



The Advocate

Official Publication of the Idaho State Bar

Volume 51, No. 10

October 2008

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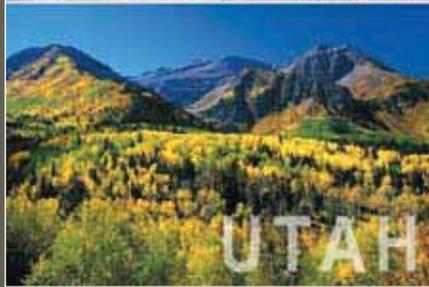
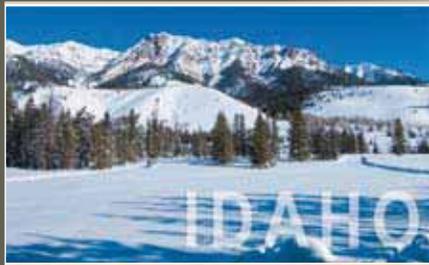
Photograph by Assistant United States Attorney Monte Stiles. Monte is an avid photographer who specializes in wildlife and landscape photography. You can view more of his pictures at www.montestilesphotography.com

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ADVOCATE STAFF

Jeanne S. Barker

Managing Editor

jbarker@isb.idaho.gov

Robert W. Strauser

Advertising Coordinator

Senior Production Editor

rstrauser@isb.idaho.gov

Communications Assistant

Kyme Graziano

kgraziano@isb.idaho.gov

www.idaho.gov/isb

(208) 334-4500



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AND JUSTICE FOR ALL (WHO CAN AFFORD IT)

Dwight E. Baker



Our Pledge of Allegiance, the pledge we learned as first graders, and mindlessly repeat as citizens, speaks symbolically to our flag and our country,

but speaks directly to JUSTICE, FOR ALL—that phrase for which we lawyers are uniquely qualified and responsible to address. No other standard, monetary or other, quantifies our pledge to our fellow citizens, and to ourselves, to provide JUSTICE FOR ALL.

A Lawyer's pledge of JUSTICE FOR ALL goes beyond the stars and stripes. When we were admitted to practice law, each of us made a more specific pledge in the form of the *Attorney's Oath or Affirmation*. This pledge was made as a condition for the privilege and opportunity of holding ourselves out to the public as individuals with the character and fitness to advise and advocate the cause of others in a professional manner. This manner requires each of us to place the system of justice above our economic interests. The obligation of the *Attorney's Oath*, that each of us accepted reads as follows: "I will contribute time and resources to public service, and will never reject, for any consideration personal to myself, the cause of the defenseless or oppressed." The oath also contains the promise to "... abide by the rules of professional conduct adopted by the Idaho Supreme Court."

Rule 6.1 of the Idaho Rules of Professional Conduct (IRPC) addresses *PRO BONO PUBLICO SERVICE*. It states "Every lawyer has a professional responsibility to provide legal services to those unable to pay", and "the lawyer should ... provide a substantial majority of the (50) hours of legal services without fee

or expectation of fee." The section further provides for an aspirational goal of fifty hours of public pro bono service per year. Is each one of us prepared to answer the hypothetical question: "How do I measure up to this goal?" An annual review of IRPC 6.1 and its following commentary would be an excellent exercise for each one of us.

There are over five thousand lawyers, who as members of the Idaho State Bar have made that *Affirmation*. Imagine if each one fulfilled their aspirational goal. ... what could be done with 250,000 hours of donated time, or the financial equivalent of that time, which at \$50 per hour would be \$12,500,000 in order to provide JUSTICE FOR ALL for the citizens of Idaho?

IDAHO VOLUNTEER LAWYERS PROJECT (IVLP)

The framework is in place to implement our oath and affirmation. The Idaho Law Foundation, with substantial assistance from members of the Idaho State Bar, has implemented and continues to operate the Idaho Volunteer Lawyer Program (IVLP). Its principal purpose is to provide a mechanism for the delivery of pro bono services. IVLP provides several important functions. One function is coordination of its services with the Legal Services Corporation. This is a program for poor people that is federally funded and has suffered drastic budget reductions in recent years. These reductions have compromised its ability to address anything but the most demanding need for legal services. IVLP also is prepared to evaluate the financial capacity of those seeking pro bono assistance, as well the types of cases for which legal assistance is requested. IVLP then refers cases to those members of the Bar who have indicated a willingness to direct their pro bono services to IVLP. IVLP also attempts to identify and track the hours of pro bono

assistance provided by members of the Bar. Have you signed up as an Idaho Volunteer Lawyer? The contact persons are Carol Craighill and Mary Hobson, both of whom may be reached at the Idaho State Bar offices, (208) 334-4510.

PRO BONO COMMISSION

A special twenty-member Pro Bono Commission has recently been created jointly by the United States Federal District Court, the Idaho Supreme Court, and the Idaho State Bar. In part, its function will be to draw attention to the need for pro bono services, and our professional obligation to meet that need, through either actual participation or financial support. While the attention created by the Pro Bono Commission is laudatory, the "rubber hits the road" only when one of us heeds the call of the Pro Bono Commission by personally providing pro bono services.

In the fall of 2006, the University of Idaho School of Law implemented a pro bono program under the able direction of Jack McMahon. Participation in the program will be mandatory for the class of 2009. Although it was voluntary last year, one student volunteered in excess of 500 hours of pro bono service, and forty of the 2008 graduating students exceeded the recommended forty hours. These up and coming young lawyers are raising the bar for all of us.

The Fourth District Bar Association has initiated a 6.1 Challenge encouraging friendly competition among law firms, big or small, to participate in pro bono work. Indeed, some Idaho law firms now require pro bono participation to advance within the firm. The history of success of the pro bono programs, including IVLP and CASA, suggests a change in the culture of the Bar with respect to pro bono services is underway. But much is left to be accomplished.

Some may argue it is the responsibility of our government to provide a

mechanism to address the legal needs of the poor. However, most would agree that government, whether local, state or federal, is not particularly efficient or effective in providing such services, which tend to be intensely personal. As citizens, we all join in the Pledge of Allegiance. As citizens and attorneys we should all be aware of and share in the obligation, and necessarily, the expense of providing ... JUSTICE FOR ALL. Judgment as to the appropriate role of our government in providing fundamental legal rights is beyond the scope of this article. Nevertheless, the failure of our governmental institutions to provide financial support for legal needs does not relieve us as lawyers from our personal pledge and professional responsibility to provide ... JUSTICE FOR ALL.

Philosophical protests are meaningless unless each one of us takes the time to meet with the individuals who have been deprived of access to justice. These are individuals who probably do not appreciate the extent to which those needs are being denied. They are probably individuals who are not aware of the legal impediments which block the realization of the full measure of protection of the rule of law. Most importantly, these are individuals who by definition are incapable, for whatever underlying reason, of accessing justice. You and I, as practicing members of the Bar, are the only ones who can personally meet with, become acquainted with, listen to, investigate, develop a plan of action for, and then begin to carry out that plan for these individuals. We can do so by educating ourselves, and then calling, meeting with, writing to, and/or otherwise appealing to those in authority to solicit, beg, explain, request, cajole, shame, demand, argue, and even litigate against the powers that be which deny our pro bono client of that which he or she may not comprehend or understand, and that which we take for granted ... JUSTICE FOR ALL.

WE WANT YOU!

A successful pro bono program involves participation by every attorney admitted to practice. Those not in the active practice or precluded by their employment from providing a legal service may participate financially. One might ask: At what level? What is the aspirational goal of fifty hours

of service per practitioner worth in dollars and cents? Why isn't it worth at least fifty dollars (\$50) per hour?

WHY DON'T MORE OF US PROVIDE PRO BONO SERVICES?

At least three reasons exist: (1) we already write-off bills, and self-servingly describe such work, after the fact, as "pro bono;" (2) it takes too much time to screen the individuals and their cases; and (3) we don't want our time to get committed to a "black hole."

THE RESPONSE

With respect to writing-off our time as fulfillment of our pro bono commitment, Comment (4) to IRPC 6.1, directly specifies that writing off a bill for which compensation was initially expected does not qualify, even if we recognize at the time of performing the service that we may not get paid in full, or that we may have to charge a good deal less than we otherwise would. Rule 6.1(a) is premised on services performed "without fee or expectation of fee ... " Writing off our billings does not cut it.

With respect to the screening problem, upon request, IVLP provides analysis of financial ability and type of legal assistance upon referral by any member of the Bar of a person seeking assistance. We as members of the Bar do not have to screen applicants; the IVLP will do it for us. Then, if we indicate a willingness to serve those individuals, they will refer appropriate cases back to us.

With respect to getting caught in a 'black hole', many courts give consideration and preference to those

providing pro bono services. The newly appointed Pro Bono Commission can do much to change the existing court room culture. They can approve in concept; early tagging or identification of those cases involving pro bono participation, recognizing those who provide pro bono services, giving priority to pro bono cases to the extent possible and appropriate, and encouraging the adoption of procedural rules which provide a framework for making pro bono service as efficient as possible for the lawyers who are willing to contribute their time and ability to pro bono cases.

Shortly we will be attending RoadShows throughout the seven districts. An important function of these meetings is to publicly and professionally recognize those who lead us in providing the pro bono services required by our Oath, and contemplated by our Code of Professional Conduct. But that is not enough. Each of us must play our own role, as our conscience dictates, in removing from our pledge of JUSTICE FOR ALL the not so hidden hurdle that JUSTICE is too often limited only to those who can afford it.

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



NEWSBRIEFS

ATTORNEYS ENCOURAGED TO BEWARE OF SCAM

An international scam, apparently based in Asia, is targeting Nevada attorneys and the money in their trust accounts. The scammers, posing as legitimate corporations, pretend to hire attorneys to collect supposed debts in the U.S. and then forward the money to an Asian country. However, the client and debtor are phony, as is the check which the debtor sends to the attorney. The attorney is then asked to deposit the check into his or her

trust account, deduct any legal fees, and then immediately forward the balance to a bank in Asia.

The money is withdrawn from the Asian bank before the phony check bounces. The "client" then vanishes with funds that actually belong to the attorney's other clients - held in his or her trust account.

Anyone with questions regarding this scam is urged to contact the Office of Bar Counsel at the Nevada State Bar, at 1-800-254-2797.

DISCIPLINE

ROBBY J. PERUCCA (Withheld Suspension/Public Censure)

On September 5, 2008, the Idaho Supreme Court issued a Disciplinary Order suspending Robby J. Perucca from the practice of law for a period of one year, with the entire one year suspension withheld, placing him on Bar Counsel probation and imposing a public censure.

The Idaho Supreme Court found that Mr. Perucca violated I.B.C.R. 505(b) [Criminal Conduct], Idaho Rules of Professional Conduct 8.4(b) [Commission of a Criminal Act] and 8.4(d) [Conduct Prejudicial to the Administration of Justice].

The Idaho Supreme Court's Disciplinary Order followed a stipulated resolution of an Idaho State Bar disciplinary proceeding in which Mr. Perucca admitted that he violated I.B.C.R. 505(b), I.R.P.C. 8.4(b) and I.R.P.C. 8.4(d). The Complaint related to Mr. Perucca's guilty plea to three misdemeanor counts of using a telephone to make lewd suggestions in violation of Idaho Code §18-6710(1)(a). Mr. Perucca's criminal conviction related to telephone and internet communications between Mr. Perucca and investigators with the Jerome County Sheriff's Office conducting an internet investigation posing as a thirteen year old female in an internet chat room, between June and September 2005. Mr. Perucca's communications were primarily sexual in nature and the internet communications were traced to a computer located in the law library at the Idaho Supreme Court building. During that time, Mr. Perucca was employed as a law clerk at the Idaho Supreme Court. The District Judge sentenced Mr. Perucca to 360 days suspended incarceration, fined him, placed him upon a one year supervised probation with conditions and he remains on probation until January 5, 2013.

As a condition of his criminal probation, Mr. Perucca enrolled in and successfully completed a sex offender treatment program for approximately one year. Mr. Perucca continues periodic follow up sessions with a licensed psychologist. That licensed psychologist has recently concluded that in his professional opinion, Mr. Perucca's risk for acting out is low.

The Disciplinary Order provides that Mr. Perucca's suspension is withheld subject to the terms and conditions of his disciplinary probation that expires on January 5, 2013. His disciplinary probation is subject to the terms and conditions of his criminal probation and additional terms of probation, which include that he: commit no crimes; refuse no evidentiary test for drugs/alcohol (BAC); have no contact of any kind with females under the age

of eighteen without a supervisor approved by his probation officer; not purchase, possess or view any pornographic or sexually explicit material of any kind; and not have any internet access without being supervised by a responsible adult approved by his treatment provider and probation officer. In addition, during the period of his disciplinary probation, Mr. Perucca shall remain under the care of his treating physicians and fully comply with any treatment regimen prescribed; submit a letter to Bar Counsel on a quarterly basis, attesting to compliance with the conditions of his probation. If Mr. Perucca admits or is found to have violated any of the conditions of probation, then the entire one year withheld suspension shall be automatically and immediately imposed. If Mr. Perucca admits or is found to have violated any of the Idaho Rules of Professional Conduct for which a public sanction is imposed for any conduct during his period of probation, regardless whether that admission or determination occurs after the expiration of the probationary period, then the entire withheld suspension shall be immediately imposed.

This public censure shall be published in *The Advocate*, *The Idaho Statesman* and *The Idaho Reports*.

The withheld suspension and this public censure do not limit Mr. Perucca's eligibility to practice law.

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

IS IT YOUR MCLE REPORTING YEAR?

No one likes last minute scrambling for MCLE credits. If your MCLE reporting period ends on December 31, 2008 and you need more credits, visit the Idaho State Bar website at www.idaho.gov/isb for lists of upcoming live courses, approved online courses and audio/video disks and tapes available for rent. Do not wait until November or December to get the credits you need. Start working on it now. If you have questions about MCLE compliance, contact the Membership Department at (208) 334-4500 or jhunt@isb.idaho.gov.

JOIN US FOR THE AWARD PRESENTATIONS AT THE RESOLUTION MEETINGS

Diane K. Minnich



DISTRICT BAR
ASSOCIATION
RESOLUTION
MEETINGS

Join the Board of Commissioners, District Bar Officers and your colleagues for the Resolution meeting in your district. The

meetings will include honoring local attorneys receiving the professionalism and pro bono awards, considering resolutions, and news from Commissioners on issues facing the bar.

Resolution packets with specific meeting dates and times and any resolutions for your consideration will be mailed to all active members and judges in mid October.

RESOLUTION MEETINGS SCHEDULE

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

PROFESSIONALISM AWARDS

The professionalism awards are an expression of respect, commendation and appreciation from a recipient's peers. It is one of the highest honors an Idaho lawyer may receive during his or her career. Honorees are lawyers who have a reputation for civility, ability, diligence, integrity, courtesy and cooperation – epitomizing what it means to be an exceptional lawyer. These lawyers bring distinction to the legal profession through their conduct and service.

The 2008 professionalism awards will be given to the following lawyers at the resolution meetings in their districts.

FIRST DISTRICT

Will Herrington
City of Sandpoint, Sandpoint

SECOND DISTRICT

Ron Blewett
Clark & Feeny, Lewiston

THIRD DISTRICT

Carl Hamilton
Hamilton, Michaelson & Hilty, Nampa

FOURTH DISTRICT

Karen Gowland
Boise Paper Holdings, Boise

Mike Gilmore
Office of the Attorney General, Boise

FIFTH DISTRICT

Keith Roark
The Roark Law Firm, Hailey

SIXTH DISTRICT

Randy Budge
Racine, Olson, Nye, Budge & Bailey,
Pocatello

SEVENTH DISTRICT

Steve McGrath
McGrath, Smith & Associates,
Idaho Falls

DENISE O'DONNELL DAY

PRO BONO AWARDS

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

First District: Roland Watson contacted IVLP offering to represent a low-income former client in a modification case. Watson spent 80 hours on this highly contested matter involving custody and child support. The case went through mediation and trial.

Muriel M. Burke was nominated by Jay Q. Sturgell. Ms. Burke accepted a client at the request of the IVLP. The client's ex-husband had petitioned to modify the custody order covering the couple's two children to avoid paying child support. There was domestic violence in the marriage of 26 years and the children were traumatized by their father who was often drunk and who had, at one point, held a gun to heads of his wife and daughter.

Burke obtained restraining order for her client. When the ex-husband violated that order he was incarcerated. The modification case was resolved with Burke's client receiving sole custody.

Second District: Jordan Taylor, currently a 2L student at the University of Idaho College of Law, was one of only two 1L's who went to New Orleans for a public service project over spring break. The trip motivated Taylor to run for President of the Public Interest Law Group (PILG). As the PILG President, Taylor put together the law school's 2008 Alternative Spring Break. He expanded the public interest volunteer opportunities from the New Orleans project to include a project in Washington D.C., and placement of large contingent of volunteers in various Boise sites. The PILG is also working with the J. Rueben Clark Society to co-sponsor the landlord/tenant aid program for UI students, and hopes to create an outreach program on domestic violence issues this fall.

Third District: Kimberly D. Brooks and Jeremy Brown of Kimberly Brooks Law contacted IVLP about representing a Spanish-speaking client to modify a child custody order through the IVLP. Brooks and Brown donated 51 hours of legal services on this case. In addition, Brooks willingly accepts requests from IVLP for pro bono assistance, which is especially appreciated since there is a tremendous demand for this work in Canyon County.

Jeff Howe retired in 2006 from his position as U.S. Trustee for the Idaho Bankruptcy Court and began what the American Bar Association terms a "Second Season of Service". Howe contacted IVLP saying he was maintaining his active status so that he could volunteer. IVLP matched him with Idaho Legal Aid in Caldwell where he provides advice and counsel to landlord/tenant clients.

Fourth District: Cathy Naugle agreed to provide pro bono services through IVLP for a divorce case in Canyon County. This pro bono project involved complicated custody jurisdictional issues with Mexico and allegations of domestic violence. Naugle donated 75 hours on this project. In addition to Naugle, several others volunteered time and resources to bring about a resolution of the case, including social workers and interpreters

with Catholic Charities and a generous court reporter, Lori Pulsifer who volunteered her time for a deposition. In addition, Kathy Railsback, another Boise attorney, provided donated services relating to the deportation problems the client faced. IVLP especially appreciates Boise attorneys like Naugle volunteering for Canyon County cases, where the needs for volunteers always exceed the supply.

Lauren Reynoldson, Spink Butler, LLP, Boise donated 36 hours through IVLP to a contracts case for Habitat for Humanity. Reynoldson's real estate project required negotiating changes to a purchase agreement and preparing the amendments to restrictive covenants as well and advice and counsel on a variety of issues.

Patrick Mahoney, Mahoney Law, PLLC worked with a group of low-income residents of a mobile home park whose homes were threatened when the landlord sold the property on which their homes were located to a developer. Mahoney negotiated the terms of the eviction and obtained a grant from the neighborhood Housing Service to provide the residents with funds for re-location of their homes or families. Mahoney donated over 40 hours of his own time, and paid one of his employees to serve as interpreter for the Spanish speaking residents.

Jim Martin, Moffat Thomas has been nominated by the 4th District CASA program. "Jim has shown exemplary character and commitment to working with CASA and advocating for the best interests of abused and neglected children in Ada County. He is thorough, compassionate and willing to help in any way he can. We constantly receive highly positive feedback from volunteers and other professionals about his level of professionalism, competence and desire to see the lives of children and families changed for the better. We are so thankful for the work

Jim does for our program. We would not be able to be successful in our advocacy without individuals like Jim giving their time and resources."

Judge Larry M. Boyle, U.S. District Court recommended **LaDawn Marsters** for the pro bono award. Ms. Marsters recently spent countless hours working on a prisoner case for the U.S. District court for the District of Idaho. The case culminated in a two-day mediation during which Ms. Marsters impressed the Judge with her professionalism and her ability to keep the best interests of her client in the forefront of her decision-making. Her work led to the successful resolution of a very difficult and challenging civil rights and American Disabilities Act lawsuit that had been pending for several years.

