



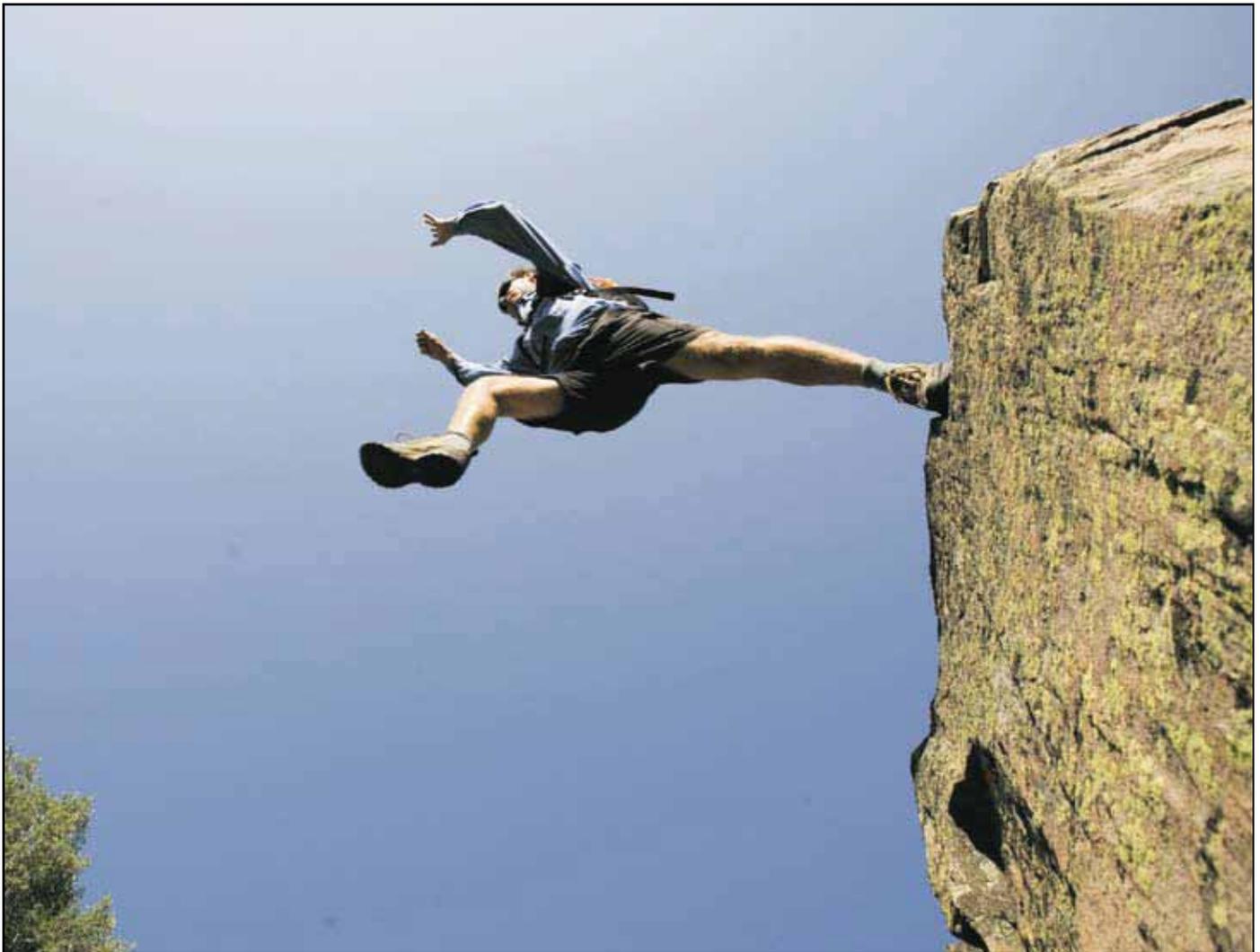
The **Advocate**

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August 2009

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Taxation, Probate and Trust Law Section



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Taken by Boise attorney Lisa Shultz at the old lumber mill site at Harris Ranch off Idaho Highway 21 this photo shows lichens blooming on a rock. The natural light is enhanced with some color saturation to create a rich, almost abstract image.

SECTION SPONSOR

This issue of *The Advocate* is sponsored by the Taxation, Probate and Trust Law Section.

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Special thanks to the August *The Advocate* editorial team: Brian P. Kane, Office of the Attorney General; Gene A. Petty, Ada County Prosecutor's Office; and Karin D. Jones, Office of the Attorney General.

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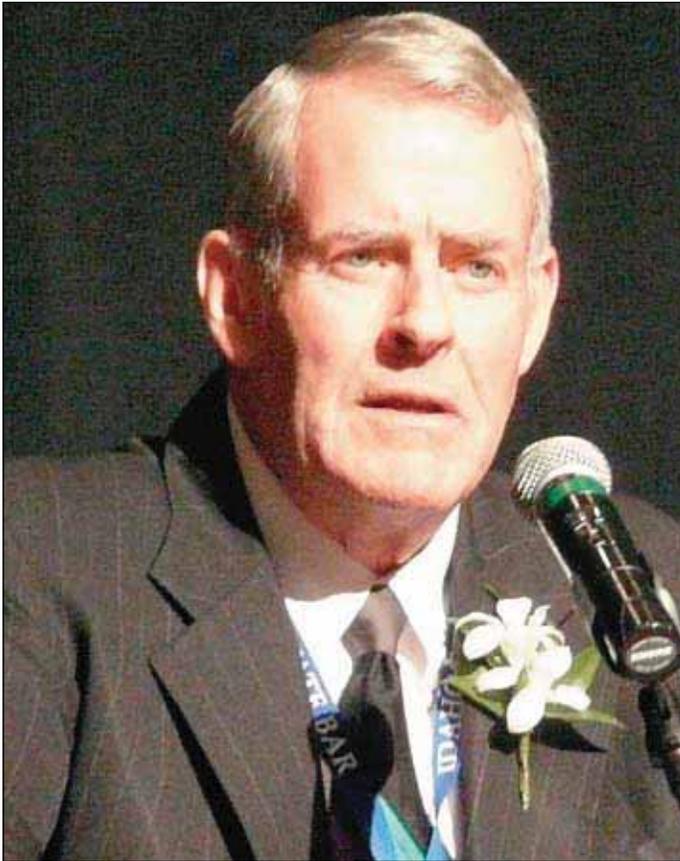
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IDAHO STATE BAR
2009 DISTINGUISHED LAWYERS

Each year, the Idaho State Bar presents an award to one or more of its member attorneys who have distinguished the profession through exemplary conduct and many years of dedicated service to the legal profession and to Idaho citizens. They fight for the legal rights of clients with intensity and enthusiasm, are relentless in pursuing justice, and exhibit an unwavering commitment to high ideals. Please join the Bar in congratulating J. Robert Alexander, Twin Falls; Donald L. Burnett, Jr., Moscow; and Craig L. Meadows, Boise, as the Bar's Distinguished Lawyers for 2009.

— **2009 DISTINGUISHED LAWYER** —
J. ROBERT ALEXANDER



J. Robert Alexander was born in 1940 in Butte, Montana where his father worked for Texaco. His father joined the Army during World War II and Bob lived in several different places before his family moved to Boise after the war. He has lived in Idaho ever since. Bob graduated from Boise High School, the only high school in Boise at the time, and attended the University of Idaho. He obtained his undergraduate degree in 1961. He attended the University of Idaho College of Law and obtained his law degree in 1964.

After graduation, he was admitted to practice before the Idaho Supreme Court and the U.S. District Court. He was admitted to practice before the U.S. Supreme Court in April of 1969, and the Ninth Circuit Court of Appeals in 1981. He was admitted to practice before the United States Court of Claims in March 1988.

Bob joined the firm of Benoit & Benoit in Twin Falls in 1964. His practice is litigation focused doing primarily personal injury cases, professional liability (including medical, legal and accounting),

products liability and business litigation representing both plaintiffs and defendants, but primarily defendants. Most recently, Bob has focused much of his practice on mediation and arbitration. He is currently a hearing officer for the State of Idaho Personnel Department.

Bob named Edward Benoit as the person who had the greatest influence on his career.

“He was a great mentor,” Bob said.

Bob also named Harry Benoit as an early mentor. When Harry died in 1966, Bob said, Ed brought the files into Bob’s office, divided them, and said, “Well, now we can sink or swim.” Bob tried as many as two or three cases a week in the old days.

Bob has been involved with many organizations. He has been a member of the Idaho Association of Defense Counsel since 1964, a founder and past president of the American Board of Trial Advocates (Idaho Chapter), a founder and past president of the Theron Ward Chapter of the American Inns of Court, a fellow with the American College of Trial Lawyers, and a member of the American Bar Foundation since 1995. He was selected for fellowship in the American College of Trial Lawyers in August of 1986. Bob served as the Lawyer Representative for the Ninth Circuit Court of Appeals from 1990 to 1993. Bob is currently a member and director of the University of Idaho Foundation and served as the president from 1997-1999.

Bob has served the Idaho State Bar in many ways. He was a director of the Idaho Law Foundation from 1995 to 1998. He was awarded the Idaho State Bar Service Award in 2000. In 1997, he was awarded the Idaho State Bar Professionalism Award for the Fifth District.

Bob and his wife, Sonia, have been married since 1961. They have raised four children: Mark, Lisa, Marci and Mitchell. When he is not at the office or in court Bob enjoys fishing and playing golf.

Bob says receiving the Fifth District Professionalism Award in 1997, and now being the recipient of the 2009 Distinguished Lawyer Award, has been very humbling. The awards a great sense of satisfaction knowing that the manner in which he practices law is appreciated and that his fellow lawyers and the courts respect him, Bob said.

— 2009 DISTINGUISHED LAWYER —
DONALD L. BURNETT, JR.

Donald L. Burnett, Jr. was born in Pocatello, Idaho in 1946. He graduated from Pocatello High School in 1964 and entered Harvard University. In 1968 he received a baccalaureate degree from Harvard in economics, magna cum laude. He obtained his J.D. from the University of Chicago in 1971 and an LLM from the University of Virginia in 1990. He is a graduate of Command & General Staff College, (Commandant's List), in the United States Army.

The earliest influence on Don to enter the legal profession was his father. Don recalled that his father often “spoke of the law as a noble profession.” Don also admired lawyer-friends of his family including Ben Davis and Lou Racine who were early influences on his career path. Other important influences for Don were Idaho lawyers Frank Church and Jess and Jack Hawley and lawyer-literary figures such as Atticus Finch.

“I read biographies of lawyers and books about great trials,” he said. “I was attracted to the blend of idealism, advocacy, problem-solving, and intellectual challenge that I saw in the work of lawyers.”

After Don graduated from law school, he clerked for the Chief Justice of the Idaho Supreme Court, Henry F. McQuade. Don then moved to private practice in Pocatello. He later associated with (now retired) Judge Bill Woodland and Lowell Hawkes. He also practiced with Brent Manning and U.S. District Court Chief Judge Hon. Lynn Winmill. Don was appointed to the Idaho Court of Appeals in 1982 where he served until 1990.

Don moved to a career in academia in 1990. He became Dean of the University of Louisville Law School, later renamed during Don's tenure to the Louis D. Brandeis School of Law.

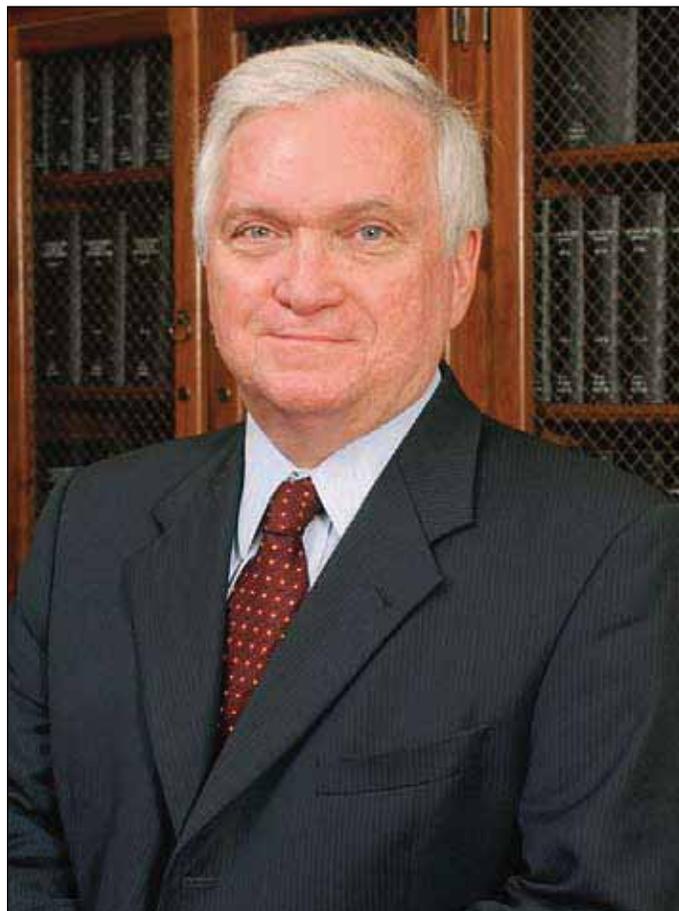
In 2002, Don returned to Idaho as Dean and Foundation Professor of Law at the University of Idaho College of Law. Don has helped move the College of Law into a second century of legal education in Idaho. He has worked to emphasize professionalism and to expand the law program to fulfill its statewide mission.

Don's career has included an incredible amount of service to his community, the universities to which he has been associated and to the legal profession. While in Louisville, he served on several state and local nonprofit boards, was active in the Kentucky Bar Association and served as chair of several University committees and councils. On a national level, he is a fellow of the American Bar Foundation and has served on many American Bar Association committees including the Section of Legal Education and Admissions to the Bar.

Don's service to the Idaho State Bar is well known. He served as an Idaho State Bar Commissioner and was President in 1981. He has served on a variety of State Bar committees, is currently a member of the Bar Examination Review Committee, and a governing board member of the Indian Law and Professionalism and Ethics sections of the Idaho State Bar. He also currently serves as a director of the Idaho Law Foundation. Don also served as chair of the Idaho Supreme Court Task Force on the Court of Appeals: The Next Quarter-Century.

Many awards and recognitions have been given to Don over his distinguished career. He received the Idaho State Bar Service Award in 1990 and the Professionalism Award in 2006.

While in Louisville, he received the Liberty Bell award from the Kentucky Supreme Court, the Distinguished Citizen Award from the City of Louisville, the “Minerva” Medal from the University of



Louisville and was named the Hon. Charles M. Allen Faculty Fellow for the Brandeis School of Law in 2002.

Don has been married to Karen since 1969. He has two grown children; Jason, who is an actuarial analyst in St. Louis, and David who is a musician in New York City. His brother, Howard, is an attorney in Pocatello. Don cites his greatest personal accomplishment as his family.

“I am grateful for the sustained closeness of my family despite geographical distances, and for their generous embrace of one another,” he said.

“I have been blessed with opportunities to build, or to strengthen, public institutions at pivotal times,” Don said of his professional life. He worked with the Idaho Court of Appeals during its quarter-century of development and with the University of Louisville when it renamed its law school for, and embraced the heritage of, the city's visionary native son Louis D. Brandeis.

Finally, and luckily for Idaho, he is now Dean of the University of Idaho College of Law.

— 2009 DISTINGUISHED LAWYER —
CRAIG L. MEADOWS

Craig L. Meadows was born in 1940 and was raised on a dryland farm in American Falls, Idaho. He received an A.S. degree from Mesa College in 1960 and a B.S. degree from Colorado State University in Agricultural Engineering in 1963. He attended the University of Idaho College of Law and received his J.D. in 1966. Craig made the decision to attend law school during his fifth year of his agricultural engineering program when he took a natural resources course. He decided that combining an engineering degree with a law degree made sense and planned to become a natural resources lawyer. He said, however, “I am still waiting for a natural resources client to come in the door.”

Craig clerked for Judge Fred M. Taylor out of law school. Craig said Judge Taylor had a significant influence on his career and in his life.

“Judge Taylor really started me off as a lawyer,” Craig recalled.

“His fairness, judicial philosophy, professionalism and the lessons he taught me about trials provided me with a sense of the law as a profession.”

Craig also named Jess and Jack Hawley as influential early mentors and teachers. Craig called the Hawleys “consummate professionals and I continually remind myself to honor their ideals and hope to someday be thought of in the same way.”

Craig has been an important and well-respected leader in the legal community. He was an Idaho Bar Commissioner from 1998-2001 and served as the President of the Idaho State Bar in 2001. He was the Lawyer Representative to the Ninth Circuit Judicial Conference from 1990-1993 and the state chair of the Idaho State Committee for the American Trial Lawyers from 1997-1998. He currently serves on the Idaho State Bar Judicial Fairness Committee and is a member of the Idaho Volunteer Lawyers Program Policy Council. He is a member of the American Inns of Court #130, the Defense Research Institute, the Idaho Association of Defense Council and a Fellow in the American College of Trial Lawyers. He has recently been nominated as a Fellow of the American Bar Foundation.

Craig married his wife, Camille, in 1994. “Camille and I dated in high school and found each other again in 1994, he said.” He has two daughters, Kelly and Kacy and six “wonderful” grandchildren. Camille also has two daughters, Ann and Amy and five grandchildren. Craig calls his and Camille’s children and grandchildren his greatest personal accomplishment.

“Camille and I are blessed with healthy, happy wonderful grandchildren, he said, “and we could not be more proud and happy about them and for them.”

He said the profession has changed since he started practicing law some 42 years ago.

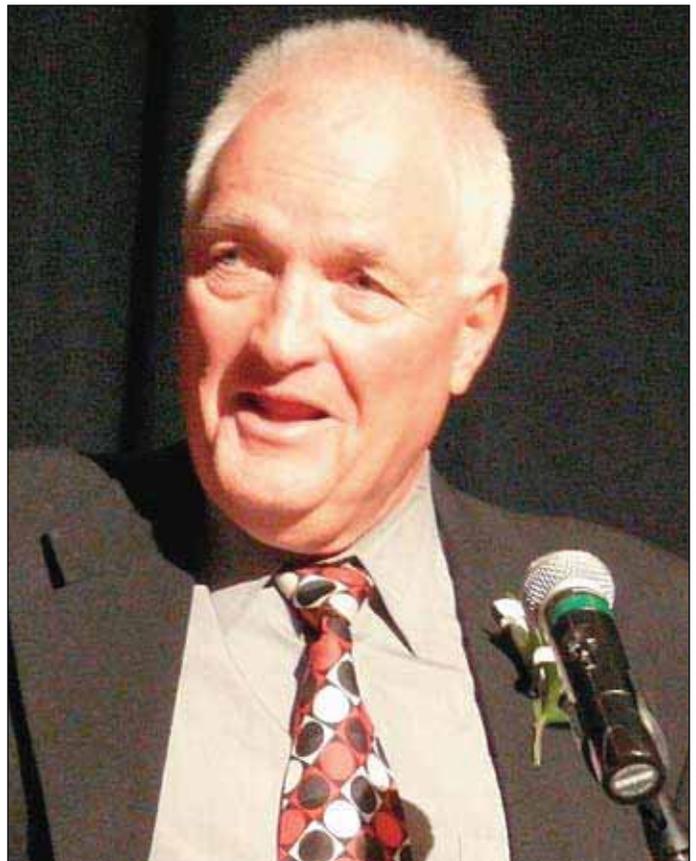
“It is more difficult for new lawyers to gain experience in trying cases than it was when I started my career,” he said. Fewer cases are tried, the stakes are considerably higher than those which enabled me to obtain experience in trying cases. The pressure that new lawyers have in starting out is much greater than when I started.”

Craig has received several professional awards during his career. In 2003, he received the Fourth Judicial District Liberty Bell Award in honor of his service in promoting a positive perception of the legal profession in his community and that same year he received the ALPS Bonnie J. Henkel “Gold Star” Award. He received the Idaho State Bar

Professionalism Award in 2004. Craig said that a great moment in his professional life was when he became a Fellow in the American College of Trial Lawyers in 1989 and having Jess Hawley, Jack Hawley, and J. Robert Alexander present at the ceremony.

“It is a great honor and privilege to become a Fellow in the American College, and you are voted upon by your peers, before becoming a Fellow,” he said.

Craig also takes great pride in being awarded the Idaho State Bar Distinguished Lawyer Award and “to be on the same stage as my good friends J. Robert Alexander and Don Burnett.”



B. Newal Squyres



One of the things a bar commissioner does is attend periodic meetings of bar officers and executive directors from other Western states. We have a lot in common. With the exception of Colorado, all have integrated or mandatory bars. Like us, lawyers in these states have no choice but to be a member of their state bar association. The membership of the bars in most of these states (New Mexico, Montana, Nevada, North and South Dakota, Utah and Wyoming) is similar in size to our 5,200 members, 4,121 of whom hold an active license comprising 3,260 in-state and 861 out-of-state attorneys. We share a common geography—hence the “Jackrabbit Bar Association” for the states just listed—and core Western values. There is always something to be learned from these associations and the similar issues we face. We learn from their mistakes and successes. Often we simply understand what to avoid and what not to change. Although the Oregon and Washington bars have memberships three to six times the size of Idaho, their concerns and activities provide a useful backdrop to evaluate how we are doing and what we might do better.

A common feature of these meetings is the “Roll Call of the States,” in which a representative from each state provides a summary of the challenges, achievements, and programs in their respective states. It will come as no surprise that the economy has been a prominent theme of these summaries for at least the past year. After participating in several of these meetings, listening to the roll call, and hearing reports from other Idaho commissioners (past and present) who have attended similar meetings, I am left with the firm belief I have held for a long time now: we are very fortunate to practice law in Idaho.

But it is no secret that times are tough for the courts, for many lawyers and soon-to-be lawyers, and for the people in need of the services we and the courts provide. Almost invariably when I talk to lawyers of my generation—and there are a lot of us

when you consider that over 46% of Idaho’s lawyers are between the age of 50 and 69—the conversation soon turns to “my 101K,” or in the best case, “my 201K.” We don’t dwell on that distressing topic for long. There is nothing we can do about it anyway, and we are grateful to be in a profession and have a job where we still have some control over what we do and how long we work. Most of the time, practicing law is fun. I digress, however, for I want to focus briefly on the impact of the economic downturn on the courts.

So far, Idaho fares better than states where budget shortfalls have forced the suspension of jury trials or required cutting them back to every other month to save money on security and juror payments. Idaho’s 44 counties are now setting budgets, and it would be surprising if county budget reductions are not adopted at some level that will affect the day-to-day operations of district and magistrate courts statewide. Please be alert for opportunities to let local policymakers know that access to the courts is more important than ever in these difficult times.

