

The background of the cover is a photograph of a desert landscape. In the foreground, there are sand dunes with distinct, wavy ripples in the sand, likely created by wind. The dunes stretch towards the horizon. The sky is a deep blue, filled with scattered white and grey clouds. The lighting suggests a late afternoon or early morning setting, with some clouds catching the light.

# The Advocate

**Official Publication of the Idaho State Bar**

Volume 49, No. 9

October 2006

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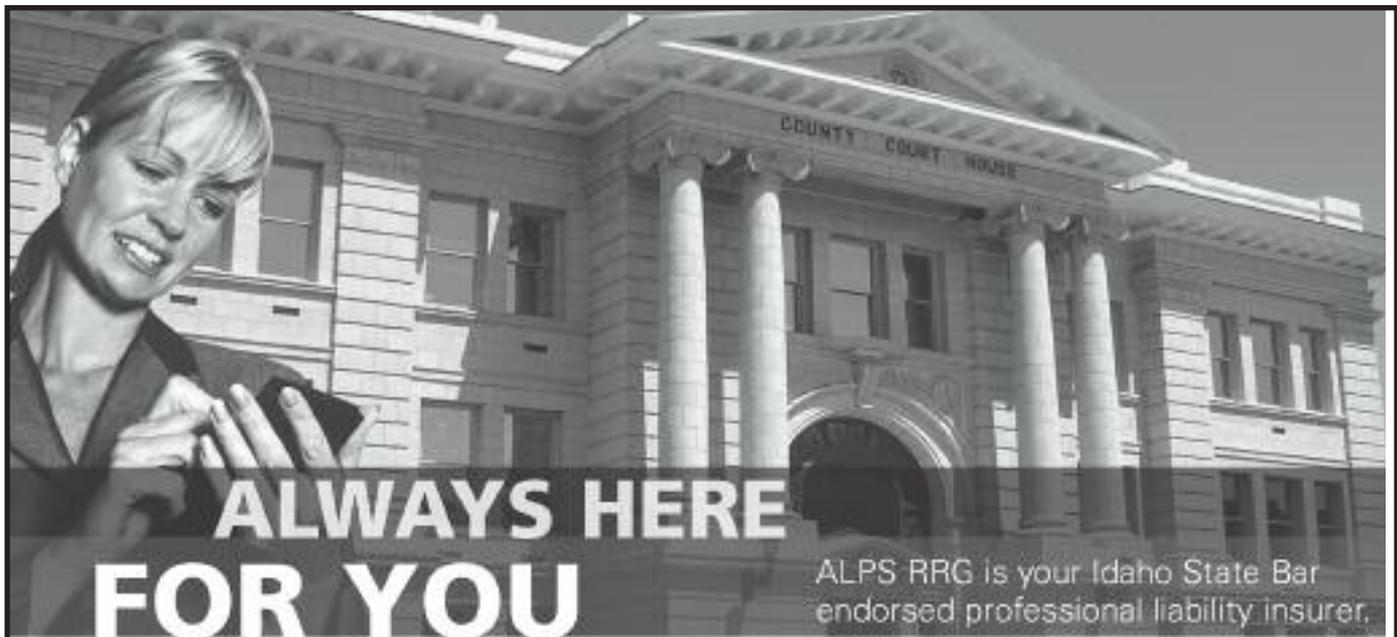
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With one of the nation's highest IOLTA participation rates, Idaho's IOLTA program has awarded over \$4,000,000 in its 20 year history to organizations that support law related education and legal services for disadvantaged citizens.

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

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

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## Be Prepared

Jay Q. Sturgell



I cannot believe that it is time for my second column. Time, and my term on the Bar Commission, is passing at an incredible rate. An Ancient Chinese curse comes to mind as I review all that has happened since I became a Bar Commissioner: "May you live in interesting times." I would like to say to whomever cursed me **IT'S WORKING! PLEASE STOP!**

As promised, this column is on being prepared. First, a disclaimer. Although I make references to litigation and conflict, I do not mean to limit myself to these. They are just handy paradigms. I believe that these principles are universally applicable regardless of the type of law you practice or life you live.

The practice of law is an art, not a science; there are many different and equally valid approaches to problem solving and conflict resolution. Nonetheless, one constant of a good lawyer is that they are well prepared. There is no substitute for good preparation as it is often the difference between success and failure.

Preparation can be broken down into the following elements: know yourself, know your enemy, know the terrain, and know your goal.

Know yourself. This is your most important preparation. It serves as the foundation of everything you accomplish. Self-knowledge and self-mastery are the keys to success and happiness. Know your strengths, your weakness, and your case. When you are involved in any endeavor the most effective strategy is to play to your strengths. Knowing yourself also brings quiet assurance and confidence.

How do you know your own strengths and weaknesses? The best indicator is past performance. You must be brutally honest with yourself, seek out friends and

peers who will give you an honest and fair assessment of your performance and capabilities—flatterers and yes-men need not apply. Preferably, seek out a senior partner or a mentor, someone who wants you to succeed; someone who has enough knowledge to evaluate your performance; someone with enough wisdom to know that an honest evaluation can only help you.

Know your case, the facts, the law, and most importantly, what outcome the client wants. This applies not just to litigation, but to any negotiation, mediation, or any other representation of your client.

Know your enemy. You must perform the same analysis of the other side. Know their strengths, their weakness, and their case. Figure out what they are capable of, what drives them, and what their limits are. Only by knowing your enemy can you anticipate what steps they will take, how they will try to counter your moves. If you can anticipate their actions, you can plan for them, deal with them, and neutralize them.

The term enemy may sound a little harsh, but this principle applies to all types of representation, be it litigation, mediation, negotiation, anything. "Enemy" can mean any obstacle to reaching your desired outcome.

Know the terrain. Know the local community, the judge, the jury, anything which could affect the outcome. This is true of factors you can influence and those you cannot. You may not be able to change the direction the wind is blowing, but you can certainly gain full

*He who knows only his own side of the case, knows little of that.*  
(John Stuart Mill, *On Liberty*)

benefit of the wind if you are prepared. Review your past cases, how has this judge reacted to similar cases, yours or other attorneys?

Know your goal. The first thing you should do when you take a case is to write the court order, agreement, contract, statute, etc. Once you have visualized the goal, your next job is to reverse-engineer how to get there. Detail the steps necessary; this will become your case plan. Craft a plan that capitalizes on your strengths and minimizes your weaknesses. Anticipate what steps the enemy will take and how to cope with them. Take into account the various influences of the terrain.

In drafting and implementing your plan, always keep the goal in mind. Only take actions that advance you to your goal. Two principles from Sun Tzu which embody this idea are, first, never engage in a fight if you do not have to, and second always engage with the aim to win. If the action does not move you toward victory, it is wasted effort, avoid it.

Know yourself, know your enemy, know the terrain, and know your goal. This is the essence of being prepared.

Finally, "No plan of attack ever survives contact with the enemy." This well known maxim may seem to indicate that planning and preparation are futile. Nothing could be further from the truth.

*Thus it is said that one who knows the enemy and knows himself will not be endangered in a hundred engagements. One who does not know the enemy but knows himself will sometimes be victorious, sometimes meet with defeat. One who knows neither the enemy nor himself will invariably be defeated in every engagement (Sun-Tzu, the Art of War.)*

One hallmark of an excellent attorney is the ability to improvise, to think on one's feet. There is no better way to gain access to this ability than by thorough preparation.

A detailed and thorough plan of action enhances your ability to

improvise. This groundwork gives you a map that you can adjust to meet changing circumstances and terrain. A thorough mental map gives you more choices to deal with unexpected contingencies. Von Clausewitz said "Presence of mind . . . is nothing but an increased capacity of dealing with the unexpected." Meticulous preparation is the best way to achieve presence of mind.

"Be prepared" – it's not just for Boy Scouts anymore.  
P.S. Hi Dad!

**Jay Q. Sturgell** is serving a six-month term as president and 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, Smelterville, 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](mailto:sturgellcs@usamedia.tv)

## NEWS BRIEFS

**CASEMAKER IMPROVEMENTS**—On October 21, 2006 Casemaker will sport a new look that will incorporate expanded and simpler search capabilities. As a user, you will continue to search using Boolean operators as well as natural language. Searching in Casemaker will be as easy as typing a question. It will maintain the Thesaurus function which allows you to search for words that are similar or otherwise related to the object work. You will continue to search using prefix and suffix expansion. The newest search enhancement will allow users to search in multiple state and federal libraries simultaneously. This feature will produce expanded results for you in an economical amount of time.

The biggest change is in the number of libraries available to members. By November 2006, users will be able to access libraries for all 50 states. Included will be state constitutions, rules of court, current statutes, and case law from at least 1950 for all non-consortium member libraries. Current libraries will include older decisions from the U.S. Supreme Court and U.S. Circuit courts. All U.S. Circuit Court (F.3d) opinions will be available from 1950 or their later inception. U.S. Supreme Court decisions will be available from its inception in 1754. The expansion will significantly increase the appellate state case law for the past 50 years. The current 24-state consortium members will receive these added benefits at no additional charge. If you don't remember your Casemaker password call Membership (208) 334-4500.

**IDAHO JUVENILE RULES**—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>.

**CERTIFIED WEATHER RECORDS**—The National Weather Service's **National Climatic Data Center (NCDC)**, archives all U.S. weather data, such as forecasts and warning products as well as weather observations including, Doppler weather radar and satellite imagery. NCDC is the source for all "Certified" United States weather data. Do not call the National Weather Service located in Boise. They will refer your calls to NCDC in Asheville, NC. Contact Information: Mail: National Climatic Data Center, Federal Building, 151 Patton Avenue, Asheville, NC 28801-5001, Phone: 828-271-4800, Fax: 828-271-4876

Web Site: <http://www.ncdc.noaa.gov>

E-Mail: [ncdc.info@noaa.gov](mailto:ncdc.info@noaa.gov)

### The Idaho State Bar and Law Foundation Announce New On-Line CLE Provider



<http://www.legalspan.com/contact.aspx>

**Beginning October 24, 2006, the Idaho State Bar and Law Foundation will offer online CLE programming with our new online partner, Legalspan. This new partnership will provide greater program choices and "user friendly" access. Attorneys will be able to connect to online CLE programs through the Idaho State Bar and Law Foundation website [www.idaho.gov/isb](http://www.idaho.gov/isb).**

## DISCIPLINE

### STEPHANIE ANNE ALTIG (Public Reprimand)

The Professional Conduct Board of the Idaho State Bar sanctioned Boise attorney Stephanie Anne Altig with a public reprimand for professional misconduct.

The reprimand, issued on September 5, 2006, followed a stipulated resolution of an ISB disciplinary proceeding, which involved violation of Idaho Rule of Professional Conduct 8.4(d) [conduct prejudicial to the administration of justice].

In October 2003, the ISB filed formal disciplinary charges alleging Ms. Altig engaged in professional misconduct in 1997 in connection with the representation of the Idaho Department of Correction in litigation brought by inmates against the Department in the United States District Court for the District of Idaho. In that case, the plaintiffs moved for an order to show cause why Ms. Altig should not be sanctioned for reading and failing to disclose access to correspondence between plaintiffs and their counsel, which correspondence was also directed to non-party inmates. The correspondence at issue was delivered to her at either her suggestion or request. However, Ms. Altig held the initial letter from February to June of 1997 without taking any action on it or disclosing that she had received it. The initial letter and additional correspondence subsequently received by her were presented to the District Court in October of 1997 by Ms. Altig because she believed that the correspondence support-

ed her client's motion to hold plaintiffs in contempt based upon her belief that opposing counsel had made misrepresentations to the District Court.

Following denial of her client's motion to hold plaintiffs in contempt, plaintiffs moved for an order to show cause why Ms. Altig should not be sanctioned for her conduct. After a three day hearing regarding sanctions, the District Court granted plaintiffs' motion and awarded monetary sanctions against Ms. Altig. That decision was later affirmed by the United States Court of Appeals for the Ninth Circuit.

As part of the stipulated resolution, Ms. Altig admitted violating I.R.P.C. 8.4(d). Pursuant to that stipulation, the Professional Conduct Board ordered the imposition of a public reprimand. This resolution does not affect Ms. Altig's ability to practice law.

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

## RECIPROCALLS

Applicants Admitted

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

The following lawyers were admitted to the practice of law in Idaho through reciprocal admission (Idaho Bar Commission Rule 204A)

**Lyn Loyd Creswell**  
Salt Lake City, UT  
*University of Utah*  
Admitted: 8/24/06

**George Pierce Fisher**  
Portland, OR  
*University of North Dakota*  
Admitted: 8/16/06

**Thomas Lee La Follett**  
Princeton, ID  
*Lewis and Clark College*  
Admitted: 8/7/06

**James C. Paine**  
Lake Bay, WA  
*University of Nebraska*  
Admitted: 8/24/06



### 2006 IOLTA HONOR ROLL

Banks play an important role in the IOLTA grant program. Many of IOLTA's partner banks have chosen to waive fees on IOLTA accounts and have applied interest rates reserved for preferred accounts. To thank these banks for their participation, ILF created the IOLTA Honor Roll. For 2006, the following banks are included on the honor roll:

- **bankcda**
- **Farmers & Merchants State Bank**
- **Farmers National Bank**
- **Inland Northwest Bank**
- **Ireland Bank**
- **Key Bank**
- **US Bank**
- **Wells Fargo**
- **Zions Bank**



# Are there too many lawyers?

Diane K. Minnich



Frequently I am asked, "How many lawyers are there in Idaho? After the September admissions ceremonies the Idaho State Bar membership will be over 4,850. In

2007, the membership will reach 5,000. If an Idaho lawyer asks me, he or she is amazed at how many lawyers there are. If a lawyer from California or Florida asked, he or she is surprised at how few lawyers we have in Idaho. A non-lawyer generally wants to know, "What do all those lawyers do?"

By way of comparison, the largest lawyer population is in California, where there are more than 200,000 licensed lawyers (Boise now has almost as many residents as California has lawyers). The smallest lawyer population is North Dakota, with about 1,830 licensed lawyers. As of June 2006, the ABA reports 1,116,967 licensed lawyers in the United States.

The chart shows how many lawyers were admitted, how many were licensed and the state population since the early 1900s. The first membership statistics were collected in 1926, the year after the Idaho State Bar became an integrated bar; 600 lawyers were licensed at that time. In 1970, the attorney population had increased to 724, and increase of only

21%. The dramatic increase has been since 1970, from 724 to 4,709 (as of December 2005) an increase of 550%.

Since 1926, the lawyer population has increased 685%; the population of Idaho has increased 221%. What does this disproportionate increase in lawyers indicate? The role of lawyers in society has changed considerably since the Bar was integrated in 1926. More rights are afforded individuals and groups and generally transactions require the expertise of a lawyer. Decisions made in our courts can profoundly affect our daily experiences as well as our civil liberties and the society in which we live. The law has become more complex and far-reaching. Lawyers are critical to accessing the Court system, to defending your individual rights, explaining contracts or agreements, and creating a will that distributes

your assets consistent with your wishes. Lawyers provide legal assistance to individuals, businesses and groups as well as leadership in their communities. Are there too many lawyers? I'll let you decide.

*Bar Numbers*—Yes, your Bar number indicates when you were admitted to the Bar. Bar numbers are assigned to applicants when they apply for admission. After the Bar became mandatory in 1925, the first applicant was number 1. For a variety of reasons, not all applicants are admitted to the Bar. But if you have a low number, you were admitted earlier than those with high Bar numbers. The Bar member with number 272 was admitted on 7/13/1936. He has the lowest number of an active member of the Bar. The Bar member with number 7,580 was admitted on 7/25/06. She has the highest bar number of an admitted lawyer.

Year	Lawyers admitted to the Idaho State Bar	Lawyers licensed in Idaho	Idaho Population
1900	41		
1910	69		
1920	38		431,866
1926*		600	
1930	7	589	445,030
1940	21	519	524,873
1950	55	528	588,673
1960	26	616	667,191
1970	42	724	713,015
1980	147	1,837	944,038
1990	145	2,878	1,006,749
2000	137	4,075	1,293,953
2005	202	4,709	1,429,096

\*1926 was the first year that we have official Idaho State Bar membership statistics

DISTRICT BAR ASSOCIATION RESOLUTION MEETING CALENDAR				
1st District	Coeur d'Alene	Noon	Thursday	November 9
2nd District	Moscow	Evening	Wednesday	November 8
3rd District	Nampa	Evening	Thursday	November 2
4th District	Boise	Noon	Friday	November 3
5th District	Twin Falls	Noon	Thursday	November 2
6th District	Pocatello	Noon	Thursday	November 16
7th District	Idaho Falls	Noon	Friday	November 17

**Legal Aid—Opening the Courthouse Doors**

*Equal justice under law is not just a caption on the facade of the Supreme Court building. It is perhaps the most inspiring ideal of our society ...It is fundamental that justice should be the same, in substance and availability, without regard to economic status.*

Justice Lewis Powell

We would like to urge your support for the proposition that all of us, whether family, friends, neighbors or strangers, deserve the ability to access our courts. While all Idahoans can vote and voice their opinions to our governor and legislature, many do not pass the “wealth test” necessary to access our courts. We do not tolerate poll taxes which keep the poor from voting but we permit tens of thousands of our fellow Idahoans to be excluded from the benefits of our courts for a lack of money. While we take offense to the statement that “the law is the mistress of the rich” it appears like it is becoming a reality for many.

Working as the largest provider of civil legal services to the poor in Idaho we can tell you that “equal access to justice” is for the most part a myth in our state. All day every day our staff turn away poor people in dire circumstances who need legal help because we lack the staff to help them. According to a 2005 study by the Legal Services Corporation we are meeting about 20% of the legal needs of Idaho’s poor.<sup>1</sup> Those we turn away frequently need help for problems like leaving a violent relationship, obtaining a guardianship for a child with drug addicted parents, helping a senior obtain nursing home care, or advice on controlling runaway medical costs after a major illness. Many of those we cannot serve are not able to protect themselves or try to handle a case themselves that requires the skills of an attorney, often with disastrous consequences. Anyone who practices in magistrate court can vouch for the growth of pro se cases. For example, in 2005 45% of all domestic relations plaintiffs and 79% of domestic relations defendants in Idaho were unrepresented. While we promote pro se action in some limited circumstances, it cannot serve as a replacement for attorney representation in complex cases.

Attorneys are guardians of our legal system, charged with working to provide those in society access to the legal system in which we work. We, more than anyone else, should heed the Preamble to the Idaho Rules of Professional Conduct (“Rules”) which provides that “legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.”<sup>2</sup> That is why those Rules urge attorneys to “devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel.”<sup>3</sup> The Rules are in step with our own Bar organizations stated goal of “promoting the public’s access to legal services and the enhancement of the public’s understanding of and respect for the law and the legal system.”

Concerns about the lack of access to courts are being expressed across our nation. The Conference of Chief Justices, consisting of the highest judicial officer in each of the fifty states, adopted a resolution that “equal justice for all is fundamental to our system of government.”<sup>4</sup> The Conference acknowledged that a lack of access adversely affects individuals and society while eroding public trust and con-

fidence in our system of justice.<sup>5</sup> The Conference encouraged states to respond by, among other things, providing public funding and support for civil legal services.

The American Bar Association believes the problem is critical enough to require more radical change. The ABA House of Delegates unanimously approved a resolution on August 7, 2006, calling for state and federal governments to provide legal counsel as a matter of right for low income persons in certain adversarial civil matters. Such cases would involve basic human needs such as shelter, sustenance, safety, health, or child custody.<sup>6</sup>

Today we ask you to work with Idaho Legal Aid to move beyond lofty statements and to take concrete action to provide poor people access to Idaho courts. Every member of the Idaho Bar will receive a letter from us explaining our proposal to seek a direct appropriation and/or to create an Access to Justice Fund to receive \$10 from civil court filings with proceeds to fund legal services for poor Idahoans. These won’t completely fix the problem, but they are steps in the right direction and will allow Idaho Legal Aid to represent many more clients. Already forty-four states (including all of our sister states but Wyoming) provide financial support to their legal services providers through a combination of direct appropriations, fines, or filing fees. Unfortunately, Idaho does not.

Seeking a direct appropriation and/or passage of a bill providing access to the courts will be difficult but we are convinced we will ultimately succeed because it is in the best interests of the people of Idaho and the government that serves them. Providing citizens access to the judicial system will allow them to enjoy the full benefits of our government. Access to the courts will provide the judiciary credibility in the eyes of those who cannot now use its services. Representation of those people by attorneys will ensure just and expeditious resolution of their legal problems through the courts.