Fifth District: In early 2006, a local chapter of a national organization, "Mad Mothers Against Methamphetamines" approached IVLP for assistance to gain tax exempt status for the organization. This organization seeks to educate people on the effects of methamphetamines through books, fund raisers and pamphlets. **Kathie Levison**, Ketchum, is a newly re-located attorney from Missouri who volunteered to work with the group donated 30 hours of legal services helping this group. Levison has now started volunteering regularly with Alternatives to Violence, giving advice and counsel to victims of domestic violence as an Emeritus Attorney, working under the supervision of Selim Star.

Sixth District: Don Marler, Pocatello, spent 40 hours in a difficult modification case that included domestic violence and sexual assault. Marler's client was constantly harassed and manipulated by her ex-husband who "used custody of the children" to oppress her. Marler negotiated a successful settlement for his client.

The 6th Judicial District CASA/GAL Program submits **Steve Muhonen** as its Volunteer Attorney of the Year. Mr. Muhonen has taken many cases over several years. One case handled by Muhonen spanned over the past six years. While Muhonen had the case two of the children "aged out" of the system and two additional children were born and added to the petition. He has had to deal with a mother that has had children by two husbands and a child by a boyfriend and who has misused drugs and neglected her children. In addition, the case involved six children with a mother who had mental and sexual issues. Muhonen attended every court hearing since 2002. In December of 2007 two of the fathers and the mother relinquished their parental rights. Muhonen will continue to represent these children in the court system until permanent placement occurs. The CASA/GAL Program thanks Muhonen for his diligence and consistency in representing the best interest of all of these children.

Seventh District: Fred Hoopes represented an inmate at the Pocatello Women's Correctional Center in a complaint wherein she alleged that her civil rights were violated through sexual harassment, and allegations that the Warden of the prison failed to correct the problem when it was reported. Hoopes contributed 92 hours of pro bono service which included extensive litigation.

Lary Larson was nominated by 7th JD CASA program: "Lary has donated a great deal of time advocating for abused and neglected children in Idaho Falls. He is a great asset to the program. Lary has been taking CASA cases since 1995 and has appeared in numerous court proceedings to ensue that the children that are victims of abuse and neglect have a voice in court. Lary's dedication to the program is greatly appreciated.

2008 DISTRICT BAR ASSOCIATION RESOLUTION MEETING CALENDAR

- 1st District: Tuesday, November 4 in Coeur d'Alene at the Ameritel Inn beginning at Noon.
- 2nd District: Wednesday, November 5 in Moscow at the University Inn beginning at 5:30 p.m.
- 3rd District: Thursday, November 13 in Nampa at the Brick 29 beginning at 6:00 p.m.
- 4th District: Friday, November 14 in Boise at the Owyhee Plaza Ballroom beginning at Noon.
- 5th District: Wednesday, November 19 in Twin Falls at the Canyon Crest Dining Event Center beginning at 6:00 p.m.
- 6th District: Thursday, November 20 in Pocatello at the Juniper Hills Country Club beginning at Noon.
- 7th District: Friday, November 21 in Idaho Falls at the Red Lion Inn beginning at Noon.

WELCOME FROM THE GOVERNMENT & PUBLIC SECTOR LAWYERS SECTION

Laura A. Chess
Michael Kane & Associates, PLLC

The Government and Public Sector Lawyers Section of the Idaho State Bar is pleased to sponsor the October 2008 issue of *The Advocate*. In this issue, Idaho Supreme Court Chief Justice Daniel Eismann, provides insight into contempt proceedings, including those governed by Idaho Rule of Civil Procedure 75 in his article, *Contempt: The Basics and More*. Deputy Attorney General Michael Gilmore provides an overview of Section 1983 litigation in *An Introduction to Liability and Immunities Under 42 U.S.C. § 1983*. Assistant Chief Deputy Attorney General Brian Kane writes, *It's Not Your Blackberry: The Ninth Circuit Reminds Employers To Update Their Workplace Electronics Policies*, a caselaw update and practice pointers regarding government (and other) employees' use of electronic communications.

The goal of the Government and Public Sector Lawyers Section is to provide information and education to attorneys who represent the interests of governmental entities at all levels of government. Our sections' members include both employees of public entities and private attorneys hired by such entities. As an attorney in private practice, I have had the pleasure of working with numerous governmental clients over the last several years, and consider the section a valuable resource in my practice. The section meets the second Friday of every month at noon. Members are welcome to attend either in person or by telephone conference call. For those who attend in person, lunch is provided. For all attendees, the monthly meetings provide a forum to address those issues that affect governmental entities and the attorneys who represent them. The monthly minutes and

other valuable information can be found at <https://www2.state.id.us/isb/sec/gov/gov.htm>.

Approximately six times per year, a CLE is provided at the lunch meeting. Recent CLE topics have included: an update and analysis of new legislation, ethics in government, and the Idaho Tort Claims Act. Upcoming CLEs are slated to address ethical obligations in administrative proceedings, the attorney client privilege as it relates to the open meetings law, and an overview of the legislative process. The section will also present a CLE regarding public financing at the October annual State Bar meeting.

A focus of the section this last year has been to provide section resources to members throughout the state. We made a CLE available statewide via webcast, and encourage participation by phone at the monthly meetings, particularly those that include a CLE. If you are interested in learning more about our section, we invite you to attend a monthly meeting or to contact me, other section officers Dave Wynkoop and Cheri Ruch, or past chair Brian Kane.

ABOUT THE AUTHOR

Laura A. Chess is an associate at *Michael Kane & Associates, PLLC* in Boise, Idaho, where she focuses her practice in the areas of Social Security disability, wills and probate, governmental defense, and administrative law. Ms. Chess earned her Bachelor of Arts degree in History and American Studies from Whitworth College and her Juris Doctorate from the University of Idaho, College of Law.

GOVERNMENT AND PUBLIC SECTOR LAWYERS SECTION

CHAIRPERSON

Laura A. Chess

Michael Kane & Associates, PLLC

P.O. Box 2865

Boise, ID 83701

Phone: (208) 342-4545, Fax: (208) 342-2323

Email: lchess@ktlaw.net

VICE CHAIRPERSON

David E. Wynkoop

Sherer & Wynkoop, LLP

P.O. Box 31

Meridian, ID 83680

Phone: (208) 887-4800, Fax: (208) 887-4865

Email: ssdwlaw@mcleodusa.net

SECRETARY/TREASURER

Cheri Joan Ruch

Idaho Industrial Commission

P.O. Box 83720

Boise, ID 83720-0041

Phone: (208) 334-6087, Fax: (208) 334-2321

Email: cruch@iic.idaho.gov

PAST CHAIRPERSON

Brian Patrick Kane

Office of the Attorney General

P.O. Box 83720

Boise, ID 83720-0010

Phone: (208) 334-4523, Fax: (208) 854-8071

E-Mail Address: brian.kane@ag.idaho.gov

AT LARGE COUNCIL MEMBER(S)

Michael Stephen Gilmore

Office of the Attorney General

P.O. Box 83720

Boise, ID 83720-0010

Phone: (208) 334-4130, Fax: (208) 334-2830

Email: mike.gilmore@ag.idaho.gov

Jannece-Marie Skeen

Eliassen Law Office

202 Idaho Street

American Falls, ID 83211

Phone: (208) 226-5138, Fax: (208) 226-5255

E-Mail Address: jmskeen@dcdi.n

CONTEMPT—THE BASICS AND MORE

Hon. Daniel T. Eismann
Chief Justice, Idaho Supreme Court

When I was a magistrate judge, I presided over a contempt proceeding in which an attorney was alleged to have failed to pay child support. Because I wanted to make sure I did things correctly, before the hearing I researched the contempt opinions of the United States Supreme Court. I discovered that the decisions of the Idaho appellate courts were wrong regarding the difference between criminal and civil contempt. A while later, I presided over a contempt proceeding involving another attorney who refused to pay child support. He appealed his jail sentence, and the district judge reversed it. The district judge reasoned that nonpayment of child support was civil contempt, that a jail sentence was a criminal contempt penalty, and that a criminal contempt penalty could not be imposed for civil contempt. At that point, I decided someone needed to begin educating Idaho judges about the law of contempt. I requested and was granted permission to begin teaching the new judges about contempt and have done it for many years. I eventually wrote a handbook that was distributed to new judges to use as a reference on issues arising in connection with contempt proceedings. Finally, when I was chair of the civil rules committee, we drafted Rule 75 of the Idaho Rules of Civil Procedure to provide guidance on how to process contempt proceedings.

Nonsummary and summary contempt proceedings. Contempt proceedings are either nonsummary proceedings or summary proceedings. In nonsummary proceedings, the alleged contemnor is given notice and an opportunity to be heard regarding the allegation of contempt. In summary proceedings, the alleged contemnor is not. Summary proceedings can be used only in instances of direct contempt.¹ The vast majority of contempt proceedings are nonsummary proceedings in which the alleged contemnor is entitled to notice of the alleged contempt and an opportunity for a hearing. I will be discussing nonsummary contempt proceedings in this article.

Is it civil or criminal contempt? The central issue regarding nonsummary contempt has been whether it is criminal contempt or civil contempt. That issue confused the Idaho appellate courts for decades. That has also been the most difficult issue for people to grasp when I have taught contempt. I will endeavor to explain why that distinction matters and what the difference is.

Why does it matter whether it is civil or criminal contempt? The reason why it is important to know the distinction between criminal and civil contempt is because of the differing federal constitutional rights applicable to those two types of contempt.

The constitutional rights applicable to nonsummary criminal contempt include:

notice that a criminal contempt sanction is being sought in the contempt proceedings; the right to a public trial; the right to a jury trial if the maximum penalty authorized by law, or actually imposed, exceeds six months incarceration or if the court imposes consecutive

sentences totaling more than six months in length;² the right to compulsory process; the right to the presumption of innocence; the privilege against self-incrimination; the requirement that the contempt be proved beyond a reasonable doubt; the right to be represented by counsel; the right to cross-examine witnesses; the right to call witnesses to testify both in complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed; the right to testify in one's own behalf; the right to the protection of the exclusionary rule; the protection of the Double Jeopardy Clause;³ and the right to speak on one's own behalf, similar to the right to allocution, in order to present matters in mitigation or otherwise attempt to make amends with the court.⁴

In addition, the Idaho Supreme Court has held that due process requires that the alleged contemnor have notice of the possible sanctions that may be imposed for criminal contempt and that there be proof that the alleged contemnor had knowledge of the terms of the court order allegedly violated.⁵

The federal constitutional rights applicable to nonsummary civil contempt are as follows:

reasonable notice of the charge of contempt;⁶ a hearing to determine if the alleged contemnor violated a court order,⁷ and a finding that the contemnor has the present ability to comply with the court order violated.⁸

Federal Courts of Appeals have held that an alleged contemnor may need the assistance of counsel to effectively raise the issue of present inability to comply, and therefore incarceration may not be imposed as a civil contempt penalty unless the contemnor either was represented by counsel or waived his right to counsel.⁹ As you can see, there is a substantial difference in the constitutional rights applicable to both types of contempt.

What is the distinction between criminal contempt and civil contempt? Much of the confusion concerning the difference between civil and criminal contempt comes from the differing definitions of those terms that have arisen over time. Space does not permit me to address the wrong definitions in this article. If you are interested in them, please refer to *Camp v. East Fork Ditch Co., Ltd.*¹⁰ The difference between criminal and civil contempt depends upon the sanction imposed. “[A]n unconditional penalty is a criminal contempt sanction, and a conditional penalty is a civil contempt sanction.”¹¹ “A penalty is unconditional if the contemnor cannot avoid any sanction by complying with the court order violated. A penalty is also unconditional even if it is suspended and the contemnor is placed on probation.”¹² “A penalty is conditional if the contemnor can avoid any sanction, including probation, by doing the act he had been previously ordered to do.”¹³ If the sanction imposed is part unconditional and part conditional, then it is a criminal sanction.¹⁴

The typical criminal sanction is a fine and/or jail sentence that is paid and/or served or suspended with probationary terms. The typical civil sanction would be incarceration or a daily fine until the contemnor does what he or she had been ordered to do. For example, a recalcitrant witness might be incarcerated until the witness testifies.

A civil sanction can only be imposed when the contempt consists of failing to do what the contemnor had been ordered to do. The court can impose incarceration or a fine until the contemnor complies with the order. A civil sanction cannot be imposed when the contempt consists of doing what the contemnor had been ordered not to do. The contemnor cannot go back in time and not do what he or she had done. In this circumstance, only a criminal sanction can be imposed. For example, if the contemnor had been ordered not to have contact with his wife and he violated that order, he cannot go back in time and undo what he did.

In some instances, a court will have the option of imposing either a criminal or civil sanction. For example, the sanction for nonpayment of child support could be thirty days in jail (a criminal sanction) or incarceration until the contemnor pays the back due support (a civil sanction). The court could not impose the criminal sanction, however, unless it had previously provided the contemnor with the constitutional rights applicable to criminal contempt. Thus, the rights granted prior to and during the hearing determine whether a criminal sanction can be imposed. If the contemnor was not given the rights applicable to criminal contempt, the court cannot impose a criminal sanction.

Burden of proof. The burdens of proof applicable to criminal and civil contempt are significantly different. To impose a criminal contempt sanction, the court must find all elements of the contempt beyond a reasonable doubt, including that the conduct constituting the contempt was *willful*.¹⁵ To impose a civil contempt sanction, the court must find the elements of contempt by a preponderance of the evidence and must find that the contemnor has the *present ability* to comply with the court order in question.¹⁶ Thus, if a contemnor had willfully violated a court order but, at the time of the hearing, was no longer able to comply with that order, the court could not impose a civil contempt sanction. The court could only impose a criminal sanction. Where there had been a previous determination of ability to comply with the order, the alleged contemnor has the obligation of producing evidence sufficient to raise the issue that compliance is now factually impossible.¹⁷ For example, assume that during a divorce action the trial court found that an item of the husband's separate property was in the possession of the wife and the court ordered her to deliver it to him. In a subsequent contempt proceeding to compel compliance with the order, the wife could raise the defense of present inability to comply only by presenting evidence showing that it was now factually impossible for her to do so. However, in the contempt proceeding she could not challenge the original finding that the item was in her possession.¹⁸

Why no orders to show cause? Rule 75(c)(2) of the Idaho Rules of Civil Procedure provides: "Contempt proceedings shall not be initiated by an order to show cause." The reason for that change from the historical procedure was twofold. First, some judges and parties thought that an order to show cause shifted

the burden of proof. The alleged contemnor had to appear and show cause (prove) that he or she was not in contempt. Second, a show cause proceeding could give the appearance to the alleged contemnor that the court had already made an initial determination that the contempt had occurred.

Discovery and the Fifth Amendment. Contempt proceedings brought in connection with a civil lawsuit or as a separate proceeding are brought under Rule 75 of the Idaho Rules of Civil Procedure.¹⁹ The discovery rules in the civil rules are applicable to such proceedings. The question then arises: Can an alleged contemnor assert the Fifth Amendment in connection with discovery requests? The answer is: Yes.

"The Fifth Amendment's protection against compelled self-incrimination applies to the States through the Fourteenth Amendment's Due Process Clause."²⁰ The applicable part of the Fifth Amendment provides: "No person ... shall be compelled in any criminal case to be a witness against himself."²¹ The Fifth Amendment "can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used."²²

An alleged contemnor could assert the Fifth Amendment as a reason for refusing to answer a question during a deposition if he or she reasonably believed that the answer would either be incriminating or could lead to other evidence that is incriminating. The same rule would apply to answering interrogatories.

Document Production and the Fifth Amendment. A more difficult issue arises with respect to requests for production or inspection. Production of documents or other things creates two issues: (1) Does the object produced itself constitute incriminating evidence? and (2) Does the act of producing the object expressly or implicitly constitute incriminating testimony? These are two separate issues.

With respect to the first issue, the Fifth Amendment does not protect someone from being required to produce incriminating evidence.

Thus, even though the act may provide incriminating evidence, a criminal suspect may be compelled to put on a shirt, to provide a blood sample or handwriting exemplar, or to make a recording of his voice. The act of exhibiting such physical characteristics is not the same as a sworn communication by a witness that relates either express or implied assertions of fact or belief. Similarly, the fact that incriminating evidence may be the byproduct of obedience to a regulatory requirement, such as filing an income tax return, maintaining required records, or reporting an accident, does not clothe such required conduct with the testimonial privilege.²³

Likewise, where an abused or neglected child under the jurisdiction of the court has been placed back in the home in the custody of a parent, the Fifth Amendment does not protect the parent from later being required to produce the child.²⁴

"[A] person may not claim the Amendment's protections based upon the incrimination that may result from the contents or nature of the thing demanded."²⁵ The word 'witness' in the constitutional text limits the relevant category of compelled

incriminating communications to those that are 'testimonial' in character."²⁶ It also does not matter if the items requested to be produced are documents containing testimony (thoughts, beliefs, assertions of fact) that had been previously voluntarily prepared by the alleged contemnor. "[A] person may be required to produce specific documents even though they contain incriminating assertions of fact or belief because the creation of those documents was not 'compelled' within the meaning of the privilege."²⁷ If the documents have been voluntarily prepared by the person before their compelled production, they cannot contain *compelled* testimonial evidence.²⁸

The second issue, however, may raise a valid Fifth Amendment claim to the production of documents or other items. The act of producing documents or other items may have a compelled testimonial aspect. "The 'compelled testimony' that is relevant ... is not to be found in the contents of the documents produced It is, rather, the testimony inherent in the act of producing those documents."²⁹ "By 'producing documents in compliance with a subpoena, the witness would admit that the papers existed, were in his possession or control, and were authentic.'"³⁰ Thus, for example, the Fifth Amendment protects a defendant in a criminal case from being called to the witness stand by the state and being required to describe any inculpatory evidence not in the state's possession and tell where it is located. The same result could not be accomplished simply by means of a subpoena *duces tecum*.

Whether or not the act of producing documents or other items would expressly or implicitly constitute compelled testimony protected by the Fifth Amendment is a factual issue to be resolved by the trial court.³¹ If the existence and location of documents is already known, producing them may not constitute implicitly admitting their existence and possession in violation of the Fifth Amendment.³² Likewise, if the person required to produce the documents is not competent to authenticate them so they can be admitted into evidence, producing them would not represent a substantial threat of self-incrimination with respect to their authenticity.³³ Placing the documents in the hands of an attorney does not change the analysis. If they would be obtainable from the client, they are obtainable from the attorney, and vice versa.³⁴

CONCLUSION

Understanding the law of contempt will avoid errors in litigation. As noted above, Rule 75 of the Idaho Rules of Civil Procedure was drafted to provide a roadmap for contempt proceedings. Please read it. If there are parts of it that are unclear, let us know.

ABOUT THE AUTHOR

The Hon. Daniel T. Eismann has been on the Idaho Supreme Court since January 1, 2001. He has served as Chief Justice since January 2, 2007. The views expressed in this article are those of the author and should not be interpreted as a formal statement of law or policy of the Idaho Supreme Court.

ENDNOTES

¹ See Rule 75(b)(1) of the Idaho Rules of Civil Procedure for a list of the requirements necessary to use summary contempt proceedings. These requirements are based upon the federal constitution. The contempt must be committed in open court in

the immediate presence of the judge. *In re Oliver*, 333 U.S. 257 (1948); *Cooke v. United States*, 267 U.S. 517 (1925). The judge must have personal knowledge of all facts necessary to constitute the contempt. *Id.* Knowledge gained from the contemnor's confession or statements by others does not constitute the personal knowledge of the judge. *Id.* The conduct constituting contempt must disturb the court's business. *Pounders v. Watson*, 521 U.S. 982 (1997). The Idaho Supreme Court has incorrectly labeled failure to appear as direct contempt. *Butler v. Goff*, 130 Idaho 905, 950 P.2d 1244 (1997); *In re Williams*, 120 Idaho 473, 817 P.2d 139 (1991). Because the judge did not have personal knowledge that the alleged contemnor had willfully failed to appear, the judge did not have knowledge of all facts constituting the contempt.

² There is also a right to jury trial if a serious fine is imposed for criminal contempt. The United States Supreme Court has not given much clarification as to the point at which a fine triggers that right, but it is more than \$10,000 and less than \$52,000,000. See *United Mine Workers of America v. Bagwell*, 512 U.S. 821 (1994).

