

# The Advocate

Official Publication of the Idaho State Bar

Volume 51, No. 6/7

June/July 2008

A person wearing a green cap and a dark vest is sitting in a blue inflatable boat on a calm lake. The person is holding a fishing rod that extends across the water towards the right. The background features a dense forest of green trees reflected in the water. The overall scene is peaceful and scenic.

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# THE ADVOCATE

The Official Publication of the Idaho State Bar  
51(6/7), June/July 2008

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Photographed by Assistant United States Attorney Monte Stiles. Monte is an avid photographer who specializes in wildlife and landscape photography. You can see view more of his pictures at [www.montestilesphotography.com](http://www.montestilesphotography.com)

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## Idaho State Bar and Idaho Law Foundation Annual Business Meeting and Luncheon

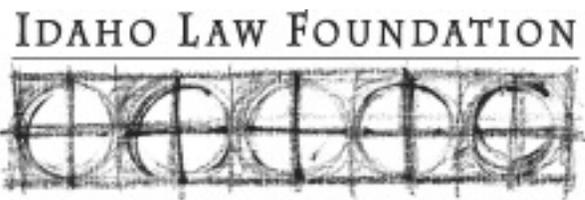
Thursday, July 10, 2008

Noon to 1:15 p.m.

Boise Centre on the Grove

Please join us to thank out-going ISB President Terry White and welcome the new ISB President Dwight Baker. The Idaho Law Foundation will also hold their Annual Meeting to elect members to the Board of Directors.

**Lunch reservations  
will be accepted  
beginning June 15th.**



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## PRESIDENT'S MESSAGE

### HEALTH INSURANCE, HEALTH INSURANCE, HEALTH INSURANCE

**Terrence R. White**  
President



For more than 80 years the Idaho State Bar has played a vital role in the positive development, education and advancement of the administration of justice. A primary

component of the Bar's work is to identify and provide members with programs and services which improve opportunities for professional growth and enhance the competency of our members.

During our Board of Commissioners road show travels in the fall of 2006, we heard many of you express frustration with the rising cost of healthcare and the lack of benefit options available to Idaho attorneys, employees and families. Further, and according to a study we performed during the same timeframe, these issues ranked as one of your top three concerns. Accordingly, your commissioners set out to identify some innovative options that would provide a better sense of control and a voice in the administration and development of the benefits offered.

The basis of our search alternatives started with the realization that the size of our bar membership is one of our greatest assets. Continuing with this thought, it seemed logical that we might be able to use the strength of our numbers to develop a healthcare program that offers members more control over eligibility and benefits as well as to achieve long-term stabilization of premiums. I am pleased to announce that the Idaho State Bar, in partnership with ALPS, is in the final process of developing and finalizing a self-funded health benefit program for Idaho lawyers and their employees.

As a member of the Bar, you will be entitled to participate in the Idaho Lawyers Benefit Plan. The backbone of

this program is a Trust directed by a board of trustees. Board members will be elected representatives chosen from lawyers that participate in the Trust. The Trust's primary objective is to provide a diversity of benefit plan options that gives you and your employees the coverage you want with a program that makes sense.

In a standard health benefit plan (a fully insured program), the employer has limited or no ability to control rising premiums. If an employer's experience is "better than expected," and there is money left over after premiums are paid and claims are covered, the insurance company keeps it. Under a self insured program, premiums that would have gone to an insurance carrier are now paid to the Trust 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 utilize excess capital to the benefit of the members. The premiums charged to participating employers are based on a professionally calculated risk analysis. The Trust purchases stop-loss insurance to protect the plan from both an individual catastrophic claim as well as aggregate claims that exceed a pre-designated level.

While we understand that the Bar cannot control the costs associated with receiving medical and health services, we can control the cost of administration. This will be a cornerstone for the Trust's

decision making. In a self-funded arrangement, tight control of administrative expenses can lead to savings that are then reinvested into the Trust for the benefit of the members.

Individually, we are small and don't stand a fighting chance, but collectively, we are significant. We can, and should, leverage the size of our membership to advance this healthcare program initiative. Doing so will allow our members to achieve a greater degree of control and involvement in the long-term future of healthcare solutions available to Idaho lawyers and their employees.

The Commissioners do not have the answer to the health care crisis facing this country. Horror stories of lack of coverage and/or inability to get coverage at an affordable price abound. I can state that several State Bars are watching us closely to see if our plan will succeed. If it does, one may expect other states to follow suit shortly. ALPS has truly gone the extra mile to get a workable model set up for Idaho that will, hopefully, serve as a launching point for other state bars.

**Terrence R. White** is a partner in the Nampa law firm of White Peterson, PA. He is serving a six-month term as President of the Idaho State Bar Board of Commissioners. He represents the Third and Fifth Districts. Terry grew up in New Plymouth, Idaho, and received his undergraduate and law degrees from the University of Idaho.

#### NOW AVAILABLE

#### IDAHO LAWYER BENEFIT PLAN

The Idaho State Bar, in partnership with ALPS, announces the availability of a new healthcare program designed to meet the specific needs of Idaho lawyers and law firm employees. To learn more about the healthcare program contact Todd Points at [tpoints@alpsnet.com](mailto:tpoints@alpsnet.com) or (800) 367-2577 or visit [www.idaholawyerbenefit.com](http://www.idaholawyerbenefit.com).

## NEWSBRIEFS

**New Idaho State Bar Commissioners**—Congratulations to Deborah Ferguson, Boise, and James Meservy, Jerome, who were elected to the serve as members of the ISB Board of Commissioners. Deborah, U.S. Attorney's Office, Boise, will represent the Fourth District and Jim Fredericksen, Williams, Meservy & Lothspeich, LLP, Jerome, will represent the Third and Fifth Districts. Both attorneys will take office in mid-July and serve three -year terms on the Commission.

**Lamont (Monty) Berez**, Boise, has been appointed magistrate judge in Ada County. Mr. Berez has been employed with the Ada County Prosecutor's office since 2001. He is a felony trial attorney focusing on domestic violence cases and serves as an on-call drug prosecutor. From 2000-2001 he was an associate attorney for Stoel Rives, Boise, specializing in products liability defense. He has a B.A. in Biology from Andrews University in Berrien Springs, Michigan and a J.D. from the University of Virginia School of Law. He and his wife, Sophie, and their three daughters live in Boise. Mr. Berez will begin juvenile court assignment in Ada county on July 1, 2008.

**Idaho State Law Library has relocated**—The 2008 Legislative Session passed SB1271 removing the requirement that the state law library be kept in the Capitol or Supreme Court building; and SB1271 adding a fourth judge to the Court of Appeals. With this legislation in place, the Law Library, located on the main floor of the Idaho Supreme Court building, has been relocated. This move will allow the Court of Appeals, currently housed in a rented, off-site space to move to the vacated Law Library space. This area is undergoing remodeling construction. It is anticipated the Court of Appeals will move to its new location the end of 2008 or beginning of 2009. The new location for the Law Library is: 4th Floor (Key Bank Building), 702 W. Idaho St., Boise, Idaho. Hours: 8:30 a.m. - 6:00 p.m., Monday - Friday. NEW CONTACT NUMBERS: Front Desk (208) 334-2117, Fax (208) 334-2467.

## DISCIPLINE

### **MAUREEN E. CASSIDY (Reinstatement to Active Status)**

On May 8, 2008, Maureen E. Cassidy was reinstated to the practice of law in Idaho.

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

## **\*Special Recognition\* Idaho State Bar Real Property Section**

The Idaho State Bar Real Property Section will contribute \$10,000 to the Idaho Law Foundation to support the Law Foundation's grants for legal services to the poor. The Real Property Section also allocated \$2,000 per year, for up to five years, to fund a scholarship for first-year law students at the University of Idaho College of Law. The student receiving the highest mark in the first-year real property class will receive the scholarship.

Over the years, the Real Property Section has successfully earned money on the sale of section publications and in conducting continuing legal education seminars. The section decided to form a committee to explore ways to utilize these excess section funds. The section also decided to use section resources to bring in a nationally recognized speaker for an upcoming section-sponsored continuing legal education program to support their continuing effort to provide service and benefit to their section membership.

## NOTICE OF LICENSING REINSTATEMENT

### **AMENDED ORDER GRANTING PETITION FOR REINSTATEMENT AS ACTIVE MEMBER IN THE IDAHO STATE BAR—Supreme Court No. 35240**

The Court issued an Order, March 4, 2008, that Mark Thomas McHugh be removed from the list of attorneys entitled to practice law in Idaho and placing him on inactive status for non-compliance with the 2008 Idaho State Bar licensing requirements. A Petition for Reinstatement was filed April 25, 2008.

The Idaho State Bar advised that Petitioner has met all requirements to be reinstated to Active Status. Therefore, good cause appearing,

IT HEREBY IS ORDERED that the Petition for Reinstatement be, and hereby is, GRANTED and Mark Thomas McHugh is reinstated to Active Status for 2008 and the Idaho State Bar is hereby directed to issue an Active Attorney License on receipt of this Order. DATED this 30th day of April 2008. For the Supreme Court Dorothy Beaver for Stephen W. Kenyon, Clerk.



WHEN IS THE ANNUAL MEETING?

Diane K. Minnich



Several years ago the Idaho State Bar Annual Meeting was held in conjunction with the Idaho Judicial Conference. The Judicial

Conference events were early in the week, on Wednesday there was joint bar/judiciary programming and the end of the week was the bar convention. The joint event was an opportunity for the Bar and Judiciary to gather in a collegial setting. Due to budget cuts, the Judiciary discontinued its Annual Conference for several years. A few years ago, the judicial conference was reinstated; however, it is now scheduled in the fall. This year the Bar is again joining with the judi-

ciary for a Annual conference. **The Idaho State Bar Annual Conference is scheduled for October 8-10 in Sun Valley.** On Wednesday, October 8, the Bar and Judiciary will have a joint CLE program and a luncheon as part of the Conference. In addition the Conference will include several CLE programs, presentation of the Distinguished Lawyer awards to 2008 recipients David Nevin of Boise and Bill Olson of Pocatello, Mark your calendars for the fall Annual Conference in Sun Valley. More details to follow in the next issue of *The Advocate*.

Scheduling the Annual Conference in the fall did create a few unanticipated problems. First the Idaho Law Foundation bylaws state that its Annual Meeting must be held in conjunction with the Idaho State Bar Annual Meeting. Also, the Idaho Bar

Commission Rules state the new ISB Commissioners shall assume office on the last day of the Annual Meeting. There was not much enthusiasm among the Bar and Foundation leadership to extend their terms until October. So, in addition to the fall Annual Conference, **the Idaho State Bar and Idaho Law Foundation have scheduled an Annual Meeting luncheon on July 10, 2008, 12:00 noon – 1:30 p.m. at the Boise Centre on the Grove.** The luncheon includes the Idaho Law Foundation Annual Meeting and the passing of the gavel from the current to the new presidents for both the Idaho State Bar and the Idaho Law Foundation. The luncheon will be preceded by a CLE program, "Managing the Client Relationship—An Interactive Ethics CLE" presented by ALPS Risk



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# WELCOME FROM THE CHAIR OF THE DIVERSITY SECTION

Ron Coulter

*Idaho Employment Law Solutions*

As the Chairperson of the Diversity Section, the Idaho State Bar's newest section, it is my pleasure to welcome you to this month's *Advocate*. I know that some of you might be saying, "I didn't know that the Idaho Bar had a Diversity Section." Some of you may even be wondering, given the demographics of the Idaho State Bar, how the Section came into being, or what it might have as its purpose. Hopefully, my message will answer these and other questions you may have.

## HOW THE SECTION WAS BORN

The creation of the Section was in itself an exercise in diversity at its best. The driving force behind the creation of the Section is a Wolf Creek Job Corps graduate, who after earning his GED, graduated from Boise State University with a degree in Elementary Education, earned his law degree at the University of California, Hastings College of Law, now serves as the Chief Judge of the Idaho Court of Appeals, and is the only current minority jurist in Idaho: Judge Sergio Gutierrez. Yet, Judge Gutierrez was not alone in his drive to establish the Section and he was aided in his efforts by an Idaho State alumni, graduate of the University of Idaho College of Law, and Partner in the law firm of Perkins Coie: Richard Boardman. Together they were the two people most responsible for shepherding this idea through the Bar process, creating the Section, and personally recruiting attorneys to join the Section. The Section held its first meeting in July of 2007 and has been growing and evolving ever since. To understand the drive and vision of these two dynamic catalysts, I invite you all to read Judge Gutierrez's *Presentation At The Inaugural Reception For The Diversity Section September 25, 2007*, and Richard Boardman's article, *Making the Case for Diversity*, that appear in this issue of the *Advocate*.

## THE PURPOSE OF THE SECTION

The Section was created to foster diversity within the legal profession and promote the professional development of a diverse bar serving the interests of the public. To further this primary objective, the Section's by-laws mandate that the Section do the following:

- Create awareness in the legal profession about the value of diversity;
- Advance the skills and ability of all attorneys to better serve diverse clients;
- Provide a forum for communication among attorneys to promote the professional advancement of a diverse bar;
- Develop programs and support systems to increase diversity in the pool of post-secondary individuals who desire to pursue a career in law;
- Develop programs to increase diversity in the pool of students K-12 who desire to pursue a career in law;
- Effectively disseminate information on relevant diversity issues through the *Advocate*, newsletters,

lectures, seminars, meetings and the discussion of issues relating to diversity in the legal profession;

- Propose such legislation as the Section may from time to time deem appropriate in the public interest, and offer, when requested, advice or assistance to any legislative committee or other legislative body on proposed legislation dealing with its designated field of law consistent with the guidelines established by the Idaho State Bar;
- Prepare statements pertaining to the field of law on issues which affect the public interest, within the guidelines established by the Idaho State Bar; and
- Engage in such other activities which are consistent with the objectives of the Section.

## THE ARTICLES IN THIS EDITION OF *THE ADVOCATE*

Through the articles appearing in this edition of the *Advocate*, the Section hopes to further its objective of disseminating information on relevant issues important to a diverse Bar. To that end, I am proud to introduce the following articles: First, Judge Sergio Gutierrez and Richard Boardman, *Presentation at the Inaugural Reception for the Diversity Section* and *Making the Case – The Benefits of Diversity in Law Firms*, respectively, are both inspiring, practical and grounded in common sense. A story in three acts, the articles by Judge Raymond S. Uno (Ret.), Raymond (Ray) Swenson, and Augustus Chin provide a personal perspective on diversity and foreshadow, in describing Utah's experience, the impact we hope Idaho's Section will have on the practice of law in Idaho. In meeting the Section's goal of preparing information pertaining to a field of law which affects the public interest, Maria Andrade and Hans Meyer have provided a timely article entitled *A Problem Worth Looking For: Immigration Related Employer Investigations, Sanctions and Protection Plans*. Finally, Sara Bearce, a law clerk for Chief Judge Sergio Gutierrez of the Idaho Court of Appeals, thoroughly explores the immigration consequences for non-citizens of pleading guilty to a crime in her article, *Criminal Rule 11's New Protection*.

As Chair, I would be remiss in not thanking the attorneys who took precious time from their busy schedules to contribute articles and other efforts to make this historic edition of the *Advocate* possible. A special thanks is owed to Raymond T. Swenson who not only contributed an article, but also chaired the Section's *Advocate* Committee. Thanks is also owed to Vonda Hall, who helped edit the address given by Chief Judge Sergio Gutierrez for publication, and to Weston Meyring for his contributions to the initial preparation of the Judge's speech.

