

The Advocate

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Cornerstones for My Law Practice

Jay Q. Sturgell



Hello, This is my first *Advocate* column so let me begin by introducing myself. My name is Jay Q. Sturgell. I am a sole-practitioner living and practicing in

Kellogg, Idaho, population 2,400 in Shoshone County. My wife Michelle is my office manager, my best supporter, and yes, we are still happily married. It was even her idea that I should run for Bar Commissioner for the First and Second Districts. We have two daughters, Emily, age sixteen, who is currently enjoying time away at camp and Micah, age seven, who scored three goals this soccer season. We have two Italian Greyhounds, two fire-belly-ed newts, and until earlier this week, two goldfish (Unlawful and Detainer met a nasty end thanks to some Ick in the tank). That's the important stuff, the minor details can be found in the blurb at the end of this column.

I am deeply honored and humbled to be the newest President of the Idaho State Bar. I am the heir to rich traditions and examples of the prior presidents, commissioners, and staff of the Idaho State Bar, and I follow in the footsteps of some of the greatest Idaho attorneys who ever practiced. Truly, I stand on the shoulders of giants.

As a Bar Commissioner, I have had the chance to travel to other states and meet with members of other state bars at different American Bar Association functions. While it is tremendous to meet so many great people from other states, my discussions with them often serve to remind me just how good we have it here. We here in Idaho have a real treasure in our Bar Association. This is not an accident, rather our happy circumstances are due to the efforts of the Executive Director, Bar Counsel, and all of the Staff.

So now that I have a Bully Pulpit what do I do with it? I am convinced that we are only truly good at what we care about, so I will share with you a subject that I am passionate about.

I was visiting the University of Idaho College of Law with the rest of the Board of Commissioners when a law student posed the question, "Is there any specific class or subject that will help us survive/succeed? And more importantly get a job?" A very good question, one I'm sure many of us have asked.

They say fools rush in where angels fear to tread. Well, I got up on my soap box and delivered a whole sermon. (You can draw what inference you may from that.)

But before I tell you what I said, allow me to share with you a lesson I learned about the law of unintended consequences. As I was waxing eloquent on my topic, unbeknownst to me, Judge Stephen S. Trott of the Ninth U.S. Circuit Court of Appeals, who was also visiting the Law School, was in the audience, sequestered among the 3Ls, an unexpected audience for my soapbox sermon.

Later that evening I attended the CLE taught by Judge Trott. To my surprise, he told all of the assembled that he had heard me address the law students and then he summarized what I had said.

I learned at that moment, to be careful what I say, especially when I get up on my soapbox, after all, you never know who is in the audience. I'm so glad I didn't say something stupid.

The content of my discourse was thankfully, simple, direct, and I believe, good advice. I told the students that no one class or topic was the "Silver Bullet." Instead the keys to success are very simple:

- **BE PREPARED**
- **BE PROFESSIONAL**
- **BE POLITE**

These are important cornerstones for my practice, for any law practice, ones that are often overlooked in studying for exams or in the day to day pressures of life and a career. I believe any successful attorney must abide by them, and that anyone who does abide by them will bring honor to themselves and the profession. These principals are so important that I will devote three of my columns to discussing and explaining each of them.

As I reach the end of my first column, know that I am very excited about my term. I love this job and I love working with the great folks at the Bar. Michelle was right, the announcement for a Bar Commissioner was like someone sat down, looked at my resume, and said, "What would be interesting and fun for this guy to do?" Since I know that my wife, office manager, and jack-of-all trades (and the master of a surprising number of them) will forward a copy of my first column to my proud parents, Hi Mom!

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, Smeltonville, and Mullan. Jay is the first attorney from the Silver Valley to be a Commissioner since 1965. You can reach Jay at (208) 784-4035 or sturgellcs@usamedia.tv

NEWS BRIEFS

Resolution Deadline: The deadline for submission of resolutions to be considered for the 2006 RoadShow is September 25, 2006. Please send all information to Diane Minnich, PO Box 895, Boise, ID 83701: or dminnich@isb.idaho.gov

Lansing L. Haynes, Coeur d'Alene has been appointed as a District Judge for First Judicial District (encompassing Benewah, Bonner, Boundary, Kootenai, and Shoshone counties). The position, which he is filling immediately, was approved by the 2006 Legislature. Prior to his appointment Judge Haynes was the Chief Deputy Prosecutor for Kootenai County. He has worked in the Prosecuting Attorney's Office since 1988. He was also a Deputy Prosecutor for Canyon County, and Deputy Public Defender for Ada County. He moved to Coeur d'Alene in 1988. He is a member of the Idaho State Bar, the Kootenai County Bar, the Idaho Prosecuting Attorneys, and the National District Attorney's associations. He is also a member of the Governor's Task Force on Drug Endangered Children and an officer in his local Knights of Columbus organization. Judge Haynes is a graduate of the College of Idaho and received his J.D. from Willamette College.

Magistrate Judge Gordon W. Petrie has been appointed as a District Judge for the Third Judicial District (encompassing Adams, Washington, Payette, Gem, Canyon and Owyhee counties). This judicial seat was approved by the 2006 Legislature. Judge Petrie was appointed to the bench as a magistrate in 1989. His tenure was interrupted when he was deployed to Kuwait and Iraq with the Idaho National Guard from June 2004 until November 2005. He is a colonel in the Idaho National Guard and is the Deputy Brigade Commander of the 116th Brigade Combat. He returned to the bench in Emmett following his tour of duty. Prior to his appointment as a magistrate judge he was in private practice in Lewiston from 1983-1988. He served as Prosecuting Attorney for Nez Perce County from 1977-1982. He is a past president of the Idaho Prosecuting Attorneys Association. Judge Petrie is a graduate of Idaho State University and received his J.D. from the University of Idaho College of Law in 1976.

Jerold W. Lee, Meridian was appointed Magistrate Judge for Canyon County on July 7. Prior to his appointment Judge Lee was a Deputy Attorney General for Idaho. He was in private practice with Benoit, Alexander, Harwood, High and Butler in Twin Falls. He also served as deputy prosecuting attorney in

Clearwater County and maintained a solo law practice in Orofino. He received his undergraduate degree from the University of Washington and his J.D. from the University of Idaho College of Law.

George W. Southworth, Pocatello was appointed Magistrate Judge for Canyon County on July 7. Since 1987 he has maintained a general law practice in Pocatello, with an emphasis on criminal defense. As part of his practice he provided public defender services for Power and Oneida counties. He was also involved in problem-solving (drug and juvenile school attendance) courts in the Sixth Judicial District. He received his undergraduate degree from Idaho State University and his J.D. from the University of Utah.

George G. Hicks, has been appointed as magistrate judge in Elmore County. Prior to his appointment to the bench he was in private practice with the firm Hoagland, Dominick and Hicks. His work includes criminal defense, real estate, family law and business litigation practice. He has been a Deputy Boise City Attorney, working in both the criminal and civil divisions. He holds a B.S. from the University of Idaho and a J.D. from the University of Idaho College of Law. His appointment in Elmore County begins September 5, 2006.

Theresa L. Gardunia, Idaho City has been appointed a magistrate judge in Ada County, filling a newly created position. She has served as the Boise County Prosecuting Attorney since January 1997 where she is responsible for all felony, misdemeanor, juvenile criminal matters, child protection cases, as well as representation on all civil matters on behalf of Boise County. She received her J.D. from the University of Idaho College of Law. She begins her appointment to the Ada County District Court on October 2, 2006.

William G. Harrigfeld, Boise has been appointed magistrate judge in Ada County filling a newly created position. He has been in private practice since 1999, specializing in civil and criminal litigation, corporate, and personal injury law. He has also worked under contract with the State of Idaho, Bureau of Children Services. In 1997, he served as a deputy prosecuting attorney for Valley County, prosecuting criminal cases. He received a B.A. from Pacific Lutheran University and his J.D. from the University of Idaho College of Law. His appointment to the Ada County District Court begins October 2, 2006.

IDAHO LAWYER ASSISTANCE PROGRAM

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

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

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

KIMBALL W. MASON

(Resignation in Lieu of Discipline)

On June 20, 2006, the Idaho Supreme Court accepted a "Resignation in Lieu of Disciplinary Proceedings" from Idaho Falls attorney Kimball W. Mason.

In accepting the resignation, the Court considered Mr. Mason's acknowledgement that formal charge disciplinary proceedings were pending at the time of his resignation. Although Mr. Mason did not admit or deny the allegations contained in the formal charge complaint upon submitting his resignation, he expressed his desire not to contest or defend against them.

The formal charges pending against Mr. Mason and his subsequent Resignation in Lieu of Disciplinary Proceedings were precipitated by the State of Idaho charging Mr. Mason with, and his pleading guilty to, one felony count of Falsifying a Public Record pursuant to I.C. § 18-3201, and two felony counts of Grand Theft pursuant to §§ 18-2403 and 18-2407(1)(b).

By the terms of the Court's Order, Mr. Mason's name has been stricken from the records of the Court and his right to practice law before the courts in the State of Idaho has been terminated.

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

CHRISTA L. TURNELL

(Public Reprimand/Withheld Suspension)

On June 26, 2006, the Idaho Supreme Court issued a Disciplinary Order imposing a public reprimand and a 92-day withheld suspension on Sandpoint lawyer Christa L. Turnell, based on professional misconduct.

The Supreme Court's Order followed a stipulated resolution of an Idaho State Bar disciplinary proceeding and a Professional Conduct Board recommendation. Ms. Turnell was found to have violated Idaho Rules of Professional Conduct 1.2(a) [Scope of Representation], 1.3 [Diligence], 1.4 [Communication], 3.3(a)(1) [Candor Toward the Tribunal], 8.4(c) [Conduct involving dishonesty, fraud, deceit and misrepresentation] and 8.4(d) [Conduct prejudicial to the administration of justice].

The Idaho Supreme Court found that Ms. Turnell violated I.R.P.C. 1.3, 1.4 and 8.4(d) with respect to her representation of a client in a criminal matter before First District Judge John T. Mitchell, for failing to timely appear at two scheduled court hearings and for failing to inform her client that she would not be in attendance at these hearings at the date and time scheduled for them to begin. The Court also found that Ms. Turnell violated I.R.P.C. 3.3(a)(1), 8.4(c) and 8.4(d), for falsely informing Judge Mitchell that she had arrived timely to the first court hearing and for falsely informing Judge Mitchell that her tardiness to the second hearing was due to a traffic jam on a bridge caused by an automobile accident.

The Idaho Supreme Court further found that Ms. Turnell violated I.R.P.C. 1.4 with respect to her representation of another client in a child custody case for failing to inform her client that she would not be appearing at the trial in the custody matter.

The Idaho Supreme Court found that Ms. Turnell violated I.R.P.C. 1.2(a) for failing to represent another client at his sentencing hearing, when Ms. Turnell had been retained to represent him through sentencing.

In addition to the public reprimand and 92-day withheld suspension, the Idaho Supreme Court further ordered that Ms. Turnell serve an 18-month period of probation.

The public reprimand and withheld suspension do not limit Ms. Turnell's eligibility to practice law.

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

SPENCER E. DAW

(Disbarment)

On July 28, 2006, the Idaho Supreme Court issued an Order of Disbarment disbarring Idaho Falls lawyer Spencer E. Daw from the practice of law in the State of Idaho. The Idaho Supreme Court's order followed a Professional Conduct Board Recommendation of disbarment in a formal charge disciplinary proceeding filed by the Idaho State Bar (ISB).

On January 12, 2005, the Idaho State Bar filed an eight-count formal charge Complaint against Mr. Daw. Four counts concerned client matters and four counts involved Mr. Daw's failure to respond to Bar Counsel in its investigation of those matters. Mr. Daw failed to file an answer or otherwise respond to the Complaint. The ISB thereafter filed a Motion to Deem Admissions (Default) and for Imposition of Sanctions, which was granted.

Count One of the Complaint alleged that Mr. Daw failed to perform or complete any substantial work on behalf of his client in a case involving a dispute with the client's mortgage company, which resulted in the foreclosure of his client's home and eviction. Count One further alleged that Mr. Daw failed to prepare and file a bankruptcy on behalf of this client, and that despite his client's request for a refund of the fee paid, Mr. Daw failed to return the unearned fee. The client in this matter filed a claim against Mr. Daw with the ISB Client Assistance Fund alleging dishonest conduct for his failure to return the unearned fee. The ISB Board of Commissioners approved the Client Assistance Fund Committee's recommendation that the client be reimbursed the \$1,385 fee paid due to Mr. Daw's dishonest conduct.

Count Three of the Complaint alleged that in a separate matter Mr. Daw failed to communicate with his client, failed to complete and file a bankruptcy petition, and failed to return the unearned fee. His client in this matter filed a claim against Mr. Daw with the ISB Client Assistance Fund alleging dishonest conduct for his failure to return the unearned fee. The ISB Board of Commissioners approved the Client Assistance Fund Committee's recommendation that the client be reimbursed the \$800 fee paid due to Mr. Daw's dishonest conduct.

Count Five of the Complaint alleged that in another matter Mr. Daw failed to provide his client with an accounting of the fees as requested and that he further failed to return any portion of the unearned fee to his client. The client filed a claim against Mr. Daw with the ISB Client Assistance Fund alleging dishonest conduct for his failure to return any unearned fee. The ISB Board of Commissioners approved the Client Assistance Fund Committee's recommendation that the client be reimbursed \$475 of the \$1,000 retainer paid.

Count Seven of the Complaint alleged that in a separate matter Mr. Daw failed to prepare and file a bankruptcy petition on

behalf of his client, failed to communicate with his client about the status of the bankruptcy and failed to return the unearned fee.

Counts Two, Four, Six and Eight of the Complaint alleged that Mr. Daw failed to respond to Bar Counsel's Office in its investigation of the above disciplinary matters.

The Idaho Supreme Court concluded that the recommendation of the Professional Conduct Board was well-supported and that Mr. Daw had violated the Idaho Rules of Professional Conduct as alleged. The Court stated:

"The Court concludes there is clear and convincing evidence in the record of Mr. Daw's numerous violations of the Idaho Rules of Professional Conduct, including but not limited to the following:

A. Violations of Rule 1.3 – Diligence; 1.4 – Communication; 1.1 – Competence; and 1.16 – Declining or Terminating Representation:

a. by failing to take action on behalf of a client resulting in the foreclosure of the client's home and subsequent eviction

b. by leaving town, whereabouts unknown, without notifying clients and while matters were pending for which he had agreed to provide services

c. by failing to maintain any contact with clients and refusing to return telephone calls regarding the cases

B. Violations of Rule 1.5 – Fees and 8.4 – Conduct involving dishonesty, fraud, deceit or misrepresentation:

a. by accepting fees to represent clients in bankruptcies and in a foreclosure and failing to take any action or return the fees

b. by accepting a retainer in a divorce modification and refusing to return the unearned fee when no services were provided

In addition, Mr. Daw's conduct throughout these disciplinary proceedings demonstrated a total lack of cooperation in violation of Rule 8.1 and Bar Commission Rule 505(e), in failing to respond to a lawful demand for information from a disciplinary authority. He left the State of Idaho in the fall of 2003 without leaving a forwarding address or any way for bar counsel or clients to contact him. While he, on occasion, sent in correspondence, he failed to timely respond to Bar Counsel's telephone calls and letters sent by certified mail. On occasion bar counsel also attempted to contact Mr. Daw through publication in *The Advocate*. It was not until July of 2005 that Mr. Daw finally advised bar counsel of his current address, where he had been living since 2003. In March of 2004, this Court placed Mr. Daw on inactive status for non-payment of his 2004 licensing fee.

In his [objection to the recommendation of disbarment filed with the Court], Mr. Daw contends that he was not properly notified of the potential consequences of his actions. Specifically, he argues that bar counsel only rec-

ommended a five-year suspension, a penalty with which he apparently agreed. His argument is that complete disbarment is in excess of the proposed sanction and he had no notice or an opportunity to be heard. Quite the contrary, Mr. Daw had multiple opportunities to respond and be heard about both the allegations of misconduct as well as proposed sanctions. Despite those opportunities, he failed to personally appear and failed to respond with a defense or argument about the proper sanction. The Hearing Committee noted in its Findings that, after accepting the default on the allegations against Mr. Daw based upon his failure to respond, the Committee nevertheless 'deferred the hearing on the imposition of sanctions to make sure the Defendant had ample time to review the exhibits submitted by the [ISB] and to otherwise prepare his defense for the sanctions hearing. On the morning of the sanction hearing, Defendant faxed his objection to the imposition of sanctions, but did not appear in person or by phone for this hearing even though he knew the Committee would be considering his ability to practice law in the state.' The Committee found Mr. Daw had been provided due process in this matter and this Court agrees.

In its analysis of the appropriate sanction, the Hearing Committee also noted Mr. Daw's extensive record of prior disciplinary offenses; that he has a dishonest or selfish motive demonstrated by his actions; that he engaged in a repeated pattern of misconduct since he was admitted to practice in 1980; that he has acted in bad faith in obstructing bar counsel's investigation of the complaints against him; and that he has refused to acknowledge the wrongful nature of his conduct, causing significant damage to his clients.

As indicated above, this Court retains the final authority regarding the imposition of discipline against an attorney and is not bound by the recommendations of bar counsel or the Hearing Committee. Based upon Mr. Daw's conduct articulated above, which is supported by clear and convincing evidence, we conclude that the recommendation of the Professional Conduct Board is well-supported and justifies the sanction of DISBARMENT."

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

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

NOTICE TO THOMAS WIDMAN OF CLIENT ASSISTANCE FUND CLAIM

Pursuant to *Idaho Bar Commission Rule* 614(a), the Idaho State Bar hereby gives notice to Thomas Widman that a Client Assistance Fund claim has been filed against him by former client Juan Carlos Landeros in the amount of \$10,500.00. Please be advised that service of this claim is deemed complete fourteen (14) days after the publication of this issue of *The Advocate*.



Updates and Reminders

Diane K. Minnich



REMINDER: PROPOSED RESOLUTIONS DUE SEPTEMBER 25

Do you, your section, committee or district bar have an issue you think should be discussed and voted upon by the Bar membership. If so, the fall resolution process, or "RoadShow" is the opportunity to propose issues for consideration by members of the Bar.

Idaho Bar Commission Rule 906 (pages 278-279 of the 2006 Directory) governs the resolution process. **Resolutions for the 2006 resolution process must be submitted by September 25, 2006.** If you have questions about the process or how to submit a resolution, please contact me at dminnich@isb.idaho.gov or (208) 334-4500.

SURVEY OF CANDIDATES IN A CONTESTED JUDICIAL ELECTION

For the first time last March, Idaho State Bar members were surveyed concerning qualifications of judicial candidates for contested elections. In May, there were two contested judicial elections, one in the First Judicial District and one in the

Seventh Judicial District. The Seventh District election resulted in a run off between two of the three candidates.

A few years ago, the Bar and its Committee On Judicial Independence and Judicial Integrity determined that surveying Bar members regarding judicial candidates in contested elections, and disseminating the survey results to the public could or would help the electorate make informed voting decisions.

The Bar membership passed Resolution 03-1 in 2003 that requested a survey be developed on or before January 1, 2005, with a plan for disseminating the results for use in contested judicial elections. The survey instrument was prepared in 2005, but there were no contested judicial elections that year.

After the candidates filed for the judicial positions, the survey instrument was available to the ISB members by e-mail. Bar members were asked to complete and return the survey electronically. The results were then tabulated electronically through the Idaho Supreme Court.

For anonymity, the survey does not track or retrieve Bar members' names or their individual survey data. Further, to ensure objectivity, Bar members are not

asked for anecdotal or narrative information, and no comments are permitted. The public and the judicial candidates received straight numerical data from the survey results.

SEVENTH JUDICIAL DISTRICT JUDICIAL ELECTION

The primary election in the Seventh District resulted in a runoff this November between Judge James Herndon and Darren Simpson. Prior to the election, the Bar plans to again survey Bar members regarding the candidates. The survey will be available by email in mid September. Responses to the survey will be due in early October. As soon as the results are tabulated they will be released first to the candidates and then to the media.

An announcement will appear in the Bar's weekly ebulletin prior to the dissemination of the survey. If you want the opportunity to respond to the survey, check the ebulletin and your email in mid-September.

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

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Merlyn W. Clark
Hawley Troxell Ennis & Hawley LLP

The Litigation Section of the Idaho State Bar is pleased to sponsor the September issue of *The Advocate*. This issue includes articles pertaining to issues of current interest to attorneys practicing in the field of litigation.

The Litigation Section has been resurrected from inactivity through the able leadership of Donald L. Harris, Holden Kidwell Hahn & Crapo PLLC, and is now the largest section of the Idaho State Bar, with approximately 265 members. When this message is published, the Chairperson of the section will be Michelle Points, Nevin Benjamin & McKay LLP, and new Governing Council members will have been elected at the annual meeting of the section on July 19, 2006 in Sun Valley, Idaho.

