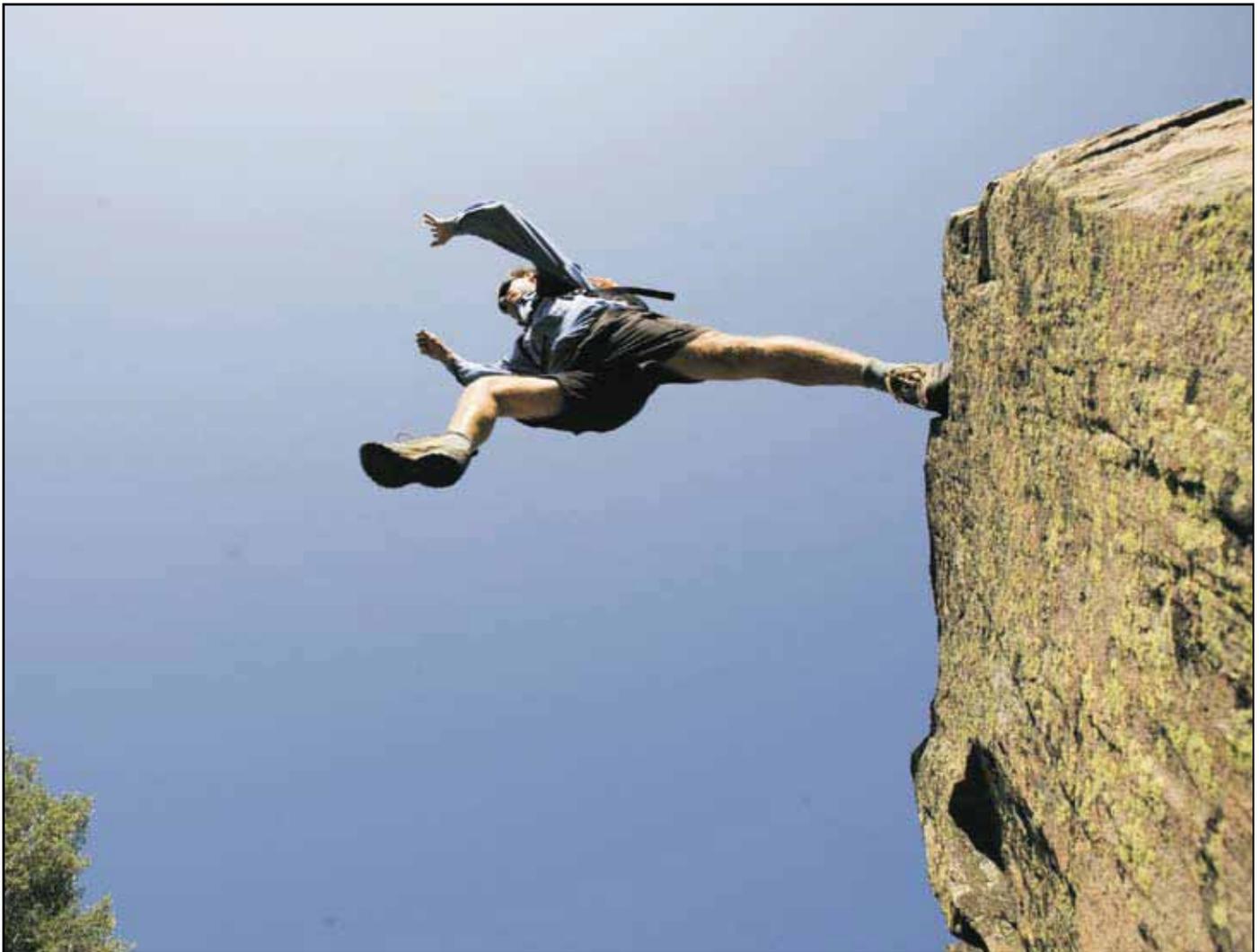




# The Advocate

Official Publication  
of the Idaho State Bar  
Volume 52, No. 10  
October 2009

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# The Advocate

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This photo was taken by taken by Idaho attorney Lane E. Erickson, a partner at Racine, Olson, Nye, Budge & Bailey, Chtd. in Pocatello.

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Special thanks to the October *The Advocate* editorial team: John Zarian, Brian Kane and Matt Christensen.

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*The Advocate* welcomes ideas for general interest articles. Aside from feature articles by Sections, *The Advocate* seeks lively writing about legal ethics, business management and technology, among other issues. Please contact Managing Editor Dan Black at [dblack@isb.idaho.gov](mailto:dblack@isb.idaho.gov) or call (208) 955-8866 to query before writing.

