



The **Advocate**

Official Publication of the Idaho State Bar

Volume 52, No. 3/4

March/April 2009

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by the Young Lawyers Section



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The Advocate

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2009 Licensing Receipts and Stickers

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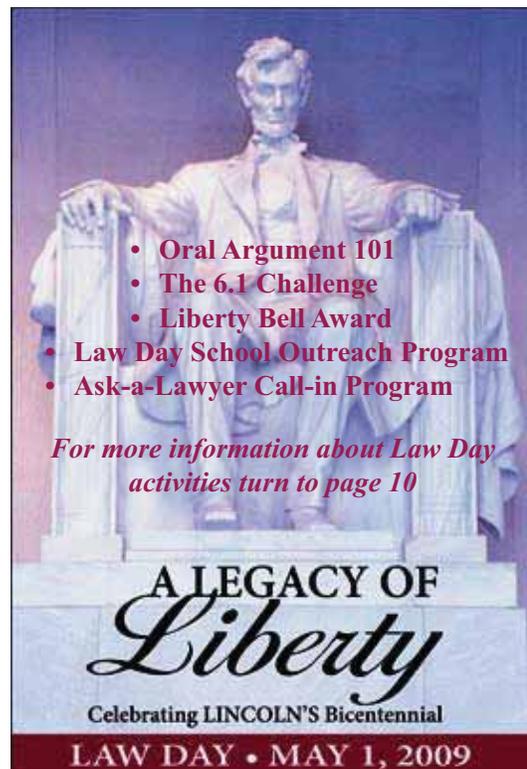
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ON THE COVER—

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SECTION SPONSOR

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HOW CAN A LAWYER DEFEND A PERSON HE KNOWS IS GUILTY?

Dwight E. Baker



How many times have we been asked that or a similar question, usually by good friends in social settings? Implicit in the question is the suggestion that we as lawyers are getting paid for services which are at best unnecessary, and at worst fraudulent or misleading. The question reflects a lack of understanding of the role of our constitution in creating the basis of our criminal procedure and the rule of law, and a further lack of understanding of the critical role we as lawyers serve in upholding and protecting the United States Constitution and in implementing the rule of law. Perhaps even more basic is the lack of an appreciation of what the “rule of law” means, as opposed to the subjective and emotional alternative. We lawyers should take every opportunity offered by our friends and neighbors to explain that the only way we can uphold and protect the Constitution is through the defense of those who are in need of those protections we hold so dearly.

We must point out that while the rights we enjoy under the Constitution are often discussed in philosophical terms, those rights become critical only when an individual is threatened by loss or compromise of those rights. We as lawyers recognize the leading constitutional cases often involve conduct which is generally highly offensive and usually involve clear violations of the law, and we should point out in fairness that it is not often law abiding citizens who need constitutional protection. While we must concede that often the conduct of the individuals involved is reprehensible, it is those cases which ultimately test, and define, our constitutional liberties. We must stress the inherent assumption upon which our constitutional protections are based, which is the primacy of the rule of law, as opposed to the personal judgments of the victim, law enforcement personnel, and the public.

We must point out that when an accused is incarcerated with bail he cannot meet, there is often a single conduit between him and constitutionally driven due process to

which all of us are entitled. That conduit is the defense lawyer, whose job is commonly misunderstood and often thankless. While we all appreciate the role of Atticus Finch in *To Kill a Mockingbird*, most of us also understand the harsh realities of the plight of the criminally accused, who are more often than not victims of dysfunctional families, ineffective education, poverty, or substance abuse. It is the criminal defense lawyer who is the first line of defense against erosion of our Constitution, and the Bar must be prepared to spring to his defense when the need arises.

We must point out that most often the only articulate voice the accused has is that of his attorney, and that there is only one individual on his side who understands his constitutional rights and who is therefore able to protect him from an improper conviction or disposition by the judicial system. We must point out that the primary vehicle for the protection of the accused under the rule of law is his attorney. We must point out that defense attorneys are not judges, nor are they expected to be judges. It is their responsibility to implement the constitutional protections of the individual from improper governmental conduct, which ultimately is one of the great protections against the potential tyranny of an over-reaching government.

We must also point out the role of the prosecuting attorney, and particularly his obligation to disclose all evidence gathered during the state's investigation, both incriminating and exculpatory, to create the foundation for a fair trial. The prosecutor's obligation is not and cannot be easy, particularly when the obligation runs counter to the emotions of family members distraught about injury or loss of a loved one, or when assisting aggressive law enforcement personnel in the execution of their duties. The louder the hue and cry, and more strident the demand for retribution, the greater the responsibility of the lawyers on both sides to uphold and defend our Constitution.

Lastly, but importantly, we must be prepared to explain the role of our courts, both trial and appellate, in applying and upholding the rule of law. As students of the law, we are often impressed when imaginative and well prepared defense attorneys are able to persuade a magistrate to refuse to bind an

accused over for trial, or to convince a trial court to suppress evidence, or to obtain a reversal of a conviction, especially when the an appellate decision is cogent and clearly understood. We lawyers must not remain silent in response to the popular press's second guessing of judge's decisions at all levels; we as lawyers must point out that the great majority of the criticism is based on emotional appeals and not the application of the rule of law.

Law Day approaches. Across the state local bar associations, either alone or in conjunction with other civic groups or schools, are planning and preparing presentations. Emphasis on the “rule of law” underlies virtually all of those presentations, but the idea is so grandiose and so poorly understood the emphasis must be made by specific examples. The criminal law captures the public's imagination more so than any other area of the law, and provides a great vehicle to explain to the students and to the public not only the importance of the Constitution, but the critical role we lawyers play in defending and protecting the Constitution.

The public has heard of the principles of presumption of innocence, burden of proof, habeas corpus, freedom of self-incrimination (the right to remain silent), cross-examination, confrontation of witnesses, and the freedom from unlawful search and seizure. What better opportunity exists to explain and re-enforce these ideas than on Law Day?

The next opportunity we have to respond to—How can a lawyer defend a person he knows is guilty?—is the next opportunity for us to educate and inform others that we lawyers and judges are defending and protecting the Constitution through the defense of individuals in our society. We should not hesitate in declaring that we are proud to have the opportunity to do so.

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

Sherman Bellwood
LECTURES

Presents

Chief Justice of the United States John G. Roberts, Jr.



Friday, March 13, 2009 at 4 p.m.

Student Union Building Ballroom – University of Idaho • Moscow

709 Deakin Avenue • Lecture is free and open to the public. • Seating is on a first-come, first-served basis; early arrival encouraged.

Overflow seating is available in the University's Borah Theater, also in the Student Union Building.

This year, the College celebrates 100 years of educating lawyers for careers in the legal profession, business and public service. The College is proud to host the Chief Justice of the United States as its featured speaker for the Bellwood Lecture. Chief Justice Roberts received his J.D. from Harvard Law School in 1979. He served as a law clerk for Judge Henry J. Friendly of the U.S. Court of Appeals for the Second Circuit from 1979-80, and during the 1980 term he served as a law clerk for then-Associate Justice William H. Rehnquist of the U.S. Supreme Court. He served as special assistant to the Attorney General in the U.S. Department of Justice from 1981-82; associate counsel to President Ronald Reagan in the White House Counsel's Office from 1982-86; and principal deputy solicitor general in the U.S. Department of Justice from 1989-93. He practiced law in Washington, D.C. from 1986-89 and from 1993-2003. He was appointed to the United States Court of Appeals for the District of Columbia Circuit in 2003. President George W. Bush nominated him as Chief Justice of the United States, and he took his seat on September 29, 2005.

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NEWSBRIEFS

NOMINATIONS FOR 2009 ISB COMMISSIONER DUE APRIL 7, 2009

Attorneys in the 6th and 7th districts will be electing a new representative to the Idaho State Bar Board of Commissioners this spring. The new commissioner will replace Dwight Baker of Blackfoot.

Pursuant to Idaho Bar Commission Rule 900, the new commissioner representing the 6th and 7th districts must reside or maintain an office in the 6th district.

Commissioners of the Idaho State Bar, the elected governing body of the Bar, serve for three years, beginning on the last day of the ISB annual meeting following their elections. The Board of Commissioners is charged with regulating the legal profession in Idaho, which includes the testing, admission, and licensing of attorneys, overseeing disciplinary functions and administering mandatory continuing legal education requirements.

Nominations must be in writing and signed by at least five members of the ISB in good standing, and eligible to vote in the districts. The executive director must receive nominations no later than the close of business on April 7, 2009. The nominating petition is available on the Idaho State Bar website or a petition may be obtained by calling the office of the executive director at (208) 334-4500.

Ballots will be mailed to all members eligible to vote in the 6th and 7th districts on April 20, 2009. All ballots properly cast and returned to the executive director will be counted by a board of canvassers at the close of business on May 5, 2009.

SUBMIT NOMINATIONS FOR 2009 AWARD RECIPIENTS

Each year, the commissioners select individuals to receive awards for their commitment and service to the profession and the public. The awards acknowledge those who have given of themselves to improve the legal profession, provide pro bono legal services, and exemplify the highest standards of professionalism. A description of the awards and the process to nominate someone for an award is on page 11. We encourage you to nominate individuals you feel deserve recognition for their efforts and contributions. Please submit your nominations by March 26, 2009.

DISCIPLINE

NOTICE TO TOM HALE OF CLIENT ASSISTANCE FUND CLAIM

Pursuant to *Idaho Bar Commission Rule* 614(a), the Idaho State Bar hereby gives notice to Tom Hale that a Client Assistance Fund claim has been filed against him by former clients, John and Denise Wiechec in the amount of \$750. Please be advised that service of this claim is deemed complete fourteen (14) days after the publication of this issue of *The Advocate*.



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EXECUTIVE DIRECTOR'S REPORT

2008 – THE IDAHO LAW FOUNDATION YEAR IN REVIEW

Diane K. Minnich



The Idaho Law Foundation provides programs and activities that improve the public's access to and understanding of the legal system and enhances the competency of

practicing lawyers and judges through the Foundation's ongoing educational programs. The financial support and continuing work of volunteers help the Foundation meet its financial and educational goals. The following are highlights of the past year's achievements.

LAW RELATED EDUCATION

Law Related Education (LRE) is a civic learning program, primarily a for K-12 student that empowers young people to become effective, knowledgeable citizens who understand their rights and responsibilities as citizens. The LRE program staff and volunteers coordinate an extensive teacher outreach and training program, the High School Mock Trial Competition, Lawyers in the Classroom, and assist with Law Day activities.

In 2008, nearly 200 educators participated in training programs offered by the LRE program, 32 teams from 20 schools participated in the High School Mock Trial Competitions and 46 teaching teams of lawyers and classroom teachers worked together to teach over 2,700 students about law, government and citizenship.

IDAHO VOLUNTEER LAWYERS PROGRAM (IVLP)

IVLP continues to provide legal services to low-income individuals, families and groups. Through case representation by volunteer attorneys, brief services, advice and consultation, clinics and workshops, IVLP served nearly 1,000 individuals last year. The

program works closely with Idaho Legal Aid Services, and the statewide Court Assistance Offices to assist those with legal needs and limited resources.

IVLP continues to expand initiatives to create more opportunities for attorneys to provide pro bono services. Included are recruiting law firm liaisons, additional workshops for low-income individuals, and the pro bono challenge for law firms in the 4th District. Soundstart, a program intended to give young parents, and particularly single mothers, the information and services they need to establish financial security and stable legal structures in their families.

IDAHO VOLUNTEER LAWYERS PROGRAM		
	2007	2008
Calls received	3,887	4,354
Cases referred to volunteer attorneys	288	267
Donated hours	10,637	13,862
Donated services value	\$1,507,644	\$2,079,300
Assisted by legal resource line	433	606

INTEREST ON LAWYERS TRUST ACCOUNTS (IOLTA)

Over the past 23 years, the IOLTA program has granted over \$5 million to law related programs and services throughout Idaho. The organizations funded in 2008 were: Idaho Legal Aid Services, Idaho Volunteer Lawyers Program, ILF Law Related Education, ILF Legal Resource Line, Idaho CASA Volunteer Recruitment, 5th District CASA Program, Idaho YMCA Youth Government, Idaho Women's Commission Legal Resource Booklet, Catholic Charities Immigration Legal Assistance, The Advocates Immigration Domestic Violence Support, BSU

Foundation Idaho Innocence Project, and law school scholarships. Funds granted for 2008 increased 50% over 2007 grant funds. The Idaho Law Foundation and the Idaho State Bar Sections offer legal education programs throughout the state. In 2008, the Foundation offered 24 live seminars; ISB Sections offered 32 live seminars.

CONTINUING LEGAL EDUCATION

ISB/ILF CONTINUING LEGAL EDUCATION		
	2007	2008
Live Seminars	47	56
Total attendance at live programs	1,847	2,199
Tape/DVD Rentals	563	859
Online Transactions	427	610

FUND DEVELOPMENT

DONATIONS		
	2007	2008
General Fund/IVLP	\$44,926	\$47,437
Endowment Fund	\$18,395	\$3,100
Total	\$63,321	\$51,906

The Idaho Law Foundation is indebted to the attorneys that volunteer their services and donate their resources to ILF programs and activities. The mission and goals of the organization are only realized with the help and support of our members. Thank You.

2009 ISB AWARD NOMINATIONS

If you would like to nominate a member of the Bar for their commitment and service to the profession and the public, please follow the guidelines for 2009 Award Nominations on page 11.

Idaho State Bar 2009 Professional Award Nominations

The Idaho State Bar Board of Commissioners is now soliciting nominations for the 2009 professional awards. These awards were initiated by the Board of Commissioners to highlight members who demonstrate exemplary leadership, direction and commitment in their profession.

- **Distinguished Lawyer** - This award is given to an attorney (or attorneys) each year who has distinguished the profession through exemplary conduct and many years of dedicated service to the profession and to Idaho citizens.
- **Professionalism Awards** - The awards are given to at least one attorney in each of Idaho's seven judicial districts who has engaged in extraordinary activity in his or her community, in the state, or in the profession, which reflects the highest standards of professionalism.
- **Pro Bono Awards** - Pro bono awards are presented to the person(s) from each of the judicial districts that have donated extraordinary time and effort to help clients who are unable to pay for services.
- **Service Awards** - Service awards are given each year to lawyers and non-lawyers for exemplary service to the Bar and/or Idaho Law Foundation.

Recipients of the awards will be announced in May. The Distinguished Lawyer and service awards will be presented at the annual conference. Professionalism and pro bono awards will be presented during each district's annual resolutions meeting in the fall.

Award nominations should include the following:

- Name of the award
- Name, address, phone, and email of the person(s) you are nominating
- A short description of the nominee's activity in your community or in the state, which you believe brings credit to the legal profession and qualifies him or her for the award you have indicated
- Any supporting documents or letters you want included with the nomination
- Your name, along with your address, phone, and email

You can nominate a person for more than one award.

The nomination deadline is March 26, 2009. Submit nominations to: *Executive Director, Idaho State Bar, PO Box 895, Boise ID 83701, fax (208) 334-4515, dminnich@isbidaho.gov.*



Idaho Senate Majority Leader Bart Davis and the Hon. Richard Greenwood at Judge Greenwood's investiture ceremony.



Fourth District Administrative Judge Darla Williams talks with Judge Greenwood before his investiture.

A LEGACY OF
Liberty
Celebrating LINCOLN'S Bicentennial
LAW DAY • MAY 1, 2009

**FOURTH JUDICIAL DISTRICT
LAW DAY – MAY 1, 2009**

A Legacy of Liberty – Celebrating Lincoln's Bicentennial

Established in 1957 by the American Bar Association, Law Day is a national day set aside to celebrate our legal system. Law Day programs are conducted across the country, designed to help people understand how the rule of law keeps us free and how our legal system strives to achieve justice. Please join the 4th District Bar Association celebrate Law Day as a participant or volunteer. **Questions?** Contact Heather McCarthy at hmccarthy@adaweb.net

- **Oral Argument 101:** On May 1, 2009, 4th District's Timberline High School will host the Idaho Court of Appeals during oral argument. The school's senior class will not only observe this oral argument, but also will study summaries of the parties' briefs in their government classes.
- **The 6.1 Challenge:** Modeled after Idaho Rule of Professional Conduct 6.1 concerning the number of pro bono hours an attorney should handle during a year, this year's 6.1 Challenge represents a friendly competition to recognize and encourage pro bono and public service from law offices within the Fourth District. The winner of the Pro Bono Award will be announced at the Law Day Reception, held on May 1, 2009 at the Rose Room in downtown Boise.
- **Liberty Bell Award:** Every year, the Liberty Bell Award acknowledges outstanding community service by an individual in the local community. The 2009 Liberty Bell Award recipient will be named at the Law Day Reception, held on May 1, 2009 at the Rose Room in downtown Boise.
- **Law Day School Outreach Program:** Conducted in the classrooms during April and May, attorneys are matched with teachers in elementary through high school in Fourth District schools. The attorneys speak in classes about legal careers, law-related topics, and this year's Law Day Theme: A Legacy of Liberty – Celebrating Lincoln's Bicentennial.
- **Ask-a-Lawyer Call-in Program:** This May 1, 2009 program is very popular in the community with over 500 callers during last year's program. The general public can call in on at least three phone lines to speak to an attorney about a variety of legal matters. Attorneys and callers use only first names to remain anonymous. Calls are limited to 15 minutes.
- **The Law Day Reception:** will cap off 2009's Law Day activities. This year, the Reception will take place on May 1, 2009 at the Rose Room in downtown Boise. It will be from 4-6 p.m.
- **President Lincoln and Idaho - CLE:** - Presented by David Leroy, at the Ada County Courthouse, from 12:30 - 1:00 p.m. Sponsored by the Idaho Law Foundation .5 CLE credit.

LAW DAY EVENTS IN ALL JUDICIAL DISTRICTS
Check with your local district bar association president
for Law Day activities in your area.

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WELCOME FROM THE YOUNG LAWYERS SECTION

Kahle Becker
Attorney at Law

The Young Lawyers Section is proud to sponsor the March 2009 issue of *The Advocate*. We have chosen to publish articles across a wide variety of subject areas which reflect the broad spectrum of practice and interests of our members.

The Young Lawyers Section is one of the most active sections of the Bar. We are also one of the few which has members representing nearly every specialty as well as members in government, private practice, clerkships, public interest, and even a few solo practitioners. We are perhaps best known for hosting Attorneys against Hunger, a semi formal charity dinner and auction, which has raised tens of thousands of dollars for the Idaho Food Bank. What you may not know is that we host semi-annual receptions in May and September for newly admitted members of the Idaho Bar, present a CLE series each spring, speak at BSU's Pre Law Society meetings, and participate in numerous charitable and service projects. While our membership is limited to attorneys under the age of 37 or those who have been practicing in Idaho for 3 years or less, our events and CLEs are open to all members of the Bar. If you haven't had the chance to check one out, I would encourage you to do so.

