

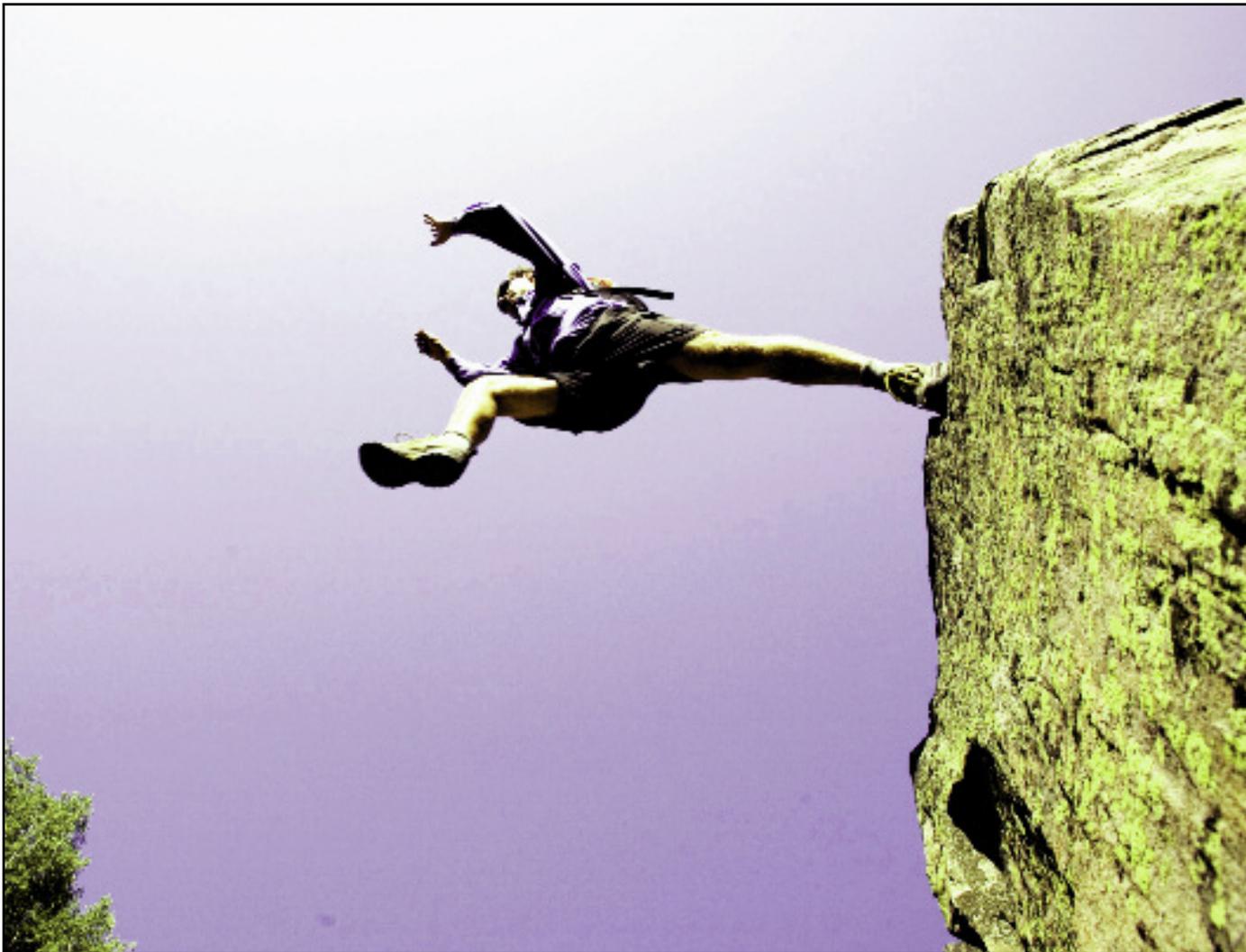
The **Advocate**

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THE ADVOCATE

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ON THE COVER—

"Chillin" was photographed at the Boise Depot by Cheryl Newmark, legal secretary at Holland & Hart in Boise.

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SELECTION OR ELECTION

Dwight E. Baker
President



One of the questions Second District Judge John Bradbury's posed to Idaho's electorate was whether Idaho's elective process for Supreme Court Justice has been subverted by the early present resignation/judicial selection process.

Judge Bradbury, ran a largely self-financed campaign against Joel Horton, a short-term appointee of Governor Butch Otter. The Governor had selected Justice Horton from four nominees selected by the Idaho Judicial Council. Both candidates ran well-organized campaigns. To the credit of both, they ran campaigns in an appropriate and respectful manner, conducted on a plane high above similar elections conducted in some of our sister states, and without the politicization of some of Idaho's recent Supreme and District Court contests.

Judge Bradbury, unknown throughout most of the state, came up a surprising 277 votes short of victory. What does the result mean – to the citizens of the State of Idaho – to us as lawyers – and to judges, or would-be judges, contemplating future races? Some of the conclusions might be:

1. The result is meaningless, since only 25% of the eligible voters participated in the election, and of those, another quarter passed on the selection of the Supreme Court Justice.
2. Judge Bradbury spent more money and was more effective in getting his name in papers and TV ads, thereby creating a higher name recognition than did Justice Horton, whose name was also relatively unknown outside Ada County.

3. The public doesn't like lawyers, or judges, and therefore many voted against the status quo, more of a general protest rather than an affirmation of any idea or candidate. Several of Judge Bradbury's issues shared a sub-silento thesis inherently critical of lawyers and judges, i.e., lawyers and judges are able to and do manipulate our judicial selection and discipline process to protect their own. Implicit is the suggestion that either the process is less than fair, or alternatively, lawyers and judges view themselves as being elitists, better able to make decisions without the hindrance of the voters.

THE CITIZEN'S VIEW OF THE ELECTIVE PROCESS

Viewpoints of the citizens may be starkly different from that of the practicing Bar, and most importantly, from those aspiring jurists whose career choices can be dramatically affected by the process.

Idaho preserved the right to elect our Supreme Court and District Courts in Article V, § 6 and 11 of our State Constitution. Article V, § 19 grants the Governor the power to appoint Supreme Court Justices or District Court Judges in the event of a vacancy.

One could read these provisions to mean that selection through general election is the preferred choice, regardless of lawyers' input, even though we enjoy a unique and privileged relationship with the courts. We lawyers should at least be aware of, if not guided by, results of recent studies which compare and contrast the quality of elected judges with selected judges, i.e., those who are chosen through an ideally non-partisan process, designed to eliminate or minimize the politicization of our courts. At least one of those studies indicates the elected judges perform just as well as the "selected" judges.

If our Constitution favors the electorate's pre-eminent role in the selection process, and if elected judges perform as well as "selected" judges, Judge Bradbury has a point which may not have been lost on our voters. His argument implicitly suggests an educated and informed electorate is capable of making good choices, and the campaign run by both candidates prove politicization of the process is not inevitable. Perhaps fair and competent judges can be chosen in consistently non-politicized campaigns, though recent experience in other states, notably Texas and Wisconsin, indicate the contrary. Idaho's rules contemplate a non-political selection process, and at least some lawyers pay lip service to such a procedure. Judge Bradbury's appeal reflects a demand by Idaho's citizens that the citizens retain a role in the selection process, and that our current "non-political" selection process is less than satisfactory.

THE PRACTICING ATTORNEY'S VIEW

Legal practitioners at all levels, whether public or private, transactional or litigation, recognize the importance of a logical dispute resolution process. That process is built on a foundation which demands judges who are both fair and competent. Our ability to properly advise our clients and advocate their causes is compromised without both qualities; it is not just appropriate, but also necessary that Idaho's lawyers participate in the selection process.

One of the opportunities to offer our input was, and is, through the judicial questionnaire process developed and approved by the Idaho State Bar Committee on Judicial Integrity and Judicial Independence in response to ISB Resolution 03-1. Judge Bradbury, fairly brought to the electorate's attention the shortcomings of that process, not the least of which was a sort of "stuffing the ballot box" with unfair criticism of disfavored

candidates. If that questionnaire is to be valid and reliable, we lawyers must recognize that we compromise our professional integrity, our intellectual honesty, and our public trust if we complete those questionnaires with an eye toward the effect of our vote, rather than an honest response to each question without respect to our personal biases or political preferences. Judge Bradbury raises a fair question: Are the lawyers of the state so motivated by their desire to support one candidate, that they will unfairly grade other candidates? In our recent Seventh Judicial District Judge race between then incumbent Jim Herndon and challenger Darren Simpson, both candidates criticized the system after the election that the other candidate was given unfairly and unrealistically low scores by some of their own overzealous supporters.

We lawyers have a political, professional and ethical stake in the selection process, and we must take an active role in identifying and addressing the source of the public's dissatisfaction. We must do so not only on a collective basis, but on an individual basis. Our friends, our clients and the citizens of our communities expect nothing less, and we should accept nothing less from ourselves.

THE CANDIDATE'S VIEW

For the candidate for judicial office, the issue is more practical. Committing one's professional career, even temporarily, to a Supreme Court or District Court judicial election is no small undertaking. By definition, those who are qualified to fill either judicial role are also generally well-able to support themselves in the practice of law, and in the private sector, to earn over time a position in their firm or community which provides a comfortable

level of financial security and intellectual challenge. The competent private practitioner who is willing to commit a decade or so to his private practice runs a minimal risk of losing his or her investment in professional reputation, clientele and professional and business relationships.

Contrast that commitment to running for a judicial office. Unlike Judge Bradbury's ability to largely finance his own campaign, and to commit significant personal funds to bringing perceived problems to the electorate, most candidates are unable or unwilling to make that commitment. Every six years the Supreme Court Justices, and every four years the District Court Judges face the potential of gearing up for a political campaign. This requires the commitment of money, time, emotional energy, and a risk to reputation or ego necessarily involved. It is not surprising that outstanding magistrates choose not to run as District Judges, even though many have demonstrated over the course of time their ability and potential to be excellent District Judges. It is also not surprising that Justice Linda Copple Trout elected to resign rather than to face a second contested state-wide election. And it is not surprising District Judges choose the increasingly popular Plan A or Plan B judicial "retirements" in lieu of possibly losing a contested election, and in the process, being deprived of eligibility for those partial-retirement options. In fairness to Justice Horton and Judge Bradbury, the overall quality of their recent campaign was far superior to some of the heavily politicized recent elections.

In order to attract those individuals who can rise above political or financial pressures inherent in our society, and thereby qualify as "fair" judges; and, in

order to attract those who have demonstrated the kind of competence we expect from our judiciary, it is only realistic that we lawyers put ourselves in the position of those who are inclined to consider a career in the judiciary, and to help to develop meaningful solutions to the practical problems those individuals face.

THE ORGANIZED BAR'S RESPONSE

The Commissioners of the Idaho State Bar have taken no positions as the issue or issues directly or indirectly raised in the last Supreme Court election. However, the Bar has an existing Committee on Judicial Integrity and Judicial Independence, chaired by Craig Meadows, which is scheduling a meeting as this article is being written. The ISB staff person supporting the committee is: Brad Andrews. If you have any thoughts or opinions which you believe are relevant to the discussions or actions of the committee, please call or write any member of the committee. Our role as individual attorneys is to learn what we can and to react appropriately to the issues raised by Judge Bradbury.

Dwight E. Baker has been engaged in private practice since 1971, and is a founding partner in the Blackfoot law firm of Baker and Harris. He is a 1963 graduate of the University of Wisconsin/Madison, and a 1971 graduate of the University of Idaho College of Law. He represents the Sixth and Seventh Districts as an Idaho State Bar Commissioner and is currently serving a one-year term as President of the Idaho State Bar.

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DISCIPLINE

ROLF M. KEHNE (SUSPENSION/PUBLIC CENSURE)

On June 27, 2008, the Idaho Supreme Court issued an Order suspending Boise attorney Rolf M. Kehne from the practice of law for one year with all but 90 days withheld, pursuant to I.B.C.R. 506(b) and 507, and imposing a public censure pursuant to I.B.C.R. 506(d).

The Idaho Supreme Court's Order followed a Professional Conduct Board Recommendation and stipulated resolution of an Idaho State Bar (ISB) disciplinary proceeding. On September 18, 2006, the Idaho State Bar filed a formal disciplinary Complaint against Mr. Kehne alleging that he engaged in professional misconduct in connection with his representation of two criminal clients (G.B. and D.E.) and one civil client (H.F.) for failing to communicate and failing to perform the work for which he was hired. The misconduct included failing to timely file two post-conviction petitions on behalf of the criminal clients despite being granted several time extensions in which to do so, and failing to timely file an appellant's brief with the Idaho Supreme Court in the civil matter after two time extensions were granted, which resulted in the appeal being dismissed. On February 15, 2007, the ISB filed an Amended Complaint against Mr. Kehne alleging misconduct with respect to plea negotiations involving criminal co-defendants. The misconduct involved promises or inducements made by one defendant (Mr. Kehne's client B.D.) to her codefendant in an effort to persuade the codefendant to accept the State's plea offer which was a benefit to B.D.

The Idaho Supreme Court found, and Mr. Kehne admitted, that he violated Idaho Rules of Professional Conduct 1.2(a) [A lawyer shall abide by a client's decisions concerning the objectives of representation], 1.3 [Diligence], 1.4 [Communication], 1.16(d) [Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as surrendering papers and property to which the client is entitled], 3.2 [A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client] and 8.4(d) [Conduct prejudicial to the administration of justice] with respect to his representation of G.B., D.E. and H.F., and I.R.P.C. 8.4(d) with respect to his representation of B.D. The Idaho Supreme Court further found, and Mr. Kehne admitted, that he violated Idaho Rule of Professional Conduct 8.1(b) [A lawyer in connection with a disciplinary matter shall not knowingly fail to respond to a lawful demand for information from a disciplinary authority] and Idaho Bar Commission Rule 505(e) [Failure to respond to a request from Bar Counsel shall be grounds for imposition of sanctions] for failing to respond to Bar Counsel's Office in its investigation into the grievances of three of the clients.

The Idaho Supreme Court's Order provided that following the 90-day actual suspension, Mr. Kehne will serve a two-year probationary period subject to the conditions of probation specified in the Order. Those conditions include that Mr. Kehne will

serve the entire nine month withheld suspension if he admits or is found to have violated any of the Idaho Rules of Professional Conduct for which a public sanction is imposed for any conduct during Mr. Kehne's period of probation, in addition to any other sanctions that may be imposed for any such admission or determination of misconduct during that time period. Other conditions of probation are that Mr. Kehne shall maintain errors and omissions legal malpractice coverage and that he must arrange for a supervising attorney to meet with him monthly and report to the ISB quarterly.

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

STEVEN J. PIERCE (Resignation in Lieu of Discipline)

On July 1, 2008, the Idaho Supreme Court accepted a "Resignation in Lieu of Disciplinary Proceedings" from former Boise attorney Steven J. Pierce.

In accepting the resignation, the Court considered Mr. Pierce's acknowledgement that formal charge disciplinary proceedings were pending at the time of his resignation. Although Mr. Pierce 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.

At the time Mr. Pierce tendered his resignation, he had been on interim suspension since May 19, 1994, following his indictment, and later conviction, in Oregon for numerous counts of racketeering and theft of client monies.

By the terms of the Court's Order, Mr. Pierce'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. He is not eligible to apply for admission sooner than five years from the date of the Court's acceptance of the resignation. Should Mr. Pierce ever desire to be admitted to the practice of law in Idaho, he shall be required to make application under I.B.C.R. 200, et seq., sit for the bar examination, and comply with all other requirements for admission to the Idaho State Bar.

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

MARC J. WEINPEL (WITHHELD SUSPENSION/PUBLIC CENSURE)

On July 9, 2008, the Idaho Supreme Court issued a Disciplinary Order suspending Boise attorney Marc J. Weipel from the practice of law for six months with all six months withheld, pursuant to I.B.C.R. 506(b) and 507, and imposing a public censure pursuant to I.B.C.R. 506(d).

The Idaho Supreme Court's Order followed a Professional Conduct Board Recommendation and stipulated resolution of an Idaho State Bar (ISB) disciplinary proceeding. On December 12, 2007, the ISB filed a formal disciplinary Complaint against

Mr. Weipel alleging that he engaged in professional misconduct in connection with his representation of two civil clients for failing to communicate, failing to perform the work for which he was hired, and failing to return unearned fees. In one case, Mr. Weipel was hired by an Arizona attorney to domesticate two Arizona judgments on behalf of a client totaling over \$2.2 million, and effectuate a garnishment of the client's ex-husband's wages in Idaho. The Arizona attorney paid Mr. Weipel \$1,000, but Mr. Weipel never filed any of the paperwork. In the other case, Mr. Weipel was hired to represent a young woman involved in an automobile accident in which her car was totaled after being rear-ended. Her father paid Mr. Weipel a \$750 retainer, but for the next year no progress was made on the case, and Mr. Weipel failed to respond to numerous requests for status updates. The client ultimately terminated the representation due to a lack of progress and hired new counsel to file the personal injury complaint.

The Idaho Supreme Court found, and Mr. Weipel admitted, that he violated Idaho Rules of Professional Conduct 1.2 [A lawyer shall abide by a client's decisions concerning the objectives of representation], 1.3 [Diligence], 1.4 [Communication], 1.16(d) [Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as surrendering papers and property to which the client is entitled, and refunding any advance payment of fee that has not been earned], and 8.4(d) [Conduct prejudicial to the

administration of justice] with respect to his representation of both clients. The Idaho Supreme Court further found, and Mr. Weipel admitted, that he violated Idaho Rule of Professional Conduct 8.1(b) [A lawyer in connection with a disciplinary matter shall not knowingly fail to respond to a lawful demand for information from a disciplinary authority] and Idaho Bar Commission Rule 505(e) [Failure to respond to a request from Bar Counsel shall be grounds for imposition of sanctions] for failing to respond to Bar Counsel's Office in its investigation into the grievance filed by the Arizona attorney.

