

The Advocate

Official Publication of the Idaho State Bar

Volume 49, No. 3

March 2006



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On the Cover: The photo was taken by Teresa Hill, Stoel Rives, Boise. Stoel Rives sponsored their lawyers to provide Disaster Legal Assistance to Hurricane Katrina victims. The photo was taken at sunset in Waveland, Mississippi, 60 miles east of New Orleans.

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

Do You Know Your Gadgets Better than Your Colleagues?

Hon. Rick Carnaroli



My time on the Idaho State Bar Commission has blessed me with the opportunity to meet and work with many wonderful people around this state. I've made

many new friends. The ranks of the Idaho State Bar are loaded with good lawyers and good human beings who are generous with their time, money, advice and friendship.

However, from time to time I hear from some lawyers who are unhappy with their careers. They express that they are disenchanting with the profession and feel isolated and disconnected from their colleagues. They point to a loss of professionalism and growing incivility among lawyers. Incivility is a real problem; and it is sad to see the occasions when members of our profession are personally attacking one another instead of fighting about their clients' issues.

Why would friends and colleagues act in such a fashion? Sure, we've got some rascals in the profession, just like any other profession. But, I also have a theory that all of our gadgets are making it easier to be impersonal in our professional relationships with one another and more distant from our colleagues. Here's why.

Consider the arrival of the Internet and on-line research. We gained a faster, more accurate, more convenient way to do legal research. But, what did we lose? We used to meet each other in county law libraries and in the small libraries we maintained in our law firms. As book subscriptions were cancelled and collections disappeared from the bookshelves, so did the lawyers. The law libraries were places where we would meet, exchange greetings, converse and discuss the law, family and local news. Now, we do not leave our offices to do legal research.

We used to meet in person more often to do business. We would gather around our conference room tables, meeting face-to-face, shaking hands and conversing about most anything both before and after our business was done. Today, we have the tele-

phone conference and videoconferencing. We certainly save time and travel expense with these tools. But, we gather on a common line, go right to the business and hang up at the end of the call without socializing much, if at all.

We used to go to the courthouse more often and interact with courthouse personnel. We knew the clerks and the court marshals much better than we do today. The clerks were the people that young lawyers looked to for practical advice and to help them navigate through the courthouse. Who better to ask than the court marshals about the outcome of a recent trial? Fax machines, hired couriers and runners bring almost everything to court for filing these days. Efficient? Certainly. Impersonal? Absolutely. And, soon e-filing will replace the couriers and runners. If we get any more efficient, the courthouse staff may someday need to wear nametags.

Even the law office itself is undergoing change. Voice recognition software is being used to replace dictation equipment. Computers have improved word processing by leaps and bounds and many lawyers do their own word processing. Fewer legal secretaries are needed in an office. Empty libraries. Empty bookcases. Empty desks. Some lawyers are engaging in "cyber-officing", working at a computer and a phone at home, and going to the office primarily to meet clients and pick-up and sign mail. They e-mail their work to the office and work with their office staff over the phone and on-line. Empty offices are next.

With a cell phone, we can do business anywhere. We do so much business by cell phone, that the cell phone often interrupts other business. Why have a receptionist to speak to and to take messages for you? Leave a voicemail. Answering services and answering machines were quickly replaced weren't they?

Modern technology has certainly saved time and money. But, if we are suffering from a lack of connection with each other

in this profession, current and future technology does not appear likely to bring us tools that will bring us closer together as colleagues.

The gadgets won't go away. Better ones are on the way. The old ways of doing business on a much more personal level are not likely to return. So, how can we improve the quality of relationships between attorneys and make everyone feel a bit more connected?

One solution to improve the day-to-day practice of law may simply lie in your present and future involvement in bar associations. It may be that involvement in local bar associations is going to be critical to developing and improving relationships between members of the profession. Try your local Inns of Court. If you are already involved locally, branch out and get more involved in the Idaho State Bar, or in a practice section. If you feel that collegiality is lacking in this profession, take the opportunity to build friendships among your peers in the Bar and see if we can make some improvements in our relationships and find more enjoyment in the practice of law. Call, fax or e-mail someone today and get involved.

The Hon. Rick Carnaroli is serving a 12-month term as president of the Idaho State Bar Board of Commissioners. He 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. He was admitted to the Bar in 1985. He was later admitted to practice in the U.S. Court of Appeals for the Ninth Circuit in 1993 and to the U.S. Supreme Court in 1999. Judge Carnaroli 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 Bar's Board

NOMINATIONS FOR 2006 ISB COMMISSIONER DUE APRIL 4, 2006

Attorneys in the 6th and 7th districts will be electing a new representative to the Idaho State Bar Board of Commissioners this spring. The new commissioner will replace Judge Rick Carnaroli, Pocatello. Pursuant to Idaho Bar Commission Rule 900, the new commissioner representing the 6th and 7th districts must reside or maintain an office in the 7th district. Commissioners of the Idaho State Bar, the elected governing body of the Bar, serve for three years, beginning on the last day of the ISB annual meeting following their elections. The Board of Commissioners is charged with regulating the legal profession in Idaho, which includes the testing, admission, and licensing of attorneys, overseeing disciplinary functions and administering mandatory continuing legal education requirements. Nominations must be in writing and signed by at least five members of the ISB in good standing, and eligible to vote in the districts. The Executive Director must receive nominations no later than the close of business on April 4, 2006. A nominating petition form may be obtained by calling the office of the Executive Director at (208) 334-4500 or on the ISB website www.idaho.gov/isb. Ballots will be mailed to all members eligible to vote in the 6th and 7th districts on April 17, 2006. All ballots properly cast and returned to the executive director will be counted by a board of canvassers at the close of business on May 2, 2006.

SUBMIT NOMINATIONS FOR 2006 AWARD RECIPIENTS—Each year, the commissioners select individuals to receive awards for their commitment and service to the profession and the public. The awards acknowledge those who have given of themselves to improve the legal profession, provide pro bono legal services, and exemplify the highest standards of professionalism. On page 44 is the description of the awards given and a nomination form. We encourage you to nominate individuals that you feel deserve recognition for their efforts and contributions. Please submit your nominations by April 3, 2006.

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.

PUBLIC LAWYERS AND PUBLIC LAW OFFICES ABA AWARDS—The ABA is accepting nominations for awards honoring outstanding public lawyers and public law offices. The Hodson Award recognizes outstanding accomplishments by a government of public sector law office. The Nelson Award recognizes outstanding contributions to the ABA by an individual government or public sector lawyer. The Dorsey Award honors an outstanding public defender or legal aid lawyer. Nominations for the three awards are due April 18, 2006. For a nomination brochure, or more information, please contact Theona Salmon at (202) 662-1023 or

salmont@staff.abanet.org or visit the Government and Public Sector Lawyers Division at www.governmentlawyer.org

LAW DAY—MAY 1, 2006. The theme this year is Liberty Under Law: Separate Branches, Balanced Powers. Contact your local District Bar for more information about activities in your area. Information about Law Day Activities is also available on the ABA website www.lawday.org. Lesson plans for lawyer classroom visits are available through the Law Related Education Program. To search by topic or grade level go to http://www2.state.id.us/isb/gen/lre_lesson_plans.asp on the Idaho Law Foundation's website or contact Becky Jensen at bjensen@isb.idaho.gov or (208) 334-4500.

LEXISNEXIS MARTINDALE-HUBBELL LEGAL FELLOWSHIP—The LexisNexis Martindale-Hubbell Legal Fellowship was created to support the continued development of individuals and associations that embrace the advancement of education, the practice of public interest, and diversity in the legal profession. The Fellowship is funded by revenues received from the sale of the Martindale-Hubbell Peer Review Rating Acknowledgements, which offer peer review rated attorneys the opportunity to display their Peer Review Rating while contributing to the future of the legal profession. Martindale-Hubbell Legal Fellowships are granted bi-annually, in June and December, with a minimum award of \$15,000. Eligibility Requirements: to be eligible for the bi-annual Martindale-Hubbell Legal Fellowships your organization must hold non-profit [501(c)(3)] status. You must submit a full description of the organization, accompanied by a proposal of how the award funds will be applied to meet the mission of the Legal Fellowship.

MOCK TRIAL FINALS—The state finals for High School Mock Trial Competition will be held in Boise on March 14-15 at the Ada County, Federal, and Supreme Courts. For more information about the finals please contact Becky Jensen at (208) 334-4500 or email bjensen@isb.idaho.gov

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.

Reciprocal Admission Applicants Admitted

(from January 1, 2006 to January 31, 2006)

Denton P. Andrews

Clarkston, WA

University of Idaho

Admitted: 1/4/06



2005 – The Idaho Law Foundation Year in Review

Diane K. Minnich



MISSION STATEMENT:

The Idaho Law Foundation supports the right of all people to live in a peaceful community. Our mission is to educate all people about the role of law in a democratic society, to provide opportunities for people to avoid and resolve conflicts; and to enhance the education and competence of lawyers.

Through its many program activities, the ILF strives to fulfill its mission and goals. The following are highlights of the past year's accomplishments.

1. Enhance public understanding of and respect for the law and the legal system.
2. Provide and improve access to legal services.
3. Provide programs and services that enhance the competency of members of the Bar.
4. Aid in the advancement of the administration of justice.
5. Generate the necessary funding to fulfill the mission and goals of the organization.
6. Maintain effective administration and management of the Foundation's resources.

Through its many program activities, the ILF strives to fulfill its mission and goals. The following are highlights of the past year's accomplishments.

LAW RELATED EDUCATION

Law Related Education (LRE) is a K-12 civic learning program that empowers young people to become effective, knowledgeable citizens who understand both their rights and responsibilities as citizens. The LRE program staff and volunteers coordinate an extensive teacher outreach and training program, the High School Mock Trial Competition, lawyers in the classroom, and Law Day activities.

In 2005, 186 educators participated in training programs reaching 16,125 students. Another 400 students participated in mock trial competitions and classroom activities. Nearly 190 judges, attorneys and community leaders donated more than 2,080 hours to support LRE programs.

IDAHO VOLUNTEER LAWYERS PROGRAM

The Idaho Volunteer Lawyers Program continues to provide legal services to low income individuals, families and groups. Through case representation by volunteer attorneys, brief services, advice and consultation, and workshops, IVLP served over 1,000 people last year. The program works closely with Idaho Legal Aid Services, and the statewide Court Assistance Offices to assist those with legal needs and limited resources.

Idaho Volunteer Lawyers Program		
	2004	2005
Requests received	1,266	1,222
Assistance provided	1,197	1,222
Cases referred	371	312
Donated hours	6,461	16,612*
Donated services value	\$675,010	\$1,606,958

*Higher number of donated hours is in part attributed to closing old CASA cases.

The Delivery of Legal Services Advisory Council held another referral service training in 2005 to provide consistent and accurate information about available services to staff members who are responsible for answering and directing calls from individuals seeking legal assistance.

INTEREST ON LAWYERS TRUST ACCOUNTS

Over the past 18 years, the IOLTA program has granted over \$3.7 million to law related programs and services throughout Idaho. The organizations funded in 2005 were: Idaho Legal Aid Services, Idaho Volunteer Lawyers Program, ILF Law Related Education, ILF Legal Resource Line, Idaho YMCA Youth Government, Idaho 4-H Know your Government, and law school scholarships. The amount granted again decreased, the 5th consecutive decrease in granted funds. The good news is that grant funds available for 2006 increased 40% over 2005 grant funds.

IOLTA		
	Grants	Organizations
2004	\$184,500	8
2005	\$150,000	7

GUARDIAN AD LITEM

The ILF continues to administer GAL grant funds allocated to the Idaho Supreme Court by the Idaho Legislature. The funds assist Court Appointed Special Advocate (CASA) programs in each of Idaho's seven judicial districts. In 2005-06, \$400,900 was granted to CASA programs assisting children that come under the purview of the Idaho Child Protective Act.

CONTINUING LEGAL EDUCATION

The Idaho Law Foundation and the Idaho State Bar Sections offer legal education programs throughout the state. In 2005, the Foundation offered 19 topics in 21 locations; ISB Sections offered 27 topics in 27 locations. The chart below includes attendance for all CLE programs; Foundation, ISB Sections and the ISB Annual Meeting.

Continuing Legal Education		
	2004	2005
Live seminars	62	56
Attendance	2,407	2,355

FUND DEVELOPMENT

The Foundation continues to focus on its fund development efforts, through the check off on the ISB license form and its spring fundraising campaign. Donations were slightly lower in 2005, in part due to a change in fund development staff.

The Idaho Law Foundation is indebted to the attorneys that volunteer their services and donate their resources to ILF programs and activities. The mission and goals of the organization are only realized with the help and support of our members. Thank you!

Total Attorney Donations		
	2004	2005
General fund	\$44,841	\$39,906
Endowment fund	\$2,000	\$1,350
Total	\$46,841	\$41,256

**HYONG K. PAK
(PUBLIC REPRIMAND)**

The Professional Conduct Board of the Idaho State Bar has issued a Public Reprimand to Twin Falls lawyer Hyong K. Pak, based on professional misconduct.

The Professional Conduct Board Order followed a stipulated resolution of an Idaho State Bar disciplinary proceeding in which Mr. Pak admitted that he violated Idaho Rules of Professional Conduct 1.5(f) ["Failure to provide an accounting"] and 1.8(a) ["Prohibited transaction"].

A client hired Mr. Pak and throughout the representation paid Mr. Pak in cash, property and services. The property provided to Mr. Pak included three rifles and a pistol. The services included mechanical repair work on Mr. Pak's vehicle. At the conclusion of the repair work, Mr. Pak's client gave Mr. Pak an itemized invoice for his repair services. Mr. Pak's client also made a reasonable request of Mr. Pak to provide his client, without charge, an accounting for fees and costs previously collected. Thereafter, Mr. Pak never provided his client with an accounting of the cash and property given to Mr. Pak and the services rendered to Mr. Pak and the values therefor, so that his client could evaluate how much he had paid or contributed to Mr. Pak in exchange for the negotiated attorney's fees for Mr. Pak's representation. The client's valuation of the cash, property and services exceeded the negotiated attorney's fees amount. Mr. Pak disagreed with the valuation, but did not provide an accounting of his valuation to his client.

This exchange of cash, property and services, without values specified or agreed upon, for negotiated attorney's fees also constituted transactions between Mr. Pak and his client that were not fair and reasonable to his client and were not fully disclosed and transmitted in writing to his client in a manner which could be reasonably understood by his client. Mr. Pak's client was not given a reasonable opportunity to seek the advice of independent counsel with respect to the property transactions and Mr. Pak's client did not consent to the values apparently assigned by Mr. Pak to those transactions in writing.

In addition to the admissions that Mr. Pak entered into prohibited transactions with his client and did not provide his client with an accounting for fees collected, Mr. Pak agreed to make restitution in the amount of \$3,000 to his client, involving the return of property and money to his client. That amount represented the difference between the client's valuation of the consideration paid to Mr. Pak and the amount of the agreed upon attorney's fees. The public reprimand does not limit Mr. Pak's eligibility to practice law.

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

**D. SCOTT SUMMER
(SUSPENSION)**

On February 10, 2006, the Idaho Supreme Court issued a Disciplinary Order suspending Meridian attorney D. Scott Summer from the practice of law. The Idaho Supreme Court's Order imposes a twenty-four-month suspension, with twelve months withheld, based upon professional misconduct. The period of suspension commenced on the date that Mr. Summer was suspended on an interim basis, July 21, 2005.

