

The Advocate

Official Publication of the Idaho State Bar

Volume 52, No. 1

January 2009



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ON THE COVER— Senior Justice Wayne Kidwell took this shot from his bedroom, with a long lens and tripod, in very cold weather with an open window and some hassle removing the window screen. His wife was pleased when the photo session ended.

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DON'T CONFUSE ACTIVITY WITH ACCOMPLISHMENT

Dwight E. Baker



As lawyers, our primary function is one of thinking, and then applying that thought to our task, whether it is effectively advocating a position through written or oral communication, or preparing transactional documents accurately. We think about the facts in light of the law applicable to our task, and we think about the law in light of the facts with which we are confronted. As we refine our understanding of the facts, we are able to refine our understanding of the law; and similarly as we refine our understanding of the law, we continue to refine our understanding of the facts.

The primary tool of all lawyers is an understanding of the law, and the inter-relationships of the various principles of law. The secondary tool, and the tool which sets aside the successful lawyer, is the ability to efficiently master and marshal the facts necessary for us to perform competently. Communication is the lynchpin to the development of factual understanding; whether the communication is between us as lawyers and our clients, or between lawyers, or between us as lawyers and third parties, whether witnesses or sources of transactional information. Effective communication is required in all areas of general or specialized practice; whether criminal law, family law, real property, business organization, administrative law, probate/estate planning, or litigation.

Do our electronic tools assist us to provide a quality service in a timely fashion at a reasonable price? OR, do our electronic tools require all but the most accomplished technicians to manage many times the truly relevant facts and law in an untimely manner at an unacceptably elevated cost to our clients? How often

are we as lawyers engaged in activity as opposed to accomplishment? Are we as lawyers spending our time thinking, efficiently identifying and cross analyzing the facts and law relevant to our task; and then directly addressing the results of those actions to the task at hand. OR, do we get caught developing billable hours in the name of due diligence; and in the process become an unintentional architect of a "justice delayed is justice denied" culture? Do we run our machines; or do our machines run us?

Our obsession with our mechanical devices is so obvious as to be nearly comedic. Any recess of a CLE, or other meeting of lawyers, results in a lemming-like withdrawal to the comfort of our cell phones, ipods or blackberries to check our calls and messages. While emergency communication is at times convenient, if not critical, one wonders how much could be accomplished if the innumerable superficial communications were replaced with thoughtful attention to detail; followed with personal, face-to-face, discussion. We are on a treadmill which seems to go faster and faster, but which may produce less and less of real legal accomplishment for each billable hour. In the process we compromise, if not lose, our humanity; the wonderful capacity to relate to, communicate with, and truly understand other lawyers or parties as human beings.

We recently observed the problem in a different setting. During a relaxing drive from Eastern Idaho past fields being simultaneously harvested of potatoes, sugar beets and the last crop of hay, our conversation turned first to two generations of mechanical changes in agriculture equipment, and inevitably to the parallel changes in our business world. The trip was a welcome release to the frustration of seemingly countless unproductive hours spent trying to efficiently catalogue, input,

and "manage" a computer file of several hundred pages of scanned documents; only several of which were in probability relevant or dispositive of the perceived issues. Our discussion continued through our check in and welcome retreat for a late afternoon Margarita. When the waitress shortly reminded us we had a few minutes to order a second libation, free during "happy hour", we were told the "computer wouldn't let us" switch our drink to a cold beer. We shortly decided to move to the dining room, again running into conflict with the omnipotent computer; it required us to satisfy our tab from one table before moving to another. While we laughed at the experience, it was a salient follow-up to our earlier discussion. Are we running our machines, or are our machines running us?

We all use machines, most of us chasing the most recent marketing of already obsolete technology. Silent obedience to our computer and TIMEMATTERS or other practice management software leads one to reflect—does time matter? The production capacity of our "copy machines", which not only copy, but also collate, punch, staple, bates stamp, date stamp, scan, send and receive faxes, and send and receive e-mails; and which include the capacity to download electronic data enable, or require, each one of us to send hundreds of pages of documents each day. But does the activity of doing so truly reflect accomplishment?

A recent commentator noted that with the explosion of communication of the "Information Age" comes superficiality in the information exchanged. The complaint is that the authors of the voluminous information don't provide any depth-of-analysis; at least in part because of a lack of thought and reflection as a part of crafting the message. The recipients of the information have come to expect little depth in the message, and with the

superficiality comes a loss of critical thinking. We all too often create and move superficial information. We have come to expect the depth of information created by the ten second sound byte, both from ourselves and others. The level of message communicated with the millions of dollars spent in the recent presidential campaign, and the message, or lack of message, presented in the nationally televised debates, painfully informs us of the lack of depth of information perceived to be adequate to persuade the public. We as lawyers must expect and demand more, at least of ourselves.

Attorneys resolve disputes or impasses in negotiations. Whether we do so directly with the other side, or through mediation, the art of effective communication produces results. Mediations work because people communicate—after preparation, and while directing attention to the issue at hand. Mediations, whether formal or informal, are what lawyers do,

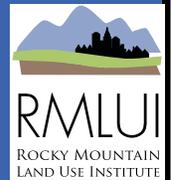
and do well. The face-to-face discussions quickly move from emotional expressions of narrow points of view and frustration to realistic evaluations of often imponderable and subjective legal or factual issues; more often than not resulting in a consensus—driven by communication, understanding and compromise. Electronic equipment is seldom if ever involved. The mediation setting forces communication—leading to consideration and evaluation of the “other side’s” point of view.

Unless properly managed, our machines enable us to avoid or evade realistic communication; communication which is essential to resolution of problems, even when the communications carry unpleasant emotional overtones or conflict. These conflicts are always present in our profession, and always will be. The constant challenge of solving problems, of resolving conflicts, and thereby helping real people is one of the intangible rewards of being a lawyer.

We must be diligent in evaluating the extent to which our machines help us to resolve conflicts, as opposed to enabling us to defer or avoid confrontation and resolution, at substantial expense to our clients. We must not allow the activity of operating our many machines stand in the way of accomplishing the goal of efficiently serving our clients’ needs through meaningful communication.

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

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- Navigating the Forest of “Green” Building Standards
- Sustainable Infrastructure: Crisis, Choices and Solutions
- Financing Renewable Energy
- Local Government Initiatives for Monetizing Solar and Water
- NEPA and Climate Change
- Innovative Sustainability Measurement Tools

Selected Featured Speakers

The Honorable Ralph Becker, Esq., FAICP, Mayor, Salt Lake City • **Karen Aviles, Esq.**, City Attorney’s Office, Denver • **James Borgel, Esq.**, Holland & Hart • **Dr. David Crowe**, National Association of Home Builders • **Christopher J. Duerksen, Esq.**, Clarion Associates • **Dr. Robert Freilich, FAICP**, Miller Baroness • **Wayne Forman Esq.**, **Carolynne White, Esq.**, **Steve Hoch, Esq.** & **Peter N. Brown, Esq.**, Brownstein Hyatt Farber Schreck • **David Foster, Esq.**, Foster Graham Milstein Miller Calisher • **John Hayes, Esq.**, Hayes, Phillips, Hoffmann and Carberry • **Edward T. Icenogle, Esq.** & **Tamara K. Gilida, Esq.**, Icenogle Norton, Smith, Gilida & Pogue • **Orlando E. Delogu**, University of Maine School of Law • **Douglas A. Jorden, Esq.**, Jorden, Bischoff and Hiser • **Julian Juergensmeyer**, Georgia State University Law School • **Lawrence Kueter, Esq.**, Isaacson Rosenbaum • **Robert Lang**, Brookings Institution • **Dwight Merriam, Esq., FAICP, CRE**, Robinson & Cole • **Anita Miller, Esq.**, Attorney at Law, Albuquerque • **Dr. Arthur “Chris” Nelson**, FAICP, University of Utah • **Carla Perez**, Office of the Governor, Colorado • **Peter Pollock, FAICP**, Lincoln Institute of Land Policy • **Thomas J. Ragonetti, Esq.** & **Bart Johnson**, Otten Johnson Robinson Neff & Ragonetti • **Sarah Rockwell, Esq.** & **John Putnam, Esq.**, Kaplan Kirsch & Rockwell • **William Shutkin**, University of Colorado • **Larry Svoboda**, U.S. EPA Region VIII • **Ed Ziegler**, University of Denver Sturm College of Law

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**MICHAEL L. SCHINDELE
(Disbarment)**

On October 23, 2008, the Idaho Supreme Court issued an Order of Disbarment, disbaring Boise lawyer Michael L. Schindele from the practice of law in the State of Idaho. The Idaho Supreme Court's Order followed a Professional Conduct Board Recommendation of disbarment in a formal charge disciplinary proceeding filed by the Idaho State Bar.

On October 31, 2007, the Idaho State Bar filed a formal charge Complaint against Mr. Schindele. The Complaint alleged seven violations of Idaho Rules of Professional Conduct 1.4 [Communication], 1.15 [Safekeeping property], 8.4(b) [Criminal act] and 8.4(c) [Conduct involving dishonesty, fraud, deceit or misrepresentation] and one violation of I.R.P.C. 8.1 [Bar admissions and disciplinary matters] and I.B.C.R. 505(e) [Failure to respond to disciplinary authority].

Those allegations related to the following facts and circumstances. In 2006, a client wire transferred \$124,336 to Mr. Schindele's trust account in order for Mr. Schindele to attend a foreclosure sale on behalf of the client and bid on collateral that secured the debt. Before the foreclosure sale, the client notified Mr. Schindele that the account had been paid off and the foreclosure sale had been cancelled. The client requested that Mr. Schindele return the \$124,336, invoice the client for any accrued costs and close his file. Mr. Schindele did not return or deliver those funds to his client.

Mr. Schindele obtained an \$8,273 judgment on behalf of another client against an individual. Mr. Schindele collected on that judgment by garnishing the individual's account and the sheriff's office gave Mr. Schindele a check which he deposited in his trust account. Mr. Schindele did not account to the individual or his client for those funds and did not return or deliver those funds to his client.

Mr. Schindele represented another client involving a delinquent account that was in Chapter 7 bankruptcy. The client discovered that Mr. Schindele had entered into a stipulated agreement with his client's debtor to pay \$22,728. The debtor paid that amount to Mr. Schindele and Mr. Schindele deposited those funds in his trust account. However, Mr. Schindele did not return or deliver those funds to his client.

Mr. Schindele represented another client in connection with a foreclosure and sale of a residence. Mr. Schindele's client was the sole beneficiary of the deed of trust on the residence. Mr. Schindele was appointed as successor trustee under the deed of trust and sold the property pursuant to foreclosure to a third party for \$66,000. Mr. Schindele deposited those funds in his trust account and failed to return or deliver those funds to his client.

Mr. Schindele collected \$3,679 to satisfy a judgment that was previously obtained on behalf of another client. Mr. Schindele received the check and deposited it into his trust account and failed to return or deliver those funds to his client. That client also discovered that between June 2006 and August 2007, Mr. Schindele had received \$44,568 in garnished funds on behalf of the client that had not been delivered to the client. Mr. Schindele has not returned or delivered those funds to his client.

Mr. Schindele represented another client in collection matters. The client discovered that it had not received funds that had been garnished from one of its employees and those garnished funds had been paid by the sheriff to Mr. Schindele. Mr. Schindele received \$3,801 from various collection accounts for that client which have not been returned or delivered to the client.

Mr. Schindele represented another client and handled its litigation for the past 26 years. In February 2007, the client began to receive phone calls from debtors claiming that collection accounts with the client had been fully paid, but continued to show as unpaid on the debtors' personal credit files. The client was unable to obtain a satisfactory explanation from Mr. Schindele and the client identified \$19,024 received by Mr. Schindele that was not remitted to the client. Mr. Schindele has not returned or delivered those funds to the client.

Mr. Schindele also failed to respond to a subpoena from Bar Counsel for trust account information.

Mr. Schindele failed to answer or otherwise respond to the formal charge Complaint. The Idaho State Bar filed a Motion to Deem Admissions (Default) and for Imposition of Sanction on January 18, 2008. A Hearing Committee of the Professional Conduct Board conducted a hearing on that motion on March 28, 2008. The Hearing Committee granted the motion and entered its Findings of Fact, Conclusions of Law, and Recommendation on July 7, 2008. The Hearing Committee recommended disbarment.

The Idaho Supreme Court's Order of Disbarment found that Mr. Schindele violated all of the Idaho Rules of Professional Conduct set forth above. Based upon that, the Idaho Supreme Court ordered that Mr. Schindele be disbarred, that his admission to practice law in the State of Idaho be revoked and that his name be stricken from the records of the Idaho Supreme Court as a member of the Idaho State Bar.

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

**MARK McHUGH
(Interim Suspension)**

On December 22, 2008, the Idaho Supreme Court issued an Order granting the Idaho State Bar's Petition for Interim Suspension of Boise attorney Mark McHugh.

The Idaho Supreme Court ordered that Mr. McHugh's license to practice law be suspended until further order of the Court. The Court found that it clearly appeared from the specific facts shown by the Petition that Mr. McHugh posed a substantial threat of irreparable harm to the public pursuant to I.B.C.R. 510(a)(2), and that he has failed, without justifiable grounds, to cooperate with or respond to requests from Bar Counsel pursuant to I.B.C.R. 510(a)(3). A formal charge complaint has been filed and that case is pending before the Professional Conduct Board.

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

**TERRY R. SPENCER
(Public Reprimand)**

The Professional Conduct Board of the Idaho State Bar has issued a Public Reprimand to Idaho and Utah lawyer, Terry R. Spencer, based on professional misconduct.

The Professional Conduct Board Order followed a stipulated resolution of an Idaho State Bar disciplinary proceeding, in which Mr. Spencer admitted that he violated Nevada Rules of Professional Conduct 5.5 [“Unauthorized Practice of Law”] and 3.4 [“Fairness to Opposing Party and Counsel”]. The Complaint related to Mr. Spencer’s conduct in cases pending in Nevada federal court while licensed as in-house counsel in Nevada. Consistent with I.R.P.C. 8.5(b), the rules of the jurisdiction in which the tribunal sits, were applicable in this case.

Mr. Spencer had been admitted to practice law in Nevada as an in-house corporate counsel, for his employer, Pacific Energy & Mining. The applicable Nevada rule permits in-house counsel for a Nevada employer to practice law without sitting for the Nevada bar examination, and specifically prohibits such lawyers from appearing in state court on behalf of the employer. Those prohibitions were referred to in the Nevada Supreme Court’s Order admitting Mr. Spencer as in-house counsel to Pacific Energy & Mining.

On January 4, 2005, Tariq Ahmad (“Ahmad”) filed a complaint, *pro se*, in the United States District Court for the District of Nevada. Subsequently, the court ordered Ahmad to amend the complaint to name Satview Broadband, Ltd., as a plaintiff and to secure counsel for the same. On or about November 15, 2005, Mr. Spencer filed a Notice of Appearance of Counsel on behalf of Plaintiff, identifying himself in the heading of his Notice as,

Terry R. Spencer, Ph.D. P.C. #Pending as of 11-10-05
Satview Broadband, Ltd.
137 Vassar Street
Reno, Nevada 89511

On March 13, 2006, the court vacated Mr. Spencer’s Notice of Appearance in that case. Thereafter, Mr. Spencer filed a Motion for Admission and appeared before U.S. Magistrate Judge Valerie P. Cooke on May 8, 2006. At that hearing, Judge Cooke specifically denied Mr. Spencer’s motion for admission based upon Mr. Spencer’s limited in-house counsel admission.

On March 22, 2005, Ahmad filed a complaint, *pro se*, in the United States District Court for the District of Nevada, against Charter Communications. By letter dated December 14, 2005, Mr. Spencer communicated with counsel for Defendant, Charter Communications (“Charter”), by making an appearance in that case on behalf of Ahmad and then substituting in Satview as plaintiff. By letter dated April 14, 2005, counsel for Charter pointed out that the Nevada rule precluded Mr. Spencer from appearing as counsel of record in the action. Mr. Spencer and opposing counsel exchanged telephone messages and letters through April 20, 2007, discussing the issue of whether or not Mr. Spencer could appear in court.

On April 27, 2006, Mr. Spencer filed a Notice of Appearance of Counsel, stating, “COMES NOW TERRY R. SPENCER, and in conformance with the Order Granting Right to Practice

as In-House Counsel, dated November 10, 2005, hereby enters his appearance of counsel for Plaintiff,” in that case. On April 28, 2006, counsel for Charter filed an Objection to Mr. Spencer’s Appearance of Counsel. That objection reiterated opposing counsel’s argument that Mr. Spencer was precluded from appearing in court under the Nevada rule.

On May 8, 2006, U.S. Magistrate Robert A. McQuaid held a hearing on Mr. Spencer’s status in the case. At that hearing, Judge McQuaid specifically ruled that Mr. Spencer could not practice in Federal Court in the District of Nevada and that Mr. Ahmad would continue to appear in proper person.

On February 9, 2006, Mr. Spencer filed suit on behalf of Pacific Energy & Mining Company in the United States District Court for the District of Nevada. The court scheduled a case management hearing on September 22, 2006, before U.S. Magistrate Valerie P. Cooke. Mr. Spencer appeared by telephone. Upon motion by opposing counsel, the Court issued an Order to Show Cause why Plaintiff’s case should not be dismissed for failure to have counsel.

Following that show cause hearing, on April 2, 2007, Judge Cooke entered an Order finding that Mr. Spencer “fell well below the standards of professional conduct” and that he was “permanently prohibited from admission to this court.”

Nevada also conducted a disciplinary proceeding regarding these circumstances and a Nevada disciplinary panel found the following mitigating factors were also applicable to the disciplinary case: (1) Judge Cooke’s permanent prohibition of Mr. Spencer’s admission to the District of Nevada; (2) Judge Cooke’s published order; (3) the fact that Mr. Spencer’s entire Nevada practice was for a single client, who has since moved its operation to Utah, where Mr. Spencer is licensed to practice law, and; (4) that in October 2006, Mr. Spencer voluntarily surrendered his Temporary Nevada In-House Bar License. Those mitigating factors and the mitigating factor that Mr. Spencer was also publicly reprimanded in Nevada were also considered to be applicable in this Idaho disciplinary case.

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

**ROLF M. KEHNE
(Reinstatement)**

On November 12, 2008, the Idaho Supreme Court issued an Order Granting Application for Reinstatement of License to Practice Law, reinstating Boise attorney Rolf M. Kehne to the practice of law in the state of Idaho.

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



EXECUTIVE DIRECTOR'S REPORT

MEMBER SERVICES

Diane K. Minnich



The Idaho State Bar is committed to providing services that enhance and assist you and your practice, and providing education, leadership, public service, and networking opportunities.

In order to focus our resources on member services, we recently reorganized some of our internal programs and functions under a member services department. This reorganization will allow the Bar to continue to concentrate on member services to best meet the professional needs of Idaho attorneys.

As most of you know, the Idaho State Bar's key role is regulatory in nature and involves admissions, licensing, MCLE, and discipline. About 70% of the Bar's resources are spent on its regulatory responsibilities. However, providing benefit to the membership through our other programs and services is also a very important function of the Bar and Foundation.

This month I want to share some of the programs and services offered through the Bar and Foundation to our members. I am sure most of these are familiar to you, but perhaps you will also learn of a program or service in which you were not familiar.

PRACTICE RESOURCES

We keep you current on Idaho legal events and issues that affect you in your daily practice.

The Advocate, the official publication of the Idaho State Bar, features articles written by lawyers for lawyers and notices of upcoming Bar and law related events.

The Idaho State Bar DeskBook Directory is published every April and provides members with an attorney roster, state and federal court contact information, the Idaho Bar Commission Rules, and the Idaho Rules of Professional Conduct.

The ISB E-Bulletin is emailed weekly to ISB members; it includes current information on upcoming CLE programs, section and district bar activities and other important information on upcoming events relevant to your practice.

Ethics Advice from Bar Counsel's office, is available to provide informal assistance and guidance regarding the Idaho Rules of Professional Conduct as they relate to the ethics questions and dilemmas you confront in your practice. Inquiries by phone call are preferred.

The Casemaker Web Library is our web-based legal research library that is available free of charge to Idaho attorneys. It is an easily searchable, continually updated database of case law, statutes, and regulations. Active attorneys and judges are provided with a user name and password to access the service.

Idaho State Bar Practice Guides on a variety of practice areas are available for purchase.

American Bar Association (ABA) Publications Discount Program is available to ISB members. Members receive a 20% discount on books purchased from the American Bar Association's on-line bookstore. The ABA on-line bookstore has hundreds of cutting-edge publications available to benefit the management of your practice and keep you current in your practice area. To view a list of available publications go to www.ababooks.org. Your Idaho State Bar pass code is **PAB7EIDB**.

LexisNexis has teamed up with the Idaho State Bar to offer special packages and pricing exclusively for attorneys in solo or small law firms. These member benefits provide access to the LexisNexis Total Research System, offering the broad perspective you need to succeed in your legal career. Contact the LexisNexis bar association hotline at **1-866-836-8116** to take advantage of your member benefit today.

The Lawyer Referral Service is a valuable resource to help build your practice. Each year, the LRS fields over 6,000 requests from citizens with various legal questions and situations. We refer these calls to lawyers on the referral list based on practice area. You then decide whether or not to take the case. This program is a win-win for the public and our lawyers.

ISB Practice Sections offer the opportunity to network with others who practice in a similar area of the law. There are currently 20 active Idaho State Bar practice sections. Many sections offer free and/or reduced cost CLE programs to their members, regular section meetings and related practice information and resources through section newsletters, publications, and electronic information sharing.