The Disciplinary Order provided that in addition to the six month withheld suspension, Mr. Weipel will serve a two-year probationary period subject to the conditions of probation specified in the Order. Those conditions include that Mr. Weipel will serve the entire six month withheld suspension if he admits or is found to have violated any of the Idaho Rules of Professional Conduct for which a public sanction is imposed for any conduct during Mr. Weipel's period of probation, in addition to any other sanctions that may be imposed for any such admission or determination of misconduct during that time period. Other conditions of probation are that Mr. Weipel shall make restitution to both clients plus interest from the date the fees were paid.

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

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LEGALLY ADMISSIBLE ART
Books and Brushes Program
Garden City, Idaho
August 2008

The Garden City Library, *Books and Brushes** program will exhibit a collection of photographs and paintings by the Hon. Wayne Kidwell, and Boise attorneys Judy Holcomb and Molly O'Leary. The exhibit will run during the month of August. A reception will be held on Wednesday, August 13, 5:30 - 7:30 p.m., at the Garden City Library, 6015 Glenwood, Garden City, Idaho (corner of Marigold and Glenwood). Refreshments will be served, while the attorney/artists share what prompted them to move from creating pictures with words to creating pictures with paintbrushes and cameras.

The *Books and Brushes* program features different community artists each month in a cross-section of creative mediums. There is no charge to attend the exhibit. Art is offered for sale and twenty percent of the proceeds from sales are donated to benefit the Library. For more information contact Bud Katich at Image Maker Art and Framing at (208) 378-4417 or nancykatich@gmail.com. Sponsored By: The Garden City Library Foundation and Image Maker Art & Framing. Adopted for 2008 by: J.R. and Jeanne King Media.



2007 RESOLUTION PROCESS

Idaho Lawyer Benefit Plan

Diane K. Minnich



REMINDER: PROPOSED RESOLUTIONS DUE SEPTEMBER 25

Do you, your section, committee or district bar association have an issue, proposed rule revisions or legislative matter that 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 284-285 of the 2008 Directory) governs the resolution process. Resolutions for the 2008 resolution process must be submitted by September 25, 2008. 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.

DISTRICT BAR ASSOCIATION RESOLUTION MEETING CALENDAR

- 1st District, Coeur d'Alene Noon, Tuesday, November 4
2nd District, Lewiston Evening, Tuesday, November 5
3rd District, Nampa Evening, Thursday, November 13
4th District, Boise Noon, Thursday, November 14
5th District, Twin Falls Noon, Friday, November 19
6th District, Pocatello Noon, Thursday, November 20
7th District, Idaho Falls Noon, Friday, November 21

IDAHO LAWYER BENEFIT PLAN

During the 2006 Roadshow, we heard members express frustration with the rising cost of healthcare and the lack of benefit options available to Idaho lawyers, their employees and families. As a result, we set out to find a solution.

Nearly two years later we are excited to introduce the Idaho Lawyer Benefit Plan; a self-funded group benefits program for members of the State Bar. Effective August 1st Idaho law firms, their employees and dependants will begin to receive health benefit coverage under this program.

Based on feedback from our partner, ALPS, the response has been overwhelmingly positive. All initial indications are that the plan is flexible, pricing is competitive and the opportunity to play a more active role in plan design and management is significant.

A little background, The Idaho Lawyer Benefit Plan is a self-funded group benefits plan in which members make contributions to a Trust. The contributions are then used to finance the cost of member benefits. Money that remains after administrative and claims expenses are paid is reinvested into the trust. Over time and as trust surplus grows the trustees can elect to use excess capital to the benefit of the members. Trustees are representatives chosen from the employees that participate in the plan.

The plan offers a variety of plan designs, from basic to premium. All plans are reasonably priced, flexible and user friendly. The plan also offers a broad network of participating Idaho physicians.

For more information about the program you can visit the Idaho State Bar website or www.idaholawyerbenefit.com.

SPECIAL THANKS

In July, Terry White, Nampa, passed the Idaho State Bar presidential gavel to Dwight Baker of Blackfoot. Dwight will serve as president of the ISB until July 2009. Terry White leaves the Commission after three years of dedicated service to the Bar. I appreciate Terry's commitment of time, expertise and energy to his position as a Commissioner. He was always willing to listen, help, and offer wise advice. Terry's dedicated to the legal profession is apparent. He worked to enhance the services offered to lawyers, such as the lawyer benefit plan, as well as improve the image of the profession among the public.

Andy Hawes also served as a bar commissioner for most of the past three years. Unfortunately (at least for the Bar), he moved to Portland late in April 2008, and was unable to complete his term as a Commissioner. Working with Andy was always enjoyable. As one of the younger Commissioners, he brought a fresh perspective to the Commission. He is bright, perceptive, and supportive. A final thanks to Tom Banducci, past ISB President, for his willingness to step in and complete Andy Hawes term on the Commission.

The Commissioners of the Idaho State Bar devote countless volunteer hours to the Bar. I am always impressed with the commitment of these individuals to their profession. A final thanks to Terry White, Andy Hawes and Tom Banducci for serving as Commissioners of the Idaho State Bar.

WELCOME FROM THE CHAIR OF THE INTELLECTUAL PROPERTY LAW SECTION

Peter M. Midgley
Zarian Midgley & Johnson, PLLC

The Intellectual Property Law Section of the Idaho State Bar is pleased to sponsor the August issue of *The Advocate*. As most attorneys know, intellectual property law is one of the fastest growing and rapidly changing areas of the law. Businesses in the modern global economy are increasingly recognizing the value and importance of protecting their intellectual property rights through various mechanisms such as patents, trademarks, copyrights, and trade secrets.

The Intellectual Property Law Section has an active educational outreach program intended to make complex intellectual property issues accessible to the general membership of the bar. Our Section sponsors an ongoing CLE series covering the "Top Ten" things every lawyer should know about a variety of intellectual property topics, such as patent licensing or non-competition agreements. These CLE programs are generally held in the morning on the third Thursday of even-numbered months, and we encourage everyone to attend.

In addition, at our Section business meetings, we typically offer CLE presentations targeted toward attorneys specializing in intellectual property law, such as registered patent attorneys and trademark specialists. These presentations are an invaluable resource for staying current in this increasingly complex and ever-changing area of the law. For those who are interested, our Section business meetings are generally held at lunchtime on the third Thursday of odd-numbered months.

This issue of *The Advocate* includes articles on a range of intellectual property law issues. Timothy McCormack's article, *Trademarks for Everybody*, provides an overview of trademark law fundamentals, and Stephen Nipper's article, *The Olympics and Trademark Infringement: Lessons from the Idaho Centennial Commission*, delves into more detail on a particular trademark issue sure to be of interest to many Idaho lawyers and clients in the coming months. In *KSR v. Teleflex and the Rising Bar of*

Innovation, Rexford Johnson and Matthew Whipple evaluate the impact of a recent Supreme Court decision on obviousness standards for patentability. Brian Esler and Tyler Rogers discuss copyright protection for architectural works in *Expensive Inspiration: Protections and Liability Under the Architectural Works Copyright Protection Act*. Elizabeth Herbst Schierman's article, *Moral Rights Under Federal Law*, explains the application and ramifications of the 1990 Visual Artists Rights Act. In *Technology Transfer Legislation and Its Effect on Idaho*, Jason Stolworthy and Eric Laird provide a brief history of technology transfer legislation and consider the impact of technology transfer on Idaho's economy.

The Intellectual Property Law Section welcomes input from all members of the bar on how we can improve our educational outreach efforts or other Section offerings. If you have any suggestions, or if you are interested in joining our Section, please feel free to contact me at midgley@zarianmidgley.com. On behalf of the entire Intellectual Property Law Section, we hope you enjoy this issue of *The Advocate*.

ABOUT THE AUTHOR

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TRADEMARKS FOR EVERYBODY

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TRADEMARKS FOR EVERYBODY

Every attorney with a business client has a client with a potential trademark issue. This article is intended to help unravel some of the myths and complexities of trademark law and practice. Both attorneys and business leaders should find this article helpful.

DEFINING THE SLANG

A “trademark” or “service mark” can be made up of any word, name, symbol, logo, color, sound, or product shape or any combination of these elements. Typically, a trademark is used to mark goods. Alternatively, a service mark is used when selling services. This article refers to trademarks and service marks synonymously.

A trade name, which is similar to a trademark, merely represents the name of a company. Similarly, a domain name is part of a unique address that identifies a particular web site on the Internet. Typically, trademarks trump trade names and domain names and, therefore, registering one’s trade name with the state is not good enough to protect rights in the trademark. The same is true of domain names.

PROTECTING ONE’S MARKS

Generally speaking, trademarks can be protected in four different ways. First, trademarks can be nationally registered through the United States Patent and Trademark Office. Second, trademarks can be registered on a state-by-state basis. Third, trademarks can be protected within specific geographic areas under the common law of particular states. Fourth, trademarks can be protected internationally. As an aside, charitable groups, non-profit corporations, professional and fraternal groups and educational and religious institutions receive the same protection against confusing use of trademarks and corporate names as for-profit business organizations.

BENEFITS OF FEDERAL TRADEMARK REGISTRATION

The benefits of federal trademark registration are immense. Some of the advantages are:

1. One registration covers fifty states;
2. One can use the ® symbol with one’s mark upon registration;
3. Once a federal registration is filed any common law rights being developed by competitors are stopped at their current extent;
4. Federal trademark registrations add value to a company’s intangible asset portfolio;
5. Tactical and substantive advantages in domain name disputes are gained;
6. One gets international priority in many foreign countries when filing for additional trademark registrations;
7. Court ordered damages can sometimes be tripled for federally registered trademarks;
8. The federal court system can be used to stop infringement of one’s marks;
9. A federal trademark registration can be entered into evidence in court to prove your trademark is valid and that you own the mark;
10. One gains potential future revenue from trademark licensing;
11. The United States Customs Service can be asked to stop goods marked with infringing trademarks from entering the United States; and,
12. The registered mark will show up prominently in other people’s trademark clearance searches (including the searches conducted by the Patent and Trademark Office) making it less likely that other businesses will chose to use your mark.

IMPORTANCE OF TRADEMARK SEARCHING AND CLEARANCE

Before a company invests substantial money on advertising, business cards, store signs, customer recognition, etc. a comprehensive trademark search should be conducted and reviewed. A comprehensive trademark search will typically examine marks on the Federal Registry, all fifty state trademark registries, common law sources including business records and newspapers, and Internet sources such as domain name registrations. A comprehensive search will look for marks that are exactly the same as the suggested mark as well as “look alike” and “sound alike” marks. A full trademark search will also consider marks that share common elements with the suggested mark, even if the marks appear quite different. This can be important in some cases. A written opinion interpreting the search results in light of legal trends and case law is also strongly recommended.

In some cases, the process of conducting a trademark search and reviewing the results with a knowledgeable attorney results in a business modifying their mark or identity. In these cases, an ounce of prevention is worth a pound of cure. No one wants to face expensive litigation that may result in being forced to change one’s mark, pay damages to the other side, and risk losing one’s customer recognition.

In many cases a full trademark search and written opinion results in specific strategies that help mitigate the risks described above. Often these same strategies help in actually getting one’s trademark registered with the Patent and Trademark Office as well.

CHOOSING A STRONG TRADEMARK

Choosing a strong trademark can be one of the most important decisions that a business owner makes. Sometimes businesses are wed to a particular mark — making no other choice available. In these cases it is important to understand the strengths and weaknesses of the mark from a protection and registration standpoint. Understanding one’s mark in this way allows for the appropriate development of registration and protection strategies that can help make a weak mark stronger. The process of understanding the relative strength of an existing trademark is the

same as the first step in choosing a new mark from scratch.

Whether one's mark has been predetermined or not, the first step in "choosing a strong mark" is to determine where the mark exists on a spectrum of protectability. Trademarks range from very weak and non-registerable to very strong and easily registered. Obviously, from a registration point of view, one end of the spectrum is highly desirable while the other end is much less so.

On the weaker end of the spectrum, one finds marks that are classified as "generic." A generic mark is not protectable as a trademark. Use of such a mark is not recommended since anyone could use the same mark in the same way without legal consequence. A generic mark is one that has become so widespread that the consuming public no longer associates it with a particular company. Ironically, owners of some of the most famous marks have had to fight to keep their once unique marks from becoming generic. KLEENEX for tissues and JEEP for small four-wheel drive vehicles are examples of marks that have come dangerously close to becoming generic.

One step up from a generic mark is a group of marks referred to as "descriptive" or "merely descriptive." Descriptive marks are exactly what their name implies - descriptive of particular goods or services. The fictional trademark CANNED GOODS for canned food products would be considered descriptive of canned goods. This mark might also be considered generic. Using the same mark to sell books, however, would be considered arbitrary (which is a good thing, as described later).

Sometimes descriptive marks can be registered and protected when one can show that the mark has become well known or, in other words, has "acquired distinctiveness." A descriptive mark can often be placed on the supplemental federal registry and after five years it can often be registered as having become "distinctive," and therefore no longer "descriptive." Marks that are merely descriptive of goods and services should be used with caution and avoided when there is a choice. It is also important to note, however, that even a mark that has a weak placement on the trademark spectrum can be considered strong if the mark is widely recognized and has "commercial strength."

One step up from descriptive marks are marks referred to as "suggestive." Many times one can argue that a mark appearing to be descriptive is actually suggestive. A suggestive trademark, while not being the strongest of marks, is registerable. A suggestive mark is one that requires some degree of imagination to associate the mark with the goods and services. An example of a suggestive mark would be Technology for mechanical parts and computer hardware. The word technology describes the goods (to some extent) but the exact nature of the goods is not clear from the mark alone. Of course, as a practical matter, the further away one gets from generic, descriptive, and suggestive marks the stronger the resulting mark will be.

The best kind of mark one can have is described as "arbitrary or fanciful." An arbitrary mark is made of common words, like "CANNED FOOD," but applied to goods and services where there is no rational connection between the goods and the mark (like CANNED FOOD for the sale of paperback books). In an etymological sense, the association between the goods and the mark is "arbitrary."

A fanciful mark is one that has no current existence in our lexicon (it is simply "made up.") Obviously, one's intellectual property rights will be the strongest in marks that did not exist before they were "invented." So, whether one has a mark or is thinking of a new mark, try to conceptualize where on the generic-descriptive-suggestive-arbitrary-fanciful spectrum the mark might fall. The further away from fanciful one gets the more important it will be to consult a trademark attorney about trademark searches, trademark registrations and, in some cases, trademark and/or advertising insurance.

TRADEMARKS "TRUMP" DOMAIN NAMES

Trademark law also applies to the Internet and domain names. Domain names are important marketing devices for corporations or businesses using the Internet, because customers and search engines use domain names to locate on-line businesses.

A growing number of domain name trademark cases suggest that a trademark holder has no absolute right to use its trademark as a domain name. The test for determining whether a trademark holder will be able to stop someone from using a similar domain name is the Likelihood of Confusion test. The Likelihood of Confusion test embodies the primary principle of traditional trademark law, namely that consumers should not be confused or deceived into buying goods or services based on false or confusing sponsorship. Other recent trademark cases suggest that a trademark holder might have an advantage in a domain name dispute. One procedure often used by trademark owners to secure domain names being used by other people that are confusingly similar is offered by ICANN (Internet Corporation for Assignment of Names and Numbers). The procedure is an *In Rem* action against the domain name itself and results in a somewhat speedy and relatively inexpensive arbitration. The procedure seems to favor trademark owners.

INTERNATIONAL TRADEMARK LAW STRATEGY

International trademark strategy has two primary components. The first component involves acquiring and protecting trademark rights. The second component is making sure that one's trademarks are not infringing a mark protected in a foreign jurisdiction. An international trademark strategy should reflect the concerns and conditions of one's company, one's target markets, and one's industry. Company concerns involve considerations such as: marketing strategy, budget, distributor relationship, and risk management.

Understanding and refining an international marketing plan is critical to developing an effective international trademark protection strategy. The following five steps should be considered when refining an international marketing plan. First, define the geographic area of the target market. Second, identify the target markets of immediate importance. Third, identify target markets of secondary importance. Fourth, develop a timetable for entering into specific target markets. Fifth, create a budget to spread costs over time, if possible. When defining target markets, don't forget to account for worldwide Internet sales if appropriate.

Trademark Law in Other Countries

Because of the national, regional, and international components of international trademark protection strategy, local and

national laws as well as international agreements and treaties must be considered. Other relevant factors relate to a particular country's intellectual property trends, culture, and local policy.

Trademark law throughout the world can be grouped roughly into two categories. The first category is based on what is called the "first-to-use" rule. The second category is based on what is known the "first-to-file" rule. The United States follows the first-to-use rule. China, for example, uses the first-to-file rule.

In first-to-use countries, trademark priority is given to the first party that actually uses the mark in that particular country. In first-to-file countries, on the other hand, trademark use alone will not establish any rights to a mark. As a matter of practical importance, consider the risk that a junior user will register "your" mark and prevent you or your client from using it in many first-to-file countries (this might happen even though your client was the first one to actually use the mark).

