supreme Court further found that Ms. Lauver violated Idaho Bar Commission Rules 505(b) and 512(b) for failing to report her August 2005 conviction of a serious crime to the Idaho State Bar.

Inquiries about this matter may be directed to: Bar Counsel, Idaho State Bar, P.O. Box 895, Boise, ID 83701, (208) 334-4500.



The Resolution Process and a Special Thanks

Diane K. Minnich



THE RESOLUTION PROCESS

Do you, your section, committee or district bar association have an issue that you think should be discussed and voted upon by the Bar membership? If so, the fall resolution process, or "Roadshow" is the opportunity to propose issues for consideration by the members of the Bar. Through the process, the Bar Commission, Supreme Court, District Bar Associations, Sections, Committees and individual members can submit issues to the membership for circulation, discussion and vote.

Matters submitted generally relate to statute and Bar commission rule changes, or changes in Bar governance or policy. Last year's resolutions addressed changes in the reciprocal admission rules, additions to the Idaho Bar Commission Rules to require disclosure of professional liability insurance as a condition of licensure, and proposed changes to the Limited Partnership Act.

All three 2005 resolutions were successful and the follow-up on each resolution is noted below.

2005-1: Mandatory Disclosure of Professional Liability Insurance

Proposed amendments to the Idaho Bar Commission Rules to require lawyers to certify to the Idaho State Bar as a part of licensing each year whether or not they have professional liability insurance. The Idaho Supreme Court approved the rule changes, effective October 1, 2006. The disclosure certification form will be included in the 2007 licensing materials.

2005-2: Reciprocal Admission

Proposed that the Idaho State Bar draft amendments to the Idaho Bar Commission Rules that

would set forth the framework to allow the Idaho State Bar to have reciprocity with all other states that allow reciprocal admission. The Idaho Supreme Court approved these rule changes also, effective October 1, 2006.

2005-3: Uniform Limited Partnership Act

Recommended the adoption by the Idaho Legislature of the Uniform Partnership Act in the form of the 2005 Idaho Senate Bill 1041 as amended. The revised Limited Partnership Act was adopted by the legislature and becomes law on July 1, 2006.

Resolutions submitted for consideration by the bar membership will be circulated to all voting members in October. In November, meetings to discuss the resolutions will be organized by the District Bar Associations and held in each Judicial District.

Idaho Bar Commission Rule 906 (2006-07 ISB Directory, pages 278-279) governs the resolution process. Resolutions for this year's resolution process must be submitted by September 25, 2006.

If you have questions about the process or how to submit a resolution, contact me at dminnich@isb.idaho.gov or 208-334-4500.

SPECIAL THANKS

The Annual Meeting activities include the passing of the presidential gavel from one ISB president to the next. This year the gavel will pass from Pocatello Judge Rick Carnaroli to Kellogg attorney Jay Sturgell. Jay will share the upcoming year with Commissioner Tom Banducci. Jay will serve as president until January 2007; Tom will serve as President from February until July 2007.

As the elected Commissioner representing the 6th and 7th Districts, Judge

Carnaroli had the privilege(?) of serving the entire year as president. Judge Carnaroli balanced his new position as a judge, his family and his commitments as the ISB President calmly and effectively. He was always willing to listen, help, and attend a meeting or event if his presence was needed. At Commissioner meetings, he would let everyone speak, vent, speculate and then subtly bring the group to a consensus.

This year the Commissioners were presented with more difficult issues than usual; issues that the decisions they made might be unpopular. In the face of formidable and persuasive arguments, Judge Carnaroli (along with the rest of the Commission) were willing to do what they considered to be in the best interest of the Bar.

As with so many Commissioners, I will miss working with Judge Carnaroli, miss our weekly conversations about Bar matters as well as other life issues, and miss his low-key but strong and effective leadership.

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DISTRICT BAR ASSOCIATION OFFICERS



The Idaho State Bar would like to congratulate the following members who were elected as the 2006-2007 officers of their District Bar Associations. For further information about the districts please visit our website (www.idaho.gov/isb) and click on Membership and Admissions.

FIRST DISTRICT

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Vice President: Kenneth D. Brooks
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SECOND DISTRICT

President: Ken E. Nagy
Vice President: Sunil Ramalingam
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THIRD DISTRICT

President: Ty A. Ketlinski
Vice President: Debra A. Everman
Secretary: Chad W. Gulstrom

FOURTH DISTRICT

President: Jeffrey Bo Davies
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Secretary: Kelli B. Ketlinski
Treasurer: James L. Martin

FIFTH DISTRICT

President: Steven B. Pitts
Vice President: Michael F. McCarthy
Sec/Treas: Philip A. Brown

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Welcome from the Intellectual Property Section

Emile Loza
Technology Law Group, LLP

Intellectual property rights continue to be of vital and growing importance to Idaho-based businesses and institutions, irrespective whether their activities are focused here in Idaho or across the globe. Accordingly, the Idaho Bar increasingly must be informed of the rapid and far-reaching developments that impact their clients' interests with respect to intellectual property.

In continuation of its commitment to the Idaho Bar and to the success of Idaho's businesses and institutions, the Intellectual Property Section of the Idaho State Bar offers again this year its sponsored issue of *The Advocate*. Because intellectual property critically impacts client's business, competitive, and legal strategies, we have diversified and broadened the perspectives in this year's sponsored issue.

In the following pages, you will find core articles on patent reform, huge increases in patent prosecutions, and the increasing attention of the United States Supreme Court to patent cases (Shane Kennedy); copyright law in the digital age (Robert Shaver); and trademark considerations to be borne in mind when filing for new busi-

ness registration (Stephen Nipper). Of vital importance to the technology entrepreneurs, start-ups, and others, you will come to appreciate the role that non-attorney registered patent agents play in the formation of patent rights (Lisa Kennedy).

You will also find new information about how Idaho's research and development funding under the Small Business Innovation Research and other programs is driving the demand for legal services that contemplate and advise on intellectual property issues (Jeff Viano, Office of Science & Technology, Idaho Department of Commerce & Labor). In addition, you will learn how legal and business imperatives are driving competitive companies to embrace intellectual property asset management systems and refined intellectual property valuation methods (Paul Cooperrider, Technology Asset Group, LLC). With the Internet's economic revitalization under Web 2.0, you will benefit from an article on the recent developments on personal jurisdiction, trademark infringement by metatags, and copyright infringement in the online context (Brad Frazer).

On behalf of the members of the Intellectual Property Law Section, whom it is my privilege to serve, I hope you will agree that we have provided a valuable service to you and your practice with this issue of *The Advocate*, and I encourage you to collaborate with our members on your clients' intellectual property matters.

ABOUT THE AUTHOR

Emile Loza, is managing attorney of *Technology Law Group, LLC*, based in Boise, Idaho. Prior to entering private practice, Emile clerked for the Honorable Sergio A. Gutierrez of the Idaho Court of Appeals and held Internet litigation- and policy-focused positions with the Federal Trade Commission in Washington, D.C. Emile's practice centers on international intellectual property transactions and on intellectual property licensing, litigation, and royalty taxation strategy. Emile holds a bachelor's degree in science and technology; a master's degree in business administration; and a juris doctor from The George Washington University Law School. Emile can be reached at eloza@technologylawgroup.com or call (208) 939-4472.

2006-2007

Intellectual Property CLEs

July 6, 2006

Patent Law 101

Speaker: Peter M. Midgley
Holland & Midgley

September 7, 2006

Trademark Law Fundamentals

Speaker: Eric M. Barzee
Battelle Energy Alliance

November 2, 2006

Copyright Law for the Rest of Us

(one hour)

and then

Copyright Law for the IP Lawyer

(two hours),

J. Michael Keyes

Preston Gates & Ellis

January 4, 2007

Closing Arguments in Complex Business Jury Trials (one hour)

and then

Phillips v. AWH: Appeal and Aftermath (one hour),

Robert W. Payne

LaRiviere, Grubman & Payne, LLP

March 1, 2007

Intellectual Property

Due Diligence in Mergers and Acquisitions speaker to be determined

Patent Law: The Forecast for 2006

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Patent issues are increasingly capturing headlines as patents become a driving force of the information age economy. The number of patent applications filed in the United States continues to increase, from 126,000 in 1985, 237,000 in 1995, to 406,000 in 2005. The financial incentives for pursuing patent protection have become quite apparent: the BlackBerry litigation, for example, resulted in a settlement payment of \$612.5 million, while IBM's patent portfolio generates between \$1.5 and \$2.0 billion in licensing revenues each year. United States Congressman Lamar Smith of Texas has been working to reform the patent system legislatively with the Patent Reform Act, which, if passed, would be the most significant event in the history of the patent system since 1952. Meanwhile, the Supreme Court has been hearing patent cases that it usually leaves to the Federal Circuit, which has exclusive jurisdiction to decide appeals in cases arising under the federal patent laws.¹

The origin of the patent system stretches back to the founding of our country. The Founders empowered Congress "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."² Thomas Jefferson was initially opposed to the limited monopolies created by patents on the ground that they would suppress industry, but eventually saw their value as an inducement to bring forth new knowledge, and became the first administrator of the Patent Office.³ Jefferson was instrumental in formulating the early standards governing what inventions were eligible for patent protection, and the patent system inherits much from the patent act that he authored in 1793.

Today, the patent system is governed by the Patent Act of 1952.⁴ The Patent Act enables patent holders to exclude others from making, using, offering for sale, or selling their patented inventions within the United States, or importing them into the United States.⁵ The limited time of protection for utility patents, which protect useful inventions and comprise approximately ninety percent of all issued patents, is generally twenty years from the date that the patent application was filed.⁶

Patentability, inventorship, and infringement are governed by federal law, but the allocation of rights to an issued patent is governed by state law. As a matter of state contract law, employees generally have the right to the patents for their own inventions unless they were specifically hired to invent, or an employment contract requires them to assign inventions to their employer.⁷ Employment agreements often require employees to assign all inventions to their employer, regardless of whether they were created on the job or on the employee's personal time. Recently, the states of California, Delaware, Illinois, Kansas, Minnesota, North Carolina, Utah, and Washington have legislatively mandated that in cases where the inventions do not relate to the employer's business and did not result from any work performed by the employee for the employer, the employee inventors will maintain the rights to their inventions, notwithstanding any contrary provision

in an employment agreement.⁸ The Institute for Electrical and Electronics Engineers, an association which strongly supports the advancement of technology, is currently pushing to expand this legislation into other states to increase the incentives for employees to create.

PATENTABILITY

The scope of what may be patented has been judicially expanding as technology reaches into virtually every aspect of our lives. The Patent Act of 1952, provides that "[w]hoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefore, subject to the conditions and requirements of this title."⁹ In 1980, the Supreme Court interpreted this to "include anything under the sun that is made by man," including microorganisms produced by genetic engineering.¹⁰

The line between useful inventions, which may be patented, and abstract ideas or laws of nature, which may not be patented, has thinned in recent years. In 1998, the Federal Circuit held that business processes taking place through mathematical algorithms on a computer constitute patentable subject matter.¹¹ In 2005, the Board of Patent Appeals and Interferences, the last resort of administrative appeal within the United States Patent and Trademark Office (USPTO), held in a 3-2 decision that an executive compensation scheme that makes no use of technology is a patentable business method, eliminating the USPTO's "technological arts" test for patentability.¹²

At this point, it seems that virtually anything may be patented, so long as the inventor is the first to have invented it. Congress is not currently considering a change in what constitutes patentable subject matter. However, the Supreme Court has taken up the issue of patentable subject matter in the context of determining whether a method consisting of "measure[ing] the level of the relevant amino acids... notic[ing] whether the amino acid level is elevated, and if so, conclud[ing] that a vitamin B deficiency exists," is patentable subject matter, or is an invalid claim because one cannot patent "laws of nature, natural phenomena, and abstract ideas."¹³ Dicta from this case may affect the lower courts' interpretation of patentable subject matter in other art areas.

The "novelty" standard, or the criteria used to determine whether an invention is new and therefore subject to patent protection, may see legislative changes this year to conform more closely to the law of other countries. The United States is the only country in the world that currently uses a "first to invent" rule rather than a "first to file" rule. The USPTO will award a patent to the one who invented first, regardless of the date the patent application was filed, unless the inventor is statutorily barred from obtaining a patent. In the United States, a public disclosure, offer for sale, or commercial use of an invention more than one year before a patent application is filed creates a statutory bar, barring the inventor from obtaining a patent for the invention.¹⁴ In most

foreign countries, there is no one-year grace period, and if an invention is disclosed to any person not under an obligation of confidence before a patent application is filed, all patent rights are lost, and the invention is considered donated to the public domain.

Congressman Smith has proposed a change that would retain the one-year grace period, but would switch our patent system from using a “first to invent” rule to a “first to file” rule. Under this change, any patent application filed by another or a public disclosure by another, before the filing date of an application, would become prior art against the applicant, regardless of the respective dates of invention. Thus, if two inventors filed patent applications for the same invention, the USPTO would award the patent to the inventor who filed the first application. Or, if another inventor published his invention before the applicant filed his application, the publication would become prior art against the application, regardless of when or whether the other inventor filed a patent application. This change, if enacted, would have the benefit of avoiding the expense of interference proceedings to determine who invented first, which have an average cost per party of six hundred thousand dollars.¹⁵

PATENT PROSECUTION

The quid pro quo of obtaining a patent is that the patent must describe the best mode contemplated by the inventor of carrying out the invention with sufficient detail to enable one trained in the art of the invention to make and use the invention.¹⁶ Upon expiration of the patent, the teachings of the patent become part of the public domain that others may freely copy. Before the enactment of the American Inventors Protection Act (AIPA) of 1999, patent applications were kept secret until the patent issued, leaving inventors with the option of abandoning their applications prior to issuance and maintaining their inventions as trade secrets. Since the enactment of the AIPA, patent applications have been published eighteen months after their filing dates, unless a non-publication request was made at the time of filing, which must include a statement that the invention is not and will not be the subject of an application filed in another country.¹⁷ The legislation proposed by Congressman Smith would eliminate this non-publication option, which is used in approximately ten percent of all applications, and also eliminate the so-called “best mode” requirement, which often serves to increase the cost of litigating infringement cases, instead requiring only a description that is sufficient to enable one trained in the art to make and use the invention defined by the claims, which are found at the end of a patent.

Patent applications have historically been ex parte, between the inventor and the USPTO. Current legislation proposes to create a post-grant opposition system, creating a window, such as nine months after issuance of the patent, in which third parties could submit evidence to invalidate the patent or force the patentee to accept a patent with a narrower scope of protection. Currently, third parties seeking to invalidate patents must resort to reexamination proceedings, which limit the type of prior art evidence that may be submitted against the issued patent,¹⁸ or litigation, which requires an alleged infringer to prove invalidity by clear and convincing evidence.¹⁹ The idea behind the post-grant opposition period is that economically significant patents would be chal-

lenged by those third parties with an interest in the outcome of the examination proceedings.

INFRINGEMENT REMEDIES

Patentees who seek to enforce their patents must bring an action in one of the federal district courts, which have exclusive jurisdiction over cases arising under the patent laws.²⁰ The Supreme Court has recently strengthened the hand of patentees by holding that the existence of a patent alone in the case of a tying arrangement involving the sale of products creates no presumption of market power sufficient to invoke the prohibitions of the antitrust laws.²¹ If a patentee is able to prove liability for infringement, it has two remedies: an injunction to prevent further infringement, and monetary damages to compensate it for past infringement.

The ability of patent holders to obtain injunctions was curtailed by the Supreme Court in May of this year.²² Previously, injunctions were issued as a matter of course, “[b]ecause the ‘right to exclude recognized in a patent is but the essence of the concept of property,’ the general rule is that a permanent injunction will issue once infringement and validity have been adjudged.”²³ However, in *eBay, Inc. v. MercExchange, LLC*, the Supreme Court held that a plaintiff patentee seeking a permanent injunction must satisfy the traditional four-factor test.²⁴ Unfortunately, Justice Thomas, writing for the Court, took “no position on whether permanent injunctive relief should or should not issue in this particular case, or indeed in any number of other disputes arising under the Patent Act.” Chief Justice Roberts, joined by Justice Scalia and Justice Ginsburg, noted that injunctive relief has historically been granted in the vast majority of cases, and that the four-factor test should be applied in light of those past precedents. Justice Kennedy, on the other hand, who was joined by Justice Stevens, Justice Souter, and Justice Breyer, replied that “in many instances the nature of the patent being enforced and the economic function of the patent holder present considerations quite unlike earlier cases,” and indicated that injunctions may not be proper in many cases. How this decision, which lacks a majority opinion, will be interpreted and applied remains to be seen.

Congress has also considered changing the method of determining money damages. Patent infringers must pay to the patent holder a “reasonable royalty” for the use of the invention, and these compensatory damages may be increased up to three times by the district court.²⁵

The reasonable royalty inquiry starts with finding a royalty base. In cases where the patented feature was the basis for customer demand for the entire product or process, the royalty base is based on the full value of the infringing product or process.²⁶ Where the patented feature was not the basis for customer demand, the royalty base may be apportioned in such a manner as to distinguish the patented elements from the non-patented elements of the product or process.²⁷ Differences on reforming the law of apportionment between the software industry, which seeks to reduce the royalty base, and the pharmaceutical and biotechnology industries, which prefer no change, have stalled the patent reform process.²⁸ At this point, the standard for the reasonable royalty base appears likely to remain unchanged.

Still on the table is a clarification of the standard for enhanc-

ing damages up to three times the compensatory award, which is currently committed to the discretion of the trial court's judgment of whether the infringement was "willful."²⁹ Congressman Smith has announced a hearing that will consider whether to reform this standard in light of a 2003 study by the Federal Trade Commission. This study recommended legislation to require, as a predicate for a finding of willful infringement that is sufficient to enhance the damage award, either actual, written notice of infringement from the patentee, or deliberate copying of the patentee's invention, knowing it to be patented.³⁰

CONCLUSION

As technology continues to drive our economy, patents take up a larger portion of the legal landscape. This is reflected in increased attention devoted to the law governing patents by both Congress and the Supreme Court. Whether this increased attention will result in changes to the law remains to be seen.

ENDNOTES

¹ 28 USC § 1295(a)(1).

² U.S. Const. art I, § 8, Cl 8.

³ *Graham v. John Deere Co.*, 381 U.S. 1, 7-9 (1966).

⁴ Title 35, United States Code.

⁵ 35 U.S.C. § 271(a).

⁶ *Id.*

⁷ *Holders Mfrs., Inc. v. Cudd*, 335 P.2d 890, 893, 80 Idaho 557, 562 (1959) ("Unless there were express terms, or by the very nature of the employment, an employee is entitled to the fruits of his own ingenuity and inventiveness, as well as the acquisition of property rights").

⁸ Report of the Intellectual Property Committee of the Institute for Electrical and Electronics Engineers of the United States of America.

⁹ 35 U.S.C. § 101.

¹⁰ *Diamond v. Chakrabarty*, 447 U.S. 303, 309 (1980).

¹¹ *State Street Bank & Trust Co. v. Signature Financial Group, Inc.*, 149 F.3d 1368, 1376-77 (1998).

¹² *Ex Parte Lundgren*, Appeal No. 2003-2088 (BPAI 2005).

¹³ *Laboratory Corp. of America Holdings v. Metabolite Laboratories, Inc.*, Supreme Court No. 04-607.

¹⁴ 35 U.S.C. § 102(b).

¹⁵ Report of the Economic Survey, American Intellectual Property Law Association, 23 (2005).