Idaho State Bar Practice Sections

- Alternative Dispute Resolution
- Commercial Law and Bankruptcy
- Business and Corporate Law
- Diversity
- Employment and Labor Law
- Environment and Natural Resources
- Family Law
- Government and Public Sector Lawyers
- Health Law
- Indian Law
- International Law
- Intellectual Property
- Litigation
- Law Practice Management
- Professionalism and Ethics
- Real Property
- Taxation, Probate and Trust Law
- Workers Compensation
- Water Law
- Young Lawyers Section

CONTINUING LEGAL EDUCATION

Live Seminars are held throughout the year on a variety of legal topics. They are sponsored by the Idaho State Bar

practice sections and by the Continuing Legal Education program of the Idaho Law Foundation. The seminars range from one hour to multi-day events.

Live Webcasts allow any attorney with computer access to view any of our one- to three-hour seminars that are available as a live webcast. Pre-registration is required. These seminars allow you the option to email in your questions during the program.

On-line On-Demand CLE pre-recorded seminars are available through our on-line CLE program. You can view these seminars at your convenience.

Recorded Program Rental are pre-recorded seminars are also available for rent in DVD, VCR and audio CD formats.

CLE Publications include a variety of Idaho State Bar practice guides, formbooks and seminar course materials and are available for purchase.

The Idaho State Bar Annual Conference offers CLE programs, networking opportunities and various social and award program events. It is generally held in July in various locations around the state.

District Bar Associations offer every attorney the opportunity to get involved and meet others practicing in their geographical area. Each of the seven judicial districts have a local bar association. The District Bar Associations provide social events, CLE programs, and host the annual Idaho State Bar Resolutions RoadShow in the fall.

LEADERSHIP OPPORTUNITIES

The Board of Commissioners is the governing body for the Idaho State Bar.

Commissioners are elected by the District they represent and serve a 3-year term. If you have program ideas or concerns regarding the operations of the ISB, please contact your local bar commissioner.

Committees contribute greatly to keeping the Idaho State Bar running smoothly. There are 18 committees of the Idaho State Bar and Law Foundation. These committees and their members provide vision and oversight to various programs and functions of the Bar and Law Foundations. Learn more about how the Bar and Law Foundation operate, meet other lawyers and serve the profession by volunteering to serve on a committee.

LAWYER BENEFITS AND SUPPORT

Job Announcements are offered free to our members through the Idaho State Bar website. Take advantage of this great resource to list positions in your firm or to view current law related job openings.

The Idaho Lawyer Benefits Program started at the request of our members. ALPS, in partnership with the Idaho State Bar, has developed a health benefit program designed to meet the long-term needs of Idaho lawyers and their employees. As a member of the Idaho Bar you are entitled to apply for participation in the plan.

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

support is available by contacting 1-800-386-1695.

PUBLIC SERVICE

The Client Assistance Fund falls under a special provision of the Idaho Bar Commission Rules. A fund has been created for the purposes of maintaining the integrity of the legal profession by reimbursing claimants for losses caused by dishonest conduct of a lawyer. Under the program, fees are paid by all lawyers throughout the state to assist in compensating members of the public for an Idaho lawyer's dishonest conduct when the claimant has no other recourse to recoup the loss.

The Law Related Education Program (LRE) is citizenship education with an emphasis on understanding the role of law as the basis of democratic society. LRE programs work to help students know how and why our legal system operates as it does, the importance of the Constitution and the Bill of Rights, and the roles of lawyers and judges. There are many ways to become involved including the Lawyers in the Classroom program and the High School Mock Trial Program.

The Idaho Volunteer Lawyers Program (IVLP) works with Idaho attorneys to provide volunteer legal assistance to low-income citizens across the state. The IVLP staff screens applicants for income and case eligibility and supports volunteer attorneys as they prepare cases.

Specific information on member services offered by the bar and foundation is available on the ISB website, www.idaho.gov/isb, or contact the Idaho State Bar at 208-334-4500.

NEWSBRIEFS

Cathy R. Silak has been named as Dean of Concordia University Law School in Boise. She will lead the planning of the law program and build financial and community support for the new school. Prior to accepting the position of Dean, she was president and CEO of the Idaho Community Foundation. Prior to 2004, she was a partner with Hawley Troxell Ennis & Hawley LLP, Boise; and served as an Idaho Supreme Court Justice from 1993-2000; and was the first woman appointed to an appellate court in Idaho's history Idaho Court of Appeals Judge from 1990 – 1993.

The Honorable Karen Lansing has been appointed Chief Judge of the Court of Appeals for a two-year term, beginning January 1, 2009.

A HEARTY WELCOME FROM THE CHAIR OF THE FAMILY LAW SECTION!

Linda Pall
Law Office of L. Pall

I am pleased to bring you this edition of *The Advocate* on behalf of the Family Law Section. From adoptions to wills, there is very little of our daily lives that is untouched in some way by family law, and the efforts of our Family Law Section show it. As we begin 2009, our section agenda is popping with new plans and proposals of interest to those practicing in the area of family law. But our plans are not only meant for practitioners, they are also aimed at non-practitioners interested in novel methods of peaceful settlement, protection of children and better outcomes for Idaho families.

This issue of *The Advocate* provides a sampling of the numerous ways in which Family Law touches us all. One of our great family law innovators, Judge Benjamin Simpson shares an alternative to the formality of trial in *Informal Custody Trial: An Alternative Child Focused Model*. Debra Alsaker Burke helps us unravel and address the ethical challenges of representing children in her article entitled: *Representing the Child in a Child Protection Case: An Ethical Conundrum*. In *An Alternative to the Next Battle: Collaborative Law*, Debra Everman and Audrey Numbers probe the next frontiers of family law and legal problem solving. Patrick Costello and Fred G. Zundel address one of the more unfortunate aspects of our society in *Domestic Violence Trends and Topics*. Finally, this issue ends with an informal overview of an aspect of your practice that you may not have thought of previously, *Violence against the Idaho Legal Profession: Results of the 2008 Survey*. I hope that after reading these articles you will agree that the breadth and impact of family law is significant and lasting.

You may not realize it, but the Family Law Section was one of the earliest organized sections of the Bar, starting in its current form back in 1987. At that time, the only other organized section was for Bankruptcy. Over the years, the Section has been instrumental in advancing:

1. Educational resources and efforts through CLEs and legislative participation;
2. New initiatives such as Peaceful Settlements;
3. Conferences to advance mediation in family law and other areas of law;
4. Cooperation with the University of Idaho Law School;
5. Helping to form the Family Law Council of Community Property States (FLCCPS) for annual forums on community property issues;
6. Hosting the national FLCCPS symposia in 1994 and 2003; and
7. Publication of a Family Law Formbook and the Family Law Handbook

The Section has also established an annual Family Law Award of Distinction, beginning with Judge Patricia Young as its first recipient in 1989, and has presented this at the annual meeting of the Idaho State Bar in conjunction with an annual reception. Our most recent 2008 recipient was Magistrate Judge Benjamin Simpson of Kootenai County, whose article on the innovative new rules for expedited divorce procedures involving children appears in these pages.

Last May, with the support of the officers and Section Council, we came together for half a day of strategic planning for the Section's future. In order to more accurately gauge the needs and desires of the section and the bar in general, the Family Law Section Council is developing an on-line survey. The survey and its results should be available soon. Recognizing the ongoing need for legislative education, the section is creating a Legislative Information and Rules Committee to provide the Idaho Legislature information, whenever there is an issue or proposal that affects family law that is in front of the legislature. The Section has

also created a Listserve for section members to share questions, advice, opinions and requests for information regarding family law issues.

Two other important new directions have been adopted by the Family Law Section this past year. First, we are broadening our purposes to include the representation of children and child protective activities. On April 15, 2009, the Section will be sponsoring a Continuing Legal Education seminar coordinated by Debra Alsaker Burke to assist attorneys in their representation of children in abuse and other similar actions with a nationally recognized speaker.

The second initiative of the Section is a project with the Idaho Supreme Court and the University of Idaho College of Law to encourage the use of highly trained, specialized child custody mediators. This initiative will be in coordination with the Northwest Mediation Institute held at the University each May. Keep an eye out for both of these exciting initiatives to enhance your skills and update your training in these areas.

Family law affects every person in Idaho. The Section invites you to join us to improve the practice and in the process, get to know some of the most interesting, caring and motivated members of the Idaho Bar. Members are invited to each Section meeting by phone. For more information, please contact me at: lpall@moscow.com.

ABOUT THE AUTHOR

Linda Pall has a solo general civil practice in Moscow, Idaho, and teaches full time at Washington State University. She concentrates her efforts in employment law, real property law, civil rights and family law. Linda graduated from Reed College in Portland, Oregon, with a B.A. in philosophy, continued her graduate work in philosophy of science at the London School of Economics and eventually gravitated to political science and law, receiving her J. D. in 1985 from the University of Idaho College of Law and her Doctor of Philosophy degree from Washington State University in 1986. She is admitted to practice in Federal, state and tribal courts in Idaho, in the Ninth Circuit Court of Appeals and in the U.S. Supreme Court.

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INFORMAL CUSTODY TRIAL: AN ALTERNATIVE CHILD-FOCUSED MODEL

Hon. Benjamin R. Simpson
Judge of the Magistrate Division, Kootenai County

One of the most challenging areas of family law involves determining child custody issues. One innovative means of addressing these challenges is through an Informal Custody Trial. Recognizing the need for innovation with regard to child custody issues, I began using the informal custody trial model in my court in 2004, and have conducted forty-three trials using this method. Other judges have recognized the advantages of this model as well, and it has been used extensively in the First District by Judges Buchanan, McGee, McFadden, Wayman, Watson, Friedlander, and Marano. A great deal of training and information has been shared to assist judges as they seek to resolve custody issues through the Informal Custody Trial. This innovation is not unique to Idaho either. In Australia, a similar model was developed where the Australian family courts have abrogated or relaxed the application of the rules of evidence in all child custody cases. An extensive evaluation conducted of the Australian court model mirrors Idaho's experience in many areas.¹ Several jurisdictions in our sister states are similarly experimenting with similar processes.

Recognizing the advantages of a more informal process, the Informal Custody Trial rule, waiver and consent forms were developed by the Children and Families in the Courts Committee with the help of Judge Dennard and Camille Cameron of the Forms Committee. This alternative trial process is an opt-in process to facilitate kinder, less confrontational custody trials and to promote greater access to the courts. At its simplest, the process is a trial of child custody and child support issues conducted in an informal manner, after a waiver of the application of the Idaho Rules of Evidence and an informed consent to the process. In October 2008, the Idaho Supreme Court adopted Idaho Rule of Civil Procedure 16(p) (Rule 16(p)), which arose out of a Children and Families in the Courts Committee² pilot project in the First Judicial District. Rule 16(p) and the court approved waiver and consent forms are reprinted at the end of this article. They can be downloaded from the Idaho Supreme Court website www.isc.idaho.gov.

INFORMAL CUSTODY TRIAL CREATES AN INCLUSIVE PROCESS

In an Informal Custody Trial (ICT), the parties are encouraged to tell the judge under oath what custody schedule they want, why it is in the children's best interests, and how it protects the other parent's fundamental right to maintain a substantial parenting relationship. After an Informal Custody Trial, the parties report a sense of being heard. They are allowed to speak without interruption about what they feel is in the best interests of their children. This gives parents an opportunity to hear, sometimes for the first time, the experience of the other parent and how they feel about the needs of their children. Since the judge is able to inquire, the judge can be sure to get a solid factual record upon which to base his or her custody decisions. This process works very well with self-represented parties to increase their access to the courts.

CHILDREN BENEFIT

Consider some of the benefits of the Informal Custody Trial process to children:

1. Parents are able to lessen their conflict because much of the testimony is child focused.
2. Self-represented parties are able to effectively present a case.
3. Costs are reduced as an Informal Custody Trial takes about two hours instead of days.
4. The wishes of children are more easily introduced.
5. Reduced animosity gives parents an opportunity to leave the Informal Custody Trial process with an improved capacity to co-parent in the interests of their children.

6. Relocation cases can be efficiently resolved.
7. Informal Custody Trial cases are usually able to go to trial at an earlier date.
8. These factors taken together protect children and have the potential to improve child well-being.

COURT BENEFITS

Within this process, the judiciary can improve its accessibility and perception with the public. It also has the opportunity to uncover facts, which are much more helpful in making a custody determination, but frequently lost within the traditional adversarial system. Consider, for example, these benefits to the court:

1. The court can re-focus the parties to present evidence that relates clearly to the best interests of the affected children and to the statutorily mandated factors regarding custody determinations. This type of evidence is far more useful to the trier of fact than is the usual history of the parents' conflict and negative feelings about each other.
2. The court has a better record from which to make sound findings of fact and conclusions of law.
3. Substantially shorter trials make more effective use of judicial time. This allows the court to process these cases closer to time standards.
4. The parties' perception of the judiciary is improved as the Informal Custody Trial court is often seen as helping the litigants and their children.
5. Implementation of this process places Idaho courts at the forefront of innovation and service to children and families in crisis.

INFORMAL CUSTODY TRIAL HAS SOME LIMITATIONS

The Informal Custody Trial process may not be appropriate in custody cases where there are special needs children, mental health issues, allegations of physical or sexual abuse, substance abuse, or domestic battery. Further, the Informal Custody Trial process should not be used to litigate property or debt issues or fault grounds for divorce. Property and debt and fault grounds cases may be bifurcated with a traditional trial for those issues and Informal Custody Trial for the custody and child support issues.

LESSONS LEARNED FROM THE PILOT PROJECT

Many Idaho judges and attorneys voiced concerns about using this process without a rule or statute authorizing the model. This has slowed the expansion of the model outside of Kootenai County. The pilot project evaluation referenced above had several conclusions as follows:

1. The Informal Custody Trial model shows promise for increased participant satisfaction and may reduce family conflict.
2. There is a need for the development of a uniform court protocol.
3. The evaluation supports the expansion of the Informal Custody Trial model if a uniform court protocol is implemented.
4. The evaluation supports attorney and judicial training in a uniform Informal Custody Trial protocol.
5. The evaluation indicates that the Informal Custody Trial model shows promise as an option to better serve some children and families.
6. The Informal Custody Trial model should remain a voluntary process.

LOOKING FORWARD THROUGH RULE 16(P)

To date, several Informal Custody Trial cases have been appealed to the District Court, but importantly, none of these appeals challenged the voluntary nature of the Informal Custody Trial process. Anecdotally, judges who have used the Informal Custody Trial model continue to recognize and support its advantages and access. Further, an independent evaluation through Portland State University and experience with this model leads to the conclusion that the model shows great promise to lower the level of conflict and reduce the amount of serial litigation in family law cases.

The adoption of Rule 16(p) implements and addresses the concerns of the bench, bar, and the evaluator. The Supreme Court's order expressly requires, "The frequency, use and experience of the parties that have used this procedure shall be monitored and an annual report prepared for the Idaho Supreme Court." Viki Howard, Coordinator for the Children and The Families In the Courts and I are developing procedures to track and monitor these cases for purposes of developing the annual reports required by the Supreme Court.

I also hope to offer a joint bench/bar continuing education program on the Informal Custody Trial in the near future. Electronic copies of the Portland State University evaluation can be obtained by contacting Julie

Hall at (208) 947-7547 or email: jhall@idcourts.net. I have a transcript of an Informal Custody Trial with an audio-recording, and will provide copies upon request. (bsimpson@kcgov.us)

ABOUT THE AUTHOR

Hon. Benjamin R. Simpson graduated from Gonzaga School of Law in 1984, and was admitted to the Idaho Bar in September of that year. He practiced law as a shareholder of Hull, Branstetter and Simpson, Chtd., in Wallace, Idaho from 1984-2000. In January 2000, he was appointed as a Magistrate Judge in Kootenai County and continues to serve in that position. He has a general docket and previously ran a juvenile drug court.

ENDNOTES

¹ Memorandum from Chief Justice Bryant of the Family Court of Australia dated August 1, 2006 citing evaluations by Professor Rosemary Hunter and Dr. Jenn McIntosh.

² CFCC Mission Statement: "To Promote Respectful, Collaborative & Timely Problem Solving of all Family Court Cases"

THE INFORMAL CUSTODY TRIAL (ICT) RULE AS FOLLOWS:

I.R.C.P. Rule 16(p). Informal Custody Trial

(1) An Informal Custody Trial is an optional alternative trial procedure that is voluntarily agreed to by the parties, counsel and the court to try child custody and child support issues. The model requires that the application of the Idaho Rules of Evidence and the normal question and answer manner of trial be waived.

Once the waiver is obtained the matter proceeds to trial by consent as follows:

- a. The moving party is allowed to speak to the court under oath as to his or her desires as to child custody and child support determination. The party is not questioned by counsel, but may be questioned by the court to develop evidence required by the Idaho Child Support Guidelines and child custody evidence required by Idaho Code § 32-717.
- b. The court then asks counsel for that party, if any, if there are any other areas the attorney wants the court to inquire about. If there are any, the court does so.
- c. The process is then repeated for the other party.
- d. If there is a Guardian ad Litem or other expert, the expert's report is entered into evidence as the court's exhibit. If either party desires, the expert

is sworn and subjected to questioning by counsel, parties or the court.

- e. The parties may present any documents they want the court to consider. The court shall determine what weight, if any, to give each document. The court may order the record to be supplemented.
- f. The parties are then offered the opportunity to respond briefly to the comments of the other party.
- g. Counsel or self-represented parties are offered the opportunity to make legal argument.
- h. At the conclusion of the case, the court will make a decision.

(2) Consent and waiver. The consent to and waiver to the Informal Custody Trial shall be given verbally on the record under oath or in writing on a form adopted by the Supreme Court.

IT IS FURTHER ORDERED that this order shall be effective immediately, and the frequency, use and experience of the parties that have used this procedure shall be monitored and an annual report prepared for the Idaho Supreme Court.

The form waiver and consent referenced in the rule provide respectively as follows: ICT Waiver (page 16) and ICT Consent (page 17).

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**THE INFORMAL CUSTODY TRIAL (ICT) WAIVER AS FOLLOWS:
IN THE DISTRICT COURT OF COURT DISTRICT JUDICIAL DISTRICT OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF COURT COUNTY MAGISTRATE'S DIVISION**

		Case No: _____
PETITIONER,)	
)	WAIVER OF THE RULES OF
)	EVIDENCE FOR INFORMAL
)	CUSTODY
)	
RESPONDENT.)	

I consent to proceed as follows:

Section A: My Rights

- I have been told I should discuss the Informal Custody Trial process with my lawyer. I have had the chance to discuss the Informal Custody Trial Process with a lawyer or I have decided not to discuss the process with a lawyer.
- I waive the normal question and answer manner of trial and I agree the court may ask me questions about the case. I agree to waive the rules of evidence in this Informal Custody Trial. Therefore:
 - ♦ The other party can submit any document or physical evidence he or she wishes into the record.
 - ♦ The other party can tell the court anything he or she feels is relevant.

Section B: Voluntary Acknowledgement

- I understand the following:
 - ◊ My participation in this Informal Custody Trial process is strictly voluntary, and that no one can force me to agree to this process.
 - ◊ Documents, physical evidence, and testimony will be admitted during the Informal Custody Trial process, and the court will determine what weight will be given to the evidence.
 - ◊ My rights on an appeal are extremely limited. I understand that, if I appeal, the court will be reviewing a transcript of the hearing and I will not be able to challenge any of the documents or testimony that was considered during the Informal Custody Trial Process. The only issue on appeal will be whether the court abused its discretion in reaching its findings and conclusions and it is unlikely an appeal will result in a different outcome.
- I have told my lawyer (if I have one), all the details of my situation or I have considered all the facts I believe the other person will testify to about me, whether true or not.
- I give this matter to the court freely and voluntarily to make a decision on the terms of child custody and child support.
- I am confident I understand the Informal Custody Trial process.
- I have not been threatened or promised anything for agreeing to this Informal Custody Trial process.

Dated this day of _____

Signature

Printed Name

This form can be downloaded from the Idaho Supreme Court website www.isc.idaho.gov.

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**ATTORNEY FIELDS OF PRACTICE
2008-2009 ANNUAL
DESKBOOK DIRECTORY**

The Idaho State Bar 2008-2009 DeskBook Directory will again contain a listing of members by their fields of practice. This listing is provided as a resource to help attorneys consult or associate with other attorneys knowledgeable in particular fields of law other than their own.

Look for your registration forms in the mail this month. If you have questions, or to learn more contact Jeanne Barker at (208) 334-4500 or jbarker@isb.idaho.gov.

**THE INFORMAL CUSTODY TRIAL (ICT) CONSENT AS FOLLOWS:
IN THE DISTRICT COURT OF COURT DISTRICT JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN
AND FOR THE COUNTY OF COURT COUNTY MAGISTRATE'S DIVISION**

_____	Case No: _____
PETITIONER,)
)
)
)
)
RESPONDENT.)

ISTARS ROA CODE: CICT1

CONSENT TO INFORMAL CUSTODY TRIAL

I consent to proceed as follows:

1. The person bringing the action before the court presents their case first, under oath. The person is not questioned by lawyers, but may be questioned by the court to develop evidence required by the Idaho Child Support Guidelines and child custody evidence required by Idaho Code 32-717.
2. The court asks the lawyer, if any or the moving party if there are any other items to be discussed.
3. The process is then repeated for the other person.
4. If there is a guardian ad litem or other expert, the expert's report is entered into evidence as the court's exhibit. If either party or the court desires, the expert may be questioned under oath.
5. The parties present any documents they want the court to consider.
6. Next, the parties may present testimony and documents to contradict or oppose the other party's testimony.
7. The lawyers involved or self-represented parties are given the opportunity to make legal argument.
8. The court will make a decision.

