

The **Advocate**

Official Publication of the Idaho State Bar

Volume 49, No. 6

June 2006

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Advocate

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2006

June

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COVER

On the Cover: "Scofflaw" was photographed by Assistant United States Attorney Monte Stiles at the MK Nature park in Boise. Monte is an avid photographer who specializes in wildlife and landscape photography in his spare time. You can see more of Monte's pictures on his website: www.montestile-sphotography.com

This issue of *The Advocate* is sponsored by the Professionalism and Ethics Section.

Does Anyone Still Slay Dragons?

Hon. Rick Canaroli



I miss the excitement of a trial. I enjoyed trying cases as a lawyer and I enjoyed observing excellent trial lawyers try their cases. But, lately, it seems like an endless parade of settlements is making its way through the courthouse, only occasionally interrupted by a trial. So far, in my twenty months on the bench I've had one civil jury trial, no criminal jury trials, and only a dozen or so criminal bench trials. I find this odd because I have hundreds of criminal cases assigned to me each month. I'm curious, what is it that might be tied to the so-called "death of the trial?"

I hear plenty of reasons for the lack of jury trials: "It's just not fair." "You can't fight the insurance industry." "Tort reform has killed the jury system." "The juries don't award anything any more." "I can't get a fair trial." "The Feds always win." "The cops always win." "The doctors always win." "I can't win, that judge doesn't like me." But, if these are true statements then where are the trials occurring that prove some of these propositions?

Perhaps, the young prosecutors and public defenders are trying cases in other courtrooms. But my sense is that young trial lawyers are not being trained as they were twenty years ago.

A skilled trial lawyer is born of experience, not a classroom setting in a trial practice seminar. It seems lawyers who have tried few or no cases seem to fear the courtroom. Is it fear about testing their abilities and limitations in a trial? It's probably not from a lack of courage.... perhaps more a fear of the unknown. There is certainty and control over the outcome in a settlement. A trial is fraught with uncertainty. It means testing your abilities and limitations in "live time." But, therein lies the challenge and excitement. And to me, it seems a good trial lawyer needs the opportunity to develop skills and to challenge their ability to think on their feet in a win or lose situation. Plus, a budding trial lawyer needs a good trial lawyer to

watch.

I have also noted in several family law cases I have tried, settlements made for the sake of settlement keep coming back for a "day in court" in modification proceedings. I have heard it said by more than one disgruntled litigant in modification proceedings, "My lawyer made me settle. I wanted a trial." Buyer's remorse...? Probably. But, this illustrates that the last question asked of the client in settlement has to be, "Can you live with this?" If not, trial may be the better alternative, for the client and the lawyer.

A trial is not a waste of time unless you are unprepared to try your case. The judge will not take it out on you or your client if you choose to try a case, at least not this one, or any other judge I know very well. I understand the client determines if the case is to be tried, so I'm not advocating pushing your clients into court for your experience.

But, trials result, not of failure to settle, but of genuine issues that cannot be resolved by the parties by other means. Lack of a settlement is not failure. The courts are here to resolve the disputes that cannot be amicably resolved. Mediated results and arbitrated results in the right cases are wonderful. The client retains some control on the outcome. Intelligent settlements result. Settlements certainly have their place in our justice system, but so do trials.

Remember, you are advocates of your client's cause, first and foremost, not mediators and facilitators of every file you have. Take a position. Stand your ground and take a case to trial that should be tried. You may find some of the enjoyment and excitement you are looking for in your practice. So, if you have a case to try, try it! The young lawyers who venture forth to try cases are a source of great enjoyment for me. Recently, I had a young lawyer actually apologize for having a number of family law trials in my courtroom over the past several months. No apology necessary!

The only way to make sure the system works is to work the system. Do not make it

a habit to yield to the so-called "conventional wisdom" that a good settlement beats a good trial. You can't slay the dragon if you if you settle with him on the courthouse steps can you?

Rick Canaroli 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 Canaroli: 208-236-7322 or rickc@co.bannock.id.us

2006
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.

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Please Join Us for the Idaho State Bar Annual Meeting July 19-21 in Sun Valley

Diane K. Minnich



Most Idaho attorneys know the State Bar has an Annual Meeting, yet many of you have never attended an annual convention. This year, I encourage you to consider attending part, if not all, of the conference. The ISB Board of Commissioners, ILF Board of Directors and staff hope you will join us for this year's Annual Meeting - July 19-21 at Sun Valley Resort in Sun Valley, Idaho.

The conference offers a variety of education programs, social events, entertainment, and award presentations. For a mere \$350 (\$250 if you are a first time attendee) you have the opportunity to obtain 12 CLE credits, enjoy two continental breakfasts, two lunches, one dinner with entertainment, and two hosted receptions. The full registration is the best value but you can register for individual programs or events; we encourage you to sign up for as many or as few activities as you can fit in to your schedule.

Seminars and Events

Plan to attend this year's annual meeting and choose from a variety of seminars and events including:

- 12 CLE choices - you can earn up to 12 MCLE credits
- 2 Hosted Receptions
- 5 Meals, including speakers, entertainment, and awards

CLE seminar titles include

- Cross-examination with Terry McCarthy
- Impeachment with Terry McCarthy
- The Impact of Health Law in Business, Real Estate and Family Law

- Intellectual Property Issues in a Typical Business Life Cycle
- 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
- Golfing for Ethics (this program actually takes place on the Bigwood golf course)
- Settlement Negotiations and Ethical Considerations
- Water Law in a Changing State
- Wetlands: The Good, the Bad and the Ugly
- Family Law Roundtable
- Preserving and Presenting a Record for Appeal
- ADR

Thursday Evening Dinner

The Thursday evening dinner at Trail Creek will be "A Slice of Island Life." Bring your Hawaiian shirt and come experience and evening of dinner and dancing to the tropical music style of Jim Morris and the Big Bamboo Band.

Several of your colleagues will be honored for their contributions to the Idaho legal profession and the public. The Friday luncheon honors the 2006 Idaho distinguished lawyers, Bud Yost of Nampa and Chief Federal District Judge Lynn Winmill. Thursday's luncheon includes service awards to those lawyers and non-lawyers that have provided exemplary service to the bar, foundation and their communities.

For more information about the events offered at the annual meeting, visit the Idaho State Bar website at www.idaho.gov/isb or refer to the Annual Meeting brochure that was mailed to you

in mid May.

Foundation for Justice Campaign

The Idaho Law Foundation conducts its spring fundraising campaign in May and June of each year. This spring we have committed to raising \$25,000 and we need your help. By giving to the Idaho Law Foundation, you make a continued investment in your profession; an investment that reaches students at all grade levels through Law Related Education and Idaho's most poor and disadvantaged people during times of legal crisis through Idaho Volunteer Lawyers Program.

Please take a moment to review the donor brochure you received in the mail. Think about how much you can afford to give, then fill out your donor information and return the card to the Idaho Law Foundation. If you have any questions, contact Carey Shoufler, Fund

Special thanks to our SPONSORS for their support of the Annual Meeting

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BOARD OF COMMISSIONERS ELECTION RESULTS

Dwight E. Baker of Blackfoot was elected to serve a three-year term on the Idaho State Bar Board of Commissioners. He will represent the Sixth and Seventh Districts, replacing current president the Hon. Rick Carnaroli whose term as commissioner ends in July.

Dwight is a partner in Baker & Harris in Blackfoot. He received his B.S. in Education from the University of Wisconsin-Madison and a B.Ed., from the University of Wisconsin-Platte. He received his J.D. from the University of Idaho College of Law in 1971 and was on the Law Review from 1970-1971. Dwight received a Professionalism Award from the Bar in 1998. Dwight has worked on over 25 cases that have gone to jury verdict, including criminal defense, plaintiffs' work primarily in the agricultural setting, and medical malpractice. He was involved in Civil Mediation for several years and presently conducts an active Probate and Estate Planning practice. He is also involved in his community, serving on the Bingham Memorial Hospital Foundation Board for nine years, two as chair. He has also been on the Bingham County Library Board and president of the Industrial Development Corporation of Bingham County, Idaho.

He and his wife Ali have five children. Dwight enjoys cattle ranching, golf, fishing, and hunting.

2006 ANNUAL MEETING SCHOLARSHIPS AVAILABLE

The Idaho State Bar is offering a limited number of scholarships to the 2006 Annual Meeting July 19-21 in Sun Valley. The scholarships include the annual meeting registration fee and a per diem (up to \$50 per day) for travel and lodging. The scholarships are designed to provide assistance to those attorneys who, due to financial or professional circumstances, would otherwise be unable to attend. To apply for a scholarship, contact the ISB Commissioner who represents your judicial district.

IDAHO STATE BAR DESKBOOK DIRECTORY

The 2006 DeskBook Directory has been mailed. Please call Bob Strauser (208) 334-4500 or bstrauser@isb.idaho.gov if you want extra copies.

UNIVERSITY OF IDAHO COLLEGE OF LAW—VICTIMS' RIGHTS CLINIC

The Victims' Rights Clinic (VRC) is now able to accept referrals from courts, attorneys, victim advocates and coordinators in all seven Idaho Judicial Districts. The VRC has been awarded \$105,000 from the National Crime Victim Law Institute at Lewis and Clark Law School in Portland under a grant from the Office for Victims of Crime, Office of Justice Programs, United States Department of Justice, to fund its second year of operations. The Idaho VRC is one of eight such clinics around the U.S. to receive such funding from NCVLI. During its first year the clinic represented survivors of sexual assault, domestic violence and arson, and victims of embezzlement and other theft crimes in criminal cases in the Second Judicial District. In its second year VRC will add adjunct faculty in Lewiston (Jamie Shropshire) and Boise (R.

Monte MacConnell) in order to expand services to state courts throughout Idaho. In addition to supervising clinic students, Prof. MacConnell and Prof. Shropshire will help recruit attorneys for a pro bono roster and provide outreach and education to criminal justice system participants and the public about crime victims' rights. Professor Pat Costello will continue to act as supervising attorney and VRC project director. If you wish to refer a victim of any felony or of any violent misdemeanor or juvenile offense please have the victim call the VRC at (208) 885-6541 or toll-free from outside Moscow (877) 200-4455. For more information, please contact Prof. Costello at costello@uidaho.edu.

BONNEVILLE COUNTY MENTAL HEALTH COURT

The Bureau of Justice Assistance (BJA), a part of the U.S. Department of Justice, has selected the Bonneville County Mental Health Court as one of five such courts in the nation to serve as a national resource (a learning site) for other jurisdictions who hope to establish successful mental health court efforts. The court provides defendants with mental illness the opportunity to participate in court-supervised treatment in lieu of prison or jail. A team of mental health and criminal justice staff supervise defendants' treatment plans. The other four courts serving as sites are in Akron, Ohio; Bronx County, New York; Dougherty County, Georgia; and Reno, Nevada.

**JEANNIE I. BRAUN
(Disbarment)**

On April 17, 2006, the Idaho Supreme Court issued an Order of Disbarment disbarring Boise lawyer Jeannie I. Braun 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. Although given proper notice of the disciplinary proceeding, Ms. Braun did not appear or otherwise participate in this proceeding.

On April 7, 2005, the Idaho State Bar filed a five-count formal charge Complaint against Ms. Braun. Count One of the Complaint alleged that Ms. Braun engaged in forgery and fraud in the course of representing client R.B. in a custody matter, by forging a judge's signature stamp on a court document entitled "Ex-Parte Order For Temporary Custody and Restraining Order." Ms. Braun gave the order to R.B. and instructed her to present the order to the police for the purpose of obtaining custody of her son from her ex-husband. R.B. presented the false order to the police who facilitated the return of her son. On March 16, 2004, Ms. Braun was indicted by an Ada County grand jury for felony forgery, I.C. § 18-3601. On Count One, the Idaho Supreme Court found that Ms. Braun violated Idaho Rules of Professional Conduct 1.2(d) [A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent"], 3.3(a)(4) ["A lawyer shall not knowingly offer evidence that the lawyer knows to be false"], 3.5(c) [A lawyer shall not engage in conduct intended to disrupt a tribunal], 8.4(a) [It is professional misconduct for a lawyer to violate or attempt to violate the rules of professional conduct or do so through the acts of another], 8.4(b) [It is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty trustworthiness or fitness], 8.4(c) [It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation] and 8.4(d) [It is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice].

Count Two of the Complaint alleged that Ms. Braun misappropriated funds held in trust when she wrote a \$1000 check on her IOTLA trust account to retain another attorney to assume the representation of R.B., even though R.B. had never paid Ms. Braun a retainer or any funds. Count Two also alleged that Ms. Braun intimidated a witness, R.B., by attempting to give R.B. a cash gift. Count Two alleged that the funds from both the payment of the retainer and the attempt to give R.B. a cash gift were paid with the intent to intimidate R.B. from disclosing to the court the fact that Ms. Braun had prepared the false custody order or from otherwise testifying against Ms. Braun. On March 16, 2004, an Ada County grand jury indicted Ms. Braun for felony influencing a witness, I.C. § 18-2604. The Idaho Supreme Court found, with respect to Count Two, that Ms. Braun violated Idaho Rules of Professional Conduct 1.15(a) [failure to hold client funds in trust], 3.4(b) [A lawyer shall not counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law], 8.4(a), 8.4(b), 8.4(c) and 8.4(d).

Count Three of the Complaint alleged that Ms. Braun destroyed evidence when she destroyed a tape recording of a conversation between Ms. Braun and R.B. regarding Ms. Braun forging the judge's signature stamp on the custody order. R.B. was criminally charged

with fraudulently preparing the order and R.B., with the assistance of an investigator, attempted to record Ms. Braun about the forgery. On March 16, 2004, an Ada County grand jury indicted Ms. Braun for felony destruction of evidence, I.C. § 18-2603. With respect to Count Three, the Idaho Supreme Court found that Ms. Braun violated Idaho Rules of Professional Conduct 3.4(a) [A lawyer shall not unlawfully alter, destroy or conceal a document or other material having potential evidentiary value], 8.4(a), 8.4(b), 8.4(c) and 8.4(d).