Last, the Section will soon be launching its website at [www.idahodiversitylaw.com](http://www.idahodiversitylaw.com). Please look for a forthcoming announcement when the site is operational.

## ABOUT THE AUTHOR



**R.A. (Ron) Coulter**, a sole practitioner, is a retired Lieutenant Colonel, United States Marine Corps whose law practice focuses entirely on Employment Law. He is the owner of Idaho Employment Law Solutions, serves on the Board of Idaho Voices for Children, is a member of the Advisory Board for Syringa Bank, is a past President of the Idaho Black History Museum, served as Idaho's first State Appellate Public Defender and served as the EEO Manager for Boise Cascade Corporation.

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# DIVERSITY SECTION INAUGURAL RECEPTION—SEPTEMBER 25, 2007

Chief Judge Sergio Gutierrez  
*Idaho Court of Appeals*

*The following remarks were delivered by Chief Judge Sergio Gutierrez of the Idaho Court of Appeals at the inaugural reception for the Diversity Section. Although the speech was not intended for written publication, Judge Gutierrez has graciously agreed to the Diversity Section's use of excerpts from it in this format. Whether written or spoken, the themes expressed herein resonate far beyond the medium of their presentation.*

It is an honor for me to speak at this inaugural reception for the most recent section approved by the Idaho State Bar: the Diversity Section. Tonight we celebrate the intersection of our professional and personal lives, as that intersection is, in part, what the Diversity Section is all about. Tonight we recognize a belief, growing ever stronger in all quarters, that the differences between us as individuals enable us to make greater contributions collectively to our profession and community.

In reflecting on my remarks tonight, I've had opportunity to think about the nature of diversity. It is not a new concept that our society has recently discovered. In fact, I would submit to you that diversity is a natural condition. Segregation and homogenization—those are the artificial constructs imposed from outside forces. Long before the Vikings, Spaniards, and Englishmen set foot in this country, the native peoples of this land understood and celebrated the value of diversity. Consider these words from Popovi Da from the San Ildefonso Pueblo tribe, who said, "There is a design in living things; their shapes, forms, their ability to live all have meaning."

But what is that meaning? Consider the molecular, the atomic, level of being. At our core, at that root level of our existence, we are the same. In fact, with a microscope powerful enough, it would be possible to get to a level of magnification where there is no difference between us and the world around us. In other words, we are made of the same things. But at smaller resolutions, the little things that make us different become apparent. It is these little things that contribute to diversity, and that are so important. That is a fine line to walk: between recognizing the fundamental and crucial aspects of our being that bind us together and appreciating and cultivating the subtle changes that make us so different.

I realize that, for some, the word "diversity" is full of political meaning. I think for some people, a "lack of diversity" is a code for a room full of white men. Well, that can be true, but it can also reflect a room full of women of color, or a room of Democrats, or a room of lawyers, or a room full of what-have-you. You see, diversity is simply the absence of homogeneity. And a lack of diversity is therefore a presence of homogeneity.

And so the question then arises, is homogeneity a bad thing? You can say that an ice cream shop that sells nothing but Rocky Road ice cream is a poor one indeed, but I happen to find that choice to be delightful! But there is a difference between choosing that flavor and having it thrust upon you.

In other words, I don't believe there is an absolute answer to the question of whether homogeneity is always a bad thing, but instead would ask you to simply consider the many benefits of diversity. For example, it is because I have been able to sample the other 30 flavors at Baskin-Robbins® that I know I love Rocky Road.

Think about diversity in genetic terms. An example that may resonate for you is that of seed crop diversity. Consider the many varieties of corn that exist. There are dozens upon dozens. At the grocery store, however, there may be only one or two. The problem arises when the insects that rely on those two varieties become resistant to control. Without a catalog of other varieties, we could find ourselves without corn—which has sustained life across North and South America for centuries. You can apply this logic, which is grounded in science, to any other situation where the value of diversity is questioned.

I have seen the value of diversity questioned here in Idaho on many occasions. My reaction to that sort of thinking is not always as reasoned and measured as I might hope, and I have found myself questioning, from time to time, whether Idaho has any diversity at all. But it does; of course it does. It is one of the reasons our state thrives. Let me remind us of Idaho's diversity in the context of languages. The most recent Census Bureau studies indicate that the population of Idahoans, five years of age and over, is 1,196,793, of which 111,879 speak a language other than English. That figure includes those who speak another language in addition to speaking English. Spanish is the most common at 80,241, followed by other Indo-European languages at 19,460, and 8,105 who speak an Asian or Pacific Island language, and about 4,073 who speak some other language.

Here is an example that may be more concrete for a roomful of lawyers: the different languages for which court interpreters have been needed in Ada County is ever increasing and includes Albanian, Amharik, Arabic, Basque, Cantonese, Chukkese, Czech, Dinka, Farsi, French, Ghana, Gujarati, Hatian-Creole, Hindi, Japanese, Kizaguwa, Khran, Korean, Krio, Laotian, Mai Mai, Mandarin, Mina, Polish, Portuguese, Romanian, Russian, Samoan, Serbo-Croatian, Sign Language, Somali, Spanish, Swahili, Toishanese, Uzbek, and Vietnamese.

Our Idaho Constitution in Article I § 1 proclaims that, "All men are created equal, and have certain inalienable rights, among which are enjoying and defending life and liberty; acquiring, possessing and protecting property; pursuing happiness and securing safety." My point in reciting these noble words is to suggest that, although beautiful, they have no talismanic effect. That is, they are not "magically" implemented. Consider that at its inception, our State Constitution recited these words, and yet barred Mormons from holding public office, voting, or serving as jurors. You see, it is not enough to have laws that dictate every human being is entitled to such inalienable rights because laws without enforcement aren't really laws—they're well-worded options. And it is lawyers who understand the value of diversity that give these words, words that ring so noble in the realm of pure intellect, an actual effect in the real world.

Often, the words of our State and Federal Constitutions are recited as proof of our diversity, but as an argument, I find that too circular. We can describe the American Dream in terms of the pursuit of liberty and justice, but that gets us no closer to its achievement. I believe that the key is to redefine the American Dream. I hope you will not think I am bragging if I tell you that I am aware, as a former fieldworker, high school drop-out, job corps graduate, and now an appellate court judge, that there are those who think I am a symbol of progress, of diversity. Some of those people may think that I have secured the American Dream for myself and my family. Let me assure you that I have not. Because my American Dream won't be realized until my neighbor's has, until equal opportunity is a fact of our American experience, a fact of life. I believe it is our duty as human beings to define our goals in terms of what we can do for others.

As lawyers, we are uniquely positioned to do just that. When it comes to matters of diversity, when it comes to matters of civil rights, when it comes to matters of human rights, when it comes to matters of justice and the American Dream, lawyers play a critical role. Lawyers like the ones in this room, who understand the value of diversity.

It is therefore with a measure of pride and great hope that I have participated in today's events with you. I believe the Diversity Section of the Idaho State Bar will be one we can count on to help carry the banner of "Justice For All." I believe the lawyers in this room are willing to take the lead in this struggle, to give effect to our Constitutions and laws. As this happens, we will begin to see the power that lies at the intersection of our professional lives and personal selves.

That is why I invite you tonight to examine your definition of the "American Dream." I propose that, as a member or soon-to-be-member of the Diversity Section, you expand it to say, "My American Dream will be realized when I help others realize theirs."

I believe that the greatness of a nation and its people occurs not by chance or by accident, but is rather the by-product of much work on behalf of individuals, both together and alone, seeking growth, prosperity, and success. We meet our goals because of the support of others, and therein lies a fundamental key to making a difference: recognizing that we are all inextricably linked. I feel confident that we are building towards a better future, a future where our similarities are celebrated along side our differences. In working to create the Diversity Section of the Idaho State Bar, and in joining this celebration of its existence, you have demonstrated your commitment to this future, and for that, I thank you.

God Bless You.

#### ABOUT THE AUTHOR

**Judge Sergio A. Gutierrez** obtained a J.D. from the University of California, Hastings Law School. He practiced law in southwest Idaho until 1993, when he was appointed to the District Court. In 2002, he was appointed to serve on the Idaho Court of Appeals. In 2008, Chief Justice Daniel T. Eismann of the Idaho Supreme Court appointed Judge Gutierrez to serve as Chief Judge of the Idaho Court of Appeals. Judge Gutierrez also chairs the Idaho Supreme Court Fairness and Equality Committee and is a former member of the Governor's Criminal Justice Commission.

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# DIVERSITY: THE UTAH PERSPECTIVE

Judge Raymond S. Uno,  
*Utah Third District Court Judge, Retired*

Raymond Takashi Swenson,  
*CH2M-WG Idaho, LLC*

Gus Chin,  
*Summit County Attorney's Office*

*We recognize that our profession, and society at large, contains members who might believe an emphasis on diversity is a concession to contemporary notions of "political correctness." But diversity is more than creating an integrated professional canvas for attorneys of color. One of the goals of diversity is to recognize differences and eliminate barriers that might otherwise obstruct the fulfillment of our oaths as attorneys. Within the legal profession, diversity should be viewed as an all-inclusive effort whereby all of our colleagues are afforded professional acceptance and opportunities based on merit regardless of gender, ethnicity, nationality, orientation, and physical challenges. The significant percentage difference between these aforementioned groups and the majority is a fair indicator of the fact that we are not there yet.*

*Every attorney has most likely had similar experiences of people who encouraged them to consider a legal career; and who provided mentoring through that experience and as they developed their skills. Some of us emerged from backgrounds where that kind of encouragement wasn't available when it could make the most difference, during our high school and undergraduate years; however, beginning in the 1960s, with a growing public understanding of the significance of the law in our lives, and the example of pioneering minority scholars, there was a quantum jump in the number of students who belonged to minority groups who were inspired to seek careers as lawyers. Here are some of their stories.*

## **RAYMOND TAKASHI SWENSON'S STORY**

I almost didn't become an American. My parents had met in Japan at a church meeting. My father was a member of the 5th Air Force Band, stationed at Komaki Air Base outside Nagoya, as part of the occupation forces. My mother's family was Russian Orthodox, a legacy from her samurai grandfather, Bunzaburo Kawai. Her father had served in the Japanese Army right after World War I, when both U.S. and Japanese troops, allies during World War I against Germany, were sent into Siberia to support the anti-communist "White Russian" movement. He was attending church there, and a Russian family invited him to celebrate Christmas dinner. Thirty years later, my grandfather decided to do the same thing with an American soldier, so he asked my Mom, who was working on the base, to invite one of the Americans to their home for Christmas. My Dad hit it off so well with her parents that he continued visiting, with the visits growing into a romance that resulted in them being married by a Russian Orthodox priest that September. When his enlistment was up, my father began his work as a missionary.

As the end of my Dad's missionary service approached, my parents made plans to move to America. However, a U.S. statute enacted in 1923, with the support of Franklin Roosevelt, still barred Japanese from immigrating to the U.S. According to U.S. law at the time, I was born in Japan, and therefore a Japanese citizen. However, Japanese law then and now is that citizenship descends from a child's father, so under Japanese law I was American. Neither nation claimed me. Utah Senator Elbert D. Thomas introduced a special bill to allow my Mother and myself to immigrate to the US as resident aliens.<sup>1</sup> It actually passed both the House and Senate before a general reform of the immigration laws, in recognition of the many "war brides" from Japan who

were marrying US servicemen, made me a citizen and my Mother a legal immigrant.

My Dad went on to work for Kennecott Copper, then the Post Office, and finally as a hospital security guard. In our neighborhood in Kearns, Utah, I never met an attorney until I participated in the statewide Model United Nations program for high school students. As part of that program, I "represented" Uruguay in a mock Security Council session held at the University of Utah Law School, presided over by Dean Sam Thurman, who praised my participation.

While an undergraduate at the University of Utah, I took a seminar that was held at the Law School, taught by Jefferson Fordham, a visiting professor on sabbatical from his position as Dean at the University of Pennsylvania School of Law. Dean Fordham was one of the most distinguished law professors of his day, with a photographic memory of cases (including the full citations), but he was also self-effacing. He was very kind to all of us, and I saw him give up his place in line at a local hamburger stand to a black student. He gave my seminar paper a good grade, but the crucial feedback came in an unexpected way. Dean Fordham enjoyed Japanese food, and while eating at the Mikado restaurant in Salt Lake discovered that his waitress was my Mother. He told her I should consider going to law school.

I wasn't in a position to act on Dean Fordham's advice initially. I was among the last people who joined the military under threat of the draft, with a number 16 in the first draft lottery. My solution, since student deferments were ended, was to enroll in Air Force ROTC. Soon after I began working at the NORAD Cheyenne Mountain Operations Center outside Colorado Springs, designing software for tracking spy satellites, the Air Force announced a competition for 25 scholarships to attend law

## UTAH'S FIRST 50 MINORITY ATTORNEYS

Several years ago, the Utah State Bar honored the "First 50" minority attorneys admitted to the Utah State Bar. It took seventy-four years to reach this milestone. The real pioneers were people like Lawrence Marsh (1909), a black man who, when he appeared at the police station to speak with his client, was beaten by a policeman, and Yoshio Katayama (1946), who had to get permission to be released from the Topaz Relocation Camp, where he had been sent by President Roosevelt in 1942, so he could attend law school. Judge Raymond Uno was number eight, graduating from the University of Utah in 1959. By the time future Idaho Attorney General Larry Echohawk graduated in 1973, he was only the 15th minority person admitted to the Utah Bar. Mary Ellen Sloan, a Native American who worked on the Rosebud Reservation, was number 21 in 1975. The next 30, including Raymond Swenson, graduated from 1976 to 1980.

school. That program took me back to Utah, and ultimately involvement in the Utah Minority Bar Association.

### JUDGE RAYMOND UNO (RET.) REFLECTS ON THE UTAH MINORITY BAR ASSOCIATION

As it has often been said, the mother of all inventions is need. For minority attorneys in Utah, the need for an organization that would unify and promote the interest of minority attorneys slowly and gradually became apparent, finally gaining momentum with the organization of the Utah Minority Bar Association (UMBA) by a group of minority attorneys and judges. The purpose of the UMBA is:

- 1) developing employment opportunities for minority lawyers, particularly those not established in a practice;
- 2) increasing judicial appointments of minorities;
- 3) developing information exchanges among minority lawyers to assist those seeking clients and to assist minority clients seeking counsel;
- 4) developing support for minority law students, including increased admissions to law schools, financial aid, training opportunities and employment; and
- 5) providing service to minority communities and developing ties with community groups.

The mission of UMBA has been and continues to be the promotion of diversity within the legal profession. Since its formation, UMBA has played an important role in encouraging diversity in law firms, in the public sector, and in the judiciary. It is believed the result of the work of the UMBA has had a significant impact on minority attorneys, the Utah State Bar and the community. The UMBA actively asks members and other minority organizations to encourage minorities to run for public office, seek appointment to public agencies and support candidates and officials who have supported UMBA programs. It is difficult to fully assess what has been done but the concerted effort, many times forming coalitions with other minority organizations, to pursue diversity in the profession has had positive results. Just in the legal profession, the UMBA has made remarkable progress based on the number of years the UMBA has been in existence. One appellate court judge, seven district court judges and three juvenile court judges are minorities, almost all are members of UMBA and some are past presidents of UMBA. There are

minority attorneys in various public offices throughout the state and in most, if not all, the major law firms, some as shareholders. Many are successfully practicing solo or as minority law firms. A past president of the UMBA is also a state senator.