¹⁶ 35 U.S.C. § 112.

¹⁷ 37 CFR § 1.213.

¹⁸ 35 U.S.C. § 301.

¹⁹ *See, e.g., Am. Hoist & Derrick Co. v. Sowa & Sons, Inc.*, 725 F.2d 1350, 1360 (Fed. Cir. 1984).

²⁰ 28 U.S.C. § 1338(a).

²¹ *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. ____ (2006).

²² *eBay, Inc. v. MercExchange, LLC*, Supreme Court No. 05-1350 (May 15, 2006).

²³ *MercExchange, LLC v. eBay, Inc.*, 401 F.3d 1323, 1338 (Fed. Cir. 2005), vacated and remanded, Supreme Court No. 05-1350

(May 15, 2006).

²⁴ The four-factors being (1) that the plaintiff has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction. *eBay, Inc. v. MercExchange, LLC*, Supreme Court No. 05-1350 (May 15, 2006).

²⁵ 35 U.S.C. § 284.

²⁶ *Rite-Hite Corp. v. Kelley Co., Inc.*, 56 F.3d 1538, 1549 (Fed. Cir. 1995) (en banc).

²⁷ *Georgia-Pacific Corp. v. United States Plywood Corp.*, 318 F.Supp 1116, 1132-37 (S.D.N.Y. 1970).

²⁸ Rooklidge, note 23 at 20-21.

²⁹ *See e.g., Read Corp. v. Portec, Inc.*, 970 F.2d 816, 826-27 (Fed. Cir. 1992) (listing nine factors: 1) deliberate copying by the infringer, 2) good faith belief that any patents the infringer knew of were invalid or not infringed, 3) the infringer's behavior in litigation, 4) the infringer's size and financial condition, 5) the closeness of the case, 6) the duration of the infringing activity, 7) the infringer's remedial actions to stop infringing, 8) the infringer's motivation to harm the patent owner, and 9) the infringer's attempts to hide infringing activity).

³⁰ To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy, A Report by the Federal Trade Commission (October 2003).

ABOUT THE AUTHOR

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Copyright Law in the Digital Age

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Early printing technique - similar to one used in William Caxton's day.

ing of original works, because copying was so impractical as to be impossible. In fact without the printing press, there was no group of authors who made a living by writing. With the printing press it became possible for an author's works to be widely disseminated, and to actually make some money by being an author. With the ability to copy came the need to control who could copy, and copyright law was born.

Following English and Colonial precedents, the Founding Fathers of the United States included a clause in the Constitution which authorizes protection of copyright and patents. Article I, Section 8 of the Constitution states that for the purpose of promoting the progress of science and useful arts, "...by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries..."

The technological ability to copy was an entirely new paradigm compared to the process of hand copying books, and many today think that the rapid rise of the Internet is also a new paradigm. Some propose that the old law of copyright is unsuited to the task of regulating the dissemination of works in this brave new medium. Surprisingly, copyright law applies very well to the modern condition, despite the desire by some that all original works should be free via the Internet. These days, all attorneys and all their clients are Internet users, and as attorneys we need to know how copyright law can affect our clients as well as ourselves. This article discusses some copyright concepts that your clients might ask you, their attorney.

Is it worthwhile to even file a copyright?

Under current copyright law, if you just create something you own a copyright in that thing, whether it is a statue, a book, a poem, a choreographed dance, a photograph, a piece of furniture, or a painting. To stop a copier from making copies, you just have to file for a copyright and then sue them for copyright infringement, assuming a cease and desist letter doesn't work. If you can

Copyright law would be totally unnecessary were it not for William Caxton, a successful 15th century merchant who in 1474 printed the first book in the English language. The book was "The Recuyell of the Historyes of Troye," which he copied from the French book of that name. Two years later he set up the first print shop in England, and began his career of what we would call copyright theft. Before the printing press, an author was not concerned

about the unauthorized copy-

ing of original works, because copying was so impractical as to be impossible. In fact without the printing press, there was no group of authors who made a living by writing. With the printing press it became possible for an author's works to be widely disseminated, and to actually make some money by being an author. With the ability to copy came the need to control who could copy, and copyright law was born.

prove you created it first, and they copied it, you can get an injunction and make them stop copying it. That is a bit of a hollow victory after spending tens of thousands on a lawsuit, and in practical terms it means that your client will only enforce his copyright if it is a very important creation, like his company's flagship product. However, if he had filed for copyright within 90 days of publication of his creation, or before it was copied, he could stand to win an injunction, plus attorney fees, plus the damages specified in the statute, which are \$750 to \$30,000 per infringement. Each time a web site is accessed, that could be a separate infringement of the artwork on that page. Thus, thousands of separate infringements can accumulate very fast. What that possible outcome adds up to is a huge hammer held over the head of the infringer. If he loses such a lawsuit, he will lose big time, and your client will be made whole and then some. Upon receiving the cease and desist letter, the infringer will go to his attorney and learn that he will certainly lose the case, there is no wiggle room, and he had better settle with the copyright holder if at all possible. The infringer will then be amenable to almost any reasonable settlement of the matter. Therefore the filing of the copyright, which costs your client only your fee plus the \$30.00 filing fee, has given your client and you as his attorney tremendous leverage, and you can enforce the copyright quite effectively without resorting to a lawsuit.

Your client owns the copyright to their web site because they paid for it—right?

Quite often a business will hire an independent contractor to create something for them. This might be a web designer hired to design a web page, an artist hired to design artwork for product containers, a software engineer hired to create software, or a photographer hired to take a picture. Your client naturally thinks that since she hired this person to do this job for money, that when the job is done and the independent contractor gets paid, she will own the work (logo, software, photograph, product packaging...). Copyright law doesn't work that way. Except in unusual circumstances, the creator of the work, if he is an independent contractor, owns the copyright until they assign the ownership of the copyright to your client in writing. This actually happened to a client of mine: he hired an artist to design artwork to be put on packages for his products. The artwork was designed, and after the artist was paid for the design work, he wanted another \$15,000 to transfer the copyright. Of course, the business owner didn't want one copy of the design, he wanted 50,000 copies, so he had to have the copyright, which is the "right to copy." The moral of the story is this: have the artist assign the copyright or agree to assign the copyright as part of the job, and as a precondition for payment. If the independent contractor won't assign the copyright, get another artist.

If it is on the Internet, it is freely available for others to use— right?

In a word... **NO**. Any original creation is capable of copyright protection, including email and seemingly non-creative works, but especially photographs and artwork. However, when an “author” posts anything to the Internet, he should have an expectation that his posting will be read, possibly printed, and possibly forwarded to another person. Thus it could be argued that the poster had impliedly granted some kind of limited license for use by others on the Internet. However, the author of the work may not have been the poster, and she probably didn’t intend for others to use her work in an unlimited fashion or for commercial use without permission. Therefore use of a photo from the Internet in a client’s website, advertising, or product packaging would be very risky, as it is likely copyright infringement if it exceeds any reasonable scope of an implied license.

A copyright is a pretty robust way to protect original creations—right?

Yes and no. It’s a great way to protect many things such as songs, photographs, poems, and text, but that protection is limited. Copyright protects a particular expression of an idea, but it doesn’t protect the idea itself. For instance, a client may copyright a blueprint of a particular two-bedroom house with a vaulted ceiling. Others can’t copy those blueprints, but they can design their own two-bedroom house with vaulted ceilings. If their design is original, it could be exactly the same as your client’s design, but it would not be a copy, it would be an original creation, and not copyright infringement. Similarly, a photographer can get a copyright of a photograph, but I can go take a very similar photograph with my own camera, and it would not be a copy, it would be a new creation.

“Fair use,” allows me to use material off the Internet—right?

Fair use is a doctrine which originally developed in court interpretations of copyright law, and allows a certain amount of unauthorized use of copyrighted material, in certain circumstances. There are four factors that are used in evaluating fair use:

1. the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

A Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, in 1961 gives some examples of fair use as “quotation of excerpts in a review or criticism for purposes of illustration or comment; quotation of short passages in a scholarly or technical work, for illustration or clarification of

the author’s observations; use in a parody of some of the content of the work parodied; summary of an address or article, with brief quotations, in a news report; reproduction by a library of a portion of a work to replace part of a damaged copy; reproduction by a teacher or student of a small part of a work to illustrate a lesson; reproduction of a work in legislative or judicial proceedings or reports; incidental and fortuitous reproduction, in a newsreel or broadcast, of a work located in the scene of an event being reported.”

Conclusion

Copyright is an inexpensive way to protect many original creation, and for a filing fee of \$30.00, it is worth doing to protect original works of expression, including brochures, web sites, catalogs, photographs, instruction manuals, or many other works your client doesn’t want her competition to copy. Your client also must obtain an assignment of all work commissioned by independent contractors. Your client must be careful to not use any artwork without permission, and also verify that any artwork used by independent contracts is used with permission of the author.

About the Author

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Trademark Considerations and Business Entity Registration

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Typically, before a company hires an attorney to help with incorporation or other business matters, they have already decided upon the name they want to use for their business. Whether it is an acronym formed from the principals' names (or initials) or a group of words that they feel perfectly describes their goods¹, the client typically has a name in mind at the time an attorney is first consulted.

This article hopes to provide some guidance to help you spot issues that will enable you to help your client both protect their trademark rights and, if necessary, encourage them to consider changing their business name before incorporation.

WHAT IS A TRADEMARK?

A trademark is an "indicator of source," meaning that a consumer, seeing the trademark, views the trademark (used on the goods) as pointing to a single manufacturer of goods. Thus, trademarks that indicate source (distinguish the user's goods from those of its competitors) are protectable, those that do not indicate source are not protectable. Not all business entity names satisfy this test. A business name that functions as nothing more than being a trade name or commercial name typically doesn't.

To understand the protectability of your client's business and product names as trademarks we need to discuss the different types of trademarks. Trademarks can be classified into five different categories: generic (generally descriptive) trademarks, merely descriptive trademarks, suggestive trademarks, arbitrary trademarks and coined trademarks.

Generic trademarks are trademarks consisting of the name of the goods. For example, it would be generic for Ore-Ida to use the term POTATO (as a trademark) on potatoes. In such a case, the mark POTATO cannot possibly indicate source because a consumer will always view the word POTATO on potatoes as generically describing the goods rather than pointing to the source of the goods. To wit, generic trademarks are never protectable.

Merely descriptive trademarks aren't the generic name of the goods, but instead merely describe the goods. For example, let's presume that Micron Electronics wanted to use the trademark FAST on memory products. While the term FAST isn't the generic name for Micron's products, it does merely describe them. In such an instance, a consumer seeing the word FAST being used on memory would not view the usage as a trademark but would instead view it as merely being a description of a feature of the goods. Because they are not distinctive, merely descriptive trademarks are not protectable.

Of course, if a trademark owner's use of a merely descriptive trademark over an extended period of time causes consumers to view the term as an indicator of source and not as being merely descriptive of the goods, then at that point the trademark has acquired distinctiveness (secondary meaning) and is protectable.²

Suggestive trademarks do not merely describe (or generically describe) the goods, but instead suggest a feature or quality of them. For example, CIRCUIT CITY® suggests an electronics (cir-

cuits) store that is as big as a city. Suggestive trademarks are by definition distinctive and are protectable.

So, where is the dividing line between "distinctiveness" and "suggestivity?" The determination as to whether or not a term is properly classified as descriptive or suggestive is dependent upon several factors. Generally speaking, suggestive marks are those that, when applied to the goods at issue, require imagination, thought or perception to reach a conclusion as to the nature of those goods. Whereas, descriptive marks are those which immediately describe something about the goods with which the mark is associated. Simply stated, if the words in the mark simply describe the goods or services connected with the mark, then the mark is descriptive. If, however, a party must make a leap of imagination, then the mark is suggestive.

One test that is utilized in the Ninth Circuit to determine whether a mark is descriptive or suggestive is called the "degree of imagination test."³ The court outlined three different criteria that need to be examined in determining whether a mark is suggestive⁴. These criteria are:

1. "the imaginativeness involved in the suggestion...that is, how immediate and direct is the thought process from the mark to the particular product,"
2. "whether granting the trademark owner a limited monopoly will in fact inhibit legitimate use of the mark by other sellers...," and
3. "whether the mark is actually viewed by the public as an indication of the product's origin or as a self-serving description of it"

An arbitrary trademark is one the use of which has no connection with the goods. For instance, APPLE® on computers or DELTA® on airlines. Arbitrary trademarks are, by definition, distinctive and protectable.

A coined trademark is a trademark that was not originally a word. For instance, XEROX® on photocopying machines or EXXON® on gasoline. Coined trademarks are likewise, by definition, distinctive and protectable.

TRADEMARK REGISTRATION

Provided your client's trademark is not generic or merely descriptive (unless secondary meaning exists), it may be worth your client's time exploring the benefits of trademark registration, either federally (if the trademark is used in interstate commerce) or with the Idaho Secretary of State's Office (if the trademark use is limited to Idaho).

A trademark user acquires rights in a trademark by using the trademark in commerce, not by registering it. Therefore, an unregistered "common law" trademark can have senior rights (typically limited to a specific geographic area) even to a federally registered mark.

WHY REGISTER?

Without federal or state registration, these common law trademarks are only afforded protection in and around those areas where actual use in commerce has occurred. In the rare instance that such a common law trademark is famous and has widespread sales, its owner may be able to have a later filed federally registered trademark canceled. Usually though, the common law trademark owner only attains the right to continue use of the trademark in the same geographic area and on the same products as were in practice when the federal or state registration was issued.

The value of federal registration is that it provides a registrant with broad nationwide coverage for the trademark upon the cited goods. Prior users, if any, typically can only cut snippets from this broad blanket of coverage. Federal registration also puts others on notice as to the registrant's use, thereby preventing future conflicts by warning off potential users of the same or similar trademarks. Likewise, a state registration provides similar benefits, albeit on a state level.

TRADEMARK SEARCHING

Because federal and state trademarks can be infringed, and common law/state unfair competition actions also come into play, a proper trademark search of federal, state (all 50 states if the trademark will be used in interstate commerce) and common law trademarks should be made anytime a business entity is formed or a new product is released. This is true regardless of whether or not a federal and/or state trademark application will be filed. If a potential issue exists with respect to a likelihood of confusion, knowing that before the company expends thousands of dollars in advertising and branding building good will oftentimes save business owners a tremendous amount of grief. Merely clearing the name through the Idaho Secretary of State's business entity database is not enough. Business entity registrations are not trademark registrations and themselves incur no trademark rights. The Secretary of State, in providing the business entity registry, isn't concerned with a trademark "likelihood of confusion" analysis, but instead with allowing creditors, individuals and the Department of Finance to more easily locate the correct business when the need so arises.

Idaho state trademarks can now be searched on-line at: <http://www.accessidaho.org/public/sos/trademark/search.html>. Such a search should be part of your business entity searching, as should a search of the federal trademark databases: <http://www.uspto.gov>. If a more thorough trademark search is necessary (or interpretation of the results of a search), an attorney specializing in trademark filing and prosecution will be able to help.

CONCLUSION

At the time of incorporation, a trademark search should be performed to determine what trademark rights exist (both your client's as well as those of third parties). A determination should also be made as to whether or not a trademark application(s) should be filed, or in a less favorable case whether or not the business owner should be counseled on potential issues with their current name.

ENDNOTES

¹A trademark can be used on goods and/or on services. For the purposes of this article (to make it read easier), the author will solely use the term "goods" herein (rather than "goods/services").

²*Kings of Boise, Inc. v. M.H. King Co.*, 88 Idaho 267 (Idaho 1965); *Cazier v. Economy Cash Stores*, 71 Idaho 178, 228 P.2d 436 (Idaho 1951); and *American Home Benefit Assoc. v. United American Benefit Assoc.*, 63 Idaho 754, 125 P.2d 1010 (Idaho 1942).

³In *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d 341 (9th Cir. 1979).

⁴*Id.*, 599 F.2d at 349.

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Patent Agents: Non-attorneys Representing Inventors Before the Patent Office

Lisa Kennedy

Moffatt, Thomas, Barrett, Rock & Fields, Chtd.

As early as 1803, inventors were using the services of patent “agents” to prosecute patent applications before what was then called the United States Patent Office (Patent Office). In early colonial America, anyone who had not been disbarred or forbidden to practice law—even a territorial governor who had a monetary interest in his client’s invention—could represent an inventor before the Patent Office. However, as the Patent Office progressed, so did technology, and the Commissioner of Patents soon realized that many of the patent clerks and agents who represented the inventors, including attorneys, did not have the legal or mechanical skills necessary to properly describe and analyze their clients’ inventions.

To ensure competence within the Patent Office, on May 1, 1869, Samuel S. Fisher, the Commissioner of the Patent Office, instituted the practice of requiring a competitive examination to become an examiner at the Patent Office. This examination was soon extended to all practitioners before the Patent Office, and in August of 1897, Commissioner Benjamin Butterworth issued an order requiring the registration of all patent practitioners. As of January 1, 1899, the roster of registered patent practitioners was approximately 2,550. Until November 15, 1938, all practitioners were registered as “attorneys,” regardless of whether they were licensed by any state bar.

Today, the roster of registered patent practitioners (persons registered to practice before the Patent Office) is approximately 58,550 (Idaho has 49 Patent Attorneys and 13 Patent Agents). Although most patent practitioners are attorneys, patent agents are not. These non-attorneys comprise one-fifth of the national patent practitioner roster. Patent agents who do not happen to be attorneys are an important part of the patent community, serving inventors either on their own or through association with attorneys. Because of the importance of scientific training in patent law, the Patent Office has maintained the early colonial practice of allowing non-attorneys to represent inventors before the Patent Office if they have the proper scientific background and demonstrate their knowledge of patent law by passing the required examination. The Patent Office is still the only administrative agency that requires attorneys and non-attorneys to pass a special examination (the patent bar examination) to demonstrate their competence. To be eligible to sit for the patent bar examination, an applicant must have an educational background in science or engineering. An attorney who has passed the patent bar and becomes registered is denoted a patent attorney, whereas a non-attorney who passes the patent bar and becomes registered is denoted a patent agent. Because of their unique training and licensing, patent agents can play a valuable role in the patent community.

Patent agents and patent attorneys have equal privileges to practice before the Patent Office. Patent agents can conduct patent novelty searches, advise clients whether an invention may be eligi-

ble for patenting, may prepare, file and prosecute United States and international patent applications with the Patent Office, and may pursue foreign patent protection through foreign associates. However, a patent agent may not represent a client for any legal matter other than a patent matter before the Patent Office. Thus, a patent agent may not assist a client with any other form of intellectual property protection, such as trademarks, trade secrets, or copyrights. A patent agent may not draft a patent license or other agreement. Additionally, a patent agent may not bring a patent infringement or contract case before any court. Nor may a patent agent appeal the rejection of patent claims from the Board of Patent Appeals and Interferences of the Patent Office to the United States Court of Appeals for the Federal Circuit, even if the agent has written and prosecuted the claims under rejection. Patent agents may testify as expert witnesses in litigation involving patents.

Some patent agents work as solo practitioners and may specialize in a particular art area, such as electrical engineering. Additionally, some patent agents work as examiners for the Patent Office; however, patent agents are more commonly found in law firms or as part of an in-house patent team for a large company. In a law firm, the patent agent is able to advise and assist clients during patent procurement stage, often at a much-reduced rate, while still able to refer the client to an attorney at the patent exploitation phase. When part of a corporation, a patent agent is often very familiar with the particular technology, usually by having worked for the company as an engineer or scientist before obtaining the patent license, and has a distinct advantage when drafting patent claims. During the examination phase of prosecuting patent applications, patent agents argue for the merits of the invention and negotiate claims with the examiner that meet the requirements for patentability while maintaining the broadest possible protection for the client. Patent agents may also organize and manage a company’s patent portfolio. Besides drafting and filing patent applications, patent agents may advise their company of the legal benefits of doing so.