Count Four of the Complaint alleged that Ms. Braun failed to respond to Bar Counsel's numerous inquiries regarding the allegations set forth in Counts One, Two and Three. The Idaho Supreme Court found, with respect to Count Four, that Ms. Braun violated Idaho Rule of Professional Conduct 8.1(b) [Knowing failure to respond to lawful demand for information by a disciplinary authority], and Idaho Bar Commission Rule 505(e) [Failure to respond to Bar Counsel ground for sanction].

Count Five of the Complaint alleged that Ms. Braun presented falsely dated documents to the court in a divorce case for deceptive purposes. Count Five alleged that Ms. Braun altered the dates on a divorce stipulation and an acceptance of service for the purpose of misleading the court into believing that the opposing party received timely notice of the proceeding. With respect to Count Five, the Idaho Supreme Court found that Ms. Braun violated Idaho Rules of Professional Conduct 3.3(a)(1) [A lawyer shall not knowingly make a false statement of material fact to a tribunal], 8.4(c) and 8.4(d).

On July 14, 2005, pursuant to a plea agreement, Ms. Braun was convicted of felony forgery and felony influencing a witness. The felony destruction of evidence charge under I.C. § 18-2603 was dismissed pursuant to the plea negotiations. Ms. Braun also pled guilty to felony issuing a check without funds. Ms. Braun was sentenced to fourteen years in the custody of the Idaho Board of Corrections with three years determinate. That sentence was suspended and Ms. Braun was placed on probation for fourteen years. She was also ordered to serve one year in the Ada County Jail. As a condition of her probation, Ms. Braun cannot practice law in the State of Idaho or any other state during her fourteen-year period of probation.

On September 16, 2005, the Idaho State Bar filed an Amended Complaint adding Count Six alleging that Ms. Braun had been convicted of serious crimes. In its Order of Disbarment, the Idaho Supreme Court found that Ms. Braun was convicted of a "serious crime" pursuant to Idaho Bar Commission Rules 512 and 501(s), and that conviction was grounds for imposition of a disciplinary sanction under Idaho Bar Commission Rule 505(b).

Based upon those violations of the Idaho Rules of Professional Conduct and the Idaho Bar Commission Rules, the Idaho Supreme Court ordered the imposition of the sanction of disbarment, that Ms. Braun's admission to practice law in the State of Idaho be revoked, and that her name be stricken from the records of the Idaho Supreme Court as a member of the Idaho State Bar. The Court further ordered that Ms. Braun reimburse the Idaho State Bar for all costs and expenses incurred in investigating and prosecuting this matter.

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

NEW CONTRACT WILL AFFECT ATTORNEYS

Inmate telephone service with the Idaho Department of Correction is now provided by Public Communications Services (PCS). Under the terms of the contract, all attorneys will be charged for calls from offenders housed in Idaho prisons.



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InterState / Canada: \$3.40 plus \$0.75 for each minute, taxes included.
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Local: \$3.60 (30 minute call limit), plus taxes.
InterState / Canada: \$3.60 plus \$0.80 for each minute, plus taxes.

Collect Call Rates:

Local: \$3.80 (minute call limit), plus taxes.
Interstate / Canada: \$3.80 plus \$0.85 for each minute, plus taxes.

To set up a pre-paid collect call account with PCS or for any other billing questions call:
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Welcome...from the Professionalism and Ethics Section

Lee Dillion

External Programs Director

University of Idaho, College of Law

The Professionalism & Ethics Section through its outreach efforts strives to preserve and enhance the level of ethics, civility, and professionalism in the practice of law and to raise the public's perception of our profession. It is through these efforts that we are pleased to sponsor our fifth annual issue of the Advocate. Section members have written articles for this issue discussing how professionalism and ethics impacts all areas of the legal profession. Dick Fields and Allyn Dingel, longtime practitioners in Boise, write about the civility and professionalism necessary to conduct an effective deposition. Stephen F. Smith, Coeur d'Alene gives sole practitioners some valuable planning tips for ethical succession. Sandra L. Clapp, Eagle, talks about the ethical rules and considerations relating to succession planning. Mark Fucile, Portland discusses Idaho Rule of Professional Conduct 4.2, "No Contact with Represented Parties" Rule. Bob Aldridge, Boise explains the series of changes (effective July 1, 2005) to the duties and powers of the guardian ad litem (GAL) in both conservatorships and guardianships.

The Section had a good year in 2005, generating a positive cash flow due to increased membership and strong attendance at our many CLE offerings. We also received the generous support of the other practice sections of the Bar to help defray the costs of our third annual Professionalism Orientation Program at the University of Idaho College of Law. Without the support of the bench and bar, this highly popular program would not be possible.

In an effort to expand the availability of ethics CLEs, we have begun to selectively tape our one-hour CLEs for rental, and the

Section now offers a one-half hour CLE every other month that members can attend by phone. This one-half hour CLE, which is free to Section members, offers a guided tour of the Idaho Rules of Professional Conduct and allows members to secure their required three hours of ethics CLE in just one year.

Finally, with the idea that ethics and professionalism can be fun, the Section is sponsoring the "Golfing for Ethics" event at the Annual Bar Meeting this year in Sun Valley. Join us and discover ethical ways to take strokes off your golf game by correctly answering ethics questions prepared by Bar Counsel. For some of us, answering the ethics questions correctly may be our only hope for breaking par.

So please consider joining our ever growing Section. We offer free lunch at our meetings, lively discussions, and the assistance of knowledgeable practitioners.

ABOUT THE SECTION CHAIR

Lee Dillion is the External Programs Director for the University of Idaho, College of Law where he manages both the externship program and the Small Business Legal Clinic. Prior to his appointment as the External Programs Director, he was engaged in a private practice that emphasized business organization and planning, business and real estate acquisitions, health law, and general commercial law.

Mr. Dillion graduated from the University of Illinois with honors, and received his J. D. at the University of Chicago. He currently chairs the Professionalism and Ethics Section of the Idaho State Bar and the CLE Committee for the Idaho Law Foundation.



**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.

Deposition Ethics

Richard C. Fields

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M. Allyn Dingel, Jr.

Elam & Burke, PA

Between us, in our 80 plus years of litigation practice, we have taken, defended or attended hundreds-possibly thousands-of depositions. We've seen good, bad, and in between. We've seen experienced and inexperienced practitioners, some in each category being very skillful and effective, and some in each category being much less so. We've seen the Rambo types as well as those who apparently believe they must put on a show for their clients. We've seen the aggressive interrogators and the destructive objectors. We've seen those who follow a well-prepared game plan and those who "shoot from the hip." There are obviously varying deposition styles and approaches to deposition practice. Even between the two of us, we do many things somewhat differently. We are in total agreement, however, proven undeniably in all of our years of experience, that:

1. As a practical matter, the most effective deposition practitioners are those who conduct themselves throughout the process in a civil and professional manner; and
2. From a disciplinary and legal point of view, the most practical, single "rule" is to conduct yourself as you would if the deposition were conducted in a courtroom, in the presence of the judge.

We were genuinely pleased to be asked to speak about ethics issues in deposition practice at the Professionalism and Ethics Section's CLE program last October in Boise. And we were even more pleased at the "standing room only" attendance, even including a few folks who already had met their reporting period requirement for ethics CLE credits. The presentation was videotaped for possible use in other areas of the state. You may obtain the video¹ from the Bar and view it at your own risk. And, if you really think we might have something further of value to say, please continue reading. The literature is replete with commentary about deposition practice, and there have been numerous CLE programs on the topic in recent years. An excellent example is a program sponsored by the Idaho State Bar Young Lawyers Section on March 15, 2006, featuring Boise attorney James L. Martin. (The materials assembled by Jim should be available from the Bar and are well worth reading, retaining, and reviewing from time to time. That presentation was also videotaped².)

There are also readily available "rules" applicable to a lawyer's conduct at and with regard to depositions, including Rule 30 of the Federal Rules of Civil Procedure (Federal) and its similar counterpart, Rule 30 of the Idaho Rules of Civil Procedure (I.R.C.P.) Included in part (d) of both are specific provisions that "conduct of counsel or other persons during the deposition shall not impede, delay or frustrate the fair examination of the deponent" and that "any objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive matter." The rules provide for imposition of sanctions if a court finds that impediment, delay or other conduct has frustrated the fair examination of the deponent, and there is a specified procedure for ter-

minating a deposition to seek court intervention. The intervention process, in our opinion, should be used rarely and only in egregious situations, but it is available. We think its presence in the rules supports the position that depositions are an integral part of the litigation process and that misconduct in deposition practice may be dealt with by a court in the same manner as if it had occurred at or in connection with trial.

Another pertinent provision of Federal Rule 30, at 30(d)(1), is that "A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion under Rule 30(d)(4)," which is the termination provision mentioned above. In other words, it is not permissible to direct a witness not to answer because of relevance, repetition or any of the other "grounds" sometimes urged.

The Idaho Rules of Professional Conduct have no specific provision with respect to depositions, but Rules 3.1 (Meritorious Claims and Contentions), 3.2 (Expediting Litigation), 3.3 (Candor Toward the Tribunal), 3.4 (Fairness to Opposing Party and Counsel), and 3.5 (Impartiality and Decorum of the Tribunal) all appear very applicable, as are portions of Idaho's Standards for Civility in Professional Conduct (Standards) adopted several years ago by the Bar membership and by the Idaho state and federal trial courts. Paragraph 18 of "Attorneys' Responsibilities to Other Counsel," for example, says specifically:

18. We will not engage in any conduct during a deposition that is inappropriate under court rule or rule of evidence, including:
 - a) obstructive questioning;
 - b) inappropriate objections;
 - c) irrelevant questioning.

The Standards are said to be voluntary and not to be used as a basis for litigation or sanctions. However, they may well be considered in defining a standard of conduct against which a lawyer's behavior is measured by a court or disciplinary panel. That is, one should regard them at all times as at least suggestive of our professional obligations to each other and to the courts.

Even more specific are the provisions with respect to depositions in the Civil Discovery Standards adopted as policy by the American Bar Association in August 1999 and revised in 2004:

V. DEPOSITIONS

16. General Procedures for Depositions.

- a. **Scheduling a Deposition.** Before noticing a deposition, unless there are extraordinary circumstances, a party should try to consult all other parties to agree on the date(s) and place for the deposition, taking into account the convenience of all counsel, the parties and the person to be deposed. A deposition notice should be served a reasonable period of time in advance of the date set for the deposition.

b. Objections to a Deposition. An objection to the date or place of a deposition should be made promptly after a notice of deposition is received. If an objection is made promptly, in most cases meaning within three business days of receipt of the notice, the deposition should ordinarily be stayed until the parties agree on, or the court sets, a date or place for it.

c. Length of the Deposition. The court may consider, either by rule, order or as part of a case management plan, whether it would be appropriate to place a presumptive limit on the length of some or all of the depositions in specific types of cases or the particular case before it.

d. Who Should Be Permitted to Attend a Deposition. The parties, a deponent's spouse or one other member of the deponent's immediate family, a designated representative of a party who is not a natural person, the attorney(s) (including one or more legal assistants) for a party or the witness and any expert retained by a party ordinarily should be permitted to attend a deposition.

e. Pertinent Documents Should Be Produced Before a Deposition. A party seeking production of documents in connection with or to be used in a deposition should, whenever reasonably possible, schedule the deposition to allow for the production of documents in advance.

f. Where Depositions Should Be Taken: Presumptions. A defendant may take a plaintiff's deposition where the suit has been brought; a plaintiff may take a defendant's deposition where the defendant resides or, if the defendant is a corporate or associational entity, where it has its principal place of business; and the deposition of a nonparty witness may be taken where he or she resides or works. Subject to the preceding requirements, a deposition ordinarily will be taken at the office of the attorney noticing the deposition. The deposing party and/or the witness may agree on another location taking into account the convenience of the witness, counsel and the parties.

17. Objections and Comments During a Deposition.

a. Form of Objections. Where the court's rules provide that all deposition objections are preserved for further ruling and the testimony is subject to the objection, any objection ordinarily should be made concisely and in a non-argumentative and non-suggestive manner. In most cases, a short-form objection such as "leading," "argumentative," "form," "asked and answered" or "non-responsive" will suffice.

b. Appropriate Remedies for Deposition Misconduct. In addition to imposing sanctions against a party and/or its attorney for misconduct during a deposition, the court should, consistent with the applicable rules of evidence, consider whether deposition misconduct warrants allowing portions of a deposition transcript or other evidence to be admitted at trial on the issue of the witness' credibility during that deposition.

18. Conferring with the Witness.

a. During the Deposition.

i. An attorney for a deponent should not initiate a private conference with the deponent during the taking of the deposition except to determine whether a privilege should be asserted or to enforce a court-ordered limitation on the scope of discovery. Subject to the provisions of subparagraph (a)(ii) and (b) below, a deponent and the attorney may confer during any recess in a deposition.

ii. An attorney for a deponent should not request or take a recess while a question is pending except to determine whether a privilege should be asserted or to ascertain whether the answer to the question would go beyond a court-ordered limitation on discovery.

iii. In objecting to or seeking to clarify a pending question, an attorney for a deponent should not include any comment that coaches the witness or suggests an answer.

iv. Any discussion among counsel about the subject matter of the examination should at the request of the examining attorney occur only when the deponent has been excused from the deposition room.

v. An attorney shall not instruct or permit another attorney or any other person to violate the guidelines set forth in sections a(i)-a(iv) with respect to that attorney's client.

b. During a Recess.

i. During a recess, an attorney for a deponent may communicate with the deponent; this communication should be deemed subject to the rules governing the attorney-client privilege.

ii. If, as a result of a communication between the deponent and his or her attorney, a decision is made to clarify or correct testimony previously given by the deponent, the deponent or the attorney for the deponent should, promptly upon the resumption of the deposition, bring the clarification or correction to the attention of the examining attorney.

iii. The examining attorney should not attempt to inquire into communications between the deponent and the attorney for the deponent that are protected by the attorney-client privilege. The examining attorney may inquire as to the circumstances that led to any clarification or correction, including inquiry into any matter that was used to refresh the deponent's recollection.