The Idaho Supreme Court's Order followed a September 14, 2005 disciplinary hearing before a Hearing Committee of the Professional Conduct Board. That hearing culminated with the Hearing Committee's recommendation that Mr. Summer be suspended from the practice of law for twenty-four months, with twelve months withheld and placed on probation for a period of twelve months following reinstatement. Based upon that hearing record, the Idaho Supreme Court found that Mr. Summer violated Idaho Rules of Professional Conduct 8.4(b) [Commission of a Criminal Act], 8.4(d) [Conduct Prejudicial to the Administration of Justice] and Idaho Bar Commission Rule 505(b) [Criminal Conduct].

In June, 2003, the Idaho State Bar brought a formal disciplinary complaint alleging that Mr. Summer was charged and ultimately convicted of attempted grand theft by deception, a felony, following a jury trial. The criminal case related to Mr. Summer's civil representation of a client

concerning two unrelated 1996 automobile accidents that occurred eleven days apart. Mr. Summer's client suffered injuries in the first accident. The other driver in the first accident was assigned fault and was insured by State Farm. The second accident involved a truck from Boise Cascade Corporation that caused no personal injury to Mr. Summer's client, other than aggravation of the previous injuries. Boise Cascade employed an independent adjuster to adjust the accident claim.

Mr. Summer made an offer to State Farm to settle the first accident. He did not report the second accident or any aggravation of his client's injuries resulting from the second accident to State Farm. State Farm agreed to a settlement and Mr. Summer informed his client that his case was closed. However, Mr. Summer wrote a letter to the independent adjuster seeking to settle Boise Cascade's accident, and claimed as damages many of the medical injuries his client had suffered in the first accident. The independent adjuster forwarded the letter to Boise Cascade, which rejected the claim.

Mr. Summer was charged by indictment. The case was tried and the jury found Mr. Summer guilty of attempted grand theft by deception. The district judge entered a withheld judgment on the felony conviction. Mr. Summer was placed on supervised probation for a period of five years, ordered and did complete 500 hours community service that was law related, and paid a contribution to be treated as a fine. The Idaho Supreme Court affirmed the judgment of conviction entered in the district court and that case is reported at 139 Idaho 219, 76 P.3d. 963 (2003).

In addition to the twelve months of actual suspension, the Idaho Supreme Court has ordered that a one-year period of probation shall be imposed upon Mr. Summer upon reinstatement. As a condition of reinstatement, Mr. Summer must also take and pass the Multistate Professional Responsibility Examination and reimburse the Idaho State Bar for the costs and expenses associated with the disciplinary proceeding.

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

Real Property Section—Message from the Chair

Charles A. Homer

Holden, Kidwell, Hahn & Crapo, P.L.L.C. in Idaho Falls

The Real Property Section of the Idaho State Bar is pleased to sponsor the March issue of *The Advocate*. This issue includes articles ranging from a discussion of the ramifications of the recent U.S. Supreme Court Case of [*Kelo v. City of New London*] pertaining to eminent domain, an “insiders” view of the land use planning process. The *Advocate* articles sponsored by the Real Property Section reflect the broad range of topics that are discussed on a regular basis by participating section members of the Real Property Section.

Real Property continues to thrive as one of the largest sections of the Idaho State Bar. We now have approximately 240 members and continue to grow. The current officers of the section are: Charles Homer-Chair, David Ballard-Vice Chair, Cynthia Melillo-Sec/Treasurer, and Bill Nichols-Past Chair. Bernadette Buentgen, Thel Casper, and Brent Schlotthauer are also serving as directors.

We continue to hold section meetings at noon on the first Wednesday of each month at the Idaho State Bar offices in Boise, with several members participating via telephone from locations throughout the state; and also from locations in Utah, Washington and Wyoming. Each month several members gather together in Idaho Falls to participate in the monthly meeting. Section members receive notice each month on the upcoming section meeting and information on how to participate via telephone.

We strive to provide at each monthly meeting a CLE which qualifies for one half-hour of CLE credit in accordance with the State Bar guidelines. The CLE presentations thus far for the 2005-

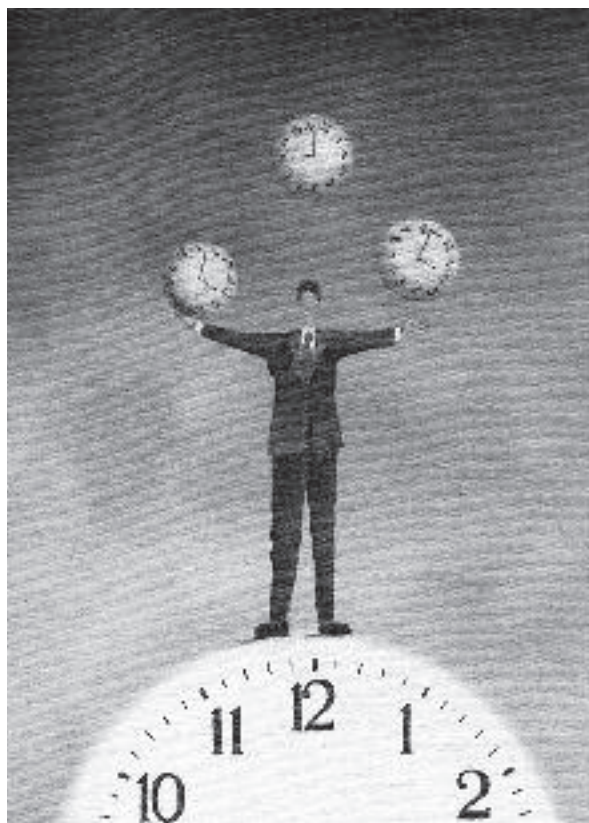
2006 year include discussions pertaining to: (1) conduit lending for the real estate practitioner, (2) legislative updates, (3) real estate investment analysis and 1031 exchanges, (4) the Fair Debt Collection Practices act, (5) Idaho water law principles for real estate attorneys, and (6) title insurance endorsements.

The section continues to sponsor CLE programs each February and at the Idaho State Bar's Annual Meeting. The CLE sponsored by the section at the 2005 Annual Meeting in Post Falls involved a discussion of recent updates to the Real Property Form book published by the Real Property Section. On February 24, 2006 in the Boise at the Centre on the Grove, our annual CLE will focus on condominium development and condominium owners associations.

It is our desire to continue to be a strong section of the Idaho State Bar, which benefits all who participate. If you are interested in any aspect of the practice involving real property, please consider becoming a member of our section.

ABOUT THE AUTHOR

Charles A. Homer is a member of *Holden, Kidwell, Hahn & Crapo, P.L.L.C. in Idaho Falls, Idaho*. He graduated from Brigham Young University in 1971 with a B.A. in economics and political science and the University of Idaho College of Law in 1974 with a J.D. He currently serves on the board of directors for the Idaho Law Foundation and is Chair of the Real Property section of the Idaho State Bar. His practice is focused primarily on real property, commercial transactions and business litigation.



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Legally Described

David Ballard

Bosch, Daw & Ballard, Chtd.

No Idaho statute expressly requires inclusion of a legal description of real property in an instrument of conveyance; however, the Idaho courts have required that a written instrument purporting to convey real property contain a sufficient description of

the property.¹ Any such instrument is void when it does not provide an adequate description to identify the land it purports to convey, using means either directly from its language or by something extrinsic to which it refers.

A description is sufficient so long as the quantity, identity or boundaries of the property can be determined from the face of the instrument or by reference to extrinsic evidence.² The property description needs only designate the land to be conveyed with reasonable certainty since the purpose of the deed description is not to identify the land, but to the furnish the means of identification.³

A vague description may render a deed void unless it is possible using rules of construction, aided by extrinsic evidence, to identify the property that was intended.⁴ In *Brose v. Boise City Railway & Terminal Co.*, a call in the deed mistakenly described the name of a road that formed a boundary for the property. This defect, however, did not invalidate the deed because the other calls for the legal description sufficiently identified the property and the parties in the chain of title had recognized that the road bounded the property.

In *Haney v. Molko*, a certificate of sale used tax parcel numbers in the description, the legal descriptions of which had been recorded in the Canyon County Assessor's office and matched the full legal descriptions of the property sold. As such, it was possible for someone to identify exactly what had been conveyed by referring to the legal descriptions of the tax parcel numbers. The descriptions were recognized as sufficient because the property being conveyed could be identified, albeit by reference to records located elsewhere in the county's assessor's office.

In yet another case where the deed of trust did not include a legal description, but did recite the street address, the court found this description sufficient because using information contained on the face of the instrument, and by reference to extrinsic evidence, the legal description could be found. Entry of the street address into the Ada County public property master database generated a legal description. Also, a view of the property at the address revealed a residential house with a fenced-in yard and a standard front yard.⁵

However, a street address may not always suffice. In *Garner v. Bartschi*, a brokerage representation agreement described the property as ["4565 Nounan Road, County Bear Lake, City Nounan, Zip 83254, Legal description approx. 500 acres mountain property."] Even though the address provided was the home address of the prospective seller, and the "description" included the approximate acreage to be sold, identification by means of a cross reference to the tax notices for the property was deemed insufficient.

Specifically, the tax notices did not show exactly what property was being conveyed. Consequently, without a legally enforceable description, the representation agreement was rendered unenforceable under Idaho Code Section 54-2050(1)(b).⁶ Likewise, reference to the tax notices in the purchase and sale agreement was deemed an insufficient legal description for conveyance of the property.

The following description from *Lexington Heights Development, LLC v. Crandlemire* was also treated as inadequate because it did not contain a description sufficient to identify the roughly five-acre parcel to be excluded from the sale, nor was there any reference to the boundaries of such five-acre parcel:

The real property located at 1400 West Floating Feather Road, consisting of approximately ninety (90) acres... however excluding the residential dwelling (which will include no more than five acres) and improvements identified below (herein called 'Premises'),

and notwithstanding that the contract provided that the precise size, location, dimensions and configuration of the five-acre parcel excluded from the sale would be determined as follows:

A precise legal description of the Premises will be prepared as a result of an ALTA survey to be obtained by Seller. It is understood and agreed that Seller may sell to a third party the existing residential dwelling situated on the Premises together with no more than five (5) acres immediately surrounding the proposed residential development (which five (5) acres will include the existing tennis court, volleyball court, and swimming pool), the precise size, location, dimensions and configuration of which shall be mutually determined by Seller and Buyer. It is further understood and agreed that within the said excluded five (5) acres, Seller may make available to United Water Corporation a site for a water storage tank provided; however, that all negotiations respecting the location, design, construction and landscaping of the said water storage tank shall be conducted by both parties and any agreement thereon must be approved by both parties.⁷

The Court pointed out that it was clear from the face of this agreement that the excluded property was more than the land upon which the existing structures were located. Although extrinsic evidence could have identified the structures described, there was nothing in the agreement from which one could sufficiently identify the boundaries of the five-acre parcel which was to be carved out of the sale. In particular, the agreement did not reference as the boundaries of the excluded parcel any structure or landmark (e.g., the existing fence enclosing the residence, swimming pool, tennis court, and volleyball court) that could then be identified by parol evidence.⁸

The question in Lexington Heights was not what the contract was intended to be, but, rather, was the contract consummated by being reduced to a writing as prescribed by the statute of frauds? Idaho Code Section 9-505(4) provides that with respect to an agreement for the sale of real property, or of an interest therein, the agreement is invalid unless the same or some note or memorandum thereof is in writing. Furthermore, that writing must be subscribed by the party to be charged, or by his agent, and that evidence of the agreement cannot be received without the writing or secondary evidence of its contents.

Within respect to the statute of frauds an agreement for the sale of real property must not only be in writing and subscribed by the party to be charged, but the writing must also contain such a description of the property, either in terms or by reference, that it can be ascertained without resort to parol evidence. Parol evidence thus may be allowed for the purpose of identifying the description contained in the writing with its location upon the ground, but not for the purpose of ascertaining and locating the land about which parties have negotiated and supplying a description thereof which they may have omitted from the writing. The statute of frauds prohibits oral evidence to establish a contract of this kind. To be distinguished is the admission of oral and extrinsic evidence for the purpose of identifying the land described and applying the description to the property, and that of supplying and adding to a description insufficient and void on its face.

By contrast, in *City of Kellogg v. Mission Mountain Interests Ltd., Co.*, a description of the property as “the lodge and the land on which it is located, along with the ski lift” sufficed because under the circumstances it would be possible for someone to identify exactly what had been conveyed. The conditions were: a map containing a reference to portions of specific sections, designations of the “chair lift,” “ski lodge,” and “ski tower;” there was no more than one lodge and chair lift no. 4 located within the resort; the land under the lodge was to be deeded, not some larger parcel within the resort area; and neither the grantor nor the grantee were uncertain or confused concerning the property conveyed by their agreement because possession of the property had been transferred prior to the agreement.⁹

If a deed is ambiguous, interpretation of the instrument is a factual issue for the trier of fact.¹⁰ In *Nationsbank Mortgage Corporation of New York v. Cazier* the court applied several rules of construction - uncertainties should be treated as ambiguities subject to being cleared up by resorting to the intention of the parties as gathered from the deed, circumstances attending and leading up to its execution, subject matter, and situation of the parties at that time. The court found that the grantor had hired a surveyor to draft a legal description for the one-acre parcel, which was to encompass the home being built on the property and an access to the road, the legal description could be surveyed and the house located within the boundaries of the description, and the description referred to a recorded subdivision adjoining the property which could be located.

In a different setting, the “description” in a record of survey for a lot line adjustment was found to be sufficient because the record of survey explained that it was a lot line readjustment between Lots 2, 3, Block 1, DuMars Subdivision, in the NE 1/4 Section 33, T.4N., R.2E., B.M., Ada County, Idaho; depicted both the original lot line and the adjusted lot line; and showed the courses and distances of the common boundary between the reconfigured lots; and identified the lot, block, street, city, county, and state where both lots were located.¹¹

In further regards to other recorded documents, items set forth therein may become part of a legal description. Thus, when a description in a deed refers to a plat, all the particulars appearing upon the plat are to be regarded as expressly recited in the deed.¹²

Lastly, the next two examples illustrate some of the types of corrections that may be made to recorded instruments. In the first instance, a deed is void where it contains a blank as to, or in, the description of the property, and such blank is not filed in before delivery.¹³ Accordingly, in *Dahlberg v. Johnson's Estate*, the insertion of the description in the deed, after it had been signed, did not validate the deed, notwithstanding the fact that the description was the description of the property which the grantor intended at the time the deed was signed.

Finally, as in *Sartain v. Fidelity Financial Services, Inc.*, a party to a conveyance of real property, under the doctrine of relation back, may correct an erroneous legal description in the original deed by filing a subsequent or “correction” deed, which then becomes effective as of the date of the original deed. Such a correction is allowed when it reflects the original intent of the parties and there is no fraud, the rights of third persons have not intervened, and equity could have reformed the deed. But, as against third persons, an alleged defective deed can be cured only by a bill in equity, not by a confirmation assuming to relate back to the original deed. Under this rule, a beneficiary under a deed of trust, which also contained the correct street address for the property, was able to correct a typographical error involving an incorrect block number of the lot.¹⁴

In closing, a practical test for any description to meet may simply be to evaluate whether the property can be located from the information provided in the description.