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### Idaho Law Foundation Fall 2009 CLE Schedule

#### October 1

*CLE Program Replays*  
9:00 a.m. - 1:00 p.m.  
The Law Center, Boise  
3.5 CLE Credits of which 2.0 are  
Ethics Credits RAC\*

#### October 2

*Idaho Practical Skills*  
8:30 a.m. - 4:00 p.m.  
Boise Centre  
6.0 Credits of which 2.0 are  
Ethics Credit RAC\*

#### November 13

*The Complete Legal Negotiator*  
8:30 a.m. - 3:30 p.m.  
The Grove Hotel, Boise  
6.0 Credits

#### November 20

*Headline News—Year in Review*  
8:30 a.m. - 4:00 p.m.  
University Inn, Moscow  
6.0 CLE credits of which 1.0 is  
Ethics Credit RAC\*

#### December 4

*Headline News—Year in Review*  
8:30 a.m. - 4:00 p.m.  
Red Lion Hotel, Pocatello  
6.0 CLE credits of which 1.0 is  
Ethics Credit RAC\*

#### December 11

*Headline News—Year in Review*  
8:30 a.m. - 4:00 p.m.  
Oxford Suites, Boise  
6.0 CLE credits of which 1.0 is  
Ethics Credit RAC\*

#### December 18

*Ethical Trial Advocacy*  
8:30 - 10:30 a.m.  
Oxford Suites, Boise  
2.0 Ethics CLE Credit RAC\*

\*RAC—These programs are approved for Reciprocal Admission Credit pursuant to Idaho Bar Commissions Rule 204A(e).

The Annual Road Show-Resolution process coming up in November will be a little more interesting than last year where, if you recall, there were no resolutions up for consideration. As predicted last year, however,



B. Newal Squyres

we are coming to you this year with a resolution requesting an increase in license fees. The last general fee increase was approved by the membership in 1997 and phased in over two years in 1999 and 2000. The Bar Commissioners committed then to do their best to abstain from requesting another increase for ten years and that goal has been accomplished. If approved, the proposed license fee increase will be phased in over a two-year period, with the first half of the total increase in 2011 and the remaining portion, just a little over one-half, in 2012. Considering the increase in price of virtually everything else, from a cup of coffee to our hourly rates, it is noteworthy, perhaps even remarkable, that our fees have not increased for 12 years.

Specifically, the proposal would increase the fee for active members in their fourth year of admission from \$340 to \$380 in 2011 and then to \$425 in 2012. Lawyers in the first, second and third calendar years of admission will have an increase from \$255 to \$285 in 2011 and to \$320 in 2012.

The Board of Commissioners has been reviewing the financial status of the Bar for at least the last three years to determine when a license fee increase would be necessary. And while we might prefer to push this recommendation and proposal off to the next board, we believe the time is now to increase our license fees. As Bar Commission President-Elect Doug Mushlitz outlined during last year's road show, the need for a license fee increase has not been caused by the events of this past year and, hopefully, by the time the increase is implemented in

2011, the fall of 2008 will be little more than a bad memory.

Historically since 1982, a license fee increase has been necessary every 8 to 10 (and now 12) years. There was an increase in 1982, 1990, and 1999. It thus seems reasonable to expect another increase will not be necessary until around 2020, if not longer. As currently structured and proposed to continue, after a lawyer's 72nd birthday, the license fees decrease significantly, to \$60 for 2011 and \$70 for 2012. It will be interesting to see whether this "break" for more senior lawyers can be maintained, considering the fact that about 50% of the members of our bar are over the age of 50.

There were 3,787 members of the Idaho Bar in 1997 and, after October 1 when the new admittees are sworn in, we will have a little over 5,350 members, an increase of 42%. While the revenue from a larger membership has helped absorb some of the increased cost over the past years, increasing bar membership does not offset incrementally increasing expenses forever.

The Bar's primary responsibility is its regulatory functions, essentially serving as a quasi-governmental organization, to oversee and administer admissions, licensing and discipline for its members. Consistent with this responsibility, about 63% of the Bar's expenses are allocated to its regulatory responsibilities, which include the Client Assistance Fund, fee arbitration, ethics advice, and District Bar Association allocations, among others. Approximately 20% of the Bar's expenses are related to member services such as *The Advocate* and other communications, Casemaker, the lawyer referral service (LRS), the lawyer assistance program, Desk Book Directory and the annual meeting. The remaining 17% or so of our expenses is for the administration of these functions. Some of the cost of admissions, member services activities and administration is covered by other revenue sources. For example, admission fees cover about 75% of admission expenses, and about 50% of the expense of publishing *The Advocate* is covered by advertising and subscription revenue. And the MCLE accreditation process is generally covered

Considering the increase in price of virtually everything else, from a cup of coffee to our hourly rates, it is noteworthy, perhaps even remarkable, that our fees have not increased for 12 years.

by the fees paid by program sponsors to apply for CLE accreditation.

In an ongoing effort to reduce its expenses, the Bar is now publishing fewer *Advocate* issues, conducting more communication with its members through its website and email rather than hard copy mailings, has reduced Yellow Page advertising for LRS, created an online LRS option (which reduced staff time spent handling LRS calls), and set up an online licensing option. Through the excellent work of our staff, the Bar continues to explore and implement improvements in technology to reduce its cost and staff time to carry out the functions and responsibilities of the Bar.

Some comparisons are in order. The proposed increase represents less than a 2% increase per year over a 10-year period. The average CPI index for the same time period was 2.8%. Idaho's license fees are comparable to those of similar unified state bars. The 2009 license fees\* for active bar members from other Western unified state bars are:

- Arizona - \$570
- Nevada \$490
- Oregon - \$482
- Alaska - \$460
- Washington - \$430
- Montana - \$370
- Utah - \$360
- Idaho - \$360
- Wyoming - \$310

\* License fees listed include other assessments such as the \$20 client assistance fee by Idaho lawyers.

Of the 33 unified bars that responded to a recent ABA survey, only seven state bars (including Idaho) had not raised license fees in the last seven years.