I consent to submit the following information to the Court:

- The names of my children and their ages.
- The current parenting arrangement, (i.e. when the children are with each parent).
- What I want for a custody schedule, (i.e. what days, holidays, etc. I want the children with me).
- The reasons I want this schedule.
- Why my proposed schedule protects the best interests of the children.
- How my schedule makes certain the other parent will also have a significant and meaningful opportunity to parent.
- My gross income.
- Whether I provide health insurance for the children, and if so, what it costs.
- The medical co-payments and deductibles for the children.
- The amount of support I pay for the support of other children I have with another person.

I have had the opportunity to ask the court about the Informal Custody Trial process. In order to minimize the negative effects of the parent's separation, I agree to have the court decide the child custody and child support issues in this case.

Dated this day of _____

Signature

Printed Name

This form can be downloaded from the Idaho Supreme Court website www.isc.idaho.gov.

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The Advocate seeks front cover original works of art or photography. Photos should be vertical with space at the top left for *The Advocate* logo and space at the bottom left for the address box.



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or call (208) 334-4500.



LICENSING DEADLINE IS FEBRUARY 2, 2009

The 2009 licensing deadline is February 2, 2009. Your payment and forms must be physically received in the Idaho State Bar office by deadline to avoid the late fee. Postmark dates do not qualify. Online licensing renewal is also available through the ISB website: www.idaho.gov/isb. If your licensing is going to be late, be sure to include the appropriate late fee: Active, Out of State Active and House Counsel - \$50; Affiliate and Emeritus - \$25. The final licensing deadline is March 2, 2009.

Contact the Membership Department at (208) 334-4500 or astrouser@isb.idaho.gov if you have any questions.



REPRESENTING THE CHILD IN A CHILD PROTECTION CASE: AN ETHICAL CONUNDRUM

Debra Alsaker-Burke
Idaho Supreme Court

“Child custody and dependency proceedings are a unique legal universe that often involve legal issues that defy the ethical categories articulated by the American Bar Association Rules of Professional Conduct, state ethical rules and judicial and executive pronouncements of best practices and minimum standards of representation.”¹ “There is no clear consensus among juvenile-law scholars, judges, legislators, or children’s organizations regarding the best definition of the attorney-child client relationship.”²

Imagine you have been appointed to represent three siblings in an Idaho child protection case. The children are Anna, Rebekah, and Lucas. Anna is ten months old and therefore unable to formulate or articulate any preferences in a child protection case. Rebekah, at age twelve, is able to express her preferences in regard to some issues in the child protection case, but not others. She often changes her position on issues related to the case, and refuses to disclose her wishes on other issues. Lucas is sixteen, and is an articulate, thoughtful young man. But, occasionally he makes decisions, in relation to the case, that, in your opinion, are not in his best interest.

The judge has appointed you to represent Anna as an attorney with the powers and duties of a *guardian ad litem*.³ You have been appointed as “separate counsel” for Rebekah and Lucas, without the powers and duties of a *guardian ad litem*.⁴ This article will discuss your ethical responsibilities to each of your young clients, and identify areas where additional clarity in Idaho law regarding the role of the attorney would be helpful.

MODELS OF REPRESENTATION

At the heart of most ethical dilemmas for attorneys representing children in child protection cases is how to reconcile the attorney’s obligation to abide by the “express wishes” of the client when the client is wholly or partially unable to articulate her wishes as to the issues in the case. There are six models of legal representation for children in abuse and neglect cases. Each attempts to resolve this ethical dilemma. The first three are “substituted judgment” or adult directed models, and include: (1) representation by a lay *guardian ad litem*; (2) representation by an attorney for a *guardian ad litem*, which is the primary model of representation in Idaho child protection cases; and (3) representation by an attorney *guardian ad litem*. The remaining three are client directed models and include: (4) an attorney appointed to advocate the express wishes of the child; (5) an attorney and *guardian ad litem* model, which provides both a client directed attorney to represent the child and a *guardian ad litem* to represent the child’s best interest; and (6) the “child’s attorney,” a model advocated by the American Bar Association and the National Association of Counsel for Children, in which the attorney advocates for the express wishes of the child, but has an opportunity to apply a substituted judgment analysis in some situations.⁵

IDAHO LAW

Idaho law favors the “substituted judgment” or adult driven model of representation for children in child protection cases. In any proceeding under the Child Protection Act, the court is required to appoint a *guardian ad litem* for the child. In appropriate cases, the court may appoint counsel to represent the *guardian ad litem* or appoint separate counsel for the child.⁶ In the event the court is unable to appoint a *guardian ad litem* for the child, the court shall appoint an attorney with the powers and duties of a *guardian ad litem* for a child under 12 years of age. For a child 12 and over, the court may order that the attorney act with or without the powers and duties of a *guardian ad litem*.⁷

The Idaho Rules of Professional Conduct (I.R.P.C.) do not include an exception or special provisions for attorneys who represent children. Therefore an attorney appointed to represent a child owes to the child the same duties and responsibilities owed to an adult client.

TRADITIONAL ATTORNEY REPRESENTATION - LUCAS

Idaho Rule of Professional Conduct 1.2 requires that, as the attorney for Anna, Rebekah and Lucas; you “abide by the client’s decisions concerning the objectives of the representation” and “consult with the client as to the means by which the [objectives] are to be pursued.” I.R.P.C. 2.1 requires you to provide “candid advice” to the client when the client proposes a course of action likely to result in substantial adverse legal consequences to the client.

As “separate counsel” for Lucas, acting without the powers and duties of the *guardian ad litem*, you are obligated to advocate Lucas’ express wishes concerning the objectives of the representation. You must do so even when Lucas takes a position that you, as his attorney, believe is not in his best interest.⁸ You may candidly advise him about the consequences of the position he has taken,⁹ and you may consult with him to determine if there is a mutually acceptable way to address your concerns. Ultimately, if you are unable to dissuade him, you must advocate his express wishes, unless the disagreement is fundamental to the representation, in which case you may withdraw.¹⁰

CLIENT WITH DIMINISHED CAPACITY - REBEKAH

As “separate counsel” for Rebekah, acting without the powers of a *guardian ad litem*, you are obligated to advocate her express wishes regarding the objectives of the representation. However, in regard to some issues related to the case, you have been unable to ascertain her preferences because while she is able to articulate her wishes on some issues, she is either unwilling or unable to articulate her wishes on others. In this situation, the I.R.P.C., do not allow you to substitute your judgment for Rebekah’s express wishes. As Rebekah’s counsel you may, however, explore her capacity to make decisions related to the case. To determine if her capacity is diminished, you must assess her capacity to make “adequately considered decisions in connection with the representation.”¹¹ Capacity refers to the child client’s ability to understand information relevant to the case and ability to appreciate the consequences of the decisions made. Capacity is not the same as competence.¹² Your assessment “should consider and balance” such factors as her ability to articulate the reasoning leading to her decisions, the variability of her state of mind and her ability to appreciate the consequences of her decisions.¹³ The diminished capacity exception must be invoked with great care and only after serious deliberation because it may result in harm to Rebekah and may require you to divulge confidential information about her case

If you determine Rebekah’s capacity to make adequately considered decisions is diminished, you must, as much as is reasonably possible, continue to maintain a normal attorney client relationship.¹⁴ However, if you determine that her diminished capacity puts her at risk of substantial physical or other harm and that she is unable to act in her own interest, you may take a reasonably necessary protective action for her benefit. Protective actions include, but are not limited to, consulting with extended family, consultation with individuals or entities that have the ability to protect her, using a reconsideration period, and in appropriate cases, seeking the appointment of a *guardian ad litem*.¹⁵ As Rebekah’s attorney, you are “impliedly authorized” to disclose confidential information when taking protective action for her benefit,

but only to the extent reasonably necessary to protect her interests.¹⁶ When taking protective action, you must keep her best interest in mind, seek to maximize her capacities and intrude as little as possible into her decision-making autonomy.¹⁷

The I.R.P.C., do not offer guidance regarding your ethical obligation to Rebekah when you are unable to ascertain her express wishes but also determine that her ability to make considered decisions is not diminished.

ATTORNEY WITH POWERS AND DUTIES OF A GUARDIAN AD LITEM – ANNA

You are representing Anna as an attorney acting with the powers and duties of a *guardian ad litem*. You have a dual role: legal advocate for Anna and *guardian ad litem*, the “eyes and ears” of the court. The *guardian ad litem* has the power to inspect and copy records necessary for the proceeding in which the guardian is appointed, with or without the consent of the child or parent(s) involved in the child protection case.¹⁸ The duties of the *guardian ad litem* include filing a report stating the results of the *guardian ad litem*'s investigation, the *guardian ad litem*'s recommendations, and any other information the court may require. It is the duty of the *guardian ad litem* to advocate for the child for whom appointed, and the *guardian ad litem* is charged with the general representation of the child.¹⁹

Appointment in the role of counsel with the powers and duties of a *guardian ad litem* presents a number of ethical issues. Two of these numerous ethical issues will be discussed here.

First, an attorney acting with the powers of a *guardian ad litem* is bound by the I.R.P.C. Your role as “separate counsel” is to advocate Anna’s express wishes. Although not expressly stated in the Child Protective Act, your role as *guardian ad litem* is to act as the “eyes and ears” of the court and advocate for her best interests. To the extent that her express wishes are in conflict with your “best interest” recommendations, your dual roles are in conflict. In this scenario, Anna is preverbal, and you have not been able to determine her express wishes. It is unlikely that the dual roles will present an actual conflict in this case.

Idaho case law and the I.R.P.C., do not recognize the special role of the attorney acting with the powers and duties of a *guardian ad litem*, and are therefore of little assistance in resolving this conflict. The American Bar Association Standards for Attorneys Representing Children in Abuse and Neglect Cases (ABA Standards) recommend the lawyer continue to perform as the child’s attorney, withdraw as *guardian ad litem*, and then request appointment of a new *guardian ad litem* for the child.²⁰ A noted ethics scholar suggests a different approach: absent an express exception to the duty to advocate the child’s express wishes, the attorney acting with the powers and duties of a *guardian ad litem* must advocate both the child’s express wishes and the recommendations of the attorney to the court, although it is not clear how the attorney could zealously advocate both positions. The attorney acting with the powers and duties of a *guardian ad litem* should then request that the court appoint another attorney to represent the child.²¹

Second, Anna is unable to formulate or articulate her wishes in regard to the objectives of the representation. You are therefore, unable to determine or advocate her express wishes in regard to the issues in the case. In her case, the diminished capacity exception may be of no or limited use to you. Protective actions are unlikely to result in clarity regarding her express wishes. A request for appointment of a *guardian ad litem* will most likely be unsuccessful because attorneys acting with the powers of a *guardian ad litem* are only appointed when a lay *guardian ad litem* is unavailable.²² When the child client is unable to express a preference, as in Anna’s case, the ABA Standards directs the attorney to make a good faith effort to determine the child’s wishes and advocate accordingly or request appointment of a *guardian ad litem*.²³ If the child does not or will not express her wishes the attorney is directed to advocate for the child’s legal interests and request the appointment of a *guardian ad litem*.²⁴

CONCLUSION

An attorney appointed to represent a child in an Idaho child protection cases faces ethical dilemmas for which there are no answers under current Idaho law. Additional clarity regarding the role of the attorney for the child and of the attorney for the child acting with powers of a *guardian ad litem* would provide a framework within which to begin to address these issues. As highlighted by the scenarios posed in this article, amendments to the Idaho Rules of Professional Conduct are likely necessary to clarify the ethical responsibilities of attorneys representing a child client. In the absence of amendments to current Idaho law and the Idaho Rules of Professional conduct, it is imperative that court orders appointing an attorney for a child clearly specify the role and responsibilities of the attorney.

ABOUT THE AUTHOR

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ENDNOTES

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³ Idaho Code § 16-1614(2).

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⁵ Marvin Ventrell, J.D., *Legal Representation of Children in Dependency Court: Toward a Better Model - The ABA (NACC revised) Standards of Practice (National Association of Child’s Counsel, Child Law Manual 1999)*.

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⁸ Idaho Rule of Professional Conduct 1.2, (comment 2).

⁹ Rule 2.1.

¹⁰ Rule 1.2, (comment 2).

¹¹ Rule 1.14.

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¹³ Rule 1.14, (comment 6).

¹⁴ Rule 1.14(a).

¹⁵ Rule 1.14, (comment 5).

¹⁶ Rule 1.14(c).

¹⁷ Rule 1.14, (comment 5).

¹⁸ Idaho Code § 16-1633.

¹⁹ Idaho Code § 16-1632.

²⁰ *American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, B-2(1) (Adopted by the American Bar Association, February 1996).

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AN ALTERNATIVE TO THE NEXT BATTLE – COLLABORATIVE LAW

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BEGINNINGS

In 1989, after eighteen years of family law practice, Minnesota lawyer Stu Webb was tired of living in what he calls the siege mentality—merely waiting for the next battle to start. Stu began experimenting with alternative ways to approach family law practice. After finishing a particularly litigious case—one Stu refers to as a “showcase for everything that is wrong with litigation,” Stu declared himself a collaborative lawyer. Knowing he could not collaborate with himself, he began to talk with colleagues about alternative ideas. He eventually recruited attorney Ron Ousky. Together they founded the International Academy of Collaborative Professionals (IACP).¹ The IACP is an international community of legal, mental health and financial professionals working in concert to create client-centered processes for resolving conflict and committed to fostering professional excellence in conflict resolution through Collaborative Practice. The organization provides a central resource for education, networking and standards of practice. Since 1999, the collaborative movement has grown steadily, mostly by word of mouth. Today it is estimated there are eight to ten thousand trained collaborative professionals spanning forty states, Canada and reaching into Great Britain and Australia.²

WHAT IS COLLABORATIVE LAW?

Collaborative law is an alternative to litigation. The Collaborative Process utilizes attorneys and, often, third party neutrals, such as financial consultants and child specialists, to help guide parties to resolution without litigation. The process is often called the “good divorce,” because it helps couples restructure the family and maintain control over the results and the process, while addressing issues important to the individuals and their children. Collaborative law holds parties to a high standard of respect and honesty. While similar to mediation, the process goes well beyond mediation, keeping the parties focused on finding common interests and goals. Ninety percent of all collaborative cases are resolved within the process. In a recent survey done by the IACP, eighty-seven percent of the surveyed participants stated they would most definitely recommend the process to friends and relatives.³

HOW DOES COLLABORATIVE PRACTICE WORK?

The Participation Agreement

All parties in a collaborative divorce or custody suit sign a Participation Agreement. This agreement outlines the responsibilities of the parties and their attorneys. All participants agree to work together, and if one of the parties no longer wishes to participate, neither party may use the collaborative attorney as counsel in litigation. This part of the Participation Agreement is very important, as it helps to ensure both parties and their attorneys are committed to making the process work.

The Participation Agreement also requires full disclosure by both parties. Both parties agree to provide all necessary information requested by any team member to fully address any issue in the divorce or custody dispute. It is the attorney’s job to ensure that his or her client understands what full disclosure means and oversee compliance.⁴ If an attorney believes a client is not being truthful, the attorney has an obligation under the Participation Agreement to confront the client. Full disclosure applies to information required to come to a fair resolution of the clients’ issues. If an attorney believes a client is hiding important information and is unable to convince the client to disclose that information, the attorney is ethically bound to withdraw from the process.

The Settlement Process

In the process, a series of meetings, called “four-way meetings” are held with both parties and their attorneys. Important issues are identified, prioritized and addressed at these meetings. Active listening techniques are used in a manner that allows both parties to be heard and

have their concerns, frustrations, and fears acknowledged. Doing this creates a safe environment where, once the parties feel they are being heard, they are free to move on to working out solutions to all concerns and settling their divorce or custody dispute.

The Interdisciplinary Team

Although approximately forty-two percent of collaborative divorce cases involve only two attorneys and the clients, an important element to collaborative law is the concept of the interdisciplinary team.⁵ In order to put together the best agreement for the parties and their children, it is often necessary to engage the services of experts to provide information and guidance. A collaborative divorce interdisciplinary team may contain several members. In addition to attorneys, team members may include counselors, a child specialist and a financial specialist. Some teams also utilize the services of a facilitator to help the parties communicate during the process. Most members of the team are neutral. Only the attorneys act as advocates and provide legal advice to their clients, working to ensure the client understands the implications of any decision made during the process.

Parties going through a divorce or a custody action often come to the process in different stages of preparedness. Both parties are likely experiencing some difficulty dealing with the emotions that surface when trying to continue parenting children after a break up with the other parent. These are issues best handled by professionals trained to assist people with these emotional issues. In the collaborative process, it is acknowledged up front that the parties may need emotional support and guidance. Often each party will retain a licensed mental health professional to act as his or her “divorce coach.” This person becomes part of the interdisciplinary team, working either with an individual or the couple. Coaches assist the parties in identifying their needs and in communicating those needs effectively. They may also provide counseling to help them deal with emotions. The coach is not a neutral participant; his or her responsibility is only to his or her client.

Any time children are involved, it is likely the team will include a child specialist. The child specialist acts as a neutral and does not render any decisions as to custody. The child specialist meets with the children to determine their needs and concerns. The specialist also acts as the voice for the child. The specialist also assists the parties by providing guidance regarding the needs of children at different developmental stages and how to discuss divorce with the children in age appropriate ways. Information is provided to the team to help the parents explore strategies for maintaining stability in the children’s lives, both before and after the divorce, and in creating an effective parenting plan.

In most collaborative cases, the team uses the expertise of a neutral financial specialist to assist in developing a plan to divide assets and debts and deal with options for division of retirement, spousal support and the tax implications and other consequences of various options the parties may be considering.

Finally, teams sometimes find it is helpful to use a facilitator trained in mediation techniques to facilitate the meetings between the parties and their attorneys. The most common type of meeting in the collaborative process is the four-way meeting between the parties and their attorneys. If a financial specialist or a parenting specialist is included, then the meeting would be a “five-way” meeting. It is often beneficial to have the specialist present at meetings where the issues on which he or she consults are being discussed. The specialist’s expertise can be used immediately when questions arise or options are being considered.

COLLABORATIVE PRACTICE GROUPS⁶

Many attorneys who practice collaborative law form practice groups. This is a group of professionals who agree to practice together

and maintain certain standards and guidelines for working together in the collaborative model. Practice groups include attorneys, mental health professionals, parenting specialists, financial specialists and, sometimes, facilitators. The groups are formed to educate the members about the practice of Collaborative Law and to educate the public about Collaborative Practice. Groups generally meet and agree on the procedures to follow in conducting their collaborative practice. They often form non-profit corporations to assist in setting guidelines and protocols as well as public education.

For attorneys, the benefit of practice groups is that there is a pool of collaboratively trained professionals they can turn to for guidance and advice and who are committed to the collaborative process.

When a client is interested in the collaborative process to resolve his or her divorce or custody dispute, it is helpful to be able to provide the client with a list of attorneys trained in the Collaborative Model. The spouse or partner can then consult with the collaborative attorney to determine whether he or she will commit to resolving the dispute in this manner. If there is a practice group, the referring attorney can provide references knowing that, if the other party does commit to the collaborative process, he/she will have a committed, competent and collaboratively trained attorney to represent his or her interests.

WHO IS A GOOD CANDIDATE FOR THE COLLABORATIVE PROCESS?

Many of an attorney's clients may be good candidates for the collaborative process. Canada and Australia are using the collaborative process almost exclusively for domestic relations cases. Most people are encouraged and excited about the possibility of resolving their disputes in a manner that is less negative than that afforded by the traditional litigation process.

Some people may not be good candidates for this process. In relationships with a history of severe spousal abuse it may be impossible, both emotionally and psychologically, for the process to be successful. Where there has been some lesser level of spousal abuse, it often can be addressed in the collaborative process if appropriate professionals participate to deal with the matter. Severe mental health issues or active substance abuse/addiction may also make it impossible for a party to rationally respond and participate in the collaborative process. However, so long as the person with the mental health problem or addiction is coping with it and seeking professional help, these issues do not need to be an impediment to the use of the collaborative process.

ETHICAL CONSIDERATIONS IN COLLABORATIVE PRACTICE

Every attorney's first impression of the Collaborative Process raises ethical concerns. The American Bar Association (ABA) in its most recent opinion has extensively addressed the most commonly raised concerns.⁷ Although the Colorado Bar Association has stated the collaborative process sets up a non-waivable conflict under its rules,⁸ other state bars and the ABA Ethics Committee determined "that collaborative law practice and the provisions of the four-way agreement represent a permissible limited scope representation under Model Rule 1.2, with the concomitant duties of competence, diligence, and communication." The Opinion specifically rejects the suggestion that collaborative law practice sets up a non-waivable conflict under Model Rule 1.7(a)(2).

Model Rule 1.2(c) permits a lawyer to limit the scope of representation so long as the limitation is reasonable under the circumstances and the client gives informed consent. The model Participation Agreement, drafted by the IACP and used by collaborative professionals, directly addresses the informed consent issue. Collaborative Law attorneys must thoroughly discuss the scope of representation prior to clients signing the agreement at the first four-way meeting before the collaborative process begins.

One aspect of Collaborative Practice causing controversy is mandatory withdrawal of both attorneys in the event a client determines

that settlement negotiations have failed. The concern is that this creates a conflict of interest, placing the attorney's interests (not litigating) over that of the client. A recent decision by the advisory committee of the Missouri Supreme Court (Formal Opinion 124) saw this tension between interests as fairly common in the attorney-client relationship, citing the most obvious example of the contingency fee case where the client does not want to settle and the attorney feels settlement is advisable. In this situation, the rules of ethics rely on the attorney to put the client's interests first. The case of collaborative law is fundamentally the same. The balance in both situations is provided by informed consent of the limited scope of representation in the collaborative process.