To succeed we need the support of the attorneys charged by our own rules to act as the guardians of our judicial system. Please vote in favor of our bar resolution to provide your fellow citizens access to Idaho’s courts.

Idaho Legal Aid Services  
Ernesto Sanchez  
*Executive Director*  
James Cook  
*Deputy Director*

**Endnotes**

<sup>1</sup>Documenting The Justice Gap in America (2005): A Report of the Legal Services Corporation.

<sup>2</sup>Idaho Rules of Professional Conduct, Preamble [1][6].

<sup>3</sup> Id.

<sup>4</sup>Conference of Chief Justices. Resolution 23, Leadership to Promote Equal Justice.

<sup>5</sup>Id.

<sup>6</sup>American Bar Association House of Delegates Resolution 112A, passed August 7, 2006.

## LETTERS TO THE EDITOR

### Idaho Rules of Professional Conduct 4.2 and HIPAA

In the September 2006 Advocate, Kim Stanger prepared a very informative article on HIPAA. However, his interpretation of the Idaho Rules of Professional Conduct and what they require seem to be off base. He implies that his reading of Rule 4.2 would prohibit an attorney from contacting the attorney's client's treating physician without first obtaining permission from physician's, (or the hospital's) attorney, *even when there is a valid authorization for disclosure on file signed by the attorney's client/patient.*

Rule 4.2 prohibits ex parte communications with another person involved in the legal matter, to wit: a person who is represented by counsel concerning the matter to which the communication relates. I believe Mr. Stanger's reading of Rule 4.2 is overly broad and is not accurate as far as his admonition against contacting treating physicians when there is a valid HIPAA authorization allowing such communication on file with the doctor. Perhaps Bar Counsel could clarify whether Rule 4.2 was ever intended to require this level of permission.

Brian D. Harper  
Twin Falls

### Thank You

Thank you so much for the section of the July 2006 issue of *The Advocate* dedicated to our fellow Bar members who served with the 116<sup>th</sup> Brigade in Iraq. What a very fitting section acknowledging the service our our fellow attorneys and Idahoans.

I am proud to be a member of our Bar and to be associated with those patriots recognized.

Thanks, and keep up the good work!

Judge Alan G. Lance, Sr.  
United States Court of Appeals for Veterans Claims  
Washington, DC

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# Business and Corporate Law Section

## Message from the Chair

Stephen C. Hardesty  
Hawley Troxell Ennis & Hawley LLP

The Business and Corporate Law Section is pleased to sponsor the October issue of *The Advocate*. Although the Section is the sponsor, the lion's share of credit goes to Nicole Snyder of Holland & Hart for her initiative and hard work in organizing our Section's efforts to sponsor this issue. Thank you Nicole.

We also want to thank each of the authors who volunteered their time to pick excellent topics and work on writing these articles. The articles submitted by these members of our section reflect the diverse practice areas that business attorneys in Idaho must be fluent in to provide effective services:

- (1) *Valerie N. Charles* writes about securities laws applicable to company websites;
- (2) *Sasha D. Collins* provides advice on estate planning for business owners;
- (3) *Emile Loza* gives tips for structuring deals to ensure payment by foreign companies;
- (4) Reminding us of the ethical issues faced by business attorneys, *Charles Brown* addresses attorney competence, diligence, and client conflicts of interest;
- (5) *Maureen Ryan* discusses the circumstances in which a parent company is liable for the obligations of a subsidiary company;
- (6) As for matters of corporate governance, *Thomas B. Chandler and William C. Wardell* write about what should and should not be included in corporate board meeting minutes;
- (7) *Christine E. Nicholas and James B. Alderman* provide advice to help clients manage their corporate boards to attract and retain quality directors; and
- (8) *Christine E. Nicholas* also writes about what it means to be a business lawyer.
- (9) The ninth article is written by *Winston Beard* and discusses the Model Entity Transaction Act (META). His article highlights one of the important activities of the Business and Corporate Law Section's Governing Council over the past year. META is a law that would

affect a wide range of corporate transactions in Idaho, and our state legislature is likely to consider META during its 2007 session. Last winter, the Governing Council formed a legislative subcommittee to review META. Winston's article highlights the significance of META in Idaho and reports on the subcommittee's findings. It is likely the legislative changes recommended by Winston and his committee will be approved by the Governing Council and submitted on this year's "RoadShow" for approval by the members of the Bar at large.

The Business and Corporate Law Section continues to be a very active section of the Bar. Each year we sponsor an issue of *The Advocate*, host a seminar on timely topics, manage our website (<http://www.idahobizlaw.com>) to provide a variety of useful research tools to our members, and ensure the Bar is actively involved in reviewing and commenting on legislation that is important to its members, such as the META. Our seminar in May is dedicated to business issues in complex real estate transactions involving limited liability companies, and our record attendance is a sign of the quality of practitioners we have on our Governing Council, who are at the forefront of business and corporate law.

We are looking forward to serving our section members another year. If you are not already a member of the Business and Corporate Law Section, we strongly encourage you to join.

### ABOUT THE SECTION CHAIR

*Stephen C. Hardesty is the Chair of the Business and Corporate Law Section. He is a partner of Hawley Troxell, Ennis & Hawley LLP in Boise, Idaho. His practice focuses on mergers and acquisitions, structured finance/securitizations, venture capital, general business law, and real estate. Most recently, consistent with the growing real estate markets and the intersection of business and real estate law, he has been involved in real estate investment funds, both nationally and internationally.*

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# An Overview of Securities Laws Implications and Company Websites

Valerie Charles

Avoture Business & Property Law PLLC

In the age of the Internet, it is common practice for companies to maintain websites as a marketing vehicle to offer their products and services to the public. A company's Internet website provides background on the company, as well as other related information. Companies, however, need to be aware of the potential federal and state securities law liability lurking on their websites and from their website content.<sup>1</sup> Several areas may create traps for the unwary; therefore, a company should consider implementing specific website practices.

The Securities and Exchange Commission ("SEC") has stated that "[t]he federal securities laws apply in the same manner as to the content of [companies'] websites as to any other statements made by or attributable to them."<sup>2</sup> Any inaccurate, false, or misleading information could expose a company to liability by anyone who incurred a loss by buying or selling the company's securities in reliance upon such statement. Therefore, the website should be regularly monitored and updated, and website content should be handled in the same manner as public statements. The following is an overview of some of the issues of concern for company websites.

## WHEN THE COMPANY HAS EXISTING SHAREHOLDERS

A company should establish a separate investor relations section on its website. This practice will allow the company to use legends and disclaimers as appropriate. The responsibility for content under securities laws, however, extends to the entire website.

## CONTINUOUS REVIEW OF WEBSITE CONTENT

A company should regularly review the information on its website. Old, outdated materials should be appropriately archived with the disclaimer: "This information is part of the archives and it is no longer current and may no longer be accurate." While many companies work with outside vendors to establish and maintain their websites, the companies should be capable of posting and removing content in a timely manner.

## THIRD-PARTY LINKS

In its April 2000 Release, the SEC explains situations that may give rise to civil liability, including third-party information that may be attributed to an issuer under an "entanglement" theory or "adoption" theory. Under the theory of "entanglement," an issuer is involved in the preparation of information. Under the theory of "adoption," an issuer is viewed as having explicitly or implicitly endorsed information.

Companies that provide hyperlinks to information on another party's website need to be cautious to avoid the risk of adoption of a third-party's statements, resulting in the attribution of the statement to the company through adoption. The SEC has stated that the context of the hyperlink, the risk of confusion, and the presentation of the hyperlinked information are important.<sup>3</sup> The context of the hyperlink will be influenced by what the com-

pany says about the hyperlink or by what is implied. Risk of confusion can be minimized by the company inserting a clear and prominent statement disclosing that the third-party information is not provided by the company and the company disclaims responsibility for the information. A company can be proactive in minimizing risk of adoption by: (i) maintaining a website with a unique or distinctive look that would differentiate its website from linked third-party websites; (ii) avoiding framing, the practice of presenting third-party website content within a window or frame with a similar look and feel of the company's website; (iii) avoiding deep linking, which is the using of a hyperlink to access a selected or specific portion of a third-party website or report instead of using the report in its entirety; and (iv) using exit screens that include a specific statement, such as the following example:

You are now leaving our website. [Company] assumes no responsibility for information or statements you may encounter on the Internet outside of our website. Thank you for visiting [www.\[company\].com](http://www.[company].com).

## INVOKE THE SAFE HARBOR

The Private Securities Litigation Reform Act of 1995 added new safe harbors: § 27A of the Securities Act of 1933, as amended, (the "1933 Act") and new § 21E of the Securities Exchange Act of 1934 Act, as amended (the "1934 Act"). The statutory safe harbors provide that a written, forward-looking statement made by a public company enjoys significant protection from a federal securities law claim if it is identified as a forward-looking statement and is accompanied by meaningful cautionary statements identifying factors that could cause actual results to differ materially from those projected.<sup>4</sup> To utilize the safe harbor, a company should include language at the bottom of the main screen of the website, on the first page of any investor relations section, and on any other pages intended for investors or that contain forward-looking statements similar to the following example:

The documents contained in (or directly accessible from) this website include forward-looking statements within the meaning of the Private Securities Litigation Reform Act of 1995, including statements about [*include description*] and any other statements containing the words "believes," "expects," "anticipates," "plans," "estimates" and similar expressions. There are a number of important factors that could cause [*company name*]'s actual results to differ materially from those indicated by such forward-looking statements, including [*insert appropriate risk factor language*] and other factors identified in the company's most

recent Annual Report on Form 10-K and subsequent reports filed with the SEC. The company disclaims any intention or obligation to update any forward-looking statements as a result of developments occurring after the date such statement was first made.

#### **INDICATE DATE OF POSTED INFORMATION**

Information should be conspicuously displayed and the company should disclaim its duty to update to help reduce the risk of a claim that information on the website is out of date or omits recent material developments.

#### **ONLY POST PUBLIC INFORMATION**

A company should not post any confidential information on its website. Also, no material information should be posted on the website until the information has been publicly disseminated, as required, by the securities laws applicable to public companies. Prior to posting, materials should be reviewed for metadata and any internal codes.

#### **TAILOR DISCLAIMERS TO THE COMPANY'S SPECIFIC CIRCUMSTANCES**

Companies should avoid boilerplate language and should tailor a disclaimer to the specific circumstances.

#### **SECURITIES OFFERINGS**

If a company is participating in or contemplating an offering of securities in a private offering, it should be aware of the potential securities law liability lurking in its website and website content as its website becomes subject to additional securities law restrictions. Federal securities laws specifically define an "offer"<sup>5</sup> by a company of its securities and place several restrictions on offers, including the type of information that must be included in or accompany offers, the persons to whom offers may be made, when offers may be made, and the manner in which they may be made. The federal securities laws and the courts define broadly the term "offer" to include most types of public communications that have the intent or the effect of promoting the company to prospective investors or eliciting interest in the company or its securities.

Companies should be advised to refrain from soliciting investors through the company website. A general solicitation of investors could amount to a violation of the registration requirements for securities offerings under the 1933 Act. Companies involved in or contemplating a private offering, such as the common Regulation D, Rule 506 offering, are prohibited from advertising and making general solicitation during the term of the offering. These restrictions are also applicable to the company website. Before and during an offering, the company should avoid adding new information to its website.

Generally, companies may have potential securities laws violations lurking on their websites, and during any public or private offering of securities, companies need to be aware that the content of their websites may run afoul of federal or state securities laws. Companies are advised to have competent securities counsel review the company's website to ensure compliance.

#### **Endnotes**

<sup>1</sup>See, e.g., The Securities Act of 1933 (codified as amended at 15 U.S.C. § 77a *et seq.*); The Securities Exchange Act of 1934 (codified as amended at 15 U.S.C. § 78a *et seq.*); Idaho Code § 30-14-101 *et seq.*

<sup>2</sup>See Use of Electronic Media, SEC Release No. 33-7856 (Apr. 28, 2000).

<sup>3</sup>*Id.*

<sup>4</sup>Pub. L. No. 104-67, 109 Stat. 737 (1995).

<sup>5</sup>Section 2(a)(3) of the Securities Act of 1933, 15 U.S.C. § 77b(3).

#### **ABOUT THE AUTHOR**

**Valerie N. Charles** is a member of Avoture Business & Property Law PLLC. Her practice includes advising start-ups to emerging growth companies on a variety of general business and securities-related issues. She obtained her undergraduate degree from Boise State University in Boise, Idaho in 1993 and her law degree from Seton.



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# Family Matters: Estate planning for the business owner

Sasha D. Collins  
*Sasha Collins Law Offices*

This article examines the unique issues facing business owners who desire to transfer their business to younger family members. The issues discussed include management control, retirement planning, taxes, and succession of children and other family members to management.

## THE FAMILY

Jack and Jane, a married couple, own a multi-million dollar errand running company. Jane started the business 20 years ago and has always been active in the business. Jack is now retired. Jane is ready to play more golf with Jack and reduce her hours working in the business. They have three adult children, Mary, Bill and Alex. Mary and Bill work full time in the business. Alex has no interest in the business. Jack and Jane desire to keep the business in the family but they also want to treat their children equally. The business represents 80% of the value of Jack and Jane's total estate. Jack and Jane need a succession plan.

When business owners desire to transfer the family business to the children, there are several unique issues that differ from selling the business to outsiders. Those issues include maintaining control of the business, balancing the need for adequate retirement cash flow with the desire to minimize gift and estate taxes, and dealing with emotional family issues.

## MAINTAINING CONTROL

Jane wants to maintain control of the business that she has worked so hard to build even more than she wants to reduce her estate and gift tax. To ensure Jane maintains control of the business, Jane should not transfer an interest in the business unless she has a way to control where that interest goes. One way to transfer a business interest while controlling where that interest goes is through a buy-sell agreement.

A buy-sell agreement is an agreement among co-owners that establishes under what circumstances an owner can sell her interest, under what circumstances an owner must sell her interest, who may (or must) buy the interest and how much will be received. A buy-sell agreement will allow Jane to keep control over the business in three ways.

First, the buy-sell agreement can prevent business interests from being transferred outside the family to folks like an ex-spouse, a bankruptcy trustee or anyone else not acceptable to Jane. The agreement can provide that if an ex-spouse receives a community property interest in the business pursuant to a divorce, the family-member spouse can purchase that interest back at the price set forth in the agreement. If the family-member spouse elects not to buy the interest, the other owners can buy the interest. The agreement can also provide that the filing of a voluntary or involuntary petition in bankruptcy under any chapter of the federal Bankruptcy Code, the adjudication of an owner as a debtor under the Bankruptcy Code, or an owner's assignment of substantially all of his or her assets for the benefit of creditors triggers the right of the other owners to buy the debtor-owner's interest. Finally, the agreement can provide that

any transfer or sale, other than according to the terms of the buy-sell agreement or with the express written approval of Jane, is void and transfers no right or interest to the purported transferee.<sup>1</sup> Second, if certain trigger events occur Jack and Jane can buy-back the children's business interests. This can be helpful if a child who once showed great promise does not live up to parents' expectations. Trigger events can include a child's bankruptcy, termination of employment, material breach or default under the duties to the corporation, or the material failure to act in the best interest of the corporation.

Third, the buy-sell agreement can help Jane sell her interest to the children by outlining Jane's retirement plan. The agreement can designate the price the children will eventually pay for Jane's interest and the timing of Jane's retirement. Jane can also reserve the right to trigger her buyout by giving notice to the other business owners.

## THE BALANCING ACT

There are two ways for parents to transfer a family business to the children: sell it to them or give it to them. Selling the business provides cash flow for the parent's retirement; gifting the business may reduce the parent's estate and gift tax by discounting and shifting future appreciation to the children. Jack and Jane must consider their options and their goals when balancing their need for retirement cash flow with their desire to minimize transfer taxes.

### *Retirement Cash Flow*

Installment sales are a common method for intra-family sales of a business. This method provides an annuity stream for the parents and allows them to spread the recognition of gain over a period of time.<sup>2</sup> An installment sale also provides the children a longer period of time to make the required payments. An unintended tax bill for the parents may arise, however, if the children (or other "related persons"<sup>3</sup>) sell their business interest within two years of purchasing the interest from their parents. The tax bill to the parents equals a portion of the remaining gain on the original sale.<sup>4</sup> With proper planning, an installment note can be drafted to avoid the "related persons" pitfall. The installment note should contain a proper acceleration clause that will provide the parents with the cash needed to pay their tax.<sup>5</sup>

### *Transfer Tax*

Everyone can give away a certain amount under the Credit Shelter Amount either during their lifetime or at death without paying gift or estate tax (collectively "transfer tax"). The gift tax is imposed on individuals who transfer property (valued in excess of the applicable Gift Tax Credit Shelter Amount) during their life.<sup>6</sup> The estate tax is imposed on individuals who transfer property (valued in excess of the applicable Estate Tax Credit Shelter Amount) at their death.<sup>7</sup> The estate tax and the gift tax were originally intended to share one Credit Shelter Amount. However, in 2001, the Economic Growth and Tax Relief Reconciliation Act divided these two taxes and provided a sepa-

rate Credit Shelter Amount for each tax. The Gift Tax Credit Shelter Amount for 2006 is \$1,000,000 per person.<sup>8</sup> The Estate Tax Credit Shelter Amount for 2006 is \$2,000,000 per person.<sup>9</sup> Transfers in excess of the applicable Credit Shelter Amount are subject to tax at a rate of approximately 45%.<sup>10</sup> This high tax rate provides a strong incentive for Jack and Jane to reduce the value of their estate through gifting techniques that leverage both Credit Shelter Amounts. Two methods of leveraged gifting include annual exclusion gifting and gifting using valuation discounts. These two techniques are generally used together.

Every year Jack and Jane may give away cash and property equal to the Annual Gift Tax Exclusion Amount, \$24,000 in 2006 (\$12,000 each), to as many individuals as they wish without paying transfer tax and without dipping into their Gift Tax Credit Shelter Amount.<sup>11</sup> That means that Jack and Jane may give their children \$72,000 (3 children at \$24,000 each) per year worth of assets without paying transfer tax. Jack and Jane could also get creative by making "upstream gifts" as well. Upstream gifts are gifts to older generations. If Jack and Jane's parents do not have taxable estates and do not have creditor issues, Jack and Jane could give a total of \$12,000 to each of their parents, who could then choose to give the money to their grandchildren. Four grandparents each gifting \$24,000 to the grandchildren could increase the annual amount of transfer from \$72,000 to \$168,000 per year to the children with no transfer tax consequences.

Gifting may also be leveraged through the use of valuation discounts. Two common discounts are "Lack of Marketability Discount" and "Minority Interest Discount." A discount for lack of marketability is available to reflect that an interest in a closely-held business is more difficult to sell than publicly-traded securities. This discount is available for all interests whether the interest is a minority or majority interest. Courts have consistently recognized that business interests should be discounted when the owner of that interest lacks the ability to transfer the interest or control the business. The minority interest discount applies where an individual's business interest cannot influence the day-to-day management of the business, compel the payment of dividends or liquidate the business.

By limiting the ability of their children to transfer their ownership interest and their control over management through the buy-sell agreement discussed above, Jack and Jane have further deflated the value of the child's business interests. For gifting purposes, this is advantageous because it allows Jack and Jane to transfer more of the business using less of their Gift Tax Credit Shelter Amount.