³ Under the Double Jeopardy clause, a criminal prosecution by the state can be barred because of a prior criminal contempt prosecuted by one of the parties in a civil lawsuit. *United States v. Dixon*, 509 U.S. 688 (1993).

⁴ *Camp v. East Fork Ditch Co., Ltd*, 137 Idaho 850, 860-61, 55 P.3d 304, 31-15 (2002) (citations omitted).

⁵ *Ross v. Coleman Co., Inc.*, 114 Idaho 817, 761 P.2d 1169 (1988).

⁶ *McNeil v. Director, Patuxent Institution*, 407 U.S. 245 (1972).

⁷ *Id.*

⁸ *Maggio v. Zeitz*, 333 U.S. 56 (1948).

⁹ *In re Di Bella*, 518 F.2d 955 (2nd Cir. 1975); *In re Grand Jury Proceedings Harrisburg Grand Jury 79-1*, 658 P.2d 211 (3rd Cir. 1981); *In re Kilgo*, 484 F.2d 1215 (4th Cir. 1973); *Ridgway v. Baker*, 720 F.2d 1409 (5th Cir. 1983); *United States v. Anderson*, 553 F.2d 1154 (8th Cir. 1977); *United States v. Sun Kung Kang*, 468 F.2d 1368 (9th Cir. 1972).

¹⁰ 137 Idaho at 861-63, 55 P.3d at 315-17.

¹¹ *Id.* at 863, 55 P.3d at 317.

¹² *Id.*

¹³ *Id.* at 864, 55 P.3d at 318.

¹⁴ *Hicks v. Feiock*, 485 U.S. 624, 638 n.10 (1988).

¹⁵ *In re Weick*, 142 Idaho 275, 280-81, 127 P.3d 178, 183-84 (2005).

¹⁶ *United States v. Rylander*, 460 U.S. 752, 757 (1983).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Rule 42 of the Idaho Criminal Rules governs contempt proceedings brought in connection with a criminal action. Note that criminal contempt proceedings are not brought under I.C.R. 42 and civil contempt proceedings are not brought under I.R.C.P. 75. Contempt proceedings under either rule can be civil or criminal.

²⁰ *Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt County*, 542 U.S. 177, 192 n.4 (2004).

²¹ U.S. Const. 5th Amendment.

²² *Kastigar v. U.S.*, 406 U.S. 441, 444-45 (1972) (footnotes omitted).

²³ *United States v. Hubbell*, 530 U.S. 27, 34 (2000) (citation and footnotes omitted).

²⁴ *Baltimore City Dept. of Social Services v. Bouknight*, 493 U.S. 549 (1990).

²⁵ *Id.* at 555.

²⁶ *Hubbell*, 520 U.S. at 34.

²⁷ *Id.* at 35-36.

²⁸ *Id.* at 36.

²⁹ *Id.* at 40.

³⁰ *Id.* at 36.

³¹ *United States v. Doe*, 465 U.S. 605, 613-14 (1984).

³² *Fisher v. United States*, 425 U.S. 391, 411-12 (1976).

³³ *Id.* at 412-13.

³⁴ *Id.* at 404-05.

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AN INTRODUCTION TO LIABILITY AND IMMUNITIES UNDER 42 U.S.C. § 1983

Michael S. Gilmore
Idaho Attorney General's Office, Civil Litigation

This article discusses some of the rudiments of the law of liability and immunity under 42 U.S.C. § 1983. Because of the volume of material it covers, this article provides a general overview of § 1983. Further analysis of § 1983 can be found in the numerous cases to which this article cites.

I. LIABILITY UNDER 42 U.S.C. § 1983

This statute, now codified at 42 U.S.C. § 1983, was Section 1 of the Civil Rights Act of 1871. Setting aside some special provisions for suit against judges, § 1983's elements can be broken into five categories: (a) persons who may be sued, (b) State action, (c) persons who may sue, (d) grounds for suit, and (e) remedies:

§ 1983. Civil action for deprivation of rights

- [a] Every person who,
- [b] under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected,
- [c] any citizen of the United States or other person within the jurisdiction thereof
- [d] to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws,
- [e] shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress [.]

PERSONS SUBJECT TO SUIT UNDER § 1983

Neither the State, a State agency nor a State officer or employee sued in his or her official capacity is a "person" who can be sued for damages under § 1983, but State officers or employees can be sued in their official capacities for injunctive relief.¹ However, State officers or employees can be sued for damages under § 1983 in their individual or personal capacities.² In contrast, local governments are "persons" who may be sued for damages under § 1983.³

STATE ACTORS UNDER § 1983

"The traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'"⁴ In other words, persons are State actors when their actions derive from the authority of the State. Thus, the United States Supreme Court held that where a prison doctor whose authority to treat prisoners came from the State confining the prisoners, and where the prisoners' receipt of medical services was limited to that provided by the State, the doctor was a State actor even though he was a private contractor and not a State employee.⁵ In another example, a county employee who used her access to county records to obtain confidential information

on her husband's ex-wife was a State actor subject to suit under § 1983.⁶

PERSONS WHO MAY SUE UNDER § 1983

Section 1983 protects the rights of citizens and of non-citizen aliens as well.⁷ Corporations are "persons" entitled to § 1983's protection.⁸ Many First Amendment cases under § 1983 are pursued by corporate plaintiffs.⁹ However, local governments—*e.g.*, cities, counties and school districts—are not "persons" who may sue under § 1983.¹⁰

RIGHTS PROTECTED UNDER § 1983

Section 1983 protects against deprivation of all rights, privileges, or immunities secured by federal law.¹¹ Familiarly, § 1983 protects what are commonly referred to as civil liberties. For example, § 1983 protects:

- First Amendment rights under the Religion Clauses¹² and Freedom of Speech Clause;¹³ and
- Fourteenth Amendment due process rights, including liberty interests¹⁴ and property interests,¹⁵ and equal protection rights.¹⁶

In addition, § 1983 also protects against deprivations of federal rights secured under:

- other provisions of the United States Constitution, *e.g.*, the Commerce Clause;¹⁷
- federal statutes, *e.g.*, the Social Security Act¹⁸ or the Telecommunications Act;¹⁹ and
- federal regulations.²⁰

RELIEF UNDER § 1983

Both legal and equitable relief are available under § 1983.²¹

II. IMMUNITIES FROM SUIT UNDER 42 U.S.C. § 1983

42 U.S.C. § 1983 contains no explicit immunities from suit. Nevertheless, the United States Supreme Court has inferred that Congress did not intend to displace common law immunities when it enacted § 1983.²² The focus for determining if there is an immunity from suit under § 1983 depends in great part upon the state of the common law in 1871.²³

When researching immunities under § 1983, one is not restricted to § 1983 cases. There is a closely related class of cases—known as *Bivens* cases—brought against federal officers and employees directly under the Federal Constitution for violation of federal constitutional rights.²⁴ Unless Congress otherwise provides, the same immunities are available in suits under § 1983 and in *Bivens* suits.²⁵

ABSOLUTE IMMUNITY FROM SUIT UNDER § 1983

The common law recognized a number of absolute immunities from suit that are also absolute immunities from suit under § 1983.

Legislative Immunity—Both State and local legislative bodies are entitled to absolute immunity for their legislative activities.²⁶ Absolute legislative immunity extends to suits for injunctive and declaratory relief²⁷ and to suits against non-legislative bodies functioning in quasi-legislative capacities. For example, when a State Supreme Court promulgated a Code of Professional Responsibility, it was acting as a legislature and was entitled to absolute legislative immunity.²⁸ Similarly, Governors and Mayors signing or vetoing legislation are entitled to absolute legislative immunity.²⁹

Judicial Immunity—State court judges have absolute immunity from suit for damages arising from their judicial acts unless they act in a complete absence of jurisdiction.³⁰ Absolute judicial immunity does not extend to a judge's non-adjudicative activities.³¹

Persons performing adjudicatory functions in administrative proceedings are also entitled to absolute judicial immunity, again unless they act in complete absence of jurisdiction.³² Clerks of the court are entitled to judicial immunity with regard to scheduling and notice.³³ Guardians ad litem are entitled to judicial immunity in Idaho.³⁴ Persons enforcing judicial orders are entitled to quasi-judicial immunity.³⁵

Prosecutorial Immunity—Prosecutors are entitled to absolute immunity in performing their prosecutorial functions, such as signing court documents, but not for functions that do not require a State's attorney in order to be performed.³⁶ Administrative law prosecutors are also entitled to absolute prosecutorial immunity.³⁷

Other Immunities—*Dicta* suggests that there is absolute juror and witness immunity.³⁸

QUALIFIED IMMUNITY FROM SUIT UNDER § 1983

Officers and employees who are not entitled to absolute immunity from suit may nevertheless be entitled to qualified immunity when they acted reasonably under existing law. *Harlow v. Fitzgerald*,³⁹ a *Bivens* case, placed the law of qualified immunity on much of its modern footing. *Harlow* explains that qualified immunity must strike a balance between the need to provide redress for those whose rights have been violated and those who must carry out the law.

[C]laims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to society as a whole. These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will “dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.”⁴⁰

There is an objective test for qualified immunity. *Harlow* abandoned aspects of previous decisions that included subjective elements of the State actor's intent or state of mind in the qualified immunity analysis and placed the entire inquiry on an objective basis by holding that “government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly

established statutory or constitutional rights of which a reasonable person would have known.”⁴¹

Harlow favors a pre-trial determination of the objective basis for qualified immunity and limiting discovery until the issue of qualified immunity is settled.⁴² In the federal system qualified immunity includes the rights not to stand trial and not to be subject to discovery, which are among the bases for immediate appealability of denial of the qualified immunity defense under the collateral order doctrine.⁴³ There is no federal right to an immediate appeal of denial of qualified immunity in a State Court system.⁴⁴

A State actor is entitled to qualified immunity if at the time of the state action there was no clearly established law that the conduct in question violated federal rights. For example, *Davis v. Scherer*⁴⁵ held that even though a public employee's due process rights to a hearing before discharge had been violated, the defendants were entitled to qualified immunity because the federal right to a hearing before discharge had not been clearly established at the time:

... [T]he constitutional right of a state employee to a pretermination or a prompt post-termination hearing was not well established at the time of the conduct in question. Nor was it unreasonable, ... for the Department to conclude that appellee had been provided with the fundamentals of due process. Thus, the District Court correctly held that appellee demonstrated no violation of his clearly established constitutional rights.⁴⁶

Qualified immunity must be assessed at a level of specificity appropriate to the conduct in question—not simply at the abstract level that constitutional rights cannot be violated:

The Court of Appeals' brief discussion of qualified immunity consisted of little more than an assertion that a general right Anderson was alleged to have violated— ... to be free from warrantless searches of one's home unless the searching officers have probable cause and there are exigent circumstances—was clearly established. ...

... [T]he determination whether it was objectively legally reasonable to conclude that a given search was supported by probable cause or exigent circumstances will often require examination of the information possessed by the searching officials. ... The relevant question in this case ... is the objective (albeit fact-specific) question whether a reasonable officer could have believed Anderson's warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed. ...⁴⁷

The United States Supreme Court has examined very specific facts to conclude that qualified immunity was available.⁴⁸ In short, resolution of qualified immunity issues will frequently require an examination of the facts surrounding the State action in question.

CONCLUSION

In a broad sense, then, analysis of a suit brought under 42 U.S.C. § 1983 should begin with whether there may be potential

liability because a State actor has deprived a person of a federal right, privilege or immunity, then, if so, whether absolute or qualified immunity is available to the State actor under the particular facts presented.

ABOUT THE AUTHOR

Michael S. Gilmore is a Deputy Attorney General with the Civil Litigation Division of the Attorney General's Office. He completed thirty years with the Attorney General's Office in May 2008. He has interests in § 1983 law, administrative law, and appellate practice, among other things. The opinions that he expresses in this article are his and not the view of the Attorney General's Office.

ENDNOTES

- ¹ *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64, 71, and n.10.; see also *Maldonado v. Harris*, 370 F.3d 945, 951 (9th Cir. 2004), cert. denied sub nom. *Kempton v. Maldonado*, 544 U.S. 968 (2005); *Owner-Operator Indep. Drivers Assoc., Inc. v. Idaho Public Utilities Comm'n*, 125 Idaho 401, 408, 871 P.2d 818, 825 (1994).
- ² *Hafer v. Melo*, 502 U.S. 21, 27-28 (1991); see also *DeNueva v. Reyes*, 966 F.2d 480, 483 (9th Cir. 1992); *Kessler v. Barowsky*, 129 Idaho 647, 656, 931 P.2d 641, 650 (1997).
- ³ *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 120-121 (1992) (holding that a city may be sued); see also *Bd. of County Comm'rs of Bryan County, Okl. v. Brown*, 520 U.S. 397 (1997) (holding that a county may be sued); *Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426 (2002) (holding that school district may be sued); *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Assoc.*, 453 U.S. 1, 19, n.29 (1981) (holding that sewerage board may be sued).
- ⁴ *West v. Atkins*, 487 U.S. 42, 49 (1988).
- ⁵ *Id.* at 54-57.
- ⁶ *McDade v. West*, 223 F.3d 1135, 1139-1140 (9th Cir. 2000).
- ⁷ *Simon v. Lovgren*, 368 F.Supp. 265, 268-269 (D.C.V.I. 1973).
- ⁸ *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 450 F.3d 1295, 1305 (11th Cir. 2006).
- ⁹ See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 525-526 (1993) (involving suit by religious corporation).
- ¹⁰ *Williams v. Mayor & City Council of Baltimore*, 289 U.S. 36, 40 (1933); see also *Delta Special Sch. Dist. No. 5 v. State Bd. of Educ.*, 745 F.2d 532, 533 (8th Cir. 1984), citing *City of Trenton v. New Jersey*, 262 U.S. 182 (1923) ("Being neither a 'citizen' under ... the Arizona Constitution nor a 'person' within the meaning of the Fourteenth Amendment..., the County may not assert an equal protection claim"); *Trust v. County of Yuma*, 69 P.3d 510, 515-516 (Ariz. Ct. App. 2003); *Exira Cmty. Sch. Dist. v. State*, 512 N.W.2d 787, 790 (Iowa 1994) (holding that school districts are not persons who can sue under § 1983).
- ¹¹ *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980); *City of Rancho Palos Verdes, Cal. v. Abrams*, 544 U.S. 113, 119 (2005).
- ¹² See, e.g., *McCreary County, Ky. v. American Civil Liberties Union of Ky.*, 545 U.S. 844 (2005).
- ¹³ See, e.g., *Beard v. Banks*, 548 U.S. 521 (2006).
- ¹⁴ See, e.g., *Wilkinson v. Austin*, 545 U.S. 209 (2006).
- ¹⁵ *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002).
- ¹⁶ See, e.g., *Johnson v. California*, 543 U.S. 499 (2005).
- ¹⁷ *Dennis v. Higgins*, 498 U.S. 439 (1991).
- ¹⁸ *Thiboutot*, 448 U.S. 1.

¹⁹ *Abrams*, 544 U.S. at 119.

²⁰ See, e.g., *Anderson v. Edwards*, 514 U.S. 143 (1995) (discussing federal regulations governing State AFDC rules).

²¹ *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 723 (1999) (Scalia, J., concurring); see also *Lubcke v. Boise City/Ada County Housing Auth., Worrell*, 124 Idaho 450, 464, 860 P.2d 653, 667 (1993).

²² *Wyatt v. Cole*, 504 U.S. 158, 163-164 (1992).

²³ *Burns v. Reed*, 500 U.S. 478, 500 (1991) (Scalia, J., concurring in judgment in part and dissenting in part).

²⁴ Cases brought directly under the United States Constitution take their name from *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971).

²⁵ *Butz v. Economou*, 438 U.S. 478, 503-504 (1978); *Wilson v. Layne*, 526 U.S. 603, 609 (1999).

²⁶ *Bogan v. Scott-Harris*, 523 U.S. 44, 48-49 (1998) (holding that city council members were absolutely immune from suit for enacting ordinance that eliminated plaintiff's position); *Jax v. Henslee*, 201 F.3d 444 (9th Cir. 1999) (unpublished decision) (holding that Gooding County Commissioners were entitled to absolute immunity for legislative acts).

²⁷ *Lasa v. Colberg*, 622 F.Supp. 557, 559 (D.P.R. 1985); *Bakalich v. Village of Bellwood*, 2006 WL 1444893, *5 (N.D.Ill. 2006) (involving a suit against local government legislators); but see *Citizens Council on Human Relations v. Buffalo Yacht Club*, 438 F.Supp. 316, 325 (W.D.N.Y. 1977) ("The doctrine of legislative immunity is not available to city legislators when a suit seeks only injunctive and declaratory relief.")

²⁸ *Supreme Court of Virginia v. Consumers Union of U. S., Inc.*, 446 U.S. 719, 731-734 (1980).

²⁹ *Torres Rivera v. Calderón Serra*, 412 F.3d 205, 212-214 (1st Cir. 2005) (holding that governor entitled to legislative immunity); *Risser v. Thompson*, 930 F.2d 549, 551 (7th Cir. 1991) (same); *Daly v. Harris*, 215 F.Supp.2d 1098, 1127 (D.Ha. 2002) (holding that mayor entitled to legislative immunity).

³⁰ *Mireles v. Waco*, 502 U.S. 9, 9-13 (1991).

³¹ See, e.g., *Forrester v. White*, 484 U.S. 219, 229-231 (1988) (holding that judge not entitled to absolute judicial immunity for personnel actions taken regarding court employees).

³² *Butz*, 438 U.S. at 513-514; *Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 924-926 (9th Cir. 2004) (permitting absolute immunity for State Board of Medicine members performing adjudicative function); *Diva's Inc. v. City of Bangor*, 411 F.3d 30 (1st Cir. 2005) (holding that city council members had absolute immunity when they acted in quasi-judicial capacity in denying permit); *Rincover v. State, Dep't of Fin., Secs. Bureau*, 128 Idaho 653, 657, 917 P.2d 1293, 1297 (1996) (permitting absolute immunity for those performing administrative adjudicative function).

³³ *In re Castillo*, 297 F.3d 940, 952-953 (9th Cir. 2002).

³⁴ *McKay v. Owens*, 130 Idaho 148, 158, 937 P.2d 1222, 1232 (1997). Query: Should this be better analyzed as witness immunity?

³⁵ *Coverdell v. Dep't of Social & Health Servs., State of Wash.*, 834 F.2d 758, 764-765 (9th Cir. 1987).

³⁶ *Kalina v. Fletcher*, 522 U.S. 118, 123-127 (1997); see also *Butler v. Elle*, 281 F.3d 1014, 1021 (9th Cir. 2002) (holding that county prosecutor entitled to absolute prosecutorial immunity); *Nation v. State, Dep't of Corr.*, 144 Idaho 177, 185-186, 158 P.3d 953, 961-962 (2007) (holding that absolute prosecutorial immunity applies when

providing discovery).

³⁷ *Butz*, 438 U.S. at 515-517 (1978); *Olsen*, 363 F.3d at 926; *Rincover*, 128 Idaho at 657, 917 P.2d at 1297 (holding that immunity extends to non-lawyer administrative official who signs an administrative complaint).

³⁸ *Butz*, 438 U.S. at 509-510.

³⁹ 457 U.S. 800 (1982).

⁴⁰ 457 U.S. at 813-814 (some citations omitted) (footnote omitted).

⁴¹ *Id.* at 816-818; see also *Inouye v. Kemna*, 504 F.3d 705, 712 (9th Cir. 2007); *Rosenberger v. Kootenai County Sheriff's Dep't*, 140 Idaho 853, 856-857, 103 P.3d 466, 469-470 (2004).

⁴² 457 U.S. at 816-819.

⁴³ *Mitchell v. Forsyth*, 472 U.S. 511, 526-527 (1985).

⁴⁴ *Johnson v. Fankell*, 520 U.S. 911 (1997).

⁴⁵ 468 U.S. 183 (1984).

⁴⁶ *Id.* at 184 (quoting the syllabus of the Court).