Sometimes, strategic trademark filings can be used to minimize the risk posed by "mark sharks." Additionally, some countries offer what is known as a defensive mark filing. When allowed, an applicant does not need to intend use of the defensive mark in the filed for country if use of the mark by another party in the country, even on dissimilar goods, would be likely to cause confusion. In many cases, strategic filings and defensive marks can be used to preserve rights in countries where future use and marketing is anticipated, but where there is no immediate intention or ability to enter a particular market.

Taking Advantage of International Treaties And Conventions

There are a variety of international trademark treaties and conventions. Different conglomerations of countries around the world have joined various collections of trademark treaties and conventions. The Paris Convention and the Madrid Protocol are among the more famous of these trademark treaties. The Paris Convention and the Madrid Protocol allow one to use a filing date from an earlier application on a new application when both countries are members of the Convention and/or Protocol and when the second filing occurs within six months of the first filing. The European Union also has special rules and regulations for registering European wide trademarks. Of course there are different costs, benefits and strategies involved with taking advantage of different international trademark treaties, conventions and agreements.

International Trademark Marking Requirements

In many countries around the world, use of the ® is either optional or there is no provision for marking. In some countries, like the United States, specific benefits are offered for using the ® appropriately, such as eliminating certain damages defenses. In other countries, like China, Chile and Costa Rica for example, a proper registration notice is required in order to maintain the registration and trademark rights. There is a danger, however, of using the ® too freely on one's international packaging. In some countries false or misleading use of the ® can result in fines, imprisonment, and other liability. Germany is one example.

International Strategy And Recommendations

If cost is not an issue, business owners doing substantial international business should consider filing trademark applications in all target countries at the same time using the broadest possible description of goods and services allowed in each country. When cost is an issue, Paris Convention priority filings can be used to help spread costs over a six-month period. Lastly, business owners should consider evaluating marketing plans in light of the advantages and disadvantages of filing for trademark protection under particular trademark conventions, treaties, and agreements, such as the Madrid Protocol and the trademark regulations of the European Union.

CONCLUSION

A trademark can be almost anything, including words, logos, colors, and sounds. The benefits of properly protecting one's trademark rights are huge. All businesses should protect their trademarks, and you should advise your clients accordingly. In the United States federal trademark protection is the best. It is recommended that a trademark search and written opinion interpreting the same be prepared for all businesses with important trademarks. Trademarks can have a state component, a federal component and an international component.

An international trademark strategy, like a domestic strategy, should reflect the concerns and conditions of one's company, such as marketing strategy, budget, distributor relationships and risk management. In addition, one's international trademark strategy should reflect the conditions of one's industry and one's target markets, including the laws, policies and cultures of one's target countries.

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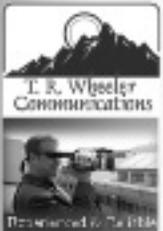
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OLYMPIC FEVER

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In the mid-1980s, the Idaho Legislature authorized the sale of a commemorative 'centennial' license plate bearing the "Centennial Design." In October 1987, this Centennial Design was registered by the Idaho Centennial Commission with the Idaho Secretary of State as a state trademark. The special license plate fees collected from motorists who wanted to use the commemorative centennial license plate funded a good deal of the expenses of the Centennial Commission organizing the centennial celebration. The residual funds were transferred to the Idaho Heritage Trust for later use in preserving some of Idaho's historic sites. In 1992, this commemorative plate was officially adopted by the Legislature as the state's standard license plate design, the red-white-blue design typically seen on the road today.

As an additional source of funds, the Centennial Commission issued licenses to various businesses for use of the Centennial Design. To protect its licensing rights, the Centennial Commission aggressively policed unauthorized uses of the Centennial Design. Individuals and businesses who used the mark without a license from the Centennial Commission typically received a stern letter demanding either immediate cessation of use or the payment of a license fee.

While some of the unlicensed users of the Centennial Design were using the design to turn a quick profit (e.g., selling inexpensive souvenirs), many others were just proud Idaho businesses wanting to participate in the celebration of the State's Centennial. Since the Centennial Commission couldn't initially differentiate between the two classes of unlicensed users, both received the same stern demand letters. One example of such a situation occurred when one Treasure Valley business, at a cost of several thousands of dollars, repainted its commercial trucks with a design similar to the Centennial Design. They were obviously upset when they received a cease-and-desist letter from the Centennial Commission demanding they pay a few thousand more dollars for a license fee for what they felt was actions they had taken promoting and celebrating the Centennial.

With Idaho being selected to host the 2009 Special Olympics World Winter Games this coming February, and the Games of the XXIX Olympiad in Beijing (the "Summer Olympics") taking place this month, many Idaho businesses will be tempted to catch Olympic fever. As these two events take place, be sure to keep watch over your clients' businesses, watching for unlicensed use of Olympic trademarks that could result in "Centennial Design" type issues.

TYPES OF INFRINGEMENT

While it is possible that an Idaho business might engage in the practice of making counterfeit goods, the most likely way they would run afoul of Olympic trademarks would be through infringing advertising or promotional campaigns. For instance, advertising an "Olympic Games" sale, or repainting a corporate vehicle with an Olympic themed paint job. Both of those examples would be problematic.

The use of Olympic symbols or terminology, such as the Olympic rings, or any other words implying an association with the United States Olympic Committee (USOC) or the International Olympic Committee (IOC) cannot be done without first obtaining formal approval and a licensing agreement. As such, any unlicensed use in advertising by a client of the word "OLYMPICS" should be met with caution.

Interestingly, Special Olympics International is the only sports organization given authorization by the IOC to use the word OLYMPIC in its name. Special Olympics International also has a federal trademark registration covering their logo (See Figure 1). Idaho businesses should thus also avoid use of any of the Special Olympic marks without prior approval.

In 1998, when Salt Lake City hosted the Winter Olympics, according to the Salt Lake Organizing Committee (SLOC), Olympic sponsors and licensees were expected to be a source of nearly 75% of the revenue needed to organize and put on the Games, and are expected to be a source of nearly \$70,000,000.00 in revenue for the Beijing Olympics. In order to protect sponsorship and licensing rights, thereby making them more valuable, the Beijing Organizing Committee (along with the USOC and IOC) carefully regulates the use of Olympic trademarks, designations and graphic designs. This regulation takes place through approving all proposed uses of the Olympic marks, as well as in licensing the use of the Olympic marks for use by licensees, sponsors and suppliers.



Figure 1: Special Olympics Registered Trademark

BASES AND REMEDIES FOR INFRINGEMENT

The Olympic Organizing Committees tend to very aggressively protect their trademarks. A number of trademark infringement cases were litigated by the SLOC over Olympic marks back in and around 2002, the cases being brought under the Ted Stevens Olympic and Amateur Sports Act (36 U.S.C. § 220501), the Lanham (Trademark) Act (15 U.S.C. § 1127), the Federal Trademark Dilution Act of 1995 (15 U.S.C. § 1125(c)(1)), Utah's Civil Trademark Statute, Utah's Truth in Advertising Act, the Federal Copyright Act (17 U.S.C. § 102), and/or the Anticybersquatting Consumer Protection Act of 1999 (15 U.S.C. § 1125(d)).

Several points of interest lie with respect to the Amateur Sports Act. Under the Act, traditional defenses such as fraudulent registration, abandonment, and fair use cannot be asserted by the defendant. Furthermore, the Plaintiff (e.g., Beijing Organizing Committee), need not prove a "likelihood of confusion"

(Lanham Act) but need only satisfy the lesser burden of “tending to cause confusion” (Amateur Sports Act §380). The Amateur Sports Act also authorizes parties to be found guilty of criminal law under 18 U.S.C. §2320 (d)(1)(B) for trafficking in counterfeit goods if they have intentionally trafficked or knowingly used counterfeit goods or services and a likelihood of confusion among the marks can be proven to a preponderance of the evidence. Although parties may assert all federal trademark defenses in a criminal prosecution, penalties for violation of this statute can be as high as \$5,000,000 or 20 years in prison or both for an individual and as high as \$15,000,000 for a corporation.

Outside of the Amateur Sports Act, potential exposure for trademark infringement includes recovery of (1) a portion or all of the Defendant’s profits; (2) a portion of the Plaintiff’s entire lost profits; (3) a portion or all of the Plaintiff’s actual business damages and losses; (4) punitive damages in addition to actual damages; and (5) attorneys’ fees. In regard to counterfeit goods (goods that have a mark that is a counterfeit of a registered mark) penalties can also include the forfeiture (including seizure and destruction) of the infringing items, as well as treble damages if the infringement is found to be a knowing intentional use of a registered mark.

While this article stresses the potential for trademark infringement, if copyrighted works are copied, damages related to that infringement may also be at issue, including injunctions, monetary damages (the Defendant’s profits or the Plaintiff’s losses), costs, attorney’s fees, and/or statutory damages of not less than \$750 or more than \$150,000 per infringing type of goods sold. If the infringement is found to be willful, the penalties increase to up to \$150,000 per infringing use.



Figure 2: The Beijing 2008 Official Emblem

CONCLUSION—How can you protect your clients?

1. Become familiar with the Olympic marks. Aside from the traditional trademarks (e.g., OLYMPIC GAMES, OLYMPICS, the five rings logo), other trademarks exist, including “BEIJING 2008” and the official emblem of the Beijing 2008 Games (entitled “Chinese Seal-Dancing Beijing”) (See Figure 2).
2. Second, counsel your clients about the Olympic marks, reminding your clients of the strong protection afforded the Olympic marks and cautioning against their use.

Sadly, trademark owners, in order to protect their trademarks, must enforce their rights against unli-

censed users, regardless of the intent of the unlicensed. Thus, Idaho attorneys need to be diligent in monitoring how our clients celebrate the Special Olympics and the Summer Games of 2008.

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KSR AND THE RISING BAR OF INNOVATION

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Whether or not a would-be patent holder's idea is considered innovative enough to be patented is often largely determined by a single issue – “non-obviousness.” The issue of non-obviousness is in many cases the most difficult obstacle in obtaining a patent and is generally a key issue in patent litigation suits. In order to be non-obvious, a claimed invention must be more than just different from what is already known at the time of the invention. As will be discussed in more detail below, a patent applicant's idea must be different enough that it would not have been obvious to one of ordinary skill in the pertinent technology, or “art,” at the time the invention was made.

Through the course of patent history in the United States, the standard for non-obviousness has varied. One common analogy used to describe this varying standard is that of a pendulum, during some periods swinging in favor of patent holders by making it easier to find patents non-obvious and thus valid, and during other periods, swinging in the direction of a more difficult standard of non-obviousness. Over the past 25 years or so, the pendulum has been fairly steadily swinging in favor of patent holders. Recently, however, the standard for determining non-obviousness has begun to swing in the other direction, making determinations of non-obviousness more difficult to achieve both in the courts and at the Patent Office.

On April 30, 2007, the Supreme Court decided *KSR International Co. v. Teleflex Inc.*¹, which has arguably had a significant impact on the determination of non-obviousness. An invention is considered “obvious,” and thus unpatentable, “if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art.”² In some cases, an invention may be determined to be “obvious” if each of the claimed elements of the invention previously existed in the prior art. The teachings of multiple prior art references, such as previously issued patents or published patent applications, that individually disclose a portion of the claimed elements may be combined together to show that each claimed element of the invention was previously known.

Prior to *KSR*, the Federal Circuit applied the “TSM test” in obviousness analyses, which requires a “teaching, suggestion, or motivation” to combine the separate teachings of the prior art references together. If no suggestion or motivation to combine the reference teachings was found, then the proposed combination of references would not support a determination of obviousness, even though every element of the claimed invention was separately disclosed in the prior art.

Some have expressed fears that *KSR* so drastically raised the “non-obviousness standard” as to wholly eliminate the TSM test and possibly even preclude the patenting of an invention that is a combination of previously known elements. At least one patent

practitioner cites the Supreme Court's decision in *KSR* as one reason why an inventor should no longer seek patent protection for an invention that is a combination of old elements.³

However, the courts and Patent Office have both made it clear that while *KSR* has broadened the determination of non-obviousness to include tests other than the TSM test, the TSM test is still alive and well. Further, the standard for obviousness has by no means precluded obtaining a patent for an invention that combines previously known elements.⁴

The purpose of this article is to briefly report on *KSR* and the changing standard of non-obviousness in view of *KSR* and Patent Office policy. Some suggestions will also be discussed for drafting and prosecuting patent applications in view of the increasingly difficult-to-meet standard of non-obviousness.

KSR

In 2002, Teleflex Incorporated (“Teleflex”) sued *KSR International Co.* (“*KSR*”) in the Eastern District of Michigan, Southern Division, for infringement of U.S. Patent No. 6,237,565 (“the ‘565 Patent”), which claimed a mechanism for combining an electric sensor with an adjustable automobile pedal.⁵ The District Court granted summary judgment for *KSR* based on a finding that the ‘565 Patent was obvious in view of a combination of prior art patents that separately taught a pivotally mounted pedal assembly and an electric pedal position sensor.⁶ On appeal, the Federal Circuit found that the District Court did not correctly apply the TSM test and remanded the case.⁷ Specifically, the Federal Circuit held that the TSM test “requires that the nature of the problem to be solved be such that it would have led a person of ordinary skill in the art to combine the prior art teachings in the particular manner claimed.”⁸ According to the Federal Circuit, the cited prior art references did not seek to solve the same problem as the claimed invention and thus, there would have been no proper suggestion at the time of the invention to combine their teachings.

The Supreme Court rejected the Federal Circuit's “rigid” application of the TSM test and reversed the Federal Circuit's finding of non-obviousness, but did not overrule or abolish the TSM test. To the contrary, the Court expressly stated that there was no inconsistency between the TSM test and its precedents concerning obviousness.⁹ The Court indicated that it is still “important to identify a reason that would have prompted a person of ordinary skill in the relevant field to combine the elements in the way the claimed new invention does.”¹⁰ In some instances, a sufficient reason might exist if it merely would have been “obvious to try” the combination of claimed elements due to a design need or market pressure. However, the Court stated that design need or market pressure basis is applicable only when there exists *a finite number of identified, predictable solutions*.¹¹ Further, the Court held that “a patent composed of several ele-

ments is not proved obvious merely by demonstrating that each of its elements was, independently, known in the prior art.”¹² Thus, a patent may still be obtainable on “novel” combinations of previously known elements.

COURTS’ INTERPRETATION OF KSR

There have been varying interpretations by the lower courts concerning the effect of *KSR* on the Federal Circuit’s TSM test.¹³ The Federal Circuit itself has continued to apply the TSM test, albeit in a less rigid manner, after *KSR*.

For example, in *Takeda Chemical Industries v. Alphapharm Party Ltd.*, the Federal Circuit affirmed the trial court’s finding that the claimed invention would not have been obvious in light of the prior art.¹⁴ The patent at suit concerned a chemical compound for use in anti-diabetic research having a previously known “compound b” as the lead compound. The trial court held that there would have been no motivation to use “compound b” as the lead compound. On appeal, the Federal Circuit held that it would not have been “obvious to try” the “compound b” because of the relatively large number of potential lead compounds.¹⁵ Further, the court stated that the TSM test may be used in an obviousness analysis as long as it is not applied as a “rigid and mandatory” formula.¹⁶

In *Ortho-McNeil Pharmaceutical v. Mylan Laboratories*, decided in 2008, the Federal Circuit reemphasized that the Supreme Court did not abolish the TSM test. In fact, the Federal Circuit held that “a flexible TSM test remains the primary guarantor against a non-statutory hindsight analysis.”¹⁷ However, the teaching, suggestion, or motivation to combine prior art references does not need to be expressly written in a reference, but rather may be within the knowledge of one of ordinary skill.¹⁸

THE EFFECT OF KSR AT THE PATENT OFFICE

Even before *KSR*, Patent Office Policy had been making it more difficult for patent applicants to receive a patent. As part of the Patent Office’s “patent quality” initiatives, the Office has been steadily lowering allowance rates for the past several years. As a result, allowance rates have dropped from over 70% in 2000 to 51 % in 2007.¹⁹

In response to *KSR*, the Patent Office has issued revised examiner guidelines for determining obviousness issues. Many patent practitioners believe that the new guidelines will make it easier for examiners to make rejections based on obviousness, thus making it even more difficult to get patents approved.²⁰

Further, the Board of Patent Appeals and Interferences, to which patent applicants can appeal an examiner’s decision to reject an application, issued three precedential opinions in quick succession after *KSR* was decided.²¹ As might be expected, each of the Board’s opinions emphasized *KSR* in affirmance of the examiners’ rejections based on obviousness. The Board’s reliance on *KSR* no doubt accounts for, at least in part, the sharp increase in its affirmance rate of examiner’s decisions, which was 69% in 2007, up from only 51% in 2005.²²

PATENT PROSECUTION STRATEGIES IN VIEW OF A HEIGHTENED STANDARD OF NON-OBVIOUSNESS

Given the heightened standard of non-obviousness being applied at the Patent Office and in the courts, quality patent drafting and prosecution is becoming ever more important. Patent

applicants can no longer expect to successfully navigate applications through the Patent Office that have been prepared with scanty disclosures and little prior thought to strategy for overcoming prior art rejections. Some possible suggestions for increasing the likelihood of getting a patent application allowed include the following:

1. Consider conducting a patentability search. Knowing the closest prior art before drafting an application can help to identify the points of novelty and allow for improved application and claim drafting.
2. When drafting applications, include disclosure of several different scopes ranging from broad to narrow. Understand both the client’s needs in protecting the invention and the points of novelty over the prior art in determining where to focus drafting efforts.
3. The claims of a patent application should be carefully drafted with an eye towards overcoming the prior art, while still achieving the broadest claim coverage allowable.
4. When drafting claims, consider including both a broad set of claims and one or more narrower sets of claims. Forcing the Examiner to search both broad and narrow independent claim sets may result in a more complete initial search by the examiner and expedite prosecution. It may also result in a more defensible patent during litigation.
5. Conduct telephonic or personal interviews with the examiner. Interviewing on a regular basis promotes good communication with the examiner, which is essential in avoiding prolonged prosecution by quickly overcoming rejections and/or determining whether an examiner’s unreasonable position may warrant an appeal.