Although there are rules of thumb for determining how much of a discount to apply, it is important to obtain a business appraisal from a professional business appraiser for two reasons. First, the taxpayer can shift the burden of proof on valuation issues by introducing "credible evidence with respect to any factual issue."<sup>12</sup> A business valuation from a professional business appraiser can provide the taxpayer with the "credible evidence" needed to transfer the burden of proof. Second, the taxpayer is subject to a penalty if an estate or gift tax return contains a "valuation understatement."<sup>13</sup> A valuation understatement has occurred if the value reported on the return is 50% or less of the amount finally determined to be correct.<sup>14</sup> The penalty is 20% of

the amount of the underpayment of tax if the underpayment exceeds \$5,000.<sup>15</sup> If the value reported on the return is 25% or less of the value as finally determined, the penalty increases to 40% of the amount of the underpayment.<sup>16</sup>

While lifetime gifting can be effective at reducing transfer taxes, lifetime gifts can increase the children's income tax bill upon the future sale of the gifted property. The children's gain on the future sale will equal the "amount realized"<sup>17</sup> from the sale minus the children's "adjusted basis"<sup>18</sup> in the property.<sup>19</sup> If Jane gifts business interests to her children during her lifetime, the children will take Jane's cost or "carry-over" basis.<sup>20</sup> For appreciating property like Jack and Jane's business, the "carry-over" basis is typically a relatively low value and will therefore generate more income tax gain than the property basis the children would receive if Jane gifts the property at her death or sells the property to the children. If Jane waits until her death to gift the business interests, her children will receive a property basis equal to the fair market value at the date of Jane's death, called a "stepped-up" basis.<sup>21</sup> If Jane sells the business interest to her children, the children will receive a property basis equal to the price the children pay for the interests.<sup>22</sup> Jack and Jane should weigh the benefits received from a reduction of transfer tax against any negative income tax consequences to the children when determining their best succession plan.

#### **DEALING WITH EMOTIONS**

It is a priority for Jack and Jane to treat their children fairly and equally. However, because the business represents 80% their estate, Jack and Jane need a way to provide an equal share to Alex, who is inactive in the family business, without making Mary and Bill, who are active in the family business, feel as if they are working for Alex. If Jack and Jane sell the business to Mary and Bill during Jack and Jane's lifetimes, Jack and Jane will have the liquidity to equalize distributions. But if Jane retains a controlling interest in the business at her death, equalizing distributions to the children can be more problematic. If Jane plans to hold a significant interest in the business at her death, some options include transferring to Alex 1/3 of the business and then providing Mary and Bill with the right (or the obligation) to buy Alex's interest using an installment note; transferring to Alex non-voting shares of the business so that Alex does not have influence over the operations and management of the company but still benefits from the growth; or not transferring to Alex any interest in the business, but purchasing life insurance naming Alex as the beneficiary.

Times of transition and transfer of wealth can bring out the best and the worst in people. For Jane, loss of control is an issue. Between Mary and Bill, differing management styles have the potential to create future conflict. And Alex may experience feelings that Jack and Jane prefer his siblings who are active in the family business. The potential for conflict makes it all the more important for Jack and Jane to plan now for the future. Early communication with the entire family is often the key to resolving potential future problems. Involving the entire family in the planning phases from the beginning maximizes the chances for a successful future transition plan. Transferring the family busi-

ness to the children is an ambitious goal, but an achievable goal with the proper succession plan.

#### ENDNOTES

<sup>1</sup>Of course, there are limits on the extent to which an attorney can draft around the Bankruptcy Code. Inadequately drafted provisions, or provisions that go too, far may not be enforceable at all. *See, e.g.*, 11 U.S.C. §§ 365, 541.

<sup>2</sup>I.R.C. § 453.

<sup>3</sup>Related persons include a spouse, child, grandchild, parent, a partnership of which the seller is a partner, a trust or estate of which the seller is a beneficiary, or a corporation owned 50% or more by the seller, but does not include a sibling, niece, nephew or spouse of a child or grandchild. *See* I.R.C. §§ 453(f)(1) and 318(a).

<sup>4</sup>The gain is limited to the amount of consideration received by the related person in the year of the resale. *See* I.R.C. § 453.

<sup>5</sup>I.R.C. § 453(e).

<sup>6</sup>I.R.C. §§ 2501 and 2503(a).

<sup>7</sup>I.R.C. § 2001.

<sup>8</sup>I.R.C. § 2505.

<sup>9</sup>I.R.C. § 2010.

<sup>10</sup>I.R.C. § 2001(c).

<sup>11</sup>I.R.C. § 2503(b)(1); Rev. Proc. 2003-85.

<sup>12</sup>I.R.C. § 7491; *Estate of Simplot v. Commissioner*, 249 F.3d 1191 (9<sup>th</sup> Cir. 2001) (holding that the burden of proof shifted to IRS when it abandoned the valuation set forth in its notice of deficiency); *Dailey v. Commissioner*, TCM 2001-263 (noting both the IRS and the petitioners agreed that because the taxpayers had introduced credible evidence as to the value of the part-

nership interests that were transferred, the burden of proving the value of the interests fell upon the government).

<sup>13</sup>I.R.C. § 6662.

<sup>14</sup>*Id.* at (g)(1).

<sup>15</sup>*Id.* at (a) and (g).

<sup>16</sup>*Id.* at (h).

<sup>17</sup>The "amount realized" on the sale is the total of all money received plus the fair market value of all other property or services received. *See* I.R.C. § 1001(b).

<sup>18</sup>The "adjusted basis" in the property is generally the taxpayer's original basis, plus the cost of any capital improvements, minus any depreciation or depletion. *See* I.R.C. §§ 1011, 1012 and 1016.

<sup>19</sup>I.R.C. § 1001(a).

<sup>20</sup>I.R.C. § 101(a); Treas. Reg. § 1.1015-1.

<sup>21</sup>I.R.C. § 1014; Treas. Reg. § 1.1014-1 – § 1.1014-8.

<sup>22</sup>I.R.C. § 1011; Treas.Reg § 1.1011-1.

#### ABOUT THE AUTHOR

**Sasha D. Collins** provides estate planning and business law services. She helps people with wills and trusts and develops succession plans for business owners. Sasha also helps people form businesses and counsels business owners on leases, real estate deals, bringing in a partner and selling the business. Sasha is licensed to practice law in Idaho, California and Florida, and she is a Certified Public Accountant. Sasha holds a Juris Doctorate with honors, a Master of Science in Accounting and a Bachelor of Science in Accounting and Finance from the University of Florida. Sasha may be reached at 1602 West Hays Street, Suite 200, Boise, ID 83702, by phone (208) 344-5828, by fax (208) 330-7676 or by e-mail [sashadcollins@msn.com](mailto:sashadcollins@msn.com)

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**Teresa M. Molitor**  
*Government Relations  
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Ms. Molitor joins the firm after completing a clerkship with the Honorable Thomas Neville and working as Vice President of Human Resources at the Idaho Association of Commerce and Industry. She earned her B.A. from Whitman College in 1994 and her J.D. from the University of Montana School of Law in 2002.

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Ms. Sullivan joins the firm after completing a clerkship with the Honorable James C. Morfitt. She received her B.A. from Colgate University in 1999 and her J.D. from the University of Idaho in 2004.



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# DUE DILIGENCE IN BUSINESS TRANSACTIONS

Emile Loza

Technology Law Group, LLC

Sir Francis Bacon wrote correctly, “Knowledge is power.” Given that truism, an attorney’s success depends, in no small measure, on his or her Information Quotient, or IQ.<sup>1</sup> Critical facts, once unearthed to provide this IQ, prevent clients from placing their revenue streams at risk or gutting their businesses of critical assets. This article demonstrates the relevance of IQ resources to the successful practice of law. In addition, this article provides Idaho’s attorneys with references to resources and practical skills with which to demonstrate their IQ value to clients.

## **IQ DEMONSTRATED**

This Section provides an adapted transactional example from practice to demonstrate the importance of IQ to legal practice in Idaho. The use of IQ in matters anticipatory of litigation is also extremely powerful, but space limitations here preclude that additional discussion.<sup>2</sup>

### *KNOW THY PARTNER*

The client was a successful entrepreneur, an innovator of manufactured goods for industrial markets and already producing annual revenues of several millions of dollars. The client viewed the market in which the client’s products compete as characterized by mostly “mom and pop” operations, strictly local or, at best, of a highly-limited regional focus. These small operations were highly fragmented in the marketplace, not consolidated into big chains of operation, and, as a whole, penetrating all population centers across the United States, large or small.

The client, then represented in other matters by local business counsel, was approached by one of these small operators located in the southern United States with a deal to manufacture and use one of the client’s products, for which a United States patent was pending. The deal was to be exclusive. A flat price was agreed, a tidy sum of just over six figures. The client felt that he had negotiated an excellent deal, but thought it advisable to have specialized counsel to review the draft agreement forwarded by the small operator’s regular business attorney, given the patent-based nature of the transaction.

Enter said counsel. After meeting with the client to discuss his timeframe and objectives for the transaction, the attorney set to work on the review, quickly uncovering that the draft agreement encompassed all the client’s later-developed inventions. This broad scope raised a red flag, given the prolific innovations of the client. Furthermore, the deal was to be exclusive, a term that would have prohibited the client from making and selling his own products.

As a best practice as part of the review, the attorney obtained certain essential intelligence reports regarding the small operator. Those reports revealed critical facts not known to the client or his general business counsel. It turned out that the small operator that had approached the client with the deal was part of a larger company listed on the New York State Exchange with revenues of some \$750 million and liquid assets in excess of \$100 million. The parent company had a vast network of distribution companies,

including in Europe and the Far East, and extensive manufacturing capabilities. From the Australian military, the parent had recently landed its largest ever order for products certain to include the client’s current and future innovations. These findings meant that the parent had the capacity to produce, sell, and distribute large quantities of the client’s products worldwide, and the ability to pay...well.

The intelligence reports also revealed highly useful facts relevant to pricing for the proposed deal. The parent had paid more than \$8 million to acquire a small competitor, a company similarly situated to that of the client. The assets of principle importance in that acquisition were two United States patents representing innovations in the relevant industry very much along the same lines as the one invention that was subject to the client’s proposed transaction. Indeed, the parent had a pattern of acquiring smaller companies for their intellectual property, so much so that the United States government sued the parent on antitrust grounds. The parent settled the litigation by agreeing to grant any third-party a non-exclusive license to the patents, individually or in combination, for a price not to exceed an agreed rate. All these facts indicated a severely insufficient price set forth in the draft and the gross inadequacy of the structure of payments to the client, *i.e.*, flat fee versus a per-unit royalty.

Unfortunately, the story did not have a sufficiently happy ending. After discussing the ramifications for the client’s business, the attorney was able to successfully narrow the scope of the substantive terms, but not as much as would have otherwise been advisable. The client, having been late to retain specialized counsel and not in earlier possession of the relevant facts, had painted himself into a corner, but felt obliged as a point of honor to proceed with the deal as otherwise written. The sad result was that client likely lost a golden opportunity to reap significantly greater financial benefits for his company, his family, and his future. The likely opportunity cost to the Idaho economy was also great.

In hindsight, a key question relevant to this transaction related to price. Unaware of the relevant facts, the client concluded that his six-figure price was fair. The real answer is that the question of an appropriate price depended upon the exercise of an appropriate IQ.

## **IQ RESOURCES & TOOLS**

Preliminarily, the availability of vast informational resources online brings to Idaho attorneys and their support teams an ever-enhanced ability to demonstrate IQ. The Internet, however, should not be regarded as the definitive resource. Press reports, subscription services, archived hard copy documents, and other resources still play an important role in the quality of investigations. Furthermore, structuring search criteria and other research skills require practice to become time- and cost-efficient and directly affect the quality of IQ. In addition, there are a number of informational resources available, often at little to no charge through state and federal governments, such as from the Idaho Department of

Commerce and Labor's Division of International Business<sup>3</sup> or from the United States Department of Commerce's Boise office for the United States Commercial Service.<sup>4</sup>

Many important IQ resources are available, depending on the nature of the information required, including, for example, tools for geolocating servers to demonstrate co-location of otherwise apparently unaffiliated businesses, executive affiliation listings to detect and detail interlocking corporate directorates, and many others. The list below identifies a few useful resources:

1. Company profile reports, financial resources analyses, and other relevant business and technological information available from fee-based service providers;<sup>5</sup>
2. Dun & Bradstreet's ("D&B's") Business Information Report and Business Directory, which are available directly from D&B or third-party vendors;<sup>6</sup>
3. Corporate records and business registrations generally available online through the Secretaries of State Web sites or as compiled and made available from WestLaw and other third-party vendors;<sup>7</sup>
4. Securities filings with the United States Securities and Exchange Commission, particularly 10-K filings, and other national securities authorities;<sup>8</sup>
5. Company reports, including summary financials, available at Hoover's Online;<sup>9</sup>
6. Press releases, financial reports, and online postings by the subject company;<sup>10</sup>
7. Reports of litigation and court filings;<sup>11</sup> and
8. Press reports.<sup>12</sup>

As with any tool's usage, one must use care in the understanding and employment of any informational resources. The endnotes briefly set forth those important caveats and caution. Due to the changing nature of Internet postings, it is also important to archive online source material supporting investigative reports, particularly in instances where litigation may ensue. Searches of Google-cached Web sites and other online archives may be helpful in locating a no-longer-online Web page, but this method is not a substitute for the best practice of archival, including recordation of the URL, or Web address, and the date on which the URL was visited.

## CONCLUSION

Idaho attorneys provide better value to clients and improve their competitive standing when they increase the information quotient underlying their legal advice.

## ABOUT THE AUTHOR

**Emile Loza, MBA, JD** is managing attorney and founder of Technology Law Group, LLC, an international, intellectual property, and Internet law and technology legislation practice in Boise. Loza chairs the Idaho State Bar's Intellectual Property Law Section and has been appointed as 2007 Secretary for the High Tech Sector of the Licensing Executives Society, an international organization of 11,000 licensing attorneys and other professionals.

## Endnotes

<sup>1</sup>SIR FRANCIS BACON, RELIGIOUS MEDITATIONS – OF HERESIES (1597), available at <<http://www.quotationspage.com/search.php3?homesearch=knowl->

[edge+is+power](http://www.quotationspage.com/search.php3?homesearch=knowl-edge+is+power)> (visited Sept. 1, 2006).

<sup>2</sup>For additional information of online and other investigative techniques prefatory to litigation, contact the author at 208.939.4472 or [eloza@technologylawgroup.com](mailto:eloza@technologylawgroup.com).

<sup>3</sup>For more information, contact Stephanie Camarillo at (208) 334-2470 or [stephanie.camarillo@trade.idaho.gov](mailto:stephanie.camarillo@trade.idaho.gov).

<sup>4</sup>For more information, contact Amy Benson at (208) 364-7791 or [Amy.Benson@mail.doc.gov](mailto:Amy.Benson@mail.doc.gov).

<sup>5</sup>Tailored intelligence resources include Boise-based Technology Intelligence Group, LLC and Guideline, formerly Find/SVP. For more information, contact Carolyn Ruby at (208) 939-4472 or [cruby@tech-intel.com](mailto:cruby@tech-intel.com), and visit <[www.guideline.com](http://www.guideline.com)>. Web-based database resources include LexisNexis, Thomson Dialog, and Factiva.

<sup>6</sup>Dun & Bradstreet ("D&B") reports may contain inaccurate information, apparently due to the self-reporting nature of D&B's investigatory methods. In addition, consumers of D&B reports should use caution as to the dates of the reports and seek substantiating or updating investigations by D&B. These investigations take about 10 days to complete and are provided without additional charge to a purchaser of the subject D&B report.

<sup>7</sup>See, e.g., Idaho Secretary of State Web Site at <<http://www.idsos.state.id.us/>>. Note that Delaware and some other states assess a fee for access to their corporate records and also may not license this content to third-party information vendors.

<sup>8</sup>The SEC offers a search tool, Edgar Online, through its Web site, <<http://www.sec.gov>>. Although one needs finesse to narrow down the relevant documents, some of which are presented in multiple parts, the documents available through Edgar Online, particularly the notes to financial statements, are an excellent source of often obscure, but highly relevant, facts. There are also a variety of fee-for-service vendors providing access to SEC filings. Foreign filings in English, particularly in the Far East, are sometimes more difficult to access. The Hong Kong Bourse and the Taiwan Stock Exchange are two excellent exceptions. Although Korean filings may be purportedly available online in English, it is sometimes more expeditious and cost-effective to work through local counsel to retrieve the desired documents.

<sup>9</sup>Hoover's makes limited, but helpful preliminary, information available without charge online. See <<http://www.hoovers.com>>.

<sup>10</sup>Here, "Consider the source" is always good advice to remember. Often times, companies engage in puffery or purposeful obscurity. It is a best practice to attempt to confirm subject companies' statements with other sources, although a statement by the subject company may be useful from a tactical perspective.

<sup>11</sup>Although fee-for-service providers, such as WestLaw, Lexis' CourtLink, and paralegal or runner services near the court in question provide access to court filings, there are often more cost-effective providers, depending on the time period of the subject litigation. Except for the implementation period for the federal courts' electronic case management, or ECM, systems, Pacer is an excellent resource for these filings. The account set-up procedure is easy, as is the use of the Pacer search engine. See <<https://pacer.login.uscourts.gov>>.

<sup>12</sup>Press reports are tremendously useful if used with appropriate care. Of key importance is to identify which of a multitude of publications are likely to yield reliable information about the subject company and to compare the important purposes served by using a variety of these resources.

# CURRENT ETHICAL ISSUES OF INTEREST TO IDAHO TRANSACTIONAL ATTORNEYS

Charles R. Brown  
*Clyde Snow Sessions & Swenson*

Any article on legal ethics and malpractice prevention could easily be fifty pages in length. Because articles in *The Advocate* are intended to be shorter, and of general interest, the purpose of this article will be to provide a brief discussion and focus on some current issues under the Idaho Rules of Professional Conduct (the "Rules") of particular relevance to the representation of business clients.

## UNBUNDLING

The purpose of this portion of the Article is to advise transactional counsel to be aware of the concept of unbundling and to recognize that its impact on providing legal services is evolving. With the cost of legal services rising and the adoption of Rule 1.2(c) in Idaho, and similar rules in other jurisdictions, transactional attorneys will more often be asked to limit their scope and the cost of representation than in the past.

### FIRST, THE RULES.

**Rule 1.1- Competence** states, "*A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.*"

**Rule 1.2(c)- Scope of Representation** states, "*A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.*"

**Rule 1.3- Diligence** states, "*A lawyer shall act with reasonable diligence and promptness in representing a client.*"

The interrelationship of Rules 1.1 and 1.3 with Rule 1.2 is currently relevant in light of the recently developing concept of "unbundling" of legal services. Unbundling is the concept that allows a client to select one of several discrete lawyering tasks contained within the full service package. The separate discrete tasks would include: (1) Advising the client; (2) Legal research; (3) Gathering of facts; (4) Discovery; (5) Negotiation; (6) Drafting of documents; and (7) Court representation. The concept of unbundling has evolved in many states due to the extreme cost of engaging counsel for any matter, and the undisputed fact that most members of the middle class have been priced out of the market.<sup>1</sup>

Rule 1.2(c) specifically provides that a lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.<sup>2</sup>

Assume that two individuals, Mr. Jones and Mr. Smith, both of whom had a pre-existing attorney-client relationship with Attorney Black, come to see Attorney Black again. They advise Attorney Black that they have negotiated and agreed upon all aspects of a particular transaction and that her role will be limited to documentation of what they have agreed upon together with limited consultation. They specifically advise their attorney that they want to limit legal fees and that her role is limited

accordingly. In essence, they advise Attorney Black that they intentionally do not expect or require, and in fact do not want to pay for, legal services equivalent to a Cadillac or Mercedes Benz. A Chevrolet would be just fine. Attorney Black advises them that there are risks to the joint representation and to the limited scope of the representation they have requested, and explains those risks in detail. After being fully advised, they understand and acknowledge the risks, and advise Attorney Black to proceed with the limited scope of representation requested.

Query: Is Attorney Black at risk in agreeing to the limited representation requested in this transaction? Of course. The issues of competence and diligence will always be paramount, but as noted above, the interrelationship of the duties of competence and diligence coupled with the requested limited scope of representation creates some evolving issues. Remember that Rule 1.2(c) mandates "informed consent," and that the limited scope be "reasonable under the circumstances." For example, did Attorney Black fully explain the risks involved with a limited scope of representation in light of the complexity of the transaction involved and Attorney Black's experience and expertise, or lack thereof, in handling that particular kind of transaction?

There is little current guidance from the courts. However, this concept of unbundling and agreed limitation of the scope of services was recently upheld in a New Jersey appellate court case, which involved a claim of legal malpractice.<sup>3</sup> In that case, the Superior Court of New Jersey, Appellate Division, held that an attorney could properly limit the scope of his representation of the client under N.J. R. PROF'L. CONDUCT 1.2(c), which reads substantially the same as Idaho's Rule 1.2(c), and that the attorney did not breach a proven standard of care to the client by failing to perform certain services that would have been performed in a full service representation context.

