



The Advocate

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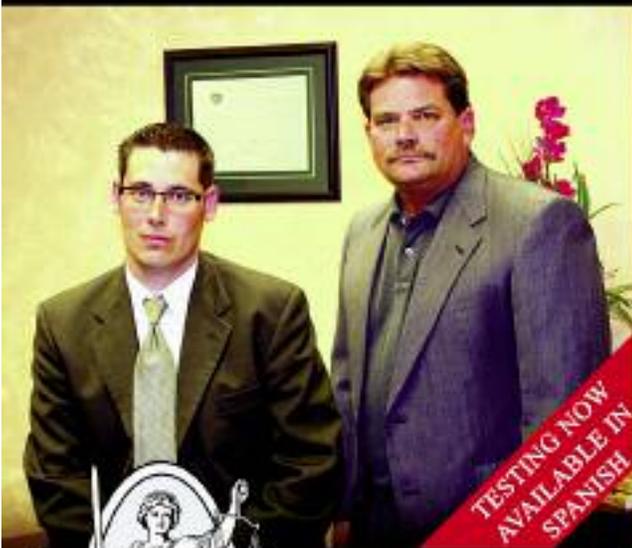
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ON THE COVER

River Island, American Falls. The picture was taken by Idaho attorney Lane E. Erickson, Pocatello.

SECTION SPONSOR

This issue of *The Advocate* is sponsored by the Alternative Dispute Resolution Section of the Idaho State Bar.

BE PROFESSIONAL

Jay Q. Sturgell



If you try to figure out what being professional is by looking it up in a dictionary, you'll soon be caught in a loop. Being professional is acting the way professionals act, and a professional is just someone who gets paid to do what they do. Hopefully, you are all getting paid for the work you do; so, no matter how you act, you're acting professionally. Right? Wrong!

I prefer to think of being professional as acting in a way that honors the profession. A "professional" plumber is the sort of plumber we wish all plumbers were. They do the job right the first time, they treat everyone with respect, and the go out of their way to be as helpful as possible—not just fixing the leak, but taking a few minutes to make sure there isn't another leak about to happen. When you meet a plumber like this, you're likely to think, "That's the way all plumbers should be." Being professional as an attorney means the same thing. Clients, judges, and other attorneys should look at your work and think to themselves, "I wish all attorneys were like that."

Whether we're talking about plumbers or attorneys, the defining traits of a true professional are Competence, Civility, and Service.

COMPETENCE—I am not talking about the mental capacity of an individual to participate in legal proceedings. Although if you lack this, I probably lost you as a reader some time ago (b.t.w. if you lack the mental capacity, call me, we'll arrange for DE.) The kind of competence I am referring to is the ability to do the job, and do it well, the opposite of which is incompetence. The sort of competence we should strive for, as a professional, should not stop with the bare minimum. Our standard should be—**Excellence**.

So how do you make sure you are competent? Do a self-assessment (see last month's article on "Be Prepared.") What are your strengths and weaknesses as an attorney? Do your clients come back, and/or refer other people to you? Would you be happy hiring an attorney who is just like you? If your list of weaknesses is longer than your strengths, if your clients tend to move on to other attorneys, or if you wouldn't be satisfied with your own service, you have a competency problem.

What should you do if you are not competent? Become competent (once again see last month's article.) If you have poor speaking skills or lack confidence when speaking, take a speech class. If you have poor writing skills, take a writing class. Get the skills you lack in your practice, but don't stop there! Acquire more. And, once you have achieved mastery, maintain your edge. Being good at what you do, be it litigation, mediation, transactional law (you get the picture) is just a part of being professional. It requires ongoing practice and training, a willingness to be frank with yourself about what you're good at, and a willingness to make sure that you do the job right the first time.

CIVILITY—At the beginning of my career I had an ethical decision to make, I had the opportunity to ambush opposing counsel. I won't go into boring details at how I could have taken advantage of the rules and employed tactics that were sneaky and underhanded. I agonized about this because the other side had not been a paragon of virtue, nor kind to me and I really wanted revenge. So I called my father, who said "Son, always take the high road. You will never be sorry you did." To this day, I follow his advice and have never regretted it. So, I called the attorney and discussed the situation. I gently showed how the attorney had personally put his case at risk. From that day on, that attorney

has been civil to me, and yes, even friendly.

While we have the duty of zealous advocacy, we must balance that against our duties to our peers, the court, and the system. Zealousness does not mean that while representing our clients that we don't need to show respect for the system, the court, our peers, and ourselves. There is nothing that shows respect more than civility — **Be Polite!**

Don Burnett, Dean of the University of Idaho College of Law says, "don't strip-mine the legal system." Do not use unethical or unfair tactics to gain an advantage. Never use sneaky or underhanded tactics and don't sink to the level of those who do. Conduct yourself in such a manner that you bring credit and honor to our noble profession.

SERVICE—We give service to the client, service to the profession, and service to the community. We are not merely legal technicians, we are counselors. A counselor does more than just the legal work. Counselors are client-centered. The ultimate goal is not just a legal victory; rather it is service to the client. You do not just provide legal advice; you

also provide objectivity, experience, and common sense. The client's welfare is tantamount. Sometimes it means trial, sometimes it means settlement, or sometimes it means you must find a way



This is my daughter Micah, age 4, at a preschool professional day. I want you to share my mental image of a true professional.

to avoid conflict. The actions you counsel them to follow must be for their good, not for the good of your own billable hours. Anyone who has lost sight of that has lost his or her way!

We also provide service to the profession. It is a privilege to be able to practice law. But this privilege has a price; and no, I am not talking about your Bar dues. It is our obligation to make the practice of law better. Do you offer advice to other attorneys, or are you afraid doing so might cut into your own bottom line? It is our duty to be active in the Bar and Bar functions, to share what we know, to remind each other of our ethical duties, to improve ourselves and be a resource to our fellows. As professionals, we must seek to not only

improve ourselves, but to improve the practice of law generally.

As professionals, we provide service to our communities—both as a lawyer and as a leader. We all have a duty to provide legal assistance and representation to those who cannot afford it. This means supporting the Idaho Law Foundation both monetarily and by volunteering. We would like your money, but we need you and your experience to help those in need. Volunteer—you will be surprised at how much it helps you.

As I finish this column, I realize that a definition of professionalism is right in front of me. Sitting here in my bookshelf is the Idaho State Bar *DeskBook Directory*. Starting on page 287 are the

Model Rules of Professional Responsibility. Read them. Use them.

P.S. Hi Micah!

Jay Q. Sturgell is serving a six-month term as president of the Idaho State Bar. He has been a Bar Commissioner representing the First and Second Judicial Districts since 2004. He received his B.S. from Utah State University and his J.D. from the University of Idaho College of Law. He is a Special Deputy Attorney General for the State of Idaho, Shoshone County Public Defender, and City Attorney for the cities of Pinehurst, Smeltonville, and Mullan. Jay is the first attorney from the Silver Valley to be a Commissioner since 1965. You can reach Jay at (208) 784-4035 or sturgellcs@usamedia.tv

NEWS BRIEFS

NEW JUDGES

Steven L. Clark, Pocatello, a Jefferson County Deputy Prosecutor has been named as a new Magistrate Judge in Lemhi County; He is replacing Magistrate Judge Jerry Meyers who is retiring in January to become a professional hunting guide in Botswana. Clark will begin his new job in January, and will also sit on the bench in Bonneville County two times per week

Penny Jo Stanford is a St. Anthony native and has been named as a new Magistrate Judge in Clark County. Previously she was Fremont County's prosecuting attorney, and currently does civil work for Madison County as a Deputy Prosecutor.

Stanford is taking over for Magistrate Judge William Hollerich, who left Dubois in September for a job as an attorney with U.S. Immigration and Customs Enforcement in California. Stanford has been asked to start as soon as possible. She will sit on the bench for cases in Bonneville County four times a week.

PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF PRACTICE AND PROCEDURE—The Judicial Conference of the United States Committee on Rules of Practice and Procedure has requested public comment on the preliminary draft of proposed amendments to the Federal Rules of Bankruptcy and Criminal Procedure and the Federal Rules of Evidence. A pamphlet containing the proposed amendments and a brochure summarizing the proposed amendments is on file

at the Idaho State Bar. Additional copies can be obtained by calling the Rules Committee Support Office at (208) 502-1820, or writing to the Rules Committee Support Office, Administrative Office of the United States Courts, One Columbus Circle, N.E., Washington, D.C. 20544. The text of the proposed amendments can also be found at www.uscourts.gov/rules All comments are due by February 15, 2007 to James C. Duff, Director, Administrative Office of the U.S. Courts, One Columbus Circle, N.E., Washington, D.C. 20544.

IDAHO JUVENILE RULES CHANGES—Effective August 21, 2006, Rules 16, 29 through 37, 39 through 46, 48, 51 through 53, and 58 of the Idaho Juvenile Rules have been repealed and revised versions of these rules have been adopted. These are the portions of the Idaho Juvenile Rules addressing procedures in Child Protective Act cases. The order adopting and setting out the revised versions of these rules can be found on the Idaho Supreme Court website at <http://www.isc.idaho.gov/ijr-amended-order.htm>.

MICHIE IDAHO CODE ERROR—Error Rule 46.2 of the Idaho Criminal Rules addresses no contact orders. Judge Michael Redman recently pointed out an error in the published version of subsection (b) of ICR 46.2. In the Michie Idaho Code volumes, the word "misdemeanor" is included in the first sentence, which makes it appear that a victim may request modification or termination of a no contact order in misdemeanor criminal cases, but not in felonies. This is

incorrect. The word "misdemeanor" was inadvertently included in an order issued on June 30, 2004, by the Supreme Court amending other wording in ICR 46.2. This error was later corrected in an order issued by the Court on August 30, 2004, but the correction has not made it into the published versions of the rule. You will note that the version of ICR 46.2(b) on the Idaho State Judiciary's website correctly omits the word "misdemeanor."

In addition, both the version of the rule published by Michie and the version on the website omit a title line in ICR 46.2(b).

Subsection (b) of ICR 46.2 actually reads as follows:

(b) Victim's right to request modification or termination of no contact order. A victim of a criminal offense for which a no contact order has issued may request modification or termination of that order by filing a written and signed request with the clerk of the court in which the criminal offense is filed. Forms for such a request shall be available from the clerk. The court shall provide for a hearing within fourteen days of the request and shall provide notification of the hearing to the victim and the parties.

DISCIPLINE

SCOTT L. BURNUM (Disbarment)

On September 13, 2006, the Idaho Supreme Court issued an Order of Disbarment, disbaring Boise lawyer Scott L. Burnum from the practice of law in the State of Idaho. The Idaho Supreme Court's Order followed a Professional Conduct Board Recommendation of disbarment in a formal charge disciplinary proceeding filed by the Idaho State Bar.

On December 28, 2005, the Idaho State Bar filed a formal charge Complaint against Mr. Burnum. The Complaint alleged that Mr. Burnum violated Idaho Bar Commission Rule 505(b) ["Criminal conduct"] and Idaho Rules of Professional Conduct "8.4(b) ["Commission of a criminal act"] and 8.4(d) ["Conduct prejudicial to the administration of justice"]. The allegations related to the Judgment, Suspended Sentence and Order of Probation, entered by the Fourth Judicial District Court in and for the County of Ada, on September 21, 2005. The judgment and suspended sentence followed a two-day jury trial. The jury found Mr. Burnum guilty of felony malicious harassment in violation of Idaho Code §18-7902.

Mr. Burnum failed to answer or otherwise respond to the formal charge Complaint. The Idaho State Bar filed a Motion to Deem Admissions ("Default") and for Imposition of Sanction on March 21, 2006. A Hearing Committee of the Professional Conduct Board conducted a hearing on that motion on May 2, 2006. The Hearing Committee granted the motion and entered its Findings of Fact, Conclusions of Law, Order and

Recommendation on June 14, 2006. The Hearing Committee recommended disbarment.

The Idaho Supreme Court's Order of Disbarment found that Mr. Burnum violated I.B.C.R. 505(b) and I.R.P.C. 8.4(b) and 8.4(d). The Court concluded that Mr. Burnum has shown a consistent pattern of nonresponsiveness to Bar Counsel, the Hearing Committee and the Idaho Supreme Court in this disciplinary proceeding and in the prior disciplinary proceeding that resulted in his suspension commencing on February 14, 2005. The Court also concluded that Mr. Burnum had engaged in serious criminal conduct, which violated his most basic professional obligations to the public, the pledge to maintain personal honesty and integrity.

Based upon the foregoing, the Idaho Supreme Court ordered that Mr. Burnum's admission to practice law in the State of Idaho be revoked and that his name be stricken from the records of the Idaho Supreme Court as a member of the Idaho State Bar.

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

CURTIS N. HOLMES (Reinstatement)

On October 4, 2006, the Idaho Supreme Court issued an Order reinstating Curtis N. Holmes of Pocatello to the practice of law in the State of Idaho.

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

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The firm is pleased to announce that

**SHELLI D. STEWART
has become an associate of the firm**

Ms. Stewart is a 2006 graduate of the University of Idaho College of Law. She became a member of the Idaho Bar and the U.S. District Court, District of Idaho in 2006. Ms. Stewart will focus her practice in the areas of real estate, estate planning, employment law and general civil litigation.

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Diane K. Minnich



PROFESSIONALISM AWARDS

The Bar's 2006 Professionalism Award is an expression of respect, appreciation and commendation from the recipient's peers. It is one of the highest honors any Idaho lawyer may receive during his or her career. Recipients are lawyers who have a reputation for civility, ability, diligence, integrity, courtesy and cooperation - epitomizing what it means to be a first-class lawyer.

The 2006 professionalism awards will be given to the following lawyers at the resolution meetings in their districts. These lawyers have brought distinction to the legal profession through their conduct and service.

FIRST DISTRICT

Janell S. Burke, Coeur d'Alene. Janell holds a career position as a Judicial Law Clerk for the District Court of the First Judicial District. Janell is a graduate of Gonzaga University and has been a member of the Bar for 22 years.

When the Hon. John P. Luster, District Court talks about working with Janell, he is very candid about her ability to elicit the best from everyone she comes in contact with, including himself, saying, "The quality of my work will go downhill in a hurry if she ever decides to retire. Her work is outstanding; her answers to questions thoughtful and are reflective of her intellect."

Janell feels each attorney must recognize the great privilege and responsibility that comes with being a lawyer. Continual studying of the law; civility in behavior, not only towards fellow professionals, but towards the public; supporting the Bar, and participating in public service should all help the attorney to focus on solutions to legal problems and seeking justice for those who can't seek it themselves.

Janell is a volunteer in many legal activities. She has been president, vice-president, and secretary/treasurer of the First District Bar Association; chair and co-chair of the Kootenai County Bar; co-chair and board of directors for the John P. Gray Inn of Court; coordinator of Settlement Week in Kootenai

County, coordinator of Law Day activities in Kootenai schools, board of directors for the Conflict Resolution Center of the Inland Northwest. She has also assisted in retirement events and investitures for judges on behalf of the Bar; and helped to plan, coordinate, and participate in many continuing legal education programs.

Janell also spends many hours in community volunteer work sharing her talents. She is a regular panelist on KSPS Public and KUID Public Television stations for the North Idaho College Public Forum; she is a former board member for the Foundation Northwest and the Inland Northwest Lutheran Outdoor Ministries, She plays the piano and organ and belongs to the AAUW Gourmet Cooking Club.

Janell feels it is a great honor to receive a Professionalism Award from her peers. She said, "There are many skilled and deserving attorneys in the First District... who recognize the great privilege and awesome responsibility of being a lawyer. I am humbled to be selected for the award.

Janell and her husband Loren have two sons.

Second District

Donald L. Burnett, Moscow. Don is the Dean and Foundation Professor of Law for the University of Idaho College of Law. His responsibilities include teaching, scholarship, service to the legal profession and the public; leadership and management of the College of Law; and participation in the administration of the University of Idaho.

Don is a native of Pocatello, but chose to broaden his world by attending Harvard, graduating magna cum laude in economics before going on to receive his J.D. from the University of Chicago. A L.L.M from the University of Virginia and graduating on the Commandant's List from the Command and General Staff College of the United States Army round out his education.

Don's career cuts a large swath through the legal profession. He has been an appellate judge, practicing lawyer, Idaho State Bar President, current Dean of the University of Idaho College of Law, and a law teacher. He started his career as a law clerk to the Chief Justice of the Idaho Supreme Court and as an assistant attorney general for the State of

Idaho. In Pocatello he practiced with B. Lynn Winmill (currently Chief Judge of the U.S. District Court for the District of Idaho). He is a past president of the Idaho State Bar, served as a contract judge of the Shoshone-Bannock Tribal Court; and served as executive director of the Idaho Judicial Council. He served on the Idaho Court of Appeals from 1982-1990 when he was appointed the University of Louisville's dean of the law school. He received the U.S. Armed Forces Legion of Merit award for career achievement when he retired with the rank of Colonel in 2001. In 2002, he accepted the University of Idaho's invitation to serve as dean of the law faculty.

Dean Burnett views professionalism as a personal commitment all attorneys must make to conduct above the minimum requirements of the law and beyond the monetary incentives of the marketplace. He says, "... it encompasses rigorous adherence to ethics; diligence and competence in serving clients and the public; civility in communications; fairness in actions; dedication to improving the law and legal institutions, and pro bono service."

He and his wife Karen have been married for 37 years and have two sons, Jason and David.

Third District

William F. Gigray, III, Nampa. Bill Gigray is a shareholder partner with White Peterson, P.A. in Nampa. His practice areas are municipal law, local government law, personal injury, estate planning, probate, and corporate law. He received his J.D. from the University of Idaho College of Law, and was admitted to the Idaho State Bar in 1973. He is past president of the Third Judicial District Bar Association; past president, and member of the board of directors for the Idaho Trial Lawyers Association; and a member of the Trial Lawyers of America.

Bill is a native of Caldwell. Over the years he has been involved in his church and community. He has served as president of the Jaycees, Optimist Club, Greenbelt Civic League of Caldwell, Inc., and the Caldwell Foundation for Education Opportunity, Inc.

Bill feels professionalism is grounded in respect for each other and the rule of law he and his legal peers serve. He says, "How we conduct ourselves in this practice toward our

clients, with the people we deal with on behalf our clients, and with each other matters a great deal. Without professionalism, there is no profession.”

Bill, and his wife Barbara have been married for 35 years. They have three children: Anne, Will, and Mary all residing in Idaho. Mary will soon be the third generation of the Gigray family to become a lawyer. Bill’s dad, William F. Gigray, Jr., a member of the Bar for 65 years, received the professionalism award in 1994.

FOURTH DISTRICT

Walter H. Bithell, Boise. Walter is a partner with Holland & Hart, LLP. He received a B.S. from the University of Idaho in 1965 and his J.D. from the University of Idaho College of Law in 1968. In 2001, he received the University of Idaho Alumni Association Silver and Gold Professional Achievement Award.

After receiving his law degree Walter was the deputy attorney general for the State of Idaho and served as general counsel for the Idaho State Department of Insurance and the Idaho State Tax Commission. In 1972 he practiced as a trial lawyer with Langroise, Sullivan & Smylie. In 1984 the firm merged with Holland & Hart. Walter is now partner and senior litigation attorney.

Walter shares his knowledge through education and writing. He has been a presenter at CLEs, Idaho Practical Skills Courses, Boise State University, Idaho Trial Lawyers Association, Citizens Law Academy, and many other venues. He has written columns for *The Advocate* and is a columnist for the *Idaho Statesman*, writing a weekly column addressing reader’s legal issues.

Walter is a past president of the Idaho State Bar; past member of the Idaho Law Foundation Board of Directors; Past Master of the Bench, American Inn of Court No. 130; past president, Idaho Trial Lawyers Association; University of Idaho Board of Directors. He is a recipient of the University of Idaho Alumni Association UI Gold and Silver Award; and is a 2006 recipient of the Judge May Trial Lawyer of the year award. He has been a member of the Bar Counsel Oversight and the Multi-disciplinary Practice Committees.

If clients could solve their own problems they would not need lawyers is how Walter starts his definition of professionalism. “We hold ourselves out as problem-solvers and the public has a right to expect, indeed demand, that we are competent, proficient, and that we treat them honestly and fairly. Professionalism is not an option in the prac-

tice of law, it is an absolute requirement,” he said.

He and his wife Sherry, a retired school-teacher and administrator, have been married for more than 40 years. They have one daughter and two sons. When he can distance himself from his legal profession Walter enjoys working on his ranch in northern Idaho and playing golf.

Jack W. Barrett, Boise. Jack is a partner with Moffatt, Thomas, Barrett, Rock & Fields. He oversees and assists in workers’ compensation practice and insurance-related issues. Jack has been with Moffatt Thomas his entire law career, joining upon graduation from the University of Idaho College of Law in 1959. He became a partner in 1962.

Jack says his definition of legal professionalism is characterized by or conforming to both technical and ethical standards. The most important traits of any lawyer are uncompromising integrity, complete honesty and exhibiting civility in all dealings with the court, adversaries and clients. In addition, the recognizes that being a lawyer ‘is not merely about earning a living,’ but also involves recognition of the profession’s obligation to the public.

Through the years he has been active in many legal committees and organizations throughout Idaho. He is a past president of the Fourth District Bar Association, served on the Idaho Judicial Council, a founding officer of the Idaho Association of Defense Counsel, past chair of the Idaho Industrial Commission Advisory Committee, current member of the American Inn of Court No. 130, worked on committees to draft and submit proposed legislation on Americans with Disabilities, and workers’ compensation.

Jack participates in career day programs sponsored by local junior high schools by discussing the law as a profession with interested students.

Jack and his wife Marilyn have a small acreage in Boise. They recently gave up tending horse when their children left home. They are both involved in their church and enjoy golfing. He and Marilyn are privileged to have all four children and ten grandchildren reside in Treasure Valley where they can watch the grandkids grow up and attend their activities.

FIFTH DISTRICT

Russell G. Kvanvig, Twin Falls. Russ is a partner with Stephan, Kvanvig, Stone & Trainor of Twin Falls. Russ received his J.D. from the University of North Dakota and joined the Bar 30 years ago. Russ has spent many practicing his chosen profession. As

with many who receive this annual reward he also spends many hours volunteering his time, both for the Bar and for his community. He served for three years as the commissioner for the Third and Fifth Districts, serving his last six months as President of the Bar. He has served on Bar Counsel Oversight Committee, the Professional Conduct Board, and on the Bar Exam Preparation Committee. He is a section member in the Business and Corporate Law; Professionalism and Ethics; Real Property; and the Taxation, Probate & Trust Law sections.