Twenty-one of the 33 state bars raised their fees in the last two to four years.

So, what's next? If a proposed license fee increase is approved by the Idaho State Bar membership, it would then be submitted to the Idaho legislature and Idaho Supreme Court for approval. License fees are set both by statute and Idaho Bar Commission Rule. If the increase is approved by these entities, it would take effect for the 2011 licensing year.

While the Bar strives to serve its members as an indispensable advocate

for the profession, it must administer its regulatory responsibilities within a sound budget, one that practically meets the needs of the profession, its members and the public. The proposed license fee increase is necessary to maintain this practical support. On behalf of the Board of Commissioners, I urge your continued support of the Bar and its mission by voting in favor of the proposed increase in license fees.

***The mission of the Idaho State Bar is to administer granting the privilege to practice law in Idaho; to control and***

***regulate the legal profession; to protect the public from the unauthorized practice of law and from unprofessional conduct by members of the bar; to promote high standards of professional conduct; and to aid in the advancement of the administration of justice.***

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

## COMING EVENTS

- Oct. 12: Law Center Closed for Columbus Day
- Oct. 16: Idaho State Bar Board of Commissioners Meeting
- Oct. 23: Idaho Law Foundation Board of Directors Meeting
- Nov. 18: Idaho State Bar Board of Commissioners Meeting
- Nov. 25-26: Law Center Closed for Thanksgiving Holiday
- Dec. 4: Idaho Law Foundation Board of Directors Meeting
- Dec. 25: Law Center Closed for Christmas Holiday
- Jan. 1: Law Center Closed for New Year's Day Holiday

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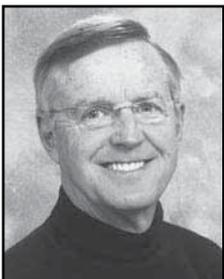
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## American Bar Association State Bar Delegate Position

Two members of the Idaho State Bar serve in the ABA House of Delegates. The State Delegate is elected by the ABA members in Idaho and the State Bar Delegate is appointed by the Board of Commissioners of the Idaho State Bar. Larry Hunter, who previously served as the State Bar Delegate, was elected to the State Delegate position, previously held by the late Allyn Dingel. The Board of Commissioners is soliciting attorneys interested in serving as the appointed State Bar Delegate to the ABA House of Delegates. The position holder is a voting member of the ABA House of Delegates which controls, formulates policy for, and administers the ABA. Interested attorneys should write or email Executive Director Diane Minnich, P.O. Box 895, Boise, ID 83701, dminnich@isb.idaho.gov by November 6, 2009.

**MARK T. MCHUGH  
(Disbarment)**

On September 3, 2009, the Idaho Supreme Court issued an Order of Disbarment disbaring Boise lawyer Mark T. McHugh from the practice of law in the State of Idaho. The Idaho Supreme Court's Order followed a Professional Conduct Board order and recommendation of disbarment in a formal charge disciplinary proceeding filed by the Idaho State Bar. Although given proper notice of the disciplinary proceeding, Mr. McHugh did not appear or otherwise participate in this proceeding.

On December 1, 2008, the Idaho State Bar filed a formal charge Complaint against Mr. McHugh alleging eight counts of professional misconduct. The first count alleged violations of Idaho Rules of Professional Conduct ("I.R.P.C.") 1.5(f) [Failure to provide itemized accounting] and 1.16(d) [Failure to return unearned fees upon termination of representation], for failing to provide an accounting of fees upon request and failing to return an unearned fee upon termination of the representation by the client. This count also alleged that Mr. McHugh violated I.R.P.C. 1.15(a) [A lawyer shall hold property of clients separate from the lawyer's own property], for failing to hold the unearned fee in trust because when he finally returned the fee to his client, his check was returned for insufficient funds. Three other counts in the Complaint alleged that Mr. McHugh violated I.R.P.C. 1.2(a) [A lawyer shall abide by a client's decisions concerning the objectives of representation and shall consult with the client as to the means by which they are to be pursued], 1.3 [Diligence], 1.4 [Communication], 1.16(d) [Failure to return unearned fees upon termination of representation], 8.4(c) [Conduct involving dishonesty, fraud, deceit or misrepresentation], and 8.4(d) [Conduct that is prejudicial to the administration of justice], for failing to perform the work for which he was hired, for failing to communicate with his clients, and for failing to return unearned fees. The remaining four counts in the Complaint alleged that Mr. McHugh violated I.R.P.C. 8.1(b) [A lawyer in connection with a disciplinary matter shall not knowingly fail to respond to a lawful demand for information from a disciplinary authority] and Idaho Bar Commission Rule ("I.B.C.R.") 505(e) [Failure to respond to a request from Bar Counsel shall be grounds for imposition of sanctions], for failing to respond to Bar Counsel's inquiries into the grievances filed against him by his clients.

Also on December 1, 2008, the Idaho State Bar filed with the Idaho Supreme Court a Petition for Interim Suspension of License to Practice Law against Mr. McHugh pursuant to I.B.C.R. 510. The Bar's petition was based upon its belief that Mr. McHugh posed a substantial threat of serious harm to the public and because he failed, without justifiable grounds, to cooperate with or respond to Bar Counsel's requests for information. On December 22, 2008, the Idaho Supreme Court issued an order granting the petition and placed Mr. McHugh on interim suspension effective at 5:00 p.m. that day.