## CONFLICTS OF INTEREST

Let us assume the same facts described in the discussion of Rules 1.1, 1.2 and 1.3 above. For the purposes of this discussion, set aside the issue of Rule 1.2(c) and unbundling. Who is Attorney Black's client? It appears that she is representing both Mr. Jones and Mr. Smith. Rule 1.7, often in conjunction with Rules 1.8<sup>4</sup> and 1.9<sup>5</sup>, creates the most interesting and challenging issues for attorneys representing closely-held business organizations.

**Rule 1.7- Conflicts of Interest** provides, in part: "*A lawyer shall not represent a client if the representation involves a concurrent conflict of interest.*" Rule 1.7 does allow for waiver of conflicts. However, there are numerous caveats to a waiver. Rule 1.7(b)(1) requires that: "*the lawyer reasonably believes that the lawyer will be able to provide competent and diligent represen-*

tation to each affected client,” and Rule 1.7(b)(4) requires that: “each affected client gives informed consent, confirmed in writing.”

The Commentary to Rule 1.7 commences with the fundamental axiom that: “Loyalty and independent judgment are essential elements of the lawyer’s relationship to a client.”<sup>6</sup> As attorneys deal with these situations, they must carefully consider when “informed consent” has really occurred and when and under what circumstances the lawyer is justified in her “reasonable belief” that she may provide competent and diligent representation to both clients.<sup>7</sup>

Now let us consider a second example. Attorney White has represented Newco for many years. Newco has three equal (1/3) shareholders, Mr. Jones, Mr. Smith and Ms. Anderson. Attorney White and his firm have also represented each of the individual shareholders in separate non-conflict matters, such as estate planning. Attorney White is now representing Newco in acquisition negotiations with Bigco. Mr. Jones and Ms. Anderson have particular skills essential to the success and operation of the business. Mr. Smith is more of a passive investor. In acquisition negotiations, allocation of price is always a major issue, both for tax and business continuity issues. The total dollar amount of the purchase price is not in dispute, but the allocation of that is still under negotiation. Bigco wants Mr. Jones and Ms. Anderson to come with the business and enter into employment agreements and non-competition agreements. Bigco is not interested in Mr. Smith. They want to allocate a portion of the purchase price to those agreements, which will likely be offset against the total amount to be allocated to the business itself, whether stock or assets, including goodwill.

Who does Attorney White represent and is he in a conflict situation? If there is a conflict, is it waivable? In the author’s view, there is an absolute conflict, which may, depending upon the circumstances, be unwaivable. Mr. Jones and Ms. Anderson have voting control of Newco. Ignoring tax considerations, any portion of the total consideration allocated to their future employment and non-competition agreements will benefit only them and not Mr. Smith. Mr. Smith could agree that the value of the business was attributable primarily to the efforts of Mr. Jones and Ms. Anderson, and agree to a disproportionate allocation of the total consideration. In that event the conflict may be waivable.

The more likely scenario is that Mr. Smith, being of an entrepreneurial bent, believes that he is entitled to receive 1/3 of the total consideration to be paid by Bigco. In this event, the conflict is unwaivable. Attorney White may be able to, and the emphasis is on “may,” with appropriate waivers, continue to represent Newco in the transaction. However, he should advise all three shareholders that, because their interests are diverse, Mr. Jones and Ms. Anderson, on the one hand, and Mr. Smith, on the other, should each retain separate counsel. Again, the emphasis must be on the fact that an attorney must always observe his duty of loyalty to a client, and if there is any question about whether that duty may be compromised, the conflict must be acknowledged and dealt with.<sup>8</sup>

## EROSION OF THE ATTORNEY-CLIENT PRIVILEGE

Transactional attorneys need to be aware of the position of the United States government and its very real attempts to erode the attorney-client privilege in corporate criminal investigations. Two Rules bring this into focus.

**Rule 1.6- Confidentiality** states, in pertinent part: “A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent . . . .”<sup>9</sup>

**Rule 1.13- Organization as a Client** states: “A lawyer . . . retained by an organization represents the organization acting through its duly authorized constituents.”

Rule 1.3 contains rules involving the representation of an organizational client, such as a corporation or a limited liability company.<sup>10</sup> In the wake of the Enron debacle, both Congress and the United States Department of Justice (“DOJ”) have been more aggressive in punishing corporate wrongdoers. The first event that everyone is generally aware of is the enactment of the Sarbanes-Oxley Act (“SOX”) on July 30, 2002.<sup>11</sup> SOX establishes very stringent accounting, disclosure and corporate responsibility compliance rules for publicly-traded reporting companies, including in Section 307<sup>12</sup> and the regulations promulgated thereunder<sup>13</sup>, rules of professional responsibility for attorneys, which include the notorious “noisy withdrawal” provisions. The second important event was the infamous Thompson Memorandum issued to all U.S. Attorneys by Larry D. Thompson, then Deputy Attorney General with the DOJ, on January 20, 2003<sup>14</sup> (the “DOJ Memo”).

Both SOX and the DOJ Memo have substantial ramifications for counsel representing business organizations. Even a brief summary of the provisions of SOX is beyond the scope of this Article, except to note that some familiarity with the requirements of Section 307 would be advisable for all business attorneys. The DOJ Memo provides that once a criminal investigation has commenced against a business entity, the future determination of whether to charge a company, civilly or criminally, will depend in significant part on whether the company cooperates fully with the investigation. In determining whether there has been full cooperation, the government would like the company to:

- report any wrongdoing it has uncovered;
- waive its attorney-client and attorney-work-product privileges with respect to any internal reports, interview memoranda, or other documents generated during the course of its internal investigations;
- suspend its own interviews of its employees (unless an interview is approved by the government);
- agree not to pay counsel fees for any employees who appear to have participated in crimes; and
- agree to fire any employees who refuse to cooperate in the investigation.

Assume that Attorney Martin is outside counsel for a closely-held corporation headquartered in Boise, which operates a chain of clothing stores throughout Idaho. The president of the company informs Attorney Martin that the company has received

complaints of theft of personal information of credit card customers at some of the stores. Attorney Martin, on behalf of the company, undertakes an investigation and retains outside experts to investigate the issue. Subsequently, the FBI knocks on the door of the company and advises it that the United States Attorneys' Office has commenced an investigation of potential fraud against customers of the company and possible obstruction of justice charges against certain officers and employees of the company.

The issues are obvious. Attorney Martin, of course, wishes to advise his client in an appropriate manner while also fully complying with the requirements of Rules 1.6 and 1.13, which have now become complex. There are no easy answers. The commentary to Rule 1.6 makes it clear that Rule 1.6 encompasses more than direct communications from a client. The Rule applies to all information relating to representation, whatever the source. If there is not a specialist in his firm, when he first becomes aware of the potential government investigation, Attorney Martin should consider immediately contacting and retaining, on behalf of the company, competent white-collar criminal counsel, with experience in dealing with the DOJ. He and the company will then have to resolve the issues of whether specific officers and employees of the company require separate counsel and whether the company can and should pay counsel fees for those employees. This scenario demonstrates the complexity under the current federal regulatory climate of issues facing counsel who represent corporate clients.

There is some more recent and positive news on this topic. The ABA formed a task force in 2004 to study and address the erosion of privilege and delivered a report last August to the ABA House of Delegates. The House of Delegates adopted a policy that essentially confirms the importance of the attorney-client privilege and calls on the government not to impinge on it by demanding a waiver, either directly or indirectly. The ABA will be asking Attorney General Alberto Gonzales to amend the DOJ Memos by eliminating any reference to a waiver. A partial victory occurred in April 2006 when the U.S. Sentencing Commission voted unanimously to remove language from the sentencing guidelines that offers the DOJ discretion in demanding a privilege waiver.

A greater victory occurred recently when, on June 27, 2006, in one of the KPMG tax shelter cases, Judge Lewis Kaplan of the U.S. District Court for the Southern District of New York ruled that certain guidelines set forth in the DOJ Memo violated the KPMG partners' and employees' Fifth Amendment right to a fair trial and Sixth Amendment right to legal representation.<sup>15</sup>

The importance of this section of the Article is to remind counsel who represent business-entity clients to be aware of the current federal regulatory climate and the related issues promulgated by this friction.

### SCOPE OF RULES

Finally, although we are all very interested in an esoteric discussion of ethical issues because avoiding legal malpractice claims is generally also high on our radar screens, it is important to understand how a violation of the Rules may, or may not, interrelate with a malpractice claim.

In the Preamble to the Rules, the discussion of the Scope of the Rules provides, in pertinent part, that:

*Violation of a rule should not itself give rise to a cause of*

*action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability.<sup>16</sup>*

Although violation of an ethical rule may not serve as a precedent or, in and of itself, be utilized to establish legal malpractice, in a legal malpractice action it is axiomatic that an attorney's good faith compliance with the applicable ethical rules is a relevant fact to be considered in analyzing whether the applicable professional standard of care has been met. The Court of Appeals of Idaho has cited to the Scope of the Rules in affirming that the Idaho Rules of Professional Conduct are not designed to be a basis for civil liability.<sup>17</sup>

### CONCLUSION

An attorney in Idaho dealing in business transactions and the representation of business organizations, whether publicly-traded or closely-held, must be fully apprised and aware of the Rules and current developments, and how these Rules will likely impact his/her practice. It is the author's experience that some transactional practitioners do not treat these ethical issues with the importance that they should. It has been the purpose of this Article to provide some minimal focus and direction in order to help improve that situation.

### ENDNOTES

<sup>1</sup>A special Utah State Bar Commission Task Force on the Delivery of Legal Services recently delivered a report on that issue to the Utah State Bar Commission. SALT LAKE TRIBUNE, July 24, 2003.

<sup>2</sup>See also Rule 1.2(c), Commentary at ¶¶ [6], [7], [8] and [9] – Agreements Limiting Scope of Representation.

<sup>3</sup>*Lerner v. Laufer*, 359 N.J. Super. 201, 819 A.2d 471 (N.J. Super. Ct. App. Div. 2003).

<sup>4</sup>See also Rule 1.8. *Conflict of Interest: Current Clients: Specific Rules* and Commentary.

<sup>5</sup>See Rule 1.9. *Duties to Former Clients* and Commentary.

<sup>6</sup>Rule 1.7, Commentary at ¶ [1]

<sup>7</sup>Paragraph 8 of the Commentary to Rule 1.7 is directly on point.

<sup>8</sup>For a more detailed discussion of the issues involved in joint or common engagements in business transactions, see *Conflicts of Interest in Business Transactions—The common engagement*, Dillion, *The Advocate* 48 (Sept. 2005).

<sup>9</sup>See also Rule 1.6 and Commentary.

<sup>10</sup>See also Rule 1.13 and Commentary.

<sup>11</sup>The Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (July 30, 2002) (also known as the Public Company Accounting Reform and Investor Protection Act of 2002, codified at 15 U.S.C. § 7201 *et seq.*).

<sup>12</sup>15 U.S.C. § 7245.

<sup>13</sup>17 C.F.R. Part 205

<sup>14</sup>Available at: [http://www.usdoj.gov/dag/cftf/corporate\\_guidelines.html](http://www.usdoj.gov/dag/cftf/corporate_guidelines.html).

<sup>15</sup>*United States v. Stein*, No. S1 05 Crim. 0888 (LAK), 2006 WL 1735260 (S.D.N.Y. June 26, 2006).

<sup>16</sup>See Preamble to Rules-Scope, Comment at ¶ [20].

<sup>17</sup>*Weaver v. Millard*, 230 Idaho 692, 819 P.2d 110 (Id. Ct. App.1991).

#### ABOUT THE AUTHOR

**Charles R. Brown** is a shareholder in the Salt Lake City, Utah law firm of Clyde Snow Sessions & Swenson. He graduated from the University of Utah, College of Law in 1971 and was admitted to the Idaho State Bar in 2003 as the first reciprocal licensee from

the State of Utah. He served as President of the Utah State Bar in 1999-2000 and served as a member of the House of Delegates of the American Bar Association from 2000 to 2006. He practices primarily in the areas of taxation, business transactions and real estate. He has lectured before bar seminars on legal ethics issues and has served as an expert witness in legal malpractice cases. Of most importance is that although he has been temporarily located in Utah for the last 30 years, he is an Idahoan at heart, having graduated from Twin Falls High School sometime during the Paleolithic Age. Go Bruins!

### COMING EVENTS

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. The ISB website contains current information on CLEs: [www.idaho.gov/isb](http://www.idaho.gov/isb) If you don't have access to the Internet please call (208) 334-4500 for current information.

#### OCTOBER 2006

(Dates May Change or Programs May Be Cancelled)

1	February 2007 Bar Exam Initial Application Deadline	12	<b>CLE: Idaho: Idaho Summit on Domestic Violence, Victim Safety: Your role in Understanding and Assessing Dangerousness – Boise Centre on the Grove</b>
2	<i>The Advocate</i> Deadline	13	<b>CLE: ISB Litigation Section present: Annual Litigation Update – Shilo Inn, Idaho Falls</b>
4	<b>CLE: ISB Professionalism and Ethics present: What Every Sole Practitioner Needs to Know About Succession Agreements</b>	18	<i>The Advocate</i> Editorial Advisory Board
4	Public Information Committee Meeting	18	<b>CLE: ISB Young Lawyers Section present: Building a Case from Discovery to Trial and Beyond Trial Preparation</b>
6	<b>CLE: ISB Litigation Section present: Annual Litigation Update – Coeur d'Alene Inn, Coeur d'Alene</b>	20	Idaho Law Foundation Board of Directors Meeting
6	Idaho State Board of Commissioners/ District Bar Presidents Meeting	27	<b>CLE: The Law Foundation present: Nuts and Bolts of Representing Your First or Next Social Security and SSI Disability Claimant</b>
9	<b>Columbus Day, Law Center Closed</b>		

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# PARENT COMPANY CONTRACTUAL LIABILITY IN IDAHO

Maureen G. Ryan  
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In modern business practice, a company will frequently create a subsidiary entity for a specific business transaction or endeavor. The company creating the subsidiary entity is referred to as the “parent company.” For example, a large land development corporation may create a limited liability company for a particular subdivision project. The subsidiary limited liability company will be the party executing all of the contracts related to that subdivision. In such instances, the parent company will frequently be the sole member (or shareholder, partner, etc., depending on the type of subsidiary entity selected by the parent company) of the subsidiary entity.

In search of a “deep pocket” or for a number of other reasons, a third party who has entered into a contract with a subsidiary entity may seek to hold the parent company liable on that contract. In Idaho, just as a court may “pierce the corporate veil” and hold individual shareholders liable on a corporation’s obligations, a parent company may be liable on its subsidiary’s obligations under the same analysis.

This article examines Idaho cases applying the “piercing” analysis in determining whether or not to disregard corporate status and impose liability on an entity’s shareholders or members. In addition, this article includes a discussion of a Fifth Circuit Court of Appeals case and commentary focusing on the specific issue of parent company liability on a subsidiary entity’s contracts. Finally, this article concludes with an identification of the instances in which an Idaho court might be inclined to impose liability on a parent company for its subsidiary entity’s contracts, and the practices to employ to avoid such liability.

## PARENT COMPANY CONTRACTUAL LIABILITY

Corporate status generally limits the liability of shareholders.<sup>1</sup> The same is true for parent companies and subsidiaries, where the corporate status of the subsidiary shields the parent company from liability for the subsidiary’s acts.<sup>2</sup> Idaho courts may employ the traditional “piercing the corporate veil” analysis when confronted with the issue of whether or not to disregard a corporate entity and hold shareholders personally liable for corporate obligations. Early cases applying this doctrine generally involved closely-held corporations with one or two individual shareholders. In the cases in which the courts disregarded the corporate entity, and imposed personal liability against the shareholders, the individuals had neglected to observe corporate formalities and left the corporation with little or no capital from which it could satisfy a judgment against it.<sup>3</sup>

In Idaho, two requirements must be met in order for the court to “pierce the corporate veil,” and disregard the corporate entity and impose liability on the shareholders: “1) that there must be such a unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist and 2) that if the acts are treated as those of the corporation an inequitable result will follow.”<sup>4</sup> Of the second requirement, the Court has stated that it will not uphold the corporate status where

to do so would “sanction a fraud or promote injustice.”<sup>5</sup>

In *Chick v. K. D. Tomlinson*, lumber company managers brought claims against their employer, arguing they were owed certain sums under salary bonus contracts.<sup>6</sup> The managers sought to hold Tomlinson, the sole shareholder and president of the lumber company, personally liable for the amounts allegedly owed to them. In holding that Tomlinson was personally liable to the managers, the Idaho Supreme Court first noted that whether or not it will disregard the corporate entity depends on the particular facts and circumstances of each case.<sup>7</sup> The court then applied the two-part veil-piercing analysis. With respect to the first requirement, the court focused on the fact that Tomlinson had failed to maintain corporate formalities and had taken many actions in the name of the corporation without obtaining the proper corporate consents.<sup>8</sup> With respect to the second requirement, the court noted that the company was in a “tenuous” financial position and that the managers’ “opportunities of enforcing the money judgment would be impaired by a denial of Tomlinson’s personal liability.”<sup>9</sup> *Chick* teaches that in determining whether or not to disregard the corporate entity and hold a parent company liable for its subsidiary’s contracts, Idaho courts will focus on the parent company’s observance of corporate formalities for its subsidiary and the subsidiary’s financial capabilities.

Although it involved a tort claim, *Ross v. Coleman Co.* is instructive in its analysis of a parent company’s liability for its subsidiary’s acts.<sup>10</sup> In *Ross*, the Idaho Supreme Court applied the two-part veil-piercing test to find that the parent company was not liable for the subsidiary’s tort. In examining the first requirement, the court focused on the fact that the subsidiary maintained corporate formalities and was not merely a “sham” entity.<sup>11</sup> With respect to the second requirement, the court quoted with approval *Hassinger v. Tideland Elec. Membership Corp.*<sup>12</sup> The court stated that even if the parent company has complete control over the subsidiary, “some additional circumstances of fraud are necessary” in order to hold the parent company liable for the subsidiary’s acts.<sup>13</sup> The court then noted that the subsidiary was adequately capitalized and could respond to a judgment against it, and therefore no injustice would result from honoring the subsidiary’s corporate status.<sup>14</sup>

With respect to parent company liability for its subsidiary’s contracts, commentators have noted that courts are unwilling to disregard the corporate entity where the claimant knew it was dealing directly with a subsidiary and, knowing that information, went forward with the deal.<sup>15</sup> In such instances, to enable the claimant to reach the pockets of the parent company would be giving the claimant a better deal than it bargained for, which directly contradicts basic contract policy.

Giving the plaintiff the deal it made, with the corporate party it reasonably thought it was dealing with, is fundamental to contract law. Thus, the idea is well developed in contract law that

enforcement of the contract should be denied when the corporate group has misrepresented the identity of the corporate group party, and conversely, that enforcement should be granted when the plaintiff got the deal and the corporate party it agreed to.<sup>16</sup>

In a 1984 case, the Fifth Circuit examined the differing policy implications of piercing in contract and torts cases involving parent companies and subsidiaries.<sup>17</sup> In examining when a parent company may be liable on its subsidiary's contracts, the court stated that:

The attempt to hold a parent corporation where the claim asserted is of contractual origin presents added difficulties. The very reasonable question must be met and answered why one who contracted with the subsidiary and received the promise which he bargained for but who has been disappointed in the fulfillment by the subsidiary of its commitment should be allowed to look to the parent. As a matter of contract right it is evident he may not. Additional compelling facts must appear.<sup>18</sup>

Therefore, basic contract law principles support honoring the separate status of a subsidiary where it is clear to a third party that the parent company is not a party to, or liable for, the subsidiary's contracts.

## CONCLUSION

In Idaho, a court will apply the two-part veil-piercing test to determine whether a parent company will be liable on a contract entered into by its subsidiary. In analyzing whether the parent company and subsidiary are sufficiently distinct from one another, the court would examine whether the parent company observed corporate formalities for the subsidiary and maintained the subsidiary's separate existence. In analyzing whether upholding the subsidiary's corporate status would result in injustice, the court would look at whether the subsidiary is adequately capitalized and able to respond to a judgment against it. In addition, the more recent *Ross* case indicates that a court may even require evidence of fraud in order to satisfy the second requirement. The Fifth Circuit's reasoning in *Edwards Co.* supports the conclusion that additional evidence of misconduct would be required, as basic contract policy favors honoring the corporate status of the subsidiary where the third party agreed to deal only with the subsidiary.