The section has an active CLE schedule. During the annual meeting of the Idaho State Bar on July 19-20, 2006, the section sponsored two three-hour seminars that were presented by the nationally known speaker, Terence F. MacCarthy, Executive Director Federal Defender Program, on the techniques of effective

cross-examination and impeachment. The section is in the final stages of planning and producing six-hour seminars to be presented in Boise, Coeur d'Alene and Idaho Falls on discovery of electronic data, the new Federal Rules governing electronic discovery, and the recently adopted Idaho Supreme Court rules governing discovery, expert witness disclosures, subpoenas and related issues. The section is also planning a two-day seminar on trial skills for young lawyers in the spring of 2007.

The section maintains a website at www.isblitigation.org containing information about section officers and contacts, announcements, CLE schedule, and links to the State of Idaho, Idaho State Bar, ABA Home Page, Idaho courts, Federal courts, research links and the Litigation Section Chat Room, which was created to provide a forum for informal communication and discussions among members of the section. On the website you will find valuable information about changes in rules and statutes that affect the litigation practice.

Section Council meetings are held on the third Friday of every month at the Idaho State Bar offices in Boise. Section members are always welcome to attend in person or by telephone. Section members receive notice and the agenda for each monthly meeting and information on how to participate via telephone.

It is the desire of the Litigation Section to continue to be an active section of the Idaho State Bar, which benefits all who participate. In you have an interest in any aspect of the litigation practice, please consider becoming a member.

ABOUT THE AUTHOR

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Litigation Section

**Civil Rules Changes: Electronic Discovery, Experts and Ethics
Presented by the Idaho State Bar Litigation Section**

Boise - September 15, 2006 at The Grove Hotel

Coeur d'Alene - October 6, 2006 at the Coeur d'Alene Inn (Best Western)

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Registration Materials available on line at www.idaho.gov/isb



How Arbitration Agreements are Enforced in Multiple Litigation

Paul Boice
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Litigation may be the only choice when multiple parties are involved in a complex dispute. State and federal civil rules of procedure are already designed to handle multiple-party litigation. Rules of interpleader and joinder can be used to bring all necessary third parties and claims into one lawsuit. The purpose of joinder of parties and claims and consolidation of trials is to avoid multiplicity of actions and unnecessary duplication of efforts by courts and litigants. Arbitration, by its voluntary nature, on the other hand, is not set up to consolidate claims or force third parties into the arbitration proceedings.

Frequently, a party involved in a complex transaction may be subject to different dispute resolution procedures with the other parties involved in the project or transaction. An example of this is found in the construction industry. The owner of a construction project may contract with several different parties, including, contractors, design professionals and or construction managers to perform work and provide services on the project. Each of the individual contracts between the parties and the owner may contain different dispute resolution procedures. For instance, the owner might have a contract with the construction manager on the project that requires all claims and disputes on the project be submitted to arbitration. The owner might then have a separate contract with the general contractor that has no arbitration agreement and instead allows the parties to litigate any claims or disputes on the project. Recently, I was involved in such a situation where I was representing the construction manager in the above example and this is what transpired.

The contractor filed suit against the owner in district court alleging breach of contract for unpaid money allegedly owed to the contractor. The owner then counterclaimed against the contractor alleging defective work and delay damages on the project. After the owner and the contractor conducted significant discovery, the owner decided to file suit against the construction manager for breach of contract and indemnification alleging that the construction manager failed to properly supervise the contractor's work. However, the contract between the owner and construction manager contained an arbitration clause mandating that the parties arbitrate any claim or dispute on the project. In spite of the arbitration provision, the owner filed suit against the construction manager, and then filed a motion to consolidate seeking to join the construction manager into the pending lawsuit with the contractor. The construction manager then filed a motion to dismiss, or in the alternative, a motion to stay the litigation pending the outcome of the arbitration proceedings between the owner and construction manager.

How will a court interpret the arbitration agreement between the construction manager and the owner? How should a court reconcile the arbitration agreement with the other pending litigation and the principals of judicial economy, complete and consistent adjudication, and fairness to all parties embodied in the Idaho

Rules of Civil Procedure? Before addressing how an Idaho court might likely resolve this issue, it is important to understand how Idaho courts have generally interpreted arbitration agreements under the Uniform Arbitration Act.

THE IDAHO UNIFORM ARBITRATION ACT

Idaho adopted the Uniform Arbitration Act in 1975 and codified it as Title 7, Chapter 9 of the Idaho Code. The Uniform Arbitration Act demonstrates a clear public policy favoring arbitration. Section 7901 of the Idaho Code states:

A provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 7901 sets forth the requirements for a valid arbitration: the agreement must be written, the arbitration clause may either contain an agreement to arbitrate any existing controversy or any subsequent controversy, and the arbitration clause must not be unconscionable, neither procedurally nor substantively.¹

This statute closely parallels the language of the Federal Arbitration Act (FAA) codified in 9 U.S.C § 2. The legislature's action in adopting the act "evinces an intent to encourage arbitration agreements as an effective means to resolve disputed issues."² In addition, there is a strong public policy favoring arbitration because it avoids the delays and expenses of litigation and serves to alleviate crowded court dockets.³ In further support of a strong policy in favor of arbitration, the Idaho Supreme Court has expressly stated that "public bodies in Idaho are bound by their agreements to arbitrate disputes."⁴

Accordingly, when a district court is confronted with a motion to dismiss or stay a proceeding pursuant to an arbitration agreement between the parties, the scope of its inquiry seems to be limited to only two issues. First, determining whether there is a valid agreement between the parties to arbitrate or not. Second, whether the claim or dispute between the parties is within the scope of the arbitration provision.⁵ Therefore, a district court should order arbitration where an agreement to arbitrate is found.⁶ The Idaho Supreme Court has further stated that beyond determining the existence of an agreement to arbitrate it is "inappropriate for the court to review the merits of the dispute as such would in many instances emasculate the benefits of arbitration."⁷

Beyond determining the existence of a valid arbitration agreement, the district court must also determine whether the particular claim or dispute is an "arbitrable issue" under the agreement.⁸ In determining whether a particular dispute is subject to arbitration, a court must first decide whether the arbitration agreement is ambiguous, which is a question of law.⁹ Agreements to arbitrate any controversy "arising out of or relating to the contract" are sufficiently broad to include tort, as well as contractual, liabilities.¹⁰ Under both the Uniform Arbitration Act, adopted by

Idaho, and the FAA, doubts about the scope of an arbitration provision are to be resolved in favor of arbitrability.¹¹

RECONCILING ARBITRATION WITH JUDICIAL ECONOMY AND FAIRNESS TO ALL PARTIES

There is no question that in Idaho arbitration agreements between parties will be enforced. However, Idaho courts have not fully addressed the issues presented by an arbitration agreement in the context of multi-party litigation. Although arbitration is generally encouraged by the courts because it expedites the settlement of disputes simply, clearly and inexpensively, in the context of multi-party litigation, the opposite can be true. Parties may be forced to duplicate time and costs in two separate proceedings and face the very real possibility of inconsistent judgments between the arbitration and litigation proceedings. In multi-party litigation where some parties are subject to arbitration and other parties are not, does the policy of complete and consistent adjudication contained in the Idaho Rules of Civil Procedure require that arbitration be denied?

The answer is probably not. Although there is no Idaho authority directly on point, the U.S. Supreme Court, has addressed this issue and generally held that arbitration must be allowed to proceed even if it would result in the possibility of inefficient maintenance of separate proceedings in different forums and result in “piecemeal” resolution of disputes.¹² Analogous to the construction situation described above, in *Moses*, the hospital was involved in two substantive disputes between the architect and the general contractor, of which only one was subject to an arbitration agreement. The Court in *Moses* stated:

The Hospital points out that it has two substantive disputes here — one with Mercury, concerning Mercury’s claim for delay and impact costs, and the other with the Architect, concerning the Hospital’s claim for indemnity for any liability it may have to Mercury. The latter dispute cannot be sent to arbitration without the Architect’s consent, since there is no arbitration agreement between the Hospital and the Architect. It is true, therefore, that if Mercury obtains an arbitration order for its dispute, the Hospital will be forced to resolve these related disputes in different forums. That misfortune, however, is not the result of any choice between the federal and state courts; it occurs because the relevant federal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement.¹³

Of course in these cases, the U.S. Supreme Court was interpreting the FAA, however, the Uniform Arbitration Act adopted by Idaho closely resembles the Federal Arbitration Act.

Getting back to the example cited above, in spite of the owner’s pleas to the court that consolidation of the two suits would promote judicial economy and provide fair adjudication for all parties involved, ultimately the district court denied the owner’s motion to consolidate and granted the construction manager’s motion to stay the proceedings pending arbitration. The result was that the owner had to simultaneously prepare for trial against the contractor and arbitrate its claims against the construction manager. The principles of judicial economy and fairness to all litigants took a back seat to the sanctity of contract law and the arbitration agreement. It would appear that in the context

of multiple-party litigation, the policies favoring arbitration outweigh the policies of judicial economy and consolidation of claims. If a party is involved in a complex transaction or project with multiple third parties it would be wise to steer clear of arbitration agreements with some, but not all, of the parties involved.

ENDNOTES

¹Idaho Code § 7901. *See also* *Lovey v. Regence Blueshield of Idaho*, 139 Idaho 37, 42, 72 P.3d 877, 882 (2003).

²*Hansen v. State Farm Mut. Auto. Ins. Co.*, 112 Idaho 663, 668, 735 P.2d 974, 979 (1987).

³*Loomis, Inc. v. Cudahy*, 104 Idaho 106, 108, 656 P.2d 1359, 1361 (1982).

⁴*International Ass’n of Firefighters, Local No. 672 v. City of Boise City*, 136 Idaho 162, 168, 30 P.3d 940, 946 (2001), citing to *Bingham County Comm’n v. Interstate Elec. Co.*, 105 Idaho 36, 665 P.2d 1046 (1983); *Bear Lake Educ. Ass’n v. School Dist. 33*, 116 Idaho 443, 447, 776 P.2d 452, 456 (1989).

⁵*See Loomis*, 141 Idaho 109, 656 P.2d 1362. *See also Lovey*, 139 Idaho 37, 41, 46, 72 P.3d 877, 881, 886; *International Ass’n of Firefighters*, 136 Idaho 162, 168, 30 P.3d 940, 946.

⁶*Loomis*, 104 Idaho 106, 109, 656 P.2d 1362 (comparing Idaho’s Uniform Arbitration Act to the FAA and case law interpreting the FAA).

⁷*Id.*

⁸*Lovey*, 139 Idaho 37, 46, 72 P.3d 877, 886.

⁹*See id.*

¹⁰*See id.*, 139 Idaho at 47, 72 P.3d at 887.

¹¹*Buckeye Check Cashing, Inc.*, 126 S. Ct. 1204, 163 L. Ed. 2d 1038, 2006 U.S. LEXIS 1814, (2006), *AT&T Technologies, Inc. v. Commc’ns Workers of America*, 475 U.S. 643, 650, (1986).

¹²*Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983).

¹³*Moses*, 460 U.S. at 19-20. *See also, Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 217 (1985) (holding that the district court should have compelled arbitration of arbitrable claims even where the result would be the possibly inefficient maintenance of separate proceedings in different forums).

About the Author

Paul A. Boice is an associate with the law firm *Meuleman Mollerup LLP*, focusing his practice in the areas of construction, real estate and business litigation, estate planning, wills, and probate. Mr. Boice received his Bachelor of Arts degree, cum laude, from the University of Utah, and his Juris Doctorate, cum laude, from the University of Idaho, College of Law. He is a member of the Idaho State Bar Association, including the Trust and Probate section, the Treasure Valley Estate Planning Council and the American Bar Association. Mr. Boice is also a Captain in the Idaho National Guard, where he serves as the Operations Law Officer for the 116th Brigade Combat Team.

HIPPA Hide and Seek: Rules for Obtaining Medical Information

Kim C. Stanger

Hawley Troxell Ennis & Hawley, LLP

Frustrated in your attempts to obtain medical information in this post-HIPAA¹ world? Confused by the misinformation and inconsistent practices among attorneys and health care practitioners? This article summarizes the rules for obtaining medical information under the HIPAA privacy regulations.²

HIPAA: AN OVERVIEW

The principles governing patient privacy are nothing new.³ The HIPAA privacy rules⁴ simply consolidated and standardized confidentiality rules on a national level, thereby creating a minimum federal standard for patient privacy. HIPAA preempts less stringent state laws.⁵ HIPAA does not preempt state or federal laws that provide greater privacy protection or give patients more rights concerning their health information.⁶ For example, information concerning drug or alcohol treatment,⁷ mental health,⁸ or peer review⁹ may be subject to additional privacy protections under federal and/or state laws.

Per the HIPAA privacy rules, health care providers cannot use or disclose protected health information unless the use or disclosure is allowed by HIPAA.¹⁰ “Protected health information” includes any individually identifiable information concerning a patient’s health, health care, or payment for health care regardless of the form or medium, e.g., oral, written, or electronic.¹¹ It includes information about deceased patients.¹² HIPAA violations may result in civil penalties of \$100 per violation or \$25,000 per type of violation per year, and up to \$250,000 and 10 years in prison for criminal violations.¹³ Add potential invasion of privacy claims, disciplinary actions by licensing boards,¹⁴ and adverse employment actions¹⁵ and one can understand why practitioners and their employees are (or should be) very careful about improper disclosures. Nevertheless, attorneys may properly obtain medical information and health care providers may properly disclose medical information through the means described below.

HAVE THE PATIENT OBTAIN THE INFORMATION

Per HIPAA, the patient or their personal representative¹⁶ has a right to access and, if requested, obtain copies of health information maintained in their “designated record set”,¹⁷ which generally includes their history, treatment, and payment records.¹⁸ If you are representing the patient, often the easiest and cheapest way to obtain records is to simply ask the patient to request the records from the provider. The provider generally must produce copies of the records within 30 days.¹⁹

SUBMIT A VALID AUTHORIZATION FOR RELEASE OF INFORMATION

HIPAA allows a provider to disclose information pursuant to a written authorization; however, to be valid, the authorization must contain certain “core” elements, including the following:

- A specific description of the information to be used or disclosed.
- The name or identification of the person(s) or class of person(s) authorized to make the disclosure.
- The name or identification of the person(s) or class of person(s) to whom the provider may make the requested disclosure.
- A description of each purpose for the requested disclosure. If the patient requests the disclosure, a statement that the disclosure is “at the request of the patient” is sufficient.
- An expiration date or event that relates to the patient or the purpose of the disclosure (e.g., “until completion of the litigation.”).
- Statements describing certain patient rights, *i.e.*: (1) the patient has the right to revoke the authorization at anytime (with certain exceptions) by submitting a written statement to the covered entity; (2) the provider may not condition treatment on the provision of the authorization; and (3) the information disclosed per the authorization may be subject to redisclosure and no longer protected.
- The date and signature of the patient or the patient’s personal representative.
- If the authorization is signed by the personal representative, a description of the personal representative’s authority.²⁰

Failure to include or complete any or all of the foregoing elements invalidates the authorization.²¹ In addition, the authorization may not be combined with any other document, and must be written in plain language.²² Appendix A to this article contains a sample HIPAA-compliant authorization.

When responding to an authorization, the provider must limit the disclosure to the scope of the authorization,²³ so you should carefully draft your authorization to ensure that you will obtain the information you seek, including oral information if you want to speak with the provider or need the provider to testify. Also, while HIPAA allows the disclosure, HIPAA does not require a provider to disclose information pursuant to an authorization.²⁴ The provider may refuse to provide the information per the authorization, or may condition the disclosure on the payment of an appropriate fee. If the provider refuses to provide the information, you may need to force disclosure by (1) having the patient request the information; (2) subpoenaing the information; or (3) obtaining a court order.

SUBPOENA THE INFORMATION

HIPAA prohibits providers from disclosing protected health information pursuant to a subpoena unless the subpoena is accompanied by “satisfactory written assurances” to the provider that (1) you have given the patient sufficient written notice of the

subpoena to enable the patient to object and either the objections have failed or the time for objection has passed; or (2) that you have obtained a “qualified protective order” that will maintain the confidentiality of the information.²⁵ These written assurances may be given through a letter accompanying the subpoena. The subpoena itself may provide satisfactory written assurance that proper notice has been given to the patient if (1) the patient is a party to the litigation; (2) the subpoena is accompanied by a certificate of service confirming that the patient (or their lawyer) has been given a copy of the subpoena in sufficient time to allow the patient to object; and (3) the time for objections has passed.²⁶ If you fail to provide the written assurances, the provider may still be required to appear pursuant to the subpoena, but he or she may not disclose protected health information and should object to any disclosure unless and until (1) you provide the required written assurances; (2) the court orders disclosure; or (3) you identify another HIPAA exception that permits the disclosure.²⁷

Even if you provide written assurance that the patient has been given adequate notice, the provider generally may not disclose the information before the time of the hearing or production as stated in the subpoena. HIPAA requires that the patient be given time to object to the subpoena.²⁸ Under the relevant rules of procedure, the patient generally may object to the subpoena until the time for compliance.²⁹ The net effect is that the provider should not disclose the information pursuant to the subpoena until the date and time stated in the subpoena unless the patient’s objections are raised and resolved before the time for compliance.

Subpoenas should be accompanied by tender of any required witness fees and the reasonable cost of the records.³⁰ As with the authorization, you need to identify the specific information sought because the provider must limit its disclosure accordingly. In addition, you must identify the proper entity for the production or disclosure. For example, to obtain records, you may need to subpoena the custodian of records for a hospital or other entity instead of a particular physician or practitioner since the practitioner may not own or control the relevant records.

Like its federal counterpart, revised I.R.C.P. 45 now allows a party to subpoena records in lieu of requiring testimony if certain conditions are satisfied, including giving at least seven days’ prior notice to opposing parties, and thirty days to the provider to respond to the subpoena.³¹ Idaho allows a hospital to respond to a subpoena by filing the records under seal after giving the parties and the patient notice and receiving payment for the records.³² This statute may be preempted by HIPAA since it would allow disclosures not otherwise permitted by HIPAA; however, there are no cases deciding the issue.

OBTAIN A COURT ORDER

HIPAA allows a health care provider to disclose protected health information pursuant to an order, warrant or subpoena signed by a judicial officer (i.e., a judge or magistrate)—no additional written assurances are required.³³ Court orders are treated differently than subpoenas since, in the case of a court order, an independent judicial officer has reviewed the request and determined production is appropriate, thereby protecting patient privacy.³⁴ You will need to make sure that the order covers the items you seek

because the provider must limit the disclosure to the scope of the order.³⁵

IDENTIFY ANOTHER HIPAA EXCEPTION

HIPAA contains several limited exceptions that may, in appropriate circumstances, allow health care providers to disclose health information without an authorization, subpoena, or order. For example, providers may disclose protected health information:

- For purposes of treatment, payment or certain health care operations, including the prosecution or defense of litigation in which the health care provider is a party;³⁶
- For workers compensation claims;³⁷
- To the extent some other law requires the disclosure (e.g., to report neglect or abuse³⁸ or injuries from criminal conduct³⁹); and
- For certain limited disclosures to law enforcement to identify or locate a suspect, fugitive, or victim.⁴⁰

CHARGES FOR RECORDS

HIPAA allows health care providers to charge patients a “reasonable, cost-based fee” to obtain copies or a summary of their health information, *i.e.*, the actual cost of making and mailing the copies, but not the cost of processing the request or retrieving the records.⁴¹ The “cost-based fee” limitation only applies to requests by the patient, not to requests by third parties such as lawyers.⁴² As a result, health care providers can generally charge lawyers and others more to obtain the information unless some other law limits the charges. In workers compensation cases, for example, Idaho regulations require health care providers to provide the first copy of medical records free of charge.⁴³ For other cases, relevant subpoena rules allow health care providers to charge a “reasonable” fee associated with the production of records.⁴⁴ If cost is an issue, lawyers representing patients may ask the patient to obtain the records, thereby limiting the amount that providers can charge.

REPRESENTING HEALTH CARE PROVIDERS

If you represent a health care provider, HIPAA generally allows the provider to disclose information to you for legitimate business purposes (including the defense or prosecution of litigation on behalf of the provider),⁴⁵ but you must first execute a “business associate agreement” that essentially requires you to comply with HIPAA.⁴⁶ The Office of Civil Rights (OCR) has posted a sample business associate agreement on its website, <http://www.hhs.gov/ocr/hipaa/>. Among other things, the agreement prevents you from using or disclosing the information except for purposes allowed by HIPAA, and requires you to put in place appropriate safeguards to protect the information from inadvertent or improper disclosures.⁴⁷ Absent the agreement, the health care provider may not disclose the information to you. Although you are not directly covered by HIPAA, you may be liable to the provider for improper disclosures based on the contract or malpractice standards.