By practicing exclusively in the area of patent prosecution, often within a particular technology area, patent agents are able to acquire high levels of expertise. Thus, patent agents are able to provide inventors with a high quality of service, while leaving the licensing and litigation matters to attorneys.

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Idaho Research and Development Funding: Stimulating demand for Intellectual Property professionals

Jeff Viano

Idaho Commerce and Labor, Office of Science & Technology

New state funding for high-technology small businesses that are applying for the federal Small Business Innovation Research (SBIR) program stands to stimulate the need for professionals skilled in intellectual property issues.

The Idaho Legislature's appropriation of \$100,000 for use in proposal-development assistance grants for small businesses applying for SBIRs allows the businesses to utilize the grant funding to offset the cost of intellectual property counsel, a service that is becoming increasingly important to businesses participating in the federal SBIR program.

SBIR is a competitively awarded set-aside program designed to stimulate innovation and product commercialization by entrepreneurs and small businesses through federal research and development funding. The program is open to United States entrepreneurs and small businesses that are independently operated and organized for profit. SBIR program solicitations are issued by the eleven federal agencies with extramural research and development (R&D) budgets of more than \$100 million. In 2005, more than \$2 billion was awarded to successful SBIR participants. The awards require no matching funds, repayment, or equity on the part of the participants, and the participants typically retain control of all intellectual property. Companies submit proposals for a competitive award of up to \$80,000 for a Phase I feasibility study of six to nine months and, if successful, are then invited to submit a proposal for a competitive Phase II award of up to \$750,000 for a more in-depth two-year R&D and prototype-development effort.

Although Idaho's SBIR award rate has improved over the last five years, the state still ranks near the bottom in the nation for total award dollars. States like Montana, Oklahoma, and Kentucky typically have more than double the number of annual awards when compared to Idaho. What do these states have that Idaho does not? The answer is money, directed at offsetting costs that SBIR applicants incur from proposal development, proposal review, and legal services. States that have implemented these funding programs have shown a dramatic increase in their award numbers by providing just a small infusion of financial assistance to their SBIR-eligible small businesses.

The \$100,000 approved by the Idaho Legislature for fiscal year 2007 will provide direct monetary assistance to at least twenty-five high-technology small businesses and entrepreneurs across the state for use in developing competitive SBIR proposals. Companies eligible for an Idaho SBIR Program assistance grant of up to \$4,000 are entitled to use these funds for offsetting proposal development costs, for traveling to meet with potential program customers and partners, for paying for professional reviewers and proposal writers, and for hiring attorneys skilled in advising companies on patent issues, proprietary data protection, and other areas of intellectual property.

The need for intellectual property professionals skilled in advising small businesses prior to and during their participation

of the federal SBIR program has never been greater. The program is increasingly becoming the best and only means for high-technology small businesses to tap into the federal market. Consolidation within the defense industry has forced the United States Department of Defense, which is responsible for more than half of all SBIR funding, to increasingly rely on SBIRs for innovation. In addition, program experts point to agencies' increasing practice of tailoring the program to their specific needs as evidence of their expanding reliance on the program as a source for meeting their R&D requirements.

Furthermore, recent court decisions have sent shockwaves through the SBIR community by establishing that the government has, in certain circumstances, broader rights to the intellectual property of projects funded through the SBIR program than had been previously assumed. In *Night Vision Corp. v. United States of America*, the United States Court of Federal Claims held that the Air Force did not have, and therefore, did not breach a contractual obligation or an oral contract with Night Vision Corporation (NVC) by allowing competitors to examine NVC's SBIR Phase II prototype of panoramic night-vision goggles.¹ Following inspection of the goggles by NVC's competitors, the Air Force issued a full and open competition solicitation that requested development of night-vision goggles with specifications almost identical to those found in the NVC prototype.²

Four months later, the Air Force awarded the contract to Insight Technology, Inc., a company that had originally been an NVC subcontractor.³ NVC's failure to apply protective markings to the actual goggle prototype, along with the court's determination that tangible products delivered under an SBIR contract are not proprietary "technical data," led the court to rule in favor of the Air Force.⁴ The Court noted that "a tangible product delivered under a contract may indeed constitute the embodiment of data, but it is not itself recorded information."⁵ The Court also noted that expert commentators have opined that "the Government may legitimately provide a sample of a product to another company with full knowledge that it will be 'reverse engineered' to learn how to make a duplicate, even if the government may not provide the technical data associated with the object."⁶

Although the ruling in the NVC case may seem straightforward to intellectual property attorneys, it illustrates the lack of knowledge that many small businesses have with regard to their intellectual property rights under the federal SBIR program. Successful completion of a Phase II project can often pave the way toward a sole-source government contract. Although SBIR contractors have no assurance of receiving a follow-on sole-source contract, it can safely be said that many assume that they have no need to fear that the fruits of their labor from an SBIR contract will wind up in the hands of their competitors. The NVC case is a stark example to the contrary, and it reveals the need for profes-

sional legal guidance and advice on intellectual property issues for SBIR program participants in Idaho and across the nation.

The SBIR program and its sister Small Business Technology Transfer program have proven to be highly beneficial and regionally unbiased to a number of companies across Idaho. Innovative entrepreneurs and small businesses from all corners of the state have benefited from the program - Manning Applied Technologies in Troy; Rocky Mountain Resource Labs in Jerome; Sentient Corporation in Idaho Falls; TenXsys in Eagle; and Remote Diagnostics in Salmon, to name a few.

The \$100,000 appropriation for the SBIR assistance-grant program, officially titled the "Idaho SBIR Program Monetary Assistance & Proposal Support Solicitation (MAPSS)," is scheduled for release on July 1, 2006 at the start of the state's fiscal year. In addition to the financial support provided through the MAPSS grants, the Idaho Office of Science & Technology, which is the program's administrator, is working to provide a number of additional proposal-development services and assistance.

A key to providing these additional services is the development of a statewide network of private-sector business consultants, accountants, proposal writers and reviewers and intellectual property attorneys. By identifying professionals in these areas who are knowledgeable about the federal SBIR program and can offer basic assistance at a cost appropriate to the budgets of small businesses and start-ups, we can educate our SBIR candidates on the importance of these services and direct them to those professionals. This strategy gives our SBIR candidates access to much-needed

professional and legal advice and plants the seeds for developing long-term business relationships that can grow and evolve along with their businesses.

As Idaho's science and technology industry grows, so does the need for intellectual property guidance for businesses both large and small throughout the state. With financial assistance from the state and legal assistance from Idaho's intellectual property attorneys, we can help our small businesses participating in the federal SBIR program protect their most valuable business asset—their intellectual property.

ENDNOTES

¹See *Night Vision Corp. v. United States of America*, 68 Fed. Cl. 368, 369, 382-88 (Fed Cl. 2005).

²See *id.* at 373-74.

³See *id.* at 373-74 & 377.

⁴See *id.* at 379-80.

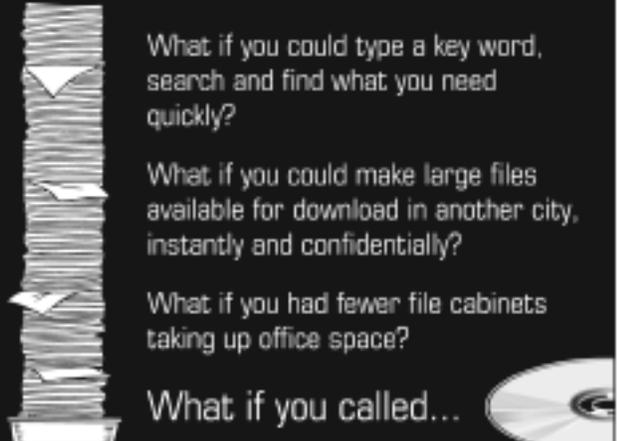
⁵*Id.* at 381 n.16.

⁶*Id.*

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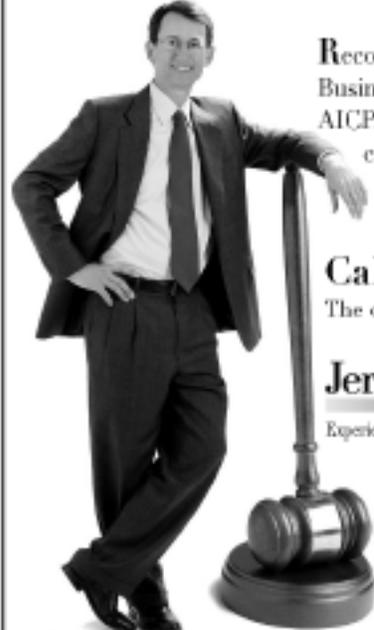
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The Imperatives Around Intellectual Property Asset Management

Paul Cooperrider
Technology Asset Group, LLC

For many years, the practice of Intellectual Property (IP) law did not enter the mainstream of thought for the vast majority of businesses. While patents, copyrights and trademarks were seen by most businesses as important things to attend to, they often played second fiddle to other aspects of running a business. With economic globalization, the emergence of the Internet as a powerful (and in some cases, essential) tool of business, and the growth of services-based businesses, a new knowledge-based economy¹ is emerging that will drive IP towards the mainstream of business management. The most telling consequence of this move is that businesses will start treating IP assets as the core of their business assets. The impact will have ramifications for those who practice IP Law, and may provide an incentive to firms practicing IP Law to broaden their outlook and services offerings to include aspects of IP Asset Management.

The United States and developed nations are inexorably moving to a knowledge-based economy. One of the indicators of this move is how companies are valued with respect to their assets. Figure 1, based on Brookings Institute data, shows how the value (as measured by market capitalization²) of Standard & Poor 500 (S & P 500) companies has shifted during the time period between 1982 and 2002.³

In this case, there has been a dramatic reversal of the valuation based on tangible assets versus intangible assets.⁴ Whereas, in 1982, market capitalization was weighted to tangible assets, by 2002 market capitalization was heavily weighted to intangible assets by more than a factor of 6:1.⁵

Within the category of intangible assets, many professionals involved in accounting for intangible business assets believe that IP comprises the largest sub-category. Indeed, Baruch Lev, the Philip Bardes Professor of Accounting and Finance for New York University's Stern School of Business, contends that IP

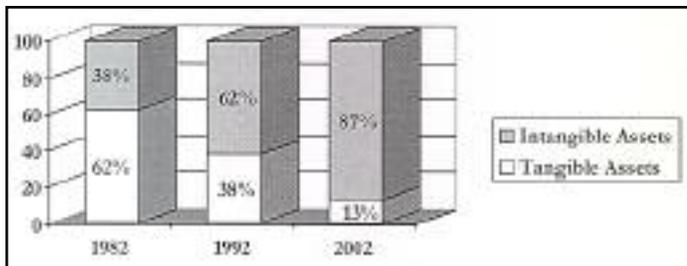


Figure 1. Intangible Assets as a Percentage of S&P 500 Market Capitalization. (Source: Brookings Institute.⁷)

now accounts for two-thirds to three-quarters of corporate assets.⁶

In another view of this trend in the growing importance of IP, the May 2004 edition of MIT's *TECHNOLOGY REVIEW* pub-

lished results reflecting that companies with strong patent positions provided much better returns to the shareholder than the average company.⁸ There, patent scores were determined by how often those companies' patents were cited in other papers and patents.⁹ The twenty-five companies in the S&P 500 with the highest patent scores produced nearly a ten-times-higher return on shareholder investments in those companies versus the average return of the S&P 500, as demonstrated on the chart published in that article and reproduced here in Figure 2.¹⁰

The key takeaway message demonstrated by these trends is that, in a knowledge-based economy, the ability to create the basis of profit and to protect that profit increasingly depends upon intellectual property as critical business assets and upon how a company manages those assets.

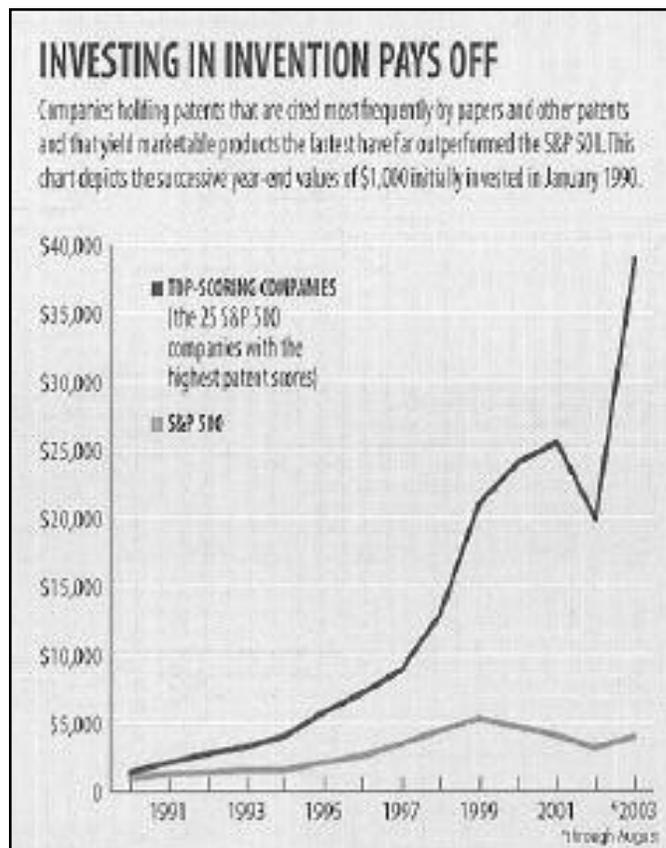


Figure 2. Financial Performance of Top IP-Investing Companies Compared to S&P 500; Source: MIT's *TECHNOLOGY REVIEW* (May

STATUTORY IMPERATIVES

The shift in company valuation toward intangible assets and IP means that financial accounting within a company and the subse-

quent public reports must acknowledge and document the value of those intangible assets to get a more valid assessment of the company's financial status. The 2002 enactment of the federal Sarbanes-Oxley Act (SOX) in the wake of Enron, Worldcom, and other major corporate scandals was a response to this need for accurate and truthful financial assessments. Generally, the SOX legislation bears upon a public company's responsibility to properly report on their financial condition and controls and, in particular, the Chief Executive Officer's and Chief Financial Officer's duties to certify those financial reports.¹²

Although SOX does not specifically call out IP as a required item for accounting in a company's financial report, many close to the development of asset accounting under SOX believe that it is only a matter of time until SOX will extend to cover companies' IP portfolios.¹³ One commentator stated that, although IP assets are intangible, they must be reported if they impact the company's financial condition or enable investors to evaluate the company.¹⁴

Under SOX Section 404, public companies must include in their annual report an accounting of their internal controls over financial reporting. Because of the impact of IP on the financial condition of a company and its status as a financial asset, Section 404 can be extended to cover reporting on controls for IP management. Indeed, one commentator claims that public disclosures of a company's financial controls must indicate the type of IP asset involved; how that asset is maintained, managed and reported; how it is valued for each IP transaction; and what are the licensing and assignment of IP rights, both in and out of the company.¹⁵

The work and commentary of economics officers, securities officials, and accounting professionals, including those from the World Intellectual Property Organization, the United States Securities and Exchange Commission, and international and domestic accounting standards boards, increasingly reflect this trend of properly accounting for IP as key to a company's value and financial status.¹⁶ For example, Financial Accounting Standards Board added to the United States Generally Accepted Accounting Principles Financial Accounting Standards 141 and 142 to specifically deal with IP valuation in mergers and acquisitions (M&A's).¹⁷ Together, those standards impose a more rigorous determination of the "fair value" of each IP asset involved in the transaction and an annual impairment test¹⁸ for each acquired IP asset, abolishing the prior loosely-constructed methods of accounting for IP simply as goodwill.¹⁹

To underscore this trend, a consortium of large corporations, including the likes of Motorola, Cisco Systems, General Electric, and Ford Motor Company, has formed the National Knowledge & Intellectual Property Management Taskforce (Taskforce).²⁰ The Taskforce's mission is to define the competencies and set the standards to accelerate the transformation of knowledge to net worth in the competitive enterprise. A key deliverable of this Taskforce is to determine how to handle the reporting of IP and remain in compliance with SOX.²¹

From a statutory perspective, there are significant imperatives for public companies to develop a system of IP asset management to properly inventory, maintain, assign value to, and report their

IP assets. Public companies, and companies soon to go public, would be well-advised to get ahead of the curve by implementing such an IP asset management system. In addition to anticipating likely inevitable developments under SOX, such systems help companies to avoid potentially embarrassing audits or litigation by shareholders and investors dissatisfied with the way corporate officers are accounting for, managing, and generating revenue and profit from this large set of critical business assets.

To stay ahead of the SOX curve as to the management and reporting of intellectual property, experts recommend a series of steps, although they may place differing emphasis on those steps.²² Several salient points are common, however, as to what a company must do to comply with SOX as to IP.

First, ensure that top management understands the imperatives and importance of IP asset management. Second, take steps to set up a system to identify and manage the company's IP portfolio, including the identification of an "owner" of that system who has accountability to top management for developing and managing the IP asset management system. Third, relate those IP assets to the company's business, including how those assets generate and maintain revenue streams. Fourth, obtain valid IP valuations and make IP valuations and IP asset controls visible, and communicate these on a voluntary basis to stay ahead of the curve, as driven by governmental authorities and by shareholders and investors. Fifth, develop an IP enforcement program that actively searches the IP landscape for potential infringement and acts upon identified infringement. Sixth, look out for areas in which the company may itself be infringing on the intellectual property rights of others, and take proactive steps to avoid costly litigation or devastating injunctions or exclusions orders. Although not an all-inclusive list, incorporation of these steps into an IP asset management system will allow the company to anticipate and be primed to respond to the growing statutory imperatives to properly reflect IP assets in the company's financial reports.

BUSINESS IMPERATIVES

With company valuation and profit increasingly tied to IP, every business should be looking at how to create and extract the maximum value and profit from its IP portfolio.²³ Many companies have not sufficiently prioritized IP asset management to effectively and systematically manage its IP portfolio. Many of these companies have been advised to simply "blot out the sun" with respect to registering and filing for IP. There are, however, significant costs involved in both time and money and, in particular, obtaining patent protection can be an expensive endeavor, especially if the company chooses to file for protection internationally.

Treating IP as a business asset means exactly that, however. The company needs to ensure and understand how its IP assets and strategy align with its business strategy and business model. IP assets that are more closely aligned to a company's business strategy and model are more likely to create the desired value, provide ways to capture profit and generate other revenue opportunities, as compared to unaligned IP.

Not all IP assets contribute equally to the achievement of a company's business goals. Those assets that contribute by building

greater value and creating a sustained competitive advantage should have greater priority when considering IP investments, as compared to other IP assets that do not create as much value or provide or sustain a competitive advantage.

Astute companies often look for something that protects their profits in their value chain,²⁴ that is, a strategic control point (SCP).²⁵ When IP is aligned to the business strategy and deployed properly with respect to a company's value chain, that alignment can create a strong SCP. This, in turn, creates a sustained competitive advantage in how a company can generate revenue and increase profit.