A parent company can avoid liability on its subsidiary entity's contracts if it observes corporate formalities and ensures that the subsidiary has sufficient capital to meet its obligations. In addition, where the third party knows that it is dealing with the subsidiary and agrees to enter into a contractual relationship with only the subsidiary, the liability, if any, will end with the subsidiary.

## ENDNOTES

<sup>1</sup>*Ross v. Coleman Co., Inc.*, 114 Idaho 817, 831, 761 P.2d 1169, 1183 (1988).

<sup>2</sup>*Id.*

<sup>3</sup>*Chick v. Tomlinson*, 96 Idaho 483, 531 P.2d 573 (1975); *Surety Life Ins. Co. v. Rose Chapel Mortuary, Inc.*, 95 Idaho 599, 514 P.2d 594 (1973).

<sup>4</sup>*Surety Life Ins. Co.*, 95 Idaho at 601, 514 P.2d at 596.

<sup>5</sup>*Ross*, 114 Idaho at 831, 761 P.2d at 1183.

<sup>6</sup>*Chick*, 96 Idaho at 484-85, 531 P.2d at 574-75.

<sup>7</sup>*Id.* at 485, 531 P.2d at 575.

<sup>8</sup>*Id.* at 486, 531 P.2d at 576.

<sup>9</sup>*Id.*

<sup>10</sup>*Ross*, 114 Idaho 817, 761 P.2d 1169.

<sup>11</sup>*Id.* at 831, 761 P.2d at 1183.

<sup>12</sup>*Hassinger v. Tideland Elec. Membership Corp.*, 622 F. Supp. 146 (E.D.N.C. 1985).

<sup>13</sup>*Ross*, 114 Idaho at 832, 761 P.2d at 1184.

<sup>14</sup>*Id.* at 832, 761 P.2d at 1184.

<sup>15</sup>Kurt A. Strasser, *Piercing the Veil in Corporate Groups*, 37 CONN. L. REV. 637, 650-51 (2005).

<sup>16</sup>*Id.* at 652.

<sup>17</sup>*Edwards Co., Inc. v. Monogram Indus., Inc.*

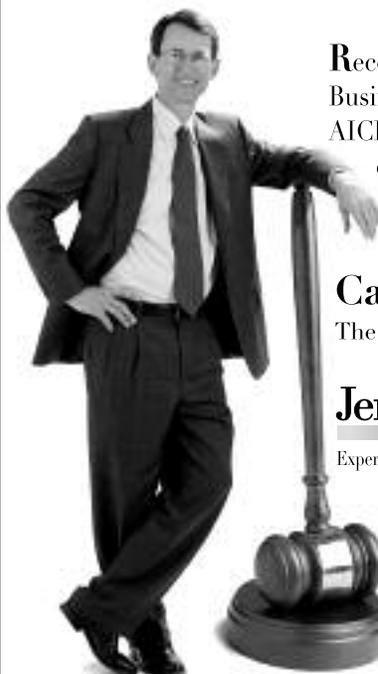
<sup>18</sup>*Id.* at 981.

## ABOUT THE AUTHOR

**Maureen G. Ryan** is a 2004 graduate of Gonzaga University School of Law. After graduation, she served as a law clerk for Chief Justice Gerald F. Schroeder of the Idaho Supreme Court. In September of 2005 she joined Holland & Hart LLP as an Associate. Ms. Ryan's practice focuses on business entities and transactions and real estate. The author would like to thank Fred Mack for giving her the assignment that became the subject of this article and Nicole Snyder for her encouragement.

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# Board Meeting Minutes: The basics

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Despite what clients think, drafting board meeting minutes is neither a skill attorneys are born with nor something learned in law school. An attorney that joins a board of directors—be it of a for-profit or non-profit entity—will automatically be considered “the expert” on minute-taking and has a good chance of becoming the new secretary. A litigator may be asked to draft a particular meeting’s minutes when the minutes are expected to be discoverable. Company counsel may be asked to draft minutes when a large transaction is to be approved. When the time comes for *you* to draft board meeting minutes, you should be capable of maximizing the minutes’ value to the board. This article seeks to help bridge the gap between what you know and what your client thinks you know.

## WHAT IS THE PURPOSE OF MINUTES?

Board meeting minutes<sup>1</sup> serve two primary purposes: to assist the board in supervising the organization, and to protect each director from liability for alleged wrongdoing. Lawyers are apt to appreciate board meeting minutes’ protective role, but tend to undervalue minutes’ supervisory role. Directors tend to undervalue both, and are likely to believe secretly that minutes are an outdated and unnecessary obeisance to parliamentary procedure—a ritual without reward. Directors should be disabused of this notion, and educated as to how minutes can help the directors supervise the organization and protect them from liability.

Good minutes enhance a board’s ability to supervise the organization primarily by helping the board manage its information and hold management accountable. Boards must make informed decisions, but have finite resources to gather and process information. Good minutes describe and, where possible, incorporate by reference and attachment, all information that the board has ever considered, and organize that information for future use. This systematic collection and organization of data (1) maximizes the amount of usable information available to the board when making a decision, (2) increases the board’s efficiency by reducing the resources used by the board searching for and re-gathering information, and (3) helps to refresh the directors’ memories regarding topics discussed and decisions made.

In addition to helping the board manage its information, good minutes also help the board hold management accountable. An organization’s board develops strategies, policies, and procedures that management then implements. By setting forth these strategies, policies, and procedures and recording the board’s instructions to management regarding the implementation of these strategies, policies, and procedures, minutes create a basis for holding management accountable.

In addition to enhancing a board’s ability to supervise the organization, the secondary role of good board meeting minutes is to protect the directors from liability by preserving evidence

that the directors fulfilled their fiduciary duties.<sup>2</sup> Under § 8.31 of the Revised Model Business Corporation Act, implemented in Idaho as Idaho Code § 30-1-831, a shareholder bringing suit against a director must establish that the director (1) did not act in good faith, (2) made a decision that the director did not reasonably believe was in the organization’s best interests, (3) made a decision without being informed to the extent the director reasonably believed appropriate, (4) lacked objectivity or independence with respect to a decision because of a family, financial, or business relationship, (5) acted while experiencing a sustained failure to be informed about the business and affairs of the corporation, (6) received a financial benefit to which the director was not entitled, or (7) otherwise breached any applicable duties to deal fairly with the corporation and its shareholders. Good minutes establish a credible record that preemptively addresses each of these grounds for director liability. This record, because it is created contemporaneously with the director’s actions, enjoys a strong presumption of accuracy that a shareholder action will find difficult to overcome.

## HOW LONG SHOULD MINUTES BE?

Whether to draft short or long minutes with respect to a particular discussion or decision at a board meeting is determined by the twin purposes of minutes: to enhance the board’s ability to supervise the organization and to protect the directors from liability. Shorter minutes have the advantage of being easier to draft and easier to review. Longer minutes have the advantage of (1) providing more information to form a basis for holding management accountable, and (2) better protecting the directors from liability by providing a more complete description of how the directors satisfied their duties. Thus, the best practice is (1) to draft short minutes with respect to routine or relatively insignificant matters, where the ease of drafting, reviewing, and referencing is more important than the value of the bolstered protection that additional detail could provide, and (2) to draft long minutes with respect to any matter of such a character or magnitude that objections (particularly from shareholders) could arise—where thoroughness and additional protection from liability are more important than succinctness. Because the circumstances dictate the relative benefits of length and brevity, you must exercise your best judgment in deciding what matters deserve greater or lesser detail.

## WHAT INFORMATION SHOULD BE IN MINUTES?

Minutes should begin with a preamble that sets forth the background information necessary to understand the context of the meeting and of any deliberations taking place and decisions made. First, the preamble should identify the participants by listing the directors, management, experts, and other guests present, and note whether directors present by teleconference are able to

communicate with all the other directors. Second, the preamble should specify the date and time of commencement to allow the reader to identify how each meeting relates to the broader sequence of events. Third, the preamble should state where the meeting is held, to evidence that the board satisfied any applicable meeting location and notice requirements and to provide the reader with a feeling of context. Fourth, if any law or provision in the organization's articles, bylaws, or operating agreement requires the meeting's purpose to be specified, the preamble should specify why the meeting was held. Fifth, the preamble should identify whether the meeting is of the full board or a committee, and whether the meeting was regular or special, to provide information necessary to determine any limits on the authority exercised at the meeting. Sixth, the preamble should specify how notice of the meeting was given or whether it was waived, to evidence that the board satisfied any applicable notice requirements. Seventh, the preamble should indicate whether the directors present reviewed, discussed, and approved the previous meeting's minutes.

The body of the minutes should describe the board's (1) information-gathering, (2) deliberations, and (3) decision-making process. In doing so, the body of the minutes should document:

- that information was presented to the board that is relevant to the topic of discussion and that is of a level of detail appropriate to support any decision made;
- why the directors found each presenter of information to be credible;
- why the directors found the information presented to be credible;
- that the board considered and discussed multiple alternatives, with summaries of the alternatives;
- any differences of opinion among the directors, because differences of opinion are evidence of bona fide, constructive deliberations;
- why the board chose that particular alternative rather than the others, and, if any of the directors dissent from a decision, who dissents;
- why the board believes that the decision is in the best interests of the organization and its shareholders;
- those facts showing that each director is independent and objective with respect to the decision;
- those facts showing that no director received any unfair personal benefit;
- that each director believed himself or herself to be informed to the extent that the director reasonably believed necessary to make the best decision for the organization;
- that the directors making the decision have a history of being informed about the topic; and
- that the directors did not notice any "red flags" that would indicate to a reasonably attentive director that more information or deliberation is required.

If you forget everything else when drafting minutes, remember the two most important items: information and alternatives. First, minutes should always summarize the information

obtained or presented, attach copies of any reports or other documents distributed to the directors, and incorporate by reference, in the body of the minutes, all such attachments. Second, minutes should always describe the alternatives that the board considered before making a decision. The inclusion of information and alternatives in the minutes is critical because it (1) allows the board to hold management accountable with respect to decisions the board made in the past, (2) helps the directors to make efficient, informed decisions in the future; and (3) can support a determination by a court that the directors have fulfilled their fiduciary duties.

With respect to any particular discussion or decision, the body of the minutes should indicate whether any directors that are listed in the preamble as present do not participate. For example, if a director recuses himself or herself because of a conflict of interests or a lack of information or preparedness, it is important that the minutes record this proper recusal so that no wrongdoing is imputed to that director.

Finally, minutes should have a short closing section. The closing should indicate the date, time, and location of the next board meeting as a courtesy to the directors and to link together the minutes for each of the board's meetings. The closing should also note the time of adjournment, to demonstrate how much time the board devoted to its responsibilities.

Minutes that follow this framework will advance the twin goals of protecting the directors from liability and enhancing the board's ability to supervise the organization. If the minutes you draft accomplish this much, you will exceed your client's expectations.

#### ENDNOTES

<sup>1</sup>Though a discussion of the evidentiary characteristics of board minutes is beyond the scope of this article, board minutes are, generally speaking, treated the same as other business records.

<sup>2</sup>For more information regarding the context for board meeting minutes, see Idaho Code § 30-1-801 *et seq.*, which sets forth the statutory framework relating to directors and their meetings.

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# WHAT'S A DIRECTOR TO DO?

Christine E. Nicholas and James B. Alderman  
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Why would any intelligent person want to serve on a corporate board today? In the wake of headline-grabbing corporate scandals, the performance of boards as a whole has come under microscopic public scrutiny. Notwithstanding the rather hostile climate, there remain people willing to serve in exchange for not much more than the satisfaction of influencing the direction of an organization and the opportunity to be a part of its success.

A good way to help your corporate client have an effective board of directors and to attract and retain quality directors is to make sure each board member understands her duties and obligations to the organization, understands how to discharge those duties and obligations, and understands where to go for assistance when questions surrounding board service arise. We recommend the adoption of a written director's handbook that can serve as a reference tool for your directors. Consider including the following information in the director's handbook you develop for your privately held, Idaho corporation.

## **DIRECTOR'S GENERAL RESPONSIBILITIES**

The basic relationship between the board and management of a corporation is expressed in state corporation statutes. The (revised) Idaho Business Corporation Act, Idaho Code Sections 30-1-101 *et seq.* (the "Act"), provides that, subject to any limitation contained in the corporation's articles of incorporation or a written agreement among the shareholders, all corporate powers shall be exercised by or under the authority of its board of directors, and that the business and affairs of the corporation shall be managed by or under the direction of its board of directors.<sup>1</sup>

In general, the primary responsibility of a director is to promote the best interests of the corporation by providing general direction for the management of the corporation's business and affairs. A director exercises two basic functions -- a management function and an oversight function. A director's actions should be designed to assure that the corporation is managed to perpetuate a successful business and to optimize long-term financial returns, all in a manner consistent with applicable legal requirements and ethical considerations. A director's oversight function has received substantial review recently in light of highly publicized corporate leaders' misbehavior. To participate in the board's important oversight function, a director should assess whether the corporation has established and implemented programs designed to address the following key issues: fair disclosures, compliance with laws, financial commitments, and internal controls and procedures.

## **QUALITY OF DISCLOSURES**

Even if your client does not provide public disclosure of its financial and business operations in the same manner as a publicly-traded corporation, the privately-held corporation nonetheless provides disclosure of its financial position and business operations to its shareholders and lenders. A director of a privately-held corporation needs to be satisfied that such disclosure documents fairly present material information about the corpora-

tion and its business activities and prospects. The primary responsibility of a director in the disclosure process is to be satisfied that the corporation has procedures that are reasonably designed to produce accurate and appropriate disclosures.

## **COMPLIANCE WITH LAWS**

A director needs to ask whether the corporation has established appropriate policies designed to provide reasonable assurance of compliance with applicable laws and regulations. The board needs to insist that it receives reasonable assurances that employees are informed and periodically reminded of compliance policies, including those pertaining to: (1) codes of business conduct; (2) anti-discrimination and employment laws; (3) environmental, health and safety laws; and (4) anti-trust laws.

## **APPROVAL OF FINANCIAL COMMITMENTS AND COMPLIANCE WITH CONTRACTUAL OBLIGATIONS**

A director needs to determine if there is a functioning and effective system in place for approval of commitments of the corporation's financial and commercial resources. The board should be satisfied that a reasonable approval system exists within the organization and should have a clear understanding with management (which may be embodied in a formal policy) as to the type or level of major commitments that require board approval.

## **EFFECTIVENESS OF INTERNAL CONTROLS, AND DISCLOSURE CONTROLS AND PROCEDURES**

Each director should determine that the corporation maintains effective systems of internal financial and disclosure controls, and procedures for determining financial and other material information about the corporation.

## **IDENTIFICATION OF BUSINESS RISKS AND PROTECTION OF ASSETS**

A director should require that the board receive periodic reports describing the corporation's programs for identifying financial and other business risks, for managing such risks, and for protecting corporate assets and employees. In addition to insurance arrangements, such programs should include procedures for protecting intellectual property and safeguarding corporate information, as well as security arrangements for physical properties and personnel.

## **DIRECTOR'S LEGAL OBLIGATIONS**

A director owes the corporation and its shareholders a duty of loyalty, a duty of care, and a duty of disclosure.

### *DUTY OF LOYALTY*

The central mandate for director action is the duty of loyalty. Every director must discharge her duties (including when serving as a member on a board committee) "**in good faith and in a manner the director reasonably believes to be in the best interests of the corporation.**"<sup>2</sup> To act in good faith is to act honestly and to deal fairly. To act with a view to the interests of the

corporation requires that a director act on an informed basis and with an emphasis on the director's primary allegiance to the corporation. A director should avoid conflicts of interest and should not use her position for personal advantage. When a director has a financial or personal interest in a potential contract or transaction with the corporation, or if the director is contemplating a transaction that uses corporate assets or may compete with the corporation, the director is said to be "interested" in the matter. A transaction between the corporation and an interested director should be approved by only the disinterested directors or by shareholders.<sup>3</sup>

Interested directors should disclose their interests and any confidentiality obligations owed to others outside the corporation, and should then describe all material facts concerning the matter that are known to the interested director. After such disclosure to the board, the interested director should abstain from voting on the matter. In most situations, the interested director should leave the board meeting after providing such disclosure, so that the disinterested directors can freely discuss the matter and vote.

Disclosures of conflicts of interest should be documented in the board minutes or committee reports, along with the results of the disinterested directors' consideration of the matter. The corporation should have formal, written policies designed to promote and police high ethical standards and compliance with law and corporate policy. You should assist your client in adopting a code of ethics and a conflict of interest policy, and in establishing procedures to insure such policies are adopted, maintained, and monitored for effectiveness. Independent advice, appraisals, or evaluations from investment bankers or others may be helpful to the disinterested directors in connection with a significant transaction involving conflicts of interest.

The duty of loyalty requires that a director, having access to a business opportunity related to the corporation's business activities, first make such opportunity available to the corporation before pursuing the opportunity for the director's own account, or for the account of another with whom the director is associated. A director to whom a corporate opportunity becomes available should disclose such opportunity to the board and allow the disinterested directors to determine whether the corporation will pursue the opportunity or not. If the board, acting through the disinterested directors, after full disclosure of all material information by the interested director, declines to pursue the opportunity, then the interested director is free to pursue the opportunity.

A director should keep confidential all information involving the corporation that has not been made known to the general public. Individual directors should avoid responding to inquiries from other persons concerning the corporation's plans, processes, new products, financial position, and the like. Ideally, the corporation will have a spokesperson and all requests for corporate information should be referred to the corporation's spokesperson.

#### *DUTY OF CARE*

A director has a responsibility to become informed so that decisions are well-considered and the director is in a better posi-

tion to oversee the management of the corporation. A director is expected to attend and participate in board meetings, as well as meetings of any committee of which the director is a member. Personal attendance is required—a **director may not vote or participate by proxy**. However, attendance may be by telephone, unless prohibited by the corporation's constituent documents.<sup>4</sup> A director must receive from management accurate and sufficient information to inform the director about the business and affairs of the corporation, and a director must insure that she receives sufficient information from which to become informed. Relevant information should be received by the directors far enough in advance of the meeting to allow study and consideration of the issues raised.

A director is entitled to rely on information provided by others reasonably believed to be reliable and competent in the matters prepared or presented.<sup>5</sup> Specifically, a director may rely on information supplied by another director or an officer or employee, if such person is reasonably believed to be reliable and competent in the matters prepared or presented—for example, financial information supplied by the corporation's chief financial officer. A director may rely upon information prepared or presented by legal counsel, accountants, financial advisors and the like, which is reasonably believed to be within the preparer's or presenter's professional or expert competence. A director may rely upon information prepared or presented by a committee on which the director does not serve as to matters within the committee's designated authority and as to which the committee is reasonably believed to merit confidence. However, a director may not rely on such information, opinions, reports, books of account, or statements if the director has knowledge concerning the matter in question that would cause such reliance to be unwarranted.

#### *DUTY OF DISCLOSURE*

Court decisions have imposed on directors a duty of disclosure, said to flow from both the duties of care and loyalty discussed above. Directors must furnish shareholders with all material information known to the directors when they present shareholders with a voting or investment decision, and each director must disclose to fellow directors and management any information known to the director that is material to corporate decisions.

The business judgment rule is a standard of judicial review used to analyze director conduct. Well established in case law, the business judgment rule protects a disinterested director from personal liability to the corporation and its shareholders, even though a corporate decision the director approved turns out to be unwise or the results of the decision turn out to be unsuccessful. The rule presumes that in making a business decision, the disinterested directors acted on an **informed basis, in good faith** and in the honest belief that the action taken was in the **best interests of the corporation**. Courts generally do not review the wisdom of the decision or its outcome.