On January 28, 2009, the Idaho State Bar filed an Amended Complaint against Mr. McHugh alleging four additional counts of professional misconduct. Two counts alleged violations of 1.2(a) [A lawyer shall abide by a client's decisions concerning the objectives of representation and shall consult with the client as to the means by which they are to be pursued], 1.4 [Communication], 1.5(a) [Unreasonable fee], 8.4(c) [Conduct involving dishonesty, fraud, deceit or misrepresentation], and 8.4(d) [Conduct that is prejudicial to the administration of justice], for accepting attorney fees from two clients, failing to perform the work for which he

was hired, failing to communicate with his clients, and for failing to return the unearned fees. Two counts alleged that Mr. McHugh violated I.R.P.C. 8.1(b) [A lawyer in connection with a disciplinary matter shall not knowingly fail to respond to a lawful demand for information from a disciplinary authority], and Idaho Bar Commission Rule 505(e) [Failure to respond to a request from Bar Counsel shall be grounds for imposition of sanctions], for failing to respond to Bar Counsel's inquiries into the grievances filed against him by his clients.

On April 7, 2009, the Idaho State Bar filed a Second Amended Complaint against Mr. McHugh alleging seven additional counts of professional misconduct. Within six of those counts, the Bar alleged three violations of I.R.P.C. 1.2(a) [A lawyer shall abide by a client's decisions concerning the objectives of representation and shall consult with the client as to the means by which they are to be pursued], two violations of I.R.P.C. 1.3 [Diligence], six violations of I.R.P.C. 1.4 [Communication], one violation of 1.5(f) [Failure to provide itemized accounting], six violations of I.R.P.C. 1.16(d) [Failure to return unearned fees upon termination of representation], and one violation of I.R.P.C. 8.4(c) [Conduct involving dishonesty, fraud, deceit or misrepresentation], for accepting fees, failing to perform the work for which he was hired, and for failing to return the unearned fees. The Second Amended Complaint also alleged, with respect to three clients, violations of I.B.C.R. 517(a) (1) [Notice of a Supreme Court order imposing interim suspension shall be given by the Respondent to all clients being represented in pending matters], for failing to inform those clients that he could no longer represent them due to his December 22, 2008 interim suspension. These clients did not know Mr. McHugh was unable to represent them until they appeared in Court and were so informed by the presiding judges. One of the additional counts in the Second Amended Complaint alleged violations of I.R.P.C. 8.1(b) [A lawyer in connection with a disciplinary matter shall not knowingly fail to respond to a lawful demand for information from a disciplinary authority] and Idaho Bar Commission Rule 505(e) [Failure to respond to a request from Bar Counsel shall be grounds for imposition of sanctions], for failing to respond to Bar Counsel's inquiries into the grievance filed against him by a client.

Based upon those violations of the Idaho Rules of Professional Conduct and the Idaho Bar Commission Rules, the Idaho Supreme Court ordered the imposition of the sanction of disbarment, that Mr. McHugh's admission to practice law in the State of Idaho be revoked, and that his name be stricken from the records of the Idaho Supreme Court as a member of the Idaho State Bar. The Court further ordered that Mr. McHugh reimburse the Idaho State Bar for all costs and expenses incurred in investigating and prosecuting this matter.

The Idaho Supreme Court ordered that before Mr. McHugh is permitted to make application for admission to the Idaho State Bar, not sooner than five years from the effective date of the disbarment, he must make restitution to eight specific clients. The Court further ordered that if any of those clients are reimbursed by the Client Assistance Fund as a result of a determination of Mr. McHugh's dishonest conduct, or any other clients are reimbursed by the Client Assistance Fund, that Mr. McHugh must make restitution to the Client Assistance Fund for all claims paid by the Fund before he may apply for admission to the Idaho State Bar.

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

**Otter names new judge to Appeals Court**

BOISE — Gov. C.L. “Butch” Otter named Fifth Judicial District Judge John Michael Melanson to the Idaho Court of Appeals. This fills the vacancy created by the retirement of Judge Darrel R. Perry, who retired Sept. 30.

Melanson, 61, has been a district judge for the past eight years, serving Minidoka County. Prior to serving there, Melanson was a magistrate in Lincoln County for six years and was in private practice in Buhl for 13 years prior. He is currently a resident of Rupert.

“I am very excited about this appointment and very humbled by the Governor’s decision and I will work every day to live up to the trust he has placed me,” Melanson said.

In recent years, Melanson has been at the forefront of some contentious legal disputes over water rights in southern Idaho, including state-imposed curtailment orders and tussles between groundwater pumpers and trout farms.

Melanson received his bachelor’s degree in Business Administration from Idaho State University in 1978 and his law degree from the University of Idaho in 1981.

“I have tremendous confidence in Melanson and the reputation that he carries into this new appointment,” Otter said. “His experience and perspective will be a welcome addition to the court.”



Honorable John Michael Melanson

**Otter names Caldwell lawyer as Third District Judge**

BOISE — Gov. C.L. “Butch” Otter has appointed Caldwell attorney Susan Wiebe to fill a judgeship in the Third Judicial District.