While the ABA Standards have not been formally adopted in Idaho and have no official status here, they represent sound and appropriate conduct. As with the Idaho Civility Standards, they may no doubt be considered in defining a standard against which an attorney's behavior may be measured. They may also provide procedural guidance to a court considering conduct issues.

Any or all of the rules or standards referred to above may serve an additional, very practical purpose when brought to the attention of a misbehaving adversary at the deposition. Frequently, all that it takes to bring a bad deposition under control is to politely make

the bad actor aware that you know the rules, you are serious about them, and he or she is not going to intimidate you. Wise use of the court reporter's transcript to make a record and use of videotaping to preserve that which may not show in the written word can also be valuable tools.

Such tools for resolving deposition conduct problems should rarely be needed if you follow our primary practical rule. Experience confirms that civil and professional conduct in deposition practice invites and ordinarily results in civil and professional conduct from others. Even if not, it ensures a solid record for corrective action and for use at trial. And, most importantly, it almost always results in a more productive and effective deposition.

ENDNOTES

1. #297Videotape (ISB/YLS)-Building a Case from Discovery to Trial and Beyond: Depositions - March 2006. (RAC) (1 Videotape - 1 credit). A one-hour discussion by James L. Martin, Moffatt Thomas Barrett Rock & Fields, Boise. YLS Section member's rental is \$25; non-section member's rental is \$30.
2. #285V (ISB/PRO) Deposition Ethics-October 2005. (RAC) (1 videotape - 1.5 Ethics credits) - Dick Fields, Moffatt Thomas Barrett Rock & Fields and Allyn Dingel of Elam & Burke, talk about their combined 83 years of practice. Both Idaho State Bar Distinguished Lawyers recipients, they bring their unique perspective and experience to the issues inherent in depositions. PRO Section members-\$30; non-section members-\$35.

ABOUT THE AUTHORS

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Making Contact: The “No Contact with Represented Parties” Rule

Mark Fucile

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Idaho Rules of Professional Conduct (I.R.P.C.) 4.2 governs communications with represented parties. The “no contact” rule is designed to protect clients by channeling most communications through counsel for each side. Although I.R.P.C. 4.2 is simple on its face, it can be difficult in application. At the same time, it involves situations lawyers encounter often and where there can be stiff penalties for guessing wrong.

In this article, we’ll first look at the elements of the rule and its exceptions. We’ll then turn to how the rule applies when “the other side” is a corporation or the government. Although the focus will be on the litigation context where the rule comes into play most often, the concepts discussed apply with equal measure outside litigation.

THE ELEMENTS

The “no contact” rule has four primary elements: (1) a lawyer; (2) a communication; (3) about the subject of the representation; and (4) with a party the lawyer knows to be represented.

A LAWYER

The “lawyer” part is easy (and includes lawyers acting pro se under *Runsvold v. Idaho State Bar*, 129 Idaho 419, 421, 925 P.2d 1118 (1996)). But what about people who work for lawyers—such as paralegals, secretaries and investigators? And what about our own clients? Although I.R.P.C. 4.2 doesn’t specifically mention communications channeled through others, I.R.P.C. 8.4(a) defines “professional misconduct” to include violating the professional rules “through the acts of another[.]” Moreover, I.R.P.C. 5.3(c)(1), which governs lawyer responsibility for staff conduct, states that “a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if . . . the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved[.]” A lawyer, accordingly, can’t use staff to make an otherwise prohibited contact. Clients, by contrast, are not prohibited from contact with each other during a lawsuit and, in fact, often continue to deal with each other on many fronts while disputes are under way. Comment 2 to I.R.P.C. 4.2 recognizes this: “Parties to a matter may communicate directly with each other[.]” Nonetheless, a lawyer should not “coach” a client for a prohibited “end run” around the other side’s lawyer.

COMMUNICATION

“Communicate” is not defined specifically in the rule. The safest course, though, is to read this term broadly to include communications that are either oral (both in-person and telephone) or written (both paper and electronic).

SUBJECT OF THE REPRESENTATION

I.R.P.C. 4.2 does not prohibit *all* communications with the other side. Rather, it prohibits communications “about the subject of the representation” when a person is represented “in the matter.” As Comment 2 to I.R.P.C. 4.2 puts it by way of example: “[T]he existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter.” In a litigation setting, the “sub-

ject of the representation” will typically mirror the issues as framed by the pleadings. For example, in an automobile accident case, asking an opposing party during a break in a deposition whether the light was green or red likely runs afoul of the rule. *See, e.g., State v. Robinson*, 115 Idaho 800, 815 n.3, 770 P.2d 809 (Ct. App. 1989) (prosecutor confronted a defendant in a courthouse hallway regarding his testimony); *Runsvold*, 129 Idaho at 421 (lawyer sent copies of pleading directly to the opposing party). By contrast, exchanging common social pleasantries during that same break should not.

PARTY THE LAWYER KNOWS TO BE REPRESENTED

I.R.P.C. 4.2 is phrased in terms of actual knowledge that the party is represented. Comment 7 to I.R.P.C. 4.2 notes, however, that “actual knowledge may be inferred from the circumstances.”

THE EXCEPTIONS

I.R.P.C. 4.2 contains two principal exceptions to the “no contact” rule: permission by opposing counsel and communications that are “authorized by law or a court order.”

PERMISSION

Because the rule is designed to protect clients from overreaching by adverse counsel, permission for direct contact must come from the party’s lawyer rather than from the party. The rule does not require permission to be in writing. A quick note or e-mail back to the lawyer who has granted permission, however, should protect the contacting lawyer if there are any misunderstandings later.

AUTHORIZED BY LAW

Contacts that are expressly permitted by law or court order do not violate the rule. Service of a summons, for example, falls within the exception. At the same time, the phrase “authorized by law” is more ambiguous in its application than in its recitation. The safest course is to read this exception narrowly and to rely on permission from opposing counsel if direct contact is necessary.

THE CORPORATE/GOVERNMENTAL CONTEXT

A key question in applying the “no contact” rule in the corporate/governmental context is: Who is the represented party? Or, stated a little differently, if the corporation or agency is represented, does that representation extend to its current and former officers and employees?

Comment 6 to I.R.P.C. 4.2 and ABA Formal Ethics Opinion 95-396, § VI (1995), which discusses the analogous provision under the ABA Model Rules from which I.R.P.C. 4.2 is drawn, set out a four-layer hierarchy of who’s “fair game” and who’s “off limits.”

CORPORATE DIRECTORS AND OFFICERS

Comment 6 notes that the “[r]ule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization’s lawyer concerning the matter or has authority to obligate the organization with respect to the matter[.]” Directors, officers and senior managers fall within this circle. Lower-level managers who do not direct the entity’s general or legal affairs management, however, typically fall outside this circle. For example, a corporate director of a large fast food chain would be “off limits,” but the night shift manager at one of the company’s outlets would likely be “fair game.”

EMPLOYEES WHOSE CONDUCT IS AT ISSUE

Comment 6 also notes that a line-level employee will be deemed to fall within the representation of the employer by corporate counsel (either internal or outside) when the employee's conduct "may be imputed to the organization for purposes of civil or criminal liability." Party admissions under Idaho Rule of Evidence 801(d)(2)(D) include statements by a "party's agent or servant concerning a matter within the scope of the agency or employment of the servant or agent, made during the existence of the relationship[.]" Therefore, an employee whose conduct is attributable to the corporation will fall within the company's representation. For example, if a company truck driver runs a red light, causes an accident, jumps out of the cab and yells "it's all my fault," that employee will fall within the company's representation and will be "off limits."

EMPLOYEES WHOSE CONDUCT IS NOT AT ISSUE

Current employees whose conduct is not directly at issue are generally "fair game." To return to the truck driver example, let's add the twist that another company driver was following behind and both witnessed the accident and heard the admission. The second driver would simply be an occurrence witness and would not fall within the company's representation.

FORMER EMPLOYEES

Former employees of all stripes are "fair game" as long as they are not separately represented in the matter by their own counsel. The only caveat is that a contacting lawyer cannot use the interview

to invade the former employer's attorney-client privilege or work product protection.

SUMMING UP

Potential sanctions for unauthorized contact can include disqualification, suppression of the evidence obtained and bar discipline. Given those possible sanctions coupled with the natural reaction of opposing counsel who learns of a perceived "end run" to get to his or her client, this is definitely an area where it's better to be safe than sorry.

ABOUT THE AUTHOR

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Ethics and the Sole Practitioner: A Guide for Succession Planning

Sandra L. Clapp

Sandra L. Clapp & Associates, PA

It's Monday morning and your telephone rings. You receive the unexpected news that your friend and close colleague was injured in an automobile accident during a short weekend trip. Your injured friend, a sole practitioner with a small office staff, is unconscious and cannot provide directions to the employees. The call comes from a frantic staff member in your colleague's law office who is lost, scared, and is seeking your advice. You learn during this call that your friend had informed his staff to contact you if something went wrong. Unfortunately, this is news to you.

Attorneys advise their clients to plan, help their clients to organize their affairs, and assist their clients through many legal and practical hurdles in business and personal matters. Attorneys are paid to plan and strategize and organize and develop alternate courses for their clients. Why is it then that planning for an emergency for this same independent and organized attorney isn't a priority? For many sole practitioners, the attorney wears many hats that may include bookkeeper, file clerk, business manager, and marketing director. In a world where information moves faster, clients demand more with less notice, and technology makes us available 24 hours a day almost anywhere in the world, the demands of those who make the most noise get handled first. Many attorneys, particularly sole practitioners, leave their individual needs at the bottom of the list.

Before you launch into this process or ignore your situation any longer, it might surprise you to learn that you may be violating your ethical responsibilities to your clients through delinquency or inadequacy in planning. There are many ethical rules that relate directly and indirectly to the obligations of a sole practitioner regarding succession or emergency planning. This article is intended to summarize ethical rules and considerations relating to succession planning. Practical steps and guidance are provided in a separate article in this issue prepared by Stephen F. Smith. In addition, the Idaho State Bar Professionalism and Ethics Section is working on developing a full handbook with forms and guidelines that will be presented in an upcoming course.

OVERVIEW OF ETHICAL CONSIDERATIONS

The *Idaho Rules of Professional Conduct*¹, both past and current, touch on several ethical considerations related to succession planning. Some of these ethical considerations may seem basic and obvious, but they nonetheless make clear the responsibilities an attorney has to a client to proactively address the likely problems that will arise in the event of an attorney's death or disability. With the adoption of the revised Idaho Rules of Professional Conduct effective July 1, 2005, the addition of a new comment to Rule 1.3 has made it clear that the planning discussed in this article is mandatory. Other ethical provisions are also involved in the succession planning analysis.

To begin, **Rule 1.1 Competence** states, "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and prepara-

tion reasonably necessary for the representation." To anticipate the death or disability of the attorney, the duty of competent representation suggests, at a minimum, that the attorney needs to ensure that someone will step in to avoid client prejudice if telephones go unanswered, mail goes unopened, or deadlines pass without attention.

Rule 1.3 Diligence, *Commentary 4* explains, "[u]nless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters for a client." Taken literally this requires the attorney anticipate and address the needs a client will have upon his or her death or disability. *Commentary 5* of **Rule 1.3** states "[t]o prevent neglect of client matters in the event of a sole practitioner's death or disability, **the duty of diligence may require that each sole practitioner prepare a plan**, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action." (author emphasis added.) In summary an attorney can meet his or her ethical diligence obligations for succession planning by taking following steps:

- Prepare a plan
- Designate another competent attorney to review client files
- Notify clients upon death or disability
- Determine need for protective action

Rule 1.4 (a) (2) Communication states, "[a] lawyer shall reasonably consult with the client . . . about the means by which the client's objectives are to be accomplished." The "means" could include using an engagement letter to convey generally what will happen to a client's documents or file in the event the attorney should die or become disabled. Subparagraph (b) of Rule 1.4 further confirms, "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." This subparagraph may require that the client understand that if some calamity should occur to the attorney, prior arrangements have been made to have another attorney contact the client and, among other things, either help the client identify another attorney or possibly offer their services to the client.

Rule 1.6 Confidentiality of Information, *Commentary 17* provides that "[a] lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision." Arrangements should be made prior to an attorney's death or disability to keep client information confidential. For example, the arrangement used between the attorney and the assisting attorney who will administer the succession plan should address confidentiality of client matters.

In addition, the firm policy manual or employee training should address confidentiality during emergency situations. If not addressed, in the perhaps chaotic period that would follow the death or disability of the attorney, client confidentiality might be breached by office staff believing the circumstances are extraordinary and that it might be permissible to disclose client information outside the normally established procedures.

Similarly, **Rule 5.3 (b) Responsibilities Regarding Nonlawyer Assistants** makes it clear that “a lawyer with supervisory authority over a non-lawyer must make efforts to ensure the non-lawyer’s conduct is compatible with the professional obligations of the lawyer.” This would include ensuring that all client information is confidential unless the client authorizes disclosure. To be more specific, *Commentary 2* under the same rule confirms that “lawyers with managerial authority within a law firm [are required] to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that non-lawyers in the firm will act in a way compatible with the Rules of Professional Conduct.”