In his Twin Falls community, Russ has been a president of the Twin Falls Chamber of Commerce, president of the College of Southern Idaho Foundation; and president of the Magic Valley Regional Medical Center Foundation.

Many may remember Russ’ columns ended with a humorous story from his childhood in a Norwegian American family. Each story had a lesson Russ wove into his column. Those story lessons were all about the value of professionalism. It is Russ’ thought that, “Being a lawyer should be synonymous with being professional.” When talking about professionalism in the legal field, he insists it can’t be taken for granted. All lawyers must be involved in the vigilance and nurturing of its reputation. Civility and integrity is required as the attorney goes about his professional life; but the other side of involvement also requires the attorney to behave with civility, integrity, and involvement in this or her community and civic affairs.

Russ and his wife Geri have two sons and two grandchildren. He enjoys telling stories, hunting and fly-fishing.

SIXTH DISTRICT

Keith A. Zollinger, Pocatello. Keith’s runs a private practice, Zollinger Law Office, Chtd.in Pocatello. He is a past president of the 6th District Bar Association, a former board member of the Idaho Legal Aid, and a member of the ITLA and the IACJ. Keith feels the corner stone for legal professionalism is treating people fairly and speaking truthfully. It is his opinion that if an attorney doesn’t know or can’t tell the truth they should say nothing. Keith is a former Commissioner for the Idaho Youth Soccer and has coached youth soccer for 15 years.

He and his wife Jan have three children and one grandchild.

Seventh District

Dale W. Storer, Idaho Falls. Dale is a partner with Holden, Kidwell, Hahn & Crapo, P.L.L.C. of Idaho Falls. His practice

is in the areas of state and local government, education, real property, planning and zoning, and employment law. He has served as the attorney for the city of Idaho Falls since 1982. He also represents a number of other smaller cities, school districts, counties, electrical utilities and private developers. He has frequently testified before the Idaho State Legislature on a variety of issues affecting cities, counties and other public entities. Dale graduated cum laude from Brigham University with a B.A. in economics and Asian Studies. He received his J.D. from the J. Reuben Clark Law School, BYU.

Volunteer work plays a prominent role in his professional life. He served three terms as president of the Idaho Municipal Attorneys Association; was Idaho chair of the International Municipal Lawyers Association, on the Board of Directors of the E. Idaho Chapter of J. Reuben Clark Law Society; member of the Association of Idaho Cities Legislative Committee; and received their 2000 Meritorious Service Award; and his is a member of the Alumni Board for the J. Reuben Clark Law School, Brigham Young University.

Dale looks at professionalism as the “grease” on the wheels of justice. “Without that lubricant the system bearings would soon freeze and the entire process would grind to a halt,” he said. Colleague Steve Tuft, Burley says, “Dale is the pro bono ‘go to’ guy for Idaho municipal lawyers. When any of us have a municipal law nut we can’t crack we go to him. I have often heard other Idaho municipal lawyers say, ‘Well, I talked to Dale and he said...’”

He and his wife Le Anne have six children, and one very magnificent grandson. He enjoys skiing, fishing, and wood working when not practicing law.

DENISE O’DONNELL DAY PRO BONO AWARDS

The pro bono awards are named for the late IVLP Director Denise O’Donnell Day who worked tirelessly throughout her career to provide legal services to the poor and disadvantaged. Pro bono award recipients follow her example of providing freely of their professional abilities, time and service.

Fonda Jovick, Paine, Hamblen, Coffin, Brooke & Miller, LLP, Coeur d’Alene donated 65 hours in a divorce case for Amanda, a 21-year-old mother of two children ages 2 years and 8 months. Amanda and her husband, Steven, separated after he was arrested for domestic battery. Amanda obtained a 90-day protection order against her husband. He then violated the order and faced additional

charges as a result. Amanda is in counseling through the local domestic violence program. Fonda represented Amanda in a long, protracted divorce that involved a trial and attempted mediation of the parenting plan and set up a custody plan that protects her and the children. Ultimately, Amanda achieved her objectives.

Carole Wells, Moscow, was nominated by Judge John R. Stegner. Ms. Wells represented a criminal defendant in Latah County drug court. As a result of her becoming acquainted with this defendant, she also learned that he had lost his visitation rights with his three children. While Ms. Wells was only obligated to represent him in his criminal matter, she undertook, *pro bono*, his representation in his child custody proceedings. Through her diligent efforts, and what was estimated to be seventy-five hours of work, she got her client’s rights to visits his children reinstated. This defendant recently graduated from drug court. His three children attended that ceremony and one of his son spoke movingly of his father’s return to his life.

Bryan K. Walker, Hamilton, Michaelson & Hilty, LLP, Nampa represented a low-income mother in a case involving extensive litigation. The divorce action involved domestic violence/abuse, high-conflict custody issues, worker’s compensation and substantial debt issues. Walker made six court appearances on the civil protection order and divorce matters.

Ultimately, the parties arrived at a stipulated decree, under which the parties established a shared custody arrangement that satisfied the desires, needs and concerns of both parents, including child support for the IVLP client.

“These parties appear to have now settled into their own lives, and I was recently contacted by my client who wanted to share her news of new employment. There does not appear to be any ongoing, extraordinary conflicts at the time. This was an interesting case professionally and involved a satisfying conclusion. I could not have done this case without the capable assistance of my legal assistant, Janet Neff. Thanks to IVLP for its support in my representing this client.” Bryan K. Walker

George DeFord, DeFord Law, PC, Nampa has been generously accepting IVLP cases for low-income people in Canyon County for years. In one particular case, a young man contacted the IVLP after his wife walked out with a new boyfriend and left him with the two children, ages 3 years and 8 months. He later learned that the new

boyfriend is a registered sex offender and is not allowed to be around children. At about this same time the man was laid off from his job and was working a minimum wage job to get by. He needed help to get the divorce completed, a custody order in place that protected the children and a child support order to help him financially. Mr. DeFord answered the call and was able to secure the divorce, custody and child support.

Kira D. Pfisterer, Greener Banducci & Shoemaker, Boise was nominated by Judge Ronald J. Wilper. Judge Wilper wanted to recognize the outstanding volunteer efforts of Ms. Pfisterer, for her part in establishing the Ada County Drug Court as a not-for-profit corporation. She accomplished the task in 2005 and the IRS now recognizes the Ada County Drug Court as a tax-exempt 501(c)(3) corporation. Obviously, this is a great benefit to the activities of Ada County Drug Court. Ms. Pfisterer continues her involvement with the Drug Court as a member of the Board of Directors, especially monitoring by-law compliance for the Secretary of State.

Lois K. Fletcher, Boise, takes the “hard ones”, divorce and custody cases for low-income victims of domestic violence. The clients are not always cooperative and the issues are sometimes difficult, but when she’s finished with one case, she calls the IVLP and asks for another. Ms. Fletcher has also assisted with IVLP Family Law Clinics and other pro bono efforts almost from the beginning of her career as an Idaho attorney.

J. Layne Davis, Davis, Miller & Walker, Boise was nominated by the 4th District CASA program. He completed a CASA case that included approximately 100 hours of pro bono service. In this case Layne represented a volunteer Guardian ad Litem for two young children (ages 5 and 3). The Court Appointed Special Advocate (Layne’s client) advocated for the best interest of the children in the case, which eventually resulted in the termination of the parental rights of the parents. The children are in the safe care of their grandparents in another state, thanks to Layne’s work.

Lisa Rasmussen, Boise. In November 2004, the Women and Children’s Alliance referred Min to the IVLP. Min and her son had recently moved to the U.S. from China and Min spoke limited English. Min’s husband, an American, had arranged for Min to come to the U.S. to marry him. Less than a year after she was here, her husband abused her and was arrested for domestic violence. While charges were pending, he filed for divorce. Min was confused and worried about her immigration status. Lisa Rasmussen

agreed to help Min through the divorce and the IVLP worked to connect Min with an immigration attorney. Lisa was able to negotiate a settlement and get the divorce finalized.

Laura O'Connell, Idaho Legal Aid Services, Twin Falls volunteered to be appointed Guardian ad Litem in a challenging guardianship case. Cindy had been providing full-time care for her two great-nieces for a year. The mother had been in and out of jail and both she and the father have drug abuse problems. The father also has mental health problems and lives generally at a Canyon County homeless shelter. Cindy let the mother take the girls for a visit in June 2005 and her live-in boyfriend allegedly sexually abused them. Cindy is employed, but with the girls in her care and no financial support from the parents, her income falls below the federal poverty guidelines. Former Pro Bono Award recipient Mark Guerry represented Cindy in her petition for guardianship of her two great-nieces. Laura was appointed Guardian ad Litem for the girls. "I enjoyed doing this case. It definitely felt like I was able to do something to protect the children. The great aunt is a really great, wonderful person. She has already raised her own children and is now taking on these two little girls. This was a really different type of case for me. In guardianship cases, particularly as GAL, the attorney has a lot more freedom." Laura O'Connell

Mark Guerry nominated Laura for this award. "There is a lot of pro bono out there that attorneys do all the time. Laura is someone who is always willing to help out."

Lowell Hawkes & Ryan Lewis, Lowell N. Hawkes, Chtd. Pocatello. IVLP nominated Lowell N. Hawkes and Ryan Lewis for a joint pro bono award. Mr. Hawkes accepted an appointment from the U. S. District Court to represent an inmate of the Idaho State Penitentiary in a Civil Rights case under the Court's Pro Se Pro Bono Program. The inmate claimed Correctional Medical Services violated his legal right to adequate medical treatment.

Messrs Hawkes and Lewis collectively billed 370.65 hours in the effort to enforce their client's legal rights. Mr. Hawkes advised that at their billing rates, this amounted to nearly \$58,000.00 in legal services donated on this case. Mr. Anderson ultimately received a medical discharge, but died from the condition that was focus of his complaint. With his death, his claim was dismissed since injury claims do not survive death.

This sad outcome does not detract from the dedication, professionalism and generosity that Messrs. Hawkes and Lewis displayed in pursuing this matter. Mr. Hawkes spoke at the man's funeral and in a letter to IVLP provided these comments about his experience:

"I do not regret accepting this assignment. Nor does Ryan. Judge Boyle was as decent, patient, and humane and professional as ever. In my book Denise Asper is a pure saint and angel in lawyers' garb; I can't imagine a better person to handle this program in the federal system. I met some wonderful people and got to know the full dimension of a family struggle of which the case was just a small part. The time with Jerry was a blessing to me as I worked with him through the issues of his case and the issues of his death. I learned some important things about myself, about life, about death, about family and had some true spiritual experiences as a result of this assignment for which I will always be grateful."

Truly Mr. Hawkes and Mr. Lewis exemplify what is best about the legal profession.

James Ruchti, Cooper & Larsen, Pocatello was nominated by the 6th Judicial District CASA Program for his frequent acceptance of CASA cases. On one particular case, the child was a young teenage girl whom her stepfather had been sexually abusing along with her two friends. The girl's mother failed to protect or even believe the allegations made by her daughter.

James battled long and hard for the child. He went to one of the abuser's hearings when the CASA was called as a witness to make sure she was treated fairly, and he participated at another hearing by telephone knowing the CASA would again have to testify.

This particular case had a good ending. The stepfather was convicted of sexual abuse and is in prison for 4 years. The mother however, still advocates for her husband and the

girl is in her grandmother's home who now has a guardianship of her. The CASA program praises James for his support and professionalism.

Penelope North-Shaul, Dunn & Clark, PA, Rigby was nominated by the 7th Judicial District CASA program. Stacy McAlevy says, "Penny has been with the program for 10 years and has taken several cases as well as recruited several attorneys to the program. She has been on a case for the past 3 years that she helped through a 6-day termination hearing in an effort to provide the children with permanency. Penny has always been willing to take on new cases and also provides law training to new volunteers. She is articulate and well versed in the courtroom when advocating for the best interest of the children we serve. I believe Penny takes CASA cases because she cares about the kids! She is an amazing attorney and a great asset to the program."

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ALTERNATIVE DISPUTE RESOLUTION

Merlyn W. Clark

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

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

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Alternative Dispute Resolution Section

Larry C. Hunter
Moffatt, Thomas, Barrett, Rock & Fields, Chtd.

On behalf of the Alternative Dispute Resolution (ADR) Section of the Idaho State Bar, allow me to introduce you to our Section and to this issue of *The Advocate*, which we are sponsoring. We are a small section, perhaps because members of the Bar view our role as more limited than it really is. We welcome any member of the Bar interested in the mission of the ADR Section, whether or not that person is an ADR practitioner. Indeed, it would be beneficial to have a wide spectrum of section members.

The objective of the ADR Section is to facilitate the exchange of information about all kinds of dispute resolution. Alternative Dispute Resolution incorporates any intervention by a neutral third-party to help parties fashion their own resolution to a dispute without having to resort to the time-honored procedure of a trial. This may include the resolution of discovery disputes by a discovery master, arbitration, early mediation, court-ordered mediation, evaluation (both under Idaho Rules and extra-regulatory), administrative law proceedings, and the negotiation of child custody agreements.

The articles and other information in this issue of *The Advocate* are intended to broaden one's understanding of ADR. This issue includes a survey of attorneys' fees awards in arbitration, useful to anyone drafting or negotiating arbitration clauses in agreements. There is also an article presenting a "mock" mediation, intended to give non-litigators a glimpse into what might happen in a mediation setting. In addition, this issue

includes the Rules of Conduct for Mediators adopted last August by the American Bar Association. The ADR Section of the Idaho Bar plans to propose to the Idaho Bar membership that these Rules be adopted as aspirational guidelines for mediators in the state of Idaho.

We trust you will enjoy this issue of *The Advocate* and hope you will consider joining the ADR Section of the Idaho State Bar.

ABOUT THE AUTHOR

Larry C. Hunter is a partner with *Moffatt, Thomas, Barrett, Rock and Fields* where he has practiced for his entire 25-year career. Larry's practice includes general and commercial litigation, administrative law, and alternative dispute resolution. He is past Bar President and is currently serving as the Idaho delegate to the ABA. He is chair of the Bar's ADR section, serves on the Public Information Committee, and is on the Law Foundation's Law Related Education committee. Larry is a member of the ABA, the Idaho Trial Lawyers' Association, and the Idaho Association of Defense Counsel.

Larry has an AB from Harvard University (*cum laude*) and further studied at Brigham Young University. He worked in international banking between college and law school, and spent two years in Chile and is fluent in Spanish. Larry received his law degree from Northwestern University School of Law in 1976. To contact Larry Hunter: (208) 345-2000 or lch@moffatt.com.

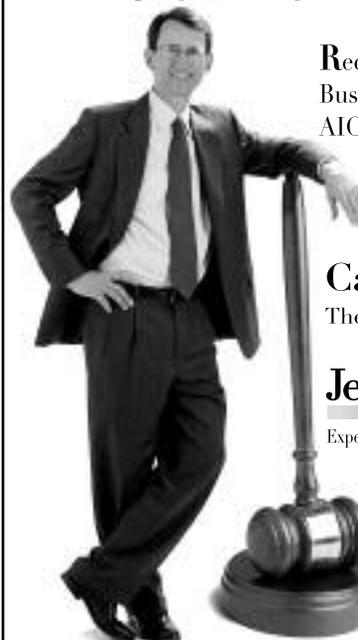
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Attorneys' Fees in Arbitration*

Henry F. Minnerop
Sidley Austin LLP, New York

Kimberly A. Johns
Goldman, Sachs & Co., New York

It is a long-standing principle of American law, the American Rule, that a prevailing party in a litigation is not entitled to an award of attorneys' fees except (i) where authorized by statute, (ii) where the parties have agreed that the prevailing party should be awarded attorneys' fees, or (iii) where the court concludes that one of the litigants has acted in bad faith. Although this principle is well established and applied with consistency in court actions, it is often stretched, modified, or ignored in arbitration proceedings. This article focuses on the vagaries of attorneys' fees awards in arbitration proceedings and the decidedly hesitant review of such awards by the courts under the doctrine of manifest disregard of the law. The authors conclude with a number of recommendations aimed at avoiding the issuance of unintended attorneys' fees awards in arbitration proceedings.

I. INTRODUCTION

It has long been recognized that each party to litigation in the United States bears its own attorneys' fees.¹ Although this principle, the American Rule, is well established and applied with consistency in court actions, it is often stretched, modified, or ignored in arbitration proceedings. This discrepancy appears due, in large part, to the informality of arbitration proceedings that encourages arbitrators to broadly and that the parties have de facto agreed to an award of attorney's fees and a strong public policy favoring finality over legally correct outcomes in arbitrations. Specifically, applying the doctrine of manifest disregard of the law in the review of arbitration awards, courts have permitted awards of attorneys' fees to stand on grounds that would not have survived appellate review if such fees had been awarded by a trial court adjudicating the same controversy. The result can be a minefield for the unwary practitioner.

II. THE AMERICAN RULE

It is a long-standing principle of American law, the American Rule, that a prevailing party in a litigation is not entitled to an award of attorneys' fees except (i) where authorized by statute, (ii) where the parties have agreed that the prevailing party should be awarded attorneys' fees, or (iii) where the court concludes that one of the litigants has acted in bad faith.² Application of the statutory and parties' agreement exceptions requires explicit reference to attorneys' fees. For example, in order to receive attorneys' fees under the statutory exception to the American Rule, a litigant must show that such an award is *specifically* authorized by statute.³ Similarly, attorneys' fees may only be awarded pursuant to the parties' agreement exception where there is an "express and unequivocal agreement" for the award of attorneys' fees.⁴

The American Rule is premised upon the policy that, because litigation is uncertain, "one should not be penalized for merely defending or prosecuting a lawsuit."⁵ It also addresses the concern that "the poor might be unjustly discouraged from instituting actions to vindicate their rights" if subject to paying their opponents' legal fees.⁶ Moreover, as a matter of judicial administration, the American Rule reduces the time, expense, and other

difficulties associated with the tangential litigation of what constitutes reasonable attorneys' fees.⁷

The American Rule is not universally followed in jurisdictions outside the United States. The so-called English Rule, applied in the United Kingdom and other jurisdictions, provides for an award of attorneys' fees to the prevailing party as a matter of course.⁸ In yet other jurisdictions, including Germany, Austria, and Switzerland, attorneys' fees are awarded in proportion to a prevailing party's success in the litigation.⁹

III. ARBITRATION

Arbitration "is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."¹⁰ This principle "recognizes the fact that arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievance to arbitrations."¹¹ With this foundation, it is not surprising that the jurisprudence governing arbitration focuses on the agreement of the parties. However, as the U.S. Supreme Court has noted, "[b]y agreeing to arbitrate a[] claim, a party does not forego the substantive rights afforded by [law]; it only submits to their resolution in an arbitral, rather than a judicial forum."¹²

A. THE FEDERAL ARBITRATION ACT

The Federal Arbitration Act ("FAA")¹³ provides the federal statutory framework for arbitration touching interstate commerce in this country and is premised upon Congressional intention to place "[a]n arbitration agreement... upon the same footing as other contracts, where it belongs."¹⁴ The FAA articulates "a national policy favoring arbitration and withdr[aws] the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."¹⁵ Indeed, "[w]here the arbitration agreement is ambiguous, the [FAA]'s policy favoring arbitration requires that any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."¹⁶ Although the FAA does not contain any express provision addressing attorneys' fees, many arbitrators have awarded such fees and courts have confirmed such awards when falling within the broad scope of issues submitted to arbitration under the FAA.¹⁷

Under the FAA, a court's function in vacating an arbitration award is "severely limited" in order that the "ostensible purpose for resort to arbitration, i.e., avoidance of litigation, [not be] frustrated."¹⁸ According to the FAA, to vacate an arbitral award, a court must find that (i) the award was the result of corruption, fraud, or undue means; (ii) there was evident partiality or corruption by the arbitrators; (iii) the arbitrators refused to postpone the hearing upon sufficient cause shown, refused to hear evidence pertinent and material to the controversy, or otherwise proceeded in a manner that prejudiced the rights of any party; or (iv) the arbitrators exceeded their powers.¹⁹ In addition to these statutory grounds, courts have invoked their equity jurisdiction to vacate or modify awards if the arbitrators acted in "manifest disregard of the law."²⁰ Proving "manifest disregard" is a significant hurdle, requiring the party seeking to vacate an award to establish that a governing legal principle that is "well-defined, explicit, and clearly applicable to the case" was ignored by the arbitrator after it was brought to his attention.²¹ Given this high standard of proof, courts are reluctant to vacate arbitration awards on "manifest disregard" grounds.²²

B. ARBITRATION RULES

Major organizations for arbitration and dispute resolution in the United States, including the NASD Dispute Resolution ("NASD-DR"), the New York Stock Exchange ("NYSE"), the American Arbitration Association ("AAA"), the CPR Institute for Dispute Resolution ("CPR"), and the International Chamber of Commerce ("ICC"), provide inconsistent rules or guidance to arbitrators as to the scope of their authority to award attorneys' fees. The CPR rules, which govern disputes arbitrated by and between CPR's largely international corporate membership, expressly provide that, absent an agreement of the parties to the contrary, arbitrators *may* award "costs of legal representation and assistance."²³ The ICC rules seem to go one step further, providing that "[t]he costs of the arbitration *shall* include...the reasonable legal and other costs incurred by the parties for the arbitration."²⁴ However, despite this mandatory language, ICC arbitrators appear to have full discretion in deciding "which of the parties shall bear [attorneys' fees] or in what proportion they shall be borne by the parties."²⁵ The AAA, focusing primarily on the resolution of disputes between American parties under its domestic commercial rules,²⁶ expressly permits, somewhat in line with the American Rule, the award of attorneys' fees *only* (i) if requested by the parties, (ii) if provided for in the parties' agreement to arbitrate, or (iii) if otherwise permitted by law.²⁷ Unlike the rules of the CPR, ICC, or AAA, the NYSE and NASD-DR rules do not, however, address attorneys' fees, one way or the other, except in connection with statutory employment discrimination claims brought before the NASD-DR.

1. NASD Dispute Resolution

As noted, the NASD-DR arbitration rules specifically refer to attorneys' fees only in connection with employment arbitrations. Rule 10215 under the Industry and Clearing Controversies section of the NASD Code of Arbitration Procedure states that an arbitrator "shall have the authority to provide for reasonable attorneys' fee reimbursement, in whole or in part, as part of the remedy in accordance with applicable law."²⁸ Pursuant to Rule

10210, this provision only applies to "disputes that include a claim alleging employment discrimination, including a sexual harassment claim, in violation of a statute."²⁹ NASD Notice to Members 99-96 explains that Rule 10215 permits the employment arbitration section of the Rules to comport with the Civil Rights Act of 1964, which allows the prevailing party to recover attorneys' fees.³⁰ This provision, however, clearly does not apply to non-employment matters.