IP asset management can represent a significant change for a company's culture. To create and extract maximum value from a company's IP assets, that company must have a sufficient culture to allow development of an effective IP asset management system. It must have the requisite support from its top management and empower a person within the company to drive IP asset management.

Closely tied to these issues are the need to develop an employee IP education program and to set relevant metrics and rewards. The education program should underscore the importance of IP asset management and lay out the processes by which it will be done. The metrics and rewards should be commensurate with driving the necessary behaviors in the whole company to execute the IP asset management system. All these issues start with a culture change from the top down, one that acknowledges the role that IP plays as a critical business asset in a knowledge-based economy.

Assuming the cultural issues can be addressed, there are other crucial elements or processes in an IP management system. Companies often struggle to comprehend what IP they have and how it relates to their revenue stream. To get a start on these issues, the company must first understand their business model(s) and value chain(s). Then, they must do a thorough inventory of their IP assets.

Many current IP inventory methods are weighted toward the categorization of IP as patent, trademark, and the like, and may suffer from a poor ability to link the IP assets to the business model or value chain. The inclusion of improved links in the inventory process provides powerful insights as to the development and management of the IP portfolio. For instance, the company can better comprehend the gaps that may exist in its IP portfolio, gaps that it must fill to create or maintain its SCPs and thus realize their strategic business objectives. The company's leaders can also get a better handle on how the IP is tied to future revenue and profit, and thus have a sounder basis for IP valuation. Those leaders can also have a better understanding of which IP should get more investment and where they should curtail or stop investments in IP.

A good inventorying process also uncovers the IP landscape in the market into which the company is deploying its product and services. A solid IP landscaping²⁶ process shows how the competitive IP is arranged in the market, where gaps in IP coverage exist, where blocking IP exists, if the company runs a risk in its right to practice, or if others may be infringing on the company's IP, for example. Several methods exist for obtaining the IP to fill the aforementioned gaps, such as by creating the IP internally or by

obtaining rights to that IP via outright purchase, licensing, or cross-licensing. The company must undertake an assessment to understand the risks and returns to each of those methods, including the alternative of doing nothing to fill those gaps. In addition, the company's assessment must contemplate the appropriate mix of types of IP necessary for branding and other methods of combining and maximizing the importance of its IP.

Upon the completion of this IP inventory, the company's decision as to its next steps depends upon its business strategy. Whether a company is playing in a competitive market for the long term or is looking to be acquired or to out-license its IP, for example, will determine how the company uses the knowledge generated by a thorough IP inventory process to help it realize its business strategy.

Where the company anticipates a transaction involving IP assets, the company should conduct or obtain an informed IP valuation that goes beyond financial accounting and that also includes technical review, competitive analysis and tests of the assumptions for entering and competing in the market. In an M&A or a buy-out, the company generally should obtain an IP valuation on its entire IP portfolio. As demonstrated in Figure 1 and the earlier discussion in this article, in a knowledge-based economy, the value of a company's IP portfolio will be a large, if not the major, contributor to its overall value.

In the case of out-licensing, the company should obtain a valuation of the particular set of IP assets involved in the anticipated transaction, thereby providing a rational basis for negotiation of terms and conditions, fees, and royalty rates. In some cases, a supplier or customer in the value chain may have a need for rights to a set of the company's IP. The licensing or granting of IP rights can include negotiations of favorable conditions in a supply agreement with such suppliers or customers.²⁷ An in-licensing scenario has a related set of valuation needs, albeit from a differing perspective. In any case, an informed IP valuation is critical to getting or giving fair value for the IP in question.²⁸

Through the IP landscaping process, the company may uncover other companies or individuals who are infringing on the company's IP rights. Establishment of an IP assertion or enforcement process is crucial to stem the damages that may occur as a result of the infringing actions and to potentially recover lost revenue and other relief. Here, the company will need experienced legal counsel in matters of IP infringement and assertion.

The IP inventorying process also may reveal IP assets that are being poorly utilized for revenue and profit generation. This poor utilization may occur in a more mature company for which the business strategy may have evolved in a different direction from that which was in place when the IP assets were originally established. Such poor utilization also may occur in younger companies or start-ups that have focused their IP in a particular application, but do not realize applications of that same IP in other markets. To ensure that its IP performs to its capacity, the company should perform an opportunity assessment of that IP, looking at how it might create revenue and profit (sometimes referred to as monetization) from that IP, through licensing for example. Of course, the company should always look to the expected return on investment of such an endeavor.

Increasingly, value creation and value extraction are tied to how companies manage their IP assets. To realize the optimal monetization of the company's IP assets, top management must buy in and support the development and execution of an IP asset management system. The company must establish clear "ownership" and accountability for the performance of that system. Furthermore, that system must include certain critical elements or tools to realize business goals, with such tools including:

- Educational programs for company employees regarding importance of IP asset management and what constitutes the company's IP management system;
- Metrics and reward system that aligns with the importance placed on IP asset management;
- A comprehensive IP inventory process that includes rational links to the business model and value chain;
- Relevant IP landscaping to assess how the IP portfolio of the company is laid out versus the competition's IP in the market of interest;
- A process to identify how and where IP investments will be made, reconciling the findings of the comprehensive IP inventory with the business model and value chain;
- IP valuation, to help establish the fair value for a company's IP when transactions involving IP are forthcoming; and
- A set of processes and priorities to execute transactions and assertions of IP.

CONCLUSION

In the United States and developed countries, a company's revenue and profit will increasingly depend on intellectual property as business assets and a company's proper management of those assets. Because business value and assets are of interest from both legal and business standpoints, both statutory and business imperatives compel the company to develop and execute a system of IP asset management, including proper accounting, strategic IP investment decisions and effective execution of transactions and assertions of IP. A company's IP asset management system requires certain crucial elements to satisfy those imperatives. Companies that develop a fully functioning IP asset management system having these critical elements gain a competitive advantage and optimize the returns from their IP assets.

ENDNOTES

¹A knowledge-based economy is characterized by its profitability being based primarily on the knowledge that goes into the products and services that are created. That is, the ability to generate and protect profits is dependent on the knowledge that goes into those products and services, as opposed to other factors, like plant and equipment.

²Market Capitalization is the product of the number of outstanding shares of a public company times the share price. Thus company A with 4 million shares outstanding at a share price of \$10, would have a market capitalization of \$40 million.

³See ICMB Ocean Tomo Brochure, *Scope of Services*, pg. 3

⁴Tangible assets include real property and other so-called hard assets. Intangible assets include intellectual property and good will, for example.

⁵See ICMB Ocean Tomo Brochure, note 1.

⁶See Alison Carpenter, *IP Valuation, Other Processes on the List for SOX Compliance*, 3 CORPORATE ACCOUNTABILITY 144-48 (BNA Feb. 11, 2005).

⁷See ICMB Ocean Tomo Brochure, note 1.

⁸See Fredrik Broden, *Sparking the Fire of Invention*, MIT Technology Review (May 2004), pg. 38.

⁹See Fredrik Broden, note 6.

¹⁰See Fredrik Broden, note 6.

¹¹See Fredrik Broden, note 6.

¹²See, e.g., Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1350; see generally Carpenter, note 4.

¹³See Carpenter, note 4.

¹⁴See *id.* (referring to an interview with Cydney A. Tune, Intellectual Property Attorney, Pillsbury Winthrop LLP, San Francisco (undated)).

¹⁵See Carpenter, note 4 (citing Tune interview).

¹⁶See Roya Ghafele, Intellectual Property and Economic Development Department, World Intellectual Property Organization, *Getting a Grip on Accounting and Intellectual Property* (undated), available at <http://www.wipo.int/sme/en/documents/ip_accounting.html> (visited May 5, 2006) (citing, in part, U.S. Securities & Exchange Commission, *Strengthening Financial Markets: Do Investors Have the Information They Need?* (2001); Financial Accounting Standards Board (FASB), *Summary of Statement Number 142: Goodwill and Other Intangible Assets* (undated), available at <<http://www.fasb.org/summary/ssum142.shtml>>; International Accounting Standards Committee, *International Accounting Standards 38* (1998), available at <<http://www/iasplus.com/standard/ias38.htm>>) (other citations omitted).

¹⁷See *id.*

¹⁸The impairment test generally requires the company to reassess whether the value of the IP obtained in the M&A at least retains its value at the time of the M&A, or whether it has declined due to various factors. It, in essence, compels the company to repeat an IP Valuation of the IP involved in the transaction.

¹⁹See *id.* (citing generally D. FRIED, ET AL., *THE ANALYSIS AND USES OF FINANCIAL STATEMENTS* (1994)) (other citations omitted).

²⁰See generally National Knowledge & Intellectual Property Management Taskforce, available at <<http://km-iptask.org/home.html>>.

²¹See National Knowledge & Intellectual Property Management Taskforce, *Taskforce Distinction*, Part 1 - Overview, pg. 1 (undated), available at <<http://km-iptask.org/overview.doc>>.

²²See generally Carpenter, note 4; Ghafele, note 14 (voluntary disclosures); WESTON ANSON, *FUNDAMENTALS OF INTELLECTUAL PROPERTY VALUATION: A PRIMER FOR IDENTIFYING AND DETERMINING VALUE* (Weston Anson & Donna Suchy eds., 2005).

²³See generally Lex Van Wijk, *Building Shareholder Value Through Effective Patent Asset Management*, LES NOUVELLES 176-78 (Licensing Executives Society Int'l, Dec. 2005).

²⁴The value chain is the linkage that exists as elements of a product or service are synthesized, built upon, or modified prior to delivery to a customer. It is expected that something of value is added at each step in the value chain. A simple value chain for edible produce might include the produce

grower, who then sells to a processor, who then sells to a distributor, who then sells to a grocery store, which then sells to a consumer.

²⁵See DAVID J. MORRISON & ADRIAN SLYWOTZKY, *THE PROFIT ZONE* 52-54 & 310-11 (2001). Examples of strategic control points are patents, brands, copyrights, control of distribution, and a unique organizational culture, among others. See *id.* at 52.

²⁶Intellectual property landscaping is the process of identifying how the various instances of IP in the market or industry of interest are distributed, often in comparison against the company's own set of IP. The manner in which the IP is distributed for purposes of analysis generally depends on the commercial application that is desired in the market of interest.

²⁷Chair's Note: That said, the company should obtain legal advice to help it avoid any claims of tying or other antitrust violations.

²⁸See generally Anson, note 18.

ABOUT THE AUTHOR

Paul Cooperrider is the Vice President of Business Development for Technology Asset Group, LLC, an intellectual property asset management and technology transfer consultancy, based in Boise, Idaho. Prior to assuming his current position, Paul worked for 24 years with Hewlett-Packard where his focus was on emerging technologies, intellectual property management, and new business development. He graduated cum laude from the University of Illinois with a B.S. in electrical engineering and a B.A. in Anthropology. He is a member of the Licensing Executives Society International. He can be contacted by phone at (208) 939-3387, or by email at pcooperrider@tech-asset-group.com

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Idaho State Bar
2006 Annual Meeting
Sun Valley

Golfing for Ethics

(2 Ethics credits)

Sponsored by Professionalism & Ethics Section - RAC

July 20, 2006

Pre-registration and additional fee \$50.00 required. This program is limited to the first 40 registrants.

Collared shirts required and no denim allowed. Dress shorts are acceptable.

Golfing for Ethics is an off-site golfing CLE offering outdoor activity and lively ethics discussions. The CLE will be held at the Bigwood Golf Course at Thunder Springs (Ketchum). This 9-hole scramble will have a shotgun start at 2:00 p.m. Teams of four players will be presented with a hypothetical ethical question from the MPRE (if this is an unfamiliar acronym and if you hope to help your team, you'd better brush up on your golf game!) on each hole, will discuss that question, and be required to reach a consensus answer before proceeding to the next hole. The event will conclude with a group discussion led by Bar Counsel Brad Andrews and Deputy Bar Counsel Julia Crossland and the "correct" answers to the ethics questions raised will be decided. We anticipate prizes and the best prize will be not for the low golf score, but for the most correct answers.

Recent Developments in Internet Law

Brad Frazer

Technology Law Group, LLC

The recent and ongoing resurrection of the Internet as a marketing, commerce and communications medium has been dubbed by pundits as “Web 2.0.” The phrase, in which Bill O’Reilly apparently claims trademark rights based on a November 3, 2003, federal trademark registration application filed by O’Reilly’s production partner CMP Media,¹ has taken on a life of its own and has come to summarily describe all that is good with the “new Internet,” including a host of new features and characteristics such as blogs, podcasts, wikis, web-based software applications, community content, RSS feeds, and massively multi-player online role-playing games (MMORPGs).

This resurgence of the Internet and the World Wide Web has done much to remove the bad taste left in many mouths by the dot-com bust of the late 1990s. But with this revival has come a concomitant upswing in Internet-based legal activity, including legislation, litigation, and administrative activity. Although there are scores of interesting current topics in the field of Internet law such as net neutrality, new generic Top Level Domains, anonymous WHOIS, rootkits, cyberstalking, key words, click fraud, and Amazon.com’s famous “one-click” patent which the Patent Office recently agreed to reexamine, this article will focus on recent developments in three areas: jurisdiction, trademarks and metatags, and copyright. Because Internet law literally changes daily, it is prudent to confirm the current status of any of these matters before relying on them as state-of-the-art.

JURISDICTION

Recent cases have affirmed the general rule that personal jurisdiction over a remote website or website operator will not be found unless the website has some type of active conduct directed toward residents of the forum state. A purely passive site that is merely available for residents of a forum state to view is likely insufficient for purposes of jurisdiction. For example, in *Boggiano v. OFFICIALCITYSITES.ORG, Lenderhost, Inc., and Does 1-10*,² the court granted defendant’s motion to dismiss for lack of personal jurisdiction when defendant Lenderhost’s only contact with the state of Utah was a link to Lenderhost’s website that appeared on the OfficialCitySites.org site.³ The court well summarized the state of the law as it relates to Internet jurisdiction:

Establishing jurisdiction through the Internet, or more specifically through a website, has been analyzed by some courts under a framework of three general categories lying along a sliding scale. On one end of the scale is where a defendant clearly does business over the Internet, such as entering into contracts which require the knowing and repeated transmission of files over the Internet. Jurisdiction is proper in those cases. On the other end of the scale are passive web sites that do little more than make information available to those who are interested. Exercising jurisdiction in these cases is inappropriate. A middle category encompasses interactive web sites where a user can exchange information with the host comput-

er. In this category, whether jurisdiction is appropriate depends on the nature and level of interactivity. [Here,] the Court finds that this link is insufficient for... specific personal jurisdiction over Defendant Lenderhost. The Court finds the link to be passive in nature.⁴

Similarly, in *Wilson and Miles v. Stratosphere Corporation*,⁵ plaintiffs sued the famed Las Vegas hotel and casino in the Western District of Pennsylvania to recover a hidden resort fee they were charged as overnight guests. Plaintiffs booked their rooms through the www.hotels.com Web site and were not apprised of the fee until checkout. In granting the Stratosphere’s motion to dismiss for lack of personal jurisdiction, the court noted that although the defendant has a website located at www.stratospherehotel.com, it “was not designed to reach and is not targeted toward customers in Pennsylvania.”⁶ Here the plaintiffs had booked their rooms through an independent third party site, www.hotels.com, and absent any evidence that defendant knowingly interacted with Pennsylvania residents through hotels.com, the court ruled that jurisdiction cannot be grounded in the independent act of a third party.⁷

Jurisdiction over a remote Doe defendant was found, however, in *Virgin Records America, Inc., v. John Does 1-35*,⁸ in which plaintiff record companies sued alleging copyright infringement arising out of Internet file sharing of digital sound recordings. One of the defendants, Doe #18, moved to quash the subpoena issued to Doe #18’s Internet service provider, Verizon, on the grounds that Doe #18, a resident of Fredericksburg, Virginia, had insufficient jurisdictional contacts with the District of Columbia. In denying the motion to quash, the court found that plaintiffs had made a *prima facie* showing of personal jurisdiction over Doe #18, holding in relevant part:

[B]y installing [peer-to-peer] software and logging onto a [peer-to-peer] network, each defendant transformed his or her computer into an interactive Internet site, allowing others to complete transactions by downloading copyrighted works over the Internet. Importantly, each Defendant was disseminating copyrighted works to anyone that wanted them and was downloading copyrighted works from others who offered them—including residents of this jurisdiction. Engaging in such “interactive” electronic transactions provides the sort of “continuous” and “systematic” contacts within the District of Columbia that [has been] recognized as sufficient to support... jurisdiction over Defendant Doe #18.⁹

Interestingly, most of the Internet jurisdiction cases rely heavily on traditional, well-settled jurisdictional analysis finding its roots in, e.g., *Burger King v. Rudzewicz*¹⁰ and *Hanson v. Denckla*.¹¹ The Internet cases are themselves also now becoming fairly well-settled, relying chiefly on the “active vs. passive” analysis discussed above, as qualified by the due process rationales articulated in *Burger King* and *Hanson*.

TRADEMARKS AND METATAGS

A recent and interesting case out of the Southern District of Ohio, *Tdata, Inc., v. Aircraft Technical Publishers*,¹² applies traditional trademark infringement analysis and the initial interest confusion doctrine to a case involving metatags. Metatags are defined as “a list of words hidden in a web site acting as an index or reference source identifying the content of the web site for search engines.”¹³ The seminal Ninth Circuit case, *Brookfield Communications, Inc., v. West Coast Entertainment Corporation*,¹⁴ further explains:

Metatags are HTML code intended to describe the contents of the web site. There are different kinds of metatags, but those of principal concern to us are the “description” and “keyword” metatags. The description metatags are intended to describe the web site; the keyword metatags, at least in theory, contain keywords relating to the contents of the web site. The more often a term appears in the metatags and in the text of the web page, the more likely it is that the web page will be “hit” in a search for that keyword.¹⁵

In *Tdata*, plaintiff Aircraft Technical Publishers (“ATP”) held three trademarks, “ATP,” ATP Navigator,” and “ATP Maintenance Director.” Defendant Tdata, who was embroiled with ATP in related litigation involving claims that Tdata infringed several of ATP’s patents, placed the three marks in the metatags of one or more of Tdata’s websites, which drew potential ATP customers to Tdata’s site(s).¹⁶ ATP moved for summary judgment on grounds of trademark infringement, relying in part on the initial interest confusion doctrine.¹⁷ According to doctrine “initial interest confusion takes place when a manufacturer improperly uses a trademark to create initial customer interest in a product, even if the customer realizes, prior to purchase, that the product was not actually manufactured by the trademark holder.”¹⁸

The initial interest confusion doctrine seems especially appropriate in cases of Internet trademark infringement, particularly when the trademark use occurs inside of a hidden metatag and the occurrence of initial confusion is unavoidable because the site visitor may not even encounter the infringed marks when visiting the site and will therefore conclude that there must be an affiliation between the searched-for term and the site that appeared as a result of the search since there is nothing to belie that conclusion. Appropriately, then, the *Tdata* court found in favor of plaintiff on summary judgment.¹⁹ Note that the court incorporated the initial interest confusion test into a broader trademark infringement analysis using the traditional “eight factors test,” as articulated by the Ninth Circuit in *AMF Inc. v. Sleekcraft Boats*.²⁰ The factors include: (1) the similarity of the marks; (2) the relatedness of the two companies’ goods or services; (3) the marketing channels used; (4) the strength of plaintiff’s mark; (5) the defendant’s intent in selecting its mark; (6) evidence of actual confusion; (7) the likelihood of expansion into other markets; and (8) the degree of care likely to be exercised by purchasers. The Ohio court went so far as to find that Tdata’s use of ATP’s marks in its metatags was “nefarious.”²¹

COPYRIGHTS

Two recent developments in the realm of copyright law

directly and indirectly impact how the Internet is used to share information. The Family Entertainment and Copyright Act contains several provisions governing how copyrighted content may be used, and a decision from the Central District of California, *Perfect 10 v. Google*,²² gives guidance on a hotly contested, albeit narrow and somewhat esoteric, Internet issue: does a search engine infringe copyrighted images when it displays them on an “image search” function in the form of thumbnails, but not infringe when, through in-line linking, it displays copyrighted images served by another website?²³

The Family Entertainment and Copyright Act

The Family Entertainment and Copyright Act of 2005²⁴ has many provisions likely directly attributable to the burgeoning practice of using the Internet to share copyrighted materials, often in violation of the copyright owners’ rights. For example, Section 102 amends the federal criminal code to prohibit the unauthorized, knowing use or attempted use of a video camera or similar device to transmit or make a copy of a motion picture or other copyrighted audiovisual work from a performance of such work in a movie theater. Similarly, Section 103 establishes criminal penalties for willful copyright infringement by the distribution of a computer program, musical work, motion picture or other audiovisual work, or sound recording being prepared for commercial distribution by making it available on a computer network accessible to members of the public, if the person knew or should have known that the work was intended for commercial distribution. Further, Section 104 directs the Register of Copyrights to issue regulations to establish procedures for preregistration of a work that is being prepared for commercial distribution and has not been published and requires such regulations to permit preregistration for any work that is in a class of works that the Register determines has had a history of infringement prior to authorized commercial distribution.