#### **BOARD COMMITTEES**

Idaho law allows a board of directors to designate one or more committees that, to the extent provided in the resolutions or in the by-laws of the corporation, have and may exercise the powers of the board of directors in the management of the busi-

ness and affairs of the corporation. Each committee of the board of directors must include at least one director.<sup>6</sup> Unless the articles of incorporation or the by-laws of an Idaho corporation provide otherwise, the board of directors may appoint persons who are not directors to serve on committees. Under Idaho law, a board committee has plenary powers, except that a committee may not: (1) authorize or approve distributions, other than according to a formula or method, or within limits, prescribed by the board of directors; (2) approve or propose to shareholders action that the Act requires be approved by shareholders (such as the sale of all or substantially all of the assets of the corporation); (3) fill vacancies on the board of directors; or (4) adopt, amend or repeal bylaws.<sup>7</sup> Typical board committees include an audit committee, a nominating committee, a corporate governance committee, and an executive committee.<sup>8</sup>

### CONDUCT OF MEETINGS

The chairman of the board conducts meetings of the board of directors in accordance with parliamentary meeting procedures, which protect the right of the majority to decide, the right of the minority to be heard, the rights of individual members, and the rights of absentees. The board should establish dates for regular meetings of the board of directors (such as on the last Friday of each calendar quarter). Idaho law provides that unless the articles of incorporation or bylaws provide otherwise, regular meetings of the board of directors may be held without notice of the date, time, place or purpose of the meeting, and that unless the articles of incorporation or bylaws provide for a longer or shorter period, special meetings of the board of directors must be preceded by at least two (2) days' notice of the date, time and place of the meeting. The notice need not describe the purpose of the special meeting unless required by the articles of incorporation or bylaws.<sup>9</sup>

A special meeting held pursuant to inadequate notice is illegal, and the action taken at such a meeting is invalid unless ratified. Notice to all directors is required in order to satisfy the expectations of the shareholders, who having elected a certain number of directors to manage the affairs of the corporation, expect that the corporation shall have the benefit of the judgment, counsel, and influence of all of the elected directors.



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The corporate secretary is responsible to ensure that appropriate minutes of the board and shareholder meetings are maintained in the corporation's minute book to memorialize actions of the board or shareholders at meetings. The corporate secretary should ensure that notice and quorum requirements of Idaho law or the corporation's organizational documents are met and that legal record-keeping requirements are satisfied. Idaho law requires that a corporation keep as permanent records: (1) minutes of all meetings of its shareholders and board of directors; (2) a record of all actions taken by the shareholders or board of directors without a meeting; and (3) a record of all actions taken by a committee of the board of directors in place of the board of directors on behalf of the corporation.<sup>10</sup>

Unless a corporation's articles of incorporation provide otherwise, any action of the board taken between meetings is obtained by written consent resolutions, which **require the signature of all members of the board** in order to be effectively adopted. **Written consent by a majority is ineffective under Idaho law.**<sup>11</sup>

This requirement of unanimity for action taken without a meeting ensures that an opportunity is provided to board members to actually deliberate on and discuss any matter on which a minority of the board may disagree.

### INDEMNIFICATION

Directors may incur personal liability for failure to satisfy their duties of care or loyalty,<sup>12</sup> and can be subject to personal liability under other state and federal laws, such as tax and environmental laws. Good faith and careful monitoring of compliance programs provide substantial safeguards against individual liability. Under Idaho law, a corporation may indemnify an individual who is a party to a proceeding because he is a director against liability incurred in the proceeding if: (1) he acted in good faith; and (2) in the case of conduct in his official capacity, he reasonably believed that his conduct was in the best interests of the corporation; and (3) in all cases, he reasonably believed that his conduct was at least not opposed to the best interests of the corporation; and (4) in the case of any criminal proceeding, he had no reasonable cause to believe his conduct was unlawful. Broader indemnity may be made under the articles of incorporation.<sup>13</sup> A corporation may not indemnify against liability for: (1) the amount of a financial benefit received by a director to which she is not entitled; (2) an intentional infliction of harm on the corporation or the shareholders; (3) an unlawful distribution; or (4) an intentional violation of criminal law.<sup>14</sup>

### CONCLUSION

The legal requirements of directors and constituency expectations for directors have changed significantly over the past few years. Despite these changes, the core values associated with the corporate director's role – good faith, general oversight, informed judgment, honesty and dedication to the corporation's best interests – continue to be the touchstone for evaluating all directors' actions. Once your corporate client establishes its commitment to these principles, attracting and retaining quality directors will become easier.

## ENDNOTES

<sup>1</sup>Idaho Code § 30-1-801.

<sup>2</sup>Idaho Code § 30-1-830.

<sup>3</sup>Idaho Code § 30-1-862.

<sup>4</sup>Idaho Code § 30-1-820.

<sup>5</sup>Idaho Code § 30-1-830.

<sup>6</sup>Idaho Code § 30-1-825.

<sup>7</sup>*Id.*

<sup>8</sup>Publicly-traded corporations are subject to additional board committee obligations. The Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, and the major security markets now require delegations of certain significant matters to board committees and limit membership on these committees to independent directors (i.e., directors who are not employed by the corporation and who have no material relationship with the corporation). The audit, compensation, and nominating/corporate governance committees of a publicly-traded company must limit membership to independent directors. The independent board committee is at the core of many measures for effective corporate governance.

<sup>9</sup>Idaho Code § 30-1-822.

<sup>10</sup>Idaho Code § 30-1-1601.

<sup>11</sup>Idaho Code § 30-1-821.

<sup>12</sup>Idaho Code § 30-1-831.

<sup>13</sup>Idaho Code § 30-1-851.

<sup>14</sup>Idaho Code § 30-1-851.

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# WHAT IS A BUSINESS LAWYER?

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Membership in the Business and Corporate Law Section of the Idaho State Bar is replete with “business lawyers.” But what exactly IS a business lawyer? I came to reconsider this question a few months ago, when I was practicing in-house at the J. R. Simplot Company. Having been asked to cover benefit plan issues for my colleague, David Spurling, while he was deployed to Iraq, and having little in-depth subject matter familiarity with the projects that were suddenly assigned to me, I joined a couple of employment law related organizations in an effort to quickly absorb issues that most lawyers take years to understand. Faced with a puzzling issue, I sent a question in to a bulletin board on a popular employment issues website and explained that I was a business lawyer needing some information on a particular employment law issue. The first response that was posted asked, “What is a business lawyer?”

In the early years of my practice, I molded myself into what I thought was a business lawyer. I formed corporations, partnerships, limited liability companies and other entities, and helped those businesses keep their minute books and other records, adopt authorizing resolutions, negotiate loans and contracts, establish personnel policies and benefit plans, merge with or acquire other businesses, declare dividends or other distributions, purchase or lease assets, change ownership, obtain licenses and permits for their businesses, review investment opportunities, and assist with the myriad of other decisions vital to the life of a business. I thought of myself as a “business lawyer.”

In 1992, the ABA’s Business Law Section launched its new publication, “Business Law Today,” and one of the first articles was entitled, “What is a business lawyer?”<sup>1</sup> When I read that article, I immediately identified with it and thought, “That’s me!” The author suggested that a business lawyer is “the lawyer to whom the business person turns when he or she wants not the specialized response of the expert tax lawyer, the expert securities lawyer, the expert anti-trust lawyer, the expert this or the expert that,” but rather the advice of the lawyer who may be expert in some field or other, but whose knowledge and experience are broader and oftentimes more insightful than that of a specialist in a particular field of law. Such a lawyer, according to that article:

- embraces the law’s increasing complexity that requires reliance on many specialists, instead of just one generalist.
- respects other specialties, is aware of his or her own competency limits, and does not let pride or intellectual arrogance impede seeking assistance from others with greater competence.
- understands that the law does not provide answers to business persons, but provides insights and knowledge that business persons can combine with their business knowledge and experience to produce a decision.
- is alert to the limits of the legal discipline and does not

preempt the unique function of the business client to make business decisions with the assistance of legal advice.

- is willing and able to ruminate with the business client to assist in framing the legal issues in the context of market conditions or practical problems facing the client.
- acts as legal counsel to a business and its management by using his or her judgment, experience, and comprehension of the client’s business to provide advice to allow the client to fulfill business goals legally.

Above all, the article suggests, since subordinates of a strong CEO can be reluctant to say that the emperor is wearing no clothes, the business lawyer must have a stern commitment to revealing the awkward and sometimes embarrassing truths about the business client’s affairs—not always an easy task when the lawyer’s business may be dependent on retaining the client’s business. Such dilemmas, however, truly test the mettle of the business lawyer.

Some business clients want to abdicate decision-making to the lawyer. Good business lawyers, with their heightened awareness of the context of the lawyer’s advice, are able to resist these efforts and help the business client understand that the lawyer’s advice is not the final answer for a business, but is simply an ingredient in the business person’s decision-making process. Most business clients are looking for someone to ruminate with, someone who acts as a sounding board and thereby assists the client in deciding on the best course of action for that particular business.

Every business lawyer should be aware there are some excellent resources to assist in his or her respective practices. First, I would encourage every business lawyer to subscribe to *Business Law Today*, which is the feature magazine of the Business Law Section of the American Bar Association. It includes articles designed to provide quick updates on hot topics in business law.

Second, there are a number of publications that discuss ways to modernize legal documents and eliminate “legalese” in the documents and contracts the business lawyer drafts.<sup>2</sup>

Third, there are a number of organizations that publish model forms with commentary.<sup>3</sup> These types of publications will assist a business lawyer in negotiating and documenting various types of transactions.

Finally, I recommend you consult publications that provide guidance on principles of finance and accounting.<sup>4</sup> These types of publications can be invaluable to the business lawyer who does not have a finance or accounting background.

## Endnotes

<sup>1</sup>A. Sommer Jr., *What is a Business Lawyer?*, Business Law Today, Vol. 1, No. 1, March/April 1992.

<sup>2</sup>See Kenneth A. Adams, *A Manual of Style for Contract Drafting*

(American Bar Association, 2004) (a comprehensive and accessible guide to drafting clear and effective contracts, that highlights common sources of inefficiency, dispute, and misunderstanding and recommends how to avoid them); Howard Darmstadter, *Hereof, Thereof, and Everywhere of: a Contrarian's Guide to Legal Drafting* (American Bar Association, 2002) (a lively collection of his own musings, reflections, suggestions, anecdotes, and witticisms that will entertain you as it teaches you how to modernize your legal documents, mostly adapted from "Legal-Ese," the author's award-winning column in *Business Law Today*); Brian A. Garner, *A Dictionary of Modern Legal Usage* (Oxford University Press, 1995) (seriously; if you've never read a usage dictionary, you'll enjoy this. It provides practical advice on how to write clear, jargon-free legal prose and addresses burning questions like, "Should it be *guaranty* or *guarantee*?").

<sup>3</sup>American Bar Association, *Model Joint Venture Agreement with Commentary* (2005) (written by the ABA Committee on Negotiated Acquisitions, this book provides a complete first draft of a model joint venture agreement with incisive commentary explaining the meaning and function of each provision; with forms); American Bar Association, *Model Asset Purchase Agreement with Commentary* (2001) (a comprehensive resource for negotiating and documenting an asset purchase, with forms); Gregory M. Stein, Morton P. Fischer, Jr., & Gail M. Stern, *A Practical Guide to Commercial Real Estate Transactions: From Contract to Closing* (American Bar Association, 2001) (follows each of the steps of a transaction in the order in which they generally arise and emphasizes the drafting, negotiation, and revision needed to get a deal closed; with forms); Dennis M. Horn, *The Commercial Lease Formbook: Expert Tools for Drafting and Negotiation* (American Bar Association, 2001) (covers all aspects of negotiating and drafting effective commercial property leases and provides a unique and comprehensive tool for evaluating the terms of a lease form and determining whether a transaction is within the norms, with forms); American Bar Association, *Model Stock Purchase Stock Agreement with Commentary* (1995) (based on a hypothetical acquisition by a single corporate buyer of all of the capital stock of a privately-held U.S. company, the manual is designed as a buyer's first draft, and each provision of the agreement is immediately followed by commentary, which explains the purpose of each provision, and, when applicable, a brief discussion of the law relevant to that provision).

<sup>4</sup>Robert B. Dickie, *Financial Statement Analysis and Business for the Practical Lawyer* (American Bar Association, 1998) (a great refresher on the key principles of finance and accounting so that you can recognize potential problems, and advise your clients in situations such as negotiating or documenting an acquisition or financing, structuring a financing so as to allocate risks and returns where your client wants them to be, negotiating and drafting loan covenants, and handling complex securities or commercial litigation).

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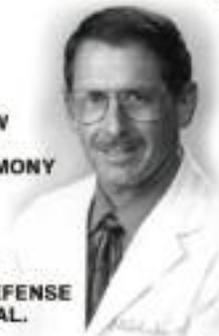
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# META – DO YOU KNOW WHAT IT IS?

Winston Beard  
*Beard St. Clair*

Occasionally we have the opportunity to make the law simpler and more flexible. META will do that. META is the Model Entity Transaction Act. If enacted, META will have application to all types of entities including corporations, not-for-profits, all varieties of partnerships, limited liability companies, cooperatives, etc. It applies to entity transactions involving same and different type entities, and to entity transaction involving all domestic or a combination of domestic and foreign entities.

It is referred to as a “junction box” statute because it facilitates a large variety of inputs and outputs. For instance, the input may be a Utah limited liability company and an Idaho partnership, and the output may be a California corporation. Any combination of entities, foreign or domestic, can enter into a META transaction (the junction box) and emerge in any new combination of entities, foreign or domestic.

## TRANSACTIONS COVERED

META covers the following five kinds of transactions: (1) mergers; (2) interest exchanges; (3) conversions; (4) domestications; and (5) divisions. Mergers include consolidations. Interest exchanges include the common triangular forward and reverse reorganizations.<sup>1</sup> Conversions allow any type of entity to become a different type of entity—limited liability companies to corporations, corporations to partnerships, etc. Domestications allow entities to change their state of organizations. Divisions allow for split-ups and spin-offs. META does not cover the sale of business assets.

After META almost any imaginable entity transaction, or combination of entity transactions, is possible. Whether the transaction is desirable is a legal, tax, and business decision outside the purview of META. META just facilitates and enables those transactions to occur that lawyers and business persons find desirable.

Each of the five transactions covered by META can now be accomplished for corporations either directly or indirectly under the Idaho Business Corporation Act. Other Idaho entity statutes allow either none or a limited subset of META type transactions. META will enable all entities, domestic and foreign, to participate in mergers, share exchanges, conversions, domestications, and divisions and to do so under a common set of procedural rules. META allows most of these transactions to be accomplished in one step rather than the multiple steps that are now commonly required to effect META-type transactions. META often results in a legal continuation of the prior entities to reduce concerns about taxable transfers.

## ORGANIZATION OF META

META has five substantive articles, one for each kind of transaction. Each article has six substantially similar sections. Those sections are as follows: (1) transaction authorization; (2) the transaction plan; (3) the approval process; (4) amendments and abandonment of the plan; (5) the statement of the transaction to be filed with the secretary of state’s office; and (6) the effect

of the transaction. Additionally, the article on divisions has a section on allocation of liabilities. There are also special provisions dealing with personal liability issues when a partnership converts to a corporation or vice versa.

## THE REVIEW PROCESS

The Legislative Subcommittee of the Business and Corporate Law Section of the Bar (“Subcommittee”) has been reviewing META since last winter. The Subcommittee has had some surprises in the review process. For example, the Subcommittee discovered that unincorporated nonprofit associations are statutory entities that provide limited liability to their members. The Subcommittee also learned that Idaho’s constitutional restrictions on corporations are also applicable to associations such as limited liability companies and limited liability partnerships. Perhaps the Subcommittee should not have been surprised since those provisions are part of our laws, but many of the members of the Subcommittee were not previously aware of those provisions.

The Subcommittee struggled with the problem of oral operating agreements and other entity documents, and oral amendments to entity documents. Ultimately, it decided to accept the recommendations of the National Conference of Commissioners on Uniform State Laws (“NCUSL”), which recognizes oral and course-of-dealing agreements and modifications. The Subcommittee did that in reluctant acknowledgement that the common law prevents exclusion of oral and course-of-dealing agreements and modifications.

Similarly, the Subcommittee struggled with balancing minority and majority rights. In this area, the Subcommittee decided it would be best to make as few changes to the substantive law of the various entity statutes as possible. For instance, appraisal rights will apply only to corporate shareholders. Admittedly, that approach perpetuates some existing substantive inconsistencies involving the various types of entities. The Subcommittee thought it best to keep META as simple as possible and use it primarily as a procedural vehicle, although the Subcommittee would like to see more consistency among the various entity laws.

During its review, the Subcommittee has been working in conjunction with representatives of the Department of Finance, the Department of Insurance, the office of the Secretary of State, the office of the Attorney General, and the Legislative Services Office. As a result of their input, META will not apply to banking and insurance entities. Not-for-profit conversions will continue to require review and approval of the Attorney General’s office. Entities that are in-part or fully public are excluded. All other entities will be covered.

All META transactions will be covered exclusively by META. Conflicting provisions in other entity statutes will be repealed as to entities covered by META. Procedures, forms, and filings will be uniform for META transactions. The

Subcommittee anticipates NCUSL will in the future recommend additional legislation to coordinate model and uniform entity acts. The Subcommittee has been advised that META will be a key part of NCCUSL's future efforts to coordinate entity laws. META will help to make Idaho a business friendly state and will put Idaho and Idaho lawyers in the forefront of this aspect of entity law.

The Subcommittee anticipates that META will be presented to the Bar in the 2006 RoadShow and introduced in the Idaho Legislature during the 2007 session. The Subcommittee is preparing Idaho legislative comments to alert users of the Idaho Code to areas where other Idaho laws need to be considered when implementing a META transaction.

**Endnote**

<sup>1</sup>These reorganizations involve the acquisition by a parent or subsidiary of stock of the target in exchange solely for voting stock of the parent were immediately after the exchange the parent or subsidiary hold stock in target representing control of the target.

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**Winston Beard** is partner in Beard St. Clair, Idaho Falls. He is a member of the Business and Corporate Law Section and The Health Law Section of the Idaho State Bar. His is Chairman of the Legislative Subcommittee Business and Corporate Law Section.

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**2<sup>nd</sup> 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

By Order of the Court  
Stephen W. Kenyon, Clerk

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

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Gerald F. Schroeder

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

**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

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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.

**IDAHO SUPREME COURT  
ORAL ARGUMENT Dates  
As of September 8, 2006**

**—Boise, Idaho Falls, Pocatello Term—**

Wednesday, October 4, 2006 – IDAHO FALLS

8:50 a.m. **OPEN**  
3:00 p.m. J. R. Simplot Company v. Bosen #31706  
4:10 p.m. Cordova v. Bonneville County  
Joint School Dist. #93 #31188

Thursday, October 5, 2006 – IDAHO FALLS

8:50 a.m. Sherer v. Pocatello School District #31681  
10:00 a.m. State v. Lenon (Petition for Review) #32754  
11:10 a.m. Cowan v. Fremont County  
Board of Commissioners #30061

Friday, October 6, 2006 – POCATELLO

8:50 a.m. **OPEN**  
10:00 a.m. Ransom v. Topaz Marketing #32146  
11:10 a.m. Pierce v. School District #21 #32406

**OFFICIAL NOTICE  
COURT OF APPEALS OF IDAHO**

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Judges  
Karen L. Lansing  
Sergio A. Gutierrez

**3<sup>rd</sup> 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

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**IDAHO COURT OF APPEALS  
ORAL ARGUMENT DATES  
As of September 7, 2006**

**—Hailey and Boise Terms of Court—**

Wednesday, October 4, 2006 – HAILEY

2:00 p.m. Blick v. Blick #32131

Thursday, October 5, 2006 – HAILEY

9:00 a.m. State v. Yakovac #31505/32033  
10:30 a.m. State v. Murray #32394  
1:30 p.m. **OPEN**

Thursday, October 19, 2006 – BOISE

9:00 a.m. State v. Garcia #32191  
10:30 a.m. State v. Nye #32183  
1:30 p.m. State v. Hedges #32464

**Idaho Supreme Court and Court of Appeals**  
**NEW CASES ON APPEAL PENDING DECISION**  
**(UPDATE 09/01/06)**

**CIVIL APPEALS**  
**PROCEDURE**

1. Whether the district court erred by refusing to set aside the default judgment when this judgment was entered after the appellants' attorney had withdrawn but had not strictly complied with the notice required by I.R.C.P. 11(b)(3), and mandated by *Wright v. Wright*, 130 Idaho 918 (1998).

*McClure Engineering v.*  
*Channel 5 KIDA*  
S.Ct. No. 32572  
Court of Appeals

2. Does I.R.C.P. 6(e)(1) extend the time to file a petition for judicial review by three days when the final order in a contested proceeding is served by mail?

*Rex Rammell v.*  
*Dept. of Agriculture*  
S.Ct. No. 32538  
Supreme Court

3. Did the district court violate Sumner's right to due process when it issued its order vacating preliminary injunction and dismissing case without notice to Sumner and the Grail Restaurant and without giving Sumner an opportunity to be heard prior to entry of the order?