In this issue, Brian Wonderlich and Chris Christensen compiled an article based upon an interview with two of the Bar Commissioners in which they discuss their responsibilities and share their insight on the future of the practice in Idaho. Ritchie Eppink's article explores the gaps in our present legal system and offers an alternative viewpoint that could help shape the practice to benefit those who can least afford legal representation. Dean Bennett provides a review and discusses a possible expansion of the Economic Loss Doctrine. Jason Prince's article addresses litigation under the Foreign Corrupt Practices Act. Heath Clark and Richard Andrus discuss whether cross-access requirements imposed by municipalities may constitute improper takings. Finally, Elizabeth Herbst Schierman provides an overview of the proposed Shawn Bentley Orphan Works Act of 2008 which seeks to limit the remedies available to a copyright owner in cases in which the infringer preceded the infringement with an unsuccessful attempt to try to locate the copyright owner. Special thanks are owed to Chris Christensen and Brian Wonderlich for their hard work in both writing and gathering the articles to put this issue together.

This past October, I had the opportunity to represent Idaho at the ABA Young Lawyers Division's Fall Conference in San

Diego. Idaho had not sent a representative for several years and I was the only representative present from Idaho, Wyoming, or Montana. While it was somewhat intimidating, with Chicago, New York, Los Angeles, Dallas, and the like sending teams of 20 or more attorneys, discussions of how the ailing stock market was impacting their multi-million dollar YLS section budgets, and attorneys with titles like "Preservation of Objections Counsel," I believe it was extremely valuable for Idaho to be represented at the event.

The conference was a great networking and learning experience providing an opportunity for county and state bar associations from around the country to meet and discuss ways to improve the practice as well as a variety of service projects. Two which I thought would be of interest to the Bar are: 1) Project Salute, a mobile education center which trains local attorneys to assist wounded veterans navigate through the bureaucracy of federal disability benefits; and 2) Story Corps for local prominent attorneys. Several bar associations are utilizing modern recording technology to interview well-known attorneys and judges to discuss their memories of the years they spent in practice so their legacies are preserved for future generations. The Idaho Legal History Society currently has an Oral History project much like Story Corps, and they are always looking for volunteers to help record these histories.

If you are a young or newly admitted attorney, I encourage you to become a member of the Young Lawyers Section. The relationships you form with fellow young lawyers, as well as other members of the Bar, will benefit you both professionally and personally throughout your career in Idaho. For those older and wiser members of the bar who have outgrown our section, we'd love to see you at one of our events. Thanks and I hope you enjoy our issue of *The Advocate*!

ABOUT THE AUTHOR

Kahle Becker is the Chair of the Young Lawyers Section. He recently left the Office of the Attorney General and is in the process of opening his own firm. His practice will focus on natural resource law, real estate transactions, and general litigation. A graduate of the University of Pittsburgh School of Law and the Pennsylvania State University, he moved to Idaho in 2006 to enjoy the great outdoor activities this area has to offer.

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IDAHO STATE BAR COMMISSIONERS SHARE CHALLENGES AND INSIGHT WITH YLS

Chris Christensen

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Before November 21, 2008, few members of the Idaho State Bar's Young Lawyers Section (YLS) could have accurately guessed how varied the duties of an Idaho State Bar Commissioner are. Fortunately, on that day a large group of the section got to sit down with Idaho State Bar Commissioners Newal Squyres and Deborah Ferguson, both representing the Fourth Judicial District, to discuss those duties. It turns out that the rules created by the Idaho Supreme Court for governing Idaho lawyers also establish the primary functions of the Bar Commissioners. Although the Commissioners are not policymakers, they have character and fitness responsibilities, serve a fiduciary function as the board of commissioners for the Bar, regulate Bar staff and oversee spending, work with the educational function of the Bar, attend local and national events, and practice law full time.

In addition to explaining some of the important work they do in their roles as Bar Commissioners, Commissioner Ferguson offered a unique comparative perspective having practiced in much larger bars before coming to Idaho. An overarching theme of the conversation was how good the practice of law is in Idaho. And, although neither commissioner could identify specific negative trends in the practice of law in Idaho, both did point out there is always room for improvement, and gave their perspective on ways in which young lawyers and all Idaho attorneys can work to maintain the excellent legal environment we currently have in Idaho.

A central theme in both of the commissioners' comments was their mutual desire for the Idaho State Bar to continue to strive for collegiality and civility. Both spoke very favorably about the current collegiality and civility in the Idaho State Bar, but as Commissioner Squyres pointed out, maintaining the high levels of cooperation and professional conduct will become more difficult as the Bar continues to grow. "We all don't know each other anymore," he noted. Commissioner Ferguson pointed out that personal interaction goes a long way in creating a good working environment. "It's important to interact. It leads to civility. If you know someone you are more likely to be collegial." Adding to this point, she spoke briefly on the success of the Idaho State Bar's 2008 annual meeting in Sun Valley as both an opportunity to receive continuing legal education and as an opportunity to interact with fellow attorneys from around the state. Needless to say, she encouraged all in attendance to consider attending the next Annual Conference to be held in Boise July 9-10, 2009.

Both a challenge and a tremendous resource, Commissioner Squyres rhetorically asked "what are we going to do with all the baby boomers?" He noted there are a significant number of Idaho attorneys nearing the retirement age. "This is a tremendous opportunity for the Bar to harness the resources of these more seasoned veterans, both as a source for pro bono work in the

Bar and to serve as mentors for attorneys who are new to the practice in Idaho," he added.

Commissioner Ferguson recognized that we need more transparency in how the Bar functions and what role it plays in regulating and serving the Idaho legal community. In addition to noting the importance of attorneys and the public to understand how the Bar operates, she also saw increased transparency as an opportunity for service. "The more you know, the more opportunities you will see to get involved." And, after an extensive discussion of all of the different functions of the Bar, it is easy to see that there are numerous ways in which attorneys can be involved and contribute.

Adding another interesting comment, Commissioner Squyres added that "we continue to have really good judges in this state. If you travel and talk to other lawyers from out of state, we are lucky." However, both agreed that more women and a continuing stream of qualified candidates are needed on the bench. One area for improvement, Commissioner Squyres concluded, would be to increase the number of individuals, especially women, who apply for judgeships.

Although neither commissioner felt that there was a lack of attorneys in Idaho, both noted that there is always a need for hard-working, well-qualified attorneys and opportunities for those attorneys to succeed. Commissioner Squyres offered that "there are opportunities for lawyers in the more sparsely populated areas in Idaho . . . I know of law firms outside of Boise that have a tough time attracting young lawyers." He concluded, "There's always room for good lawyers to make a contribution to the system, to their clients, and there are a lot of clients that need help."

On the related topic of legal education in Boise, both commissioners agreed quality legal education in the Treasure Valley is a worthwhile goal. Commissioner Ferguson noted that "with as many attorneys as there are in the Fourth District and with the presence of the judiciary, legislature, all of the commerce, there has been a need and a desire to provide legal education in this area. Although the Dean [of the University of Idaho College of Law] didn't get everything [the school] asked for, the U of I is going to embark on some legal education in Boise with the development of a third-year program here. We want to see excellent lawyers come out of a program who want to practice in Idaho and contribute to the Bar. I think it makes a lot of sense to have an option for part of the U of I's education to occur here." Both commissioners felt it was important to offer a quality legal education in Idaho because that is where the majority of Idaho lawyers are educated.

By all accounts, the information provided by the Bar Commissioners was interesting and the event a great success. "I learned an immense amount about the role of the Bar Commissioners and how the State Bar functions," commented

YLS President Kahle Becker. "And what a great opportunity for the members of this section to begin thinking about the challenges the Bar will face when we are in either Commissioner Ferguson's or Commissioner Squyres' shoes."

The Young Lawyers Section would like to offer their sincere thanks to both commissioners for their time at the event, the time they spent thinking about their answers and preparing and especially for the time they have volunteered to the Idaho State Bar as Commissioners.

ABOUT THE AUTHORS

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Brian Wonderlich is a member of the Civil Litigation Division in the Idaho Attorney General's office, and currently serves as the CLE and Publications Chair for the Bar's Young Lawyers Section. After graduating from the University of Idaho College of Law in 2007, he worked for one year as a law clerk for the Honorable Stephen S. Trott on the Ninth Circuit Court of Appeals. In his free time, Brian enjoys reading, traveling and anything that involves the outdoors, especially skiing, hiking, backpacking and golf.

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ORPHAN WORKS: CONGRESS CONSIDERS LESSENING PENALTIES FOR COPYRIGHT INFRINGERS

Elizabeth Herbst Schierman
Dykas, Shaver & Nipper, LLP



Can you identify the owner of the copyright for this drawing?

ensure that the authorship of their works is determinable from a reasonable search.

As an example, imagine you are a documentarian doing research for a documentary on a historically-important, though fairly-recent, event. During your research you come across a number of photographs from the important day in question. These photographs contain valuable information for your documentary, information not available from another source. You would love to use them in your documentary and believe you must use them if your documentary is to be a success.

The photographs do not include a copyright “©” symbol, but as a law-savvy documentarian, you know that does not necessarily mean that the photographs are not protected under United States copyright law. You also know that, under current copyright law, the owner of the copyright in the photographs has “the exclusive rights . . . to reproduce the copyrighted work in copies or phonorecords; . . . to prepare derivative works based upon the copyrighted work; . . . to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; and . . . to display the copyrighted work publicly”¹ Accordingly, you rightfully decide to seek out the copyright owner to negotiate a license to use the works in your documentary. Unfortunately, none of the photographs contain any indication as to by whom they were taken. You try an Internet search using a description of the photographs, but to no avail. After all of your efforts, all you have are the photographs that are protected under U.S. copyright law, but for which no author can be located. That is, you have an “orphan works” problem. You have to decide whether to put those orphan works aside and not use them in your documentary or to put the orphan works to good use in your documentary and risk a copyright infringement lawsuit down the road. You would hate to go through all the work to

The United States Congress is currently considering the Shawn Bentley Orphan Works Act of 2008, which seeks to limit the remedies available to a copyright owner in cases in which the infringer preceded the infringement with an unsuccessful attempt to try to locate the copyright owner. Under the Act, individuals and entities will be able to engage in blatant copyright infringement of orphan works without the risk of statutory damages penalties, attorney’s fees awards, or detrimental injunctions. To prevent such reduced-penalty infringements, copyright owners will have to take it upon themselves to

create your documentary around these photographs only to have the copyright owner surface later, once the documentary has become a success at all of the major film festivals, and demand statutory damages, attorneys’ fees, and an injunction prohibiting the documentary from being distributed. Thus, you put the orphan works aside, and the world never enjoys the benefit of seeing your masterpiece.

REASONS BEHIND THE SHAWN BENTLEY ORPHAN WORKS ACT OF 2008

Orphan works problems, such as the hypothetical above, are real and warrant attention, according to the January 2006 “Report on Orphan Works” issued by the United States Copyright Office (hereinafter “the Report”).² The Report is the result of an in-depth study conducted by the United States Copyright Office, during which roundtable discussions were held and more than 850 written comments and replies from various individuals and entities were received.³ Google, Inc.; the Science Fiction and Fantasy Writers of America; Brigham Young University’s Copyright Licensing Office; the Motion Picture Association; and the J. Paul Getty Trust were just a few of the entities that participated in the roundtables, which addressed how to best solve the orphan works problem.⁴

Following the issue of the Report, Senators Patrick Leahy, Orrin Hatch, and Robert Foster Bennett introduced the Shawn Bentley Orphan Works Act of 2008 (the “Orphan Works Act”) to the Senate. The bill, which is designed to “provide a limitation on judicial remedies in copyright infringement cases involving orphan works,”⁵ was passed by the Senate on September 26, 2008, and is, as of the writing of this article, waiting to be reviewed by the House Committee on the Judiciary. Senator Hatch contends that “[t]housands of artistic creations around the country are effectively locked away in a proverbial attic and unavailable for the general public to enjoy because the owner of the copyright for the work is unknown.”⁶ If signed into law, the Orphan Works Act will make it possible to utilize these otherwise-unavailable works, which are protected by copyright law, without the full risk of the usual copyright infringement remedies and without, in any way, attaining the copyright owner’s permission for the use.

CAUSES OF THE ORPHAN WORKS PROBLEM – HISTORY OF COPYRIGHT LEGISLATION

The orphan works problem has become more prevalent of late largely for two reasons. First, technological improvements have made it easier for a work or a part of a work to become separated from indications of ownership or permission, such as through sound “sampling” or reposting of someone else’s images on Internet sites.⁷ Second, and more importantly, the change in U.S. copyright law over the years has made it easier for authors to acquire copyright protection and has extended the length of the term of such protection, but has left the public with

less access to information on the copyright-protection status and authorship of the work.

Pursuant to the Copyright Act of 1909, if an author wanted the benefits of copyright protection, the author had to take certain steps or else forfeit copyright protection all together. Specifically, the author had to publish the work with proper copyright notice and register the work with the Copyright Office.⁸ Registration necessarily meant that pertinent information about all copyrighted works' protection status, ownership, and authorship was kept in a central location. Further, copyright protection applied only for an initial twenty-eight years, but was renewable for another twenty-eight years.⁹ If proper renewal was not acquired during the last year of the first twenty-eight year term, copyright protection was forever lost, and the work became open to use by the public.¹⁰ Thus, determining whether the copyright of a work had expired required only a search of the Copyright Office's registration and renewal records.

In 1976, however, a new Copyright Act awarded copyright protection to a work without any extra effort on the author's part. That is, copyright protection was established as soon as the author fixed the work in a tangible medium of expression.¹¹ The Copyright Act of 1976 further moved away from the fixed-term set by the 1909 Act, providing that, for works created on or after January 1, 1978, the copyright's term was the life of the author plus fifty years. Accordingly, no longer did an author of a work need to renew the copyright, or to register the copyright, or to publish the work, or even to put a copyright notice on the work. Rather, all the author had to do was create the work, and the copyright protection attached. Thus, a photographer could take a picture and that picture would be protected by the copyright laws for as long as the photographer lived and for fifty years thereafter. (In 1998, the copyright protection term was increased to the life of the author plus *seventy* years.¹²) No longer could a mere search of the Copyright Office's registration and renewal records reveal the ownership and status information for every copyrighted work.

As for works created before January 1, 1978, pursuant to the Copyright Act of 1976, their copyright protection life was extended to seventy-five years, but continued to be subject to the earlier renewal terms, and, in 1992, the renewal was made automatic by statute.¹³ In 1998, the life of works created before January 1, 1978, was again extended, this time to a term of ninety-five years.

Accordingly, under current copyright law, to determine whether a work is protected by copyright one usually needs to know when the work was created (*i.e.*, whether pre-1978 or thereafter), whether the author of the work is still alive (which usually requires knowing who the author is), and, if deceased, when the author died. In many instances, unless the work is registered with the Copyright Office or unless significant information about the author and creation date are included on the work itself, it is very difficult, if not impossible, to determine the copyright-protection status of a work or to identify and locate its author. Thus, because copyright protection automatically applies to a creative work fixed in tangible form and because the copyright owner is currently under no duty to make copyright-protection status information available to the public in order

to enjoy the benefit of copyright protection, there are a large number of works for which it is impossible to either determine whether the work is still protected by copyright or who the copyright owner is.

LIMITATIONS ON INFRINGEMENT REMEDIES UNDER THE ORPHAN WORKS ACT

The Shawn Bentley Orphan Works Act of 2008 seeks to make orphan works available for use without the risks of large monetary damages awards and detrimental injunctions. Importantly, however, the Orphan Works Act applies only to "orphan works," *i.e.*, copyrighted works for which the authors cannot be located. Thus, if the pertinent question between a determination of infringement and non-infringement is whether copyright protection applies at all, the Orphan Works Act will not be of help to the infringer.¹⁴ Further, the Orphan Works Act provides no protection to the infringer in situations in which identified authors have refused to respond to any of the infringer's correspondence or requests for licenses.¹⁵ Again, the Orphan Works Act is addressed only to works that are protected by copyright but whose copyright owner cannot be identified and found.

The Orphan Works Act, if made into law, will revise the chapter of the United States Code copyright law provisions that deals with infringement and remedies. That chapter, Chapter 5, currently provides that anyone who violates an exclusive right of a copyright owner (*e.g.*, by copying, publicly displaying, or making a derivative work from a copyrighted work) is a copyright infringer.¹⁶ The remedies for copyright infringement may be an injunction against continued infringement, impounding and/or destruction of the infringing articles, an award of the copyright owner's actual damage and additional profits of the infringer, statutory damages (which can be extensive)¹⁷, and costs and attorney's fees.¹⁸ The Orphan Works Act would limit these remedies available in a copyright infringement action if, before the infringer used the work in an infringing manner, the infringer, or someone acting on behalf of the infringer, (a) performed and documented "a qualifying search" in good faith to locate and identify the owner of the infringed copyright and (b) was unable to locate and identify the copyright owner.¹⁹ The infringer must also have (c) provided attribution, "in a manner that is reasonable under the circumstances, to the legal owner of the infringed copyright, if such legal owner was known with a reasonable degree of certainty, based on information obtained in performing the qualifying search;" (d) included with the use of the work made by the infringer notice that the work is being used as an orphan work, (e) asserted an orphan-works-use defense in the infringer's first pleading, and (f) stated, with particularity, the basis for the orphan-works-use defense at the time of making the initial disclosures under Federal Rule of Civil Procedure 26.²⁰

If elements (a) through (f) discussed above are proven, then monetary relief for the copyright infringement is limited to requiring the infringer to pay "reasonable" compensation to the copyright owner.²¹ However, the monetary relief available is even further limited if the infringer is a nonprofit educational institute, museum, library, archives, or public broadcasting entity, and if (1) the infringement was not for any purpose of

direct or indirect commercial advantage, (2) the infringement was primarily educational, religious, or charitable, and (3) the infringer ceased the infringement after receiving a notice of the infringement claim, with time to conduct a good faith investigation of the claim.^{22,23}

Injunctive relief is also limited by the Orphan Works Act. That is, the court may impose injunctive relief to prevent or restrain infringement, but, if the infringer has proven elements (a) through (f) above, the injunctive relief “shall, to the extent practicable and subject to applicable law, account for any harm that the relief would cause *the infringer* due to its reliance” on elements (a) through (f).²⁴ Moreover, injunctive relief is further limited if “the infringer has prepared or commenced preparation of a new work of authorship that recasts, transforms, adapts, or integrates the infringed work with a significant amount of original expression,” such that “any injunctive relief ordered by the court *may not restrain the infringer’s continued preparation or use of that new work,*” if the infringer “pays reasonable compensation in a reasonably timely manner after the amount of such compensation has been agreed upon with the owner of the infringed copyright or determined by the court”²⁵ The court must also order the infringer to provide attribution to the copyright owner “in a manner that is reasonable under the circumstances” if the copyright owner so requests.²⁶

Notably, while monetary relief is most limited in cases of a non-commercial nature, whether the infringing use is commercial has no bearing on whether the greatest amount of limitation on injunctive relief is available to the infringer. To the contrary, commercial uses are likely to involve a more significant investment of resources by the infringer than non-commercial uses; therefore, commercial uses are less likely to be subject to an injunction under the Orphan Works Act because an injunction would likely do greater harm to such an infringer than in cases in which the infringer has invested little in the would-be use.