CONCLUSION

In view of recent cases such as *KSR*, as well as Patent Office policy, the bar of innovation is rising for would-be patentees and patent holders. Overcoming rejections and withstanding invalidity attacks based on obviousness is now, and will likely remain for the foreseeable future, a more challenging issue than it has been in the past. It is becoming increasingly important to anticipate issues of obviousness and employ appropriate patenting strategies when drafting and prosecuting patent applications if inventors are to be successful in obtaining and defending patent rights in their inventions.

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ENDNOTES

¹ *KSR International Co. v. Teleflex Inc.*, 127 S.Ct. 1727 (2007).

² 35 U.S.C. § 103.

³ Dennis Fernandez, *Five Reasons You Should No Longer Get Patents*, Andrews Intellectual Property Litigation Reporter, January 30, 2008.

⁴ Based on the Patent Office allowance rate for reported for 2007, as discussed below, it appears that more than half of patent applications considered last year became patents, which is still much higher than in Japan, where only 29% of patent applicants receive patents.

⁵ *Teleflex Inc. v. KSR International Co.*, 298 F.Supp.2d 581, 583 (E.D. Mich. 2003).

⁶ *Id.* at 592-94.

⁷ *Teleflex Inc. v. KSR International Co.*, 119 Fed.Appx. 282 (Fed. Cir. 2005).

⁸ *Id.* at 288.

⁹ *KSR International Co. v. Teleflex Inc.*, 127 S.Ct. 1727, 1732 (2007); *See Graham v. John Deer Co. of Kansas City*, 383 U.S. 1 (1966).

¹⁰ *KSR*, 127 S.Ct. at 1741.

¹¹ (Emphasis added.) *Id.* at 1742.

¹² *Id.* at 1741.

¹³ *McNeil-PPC, Inc. v. Perrigo Co.*, 516 F.Supp.2d 238, 251 (S.D.N.Y. 2007) (“*KSR* casts doubt on the continuing validity of Federal Circuit precedent on the issue of obviousness”); *MercExchange, L.L.C. v. eBay, Inc.*, 500 F.Supp.2d 556, 575 (E.D.Va. 2007) (*KSR* “raised the bar as to what qualifies as non-obvious”); *Lucent Technologies, Inc. v. Gateway, Inc.*, 509 F.Supp.2d 912, 933 (S.D.Ca. 2007) (*KSR* did not completely remove suggestion or motivation to combine from the obviousness analysis); *Global Traffic Technologies, LLC v. Tomar Electronics, Inc.*, 2007 WL 4591297, at *6 (D.Minn. 2007) (*KSR* did not overrule or nullify the TSM test).

¹⁴ *Takeda Chemical Indus. v. Alphapharm Pty.*, 492 F.3d 1350 (Fed. Cir. 2007).

¹⁵ *Id.* at 1359.

¹⁶ *Id.* at 1357.

¹⁷ *Id.* at 1364; *See In re Translogic Tech., Inc.*, 504 F.3d 1249, 1257 (Fed. Cir. 2007).

¹⁸ *Ortho-McNeil*, 530 F.3d at 1365.

¹⁹ United States Commerce News, Nov 15, 2007, Press Release, <http://www1.uspto.gov/go/com/speeches/07-46.htm>

²⁰ ABA Journal, February 2008, “Reinventing Patent Law”, Steve Seidenberg.

²¹ Ex parte MAREK Z. KUBIN, BPAI, Appeal 2007-0819, May 31, 2007; Ex parte MARY SMITH, BPAI, Appeal 2007-1925 June 25, 2007; Ex parte CAROLYN RAMSEY CATAN, BPAI, Appeal 2007-0820, July 2, 2007.

²² FN United States Commerce News, Nov 15, 2007, Press Release,



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EXPENSIVE INSPIRATION

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Most people know that entertainment products such as video games, movies, and music are protected against unauthorized copying. But many people do not know that constructing habitable buildings from existing architectural plans, models, or even completed structures, may also be considered “copying” protected work.

This has not always been the case. Prior to 1990, architectural designs and drawings could be protected only under a provision in the copyright law for pictorial, graphic, and sculptural works.¹ Such drawings were only protected against reproduction and it was not considered copyright infringement to build a building from protected designs. Further, completed buildings and other architectural works could not be protected unless they served no utilitarian purpose.²

That law changed in 1990 when the Architectural Works Copyright Protection Act (AWCPA) took effect, which affords protections to physical buildings and other “architectural works.”³ The AWCPA defines “architectural works” as:

“[T]he design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawing. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features.”⁴

The language of the AWCPA is broad and it is intended to afford far reaching protections for original architectural works in many different forms.⁵ Buildings, models, plans and drawings can all be registered as architectural works.⁶

The mere fact that a work is registered, however, does not guarantee that a claim for infringement will be successful. A claim under the AWCPA proceeds in a similar manner to traditional copyright claims.⁷ The plaintiff will bear the burden of showing that the work was properly copyrighted, that the infringing party had access to the work and actually copied it, and that the final product is substantially similar to the protected work.⁸

If liability is shown, the potential damages for copyright infringement under the AWCPA are substantial. The Copyright Code provides that a copyright holder may recover (1) its actual damages, (2) any profits of the infringer that were attributable to the infringement, and (3) statutory damages of between \$750 and \$30,000 per work infringed. The court may also award punitive damages of up to \$150,000 and/or attorney fees if the court decides that the infringement was willful.⁹

The AWCPA creates a powerful opportunity for architects to protect their work and creates many potential liabilities for architects, builders, and developers. The case law with respect to this relatively underutilized corner of the Copyright Code is still developing, but a brief look at three recent cases provides valuable lessons about some of the potential issues that you and your clients should consider.

REGISTRATION AS AN “ARCHITECTURAL WORK” IS ESSENTIAL

In *Oravec v. Sunny Isles Luxury Ventures L.C.*¹⁰, the Eleventh Circuit discussed the long-standing rule that a pictorial, graphic, or sculptural (PGS) copyright will not prohibit the use of protected designs in the construction of a building.

The relevant facts of *Oravec* are as follows. Oravec, a Czechoslovakian émigré, held five copyrights for various architectural designs. In his attempt to market his work, Oravec met with several developers and designers and submitted copies of his work to dozens of different individuals and organizations. His efforts proved fruitless, but he later became aware of two buildings at the Trump Grande Ocean Resort and Residences that bore some similarity to his copyrighted designs. Oravec brought suit against the developers of the resort for infringing on several of his copyrights.

While most of Oravec’s works were registered as “architectural works” under AWCPA, one was registered only under the PGS provision of the Copyright Code. Oravec conceded that PGS copyrights do not protect against construction, but he claimed that his design should also be protected as an “architectural work” under the effective registration doctrine. The court disagreed. The Eleventh Circuit held that registration as a PGS will not prohibit those registered designs or drawings from being used in the construction of a building. The court found ample support for the conclusion that the AWCPA does not afford any greater protection to works registered under the PGS provision than what was available prior to 1990.¹¹

The lesson here is clear. If architects want to avail themselves fully of the protections afforded under the AWCPA, they should register their designs both as architectural works *and* under the PGS provision. In doing so, the designs themselves will be protected from reproduction and the law will also prohibit the building of a physical structure from the protected designs.

BUILDERS SHOULD THINK TWICE BEFORE REUSING PLANS

In *LGS Architects Inc. v. Concordia Homes*¹², the Ninth Circuit clearly held that builders may be found liable for copyright infringement if they reuse an architect’s registered plans without permission.

The facts of LGS are simple. Concordia Homes hired LGS Architects to provide architectural plans for a master-planned community outside of Las Vegas. The parties’ license agreement was based on a standard-form AIA agreement and stated that the architectural documents were licensed to the builder solely for use on that project and no other. The agreement further stated that any other use of the documents was prohibited unless the builder first obtained express written authorization from the architect and then paid an agreed-upon reuse fee.

Concordia later decided to use the plans for a second development and the company made some effort to comply with the terms of the agreement. Ultimately, however, Concordia failed to pay the full reuse fee and LGS refused to grant permission for Concordia to reuse the plans. Despite LGS's express refusal to grant permission for reuse, Concordia forged ahead and built the second development. LGS then brought suit against Concordia. The Ninth Circuit Court of Appeals found that LGS was likely to succeed on the merits of its copyright infringement claim because "when a licensee exceeds the scope of a license granted by the copyright holder, the licensee is liable for infringement."¹³

Again, the lessons are clear. First, builders may face liability for copyright infringement when using protected plans without the express permission of the copyright holder. Second, builders and architects should carefully negotiate license agreements and both parties should be sure to understand the scope of the agreement from the outset. Finally, architects are wise to license rather than assign their designs because this will allow them to retain control should the builder decide to use the plans in a way that was not originally discussed.

ARCHITECTS SHOULD BE CAREFUL WHEN THEIR INSPIRATION COMES FROM SOMEBODY ELSE'S MODEL

In *Shine v. Childs*¹⁴, a federal district court in New York held that an architectural model could be protected as an architectural work under the AWCPA. As a result, an architect who had seen the model and then designed a similar building faced potential liability for copyright infringement.

As part of his work in the community, the defendant architect Childs judged a competition at the Yale School of Architecture. Childs was particularly impressed with the building model of one student, Shine, and Childs approached Shine after the competition to discuss the student's model. A few years later, Childs was tasked with designing a building to replace the World Trade Center in New York City. The resulting design was similar in many ways to the model that Childs had seen while judging the competition at Yale. Shine learned of the design and brought suit for copyright infringement.

Defendant Childs moved to dismiss the infringement claims, and the district court partially denied the defendant's motion, finding that a sufficiently detailed model may be protected as an architectural work even if that model has not yet been developed to the point that the building is capable of construction.¹⁵

Shine provides three important lessons. First, an architect's original design may be protected as an architectural work even if it only exists as a somewhat preliminary model. Second, an architect who is inspired by such a model should be careful not to copy the design's unique and original elements. Finally, the district court's decision shows that the courts are willing to broadly interpret the meaning of "design of a building" under the AWCPA.

CONCLUSION

There are still many questions to be answered about the scope of the AWCPA. The purpose of this article is not to provide an exhaustive checklist of the potential issues and sources of liability. However, counsel – especially to the building trades – needs to be aware of this unique and powerful section of the Copyright

Code. At the intersection of copyright and construction law, inspiration is not always free.

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ENDNOTES

- ¹ 17 U.S.C. § 102(a)(5).
- ² See *Shine v. Childs*, 382 F.Supp.2d 602, 608 (S.D.N.Y. 2005).
- ³ 17 U.S.C. § 102(a)(8).
- ⁴ 17 U.S.C. § 101.
- ⁵ See *Shine*, 382 F.Supp.2d at 608-09.
- ⁶ *Id.*
- ⁷ *Id.* at 607.
- ⁸ *Id.*
- ⁹ 17 U.S.C. §§ 504, 505.
- ¹⁰ 527 F.3d 1218, (11th Cir. 2008).
- ¹¹ See *id.*
- ¹² 434 F.3d 1150 (9th Cir. 2006)
- ¹³ *Id.* at 1156.
- ¹⁴ 382 F.Supp.2d 602 (S.D.N.Y. 2005).
- ¹⁵ *Id.* at 608.



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MORAL RIGHTS UNDER FEDERAL LAW

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In 1959, sculptor Amar Nath Sehgal was commissioned to design a mural that would adorn the walls of a central arch in a building that served as a venue for important government functions. The mural became a landmark of cultural life in the city and attracted dignitaries and art connoisseurs from all over the world. Then, after nearly twenty years, the mural was ripped from the wall during renovation of the building. Parts of the 40 foot by 140 foot mural were destroyed and the rest was put into storage. After years of petitions to the government, Mr. Sehgal finally initiated a lawsuit for violation of his moral rights, claiming that “the dismemberment of the homogenous blend of the pieces of each tile in the mosaic constituted an act of mutilation”; the removal was “prejudicial to his honor and reputation as an artist, because, by reducing the mural to junk, it dealt a body blow to the esteem and celebrity bestowed on the work at its inception”; and “the obliteration of his name on the work violated his right to claim authorship.¹” The court ruled in his favor, ordering return of the remnants of the mural to the artist and awarding damages that were equivalent to approximately \$12,000. Still, the legal battle continued, but eventually, Mr. Sehgal waived the claim for damages in exchange for return of what was left of his mural.

Mr. Sehgal’s battle was fought and won in India, one of the many countries that has long recognized and enforced artists’ moral rights. Had Mr. Sehgal’s mural been similarly destroyed in the United States at that time, he likely would have had little recourse because the United States has formally recognized moral rights only since 1990, when the Visual Artists Rights Act (VARA) was enacted. Additionally, compared to moral rights in India, Europe, and elsewhere, moral rights in the United States are much weaker, in large part because of the narrow scope of the VARA, codified at 17 U.S.C. § 106A, the number of exceptions in the VARA, and the ease with which the rights can be waived. For these reasons, and because few are even aware that moral rights are recognized here, few artists in this country have been successful in moral-rights violation actions. Even so, when the circumstances are right, the VARA has the potential to be a powerful tool to protect an artist’s interest, particularly when copyright law offers little relief.

THE VARA

The VARA ensures certain artists the rights of attribution and integrity. More specifically, the VARA gives authors of works of “visual art” the right to claim authorship of his or her work and to prevent others from naming him or her as the author of work that has been distorted, mutilated, or otherwise modified if such modification would be prejudicial to the artist’s honor or reputation. These make up the rights of attribution. The VARA also gives authors of visual works the right to “prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation” and

“to prevent any destruction of a work of recognized stature”² These constitute the rights of integrity.

THE VARA’S ADVANTAGES

Certain aspects of the VARA make it a very attractive and potentially-strong tool for protecting an artist’s interest in a work of visual art. First, the rights provided in the VARA survive with the author artist even after the work of visual art has been sold and even after the author has transferred the copyright in that work to another. This is because the rights in the VARA may not be transferred, and ownership of the moral rights are distinct from ownership of any copy of the work, of the copyright in the work, or of any exclusive right under a copyright in that work.³ Second, to bring an action for violation of an artist’s rights under the VARA, the copyright of the work in question need not be registered.⁴ Thus, while a copyright holder must wait to bring an action for copyright infringement only after the copyright has been registered, the artist may immediately initiate a claim for a violation of the VARA.⁵ Third, statutory damages may be recovered for violations of the VARA. In cases of copyright infringement, statutory damages are recoverable only if the copyright for the work in question was registered within three months of the first publication of the work or prior to the infringement.⁶ Contrarily, because the copyright of the work need not be registered to assert rights under the VARA, statutory damages are available even if the copyright of the work has never been registered or even if the copyright was registered well after publication or after the violation occurred. Accordingly, should an artist find him or herself in a situation in which his or her work has been mutilated or distorted during the creation of a derivative work by another, if the copyright of the work was not registered prior to the copyright infringement (i.e., the creation of the derivative work), or if proving ownership of the copyright would be difficult, the artist may be better off bringing an action for violation of his or her rights under the VARA, rather than just alleging copyright infringement.

THE VARA’S SHORTCOMINGS

Despite the VARA’s potential to protect artist’s interests when copyright law would not, the scope of the VARA is so narrow, its exceptions so many, and its protections so easily waived that few artists have found relief therein.

SHORTCOMING # 1—LIMITED TO “WORKS OF VISUAL ART”

As a first example of the narrow scope of the VARA, it applies only to the authors of a “work of visual art.”⁷ A “work of visual art” may be, basically, a painting, a drawing, a print, a sculpture, or a photograph (produced for exhibition purposes only) where the art exists in a single copy or in a limited number of copies that are signed and numbered by the author.⁸ The list of works specifically excluded from the definition of “work of visual art” is long: posters; maps; globes; charts; technical drawings;

diagrams; models; applied art; motion pictures or other audiovisual work; books; magazines; newspapers; periodicals; data bases; electronic information services; electronic publications; or similar publications; any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container; any work not subject to copyright protection; and any work made for hire.⁹ Thus, essentially only fine arts artists who have not been commissioned to create the work in question are clearly within the scope of the VARA (with still other exceptions discussed below). Artists who use unusual mediums or who have been commissioned to create their works are less surely protected. Commissioned artists, in particular, are at risk of having their works be considered “works made for hire”¹⁰ and therefore outside of the protection of the VARA.¹¹

SHORTCOMING # 2—AMBIGUOUS TERMS WITH UNCLEAR STANDARDS OF PROOF

Moreover, to exercise the rights under the VARA so as to prevent intentional distortion, mutilation, or modification of a work, or to prevent use of his or her name as the author of a work of art that has been distorted, mutilated, or otherwise modified, the artist must prove that the distortion, mutilation, or modification “would be prejudicial to his or her honor or reputation.”¹² Similarly, to prevent destruction, the artist must prove that the work is “a work of recognized stature.” None of “prejudice,” “honor,” “reputation,” or “recognized stature”¹³ are defined in the VARA. Further, there is little case law to provide guidance on the meaning of these terms. It seems to boil down to a requirement that the artist must show that art experts, the art community, or society in general would view the work as possessing stature.¹⁴ Finding evidence of this can be quite difficult if the work was significantly mutilated or completely destroyed before it could be reviewed by an art expert.¹⁵

SHORTCOMING # 3—TOO MANY EXCEPTIONS

In addition to its limited scope and vague standards, there are several exceptions to the VARA¹⁶. Included in these is the exception of Section 106A(c)(2) that “[t]he modification of a work of visual art which is the results of conservation, or of the public presentation, including lighting and placement, of the work is not a destruction, distortion, mutilation, or other modification . . . unless the modification is caused by gross negligence.”¹⁷ This provision was recently held by the United States Court of Appeals for the First Circuit to mean that the VARA does not apply to site-specific art, i.e., art where the location of the work is an integral element of the work.¹⁸ The First Circuit reasoned that because Section 106A(c)(2) states that placement is not a destruction, distortion, mutilation, or other modification, the VARA necessarily permits work to be relocated. Because site-specific art is at least partially destroyed by being moved, the VARA cannot protect site-specific art while permitting its relocation. Considering that the VARA has apparently been utilized most by artists whose works were originally designed for installation in public locations, the First Circuit’s decision hits a heavy blow to the protections of the VARA. If this holding is followed, it will, in this author’s opinion, effectively eliminate the VARA’s protections for a large percentage of those who would otherwise

benefit most from it, i.e., the public-art artists who integrate the intended setting of their work in the art itself.