CONTACTING REPRESENTED OR EMPLOYED PROVIDERS

HIPAA does not preempt or alter ethical rules. Accordingly, Ethical Rule 4.2 generally prohibits lawyers from contacting providers directly if they know the provider is represented by

counsel in the matter.⁴⁸ The commentary to Rule 4.2 prohibits *ex parte* contacts with constituents of an organization if the constituent

supervises, directs, or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

(*Id.*, Comment [7], emphasis added). Given the significant civil or criminal penalties that may be imposed for improper disclosures by institutional as well as individual providers (*e.g.*, hospitals, clinics, practices, and other medical entities), the ethical rules may be interpreted to prevent *ex parte* contacts with employed or affiliated practitioners if you know the hospital, clinic or practice has legal counsel.

APPENDIX A: PROTECTED HEALTH INFORMATION - USE OF DISCLOSURE - SAMPLE FORM ON PAGE 18

Page 18 contains a sample form that is a sample authorization for use or disclosure of protected health information. You can format it for your firm.

ADDITIONAL RESOURCES

If you have additional questions concerning HIPAA and its specific application, you may want to visit the OCR's website, <http://www.hhs.gov/ocr/hipaa/>. Among other things, the website contains copies of the regulations; the commentary that accompanied the rules; and frequently asked questions relevant to attorneys' compliance.

ENDNOTES

¹For purposes of this article, "HIPAA" refers to the Administrative Simplification provisions of the Health Insurance Portability and Accountability Act of 1996 and its implementing regulations found at 45 C.F.R. parts 160 through 164.

²This article provides a summary. The applicable rules are relatively complex and their application may depend on the circumstances. You should review the applicable regulations and your particular circumstances in determining proper compliance.

³*See, e.g.*, IC § 9-203(4) and I.R.E. 503(b) (patient privilege); I.C. §§ 39-3316 and -.3516 (confidentiality of residential or assisted living facility); I.C. § 54-1727 (confidentiality of pharmacy records); IC § 54-712 (chiropractor's duty of confidentiality); I.C. § 54-1814 (physician's duty of confidentiality); I.C. § 54-2218 (physical therapists' duty of confidentiality); I.C. § 54-2314 (psychologist-patient privilege); I.C. § 54-3213 and IDAPA 24.14.01. 450.02 (social worker's duty of confidentiality); IC § 54-3410 (counselor's duty of confidentiality); IDAPA 22.01.01.370.21 (nurse's duty of confidentiality).

⁴45 C.F.R. 164.501 et seq.

⁵45 C.F.R. § 160.203.

⁶45 C.F.R. § 164.202-.203.

⁷*See, e.g.*, 42 U.S.C. § 290dd-2 and 42 C.F.R. part 2; I.C. § 37-3102 et seq., I.C. § 39-308, and IDAPA 16.03.03. 110.03.

⁸*See, e.g.*, I.C. § 16-2428 (children's mental health records); I.C. § 54-2314 (psychological records); I.C. § 54-3213 (social worker's records).

⁹*See, e.g.*, I.C. § I.C. 39-1392b.

¹⁰45 C.F.R. § 164.502(a).

¹¹45 C.F.R. § 160.103.

¹²45 C.F.R. § 164.502(f).

¹³45 C.F.R. § 164.0404.

¹⁴*See, e.g.*, I.C. § 54-1814.

¹⁵*See, e.g., McAlpin v. Wood River Med. Center*, 129 Idaho 1, 921 P.2d 178 (1996)

¹⁶For purposes of HIPAA, a "personal representative" is a person authorized to make health care decisions for the patient. 45 C.F.R. § 164.502(g)(2)-(3). For deceased patients, it is the person authorized to make decisions concerning the deceased or the deceased's estate. 45 C.F.R. § 164.502(g)(4). In Idaho, it would include those persons listed in I.C. § 39-4503 to the extent their authority has been triggered.

¹⁷45 C.F.R. §§ 164.502(a)(2) and 164.524.

¹⁸45 C.F.R. § 164.501.

¹⁹45 C.F.R. § 164.524(b).

²⁰45 C.F.R. 164.508(c).

²¹45 C.F.R. § 164.508(b).

²²45 C.F.R. § 164.508(b)(2)-(3) and (c)(3).

²³*See* 45 C.F.R. § 502(b).

²⁴*See* 45 C.F.R. § 508(a).

²⁵45 C.F.R. § 164.512(e)(1)(ii)-(vi).

²⁶*See* Health Information Privacy and Civil Rights—Questions and Answers, located at www.hhs.gov/ocr/hipaa/.

²⁷The obligation to appear may depend on the type of action. For example, if a provider objects to producing records in a federal civil case, Federal Rule of Civil Procedure 45 requires the party seeking the documents to obtain a court order compelling the production. *See* Fed. R. Civ. Proc. 45(c)(2)(B).

²⁸*See* 45 C.F.R. § 164.512(e)(1)(iii)(C).

²⁹*See, e.g.*, I.R.C.P. 45(d); I.C.R. 17; Fed. R. Civ. P. 45(c)(3)(A); Fed. R. Crim. Proc. 17(c)(2).

³⁰*See, e.g.*, I.R.C.P. 45(d)-(e); I.C.R. 17; Fed. R. Civ. P. 45(c)(3)(A); Fed. Crim. R. Proc. 17(d).

³¹I.R.C.P. 45(b).

³²I.C. § 9-420.

³³45 C.F.R. § 164.512(e)(1)(i).

³⁴*See* 64 Fed. Reg. 59961 and 64 Fed. Reg. 82679.

³⁵45 C.F.R. § 164.512(e)(1)(i).

³⁶45 C.F.R. § 164.506.

³⁷45 C.F.R. § 164.512(l); I.C. § 72-432(10).

³⁸I.C. § 16-1602.

³⁹I.C. § 39-1390.

⁴⁰45 C.F.R. § 164.512(f).

⁴¹45 C.F.R. § 164.524(c)(4).

⁴²*See id.*; 65 Fed. Reg. 82557 and 82735.

⁴³IDAPA 17.02.04.322.

⁴⁴*See, e.g.*, I.R.C.P. 45(b)(2); Fed. R. Civ. Proc. 45(c)(2).

⁴⁵*See* 45 C.F.R. § 164.506.

⁴⁶45 C.F.R. §§ 164.502(e) and 164.504(e).

⁴⁷*See* 45 C.F.R. § 164.504(e).

⁴⁸Idaho Rules of Professional Conduct 4.2.

ABOUT THE AUTHOR

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Appendix A -

HIPPA Hide and Seek: Rules for Obtaining Medical Information Article

Kim C. Stanger

Hawley Troxell Ennis & Hawley, LLP

SAMPLE AUTHORIZATION FOR USE OR DISCLOSURE OF PROTECTED HEALTH INFORMATION

[Note: This is a sample general authorization pursuant to 45 CFR § 164.508. It is not required for uses or disclosures of protected health information for treatment, payment or health care operations (except psychotherapy notes) and certain other uses or disclosures allowed by law. An authorization for the disclosure of psychotherapy notes may not be combined with another authorization. The disclosure of information relating to drug or alcohol treatment facilities must satisfy additional standards set forth in 42 CFR part 2.]

1. Name of patient: _____

2. Specific information to be used or disclosed:

- Psychotherapy notes: _____
- Medical records (describe): _____
- Other (describe): _____

3. Entity(ies) authorized to use or disclose the information: _____

4. Entity(ies) to whom disclosure may be made: _____

5. Purpose for use or disclosure (*check one*):

- The use or disclosure is at the request of the individual.
- The use or disclosure is for marketing purposes. The health care provider will / will not (*circle one*) receive remuneration from a third party for the use or disclosure of information.
- Other (*describe the purpose*): _____

6. This authorization will expire on the following date or event:

- One year from the date of the authorization.
- Other (specify): _____

I understand that the health care provider may not condition my treatment on provision of this authorization unless the authorization is for the use or disclosure of information for research-related treatment, or unless the treatment is solely for the purpose of disclosing information to a third party (*e.g.*, an employment physical).

I understand that I may revoke this authorization at anytime unless the health care provider has taken action in reliance on the authorization. To revoke the authorization, I must submit a written request to: **[IDENTIFY CONTACT PERSON, ADDRESS]**.

I understand that information disclosed pursuant to this authorization may be re-disclosed by the recipient and no longer be protected by applicable law.

I have read and understand this authorization. I do hereby authorize the use or disclosure of my protected health information as described above.

Signed by: _____ Date: _____

(If signed by personal representative, describe authority)

Give a copy of this authorization to the patient or personal representative.

The Small Lawsuit Resolution Act: Good for Idaho

Sarah A. Bradley
Ely, Nevada Courts

When the Legislature adopted the Small Lawsuit Resolution Act ("SLRA") Idaho joined a number of states using alternative dispute resolution to resolve civil lawsuits.¹ Recently, in recognition of the SLRA's positive impact on Idaho, the 2006 legislature removed the SLRA's original sunset clause.² Now Idaho's SLRA will occupy a more permanent part of the statutory landscape and will remain in effect.³ The SLRA benefits Idaho by providing litigants with an alternative method of dispute resolution and thereby decreasing the demand for the courtroom. It incorporates useful processes from similar statutes enacted in other states, is tailored to apply only to a specific group of cases, and has proactive provisions.

IDAHO'S SLRA LEARNS FROM OTHER STATES

The SLRA is patterned after similar legislation that has been used in many other states for a number of years.⁴ In those states, court caseloads have been reduced and lawsuits have been resolved faster.⁵ Specifically, the SLRA is most similar to a Washington State statute.⁶ Therefore, Idaho will likely look to Washington to resolve ambiguities and questions regarding the application and construction of the SLRA. Because of the similar older statutes in other states, the legislature was able to learn from the experiences in other states as it crafted the Idaho statute. For example, unlike its Washington counterpart, the SLRA is a voluntary process. Like many states, the SLRA preserves the parties' right to a de novo trial, although additional costs may be assessed to parties who fail to improve their monetary position. In addition, the SLRA encourages involvement by all experienced members of the bar as evaluators.

VOLUNTARY PROCESS

The SLRA does not require alternative methods of dispute resolution but rather *encourages* it. In many states, this is not the case. For example, in Washington, "[i]n counties with a population of more than one hundred fifty thousand, mandatory arbitration of civil actions" seeking only monetary relief must be arbitrated.⁷ In Idaho, the Legislature recognized the value of ADR, yet still allowed the process to be voluntary. The SLRA provides parties an additional forum for resolving their disputes, yet does not require such a forum for all cases in the Act's purview. This allows Idaho to benefit from the application of ADR in dispute resolution without forcing unwilling parties to participate.⁸

TRIAL DE NOVO RIGHT PRESERVED

As in nearly all states, Idaho litigants' right to a de novo trial is preserved under the SLRA.⁹ Any party to an evaluation may request a trial de novo within twenty-one days after the evaluator's decision.¹⁰ The scope of the trial de novo includes "all issues of law and fact,"¹¹ thus preserving the parties' right to a court or jury trial and allowing an additional review of the case. By allowing an additional review of the case, substantial injustice can be avoided.¹² In addition, by mandating that the trial court assess costs, reasonable attorney's fees, and the entire amount of the evaluator's fee against the party that requested a trial de novo if the party fails to improve its position, the legis-

lature is encouraging only merited trial de novo reviews.¹³ Requesting a de novo trial "just because" is discouraged by the potential risk of incurring additional fees. Such requests would also disrupt the finality of judgments and lengthen the resolution process.

PRACTITIONERS MAY SERVE AS CIVIL LITIGATION EVALUATORS

Qualifications for being listed as a private civil litigation evaluator with the Supreme Court include active membership in the Idaho state bar for a minimum of seven years or being a retired or senior judge.¹⁴ The SLRA is unique in that it allows experienced practitioners, in addition to members of the judiciary and ADR experts, to serve as case evaluators.¹⁵ The SLRA is not intended to only involve ADR practitioners. Instead the goal is to get a rational, realistic, independent professional assessment for use as a benchmark in resolving these smaller cases."¹⁶ Thus, the SLRA provides an innovative mechanism to involve a wider range of practitioners in the dispute resolution process.

TAILORED AND SPECIFIC FOCUS

The SLRA was not meant to be a one-size fits all approach to the resolution of disputes in Idaho. First, the Act is limited to only civil action solely seeking monetary damages under \$25,000.¹⁷ Thus, the statute's language carefully selects a narrow segment of the civil actions filed in Idaho. In addition, throughout the SLRA process, any party may petition the court for removal from the evaluation at any stage *for good cause*.¹⁸ Any change that makes "the evaluation option an inappropriate method to obtain resolution of the particular dispute" is sufficient for removal of the case from the evaluation process.¹⁹ The SLRA is not meant to require a lawsuit to be resolved under an unfavorable form of resolution should facts and circumstances change. Thus, while the SLRA is directed at resolving only specific segment of civil cases, the Legislature recognized that all cases in that segment might not be appropriate for resolution under the SLRA. And, if circumstances change, even cases that initially appeared favorable for resolution under the SLRA will not be required to continue the process.

PROACTIVE PROVISIONS

The SLRA is a fluid statute allowing it to be applied on a case-by-case basis. The Legislature could not anticipate all potential circumstances and situations, so it authorized the evaluator and the Supreme Court to make rules and decisions that ensure that the purpose of the Act is served. The Legislature also provided a "good faith" requirement that can be used by both the evaluator and the Supreme Court, as needed, if any party is attempting to take unfair advantage of the process. Finally, the Act includes ready solutions to foreseen delays.

THE SUPREME COURT AND EVALUATOR "TO FILL IN THE GAPS"

Many details regarding the administration or details of the SLRA are left to the discretion of the evaluator or the Supreme Court. For example, the Idaho Supreme Court is expressly authorized to make rules "to reduce the costs of evaluation under

this chapter”²⁰ and any other rules, procedures, or standards “it deems appropriate to effectuate the purposes of this chapter.”²¹ This provision empowers the Supreme Court to ensure that the SLRA works as effectively and efficiently as possible. Any omissions by the Legislature or unexpected issues in practice can be remedied without requiring additional legislation or other lengthy procedures. This is similar to Washington’s Mandatory Arbitration of Civil Actions statute. Washington’s statute is highly governed and regulated by the Washington State Supreme Court.²² The Idaho Supreme Court may also exempt all cases filed in certain designated counties if the court “determines the county does not have sufficient judicial or other resources to implement and effectuate the purposes of this chapter or for other good cause shown.”²³ The SLRA is only applicable where it can bring about the efficient and effective resolution of lawsuits. Counties with scarce resources or other characteristics which might hamper the Act’s effectiveness are exempt from its application. The Supreme Court is also authorized to supplement the Legislature’s list of qualifications and procedures for the appointment of civil litigation evaluators.²⁴ As it deems necessary, the Supreme Court may add any additional qualifications for evaluators “in some or all cases with the purpose of providing the largest pool of individuals with the knowledge and experience to fairly determine claims under this chapter at *minimal* or *no cost* to litigants.”²⁵

The SLRA is not meant to increase time spent resolving disputes or add to the complexity or difficulty in such resolution. The evaluator is authorized to decide the scope and process of discovery and this decision shall be based on whether such discovery is “necessary to obtain a fair determination of the case.”²⁶ The evaluator shall determine the extent to which the formal rules of evidence will apply in the evaluation hearing.²⁷ “To the extent determined applicable, the evaluator shall construe those rules liberally in order to effectuate a fair, swift and cost-efficient procedure.”²⁸ The evaluator also has the authority to decide “procedural issues and deadlines relating to the conduct of the evaluation,” whether or not pre-hearing briefs will be allowed, and to “[t]ake such other acts as are necessary to accomplish the object of a fair, swift, and cost-effective determination of the case.”²⁹ While the general rule under the Act is to limit each party’s presentation of its case at the evaluation hearing to no more than three hours, the evaluator may decide whether more or less time will be allowed.³⁰ The evaluator may also penalize a party that fails to provide medical records and documents in a timely manner.³¹ The evaluator’s authority is not set, but rather the evaluator is allowed to take necessary actions in order to effectuate the purposes of the SLRA.

GOOD FAITH REQUIRED

A failure to act in good faith is not taken lightly. “If it is shown to the trial court by clear and convincing evidence that a party or its counsel has not acted in good faith during the evaluation, the trial court may impose *any* appropriate sanction against such party or its counsel.”³² The use of the word “any” allows the trial court broad discretion over the imposition of sanctions to parties who do not act in good faith. Imposition of sanctions is an additional mechanism to ensure that the SLRA operates in a smooth, efficient, and effective manner. Parties are not to abuse

the forum or be able to subvert expected conduct in a legal setting.

FORESEEN DELAYS EXPEDITED

The statute provides several mechanisms to ensure that resolution of disputes under the SLRA occurs in a timely manner and is unburdened by delays. For example, disagreement over the choice of evaluator is not permitted to unduly lengthen the process. Instead, if within fourteen days from requesting that the case proceed under the SLRA, the court does not receive a notice of selection or motion for assistance in the selection of an evaluator, the clerk shall randomly choose and assign any of the individuals on the list given to the parties to evaluate the case.³³ In addition, any challenge to whether the evaluator shall serve on the particular case shall be made “by motion to the trial court and shall be heard expeditiously.”³⁴

FREQUENT EMPOWERMENT OF THE PARTIES

As in ADR in general, disputing parties under the SLRA have more control over the process and the resolution of their dispute than in traditional litigation.³⁵ Under the Act, the parties are frequently allowed to make decisions affecting the dispute resolution process. For example, the parties decide which process to undertake (evaluation or mediation)³⁶, what process will be used to select the third-party neutral,³⁷ whether to agree to choose specific person in advance,³⁸ the date of the evaluation hearing,³⁹ whether or not to file a prehearing statement,⁴⁰ and whether or not the evaluation hearing will be recorded.⁴¹ The parties may also agree to allow additional discovery.⁴² In a traditional litigation setting, the forum, the fact-finder, the timeline, the required documents, and the record of the proceeding are all outside the parties’ realm of control. Thus, the SLRA allows the parties to decide and control more of the resolution process.

FUTURE IMPACT ON IDAHO

Because the SLRA is still fairly new, its current impact on Idaho is hard to measure and its future impact is difficult to assess. However, the experience of other states indicates that statutes that allow litigants to resolve disputes through appropriate dispute resolution processes are beneficial to the state because they provide quicker resolutions and help to relieve the court congestion.⁴³

The SLRA is resolving lawsuits. At the end of 2003, forty-three cases remained pending under the SLRA.⁴⁴ In 2004, 149 new cases invoked the SLRA, creating a total of 192 cases proceeding under the Act.⁴⁵ Of these, fifty-nine were dismissed, and seventy-nine were still pending at the end of 2004.⁴⁶ In 2004, forty-five cases were resolved under the SLRA and nine were resolved through other means.⁴⁷ In 2004, only four cases proceeded to a trial de novo after an evaluation under the SLRA.⁴⁸ Compared to the total number of cases resolved under the SLRA in 2004, this is a relatively small percentage.⁴⁹ However, any firm assessment regarding the trial de novo percentage in Idaho is immature due to the short length of time that the SLRA has been in place. In Pennsylvania, one of the first states to incorporate ADR processes in the court system, during an eighty-five month period, court statistics reveal that only 1.7 percent of cases resolved through arbitration “finally required a trial de novo.”⁵⁰ In North Carolina, de novo trials “occurred in only nine percent

of the cases” resolved through court-ordered arbitration.⁵¹ Therefore, if Idaho’s experience is consistent with that of other states, de novo trials should be minimal.⁵² While resolution of forty-five cases from both the magistrate and district court divisions might not create a significantly visible impact, in time, if the trend continues, the SLRA may impact total case filings in the state.⁵³

House Bill 432, signed by the Governor on March 22, 2006, deleted the sunset clause from the Small Lawsuit Resolution Act. The Act became effective on January 1, 2003 and was set to terminate on June 30, 2006. With the legislation it was made permanent. The revocation of the sunset clause is an indication that the Legislature, like many practitioners, considers the Act to be a success. As lawyers in Idaho continue to use the SLRA, it should be invoked more frequently. With any new procedure there is an adjustment period while people gain familiarity and comfort with the process. Idaho is a small bar, and as such, the more that individual lawyers use the SLRA the more other lawyers will become aware of its potential benefits and might be likely to invoke the SLRA on their own cases.

Thus, in summary, the SLRA is a necessary statute, providing Idaho litigants an alternative forum in order to relieve court congestion and provide fast and effective resolution of disputes. The SLRA is unique and its provisions are informed by the experience of other states. With its continued use, the SLRA can and should continue to be a valuable tool for Idaho.

ENDNOTES

¹Idaho Code §§ 7-1501–1512 (Michie 2004).

²H. 432, 58th Leg., 2d Sess. (Idaho 2006). As originally passed in 2003, the legislature provided a sunset clause of June 30, 2006. H. 72, 57th Leg., 1st Sess., § 10 (Idaho 2003).