Significant budget reductions have already been implemented statewide. For example, the Idaho Supreme Court fully participated in the Governor’s holdback request of 4% of its 2009 General Fund budget, which was later increased to 6%. Idaho’s judiciary volunteered to work two days without pay and other court personnel took two unpaid furlough days. A statewide hiring freeze for nonjudicial employees is in place and significant cutbacks have been made in the areas of training, travel, law library operations and other statewide court operations.

At this point, I suspect most of us are relatively oblivious to these budget reductions because they have had little effect on our day-to-day practices. The number one budget priority for the Supreme Court has been to keep judicial resources available for the ever-increasing growth in cases filed in Idaho’s courts. Civil filings in the district courts have increased more than 15% in the each of the last two years, while felony DUIs have increased over 30%. I was surprised to learn that the use of senior judges is one important way our courts have kept up with rising demands on

the system. Paying retired magistrate, district court and appellate judges at a daily rate costs taxpayers significantly less than it would to add additional judgeships in those districts, particularly the First, Third and Fourth, where the population has increased significantly. We should applaud cooperative efforts by the Legislature, the Governor and the Supreme Court to assure Idaho’s citizens still have meaningful access to the courts, despite the challenges presented by the economy.

Consider the observation of Oregon’s Chief Justice that the cornerstone of our free market economy rests on the court system. Those affected by the troubled economy need the courts to interpret and enforce economic and property rights, thus preventing further deterioration. This provides a sound economic justification for holding the line on budget cuts that might reduce the courts to hearing only criminal and domestic relations cases. I heard just such a suggestion made by lawyers and bar leaders from one of our neighboring states—that is, that the civil justice system as we know it will simply disappear if current trends continue, relegating potential civil litigants to mediation or arbitration, or the prospect of attempting to resolve disputes without the ability (or the meaningful threat) of going to court to address the problem. I thought those statements were way over the top until reading some of the articles being written about the impact of the economic downturn, falling taxes and budgetary restrictions on the state court systems throughout the country.

In conclusion, we should not take for granted the opportunity we have to ply our trade in the State of Idaho.

B. Newal Squyres is a senior litigation partner of *Holland & Hart LLP*. He is serving a sixth-month term as President of the Idaho State Bar Board of Commissioners. He represents the Fourth District. Newal received his undergraduate and law degrees from Texas Tech University.

NEWS BRIEFS

EchoHawk Named Assistant Secretary for Indian Affairs

Larry EchoHawk, Orem, Utah, was sworn in as the 11th Assistant Secretary for Indian Affairs on May 22. President Barack Obama nominated him for the post earlier this year, with the nomination approved in the Senate by unanimous consent. He will oversee the Bureau of Indian Affairs and work with the nation's 562 federally-recognized tribes. The agency, which manages 66 million acres of land and oversees Indian schools and other programs, has fought a lawsuit for 12 years over Indian trust land. The long-running suit claims the Indians were swindled out of billions of dollars in oil, gas, grazing, timber and other royalties overseen by the Interior Department since 1887. Mr. EchoHawk is a member of the Pawnee Tribe.

Prior to his appointment, he was a law professor at Brigham Young University. While living in Idaho, he served as a county prosecutor and represented Bannock County for two terms in the Idaho House of Representatives. In 1990, he was elected Idaho Attorney General, the first American Indian ever elected in the United States to that post. He served in that position from 1991 to 1995. The Democratic nominee for Idaho governor in 1994, he lost to Republican Phil Batt by fewer than 35,000 votes.

Interior Secretary Ken Salazar said Mr. EchoHawk has the leadership abilities, legal expertise and experience to help carry out the President's commitment to build stronger Indian economies and safer Indian communities.

"Together we will work cooperatively with the federally recognized tribes to empower American Indian and Alaska Native people, restore the integrity of the government-to-government relationship and fulfill the United States' trust responsibilities," Salazar said.

Magistrate Judges Announced

Third Judicial District Administrative District Judge Juneal C. Kerrick announced the selection of Dayo O. Onanubosi of Nampa as a magistrate judge for Canyon County and Brian D. Lee as a magistrate judge for Payette County. Mr. Lee and Mr. Onanubosi were selected from 26 applicants at a meeting of the Third District Magistrates Commission in Caldwell on June 26.

Mr. Lee will fill a position to be vacant by the retiring of the Hon. William B. Dillon III on September 30. Mr. Onanubosi will fill a position left vacant in April when the Hon. Bradley S. Ford was appointed as a District Judge for the Third Judicial District.

Mr. Lee attended Brigham Young University and received his undergraduate degree from Boise State University. He received his law degree from the University of Idaho. He served as deputy prosecuting attorney in Payette County from October of 1999 to January 2000. After leaving the prosecuting attorney's office in 2000, Mr. Lee maintained a private law practice in Fruitland, Idaho, until he was elected as prosecuting attorney for Payette County, a position he has held since January of 2005. Mr. Lee will assume his new duties on October 1.

Mr. Onanubosi received both his undergraduate and law degrees from the University of Idaho. He practiced criminal defense and family law with the Van Bishop Law Office from January 1995 to January 1996. He was a deputy prosecuting attorney in Canyon County from January 1996 until May 1997. Since leaving his position as a deputy prosecuting attorney, he has been employed with the Wiebe and Fouser law office in Caldwell, Idaho, as a deputy public defender. Mr. Onanubosi also maintained a civil and family law practice. He is a Canyon County resident and assumes his duties in August.

Chief Justice Eismann Recognized

The National Association of Drug Court Professionals, representing over 2,300 drug courts across the United States, presented its highest honor, the Stanley M. Goldstein Hall of Fame Award in June, to Idaho's Supreme Court Chief Justice, Daniel T. Eismann. Chief Justice Eismann was acknowledged for his personal commitment and state and national leadership in advancing the expansion and effectiveness of drug courts.

YMCA Honors Chief Judge Karen Lansing

On June 3, Chief Judge Karen Lansing received the YMCA Service to Youth Award at the annual meeting. Chief Judge Lansing chairs the YMCA Youth Government Statewide Committee. The award was presented by retired Supreme Court Chief Justice Charles McDevitt.

Farewell Celebration Planned for Judge Peter McDermott

A retirement reception is planned for the Hon. Peter D. McDermott, who served as district judge for 28 years. The ceremony will be held in Judge McDermott's courtroom at the Bannock County Courthouse in Pocatello on Monday, August 3, beginning at 2 p.m. MT. For more information contact Suzanne Johnson at (208) 236-7071.



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DISCIPLINE

KIM R. KILDEW (Public Reprimand)

The Professional Conduct Board of the Idaho State Bar has issued a Public Reprimand to Boise lawyer Kim R. Kildew, based on professional misconduct.

The Professional Conduct Board Order followed a stipulated resolution of an Idaho State Bar disciplinary proceeding, in which Mr. Kildew admitted that he violated Idaho Rules of Professional Conduct 8.4(c) [Engaging in conduct involving dishonesty, fraud, deceit or misrepresentation] and 8.4(d) [Engaging in conduct prejudicial to the administration of justice].

The Complaint related to Mr. Kildew's conduct in an arbitration and arbitration confirmation case. In the arbitration confirmation case, the district court found that Mr. Kildew and another had committed fraud upon the district court by obtaining the confirmation judgment based upon a sham arbitration. The district court entered sanctions against Mr. Kildew and the other person. Mr. Kildew and the other person appealed and the Idaho Supreme Court affirmed the district court decision. The Idaho Supreme Court also granted sanctions against Mr. Kildew and the other person concluding that they "committed fraud upon the district court and yet frivolously tried to shift the blame for their conduct on the district court" and the appeal was simply "a continuation of the sanctionable conduct."

In mitigation, the Professional Conduct Board considered that Mr. Kildew was not representing clients at the time of the misconduct and that he has no prior disciplinary record.

The public reprimand does not limit Mr. Kildew'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.

NOTICE TO MICHAEL L. SCHINDELE OF CLIENT ASSISTANCE FUND CLAIM

Pursuant to Idaho Bar Commission Rule 614(a), the Idaho State Bar hereby gives notice to Michael L. Schindele that a Client Assistance Fund claim has been filed against him by former client Bennett Law, PLLC, in the amount of \$100,000. Please be advised that service of this claim is deemed complete fourteen (14) days after the publication of this issue of *The Advocate*.

PATRICK J. MCCOY (Resignation in Lieu of Discipline)

On June 15, 2009, the Idaho Supreme Court accepted a "Resignation in Lieu of Disciplinary Proceedings" from Boise attorney Patrick J. McCoy.

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

By the terms of the Idaho Supreme Court's Order, Mr. McCoy may not make application for admission to the Idaho State Bar sooner than five years from the date of his resignation. If he does make such application for admission, he will be required to comply with all bar admission requirements found in Section II of the Idaho Bar Commission Rules and shall have the burden of overcoming the rebuttable presumption of "unfitness to practice law." Upon submitting his resignation, Mr. McCoy indicated that he does not intend to seek readmission in five years for medical reasons.

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

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

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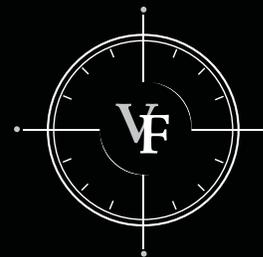
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2009 RESOLUTION PROCESS

Diane K. Minnich



Proposed Resolutions Due September 25

Doyou,yoursection, committee or district bar association have an issue, proposed rule revision or legislative matter that you think should be voted upon

by the Idaho State Bar membership? If so, the fall resolution process, or "Roadshow" is the opportunity to propose issues for consideration by members of the bar.

Unlike most state bars, the Idaho State Bar cannot take positions on legislative matters, or propose changes to rules of court, or substantive rules governing the bar itself at its Annual Meeting, or by act of its Bar Commissioners, without first submitting such matters to the membership through the Resolution Process.

Idaho Bar Commission Rule 906 (pages 287-288 of the 2009-2010 Directory) governs the resolution process. Resolutions for the 2009 resolution process must be submitted by September 25, 2009. If you have questions about the process or how to submit a resolution, please contact me at dminnich@isb.idaho.gov or (208) 334-4500.

This year, the ISB Board of Commissioners plans to submit three resolutions to the membership.

Revisions to IRPC 1.10

First, an amendment to Idaho Rule of Professional Conduct 1.10. The ABA has approved changes to IRPC 1.10 that would allow screening under certain circumstances. At its Annual Meeting, the ABA plans to again address amendments to IRPC 1.10. The ISB plans to propose IRPC be amendment consistent with the revisions approved by the ABA House of Delegates this month.

Revisions to IBCR Section II Admissions

Last year, the Commission appointed a committee to review and revise Section II Admissions of the Idaho Bar Commission Rules. The purpose of the revisions is to clarify, simplify and update the rules. The Committee hopes to have its recommended

revisions ready for submission to this year's resolution process.

License fee increase

Finally, as the Commissioners conveyed at last year's resolution meetings, it is time for the Bar to request a license fee increase. The last fee increase was approved by the ISB membership in 1997. The increase was implemented over a two-year period, 1999 and 2000. When the bar requested the license fee increase in 1997, we committed to not requesting another fee increase for at least 10 years; it has now been 12 years.

Since the last fee increase was approved, the bar membership has increased 37%, and that has helped keep pace with the cost of serving a larger Bar. License and admissions fees represent 83% of the Bar's revenue used to provide these services. While the Bar continues to generate additional revenue sources and control expenses, the Bar will struggle to keep up with the incremental increases in operating expenses without a fee increase. The majority of bar funds are used to administer the regulatory functions; admission, discipline and licensing as well as provide member benefits, such as The Advocate, Casemaker and the Lawyer Assistance Program.

2009 District Bar Association Resolution Meetings

Table with 3 columns: District, Meeting Time, Date. Rows include 1st District (Coeur d'Alene), 2nd District (Lewiston), 3rd District (Nampa), 4th District (Boise), 5th District (Twin Falls), 6th District (Pocatello), and 7th District (Idaho Falls).

Special Thanks

At the Annual Meeting, the leadership of the Bar passes from one president to the

next. In July, Blackfoot attorney Dwight Baker completed his term as ISB president and Boise attorney Newal Sqyres began his presidential term. Newal will share the upcoming year with president-elect Doug Mushlitz from Lewiston. Newal will serve as president until January 2010; Doug will serve as president from February until July 2010.

The Bar was privileged to have Dwight serve for one year, after his being elected commissioner from the 6th and 7th Districts. It was a pleasure to work with Dwight; he is reasonable, intelligent, fair and has a great sense of humor. We will miss his quick wit and dedication to improving the quality of the practice of law in Idaho.

Serving as a bar commissioner requires a substantial commitment of time and energy. Dwight joins the other past presidents who served the bar and its members because they care deeply about the Idaho legal profession. I thank Dwight for his service.

WELCOME FROM THE TAXATION, PROBATE AND TRUST LAW SECTION

John McGown, Jr.
Hawley Troxell Ennis & Hawley LLP



John McGown, Jr.

This apparently is the first time the Taxation, Probate and Trust Section of the Idaho State Bar has sponsored an issue of *The Advocate*. I hope you find it worth the wait!

Featured Articles

For the old timers, including myself, it brings back memories of the “Tax Thoughts” column, which I faithfully authored every other month from 1984 through 2003. In deference to that long tradition, the first item of this Tax Section issue is a final “Tax Thoughts” column. The photograph accompanying that article is from that first “Tax Thoughts” column. You might compare it with the photograph accompanying this article. The final “Tax Thoughts” column is followed by Nick Marshall’s important discussion of IRA beneficiary designations and an article by John Hughes on addressing retirement plan failures and problems. Andrew Wayment and Tim Lindstrom provide a discussion of conservation easements, followed by my article on state corporate income tax systems. That is followed by another tradition — Bob Aldridge’s legislative wrap-up. These six articles are capped off with Erik Jensen’s very entertaining review of Brad Borden’s recent book, entitled *Tax-Free Like-Kind Exchanges*.

Tax Section Activities

Meetings — The Tax Section’s 20 chairs, starting with Bob Erickson in 1989, created a rich history. We meet at the Idaho State Bar offices at noon on the second Tuesday of the even months, but take August off, since we have our annual meeting at the Advanced Estate Planning Conference in Sun Valley on September 11 and 12. You can call (888) 622-5357 to participate in the monthly meetings by telephone, using a participant code (which changes from meeting to meeting and can be obtained by calling the Idaho State Bar offices at (208) 334-4500). ISB staff can fax or e-mail the handouts to you prior to the meeting. If you do not receive these handouts, just ask. Tax Section members outside of the Treasure Valley are especially encouraged to attend in person or by phone.

Committees

The Tax Section includes several committees, which provide members of the Bar with many services and opportunities. The Legislative Committee looks for suggestions on improving the Idaho statutes. For example, if you are frustrated by a provision in the Uniform Probate Code, call or e-mail Bob Aldridge. The Public Service Committee provides tax, probate, guardianship and conservatorship information to the public through publications, seminars and participation in “Law Day.” The Committee recently updated brochures on Estate Planning, Guardianships and Conservatorships, and Living Trust Abuses, which are available from the ISB offices. The Probate,

Guardianship, and Conservatorship Committee reviews issues and new legislation in those areas and prepares a pleadings form book, which is available for purchase by attorneys and others practicing in these areas.

The CLE Committee has recently worked on two seminars. First, Nick Marshall discussed IRA beneficiary designations and Mary Kimmel discussed limited partnership issues for the ISB Annual meeting, held in Boise on July 8-10. In addition, the Committee has arranged for Steve Akers and others to speak at the Advanced Estate Planning Seminar on September 11 and 12, in Sun Valley.

The Tax Liaison Committee has formal meetings twice a year with local and regional IRS representatives. You can check the Tax Section’s Web page at http://isb.idaho.gov/member_services/sections/sections.html#tax for the minutes of the most recent meeting, as well as further information regarding the Tax Liaison Committee’s activities.

Finally, the Newsletter and Internet Committee needs volunteers to nurture the Tax Section’s small but growing Web site. A listserv might be an excellent tool for solo practitioners and for the rest of us and could potentially be funded by the Tax Section, which demonstrated a strong interest in developing such a listserv.

Strategic Plan

The Tax Section’s Governing Council has drafted a Strategic Plan, which will be presented to the membership. The tentative Mission Statement reads as follows:

The mission of the Taxation, Probate and Trust Law Section is to efficiently provide its members and the general public throughout Idaho with the resources to broaden their knowledge in the areas of tax, probate and trust law through education, interaction with government employees and personal contact.

If you have any questions or comments about the Tax Section, please contact me by phone at (208) 344-6000, ext. 4816, or by e-mail at jmcgown@hawleytroxell.com.

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FINAL TAX THOUGHTS COLUMN

John McGown, Jr.
Hawley Troxell Ennis & Hawley LLP



John McGown, Jr. 1984

I diligently wrote a “Tax Thoughts” column every other month for 19 years. While “all good things must come to an end,” I was shocked to look back and realize it has been over six years since my last column.

What motivated me to finally sit down and start writing a final column? Was it that the Taxation, Probate and Trust Law Section sponsored its first issue of *The Advocate*? Or perhaps it was finally time to officially close a 19-year chapter of my life. I suspect that it was the former, and I will provide my parting

observations in this, the final “Tax Thoughts” column.

Observations

Maturation of Tax Practice — I started my tax practice with Hawley Troxell Ennis & Hawley in 1982. It was a broad tax practice, and I essentially served as the tax department. I did income tax planning, exempt organizations, ERISA, estate planning, federal and state tax dispute work, and probate, and I prepared estate income tax returns as well as federal and Idaho estate tax returns.

In contrast to my Idaho tax practice in the early 1980s, I have now dropped all return preparation and ERISA work. The Internal Revenue Service appeals work cut way back as the IRS cut back on its audit coverage. The Idaho tax dispute work picked up. Rick Smith and Bob Thomas now help Hawley Troxell provide the breadth to serve clients in all areas of taxation.

The IRS has changed dramatically, with state specific personnel being replaced by regional bureaucrats who have only a very limited presence in Idaho. The IRS has some good people, but the personal contacts are much less, especially with the retirement of Merry Trudeau, a wonderful professional, and the retirement of Rick Poplack. There is an IRS Idaho Tax Practitioner Liaison Group, which I chair. It is one of the few formal contacts that the IRS maintains with the Idaho Tax Bar. While well-intentioned, many of the IRS attendees at the semi-annual Liaison Group meetings are from Oregon, Washington and Arizona.

The Idaho State Tax Commission has been much more stable, especially with old hands like Ted Spangler and Dan John, but we had the recent retirement of Commissioner Coleen Grant, who brought her professionalism to the position.

The tax practice has changed with boutique firms such as Ahrens & DeAngeli, Thornton Byron, Martin & Eskelson, McAnaney & Associates, and others. While an Idaho tax practitioner will never have the specialized niches of “big city” tax attorneys, there is more specialization than in the past.

Educational Opportunities

Boise State University has taken the lead in Idaho tax education with its masters in Accounting program, including a tax emphasis. Shawn Novak, a long-time professor in the program, is a knowledgeable professor who hones his teaching skills. Mark Cowan has been a great addition to the BSU graduate tax program. An attorney interested in a tax practice can pick up valuable knowledge from the BSU program. The University of Idaho College of Law is blessed to have Jack Miller, who excels as a teacher and as an author. But the lack of breadth in its tax offerings is a limiting factor. Fortunately, leaders from both schools are working together to combine their strong points in a way to benefit students.

Most Idaho tax practitioners have had to go out of state for an LL.M. in Taxation. The University of Florida has produced a number of excellent Idaho tax practitioners, headed by Joe Uberuaga. But perhaps the combined efforts of BSU and the U of I College of Law will allow students to stay home and still get advanced tax courses taught by excellent professors.

Idaho also is fortunate to have three annual seminars that are able to lure national speakers. They include the Advanced Estate Planning Seminar in Sun Valley (September 11 and 12), the 51st Annual Idaho State Tax Institute in Pocatello (November 5 and 6), and the upcoming Eighteenth Annual Charitable Estate Tax Strategy Seminar (early May 2010), sponsored by the St. Luke’s Health Foundation and the College of Idaho.

Personal Items

I look back fondly on creating Idaho Tax Alert, a quarterly newsletter that I nurtured for six years. It has been adopted in a more limited, but still useful, form by Associated Taxpayers of Idaho, headed by Randy Nelson.

I was a full-time professor in BSU’s graduate tax program for two and a half years. The best way to learn a subject is to teach it. My breadth in partnership tax, tax-exempt organizations and state taxation significantly increased as a result of teaching. Those subjects are more fun in private practice as a result of the increased breadth.

I recently taught estate tax/planning at the University of Idaho College of Law, as a four-hour course. While I have learned less about the subject matter than in other tax courses I have taught, there are still items that had escaped my knowledge. It is especially interesting to help the students transition between the ivory tower and the realities of practice — a big transition indeed. I will have that opportunity again in the spring of 2010 when I will be a visiting professor teaching estate planning and partnership tax at the College of Law in Moscow.

I have found that the American College of Trust and Estate Counsel (“ACTEC”) is a wonderful vehicle for staying on top of the area. The Listserv can drive me crazy with dozens of daily postings, but there are nuggets every day. I highly recommend that experienced estate planning attorneys explore membership in ACTEC.

In summary, I have been blessed to have a broad tax practice and to be able to help clients, the public, fellow practitioners and students along the way.

About the Author

John McGown, Jr. published his first “Tax Thoughts” column in *The Advocate* in March 1984. The topic was *Personal Use of Company Cars*. It is one of 92 items he has published over the years, including 62 in *The Advocate*. Other publications include *The Journal of Taxation*, *the Idaho Law Review*, *TAXES – The Tax Magazine*, *Taxation for Lawyers*, *State Tax Notes*, *the State and Local Tax Lawyer* and *the Journal of State Taxation*.

ASSEMBLY REQUIRED: RETIREMENT BENEFITS MUST BE INTEGRATED WITH YOUR ESTATE PLAN

Nicholas S. Marshall
Ahrens & DeAngeli, PLLC

The principal objective of an estate plan is to provide clear instructions directing the post-death transfer of assets to intended beneficiaries. In addition to and consistent with that principal objective, an estate plan should also achieve other important objectives such as tax minimization and creditor protection. Accomplishing all of these objectives for a client with interests in one or more retirement plans¹ presents a number of challenges for the estate planner. This article identifies some of these frequently encountered yet often-overlooked challenges.