The role and obligations of the attorney who administers the succession plan is another important consideration under the ethical provisions. **Rule 1.7(a) Conflict of Interest** states “a lawyer shall not represent a client if the representation involves a concurrent conflict of interest.” A decision should be made during the succession planning stages whether or not the assisting attorney will be representing the deceased or disabled attorney or will be attempting to represent the deceased or disabled attorney’s clients directly. In the event the assisting attorney is attempting to undertake representation of the deceased or disabled attorney’s clients, the assisting attorney should conduct a conflicts check to determine if he or she already represents a client that might be adverse to the deceased or disabled attorney’s clients.

The planning of the succession of the sole practice should also taken into consideration that if the assisting attorney is representing the deceased or disabled attorney’s clients, he or she may be required to disclose to the clients any malpractice discovered.

The American Bar Association, through the Standing Committee on Ethics and Professional Responsibility, issued Formal Opinion 92-369 entitled “Disposition of Deceased Sole Practitioner’s Client Files and Property,” which provides in part:

To fulfill the obligation to protect client files and property, a lawyer should prepare a future plan providing for the maintenance and protection of those client interests in the event of the lawyer’s death. Such a plan should, at a minimum, include the designation of another lawyer who would have the authority to review client files and make determinations as to which files need immediate attention, and who would notify the clients of their lawyer’s death.

A lawyer who assumes responsibility for the client files and property of a deceased lawyer must review the files carefully to determine which need immediate attention. Because the reviewing lawyer does not represent the client, only as much of the file as is needed to identify the client and to make a determination as to which files need immediate attention should be reviewed. Reasonable efforts must be made to contact all clients of the deceased lawyer to notify them of the death and to request instructions in accordance with Rule 1.15.

These ethical guidelines discussed in this article make it clear that each attorney, and particularly the sole practitioner, has an ethical obligation to plan for the handling of client matters in the event of death or disability.

CONCLUSION

As a sole practitioner, it is an understandable concern that the time to complete this planning process will take away from your short-term client obligations. However, your clients are counting on you to keep their interests in mind and, most importantly, your ethical directives require this succession planning.

ENDNOTES

¹*Idaho Professional Rules of Conduct* (effective 7-1-04)

Rule 1.1 Competence

Rule 1.3 Diligence, Commentary 4 & 5

Rule 1.4 A (2), Communication

Rule 1.4 B Communication

Rule 1.6 Confidentiality of Information, Commentary 17

Rule 5.3 (b) Responsibilities of Nonlawyer Assistants

Rule 5.3 Responsibilities of Nonlawyer Assistants, Commentary 2

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A Sole Practitioner's Tactical Toolbox for Ethical Succession

Stephen F. Smith

Stephen F. Smith, Attorney at Law, Chtd.

"I have always admired the ability to bite off more than one can chew and then chew it"¹

William DeMille

Perhaps to an even greater extent than other attorneys, the sole practitioner must daily face the sobering truth that, for every aspect and detail of the practice of law in the office, the buck ultimately stops there, on the sole practitioner's desk. Upon reading Sandra Clapp's article, with its compelling review of why succession planning has become non-optional for all sole practitioners in the State of Idaho, the sole practitioner may once again feel overwhelmed by this new task that has been plopped upon what seemed to be an already-overloaded plate. I would like to discuss seven practical steps for planning ahead as a sole practitioner. The purpose of these steps is to equip the sole practitioner with a tactical toolbox to get the job done right and with as little wasted motion as possible. As has been so perceptively observed, "Wisdom is knowing what to do next, virtue is doing it"²

SEVEN STEPS TO PLAN AHEAD

ONE—LOCATE AN ASSISTING ATTORNEY

As with any journey, the first step is the most important because it establishes the direction for all of the steps that follow. You will need to find someone who is like-minded, trustworthy and thorough enough to faithfully administer the closing down and winding up of your practice. While it is preferable that this person be another attorney, there is no requirement that would prohibit you from selecting someone who is not an attorney. At a minimum, the person will either have to possess the knowledge and skill to deal with the legal issues that will come up, or will have to retain an attorney to assist with the legal issues that are not within the person's competency. While it would also be preferable to find an attorney in your locale, that is also not required. If you are not otherwise able to locate someone, you can ask for the assistance of the Idaho State Bar. (The term "assisting attorney" will be used below to refer to whomever it is that you choose to help you.)

TWO—DETERMINE NATURE AND SCOPE OF RELATIONSHIP

This step deals with the nature and scope of the relationship between the assisting attorney and you. As is discussed more fully below, the nature of the relationship will establish the assisting attorney's duties to you and your clients. If the assisting attorney represents you as your attorney, the assisting attorney will be prohibited from representing your clients on some, or possibly all, matters. If the agreement is of this nature, the assisting attorney would owe fiduciary obligations to your estate (i.e., the assisting attorney would not be able to inform your clients of your legal malpractice or ethical violations). Alternatively, if the assisting attorney is not your attorney, the assisting attorney would have an ethical duty to inform your clients of such errors or omissions. The scope of the relationship would involve a determination of whether the assisting attorney is going to handle some or all of the

matters involved in the closing down and winding up of your practice. While there may be some special circumstances that would cut in favor of having the assisting attorney only do some of the work and having one or more other professionals handle the rest of the work, in most circumstances it would seem that the assisting attorney should either handle all of the work or, at a minimum, handle part of the work and be ultimately responsible to make sure that all of the other work gets done.

THREE—HAVE ASSISTING ATTORNEY DO A CONFLICT-OF-INTEREST CHECK

Regardless of the nature or scope of the relationship, the assisting attorney must be aware of the potential for conflicts of interest and must do a conflict-of-interest check. The checking that should be done will be two-fold: First, to determine if the assisting attorney is providing any legal services to your past or existing clients, and, secondly, to determine if the assisting attorney has represented someone adverse to your clients that would result in a conflict if the assisting attorney would review confidential information in your client's files as a part of taking the actions necessary to transfer those files.

FOUR—DISCUSS DETAILS OF OFFICE-CLOSING ARRANGEMENTS

This discussion needs to be comprehensive and should include the preparation and signing of a consent form, which would authorize the following: Contacting your clients for instructions on transfer of their files; obtaining extensions of time in litigation matters, where needed; providing all relevant people with notice of closure of your law firm; winding down of your financial affairs; providing your clients with a final accounting and closing billing invoice; collecting all unpaid fees on your behalf; liquidating or selling your law practice; and, paying the assisting attorney from your estate. In regard to the final area of consent noted, that being the paying of the assisting attorney, it would be prudent for both you and the assisting attorney to reach a firm agreement as to how much the assisting attorney would be paid. Perhaps the most-appropriate method would be for the assisting attorney to be paid on an hourly basis at what will be the assisting attorney's standard hourly billing rate when it becomes necessary to do the work, less some reasonable professional discount.

FIVE—PREPARE AND SIGN AGREEMENT

Once you have reached a common understanding and agreement on the items noted above, as is the case with almost all transactional legal work, there comes the crucial task of reducing the agreement to writing. The CLE that will be presented by the Professionalism and Ethics Section will include some forms that should be helpful in this regard. The final draft of that agreement will need to be signed by you and the assisting attorney, copied so

that both you and the assisting attorney have an office copy of the agreement, and then the signed original agreement should be retained in the safety deposit box or fire-proof safe of your office. The existence and location of the original agreement must be information retained by your paralegal or assistant.

SIX—MAKE ARRANGEMENTS FOR ACCESS TO TRUST ACCOUNT.

In practical terms, what would happen if you became physically, emotionally or mentally unable to continue your law practice and no arrangements had been made for someone to access your trust account? If those arrangements had not been made, your clients' money would have to remain in the trust account until a court order could be obtained to allow someone access to that account. Practical complications that could ensue might include money not being available to close a time-sensitive transaction or the client not having access to the money to retain a new attorney. Situations like this would put clients in a difficult position, which could result in a potential ethical complaint, a claim against the client security fund or even a suit for malpractice.

That having been said, however, it will be important for you to be circumspect about just who you allow to have access to your trust account. For example, if the person having access to your trust account misappropriates the money in it, your clients will be damaged and you or your estate will probably be held liable.

Not only are there no quick and easy answers to this problem, but there is also no way to know with absolute certainty if you have made the right choice even after you have given careful consideration to whom you will allow access. You will need to give careful consideration to not only the person who will have access, but also the question of under what circumstances that access will be allowed. But, as is the case with all of the planning discussed in this article, looking at the alternatives available to you and weighing the relative risks should allow you to make a reasoned choice, which is better than not making any choice at all.

After deciding the "who" question about access, the two major components of the "how" question about access are, first, do you want to give general access to your trust account to someone or, instead, access that is contingent upon the happening of a triggering event, and, secondly, who do you want to determine if the triggering event has occurred, such as impairment, disability, incapacity or some other reason that prevents you from being able to conduct your business affairs? There are probably two main approaches: 1) giving the assisting attorney general access to your trust account, or 2) allowing the assisting attorney access to the trust account only during a specific time period or following a specific triggering event. If you use the second approach, you will then need to choose between either allowing the assisting attorney to be the one to determine if the triggering event has occurred, or having some third party, who could be your spouse, another trusted family member or best friend, hold a power of attorney for the assisting attorney until that person determines whether a triggering event has occurred so that the power of attorney should be given to the assisting attorney.

Once you have decided who will have access, and when, the final action necessary will be that of documenting the authorization with your bank. With the advent of anti-terrorism legislation, that will probably require a visit to your bank with the assisting attorney.

SEVEN—NOTIFY YOUR CLIENTS

After you have a documented agreement between you and the assisting attorney, the next step of action is to give information about your plans to your clients. For existing clients, one way to provide notice would be sending out a letter in your next monthly billing. You may want to consider sending an extra copy of the notification letter with a place that the client could register any objection to your arrangements, or sign the copy and return it to your office. With prospective clients, the best way to provide notification would be to include the information in your engagement letter. It would be well to provide prospective clients with an opportunity to agree to the plan by signing and returning the engagement letter.

ROUTINE OFFICE PROCEDURES TO FACILITATE SUCCESSION

There are several other basic procedures that you can build into your practice routine to facilitate the process of the assisting attorney closing your office. Those procedures include the following: 1) have a manual of office procedures explaining, among other things, how to generate for your open files a list of the names and addresses of the clients; 2) have two calendaring systems, one maintained by you and one maintained by your assistant or paralegal, on which are routinely set forth all follow-up reminders and deadlines; 3) invest the relatively-small amount of additional time to make sure that every client file is documented with its present status and what you are intending to do for the client; 4) maintain up-to-date records of your time and billings; 5) provide your assisting attorney with a walk through during which you and your assistant or paralegal can acquaint the assisting attorney with the procedures of your office and the operation of your office systems; 6) calendar a reminder each year, on a set date, to renew your written agreement with the assisting attorney; 7) adhere to the routine practice of not keeping your clients' original documents unless absolutely necessary; and, 8) consider the potential for the need to have sufficient funds to pay for the closing of your practice in the event of some impairment, incapacity or disability. Since those problems could adversely impact your ability to generate accounts receivable, you may want to consider whether you should carry a disability insurance policy.

After reviewing the list, you may be asking yourself the question, "Even if I am motivated now to try to do everything listed, will I continue to have sufficient motivation in the future to still be performing the items on that list in the months and years I hope are yet to come?" Here are some important elements to give you that motivation: 1) If the assisting attorney finds your office in good order, the assisting attorney's job in closing down the office will be more simple, thereby costing your estate less; 2) your law practice, which will be found in a situation of good organization, will be a more-valuable asset that can be sold more quickly and at its maximum value, thereby benefiting your heirs; and, 3) perhaps of utmost importance, you will have ended your practice on a high ethical note and you will have left your clients in a good status.

SPECIAL CONSIDERATIONS CONCERNING THE DEATH OF A SOLE PRACTITIONER

Your authorization of the assisting attorney to close your law practice constitutes a special power of attorney. By use of the appropriate language, you can make a durable special power of

attorney not affected by disability or incapacity. Idaho Code §§15-5-501 and 15-5-502. Although the Idaho statute expressly provides that the power of attorney is not revoked as to a person who, without actual knowledge of the death of the principal, acts in good faith under the power, once that person has notice of the principal's death, the power of attorney is revoked. Idaho Code §15-5-504. Therefore, there will come a point at which the assisting attorney's authority will cease.

This is a transition point at which your practice will constitute an asset of your estate. Now, the personal representative of your estate will have the responsibility to deal with the closing of your practice, although the personal representative can authorize the assisting attorney to proceed with the closing down of the practice as a part of the winding up of your estate. Idaho Code §15-3-711.

For this transition process to work smoothly, it will be important for you to have an up-to-date will that nominates a personal representative and, preferably, also directs that your personal representative authorize your assisting attorney to close your practice. This would also allow your personal representative to be appointed without delay and facilitate the transition from your assisting attorney working under your power of attorney to your assisting attorney working under the authorization of your personal representative. You should also include in your will a direction to your personal representative as to whether the personal representative will need to post bond, and also whether a surety bond should be posted by the assisting attorney.

As you have no doubt advised and cautioned your clients, if you do not have a will you leave open the potential for a dispute among your family members and others not only as to who should be the personal representative of your estate, but also whether it was your intention that the assisting attorney is the one who would complete the closing down of your practice. That advice that you have given to others was sound and will benefit both your heirs and your clients if you follow it yourself.