*Lang Sumner v.*  
*Idaho State Police*  
S.Ct. No. 32734  
Court of Appeals

4. Did the court err in granting Stanion's motion to dismiss on the basis of *res judicata* where Ticor was not a party to Stanion's bankruptcy proceeding and the issue brought in this state court action was never litigated before the bankruptcy court?

*Ticor Title Co v.*  
*Richard W. Stanion, II*  
S.Ct. No. 32649  
Supreme Court

**LAND USE**

1. Whether state endowment land on Priest Lake, leased by Idaho Department of Lands to defendants for commercial purposes as the Blue Diamond Marina, is subject to the Local Land Use Planning Act in general, and specifically to I.C. § 67-6528, and to all zoning regulations contained in the Bonner County Revised Code.

*Loel Fenwick, M.D. v.*  
*Dept. of Lands*  
S.Ct. No. 32690  
Supreme Court

**TAX CASES**

1. Whether the court erred in awarding IR Trust vehicles to the Idaho Tax Commission for the debt of the Hendersons.

*Idaho State Tax Comm. v.*  
*IR Trucking Trust*  
S.Ct. No. 32776  
Supreme Court

**ATTORNEY FEES AND COSTS**

1. Whether the trial court erred in awarding attorney's fees against the plaintiffs when the defendants did not plead the applicable statutes, nor did any of the applicable statutes appear in any of the defendants' pleadings.

*Steve Fritts v.*  
*Liddle & Moeller Construction*  
S.Ct. No. 32089  
Supreme Court

2. Did the district court err in awarding attorney's fees to Justin and Allison Lake based on a contingent fee agreement under the Small Lawsuit Resolution Act?

*Leslie Lake v.*  
*Shana Purnell*  
S.Ct. No. 32435  
Supreme Court

**SUMMARY JUDGMENT**

1. Whether the court erred in determining Baird's claim was barred by *res judicata*.

*Baird Oil Co. v.*  
*Idaho State Tax Comm.*  
S.Ct. No. 31668  
Supreme Court

2. Whether the district court, acting in its appellate capacity, erred in finding that factual issues existed regarding whether the debt was partnership related and whether a winding up and accounting had occurred, which precluded the trial court from granting Ostrom's motion for summary judgment.

*James Berry v.*  
*Ed Ostrom*  
S.Ct. No. 32561  
Court of Appeals

3. Did the magistrate court erroneously grant summary judgment in favor of the Spokesman Review on the claim of defamation?

*Trent Clark v.*  
*Spokesman Review*  
S.Ct. No. 32565  
Supreme Court

4. Whether the district court erred in determining that the City of Blackfoot is immune from liability pursuant to I.C. § 6-904(1).

*Dorea Enterprises v.*  
*City of Blackfoot*  
S.Ct. No. 32826  
Supreme Court

5. Did the court err in granting Adams' motion for summary judgment by failing to apply the three-tiered "open range test" found in I.C. § 25-2118 when it ruled the Adams were entitled to "open range immunity"?

*Mary Moreland v.*  
*Royce Adams*  
S.Ct. No. 32284  
Supreme Court

6. Whether the trial court erred, as a matter of law, in granting summary judgment in favor of Thompson in finding that the memorandum of lease was void as being in violation of the declaration for the Sawtooth Condominiums.

*Dennis Thompson v.*  
*Robert Ebbert*  
S.Ct. No. 32743  
Supreme Court

7. Whether the court erred in granting summary judgment to the City based upon I.C. § 54-1920(2).

*Jerry Trammel v.*  
*City of Nampa*  
S.Ct. No. 32150  
Supreme Court

8. Whether the court erred in holding that expert testimony was necessary to establish causation.

*Harold Gene Weeks v.*  
*Eastern Idaho Health*  
*Services, Inc.*  
S.Ct. No. 32458  
Supreme Court

**CONTEMPT**

1. Did the court err in using a burden of proof less than beyond a reasonable doubt in determining Steiner was in contempt of the stipulated judgment?

*Charles W. Steiner v.*  
*Carol Gilbert*  
S.Ct. No. 32322  
Supreme Court

**POST-CONVICTION RELIEF**

1. Did Briggs present a genuine issue of material fact bearing on the question of whether his appointed counsel was ineffective?

*Todd Robert Briggs v.*  
*State of Idaho*  
S.Ct. No. 32502  
Court of Appeals

2. Did the court err in dismissing Kendall's petition for post-conviction relief prior to ruling on his response to the notice of intent to dismiss, which was, in essence, a motion to appoint new counsel?

*Jason Kendall v.  
State of Idaho  
S.Ct. No. 32397  
Court of Appeals*

3. Did the district court err by denying Lamm's motion to disqualify the district court for cause, without a hearing, as required by Idaho Civil Rule 40(d)(2)(B)?

*Joel Shay Lamm v.  
State of Idaho  
S.Ct. No. 32365  
Court of Appeals*

4. Did the court err in summarily dismissing Martinez's claim and in finding that he had not raised a genuine issue of material fact as to the validity of his guilty plea?

*Cruz Martinez v.  
State of Idaho  
S.Ct. No. 32349  
Court of Appeals*

5. Did the district court err when it summarily dismissed McCabe's claim that his counsel was ineffective for failing to object to the inclusion of confidential and erroneous information in the PSI?

*Darrell McCabe v.  
State of Idaho  
S.Ct. No. 32067  
Court of Appeals*

6. Did the court err in denying Scott's claim that he was denied effective assistance of counsel?

*Dean H. Scott v.  
State of Idaho  
S.Ct. No. 32566  
Court of Appeals*

7. Whether the court erred in dismissing the claims presented in Smrz's petition for post-conviction relief.

*Patrick Smrz v.  
State of Idaho  
S.Ct. No. 31692  
Court of Appeals*

## **BONDS**

1. Did the court have authority to exonerate the bond after forfeiture when the reason the defendant was not brought before the court within 90 days of forfeiture was because he was incarcerated in another state?

*State of Idaho v.  
Quick Release Bail Bonds  
S.Ct. No. 32460  
Court of Appeals*

## **REAL PROPERTY**

1. Did the district court abuse its discretion by denying Bautista's motion to set aside the default and the default judgment forfeiting real property pursuant to I.C. 37-2744A?

*Idaho State Police v.  
Real Property in Cassia County  
S.Ct. No. 32593  
Supreme Court*

## **WILLS**

1. Whether a post mortem witness subscription may be used to satisfy the execution requirements for a will under I.C. § 15-2-502.

*Christine Spelius v.  
Inez Hollon  
S.Ct. No. 32660  
Supreme Court*

## **CRIMINAL APPEALS PLEAS**

1. Did the court abuse its discretion when it denied Hunter's motion to withdraw his guilty pleas?

*State of Idaho v.  
Gregory A. Hunter  
S.Ct. No. 31785  
Court of Appeals*

2. Did the State breach the plea agreement by proffering evidence and argument advocating a sentence that was inconsistent with the "rider" recommendation that it was obligated to give?

*State of Idaho v.  
Christopher Nalley  
S.Ct. No. 31986  
Court of Appeals*

3. Did the State violate the terms of the plea agreement thereby entitling Timbana to a new disposition hearing in front of a different judge?

*State of Idaho v.  
Tim Timbana  
S.Ct. No. 31891  
Court of Appeals*

## **PROCEDURE**

1. Did the court deny Cook due process of law when it denied Cook's request for a continuance?

*State of Idaho v.  
Guy Michael Cook  
S.Ct. No. 31641  
Court of Appeals*

2. Whether the court erred in denying Phillips' request for a trial by jury.

*State of Idaho v.  
Jason Phillips  
S.Ct. No. 32845  
Court of Appeals*

## **SEARCH AND SEIZURE – SUPPRESSION OF EVIDENCE**

1. Did the court err in finding that Cutler did not establish a reasonable expectation of privacy in the rental vehicle when the evidence showed he was not the renter or the authorized driver?

*State of Idaho v.  
Bobby Allen Cutler  
S.Ct. No. 31789  
Court of Appeals*

2. Did the court err in concluding that Davenport's search and seizure rights were not violated by a consensual encounter with police that evolved into a Terry frisk when Davenport refused to keep his hands out of his pockets and into a search incident to arrest when Davenport stated that he possessed syringes?

*State of Idaho v.  
Troy Davenport  
S.Ct. No. 31883  
Court of Appeals*

3. After the officer conducting the traffic stop knew the original reason for the stop was wrong, did the detention of Frink violate Frink's constitutional rights?

*State of Idaho v.  
Darrell Frink  
S.Ct. No. 32535  
Court of Appeals*

4. Did the court err in finding that McBaine consented to the search of his home and in denying McBaine's motion to suppress?

*State of Idaho v.  
Richard Lee McBaine  
S.Ct. No. 32368  
Court of Appeals*

5. Did the court err in denying Prescott's motion to suppress because she was unlawfully detained by police?

*State of Idaho v.  
Lacy Prescott  
S.Ct. No. 32081  
Court of Appeals*

6. Did the magistrate court err by holding that there were no exigent circumstances to justify a warrantless entry into Robinson's home to arrest her for misdemeanor DUI?

*State of Idaho v.  
Linda Robinson  
S.Ct. No. 32673  
Court of Appeals*

7. Did the officer have reasonable and articulable suspicion to stop the car in which Smith was a passenger?

*State of Idaho v.  
Anita Smith  
S.Ct. No. 32574  
Court of Appeals*

8. Did the court apply the wrong legal standard to Strong's challenge to the search warrant?

*State of Idaho v.  
David R. Strong*  
S.Ct. No. 32540/32552  
Court of Appeals

9. Whether the district court erred in reversing the magistrate court's order granting Young's motion to suppress because the traffic stop of Young's vehicle was not a valid Terry stop.

*State of Idaho v.  
Michael Young*  
S.Ct. No. 32624  
Court of Appeals

#### **SUBSTANTIVE LAW**

1. Did the court err in denying Gonzales' motion to vacate his conviction?

*State of Idaho v.  
Rudolph Gonzales*  
S.Ct. No. 32121  
Court of Appeals

2. Did the state violate Phillips' right to a fair trial by committing prosecutorial misconduct during closing argument?

*State of Idaho v.  
Derek Phillips*  
S.Ct. No. 31872  
Court of Appeals

#### **EVIDENCE**

1. Did the district court err by allowing the victim to testify as to property that had been returned to him because Becker had not been charged with theft of anything other than a pickup truck?

*State of Idaho v.  
Darin Becker*  
S.Ct. No. 32359  
Court of Appeals

2. Did the court commit error in declaring a witness unavailable and allowing the State to read her preliminary hearing testimony?

*State of Idaho v.  
Kevin M. Perry*  
S.Ct. No. 32472  
Court of Appeals

#### **INSTRUCTIONS**

1. Did the court commit reversible error by not instructing on the lesser included offense of aiming a firearm at another?

*State of Idaho v.  
Melvin McMinn*  
S.Ct. No. 32311  
Court of Appeals

2. Was Wolfrum prejudiced by jury instructions that were confusing and misleading?

*State of Idaho v.  
Edward Wolfrum*  
S.Ct. No. 31557  
Court of Appeals

#### **ADMINISTRATIVE APPEALS**

##### **INDUSTRIAL COMMISSION**

1. Did the Industrial Commission commit error by refusing to reopen the hearing for Dr. Berning's post-hearing deposition?

*Mary Jo Stolle v.  
Christine Bennett*  
S.Ct. No. 32429  
Supreme Court

2. Did IDLC properly compute the partial assessment percentage in light of the mandates of I.C. § 72-1351(4)(b)?

*Super Grade, Inc. v.  
Dept. of Commerce*  
S.Ct. No. 32695  
Supreme Court

3. Is there substantial and competent evidence to support the Commission's determination that claimant failed to demonstrate he suffers from an injury related to his employment, such that he is entitled to indemnity and medical benefits?

*John Wichterman v.  
J.H. Kelley, Inc.*  
S.Ct. No. 32526  
Supreme Court

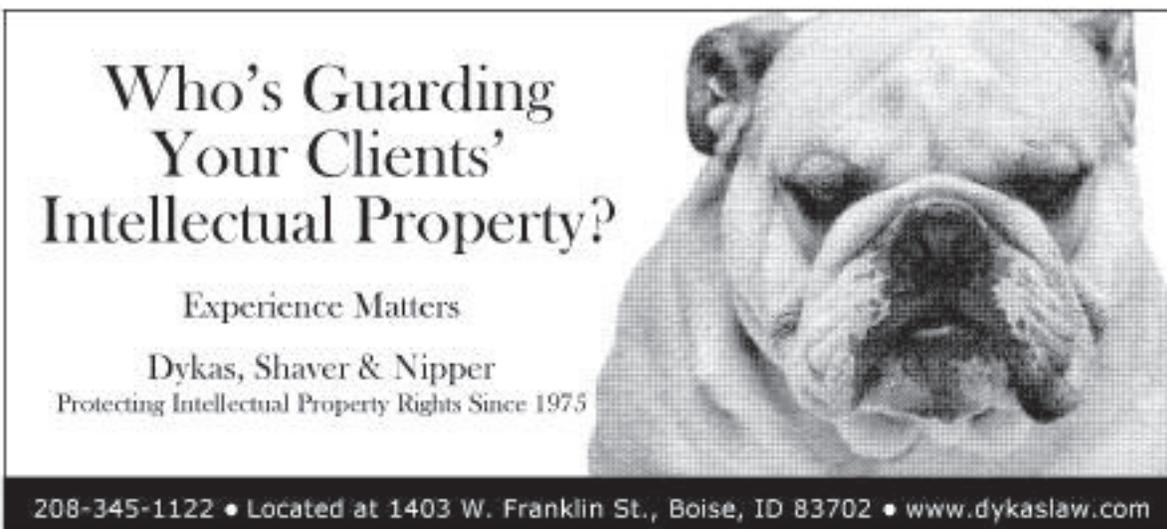
#### **SNAKE RIVER BASIN ADJUDICATION QUESTIONS**

1. Whether the United States can appropriate stock water rights based on its ownership, management and administration of public lands for grazing under the Taylor Grazing Act

*Joyce Livestock Co. v. USA*  
S.Ct. No. 32278/32279  
Supreme Court

#### **Summarized by:**

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



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# One Year Out: A young lawyer's (quest for) perspective

Benson Barrera  
*Holland & Hart, LLP*

## THOSE WERE THE DAYS

Fridays off, wake up at nine, flip flops everyday. Was law school really only one year ago? Has it already been 4 years since undergrad? Since graduation I have incessantly tried to recreate the flux capacitor. When I finally accepted that these efforts would ultimately fail, I took a step back and acknowledged how life has evolved since deciding to enter the field of law.

## WHAT IS ALL THIS JUNK?

The parameters defining a “need” and a “want” are very malleable. I possess few objects that I can point to and say “yeah, I really needed that.” Somehow I headed to law school with all my worldly possessions (minus various Star Wars figurines and sports memorabilia Mom promised to safeguard) all packed into a 5’ X 8’ trailer.

The beginning of “the accumulation” began when a loan meant to last 5 months was presented all in advance. Suddenly, Ron Popeil is creating items you could not possibly do without. How did I ever get by without a food dehydrator? The one time in the last five years when I ate a fruit roll-up, I could have made it my self and saved \$1.23; assuming I value my time at a shiny quarter/hour. Then there is the transition from wing-nut assembly futons to a full-fledged sofa. I was just beginning to wonder how many egg-crate pads I was going to stuff under the futon mattress before I was better off than simply sitting on bars. Losing the futon also magically created a mattress and box spring in addition to a sofa. Of course, the 13 inch television with built-in VCR once carried the day. Now I’m watching a 32” television and looking for my glasses.

## SELF-IMPOSED INFLATION

One interesting realization is how, upon graduation, I have less leisure time but my money disappears much faster. In law school, I was doing just about everything I wanted to do (even figuring out how to shoestring carrots on the dial-omatic food slicer) and somehow \$18,500 covered it. After which paycheck was I finally convinced that a \$9 meal was a

value when I used to have the best meals for under \$5. What is an “appetizer?” Previously, my closest encounter with this concept was at Wendy’s when I didn’t feel too hungry so only ordered a junior bacon cheeseburger. The chili, potato, and classic cheeseburger that followed once I realized how hungry I really was retroactively made that JBC an “appetizer.” Come to think of it, when did Dr. A+ become totally inadequate as a Dr. Pepper substitute? Further, the workplace had a similar affect on me as the forbidden fruit had on Adam and Eve’s awareness of nakedness in the Garden of Eden. In law school, I never noticed or cared whether my buddy was wearing his alma mater shirt for the fourth day in a row. Neither did he. Suddenly, that lone suit I wore to every single interview felt a bit inadequate even with my mitigation efforts of changing the dress shirt on a daily basis.

## YOU MEAN LEXIS AND WESTLAW ARE NOT FREE ANYMORE NOR DO THEY PROVIDE THE PRINTER PAPER?

I remember during my first month of law school I was handed two little cards; one from Lexis and one from Westlaw. I thought “big deal.” Then I noticed the printer paper with blue Westlaw and red Lexis insignia. Sure enough, printing from these databases was FREE. Talk about negative externalities. All of the sudden I am printing 50 page law review articles because it had the word “contract”

within the title. I remember unsuccessfully trying any means to send my Word documents to the Lexis printers.

I still have to enter a password but interestingly, I also have to enter a client/matter number. This additional request all but ended my habit of using the “new search” feature as if it was the same as the “locate” feature. Even worse, I can’t ever seem to find those Lexis/Westlaw reps to refill the printer when it reads “out of paper.”

## THESE ARE THE DAYS

And as I sit here thinking back on these not-too-distant memories I also look to the future and wonder when I’ll think “Remember when I was just a year out of law school and had the world ahead of me...those were the days.”

## ABOUT THE AUTHOR

*Benson Barrera is with Holland & Hart, LLP, Boise. He received his J.D. from the University of San Diego. He is a member of the Litigation; Professionalism & Ethics; Taxation, Probate and Trust Law; and Young Lawyers sections of the Idaho State Bar.*

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## IDAHO VOLUNTEER LAWYERS PROGRAM SPECIAL THANKS

*The Idaho Volunteer Lawyers Program (IVLP) would like to extend our heartfelt and enthusiastic thanks to the following attorneys 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!"*

Jessie, a 13-year-old girl in Hailey, Idaho was lucky that her grandmother, Eileen, was willing and able to take over raising her when her own parents were not up the task. Her mom dropped Jessie at her grandmother's home when she was only four. Jessie's dad was even less predictable. He had been in and out of jails and mental institutions due to drug addiction and sometimes wanting to raise his daughter and at others acting with hostility toward his mother and showing a jealous possessiveness of his daughter.

Thanks, in part, to a grant from the Walter & Leona Dufresne Fund of the Idaho Community Foundation, the Idaho Volunteer Lawyers Program (IVLP) was able to recruit volunteer attorney, **Robert W. Bartlett** of Hailey to file and secure a guardianship for Eileen and Jessie. Mr. Bartlett is 73 years young and was admitted to the Idaho State Bar in 1985, after retiring from a career as a newspaper journalist and sometimes editor. Mr. Bartlett has regularly volunteered through IVLP, donating numerous hours to help low-income people in peril like Eileen and Jessie.

Cases like these restore and maintain stability for children trying to grow in families torn apart by substance abuse and other calamities. Many grandparents begin as informal caregivers and find that because of the parents' illness, addiction, incarceration, or other absence they become full-time providers for the children without the legal rights needed to raise them. Without establishing legal guardianship, caregivers are hindered in protecting and providing for children, and the children are vulnerable to the whims of their unfit parents. For example, unless they are recog-

nized as legal guardians, caregivers may have trouble enrolling a child in school, providing permission to a doctor to give medical treatment, or qualifying for financial help to raise a child. To make matters worse, an unfit parent may intervene and try to remove the child from his stable environment, leaving the caregivers with no legal recourse through which they can protect the child

Although it was not needed in Eileen and Jessie's case, guardianships for low-income families often require IVLP to recruit two attorney volunteers, one for the caregiver, and one for the child(ren). IVLP is able to expand its capability to provide legal resources to potential guardians and children thanks to grants like this one from the Walter & Leona Dufresne Fund.