Perfect 10 v. Google

Perfect 10, an adult magazine publisher, sued Google for, *inter alia*, copyright infringement arising out of Google’s practice of causing photographic images, the copyrights to which belong to plaintiff, to appear as a result of searches conducted by users of a Google feature called “Google Image Search.” If one runs a query for an image on Google Image Search, the result consist of both small pictures called “thumbnails” as well as links to the source of the thumbnail image. The thumbnail image is actually stored, or “cached” on a Google server, whereas if one clicks on the link, the source of the thumbnail, the original image, appears inside a new window within the Google search result, a process called “framing.” Google neither stores nor serves the content appearing inside the frame.

In its order, the court found that Perfect 10 would likely prevail on the merits on its counts of direct copyright infringement against Google’s practice of caching and serving the thumbnail photographic images, but would likely not prevail against Google on its related vicarious and contributory copyright infringement counts against Google based on its practice of framing since it neither cached nor stored the framed content—that content was served up by the original site.²⁵ The court ordered the parties to

lodge a jointly crafted proposed form of order embodying the injunction against Google's thumbnails, but stated that the injunction must be "carefully tailored to balance the competing interests of copyright holders and the value of facilitating and improving access to information on the Internet."²⁶

Although it does not appear the injunction has yet been entered, the February 17 order offers guidance to websites incorporating content from other sources, with the conclusion appearing to be that in-line linking and framing are a better methodology than actually hosting and serving up thumbnails. Thus, until the injunction is entered, the appeals process is exhausted, or both, any user of third party content on the Internet will be well-served by obtaining a license to any such content rather than relying on the Perfect 10 case or the fair use doctrine.

ENDNOTES

¹See "Claim to Web 2.0 Brand Provokes Blog Uproar," Nancy Gohring, IDG News Service, May 30, 2006, available at <<http://www.macworld.com/news/2006/05/30/web2/index.php>>; United States Patent and Trademark Office Trademark Registration Application Serial No. 78322306, November 3, 2003.

²No. 2:05-CV-6223 TS (D. Utah Central Division)

³See *id.* (Memorandum Decision and Order Granting Defendant Lenderhost's Motion to Dismiss April 17, 2006)

⁴*Id.*[citations omitted.] The case offers no insights into whether jurisdiction over OfficialCitySites.org might be proper.

⁵No. 2:05-cv-00939 (D. Pa.W.D.)

⁶See *id.* (Report and Recommendation March 31, 2006)

⁷*Id.*

⁸No. 05-1918 (D.D.C.)

⁹See *id.* (Memorandum Opinion April 18, 2006)

¹⁰471 U.S. 462 (1985)

¹¹357 U.S. 235 (1958)

¹²No. 2:03-cv-264 (S.D. Ohio Eastern Division filed December 7, 2004)

¹³PACCAR Inc. v. Telescan Techs., L.L.C., 391 F.3d 243, 248 n.2

(6th Cir. 2003)

¹⁴174 F.3d 1036 (9th Cir. 1999)

¹⁵*Id.* at 1045

¹⁶*Tdata* (Opinion and Order January 23, 2006)

¹⁷*Id.*

¹⁸*Gibson Guitar Corporation v. Paul Reed Smith Guitars*, 423 F.3d 539, 549 (6th Cir. 2005)

¹⁹*Tdata* (Opinion and Order January 23, 2006)

²⁰599 F.2d 341, 348-49 (9th Cir. 1979)

²¹*Tdata* (Opinion and Order January 23, 2006)

²²No. CV 04-9484 AHM (SHx) (D. Cal. C.D. filed November 19, 2004)

²³*Id.* (Order Granting in Part and Denying in Part Perfect 10's Motion for Preliminary Injunction Against Google February 17, 2006)

²⁴Pub. L. 109-9, 119 Stat. 218 (Apr. 27, 2005), *codified at various sections of* 17 and 18 U.S.C.

²⁵No. CV 04-9484 AHM (SHx) (D. Cal. C.D. filed November 19, 2004) (Order Granting in Part and Denying in Part Perfect 10's Motion for Preliminary Injunction Against Google February 17, 2006)

²⁶*Id.*

ABOUT THE AUTHOR

Brad Frazer, received his law degree from the University of California, Hastings College of the Law, and his M.B.A. from the University of Utah. Brad is the former Deputy General Counsel to Atlanta-based web hosting company Interland, Inc., now Web.com. He recently joined Technology Law Group, LLC, in Boise as Senior Counsel where he emphasizes Internet and intellectual property law. He also heads the firm's new Internet practice group, "Technologylawgroup.com." His Internet law blog can be found at <http://internetlawyer.blogspot.com/>. Brad can be reached at bfrazer@technologylawgroup.com.

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Tom Murawski
U.S. District and Bankruptcy Courts

CJA (CRIMINAL JUSTICE ACT) PANEL

Applications are now being accepted for a position on the District Court CJA Panel for appointment to indigent cases in the District of Idaho. The Panel is large enough to provide a sufficient number of experienced attorneys to handle the CJA caseload, yet small enough so that Panel members will receive an adequate number of appointments to maintain their proficiency in federal criminal defense work, and thereby provide a high quality of representation.

A Panel member must meet the following minimum criteria: Be a member in good standing of the Federal Bar of this District; Have at least three years experience as a member of the Bar; Have demonstrated experience in, and knowledge of the Federal Rules of Criminal Procedure; the Federal Rules of Evidence; and the Federal Sentencing Guidelines; be a registered participant in the Court's Electronic Case Filing (ECF) System and be familiar with the ECF Procedures governing E-Filing in the District of Idaho. Under the District's CJA Plan, the District is divided into three separate panels: the Southern Division, the Northern/Central Division and the Eastern Division, maintaining a separate roster for each division. Applications can be accessed and filled out online:

http://www.id.uscourts.gov/cja_manual/CJA_Frameset.htm.

The deadline for applications is October 31, 2006. A Panel Selection Committee will review all applications and make recommendations for Panel membership to the Court. General Order #134 and its recently revised Appendix govern the administration of the CJA Plan.

CONTINUING CM/ECF PROBLEM: METHOD OF PDF CONVERSION

There is an increasing problem in CM/ECF with the amount of documents

which have been converted to pdf by being "scanned" or "imaged" rather than converted to pdf directly from the word processing software printing options. Not only does scanning result in pdf documents of significantly larger size, but more importantly, the Court is prevented from searching, cutting & pasting, editing or otherwise manipulating the text of a scanned or imaged pdf document. Conversion to pdf by scanning should only be used in instances where a particular document does not exist in Word or WordPerfect format, such as a map or other type of exhibit.

NEW CM/ECF BANKRUPTCY MODULE

In early June, the District of Idaho converted to the latest Bankruptcy ECF module (version 3.0), which contains numerous enhancements, including a case module upload which now allows attorneys to use commercial bankruptcy petition software to create files that are uploaded to CM/ECF during the case opening process. Other improvements include a streamlining of the screen sets, which intuitively knows who is filing on behalf of the debtor, and several new claims features designed to make the filing and tracking of claims much easier. The new system allows for the addition of a creditor when filing a claim and the insertion of an extension number when amending a claim. Furthermore, a link to the claims register now appears on the NEF (Notice of Electronic Filing) and a large creditor has the ability to batch and file claims.

CM/ECF ONLINE CERTIFICATION FOR ATTORNEYS

The CM/ECF User Group has designed an online process for certifying attorneys for electronic case filing without their attendance at a "hands-on" training session. Online tutorials have been specifically created for the District and Bankruptcy areas, although much of the content is applicable to both.

After reviewing the tutorial, the attorney will then complete an online proficiency exam consisting of approximately 25 questions designed to test the applicant's knowledge of the ECF rules, steps, process & procedures. Within 24-hours after submission of the test, the attorney will be notified by e-mail of the results, and if successful, provided with an ECF login/password. The Court will continue to offer hands-on training on a limited basis.

ANNUAL CRIMINAL DEFENSE CONFERENCE

The Annual Western All-Star Criminal Defense Conference & Confabulation will take place on Friday, August 25th at the Boise Centre on the Grove. This Program is jointly sponsored by the U.S. District Court for the District of Idaho and the Federal Defenders of Eastern Washington & Idaho. Scheduled presentations and faculty include: "Jury Selection: It's Nice to Have Friends" by Richard Kammen; "That Reminds me of a Story!" by Keith Belzer; "Criminal Defense Lawyer: Liberty's Last Champion" by U.S. District Judge David Carter; "Closing: The Finishing Touch" by Andrea Lyon; "Sentencing Videos: Take 1" by Amy Rubin; "Making your Appeal Appealing" by Tom Monaghan; and "What Happens in State Court Stays in State Court" by Maria Andrade. The Capital Habeas Conference will be held the following day at the same location. CLE credits will be awarded. The application deadline is August 15th. For additional information contact Suzi Butler at (208) 334-9208 or Dick Rubin/ Kathy Bozman at (208) 388-1600.



Tom Murawski is an Administrative Analyst with the United States District and Bankruptcy Courts. He has a J.D. and Masters in Judicial Administration.

UNITED STATES DISTRICT AND BANKRUPTCY COURT
DISTRICT OF IDAHO



NOTICE
June 2, 2006

TO: INTERESTED MEMBERS OF THE IDAHO STATE BAR

The Judges of the United States District and Bankruptcy Court for the District of Idaho intend to appoint a Lawyer Representative to serve on the Ninth Circuit Conference of the United States Courts for a three-year term to replace Ron Kerl. In addition to Mr. Kerl, the District of Idaho's current Lawyer Representatives are Keith Roark and Deb Kristensen. Joe Meier currently serves as Chair of the Ninth Circuit Lawyer Representative Coordinating Committee and Candy Dale serves on the Ninth Circuit Advisory Board.

Effective November 1999, the Board of Judges adopted a Lawyer Representative Selection Plan, based upon current bar membership, which ensures state-wide representation. This plan calls for selection of lawyer representatives as follows: 2000 - 4th District; 2001 - 1st and 2nd District; 2002 - 4th District; 2003 - 6th and 7th District; 2004 - 3rd and 5th District; 2005 - repeat above.

Based upon the Plan, this year's lawyer representative must come from the 1st or 2nd District.
Applicants are required to:

1. Be a member in good standing of the Idaho State Bar and be involved in active trial and appellate practice for not less than 10 years, a substantial portion of which has been in the federal court system;
2. Be interested in the purpose and work of the Conference, which is to improve the administration of the federal courts, and be willing and able actively to contribute to that end;
3. Be willing to assist in implementing Conference programs with the local bar;
4. Be willing to attend committee meetings and the annual Ninth Circuit Judicial Conference.

Reimbursement of actual expenses will be allowed for attending the Ninth Circuit Judicial Conference as well as the expenses to attend committee meetings and the Annual District Conference. Typical duties include: serving on court committees, making recommendations on the use of the Court's non-appropriated fund, developing curriculum for the District Conference, serving as the representative of the bar to advance opinions and suggestions for improvement, and assisting the Court in the implementation of new programs or procedures.

Any persons interested in such an appointment should submit a letter setting forth their experience and qualifications, **no later than September 21, 2006, to the following:**

Ms. Diane K. Minnich
Executive Director
Idaho State Bar
P. O. Box 895
Boise, Idaho 83701-0895

The Idaho State Bar Commissioners will then select six applicants for referral to the Judges of the United States District Court in Boise, Idaho, who will make the final selection by October 31, 2006, or as soon thereafter as possible.

DATED this 2nd day of June, 2006.

B. LYNN WINMILL, CHIEF JUDGE
UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

Perspectives after Iraq

Idaho 116th Brigade

The 116th Brigade Combat Team was on loan to the U.S. Army for a minimum of one year starting in December 2004. During that time they served in Kirkuk, Iraq. While in Iraq the Idaho State Bar attorneys who were there sent back periodic columns for The Advocate. The following column is their thoughts on being home.

David E. Spurling

Corporate Counsel, J. R. Simplot Company

It didn't seem like a difficult request when *The Advocate* asked me to write a few short paragraphs describing the aftermath of our deployment in Iraq. It should have been a simple assignment. Miserable heat, dust storms, and in-coming rockets: Bad. Coming home to family and friends in Idaho: Very Good.

There have private celebrations and reunions. But re-entry to civilian life has been occasionally less smooth than expected and correspondingly less comfortable to describe.

I occasionally run an errand only to find that the business is gone. I've been momentarily confused when turning a corner to find a building has been demolished, remodeled, or replaced (no such luck with the hole-in-the-ground called the Boise Tower project). A few people sometimes feel awkward, uncertain whether or how to ask about our Iraq experience. Sometimes they are oblivious. A couple of weeks after my return, for example, an acquaintance solicited me for a donation by telephone, mentioning he hadn't seen me around and asking if I'd been working on a case out of town or something.

Life here did go on without us. That is good thing. I have a much greater appreciation for all the institutions that make our society better: from schools to neighborhood associations to our court system. Don't take them for granted. A person who actively invests time in family and community helps our state and country in very positive ways.

Some families did not experience a happy homecoming. When I think of them, I have a gut-wrenching sadness for their losses. I often think of Dean and Bonnie Wullenwaber, and still mourn the death of their wonderful son Luke. There are many appropriate words written through the ages about the nobility and need for such sacrifice, and I don't presume to offer the ones that resonate with me. I believe all of us who came home continue to have moments of extremely strong emotion when we hear of new deaths in the media, or think back to honoring our own Brigade's flag-draped coffins as they were carried onto C-130s.

Regardless of political viewpoint, I hope the public uniformly appreciates that there have been some remarkable efforts by Idaho soldiers to make Iraq a better place. Only time will tell whether the seeds we planted will take root or be plucked out or wither in inhospitable soil.

While there is a satisfying feeling of accomplishment in the good results we achieved during our deployment, there are also fleeting regrets for not being able to follow through on the positive momentum that existed in our area at the time we left.

Like the conclusion of any case, it is now time to put the Iraq file in archives and move on to the next matter. Before doing that, I want to use this opportunity to mention the Idaho lawyers whose

work I continue to admire. Judge Gordon Petrie worked tirelessly and effectively in developing a free Iraqi press, helping create sources of honest information and forums for public discussion that never existed there before. Alan Conilogue helped hundreds of soldiers solve individual problems as he made himself available 24 hours a day, seven days a week, and energetically looked into their concerns. Lora Rainey Breen ensured that when the 116th BCT conducted investigations, the right questions were asked, all the relevant evidence gathered, and that the investigation findings were accurate, based on a thorough review of the evidence. As a result, our Brigade was able to make sound decisions and take prompt effective action. Paul Boice served as a very effective Trial Counsel (military prosecutor and advisor to commanders), but also proved to be an effective emissary to the Iraqi judiciary. He worked with them to enhance Rule of Law initiatives in the country and implement our efforts to modernize and enhance the court system—from improved security measures to installation of computer systems.

These lawyers did great work and made a difference. If you know them, take a moment to say thanks. They did a lot more than I highlighted here.

We also worked closely with some terrific, dedicated people, including law student Eric Vehlow, paralegal Rachelle Brookshier, and our other soldiers, some of them still teenagers, who worked on our security teams as we moved through the local communities. They did a fantastic job. The next time you think about today's young people, please remember there are some who you can trust with your life.

It was an honor to serve with those I have mentioned here, our superb staff of paralegals, and all the men and women of the 116th Brigade Combat Team.



David Spurling's family greets him as he gets off the plane.



Judge Petrie explains the Great Seal of Idaho to his 4-year old grandson, Turner Webb in the Gem County District Courtroom.

Hon. Gordon W. Petrie
Gem County Magistrate Court

Since returning home in 2005 with the 116th Brigade Combat Team (BCT) after our Iraq deployment, I am often asked if I'm glad to be back. Around these parts, that's akin to being asked in mid-July, "Is it hot enough for you?" It's a way to begin a conversation. But, yes, I am glad to be back; and, yes, it is hot enough for me in July. I'm just thankful that, nowadays, I don't have sixty or seventy pounds of extra stuff hanging on me in 100-plus degree heat. But I'm also thankful for having had the opportunity to serve with some of the finest soldiers in the United States military, today.

As is evident to anyone paying attention since the 116th left Iraq, (1) the 116th was very lucky, or (2) the 116th was very good. The truth is the 116th was (and is) both. Our brigade was honored to bring clean water to villages that never had it before, to rebuild schools that crumbled long before Saddam was overthrown, and to stand up medical centers that never existed until we got there, not to mention providing competent medical care for Iraqi villagers who had never before seen a real doctor, nurse or dentist. We also advised a functioning elected-provincial government. Indeed, the 116th BCT was particularly well-suited to perform its mission, much to the consternation of the nay-sayers who prophesied our doom and destruction due to our alleged lack of training, experience and equipment. They just didn't get it, and many still don't.

Since returning home and reflecting on my Iraq experience, I have come to a several conclusions. First, our way of life in the West is worth preserving, even worth dying for in order to preserve it. Second, contrary to the "exceptions" the alphabet networks present to us as the "rule," the United States military has the highest regard for human life—friend or foe—of any competent military force in history. Finally, those of us who toil in courtrooms—either as advocates or as referees—have a sacred trust. We are the keepers of a durable, yet fragile, system of government. Durable because as both December 7th and 9/11 demonstrated, we can take a hit, get up, and let the bad guys know they made a terrible mistake.

Fragile, because if our system is going to be destroyed, we're the ones who will destroy it.

Lora Rainey Breen
Referee, Idaho Industrial Commission

It's almost surreal to reflect back on where I was at this same time last year: Kirkuk, Iraq, combat zone, 120 degrees in the shade, and working long hours in the Office of the Staff Judge Advocate of the 116th Brigade Combat Team. In some ways, it seems like a lifetime ago—or perhaps, a different life altogether. In other ways, it feels like I just left, or strangely enough, still have a part of me there. As Colonel Spurling has mentioned, the news surrounding the war in Iraq still has a haunting and very personal impact on those of us who were there; and, I think our hearts will continue to be there so long as there are soldiers in harm's way. Obviously, it has been wonderful coming home. But, it's a mixed bag, filled with mixed emotions.