When attorneys first become acquainted with the concept of collaborative practice groups, they are concerned about the ethical considerations involved in a professional affiliation with non-attorneys. This is addressed in collaborative practice groups by the fact that the non-lawyer professionals are contracted independently with the clients, and consents for exchange of information are signed by the parties after informed consent. The Maryland Bar Association has informally addressed the ethical concerns raised by Idaho Rules of Professional Conduct 5.4, regarding the professional independence of a lawyer. The committee states it believed lawyers could participate in such an organization, provided the purpose was to "educate the public, including educating them on new methods of dispute resolution that ... elevate the integrity, honor and courtesy of the divorce process."⁹ The committee expressed concerns regarding lawyer advertising and creating lawyer referral services. However, the committee believed practice groups fell within the safe harbor provisions in Maryland's Rule 7.2, as dues were collected only as a way to cover the actual costs of the organization's operation. The committee further stated that the closer the organization stayed to the public education component, the less likely it would be to run afoul of the Rules of Professional Conduct.

CONCLUSION

The collaborative process goes beyond mediation and allows the parties to control the divorce proceedings and outcome, using neutrals to help guide them through a client-centered process. The parties, rather than a court's calendar, set the pace. The Collaborative Process is often less expensive and is almost always less taxing emotionally for the parties, resulting in parents more able to work together effectively for the benefit of their children. Relationships with mutual friends and extended family members are often maintained. Money saved in this process is available for other matters important to the parties. Children are protected and, by agreement, are not put in the middle of the dispute while the team addresses their concerns. Use of a child specialist provides guidance to the parents, helping to fashion a parenting plan that promotes stability and continuity.

Clients in divorce cases have difficulty focusing on the issues, as they are caught up in emotions. Collaborative Practice recognizes this emotional vulnerability and addresses it by providing coaching and counseling. Issues are recognized, prioritized and addressed during the process. Negative emotions and power imbalances that get in the way of settlement negotiations are diffused, allowing the attorneys to focus on the legal aspects of the situation and how best to resolve issues.

By working together, divorcing couples or partners often obtain far better outcomes than in the traditional divorce process. This leads to more satisfied, happier clients, less stress on the children, and fewer time restraints on the attorneys.

ABOUT THE AUTHORS

Debra Everman is a 1995 Graduate of Washburn University School of Law in Topeka, Kansas. After working as a Staff Attorney – Child Support Services for the Kansas Department of Social and Rehabilitation Services and a Special Assistant Attorney General and Personnel

Attorney for the Kansas Department of Health and Environment, she returned home to Idaho in 2002 to work for the Idaho Department of Labor. In August 2007, Debra opened her own practice, Everman Law Offices, PLLC. She is a member of the International Academy of Collaborative Professionals, ISB Family Law Section, ISB Employment Law Section and the Idaho Women Lawyers.

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ENDNOTES

¹ Stuart Webb and Ron Ousky, *The Collaborative Way to Divorce* (Plum Books 2006).

² *Id.*

³ IACP Client Experience Study, available at: http://64.84.20.100/iacp_SQL-w/jazz_t.asp?M=9&MS=8&T=Survey.2008.

⁴ The attorney must receive informed consent from his or her client to

participate in the collaborative process. See ABA Formal Opinion 07-447.

⁵ IACP Cumulative Data Results Survey, available at: http://64.84.20.100/iacp_SQL-New/analyzesurveys.asp?T=FINAL_CUM.2008.

⁶ Those considering forming collaborative practice groups should be aware of Idaho Rule of Professional Responsibility 5.4. The permissibility of such collaborative groups depends upon how the group is structured.

⁷ The American Bar Association (ABA) in its most recent decision, Formal Opinion 07-447, August 9, 2007. Ethical Considerations in Collaborative Law Practice.

⁸ Colorado Bar Ass'n Eth. Op. 115 (Feb. 24, 2007), *Ethical Considerations in the Collaborative and Cooperative Law Contexts*, available at: <http://www.cobar.org/group/display.cfm?GenID=10159&EntityID=ceth> is the only opinion to conclude that a non-consentable conflict arises in collaborative practice.

⁹ See Maryland Bar Ass'n Eth. Op. 2004-23 (2004) (discussing ethical propriety of "collaborative dispute resolution non-profit organization.")

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- Stuart G. Webb and Ronald D. Ousky, *The Collaborative Way to Divorce; The Revolutionary Method that Results in Less Stress, Lower Costs, and Happier Kids Without Going to Court* (2006)

Websites and Web Pages

- www.collaborativepractice.com: International Academy of Collaborative Professionals website for clients and members.
- www.collaborativedivorcebook.com: excerpts from *Collaborative Divorce*, by Tesler & Thompson, and video interview with authors.

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DOMESTIC VIOLENCE TRENDS AND TOPICS

Fred G. Zundel, *Idaho Legal Aid Services, Moscow*
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INCIDENCE OF DOMESTIC VIOLENCE

Recent Idaho domestic violence statistics tell a confusing and apparently contradictory story. From 2003 to 2007, the annual filing of domestic violence petitions decreased from 5,906 to 4,689, more than a twenty-percent reduction. Over the same five years, yearly criminal prosecutions for domestic assault or battery dropped from 3,917 to 2,678, a better than thirty-percent decline.

The largest declines in domestic violence case filings came in the fourth, sixth, and seventh judicial districts. As it happens, these are the three districts with “integrated domestic violence courts,” in which all of a family’s pending legal issues—civil, criminal, juvenile, and child protection—can be consolidated before one judge.

But while these numbers appear encouraging, if one looks instead at incident reports and lethality statistics, rather than case filings, an opposite trend is evident. Statewide, the Idaho State Police reports that incidents of domestic violence reported to law enforcement actually increased by 1.7%, to 6,360. The number of domestic violence-related fatalities spiked in 2007, to a total of 22 statewide.¹

We do have more services available for victims of domestic violence than in the past. In addition to the three Domestic Violence courts,² every judicial district now has a Family Court Services coordinator. Family Court Services can arrange for visitation supervisors, can make referrals to batterers’ programs and other social services, and can perform “Alternative Dispute Resolution” screenings under Rule 16(m) of the Idaho Rules of Civil Procedure.³ We have one or more domestic violence shelters in each district. Legal representation for domestic violence and sexual assault victims is a high priority for Idaho Legal Aid Services, the University of Idaho Legal Aid Clinic, and for the Idaho Volunteer Lawyers Program, thanks to grant funding and other resources provided by the Idaho Coalition against Sexual and Domestic Violence. And the Coalition’s Coordinated Response to Domestic and Sexual Violence project has developed a new Model Risk Assessment of Dangerousness Tool which is scheduled to be distributed to the Idaho judiciary, attorneys, law enforcement, and shelters this month to help gauge the level of risk present in various domestic violence situations.

RECENT LEGAL DEVELOPMENTS

Legislation—the 2008 Idaho Legislature enacted three statutes dealing with domestic violence. The most significant statute promises to be the creation of a new “Address Confidentiality Program” administered by the Idaho Secretary of State.⁴ Victims of domestic violence, sexual assault or stalking may utilize this program to establish a mailing address for official governmental purposes which does not allow perpetrators to discover the victim’s actual residential address using public records. Between July 1, 2008, when the law went into effect, and the end of October, three households totaling nine people signed up for the program, according to the Secretary of State’s office.⁵

The legislature also doubled penalties for crimes, including domestic assault or battery, in which “conducted energy devices” (e.g. Tasers and cattle prods) are used. It also provided for an enhanced penalty for the third or subsequent conviction for violation of a no-contact order within five years.⁶

Cases—there were no reported appellate decisions dealing with Domestic Violence Protection Orders (DVPO’s) this past year. *Schultz v. Schultz*,⁷ dealt with domestic violence in the context of a custody case. It distinguished *Hopper v. Hopper*,⁸ which held that a move-away by one joint custodian with the minor child to another state was not in the best interests of the child. In *Schultz*, there was evidence (four unrefuted incidents of domestic violence) that the non-move-away parent was an habitual perpetrator of domestic violence, and the magistrate failed to

consider whether such evidence should have overcome the presumption in favor of joint custody pursuant to Idaho Code § 32-717B(5). When the move-away parent has been the victim of habitual domestic violence, the *Schultz* decision indicates the move may well be deemed to be in the child’s best interests.

EMERGING ISSUES/PROBLEM AREAS

Mutual Protection Orders—in the years immediately following the 1988 adoption of the Domestic Violence Crime Prevention Act, Idaho Code § 39-6301, *et seq.*, it was common for Idaho magistrates to make Domestic Violence Protection Orders (“DVPOs”) mutual, i.e., which prohibited both parties from having contact with each other, and from coming near the other party. In fact, the first iteration of standard DVPO forms approved by the Idaho Supreme Court contained a check box the judge could use to easily make the DVPO’s no contact provisions apply mutually. The statutory authority cited for this practice was Idaho Code § 39-6306(e), which authorizes the court to grant “other relief ... as the court deems necessary for the protection of a family or household member...” However, the Full Faith and Credit provision of the federal Violence Against Women Act (VAWA)⁹ only applies to DVPOs restraining a Petitioner if the Respondent has filed his own Petition seeking a protection order and the court has made specific findings that each party is entitled to such an order. Since this will but rarely reflect the typical domestic violence case, mutual DVPOs will rarely satisfy these two conditions and will therefore not be entitled to full faith and credit. Because of this, in 2006 the Idaho Supreme Court modified the standard DVPO forms to eliminate the check box to make the “no contact” provision mutual. Despite this change, some magistrates around the state continue to enter mutual orders using the “other” space on the DVPO forms,¹⁰ whether or not the Respondent has petitioned for one, and without making express findings required by both I.C. § 39-6306(6) and 18 U.S.C. § 2265(c). This practice seems to persist despite education efforts by the Supreme Court and its Children and Families in the Courts Committee to discourage it, and despite VAWA withholding Full Faith and Credit for such orders. Not only does this practice render the protection order unenforceable in other state or tribal courts, but it arguably violates the Due Process clause of the Fourteenth Amendment.¹¹ Many policy reasons have also been advanced as to why the practice of entering mutual protection orders absent findings of culpability on the part of the petitioner should be discouraged. Among them are that such orders are confusing to police, the abuser, the parties’ children and the victim. They may result in either dual arrests or no arrests when a violation of the order occurs.¹² And absent specific findings to the contrary, they imply that the batterer needs protection from his or her victim. But because of the fleeting nature of DVPO cases, the practice of issuing mutual protection orders is one which continues to escape appellate review.

Urinalysis Drug Testing in Domestic Violence Proceedings—the Domestic Violence Crime Prevention Act allows for a magistrate to issue a civil protection order that makes an award of temporary custody of the minor children of the parties.¹³ In determining custody, a child’s welfare and best interests are of paramount importance.¹⁴ The custody factors found at I.C. § 32-717(1) would therefore apply to that custody decision. Domestic violence as defined in I. C. § 39-6303 is one of those factors.¹⁵

Alcohol and drug abuse by a parent seeking custody is a relevant consideration in a custody dispute.¹⁶ “Substance use/abuse and intimate partner violence (IPV) often co-exist ... Several studies indicate that a significant proportion of domestic violence cases involve illicit drug use or perpetrators with illicit drug use problems.”¹⁷

Idaho has no statute or rule that expressly allows a magistrate to order a drug test of a party in a domestic violence or other civil proceeding. And yet according to attorneys around the state, it would appear that magistrates by and large do not hesitate to order drug testing in custody disputes where there is evidence of drug use for at least one parent. There are arguably four statutes or rules which provide that authority.

First, I.C. § 32-717(1) provides that the Court shall evaluate custody of the children as shall be in their best interests, and that the Court shall consider all relevant factors which may include seven enumerated factors. The fifth such factor is “the character and circumstances of all individuals involved.” Credible evidence of drug use in one or both parents reflects character and is clearly relevant to custody. Urinalysis drug testing is a reliable test for recent use of illicit drugs. A court therefore arguably has implicit discretion to order a urinalysis drug test of such a parent in order to further the best interests of the children involved.

Second, the Domestic Violence Crime Prevention Act provides that after the full hearing on the merits, the court can order “temporary custody” or that the respondent “participate in treatment or counseling services” and “other relief ... as the court deems necessary for the protection of the family or household member ...” I.C. § 39-6306(1) (a, d, and e). The foregoing argument for the inherent discretion of the court to order drug testing in order to further the best interests of the children would also apply in a domestic violence proceeding to order drug testing for the same purpose. It may be a stretch to try to characterize an order for drug testing as “treatment or counseling services.” However, drug testing could reasonably be interpreted as “other relief” where the court deems that necessary for the protection of the children during times of physical custody with the alleged drug-using parent.

Third, IRCP Rule 35(a) provides that “when the mental or physical condition ... of a party, ... , is in controversy, the parties by stipulation or the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or a qualified mental health professional ...” This rule by its terms would appear to apply only to examination by a physician or mental health professional and would therefore not strictly apply to a drug test. However, the Idaho Rules of Civil Procedure are to be liberally construed to secure the just resolution of every action, and at least hospital labs are normally supervised by a physician. Other jurisdictions, as indicated below, have not hesitated to use their counterpart to Rule 35(a) to allow drug testing in the context of a contested custody case.

Fourth, IRCP Rule 65(g) provides that “in suits for divorce ... or custody of children, the court may make prohibitive or mandatory orders with or without notice or bond as may be just.” Upon credible evidence that at least one parent is or has recently used drugs, it could clearly be just, in furtherance of the best interests of the children, to issue a mandatory order requiring that parent to submit to drug testing.

There are remarkably few cases nationwide, and none in Idaho, that address the issue of the authority of a trial court judge to order alleged drug-using parents to undergo drug testing.¹⁸ Most of the reported cases approve the use of their counterpart to IRCP Rule 35(a) and find no constitutional problem with that approach. In *Walsh v. Ferguson*,¹⁹ the Texas Court of Appeals found that in order to compel drug testing pursuant to the Texas counterpart of IRCP Rule 35(a), a party must make an affirmative showing that a parent’s mental or physical condition was in controversy and that there was good cause for such testing upon a showing of adequate proof. In the Pennsylvania case of *Luminella v. Marcocci*,²⁰ the trial court’s order that the mother undergo random drug testing did not violate the Fourth Amendment of the United States Constitution. The trial court had ordered such testing for both parents. Although it did not specify its authority for this order, the Pennsylvania Superior Court found that the trial court could have cited the Pennsylvania counterpart to IRCP Rule 35(a). Since that rule did not require that the court articulate a basis of reasonable suspicion

for drug use based upon evidence presented by the parties, and no other Pennsylvania statute required that basis, it was not necessary for the trial court to do so to order drug testing. Such a rule facilitates the State’s exercise of its compelling interest in the welfare of the children.

In the case of *Burgel v. Burgel*,²¹ the New York Supreme Court approved the New York counterpart to IRCP Rule 35(a) as a basis for hair follicle testing in a child custody dispute. The husband alleged that the wife was a cocaine user, and the wife admitted that she had used cocaine in the past but claimed she was no longer a user. The trial court ordered a hair follicle test pursuant to New York’s version of IRCP Rule 35(a). The New York Supreme Court ruled that there was to be liberal discovery in civil actions, that the wife’s physical and mental condition was at issue, and that where the welfare of the children was at stake and the best interest of the children was of paramount concern, the broadest possible latitude should be accorded to reasonable discovery requests. Since this was a civil and not a criminal matter, Fourth Amendment precepts were not implicated.

In *Raney v. Raney*,²² the Ohio Court of Appeals found inherent authority in the trial court to order drug testing by finding that the best interests of the children was the trial court’s primary concern and that there had been no abuse of discretion or constitutional defect in ordering the father to undergo drug testing and imposing supervised visitation until the drug test results had been received. “Drug testing may be ordered or agreed to when the best interests of a child is at stake.”²³

The only jurisdiction that the authors have found that imposed constitutional constraints on drug testing in custody disputes was California. In *Wainwright v. Superior Court of Humboldt County*,²⁴ the Court of Appeals found that California’s statute allowing for consideration of drug use in custody disputes did not justify a court ordered drug testing. California at that time had a family law statute that directed the trial court to consider certain factors in determining the best interests of the child, including drug use by a parent. Mother alleged father’s drug use and requested drug testing. The trial court assumed that it had jurisdiction to order drug testing based on the statute, so it ordered a hair drug analysis with mother to pay the costs. Father sought a writ of mandate from the Court of Appeals to vacate that order, and the Court of Appeals held that the family law statute, without any substantive or procedural safeguards, did not authorize any court ordered drug testing.

In response to this case, the California legislature passed California Family Code § 3041.5(a) for drug and alcohol abuse testing. It provided that if there has been a judicial determination based on a preponderance of the evidence that a parent is a habitual, frequent or continual illegal user of controlled substances, or a habitual or continual abuser of alcohol, then the trial court may order drug testing subject to the following conditions: (1) the court must use the least intrusive method of drug testing; (2) the drug testing must be in conformity with the procedures and standards of the United States Department of Health and Human Services for drug testing of federal employees; (3) the party subject to the drug test has the right to request a hearing to challenge any positive test results; (4) any positive test result alone shall not be grounds for any adverse custody decision; (5) the test results shall be confidential and shall not be disclosed to anyone other than as authorized by statute; (6) any breach of that confidentiality shall be punishable by a civil fine not to exceed \$2,500.00; and (7) the test results may not be used for any other purpose than in determining the best interests of the child in the current proceeding. In the subsequent case of *Deborah v. Superior Court of San Diego County*,²⁵ the California Court of Appeals held that the trial court could not order hair follicle testing pursuant to the new California statute, since that statute requires that any court ordered drug testing conform to federal drug testing procedures and standards, and those standards currently only allow for urine tests.

The authors would suggest that Idaho courts have inherent discretionary authority to order urinalysis drug testing in a domestic

violence or other civil setting when the best interest of a child is at stake. There is no language in the Domestic Violence Crime Prevention Act or in reported cases requiring that the drug use or its effects occur during an incident of domestic violence in order for the court to order the drug-using parent to submit to drug testing. Such a requirement would ignore the best interest of the children. Fourth Amendment concerns are not implicated since the setting for such drug testing is a civil custody setting and not a criminal case. If a court should prefer additional statutory or rule authority, I.C. § 39-6306(1) (e), IRCP Rule 35(a), and IRCP Rule 65(g) would reasonably provide such authority. If any magistrate were to be persuaded by the reasoning of the *Wainwright* decision, then it could simply incorporate in its order the conditions for drug testing in the California statute in order to satisfy any constitutional challenge to the drug testing.

Recent and Remote Domestic Violence—When the Domestic Violence Crime Prevention Act was enacted in 1988, a magistrate could grant an *ex parte* temporary protection order upon an allegation that “irreparable injury could result from domestic violence if an order [was] not issued immediately without prior notice to the respondent,”²⁶ Irreparable injury “includes but is not limited to situations in which the respondent has recently threatened the petitioner with bodily injury or has engaged in acts of domestic violence against the petitioner.”²⁷ If a magistrate granted an application for an *ex parte* temporary protection order, then a full hearing would be set for not later than 14 days from the issuance of the temporary order.²⁸

After a hearing, the magistrate can extend the *ex parte* temporary order for up to one year “upon a showing that there is an immediate and present danger of domestic violence to the petitioner”²⁹ The definition of “immediate and present danger” largely tracks the definition of “irreparable injury” and “includes but is not limited to, situations in which the respondent has recently threatened the petitioner with bodily harm or engaged in domestic violence against the petitioner.”³⁰ Based upon the foregoing statutory definitions, magistrates often assumed that they could extend a protection order only upon a showing of a recent threat or act of domestic violence. Based on current anecdotal evidence, magistrates, in interpreting the word “recent,” tend to require that the threat or domestic violence occur no more than three weeks prior to the filing of an application for the temporary order. There is no statutory definition for the word “recent” and no appellate interpretation of the word.

However, in 2006 the legislature expanded the definition of “immediate and present danger” from recent threats or recent domestic violence to include situations “where there is reasonable cause to believe bodily harm may result.”³¹ This third prong for issuing a protection order does not include any reference to recent threats of domestic violence, and there is no reasonable interpretation of its language that could transport the word “recently” to its meaning. A magistrate may therefore issue a one year civil protection order upon a showing of recent threats of bodily harm, recent acts of domestic violence, or where there is reasonable cause to believe bodily harm may result to the petitioner.

This third prong to the definition of “immediate and present danger” is a sensible addition to the definition. It could apply to the situation where a petitioner learns that a prior perpetrator of felony domestic violence against the petitioner is about to be released from prison and the petitioner believes that, based upon his or her cooperation with law enforcement that put the perpetrator in prison, he or she needs the protection of the law for at least some period of time after the perpetrator’s release from prison. There could clearly be reasonable cause to believe that bodily harm may result to the petitioner, even though there have been no recent threats or acts of violence by the perpetrator against the petitioner.

Another possible scenario would include the case of a petitioner who has been subject to severe unreported domestic violence in a cycle that includes acts of domestic violence every two or three months. The

petitioner knows the cycles of the perpetrator and what tends to set him off, notwithstanding his or her efforts to avoid the violence, and the petitioner now realizes that the next domestic violence episode is about to occur. Although there have been no recent acts of domestic violence, the petitioner has genuine reasonable cause to believe that bodily harm may result without the legal protection of a civil protection order. A magistrate who is well-informed about the patterns of domestic violence would be sensitive to the petitioner’s fear, and would only need credible evidence of those patterns in the particular case to feel warranted in issuing a protection order to the petitioner.