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ENDNOTES

¹In re Miller, 260 BR 158 (Bankr.D.Idaho 2001).

²Haney v Molko, 123 Idaho 132 (Ct.App. 1992).

³In re Miller, Id.

⁴Brose v Boise City Railway & Terminal Co., 5 Idaho 694 (1897).

⁵In re Miller, Id.

⁶Garner v Bartschi, 139 Idaho 430 (2003).

⁷Lexington Heights Development, LLC v Crandlemire, 140 Idaho 276 (2004).

⁸Lexington Heights Development, LLC v Crandlemire, Id.

⁹City of Kellogg v Mission Mountain Interests Ltd., Co., 135 Idaho 239 (2000).

¹⁰Nationsbank Mortgage Corporation of New York v Cazier, 127 Idaho 879 (Ct.App. 1995).

¹¹Adams v Anderson, ___ Idaho ___, 2005 WL 3498307 (2005).

¹²Boise City v Hon, 14 Idaho 272 (1908).

¹³Dahlberg v Johnson's Estate, 70 Idaho 51 (1949).

¹⁴Sartain v Fidelity Financial Services, Inc., 116 Idaho 269 (1989).

The Idaho Contractor Registration— What practitioners should know

Jeremy Pisca
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After more than forty (40) years of debate, in 2005 the first regular session of the 58th Idaho Legislature passed the Idaho Contractor Registration Act* (“ACT”). Short of a full blown licensing program, the Act provides that “[o]n and after January 1, 2006 it shall be unlawful for any person to engage in the business of, or hold himself out as, a contractor within this state without being registered as required in this chapter.”¹ As stated in the Act’s declaration of policy the act “provide[s] a mechanism to remove from practicing incompetent, dishonest, or unprincipled practitioners of construction.”² With the Act now in effect, there are several requirements that real estate practitioners should know.

First, the practitioner must understand that very broad definitions of “construction” and “contractor” are utilized. “Construction” is defined as “the performance of building, altering, repairing, adding to, subtracting from, improving, reconstructing, moving, excavating, wrecking or demolishing any building, highway, road, bridge, or other structure, project, development or improvement to real property, or to do any part thereof, including the erection of scaffolding or other structures or works in connection therewith.”³ A “contractor” is defined as “any person who in any capacity undertakes, offers to undertake, purports to have the capacity to undertake, or submits a bid to, or does himself or by or through others, perform construction...”⁴ The broad definition includes all persons – including general and subcontractors – who may be performing any type of work on a construction project. Such a broad definition of construction is very similar to the definitions used in surrounding states.⁵

Along with the broad definitions of construction and contractor, an extensive list of exemptions is contained in the Act. For example, all persons who are “licensed, registered or otherwise regulated by the state of Idaho,” in a construction trade do not have to register under the Act so long as they are acting within their licensed scope of practice.⁶ That list includes architects, electricians, engineers, public works contractors, plumbers, construction managers, and HVAC installers – all of whom were required to be licensed with the state of Idaho prior to enactment of the Act. Also exempt are: employees, volunteers, bonafide educational curriculums and non-profit charitable activities.⁷ Similarly, a “handyman” exemption has been provided. Any person performing construction on a project in which the aggregate price for labor and materials is less than \$2,000, does not need to register under the Act.⁸ An owner performing work on his own property, or acting as his own general contractor is likewise exempt from registration so long as that person does not have the intent to evade the chapter, and is not acting with the intent to “flip” the property within twelve (12) months of completion of the construction.⁹ Also exempt are government entities, public utilities, mining operations, suppliers of materials, farmers or ranchers engaged in agriculture, irrigation operations, owners of commercial properties performing their own construction or commercial lessee’s with the owner’s consent, real estate licensees acting within the scope of their licensure, loggers, as well as others.¹⁰

Regulation of the contractors registration program will be administered by the Idaho Contractors Registration Board (“Board”, which is an occupational board within the Idaho Bureau of Occupational Licenses. Similar to other regulatory boards within the State of Idaho, the Board has the ability to accept or reject applications; hold public meetings; conduct disciplinary hearings; furnish standards and prescribe rules; and investigate and discipline registrants.¹¹

The new law will also affect the procurement of building permits. Under the Act, city and county clerks issuing building permits will be required to check for the contractor’s registration. The Act requires that the “registration number presented shall be conspicuously entered on the face” of the building permit. If a person lawfully exempt from the registration requirement applies for a building permit, the face of the building permit “shall conspicuously contain the phrase “no contractor registration provided.”¹² Furthermore, all building permits issued must be posted at the construction site in a conspicuous manner.¹³ Some issuing authorities are in the process of enacting ordinances to deny building permits to unregistered contractors altogether.

While the Act stopped short of a licensure program with educational and performance standard requirements, the Act does provide a significant measure of consumer protection. Applicants for registration are required to list a social security number for natural persons, or an employer tax identification number for a registering business entity.¹⁴ Similarly, the registrant must list the “name and address of each principal, member, partner, shareholder, or any other person claiming an ownership interest in the business entity for which the registration is being applied for.”¹⁵ In this way, it is the intent of the law to stop the “shell game” of contractors who have been denied registration in the state of Idaho, or received disciplinary action in another state. In addition, all contractors registering under the Act are required to present satisfactory proof that the applicant is in compliance with Idaho’s workers compensation statutes and have in effect a workers compensation insurance policy, unless otherwise lawfully exempt.¹⁶ The applicant must also present proof that the applicant has in effect a “general liability policy” which includes products and continued or completed operations insurance with single limits in an amount of not less than three hundred thousand dollars (\$300,000)¹⁷ The application is made under oath, and must include a statement that no person with an ownership interest in the construction entity has ever been denied or had revoked a contractor’s license or registration in Idaho or any other state.¹⁸

Registrations, once issued, are neither transferable nor assignable.¹⁹ After issuance of a registration number the contractor must “prominently display his contractor registration number for public view in his place of business, on advertising, contracts, permits, company or business letterheads, and purchase orders and subcontracts within sixty (60) days of issue of registration.”²⁰

Most important to the practitioner, or course, are the significant penalties that can be enforced against a contractor who fails to register in accordance with the Act. First, the contractor who does not register

“shall be denied and shall be deemed to have conclusively waived any right to place a lien upon real property as provided for in Chapter 5, Title 45, Idaho Code.”²¹ The law will also affect the lien rights of the supplier of materials who knowingly supplies materials to an unregistered contractor. There is, however, a safe harbor provision contained within the Act. That section states that a subcontractor who is duly registered or a supplier of materials does not lose their lien right “so long as such subcontractor, independent contractor, employee or supplier did not have actual knowledge that such contractor was not duly registered or who reasonably believed that such contractor was duly registered.”²² General contractors, subcontractors and suppliers must be aware of the registration status of those they deal with to ensure their lien rights are protected. In addition, the Act states “it shall be unlawful for a contractor to engage any other contractor who is required by this chapter to be registered as a contractor unless such other contractor furnishes satisfactory proof to the contractor that he is duly registered under the provisions of this chapter.”²³

In addition to risking lien rights, a person acting in the capacity of a contractor without being duly registered under the Act, is guilty of a misdemeanor punishable by a fine not to exceed one thousand dollars (\$1,000) or by imprisonment in the county jail for a term not to exceed six (6) months or by both fine and imprisonment in the discretion of the Court.²⁴ Furthermore, a person acting in the capacity of a contractor without being duly registered may not utilize the courts for “the collection of compensation for the performance of any act or contract for which registration is required by this chapter without alleging and proving that he was a duly registered contractor” or otherwise exempt.²⁵ Prior to enactment of the Act, the Idaho Supreme Court dealt with a similar issue in the case of *Barry v. Pacific West Construction*, 140 Idaho 827, 10B P.3d 440 (2004). In the *Barry* case the court found that a specialty subcontractor was required to hold a public works license and, since it did not, the contract for public works construction was an illegal contract.²⁶ In its decision the Court stated that “the Court will not enforce an illegal contract... Illegal contracts are void and generally the Court will leave the parties where it finds them.”²⁷ Although the Court found the contract illegal, the Court also cited instances in which leaving the parties where it found them would be “unduly harsh.”²⁸ While the Court denied Barry’s ability to sue for contractual damages, the Court did allow recovery under the theory of unjust enrichment, leaving Barry to prove that Pac-West was unjustly enriched.²⁹

Finally, the Board itself may impose discipline by way of informal letters of reprimand, suspension or revocation of registration or imposition of a civil penalty in an amount not to exceed one thousand (\$1,000) dollars and recover costs and fees incurred in the investigation and prosecution of the matter.³⁰ Naturally, before any such sanction can be imposed, administrative due process is granted to the respondent of the complaint. An investigation may only begin after receipt of a written complaint by the Board. Such administrative penalties may be assessed after a finding that a contractor has: violated provisions of the chapter, violated the Consumer Protection Act; employed fraud or deception in obtaining registration or a building permit; violated public laws relevant to contracting; engaged in dishonest or dishonorable dealings; acted grossly negligent or reckless in the performance of construction; had a license or registration revoked, suspended or refused in Idaho or any other jurisdiction; been adjudged mentally incompetent by a court of competent jurisdiction, or interfered with an investigation

or disciplinary proceeding by willful misrepresentation, threats, or harassment.

ABOUT THE AUTHOR



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*For further information about the Idaho Contractor Registration Act, or to check the registration status of a contractor, contact the Idaho Bureau of Occupational Licenses at: 1109 Main Street, Suite 220, Boise, Idaho 83702-5642; by email at ibol@ibol.idaho.gov; by telephone at (208) 334-3233; by fax (208) 334-3945; or visit the IBOL website at <http://ibol.idaho.gov>

ENDNOTES

¹ Idaho Code § 54-5204(1).

² Id. § 54-5202.

³ Id. § 54-5203(3).

⁴ Id. § 54-5203(4)(a).

⁵ See Wash. Rev. Code § 18.27.010, Or. Rev. Stats § 701.005, Nev. Rev. Stat. § 624.020, Utah Code Ann. § 58-55-102.

⁶ Idaho Code § 54-5205.

⁷ Id. § 54-5205(2)(a).

⁸ Id. § 54-5205(2)(f).

⁹ Id. § 54-5205(k)(1).

¹⁰ Id. § 54-5205 (b-d), (e), (g), (i), (m-o)

¹¹ Id. § 54-5207

¹² Id. § 54-5209(1)

¹³ Id. § 54-5209(2)

¹⁴ Id. § 54-5210(1)

¹⁵ Id. § 54-5210(c)

¹⁶ Id. § 54-5210(d)

¹⁷ Id. § 54-5210(e)

¹⁸ Id. § 54-5205(g)

¹⁹ Id. § 54-5214(1)

²⁰ Id. § 54-5214(2)

²¹ Id. § 54-5208

²² Id. § 54-5208

²³ Id. § 54-5204(2)

²⁴ Id. § 54-5217

²⁵ Id. § 54-5217

²⁶ Barry 140 Idaho, 10B P.3d at

²⁷ Id. at 445 (citations omitted)

²⁸ Id. at 446

²⁹ Barry at 447

³⁰ Id. § 54-5215(2)

Public and Private Street Dedications

Dale W. Storer, Esq.
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With the advent of modern computer technology, the process of preparing a subdivision plat has become routine and considerably less expensive than in earlier eras. Unfortunately, such efficiency has brought complacency with respect to the substance of the plat and the manner in which it is prepared. In particular, developers, local planners and their legal counsel often fail to consider the import of the owner's dedication certificate for public streets, alleys and easements and whether or not the manner in which public ways are laid out in the plat truly reflects the owner's intentions. Such laxity often results in disputes and litigation in future years over the ownership and obligation to maintain roads and easements reflected on the plat and over the extent to which such roads and ways could be subject to private control by a limited number of owners. This article will discuss some of the more common pitfalls and the precautions that should be taken to avoid such disputes.

PUBLIC DEDICATIONS

Under Idaho law, a dedication of a public street may be accomplished by statute or under the common law.¹ The elements of a common law dedication are: (1) an offer by the owner clearly and unequivocally indicating an intent to dedicate land and (2) an acceptance of the offer.² In determining an owner's intent to dedicate, the court must examine the plat, as well as the surrounding circumstances and conditions of development and the sale of individual lots.³ The intent to dedicate must be clearly and unequivocally evident and such intent must never be presumed.⁴ Although leaving a blank on a plat, by itself, is not sufficient to prove the intention of the owner to dedicate the premises bounded within the blank space, combined with other circumstances, a blank or undesignated part of a plat may be considered a dedication, if the open space appears to be a continuation of a preexisting road.⁵ The elements for statutory dedication of a public street are set forth in Idaho Code (I.C.) §§ 50-1309, 1310. Such elements are: (1) an acknowledgment of the owner's intent to dedicate a public street, duly acknowledged by a notary public, (2) acceptance by the public agency, and (3) filing and recording of the plat.⁶ The acknowledgment and recording of a plat is equivalent to a deed in fee simple to the areas shown on the plat as public streets.⁷ Once dedicated and accepted by the governing agency, such dedication is irrevocable and the only way a street, alley or way can revert to private ownership is by compliance with the statutory procedure for vacation of streets.⁸

A defective attempt to dedicate under the statute may still be effective as a common law dedication.⁹ A party claiming a right by dedication bears the burden of proof on every material issue involving the asserted dedication.¹⁰ The intent to dedicate must be present at the time the plat is submitted for recording, not a mere declaration of a future intention.¹¹

PRIVATE DEDICATIONS

Idaho recognizes common law dedication of land both for public, as well as for private use.¹² The process for accomplishing a private dedication of a street, alley or way is essentially the same as for a public common law dedication, the only functional difference being that the dedication is for a more limited group of persons, rather than being to the public as a whole. In determining whether the owner intended to offer the land for dedication, the court must examine the plat, as well as "the surrounding circumstances and conditions of the development and sale of lots."¹³

PRIVATE OR PUBLIC STREETS—WHICH CHOICE AND WHEN?

In planning the development of a subdivision, developers are frequently confronted with the choice of whether to dedicate a street for public use or whether to reserve the same in private ownership. That choice has important ramifications extending not only to the immediate development of the property, but for many years later. First and foremost, the choice of whether to dedicate a public street or reserve it for private ownership will significantly affect the costs of constructing the street. Streets dedicated to the public are typically subject to a plethora of local regulations establishing street width, thickness of asphaltic pavement, gravel ballast, curb, gutter, sidewalk design and other construction criteria. Conversely, private streets are typically not regulated by local governmental entities and as a result, are generally less expensive to construct. Private streets are also not subject to as much governmental scrutiny regarding their physical layout and location. The choice of whether or not to dedicate a public street is also dictated by provisions in the local governmental ordinance requiring access to a dedicated public street — some subdivision ordinances do not allow structures to be built if their sole access to a public street is through a private road.

Secondly, and equally as important, are the ramifications of private ownership upon the future obligation to maintain the street. If a street is dedicated to the public, then the public entity will assume that obligation; conversely privately dedicated streets leave the burden of maintaining streets upon adjoining owners, often to their surprise if they have not been diligent in researching that issue before purchasing their property. Street maintenance costs do not tend to be significant during the early years of ownership, however in later years street maintenance can be a significant expense.