SHORTCOMING # 4—EASY WAIVER

Finally, the rights protected by the VARA are easily lost. Though in Europe and in India, artists’ moral rights are inalienable, in the United States, under the VARA, an artist’s rights are waived if the author expressly agrees, in writing, to the waiver.¹⁹ The waiver provision in the United States is apparently unique. The VARA was enacted in accordance with the requirements of the Berne Convention for the Protection of Literary and Artistic Works, to which the United States is a member. The Berne Convention is silent on moral rights waivers. Even so, when the United States codified the recognition of moral rights so as to comply with the Berne Convention, it included a waiver provision in the VARA. Because of the concern that artists could be pressured into waiving their moral rights due to lack of bargaining power, in 1996, the Copyright Office reported on a survey conducted to assess for Congress the impact of the waiver provisions of the VARA.²⁰ Nearly forty percent of respondents reported that waiver clauses were parts of contracts for commissioned works.²¹ Such moral-rights waiver requests are continuing to be made, particularly with regard to commissioned works, and with increasing frequency.²² Waiver is further made easier in the case of a work having two more authors. In such cases, the moral rights are co-owned by the authors, and waiver of the moral rights by one author waives the rights for the other authors.²³

CONCLUSION

All things considered, the VARA is a potentially-great source of protection of an artist’s interests when the circumstances are right, particularly when the artist has transferred his or her copyright rights or did not register the copyright within three months of publication or before infringement. Thus, in a hypothetical circumstance in which a piece of artwork (that was not a commissioned work raising concerns of its being a “work for hire,” that is not a site-specific installation, and that has been published in magazines, displayed in museums, and acclaimed by the art critic world as being of “stature”) has been mutilated or destroyed (at least to the point that the original artist has been rebuked and publicly humiliated), provided that the artist is still alive, was not pressured into signing a moral-rights waiver at the time the artwork was sold or at any other time (and did not have a co-author that was so pressured), and is in the minority of artists who have the means of bringing a federal civil law suit,²⁴ the VARA is a handy sword.

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¹ Binny Kalra, *Copyright in the Courts: How Moral Rights Won the Battle of the Mural*, WIPO MAGAZINE, Apr. 2007, available at http://www.wipo.int/wipo_magazine/en/2007/02/article_0001.html (last visited June 30, 2008).

² 17 U.S.C. § 106A(a)(3)

³ 17 U.S.C. § 106A(e).

⁴ “Except for an action brought for a violation of the rights of the author under section 106A(a), and subject to the provisions of subsection (b), no action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title.” 17 U.S.C. § 411(a) (emphasis added).

⁵ Pursuant to 17 U.S.C. § 504(c), a copyright owner may elect, at any time before final judgment, to recover statutory damages rather than actual damages and profits. 17 U.S.C. § 504(c)(1). When the copyright owner can prove that the infringement was willful, the court may increase the award of statutory damages to \$150,000. 17 U.S.C. § 504(c)(2) Because actual damages and profits are often difficult, if not impossible, to prove, seeking statutory damages is usually preferred. (It should be noted that even though rights under the VARA are distinct from the copyright rights, with regard to Section 504, the definition of “copyright owner” includes an artist under the VARA Section 106A(a). 17 U.S.C. § 501(a) (“For purposes of this chapter (other than section 506), any reference to copyright shall be deemed to include the rights conferred by section 106A(a).”).

⁶ 17 U.S.C. § 412.

⁷ 17 U.S.C. § 106A(a).

⁸ 17 U.S.C. § 101.

⁹ *Id.*

¹⁰ “Works made for hire” fall within those works that are excepted from the normal copyright rule that the author of the work is the owner of the copyright. Determining whether or not a work is a “work made for hire” under the copyright laws depends in large part on whether the artist was “an employee” or “an independent contractor” of the person who hired the artist or who ordered the work. This is a topic for a separate article.

¹¹ See, e.g., *Carter v. Helmsley-Spear Inc.*, 71 F.3d 77 (2d Cir. 1995). In *Carter*, three sculptors were commissioned to create a large art installation for a Queens warehouse. The landlord demanded that the artists vacate and indicated that he would remove the work in progress. The artists sued under VARA and won an injunction against the destruction in the district court. On appeal, however, the Second Circuit Court of Appeals concluded that the sculpture was a “work made for hire” and therefore was outside the scope of the VARA.

¹² 17 U.S.C. § 106A(a)(2),(3)(A).

¹³ 17 U.S.C. § 106A(a).

¹⁴ David M. Spatt, *Life after the Federal Visual Artists Rights Act*, available at <http://www.artslaw.org/VARA.htm> (last visited June 30, 2008).

¹⁵ See, e.g., *Martin v. City of Indianapolis*, 192 F.3d 608 (7th Cir. 1999). In *Martin*, the work of a reputable artist had been completely destroyed. In determining whether the work was a “work of stature,” the Seventh Circuit cited *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 325 (S.D.N.Y. 1994), *aff’d in part, vacated in part, rev’d in part*, 71 F.3d 77 (2d Cir. 1995). In particular, the Seventh Circuit noted the district court’s statement in *Carter* that to make the showing of “stature,” “plaintiffs generally, but not inevitably, will need to call expert witnesses to testify before the trier of fact.” *Martin*, 192 F.3d at 612 (citing *Carter*, 861 F.Supp. at 325). Though the artist in *Martin* was ultimately successful in receiving costs, attorney’s fees, and apparently statutory damages, the artist’s case was made all the more

difficult because the sculpture at issue “was destroyed by the City without the opportunity for experts to appraise the sculpture in place.” *Martin*, 192 F.3d at 612.

¹⁶ See 17 U.S.C. § 106A(c).

¹⁷ 17 U.S.C. § 106A(c)(2).

¹⁸ *Phillips v. Pembroke Real Estate, Inc.*, 459 F.3d 128 (1st Cir. 2006).

¹⁹ 17 U.S.C. § 106A(e).

²⁰ *Waiver of Moral Rights in Visual Artworks*, Copyright Office (Oct. 24, 1996), available at <http://www.copyright.gov/reports/exsum.html> (last visited June 30, 2008).

²¹ *Id.*

²² Patricia Failing, *Artists Moral Rights in the United States before VARA/1990: An Introduction*, Session Paper for a Panel Discussion of the Visual Artists Rights Act (VARA) for The Committee on Intellectual Property of the College of Art Association (Feb. 2002), available at <http://www.studiolo.org/CIP/VARA/Failing/Failing.htm> (last visited June 30, 2008).

²³ 17 U.S.C. § 106A(e).

²⁴ According to the Copyright Office’s survey in 1996, most artists who responded grossed less than \$10,000 annually from their artwork. *Waiver of Moral Rights in Visual Artworks*, Copyright Office (Oct. 24, 1996), available at <http://www.copyright.gov/reports/exsum.html>

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TECHNOLOGY TRANSFER LEGISLATION

Jason C. Stolworthy
Eric M. Laird
Battelle Energy Alliance

As much as half of all economic growth is not accounted for by increases in labor or capital inputs, experts assume that such economic growth is a result of advances in knowledge. According to Idaho's Department of Commerce, Idaho's innovation industries currently employ 8.5% of the state's workforce and earn 16% of the state's total wages.¹ It is estimated that Idaho's innovation industries contribute to 18.4% of Idaho's GDP, which exceeds all other industry sectors. With Idaho's per capita income ranking at forty-fourth in the nation, it is no wonder that Idaho statesmen are focusing on how to grow Idaho's innovation industries. This article focuses on technology transfer legislation and how it has and will affect Idaho.

A BRIEF HISTORY OF TECHNOLOGY TRANSFER LEGISLATION

Throughout the history of U.S. lawmaking, visionary statesmen have recognized the importance that technology development has on the United States public. Such individuals initially recognized a need to promote discovery and scientific advancement, which have led to world class federal laboratories and robust university research programs. As these organizations developed, however, individuals began to realize that many important scientific discoveries were not being transferred from the lab to the public. This realization has led lawmakers to promote and pass legislation to address this problem.

The Smith-Lever Act of 1914², is recognized as the first legislation that intentionally addressed the problem of technology not being transferred to the public. In 1945, Vannevar Bush published an article responding to a request from President Roosevelt, who had requested recommendations on how the U.S. might transfer knowledge of discoveries made as a result of war time research and development efforts and the plausibility of continuing the level of scientific discovery made during World War II. Vannevar's article was critical to policy models and resulted in a pillar of support for today's research and technology transfer efforts.

In the late 1970's, lawmakers again focused on improving the public's return on investment of research and development. Technology transfer as we know it today is primarily a result of the Stevenson-Wydler (P.L. 96-480) and Bayh-Dole Acts of 1980 (P.L. 96-517.) Provisions in the Stevenson-Wydler Act required federal laboratories to perform cooperative research with non-federal partners and allowed federal laboratories to create organizations that focus on building and transferring intellectual property. The Bayh Dole Act provided universities with similar abilities. The ability for labs and universities to build and license intellectual property was key, because it allowed them to provide companies and investors with exclusivity in the market. This made it easier for the labs and universities to justify the expenditures required to bring a bench scale technology to a commercial product.

TECHNOLOGY TRANSFER TODAY

Technology transfer is the practice of transferring intellectual property or know-how from one organization to another. In the context of government and universities, technology transfer is a phrase used loosely to describe an organization or group of professionals that carries out the intent of the technology transfer legislation, which is "to promote the utilization of inventions arising from federally supported research or development; to encourage maximum participation of small business firms in federally supported research and development efforts; to promote collaboration between commercial concerns and nonprofit organizations, including universities ... to promote the commercialization and public availability of inventions made in the United States by United States industry and labor; to ensure that the government obtains sufficient rights in federally supported inventions to meet the needs of the government and protect the public against nonuse or unreasonable use of inventions"

In order to accomplish this intent of 35 USC 200³, Federal laboratories and universities have set-up organizations that are responsible for capturing, patenting, marketing and licensing inventions. To carry out these functions, patent and licensing attorneys who have a familiarity with technology transfer legislation are required. It is not uncommon for a small technology transfer office to expend over a million dollars a year for patenting and licensing expertise.

THE AFFECT OF TECHNOLOGY TRANSFER LEGISLATION ON IDAHO

The practice of technology transfer, despite being in its early stages, has been very positive in the advancement of Idaho's local economy. In the academia spectrum there are four major Idaho universities involved in technology transfer: University of Idaho in Moscow, Boise State University in Boise, Idaho State University in Pocatello, and Brigham Young University – Idaho in Rexburg. Idaho is also fortunate to have a national laboratory, which supports a robust technology transfer program.

In the last two years, the Office of Technology Transfer (OTT) at the University of Idaho has licensed eight technologies. A recent success of OTT for the Idaho community was in 2003 with the licensing of water purification technology named BluePRO to a newly formed company named Blue Water Technologies located in Hayden, ID. The technology's process for effectively removing phosphorous from water was featured in the Association of University Technology Managers' (AUTM) Better World Report 2006, cited as one of the top 100 Technology Transfer Companies and as a top twenty five "Innovator Changing the World" in 2005. Currently, Blue Water Technology has equipment installed at over 220 locations throughout the U.S. and Canada. The OTT is currently managed by a six person team. Another upcoming success is with their

“Biodiesel Blend Level Detector” which is proving to be a very promising technology.

Boise State University and Idaho State University are in their beginning stages of technology transfer with 1 full-time employee, and one part-time employee management team respectively. Brigham Young University-Idaho, while not conducting its own university led research, regularly assists the Idaho National Laboratory’s technology transfer division through cooperative market and strategy research in senior-level capstone classes. The student groups are given emerging laboratory technologies to create market analyses and strategy recommendations to commercialize or license the technology. The students manage an average of ten technologies each trimester.

The Idaho National Laboratory (INL) is in the fore-front of technology transfer in Idaho. With this last year’s 40 patents and 118 Invention Disclosures (up from 77 FY ’06) from scientists at the lab, the INL has created a large venue of innovative ideas and possibilities to help the growth of Idaho’s economy. The twenty five member team of licensing, legal, and technology experts strive to advance the lab’s vision of advancing the U.S.’s competitive position in global technology and business. The laboratory’s licensing program generated approximately \$1.6 million through 60 licenses and 202 inventors during fiscal year 2007. Success at the INL can also be seen in its many R&D top 100 awards as well as with spin-off companies brought into operation by the INL tech transfer team.

Nanosteel Company, Inc. is one such spin-off which was created in 2003 from the invention of a super-hard steel coating by INL scientist Dr. Daniel Branagan. Product success has been through the development of Super Hard Steel® (SHS) alloys with nanoscale microstructures for use as metallic coatings within the concrete & cement, mining & aggregates, oil & gas and power generation industries. Nanosteel is currently thriving in its respective markets and creating new expansive product lines. The Idaho National Laboratory technology transfer team has also produced numerous other start-up companies, including Positron Systems, Nitrocision, SRP Technologies, Princesses Energy Systems, RSP Tooling, OKOS Solutions, and ML Technologies.

THE FUTURE OF TECHNOLOGY TRANSFER IN IDAHO

Individuals and lawmakers in Idaho are increasingly focused on the impact that innovation can have on Idaho. By adopting model programs of other successful states, Idaho is creating a solid foundation of support through university involvement, local business development programs such as Idaho TechConnect, Idaho Innovation Center, Idaho Small Business Development Center, and several venture and federal funding associations. The true impact of technology transfer on Idaho is difficult to measure. However, it is very likely that technology transfer will continue to grow Idaho’s legal community as resulting technology based companies grow and become successful.

ABOUT THE AUTHORS

The views and opinions express in this article do not necessarily represent the view of Battelle Energy Alliance.

Jason C. Stolworthy works with the Battelle Energy Alliance in Idaho Falls, Idaho in Technology Transfer and Commercialization. He is admitted to practice before the U.S.

Patent and Trademark Office, the Idaho State Bar, and the Montana State Bar. Mr. Stolworthy graduated from Idaho State University with a B.A. in Chemistry and a B.S. in Biochemistry (1998), and from University of Idaho with M.S. in Chemical Engineering and J.D. in Law (2003).

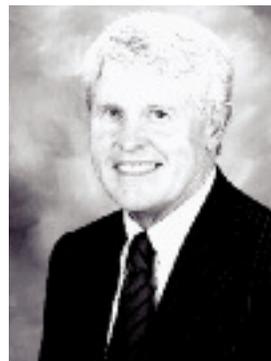
Eric M. Laird works with the Battelle Energy Alliance in Idaho Falls, ID. He is a graduate of Brigham Young University-Idaho with a B.S. in Finance. Mr. Laird is also currently enrolled in the International MBA program at Thunderbird School of Global Management, where he currently serves as the OAC President and a PE/VC club member.

ENDNOTES

¹ <http://commerce.idaho.gov/innovationeconomy.aspx>

² In 1862 congress passed the Morrill Act to provide resources to the states to develop colleges in agriculture and mechanical arts. In 1887 congress passed the Hatch Act which created a system of experiments in agriculture at land grant colleges and universities. In 1914 congress passed the Smith-Lever Act to create cooperative services to deliver practical benefits of research to the public.

³ 35 USC 200



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HOW NOT TO START A TOUR OF CHINA

Larry Hunter, Idaho State Bar Delegate
Moffatt, Thomas, Barrett, Rock and Fields, Chtd.

Last fall, my wife, Iris, and I had the opportunity to an educational study tour to China. The tour was sponsored by Boise State University and led by Music Professor El Parkeinson. During our tour we had the opportunity to see a Chinese opera, acrobats and cultural presentations on separate evenings in separate cities.

But our time was mixed with general sightseeing tours with local guides. Our first tour was to start at 9:30 a.m. the morning after we arrived in Beijing. But, we had read that every morning in the Square that there was a flag raising ceremony with the playing of the Chinese national anthem and marching of some troops. Since we were up early, we thought we could take a quick walk before the tour ... it seemed like a good idea at the time. The Square was straight up the road from our hotel, about 20 minutes by cab, so we felt like we could go and be back in time for breakfast ... long before the tour left, with no trouble. After getting a cab the next morning, we eventually got the driver to understand where we wanted to go, and zoomed off. At about 5:15 a.m., as we approached the Square, the traffic increased significantly, but we eventually arrived. The ride cost 40 Yuan (\$4.00). We could see the flag pole in the distance, but there was one impediment. What we hadn't known before we left the hotel was that we had arrived during one of China's national holiday weeks. October 1, is the day Mao Tse Tung proclaimed the People's Republic of China. Every year they celebrate the occasion for a week. When we went to the Square, it was October 2, and there were approximately 100,000 people in the Square ... many of them between us and the flag pole. As nearly as we could tell, we were the only Westerners there. As it turned out that did not escape others' notice as well.