Wiebe, 47, is a North Carolina native with a bachelor’s degree from Boise State University and a law degree from the University of Idaho. She worked for the Boundary County Prosecutor’s Office in Bonners Ferry, the Coeur d’Alene City Attorney, the Kootenai County Prosecutor in Coeur d’Alene and as a deputy attorney general before going into private practice in Boise and later Caldwell.

“I accept this appointment with a profound sense of humility and a keen awareness of the tremendous responsibility that being a district judge entails,” said Wiebe, who succeeds retiring Judge Stephen Drescher. “I eagerly look forward to meeting and working with all of the court staff in the Third Judicial District.”

Wiebe is the daughter of Caldwell-based attorney and former Canyon County public defender Klaus Wiebe. Judicial rules governing professional conduct would prohibit Klaus Wiebe from arguing cases in front of her, Susan Wiebe said.



Honorable Susan Wiebe

**Naftz elevated to Sixth District Judge**

BOISE — Gov. C.L. “Butch” Otter elevated Bannock County Magistrate Robert Naftz of Pocatello to a Sixth District judgeship.

Naftz, 47, is a Colorado native with a bachelor’s degree from Colorado State University and a law degree from the University of Idaho. He was in private practice until going to work as a deputy attorney general in 2000 and was appointed a Bannock County magistrate in 2004.

“It speaks volumes about the quality of our people that we have such well-qualified and civic-minded individuals willing to serve Idaho’s citizens as judges,” Otter said. “I’m confident that our new Third and Sixth District judges will dispense justice wisely and well, and will make us all proud to live here in Idaho.”



Honorable Robert Naftz

**District Magistrate Commissioners appointed**

The Idaho State Bar Board of Commissioners appointed the following attorneys to the District Magistrate Commissions:

**First District Bar:**

- Heidi Fisher: *Child & Fisher*
- Hollis Anderson: *Hollis J. Anderson, PA*

**Second District Bar:**

- Charles Kovis: *Charles E. Kovis Law Office*
- Anthony Anegon: *Aherin, Rice & Anegon*

**Third District Bar:**

- Bryan Knox: *Tucker & Knox, LLP*
- Nick Bokides: *Bokides Law Office*

**Fourth District Bar:**

- Stan Welsh: *Cosho Humphrey, LLP*
- Rob Chastain: *Chastain Law Office*

**Fifth District Bar:**

- Lance Loveland: *Parsons, Smith & Stone, LLP*
- David Coleman: *Coleman, Ritchie & Robertson*

**Sixth District Bar:**

- Jonathan Volyn: *Racine, Olson, Nye, Budge & Bailey, Chtd.*
- Fred Belzer: *Belzer Law Office*

**Seventh District Bar:**

- Royce Lee: *Royce B. Lee, PA*
- Scott Axline: *Scott Axline Law Office*

Pursuant to Idaho Code 1-2203, each District Bar Association nominates two attorneys to the Board of Commissioners to the Idaho State Bar to serve on the local District Magistrate Commission. House Bill 208, effective July 1, 1991, amended the existing statute to provide that attorneys shall be voting members of the Commissions and limits the terms of members to three.

All those currently serving have terms which will expire on June 30, 2011.

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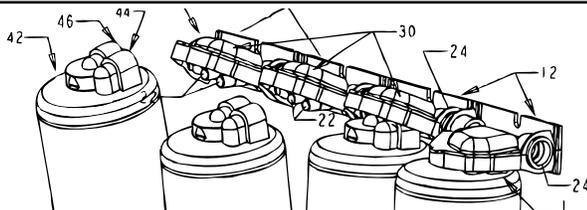
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**Is It Your MCLE Reporting Year?**

No one likes last minute scrambling for MCLE credits. If your MCLE reporting period ends on December 31, 2009 and you need more credits, visit the Idaho State Bar website at [isb.idaho.gov](http://isb.idaho.gov) for lists of upcoming live courses, approved online courses and audio/video rental programs. Do not wait until November or December to get the credits you need. Start working on it now. If you have questions about MCLE compliance, contact the Membership Department at (208) 334-4500 or [jhunt@isb.idaho.gov](mailto:jhunt@isb.idaho.gov).

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## 2009 Professionalism Award Recipients

### Diane K. Minnich

Please join the Board of Commissioners, District Bar officers and your colleagues at the resolution meetings in November. The resolution meeting schedule is on page 15.

The meetings will include honoring local attorneys receiving the 2009 professionalism and pro bono awards. Professionalism awards will be given to the following lawyers at the resolution meetings in their districts.



Diane K. Minnich

#### First District

**Sue S. Flammia** practices with her sister, Anne Solomon, at their Coeur d'Alene law firm, Flammia and Solomon. Her practice includes family law, as well as other areas of civil law. Sue has been very active with the Bar and the court. She is a member of the ISB Family Law Section and was chair for three terms. She co-chaired the Bench-Bar Committee to Protect Children of High Conflict Divorce. She served on the Idaho Law Foundation CLE committee. She served on the Idaho Supreme Court Mediation Committee in 1988 when the committee drafted the initial rules for child custody mediation. She served on the Idaho Judicial Council from 1993-1999 and currently is a member of the ISB Professional Conduct Board. She received the Governor's Award for Support of the Arts in 1990 (along with her late husband Patrick Flammia), the Family Law Section Award of Distinction in 1997, the Pro Bono Award in 1999 and the Idaho State Bar Service Award in 2000. She names Scott Reed as a professional mentor and says of the profession, "The law is an important profession, the difference between a culture of order or one of chaos. We lawyers have the important task of treating each other and all persons involved with respect."