The choice of public versus private ownership also affects the location of public utilities (e.g. telephone, natural gas, water, sewer) serving the properties fronting upon the privately dedicated street. Again a developer who opts for the private street approach must carefully ensure the scope of private street easements is sufficiently broad to allow necessary utilities to serve all of the lots within the subdivision. Dedicating a street or way for public use also brings the dedicated area within the police powers

of the city or county to whom the road is conveyed. Hence, unlike its private counterpart, a public street, once dedicated becomes subject to a variety of regulatory provisions such as speed restrictions, load limits, parking regulations and vehicular equipment requirements. Finally, leaving the street in private ownership also reserves greater control by the private owners over the identity of persons using the private road. Greater private control is often highly desirable, particularly if a private street provides access to a stream, lake or other natural resource and the adjoining property owners do not wish to be pestered by public pedestrian or vehicular access adjacent to or across their properties.

As always, the determination of public versus private streets should be made at the outset of the project, typically upon the filing of a subdivision plat. Once a property is subdivided and lots are sold to subsequent owners, it may be very difficult to later obtain the necessary consents from everyone should the owners decide to dedicate the private road to the public. The same is true if the adjoining owners desire to vacate a publicly dedicated street. Careful consideration of this choice should always be made at the outset of any development project, after consideration of the ramifications noted above.

CONCLUSION

Developers, local planners and their legal counsel should meticulously review all subdivision plats with which they are involved in order to ensure the plat accurately reflects the owner's intent with respect to the dedication of streets, alleys and easements therein. Publicly dedicated streets should be clearly marked on the plat and should be given a street name. If the owner intends to dedicate common areas or roads to and for the benefit of the public as a whole, such intent should be clearly reflected on the plat. Conversely, if property is to be reserved in private ownership, the drafter should either ensure such property is given a lot and block number or such areas should not be included within the plat at all. Blank, undefined areas on the plat and phrases such as "reserved for future use," "reserved for future street," "reserved" or similar vague phrases should be avoided. Depiction of previously granted private easements on the plat should also be avoided, unless the owner's intent to reserve private ownership thereof is clearly noted. By following these simple precautions, future disputes and costly litigation can be avoided.

ABOUT THE AUTHOR

Dale W. Storer is a partner in the Idaho Falls Law Firm of Holden, Kidwell, Hahn & Crapo. His area of emphasis is local government law and land use and development. He has also served as the City Attorney for the City of Idaho Falls for over twenty-five (25) years.

ENDNOTES

¹ *Ponderosa Homesite Lot Owners v. Garfield Bay Resort, Inc.*, 139 Idaho 669, 85 P.3d 674, (2004).

² *Ponderosa Homesite Lot Owners*, 139 Idaho at 669; *Sun Valley Land and Minerals*, 138 Idaho 543, 66 P.2d 798 (2003) and *Pullin v. Victor*, 103 Idaho 879, 655 P.2d 86 (Ct. App. 1982).

³ *Hayman v. Fox*, 100 Idaho 140, 594 P.2d 1093 (1979).

⁴ *Pullin v. Victor*, 103 Idaho at 881; *Haman v. Fox*, 100 Idaho at 146.

⁵ *Dunham v. Hackney Airpark, Inc.*, 133 Idaho 613, 990 P.2d 1224 (Ct. App. 1999); *Smylie v. Pearsall*, 93 Idaho 188, 457 P.2d 427 (1969).

⁶ I.C. §§ 50-1309, 1310; *Worley Hwy. District v. Yacht Club of Coeur d'Alene, Ltd.*, 116 Idaho 219, 775 P.2d 111 (1989).

⁷ I.C. § 150-1312. The estate conveyed however is not a true fee simple estate, rather it is a "determinable" or "defeasible" fee, which means essentially that the local governmental entity holds the title in trust for the benefit of the public. See *Mochel v. Cleveland*, 51 Idaho 468, 5 P.2d 549 (1930), 309, 1310; *Worley Hwy. District v. Yacht Club of Coeur d'Alene, Ltd.*, 116 Idaho 219, 775 P.2d 111 (1989).

⁸ *Smylie v. Pearsall*, 93 Idaho 188, 457 P.2d 427 (1969); *Hanson v. Proffer*, 23 Idaho 705, 132 P. 573 (1913). It should be noted however that both of these cases involved statutory dedications. The Idaho Supreme Court has yet to specifically address the proper procedure for vacating a common law public street dedication.

⁹ *Pullin v. Victor*, 103 Idaho at 881.

¹⁰ *Haman v. Fox*, 100 Idaho at 147.

¹¹ *McQuillan Mun. Corp.*, § 33.30 (3rd Ed.).

¹² *Monaco v. Bennion*, 99 Idaho 529, 532, 585 P.2d 608, 611 (1978); *Sun Valley Land and Minerals, Inc. v. Hawkes*, 138 Idaho at 548.

¹³ *Sun Valley Land and Minerals, Inc.*, 138 Idaho at 548.

Idaho State Bar *DeskBook Directory Updates* Changes Needed by 3/10/06

There will be no Directory Updates published in the March *Advocate*. Instead they will be published in the April *DeskBook Directory*. If you will be changing your address and haven't notified the Membership Department please do so by March 10, 2006 to have it included in the 2006-2007 *DeskBook Directory*. To locate any attorney address, or to see if your address information is correct, visit our website at www.idaho.gov/isb and click on the Attorney Directory. If you need to make changes you can call the Membership Department (208) 334-4500, or send changes by email to: astrause@isb.idaho.gov

Representing Clients in Land Use Decisions—A view from the inside

Renee Magee and Joseph H. Groberg
City of Idaho Falls and Idaho Falls City Council

From time to time an attorney is asked to represent someone in a land use matter before a city planning commission or city council. The request may come from a landowner who seeks to annex, zone or re-zone his property, or from the landowner's neighbors who oppose it. The authors of this article are, respectively, the director of a city planning and building department and a member of the city council. We will attempt to provide insider insight into how best to represent clients in such matters. Our discussion will be confined to city land use decisions though the same issues generally arise in county land use decisions, too. The article also will address, in a very brief manner, the laws and unique procedures involved in local land use decisions.

Land use planning has its own vocabulary and is governed by specific state statutes and local ordinances¹. Understanding the specific type of land use matter being considered by the commission or council will guide the attorney to the applicable statutes and ordinances which determine the procedures and legal rights of his client. All of the procedures and rights can be broadly divided into two categories: those that are legislative in nature and those that are quasi-judicial. For example, if neighbors contact an attorney to represent them in connection with a new zoning ordinance being proposed by their city, that matter is legislative. Not only may the attorney and his neighbors prepare statements to present at the public hearing, but they may contact planning commissioners and council members prior to the public hearing and explain their concerns and opinions just as they do with state or federal legislators. If council members have run for office on a platform of better planning or changes to the city's zoning law, those views are known prior to the hearing, and neighbors and others may target their comments to those council members because the hearing is legislative in nature.

However, in our experience few attorneys are contacted about the adoption of comprehensive plans or zoning ordinances. More often attorneys become involved in initial zoning or rezoning requests, conditional use permits, or subdivision proposals, all of which are land use decisions that are quasi-judicial in nature because they concern one particular piece of property.² Whether the land use action is legislative or quasi-judicial in nature affects all aspects of the hearing procedure. Hearings for quasi-judicial land use proposals are more prescribed. Parties are given notice in the manner prescribed by law, they are given an equal and public opportunity to be heard and to rebut testimony, the decision of the city council is based on the record of that hearing which must be transcribable, and following the public hearing the decision-making body must prepare and adopt written findings of fact and conclusions of law. Because a quasi-judicial hearing must be fair to all parties involved, the substance of ex parte contacts with commission and council members, and the identity of the participants in those conversations, must be disclosed on the record.³

Since fairness is the "rule" of the hearing process, the decision makers are to be unbiased. This means that prior to the hearing they must disclose any conflict of interest or any private contact with the parties about the matter at hand.⁴ It even means that once the hearing process is underway, decision makers are not to visit the site without notice to all parties to assure they are privy to all information on which an ultimate decision may be based.⁵

Still, a public hearing in a quasi-judicial land use matter is far from a trial. Here are some important differences to keep in mind. First, the decision-making body, whether a planning commission or city council, is not a completely disinterested trier of fact. Necessarily, to some extent, it also represents the public interest in the outcome because it is charged with making land use decisions that reflect the policies and concerns of the community. It is bound by laws; but, its principal interest is to carry out those land use policies and concerns.

Second, prior to going before a planning commission or city council, any interested person and his attorney can learn the policies and concerns likely to impact a particular land use matter by talking with the city's planning staff. Staff may identify the applicable portions of the comprehensive plan and local ordinances. Staff may further assist by providing the standards and criteria found within the ordinances to be used by the decision-making body in its decision. Staff also may suggest modifications to improve the proposal's chance for success or discuss alternatives not considered by the applicant or the neighbors. In larger jurisdictions the staff often prepares a report which is given to the decision makers prior to the hearing and is available to the applicant and interested parties. Since the staff represents the public, not the applicant or neighbors, it often understands past decisions of the governing body and, therefore, reflects the decision-making body's policies. Staff may also provide ordinances and policies delineating the public hearing process such as whether there will be only one public hearing before the planning commission, which is generally a recommending body only, or whether the city council will hold a second public hearing after receiving the commission's recommendation. Some communities may require a "super-majority" vote for certain actions such as a variance or rezoning under limited conditions. Finally, staff may describe the process of the public hearing, including opportunities for rebuttal, and may provide information on obtaining a transcribable record.

Third, since the hearing is not a trial in the true sense, there are no rules of evidence. All relevant testimony is received whether or not there is foundation or support for it. Accordingly, control over the form and substance of the testimony is much more relaxed. Notwithstanding the more relaxed standard, an attorney representing a participant should avoid repetitive, accusatory, negative or combative testimony or argument. Contentious, emotionally charged public hearings are not a good environment in which

to make sound decisions. In fact, though land use decisions usually are made directly after public hearings, there is no requirement that they be made at that time. After a heated public hearing, a wise planning commission or city council may postpone its decision to a subsequent meeting. If prior to the hearing, the attorney has worked with the city's staff and understands the concerns of the decision-making body, he will do well to keep the public hearing focused on the criteria for the decision, the policies of the governing body as found in the ordinances and, if applicable, comprehensive plan, and the policies as evidenced in similar past decisions.

Fourth, legal counsel and their clients are wise to meet with the adjoining neighbors before the public hearing in order to develop a consensus which is compatible with the applicable ordinances and policies of the community. However, unlike a civil action, parties for and against a land use proposal cannot settle their differences and simply ask the decision-making body to approve the settlement. Not only is the council charged with carrying out the city's land use ordinances and policies, which involve much more than settling disputes between neighbors, the council may not have the legal tools such as contract zoning to implement any consensus. Nevertheless, ameliorating the opposition always enhances one's chance for success. It is especially important that an attorney who represents a neighborhood (as opposed to a specific person or legal organization) also understands who his clients are and what, if anything, he can negotiate on their behalf. Presenting ideas or solutions which address the concerns of all parties, and are within the provisions of the ordinances, may be welcomed by all concerned, including the decision makers. Successful representation of a client's interest before a commission or council may require that an attorney be more mediator than advocate.

Finally, it is surprising how infrequently city land use decisions are appealed to district court. No doubt this is due in part because the case law grants substantial deference to local land use decisions and developers are reluctant to take the city to court when they know they must work with it in the future. If an attorney believes it is in his client's interest to appeal a city's land use decision to the district court, he should remember that the appeal is not a de novo hearing but simply a request to have a judge review the record to determine if it contains support for the decision. Therefore, it is important that the attorney understand the criteria for the decision before the hearing takes place, that the testimony in the record addresses that criteria, and that the record is transcribable. Too often recording equipment at the local government level fails to convey all that was said and who said it. Local decision makers are realistic, and their staff are professionals. It is unlikely that in the future anyone will be treated less helpfully by a city government simply because he appealed one of its land use decisions. At the same time, appeals are an expensive and time-consuming process which if successful may only result in another hearing before the same city council. Gaining familiarity with the comprehensive plan and land use ordinances, the issues as analyzed by staff and one's client, and the concerns of the opposing parties will enhance an attorney's ability to negotiate and suggest solutions which will avoid the necessity of turning to the district court after a decision has been made by the city council.

ABOUT THE AUTHORS

Renee Magee is the director of the Planning and Building Division, City of Idaho Falls. She earned her Masters of City and Regional Planning from Ohio State University and her Juris Doctor from the University of Wyoming. She was admitted to the Wyoming State Bar in 1980 and the Idaho State Bar in 1991. She is presently on inactive status in both bars.

Joseph H. Groberg is a member of the Idaho Falls city council. He received his law degree from the University of Chicago and is a member of the Colorado and Idaho state bars.

ENDNOTES

¹ The statute authorizing land use planning and zoning is the Local Land Use Planning Act, Idaho Code § 67-6501 to 67-6538. Comprehensive plans are adopted by resolutions and zoning requests are to be "in accordance" with the comprehensive plan. Zoning ordinances govern initial zoning and rezoning requests, conditional use permits, planned unit developments, and variances. Subdivision ordinances control the platting process. Other ordinances which may be applicable, depending on the jurisdiction, are sign ordinances, historic preservation ordinances, impact fee ordinances, and specific ordinances addressing public utility systems.

² Cooper v. Ada County Commissioners, 101 Idaho 407, 614 P.2d 947 (1980), Curtis v. City of Ketchum, 111 Idaho 27, 720 P.2d 210 (1986), Angstman v. City of Boise, 128 Idaho 575, 917 P.2d 409 (Ct. App. 1996).

³ Idaho Historic Preservation Council, Inc. v. City of Boise, 134 Idaho 651, 8 P.3d 646 (2000).

⁴ Idaho Code § 67-6506.

⁵ Eacret v. Bonner County, 139 Idaho 780, 86 P.3d 494 (2004).

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Eminent Domain—

Bringing liberals and conservatives together

Reginald R. Reeves
Idaho Falls

While much has been written and reported about the social and other implications of the recent decision of the U.S. Supreme Court, in the landmark eminent domain case of *Kelo v. City of New London*, this writer has neither read nor heard any editorial comment about the much broader land-taking provisions of the Idaho Constitution and statutes.

In the *New London* case, the Supreme Court ruled that local governments may force property owners to sell their homes, buildings, and land, to make way for private economic development, even in an area which is not blighted and where there is no guarantee of the success of the project.

The City of New London wanted to turn 90 acres of waterfront land into office buildings, upscale housing, a marina, and other facilities, to generate a projected \$680,000.00 in property tax revenue, along with hundreds of jobs.

Owners of 15 homes, on 15.4 acres of the proposed site, refused to sell. One owner, Suzette Kelo, had done extensive remodeling on her home, with its view of the water, and had no desire to move elsewhere. Another, Wilhelmine Dery, was born in her home, in 1918, and had lived in it for all of her 87 years.

Writing for the majority, Justice John Paul Stevens concluded that creating jobs in a depressed city could constitute "public use," without violating the Fifth Amendment prohibition against taking private property by government, except for "public use."

The Idaho Constitution, at Article 1, Section 14, allows the taking of private property for public use, upon payment of "just compensation." By way of expanding that power, Section 8 specifies that the legislature may not be prevented from taking the property and franchises of corporations, "and subjecting them to public use, the same as the property of individuals."

Implementing that constitutional provision, the Idaho Legislature authorized the use of eminent domain for, among other things, public buildings and grounds for the use of the State, or any county, city, or school district, and "all other public uses for the benefit of the State or of any county, incorporated city or the inhabitants thereof."