### GUS CHIN'S STORY

Involvement in UMBA during my law school years at the University of Utah College of Law led to my becoming president of the organization in 1999. In 2004, during my second three year term on the Bar Commission I decided to run for the position of president-elect of the Bar. My decision to become the first attorney of color to hold the position was due in part to my personal desire to make a difference and also due to a challenge given by Dennis Archer, then President of the American Bar Association, during a July breakfast meeting with UMBA members in 2003 at the Utah State Bar Annual Convention in Sun Valley for someone to blaze the trail.

Unsuccessful in my first attempt, I decided to try again in 2005. I was pleased by the support I received but also somewhat surprised by the subtle discouraging remarks from others who held the position I was seeking. Despite their discouragement, I forged ahead and was elected in April 2005. In July of 2006 I had the privilege of being the first attorney of color to hold the position of President of the Utah State Bar in its seventy-five year history. As the seventy-fifth president of the Utah State Bar, I hope I made a difference and somehow assisted in paving the way for others.

With the organization of the Diversity Section, the Idaho State Bar joins other bar associations and organizations who recognize that diversity is important to the future of our profession. Dean Donald Burnett's recent article in the February 2008 issue of *The Advocate* on diversity at the University Of Idaho College of Law is further evidence of interest in diversity in Idaho. Diversity is especially important given the evolving landscape of the legal profession and the growing demographic of those utilizing the legal services we provide as members of this noble profession.

The creation of the Diversity Section will, over time, have a meaningful impact on the Idaho State Bar. One such impact, which Utah experienced, is the retention of law students and attorneys of color. In addition, the increased awareness about diversity has assisted in an understanding of the need to eliminate indifference which discredits the legal profession and can thwart the interest of justice.

### ABOUT THE AUTHORS

**Raymond S. Uno** is a graduate of the University of Utah College of Law, member of the Utah State Bar and a retired Third District Court Judge. He was the first president of the Utah Minority Bar Association.

**Raymond Takashi Swenson, Lt. Colonel, USAF (Retired)** is Senior Counsel for CH2M-WG Idaho, LLC, which is cleaning up nuclear waste at the Idaho National Laboratory under contract to the Department of Energy. He is admitted in Utah, California, Washington, and Idaho.

**Augustus "Gus" Chin**, is originally from Jamaica. He is a Deputy County Attorney/Prosecuting Attorney with the Summit County Attorney's Office. He is the immediate Past President of

the Utah State Bar, a past president of the Utah Minority Bar Association, and a past president of the University of Utah College of Law Alumni Board of Trustees. He is also a member of the Utah Supreme Court's Advisory Committee on Professionalism, and the Judicial Council's Standing Committee on Justice Court Standards. He received his undergraduate and Juris Doctor degrees from the University of Utah.

**ENDNOTES**

<sup>1</sup> Senator Thomas, a Democrat, was instrumental in persuading the Roosevelt Administration to open the doors for Jewish refugees from Europe. He also is one of the people credited with the fact that Kyoto, the ancient capital of Japan and home to many historic buildings, was spared the mass fire bomb raids that flattened Tokyo and much of my birthplace, Nagoya. Ironically, this action also spared Jewish lives, because there were many Polish Jews in Kyoto from among the thousands who had been given Japanese visas to escape the Nazis by the Japanese Consul in Lithuania, Chiune Sugihara.

**MCLE REMINDER**

Reminder letters were recently sent to all members with an MCLE reporting deadline of December 31, 2008. Please check your records to make sure all the courses you attended have been approved for Idaho MCLE credit. Avoid the last minute scramble by applying for accreditation now. You can check your MCLE attendance records on our website at [www.idaho.gov/isb](http://www.idaho.gov/isb). Questions should be directed to the Membership Department at (208) 334-4500 or [jhunt@isb.idaho.gov](mailto:jhunt@isb.idaho.gov).

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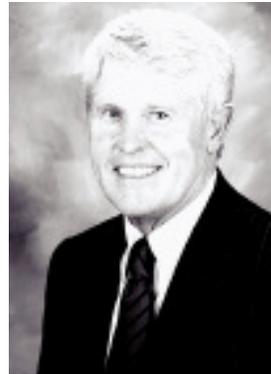
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# MAKING THE CASE - THE BENEFITS OF DIVERSITY IN LAW FIRMS

Rick Boardman  
Perkins Coie, LLP

The case, as it turns out, is really quite easy to make. Diversity in law firms is important for one simple reason: it's good for business. Law firms are in the business of providing representation and legal services to clients, and clients are increasingly expecting their law firms to reflect the cultural diversity of our society.

That clients are "expecting" their lawyers to be diverse is an understatement. Many clients are **demanding** that law firms representing the client's interests include minority and female attorneys not only in the preparation and presentation of the legal work product but also in the law firm's management. The clients, in turn, are responding to societal pressures that similarly compel them to reach out and embrace diversity in their corporate organizations from the assembly line to the board room. Whether the representation involves a corporate transaction, court proceeding or any of the other legal services that lawyers provide, clients' expectations and demands for diversity in their legal professionals are inescapable. No one doubts that the paradigm of law firms and law firm partnerships dominated by white, Anglo-Saxon, Protestant males is a thing of the past.

Large corporations in particular have rallied to the call for more diversity in law firms. Since 2004, more than one hundred corporate legal officers have signed on to "A Call to Action: Diversity in the Legal Profession":

*We pledge that we will make decisions regarding which law firms represent our companies based in significant part on the diversity performance of the firms. We intend to look for opportunities for firms we regularly use which positively distinguish themselves in this area. We further intend to end or limit our relationships with firms whose performance consistently evidences a lack of meaningful interest in being diverse.*

In-house corporate legal departments are clearly drawing the line on diversity requirements. Their outside law firms either make a meaningful commitment to diversity in their ranks or suffer the consequences – loss of the company's legal business.

Several years ago, Shell Oil Company reduced the number of outside law firms actively handling the company's legal matters. Like many other companies attempting to restructure their outside counsel relationships, Shell believed that its bottom line would improve by receiving more efficient services from outside law firms that "know our business better," according to John Esquivel, an associate general counsel with Shell. The outside counsel selection process included consideration of four criteria: quality, cost, partnering and diversity. With regard to diversity, the company selected firms that displayed a willingness to hire and promote minority and women lawyers. The scrutiny, however, did not end at the selection process. In the years that followed, Shell conducted evaluations of the selected law firms' progress and required that the firms live up to their commitments to hir-

ing and promotion of minority and women lawyers. "We are looking for an evolution from commitment to action to results," Esquivel remarked. "A nice plaque on the wall is not enough. And action without results is not enough, either."

Other companies approach diversity requirements for their outside law firms somewhat differently. American Airlines, for instance, does not set "numbers goals" for hiring, promotion and retention of minority and female attorneys by their outside counsel. Nevertheless, law firms must be able to demonstrate meaningful progress in their diversity efforts, including the manner in which the firm staffs its projects on behalf of the company. American Airlines believes that a diverse team of attorneys results in a better work product. Diverse backgrounds in the ranks of partners and associates working on a particular legal project result in a diversity of thought, a diversity of perspective and a diversity of possible solutions. The firm's finished product, whether a brief, mediation statement, employment manual or securities prospectus, benefits from the confluence of diverse ideas and analyses. This "Neapolitan" approach to legal services ensures that the firm's representation of its clients encompasses the assortment and variety that mirror American culture in the 21st Century.

With extremely tight competition for client business, law firms can hardly ignore the diversity requirements of their clients. Even law firms in one of the most homogenous states in the country can ill afford to disregard client demands for diversity among partners, associates and staff. Many firms in Idaho provide representation to large, international corporations on a variety of matters. That Idaho law firms happen to be located in a state in which minority lawyers are disproportionately represented in the bar compared to minorities reflected in larger, more urban bar associations, or in which female attorneys have only become a significant percentage of the practicing bar in the past few years, cannot be an excuse for law firm complacency with respect to diversity commitments and obligations. Out-of-state corporate clients will not accept this provincial attitude or the diversity shortcomings at Idaho law firms, and in-state clients certainly expect more of us, too. Idaho, as does the rest of the country, continues to evolve culturally. Clearly, the local legal clientele is also changing. The Idaho Hispanic, African-American, Native-American, Asian-American, Gay/Lesbian and other minority communities contribute to the changing face of Idaho in the 21st Century and, therefore, the need for diversity in our law firms, large and small.

To be sure, Idaho law firms will face challenges in their efforts to recruit and maintain minority lawyers. Racist and other negative stereotypes which have, unfortunately, tarnished the state's image in the past probably continue to deter out-of-state minority law students and practicing minority lawyers from considering Idaho as a place to live and practice law. Although most Idahoans realize that prejudice in this state is no more (and, it is

hoped, less) prevalent than in other parts of the country, our conservative reputation and largely rural culture present formidable obstacles to recruitment of minority lawyers by law firms. Nonetheless, it is incumbent upon law firms to take the lead in actively soliciting minority and female applicants for attorney as well as para-professional and staff positions. Hiring partners coordinating interviews at law schools within the state and outside the state should make it a point to express their firm's interest in minority candidates to the law school's placement personnel. Interviews of judicial clerks transitioning to private practice likewise should include consideration of minority lawyers. At a minimum, law firm websites should reflect a culture and practice inclusive of diverse interests and opportunities. Once hired, minority and women lawyers deserve the support and mentoring that benefits any new lawyer to the practice in Idaho. Minority and women lawyers must be meaningfully engaged in the firm's organization and management. A diversity of perspectives is invaluable to the sustenance of a firm.

Idaho has lagged behind other state bars in the recognition and promotion of diversity within its membership. We are one of the last states to initiate a bar section devoted to the support and advancement of minority and women lawyers. The recent approval of the Diversity Section by the Board of Commissioners, however, signals an end to that era. Law firms likewise must step up to the plate and recognize that diversity is important to their long-term client relationships and therefore to their continued success. It's good for business. More importantly, it's the right thing to do.

#### ABOUT THE AUTHOR

**Rick Boardman**, Boise, is a partner the Perkins Coie, LLP, Boise office. His practice focuses on civil litigation (trial and appellate), commercial litigation, construction law and intellectual property litigation. He received his J.D. from the University of Idaho College of Law in 1982. Rick has been a member of the ISB Character & Fitness Committee since 1999. He received Pro Bono Awards in 1994 and 2004, and a Service Award in 2006. He is a member of the American Bar Association and is a member of the Idaho State Bar and the Washington State Bar.

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# A PROBLEM WORTH LOOKING FOR: IMMIGRATION-RELATED EMPLOYER INVESTIGATIONS, SANCTIONS AND PROTECTION PLANS

Maria E. Andrade  
Hans C. Meyer

Considering the present landscape of heightened immigration enforcement and recent changes to immigration law, businesses with a large non-citizen workforce need to take an honest look at their employment-related immigration practices. Failure to do so, particularly given the vitriolic and polarizing environment of the contemporary immigration debate, may unnecessarily expose those businesses to a wide variety of civil and criminal penalties. Even in a situation where a business itself is not responsible for any wrongdoing, an immigration enforcement action, such as an on-site “raid” or an I-9 audit, can cause significant disruption to the business, fear among the workforce, and often-time’s negative and unfair press. This article summarizes employer obligations imposed by the Immigration Reform and Control Act<sup>1</sup> (IRCA), workplace investigations carried out by the bureau of Immigration and Customs Enforcement<sup>2</sup> (ICE), the ICE’s recent attempts to access Social Security Administration (SSA) earnings data for use in its investigations, and the basic components of an employer sanction protection plan.

## WHY PLAN NOW?

On a national scale, ICE has increased its worksite enforcement actions significantly over the last three years. The number of criminal arrests has increased 390% between 2005 and 2007.<sup>3</sup> Administrative arrests went up by 265% in the same period.<sup>4</sup> In its 2007 annual report, ICE describes a “new era” of enforcement in which worksite enforcement is one of the agency’s top priorities.<sup>5</sup> In addition, ICE is giving greater consideration to how an employer responds to “no match” letters from the Social Security Administration (SSA) in determining whether an employer “knowingly” hired or employed persons who are not authorized to work in the United States. In light of the increased attention paid to workplace issues, employers need to be prepared for these inquiries.

## Audits and “No Match” Letters Trigger Action

Most worksite enforcement actions are preceded by an I-9 audit. A business without a plan outlining its response to a raid or I-9 audit is more likely to react with disorganization and panic, which could lead to poor decision making, bad press, and costly litigation. For example, when faced with an ICE subpoena to produce I-9 paperwork, an unprepared business may react impulsively and demand that certain employees produce new proof of their eligibility to work or face termination. For a business, this reaction invites equally concerning problems of a different nature.

The same law that requires employers to verify the work authorization of employees generally prohibits an employer from demanding the employee go through the I-9 process after they have already been hired, and from requiring the employee to produce work verification and identity documents that are different from those the employee produced when hired.<sup>6</sup> In such a situa-

tion, aggrieved private parties can sue for damages, and the government can seek civil penalties.<sup>7</sup>

Social Security “no-match” letters advise employers that the name and social security number of an employee reported on form W-4 does not match SSA records. Although “no-match” letters specifically state that they should not be considered a statement related to immigration status, DHS considers a “no match” letter as an indication that the subject of the letter may not have valid work authorization. In August 2007, DHS promulgated a rule requiring an employer who receives a “no-match” letter to fire the employee if it cannot resolve the no-match issue within 90 days.<sup>8</sup> The rule also states that it considers an employer’s failure to follow the specific steps in the rule to respond to the “no match” letter as evidence the employer “knew” it was employing people who were not work-authorized.<sup>9</sup> The rule drew waves of criticism and ultimately a federal lawsuit that resulted in a district court order enjoining the rule from going into effect.<sup>10</sup> In March of 2008, DHS released a supplemental proposed rule that is substantively the same as the initial rule.<sup>11</sup> The controversy surrounding the rule is ongoing, making it imperative that employers track developments in this area.<sup>12</sup>

## THE IMMIGRATION REFORM AND CONTROL ACT—ASKING THE IMPOSSIBLE?

After the passage of IRCA, all employers are required to verify that employees hired after November 8, 1986 are authorized to work lawfully in the United States.<sup>13</sup> Employers verify work authorization through the use of the Form I-9. For many businesses, the I-9 verification process presents little difficulty for human resources staff and employees. However, for employers in industries that historically hire large numbers of non-citizens employees, the I-9 process can be a daunting task. Although the I-9 process appears simple, it is governed by complex and counterintuitive rules regarding what documents can be accepted, when documents must be re-verified, how long documents must be retained and when employers must accept or refuse proffered documents. Reviewing the variety of documents permitted by Form I-9 is complicated by the fact that the employee can select from an array of documents to prove work authorization and the list of permissible documents changes over time, requiring Human Resource departments to keep abreast of the most current list.<sup>14</sup>

Among the many documents that a non-citizen may produce to establish work authorization are a lawful permanent resident card (Document I-551), a stamped card indicating admission to the country with permission to work (Document I-94), or a one-year employment authorization document (Document I-765).<sup>15</sup> Certain documents that establish eligibility for the Form I-9 have expiration dates on the face of the card while others do not. In some cases the expiration date is a signal that re-verification is

necessary, on other cards, a future expiration date does not trigger re-verification. For example, the I-751 card must be re-verified by the employer on or before the expiration date listed in the document. In contrast, older versions of the I-551 card have no expiration date and may bear a photo taken many years ago. Newer I-551 card expires 2 or 10 years from date of issue.<sup>16</sup> Both versions of the I-551 may be used to establish employment authorization; however, no re-verification is necessary for either document as long as the I-551 card was unexpired when presented. For businesses that are presented with a variety of documents, the I-9 process can present a confusing morass involving the types of documents they can accept, whether that particular version of the document is valid, and the significance of an apparent expiration date for re-verification purposes. The potential Catch-22 of IRCA is borne out by the tenuous line, which employers must walk in order to comply with the law: employers are required to check documents to verify an employee's eligibility to work while not engaging in conduct that could subject them to suit for "document abuse" or national origin discrimination. At the same time, an employer may face civil penalties for paperwork violations, or charges of "knowingly" hiring or employing unauthorized workers if it does not properly following the I-9 process.<sup>17</sup> However, an employer can be too vigilant when inspecting documents. If the employer overly scrutinizes documents, asks an employee to present additional documents other than those that listed on the Form I-9, or selectively targets certain employees for heightened review of their I-9 documents, it can be liable for "document abuse" under IRCA.<sup>18</sup>

#### **ACTUAL VS. CONSTRUCTIVE KNOWLEDGE**

The I-9 verification requirements are the means by which IRCA enforces a central mandate: that employers do not knowingly hire or continue to employ anyone who lacks work authorization. Significantly, the term "knowing" includes actual and constructive knowledge and is meant to cover a broad range of circumstances:<sup>19</sup>

(1) The term *knowing* includes not only actual knowledge but also knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition. Constructive knowledge may include, but is not limited to, situations where an employer

- (i) Fails to complete or improperly completes the Employment Eligibility Verification Form, I-9;
- (ii) Has information available to it that would indicate that the alien is not authorized to work, such as a Labor Certification and/or an Application for Prospective Employer; or
- (iii) Acts with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into its work force or to act on its behalf.