It is unlikely that many, if any, sole practitioners have taken all of the actions necessary to allow all of the assets of their practice to pass to their heirs without a probate. It is therefore likely that some probate will be required. It is also likely the assisting attorney will have to do the work necessary to wind up, close down and sell your practice. Therefore, it will be important to think through the need for, and provide for the availability of, sufficient funds to pay your personal representative, assisting attorney and their support staff, as well as office overhead expenses and rent, during the period of the closing down of your practice. You should consider how much time it will take to complete final billings, collections of accounts receivable and other elements of the winding-up process in order to be able to project what may be necessary for cash-flow purposes. Depending on what has occurred just before your death, and especially if there has been any significant or prolonged disability or illness, your accounts receivable may not provide sufficient funds for the closing-down work that needs to be done. It would not be reasonable to expect your assisting attorney to advance funds for the closing-down work or to serve without being paid. You may therefore want to consider reviewing your insurance policies to determine if there is an existing policy, or a policy needed, to provide the funds that your personal representative and assisting attorney will require. You should consider review-

ing with your insurance agent whether your estate should be the beneficiary of the insurance policy, or whether your family should be the beneficiary and be subject to instruction to loan sufficient funds to your estate to pay for the closing-down work.

THE IMPORTANCE OF STARTING THE PLANNING PROCESS

According to the information supplied by the Idaho State Bar, there may be as many as 647 sole-practitioner attorneys licensed in Idaho. Although the planning process just described has always been a good idea, as of July 1, 2004 it is mandatory for all of those attorneys through the adoption of Rule 1.3 of the Idaho Rules of Professional Conduct. But, even without the sort of motivation that ethical rules can give to attorneys, the planning process should be motivated by the Golden Rule: "Therefore all things whatsoever ye would that men should do to you, do ye even so to them, for this is the law and the prophets."³ Just as you would want continuity in the help and services provided to you by the professionals who work for you, if those professionals suffered some mishap that prevented them from being able to carry on their professional relationship with you, then you should do so to your clients.

CONCLUSION

It is important for you to take the first step in the process. The Idaho State Bar is committed to helping you to successfully complete this process and, with the encouragement of Bar Counsel, the Professionalism and Ethics Section has taken on the project to try to make the planning process something that can be completed in the real world. An upcoming CLE is being planned to walk you through the process and provide you with sample forms and documents. As a sole practitioner, it is understandable that taking the time to complete this planning process will take away from your short-term earning power to some extent. But, as Mark Twain once said, "Always do right. This will gratify some people, and astonish the rest."⁴ You will find that your efforts are more than compensated for with the ethical and financial benefits of planning ahead.

ENDNOTES

¹William DeMille, *The Little Book of Virtues*, Garborg's, Inc. (1995)

²David Starr Jordan, *The Little Book of Virtues*, Garborg's, Inc. (1995)

³The Holy Bible, Matthew 7:12 (K.J.V.)

⁴Samuel Langhorne Clemens, Card sent to the Young People's Society, Greenpoint Presbyterian Church, Brooklyn (February 16, 1901.)

ABOUT THE AUTHOR

Steve Smith is a native of Coeur d'Alene, who received his B.S. from the University of Idaho in 1974 and his J.D. from the University of Idaho Law School in 1977. He was then employed as the first law clerk for the First Judicial District. In 1978, he was hired as an associate with the Cooke & Lamanna Law Firm of Priest River, and became the managing attorney in its Sandpoint office. In 2001, he became a sole practitioner by purchasing the Sandpoint office where he is continuing his practice of 27 years in the same building with the same paralegal. He is a past president of the First District Bar, a member of the Idaho Supreme Court Evidence Rules Committee, and a member-at-large of the Idaho State Bar Professionalism and Ethics Section. He lives in Sagle with his wife and five children.

Ethics and the Attorney as Guardian ad Litem

Robert L. Aldridge
Robert L. Aldridge, Chartered

To understand the ethical considerations pertaining to a guardian ad litem, the scope and function of the office itself must first be understood.

PILOT PROJECT—NEW LAW

The 2005 Idaho legislature enacted a series of changes to the duties and powers of the guardian ad litem in both conservatorships and guardianships, effective July 1, 2005. These, and other changes relating to conservatorships and guardianships (for example, a greatly detailed legislative statement of the required contents of a proper conservatorship accounting) were enacted in part to form the basis of ultimate monitoring of all conservatorships, and perhaps guardianships, in a formal manner, possibly through the Idaho Department of Finance. The Pilot Project, of which I am Co-Chair with Judge Lowell Castleton, will run monitoring in six Idaho counties on a test basis and then will report back to the Idaho legislature for possible permanent legislative enactment of monitoring. Funding for the Project is initially supplied by increased fees for filing of petitions and reports in conservatorship and guardianship proceedings. While monitoring will presumably take place through the Department of Finance initially, enforcement regarding any discrepancies found in the monitoring process will be through the guardian ad litem. Additionally, the guardian ad litem should be taking a more proactive role starting at the commencement of the proceedings, which should limit the number of problems to be found at the monitoring level. The major changes to guardian ad litem law are new sections 15-5-434 (Guardian ad Litem - Duties), 15-5-435 (Guardian ad Litem - Rights and Powers), 15-5-314 (Guardian ad Litem - Duties), and 15-5-315 (Guardian ad Litem - Rights and Powers). While the existing code had a limited description of the guardian ad litem's function in the process, the new sections contain essentially all of the relevant duties and powers. They should be reviewed carefully and in detail.

REQUIREMENTS FOR GUARDIAN AD LITEM

Idaho Code 15-1-201, the general definitions section of the Probate Code, contains no definition of a guardian ad litem, showing the original lack of importance placed on that office by the Uniform Probate Code as drafted in 1971. Likewise, 15-5-101, which contains some general definitions for conservatorships and guardianships, does not contain a definition for guardian ad litem. The first mention is the Minor guardianship provisions, at 15-5-207(d), a section recently added to the Code and amended last year, but without definition. In 15-5-303, guardianship procedures:

(b) Upon the filing of a petition, the court shall set a date for hearing on the issues of incapacity and unless the allegedly incapacitated person has counsel of his own choice, it shall appoint an attorney to represent him in the proceeding, who shall have the powers and duties of a guardian ad litem.

It is mentioned again in 15-5-407(b):

Unless the person to be protected has counsel of his own choice, the court may appoint a lawyer to represent him who then has the powers and duties of a guardian ad litem.

Prior to the new law being enacted, these sections stated the primary criterion for acting as a guardian ad litem – the appointment must be of an attorney. Unlike the visitor (15-5-308) where there are both extensive descriptions of the requirements for acting and of the required actions to be taken in the proceedings, no further description of the guardian ad litem or the guardian ad litem's required actions is set forth except in minor fashion.

POTENTIAL ETHICAL CONFLICTS

On May 8, 2000, the Delaware State Bar Association, Committee of Professional Ethics, issued Opinion 2001-1. While the language of the Delaware statutes involved (creation of the Office of the Child Advocate) is not identical to Idaho probate code statutes, the central concepts of the potential ethical violations are very similar and I believe give guidance to Idaho guardians ad litem. The issues fell into three main areas:

- a. Whether the duty of the guardian ad litem to represent the best interests of the child/ward/protected person conflicted with the relevant Delaware Rule of Professional Responsibility requiring an attorney to represent the client's interests and abide by their decisions.
- b. Whether the duty of the guardian ad litem to ascertain the wishes of the child/ward/protected person and make them known to the Court and otherwise participate in the proceedings violated the Rule governing confidentiality obligations to a client.
- c. Whether the investigatory and reporting obligations of the guardian ad litem conflicted with the Rule prohibiting an attorney from acting as an advocate at a trial in which the attorney is likely to be a necessary witness.

The Committee first stated its opinion that “an attorney guardian ad litem does not serve directly as counsel for the child under a traditional attorney/client relationship”. However, to some extent this was based on the somewhat unique Delaware statutory language, and the Committee noted the analysis of the Wyoming Supreme Court, under a different statutory scheme, where the roles of attorney and guardian ad litem are combined. There, the Court held that the attorney does owe attorney/client obligations directly to the child. The Committee went on to analyze the difference as follows:

... Several authorities and commentators who have considered the question have noted the potential

ambiguity in roles that arises when a lawyer is appointed as guardian ad litem, as distinct from being appointed as the child's attorney. *Jean Koh Peters, Representing Children in Child Protective Proceedings: Ethical and Practical Dimensions*, Chapter 2 (1997). A lawyer appointed the child's attorney is a lawyer who provides legal services for a child and who owes the same duties of undivided loyalty, confidentiality and competent representation to the child as is due an adult client, subject only to the modifications of Rule 1.14 (Client under a disability). In contrast, a lawyer appointed as "guardian ad litem" for a child is generally regarded as an officer of the court appointed to protect the child's best interests without being bound by the child's express preferences. *Id.*, *American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* (approved by the American Bar Association House of Delegates, February 5, 1996).

The Committee, in its further analysis, reviewed Delaware statutes that, like Idaho statutes (both as to minors and adults) allowed the simultaneous existence of a guardian ad litem and an attorney for the child/ward/protected person and stated:

The obligation of the attorney guardian ad litem is to represent the best interests of the child; while the obligation of the attorney for the child is to carry out the child's wishes."

The Committee noted in a footnote that:

... the child's "best interest" includes consideration of the child's expressed wishes when the child is mature enough to verbalize his wishes. ***Moreover, in those rare instances where a child's wishes may conflict with what the guardian ad litem determines to be the child's best interests, the attorney guardian ad litem still must advise the court of the child's wishes.

The Committee summarized its initial discussion by stating:

To summarize, a lawyer appointed attorney guardian ad litem acts as attorney for himself in his capacity as guardian ad litem charged with representing the best interests of the child; he does not act directly as attorney for the child in a pure attorney/client relationship.

The Committee next analyzed whether the statutory listing of duties and powers overrode the Rules of Professional Responsibility:

To the extent a conflict exists between the statutory mandate and the Rules of Professional Responsibility (an issue addressed in further detail below), the Rules of Professional Responsibility would govern the lawyer's role as an attorney in carrying out an attorney guardian ad litem appointment. Stated otherwise, it is no answer to an apparent ethical dilemma for an attorney to rationalize that the statute authorizes or mandates behavior that would otherwise violate the Rule of Professional Conduct.

The Committee then directly examined the three questions presented. On the issues of questions a and b, regarding the conflict between "best interests" and the wishes of the client, and confidentiality, in addition to more in depth analysis of the points stated above, the Committee pointed to Rule 4.3. In Idaho, that Rule reads:

RULE 4.3: DEALING WITH UNREPRESENTED PERSON

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or could have a reasonable possibility of being in conflict with the interests of the client.

Given the somewhat convoluted Delaware idea that a guardian ad litem is an attorney for himself in addition to being an officer of the court, the Committee nonetheless came to what is probably sound advice for the simpler Idaho situation. In essence, communicate to the child/ward/protected person (if possible) that:

1. the guardian ad litem will represent the person's best interests, which may or may be the same as the person's wishes;
2. that the guardian ad litem will use information gained in interviews with the person and others to further the person's best interests, but that this information may be disclosed to the Court, including the wishes of the person.

As to the third question, being both advocate and witness, the Committee correctly pointed out that:

That is, the attorney guardian ad litem ought to * * * provide independent factual information to the Court through the testimony and exhibits of others.

While the Idaho situation, at least when the attorney is acting solely as a guardian ad litem, does not present all the complexities of the Delaware situation, the guardian ad litem must remember that he or she is not generally a witness, nor especially an expert witness. The guardian ad litem should, except for actual factual statements such as the expressed wishes of the child/ward/protected person, or perhaps the actions of the child/ward/protected person to extent actually observed by the guardian ad litem, mainly analyze and recommend based on the visitor's report or other credible evidence or documents and the guardian ad litem's perception of the best interests standard.

OTHER RULES OF PROFESSIONAL CONDUCT APPLICATIONS

Other Rules that may apply whether directly or in principle:

- a. **Competence. Rule 1.1.** The guardian ad litem should have the "legal knowledge, skill, thoroughness and preparation reasonably necessary for representation."

b. **Diligence. Rule 1.3.** The guardian ad litem “shall act with reasonable diligence and promptness in representing a client.” This is clearly reflected in the statutory requirements quoted at the beginning of this document.

c. **Fees. Rule 1.5.** This is somewhat less direct, but the guardian ad litem should charge a reasonable fee for the services rendered. We are currently working on potential legislation to cover this statutorily.

d. **Candor Toward the Tribunal. Rule 3.3.**

e. **Truthfulness in Statements to Others. Rule 4.1.**

GENERAL OBSERVATIONS

The guardian ad litem status, by its very nature, requires independence from the other parties to the action. This has raised a potential problem when the petitioning attorney provides an order to the Court with the proposed guardian ad litem and court visitor already filled in. This creates at the very least a perception of lack of independence, especially if a particular guardian ad litem is always used by a particular petitioning attorney. Judge Bieter has attempted to meet this problem by the creation in Ada County of a rotating list of visitors and guardians ad litem, thereby assuring random assignments.

Can a guardian ad litem ethically “withdraw”? There are no provisions in Idaho code for this, and the duties and powers quoted above for a guardian ad litem make it clear that the guardian ad litem is in for the duration of the case except for unusual circumstances. The guardian ad litem could, by motion, seek to withdraw at the discretion of the Court. Grounds might include that the office is no longer needed – for example if the conservator is the spouse, for 50 years, of the protected person, and the sole assets and income are the home and social security income. However, in general, the statutes make it clear that the appointment of a conservator and/or guardian does not remove the duties and powers of the guardian ad litem, but instead requires them to be actively, diligently, and competently pursued. In contrast, the petitioning attorney can withdraw. However, if there is no guardian ad litem or attorney for the person (for example, a minor guardianship either before the enactment of the guardian ad litem/attorney provisions or in which no guardian ad litem or attorney was appointed), and the petitioning attorney remains in the case, the petitioning attorney would have a duty to continue to represent the petitioning client, who is often now the guardian and/or conservator. Failure to monitor whether inventories and reports are filed therefore could be a serious breach and possibly malpractice – that is a subject for another seminar.