In *New London*, the "taking" was by a city. In Idaho, however, as long ago as 1906, the Idaho Supreme Court allowed Potlatch Lumber Co. to condemn land for the use of a storage reservoir, for logs and other products. *Potlatch Lumber Co. v. Peterson*, 12 Idaho 769.

Elaborating upon the "taking" principle, one year later, in *Connally v. Woods*, 13 Idaho 591, the Supreme Court allowed an individual to use eminent domain to condemn lands for a railroad right of way, explaining its position by stating that "very few states have constitutional provisions as broad as our own [on eminent domain]," and that it "is not made to depend upon the narrow and restricted meaning of the phrase 'public use' as defined by the courts [of such other states]."

A few years later, in 1931, in *Bassett v. Swensen*, 51 Idaho 256, a private individual was allowed to condemn a tract of land (150' x 180'), as a diversion and power site, stating that "the courts of

this state have repeatedly held the right [of eminent domain] is granted to private enterprises in uses necessary to the complete development of the state."

More recently, in 1972, in *Boise Redevelopment Agency v. Yick Kong Corporation*, 94 Idaho 876, the Supreme Court allowed the condemnation of land in "deteriorated and deteriorating areas" of the City of Boise, for an urban renewal project, stating that "[T]he state...through the power of eminent domain" "may legitimately protect the public from disease, crime, and perhaps even deterioration, blight and ugliness." This, in spite of its further holding that although the objectives were "designed to predominately benefit private interests," such private benefit would not invalidate the plan, repeating the 1931 confirmation of the granting of the right of eminent domain to private enterprises, "in uses necessary to the complete development of the state."

In the *New London* case, Justice Sandra Day O'Connor, in a strongly-worded dissent, wrote that the ruling favors the most powerful and influential in society, and leaves small property owners little recourse, and that now, the "specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."

As an example of its possible impact, the decision could enable the District of Columbia to take homes and other property to build a baseball stadium along the Anacostia River waterfront. The Idaho law could allow any individual or corporation to condemn homes, farms, businesses, or underdeveloped land, to remove a "blight," or to provide jobs, or increase the tax base.

Despite the unexpected political alignment shown by the justices in the *New London* case, the chilling effect of that decision is the same. As a result of the majority's opinion, forcibly shifting land from one private owner to another no longer violates the Fifth Amendment to the Constitution, or the much broader provisions of the Idaho Constitution.

ABOUT THE AUTHOR

Reginald Reeves is a Sun Valley resident who practices Family Law in Idaho Falls.

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Real Property, Real Destruction, Real People— Temping as a Mississippi lawyer

Teresa A. Hill
Stoel Rives, LLP

Hurricane Katrina hit the Gulf Coast on August 29, 2005. Two months later I boarded a plane to Biloxi, Mississippi armed with a training DVD, outlines of Mississippi law on key post-hurricane issues, a letter containing my temporary admission to the Mississippi State Bar and two oversized and misshapen t-shirts that simply said “Disaster Legal Assistance” on the front. Words that I feared only too accurately described the kind of assistance I could provide to the people of Mississippi.

The week before I flew to Mississippi I had received a request for volunteers to provide legal advice in Federal Emergency Management Agency (FEMA) Disaster Relief Centers (DRC) along the Mississippi coast. My employer, Stoel Rives, was offering to pay for the trip. Like many others who saw the tragedies of Hurricane Katrina unfold on television, I wanted to help. However, as an environmental compliance attorney I felt ill-equipped to answer the types of questions I would likely be facing—landlord-tenant, bankruptcy, insurance, and real estate—issues I hadn’t considered since the bar exam. Fortunately, with only a week’s notice, once I had volunteered there was no time to chicken out.

I am not sure what I expected Mississippi to be like. I knew I would be staying in an evacuation area in a gutted casino. But, I was naive enough to think the cleanup was well underway. After all, it was two months after the hurricane... I was wrong. The destruction was indescribable. As I drove along the coast highway I saw enormous barges sitting two hundred feet inland, trees stripped of their leaves and blackened with windburn, people living in makeshift shelters building fires for cooking and warmth, bridges out, road signs down, debris everywhere. That was Biloxi. Waveland, a town of 6,500 sixty miles east of New Orleans, was simply erased. All that remains of their City Hall is a set of steps and a sign thanking people for their support during 1969’s Hurricane Camille.

In many ways, time had only worsened legal problems, despair and hopelessness. FEMA checks were running out. People had just received the first round of insurance determinations, which offered little hope of rebuilding. The insurance questions always started out uniquely with pictures of a destroyed home, stories of where people were evacuated, how they survived, and who didn’t. Unfortunately, the stories always ended the same: Homes were outside the flood zone established by Hurricane Camille, so people had no flood insurance. After being pounded by 125-mph winds all night, a 35-foot storm surge hit. Their homes were destroyed. They were being offered minimal or no coverage because their policy covered wind, not water. One client, who referred to the hurricane as “that hussy Katrina,” received \$2,000 from her insurance company for wind damage to replace the roof of a completely destroyed home, a home worth \$70,000 where she and her husband had lived for thirty-five years and raised five sons.

Several forces were at work creating a rising tide of evictions. Buildings that initially were thought to have suffered relatively minor damage were becoming uninhabitable due to mold. Landlords were being denied insurance coverage and were unable to make necessary

repairs. Temporary workers with cash in hand were inundating an already overwhelmed housing market. The most heartbreaking example was a pregnant woman that sought help fighting the eviction of her family (husband and toddler) from a storage unit. The “landlord” wanted to rent the unit to temporary workers willing to pay three times the rent. In this case, as in many cases, the legal issues took a back seat to working with other volunteers like the amazing Ohio Crisis Response Team, to find the family basic necessities such as food and safe housing.

Unscrupulous individuals were also preying on victims of the hurricane: Landlords raising rent to match the tenants’ FEMA check, a manufactured home dealer who refused to refund the down payment on a trailer after he pulled a bait and switch on the purchaser.

There were comical times too. Trying to talk tough on a phone call only to be disarmed by an attorney calling me “honey” or betrayed by my inability to pronounce the town where my client lived (Escatawpa pronounced “Escataba”) and the name of the town where the fraud occurred (Goutier pronounced “Gosher”). The unsolvable problems often had interesting punch lines. A colleague struggled with one man’s question of whether a city was liable for the destruction of his home while he was evacuated. Only in parting did he mention that the house was sitting in, and blocking, a major city street.

On the plane to Mississippi I had feverishly studied Mississippi law, afraid I wouldn’t know the answers to people’s questions. I soon realized that the people sitting across from me seeking my help—people who could have been my mom, or aunt and uncle—didn’t care about my knowledge of the intricacies of Mississippi landlord-tenant law. They needed someone that would listen to them, make a phone call, write a letter, and call them by name instead of their FEMA number. One client grinned from ear-to-ear just hearing me say “I am Miss Krystal’s attorney” to the man that had defrauded her out of \$10,000.

Even though I grew up in poverty and was taught to respect and appreciate the privilege of pursuing a higher education, I had already started taking it for granted. Earning a law degree gives us the power and privilege to work on behalf of people who do not have that power or privilege. Although many of you are likely reminded of this in your everyday work, it took that “hussy Katrina” and the proud people of Mississippi to remind me.

ABOUT THE AUTHOR



Teresa Hill is an associate at the Boise office of Stoel Rives, LLP and is a member of the firm’s environmental, land use and natural resources practice group. Her practice focuses on environmental compliance counseling, permitting and enforcement defense, natural resources litigation, and land use. She received her B.A. from Boise State University, an M.S. in Sociology from the University of Utah, and her J.D. from the University of Utah S.J. Quinney College of Law.

Passing the Torch—Beyond the First 50 Women in Idaho Law

Deb Kristensen
Givens Pursley, LLP

Women for centuries have stood only as spectators before the 'procession of educated men.' Now that barriers to entry have lifted, women are free not only to join this procession but also to rethink its direction and the terms on which they will participate. That opportunity holds great promise for women, the profession, and the public.¹ Virginia Woolf

It is hard to believe a year has passed since the Idaho State Bar sponsored an evening to recognize the *First 50 Women* admitted to practice law in Idaho. The dinner, planned in conjunction with March's designation as Women's History month, was an overwhelming success. More than 300 people were in attendance, including many of the *First 50 Women* themselves.

Rei Kihara Osaki, one of the evening's speakers, was the first Japanese-American to graduate from the University of Idaho College of Law and be admitted to the Idaho Bar. She spoke about her struggle for acceptance socially in the community, and about her struggles to enter the male-dominated legal profession. Amazingly, Osaki, the 16th woman admitted in Idaho, attained these accomplishments during World War II, while the rest of her family was interned at Wyoming's Heart Mountain Relocation Camp.

The evening's keynote speaker, Stanford Law Professor Barbara Babcock, was the first woman to receive tenure at Stanford Law School. She described the difficulties confronting early women lawyers and contrasted them with the many opportunities available to women practitioners today. Her message was clear: the door of opportunity lies profoundly open today for those women (and men) willing to step forward.

The *First 50 Women's* stories of overcoming adversity and triumph in the face of great odds was inspiring to all those in attendance. Not surprisingly, it was particularly inspiring for younger women who may have never faced the types of harassment or discrimination routinely confronted by their predecessors. As such, the evening was not only a reminder of how far things have come, but a wake up call to the current generation of women in law to take full advantage of their places in society. The commitment and legacy of the *First 50 Women* to succeed and achieve in the legal world, cannot pass unnoticed, particularly by the next generation of women lawyers.

Idaho women in positions of power and leadership, political or legal, along with the younger generation of women need to keep the proverbial "torch" lit by their predecessors. And, more importantly, they need to help it to grow bright enough so Idaho women can join the "procession of educated men" in leadership and power.

LIGHTING THE TORCH

Battles for equality and access do not loom menacingly on the horizon for today's women practitioners. Women are increasingly found in law practices and courts throughout the state, constituting roughly 23 percent of the membership of the Bar and 12 percent of the judiciary in Idaho. Women have achieved significant success in the boardroom, courtroom and political arena. Even so, there is room for much improvement.

In the area of politics, many women have become involved but few have risen to the highest positions of power in the state. Indeed, but for the notable exceptions of the Superintendent of Public Instruction² and State Treasurer, a woman has not held a statewide executive office in Idaho. Idaho has never had a woman Governor, Lieutenant Governor, Secretary of State, State Controller or Attorney General. At the federal level, Idaho has elected two women to the United States House of Representatives (Gracie Bowers Pfof served from 1953-65 and Helen Chenoweth served from 1995-2001), but has never elected a woman United States Senator. In 1993, Betty Richardson was appointed United States Attorney for Idaho, marking the first time a woman held the highest federal law enforcement position in Idaho.

Women have fared relatively well in other leadership positions at the state and local level. For example, the Idaho Legislature (Kate Kelly is the only woman lawyer) is currently comprised of four women senators (11%) and 25 women representatives (36%), but only two women (13%) are in leadership and seven are committee chairs (29%), all in the House. No woman has ever held the position of President Pro Tem of the Idaho Senate or Speaker of the Idaho House of Representatives. At the local level, 35 of Idaho's 200 incorporated cities are headed by women mayors (18%).

Accomplishments of Idaho women in the judiciary have been, at times, remarkable. Unfortunately, these gains have occurred only in our state court system and only in recent years. For example, in 1983 Deborah Bail became the first woman appointed to the district court bench in Idaho (Ada County). Today, women make up 11 percent of Idaho's trial court bench, with six women district court judges and eight women magistrates (out of a total of 122 positions).

At the appellate court level, Cathy Silak became the first woman appointed to an appellate court (Idaho Court of Appeals) in 1990 and, shortly thereafter, Linda Copple Trout was appointed to the Idaho Supreme Court in 1992. Justice Trout has the further distinction of being elected as the first woman Chief Justice of the Idaho Supreme Court in 1993. Today, women hold two of Idaho's eight appellate court seats (25%).

Unfortunately, Idaho's federal court has failed to match the diversity strides made by Idaho's state courts. Idaho has never had a woman Ninth Circuit judge, federal district court judge, federal magistrate, or bankruptcy judge. Women have been appointed by the federal court to serve on various committees, including as Lawyer Representative to the Ninth Circuit Conference of United States Courts.

While statistics are not readily available to analyze practitioners in Idaho, experience suggests that women are making partner at Idaho's largest law firms. It is unclear, however, whether they are also being offered leadership positions at their firms (e.g., managing partner or executive committee membership).³ To date, three women have held the position of President of the Idaho State Bar since its inception in 1899.

National data collected by the American Bar Association's (ABA) *Commission on Women in the Profession* indicates that "[c]ompared with men, women are less likely to work in law firms, and more likely to work in public interest and public sector offices,"⁴ positions that traditionally carry less power, status and pay. Accordingly, the Commission concludes, "despite substantial progress towards equal opportunity, that agenda remains unfinished. Women in the legal profession remain underrepresented in positions of greatest status, influence and economic reward."⁵

PASSING AND TAKING THE TORCH

A review of the current status of women in Idaho reveals that women have increasingly entered the legal and political arena, but few have yet to attain positions of power and influence. Why is this?

The ABA's Commission on Women in the Profession opines,

Women's opportunities are limited by traditional gender stereotypes, by inadequate access to mentors and informal networks of support, by inflexible workplace structures, and by other forms of gender bias in the justice system.⁶

Whatever the reason, they all point to the most common justification given to explain the dearth of women in positions of power – there are not enough "qualified" women to fill these spots. Yet, the data doesn't seem to support this theory.

For at least the past 30 years, women have received graduate degrees and specialized training in significant numbers and have worked to gain valuable experience in all aspects of business and industry. They are clearly "qualified" intellectually and professionally for positions of power and influence. On the other hand, if being "qualified" refers not to academic or professional achievement, but to a woman with high-ranking contacts and inside information about what positions of power are available together with a support network available to help her attain such positions, then Idaho is lacking in qualified women applicants for positions of power. And, this needs to change.

One of the most accomplished women lawyers of all time, United States Supreme Court Justice Sandra Day O'Connor, has described women's pursuit of power and the importance of women seeing other women succeed in its pursuit:

The acquisition of power requires that one aspire to power, that one believe power is possible. As women then achieve power and exercise it well, the barriers fall. That's why I'm optimistic. As society sees what women can do, as women see what women can do, there will be even more women out there doing things – and we'll all be better off for it.⁷

In this vein, I believe that the problem underlying women's failure to achieve significant power and influence in Idaho may be due, at least in part, to the lack of women actively seeking positions of power and leadership. If more women sought these kinds of positions, more women would think that such positions were attainable and, perhaps, apply themselves. And, as more qualified women applied for these positions, more would be selected. After all, the only way to be selected is to apply.

So, what can be done to help women rise to the highest ranks of their profession? Women (and men) must mentor other women on how to achieve power.⁸

They must actively build a base – whether academically, through experience or contacts – so that "qualified" candidates are readily available when an opportunity presents itself.⁹ Diversity doesn't just happen...women must actively organize, recruit and support women in applying for and attaining positions of power.