Other than the express authority to grant attorneys' fees in employment matters, there is no mention of attorneys' fees elsewhere in the NASD Code of Arbitration Procedure.³¹ Undaunted by the lack of express authority, litigants (and arbitrators) have looked to NASD Arbitration Rule 10332(c) for such authority. This Rule states:

In addition to forum fees, the arbitrator(s) may determine in the award the amount of costs incurred pursuant to Rules 10319, 10321, 10322, and 10326 and, unless applicable law directs otherwise, other costs and expenses of the parties and arbitrator(s) which are within the scope of the agreement of the parties. The arbitrator(s) shall determine by whom such costs shall be borne.³²

Although NASD-DR arbitrators may award "costs," that term is not commonly understood to include attorneys' fees.³³ Nevertheless, in *Nieminski v. John Nuveen & Co., Inc.*,³⁴ the court rejected the contention that arbitration before the NASD was fundamentally flawed because attorneys' fees were allegedly unavailable in that forum, noting that NASD-DR rules allowing the grant of "damages and other relief" do not preclude arbitrators from awarding attorneys' fees.³⁵ Similarly, in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Adler*,³⁶ a New York appellate court compelled arbitration, noting that NASD arbitration Rule 41(e) (the precursor to Rule 10332(c)), authorized arbitrators to broadly grant "damages and other relief," which, the court held, included attorneys' fees.

Although no rule in the NASD Code of Arbitration Procedure explicitly addresses attorneys' fees in non-employment matters, the current Arbitrator's Manual provided by the NASD-DR to its arbitrators notes that:

Attorneys' fees are frequently requested in arbitration. Arbitrators have the authority to consider awarding attorneys' fees, but the procedure varies from state to state. It is appropriate for the arbitrators to request the parties to brief this issue.³⁷

Although the current Arbitrator's Manual does not inform arbitrators of the American Rule, the 1996 version of the Manual did, at least implicitly:

Generally, parties to an arbitration are responsible for their personal costs associated with bringing or defending an arbitration claim. Exceptions to the rule do exist. Parties should be prepared to argue the statutory or contractual basis that permit an award of attorneys' fees. The arbitrators should consider referring to the authority relied upon if attorneys' fees are awarded.³⁸

2. The NYSE

The NYSE arbitration rules do not specifically mention attorneys' fees—not even in the context of employment claims.

However, NYSE Arbitration Rule 629(c) provides that “In addition to forum fees, the arbitrator(s) may determine in the award the amount of costs incurred pursuant to Rules 617, 619 and 623, and unless applicable law directs otherwise, other costs and expenses of the parties. The arbitrator(s) shall determine by whom such costs shall be borne....”³⁹ NYSE Arbitration Rules 617, 619, and 623, in turn, refer to adjournments hearing session fees, document production and subpoenas, and the record of proceedings, respectively.⁴⁰ None of these rules refers to attorneys’ fees.

Nevertheless, the limited case law that has examined the question of whether “other costs and expenses” under Rule 629(c) encompasses attorneys’ fees has confirmed NYSE panel arbitration awards that have included attorneys’ fees. For example, in *Prudential-Bache Securities, Inc. v. Tanner*,⁴¹ a brokerage house filed a petition to vacate an arbitration award in favor of former employees. Prudential claimed that the award of attorneys’ fees was not contemplated by Rule 629(c) because the rule does not explicitly mention attorneys’ fees and “to assume that it provides an implicit independent basis for awarding them is contrary to the general American Rule that parties typically bear their own legal fees.”⁴² The court disagreed and stated that the language “costs and expenses, unless applicable law directs otherwise” included attorneys’ fees and that there was no contrary case law that suggested otherwise.⁴³ Thus, the court held that the award of attorneys’ fees was within the scope of the panel’s authority under NYSE rules.⁴⁴ The court buttressed its conclusion by noting that both parties requested attorneys’ fees from the panel and that therefore an award was “contemplated by the parties to be within the scope of the agreement to arbitrate.”⁴⁵

The NYSE also provides a Manual to its arbitrators—namely, an earlier version of the current Arbitrator’s Manual used by the NASD-DR—that makes no reference to the American Rule.⁴⁶

3. AAA

Unlike the NASD-DR and NYSE, the AAA Rules specifically address the authority of arbitrators to grant attorneys’ fees as part of their awards. Pursuant to Rule 43 of the Commercial Arbitration Rules and Mediation Procedures, the arbitrator’s award may include an award of attorneys’ fees (i) if all parties have requested such an award in the arbitration; (ii) if it is authorized by law; or (iii) if it is within the scope of the parties’ arbitration agreement.⁴⁷ Thus, the AAA Rules provide an articulation of the American Rule.⁴⁸ Nonetheless, the AAA Rules are still somewhat broader than the American Rule, which does not permit an award of attorneys’ fees just because “all parties have requested such an award” in their pleadings or briefs (e.g., boilerplate prayers for relief with the language “including attorneys’ fees”). The authors have not been able to locate any decision in which a court has relied upon mutual prayers for relief that include attorneys’ fees as constituting an express agreement empowering the court to grant attorneys’ fees to the prevailing party under the American Rule.

4. CPR (International Institute for Conflict Prevention & Resolution)

The CPR Rules for Non-Administered Arbitration (“CPR Rules”) provide that, subject to any agreement by the parties to

the contrary, the arbitral tribunal “may apportion the costs of arbitration between or among the parties....”⁴⁹ The CPR Rules go on to define “costs of arbitration” to include, *inter alia*, “[t]he costs for legal representations and assistance... incurred by a party to such extent as the Tribunal may deem appropriate.”⁵⁰ Thus, by submitting to CPR arbitration, the parties—unless they state an express intention to the contrary—agree that a party may be awarded “costs for legal representation and assistance” as the arbitrators deem appropriate. The CPR Rules appear to reflect the international nature of many of the disputes arbitrated under its auspices and lean toward the so-called English Rule under which the prevailing party is generally awarded attorneys’ fees as a matter of law.

C. STATE STATUTES

Many states, codifying the American Rule, have enacted statutes limiting the ability of parties to obtain attorneys’ fees in arbitrations. Notably, New York Civil Practice Law and Rules 7513 provides that “Unless otherwise provided in the agreement to arbitrate, the arbitrators’ expenses and fees, together with other expenses, *not including attorneys’ fees*, incurred in the conduct of the arbitration, shall be paid as provided in the award.”⁵¹ Similar statutes have been enacted in other states.⁵² Thus, pursuant to some states’ laws, arbitrators are not permitted to award attorneys’ fees “unless they are *expressly* provided for in the arbitration agreement.”⁵³ These state statutes therefore merely reiterate that which would otherwise be required for the award of attorneys’ fees under the parties’ agreement exception to the American Rule. However, the application of state statutory provisions regarding attorneys’ fees has been preempted in large part by the FAA with regard to disputes arising out of contracts or conduct involving interstate commerce. As discussed further, *infra*, under the FAA, agreements to arbitrate *all* disputes between the parties have been construed to include claims for attorneys’ fees even if the claim of attorneys’ fees has entered the arena only by way of a boilerplate prayer for relief and was not part of the dispute that led to the invocation of the “all disputes” arbitration agreement.⁵⁴

IV. JUDICIAL TREATMENT OF ATTORNEYS’ FEES IN ARBITRATIONS

Judicial application of the American Rule to arbitration awards has been uneven. Indeed, a small number of decisions has gone so far as to reject the proposition that arbitrators are bound by the American Rule at all.⁵⁵ Most courts, however, recognize the relevance of the American Rule to arbitrations. The scope and manner of its application, nonetheless, remain inconsistent and unsettled.⁵⁶ This is in sharp contrast to the straightforward and consistent application of the American Rule in judicial proceedings.

Judicial treatment of attorneys’ fees in arbitrations may be divided into two categories, one, prior to the issuance of an award, and two, after an award is issued. As to the first category, courts have generally required the *submission* of claims seeking attorneys’ fees to arbitration under agreements calling for arbitration of *all* disputes between the parties. In compelling arbitration, these courts have not suggested that arbitrators may disregard the American Rule when considering a claim for attor-

neys' fees submitted to them. To the contrary, the courts have emphasized that they are simply ordering the *submission* of attorneys' fee claims (along with others) and have expressed no view on the resolution of those claims by the arbitrators. As to the second category, involving post-arbitration review of awards granting attorneys' fees, courts have generally confirmed such awards, declining to find that they constituted manifest disregard of the law. In confirming these awards, courts frequently ignore or distort elements of the American Rule in the interest of finality of arbitrators' decisions.

A. PRE-AWARD CASES

Prior to the Supreme Court's 1995 decision in *Mastrobuono v. Shearson Lehman Hutton, Inc.*,⁵⁷ courts generally declined to compel the submission of attorneys' fee claims to arbitration, relying upon state law and the UAA, which explicitly provide that arbitrators do not have authority to award attorneys' fees in the absence of a specific agreement to the contrary. *Mastrobuono* changed all that, holding that the FAA preempts state laws that restrict an arbitrator's authority to consider all claims in cases involving interstate commerce when the parties have agreed to submit "all disputes" to arbitration.

Relying upon the reasoning of *Mastrobuono* (which involved the authority of New York arbitrators to consider punitive damage claims), the Second Circuit in 1996 held in *PaineWebber v. Bybyk*⁵⁸ that claims for attorneys' fees must be submitted under an "all disputes" arbitration clause regardless of New York's Civil Practice Law and Rules § 7513, which provides that arbitrators have no authority to award attorneys' fees in the absence of an explicit agreement giving them that authority.⁵⁹ In compelling arbitration, the Second Circuit in *Bybyk* did not, however, suggest that the arbitrators were free to award attorneys' fees as they saw fit in disregard of the American Rule.⁶⁰

In 2003, the Second Circuit made this point explicit in *Shaw Group Inc. v. Triplefine International Corp.*⁶¹ when it compelled the submission of a claim for attorneys' fees under an "all disputes" arbitration clause. The court went out of its way to note that any defense to that claim should be submitted to the arbitrators:

Appellees may well have various New York law defenses to Triplefine's claim [for attorneys' fees], *see, e.g.*, N.Y. C.P.L.R. § 7513 (McKinney 1998) (stating that attorneys' fees shall not be awarded in arbitration unless agreement to arbitrate so provides. ... As we have previously ruled, the proper remedy under such circumstances 'is to defend the arbitration' by invoking the applicable state law, 'not to enjoin arbitration altogether.'⁶²

Similarly, in *Livingston v. Associates Finance, Inc.*,⁶³ the Seventh Circuit, compelling arbitration under an "all disputes" clause in a loan agreement, stated that the AAA arbitrators appointed to hear the matter would be bound by the statutory law governing attorneys' fees in the case, rather than be permitted to act—as respondents feared—within their own discretion under AAA rules. The statute that formed the basis of the claim in arbitration provided for attorneys' fees to a successful claimant only, not to a successful defendant.⁶⁴ AAA Commercial Arbitration

Rule 45(d)(b) permitted "an award of attorneys' fees if all parties have requested [such an] award or *it is authorized by law or their arbitration agreement.*"⁶⁵ Thus, the court held:

We fail to see how the Arbitration Agreement and the Commercial Arbitration Rules provide the arbitrator with discretion to award attorneys' fees to [a party] greater than that which is provided for in the [statute] or that in any way contravenes the [the statute's] limitations on such awards. Moreover, the availability of judicial review ensures that an arbitrator's award is not in conflict with statutory requirements. '[T]here is no reason to assume at the outset that arbitrators will not follow the law, although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute.' Accordingly, we reject this basis for denying arbitration.⁶⁶

Finally, in *Rosenberg*⁶⁷ and *Nieminski*,⁶⁸ where the courts pointed to the NYSE and NASD rules authorizing an award of "damages and/or other relief" as encompassing awards of attorneys' fees, each court did so in the context of compelling the submission of attorneys' fee claims (among others) to arbitration, without suggesting that NYSE or NASD arbitrators were free to grant attorneys' fees in disregard of substantive law, i.e., the American Rule.

B. POST ARBITRATION CASES

Although courts compelling the submission of attorney fee claims to arbitration have left the American Rule fully intact, the same cannot be said of courts reviewing awards of attorneys' fees in a post-arbitration context. Rather than follow the American Rule's unambiguous requirement that the parties' agreement contain an explicit provision authorizing an award of attorneys' fees to the prevailing party,⁶⁹ courts have strained and stretched to find the existence of an "agreement" to be able to confirm attorneys' fee awards for the sake of finality of arbitration decisions. In this regard, courts have upheld awards where both parties submitted the issue of attorneys' fees to arbitration through their pleadings.⁷⁰ In so ruling, courts have relied upon the well-established principle that an arbitrator "can bind the parties only on issues that have been submitted to him" to support the finding that mutual requests by the parties for attorneys' fees in the parties' pleadings constitute an express agreement authorizing an award of attorneys' fees to the prevailing party under the American Rule.⁷¹

For example, in *Spector v. Torenberg*,⁷² the court found that AAA arbitrators acted properly in awarding attorneys' fees when each of multiple parties requested such fees in its post-hearing briefs and no party objected during summations when most parties reiterated their request for fees.⁷³ Concluding that submission of requests for fees constituted an agreement between the parties, the court confirmed that the arbitrator had the authority to award attorneys' fees.⁷⁴ The court in *WMA Securities, Inc. v. Wynn*⁷⁵ similarly stated that the award of attorneys' fees by NASD arbitrators was proper because all parties submitted requests to the arbitration panel for an award of fees.⁷⁶ The court

emphasized that these mutual requests constituted an agreement between the parties.

Although the outcome in *Spector* and *WMA Securities* reflects the informality of arbitration proceedings, there can be little doubt that similar pleadings in court actions, often in the form of boilerplate prayers for relief in complaints or answers, would not warrant an award of attorneys' fees by a court under the American Rule. Nor is it likely that parties to a court action would urge the judge during summation or in post-trial briefs to grant attorneys' fees in the absence of a prior written agreement between the parties specifically permitting such a grant to the prevailing party as an exception to the American Rule.

In *Cassedy v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,⁷⁷ the court held that "no 'express agreement' devoted exclusively to the question of attorney's fees is necessary" but rather that "the parties may, by their actions, filings, and submissions, expressly waive their right [under Florida law] to insist that only a court decide the issue of attorney's fees."⁷⁸ Relying upon the parties' NASD Uniform Submission Agreement, the court found that they had agreed to submit to arbitration all claims raised in the statement of claim, which included a prayer for attorneys' fees.⁷⁹ Therefore, because Merrill Lynch made no reservation of its rights in executing the Uniform Submission Agreement, the court found that "the parties specifically and expressly agreed, in every sense of these words, that the arbitration panel would determine the attorney's fee issue."⁸⁰ In affirming the award, the *Cassedy* court noted that, although Merrill Lynch had objected during the arbitration that claimants were not entitled to attorneys' fees under the state securities statute, Merrill Lynch did not object to the arbitrators *addressing* the issue of attorneys' fees, noting that Merrill Lynch had made a fee request of its own during the arbitration.⁸¹ Similarly, the court in *First Interregional Equity Corp. v. Haughton*⁸² relied upon the parties' Uniform Submission Agreement to find that the arbitrators had a contractual basis for their authority to award attorneys' fees. That Agreement stated that:

[t]he undersigned party hereby submits the present matter in controversy as set forth in the attached statement of claim... to arbitration.⁸³

The Statement of Claim attached to the Uniform Submission Agreement sought attorneys' fees.⁸⁴

Moreover, courts have indicated that it would be proper to confirm awards of attorneys' fees where only one party requests fees and the other side simply fails to object.⁸⁵ In *McDaniel v. Bear Stearns & Co., Inc.*,⁸⁶ the court reasoned that McDaniel's post-hearing brief requested attorneys' fees as a discovery sanction against Bear Stearns for making disclosures that were both "materially misleading" and "materially inaccurate" in violation of its duty of faith and fair dealing.⁸⁷ In arguing that its actions did not warrant a sanction, Bear Stearns failed to raise an objection to the authority of the panel to award attorneys' fees. According to the court, therefore, because Bear Stearns never maintained that an award of attorneys' fees was beyond the arbitrators' authority, it "implicitly conceded that it was within the Panel's authority to award such fees."⁸⁸ Thus, objecting to the sanction on the merits was not enough; there had to be an objec-

tion to the legal authority of the arbitrator to award attorneys' fees.

In addition, some courts have confirmed the award of attorneys' fees despite the application of the wrong state's law in contravention of the parties' choice-of-law provision.⁸⁹ In *Coutee v. Barington Capital Group, L.P.*, the Ninth Circuit Court of Appeals confirmed an award of attorneys' fees made pursuant to California's Welfare and Institutions Code despite the fact that the parties' agreement contained a New York choice-of-law clause.⁹⁰ The *Coutee* court held that the arbitrators' failure to apply New York law was harmless error because an "arbitration panel may award attorney's fees, even if not otherwise authorized by law to do so, if both parties submit the issue to arbitration."⁹¹

At least one court has resisted the otherwise overwhelming trend of judicial accommodation and applied the American Rule unambiguously to post-arbitration proceedings. In *Asturiana De Zinc Marketing, Inc. v. LaSalle Rolling Mills, Inc.*,⁹² the court vacated an award of attorneys' fees to the prevailing party, holding that an agreement to submit all claims to arbitration "is clearly not equivalent to a *substantive agreement* that states that attorneys' fees may be awarded to the prevailing party."⁹³ The court stated that under New York substantive law, which includes the American Rule, an award of fees may be granted only when authorized by statute or the parties' express agreement. Although the parties in *Asturiana* agreed to submit "any dispute [in connection with their contract] to arbitration," the court found that this was not the equivalent of an express agreement that attorneys' fees may be awarded to the prevailing party.⁹⁴ The court noted that, under *Bybyk*, an "AAA arbitrator here is assumed to have the same power as a New York Court (as opposed to a New York arbitrator [under NY CPLR § 7513]) to award attorneys' fees, but must still make that determination in accordance with the substantive law [i.e., the American Rule] such a court would apply."⁹⁵ The court noted that "although AAA Rule 43 allows arbitrators to grant 'any remedy or relief that that the arbitrator deems just and equitable *and* within the scope of agreement of the parties... , this Rule merely refers back to the parties' contract and limits the scope of the arbitrator[']s authority to the contract's express terms."⁹⁶ The court found that neither the parties' arbitration agreement nor any statutory provision relevant to the case permitted an award of attorneys' fees to the prevailing party.⁹⁷ Accordingly, the court vacated the award as being in manifest disregard of the American Rule.

The opinion in *Asturiana* was commented upon by the Second Circuit in a summary opinion in *Stone & Webster, Inc. v. Triplefine International Corp.*⁹⁸ There, the court affirmed an award of attorneys' fees by reference to the rules of the arbitral forum, the International Chamber of Commerce ("ICC"), which explicitly permitted arbitrators to award "[t]he reasonable legal and other costs incurred by the parties."⁹⁹ The respondent in *Stone & Webster* had been compelled over its objection to arbitrate petitioner's attorneys' fee claim before the ICC.¹⁰⁰ In affirming the confirmation of the attorneys' fee award, the *Stone & Webster* court distinguished its decision from that in *Asturiana* on the grounds that the arbitral forum in *Asturiana*, the AAA, did not grant arbitrators the authority to award attorneys' fees with-

out the parties' express agreement, whereas, "ICC rules ...allow them."¹⁰¹ Thus, the parties' agreement to arbitrate their disputes before the ICC had the effect of making ICC rules part of their agreement expressly allowing ICC arbitrators to award attorneys' fees.

The Second Circuit's analysis in *Stone & Webster* places attorneys' fee awards issued by AAA, NASD-DR, and NYSE arbitrators in jeopardy because none of those venues has a rule (other than the NASD-DR in employment cases) explicitly authorizing attorneys' fee awards. Thus, under *Stone & Webster*, arbitrators at AAA, NASD-DR, and NYSE would lack authority to award attorneys' fees in the absence of an express agreement between the parties authorizing such awards. Put another way, unless the parties through their pleadings or through their conduct expressly agree to authorize the arbitrators to award attorneys' fees, AAA, NASD-DR, and NYSE arbitrators do not have the authority to award such fees based upon forum rules allowing awards of "damages and other relief."

V. CONCLUSION AND RECOMMENDATIONS

The courts' deviation from the American Rule in post-arbitration proceedings is one of degree and covers a spectrum of factual circumstances. Undoubtedly, *Asturiana* stands out—some would say stands tall—for its strict adherence to the American Rule, insisting that arbitrators—like courts—award attorneys' fees only if the parties have expressly agreed to such an award to the prevailing party. However, most courts have found the existence of an express agreement by reference to the parties' pleadings or conduct during the arbitration condoning an award of attorneys' fees to satisfy the American Rule. Although the issuance of attorneys' fee awards under those circumstances may be within the literal contemplation of the parties, such awards would, nevertheless, not have been issued by a court under similar circumstances. Needless to say, one is hard pressed to sympathize with a party who requests attorneys' fees and invokes the American Rule only after finding himself on the losing end of the argument after the arbitration is over. This is especially so where a party's request for attorneys' fees has been reiterated during summations and affidavits documenting its fees have been submitted to the arbitrators.

Awards of attorneys' fees are issued with some frequency in arbitrations,¹⁰² but by no means in every case. In fact, arbitrators do not in most cases award attorneys' fees to the prevailing party, even in cases where both parties have requested them in their pleadings and where, in line with many court decisions, the parties are deemed to have entered into an express agreement with respect to attorneys' fees within the meaning of the American Rule. The authors' experience and anecdotal evidence suggests that arbitrators tend to award attorneys' fees, not simply because the parties are deemed to have agreed that they may do so within the meaning of the American Rule, but because of their personal displeasure with the underlying conduct of the losing party—e.g., an egregious breach of contract or bad faith conduct—coupled with a desire to redress an economic imbalance between an offending corporate respondent and an unsophisticated individual claimant of limited means.