The statutory method for the conservator requires that the conservator preserve the estate plan of the protected person. In the course of that, however, the conservator can petition for the creation of a trust. However, the guardian ad litem must be careful to represent the best interests of the person, not the rest of the family, which can lead to some real confrontations regarding gifts and similar matters.

Finally, remember that the above statutes apply only to conservatorships and guardianships. The new statutes do not affect the

use of a guardian ad litem in other areas of law.

ABOUT THE AUTHOR

Robert L. Aldridge received his J.D. from Washington University, St. Louis, Missouri, in 1970 and was admitted to the Idaho State Bar the same year. His practice is limited to Estate Planning, Taxation, Probate, Elder law (including Medicaid and conservatorships/guardianships), and 501(c)(3)/religious institutions law. He is past-Chairman, and current Legislative Chairman, of the Taxation, Probate & Trust Section of the Idaho State Bar. He represented the Idaho State Bar on the Idaho Workforce Investment Board (WIB). He has spoken at numerous Continuing Legal Education seminars for the Idaho State Bar. He has published articles on legal ethics, bio-ethics, and various aspects of estate and tax planning. Current Vice-Chairman of the Professionalism and Ethics Section of the Idaho State Bar.

The Lawyers of
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are pleased to announce that
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Has joined the firm as a Partner



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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2006 Legislative Session Changes to the Law

Michael Henderson

The Legislative session is a busy time for many, including those of us in the court system who try to track legislation. But the aftermath is challenging as well. Between adjournment and July 1, the effective date of most legislation, the courts must accommodate the changes required by the new and amended statutes.

Here are some of the items we are working on that will affect both what we do and the practice of much of the Bar. By no means does this constitute a comprehensive legislative review. It's just a few of the actions taken in the 2006 Legislative session that you may want to bear in mind.

BILLS PROPOSED BY THE JUDICIARY

These are a few of the proposals put forward by the Judiciary that were adopted by the Legislature.

SB 1407 - The Legislature created two new district judge positions, one with resident chambers in Canyon County and the other in Kootenai County. No district judge positions had been added since 1998. The use of senior judges and other innovative approaches had enabled the courts to handle the burgeoning caseload for a time, but new positions finally became inevitable. The Legislature also provided funds for four new magistrate judge positions, two in Ada County and two in Canyon County.

- HB 716 - Criminal defendants who are placed on probation may have their felony convictions reduced or dismissed under I.C. § 19-2604 - but only if they have complied at all times with the conditions of probation. This bill will allow persons convicted of felonies to gain the benefit of this statute, even if they have violated conditions of probation, if they: (1) graduate from a drug court or mental health court program, and (2) comply with all conditions of probation following their graduation. It is hoped that this will give drug court and mental health court participants added incentive, and will also enable them to clean up their records and ease their transition to becoming productive members of society.
- HB 629 - Last year the Legislature increased the maximum fine for many misdemeanors to \$1,000. This bill sets the maximum fine at \$1,000 for some 20 additional misdemeanors that were not included in last year's bill. The most notable is reckless driving; not only does the maximum fine for a first offense go to \$1,000, but the maximum fine for a second offense will become \$2,000.

OTHER BILLS RELATING TO THE COURTS

- SB 1400 - This bill increases the limit for small claims cases from \$4,000 to \$5,000. It also allows for recovery of attorney's fees and costs related to collection of a judgment.
- HB 432 - When the Small Lawsuit Resolution Act was adopted in 2002 it had a sunset date of June 30, 2006.

This bill removes the sunset clause and allows the SLRA to continue in effect after that date.

- HB 545 - This authorizes the initiation of a general water rights adjudication for those portions of northern Idaho not included in the Snake River Basin.

CHILDREN

- HB 581 - This bill will facilitate foreign adoptions. It provides that when Idaho residents adopt a child in a foreign country in accordance with the laws of that country, and the adoption is recognized as final by the federal government, the residents can file a petition along with the foreign adoption order and proof of full and final adoption from the federal government. The court shall then issue an order recognizing the adoption without the necessity of a hearing.

CRIMINAL LAW

- HB 536 - This bill, arising from the hearings of an interim legislative committee, defines human trafficking and makes it a felony.
- HB 630 - This makes it a misdemeanor to threaten to do violence to another on school grounds by means of a firearm or other deadly or dangerous weapon.
- SB 1336 - This one is Governor Kempthorne's gang bill. It defines the term "criminal gang," enhances the penalties for crimes committed for the benefit or in association with criminal gangs or their members, and creates the new felonies of recruiting gang members and supplying firearms to a criminal gang.
- SB 1386 - This extends the statute of limitations from two years to five years for two types of fish and game offenses: (1) unlawfully taking or possessing any big game animal, caribou or grizzly bear, and (2) unlawful purchase, possession or use of a license, tag or permit by a nonresident.
- SB 1396 - This bill provides a procedure for seizure of an animal where the owner or keeper is charged with animal cruelty and allows forfeiture of the animal if the defendant pleads guilty or is found guilty.

DUI

Two important bills in this area may have an impact on the decision as to whether to take an alcohol concentration test following an arrest.

- HB 582 - This imposes a civil penalty of \$250 for refusing to take an alcohol concentration test where the officer has reasonable grounds to believe there is a DUI.
- SB 1397 - And this one increases the suspension for refusing an alcohol concentration test from 180 days to one year. The old law provided that a second refusal within five years brought a one-year suspension. Now, a sec-

ond refusal within ten years will result in a two-year suspension. The bill also increases the maximum sentence for felony DUI from five years to ten years, and the maximum for aggravated DUI from ten years to fifteen years.

SEX OFFENDERS

This was a major concern of the 2006 session. Some of the bills enacted in this area included:

- HB 533 - This makes the commission of a murder in the perpetration of the infamous crime, lewd conduct, sexual abuse, ritualized abuse, sexual exploitation, sexual battery or forcible sexual penetration a statutory aggravating circumstance, providing a basis for imposition of the death penalty.
- HB 534 - This bill removes the statute of limitations for sexual abuse, lewd conduct and terrorism.
- HB 713 - This enacts a new statute making it a misdemeanor for a registered sex offender to be on or remain within 500 feet of school property when children are present, or to reside within 500 feet of school property unless the residence was established before July 1, 2006. Exceptions are provided for persons dropping off or picking up their children or attending parent-teacher conferences, and for students enrolled in school.
- SB 1301 - This bill establishes a mandatory minimum sentence of 15 years for repeat offenders committing sex offenses for which registration is required, and a mandatory minimum life sentence for a persons committing such offenses who have previously been designated as violent sexual predators.
- SB 1304 - This amends I.C. § 19-2604 to provide that dismissal or reduction of a conviction is not permitted if the conviction was for any sex offense for which registration as a sex offender is required.
- SB 1312 - This is Governor Kempthorne's sex offender bill. It increases the maximum sentences for several sex offenses. It also requires a sex offender to register within two working days of coming into a county, requires violent sexual predators to register every three months and provides a procedure for verifying addresses of registered sex offenders.

DOMESTIC VIOLENCE

- SB 1356 - This bill made several changes in I.C. § 39-6306, which deals with the issuance of domestic violence protection orders. Previously, the statute said that an order was issued for a period not to exceed three months; now it provides that it may be issued for a period not to exceed one year. The statute also now states that an order may be made permanent. Additionally, such orders may now restrain a respondent from contacting not only the petitioner and any children whose custody is awarded to the petitioner, but also "any designated family member or specifically designated person of the respondent's household." Also, the statute now states that the respondent may be restrained from coming within 1,500 feet "or other appropriate distance" of these persons. None of these provisions impose any additional requirements on the courts; they simply enlarge the court's options when issuing these orders. The bill also modifies the definition of "immediate and present danger" to include situations "where there

is reasonable cause to believe that bodily harm may result." The bill included an emergency clause and went into effect upon its adoption on March 31, 2006.

EVIDENCE

- HB 634 - This bill provides that expressions of apology, condolence or sympathy by health care professionals or employees are not admissible, except so far as they constitute statements of fault. This issue will no doubt be addressed by the Supreme Court's Evidence Rules Advisory Committee.

PROPERTY

- SB 1311 - There seemed to be little discussion or debate on this one during the session, but it enacts a major change in real property law by extending the period needed for adverse possession of real property from five years to 20 years.



Michael Henderson is Legal Counsel for the Idaho Supreme Court. He previously served as a Deputy Attorney General for 18 years (seven of those years as Chief of the Criminal Law Division), and before that was a Deputy Prosecuting Attorney in Ada, Blaine, and Twin Falls Counties. He received his J.D. from Brooklyn Law School and has been a member of the Bar for 24 years.

ALTERNATIVE DISPUTE RESOLUTION

Merlyn W. Clark

Mr. Clark serves as a private hearing officer, federal court discovery master, neutral arbitrator and mediator. He has successfully conducted more than 500 mediations. He received the designation of Certified Professional Mediator from the Idaho Mediation Association in 1995. Mr. Clark is a fellow of the American College of Civil Trial Mediators. He is a member of the National Rosters of Commercial Arbitrators and Mediators and the Employment Arbitrators and Mediators of the American Arbitration Association and the National Panel of Arbitrators and Mediators for the National Arbitration Forum. Mr. Clark is also on the roster of mediators for the United States District Court of Idaho and all the Idaho State Courts.

Mr. Clark served as an Adjunct Instructor of Negotiation and Settlement Advocacy at The Straus Institute For Dispute Resolution, Pepperdine University School of Law in 2000. He has served as an Adjunct Instructor at the University of Idaho College of Law on Trial Advocacy Skills, Negotiation Skills, and Mediation Advocacy Skills. He has lectured on evidence law at the Magistrate Judges Institute, and the District Judges Institute annually since 1992.

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Idaho Volunteer Lawyers Program Special Thanks

The Idaho Volunteer Lawyers Program (IVLP) would like to extend our heartfelt and enthusiastic thanks to the following attorneys and volunteers for their generous contributions in providing pro bono legal services to individuals who would not otherwise be able to afford them. Once again this month, we are reminded of the outstanding generosity of the many volunteers who “make the Program work.”

IDAHO ASSOCIATION OF PARALEGALS

Members of the *Idaho Association of Paralegals* donated their time to interview IVLP applicants and screen the cases for IVLP services on the evening of April 5th. We wish to thank Bernice Myles (Attorney General’s Office), Lori Peel (Attorney General’s Office), Rosemary Zimbelman, (retired from US Attorney’s Office), Lauren Paul (Washington Group International), Stephanie Bennett (Albertsons), and Lisa Hoag (Idaho Transportation Department) for your assistance and interest in IVLP.

JAY FRIEDLY AND BRIAN PETERSON

The IVLP would like to recognize Jay Friedly and Brian Peterson of Hall, Friedly & Ward, Mountain Home with special thanks in connection with their ongoing work with the Mountain Home Senior Center and Consultation Clinic. Since July 2004, either Jay or his associate, Brian, began meeting EVERY MONTH with Mountain Home residents at the Senior Center to answer legal questions (Jay had previously rotated the duty with other Mountain Home attorneys). Jay and Brian have assisted these sen-

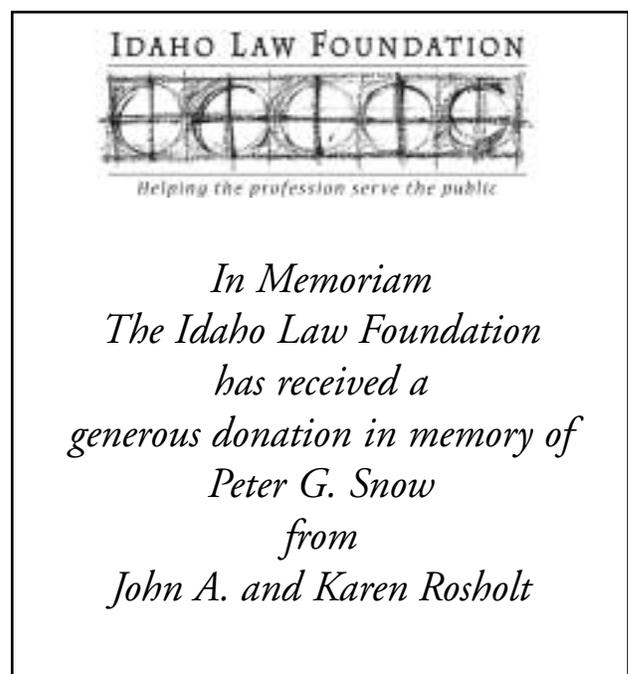
iors with questions about wills, trusts and estates, consumer issues, and insurance and Medicare questions, to name a just few topics. This generous gift of their time and talents has been a great benefit to Mountain Home’s seniors, and exemplifies the kind of selfless dedication to professionalism that is at the heart of pro bono service.

LAYNE DAVIS

Special thanks to Layne Davis, Davis, Miller & Walker, Boise who just closed a CASA case that included approximately 100 hours of pro bono service. In this case under the Child Protection Act, Layne represented a volunteer Guardian ad Litem for two young children (ages 5 and 3). The Court appointed Special Advocate (Layne’s client) advocated for the best interest of the children in the case, which eventually resulted in the termination of the parental rights of the parents. The children are in the safe care of their grandparents in another state, thanks to Layne’s work.

WILLIAM LEE

Attorney William Lee, Emmett agreed to represent a young low-income mother in the modification of her custody decree through the Idaho Volunteer Lawyers Program. The client was a victim of domestic violence at the hands of the father of her child, and was fearful of facing him again in court. Lee spent over fifty hours on the case to win the outcome she desired. Lee stated he was grateful for the “excellent” client and the support of the IVLP. The IVLP appreciates Lee’s dedication and cheerful generosity.