An excellent example of women working together to help other women succeed professionally is Idaho Women Lawyers (IWL), a non-profit group of practitioners throughout the state. IWL meets monthly and offers a broad range of topics for its members and, importantly, a chance for women to network with other women in the profession. Recently, IWL co-sponsored a forum with the ISB Litigation Section featuring a panel of prominent Idaho jurists entitled "How to get on the Bench in Idaho." It was billed as being for "[a]nyone who has ever wanted to know more about the Idaho judiciary process or would like to know how to encourage female and minority candidates." This is precisely the kind of activity that will result in a greater percentage of women holding positions of power and influence in Idaho.

As Justice O'Connor says, women must "aspire to power" in order to gain it. So, here are two challenges:

To each woman reading this: aspire to power. If you do not personally have such aspirations, support women who do. Be ready, willing and able to take the "torch" of power and leadership when it is handed to you so that it may burn brighter and longer for all to enjoy.

To all readers (men and women): actively encourage qualified women you know to run for public office, apply for the judiciary, seek a management position and/or increase their networking skills.

If these challenges are met, it will not be long before Idaho reaps the benefits of a diversity of perspective in positions of power and influence.

ABOUT THE AUTHOR

Deb Kristensen is a partner at Givens Pursley LLP, is a general business litigator in state and federal courts, with a particular emphasis in the areas of First Amendment litigation, copyright/trademark litigation, and public records and courtroom access. She is a past president of the Idaho State Bar Board of Commissioners, a member of the ISB Public Information Committee, the board of the Idaho State Broadcasters Association, the Idaho Press Club, the ABA's Forum on Communications Law, the Libel Defense Resource Center, a founding member of the Idaho Supreme Court's statewide Media and Courts Committee, as well as a member of the Fourth Judicial District's Media and Courts Committee. Deb also serves on numerous civic organizations, including the board of the Bishop Kelly Foundation.



ENDNOTES

¹ ABA Commission on Women in the Profession, *The Unfinished Agenda: Women and the Legal Profession* 38 (2001) (citing Virginia Woolf, *Three Guineas* 162 (1938)).

² While there are many theories behind this phenomenon, the most frequently cited reason why women have been elected to the position of State Superintendent for Public Instruction but excluded from other statewide positions is that women have traditionally been accepted in the area of education.

³ National data indicates that women account for only 5% of managing partners of large firms. ABA Commission on Women in the Profession, *The Unfinished Agenda: Women and the Legal Profession* 14 (2001).

⁴ *Id.* at 8. This report finds that women currently make up about 33% of the nation's lawyers. Of those, one-third are employed in law firms, one third in solo practice, 10% in government or corporate counsel office, 3% in the judiciary or public interest, public defender or legal aid organization, and about 1% in legal education. *Id.* at 8 & 14.

⁵ *Id.* at 5.

⁶ *Id.* at 14.

⁷ Sandra Day O'Connor, *The Majesty of the Law* 200-201 (2004).

⁸ The ABA's Commission on Women in the Profession notes that some "prominent women leaders are concerned about gender-related problems but reluctant to become actively involved in the solution. Some worry about being 'typed as a woman' by participating in special women's networking groups or by giving disproportionate support to other women, particularly those whose performance is not sure to reflect favorably on their sponsors." ABA Commission on Women in the Profession, *The Unfinished Agenda: Women and the Legal Profession* 16 (2001). Idaho's women leaders should not shy away from supporting other women in their quest for power and influence. Men have traditionally supported other men for positions of power without fear of being "typed as a man;" women should similarly support other women for positions of power without fear of being "typed as a woman."

⁹ This is particularly true for younger women faced with the challenge of practicing law and the demands of motherhood. To use a sports analogy, I believe it is extremely important for women to "stay in the game" even when they take a timeout to raise their children. In other words, if a woman decides to take some time off to raise her children, she should work to stay connected to her colleagues and professional networks so that when she is ready to return to the practice of law, a "team" is waiting for her.

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Federal Court Corner

Tom Murawski
U.S. District and Bankruptcy Courts

RECORD SETTING BANKRUPTCY FILINGS

During 2005, the U.S. Bankruptcy Court for the District of Idaho set a record with 11,808 filings (not counting re-openings). This represents a 27% increase over the prior year. In anticipation of the implementation of the Bankruptcy Reform Act on October 17, 2005, the District of Idaho had 3,560 bankruptcy filings between October 1st and 16th and only 147 bankruptcy filings from October 17th through the remainder of the 2005 calendar year. From a long-range perspective, the increase of Bankruptcy filings over the past 15 years has been phenomenal. Consider this: In calendar year 1994, there were only 3,303 total bankruptcy filings, as opposed to 11,808 in 2005!

COMMUNITY OUTREACH GRANT PROGRAM

The District of Idaho will make available \$12,750 for the Community Outreach Grant Program for calendar year 2006. The purpose of this program is to enhance public trust and confidence in the judiciary, promote better understanding of the judiciary and legal processes, and improve communication with the public about the role of courts and the legal process. This grant funding must be related in some way to community education. Any interested association, organization or group may apply for funding from this program by completing the application form available on the Court's website at www.id.uscourts.gov. The application should briefly describe the organization, association or group, the date it was organized, its history and purpose, and the tax status of this group. The application must be submitted or co-signed by an active member of the Bar of the United States District and Bankruptcy Court for the District of Idaho. Only one application can be submitted by a single organization

or entity. Preference will be given to non-profit agencies or organizations. Deadline for Grant applications is April 1, 2006.

AMENDED ELECTRONIC CASE FILING (ECF) PROCEDURES

The Court has recently amended its Electronic Case Filing (ECF) Procedures to reflect the fact that Civil Complaints, Civil Cover Sheets, Notices of Removal, and *Pro Hac Vice* Applications can now be filed electronically under the CM/ECF System.

PRO HAC VICE APPLICATION THROUGH CM/ECF

After registering with the Court for an ECF account, and completing training or demonstrating that they have used CM/ECF in another federal district, out-of-district counsel can now submit their *Pro Hac Vice* Application electronically to the Court using the CM/ECF System. The application must be accompanied by the \$200 fee, which will be paid electronically using the Pay.gov credit card module.

CHAPTER 13 FIXED FEE SET FOR REASONABLE SERVICES RENDERED

With the adoption of General Order #203, the Court has ordered that the presumptive fee for all services rendered (or to be rendered) during a Chapter 13 case, as addressed in Local Bankruptcy Rule 2016.1(b), is \$2,500. This became effective for all cases filed after January 1, 2006.

FAX FILING NOW RESTRICTED TO EMERGENCY SITUATIONS

Since Electronic Filing is now mandatory and since over the past year CM/ECF has significantly reduced the need for fax filing, the Court has adopted General Order #201, which restricts the use of Fax Filing. Effective January 1, 2006, Fax Filing will only be allowed if an attorney demonstrates that (1) he or she cannot use electronic filing and is or should be exempt from the mandatory ECF requirement, and

(2) he or she cannot reasonably use any other filing alternative (in-person filing; 24-hour drop box; mail; or delivery/courier service), and (3) he or she has obtained the prior approval of the assigned judge.

CM/ECF Helpful Hints # 5

The Court has now published the fifth installment of CM/ECF Helpful Hints. These tips, hints and answers to frequently asked questions, are designed to make your use of CM/ECF more efficient and problem-free. As our experience with CM/ECF continues, we are constantly refining the process in order to best serve the needs of both the Court and the Bar. Please direct your questions and comments by way of e-mail to ecfhelp@id.uscourts.gov or call the help desk at (1-800-699-9842). Some of the topics discussed in Helpful Hints #5 include: using the correct log-in; summonses in civil and adversary cases; timing of proposed orders; sealing of Social Security statement; effect of new amendments to Federal Rules of Bankruptcy Procedure upon CM/ECF; format of proposed Bankruptcy Order; amendments to Bankruptcy Judgments or Orders; and override of preferred Bankruptcy Noticing Center addresses. All of the Helpful Hints series are available on our website at www.id.uscourts.gov.

INCREASED FILING FEES LIKELY

At the time of this writing, there is federal legislation pending which, if passed, would result in increased filing fees for both District and Bankruptcy Courts. This would take effect 60 days after the President signs the Act. Stay tuned for further details.



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

Idaho Court of Appeals

Oral Argument Dates

As of February 3, 2006

Boise/Twin Falls Term

BOISE

Monday, March 13, 2006

9:00 a.m.	State v. Hooper	#31025
10:30 a.m.	State v. Dalrymple	#31398
1:30 p.m.	State v. Thompson	#31305

BOISE

Tuesday, March 14, 2006

9:00 a.m.	State v. Rogers	#31264
10:30 a.m.	State v. Hanes	#30675
1:30 p.m.	State v. Zueger	#31761

TWIN FALLS

Thursday, March 16, 2006

9:00 a.m.	State v. Puente	#30515
10:30 a.m.	State v. Jones	#31050
1:30 p.m.	State v. Owen	#31404

TWIN FALLS

Friday, March 17, 2006

9:00 a.m.	State v. Pruett	#31530
10:30 a.m.	Suits v. State	#31444
1:30 p.m.	OPEN	

Idaho Supreme Court

Oral Argument Dates

As of February 3, 2006

Boise Terms

Wednesday, March 1, 2006

8:50 a.m.	State v. Kerrigan	#32494
10:00 a.m.	Cobbley v. City of Challis	#31688
11:10 a.m.	Canyon Co. v. Amalgamated Sugar	#31063

Friday, March 3, 2006

8:50 a.m.	Jackson v. JST Manufacturing	#32001
10:00 a.m.	Lockheed Martin v. State Tax Commission	#32022
11:10 a.m.	Goodman v. Hess	#31291/#31292

Monday, March 6, 2006

8:50 a.m.	V. J. Magee v. Thompson Creek Mining	#31509
10:00 a.m.	Haw v. State Board of Medicine	#31862
11:10 a.m.	Rees v. Dept. of Health & Welfare	#31632

Wednesday, March 8, 2006

8:50 a.m.	Fullerton v. Griswold	#31775
10:00 a.m.	Mains v. Cach	#31879
11:10 a.m.	ERMC v. Dept. of Insurance	#30837

Friday, March 10, 2006

8:50 a.m.	McLean v. Maverick	#31627
10:00 a.m.	Horner v. Sani-Top, Inc.	#31588
11:10 a.m.	OPEN	

OFFICIAL NOTICE

SUPREME COURT OF IDAHO

Chief Justice
Gerald F. Schroeder

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

Amended Spring Terms for 2006

Boise.....January 4, 6, 9, 11 and 13
Boise.....February 1, 3, 6, 8 and 10
Boise (Twin Falls appeals).....
March 1, 3, 6, 8 and 10
Coeur d'Alene.....April 3, 4, and 5
Lewiston.....April 6
Boise.....April 10
Boise (Eastern Idaho appeals).....
May 1, 3, 5, 8 and 10

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 Supreme Court, and should be preserved. A formal notice of the setting of oral argument in each case will be sent to counsel prior to each term.

OFFICIAL NOTICE

COURT OF APPEALS OF IDAHO

Chief Judge
Darrel R. Perry

Judges
Karen A. Lansing
Sergio A. Gutierrez

Regular Spring Terms for 2006

Boise January 10, 12, 17 and 19
Boise February 2, 14, and 27
Eastern Idaho.....March 13, 14, 15, 16 and 17
Moscow.....April 10, 11, 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.

Idaho Supreme Court and Court of Appeals

NEW CASES ON APPEAL PENDING DECISION

(Update 02/01/06)

CIVIL APPEALS

Easements

- Whether the construction of gates and fences on the right of way or easement of an Idaho irrigation district without the permission of that district violates the terms of Idaho Code 42-1209.

*Black Canyon Irrig Dist v.
Fred L. Murphey*
S.Ct. No. 31622
Supreme Court

SUBSTANTIVE LAW

- Whether the subject matter of Liberty Lobby's proposed initiative is beyond the scope of the City of Sun Valley's initiative process or power.

Ryan Davidson v. Janis Wright
S.Ct. No. 31792/31793
Supreme Court

- Whether the district court abused its discretion in dismissing the appellant's complaint for failure to state a claim upon which relief can be granted and for failure to comply with the two year limitation of I. C. § 6-911.

Darrell McCabe v. Olivia Craven
S.Ct. No. 32119
Court of Appeals

EMPLOYMENT

- Whether the Idaho Personnel Commission erred in ruling it did not have statutory authority to award attorney fees and costs against the IDOC.

Dept. of Correction v. Kelly Sanchez
S.Ct. No. 32266
Supreme Court

- Whether Potlatch was Foster's statutory employer and thus immune from tort liability.

Bruce N. Foster v. Potlatch Corporation
S.Ct. No. 32075
Supreme Court

DIVORCE, CUSTODY, AND SUPPORT

- Did the trial court abuse its discretion by determining that a material, substantial, and permanent change in circumstances had occurred?

Kristen Lynn Parker v. Keith Parker
S.Ct. No. 31396
Supreme Court

- Whether the trial court erred in awarding primary physical custody to Nancy based upon the court finding in favor of Rudy on each factor set forth in I.C. § 32-717 in an action to modify custody.

Nancy Ann Silva v. Rudy Silva
S.Ct. No. 31942
Court of Appeals

- Whether the court erred in its community property characterization and division of James' professional goodwill.

James H. Stewart v. Sarah P. Stewart
S.Ct. No. 31905
Supreme Court

POST-CONVICTION RELIEF

- Whether trial counsel provided effective assistance of counsel by instructing the plaintiff to plead guilty when there was no evidence of corpus delicti.

Keyte Leroy Behunin v. State of Idaho
S.Ct. No. 32271
Court of Appeals

- Did Branigh present a prima facie claim of ineffective assistance of appellate counsel when he presented proof that the trial transcripts contained an error and that this court relied upon that error in affirming the length of his sentence?

Leotis B. Branigh, III v. State of Idaho
S.Ct. No. 32104
Court of Appeals

- Did the court err in denying Chippolla's petition for post-conviction relief?

Michael T. Chippolla v. State of Idaho
S.Ct. No. 31147
Court of Appeals

- Did the court apply the correct test for prejudice, as it believed that the petitioner had to show that, but for trial counsel's error, the outcome of the trial would have turned out differently?

David Harshbarger v. State of Idaho
S.Ct. No. 31481
Court of Appeals

- Did the court err by granting the state's motion for summary dismissal?

Jose Alfredo Martinez v. State of Idaho
S.Ct. No. 32235
Court of Appeals

- Did the district court improperly dismiss Parr's petition for post-conviction relief because the "discovery exception" applies and, therefore, the time period for the filing of the petition must be tolled?

William L. Parr v. State of Idaho
S.Ct. No. 32064
Court of Appeals

- Whether the state's motion for summary judgment provided sufficient notice of the grounds for dismissal subsequently relied upon by the district court.

Juan Quintanilla v. State of Idaho
S.Ct. No. 31969
Court of Appeals

- Did the court err in finding Wade's allegations were conclusory and summarily dismissing his petition?

Randy Dean Wade, Sr. v. State of Idaho
S.Ct. No. 31475
Court of Appeals

DAMAGES

- Did the trial court commit error by reducing the jury's determination of punitive damages from \$600,000 to \$200,000?

*Anthony J. Ferro v.
The Society of St. Pius X*
S.Ct. No. 31807
Supreme Court

QUIET TITLE

- Was the trial court's holding that "the east to west road" was actually multiple roads that formed a circle and did not serve the stated purpose of the easement supported by substantial and competent evidence?