Given the risk that the American Rule may not be strictly followed, if at all, in arbitrations, parties should take great care to

avoid an unintended award of attorneys' fees. Toward that end, a party should not be perceived as agreeing, even implicitly, to the arbitrators' authority to award attorneys' fees. Specifically, a party wishing to avoid an unintended award of attorneys' fees (i) should not ask for attorneys' fees in its own pleadings or submissions;¹⁰³ (ii) should clearly and timely object to all requests for attorneys' fees; (iii) should timely place the applicable law (i.e., the American Rule) before the arbitration panel in writing;¹⁰⁴ (iv) should, if possible, designate in the governing law clause of the arbitration agreement the law of a state that follows the American Rule; (v) should provide in the arbitration clause of the agreement that the arbitration is subject to the substantive law of the jurisdiction selected in the governing law clause;¹⁰⁵ and finally, (vi) should, where possible, include language in its arbitration agreements that excludes the issue of attorneys' fees from submission to arbitration.¹⁰⁶ Taking these precautions, an award of attorneys' fees by arbitrators is less likely to be issued and, if it is issued, is more likely to be vacated under the doctrine of manifest disregard of the law. In any event, in counseling a client as to whether to agree to arbitration, it would also be prudent for the attorney to note the risk that, despite these precautions, the arbitration award may, unlike litigation, include an award of attorneys' fees to the prevailing party.

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ENDNOTES

¹This principle applies to arbitrations and court actions. DOMKE ON COMMERCIAL ARBITRATION § 35:8 (Larry E. Edmondson, ed., 3d ed. 2005) ("As a general rule, each party to an arbitration must bear its own attorney fees associated with an arbitration action or the enforcement of an arbitration award."). *But see infra* note 55 and accompanying text.

²*Alyeska Pipeline Service Co. v. The Wilderness Society*, 421 U.S. 240, 247, 258–59 (1975); *Hirschfield v. Board of Elections in the City of New York*, 984 F.2d 35 (2d Cir. 1993) (bad faith exception to American Rule). The *Hirschfield* court articulated the bad faith exception as: "An inherent power award may be imposed either for commencing or for continuing an action in bad faith, vexatiously, wantonly, or for oppressive reasons." *Id.* at 40 (quoting *Oliveri v. Thompson*, 803 F.2d 1265, 1272 (2d Cir. 1986)).

³*Alyeska*, 421 U.S. at 245–55, 260. For example, federal fee-shifting statutes expressly provide for the reallocation of fees to successful parties in cases arising under Title VII, the Age Discrimination in Employment Act, and Section 1983. *See, e.g.*, 42 U.S.C. § 2000e-5(k) (2000); 29 U.S.C. § 626(b) (2000) (ADEA); 42 U.S.C. § 1988(b) (2000) (Section 1983 actions).

⁴*Orlowski v. Koroleski*, 651 N.Y.S.2d 137, 137–38 (N.Y. App. Div. 1996).

⁵*Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967).

⁶*Id.*

⁷*Id.*

⁸See CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 234–36 (1935); *Alyeska*, 421 U.S. at 247, n.18.

⁹See YVES DERAÏNS & ERIC A. SCHWARTZ, A GUIDE TO THE NEW ICC RULES OF ARBITRATION 341–42 (1998).

¹⁰*AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 648 (1986) (quoting *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)). Some courts have articulated this principle as “that parties cannot be compelled to arbitrate issues that they have not *specifically* agreed to submit to arbitration.” *Shaw Group Inc. v. Triplefine Int’l Corp.*, 322 F.3d 115, 120 (2d Cir. 2003) (emphasis added).

¹¹*AT&T*, 475 U.S. at 648–69.

¹²*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

¹³U.S.C. §§ 1–16 (2000 & Supp. II 2002).

¹⁴*Southland Corp. v. Keating*, 465 U.S. 1, 15–16 (1984) (quoting H.R. REP. NO. 96, 68th Cong., 1st Sess., 1 (1924)).

¹⁵*Id.* at 10.

¹⁶*PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1198 (2d Cir. 1996) (quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983)).

¹⁷See *infra* notes 69–91 and accompanying text.

¹⁸*Synergy Gas Co. v. Sasso*, 853 F.2d 59, 63 (2d Cir. 1988) (quoting *Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp.*, 274 F.2d 805, 808 (2d Cir.), *cert. denied*, 363 U.S. 843 (1960)).

¹⁹U.S.C. § 10(a)(1)–(4) (2000 & Supp. II 2002). See, e.g., *Conoco, Inc. v. Oil, Chemical & Atomic Workers Int’l Union*, 26 F. Supp. 2d 1310, 1320 (N.D. Okla. 1998) (“[U]ndue means’ connotes behavior that is immoral, if not illegal” and is determined by applying “the test for determining whether the award was procured by fraud”); *Austin South I, Ltd. v. Barton-Malow Co.*, 799 F. Supp. 1135, 1142 (M.D. Fla. 1992) (“[T]here must be a substantial relationship between the arbitrator and a party in order to establish ‘evident partiality’” and “[t]he possibility of bias must be ‘direct, definite, and capable of demonstration rather than remote, uncertain and speculative’”) (quoting *Middlesex Mutual Ins. Co. v. Levine*, 675 F.2d 1197, 1202 (11th Cir. 1982)).

²⁰*DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 821 (2d Cir. 1997), *cert. denied*, 522 U.S. 1049 (1998).

²¹*New York Tel. Co. v. Communications Workers of America Local 1100, AFL-CIO District One*, 256 F.3d 89, 91 (2d Cir. 2001) (citing *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 202 (2d Cir. 1998)). According to the court in *Goldman v. Architectural Iron Co.*, 306 F.3d 1214, 1216 (2d Cir. 2002), an arbitrator is presumed to be a blank slate with respect to applicable law. Therefore, it is the duty of the parties to inform him of pertinent law, including attorneys’ fees in arbitration.

²²See, e.g., *DiRussa*, 121 F.3d at 821 (“we have also emphasized that the reach of the manifest disregard doctrine is ‘severely limited’”) (quoting *Government of India v. Cargill Inc.*, 867 F.2d 130, 133 (2d Cir. 1989)); *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 202 (2d Cir. 1998), *cert. denied*, 526 U.S. 1034 (1999) (“We have also pointed out, however, that the reach of the [manifest disregard] doctrine is ‘severely limited’”) (quoting *Government of India v. Cargill Inc.*, 867 F.2d 130, 133 (2d Cir. 1989)); *Ludgate Ins. Co. Ltd. v. Banco Seguros del Estado*, No. 02 Civ. 3653, 2003 WL 443584, at *4 (S.D.N.Y. Jan. 6, 2003) (“A district court’s role in reviewing an arbitral award is ‘highly deferential’ . . .”) (quoting *Pike v. Freeman*, 266 F.3d 78, 85 n. 4 (2d Cir. 2001)).

²³CPR RULE 16.2(d), available at <http://www.cpradr.org/pdfs/arb-rules2005.pdf>.

²⁴ICC RULES OF ARBITRATION, Art. 31 (emphasis added). See DERAÏNS & SCHWARTZ, *supra* note 9, at 341 (“Under Art. 31(1), the arbitrators have complete discretion to allocate the costs as they see fit.”).

²⁵ICC RULES OF ARBITRATION, Art. 31(3) (alteration in original).

²⁶The AAA has an arm, the International Centre for Dispute Resolution, that deals with international disputes. Under its International Arbitration Rules—like those of the ICC—arbitrators may award “costs,” which are defined to include, *inter alia*, “the reasonable costs for legal representation of a successful party.” American Arbitration Association, INTERNATIONAL ARBITRATION RULES, Art. 31. The AAA also has the Commercial Arbitration and Mediation Center for the Americas (“CAMCA”), which handles disputes arising out of the North American Free Trade Agreement. Under its mediation and arbitration rules, arbitrators may also award “costs,” which are defined to include, *inter alia*, “the reasonable costs for legal representation of a successful party.” CAMCA MEDIATION AND ARBITRATION RULES, Art. 33.

²⁷AAA’S COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURE R-43(d).

²⁸NASD CODE OF ARBITRATION PROCEDURE RULE 10215.

²⁹NASD CODE OF ARBITRATION PROCEDURE RULE 10210.

³⁰NASD Notice to Members 99-96 (Dec. 1999).

³¹NASD Notice to Members 99-96 recognizes that:

Although the Code is silent with respect to attorneys’ fees, such fees may be awarded under current practice. Normally, the parties will brief the arbitrators on applicable law providing for the award of attorneys’ fees in their cases.

Id. (footnote omitted).

³²NASD CODE OF ARBITRATION PROCEDURE RULE 10332. Rule 10319 permits arbitrators to impose fees, not to exceed \$1,500, upon parties for adjournments; Rule 10321 addresses pre-hearing proceedings; Rule 10322 permits arbitrators to allocate the costs of the appearance of a person or production of documents pursuant to subpoenas; and Rule 10326 permits arbitrators to allocate costs of transcription of records of proceedings. NASD CODE OF ARBITRATION PROCEDURE RULES 10319, 10321, 10322, 10326.

³³See *McDaniel v. Bear Stearns & Co., Inc.*, 196 F. Supp. 2d 343, 364 (S.D.N.Y. 2002) (citing *Libra Bank Ltd. v. Banco Nacional de Costa Rica, S.A.*, 570 F. Supp. 870, 892 (S.D.N.Y. 1983)).

³⁴No. 96 C 1960, 1997 WL 43241 (N.D. Ill. Jan. 23, 1997).

³⁵*Id.* at *6.

³⁶651 N.Y.S.2d 38 (N.Y. App. Div. 1996). In compelling arbitration, neither *Nieminski* nor *Adler* suggested that NASD-DR arbitrators were free to disregard the American Rule in considering claims of attorneys’ fees.

³⁷THE ARBITRATOR’S MANUAL 32 (Securities Industry Conference on Arbitration, May 2005), available at http://www.nasd.com/web/groups/med_arb/documents/mediation_arbitration/nasdw_009668.pdf. The Securities Industry Conference on Arbitration (“SICA”) is a group composed of representatives of SROs that provide arbitration forums, counsel for public investors, and the securities industry. See NASD Notice to Members 99-96.

³⁸NASD Notice to Members 99-96 (quoting THE ARBITRATOR’S MANUAL (SICA, Oct. 1996)).

³⁹NYSE RULE 629(c).

⁴⁰NYSE RULES 617, 619, and 623.

⁴¹72 F.3d 234 (1st Cir. 1995).

⁴²*Id.* at 242.

⁴³*Id.* at 242–43. See also *Nieminski*, 1997 WL 43241, at *6 (“the NYSE [and NASD] rules do not restrict the type of relief an arbitrator may award, but merely refer to ‘damages and/or other relief’”) (quoting

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 32 (1991)); Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith Inc., 170 F.3d 1, 15 (1st Cir. 1999) (“The NYSE rules do not limit available relief. Rule 627 provides that arbitrators may award ‘damages and/or other relief.’”).

4472 F.3d at 242.

45^{Id.} at 243.

46THE ARBITRATOR’S MANUAL (SICA, Jan. 2001). The 2001 version of *The Arbitrator’s Manual* contains a provision with respect to attorneys’ fees that is identical to the current version provided by the NASD-DR to its arbitrators. Compare THE ARBITRATOR’S MANUAL at 34 (SICA, Jan. 2001) with THE ARBITRATOR’S MANUAL at 31 (SICA, Aug. 2004).

47AAA’S COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURE R-43(d) provides that: “The award of the arbitrator(s) may include... (ii) an award of attorneys’ fees if all parties have requested such an award or if it is authorized by law or their arbitration agreement.” The AAA Guide for Commercial Arbitrators also provides: “In some cases, you are authorized by the parties’ contract to award attorney fees.” The AAA Guide for Commercial Arbitrators is available at www.adr.org/Guides.

48^{See In re Arbitration of Prudential-Bache Secs., Inc. and DePew}, 814 F. Supp. 1081, 1083–84

(M.D. Fla. 1993) (Rule 43 “does not create the power to award attorneys’ fees,” but arbitrators may award attorneys’ fees “only when the contract expressly includes an express authorization”) (emphasis in original). ^{See also} Livingston v. Associates Fin., Inc., 339 F.3d 553, 558 (7th Cir. 2003) (holding that an earlier, but nearly identical, version of AAA’s rule with respect to the power to award attorneys’ fees did not “provide the arbitrator with discretion to award attorneys’ fees . . . greater than that which is provided for in the” Truth in Lending Act).

49CPR RULE 16.3.

50CPR RULE 16.2(d).

51N.Y. C.P.L.R. § 7513 (McKinney 1998) (emphasis added). New York’s C.P.L.R. § 7513 is based upon § 10 of the Uniform Arbitration Act of 1956 (“UAA”). ^{See} UAA § 10. The UAA was revised in 2000. The Revised Uniform Arbitration Act (“RUAA”) eliminates UAA’s § 10 prohibition against the award of attorneys’ fees by arbitrators. ^{See} Comment 4 to RUAA § 21. Rather, § 21(b) of the RUAA provides that:

An arbitrator may award reasonable attorney’s fees and other reasonable expenses of arbitration if such an award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding.

RUAA § 21(b). Unlike the RUAA’s provision with respect to an arbitrator’s ability to award punitive damages, there is “no requirement that the arbitrator apply the appropriate legal standard or have sufficient evidence to support a claim of attorney’s fees under the applicable statute.” Comment 2 to RUAA § 21.

52^{See, e.g.,} FLA.STAT.ANN. § 682.11 (West 2003); 710 ILL.COMP.STAT.ANN. 5/10 (West 1999); TENN.CODE ANN. § 29-5-311 (2000).

53Grossman v. Laurence Handprints-N.J., Inc., 455 N.Y.S.2d 852, 856 (N.Y. App. Div. 1982) (emphasis added). ^{See also} D&E Construction Co. v. Robert J. Denley Co., 38 S.W.3d 513, 519 (Tenn. 2001) (vacating award of attorneys’ fees because, even though agreement gave “panel very broad authority to decide any claims relating to a breach of contract dispute,” it contained no provision requiring attorneys’ fees) (emphasis in original); Terrell v. Amsouth Investment Servs., Inc., 217 F. Supp. 1233, 1237 (M.D. Fla. 2002) (holding that “parties must explicitly waive the limitation set forth in” the Florida statute limiting the award of attorneys’ fees by arbitrators).

54^{See, e.g.,} PaineWebber v. Bybyk, 81 F.3d 1193, 1199, 1202 (2d Cir. 1996); Shaw Group, 322 F.3d at 121.

55For example, in *Tennessee Dep’t of Human Servs. v. United States Dep’t of Educ.*, 979 F.2d 1162 (6th Cir. 1992), the court stated that “[t]he American Rule applies to the awarding of attorneys’ fees to parties that have litigated their cause in the federal courts and therefore, does not apply to this case, which concerns the awarding of attorneys’ fees incurred during the arbitration process.” *Id.* at 1169 (emphasis in original) (citing *Alyeska*, 421 U.S. at 269). ^{See also} Wilson v. Sterling Foster & Co. Inc., No. 98 C 2733, 1998 WL 749065, at *6 (N.D. Ill. Oct. 15, 1998) (noting that some authority supports the proposition that the “American Rule” does not apply to arbitration). The citation in *Tennessee Dep’t of Human Servs. to Alyeska* is, however, misplaced. The Supreme Court in *Alyeska* affirmed the scope of the American Rule as generally understood and made no reference to its exclusion from application in arbitrations. ^{See} *Alyeska*, 421 U.S. 240.

56Another way that judicial review of arbitration awards of attorneys’ fees has been hampered is by the practice of some arbitrators to grant lump sum awards without explanation as to whether such amounts contain an award of attorneys’ fees. ^{See} 3MACNEIL, SPEIDEL, & STIPANOWICH, FEDERAL ARBITRATION LAW § 36.8.4, at 36:82 (1995).

57514 U.S. 52 (1995).

5881 F.3d 1193 (2d Cir. 1996).

59^{Id.} at 1202. In *CIT Project Finance, L.L.C. v. Credit Suisse First Boston LLC*, No. 600847/03, 2004 WL 2941331 (N.Y. Sup. Ct. N.Y. County June 17, 2004), a New York court vacated an award of attorneys’ fees as being in manifest disregard of the law where the parties had agreed to arbitrate, not all disputes, but only a single claim. The court held that the FAA did not preempt NY C.P.L.R. § 7513 in that case. The court specifically noted that *Bybyk* “is not inconsistent with this conclusion, since the parties [there] agreed ‘to refer all issues to arbitration.’” *Id.* at *5.

60^{See} *Bybyk*, 81 F.3d 1193. ^{See also} *Adler*, 651 N.Y.S.2d 38. In addition to relying upon *Mastrobuono*, the New York intermediate appellate court in *Adler* relied upon NASD-DR arbitration rule 41(e), which authorized arbitrators to broadly grant “damages and other relief.” *Id.* at 38. The court also noted that the NASD’s Rule of Fair Practice, Rule 21(f)(4) provided that “No agreement [between an NASD member and a customer] shall include any condition which... limits the ability of a party to file any claims in arbitration or limits the ability of the arbitrator to make any award.” *Id.* at 38–39 (emphasis added).

61322 F.3d 115 (2d Cir. 2003).

62^{Id.} at 122 (citing *Bybyk*, 81 F.3d at 1200; *Smith Barney Shearson Inc. v. Sacharow*, 91 N.Y.2d 39, 46, 666 N.Y.S.2d 990, 993, 689 N.E.2d 884 (1997) (quoting *Bybyk*)).

63339 F.3d 553 (7th Cir. 2003).

64^{Id.} at 558.

65^{Id.} (emphasis added).

66^{Id.} (citations omitted).

67170 F.3d 1. ^{See supra} note 43 and accompanying text.

681997 WL 43241. ^{See supra} notes 34, 43, and accompanying text.

69^{See} Prudential Secs., Inc. v. Credon, 52 F.3d 334 (9th Cir. 1995).

70^{See} WMA Secs., Inc. v. Wynn, 105 F. Supp. 2d 833 (S.D. Ohio 2000), *aff’d*, 32 Fed. Appx. 726 (6th Cir. 2002).

71Butterkrust Bakeries v. Bakery, Confectionery & Tobacco Workers Int’l Union, AFL-CIO, Local No. 361, 726 F.2d 698, 700 (11th Cir. 1984) (quoting *Piggly Wiggly Operators’ Warehouse, Inc. v. Piggly Wiggly Operators’ Warehouse Indep. Truck Drivers Union, Local No. 1*, 611 F.2d 580, 583 (5th Cir. 1980)). ^{See, e.g.,} *Synergy Gas Co.*, 853 F.2d at 63–64 (“the ‘scope of authority of arbitrators generally depends on the intention of the parties to an arbitration, and is determined by the agreement of submission.’”) (quoting *Ottley v. Schwartzberg*, 819 F.2d 373, 376 (2d Cir. 1987)).

⁷²852 F. Supp. 201 (S.D.N.Y. 1994).

⁷³*Id.* at 210. The party against whom attorneys' fees were awarded also sought attorneys' fees in its demand for arbitration and did not object to such fees when others demanded them during summations. *Id.*

⁷⁴*Id.* See also *In re Arbitration between U.S. Offshore, Inc. and Seabulk Offshore, Ltd.*, 753 F. Supp. 86, 92 (S.D.N.Y. 1990).

⁷⁵105 F. Supp. 2d 833 (S.D. Ohio 2000), *aff'd*, 32 Fed. Appx. 726 (6th Cir. 2002).

⁷⁶*Id.* at 839.

⁷⁷751 So. 2d 143 (Fl. Ct. App. 2000).

⁷⁸*Id.* at 149. Florida courts had held that FLA.STAT. § 682.11 only permitted awards of attorneys' fees to be made by the trial courts. See *Loxahatchee River Environmental Control District v. Guy Villa & Sons, Inc.*, 371 So. 2d 111, 113 (Fla. Dist. Ct. App. 1979), *cert. denied*, 378 So. 2d 346 (Fla. 1979). Thereafter, Florida courts held that, despite FLA.STAT. § 682.11, arbitrators could award attorneys' fees if the parties expressly agreed to submit the issue to arbitration. See, e.g., *Pierce v. J.W. Charles Bush Secs., Inc.*, 603 So. 2d 625, 630-31 (Fla. Dist. Ct. App. 1992) (en banc); *Barron Chase Secs., Inc. v. Moser*, 745 So. 2d 965, 967 (Fl. Dist. Ct. App. 1999) (absent an agreement by the parties to permit arbitrators to award attorneys' fees the parties "must submit to the bifurcated process of having the circuit court determine the issue of attorney's fees"), *rev'd in part*, 783 So. 2d 231 (Fla. 2001). See also Russell C. Weigel III, *Preserving Claims for Attorney Fees in NASD Dispute Resolution Arbitrations*, PIABA BAR JOURNAL, at 54-59 (Spring 2005).

⁷⁹751 So. 2d at 149.

⁸⁰*Id.* Similarly, the court in *Wing v. J.C. Bradford & Co.*, 678 F. Supp. 622, 626 (N.D. Miss. 1987) found that the NYSE's Uniform Submission Agreement executed by the parties "explicitly empowered the arbitrators to decide the issue of attorneys' fees and expenses."

It is unlikely that a party to an arbitration can successfully modify or object to the Uniform Submission Agreement so as to avoid the "acquiescence" to the award of attorneys' fees as found by the *Cassedy* court. Some respondents in securities arbitrations, however, simply do not execute the Uniform Submission Agreement. In such cases, the arbitration panel typically notes in the award that, despite the lack of an executed Uniform Submission Agreement, the respondent was required by industry rules to submit to the arbitration and is bound by the award.

⁸¹751 So. 2d at 149-50.

⁸²842 F. Supp. 105 (S.D.N.Y. 1994).

⁸³*Id.* at 112 (emphasis added and alteration in original). The NASD-DR and NYSE both contain this quoted language in their respective Uniform Submission Agreements. Compare NASD-DR Arbitration Uniform Submission Agreement (available at http://www.nasdr.com/web/groups/med_arb/documents/mediation_arbitration/nasdw_009438.pdf) with NYSE Uniform Submission Agreement (available at <http://www.nyse.com/pdfs/uniformsubmission.pdf>).

⁸⁴842 F. Supp. at 112.

⁸⁵See *Spector*, 852 F. Supp. at 210.

⁸⁶196 F. Supp. 2d 343 (S.D.N.Y. 2002).

⁸⁷*Id.* at 363-64 ("The Panel awarded claimants \$75,000 in attorneys' fees (out of the \$248,443 requested) as a sanction for Bear [Stearns]'s discovery violations." The Panel cited NASD Notice To Members 99-90 "which explicitly authorizes arbitrators to award attorneys' fees as a sanction for a party to properly make discovery. . . .")

⁸⁸*Id.* at 365. See generally *Hirschfield*, 984 F.2d at 40 (discussing bad faith exception to American Rule).