Undaunted, we advanced toward the center of the Square. In spite of the crowd there was very little jostling. There was enough room for us to move forward without being pushy. Americans and we got to within fifty yards, or

so, of the flagpole. It was an enriching experience to see the Chinese, many of them on holiday with their families standing and waiting for this patriotic experience for them. Just as the sun was coming up a recording played, what must have been, the national anthem and we could see the tops of military heads marching in, maneuvering, and marching out. The flag rose with the playing of the anthem. There was no cheering, just a respectful viewing of the ceremony. Kids were on parents' shoulders or being held aloft and there were many straining to see the ceremonies. After a few minutes it was over and everyone, including us, started an exodus toward the streets and our way home. We had hoped to take the subway. It was a few minutes past 6:00 a.m., and we would have plenty of time to get back and eat before the tour started.

There was slightly more jostling as people went to leave, so when someone pushed me in the back, I did not think much of it. Just as we were reaching a crowd-control rope barrier, it happened a second time. I pulled my hand out of my front pocket to balance myself. I had placed my wallet in my front pocket for additional security and had kept my hand in my front pocket covering my wallet for protection. I felt just the slightest of movements in my pocket and knew what had happened. I turned quickly to see if I could find the perpetrator and was surprised to see a young woman in her 20s on the ground still holding my wallet. A Chinese man was holding her down with his knee in her back. Our day had now truly begun.

I showed my passport to the man, who I thought was perhaps trying to take the wallet from the thief for his own benefit, and asked for my wallet. He ignored my requests. Next to him was another man on the ground being held down and finally a third person, another woman, crying and being restrained by yet another Chinese man. Finally, one of the men doing the restraining took out handcuffs to put on the perpetrators and showed me a badge that looked relatively authentic. One of them



Crowded square in Beijing.

spoke enough English to tell me they were policemen. Directing my request for my wallet to him I again asked for its return. I was told to follow them to the station because I would have to fill out a statement before they could return my wallet. At that point Iris returned to my side and we set off toward the other side of the square, near the building where the People's Congress sits. There were police vans there and after some minutes of discussion among the officers there, we were all loaded in the van. My wife and I, eight policemen and the three perpetrators headed off, sirens wailing to the Beijing police station.

When we arrived at the station, it was still before 7:00 a.m. and it was not yet open. When it did open, Iris and I stood awkwardly on the steps while the police escorted the would-be pickpockets into the station. They walked past very submissively with heads bowed and their bodies meekly hunched over. They were dressed about the same as the plain clothes policemen that had arrested them. However, they had on very good Western-style athletic shoes—quick getaways I suppose.

After they passed, we were escorted into the room where we would spend the next three and one-half hours. However, it did not feel oppressive. The English-speaking policeman became our new best friend and constant companion. It turned out we were the first Westerners any of them had ever dealt with, and it was a novel experience for them as well as for us. The reason for the delay was not readily apparent to us, but our friend explained, we really should have been taken to a different station and we had to wait for a person from that station to come and take our statement from us. Since they knew we would be leaving shortly they

wanted to make sure they took an official statement from me. Since they still had my wallet, I did not have much choice.

As the time passed our friend (I am sorry, but I did not write his name down), was very hospitable to us. First he brought us two cups of water. Of course in preparing for the trip we had it

drummed into us:

“don't drink any water that is not from a plastic bottle.” We politely declined the water. He offered us a cigarette, but we are non-smokers, so we declined the offer. A few minutes later, he offered to go buy us some breakfast. Since we had yet to have a meal in China, we did not know what to even ask for. And, again had been warned to be careful about eating food from street vendors and small cafes which is where he had offered to go to buy food. We told him that we were sure that we would be able to eat back at our hotel (although by that time it was almost 9:00 a.m., and it looked doubtful that we would be able to join our group for the start of the tour, let alone for breakfast). The ubiquitous tea was offered next, but we are also non-tea drinkers. I am sure our friend was beginning to wonder about us. Finally, a few minutes later he came in to the room with a small white opaque bottle, something akin to a vitamin bottle. It was covered in Chinese script except for one word: Extra. It also had a picture of a cantaloupe on it. He offered an orange-ish looking tablet. We took the chance that this was cantaloupe-flavored gum or candy, and it was. That piece of cantaloupe gum was our breakfast that morning.

Meanwhile, the officer from the correct police precinct had arrived, but she did not speak English, so we still had to wait for an interpreter. Our friend apparently did not have the correct credentials. We asked him to do it, but he could not. When the interpreter arrived she actually spoke marginal English. There were a number of terms and concepts that she could not express to us and our friend's English was starting to fail him too. We were also getting a little panicky about the tour. We had a plastic card



The Terra Cotta warriors, a cultural event of their own, stand watch in the countryside near the present city of Xian, population one million.

key for the hotel and asked them to call so that we could speak to the American who headed our tour (Professor Del Parkinson of BSU). Instead they spoke to the Chinese tour guide who was at the hotel. He graciously agreed to come to the station to serve as our interpreter. His English was excellent, but even after he arrived it took an hour to complete the statement. He had left his assistant to escort the group to the



Town Square in Beijing, China.

Palace of Heaven, which was a fair distance from where we were, both physically and metaphorically.

The taking of the statement began apace after the tour guide's arrival. However the statement was taken by hand and written in Chinese script by the police officer. The script was beautifully, but slowly penned. It was interesting to see that they were much more interested in the amount of money in my wallet than the credit and debit card. The cash, part in Chinese funds and part in American was less than \$400. The credit cards and debit card were potentially much more of a financial exposure. However, when I told them about the cards, they appeared uninterested. The amount of the cash itself was however sufficient to push the crime into a higher category (perhaps like a felony). We asked and were told that the threesome was destined to spend a year or two in prison.

Toward the end of the meeting, our friend explained to us that as soon as we arrived at the square that morning this group of three (and perhaps others) had marked us for a potential hit. The plainclothesmen had in turn marked them. Therefore, that morning as we moved through the Square we were really the head of a little procession: Western couple, pickpocket team, police, each with more members than the other. I would not call it entrapment, but we were kind of like unwitting bait for a trap. At any

rate we were grateful that if there was going to be a theft that the police were there.

After the statement was finally taken, the officer taking the statement relaxed noticeably. As we were escorted out of the station she asked if I would stand on the steps of the station with her for a photograph. Once again, this was the first time that she had taken a statement from a Westerner. At that time the Olympics were still ten months away, but they were very aware of impressions outsiders might have. In a final goodwill gesture, our guide, my wife and I were loaded back into the police van and were taken across town to the Temple of Heaven where our tour had spent the morning. Our four hours in a "temple" of a different type was some of the most compelling time that we spent in a very interesting society.

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) 345-2000, or leh@moffatt.com.





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Chief Justice
Daniel T. Eismann

Justices
Roger S. Burdick
Jim Jones
Warren E. Jones
Joel D. Horton

AMENDED Regular Fall Terms for 2008

Boise June 2, 4, 6, 9, and 11
~~Idaho Falls~~ **Pocatello** September 10
~~Pocatello~~ **Idaho Falls** September 11 and 12
Rexburg **September 12**
Boise September 15 and 17
Twin Falls November 6 and 7
Boise November 10, 12, and 14
Boise December 1, 3, 5, 8, and 10

By Order of the Court
Stephen W. Kenyon, Clerk

NOTE: The above is the official notice of setting of the year 2008 Spring and Fall Terms of the Idaho Supreme Court, and should be preserved. A formal notice of the setting of oral argument in each case will be sent to counsel prior to each term.

OFFICIAL NOTICE COURT OF APPEALS OF IDAHO

Chief Judge
Sergio A. Gutierrez

Judges
Karen L. Lansing
Darrel R. Perry

1st AMENDED — Regular Fall Terms for 2008

Boise August 12, ~~14~~, 21,
and ~~22~~
Coeur d'Alene (Northern Idaho) September 15, 16,
..... 17, 18 and 19
Hailey October 9 and 10
Boise October 14 and 16
Boise November 6 and 7
Boise December 2, 4,
9, and 11

By Order of the Court
Stephen W. Kenyon, Clerk

NOTE: The above is the official notice of setting of the year 2008 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 SUPREME COURT ORAL ARGUMENT DATES

As of July 14, 2008

Wednesday, September 10, 2008 – POCATELLO

8:50 a.m.	Porter v. Bassett	#33828
10:00 a.m.	Dept. of Health and Welfare v. Hudelson	#34495
11:10 a.m.	Teton Peaks Investment v. Ohme	#34642

Thursday, September 11, 2008 – IDAHO FALLS

8:50 a.m.	Johannsen v. Utterbeck	#34023
10:00 a.m.	Carter v. Zollinger	#34377
11:10 a.m.	Johnson v. Blaine County	#34524

Friday, September 12, 2008 – REXBURG

8:50 a.m.	Mendenhall v. Aldous	#34700
10:00 a.m.	Burns Holding LLC v. Madison County	#33753
11:10 a.m.	Cherry v. Coregis Insurance Co.	#34404

Monday, September 15, 2008 – BOISE

8:50 a.m.	Rhino Metals, Inc. v. Craft	#34380
10:00 a.m.	Bartosz v. Jones	#34185

Wednesday, September 17, 2008 – BOISE

8:50 a.m.	U of I Foundation v. Civic Partners	#34461
10:00 a.m.	Ray v. Frasure	#34311
11:10 a.m.	State v. Perry (Petition for Review)	#34846

IDAHO COURT OF APPEALS ORAL ARGUMENT DATES

As of July 14, 2008

Tuesday, August 12, 2008 - BOISE

9:00 a.m.	Schoger v. State	#33976
10:30 a.m.	State v. Cole	#34525
1:30 p.m.	State v. Wright	#34017

Thursday, August 21, 2008 – BOISE

9:00 a.m.	State v. Walthall	#32563
10:30 a.m.	Blanc v. State	#34324
1:30 p.m.	State v. Rolon	#32989

Idaho Supreme Court and Court of Appeals
NEW CASES ON APPEAL PENDING DECISION
(UPDATE 07/01/08)

CIVIL APPEALS

Contract

1. Whether the court erred in specifically enforcing the option agreement to purchase real property, which lacked essential sale terms, by creating those terms.

Justad v. Ward
S.Ct. No. 34793
Supreme Court

Divorce, Custody, and Support

1. Did the trial court err in reducing Harris' child support obligation to zero while he is incarcerated based solely on the fact of incarceration?

Mackowiak v. Harris
S.Ct. No. 34527
Supreme Court

Evidence

1. Were the findings of the trial court in favor of American Pension Services, Inc., supported by substantial and competent evidence?

American Pension Services, Inc. v. Cornerstone Home Builders, LLC
S.Ct. No. 34697
Supreme Court

2. Did the court correctly conclude that Peugh failed to meet his burden of showing sufficient cause for his refusal to submit to evidentiary testing?

State v. Peugh
S.Ct. No. 34819
Court of Appeals

Post-conviction Relief

1. Was dismissal of the claim of ineffective assistance of trial counsel improper given there was a genuine issue of material fact as to whether counsel's failure to advise his client of the elements of the charge was prejudicial?

State v. Schoger
S.Ct. No. 33976
Court of Appeals

2. Did the court err by summarily dismissing Vasquez-Hernandez's claims because he was provided inadequate notice of the claimed defects in his petition?

Vasquez-Hernandez v. State
S.Ct. No. 34127
Court of Appeals

3. Did the court err in denying Walliser's petition for post-conviction relief?

Walliser v. State
S.Ct. No. 34424
Court of Appeals

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

Whiteley v. State
S.Ct. No. 34234
Court of Appeals

Probate Estates

1. Did the court err by finding that Nancy Montgomery did not own an interest in the Alibi Bar business, equipment or inventory and that it was the separate property of the deceased, James Montgomery?

Montgomery V. Simmons
S.Ct. No. 33943
Supreme Court

Substantive Law

1. Whether the Lottery Commission's emergency action suspending the bingo license and the district court decision upholding the suspension were contrary to the provisions of I.C. § 67-5247.

Kuna Boxing Club, Inc. v. Idaho Lottery Commission
S.Ct. No. 34886
Supreme Court

2. Whether the hearing officer violated Rammel's due process rights in excluding evidence of the reasonableness of the relevant Department rules.

Rammel v. Idaho Dept. of Agriculture
S.Ct. No. 34927
Supreme Court

Summary Judgment

1. Did the district court err in granting summary judgment on the plaintiffs' apparent agency claim against the hospital defendant/appellant?

Jones v. Healthsouth Treasure Valley Hospital
S.Ct. Nos. 33905/33907/33908
Supreme Court

2. Did the court err in granting the defendant's motion for summary judgment as to all claims?

Johnson v. McPhee
S.Ct. No. 33966
Court of Appeals

3. Did Beckstead comply with the notice requirement of the Idaho Tort Claims Act?

Scott Beckstead Real Estate Company v. City of Preston
S.Ct. No. 34644
Supreme Court

CRIMINAL APPEALS

Due Process

1. Did the state violate Sawyer's right to a fair trial by committing prosecutorial misconduct through comments made in closing argument?

State v. Sawyer
S.Ct. No. 33687
Court of Appeals

Evidence

1. Did the court abuse its discretion by excluding the testimony of Dr. Malpass regarding eyewitness reliability?

State v. Wright
S.Ct. No. 34017
Court of Appeals

2. Did the district court abuse its discretion in allowing the state to present late disclosed evidence?

State v. Burris
S.Ct. No. 33593
Court of Appeals

3. Did the court abuse its discretion by allowing the testimony of two late disclosed states' witnesses?

State v. Huntsman
S.Ct. Nos. 33213/33243
Court of Appeals

4. Did the court abuse its discretion by excluding the testimony of a defense witness?

State v. Karpach
S.Ct. No. 33949
Court of Appeals

Jurisdiction

1. Did the magistrate court have jurisdiction to consider Whitt’s motion to enter a withheld judgment more than five years after the conviction had become final?

State v. Whitt
S.Ct. No. 34584
Court of Appeals

Pleas

1 Did the court err in finding that Chacon had breached the confidential informant agreement?

State v. Chacon
S.Ct. No. 33394
Court of Appeals

2. Did the district court abuse its discretion by denying Hilgendorf’s motion to withdraw her plea as she presented a “just reason” and the state would not have been prejudiced by the withdrawal?

State v. Hilgendorf
S.Ct. No. 34498
Court of Appeals

3. Did the court err in denying the motion to withdraw the guilty plea and in finding McDonald failed to demonstrate manifest injustice?

State v. McDonald
S.Ct. No. 34338
Court of Appeals

Search and Seizure—

Suppression of Evidence

1. Did the court err in denying Insyxiengmay’s motion to suppress and in finding there was probable cause for his arrest?

State v. Insyxiengmay
S.Ct. No. 34251
Court of Appeals

Sentence Review

1. Did the court err when it denied Fairbanks’ motion for credit for time served?

State v. Fairbanks
S.Ct. No. 34319
Court of Appeals

Substantive Law

1. Did the district court lack authority to order ISP or any other law enforcement agency to expunge its records related to Sheehan’s conviction in this case?

State v. Sheehan
S.Ct. No. 34798
Court of Appeals

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



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**FOURTH DISTRICT BAR ASSOCIATION
THANKS LAW DAY— ATTORNEYS IN THE CLASSROOMS
VOLUNTEERS AND TEACHERS**

Established in 1957 by the American Bar Association, Law Day is a national day set aside to celebrate our legal system. Law Day programs are conducted across the country for both youth and adults and are designed to help people understand how law keeps us free and how our legal system strives to achieve justice.

The Fourth District Bar Associations Law Day Committee was chaired by **Jason Prince**. Committee members were: **Chris Christensen, Dan Gordon, Gabe McCarthy, Galen Carlson, Heather McCarthy, Jennifer Reinhardt, Lorna Jorgensen, Matt Christensen, Maureen Ryan, Nicole Hancock, Nicole Owens, Samia McCall, Stacy Wallace, Teresa Baker, Julie Tetric**. The committee coordinated the efforts for the Liberty Bell Award, School Outreach Program (attorneys in the classroom), Ask-a-Lawyer (public call-in program), and 6.1 Challenge (check your Idaho Rules of Professional Conduct 6.1).

The **Law Day School Outreach Program** is conducted during April and May. Attorneys are matched with teachers in elementary through high school in Fourth District schools. The attorneys speak in classes about legal careers and law-related topics. This year over 40 attorneys were matched with different classrooms, and 1,427 students participated.