Sue S. Flammia

#### Second District

**Eric K. Peterson** is a member of the Lewiston law firm of Clements, Brown & McNichols, P.A. Eric has served as an officer with the Second District Bar Association and with the Ray C. McNichols American Inn of Court. He was elected to the ISB Board of Commissioners in 2001 and served as President in 2004. Eric said that serving as a Bar Commissioner "instilled a great awareness and appreciation of the high degree of civility and professionalism in the practice of law in the State of Idaho."



Eric K. Peterson

Eric was nominated by his colleague, Ron Blewett, who said Eric "can be counted on to donate time and assistance in any worthy cause."

He added that "Eric has not just continued, but has built upon, the tradition of professional excellence and service founded by his late father, Phil Peterson."

Eric is particularly proud of his family and said being able to "combine the practice of law and my family — I cannot ask for anything more."

#### Third District

**David E. Kerrick** is an attorney in Caldwell where his practice focuses on business, estates and trust, real property, civil litigation and mediation. He has been in practice since 1980. David has been the President of the Third District Bar Association. He is the past president of the Caldwell Kiwanis Club and of the Canyon County Lawyers. He has received the Caldwell Distinguished Service Award and the Idaho State Bar Service Award. He served in the Idaho State Senate and was Majority Caucus Chairman and Majority Leader. He is very active in his community with the Caldwell Kiwanis Club and Caldwell Chamber of Commerce. David is married to District Judge Juneal Kerrick and they have four children. David said professionalism is a lawyer who can "represent clients zealously but doesn't lose the big picture or sense of humor."



David E. Kerrick

#### Fourth District

**Trudy Hanson Fouser** is the managing shareholder in the Boise firm, Gjording & Fouser, PLLC. In her practice, she represents businesses, hospitals, doctors and individuals in medical malpractice defense, employment defense and personal injury defense litigation. Trudy has been a very active volunteer in her profession. She has been a volunteer lawyer with the Court Appointed Special Advocates program (CASA) since 1990. She has served on many court committees including the Idaho Civil Rules Committee, Local U.S. District Court Rules Committee, State Discovery Rules Committee, U.S. Magistrate Selection Committee and most recently she was appointed to the newly formed Idaho Pro Bono Commission. Trudy has served as president of the Idaho Chapter of the Federal Bar Association and as director of that group's continuing legal education program. Trudy names Carl Burke and Allyn Dingel as mentors in her early career.



Trudy Hanson Fouser

"On a day-to-day basis, though, the person I have watched and learned the most from is my husband, (Jack Gjording)," she said. Trudy and Jack have three children — Whitney, Chris and Taylor.

**Larry C. Hunter** is a partner with the Boise firm Moffatt Thomas Barrett Rock & Fields, Chartered. His practice includes general and commercial litigation, alternative dispute resolution, agricultural law, products liability and insurance defense. Larry has provided many years of service to the Idaho State Bar. He served on the Board of Commissioners from 2001-2004 and was President in 2004. He served as chair of the ADR section for many years and currently chairs the ISB Public Information Committee. Larry has participated as a bar exam grader on numerous occasions. Larry currently serves as the Idaho State Delegate to the American Bar Association House of Delegates. He is the current chair of the ABA Standing Committee on Paralegals. Larry is also very active in his community. He has been a member of the Boise Philharmonic Association Board of Directors since 2001 and was the president from 2007-2008. He is the president-elect for the Kiwanis Club of Capital City. He has been an active volunteer with the Boise schools and youth sports. Larry named Richard Fields, Allyn Dingel and Bud Yost as professional mentors. He calls professionalism "the core of the legal profession." He has been married for 38 years to Iris and they have 6 children and 15 grandchildren.



Larry C. Hunter

**Fifth District**

**Susan P. Roy** is a partner with the Twin Falls firm of Roy, Nielson, Barini-Garcia & Platts. Susan has been a member of the Idaho State Bar since 1976. Her practice is focused on family law. Susan has served on the Idaho Child Support Guidelines Committee since its inception in 1979. Susan has been very active in her community with the Magic Valley Tennis Association, Golf Association and the Magic Valley Road and Dirt Bike Organization. Susan's view of the law has been shaped by attorneys Lloyd Webb and Ken Pederson. She said they "were, and are, passionately committed in protecting the rights of each individual." She also said her partner, Brent Nielson is a personal mentor and set an example by his "honesty, fair treatment, and treating every human being with dignity." Susan has been married to Ken for 29 years and they share two grown children.



Susan P. Roy

**Sixth District**

**Dave R. Gallafent** is president and senior partner with the Pocatello firm of Merrill & Merrill, Chartered. Dave has served as the President of the Sixth District Bar Association and has volunteered as an arbitrator in fee dispute cases for the Idaho State Bar. He is also the past president of the Pocatello United Way, past president of the Idaho State Civic Symphony and has been actively involved in Boy Scouts for several years. Dave described professionalism as combining "competence, courtesy, diligence and integrity in a lawyer's service to his clients, to his firm, to opposing counsel and to the court."