⁸⁹See *Coutee v. Barington Capital Group, L.P.*, 336 F.3d 1128, 1135-36 (9th Cir. 2003). *But see* *Hollern v. Wachovia Secs., Inc.*, No. 04-M-2585 (D. Colo. Apr. 25, 2005). In *Hollern*, the arbitration panel awarded attor-

neys' fees pursuant to a Colorado statute, which permitted an award of attorneys' fees for bad faith conduct by a litigant, despite the fact that the parties' agreement contained a Virginia choice-of-law provision. Virginia, like New York, has a statute based upon the UAA that prohibits the award of attorneys' fees by arbitrators absent an agreement by the parties. The *Hollern* court rejected the argument that submission of requests for attorneys' fees by both parties constituted such an agreement. Therefore, the court vacated the attorneys' fees portion of the award. *Id.*, Order of April 21, 2005 (on file with *The Business Lawyer*). Notably, the underlying arbitration award of attorneys' fees was against an individual and in favor of a broker-dealer.

⁹⁰336 F.3d at 1135-36.

⁹¹*Id.* at 1136.

⁹²20 F. Supp. 2d 670 (S.D.N.Y. 1998).

⁹³*Id.* at 675 (emphasis in original).

⁹⁴*Id.* at 671. In opposing the motion to vacate the attorneys' fee award, claimant-petitioner *Asturiana* argued unsuccessfully:

First, the award of attorneys' fees were [sic] contemplated by the parties when they agreed to submit to arbitration *any dispute* arising out of the sales. Second, the arbitrator acted within the rules of the AAA when he awarded attorneys' fees because the rules permit the granting of any remedy or relief that the arbitrator deems just and proper and equitable and within the scope of the parties. Additionally, throughout the proceeding, beginning with the Statement of Claim, the issue of attorneys' fees was before the arbitrator and the parties.

Moreover, Federal and New York law permits the award of attorneys' fees. The *Mastrobuono* holding which related to arbitrators' award of punitive damages has similarly been applied to arbitrators' awards of attorneys' fees in situations such as the one at issue. Since *Mastrobuono*, New York courts applying New York law have recognized that it is within the power of an arbitrator to award attorneys' fees.

Claimant-Petitioner's Memorandum of Law in Opposition to Respondent's Cross-Motion to Vacate or Modify, at 2-3, *Asturiana*, 20 F. Supp. 2d 670 (No. 97 Civ. 6053) (emphasis in original). Clearly, petitioner-claimant had misconceived the *submission* of all claims to arbitration with the authority of arbitrators to award attorneys' fees in the absence of an explicit agreement within the meaning of the American Rule. It is also noteworthy that apparently only claimant-petitioner in *Asturiana* had demanded attorneys' fees.

⁹⁵20 F. Supp. 2d at 674. Under New York law, as in many states, attorneys' fees are excluded from the expenses and fees that an arbitrator can grant, barring a statutory provision or express agreement by the parties. See *supra* notes 51-54 and accompanying text.

⁹⁶20 F. Supp. 2d at 675 (emphasis in original) (quoting *In Matter of Arbitration of Prudential-Bache Secs., Inc. and DePew*, 814 F. Supp. 1081, 1083 (M.D. Fla. 1993)).

⁹⁷The opinion is silent on whether the parties' pleadings requested an award of attorneys' fees.

⁹⁸118 Fed. Appx. 546 (2d Cir. 2004).

⁹⁹ICC RULES OF ARBITRATION Art. 31(1).

¹⁰⁰See *Shaw Group*, 322 F.3d 115.

¹⁰¹See *Stone & Webster*, 118 Fed. Appx. at 550.

¹⁰²An examination by the authors of a sample of 300 arbitration awards issued mostly by the NASD-DR and NYSE between 1990 and 2005 shows that attorneys' fees were granted to the successful party in 30 of the 300 cases, i.e., 10% of the time. In each of those 30 cases, both sides had requested attorneys' fees. However, in 68 other cases, where both sides had requested attorneys' fees, none was granted. Nevertheless, in the 98 cases where both sides requested attorneys' fees, 30 cases, as

noted, led to awards of attorneys' fees, i.e., nearly 30%. The 300 awards in the sample consisted of 20 awards issued in each of the years 1990–2005, specifically, the first 10 awards issued in January and the first 10 awards issued in July of each of those years. Florida awards were excluded from the sample due to Florida's statute permitting trial courts in arbitration award confirmation proceedings to award attorneys' fees to a prevailing party. *See supra* note 78. *See also* Weigel, *supra* note 78, at 54–59 (discussing NASD-DR award statistics in Florida cases). Copies of the 300 awards in the sample were provided to the authors by SECURITIES ARBITRATION COMMENTATOR.

¹⁰³*See, e.g., Spector*, 852 F. Supp. at 210; *WMA Secs.*, 105 F. Supp. 2d 833. *See supra* notes 70–84 and accompanying text.

¹⁰⁴*See, e.g., McDaniel*, 196 F. Supp. 2d at 363. *See supra* notes 85–88 and accompanying text. One should submit a detailed memorandum of law, with reference to numerous caselaw citations, that explains the American Rule and its application to arbitrations. *See Constantine*, NASD-DR Arb. No. 01-05581 at 3, available at <http://scan.cch.com/aad/200505/01-05581.pdf> (awarding attorneys' fees and noting that respondent submitted to the panel only *Alyeska*, which “[w]hile the dictum made some reference to the so-called ‘American Rule’ on attorney’s fees, the case involved an analysis of the extent the federal courts could award attorney’s fees absent specific authority from Congress.”).

¹⁰⁵*See, e.g., Asturiana*, 20 F. Supp. 2d at 675; *CIT Project*, 2004 WL 2941331, at *5. *See supra* notes 92–96 and accompanying text.

¹⁰⁶*See, e.g., CIT Project*, 2004 WL 2941331, at *5. For example, the parties' arbitration provision should include a clause similar to the following: “Unless specifically agreed to in this agreement or expressly required by statute, the parties shall not be entitled to an award of attorneys' fees and no arbitrator shall be authorized to make such an award in any dispute between the parties.” This clause may not be feasible in arbitrations mandated by NASD-DR and NYSE rules.

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Mediation—Behind Closed Doors

Larry C. Hunter

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

The following is an imagined mediation that is drawn on my experience from all three positions in a mediation: plaintiff, defendant, and mediator. It is not intended to portray any one attorney or mediator, but these are composite characters meant to depict a “typical” mediation for a person who may not have experienced one. However, I have tried not to stereotype either party, his or her attorney, or the mediator. If you perceive one, I apologize. Any similarity to a person living or dead or to any particular case or client is entirely coincidental. I hope reading this account will permit the reader to witness a virtual mediation in a way that a plaintiff and defendant cannot; i.e., as an observer who can see behind the closed doors that separate the mediation participants as they work through their strategies.

BACKGROUND

Frank and Freda Fox live in Backwater Creek, Idaho, where they farm and run cattle on an irrigated section and a half and 200 acres of rangeland. They run a rotation of grain, sugar beets and alfalfa. They are experienced farmers. Paul (Paco) Perez is an experienced small plane pilot who has been an “ag pilot” for 15 years applying pesticides to crops during the growing season. Paco gets his chemicals from Desert Oasis Chemical Company (“DOC”), whose field man, Kip Kelso, works with the Foxes. The suit was brought in late 2005 for damages suffered in the 2004 and 2005 crop seasons. Discovery has been undertaken by all parties. Informal settlement discussions have been held, but the parties are far apart. Trial is set for February 2007 and the judge has mandated a mediation under Rule 16(k) of the Idaho Rules of Civil Procedure.

PRELIMINARY

At a scheduling conference Judge Finsterwald ordered the parties to select a mediator and undertake mediation to be held at least 120 days before trial. If the parties could not agree on a mediator, she would select one. The attorney for the plaintiffs, Phil Frederickson, suggested that they try to use Judge Jasper, a judge sitting in another district in order to avoid a mediator’s fee and because Judge Jasper had a good reputation for helping cases to settle. The defense counsel, Curt Cassidy for DOC (the chemical company) and Pat Petrie for Perez, had no objection but also suggested two other names of attorneys and retired judges who did mediation. Judge Jasper’s calendar was not flexible enough to meet the court-imposed guidelines and the three attorneys scheduled the mediation with Mike Murphy, an attorney who has practiced for 25 years and has handled agricultural cases in the past both as a litigator and a mediator. The mediation was scheduled for his office in Boise for November.

PRE-MEDIATION

Prior to the mediation Mr. Murphy asked all sides to submit a 3 to 4 page position paper which were to be confidential unless the party submitting it indicated otherwise. The position paper was to give a brief outline of the facts, the party’s weak and strong points and the history of settlement discussions, including

the parties’ relative settlement positions. When they submitted their position papers, plaintiffs’ counsel Mr. Frederickson submitted a 5 page mediation statement plus 20 pages of documents and 30 photographs which he felt documented the Foxes’ losses. Mr. Cassidy for DOC and Mr. Petrie for Paco Perez both submitted shorter papers, with 2 or 3 pages of summaries of the Foxes’ past yields.

The basic facts of the three mediation papers were very similar, as is customary in such statements. There were some issues of law, but none that rose to a level of being dispositive on a motion for summary judgment.

Paco Perez had been hired by DOC’s field man, Kelso, to apply the pesticide “Bicho” to the Foxes’ sugar beet fields to kill sugar moth larvae. There is a narrow time frame in which to spray for the larvae. Bicho is a toxic insecticide that is harmful to any animal life if it comes in contact with them. On August 10, 2004, Perez applied the Bicho in the strength recommended by Kelso.

Foxes’ claim against Perez is threefold: (1) the spray was applied too late in the day (5:00 p.m.) to be effective and the sugar content of the crop was down, lowering their profits; (2) the spray drifted into the alfalfa field next to the sugar beet field and when the hay cut off that field was fed to Foxes’ cattle they sickened, failed to gain weight, and some died; (3) Perez had sprayed an herbicide just before the Bicho and had failed to clean his tanks thoroughly, resulting in a contamination of the spray and a consequent failure to thrive in the sugar beets, resulting in a lower yield than anticipated. Their claim against DOC in addition to derivative claims through Perez are that a better pesticide, Guzano, was available on the market and should have been used rather than Bicho and that Bicho was mislabeled.

The positions of the two defendants were similar: (1) Foxes’ watering of the sugar beets immediately after the application reduced its effectiveness; (2) the amount of drift onto the alfalfa, if there was any, would have been so small as to have caused an insignificant residue; (3) both the sugar beet crop and the cattle had significant problems unrelated to Bicho which would have caused lower yield and lower weight gain; (4) Fox was consulted before the Bicho was applied, and chose to go with the Bicho rather than another pesticide.

One final detail preliminary to the mediation is who attends the mediation. The Foxes were there with their counsel Frederickson. Paco Perez was there with Petrie, but the claims manager for his insurance company (Sprayplanes R-Us), Pam Pearson, was in Colorado Springs and wanted to participate by telephone. Foxes’ counsel begrudgingly agreed. DOC’s field man was not in attendance but its risk manager from Emmett, Carl Kennedy, was in attendance with counsel Cassidy.

Prior to the mediation the Foxes had demanded \$450,000 and the defendants had offered \$25,000 (\$15,000 from Sprayplanes and \$10,000 from DOC).

MEDIATION

This mediation lasted five hours. Mediations have significant downtime for the parties as the mediator goes from one party to the next. The mediator has some down time. The description of the mediation will be made in half-hour blocks and each participant's activities will be chronicled. To avoid this being a real-time description, the entries will be condensed. The activities of the parties are again composite and representative and not meant to depict actual events or historical strategies.

9:00 A.M.

Meet in mediator Murphy's office. The parties have been shown to separate rooms. The two defendants are in separate rooms since their interests are not exactly identical. All of the parties convene in the larger conference room that is the home-room for the plaintiffs. Murphy knows that everyone but the Foxes have been through this and that because discovery is almost complete, all parties know the others' positions. Therefore he spends ten minutes talking mostly to the Foxes about the process of mediation: it is nonbinding; it is more flexible than a court decision; it allows the parties to fashion a solution; it can end the case today; it is certain and it will cut off expenses. He also tells them that the nature of mediation is that each side will have to move towards an agreed resolution that will be less or more than they presently have expressed. Although he does not tell them this, it also allows them to talk to a neutral third party and tell their story. Murphy usually chooses not to have the parties state their cases in this opening session, but asks counsel if they have anything they wish to add. All counsel say that in spite of the fact that this is a court-ordered mediation, that they are there to mediate in good faith. The plaintiffs have some additional photographs to share before the session splits up with the DOC group and the pilot's group going to their respective rooms.

9:30 A.M.

The mediator is still with the Foxes. He has asked them to tell him in their own words what has happened, which they do with some prompting and filling in of facts by counsel. Frederickson complains that defense counsel are not taking their case seriously enough. He talks of other Bicho claims around the country and thinks that the combined \$25,000 offer to date does not warrant a response. Murphy sympathizes with him and asks what he knows about the other Bicho claims. Frederickson only had general knowledge from articles he had read but no specific knowledge. Mr. Fox told Murphy about how the lack of income for the 2004 crop year had affected his ability to farm in 2005. Also, the decreased weight gain from his cattle had caused loss. It had put him and his family in a financial bind that had affected their credit, their future and their personal lives.

Murphy told them that since the defendants had made the last offer before mediation that the plaintiffs needed to give him another number. They reluctantly dropped to \$420,000.

The two defendants were getting settled into their rooms and discussing the new photographs. Petrie was talking to Perez again about how he cleaned his tank and the wind conditions for drift. Cassidy was talking to Kennedy about Bicho and what the track record was for Bicho. They both speculated with their

clients what the plaintiffs' offer would be, blustering that if they did not make a reasonable reduction it would be a short mediation.

10:00 A.M.

The mediator had met first with Perez and Petrie and now with Cassidy and Kennedy about the plaintiffs' offer. The defendants were disappointed that the plaintiffs had not come below \$400,000. In their reports to their respective clients and carriers before the mediation the defendants had valued the case between \$75,000 and \$125,000. The mediator spent only a few minutes with Perez and asked him about his view of the case. Perez did not feel he had done anything wrong. The late afternoon application was within the practice of the industry if not exactly on the label. He cleaned his tanks with water and a solvent as he always does and his records made at the time show little or no wind.

Murphy spent more time in DOC's room. Bicho was a very volatile chemical and the label was not clear about application time or watering after application. When it worked, it worked well, but it was hard to use. The label had been changed in the past year to recommend no water for 48 hours after application. Murphy suggested that an adverse trial decision could be bad precedent in other Bicho cases.

Murphy received authority for \$20,000 from each defendant for a total of \$40,000.

10:30 A.M.

Murphy was still with DOC.

Perez and Petrie had finished their discussion of the case after Murphy left and Petrie called the claims person at Sprayplanes to discuss the status of the claims and to receive authority for the next round. Knowledgeable that some urban juries did not like chemical sprays, she talked to Petrie again about the possible make-up of the jury. She also asked about DOC's reputation to see if a jury would be hesitant to find a product of that company had problems.

It had now been 45 minutes since Murphy had left the plaintiffs and they had emotionally settled into the process somewhat. They talked with Frederickson about the farm and the prospects for the harvest. They had sold their cattle operation to concentrate on crop farming and felt more focused. Their second son had moved back to the area and was showing an aptitude for farming. They discussed what their next offer would be, agreeing to go below \$400,000.

11:00 A.M.

Murphy returned to the plaintiffs with the defense offer of \$40,000 and they were upset that defendants had moved so little. Murphy had to convince them to stay with the process for a little longer and explained that if they expected a bigger move they would have to make one, if they felt they could. Murphy left the room and the plaintiffs talked with their attorney. They agreed they wanted to settle this matter and they knew they would not get all they wanted. They also recognized that the defendants would be able to show that they had some fungus in their sugar beets that year, prices were depressed and the hot early growing season had stunted the beets' growth. They agreed to make a bigger move, coming down to \$370,000, but Frederickson told Murphy they expected a commensurate move by defendants.

In the defendants' rooms both counsel were reviewing the yield figure for '04 and comparing them to the Foxes' '04 crop. They also were looking at the Foxes' past yield for beets, particularly on the field in question. Cassidy for DOC was looking at the cattle records again to try to establish the fact that Foxes had not had great success with the cattle business.

Murphy complimented the Foxes for the movement in their offer and went to the two defendants.

11:30 A.M.

This time, Murphy went to DOC first and talked to Cassidy and Kennedy. Based on information given to him by the Foxes, DOC's field man Kelso assured Foxes that Bicho would do the job without harming any neighboring fields.

That overcame any resistance Fox had to its use. Kelso denies that he told Fox that, maintaining that Fox wanted the product. Murphy suggests that since Bicho is a DOC product, a jury may be inclined to go with the plaintiff. DOC rep says he recognizes this and would like to talk to attorney Cassidy before offering more.

The mediator Murphy goes to Perez and Petrie to tell them of the offer. They agree to offer more but not more than DOC does. In fact, they think this is a product problem, not an application problem and in the future will not offer as much as DOC. Murphy encourages them not to make any hard and fast rules and to see how the mediation develops. Murphy gets on the speaker phone with Pearson in Colorado while Perez and Petrie are in the room to talk to her about not tying her settlement offer to that of DOC. Either a number works or it does not. Sprayplanes R-U's agrees to offer up to \$20,000 more, but not to use all of it now. Murphy returns to DOC and they have authorized \$15,000.

During this time, the plaintiffs and counsel Mr. Frederickson are discussing crops, families, and somewhat about the case. Frederickson suggests that some of the documents do not support their claim. Fox confides that if he could get \$200,000, he would be happy.

12:00 NOON

Murphy is back to the plaintiffs with an offer of \$70,000. While not ecstatic about it, both of the Foxes and counsel acknowledge that that is almost double of the prior offer (easy to do when they were so low Frederickson carps).

Murphy's staff brings in sandwiches for lunch and the plaintiffs and their counsel talk turkey with Murphy. Murphy is interested to hear more about Foxes' position on the cattle loss. Cassidy is discussing strategy with Kennedy over lunch. Everyone knows that DOC has had other claims involving Bicho which DOC has settled. They agree that while there may be a colorable claim involving the sugar beets, the cattle claim, which amounts allegedly to \$175,000, is bogus. Kennedy has other work and gets on his cell phone to call his office. Cassidy leaves for a few minutes to call his office. Petrie and Perez are also eating lunch. Petrie has his marching orders from Pearson in the way of settlement authority. He has \$50,000 in authority and has already used \$35,000. He feels like Perez will be a good witness and feels strong about the defense of the cattle loss. After eating, they grab the newspaper to check the weather (Perez) and the sports (Petrie).

12:30 P.M.

Murphy has an offer of \$310,000 from the Foxes which he carries first to DOC. The offer is still too high for DOC since they have discounted the cattle loss and feel like plaintiffs need to be in the \$250,000 range to be realistic. Therefore, Kennedy is disinclined to offer much more until Foxes get in the \$250,000 neighborhood. Murphy tells him he needs to make some type of positive movement to elicit a response. He agrees to add another \$15,000 to the offer and does not tie it to the co-defendants' offer.

Murphy then goes to Petrie and Perez. Things are moving a bit faster now because the cards are on the table and posturing with the mediator is not as necessary. With the authority Pearson gave him, Petrie adds another \$5,000, and Murphy takes the \$90,000 to Foxes. Murphy is satisfied with an offer under \$100,000 because it sends a message to Foxes that they need to come significantly under \$300,000 to settle.

1:00 P.M.

Defendants' offer of \$90,000 is met with little enthusiasm by Foxes and Frederickson. They have come down \$40,000 from pre-mediation numbers and defendants have come up only \$65,000. Murphy discusses the value of their claim with them and they acknowledge that \$450,000 was a better than best-case scenario. They also confide to Murphy that they are willing to take the \$175,000 cattle claim out of the equation. Murphy asks them if that is to be confidential, and Frederickson tells him it is. Recognizing that compromise on the sugar beet claims is also necessary, the plaintiffs authorized an offer of \$260,000.

Murphy starts thinking that an end-game strategy may be necessary to close this mediation as he walks down the hall to the defendants' rooms. He decides he will have one more separate meeting with them and then bring them together.

Separately, Kennedy and Cassidy hear the reduction with interest and comment that Foxes have finally cut out the cattle claim. They recognize the size of the reduction but warn Murphy that they do not have a lot of money left. They authorize another \$15,000. After Murphy leaves, they discuss what they think the case will settle for and how much they will have to contribute and then return to their cell phones.

1:30 P.M.

The meeting with Petrie and Perez is short. Petrie gives Murphy \$5,000 more but tells him he has almost exhausted his authority and doubts there is any more. Murphy understands that this defendant's limit is \$50,000. Since DOC is already at \$65,000, he believes they may have \$80,000-\$100,000 authority. He knows Kennedy can call the shots on this type of settlement up to the \$250,000 retention they have with their carrier as Kennedy told him that. Murphy goes back to the Foxes with the rather sobering news that the offer is \$110,000 and both defendants have told him they are running out of money. At this point, Foxes want to settle and get back to farming but cannot give the case away since they have a \$150,000 operating loan to repay. They have Murphy leave for a minute, and when he comes back, their offer is \$210,000 with a warning that a "split the difference" offer will not be acceptable.

2:00 P.M.

Murphy asks the two defendant groups to meet together and tells them that the plaintiffs have offered to settle for \$210,000. He advises them that a split-the-difference settlement will not work, but speculates that something somewhat more than that would. The defendants advise him that together they only have \$150,000. He asks them to seek more, thinking that if the two can come up with \$175,000 the mediation could come together. Cassidy tells Petrie that they are already paying out twice as much, and he thinks that the additional \$25,000 should come from Sprayplanes R-U's. There follows a brief discussion between defense counsel as to the relative faults of the other's position. Murphy points out this type of in-fighting will play into plaintiffs' hands at trial. Murphy asks if he should call Pearson, and Petrie says he will do it. He comes back with \$65,000, and DOC's Kennedy goes to \$110,000. However, they want Murphy to tell plaintiffs that this is not an offer. If Foxes will accept \$175,000, they will offer it.

Meanwhile, Foxes and Frederickson are talking about how low they can go. Foxes need to come out of this with at least \$150,000 in cash. Frederickson says he will take a lower contingency fee. When Murphy comes back with \$175,000, Foxes are pleasantly surprised but still do not think the numbers will work even with a 20% fee the net to them is \$140,000. Murphy asks them what their fertilizer bill will be for the next year and are told it will be between \$9,000 and \$11,000. Without committing the Foxes to accepting, he returns to DOC and asks if they will add the next year's fertilizer to the settlement. DOC does not like to supply chemical to a litigant, but fertilizer is more neutral and Foxes had been a customer in the past. If they threw in the fertilizer, they wanted a realignment of the settlement amounts which

Petrie and Pearson finally agreed to. The final alignment was \$105,000 from DOC, \$70,000 from Sprayplanes R-U's and next year's fertilizer from DOC. Foxes said that they would accept such an offer, and at 2:20 p.m. after Murphy quickly printed out a short summary of the settlement which all parties signed, the mediation ended. (DOC asked for a confidentiality agreement.) The parties shook hands and all departed.