Should the Orphan Works Act be enacted, copyright law in the United States will have made another significant swing; a swing away from placing absolutely no burden on an author to establish and maintain copyright rights toward requiring a copyright owner to take action to protect his or her copyright rights. This is, of course, good news for would-be infringers of orphan works. While there are several steps that must be taken to acquire the protections of the orphan-works remedies limitations, the steps are relatively simple, depending on the circumstances. On the other hand, worried copyright owners of *textual* works should be reassured that they can likely easily prevent infringers from utilizing an orphan-works safe harbor by making the authorship of their works readily searchable, though this will mean the loss of anonymity and will likely require that they make their work more readily open to copying than it otherwise would have needed to be.²⁷ However, copyright owners of *non-textual* works, such as artists, non-lyrical musicians, choreographers, and the like, will be hard-pressed to prevent infringement under the orphan-works safe harbors. That is, such non-textual copyright owners will likely find it difficult, if not impossible, to ensure that the authorship of their works will be determinable and identifiable from a search by a would-be infringer.

For example, take the image at the start of this article, absent plastering the author’s name on the image each time the author displays it in public, how can the author ever ensure that someone will not wrongly copy and display the picture on an obscure website without giving attribution to the author?²⁸ When someone else then comes along to that obscure website, sees the image, and wants to use it as an illustration in an anthology, how could that anthologist possibly search and identify the true author and copyright owner? A search on the Internet with a common search engine using key terms (*e.g.*, black and white, mannequin, hand, and room) would not be sufficient to identify the author unless those terms had, by chance, been used to identify this same image on another indexed website. More likely than not, even the best search efforts would not produce the identity of the work’s copyright owner; therefore, the anthologist would be protected by the Orphan Works Act in the event that the copyright owner surfaced and brought a copyright infringement claim against the anthologist.

CONCLUSION

In any regard, the Orphan Works Act has not yet been enacted, but given its unanimous approval by the Senate in September, this author expects that the Act will soon be widely approved by members of the House of Representatives as well. Thereafter, only time and further study will tell whether the Orphan Works Act provides a suitable solution to the orphan works problem.²⁹

ABOUT THE AUTHOR

Elizabeth Herbst Schierman is a registered patent attorney with the firm *Dykas, Shaver & Nipper, LLP*, in Boise. Her practice includes intellectual property litigation, patent prosecution, and trademark and copyright protection. Ms. Schierman holds degrees in law and chemical engineering from the University of Idaho where she was a member of the law review and the national moot court competition team. She was previously involved with intellectual property protection at the Washington State University Research Foundation and at Schweitzer Engineering Laboratories, Inc., an electrical engineering corporation in Pullman, Washington.

ENDNOTES

¹ 17 U.S.C. § 106. Other exclusive rights provided to a copyright owner apply in other situations, such as in the case of literary, musical, dramatic, and choreographic works, pantomimes, motion pictures, and other audiovisual works to be performed and in the case of sound recordings to be performed publicly.

² Register of Copyrights, *Report on Orphan Works* (Jan. 2006), at 2, available at <http://www.copyright.gov/orphan/orphan-report-full.pdf>.

³ Marybeth Peters, Register of Copyrights, Letter to Chairman Hatch and Senator Leahy (Jan. 23, 2006), available at <http://www.copyright.gov/orphan/orphan-report-full.pdf>.

⁴ Register of Copyrights, *Report on Orphan Works* (Jan. 2006), at 195–205, available at <http://www.copyright.gov/orphan/orphan-report-full.pdf>.

⁵ Shawn Bentley Orphan Works Act of 2008, S. 2913, 110th Cong. (2008).

⁶ Orrin G. Hatch, U.S. Senator for Utah, Remarks to the Senate (Apr. 28, 2008), transcript available at <http://www.thomas.gov/cgi-bin/query/D?r110:1:./temp/~r110Cu3xpK::>

⁷ Marybeth Peters, Register of Copyrights, Statements before the

Subcommittee on Courts, the Internet, and Intellectual Property, Committee on the Judiciary (Mar. 13, 2008) (transcript available at <http://www.copyright.gov/docs/regstat031308.html>).

⁸ Register of Copyrights, *Report on Orphan Works* (Jan. 2006), at 41, available at <http://www.copyright.gov/orphan/orphan-report-full.pdf>.

⁹ *Id.* at 42.

¹⁰ *Id.*

¹¹ *Id.* at 41 (citing Pub. L. No. 94-553, 90 Stat. 2541 (1976)).

¹² *Id.* at 42.

¹³ *Id.* (citing Copyright Renewal Act of 1992, title I of the Copyright Amendments Act of 1992, Pub. L. No. 102-307, 106 Stat. 264 (1992) (amending 17 U.S.C. § 304 to add an automatic renewal term.)).

¹⁴ Assuming the Orphan Works Act becomes enacted law, if a would-be work user finds him- or herself with a work for which the copyright-protection status is undeterminable, as long as the author of the work is unknown and not locatable, the would-be work user would be well advised to meet the requirements of the Orphan Works Act in order to protect him- or herself from the full remedies of an infringement suit, should it turn out that the work was indeed protected by copyright.

¹⁵ Register of Copyrights, *Report on Orphan Works* (Jan. 2006), at 22, available at <http://www.copyright.gov/orphan/orphan-report-full.pdf>.

¹⁶ 17 U.S.C. § 501(a).

¹⁷ Statutory damages are available to a copyright owner in certain circumstances, such as when the copyright for the infringed work was registered before the infringement began. 17 U.S.C. § 412. Copyright owners often elect to pursue statutory damages, rather than actual damages and profits, when such election is a possibility, so as to avoid having to prove damages and profits and because statutory damages can often be much greater than actual damages and profits. Statutory damages range from \$200 to \$150,000, depending on the court's discretion and whether the infringement was willful. 17 U.S.C. § 504(c).

¹⁸ 17 U.S.C. § 504.

¹⁹ Shawn Bentley Orphan Works Act of 2008, S. 2913 § 2, 110th Cong. (2008). Proving that a search was performed, documented, qualifying, conducted in good faith, and unsuccessful in locating a copyright owner is the infringer's burden and must be proven by a preponderance of the evidence. *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Of course, current U.S. copyright law already provides for exceptions to the infringement provisions in certain circumstances. For example, "fair use" is not an infringement of a copyright. 17 U.S.C. § 107. Examples of fair uses include a reproduction "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research . . ." *Id.* Because use for teaching, scholarship, or research is already exempt from infringement under current copyright law, it is interesting that the Orphan Works Act provides for additional protections of infringers in cases of non-commercial infringement for educational use where the infringement ceases upon notice of a claim. Accordingly, if the Orphan Works Act is enacted, educators, and others similarly situated, may be able to defend infringement claims on two fronts, *i.e.*, by arguing both that the use is a "fair use" and, in the alternative, that remedies are limited under the orphan works provisions, if the work qualified as an orphan work.

²⁴ Shawn Bentley Orphan Works Act of 2008, S. 2913 § 2, 110th Cong. (2008) (emphasis added).

²⁵ *Id.* (emphasis added).

²⁶ *Id.*

²⁷ For example, Google, Inc., has undergone a project to make the full text of books available through Google Book Search. See <http://books.google.com/googlebooks/agreement/>. Currently, the full texts of approximately 7,000,000 books are available to be searched. On or around October 30, 2008, Google, Inc., announced the settlement of a class action suit against it by the Authors Guild, the Association of American Publishers, and a handful of other authors and publishers. *Id.* This settlement will allow Google to considerably expand its current Google Book search services. Juan Carlos Perez, *In Google Book Settlement, Business Trumps Ideals*, PC WORLD BUSINESS CENTER, (Oct. 30, 2008), http://www.pcworld.com/businesscenter/article/153085/in_google_book_settlement_business_trumps_ideals.html (last visited Nov. 3, 2008). Accordingly, should a would-be documentarian come across even a small section of a book, that documentarian will likely be able to quickly and easily search for the author thereof using a simple Google Book Search.

²⁸ Even where the author to paste his or her name directly over the drawing image as a water mark, the author could not prevent an infringer from digitally modifying the image to remove the name before displaying it to others without the author's permission.

²⁹ The Orphan Works Act calls for a report from the Register of Copyrights on or before December 12, 2014, regarding the implementation and effects of the remedies limitations provisions of the Orphan Works Act, including any recommendations for legislative changes. Shawn Bentley Orphan Works Act of 2008, S. 2913 § 4, 110th Cong. (2008).

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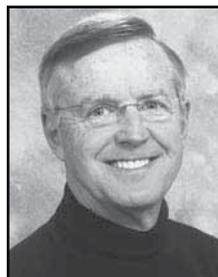
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A ROSE BY ANY OTHER NAME? FOREIGN CORRUPT PRACTICES ACT-INSPIRED CIVIL ACTIONS

Jason E. Prince
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The U.S. Foreign Corrupt Practices Act (FCPA), which prohibits companies and individuals from paying or promising to pay anything of value to foreign officials with the corrupt intent of obtaining or retaining business, does not provide a private right of action. Yet this fact has not stopped businesses, shareholders, and foreign governments from recently bringing an array of FCPA-inspired civil actions, and Congress is considering amending the FCPA to permit private civil suits against “foreign concerns.”

*“What’s in a name? That which we call a rose
By any other name would smell as sweet.”*

-William Shakespeare, Romeo and Juliet

For over thirty years, companies and individuals engaged in international business have had to comply with the Foreign Corrupt Practices Act’s (FCPA) prohibition on bribing foreign officials to obtain or retain such business advantages as contracts, tax breaks, and customs exemptions. The Department of Justice (DOJ) and the Securities & Exchange Commission (SEC) have exclusive responsibility for enforcing the FCPA’s prohibitions and requirements. In recent years, the DOJ and the SEC have dramatically increased their efforts in this area, doling out millions of dollars in civil and criminal penalties and securing hefty prison sentences for dozens of individuals. The U.S. government’s increased enforcement activity, coupled with the inherent challenges of complying with the FCPA’s vague language, have understandably generated anxiety among exporters, importers, and multinational companies.

Such global businesses might take some solace in the fact that the FCPA does not provide a private right of action and, therefore, does not enable shareholders, business partners, competing businesses, and foreign governments to sue for the alleged bribery of foreign officials. If so, these global businesses should think again. Plaintiffs are increasingly making an end-run around the FCPA’s lack of a private right of action through an array of FCPA-inspired civil suits. The plaintiffs in such civil actions allege facts that sound virtually identical to those alleged in the U.S. government’s FCPA enforcement actions. Yet rather than cite the FCPA as the basis for a damages award, these plaintiffs rely on such causes of action as violation of the Racketeer Influenced and Corrupt Organizations Act (“RICO”), common law fraud, and violation of federal securities law. In other words, the plaintiffs in these FCPA-inspired cases simply change the name of their cause of action from “FCPA” to something like “RICO.” And based on the sizeable settlements and judgments this strategy can possibly fetch, the FCPA by any other name smells just as sweet to potential plaintiffs.

OVERVIEW OF THE FCPA

During the mid-1970s, a series of congressional investigations—including one headed by Idaho Senator Frank F. Church in his capacity as Chair of the Subcommittee on Multinational Corporations—targeted various U.S. corporations’ questionable foreign activities. These inquiries revealed that over 400 U.S. corporations had paid roughly \$300 million in bribes to foreign officials to secure business abroad. In the wake

of these revelations, Congress passed the FCPA, and President Jimmy Carter signed it into law on December 19, 1977.

The FCPA contains two overarching sets of provisions geared toward battling bribery abroad. First, the FCPA’s anti-bribery provisions prohibit companies (both private and public) and individuals from paying or promising to pay foreign officials anything of value with the corrupt intent of obtaining or retaining business.¹ Second, the FCPA’s books-and-records and internal-controls provisions (collectively known as the accounting provisions) mandate various record-keeping practices and internal accounting controls aimed at preventing and detecting illegal bribery of foreign officials.²

The FCPA generally strikes fear into the hearts of exporting, importing, and multinational companies for five primary reasons: (1) its jurisdictional reach is expansive, (2) its anti-bribery prohibitions are sweeping, (3) its vicarious and successor liability is extensive, (4) its penalties are harsh, and (5) its enforcement by the U.S. government is becoming increasingly aggressive. I will briefly address each of these factors in turn.

JURISDICTION

The FCPA casts an expansive jurisdictional net intended to ensnare as many individuals and entities—both domestic and foreign—as possible. In general, the FCPA covers (1) “issuers,” (2) “domestic concerns,” and (3) “any person other than issuers or domestic concerns” who corruptly uses the U.S. mails or instrumentalities of interstate commerce to bribe foreign officials. The FCPA’s anti-bribery provisions pertain to entities and individuals falling within any of these three categories, while the accounting provisions apply only to issuers.

“Issuers” are entities required under the U.S. Securities Exchange Act to register under Section 12 or to file reports under Section 15(d).³ In other words, publicly held companies with securities or American Depositary Receipts listed on a U.S. securities exchange (e.g., NYSE or NASDAQ) are subject to the FCPA. The term “domestic concern” includes any individual who is a U.S. citizen, national or resident, as well as any business entity (public or private) with its principal place of business in the United States, or which is organized under the laws of a U.S. state, territory, possession or commonwealth.⁴ Under the nationality approach to jurisdiction, issuers and domestic concerns are subject to FCPA criminal and civil liability for bribery committed anywhere in the world, regardless of whether

the bribery implicates the U.S. mails or instrumentalities of interstate commerce.

Based on the territorial approach to jurisdiction, “any person other than issuers or domestic concerns” faces FCPA exposure if the person uses the mails or instrumentalities of interstate commerce, while within U.S. territory, to carry out an act prohibited under the FCPA.⁵ This territorial jurisdictional hook ensnares any foreign individual or entity that causes a prohibited act to be done within U.S. territory by any person acting as the individual’s or entity’s agent.

Officers, directors, employees, and agents of entities that fall within one of the three categories above also face FCPA exposure.⁶ It does not matter whether the officers, directors, employees, and agents qualify as issuers or domestic concerns or utilize an instrumentality of interstate commerce in their own rights; mere association with the covered entity suffices for purposes of imposing FCPA civil and criminal penalties.

ANTI-BRIBERY PROHIBITIONS

The broad scope and sweeping language of the FCPA’s anti-bribery provisions render compliance challenging for exporting, importing, and multinational companies. Again, the FCPA’s anti-bribery provisions prohibit companies and individuals from paying or promising to pay foreign officials anything of value with the corrupt intent of obtaining or retaining business. Although a comprehensive analysis of the FCPA’s various terms is beyond the scope of this Article, a brief discussion of the term “foreign official” should illustrate the slippery nature of the FCPA’s language.

Under the FCPA, the term “foreign official” includes not only actual government members, but also government instrumentalities, public international organizations (e.g., the United Nations), political parties, political party officials, candidates for political office, and even members of royal families.⁷ In countries like China, where government instrumentalities known as state-owned enterprises (“SOEs”) dominate the business arena, an array of potential business partners may arguably constitute “foreign officials.”

For example, in June 2008, the DOJ and the SEC brought enforcement actions against AGA Medical Corporation (“AGA”), a Minnesota-based medical products manufacturer, for authorizing its Chinese distributor to pay \$460,000 in “commissions” to Chinese doctors. These doctors in turn directed their hospitals to order AGA’s products. Given that these hospitals are SOEs, the doctors constitute “foreign officials” under the FCPA, thus rendering AGA’s payments illegal bribes. After the DOJ brought enforcement proceedings against AGA, AGA agreed to pay a \$2,000,000 penalty and enter into a deferred prosecution agreement.

VICARIOUS AND SUCCESSOR LIABILITY

The FCPA makes companies and individuals vicariously liable for the conduct of third parties like distributors, agents, consultants, and representatives. It also imposes successor liability on the acquiring company in a merger, even if the merger target’s FCPA violations predate the merger’s closing date. Such vicarious and successor liability is especially perilous because, under the scienter element of the FCPA’s anti-bribery provisions, a company is deemed to “know” of prohibited

conduct if it possesses information indicating a high probability of the prohibited conduct.⁸ In other words, to run afoul of the FCPA, a company need not have actual knowledge of illegal bribes paid by its third-party representatives or merger targets—the mere failure to recognize and investigate the third party’s or merger target’s suspicious activities may suffice.

CIVIL AND CRIMINAL PENALTIES

Under the FCPA’s anti-bribery provisions, entities face criminal fines of up to \$2,000,000 per violation and civil penalties of up to \$10,000 per violation. Individuals face criminal fines of up to \$100,000 or imprisonment of not more than five years, or both, per violation, and civil penalties of up to \$10,000 per violation.⁹ As for the accounting and record keeping provisions, entities face fines up to \$25,000,000, and individuals face up to twenty years in prison and fines up to \$5,000,000, or both.¹⁰ Additionally, under the alternative “profit disgorgement” penalty provisions, a fine can be twice the gross gain to the defendant or, if a competitor suffers a monetary loss, the greater of twice the gross gain to the defendant or twice the gross loss to the competitor.¹¹

UPWARD ENFORCEMENT TREND

The DOJ and the SEC have recently dramatically stepped up their efforts to enforce the FCPA. While the DOJ handles all criminal actions and all civil actions against non-issuers, the SEC handles only civil actions against issuers. In 2007 and 2008, the DOJ and the SEC brought a combined total of seventy-one FCPA enforcement actions—a more than 162 percent increase over the total number of FCPA enforcement actions brought in 2005 and 2006. Moreover, top-ranking enforcement officials have acknowledged the existence of over 100 ongoing FCPA investigations, and have publicly committed to continuing their aggressive enforcement of the FCPA.

In addition to pursuing more enforcement actions, DOJ and SEC officials—as well as their foreign counterparts—are levying heftier fines for bribery abroad. For example, on December 15, 2008, Siemens AG, a German conglomerate company, and three of its subsidiaries (collectively, “Siemens”), pled guilty in the U.S. District Court for the District of Columbia to violating the FCPA. According to the DOJ’s and the SEC’s estimates, Siemens paid \$1.4 billion in bribes to foreign officials in Asia, Africa, Europe, the Middle East, and the Americas.¹² As part of its settlement with the DOJ and the SEC, Siemens agreed to pay a \$450 million criminal penalty and to disgorge \$350 million in wrongful profits. On the same day, Siemens announced an agreement with German prosecutors to pay a €395 million (\$569 million) fine for violating Germany’s anti-corruption laws, adding to the €201 million (\$285 million) a Munich court sentenced Siemens to pay in October 2007.

The \$1.6 billion penalty Siemens must pay U.S. and German authorities is roughly thirty-five times larger than any previous anti-corruption settlement. This staggering figure does not include the €850 million (\$1.2 billion) Siemens has reportedly paid to attorneys, accountants, and other service providers to deal with its global bribery scandal since late 2006. Nor does it include the significant sums Siemens must pay an outside FCPA compliance monitor for the next four years as part of its settlement with the DOJ and the SEC.

The five factors discussed above have already combined to make the FCPA a hot topic in business, legal, and government circles. As discussed in the following section, a sixth factor is rapidly emerging: FCPA-inspired civil actions. Although this sixth factor is still in its formative stages, it has the potential to significantly broaden the FCPA's reach in a way Congress likely never envisioned.

FCPA-INSPIRED CAUSES OF ACTION

As indicated above, the FCPA does not contain a private right of action.¹³ In other words, under the FCPA, only the U.S. government may sue entities and individuals for bribing foreign officials. Yet this fact has not deterred the U.S. plaintiffs' bar. In recent months, plaintiffs have transformed FCPA violations into traditional causes of action against companies under RICO,¹⁴ common law fraud, and federal securities laws. These plaintiffs have generally fallen into four categories: (1) foreign governments, (2) shareholders, (3) business partners, and (4) business competitors. The following paragraphs analyze some of the most noteworthy examples from each of these four categories.