Integrating Disposition of Retirement Plans with the Estate Plan

The post-death transfer of probate assets and nonprobate assets,² such as retirement plans, are governed by different rules.³ The disparate rules applicable to probate assets and retirement plans present challenges because the failure to properly integrate planning for both types of assets with the client's estate plan can frustrate many of the client's estate planning goals.

If an individual engages in estate planning, the testamentary transfer of most types of his or her assets will be governed by the terms set forth in the individual's will or revocable trust.⁴ Obviously, for the testamentary documents to be effective with respect to an asset, the asset must at some point actually be subject to the directions set forth in the testamentary documents.

Probate assets are automatically subject to the directions set forth in a decedent's will. For example, real estate owned in the name of an individual and not subject to survivorship rights will be disposed of in accordance with the terms of the individual's will at the individual's death. Similarly, an investment account titled in the name of an individual's revocable trust is subject to disposition in accordance with the terms of the revocable trust.⁵ In both cases, the distribution scheme set forth in the testamentary documents is implemented without taking the additional step of making the asset subject to the testamentary documents.

A nonprobate asset, such as a retirement plan, is not automatically subject to the distribution scheme set forth in its owner's testamentary documents. At a plan owner's death, the assets held in a retirement plan generally are distributed pursuant to directions set forth in a beneficiary designation form signed by the plan owner. Alternatively, if the plan owner does not properly complete a beneficiary designation form, the post-death distribution scheme is provided by default distribution provisions of the agreement establishing the retirement plan.⁶

Unless the beneficiary designation form or the default distribution provisions of the retirement plan direct plan assets to the plan owner's estate or to a trust established by the owner's testamentary documents, the owner's testamentary documents will have no bearing on the ultimate distribution of the retirement plan. Accordingly, distribution schemes for retirement plans must be properly integrated with the distribution directions set forth in the client's testamentary documents. If they are not, the retirement plan may be distributed in a manner that is inconsistent with the client's estate planning objectives.

A few examples of the contexts in which these inconsistencies arise are set forth in the following section of this article.

Common Distribution Planning Pitfalls

A significant estate planning objective of many parents is to place limits on their children's control of inherited assets until the children

attain an age at which it is anticipated they will have sufficient experience and maturity to responsibly manage an inheritance. Therefore, testamentary documents frequently require assets to be held in trust for the benefit of a child until the child attains that presumed age of sufficient experience and maturity. If the beneficiary designation form of a retirement plan merely directs the distribution of plan assets to the owner's child, or, if the beneficiary designation form is not properly completed and the default distribution provisions of the retirement plan provide for such a distribution, the owner's child will have unfettered control of and access to the inherited retirement plan assets at age eighteen.⁷ If the estate planning objective is to provide limits on the child's access to assets until an older age, such as age 35, for example, the failure to integrate the beneficiary designation with the client's testamentary documents would defeat an important estate planning goal. To avoid this unsatisfactory result, the beneficiary designation form must direct the distribution of retirement plan assets to the trust established for the child under the client's testamentary documents.

Many clients name one or more charitable organizations as beneficiaries of their estate plans. In the context of charitable planning, income tax liability is oftentimes reduced by providing for the transfer of assets from the retirement plan directly to the charitable beneficiary following the plan owner's death. Accordingly, retirement plan owners with testamentary documents naming charitable organizations as beneficiaries should consider tailoring their beneficiary designation forms to name the charitable organization as beneficiary of all or a part of their retirement plan. Integration of the beneficiary designation form with the charitable gifts set forth in the testamentary documents will provide significant income tax savings in many cases. Without proper integration, however, income tax liability may increase due to the difficulty associated with an estate or trust obtaining a full charitable income tax deduction under IRC § 642(c).⁸

Estate tax planning for married couples frequently includes using a "credit shelter trust" for the benefit of a surviving spouse. A credit shelter trust established pursuant to the deceased spouse's testamentary documents utilizes the deceased spouse's estate tax exemption. The assets of the credit shelter trust will escape the estate tax applicable at the surviving spouse's death and pass to the trust's remainder beneficiaries free of estate tax. The estate tax savings associated with this type of estate plan, however, may be diminished if the beneficiary designation does not allocate at least a portion of retirement plan assets to the credit shelter trust. Accordingly, substantial estate tax savings can be lost if the distribution of the client's retirement plans are not properly integrated with the client's testamentary documents.

Deferral of Retirement Plan Distributions

The significant tax and creditor protection advantages associated with keeping assets inside a retirement plan put a premium on deferring distributions of retirement plan assets. Income tax benefits are generally maximized if the distribution of assets from a retirement plan is deferred for the maximum period allowable under federal tax law.⁹ Deferred distribution of plan assets also maximizes the creditor protection benefits associated with retirement plans.¹⁰

Unfortunately, a complex set of federal treasury regulations¹¹ force the liquidation of a retirement plan following a plan owner's death. In most cases, the longest available period of deferral requires

a beneficiary to take distributions from an inherited retirement plan in a series of increasing annual distributions that are spread out over the beneficiary's life expectancy.¹² A beneficiary will not have the ability to take advantage of the life expectancy payout option, however, if the retirement plan owner's beneficiary designation is not properly integrated with the owner's testamentary documents. For example, if the retirement plan owner's estate is the beneficiary of the plan, the beneficiaries of the owner's estate are generally unable to take advantage of the tax deferral and creditor protection benefits associated with the life expectancy payout option.¹³ The benefits associated with the life expectancy payout option are also lost if the retirement plan owner names a trust that does not conform to the complex requirements of applicable federal Treasury Regulations.¹⁴ To achieve the longest period of deferral and, therefore, maximize income tax deferral and creditor protection benefits for the beneficiaries of a retirement plan, a retirement plan owner's beneficiary designations must be properly integrated with the plan owner's testamentary documents.

Conclusion

Because the post-death distribution of probate assets and retirement plan assets are governed by different rules, the estate planner must ensure that the directions governing the distribution of both types of assets are properly integrated. Proper integration requires a review of a client's existing beneficiary designation forms and, in many cases, custom drafted revisions of those beneficiary designation forms. The failure to properly integrate planning for the disposition of a client's interest in a retirement plan with planning for the client's testamentary documents will likely frustrate the client's estate planning objectives and result in the forfeiture of important benefits.

About the Author

Nicholas S. Marshall is a member of the law firm of *Ahrens & DeAngeli, P.L.L.C.*, where his areas of practice include trusts, estates, tax and charitable planning. Nick received his LL.M. in taxation from New York University; J.D. from the University of Idaho; and B.A. in economics from the University of Puget Sound. Nick lives in Boise with his wife, Michelle, and their two daughters, Emma and Zoë.

Endnotes

¹ In this article, the phrase "retirement plans" or "retirement plan" refers collectively to IRAs described in Internal Revenue Code ("IRC") §§ 408 and 408A and retirement plans that meet the requirements of IRC § 401(a) such as a 401(k) plan, Keogh plan, pension plan and profit-sharing plan.

² In this article, the phrase "probate assets" or "probate asset" refers generally to those assets that are subject to disposition pursuant to the terms of a decedent's will and the phrase "nonprobate assets" or "nonprobate asset" refers generally to all other assets that are not subject to such disposition.

³ See Idaho Code §§ 15-3-101 and 15-6-201(a).

⁴ Wills and revocable trusts are collectively referred to herein as "testamentary documents."

⁵ An asset is not a "probate asset" once it has been transferred to a revocable trust. If a decedent's testamentary documents consist of a will and revocable trust, however, the decedent's will ordinarily directs the distribution of probate assets to the revocable trust. The revocable trust then provides for the ultimate distribution of the asset.

⁶ The default beneficiary supplied by many retirement plans is the estate of the deceased owner meaning that the retirement plan will be distributed in accordance with the owner's will or, if there is no will, the applicable laws of intestate succession. Another common default beneficiary supplied by retirement plans is the owner's spouse. If the owner of such a plan is not survived by a spouse, the terms of some plans will designate the owner's surviving children or descendants as default beneficiaries.

⁷ Idaho Code § 32-101.

⁸ See, e.g., Choate, *Life and Death Planning for Retirement Benefits*, 371-376, Sixth Edition (2006).

⁹ Choate, *Life and Death Planning for Retirement Benefits*, 27-28, Sixth Edition (2006).

¹⁰ Idaho law exempts assets held in an inherited retirement plan from the claims

of the beneficiary's creditors. See Idaho Code §§ 11-604A(5) and 55-1011. The surprisingly strong creditor protection provided by Idaho law to inherited retirement plans has been confirmed by the Federal Bankruptcy Court for the State of Idaho. *In re McClelland*, 2008 Bankr. Lexis 41. In many other jurisdictions, however, creditor protection provided to the beneficiary of an inherited IRA is weak or nonexistent. See, e.g., *In re Kirchen*, 344 B.R. 908 (Bankr. E.D. Wis. 2006); *In re Navarre*, 332 B.R. 24 (Bankr. M.D. Ala. 2004); *In re Greenfield*, 289 B.R. 146 (Bankr. S.D. Cal. 2003).

¹¹ Treasury Regulations § 1.401(a)(9)-0, *et seq.*

¹² Treasury Regulations §1.401(a)(9)-3, A-4 and §1.401(a)(9)-5, A-5.

¹³ In the event the owner's estate is the beneficiary of his or her retirement plan, the longest period of deferral is likely to be five years, if the owner died prior to his or her required beginning date, or, if the owner died on or after his or her required beginning date, the longest period of deferral is likely to be deceased owner's remaining life expectancy. Treasury Regulations §1.401(a)(9)-3, A-4 and §1.401(a)(9)-5, A-5.

¹⁴ Treasury Regulations § 1.401(a)(9)-4, A-5.

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INTRODUCTION TO FIXING 401(K) AND OTHER RETIREMENT PLAN FAILURES AND PROBLEMS

John C. Hughes

The ERISA Law Group, P.A.

Introduction

This article will describe the basics regarding retirement plan failures, the potential consequences associated with such failures, and the Internal Revenue Service's correction program that is available to fix certain failures. The correction program allows employers to avoid potentially substantial tax consequences and other liabilities.

Most Employers and Employees Maintain or Are Participants in Retirement Plans

Involvement with retirement plans is far reaching. Anyone reading this article is likely a retirement plan participant, plan trustee, plan sponsor, plan fiduciary, and/or represents clients that maintain a retirement plan (and/or act in the foregoing capacities). There are trillions of dollars invested under the umbrella of retirement plans. Almost all employers, big and small, private and public, maintain some kind of retirement plan. Retirement plan participants range from the lowest of wage earners to the highest.

Compliance with the Law Requires Vigilance

The laws and regulations governing retirement plans are excessively complex and everchanging. The majority of plans maintained by private employers are "qualified" plans.¹ A plan is considered qualified by the Internal Revenue Service when it complies with the litany of requirements that are set forth in Section 401(a) of the Internal Revenue Code ("IRC") (and underlying official guidance; *i.e.*, Treasury regulations, Revenue Procedures, *etc.*).²

Qualified status provides significant tax advantages. When a plan is qualified, it generally allows the employer that sponsors the plan to deduct the contributions it makes to the plan. It also allows the plan participants to delay paying taxes on the employer's contributions (*e.g.*, profit sharing and matching contributions), as well as the contributions the participants themselves make by salary deferral (commonly referred to as "401(k) contributions"). The earnings thereon grow tax-free until distributed.

The Potential Consequences Associated with Plan Failures Are Disastrous

If a qualified plan does not operate in accordance with the maze of requirements under IRC Section 401(a) (and the associated guidance), it will suffer a qualification failure. If a qualification failure is discovered by the IRS, *e.g.*, on audit or through the reporting of such by a disgruntled or concerned employee, the potential results can be disastrous – plan disqualification.

If a plan is disqualified, the tax benefits that were enjoyed by the employer and the employees cease to exist. Taxes are owed, going back, on the amounts that were deducted by the employer and also on the amounts that the employees did not include in their income. Additionally, penalties and interest will be owed on these amounts. Distributions will not be eligible for favorable tax treatment (*i.e.*, rollover), trust earnings will not be exempt from taxation, and social security taxes will be owed. Finally, the employer, as a plan fiduciary, will face increased exposure from the now disgruntled participant employees relative to the employer's fiduciary breaches (for which there is personal liability – not only for the employer, but for anyone else exercising discretion over plan assets; *e.g.*, an employee who handles administrative plan matters as part of his or her job or an investment consultant involved with the plan). Short of these consequences,

the IRS may negotiate the payment of a penalty that is based on the amount of taxes that might be owed if the plan were disqualified (see Audit CAP below).

Common Plan Failures

There are four primary ways in which a plan suffers a qualification failure.

First, a plan will suffer a qualification failure if it is written in such a way that it violates IRC Section 401(a). This type of failure can also occur if the written plan document is not appropriately or timely amended to reflect changes in the law. This often happens if a new legal requirement is overlooked altogether or if an amendment is not signed or dated by the employer for some reason.

Changes in the law requiring mandatory plan amendments generally are made approximately every year or two. For example, this year most qualified plans must be amended to reflect the provisions of the Pension Protection Act of 2006 and the Heroes Earnings Assistance and Relief Tax Act of 2008. Also, employers sometimes make changes in the design of their plans. For example, an employer may decide to implement a "Roth" feature to a plan, implement an automatic contribution feature, or change the identity of the related employers that are participating in the plan. These discretionary changes also require timely execution of properly drafted amendments. In short, sometimes the language of the plan is wrong or missing, or mandatory amendments reflecting changes in the law are not timely executed.

Second, a plan will suffer a qualification failure if it is not operated in accordance with the plan terms. For example, a plan might state that hardship distributions are not available to participants; however, in operation the plan makes a hardship distribution available. This would also be a qualification failure – the failure to follow the plan terms.

Third, a demographic failure will occur if there is a failure to satisfy IRC Sections 401(a)(4), 401(a)(26), or 410(b). These IRC sections serve to ensure that a plan does not discriminate in favor of highly compensated employees. Specialized tests are run every year by the plan's service providers ensuring that the plan is satisfying these and other IRC sections and thus not discriminating.

Fourth, a qualification failure will occur if an employer adopts a type of plan that it is not eligible to adopt in the first place. Different types of plans are available to different types of employers.

All four of these types of failures are common given the complexities associated with the laws that require plans to change their terms, and also the complexities associated with operating a plan and ensuring operation conforms to the complicated and many terms contained in the plan (most qualified plans are approximately 100 pages in length and include much technical-speak).

More specifically, the IRS has identified the 10 top failures:³

1. Failure to amend the plan for tax law changes by the end of the period required by the law.
2. Failure to follow the plan's definition of "compensation" for determining contributions.
3. Failure to include eligible employees in the plan or the failure to exclude ineligible employees from the plan.
4. Failure to satisfy the plan loan provisions.
5. Impermissible withdrawals from the plan while

the participant is still employed.

6. Failure to satisfy minimum distribution rules (*e.g.*, at age 70½ or death).
7. Employer eligibility failure (*i.e.*, adoption of the wrong kind of plan).
8. Failure to pass the ADP/ACP nondiscrimination tests under IRC Sections 401(k) and 401(m).
9. Failure to properly provide the minimum “top-heavy” benefit or contribution for “non-key” employees.
10. Failure to satisfy the annual contribution and benefit limits.

The IRS Allows Plans to Correct Failures Under “EPCRS”

The good news is that the IRS maintains a correction program that allows plans to fix qualification failures. An employer that properly participates in this program upon discovery of a qualification failure will retain its qualified status and avoid the adverse tax consequences and other liabilities mentioned above.

The program is called the Employee Plans Compliance Resolution System (commonly referred to as “EPCRS”).⁴ EPCRS in its current form is set forth in IRS Revenue Procedure 2008-50. EPCRS is updated every few years to clarify certain provisions and to broaden the available corrections. EPCRS generally consists of three correction programs that are titled as follows: Audit CAP, Voluntary Correction (“VCP”) and Self-Correction (“SCP”).

Audit CAP

Audit CAP is mentioned above. A plan will generally find itself in Audit CAP if a failure is identified during the course of an IRS audit or the IRS’s routine review of a plan’s amendments. Audit CAP involves taking actions to correct the failure and paying a penalty to the IRS. The penalty is a negotiated percentage of the “Maximum Payment Amount.” The Maximum Payment Amount is the amount that is approximately equal to the tax the IRS could collect upon plan disqualification, which, in turn, is the sum of the open taxable years of the tax on the trust, income tax resulting from the loss of employer deductions for contributions it made to the plan, income tax resulting from inclusion of income for participants on amounts that were deferred, and “any other tax that results from a Qualification Failure that would apply. . . .”

If an Audit CAP negotiation is unsuccessful, the plan will be disqualified. Clearly, the goal is to avoid Audit CAP. This is achieved through proper participation in SCP or VCP upon the discovery of a problem by the employer, third party administrator, legal counsel, recordkeeper, investment consultant, *etc.*

Voluntary Correction Program

VCP generally requires the preparation of a formal application for submission to the IRS along with the payment of a fee. A successful application will result in the IRS issuing a “compliance statement.” The compliance statement will summarize the failure and the agreed-upon method of correction. The compliance statement will state that the IRS will not pursue the sanction of disqualification on account of the failure.

The VCP application must include specified information such as general information about the plan (plan type, number of participants, *etc.*), a description of the failure, a description of the proposed method of correction, a description of the administrative procedures in place aimed at preventing future failures, and statements regarding whether the plan is under examination or whether the plan or sponsor have been parties to abusive tax avoidance transactions.

The current version of EPCRS also includes streamlined VCP applications that may be used for specified failures. A plan that was not timely amended for a recent change in the law would likely be eligible

to utilize this streamlined procedure; for example, if an employer did not timely amend its plan to reflect the Economic Growth and Tax Relief Reconciliation Act of 2001 (“EGTRRA”). Similarly, EPCRS will likely be modified to allow a streamlined fix for employers that fail to timely amend for the Pension Protection Act of 2006 this year.

The VCP fees vary based on the type of failure and the number of plan participants identified in the most recently filed Form 5500 (Annual Return/Report of Employee Benefit Plan). Generally, there are eight categories of fees ranging from \$750 (20 or fewer participants) to \$25,000 (over 10,000 participants). A chart of the eight fee categories is set forth in Revenue Procedure 2008-50.

Discounted fees are available for specified failures including those failures eligible for the streamlined procedure mentioned above. Increased fees may apply if the failure is egregious or where the failure is not the result of mistake or oversight.

VCP applications may be submitted on an anonymous basis. This option can be very useful when the failure is not one for which the method of correction is entirely clear or if the IRS and the applicant potentially might not agree on the appropriate correction. In this instance, an application is submitted with redacted information and documents. Thereafter, if the negotiation is successful, the employer and the plan identities are later disclosed to the IRS.

Self Correction Program

SCP generally involves correcting the failure without submitting an application or a fee to the IRS (hence “self-correction”). Only certain failures are eligible for SCP.

SCP eligibility requires that the failure be an “operational” failure. An operational failure arises from a failure to follow plan provisions. Accordingly, many failures, like the failure to timely adopt a plan amendment, are not eligible for SCP.

Eligibility for SCP also requires that the operational failure must have occurred through an oversight or mistake in applying established practices and procedures reasonably designed to promote and facilitate compliance with the IRC, or because the established practices and procedures were not sufficient to prevent the occurrence of the failure. The established practices and procedures may be formal or informal.

SCP provides for the correction of both significant and insignificant failures; however, the availability of each has certain limits. The correction of a significant failure must be completed by “the last day of the second plan year following the plan year for which the failure occurred.” In contrast, insignificant failures may be corrected at any time. Also, insignificant failures may be corrected under SCP even if the Plan is “under examination” or if the operational failure is discovered on examination.

Correction Principles

EPCRS contains several provisions that provide detail on how to correct specified failures. Often, EPCRS will describe a specific correction methodology for a particular failure. However, often it will be the case that an employer will be faced with a problem that is not specifically addressed in EPCRS. In that case, EPCRS also describes correction principles of general applicability.

The general correction principles include the following:

1. The failure should be fully corrected with respect to all participants and all years (whether or not a taxable year is closed).
2. The correction should restore the plan and its participants to the position they would have been in but for the failure (including former participants).
3. The correction should be reasonable and appropriate for the failure (and, if possible, resemble one already provided for in the IRC).
4. The correction should keep plan assets in the plan.

5. The correction should provide benefits to non-highly compensated employees if the failure relates to a nondiscrimination issue.
6. The correction should not violate other requirements or cause additional failures.
7. The correction should be applied consistently.

Corrections oftentimes require additional deposits or distributions to participants which, consistent with the above principles, will require a measure of lost earnings on the amounts. In certain circumstances it will be difficult or impossible to identify the precise amounts. EPCRS contains provisions regarding appropriate calculations and the use of estimates and reasonable interest rates.

Conclusion

Proper maintenance of a retirement plan requires constant vigilance. Plan failures are very common and the consequences associated with plan failures can be severe. The IRS has established a program that allows plan sponsors to correct many plan failures and thus retain their qualified status and continue to enjoy the associated tax benefits (and avoid other potentially significant liabilities). EPCRS itself is complex and does not cover all instances of failure. Practitioners in the retirement plan arena, as well as plan sponsors, should recognize the complexities and know where to look for guidance when problems arise so that the plan's qualified status is not jeopardized.

About the Author

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Endnotes

- ¹ This article focuses on corrections to qualified plans.
- ² EPCRS is also available to correct failures of SEPs and SIMPLE IRA plans, 403(b) plans, 403(a), and, provisionally, governmental 457(b) plans.
- ³ See <http://www.irs.gov/retirement/article/0,,id=156774,00.html>
- ⁴ There are various other governmental correction programs aimed at different aspects of plan related problems. Those programs include the Department of Labor's Delinquent Filer Voluntary Compliance Program ("DFVC") and the Voluntary Fiduciary Correction Program ("VFCP").

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CONSERVATION EASEMENTS: FOREVER IS A VERY LONG TIME

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A December 2007 article in *The Advocate* entitled, *Conservation Easements in the Rocky Mountain West: "Perpetuity" is Relative* (hereinafter referred to as "*Perpetuity is Relative*") questioned the sustainability of conservation easements in Wyoming and the Rocky Mountain West and asked the question: "How long is forever?"¹ The answer is that forever is a very long time.

To provide this answer, this article will briefly examine the nature of conservation easements; the Wyoming case of *Hicks v. Dowd*² addressed in *Perpetuity is Relative*; and the federal and state law constraints on the amendment or termination of conservation easements that ensure their perpetuity.