For me, reconnecting with my family, friends, co-workers, and colleagues has been the greatest of experiences. It has come easily and my eternal gratitude goes out to all those people who so warmly welcomed me home. The harder part has been reconnecting with my former self and my former life, and finding a way to make it gel with who I am now... after the war. From little things like having to share my space again with loved ones after living alone for a year in a 100 sq. ft. metal "box," to big things like adjusting to the complexity of civilized life again (does anyone else marvel at how many choices we have and how frantic they keep us?) after living with so few choices for so long. If you haven't experienced it yourself, I can tell you there is a resigned, happy comfort in the simplicity of having very few options and making the best of what you have. Experiencing the freedoms (for instance, the simple ability to get in my car and drive whenever and wherever I want) we had all forgone while in Iraq was, and still is, so exciting as to be practically overwhelming.

While I'm sure time will mitigate many of these effects, I hope to hang on to the valuable lessons I learned along the way and pass



Lora is greeted by her family when she returns from Iraq.

them on to others. We hear them all the time, but we really should be living them: Life is short, live it to the fullest; don't take your loved ones for granted; embrace and don't fear change; make the

best of what you have; find balance in your life; overcome adversity; and, so on. Overall, I can say that my experiences in Iraq, hard as they were, only made me a better person and they are experiences I am happy to share with anyone who is curious. On behalf of myself and my fellow soldiers, thank you once again for the overwhelming support and numerous well wishes we received along the way.

Paul Boice

Meuleman Mollerup, LLP

In June 2004, I left a growing estate planning and commercial litigation practice to serve with the Idaho National Guard's 116th Brigade Combat Team in Kirkuk, Iraq as the brigade's Trial Counsel and Operations Law officer. Part of our overall mission was to assist the Iraqi transitional authority in rebuilding and to facilitate the formation of a permanent Iraqi government pursuant to a ratified constitution. It is hard to believe that I have been home for seven months now. In some respects I feel like I am just now settling down to my "normal" routine; although, I am still trying to remember what normal was, or if it ever existed. I would say that overall coming home was a more difficult adjustment process than leaving. Going from a singular military mission focus in Iraq to once again learning how to balance family, work, and many other demands has been more difficult than I anticipated. The hardest work has been adjusting back to home life. Leaving my family for 18 months had a tremendous impact on me and my family. My wife and kids did a tremendous job without me... hmm maybe even too good! Seriously though, it has taken all of us awhile to get reintegrated and comfortable living together again and following the same schedule and routine. Luckily, my beautiful and long-suffering wife and my three wonderful children have been patient with me. I think they have decided to keep me around!

Returning to work at Meuleman Mollerup was a smoother transition perhaps than readjusting at home. However, there were still a few kinks to work out. I believe my deployment has offered me a better perspective towards my practice as a whole, and with my clients. I have a much deeper appreciation for our legal system after working with the Iraqi judiciary for a year. One thing I really appreciated when I first came back to work was all of the calls and emails I received from other attorneys expressing their gratitude for my military service. This really meant a lot to me and



Paul Boice and his family take a few moments for a picture after he arrives home from Iraq.

helped me feel reconnected to my colleges. Of course, my firm also helped me feel reconnected to practicing law again and they expressed to me how much I had been missed by burying me with work immediately. They really know how to make a guy feel appreciated! On a more serious note, regaining the momentum I had established professionally before my deployment has been a challenge. I continue to work hard to rebuild my practice in the areas of estate planning, probate and commercial litigation. But as challenging as that might be some days, I am more than happy to be doing the work right here at home in Boise in the United States of America.

Alan Conilogue

Idaho Industrial Commission



Alan Conilogue still likes to drive - though his choice of vehicles is now a snazzy care instead of a tan Hummer!

Slipping seamlessly back into civilian life does not exactly describe my experience since returning from Iraq. I remembered how to drive a car, operate a washer, look up a statute, turn right on red and ride a bicycle, but I've enjoyed odd little hiccups of reentry.

In my absence, my civilian job migrated to another employee, never to return, so I have been learning new job duties at the Idaho Industrial Commission. My military position, Inspector General, was a casualty of the 116th's reorganization and it vanished, dropping me into a slot for which I've not been trained, with duties that have not been explained to me, and with a boss who has not been identified. With these parameters it will be either very easy or impossible to succeed.

These things have changed. I am now easily startled; a ringing phone will accelerate my pulse, and a loud sound will stop it. I get very emotional hearing about injured and killed soldiers, as if I personally knew the victim. When I left Iraq I had a certain fondness for the Iraqi people, but my heart has hardened with each American casualty and I have little good will left for Iraqis. I have much more experience with listening to people explain their problems, but have much less patience for it. I have been strangely reluctant to balance my check book or figure out my monthly finances. Time spent with my children feels incredibly precious.

My memories of Iraq are bright and fresh and yet it seems to have happened a long time ago. I miss being involved in such an important and historic endeavor; the simplicity of the lifestyle (no cooking, no dishes to wash, few choices to make); my fellow soldiers; the way work and personal life were as one. I don't want to go back, but would if called.

The sky is very blue here, and I'm still waiting for a hot day. It's great to be back..

JULY 2006 IDAHO STATE BAR EXAMINATION APPLICANTS
(as of June 13, 2006)

Listed below are the applicants who have applied to sit for the July 2006 Bar Examination. The Board of Commissioners publishes the names of these applicants for your review and requests any information of a material nature concerning moral character and fitness of an applicant be brought to the attention of the board of Commissioners in a signed letter by July 14, 2006. Direct correspondence to: Admissions Director, Idaho State Bar, PO Box 895, Boise, ID, 83701.

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HeinOnline Redux

John Hasko

University of Idaho College of Law

In the September 2001 issue of *The Advocate*, I reviewed a new electronic database, HeinOnline, produced by William S. Hein & Co., Inc. At that point in time, it consisted of the full text of just shy of 100 law journals, with another 102 scheduled for production. In the close to five years since that article, HeinOnline has grown to include the complete runs of over 800 journals, with hundreds more contracted for inclusion.

In that period of time, in addition to adding significantly to the Law Journal Library, HeinOnline has expanded its coverage to include a number of collections useful to practicing attorneys, all of which are image-based and fully searchable:

U.S. FEDERAL REGISTER LIBRARY

The *Federal Register* can be accessed from its inception in 1936 to the end of the first quarter of 2006. It is an immeasurable improvement over the print and microfiche versions; the print version is on poor quality paper, and the fiche version leaves much to be desired in user-friendliness.

U.S. SUPREME COURT LIBRARY

The complete official U.S. Reports is now available. Coverage in the bound volumes is through 2002, in Preliminary Prints to early 2005, and as slip opinions since then. Also included in the Supreme Court Library are classic treatises on the Supreme Court, and two journals, *The Supreme Court Review* and *Supreme Court Economic Review*.

U.S. STATUTES AT LARGE LIBRARY

The complete text of the *United State Statutes at Large*, official source for the laws and resolutions passed by Congress, runs from 1789 to 2002. (Several volumes in *Statutes at Large* also contain the texts of treaties; vol-

umes 7 and 8 are distinctive in that they contain only treaties. Volume 7 has treaties between the United States and a number of Indian tribes, 1778-1842; volume 8 reproduces treaties with Foreign Nations, 1778-1845.

TREATIES AND AGREEMENTS LIBRARY

This library has the text of all treaties entered into by the United States, whether in force, expired, or yet to be published. Included are the official *United States Treaties and Other International Agreements* set, *Treaties and International Acts Series (TIAS)*, and unpublished treaties obtained by Hein through the Freedom of Information Act. There are also unofficial treaty collections, guides and indexes, and books and texts about treaties.

UNITED STATES FEDERAL LEGISLATIVE HISTORY LIBRARY

For a number of years, Hein has produced print versions of legislative histories of Federal statutes. In the early 1990s, a number of those legislative histories were put on microfiche, and marketed as a package. Legislative histories of some landmark legislation from that package have been digitized and placed in this library. The library also has an index of compiled legislative histories, in the form of Nancy P. Johnson's *Sources of Compiled Legislative Histories: A Bibliography of Government Documents, Periodical Articles, and Books*.

LEGAL CLASSICS

HeinOnline has collected over 400 legal classics, published in the U.S. and the UK. Among the authors are Louis D. Brandeis, Oliver Wendell Holmes, Joseph Story, F. W. Maitland, and Hugo Grotius. Some representative titles, indicative of the range of materials in

this library, are *Bouvier's Law Dictionary and Concise Encyclopedia*, *The Federalist Papers*, and the original 1942 edition of *The Handbook of Federal Indian Law*, by Felix S. Cohen.

A Presidential Library has been started, and in the works are libraries dealing with the *Code of Federal Regulations* and U.S. Federal Agencies.

ABOUT THE AUTHOR



John Hasko received his J.D. from St. Mary's University in San Antonio, Texas, and his M.S. in Library and Information Science from the University of Illinois in Urbana-Champaign. He has been Director of the Law Library at the University of Idaho College of Law since 1997.



LAW RELATED EDUCATION Logos Finishes 9th at National Mock Trial

The following article was reprinted with permission from the Moscow Pullman Daily News. By Emily Thomason--Published: 06-05-2006. It was entitled: Early mornings, late nights, highlight Mock Trial Preparation

Hui and seven of her classmates from Logos School got together three days a week at 6 a.m. to talk about murder and sabotage. They were part of the Moscow school's mock trial team that placed ninth out of 44 teams at the national competition May 11-13 in Oklahoma City.

The competition revolved around a case of rodeo rivals and a second-degree murder charge. A bronc rider died from head injuries she sustained after her hack rein broke during the competition. Her rival was accused of cutting her rein and taping it so the rein appeared fine.

The case was revealed to the teams April 1, giving Logos and the other competitors a little more than a month to prepare for nationals. "I think the most challenging part was getting everything ready in a short time for nationals," said Hui, who acted as one of the team's defense attorneys.

The team conducted informal practice sessions at night to squeeze in extra hours to answer objections or give their characters dialects.

Coach Chris Schlect said the students gained confidence through the mock trial program. "The kids themselves have said they're not intimidated to speak in stressful situations," Schlect said. Hui agreed mock trial has improved her speaking skills, since much of the time the speaking is impromptu. "Mock trial is not working from a script. It's working from your feet," Schlect said.

Logos placed 11th in the nation in 2005. "We beat our own record," Schlect said of the team's May performance. Ninth place is the highest an Idaho team has ever finished. The team's only loss was a split decision to the eventual national champion, Iowa. "When you break into the top 10 that's sort of the stratosphere," Schlect said. The team received a trophy for its ninth-place finish.

Logos has won the state competition for three consecutive years. Schlect said the team had to eat, sleep, and breathe mock trial to prepare for the national competition. "It's really the entire work of a mock trial season collapsed into the month of April," Schlect said.

Hui said the early mornings and rule memorization was worth the work. She does not think she will pursue a career in law, but she still found the experience rewarding. "It gave us a lot of experience and it was a lot of fun hanging out with the team in Oklahoma City," she said. Schlect credits the logic and rhetoric courses at Logos for helping prepare the students for the competition. "What these kids have accomplished is far more than I could have done at their age," Schlect said.

IDAHO VOLUNTEER LAWYERS PROGRAM Special Thanks for Going the Extra Mile

This month, the Idaho Volunteer Lawyers Program (IVLP) would like to recognize and give special thanks to several Idaho State Bar members who have contacted the Program and offered their services.

Ben Rice planned to retire in December. He was going to change his status to Affiliate and move out of state. Instead, to continue representing two pro bono clients, Ben worked with IVLP to obtain Emeritus Status. This change in status allowed him to complete both pro bono cases, providing legal assistance to individuals who were otherwise unable to pay for an attorney. Ben's generosity made an important contribution. Emeritus Status attorneys are required to have a supervising attorney, so IVLP also wishes to thank **Steve Beer** for his willingness to serve in this capacity for Ben.

Kathy Levison contacted the IVLP in April wanting to help eligible pro bono clients with Estate Planning, Real Estate, Mediation, or Transactional Law. While these legal specialties are not often needed for IVLP clients, it wasn't long before a couple of opportunities presented themselves. Kathy contacted the Tax Clinic at the University of Idaho College of Law to offer to assist over-flow requests and during school vacations. The Tax Clinic provides qualified low-income taxpayers with free legal representation in federal tax matters. Kathy also agreed to help a non-profit group in Twin Falls attain their 501(c)(3) tax status with the Internal Revenue Service.

Shauna McDavid, an attorney who recently moved to Idaho from Missouri contacted IVLP, offering to do family law for pro bono clients. Shauna is applying for Emeritus status with the Bar and will be supervised by **Lois Fletcher**. IVLP expresses its heartfelt thanks to Shauna and Lois for their generous contributions. It will undoubtedly not be long before they will be put to work—IVLP is always looking for volunteers to accept family law cases.

Nick Baran is a newly admitted Affiliate attorney who is willing to become an ACTIVE member of the Bar in order to serve IVLP clients. Nick explained that he went to law school late in life and passed the bar exams in California and Idaho. He looks on his law degree and license as the best way to give back to society. Although he is retiring and plans to spend his summers in Sandpoint, Idaho, he plans to complete the requirements for Active status with the ISB so that he can provide pro bono legal service. IVLP has already contacted Nick about specific cases where he may be able to provide assistance.

Our special thanks to these special attorneys who have truly gone the extra mile to help our IVLP clients.

Idaho State Bar
2006 Annual Meeting Schedule
Sun Valley Resort, Sun Valley

Wednesday—July 19

- 8:30 a.m. - 3:00 p.m. _____ Board of Commissioners Meeting
11:30 a.m. - 5:30 p.m. _____ ISB Registration & Exhibit Display
1:30 p.m. - 4:45 p.m. _____ Concurrent CLE Programs
- “Look Good Cross” with Terry MacCarthy
 - Water Law in a Changing State
 - Intellectual Property Issues in a Typical Business Life Cycle
- 5:00 – 7:00 p.m. _____ President’s Hosted Reception

Thursday—July 20

- 7:00 a.m. - 6:00 p.m. _____ Meeting Registration
7:30 a.m. - 8:30 a.m. _____ Continental Breakfast with Registration/Exhibits
7:30 a.m. - 8:30 a.m. _____ District Bar Presidents Breakfast (by invitation)
8:30 a.m. - 11:45 a.m. _____ ILF Board of Directors Meeting
8:30 a.m. - 11:45 a.m. _____ Concurrent CLE Programs
- Impeachment—Weapons of Mass Destruction with Terry MacCarthy
 - The Council’s Counsel: Ethical and Practical Considerations of Advising and Serving on Governmental Councils, Boards, and Commissions
 - Everything You Wanted to Know About Billing But Didn’t Know Whom to Ask
- Noon - 1:15 p.m. _____ Idaho Law Foundation Annual Meeting
and Idaho State Bar Awards Luncheon
1:15 p.m.- 1:30 p.m. _____ Exhibit Break
1:30 p.m.- 4:45 p.m. _____ Concurrent CLE Programs
- Golfing for Ethics
 - The Impact of Health Law in Business, Real Estate and Family Law
 - Wetlands: The Good, The Bad and The Ugly
- 1:30 p.m.- 3:30 p.m. _____ Guest Program
4:45 p.m.- 5:30 p.m. _____ Exhibit Break
5:30 p.m.- 7:00 p.m. _____ Hosted Reception acknowledging ILF donors
7:00 p.m.- 9:30 p.m. _____ Dinner with Jim Morris and The Big Bamboo Band

Friday—July 21

- 7:30 a.m. - Noon _____ Meeting Registration & Exhibits
7:45 a.m. - 8:45 a.m. _____ 50-65 yr. Recognition Breakfast
9:00 a.m. - 12:15 p.m. _____ Concurrent CLE Programs
- Family Law Roundtable
 - Preserving and Presenting a Record for Appeal
 - Preparing Your Client for a Successful ADR Experience
 - Lessons From the Masters
- 12:30 p.m.- 1:45 p.m. _____ Distinguished Lawyer Luncheon
1:45 p.m. _____ Conference officially adjourns

JULY

PATENT LAW

*Sponsored by the
Intellectual Property Law Section*

Thursday July 6, 2006
Law Center

Patent law issues are becoming increasingly important in today's legal environment. Every attorney should understand at least a few basic patent law principles. Join attorney Peter Midgley of Holland and Midgley, LLP, as he provides a general overview of these principles and dispels many common myths and misunderstandings about the patent system.

■■■■

Annual Meeting

Thirteen CLE opportunities at the **ISB Annual Meeting** in Sun Valley

Wednesday, July 19

1. "Look Good Cross" with Terry MacCarthy
2. Water Law in a Changing State
3. Intellectual Property Issues in a Typical Business Life Cycle

Thursday, July 20

4. Impeachment—Weapons of Mass Destruction
5. The Council's Counsel: Ethical and 6. Practical Considerations of Advising and Serving on Governmental Councils, Boards, and Commissions
7. Everything You Wanted To Know About Billing But Didn't Know Whom to Ask
8. Golfing for Ethics
9. The Impact of Health Law in Business, Real Estate and Family Law
10. Wetlands: The Good, The Bad and the Ugly

Friday, July 21

11. Family Law Roundtable
12. Preparing Your Client for a Successful ADR Experience
13. Lessons from the Masters

SEPTEMBER

TRADEMARK LAW

*Sponsored by the
Intellectual Property Law Section*

Thursday, September 7, 2006
Law Center

■■■■

**ANNUAL ADVANCED ESTATE
PLANNING CONFERENCE**

*Sponsored by the Taxation, Probate
and Trust Law Section*

September 8 & 9, 2006
Sun Valley Resort

The theme of this years' Annual Conference will be asset protection. The conference will feature speakers on issues of asset protection through insurance coverage, protecting assets in contemplation of qualifying for SSI and/or Medicaid, protecting assets through self-settled trusts and more.

■■■■

Annual Litigation Update

*Sponsored by the
Litigation Section*

September 15, 2006
Grove Hotel, Boise

October 6, 2006
Coeur d'Alene Inn, CDA

■■■■

**Building a Case from Discovery
to Trial and Beyond
Alternative Dispute Resolution**

*Sponsored by the
Young Lawyer Section*

September 20, 2006
Law Center

Join speaker John Magel from Elam and Burke, P.A. Boise as he discusses the practice of alternative dispute resolution strategies in the litigation setting.

■■■■

IDAHO PRACTICAL SKILLS

*Sponsored by the
Idaho Law Foundation, Inc.*

September 29, 2006
Boise Centre on the Grove

This course is designed for both the new attorney and experienced lawyers that have recently qualified before the Idaho Bar. Idaho judges and attorneys will provide insight on the real workings of Idaho law. Knowledgeable practitioners cover the practice of law in a variety of areas during concurrent seminars

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David M. Penny

Mr. Penny practiced with the firm for 17 years from 1986 to 2004. He has rejoined the firm to continue his practice of law. In 1986 he graduated from Gonzaga School of law and is admitted to practice before the State and Federal courts of Idaho. His practice includes: Litigation, Business and Real Estate Transactions, Family Law and Mediation.

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- Self-settled trusts,
- And more.

Registration Information Out Soon!

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Sun Valley Resort by calling 1-800-786-8259.**

(The Idaho State Bar has negotiated a reduced room available until August 1, 2006.)