FOREIGN GOVERNMENTS

The Kingdom of Bahrain and the Republic of Iraq have led the charge in bringing FCPA-inspired civil suits against U.S. companies for allegedly corrupting government officials with bribes. First, on February 27, 2008, the Kingdom of Bahrain's state-controlled aluminum smelter, Aluminum Bahrain B.S.C. ("Alba"), sued its Pennsylvania-based aluminum supplier, Alcoa, Inc. ("Alcoa"), in the U.S. District Court for the Western District of Pennsylvania.¹⁵ Alba, which seeks more than \$1 billion in damages, alleges in its complaint that an Alcoa agent created shell companies in Switzerland, Singapore, and the Isle of Guernsey for the purpose of funneling illegal bribes to senior Bahraini government officials. These bribes allegedly prompted the Bahraini officials to cause Alba to pay inflated prices for Alcoa's aluminum and to push for the sale of a controlling interest in Alba to Alcoa.

Although Alba's complaint primarily relied on RICO, common law fraud, and civil conspiracy to defraud as the bases for its damages claim, its allegations sounded eerily similar to those found in the DOJ's and the SEC's past enforcement actions. In fact, Alba's claims were so similar to standard FCPA claims that the DOJ and the SEC soon intervened in Alba's lawsuit, prompting the federal court to stay discovery pending the U.S. government's FCPA investigation.

Next, on June 27, 2008, the Republic of Iraq filed an action in the U.S. District Court for the Southern District of New York against ninety-one companies and two individuals for allegedly corrupting the United Nations' Oil-for-Food program.¹⁶ According to Iraq's complaint, the defendants conspired with members of Saddam Hussein's regime to divert up to \$10 billion in Oil-for-Food program funds intended for humanitarian purposes to the illicit use of Hussein's government. Again, the allegations sound almost identical to those of an FCPA claim, but Iraq relies on RICO, common law fraud, breach of fiduciary duty, and Robinson-Putnam Act claims. Unlike Alba, Iraq filed its FCPA-inspired lawsuit after, rather than before, the DOJ and the SEC announced their related FCPA enforcement actions.

Indeed, by the time Iraq filed its lawsuit, the DOJ and the SEC had already levied large penalties against several of the defendants.

Alba's and Iraq's lawsuits suggest a trend in which foreign governments seek redress for alleged bribery-related injuries by simply casting their FCPA claims in the form of some other cause of action. RICO will likely serve as a driving force behind such FCPA-inspired civil actions because federal courts have already held that a RICO predicate act may be based on an FCPA violation.¹⁷ Moreover, these two cases illustrate the dangers of "tag-along" lawsuits in which a foreign government's private civil action triggers a U.S. government FCPA enforcement action or vice versa. The U.S. government's recent FCPA enforcement surge, coupled with the U.S. plaintiffs' bar's development of FCPA-inspired private rights of action, promises to dramatically expand the already vast realm of FCPA exposure for companies conducting cross-border operations.

SHAREHOLDERS

Shareholders of public companies are increasingly following the U.S. government's FCPA enforcement actions with private civil actions against the allegedly bribing companies and their officers and directors. In fact, the Alba lawsuit described above gave rise to a shareholders derivative lawsuit. On May 6, 2008, an ironworkers' pension trust fund filed a shareholders' derivative action in the U.S. District Court for the Western District of Pennsylvania on behalf of Alcoa against twenty-two current and former Alcoa officers and directors.¹⁸ The pension fund's complaint essentially raised the same FCPA-based allegations set forth in Alba's complaint, and sued the defendants for breach of fiduciary duty, corporate waste, abuse of control, gross mismanagement, and unjust enrichment. The Western District of Pennsylvania dismissed this lawsuit on July 9, 2008 on the grounds that plaintiffs failed to make a pre-suit demand on Alcoa's board of directors.

Additionally, FARO Technologies, Inc. ("FARO"), a Florida-based company that markets software and portable computerized measurement systems, recently discovered that FCPA violations can lead to costly securities fraud class actions under § 10(b) of the Securities Exchange Act.¹⁹ FARO's public FCPA troubles began in 2006 when it self-disclosed that its Shanghai-based subsidiary had secured sales contracts by paying \$444,492 in bribes (disguised as "referral fees") to various employees of Chinese SOEs. DOJ and SEC enforcement actions soon commenced, followed by a related amendment to a pending shareholders' consolidated class action complaint. The shareholders' amended class action complaint alleged, among other things, that FARO's "system of internal controls was inadequate and unable to prevent [its] FCPA violations," resulting in a fraud upon its shareholders.²⁰ On October 3, 2008, the U.S. District Court for the Middle District of Florida fully approved a \$6.875 million settlement of this lawsuit.²¹ FARO's desire to settle this lawsuit was likely heightened by the fact that at least two federal courts had previously allowed similar § 10(b) securities fraud actions to survive summary judgment.²² Three days later, the DOJ and the SEC announced a roughly \$2.92 million settlement of their FCPA enforcement actions against FARO.

These types of FCPA-inspired shareholders actions are especially frightening for directors and officers of international businesses because many directors and officers insurance policies (“D&O policies”) contain a “commissions exclusion” (created shortly after the FCPA’s enactment) that excludes coverage for losses arising from payments to foreign officials. As the U.S. government ramps up its FCPA enforcement efforts, the number of tag-along shareholders private actions will likely correspondingly increase, resulting in yet another layer of potential liability for international businesses, as well as these businesses’ directors and officers. Indeed, given that the shareholders class managed to extract a nearly \$7 million settlement out of FARO with its § 10(b) securities fraud theory, FCPA-inspired shareholders’ actions appear poised for a rapid increase.

BUSINESS PARTNERS

The business partners of global companies constitute another burgeoning group of FCPA-inspired plaintiffs. For example, on February 21, 2008, Colorado-based oilman Jack Grynberg filed a lawsuit in the U.S. District Court for the District of Columbia against BP PLC (“BP”), StatoilHydro ASA (“Statoil”), British Gas, and several of these entities’ current or former top executives.²³ Mr. Grynberg’s complaint alleged that he entered into a joint venture partnership with the defendants to pursue oil business in Kazakhstan, and the defendants, without his knowledge or consent, bribed Kazakh officials to obtain certain oil rights and then lied to cover up the bribes. Mr. Grynberg claims these bribes not only constituted a diversion of his share of the joint venture profits, but also “harm[ed his] hard-earned and well-justified reputation as a crusader against bribery and other corruption within the petroleum industry.” In addition to the increasingly standard FCPA-inspired RICO causes of action, Grynberg’s complaint raises common law fraud, theft/conversion, false light, and constructive trust claims against the defendants.

On March 24, 2008, Agro-Tech Corp. (“Argo-Tech”), an Ohio-based aerospace manufacturer, sued its Japanese distributor, Yamada Corp. (“Yamada”), and Yamada’s California-based subsidiary, Upsilon International Corp. (“UIC”), in the U.S. District Court for the Northern District of Ohio.²⁴ This lawsuit flowed from the Japanese government’s investigation of Yamada for allegedly bribing high-ranking officials in Japan’s Ministry of Defense to secure contracts. In its complaint, Argo-Tech claims Yamada breached a provision in the parties’ distribution agreement requiring Yamada to take various steps to ensure FCPA compliance. Argo-Tech also asks the federal court for a declaratory judgment that Argo-Tech may lawfully terminate the distribution agreement in its entirety based on Yamada’s alleged breach of the FCPA provision.

Such FCPA-inspired business partner lawsuits, like the foreign government and shareholders suits described above, will almost certainly gain prominence in the wake of the DOJ’s and the SEC’s escalating FCPA enforcement efforts. Companies that suspect their business partners have engaged in bribery abroad have an incentive to go on the legal offensive, both from a public relations standpoint and an FCPA liability perspective. If such companies sue their allegedly corrupt business partners,

they have an opportunity to portray themselves as innocent victims in the complaint, and, therefore, can theoretically garner favor with consumers, investors, the DOJ, and the SEC. As the DOJ and the SEC continue to crank up their FCPA enforcement activity, businesses have an even greater incentive to file preemptive FCPA-inspired civil suits against their allegedly corrupt partners.

BUSINESS COMPETITORS

Yet another category of FCPA-inspired plaintiffs appears to be emerging: companies that allegedly lose business abroad due to a competitor’s bribery of foreign officials. On October 21, 2008, Supreme Fuels Trading FZE (“Supreme”), a United Arab Emirates-based company, sued its Florida-based competitor, International Oil Trading Co. (“IOTC”), and IOTC’s owners in the U.S. District Court for the Southern District of Florida.²⁵ To transport fuel through Jordan into Iraq, a company must obtain a Letter of Authorization (“LOA”) from the Jordanian government. In turn, only companies that obtain this LOA are eligible to bid for certain U.S. government contracts for supplying aviation and ground fuel to U.S. forces in Iraq. Supreme alleges that IOTC paid Jordanian government officials millions of dollars in bribes to ensure that only IOTC received an LOA from the Jordanian government, and, therefore, only IOTC could bid for these lucrative U.S. government contracts. The complaint further alleges that, if not for IOTC’s bribery scheme, Supreme would have obtained the LOA from Jordan and secured millions of dollars in U.S. government contracts. Supreme brings its action under RICO, the Sherman Act, the Florida state law equivalents of those federal acts, and Florida common law for tortious interference with business relations.

Under the FCPA, companies have to rely on the DOJ and the SEC to ensure a level playing field abroad. Accordingly, it is not uncommon for companies to provide the DOJ and the SEC anonymous tips about their competitors’ alleged bribery of foreign officials. The DOJ’s and the SEC’s subsequent FCPA investigations might lead to hefty penalties for the bribing competitors. Yet the companies that lost business to these bribing competitors will not receive a penny of the penalty funds. In contrast, through the types of FCPA-inspired civil suits discussed in this article, companies can potentially recoup the money they claim to have lost at the hands of their allegedly bribing competitors, as well as punitive damages. Thus, such FCPA-inspired lawsuits will probably increasingly crop up alongside not only U.S. government enforcement actions, but also suits brought by foreign governments, shareholders, and business partners.

FOREIGN BUSINESS BRIBERY PROHIBITION ACT OF 2008

The foreign governments, shareholders, business partners, and business competitors discussed above are evidently not the only parties interested in private rights of action and the FCPA. On June 4, 2008, Representative Ed Perlmutter (D-Colorado) introduced in the U.S. House of Representatives the “Foreign Business Bribery Prohibition Act of 2008” (H.R. 6188).²⁶ In short, H.R. 6188 seeks to amend the FCPA to enable issuers, domestic concerns, and United States persons to sue “foreign concerns” for violating the FCPA. Plaintiffs would have to establish that a foreign concern not only violated the FCPA, but

also that the FCPA violation either prevented the plaintiff from obtaining or retaining business or enabled the foreign concern to obtain or retain business. If successful, the plaintiff could obtain damages of three times the greater of the total amount of the contract the foreign concern obtained through the FCPA violation or the total amount of the contract the plaintiff lost due to the foreign concern's FCPA violation.

Given that H.R. 6188 defines the term "foreign concern" to exclude issuers and domestic concerns, this bill would essentially only allow U.S.-based entities and individuals to sue foreign companies that corruptly use the instrumentalities of interstate commerce within the United States for the purpose of bribing foreign officials in violation of the FCPA. H.R. 6188 would not allow any plaintiff to bring such a private FCPA civil action against a U.S.-based entity or individual, and, thus, would not necessarily transform the types of FCPA-inspired civil actions discussed above into legitimate FCPA civil actions.

Rather, H.R. 6188 appears geared toward addressing concerns that the FCPA places U.S.-based global companies at a disadvantage because (1) the FCPA's application to "domestic concerns" makes their liability exposure broader than that of their foreign competitors, and (2) the authorities in their foreign competitors' home countries do not enforce anti-bribery laws as aggressively as the DOJ and the SEC enforce the FCPA. By enabling U.S. entities and individuals to sue their foreign competitors in U.S. courts under the FCPA, H.R. 6188 would arguably help level the playing field in the international business arena. The House Judiciary and Energy and Commerce committees did not take action on the H.R. 6188 during the 110th Congress. Thus, as of the submission of this Article for publication, it remains to be seen whether the bill's "foreign concern" approach to FCPA private rights of action has a chance of becoming law.

CONCLUSION—FCPA COMPLIANCE PROGRAMS

In light of the trends discussed above, the need for international businesses to proactively address their potential FCPA and FCPA-inspired liability exposure has never been more important. Global businesses can minimize their exposure to FCPA enforcement actions and FCPA-inspired civil actions by developing a culture of FCPA compliance throughout their global operations. The cornerstone of such a culture of compliance is an FCPA compliance program that contains at least the following five elements:

1. **WRITTEN POLICIES:** Companies should work with their attorneys to draft a clearly articulated policy against FCPA violations. Depending on the extent of the company's foreign operations, this written policy may vary in length and complexity. In any event, it should highlight prohibited behavior, accommodate employees who blow the whistle on compliance violations, and set forth disciplinary procedures to address such violations.
2. **TRAINING PROGRAMS:** Companies should provide regular FCPA training for employees, distributors, sales agents, and other third-party representatives. Such training sessions should seek to equip these individuals with the ability to recognize and avoid conduct that runs afoul

of the FCPA and should conclude with each participant signing an FCPA certification.

3. **DUE DILIGENCE:** Businesses should conduct thorough due diligence of potential foreign distributors, agents, consultants, representatives, joint venture partners, and merger targets, focusing on whether anything in these third parties' backgrounds raises any FCPA red flags.

4. **CONTRACT PROVISIONS:** Companies should ensure their agreements with foreign business partners address the FCPA. For example, an exporting company's international distribution agreements should require the distributor to provide FCPA-specific representations, warranties, and covenants. Such agreements should give the exporter the right to audit the foreign business partner's financial records, as well as the right to terminate the agreement immediately if the foreign business partner breaches its FCPA representations, warranties, or covenants. (Notably, it appears Agro-Tech and Yamada's distribution agreement, which gave rise to the FCPA-inspired lawsuit discussed above, did not give Agro-Tech a clear right to terminate the agreement if Yamada violated the FCPA. If the distribution agreement had included such termination rights, Agro-Tech likely could have avoided the court proceedings in which it is currently embroiled.)

5. **INTERNAL CONTROLS:** Businesses should centralize their accounting systems to ensure corporate headquarters' review of all foreign financial transactions. Careful analysis of the financial records of employees, subsidiaries, and business partners abroad can enable businesses to quickly detect and eliminate conduct prohibited under the FCPA.

In the past, global businesses have implemented such FCPA compliance programs to (1) minimize the possibility of FCPA violations, and (2) to heed the DOJ's and the SEC's warnings that they will punish more severely those companies that lack well-developed compliance programs. In light of the recent rise of FCPA-inspired civil actions, FCPA violation minimization should assume an even greater importance for such global businesses. Unlike the DOJ and the SEC, private plaintiffs could generally care less about the existence or complexity of the defendant's FCPA compliance program; rather, these plaintiffs merely care about the occurrence of FCPA violations that they can bootstrap into existing causes of action. And as far as defendants are concerned, these FCPA-inspired causes of action can smell just as foul as the traditional FCPA enforcement actions from which they spring.

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ENDNOTES

¹ 15 U.S.C. §§ 78dd-1-78dd-3.

² See *id.*, § 78m.

³ See *id.*, §§ 78dd-1, 78m.

⁴ See *id.*, § 78dd-2.

⁵ See *id.*, § 78dd-3.

⁶ See *id.*, § 78dd-2(g)(2).

⁷ See *id.*, § 78dd-1(f)(1).

⁸ See *id.*, § 78dd-1(f)(2).

⁹ See *id.*, § 78dd-2(g).

¹⁰ See *id.*, § 78ff(a).

¹¹ See 18 U.S.C. § 3571(d).

¹² See Complaint, SEC v. Siemens AG, No. 1:08-cv-02167 (D.C. Dec.

¹² 2008); Information, United States v. Siemens AG, No. CR-08-367 (D.C. Dec. 12, 2008).

¹³ See *Lamb v. Phillip Morris*, 915 F.2d 1024, 1027-30 (6th Cir. 1990).

¹⁴ See 18 U.S.C. §§ 1962-1968.

¹⁵ See Complaint, Aluminum Bahrain B.S.C. v. Alcoa, Inc., No. 08-cv-299 (W.D. Pa. Feb. 27, 2008).

¹⁶ Original Complaint, Iraq v. ABB AG, No. 08 CV 5951 (S.D.N.Y. June 27, 2008).

¹⁷ See, e.g., *United States v. Young & Rubicam, Inc.*, 741 F. Supp. 334, 339 (D. Conn. 1990) (holding that a predicate act under RICO could be based on a violation of the FCPA); *Nat'l Group for Commc'ns & Computers, Ltd. v. Lucent Technologies Inc.*, No. 03 C.v. 6001 (NRB), 2004 WL 290374 (S.D.N.Y. Dec. 15, 2004) (holding that an

FCPA-based claim alleging bribery of a Saudi Arabian government official could be brought as a predicate claim under RICO).

¹⁸ See Complaint, Hawaii Structural Ironworkers' Pension Trust Fund v. Belda, No. 08-cv-00614 (W.D. Pa. May 6, 2008).

¹⁹ See 15 U.S.C. § 78j(b).

²⁰ See Consolidated Amended Class Action Complaint, In re FARO Technologies Securities Litigation, No. 6:05-cv-1810-Orl-22DAB (M.D. Fla. May 16, 2008).

²¹ See Final Judgment and Order of Dismissal with Prejudice, In re FARO Technologies Securities Litigation, No. 6:05-cv-1810-Orl-22DAB (M.D. Fla. October 3, 2008).

²² *In re Nature's Sunshine Prods. Sec. Litig.*, 486 F. Supp. 2d 1301 (D. Utah 2007); *In re Immucor Inc. Sec. Litig.*, No. 1:05-CV-2276-WSD, 2006 WL 3000133 (N.D. Ga. Oct. 4, 2006)

²³ Verified Complaint and Jury Demand, Grynberg v. B.P. P.L.C., No. 1:08-cv-00301-JDB (D.C. Feb. 21, 2008). On November 12, 2008, the District Court for the District of Columbia dismissed without prejudice Grynberg's complaint against BP, Statoil, and the individual BP defendants on the grounds that a AAA arbitrator needed to determine the arbitrability of Grynberg's claims against these defendants.

²⁴ Complaint, Agro-Tech Corp. v. Yamada Corp., No. 1:08CV0721 (N.D. Ohio March 24, 2008).

²⁵ Complaint, Supreme Fuels Trading FZE v. Sargeant, No. 9:08-cv-81215-DTKH (S.D. Fla. October 21, 2008).

²⁶ Foreign Business Bribery Prohibition Act of 2008, H.R. 6188, 110th Cong. (2008).

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THE “UNIQUE CIRCUMSTANCES” EXCEPTION TO THE ECONOMIC LOSS DOCTRINE

A. DEAN BENNETT
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It is basic tort law that the economic loss doctrine bars recovery in tort for purely economic loss. Such loss consists of damages for inadequate value, costs of repair and replacement of a defective product, or consequent loss of profits—without any claim of personal injury or damage to other property. Application of the doctrine and its exceptions, however, is somewhat more convoluted.