Conservation Easements

A conservation easement is a private agreement between a landowner and a "holder" of the easement. The terms of the easement impose restrictions on the future use of land. The purposes of these restrictions may include:³ (i) conservation of land for the purposes of habitat protection; (ii) the preservation of scenic views; (iii) the protection of open space pursuant to a clearly delineated governmental conservation policy; (iv) the preservation of historic areas; or (v) the provision of land for public recreation or education. In Idaho, conservation easements are authorized by the Idaho Uniform Conservation Easement Act.⁴ The holder of the easement (whose authority is limited to enforcing the restrictions imposed by the easement) is either a governmental agency or a private, "publicly supported" charity recognized as an exempt organization under federal tax law.⁵ Such private entities are typically known as "land trusts," even though they are usually non-profit corporations, not trusts.

Conservation easements are creatures of state law. However, if the easement meets the requirements of the Internal Revenue Code, substantial tax benefits, including state⁶ and federal income and estate tax, are available to easement donors. One of the principal requirements of federal tax law is that the conservation easement be "in perpetuity." Perpetuity is not a state law requirement, but is required if the contribution of a conservation easement is to be eligible for tax benefits.⁷

Idaho law provides that a conservation easement may be created, modified or terminated in the same manner as other easements.⁸ However, the fact that the holder of a conservation easement is either a governmental agency or a private charity imposes substantial constraints on the ability of the parties to amend or terminate conservation easements.⁹ These constraints are discussed below and must be taken into account in any consideration of the "sustainability" of conservation easements.

Hicks v. Dowd

Perpetuity is Relative relied for its conclusions upon the unfortunate *Hicks* case. It is worth noting at the outset that the improper termination of a conservation easement addressed by the *Hicks* case is the first and, thus far, the only reported case in the United States of an improper easement termination.¹⁰ That is, it is the first reported case of an improper easement termination in over 100 years¹¹ of conservation easements in America. In addition, the conservation easement that was the subject of the *Hicks* case was held, and terminated, by a governmental agency: Johnson County, Wyoming. Although governmental agencies are subject to limitations on their authority in dealing with public property, as discussed above, they are not subject to the same constraints or reporting requirements with respect to conservation easements as are

private land trusts. Finally, the benefits of the termination in *Hicks* accrued to the successor in title to the original easement donor, so that the penalties of the "tax benefit rule" did not apply. Thus, the facts of *Hicks* do not support the generalized conclusion that the sustainability of conservation easements is questionable.

In *Hicks*, the original landowner, the Lowham Limited Partnership (hereinafter "Lowham"), deeded a conservation easement on over 1,000 acres ("Meadowood") to Johnson County.¹² The owner of Meadowood subsequently sold Meadowood, subject to the conservation easement, to Fred and Linda Dowd.¹³

Lowham did not own the mineral rights to Meadowood at the time of the easement conveyance, a fact known to Lowham¹⁴ and presumably to the Dowds, who took title subject to matters of record. In 2001, Northwest Energy, the mineral rights owner, commenced limited coal-bed methane operations on Meadowood.¹⁵ On the grounds that the proposed mineral development would put them in violation of the easement (which prohibited mining or mineral extraction¹⁶), the Dowds asked the Johnson County Commission to terminate the conservation easement. Because Johnson County had accepted the easement subject to third-party mineral rights, it is difficult to understand how the Dowds could have been held liable for the exercise of those rights. Nevertheless, the County Commission adopted a resolution terminating the easement in exchange for the Dowds' agreement to hold the County harmless from the consequences of such termination.¹⁷ At that time, less than one acre of Meadowood had been disturbed by mining activities.¹⁸

Ten months after Johnson County's action, Robert Hicks, editor of the local paper and a resident of Johnson County, filed suit against the Dowds and Johnson County, seeking to have the easement termination set aside.¹⁹ The trial court ultimately ruled that Hicks had failed to file his case in a timely manner under the Wyoming Rules of Appellate Procedure and dismissed the case.²⁰ On appeal, the Wyoming Supreme Court accepted as the rule of the case that the easement was conveyed to a charitable trust²¹ (a position challenged by no one at trial level) but disagreed that the Rules of Appellate Procedure governed the case. The Supreme Court dismissed the case on the grounds that Hicks did not have standing to enforce a charitable trust.²² In rendering its opinion, the Supreme Court invited the Wyoming Attorney General to reconsider his earlier refusal to become involved in the case.²³ In response, the Attorney General filed a new complaint, styled *Salzburg v. Dowd*, against Johnson County and the Dowds, seeking to reverse the termination of the Meadowood easement.²⁴

The Attorney General in *Salzburg* advances two principal grounds for reversal of Johnson County's actions: first, that improper termination of the easement violated the charitable trust doctrine and, second, that termination of the easement violated Article 16, section 6 of the Wyoming Constitution, which prohibits public agencies from making donations to any individual.²⁵

Hicks sheds no light on the perpetual nature of conservation easements because the case was decided on procedural grounds, and the Wyoming Supreme Court's acceptance of application of the charitable trust doctrine was also procedural, not substantive.²⁶ However, in *Salzburg*, the issue of the permanency of conservation easements is again before the Wyoming courts. This time, Johnson County's termination of the Meadowood easement is likely to be decided on the merits and probably in a way that will reaffirm the permanency of perpetual conservation easements.

Federal Legal Constraints

Easement Documentation Requirements—The conclusion that the sustainability of permanent conservation easements is questionable not only fails to recognize the limiting nature of the *Hicks* decision as support for that thesis, but it also fails to consider the federal tax law that governs deductible conservation easements.

As noted, in order to be deductible, federal tax law requires that conservation easements must be “granted in perpetuity.”²⁷ Furthermore, a conservation easement is required to contain provisions granting the holder of the easement the rights to monitor property subject to easement for compliance with the easement.²⁸ Federal law also requires that the easement contain provisions granting the holder the right to enforce the easement, including requiring restoration of any violation of the easement to the conditions that existed when the easement was granted.²⁹ The federal law also requires that conservation easements prohibit uses that would be inconsistent with the conservation purposes of the easement.³⁰

In addition, federal tax law requires that a deductible easement provide that in the event of a termination of the easement by judicial action, the portion of the proceeds resulting from the sale of the underlying property allocable to the easement must be paid to the former easement holder for use consistent with the conservation purposes of the original easement.³¹ Based upon these clear requirements in federal law, if a landowner hopes to obtain the tax benefits for donating a conservation easement, the owner must make sure that these provisions, which contractually require and ensure perpetuity, are included in the easement document.

Federal Constraints on Easement Holders

A deductible conservation easement must be held by a qualified organization, which is defined by the tax code as being either a governmental entity or a publicly supported exempt organization.³² In either case, the organization is required to have the commitment necessary to protect the conservation purposes of the easement in perpetuity.³³ The easement must also contain a provision that states that it cannot be assigned except to another qualified holder (as defined in the tax code), provided the assignee agrees to continue to enforce the easement.³⁴

The tax code’s requirement that a deductible conservation easement be held by one of these types of entities imposes an even more severe constraint upon easement amendment or termination than the terms of the easement itself. That is because the legal requirements applicable to these entities severely limit their dealings with conservation easements they may hold.

The requirement that private land trusts be exempt organizations subjects them to two important constraints. First, a land trust must be organized and operated “exclusively” for its tax-exempt purposes.³⁵ Second, no part of a land trust’s net earnings may inure to the benefit of any “disqualified person.”³⁶

The penalty for violation of the first constraint, sometimes known as the “exclusivity requirement,” is loss of a land trust’s exempt status.³⁷ Loss of exempt status is akin to nuclear annihilation for a land trust, because contributions to it, including easement contributions, are no longer deductible, meaning it is out of business. In addition, if the original donor of a conservation easement is the recipient of a net financial benefit resulting from an improper easement amendment or termination, that individual is subject to the “tax benefit rule,” in which repayment of the tax benefit originally enjoyed in connection with the easement contribution may be required.³⁸

The second constraint prohibits what are known as “excess benefit transactions.” Excess benefit transactions are those in which an exempt organization confers a financial benefit upon a “disqualified person” in excess of the benefit received by the organization in exchange.³⁹ Disqualified persons include a land trust’s employees, officers,

directors, “substantial contributors,” and parties related by blood or business to such persons.⁴⁰ A contributor is a “substantial contributor” if his or her contributions over a five-year period total more than 2% of the donee organization’s total contributions and exceed \$5,000.⁴¹ It is likely that many conservation easement donors fall within this category, depending upon how the IRS values the easement contribution.⁴²

The termination or amendment of a conservation easement conferring a financial benefit on a landowner exceeding the benefit to the land trust is an excess benefit transaction. The possible penalties for engaging in an excess benefit transaction not only include loss of exempt status, but also intermediate sanctions. If a disqualified person engages in an excess benefit transaction with a land trust, the IRS requires the individual to “correct” the transaction by restoring the benefit received⁴³ and pay an excise tax equal to 25% of the benefit received.⁴⁴ Managers of a land trust who engage in excess benefit transactions are subject to an excise tax equal to 10% of the excess benefit, not to exceed \$20,000.⁴⁵ These federal rules prohibit and strenuously penalize any landowner and land trust that engage in the amendment or termination of a conservation easement in a manner that confers a net financial benefit on any private entity or individual.

Another federal rule that applies to all qualified easement holders, whether private land trusts or public agencies, requires that they must have the commitment to protect the conservation purposes of the conservation easements they hold in perpetuity.⁴⁶ Easement amendments or terminations that are inconsistent with the original conservation goals of a conservation easement violate this requirement and expose the easement holder to loss of its status as a “qualified organization” for purposes of holding deductible easements.

One might ask how the IRS monitors easement transactions for compliance with these rules. Federal tax law requires that any amendment, termination, or assignment of a conservation easement (whether or not the easement was deductible) by a land trust be reported annually on the land trust’s Form 990, along with an explanation of the action.⁴⁷ Form 990 also requires a land trust to attach a schedule detailing its activities, including the amount of time and money it spends annually monitoring and enforcing the easements that it holds.⁴⁸

Except for the requirement to have a commitment to protect the conservation values of the conservation easements they hold, the prohibitions and penalties described above do not apply to governmental agencies. Such agencies are also exempt from the reporting requirements applicable to private land trusts. Government-affiliated land trusts, such as the Johnson County Scenic Preserve Trust, are exempt organizations subject to the prohibitions and penalties applicable to private land trusts. However, they are excused from the reporting requirements applicable to private land trusts, and they are not dependent upon deductible contributions for their continued operation.⁴⁹ The failure of federal tax law to treat governmental agencies and affiliated organizations in the same manner as private land trusts is a failing that should be addressed in future tax code revisions. Nevertheless, there are state law requirements that limit the ability of state and local government agencies and government-affiliated land trusts to engage in improper easement practices.

State Laws Ensuring Perpetuity

Although the federal tax code does not currently impose sufficient sanctions on improper conservation easement amendments or terminations by governmental agencies, state constitutional provisions offer an antidote to such actions.

The Wyoming Attorney General has asserted that the action of Johnson County in terminating the Meadowood easement was in violation of the Wyoming Constitution, which provides: “Neither the state nor any county, city, township, town, school district, or any other political subdivision, shall loan or give its credit or make donations to or in aid of any individual, association or corporation . . .”⁵⁰ If found

to violate this provision, the action of Johnson County is voidable, and the Wyoming Attorney General has standing and authority to challenge the validity of such action as it has done in *Salzburg*. Furthermore, there is no statute of limitations for constitutional violations.

Idaho has a similar constitutional provision: "The credit of the state shall not, in any manner, be given, or loaned to, or in aid of any individual, association or corporation."⁵¹ As in *Salzburg*, this provision could be used by Idaho's Attorney General to address wrongful conservation easement terminations by governmental entities.

Another count of the Wyoming Attorney General's challenge to Johnson County's action is that it violates the charitable trust doctrine. This doctrine has never been judicially applied to conservation easements, and there is significant debate as to whether it should be so applied.⁵² However, should the Wyoming courts choose to rule that the doctrine does apply to conservation easements, it will represent a state law sanction for improper easement amendments or terminations applicable to both private land trusts and public agencies.

Land trusts, including government-affiliated land trusts, are also governed by the provisions of their corporate charters. To be qualified to hold deductible easements, a land trust's charter should provide that land conservation is among its purposes. In addition, to qualify as an exempt organization under federal law, land trusts, including government-affiliated land trusts, must include in their charters the requirements that they be operated exclusively for their exempt purposes and that none of their net earnings may inure to the benefit of disqualified persons. Violation of these charter requirements not only exposes a land trust to federal tax sanctions, it provides grounds under state law to set aside transactions in violation of charter provisions as *ultra vires*.⁵³

Conclusion

For all of the reasons summarized in this article, it is clear that land trusts and government agencies may not lawfully amend or terminate conservation easements in a manner that supports the assertion that conservation easements last only "...as long as the land trust is willing and able to retain its interest in the conservation easement."⁵⁴ The one exception found in the *Hicks* case does not make the rule.

About the Authors

Andrew M. Wayment is a member of the Idaho Bar. Andrew is a partner with Wright Johnson Tolson & Wayment, PLLC in Idaho Falls. Mr. Wayment has represented both individual landowners and land trusts in the creation of conservation easements in eastern and central Idaho.

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Endnotes

¹ Jessica Rutzick, *Conservation Easement in the Rocky Mountain West: "Perpetuity" is Relative*, THE ADVOCATE, Dec. 2007, at 33-34 [Hereinafter "Perpetuity is Relative"].

² *Hicks v. Dowd*, 157 P.3d 914 (Wyo. 2007) [Hereinafter "*Hicks*."] For a detailed analysis of *Hicks*, the legal origins of conservation easements, federal tax rules governing easements, and the amendment or termination of easements, see C. Timothy Lindstrom, *Hicks v. Dowd: The End of Perpetuity?*, 8 WYO. L. REV. 25 (2008) [Hereinafter "*The End of Perpetuity*"]

³ See 26 U.S.C.A. § 170(h)(4). For a detailed explanation of the requirements of the Internal Revenue Code for deductible conservation easements see C. TIMOTHY LINDSTROM, A TAX GUIDE TO CONSERVATION EASEMENTS (Island Press 2008) [Hereinafter "*Tax Guide*"].

⁴ See I.C. §§ 55-2101 – 2108.

⁵ See 26 U.S.C. § 170(h)(3).

⁶ Idaho Code § 63-3011B provides that "taxable income" for Idaho income tax purposes is defined in the same manner as taxable income for federal income tax purposes, thereby recognizing a state income tax deduction for the contribution of a conservation easement, provided it meets the federal tax law requirements for deductibility.

⁷ See 26 U.S.C. § 170(h)(2)(C).

⁸ See I.C. § 55-2102(1).

⁹ For a detailed discussion of the types of organizations allowed to hold deductible easements and the tax rules that govern them, see *Tax Guide*, *supra*, at 28-39.

¹⁰ *The End of Perpetuity*, *supra*, at 25.

¹¹ See *id.*, at n.53.

¹² See *Hicks*, 157 P.3d at 916. There is some confusion in the record, and apparently in Johnson County, about what entity actually held the Meadowood conservation easement. Johnson County had created its own land trust (the Johnson County Scenic Preserve Trust) expressly for the purpose of accepting the Meadowood easement. However, the Scenic Preserve Trust was not in place in time to accept the Meadowood easement, and so the County itself accepted the easement. Thereafter, the County never seemed clear about exactly what entity owned the easement, and it was ultimately terminated by the County Commission, not the trustees of the Scenic Preserve Trust.

¹³ See *id.* at 916-17.

¹⁴ As required by 26 C.F.R. § 1.170A-14(g)(4)(ii), Lowham had obtained a professional opinion from a qualified geologist that the probability of surface mining on Meadowood was "so remote as to be negligible."

¹⁵ See *Hicks*, 157 P.3d at 917; see also *Perpetuity*, *supra*, at 29-30.

¹⁶ See Paragraph 5 of the "Conveyance of Conservation Easement;" see *Perpetuity*, *supra*, at n.17.

¹⁷ See *Hicks*, 157 P.3d at 917.

¹⁸ See Affidavit of Kenneth M. Quinn, General Manager of Northwest Energy, filed in Civil Action No. 2003-0057 (*Hicks v. Dowd*); see *Perpetuity*, *supra*, at n. 31.

¹⁹ See Wyoming 4th Judicial District Court, Civil Action No. 2003-0057.

²⁰ See "Order Dismissing Remaining Claims for Lack of Subject Matter Jurisdiction" entered in Civil Action 2003-0057 (*Hicks v. Dowd*), October 11, 2005; see *Perpetuity*, *supra*, at 33.

²¹ See *Hicks*, 157 P.3d at 919.

²² See *id.*, at 918-19.

²³ See *id.* at 921.

²⁴ *Salzburg v. Dowd*, Compl. for Declaratory J. Charitable Trust, Mandamus Relief, Breach of Fiduciary Duties, Violation of Constitutional Provisions filed in Civil Action 2008-0079, filed in the Wyoming District Court for the Fourth Judicial District, July 9, 2008 [Hereinafter *Salzburg*.]

²⁵ See *id.*

²⁶ *The End of Perpetuity*, *supra*, at n.46.

²⁷ 26 U.S.C. § 170(h)(2)(C).

²⁸ See 26 C.F.R. § 1.170A-14(g)(5)(ii).

²⁹ See *id.*

³⁰ See 26 C.F.R. § 1.170A-14(e)(2).

³¹ 26 C.F.R. § 1.170A-14(g)(6)(i).

³² See, generally, 26 U.S.C. § 170(h); 26 C.F.R. § 1.170A-14.

³³ See 26 C.F.R. § 1.170A-14(c)(1).

³⁴ See 26 C.F.R. § 1.170A-14(c)(2).

³⁵ See 26 U.S.C. § 501(c)(3).

³⁶ See *id.*

³⁷ See 26 U.S.C. § 501(c)(3) (2007); see also, *The End of Perpetuity*, *supra*, at 52-54.

³⁸ See *Nash v. U.S.*, 398 U.S. 1, 3 (1970) (describing the requirements of 26 U.S.C. § 111).

³⁹ See 26 U.S.C. § 4958(c)(1).

⁴⁰ See 26 U.S.C. § 507(d)(2)(A).

⁴¹ See *The End of Perpetuity*, *supra*, at 51.

⁴² See *id.*

⁴³ See 26 C.F.R. § 53.4958-7 (2007).

⁴⁴ See 26 U.S.C. § 4958(a)(1) (2006).

⁴⁵ See 26 U.S.C. § 4958(a)(2) and (d)(2).

⁴⁶ See 26 U.S.C. § 170(h)(3).

⁴⁷ See *The End of Perpetuity*, *supra*, at 48.

⁴⁸ See Instructions to Form 990, Schedule A, line 3c.

⁴⁹ For a general discussion of the differences between land trusts, government agencies and government-affiliated land trusts, see *The End of Perpetuity, supra*, at 47-48.

⁵⁰ WYO. CONSTITUTION, art. XVI, § 6.

⁵¹ IDAHO CONSTITUTION, art. VIII, § 2.

⁵² See *The End of Perpetuity, supra*, at 56-69. For an opposing view, see Nancy A. McLaughlin and W. William Weeks, *In Defense of Conservation Easements: A Response to the End of Perpetuity*, 9 WYO. L. REV. 1 (2009) (hereinafter referred to as “*Defense*”).

⁵³ For an excellent debate on whether the charitable trust doctrine should apply to conservation easements, see *The End of Perpetuity, supra*, and *Defense, supra*. C. Timothy Lindstrom will be shortly publishing in the Wyoming Law Review a rebuttal to McLaughlin and Weeks’ arguments in *Defense*, entitled, *Conservation Easements, Common Sense and the Charitable Trust Doctrine*.

⁵⁴ *Perpetuity is Relative, supra*, at 33.

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STATE CORPORATE INCOME TAX SYSTEMS

John McGown, Jr.
Hawley Troxell Ennis & Hawley LLP

This article is a basic primer on how Idaho (and most states) tax corporations when the income is “earned” from both inside and outside the state. Idaho taxes individuals by: (1) taxing residents on all of their income, but providing a credit for taxes paid to other states; and (2) taxing nonresidents on their income from Idaho sources. The conceptual differences between the approach for corporations and the approach for individuals are remarkable.

Introduction

Assume a taxpayer has taxable income that is earned partly in Idaho and partly in other states. Most people would expect an income tax system that would have each state tax only the income earned in that state. Further, it would be reasonable to expect that the state income tax systems for individuals and corporations would be similar, just as they are for federal income tax purposes. In fact, Idaho and most other states have income tax systems that divvy up a taxpayer’s income among the various states in dramatically different ways, depending on whether the taxpayer is an individual or a corporation (other than an S corporation).

State Income Taxation of Corporations

A corporation (not taxed as an S corporation) that does business in several states must divide its income among those states. There are numerous possibilities on how to accomplish such a division. The most obvious is to determine the taxable income earned in each of the states. A key “flaw” in that method is a concern that many corporations would locate key management in a no tax state such as Nevada and that the management fee would be such that the operations in the taxing states would show little or no profit.

The system that Idaho and many other states have adopted is to completely ignore how profitable or unprofitable a corporation has been in a particular state. Rather, the overall taxable income of the corporation is split into two parts, business income and non-business income. The business income is the dominant amount and comes from normal operations (which are very broadly defined). The non-business income is any item that is not business income (usually viewed as an irregular item not connected to normal operations).

The corporation’s business income is apportioned among the states where the corporation does business, based on its property (25%), payroll (25%), and sales (50%)¹ in each state. For example, assume Albert Corp. has \$1,000 in overall taxable income, all of which is business income. Further assume that it has some stores in Idaho, but has its home office in another state. For that reason, it has proportionately more sales in Idaho than it has property or payroll. If the Idaho sales are 24% of total sales, Idaho property is 12% of total sales, and Idaho payroll is 6% of total payroll, then 16.5% of the \$1,000 in overall taxable income, or \$165, is Idaho taxable income.²

A corporation’s nonbusiness income, if any, is allocated to the state where it arises. Returning to the example of Albert Corp., assume that it had \$1,000 of taxable income, with \$800 of that income being business income and \$200 being non-business income arising from the sale of Idaho real property, which property was not part of normal operations. In that case, the Idaho taxable income is computed as follows:

Business income (\$800) x Idaho apportionment factor (16.5%)
= \$132
Nonbusiness income (\$200) x Idaho allocation (100%)
= \$200
Idaho taxable income
\$332

The politics of state income taxation of corporations is interesting. The states have different tax systems, which allow significant state tax planning. Further, and as noted in footnote 2, Idaho and other states are moving toward giving more weight to the sales factor and less weight to the property and payroll factors. This shift in giving more weight to the sales factor favors corporations with headquarters in that state. For example, Micron, Albertsons and other Idaho-based corporations received a significant benefit in 1994 when Idaho moved from equal weighting of the property, payroll and sales factors to a double-weighting of the sales factor. As Idaho-based corporations, their Idaho property and payroll factors were relatively high, and decreasing these factors resulted in those corporations paying less Idaho income tax (to the extent they had overall taxable income).