⁴⁷ *Anderson v. Creighton*, 483 U.S. 635, 639-641 (1987) (footnotes omitted).

⁴⁸ See, e.g., *Scott v. Harris*, 50 U.S. —, —, (2007) (determining that high speed chase of fleeing motorist whose car was forced off the road by a deputy sheriff was not an unreasonable seizure on the basis of a recording from the deputy's vehicle, even though there were potentially conflicting affidavits).

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IT'S NOT YOUR BLACKBERRY: THE COURTS REMIND EMPLOYERS TO UPDATE THEIR WORKPLACE ELECTRONICS POLICIES

Brian Kane

Idaho Attorney General's Office

Workplace technology has evolved rapidly to include portable electronic devices that, among other functions, can send and receive e-mail messages, text messages, voice mail messages, and instant messages, increasing both the speed and the portability of the office. Even as employers embrace these technologies, however, they have not universally updated their workplace policies for use of these devices.

This article underscores the need to dust off electronic usage policies for an overhaul, in light of the Ninth Circuit Court of Appeals' recent decision in *Quon v. Arch Wireless*¹ and the Idaho Supreme Court's recent decision in *Cowles Publishing Co. v. Kootenai County Board of County Commissioners*.² These cases provide four key practice points that all employers, including law offices, should follow: (1) ensure that your policy is updated to account for all types of electronic hardware and software in use within your office; (2) ensure that no "informal" policies, practices, or customs have arisen outside the parameters of your written policy; (3) update and obtain signatures acknowledging and consenting to electronic usage policies from all employees using mobile electronics; and, for government attorneys and employees: (4) be fully aware of the public nature of the use of electronics under the Idaho Public Records Act.

THE QUON AND COWLES CASES

In *Quon*, the City of Ontario, California provided two-way text pagers to its police officers. The officers were required to sign an e-mail and internet policy, which included notification that there was no expectation of privacy in the use of the City's computers, internet, or e-mail systems. The officers were verbally informed that the policy applied to their use of the text pagers, but no further written acknowledgments or consents were obtained by the City.

Each pager was allotted 25,000 characters. Usage in excess of 25,000 characters was billed to the city. The city adopted an informal policy whereby an employee's usage in excess of the allotted characters was either paid by the employee, or the employee could request an audit and the City would pay for the work-related overage. Invariably, the officers opted to pay for the overage themselves. Sgt. Jeff Quon, like other officers, sporadically exceeded the limit and paid the overage. Without notice, Sgt. Quon's supervisor decided that he no longer wanted to be the "bill collector" and that payment in lieu of an audit was not an option. Having exceeded the character limit, Quon's messages were audited, and it was discovered that Quon had engaged in sexually explicit, non-work-related texting. Quon sued the City under 42 U.S.C. § 1983, alleging that the audit was an unlawful search and seizure, and that the City had thus violated his right to privacy granted by the Fourth Amendment of the U.S. Constitution.

The Ninth Circuit held in favor of Quon, finding that employees generally do have an expectation of privacy with

respect to their electronic messages. In particular, Quon's expectation of privacy was reasonable due to the City's informal policy of allowing officers to pay for overage rather than undergo an audit of the content of their messages, and the City's search of Quon's messages was unreasonable.³

The Ninth Circuit noted that the formal internet and e-mail policy clearly applied to Quon, and that he had been verbally advised in a training meeting that the policy covered the pager at issue. The Court acknowledged that if this were the extent of the facts, there would be no expectation of privacy in the content of messages sent using such pagers. However, the "operational reality"⁴ embodied by the informal policy created an expectation of privacy in the contents of officer messages. On this basis, the Court found that Quon's employer had acted unconstitutionally in reading the content of his messages, notwithstanding the formal policy stating that such messages were not private.

In *Cowles*, the *Spokesman Review* in Spokane made a public records request encompassing non-work-related, sexually explicit e-mail messages sent between two County employees. One of the employees argued that disclosure of the e-mails to the *Spokesman Review* would violate her Fourth Amendment privacy right.

The *Cowles* Court noted that the messages at issue were prepared on government-owned equipment and software. Further, the County had a formal, written policy in place stating that employee e-mails were considered a public record and subject to disclosure, that employee use of the internet would be logged, and that the County could monitor employee e-mails. Unlike the situation in *Quon*, no informal policy was followed that would lead employees to believe that they had any reasonable expectation of privacy in any message generated using the employer's computer system, even if such messages were not work-related.

Here, then, are four practice pointers to help your office and your clients avoid the *Quon* conundrum and institute a policy like the one upheld in *Cowles* – and hopefully avoid such disputes altogether.

PRACTICE POINTER 1: "MOBILIZE" YOUR ELECTRONICS POLICY

Today, most employers have an office electronics use policy that outlines usage parameters and privacy expectations of employees. As the *Quon* case points out, however, these policies may be in need of updating.

For example, the State of Idaho has an electronics policy, set forth in Executive Order 2005-22.⁵ A quick review of this policy in light of the *Quon* decision reveals that it is already dated. The 2005 Executive Order was issued just prior to the proliferation of handheld internet and e-mail devices, such as the Blackberry, and long before the debut of the iPhone. As the *Quon* Court found, where the employer's formal, written policy does not specifically

address mobile communications devices, such devices may not be covered by the policy.

In *Quon*, the lack of a formal policy regarding the specific device in question contributed to the Court's willingness to find that an informal policy trumped the written one. Your clients should therefore be advised to update their policies, particularly as they add new devices to their employee's electronics suite – and your own office should update its own policy as well.

Appropriate language is crucial to the effectiveness of such policies. Compare the respective policies at issue in *Quon* and *Cowles*. In *Quon*, the City's policy stated: "Users should have no expectation of privacy or confidentiality when using these resources."⁶ In *Cowles*, Kootenai County's policy stated: "Employees have no right to personal privacy when using the e-mail system(s) provided by the County."⁷ While similar, the language of the Kootenai County policy is much stronger. Ontario's use of the word "should" in its policy seems more like a friendly suggestion than a statement of official policy. It is evident that proper drafting can ameliorate doubts surrounding the application and enforcement of an electronic usage policy.

PRACTICE POINTER 2: KEEP IT FORMAL

As *Quon* illustrates, one of the most difficult challenges for attorneys trying to defend employers arises in the area of "operational reality." Attorneys and employers must be vigilant to ensure that a formal policy is not undercut by the adoption of an (often unknown) informal policy. In *Quon*, because an informal policy had become the accepted practice, the City found itself in the unenviable position of asking the Court to overlook a very significant contradiction – the employee was told that his messages would not be audited so long as he paid the bill, but that was followed by an arbitrary reversal of the stated practice without notice.

The opinion in *Quon* suggests to employers that, if an informal policy or practice needs to be changed or discontinued, reasonable notice and a grace period should be provided. As an attorney, in addition to assisting your clients in drafting formal electronic usage policies, you should assist your clients in identifying situations in which informal policies have arisen or are likely to arise, and then assist the employer in returning to and enforcing its formal or written policies while avoiding the pitfalls in *Quon*.

PRACTICE POINTER 3: GET IT IN WRITING

As attorneys review and update written policies, it is critically important that consent and acknowledgement forms are updated as well. A search or audit for which written consent was given is universally more defensible than a search or audit undertaken without consent. Again, *Quon* is instructive because the City relied on a consent form signed prior to the distribution of the messaging pagers, and the City never sought the officers' written consent and acknowledgement with regard to any addition of the messaging pagers to its electronics policy.

The simple solution is that as the written policy is updated, new consents and acknowledgments should be collected by the employer. Obtaining these consents will remove any doubt as to whether an audit or search is consensual. Implementing these small measures could well prevent a long day in court in the future.

PRACTICE POINTER 4: IN IDAHO, IT'S PUBLIC

Quon was a California case, and the Ninth Circuit found that the California Public Records Law did not work to diminish the employee's reasonable expectation of privacy.⁸ Compare the Idaho-specific holding in *Cowles*, wherein the Idaho Court found that the Idaho Public Records Act specifically eliminates any reasonable expectation of privacy in personal e-mails generated on government-owned equipment.⁹

Significantly, if the messages had been stored on a third party's server, rather than a server owned and overseen by the governmental entity (as Sgt. Quon's were), this would not have changed the application of the Idaho Public Records Act in *Cowles*. Idaho Code § 9-338(9) prohibits any governmental entity from avoiding disclosure of public records by contracting with a third party. Further, in *Idaho Conservation League Inc. v. Idaho State Department of Agriculture*,¹⁰ the Court held that disclosure of public records cannot be denied where a third party maintains the public records at a non-governmental location.¹¹ For these reasons, in Idaho, the fact that messages were transmitted and stored on a third party's servers could not have been used to make an otherwise public record exempt.¹²

In practice, then, electronic usage policies for governmental employers should note that, in addition to the general absence of privacy rights in the use of an employer's computer system, the Idaho Public Records Act also specifically denies to government employees any expectation of privacy in their use of government-owned electronic equipment.

CONCLUSION: UPDATE, WRITE, SIGN, AND PUBLICIZE

Now that our offices can accompany us wherever we go, each office needs an equally ubiquitous electronic usage policy. *Quon* serves as a call to action for all employers and their attorneys to dust off and update workplace electronic usage policies. As new electronic equipment is added to the workplace, these policies should be reviewed and updated, new consents should be obtained, and regular investigations should be made to ensure that no informal policies have sprung up in the interim. If an informal policy is identified, employers and their attorneys should take reasonable steps to return the workplace to the correct formal policy and eliminate the informal one. Finally, all government employers and employees should be made aware of the requirements of Idaho's Public Records Law and its impact on their workplace.

ABOUT THE AUTHOR

Brian Kane is the Assistant Chief Deputy Attorney General for Idaho Attorney General Lawrence Wasden. The views expressed in this article are solely those of the author and should in no way be interpreted as a statement of law or policy of the Idaho Office of Attorney General.

ENDNOTES

¹ 529 F.3d 892 (9th Cir. 2008) ("*Quon*").

² 144 Idaho 259, 159 P.3d 896 (2007) ("*Cowles*").

³ There were other holdings by the Court in this case, but those holding are largely outside the scope of this article. Private practitioners in particular may want to closely scrutinize the Court's holding that the wireless provider was an "electronic communication service" (ECS) rather than a "remote computing service" (RCS) under the Stored Communications Act (SCA), and that the provider had violated SCA

by releasing archived transcripts to the City. This holding further emphasizes the necessity of obtaining consent to the release of the messages, because the SCA differentiates between a subscriber and an addressee or intended recipient of the message. This aspect of the opinion in *Quon* has an interesting impact on the effect of state statutes such as Idaho Code § 9-338(9) on the Federal Stored Communications Act.

⁴ *Quon*, 529 F.3d at 907.

⁵ The Executive Order was signed by Governor Kempthorne on November 10, 2005 and is set to expire November 10, 2009. It can be viewed online at: http://gov.idaho.gov/mediacenter/execorders/eo05/eo_2005-22.htm.

⁶ *Quon*, 529 F.3d at 896.

⁷ *Cowles*, 159 P.3d at 902.

⁸ *Quon*, 529 F.3d at 907.

⁹ Compare *Quon*, 529 F.3d at 907, with *Cowles*, 159 P.3d at 902.

¹⁰ 143 Idaho 366, 146 P.3d 632 (2006).

¹¹ *Id.* at 635.

¹² California does have a corresponding provision, but it is distinguishable from its Idaho counterpart. California Government Code § 6270(a) (Deering 2008) reads, in relevant part:

“Notwithstanding any other provision of law, no state or local agency shall sell, exchange, furnish, or otherwise provide a public record subject to disclosure pursuant to this chapter to a private entity in a manner that prevents a state or local agency from providing the record directly pursuant to this chapter.” Compare this with Idaho’s relatively direct statement: “A public agency or independent public body corporate and politic shall not prevent the examination or copying of a public record by contracting with a nongovernmental body to perform any of its duties or functions.” Idaho Code § 9-338(9).

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IS LEGISLATION NECESSARY TO PROTECT THE RIGHTS OF TRANSGENDERED EMPLOYEES?

Erika Birch
Rachel Otto
Strindberg & Scholnick, LLC

During the Idaho State Legislature's 2008 session, a Senate bill (S 1323) was introduced that would have extended Idaho's anti-discrimination laws to cover discrimination based on one's sexual orientation or gender identity. Although the bill was sponsored by both Republican and Democratic legislators, it was not scheduled for a full hearing. Similar legislation has been introduced in Idaho in the past (including in 2007) and has always suffered a similar fate.

Likewise, similar federal legislation has consistently failed, despite many appearances before Congress. Last November, however, the United States House of Representatives passed a version of the Employment Non-Discrimination Act ("ENDA"), in the form of H.R. 3685, by a vote of 235 to 184.¹ ENDA is intended to fill a gap in the coverage offered by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, which prohibits employment discrimination based on race, sex, religion, national origin, or color, by including protection for gay, lesbian, bisexual, and transsexual or transgender people.

Our firm recently represented a transgendered employee, Krystal Etsitty, born Michael, a biological male, who was in the process of transitioning to female when she was fired from her position as a bus driver for the Utah Transit Authority in February 2002. Ms. Etsitty's termination was ostensibly because her employer was concerned that people might be offended by her use of female restrooms and other expressions of her female identity (wearing make-up and jewelry and painting her fingernails). Ms. Etsitty's case was dismissed on summary judgment by the United States District Court in Utah and then appealed to the Tenth Circuit. The circuit court affirmed the dismissal but left open the issue of whether Title VII might afford protections to employees in similar circumstances.²

This article provides a brief overview of the law related to employment discrimination claims based on one's sexual identity.

COURT DECISIONS

In order to understand the law surrounding sexual orientation and sexual identity discrimination, it is important to understand what the term "transsexual" means. A transsexual is a person who is or who could be diagnosed with a recognized medical condition called Gender Identity Disorder ("GID") or gender dysphoria.³ According to the American Psychiatric Association, GID is marked by two characteristics: "(1) a strong and persistent cross-gender identification, which is the desire to be, or the insistence that one is, of the other sex; and (2) persistent discomfort about one's assigned sex or a sense of inappropriateness in the gender role of that sex."⁴ The term "transsexual" can be distinguished from the terms "transvestite," "intersexed," and "transgender." A transvestite is more commonly thought of as a cross-dresser (a heterosexual person who dresses as the opposite sex); an intersexed person is someone who has ambiguous genitalia and/

or chromosomes (a physical, not psychological, condition); and the term "transgender" or "transgendered" is "an umbrella term encompassing anyone who is at odds with traditional concepts of gender, whether transsexual, transvestite, intersexed, or otherwise."⁵

No matter how one terms it, transgendered people have had little success pursuing discrimination protection under federal discrimination laws. In fact, the Americans with Disabilities Act and the Rehabilitation Act expressly exclude transsexualism and other sexual identity disorders from protection.⁶ The Civil Rights Act of 1964 was not originally intended to include any provision regarding gender protection. Indeed, "sex" was added to the list of protected classes in a last-minute attempt to sabotage the bill, but despite the fear that its passage would result in equal employment rights for women, the bill passed.⁷

The seminal case addressing a transsexual's Title VII claim is *Ulane v. Eastern Airlines, Inc.*, decided by the Seventh Circuit in 1984.⁸ Kenneth Ulane was diagnosed as a transsexual eleven years after she was hired as an Eastern Airlines pilot. She underwent hormone therapy and sex-reassignment surgery; when she returned to work, Eastern Airlines fired her. Ulane sued under two theories: that she was discriminated against as a transsexual, and, failing that, that she was discriminated against as a female. The court rejected both claims.⁹

The Eighth and Ninth Circuits reached similar conclusions at around the same time as the *Ulane* decision. In *Holloway v. Arthur Andersen & Co.*, the Ninth Circuit decided that it did not violate Title VII to fire an employee for beginning the sex transition process.¹⁰ In *Sommers v. Budget Marketing, Inc.*, the Eighth Circuit reached a similar conclusion, also basing its decision on the idea that sex refers to anatomy and not to how an individual psychologically perceives him- or herself; therefore, the court decided, transsexuals do not fall under the protection of Title VII.¹¹

But in *Price Waterhouse v. Hopkins*,¹² the United States Supreme Court opened the door to what might prove to be a new avenue for transsexual protection under Title VII. While transsexual employment rights were not even mentioned in this case, the Court expanded the definition of "sex" under Title VII by holding that sex stereotyping provides a cause of action under the statute.¹³ In other words, if a woman is discriminated against for not acting "feminine" enough, that qualifies as an adverse employment action because of sex. Presumably, if a man does not act in accordance with the perceived societal norm of masculinity, he too could suffer an adverse employment action because of sex. This was one theory pursued by Ms. Etsitty in her case against the Utah Transit Authority and recently has been favorably received by other federal courts.

Although the Tenth Circuit affirmed the lower court's dismissal of Ms. Etsitty's case, it left open the issue of whether she (and

others like her) could state a viable claim based on this gender stereotype theory. This seems to follow a recent trend in federal court decisions on this issue. For example, the Sixth Circuit recently relied on *Price Waterhouse* to uphold a transsexual's claim for protection under Title VII.¹⁴ In *Smith v. City of Salem*, the Sixth Circuit "explained that just as an employer who discriminates against women for not wearing dresses or makeup is engaging in sex discrimination under the rationale of *Price Waterhouse*, 'employers who discriminate against men because they do wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex.'"¹⁵ In that case, Jimmie Smith, a Salem City Fire Department employee, was diagnosed with GID and began expressing herself in a more feminine manner, only to be quickly terminated.¹⁶ On the sex stereotyping question, the Sixth Circuit held that if transsexuals are fired for not conforming to gender stereotypes, they have a claim under Title VII; the fact that they are transsexuals does not somehow strip them of *Price Waterhouse*'s protection.

Likewise, the Ninth Circuit has concluded that transsexual individuals must be protected from sex stereotyping under the Gender Motivated Violence Act ("GMVA") by analogizing to Title VII.¹⁷ In doing so, the Ninth Circuit repudiated its prior reasoning in *Holloway*, suggesting that a sex stereotyping claim under Title VII may be viable for a transgendered employee.

Most recent is the decision in the case of *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.*, where the United States District Court for the Southern District of Texas determined that Lopez's transsexuality did not bar her sex stereotyping claim.¹⁸ In *Lopez*, the defendant medical clinic offered a position to the plaintiff, but the job offer was subsequently rescinded because the clinic's management determined that Lopez had "misrepresented" herself as a woman during the interview process.¹⁹ While Lopez brought her claim under Title VII, she did not argue *per se* that transgendered people are entitled to Title VII protection.²⁰ Nonetheless, the court concluded that "applying Title VII as written and interpreted by the United States Supreme Court Lopez has stated a legally viable claim of discrimination as a male who failed to conform with traditional male stereotypes."²¹ Subsequent to the court's ruling, the parties settled during mediation.

LEGISLATIVE PROTECTIONS

In a footnote, the *Etsitty* court stated:

This court is aware of the difficulties and marginalization transsexuals may be subject to in the workplace. The conclusion that transsexuals are not protected under Title VII as transsexuals should not be read to allow employers to deny transsexual employees the legal protection other employees enjoy merely by labeling them as transsexuals... . If transsexuals are to receive legal protection apart from their status as male or female, however, such protection must come from Congress and not the courts.²²

Two ENDA bills were introduced in Congress this past year: H.R. 2015 and H.R. 3685. H.R. 2015 included protection for gender identity, which encompasses transgender individuals, but H.R. 3685 only includes sexual orientation, which limits

its protection to gay, lesbian, and bisexual people. The version of ENDA passed through the House on November 7, 2007 was the latest version of a bill that Edward Koch and Bella Abzug, two former Democratic representatives from New York, first introduced in 1974.²³ The current bill removed the language protecting transgendered individuals in order to ensure a majority in the House.²⁴ This bill has been on the Senate legislative calendar for months.

While federal legislation might not be enacted for some time, nearly half of all states already provide equal employment legislation for gay and lesbian people, and a handful also specifically protect transsexuals in the workplace, including California, Maine, Minnesota, New Mexico, and Rhode Island. Additionally, approximately eighty-four cities and several counties have adopted local ordinances to protect transgender rights.²⁵ But as state laws trump local ordinances, these laws do not always carry much weight. Nonetheless, this type of legislation is key in clarifying the rights of transsexuals – there is no confusion about whether "sex" or "because of sex" applies to all people, regardless of their gender identity.