**4TH DISTRICT BAR ASSOCIATION WOULD LIKE TO THANK THE FOLLOWING
LAW DAY VOLUNTEERS IN THE SCHOOL OUTREACH PROGRAM**

SCHOOLS

Mountain View Elementary, Jefferson Elementary, Roosevelt Elementary, Riverglen Junior High, Shadow Hills, Lewis and Clark Middle School, Meridian Medical Arts Charter High School, Capital High School, Central Academy High School, Mountain View High School, Lowell Scott Middle School, Hillcrest Elementary, Garden City Community School, Kuna High School

TEACHERS

Terri Nicholson, Amy Pinkerman, Sharon Kerr, Brad Peachery, Shannon Cullen, Lisa Churchman, Bryan Wheeler, Pat Bronner, Kim Soper, Mike Kauston, Bill Driscoll, Mike Dawley, Crystal Gunderson, George Ragan, Kim Aronson, Cheryl Richardson, Marin Ramey, Emilee Merrell

ATTORNEY VOLUNTEERS

Walt Donovan, Steve Olson, Lynette McHenry, Angela Nelson Edwards, Mike Gilmore, Joe Miller, Merritt Dublin, David Christensen, Trudy Fouser, Debra Young Irish, Michael Bartlett, Robyn Fyffe, Michael Lojek, Rebekah Cude, David Henseley, Jennifer Dempsey, Becky Broadbent, Larry Hunter, Nancy Bishop, Ritchard Eppink, Rod Gere, David Lorello, Tom McCabe, Randal French, Janis Dotson, Kelly Miller, Mack Redford, Cathy Naugle, Whitney Welsh, Tobi Mott, Monty Berecz, Kris Sasser, Peter Anderson, Stephen Suarez, Kate Kelly, Judith Brawer, Russell Johnson

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WE ARE STUCK IN 1982!

Jim Davis

Chair, Revenue Enhancement Committee

Idaho attorneys—we are stuck in 1982! Your help is needed to move us into 2008, and beyond.

In 1982, Idaho was the third state to adopt an Interest On Lawyers' Trust Account program (IOLTA). Under the IOLTA program, interest earned on Idaho attorneys' trust accounts is channeled through the charitable Idaho Law Foundation, Inc. (ILF) to help fund law-related, public-interest programs. Historically, these programs have included funding for legal services to domestic-violence victims and to the impoverished, as well as legal education to high school students through youth government programs and scholarships for University of Idaho Law School students who are willing to provide public service.

When IOLTA programs were conceptualized in the 1980s, there were few bank products that provided two critical features for lawyers' trust accounts—high level of safety for the principal and high liquidity. The one bank product that met both criteria at the time was interest-bearing checking accounts. The amount of interest paid on such accounts is historically very low. Thus, even today some IOLTA accounts in Idaho have stated interest rates as low as 0.05%.

While the interest rates on IOLTA accounts remain stuck in the 1980s, the need for additional funding for law-related, public-interest programs has grown exponentially. Every year, the requests to ILF for IOLTA funds far exceed the amount earned and available. The need to provide legal services to the poor is well-documented and publicized in Idaho. Annually, by far the largest recipients of IOLTA funding are Idaho Legal Aid and the Idaho Volunteer Lawyers' Program, both of which provide legal services to the underprivileged. From 1985 through 2008, over 75% of the grants awarded by ILF have been for legal services to the disadvantaged. Yet, Idaho Legal Aid recently announced that it only has sufficient funding to represent about twenty percent of the people who seek its services.

At the same time, since the 1980s banks have created higher-yield products that have both the safety and liquidity features required by the IOLTA program. With the advent of these higher-yield bank products, it is nearly impossible to justify pinning the interest rate to interest-bearing checking accounts for our IOLTA program.

In short, while the needs for IOLTA funds have grown and new suitable bank products with higher-yield interest rates exist, the IOLTA program funding source—interest on lawyers' trust accounts—has remained largely stagnant for 22 years. However, Idaho is not alone. All 50 states and the District of Columbia have IOLTA programs that initially tied the interest rate to interest-bearing checking accounts. Similarly, nationally there is an ever-increasing need for law-related, public-interest programs.

In response to these factors, states have considered various means to enhance revenue from lawyers' trust accounts. The means championed in many states is known as "rate comparabil-

ity." The simplified, central concept of rate comparability is that IOLTA accounts should earn interest at the same rate as the highest rate paid by a bank to its other customers for similar accounts. In those states where rate comparability has been adopted, income from IOLTA accounts has increased dramatically. For example, in Florida, income grew almost 300% from June 2004 to June 2006.

There are currently 21 states, including our neighboring states of Utah and California, that have adopted some form of rate comparability. Idaho is now formulating its own plan for rate comparability. In March 2008, ILF created a temporary committee to study interest-rate comparability. The members of the Revenue Enhancement Committee include bankers, a certified public accountant, and attorneys. The Committee first met in March 2008. The Committee has considered various rate comparability plans. As of June 18, 2008, the Committee has refined and recommended an IOLTA Revenue Enhancement Campaign. ILF Board has approved the Campaign.

The Committee's recommendation is that a year be devoted to increasing IOLTA rates through direct negotiation with banks. Banks will be encouraged to increase the rates on IOLTA accounts to at least 70% of the current Federal Funds rate, based upon a net yield of all IOLTA accounts held at the bank. In addition to the increased interest rate, negotiations will also focus upon elimination of bank service fees on IOLTA accounts and agreement to minimum reporting requirements. Any bank that meets these criteria will become an IOLTA Leadership Bank. At the same time, attorneys will be encouraged to spur their banks to become Leadership Banks or to place their IOLTA accounts with Leadership Banks.

While the Committee is in the earliest phase of the Revenue Enhancement Campaign, six banks have already agreed to be Leadership Banks. The banks are Bank of the Cascades, Idaho Trust National Bank, Key Bank, Mountain West Bank, U. S. Bank, and Zions Bank. Heartfelt gratitude and appreciation goes to these courageous banks for stepping forward to help with this



2008 LEADERSHIP BANKS

- Bank of the Cascades
- Idaho Trust National Bank
- Key Bank
- Mountain West Bank
- US Bank
- Zions Bank

IOLTA QUIZ FOR ATTORNEYS

1. Do you know whether you or your law firm have an Interest On Lawyers' Trust Account (IOLTA Account)?
2. Do you know at which bank you have your IOLTA Account?
3. BONUS QUESTION: Do you know the rate of interest paid by your bank on your IOLTA Account?
4. Do you know to whom your bank pays the earned interest?
5. Do you know for what the interest is used?

FOR ANSWERS SEE PAGE 43

Campaign. Committee members are currently engaged in preliminary discussions with some of the 30 other Idaho banks with IOLTA accounts.

To make the Revenue Enhancement Campaign successful, we need all of the attorneys in Idaho who have IOLTA accounts to ask their banks to become Leadership Banks. Revenue Enhancement Committee members are currently contacting attorneys with larger IOLTA account balances to work with ILF and the Committee to encourage their banks to become Leadership Banks. If your bank has not already joined in the Campaign, you may be contacted soon.

Rate comparability in the 21 states that have thus far adopted it is much more complex and imposing than the Idaho plan. One of the benefits of the Idaho plan is its simplicity. Under Idaho's

plan banks need not attempt to identify which of its account products is akin to IOLTA accounts and determine the highest rate paid to other customers. Rather, the interest rate is merely derived from the benchmark Federal Funds rate. Moreover, the Campaign is, at least initially, based upon negotiation and voluntary compliance rather than a compulsive or mandatory plan as adopted in other states. After all, since enhanced IOLTA funding provides a benefit to everyone, attorneys and banks, alike, should willingly want to participate. If Idaho attorneys and banks embrace this voluntary Campaign, there will be no need to consider other alternatives.

Idaho attorneys—we need your help to move beyond 1982! Please contact your banker and inquire whether your bank will become a Leadership Bank. In addition, please be receptive when you are contacted to request your assistance in negotiating with your bank.

If you have any questions about this article, the Revenue Enhancement Committee, or the IOLTA Revenue Enhancement Campaign, please contact Jim Davis email: jdavis@davisjd.com, Carey Shoufler email: cshoufler@isb.idaho.gov, Staff Liaison to the Revenue Enhancement Committee, Diane Minnich email: dminnich@isb.idaho.gov, Executive Director of the Idaho State Bar and ILF, or any member of the Revenue Enhancement Committee.

ABOUT THE AUTHOR

Jim Davis is an attorney in Boise, Idaho, and the Chair of the Revenue Enhancement Committee.



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SPECIAL THANKS IVLP VOLUNTEERS ASSISTING SENIORS

For many Idaho seniors, community Senior Centers or other community-based organizations offer a variety of services that improve their lives. In six Idaho cities those services include free consultation with a local attorney to answer their legal questions and point them in the right direction. The **Idaho Volunteer Lawyers Program** would like to extend special thanks to the following attorneys who have collectively contributed hundreds of hours providing pro bono advice and consultation to seniors during 2008.

BOISE SENIOR CENTER

Eric Aaserud, **Perkins Coie, LLP**
 Steve Alkire, **Eberle, Berlin, Kading, Turnbow & McKlveen, Chtd.**
 Laura E. Burri, **Ringert Clark, Chtd.**
 Thomas B. Dominick, **Dominick Law Offices, PLLC**
 Rick Goodson, **Hawley Troxell Ennis & Hawley, LLP**
 Lorna K. Jorgensen, **Ada County Prosecutor's Office**
 Craig Meadows, **Hawley Troxell Ennis & Hawley, LLP**
 John McGown, **Hawley Troxell Ennis & Hawley, LLP**
 Denise Penton, **Penton Law Offices, PLLC**
 Christine M. Salmi, **Perkins Coie, LLP**
 Stan Tharp, **Eberle, Berlin, Kading, Turnbow & McKlveen, Chtd.**

MOUNTAIN HOME SENIOR CENTER

Jay R. Friedly, **Hall, Friedly & Ward**
 Brian B. Peterson, **Hall, Friedly & Ward**

IDAHO FALLS SENIOR CENTER

Boyd J. Peterson, **Law Offices of Boyd J. Peterson**
 John M. Sharp

MERIDIAN SENIOR CENTER

Mark S. Freeman, **Foley Freeman, PLLC**

POCATELLO SENIOR CENTER

Kirk B. Hadley, **Racine, Olson, Nye, Budge & Bailey, Chtd.**

LEGAL LINK, ST. VINCENT DEPAUL CENTER, COEUR D'ALENE

Jeffrey J. Aultman, **Paine Hamblen, LLP**
 Rick Baughman, **Law Office of Rick Baughman**
 R. Romer Brown, **Brown, Justh & Romero, PLLC**
 Steven P. Frampton
 Terrance W. Hannon
 Dale Holst
 Fonda L. Jovick, **Paine Hamblen LLP**
 David K. Robinson Jr.
 Christopher Schwartz, **Palmer George, PLLC**
 Chuck Sheroke, **Idaho Legal Aid Services Inc.**
 Richard P. Wallace, **Richard P. Wallace Attorney**
 Alan M. Wasserman, **Idaho Legal Aid Services Inc.**
 Roland Watson, **Watson Law Office, Chrtd.**

PLEASE HELP!

To continue to provide these services in the six cities listed above volunteers are needed. **Even more important**, if you live or work in one of the dozens of Idaho communities that do not have a clinic for seniors, IVLP will help you to start a program in your area. Contact Mary Hobson at 1-800-221-3295 or mhobson@isb.idaho.gov.

IVLP VOLUNTEERS



Family Law Pro Se Clinic Volunteers

L to R, front row: Denise Penton, Beth Smethers, Dara Labrum, Sara Bearce. Back row, L to R: Tom Dominick, Chris Christensen, Mark Coonts and Greg Adams.



Paralegal Volunteers

L to R, front row: Kevin Kluckhorn, André Bartholoma, Suzanne McFarlane, and Donna Ortmann. L to R standing are Al Gill (instructor), Ralph Blount (instructor), Adrian Daniluc, Chrystal Shoup, Victoria James, Elizabeth Spinner, and Avery Epperly. Volunteers not pictured, Camilla Hartley and Sunciaray Price.

2008 ILF/ISB ANNUAL MEETING



Mike Felton, newest Idaho Law Foundation board member gets a few tips from incoming ILF President Chuck Homer.



Outgoing ISB President Terry White (L) talks with incoming ISB President Dwight Baker and Commissioner Doug Mushlitz about writing the President's column for *The Advocate*.



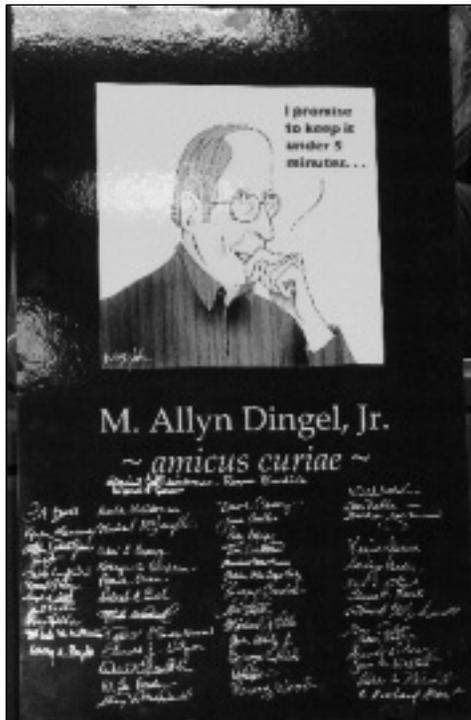
US Bank and Key Bank are two of the ILF IOLTA Leadership Banks. Ridgley Denning, US Bank and ILF Board Member, talks with Jeff Hancock, Key Bank.



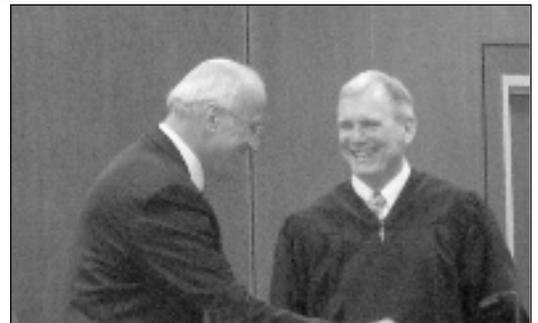
ILF Board Treasurer, Kevin Satterlee discusses IOLTA Leadership Banks with outgoing ILF President Linda Judd.

FOURTH JUDICIAL DISTRICT RECOGNIZES M. ALLYN DINGEL, JR.

In recognition of his outstanding contributions advancing, promoting, and improving the administration of justice in the State of Idaho; the Fourth Judicial District judges dedicated a courtroom in the Ada County Courthouse to Allyn Dingel. The ceremony was July 1, 2008.



The judges presented Allyn with a signed caricature alluding to his "understanding" of time limitations. The drawing was done by K. Ray Johnson, 2L at UI College of Law.



Chief Justice Eismann and Allyn Dingel share a laugh about the length of time Allyn promises to take when he talks about the ceremony.



M. Allyn Dingel, Jr.



Carl Burke, congratulates Allyn, his former longtime partner.

OF INTEREST

ON THE MOVE

Erika Birch, has joined the firm Strindberg & Scholnick, LLC, who recently opened an office in Boise. She will manage the Boise office, while working on a wide variety of employment and labor law matters for individuals and corporations. She practiced employment law in Colorado and Utah before settling down in Idaho with her husband Grady Wright, who teaches mathematics at BSU, their two kids, and their dog Jelly. The office is located at: 671 E. Riverpark Lane, Ste. 130, Boise, ID 83706; Tel: (208) 336-1788; Fax: (208) 344-7980; www.idaho-jobjustice.com

Colleen Zahn has joined Hall, Farley, Oberrecht and Blanton as a new associate. She received her B.S. degree in Communications from the University of Idaho in 1995. She received her J.D., *magna cum laude*, from the University of Idaho in 2000. While in law school, she was a member of her law school's mock trial team, which was ranked seventh in the nation. As an undergraduate, she was a member of the honors society Phi Beta Kappa. She has also been active in the Idaho State Bar, serving as former chair of the Young Lawyers Section, serving a five-year term on the Public Information Committee, and a three-year term on the IOLTA. Fund Committee; as well as, volunteering her time with the Idaho Law Foundation Mock Trial program and Bar Exam Grading. She was a recipient of the Idaho State Bar's Public Service Award in 2004. Previously, she was an associate with Naylor and Hales. She can be reached at (208) 395-8500.

The firms **Holland & Hart LLP** and **Hale Lane Peek Dennison & Howard** announced they will combine forces. Hale Lane is one of Nevada's largest law firms. Holland & Hart, is the largest law firm based in the Mountain West, and expanded into Nevada in 2006. This combination allows them to provide enhanced legal services across the region, with both firms continuing to maintain strong connections to their communities. The combined firm will result include 415 attorneys firm-wide with 63 of them in Nevada. The firm will maintain the name Holland & Hart LLP. It will have offices in Reno, Carson City, and Las Vegas. For more information on Holland & Hart and Hale Lane, please visit www.hollandhart.com or www.halelane.com.

Matthew Whipple, has joined the law firm of Zarian, Midgley and Johnson, Boise, as a registered patent attorney and former patent examiner for the U.S. Patent and Trademark Office. He has represented many Fortune 500 companies in both procuring and defending intellectual property. Prior to joining Zarian Midgley, he practiced with two Washington, D.C. law firms. He can be reached at (208) 949-0304.

Timothy S. Callender, has joined Foley Freeman PLLC, as an associate attorney. Mr. Callender received his B.A. in history

and political science from The College of Idaho in 2000. He received his J.D. from the University of San Diego School of Law in 2004, and was admitted to the Idaho State Bar in 2007. His areas of emphasis include civil litigation, criminal defense, immigration law and workers' compensation. He is a member of the Young Lawyers' and Workers' Compensation sections of the Bar. He can be reached at (208) 888-9111

Jacob D. Twiggs, has joined the Mini-Cassia Public Defender's Office. His principal duties will include adult misdemeanor cases in Cassia County. He is a native of Blackfoot. He holds degrees in arts and sciences from BYU-Idaho; a B.A. from BSU, and a J.D. from Thomas M. Cooley Law School in Lansing, Michigan. He can be reached at (208) 878-6801, and his email address is jtwiggs@cassiacounty.org

James R. Stoll has joined the firm of Naylor & Hales, P.C., as an associate attorney. He received his undergraduate degree from the University of Idaho, and was awarded his law degree from Cleveland State University, Cleveland-Marshall College of Law. He has been in private practice, and clerked for Senior District Court Judges D. Duff McKee and Daniel C. Hurlbutt of the Idaho Fourth Judicial Districts. He is admitted to practice in Idaho and in the United States District Court for the District of Idaho. His current practice areas include general litigation, municipality defense, administrative law, and family law. You can contact him at Naylor & Hales, P.C., 950 W. Bannock Street, Suite 610, Boise, Idaho 83702, (208) 383-9511, or by email at jrs@naylorhales.com.