Conclusion

This article explains the key differences between how Idaho, and most states, tax individuals and how they tax corporations when the income is earned both inside and out of Idaho. It also explains some of the flaws in those tax systems.

While basic, it should help practitioners to better understand the tax rules facing individual and corporate (other than S corporations) clients who have income from both within and without Idaho.

About the Author

John McGown, Jr. is Of Counsel to the Boise office of Hawley Troxell, where he has worked since 1982. He taught state taxation in the graduate tax program at Boise State University in 2000, 2001 and 2002. The students in the Spring 2002 state taxation course rated it the highest among the 36 courses taught that semester by the Accountancy Department faculty.

Endnotes

¹ The weight of each factor varies by state. Idaho “double-weights” the sales factor, so it is 50%, while property and payroll are 25% each.

²The corporation’s Idaho apportionment factor for its business income is as follows:

| | |
|---------------|-------------------|
| Sales: | 24% x .50 = 12.0% |
| Property: | 12% x .25 = 3.0% |
| Payroll: | 6% x .25 = 1.5% |
| TOTAL: | 16.5% |

Until 1994, the three factors were given equal weight in Idaho. If that were still the case, the computation of the Idaho apportionment factor would be:

| | |
|---------------|------------------|
| Sales: | 24% x 1/3 = 8.0% |
| Property: | 12% x 1/3 = 4.0% |
| Payroll: | 6% x 1/3 = 2.0% |
| TOTAL: | 14.0% |

2009 LEGISLATIVE REPORT

Robert L. Aldridge
Robert L. Aldridge, Chtd.

This year sine die was May 8, the 117th day, one day short of the record. For the fifth session in a row, there was a lot of pointed debate. Prior Governor Dirk Kempthorne's GARVEE bond proposal for highway projects, now called "Connecting Idaho", continued to be a source of dispute, still unresolved, along with a multitude of related transportation and funding issues. Gov. C.L. "Butch" Otter vetoed 36 bills to prevent adjournment. A deal was ultimately struck that provided some revenue for the governor's priorities, but did not increase the gas tax. This deal permitted the Legislature to adjourn but left many issues for next session.

Two primary reasons exist for the lengthy legislative session. First, the economic forecasts and realities of the state were bleak and worsening through the first months of the session. Second, the dispute over road improvements and how to fund them exacerbated the economic rift. In short, there were few "winners" this session, multiple unresolved issues, and controversies that may exist for the foreseeable future. When future generations look back on this session, it is likely that it will be seen as a textbook example of Public Choice Theory in action. With that as a backdrop, more than 300 ideas became law.

There were 378 House bills (quite a few of them revenue/appropriations bills introduced in the last weeks of the session), 34 House Concurrent Resolutions, 8 House Joint Memorials, 1 House Joint Resolution, 2 House Proclamations, and 2 House Resolutions. The Senate had 246 bills (again many revenue/appropriations bills), 12 Senate Concurrent Resolutions, 2 Senate Joint Memorials, 1 Senate Joint Resolution, and 1 Senate Proclamation. That's a total of 624 bills, with 344 enacted. The number of bills presented in the probate code and its progeny was quite limited, and only one of those bills actually passed.

New laws of interest are designated by the term "LAW" in bold print, and took effect July 1, 2009.

Probate Code, Elder Law, and Related Areas

Guardianship of Adults and Minors Where a Convicted Felon Resides At or Frequents the Proposed Residence – Senate Bill 1048. Prior legislation had provided that a convicted felon should not be appointed as a guardian unless the Court found by clear and convincing evidence that the appointment was in the best interests of the protected person. Last session we extended the protection, as to adults, if a convicted felon resides at, or frequents, the residence where the protected person is proposed to reside, and the appointed guardian was also required to take reasonable measures to ensure that a convicted felon did not reside with, care for, or visit the ward without court approval. However, a companion bill in last year's session would have given the same protections in minor guardianship cases, but was, for no reason ascertainable by me, held in committee in the House after passing the Senate 29 -1. The bill was presented again this year, essentially unchanged except for additional provision providing protection for minors compromise funds. The bill passed the Senate unanimously, but again was never scheduled for hearing in the House despite widespread support from over a dozen sources, including child advocates, law enforcement, and similar entities. This leaves minors seriously unprotected compared to adults in Conservatorship and Guardianship proceedings.

Vulnerable Adults

(1) House Bill 87 modifies §18-1505(4)(e), Idaho Code (abuse, exploitation or neglect of a vulnerable adult) so the definition of

"vulnerable adult" not only refers to decisions regarding his person, but also includes the person's funds, property, or resources. **LAW.**

(2) Senate Bill 1005a. §18-1505B(4) makes it a felony to commit sexual exploitation of a vulnerable adult – essentially, making or distributing pornographic material involving an adult who lacks the understanding or capacity to make, communicate, or carry out decisions for himself or herself, but defines "sexually exploitative material" by reference to §18-1507, which only addresses the use of a child in sexual acts, so this bill provides a definition of "sexually exploitative material" that refers to vulnerable adults, rather than children. **LAW.**

c. Uniform Principal and Income Act – House Bill 142. Amends two sections of the Idaho Uniform Principal and Income Act.

(1) §68-10-409 relates to the distributions from deferred compensation, annuity, and similar plans. When an IRA or other retirement arrangement is payable to a marital deduction trust, the IRS treats the plan as a separate property interest that itself must qualify for the marital deduction. IRS Revenue Ruling 2006-26 said that, as written, this section of the Uniform Principal and Income Act does not cause a trust to qualify for the IRS's safe harbors. Without necessarily agreeing with the IRS' position in that ruling, the revision satisfies the IRS's safe harbor provisions.

(2) §68-10-505 - distribution of income derived from a passthrough entity. When a trust owns an interest in a passthrough entity, such as a partnership or S corporation, it must report its share of the entity's taxable income regardless of how much the entity distributes to the trust. Whether the entity distributes more or less than the trust's tax on its share of the entity's taxable income, the trust must pay the taxes and allocate them between income and principal. The amendments clarify the required distributions. **LAW.**

d. Appointment by Will of Guardian for Developmentally Disabled Person – House Bill 179 Written by TEPI. Unlike probate code appointments, there is no provision allowing a parent to make a testamentary nomination of a guardian for a developmentally disabled child. This bill extends the provisions for testamentary nomination of a guardian in the probate code to include developmentally disabled persons and amends §66-404 to allow recognition of the testamentary nomination. **LAW.**

e. Temporary or Emergency Appointment of Guardians for Developmentally Disabled – Senate Bill 1047. Guardianships and conservatorships under the Idaho Probate Code have extensive provisions for temporary appointments of guardians or conservators, and clear definition of the duties and powers of the Guardian ad Litem, all amendments written in the past by TEPI. However, Developmental Disability has no such provisions, which can leave the developmentally disabled person in limbo and without protection until a hearing can be held on the petition, nor is there definition of the duties or powers of the Guardian ad Litem in DD cases. This bill therefore inserted the appropriate probate code language into the DD code, both as to temporary appointments and the duties, rights, and powers of a Guardian ad Litem. This would legitimize the existing procedure of courts in Developmentally Disability cases of using the Probate Code criteria in making such appointments and would have clarified the GAL provisions. The bill passed the Senate unanimously.

Legislators on the relevant House committee insisted that some sort of "notice" had to be given. What the notice would have been was unclear, since this is an ex parte proceeding, not a hearing, held with an unknown judge at an unknown time. How the notice could be given (the legislators suggested by phone, or e-mail, or fax, or a note left with

someone) was not an acceptable procedure. As in the probate code, the bill required the contemporaneous filing of a permanent petition for guardianship and/or conservatorship, required notice in writing of the temporary appointment to be served on a broad group of interested persons, included the developmentally disabled person, within 48 hours, and allowed any interested person to have an expedited hearing within a maximum of five days. Proponents of this legislation withdrew it because unacceptable amendments were proposed.

f. Pre-arranged Funeral Plans – Senate Bill 1062. In reaction to a recent Idaho court case, provides that any matters not covered by a prearranged plan are settled as set forth in §54-1142 and makes it clear how alternate services may be held. **LAW.**

g. Grandparent Visitation – Senate Bill 1105. In 2000, the US Supreme Court, in *Troxel v. Granville*, overturned a Washington grandparent visitation statute and stated, both directly and indirectly, minimum constitutional standards for such statutes. The existing Idaho statute, §32-719, violates one or more of those constitutional standards. Later, the Idaho Supreme Court, in *Leavitt v. Leavitt*, affirmed that a “clear and convincing” standard of proof was needed in the Idaho statute, at minimum, to pass constitutional muster. Prof. Elizabeth Brandt, UI Law School, and I were asked to prepare a constitutional bill, modifying §32-719 to meet the highest possible constitutional standards for grandparent visitation, taking a conservative approach to guarantee constitutionality in Idaho until there is a clear judicial statement that some lesser standard might be allowable. However, a grandparents group would not agree to the conservative approach and therefore the bill was withdrawn. Consequently, Idaho currently does not have a constitutional grandparents visitation statute.

h. Revisions to Uniform Anatomical Gift Act – Senate Bill 1129. This bill amends a section of the Uniform Anatomical Gift Act which was adopted by the Idaho legislature in 2007 to harmonize a patient’s expressed wishes to be an organ donor, which might require life support in order to preserve organs for donation, with the patient’s expressed wishes in a living will that unnecessary life supporting measures, excluding pain relief, not be administered merely to prolong life, to require that the wishes and needs of the patient are paramount. **LAW.**

2. GUARDIANSHIP PILOT PROJECT – House Bill 103. In 2005 the Legislature enacted HB 131 creating the Guardianship Pilot Project, to evaluate and improve the monitoring of guardianship and conservatorship cases. The project has been extremely effective; between 2005 and 2007, compliance with required reporting in the six project counties has increased from less than 30% to 85%. This bill makes no change in the fees currently being assessed pursuant to Idaho Code §31-3201G, which are deposited in the Guardianship Pilot Project Fund, but made the project permanent. The funds that have been collected thus far and deposited in the Fund will be used to extend the monitoring procedures developed by the project to all 44 counties. As additional funds become necessary to continue this work, the Supreme Court will work with the Legislature to identify sources of funding. **LAW.**

Medicaid

(a) Medically indigent program – Senate Bill 1158. Provides revisions and additions to Chapter 35, Title 31, relating to the medically indigent, to require the Department of Health and Welfare to conduct utilization reviews on medical claims, provide for an early determination as to whether individuals are Medicaid eligible, and perform third-party recovery of claims paid by the county and the state, and increases the county deductible from \$10,000 to \$11,000. The Medically Indigent Health Care program and the state General Fund are responsible for all medical bills in excess \$11,000 in a 12-month period. Remember that county indigency coverage comes 100% from state funds, while Medicaid funds, subject to the stimulus provisions, only come about 30% from state funds, so getting early determination could save substantial funds. **LAW.**

(b) Medicaid Request For Notice – Senate Bill 1113. When a person applies for and receives medical assistance (Medicaid) to provide for long-term care services such as nursing home care, they are restricted in their ability to give away their property without receiving fair market value, or to encumber it without reporting the proceeds to Medicaid eligibility. Violation can result in retroactive loss of eligibility. This legislation permitted the Department of Health and Welfare to record a “request for notice” relating to real property of a Medicaid recipient to assure that the Department receives notice if the real property is being sold or encumbered. If the Department is aware of the transfer or encumbrance, it can advise the seller/encumbrancer of the potential consequences of the transaction, or can prevent the diverting of proceeds contrary to Medicaid laws. It is not a lien or encumbrance on the real property but only provides for notice to the Department. The legislation also provides for a termination of such request for notice. This bill would have had a large positive fiscal effect by preventing improper asset transfers, allowing recovery in cases where the proceeds would otherwise be dissipated and no practical recovery could be made, and avoiding mandatory repayment to the feds of payments (70% of long-term care Medicaid is federal) where a person is found to have become ineligible. It passed the Senate unanimously. However, on the day of the House hearing, a representative of the Idaho Land Title Association appeared in opposition. This representative did not respond to requests to discuss amendments to the bill, so the bill was withdrawn. This would have likely saved the state thousands of dollars without any ascertainable cost or liability to title companies.

Tax

(a) Real and Personal Property Tax:

Due to space constraints, I will not report here on the more esoteric bills such as STAR or waters edge.

(a) House Bill 4. The current homeowners exemption law requires the State Tax Commission publish an adjustment to the exemption based on the “annual increase” in the Idaho housing price index, but if the index change is a decrease, the statute may not authorize a reduction in the exemption, which this bill corrects. **LAW** Effective 1-1-09.

(b) House Bills 64aa and 281 are the annual bill to update references to the Internal Revenue Code (IRC) and thereby conform the Idaho Income Tax Act to changes made to the IRC after January 1, 2008. Two bills were needed, to include conforming to the provisions of the federal stimulus bill, HR1, The American Recovery and Reinvestment Act, to the extent those changes affect Idaho taxable income. If you want the list of changes, contact me. Both are **LAW.**

(c) House Bill 83 relieves small business owners of the “onerous task” of performing an annual inventory of personal property and submitting it to the county assessor, when it is obvious that the \$100,000 exemption will apply and the business owes no personal property tax to the county, by simply filing an affidavit on the Tax Commission form. However, the implementation of the personal property tax exemption (\$100,000) will not occur until the state controller certifies that receipts to the general fund for the last fiscal year exceed by 5% or more the 2008 fiscal year receipts, taking effect in the year following. **LAW.**

(d) Section 42 Low Income properties – Senate Bill 1138 provides guidance to county assessors when valuing section 42 low income housing projects and outlines procedures for valuing the federal tax credits associated with these properties. **LAW,** and a temporary rule is being made.

b. Income Tax

(a) House Bill 232a. Technical corrections to §63-3029 for credits given for taxes paid in other states. Until recently, the Tax Commission has allowed a resident trust or estate that has an income tax liability separate from its beneficiaries to utilize this credit. However, the Tax Commission has reversed its position on this issue because Section 63-3029 does not specifically mention trusts and estates. This new

interpretation often results in double taxation to a trust or estate which has income in other states that is subject to the other states' income tax. This legislation specifically extends the credit to trusts and estates. **LAW.**

(b) House Bill 51 amends existing law to provide a state income tax deduction for donations of technological equipment to private elementary or private secondary schools. **LAW.**

(c) House Bill 121 allows for a check off donation on the Idaho Income Tax Form to benefit the Idaho Food-Bank. Each dollar donated will purchase \$10.00 of food or three meals. **LAW.**

(d) House Bill 242 amends Section 63-4402, Idaho Code, to extend the Small Employer Investment Act to year 2020, and extends the project period 10 years to match the new sunset date. **LAW.**

c. Miscellaneous

(a) House Bill 76a - under the employment security law, this amendment clarifies that direct salespeople are not employees, based on IRS Code § 3508, which gives direct sellers independent contractor status. Thirty-seven other states have such a specific exemption. **LAW.**

(b) Senate Bill 1128 mandates provisions for settlement agreements before the State Tax Commission when the tax liability of a taxpayer is equal to or exceeds \$50,000 and a settlement agreement or closing agreement occurs. This resulted from the public outcry over perceived favoritism to larger taxpayers in settlements. **LAW.**

Miscellaneous

(a) House Bill 75. New §§41-1950-1965 to establish the Life Settlements Act, for protections of consumers transferring their life insurance policies in exchange for compensation. Defines and prohibits Stranger Originated Life Insurance (STOLI's) and adds protections. **LAW.**

(b) House Bill 154. Amends §49-2427 to delete the requirement of painting Idaho State Police vehicles with a white top. The fiscal impact statement says this change will save the State of Idaho \$250 per vehicle, with an annual savings of \$10,000 or more. I have a suspicion there is more than that to this. **LAW.**

(c) House Bill 191. Removes the requirement that a property foreclosure disclosure form be printed on yellow paper. **LAW.**

(d) House Concurrent Resolution 11 encourages state partnerships with faith-based and community organizations.

(e) House Concurrent Resolution 15 authorizes the legislative council to appoint a committee to undertake and complete a study of the feasibility and expense of providing small businesses better access to affordable health insurance.

(f) Senate Bill 1017 amends §16-1602(25), clarifying under what circumstances a child may be found to suffer educational neglect by tying this term to the compulsory education requirements of Idaho Code §33-202 and gets rid of the ambiguous "comparable education" language as it applies to home schooling and private and charter schools. **LAW.**

(g) The Senate considered, but did not get out of committee, two bills that would have barred cell phone use while driving (Senate Bill 1030) or texting while driving (SB 1031).

Non-Legislative Legal Issues

(a) The Idaho State Tax Commission has determined, informed and trained county assessors, that any deed change of title, other than from husband and wife to husband and wife as Community Property With Right of Survivorship, triggers the need to file a new application for the homeowners exemption on property tax. Previously, we had believed that if the affidavit, which is normally filed when a residence is deeded into a revocable trust, was sufficient. Looking forward, clients will need to be advised of this change in the interpretation and application with regard to the homeowners exemption.

(b) Medicaid rules require that an IRA or similar qualified plan be paid in regular monthly installments to avoid being treated as an asset

instead of only income. The stimulus bill gives a holiday to mandatory withdrawals from IRAs. Does this override the Medicaid requirement? CMS has been asked for written response, which has not yet been received. But the oral response, and therefore current Idaho Medicaid policy, is that the regular payments are still required.

About the Author

Robert L. Aldridge was admitted to the Idaho State Bar in 1970. His legal practice includes Estate Planning, Elder Law, Medicaid, Taxation, Probate, and Trusts, and he gives extensive lectures, including Continuing Legal Education classes for attorneys, on his areas of specialty. Mr. Aldridge is a volunteer legislative lobbyist writing and promoting bills that protect the elderly and improve probate and estate planning laws, and in 2003 and 2004 testified before the U.S. Senate Committee on Aging regarding guardianship reform and the Elder Justice Act.

Endnotes

¹ Tax & Estate Professionals of Idaho, Inc., which is a broad-based multi-disciplinary group, reviewed and proposed legislation in the tax and probate code arena. I currently serve as Chairman.

² 530 U.S. 57, 120 S.Ct. 2054 (2000).

³ 142 Idaho 664, 132 P.3d 421 (2006).



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BOOK REVIEW: TAX-FREE LIKE-KIND EXCHANGES

Erik M. Jensen
Case Western Reserve University

A version of this review was originally published at 120 Tax Notes 479 (Aug. 4, 2008). Tax-Free Like-Kind Exchanges (2008, 740 pages, \$ 259.50) by Bradley T. Borden is available from Civic Research Institute at <http://www.civresearchinstitute.com>.

Section 1031 can apply to exchanges of all sorts of “like-kind” property, but its best known application is to real estate swaps. If I have a piece of appreciated real estate, (there used to be some around, I understand), that I’ve held for business or investment purposes and I sell the property, I’ll of course have to pay income tax on the gain. But if I swap the property, with you for other real property that I’ll hold for similar purposes, I won’t recognize any gain now. Because of section 1031, I’ll be able to defer any tax liability until I dispose of the replacement property. That’s a powerful principle, and section 1031 also affects other transactions that are much more complicated than straightforward two-party swaps—I’ll discuss that point later in this review—making section 1031 even more valuable in the real world.

I’ve referred to Bradley T. Borden as the legal academy’s “Mr. 1031”, a title Borden isn’t necessarily happy with because he doesn’t want to be typecast, but I’ve done it because others did so before me. The designation is certainly not intended to be negative. (I think it would be cool to be Mr. 1031.) Borden is Mr. 1031 because his knowledge of like-kind exchanges is extraordinary. His new book, *Tax-Free Like-Kind Exchanges*, proves that point.

Borden has been teaching at the Washburn University School of Law since 2004, but like-kind exchange aficionados shouldn’t hold his academic credentials against him. Some professors really do know something about the practice of law, and Borden is one of them. Before Washburn, Borden had extensive practice experience and has maintained strong connections with the real world of law practice. He’s the chair of the Sales, Exchanges, and Basis Committee of the American Bar Association Section of Taxation — the committee with primary jurisdiction over section 1031—and he has spoken at numerous meetings of both tax practitioners and academics.

He’s written up a storm, too. The new book is his second treatise on like-kind exchanges in less than two years,¹ and it goes along with his dozens of articles in the area. In short, Borden lives and breathes like-kind exchanges, (as unhealthy as that might seem), from both practical and theoretical perspectives.

Trying to summarize *Tax-Free Like-Kind Exchanges* is like trying to write a one-sentence description of *War and Peace*. Well, there was a lot of war, and some peace, and Natasha, Andrei, Pierre, General Kutuzov, Napoleon, and many others were very busy. *Tax-Free Like-Kind Exchanges* is about, well, like-kind exchanges; and it too is very busy. It’s as complete a presentation of section 1031 and related subjects as one could hope for. It’s a one-volume *tour de force*.² It ranges from nuts-and-bolts stuff, like how to complete Form 8824,³ to grand theoretical issues in the area, and it hits everything else in between. If there’s an issue involving like-kind exchanges, it almost certainly is dealt with in this book.

After discussion of the basics in the first three chapters, there is detailed, (and I do mean detailed), discussion in the next seven chapters of various sorts of 1031 transactions, including deferred exchanges, reverse exchanges, improvements exchanges, exchanges and proximate business restructurings (you know, like dropping replacement property down into a partnership), exchanges of tenancy-in-common interests, (a really hot topic the past few years), multiple-property exchanges, mixed-use-property exchanges, exchange programs, and — I suppose this isn’t really a “transaction” — section 1031 and estate planning.

Each of these subjects receives a chapter of its own.

Borden guides the discussion with myriad diagrams to illustrate the transactions under discussion. The book will be useful to like-kind exchange novices. In particular, any novice would be crazy not to read Chapter 1, a wonderful introduction to the history, structure, and practice of section 1031.⁴ But the book, especially the transaction-specific discussions, will be valuable to seasoned practitioners as well, (and to those who are no longer novices but not yet well-seasoned enough to be old salts). Appendices and an accompanying diskette provide a rich source of basic documents for the relevant transactions.