³H. 432, 58th Leg., 2d Sess., Statement of Purpose at 1 (Idaho 2006).

⁴H. 627, 56th Leg., 2d Sess., Statement of Purpose at 1 (Idaho 2002) (House Bill 627 was later passed in 2003 as House Bill No. 72). For example, Washington State’s statute was enacted in 1980. WASH. REV. CODE § 7.06.010 (2004).

⁵*Id.*

⁶Senate Judiciary and Rules Comm., Minutes at 4 (March 8, 2002). Oregon also has a similar provision, but Idaho’s statute is more similar to Washington’s.

⁷WASH. REV. CODE § 7.06.010 (2004). In addition, “[i]n counties with a population of one hundred fifty thousand or less, the superior court of the county, by majority vote of the judges thereof, or the county legislative authority may authorize mandatory arbitration of civil actions. . .” *Id.*

⁸MARTIN A. FREY, ALTERNATIVE METHODS OF DISPUTE RESOLUTION 147 (2003). (“The decision to mediate requires the participation by both parties.” Both parties “must agree to mediate.”)

⁹Specific requirements must be met in order to receive a trial de novo. The party may waive its right by acting contrary to the statute’s requirements. *See* Idaho Code §§ 7-1508(10); 7-1509(2). There is no review of an evaluator’s decision once it has been finalized into a binding court judgment. Idaho Code § 7-1509(8) (At this stage, it may only be set aside pursuant to rule 60 of the Idaho Rules of Civil Procedure).

¹⁰Idaho Code § 7-1509(2).

¹¹*Id.*

¹²If a party did poorly when presenting its case or if the evaluator arbitrarily opted to favor one party over the other, injustice could result. Allowing a party to request a de novo trial, minimizes this risk.

¹³Idaho Code § 7-1509(5).

¹⁴Idaho Code § 7-1505(2).

¹⁵Representative Leon Smith, *The Small Lawsuit Resolution Act: A Fundamental Change in Idaho Procedure for Small Disputes*, THE ADVOCATE, August 2002 at 12, 12.

¹⁶*Id.*

¹⁷Idaho Code § 7-1503(1).

¹⁸*Id.*

¹⁹*Id.*

²⁰Idaho Code § 7-1504(9).

²¹*Id.* As it deems necessary, the supreme court may add any additional qualifications for evaluators “in some or all cases with the purpose of providing the largest pool of individuals with the knowledge and experience to fairly determine claims under this chapter at *minimal or no cost* to litigants.” Idaho Code § 7-1505(2) (emphasis added).

²²WASH. REV. CODE § 7.06.030 (2004). The Washington legislature instructed the Washington State Supreme Court to adopt procedures by rule to implement mandatory arbitration of civil actions. These rules are given a high level of authority. “[M]andatory arbitration rules, like any other court rules, are interpreted as though they were drafted by the Legislature and are construed consistent with their purpose.” *Wiley v. Rehak*, 20 P.3d 404, 406 (Wash. 2001). *See also Alvarez v. Banach*, 84 P.3d 278, 280 (Wash. Ct. App. 2004).

Washington’s statute provides less detail than Idaho’s, giving more of a necessity to rules promulgated by the Washington State Supreme Court. For example, the Washington statute consists of ten sections none consisting of more than two paragraphs, while the Idaho statute, consists of twelve sections with seven of these sections consisting of more than four paragraphs. To fill in the detail not included in the statute, the Washington State Supreme Court’s Mandatory Arbitration Rules consist of eight sections and govern a variety of elements of the resolution process, including the qualifications of arbitrators, the arbitration hearing process, the arbitrator’s award, and trial de novo. Washington State Superior Court Mandatory Arbitration Rules (MAR) 1.1, et seq. (2004).

²³Idaho Code § 7-1504(10). This determination is made by the court upon application of the administrative judge of the judicial district including the county to be exempted. This is not a proactive mandate for the supreme court to evaluate all counties in regards to resources and ability to effectuate the SLRA. Rather, it is the duty of the administrative judges in the counties that are unable to adequately offer dispute resolution under the SLRA, to initiate the supreme court’s review and obtain an exemption for the county.

²⁴Idaho Code § 7-1505(2); *see also* Idaho Code § 7-1504(1) and (2).

²⁵*Id.* (emphasis added).

²⁶Idaho Code § 7-1507(2). A statement of special, general, and other damages sought in the evaluation may be requested by a defending party, unless the evaluator decides otherwise. Idaho Code § 7-1507(1)(a). The evaluator also determines whether or not depositions may be taken, the defending party may obtain relevant med-

ical reports of the claimant and one defendant's medical examination of the claimant, and requests for admission may be submitted. Idaho Code § 7-1507(b)-(d). These actions are allowed under the SLRA, but the evaluator is "free" to order otherwise. Idaho Code § 7-1507. The evaluator must base his or her decision on what will provide a fair and just resolution to the case. The evaluator may also order additional discovery. Idaho Code § 7-1507(3).

²⁷Idaho Code § 7-1504(10).

²⁸*Id.*

²⁹Idaho Code § 7-1506(1).

³⁰Idaho Code § 7-1508(2). The time allowed for presentation of a party's case is "[s]ubject to the evaluator's discretion." *Id.*

³¹Idaho Code § 7-1507(c). Furthermore, "[a] claimant shall have an absolute right to a copy of any document relating to the claimant which is created by the examiner or the examiner's employees or agents during or after the examination. Such materials shall be provided to the claimant within fourteen (14) days of the date of the examination and no later than twenty-one days prior to the evaluation hearing date. Failure to timely provide the medical examiner's materials shall be a basis for vacating and rescheduling the hearing or for excluding the evidence in the discretion of the evaluator." *Id.* Failure to comply with provisions and timely provide documents may result in sanctions against the non-compliant party.

³²Idaho Code § 7-1508(10). The court may also step in if any party fails to comply with the procedures outlined in the Act with regards to the selection of an evaluator. Idaho Code § 7-1504(6). In such a case, "[n]o hearing shall be required and the court shall rule on [the] motion expeditiously and [shall] take whatever steps are necessary to obtain the prompt selection of an evaluator." *Id.* The court will step in to choose an evaluator and grant any sanction it deems just. *See also* Idaho Code § 7-1508(10). "If the court finds that a party has requested a replacement list of evaluators unreasonably or determines it is otherwise appropriate, the court may appoint a sitting or retired judge or a private lawyer from the list of approved evaluators to serve as an evaluator for the case." Idaho Code § 7-1504(6).

³³Idaho Code § 7-1504(7).

³⁴Idaho Code § 7-1505(3).

³⁵FREY, *supra* note 8, at 29 ("As the methods of dispute resolution sweep from the least interfering (unilateral action) to the most interfering (adjudication), a party's power to select the method of dispute resolution, participate in the process, and determine the outcome varies.").

³⁶Idaho Code § 7-1503(3).

³⁷Idaho Code § 7-1504(5). The third-party neutral is the evaluator or mediator, depending on the resolution process chosen.

³⁸Idaho Code § 7-1504(8). *See also* Idaho Code §§ 7-1504(3), 7-1504(5), 7-1503(3). The parties may always choose to stipulate to the appointment of any individual who agrees to evaluate their case whether or not such person's name is on the list provided by the clerk. In such case, the parties must file a "joint statement to that effect with the court." Idaho Code § 7-1504(8).

³⁹Idaho Code § 7-1508(1). By "stipulation among the parties and the evaluator," the hearing may be held sooner than twenty-eight days or later than seventy days from the time the case is assigned to the evaluator. *Id.*

⁴⁰Idaho Code § 7-1508(4). "Unless otherwise agreed by the par-

ties," a prehearing statement must be filed with the evaluator and served upon all other parties. *Id.*

⁴¹Idaho Code § 7-1508(6). "A stenographic or electronic recording may be made at the request and at the expense of any party." *Id.* (Emphasis added).

⁴²Idaho Code § 7-1507(3). Additional discovery is not allowed for the sole purpose of complicating or delaying the case. Its purpose must be to attain a just resolution and good faith is always required by both parties. *See* Idaho Code § 7-1508(10). Because both parties must agree to the addition(or it may be ordered by the evaluator), these risks are minimal.

⁴³*See supra* notes 4 and 6 and accompanying text. *See also* Richard A. Enslin, *ADR: Another Acronym, or a Viable Alternative to the High Cost of Litigation and Crowded Court Dockets? The Debate Commences*, 18 N.M. L. REV. 1 (1988); Stevens H. Clarke et al., *Court-Ordered Arbitration in North Carolina: Case Outcomes and Litigation Satisfaction*, 14 JUST. SYS. J. 154 (1991).

⁴⁴E-mail from John Peay, Administration Office, Idaho Supreme Court, to Author (November 5, 2004).

⁴⁵E-mail from John Peay, Administration Office, Idaho Supreme Court, to Author (February 22, 2005).

⁴⁶*Id.*

⁴⁷*Id.*

⁴⁸E-mail from John Peay, Administration Office, Idaho Supreme Court, to Author (February 28, 2005). There is some discrepancy regarding this fact. Another source has cited five cases proceeding to a trial de novo. Ellen Scott Elliott, *SLRA—Practical Application and Potential Implications*, THE ADVOCATE, December 2004 at 10, 10.

⁴⁹There were forty-five cases resolved under the SLRA in 2004. E-mail from John Peay, Administration Office, Idaho Supreme Court, to Author (February 28, 2005). This equates to less than ten percent trial de novo requests.

⁵⁰Enslin, *supra* note 43, at 18 n. 64.

⁵¹Clarke et al., *supra* note 43 at 154.

⁵²If Idaho's success using ADR to resolve civil disputes tracks with other states, more than 90% of all cases resolved under the SLRA will not require a de novo trial.

⁵³It is also important to note that of the total filings in the district courts in 2003, it is not known under how many cases the SLRA would have even been applicable. Many likely sought other than solely monetary relief and many likely sought more than twenty-five thousand dollars.

ABOUT THE AUTHOR

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Lessons Learned from the 30(b)(6) deposition

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Rule 30(b)(6) of the Idaho Rules of Civil Procedure (“30(b)(6)”) allows a party to take the deposition of an organization by describing the matters on which examination is requested of said organization.¹ The organization is then obligated to produce a person or several persons capable of testifying to the requested topics. The 30(b)(6) deposition can be a helpful litigation tool because it enables a party to depose an organization without having to first identify the most knowledgeable persons in the organization and it allows the deposing party to obtain one official “organization” position on the designated matters. On the other hand, the 30(b)(6) deposition also has the potential for much abuse. This article will outline the background and purpose of the 30(b)(6) deposition, discuss some areas of potential abuse, and offer some potential solutions.

BACKGROUND AND PURPOSE OF RULE 30(B)(6)

The purpose of a 30(b)(6) deposition is to obtain binding testimony from an organization. The party seeking the testimony must designate areas of inquiry with reasonable particularity. This is something which needs careful attention, by both the designating party and the recipient. Generally, broad designations are not provided for in the Rule and can raise many issues. The topics should be structured to reach relevant questions and should bear a reasonable relationship to the legal issues in the case.

Overly broad topics, such as “facts supporting allegations of negligence,” are improper for a 30(b)(6) deposition. Topics should be looking for information the organization would have. Topics that seek information the organization would not have are improper. While there is a duty to “educate” a 30(b)(6) witness, this duty does not require the organization to research and discover something not previously known. Requests that are not particular or are not relevant should also be avoided. A party in receipt of an improper 30(b)(6) deposition notice should promptly make appropriate objections. If the objections cannot be resolved through communications with opposing counsel, the party in receipt of the improper 30(b)(6) notice should file a motion for a protective order with the court as soon as possible. If you proceed with the 30(b)(6) deposition without resolution, be sure to raise the objections on the record and clarify that any response believed to be addressing a topic outside the scope of the 30(b)(6) notice or the proper 30(b)(6) topics is only the opinion of that deponent and not the opinion of the organization.

The nature of the 30(b)(6) deposition mandates that the organization produce a knowledgeable witness. This forces the organization to produce witness(es) knowledgeable on the topic and deters the designated deponent from repeatedly responding to questions with “I don’t know.” Although there may not be a witness, or even a few witnesses, truly “the most knowledgeable” on the topic, the Rule does not require production of the most knowledgeable witness. It only requires production of an

educated witness who can respond to the topics designated. At the same time, producing a totally unprepared witness in response to a 30(b)(6) deposition can be tantamount to a failure to appear at all. While producing a partially prepared witness is not the equivalent of failure to appear or producing a totally unprepared witness, in most instances, such a witness will require the responding party to either supplement the 30(b)(6) deposition with an additional witness or witnesses or re-prepare the witness(es) and allow the 30(b)(6) deposition to be continued and completed at a later date. One should note that producing an unprepared witness could result in court-imposed sanctions ranging anywhere from the award of unnecessarily incurred costs to the entry of a default in an extreme case. Courts, however, seldom impose serious sanctions unless the witness fails to appear at all or is totally unprepared.

PROBLEMS WITH 30(B)(6) AND POTENTIAL FOR ABUSE *THE SUPER-WITNESS*

One problem with the 30(b)(6) deposition is that it often requires the organization to produce a “super-witness” who is knowledgeable in numerous areas and can present testimony reflecting the official organization’s position—often considered binding on the organization. Production of a super-witness requires significant preparation efforts for both counsel and the witness. While an individual witness can simply cite a lack of knowledge in response to questions, an organization 30(b)(6) designee has an obligation to become knowledgeable on the topics set forth in the 30(b)(6) deposition notice in advance of the deposition. This obligation, while often a burden on the organization, can also be used as a tool to “craft” the best possible witness for the organization.

Generally speaking, the organization (and counsel) has a duty to use reasonable efforts to prepare the 30(b)(6) witness. This duty includes review of any documents reasonably available and relevant, interviews with employees associated with the designated topics, and possibly interviews with former employees as well. Preparation efforts can often become burdensome, as it is often not clear to what extent counsel and the organization must work to become knowledgeable with respect to the requested topics.

After the deposition, the organization has the same duty as any party under Idaho Rule of Civil Procedure 26(e) to supplement answers if it becomes aware of additional information or if it learns that a previous response was incorrect. The duty to supplement may be problematic for the propounding party, in that it may give organizations the opportunity to defer answering some questions at the deposition by stating that the answer will be supplemented at a later date when or if additional information becomes available. This practice is not recommended namely because by taking this position, and subsequently submitting written supplemental testimony, the organization can have coun-

sel review and revise the testimony which is inapposite to the purpose of a deposition in the first place.

WORK PRODUCT CONCERNS

Witness preparation also presents defending counsel with issues concerning potential disclosure of attorney work-product. When preparing the 30(b)(6) witness, counsel often selects documents from a database or larger group of documents. These selections are a reflection of the attorney's thoughts and impressions regarding the case, including what is relevant to the designated areas of inquiry. Consequently, the selections may be protected work product. In a recent opinion, the Fourth Judicial District of Idaho indicated that the selection of one document by counsel is not protected work product, but where counsel selects numerous documents and assembles them in a binder to assist in the preparation of a 30(b)(6) witness, the binder would be considered protected work product.² Counsel should also advise the 30(b)(6) witness that, if the witness refers to the protected documents in his or her testimony, the protection may be waived.

SCOPE OF THE NOTICE

Although the 30(b)(6) deposition notice will list topics to which the witness must be prepared to testify, the examining attorney may ask questions outside the scope of those topics. The defending attorney should object to such questions as being outside the scope of the 30(b)(6) designation, or that such questions call for the disclosure of privileged information or protected work product. Failure to object could constitute waiver of the objection. If the objection is waived, the witness should answer the question, if he or she can, in an individual capacity and not as the organization's 30(b)(6) designee.

Federal courts have ruled both ways when examining the issue of whether an attorney may ask questions outside the scope of the 30(b)(6) deposition notice. A federal court in Massachusetts ruled that the examining attorney must confine the examination to matters which are contained in the notice of deposition, but counsel for the defending party could not instruct the witness not to answer if questions went beyond the subject matters listed in the notice.³ Rather than instruct the deponent not to answer, counsel could stop the deposition and seek a protective order.⁴ A federal court in Florida, on the other hand, held that the examination of a 30(b)(6) witness could not be limited by the topics set forth in the deposition notice.⁵ According to the Florida Court, the Rule 30(b)(6) notice simply defines the topics for which the organization must produce a knowledgeable witness. The examining attorney is free to ask questions outside of the topics, but the 30(b)(6) witness is not required to be knowledgeable on those topics and any testimony given would be of the witness, not that of the organization.⁶

DOWNSIZED OR DEFUNCT ORGANIZATIONS—

A SPECIAL PROBLEM

The 30(b)(6) deposition notice served on a defunct or severely downsized entity presents a very challenging issue. In this case, the organization most likely has no knowledgeable employee and limited, if any, documents may remain with which to prepare a witness. In many instances, the former employees could be working for a prior competitor and access may be difficult, if

not impossible. Even if former employees are not working for the competition, a knowledgeable former employee is not necessarily a prudent choice for a 30(b)(6) deponent. The 30(b)(6) deponent's testimony will bind the organization and the former employee's interest may not necessarily be aligned with those of the organization. The former employee, however, may be used as a 30(b)(6) witness if he or she agrees to do so, or may be used to help prepare a current employee as a 30(b)(6) witness, if the organization has any current employees.

TESTIMONY NOT THE EQUIVALENT OF A JUDICIAL ADMISSION

Although 30(b)(6) testimony is considered testimony of the organization, it is not and should not be considered the equivalent of a judicial admission. The 30(b)(6) testimony should be treated the same as any individual's testimony would be treated. The organization may change its testimony in review of the initial transcript of the deposition, or at trial, and attempt to explain the change just as any witness can, but the prior 30(b)(6) testimony may be used for impeachment purposes.

SOLUTIONS TO CURRENT 30(B)(6) ISSUES

Due to some of the issues with respect to the 30(b)(6) deposition as it is currently being utilized, the Rule may warrant some changes or clarifications to ensure that the 30(b)(6) deposition is being implemented according to its original intent. As an alternative, the party responding to the 30(b)(6) deposition could immediately move for a protective order upon notification of overly broad topics or overly burdensome preparation requirements. If there is proper court supervision, any abuses would become limited. However, with the judicial dockets already strained, the court may not have sufficient resources or interest in monitoring additional discovery disputes. Therefore, changes to the Rule may be a more appropriate solution.

Rule 30(b)(6) could be amended to clarify that 30(b)(6) testimony is not a judicial admission, but simply deposition testimony like any other. Once the binding effect of 30(b)(6) testimony is clear, the focus of the deposition should be to obtain information from the organization, rather than to elicit binding admissions. The Rule could also be amended to exclude ultimate questions of law from the scope of 30(b)(6) depositions. This would help limit the deposition to the factual knowledge of the organization, rather than allow it to be expanded to opinions regarding the central issues of the case.

Regardless of what changes are ultimately implemented, counsel should keep in mind the Rules of Professional Conduct as well as the Rules of Civil Procedure when engaging in 30(b)(6) depositions to help ensure that any problems that arise are resolved in the most efficient manner, preferably through informal meet and confer communications between counsel. Although the 30(b)(6) deposition can present significant burdens, when used properly it can also be an effective discovery tool.

It is anticipated the Federal Rule 30(b)(6) may be under consideration for revision by the Federal Rules Committee. All practitioners are encouraged to participate in the debate should this occur to get a broad understanding of the benefits and/or abuses of the current application of the Rule.

ENDNOTES

¹"Organization" includes a public or private corporation, a partnership, an association, or a governmental agency. Idaho R. Civ. P. 30(b)(6).

²See *St. Alphonsus Diversified Care, Inc. v. MRI Assocs.*, No. CVOC 0408219D at 15 (4th Dist. Idaho Apr. 17, 2006).

³See *Paparelli v. Prudential Ins. Co. of America*, 108 F.R.D. 727, 730 (D. Mass. 1985).

⁴See *id.* at 731.

⁵See *King v. Pratt & Whitney*, 161 F.R.D. 475, 476 (S.D. Fla. 1995).

⁶See *id.*

ABOUT THE AUTHORS

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Prior to being appointed as the Idaho State Bar delegate to the American Bar Association's House of Delegates, I had never attended an annual meeting of the ABA. I had attended a mid-year meeting when I was a member of the Bar Commission, but not an annual meeting. Generally the Annual meeting is larger and the House of Delegates has more resolutions and other business to handle.

The meetings begin with numerous CLE presentations organized and presented by the various Sections. The Sections also have their business meetings. Related organizations such as the National Association of Bar Counsel and National Association of State Bar Directors have their business meetings. For me, the principal meeting is the meeting of the House of Delegates, which meets on the last two days of the conference. Before the meeting of the House, I attended two caucuses to discuss issues of import to each group. The first I attended was the Caucus of State Bar Delegates which, as you may surmise, is comprised of the delegates of each of the state and local bar associations. The second I attended was a caucus of the Northwestern states. It was begun by the Washington delegation, but they invited states with smaller delegations such as Idaho, Utah and Montana to join. Participating with these other Western states is an excellent way to focus on issues and candidates for office which are of interest to the Western states.