Leslie G. Murray has joined Technology Law Group, PLLC (TLG) as Intellectual Property Counsel. He is a registered patent attorney and is admitted to practice before the United States Patent and Trademark Office. He is admitted to practice law in Idaho and California and before the Court of Appeals for the Federal Circuit. He earned his J.D. at the University of Idaho's College of Law. He has Masters' degrees in management science and aeronautical engineering from the Naval Postgraduate School in California. He holds a bachelor's degree in physics from the University of Idaho. He is a retired Lieutenant Commander of the United States Navy. Previously he worked for Hewlett-Packard, IBM, and was Senior Associate with Davis & Schroeder in Monterey, California. Prior to his legal career, Les was an electrical engineering instructor with University of Idaho's College of Engineering. He has a high technology intellectual property practice with an emphasis on strategy, patents, and commercialization. His practice encompasses the preparation and prosecution of foreign and domestic patent applications for mechanical, electrical, electronic, computer hardware, software, and related technologies; patentability, validity, and infringement legal opin-

ions; intellectual property transactions, including Open Source licensing; and select litigation matters. He can be reached at (208) 939-4472.

RECOGNITION

Matthew Hicks has been made partner at Holland & Hart, Boise. He joined Holland & Hart's, Boise office, in 2001. He received his J.D. from Notre Dame Law School in 1996. His primary focus is on real estate transactions, including acquisitions and sales, financing, commercial leasing, title-related issues, and shopping center, office and other commercial development. He also represents lenders and borrowers in secured and unsecured financing transactions, and loan workouts and restructurings. Prior to joining Holland & Hart, he was with the law firm of Hall, Farley, Oberrecht & Blanton, Boise. He is a recipient of the Idaho Business Review's 2008 Accomplished under Forty Recognition Award. He can be reached at (208) 342-5000.

Lauren Maiers Reynoldson has been made partner at Spink Butler, Boise. Her practice focuses in the areas of real estate and commercial transactions, advising and assisting clients on all aspects of real estate transactions, loan negotiations, leasing and title work, land use and development work, assisting clients with land use entitlements, development of multi-use projects and representation in front of governmental agencies, cities and counties. Prior to joining Spink Butler, LLP, she was a Senior Attorney for Albertsons, Inc. She is a recipient of the Idaho Business Review's 2008 Accomplished under Forty Recognition Award. She can be reached at (208) 388-0245.

Melanie Rubocki has been made partner and head of Boise office business law department at Perkins Coie, Boise. Her practice area focuses on mergers and acquisitions, emerging growth companies, private equity and venture capital, corporate governance and transactions, financial transactions and restructurings, as well as real estate transactions and financings. She has represented corporate clients in debt and equity financings, mergers and acquisitions, technology transfer transactions, and commercial real estate transactions and financings. She is a recipient of the Idaho Business Review's 2008 Accomplished under Forty Recognition Award. She can be reached at (208) 343-3434.



Emile Loza, Managing Attorney and Founder of Technology Law Group, PLLC, has been awarded the Certified Licensing Professional credential by the Licensing Executives Society, the world's largest association of intellectual property licensing professionals. The Certified Licensing Professional designation requires demonstrated proficiency, experience, and skill in eight domains, including intellectual property strategy, protection, and valuation. The CLP standards also require demonstrated leadership in the assessment and development of opportunities to commercialize and monetize intellectual property, and requires expertise in marketing intellectual prop-

erty, negotiations, and development, drafting, and post-execution management and enforcement of licensing agreements. To contact Emile Loza, JD, MBA, CLP, please email eloza@technologylawgroup.com or call (208) 939-4472.

Jim Hansen has retired after thirteen years of service from the United Vision for Idaho and United Action for Idaho. Prior to his work with UVI/UAI, Jim worked in the Idaho Legislature for six years. In 1994, he began working on behalf of many of the coalition participants to organize the founding of the United Vision for Idaho. He is trained as an attorney and mediator. He practiced law with a Boise law firm from 1986-1991. From 1992-94 Jim ran the Office of Conflict Management Services at Boise State University. Jim helped to create the Fund for Idaho, a new foundation in Idaho nurturing social justice. In 2006, Jim took a sabbatical from UVI to run for the United States Congress. He was born, and raised, in Idaho Falls and currently lives in Boise with his family. He can be reached at hansen-jim@aol.com

John Rosholt, Barker, Rosholt & Simpson, LLP, was honored with the University of Idaho law school's Award of Legal Merit at commencement ceremonies in May. This prestigious award recognizes the contributions of an Idaho law graduate whose career exemplifies the best in the legal profession. Don Burnett, the dean of the University of Idaho law school said of Rosholt, "His open and congenial personality has been very important in resolving potentially very contentious disputes over surface and groundwater, particularly in southern Idaho." Prominent water-related matters on which Rosholt worked include the Snake River Basin Adjudication, the Endangered Species Act and the Clean Water Act. He can be reached at Barker, Rosholt & Simpson, LLP, PO Box 485, Twin Falls, ID 83303, (208) 733-0700.



Answers to IOLTA Quiz on page 39

1. If you have an interest-bearing trust account in your name and you have not opted-out of the IOLTA program, the answer is yes.
2. There are currently 34 banks in Idaho where attorneys have IOLTA accounts.
3. The rates vary, but they have historically been very low. For instance, currently, at least one bank has a stated interest rate of only 0.05%.
4. The interest is paid to the Idaho Law Foundation, Inc.
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(208) 343-1000 or dpresher@nbmlaw.com

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~ LEGAL ETHICS ~

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ISB/ILF CLE Courses

Upcoming Fall/Winter

SEPTEMBER 12-13

Annual Estate Planning Update

Sponsored by the Taxation, Probate and Trust Section

Sun Valley Resort
Sun Valley, ID

SEPTEMBER 19

Election Law

Sponsored by the Idaho Law Foundation
Doubletree Riverside Hotel

Boise, ID
RAC Approved

OCTOBER 1

Idaho Practical Skills Training

Sponsored by the Idaho Law Foundation
5.0 CLE Credits pending
Boise Center on the Grove
Boise, ID

OCTOBER 8-10

Idaho State Bar Annual Conference

CLE Programs, Guest Speakers,
Social Events

Sean Carter—Legal Humorist
Ethics Rock!—A Musical Ethics CLE
Sun Valley Resort
Sun Valley, ID

NOVEMBER 7

Litigation Ethics

Sponsored by the Litigation Section
Idaho Falls
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NOVEMBER 14

Litigation Ethics

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Boise
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NOVEMBER 21

Headline News-Year in Review

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DECEMBER 5

Headline News-Year in Review

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DECEMBER 12

Headline News-Year in Review

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Coming Events

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

(DATES MAY CHANGE OR PROGRAMS MAY BE CANCELLED)

AUGUST

20 *The Advocate* Editorial Advisory Board Committee

SEPTEMBER

1 **Labor Day, Law Center Closed**

2 *The Advocate* Deadline

5 Idaho State Bar Board of Commissioners

11 July Bar Exam Results Released

17 *The Advocate* Editorial Advisory Board Committee

30 Idaho State Bar Admission Ceremony, Boise Center on the Grove

OCTOBER

1 *The Advocate* Deadline

1 Initial February Bar Exam Deadline

1 Public Information Committee

9 Idaho Law Foundation Board of Directors,
Sun Valley

10 Idaho State Bar Board of Commissioners,
Sun Valley

13 **Columbus Day, Law Center Closed**

15 *The Advocate* Editorial Advisory Board Committee

NOVEMBER

3 *The Advocate* Deadline

19 *The Advocate* Editorial Advisory Board Committee

21 Idaho State Bar Board of Commissioners

27 **Thanksgiving Day, Law Center Closed**

28 **Law Center Closed**

DECEMBER

1 *The Advocate* Deadline

1 Final February Bar Exam Deadline

5 Idaho State Bar Board of Commissioners

17 *The Advocate* Editorial Advisory Board Committee

25 **Christmas Day, Law Center Closed**



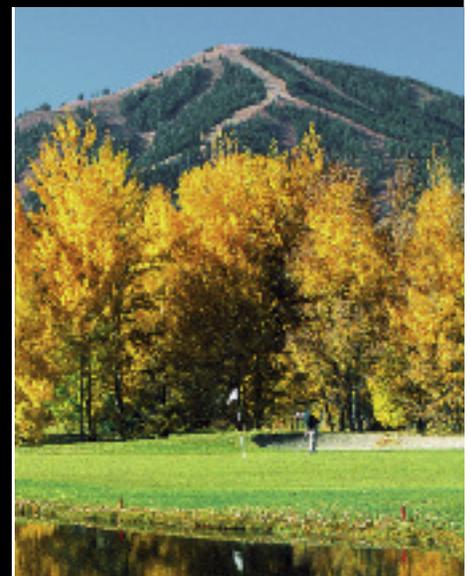
SAVE THE DATE

OCTOBER 8-10



- ⚙ Educational and informative legal seminars
- ⚙ Earn CLE credits
- ⚙ Awards and special events
- ⚙ Connect with old friends and make new ones

2008 Idaho State Bar Annual Conference • Sun Valley Resort



2008 ISB ANNUAL CONFERENCE

SUN VALLEY, IDAHO

OCTOBER 8-10, 2008

AGENDA

WEDNESDAY, OCTOBER 8, 2008

- 8:00 a.m. – 5:00 p.m. Registration (Continental Room)
10:00 a.m. – 12:30 p.m. U.S. Supreme Court Update; Duke Law Professor Neil Siegel -
2.5 CLE Credits
12:30 – 2:00 p.m. Bench/Bar lunch with the Idaho Judicial Conference “Diamondfield Jack”
presentation by Idaho Legal History Society’s Dave Metcalf
2:30 – 5:30 p.m. Lessons from the Masters 3.0 CLE Credits (Limelight C)
5:30 – 7:00 p.m. President’s Reception Sponsored by the University of Idaho College of Law
* Recognition of the 100th Anniversary of the Canons of Ethics (Limelight Terrace)
7:00 p.m. Distinguished Lawyer Dinner (Limelight C)

THURSDAY, OCTOBER 9, 2008

- 7:30 a.m. - 5:00 p.m. Registration (Continental Room)
7:30 – 8:30 a.m. District Bar Presidents Breakfast (By Invitation) (Sage)
8:45 – 10:00 a.m. Plenary Session (Limelight C)
 - President’s Welcome
 - Sean Carter – “Sue Unto Others” -1.0 Ethics CLE9:00 a.m. – Noon Idaho Law Foundation Board of Directors Meeting (Camas)
10:30 a.m. – Noon CLE Session – 1.5 CLE Credits
 - Effectively Communicating with the Court (Columbine)
 - Developing the Gift of Gab (Limelight C)
 - New Uniform Mediation Act (Limelight A)12:15 – 1:30 p.m. Service Award and 50/60 Year Attorney Recognition Lunch (Limelight B)
1:45 – 3:15 p.m. CLE Session – 1.5 CLE Credits
 - New Revised LLC Act (Columbine)
 - Uniform Powers of Attorney Act (Columbine)
 - Public Financing in Idaho: Taking it to the People, the Judges and
the Financiers (Limelight A)4:00 – 6:00 p.m. “Ethics Rock” A Musical CLE - 2.0 Ethics Credits (Limelight B/C)
6:00 – 7:00 p.m. Idaho Law Foundation Reception Sponsored
(Limelight Terrace)
7:00 p.m. Dinner on Your Own

FRIDAY, OCTOBER 10, 2008

- 8:30 - Noon Board of Commissioners Meeting (Camas Room)
8:30 – 11:45 a.m. CLE Session
 - The In-Between Children: Grandparents, Relatives and other
Custodial Relationships (Limelight C)
 - Employment Law Update (Camas)
 - 60 Law Practice Tips in 60 minutes (Boiler)Noon Conference Adjourns



Jack Marshall

The 2008 Idaho State Bar Annual Conference Presents

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A Musical CLE Ethics Program
Developed by Jack Marshall
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The 2008 Idaho State Bar Annual Conference Presents

“Sue Onto Others As You Would Have Them Sue Onto You”

Featuring Lawyer-Humorist:
Sean Carter

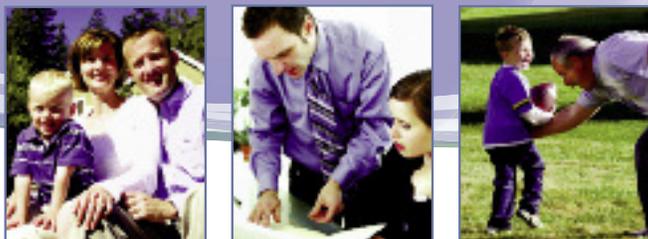


“Under Rule 8.4, it is professional misconduct to commit a criminal act that reflects adversely on your honest, trustworthiness or fitness to practice law. Needless to say, stabbing opposing counsel in the parking lot creates such an adverse reflection.”

Sean Carter, Graduate of Harvard law School, left the practice of law to pursue a career as the country’s foremost (and perhaps only) “Humorist at Law”. This year he will be a featured presenter at the Idaho State bar’s Annual Conference on October 9th in Sun Valley.

Sean Carter is well known as the writer of syndicated legal humor column that has appeared in general circulation newspapers in more than 30 states, including The Los Angeles Times.

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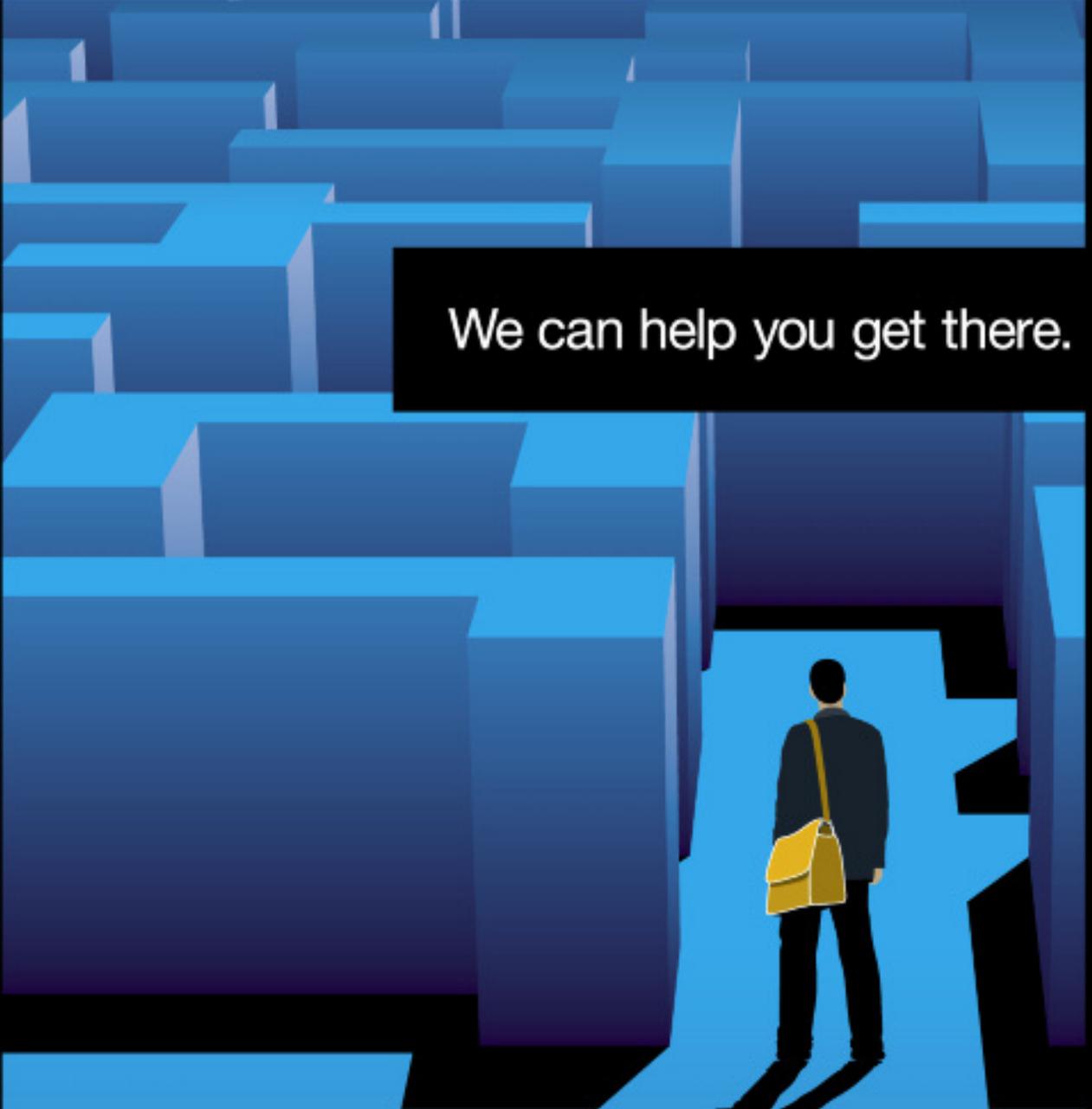
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