CONCLUSION

Domestic violence continues to present a significant problem throughout the State of Idaho. Increasing services are available for victims of domestic violence, and the 2008 Idaho Legislature took steps to address the issue of domestic violence by enacting three pieces of legislation. However, problem areas—or areas needing further judicial analysis—still exist, particularly with respect to mutual protection orders, court ordered drug testing, and protection orders for petitioners who reasonably fear domestic violence but have not experienced a recent episode. The authors encourage other family law attorneys to share their views on these topics and to engage in dialogues regarding other trends, emerging issues, and problem areas they have encountered.

ABOUT THE AUTHORS

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ENDNOTES

¹ When this article went to press, however, the number of domestic violence-related fatalities for 2008 appeared headed toward more typical pre-2007 levels of around ten fatalities per year.

² The three integrated domestic violence courts reported serving 1,360 victims in 2007. 2007 IDAHO SUP. CT. ANN. REP., *Children and Families in the Courts*, 2.

³ Family Court Services reported serving 33,000 parents and 14,560 children last year. *Id.*

⁴ I.C. §§ 19-5701-08; I.C. § 9-340C(27).

⁵ The application is available on the website at <http://www.idos.state.id.us/ACP/ACP.htm>.

⁶ I.C. § 18-920 (providing for the enhanced penalty that the crime is deemed a felony punishable by a maximum of five years imprisonment and \$5,000 fine).

⁷ *Schultz v. Schultz*, 145 Idaho 859, 187 P.3d 1234 (2008).

⁸ *Hopper v. Hopper*, 114 Idaho 624, 167 P.3d 761 (2007).

⁹ 18 U.S.C. § 2265 (c).

¹⁰ Para. 8 of the Temporary Protection Order form or para. 10 of the Protection Order form.

¹¹ See, e.g., *Bays v. Bays*, 779 So. 2d 754 (La. 2001); *Marco v. Superior Court*, 496 P.2d 636 (Ariz. Ct. App. 1972). The Louisiana statute relied upon by the *Bays* trial court as authority for the mutual protection order stated a court may grant “any” protective order necessary to bring about a cessation of violence, which is similar to the catch-all language of Idaho Code § 39-6306(e). However, the appellate court held that such language must be construed in context, and that if it were construed as broadly as the trial court had in this instance in order

to enter an order against the Petitioner absent a petition or request by the Respondent, it would violate the Petitioner's due process rights to notice and an opportunity to be heard.

¹² Joan Zorza, *What is Wrong with Mutual Orders of Protection?*, available at www.sevan.org/mutual_orders.htm (last visited Dec. 8, 2008).

¹³ I.C. § 39-6306(1)(a).

¹⁴ *Roeh v. Roeh*, 113 Idaho 557, 558, 746 P.2d 1016, 1017 (Ct. App. 1987).

¹⁵ *Schultz v. Schultz*, 145 Idaho 859, 187 P.3d 1234 (2008).

¹⁶ MATTHEW BENDER, *CHILD CUSTODY AND VISITATION LAW AND PRACTICE*, 201-04 (Vol. 2 1997); see also Mary E. Taylor, *Parent's Use of Drugs as Factor in Award of Custody of Children, Visitation Rights, or Termination of Parental Rights*, 20 A.L.R. 5th 534 (1994); Nanette Reed, *Sacrificing the Child's Best Interests: Judicial Custody Award, and Parental Alcohol Abuse*, Sw. U. L. REV. (2005).

¹⁷ NICKY ALI JACKSON, *ENCYCLOPEDIA OF DOMESTIC VIOLENCE* 296-97 (Routledge 2007); see also LUNDY BANCROFT AND JAY G. SILVERMAN, *THE BATTERER AS PARENT* (Sage Publication 2002) ("Although substance abuse is not causal in domestic violence, it can contribute to a batterer's frequency and severity of violence, and the most dangerous batterers have elevated rates of heavy substance abuse. Substance abuse history is an important factor in risk assessment.") (Citations omitted).

¹⁸ In the criminal law context, an Idaho magistrate recently ordered that the parents of a juvenile offender on probation submit to random drug testing as a condition of their daughter's probation. The Idaho

Court of Appeals held that the magistrate did not exceed his authority by so ordering. (However, the court further held that the order violated the parents' constitutional right to be free from unreasonable searches because the juvenile's crimes were unrelated to drugs.) *In re Doe*, ___ P.3d ___, 2008 WL 4880196 (Idaho Ct. App., Nov. 13, 2008).

¹⁹ *Walsh v. Ferguson*, 712 S.W.2d 885 (Tex. App. 1986).

²⁰ *Luminella v. Marcocci*, 814 A.2d 711 (Pa. Super. Ct. 2002).

²¹ *Burgel v. Burgel*, 533 N.Y.S.2d 735 (N.Y. 1988).

²² *Raney v. Raney*, 1999 WL 58162 (Ohio Ct. App. 1999) (unpublished).

²³ *Id.*

²⁴ *Wainwright v. Superior Court of Humboldt County*, 100 Cal. Rptr. 2d 749 (Cal. Ct. App. 2000).

²⁵ *Deborah M. v. Superior Court of San Diego County*, 27 Cal. Rptr. 3d 757 (Cal. Ct. App. 2005).

²⁶ I.C. § 39-6308(1).

²⁷ I.C. § 39-6308(3) (emphasis added).

²⁸ I.C. § 39-6308(5).

²⁹ I.C. § 39-6306(1). Section 39-6306(5) allows the order to extend beyond a year—even to be made permanent—upon motion and for good cause.

³⁰ I.C. § 39-6306(2) (emphasis added).

³¹ *2006 Session Laws*, Chapter 287; I.C. § 39-6306(2).

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VIOLENCE AGAINST THE IDAHO LEGAL PROFESSION: RESULTS OF A 2008 SURVEY

Stephen D. Kelson
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Attorneys often spend their days working on case loads, meeting clients, returning calls, drafting communications and memoranda, and attending court. They rarely consider the possibility that their professional routine might be disrupted by a violent situation arising from their work. When the media reports some violent act against the legal profession, it is quickly forgotten. Work continues, and we naturally assume the odds of similar violence happening to us is simply too remote to even consider. However, just because one doesn't regularly hear of workplace threats and/or violence in the Idaho legal profession, does not mean it is not regularly occurring.

Many attorneys in Idaho have experienced workplace violence related to their services in the legal profession. From March 6 through April 9, 2008, the Idaho State Bar permitted a statewide survey (the "Survey") concerning violence against its members. The results of the Survey reveal a surprising picture of the nature and level of violence against the Idaho legal profession. This article presents and examines the results of the Survey on Violence, which shows that members of the Bar are not exempt from workplace violence; but, in fact, regularly experience threats and violence from opposing parties, interested parties, and their own clients; at any place and at any time.

STUDIES OF VIOLENCE AGAINST THE LEGAL PROFESSION

There is no national method for reporting attacks against the legal profession, and only limited research exists on the subject. However, studies do show a substantial amount of violence is regularly directed at the legal profession and that it may be increasing. For example, statistics gathered by the U.S. Marshals Service provide troubling information regarding violence against federal judicial officials in the United States. During the period between October 1, 1980 and September 30, 1993, there were a total of 3,096 recorded inappropriate communications and threats involving federal judges—an average of 238 per year.¹ In comparison, a total of 1,207 inappropriate communications or threats against the federal judiciary and employees were reported during the fiscal years of 1998 and 1999.² During the fiscal years of 2001 through 2007, the U.S. Marshals Service reported a total of 5,657 inappropriate communications or threats—an average of 808 per year.³ The results in Table 1 show an apparent increasing trend.

Analysis has revealed threats against the legal profession at the state and local courts are far more serious and occur more frequently than those at the federal level.⁴ In 1999, a survey by the Administrative Office of Pennsylvania Courts found that of 1,029 judges surveyed, 23 percent had at some time received explicit threats; 17 percent reported physical assaults; and 44 percent experienced inappropriate approaches.⁵ In 2001, the Federal Bureau of Justice Statistics conducted the first, and only, published study examining workplace aggression as it relates to prosecutors and their office personnel.⁶ It reported that 81 percent of large state prosecutors' offices reported work-related threats or assaults in that year alone.⁷ A 2005, Canadian study of 1,152 lawyers in Vancouver and British Columbia indicated that 59.2 percent (583 lawyers) reported varying degrees and numbers of threats.⁸

Year	2001	2002	2003	2004	2005	2006	2007
#	629	565	585	674	953	1,111	1,140

In 2006, the Utah State Bar conducted a survey of its 8,737 members, presenting surprising details of violence experienced by its membership.⁹ In total, 984 members, representing 11.3 percent of the bar, responded to the survey. Of this number, 452 (45.9) of the respondents reported

they had been threatened or physically assaulted at least once. Many of these threats and acts of violence included death threats, assaults, and vandalism to the attorney's property. The results showed that violence against the Utah legal profession is not as uncommon as was previously believed.

THE IDAHO STATE BAR'S STATEWIDE SURVEY OF VIOLENCE AGAINST THE LEGAL PROFESSION

From March 6 through April 9, 2008, the Idaho State Bar conducted a statewide survey of violence against the legal profession. During the relevant time period of the Survey, the Idaho State Bar consisted of 5,067 members, including all active, out-of-state, affiliate, and emeritus members, as well as house counsel and judges. The Survey was conducted online through <http://www.surveymonkey.com>, and all members of the Idaho State Bar with available e-mail addresses were requested to respond. The Survey was a hybrid of several prior surveys; including the 1999 survey performed by the Administrative Office of the Pennsylvania Courts, the 2005 survey of lawyers in Vancouver and British Columbia; Canada; and the 2006 survey of the Utah State Bar. It consisted of thirteen closed-ended questions with open-ended responses provided in two of the questions as they related to the category of law practiced and types of violence experienced. One descriptive question was also provided, wherein respondents could provide a brief description of any threat(s) or physical assault event(s).

Demographic Questions

- Gender
- In-state or out of-state practitioners
- Age
- Area of practice
- Years of Practice

Query Response Questions

- Whether respondent had ever received threats or been the victim of violence
- Number of threats received
- Types of threats and/or violence
- Location of threats or violent acts
- Relationship with perpetrator
- Association between threat and violent act
- Whether the threat or violent act was reported to police
- When threat and/or physical assault last occurred
- Change in Conduct

Generally, the determination of whether a "threat" was made is a subjective determination by the recipient. For the purposes of the Survey, and in an attempt to clarify the term, a "threat" was defined as: "A written or verbal intention to physically hurt or punish another and/or a written or verbal indication of impending physical danger or harm." To simplify the Survey, if a respondent indicated he or she had not been a recipient of a threat or of a violent act, the Survey skipped over otherwise irrelevant questions related thereto.

QUERY RESPONSE QUESTION SURVEY RESULTS ON THREATS AND VIOLENCE

The Survey received a total of 965 responses from 5,067 members of the Idaho State Bar, representing 19.05 percent of its total membership. Where the Survey's responses present sufficient results to provide a thorough analysis of each of the close-ended questions as they relate to the five demographic close-ended questions, for practical purposes, this article focuses on the responses to the questions themselves and to

the demographic questions solely as they apply to whether respondents have ever been the recipient of threats and/or violence.

QUESTION 1 - THREATS AND ACTS OF PHYSICAL VIOLENCE

The Survey’s first question focused on the main topic and asked members if, while serving as a member of the legal profession, they had ever been the recipient of a threat or had been the victim of a violent act. Of the 965 responses to this question, 400 (41.5) of the total respondents reported they had been threatened and/or physically assaulted at least once. Respondents to the survey identified over 250 examples of threats and/or acts of violence that had been perpetrated against them. Although there are far too many examples to list in this article, a few are provided to show the kinds of violence the Idaho respondents reported:

- The wife of a man I was prosecuting came to my office and threatened to “slit my throat” if I didn’t drop the case;
- Written bomb threat;
- I twice was physically attacked by an opposing party, once in the hallway of a courthouse and once at a private residence;
- Death threat via telephone;
- I received a toy replica of my car torched. It was after collecting a judgment in a case;
- Opposing counsel grabbed me by the neck in the hallway during a break in a jury trial;
- Client killed two people, tried to kill other attorney and committed suicide;
- I was attacked in the restroom by the girlfriend of a party who was opposed to me in a case;
- Followed in vehicle by opposing party;
- Bullet holes in office windows most recently;
- Dead fish heads left in mail box;
- A pro se defendant lunged at my throat with his hands while I was a prosecuting attorney handling a pre-trial conference;
- Police contacted me about a reported contract to harm me. The person who was hired to perform the act reported it to police.
- Dissatisfied client left voicemail message threatening physical violence;
- I was punched in the mouth by another client while in the courtroom

These responses are only the tip of the iceberg and represent actual situations of threats and violence members of the bar have experienced.

QUESTION 2 - NUMBER OF THREATS RECEIVED

The second question requested those respondents who had identified themselves as recipients of threats and/or violence to indicate the number of threats received. A total of 390 respondents reported they had received threats in the practice of law. Based on the responses shown in Table 2, the Idaho respondents who were recipients of threats and/or violence, 291 (72.1) also received more than one threat.

Table 2 Threats Received		
		n = 390
# Threats	# Respondents	Percent
One	109	27.90
Two	103	26.40
Three	67	17.20
Four	12	03.10
More than 4	99	25.40
Total	390	100.00

QUESTION 3 - TYPES OF THREATS

The third question asked respondents to identify the type of threats and/or acts of violence received relating specifically to the recipients’ responsibilities as legal practitioners. There were 390 affirmative responses limited to one of the choices set forth in Table 3. Inappropriate threats were considered to be menacing or troubling, and communicated by letter, phone, fax, or verbal. Inappropriate approaches, for example, followed face-to-face confrontations or attempts. Physical assaults accounted for 4.1 of the total threats reported. .

Respondents were provided the opportunity to write a brief description of the types of threats received. The vast majority of the responses consisted of inappropriate/threatening communications. These communications were made primarily in person or by phone and included direct and veiled threats. For example, individuals made threats of: “I will get you;” “watch your back;” “I’ll kill you;” “We know where you live;” “I’ll gut you like pigs;” and “You’re a dead man.” These threats were generally made directly against the attorney, but in some circumstances were made against the attorney’s family and/or children. Several serious threats described by respondents showed the individual making the threats knew where the attorney lived. For example, an ex-husband of a client made harassing phone calls and drove past the attorney’s residence several times later at night. In another incident, flyers were passed out to neighbors, suggesting actions to be taken against a judge and his family.

Many threatening approaches described by respondents occurred during or after court hearings, as well as in the office. For example, several respondents reported incidents of being followed by the opposing party. In one incident, the opposing party in a divorce and custody case stood day after day looking up at the attorney’s corner office window. In another divorce matter, the opposing party threatened to kill the attorney, purchased a gun and drove to his office, where police were waiting, thanks to a tip from the opposing party’s counsel.

Several respondents reported incidents resulting in physical violence where attorneys were attacked. For example, in one incident, a client assaulted his attorney with a pool cue in a local tavern over a \$25.00 bill. In a divorce case, a methamphetamine user went to opposing counsel’s office, threatened to harm the attorney and staff, grabbed the attorney, and fled when police were called. In another incident, a walk-in became combative when asked to leave, resulting in a scuffle, where the attorney found it necessary to pin the man to the ground until police arrived.

Table 3 Types of Threats/Inappropriate Communications		
		n = 390
Type	Number	Percent
Inappropriate Communications	189	48.50
Inappropriate Approaches	80	20.50
Physical Assault	16	4.10
Two or more of the above	105	26.90
Total	390	100.00

QUESTION 4 - LOCATION OF THREATS

The Survey’s fourth question asked members of the Idaho State Bar to identify the location where they experienced threats or violent acts. See Table 4.

Not surprisingly, the Survey responses identify that the most prominent locations of threats or violence have been the business office and courthouse. The responses to this question show that although threats and violence predominantly occur at an attorney’s work-related

environment, it also occurs beyond the office and courthouse, including at home and other locations. For example, multiple respondents reported threats/violence occurred in public places, including incidents where opposing parties attempted to run attorneys down with their cars.

Table 4 Where Threats/Violence Occurs		
		n = 382
Location	Number	Percent
Office	105	27.50
Courthouse	88	23.00
Residence	11	2.90
Elsewhere	27	7.10
Combination	151	39.50
Total	382	100.00

QUESTION 5 - RELATIONSHIP WITH THE PERPETRATOR OF THREATS/ASSAULTS

The fifth question asked members of the Idaho State Bar to identify the relationship with the individual who threatened and/or assaulted them. One of the more interesting relationships was the 5.2 of reported incidents that were perpetrated by opposing counsel.

These responses show that threats and violence are primarily perpetrated by opposing parties, their associates and relatives, or by an attorney's own client. This shows that threats and violence can occur from any individual involved in a legal case, including other members of the Bar.

Table 5 Perpetrators of Threats/Assaults		
		n = 382
Relationship	Number	Percent
Client	79	20.70
Relative/Associate Client	22	5.80
Opposing Party	195	51.00
Relative/Associate of Opposing Party	42	11.00
Unknown	24	6.30
Opposing Counsel	20	5.20
Total	382	100.00

QUESTIONS 6 - THREATS AND SUBSEQUENT ASSAULTS

In the Survey's sixth question, those members of the Idaho State Bar that responded to receiving threats were asked to identify if the author, or an individual connected to the author, of an inappropriate or threatening communication subsequently physically assaulted the respondent. Of 382 responses, a total of 24 incidents of subsequent physical assaults were reported.

QUESTION 7 - RESPONSES TO THREATS/PHYSICAL ASSAULTS

The Survey's seventh question asked respondents who had received threats or had been the victims of a physical assault if those incidents were reported to the police. Only 126 (38.8) of 325 respondents who identified themselves as recipients of threats and/or violent acts, reported such incidents to the police. Related thereto, the Survey also asked members of the Idaho State Bar who had received threats and/or had been the victim of physical assault if such violence had altered the way they conducted their legal business. Only 21 respondents reported such incidents had affected their conduct a great deal; 133 indicated that their conduct had been somewhat affected, and 210 stated that it did not at all alter the way they conducted business. These low percentages may be associated, in part, to the perceptions reported by some attorneys that

physical threats and violence are just part of the job, that threats are a bluff more than real, and/or if reported, the police would do nothing.

QUESTION 8 - WHEN THREATS/PHYSICAL ASSAULTS LAST OCCURRED

The eighth question asked when members of the Idaho State Bar had last received a work-related threat or had been the victim of a physical assault (see Table 6). The results show that 200 (52.2) of all reported work-related threats and/or physical assaults reported by members of the Idaho State Bar occurred within the past 5 years.

Table 6 Last Work-Related Threat or Physical Assault		
		n = 376
Time Frame	# of Type	Percent
Within past year	69	18.40
1-5 years ago	131	34.80
6-10 years ago	86	22.90
> 10 years ago	90	23.90
Total	376	100.00

QUESTION 9 - CHANGE IN CONDUCT

The survey's ninth question asked those respondents that had received a threat or been the victim of a physical assault to identify if the experience/s altered the way they conducted their legal business. Of 364 respondents, 210 (57.7) identified that the experience/s did not alter their conduct at all. Only 21 (5.8) identified that they had altered their conduct a great deal, and 133 (36.5) identified that they altered their conduct "somewhat." These results may be due to the perceptions reported by many that such threats are just "part of the job."

DEMOGRAPHIC QUESTION SURVEY RESULTS ON THREATS AND VIOLENCE

The Survey's five demographic questions provide additional information regarding the distribution of threats and violence against members of the Utah legal profession by gender, in-state/out-of-state membership, age, area of practice, and years of practice.

THREATS BY GENDER

Table 7, shows Survey results regarding threats and violence experienced by members of the Idaho State Bar, as distinguished by gender. The Survey reveals that slightly more female attorneys and fewer male attorneys responded to the Survey than is representative of the total Idaho State Bar membership. However, the percentage of threats/violence reported by each gender closely resembles the representative percentage of each gender. Female attorneys represented 30.2 percent of the total respondents who identified that they had been the recipients of threats and/or violence, while male attorneys represented 69.8 percent. Where a respondent's experience with violence in the legal profession might have been a motivating factor to answering the Survey, a general overview of the results do not appear to show a prevalence in threats/violence associated by gender.

Table 7 Threats/Violence by Gender			
	Female	Male	Total
Number Members	1250	3817	5067
Percent Members	24.7	75.3	100.0
Number Responding	30	625	927
Percent Responding	32.6	67.4	100.0
Number Threat/Violences	113	261	374
Percent Threats/Violence	30.2	69.8	100.0

IN-STATE/OUT-OF-STATE MEMBERS

Of the 929 respondents who reported their in-state/out-of-state status, 319 of the responding in-state members, and 56 of out-of-state members identified that they had been the recipient of threats and/or violence arising from their work in the legal profession.

A review of the Survey’s results reveals a disproportionately smaller percentage of out-of-state members responded to the Survey than those in-state. The greater number of responses from in-state members arguably provides a more realistic representation of the level of threats and violence experienced by practitioners in Idaho. However, a greater response from out-of-state members would have provided a more accurate representation of the entire membership of the Idaho State Bar.

	In-State	Out-of-State	Total
Number Members	3,627	1,440	5,067
Percent Members	71.6	28.4	100.0
Number Respondents	780	149	929
Percent Respondents	84.0	16.0	100.0
Number Threats/Violence	319	56	375
Percent Threats/Violence	85.1	14.9	100.0

AGE

Table 9, sets forth the results of the Survey regarding threats or violence experienced by respondents of different age groups.

An examination of the Survey reveals what appears to be a correlation between the rising number of respondents who identify themselves as recipients of threats and violence, and their reported age. There also appears to be a strong correlation between the number of years an individual has practiced law, and threats and violence reported.