The standard for constructive knowledge is sometimes referred to "willful blindness" and has been consistently tied

to the employer's failure to take reasonable steps in response to information received that an employee may not be work authorized.

The simplest evidence of actual knowledge is an admission by an employee to the employer that they do not have valid work-authorization. Typically, these reports are made to co-workers and supervisors who work closely with the workforce. Every business should have a policy that clearly directs an employee on what to do in such a situation.

Conversely, establishing whether an employer has constructive knowledge of hiring or employing unauthorized workers requires consideration of the totality of the circumstances presented in the particular case.<sup>20</sup> Some relevant factors include the following:

- whether the employer is missing I-9 forms for each employee;<sup>21</sup>
- whether the I-9s are completed accurately and if not, whether the employer can demonstrate good faith efforts to comply with the I-9 requirements;<sup>22</sup>
- whether despite having I-9s on each employee, the employer has a large number of unauthorized workers;<sup>23</sup>
- whether the government provided specific or general information to employer about an employee's immigration status and the employer's response to the information;<sup>24</sup>
- whether the employer has a record of ignoring "no match" letters;
- The manner in which the employer inspected the I-9 documents, including review of back and front of the card or comparing the document against government-provided samples.<sup>25</sup>

An employer should not assume that it complies with IRCA simply because they have completed I-9s on all employees or because the employer is certain that the entire workforce is work authorized. An employer that has a perfect Form I-9 completed on each employee but who continues to employ somebody after knowing that the employee lacks work authorization has violated IRCA's prohibition of hiring and employing an unauthorized worker.<sup>26</sup> If an employer has no Form I-9 for any employee, but all employees are authorized to work, the employer has violated IRCA's paperwork obligations.<sup>27</sup>

#### **SOCIAL SECURITY ADMINISTRATION NO-MATCH LETTERS**

The SSA routinely sends letters to employers when the information reported to the IRS on form W-4 does not match the records of the SSA.<sup>28</sup> The aggressive effort of DHS to integrate its enforcement actions with SSA's practice of sending out these letters should make employers aware that it cannot ignore the letters without consequence. These letters are commonly referred to as "no match" letters. The SSA has traditionally stayed out of the immigration enforcement business. Instead, the duty of the SSA is to credit individual workers with their social security earnings. The "no-match" letters themselves state that it is not a statement about the employee's immigration status specifically warn employers not to take adverse action against

the subject employee solely because SSA issued the letter.<sup>29</sup> Special Counsel for INS, DHS, and for the Department of Justice Immigration Related Unfair Employment Practices office, concur that a “no-match” letter is not in and of itself sufficient grounds to inquire into, or draw conclusions about, an employee’s immigration status.<sup>30</sup> All agencies acknowledge that a mismatch can be caused by a number of things such as a name change, a clerical error in the recording or transmission of information, or by intentional misrepresentation.<sup>31</sup> Nevertheless, DHS now seeks to insert a notice to be mailed out with the “no-match” letters advising employers that the agency will consider the employer’s failure to follow particular steps in response to a “no match” letter as evidence that the employer had constructive knowledge that it continues to employ individuals who are not work authorized.

#### *DOES A FAILURE TO RESPOND AS DHS ASKS EQUAL CONSTRUCTIVE KNOWLEDGE?*

Under a rule DHS promulgated in August 2007, an employer’s failure to respond to a “no-match” letter could become the deciding factor for an ICE agent or judge who is deciding whether or not the employer had actual or constructive knowledge of hiring or continuing to employ unauthorized workers.<sup>32</sup> By trying to integrate its own enforcement efforts into the non-immigration related operations of an independent federal agency, ICE broadcasts a significant change in the importance it places upon these letters. If this rule goes into effect, the agency will have a new investigation tool which employers must respect.

The initial DHS rule, and the proposed amendments to the rule released in March 2008 require an employer to resolve the no-match situation within 90 days. The procedures include (1) the employer must check its internal records to determine if the document numbers and types were correctly captured and reported to the IRS, (2) if no employer error is detected, asking the employee about the discrepancy, (3) requesting the employee seek correction at the SSA office if the discrepancy is not explained, (4) completing a new Form I-9 with the new or corrected information presented by the employee, (5) using an SSA electronic verification system to verify the corrected or new information presented all within 90 days. The rule requires the employer to terminate the employee if the above steps are not completed and the issue resolved within 90 days.<sup>33</sup> If the employer follows these procedures, ICE would not consider the fact that the employer received a “no-match” letter as evidence that the employer knowingly hired or employed unauthorized workers. Although the rule suggests that it gives employers who follow it “safe-harbor” from an ICE determination that the employer knowingly employed unauthorized workers, it is only “safe harbor” from considering the fact that a “no-match” letter was received as evidence of constructive knowledge. ICE will still consider anything else it deems relevant when deciding if the employer knowingly hired or continued to employ unauthorized workers.

This attempt to bootstrap immigration enforcement efforts onto SSA data correction procedures caused a firestorm of criticism from labor, business, immigrants and privacy rights advocates who ultimately sued to enjoin implementation of the rule.<sup>34</sup>

Opponents of the rule explained how “no-match” letters can be generated by events that have nothing to do with immigration status. In addition, critics explained that following the rule’s procedures may expose employers to liability for “document abuse” under IRCA because it requires re-verification of employees at some time other than the date of hire and upon re-verification. Employers were also worried about claims of document abuse. The rule prohibits the employer from accepting any document called into question by a “no-match” letter upon re-verification. However, IRCA threatens penalties for document abuse upon an employer who dictates which documents listed on Form I-9 it will accept to prove an individual’s identity and work authorization. To many employers, following the proposed rule is a Faustian bargain.

#### *THE RULE CHALLENGED*

The lawsuit filed to enjoin implementation of the original rule, *AFL-CIO, et al. v. Chertoff, et al.* raises six claims:

- The rule contravenes the governing statute by unlawfully expanding the definition of “knowing” established by IRCA, undermining Congressional intent to require employment verification only at the time of hire, and not exempting employees hired before November 8, 1986.
- The rule was promulgated in violation of the Regulatory Flexibility Act because the agency did not analyze the economic impact of complying with the rule upon employers;
- The rule is arbitrary and capricious in violation of the Administrative Procedures Act because DHS does not have access to SSA data and cannot possibly know how many people who received the letters are not work authorized;
- The rule is an *ultra vires* agency action on the part of the DHS and the SSA;
- The rule imposes unreasonably strict deadlines and will cause workers to be fired without due process of law;
- The rule impermissibly imposes immigration law obligations upon employees and employers.<sup>35</sup>

On October 10, 2007, the Court issued a preliminary injunction finding that the Plaintiffs raised serious questions as to the first issues listed above and the balance of hardships tipped in the favor of the Plaintiffs.<sup>36</sup> The order was quickly followed by DHS’s motion to stay proceedings so it could engage in new rulemaking to address the Court’s concerns.<sup>37</sup> On March 21, 2008, DHS released a supplement to the rule that resolved the first two claims listed above but the remaining issues are still unresolved.<sup>38</sup> Whether or not the proposed rule is permitted to go into effect, employers are forewarned that failure to consistently respond to “no-match” letters will be considered evidence in support of a finding that the employer may have knowingly continued to employ individuals who are not work-authorized.

Employers should have a carefully crafted procedure in place to ensure consistent and prompt response to “no-match” letters that does not violate IRCA’s document abuse or anti-discrimination provisions. Electronic verification systems touted by the

government as a tool for employers to ensure that its employees are work-authorized may verify work authorization, but not a worker's identity. For example, the Swift Company had been using an electronic verification program called Basic Pilot since 1997, yet 1,300 of its employees were arrested for lacking work authorization when the company was raided in December of 2007.<sup>39</sup> In addition, the most commonly used government electronic verification system, "e-verify" (formerly called Basic Pilot), can only be applied to individuals who are hired *after* the date the employer adopts the verification system and has other significant limitations that our beyond the scope of this article.

### RECENT ICE ENFORCEMENT ACTIVITY

In recent years, ICE has made worksite enforcement a priority across the country reflected in increased budget allocations, a marked increase in high-profile worksite enforcement actions and a greater number of criminal charges being lodged against employers and employees arising out a worksite enforcement action. The enforcement environment can be felt in Idaho and neighboring states. In April 2008, the first worksite enforcement action to take place in at least five years was carried out at Specialty Wood Inc. in Homedale, Idaho.<sup>40</sup> In February 2008, ICE raided Universal Industrial Sale Inc. in Lindon Utah. In June of 2007, ICE carried out a raid of Fresh Del Monte Produce in Portland, Oregon. On December 6, 2007, ICE conducted a raid of multiple Swift Company facilities in six states.<sup>41</sup>

The Boise ICE enforcement efforts also include I-9 audits, seeking out individuals with prior removal orders, identifying those convicted of criminal offenses and ad-hoc interrogations. In September of 2007, ICE officers went door to door to homes in Blaine County looking for people with old removal/deportation orders and criminal convictions.<sup>42</sup> In November 2007, ICE stopped and questioned people at bus stops and supermarkets in Twin Falls and other Eastern Idaho cities.<sup>43</sup> For some time, clients have reported being stopped and asked for their immigration documents at road side "check-points" in Jerome County.<sup>44</sup> Aside from the Blaine County actions which were directed at particular people at particular addresses, ICE officers simply stopped and question individuals they suspect of being in the country unlawfully during other operations.<sup>45</sup> The basis of the officer's "reasonable suspicion" to stop individuals and subsequently detain them nearly always raises Fourth Amendment, Fifth Amendment and privacy concerns.<sup>46</sup>

The increase in enforcement actions in Idaho follows a national trend. On a national level, the number of criminal charges against business owners, executives and employees arising out of worksite enforcement actions has exploded.<sup>47</sup> Between 2005 and 2006, the number of criminal arrests arising out of worksite enforcement actions increased by over 400% and administrative arrests increased by over 200%.<sup>48</sup> The number of criminal and administrative arrests increased between 2006 and 2007, but at much smaller margins.<sup>49</sup> The most common criminal charges against employers arising out of worksite enforcement actions is for harboring individuals present without government authorization.<sup>50</sup> Universal Industrial Sales, Inc. of Utah and its human resources director were each indicted on charges of harboring undocumented individuals.<sup>51</sup> The human resources

director was also indicted for encouraging or inducing undocumented individuals to remain in the United States unlawfully.<sup>52</sup> Last year the ICE budget was increased by 6.3% to \$3.9 billion and included earmarks specifically for worksite enforcement.<sup>53</sup>

Employers are well advised to evaluate their immigration related employment practices and policies in light of this charged enforcement environment.

### EMPLOYER PROTECTION PLAN BASICS

An assessment of your client's readiness to withstand an I-9 audit or immigration raid and its potential exposure to civil sanctions or criminal charges begins with a single question: What tangible evidence can your business client point to as evidence of its efforts to comply with IRCA?

The success of an worksite enforcement action success depends in large part upon the element of surprise. Employers that regularly evaluate their immigration-related employment practices will be in the best position to note errors, correct inappropriate practices and build a record of good faith compliance with IRCA through business policies and demonstrated enforcement of immigration-related polices. Thoughtful policies will also minimize exposure to lawsuits for engaging in document abuse or national origin discriminating against certain types of employees. At a minimum, an employer with a significant non-citizen workforce should:

1. Conduct regular training on Form I-9 completion, document inspection, re-verification and purging for all Human Resources staff.
2. Conduct audits of Form I-9s for accuracy and timeliness on a regular basis so errors are promptly identified and corrected.
3. Maintain employee Form I-9 file separate from employee personnel file and an up-to-date current and terminated employee list for every employee for disclosure to ICE in the event of a Form I-9 audit.
4. Create a tickle system to alert Human Resources when an employee's work authorization will expire.
5. Create a written policy for responding to Social Security "no-match" letters which includes standard letters for notifying employees of the "no-match" situation with non-accusatory language that establishes a reasonable timeline for resolving the discrepancy.
6. Apply all policies uniformly and consistently.
7. Ensure that employer handbooks state the employer's commitment to follow all immigration-related employment laws and enforce policies consistent with that commitment.
8. Ensure that sub-contractors and temporary staffing agencies warrant that they comply with all immigration-related employment laws in its hiring and staffing. Consider adding an indemnification clause to all contracts with such entities and or requiring the subcontractor submit to an independent audit of their immigration-related employment practices.
9. Carefully investigate the immigration-employment practices of any business your client seeks to acquire

to ensure that your client is buying a host of immigration-related problems.

10. Create an action plan for responding to an I-9 audit and for responding to a work site enforcement action.

## CONCLUSION

While there is no single action that an employer can do to guarantee that it will not be found to have knowingly hired or continued to employ a person who is not work authorized, by adopting the recommendations within this article, a business can build a defense to any alleged violation of IRCA. By implementing procedures to reduce the likelihood of Form I-9 errors and instituting a systematic response to “no-match” letters, an employer is in a better position to respond to enforcement actions and survive any allegation of wrong-doing. A solid employer immigration compliance plan will enable an employer to immediately respond to a Form I-9 audit or worksite enforcement action with confidence and will ensure that the employer has a concrete record of its good faith efforts to comply with all immigration-related employment laws, and minimize the risk of ICE enforcement actions and penalties. It is never too late for the employer to create and implement a compliance program. However, a company that finds and corrects its immigration-related employment problems now will have a stronger defensive position against any government action and may avoid an agency enforcement action all together.

## ABOUT THE AUTHORS



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## ENDNOTES

- <sup>1</sup> The Immigration Reform and Control Act of 1986 (“IRCA”), Pub. L. No. 99-603 Stat. 100-3359 (codified in various sections of the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*)
- <sup>2</sup> The Immigration and Customs Enforcement (ICE) bureau is part of the Department of Homeland Security (DHS). The Homeland Security Act of 2002 (HSA), Pub. L. 107-296, 116 Stat. 2135 (Nov. 25, 2002) abolished the Immigration and Nationality Service (INS) and transferred its responsibilities to three bureaus within the Department of Homeland Security (DHS). The Immigration and Customs Enforcement (ICE) bureau is responsible for the detention and removal of non-citi-

zens including worksite enforcement actions. See 8 U.S.C. § 1103.