Mock Trial Competition

Logos Wins State Heads to Nationals in Oklahoma

Second Place Kimberly goes to North Carolina for American Mock Trial Invitational



LRE Mock Trial -First place - Logos Secondary School mock trial team and teacher coach Chris Schlect (far left) and attorney coach Greg Dickison (back right) with panel judges Russ Heller, Justice Trout and Judge Boyle.

Logos Secondary School (plaintiff) won the Idaho Law Foundation State Mock Trial Competition on March 15, by defeating Kimberly High School (defense) during the final round at the Idaho Supreme Court.

The Honorable Linda Copple Trout, who presided over the final round in Boise, announced the performance decision and that the defendant, Pat Cartwright, was 50 percent liable for injuries sustained by Jamie Franklyn in a fire on property owned by Cartwright. Students who orchestrated the illegal bar and casino were held to each be 25 percent at fault. Justice Trout and fellow panel judges Honorable Larry Boyle, chief magistrate judge, U.S. District Court and Russ Heller, Boise School District administrator commended the students for their poise and presentation.

Students competing from Logos (Moscow) included: Samuel Dickison, Jeremiah Grauke, Heather Hagen, Cecilia Hui, Laurel McGarry, Danny Ryan, Justin Spencer, and Vicky Trochez. Students competing from Kimberly included: Emily Clements, Ashley Evans, Shiann Johns, Edie Jones, McKay Nield, Morgan Price, Kelly Stout, Jamie Thomas, and Kelsey Yung. At the semi-final competition held earlier in the day, Lake City (Coeur d'Alene) and another Logos team placed third and fourth respectively.

The teams argued a civil case, Franklyn v. Cartwright. Franklyn is a student who is burned in a fire that happens in a barn owned by Cartwright. Cartwright rented the barn to two high school students who were supposedly storing equipment for their summer lawn business in the barn. Instead, the enterprising students open a bar and casino in the barn. It is during a night when students are gathered to game and drink that the fire occurs. Franklyn is badly burned by the fire that was caused by faulty electrical wiring inside the barn. The barn owner's defense is that he had no knowledge that his barn was being used for a purpose other than the one he agreed to when he rented it to the two young men. Although the fact pattern has obvious criminal issues, students were asked to consider solely the civil liability of the defendant, Pat Cartwright.

The final round of the state competition was the culmination of a month-long season of regional competitions, and a preliminary and semi-final round at the state level. Thirty-six teams, con-

sisting of 320 students, participated in the competition statewide. Twelve teams advanced from their regions to participate at state.

North Idaho

Lake City (Coeur d'Alene) Teacher Coach: Sandy Bain, Attorney Coach: Mike Palmer

Logos (2 teams-Moscow) Teacher Coaches: Chris Schlect & Jim Nance, Attorney Coach: Greg Dickison

Treasure Valley

Boise High (2 teams) Teach Coach: Robert Bellomy, Attorney Coach: Robert Bellomy

Centennial Teacher Coach: Donald Frasier, Attorney Coach: Aaron Lucoff

Mountain View Teacher Coach: Mike Knutson, Attorney Coach: Soo Kang.

Magic Valley

Bishop Kelly (Boise) Teacher Coach: Annah Merkley, Attorney Coaches: Celeste Miller & George Breitsameter

Kimberly (2 teams)-Teacher Coach: Lori Clements and Steve Birnie, Attorney Coach: Tom High

Snake River Valley

Blackfoot Teacher Coach: Wes Jensen, Attorney Coaches: Jared Harris & John Thomas

Pocatello Teacher Coach: Wendy Shelman, Attorney Coach: Mike Fica

Teams from **Lake City, Valley** and the **two Logos** teams advanced to the Semi-final Competition.



LRE Mock Trial -First place - Second place Kimberly High School students with teacher coach Lori Clements (back right) and Russ Heller, Justice Trout and Judge Boyle.

The students from Logos participated in the national competition on May 10-12, 2006, in Oklahoma City. The second place team from Kimberly was invited to participate in the American Mock Trial Invitational and traveled to North Carolina on May 15-17.

Exciting news! Our Idaho Logos students placed ninth out of 46 teams at the national competition held in Oklahoma. They received a trophy for placing in the top ten. The only round they lost was to the Iowa team who ended up winning the national championship. This is the highest a team from Idaho has ever placed.

Thanks to the following Mock Trial Supporters

VOLUNTEER COMPETITION COORDINATORS & STAFF

Alexis Calkin	Jessica Jensen	Jodi A. Nafzger	Louise Wheeler
Kathy Cole	Lynn MacAusland	Eric R. Sloan	Tina Young
Jenny Coon	Hon. Eugene A. Marano	Kali Steppe	Colleen Zahn
Cami Hunt	Karen C. McCarthy	Joan Thompson	
Jenay Hunt	Carol McDonald	Samantha Ward	

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Brad Andrews	Diane Herz	Bern Mussman	Jim Smirch	Trout
Sandy Bain	Tom High	Kirtlan G. Naylor	David Stanish	Delton Walker
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LRE Mock Trial Witness pic tag line A witness is sworn in during the state mock trial competition at the Ada County Courthouse in Boise.

Law Related Education

Controversy and the Constitution Teacher Workshop April 10, 2006

Should intelligent design be taught as part of the public school curriculum? What about the current issues with FISA warrants? Thirty-five teachers gathered at the Shilo Inn in Idaho Falls to learn more about these issues and the importance of appropriate discussion and learning about controversial issues in the classroom. Kirt Naylor, a long-time law-related trainer and attorney from Naylor and Hales in Boise, examined the history of the separation and establishment clauses of the first amendment as he presented case law and worked with teachers to find arguments on both sides of the issue. Beth Ratway, a national law-related education facilitator from Wisconsin, followed up with lesson plans and teaching strategies that stressed the importance of making accurate information available, presenting a balance of viewpoints and establishing an atmosphere where students feel they can be respected for their ideas. During lunch, David Adler, political science professor from Idaho State University, focused on the Law Day theme Separate Branches, Balanced Powers by discussing issues relating to FISA warrants and how the office of the presidency has changed historically over time.

This workshop was part of the Law Related Education Program's Lawyers in the Classroom: Partners in Education Initiative that pairs and trains teachers and lawyers to work together in the classroom. Lawyers who are interested in participating in this program during the 2006-07 school year can check the ISB/ILF website under Education/Law Related Education for information or contact Becky Jensen at bjensen@isb.idaho.gov or (208) 334-4500.

Idaho Court of Appeals

Oral Argument Dates

As of May 5, 2006

Boise Term

Thursday, June 8, 2006

9:00 a.m.

10:30 a.m.

1:30 p.m.

State v. Workman

#31968

State v. Alladin Bail Bonds

#32323

Lewis v. Dept. of Transportation #31833

Tuesday, June 13, 2006

9:00 a.m.

10:30 a.m.

1:30 p.m.

State v. Cardenas

#31758

Open

Open

Note: The group of cases set for Tuesday, June 13, 2006 at 10:30 a.m. are consolidated.

The regular fall terms for the Idaho Supreme Court and the Court of Appeals of Idaho will start again in August. Look for the calendars in the July issue of the *Advocate*.

For June *Advocate* court information see page 38 for Cases Pending and page 24 for Michael Henderson's column on 2006 Legislative changes in the Law.

For more information visit their website:
www.isc.idaho.gov

Official Notice Court of Appeals of Idaho

Chief Judge
Darrel R. Perry

Judges

Karen A. Lansing

Sergio A. Gutierrez

Regular Spring Terms for 2006

2nd Amended - 3/8/06

Boise January 10 and 12

Boise February 2, 14, and 27

Boise March 13 and 14

Eastern Idaho.....March 16 and 17

Moscow.....April 12, 13 and 14

BoiseMay 9, 11, 16 and 18

Boise.....June 6, 8, 13 and 15

By Order of the Court
Stephen W. Kenyon, Clerk

NOTE: The above is the official notice of setting of the year 2006 spring 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.

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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

Annual Meeting CLE

Terence F. MacCarthy: Master Lawyer and Teacher

James J. Davis

Attorney at Law, Boise, Idaho

A little over two years ago I witnessed Terence F. MacCarthy (“Terry”) regale a roomful of lawyers at an American Bar Association seminar with his unique approach to cross-examination. It was the best seminar on trial practice that I have “experienced.” It was one of those experiences that you want to share with friends. Later, I had the pleasure of meeting Terry and I asked him whether he would be willing to present his brand of cross-examination and impeachment in Idaho. Thanks to the Idaho State Bar Commissioners and the Litigation Section Council, I am delighted to report that Terry will be presenting two seminars at the Idaho State Bar Annual Meeting in July. On Wednesday afternoon, July 19, Terry will demonstrate “Look Good Cross,” and the following morning he will present “Impeachment—Weapons of Mass Destruction.” Whether you are a novice or an experienced litigator or you practice civil or criminal law, you will find Terry’s seminars entertaining and informative. Mark your calendars because you will not want to miss him!

Terry is one of the nation’s most sought-after speakers at continuing legal education programs. He has lectured in all fifty states and over a dozen foreign countries. He has been rated as one of the top four CLE speakers in the country and has been called “1/4 America’s most popular and respected teacher of lawyers” His lecture style has been described as “... engaging, animated, roguish, and unusually intelligent.”

Terry is the Executive Director of the Federal Defender Program in the United States District Court for the Northern District of Illinois. He was selected for this position in 1966 by the judges of the United States District Court and the deans of the six Chicago law schools. The office is frequently mentioned as being one of the best defender offices in the country.

He received a Bachelor of Arts in philosophy from St. Joseph’s College in 1955, and a Juris Doctor from DePaul Law School in 1960. He was a law clerk to former Chief Judge William J. Campbell of the United States District Court for the Northern District of Illinois. He also served for several years as an Illinois Special Assistant Attorney General, specializing in civil trials and appeals.

Terry has taught at the National Criminal Defense College every year since its inception, and he has taught at virtually every other criminal defense trial advocacy program of note throughout the United States. Terry’s cross-examination method is taught at the National Criminal Defense College and the United States Department of Justice as a preferred method of cross-examination. He is a member of the faculty of the Western Trial Advocacy Institute, the Northwestern Short Course and the University of Virginia Trial Advocacy Institute, and he has taught at Gerry Spence Trial Lawyer’s College.

He has received numerous awards in his extensive career. In the last five years alone, he has received the “Defender of the Century” Award from the Federal Defenders Association, the Inns of Court

Professionalism Award from the Court of Appeals for the Seventh Circuit, the Charles English Award from the American Bar Association Criminal Justice Section, the Laureate Award of the Illinois State Bar Association, the Public Interest Award for Excellence from the Chicago Chapter of the Federal Bar Association and the United States District Court of Illinois, and the First Defender Award from First Defense Legal Aid.

Terry has been a member of the American Bar Association for over thirty years. He has chaired the Criminal Justice Section and he has served on its council for over twenty years, seven as a Section representative in the House of Delegates. He joined the Board of Governors at the conclusion of the 1997 annual meeting.

In addition to all of the national recognition Terry has received for what he has accomplished, it would be remiss to not also recognize him simply for who he is as a person. While he is a character, he also has character. He is personable, genuine and integral. When you meet him for the first time, he makes you feel like you have known him for years. His personal attributes have made him friends throughout the world.

I still smile when I think how he controlled that roomful of lawyers two years ago like we were the witnesses subject to his skilled cross-examination. His audience was spellbound throughout that seminar. We are privileged to have Terry speak to us on cross-examination and impeachment. Plan to meet Terry at the Idaho State Bar Annual Meeting in July. Expect to be entertained and educated by a true master in a way you have not experienced before!



**Idaho State Bar
2006-2007 Annual Meeting
CLE Speaker**

Terence F. MacCarthy Executive Director of the Federal Defender Program in the United States District Court for the Northern District of Illinois.

Annual Meeting Series

Lessons from the Masters

Betty Richardson
CLE Program Attorney

The Continuing Legal Education Committee of the Idaho State Bar plans and oversees the CLE programming of subjects, speakers, course materials and policies. The Committee recognizes that every profession has “masters,” senior members who have inspiring and instructive experiences that are well worth sharing with others, and it takes seriously its responsibility to provide relevant programs that will enable practitioners at all stages of practice to hone their professional skills. To that end, the CLE Committee recently decided to inaugurate a new series of presentations to be entitled: “Lessons from the Masters.”

The annual meeting of the Idaho State Bar appeared to be the ideal forum at which to offer the inaugural “Lessons from the Masters” presentation. The Committee identified three Bar members - one from northern Idaho, one from southern Idaho and one from eastern Idaho - to comment on one of the most significant cases of his career. Each of these experienced attorneys will discuss lessons they learned and from which all practitioners can benefit.

- Scott W. Reed, Coeur d’Alene, is perhaps best known in the Idaho legal community for his outstanding advocacy in environmental cases. He will discuss Kootenai Environmental Alliance v. Panhandle Yacht Club, the 1983 case in which the Idaho Supreme Court held that the public trust doctrine applies to state-owned submerged lands within the state.

- One of the most well-respected media law and civil rights attorneys in the state, Allen R. Derr, Boise, will talk about Reed v. Reed, the landmark decision in which the United States Supreme

Court first declared that a state law discriminating against women violated the equal protection clause of the United States Constitution.

- Widely recognized as one of the state’s premier civil and criminal law practitioners, Fred D. Hoopes, Hopkins Roden Crockett Hansen & Hoopes, PLLC, Idaho Falls, will comment on his successful representation of Charles Fain in a Habeas Corpus proceeding. Fain had been convicted of murder in state court and served 18 years on Death Row before he was exonerated based on DNA evidence.