Consider this scenario: Your client is a successful small business owner who has decided to relocate her business. She just signed a lease with the owner of an existing office space in downtown Boise. As part of the lease, the building owner agrees to hire a contractor to prepare the space to suit your client’s needs. On move in day, your client shows up and, due to the contractor’s negligence, the space is not anywhere close to complete. With nowhere to conduct her business, the previously successful operation falters and your client suffers hundreds of thousands of dollars in business losses. Will the economic loss doctrine prevent your client from suing the contractor in tort for the business losses? Because your client has no claim for personal injury or damage to property, it looks as though her tort claim against the contractor is a shoe-in for early dismissal. However, there still may be a chance to recover some of those losses via the two recognized exceptions to the economic loss doctrine: 1) the “special relationship” exception, and 2) the “unique circumstances” exception.¹

Generally, Idaho courts will apply the “special relationship” exception where a professional or quasi-professional performed inadequate services or where an entity holds itself out to the public as having expertise with regard to some function, and then fails to provide that function.² Although the exception appears far-reaching and applicable to the hypothetical presented above, the Idaho Supreme Court has significantly limited its application. For example, professional or quasi-professional services must be “personal services,” such as those performed by an attorney, accountant, engineer, or physician.³ Additionally, although a plaintiff may be able to show that an entity held itself out to the public as having expertise, the Idaho Supreme Court has added the additional requirement that a defendant must have “actively sought to induce reliance” on that representation.⁴ The reality is that this exception has only been applied in a handful of cases, and in circumstances such as the hypothetical laid out above the exception is of no aid—our small business owner is going to be precluded from recovering her business losses unless there is another way around the economic loss doctrine.

If the “special relationship” exception can be described as limited, the other exception, the “unique circumstances” exception, can currently be described as nonexistent. This is because the exception, recognized by the Idaho Supreme Court in 1978 and mentioned in a few Idaho cases since, has never been substantively analyzed or applied in a published Idaho opinion.⁵ In fact, whenever any Idaho court even mentions this exception it quickly rejects it as not applicable without engaging in *any*

analysis.⁶ It does not appear that an Idaho court would *never* apply the exception, but it would take a savvy attorney and the right set of facts to persuade a court to apply the exception in the first instance. Currently, the only instruction Idaho courts have provided practitioners is “that an occurrence of a unique circumstance requires a different allocation of the risk, and is sufficient to operate as an exception to the economic loss rule.”⁷ To be sure, that instruction does not provide much guidance to determine the applicability of the exception to the facts of a case, or to our hypothetical situation. The history of the economic loss doctrine, however, may provide some guidance as to what circumstances require a “different allocation of the risk.” The original formulation of the economic loss doctrine was a bright-line rule that applied only in the context of product liability cases. The justification for the rule was that a *manufacturer* should not be held liable for purely economic loss caused by the poor performance of its *products* in a consumer’s business. Warranty and contract law were instead the exclusive remedies for the insured consumer.⁸ That simply meant that a manufacturer could not be held liable in tort for the failure of a defective product unless the failure resulted in personal injury or damage to property other than the product itself.

Since then, however, courts have expanded the economic loss doctrine to bar tort recovery beyond product liability claims; it has been applied in other areas where the bright-line rule is not necessary or particularly useful. For example, the rule is now applied in *negligence* cases where the concept of proximate cause has traditionally been the gatekeeper to a plaintiff’s recovery. In addition, Idaho courts also apply the economic loss doctrine to the poor performance of *services*, where the additional protections of the Uniform Commercial Code (“UCC”), applicable only to goods or products, do not apply. Addressing these more recent “add-ons” to the traditional rule may provide an Idaho attorney some traction in getting an Idaho court to apply or even examine the “unique circumstances” exception. Some factors to consider in this context include:

- Whether there are any remedies provided in the UCC or similar statutory provisions.
- Whether the circumstances present a limited number of prospective plaintiffs.
- Whether contractual privity is absent between your client and the defendant.
- Whether there are no other defendants available to respond in contract damages.
- Whether the client suffered damages greater in degree than the general public.
- Whether the client did not have an opportunity to negotiate the risk of the transaction at arms length.
- Whether the defendant could have reasonably foreseen the damage to the client.

By distinguishing the hypothetical business owner’s circumstances from the historical justification for the economic

loss doctrine, an attorney would provide a court with a reasonable basis to recognize a need for a “different allocation of the risk.” Even if the court ultimately chose not to apply the unique circumstances exception, at the very minimum the above referenced argument may force a court to provide *some* substantive discussion for an exception that has been in existence for 30 years but has never been applied or even examined in a published decision in Idaho.

ABOUT THE AUTHOR

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ENDNOTES

¹ *Just’s Inc. v. Arrington Constr. Co.*, 99 Idaho 462, 470, 583 P.2d 997, 1005 (1978)

² *Duffin v. Idaho Crop Improvement Ass’n*, 126 Idaho 1002, 1008, 895 P.2d 1195, 1201 (1995).
³ *Blahd v. Richard B. Smith, Inc.*, 141 Idaho 296, 301, 108 P.3d 996, 1001 (2005).
⁴ *Id.* (internal quotation marks and citation omitted).
⁵ *Just’s Inc.*, 99 Idaho at 470, 583 P.2d at 1005.
⁶ *See id.*, 99 Idaho at 470, 583 P.2d at 1005 (offering no explanation for non-application of the rule) (citing *Union Oil Co. v. Oppen*, 501 F.2d 558 (9th Cir. 1974)); *Duffin*, 126 Idaho at 1007-08, 895 P.2d at 1200-01 (same); *Blahd*, 141 Idaho at 302, 108 P.3d at 1002 (same); *Millenkamp v. Davisco Foods Intern., Inc.* 391 F.Supp.2d 872, 879 (D. Idaho 2005) (same).
⁷ *Just’s Inc.*, 99 Idaho at 470, 583 P.2d at 1005.
⁸ *Clark v. Int’l Harvester Co.*, 99 Idaho 326, 334, 581 P.2d 784, 792 (1978) (citing *Seely v. White Motor Co.*, 403 P.2d 145, 151 (Cal. 1965)).

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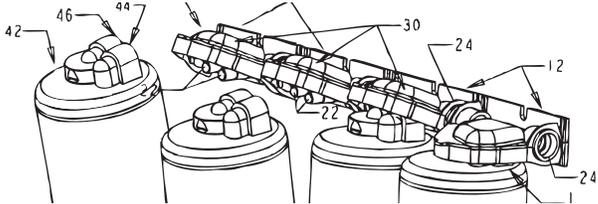
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ARE WE MISSING SOMETHING? PUBLIC LEGAL HEALTH

Ritchie Eppink

Idaho Legal Aid Services, Inc.

One of the world's power tool manufacturers, reports British lawyer and legal technology expert Richard Susskind, leads off its executive trainings by showing the newest recruits a photo of a power drill. The trainers ask if that drill is what the company sells. The new hires admit that it is. But then they're shown the next slide—a picture of a small, tidy hole in the wall. "That is what we sell," their trainers tell them. "Very few of our customers are passionately committed to the deployment of electric power tools in their homes. They want holes."¹

Like those power tool executives, lawyers have often missed the point, too. For centuries the legal profession has been fixated on the deployment of legal power tools: retained counsel, litigation, courts, legislative lobbying, and, more generally, a case-by-case and client-by-client approach to solving legal problems. Since the late 1930s, when bar association studies began to reveal huge unmet legal needs across all economic classes; our profession has had good reason to know that a case-by-case approach is not enough. Indeed, recent numbers from the American Bar Association (ABA) suggest that moderate-income American households with a civil legal problem often—over 25% of the time—do nothing about the problem at all.²

Putting every attorney in the country to case-by-case work on these unmet needs would needlessly clog our courts and have only a meager impact. And even the most able counsel could not help those who never realize they have a legal problem. As one lawyer put it, before the law can help a group of people, they "must know their situation is a problem, (assumption number one), that their problem is a grievance, (assumption number two), that their grievance has a remedy, (assumption number three), and that they have a remedy they want, (assumption number four)."³ These often faulty assumptions prop up our justice system's even more dangerous premise: that laypeople are prepared to recognize, avoid, and address their legal problems.

WE DON'T EVEN HAVE A WORD FOR IT

When it comes to dangerous assumptions like those, maybe doctors have been wiser than lawyers. After all, the medical profession actually has a word for laypeople who are well-prepared to recognize and avoid their medical problems: "healthy." We have never had a word like that in the legal profession, much less branches within our profession analogous to long-developed medical specialties like preventive medicine, health education, and public health.

Part of the problem might have been the bar itself. The ABA's first rules of professional conduct, the 1908 Canons of Professional Ethics, made preventive law and community legal education dangerous waters for lawyers. The Canons admonished attorneys against solicitation and advertising,⁴ prohibited them from "stirring up litigation,"⁵ and cautioned them about writing legal information articles for newspapers.⁶ Nonlawyers, too, have been scared away from this work because of prohibitions on the unauthorized practice of law and uncertainty about when

giving out legal "information" becomes giving legal "advice."

In this way, prevention and public education in the law fell into a gap that no one was clearly authorized to fill. By the middle of the last century, however, the organized bar began to realize that community legal education was a missing piece that the Canons kept lawyers away from. The ABA itself, through its Joint Conference on Professional Responsibility, plainly acknowledged a fault in the case-by-case approach to justice as early as 1958, exhorting that:

[t]he obligation to provide legal services for those actually caught up in litigation carries with it the obligation to make preventive legal advice accessible to all. It is among those unaccustomed to business affairs and fearful of the ways of the law that such advice is often most needed. If it is not received in time, the most valiant and skillful representation in court may come too late.⁷

Then, as attorneys during the 1960s—especially the throngs of new civil legal aid lawyers deployed during our nation's War on Poverty—discovered neighborhood legal education as an essential method for bringing justice to the poor and oppressed, those lawyers also discovered that the ABA's Canons had put roadblocks in their way.⁸ In 1965, Marvin Frankel, writing just before his appointment to the federal bench, acknowledged that "[t]here is unquestionable occasion as such experiments proceed for concern and scrutiny by the Bar in the interests of legitimately cherished professional standards." But Professor Frankel urged that:

[t]raditional notions about solicitation do not fit comfortably the plight of the poor and the alienated. Programs of consumer and slum tenant education may generate "legal business," to be sure, but this is a world away from the evils against which the relevant canons were drawn. And it is no mere coincidence, but a pertinent and hopeful sign, that the American Bar Association is embarked on a re-examination of the canons along with its current studies of legal services for the indigent.⁹

Indeed, before the end of that decade the ABA had left the Canons behind and produced a new set of rules, the 1969 Model Code of Professional Responsibility.

Today, legal ethics codes are not only much more permissive of community legal education by lawyers, they even encourage it. Both the ABA's latest model rules and the Idaho Rules of Professional Conduct now make clear that all lawyers have a responsibility to "further the public's understanding of and confidence in the rule of law and the justice system."¹⁰

However, as a profession we still do not have adequate infrastructure—or even a comprehensive strategy—for educating the public about law and justice. We have never tackled "preventive law" the way that the health professions have tackled preventive medicine. And although as lawyers we are all public citizens with a special responsibility for the quality of justice,¹¹ when it comes to the public's interaction with law and the legal system, we still don't even have a native concept of "healthy."

EDUCATION FOR LEGAL HEALTH

Despite that we have no term for talking about public legal health, we know that public legal education is a fundamental way to improve it. Over and over, research on meeting the public's legal needs has identified community legal education as a key strategy and a giant missing piece. The United Kingdom's Legal Services Commission, in a book-length analysis of legal needs assessment data it had collected, pondered startling phenomena similar to those the ABA has found in the U.S.: that "people sometimes take no action at all to resolve apparently serious [legal] problems" and that "the most common reason for this was a belief that nothing could be done."¹² In formulating a solution, the U.K. report identified community legal education as a central piece, noting that "it is clear that the continuing development of education and information strategies regarding rights, obligations, the basic principles of civil law, sources of advice, and methods for resolving justiciable problems has an important role to play in promoting social justice."¹³

In our own state, the Idaho Delivery of Legal Services Advisory Council has pointed to an Oregon bench- and bar-sponsored study stressing the "lack of legal information" and "ignorance of resources and remedies" in low- and moderate-income households, and identifying "significant unmet need" for community legal education.¹⁴

Implementing programs to meet these needs has begun in earnest. Throughout the U.S., work within the legal profession on "alternative delivery systems," which look beyond the usual "power tools," has been gaining intensity over the decades. Programs here in Idaho like the Idaho Law Foundation's Citizen's Law Academy and other law-related education projects, Idaho Legal Aid's workshops and self-help materials, and the legislatively-established Court Assistance Offices all evidence a substantial commitment to community legal education and "preventive law." Lawyers in this country might finally be ready to talk seriously about innovative strategies for addressing a legally illiterate, justice-starved population.

We can learn from comprehensive, professional, and institutional strategies that are already in place elsewhere. In Canada, just across Idaho's northern border, a whole class of lawyers, educators, and librarians have devoted their entire careers to educating the public about the law. The aggregate of their efforts is a nationwide network of government-funded nonprofit organizations devoted exclusively to preventive, public legal education. These sole-purpose public legal education organizations produce millions of dollars worth of not-for-profit programming each year, from offices in every one of Canada's provinces and territories. From workshops to television shows, from phone hotlines to street theater, these groups employ an imaginative range of formats tuned to differing levels of sophistication. The diverse programming helps ensure that the Canadian public can effectively resolve many legal questions without a lawyer and, more importantly, use common legal sense to prevent legal problems the way most of us already use common health sense to prevent colds and flu.

Interestingly, the Canadian model grew partly from American seeds. The neighborhood law offices and community lawyering projects that emerged in America during the War on

Poverty attracted the attention of law students and innovative attorneys in Canada, who put together similar efforts north of the border.¹⁵ By the mid-1980s, new federal legal aid funding restrictions were putting a brake on U.S. community legal education efforts.¹⁶ During the same era in Canada, however, the standalone public legal education organization model was thriving, helped by substantial provincial law foundation support and a federal "Access to Legal Information Fund." The Canadian system continues strong today, with some sixteen sole-purpose community legal education organizations staffed with full-time attorneys and a national professional association, the Public Legal Education Association of Canada, facilitating collaboration and professional development.¹⁷

CONCLUSION

Idaho lawyers cannot yet point to as durable an investment in community legal education and preventive law as our Canadian counterparts can. Indeed, here in the U.S., for-profit legal forms and instruction outfits like LegalZoom, Nolo Press, and We the People have sprung up to fill voids in the supply side of the market—but perhaps at the expense of the credibility of a profession that claims a responsibility for accessible justice, quality legal service, and public understanding of and confidence in the rule of law.

The messages from the development of legal ethics codes, from the health professions, and from Canada are messages for all lawyers: whether the general practitioner helping the average Idahoan with a will or after a police encounter, the legal aid attorney serving rural and minority low-income clients, or the transactional lawyer retained by a multinational enterprise. They are messages about what Richard Susskind calls the latent legal market: the many situations where our profession does not help anyone "because conventional legal service is too expensive or too impractical in the circumstances."¹⁸ These messages, to which we have begun to respond with increasing investment in extensive community legal education, are about thinking more of "health" and "prevention"—in terms of holes, not drills—and they are worth listening to in Idaho.

ABOUT THE AUTHOR

Ritchie Eppink has been a Staff Attorney for Idaho Legal Aid Services Inc., since June 2007. He specializes in affordable housing law and helping domestic violence victims reclaim their lives. Before that, Ritchie was a Fulbright Fellow at the University of Alberta Faculty of Law. He earned a J.D., *summa cum laude*, in 2006 from the University of Idaho College of Law and a B.S., with distinction, in 1999 from the University of Virginia. He can be reached over the phone at (208) 345-0106, ext. 103, or by email at richieeppink@idaholegalaid.org.

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¹ RICHARD SUSSKIND, *THE FUTURE OF LAW: FACING THE CHALLENGES OF INFORMATION TECHNOLOGY* 1 (1996) (emphasis added).

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⁶ Id. Canon 40.

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⁸ See Note, Ethical Problems Raised by the Neighborhood Law Office, 41 NOTRE DAME LAW. 961, 971 (1965-66).

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¹⁰ IDAHO R. PROF'L CONDUCT preamble ¶ 6 (2004); MODEL RULES OF PROF'L CONDUCT preamble ¶ 6 (2008).

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¹⁴ D. MICHAEL DALE, THE STATE OF ACCESS TO JUSTICE IN OREGON: PART I: ASSESSMENT OF LEGAL NEEDS ii, iii (2000); see Idaho Delivery of

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¹⁵ Lois Elaine Gander, The Radical Promise of Public Legal Education in Canada, at Ch. 2 (1999) (unpublished LL.M. thesis, University of Alberta Faculty of Law).

¹⁶ See Ingrid V. Eagly, Community Education: Creating a New Vision of Legal Services Practice, 4 CLINICAL L. REV. 433, 434 (1998) (discussing Legal Services Corporation regulations' effect on community legal education efforts by federally-funded civil legal aid programs).

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¹⁸ SUSSKIND, note 1 at 27.

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THE “DISCONNECT” IN “CONNECTIVITY” LEGAL ISSUES CONCERNING CONDITIONS OF DEVELOPMENT APPROVAL REQUIRING PRIVATE ACCESS WAYS BETWEEN NEIGHBORING PROPERTIES

Rich Andrus
Hethe Clark
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Imagine the following scenario: Your client owns land she would like to develop commercially. Developed and undeveloped parcels border her property, each with existing access to a public road. One adjacent neighbor with existing public road access nonetheless wants to reach the road at another location by taking access across your client's land. Your client has declined to grant an easement to her neighbor. The neighbor's desire becomes more pronounced when your client makes application for development approvals. The neighbor and city say they want to create better “connectivity” between the properties and suggest to your client that neighbor opposition will end and approvals will become more likely if she “voluntarily” provides the neighbor additional access to the road across the parking areas and drive aisles within her commercial development.

This scenario highlights the frequent collision of public and private interests in the local government entitlement process. The entitlement process aims to protect the public's health and welfare in light of an individual's land uses, but sometimes, the attempt to protect the public unnecessarily encumbers the individual's private property. As an example, the public sometimes oppose new development claiming an increase in the number of cars on the road undermines the public welfare. Local governments may try to address the claim by channeling cars to certain road access locations in an attempt to reduce the number of entry points onto a road – often said to be supportable because of the need for “connectivity” between private properties. In response, local governments have pressed landowners to provide access across their own parcels to neighboring properties, or negotiate access agreements for the benefit of neighboring property owners. Frequently, as in the hypothetical example above, these access arrangements involve private access rights rather than public roadway dedications.

Local governments may violate state and federal law when they require these accesses without providing just compensation to the landowner providing the access. This article provides an overview of some of the pitfalls under federal and Idaho law that may beset such exactions. After considering the issue more generally, this article explores two facets of the question: first, what requirements federal regulatory takings jurisprudence imposes in determining whether access conditions have been validly imposed; and, second, how private benefits and the interests of private parties may affect an attempt to obtain access through the power of eminent domain.

ABOUT CONDITIONS OF DEVELOPMENT APPROVAL RELATED TO ACCESS

Local governments impose the access conditions discussed in this article in a commercial context and allow business invitees to move across one property to a second property on something

less than a publicly dedicated road.¹ Just as in the hypothetical above, these access conditions are often imposed even when the neighboring parcel already has independent access to a public roadway (i.e., are not landlocked).² In other words, the push for the access often lies not in necessity, but out of a desire to achieve greater “connectivity” between properties or to appease neighboring landowners.