Age Category	≤ 30	31-40	41-50	≥ 51	Total
Number Respondents	95	250	218	365	928
Percent Respondents	10.2	27.0	23.5	39.3	100.0
Number Threats/Violence	11	79	99	186	375
Percent Threats/Violence	2.9	21.1	26.4	49.6	100.0

AREA OF LAW

The Survey also requested that respondents identify what area of law comprises a majority of their legal practice. The respondents were provided the following options:

Table 10, sets forth the Survey results regarding threats or violence experienced by respondents who practice in different areas of the law.

It can be seen from the Table 10 that, by percentage, the greatest number of threats and/or violence were received by attorneys who practice in the areas of Criminal Defense, State/Federal Prosecution, Family/Divorce, and General Litigation. However, these results also show that a significant number of threats and violence occur in all of the Survey’s other identified areas of law.

- Criminal Defense
- State/Federal Prosecution
- Family/Divorce
- Wills/Estates
- Administrative

- Corporate/Commercial/Real Estate
- General Litigation
- Labor/Employment/Civil Rights
- Other

	Number Respondents	Percent Respondents	Number Threats	Percent Threats
Criminal Defense	94	10.1	56	59.6
State/Federal Prosecution	102	10.9	56	54.9
Family/Divorce	92	9.9	48	52.2
Wills/Estates	36	3.8	10	27.8
Administrative	38	4.1	9	23.7
Corporate/Commercial/Real Estate	119	12.8	37	31.1
General Litigation	182	19.6	61	33.5
Labor/Employment/Civil Rights	27	2.9	13	48.1
Other	239	25.7	86	36.0
Total	929	100.0	376	

YEARS OF PRACTICE

Lastly, respondents were asked to identify the number of years that they have been in practice. Table 11, demonstrates the Survey results regarding threats or violence experienced by respondents, as distinguished by the respondents’ years of practice.

	Number Respondents	Percent Respondents	Number Threats/Violence	Percent Threats/Violence Category
< 1	37	4.0	1	2.7
1 - 5	149	16.0	26	17.4
6 - 10	147	15.8	60	40.8
11 - 15	135	14.5	58	43.0
16 - 20	101	10.9	46	45.5
21 - 30	245	26.3	128	52.2
> 31	116	12.5	57	49.1
Total	930	100.0	376	

An examination of Table 11 reveals a strong increase of the percentage of violence from new practitioners to those that have been practicing for 30 years. Arguably, the low number of reported threats/violence reported by respondents between 0 and 5 years of practice may be due, in some instances, to their lack of direct exposure to clients and opposing parties, as many attorneys during these first years spend their time behind the scenes doing research and memoranda. Attorneys with 6 to 30 years of practice may spend more time interacting with the parties and have more courtroom exposure, making them more recognizable and a more identifiable target against whom to express discontent.

The only decrease in the percentage of threats/violence experienced by respondents in comparison with years of practice was reported by those attorneys who have practiced for 31 or more years. Legal commentators have argued that there has been a rise in violence against the legal profession since the 1980s. Although the Survey was not designed to examine this issue, it is arguable that this decreased percentage of threats/violence reported by those who have practiced for 31 or more years could be related to the argument that attorneys in and

before the early 1980s practiced in a time when there were fewer threats and violence against the legal profession as a whole. This could explain why attorneys with 31 or more years of practice identify a decreased percentage of violence.

CONCLUSION

The purpose in examining violence against the Idaho State Bar is not to instill fear in lawyers or in any way to discourage the practice of law. The results of the Survey against the members of the Idaho State Bar instead shows that, contrary to the general assumption, a significant percentage of members of the Idaho State Bar have and do face threats and/or violence in their practice. Although the amount of violence experienced by the Bar’s members may vary due to factors such as area of practice, age, and years of practice, the Survey’s results clearly show that no members of the Bar can simply assume they are immune from the potential of workplace violence. The reality is that violence in the legal profession can come from any side of a given case and can reach into every aspect of a lawyer’s life. There is no basis to presume threats and violent acts against members of the Idaho State Bar are extremely rare incidents or do not occur because they are not being reported in the media.

ABOUT THE AUTHOR

Stephen Kelson, *Kipp and Christian, P.C., Salt Lake City, UT.* His practice areas focus on civil and commercial litigation, insurance defense, and personal injury. He received his J. D. from the J. Reuben Clark Law School, Brigham Young University, an M. A. in Modern European History and a B. A. in History from the University of Utah. He is admitted to practice before the United States District Court for the District of Utah. Associations: Utah State Bar, Utah Council of Conflict Resolution (UCCR), Utah Dispute Resolution.

ENDNOTES

¹ Frederick S. Calhoun, *Hunters and Howlers: Threats and Violence Against Federal Judicial Officials in the United States, 1789-1993*, 51 (U.S. Marshals Service 1998).

² See Kim Smith, *Threat Investigator Works to Keep Judges from Harm*, Las Vegas Sun, August 10, 1999, available at <http://www.lasvegassun.com/sunbin/...0/509159941.html>; see also Andrew Woldson, *Judges, Prosecutors feel vulnerable: Capps Killing Illustrates Perils they Face at Work, Home*, The Courier-Journal Local News, June 13, 2000, available at <http://www.courier-journal.com/localnews/2000/0006/13/000613fear.html>.

³ See Office of Public Affairs, U.S. Marshals Service, Pub. No. 23, Facts and Figures at a Glance (2002); Office of Public Affairs, U.S. Marshals Service, Pub. No. 23, Facts and Figures at a Glance (2003); Office of Public Affairs, U.S. Marshals Service, Pub. No. 21-B, Facts and Figures at a Glance (2004); Office of Public Affairs, U.S. Marshals Service, Pub. No. 21-D, Facts and Figures at a Glance (2005); Office of Public Affairs, U.S. Marshals Service, Pub. No. 21-D, Facts and Figures at a Glance (2006); Office of Public Affairs, U.S. Marshals Service, Pub. No. 21-D Facts and Figures at a Glance (2007); see also U.S. Marshals Service: Judicial and Court Security, available at <http://www.usmarshals.gov/judicial/index.html>.

⁴ Calhoun, *supra* note 1, at 29.

⁵ Don Hardenbergh & Neil Allen Weiner, Preface in *The Annals of the American Academy of Political and Social Science 2001: 576*, 13-15 (Alan W. Heston, et al. eds. July 2001).

⁶ C.J. DeFrances, *State Court Prosecutors in Large Districts, 2001*, Bureau of Justice Statistics Bulletin (Washington, DC.: U.S. Department of Justice 2001); C.J. De Frances, *Prosecutors in State Courts, 2002*, Bureau of Justice Statistics Bulletin (Washington, DC: U.S. Department of Justice 2002).

⁷ *Id.*

⁸ Karen N. Brown, *An Exploratory Analysis of Violence and Threats Against Lawyers* (2005) (unpublished M.A. thesis, Simon Fraser University) (on file with the Simon Fraser University), available at <http://ir.lib.sfu.ca/retrieve/2110/etd1740.pdf>.

⁹ Stephen D. Kelson, *Violence Against the Utah Legal Profession – a Statewide Survey*, 19 Utah Bar J. 4, 8 (July/Aug 2006).

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2008 IDAHO STATE BAR ROADSHOW PROFESSIONALISM AND PRO BONO AWARD RECIPIENTS



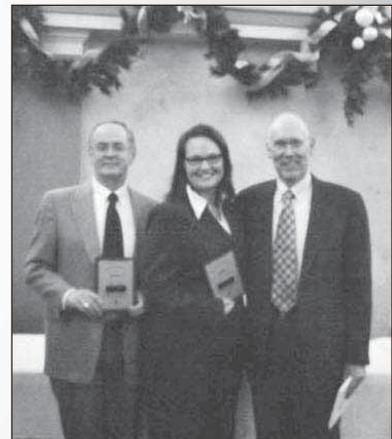
First District – Muriel Burke, Hon. Robert Burton, Rolan Watson, and Will Herrington.



Second District — Carole Wells, Connie Taylor (Jordan's mother), Jordan Taylor, and Jack McMahon.



Second District — Ron Blewett, Jordan Taylor, Tom Whitney, and Dick Clifford.



Third District — Jeff Howe, Kimberly Brooks, and Carl Hamilton,



Fourth District — Rinda Just, Mike Gilmore, Patric Mahoney, LaDawn Marsters, Karen Gowand, Laurie Reynoldson, and Jim Martin

**2008 IDAHO STATE BAR ROADSHOW PROFESSIONALISM
AND PRO BONO AWARD RECIPIENTS**



Fourth District — Kim and Karen Gowland with Karen's parents.



Fifth District — Doug Nelson, K Baxter, Keith Roark, Kevin Cassidy and Jim Phillips



Sixth District — Becky and Randy Budge; Hon. Mark Beebe, Hon. Donald and Janet Hardy, and Steve Muhonen.

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IDAHO'S NEW JUDICIARY IN 2008

Hon. Lowell D. Castleton, Senior Judge
Judicial Education Director, Idaho Supreme Court

As of December 3, 2008, there have been eleven new Idaho judges appointed: one new Court of Appeals Judge, three new District Judges, and seven new Judges of the Magistrate Division.

IDAHO COURT OF APPEALS

HON. DAVE GRATTON

Governor C.L. "Butch" Otter appointed Boise attorney Dave Gratton to a new seat on the Idaho Court of Appeals, effective January 1, 2009. Judge Gratton was named to a place on the bench created by the Legislature last winter, expanding the appellate court from three to four members.

Judge Dave Gratton, 48, is an Emmett native with a bachelor's degree from Boise State University and a law degree from the University of Idaho. Prior to his appointment, he was a partner in the Boise law firm of Evans Keane LLP, and previously clerked for the late U.S. District Judge Hal Ryan.

Judge Gratton and his wife, Robin, have two children and live in Boise.

IN THE FIRST JUDICIAL DISTRICT

HON. JAMES D. STOW—was appointed as a Magistrate Judge for Kootenai County, effective March 3, 2008, filling the vacancy left by the retirement of Judge Robert Burton. Judge Stow presides over a variety of matters including criminal, family law, small claims and probate.

Judge Stow was born in Oregon and is a graduate of South Eugene High School (Go Axemen!) Willamette University (Go Bearcats!) and the University of Oregon School of Law (Go Ducks!).

Prior to his appointment to the Judiciary Judge Stow was the Chief Deputy Prosecuting Attorney for Bonner County, Idaho for a period of fifteen years. In this position he prosecuted a variety of felony cases and was on the organizing team which instituted the Bonner County Drug Court. Judge Stow also served as a Deputy Prosecutor in Kootenai County, Idaho and served as a law clerk for the Honorable William Becket of the Lane County Circuit Court in Oregon.

Judge Stow and his wife Marti, a nurse practitioner, live in Coeur d'Alene, Idaho where they enjoy golfing, skiing and endless home remodeling projects.

IN THE SECOND JUDICIAL DISTRICT

HON. JOHN C. JUDGE—was appointed as a Magistrate Judge for Latah County, effective October 1, 2008, filling the vacancy left by the retirement of Judge William Hamlett.

Prior to taking the bench, he was an attorney in private practice in Moscow, Idaho in the firm of Landeck, Westberg, Judge & Graham. He received his law degree from the University of Idaho and his undergraduate degree from the University of California, Santa Barbara.

IN THE FOURTH JUDICIAL DISTRICT

HON. TIMOTHY HANSEN—was appointed as a District Judge for Ada County, effective February 1, 2008, filling the vacancy left by the appointment of Judge Joel Horton to the Idaho Supreme Court.

Prior to his appointment as a District Judge, Judge Hansen served as a Magistrate Judge, in Ada County. He was appointed to the magistrate bench in 1992.

HON. DANIEL STECKEL—was appointed as a Magistrate Judge for Ada County, effective January 19, 2008 filling the vacancy left by the retirement of Judge Richard Schmidt. Judge Steckel handles the Ada County misdemeanor criminal calendars and juvenile calendars.

Prior to taking the bench, Judge Steckel had worked at the Idaho Attorney General's office since 1991, with the exception of 1999 when he worked for Micron as an Employee Relations Specialist. While at the

Attorney General's office he worked in the Department of Water Resources, Human Rights Commission, and Division of Human Resources. When he was appointed, he was working in the Contracts and Administrative Division where he provided representation to the state Division of Human Resources, the Idaho Human Rights Commission and various commissions and boards.

Judge Steckel has a B.A. in Psychology from the University of Wisconsin, Madison, and a J.D. from the University of Colorado School of Law. He is a past member and chair of the Idaho State Bar's Editorial Advisory Board (1994-1999), has served as a Bar Fee Arbitration panelist, as Chair of the Bar's Conditional Admission Committee, and as a member of the Character and Fitness Committee. He also served as President of the Board, Land Trust of the Treasure Valley.

HON. MONTY BEREZ—was appointed as a Magistrate Judge for Ada County, effective July 1, 2008, filling the vacancy left by Judge Timothy Hansen who was appointed to fill a district judge position in the Fourth Judicial District.

Prior to his appointment to the bench, Lamont (Monty) Berez, 33, of Boise, was employed with the Ada County Prosecutor's office from 2001, where he was a felony trial attorney focused on domestic violence cases and served as an on-call drug prosecutor. From 2000-2001, Judge Berez worked as an associate attorney for the Stoel Rives law firm in Boise, where he specialized in products liability defense. Outside the legal profession, he has over ten years experience in working with youth as a camp director, counselor and instructor in Wisconsin, Colorado and Michigan.

Judge Berez holds a Bachelor's of Art degree in Biology from Andrews University in Berrien Springs, Michigan and a J.D. from the University of Virginia School of Law.

He and his wife, Sophie, and their three daughters make their home in Boise.

IN THE FIFTH JUDICIAL DISTRICT

HON. MICK HODGES—was appointed as a Magistrate Judge for Cassia County, effective February 1, 2008, filling the vacancy left by Judge Michael Crabtree who was appointed to fill a district judge position in the Fifth Judicial District.

Judge Hodges, 54, has been practicing law since 1987. He had served as the Hearing Panel Chairman for the State Board of Medicine since January of 2008. He has been an Administrative Hearing Officer for the State of Idaho Dept. of Transportation and the Dept. of Health & Welfare since 1994. Judge Hodges was a partner with the Twin Falls firms of Smith, Beeks & Hodges; and Peterson, Hodges & Harper, L.L.C. from 1996 to 2004. Judge Hodges had been a sole practitioner in Twin Falls since 2004. He received his Bachelors degree from BSU in 1977. He also owned and operated a small newspaper in Marsing, Idaho prior to obtaining his J.D. degree from the University of Idaho, Law School in 1987.

IN THE SIXTH JUDICIAL DISTRICT

HON. MITCHELL W. BROWN—was appointed as a District Judge for the Sixth Judicial District, effective October 1, 2008, filling the vacancy left by the retirement of Judge Don Harding. He was sworn in by Judge Harding on September 26, 2008.

Mitchell W. Brown was born in Afton, Wyoming in 1961. He graduated from Star Valley High School in 1979. He attended the University of Wyoming, in Laramie for two years and then served a mission for his

church. Upon return from his mission he completed his undergraduate studies at Utah State University where he graduated Cum Laude from Utah State University obtaining a Bachelor of Science degree in Political Science in 1986. He received his legal education at the University of Idaho, where he obtained his Juris Doctor degree in 1990 and was admitted to the Idaho State Bar in 1990.

Mitch joined the law firm of Racine Olson Nye Budge and Bailey in 1990 as an associate. In 1998 he was made a partner. He continued his practice at Racine Olson Nye Budge and Bailey until September 2008. He is admitted to practice before all State and Federal Courts of the State of Idaho. Judge Brown's emphasis of practice was in civil litigation, with a particular emphasis on defense litigation. Judge Brown is a member of the American Bar Association and presently serves on the 6th District Bar Association's Executive Committee as President. He has served as a member of the Bench and Bar Liaison Committee and the Magistrate Commission for the 6th Judicial District. Judge Brown was a member of the Defense Research Institute and served as a Board Member of the Idaho Association of Defense Counsel.

Mitch is married to his wife of 22 years Tricia Brown. They have four children, Taylor 22, Jordan 19, Raegan, 16 and Skyler 4. Taylor and Jordan attend Idaho State University in Pocatello, and Raegan is a junior at Soda Springs High School.

HON. STEPHEN S. DUNN—was appointed as a District Judge for the Sixth Judicial District, effective October 1, 2008, filling the vacancy left by the appointment of Judge Ronald Bush who was appointed as a federal Magistrate Judge.

Prior to his appointment to the bench, Judge Dunn was a partner in the law firm of Merrill & Merrill, Chartered, where he had practiced law for 31 years. He served as a part-time federal magistrate from 1990 to 1992. Judge Dunn, a Twin Falls native and Brigham Young University graduate and his wife, Wanda, have three children.

HON. PAUL LAGGIS—was appointed as a Magistrate Judge for Power County, effective July 1, 2008 filling the vacancy left by the retirement of Judge Mark Beebe.

Judge Laggis graduated from the University of Idaho in 1985 and earned his Juris Doctorate from the University of Idaho, College of Law in 1992.

Prior to his appointment to the bench, Judge Laggis had served as a solo practitioner since 1995. He also served as legal counsel for a variety of larger public clients including, the American Falls School District, Power County Highway District, and Harms Memorial Hospital District. Between the years of 1993-1997, he served as Power County Prosecuting Attorney, as City Attorney for the City of Aberdeen and as Deputy City Attorney for the City of American Falls. From 1997-2008, he served as Power County Prosecuting Attorney.

His community involvement included volunteer coach for little league baseball, football, basketball and soccer; volunteer coach for the American Falls varsity football program; volunteer coach for Chubbuck Sting All Star Baseball Team; Member of the Power County Fat Stock Sale Committee; Member of the American Falls Lion's Club and Co-chairman of the American Falls/Aberdeen Ducks Unlimited Committee.

Judge Laggis and his wife, Paula have three children.

IN THE SEVENTH JUDICIAL DISTRICT

Hon. Robert L. Crowley—was appointed as a Magistrate Judge for Jefferson County, effective January 23, 2008, filling the vacancy left by the retirement of Judge Michael Kennedy.

Judge Robert Crowley obtained his undergraduate degree from Brigham Young University and his law degree from the University of Idaho. He practiced law in Burley from 1977 to 1979. In 1979, he moved to Rigby, where he maintained a general law practice until his appointment as Magistrate. He is a past president of the Seventh Judicial District Bar Association and is a past recipient of the Denise O'Donnell-Day Pro Bono Award. He and his wife, Tauna, have two sons and 3 (almost 4) grandchildren. He enjoys hiking, backpacking, camping, canoeing and photography, among other activities.



**R. Bruce Owens
Attorney at Law**

of the Firm,



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COURT INFORMATION

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SUPREME COURT OF IDAHO**

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Daniel T. Eismann

Justices

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Jim Jones

Warren E. Jones

Joel D. Horton

Regular Spring Terms for 2009

Boise January 12, 14, 16, 21 and 23

Boise February 9, 11, 13, 18 and 20

Northern Idaho April 6, 7, 8, 9 and 10

Eastern Idaho May 4, 6, 8, 12 and 13

Twin Falls June 8, 10, 12, 15 and 17

By Order of the Court

Stephen W. Kenyon, Clerk

NOTE: The above is the official notice of setting of the year 2009 Spring Terms of the Idaho Supreme Court, and should be preserved. A formal notice of the setting of oral argument in each case will be sent to counsel prior to each term.

**OFFICIAL NOTICE
COURT OF APPEALS OF IDAHO**

Chief Judge

Karen L. Lansing

Judges

Sergio A. Gutierrez

Darrel R. Perry

Regular Spring Terms for 2009

Boise January 13, 15, 20 and 22

Boise February 10, 12, 17 and 19

Eastern Idaho March 9, 10, 11, 12 and 13

Northern Idaho (Moscow) April 13, 14, 15, 16 and 17

Boise May 14, 15, 19 and 21

Boise June 16, 18, 23 and 25

By Order of the Court

Stephen W. Kenyon, Clerk

NOTE: The above is the official notice of setting of the year 2009 Spring Terms of the Court of Appeals, and should be preserved. A formal notice of the setting of oral argument in each case will be sent to counsel prior to each term.

Idaho Supreme Court

Oral Argument Dates

As of November 26, 2008

Monday, January 12, 2009 – BOISE

8:50 a.m.	Cramer v. Slater	#34825
10:00 a.m.	State v. Pina	#34192
11:10 a.m.	Bushi v. Sage Health Care, PLLC	#34827

Wednesday, January 14, 2009 – BOISE

8:50 a.m.	Shore v. Peterson	#34488
10:00 a.m.	St. Luke's v. Ada County	#34953
11:10 a.m.	St. Alphonsus v. Ada County	#35158

Friday, January 16, 2009 – BOISE

8:50 a.m.	Zions First National Bank v. Lettunich	#34437
10:00 a.m.	Wernecke v. Industrial Special Indemnity Fund	#34539
11:10 a.m.	Dypwick v. Swift Transportation	#35027

Wednesday, January 21, 2009 – BOISE

8:50 a.m.	Chapman v. NYK Line North America	#35014
10:00 a.m.	ICRMP v. Northland Insurance Co.	#34375
11:10 a.m.	Gray v. Tri-Way Construction	#34666

Friday, January 23, 2009 – BOISE

8:50 a.m.	Blake v. Starr	#34771
10:00 a.m.	Boise Tower Associates v. Hogland	#34333
11:10 a.m.	Gibson v. Ada County Sheriff's Office	#34368

Idaho Court of Appeals

Oral Argument Dates

As of November 26, 2008

Tuesday, January 20, 2009 – BOISE

9:00 a.m.	State v. Penaloza	#34212
10:30 a.m.	Kelly v. State	#33773
1:30 p.m.	State v. Doe	#35004

Thursday, January 22, 2009 – BOISE

9:00 a.m.	State v. Teague	#34586
10:30 a.m.	Bower v. White	#34803
1:30 p.m.	State v. Ruperd	#32761

Idaho Supreme Court and Court of Appeals
NEW CASES ON APPEAL PENDING DECISION
(Update 11/01/08)

CIVIL APPEALS

ARBITRATION

1. Did the trial court err in finding there was an agreement to arbitrate without a “meeting of the minds”?

Carroll v. MBNA America Bank
S.Ct. No. 34765
Supreme Court

ATTORNEY FEES AND COSTS

1. Whether the trial court erred in denying most of Harnes’ attorney fees incurred in the civil action before the matter was referred to arbitration and all of Harnes’ attorney fees after it returned.