- <sup>3</sup> ICE Annual Report 2007, 2006, 2005 available at [www.ice.gov/doclib/about/ice07ar\\_final.pdf](http://www.ice.gov/doclib/about/ice07ar_final.pdf) (last visited 3/21/08).

<sup>4</sup> *Id.*

- <sup>5</sup> The increased focus on worksite enforcement including increased budget allocations, arrests and civil penalties recovered are reported in the 2007 ICE Annual Report available at [www.ice.gov/doclib/about/ice07ar\\_final.pdf](http://www.ice.gov/doclib/about/ice07ar_final.pdf) (last visited 3/21/08). In a news release discussing the February 2007 raid in Utah, ICE warns businesses that “...ICE is targeting unscrupulous employers by seeking criminal prosecutions and forfeiture of businesses’ assets.” News Release, ICE Investigation leads to multiple arrests at Lindon, Utah, business,” Feb. 7, 2008 available at <http://www.ice.gov/pi/news/newsreleases> (last visited 3/19/08).

<sup>6</sup> 8 U.S.C. § 1324a(b), INA § 274A (verification requirement; requiring employers accept documents that appear “reasonably genuine” and appear to “relate to” the person presenting them); INA § 274B(a); 8 U.S.C. § 1324b (national origin/citizenship status discrimination and document abuse prohibited).

- <sup>7</sup> INA § 274A(e), 8 U.S.C. § 1324a(e) (complaints can be filed by individuals, entities or a DHS official for alleged employment of persons who are not work-authorized); INA § 274B(b), 8 U.S.C. § 1324b(b) (any person or a DHS official who claims they were adversely affected by an unfair immigration-related employment practice can file charge). An alternate remedy for national origin discrimination may be available under Title VII of the Civil Rights Act of 1964, though no overlapping claims are permitted. *Id.*

<sup>8</sup> “Safe-Harbor Procedures for Employers Who Receive a No-Match Letter.” See 72 Fed. Reg. 45611 (Aug. 15, 2007).

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

- <sup>10</sup> *AFL-CIO, et al. v. Chertoff, et al.* No. 07-CV-4472 CRB (N.D. Cal. 2007), Order, Granting Preliminary Injunction, Oct. 10, 2007, Dkt. #135; Order Granting Defendant’s Motion to Stay Proceeding Pending New Rulemaking, Nov. 11, 2007, Dkt. #142.

<sup>11</sup> “Safe-Harbor Procedures for Employers Who Receive a No-Match Letter: Clarification; Initial Regulatory Flexibility Analysis.” 73 Fed. Reg. 15944 (March 26, 2008).

- <sup>12</sup> The status of the new rule is still pending as of the date of this article. The National Immigration Law Center ([www.nilc.org](http://www.nilc.org)) and the National Employment Law Project’s Immigrant Worker Project ([www.nelp.org](http://www.nelp.org)) have all been closely following this issue and are likely to have current information on the subject.

<sup>13</sup> INA § 274A (b)(1), 8 U.S.C. § 1324a(b), 8 C.F.R. § 274a.2.

- <sup>14</sup> For example, the new Form I-9 form issued in 2007 eliminates five list A documents, adds one list A document, and does not require the employee provide a social security number in Section 1 unless the employee participates in an electronic verification system. The new form must be in use by employers on December 27, 2007. Fact Sheet, “USCIS Revises Employment Eligibility Verification Form I-9,” Nov. 7, 2007. Available at [www.uscis.gov](http://www.uscis.gov) (last visited 11/2007).

<sup>15</sup> Form I-9 (6/5/07), page 2.

<sup>16</sup> The DHS HANDBOOK FOR EMPLOYERS, INSTRUCTIONS FOR COMPLETING FORM I-9, Doc. M-274 (Revised 11/1/07) provides examples of I-9 documents and accompanying guidance. Available at [www.uscis.gov/files/nativedocuments/m-274.pdf](http://www.uscis.gov/files/nativedocuments/m-274.pdf) (last visited 3/16/08). Note, the HANDBOOK incorrectly identifies old specimen of the I-551 as the “latest version” of the document. *Id.*, p. 33. The current I-551 includes a full frontal photo rather than the 3/4 photo displayed.

<sup>17</sup> The authors use “unauthorized” to describe an individual who does not have permission to work in the United States. There are classes of non-citizens who are lawfully in the United States, but either are ineligible for or do not apply for work authorization for which they are eligible. Therefore, it is inaccurate to refer to people without work authorization as “undocumented.” Similarly, the authors reject the reference to any person as “illegal.” Our laws penalize individuals for taking certain acts, not persons. See note 6, regarding penalties. .

<sup>18</sup> INA § 274B(a)(6); 8 U.S.C. § 1324b.

<sup>19</sup> The regulation also states that “knowledge” cannot be inferred by an employee’s foreign appearance or accent. 8 C.F.R. § 1274a.1.

<sup>20</sup> E.g., *New El Rey Sausage Co., v. US INS*, 922 F.2d 1153 (9th Cir. 1991), *Mester Manufacturing Co., v. INS*, 879 F.2d 561 (9th Cir. 1989), Letter, Virtue, General Counsel, INS (April 12, 1999); Letter, Martin, General Counsel, INS (1998)(discussing totality of circumstances test).

<sup>21</sup> A completed I-9 form on each employee provides a good faith defense to allegation of knowingly hiring individuals who lack work authorization that can be lost by after-acquired knowledge of lack of work authorization. INA § 274A(a)(3), 8 U.S.C. § 1324a(a)(3). See, *New El Rey Sausage Co.*, 922 F.2d at 1158 n. 7, 8, *Mester Manufacturing Co.*, 879 F.2d at 569 n. 11.

<sup>22</sup> A technical failure to complete I-9s accurately can be excused if the employer can show it made a good faith efforts to comply with the I-9 obligations. INA § 274A(b)(6), 8 U.S.C. § 1324a. See, *New El Rey Sausage Co.*, 922 F.2d at 1158 (incorrect I-9 documents places employer on notice of lack of work authorization), *Mester Manufacturing Co.*, 879 F.2d at 568 (accepting inadequate documentation relevant to finding constructive knowledge).

<sup>23</sup> The lack of an I-9 for each employee will independently subject an employer to liability for violation of IRCA’s paperwork violations even if all employees are work-authorized. Paperwork obligations are independent from the prohibition from continuing to employ a person who the employer knows is not work authorized. INA § 274A(a), 8 USC 1324a(a)(prohibiting hiring or continuing employment for a person who lacks work authorization), INA § 274A(b), 8 USC 1324a(b)(requiring review of documents upon hire).

<sup>24</sup> *New El Rey Sausage Co.*, 922 F.2d at 1158, *Mester Manufacturing Co.*, 879 F.2d at 566-7.

<sup>25</sup> *Collins Foods International, Inc. v. U.S. I.N.S.*, 948 F.2d 549 (9th Cir. 1991).

<sup>26</sup> See n. 21.

<sup>27</sup> See n. 23. It is also important to remember that all employers must have a completed Form I-9 on all employees. Businesses

routinely overlook its Form I-9 obligations with regard to upper management and executives.

<sup>28</sup> “Overview of Social Security No-Match Letters Process,” Social Security On-Line, <http://www.socialsecurity.gov/legislation/nomatch2.htm> (last visited 3/15/08).

<sup>29</sup> A good collection of information on “no-match” letters, including samples of the different versions is available from the National Immigration Law Center [http://www.nilc.org/immsemplymnt/SSA-NM\\_Toolkit/index.htm#emplyr](http://www.nilc.org/immsemplymnt/SSA-NM_Toolkit/index.htm#emplyr) (last visited 3/19/08).

<sup>30</sup> Letter, Sanchez, Special Counsel Unfair Employment Practices, U.S. Dept. of Justice, (Sept. 16, 2005); Letter, Brown, Deputy Associate General Counsel, DHS, (March 16, 2005); Letter, Virtue, General Counsel, INS (April 12, 1999); Letter, Martin, General Counsel, INS (1998).

<sup>31</sup> *Id.*

<sup>32</sup> See, “Safe-Harbor Procedures for Employers Who Receive a No-Match Letter.” See 72 Fed. Reg. 45611 (Aug. 15, 2007).

<sup>33</sup> *Id.*

<sup>34</sup> *AFL-CIO, et al. v. Chertoff, et al.* No. 07-CV-4472 CRB (N.D. Cal. 2007)

<sup>35</sup> *Id.*, Complaint. Immigration enforcement agencies have never been able to get free access to an individual’s private tax data in the hands of the SSA because it is protected by the Internal Revenue Code’s non-disclosure provisions and cannot be released to DHS without a court order, subpoena or grand jury subpoena. 26 U.S.C. § 2603. See, ICE Safe-Harbor, FAQ’s, #28, posted at: <http://faq.ice.gov> (last visited 3/19/08).

<sup>36</sup> *Id.* Order Granting Preliminary Injunction, Oct. 10, 2007, Dkt. #135.

<sup>37</sup> *Id.* Defendant’s Motion to Stay Proceeding Pending New Rulemaking, Nov. 11, 2007, Dkt. #142, Order Granting Defendant’s Motion, Nov. 11, 2007, Dkt. #143.

<sup>38</sup> “Safe Harbor Procedures for Employers Who Receive a No-Match Letter: Clarification; Initial Regulatory Flexibility Analysis,” 73 Fed. Reg. 15944 (March 26, 2008)(comment period through April 25, 2008).

<sup>39</sup> See, Brown, Stephen A. “Comment: Illegal Immigrants in the Workplace: Why Electronic Verification Benefits Employers,” 8 N.C. J.L. & Tech. 349 (2007)(citing interviews with Swift). The Basic Pilot program is now called “E-Verify.” Information about “E-Verify” is available at [www.uscs.gov](http://www.uscs.gov) (last visited April 5, 2008).

<sup>40</sup> “ICE Arrests 13 illegal aliens unlawfully employed at Idaho Company.” <http://www.ice.gov/pi/news/newsreleases/articles/080403boise.htm> (last visited 2/4/08). Author Andrade acted as the volunteer attorney coordinator for the arrested individuals and notes that one of those arrested was in fact work-authorized. The employer had been undergoing an I-9 audit prior to the operation. Although the government brought criminal charges against the vast majority of employees, the government did not bring criminal charges against the employer as of the date this article was written.

<sup>41</sup> See, “ICE Releases Final Arrest Numbers for Utah Worksite Enforcement Operation: Criminal Charges May be Forthcoming for Some Illegal Aliens” ICE News Release (2/8/08) available at <http://www.ice.gov/pi/news/newsreleases/> (last viewed 3/16/08);

“Immigration Raid: 30 People May Face Criminal Charges, The Daily Herlod (2/9/08).

<sup>42</sup> See, “Immigration Raids Spark Anger in Sun Valley Area: One Family of Legal Residents Say they were Terrorized: Agents Arrest 21 People,” Idaho Statesman (9/21/07), “Immigration Agents Seize 20 Suspected Illegal Aliens: ACLU Investigation to see if Civil Rights were Violated,” Idaho Mountain Express (9/19/07). The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Division C of Pub.L. 104-208, 110 Stat. 3009-546 (Sept. 30, 1996) replaced the terms “deportation” and “exclusion” with the term “removal.”

<sup>43</sup> “Targeting illegal immigrants: Immigration sweeps fuel debate about racial profiling,” Times-News (12/2/07), “Border agents confirm raids in Magic Valley Hispanic leaders to rally against action at 7:00 p.m.,” Times-News (11/14/07).

<sup>44</sup> In the last five years, one author has talked with multiple individuals or family members of individuals who report being stopped and questioned about their immigration status at a roadway checkpoint.

<sup>45</sup> Because many of the warrants arose out of deportation/removal cases that were resolved several years ago, the address was no longer valid. Upon execution of the warrant, ICE officers sometimes found, and arrested, the new residents of the home. One author interviewed eight people arrested under these circumstances.

<sup>46</sup> The constitutional issues related to raids are beyond the scope of this article, but is the subject of many scholarly articles. E.g., Johnson, Kevin R., “The Case Against Race Profiling in Immigration Enforcement,” Washington University Law

Quarterly, Vol. 78, January 2001; Alanda, Raquel E., “Of Katz and Aliens: Privacy Expectations and the Immigration Raids” UC Davis Law Review Vol. 41 No. 3 2008, UNLV William S. Boyd School of Law Legal Studies Research Paper No. 07-02 (12/7/07). All articles available at Social Science Research Network [www.srn.com](http://www.srn.com) (last visited 3/15/08).

<sup>47</sup> News Release, ICE Worksite Enforcement available at <http://www.ice.gov/pi/investigations/worksite/newsreleases.htm> (last visited 3/20/08).

<sup>48</sup> In 2005 ICE made 176 criminal arrests and 1,667 administrative arrests. In 2006, ICE made 716 criminal arrests and 3,667 administrative arrests. In 2007, ICE made 863 criminal arrests and 4,077 administrative arrests ICE Annual Report 2007, 2006, 2005 available at [www.ice.gov/doclib/about/ice07ar\\_final.pdf](http://www.ice.gov/doclib/about/ice07ar_final.pdf) (last visited 3/21/08).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> ICE News Release, “ICE releases final arrest numbers for Utah worksite enforcement operation,” Feb. 8, 2008 available at <http://www.ice.gov/pi/news/newsreleases/>(last visited 3/21/08).

<sup>52</sup> *Id.*

<sup>53</sup> “ICE Budget Gains 6.3 Percent in FY 06 DHS Spending Bill,” Inside ICE: Vol. 2, No. 23 (newsletter) available at [http://www.ice.gov/pi/news/insideice/articles/InsideICE\\_111405\\_Web3.htm](http://www.ice.gov/pi/news/insideice/articles/InsideICE_111405_Web3.htm) (last visited 3/15/08)



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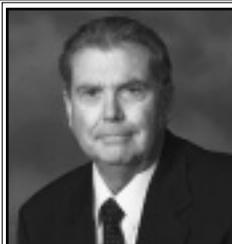
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# IMMIGRATION CONSEQUENCES IN STATE COURTS: IDAHO CRIMINAL RULE 11'S NEW PROTECTION FOR NON-CITIZEN DEFENDANTS

SARA BEARCE

*Idaho Court of Appeals*

In 2007, the Idaho Supreme Court joined twenty-six other states and the District of Columbia in requiring that all criminal defendants be advised, prior to entering a guilty plea or admitting facts during a plea colloquy, that if he or she is not a citizen of the United States, there could be immigration consequences resulting from the guilty plea.<sup>1</sup> Prior to the amendment, courts were not required to discuss immigration consequences with defendants before accepting a guilty plea because they are considered collateral consequences. Collateral consequences are categorized in either of two ways: first, by the fact that they are dependent on a subsequent and independent proceeding before they are imposed,<sup>2</sup> or second, because they are uniquely within a defendant's control to prevent.<sup>3</sup> Immigration consequences are imposed by the Department of Homeland Security, which is an independent federal agency wholly unrelated to our state courts. Even though the consequences attach nearly automatically and are something the non-citizen defendant has no control over, they are still considered collateral. Furthermore, state trial courts have no influence over, or responsibility towards, the Department of Homeland Security, and no control over whether immigration consequences will be imposed as a result of the criminal conviction. Therefore they are not constitutionally obligated to advise defendants of the possible consequences. This situation persists in many states despite the fact that the risk of deportation may be of far greater importance to non-citizen defendants than the possibility of incarceration.<sup>4</sup>

An advisory regarding immigration consequences is important to non-citizens because the crimes for which such consequences can be imposed are not limited to the obvious violent and heinous crimes. Under the Immigration and Nationality Act (INA), any crime which exhibits moral turpitude, is an aggravated felony, or is otherwise specifically listed in the code can result in deportation, denial of admission or legal status, or the denial of an application for citizenship.<sup>5</sup>

Unfortunately, while some of the classifications in the INA are fairly straight-forward and relatively easy to understand, the concepts of an "aggravated felony" or a "crime of moral turpitude" are not. A crime may be an aggravated felony even if it was not a felony in the state of conviction, or was not charged with aggravating enhancements, so long as the punishment imposed included a sentence of incarceration for 365 days or more. Even if the majority of jail time was suspended, it is the total time imposed that counts for immigration purposes. Moreover, crimes of moral turpitude are those crimes that are "so far contrary to the moral law, as interpreted by the general moral sense of the community that the offender is brought to public disgrace, is no longer generally respected, or is deprived of social recognition by good living persons."<sup>6</sup> While this definition could conceivably encompass every crime committed, a person is only rendered removable if the crime was committed within five years of

entry into the United States and the punishment imposed included at least one year of imprisonment.<sup>7</sup> Alternatively, a person convicted of two independent crimes of moral turpitude is also rendered removable, regardless of when they were committed or whether imprisonment was part of the sentence.<sup>8</sup> Although some crimes have been specifically declared to be crimes of moral turpitude, the name of the crime for which a person is convicted is not ultimately controlling; it is the elements of the crime of conviction that determine whether the person is removable.