CONCLUSION

Of course, not all mediations arrive at a successful conclusion in five hours or even on the same day they start. However, many do and the vast majority of cases that go to mediation do settle. One of the reasons, as illustrated in this example, is that the parties and their counsel control the outcome and can fashion an outcome that a court or jury cannot. Finally, although this mediation occurred in the familiar setting of tort litigation, mediation is effective in many arenas. As litigation expenses have increased and acrimony creeps into many disputes, mediation offers an effective, and less expensive mechanism for solving problems.

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. Larry is a past president of the Idaho State Bar. He received his J.D. from Northwestern University School of Law and his A.B. from Harvard University (cum laude). Contact information for Larry is: (208) 345-200, or lch@moffatt.com

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The Model Standards of Conduct for Mediators 2005

The Rules of Conduct for Mediators was adopted last August by the American Bar Association. The ADR Section of the Idaho Bar plans to propose to the Idaho Bar membership that these Rules be adopted as aspirational guidelines for mediators in the state of Idaho.

Executive Summary

In August 2005, the American Bar, Association House of Delegates approved the Model Standards of Conduct for Mediators, a comprehensive body of mediator standards of conduct covering mediators in all practice settings. Soon after, the Standards were also approved by the American Arbitration Association and the Association for Conflict Resolution.

Today, mediation has become commonplace not only in the legal system but also in many other walks of life. Parties and their counsel utilize mediation routinely in litigated cases and in pre-litigation disputes; in purely voluntary mediations and those directed by the court; in civil, domestic and criminal cases; in federal, state and local courts; in the simplest two-party cases and the most complex cases, with dozens or more parties; and, in mediations lasting multiple days to an hour or less. Disputants frequently use mediation in the workplace, in schools, in health-care, in public policy formulation, and in a variety of other settings outside of the legal context. The backgrounds of mediators are quite varied, including lawyers; former judges; mental health, financial, human resource, engineering, and other professionals; and including not only paid mediators, but many thousands of volunteers.

The 2005 Model Standards of Conduct for Mediators, a revision of standards originally formulated in 1992, are a foundational set of ethical guidelines for mediator practice. They are intended to guide individual mediators, including both lawyers and non-lawyers in their practice; provide a model for entities, such as courts, professional organizations, and providers of mediation services, that establish standards, of conduct for mediators; and, inform potential and actual participants in mediation about what they should expect in mediation.

The *Model Standards of Conduct for Mediators*, as summarized below, are comprised of a Preamble, a Note on Construction, and nine standards. Thorough Reporter's Notes are available at www.abanet.org/dispute and www.abanet.org/litigation/practiceresources/home.nl.

* The Preamble and Note on Construction address the definition of mediation ("...a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute."); other definitions; the need to balance the Standards with other possible authorities—such as law, court rules, regulations, other professional rules, and other agreements of the parties; and a note that while these Standards do not have any power until they are adopted by an entity with authority, they could be interpreted by a court to be the standard of care for mediators.

* The first standard establishes self-determination as the core principle of mediation, which applies both to process issues, as well as outcomes.

The *Model Standards of Conduct for Mediators* was prepared in 1994 by the American Arbitration Association, the American

Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution.¹ A joint committee consisting of representatives from the same successor organizations revised the Model Standards in 2005.² Both the original 1994 version and the 2005 revision have been approved by each participating organization.³

Preamble

Mediation is used to resolve a broad range of conflicts within a variety of settings. These Standards are designed to serve as fundamental ethical guidelines for persons mediating in all practice contexts. They serve three primary goals: to guide the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes.

Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute.

Mediation serves various purposes, including providing the opportunity for parties to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions, and reach mutually satisfactory agreements, when desired.

Note on Construction

These Standards are to be read and construed in their entirety. There is no priority significance attached to the sequence in which the Standards appear.

The use of the term "shall" in a Standard indicates that the mediator must follow the practice described. The use of the term "should" indicates that the practice described in the standard is highly desirable, but not required, and is to be departed from only for very strong reasons and requires careful use of judgment and discretion.

The use of the term "mediator" is understood to be inclusive so that it applies to co-mediator models.

These Standards do not include specific temporal parameters when referencing a mediation, and therefore, do not define the exact beginning or ending of a mediation.

Various aspects of a mediation, including some matters covered by these Standards, may also be affected by applicable law, court rules, regulations, other applicable professional rules, mediation rules to which the parties have agreed and other agreements of the parties. These sources may create conflicts with, and may take precedence over, these Standards. However, a mediator should make every effort to comply with the spirit and intent of these Standards in resolving such conflicts. This effort should include honoring all remaining Standards not in conflict with these other sources.

These Standards, unless and until adopted by a court or other regulatory authority do not have the force of law. Nonetheless, the fact that these Standards have been adopted by the respective

sponsoring entities, should alert mediators to the fact that the Standards might be viewed as establishing a standard of care for mediators.

ENDNOTES

¹The Association for Conflict Resolution is a merged organization of the Academy of Family Mediators, the Conflict Resolution Education Network and the Society of Professionals in Dispute Resolution (SPIDR). SPIDR was the third participating organization in the development of the 1994 Standards.

²Reporter's Notes, which are not part of these Standards and therefore have not been specifically approved by any of the organizations, provide commentary regarding these revisions.

³The 2005 version to the Model Standards were approved by the American Bar Association's House of Delegates on August 9, 2005, the Board of the Association of Conflict Resolution on August 22, 2005 and the Executive Committee of the American Arbitration Association on September 8, 2005.

STANDARD I. SELF-DETERMINATION

A. A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.

1. Although party self-determination for process design is a fundamental principle of mediation practice, a mediator may need to balance such party self-determination with a mediator's duty to conduct a quality process in accordance with these Standards.

2. A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.

B. A mediator shall not undermine party self-determination by any party for reasons such as higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media or others.

STANDARD II. IMPARTIALITY

A. A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.

B. A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.

1. A mediator should not act with partiality or prejudice based on any participant's personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason.

2. A mediator should neither give nor accept a gift, favor, loan or other item of value that raises a question as to the mediator's actual or perceived impartiality:

3. A mediator may accept or give de minimis gifts or

incidental items or services that are provided to facilitate a mediation or respect cultural norms so long as such practices do not raise questions as to a mediator's actual or perceived impartiality.

C. If at any time a mediator is unable to conduct a mediation in an impartial manner, the mediator shall withdraw.

STANDARD III. CONFLICTS OF INTEREST

A. A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality.

B. A mediator shall make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for a mediator. A mediator's actions necessary to accomplish a reasonable inquiry into potential conflicts of interest may vary based on practice context.

C. A mediator shall disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality. After disclosure, if all parties agree, the mediator may proceed with the mediation.

D. If a mediator learns any fact after accepting a mediation that raises a question with respect to that mediator's service creating a potential or actual conflict of interest, the mediator shall disclose it as quickly as practicable. After disclosure, if all parties agree, the mediator may proceed with the mediation.

E. If a mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, a mediator shall withdraw from or decline to proceed with the mediation regardless of the expressed desire or agreement of the parties to the contrary.

F. Subsequent to a mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation. When a mediator develops personal or professional relationships with parties, other individuals or organizations following a mediation in which they were involved, the mediator should consider factors such as time elapsed following the mediation, the nature of the relationships established, and services offered when determining whether the relationships might create a perceived or actual conflict of interest.

STANDARD IV. COMPETENCE

A. A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties.

1. Any person may be selected as a mediator, provided that the parties are satisfied with the mediator's competence and qualifications. Training, experience in mediation, skills, cultural understandings and other

qualities are often necessary for mediator competence. A person who offers to serve as a mediator creates the expectation that the person is competent to mediate effectively.

2. A mediator should attend educational programs and related activities to maintain and enhance the mediator's knowledge and skills related to mediation.

3. A mediator should have available for the parties' information relevant to the mediator's training, education, experience and approach to conducting a mediation.

B. If a mediator, during the course of a mediation determines that the mediator cannot conduct the mediation competently, the mediator shall discuss that determination with the parties as soon as is practicable and take appropriate steps to address the situation, including, but not limited to, withdrawing or requesting appropriate assistance.

C. If a mediator's ability to conduct a mediation is impaired by drugs, alcohol, medication or otherwise, the mediator shall not conduct the mediation.

STANDARD V. CONFIDENTIALITY

A. A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.

1. If the parties to a mediation agree that the mediator may disclose information obtained during the mediation, the mediator may do so .

2. A mediator should not communicate to any non-participant information about how the parties acted in the mediation. A mediator may report, if required, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution.

3. If a mediator participates in teaching, research or evaluation of mediation, the mediator should protect the anonymity of the parties and abide by their reasonable expectations regarding confidentiality.

B. A mediator who meets with any persons in private session during a mediation shall not convey-directly or indirectly to any other person, any information that was obtained during that private session without the consent of the disclosing person.

C. A mediator shall promote understanding among the parties of the extent to which the parties will maintain confidentiality of information they obtain in a mediation. .

D. Depending on the circumstance of a mediation, the parties may have varying expectations regarding confidentiality that a mediator should address. The parties may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations.

STANDARD VI. QUALITY OF THE PROCESS

A. A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes diligence; timeliness, safety, presence of the appropriate participants, party

participation; procedural fairness, party competency and mutual respect among all participants.

1. A mediator should agree to mediate only when the mediator is prepared to commit the attention essential to an effective mediation.

2. A mediator should only accept cases when the mediator can satisfy the reasonable expectation of the parties concerning the timing of a mediation.

3. The presence or absence of persons at a mediation depends on the agreement of the parties and the mediator. The parties and mediator may agree that others may be excluded from particular sessions or from all sessions.

4. A mediator should promote honesty and candor between and among all participants, and a mediator shall not knowingly misrepresent any material fact or circumstance in the course of a mediation.

5. The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and thus, a mediator should distinguish between the roles. A mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards.

6. A mediator shall not conduct a dispute resolution procedure other than mediation but label it mediation in an effort to gain the protection of rules, statutes, or other governing authorities pertaining to mediation.

7. A mediator may recommend, when appropriate, that parties consider resolving their dispute through arbitration, counseling, neutral evaluation or other processes.

8. A mediator shall not undertake an additional dispute resolution role in the same matter without the consent of the parties. Before providing such service, a mediator shall inform the parties of the implications of the change in process and obtain their consent to the change. A mediator who undertakes such role assumes different duties and responsibilities that may be governed by other standards.

9. If a mediation is being used to further criminal conduct, a mediator should take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.

10. If a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a mediation, the mediator should explore- the circumstances and potential accommodations, modifications or adjustments that would make possible the party's capacity to-comprehend, participate and exercise self-determination.

B. If a mediator is made aware of domestic abuse or violence among the parties, the mediator shall take appropriate steps

including, if necessary, postponing, withdrawing from or terminating the mediation.

C. If a mediator believes that participant conduct, including that of the mediator, jeopardizes conducting a mediation consistent with these Standards, a mediator, shall take appropriate steps, including, if necessary, postponing, withdrawing from or terminating the mediation.

STANDARD VII. ADVERTISING AND SOLICITATION

A. A mediator shall be truthful and not misleading when advertising, soliciting or otherwise communicating the mediator's qualifications, experience, services and fees.

1. A mediator should not include any promises as to outcome in communications, including business cards, stationery, or computer-based communications.

2. A mediator should only claim to meet the mediator qualifications of a governmental entity or private organization if that entity or organization has a recognized procedure for qualifying mediators and it grants such status to the mediator.

B. A mediator shall not solicit in a manner that gives an appearance of partiality for or against a party or otherwise undermines the integrity of the process.

C. A mediator shall not communicate to others, in promotional materials or through other forms of communication, the names of persons served without their permission.

STANDARD VIII. FEES AND OTHER CHARGES

A. A mediator shall provide each party or each party's representative true and complete information about mediation fees, expenses and any other actual or potential charges that may be incurred in connection with a mediation.

1. If a mediator charges fees, the mediator should develop them in light of all relevant factors, including the type and complexity of the matter, the qualifications of the mediator, the time required and the rates

customary for such mediation services.

2. A mediator's fee arrangement should be in writing unless the parties request otherwise.

B. A mediator shall not charge fees in a manner that impairs a mediator's impartiality.

1. A mediator should not enter into a fee agreement which is contingent upon the result of the mediation or amount of the settlement.

2. While a mediator may accept unequal fee payments from the parties, a mediator should not allow such a fee arrangement to adversely impact the mediator's ability to conduct a mediation in an impartial manner.

STANDARD IX. ADVANCEMENT OF MEDIATION PRACTICE

A. A mediator should act in a manner that advances the practice of mediation. A mediator promotes this Standard by engaging in some or all of the following:

1. Fostering diversity within the field of mediation.
2. Striving to make mediation accessible to those who elect to use it, including providing services at a reduced rate or on a pro bono basis as appropriate.
3. Participating in research when given the opportunity, including obtaining participant feedback when appropriate.
4. Participating in outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for, mediation.
5. Assisting newer mediators through training, mentoring and networking.

B. A mediator should demonstrate respect for differing points of view within the field, seek to learn from other mediators and work together with other mediators to improve the profession and better serve people in conflict.

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ANNUAL DISTRICT CONFERENCE/ FEDERAL PRACTICE PROGRAM

In case you happened to miss this year's Annual District Conference "Road-Show" presentations in Pocatello and Coeur d'Alene during October, there is still one remaining scheduled for Boise - Friday, November 17th at the Boise Centre on the Grove.

The "What's New" portion of the Program includes the following topics: The Ripple Effect of Bankruptcy Reform; New Federal Rule Changes; ECF Update; Practical ECF Pointers for the Lawyer and Law Firm; and E-Briefs. The Program will also feature a Panel presentation on Mediation - "What the Attorney Needs to Know/Do to be Successful in Mediation" a Gender Fairness Presentation entitled, "Mars and Venus - How do they coexist in the Courtroom"; a presentation on "ACTL - Code of Trial & Pretrial Conduct"; and a Federal Judges' Panel Q&A Session. Chief Ninth Circuit Court of Appeals Judge Mary M. Schroeder is expected to attend. The Conference brochure, agenda and online registration is available at: http://www.id.uscourts.gov/distconf06/index_06.htm. The registration fee is \$50 (\$60 at the door) 5.25 CLE credits will be awarded, including 1.0 Ethics credit. Contact Suzi Butler at 334-9208 or email suzi_butler@id.uscourts.gov if you need additional information.

SLIDE SHOW— IMPLEMENTATION OF CM/ECF BANKRUPTCY VERSION 3.1

A short slide show (23 slides) has been created to highlight the various changes contained in the new Bankruptcy CM/ECF Version. The new release was designed primarily to collect and report additional statistical data required by the Bankruptcy Abuse Protection and Consumer Protection Act of 2005 (BAPCPA) and the Judicial Conference Committee on the Administration of the Bankruptcy System. Many new fields are

incorporated into the case opening events. This brief but informative slide show can be accessed on our website: www.id.uscourts.gov in the Bankruptcy Reform Act Resource Pages, the CM/ECF Bankruptcy Reference Guides (found under ECF Resources), or in the Scrolling Announcements section.

NEW BANKRUPTCY FORMS & INTERIM RULE

Several revised Official Bankruptcy forms became effective on October 1, 2006. These include Forms # 1, 5, 6, 9, 22A, 22C and 23. In addition, two revised Procedural Forms, # 104 & 210, became effective on October 17, 2006, in connection with the implementation of Bankruptcy CM/ECF Version 3.1. Furthermore, Interim Bankruptcy Rule 1007 (regarding lists, schedules, statements, other documents and time limits), was also adopted and took effect on October 1, 2006. You can access all of the revised forms and the Interim Rule through our Bankruptcy Reform Act Resource Page at: www.id.uscourts.gov.

NEW CM/ECF DISTRICT COURT VERSION 3.0

The new version of District Court CM/ECF was released on October 6th containing enhancements in the areas of Utilities and Sealed Functionality. The e-mail options available for ECF users has been completely revamped to allow greater flexibility in the delivery of the Notices of Electronic Filing (NEF). Each person receiving NEF's under an attorney's ECF account may tailor their e-mail preferences independently from each other. For example, one might select a summary or individual NEF depending upon the needs of the attorney or firm. Please review the instructions under "Managing Your User Account" located on the CM/ECF Announcements screen, or on the ECF Reference Page entitled, "District Court Reference Guides."

The e-filing of a sealed document has more functionality in this version and

service options for the court. A new event entitled "Ex Parte Motion" will now be available. Additionally, if a Proposed Order is submitted that does not comply with the CM/ECF procedures, the filing party will receive a corrective entry requiring the re-submission in compliance with the procedural guide. See Amended ECF Procedures 14 (c) & (d) located on our website at:

www.id.uscourts.gov/docs/Dec2005Amend-ECFProced-8.pdf.

REVISED CRIMINAL JUSTICE ACT (CJA) PLAN

The Criminal Justice Act (CJA) Plan (General Order # 210) was revised, in part, to describe the role of the newly-formed Federal Defender Services of Idaho, Inc in the representation of criminal defendants throughout the District of Idaho. Addendum I contains the revised Plan for the Composition, Administration and Management of the Panel of Private Attorneys under the CJA while the By-Laws of the Federal Defender Services of Idaho, Inc comprise Addendum II.

PARTIAL COMPLETION OF COURTHOUSE RENOVATION PROJECT IN BOISE

The Boise Courtroom Renovation Project involving the installation of new evidence presentation equipment and a video conferencing system in the fifth-floor courtrooms of Judge Myers and Judge Williams has been completed. Judge Boyle's courtroom will receive similar enhancements in the near future.



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



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Confronting *Crawford* and *Davis* – What do they mean?

"In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him... ."

Many of us may have thought we had a good fix on what these simple words from the Sixth Amendment meant, but the last two years have changed all that. The decisions in *Crawford v. Washington*, 541 U.S. 36 (2004), and *Davis v. Washington*, 126 S.Ct. 2266 (2006), have drastically revised the standard for determining whether an out-of-court statement is admissible against a defendant in a criminal case, substituting a testimonial/non-testimonial distinction for the reliability test of *Ohio v. Roberts*, 448 U.S. 56 (1980).

While participating in a panel discussion on these cases at the recent Idaho Judicial Conference I found that judges had a great deal of interest in this subject – and so, I assume, do criminal practitioners. So, with the understanding that nothing here represents an official statement of the Idaho Supreme Court, I will briefly review where we stand now in applying the Confrontation Clause.

At the outset, you should recall that there are several considerations that may resolve a confrontation issue without needing to reach the testimonial/non-testimonial distinction of *Crawford*:

First, the Confrontation Clause does not bar the use of statements offered for purposes other than establishing the truth of the matter asserted. *Tennessee v. Street*, 471 U.S. 409, 105 S.Ct. 2078, 85 L.Ed.2d 4256 (1985).

Second, the admission of the prior statements of a witness who appears for cross-examination at trial is not barred by the Confrontation Clause. *California v. Green*, 399 U.S. 149 (1970). This is so even if the witness does not remember making the prior statement, or the underlying event, *United States v. Owens*, 484 U.S. 554 (1988); or denies making the prior statement, *Nelson v. O'Neil*, 402 U.S. 622 (1971).

Third, if the declarant is not present, the state will generally have to show that

he or she is unavailable. Unless the declarant is dead, or physically or mentally unable to testify, the state will have to show that it has made a good-faith effort to obtain the declarant's presence at trial. The lengths to which the state must go to fulfill this requirement is a question of reasonableness. *Ohio v. Roberts*, 448 U.S. 56 (1980); *State v. Bagshaw*, 137 Idaho 613, 51 P.3d 427 (Ct. App. 2002).

Fourth, "when defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce... That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation." *Davis v. Washington*, 126 S.Ct. 2280.

It should also be recalled that a previous statement by an unavailable declarant may be admissible if the defendant had a prior opportunity for cross-examination. For instance, testimony from a preliminary hearing may be admissible at trial if it meets the requirements of Idaho Code § 9-336. *State v. Cross*, 132 Idaho 667, 978 P.2d 227 (1999); *State v. Ricks*, 122 Idaho 856, 840 P.2d 400 (Ct. App. 1992).

Assuming these considerations have not resolved the Confrontation Clause issue, the nature of the out-of-court statement must be considered. Previously, under *Ohio v. Roberts*, the question was whether the offered statement bore adequate "indicia or reliability." This test could be met in one of two ways: by showing that the statement fell within a firmly rooted hearsay exception, or that it bore particularized guarantees of trustworthiness. 448 U.S. at 66.

In *Crawford*, the Court considered the admissibility of statements made by the defendant's wife during an interrogation at the station house by police officers. The interrogation was preceded by *Miranda* warnings and was recorded. Justice Scalia,

writing for the majority in a 7-2 decision, concluded that the *Roberts* test was not consistent with the original meaning of the Confrontation Clause. Rather, the Court said, this provision was directed at certain types of procedures which were used to gather evidence against an accused, without the opportunity for cross-examination, and the subsequent use of that evidence at a criminal trial. For instance, it had become the practice in England to have justices of the peace examine suspects and witnesses before trial; these statements were then in some cases introduced at a later criminal trial in lieu of live testimony. 541 U.S. at 43-44.

Therefore, the Court said, the Confrontation Clause was meant to bar certain types of "testimonial" statements. The Court said it would "leave for another day any effort to spell out a comprehensive definition of 'testimonial.'" *Id.* at 68. But the Court suggested that it included "ex parte in-court testimony or its functional equivalent." *Id.* at 51. And it specifically included police interrogations, which, the Court said, served the same "investigative and prosecutorial function" as the examinations by justices of the peace in England. *Id.* at 53. The interrogation of Mrs. Crawford fell into that category and should have been excluded. The Court, however, also refused to define "police interrogation," offering only the observation that it was using "the term 'interrogation' in its colloquial, rather than any technical legal, sense." *Id.* at 53, n.4.

Crawford left many questions unanswered. What exactly was a "testimonial" statement? And what did the Court mean by "police interrogation"? Would statements arising from less formal interrogations than Mrs. Crawford's fall into this category? Would it include, for instance, 911 calls, or questioning by the police on the scene during the immediate aftermath of an incident? And while the Court made

clear that the admission of testimonial statements were excluded by the Confrontation Clause, what about non-testimonial statements? Were the admission of such statements never barred by the Confrontation Clause, or were they subject to a reliability test before being admitted?