As the Idaho State Bar looks to its future, it is important that it also recognizes and honors its past. As William Shakespeare wrote in *The Tempest*, “What’s Past is prologue.” By studying historic cases and hearing from the attorneys who successfully advocated for their clients, future generations of attorneys can glean valuable lessons, not only as to the substance of the law, but as to the spirit of the law, as well.

Please join your colleagues on Friday, July 21, 2006, at the ISB meeting in Sun Valley, for what promises to be a most memorable series of presentations from three of the Idaho Bar’s most accomplished practitioners.

Idaho State Bar 2006-2007 Annual Meeting CLE Speakers



Scott W. Reed talks about the 1983 Kootenai Environmental Alliance v. Panhandle Yacht Club.



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Idaho Supreme Court and Court of Appeals
NEW CASES ON APPEAL PENDING DECISION
(Update 05/01/06)

CIVIL APPEALS

EASEMENTS

1. Did the district court err by granting summary judgment in favor of the Freemans, confirming four easements over and across Piske's real property

William Piske v. Lloyd Freeman
S.Ct. No. 31816
Supreme Court

ARBITRATION

1. Did the trial court err in determining that the arbitrator ruled on matters not submitted to him?

Daryl Norton v.
California Insurance Guarantee
S.Ct. No. 31558
Supreme Court

BOND FORFEITURE

1. Whether the district court erred by treating the motion to set aside forfeiture as a prohibited motion for extension of time and denying it for that reason.

State of Idaho v. Alladin Bail Bonds
S.Ct. No. 32323
Court of Appeals

SUMMARY JUDGMENT

1. Did the court err in granting summary judgment by weighing the testimony of Albrethsen, and resolving controverted issues of fact?

Carolyn M. Finholt v. Jason Cresto
S.Ct. No. 32448
Supreme Court

POST-CONVICTION RELIEF

1. Whether the court erred when it dismissed the petition as untimely.

Jaimi Dean Charboneau v.
State of Idaho
S.Ct. No. 32120
Supreme Court

2. Whether the court erred in summarily dismissing Franck-Teel's petition for post-conviction relief.

Dee Dee Franck-Teel v. State of Idaho
S.Ct. No. 32180
Court of Appeals

3. Did the court err in summarily dismissing McKinney's successive petition for post-conviction relief pursuant to I.C. §19-2719(5)?

Randy Lynn McKinney v. State of Idaho
S.Ct. No. 29411
Supreme Court

4. Did the court err in concluding that Sapien had failed to prove ineffective assistance of trial counsel?

Adam Sapien v. State of Idaho
S.Ct. No. 31748
Court of Appeals

5. Did the court err by denying Swader's motion for appointment of counsel because it considered the merits of Swader's petition prior to ruling on her motion for the appointment of counsel?

Kalina Swader v. State of Idaho
S.Ct. No. 32114
Court of Appeals

CRIMINAL APPEALS

SUBSTANTIVE LAW

1. Whether the police acted lawfully in ordering the defendants to leave the closed park.

State of Idaho v. Frank A. Gamma
S.Ct. No. 32300/32303-09
Court of Appeals

2. Is ordering the payment of child support pursuant to I.C. § 18-4007(3)(d) a direct consequence of which the defendant must be informed prior to a guilty plea to manslaughter?

State of Idaho v. Gilbert Heredia
S.Ct. No. 32249
Supreme Court

EVIDENCE

1. Whether Santistevan's rights against compelled self-incrimination were violated by a court order requiring him to elect between presenting a full and fair defense or surrendering to a full psychological interview with a state appointed psychologist.

State of Idaho v. David Santistevan
S.Ct. No. 31918
Court of Appeals

2. Did the court err in admitting into evidence an officer's testimony regarding alleged statements made to him by an unavailable declarant in violation of the Confrontation Clause of the Sixth Amendment?

State of Idaho v. Gary Leon Stockton
S.Ct. No. 32034
Court of Appeals

DUE PROCESS

1. Did the state violate Zamora's due process rights by using his pre-Miarnnda silence in order to infer guilt?

State of Idaho v. Joe William Zamora
S.Ct. No. 31960
Court of Appeals

DOUBLE JEOPARDY

1. Was Hussain twice put in jeopardy for the same offense when he was convicted of two separate counts of sexual abuse of a child based on a single, uninterrupted course of conduct?

State of Idaho v. Abdul Aziz Hussain
S.Ct. No. 32046
Court of Appeals
(208) 334-3867

Summarized by:

Cathy Derden
Supreme Court Staff Attorney
(208) 334-3867

RECIPROCAL ADMISSION

The Idaho Supreme Court approved rules submitted by the Bar that allow reciprocal admission with Oregon, Washington, Utah and Wyoming (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.

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(from April 1, 2006, to April 30, 2006)

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Admitted: 4/27/06

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Admitted: 4/27/06

Lincoln Wray Hobbs

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LICENSING CANCELLATION AND REINSTATEMENT

On April 17, 2006, the Idaho Supreme Court entered an order granting Richard Evan Kriger's petition for reinstatement. Mr. Kriger was reinstated to affiliate status for 2006.



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Bar Exam grading for the July 2006 exam will be held in Boise on September 8 & 9, 2006. Following the grading session, a reevaluation team will meet on September 13 in Boise. If you are interested in serving as a member of a grading team or a member of the reevaluation team, call Carol McDonald at 334-4500 or email: cmcdonald@isb.idaho.gov.

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COMING EVENTS

6/1/06 – 7/31/06

These dates include Bar and Foundation meetings, seminars, and other important dates. All meetings will be at the Law Center in Boise unless otherwise indicated. Dates might change or programs may be cancelled. The ISB website contains current information on CLEs. If you don't have access to the Internet please call (208) 334-4500 for current information.

June 2006

(DATES MAY CHANGE OR PROGRAMS MAY BE CANCELLED)

- 1 *The Advocate* Deadline
- 6 **CLE: Professionalism & Ethics Section:**
“My Client? And I Agreed to do What?”
Rule 1.2 Scope of Representation
- 7 Public Information Committee Meeting
- 21 *The Advocate* Editorial Advisory Board
- 21 Delivery of Legal Services Advisory Committee Meeting
- 23 **CLE: Idaho Law Foundation: Your First or Next Business Acquisition**
- 30 **Idaho Trial Lawyers Association Annual Meeting – Sun Valley**
- 30 Idaho Volunteer Lawyers Program Council Meeting – Boise Cascade

July 2006

(DATES MAY CHANGE OR PROGRAMS MAY BE CANCELLED)

- 3 *The Advocate* Deadline
- 4 **Independence Day – Law Center closed**
- 12 *The Advocate* Editorial Advisory Board
- 19-21 **Idaho State Bar Annual Meeting – Sun Valley**
- 19 Idaho State Bar Board of Commissioners Meeting – Sun Valley
- 20 Idaho Law Foundation Board of Directors Meeting - Sun Valley
- 24-26 **Idaho State Bar Exam – Boise Center on the Grove/Moscow**

**For Continuing Legal Education schedules check the
Idaho State Bar website www.idaho.gov/isb**

MCLE Reminder

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 website 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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Volunteer Opportunities



Member participation is vital to the success of the Idaho State Bar and Idaho Law Foundation. Lawyers can and do make a difference by participating on one of the many committees listed below. Committee assignments are three-year terms and each year there are generally one to three openings available on each committee. Time commitments vary with each committee depending upon its function and meeting schedule. In the appointment process, consideration is given to geographic distribution, areas of practice and other committee assignments or ISB/ILF involvement.

Please let us know if you are interested in contributing to the activities of the Idaho State Bar and the Idaho Law Foundation by serving on one of the committees listed below.

Please indicate your 1st, 2nd, or 3rd choice.

Idaho State Bar Committees

- _____ The Advocate Editorial Advisory Board – meets-monthly
- _____ Bar Exam Grading – takes place twice a year
- _____ Bar Exam Question Writers – no meetings
- _____ Fee Arbitration Panels – meets as needed
- _____ Professional Conduct Board – meets as needed
- _____ Lawyer Assistance Program – meets quarterly
- _____ UPOL – Unauthorized Practice of Law – meets twice a year
- _____ I would like more information about Sections of the Bar

Idaho Law Foundation Committees

- _____ Continuing Legal Education - meets quarterly
- _____ IOLTA Fund Committee - meets once a year
- _____ Law Related Education - meets 3-4 times a year
- _____ Idaho Volunteer Lawyers Program Policy Council - meets quarterly
- _____ Fund Development Committee – meets every other month
- _____ I would like more information about Law Related Education Programs such as Mock Trial, Lawyer in the Classroom
- _____ I am interested in participating in the Idaho Volunteer Lawyers Program

Name: _____ Firm: _____

Address: _____ City: _____ Zip: _____

Phone _____ email _____

Have you previously participated as a member of an ISB and/or ILF Committee?

- No
- Yes - Most recent committee assignment(s) _____

Please return this form no later than June 2, 2006
ISB/ILF Committees
P.O. Box 895
Boise, ID 83701

Or email your committee interests to dminnich@isb.idaho.gov

-In Memoriam-

**Wynne M. Blake
1922 – 2006**

Wynne M. Blake was killed, with his wife, Herbie, Monday, March 27, 2006, in a single-car accident near Snowville, UT.

Mr. Blake was born April 10, 1922, in Pomeroy, the only child of Vera Smith and Henry Blake. He attended grade school in Lewiston, then attended high school in Boise, graduating in 1939.

Mr. Blake served in the U.S. Army from 1943 to 1945, leaving the service as a sergeant. He attended the University of Idaho, graduating from its College of Law in 1948.

Mr. Blake practiced law in Lewiston from 1948 through 1995. His career included time as Nez Perce County's prosecutor, Potlatch Forest's general counsel, and chairman of the Lewiston School Board. He also served on the Idaho Fish and Game Commission.

In 1988, Mr. Blake was a recipient of the Idaho State Bar's Distinguished Lawyer Award. It is the highest honor bestowed by the Idaho State Bar.

In the fall of 1995, he married Cherryol Maxine Coulter, known to all as "Herbie," of Lewiston. Together they made their home in Clarkston. Much of the past ten years were spent traveling throughout the country, spending time with their children and most importantly, their grandchildren. They loved the outdoors, gardening, crafts, movies and music.

Friends describe Mr. Blake as a man deeply involved in his community and family. He is survived by eight children and their spouses: Mary T. and Ron Craig of St. Maries; Idaho, Ann and Steve Snyder of Encino, California; Joan Jerman of Seattle; Sue and Dick Couper of Seattle; Beth and Les Pettet of Camas, Washington; Scott and Jill Blake of Hayden Lake, Idaho; Todd and Marilyn Blake of Lewiston; and Megan Blake of England; nine grandchildren and two great-grandchildren.

-Recognition-

Meuleman Mollerup received the "My Boss is a Patriot" award on March 28, 2006 from the National Committee for Employer Support of the Guard and Reserve.

Meuleman Mollerup's commercial litigation/estate planning attorney, CPT Paul A. Boice, served with the Army's 116th Brigade Combat Team as Trial Counsel for the Staff Judge Advocate. Returning to Boise in December after serving a year in Iraq, Cpt. Boice applied for the award in honor of Meuleman Mollerup's ongoing support to him and his family while he was deployed to Iraq.

Meuleman Mollerup is an active associate member of the AGC, and has met the AGC's call to "Support Our Troops".

Richard A. (Ritchie) Eppink, 3L at the University of Idaho College of Law has been chosen for a prestigious Fulbright Award. His approved proposal is to conduct rigorous research on

public legal education (PLE) in Canada and then to build elements of PLE into a project for civic engagement and citizen empowerment in the United States. PLE in Canada is conducted by a long-established network of government-funded agencies that educate Canadians about the law as well as their rights and responsibilities.

Mr. Eppink will investigate PLE as a model for making justice more accessible, understandable, and responsive to diverse populations in the United States. For further information, he can be contacted at eppi0937@uidaho.edu

Trudy Fouser, of the firm Gjording & Fouser, Boise, Idaho, was inducted as a Fellow of the International Society of Barristers at the 2006 annual meeting in Scottsdale, Arizona.

Thomas B. High, of the firm of Benoit, Alexander, Harwood, High & Valdez LLP, Twin Falls, Idaho, was elected to a three-year term on the fifteen member Board of Governors of the International Society of Barristers.

The Society is made up of experienced trial lawyers, judges and academicians from throughout the United States, Canada, Europe and Australia. The Society is dedicated to the protection of the rights of citizens, the independence of the judiciary, the preservation of the jury trial system, and the promotion of professionalism in the practice of law. There are six Fellows in Idaho.

-On The Move-

Brian J. Coffey has joined the firm Hall, Farley, Oberrecht & Blanton P.A. Brian graduated from the University of San Diego with a B.A. in History. He obtained his J.D. from the University of San Diego, School of Law. His practice is concentrated in civil litigation and he has experience in the areas of insurance defense, construction defect and medical malpractice.

Mr. Coffey is a member of the Idaho and California State Bar, the American Bar Association, and the ABA's Litigation and Business Sections. He currently serves on the Board of Directors of Hidden Springs Charter School and is active in the Boise Metro Chamber of Commerce.

Karen O. Sheehan joined the firm Hall, Farley, Oberrecht & Blanton, P.A. as an associate. She received her B.A. degree from Bucknell University and her J.D. with honors from George Washington University Law School. Prior to joining the firm, Ms. Sheehan held senior associate positions with law firms in both Washington D.C. and the Boise area. She practices in the area of employment, estate planning, construction contracts and claims, and commercial litigation. She represents businesses in a variety of legal matters including business formation, contract negotiation and counseling on legal and employment issues. Karen is licensed to practice law in Idaho, Maryland, Virginia and the District of Columbia.

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COMING EVENTS

See Page 31

**Continuing Legal Education
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