Many companies have also voluntarily included protection to transgendered employees as part of their written employment policies. While these employers should be commended for affording this protection, in many cases these policies may be unenforceable in courts. In many states, including Idaho, courts have held that, while employee handbooks or policies can create a contract, that contract is easily extinguished with simple disclaimer language, which is virtually always included.²⁶

CONCLUSION

As the sponsors of Idaho Senate Bill 1323 recognized, this type of legislation is necessary to "end decades of discrimination against men and women in every part of Idaho and set a tone for the state making it clear that it is wrong to fire someone from a job . . . for no other reason than that they are gay."²⁷ These legislators are among the significant majority of Americans (nearly 90% according to a Gallup poll from May 2007) who support equal employment rights for gays and lesbians.²⁸ These authors are hopeful that both the legislative and the judicial branches of our government will soon make clear that our laws prohibit discrimination based on one's gender identity and sexual orientation.

ABOUT THE AUTHOR

Erika Birch, is a partner at *Strindberg & Scholnick, LLC*, a Salt Lake City based firm focusing on employment and labor law. She graduated from University of Colorado School of Law in 2000. Her primary focus has been plaintiff's employment and civil rights law. Erika moved to Boise in the fall of 2007 to open a Boise office for her firm. She is the vice-chair of the ISB Labor and Employment Law section, a member of the National Employment Lawyer's Association, the Federal Bar Association, and Idaho's Women's Lawyers group. She is licensed in state and federal courts in Idaho, Utah and Colorado.

Rachel Otto, graduated from the University of Utah College of Law in 2008. She clerked for *Strindberg & Scholnick* in Salt Lake City during her second and third years of law school. She now works for *Western Resource Advocates*, a non-profit environmental law firm based in Boulder, Colorado.

ENDNOTES

¹ See Human Rights Campaign, *Employment Non-Discrimination Act*, available at http://www.hrc.org/laws_and_elections/enda.asp (last visited July 2, 2008).

² *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1220 (10th Cir. 2007).

³ Neil Dishman, *The Expanding Rights of Transsexuals in the Workplace*, 21 LAB. LAW 121 (Fall 2005) (citing AM. PSYCHIATRIC ASS'N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 576 (4th ed., text revision 2000)).

⁴ *Id.* at 123.

⁵ *Id.* at 123-24.

⁶ See 42 U.S.C. § 12211(b)(1); 29 U.S.C. § 705(20)(F)(i).

⁷ Jo Freeman, *How "Sex" Got into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQUALITY: A JOURNAL OF THEORY & PRACTICE 163-84 (March 1991).

⁸ 742 F.2d 1081 (7th Cir. 1984).

⁹ *Id.* at 1082, 1084.

¹⁰ 566 F.2d 659, 661 (9th Cir. 1977).

¹¹ 667 F.2d 748, 749-50 (8th Cir. 1982).

¹² 490 U.S. 228 (1989).

¹³ *Id.* at 250-51.

¹⁴ *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004).

¹⁵ *Etsitty*, 502 F.3d at 1223 (quoting *Smith*, 378 F.3d at 574).

¹⁶ *Smith*, 378 F.3d at 569.

¹⁷ *Schwenk v. Hartford*, 204 F.d 1187 (9th Cir. 2000).

¹⁸ 542 F.Supp.2d 653, 660 (S.D. Tex. 2008) (citing *Schroer v. Billington*, 525 F.Supp.2d 58, 63 (D.D.C. 2007).)

¹⁹ 542 F.Supp.2d at 656.

²⁰ *Id.* at 668.

²¹ *Id.* at 668-69.

²² *Etsitty*, 502 F.3d at 1221.

²³ Editorial, *An Overdue Step for Equal Justice*, N.Y. TIMES (Nov. 9, 2007).

²⁴ *Id.*

²⁵ Dishman, Note iii at 125.

²⁶ See, e.g., *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 241, 108 P.3d 380, 388 (2005); *Parker v. Boise Telco Federal Credit Union*, 129 Idaho 248, 255, 923 P.2d 493, 500 (Ct. App. 1996).

²⁷ [insert cite]

²⁸ Gallup Poll, *Homosexual Relations* (May 2007), available at <http://www.gallup.com/poll/1651/Homosexual-Relations.aspx> (last visited July 2, 2008).

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“WINTER SOLDIERS”

Chief District Judge B. Lynn Winmill
U.S. District Courts, District of Idaho

(Adapted from a talk given at the Civil Rights Symposium held at the College of Southern Idaho June 20, 2008)

“Those who profess to favor freedom and yet deprecate agitation are men who want crops without plowing up the ground. They want rain without thunder and lightning. They want the ocean without the awful roar of its waters. This struggle may be a moral one or it may be a physical one, or it may be both moral and physical: but it must be a struggle. Power concedes nothing without a demand. It never did and it never will. Find out just what people will submit to, and you have found out the exact amount of injustice and wrong which will be imposed upon them: and these will continue until they are resisted . . . The limits of tyrants are prescribed by the endurance of those whom they oppress.”

Frederick Douglass

Civil rights don't fall from Heaven. They are typically won only after a prolonged struggle against entrenched power. And no such struggle has ever been won without courageous individuals.

In this address, I want to review the lives of some of these individuals, who I will refer to as “Winter Soldiers.” And to explain that term, I want to return to a particularly bitter winter in our past. December 23, 1776, was a time of crisis for the United States. The five months since the declaration of our independence had brought unrelenting bad news. Swept off Long Island, chased the length of Manhattan, bloodied at the Battle of Harlem Heights, and soundly defeated at Forts Mifflin and Mifflin, the ragtag band of 6,000 rebels in the Continental Army was tired, footsore and hungry.

But, accompanying them was a writer of extraordinary talent – Thomas Paine. Having emigrated from England just 2 years earlier, Paine had already done his part to promote the cause of revolution with the publishing of his essay *Common Sense* eleven months earlier. Next to the bible, it was the best-selling publication in 18th Century America. It sold 120,000 copies in the first three months, equivalent to sales today of ten to twelve million copies. *Common Sense* has been described as the most influential literary work of the Revolution.

Although far from wealthy, Paine donated proceeds from the sales to the Continental Army. Perceiving that his newly adopted country had reached a crisis point, he sat down on December 23 to pen an essay which might renew the strength and courage of the common soldier who had tasted so much defeat and despair over the last 5 months. His essay, later given the title of *The Crisis*, begins with these words:

“These are the times that try men's souls: The summer soldier and the sunshine patriot will, in this crisis, shrink from the service of their country; but he that stands it now, deserves the love and thanks of man and woman. Tyranny, like hell, is not easily conquered; yet we have this consolation with us, that the harder the conflict, the more glorious the triumph. What we obtain too cheap, we esteem too lightly: it is dearness only that gives everything its value.”

Two days later, on Christmas Day, 1776, General Washington

orders *The Crisis* be read to his soldiers. And what follows is legendary.

At 6:00 p.m. that evening all 2600 of Washington's men march to McKonkey's Ferry. The snow fall increased to where they were not able to make the scheduled 11:00 p.m. crossing of the Delaware. Finally 4 hours late, at 3:00 a.m., on December 26, they cross the Delaware. At 8:00 a.m., they attack and soundly defeat the Hessian Soldiers at Trenton.

Since I read these words as a junior high student, I've been fascinated by their power and their complexity. My initial reading – with all the sophistication of a 14-year old – was that its only relevance was during times of war. It seemed a clarion call to men and women to rally around the flag when our nation was threatened by invasion from without.

However, with the passage of time, I have come to see his words in a different light – to see them as intended to inspire a sense of patriotism and devotion to country during times of crisis, regardless of the source or nature of the threat.

Indeed, does it matter if the threat to our country is from armies massed on our borders, or from our own biases and prejudices? Does it matter whether the source of danger is from a foreign enemy or from a real or imagined domestic threat? Does it matter whether danger lies on the battlefield or in the hypocrisy of our own government's policies?

Each such threat, whether external or internal, has the ability to undermine our core beliefs and way of life, to imperil our existence as a free society. Seen, in this way, the summer soldier and sunshine patriot may be willing to stand up for the oppressed, speak out against discrimination, and fight for the rights protected by our constitution – but only when the wind is at their back. When the winds of public opinion change and they find themselves tacking into the storm, their courage fails them, their good intentions go unfulfilled, and they choose the easier course.

But, of course, it was the summer soldier's opposite – what I will call the winter soldier – which Paine was challenging us to emulate. And that is my message today.

So who is the Winter Soldier? What is his character? What are her strengths and weaknesses? I think we can answer those

questions by examining the lives of four individuals who clearly qualify as Winter Soldiers.

First, Edward R. Murrow, a patriarch of radio and television news, who risked his own reputation and career to stand up to the witch hunts of the 1950s. Second, Charles Horsky, the plaintiff's lawyer in *Korematsu v. U.S.*, who lost the legal battle against Japanese-American internment during World War II. Third, Judge Frank Johnson, a federal judge in Alabama, who endured death threats, cross burnings and bombings as he made decision after decision striking down segregation in Alabama during the 1950s and 60s. The fourth is Paine himself.

All of these men were Winter Soldiers, willing to brave the worst storms of controversy to fight prejudice, oppression, discrimination and tyranny.

EDWARD R. MURROW

Most of us are familiar with Edward R. Murrow from the recent movie *Good Night and Good Luck*, his signature sign-off line. In reporting from Europe during World War II, he developed a reputation for honesty, integrity, and bluntness that endeared him to the American public and made him a true icon of his age.

During the Battle of Britain, his reporting made the war come alive for the American public. In no small way, this contributed to the demise of American isolationism and led the average American to accept the imperative of the United States' entrance into the war.

After Murrow returned to the United States in 1941, the poet and Librarian of Congress, Archibald MacLeish, described Murrow's role as follows:

"You burned the city of London in our houses and we felt the flames. . . You laid the dead of London at our doors and we knew that the dead were our dead, were mankind's dead. Without rhetoric, without dramatics, without more emotion than needed be. . . you have destroyed the superstition that what is done beyond 3,000 miles of water is not really done at all."

His confrontational style was particularly notable. During a report from the liberation of the Buchenwald concentration camp at the end of WW2, Murrow [now famously] mentioned "rows of bodies stacked up like cordwood." When asked to apologize for this unsettling description, he replied:

"I pray you to believe what I have said about Buchenwald. I have reported what I saw and heard, but only part of it. For most of it I have no words...If I've offended you by this rather mild account of Buchenwald, I'm not in the least sorry."

After the War, Murrow returned to the United States and pursued his love of investigative journalism – first on radio and then on television. Despite misgivings about the new medium and its emphasis on pictures rather than ideas, he became a pioneer in TV news journalism with controversial programs like "Hear It Now" and "Person to Person."

In 1954, at the height of the Red Scare era, Murrow focused his investigative microscope on the tactics of Senator Joe McCarthy. Concerned with the media's unwillingness to stand up to McCarthy, he produced "A Report on Senator Joseph McCarthy," which criticized the senator's tactics and integrity.

His broadcast on March 9, 1954, was one of the first to openly criticize "Tailgunner Joe" in a national forum. Because

CBS and its sponsors refused to support this criticism, Murrow and his producer, Fred Friendly, used their own money to finance the show's promotion. They had to pay for their own newspaper advertisements and were not allowed to use the CBS logo.

Murrow's attack on McCarthy was devastating. Let me quote briefly from the summation:

"[McCarthy's] primary achievement has been in confusing the public mind, as between the internal and the external threats of Communism. We must not confuse dissent with disloyalty. We must remember always that accusation is not proof and that conviction depends upon evidence and due process of law. We will not walk in fear, one of another. We will not be driven by fear into an age of unreason, if we dig deep in our history and our doctrine, and remember that we are not descended from fearful men. [...] We proclaim ourselves, as indeed we are, the defenders of freedom, wherever it continues to exist in the world, but we cannot defend freedom abroad by deserting it at home."

Murrow's words marked the beginning of the end for McCarthy. McCarthy was allowed to appear, three weeks later, to offer a rebuttal. But his appearance further undermined his credibility. The tide had turned.

Gallup Polls showed that from January 1954 to May 1954, McCarthy's favorable ratings dropped 15% and his unfavorable ratings rose 20%. Murrow's exposé, led directly to the convening, a few months later, of the Army-McCarthy hearings. These, in turn led to McCarthy being censured by the United States Senate. His day had past, and he never ran for re-election.

But Murrow's relationship with CBS deteriorated in large part because of this and other exposés. His show was cancelled by CBS in 1958. CBS President William R. Paley explained to Murrow, "I'm tired of this constant stomach ache every time you cover a controversial subject."

Three months later, Murrow gave a speech for the Radio and Television News Directors Association in Chicago, in which he blasted American broadcast journalism's commercialism. Murrow stated:

"[D]uring the daily peak viewing periods, television in the main insulates us from the realities of the world in which we live. If this state of affairs continues, we may alter an advertising slogan to read: *Look now, pay later.*"

Murrow eventually resigned from CBS in 1961 to become head of the U.S. Information Agency under Kennedy and one of the early advocates of public radio and television. This Winter Soldier fought a final unsuccessful battle with lung cancer, dying shortly after his 57th birthday in 1965.

CHARLES HORSKY

Charles Horsky the plaintiff's lead attorney in the Supreme Court case *Korematsu v. United States* is now almost a minor footnote in the annals of history, but his contributions were fundamental and far-reaching. A native westerner born in Helena, Montana, Horsky grew up in a legal family. His father was a State judge, elected to eight separate four-year terms.

Horsky graduated from the University of Washington and Harvard Law School, and served as law clerk to Judge Augustus Hand on the 2nd Circuit (brother of renowned Judge Learned Hand). In 1935, Horsky began working in the Solicitor General's office in Washington, D.C., and he moved to the law firm

Covington & Burling in 1939, where he worked the majority of his career.

He started the Washington, D.C., chapter of the ACLU, which funded Korematsu's petition and case before the Supreme Court in 1944. Horsky, without any promise or offer of compensation, devoted the better part of two years of his life pursuing the Korematsu case.

While the rest of the country's attention was focused on winning the war against Germany and Japan, Horsky took up the unpopular cause of protecting the rights of Japanese-American citizens. Of course, Horsky lost the Korematsu appeal, but his position was ultimately vindicated when Congress in 1988, approved a bill that offered the nation's apologies to Japanese Americans and provided payments to those who were interned.

Horsky never sought or obtained fame or fortune from his representation of Fred Korematsu. He later said, "I was just trying to persuade the Court that there was no legitimate basis for the Army to arrest citizens."

After completing the Korematsu appeal, Horsky went on to serve as a prosecutor at the Nuremberg trials, then returned to his practice of law in Washington, D.C. Although a distinguished and successful lawyer, this Winter Soldier passed away in relative anonymity, in 1997.

FRANK JOHNSON

Judge Frank Johnson was born in 1918 to a white family in the Deep South – Alabama – at a time when racial discrimination was at its worst. His parents were Republicans, when the State (and the entire South) was a Democratic stronghold. His father was one of the few Republicans in the Alabama State legislature.

Immediately after receiving his law degree from the University of Alabama in 1943, Johnson entered the Army and fought in the D-Day invasion in Normandy. He was shot during the invasion and carried the bullet in his body the rest of his life. Thus, he understood the dangers of the battlefield and the life of a soldier.

After the war, Johnson returned to practice law in Alabama. Returning to his Republican roots, Johnson supported Eisenhower's presidential candidacy in 1952, and Eisenhower appointed him a U.S. Attorney and eventually a U.S. District Judge in 1955 for the Middle District of Alabama. At the age of 37, he became the youngest federal judge in the country.

Johnson quickly established himself as one of the strongest defenders of the Supreme Court's *Brown v. Board of Education* decision. The first public outcry to his career as a judge was *Browder v. Gale* (1956), where he held in response to the Montgomery bus boycott (led by Rosa Parks and Martin Luther King, Jr.) that *Brown v. Board* applied to public transportation as well as to public schools.

Sitting in the majority of a 3-judge panel, Johnson held that Montgomery's bus segregation violated both 14th Amendment Due Process and Equal Protection. Still, the ruling only applied to his jurisdiction of central Alabama, so other bus systems were free to maintain their segregated seating and bus terminal waiting rooms.

He worked to desegregate a variety of facilities such as parks, libraries, and airports during the 1950s and 1960s. In the process, Johnson and his family endured death threats, cross burnings on

their lawn, and even a bomb that targeted his mother's house. For 17 years he lived with round the clock protection from U.S. Marshalls.

Even after the Civil Rights movement was coming to a close, Judge Johnson continued to make a difference. His decisions in *Wyatt v. Stickney* (1971), *Newman v. Alabama* (1972), and *Pugh v. Locke* (1976) imposed more humane standards for mental hospitals and prisons and created a human rights committee to monitor those standards.

In 1979, President Carter appointed Johnson to the Fifth Circuit Court of Appeals. Johnson continued as a winter soldier, fighting for civil rights on all fronts. In 1985, he wrote the opinion for the Eleventh Circuit in the case of *Hardwick v. Bowers* that declared a Georgia sodomy statute unconstitutional when applied to consenting adults, homosexual as well as heterosexual. The Supreme Court reversed his decision, but Johnson was eventually vindicated when the Court overturned its own decision in the 2003 case *Lawrence v. Texas*.

Of all the judges who have ever served on the federal bench – and there have been some great ones, from John Marshall to Oliver Wendell Holmes, from Learned Hand to J. Skelly Wright – there are none who were more courageous and upright than Frank M. Johnson. Although his career was largely anonymous, he has inspired countless other federal judges, like me, with his example and his decisions.

QUALITIES OF A WINTER SOLDIER

Before turning to the life of Thomas Paine, let's take a moment and reflect on the qualities of a Winter Soldier? As we look at examples like Murrow, Horsky, and Judge Johnson, a certain pattern emerges:

- Like Edward R. Murrow, they often take a stand against the crowd;
- Like Judge Johnson, they usually act outside the glow of public acclaim and often stand alone.
- Like Horsky, they are typically not pragmatic compromisers;
- Like Murrow, they often suffer painful personal consequences;
- Like Horsky and Judge Johnson, they are often relegated to the dustbin of history. At most a footnote in history.
- Like Horsky, they are rarely vindicated until much later – often after their death.

THOMAS PAINE – WINTER SOLDIER

Which brings me to Thomas Paine, in whose life we see all of these characteristics emerge vividly. Having helped achieve the great success of independence in America, Paine traveled to Great Britain at the end of the Revolutionary War to urge that the Monarchy be abolished and democracy established.

Not surprisingly, the British sought to arrest him on charges of Seditious Libel, but he escaped to France. His writings had made him popular there and he was elected as an honorary citizen of the French Republic. He was even elected to the French Convention – their general legislative body. Although he spoke no French, he prepared a draft of a republican constitution for France.

While he was a member of the French Convention, it was proposed by others that King Louis XVI and his wife be executed. Paine opposed his colleagues' demand and instead urged exile.

He stood alone and lost that battle. This and other courageous stands eroded his standing in France. As the French Revolution took a decidedly violent turn, his draft constitution was torn up and he was thrown into jail. He was imprisoned for over a year, narrowly escaping the guillotine.

Now in his 65th year, he returned to the United States where he dined with President Thomas Jefferson. But his star was falling here as well – already loathed by many in Great Britain and France, he was now becoming a pariah in America.

His book *“The Age of Reason”* was a ferocious assault on the organized Churches of the day and the conventional view that the Bible was the revealed and unerring word of God. But, at the same time, this man of contradictions was one of the foremost Deists and a deeply spiritual man. But his opponents tarred him as an atheist. For the rest of his life he would be subject to ridicule and humiliation for views that he did not hold.

Paine battled as a Winter Soldier all his life, but never from afar – he always took his fight right to the home land of his enemies. He challenged the monarchy while in Great Britain. He challenged the excesses of the French Revolution while in France.

He railed against slavery while in America.