Tax-Free Like-Kind Exchanges makes things as clear as can be, but nothing is oversimplified. (As J. Robert Oppenheimer put it, in a quite different—and more explosive—context, “I can make it clearer; I can’t make it simpler.”) As a result, the book is not going to answer all of your questions definitively; the law is full of ambiguity. When authority is cloudy or commentators are divided, Borden lets you know. He provides his views as well, but doesn’t pretend that the sun is shining if it isn’t. For example, he notes the “overcast” issue of improvements — when real estate improvements are exchanged for land or land and improvements — and he explains why, under regulations and rulings, there really shouldn’t be any doubt about the applicable legal principles. But he doesn’t ignore the fact that others disagree. If some serious commentators see imminent thunderstorms, the well-informed practitioner should receive the full forecast.

I won’t pretend to have read every word of *Tax-Free Like-Kind Exchanges*. This is a reference work, not something to be devoured from start to finish. I’m delighted that there are texts explaining the results of “asymmetrical depreciation exchanges”—for example, if the relinquished and replacement properties have different recovery periods even though they are of like kind, how should the basis of the replacement property be recovered?⁶ But I don’t want to focus on that sort of thing until the need arises. You read *Tax-Free Like-Kind Exchanges* as necessary, when a question like that comes up or when you come across an apparently insuperable problem. With Borden’s help, the only problems that will remain insuperable are those that truly are insuperable.

I referred above to the first few chapters as dealing with the “basics,” but that’s a bit misleading. Those chapters do deal with things like the treatment of boot, computation of basis, and other fundamental aspects of section 1031—things I would consider basic. But one of the many valuable attributes of this book is the effort Borden devotes to questions with implications that go far beyond section 1031, such as what constitutes the practice of law, whether a qualified intermediary might be treated as practicing law, and why that might matter. Similarly, Borden’s discussion of the reporting standards for like-kind exchanges — what return positions a taxpayer can reasonably take — raises issues that are certainly not limited to the section 1031 context.

And while most practitioners have no reason to be interested in the history of section 1031—at least not the events of decades ago — there are odd folks (like me) who find that sort of thing interesting. I was particularly intrigued by Borden’s description of how today’s section 1031 might have been different if some basic interpretive issues had been resolved differently in the 1920s.

When what later became section 1031 was in its infancy, a 1924

colloquy on the House floor between the then House Ways and Means Committee Chair William Green and the “little flower,” Fiorello LaGuardia,⁷ came to stand for the proposition that the receipt of cash on the disposition of an asset, even if reinvested immediately in like-kind property, would defeat nonrecognition. In response to LaGuardia’s question whether it is “necessary to exchange property” to get the benefit of section 1031,⁸ Green first noted that “if the property is reduced to cash and there is a gain, of course it will be taxed.”

Then, after LaGuardia asked about the reinvestment of proceeds in property of like kind, Green responded, “That would not make any difference.” Section 1031 is not a rollover provision, as we all now know, whether or not that makes theoretical sense.⁹

Borden interestingly notes, however, that Green’s comments could have been interpreted differently. If Green had been understood to mean that section 1031 requires a swap, the section might have come to be limited to two-party exchanges. Had that been the case, section 1031’s scope would have been dramatically narrower than is the case today. Indeed, it’s likely that like-kind exchange practice wouldn’t exist as a specialty, this book wouldn’t have been written, and therefore — sadly — you wouldn’t be reading this review.¹⁰

It’s also interesting to be reminded of a time when nonspecialist lawmakers — and on the issue of like-kind exchanges, LaGuardia was surely that — could participate in a discussion of technical tax provisions without seeming like buffoons.¹¹ Not today.

Are there downsides to this book? Oh, I suppose. As I suggested earlier, unless you have very peculiar tastes, this book won’t work on the bedside table, except as a paperweight. A potboiler it’s not. If you’re looking for a mystery or thriller centered on like-kind exchanges (Dial 1031 for Murder!), this isn’t it.¹²

I also think *Tax-Free Like-Kind Exchanges* could have used a few more section 1031 jokes. Here’s a possibility for future editions:

The regular patrons of the Like-Kind Saloon in Dodge City wear distinctive boots, and everyone knows everyone else’s style of footwear. One day two cowboys swagger in, one in sock feet and the other in Guccis.

The ever-vigilant Marshal Dillon stops flirting with Miss Kitty long enough to say, “Sock Feet, you look vaguely familiar, but I don’t remember your name.” And to the other guy he remarks, “I’ve never seen boots like yours before, dude.”

“I’m Gus Gain, Matt, remember?” says cowpoke number one. And number two responds, “Name’s Luke Loss.”

“Oh yeah,” replies Matt. “I should have known that in the Like-Kind I wouldn’t recognize Gain without boots, and I wouldn’t recognize Loss at all.”

Not too good? Well, at least it’s a start, and I’m sure Borden would welcome your suggestions for the next edition of *Tax-Free Like-Kind Exchanges*, or perhaps for the *Like-Kind Exchange Jokebook*.

About the Author

Erik M. Jensen, S.B., MIT; M.A., Chicago; J.D., Cornell, is the David L. Brennan Professor of Law at Case Western Reserve University, where he has taught for 25 years. Jensen has served with Brad Borden on the Sales, Exchanges, and Basis Committee of the ABA Section of Taxation, but he wouldn’t have reviewed *Tax-Free Like-Kind Exchanges* if the book weren’t worth it.

Endnotes

¹ The first was Bradley T. Borden, *Tax-Free Swaps: Using Section 1031 Like-Kind Exchanges to Preserve Investment Net Worth* (DNA Press LLC 2007).

² Unlike the Tour de France, no blood doping is involved.

³ Even there, to be sure, a great deal of sophistication is required.

⁴ Novices might also look at Borden, note 1, which is specifically directed toward “anyone interested in developing a working knowledge of section

1031.” *Id.* at iv.

⁵ Quoted in Kai Bird and Martin J. Sherwin, *American Prometheus* 84 (Knopf 2005).

⁶ If the exchange is “symmetrical”—recovery periods and recovery methods the same—the taxpayer will simply continue taking cost recovery deductions using the same method, and over the same remaining period, that would have applied for the relinquished properties.

⁷ Fiorello LaGuardia was a Republican Congressman, 3 term Mayor of New York, and President Roosevelt’s Director of Civilian Defense. The nickname Little Flower likely derives from the Italian translation of his first name, Fiorello, and his short stature.

⁸ I know that wasn’t the section number then. (In fact, there was no Internal Revenue Code at all.) It’s just easier to refer to section 1031 for these purposes.

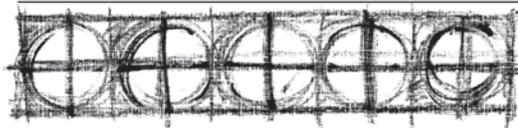
⁹ Commentators have occasionally suggested that section 1031 might be converted to a rollover provision; see, e.g., Staff of Joint Committee on Taxation, Study of the Overall State of the Federal Tax System and Recommendations for Simplification, Pursuant to Section 8022(3)(B) of the Internal Revenue Code of 1986, Vol. II, at 300-303 (JCS-3-01) (2001), but section 1031, in its current form, is clearly not such a provision.

¹⁰ To be sure, Congress could have provided explicitly for today’s exotic section 1031 transactions, but I’m skeptical that it would have done so if it were starting from scratch. Deferred exchanges and other esoterica began as riffs on the old statute and became blessed through practice and judicial decisions, not because the original statute required that result.

¹¹ LaGuardia didn’t get things quite right, however. His question to Green was whether there would be gain recognized in the reinvestment situation, “assuming there is greater value in the property acquired” (quoted at pp. 1-7) (emphasis added). LaGuardia had the same problem understanding basis that many law students and some D.C. Circuit judges have. It’s not necessary to receive more in value than the value given up to have to recognize gain. Receiving more in value than basis will do it. See *Murphy v. IRS*, 460 F.3d 79 (D.C. Cir. 2006) (implying that value-for-value exchanges aren’t taxable).

¹² Contemplating potboilers made me wonder. Did Mitchell McDeere, the hero of John Grisham’s *The Firm*, do like-kind exchanges? If so, and if he’d stayed in practice, would Mitch have bought *Tax-Free Like-Kind Exchanges*? I’d like to think so. (Who can forget the great scene in the movie of *The Firm* in which Mitch is attending a continuing legal education conference and the speaker is droning on about “substantial economic effect” under section 704(b)? That scene would have been even more effective if the session had been about section 1031.)

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TECHNOLOGY RAPIDLY RESHAPES THE LEGAL PROFESSION

Dan Black
Idaho State Bar

Technology and the recession are reshaping the world's law practices, two national speakers told the Idaho State Bar Annual Conference in July. These changes will drive clients to seek free legal services on the Internet, outsource legal services overseas and ask lawyers to use more efficient services. In just five to 10 years, the United States will have 10 percent fewer practicing lawyers, they said.

Frederic Ury and Thomas Lyons practice law in New England and lecture regularly about changes facing the legal profession. They shared predictions from various economists that efficiencies in technology are changing clients' expectations and that about 40,000 U.S. lawyer positions will be lost to India by 2015.

"Clients are going to insist on outsourcing to save money," Lyons said.

Quoting liberally from *The End of Lawyers?* By Richard Susskind, the presenters predicted surviving future law firms will adopt new business models. Aside from utilizing home-based attorneys, sometimes in other states, or hiring other firms to do piece work, some firms will create innovative partnerships with other businesses, diversifying to include non-legal services.

Management structures, too, might change. In 2007, Australia became the first country to have a publicly-traded law firm. The United Kingdom now allows some non-lawyer investment in law firms and the European Union has cleared the way for lawyers to represent their clients in different member countries.

Ury said that business clients increasingly want attorneys who can represent them around the world, a challenge lawyers can overcome with new partnerships. He said supervising outsourced overseas legal work creates important ethical questions that have yet to be fully addressed.

All is not gloom. In some ways, technology will empower clients and small firms. Through collaboration and sharing digital information, small firms from across the country will band together to handle large, complex litigation. Some will use free content on their Web sites or social networking sites to reach potential clients. Consumers have become accustomed to finding answers on the Internet, through sites such as WebMD.com and Ask.com. Potential legal clients currently download thousands of legal forms for free on sites such as idsupra.com and docstoc.com.

"Easy access to legal answers on the Internet will change how people use attorneys," Lyons said, adding that new sites such as mycorporation.intuit.com and completecase.com offer to resolve legal issues online for a fixed fee. Many of these companies offer services in all 50 states and at rates far below those of a local office.

He added that Web sites increasingly deliver free answers to everyday legal questions and that artificial intelligence and increased search capability will greatly improve access to more specialized information. For instance, legalonramp.com provides a cross between Facebook and Wikipedia. Some lawyers use free content on their sites as a marketing tool.

But isn't such indiscriminate distribution of legal advice the unauthorized practice of law? Ury said the Department of Justice and Federal Trade Commission are watching any attempts to restrict these online legal services as anti-competitive practices. To compete, he said, lawyers must embrace technology. Expect new search tools to rate attorneys in the same way diners compare restaurants.

In addition to rapidly adapting to technology, Ury said lawyers should do a better job with succession planning. A majority of today's

lawyers will soon retire and each firm needs a plan to transfer control, clients and responsibilities. To match another trend in clients' needs, attorneys should explore methods to practice in other states, he said, suggesting rules of conduct should be adjusted to match the "speed of business."

This lecture and others are available for CLE credit and can be ordered in CD or DVD format from the Idaho State Bar at www.isb.idaho.gov, or by calling Eric at (208) 334-4500, ext. 1868.

About the Author

Dan Black is communications director of the Idaho State Bar and is managing editor of *The Advocate*.

Stephan, Kvanvig, Stone, Trainor

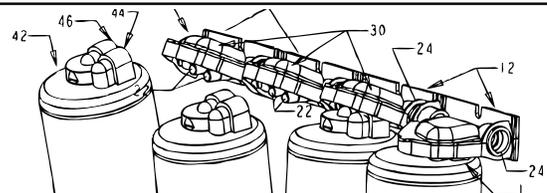
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COURT INFORMATION

Idaho Supreme Court

Oral Argument Dates
As of July 15, 2009

Wednesday, August 19, 2009 – BOISE

8:50 a.m. Coombs v. Curnow #35157
10:00 a.m. Saint Alphonsus v. MRI Associates #34885
11:10 a.m. Paul Ezra Rhoades v. State #34236

Friday, August 21, 2009 – BOISE

8:50 a.m. Michalk v. Michalk #35221
10:00 a.m. State v. Clements (Petition for Review) #35665
11:10 a.m. Storey Construction v. Hanks #35459

Monday, August 24, 2009 – BOISE

8:50 a.m. Nelson v. Big Lost River Irrigation District. #35543
10:00 a.m. Vernon K. Smith v. Dept. of Labor #35651
11:10 a.m. Stuart v. State #34198/34199
11:10 a.m. Rhoades/McKinney/Pizzuto v. State #35187

Wednesday, August 26, 2009 – BOISE

8:50 a.m. Dry Creek Partners v. Ada County #35641
10:00 a.m. Oregon Mutual Ins. v. Farm Bureau Mutual Ins. #35269
11:10 a.m. State v. Jerome L. Korn #34965

Friday, August 28, 2009 – BOISE

8:50 a.m. State v. Shackelford (Death Penalty Review) #27966/31928
10:00 a.m. State v. Lampien (Petition for Review) #36115
11:10 a.m. Schmechel v. Dille. #35050

Thursday, September 17, 2009 – BOISE

8:50 a.m. State v. Watkins (Petition for Review). #35687
10:00 a.m. State v. Flegel (Petition for Review). #35117
11:10 a.m. Morgan, Jr. v. Sexual Offender Classification Board #35913

Friday, September 18, 2009 – BOISE

8:50 a.m. Thompson Creek Mining v. IDWR. #35175
10:00 a.m. Paul Rhoades v. State. #35021
11:10 a.m. Gardiner v. Boundary County. #35007

Thursday, September 24, 2009 – POCATELLO

8:50 a.m. Christian v. Mason. #35331
10:00 a.m. Henderson v. Henderson Investment Properties. #35138
11:10 a.m. Wendy Knox v. State. #35787

Friday, September 25, 2009 – ST. ANTHONY

8:50 a.m. Crump v. Bromley. #35666
10:00 a.m. Ransom v. Topaz Marketing, LP. #35494
11:10 a.m. Losee v. The Idaho Company. #34887

OFFICIAL NOTICE COURT OF APPEALS OF IDAHO

Chief Judge

Karen L. Lansing

Judges

Darrel R. Perry
Sergio A. Gutierrez
David W. Gratton

2nd AMENDED - Regular Fall Terms for 2009

Boise. August ~~18~~, 20, 25 and 27
Boise. September 10, ~~14~~, 15 and ~~29~~
Boise. October 13, 15, 20 and 22
Boise. November 10, 13, 17 and 19
Boise. December 8, 10 and 15

By Order of the Court

Stephen W. Kenyon, Clerk

NOTE: The above is the official notice of setting of the year 2009 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.

OFFICIAL NOTICE SUPREME COURT OF IDAHO

Chief Justice

Daniel T. Eismann

Justices

Roger S. Burdick

Jim Jones

Warren E. Jones

Joel D. Horton

3rd AMENDED - Regular Fall Terms for 2009

Boise. July 22 at 3:00 p.m.
Boise. August 19, 21, 24, 26 and 28
Boise. September 17 and 18
Pocatello. September 24
St. Anthony. September 25
Twin Falls. November 4, 5 and 6
Boise. November 9 and 12
Boise. December 2, 4, 7, 9 and 11

By Order of the Court

Stephen W. Kenyon, Clerk

NOTE: The above is the official notice of setting of the year 2009 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.

Idaho Court of Appeals

Oral Argument Dates

As of July 15, 2009

Thursday, August 20, 2009 – BOISE

9:00 a.m. Barker v. State #34978
10:30 a.m. Rocky Mountain Pharmaceuticals v. Dewinkle #35135
1:30 p.m. State v. Wolf #35309

Tuesday, August 25, 2009 – BOISE

9:00 a.m. Wheeler v. Idaho Transportation Dept. #35839
10:30 a.m. State v. Hansen #34701
1:30 p.m. Kriebel v. State #35340

Thursday, August 27, 2009 – BOISE

9:00 a.m. Videgain v. State #35282
10:30 a.m. Idaho State Tax Commission v. Beus #35414
1:30 p.m. Ellis v. State #35461

Thursday, September 10, 2009 - BOISE

9:00 a.m. Feasel v. State, Dept. of Transportation. #35720
10:30 a.m. State v. Mantz. #35540

Tuesday, September 15, 2009 – BOISE

9:00 a.m. State v. Byington. #35697
10:30 a.m. State v. Agency Bail Bonds. #35926
1:30 p.m. Speech & Hearing Service v. Brown. #35393



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CIVIL APPEALS

**ADVERSE POSSESSION AND
PRESCRIPTIVE EASEMENTS**

1. Did the district court err in holding the Harrisons waived any claim of bias by the arbitrator and in holding the arbitrator did not exceed his powers?

*Harrison v.
Certified Underwriters at Lloyds London*
S.Ct. No. 35678
Supreme Court

DIVORCE, CUSTODY, AND SUPPORT

1. Whether the court erred as a matter of law in determining the Property Settlement Agreement was merged into the Judgment and Decree of Divorce.

Borley v. Smith
S.Ct. No. 35751
Supreme Court

EASEMENT

1. Did the trial court err in ruling that Church and Luna's alleged encroachments on the right of way unreasonably interfered with Northwest's easement rights, yet were not wholly inconsistent with Northwest's use of the easement?

Northwest Pipeline Corporation v. Luna
S.Ct. No. 35469
Supreme Court

POST-CONVICTION RELIEF

1. Did the court err in dismissing Conde's petition as untimely filed?

Conde v. State
S.Ct. No. 35426
Court of Appeals

2. Did the district court have an obligation to investigate whether appointed counsel had a conflict of interest?

State v. Sanchez
S.Ct. No. 35183
Court of Appeals

3. Did the district court err by summarily dismissing Martinez's petition for post-conviction relief?

Martinez v. State
S.Ct. No. 35655
Court of Appeals

PROCEDURE

1. Did the court correctly dismiss the complaint as barred by the two year statute of limitation?

Matthews v. Boise Police Dept.
S.Ct. No. 35780
Court of Appeals

SUMMARY JUDGMENT

1. Did the trial court abuse its discretion by granting summary judgment when the defendants made a showing that a genuine issue of material fact did exist in the affidavits, pleadings, depositions, and admissions?

Spectra Site, LLC v. Lawrence
S.Ct. No. 35119
Supreme Court

2. Did the trial court abuse its discretion by granting summary judgment when the defendants made a showing that a genuine issue of material fact did exist in the affidavits, pleadings, depositions, and admissions?

Capstar Radio Operating Co. v. Lawrence
S.Ct. No. 35120
Supreme Court

3. Whether the ordinance, enacted pursuant to LLUPA, may regulate water quality at Confined Animal Feeding Operations when water quality is comprehensively regulated by state and federal law.

*Idaho Dairymen's Association v.
Gooding County*
S.Ct. No. 35980
Supreme Court

TORT

1. Does plaintiff's personal injury claim, or any portion of the claim, survive her death, when that death is unrelated to the underlying basis for the claim?

Craig v. Gellings
S.Ct. No. 35231
Court of Appeals

CRIMINAL APPEALS

DEATH PENALTY CASES

1. Whether Pizzuto has failed to meet his burden of overcoming the procedural bars of I.C. § 19-2719, which governs successive post-conviction petitions in capital cases.

Pizzuto v. State
S.Ct. No. 34845
Idaho Supreme Court

DUE PROCESS

1. Does the record support Sarabia-Leon's argument that he was deprived of the aid of an interpreter at his change of plea and sentencing hearings?

State v. Sarabia-Leon
S.Ct. No. 35219
Court of Appeals

EVIDENCE

1. Was there sufficient corroborating evidence to support the accomplice testimony presented at Stone's trial?

State v. Stone
S.Ct. No. 35500
Court of Appeals

2. Is there sufficient evidence to support the district court's finding that Rogers violated the drug court rules by soliciting drug court participants to work in an adult entertainment business?

State v. Rogers
S.Ct. No. 35129
Court of Appeals

3. Was the evidence presented at trial insufficient to support the jury's verdict finding her guilty of aggravated battery?

State v. Kettle
S.Ct. No. 35386
Court of Appeals

PLEAS

1. Did the prosecutor violate the plea agreement by arguing against the agreed upon recommendation and did the prosecutor's conduct amount to fundamental error?

State v. Larsen
S.Ct. No. 34833
Supreme Court

2. Did the district court abuse its discretion by denying Chittum's motion to withdraw his guilty plea?

State v. Chittum
S.Ct. No. 35711
Court of Appeals

RESTITUTION

1. Did the court abuse its discretion in ordering Brown to pay restitution despite the state's untimely request?

State v. Brown
S.Ct. No. 35456
Court of Appeals

2. After Hooper's conviction was vacated, did the court err when it refused to refund restitution money to Hooper on the basis the money had been disbursed to the Industrial Commission and the court lacked personal jurisdiction over the Commission?

State v. Hooper
S.Ct. No. 35074
Supreme Court

**SEARCH AND SEIZURE –
SUPPRESSION OF EVIDENCE**

1. Did the court err when it denied Reynolds’ motion to suppress in which he contended the warrant lacked particularity regarding the search of Reynolds’ apartment?

State v. Reynolds
S.Ct. No. 35382
Court of Appeals

2. Did the court err in denying Mr. Aschinger’s motion to suppress the evidence obtained as a result of the search of his laptop because this search exceeded the scope of Ms. Aschinger’s apparent authority to consent to the search?

State v. Aschinger
S.Ct. Nos. 35677/35684
Court of Appeals

SENTENCE REVIEW

1. Whether the court correctly ruled that I.C. § 37-2739B(b)(2) requires a mandatory minimum sentence and that therefore the court could not retain jurisdiction.

State v. Patterson
S.Ct. No. 35463
Court of Appeals

SUBSTANTIVE LAW

1. Did the district court abuse its discretion by denying Thurlow’s request for a second attorney by failing to reach its decision by determining the need for the second attorney?