*Meryle J. Van Stone v.
Brian P. McCarthy*
S.Ct. No. 31633
Court of Appeals

TERMINATION OF PARENTAL RIGHTS

- Was the magistrate's finding that Doe had willfully abandoned his daughter based on substantial and competent evidence?

Jane Roe v. John Doe
S.Ct. No. 31969
Supreme Court

CRIMINAL APPEALS

SEARCH AND SEIZURE – SUPPRESSION OF EVIDENCE

- Did the court err in denying the motion to suppress evidence found in a warrantless search of Cutler's car and in finding the officer's initial contact was justified under the community caretaking function of the officer?

State of Idaho v. John Fitzgerald Cutler
S.Ct. No. 31486/31487
Court of Appeals

- Did the court err in denying the motion to suppress the results of a blood alcohol test due to the lack of proper observation of DeFranco during the fifteen-minute waiting period prior to the test?

State of Idaho v. Roy Richard DeFranco
S.Ct. No. 31801
Court of Appeals

- Did the district court err when it denied Mendoza's motion to suppress because Deputy Endres lacked reasonable, articulable, suspicion to believe Mendoza had been involved in any criminal activity?

State of Idaho v. Jose Madrigal Mendoza
S.Ct. No. 31704
Court of Appeals

4. Was the initial entry into the warehouse justified by exigent circumstances?

State of Idaho v. John Michael O'Keefe
S.Ct. No. 32127
Court of Appeals

5. Did the officer have a reasonable basis to stop Timboe's vehicle when he had observed no criminal offense or traffic violation?

State of Idaho v. Carolyn Key Timboe
S.Ct. No. 31873
Court of Appeals

6. Did the court err when it concluded that the prosecutor's signing of the magistrate's name upon being told to do so by the magistrate was a defect in the search warrant mandating application of the exclusionary rule?

State of Idaho v. Cody P. Zueger
S.Ct. No. 31762
Court of Appeals

SUBSTANTIVE LAW

1. Whether the district court erred by failing to apply the *State v. Fry* analysis when denying a motion to set aside a forfeiture and exonerate the bond where the criminal defendant was incarcerated in another jurisdiction.

State of Idaho v. Alladin Bail Bonds
S.Ct. No. 31901
Court of Appeals

2. Whether the court has statutory power to order the parent of a juvenile offender to sign a probationary contract that includes urinalysis drug testing for the parent.

State of Idaho v. Scott Watkins
S.Ct. No. 31700
Supreme Court

SENTENCE REVIEW

1. Was the evidentiary hearing on Rose's alleged probation violation so fundamentally unfair as to deny him due process?

State of Idaho v. Joshua Allen Rose
S.Ct. No. 31966
Court of Appeals

2. Whether there is a disparity as to the duration of probation between the sentence imposed in open court and that sentence expressed in the written order of the court that incorporates an extension of probation not contained in the actual sentence announced in open court.

State of Idaho v. Terrill James Smith
S.Ct. No. 31733
Court of Appeals

SPEEDY TRIAL

1. Did the district court err in denying Avila's motion to dismiss in which he argued the state violated his right to a speedy trial?

State of Idaho v. Hector Avila
S.Ct. No. 31335
Court of Appeals

EVIDENCE

1. Did the State present sufficient evidence of convicted felon status to find Cook guilty of unlawful purchase of a firearm?

State of Idaho v. Guy Michael Cook
S.Ct. No. 31642
Court of Appeals

2. Did the court err when it allowed a witness to testify that, in his opinion, certain individuals had been untruthful in their statements to the police?

State of Idaho v. Summer Hauser
S.Ct. No. 31695
Court of Appeals

3. Was there substantial, competent evidence from which the jury could find beyond a reasonable doubt that Warriorwoman was guilty of trespass?

State of Idaho v. Stonecalf Warriorwoman
S.Ct. No. 31956
Court of Appeals

INSTRUCTIONS

1. Did the court err when it instructed the jury that the state could prove Ratelle was under the influence without proving any particular degree or state of intoxication, using the model jury instruction approved by the Idaho Supreme Court?

State of Idaho v. Sheryl L. Ratelle
S.Ct. No. 31832
Court of Appeals

2. Did the court's instruction for the jurors to continue deliberating when there was no indication that the jury was deadlocked coerce the jurors to surrender their convictions to render a unanimous verdict?

State of Idaho v. Daniel R. Shepard
S.Ct. No. 31806
Court of Appeals

MISTRIAL

1. Did the district court abuse its discretion in denying Gutierrez's motion for mistrial?

State of Idaho v. Miguel Gutierrez
S.Ct. No. 31582
Court of Appeals

2. Did the court err by denying Nourse a new trial or by denying his motion for mistrial?

State of Idaho v. Joe Nourse
S.Ct. No. 3232
Court of Appeals

ADMINISTRATIVE APPEALS INDUSTRIAL COMMISSION

1. Whether the Industrial Commission's finding that claimant was injured and that claimant is now totally and permanently disabled is supported by substantial, competent evidence.

Gary Anderson v. Harper's, Inc.
S.Ct. No. 32135
Supreme Court

2. Whether the Commission erred in ruling that Hutton sustained injuries as a result of an accident within the meaning of Idaho's worker's compensation laws.

Norman Hutton v. Manpower, Inc.
S.Ct. No. 32160
Supreme Court

3. Was the appeal examiner's finding that Obenchain's two day absence fell below a reasonably expected standard of conduct in light of the circumstances, and was therefore misconduct, supported by the evidence on the record?

McAlvain Construction v. Tom Obenchain
S.Ct. No. 32140
Supreme Court

SNAKE RIVER BASIN ADJUDICATION QUESTIONS

- Is the United States entitled to an SRBA decree confirming that it holds sole title to the Boise Project storage water rights, when it built, owned, and operates the storage reservoirs, delivers Project water to the Irrigation Entities under federal Reclamation contracts, and it has prior licenses and decrees for these rights?

Gene E. Bray v. Pioneer Irrigation Dist.
S.Ct. No. 31794
Supreme Court

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The Idaho Law Foundation and Idaho State Bar CLE Speakers - 2005

The Continuing Legal Education program of the ILF and ISB wants to acknowledge the many individuals who contributed their time and expertise in 2005. Without the commitment of these individuals these programs would not be possible!

(ISB) REASONABLE PRECAUTIONS IN A DIGITAL WORLD

Lee Dillion, *University of Idaho, Boise Campus*

DRAFTING YOUR FIRST — OR NEXT WILL OR ESTATE PLAN

Edward Ahrens, *Ahrens & DeAngeli, PLLC*

(ISB) TEN THINGS YOUR CLIENTS EXPECT YOU TO KNOW ABOUT

INTERNET (AND ELECTRONIC PRIVACY LAW)

Cecelia Gassner, *Office of the Attorney General*

(ISB) IDAHO TORT CLAIMS ACT — AN OVERVIEW AND UPDATE

Lynnette McHenry, *ICRMP*

(ISB) TECHNOLOGY IN THE ADA COUNTY ELECTRONIC COURTROOM

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(ISB) BASIC ESTATE PLANNING AND PROBATE

Joseph Uberuaga, *Eberle, Berlin, Kading, Turnbow, McKlveen & Jones, Chtd.*

PREPARING YOUR FIRST — OR NEXT — WORKERS COMPENSATION CASE

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(ISB) Workers Compensation Annual Seminar

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James Kile, *Idaho Industrial Commission*

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Scott McDougal, *Idaho Industrial Commission*

Handling your first — or next Divorce Case

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(ISB) Litigation Technology in the Electronic Courtroom

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Hon. Mikel Williams, *Magistrate Judge, U.S. District Court*

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Margaret Marlatt, *Paralegal, Stoel Rives LLP*

Now that I am on a Nonprofit Board, What do I Do?

Les Bock, *Bock Law Offices, Chtd.*

(ISB) Keeping your clients out of Employment Litigation

Candy W. Dale, *Hall, Farley, Oberrecht & Blanton, PA*

Identity Theft: Protecting Your Clients, Protecting Yourself

Thomas Moss, *United States Attorney, District of Idaho*

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Wade Spain, *Boise City Police Department*

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George Breitsameter, *Assistant United States Attorney, District of Idaho*

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(ISB) CURRENT INTELLECTUAL PROPERTY LEGISLATION AND PATENT REFORM PROPOSALS

J. Matthew Buchanan, *Ohio*

(ISB) CURRENT DEVELOPMENTS IN COMMERCIAL LAW

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Hon. Ralph Kirscher, *Chief Judge Judge, U.S. Bankruptcy Court, District of Montana*

Hon. Jim D. Pappas, *Bankruptcy Judge, U.S. Bankruptcy Court*

Hon. Terry L. Myers, *Chief Bankruptcy Judge, U.S. Bankruptcy Court, District of Idaho*

Hon. Gregg Zive, *Bankruptcy Judge, U.S. Bankruptcy Court, District of Nevada*

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Suzanne Hickok, *Clerk, U.S. Bankruptcy Court*

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(ISB) COMMON PITFALLS OF PRACTICE FOR THE YOUNG LAWYER

Hon. Ron Wilper, *District Judge Fourth Judicial District*

Hon. Michael McLaughlin, *District Judge Fourth Judicial District*

(ISB) DOCUMENTING A REAL ESTATE TRANSACTION

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Timothy Tyree, *Hawley Troxell Ennis & Hawley, LLP*

(ISB) LEGAL ETHICS: A 38-YEAR PERSPECTIVE

Hon. Jim Jones, *Justice Idaho Supreme Court*

INDIVIDUAL RIGHTS IN A CHANGING WORLD

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Hon. Timothy Hansen, *Magistrate Judge, Ada County*

Debora Kristensen, *Givens Pursley LLP*

(ISB) PLANNING TO WIN

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(ISB) CONFLICTS OF INTEREST IN BUSINESS TRANSACTIONS

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Lee Dillion, *University of Idaho, Boise Campus*

(ISB) INTERNATIONAL LAW AND TRANSACTIONS

Emile Loza, *Technology Law Group, LLC*

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CONTINUING LEGAL EDUCATION (dates & locations may change)

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March 10
Sun Valley Resort
Sun Valley, Idaho

Please join the Workers Compensation Section for this year's important seminar on Workers Compensation law. Speakers will include:

Linda Cocchiarella, M.D.
Jerry Hockett from OSHA
Jack Barrett speaking about the History of Workers Compensation Law
Thomas Baskin with Case Review
Michael O'Connor from Workers Compensation Law and Advocacy Group
Lora Rainy Breen and Alan Conilogue with Reflections on their service in Iraq
Thomas Limbaugh and James Kile from the Idaho Industrial Commission.

Handling your First or Next Immigration Case

Sponsored by the Idaho Law Foundation

March 10, 2006
Law Center, Boise

Administrative practice before the Department of Homeland Security, the U.S. Department of State, and the U.S. Labor Department will be the focus of this CLE program in the "...first or next..." series sponsored by the Idaho Law Foundation. Attorney Ernest A. Hoidal will review current immigration law and nationality issues as well as the basics for the attorney who has not yet practiced in this area of law.

Building a Case from Discovery to Trial and Beyond

*An 8- part series sponsored by the Young
Lawyers Section*

March 15, 2006 (Part 2)
Law Center, Boise

Part two will cover deposition strategies as presented by Attorney James Martin of Moffatt Thomas Barrett Rock & Fields.

April 19, 2006 (Part 3)

Part three is a seminar on dispositive motion practice and pre-trial motions presented by the **Honorable Mikel H. Williams, United States Magistrate Judge.**

Idaho Practical Skills

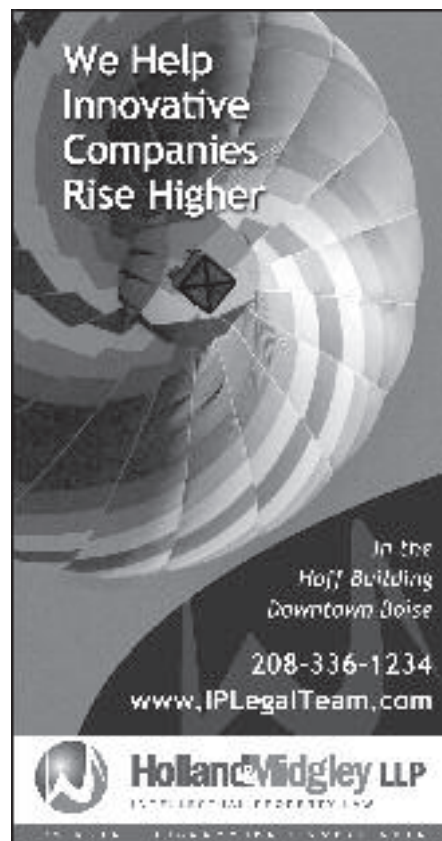
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April 28, 2006
Boise Centre on the Grove

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

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ABA Mid-year Meeting Addresses Katrina, Surveillance and Immigration

Larry Hunter

*Idaho State Bar Delegate to the American Bar Association House of Delegates
Moffatt, Thomas, Barrett, Rock and Fields*

While in some ways the mid-year meeting is preliminary to the business taken up at the annual meeting (like the new Code of Judicial Conduct), it has a character of its own that manifested itself this year in four principal areas which the House of Delegates considered: the aftermaths of hurricanes Katrina and Rita; three separate policies of current administration; a dues increase; and finally, the House ratified an international statement of core principles which had been authored by the current ABA President, Mike Greco. It had been ratified by a meeting of 100 Bar Association presidents in November 2005.

Poignant and timely reminders were provided to the House by the State Bar Presidents of Alabama, Florida, Mississippi, Louisiana and Texas of the devastating effects on the Gulf Coast by Hurricane Katrina; and even more relevantly, the continued deplorable conditions in that area. An example of the ongoing disruption to life is the effect on the legal system. There have been no criminal trials in New Orleans since Katrina. They cannot assemble a jury pool, they have no courthouses and there are no public defenders. Tulane Law School has reopened and 90% of the existing students have returned.

These problems led to the adoption of a resolution by the House, urging Congress to take immediate action to help the victims of the hurricanes and the underlying infrastructure. A second resolution asked the administration to stem the decline in the funding for the Legal Services Corporation at a time when areas such as the Gulf Coast have half a million people to be served by less than 30 Legal Services Corporation attorneys.

Another resolution dealt with the constitutionality of the secret domestic surveillance program. This was a matter that was dealt with on a separation of powers/constitutional law basis rather than a political basis, although the outcome had overtones that could be interpreted as political. The House voted overwhelmingly to urge the President to stop the secret surveillance or to ask Congress to amend the Foreign Intelligence Security Act (FISA).

The third significant matter considered by the House was immigration. The principal thrust of their resolutions was to provide protections of civil liberties in the immigration courts. This includes providing counsel in certain cases.

The financial status of the ABA is solid in that it runs in the black and has a surplus account. However, to maintain that surplus over the oncoming years and to continue funding the relevant and significant programs of the ABA, a dues increase was proposed, debated and adopted. Significant cost-cutting measures have already been put in place over the past few years, cutting approximately \$30 million from the budget.

During the first six months of his tenure, President Greco has been involved in a number of meetings with other international

bar leaders. During the course of exploring common ground with those bar leaders in seeking to foster the Rule of Law in societies throughout the world, the following was adopted by a group of 100 international bar presidents:

"Statement of Core Principles"

*Adopted by the Bar Association Presidents Meeting in
Paris, France, November 19, 2005
Maison du Barreau*

The legal profession throughout the world, in the interest of the public, is committed to these core principles:

- 1) An impartial, and independent, judiciary, without which there is no rule of law.
- 2) An independent legal profession, without which there is no rule of law or freedom for the people.
- 3) Access to justice for all people throughout the world, which is only possible with an independent legal profession and an impartial and independent, judiciary.