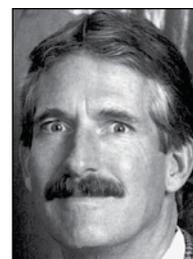


Dave R. Gallafent

He said his senior partner, Wes Merrill, has been his greatest professional influence. Dave is married to Suzanne and they have two grown children.

**Seventh District**

**Michael Hinman** is the managing attorney for the Idaho Falls Idaho Legal Aid Services office. Mike is very active in his community. He serves on the Board of Directors for the Eastern Idaho Community Action Partnership and has previously served as the Board President. He is a founder and serves on the Board of Directors of CLUB, Inc., a halfway house that provides mental health and substance abuse services. He also serves on the Head Start Policy Council, Region VII Children's Mental Health Council, Region VII Mental Health Advisory Board, State Planning Council on Mental Health, Affordable Housing Task Force and the Protection and Advocacy for Individuals with Mental Illness (PAIMI) Advisory Council. Mike is well known for his expertise in mental health law, social security law and housing and domestic violence issues. Mike credits Jack Hawley, Ted Pike and Roger Cox as professional mentors. Ernesto Sanchez, Executive Director of Idaho Legal Aid Services, said Mike "is dedicated to ILAS and to the clients he serves. He has dedicated his career to helping the underprivileged."



Michael Hinman



**IDAHO STATE BAR**  
**2009 RESOLUTION SCHEDULE**

**District Bar Association Resolution Meetings –meeting dates and times**

<i>1st District, Coeur d'Alene</i>	<i>Noon</i>	<i>November 13</i>	<i>Location TBA</i>
<i>2nd District, Lewiston</i>	<i>Evening</i>	<i>November 12</i>	<i>Red Lion Hotel</i>
<i>3rd District, Nampa</i>	<i>Evening</i>	<i>November 17</i>	<i>Location TBA</i>
<i>4th District, Boise</i>	<i>Noon</i>	<i>November 18</i>	<i>Grove Hotel</i>
<i>5th District, Twin Falls</i>	<i>Evening</i>	<i>November 18</i>	<i>Canyon Crest Dining Event Center</i>
<i>6th District, Pocatello</i>	<i>Noon</i>	<i>November 19</i>	<i>Juniper Hills Country Club</i>
<i>7th District, Idaho Falls</i>	<i>Noon</i>	<i>November 20</i>	<i>Sandpiper Restaurant</i>

## WELCOME FROM THE INTERNATIONAL LAW SECTION

Shasta J. Kilminster-Hadley  
*Idaho Office of the Attorney General*

The International Law Section of the Idaho State Bar is proud to sponsor this issue of *The Advocate*. The International Law Section is the newest practice section of the Idaho State Bar, started in September of 2008. Since that first meeting, our membership has grown larger and more diverse to include practitioners of immigration law, international trade law, intellectual property law, and human rights law, to name a few. As chair of a new Section, it has been a pleasure to see such a great level of participation and interest from our members as we explore the various ways that international issues impact the practice of law in Idaho.

Our CLE presentations over the year have been representative of the diversity of our members. We have had presentations from Section members on immigration law, international trade and World Trade Organization law, and international corporate social responsibility. In addition, we have sponsored CLE programs on Idaho Trade and its international ramifications and on Guantanamo and the rule of law. In the upcoming months we will have CLE presentations on the ABA Rule of Law Initiative and the Central European and Eurasian Law Initiative (also known as CEELI), and on the Foreign Corrupt Practices Act. We are looking forward to another year of timely and informative CLE programs and thank both our members and outside contributors for their willingness to share their expertise with the section and the Idaho State Bar.

This issue of *The Advocate* reflects the diversity of issues addressed by the International Law Section. The variety of topics, experience and perspectives found in the articles is indicative of the many different ways in which international law impacts attorneys in Idaho. In his article *Social Contract, Corporate Social Responsibility, Counsel and the ISO 26000 Guidance on Social Responsibility*, Mark Buchanan discusses the current efforts to create international standards of corporate social responsibility, and how such standards help attorneys advise their clients. Jason Prince reminds us of the potential dangers of contracting with foreign states in his article, *Does "Act of State" Mean "Out of Luck"?: The Perils of Doing Business*



Shasta J.  
Kilminster-Hadley

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In the upcoming months we will have CLE presentations on the ABA Rule of Law Initiative and the Central European and Eurasian Law Initiative (also known as CEELI), and on the Foreign Corrupt Practices Act.

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*With Foreign States and Their State-Owned Companies.* Russell Case provides important lessons for representing your clients abroad in *The Ugly American" Redux—Lessons in International Business and Law*. In her article, *Attorney Competence, Ethical Compliance and Transnational Practice*, Emile Loza discusses how competence in certain aspects of international law may be required under the Idaho Rules of Professional Conduct. Mikela French and Kristi Wilson detail the efforts of the *Idaho Immigration Pro Bono Network* to provide legal representation to low-income individuals facing deportation in Idaho. Monica Schurtman has written a thoughtful piece about the laws protecting historical memory in *Legislating the Right to Memory in Spain and Basque Country*. Finally, Brian Kane discusses Internet gambling and State legal sovereignty in *All In and a Call: Is Online Poker the Latest Threat to State Sovereignty?*

On behalf of the other officers of our Section, Melissa Moody and Kristi Wilson, I thank our authors for their time and effort in putting together this issue. We hope that you will find these articles informative and thought-provoking and invite you to attend one of our monthly section meetings or CLE programs. The International Law Section meets on the fourth Thursday of the month from Noon to 1 p.m. at the Idaho State Bar Law Center. For more information about upcoming CLEs or suggestions on how our section can better serve you, please feel free to contact any of our officers.