These battles left a mark on him. His years of dissent – of being a Winter Soldier – had taken a physical toll on him. In a remarkable account, the young industrialist Eli Whitney wrote of a chance encounter he had with Paine during this time. Here is Whitney’s description of Paine:

“He is about five feet 10 inches high -- his hair three-fourths white -- black eyes -- a large bulbous nose -- a large mouth drawn down at the corners with flabby lips -- with more than half decayed, horrid looking teeth -- his complexion of a brick colour -- his face & nose covered with carbunkles & spots of a darker hue than the general color of his skin -- his dress rather mean & his whole appearance very slovenly -- his hands so convulsed that while his expansive lips almost encompassed a wine glass, he could hardly get the contents of it into his head without spilling it”

And so we add another defining characteristic of most Winter Soldiers – they cannot hide their battle scars.

Now almost 70 years old, and living in New York, Paine’s inspiring support of the Revolutionary cause was largely forgotten.

His opponents denied him the right to vote, claiming he was not a citizen. One night as he sat in his study in New Rochelle, someone fired a shot at him but missed. Drinking heavily, he suffered serious illness, and eventually died at age 72.

His funeral was attended by a few friends, and by two blacks who had traveled 25 miles on foot to pay their respects to a leading antislavery advocate. Denied burial in a Quaker cemetery, he was buried in an orchard on his farm.

The great orator and writer Robert G. Ingersoll wrote at his passing:

“Thomas Paine had passed the legendary limit of life. One by one most of his old friends and acquaintances had deserted him. Maligned on every side, execrated, shunned and abhorred – his virtues denounced as vices – his services forgotten – his character blackened, he preserved the poise and balance of his soul. He was a victim of the people, but his convictions remained unshaken.

He was still a soldier in the army of freedom, and still tried to enlighten and civilize those who were impatiently waiting for his death. On the 8th of June, 1809, death came – Death, almost his only friend. At his funeral no pomp, no pageantry, no civic procession, no military display. In a carriage, a woman and her son who had lived on the bounty of the dead – on horseback, a Quaker, the humanity of whose heart dominated the creed of his head – and, following on foot, two negroes filled with gratitude – constituted the funeral cortege of Thomas Paine.”

Some years later, the English radical William Cobbett disinterred Paine’s casket hoping to re-bury it in Great Britain as a memorial to the cause of democracy there. Obviously, the British Monarchy denied the request. Paine’s remains were somehow lost and were never recovered.

And so Thomas Paine fits all the qualifications for being a Winter Soldier. He took courageous stands against the crowd, suffered terrible consequences, was demonized by opponents, but never backed down. Tony Benn, a contemporary British politician, eloquently summarized the Winter Soldier quality of the life of Thomas Paine:

“If you meet a powerful person, ask him or her five questions: What power have you got? Where did you get it from? In whose interest do you exercise it? To whom are you accountable? And how can we get rid of you? Now that last question . . . is the democratic question. And Paine asked it of kings and emperors and rulers. And of course they didn’t like it. I’ve always thought democracy was the really controversial thing . . . [W]hen you challenge power, then they turn on you and they crucify you and they destroy you and they harass you and Paine was a victim of that. And that’s why he’s so important today when power is so widely abused . . .”

The life of Thomas Paine is important – perhaps today more than ever. When power is being abused in the highest reaches of government, we must ask ourselves, where are the Winter Soldiers? As we see our constitutional rights threatened in the name of national security, we must ask ourselves, where are the Winter Soldiers? As we see individual rights sacrificed at the altar of conformity and fear, we must ask ourselves, where are the Winter Soldiers?

As we seek answers to these questions, I would point out that my four models of the Winter Soldier included a pamphleteer, a journalist, a lawyer and a judge. In writing this speech, I did not set out to select role models who would parallel the theme of this conference. It just turned out that way.

But this coincidence provides a partial answer to the question of where can we find today’s Winter Soldiers. Today they can be found in rooms like this, with groups of academics, journalists, lawyers and ordinary citizens who share a passionate interest in civil rights and civil liberties. Their weapons are found in legal briefs, the pages of newspapers, and the flickering screens of television newscasts.

Their battlefields are in the classroom, where teachers struggle to open the minds of the young. And in the pressroom where the journalist fights to expose the truth. And in the courtrooms where attorneys fight, without compensation, for what Dean Burnett referred to this morning as the rights of the few against the tyranny of the many.

My talk today was not designed to be a call to arms. I think

this audience is already conscripted in the fight for civil rights and fully engaged in that battle. I just want to offer my respect and my support for your efforts in these difficult times – in the words of Paine, “times that try men’s souls.” My goal today was simply to remind each of you that the Winter Soldier tradition – your tradition – is rich and noble. May it continue to be ever so.

ABOUT THE AUTHOR

Hon. B. Lynn Winmill was appointed a United States District Judge for the District of Idaho by President William J. Clinton on August 14, 1995. Chief Judge Winmill graduated from Idaho State University in 1974 and from Harvard Law School in 1977. He practiced law in Denver, Colorado, from 1977-1979, and in Pocatello, Idaho, from 1979 to 1987.

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2nd AMENDED Regular Fall Terms for 2008

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 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

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Judges
Karen L. Lansing
Darrel R. Perry

2nd AMENDED Regular Fall Terms for 2008

Hailey October 9 and 10
Boise October 14 and 16
Boise November 6 and 7
Boise December 2, 4, 9, and 11

By Order of the Court
Stephen W. Kenyon, Clerk

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

Idaho Supreme Court

Oral Argument Dates
As of September 16, 2008

October 2008

The Supreme Court DOES NOT have any oral argument scheduled for the month of October

November 6, 2008 – TWIN FALLS

| | | |
|------------|-----------------------------------|--------|
| 8:50 a.m. | Farrell v. Whiteman | #34383 |
| 10:00 a.m. | Grover v. Wadsworth | #34810 |
| 11:10 a.m. | Griffith v. Clear Lakes Trout Co. | #34430 |

Friday, November 7, 2008 – TWIN FALLS

| | | |
|------------|--|--------|
| 8:50 a.m. | Saddlehorn Ranch v. Dyer | #34605 |
| 10:00 a.m. | Bauchman-Kingston Partnership v. Haroldsen | #34551 |
| 11:10 a.m. | PHH Mortgage Services v. Perreira | #34764 |

Monday, November 10, 2008 – BOISE

| | | |
|------------|---------------------|--------|
| 8:50 a.m. | Thomson v. Olsen | #34185 |
| 10:00 a.m. | Borah v. McCandless | #34756 |
| 11:10 a.m. | Taylor v. Maile | #33781 |

Wednesday, November 12, 2008 – BOISE

| | | |
|------------|--|--------|
| 8:50 a.m. | Gonzalez v. Thacker | #34534 |
| 10:00 a.m. | Olsen v. Vencor, Inc. | #34561 |
| 11:10 a.m. | Derushe v. State (Petition for Review) | #35116 |

Friday, November 14, 2008 – BOISE

| | | |
|------------|--|--------|
| 8:50 a.m. | Wheeler v. Dept. of Health and Welfare | #34426 |
| 10:00 a.m. | City of McCall v. Buxton | #34609 |

Idaho Court of Appeals

Oral Argument Dates
As of September 16, 2008

Thursday, October 9, 2008 – HAILEY

| | | |
|------------|------------------|--------|
| 9:00 a.m. | State v. Lampien | #34145 |
| 10:30 a.m. | State v. Perry | #34469 |
| 1:30 p.m. | State v. Beasley | #34698 |

Friday, October 10, 2008 – HAILEY

| | | |
|------------|--------------------|--------|
| 9:00 a.m. | Peterson v. Shore | #34568 |
| 10:00 a.m. | Carlson v. Stanger | #33607 |

Tuesday, October 14, 2008 – BOISE

| | | |
|------------|------------------------|--------|
| 9:00 a.m. | State v. Karpach | #33949 |
| 10:30 a.m. | State v. Precht | #34864 |
| 1:30 p.m. | Lawrence v. Hutchinson | #34775 |
| 3:00 p.m. | State v. Schultz | #32111 |

Thursday, October 16, 2008 – BOISE

| | | |
|------------|--|--------------|
| 9:00 a.m. | State v. Gerardo | #33450 |
| 10:30 a.m. | State v. Hedgecock | #33950 |
| 1:30 p.m. | State v. Herrera/State v. Oernelas-Perez | #33241/33284 |

IDAHO CHAPTER, FEDERAL BAR ASSOCIATION EXEMPLARY SERVICE AWARDS

Please join us as we congratulate **Dick Fields**, **Joe Meier**, **Dave Metcalf**, and **Dick Rubin** on receiving the *Exemplary Service Award* from the Idaho Chapter of the Federal Bar Association. The *Exemplary Service Awards* honor attorneys who have improved the quality of practice in Idaho's federal courts.

These practitioners have been recognized by their peers from the Idaho Chapter, FBA as demonstrating professionalism, collegiality, mentoring, and providing quality legal representation. These individuals set the standard for federal practitioners in chambers, in the courtroom, in continuing legal education and in all phases of litigation.

The Idaho Chapter of the Federal Bar Association will present these awards over the lunch hour at the Federal District Court Conference on Friday, November 7, 2008, at the Boise Center on the Grove. To register for the conference, which includes the luncheon, contact Suzi Butler at (208) 334-9208, or Suzi_Butler@id.uscourts.gov.



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Idaho Supreme Court and Court of Appeals
NEW CASES ON APPEAL PENDING DECISION
(Update 09/01/08)

CIVIL APPEALS

DUE PROCESS

1. Whether the court erred in striking the written comments of the QIO peer reviewer, who did not testify, based on the premise that due process afforded Kootenai Medical Center the right to cross-examine the peer reviewer at the administrative hearing under 42 CFR §§ 431.200, *et. seq.* and *Goldberg v. Kelly*, 397 U.S. 254 (1970), where the sole issue at hearing is reimbursement to the provider

Kootenai Medical Center v. Idaho Dept. Of Health and Welfare
S.Ct. Nos. 34879/34880/34881
Supreme Court

EVIDENCE

1. Did the court err in calculating the deficiency judgment based upon a valuation of the property in the amount of \$300,000 when competent and better evidence established a higher value?

Parma LLP v. Gray
S.Ct. No. 34477
Supreme Court

POST-CONVICTION RELIEF

1. Has Stuart established that I.C. § 19-2719 violates ex post facto laws or state retroactivity laws when the statute is Idaho's procedural mechanism for dealing with successive post-conviction petitions in capital cases and was expressly enacted with language that it should be retroactively applied?

Stuart v. State
S.Ct. No. 34200
Supreme Court

2. Whether the district court abused its discretion in denying Rhoades' motion to amend and in finding he knew or reasonably should have known of the claims when he filed his first post-conviction petition.

Rhoades v. State
S.Ct. No. 34236
Supreme Court

3. Whether the court erred in dismissing the application for post-conviction relief in which Torres-Vargas claimed he had received ineffective assistance of counsel.

Torres-Vargas v. State
S.Ct. No. 34449
Court of Appeals

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

Weller v. State
S.Ct. No. 34805
Court of Appeals

PROBATE

1. Did the court err in concluding the letter dated November 17, 2004, did not qualify as a codicil to Hazel White's will?

In the Matter of the Estate of Hazel White
S.Ct. No. 34803
Court of Appeals

QUIET TITLE

1. Whether the court erred in finding that an indiscernible and variable line of live and dead trees fixed a discernable line caused by water impressed on the soil by covering it for sufficient periods to deprive the soil of its vegetation and destroy its value for agricultural purposes and was the ordinary high water mark defined by I.C. § 58-104(9).

Mesenbrink v. Hosterman
S.Ct. No. 34714
Supreme Court

SUMMARY JUDGMENT

1. Whether the district court erred in granting summary judgment in favor of Zion on Lettunich's counterclaim for breach of contract.

Zions First National Bank v. Lettunich Land & Livestock LLC
S.Ct. No. 34437
Supreme Court

2. Did the trial court err in granting summary judgment to Hutchinson and in finding there was no settlement agreement?

Lawrence v. Hutchinson
S.Ct. No. 34775
Court of Appeals

3. Did the court err in granting partial summary judgment dismissing the appellant's cross-claim of fraud, misrepresentation and breach of good faith and fair dealing?

Gold v. Lockwood Engineering, B.V.
S.Ct. No. 34817
Supreme Court

4. Whether the district court erred in granting the motion for summary judgment in favor of ICRM on appellant's wrongful death claim when there are issues of fact as to whether ICRM's failure to disclose the decedent's positive HIV result was a proximate cause of his death.

Cramer v. Slater
S.Ct. No. 34825
Supreme Court

5. Whether the district court erred when it granted the Northland motion for summary judgment concluding that Northland was not obligated to reimburse IRCMP for monies paid to settle the *Paradis v. Brady et. al.* litigation.

IRCMP v. Northland Insurance Co.
S.Ct. No. 34375
Supreme Court

6. Whether the district court erred in granting Indian Springs' motion for summary judgment.

Indian Springs, LLC v. Andersen
S.Ct. No. 34623
Supreme Court

CRIMINAL APPEALS

EVIDENCE

1. Did the district court commit reversible error in limiting Ruiz's cross-examination of a key prosecution witness?

State v. Ruiz
S.Ct. No. 33053
Court of Appeals

2. Was there substantial competent evidence presented at trial from which a jury could find beyond a reasonable doubt that Bennett was guilty of grand theft?

State v. Bennett
S.Ct. No. 34066
Court of Appeals

3. Did the trial court abuse its discretion by allowing the state to introduce a co-defendant's videotaped interview with a detective before the co-defendant testified?

State v. Osborn
S.Ct. No. 34178
Court of Appeals

4. Was Pina denied due process of law when he was convicted of felony murder absent proof that he was acting in concert with his co-felon who actually killed the victim?

State v. Pina
S.Ct. No. 34192
Supreme Court

5. Was there sufficient evidence to support Herrera's conviction for conspiring to traffic in between 7 and 28 grams of heroin?

State v. Herrera
S.Ct. No. 33241
Court of Appeals

6. Did the district court commit reversible error when it permitted the state to play a copy of the preliminary hearing testimony of Curtis Coe during trial?

State v. McNabb
S.Ct. No. 33576
Court of Appeals

PROCEDURE

1. Did the district court err in reversing the magistrate's order requiring Doe and his mother to reimburse Nez Perce County for the costs of detention as authorized by I.C. § 20-524(2) on the basis they were entitled to notice and an opportunity to be heard before the order?

State v. Doe
S.Ct. Nos.
Court of Appeals

SEARCH AND SEIZURE

- SUPPRESSION OF EVIDENCE

1. Did the court err in denying Floyd's motion to suppress and in finding the stop was supported by reasonable suspicion?

State v. Floyd
S.Ct. No. 34114

Court of Appeals

2. Did the district court err in denying Martinez's motion to suppress statements obtained in violation of his Fifth Amendment rights?

State v. Martinez
S.Ct. No. 33626

Court of Appeals

SENTENCE REVIEW

1. Did the court act outside the bounds of its authority in the terms of the no contact order and err in denying Cobler's motion to modify the order?

State v. Cobler
S.Ct. No. 34308

Court of Appeals

SUBSTANTIVE LAW

1. Did the court abuse its discretion in denying Cavanaugh's motion for new trial based on newly discovered evidence?

State v. Cavanaugh
S.Ct. No. 33657

Court of Appeals

2. Did the court err in affirming Morgan's designation as a violent sexual predator in light of I.C. § 18-8321(12)(b)?

Morgan v.
Sexual Offender Classification Board

S.Ct. No. 34851

Court of Appeals

3. Did the court err in denying Leslie's motion to strike his previous DUI conviction and in finding that prior convictions enhanced for excessive alcohol concentration are still prior convictions for purposes of enhancing a current DUI?

State v. Leslie
S.Ct. No. 34590

Court of Appeals

Summarized by:

Cathy Derden

Supreme Court Staff Attorney

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The United States District Court for the District of Idaho is accepting applications for positions on the District Court CJA Panel List for appointment to indigent cases in the District of Idaho. General Order 210. The deadline for applying is October 31, 2008. Please refer to the District of Idaho's website at www.id.uscourts.gov or contact Wendy Messuri at (208) 334-1976 or Wendy_Messuri@id.uscourts.gov for further information.



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

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

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HON. LARRY M. BOYLE RETIRES AS CHIEF MAGISTRATE JUDGE FOR THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

Katie Ball

U.S. District Court, District of Idaho, Law Clerk



After a legal career spanning 36 years, including nearly 25 years on both the federal and state bench, Chief United States Magistrate Judge Larry M. Boyle retired at the end of September. However, the good news is that he will remain working as a federal judge. Those who have worked with and appear before Judge Boyle will be pleased to know that he has been recalled to service as a federal judge, the equivalent of senior status.

In this article I would like to consider Judge Boyle's legacy, focusing particularly on the nearly quarter century of unique judicial leadership he has provided in his combined service as a state district judge, Justice of the Supreme Court of Idaho, and federal judge. Judge Boyle's consistent service to the Idaho judiciary began in 1972 after graduating from the University of Idaho College of Law where he was an editor of the *Law Review*. He worked as a law clerk for the Idaho Supreme Court, first for then-Chief Justice Henry McQuade and thereafter for future Chief Justice Robert Bakes. Judge Boyle practiced law for 14 years as a co-founding partner in the prominent Idaho Falls law firm of Hansen, Boyle, Beard & Martin. In 1986, he was appointed as a State of Idaho district judge by Governor John Evans. Three years later, he accepted an appointment from Governor Cecil Andrus as an Associate Justice of the Idaho Supreme Court, where he served until becoming a federal judge in 1992.

Throughout his career, Judge Boyle has gone above and beyond his various job descriptions to provide community service. In 1985, Judge Boyle served as president of the Seventh Judicial District Bar Association. In 1990 he received a special community service award from his undergraduate alma mater, Brigham Young University. While practicing law in Idaho Falls he refereed high school basketball and coached three different Babe Ruth baseball teams, made up of 15 and 16 year-olds, to state championships. Each of those years, one of his sons played on the team. One team won the Pacific Northwest Championship and went on to play in the 1985 Babe Ruth World Series in Jamestown, New York.

In August of 2007, Judge Boyle received a special and unique assignment from the United States Administrative Office of the Courts to conduct court hearings in Bangkok, Thailand at the Klong-Prem Central Prison for United States' citizens convicted of felony-level crimes in that country.

Judge Boyle has served on many Ninth Circuit committees

and task forces, and he was recently appointed to the Idaho State Bar's Judicial Independence Committee. Some of the most significant work Judge Boyle has undertaken, however, has impacted the federal judicial system nationally. Under Judge Boyle's leadership, what is now known as the Executive Board of the Ninth Circuit Magistrate Judges was established; he chaired that Board from 1995 to 1997. Proctor Hug, Jr., then-Chief Judge of the United States Court of Appeals for the Ninth Circuit, was so impressed with the work Judge Boyle did that he nominated him to be appointed to the U.S. Judicial Conference Committee on the Administration for the Magistrate Judge System.

The Chief Justice of the United States Supreme Court, William H. Rehnquist, accepted Chief Judge Hug's recommendation and appointed Judge Boyle to this prominent national committee, which is composed of twelve district judges and three magistrate judges, and makes policy decisions related to the federal judiciary nationwide and makes recommendations to the Judicial Council about whether new federal judicial positions should be created. Notably, in 2004, Chief Justice Rehnquist extended Judge Boyle's service on the committee for an unprecedented third term. At the end of Judge Boyle's eight years of service, a new Chief Justice, John G. Roberts, extended his gratitude in a personal letter to Judge Boyle for his many contributions and the time he invested, over and above the performance of his regular judicial duties, to contribute to the work of the federal judiciary.

Judge Boyle's leadership, commitment, and integrity are best expressed by the judges with whom he has worked closely. United States District Judge Michael Ponsor of Massachusetts describes his time on the Committee with Judge Boyle:

During that time, an increasing work load was straining the judicial system in many parts of the country. The Committee's decisions, especially on the creation of new Magistrate Judge positions, had a very direct, practical impact on the delivery of justice in the federal courts. The critical issues before the Committee inevitably generated intense discussion among the members. No one on the committee was more thoughtful, fair-minded, or articulate in reviewing the knotty matters before us than Larry Boyle. His good humor was so engaging, and his intelligence so constructive, that he was always a force for common sense.