During the meeting of the House a gentleman was introduced who, while not being a member of the House or having any elected or appointed position with the ABA, has attended 37 straight meetings of the House of Delegates. This attorney from New England sits in the gallery for visitors and has attended each meeting since 1969. I am not sure that I would recommend such diligence, but I would recommend that each of you take the opportunity to attend one of these annual meetings. You can fill your CLE requirements and attend the House of Delegates meeting. It is worthwhile to see the House debate issues that involve the legal profession. This is not a "sausage making" experience where you really do not want to see how it is made. The process itself is worthwhile. Next year's meeting is in San Francisco, which is relatively close, so take the time to attend.

One other procedural matter I would like to discuss, before telling you about of this year's meeting, involves the resolution process: both that of the ABA and the Idaho State Bar. Many of the resolutions presented at the ABA are co-sponsored by a number of organizations. There are times when it would be appropriate for Idaho to join those resolutions as a co-sponsor. Unfortunately, the opportunity to do so rarely comes up by the November before the ABA meeting and therefore, cannot be included as a RoadShow resolution. I am considering a RoadShow resolution which would allow the State Bar Commission to approve Idaho's co-sponsorship of a resolution

before the ABA House of Delegates by unanimous vote upon application by the State Bar Delegate. Idaho would not sponsor a resolution unless presented at the RoadShow, since as the sponsor, there would be sufficient advance knowledge to allow the November resolution process to function; however, this would allow a more stream-lined procedure for a co-sponsorship.

SUMMARY OF PROCEEDINGS

While there were other matters discussed and dealt with, the substantive issues deliberated, debated, and passed by the House at this meeting fall within three categories: Service by the Profession, Governance of the Profession, and Separation of Powers. In this article I discuss Service by the Profession. I will discuss the significant matters that the House undertook with regard to the other two categories in next month's issue.

SERVICE BY THE PROFESSION

Both the sitting president of the ABA, Mike Greco and the incoming president, Karen Mathis of Colorado, have service by the profession as a theme to their administration. There were resolutions considered and passed which addressed the opportunity of the members of the Bar to render service to the profession, to society and to institutions in both professional and non-professional capacities. President Greco entitled his initiative "The Renaissance of Idealism in the Legal Profession." A quick self-analysis and review of our colleagues will disclose a too prevalent skepticism among the profession.

The question is how do we overcome that attitude and replace it with the "idealism" that President Greco seeks. The Commission that Greco appointed proposed three resolutions to encourage this renovation of spirit. The first urges law firms of all sizes, corporate law departments, and government offices to encourage their lawyers, partners as well as associates, to service their communities through pro bono and public service activities. The second urges law schools to require employers of legal professionals that recruit on campus to disclose and to make available to the schools' students and alumni, specific information about the employer's pro bono policies and practices. The third urges all federal and state courts to develop programs, in collaboration with state and local bar associations to encourage, facilitate and recognize pro bono representation of indigent parties in civil cases. The Idaho State Bar has already taken steps in some of these areas with its pro bono publico awards that it presents every year, which recognize only some of the many attorneys in the state who already undertake public service and pro bono representation. On the day that this article was composed there was information in the Idaho Statesman about a Boise attorney, Lyman Belnap, who was undertaking the pro bono representation of mobile home park tenants who were being displaced. The idealism that President Greco seeks may never have died here in

Idaho, but we certainly need to continue to reach out for opportunities to serve.

Incoming President Mathis has not outlined specific programs, but one of the principal themes that she has discussed is called "A Second Season of Service" and calls on the baby-boomer generation as they lay down their full time practices to use their time to serve on civic boards, do pro bono work and otherwise use their experience and insight to continue to help society. A resolution to aid that effort was passed that would encourage state and local bar associations to adopt practice rules that establish guidelines to allow pro bono legal service by qualified, retired or otherwise inactive lawyers under the auspices of qualified legal services or other non-profit programs. Since many retired attorneys move to a jurisdiction other than the one in which they had their primary practice, this would allow some flexibility and would encourage the second season of service and pro bono work that Presidents Greco and Mathis envision.

In the remarks from the outgoing and incoming presidents various aphorisms were invoked to help encourage all of us to undertake these activities, which while building character will not build the bank account. "Those to whom much is given much is required," reminds us of the responsibility to give back when we have been given. Some of you may say, "No one gave me anything—I earned it". Ah, but many people work just as hard as you do, in other societies, other professions and other communities, but without the remuneration. "When you are in the service of your fellow man you are only in the service of your God" (higher power, mankind, the general good--choose your superlative) is a reminder that we are all part of the same family and that

one person's burdens are the burdens of all, which was poetically stated hundreds of years ago by John Donne: "No man is an island entire of itself; every man is a piece of the continent, a part of the main... any man's death diminishes me, because I am involved in mankind; and therefore never send to know for whom the bell tolls, it tolls for thee." Finally and in conclusion we are reminded, "Commitment to a higher goal is the embodiment of the human spirit." Our profession is uniquely positioned to help us seek out such higher goals and then take action towards their fulfillment.

Next month Larry will discuss: Governance of the Profession, and Separation of Powers.

About the Author



Larry Hunter was appointed as the Idaho State Bar Delegate to the American Bar Association House of Delegates effective August 2004. Mr. Hunter is a partner with Moffatt, Thomas, Barrett, Rock and Fields in Boise. His practice includes general and commercial litigation, administrative law, and alternative dispute resolution. Larry is a past president of the Idaho State Bar. He received his J.D. from Northwestern University School of Law. He has an A.B. from Harvard University (*cum laude*). Contact information for Larry is: (208) 345-200, or lch@moffatt.com

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LAWYER REPRESENTATIVE APPLICATION DEADLINE

Members of the Idaho State Bar from either the 1st or 2nd Judicial Districts who are interested in serving as a Federal Court Lawyer Representative need to submit their application, setting forth their experience and qualifications, to Diane Minnich, Executive Director of the Idaho State Bar, no later than September 21, 2006. Typical duties include: serving on Court Committees, making recommendations on the use of the Court's Non-Appropriated fund, developing curriculum for the District Conference, serving as the representative of the Bar to advance opinions and suggestions for improvement, and assisting the Court in the implementation of new programs or procedures. Check the District of Idaho website at www.id.uscourts.gov for further details.

WI-FI SYSTEM INSTALLED IN BOISE COURTROOMS

The installation of a Wi-Fi Network has been completed in the Federal Courthouse in Boise, which now allows attorneys to access the Internet for business purposes. The Wi-Fi is accessible in all courtrooms and witness rooms. Upon request, the courtroom deputy will provide you with a business card which contains the network name required for using this system. For security purposes, this will be periodically changed. Detailed instructions and restrictions concerning the use of the Wi-Fi system can be found on our Internet Website: <http://www.id.uscourts.gov/docs/wifi-secure.pdf>. After testing this Boise pilot project, it is anticipated that Wi-Fi networks will soon be installed in the Pocatello and Coeur d'Alene courthouses.

COMPLETION OF COURTHOUSE RENOVATIONS IN BOISE

The Boise Courtroom Renovation Project involving the installation of new evidence presentation equipment and a video conferencing system in fifth-floor courtrooms #5, #6 and #7 is scheduled for completion sometime in September.

NEW COEUR D'ALENE COURTHOUSE

The General Services Administration (GSA) announced a lease award to JDL Enterprises for the new federal courthouse facility in Coeur d'Alene which will be located on property adjacent to the Hecla Mining Building (bounded by Highway 95 and Handley Avenue). The project schedule calls for occupancy no later than July 1, 2008.

COMMUNITY OUTREACH GRANTS AWARDED

Recipients of the 2006 Community Outreach Grants included the Bankruptcy Resource Line and the Citizens Law Academy. With respect to the Bankruptcy Resource Line, it is anticipated that legal questions would be referred to a toll-free telephone number, where volunteer lawyers would screen the questions and respond accordingly. It is expected that this new resource will significantly enhance public service in the Bankruptcy area. Each year, subject to the availability of sufficient funds in the District of Idaho's Non-Appropriated Fund, a portion of the proceeds are awarded to programs which enhance public trust and confidence in the judiciary; promote a better understanding of the judiciary and legal processes; and improve communication with the public about the role of courts and the legal process. The grant funding must be related in some way to community education. The application deadline is April 1st of each calendar year. Additional information concerning this program is available on our website at:

ANNUAL DISTRICT CONFERENCE/ FEDERAL PRACTICE PROGRAM

This year's Annual District Conference will again be presented in a "road-show" format. The dates and locations for the three-city tour is as follows: Pocatello-Thursdays, October 12th at the Red Lion Inn; Coeur d'Alene- Friday, October 27th at the Coeur d'Alene Inn & Convention Center; and Boise- Friday, November 17th at the Boise Centre on the Grove.

The "What's New" portion of the Program is expected to include the follow-

ing topics: The Ripple Effect of Bankruptcy Reform; New Federal Rule Changes; ECF Update; Practical ECF Pointers for the Lawyer and Law Firm; and E-Briefs. The Program will also involve a Mediation Panel, a Gender Fairness Panel, a Federal Judges Panel and a presentation on ACTL - Code of Trial & Pretrial Conduct.

NEW BANKRUPTCY FORMS

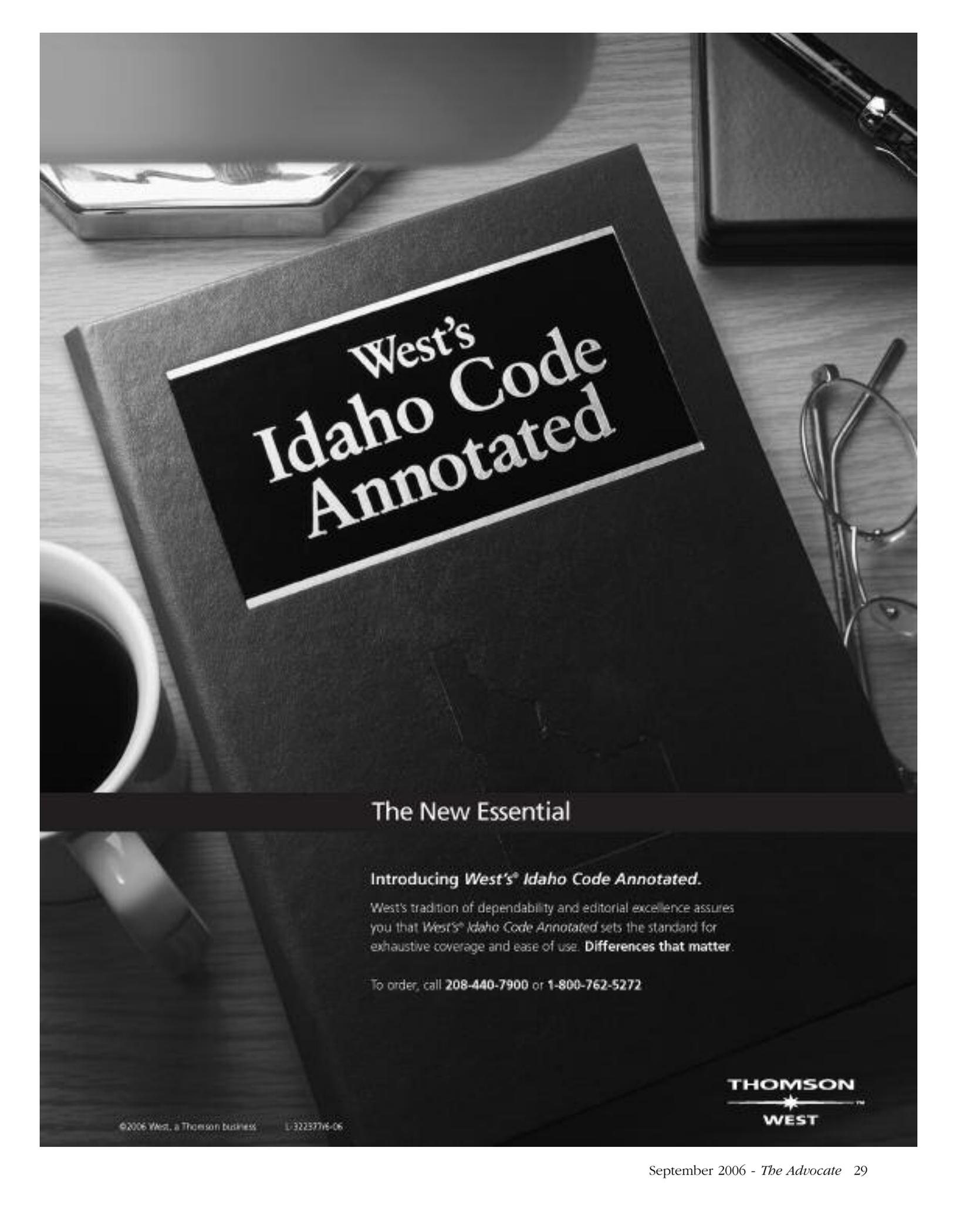
Four new or revised Procedural Bankruptcy forms became effective on August 1, 2006. They are B-202, Statement of Military Service (new); B-240, Reaffirmation Agreement; B-271, Final Decree; and B-281, Appearance of Child Support Creditor. Furthermore, pending approval by the Judicial Conference at the mid-September meeting, the following proposed amendments to the Official Bankruptcy Forms are slated to take effect on October 1, 2006. These include Forms 1, 5, 6, 9, 22A, 22C and 23. A draft version of the amendments are located on the website of the Administrative Office of the US Courts at:

MULTI-STATE CLE AT SUN VALLEY

The Idaho Chapter of the Federal Bar Association is sponsoring a two-day, Multi-State CLE at Sun Valley on September 22nd & 23rd. The Program will include topics such as: "The Politicalization of the Federal Bench"; Chief District Judges Panel; "Federal Sentencing post-Booker"; "U.S. Bankruptcy Practice - Fraud Referrals & BAPCA"; "The Trial of the Century"; "Strategic Issues in Electronic Discovery"; Federal Courts and Electronic Discovery"; and "Ethical Considerations in Electronic Discovery." Check the District of Idaho website at www.id.uscourts.gov for further details or contact Lisa Mesler at (208) 334-9330 or lisa_mesler@id.uscourts.gov.



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

A black and white photograph of a desk. In the center is a dark book with a white label that reads "West's Idaho Code Annotated". To the right of the book are a pair of glasses and a pen. To the left is a white coffee cup. The background shows a wooden desk surface.

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BOOK REVIEW

Business and Commercial Litigation in Federal Courts, 2nd ed., ed. Robert L. Haig

Reviewed by Craig L. Meadows
Hawley Troxell Ennis & Hawley, LLP

In 1998 the American Bar Association Section of Litigation, together with West Group published *Business and Commercial Litigation in Federal Courts* (1998). It was an 80 chapter, six-volume series devoted to timely topics that lawyers who practice in federal court, and have clients that become involved in federal court proceedings found to be an invaluable tool in practice and in providing advice to clients. The 1998 issue was reviewed in the May 1999 *Advocate* by Stephen R. Thomas, Gerald T. Husch and John C. Ward. The 1998 Edition was also reviewed by the *ABA Journal*, (Vol. 85, Mar. 1999) at 63. These reviews provide excellent insight into the First Edition of this work.

In 2005, the Second Edition was published by the American Bar Association Section of Litigation and Thomson West. Robert L. Haig, a distinguished member of the New York Bar, practicing with Kelley Drye & Warren LLP in New York, was again the Editor-in-Chief. He assembled 199 of the United States' most experienced and respected judges and practitioners to provide insight, analysis and commentary on current federal court topics lawyers will experience in the ever-expanding federal court system. The Second Edition was expanded to 96 chapters, 47 new authors, and now includes eight hardbound volumes; one paperback volume with jury instructions, forms, and tables; and one CD-ROM that also includes jury instructions and forms. You can save the materials on the CD-ROM to a separate file on your computer, and take the materials with you on your personal computer, leaving the CD-ROM with the set of books.

While reviewing the Second Edition, I found just about every conceivable topic, issue, procedural step or strategy was covered, or referenced in the 96 chapters. At the end of most of the various chapters are practice aids, including practice checklists, form complaints, form answers with affirmative defenses, form interrogatories, form requests for production, and in some chapters, jury instructions. The Second Edition is not just written for the defense practitioner, the Second Edition is for the plaintiff practitioner too. Remarkably, I found it devoted a substantial number of chapters to advice on current issues facing attorneys and clients who have to navigate the increasingly complex federal rules, regulations and laws coming from Congress.

The 16 new chapters included in the Second Edition are worthy of mentioning to give you some idea of the breadth of this work. They include: Case Evaluation, Discovery of Electronic Information, Litigation Avoidance and Prevention, Techniques for Expediting and Streamlining Litigation, Litigation Technology, Litigation Management by Law Firms, Litigation Management by Corporations, Civility, Director and Officer Liability, Mergers and Acquisitions, Broker-Dealer Arbitration, Partnerships, Commercial Defamation and Disparagement, Commercial Real Estate, Government Entity Litigation, and E-Commerce.

It was not possible for me to review all of the new chapters so I chose to review Discovery of Electronic Information and

Director and Officer Liability. Those seem to be current topics that might affect Idaho attorneys practicing in federal court here in Idaho and in other federal courts.

DISCOVERY OF ELECTRONIC INFORMATION

Chapter 22, Discovery of Electronic Information is authored by The Honorable Shira A. Scheindlin and Jonathan M. Redgrave, with significant contributions by eight other practitioners. It has seventy-seven (77) separate sections dealing with the issue of the discovery of electronic information. All of the sections are timely, with citations to rules, discussion of current cases and advice to the client facing litigation that has electronic data stored. The practice aids include checklists of various organization employees (who to ask, what to ask and how to ask), investigation of the hardware environment, investigation of back-up systems and archives, and investigation of applications. Sample orders are included, with a sample order on the ever increasing issue in electronic discovery of inadvertent document production.

As with all new topics, I think attorneys like to have a reference work they can go to and in one place find the issues, the rules and how to comply with the new rules. This chapter does that. I have not seen a book, or an article that assembles this much information in one place, with citations to rules and cases that is as well written and understandable. It is a must read for attorneys that face issues of electronic discovery, and who must advise clients that are facing litigation in federal court.

Chapter 22 addresses current legal doctrine, application of procedural rules and standards, and practice considerations that apply to electronic discovery from the anticipation of initiation of litigation through document production. Specific topics include identification of the various sources of electronically stored business information; pre-litigation strategies to reduce the burdens and risks of discovery; the scope and mechanisms for the preservation of electronic information; media and formats used to preserve information; the proportionality test, document production cost sharing and cost shifting; form of production; spoliation and sanctionable conduct.

The new federal rules on electronic discovery which will take effect on December 1, 2006 regrettably were not part of Chapter 22. I assume this chapter will be updated with the new rules when they become effective in federal courts on December 1, 2006. From what I reviewed, the materials contained in Chapter 22 will prepare the attorney for the new rules and the practical application of those new rules to electronic data and evidence that take so much time and effort in today's litigation arena.

DIRECTOR AND OFFICER LIABILITY

Chapter 63, Director and Officer Liability is authored by The Honorable Paul S. Diamond and Mathieu J. Shapiro. It has 33 separate sections dealing with this timely topic, including substance of director and officer actions, types of director and officer actions, indemnity and insurance.

Congress passed the Sarbanes-Oxley Act of 2002 (Sarbanes). As I have come to find out from some of my partners, it affects many corporations here in Idaho. Chapter 63 deals with the substance of director and officer claims, including the duties of care, loyalty and disclosure; the business judgment rule, the effect of

bankruptcy or impending bankruptcy on an officer or director's duties, the effect Sarbanes likely may have on director and officer liability, and the interplay between federal or state law.

Chapter 63 goes on to discuss the three types of actions typically brought against directors and officers: direct actions, class actions, and derivative actions. The difficult and sometimes thorny issue of attorney-client privilege considerations that arise in director and officer litigation is also reviewed. The issues of indemnity and insurance are thoroughly discussed. Throughout Chapter 63 there are numerous citations to cases and to statutes. In the preface to the chapter there are research references to aid the practitioner in getting to the current state of the law in this difficult and ever-changing area of the law.

The practice aids include a checklist for director and officer liability, with references to the specific section within Chapter 63. Additionally you will find a form complaint, and sample jury instructions, with citations to authority included in Chapter 63.

We are all acquainted with treatises that cover the federal rules, and treatises that cover various federal statutes. *Business and Commercial Litigation in Federal Courts*, 2nd ed., is the only treatise that I have seen that in one place, ties the federal rules, case law and statutes together. It also includes jury instruc-

tions, form complaints, form answers, and form discovery for the various federal related claims. For instance, the chapter on environmental claims, also included in the First Edition, is a must read and reference for an attorney advising, or representing a client involved in environmental issues.