Also specifically defined in the INA, for immigration purposes only, is the meaning of the word conviction. Not only does it include a formal judgment of conviction, it includes the expunged conviction, withheld judgment, plea of *nolo contendere*, and mere admission of facts sufficient to support a finding of guilt even if no conviction is entered.<sup>9</sup> This means that a non-citizen defendant could be declared removable for acts admitted to during a plea colloquy, but which he was not pleading guilty to in court, and with which he may not even have been charged.

Furthermore, the INA makes a distinction between being declared deportable, which means the person can be forcibly removed from this country, and being rendered inadmissible, which can prevent a person from entering or re-entering the country or prevent him or her from adjusting status.<sup>10</sup> There is a great degree of overlap between the crimes that will result in deportation and the crimes that impose inadmissibility. And if all these categories are not already confusing enough, it must be remembered that Congress has the authority to amend the INA at any time to include more crimes and broader definitions. These laws can be made retroactive;<sup>11</sup> thus, a "safe" guilty plea entered today could render defendants removable next week after a new law takes effect.

There are circumstances in which a defendant who is otherwise deportable or inadmissible may be granted leniency and have the criminal grounds waived so that the person can either stay in this country or adjust status. However, these opportunities are difficult to come by and not easily granted, and turn on whether having the person in this country is not "contrary to the national welfare, safety, or security,"<sup>12</sup> or if the person is of good moral character. The majority of criminal convictions are not waivable in deportation proceedings.<sup>13</sup>

It is in this context that the need for an amendment to Idaho Criminal Rule 11 became apparent. Of the twenty-seven other jurisdictions that have an advisory requirement for non-citizen defendants, the majority are given prior to the entry of a guilty plea and the defendant's understanding of the advisory is ascertained by the court.<sup>14</sup> Many of these states require that the advisory be given to all defendants, so as to avoid inquiry into a particular defendant's citizenship status.

The impetus to change Rule 11 to advise non-citizens began in 2006 with the Idaho Criminal Rules Advisory Committee, chaired by Justice Roger Burdick. At a meeting in January, the Committee discussed the general nature of advisories given by other states, and formed a subcommittee to explore the issue further and develop proposed language. The project was influenced by a recognition of the life-altering consequences non-citizens encounter and the need to insure that someone in the criminal process notifies defendants that immigration consequences are likely. Negative immigration consequences can tear families apart and affect everyone, from undocumented aliens to legal permanent residents and U.S. citizens. When faced with complicated immigration laws, and the detailed factual recitation required for a guilty plea, defendants need a basic knowledge of the consequences they face when pleading guilty. The American Bar Association recognizes the importance of immigration consequences and encourages defense counsel to address these concerns with clients when deciding whether to plead guilty,<sup>15</sup> although not all state courts hold that an attorney is ineffective if he or she does not discuss such consequences with a client.

Members of the subcommittee in Idaho addressed several concerns from both sides of the aisle prior to developing proposed language for the amendment. The first hurdle was deciding where to draw the line for advising defendants about collateral consequences. There are a multitude of consequences defendants might want to know about, but the court can only devote time to a few. Also discussed and adopted during this process were advisories to persons required to register as sex offenders, and those waiving the right to appeal as part of the plea process.

Judge James Cawthon, chair of the subcommittee, advocated for the adoption of an advisory based on his experience practicing law in Texas prior to moving to Idaho. While there he saw the effect of the pre-guilty-plea immigration advisory first hand. Many defendants were wholly unaware of the implications of their plea until being informed by the court.

However, such an advisory creates other issues as well. Some subcommittee members were concerned that the added advisory would require defense attorneys to develop an in-depth knowledge of immigration law or face ineffective assistance of counsel claims for giving their clients incorrect advice. While not all states would find such assistance ineffective, it is still an open question in Idaho. Similarly, some states hold that a guilty plea entered without knowledge of the immigration consequences is not knowingly and voluntarily made. Therefore the subcommittee had to decide what effect, if any, the failure to give the advisory would have on a guilty plea in Idaho. This required a balance of the desire of non-citizen defendants to withdraw a plea that was not based on full information of the immigration consequences, with the needs of the community and judicial system to have finality and not over-burden the appellate process. These concerns were addressed in the proposed language the subcommittee sent to the Committee based upon the placement of the advisory, as well as the general language used.

The full Committee met a second time in 2006 to discuss the language proposed by the subcommittee, and also heard from two immigration attorneys in Idaho regarding why this change was so critical. Due to the importance of the issue and the com-

plicated nature of immigration law, the Committee received a substantial amount of information from outside sources. Professor Monica Schurtman, from the University of Idaho, College of Law, and attorney Maria Andrade were instrumental in educating the Committee on the effects of immigration consequences on defendants' lives, as well as the nuances of the advisories given in other states. Several students from the Immigration Clinic at the U of I joined forces with the Idaho State Appellate Public Defender's Office to create proposed amendments for the Committee to consider as well.

Fortunately for the over 55,000 non-citizen residents of Idaho,<sup>16</sup> the Committee recommended an amendment to Rule 11 to the Supreme Court that included an immigration advisory for non-citizens. In early 2007 the Supreme Court made further amendments, and unanimously adopted a new version of Rule 11, which went into effect last July. The rule now reads as follows:

**(d) Other advisories upon acceptance of plea.** The district judge<sup>17</sup> shall, prior to entry of a guilty plea or the making of factual admissions during a plea colloquy, instruct on the following:

(1) The court shall inform all defendants that if the defendant is not a citizen of the United States, the entry of a plea or making of factual admissions could have consequences of deportation or removal, inability to obtain legal status in the United States, or denial of an application for United States citizenship.

Like many other states that have adopted similar advisories, Idaho uses general language that does not impose a duty on defense attorneys to become experts in immigration law and does not force them into a position of giving advice to their clients that may not be accurate. At the same time, it provides an opportunity for defense counsel to have a conversation with a client about the immigration implications of pleading guilty and then to consult with an immigration lawyer if further information is needed for an informed guilty plea. The rule as amended does not specify what will happen if a judge omits to mention the immigration consequences to a defendant prior to accepting a guilty plea; thus, it is a decision left to our appellate courts if raised in the future.

Idaho is home to non-citizens from Europe, Asia, Africa, Latin America, and Australia.<sup>18</sup> While we hope these newcomers will be able to avoid entanglements with our criminal justice system, those that do find themselves facing a judge and the decision to plead guilty to a crime will know that there may be immigration consequences to their criminal conduct, and they can plead accordingly.

#### **ABOUT THE AUTHOR**

*Sara Bearce is a law clerk for Chief Judge Sergio Gutierrez at the Idaho Court of Appeals. She would like to thank all of the members of the Idaho Criminal Rules Advisory Committee who shared their insight into the rule amendment process. Special thanks go to Monica Schurtman, who provided guidance all the way from Spain. Sara received her J.D., magna cum laude, from*

the University of Idaho, College of Law, and her B.A., *summa cum laude*, from the University of New Mexico.

#### ENDNOTES

- <sup>1</sup> Idaho R. Crim. P. 11(d)(1).
- <sup>2</sup> Cuthrell v. Dir. Patuxent Inst., 475 F.2d 1364, 1366 (4th Cir. 1973).
- <sup>3</sup> Carter v. State, 116 Idaho 468, 468-69, 776 P.2d 830, 830-31 (Ct. App. 1989).
- <sup>4</sup> Michel v. United States, 507 F.2d 461, 465 (2d Cir. 1974).
- <sup>5</sup> Specific categories include crimes of domestic violence, multiple criminal convictions, controlled substance violations, firearms offenses, and crimes related to security offenses. See 8 U.S.C. § 1227(a)(2)(A) – (E).
- <sup>6</sup> Matter of D., 1 I. & N. Dec. 190, 194 (B.I.A. 1942).
- <sup>7</sup> 8 U.S.C. § 1227(a)(2)(A)(i).
- <sup>8</sup> 8 U.S.C. § 1227(a)(2)(A)(ii).
- <sup>9</sup> 8 U.S.C. § 1101(a)(48)(A)(i).
- <sup>10</sup> Adjustment of status can occur in a variety of ways. The most well-known example is when a person becomes a United States citizen after a period as a legal permanent resident (or green-card holder).
- <sup>11</sup> Galvan v. Press, 347 U.S. 522, 531 (1954) (declaring that the prohibition against ex post facto laws “has no application to deportation”).
- <sup>12</sup> 8 U.S.C. § 1182(h)(1)(A)(ii).
- <sup>13</sup> 8 U.S.C. § 1229b(b)(1)(C).
- <sup>14</sup> California Penal Code § 1016.5(a); Florida R. Crim. P. 3.172(c)(8); Georgia Code Ann. § 17-7-93(c); Maryland R. Crim. P. 4-242(e); Massachusetts Gen. Laws ch. 278, § 29D; New Mexico R. Dist. Ct. R. Crim. P. 5-303(F)(5); Ohio Rev. Code Ann. § 2943.031(A); Oregon Rev. Stat. § 135.385(2)(d); Rhode Island Gen. Laws § 12-12-22(b); Texas Code Crim. P. Ann. art. 26.13(a)(4).
- <sup>15</sup> ABA Standards for Criminal Justice § 14-3.2(f) cmt.
- <sup>16</sup> Migration Policy Institute, Fact Sheet on the Foreign Born: Idaho, <http://www.migrationinformation.org/DataHub/acscensus.cfm> (click on Idaho in the map to see the facts and figures) (last visited Mar. 12, 2008).
- <sup>17</sup> Although the rule refers to district judges, it applies to judges of both the district and magistrate courts.
- <sup>18</sup> Migration Policy Institute, note 16.

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*University of Idaho*

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3.0 Ethics CLE Credits

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## COURT INFORMATION

### OFFICIAL NOTICE SUPREME COURT OF IDAHO

**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 A. Lansing  
Darrel R. Perry

#### 4th AMENDED Regular Spring Terms for 2008

**Boise**.....January 8 and 10  
**Boise**.....February 5, 7, and 12  
**Pocatello (Eastern Idaho)**.....March 10 and 11 ~~and 12~~  
**Northern Idaho (Moscow)**.....April 14, 15, 16, 17 ~~and 18~~  
**Boise**..... May 6, 8, 13, and 15  
**Boise**.....June 10, 12, 17, and 19

By Order of the Court  
Stephen W. Kenyon, Clerk

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

### IDAHO COURT OF APPEALS ORAL ARGUMENT DATES

As of May 19, 2008

#### Tuesday, June 17, 2008 – BOISE

9:00 a.m. Chapman Enterprises, Inc.  
v. Haught, et al #34043/34159  
10:30 a.m. Nguyen v. Bui, et al #34647

#### Thursday, June 19, 2008 – BOISE

9:00 a.m. State v. Durham #34082  
10:30 a.m. McKay v. State #34271

### IDAHO SUPREME COURT ORAL ARGUMENT DATES

As of May 19, 2008

#### Monday, June 2, 2008 - BOISE

8:50 a.m. Taylor v. Maile #33781  
10:00 a.m. Euclid Avenue Trust  
v. City of Boise #33974  
11:10 a.m. Terrazas v. Blaine County #34106

#### Wednesday, June 4, 2008 – BOISE

8:50 a.m. Lee v. Nickerson #33896  
10:00 a.m. MBNA v. Fouche #34054/34055  
11:10 a.m. Federated Publications  
v. Idaho Business Review #34343

#### Friday, June 6, 2008 - BOISE

8:50 a.m. Black Labrador Investing  
v. Kuna City Council #34513  
10:00 a.m. Deluna v. State Farm #34202  
11:10 a.m. Jason C. Smith v. State #33254

#### Monday, June 9, 2008 - BOISE

8:50 a.m. Arel v. T & L Enterprises, Inc. #34562  
10:00 a.m. State v. Thomas  
(Petition for Review) #34741  
11:10 a.m. Galli v. N. A. Dagerstrom, Inc. #33999

#### Wednesday, June 11, 2008 - BOISE

8:50 a.m. Cantwell v. City of Boise #34283  
10:00 a.m. Todd v. Sullivan Construction #33954  
11:10 a.m. State v. Harold E. Grist, Jr. #33652

### OFFICIAL NOTICE COURT OF APPEALS OF IDAHO

**Chief Judge**

Sergio A. Gutierrez

**Judges**

Karen L. Lansing

Darrel R. Perry

#### 4th Amended Regular Spring Terms for 2008

#### 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

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**Idaho Supreme Court and Court of Appeals**  
**NEW CASES ON APPEAL PENDING DECISION**  
(UPDATE 05/01/08)

**CIVIL APPEALS**

**ATTORNEY FEES AND COSTS**

1. Whether the court erred by assigning a collective award of attorney fees and costs against multiple defendants without analyzing the factors in Rule 54(e)(3) as relative to each defendant and each claim independently.

Nguyen v. Bui  
S.Ct. No. 34647  
Court of Appeals

2. Whether Action Collection Services is entitled to attorney fees under I.C. § 12-120(5) for its post-judgment collection services.

Action Collection Services v. Bigham  
S.Ct. No. 34743  
Court of Appeals

**DIVORCE, CUSTODY, AND SUPPORT**

1. Did the trial court err in failing to consider the parties' partial performance of their oral premarital agreement as a compelling reason to order an unequal distribution of the community property?

Dunagan v. Dunagan  
S.Ct. No. 34516  
Supreme Court

**LAND USE**

1. Whether the Blaine County Ketchum Housing Authority involvement in the project violates its enabling authority under Title 31, Chapter 42, because less than 50% of the project is made up of low income housing.

Johnson v. Blaine County  
S.Ct. No. 34524  
Supreme Court

2. Whether the court erred in vacating and remanding the Board's Final Order amending the Comprehensive Plan pursuant to I.C. § 67-5279.

Neighbors for Responsible Growth v.  
Powderhorn  
S.Ct. No. 34592  
Supreme Court

**LICENSE SUSPENSION**

1. Whether the Department and district court erred in finding Wheeler failed to show cause why his license should not be suspended for failure to pay child support as required by I.C. § 7-1410(1)(c).