Another colleague, United States District Judge Dan Polster from the District of Ohio, also comments:

While our work was often difficult and sometimes contentious, Judge Boyle was unfailingly thoughtful, professional, and considerate of the feelings of everyone on the committee. For any organization to function successfully as a team, you need at least one person such as Larry Boyle.



Idaho Supreme Court circa 1990 - (left to right) Justice Stephen Bistline, Justice Byron J. Johnson, Chief Justice Robert E. Bakes, Justice Charles F. McDevitt, and Justice Larry M. Boyle.

Judges Boyle's colleagues at the federal court in Idaho comment in the same refrain. As Chief Judge B. Lynn Winmill noted when his retirement was announced, Judge Boyle has "left an indelible mark on the Federal Judiciary and the people of Idaho." His "hard work and dedication to the Rule of Law [has] significantly improved the administration of justice in the District of Idaho and throughout the nation." District Judge Edward J. Lodge comments: "Judge Boyle has a deep love and respect for the law and is passionately committed to preserving the integrity of the legal system." Along the same lines, Judge Mikel H. Williams explains:

Judge Boyle does not perform his judicial duties in the abstract, but brings a sense of compassion to the bench. Through his years in private practice he understands the tensions and difficulties that lawyers and litigants confront in protracted litigation. Even when the litigants and the attorneys have a case decided against them in Judge Boyle's court, they know the issues were decided in a reasoned manner, by an impartial and fair jurist. And there is probably no higher compliment that a trial judge can receive.

Significantly, lawyers who have appeared in Judge Boyle's court respect and trust him. Judge Boyle's work ethic and skill as a trial judge are reflected in comments from John Copeland Nagle, former Associate Dean and current law professor at Notre Dame Law School:

My relationship with Judge Boyle developed from my experience in the Department of Justice representing several federal agencies in litigation involving environmental contamination at the Blackbird Mine in central Idaho. Nearly a dozen federal agencies and almost as many private corporations struggled to determine who would pay the estimated \$50 million to clean up the site. For three years, I attended nearly a

dozen settlement meetings in Boise and elsewhere, all to no avail. It was not until Judge Boyle agreed to meet with the parties that the parties achieved any progress toward actually remedying the environmental problems at the mine.

Judge Boyle presided over three settlement meetings with the parties in Boise. His courtroom was filled with dozens of attorneys representing numerous federal and state governmental agencies, mining companies, and other businesses and individuals who had a past or present connection to the mine. Yet Judge Boyle was not daunted. He prodded attorneys who need to make concessions (like me), and kept focused on remedying the pollution. From the outset, he evidenced sensitivity to the complicated technical issues, a keen understanding of the legal questions, and great patience with the need to reconcile conflicting agency positions before a decision can be reached by the federal government. He encouraged the parties when needed, and he privately indicated when a party's position threatened continued progress. All of the parties trusted Judge Boyle. He impressed me as the most thoughtful and gifted judge whom I had the privilege to appear before during my tenure at the Department of Justice.

Judge Boyle's former law partner, and now General Counsel at Brigham Young University, Michael R. Orme, observed: "As a lawyer Larry was an 'American Original' -- a regular guy, but also a highly skilled trial advocate who had an uncanny sense for what ordinary people like in clients, juries, secretaries and young associates, like me, were thinking and feeling. I consider myself greatly blessed to have had Larry as my senior partner, mentor, guide and friend, especially in those first few tender years when I was beginning my Idaho law practice."

Judge Boyle has earned not only the trust of those whose cases he presides over, but also the trust of his fellow judges.

Judge Winmill comments that Judge Boyle “has always been a dear friend and trusted confidante.” Judge N. Randy Smith of the Ninth Circuit Court of Appeals, who was in private practice at the same time as Judge Boyle, adds: “I have never practiced with a finer and more ethical lawyer. While we would present the best cases that we could and argue with each other (in order to represent our clients to the best of our abilities) in the courtroom, we were friends and never had a cross moment outside of the courtroom.”

As he was mentored, Judge Boyle also is committed to help instill this level of excellence to new generations of lawyers. He has trained numerous law clerks and externs and his former clerks now work in several states as judges, law professors, lobbyists, corporate in-house counsel, and many lawyers highly successful in private practice. Judge Boyle also has helped a new generation of young lawyers by teaching law school classes, including those at Notre Dame Law School and the University of Idaho College of Law, and he recently trained new Assistant Attorneys General at the Department of Justice’s National Advocacy Center. For many years, Judge Boyle has taught law students at both orientation and commencement programs. He also served on the Board of Visitors at the J. Reuben Clark Law School at Brigham Young University from 1990 through 1995.

Moreover, Judge Boyle has written and published extensively in a variety of law review and law journals, including publications by the *Idaho Law Review*, the Brigham Young University *Clark Memorandum*, the Idaho Bar Association *Advocate*, and the American Bar Association’s flagship publication *Litigation Magazine*.

Judge Boyle has always kept first things first though and focused on his six children and ten grandchildren whom he and his wife of forty years, Beverly Rigby Boyle, recognize is their real treasure.

Chief Judge Winmill’s assessment of Judge Boyle’s career of service says it best as he succinctly describes the legacy from which all of us in the Idaho and federal bar have benefitted:

Judge Boyle has contributed more to the Idaho judiciary than anyone I know. His legal and judicial career - - including years in private practice as a trial lawyer, time on the state trial court bench, a distinguished career on the Idaho Supreme Court, and 16 years as a well-respected United States Magistrate Judge -- is truly unparalleled.

About the Author

Katie Ball is currently a law clerk for the Hon. Ronald E. Bush, Magistrate Judge, United States District Court and works as the Externship Coordinator for the University of Idaho College of Law. She served as Judge Boyle’s career law clerk until his retirement.

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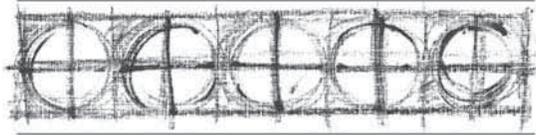
Parkinson’s Disease is a progressive disorder that affects nerve cells in the part of the brain controlling muscle movement. People often experience trembling, muscle rigidity, difficulty walking, problems with balance and slowed movements. People with the disease need caregiving and legal advice. Long-term care is expensive, no matter where the person lives (home, assisted living facility or nursing home). Sisson & Sisson concentrates on helping seniors with chronic health care issues protect assets for themselves and their families and get the care they need.

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Soundstart, a program of the Idaho Volunteer Lawyers Program (IVLP), addresses the legal needs of young, low-income parents, as they start their families by focusing on education and prevention. Attorneys volunteering through **Soundstart** give parents basic information concerning topics such as custody, child support, and paternity. The curriculum is designed to teach the fundamental ideas in each area, and to try and provide answers to the most commonly asked questions. The project's objective is to help parents to appreciate the importance of legal structures for their families and motivate them to contact IVLP, or other appropriate agencies, for assistance to create those structures.

Soundstart has proved popular with parents and the social agencies that support them. The project's success rests entirely on the efforts of volunteer attorneys who juggle their busy schedules (and often step outside their comfort zones) to learn the curriculum and make the educational presentations. IVLP extends special thanks to the firm of Moffatt, Thomas, Barrett, Rock and Fields, Chtd., who have taken on **Soundstart** as a pro bono project for their firm and the individual attorneys who have volunteered in 2008 to expand the legal services available to low-income families through **Soundstart**.

If you would like to learn more or volunteer for Soundstart, please contact IVLP at (208) 334-4510.

ATTORNEYS

Alison Brace

Non-Confrontational Legal Solutions, Boise

Trudy Fouser,

Gjording & Fouser, PLLC

Joanne Kibodeaux,

Kibodeaux Law Office, Boise

Brian Peterson,

Hall, Friedly & Ward, Mountain Home

Glenda Talbutt,

Brady Law, Chtd., Boise

Bob Wallace,

Robert A. Wallace, Lawyer, Boise

FIRMS

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

- Glenna Christensen
- Christine Nicholas
- Rebecca Rainey
- Nathan Starnes

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OF INTEREST

—IN MEMORIAM—

JOHN LYMAN KING 1942-2008

John Lyman King was born in Glendale, Calif. on Jan. 22, 1942. He lived in Lima, Peru as a child where his father was a pilot for Standard Oil. From Lima, the family moved to New Jersey, where he completed Jr. High School, and then to Boise, where he attended Boise High, graduating in 1959. Following one year at Boise Junior College, he attended the University of Oregon and received his B.S degree in 1964 and his law degree (J.D.) in 1967.

John and his wife Jackie were married on July 25, 1964. In August 1967, John and Jackie packed up their '56 Chevy and moved to Boise, where he clerked for Judge Fred M. Taylor in the U.S. Federal District Court. He then served as a federal prosecutor until entering private practice in 1972.

He and Jackie had two children, Jennifer and John. He and Jackie celebrated their 44th wedding anniversary July 25, 2008.

John was a partner in the Cantrill, Skinner, Sullivan and King law firm for 28 years, and he particularly enjoyed his time working with the Boise School District.

He had a great passion for being outdoors. He was an avid biker, runner and skier. He enjoyed being on and around Payette Lake, skiing at Baldy and Brundage, riding bikes and running with family and friends. His vintage collection of T-shirts from local athletic events from over the years is testament to his enthusiasm and lively spirit. He was an avid gardener and could be found tending to the wildflowers and landscaping that he so greatly enjoyed in both Boise and McCall.

John's love for his family was of paramount importance in his life. His advice and guidance to his children was always given with support and encouragement and the positive influence he had on their lives was one of his greatest gifts. John never missed a sporting event or activity in which his children were involved.

He and Jackie, for whom he had such love and respect, were known for

the warm welcome they extended to everyone. He cherished the relationships he cultivated over the years, and was known as a loyal and thoughtful friend. John's memory may best be recalled when running backcountry trails, tree skiing at Brundage, biking up a favorite summit, getting ready to dock-start at age 66, or sitting at the water's edge reflecting on the beauty of Payette Lake.

John is survived by his wife, Jackie of Boise; his daughter, Jennifer King; son, John (Amanda) King and granddaughter, Lucy Brady King; sister, Joan (Rodney) Priest; sister, Susan King; sister-in-law, Karin King; and several nieces and nephews. He is preceded in death by his mother, Mildred Stacey King; his father, Charles Robinson King; and his brother, Bob King.

—RECOGNITION—

Matthew T. Christensen, Angstman, Johnson & Associates, PLLC was appointed by the American Bar Association President H. Thomas Wells to the ABA Center for Professional Responsibility's Standing Committee on Professionalism ("SCOP"). SCOP's mission is educating, encouraging, recommending and providing assistance in the development and coordination of professionalism initiatives and other efforts to improve lawyer professionalism and competence. Matt has a B. A. in International Studies from Brigham Young University in Provo, Utah. He received both a *Juris Doctor* and LL.M. (International and Comparative Law) from Duke University School of Law in Durham, North Carolina. Currently, he practices real estate and business law, including litigation. He is also an adjunct professor at Boise State University and the University of Idaho College of Law. He can be reached at (208) 384-8588.

Jon Gould, Ringert Law Chartered, Boise, and Ryon Butterfield, won the Masters Division of the 2008 Trans Rockies Challenge, an epic seven-day mountain bike race through the Canadian Rockies. The race is dubbed "North America's most difficult mountain bike race." A maximum of 300 amateur and pro teams compete in the TransRockies

Challenge each year. Participants must grind their way back and forth over the Continental Divide on mountain bikes over 600 km, which includes over 12,000 meters of climbing through wilderness trails. It is considered by most mountain bike enthusiast to be the ultimate test of both physical endurance and mental determination. The riders of each team must remain together at all times during the race. If at any point, riders separate by more than two minutes, the team will receive a penalty. Each of the seven stages begins at 8:00 a.m. and riders are expected to reach the finish line by 6:00 p.m. daily. TransRockies is organized as a wilderness mountain bike race, where participants sleep in tent villages that are set up prior to the participant's arrival and broken down immediately after the start of the next stage each morning. Participants must endure the climate and physical challenges of the Canadian Rocky Mountains. TransRockies began in 2002 and is based on the hugely successful TransAlp Challenge, which annually attracts more than 6,000 enquiries for the 550 available starting positions. See photos on page 43.

Givens Pursley LLP has been selected as a winner for the Alfred P. Sloan Awards for Business Excellence in Workplace Flexibility. This prestigious award recognizes employers in select communities nationwide that are successfully using flexibility to meet both business and employee goals. Givens Pursley was the only law firm in Boise to win the award in 2008.

Stoel Rives, LLP has announced nine of its Boise attorneys were favorably ranked in the most recent edition of Chambers USA: Guide to America's Leading Lawyers for Business. The attorneys and their practice areas include: **Kevin Beaton**, natural resources and environment; **Paul Boyd**, corporate/commercial; **James Dale**, labor and employment; **John Eustermann**, natural resources and environment; **Mark Geston**, commercial litigation; **Quentin Knipe**, real estate; **Krista McIntyre**, natural resources and environment; **Kris Ormseth**, corporate/commercial; and **J. Walter Sinclair**, commercial litigation.

—ON THE MOVE—

Dean Arnold has joined Perkins Coie LLP, Boise as an associate in the litigation practice group. His practice focuses on complex civil litigation, with special emphasis in commercial litigation, business and contract disputes, construction litigation and real estate. Previously he was with Holland & Hart LLP, Boise, where he was a member of the firm's commercial litigation and white collar defense practice groups. He can be reached at (208) 343-3434.

Janelle Finfrock joins the law firm of Zarian, Midgley and Johnson, PLLC, Boise. She has extensive experience working as a litigation paralegal and is familiar with all aspects of automated litigation support, including trial support. Previously she was with Sygenta Seeds, Inc., as a paralegal and regional document retention manager. She also spent four years working as a paralegal in the Boise office of Stoel Rives, LLP. She earned both her B. S. in Political Science and a Paralegal Certificate from Boise State University. She can be reached at (208) 562-4900.

Emile R. Berg, has opened a solo practice in Boise. His area of practice emphasizes insurance coverage issues, appeals, and civil motions in the state and federal courts of Idaho and Oregon. His experience with civil motions included serving as a pro tem circuit judge in the Oregon state courts. He can be reached by phone (208) 345-2972 and email at erberg@cableone.net



Jon Gould, Ringert Law Chartered, Boise, and teammate Ryon Butterfield competing in the 2008 Trans Rockies Challenge, an epic seven-day mountain bike race through the Canadian Rockies.

Grapes Against Wrath

The Idaho Partners Against Domestic Violence and the Fourth District Bar Association cordially invite you to attend the

7th Annual Grapes Against Wrath

A wine tasting and social affair to raise funds for Idaho Partners Against Domestic Violence.

Thursday, October 16th
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Wine will be available for purchase with the proceeds generously donated by the Boise Co-op.

An affair that makes a difference.



JANELLE FINFROCK

ZM ZARIAN•MIDGLEY

Zarian Midgley & Johnson, PLLC, a Boise-based firm specializing in intellectual property matters and litigation, is proud to welcome **Janelle Finfrock** as a litigation paralegal with the firm. Janelle has extensive experience working as a litigation paralegal and is familiar with all aspects of Automated Litigation Support, including trial support. She has worked as a paralegal at Stoel Rives, LLP and most recently held the position of paralegal and regional document retention manager at Syngenta Seeds, Inc. Finfrock earned both her Bachelor of Science in Political Science and a Paralegal Certificate from Boise State University.

Janelle can be reached at finfrock@zarianmidgley.com or 208-562-4900

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DIRECTORY UPDATES

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Gregory Marshall Adams

Ninth Circuit Court of Appeals
2120 N. 16th Street
Boise, ID 83702
(208) 334-1612
greg_adams@ca9.uscourts.gov

Mary Durham Adams

2120 S. O Street
Fort Smith, AR 72901
(479) 782-3371

Dean Bradley Arnold

Perkins Coie, LLP
251 E. Front Street, 4th Floor
Boise, ID 83702
(208) 343-3434
Fax: (208) 343-3232
damold@perkinscoie.com

Shirley Bade

Shirley Bade Law Firm, PC
408 Sherman Avenue, Ste. 207
Coeur d'Alene, ID 83814
(208) 665-1335
Fax: (208) 665-4621
badelady@hotmail.com

John Haslam Bailey

Bailey & Hutchings, PC
550 N. Main Street, Ste. 114
Logan, UT 84321
(435) 755-5858
Fax: (435) 755-5858
john.bailey.esq@gmail.com

Thomas Anthony Banducci

Banducci Woodard Schwartzman, PLLC
802 W. Bannock Street, Ste. 500
Boise, ID 83702
(208) 342-4411
Fax: (208) 342-4455
tbanducci@bwslawgroup.com

Brent Sidney Bastian

Banducci Woodard Schwartzman, PLLC
802 W. Bannock Street, Ste. 500
Boise, ID 83702
(208) 342-4411
Fax: (208) 342-4455
bbastian@bwslawgroup.com

Kathryn Deann Billing

616 E. 8th Street
Moscow, ID 83843
(208) 596-8811
deann@turbonet.com

Joy M. Bingham

Jones & Swartz, PLLC
PO Box 7808
Boise, ID 83707-7808
(208) 489-8989
Fax: (208) 489-8988
joy@jonesandswartzlaw.com

John Charles Black

Dunn & Black, PS
111 N. Post, Ste. 300
Spokane, WA 99201
(509) 455-8711
Fax: (509) 455-8734
jblack@dunnandblack.com

James Donovan Bowen

Abengoa Bioenergy Corporation
16150 Main Circle Drive, Ste. 300
Chesterfield, MO 63017
(636) 728-0508
Fax: (626) 728-1148
james.bowen@bioenergy.abengoa.com

Andrew C. Boyd

1130 NW Valise Drive
Pullman, WA 99163
(208) 310-6754
boyd1585@hotmail.com

Brett Thomas Bunkall

1931 16th Street NW
Washington, DC 20009
(202) 320-1435
bunkallb@gmail.com

Bryant Edward Bushling

2587 S. Bonnell Road
Coeur d'Alene, ID 83814
(208) 769-9761
bryantel@netzero.com

Sadri Ann Butler

Battele Energy Alliance
134 West 33rd North
Idaho Falls, ID 83401-1141
(208) 310-1806
sadributler@hotmail.com

Stuart Waller Carty

Carty Law, PA
380 S. Fourth Street, Ste. 102
Boise, ID 83702
(208) 342-3501
Fax: (208) 342-3548
reception@cartylaw.net

David Hyrum Cazier

U.S. Air Force
354 FW/JA
354 Broadway Street, Unit 2B
Eielson AFB, AK 99702-1881
(907) 377-4114

Margalit Zaltzman Chappell

The Graham Law Office, PA
1009 W. Fort Street
Boise, ID 83702
(208) 344-0375
Fax: (208) 344-1510
maggie@graham-legal.com



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Boise, ID 83701
(208) 388-1211
Fax: (208) 388-1300
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J. Ed Christiansen
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Staff Judge Advocate
Box 110120
Barstow, CA 92311-5050
(760) 577-6879
Fax: (760) 577-6772
j.ed.christiansen@usmc.mil

Stephen K. Christiansen
Van Cott, Bagley, Cornwell
& McCarthy
36 S. State St., Ste. 1900
Salt Lake City, UT 84111-
1478
(801) 237-0456
Fax: (801) 534-0058
christiansen@vancott.com

James Lyle Cornwell
Dykas, Shaver & Nipper,
LLP
PO Box 877
Boise, ID 83701-0877
(208) 345-1122
Fax: (208) 345-8370
jim@dykaslaw.com

Katharine Johnston Cox
Johnston Law
420 W. Main Street, Ste. 206
Boise, ID 83702
(208) 287-3799
Fax: (208) 336-2088
kate@kjohnstonlaw.com

Douglas William Crandall
Crandall Law Office
420 W. Main Street, Ste. 206
Boise, ID 83702
(208) 343-1211
Fax: (208) 336-2088
dwc@crandall-law.net

Juniper L. Davis
Five Valleys Land Trust
PO Box 8953
Missoula, MT 59807
(406) 549-0755
Fax: (406) 728-2841
juniper@fvlt.org