The Court provided some answers in its recent decision in *Davis v. Washington*, 126 S.Ct. 2266 (2006), which considered the application of the Confrontation Clause in two separate cases. In *Davis*, the statements at issue were made by Davis's girlfriend, Michelle McCottry, in a 911 call during a violent domestic disturbance. In *Hammon v. Indiana*, officers arrived at the scene of a reported domestic disturbance. Initially, Amy Hammon told the police that "nothing was the matter," and her husband also denied that there had been any violence. But shortly afterward, during a conversation with the officers at the scene, Amy said that her husband had attacked both her and her daughter.

In considering whether these statements were made during police interrogation and were therefore testimonial, the Court said it would not offer an "exhaustive classification of all conceivable statements," but that it would apply the following rule to these cases:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. 126 S.Ct. at 2273-74.

The focus, then, is on the primary purpose of the police: Are they attempting to deal with an ongoing emergency, or are they gathering information relevant to a possible prosecution?

The Court went on to conclude that the statements made by McCottry were admissible because the primary purpose of the 911 operator "was to enable police assistance to meet an ongoing emergency." *Id.* at 2277. The statements made by Amy Hammon, on the other hand, were

not made during an ongoing emergency; there was no immediate threat to Amy at the time of her disclosures to the officers and the officers were simply trying to determine what had happened. Therefore, the officers' primary purpose "was to investigate a possible crime." *Id.* at 2278.

This holding provides some guidance in determining whether statements are made during "police interrogation" within the meaning of *Crawford*. Questions posed by police officers at the scene of an incident, and in settings considerably less formal than the station house interview in *Crawford*, may still result in testimonial statements if there is no longer an emergency and the officers' primary purpose is to gather information for a possible prosecution. And the Court also clarified the status of non-testimonial statements: their admission is not barred by the Confrontation Clause. "It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." *Id.* at 2273 (emphasis added). The Court demonstrated this approach in applying its holding to the facts of *Davis*: once the Court had determined that the statements were not made in the course of police interrogation, the Court concluded that the statements were admissible. No analysis of the reliability of the statements was necessary (although the statements would have fallen within the firmly-rooted hearsay exception of excited utterances, and therefore would have been admissible even under *Roberts*).

Crawford and *Davis* still leave several questions unresolved. The Court has not yet given us a comprehensive definition of "testimonial." And a related question is whether statements made to persons other than police officers may be considered testimonial. The Court stated in *Davis* that 911 operators may be agents of law enforcement when conducting interrogations of callers; therefore, "[f]or purposes of this opinion (and without deciding the point), we consider their acts to be acts of the police . . . [O]ur holding today makes it unnecessary to consider whether and when statements made to someone other than law enforcement personnel are 'testimonial.'" *Id.* at 2274, n.2.

Confrontation issues frequently arise in cases involving charges of sexual abuse of children. The application of the *Crawford* standard in these cases is a continuing challenge. In *State v. Doe*, 140 Idaho 873, 103 P.3d 967 (Ct. App. 2004), a four-year-old girl made statements to her mother and grandmother about sexual abuse, apparently within minutes after it had occurred. The Court of Appeals held that these statements were non-testimonial.

But a significant related question is the admissibility of statements made during more structured interviews by children who may be victims of abuse. This issue is being addressed here in Idaho in a case currently pending on appeal. In *State v. Hooper*, 2006 WL 2328233, (Ct. App. August 11, 2006), the defendant was convicted of lewd conduct. The six-year-old alleged victim was too frightened to testify at trial. The trial court admitted the videotape of an interview with the six-year-old that had been conducted by a nurse at a Sexual Trauma Abuse Response (STAR) Center. The Court of Appeals, applying the holding in *Davis*, held that the videotaped statements were testimonial and should not have been admitted. The Court pointed out that the interview took place several hours after the event, well after any emergency had passed. Further, the Court said, the interview, taking place in a closed environment and involving structured questioning, had much of the same formality as the interviews in *Crawford* and *Hammon*.

The Court noted that the nurse was not a police officer, but concluded that she "was acting in tandem with law enforcement officers to gain evidence of past events potentially to be used in a later criminal prosecution." The Court pointed to the fact that the police had directed the alleged victim's mother to take her to the STAR Center and that an officer watched the interview from another room. Also, the nurse left the interview room at one point to ask the officer whether she had asked all of the questions that the officer desired, and then returned to the interview and asked the child additional questions.

A petition for review is pending in *Hooper* at the time of this writing. No doubt other cases will be needed to clarify the future application of *Crawford*. But we

may also find out soon how far into the past the *Crawford* holding will reach.

In *Bockting v. Bayer*, 399 F.3d 1010, amended 408 F.3d 1127, rehearing *en banc* denied 418 F.3d 1055 (9th Cir. 2005), *cert. granted sub nom. Whorton v. Bockting* 126 S.Ct. 2017 (2006), the Ninth Circuit held that *Crawford* applied retroactively – that is, to convictions as to which state appeals were final at the time *Crawford* was decided. The other federal circuits that have addressed this issue have reached a contrary result. *See, Lave v. Dretke*, 444 F.3d 333 (5th Cir. 2006); *Espy v. Massac*, 443 F.3d 1362 (11th Cir. 2006); *Dorchy v. Jones*, 398 F.3d 783 (6th Cir. 2005); *Bintz v. Bertrand*, 403 F.3d 859 (7th Cir.), *cert. denied*, (2005); *Brown v. Uphoff*, 381 F.3d 1219 (10th Cir. 2004), *cert. denied* (2005). The United States Supreme Court has granted certiorari in the Ninth Circuit case and has scheduled argument for November 1, 2006. We may soon find out more about how far-reaching the effects of *Crawford* will be.



Michael Henderson is Legal Counsel for the Idaho Supreme Court. He previously served as a Deputy Attorney General for 18 years (seven of those years as Chief of the Criminal Law Division), and before that was a Deputy Prosecuting Attorney in Ada, Blaine and Twin Falls Counties.

2007 Licensing Packets

The 2007 licensing packets will be mailed in mid-November. Be sure your packet reaches you by verifying and updating your address information before November 10. Visit the ISB website at www.idaho.gov/isb to check your records in the Attorney Directory. Use the online form or contact the Membership Department at (208) 334-4500 or astrauser@isb.idaho.gov to update your information.



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Idaho Supreme Court and Court of Appeals
NEW CASES ON APPEAL PENDING DECISION
(UPDATE 10/01/06)

PROCEDURE

1. Should a defendant be required to show prejudice by not having in person service of process within six months when the defendant was provided with the summons and complaint by mail within days of filing and the defendant's attorney asked for a delay in the proceedings?

Lana Campbell v.
Michael E. Reagan
S.Ct. No. 32879
Supreme Court

2. Did the court abuse its discretion when it denied Drennon's motion for relief from final order pursuant to IRCP 60(b) as untimely?

Richard Drennon v.
Paul Panther
S.Ct. No. 32785
Court of Appeals

3. Whether I.C. §5-215 precludes revival of a judgment that is more than six years old by virtue of a *nunc pro tunc* entry on January 17, 1997.

Western Corporation v.
Stan L. Vanek
S.Ct. No. 32523
Court of Appeals

**ATTORNEY DISCIPLINE,
SANCTIONS, AND MALPRACTICE**

1. Whether the Hearing Committee's decision is clearly erroneous or arbitrary and capricious.

Lacey Sivak v.
Defendant A
S.Ct. No. 33300
Supreme Court

ATTORNEY FEES AND COSTS

1. Whether the court erred in concluding that Stout was not entitled to attorney fees under I.C. § 12-120(3) or I.C. § 67-5908(3).

Anissa Stout v.
Key Training Corp.
S.Ct. No. 32881
Supreme Court

SPECIAL USE PERMIT

1. Whether the Twin Falls City Council violated the Twin Falls City Code and exceeded its statutory authority when it reversed the Twin Falls Planning and Zoning Commission's decision to grant Marcia T. Turner, LLC's Special Use Permit.

Marcia T. Turner LLC v.
City of Twin Falls
S.Ct. No. 32884
Supreme Court

SUMMARY JUDGMENT

1. Whether material issues of fact existed such that the court erred in granting summary judgment to Kootenai County Fire and Rescue.

Mary C. Curlee v.
Kootenai Co. Fire
S.Ct. No. 32794
Court of Appeals

2. Whether the court erred in finding Drumwright's claims were barred under Idaho's pure economic loss rule and in granting Cometto's motion for summary judgment.

Bill Drumwright v.
Cometto's Heating
S.Ct. No. 32091
Court of Appeals

3. Whether the court was correct in ruling that the promissory note was supported by adequate consideration and in granting summary judgment in favor of Sirius L.

Sirius LC v.
Bryce H. Erickson
S.Ct. No. 32582
Supreme Court

POST-CONVICTION RELIEF

1. Did the court err in concluding the psychological evaluation report was not material evidence requiring a new sentencing in the interests of justice because two mental health experts addressed Knutsen's psychological problems at the sentencing hearing?

David Knutsen v.
State of Idaho
S.Ct. No. 32386
Court of Appeals

2. Did the district court commit reversible error when it dismissed Shelton's petition for post-conviction relief after an evidentiary hearing?

William H. Shelton v.
State of Idaho
S.Ct. No. 31001
Court of Appeals

DAMAGES

1. Whether the court erred in granting plaintiff's motion for reconsideration and vacating its grant of summary judgment in favor of Dr. Verska.

Paula Puckett v.
Joseph Verska, M.D.
S.Ct. No. 32571
Supreme Court

CONTRACT

1. Whether the district court erred in holding that the parties reached a meeting of the minds on November 6, 2004, necessary to create a land sale contract enforceable by specific performance.

P.O. Ventures, Inc. v.
Loucks Family Trust
S.Ct. No. 32551
Supreme Court

HABEAS CORPUS

1. Were Abbott's due process rights violated by the terms of his parole being unduly restrictive?

Dennis E. Abbott v.
Olivia Craven
S.Ct. No. 32996
Court of Appeals

2. Did the court err in denying Hayes' petition for a writ of habeas corpus?

Michael T. Hayes v.
Jeff Conway
S.Ct. No. 33050
Court of Appeals

PROPERTY

1. Were the City's findings of fact and conclusions of law relative to the denial of the Partnership's zoning applications clearly erroneous or unsupported by substantial evidence in the record as a whole?

Lane Ranch Partnership v.
City of Sun Valley
S.Ct. No. 32545
Supreme Court

CRIMINAL APPEALS

EVIDENCE

1. Is there substantial evidence to support the jury verdict that Burnum committed the offense of felony malicious harassment?

State of Idaho v.
Scott L. Burnum
S.Ct. No. 32353
Court of Appeals

2. Whether the state presented substantial, competent evidence upon which the jury reasonably concluded that Johnson drove while under the influence of a controlled substance and was thus guilty of DUI.

State of Idaho v.
Johnny D. Johnson
S.Ct. No. 32177
Court of Appeals

3. Under the plain language of the domestic violence statute, did the evidence support the verdict that Loftis was a "household member" of the residence he and Richards rented and lived in at the time Loftis battered Richards?

State of Idaho v.
Kirk A. Loftis
S.Ct. No. 31003
Court of Appeals

4. Did the magistrate err by denying Doe's motion for judgment of acquittal?

State of Idaho v.
John Doe
S.Ct. No. 32575
Court of Appeals

5. Whether the court erred by admitting the I.R.E. 404(b) prior bad acts evidence because it did not show a plan.

State of Idaho v.
Theodore J. Kremer III
S.Ct. No. 32029
Court of Appeals

**SEARCH AND SEIZURE –
SUPPRESSION OF EVIDENCE**

1. Did the district court err when in denied Keene’s motion to suppress because the stop, which became a *de facto* arrest, was not supported by reasonable suspicion or probable cause and because the scope and duration was unreasonable?

*State of Idaho v.
Shyrlene Rae Keene*
S.Ct. No. 32504
Court of Appeals

2. Did the court err in denying Watson’s motion to suppress evidence found in Watson’s pocket and in concluding safety concerns justified the frisking of Watson for weapons?

*State of Idaho v.
David R. Watson*
S.Ct. No. 31483
Court of Appeals

SUBSTANTIVE LAW

1. Did the district court err as a matter of law in vacating Anderson’s excessive DUI conviction?

*State of Idaho v.
Robert Anderson*
S.Ct. No. 32038
Court of Appeals

RESTITUTION

1. Did the district court err by imposing restitution upon Shafer’s plea of guilty to leaving the scene of an accident when the restitution amount was not the result of his criminal act or consented thereto as required by I.C. 19-5304?

*State of Idaho v.
Nathaniel R. Shafer*
S.Ct. No. 32774
Court of Appeals

2. Whether the district court erred in ordering restitution to two entities that would not be considered victims under I.C. § 19-5304.

*State of Idaho v.
Ruth M. Cheeney*
S.Ct. No. 32625
Court of Appeals

**Summarized by:
Cathy Derden
Supreme Court Staff Attorney
(208) 334-3867**

**OFFICIAL NOTICE
SUPREME COURT OF IDAHO**

Chief Justice
Gerald F. Schroeder

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

2nd Amended - Regular Fall Terms for 2006

Idaho Falls..... October 4 and 5
Pocatello..... October 6

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

Boise..... November 29
Boise..... December 1, 4, 6, and 8

Regular Spring Terms for 2007

Boise..... January 3, 5, 8, 10, and 12
Boise..... January 29, 31, and
February 2, 7, and 9

Boise (Twin Falls appeals)..... February 28, and
March 2, 7, and 9

Coeur d’Alene and Lewiston..... April 2, 3, 4, 5, and 6
Boise (Eastern Idaho appeals)..... May 2, 4, 7, 9, and 11

By Order of the Court
Stephen W. Kenyon, Clerk

NOTE: The above is the official notice of setting of the year 2007 Spring Terms of the Idaho 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 L. Lansing
Sergio A. Gutierrez

3rd Amended - Regular Fall Terms for 2006

Hailey (Eastern Idaho term).....October 4 and 5
Boise.....November 8, 9, 20, and 21
Boise.....December 5 and 7

Regular Spring Terms for 2007

BoiseJanuary 9, 11, 16, and 18
Boise.....February 6, 8, 13, and 15

Eastern Idaho.....March 12, 13, 14, 15, and 16
Northern Idaho.....April 9, 10, 11, 12, and 13
BoiseMay 8, 10, 15, and 17
Boise.....June 5, 7, 12, and 14

By Order of the Court
Stephen W. Kenyon, Clerk

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



IDAHO VOLUNTEER LAWYERS PROGRAM SPECIAL THANKS

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

On September 9 volunteer attorney **Kim Toryanski**, Toryanski Law Group, PC, joined Zoe Ann Olson, Idaho Legal Aid Services, and Mary Hobson, Idaho Volunteer Lawyers Program, in providing legal consultation services to members of Boise's homeless population at the **Stand Down for the Homeless** event, sponsored by the Department of Veteran's Affairs with the support of the Ada County Housing Authority and several other public agencies. Toryanski assisted people with questions concerning family law, federal benefits, and minor criminal charges.

But **Toryanski's** contribution did not end there. The Stand Down event opened her eyes to the legal services needs of the homeless, and particularly to homeless veterans who are estimated, conservatively, to make up one third of the total homeless population. Working with Idaho Legal Aid and Idaho Volunteer Lawyers Program, **Toryanski** has begun planning for the provision of more comprehensive *pro bono* services for the homeless. One part of this effort will be to address resolution of minor criminal charges that stand in the way of obtaining assistance for housing, job training and

other benefits that would bring the homeless back into productive society.

Many thanks to Kim Toryanski for saying "yes" to the Stand Down and for picking up the challenge to provide legal services to those unable to pay.

As this planning effort progresses toward implementation, other volunteer lawyers (especially those with criminal law expertise) will be needed. For more information please contact Mary Hobson at the Idaho Volunteer Lawyers Program: (208) 334-4510, (800)-221-3295 or mhobson@isb.idaho.gov.

DO YOUR SHOPPING AND SUPPORT IVLP!

Special Thanks to those who use the Albertsons **Community Partners Card** to contribute to the Idaho Volunteer Lawyers Program (IVLP). IVLP has received over twelve thousand dollars in donations since the beginning of this program. We are grateful to everyone who uses this simple method to send 2% of your Albertsons' bill to IVLP.

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You can contribute to more than one organization: You can have up to four organizations on each Preferred Savings Card. For more information, contact Carol Craighill at ccaighill@isb.idaho.gov.



Idaho Volunteer Lawyers Program Sponsors Family Law *Pro Se* Clinic

On most Wednesdays at 6:00 PM, work at the Law Center would be winding down for the day. But at 6:00 on Wednesday, October 4, the Law Center was filled with volunteers and IVLP applicants anticipating their work for the evening. In the Board Room was a group of paralegals from the **Idaho Association of Paralegals** undergoing an orientation to prepare to help people seeking assistance with their cases waiting in the lobby. Both groups were there to participate in **Idaho Volunteer Lawyers Program's Family Law *Pro Se* Clinic**.

Citizens preparing to file a *pro se* case in Idaho can visit their local Court Assistance Offices to get the paperwork they will need. However, these offices do not (and cannot) help fill out this paperwork or answer legal questions. IVLP's *Pro Se* Clinics are set up to address this gap in service.

When potential *pro se* filers call IVLP for assistance, they are screened for income, case, and residential eligibility prior to referring them to the *Pro Se* Clinic, which is given free of charge to

eligible applicants who wish to establish or modify custody orders or complete a divorce where children are impacted.

In addition to screening applicants for eligibility, Diana Campos-Anaya, IVLP's staff paralegal, opens up a file for each participant and helps schedule and organize the clients so they will have the appropriate documentation they will need to complete their paperwork during the *Pro Se* Clinic. Diana says that it's great to see people working together on the *Pro Se* Clinics. She sees it as "the community coming together to help those in need."

On the night of the *Pro Se* Clinic, clients meet one-on-one with paralegals who volunteer time during their evening hours to help these clients fill out forms. This includes helping them understand what forms to use for each case type and the logistics of filling out and filing the appropriate paperwork with the courts. Each paralegal spends about 90 minutes with his or her assigned participant, walking the participant through the required paperwork. Barbara Feraci, a paralegal at Holland & Hart says, "I am

thrilled that our association is connected with this type of community service, and would love to see our continued assistance with this type of endeavor."

At the *Pro Se* Clinics, there are also volunteer attorneys on-call who can answer jurisdictional and procedural questions and provide advice for questions only a lawyer can answer. Mary Hobson, IVLP's Legal Director believes that the *Pro Se* Clinic "was a great beginning. Participants left with a much better sense of direction about what they needed to do next."

Carol Craighill, IVLP's Program Director hopes to coordinate regular Family Law *Pro Se* Clinics. She says that she tells people that "Courts have resources to help in cases that include children but you must get your case filed to get access to those resources." IVLP's Family Law *Pro Se* Clinics help people get over the barriers for going to court and get the help they need to solve their legal difficulties.



Front row, L to R: Josie Ford, Ada County Family Court Services; Carol Craighill, IVLP Program Director; Mary Hobson, IVLP Legal Director.

Second Row, L to R: Steve Beer, IVLP Volunteer Attorney; Lori Peel, IAP member, Idaho Office of the Attorney General, Civil Litigation Division; Lisa Hoag, Idaho Transportation Department; Bernice Myles, IAP member, Idaho Office of the Attorney General; Carolyn Montgomery, IAP member, Holland & Hart; Barbara Feraci, IAP member, Holland & Hart; Angela Shapow, IVLP Volunteer Attorney.



**2007 IOLTA Grant Awards
Interest on Lawyers Trust Accounts Program**

**Idaho Legal Aid Services, Inc.
Domestic Violence Project
\$169,500**

For general support of Idaho Legal Aid attorneys representing victims of domestic violence and elder abuse cases.

**Idaho Law Foundation, Inc.
Idaho Volunteer Lawyers Program
\$85,000**

For general support of the Idaho Volunteer Lawyers Program, which provides legal services to Idaho's poor through referral of appropriate civil cases to volunteer attorneys statewide.

**Idaho Law Foundation, Inc.
Legal Resource Line
\$4,400**

For expenses of the Legal Resource Line, which offers a limited consultation with a lawyer by telephone to Idaho residents, supplementing the services provided by Court Assistance Offices.

**Second Judicial District
CASA Program
\$1,100**

To support the program's efforts to expand guardian ad litem services for children in the Second Judicial District.

**Idaho YMCA
Youth Government Program
\$1,500**

For scholarship and travel funds to the annual statewide model legislative and judicial session for high school students in outlying areas, who could not otherwise participate.

**Idaho State 4-H Office
4-H Know Your
Government Conference
\$500**

For general support of the Idaho State 4-H Know Your Government Conference which provides 8th and 9th grade 4-H members an opportunity to participate in a mock legislative session and learn about the Idaho judicial system.

**Idaho Law Foundation, Inc.
Law Related Education Program
\$32,000**

For support of the Law Related Education program which focuses on democracy education for young people. Program components include a statewide mock trial competition for high school students, teacher training, resource materials relating to the justice system, and support of Lawyers in the Classroom.

**University of Idaho
College of Law
Scholarship Program
\$6,000**

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MY SUMMER OF STUDY: SITTING FOR THE IDAHO BAR EXAM

Jason T. Piskel
Young Lawyers Section

I knew it was coming. I just transferred back to the firm I clerked for during law school and knew that its practice exceeded the state boundaries, most often into Idaho. I knew the firm partners would want me to be admitted to practice in Idaho as soon as possible, thus waiting for reciprocal admission was not an option. Regardless, I was at first excited to tackle another bar exam and to be admitted in Idaho. Living in essentially a corridor to North Idaho admission in Idaho is an essential element to the modern transitory practice of law. So with the financial backing of the firm I set out to take on the feared MBE—multistate bar exam, the MEE—multistate essay exam, the MPT multistate practice exam, and Idaho state-specific essays.

Financial backing by the firm was great. With all the admission costs taken care of, I could buy the full set of Barbri books and the firm would put me up for my three night stay in Moscow. What I didn't get was time off, except for two days the week prior to the exam. Therefore, my study time started at 7:00 p.m. and went to 10:00 p.m. essentially every weeknight, and I added about four to five hours on Saturday.

I started by reviewing the Conviser outlines (I never touched those huge 8.5 x 14 books—way too much information). After thinking I was proficient in each subject or just tired of studying Con Law, I tortured myself with hundreds of multiple choice questions. Barbri presents them in levels of difficulty and anyone looking for a humbling experience should take 20 of the advanced questions in their area of practice. If you score fifty percent join MENSA. Needless to say, the focus of my studies was on the dreaded multiple choice questions.