Mr. Haig is to be congratulated for the Second Edition of this treatise. Current topics and current laws are covered. This work gives the practitioner one place to begin work on the issues facing the lawyer and client in commercial litigation in federal court.

For ordering information, call 1-800-344-5009. Part of the proceeds of the sale of this work goes to the American Bar Association Section of Litigation.

ABOUT THE REVIEWER:

Craig L. Meadows is a senior partner in the law firm of *Hawley Troxell Ennis & Hawley LLP* and has been with the firm since 1968. His practice areas are commercial litigation, environmental law, aviation law, insurance law, and professional malpractice law. He is a past president of the Idaho State Bar.



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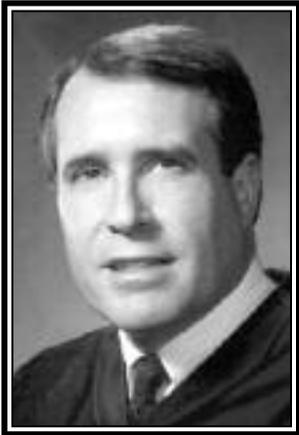
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Each year, the Idaho State Bar presents an award to one or more attorneys who have distinguished the profession through exemplary conduct and many years of dedicated service to the profession and to Idaho citizens. The distinguished lawyers for 2006 are guiding lights for all of us. They fight for the legal rights of clients with intensity and enthusiasm; they are relentless in pursuing justice; and they exhibit unwavering commitment to high ideals.

—2006 Distinguished Lawyer— Chief Judge B. Lynn Winmill



Chief Judge B. Lynn Winmill was born in Blackfoot, Idaho during a blizzard in March of 1952. His parents owned and operated a dairy farm that, even though not financially a success, did provide ample opportunities to teach their children about hard work, reaping what one sows, and to seek their life's work somewhere besides dairy farming. A good debater and student in high school Judge Winmill applied to and was accepted at Idaho State University where he planned to major in medicine. It was while

preparing a paper for an English class that he started reading about the lawyers who shaped our nation's democratic theory. As he learned more about Charles Hamilton Houston, Thurgood Marshall, and Jack Greenberg, lawyers who worked to liberate the nation from segregation, Judge Winmill decided a legal career would be more satisfying than a medical career and changed his major to pre-law. He was Student Body President at ISU and graduated with High Honors before pursuing his law degree at Harvard University. After receiving his Juris Doctorate he joined the law firm Holland & Hart in Denver.

Holland & Hart assigned him to work with litigator Bill McClearn on a large antitrust case. Bill told Judge Winmill he was developing into a fine lawyer, who understood the need to do the preliminary work necessary for success; whether it was writing briefs, preparing for oral argument, or getting his case ready for trial. Bill told him doing everything within his powers to make sure he was prepared would give him the confidence to carry him the rest of the way to a successful conclusion.

The decision to leave Denver and move to Pocatello led him to work with Don Burnett, current Dean of the University of Idaho College of Law, who taught him every client—big or small, rich or poor, lofty or humble—is deserving of the same first-quality legal advice and representation. Judge Winmill said, "Dean Burnett's commitment to exactness, preparation, and professionalism, even when it is unlikely services will be compensated inspired me to be a better lawyer." He carried this philosophy over to his career on the bench saying, "... it is critical every litigant, including those whose cases arise in obscurity, receives the same careful, thoughtful, and reflective attention of the presiding judge."

Judge Winmill was 21 when his father died. His father was a compassionate, empathetic, and caring man who could deal with life issues with optimism, confidence, and firmness. His father's influence has followed him through life. He often asks himself, "What would Dad do? Invariably, the answer to that question has

proven to be, not only the proper choice, but the one that has made all the difference in my life."

Judge Winmill has many professional accomplishments in life. Being appointed as a federal judge was clearly one of the highlights. But, being appointed a state court district judge by Governor Cecil Andrus in 1987 gave him the most pleasure. It was his work as a state district judge that defined his judicial philosophy, temperament, and outlook, and had a fundamental impact on his entire outlook on life and the human experience.

Reflecting on his time in the legal field Judge Winmill feels there are important attributes about being an attorney that haven't changed: your word is your bond; your arguments are zealous but never personal; and your approach to the profession is a calling rather than a job. He sees the challenge for today's young lawyers as working to maintain these standards with more competition, and fewer chances to be financially successful without taking ethical shortcuts. Computerized legal research, electronic filing, and evidence presentations systems are an integral part of being an effective practitioner in today's legal field. Continuing legal education and mentoring programs are more available and more relevant to the practice of law, and the makeup of the Bar has changed to reflect the changes in society. While the practice of law has changed, Judge Winmill believes the fundamental values of hard work; honesty, integrity, and ethical conduct remain the same.

Judge Winmill has long been active in Bar/Foundation committees and activities. As a young lawyer he was involved in grading bar exams, organizing Law Day activities, writing a weekly law column for the Idaho State Journal, and doing pro bono work for the Idaho Volunteer Lawyers Program. After his appointment as a district judge for the Sixth Judicial District he continued to support the Bar by speaking at bar district association meetings, Law Day events, and Bar-sponsored CLE programs. He wrote a sentencing exercise for laypersons that has been presented in speaking engagements throughout Idaho and is used as a lesson for the Citizens' Law Academy. It is now part of a program discussing the merits and efficacy of the death penalty. He was awarded the 1995 Professional Achievement Award from the ISU Alumni Association, the 2000 Statesman of the Year Award given by Pi Sigma Alpha, ISU Political Science Honor Fraternity; 2004 Advocate Award Best Article from the Idaho State Bar, and named in 2006 as one of the 500 Leading Judges in the United States. He has been a Scoutmaster for the Boy Scouts of America; Board Member of the Idaho Humanities Council; on the Adjunct Faculty of ISU; Chair, Idaho Supreme Court's Evidence Rules Committee; member, Board of Visitors of the J. Reuben Clark Law School; Moot Court judge for University of Idaho College of Law and J. Reuben Clark Law School; current member, Information Technology Committee of the Judicial Conference of the United States; instructor, UI College of Law Trial Advocacy Course; initiated formation of the Federal Bar Associa-

tion Idaho Chapter; instructor, Citizens Law Academy, co-founder and member of the Idaho Legal History Society; current member, Ninth Circuit Judicial Council; and Chair of Council of the Ninth Circuit Chief District Judges.

The recognition, experiences, and awards Judge Winmill has received in his professional life are reflective of his career. But, the most important, and most satisfying aspect of his life is that of husband, father, and grandfather. Judge Winmill said, "I would not trade a lifetime of success in the business world or the courtroom for any

of the precious moments I have experienced while caring for a sick child, coaching a son or daughter in basketball or soccer, seeing the smile on their faces when I came home from work, and witnessing their growth into adulthood." He has been married to his high school sweetheart, Judy, since 1973. They have four children: Kristen Winmill Southwick (husband Brady, two children - Clair and Eliza), Singapore; Jeff Winmill, George Washington University Law School, Caitlin Winmill, New York City, and Carley Winmill Tanner (husband Jonathan) Provo, Utah.

—2006 Distinguished Lawyer— William F. "Bud" Yost



William F. "Bud" Yost was born in Lancaster, Ohio in 1939. During high school he was in football and track, President of the Senior Class and worked at the local hardware store. He attended Miami University (Ohio) graduating in 1961 with a degree in Political Science. He was then commissioned into the United States Air Force as a Second Lieutenant. Before he was activated he attended Wharton School of Business, University of Pennsylvania, earning a Masters Degree in Governmental

Administration. In 1963 he was activated by the Air Force and stationed in Mountain Home, Idaho. He was a captain when he was honorably discharged in 1966. He was accepted at the University of Idaho College of Law and received his Juris Doctorate in 1969. Bud has been a member of the Idaho State Bar for 36 years.

The opportunity to solve problems for people was a motivator in Bud's decision to pursue a career in law. But it was the father of his best friend in high school who had the most influence. Lancaster was a small town where professional lives were easily observed. Bud's friend's father was an attorney who exhibited great integrity and showed great concern for his clients. Those two traits are often mentioned in Bud's writing.

Through the years many people have shaped the way he practices law. Bud tried many cases in front of then Administrative Judge, and now United States District Judge, Edward Lodge. It was in Judge Lodge's courtroom where Bud realized the meaning of being ethical as a lawyer or a judge, and what it brings to the legal profession. Bud is often described as a practical and pragmatic lawyer, and one who is solution-oriented and doesn't get bogged down in the process of working with the law. Bill Wellman, Nampa, shared office space with Bud in the mid-1980s. When asked about his onetime partner he said, "If I have an ethical question I need to bounce off someone, Bud is the colleague I call. He is a wonderful man; and he gives a lot of consideration to his answers."

Not sure of the direction to take when planning for a career Bud listened closely to Dr. Joseph Black, Chair of the Political Science Department at Miami of Ohio. Dr. Black was a professor who insisted his students recite on their feet. Bud had no problem with, not only thinking on his feet, but arguing on his feet. Dr. Black told him he would make a good lawyer because he had a talent for arguing and encouraged Bud to attend graduate school and to continue beyond to law school.

There have been many personal and professional accomplishments during Bud's lifetime. His election to the Idaho State Bar as a commissioner representing the Third and Fifth Districts, provided him an opportunity to work closely with fellow commissioners who's only agenda was to provide the best service they could to the State Bar. It was an added bonus to meet new people and renew acquaintances as he traveled across the state for meetings and the RoadShow. This opportunity to meet closely with peers is the biggest change Bud sees between the time he entered the law field and today. He sees the collegiality among lawyers diminishing. He feels it is important for senior lawyers to mentor younger lawyers to see the need for problem solving not just "winning" the case.

Bud has been an active participant in Bar, state, and community activities for many years. He has been a member of the Professional Conduct Board, a member of the first Committee to Redraft the Idaho Corporations Law, and he was Past President of the Canyon County Lawyers Club. In 1999 he was elected Commissioner to represent the 3rd and 5th Districts on the Board of Commissioners for the Bar. He was the Bar President in 2002. He was the chairman of the Third District's Citizens Law Academy, and is presently a member of the Idaho State Bar Character & Fitness Committee and the Legislative Compensation Committee. He has been a District Chairman for the Boy Scouts of America; Chairman of the Canyon County United Way; member and on the Board of Directors of the Nampa Rotary Club; member and Chair of Board of Directors of Mercy Medical Center; Board of Directors of Snake River Stampedge; member, past President, and current Secretary of the Nampa Industrial Corporation.

In recognition of his service to the Bar and his community Bud has received several awards. He was named a Samuel L. Fels Scholar at the University of Pennsylvania, Wharton School, he received a Professionalism Award from the Bar and was named a Paul Harris Fellow at the Nampa Rotary Club.

Bud and his wife Joan have been married for thirteen years. They have seamlessly blended five children and eight grandchildren into a very special family. Bud's father used to tell him the greatest legacy a person leaves behind are his children and grandchildren. Bud and Joan make every opportunity to watch soccer games and listen to piano recitals. Bud is considered the "go to guy" in his family for consistency and his desire to teach his kids. Joan and Bud are avid skiers. Though neither is quite willing to take on snowboarding, they have made it their goal to make sure every grandchild learns to ski or snowboard. During the off-season they can be found fly fishing and camping.

ANNUAL MEETING IN REVIEW



50-year attorneys: Milo Janecek, Bob Bakes, Lloyd Webb, and Scott Reed.



Molly O'Leary and Neil McFeeley.



Judy Peavey-Derr, Allen Derr, Joe McCollum, and Jon Gorski.



Outgoing ISB President, Hon. Rick Carnaroli and past President, Fred Hoopes.



Belinda and Jim Davis with Jim Morris and The Big Bamboo Band.



Brian and Emily Kane's daughter surveys the band action.



Good music, good food, good friends at Trail Creek BBQ.



2006 Idaho State Bar Distinguished Lawyers: Bud Yost and Chief Judge B. Lynn Winmill.



Idaho Law Foundation President John Bush talks with Larry Hunter and Bob Bakes.



2006 Distinguished Lawyer Bud Yost and wife Joan.



2006 Distinguished Lawyer Chief Judge B. Lynn Winmill and wife Judy.



Andy Hawes dances with oldest daughter Audrey while youngest daughter Greta waits her turn.



Previous neighbors, Jim Davis and Katherine Moriarty get together to talk over old times.



Retired Court of Appeals Judge Jesse Walters with wife Harriet and Allen Derr.



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**Very Special Thanks to Jim Davis for his efforts in bringing CLE speaker
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Attorneys Against Hunger 2006 - Save the Date!

Maureen G. Ryan
Holland & Hart LLP

The Young Lawyers Section will be hosting its annual Attorneys Against Hunger event on Friday, November 10, 2006.

This year's event will be held in the ballroom of the Owyhee Plaza Hotel. The event includes a silent auction, dinner, live music and dancing. Invitations are open to all members of the Idaho State Bar and their guests.

All of the money raised through Attorneys Against Hunger benefits the Idaho Food Bank. The Young Lawyers Section has worked with the Food Bank on Attorneys Against Hunger for the past 15 years. Over those 15 years, the Young Lawyers Section has raised more than \$75,000.00 for the Food Bank. Last year, the event raised approximately \$8,000.00, and this year we hope to raise even more.

Members of the Young Lawyers Section have been busy for the past few months planning the event, with the primary focus being on soliciting donations for the silent auction. We have already obtained many donations, but we are working hard to get even bigger and better donations for this year's event.

The money the event generates for the Food Bank comes from the silent auction, as well as from single ticket and table sales. I will be sending out information about tickets and tables, as well as other sponsorship opportunities for the event, within the next few weeks. With respect to the silent auction, individual

attorneys and law firms are encouraged to donate cash or other items for the silent auction. For example, a firm could donate a \$500 airline gift certificate (just a thought!). Your name would be publicized as the donor at the silent auction.

Not only does Attorneys Against Hunger serve an important charitable purpose in raising much-needed money for the Idaho Food Bank, but it is also a fun social event. It is a great opportunity for members of the Bar to get together for an evening of dining, dancing, and conversation.

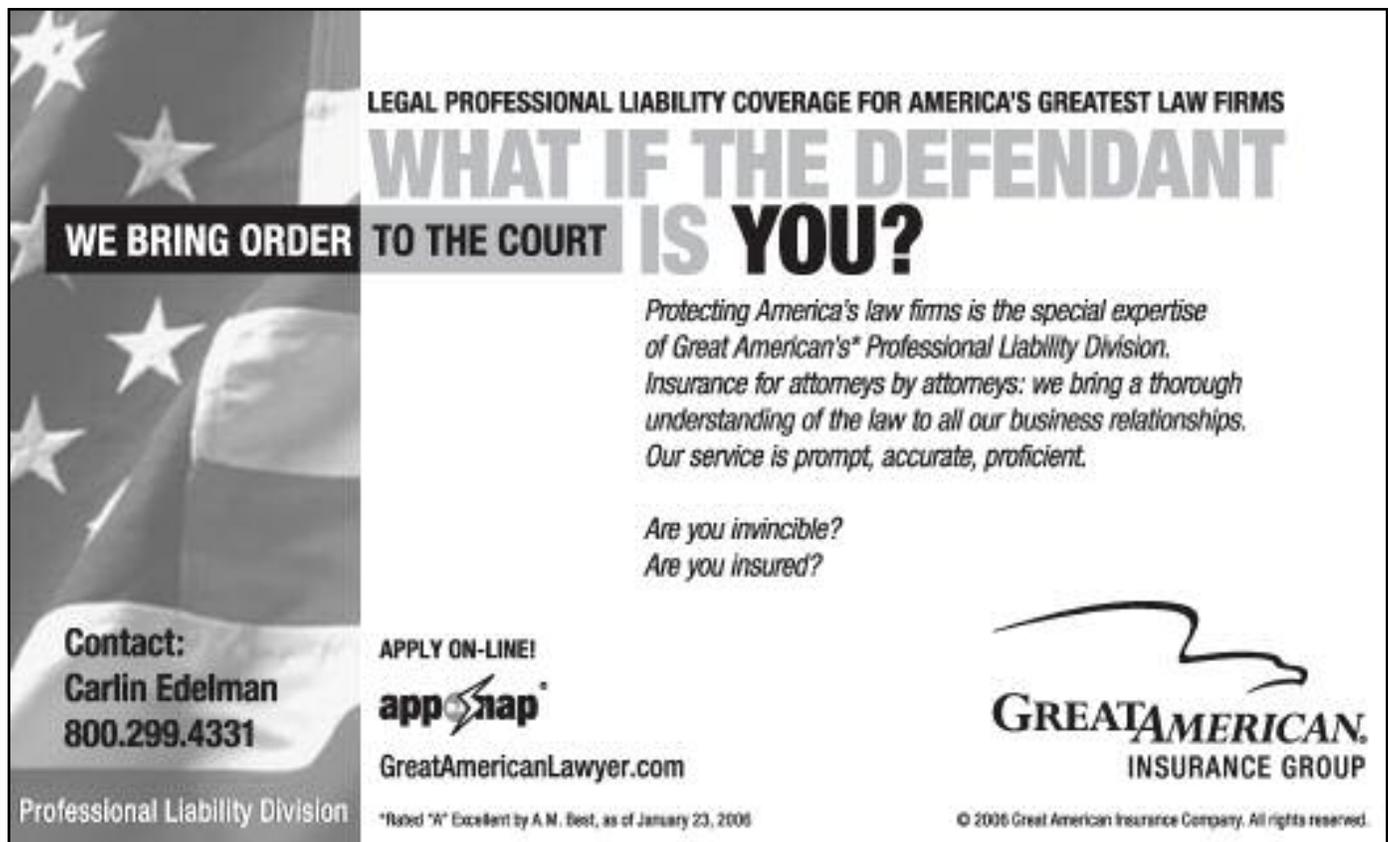
I encourage all of you to save the date of Friday, November 10 for Attorneys Against Hunger. It is sure to be a wonderful evening filled with good people gathering for a good cause.

If you are interested in making a donation to the silent auction, or if you have any other questions about Attorneys Against Hunger, please feel free to contact me, Maureen Ryan, by phone at (208) 342-5000, or by e-mail at mgryan@hollandhart.com. All donations are tax-deductible.

I hope to see many of you on Friday, November 10!

About the Author

Maureen G. Ryan is Vice Chair of the Young Lawyers Section of the Idaho State Bar. She is an Associate with Holland & Hart LL, Boise. Her practice focuses on general business and real estate transactions.



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ILP AND LEGAL PERIODICALS—THE ELECTRONIC EVOLUTION

John Hasko

University of Idaho College of Law

Over the course of the past twenty-five years or so, the manner in which legal research is conducted has moved from having access to only print materials, through a transition period of print and electronic access, to the point now where we're on the verge of being able to conduct some research through exclusively electronic access. Illustrative of this development is the world of legal periodicals and the indexes to them.

The longest running print index to law reviews and journals is the H. W. Wilson Company's *Index to Legal Periodicals*, and its current offering, *Index to Legal Periodicals & Books (ILP&B)* (since 1994). Continuously published since 1908, this index currently covers about 850 English language publications from the United States and the Commonwealth countries. Its position as the sole index for American legal periodicals was not challenged until 1980, when the print *Current Law Index (CLI)* was started by Information Access Company. *CLI* was also offered as a microfilm product, updated each month, and run on a special film reader; it was marketed in this format as *Legal Resource Index (LRI)*. For a number of years now, the electronic version of *CLI* has been produced by Gale Group (Thomson), under the title, *LegalTrac*. *LegalTrac* currently indexes over 900 legal periodicals, several major legal newspapers, and selected law-related articles from hundreds of non-legal periodicals.

While *LegalTrac* gained a coup on the Wilson products by becoming Internet accessible earlier, recent product enhancements have moved the *ILP* indexes a step beyond *LegalTrac*. *ILP&B* became available on the Internet shortly after *LegalTrac* did, providing indexing for legal periodicals from 1982 to the present. About three years ago, *Index to Legal Periodicals Retrospective (ILPRetro)* kicked in, with coverage from 1918 to 1981. In July of this year, *ILP&B* went back retroactively to 1908, so the two electronic indexes now cover the entire time period of the print version of the index.

The creation of these two Internet accessible *ILP* indexes has greatly changed the way information is found in legal periodicals.

If one were to do a subject search of the print *ILP*, 1908-1981, there are 24 individual volumes to consult; with the Internet version, *ILPRetro*, there is one search for that entire period of time, with the option of combining search terms for more precision.

What has further transpired in the electronic age is the ability to tie different stages of the research process more intimately together, creating a measure of transparency that does not exist when using print materials. Indicative of this trend is the way the *ILP* electronic indexes work with electronic databases of full-text legal periodicals. As an example of this collaboration among publishers, Wilson has partnered with HeinOnline and other electronic database vendors to provide full-text copies of the search results. When search results come up in *ILPRetro* or *ILP&B*, there are links to electronic databases that contain the full-text of the search results. Many of the articles showing up in the two *ILP* indexes can be retrieved in PDF format in HeinOnline, currently containing complete runs of over 800 law reviews and journals, with a couple of clicks.