**OFFICIAL NOTICE
SUPREME COURT OF IDAHO**

Chief Justice
Gerald F. Schroeder

Justices
Linda Copple Trout
Daniel T. Eismann
Roger S. Burdick
Jim Jones

Regular Fall Terms for 2006

Coeur d'Alene August 28, 29, and 30
Moscow August 31

Lewiston September 1
Boise September 27 and 29

Idaho Falls October 4 and 5
Pocatello October 6

Boise November 1, 3, and 6
Twin Falls November 8 and 9
Boise November 29

Boise December 1, 4, 6, and 8

By Order of the Court
Stephen W. Kenyon, Clerk

NOTE: The above is the official notice of setting of the year 2006 Fall Terms of the Supreme Court, and should be preserved. A formal notice of the setting of oral argument in each case will be sent to counsel prior to each term.

The complete* Fall Oral Argument Dates have not been set yet. Please check the Courts website for the most current information:

www.isc.idaho.gov

*Idaho Court of Appeals - Special Hearing Re: Pending Motion - see box under Idaho Court of Appeals Calendar - this page.

EVERY WHICH WAY BUT RIGHT

District Bar Officers

Our apologies to the 2006 District Bar Officers. Some of the last names were left off the list in last month's journal. They were an unfortunate victim of collateral proofing errors. For a corrected list please see page 10.

**OFFICIAL NOTICE
COURT OF APPEALS OF IDAHO**

Chief Judge
Darrel R. Perry

Judges
Karen L. Lansing
Sergio A. Gutierrez

Regular Fall Terms for 2006

Boise August 8, 10, 15, and 17

Coeur d'Alene September 12, 13, 14, and 15
(Northern Idaho term)

Hailey October 4, 5, and 6
(Eastern Idaho term)

Boise November 8, 9, 20, and 21

Boise December 5 and 7

By Order of the Court
Stephen W. Kenyon, Clerk

NOTE: The above is the official notice of setting of the year 2006 fall terms of the Court of Appeals, and should be preserved. A formal notice of the setting of oral argument in each case will be sent to counsel prior to each term.

**Idaho Court of Appeals
Oral Argument Dates**

As of June 15, 2006

Boise Term

Wednesday, July 12, 2006

9:00 a.m.

State v. Rogers

#31264/32477

HEARING RE: PENDING MOTIONS

RECIPROCAL ADMISSION

The Idaho Supreme Court approved rules submitted by the Bar that allow reciprocal admission with surrounding states (Idaho Bar Commission Rule 204A). Under these rules, certain Idaho, Washington, Oregon, Utah and Wyoming lawyers can apply to be admitted to practice in the other states without having to take additional bar exams. The following lawyers were admitted to the practice of law in Idaho.

**Reciprocal Admission Applicants Admitted
(from May 1, 2006, to May 31, 2006)**

Stephen Christopher Smith

Honolulu, HI
Tulane University
Admitted: 5/9/06

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FOURTH DISTRICT BAR ASSOCIATION AND LAW DAY

The Law Day theme for 2006 was **Liberty Under Law: Separate Branches, Balanced Powers**. Lorna Jorgensen was the 2006 4th District Law Day Chairperson. The Fourth District Bar Association and Law Day Committee would like to thank all of the 4th District volunteers who joined together for a great Law Day Celebration. The following events took place during the Law Day celebration:

The **Ask-A-Lawyer program** is very popular in the community. There were over 70 calls. Each volunteer took a two-hour shift to take calls from the general public on a variety of legal matters. Attorneys and callers used only first names to remain anonymous. Calls were limited to 15 minutes. Stoel Rives LLP, Boise donated the use of their Boardroom, and provided parking, for this project. CricKet Phone donated two numbers and phones for the morning.

The **Attorneys in the Classroom** project matched attorneys with teachers in Fourth District schools. The attorneys visited classes and spoke about legal careers and law-related topics. The purpose was to expand stu-

dents' knowledge of the legal system and to increase their understanding of the law.

Dr. James B. Weatherby, Director of the Public Policy Center at Boise State University, was awarded the **2006 Liberty Bell Award** from the Fourth District Bar Association. Dr. Weatherby was chosen for the award because of his ability to educate not only his students, but also the citizens of Idaho regarding how the different branches of government have separate branches and separate powers, but work together for the common good.

Over 150 students at Borah High School attended **The Dialogue on Freedom**. The guest speakers were Judge Stephen Trott, Ninth Circuit Court of Appeals, State Senator Kate Kelly, and Tom Dominick, Boise. The students were actively engaged in the discussion; asking questions about several issues relating to the doctrine of separation of powers or governmental checks and balances. They discussed judicial activism (Roe v. Wade), the War Powers Act (Iraq), and legislative issues (the proposed gay marriage amendment).

LAW DAY COMMITTEE MEMBERS

Alex Peterson, *Dominick Law*
 Benson Barrera, *Holland & Hart*
 Bob Strauser, *Idaho State Bar*
 Dan Gordon, *Greener Banducci*
 Jeanne Barker, *Idaho State Bar*
 Jeremy Chou, *Office of Attorney General*
 Kathy Johnston, *Stoel Rives*
 Lorna Jorgensen, *Ada County Prosecutor's Office*
 Mandy Hessing, *Ada County Public Defender*
 Maureen Ryan, *Holland & Hart*
 Nicole Hancock, *Stoel Rives*
 Pamela Howland, *Holland & Hart*
 Samia McCall, *Stoel Rives*
 Soo Kang, *Elam Burke*
 Stephanie Bonney, *Morris, Buxton, Turk*
 Teresa Baker, *Ada County Prosecutor's Office*
 Teresa Hill, *Stoel Rives*
 Tom Dominick, *Hoagland Dominick & Hicks, PLLC*

ASK-A-LAWYER VOLUNTEERS

Alissa Rippee, *Idaho Supreme Court*
 Ammon Hansen, *Ada County Prosecutor's Office*
 Audrey Numbers, *Numbers Law Office*
 Brad Poole, *Bradley B. Poole, Chtd.*
 Charina Neville, *Idaho Supreme Court*
 Christopher Bromley, *Office of the Attorney General*
 Clinton Casey, *Cantrill, Skinner, Sullivan & King, LLP*
 David Hyde, *Hyde & Haff, PLLC*
 David Wishney, *Self*
 Dawn Blancaflor, *Boise Cascade*
 Deborah Ferguson, *United States Attorney's Office*
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PC
 Garrick Baxter, *Office of the Attorney General*
 Gary Neal, *Neal & Uhl, PLLC*
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 M. Sean Breen, *Manweiler, Manweiler, Breen & Ball, PLLC*
 Mandy Hessing, *Ada County Public Defender's Office*
 Margery Smith, *Law Office of Margery Smith*
 Mark Freeman, *Foley Freeman Borton, PLLC*
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 Reid Hay, *Idaho Supreme Court*
 Richard Stover, *Eberle, Berlin, Kading, Turnbow, McKlveen & Jones, Chtd*
 Rob Vail, *Howell & Vail, LLP*
 Samia McCall, *Stoel Rives, LLP*

Shane Kennedy, *Kennedy Law Office*
 Stephanie Bonney, *Moore, Smith, Buxton & Turcke, Chtd*
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 Tammy Zokan, *Moore Smith Buxton & Turcke, Chtd.*
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 Tony Steenkolk, *Boise Cascade, LLC*
 Wes Meyring, *Idaho Court of Appeals*
 William Myers, *Holland & Hart, LLP*
 Yvonne Vaughn, *Idaho Supreme Court*

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Bettis, Laura
 Brown, Christian, *Brown & Patrick*
 Bryan Aydelotte, *DBSI*
 Campbell, Susan
 Coulter, Ronaldo, *State Appellate Public Defender*
 Eberharter-Maki, Elaine, *Eberharter-Maki & Tappen*
 Feldman, Murray, *Holland & Hart*
 Hammerquist, David, *Ringert Clark*
 Hessing, Mandy, *Ada County Public Defender*
 Holzer, Kurt D., *Holzer Edwards & Harrison*
 Hunter, Larry, *Moffatt Thomas*
 Jorgensen, Ken, *Idaho Attorney General (Ag)*
 Keenan, John, *Idaho Attorney General (Ins)*
 Mimura, Susan, *Mimura James & Mimura*
 Patrick, Rudy, *Brown & Patrick*
 Perison, Mark, *William R. Snyder &*

Associates
 Ranum, Carla, *Corporate Consulting*
 Sasser, David, *Idaho Counties Risk Mgmt.*
 Schwarz, Robert, *Idaho Attorney General (Ag)*
 Shaner, Erick M., *Idaho Attorney General (Tax)*
 Shaw, Michael, *State Appellate Public Defender Investigator*
 Simmons, Kimberly, *State Appellate Public Defender*
 Starr, Christine, *Boise City Attorney*
 Talbutt, Glenda, *Brady Law Office*
 Tobiason, Steve, *Kane & Tobiason*
 Wetherell, Bob, *Brassey Wetherell Crawford & Garrett*

TEACHERS

Blackwood, Mitch
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 Easton, Mel
 Faulkner, Steve
 Heathcock, Mrs.
 Jones, Terrie
 Kerfoot, Jan
 Knutson, Mike
 Liston, Janet
 Mantooth, Kay
 Massman, Gretchen
 Reuling, Linda
 Salinas, Suzanne
 Smith, Ed
 Thomas, Ed
 Zimmer, Tiffanie

The Pen is Mightier... A Law Clerk's Perspective on Good Writing

Hethe Clark
Law Clerk, 4th District Court

This is the first of a series of monthly columns the Young Lawyers Section will be publishing in The Advocate.

While a lawyer puts her public face forward in the courtroom, in reality, the attorney wins many battles on the written page. Law clerks stand on the front lines of these battles and are uniquely exposed to writing at its best and worst. In fact, to further the metaphor (and risk violating the suggestions found herein), because many clerks have jumped on the grenade of a clumsy and obscured argument—deciphering it so that the judge will know what the parties intended by the time hearing arrives—they are well aware of and immediately distinguish between poor and great writing.

From this perspective and in the spirit of improvement, this current law clerk offers the following advice for “sharpening” any attorney’s written “sword.”

THE “POST-MORTEM” OUTLINE

All good writers consider the overall structure and logical flow of their writing from the outset; excellent writers recognize that arguments will evolve as they are developed and plan to adjust accordingly. Outline at the outset, but check your finished product and re-outline as you conclude to ensure your developed argument remains coherent. This re-outlining process requires little time, restores perspective, and quickly indicates internal inconsistencies and irrelevancies that may have crept in.

Check Your Tone

Avoid passive voice at all costs—it slows the pace of your writing and cloaks its overall meaning. Also, ensure you have chosen the proper tone for the argument itself. Excessive repetition mutes your point. Most importantly, whatever water has passed under the proverbial bridge, snide or abusive comments toward the opposing party will win you no favor.

Do Not Fall in Love

Do not become such a proud parent of the words on the page that you cannot delete verbiage. Good writing is more golf than basketball—keep your word count low in order to succeed. And do not, under any circumstances, request leave to file a memorandum of length beyond that allowed under the local rules when simple editing would have brought you within the standard limits.

Question Everything! (and buy the book)

Good writers question everything and take nothing for granted because a moment’s research will prevent grammar mistakes from distracting the reader. Is it July 2006, or July, 2006? (July 2006 is correct.) Is the situation a “travesty” or a “tragedy”? (They’re not the same!) Does one “ensure” or “insure” the result? (“Ensure” means to make safe or guarantee; “insure” refers to buying insurance.) When should one use “that” or “which”? (“That” is used in restrictive clauses, meaning that the clause itself is necessary to understand the sentence. Use “which,” preceded by a comma,

when the clause merely adds information.) Am I moving “toward” or “towards” my conclusion? (Use “toward” if in the United States; “towards” is proper in the United Kingdom.)

And, of course, spell-check catches none of these errors.

A handy reference is a key to good writing. Some particularly helpful reference books include: *The Redbook: A Manual on Legal Style* by Bryan A. Garner; *The Elements of Style* by William Strunk, Jr. and E.B. White; *The New York Times Manual of Style and Usage* by Allan M. Siegal and William G. Connolly; *Eats, Shoots & Leaves* by Lynne Truss; and *Guide to Legal Writing Style* by Terri LeClerq.

Happy sharpening! (And don’t forget the judge’s courtesy copies!)

ABOUT THE AUTHOR

Hethe Clark received a B.A. from Duke University and his J.D. from Washington University in St. Louis in 2005. He was admitted to the Bar in 2005 and is currently serving as Law Clerk to the Honorable Darla Williamson, 4th Judicial District. He was Editor-in-Chief of Washington University Global Studies Law Review from 2004 to 2005.

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Helping the profession serve the public

IDAHO SUPREME COURT AND COURT OF APPEALS
NEW CASES ON APPEAL PENDING DECISION
(Update 06/01/06)

CIVIL APPEALS
PROPERTY

1. Whether the district court erred by determining it could order that Crown Point's applications be granted without remanding the matter to the Sun Valley City Council.

*Crown Point Development v.
City of Sun Valley*
S.Ct. No. 32264
Supreme Court

SUBSTANTIVE LAW

1. Whether the Commission's final order exceeds the Commission's statutory authority in that the statutes do not support a finding that Mr. Tway and Mr. Ford received indirect compensation through Z & J Services, Inc.

*Sons & Daughters of Idaho v.
Idaho Lottery Comm.*
S.Ct. No. 32218
Supreme Court

MEDICAL MALPRACTICE

1. Whether the trial court abused its discretion by denying Foster's motion to vacate the final judgment in favor of Kootenai Medical Center.

*William L. Foster v.
Kootenai Medical Center*
S.Ct. No. 32473
Court of Appeals

SUMMARY JUDGMENT

1. Did the court err in granting summary judgment to Martelle on Augustin's claim of professional negligence?

Verner Augustin v. Martin J. Martelle
S.Ct. No. 32142
Court of Appeals

2. Whether the trial court erred in finding the plaintiff has no right to pursue state court tort remedies due to preemption by federal law.

*Leann Marchand v.
JEM Sportswear, Inc.*
S.Ct. No. 32476
Supreme Court

EVIDENCE

1. Whether the trial court abused its discretion by excluding the testimony of newly-discovered witness Jennifer Broncheau or by not vacating the trial in the alternative.

Sammye McKim v. Richard Horner
S.Ct. No. 32003
Supreme Court

POST-CONVICTION RELIEF

1. Did the court fail to provide Plant with an adequate explanation as to the reason the district court would not grant counsel such that Plant had a meaningful opportunity to amend his petition and renew his request for counsel?

Rodney L. Plant v. State of Idaho
S.Ct. No. 32094
Court of Appeals

2. Did the court correctly apply the law to the facts in denying Soria-Navarrete's ineffective assistance of counsel claims?

*Felipe Soria-Navarrete v.
State of Idaho*
S.Ct. No. 32176
Court of Appeals

DAMAGES

1. Whether the district court applied the proper measure of damages for a trespass.

Villarr Ransom v. Topaz Marketing
S.Ct. No. 32146
Supreme Court

CONTRACT

1. Was David Watson's oral agreement to sell his interest in the property to Duane Watson proven by clear and convincing evidence?

Duane Watson v. David Watson
S.Ct. No. 32237
Supreme Court

2. Whether the district court erred in holding that an enforceable contract existed between the parties despite their fundamentally different understandings of the most important term of the purported agreement

Rodney Griffith v. Clear Lakes Trout Co.
S.Ct. No. 32385
Supreme Court

HABEAS CORPUS

1. Did the court err in finding Eubank had not been denied due process by the Parole Commission and in denying his petition for writ of habeas corpus?

*Thomas Eubank v.
Idaho Commission of Pardons*
S.Ct. No. 32336
Court of Appeals

CRIMINAL APPEALS
PLEAS

1. Did the court abuse its discretion in denying Salyers' motion to withdraw his guilty plea to the charges of removal of a firearm from a law enforcement officer and stalking?

State of Idaho v. Dale Robert Salyers
S.Ct. No. 31663

Court of Appeals

**SEARCH AND SEIZURE -
SUPPRESSION OF EVIDENCE**

1. Did the court err in concluding that the officer's mere presence during the lawful police encounter rendered Rector's consent involuntary?

State of Idaho v. Shanna Lee Rector
S.Ct. No. 31982
Court of Appeals

2. Did the court err in denying Jones' motion to suppress on the basis it was untimely, in finding no good cause for the delay and in failing to consider the merits of the motion?

State of Idaho v. Michael Anthony Jones
S.Ct. No. 32031
Court of Appeals

SUBSTANTIVE LAW

1. Did the court err in finding that Anderson's waiver of counsel was made knowingly and intelligently?

*State of Idaho v.
John Cornell Anderson, III*
S.Ct. No. 32330/32331
Court of Appeals

2. Did the court err when it held that Murray timely raised his due process objection to the uniform citation?

State of Idaho v. Blaine Murray
S.Ct. No. 32394
Court of Appeals

ADMINISTRATIVE APPEALS
INDUSTRIAL COMMISSION

1. Did the Industrial Commission err when it refused to permit appellant the opportunity to submit additional evidence?

William C. Slaven v. Road to Recovery
S.Ct. No. 32650
Supreme Court

SNAKE RIVER BASIN ADJUDICATION
QUESTIONS

1. Whether qualified grazing preference rights are evidence of historic use of water sources pre-dating the enactment of the Taylor Grazing Act.