This focus almost went to the expense of the other important part of the exam, the Idaho specific essays, including water law or as I call it the great out-of-stater barrier. I got to those shortly after I took a four day break from working and studying with a trip to Hawaii. This break was helpful to replenish before the final stretch going into the exam.

A quick aside. An important point, you have to study, taking a bar exam cold isn't wise even if you just got out of law school

with flying colors. From the fresh 3L to the 20-year practicing attorney, all applicants must study and take practice exams; to not is just begging for omission from the passing list posted for view by the general public.

Not making this list should be enough motivation to hit the books, and the fate of your livelihood being a close second. Let's face it, if you study you should pass, don't study, you should fail. Too simplistic maybe, but that is why it is called a BAR.

Now, back to my experience. After studying for one month and three weeks I woke up on Sunday and drove to Moscow. Prior to this week, the hotel I reserved experienced a newsworthy fire. This made me a little nervous about my accommodations, but after a few calls the hotel staff assured me I wouldn't be bothered by the charred stench. Honestly, I was nervous on Monday, and I was made more nervous by standing in the hall of the University of Idaho's law school listing to all of the law students who had dedicated their summer to preparing. They appeared to be filled with confidence. I remember one student talking about his last MBE practice exam score, near close to perfect. This drives me nuts, people puffing before the exam, but not as much as the discussion after portions of the exam. You know the ones where people talk loudly about the various UCC 9 issues that appeared in the question I was sure only dealt with criminal law. Man, that drives me crazy. I tried to keep my eyes and ears shut for the three day exam and only talk if ques-

tioned by another. It is a bit lonerish, but it helped keep me focused and on task.

After finishing the exam in the end of July, I had a month and a week or so to stew. The problem is that everyone knows you took the exam and everyone asks if you passed right after you took it. Obviously, you say I won't know until September and that it was a tough exam. This is an attempt at tempering any perception that passing is assured, even when the person asking always follows your answer with, "oh I am sure you passed." Anyway, the few days before the results are released world wide via the "wonderful" internet I was as nervous as a barwire salesman.

Just like clockwork the list is posted promptly at 9:00 a.m. Mountain Time. I sat in my office with all the lawyers and staff knowing what I was about to see, and depending on my reaction, that dictated how they would treat me the rest of the day. My heart pumped as I scrolled down the list. I overscrolled, thought I saw my name as the page moved down on its own, but not being sure, with my heart jumping, I scrolled the mouse back up and said to myself, "yes, yes." It almost makes losing a summer to studies worth it; seeing your name, feeling the sense of accomplishment, and being able to say "I knew it all along."

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Mergers & Acquisitions

Idaho group of investors in leverage buyout and securities offering for purchase of nationwide Agribusiness client in sale of Canadian ammonia-based fertilizer business including pre-positi company transfer of potato processing business unit and obtaining third-party consents
 Publicly traded company in purchase of various aggregate, asphalt, ready mix concrete, and p
 Publicly traded wholesale building materials supplier and contract construction services provi
 lumber and building material yards and construction services businesses throughout the w

Securities & Project Finance

Investor in venture capital investment in high-tech Taiwanese startup
 Sugar beet processing company in financing transactions
 Issuers in private placements and securities offerings
 Borrower in loan to recycling operation
 Agribusiness client in loans to barley processing facilities
 Agribusiness client in syndicated revolving credit, term loan and demand credit facilities
 Agribusiness client in ISDA Master Agreements and related documentation for hedging of cor
 interest rate risk
 Agribusiness client in master equipment leases and related schedules, including operating lei
 Issuer in subordinated note project financing

Real Estate Transactions

Seller in sale of business block in downtown Boise
 Publicly traded wholesale building materials supplier and contract construction services provi
 industrial properties throughout the United States including the assemblage of numerous parcels of industri
 ty in
 Las Vegas, Nevada
 Buyers and sellers in purchases and sales of Blaine county properties
 Seller in sale of Emmett valley orchard properties
 Urban renewal agency in purchase of Boise parking garage
 Buyer in purchase of power generation facility site in Colorado
 Developers in development and sale of 3 condominium projects
 Developer in permitting, platting and sale of residential subdivisions
 Buyers and sellers in purchases and sales of various commercial, industrial and residential po

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Licensing and MCLE Compliance

Annette Strauser
ISB Membership Director

LICENSING

The 2007 licensing packets will be mailed in mid November. To avoid delays in receiving your packet, please check your address information on our website (www.idaho.gov/isb) and submit any updates to the Membership Department at (208) 334-4500 or astrauser@isb.idaho.gov before November 10.

The licensing deadline is February 1, 2007. Your payment and paperwork must be received in our office by that date. Postmarked is not enough. If it is not received by February 1, you must also pay the appropriate late fee - \$50 for active and house counsel members and \$25 for affiliate and emeritus members. The final licensing deadline is March 1, 2007. All licensing fees and paperwork must be received by that date. No further extensions can be given. If your licensing is not complete by March 1, your name will be given to the Idaho Supreme Court for transfer to inactive status.

MCLE COMPLIANCE

If it is your year to report your mandatory continuing legal education (MCLE) credits, you received a reminder letter in May and you will receive a MCLE certificate of compliance in your licensing packet. The deadline for obtaining the required MCLE credits is December 31, 2006. However, the certificate of compliance does not have to be submitted until the February 1 licensing deadline.

You need to have at least thirty Idaho approved MCLE credits (of which at least two must be ethics) by the end of your reporting period. Check your attendance records on our website at www.idaho.gov/isb. If you attended courses that are not on your attendance records, contact the Membership Department to make sure they have been approved for Idaho MCLE credit. Only Idaho MCLE approved courses can be used to meet the MCLE requirements. Approved courses will appear in your attendance records if we received verification from the sponsor that you attended the course. It is not necessary for your name to be in our attendance records for you to count the course toward meeting your requirements. As long as the course has been approved for Idaho MCLE credit, simply add it to your certificate of compliance before signing it. Most certificates of compliance will have written additions and corrections.

There will be many courses offered between now and the end of the year. We post a list of upcoming approved courses on our website. We also have a library of video/audio tapes available for rent and we have online courses available. Information about the tapes and online courses is on our website. If you are considering renting a video or audio tape, order it now. The tapes (especially ethics tapes) will be scarce during November, December and January. If you wait, you may not be able to get a tape before the December 31 deadline.

Online courses are a great way to avoid the hassle of ordering and returning tapes. They are video and/or audio streaming versions of our courses that are available at your convenience 24 hours a day. They are an easy way to get MCLE credits when you

want them. Visit our website and to see the available courses.

Remember, the limit for self-study credits is fifteen per reporting period. If you take an online course, it will be considered self-study. Watching a videotape is self-study if you watch it on your own. If you can get at least one other Idaho attorney to watch a tape with you, it is not considered self-study. Getting together with another member of the Bar is a good way to avoid self-study credit and, if you are lucky, split the rental cost.

If, despite your best efforts, you do not think you will be able to complete the MCLE requirements by the December 31 deadline, you can request an extension until March 1, 2006. To get the extension, send a written request and pay \$50. Credits earned during the extension period will be counted toward your reporting period that ended in 2006. Your certificate of compliance should not be submitted until the requirements have been met. However, the rest of your licensing must be submitted by the February 1 deadline to avoid the late fee. The final deadline for submitting your completed certificate of compliance is March 1, 2007. No additional extension can be given. If you have not completed the MCLE requirements by March 1, your name will be given to the Idaho Supreme Court for transfer to inactive status.

QUESTIONS

We want to make the licensing process as easy and trouble free as possible. If you have questions or need more information, please contact us at (208) 334-4500.

For licensing and MCLE credits/reporting information contact Annette Strauser (astrauser@isb.idaho.gov) or Jenay Hunt (jhunt@isb.idaho.gov) in the Membership Department.

If you are registering for ILF or ISB courses or renting video/audio tapes contact Legal Education Department at (208) 334-4500.

For more information on licensing/MCLE, the list of upcoming courses, the list of tapes and online courses, etc. - visit our website at www.idaho.gov/isb.

MEDIATOR/ARBITRATOR

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—IN MEMORIAM—

Connie Ann (Herd) Vietz
1963-2006

Connie Ann (Herd) Vietz passed away unexpectedly on Oct. 19, 2006 after a very brief illness. Connie was born in the Magic Valley Hospital in 1963 to James Vincent Herd Jr. and Janet Ann Herd. She spent a number of years in the Twin Falls area before moving to Utah. In her youth, she attended schools in Idaho and Utah. Connie participated in volleyball, basketball and softball. She excelled in academics and had a phenomenal memory. Connie married her one true love and soul mate, Greg Vietz, in June of 1982. She graduated with a B.S. in Accounting from the University of Utah in 1986. She received her J.D. from the University of Houston, College of Law in 1991. Connie began her legal career as a deputy prosecuting attorney with Ada County in 1991. During her tenure with the office, she served as the Chief of the Juvenile Division, a felony trial attorney, the Preliminary Hearing Team Supervisor, The Idaho Prosecuting Attorneys Association representative to the Idaho Legislature, and the Screening Unit Chief. She had an amazing rapier wit, and was cherished, loved and respected by her husband, children, parents, sisters, relatives, friends, colleagues, law enforcement officers, members of the Idaho State Bar and the judiciary. Connie's greatest joy in life was being a mother. She taught her children to both embrace and engage wholeheartedly in life; and, shared many wonderful adventures with her husband and children. Connie is survived by her loving husband, Greg, daughter Vanessa, son Stefan, parents Jim and Janet Herd, sisters Becky Stein and Jana Beyerlin, brothers-in-law Adam Stein and Corey Beyerlin, niece Ariana Stein and nephew A.J. Stein, her grandmother Ann Nielsen, mother and father in-law, Elaine and Norman Vietz, as well as, numerous aunts, uncles and cousins.

—ON THE MOVE—

Lisa B. Rasmussen has opened a new law practice focusing on collections, real estate, family law and litigation. She has been practicing law in Idaho for 13 years. Previous to opening her new office she worked at the firm Wilson McColl & Rasmussen in Boise, Idaho. Lisa is a graduate of J. Reuben Clark Law School at Brigham Young University. You can reach her at 5700 E. Franklin Rd., Ste. 100, Nampa, Idaho 83687, (208) 465-8897 or at her Boise office at 801 W. Main Street, Ste. 100, Boise, Idaho 83702.

Dana M. Herberholz joined the law firm of Hall, Farley, Oberrecht & Blanton, P.A. as an associate. He received a B.S. in Cellular and Molecular Biology and a B.A. in Law, Societies and Justice from the University of Washington. He then received his J.D. with honors from Gonzaga University School of Law in 2006. In law school he was a member of the Gonzaga Moot Court Honor Council and represented Gonzaga in the Saul Lefkowitz Trademark and Unfair Competition National Moot Court Competition. He was the first recipient of the Washington State Bar Association's Intellectual Property Law Scholarship in 2005. He is currently licensed to practice law in all Idaho courts and the U.S. District Court for the District of Idaho. He is a member of the Intellectual

Property Law, Litigation, and Young Lawyers Practice Sections of the Idaho State Bar, as well as a member of the American Bar Association.

Mark J. Orler has joined the law firm of Hall, Farley, Oberrecht & Blanton, P.A. as an associate. He received both a B.S. in Biology and a B.A. in History from the University of Montana. He received his J.D. from the University of Idaho College of Law, graduating with honors in May 2006. During law school, he was a member of the Idaho Law Review, serving as Lead Articles Editor and a member of the Executive Board. Prior to attending law school, he worked in the hi-tech industry as a technical recruiter for hardware and software companies located in Silicon Valley. He is currently licensed to practice law in all Idaho courts and the U.S. District Court for the District of Idaho. He is a member of the Business & Corporate Law, Litigation, and Young Lawyers Practice Sections of the Idaho State Bar, as well as a member of the American Bar Association.

—RECOGNITION—

Holland & Hart announces seven attorneys from their Boise office are listed in the 2007 edition of *The Best Lawyers in America*.

The Holland & Hart attorneys listed as leading practitioners in their field include **Steve Anderson** for personal injury litigation, **Walter Bithell** for commercial litigation and personal injury litigation, **Murray Feldman** for environmental law, **Fred Mack** for corporate law and mergers and acquisitions, **Bill Myers** for environmental law, **Larry Prince** for bankruptcy and creditor-debtor rights law, and **Newal Squyres** for commercial litigation.

Both Mr. Bithell and Mr. Prince have been listed for more than 10 years.

Lynn M. Luker has been selected for inclusion in the 2007 edition of *The Best Lawyers in America* for his work in the area of Workers' Compensation Law. He is a 1980 graduate of the University of Idaho College of Law, and received his undergraduate degree in political science from the University of California at Berkeley. He is a former editor-in-chief of the Idaho Law Review, law clerk to Chief Justice Robert E. Bakes of the Idaho Supreme Court, and chairman of the Idaho State Bar Workers Compensation Section. Luker has practiced law in Boise since 1982.

—CORRECTIONS—

In the September issue of *The Advocate* the article written by **Kim C. Stanger** had an incorrect acronym in the title. The acronym for the Health Insurance Portability and Accountability Act of 1996 was inserted as HIPPA. The correct acronym should be HIPAA, with the title reading: *HIPAA Hide and Seek: Rules for Obtaining Medical Information*.

In the October *Advocate* we misspelled the name of **John McGown, Jr.**, Hawley Troxell Ennis & Hawley, LLP. He was recognized in the Of Interest column as one of the 2007 Best Lawyers in America for tax law and trusts and estates. We apologize for the error.



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Ethics Credits - Need More?

If you plan to rent an ethics tape before the end of the year, do not wait to order it. The 2007 licensing packets will be mailed in mid-November. Once they are received, the demand for ethics video/audio tapes will increase.

If you wait, there may not be any tapes available. Contact Kendra Hooper at (208) 334-4500 or khooper@isb.idaho.gov for information on renting tapes.

COMING EVENTS

11/1/06 – 12/31/06

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

NOVEMBER 2006

(Dates may change or programs may be cancelled)

- 1 *The Advocate* Deadline
- 1 **CLE: ISB Law Practice Management Section present: Designing Effective Mentoring Programs**
- 2 **CLE: ISB Intellectual Property Section present: Copyright Law: A two-part CLE**
- 2-3 Annual Idaho State Tax Institute, Pocatello
- 2 **5th District Bar Resolution Meeting, Twin Falls**
- 2 **3rd District Bar Resolution Meeting, Nampa**
- 3 Idaho State Board of Commissioners Meeting
- 3 **4th District Bar Resolution Meeting, Boise**
- 6 **CLE: ILF present: Video Replay Series**
- 8 **2nd District Bar Resolution Meeting, Moscow**
- 9 **1st District Bar Resolution Meeting, Coeur d'Alene**
- 10 Attorneys Against Hunger, Boise
- 13 **CLE: ILF present: Video Replay Series**
- 15 **CLE: ISB Young Lawyers Section present: Building a Case from Discovery to Trial and Beyond Trial Preparation: Examination of Witnesses**
- 15 *The Advocate* Editorial Advisory Board
- 16 **6th District Bar Resolution Meeting, Pocatello**

- 17 **7th District Bar Resolution Meeting, Idaho Falls**
- 20 **CLE: ILF present: Video Replay Series**
- 23 **Thanksgiving Day, Law Center Closed**
- 24 **Thanksgiving Day Holiday, Law Center Closed**

DECEMBER 2006

(Dates may change or programs may be cancelled)

- 1 *The Advocate* Deadline
- 1 **CLE: ILF present: Headline News The Year in Review, Coeur d'Alene**
- 8 **CLE: ILF present: Headline News The Year in Review, Boise**
- 11 **CLE: ILF present Video Replay Series**
- 15 **CLE: ILF present: Headline News The Year in Review, Idaho Falls**
- 20 **CLE: ISB Young Lawyers Section present: Building a Case from Discovery to Trial and Beyond**
- 20 *The Advocate* Editorial Advisory Board
- 25 **Christmas Day, Law Center Closed**

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

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The University of Idaho College of Law would like to congratulate our graduates admitted to the Idaho State Bar.

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NOVEMBER

CLE COURSES

Wednesday, November 1, 2006 from 8:30 – 9:30 a.m. at the Law Center, Boise

Designing Effective Mentoring Programs (1 CLE credit)

Sponsored by the Law Practice Management Section

Presented by Lee Dillion, University of Idaho College of Law.

Thursday November 2, 2006 from 8:00 to 9:00 a.m. , 9:15 to 11:15 a.m. at the Law Center, Boise

Copyright Law for the Rest of Us (1 CLE credit)

Advanced Copyright Law (2 CLE credits)

Sponsored by the Intellectual Property Section

This seminar is presented as a two-part program. Michael Keys of Preston Gates & Ellis will discuss copyrightable subject matter, what exclusive rights are granted under the Copyright Act, ownership issues such as registration and other statutory formalities, and remedies available to enforce copyrights. During the second part of the program, Mr. Keys will discuss copyrightability issues such as end-user license agreements, the fair use defense to copyright infringement, the impact of the Grokster.

Monday, November 6, 2006 from 12:00 – 1:00 p.m. at the Law Center, Boise

An Ounce of Prevention is Worth a Pound of Cure: Part 1 (1 Ethics Credit)

Idaho Law Foundation Video Replay Series

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Bring your lunch (or we will order one for you if you pre-register) and watch a replay of a past ILF CLE courses.

Monday, November 13, 2006 from 11:00 a.m. – 1:00 p.m. at the Law Center, Boise

An Ounce of Prevention is Worth a Pound of Cure: Part 2 (1 Ethics Credit)

Idaho Law Foundation Video Replay Series

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Monday, November 20, 2006 from 12:00 – 1:00 p.m. at the Law Center, Boise

Lobbying and the Legislative Process (1.5 CLE credits including .5 Ethics)

Idaho Law Foundation Video Replay Series

Sponsored by the Idaho Law Foundation

Bring your lunch (or we will order one for you if you pre-register) and watch a replay of a past ILF CLE courses.

Wednesday, November 15, 2006 from 8:00 to 9:00 a.m. at the Law Center, Boise

Building a Case from Discovery to Trial and Beyond Trial Preparation Examination of Witnesses (1 CLE credit)

Sponsored by the Young Lawyer Section

Presented by J. Walter Sinclair of Stoel Rives, LLP Boise.

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Friday, December 1, 2006

Headline News: The Year in Review

Coeur d'Alene Inn, Coeur d'Alene

Friday, December 8, 2006

Headline News: The Year in Review

Doubletree Riverside, Boise

Monday, December 11, 2006

Handling Your First or Next Matter Involving the Sale or Acquisition of a Small Business
Law Center, Boise

Friday, December 15, 2006

Headline News: The Year in Review

Shilo Inn, Idaho Falls

Wednesday, December 20, 2006

Building a Case from Discovery to Trial and Beyond Appeal Tips
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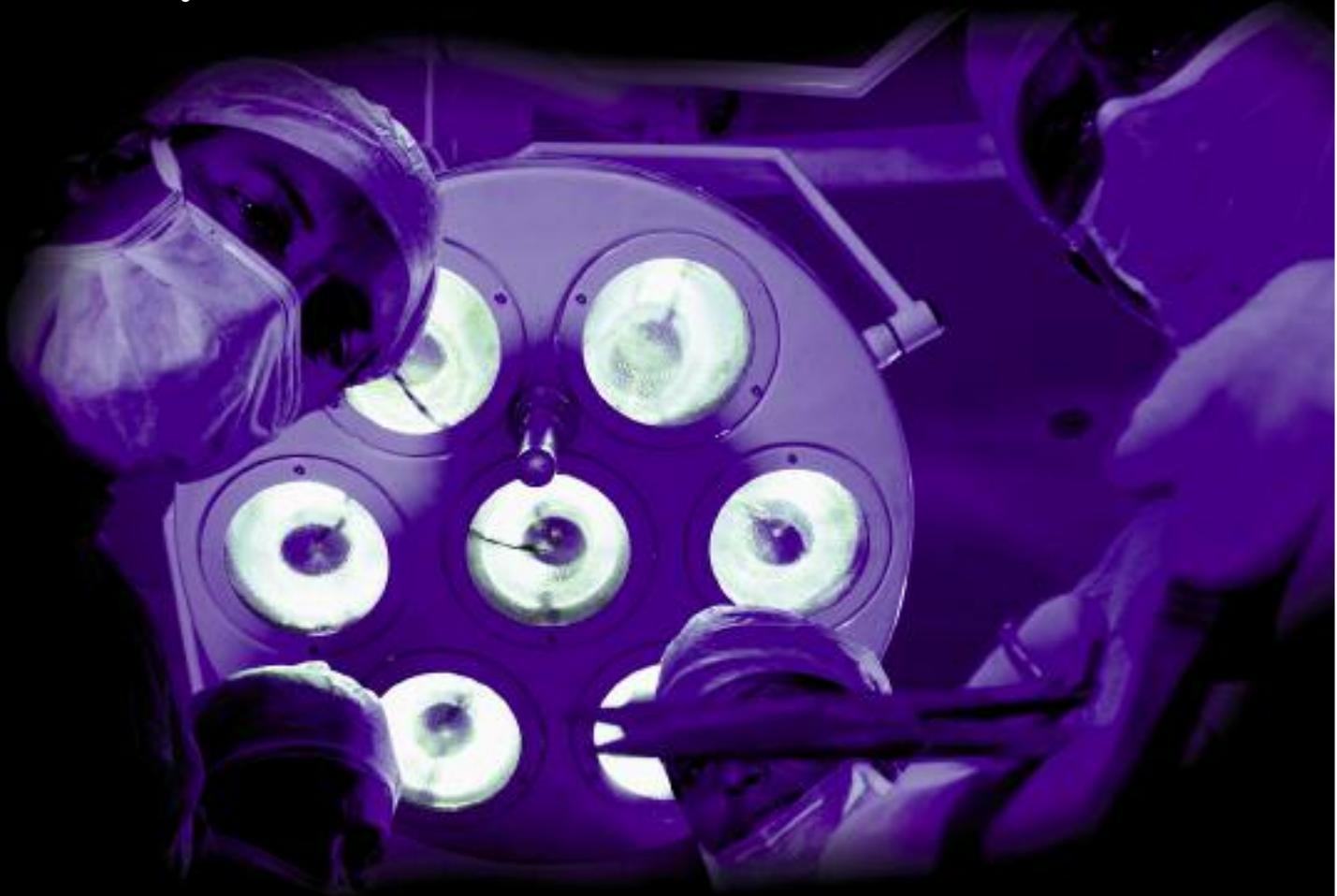
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