Department of Health & Welfare v. Wheeler  
S.Ct. No. 34426  
Supreme Court

**POST-CONVICTION RELIEF**

1. Did Montoya receive adequate notice of the reasons for summary dismissal of his post-conviction relief?

Montoya v. State  
S.Ct. No. 34165  
Court of Appeals

2. Whether the court erred in denying Rojas' petition for post-conviction relief in which he alleged ineffective assistance of counsel.

Rojas v. State  
S.Ct. No. 33760  
Court of Appeals

3. Did the court err in concluding Howard voluntarily entered his guilty plea and in denying his petition for post-conviction relief?

Howard v. State  
S.Ct. No. 34423  
Court of Appeals

4. Whether the district court erred by summarily dismissing the petition for post-conviction relief, finding that there were no genuine issues of material fact.

Sheahan v. State  
S.Ct. No. 34180  
Court of Appeals

5. Did the court err in dismissing Martinez's petition for post-conviction relief and in finding he failed to prove his guilty plea was entered involuntarily or that his counsel provided ineffective assistance?

Martinez v. State  
S.Ct. No. 34441  
Court of Appeals

**PROPERTY**

1. Whether the district court erred in determining there was a boundary by agreement based solely on presumptions with no evidence of dispute or uncertainty about the east or west owners' property boundary or evidence of an agreement that the fence was to be the property boundary.

Teton Peaks Investment Co. v. Ohme  
S.Ct. No. 34642  
Supreme Court

**QUIET TITLE**

1. Did the court abuse its discretion in ordering Harvey to provide and pay for a survey of Little Gold Creek as part of its entry of judgment in favor of the Reads?

Read v. Harvey  
S.Ct. No. 34336  
Supreme Court

**SUBSTANTIVE LAW**

1. Whether the trial court committed error in ruling Kurtz was a medical technologist or other health care provider subject to I.C. § 6-1012 such that her liability was to be determined by a statutory standard of care rather than common law negligence principles.

Jones v.  
B & B Autotransfusion Services, Inc.  
S.Ct. No. 33956  
Supreme Court

2. Whether the magistrate erred in prohibiting the Department from recovering medical expenses paid by Medicaid from that part of a settlement that represents or can reasonably be construed as representing medical expenses.

Dept. of Health & Welfare v. Hudelson  
S.Ct. No. 34495  
Supreme Court

3. Whether I.C. § 6-320 requires the tenant to serve a three day notice to the landlord before filing a claim for affirmative relief against the agent of the landlord and/or a counterclaim against a collection assignee, when the claim asserted is within the purview of Title 6, Chapter 3, Idaho Code.

Action Collection Services, Inc. v. Haught  
S.Ct. No. 34043/34159  
Court of Appeals

4. Whether the court erred in failing to find and conclude that Farrell was barred from recovery because he rendered architectural services in Idaho in violation of then existing I.C. § 54-301 et. seq. in that a portion of such services were rendered before Farrell was licensed to practice architecture in Idaho and Farrell retained CDS to render services on Farrell's behalf in violation of statutes.

Farrell v. Whiteman  
S.Ct. No. 34383  
Supreme Court

5. Whether a person using a rest area during a break on a workday at adjacent property is deemed a recreational user within the meaning of I.C. § 36-1604.

Ewing v.  
Idaho Transportation Department  
S.Ct. No. 34541  
Supreme Court

6. Did the magistrate court err in taking judicial notice of the existence and content of the Caldwell City curfew ordinance?

Doe v. State  
S.Ct. No. 34766  
Court of Appeals

**SUMMARY JUDGMENT**

1. Did the court err in awarding summary judgment in favor of Jameson and Davidson Trust Company?

Spencer v. Jameson  
S.Ct. No. 34517  
Supreme Court

2. Whether KEC's asserted right to recovery under Idaho's High Voltage Act is properly barred by a broad application of the doctrine of res judicata.

Kootenai Electric Cooperative, Inc. v. The  
Lamar Corporation  
S.Ct. No. 33807  
Supreme Court

3. Did the court err in granting summary judgment to Haroldsen after Bauchman-Kingston Partnership LP filed a suit for specific performance of a real estate purchase and sale agreement?

Bauchman-Kingston Partnership v. Haroldsen  
S.Ct. No. 34551  
Supreme Court

### CRIMINAL APPEALS DUE PROCESS

1. Did the state violate Gross' right to a fair trial by committing multiple acts of prosecutorial misconduct during the trial and closing argument?

State v. Gross  
S.Ct. No. 32614  
Court of Appeals

### INSTRUCTIONS

1. Did the court err in instructing the jury and in refusing Merrick's proposed instruction on disregarding certain testimony?

State v. Merrick  
S.Ct. No. 32085  
Court of Appeals

### PLEAS

1. Did the district court breach the plea agreement by imposing a five year term of probation because the court had bound itself to impose a four year term of probation?

State v. Armstrong  
S.Ct. No. 33868  
Court of Appeals

2. Did the court err in concluding it did not have jurisdiction to consider Wegner's motion to withdraw his guilty plea?

Wegner v. State  
S.Ct. No. 33960  
Court of Appeals

3. Did the court abuse its discretion by denying Miser's motion to withdraw his guilty plea?

State v. Miser  
S.Ct. No. 33988  
Court of Appeals

### PROCEDURE

1. Did the district court abuse its discretion by not sua sponte disqualifying itself from presiding over Ewings' perjury trial because the court was prejudiced against Ewing?

State v. Ewing  
S.Ct. No. 32007  
Court of Appeals

### SEARCH AND SEIZURE – SUPPRESSION OF EVIDENCE

1. Did the court err in finding the search of Chapman that yielded cocaine was a lawful search incident to arrest?

State v. Chapman  
S.Ct. No. 33859  
Court of Appeals

2. Did the court err in denying Springs' motion to suppress and in finding officers had reasonable, articulable suspicion that he was engaged in criminal activity that justified stopping him as he emerged from an apartment complex?

State v. Springs  
S.Ct. No. 34113  
Court of Appeals

3. Did the court err in denying the motion to suppress and in finding that exigent circumstances existed to justify the initial entry into the house?

State v. Reynolds  
S.Ct. No. 34399  
Court of Appeals

4. Did the district court err in denying Witmor's motion to suppress statements made to officers?

State v. Witmor  
S.Ct. No. 34322  
Court of Appeals

5. Did the court err in denying Fledderjohann's motion to suppress and in finding her mother and brother, who co-owned the house where she lived, had authority to give consent for officers to enter?

State v. Fledderjohann  
S.Ct. No. 32099  
Court of Appeals

### SENTENCE REVIEW

1. Did the court err in denying the motion for credit for time served?

State v. Balderama  
S.Ct. No. 34507  
Court of Appeals

2. Did the district court abuse its discretion when it failed to sua sponte order a psychological evaluation of Durham pursuant to I.C.R. 32?

State v. Durham  
S.Ct. No. 34082  
Court of Appeals

3. Did the court abuse its discretion by imposing a sentence that was unreasonable and excessive upon the facts of the case?

State v. Correia  
S.Ct. No. 33860  
Court of Appeals

4. Did the court err by sentencing Bautista-Aguayo him at the same time as his co-defendant, who was not a United States citizen?

State v. Bautista-Aguayo  
S.Ct. No. 34290  
Court of Appeals

### SUBSTANTIVE LAW

1. Did the court err by releasing a copy of Nielson's mental health records from the IDOC to his standby trial counsel during a short time period during which Nielson had elected to proceed pro se?

State v. Nielson  
S.Ct. No. 33823  
Court of Appeal

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

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## 6.1 CHALLENGE

### FOURTH DISTRICT HONORS AWARD RECIPIENTS AT LAW DAY RECEPTION

Two Boise law firms were named winners of the **2008 6.1 Challenge** at the Fourth District's Law Day reception held on April 30 at the Rose Room in Downtown Boise. The Challenge recognizes contributions made by attorneys under Rule 6.1 of the Idaho Rules of Professional Conduct, which outlines the duty of attorneys to perform voluntary pro bono work.

This year's winners are **Holland & Hart LLP**, in the "large firm" category, and **Perkins Coie, LLP**, which this year was recognized as the winning "small" firm. Firm sizes are measured by attorneys in Idaho's Fourth Judicial District. Widespread participation among firm lawyers in a particular office was a key factor for both firms' recognition.

At **Holland & Hart**, 28 of the firm's lawyers spent 770 hours on pro bono work over the last year. Among those singled out were **Pam Howland** and **Dean Arnold** for their work for the guardian of local man who was bilked out of \$150,000 he thought he was investing in a cutting-edge water purification project. A four-day trial concluded with a 70-page opinion giving the guardian a complete victory.

At **Perkins Coie**, 11 of 13 attorneys, or 84 percent of the firm's (Boise) members, contributed 640 hours of pro bono work. This included working for child victims in protective cases, for a nonprofit corporation that assists Mexican refugees, and for other indigent immigrants. **Perkins Coie** was also recognized in the **2007 6.1 Challenge** for its outstanding commitment

to pro bono service.

The judges for the **6.1 Challenge** this year included Mayor Dave Bieter, Idaho Statesman Executive Editor and Vice President Vicki Gowler, U.S. District Chief Judge B. Lynn Winmill, Idaho 4th District Judge Ronald Wilper and Idaho Supreme Court Justice Roger Burdick, collectively known as the "Blue Ribbon Panel."

This year's **6.1 Challenge** entries from law offices throughout the Fourth Judicial District forced the judges on the "Blue Ribbon Panel" to use some ingenuity to recognize the many commendable pro bono contributions of local attorneys. In addition to naming the two law firms as the 2008 winners, the Panel recognized the individual contributions of the "Top Ten" lawyers whose efforts under Rule 6.1 were most outstanding. The list includes **Erik Stidham, Victoria Loegering, Whitney Welsh, Teresa Baker, Timothy Tyree, Randall Schmitz, Shaina Jensen, Christopher Pooser, Pam Howland, and Dean Arnold.**

Established in 1957 by the American Bar Association, Law Day is a national day set aside to celebrate the nation's legal system. This year's theme was "The Rule of Law." Justice Burdick spoke of the importance of pro bono service to the Law Day theme: "Rule 6.1 provides access to the process of law for those who can't pay," Burdick said. "Without access, there is no rule of law."



*Carol Craighill, IVLP; Lorna Jorgensen, Ada County Prosecutor's Office, Mary Hobson, IVLP are members of the 6.1 Challenge Law Day Committee. (not pictured, Maureen Ryan)*



*Bob Faucher, Holland & Hart, LLP, Boise, accepts the Large Firm Category. 6.1 Challenge Award.*



*6.1 Challenge Judges: Justice Roger Burdick and Vicki Gowler, Idaho Statesman Executive Editor.*



*Bob Maynard, Perkins Coie, LLP, Boise accepts the Small Firm 6.1 Challenge Award for the 84% participation of the 13 attorneys in their office.*

## LAW DAY ACTIVITIES

*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.*

### FOURTH DISTRICT LAW DAY ACTIVITIES

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 Tetrick**. 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).

**Walt Sinclair**, Stoel Rives, Boise was this year's recipient of the **Liberty Bell Award**. This award acknowledges outstanding community service by an individual in the local community.

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.

The **Ask-a-Lawyer** Call-in Program was, once again, hugely successful. This year almost 400 calls were received. This program gives the general public an opportunity to call in to speak to an attorney about a variety of legal matters. Attorneys and callers use only first names to remain anonymous, and all calls are limited to 15 minutes. Stoel Rives, Boise donated one of their conference rooms for the attorneys to use while taking and replying to calls.

The 6.1 Challenge creates a friendly challenge among attorneys and firms. This year's winners were **Holland & Hart LLP**, in the "large firm" category, and **Perkins Coie, LLP**, which this year was recognized as the winning "small" firm. Both firms had widespread participation in their offices.

Fourth District would like to thank the many volunteers for the hours they spent working to make Law Day a success for the attorneys and for the community. We will run an ad with all of your names in the August issue of The Advocate.



*Perkins Coie, LLP received a 6.1 Challenge Award at the Law Day Reception. (left to right) Bob Faucher, Perkins Coie, and Allen Derr, Allen Derr Law Office.*



*Walt Sinclair (center), Stoel Rives, received the Fourth District's 2008 Liberty Bell Award. Extending congratulations were members of the Law Day Committee: (left to right) Ruth and Jason Prince, Samia McCall, and Nicole Hancock.*



*The Fourth District Law Day Reception was held at the Rose Room in Boise. Left to right, Tom McCabe and Scott Muir.*



*Fourth District Bar Association Law Day Committee members (left to right) Noah Hillen, Nicole Owens, and Chris Christensen take a few minutes to visit during the Law Day reception.*



*Fourth District Bar Association President Paula Kluksdal, talks with John Kluksdal and Ralph Blount before the awards ceremony.*

## LAW DAY ACTIVITIES FOURTH DISTRICT BAR ASSOCIATION

### RULE OF LAW FORUM

The Rule of Law Forum is part of the World Justice Program (WJP), a program engendered by the American Bar Association (ABA) and its current president, William H. Neukom of Seattle. The WJP's working definition of "rule of law" is: (a) a system of self-government in which all persons including the government, are accountable under the law; (b) a system based on fair, published, broadly understood and stable laws; (c) a fair, robust and accessible legal process in which rights and responsibilities based in law are enforced; and (d) diverse, competent and independent lawyers and judges.

Larry Hunter, Chair of the Bar's Public Information Committee (PIC) and the Idaho delegate to the ABA House of Delegates, presented an idea to the PIC to sponsor a forum on the Rule of Law that would be held in conjunction with Fourth District Law Day activities. Keynote speakers would anchor a moderated multi-disciplinary panel that would discuss the benefits and impact of the Rule of Law in their professions. The PIC

contacted speakers, reserved rooms, worked on media releases, received extensive support from the ISB/ILF CLE department, and developed a program.

As Chair, Larry Hunter did the introductions along with the opening and closing comments. The keynote speakers were The Hon. Stephen S. Trott, U.S. Court of Appeals, Ninth Circuit and Representative Maxine Bell, Jerome, Chair of Appropriations and Co-chair of the Joint Finance and Appropriations Committee. Newal Squyres was the panel moderator. The speakers were Stephanie Westermeier, General Counsel, St. Al's Regional Medical Center; Ross Burkhart, Ph.D., Chair Political Science Department, Boise State University; Sheldon Barker, P.E., Vice-president and NW Water Group Manager, CH2M Hill; and Samuel Cotterell, Controller, Boise, Inc. and current Chair of the National Association of State Boards of Accountancy (NASBA).



Pictured L. to R. - Sheldon Barker, CH2M Hill; Rep. Maxine Bell, R-Jerome; Hon. Stephen S. Trott, U.S. Court of Appeals Ninth Circuit; Stephanie Westermeier, St. Al's RMC; Newal Squyres, Holland & Hart, LLP; Ross Burkhart Ph.D., BSU; Larry Hunter, Moffat Thomas Barrett, Rock & Fields; and Sam Cotterell, Boise Inc.

### SIXTH DISTRICT LAW DAY ACTIVITIES

Attorneys from the Sixth District Bar Association visited about 40 classes at Pocatello, Highland, and Century High Schools on May 1-2 to speak to students about the law. Most of the attorneys spoke on the Rule of Law, the recommended topic for Law Day this year.

Several teachers requested special topics such as Native American and Women's Rights, Minority and Civil Rights,

Drugs and Drinking and the Law, Business Law, Students' Rights, and Major Court Cases. Some classes also used the Turning 18 magazine for discussion.