Lu Ranching Co. v. USA
S.Ct. No. 31994
Supreme Court

Summarized by:
Cathy Derden
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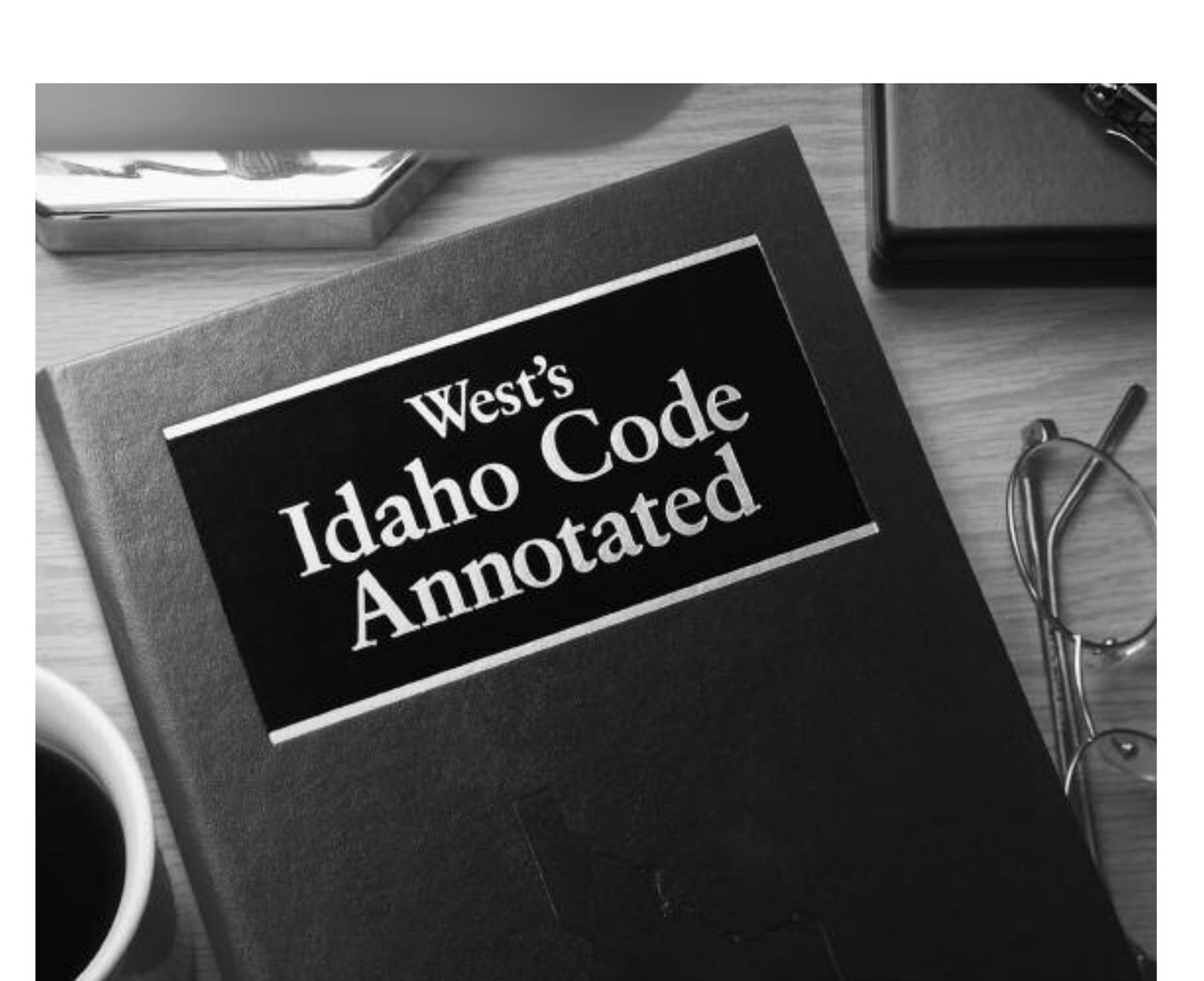
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- 4 **Independence Day – Law Center closed**
- 6 **CLE:ISB Intellectual Property Section present:
Patent Law 101**
- 12 *The Advocate* Editorial Advisory Board
- 19-21 **Idaho State Bar Annual Meeting – Sun Valley**
- 19 Idaho Sate Bar Board of Commissioners Meeting –
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- 20 Idaho Law Foundation Board of Directors Meeting -
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- 24-26 **Idaho State Bar Exam – Boise Center on the
Grove and Moscow**

AUGUST 2006

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- 15 Professionalism & Ethics Orientation, University of
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Reminder letters were recently sent to all members with an MCLE reporting deadline of December 31, 2006. Please check your records to make sure all the courses you attended have been approved for Idaho MCLE credit. Avoid the last minute scramble and apply for accreditation now. You can check your MCLE attendance records on our web-site at www.idaho.gov/isb. Questions should be directed to the Membership Department at (208) 334-4500 or jhunt@isb.idaho.gov.

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-IN MEMORIAM-
— William J. Jones —
1920-2006

William J. Jones, of Lewiston, passed away February 5, 2006. Bill was born April 1, 1920, in Almira, Washington to Will J. Jones and Bonnie Courtway Jones. He was raised in Wallace, Idaho, graduating from high school in 1938 and enrolled in the University of Idaho College of Engineering. While attending the UI, Bill joined the North Idaho unit of the Idaho National Guard. His Guard unit was activated at the end of his sophomore year.

In 1942, Bill was shipped overseas to Australia, where he served until 1945, seeing active combat duty in New Guinea. Bill considered the time he spent in the service an honor and remained active in the local reserve unit throughout his retirement, ultimately reaching the rank of lieutenant colonel. While in Australia, Bill met and married Joy Lorraine Williamson.

As soon as he returned to the United States Bill enrolled in the UI Law School. After graduation, he practiced for a short time in Moscow before moving to Lewiston, where he continued to practice for the next 50 years.

Initially Bill spent a great deal of his time in court, but later devoted his practice primarily to the day-to-day matters of his clients. You will not find a past client of Bill Jones who will not attest to his concerns for the client, honesty and diligence. Most of his clients became his friends. Bill's practice was greatly aided by the service of two long-term secretaries, Rita Paolini and Peggy Rode. Bill joined the Idaho State Bar in 1948. He was a past president of the Second Judicial Bar Association and was recognized by the Bar as a 50-year attorney 1998.

Among Bill's personal hobbies and pursuits were rock hounding, playing bridge and antiques. At various times he enjoyed his memberships in Nez Perce No. 10 Masonic Lodge, York Rites Masons, Kiwanis, Elks and Lewiston Golf and Country Club. He was the past president of the Lewiston Boys Club. He particularly enjoyed the time he spent as a Master Thimbalist in the Calem Shrine Oriental Band.

Bill is survived by his wife Joy Lorraine Jones of Lewiston; his sons Garry W. Jones and wife Ann of Lewiston; Mark R. Jones and fiancée Dianne Phillips of Lewiston; and daughter Leisa Weaver and husband Bill of Honolulu; grandchildren Brent Jones, Jill Law and Todd Jones; great-grandchildren Chelsea, Kaley, Derek, Nick, Rachel and Savanna; brother Jim Jones and wife Lil of Las Vegas, New Mexico; and brother-in-law E.W. Williamson, Ascot Vale, Australia. Bill was preceded in death by his parents his sister, Phil Keating and brother Jay Roy Jones.

— Robert L. Alexanderson —
1915-2006

Robert L. Alexanderson of Caldwell passed away on June 8, 2006 in Lewiston. He was born July 31, 1915 on a farm in Centerpoint Community west of Caldwell, the youngest son of Anders Petter ("A.P.") and Anna Peterson Alexanderson. He attended schools in Centerpoint and graduated from Wilder High School in 1933. Bob attended the University of Idaho and

received his degree in business administration and a reserve commission in the U.S. Army in 1939. Bob went on to law school at the U. of I., receiving his law degree in 1941.

Bob was admitted to the Idaho State Bar in 1941 (He was a member of the Bar for 65 years). He was appointed to the FBI as a special agent, serving in various cities on the east coast during World War II. Returning to Caldwell in 1946, Bob began a long legal career and became well known and respected locally. During his 60-year law practice, he was a member of the Idaho State Bar, the American Bar Association, the American Council of Trust and Estate Counsel, and president of the Third Judicial District Bar Association.

Bob was also active in many Caldwell community affairs. He was a member, and president of the Caldwell Chamber of Commerce; served on the board of trustees at the College of Idaho, and was elected board chairman of the College. The College awarded Bob an honorary doctorate degree in law in 1973. Bob also joined the Caldwell Kiwanis Club, serving later as their president and lieutenant governor of the Utah/Idaho District of Kiwanis. He was a member of the United Methodist Church of Caldwell; a member of IOOF Lodge No. 10 and Encampment No. 3 of Caldwell; Mt. Moriah Lodge No. 39 AF & AM; Hermosa Chapter of Order of the Eastern Star No. 32; El Korah Temple AAON-MS of Boise; Delta Chi Fraternity; Caldwell Elks' and Caldwell Shrine Club; and Hillcrest Country Club of Boise.

In 1964, when professional baseball came to Caldwell, he joined with others in establishing Treasure Valley Baseball, Inc., to sponsor a local team for the Chicago Cubs organization. He was a director of the local organization and a director of the Pioneer Baseball League, headquartered in Salt Lake City. In addition to his family and his profession, Bob enjoyed reading, playing bridge, and vacationing at the family cabin in McCall. He traveled extensively.

Bob married Bernice (Betty) Frances Curtis in Tampa, Fla. in June 1942; Betty passed away in Philadelphia in November 1943. On April 14, 1951, he married Jane Pasley of Caldwell. Jane passed away on May 14, 1982. Bob is survived by three children: Anne Pasley-Stuart of Boise, Joseph Flower of Pusan, South Korea, and Tina Alexanderson of Lewiston, by granddaughter Lisa Mullins, great-granddaughter Jane Anne Gibson of Boise, and grandson Joseph R. Flower of Portland. He was preceded in death by siblings Helma Larson, Albert Alexanderson, Chester Alexanderson, Helen Pearson and Inez Van Zelf. He also leaves behind many devoted nieces and nephews. Bob was beloved by family and friends, who knew his warmth, generosity, integrity and loyalty over many decades.

— Judge Walter E. Smith, Jr. —
1918-2006

Fourth District Judge **Walter E. (Bill) Smith**, died June 15, 2006. He was born on Dec. 9, 1918 in Boise, the first child of Walter E. Sr. and Laurel Vickers Smith. "Billy" as he was known in his childhood in Boise's North End, attended Lowell School through 8th grade, and Boise High School,

-RECOGNITION-

graduating in 1937. He enrolled at the University of Idaho, and pledged Kappa Sigma fraternity, graduating in 1941 with a degree in accounting. Following graduation, he took a job in the auditing department of the Sun Valley Corporation, where he was working when World War II broke out on Dec. 7, 1941. He enlisted in the United States Army in 1942. He volunteered for, and was accepted into Officer Candidate's School, and was commissioned as a Second Lieutenant of Field Artillery in 1944. Assigned to the 77th (Liberty) Infantry Division. Judge Smith saw combat during the bloody invasion of Okinawa, where he assumed command of his howitzer battery after his CO was wounded during fierce fighting on that island. After Okinawa was secured, Judge Smith was promoted to First Lieutenant and his battery was preparing for the invasion of Japan when the war in the Pacific ended on Aug. 14, 1945. Judge Smith then was assigned to the American occupation forces in Japan, where he served until 1946 when he left the active Army and returned to Idaho. He remained with a reserve unit in Boise until 1953 when he was discharged from the service.

After his discharge Judge Smith enrolled at the University of Idaho College of Law from which he was graduated in 1949. He was briefly in private practice in Boise, and also served as an Ada County Deputy Prosecutor and an Idaho State Assistant Attorney General, and in the general counsel's office of Allied Stores in Seattle, before he was elected as Probate Judge in November 1956.

He served as Ada County Probate Judge in the turbulent 1960s and 1970s revolutionized Idaho's juvenile justice system. He worked with a juvenile justice system that often warehoused young offenders with hardened criminals at the old Ada County Jail. Realizing such a system did often turn these teenagers into repeat criminals, he took on the difficult - and at times politically unpopular - task of establishing a separate and modern juvenile court system with well-trained probation officers, counselors and staff. This was a first in Idaho. The court, in Smith's 12 years as Probate Judge, processed more than 7,000 petitions on juvenile violations, and the court staff was able to reduce commitments to the Idaho State Youth Training Center from 56 in 1958 to 26 in 1968. As the result of the programs he instituted Ada County eventually approved and constructed a separate juvenile court facility in the Liberty Road area of West Boise. The current facility located there now houses a modern court and detention facility. In 1968, Judge Smith was appointed to the Fourth District Court, where he served for 18 years. He retired from the bench in 1988.

Judge Smith was a member of the Idaho State Bar for 57 years. He was active in his community as a board member of the El-Ada, Inc., a Community Action board, an assistant Boy Scout scoutmaster and Explorer Post Committee chairman. He was the chair of the program committee for the Foundation on Youth. He spoke at numerous civic and fraternal meetings in Boise. He was a Master Mason, Scottish Rite of Full Masonry, member of El Korah Shrine Temple, and the Legion of Honor of the Order of Demolay.

Judge Smith was married to Eileen Patricia Coughlin, also of Boise, for 56 years. They had four children - all of whom followed their father's footsteps into the law. He is survived by his wife Eileen, his children Stephen C. (Kathleen) Smith of Honolulu; Professor Thomas A. (Jeanne) Smith of San Diego, U.S. District Judge William E. (Christine) Smith of Providence, Rhode Island, and Patricia S. (U.S. District Judge Paul G. Cassell) Cassell of Salt Lake City, twelve grandchildren; and his brother Jerry V. (Paulette) Smith of Lewiston.

The Idaho Newspaper Foundation. has honored attorneys **Emil Berg, Joe Miller and Tony Park** as the 2006 recipients of the Max Dalton Open Government Award. The award is named for the late Idaho milk industry businessman whose open records lawsuit led to a landmark 1984 state Supreme Court ruling. They were nominated for the award by the Idaho Conservation League (ICL) for their efforts in a lawsuit the ICL filed against the Idaho State Department of Agriculture. The lawsuit challenged a law adopted in 2004 by the Idaho Legislature, denying public access to nutrient management plans kept by feedlot operators. In 2005, a state judge agreed and ordered the state to retrieve the plans from feedlots and provide copies to the public if an open records request was submitted. The decision was appealed to the Idaho Supreme Court. A hearing was held earlier this year, but no decision has been released.

Leslie Goddard has been honored as this year's recipient of the 2006 Hewlett Packard Award for Distinguished Leadership in Human Rights. In 1998, Ms. Goddard became a Deputy Attorney General representing the Human Rights Commission. She was instrumental in instituting comprehensive state laws against malicious harassment, in protecting the disabled from job and public accommodations discrimination, in eliminating pregnancy discrimination and in protecting workers against sexual harassment. She has also been a strong advocate against initiative proposals that would discriminate against gays and lesbians.

Ms. Goddard became the Director of the Idaho Human Rights Commission in 1998. Under Ms. Goddard's leadership, the Human Rights Commission significantly contributes to ensuring the personal dignity and productive capacities of all Idahoans. The Commission helps parties resolve their disputes voluntarily, and if that is not possible, it investigates the claims. If discrimination is found, the Commission makes efforts to address the harm to the victim and the causes of the discrimination. The Commission's work helps ensure that workplaces, businesses, housing situations, schools and other environments are free from discrimination.

The National Association of Corporate Counsel honored **Karen Gowland** of Boise Cascade with the pro bono award and **Roderic Lewis** of Micron Technology the leadership award from the association's Mountain West chapter.

"Karen Gowland is an outstanding example of an attorney who fulfills the bar's commitment to helping others," said Stan Soper, president of the association's Mountain West chapter. "Because of her work, dozens of children have a better life. Her employer, Boise Cascade, also is to be congratulated for its policy of encouraging its staff to participate in public service."

Ms. Gowland, the company's general counsel and corporate secretary, has been with Boise Cascade and its predecessor company, OfficeMax, since 1984. She holds degrees in accounting and law from the University of Idaho. She is currently chair of the Idaho State Bar Professional Conduct Board, and was chair of the Idaho Volunteer Lawyers Program from 1989 to 1992. She received an Idaho State Bar Outstanding Service Award in 2003, the Girl

Scouts Women of Today and Tomorrow Award in 2003, and the YWCA Tribute to Women in Industry award in 1995.

Mr. Lewis has led the Micron legal department as it expanded its patent work and took a strong role in enforcing anti-dumping regulations that prohibit foreign-owned companies from selling products in the United States at below-cost prices. Mr. Lewis also carries responsibility for Micron in the areas of strategic communications, investor relations, government affairs and corporate development. He holds a B.A. from Brigham Young University and a J.D. from Columbia University School of Law. Mr. Lewis has been a member of the State Board of Education since 2000. He served as board chair in 2005 and 2006.

-ON THE MOVE-

Kendal A. McDevitt is pleased to announce the opening of his new law practice, McDevitt Law Office, PLLC. Mr. McDevitt will offer clients solutions to their problems in the areas of business litigation, criminal defense, family law and water law. Mr. McDevitt has ten years of litigation experience with the Ada County Prosecutor's Office. He has been the sole attorney for the State in 42 jury trials in the last five years. Mr. McDevitt can be reached at McDevitt Law Office PLLC, 405 S. 8th Street, Suite 202, Boise, Idaho, 83702; (208) 246-8650; or email kendal@mcdevittlawoffice.com.

McAnaney & Associates, PLLC is pleased to announce that **R. Greg Ferney** has joined our firm. Greg's practice includes estate planning, business representation and succession planning, real estate transactions, corporate tax planning, tax dispute resolution and administration of estates. Originally from Caldwell, Idaho, formerly practiced law with Paine, Hamblen, Coffin, Brooke and Miller, LLP, and was a law clerk for the Honorable John T. Mitchell. Greg is a graduate of Albertson College, B.A., the University of Idaho College of Law, J.D., and the University of Washington School of Law, LL.M. in Taxation. Greg can be contacted at McAnaney & Associates, PLLC, 1101 W. River Street, Suite 100, Boise, Idaho 83702, (208) 344-7500, rgf@mctaxlaw.com.

The attorneys of Brassey, Wetherell, Crawford & Garrett are pleased to announce that **Joyce A. Hemmer** has joined the firm as an associate. Ms Hemmer graduated from William & Mary School of Law in 2005 and was admitted to practice in Idaho and the U.S. District Court, District of Idaho. Ms. Hemmer will focus her practice on insurance defense and other civil litigation matters. Prior to joining the firm, she served as Law Clerk for the Honorable Joel D. Horton, District Judge for the Fourth Judicial District of Idaho. She can be reached at (208) 344-7300, PO Box 1009, Boise ID 83701.

Brian J. Simpson has opened Northwest Mediation Service, LCC, in Coeur d'Alene, Idaho. He has been a mediator for over ten years, having moved his mediation practice from California to Idaho four years ago. He received his post graduate mediation training at Northwestern University, Chicago, Illinois; University of Idaho; and Pepperdine University, Malibu, California. He graduated from the University of San Diego Law School (Cum Laude) in 1971. Since 1972 he has practiced law in California with an emphasis in the fields of real property, construction and construc-

tion defects, business, probate and estate planning. He is a member of the California and Idaho state bars. He can be reached at (208) 676-0109, www.northwestmediation.com, or brian@northwestmediation.com

Anderson, Julian & Hull LLP, a Boise-based Insurance Defense firm, is pleased to announce that **Stephanie N. Guyon, Davis F. VanderVelde** and **Charles C. Crafts** have joined the firm as associates.

Stephanie N. Guyon joined the firm, as an associate in April 2006. Before coming to the firm, she was a deputy attorney general with the Litigation Division of the Idaho Attorney General's Office. Ms. Guyon is a 1999 graduate of Willamette University College of Law where she served as Executive Editor of *Willamette Law Review* and published an article discussing father's rights in child custody proceedings. Following law school, Ms Guyon clerked for the Honorable Peter D. McDermott, Sixth District Judge for the District of Idaho, and subsequently worked as a deputy prosecuting attorney with the Bannock County Prosecutor's Office. She also graduated *cum laude* from Boise State University with a Bachelor of Arts degree in English, with a writing emphasis. As an attorney, Ms Guyon is licensed to practice in all Idaho courts. Her practice includes insurance defense, employment and education law.

Davis F. VanderVelde earned his Bachelor of Arts degree in English from the University of Nevada Las Vegas in 1998, where he graduated *cum laude*. Davis, thereafter, obtained his J.D., *magna cum laude*, from California Western School of Law in 2000. Mr. VanderVelde is a member of the Idaho and Nevada State Bar Associations. Admitted to practice before the United States District Court for the Districts of Idaho and Nevada, and all State Courts of Idaho and Nevada. Prior to joining AJH, Davis was a Senior Associate at the firm Alverson, Taylor, Mortensen & Sanders in Las Vegas, Nevada. His practice includes general insurance defense, mold litigation, pharmaceutical litigation, and products liability defense.

Charles C. Crafts earned his Bachelor of Science degree in Political Science from Idaho State University. In 2004, he earned his J.D. from the University of Idaho College of Law. Charles is a member of the Idaho State Bar and admitted to practice in the United States District Court for the District of Idaho and all state courts in Idaho. Prior to joining AJH, Charles worked as a deputy prosecuting attorney in Canyon County handling complex felony cases such as: vehicular manslaughter, aggravated battery, and felony driving under the influence. His current practice includes insurance defense, education law, employment law, personal injury and appellate practice.

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