And that, these core principles shall not yield to any emergency of the moment.

ABOUT THE AUTHOR



Larry Hunter was appointed as the Idaho State Bar Delegate to the American Bar Association House of Delegates effective August 2004. Mr. Hunter is a partner with Moffatt, Thomas, Barrett, Rock and Fields in Boise. His practice includes general and commercial litigation, administrative law, and alternative dispute resolution. Mr. Hunter is a past president of the Idaho State Bar. He received his J.D. from Northwestern University School of Law. He has an AB from Harvard University (cum laude). Contact information for Larry is: (208) 345-2000 or lch@moffatt.com.

2006 Licensing Receipts and Stickers

The licensing receipts and 2006 stickers will be mailed in mid-March. Please contact the Membership Department at (208) 334-4500 or jhunt@isb.idaho.gov by March 10, 2006 if you need a new membership card.

DECEASED JUDGES AND ATTORNEYS MEMORIAL CEREMONY

Thursday, March 23, 2006 at 10:00 a.m.

Idaho Supreme Court Courtroom

Reception following ceremony

Judges

Name	Residence	Date of Death
Ariel L. Crowley	Letha/Emmett	April 13, 2005
J. William "Bill" Hart	Buhl	May 9, 2005
Hardy Clayton Lyons	Sagle	August 21, 2005

Attorneys

Name	Residence	Date of Death
William J. Brauner	Nampa	January 21, 2005
Paul C. Keeton	Lewiston	March 24, 2005
Harry Stewart Chandler	Boise County	April 2, 2005
Patricia L. McDermott	Pocatello	April 5, 2005
Byron K. Meredith	Jordan Valley, OR	April 27, 2005
Clarence J. Hamilton	Coeur d'Alene	May 5, 2005
William W. "Bill" Becker	Pocatello	May 8, 2005
Robert James Ennis	Boise	June 9, 2005
Brett P. Allison	Idaho Falls	June 28, 2005
John A. Swayne	Orofino	June 28, 2005
Louis F. Racine, Jr.	Pocatello	August 17, 2005
Wesley F. Merrill	Pocatello	September 6, 2005
Stewart A. Morris	Boise	September 14, 2005
Winston H. Churchill	Boise	October 14, 2005
Kim Jonathan Grosch	Coeur d'Alene	October 14, 2005

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Idaho Legislative History—Easing the Pain

John Hasko

University of Idaho Law Library Director

Trying to collect a legislative history of Idaho statutes is not an easy task. As with other states, there is no concerted effort to make available to the public the text of hearings, reports, or even transcripts of debates that have occurred as proposed bills move forward through the legislative process. There is no paper trail generated at the state level that even remotely approaches what might be drawn for the same activity at the Federal level.

That's not to say that putting together a legislative history for statutes from Idaho and other states is impossible. It's just a bit more challenging. There are a couple of tools out there that can be used to make the task less daunting, one in print, the other in electronic format.

To aid in starting the process of identifying what the legislatures of Idaho and the other states generate, the researcher should take a look at Manz, William H., *Guide to State Legislative and Administrative Materials*, 2002 ed. (Buffalo: William S. Hein, Inc., 2002). Based on the 1988 edition of this title, the more recent edition has been greatly expanded to include references to an increasingly growing pool of electronic information. In addition to breaking down the availability of materials from all the states and the District of Columbia, commonwealths and territories (American Samoa, Guam, Northern Mariana Islands, Puerto Rico, Virgin Islands), and former possessions (Panama Canal Zone, Trust Territory of the Pacific) are also covered.

Print and electronic sources of bills, session laws, and codes are listed, along with administrative regulations, Rules of Court, executive orders, Attorney General opinions, and state law guides. These are fairly standard fare for all the jurisdictions. There is a wide variety of work product generated by each state's legislative process, and it's in this area that this title has its greatest value. Depending on the state, more or less of what constitutes a legislative history is publicly available. What the *Guide to State Legislative and Administrative Materials* does is to identify just what is available. This is a time-saving device, as the researcher is able to determine from the start what to expect to find.

The editor has created a template of all the possible elements of a legislative history for each state. If a state does not produce an element that is noted (e.g., under Floor Debates, Hardcopy for Idaho, there is the notation, "Not officially recorded"). If an element is available electronically, the URL is noted; if in hardcopy, reference is made to the appropriate state office, with addresses and phone numbers for those offices in a list at the end of the state's section.

An electronic tool for collecting selected materials generated during the legislative process in Idaho is located at *Access Idaho* (<http://www.accessidaho.org.index.html>), the webpage for the State of Idaho. Starting in 2003, the Legislature's webpage (<http://www.legislature.idaho.gov/priorsessions.htm>), has archived the journals, committee minutes, and *Sine Die Reports* for each year. While not as useful as some other documents produced by other states, these materials can help tie together some dangling ends from the legislative history process.

For the current legislative session in Idaho, the Legislature's webpage allows one to link to the text of proposed bills, calendars and agendas,

journals, and committee minutes from the Legislature webpage, <http://www.legislature.idaho.gov>. The link to "Legislation" on that page takes you to a page covering the current legislative session (<http://www3.state.id.us/legislat/legtrack.html>). Located on that page are icons for the "Legislative Topic Index to Bills", and "Mini-Data Bill Status Information." The text of bills retrieved through the Topic Index will include statements of purpose, important in establishing justification for them. The Bill Status Information tracks legislation on a daily basis, reflecting activity up to the prior day.

If you are engaged in researching the legislative history of Idaho statutes, you should find these two tools useful, the *Guide to State Legislative and Administrative Materials* for identifying what types of documents are available, and *Access Idaho* to track current legislation and what has been generated in the last few legislative sessions.

ABOUT THE AUTHOR



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

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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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Nick received his B.A. in Economics from the University of Puget Sound, his J.D. from the University of Idaho and his LL.M. in taxation from New York University. Prior to joining our firm, Nick was a partner with Thornton Byrne LLP. Nick's licensed to practice in Idaho and California.

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PATRICIA D. GAW
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Patricia Dewey Gaw, 68, Hillsboro, Oregon died November 5, 2005 in Portland. She was born September 13, 1937 in Victor, Idaho, the fifth of eight children of John and Amanda Dewey. She graduated from Boise High School in 1955. She received her undergraduate degree from Brigham Young University in 1959, masters in social work from the University of Utah in 1965, and later completed law school at Seattle University. She worked as a clinical social worker at Napa State Hospital in Napa, California from 1965 - 1977. During her law career, she practiced in Wendell, Idaho; as well as, Roseburg, Springfield, Scappoose, and Hillsboro, Oregon.

She was married to Dr. Emir A. Gaw who preceded her in death. Mrs. Gaw was a bird watcher, gardener, and voracious reader. She often provided pro bono legal services to needy clients. She is survived by her stepchildren, Esther McLaughlin, Minneapolis, Minnesota; James Gaw, Carbondale, Colorado; and Pauline Gardette, California; four grandchildren, three great-grandchildren; and her siblings, Clara Slone, Anchorage, Alaska; Florence Goodson, Orem, Utah, LaRaine McQueen, Boise, Idaho; LeReine Stevens and Julia Dewey, both of Hillsboro, Oregon; John Dewey, Gooding; and Larry Dewey, Boise, Idaho.

ON THE MOVE



Chad A. Campos is pleased to announce the opening of his new firm, Campos Law. Campos Law is located in the Historic Post Office in Downtown Idaho Falls. The address is 591 Park Ave. Ste. 303, Idaho Falls, ID 83402.

In his new office, Chad will continue to practice in the areas of collections, contract disputes, criminal defense, family law, landlord-tenant law, and personal injury/workers' compensation. Chad earned his B.S. degree from Brigham Young University and his J.D. Degree, cum laude, from University of Idaho where he was a Technical Editor for the Law Review. Before starting his own firm, Chad was an associate with Beard St Clair Gaffney McNamara Calder, P.A., where he practiced for five years. Chad is admitted to practice before all of Idaho's State and Federal Courts. As the current President of the Eagle Rock Chapter of the Inns of Court, Chad is actively involved in the Idaho Falls legal community. He is similarly involved in other aspects of the Idaho Falls com-

munity where he serves as the President of the Tautphaus Park Zoological Society and his firm is a member of the Greater Idaho Falls Chamber of Commerce. Chad can be reached by telephone, (208) 529-0885, facsimile, (208) 529-0887 or e-mail, chad@camposlaw.net.

Shea C. Meehan is now a principal with the firm Walker & Heye, PLLC, Richland, WA. Prior to joining Walker & Heye, Mr. Shea clerked for the Idaho Supreme Court and worked for the Department of Social and Health Services. His primary practice areas include litigation, real estate, probate and estate planning. He received his J.D. from the University of Idaho and is licensed to practice law in Washington and Idaho.

Patrick E. Mahoney, formerly of Blackburn & Jones LLP, has opened his own firm, Mahoney Law, PLLC. The firm's offices are in downtown Boise's historic Eighth Street Marketplace and can be reached at (208) 345-6364. Patrick's practice focuses on civil litigation matters,

primarily for plaintiffs, in the areas of personal injury, product liability, commercial litigation, medical negligence, and employment law. Patrick is a 1992 graduate of the University of Washington and a 1995 graduate of the University of Idaho, College of Law, where he served as an editor for the Idaho Law Review. Prior to entering private practice, he clerked for Fourth District Judge D. Duff McKee. He currently serves on the Board of Directors of the Idaho Trial Lawyers Association as its public relations chair.

GENERAL INTEREST

BLSA . . . the association for legal professionals will hold its monthly educational meeting on **Tuesday, March 21, 2006** at 5:30 p.m. The education topic will be **Health Law**, and our speaker will be Shane Bengoechea, Esq. The meeting will be held in the U.S. Bank Building, 2nd floor, 101 S. Capitol Blvd., Boise, Idaho. For more information and to RSVP, please contact Bert Barton, PLS at 385-5372.



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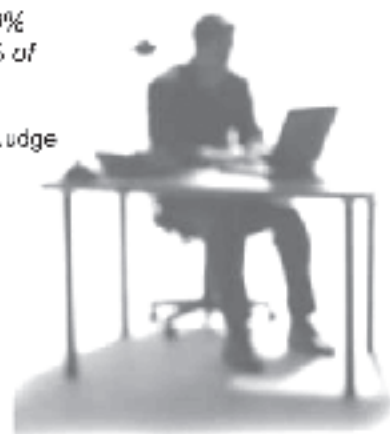
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Interested persons should send a letter, writing sample, and resume listing three references to Laurie O'Neal, Chair, Research/Writing/Advocacy Skills Hiring Committee, University of Idaho College of Law, Moscow, ID 83844-2321. Application deadline is March 27, 2006 or as soon thereafter as the position is filled.

University of Idaho is an affirmative action, equal opportunity employer and applications from those who would increase faculty diversity are encouraged. Visit our Web site at <http://www.uidaho.edu/law>.

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Mr. Gledhill has been a practicing attorney for over 25 years, both overseas and in the Boise area. He will continue to practice in the fields of construction litigation, insurance defense, personal injury, business litigation, and property development. Mr. Gledhill is an extremely capable and talented attorney and is available now for referrals and consultations.

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Idaho Volunteer Lawyers Program

SPECIAL THANKS

Each year the Idaho Volunteer Lawyers Program (IVLP) gives special recognition to all the volunteer attorneys who contribute so generously, making legal services available to low-income people through the IVLP. This month we are focusing on the volunteers who serve on the IVLP Policy Council and a sub-Committee on Pro Bono Initiatives, those who contribute their time and expertise by participating in IVLP clinics and other volunteer activities. We appreciate the continued support our program — and our clients — receives from these volunteers.

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Idaho State Bar 2006 Professional Awards Nomination Form

The Idaho State Bar Board of Commissioners is now soliciting nominations for the 2006 professional awards. These awards were initiated by the Board of Commissioners to highlight members who demonstrate exemplary leadership, direction and commitment in their profession.

2006 Distinguished Lawyer - This award is given to an attorney (or attorneys) each year who has distinguished the profession through exemplary conduct and many years of dedicated service to the profession and to Idaho citizens.

Professionalism Awards - The awards are given to an attorney in each of Idaho's seven judicial districts who has engaged in extraordinary activity in his or her community, in the state, or in the profession, which reflects the highest standards of professionalism.

Pro Bono Awards - Pro bono awards are presented to the person(s) from each of the judicial districts that has donated extraordinary time and effort to help clients who are unable to pay for services.

Service Awards - Service awards are given each year to lawyers and non-lawyers for exemplary service to the Bar and/or Law Foundation.

Recipients of the awards will be announced at the Bar's Annual Meeting, held this year July 19-21 in Sun Valley. The Distinguished Lawyer and service awards will be presented at the annual meeting. Professionalism and pro bono awards will be presented during each district's annual resolutions meeting in the fall.

Please use a separate form for each nomination.

Nominee: _____

Award: _____

Address: _____

City: _____ Zip: _____

Please describe the nominee's activity in your community or in the state, which you believe brings credit to the legal profession and qualifies him or her for the award you have indicated. Attach any other supporting documents to this form.

Your Signature: _____ Date: _____

(Please print your name): _____

Address: _____

City: _____ Zip: _____

Telephone: _____ Email Address: _____

Nominations must be received by April 3, 2006.

Send to: Executive Director, Idaho State Bar, PO Box 895, Boise ID 83701, fax (208) 334-4515 OR 334-2764

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MARCH 2006

(DATES MAY CHANGE OR PROGRAMS MAY BE CANCELLED)

- 1 *The Advocate* Deadline
- 1 Licensing Deadline
- 1 July 2006 bar Exam Initial Application Deadline
- 10 **CLE: Idaho Law Foundation: Working on your First or next Immigration Case**
- 10 **CLE: Workers Compensation Section Seminar, Sun Valley**
- 15 **CLE: Young Lawyers Section: Depositions**
- 15 *The Advocate* Editorial Advisory Board
- 22 Alternative Dispute Resolution Section Meeting
- 24 Bar Exam Preparation Committee
- 28 Practice Section Council Meeting

APRIL 2006

(DATES MAY CHANGE OR PROGRAMS MAY BE CANCELLED)

- 3 *The Advocate* Deadline
- 5 **CLE: Professionalism and Ethics Section: Ethics and the Attorney as Guardian Ad Litem**
- 7 **CLE: Litigation Section: Discovery**
- 7 Idaho State Bar Board of Commissioners Meeting, Pocatello
- 7 Idaho Volunteer Lawyers Program Council Meeting, Boise Cascade
- 14 Bar Exam Results Issued
- 19 **CLE: Young Lawyers Section: Dispositive Motion and Pre-trial 28 Practice Section Council Meeting Motions**
- 19 *The Advocate* Editorial Advisory Board
- 21 Idaho Law Foundation Board of Directors Meeting
- 22 Alternative Dispute Resolution Section Meeting
- 27 Idaho State Bar Admission Ceremonies: Idaho Supreme Court and Federal Court, Boise
- 28 **CLE: Idaho Practical Skills, Boise**

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.

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