Concurrent subscriptions to the electronic *ILP* indexes and to HeinOnline provide access to over a century's worth of indexing, along with a collection of legal periodicals whose volumes are, in effect, always on the shelf. The search process is much less time-consuming than when using the equivalent print indexes, and the articles are readily available to read or download. The times they are a-changin'.

About the Author



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

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IDAHO LAW FOUNDATION



Helping the profession serve the public

LAW FOUNDATION RELEASES ANNUAL REPORT

The Idaho Law Foundation recently released its 2005-2006 annual report. This report contains information about ILF programs, including Idaho Volunteer Lawyers Program, Law Related Education, Continuing Legal Education, Guardian ad Litem, and Interest on Lawyers' Trust Accounts. It also includes a financial statement for the period ending December 31, 2005.

Some of the Law Foundation's accomplishments for 2005-2006 include:

- Serving over 1,000 low-income Idahoans who received some kind of legal help or representation.
- Providing law-related instruction for 500 Idaho students at all grade levels.
- Sponsoring 56 live continuing legal education seminars attended by 2355 attorneys.

In the year to come, the Foundation will continue to help the legal profession serve the public and bring much needed educational services and legal access to Idaho communities. Some of the goals for 2006-2007 include:

- Partnering with law firms and legal departments to facilitate communication with IVLP for placing high priority cases and new case types.

- Sponsoring four Lawyers in the Classroom event days during the 2006 - 2007 school year.
- Launching a new Continuing Legal Education series entitled *Lessons from the Masters* in which Idaho "living legend" attorneys share their wisdom and advice as they talk about significant cases from their legal careers.
- Finalizing plans for the upcoming endowment campaign.

People who donated to ILF from July 1, 2005 to June 30, 2006 received a copy of the annual report in the mail. These donors, listed in this addition of *The Advocate*, helped ILF raise over \$100,000. Donations came from over 700 contributors, including both individuals and organizations who made donations of both cash and in-kind goods and services.

If you would like a hard copy of the report please call the Idaho Law Foundation at (208) 334-4500. You can download a copy from our website:

http://www2.state.id.us/isb/gen/ilf_info.htm

If you would like to help the Idaho Law Foundation, either with volunteer time or to make a donation, please call Carey Shoufler at (208) 334-4500.

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*The Idaho Law Foundation
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Ralph Blount	David Ducharme	William J. Grismer	Soo Yong Kang
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John D. Bowers	Margaret Dunbar	Jennifer L. K. Haemmerle	William Killen
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Carol Brassey	Larry Dunn	Jarin O. Hammer	James Kiser
Kimberlee Bratcher	Billy G. DuPree Jr.	Terrance Hannon	Karl Klein
Christopher Bray	Malcolm S. Dymkoski	Rusty Hansen	Edward Kok
George Breitsameter	W. Brent Eames	Kathleen Hardcastle	David R. Kress
Karl Brooks	Elaine Eberharter-Maki	Roseanne Hardin	Debora Kristensen
Kelly Brown	Matthew S. EchoHawk	Edwin A. Harnden	Paul Kroeger
Steven Brown	Michael Elia	William G. Harrigfeld	Russell Kvanvig
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Ronald Mumford	Ronald Schilling	Marie T. Tyler	
Joseph Munson	Kristina Schindele	Glen Utzman	
Gary Nalder	Michael Schmidt	Robert W. Vail	
David Negri	William Schroeder	Anthony Valdez	

The Idaho Law Foundation gratefully acknowledges the generous contributions received between July 1, 2005 and June 30, 2006. While we have taken care to ensure the accuracy of the names listed, should you find an error or omission, please accept our apologies and let us know so we can acknowledge your contribution in a future issue of The Advocate.



IDAHO VOLUNTEER LAWYERS PROGRAM
Special Thanks for
Going the Extra Mile

The Idaho Volunteer Lawyers Program 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!"

Kenneth White, *Kenneth F. White Chtd.*, Nampa, spent over 30 hours working on a Divorce (with Bankruptcy issues) for a low-income client through IVLP. This case was referred to IVLP from the Idaho Legal Aid Senior Hotline. "Virginia" (not her real name) is a 66-year-old woman living on social security who needed help with a divorce from her husband, "Thomas", of 8 years. Both Virginia and Thomas had struggled in recent years with health problems and Thomas moved in with his adult daughter. He was experiencing some Alzheimers-related problems and would frequently drain the couple's joint bank accounts. Both parties wished to end the marriage. Kenneth White was able to secure the divorce and thereby provide more stability for Virginia. The client and IVLP are grateful for the assistance Mr. White provided in his first case for IVLP.

Cassandra G. Drescher, *Law Office of Cassandra Gray Drescher*, Boise. Despite the fact that accepting this IVLP case required commuting to Canyon County, Ms. Drescher generously and professionally represented a young woman who needed legal assistance to secure the safety of her children. "Corrie," was served with a petition for custody for her two children in January by her ex-boy friend. He had spent most of the previous three years in prison, but nonetheless, claimed he was ready to take on parenting the 3 and 4-year-old boys fifty percent of the time. While her ex-boyfriend was in prison Corrie managed to care for her boys and maintain a household without support or

material assistance from the father of her children, relying primarily on her wages as a caregiver in an adult assisted living/group home. Since the father's release Corrie had allowed weekend visitation but learned he had left the children with others to pursue his own interests. Ms. Descher had this to say about her first IVLP case: "Corrie really was a good client and I was grateful for that. My experience with IVLP was a valuable learning experience, and I was very grateful for the guidance and support provided by fellow attorneys." With this case Ms. Drescher exceeded the Idaho State Bar aspirational goal of 50 hours pro bono per year (Idaho Rules of Professional Conduct, Rule 6.1) with her "60 hours—not counting sleepless nights." IVLP salutes her generous dedication.

David Lloyd, *Saetrum Law Offices*, Boise also exceeded the yearly aspirational goal of 50 hours of pro bono service in a divorce and custody case for a low-income mother who was the victim of domestic violence and intimidation. Mr. Lloyd contributed more than 100 hours over a two-year period. David said this about the case: "This has been an extremely contentious divorce and the client had great need of an attorney. I appreciate the opportunity to be of service in this case." After an extensive trial and a series of motions, the final order of divorce awarded custody to Mr. Lloyd's client and included a period of supervised visitation for the father. IVLP gratefully thanks Mr. Lloyd for his dedication and generous assistance in this, his first IVLP case.

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Holland & Hart Takes on Pro Bono Challenge

Every lawyer has a professional responsibility to provide legal services to those unable to pay.

Idaho Rule of Professional Conduct 6.1

In the past, immigration laws have overlooked—and in some cases even exacerbated—the plight of immigrant women and children who have been victims of domestic violence committed by a United States citizen (or “Green Card” holding) spouse or parent. Cutting off the ability of abusers, traffickers, and perpetrators of sexual assault to avoid prosecution and blackmail their victims with threats of deportation is a key goal of the “Violence Against Women Act” (VAWA), enacted in 1994 and reauthorized in 2005. VAWA allows immigrant victims to obtain immigration relief without their abuser’s cooperation or knowledge. To take advantage of VAWA’s protections, however, most victims require legal assistance, but few are able to pay.

Seeing a need, Boise’s **Holland & Hart** law firm stepped in. Last year **Brian Fischenich**, a Holland & Hart associate, worked with Catholic Charities of Idaho to provide *pro bono* assistance to a victim of domestic violence in getting her legal visa under VAWA. Brian soon agreed to take a second case, and in February of this year a second Holland & Hart associate, **Maureen Ryan**, began assisting a third immigrant victim.

Brian recognized the need for legal assistance with VAWA cases was beyond his ability to do it alone. Recently he arranged for representatives of Catholic Charities of Idaho and Idaho Volunteer Lawyers Program to make a presentation to a group of Holland & Hart attorneys showing how they could work with these programs to make a significant difference in the lives of victims of domestic violence. Following a presentation, which included perspectives from **Kathryn Railsback**, a long-time volunteer attorney in VAWA cases, a number of Holland & Hart

attorneys, including **Benson Barrera, Brad Georgen, James Bowen, Kevin Braley, Matt Hicks, Nicole Snyder, Pam Howland,** and **Tracy Crane**, each pledged to take on at least one VAWA case over the next year.

Holland & Hart’s commitment is significant. Idaho Catholic Charities estimates each case requires between 25 and 40 *pro bono* attorney hours. But the rewards are great. Not only are the Holland & Hart attorneys well on their way to meeting—and exceeding—the aspirational goal of 50 hours of *pro bono publico* service per year under Idaho Rule of Professional Conduct 6.1, they are expanding their skills and reaping significant intangible rewards. As Brian Fischenich noted, “any lawyer who works with one these victims will feel the satisfaction that comes with knowing that such a small amount of our time can make such a positive and profound difference on the lives of others.”

Even with the generous commitment of Holland & Hart, however, many immigrant victims of domestic violence go without legal assistance or will endure long waiting periods to receive help. Brian Fischenich summed up the issue like this, “This is a segment of society that is in desperate need of legal services; I am hopeful the legal community will step in to fill that need.” If you would like more information about VAWA cases, please contact Starr Shepard at Catholic Charities of Idaho, email: sshepard@ccidaho.org. Contact Mary Hobson at the Idaho Volunteer Lawyers Program, email: mhobson@isb.idaho.gov about volunteering for VAWA cases or for information about other exciting projects for your law firm or group.

knowledge
justice
access
community
democracy
expertise

DID YOU KNOW?
Since 1988 **Idaho Volunteer Lawyers Program** has helped provide legal services to over 20,000 Idahoans, the majority of whom are families requiring assistance with family law issues.

IDAHO ATTORNEYS:
providing advice, consultation and case representation for Idaho's most vulnerable families.

IDAHO LAW FOUNDATION

Helping the profession serve the public



Children (3,420) + Volunteer Hours (299,000) = \$400,900.00*

Barbara Anderson
Idaho State Bar
Controller/Grants Administrator

In 1989, the Idaho Supreme Court designated the Idaho Law Foundation (Foundation) to be the grant administrator to award and administer guardian ad litem grants under the terms and conditions of the Child Protective Act with funding from an annual appropriation designated by the State Legislature. The awards for the first year totaled \$136,500; the awards for FY 2006/2007 will total \$409,100. This increase in funding signifies the success of the concept of the guardian ad litem programs to ultimately find a safe and nurturing environment for young victims of abuse, abandonment or neglect.

According to the National Court Appointed Special Advocate (CASA) Association over one-half million children are in foster care in the United States because they cannot safely live with their families. The welfare of those children in Idaho is a primary concern of the seven guardian ad litem programs operating in the state of Idaho, one in each judicial district. These programs provide training and oversight of guardian ad litem volunteers who speak up on behalf of abused, neglected or abandoned children under the purview of Idaho's Child Protective Act.

In Idaho, guardian ad litem volunteers served over 3,420 children during fiscal year 2005-2006 according to program reports provided to the Idaho Law Foundation and approximately 299,000 CASA volunteer hours were spent in advocating for children.

Each of the following seven programs in the state will receive \$58,443 from the legislative appropriation in FY 2006/2007:

- First Judicial District CASA Program, Inc.
- Second Judicial District CASA Program, Inc.
- Third Judicial District CASA Program/
Children's Voices, Inc.
- IV Judicial District CASA Program/
Family Advocate Program, Inc.
- Fifth Judicial District CASA Program, Inc.
- Sixth Judicial District CASA Program, Inc.
- Judicial District VII CASA Program, Inc.

Contact information for each of these programs can be found on the Idaho CASA Association website at www.idahocasa.com. For more information about the concept and impact of CASA programs nationwide, visit the website of the National CASA Association at www.nationalcasa.org.

Attorneys can volunteer through the Idaho Volunteer Lawyers program to join the team that speaks up for the child in Child Protective Act Placement procedures. CASA programs in Districts 4, 6, and 7 use volunteer attorneys to represent trained, lay guardians ad litem. Call today to be a part of the team that safeguards the rights of minor victims of child abuse and neglect. Contact Carol Craighill, IVLP, at 334-4510 or 1-800-221-3295 or ccraighill@isb.idaho.gov

*During 2005/2006 grant year, the guardian ad litem grants distributed \$400,900.00 to Idaho's Seven Judicial Districts.

RECIPROCAL ADMISSION

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

Reciprocal Admission Applicants Admitted

(from June 1, 2006, to July 31, 2006)

Stephanie M. Ammirati

Garden City, UT
Loyola Marymount
University-Los Angeles
Admitted: 7/18/06

R. Scott Garland

Jackson, WY
University of Wyoming
Admitted: 6/26/06

Brent Gordon

Salt Lake City, UT
University of Utah
Admitted: 6/22/06

R. Mackay Hanks

North Salt Lake, UT
University of Idaho
Admitted: 6/6/06

Christine A. Kosydar

Portland, OR
Lewis and Clark College
Admitted: 6/20/06

Brant L. Stevens

Spokane, WA
Gonzaga University
Admitted: 6/30/06

CONTINUING LEGAL EDUCATION

SEPTEMBER

Trademark Law

Sponsored by the
Intellectual Property Law Section

Thursday, September 7, 2006
Law Center

†††

Advanced Estate Planning Annual Conference

Sponsored by the
Taxation, Probate and Trust Law Section
September 8 & 9, 2006
Sun Valley Resort

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

†††

Judicial Confirmation: A Perspective from the Bench

Sponsored by the
Government and Public Sector Lawyers
Section

September 8, 2006
Law Center, Boise

Justice Daniel Eismann, Judge Cheri Copsey and Judge Michael McLaughlin will present a panel discussion regarding judicial confirmation in light of the decision *City of Boise v. Frazier*. Each of the panel members have authored decisions

concerning judicial confirmation and will provide their insight into issues and factors connected with the process of judicial confirmation.

†††

Annual Litigation Update

Sponsored by the Litigation Section

September 15, 2006
Grove Hotel, Boise

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 Alternative Dispute Resolution

Sponsored by the Young Lawyer Section

September 20, 2006
Law Center

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

†††

Idaho Practical Skills
Sponsored by the
Idaho Law Foundation, Inc.

September 29, 2006
Boise Centre on the Grove

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

OCTOBER

Successor Plans for Solo Practitioners

Sponsored by the Professionalism and Ethics Section

October 4, 2006
Law Center, Boise

Join attorneys Steve Smith and Sandra Clapp as they discuss the policy and practicality of successor plans for solo practitioners.

†††

Your First or Next Social Security Insurance Case

Sponsored by the Idaho Law Foundation, Inc.

October 27, 2006

Join Attorney Debra Irish as she discusses the nuts and bolts of handling "your first or next" social security case

†††

Also watch for the following upcoming CLE programs:

‡Headline News (December)

‡Video Replay Series

‡Your First or Next
Guardianship Case

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**OFFICIAL NOTICE
SUPREME COURT OF IDAHO**

Chief Justice
Gerald F. Schroeder

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

2nd Amended - Regular Fall Terms for 2006

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

Boise September 8, 27 and 29

Idaho Falls October 4 and 5
Pocatello October 6

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

Boise December 1, 4, 6, and 8

By Order of the Court
Stephen W. Kenyon, Clerk

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

Idaho Supreme Court

Oral Argument Dates

As of August 16, 2006

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

Friday, September 8, 2006 - **BOISE**

10:00 a.m. State of Idaho v.
Fourth Judicial District #29203

Wednesday, September 27, 2006 - **BOISE**

8:50 a.m. State v. Zueger (Petition for Review) #33071
 10:00 a.m. Hutton v. Manpower, Inc. #32160
 11:10 a.m. Point of Rocks Ranch v
Commonwealth Land Title #31959

Friday, September 29, 2006 - **BOISE**

8:50 a.m. Stewart v. Stewart #31905
 10:00 a.m. Blimka v. My Web Wholesaler #32185
 11:10 a.m. Stuart v. Dept. of Transportation #31974

Wednesday, October 4, 2006 - **IDAHO FALLS**

8:50 a.m. Sherer v. Pocatello School District #31681
 10:00 a.m. J. R. Simplot Company v. Bosen #31706
 11:10 a.m. Cordova v. Bonneville County Joint
School Dist. #93 #31188

Thursday, October 5, 2006 - **IDAHO FALLS**

8:50 a.m. Cowan v. Fremont County
Board of Commissioners #30061
 10:00 a.m. Slaven v. Road to Recovery #32650
 11:10 a.m. OPEN

Friday, October 6, 2006 - **POCATELLO**

8:50 a.m. State v. Lenon (Petition for Review) #32754
 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**

Chief Judge
Darrel R. Perry

Judges
Karen L. Lansing
Sergio A. Gutierrez

Regular Amended Fall Terms for 2006

Boise August 15
Coeur d'Alene September 12
 (Northern Idaho term)
Hailey October 4 and 5
 (Eastern Idaho term)
Boise November 8, 9, 20, and 21
Boise December 5 and 7

By Order of the Court
Stephen W. Kenyon, Clerk

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

Idaho Court of Appeals

Oral Argument Dates

As of June 15, 2006

— **Boise Term** —

Thursday, September 12, 2006 - **BOISE**

9:00 a.m. Johnson v. Lambros #31867
 10:30 a.m. Foster v.
Kootenai Medical Center #32473

 1:30 Gibbar v.
Dept. of Transportation #31840

IDAHO SUPREME COURT AND COURT OF APPEALS
NEW CASES ON APPEAL PENDING DECISION
(Update 08/01/06)

CIVIL APPEALS
PROCEDURE

1. Did the court err in denying Johnson's motion for reconsideration?

J. David Johnson v.
John Lambros
S.Ct. No. 31867
Court of Appeals

2. Whether the district court erred in dismissing Lake's notice of appeal when it appears he timely filed it but did not include the filing fee or motion for fee waiver as part of that submission.

Michael A. Lake v.
Russell Newcomb
S.Ct. No. 32490
Court of Appeals

PROPERTY

1. Whether the trial court erred, as a matter of law, in granting summary judgment in favor of the Olsons, finding that the express meaning of the deeds allowed the Olsons to fence off the easement running through NVVC's property.

Harold G. Olson v.
J. Rand Bergstrom
S.Ct. No. 32408
Supreme Court

ATTORNEY FEES AND COSTS

1. Did the court abuse its discretion in awarding Parsons \$20,000 in attorney fees under I.C. § 41-1839, where the \$60,000 amount "justly due" was paid fifty-two days after the alleged proof of loss and the lawsuit to collect the UIM coverage lasted only seventeen days?

Rena Parsons v.
Mutual of Enumclaw
S.Ct. No. 32603
Supreme Court

2. Did the court err in allowing the amendment to the Estate's Attorney's fee request?

D. Grant Summers v.
Estate of Dennis A. Summers
S.Ct. No. 32350
Supreme Court

SUBSTANTIVE LAW

1. Did the court err in its conclusion that non-public business related emails are "public records" subject to disclosure?

Cowles Publishing Co. v.
Idaho Counties Risk Mgmt.
S.Ct. No. 32195
Supreme Court

MEDICAL INDIGENCE CLAIMS

1. Whether the district court erred in dismissing Mercy Medical Center's petition for judicial review as untimely.

Mercy Medical Ctr v.
Ada County
S.Ct. No. 32729
Supreme Court

SUMMARY JUDGMENT

1. Did the trial court correctly rule that the City met its burden of establishing the absence of a genuine issue of material fact as to the elements of attractive nuisance?

Stephanie Follett v.
City of Elk River
S.Ct. No. 32543
Supreme Court

2. Did the court err in granting summary judgment in favor of the defendants?

Tyler Mannos v.
Todd Moss
S.Ct. No. 31958
Supreme Court

3. Whether the trial court erred in dismissing McDaniel's case by finding the affidavits of Dr. Wish are insufficient under I.C. § 6-1013.

Tammie McDaniel v.
Inland Northwest Renal Care
S.Ct. No. 32539
Supreme Court

4. Whether a triable issue of fact exists regarding an insurance company's alleged breach of its duty to its insured where it was presented with an opportunity to settle a claim within policy limits, had knowledge of damages in excess of those limits, failed to investigate other possible claims and failed to diligently communicate the offer to its insured.

William McKinley v.
Guaranty National Ins.
S.Ct. No. 32500
Supreme Court

5. Whether the district court erred in granting summary judgment to Ness and AMA on each of DK's claims for breach of fiduciary duty, tortious interference with prospective economic advantage, defamation, negligence, indemnity and contribution.

Utah Cleaning Systems v.
Douglas A. Ness
S.Ct. No. 32456
Supreme Court

DIVORCE, CUSTODY,
AND SUPPORT

1. Did the court abuse its discretion when it construed Alanis' motion to modify a child support order and motion for DNA testing to be a motion to set aside an order of filiation and found the legal principle of *res judicata* applied to these untimely claims?