Indeed, this scenario suggests a major pitfall for local governments if they succumb to requests to consider something beyond the specific impacts of the particular application then before the local government. Conditions of approval generated in a land-use entitlement decision, as discussed more fully in Part II below, must mitigate the impacts created by the application, in the context of the local government's rules and ordinances as applied to the application.³ A local government should be circumspect when considering the complaints of neighboring property owners to gauge whether the complaints invoke a reasonable concern about impacts the proposed use of land has the potential to cause. If, on due consideration, the local government determines the complaints reflect far-fetched hypothetical future impacts⁴ or impacts not caused by the particular application, the local government should refrain from imposing conditions that could result in future legal challenges. In such instances, the wise course of action would acknowledge the complaints for what they may be – an attempt to use the governmental process to gain an advantage not available in private negotiations.

A REGULATORY TAKINGS FRAMEWORK FOR CONSIDERING ACCESS REQUIREMENTS

The first question is whether such an access condition could be supported as an “exaction” within the context of federal takings jurisprudence. Any required exaction, including access to a neighboring property, requires a case-by-case analysis under the so-called “Nollan-Dolan” tests, as crafted by the United States Supreme Court.

The Basic Test for Exactions – Nollan and Dolan

Under both the federal and state constitutions, private property may not be taken for public use without just compensation.⁵ Federal takings jurisprudence since the landmark cases of *Nollan v. California Coastal Comm'n*⁶ and *Dolan v. City of Tigard*⁷ has required a two-part test for exactions. First, an “essential nexus” must exist between a “legitimate state [i.e., public] interest” and the condition that the government seeks to impose.⁸ Second, the nature and extent of the required condition must provide “rough proportionality” to relieve the impact of the proposed development on the legitimate state interest.⁹ The Idaho Supreme Court's recent decision in *City of Coeur d'Alene*

*v. Simpson*¹⁰ recognizes the two-part “Nollan-Dolan” test as the state of the law in Idaho.

An “Essential Nexus” With a “Legitimate State Interest”

We begin with the “essential nexus” test required by *Nollan*. Courts in other states have confronted access requirements similar to the hypothetical presented above.¹¹ Several have been critical of imposing such conditions of approval in light of the *Nollan* test.

A case from Washington, *Unlimited v. Kitsap County*,¹² is instructive and similar to the scenario proposed at the beginning of this article. There, a landlocked commercial developer, Berg/Carlson, asked a county to impose a condition of approval on its neighbor, Unlimited, to provide a “50-foot public right-of-way for commercial access...” to benefit the Berg/Carlson property.¹³ Unlimited did not receive compensation for the dedication.¹⁴

The *Unlimited* court described *Nollan* as requiring “an exaction to be reasonable and for a legitimate public purpose.”¹⁵ Applying this test, the Washington court considered the access requirement at issue to be an unconstitutional taking because no legitimate public interest existed for the requirement. The Court considered, first, the Berg/Carlson property had no immediate development plans, though that consideration was merely context for the underlying issue—a public interest. Even if the owner of the Berg/Carlson property had immediate plans for development, no public interest exists in providing access for one private property owner across a second private property owner’s land, even when the property is a commercial development that the public will frequent:

There is no expectation that the Berg/Carlson property is to be developed at the same time as Unlimited’s development or, for that matter, any time soon. Even if there was, the exaction serves no public interest, let alone a reasonable one. The public has no interest in the commercial development of the Berg/Carlson property, and it is manifestly unreasonable for Kitsap County to exact a commercial access easement to this commercially land-locked parcel as a condition to Unlimited’s planned unit development.¹⁶

In sum, the *Unlimited* court, applying the standards of *Nollan*, found that a requirement of access to benefit a neighboring commercial property cannot stand as a valid exaction because no legitimate public interest exists in such an access.

“Rough Proportionality”

The *Unlimited* case considered whether a legitimate state (or public) interest exists in an access requirement. The later-decided *Dolan* case added an additional requirement – “rough proportionality.”¹⁷ Rough proportionality requires an individualized determination that a dedication relates in nature and extent to the impact of the proposed development.¹⁸

The rough proportionality requirement often arises when a local government claims an access is needed to address future planning needs. Thus, a local government may argue an access should be required in anticipation of future, neighboring development thereby “land banking” the property to address

future, potentially undefined needs, despite the fact that the immediate application may not create the impacts the access requirement intends to address.

Such an argument may also fail the requirements of *Dolan*. In fact, the U.S. Supreme Court in *Dolan* relied upon and cited with approval a “land banking” case¹⁹ in crafting its “rough proportionality” test. The case cited by the U.S. Supreme Court, *Simpson v. City of North Platte*,²⁰ arose when a city passed an ordinance requiring dedications for a street the City had set aside in its comprehensive plan, but for which the city did not have a concrete timeline or funding for land acquisition or construction. The *Simpson* court found the city did not have the ability to acquire an interest in the property, holding it for some planned—but indefinite—future use, holding:

The distinction, therefore, which must be made between an appropriate exercise of the police power and an improper exercise of eminent domain is whether the requirement has some reasonable relationship or nexus to the use to which the property is being made or is merely being used as an excuse for taking property simply because at that particular moment the landowner is asking the city for some license or permit.²¹

Thus, although the comprehensive plan considered the roadway, “no project was immediately contemplated whereby the street would be constructed...”²² Meanwhile, no evidence indicated the construction of the project in question would itself create sufficient additional traffic to justify the requirement imposed, leading the Nebraska court to conclude the condition of approval constituted a taking thereby requiring just compensation.²³

Other courts to consider “land-banking” attempts by local governments have reached similar conclusions.²⁴ There must be an individualized determination that a “required condition is related both in nature and extent to the impact of a proposed development.”²⁵ Rarely would development of one property create the necessity of providing access to a wholly independent property for possible future development free of charge.

Other Takings Considerations

An access for the benefit of a neighboring private property owner triggers a few additional considerations. First, if a property owner no longer has the right to determine when and on what conditions members of the public may access her property, but is now beholden to a neighboring landowner, then the property owner no longer maintains her fundamental right to exclude. Denial of the right to exclude—a fundamental attribute of property ownership—is generally considered a clear indication of a compensable taking.²⁶

Additionally, an access requirement presents the distinction considered in *Dolan* between a legislative land use decision entitled to a presumption of validity, and a quasi-judicial decision imposing an exaction, which is not. Exactions trigger heightened scrutiny not because they simply limit a use to which an owner may put his property, but because they go beyond such limits and may require, as discussed here, that a property owner actually deed portions of her property (or convey or grant an interest therein) to another individual or entity.²⁷

IDAHO STRICTLY LIMITS THE USE OF EMINENT DOMAIN FOR THE BENEFIT OF PRIVATE PARTIES

In the hypothetical first set forth, the local government intends to impose a condition that transfers an interest in private property to a second private property owner, ostensibly for a public benefit. As discussed above, this can lead to consideration of speculative impacts beyond the scope of the application, which is problematic from a regulatory takings perspective.

The transfer of private property to a second private property owner also suggests analysis under the law of eminent domain, particularly in light of the U.S. Supreme Court's decision in *Kelo v. City of New London* and the State of Idaho's response in the form of Idaho Code Section 7-701A. The use of eminent domain in the State of Idaho has a long history. However, while private parties²⁸ and even local governments may ostensibly use eminent domain to acquire certain property rights, both the Idaho legislature and courts have taken a critical view of transfers to private parties where there is no legitimate public use.²⁹

Article 1, section 14 of the Idaho Constitution allows for a right of eminent domain, which grants a power to take private property for "public use" so long as just compensation is paid.³⁰ Idaho Code Section 7-701 sets forth a litany of "public uses"; however, article 1, section 14 limits public uses to those "necessary to the complete development of the material resources of the state or the preservation of the health of the inhabitants."³¹

In *Cohen v. Larsen*,³² the Idaho Supreme Court explained that Article 1, Section 14 of the Idaho Constitution³³ limits the exercise of condemnation to uses that (1) involve the exploitation of natural resources and (2) benefit and provide uses for the general public.³⁴ Even the most creative attorney would encounter considerable difficulty conceiving how a new access for a commercial development would meet the narrow standards set forth in *Cohen*, the Idaho Constitution, and Idaho's eminent domain statutes. Indeed, the *Cohen* decision itself suggests that access for the benefit of one private property owner is "purely a private dispute and, as such, eminent domain is not the appropriate remedy."³⁵

Perhaps more significantly, the Idaho legislature recently clarified the proper exercise of eminent domain for public and private uses. Idaho Code Section 7-701A, passed in response to the United States Supreme Court decision in *Kelo v. City of New London*,³⁶ "limits and restricts the use of eminent domain in the State of Idaho...."³⁷ In particular, Section 7-701A states the government may not use eminent domain to acquire private property "[f]or any alleged public use which is merely a pretext for the transfer of the condemned property or any interest in that property to a private party."³⁸ A development condition requiring a developing property owner to provide access to a neighboring property or requiring a developing property owner to negotiate an access agreement with a neighboring property owner could not be supported by Section 7-701A.

CONCLUSION

Based upon the hypothetical presented above, Idaho and federal law suggest that local governments should be wary of imposing access across one private property for the benefit of

a neighboring private property owner, particularly where the neighboring property owner already has independent access to a public roadway.

Such a condition would likely not survive scrutiny under a regulatory takings analysis. Certainly, regulatory takings jurisprudence resides among the areas of law in which it is most difficult to provide certain answers to property owners.

This article proposes that a condition of development approval that encumbers an applicant's property with an access way for the benefit of a neighboring private property owner likely does not satisfy the "rational nexus" requirement of *Nollan* because there is no legitimate state interest in providing alternate access as described in the hypothetical above. Such a condition may also lack "rough proportionality," particularly in cases when the access is required for presently undefined future uses of neighboring property. A local government may not "land bank" an access to mitigate potential impacts of as-yet unplanned future development where the present application does not, of itself, create the impacts to be mitigated.

Finally, even if considered outside the context of regulatory takings, the transfer of a private property interest set forth in the initial hypothetical also suggests difficulty if pursued under the power of eminent domain.

ABOUT THE AUTHORS

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T. Hethe Clark is an associate with the law firm of *Spink Butler, LLP*. He is a graduate of Duke University and received his J.D. from Washington University School of Law, where he served as Editor-in-Chief of the *Washington University Global Studies Law Review*. He served as law clerk to the Hon. Darla Williamson, Administrative District Judge, Fourth District, Idaho.

ENDNOTES

¹ These accesses constitute something different from a standard street dedication, which a municipality can legitimately require in order to provide access to parcels newly created through the subdivision process. These street dedication requirements internal to a subdivision rest on a more stable legal footing because the dedication serves to mitigate the very need the subdivision creates – access to new lots.

² If a local government were to impose a condition that required private access for the private use of a sole neighboring landowner, such an imposition is almost certainly improper. The more difficult case arises when a local government imposes access to a neighboring property that can be used by the general public, despite the fact that the benefits flow to a private commercial enterprise.

³ *Dolan v. City of Tigard*, 512 U.S. 374, 393, 114 S.Ct. 2309, 2320, 129 L.Ed.2d 304, ___ (1994). This requirement is inherent in the tests for exactions imposed in *Dolan* as well as *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987). See also *Schultz v. City of Grants Pass*, 131 Or.App. 220, 228, 884 P.2d 569, 573 (1994) (using *Dolan* the court struck an exaction because no impact of the application would create a need for the exaction—"only the city's speculation as to what other construction

could take place at some time in the future... There is, in short, nothing in the record that provides evidence of a relationship between the conditions the city has imposed and the impact of the petitioners' proposed development.”).

⁴ *Schultz*, 131 Or.App. at 228.

⁵ U.S. CONST. amend. V (“... nor shall private property be taken for public use, without just compensation.”); IDAHO CONST. art. I, § 14 (“Private Property may be taken for public use, but not until a just compensation, to be ascertained in the manner prescribed by law, shall be paid therefor.”).

⁶ 483 U.S. 825 (1987).

⁷ 512 U.S. 374 (1994).

⁸ *Nollan*, 483 U.S. at 837.

⁹ *Dolan*, 512 U.S. at 391.

¹⁰ 142 Idaho 839 (2006). The Idaho Supreme Court’s recent treatment of regulatory takings in *Covington* and *Moon*, followed by what appears to be a correction in *Simpson*, suggests that Idaho courts, now recognizing “non-categorical” takings, are aligning with federal regulatory takings jurisprudence. At the same time, the Idaho Supreme Court’s decisions in *Ada County Highway District v. Total Success Investments, LLC* and *KMST, LLC v. County of Ada* suggest regulatory takings claims will continue to be a difficult row to hoe for those asserting such claims before Idaho courts.

¹¹ *See, e.g., Unlimited v. Kitsap County*, 50 Wash.App. 723, 750 P.2d 651 (Wa. Ct. App. 1988); *Paradyne Corp. v. State Dep’t of Trans.*, 528 So.2d 921, 13 Fla. L. Weekly 1477 (Fla. Dist. Ct. App. 1988).

¹² *Unlimited*, 750 P.2d 651.

¹³ *Unlimited*, at 653.

¹⁴ *Id.*

¹⁵ *Unlimited*, 750 P.2d at 653.

¹⁶ *Id.* at 653-54.

¹⁷ *Dolan*, 512 U.S. at 391.

¹⁸ *Id.*

¹⁹ *Simpson v. City of North Platte*, 206 Neb. 240, 292 N.W.2d 297 (1980).

²⁰ *Id.*

²¹ *Id.* at 245.

²² *Id.* at 246.

²³ *Id.* at 248.

²⁴ *See, e.g., Unlimited*, 50 Wash. App. at 728 (“... the record discloses that the County has no immediate plans for an extension. Rather, it intends to hold the exacted property until some undefined future time when Randall Way can be extended to connect with other, as yet unbuilt, roads. This uncompensated exaction, too, is invalid.”). *See also Ventures in Property I v. City of Wichita*, 225 Kan. 698, 594 P.2d 671 (Kan. 1979) (“... we hold where the proposed platting of land by an owner for residential development is approved by the governing body of a city in accordance with previously approved zoning regulations, subject to the sole restriction that a portion of the land in a defined highway corridor within the proposed plat be reserved in its undeveloped state for possible highway purposes at some indefinite date in the distant future, the governing body has taken property from the landowner for which it is required to respond in damages by inverse condemnation.”); *181 Incorporated v. The Salem Cty. Planning Bd.*, 133 N.J.Super. 350, 359, 336 A.2d 501, 506 (1975) (“In short, for the nexus test to apply, making a compulsory dedication constitutionally valid, the nexus must be rational. This means it must be substantial, demonstrably clear and present. It must definitely appear that the proposed action by the developer will either forthwith or in the demonstrably immediate future so burden the abutting road, through increased traffic or otherwise, as to require its accelerated improvement. Such dedication must be for specific and presently contemplated immediate improvements not for the purpose

of ‘banking’ the land for use in a projected but unscheduled possible future use.”).

²⁵ *Dolan*, 512 U.S. at 391.

²⁶ *See, e.g., Nollan*, 483 U.S. at 419 (“the right to exclude others is one of the most essential sticks in the bundle of rights commonly characterized as ‘property.’”).

²⁷ *Dolan*, 512 U.S. at 385 (cited in *Schultz v. City of Grants Pass*, 131 Or. App. 220, 227, 884 P.2d 569, 573 (Or. Ct. App. 1994)).

²⁸ This discussion also necessarily involves consideration of “private condemnation,” a term that is often misunderstood. The phrase “private condemnation” does not generally refer to the right of a private party to condemn property simply to acquire a private right. Rather, the phrase refers to the ability under limited circumstances of a private party—an entity other than the State or its political subdivisions (for example, a railroad)—to acquire a property interest for a public use. *See* IDAHO CONST. art. 1, § 14. *See also* IDAHO CODE §§ 7-701 and 7-701A. *But see* IDAHO CODE § 7-701(5) (defining “public use” to include “byroads, leading from highways to residences and farms.”). For example, in *Potlatch Lumber Co. v. Peterson*, 12 Idaho 82, 88 P. 426 (1906), the Idaho Supreme Court upheld the right of a logging company to condemn land belonging to a private individual for use as a storage reservoir for logs because the use was “necessary to the complete development of the material resources of the state or preservation of the health of the inhabitants.” *Potlatch Lumber*, 12 Idaho at 84 (quoting IDAHO CONST., art. 1, § 14). In other words, private condemnation has been allowed, but only insofar as it serves the needs of the public of the State as a whole.

²⁹ *See, e.g., Cohen v. Larson*, 125 Idaho 82, 867 P.2d 956 (1993).

³⁰ IDAHO CONST. art. 1, § 14.

³¹ *Id.*

³² 125 Idaho 82, 867 P.2d 956 (1993).

³³ IDAHO CONST., art. 1, § 14.

³⁴ *Cohen*, 125 Idaho at 84 (citing cases approving such public purposes including: logging roads (*Blackwell Lumber Co. v. Empire Mill Co.*, 28 Idaho 556, 557, 155 P. 680, 684 (1916)); pipelines (*Yellowstone Pipe Line Co. v. Drummond*, 77 Idaho 36, 287 P.2d 288 (1955)); and furnishing of electricity (*Washington Water Power Co. v. Waters*, 19 Idaho 595, 115 P. 682 (1911)).

³⁵ *Cohen*, 125 Idaho at 85.

³⁶ 545 U.S. 469 (2005).

³⁷ IDAHO CODE § 7-701A.

³⁸ *Id.* (emphasis added).

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IDAHO COURTS

Chief Justice Daniel T. Eismann
Idaho Supreme Court

STATE OF THE JUDICIARY

PRESENTED ON JANUARY 20, 2009



It is an honor to report to you on the state of the Idaho judiciary. I wish that I could be speaking to you in person this year, but I recently completed my last chemotherapy treatment followed by an infusion of stem cells to regrow bone marrow that was destroyed by the chemotherapy. Because of my compromised immune system, at this point in my recovery I would have had to speak while wearing a HEPA filter mask, which is not very conducive to public speaking.

Last year I reported that a task force, which was chaired by Dean Burnett from the University of Idaho College of Law and which included the Hon. Denton Darrington and the Hon. Jim Clark, had recommended adding one more judge to the Idaho Court of Appeals to help with its increasing caseload. I thank you for enacting legislation and providing appropriations to do so. The Governor has appointed David Gratton to fill that position. The space on the ground floor of the Supreme Court building that formerly housed the state law library has also been remodeled to provide chambers for the Court of Appeals.

In addition to their regular caseloads, Idaho judges continue to devote countless hours presiding over problem-solving courts, including adult felony and juvenile drug courts, DUI courts, and adult and juvenile mental health courts. Their efforts are producing positive results. Idaho has 54 problem-solving courts that supervised 1,983 offenders in 2008, an increase of 9% from the prior year. A recent statewide evaluation of adult drug courts showed significant reductions in recidivism for participating offenders compared to a

matched comparison group who received traditional management of probation. A study of four well-established DUI courts also showed a significant reduction in recidivism.