The Grease Spot, Inc. v. Harnes
S.Ct. No. 35321
Supreme Court

CONTRACT

1. Whether the district court erred as a matter of law in holding that an express contract was established between EVCO and Cedar Street.

EVCO Sound & Electronics, Inc. v. Cedar Street Electric, Seaboard Surety Company
S.Ct. No. 34898
Supreme Court

DIVORCE, CUSTODY, AND SUPPORT

1. Whether the district court erred in affirming the amount of spousal maintenance and the method by which the trial court reached the amount and duration of the award.

O’Reilly v. Mulvey
S.Ct. No. 34811
Supreme Court

2. Did the district court err in holding that, under the Uniform Child Custody Jurisdiction Enforcement Act, Idaho had jurisdiction to make child custody decisions in the Johnsons’ case?

Johnson v. Johnson
S.Ct. No. 35509
Supreme Court

3. Whether the magistrate’s decision as to divorce and custody is supported by substantial and competent evidence.

Danti v. Danti
S.Ct. No. 34723
Supreme Court

LAND USE

1. Whether the district court erred by affirming the Board’s action amending the repealed 1995 Comprehensive Plan.

Vickers v. Canyon County Board of Commissioners
S.Ct. No. 34809
Supreme Court

2. Did the court err in determining Boundary County Zoning and Subdivision Ordinance 99-06 violates I.C. § 67-6512, pertaining to special use permits, and should be rendered void?

Gardiner v. Boundary County Board of Commissioners
S.Ct. No. 35007
Supreme Court

3. Whether the district court erred in affirming the Board’s order because the Board’s decision was made in violation of the various subsections of I.C. § 67-5279(3).

Noble v. Kootenai County
S.Ct. No. 35201
Supreme Court

POST-CONVICTION RELIEF

1. Did the district court correctly dismiss Lake’s petition for post-conviction relief as untimely?

Lake v. State
S.Ct. No. 32716
Court of Appeals

2. Did the court err when it dismissed Buss’s second petition based on the doctrine of issue preclusion?

Buss v. State
S.Ct. No. 33180
Court of Appeals

3. Did the court err in summarily dismissing Warren’s application for post-conviction relief based upon its failure to recognize the actual terms of the plea agreement?

Warren v. State
S.Ct. No. 34998
Court of Appeals

4. Did the district court err in summarily dismissing Bowcut’s petition for post-conviction relief as untimely filed?

Bowcut v. State
S.Ct. No. 34914
Court of Appeals

5. Whether the district court abused its discretion in summarily dismissing the petition for post-conviction relief as untimely.

Rhoades v. State
S.Ct. No. 35021
Supreme Court

6. Did the court err in dismissing the petition for post-conviction relief as time-barred on the claim that counsel was ineffective in negotiating an unenforceable plea agreement when the claim was filed within one year of when the claim was and reasonably could have been discovered?

Person v. State
S.Ct. No. 34919
Court of Appeals

PROPERTY

1. Did the district court err by ruling the Backmans were not entitled to condemn an easement over and across an existing road on defendants’ property to access the Backman property?

Backman v. Spagon
S.Ct. No. 35151
Supreme Court

SUMMARY JUDGMENT

1. Did the court err in granting summary judgment to Citibank after Carroll challenged its standing as the real party in interest?

Citibank v. Carroll
S.Ct. No. 35053
Supreme Court

WATER LAW CASES

1. Whether the agency record contains substantial evidence that WD170 is required in order to properly administer uses of the water resource as mandated by I.C. § 42-604 and provisions of the Idaho APA.

Thompson Creek Mining v. Idaho Department of Water Resources
S.Ct. No. 35175
Supreme Court

CRIMINAL APPEALS

DUE PROCESS

1. Did the district court’s response to the jury’s question regarding a hung jury violate Foldesi’s right to a fair trial because it misled the jury?

State v. Foldesi
S.Ct. No. 343519
Court of Appeals

2. Whether use of Lamb’s guilty pleas, under the former DUI scheme for enhancement, to enhance the present DUI offense violates the ex post facto clause of the Constitution.

State v. Lamb
S.Ct. No. 34969
Court of Appeals

EVIDENCE

1. Was there substantial, competent evidence presented at trial from which a jury could find beyond a reasonable doubt that Dreier was guilty of the crimes of grand theft and failure to transfer title?

State v. Dreier
S.Ct. No. 32841
Court of Appeals

2. Whether the court erred when it held the child-related communications exception to the psychologist-patient privilege did not apply in this case and so prohibited examination of the victim’s psychologist?

State v. Rossignol
S.Ct. No. 34374
Court of Appeals

3. Did the court err by allowing eight prior bad act witnesses to testify in the state's case in chief?

State v. Parmer
S.Ct. No. 33721
Court of Appeals

4. Did the district court err by denying Wardle's third motion in limine and ruling that the state could introduce evidence of prior sexual misconduct from a case where Wardle was found guilty of nothing more than simple battery?

State v. Wardle
S.Ct. No. 34535
Court of Appeals

5. Did the court abuse its discretion in excluding a note disclosed on the first day of trial in light of Anderson's failure to provide an offer of proof sufficient to demonstrate the note she wanted to introduce was relevant or authentic?

State v. Anderson
S.Ct. No. 35040
Court of Appeals

INSTRUCTIONS

1. Did the court's failure to instruct the jury on the inherent dangers of eyewitness identification constitute fundamental error that prejudiced Alfaro?

State v. Alfara
S.Ct. No. 34719
Court of Appeals

PLEAS

1. Did the court abuse its discretion in denying Stone's motion to withdraw his guilty pleas by applying the incorrect legal standard?

State v. Stone
S.Ct. Nos. 34569/34571
Court of Appeals

2. Was the court correct in denying Olsen's motion to withdraw his guilty plea because the court had no jurisdiction to consider it?

State v. Olsen
S.Ct. No. 34990
Court of Appeals

RESTITUTION

1. Did the court abuse its discretion when it awarded restitution in the amount of \$31,431.57?

State v. Bullard
S.Ct. No. 34792
Court of Appeals

**SEARCH AND SEIZURE –
SUPPRESSION OF EVIDENCE**

1. Did the district court err when it reversed the magistrate's order denying Finnicum's motion to suppress?

State v. Finnicum
S.Ct. No. 34087
Court of Appeals

2. Did the court err in denying Navarez's motion to suppress and in concluding the traffic stop was supported by reasonable and articulable suspicion?

State v. Navarez
S.Ct. No. 34692
Court of Appeals

SENTENCE REVIEW

1. Did the court deny Bosier the right to due process when it revoked probation without notice and without any finding that he had violated any term of probation?

State v. Bosier
S.Ct. No. 34745
Court of Appeals

SUBSTANTIVE LAW

1. Did the court err in determining that luring and luring with sexual motivation are crimes which, if committed in this state, would require sex offender registration and thus trigger the application of the mandatory minimum sentence requirement of I.C. § 19-2520(G)(2)?

State v. Ewell
S.Ct. No. 35093
Court of Appeals

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

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**2009 Idaho State Bar
Examination Applicants
(as of December 12, 2008)**

Listed below are the applicants who have applied to sit for the February 2009 Bar Examination. The Board of Commissioners publishes the names of these applicants for your review, and requests any information of a material nature concerning moral character and fitness of an applicant be brought to the attention of the Board of Commissioners in a signed letter by February 15, 2009. Direct correspondence to: Admissions Director, Idaho State Bar, PO Box 895, Boise, ID, 83701.

Atkinson, L. Craig <i>Albany Law School of Union University</i> Emmett, ID	DeFriez, Brian Matthew <i>Thomas M. Cooley Law School</i> Caldwell, ID	Hudson, Jason Lee <i>University of Colorado School of Law</i> Boise, ID	Mehall, Michael John <i>Loyola Marymount University-Los Angeles</i> Boise, ID	Rodriguez-Kelso, Paulina Elena aka Kelso, Paulina Elena aka Rodriguez, Paulina Elena <i>Seattle University</i> Chubbuck, ID
Aumick, Ashley Jean Ruen <i>University of Idaho</i> Hope, ID	Donoval, James Russell <i>DePaul University</i> Sun Valley, ID	Hunsaker, Kurt Warren <i>University of Nebraska</i> Lincoln, NE	Meyer, Daniel Charles <i>University of San Diego</i> Boise, ID	Schoppe, Andrew Taylor aka Adamson, Andrew <i>University of California- Los Angeles</i> Venice, CA
Benavides, Rebecca Hernandez <i>University of Texas at Austin</i> Boise, ID	Dunteman, Roxana aka Jimenez, Roxana <i>Loyola University- Chicago</i> Coeur d'Alene, ID	Hursh, Benjamin Philip <i>University of Montana</i> Missoula, MT	Millward, Michael George <i>Gonzaga University</i> Gardnerville, NV	Service, Ian Nicholas <i>Thomas M. Cooley Law School</i> Twin Falls, ID
Bennett, Don Hart <i>University of Hawaii/ Richardson School of Law</i> Star, ID	Eiden, Meagan Mackenzie <i>Thomas M. Cooley Law School</i> Boise, ID	Jameson, Regan C. aka Boyd, Regan Christine <i>University of Idaho</i> Missoula, MT	Misseldine, Trevor S. <i>Thomas M. Cooley Law School</i> Nampa, ID	Sheehy, Martha <i>University of Montana</i> Billings, MT
Bohannon, Kristen Lacey <i>New York Law School</i> Houston, TX	Flaig, Jason E. aka Williams, Jason Eugene <i>University of Idaho</i> Pocatello, ID	Jenks, Chad Aaron aka Jenks, Chadwick Aaron <i>Roger Williams University</i> Briston, RI	Murphy, Timothy E. <i>University of Michigan</i> Boise, ID	Smith, Tran J. aka Smith, Tran Jay <i>Yeshiva University/ Benjamin N. Cardozo School of Law</i> Moscow, ID
Bridge, Mary Elizabeth <i>University of Oregon</i> Boise, ID	Follett, Robyn J. aka Jackson, Robyn <i>Brigham Young University</i> Pocatello, ID	Kellogg, Mary Lucy aka Tan, Mary Lucy Estepa <i>Loyola Marymount University-Los Angeles</i> Boise, ID	Neville, Brian Patrick <i>University of Idaho</i> Boise, ID	Soni, Rajat <i>Northwestern University</i> Boise, ID
Buck, Alexander Robert <i>Seattle University</i> Carmel, CA	Giordano, Heidi Lynn <i>Seattle University</i> Carmel, CA	Kingston, Amy J. <i>University of Idaho</i> San Diego, CA	Nixon, Casey Conrad <i>University of South Dakota</i> Sagle, ID	Squire, Robert James <i>University of Akron</i> Medina, OH
Carlquist, Jennifer M. <i>Brigham Young University</i> Provo, UT	Goldmann, James Eric <i>Catholic University of America</i> Hailey, ID	Klaas, Oscar S. <i>University of St. Thomas- Minneapolis</i> Boise, ID	Parry, Jeffrey C. <i>Brigham Young University</i> Boise, ID	Stauffer, Patrick H. <i>University of Florida</i> Oviedo, FL
Chamberlain, Nicholas Isaac <i>State University of New York at Buffalo</i> Eagle, ID	Graham, Theodore William <i>Stanford University</i> Hailey, ID	Litster, Andre N. <i>University of Utah</i> North Salt Lake, UT	Penrod, Aaron Thoreau <i>Duquesne University</i> Sandy, UT	Strong, Katherine Grace <i>Lewis and Clark College</i> Idaho Falls, ID
Cole, Mckinzie Nicole Elizabeth aka Grover, Mckinzie <i>Albany Law School of Union University</i> Moscow, ID	Hammer, Sharon Rosa <i>Southern Illinois University-Carbondale</i> Sun Valley, ID	Lorbeck, John G. <i>Thomas M. Cooley Law School</i> Boise, ID	Peters, Mark T. <i>University of Michigan</i> Boise, ID	Studor, Joshua G. <i>University of Idaho</i> Cour D'Alene, ID
Cooper, Joseph Donald <i>San Joaquin College of Law</i> Fresno, CA	Holter, Dean Sage <i>University of San Francisco</i> Ketchum, ID	McKennett, David Gordon <i>George Mason University</i> Nokesville, VA	Pingel, Todd Durney <i>Washburn University</i> Lawrence, KS	Sue, Elisa L. <i>University of San Diego</i> San Francisco, CA
Cronin, Jeff aka Cronin, Jeffrey Thomas <i>Willamette University</i> Boise, ID	Hammer, Sharon Rosa <i>Southern Illinois University-Carbondale</i> Sun Valley, ID	McKlveen, Lindsay <i>Gonzaga University</i> Boise, ID	Powers, Nicholas James <i>Creighton University</i> Kimberly, ID	Swanson, Scott David <i>Ave Marie School of Law</i> Boise, ID
Davidson, Michael D <i>Gonzaga University</i> Caldwell, ID	Hornbein, Melissa Anne <i>University of California- Hastings</i> Missoula, MT	McNees, W. Scott <i>Rutgers University- Newark</i> Pennington, NJ	Reuter, Theodore W. <i>Willamette University</i> Ontario, OR	Swensen, Casey Hunter <i>Thomas Jefferson School of Law</i> San Diego, CA

Taylor, Nancy Beauregard
 aka Bryant, Nancy Louise
 aka Beauregard-Bryant, Nancy
 aka Beauregard, Nancy Louise
University of the Pacific, McGeorge School of Law
 Eagle, ID

Thompson, Cheryl Wight
 aka Wight, Cheryl Anne
Santa Clara University
 Boise, ID

Trotta, Victoria Claire
Arizona State University
 Scottsdale, AZ

Uebelher, Robert John
University of Utah
 Boise, ID

Wallace, Elizabeth C.
Gonzaga University
 Spokane, WA

Webb, Lenden Franklin
California Western School of Law
 Fresno, CA

Wenninger, Lisa D.
 aka Donnell, Lisa Diane
Roger Williams University
 Hagerman, ID

Williams, Brian James
University of Idaho
 Jerome, ID

Wilson, Jeffrey Scott
Michigan State University
 College of Law
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Woodcock, Kendall Aline
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Young, Ian England
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- ❖ Washington Mutual Bank
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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.

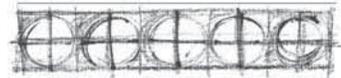
Thanks to an IOLTA grant, Idaho CASA programs are able to **improve the administration of justice** and recruit and train more volunteers. Idaho children who need a voice in court will not have to remain on a waiting list for the critical services they urgently need.

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.

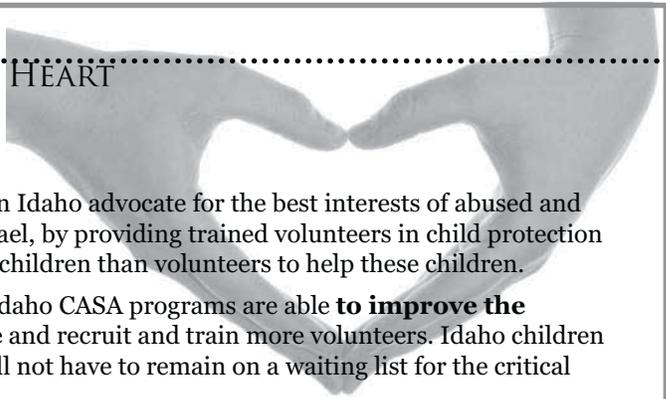
To honor banks that help increase IOLTA funds, the Idaho Law Foundation created the Leadership Bank Program. To find out more about Leadership banks, visit www.idaholawfoundation.org or call Carey Shoufler, ILF Development Director, at (208) 334-4500.

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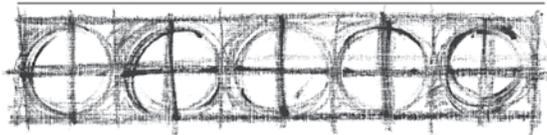
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IVLP SPECIAL THANKS

Since 2006, the plight of immigrant women and children in Idaho who are victims of domestic violence committed by a United States citizen spouse or parent has been eased by volunteer attorneys using the federal "Violence Against Women Act" (VAWA). VAWA allows immigrant victims to obtain immigration relief without their abuser's cooperation or knowledge and thereby eliminates the ability of abusers, traffickers, and perpetrators of sexual assault to control their victims with threats of deportation. The Idaho Volunteer Lawyers Program (IVLP) wishes to give its special thanks to the attorneys who have volunteered their time to help low income victims gain VAWA's protections. IVLP also wishes to thank the firms of **Holland & Hart, LLP** and **Hawley Troxell Ennis & Hawley** who have made VAWA work a firm pro bono project.

Working with Catholic Charities of Idaho to screen possible VAWA clients and match them with appropriate legal assistance, IVLP has placed twenty-six (26) primary cases and twelve (12) additional "derivative" cases for related family members who also need immigration assistance since 2006. In addition seventy two (72) children born in the U.S. whose mothers are victims have been assisted thanks to the following volunteers:

Brian Fischenich, formerly of Holland & Hart, LLP and now serving in the U.S. Air Force was instrumental in starting this program, and in recruiting and mentoring the many volunteers from his former firm.

Maureen Ryan, (now with Meuleman Mollerup, LLP)
Nicole Derden and Jon Shaklee (Labrador Law Offices, PC)
Michael Porter (Labrador Law Offices, PC)
Ryan McFarland (Hawley Troxell Ennis & Hawley LLP)

Brad Goergen (formerly of Holland & Hart, LLP)
Matthew Hicks (Holland & Hart, LLP)
Nicole Snyder (Holland & Hart, LLP)
Pamela Howland (Holland & Hart, LLP)
Kevin Braley (Holland & Hart, LLP)
Anthony Pantera
Mark Geston (Stoel Rives LLP)
Will Wardwell (Hawley Troxell Ennis & Hawley, LLP)
Marty Durand (now with Herzfeld & Piotrowski, LLP)
Nicholas Taylor (Hawley Troxell Ennis & Hawley, LLP)
Beth Smethers (Hawley Troxell Ennis & Hawley, LLP)
Kristin Bjorkman (Hawley Troxell Ennis & Hawley, LLP)
Jessica Lorello (Office the Attorney General)
Stephen Woychick (S.T. Woychick, Chtd.)
Jacqueline Kite-Powell (McKenna Long & Aldridge, LLP)
Taylor Mossman (Comstock & Bush)
Matthew McGee (Moffatt Thomas Barrett Rock & Fields, Chtd.)
Loren Messerly (formerly-Hawley Troxell Ennis & Hawley LLP)

In addition, very special thanks goes to **Sara Bearce** and **Chris Christensen**; law clerks to the Idaho Court of Appeals; for their research, translation service and other support to these volunteer lawyers; to **Monica Schurtman** at the University of Idaho College of Law for the fine work produced by her clinical program; and to **Kathryn Railsback** for her mentoring of volunteers, and for the numerous VAWA matters she has handled on a substantially reduced fee basis.

More volunteers are needed! If you are interested in getting involved in this important work, please contact the Idaho Volunteer Lawyers Program at 334-4510.

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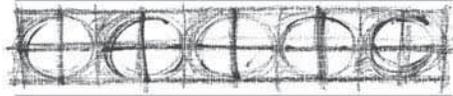
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WITH IDAHO'S LAWYERS

ATTORNEYS AGAINST HUNGER

When: Thursday, February 26, 2009
Time: Cocktail hour beginning at 5:30 p.m.
Dinner catered by A Lively Chef at 6:30 p.m.
Where: The Rose Room, downtown Boise

The Young Lawyers Section encourages you to support our 2009 Attorneys Against Hunger campaign! While enjoying a fun-filled event, our main goal is to help the Idaho Foodbank fulfill their mission that no one in Idaho should go hungry. The Idaho Foodbank serves as a central clearinghouse for donated and purchased food for over 75 Treasure Valley agencies. These agencies serve our community by helping to feed families and individuals who are struggling during these challenging economic times. If you can't attend please consider sending your donation directly to the Idaho Foodbank.

IDAHO LAW FOUNDATION



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Financial Institutions Approved by the Idaho State Bar to Act as Depositories for Attorney Trust Accounts

In accordance with Idaho Bar Commission Rule 302(a)(2)(C) the Idaho State Bar annually publishes a list of financial institutions acting as depositories for trust accounts that have consented to provide notification to Bar Counsel in the event any properly payable instruments is presented against an attorney trust account containing funds insufficient to honor the instrument in full, irrespective of whether the instrument is honored. The following financial institutions have agreed to report this information to the Bar Counsel as of December 1, 2008. Contact Debbie Dudley at (208) 334-4500 for information on being an approved financial institution.