**Margaret "Peg" M.
Dougherty**
Office of the Attorney
General
Human Services Division
PO Box 83720
Boise, ID 83720-0036
(208) 334-5537
Fax: (208) 334-5548
dougherp@dhw.idaho.gov

S. Magnus Eriksson
S. Magnus Eriksson,
Attorney-at-Law, PLLC
10800 E. Cactus Road, Unit
62
Scottsdale, AZ 85259
(408) 766-2256
Fax: (480) 767-7301
smagnusericksson@gmail.com

Valerie Elizabeth Fenton
Bonner County Prosecutor's
Office
127 S. First Avenue
Sandpoint, ID 83864
(208) 263-6714
Fax: (208) 263-6726
vfenton@bcpros.org

Sharon Louise Fields
5709 E. Gelding Drive
Scottsdale, AZ 85254
(602) 788-1286

Brian Thomas Fischenich
U.S. Air Force
27 Middlesex Circle, Apt. 6
Waltham, MA 02452
(781) 377-2361
bistheman@hotmail.com

James Maurice Frazier III
Bonner County Prosecutor's
Office
127 S. First Avenue
Sandpoint, ID 83864
(208) 263-6714
Fax: (208) 263-6726
jfrrazier@bcpros.org

Shyla Relyea Freestone
Ninth Circuit Court of
Appeals
PO Box 1339
Boise, ID 83701
(208) 334-9746
Fax: (208) 334-9769
shyla_freestone@ca9.uscourts.gov

Jack Bartlett Furey
PO Box 280
Challis, ID 83226
(208) 876-4070
furey@custertel.net

Jennie Budge Garner
Chapman & Cutler, LLP
201 S. Main Street, Ste. 2000
Salt Lake City, UT 84111-
2298

Raymond C. Givens
Givens Law Firm
1309 114th Avenue SE, Ste.
211
Bellevue, WA 98004
(425) 641-5949
Fax: (425) 614-0158
raygivens@givenslaw.com

Tracy W. Gorman
Gaffney Law Office
591 Park Avenue, Ste. 302
Idaho Falls, ID 83402
(208) 524-6655
tracy@gaffneylaw.net

Suzanna Leona Graham
Suzanna L. Graham, PC
1034 N. 3rd Street, Ste. 9
Coeur d'Alene, ID 83814
(208) 667-4101
Fax: (208) 665-7079
suziegraham@verizon.net

James Bartlett Green
Green & Green Law Firm
611 Wilson Avenue, Box 1A
Pocatello, ID 83201-5046
(208) 232-2727
Fax: (208) 232-0235
jgreen@greenlaw.myrf.net

Britan D. Groom
Brit Groom, Esq.
PO Box 577
Grangeville, ID 83530
(208) 983-0045
groomlaw1@yahoo.com

Erika Ellingsen Grubbs
Law Office of Erika B.
Grubbs
8475 Government Way, Ste.
202
Hayden, ID 83835
(208) 762-3817
Fax: (208) 762-3819
grubbslaw@verizon.net

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PO Box 572
Rupert, ID 83350
(208) 436-9883
Fax: (208) 434-2171
spencer@southidaholaw.com

Laurel Inman Handley
Pite Duncan, LLP
4375 Jutland Drive, Ste. 200
San Diego, CA 92117
(619) 590-1300
Fax: (619) 590-1385
lhandley@piteduncan.com

John Joseph Hansen
Office of Assigned Counsel
1550 Irving Street SW, Ste.
300
Tumwater, WA 98512
(360) 754-4897
Fax: (360) 754-4469
hansenj@co.thurston.wa.us

Brooke Allison Hartmann
Gordon & Rees, LLP
275 Battery Street, Ste. 2000
San Francisco, CA 94111
(415) 986-5900
Fax: (415) 986-8054
bhartmann@gordonrees.com

Natalie J. Havlina
Advocates for the West
PO Box 1612
Boise, ID 83701
(208) 342-7024
Fax: (208) 342-8286
nhavlina@advocateswest.org

Clinton James Henderson
10110 U.S. Highway 12,
Ste. A
Orofino, ID 83544-5012
Fax: (509) 758-3399

Nathan Joel Henkes
Elmore County Prosecuting
Attorney's Office
PO Box 607
Mountain Home, ID 83647
(208) 587-2144
Fax: (208) 878-2147
nhenkes@elmorecounty.org

Dari Mathews Huskey
Banducci Woodard
Schwartzman, PLLC
802 W. Bannock Street, Ste.
500
Boise, ID 83702
(208) 342-4411
Fax: (208) 342-4455
dhuskey@bwsllawgroup.com

Andrew Michael Hyer
Hall, Farley, Oberrecht &
Blanton, PA
PO Box 1271
Boise, ID 83701
(208) 395-8500
Fax: (208) 395-8585
amh@hallfarley.com

N. Aaron Johnson
173 Bishop Drive
Framingham, MA 01702
(208) 301-4708
naaronj@gmail.com

Shane Aiden Kennedy
Brake Hughes Bellermand,
LLP
2232 NW Everett Street,
Apt. 33
Portland, OR 97210-5516
(208) 286-1013
Fax: (202) 470-6464
shane@brakehughes.com

Isaac David Keppler
Capitol Law Group, PLLC
PO Box 32
Gooding, ID 83330
(208) 934-8872
Fax: (208) 934-8873
kepplerid@hotmail.com

Adam Bruno King
Adam B. King, Attorney at
Law, PC
PO Box 4962
Ketchum, ID 83340
(208) 726-8219
Fax: (208) 726-3750
abk@ketchumlegal.com

Brian Daniel Knox
Banducci Woodard
Schwartzman, PLLC
802 W. Bannock Street, Ste.
500
Boise, ID 83702
(208) 342-4411
Fax: (208) 342-4455
bknox@bwsllawgroup.com

Dara Labrum
Banducci Woodard
Schwartzman, PLLC
802 W. Bannock Street, Ste.
500
Boise, ID 83702
(208) 342-4411
Fax: (208) 342-4455
dlabrum@bwsllawgroup.com

Stephen Gerard Larsen
PO Box 845
Pocatello, ID 83204
(208) 478-7600
Fax: (208) 478-7602
s_lars_n@yahoo.com

Gary D. Luke
Lerma Law Office, PA
PO Box 190719
Boise, ID 83719
(208) 288-0608
Fax: (208) 288-0697
lermalaw@fiberpipe.net

Louis E. Marshall III
Bonner County Prosecutor's
Office
127 S. First Avenue
Sandpoint, ID 83864
(208) 263-6714
Fax: (208) 263-6726
louismarshall@bcpros.org

Theresa A. Martin
The Law Office of Theresa
A. Martin
623 W. Hays Street
Boise, ID 83702
(208) 422-9300
Fax: (208) 422-9304
martinlawboise@yahoo.com

Stephen Patrick McCleary
U.S. Coast Guard
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November 14, 2008
at the Hotel 43 in Boise.

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Research,
Drafting,
& Editing

*There is no such thing as good writing.
There is only good rewriting.*
Justice Brandeis

JAMES M. SMIRCH
ATTORNEY AT LAW

1041 E. BUTTE AVE., CHALLIS, IDAHO 83226
208-940-1901 • jsmirch@custertel.net
WEBLOG: jsmirch@blogspot.com

Drake Dee Mesenbrink
Mesenbrink Law Offices,
PS, Inc.
PO Box 1112
Poulsbo, WA 98370
(360) 697-0155
Fax: (360) 697-0156
drakemesenbrink@earthlink.net

Mark Jason Michaud
WILOBE, LLC
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Boise, ID 83713
(208) 949-4401
Fax: (208) 439-4957
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Moscow, ID 83843-2284
(208) 882-0962
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Brett R Millburn
U.S. Air Force
3500 Harbison Drive, Apt.
411
Vacaville, CA 95687-3921
bmillburn17@yahoo.com

Joseph C. Miller
Miller & Fisher, LLP
802 W. Bannock, Ste. LP110
Boise, ID 83702
(208) 888-9980
Fax: (208) 888-9970
burningmill@msn.com

Thomas Veness Munson
Strother Law Office
200 N. 4th Street, Ste. 30
Boise, ID 83702
(208) 342-2425
Fax: (208) 342-2429
tmunson@strotherlawidaho.com

Jane Margaret Newby
3107 N. 26th Street
Boise, ID 83702-0615
janen83702@yahoo.com

Darwin Overson
Jones & Swartz, PLLC
PO Box 7808
Boise, ID 83707-7808
(208) 489-8989 Ext: 227
Fax: (208) 489-8988
darwin@jonesandswartzlaw.com

David Reza Partovi
Partovi Law, PS
804 W. Boone Avenue
Spokane, WA 99201
(208) 215-0565
Fax: (509) 747-3175
davidpartovi@gmail.com

Bart James Patterson
Nevada System of Higher
Education
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Avenue
Las Vegas, NV 89117-0734
(702) 889-8426
Fax: (702) 889-8495
bartpat1@aol.com

Mary Linda Pearson
Coeur d' Alene Tribe
PO Box 343
Plummer, ID 83851
(509) 990-4214 Ext: 5033
Fax: (208) 686-5805
mary0808@msn.com

Paul Stephen Penland
Penland Law Office, Chtd.
PO Box 8266
Boise, ID 83707
(208) 343-8200
Fax: (208) 343-8201
penland@pmattorneys.com

Troy Darwin Peterson
Riverbend Holdings, LLC
2880 North 55 West
Idaho Falls, ID 83402
(208) 528-6635
Fax: (208) 528-6636
tpeterson@rbhi.us

Gair Bennett Petrie
Randall & Danskin, PS
601 W. Riverside Avenue,
Ste. 1500
Spokane, WA 99201-0653
(509) 747-2052 Ext: 237
Fax: (509) 624-2528
gbp@randanco.com

Jason Thomas Piskel
Dunn & Black, PS
111 N. Post, Ste. 300
Spokane, WA 99201
(509) 455-8711
Fax: (509) 455-8734
jpiskel@dunnandblack.com

Gary Lynn Quigley
PO Box 1296
Meridian, ID 83680
(208) 884-5679
Fax: (208) 884-5728
gqresearch@rocketmail.com

Scott Elliott Randolph
1988 N. Stoneview Place
Boise, ID 83702
(208) 478-4140
randolphsco@gmail.com

Scott White Reed
PO Box A
Coeur d'Alene, ID 83814
(208) 664-2161
Fax: (208) 765-5117
scottwreed@verizon.net

Jerry D. Reynolds
385 East 200 South
Orem, UT 84058-5557

Angela J. Richards
Andrade Law Office, Inc.
PO Box 2109
Boise, ID 83701
(208) 472-5690 Ext: 226
Fax: (208) 388-0234
arichards@huntleylaw.com

Philip Henry Robinson
Bonner County Prosecutor's
Office
127 S. First Avenue
Sandpoint, ID 83864
(208) 263-6714
Fax: (208) 263-6726
robinson@bcpros.org

Steven Michael Rogers
Hutchinson & Steffen, LLC
10080 W. Alta Drive, Ste.
200
Las Vegas, NV 89145
(702) 385-2500 Ext: 213
Fax: (702) 385-2086
srogers@hutchlegal.com

Jason Michael Romrell
Jason's Law, PLLC
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Kevin Dewayne Satterlee
Boise State University
1910 University Drive, B319
Boise, ID 83725-1002
(208) 426-1202
Fax: (208) 426-1345
ksatterl@boisestate.edu

Nicole L. Schafer
2825 E. Pennsylvania
Avenue
Nampa, ID 83686

Erwin Lee Schlender
Quinault Indian Nation
PO Box 99
Taholah, WA 98587
(360) 276-8211 Ext: 223
lschlender@quinault.org

Benjamin Andrew Schwartzman
Banducci Woodard
Schwartzman, PLLC
802 W. Bannock Street, Ste. 500
Boise, ID 83702
(208) 342-4411
Fax: (208) 342-4455
bschwartzman@
bwslawgroup.com

Scott Robert Seedall
Seedall Law Office, PC
1252 South 52 East
Idaho Falls, ID 83401
(208) 552-7788
Fax: (877) 495-6079
scott@seedall-lawoffice.com

Raymond Walter Setzke Jr.
Setzke Law Office
1412 W. Idaho Street, Ste. 210
Boise, ID 83702-5256
(208) 345-4444
Fax: (208) 345-4427

Mark Andrew Shaffer
Racine, Olson, Nye, Budge
& Bailey, Chtd.
PO Box 1391
Pocatello, ID 83204-1391
(208) 232-6101
Fax: (208) 232-6109
mas@racinelaw.net

Mark Joseph Shuster
N5710 CTH M
Hawkins, WI 54530
(715) 585-2508

Debra Ann Silk
Montana School Boards
Association
863 Great Northern Blvd.,
Ste. 301
Helena, MT 59601
(406) 442-2180
Fax: (406) 442-2194
dsilk@mtsba.org

Erin Patricia Smith
PO Box 10160
Ketchum, ID 83340
(917) 364-4777
Fax: (208) 725-5981
erin@quadrin.com

**John Jay Hilbert
Stephenson II**
U.S. Army
4729 Springbrook Drive
Annandale, VA 22003-3934
john.stephenson@us.army.
mil

Tyrel Duane Stevenson
PO Box 503
Garfield, WA 99130-0503
stev7975@uidaho.edu

Alison Anne Tate
PO Box 6404
Boise, ID 83707

Jesse Carl Trentadue
Suittter Axland, PLLC
8 E. Broadway, Ste. 200
Salt Lake City, UT 84111
(801) 532-7300
Fax: (801) 532-7355
jtrentad@sautah.com

Michael Robert Tucker
Dunn & Black, PS
111 N. Post, Ste. 300
Spokane, WA 99201
(509) 455-8711
Fax: (509) 455-8734
mtucker@dunmandblack.com

Martha Wharry Turner
Northwest Attorney Services,
LLC
3609 La Meista Way
Boise, ID 83702-1534
(208) 869-0137
Fax: (208) 333-9596
mwt@nwasllc.com

Julia Garrett Tyson
44 Highland Avenue, #3A
Somerville, MA 02143
(202) 641-8597
juliagtyson@hotmail.com

Allen Wayne Walterscheid
522 W. Mermond Street,
#727
Carlsbad, NM 88220
(575) 234-3006
Fax: (575) 234-3481
wayne@cswlegal.com

John Patrick Whelan
213 N. 4th
Coeur d'Alene, ID 83814
(208) 664-5891
Fax: (208) 664-2240
jpwhelanattorney@yahoo.
com

Teri A. Whilden
16344 N. Asbury
Nampa, ID 83651
(208) 880-8470
tawhilden@nnu.edu

Matthew L. Whipple
Zarian Midgley & Johnson,
PLLC
960 Broadway Avenue, Ste. 250
Boise, ID 83706
(208) 562-4900
Fax: (208) 562-4901
whipple@zarianmidgley.com

Gearld Linn Wolff
Canyon County Prosecutor's
Office
1115 Albany
Caldwell, ID 83605
(208) 454-7391
Fax: (208) 454-7474
gwolff@canyonco.org

Wade Laurence Woodard
Banducci Woodard
Schwartzman, PLLC
802 W. Bannock Street, Ste. 500
Boise, ID 83702
(208) 342-4411
Fax: (208) 342-4455
wwoodard@bwslawgroup.
com

Tammy A. Zokan
WinCo Foods, LLC
PO Box 5756
Boise, ID 83705
(208) 377-0110
Fax: (208) 377-0474
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NOVEMBER

Friday, November 7, 2008

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Friday, November 14, 2008

Litigation Ethics

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Hampton Inn – Boise

2.0 Ethics Credits

Friday, November 21, 2008

Annual Headline News-Year in Review

Sponsored by the Idaho Law Foundation

Coeur d'Alene Inn, Coeur d'Alene

5.0 Credits (pending)

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DECEMBER

December 2, 2008

Ethics in Federal Discovery

Sponsored by the Professionalism & Ethics Section

8:30 - 9:30 a.m.

Law Center – Boise

1.0 Ethics Credit

DECEMBER

(Continued)

December 4, 2008

Ethics in Administrative Proceedings

Sponsored by the Government and Public Sector Lawyers Section

8:30 - 9:30 a.m.

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1.0 Ethics Credit

December 5, 2008

Annual Headline News-Year in Review

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Shilo Inn, Idaho Falls

5.0 CLE Credits (pending)

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December 12, 2008

Annual Headline News – Year in Review

Sponsored by the Idaho Law Foundation

Oxford Suites, Boise

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December 18, 2008

Top Ten Things Every Lawyer Should Know About Copyrights

Sponsored by the Intellectual Property Law Section

8:30 - 9:30 a.m.

Law Center – Boise

1.0 CLE Credit

COMING EVENTS

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

OCTOBER

- 1 *The Advocate* Deadline
- 1 Practical Skills
- 1 Initial February Bar Exam Deadline
- 1 Public Information Committee
- 8-10 ISB Annual Conference, Sun Valley**
- 9 ILF Board of Directors Meeting, Sun Valley
- 10 ISB Board of Commissioners Meeting, Sun Valley
- 13 Columbus Day, Law Center Closed**
- 15 The Advocate Editorial Advisory Board

NOVEMBER

- 3 *The Advocate* Deadline
- 4 1st District Bar Resolution Meeting, Coeur d'Alene
- 5 2nd District Bar Resolution Meeting, Lewiston
- 13 3rd District Bar Resolution Meeting, Nampa
- 14 4th District Bar Resolution Meeting, Boise

NOVEMBER

(Continued)

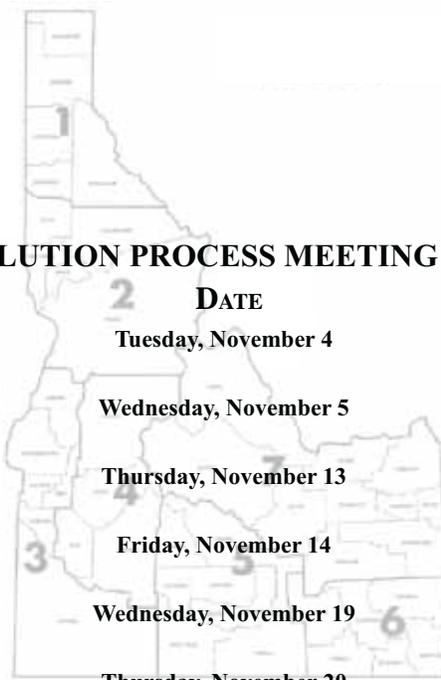
- 19 5th District Bar Resolution Meeting, Twin Falls
- 19 *The Advocate* Editorial Advisory Board Committee
- 20 6th District Bar Resolution Meeting, Pocatello
- 21 7th District Bar Resolution Meeting, Idaho Falls
- 21 ISB of Commissioners, Idaho Falls
- 27 Thanksgiving Day, Law Center Closed**
- 28 Law Center Closed**

DECEMBER

- 1 *The Advocate* Deadline
- 1 Final February Bar Exam Deadline
- 5 Idaho State Bar Board of Commissioners
- 17 *The Advocate* Editorial Advisory Board Committee
- 25 Christmas Day, Law Center Closed**
- 26 Law Center Closed**



2008 RESOLUTION PROCESS MEETING SCHEDULE



| DISTRICT/PRESIDENT | DATE | LOCATION/TIME |
|---|------------------------|--|
| First District Peter Smith, President | Tuesday, November 4 | Coeur d'Alene, Ameritel Inn at Noon |
| Second District Paul Clark, President | Wednesday, November 5 | Moscow, University Inn at 5:30 p.m. |
| Third District Ted Fleming, President | Thursday, November 13 | Nampa, Brick 29 at 6:00 p.m. |
| Fourth District Kelli Ketlinski, President | Friday, November 14 | Boise, Owyhee Plaza Ballroom at Noon |
| Fifth District Phil Brown, President | Wednesday, November 19 | Twin Falls, Canyon Crest Dining Event Center at 6:00p.m. |
| Sixth District Hon. Mitch Brown, President | Thursday, November 20 | Pocatello, Juniper Hills Country Club at Noon |
| Seventh District Scott Axline, President | Friday, November 21 | Idaho Falls, The Red Lion Inn at Noon |

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