Dept. of H&W v.
Frank Alanis
S.Ct. No. 33238
Court of Appeals

2. Whether the court erred in ruling that Jacqueline Matthews was entitled to reimbursement of sums of \$5,000 and \$13,000 for separate property contributed to the community.

Terrance Matthews v.
Jacqueline Matthews
S.Ct. No. 32517
Court of Appeals

3. Whether the court erred in its application of I.C. § 32-717 (c) and I.C. § 32-717 (1)(f) and in determining the defendant's home was more stable.

Kyle S. Nelson v.
Darline Nelson
S.Ct. No. 32503
Supreme Court

POST-CONVICTION RELIEF

1. Did the court err in summarily dismissing Crabtree's petition for post-conviction relief in which he alleged ineffective assistance of counsel?

Frank J. Crabtree v.
State of Idaho
S.Ct. No. 32196
Court of Appeals

2. Did the court err in summarily dismissing Gonzalez's claim that he received ineffective assistance of counsel in defense counsel's failure to investigate disputed allegations contained in the PSI?

*Vidal Gonzalez v.
State of Idaho
S.Ct. No. 32182
Court of Appeals*

3. Whether the court erred in finding that newly discovered evidence in the form of recanted testimony did not affect the voluntariness of Lara's plea.

*Ricardo Lara v.
State of Idaho
S.Ct. No. 32364
Court of Appeals*

4. Did the district court correctly apply the law to the facts in summarily dismissing Papse's post-conviction petition as untimely?

*Rodney Papse v.
State of Idaho
S.Ct. No. 31952
Court of Appeals*

5. Whether the trial court erred in summarily dismissing Ramsey's petition for post-conviction relief by finding no genuine issue of material fact existed regarding an actual conflict of interest for sentencing counsel.

*James B. Ramsey v.
State of Idaho
S.Ct. No. 32631
Court of Appeals*

6. Did the court err by summarily dismissing Roeder's petition for post-conviction relief because he raised an issue of material fact as to whether the State failed to disclose exculpatory evidence and thus violated his right to due process?

*Richard Roeder v.
State of Idaho
S.Ct. No. 30671
Court of Appeals*

7. Whether the successive petition for post-conviction relief should be deemed timely based upon ineffective assistance of post-conviction counsel.

*Dovey Small v.
State of Idaho
S.Ct. No. 32134
Court of Appeals*

DAMAGES

1. Did the trial court substitute its opinion for that of the jury as to an appropriate amount of damages?

*Alan W. Wilson v.
J.R. Simplot Company
S.Ct. No. 31774
Supreme Court*

JURISDICTION

1. Does the court lack jurisdiction in this appeal because Halper failed to file an appeal to the district court within 28 days after the decision by the Jerome County Board of Commissioners as required by I.C. § 67-6521(d), despite the language in the Commissioner's decision that purported to allow a thirty-one day appeal period?

*Lee Halper v.
Jerome County
S.Ct. No. 31819
Supreme Court*

QUIET TITLE

1. Did the district court err when it granted judgment in favor of Plaintiffs, awarding them quiet title?

*Teresa Louise Griffin v.
Mark L. Anderson
S.Ct. No. 32617
Supreme Court*

2. Did the district court err in determining that the Quirins were entitled to a decree of quiet title to the triangular parcel based upon the Kieberts' inability to prove adverse possession?

*Travis Kiebert v.
Earlyn Quirin
S.Ct. No. 31708
Supreme Court*

CRIMINAL APPEALS

NEW TRIAL/MISTRIAL

1. Did the court err by failing to grant a new trial because at least three jurors failed to pay attention to the trial?

*State of Idaho v.
Stephen Ray Bolen
S.Ct. No. 31294
Court of Appeals*

2. Did the court err in denying each of Linzi's motion for a mistrial?

*State of Idaho v.
James Randolph Linzi, II
S.Ct. No. 31617
Court of Appeals*

PLEAS

1. Whether the drug enforcement restitution award must be vacated because Meija was not advised of its possibility before pleading guilty.

*State of Idaho v.
Santos Ramirez Mejia, Sr.
S.Ct. No. 31671
Court of Appeals*

PROCEDURE

1. Did the district court err in dismissing Odle's intermediate appeal from his misdemeanor conviction for DUI?

*State of Idaho v.
John Irvin Odle
S.Ct. No. 32299
Court of Appeals*

SEARCH AND SEIZURE – SUPPRESSION OF EVIDENCE

1. Did the court err in denying Fuentes' motion to suppress as Detective Reed did not possess reasonable, articulable suspicion for the stop and frisk of Fuentes, and because the handcuffing of Fuentes amounted to a *de facto* arrest without probable cause?

*State of Idaho v.
Andres Sanchez Fuentes
S.Ct. No. 32193
Court of Appeals*

2. Is there substantial evidence to support the court's conclusion that the consent to search the truck was not coerced or involuntary as the un rebutted evidence was that consent was obtained as a result of the police threats to arrest him and his co-workers?

*State of Idaho v.
Francisco Garcia
S.Ct. No. 32191
Court of Appeals*

3. Whether the district court erred in finding the State had not denied or interfered with Hedges right to collect meaningful evidence to challenge the State's breath alcohol evidence.

*State of Idaho v.
Clinton Hedges
S.Ct. No. 32464
Court of Appeals*

4. Did the court err in denying Nye's motion to suppress evidence seized from her purse?

State of Idaho v. Miranda Renee Nye
S.Ct. No. 32183
Court of Appeals

5. Was there insufficient probable cause to issue the search warrant for Roger's residence such that the district court erred when it denied Roger's motion to suppress?

State of Idaho v. Charles Alan Rogers
S.Ct. No. 31913
Court of Appeals

6. Is the district court's factual finding that Todd voluntarily left her purse in the vehicle clearly erroneous as it is not supported by substantial evidence?

State of Idaho v. Angila Lynn Todd
S.Ct. No. 31773
Court of Appeals

EVIDENCE

1. Did the court err in ruling that a statement made by the victim's sister three hours after the murder was admissible as an excited utterance?

State of Idaho v. Christopher David Griffith
S.Ct. No. 29631
Court of Appeals

2. Did the court err in admitting evidence of prior possession of red phosphorous under I.R.E. 404(b) given that there was no proof the item seized by the police was actually red phosphorous, that Mann knew of its existence or that it actually belonged to Mann?

State of Idaho v. James Mann
S.Ct. No. 32214
Court of Appeals

3. Did the district court err when it admitted evidence of the contents of Tellez's car two days after the crash when it was never established that the car was in substantially the same condition as it was at the time of the crime?

State of Idaho v. Luis Almondo Tellez-Tellez
S.Ct. No. 31377
Court of Appeals

DUE PROCESS

1. Was the admission of Detective Stewart's testimony regarding Voss' post-Miranda silence harmless error?

State of Idaho v. Michael Stephen Voss
S.Ct. No. 31772
Court of Appeals

**ADMINISTRATIVE APPEALS
INDUSTRIAL COMMISSION**

1. Whether the Commission erred in not allowing an attorney's charging lien against medical benefits of the providers.

Kristin J. Derbige v. Mountain States Provisions
S.Ct. No. 32646
Supreme Court

2. Whether the Industrial Commission's determination that claimant failed to prove entitlement to further medical care is supported by substantial, competent evidence.

Thomas C. Dilulo v. Anderson & Wood Co.
S.Ct. No. 32499
Supreme Court

3. Whether School District #21 was the statutory employer of Pierce.

Joey Pierce v. School District #21
S.Ct. Ho. 32406
Supreme Court

**Summarized by:
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COMING EVENTS

9/1/06 – 10/31/06

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

SEPTEMBER 2006

(Dates May Change or Program May Cancel)

- 1 *The Advocate* Deadline
- 4 **LABOR DAY – LAW CENTER CLOSED**
- 6 Public Information Committee
- 8 Tax Section Annual Seminar, Sun Valley
- 8 Idaho State Bar
Board of Commissioners Meeting
- 14 July 2006 Idaho State
Bar Exam Results Released
- 14 Delivery of Legal Services
Advisory Council
- 18 Law Related Education Committee
- 20 *The Advocate* Editorial Advisory Board
- 20 Idaho Coalition Against
Domestic Violence
- 25 2006 Resolutions
Deadline for submission
- 26 Section Officer Orientation
- 28 Idaho State Bar Admission Ceremonies,
Statehouse
- 29 Idaho Volunteer lawyers Program
Policy Council Meeting, Boise Cascade
- 29 Idaho Practical Skills, Boise
- 29 Young Lawyers Section Reception

OCTOBER 2006

(Dates May Change or Program May Cancel)

- 1 February 2007 Bar Exam
Initial Application Deadline
- 2 *The Advocate* Deadline
- 3 Public Information Committee
- 6 Idaho State Board of Commissioners/
District Bar Presidents Meeting
- 9 **COLUMBUS DAY, LAW CENTER CLOSED**
- 18 *The Advocate* Editorial Advisory Board
- 20 Idaho Law Foundation Board of Directors Meeting

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

Don't Miss the 2007 Annual Meeting Idaho State Bar

- July 18 to 20, 2007
- Boise Centre on the Grove
- CLE Seminars
- Entertainment
- Fun and Fabulous Food

Resolution Meetings for District Bar Associations

Mark these dates on your calendar-

Dates may change, check the website or call (208) 334-4500 for most current dates.

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



Don and Joyce Harris enjoy their time at the 2006 Annual Meeting.



The Hon. Larry Duff, recipient of Family Law Practice Section Award and Family law section chair, Tore Beal-Gwartney.



Idaho State Supreme Court Chief Justice Gerald Schroeder talks with 9th Circuit Judge Edward Leavy.



Carol White, wife of ISB Commissioner Terry White plays piano before Distinguished Lawyers luncheon.



Michele Bartlett and Kelii Ketlinski at the BBQ.

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Spink Butler, LLP, a Boise-based Commercial Real Estate and Land Use law firm, is pleased to announce that **Richard H. Andrus** and **T. Hethe Clark** have joined the firm as associates.

Richard H. Andrus joined the firm as an associate in July 2006. In 2002 Mr. Andrus graduated *summa cum laude* from Utah State University, where he earned his B.S. in Economics and Political Science. Thereafter, he graduated *cum laude* from the J. Reuben Clark Law School at Brigham Young University in 2005, where he earned his J.D. During this time he served as Associate and Executive Editor of the *BYU Journal of Public Law*. Before joining the firm, Mr. Andrus clerked for the Honorable Cheri Copsey, District Judge for the Fourth Judicial District of Idaho. Mr. Andrus is licensed to practice in all Idaho courts.

T. Hethe Clark joined the firm as an associate in August 2006. Mr. Clark graduated with his B.A. in Political Science from Duke University in 2002. Hethe went on to earn his J.D. from Washington University School of Law in 2005. While at Washington University, he served as Editor-in-Chief for the *Washington University Global Studies Law Review*. Prior to joining Spink Butler, LLP, Mr. Clark clerked for the Honorable Darla Williamson, District Judge for the Fourth Judicial District of Idaho. Mr. Clark is licensed to practice in all Idaho courts.

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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-IN MEMORIAM-

**— Judge Merrill K. Gee —
1916-2006**

Merrill K. Gee was born in Rexburg, Idaho on April 12, 1916, the fourth of five sons of William E. Gee and Mary Ellen Kerr Gee. As a young boy, he determined, that some day, he would like to fly his own plane and be an attorney. Both of these goals were met in his lifetime. Merrill graduated from Pocatello High School where he was active in band, choir, drama, and debate. He played saxophone in a dance band that performed for dances around the community. He attended college at what is now Idaho State University, where he was again very active in debate touring the Western States with his college debate team. He attended George Washington University Law School in Washington, DC, where he received his law degree. He met and married Dorothy Merrill, from Preston, Idaho, in the Washington DC chapel on October 29, 1938.

Upon graduation from law school, Merrill moved back to Pocatello to be the head of the local Social Security office. He was then tapped to be the Assistant U. S. District Attorney in Boise, Idaho. Soon after World War II, Merrill volunteered as a civilian attorney for war crimes in Germany where he was a judge in military courts. He and his family lived in Germany for two years and toured many countries in Europe. Upon returning from Europe in 1949, Merrill became the senior partner of the law firm of Gee, Hargraves, & Armstrong in Pocatello and Preston, Idaho.

Merrill was very active in his church and public service for the communities he lived in. Music was always an integral part of Merrill's life. He sang bass for many years in an award winning Lions Club Quartet. He was the co-founder of a men's chorus, and president of the Community Concert Association. He was elected to the Pocatello School Board, and was president of the Idaho School Trustees Association, and then became a member of the National School Board Association. In these capacities, he testified before Congress several times on matters of education. Upon completing his private pilots license, he became a Major in the Civil Air Patrol and was the group's legal advisor. He was also a member of the Tendoy Boy Scout Executive Council, and president of the Idaho Sixth District Bar Association. After practicing law for 25 years in Pocatello; he became an administrative law judge for the Social Security Administration - first in Virginia, then California, and finally Salt Lake City.

Merrill and his wife, Dorothy served two missions, in South Carolina and at BYU-Hawaii. He was preceded in death by his parents, three brothers, and his wife, Dorothy. He is survived by his children, Merrill Kerr II (Shauna) of Salt Lake City, Loni Gee Hackworth (Allen) of St. George, Utah, Gavin (Libby) of Boise, Idaho, and E. Preston (Janice) of Austin, Texas, 22 grandchildren and 21 great grandchildren, and a brother, Lynn, of Stillwater, Oklahoma.

**— Steven W. Arnold —
1956-2006**

Steven W. Arnold was born January 14, 1956 to Harold and Dolores Arnold, Wichita, Kansas. Steve moved to Lewiston, Idaho when he was ten. He graduated from Eastern Washington University with a degree in audio engineering. He received his J.D. from the University of Idaho College of Law. Steve lived in Boise where he practiced as an attorney, and had served as the prosecuting attorney for Boise County. He was an accomplished musician. He is survived by his wife Erleen, and children, Eddie, Audra, Mary, and Amanda; brothers Randy and Mark, and nieces Lee Ann and Amy.

-RECOGNITION-

Jefferson Awards Recipients - The Jefferson Award was established by the American Institute for Public Service and is nationally recognized. On the local level, media sponsors solicit nominations of people who work to better their communities through volunteer and community services. The Idaho Statesman, KBCI CBS 2, and Washington Trust Bank Judge Ronald Wilper and Reginald R. Reeves for their service to their communities.

Judge Ronald J. Wilper, Fourth District Court was recognized as the April recipient of the Jefferson Award for his public service efforts and dedication to Idaho's drug courts. Judge Wilper has spent the past four years volunteering up to 15 hours a week preparing for and presiding over the Ada County Drug Court. In addition to his regular case load, he typically has as many as 170 drug court cases.

Reginald R. Reeves, Idaho Falls was honored as the July recipient of the Jefferson Award. He has created and implemented numerous social programs such as food for people in need and assistance for low income groups. He is a man of action - spotting a need and finding the means to fill it. His efforts have had a positive effect on the lives of thousands of people all over the world.

Judge Larry Duff, Minidoka County magistrate was honored with the Idaho State Bar's Family Law Section Award of Distinction at the Bar's Annual Meeting.

John G. Goller has been promoted to Shareholder in the Milwaukee, Wisconsin firm of *von Briesen & Roper, s.c.* He is a member of the Litigation and Risk Management Practice Group. His practice consists of trial and appellate work in the Federal and State courts in insurance coverage, products and environmental matters with a special focus on toxic torts, specifically in the asbestos and lead paint areas. It will also include advising and litigating on behalf of educational institutions and school

districts. John is licensed to practice law in Wisconsin, Washington, and Idaho. He is a member of the Milwaukee and American Bar Associations and the Defense Research Institute. In 1995, he was awarded the West Coast Conference "Scholar Athlete Award" and received a B.A. from Gonzaga. He attended Gonzaga University Law School and received his J.D. 1998. He can be reached at (414) 276-1122.

John R. Tait, *Keeton and Tait, Lewiston* was elected an officer of the Association of Trial Lawyers of America (ATLA) Workers Compensation and Workplace Injury section at the annual meeting of the ATLA in Seattle. The section provides education to its members about legal remedies to protect employees in the workplace and to assist workers harmed in the course and scope of employment. He was also elected to the Idaho Board of the Workers Injury Law & Advocacy Group (WILG) which is the national membership organization that represents workers and their families who suffer the consequences of work-related injuries. He also just completed two years as Chair of the Workers Compensation Section of the Bar. Mr. Tait has practiced law in Lewiston since 1974 with the firm of Keeton and Tait.

-ON THE MOVE-

Scott D. Hess, trial attorney, has joined the Boise office of *Holland & Hart* to continue his commercial and construction litigation practice. Mr. Hess has been in private practice in Boise since 1982. He has worked with all aspects of commercial litigation with a current emphasis on litigation involving complex business disputes. Mr. Hess has tried cases involving environmental and commercial insurance, various real estate matters relating to sales, acquisitions and real estate development, construction disputes representing general contractors, and subcontractors; as well as disputes involving financial institutions, dis-

puted patent and trademark matters and various types of personal and property damage issues including those implicating governmental liability. He has also been a frequent speaker on various trial advocacy issues and insurance coverage issues. With *Holland & Hart* he will participate in the Commercial Litigation and Construction/Real Estate practice groups. You can contact him at (208) 342-5000.

Patrick J. Geile has joined the Meridian law firm of *Foley Freeman Borton, PLLC* as an associate. He received his law degree from the University of Idaho College of Law and a B.A. from the University of Puget Sound. His practice will focus on family law and domestic relations as well as representation of creditors and debtors in bankruptcy. He can be reached at PO Box 10, Meridian ID 83680 or (208) 888-9111.

Bradley S. Richardson has joined the law firm of *Brassey, Wetherell, Crawford & Garrett*. Mr. Richardson's practice includes insurance defense, medical malpractice defense, real estate law, and commercial litigation. He received his B.A. in Communications from Brigham Young University, and his J.D. from the University of Idaho College of Law. He can be contacted at *Brassey, Wetherell, Crawford & Garrett, LLP*, PO Box 1009, Boise ID 83701 or (208) 344-7300.

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University of Idaho

College of Law

Tenure-Track Position

The University of Idaho College of Law is seeking applications for a tenure-track position in the College of Law in the area of water resources. The teaching package for the position will include water quality law, general environmental law, and -- depending on the interests and qualifications of the successful applicant -- property, land use, and/or civil procedure.

Applicants should be committed to teaching law school courses with law and non-law students and lecturing in non-law courses in water resources. They should have teaching, service, and research interests in water quality and related areas of water resource and environmental law. In addition to participation in the water resources program, the new faculty member will have the opportunity to teach and advise students in the existing concurrent degree program leading to a J.D. and Masters in Environmental Science. Due to the interdisciplinary nature of the water resources program, applicants with multidisciplinary research experience or interests in multidisciplinary topics in environmental law and with an interest in advising J.D./M.S. and J.D./Ph.D. graduate students will be given preference.

Applicants must have a J.D. degree. Graduate training and research in fields related to water resources are highly desirable. The University of Idaho, College of Law is a small law school with approximately 100 students per class, allowing for a close working relationship among faculty and students. Cover letter and resume should be sent electronically to: Professor Elizabeth Brandt, Chair, Faculty Appointments Committee at ebrandt@uidaho.edu or via mail to: Professor Brandt at University of Idaho, College of Law, P.O. Box 442321, Moscow, ID 83844-2321.

Please address your interest and experience in interdisciplinary teaching and research in your cover letter. The Faculty Appointments Committee will begin considering applications on September 8, 2006, and will continue to accept applications until the position is filled. The University of Idaho is an equal opportunity employer. Applications are especially encouraged from qualified persons who will enhance the diversity of the law school community.

Announcement for 2006 Faculty Positions

The University of Idaho College of Law seeks to fill an entry-level, tenure-track faculty position beginning in the Fall of 2007.

Anticipated curricular needs include Civil Procedure, Lawyering Process (a pretrial practice course), Local Government, Real Estate Transactions and Finance, and Intellectual Property. Applicants should have a distinguished academic record and post J.D. practice, clerking and/or teaching experience. Situated in the beautiful Pacific Northwest, the University of Idaho is a comprehensive research institution that is enriched by its proximity to Washington State University.

Interested persons should send a letter of application and resume listing three references to Elizabeth B. Brandt, Chair, Faculty Appointments Committee, University of Idaho, College of Law, PO Box 442321, Moscow, Idaho 83844-2321. We will begin reviewing applications on September 15, 2006 and will consider applications until the position is filled.

The University of Idaho is an affirmative action, equal opportunity employer. Applications from those who would increase faculty diversity at the College of Law, or with significant experience working with diverse populations, are encouraged. More information about the College of Law is available at www.law.uidaho.edu.

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Khris Allen Dietz **a/k/a Khris Allen Dietz-Knowlton, Deceased**

If your office has done any estate planning for Ms. Dietz, please advise:

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