American West Bank bankcda	Idaho Banking Company	Scenic Falls Federal Credit Union
Bank of America	Idaho Central Credit Union	Sterling Savings Bank
Bank of Commerce	Idaho First Bank	Syringa Bank
Bank of Idaho	Idaho Independent Bank	Twin River National Bank
Bank of the Cascades	Idaho Trust National Bank	US Bank
Bank of the West	Inland Northwest Bank	United Bank of Idaho
Banner Bank	Intermountain Community Bank	Washington Federal Savings Bank
Citizens Community Bank	Ireland Bank	Washington Mutual Bank
Clearwater Credit Union	Kamiah Community Credit Union	Washington Trust Bank
D.L. Evans Bank	Key Bank National Association	Wells Fargo Bank
Farmers National Bank	Lewiston State Bank	Zions Bank
First Bank of Idaho	Magic Valley Bank	
First Bank of the Tetons	Merrill Lynch	
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The Continuing Legal Education program of the ILF and ISB wants to acknowledge the many individuals who contributed their time and expertise in 2008. Without the commitment of these individuals these programs would not be possible!

A

Aldridge, Robert
Allred, Keith
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OF INTEREST

—IN MEMORIAM—

WAYNE G. CROOKSTON, JR. 1947 – 2008

Wayne G. Crookston, Jr., 61, of Boise, passed away on Nov. 8, 2008 in Boise with his family by his side from complications of Multiple Sclerosis and a recent stroke.

Wayne was born in Hailey, ID on May 6, 1947 to Dr. Wayne Crookston and Inez Crookston. They later moved to San Francisco. The family moved to Boise where his dad was a surgeon at the VA Hospital. Wayne graduated from Boise High School in 1965 and received his undergraduate degree at the University of Idaho in 1969 where he was a member of the Sigma Nu fraternity. He attended the U of I College of Law and graduated with a Juris Doctorate degree in 1972. Wayne was always a true Vandal!

Wayne married Connie Coleman in 1975 and they had two children, Trey Crookston (Wayne Crookston III) in 1979 and Ashlee Crookston in 1982.

Wayne practiced law in Meridian including service as Meridian City Attorney for many years. He received recognitions for his pro bono legal work. Wayne was actively involved in the Chamber of Commerce, Optimist, and Rotary organizations of Meridian. In much of his free time Wayne could be found on the golf course with his family and friends.

Wayne was preceded in death by his father Dr. Wayne Crookston and is survived by his children, Trey and Ashlee, his mother Inez Crookston, and sisters Pamela Crookston and Laurie Crookston.

WILLIAM "BILL" F. GIGRAY, JR. 1916-2008

William (Bill) F. Gigray, Jr. passed away on Oct. 30, 2008 of complications resulting from a stroke. Bill was born on March 6, 1916 in Caldwell, ID to Florence and Dr. William (Will) F. Gigray. Bill was raised in Caldwell and graduated from Caldwell High School with honors in 1934.

He then attended the University of Idaho. He was active in campus activities was a member of the Beta Theta Pi fraternity and served as its President in 1938. He was in Intercollegiate Knights, was an outstanding member of the collegiate golf team and was on the collegiate fencing team and he served as Homecoming Chairman in 1938 for the dedication of Neal Stadium. Bill attended the University of Idaho law school and received his degree in 1940.

Following law school he served as a special agent of the FBI under J. Edgar Hoover. During his service with the FBI he married Margaret [Puggy] Elizabeth King on Jan. 17,

1941 at the Second Presbyterian Church in Indianapolis, IN. He continued his service in the FBI in Indianapolis, Fort Wayne, Houston, TX and then Los Angeles until 1943 when he resigned to join the United States Navy as a commissioned officer.

Bill served as a communications officer (Lt J. G.) in the Pacific theater of World War II on the Essex class carrier the Ticonderoga (CV14). Bill was honorably discharged from the Navy in 1946 when he returned to Caldwell with his wife Margaret to reside and practice law.

He and Margaret had two sons William (Bill) F. Gigray, III and Sherman C. Gigray. Margaret died in 1999 and Bill later met Ann Berry and they were married in 2002.

Bill was very active in the community, his church and in the practice of law. He was member of the Caldwell Rotary Club and served as its president, he received the Night Commander of the Court of Honor Scottish Right 33rd degree and was a member of the Elks's Club and Hillcrest Country Club. He served as President of the Caldwell Community Foundation and was a member of Boone Memorial Presbyterian Church where he taught Sunday school, served as an elder and sang in the praise band.

In 1946, Bill started his practice of law in Caldwell as a solo practitioner. He soon formed a partnership with Peter J. Boyd. They were later joined by Donald Downen. Peter left the firm in 1967. Don remained Bill's partner until Don's retirement in 2002. Bill's firm was joined by Gary Morgan in late 1960's and later by his son Bill III in 1973. Bill's firm merged with the long time Caldwell firm of Dean Miller and Gerald Weston and Joe Miller in 1977. Other attorneys who later practiced in Bill's firm include Scott Fouser, R. Scott Pasley, Pat Cole and Honorable 4th District Judge Ronald Wilper. Bill served as Caldwell City Attorney during Jason Smith's term as mayor in the mid 1950's and during Coley Smith's term in the mid 1960s. He also served as city attorney for Wilder from 1947 to 1977 was attorney for the Wilder Housing Authority and the Wilder Rural Fire Protection District, Caldwell Memorial Hospital, Middleton School District, Nampa Highway District No. 1 and Albertson College of Idaho.

He was a member of the American College of Probate Counsel, Fellow and Life member of the American Bar Association and served as the president of the 3rd District Bar Association and was on the Idaho State Bar Professional Conduct Board. Bill was awarded the Idaho State Bar Professionalism award in 1994.

The practice of law was Bill's first love of which he was an honorable member from July

of 1940 until his death. Bill was a family man, an avid golfer, very accomplished dancer, played the drums and last play in the College of Idaho Alumni Band. He loved music, cards and games in general.

He is survived by his wife Ann, his two sons Bill and Sherman, seven grand-children, and six great-grandchildren. He was preceded in death by his brother-in-law Sherman C. King in WWII in 1945, his father Will in 1951, his mother Florence in 1968, his wife Margaret in 1999 and his daughter-in-law Barbara in 2007.

RONALD GARY CARTER 1932-2008

Ronald Gary Carter died on Friday, November 7, 2008. He was born on October 24, 1932; in Salt Lake City, Utah, and moved soon after to Twin Falls, Idaho. He graduated from BYU with a Bachelor of Arts degree.

Ron married LaRae Dunn. He attended law school at George Washington University in Washington D.C., and the University of Utah. He practiced law for 25 years in Boise, Idaho; concluding his legal career with seven years in research and writing for Superior Court judges in Los Angeles County, CA. He also served one term as a state senator in Idaho.

He was preceded in death by his son John Christian Carter. He is survived by his wife, LaRae Dunn Carter and children; Ronald Gary, Melvin Eric, Charles Thomas, Jeffrey William, Kristen, Karen, Shannon and Joseph Benjamin Carter.

—ON THE MOVE—

Edwin (Win) V. Apel, Jr. has become the Senior Vice-President, Secretary, and General Counsel of Weeks Marine, Inc. It is the largest marine contractor in North America, working on the East and Gulf Coasts, the Caribbean, Hawaii, and the western Pacific. Based at their headquarters in Cranford, NJ, Mr. Apel will be responsible for legal, risk management, and safety. He received a B.A. in philosophy from Yale University and a J.D. from the University of Idaho College of Law. He then clerked for the Hon. Ray McNichols, Chief Judge, U.S. District Court for the District of Idaho, before joining the Boise firm of Hawley Troxell Ennis & Hawley. He then joined the legal department of Morrison Knudsen, and most recently serving as VP-Risk Management at Washington Group International (formerly Morrison Knudsen). Mr. Apel can be reached at (908) 272-4010.

Gabriel Hamilton has joined the law firm of Hawley Troxell Ennis & Hawley LLP. He will assist clients in matters of finance and

corporate law. Mr. Hamilton obtained his undergraduate degree from the University of Massachusetts Amherst magna cum laude, and his law degree from the University of Texas School of Law with high honors and Order of the Coif. While in law school, he was an associate editor of the *Texas Law Review* and co-editor of the 11th edition of the *Texas Law Review's Manual on Usage and Style*. He is also a co-author of *Consent for Healthcare under Idaho Law: A Primer*. Mr. Hamilton can be reached at (208) 344-6000.

Ramona Johns has joined Hawley Troxell Ennis & Hawley LLP. She will offer services to clients in the areas of real estate and corporate law. Ms. Johns obtained her bachelor's degree in economics from the University of New Mexico, summa cum laude, and received her law degree from Vanderbilt University Law School. She has served as a volunteer in a variety of programs, including Volunteer Income Tax Assistance, which helps low-income individuals prepare their taxes. She has taught classes through Street Law, which helps homeless individuals understand their legal rights. Ms. Johns can be reached at (208) 344-6000.

Rand L. Peebles has joined POWER Engineers, Inc., an Idaho Corporation, as in-house general counsel. Mr. Peebles graduated from the University of San Francisco in 1973. He practiced law in San Francisco until moving to Ketchum in 1980 where he practiced with the firm of Lawson & Peebles. In 1992, Lawson & Peebles merged with Hawley Troxell Ennis & Hawley, where he became a partner until his move to POWER. Mr. Peebles can be reached at (208) 788-3456 or at randpeebles@powereng.com.

Beth Smethers has joined Hawley Troxell Ennis & Hawley LLP and will offer services to clients in the areas of commercial litigation, mediations and arbitrations. Ms. Smethers returns to her hometown after attending the University of Idaho, where she obtained her undergraduate degree in accounting, summa cum laude; a Master's of Accountancy degree, and her law degree, cum laude, graduating in the top 10 percent of her class. While in law school, she was an editor of the University of Idaho Law Review. Before joining Hawley Troxell, she served as law clerk for Judge Thomas G. Nelson, 9th U.S. Circuit Court of Appeals. She is also involved in a program to assist refugees with documentation and guardianship issues. Ms. Smethers can be reached at (208) 344-6000.

Nathan Starnes has joined the firm Powers Thomson, P.C. as an associate. Mr.

Starnes' practice focuses primarily on litigation in the areas of general insurance defense, professional malpractice, construction/contract disputes, and products liability. He comes to Powers Thomson, P.C. with prior experience working as an associate with Moffatt Thomas Barrett Rock & Fields, Chtd. in Boise. He also served as a law clerk to Idaho Fourth Judicial District Judge Darla S. Williamson. He holds a Bachelor of Science degree in Sociology, with a Business Management minor, from Brigham Young University, and a J.D. degree, cum laude, from Gonzaga University School of Law. Mr. Starnes can be reached at (208) 577-5100.

—RECOGNITION—

Holland & Hart Boise office partner **Walter Bithell** is a finalist in this year's Lawdragon 500 Leading Lawyers in America. Mr. Bithell has been included as a finalist in this annual publication since 2006. As a trial lawyer in Holland & Hart's Boise office with more than 35 years of experience, his practice emphasizes complex business and commercial litigation. He is a fellow of the American College of Trial Lawyers, past president of the Idaho Trial Lawyers Association, and past president of the Idaho State Bar. Mr. Bithell can be reached at (208) 342-5000.

The Idaho State Bar has appointed **William Myers** of Holland & Hart as trustee to the Rocky Mountain Mineral Law Foundation. The foundation is an educational organization dedicated to providing scholarly research of the law and issues affecting domestic and international natural resources. It is governed by a board of trustees with representatives from across the Mountain West. Mr. Myers has extensive experience in natural resources and public land law. He has served as vice chairman of the American Bar Association Committee on Public Lands under the section of environment, energy and resources. His experience includes serving as solicitor of the U.S. Department of the Interior, deputy general counsel for programs at the U.S. Department of Energy, and assistant to the attorney general in the U.S. Department of Justice. He also chaired the Federal Lands Task Force Working Group, chartered by the Idaho State Board of Land Commissioners to promote improved management of federal lands in Idaho. Mr. Myers can be reached at (208) 342-5000.

The law firm of Hall, Farley, Oberrecht & Blanton has announced that **Richard E. Hall, Donald J. Farley, Phillip S. Oberrecht, J. Kevin West** and **Keely E. Duke** have been selected by their peers to be included in the 2009 Edition of *The Best Lawyers in America*. Inclusion in *Best Lawyers* is based on a peer

review survey of leading attorneys throughout the country who vote on the legal abilities of other lawyers in their specialties. They can be reached at (208) 395-8500.

Robert J. McCarthy, an Idaho Bar member since 1989, has been recognized by the Oklahoma Bar Association with its 2008 "Courageous Lawyer Award." The Award is given "to an OBA member who has courageously performed in a manner befitting the highest ideals of our profession." Mr. McCarthy gave testimony last year in the long-running Cobell v. Kempthorne class-action suit that sought an accounting of Indian trust funds. As a field solicitor for the Department of the Interior, Mr. McCarthy testified that he had a duty of loyalty to some 300,000 Indians whose lands and income were held by the government. Mr. McCarthy testified that he had disclosed gross mismanagement to the secretary of the interior and to the inspector general, and that Agency audits eventually verified his claims. He testified that in his opinion, "funds collection was on the honor system." Mr. McCarthy identified a secret agency document that characterized its own accounting system as "nothing more than a database of misinformation." Mr. McCarthy testified that he was locked out of his office and threatened with dismissal just one day after he notified the department that he had received a subpoena to testify. Mr. McCarthy was recently named as General Counsel to the United States Section of the International Boundary and Water Commission, in El Paso, Texas.

—ERRORS AND OMISSIONS—

In the November/December 2008 issue of *The Advocate*, the short biographical information regarding Judge Larry M. Boyle (page 21) contains the following error: "During this time, he served as Commissioner and President of the Idaho State Bar." Please note for the record that Judge Boyle did not serve as a commissioner or president of the Idaho State Bar, but as the President of the 7th District Bar Association. The Advocate regrets the error.

In the November/December 2008 issue of *The Advocate*, the short biographical information regarding Judge Frederick Taylor (pgs 15-16) contains the following error: Senator Herman Walker. Please note the Senator's last name is Welker. Herman Welker received his law degree from the University of Idaho College of Law. He was elected to the United States Senate in 1952. In 1956, he ran for a second term, but was defeated by Frank Church.

On the cover of the November/December 2008 issue of *The Advocate* was a picture of Carl Burke and Frank Church riding horses.

The photo was from the private collection of Mr. Burke. The photographer, David R. Frazier, was identified after publication. The photo was taken on a fishing trip in the White Clouds. Mr. Frazier's photos have appeared in Time, Newsweek, U.S. News & World Report, and the New York Times. You can view his photo library at: <http://www.drphoto.com/about/>

In the November/December 2008 issue of *The Advocate* the caption under the picture at the bottom of page 33, on the left-hand side incorrectly identified someone in the picture. Brian Elkins, a good friend of David Nevin's was not identified as being the person to the left of David's wife Kathie.

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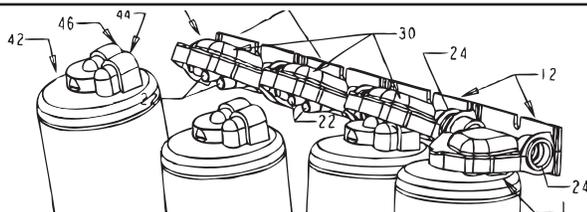
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*There is no such thing as good writing.
There is only good rewriting.*
Justice Brandeis

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JANUARY 2009

January 22, 2009

Top Ten Tips for Representing Start up and Emerging Growth Companies

Sponsored by the Young Lawyers Section

Law Center Boise

8:30 - 9:30 a.m.

1.0 CLE Credit

January 28, 2009

Annual Environmental Law Update

Sponsored by the Environment and Natural Resources Section

Hoff Building, Boise

8:30 a.m. - 12:00 p.m.

FEBRUARY 2009

February 13, 2009

Child Custody in Idaho

Sponsored by the Family Law Section

Doubletree Riverside Hotel, Boise

8:30 a.m. - 4:00 p.m. (Tentative)

FEBRUARY 2009

(CONTINUED)

February 19 – 21, 2009

Annual Bankruptcy Seminar

Sponsored by the Commercial Law and Bankruptcy Section

Sun Valley Resort

Room Reservations Call: 1-800-786-8259

February 27, 2009

Real Estate Transactions in a Down Market

Sponsored by the Real Property Section

Grove Hotel, Boise

MARCH 2009

March 6, 2009

Workers Compensation Annual Update

Sponsored by the Workers Compensation Section

Sun Valley Resort

Room Reservations Call: 1-800-786-8259

March 6 – 7, 2009

Trial Skills Academy

Sponsored by the Litigation Section

Federal Courthouse, Boise

COMING EVENTS

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

JANUARY

- 1 **New Year's Day, Law Center Closed**
- 2 **Law Center Closed**
- 5 *The Advocate* Deadline
- 16 Idaho State Bar Board of Commissioners
- 19 **Martin Luther King, Jr. Day, Law Center Closed**
- 21 *The Advocate* Editorial Advisory Board
- 23 Idaho Law Foundation Board of Directors

FEBRUARY

- 1 *The Advocate* Deadline
- 11 - 17 **ABA NCBP Midyear Meeting, Boston**
- 16 **President's Day, Law Center Closed**
- 18 *The Advocate* Editorial Advisory Board
- 20 Idaho State Bar Board of Commissioners
- 23 - 25 Idaho State Bar Exam, Boise Center on the Grove

MARCH

- 1 *The Advocate* Deadline
- 12 -14 **Bar Leadership Institute - Chicago**
- 18 *The Advocate* Editorial Advisory Board
- 25-28 **Western States Bar Conference, Turtle Bay, Hawaii**

APRIL

- 1 *The Advocate* Deadline
- 3 Idaho State Bar Board of Commissioners, Idaho Falls
- 9 February Bar Exam Results Released
- 15 *The Advocate* Editorial Advisory Board
- 17 Idaho Law Foundation Board of Directors Meeting

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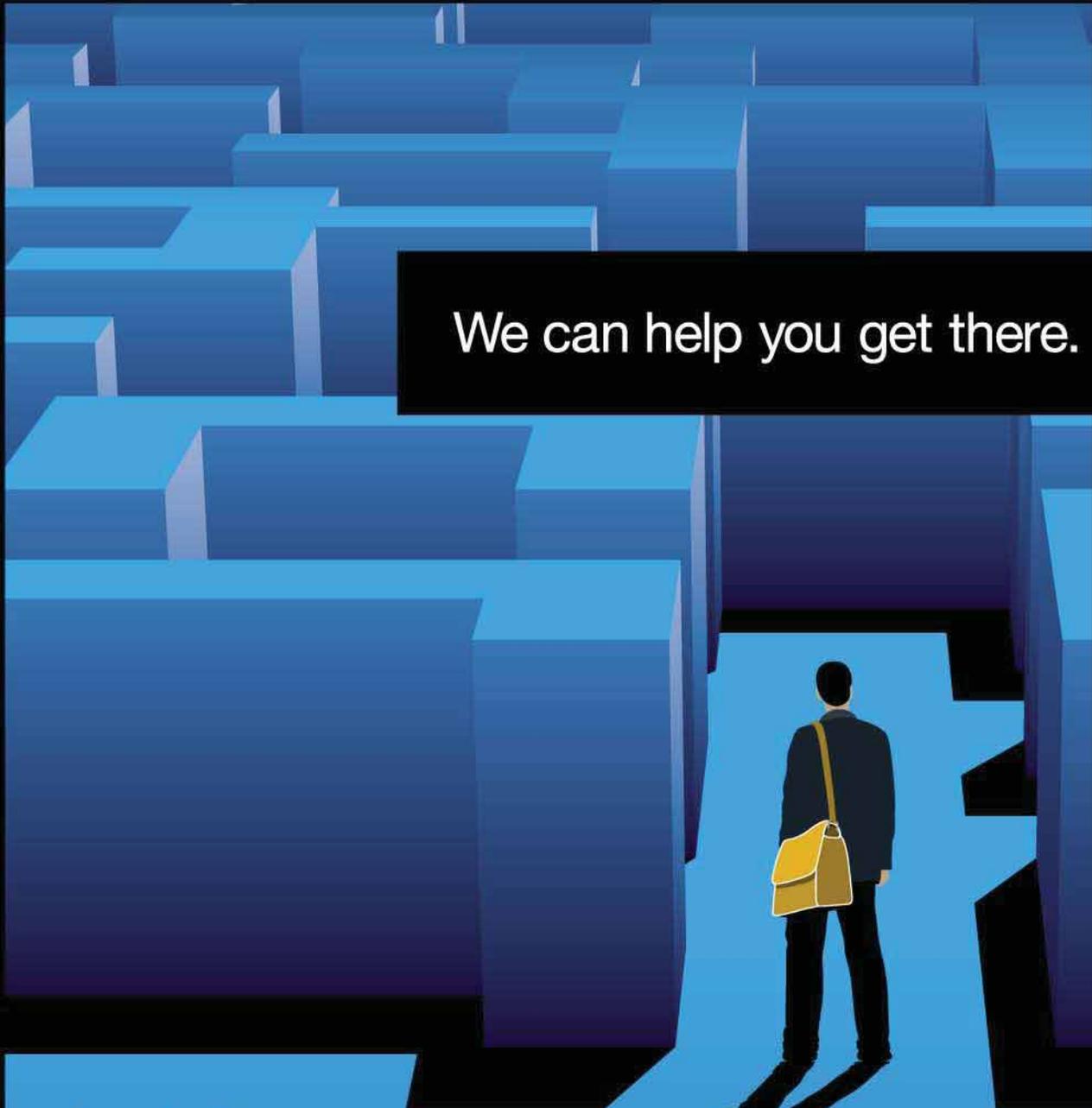
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