Idaho now has four Child Protection Drug Courts, which handle child abuse and neglect cases in which the abuse or neglect is related to the parents' substance abuse. Parental substance abuse is the main underlying cause of proceedings by the Department of Health and Welfare to terminate parental rights in Idaho. A national study of similar courts elsewhere has shown that when parents participated in such a court, their children spent less time in out-of-home placement and, when returned to parental custody, were less likely to be abused and removed again. We can expect similar results in Idaho. Two of Idaho's Child Protection Drug Courts are part of a national initiative by the Administration for Children and Families and will be extensively evaluated through Idaho State University over the next four years.

Proceedings to terminate parental rights are handled in magistrate court. It can take two to three years to go through the normal process of appealing the magistrate's decision to the district court and then to the Supreme Court. During that period, the status of the child is in limbo. We have a task force that will shortly be suggesting procedural changes so that a case involving the termination of parental rights will be heard by the Supreme Court within about four months after the magistrate judge's decision.

We now have seven domestic violence courts in Idaho, in which defendants are forced into treatment and held accountable through enhanced judicial monitoring, including regular "face-to-face" meetings with the judge. These courts also have a case coordinator who maintains regular contact with the

victims, assisting them and their children in accessing needed services. An assessment of domestic violence courts in eastern Idaho has shown that a domestic violence court can significantly reduce violations of no contact orders and civil protection orders by offenders in that court. Legislation will be introduced this session to strengthen domestic violence courts statewide.

The coordinator of the Ada County domestic violence court worked with probation to create a risk assessment tool for regularly assessing the risks offenders may pose to victims and their children. That information is then used to adjust probation recommendations to ensure offender accountability, to promote victim safety, and to refer victims to necessary available resources. We know of no other court that utilizes this type of ongoing risk assessment.

Because of the emotions involved, some of the more challenging court cases are domestic relations actions involving minor children. Judges throughout the state participate in parent education classes during which they introduce families to the court process and explain the variety of tools available to assist them in resolving child custody issues. In a statewide exit survey, parents who attended such classes gave the judges high marks, stating that the information was helpful and that it was reassuring to know they were being served as individuals. Over ninety percent of those parents said they would make a stronger effort to reduce parental conflict for the sake of their children's long-term best interests.

We are seeing increasing numbers of litigants in domestic relations cases who are not represented by attorneys. In Canyon, Ada, and Valley counties, parents who cannot afford attorneys are given the opportunity to work with

professional mediators to arrive at an agreement on a workable parenting plan that is in the children's best interests. A recent evaluation of such cases in Ada County showed that parents utilizing such mediators have longer term resolutions and return to court less often than parents in litigated cases.

In 1999, we began opening court assistance offices where litigants who did not have attorneys could obtain forms for various civil actions and legal advice in filling out the forms if the office was staffed by an attorney. There are now court assistance offices in most Idaho counties, and last year over 38,000 people took advantage of that help.

In partnership with Idaho Legal Aid Services, in 2005 we began making forms for various civil cases available on the internet, which are maintained on a server provided by a third party at no charge. We have increased the number of forms available, and some of the more complex types of cases, such as domestic relations cases involving minor children, have forms created through an online interactive interview to make it easier for the pro se litigants. Five of the interactive interviews are also in Spanish. These online forms have been used by litigants in all forty-four Idaho counties. Of all states, Idaho has the third highest number of forms available online for pro se litigants. Of course, online forms cannot replace an attorney, but they provide an essential resource for the

many citizens who cannot afford counsel to represent them.

We have also taken action to decrease the time it takes to appeal cases. Although the overwhelming majority of court reporters prepare transcripts of testimony timely, there were a few who were habitually late in doing so. As a result, some appeals were delayed a year or more while waiting for the transcript to be prepared. We have instituted time limits for the preparation of transcripts and consequences, including suspension without pay, for failing to meet those deadlines.

Last year we began providing online access to a data repository through which anyone can check the register of actions of cases in the trial courts of every county in the state. The register of actions is a case history containing a chronological list of all documents filed in the case and all hearings and trials. There are about 60,000 hits per day on the repository. When testing it, I discovered that in 1997 a criminal defendant had filed an action seeking to have me removed from office. Fortunately, the case was dismissed.

It does not appear that the recent economic downturn will result in a decrease in cases filed in our courts. When the last seven months of this year are compared to the last seven months of last year, there has been about a three to four percent increase in cases filed in the district courts and magistrate courts. Some types of cases have increased

dramatically, with civil filings in the district courts increasing almost eighteen percent and felony DUI's increasing thirty four percent.

We have been able to provide adequate judicial resources only by the use of senior judges. Paying retired judges at a daily rate to preside over cases costs taxpayers less than increasing the number of judges in those parts of the state where the population has increased significantly faster than judicial positions.

The recent economic downturn will certainly present challenges for the judiciary. For years we have endeavored to keep the judicial budget for operating expenses and administrative personnel at the lowest level possible to provide the resources and services necessary for the judiciary to provide equal access to justice, the expeditious resolution of cases, and the training and support necessary for judges to utilize innovative techniques to address some of the most difficult problems in our society. We look forward to working with the legislature to find ways to insure that the citizens of Idaho can continue to have trust and confidence in their judiciary.

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



Idaho Court of Appeals Judge David W. Gratton (left) receives congratulations from U.S. Magistrate Judge Mikel H. Williams, District of Idaho.



Justice Joel Horton congratulates Judge David Gratton at the reception after his investiture.

COURT INFORMATION

**OFFICIAL NOTICE
SUPREME COURT OF IDAHO**

Chief Justice
Daniel T. Eismann
Justices
Roger S. Burdick
Jim Jones
Warren E. Jones
Joel D. Horton

Amended - Regular Spring Terms for 2009

Boise January 12, 14, 16, 21 and 23
Boise February 9, 11, 13, 18 and 20
Coeur d'Alene. April 6, 7, and 8
Moscow. April 9
Lewiston April 10
Boise (Eastern Idaho). May 4, 6, 8, 11 and 13
Boise (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
Darrel R. Perry
Sergio A. Gutierrez
David W. Gratton

3rd Amended - Regular Spring Terms for 2009

Boise. January 20 and 22
Boise. February 10 and 19
Boise. March 10, 12 and 13
Boise Northern Idaho (Moscow) ... April 14, 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 February 13, 2009

Monday, April 6, 2009 – COEUR D'ALENE

8:50 a.m.	Henderson v. Eclipse Traffic	#34526
10:00 a.m.	Read v. Harvey	#34336
11:10 a.m.	Christensen v. S.L. Start & Associates	#35169

Tuesday, April 7, 2009 – COEUR D'ALENE

8:50 a.m.	Kootenai Medical Center v. IDHW	#34879/34880/34881
10:00 a.m.	Justad v. Ward	#34793
11:10 a.m.	Ewing v. Dept. of Transportation	#34541

Wednesday, April 8, 2009 – COEUR D'ALENE

8:50 a.m.	Davidson v. State Insurance Fund	#34626
10:00 a.m.	Mesenbrink v. Hosterman	#34714
11:10 a.m.	Kraly v. Kraly	#34947

Thursday, April 9, 2009 – MOSCOW

8:50 a.m.	Dunagan v. Dunagan	#34516
10:00 a.m.	Backmon v. Spagon	#35151
11:10 a.m.	State v. Meister (Petition for Review)	#35048

Friday, April 10, 2009 – LEWISTON

8:50 a.m.	Kootenai Electric v. Lamar Corporation	#33807
10:00 a.m.	Zenner v. Holcomb	#35034

Idaho Court of Appeals

Oral Argument Dates
As of February 26, 2009

Tuesday, March 10, 2009 – BOISE

9:00 a.m.	State v. Finnicum	#34087
10:30 a.m.	State v. Two Jinn	#35198
1:30 p.m.	State v. Salinas	#34262

Thursday, March 12, 2009 – BOISE

9:00 a.m.	Bennett v. Dept. of Transportation	#35150
10:30 a.m.	State v. Navarez/State v. Jiminez	#34692/34902
1:30 p.m.	Johnson v. Johnson	#34645

Friday, March 13, 2009 – BOISE (via telephone conference)

9:00 a.m.	Burke v. Dept. of Transportation	#34868
10:30 a.m.	State v. Eckroth-Croft	#34686

Tuesday, April 14, 2009 – BOISE

9:00 a.m.	Cooke v. State	#32447/34820
10:30 a.m.	State v. Shoemaker	#33047
1:30 p.m.	State v. Anderson	#35040

Thursday, April 16, 2009 – BOISE

9:00 a.m.	State v. Adams	#34220
10:30 a.m.	State v. Johnson	#35155
1:30 p.m.	State v. Livas	#35301

Friday, April 17, 2009 – BOISE

9:00 a.m.	Sunnyside v. Eastern Idaho Public Health	#34961
10:30 a.m.	State v. Doe	#34206/34207/34208/34209/34210

Idaho Court of Appeals

Law Day 2009

Oral Argument 101

As of February 24, 2009

Friday, May 1, 2009 - Boise - will be heard at Timberline High School.

9:00 a.m.	Oral Argument 101	Case to be announced
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Law Day Contact: hmccarthy@adaweb.net

Idaho Supreme Court and Court of Appeals
NEW CASES ON APPEAL PENDING DECISION
(Update 02/01/09)

CIVIL APPEALS

ATTORNEY FEES AND COSTS

1. Did the trial court err in awarding fees to the respondents under the Operating Agreement for Henderson Investment Properties, LLC?

*Henderson v.
Henderson Investment Properties, LLC*
S.Ct. No. 35138
Supreme Court

EVIDENCE

1. Whether the court abused its discretion in excluding expert testimony concerning the 2003 delegation of services agreement when the respondents' tardy production of the agreement caused the delay of the opinion disclosure.

Schmechel v. Dille
S.Ct. No. 35050
Supreme Court

MEDICAL INDIGENCE CLAIMS

1. Whether approved Medicaid and Social Security Disability benefits that only need to be reinstated are "available resources" that make the patient not indigent.

*St. Alphonsus Regional Medical Center
v. Ada County*
S.Ct. No. 34962
Supreme Court

PARENTAL RIGHTS

1. Did the court err finding the children were neglected by their parents and that the evidence supported termination of parental rights?

Department of Health & Welfare v. Doe
S.Ct. No. 35593
Supreme Court

POST-CONVICTION RELIEF

1. Did the court err when it denied Eby's motion to set aside the order dismissing his petition for post-conviction relief?

Eby v. State
S.Ct. No. 34179
Court of Appeals

2. Did the court err in its conclusion that Murphy failed to show ineffective assistance of counsel?

Murphy v. State
S.Ct. No. 34920
Court of Appeals

3. Did the court err in finding the petition for post-conviction relief was untimely and that the time for filing had not been tolled?

State v. Sturgis
S.Ct. Nos. 33670/34853
Court of Appeals

4. Whether *Estrada* should be given retroactive application.

Vavold v. State
S.Ct. No. 35339
Supreme Court

5. Did the court err by summarily dismissing Curtis' post-conviction petition as to the claim that he was denied counsel during police interrogation?

Curtis v. State
S.Ct. No. 33130
Court of Appeals

6. Did the court err in dismissing Hebert's petition for post-conviction relief in which he alleged claims of ineffective assistance of counsel?

Hebert v. State
S.Ct. No. 34141
Court of Appeals

PROPERTY

1. Whether the appellants' claims for boundary by agreement and/or acquiescence, estoppel and laches, prescriptive easement, and quasi-estoppel were incorrectly denied by the district judge.

Weitz v. Green
S.Ct. No. 33696
Supreme Court

SUBSTANTIVE LAW

1. Is Idaho's Dead Man's Statute applicable in claims against personal representatives of a decedent other than executors and administrators?

Carpenter v. Turrell
S.Ct. No. 35576
Supreme Court

2. Whether the district court erred in dismissing the complaint and in finding the plaintiff failed to adequately plead demand futility?

Orrock v. Appleton
S.Ct. No. 35064
Supreme Court

SUMMARY JUDGMENT

1. Did the court err in granting summary judgment to the City on the basis that I.C. § 50-506 provides the only scheme by which to remove a city clerk?

Boudreau v. City of Wendell
S.Ct. No. 35077
Supreme Court

2. Did the district court err by making findings of fact on disputed evidence in violation of I.R.C.P. 56(c)?

Houston v. Whittier
S.Ct. No. 35287
Supreme Court

CRIMINAL APPEALS

DUE PROCESS

1. Did the state violate Oser's right to due process when the prosecutor misstated the law during closing argument?

State v. Oser
S.Ct. No. 35228
Court of Appeals

2. Did the prosecutor violate Adams' right to due process by committing misconduct in his closing argument by appealing to the passions and prejudices of the jury?

State v. Adams
S.Ct. No. 34220
Court of Appeals

3. Were Ciccone's speedy trial rights violated when, on the eve of trial, the court granted the state's motion for a continuance and set Ciccone's trial out an additional six months?

State v. Ciccone
S.Ct. No. 32179
Court of Appeals

NEW TRIAL

1. Whether the court erred in not setting aside the conviction because the jury's decision was tainted by the manner in which the jury was able to receive and hear the evidence.

State v. Strange
S.Ct. Nos. 35032/35061
Court of Appeals

PLEA

1. Did the court err by rejecting Gonzalez's unconditional straight guilty plea to all charges?

State v. Gonzalez
S.Ct. Nos. 34135/34971
Court of Appeals

PROCEDURE

1. Did the district court err in its appellate decision by finding the claims raised had not been preserved for appeal and by declining to consider them?

State v. Jackson
S.Ct. No. 35344
Court of Appeals

SEARCH AND SEIZURE – SUPPRESSION OF EVIDENCE

1. Did the court err in finding the officer had reasonable, articulable suspicion that Stewart had committed a traffic violation after observing Stewart's vehicle cross the center of the road?

State v. Stewart
S.Ct. No. 35131
Court of Appeals

2. Did the district court err in denying Thede's request for a *Franks* hearing to challenge the validity of the search warrant?

State v. Thede
S.Ct. Nos. 34992
Court of Appeals

3. Whether the district court erred by denying Thede's motion to suppress and dismiss because the search warrant was not supported by probable cause.

State v. Thede
S.Ct. No. 34993
Court of Appeals

SENTENCE REVIEW

1. Did the court abuse its discretion when it relinquished jurisdiction over Urrabazo?

State v. Urrabazo
S.Ct. Nos. 33459/33460
Court of Appeals

2. Were Todd's rights under both the due process clause and the equal protection clause violated when the court based its decision to impose a long prison sentence on Todd in part on his inability to pay the restitution actually imposed?

State v. Todd
S.Ct. No. 35012
Court of Appeals

SUBSTANTIVE LAW

1. Did the court err by denying Madden's motion to dismiss the eluding charge when Madden had pleaded guilty to eluding in Washington in a case involving the same conduct at issue in this case?

State v. Madden
S.Ct. No. 34269
Court of Appeals

2. Did the court err by denying Knapp's motion to dismiss the indictment because there is no factual specificity as to when the event occurred and because several types of alleged acts are not supported by evidence?

State v. Knapp
S.Ct. No. 35213
Court of Appeals

Summarized by:
Cathy Derden
Supreme Court Staff Attorney
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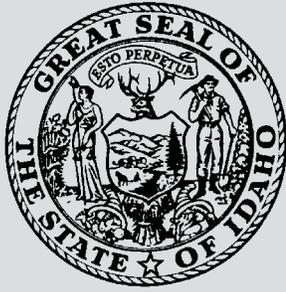
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**Memorial Ceremony
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10:00 a.m.

Idaho Supreme Court Courtroom

Reception following ceremony

Chief Justice Daniel T. Eismann announced the Idaho Supreme Court will hold its annual Memorial Ceremony March 19, 2009, at 10:00 a.m., in the courtroom of the Idaho Supreme Court, Boise, Idaho. A resolution will be presented in memory of the deceased judges and attorneys, members of the Idaho State Bar who passed away during 2008. The Court invites friends and family to a reception at the Supreme Court Building immediately following the ceremony.

JUDGES

Gerald L. Weston

RESIDENCE CITY

Caldwell

DECEASED

08/20/08

ATTORNEYS

William (Bill) McFarland

RESIDENCE CITY

Coeur d'Alene

DECEASED

03/06/07

Richard E. Weston

Boise

02/24/08

Dale W. Kisling

Pocatello

03/09/08

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DeskBook Updates

We are preparing the 2009-2010 Idaho State Bar DeskBook Directory. All address updates must be received by March 13, 2009 to be included in the upcoming edition. Please check your address information on the ISB website (www.idaho.gov/isb) and send any changes to the Membership Department at astrauser@isb.idaho.gov by March 13, 2009.

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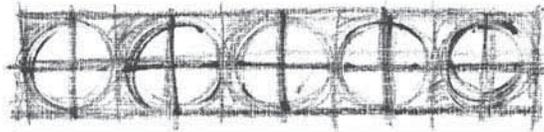
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— IN MEMORIAM —

JOHN MARLON SHARP Past Bar President 1916 - 2008

John Marlon Sharp, 92, of Idaho Falls, passed away on January 17, 2009. He was born in Salt Lake City, Utah on May 31, 1916, to Joseph Palmer Sharp and Anna Ellen Robinson Sharp. He married Margaret Hannah Rasmussen on November 15, 1941, in Washington, D.C. Their marriage was later solemnized in the Idaho Falls LDS Temple. In 1989, one day prior to their 48th wedding anniversary, she passed away.

John graduated from East High School in Salt Lake City at age 16. He attended the University of Utah for three years, before serving a mission for the LDS Church in Australia. Upon returning, he continued his education at Utah, where he was awarded a degree in law.

Following law school, he entered the FBI as a Special Agent in 1940 and served in the FBI during World War II. After working in several cities in the eastern United States, he requested a transfer to the West. He was assigned to Butte, Montana; San Francisco, California; and Idaho Falls, Idaho. In 1947, he and Margaret decided to leave the FBI and make Idaho Falls their home.

He was elected Bonneville County Prosecuting Attorney and served for six years. Upon leaving public office in 1954, he entered private law practice and was a founding partner in the law firm of Sharp, Anderson, & Bush. He practiced actively for 52 years, and continued as a member of both the Utah and Idaho Bars for 60 years until the time of his death. He served on the Idaho State Bar Board of Commissioners, serving as President in 1972. He also served on the Bar's disciplinary committee. He was the recipient of a Service Award from the Idaho State Bar in 1991. Then in 1992, he was named as one of the first recipients of the Idaho State Bar Professionalism Award. After his retirement in 1992, he provided volunteer legal services for seniors at the Senior Citizens Center.

John was dedicated to the practice of law and enjoyed his association with

members of the Bar. One of his proudest moments was representing the Bar at the ceremony when his son, Richard, was admitted to the Idaho State Bar in 1971. His grandson, John M. Avondet, an attorney in Pocatello; accompanied his grandfather to the 2008 Annual Conference luncheon, where he was the recipient of an award for being a member of the Bar for 60 years.

Of the practice of law, John wrote, "I must say that I am so proud to have served as an attorney. I am convinced that it is a most honorable profession, and hope that I have treated it as such. It has been a rewarding and delightful career and I can think of no other that would have given such great satisfaction."

He was preceded in death by a sister and four brothers. He was also preceded by his wife, Margaret; a son, John Richard; a granddaughter, MaryDelsa Sharp; and a grandson, Morgan Richard Sharp. He is survived by his daughters, Pat Persons and Callie (Alan) Avondet; a daughter-in-law, Marylinda Sharp; 13 grandchildren; and 18 great-grandchildren.