Programs like IVLP do not operate on donated time alone. It is imperative that we reach out to our friends, like the Walter & Leona Dufresne Fund and the Idaho Community Foundation, to help support the program and lead the charge to increase access to justice for low-income families and individuals in Idaho. We are grateful.

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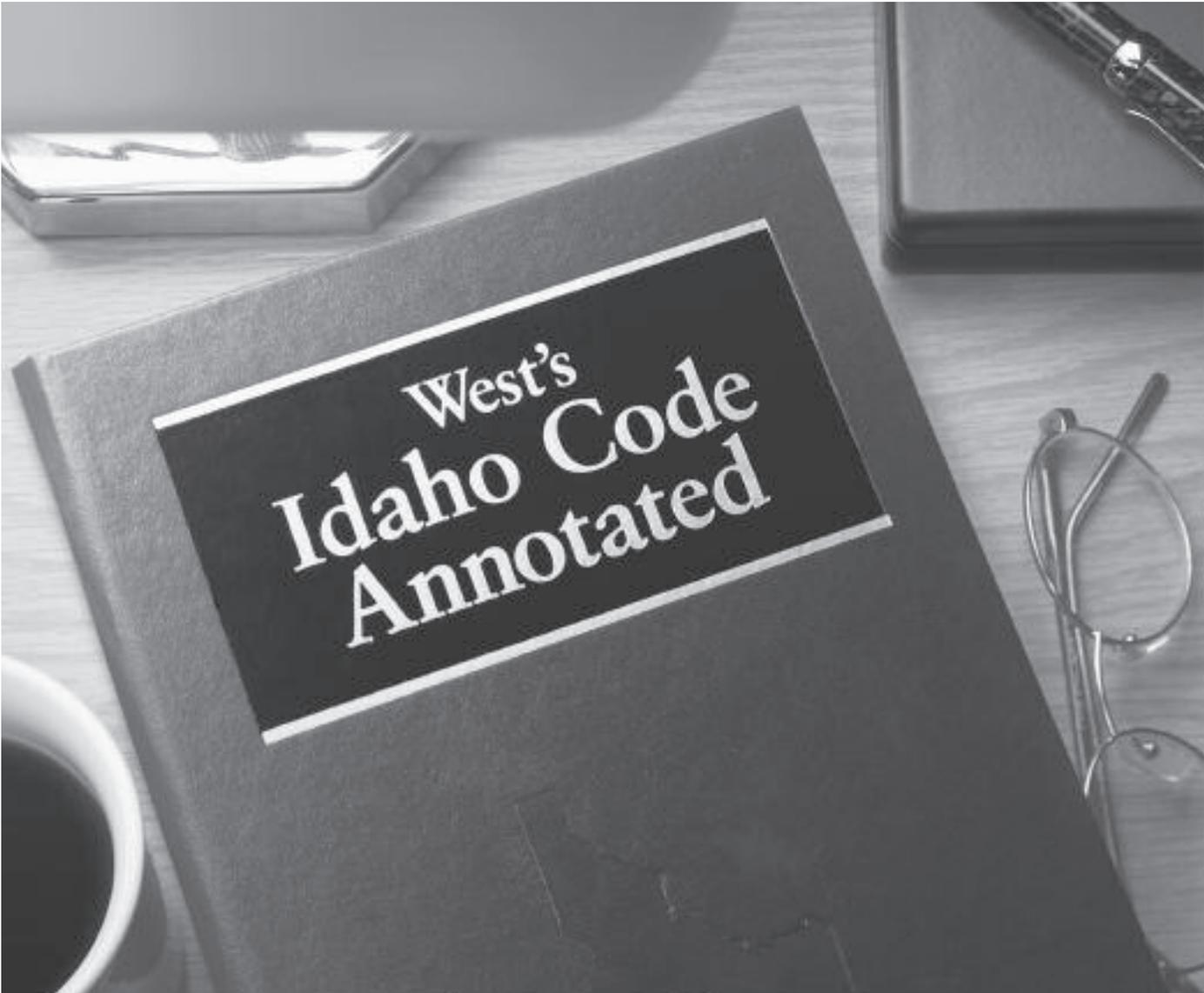
Very Special Thanks to **Bernice Myles**, Vice President of Policy and Public Affairs of the Idaho Association of Paralegals. Bernice has coordinated IVLP Volunteer Night for the Association for past two years, successfully recruiting volunteers with tasty repasts, CLE credits and prizes! **Lisa Hoag** (Idaho Department of Transportation), **Cindy Leoni** (Student, BSU Paralegal Studies Program), **Kathryn Brandt** (Penland & Munson, Chtd.) and **Frances Beezley** (Self-employed Contract Paralegal) joined Bernice (Attorney General's Office) August 2nd helping screen IVLP applicants. IVLP is greatly benefited by such lively and productive evenings.

IAP members are already signing up for the next Volunteer Night at IVLP. On Wednesday October 4, 2006, IVLP will be holding a *Pro Se* FAMILY LAW CLINIC with the assistance of volunteers from the Idaho Association of Paralegals and IVLP volunteer attorneys. Volunteer attorneys and paralegals will be available to assist in completing the Court Assistance Office forms for family law matters. This is an opportunity for those planning to represent themselves in court to talk to attorneys and paralegals without charge.

To volunteer for IVLP activities, please contact Mary Hobson at 1-800-221-3295 or [mhobson@isb.idaho.gov](mailto:mhobson@isb.idaho.gov).



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## CONTINUING LEGAL EDUCATION

### OCTOBER

#### What Every Sole Practitioner Needs to Know about Succession Agreements

Sponsored by the Professionalism and Ethics Section

*Wednesday October 4, 2006*

8:30 to 9:30 a.m.

Law Center

Join presenters Steven Smith and Sandra Clapp as they discuss the rule and ethical obligations regarding succession agreements. Learn when succession agreements are necessary, what are the applicable rules that govern if an attorney is not able to continue their law practice, and what are the ethical ramifications if an attorney does not have a succession plan in place. They will review the steps to develop a succession plan that will comply with the ethical rules and the routine office procedures that can facilitate succession of a practice.

†††

#### ANNUAL LITIGATION UPDATE

Sponsored by the Litigation Section

*October 6, 2006*

Coeur d'Alene Inn, CDA

*October 13, 2006*

Idaho Falls, Shilo Inn

Topics will include electronic discovery, IRCP Rules changes, expert disclosures and more.

†††

#### BUILDING A CASE FROM DISCOVERY TO TRIAL AND BEYOND TRIAL PREPARATION

Sponsored by the Young Lawyer Section

*Wednesday October 18, 2006*

8:00 to 9:00 a.m.

Law Center

Join speaker William Dryden from Elam & Burke, P.A. Boise as he discusses the nuts and bolts of trial preparation.

†††

#### Nuts and Bolts of Representing Your First or Next Social Security and SSI Disability Claimant

Sponsored by the Idaho Law Foundation

*Friday October 27, 2006*

8:30 to 10:30 a.m.

Filing for and obtaining Social Security and SSI disability benefits is a long and complicated process. The average dis-

abled individual has great difficulty navigating the Social Security disability regulations to a successful outcome and are often denied benefits due to technical errors even though legally they are entitled to receive benefits. This short two-hour course will focus on the basics of the disability procedures

from the initial application through the administrative hearing judge level. Join Debra Irish, an attorney with 16 years' experience in Social Security disability law, in this informative seminar.

### NOVEMBER

#### MENTORING PROGRAMS FOR NEW ASSOCIATES

Sponsored by the Law Practice Management Section

*November 1, 2006*

Law Center, Boise

Building a Case from Discovery to Trial and Beyond  
Trial Preparation

†††

#### EXAMINATION OF WITNESSES

Sponsored by the Young Lawyer Section

*Wednesday November 15, 2006*

8:00 to 9:00 a.m.

Law Center, Boise

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

†††

#### COPYRIGHT LAW

Sponsored by the Intellectual Property Section

*Thursday November 9, 2006*

8:00 to 9:00 a.m.

Law Center, Boise

### DECEMBER

#### HEADLINE NEWS—THE YEAR IN REVIEW

Sponsored by the Idaho Law Foundation

*Friday December 1, 2006*

Coeur d'Alene Inn

Coeur d'Alene

*Friday December 8, 2006*

Doubletree Riverside

Boise

*Friday December 15*

Shilo Inn

Idaho Falls

#### Is It Your MCLE Reporting Year?

No one likes last minute scrambling for MCLE credits. If your MCLE reporting period ends on December 31, 2006 and you are need more credits, visit the ISB website?www.idaho.gov/isb?for lists of upcoming live courses and approved online and tape courses. Do not wait until November or December to get the credits you need. Start working on it now. Questions about MCLE compliance? Contact the Membership Department at (208) 334-4500 or [jhunt@isb.idaho.gov](mailto:jhunt@isb.idaho.gov).

## IN MEMORIAM

**JAMES F. FELL**  
**1944 - 2006**

**James F. Fell**, 61, died peacefully at home on Aug. 26, 2006. Jim was born Nov. 18, 1944, in Toledo, Ohio.

He earned a B.A. in economics from the University of Notre Dame in 1966 and received his law degree cum laude from The Ohio State University College of Law in 1969. He was a third-generation attorney, following in the tradition of his father (George H. Fell) and grandfather (George N. Fell). Jim began his career at private law firms in New York City and Los Angeles, where he became a partner at McKenna & Fitting. He moved to Boise, Idaho, in 1978 and served as an attorney and administrator with the Idaho Public Utilities Commission. In 1981, Jim chose to make Portland his home. At the Northwest Power Planning Council, he served as general counsel and deputy director, with legal and administrative responsibility for developing the Council's first Northwest Power Plan and Columbia River Basin Fish and Wildlife Program. Jim joined Stoel Rives as a partner in 1984 and grew to be regarded as a patriarch in the firm's Energy and Telecommunications practice group. Widely considered one of the top public-utility lawyers in the Northwest, he chaired the Oregon State Bar's Public Utility Law Section and was listed in *The Best Lawyers in America* for more than a decade. Jim retired from Stoel Rives in 2005.

For 36 years, the law was his art, the unfolding of his talents. As a mentor to colleagues, friends, and family, Jim was generous with his wisdom and support. He always sought to bring out the best in people. He was kind, truthful and fair; few people were trusted by so many. An avid golfer and motorcycle enthusiast, Jim lived a full and vital life, keeping fit throughout his life. Jim will be greatly missed by his beloved wife of 25 years, Betty Fell; daughter, Jennifer Fell; son and daughter-in-law, Brian and Stacey Fell-Eisenkraft; and grandchildren, Cornelia Rose and Leopold Frederick Fell-Eisenkraft. He also is survived by his mother, Bibianne Caroline (Hebert) Franklin; brothers, George, Rich, Charles, and John Fell; sisters, Madelyn Fell and Dorian Fitz; and much-loved nieces and nephews.

**JAMES L. "LARRY" SCHOENHUT**  
**1930 - 2006**

**James L. "Larry" Schoenhut**, Cascade, Idaho passed away on Sept. 14, 2006. He was born November 22, 1930 in Boise, Idaho to Courtney L. and Hilma Nortune Schoenhut of Cascade. Larry grew up in Cascade attending Cascade Schools until his senior year when he attended Brown Military Academy.

During his teen years he worked on the US Geological team, managed the Warm Lake Plunge and fought forest fires for the US Forest Service. Larry attended Annapolis Naval Academy where he was a member of the swim team and acquired his love of sailing. He enlisted in the Army and served in Korea for two years. Upon his discharge he attended the College of Idaho for pre-law. During this time he met and married Marilyn Gifford. They moved to Salem, Ore. where he received his J.D. from

Willamette Law School. He was admitted to the Idaho State Bar in 1957. Larry and Marilyn then moved to Cascade where he opened his law office. He had a diverse career as Prosecutor, Public Defender, private practice, and Magistrate until his retirement in 1996. During his lifetime he wore many hats as Scoutmaster, Commander of the American Legion Post in Cascade, Member of the Masonic Lodge, Chairman of the Idaho State Young Republicans, President of the Idaho Prosecuting Attorney Assn., Battery "A" Assn 300th Armored Field Artillery Battalion, US Naval Academy Alumni Assn. and the Veterans of Foreign Wars Post 63. He had many interests; he was an avid reader, enjoyed skiing, sailing, swimming and spending time in Warm Lake. Larry was an active participant and performed in many plays for the McCall Little Theater. He also was a strong supporter of the McCall Music Festival and Idaho Public TV and Radio. He is survived by Marilyn Schoenhut, daughter Catherine (Paul) Tonks, son Michael, daughter Christine Diehl, son Douglas, Aunt Betty Nortune, numerous cousins and his beloved Chow Ted E. Bear. While living in Cascade he took on the responsibility of raising two of the grandsons, Andy Mark Despeaux and Steve Schoenhut. He enjoyed this challenging time in his life. He always enjoyed watching all of his grandchildren and great-grandchildren play in sports. He is also survived by 12 grandchildren and 15 great-grandchildren. He touched the lives of many and will be greatly missed by all.

## — ON THE MOVE —

**Kyle M. Yearsley** joined the firm of Hall, Farley, Oberrecht & Blanton, PA, as an associate. He received his B.A. in Business Administration from Albertson College of Idaho. He worked for several years in the high tech sector. He was part of a start-up company that commercialized and patented a non-destructive testing technology developed at the INEEL. He then attended Gonzaga University School of Law and received his J.D. in 2005. Concurrent with receiving his law degree, he also attended Gonzaga's Jepson School of Business and received his Masters in Business Administration. He was an associate editor for the *Gonzaga Journal of International Law* and he obtained legal experience working for Evans, Craven & Lackie, P.S. in Spokane, Washington.

Prior to joining the firm, Mr. Yearsley served as law clerk to the Honorable Gregory M. Culet in the Third Judicial District of Idaho. He is currently licensed to practice law in all courts of the State of Idaho and the U.S. District Court for the District of Idaho. He is a member of the Business & Corporate Law, Real Property, and Young Lawyers Practice Sections of the Idaho State Bar. He is also a member of the American Bar Association.

**James S. Thomson, II**, with the Law Office of Hall, Farley, Oberrecht & Blanton, P.A. has become a shareholder in the firm. Mr. Thomson has been with the firm since 2000. His practice areas include general insurance defense, insurance coverage, defense of insurance bad faith claims, professional malpractice, products liability and defense of civil rights and constitutional litigation. Mr. Thomson's work has included the defense of

## OF INTEREST

numerous cases on behalf of individual, insurance and corporate clients involving motor vehicle collisions, premises liability, contract disputes, insurance bad faith claims, product and construction defect claims, medical and dental malpractice claims, E&O claims against insurance agents and prisoner civil rights litigation.

Prior to joining the firm, Mr. Thomson served on active duty as an attorney with the United States Air Force Judge Advocate General's Department and was stationed at Mountain Home Air Force Base, Idaho. As an Air Force attorney, he prosecuted criminal cases before military courts-martial and as a Special Assistant United States Attorney for the District of Idaho. He also worked in a variety of civil practice areas, including environmental and government contract law.

He received his B.S. degree in Business Administration from the University of Florida in 1990. He received his J.D. with Honors from the University of Memphis in 1996.

Mr. Thomson is admitted to practice before all courts in the State of Idaho, the U.S. District Court for the District of Idaho, the U.S. Court of Appeals for the Ninth Circuit, the U.S. Air Force Court of Criminal Appeals and the U.S. Court of Appeals for the Armed Forces. He is a member of the American Bar Association, the ABA Section of Litigation, ABA Tort and Insurance Practice Section, and American Inn of Court No. 130. He is also a member of the Idaho Association of Defense Counsel and Boise Adjuster's Association. Mr. Thomson has presented lectures concerning the defense of automobile injury cases and loss prevention for insurance agents.

### — RECOGNITION —

**Holland & Hart** was ranked among the top 10 firms in the nation based on pro bono participation according to the American Lawyer's 2006 Pro Bono Report. With more than 80 percent of the firm's attorneys undertaking more than 20 hours of pro bono work in 2005, Holland & Hart was ranked sixth nationally.

According to the publication, Holland & Hart attorneys averaged 88 pro bono hours each. Nation-wide only 10 firms averaged more than 85 pro bono hours per attorney, and only five firms had more than 80 percent of their lawyers undertaking more than 20 pro bono hours.

"Giving back to our communities is a guiding principle of Holland & Hart," said firm Chair Paul Phillips. "This includes our pro bono legal work, and The American Lawyer ranking reflects the commitment of our attorneys to act upon that principle. The people who founded Holland & Hart taught us that practicing law is a privilege, not a right, and brings with it an obligation to give back to the communities and society we live in."

**E. Lee Schlender** was appointed to the Board of Governors of the American Board of Professional Liability Attorneys (ABPLA) at the annual meeting held June 10th 2006 at the Ritz-Carlton Hotel, Palm Beach, Florida. ABPLA is a certification Bar approved by the ABA for Specialists both for Plaintiffs and Defendants in medical and legal malpractice litigation, based in

New York City, New York. Certification may be obtained by written and oral examinations. Mr. Schlender encourages all Idaho attorneys in these fields to apply for admission; the application forms are on the Internet under ABPLA. The 2007 annual meeting will be held in San Francisco, California. Further information may be obtained from Mr. Schlender at 208-587-1999.

#### *2007 Best Lawyers in America*

Several Idaho State Bar members have been named. The publisher's website, [www.Bestlawyers.com](http://www.Bestlawyers.com), the list is compiled through "an exhaustive peer-review survey in which thousands of top lawyers in the U.S. confidentially evaluate their professional peers." Noted legal publisher ALM has praised *Best Lawyers* as "the most respected referral list of attorneys in practice."

**William Breck Seiniger, Jr.**, Seiniger Law Offices, PA was selected for *2007 Best Lawyers in America*, biennial listing in the category of employee benefits law. Mr. Seiniger has been practicing employment, personal injury, and workers' compensation law in Idaho since 1979. He is an honors graduate of the University of Massachusetts at Amherst, and the University of Idaho College of Law. He previously received the highest peer-review rating from the industry leader Martindale-Hubble, and is a recipient of the Idaho State Bar's award for outstanding service to the profession.

**Richard E. Hall, Donald J. Farley and Candy W. Dale** with the firm of Hall, Farley, Oberrecht & Blanton, P.A. have been named in the 2007 edition of *The Best Lawyers in America*. They are of a distinguished group of attorneys who have been listed in Best Lawyers for ten years or longer.

**Brian Ballard**, real estate; **Steven W. Berenter**, labor and employment law; **Merlyn W. Clark**, commercial litigation and alternative dispute resolution; **John M. Gown Jr.**, tax law and trusts and estates; **Craig L. Meadows**, commercial litigation; **Nicholas G. Miller**, corporate law and public finance; and **Richard A. Riley**, corporate law and mergers and acquisitions, all partners in Hawley Troxell Ennis and Hawley LLP have been listed in the 2007 edition of *The Best Lawyers in America*. The attorneys and the fields in which they were recognized for their expertise are as follows: Both Clark and Miller have been listed in the directory for the past 10 years.

**Richard Greener, Christopher Burke**, and his father, **Carl Burke**, with the law firm of Greener Banducci Shoemaker P.A. have been named in the *2007 Best Lawyers in America*. Richard Greener has been listed for several years in a row, and Carl Burke is one of a small number of attorneys who have been listed in Best Lawyers in America for twenty years or longer.



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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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Northwest Farm Credit Services is a multi-state agricultural lender headquartered in Spokane, Washington. It seeks to fill an entry level in-house counsel position to assist in documenting, closing and servicing complex loans and leases, work on assigned projects and provide general legal support in a variety of areas of operations.

The successful candidate must be a motivated, self directed and committed team player with exceptional writing, communication, interpersonal and customer service skills. They must be able to understand complex fact patterns, often presented verbally or through email communication, and then assist senior lending and legal staff to structure and document loan packages which address these facts and comply with legal and policy requirements. They must handle multiple and conflicting work priorities in a very fast paced and open office environment. Once exposed to a product or responsibility, the candidate is to then carry out future comparable responsibilities independently and with minimal supervision.

Bachelors Degree (Business or Finance preferred), and a Juris Doctorate Degree with admission to practice law in Washington, Oregon, Idaho or Montana. Must comply with Washington in-house counsel rules. Relevant training or experience in commercial and residential lending, real property, secured transactions, bankruptcy and related areas of law would be helpful.

Competitive compensation and benefits package available. For immediate consideration, apply online at [www.farm-credit.com](http://www.farm-credit.com). Equal Opportunity Employer.



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