*Many students came and told me that they really enjoyed Law Day. The attorneys and Judges had a lot of great information to share. All three teachers really appreciated having guest speakers too. Thanks again. Let me know what I can do for next year.*

*Thank you for all your efforts getting speakers for Law Day. We had a wonderful response and the kids loved it. Please pass along to the attorneys how much we appreciate their time. It is truly rare for teachers to be so pleased with giving up their instructional time. I hope your attorneys enjoyed it as much as we did.*

**The Sixth District Bar Association would like to thank the following attorneys who took time to participate in this program.**

## SIXTH DISTRICT LAW DAY VOLUNTEERS

Dave Bagley  
 Doug Balfour  
 Mitch Brown  
 TJ Budge  
 Tom Clark  
 Cleve Colson  
 Rich Diehl  
 Michael Fica  
 Tim French  
 David Gardner  
 John Goodell  
 Kent Higgins

Mary Huneycutt  
 Angela Jensen  
 Ian Johnson  
 Craig Jorgensen  
 Matt Kinghorn  
 Kelly Kumm  
 Naomi Leiserowitz  
 Nathan LongCherese McLain  
 Michelle Mallard  
 Dave Martinez  
 Doug Merkley  
 Steve Muhonen

Craig Parrish  
 JaNiece Price  
 Scott Randolph  
 Steve Richert  
 Tony Sasser  
 Jan Skeen  
 Judge Randy Smith  
 Jim Spinner  
 Jared Steadman  
 Carole Wesenberg  
 Nick Vieth

**Teacher from Highland High:** *Hello. I also wanted to thank you. All 3 of the lawyers I had in my room were really good. My students enjoyed their presentations. I would love to make this an annual event in my room.*

**Teacher at Highland High:** *Thank You for setting all of the Law Day presentations up. All of my speakers were great. They did an excellent job. It was well worth it. Thank You!.*

## IVLP Special Thanks



*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.*

Each month, IVLP relies on a group of willing volunteers to assist eligible clients in preparing their pro se family law cases for filing with county magistrate courts. On April 29, volunteer law clerks from the Idaho Supreme Court and the Idaho Court of Appeals and other attorneys volunteered to help those who were going through this process. Though not directly connected with Law Day Activities, one of the volunteers in this IVLP Family Law Pro Se Clinic, Chris Christensen, participated “non-stop” in Law Day Radio talk show, Ask-A-Lawyer, Attorney in the Classroom, and the 6.1 Challenge Award ceremonies on the following day.



*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 Spenner, and Avery Epperly. Volunteers not pictured, Camilla Hartley and Sunciaray Price.*

Members of the Introduction to Paralegal Studies class, Boise State University volunteer regularly with the Idaho Volunteer Lawyers Program (IVLP) assisting staff interviewing and screening clients for free legal services.

**IN MEMORIAM**

**JOE (GAR) GARDINER HACKNEY  
1949-2008**

**Joe Gardiner Hackney** (Gar) was a defense attorney and world champion triathlete who lived in Boise, Idaho. He died May 7, with his wife, Carol, by his side. He was 59 years old, and lived each day to its fullest despite a seven-year battle with prostate cancer.

In 1995 and 1996, Gar was a world champion triathlete in his age group. He was National Champion in 1994, 1996, 1999 and 2000 and was USAT Masters Triathlete of the Year in 1999. He discovered his athletic talent after graduating law school. Before settling into his legal career, he focused his early energy on music, playing bass with various Idaho bands including the "Disciples" and "Spud Russet." He began swimming regularly in law school as a way to relieve stress, and grew to love endurance exercise and competition. His first experience with triathlon was the swim leg of the 1983 Idaho Triathlon. He competed in his first full triathlon in 1984.

Gar was born in Burley Idaho, March 23, 1949, the second of three siblings. Gar's sister Marcia died tragically at the age of 16, and Gar was deeply impressed by his father's ability to confront and forgive the one responsible. Understanding the power of forgiveness remained a driving force in Gar's life. It underscored his desire to represent people in trouble and open his home to friends in need. His mother, Beverly, danced professionally with the San Francisco Ballet and continued to teach ballet once her professional career ended. Gar met one of his mother's students, Carol, when they attended classes at the University of Idaho. They later married.

Gar received his undergraduate degree in psychology in 1972 from the University of Utah. He then attended University of Idaho Law School where he received his J.D. in 1976.

His legal career began with the Ada County Public Defender's office. In 1980; he formed a partnership with John Lynn and Larry Scott. He was able to achieve such high levels of success because of his ability to maintain balance and focus in all aspects of his life.

Gar loved – and was loved by Carol, and together they lived fully and in the moment, following their bliss. He leaves behind many friends and family who will miss his common sense, wit, and story-telling (even during movies). Most of all he will be missed for his generosity to those in need ... no questions asked, just stories told.

**—ON THE MOVE—**

**Blair Clark**, after 37 years at the same firm, is leaving to set up shop as the Law Offices of D. Blair Clark, PLLC at 1513 Tyrell Lane, Suite 130, Boise, ID 83706, (208) 475-2050 fax (208) 475-2055 email will be dbc@dbclarklaw.com.

**David M. Swartley** has joined the firm of Eberle, Berlin, Kading, Turnbow & McKlveen as an associate. He received his B.A. in history from the University of Puget Sound in 1992, and his J.D. in 1995 from the University of Idaho. His practice focuses on all areas of civil litigation with an emphasis on insurance defense, insurance coverage disputes, product liability, business torts and landlord-tenant disputes. He can be reached at dswartley@eberle.com (208) 344-8535.

**—RECOGNITION—**

**Linda Pall**, Law Offices of L. Pall, Moscow, was honored by the City of Moscow on April 25, when Mayor Nancy Chaney named the day after her. Linda has served as Chair of the Latah County Democrats and is active in the League of Women voters. During her years on City Council she served as Council President, Vice President, Chair of the Public Works/Finance Committee and Chair of the Administrative Committee. She is a charter member of the Latah County Human rights Task Force from which she received the Rosa Parks Human Rights Leader Award in 2003. She has also been instrumental in the annual Finding the Center Human Rights Conference. She can be reached at Law Office of L. Pall, PO Box 8656, Moscow, ID 83843, (208) 882-7255.

Boise lawyer **David Nevin** and his partner, **Scott McKay** will be among eleven lawyers who will defend detainees facing military trials at Guantanamo Bay in Cuba. Several years ago, David and Scott leveled a successful defense of Sami al-Hussayen, a University of Idaho graduate student, who was charged with aiding terrorists. They can be reached at Nevin, Benjamin, McKay & Bartlett, LLP, Boise, ID 83701, (208) 343-1000.

On Saturday, April 19, the **Honorable Larry M. Boyle**, Chief Magistrate Judge for the United States District Court for the District of Idaho, was honored as one of two outstanding Pocatello High School alumni by the Pocatello Heritage Foundation. Judge Boyle was the 21st recipient of this prestigious award which recognizes outstanding professional and personal achievements. He can be reached at U.S. District Court, 550 W. Fort, Boise, ID 83724, (208) 334-9010.

**Adam Richins**, Stoel Rives, has been named to the board of the United States Green Building Council Idaho Chapter. The council establishes and oversees the Leadership in Energy and Environmental Design (LEED) Green Building Rating System. As a member of the Idaho Chapter board, Richins will assist in promoting sustainable building practices through the chapter's training sessions, demonstration projects, and outreach to the development community. He can be reached at Stoel Rives LLP, 101 S. Capitol Blvd., Ste. 1900, Boise, ID 83702, (208) 389-9000.

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**4/2/08 - 5/1/08**

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# University of Idaho

College of Law

**The University of Idaho College of Law congratulates these graduates on passing the February Idaho State Bar Exam:**

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- Phu Hung Chau**
- Kendra S. Dean**
- Steven Fisher**
- Brady James Hall**
- John Ryan Jameson**
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# Upcoming Summer ISB/ILF CLE Courses

## JUNE 2008

### JUNE 6

*The Refugee Guardianship Project*  
Sponsored by the ISB Diversity Section  
and the Idaho Volunteer Lawyers Program  
8:30 - 10:30 a.m.  
The Law Center  
2.0 CLE Credits RAC Approved

### JUNE 19-20

*Knowing and Persuading the Idaho Juror*  
Sponsored by the Litigation Section  
Sun Valley Resort  
1:00 - 5:00 p.m.  
7.25 CLE Credits of which .5 is Ethics  
Lodging Reservations call 1-800-786-8259

### JUNE 26

*Ethics*  
Sponsored by the Young Lawyers Section  
Law Center or View Webcast  
12:00 - 1:00 p.m.  
1.0 CLE Credit

### JUNE 27

*Candor Toward the Tribunal: A View from  
the Bench*  
Sponsored by the Professionalism and  
Ethics Section  
Law Center or View Webcast  
8:30 - 9:30 a.m.  
1.0 Ethics Credit RAC Approved

## JULY 2008

### JULY 10

*Managing Technology in a Law Firm-An  
Interactive Ethics CLE*  
Sponsored by the Idaho Law Foundation  
Boise Centre on the Grove  
8:30 - 11:45 a.m.  
3.0 Ethics CLE Credits

## SAVE THE DATE

### SEPTEMBER 11-13

*Annual Estate Planning Update*  
Sponsored by the Taxation, Probate and  
Trust Section  
Sun Valley Resort

### OCTOBER 1

*Idaho Practical Skills Training*  
Sponsored by the Idaho Law Foundation  
5.0 CLE Credits pending  
The Grove Hotel  
Boise, Idaho

### 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

### NOVEMBER 7

*Litigation Ethics*  
Sponsored by the Litigation Section  
Idaho Falls

### NOVEMBER 14

*Litigation Ethics*  
Sponsored by the Litigation Section  
Boise

### NOVEMBER 21

*Annual Headline News-Year in Review*  
Sponsored by the Idaho Law Foundation  
Coeur d'Alene

### DECEMBER 5

*Annual Headline News-Year in Review*  
Sponsored by the Idaho Law Foundation  
Idaho Falls

### DECEMBER 12

*Annual Headline News-Year in Review*  
Sponsored by the Idaho Law Foundation  
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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, October 9th in Sun Valley.

Sean Carter is well known as the writer of a 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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**COMING EVENTS  
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*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](http://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)*

**JUNE**

- 2 *The Advocate* Deadline
- 6 CLE: The Refugee Guardianship Project
- 6-7 Jackrabbit Bar Meeting, Snowbird, UT
- 13 July 2008 Re-Exam Deadline
- 13 Fourth District Bar Spring Fling Golf Tournament, Warm Springs Golf Course, Boise
- 18 *The Advocate* EAB Committee Meeting
- 19-20 CLE: Knowing and Persuading the Idaho Juror, Sun Valley
- 26 CLE: Ethics
- 27 CLE: Candor Toward the Tribunal: A View from the Bench

**JULY**

- 1 *The Advocate* Deadline
- 4 **Independence Day, Law Center Closed**
- 10 CLE: Managing Technology in a Law Firm-An Interactive Ethics, Boise Centre on the Grove
- 10-11 Idaho State Bar July Annual Meeting, Boise Center on the Grove, Boise

- 10 Idaho State Bar Board of Commissioners Meeting
- 11 Idaho Law Foundation Board of Directors Meeting
- 16 *The Advocate* EAB Committee Meeting
- 28-30 Idaho State Bar July 2008 Bar Exam, Boise and Moscow

**AUGUST**

- 1 *The Advocate* Deadline
- 20 *The Advocate* EAB Committee Meeting

**SEPTEMBER**

- 1 **Labor Day, Law Center Closed**
- 2 *The Advocate* Deadline
- 11 July Bar Exam Results Released
- 11-13 CLE: Annual Estate Planning Update, Sun Valley Resort
- 17 *The Advocate* EAB Committee Meeting
- 30 Idaho State Bar Admission Ceremony, Boise Center on the Grove

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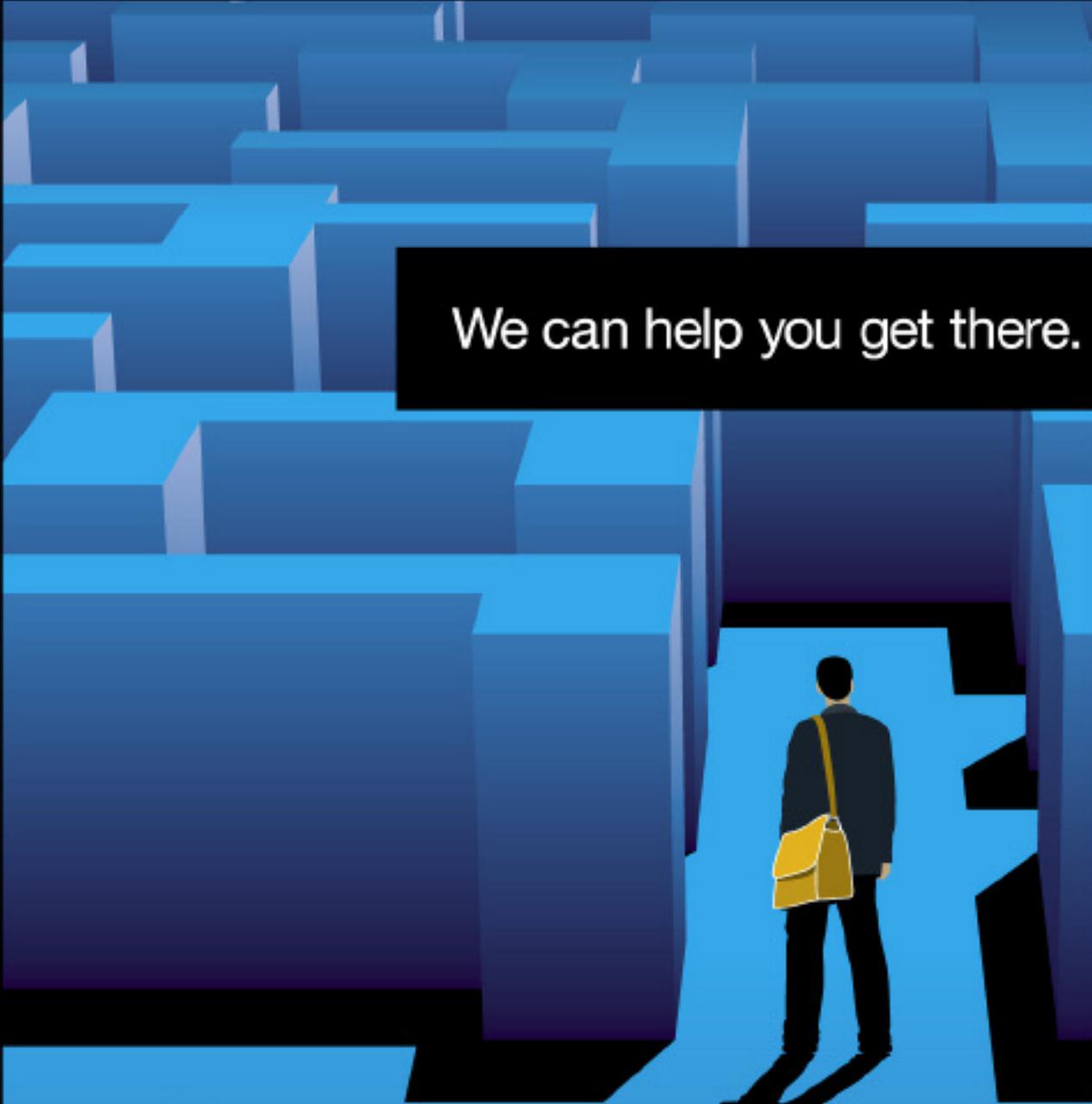




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