State v. Thurlow
S.Ct. No. 33969
Court of Appeals

Summarized by:
Cathy Derden
Supreme Court Staff Attorney
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United States District and Bankruptcy Courts

New Consent Process and Procedures - General Order #237

General Order #237, which became effective July 1, 2009, automatically assigns all pro se civil cases to the Magistrate Judges in a random fashion. In addition, the General Order sets forth the revisions to the Court's Consent Process & Procedures. Please note that Civil Local Rule 73.1 has also been amended to reflect the various changes with respect to notice, return of consent forms, voluntariness and confidentiality. General Order #237 can be reviewed in its entirety at: <http://www.id.uscourts.gov/generalorders/GeneralOrder-237.pdf>

Lawyer Representative Application Deadline

The deadline for submission of applications for Lawyer Representative is September 1, 2009. To ensure uniform representation throughout the state, this year's Lawyer Representative will be selected from either the 3rd or 5th Judicial District. Typical duties include: serving on court committees, making recommendations on the use of the Court's non-appropriated fund, developing curriculum for the District Conference, serving as the representative of the Bar to advance opinions and suggestions for improvement, and assisting the Court in the implementation of new programs or procedures. Interested applicants should submit a letter setting forth their experience and qualifications, no later than September 1, 2009, to Ms. Diane K. Minnich, Executive Director, Idaho State Bar, P. O. Box 895, Boise, Idaho 83701-0895. The Commission will then select six applicants for referral to the Judges of the United States District & Bankruptcy Court for the District of Idaho, who will make the final selection by October 31, 2009, or as soon thereafter as possible.

Annual Western All-Star Conference & Confabulation

The Annual Western All-Star Conference & Confabulation will be held on Friday August 28 at the Grove Hotel in Boise. The Capital Habeas Day will follow on Saturday, August 29. This program is, once again, being jointly sponsored by Federal Defender Services of Idaho and the United States District Court. Check our website at www.id.uscourts.gov under the scrolling announcements for a copy of the brochure which details the relevant

presentations being offered and distinguished faculty. Application deadline is August 15. Cost is \$40 for each day or \$75 for both. CLE credits will be awarded. For additional information contact Kathy Bozman at (208) 388-1600.

Annual District Conference / Federal Practice Program

Please mark your calendar for the upcoming Annual District Conference / Federal Practice Program, to be held in two separate locations. The first, in Moscow on October 30 at the University Inn, then subsequently in Boise on November 13 at the Centre on the Grove. The theme for this year's program is the "Nuts & Bolts of Practice in the Federal Courts." Additional details to follow.

District Court ECF System

The District Court has set a tentative date of October 4 for the upgrade of the District Court's ECF system. Although the majority of the improvements are internal, the one area which would most affect attorney practitioners are the significant enhancements made to the civil case opening module. The Court is presently in the testing phase. Stay tuned for more details as well as training information as the date nears.

Annual Report - Statistical Highlights

The 2008 Annual Report is available in electronic format on our website at www.id.uscourts.gov under Publications/Reports/Annual Reports. Included is an Executive Summary which details the various initiatives and accomplishments of the Court throughout the past year. There is also a series of detailed statistical tables, charts, graphs and narrative which reflects the Court's ever-increasing case workload. For example, during calendar year 2008, bankruptcy filings increased by 41% following a 35% increase the prior year. Criminal case filings increased by 23%; criminal defendant filings rose by 17%, while pending criminal cases went up 25%. Civil Pro Se litigants accounted for 43% of the entire civil filings and visiting Judge hours increased by 96%.

Tri-State CLE Conference in Sun Valley

The Idaho Chapter of the Federal Bar Association is sponsoring a Tri-State (Idaho, Utah and Wyoming) CLE Conference in Sun

Valley on October 8 -10. The conference was organized several years ago by Chief Judges Lynn Winnill (Idaho), Dee Benson (Utah), and William Downes (Wyoming), as a way for practitioners to meet and exchange ideas about federal court practice and procedures of law in the western states. The scheduled keynote speaker during Friday's luncheon is Judge Stephen S. Trott of the Ninth Circuit Court of Appeals. A block of rooms has been set aside at the Sun Valley Lodge at a special rate of \$115 per night. A brochure and online registration form is available on our website at www.id.uscourts.gov under the Scrolling Announcements section.



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

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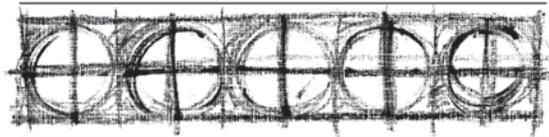
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2008 – 2009 Idaho Law Foundation Annual Report

The Idaho Law Foundation recently released its 2008-2009 annual report. This report contains information about ILF programs, including Idaho Volunteer Lawyers Program, Law Related Education, Continuing Legal Education, and Interest on Lawyers' Trust Accounts. It also includes a financial statement for the period ending December 31, 2008.

Some of the Law Foundation's accomplishments for 2008-2009 include:

- **Idaho Volunteers Lawyers Program** has served over 2,000 low-income people who received some kind of legal help or representation.
- **Law Related Education** prepared Idaho lawyers to visit classrooms across the state to provide engaging law-related instruction for more than 2,700 students at all grade levels.
- **The IOLTA Grant Program** granted \$360,000 to community programs in all parts of Idaho.
- **Continuing Legal Education** expanded its online education options to over 400 programs that were viewed via our on-line, on-demand service.

In the year to come, the Foundation will continue to help the legal profession serve the public and bring much needed educational services and legal access to Idaho communities. Some plans for 2009 - 2010 include:

- Increase the number of attorneys who volunteer in family law cases by working statewide with partner organizations.
- Expand the geographic scope of the *Soundstart* project under which volunteer attorneys provide education, motivation, and legal services to low-income parents.
- Expand the partnership between Catholic Charities and volunteer attorneys to represent victims of violence in immigration proceedings and assist those in deportation hearings.
- Write a high school mock trial case based on the Haywood trial then adapt the case materials for fourth grade Idaho history and develop supplementary lessons regarding the trial.
- Train additional teachers on *Deliberating in a Democracy* and develop deliberation materials regarding Lincoln and Bush and the Suspension of Habeas Corpus.
- Work with BSU's History Education Program to complete a curriculum guide for the *Turning 18* magazine developed by students from the University of Idaho College of Law.

A copy of the annual report has been mailed to individuals and organizations who donated between July 1, 2008 and June 30, 2009. Additionally, a copy of the report has been placed on the Idaho Law Foundation website.

If you have any questions or would like to make a donation to or volunteer your time with any of the Foundation's programs, contact Carey Shoufler, ILF Development Director, at (208) 334-4500.

Idaho Law Foundation Donors 2008 – 2009

The Board of Directors and staff of the Idaho Law Foundation would like to thank our donors. We encourage all Idaho attorneys to consider a donation to the Foundation that helps your profession serve the public. We depend on you for our continued growth and success.

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Like Michael.

Every day, CASA programs in Idaho advocate for the best interests of abused and neglected children like Michael, by providing trained volunteers in child protection cases. Often, there are more children than volunteers to help these children.

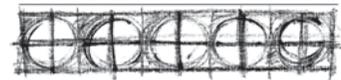
Thanks to an IOLTA grant, Idaho CASA programs are able **to improve the administration of justice** and recruit and train more volunteers. Idaho children who need a voice in court will not have to remain on a waiting list for the critical services they urgently need.

Where attorneys place their IOLTA funds impacts how much money the IOLTA grant program can offer. Banks that partner with the Idaho Law Foundation to pay higher interest rates on IOLTA accounts determine whether the Foundation is able to help young people like Michael get legal services they deserve.

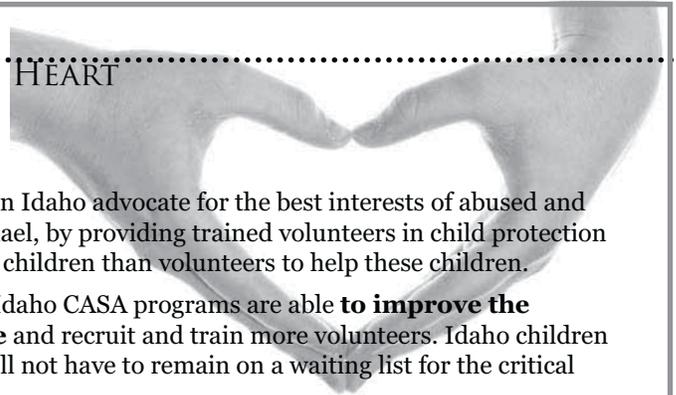
To honor banks that help increase IOLTA funds, the Idaho Law Foundation created the Leadership Bank Program. To find out more about Leadership banks, visit www.idaholawfoundation.org or call Carey Shoufler, ILF Development Director, at (208) 334-4500.

IT MATTERS WHERE YOU BANK.

IDAHO LAW FOUNDATION



Helping the profession serve the public



IVLP Special Thanks

This month the Idaho Volunteer Lawyers Program (IVLP) would like to extend special thanks to those volunteers who have contributed services directly to IVLP over the past year to assist the program in serving Idaho's low-income population in need of legal assistance.

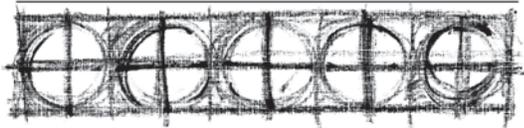
Joanne Kibodeaux, Kibodeaux Law Office, **Brenda Quick**, Law Offices of Brenda H. Quick and **Bob Wallace** each donated many hours helping IVLP Staff evaluate requests for legal services and responding to callers who need assistance with their pro se filings and direction on other legal issues on IVLP's Legal Resource Line. These volunteers made it possible for IVLP to continue to be responsive to the many demands on its resources.

IVLP also thanks **Tracy Oneale**, OfficeMax Incorporated and **Michael Mehall** who donated their time and expertise to IVLP to help interview applicants for legal services and put together files of relevant information and documents for use by the volunteer attorneys who take on case representation.

David Larsen of Orlando, Florida, demonstrated that it is not necessary to come into the office to render assistance to IVLP and the people it serves. David contacted the program a few months ago asking how he could help even though he is in Florida and "not available to go to court." He promptly set to work providing IVLP with legal research and information the program will use to support volunteers and to provide information directly to low-income callers who are appearing pro se.

In the past year family law practitioners **James Stoll**, Naylor & Hales, PC, **Lois Fletcher**, Fletcher & West, LLP, **Tom Dominick**, Dominick Law Offices, PLLC, **Audrey Numbers**, Numbers Law Office, **Alison Brace**, Non-Confrontational Legal Solutions, and **Rod Gere**, Idaho Legal Aid Services, have donated their expertise to IVLP's Family Law Clinics for low-income persons with family law cases. The volunteer attorneys and paralegals who staff the clinics and the members of the public who participate are very grateful to these attorneys for their generosity. One recent clinic participant wrote, "Thank you for your help and counsel. I couldn't have gotten things sorted out without the help provided to me by your organization and James Stoll." IVLP joins the volunteers and participants in thanking all of these family law practitioners for making the clinics a beneficial success.

IDAHO LAW FOUNDATION



Helping the profession serve the public

In Memoriam

The Idaho Law Foundation has received a generous donation from **Fred and Pearl Hahn** in memory of:

- **M. Allyn Dingel, Jr.**
- **Reed Hansen**

Legal Aid Clinic and Faculty Earn Plaudits from Ninth Circuit for Pro Bono Work

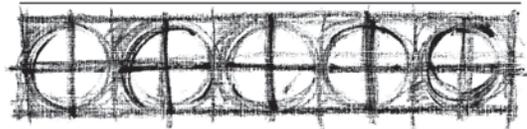
When Professor and Clinical Programs Director Maureen Laffin was invited by the United States Court of Appeals for the Ninth Circuit to attend a recent reception in Seattle honoring pro bono lawyers, she assumed it was a routine social invitation. But when the Court offered to pay for her travel, she realized something more was afoot. On June 23 the Ninth Circuit recognized the University of Idaho Legal Aid Clinic for years of pro bono service in cases where representation has been requested by the Court.

The Certificate of Appreciation states: "The United States Court of Appeals for the Ninth Circuit extends its appreciation to the University of Idaho College of Law and Maureen Laffin, Esq., and Monica Schurtman, Esq., in recognition of outstanding contributions of time and legal expertise in support of the Pro Bono Program."

Making the presentation on behalf of the Court, Susan Gelmis, supervisor of the Ninth Circuit's Motions Unit and Pro Se Unit, noted that the University of Idaho clinic had provided indigent representation on request even before there was an official pro bono program, and that Idaho had served as the model for creation of the program.

Source: University of Idaho College of Law monthly e-newsletter First Monday.

IDAHO LAW FOUNDATION



Helping the profession serve the public

Memorial Gifts

The Idaho Law Foundation welcomes memorial gifts in tribute to the lifetime accomplishments of individuals who have passed away. The Law Foundation recognizes the heartfelt purpose of these gifts and will administer them as you specify. When you designate a gift in memory of someone, the Law Foundation notifies the next of kin of your kindness and a notice acknowledging the gift appears can appear in the Advocate at your discretion.

For information regarding memorial gifts, contact Carey Shoufler at (208) 334-4500 or cshoufler@isb.idaho.gov. Send your memorial donations to The Idaho Law Foundation: P.O. Box 895; Boise, ID 83701.

SEMESTER IN PRACTICE PROGRAM GIVES LAW STUDENTS PRACTICAL EXPERIENCE

Jordan Taylor
College of Law Class of 2009

This spring, I had the pleasure of participating in the University of Idaho's College of Law Semester in Practice program along with 12 other students. As "externs" we spent our final semester working for credit at unpaid externships. Students were placed at:

- Ada County Public Defender's Office
- Attorney General's Office (Consumer Protection Unit and Civil Litigation Division)
- Boise, Inc.
- Boise State University General Counsel's Office
- Gem County Prosecuting Attorney's Office
- Idaho Legal Aid
- Supreme Court of Idaho (Hon. Roger S. Burdick)
- United States Court of Appeals for the Ninth Circuit (Hon. Thomas G. Nelson)
- United States District Court for the District of Idaho (Hon. B. Lynn Winmill, Candy W. Dale, Ronald E. Bush, Mikel H. Williams, Larry M. Boyle)

According to the College of Law Student Handbook, "The Extern Program aims to bridge the gap between theory and practice for law students by affording them the opportunity to work on a close, personal basis with judges or practicing attorneys." In the Semester in Practice program, students work full-time and attend one class per week. Additionally, students receive up to 12 credits toward graduation.

The classroom component was taught by Externship Coordinator Katie Ball and included several roundtable discussions with local attorneys. My placement was with Ninth Circuit Court of Appeals Judge Thomas G. Nelson's chambers, where I gained valuable experience in research and writing. In addition to the practical research and writing experience I gained, I was also able to observe the inner workings of the federal court system.

The College of Law offers many practical programs, but the Semester in Practice program is unique because it provides students with a full-time immersion into the day-to-day practice of law. Participants benefit by observing the day-to-day workings of a legal office or judge's chambers, professional interaction with attorneys, and involvement in specific legal problems and resolutions. With the Semester in Practice program, third-year law students are engaged in a stimulating environment that is completely different than the typical classroom setting.

The College of Law's externship program follows a nationwide trend of getting students out of the classroom and into the workplace

their final year. For example, Washington and Lee University School of Law recently revamped its third year program by replacing all academic classes with practical simulations, skills development, and live client interactions. This trend towards practical legal education is in response to concerns in the legal community that law students were not fully prepared to enter the workforce.

Numerous lawyers have told me there are many things about the practice of law you cannot learn in law school. The Semester in Practice program not only bridges the gap between theory and practice, but it offers the newest members of our profession an ability to "hit the ground running."

On behalf of all the externs, I would like to thank all the placement supervisors who make this program possible. If you would like to be a Semester in Practice supervisor and host externs at your workplace in the future, please contact Katie Ball at ktball@uidaho.edu.

About the Author

Jordan Taylor graduated from the University of Idaho School of Law in May and is took the Bar exam in July. He will be clerking this fall for District Court Judge John Butler in Jerome, Idaho. Jordan is originally from Lewiston, and his parents, Connie Taylor and R. John Taylor are both members of the Idaho Bar.

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— IN MEMORIAM —

Edward Wallace “Ted” Pike

1924 - 2009

Edward Wallace “Ted” Pike, 84, died May 19, 2009, at Eastern Idaho Regional Medical Center.

He was born May 27, 1924, to Raymond C. and Marybelle Hardy Pike. He and his three brothers, Robert, Douglas and William, grew up in Cornish, Utah, in a house whose walls were lined with books. From the examples his parents set, Ted gained a moral compass that guided him throughout his life. Three of the many principles he learned are the lifelong curiosity that comes from an unquenchable thirst for learning, the peaceful night’s rest awarded for honesty and integrity, and the deep satisfaction of a “good” tired after a hard day’s work.

World War II interrupted his college education after the first year. Ted enlisted in the U.S. Army Air Corps, which later became the United States Air Force. He was invited to join the Air Corps Band as a percussionist and as such he would have avoided combat. Instead, he chose to become a navigator and served in the thick of battle with the 15th Air Force, stationed in Cerignola, Italy. At the end of his tour, he continued his education at the University of Utah and was admitted to the Utah State Bar in 1950, exercising this license until his death. Recalled to active duty during the Korean War, he served as a navigator, administrative officer and legal officer. While home on leave, he took and passed the Idaho State Bar in 1952. When he used his storytelling ability to talk about the war, it was through his ineffable sense of humor, remembering the absurdity in the chaos.

After completing his second tour, he settled in Idaho Falls. Following in his grandfather Edward R. Pike’s footsteps, who was from Juab, Utah, a nine-term county attorney and later a judge, Ted served as Bonneville prosecuting attorney.

Over his 57 years of practice in Idaho, he has received many awards and special recognitions. The latest was in 2007, when he was chosen by the Idaho State Bar to receive the prestigious Distinguished Lawyer Award. His greatest award is the gratitude and respect from the thousands whose lives have benefited from associating with him.

He served as both chairman of the Bonneville County Democratic Party and a state committeeman. Counted among his friends were Sen. Frank Church, Gov. John Evans and congressmen Orville Hanson,

Ralph Harding and Richard Stallings. Pilot, percussionist, partner and parent, Ted, who described himself as a simple country lawyer, was the embodiment of an officer and a gentleman.

Ted is survived by his wife, Alice Pike; his brother, William (Ruth) Pike; five children, Peggy Pike, Kathryn (Mark) Whiteside, Jon Pike, Tamara (Chad) Sneddon and Alexis (Jerone Carpenter) Pike; six stepchildren, Wayne Miller, Mark Miller, Shaine White, Jennifer White, Bethanie White and Andrew White; and 10 grandchildren, Julieann (Paul Cardenas) Myers, Joshua (Hazuki) Pike, Sadie Grusin, Erika Whiteside, Megan Whiteside, Ian Sneddon, Isabel Sneddon, Justice Carpenter, Malachi Skillman and Mirabella Skillman. Ted is also survived by his former wives and dear friends, Doris Pike, Carolyn Jenkins and Dona King.

James Thomas Knudson

1928 - 2009

James Thomas Knudson died on May 30, 2009. Born James Thomas Knudson, April 20, 1928 to Emery and Nathalie Knudson in Coeur d’ Alene Idaho. He graduated from Coeur d’ Alene High School in 1946. He served in the United States Army as a Sergeant from 1946 to 1948.

Jim graduated from the University of Idaho College of Law in 1953, and practiced law in Coeur d’ Alene for nearly 40 years until retiring to the Oregon Coast in 1990.

Jim and Pat Posey were married in September 1951 and have four children; Ed Knudson (Denise) of Bakersfield, California; Teresa Schmidt (Galen) of St. John, WA; Lorelee Bafford of Boise, Idaho; and Kim McClatchey (Pat) of Eugene, Oregon.

He is survived by his wife, Pat, and his four children, as well as 11 grandchildren; Erich and Matt Knudson; Tamara Smith, Todd and Troy Nealey; Keytra, Joseph, Taya and Carissa Bafford; and Katie and Allison McClatchey. There are also 3 great-grandchildren, Tyanna Bone, and Noah and Samuel Nealey. The family requests that any remembrances be sent to the general scholarship fund at North Idaho College, Coeur d’ Alene, Idaho.

Robert “Bob” Burks

1928 - 2009

Die Hard Cougar Fan Bob Burks, age 79, passed away July 10, 2009 in Bellingham. He was born in Yakima, WA on Easter Sunday, April 20, 1930 to Joseph and Fern (Prowell) Burks. He graduated from Wenatchee High

School, served in the U.S. Navy, then earned the following degrees; Bachelor in Political Science at WSU, Master of Business Administration at the UW, Doctorate in Law the University of Arizona, and Master of Laws in Taxation at the University of Miami. Bob was a Certified Public Accountant, worked as an attorney for the IRS, and practiced for many years. Bob had an amazing memory, was a lifelong learner, and absolutely loved Cougar sports. He enjoyed golf and played until a month before his passing. He is survived by wife, Sylvia Burks, son Bruce (Gwen) Burks, and their daughters Emily and Kelsey, daughter Tasha (Chris) Yonlick and at their daughter Shann, step-daughter Jeanie (Dan) Pritchard and their, son David, sister Joan Espe-Grubb (Ed), and many family and friends including Gailee (Bob) Kerns and family, and Ann Richardson-Jones and family.

— RECOGNITION —

Givens Pursley’s co-managing partner **Christopher J. Beeson** was named 2009 Idaho Lawyer of the Year in Real Estate by Best Lawyers.

Mr. Beeson concentrates his practice in commercial real estate, business transactions, financing, entity structuring, equity formations and loan workout solutions.

The lawyers being honored have received high ratings from peers in Best Lawyers’ surveys. Only a single lawyer in each specialty in each community is being honored as Lawyer of the Year.

Mr. Beeson received his B.S. in Business, Accounting (Magna Cum Laude) from the University of Idaho and his J.D. (Cum Laude) from the University of Idaho, College of Law.

He can be reached by telephone at (208) 388-1200 or by email at cjb@givenspursley.com.

Givens Pursley LLP partner **Franklin G. Lee** was selected by the Idaho Business Review as a 2009 Accomplished Under 40 honoree. Accomplished Under 40 honorees are chosen based on their professional accomplishments, leadership, community involvement and long-term goals. He was one of 40 movers and shakers chosen from more than 140 young professionals from across the state.

Mr. Lee’s practice focuses on real estate, construction and entitlement matters. His particular areas of expertise include magazine Real Estate construction contracts and disputes, urban land use planning and all

phases of property acquisition, development and disposition.

Mr. Lee received his B.S. in Architectural Studies at the University of Nebraska-Lincoln and his J.D. (Magna Cum Laude) from the University of Idaho, College of Law.

Mr. Lee and fellow honorees were recognized at the Idaho Business Review awards dinner on June 23 at the Boise Centre on the Grove and were profiled in the June 22 and Environment Law publication.

He can be reached by telephone at (208) 388-1200 or by email at franklee@givenspursley.com.