CHARLES BREAUD BRANTLEY II 1968 - 2009

Charles Breaud Brantley II, 40, passed away Feb. 13, 2009, after a six-month battle with renal cell carcinoma. He was born July 30, 1968, in New Orleans, Louisiana, to Patricia Newman Brantley and Charles Breaud Brantley. He was raised in Meadows, Texas; graduating from William P. Clements High School in Sugar Land, Texas. As a youth he was active in Boy Scouts, achieving the rank of Eagle Scout, and in local and state politics.

After earning a B.S. in mathematics at the University of Texas at Austin, Charles obtained his J.D. with honors at the John Marshall School of Law, Chicago, Illinois. While there he served on the Law Review and as a member of the Phi Delta Phi Law Fraternity. Charles spent the next two years living in Washington, DC, and traveling the country to hear cases as a clerk for the Hon. Bohdan A. Futey, in the U.S. Court of Federal Claims.

In 1996, he joined Micron Technology, Inc. as a patent attorney, and moved to Boise. During his 13 years at Micron, he became a member of the Idaho State Bar and also served as Treasurer of the Intellectual Property Law Section.

Charles enjoyed fly fishing with family and friends, especially on annual spring trips to the Big Horn River in Montana. As a season ticket holder, he regularly cheered on Boise State University at football and basketball games. He was also an avid art collector, with great interest in sculpture and kinetic art. He worked with a favorite artist, Fred Prescott of Santa Fe, New Mexico, to commission and design unique works for his office and home.

Charles was a loving family man and he had a particularly special relationships with his grandparents. When his grandmother was ill, he spent many months caring for her at her bedside. Charles especially enjoyed spending time with his nephews and niece, all of whom he entertained with much silliness and enthusiasm. When he played with them, he became one of them, and the bonds he created, especially with his nephews Brant and Ben, were very special. He possessed a generous spirit and quick and dry sense of humor which he exhibited even throughout his illness.

He will be greatly missed by his survivors: mother, father, sister, brother-in-law, three nephews and a niece, step-father, step-sister, in-laws and many aunts, uncles, cousins, and friends.

— RECOGNITION —

Deb Kristensen, partner Givens Pursley LLP, was appointed to serve on the U.S. District Court Advisory Committee on Local Rules for the District of Idaho. The committee, chaired by Chief Magistrate Judge Candy W. Dale and charged with considering various changes to the court's local rules, is comprised of respected practitioners from around the state who frequently appear before the federal bench in Idaho.

Tom Banducci, Banducci Woodard Schwartzman PLLC has been selected as one of the *Lawdragon* Leading 500

Lawyers in America. He was the only Idaho attorney on the list. Tom recently served a 3-year term as a commissioner for the Idaho State Bar representing the 4th Judicial District. He served as president in 2007. He can be reached at (208) 342-4411.

Quentin M. Knipe, Boise has been named the Office Managing Partner for the Stoel Rives LLP. As such, he will oversee all aspects of the Boise office. He is a member in the firm's Resources, Development and Environment group, and heads the Idaho Development Team. He is a member of the American College of Real Estate Lawyers. He is the former chair of the Idaho District Council of Urban Land Institute, is the director and former president of the Downtown Boise Association, and is the director of the Bogus Basin Recreational Association. He received his J.D. from the University of Washington and a B.S. in economics and business administration from Lewis & Clark College. He is admitted in Idaho and Washington. He can be reached at (208) 389-9000.

Daniel L. Glynn, Boise has become a shareholder in the firm Trout Jones Gledhill Fuhrman, P.A. His practice areas focus on all levels of commercial litigation. He graduated from Whitman College with a B.S. in Political Science and received his J.D. *cum laude* from Gonzaga University. He was a law clerk for the Idaho Supreme Court before going into private practice. He is a member of the ABA Litigation and Appellate Practice Divisions and a member of the Idaho Trial Lawyers Association. He can be reached at (208) 331-1170.

Teresa A. Hill, Boise, has been named a new member in the law firm Stoel Rives LLP. She is a member of the Resources, Development and Environment practice group, and the Renewable Energy group. Her practice encompasses a wide range of energy, development and environmental work. She received her J.D. from the University of Utah and is a member of the Bar's Environment and Natural Resources Section. She can be reached at (208) 389-9000.

Brian Hansen was recently elected into the Holland & Hart partnership. He has experience in business and commercial matters, including mergers and acquisitions, securities, licensing and technology and real estate. He can be reached at (208) 342-5000.

Anne C. Kunkel has been named a partner in Givens Pursley LLP. She earned her B.A. in Political Science and History from the University of Kentucky and her J.D. from Northwestern School of Law at Lewis & Clark College. She joined Givens Pursley following graduation from law school. Her practice focuses primarily on complex real estate and asset transactions. She can be reached at (208) 388-1200.

Richard L. Stacey, Boise has been named partner in the law firm Meuleman Mollerup LLP. He is a construction law attorney with experience representing general contractors, subcontractors, suppliers, sureties, and owners in all phases of litigation; and in drafting and negotiating construction contracts. Before beginning his legal career, he worked for more than ten years in the construction industry in general construction and construction management. He received his J.D. from the University of Utah School of Law with certificates in Environmental and Natural Resource Law. He completed his undergraduate studies *magna cum laude* at Boise State University. He can be reached at (208) 342-6066.

– ON THE MOVE –

Eric R. Glover, Boise, joined the firm of Eberle, Berlin, Kading, Turnbow & McKlveen, Chartered as an Associate. He received his B.S. degree from Boise State University and his J.D. from Gonzaga University School of Law. He served as a judicial extern to the Honorable Michael P. Price of the Spokane County Superior Court in Washington. Before entering private practice, he worked as an Idaho deputy attorney general, deputy prosecuting attorney, and law clerk to the Honorable R. Barry Wood of the Fifth Judicial District of Idaho. He then had his own law practice before joining Eberle Berlin. His practice focuses

on estate planning, probate and estate administration, estate litigation, business law, contracts, insurance defense and general civil litigation. You can reach him at: eglover@eberle.com or (208) 344-8535.

Brent Bastian has joined the firm Banducci Woodard Schwartzman PLLC as an associate. Prior to joining BWS PLLC, Brent was an associate with Patton Boggs, LLP in Dallas, Texas where his practice focused on complex commercial litigation. Brent graduated in 2000 from Boise State University and is a 2004 Graduate of Tulane University School of Law, where he graduated *magna cum laude*. Brent specializes in complex commercial litigation and is licensed to practice law in Texas and Idaho. He can be reached at (208) 342-4411.

Dara Labrum has also joined the firm Banducci Woodard Schwartzman PLLC as an associate. Dara is a 2005 *cum laude* graduate of the University Of Idaho College Of Law. She graduated with high honors in 2002 from Idaho State University with a degree in Mass Communication and Journalism. Prior to joining BWS PLLC, Dara served as a clerk for Judge Karen Lansing in the Idaho Court of Appeals. Dara specializes in complex commercial litigation. She can be reached at (208) 342-4411.

Forrest Hunter has joined the Perkins Coie, LLP; Boise office Labor & Employment practice as Of Counsel. His practice will focus on the representation of management in labor and employment matters. Prior to joining Perkins Coie he was with Alston & Bird LLP, Atlanta, Georgia where he was a partner in the firm's ERISA Litigation and Labor & Employment groups for more than 25 years. He received his law degree from Emory University and his undergraduate degree from the University of Virginia. He can be reached at (208) 343-3434.

Peter G. Scott has joined the Law Firm of Gough, Shanahan, Johnson & Waterman PLLP; Helena, Montana as a partner. He joins the firm as regulatory and litigation counsel for various

governmental, private, non-profit and corporate clients through the Northwest. Previously he worked in the Spokane office of Preston, Gates & Elli. He is a member of the State Bars of Montana, Idaho, Washington and Oregon. His law practice focuses primarily on land use, water rights and natural resource issues. He serves as Secretary to the Northwest Mining Association and as Vice Chair of the American Bar Association's Mining Committee. He can be reached at (406) 442-8560.

– ERRORS & OMISSIONS –

In the February 2009 issue of *The Advocate* Mr. Christensen's article *Counselors and Healers at Law* incorrectly identified Bruce Hafen as the first Dean of BYU law school and later Solicitor General. In reality, Rex E. Lee was the first dean and later Solicitor General. We apologize for the incorrect biographical information regarding Mr. Hafen.

Sherman J. Bellwood

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NOTICE FROM THE IDAHO STATE LAW LIBRARY

Effective January 31, 2009

To: All Library Patrons

From: John R. Peay, State Law Librarian

Subject: Reduction in Services

The Idaho Supreme Court has agreed to participate in Governor Otter's budget holdback for the current fiscal year ending June 30, 2009. To meet the budget reduction the judiciary has laid off part-time staff, left positions unfilled, and eliminated virtually all training and out-of-state travel. In addition, all judges have agreed to a voluntary salary holdback equivalent to two days salary. Other state court employees will participate in a two-day furlough.

The Law Library has not been spared from this challenge. The following changes will occur in order for the library to meet its budget reduction:

1. Library hours will be reduced, and are now 10:00 a.m. – 4:00 p.m., Monday – Friday
2. Westlaw is being reduced to its primary law service
3. All subscriptions have been cancelled, with the exception of the following:

Hein-on-Line	Collier on Bankruptcy	Trademarks and Unfair
Idaho Reports	Holmes Appleman on Ins	Competition
Pacific Reporter	Moore's Federal Practice	State Code Exchange
Idaho Digest	Larson's Workers Comp	Attorney General Opinions
Idaho Law Review	Nichols on Eminent Domain	Government Docs
Advocate	Modern Estate Planning	Idaho Legislative Materials
Standard Fed Tax Reporter	McCarthy on Trademarks	Idaho Code
Tax Management	Ribstein LTD Liability	Idaho Session Laws
	Couch on Insurance	

We regret that these dramatic steps have been necessary. However, further budget constraints may result in additional reductions in service, if not the closing of the library entirely.

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The Idaho State Bar DeskBook Directory is a valuable tool when placed in your employee's hands.
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UPCOMING CLEs

March 2009

March 13

Handling Your First or Next DUI

Sponsored by the Idaho Law Foundation
8:30 - 10:30 a.m. at the Law Center, Boise
2 CLE Credits RAC* Approved Live Webcast Statewide

March 26

Alternatives to Foreclosure

Sponsored by the Young Lawyers Section
8:30 - 9:30 a.m. at the Law Center, Boise
1 CLE Credit Live Webcast Statewide

April 2009

April 3

Understanding the Idaho Juvenile Corrections Act

Sponsored by the Idaho Law Foundation
8:30 - 10:30 a.m. at the Law Center, Boise
2 CLE Credits RAC* Approved Live Webcast Statewide

April 14

Representing the Child Client

Sponsored by the Family Law Section
Holiday Inn, Pocatello RAC* Approved

April 15

Representing the Child Client

Sponsored by the Family Law Section
Oxford Suites, Boise RAC* Approved

April 16

Representing the Child Client

Sponsored by the Family Law Section
Coeur d'Alene Inn, CDA RAC* Approved

April 23

Choice and Creation of Business Entities

Sponsored by the Young Lawyers Section
8:30 - 9:30 a.m. at the Law Center, Boise
1 CLE Credit Live Webcast Statewide

May 2009

May 1

President Lincoln and Idaho

Sponsored by the Idaho Law Foundation
12:30 - 1:00 p.m. at the Ada County Courthouse
.5 CLE Credits

May 8

Idaho Practical Skills

Sponsored by the Idaho Law Foundation
Boise Centre on the Grove
5 CLE Credits (tentative) RAC* Approved

May 15

Business and Corporate Section Annual Seminar
Boise Centre on the Grove

May 28

Transactional Tips from a Litigator

Sponsored by the Young Lawyers Section
8:30 - 9:30 a.m. at the Law Center, Boise
1 CLE Credit Live Webcast Statewide

Save the Date

July 8-10, 2009

Idaho State Bar Annual Conference

Boise Centre on the Grove

September 11

Annual Estate Planning Seminar

Sun Valley, Idaho
Room Reservations Call 1-800-786-8259

October 2

Idaho Practical Skills

Sponsored by the Idaho Law Foundation
Boise Centre on the Grove

*RAC - Reciprocal Admission Credits

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.

MARCH

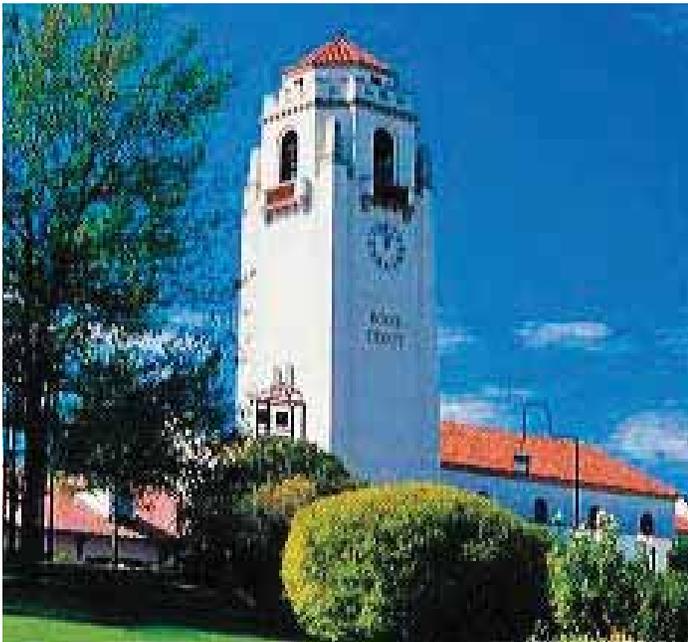
- 1 *The Advocate* Deadline
- 2 Final Licensing Deadline for July 2009 Bar Exam
- 12-14 Bar Leadership Institute - Chicago
- 18 The Advocate Editorial Advisory Board
- 25-28 Western States Bar Conference, Turtle Bay, Hawaii

APRIL

- 1 *The Advocate* Deadline
- 3 Idaho State Bar Board of Commissioners, Idaho Falls
- 9 February 2009 Bar Exam Results Released
- 15 *The Advocate* Editorial Advisory Board
- 17 Idaho Law Foundation Board of Directors Meeting

MAY

- 1 *The Advocate* Deadline
- 1 Law Day
- 7 Idaho State Bar Admission Ceremony, Boise Center on the Grove
- 8 Idaho State Bar Board of Commissioners
- 14 District Bar Presidents Orientation
- 20 The Advocate Editorial Advisory Board
- 25 **Memorial Day: Idaho State Bar Closed**

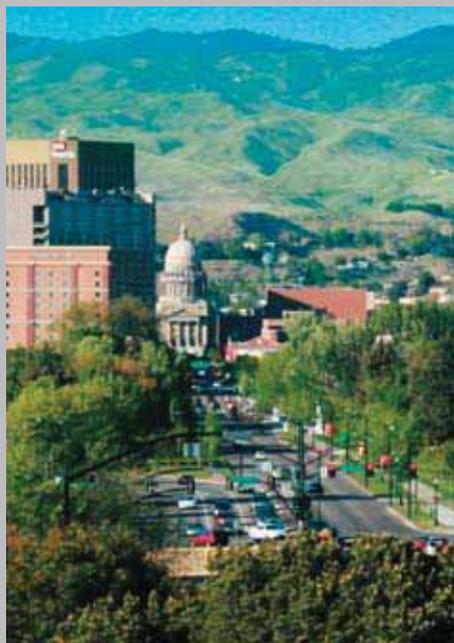


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2009 SYMPOSIUM

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April 10, 2009

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Please see
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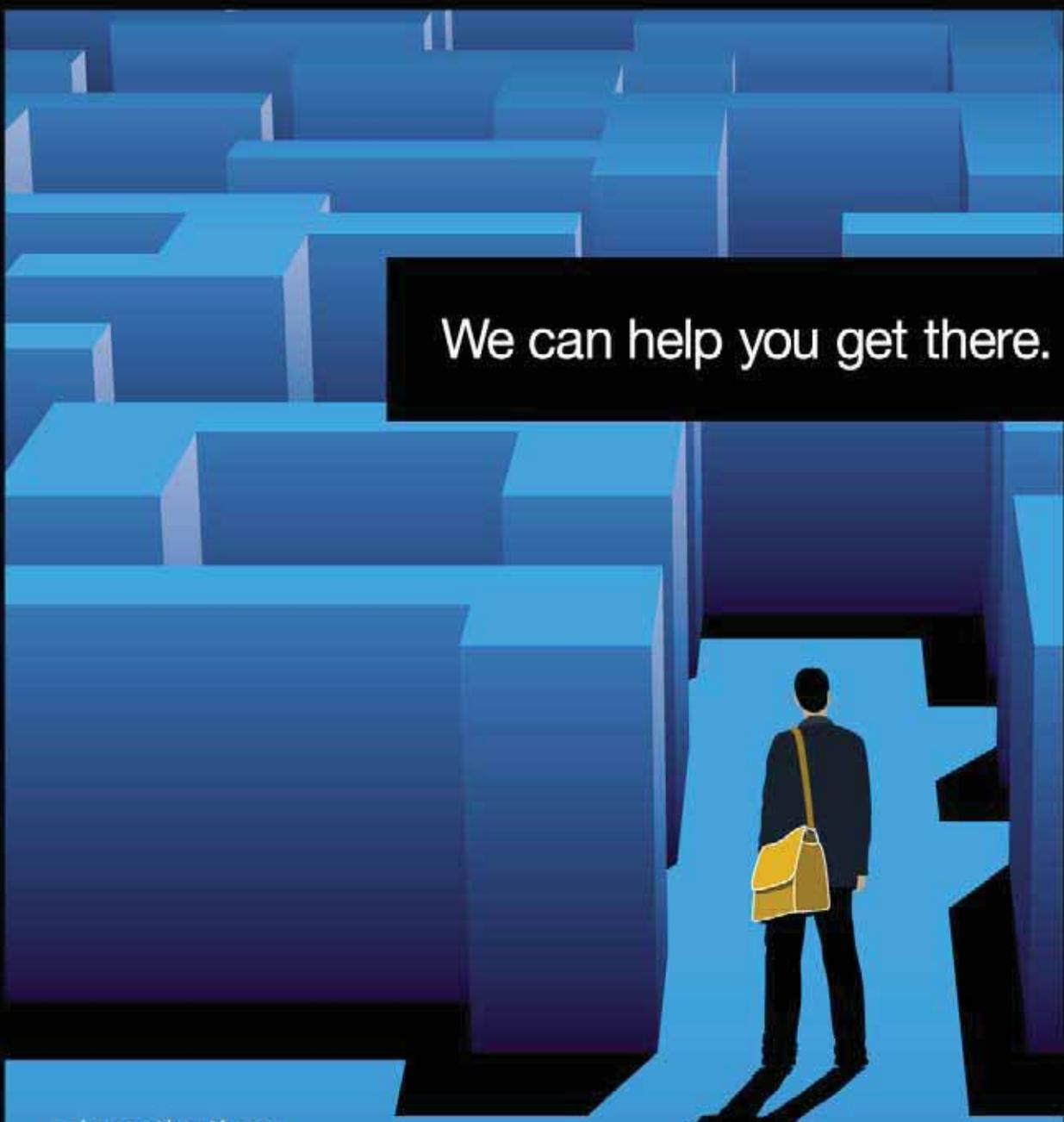
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