Givens Pursley LLP is pleased to announce that the following practice groups have received top rankings in Chambers USA 2009:

- Litigation: General Commercial
- Real Estate
- Labor & Employment Law
- Natural Resources and Environment Law

The firm also congratulates eight partners on their recognition as top ranked attorneys in their fields:

- **Robert B. White**, Labor & Employment law
- **Christopher H. Meyer, Jeffrey C. Fereday** and **Hugh O’Riordan**, Natural Resources and Environment law
- **Christopher J. Beeson**, Real Estate law
- **Gary Allen** and **Deborah Nelson**, Real Estate: Zoning/Land Use law
- **David Lombardi**, Litigation: General Commercial

Chambers USA 2009 is a leading guide to business lawyers throughout the United States. The publication ranks lawyers based on legal community submissions and attorney interviews.

Boise attorney **Wade L. Woodard**, founding member of Banducci Woodard Schwartzman, PLLC was inducted into the Litigation Counsel of America at the LCA’s Spring Conference and Induction of Fellows in Santa Fe.

BWS PLLC is a Boise-based law firm specializing in complex commercial litigation.

The Litigation Counsel of America is a trial lawyer honorary society comprised of less than one-half of one percent of American lawyers. Fellowship in the LCA is highly selective and by invitation only. Fellows are selected based upon excellence and accomplishment in litigation, both at the trial and appellate levels, and superior ethical reputation. The LCA is aggressively diverse

in its composition. Established as a trial and appellate lawyer honorary society reflecting the American bar in the twenty-first century, the LCA represents the best in law among its membership.

Meuleman Mollerup LLP announces that Boise attorneys **Wayne V Meuleman, Richard W. Mollerup**, and **Geoffrey J. McConnell**, partners in the law firm Meuleman Mollerup LLP, have been selected by their peers for recognition by Mountain States Super Lawyers 2009. In addition, attorney **Maureen Ryan** has been selected as a 2009 Mountain States Super Lawyer Rising Star, an honor awarded to only 2.5% of the attorneys in Idaho who are 40 years old or younger or have been in practice less than 10 years.

Mr. Meuleman, one of only 11 attorneys named in his field, was recognized for his expertise in construction litigation. Mr. Mollerup, a 17-year veteran of the title insurance business before earning his law degree in 1993, was selected for his accomplishments in the field of Real Estate Law. Mr. McConnell, a first-year recipient of the Super Lawyers’ identification, was recognized for his expertise in construction litigation and government contracts. Ms. Ryan was selected as a Rising Star for her work in commercial litigation and employment law.

The selection process for Mountain States Super Lawyers includes a statewide nomination process, peer review by practice area, and independent research on candidates. Only five percent of the lawyers in Idaho are selected for this prestigious list.

Meuleman Mollerup LLP attorneys have provided industry-specific legal solutions for the construction, real estate, and business communities for more than 28 years. Meuleman Mollerup’s “Super Lawyers” can be reached at the firm by calling 208.342.6066. More information at www.lawidaho.com.

— ON THE MOVE —

Paine Hamblen LLP is pleased to announce **Michael B. Hague** has assumed the position of managing partner effective June 1. Mr. Hague has been practicing law in the Coeur d’Alene office since 1986 and a partner with Paine Hamblen since 1994.

Mr. Hague can be reached by telephone at (208) 664-8115 or by email at mhague@painehamblen.com.

The Mini-Cassia Public Defender Office announces the addition of **Robert James Squire** as a deputy public defender. His assignment as a licensed attorney will include representing court appointed clients

in misdemeanor cases for Cassia County.

His wife, Alisha, and two children will be welcome members of the community. Mr. Squire can be reached by telephone at (208) 878-6801.

Healthwise, Incorporated, a nonprofit consumer health education company located in Boise, Idaho has appointed **Robert E. Kyte** as general counsel. Bob served Healthwise as outside counsel for more than 15 years while in private practice with the firm of Skinner Fawcett.

For the past four years, Mr. Kyte served as general counsel for the Seventh-day Adventist Church World Headquarters in Silver Spring, Maryland. He is a graduate of Lewis and Clark, Northwestern School of Law in Portland, Oregon. In addition to managing the overall legal aspects of the Healthwise business, he will be involved with the broad licensing and intellectual property needs for the organization.

Mr. Kyte can be reached by telephone at (208) 331-6913 or by email at bkyte@healthwise.org.

Fredrick J. Hahn, III has been named partner in the Idaho Falls office of Racine, Olson, Nye, Budge & Bailey, Chtd. Hahn has been practicing nearly two decades and emphasizes government contracts, general commercial litigation, construction law and litigation. Hahn is originally from Idaho Falls and is a graduate of the University of Idaho College of Law.

The law firm has offices in Idaho Falls, Pocatello and Boise. Mark Nye, firm managing partner said “With F.J. Hahn, we have a great addition and we will strive to enhance the reach of our firm and the services that we provide to our clients.”

The firm began in 1940 and will celebrate its 70th in 2010. F.J. Hahn will manage the Idaho Falls office.

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(includes reciprocals)

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ALTERNATIVE DISPUTE RESOLUTION

Merlyn W. Clark

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

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

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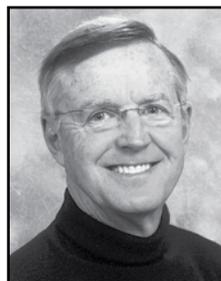
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VOLUNTEERS ADVOCATES

Needed: Volunteer Legislative Advocates for AARP. Calling all retired attorneys and judges: Still interested in what is going on in the legislature? Missed being able to express your opinion forthrightly? Now's your chance to interact with the legislature on issues that are important to Idaho's families and seniors. AARP Idaho has a Capitol City Task Force which meets during legislative sessions to formulate positions that are then shared with legislators. Sub-groups include such subjects as Transportation; Health Care and Services; Taxation; Elder Care Issues; E-advocacy, etc. Call Dede Shelton, Associate State Director of Advocacy, (208) 855-4005.

POSITIONS

ASSOCIATE ATTORNEY POSITION

Worst, Fitzgerald & Stover, PLLC seeks an associate attorney with one to five years of experience. Located in Twin Falls, Idaho, the firm's principal areas of practice are civil litigation, personal injury, business transactions, real estate, and corporate law. The position offers unique opportunities for professional development and purpose to make positive differences. Please submit a cover letter, resume and brief writing sample to P.O. Box 5226, Twin Falls, ID 83303 or by e-mail to wfs@magicvalleylaw.com.

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Witherspoon, Kelley, Davenport & Toole, a full-service regional law firm with offices in Spokane, Seattle, Portland and Coeur d'Alene, is seeking an attorney to join its bankruptcy and creditor rights group where he/she will enjoy a sophisticated practice. The ideal candidate will have three to four years experience in creditor rights, loan workouts and bankruptcy matters. He/she should also possess strong academic credentials, excellent drafting skills, along with some experience in corporate transactions. Interested candidates should submit a cover letter and résumé to: Hiring Partner, Witherspoon, Kelley, Davenport & Toole, 422 W. Riverside Avenue, Suite 1100, Spokane, WA 99201; or fax to (509) 458-2717; or e-mail dmk@wkdtlaw.com.

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UPCOMING CLEs

August 7

Lunch and a Movie: Handling Your First or Next Grandparent Guardianship Case
Sponsored by the Idaho Law Foundation
Law Center, Boise
1.5 CLE Credits *RAC

August 14

Lunch and a Movie: Post-Settlement Ethical Dilemmas
Sponsored by the Idaho Law Foundation
Law Center, Boise
1.0 CLE Credit *RAC

August 28

Lunch and a Movie: Handling Your First or Next Probate Case
Sponsored by the Idaho Law Foundation
Law Center, Boise
1.5 CLE Credits *RAC

September 11

Annual Estate Planning Seminar
Sponsored by the Taxation, Probate and Trust Section
Sun Valley, Idaho
9.5 CLE Credits of which 1.0 will be ethics credit
Room Reservations Call 1-800-786-8259

September 25

Idaho Evidence Law
Sponsored by the Idaho Law Foundation
Law Center, Boise
1.0 CLE Credit *RAC

October 2

Idaho Practical Skills
Sponsored by the Idaho Law Foundation
Boise Centre on the Grove
Registration available on-line beginning September 1st

October 2

Basic Family Law Training
Sponsored by the Family Law Section
Blackfoot, ID *RAC

October 9

Basic Family Law Training
Sponsored by the Family Law Section
Boise, ID *RAC

October 15

Basic Family Law Training
Sponsored by the Family Law Section
Coeur d'Alene, ID *RAC

November 20

Headline News—Year in Review
Sponsored by the Idaho Law Foundation
Moscow, ID *RAC

December 4

Headline News—Year in Review
Sponsored by the Idaho Law Foundation
Pocatello, ID *RAC

December 11

Headline News—Year in Review
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COMING EVENTS

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

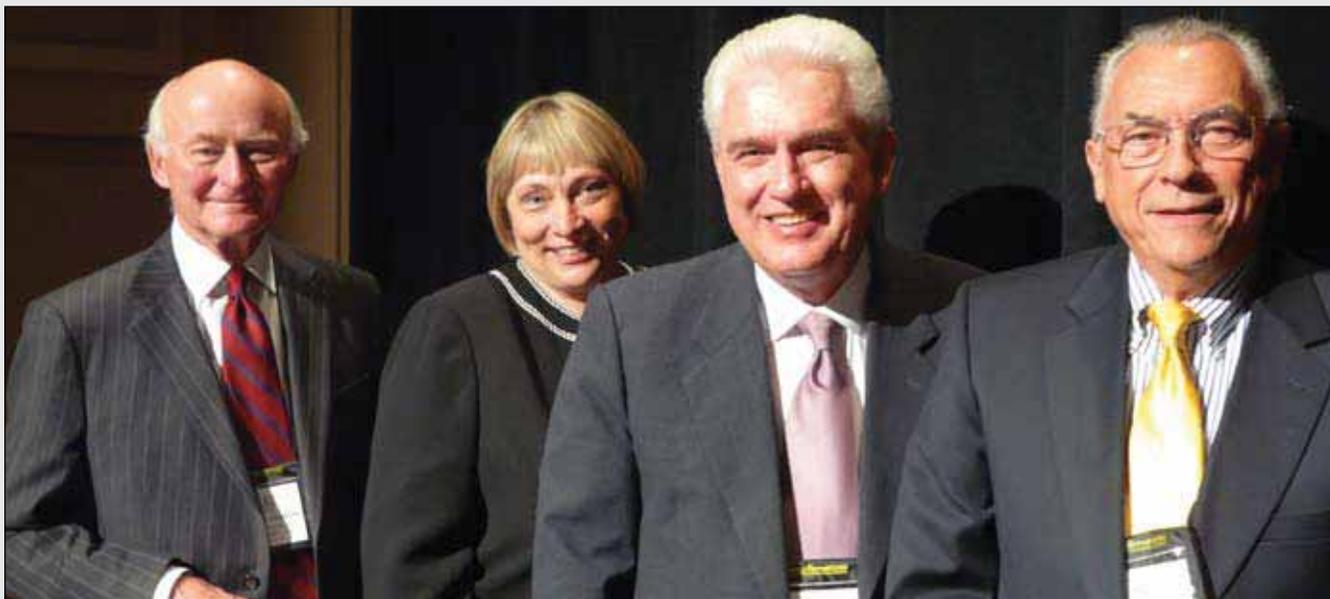
AUGUST

- | | |
|-----|---|
| 1 | <i>The Advocate</i> Deadline |
| 3-7 | ABA/NABE/NCBP/NCBF Annual Meeting, Chicago, IL |
| 19 | <i>The Advocate</i> Editorial Advisory Board |

SEPTEMBER

- | | |
|----|--|
| 1 | <i>The Advocate</i> Deadline |
| 7 | Labor Day: Law Center is Closed |
| 11 | Idaho State Bar Board of Commissioners Meeting |
| 16 | <i>The Advocate</i> Editorial Advisory Board |
| 17 | July Idaho State Bar Exam Results Released |

2009 Idaho State Bar Annual Conference



From left, Tim Hopkins, Betty Richardson, Hon. Lowell Castleton and Merlyn Clark enjoy a quick break during the Lessons from the Masters presentation. Betty introduced the masters who spoke about high points and challenges in their careers.



Allen Derr shares a light moment with the audience during the 50/60-year attorney recognition luncheon.



Joanne Kibodeaux and Natalie Comacho-Mendoza relax in front of the Diversity Section booth.

2009 Idaho State Bar Annual Conference



Jim Bruce, 61-year Bar member and Louie Gorrone, 60-year Bar member, good friends, have fun at the 50/60-year recognition luncheon.

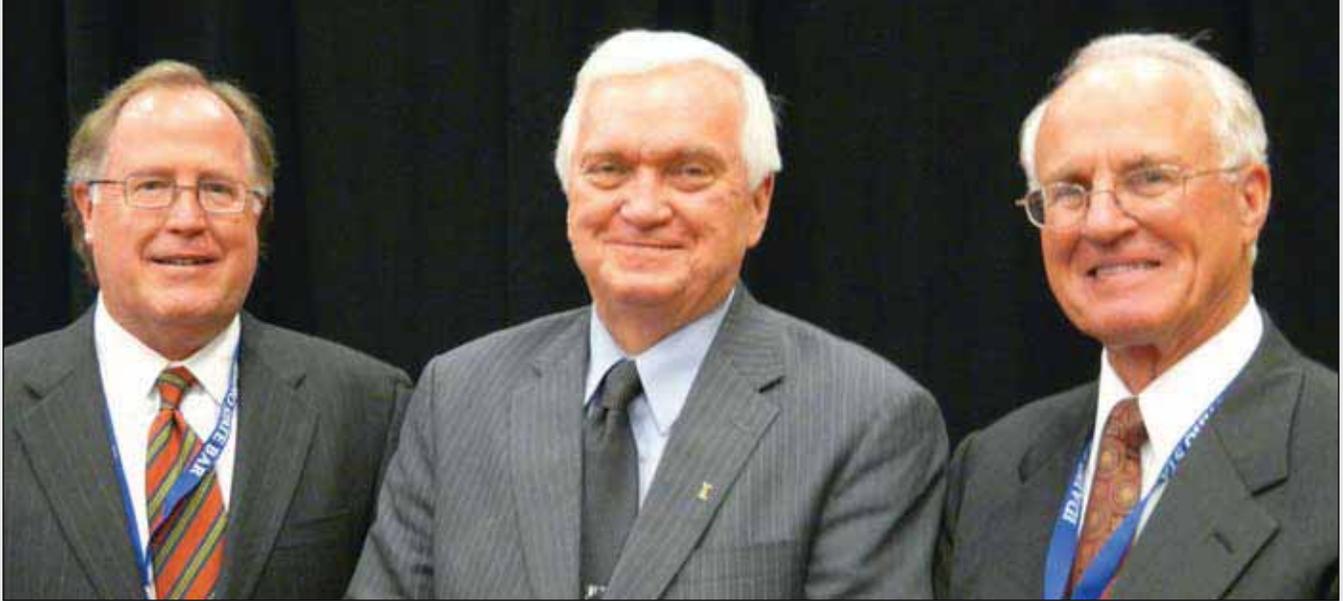


Hon. Robert C. Huntley accepts his recognition as a 50-year attorney.



Lane and Jodi Erickson pose with their daughter, Riley, prior to the Service Awards Luncheon. Lane Erickson was honored for his work with the Bar Exam Preparation Committee.

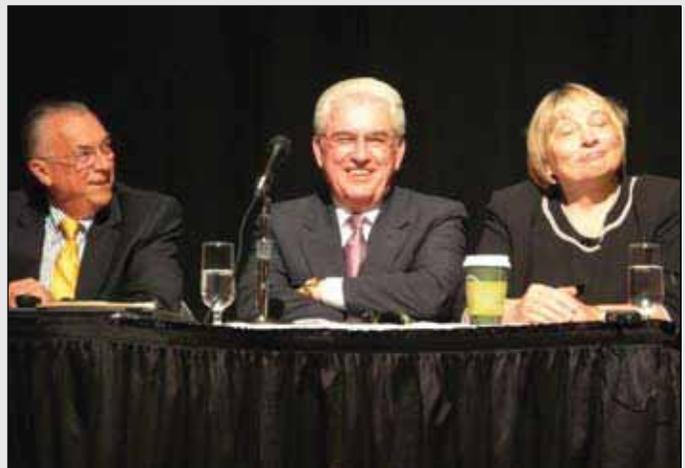
2009 Idaho State Bar Annual Conference



From left are new Idaho State Bar President Newal Squyres, University of Idaho College of Law Dean Don Burnett, Jr. and Idaho State Bar Past President Dwight E. Baker.



Richard and Geraldine Eismann socialize with friends and family prior to the luncheon. Richard Eismann received recognition as a 60-year bar member.

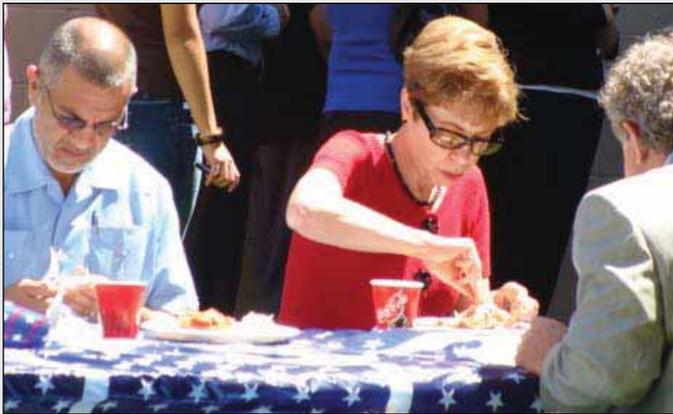


From left, Merlyn W. Clark, Hon. Lowell Castleton and Betty Richardson laugh at anecdotes delivered by Tim Hopkins (not pictured) during the Lessons from the Masters presentation.

Third District Bar Annual Liberty Bell Barbecue



Longtime Canyon County Deputy Prosecuting Attorney Gearld Wolff dishes up barbeque pulled pork sandwiches to a line of Third District Bar members and Canyon County employees.



Idaho Court of Appeals judges Sergio Gutierrez, left and Karen Lansing enjoy the Third District Bar Association's First Annual Liberty Bell Barbecue with Justice Roger Burdick of the Idaho Supreme Court.



From left, Canyon County Board of County Commissioners David Ferdinand, Kathryn Alder, and Steve Rule pull pork at the First Annual Liberty Bell Barbecue.



Sam Laugheed, 2009-2010 President of the Third District Bar, gives a giant check to Tina Freckleton, Executive Director of the Third Judicial District CASA program. Over \$1,000 was donated by the Third District Bar to CASA, much of it raised by the sale of pulled pork sandwiches, slaw, and baked beans at the First Annual Liberty Bell Barbecue. For an additional donation, attendees rang the courthouse bell.

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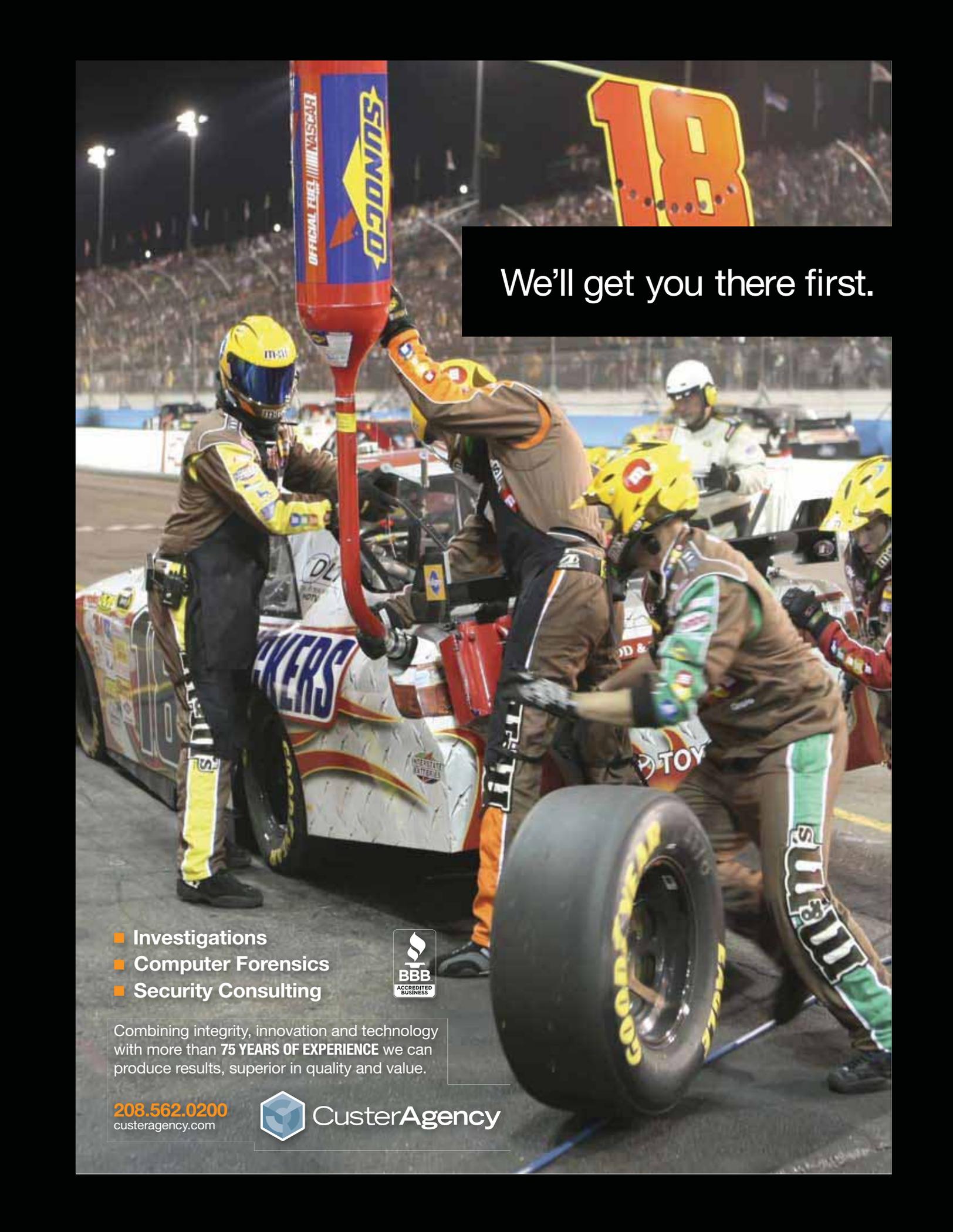
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