### About the Author

**Shasta Kilminster-Hadley** is the Chair of the International Law Section of the Bar. She is a Deputy Attorney General in the Natural Resources Division of the Idaho Office of the Attorney General. She received her B.A. in French from the University of Montana, continued her graduate studies in French at the State University of New York at Buffalo, and received her J.D. from the James E. Rogers College of Law at the University of Arizona. She is admitted to practice in Idaho and Arizona.

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# SOCIAL CONTRACT, CORPORATE SOCIAL RESPONSIBILITY, COUNSEL AND THE ISO 26000 GUIDANCE ON SOCIAL RESPONSIBILITY

Mark A. Buchanan

Corporate Social Responsibility (CSR) is not just a nice guy's way to do business. It creates value, secures the business' license to operate and creates strategic advantage in the global marketplace. In addition, of course, there's the legal perspective. Although the influence of CSR has had clear legal implications in the United States for some time, developments are increasing in international forums that have clear implications for defining legal obligation and risk, as well as business opportunity. One such development is the soon-to-be launched International Organization for Standardization (ISO) 26000 Guidance on Social Responsibility.

The term CSR is one of many terms indicating similar or overlapping themes. Other terms include Triple, or Multiple Bottom Line, ESG (environment, social, and governance), sustainability or corporate citizenship. Each implies a business expectation beyond simply maximizing profits while being in compliance with the law.



Mark A. Buchanan

## Lawyers must expand the breadth of their counsel

For lawyers advising corporate clients, especially those likely to attract public scrutiny, especially public policy-related scrutiny, it is customary to ask whether currently "legal" conduct could invite contrary legislative responses. Taking this inquiry a step further, a diligent attorney will query whether proactive adjustments in business behavior will be a preventative to government altering the regulatory structure. In fact, it is strongly suggested that fiduciary duties for attorneys and other professional advisors include the inclusion of CSR-related considerations.

For example, Freshfields Bruckhaus Deringer, an international law firm recently released the findings of a report, which contemplated the integration of environmental, social, and governance issues into counsel on investment policy. This report evaluated whether this integration was "voluntarily permitted, legally required or hampered by law and regulation."<sup>1</sup> Although this inquiry was limited primarily to the field of financial institutions, it does have wider implications. The report found that "integrating ESG considerations into an investment analysis so as to more reliably predict financial performance is clearly permissible and is arguably *required* in all jurisdictions," including the U.S.<sup>2</sup> A follow up report issued in July not only confirmed but strengthened the argument.<sup>3</sup> It seems clear that attorneys need to have some knowledge of the clients' particular "social contract" environment, an environment that is increasingly global in scope. This knowledge will assist them in counseling clients either from the perspective of traditional risk management or from more fully being able to assist the client in identifying strategic opportunity.

## Corporate citizens in the public eye

The field of corporate social responsibility occupies much of the interface in the ever-changing social contract between business and society, largely, but not exclusively, mediated by government. Among other factors, two major forces in the last

two or more decades have altered the face of that relationship: globalization, and the Internet.

Globalization presents both positives and negatives with regard to society. On the plus side, globalization, brought on largely by the reductions in barriers to trade, has expanded opportunities for new markets for goods, services, technology, and capital. On the negative side, it also has opened the home market door to the entry of fierce new competition, putting greater pressures on cost and pricing structures in all markets. But even this negative presents secondary benefits of globalization: access to new and cheaper sourcing of raw materials, components, finished products and services. Although the availability of these services is positive, it may lead to relocation of corporate facilities, which in turn may lead to the loss of jobs. The overwhelming conclusion is that counsel must be aware of the impacts of globalization on the accuracy of the legal advice dispensed to corporate clients.

The Internet has facilitated the speed and breadth of availability of information about business activity around the world. The speed with which news travels cannot be overstated. Businesses must be aware of what a more informed and active set of stakeholders are saying about them, appreciating the impacts that may have on brand and customer loyalty. Businesses should also be aware of the full breadth and depth of its value chain, value proposition, and competitive context.

Perhaps the most potent aspect of business communication through the Internet and related social network technologies (e.g., blogs, texting, and Twitter) is their capacity to facilitate organization and coordination of action by interested or aggrieved people, so-called "netizens". This phenomenon has replicated itself recently in places as far flung as Iran, China, and elsewhere. Businesses are also fair targets as witnessed by United Airlines, which, after denying a claim for a broken guitar, found itself the subject of a smash hit YouTube video.<sup>4</sup> Businesses and their attorneys should not discount the reach and speed of communication via the Internet, which includes political, economic and other opinions.

Stakeholders are any person or interest group, including governments, upon which the business has an impact or that has the power to impact the business. These stakeholders should be identified throughout the business' entire value chain because virtually all of the business' functional areas impact internal and external actors. To the extent that a business can increase its positive impacts (value-creation) or decrease its negative impacts, it will increase its value proposition, its competitive advantage in the market, and better manage its risks.

For example, identifying how waste can be reduced not only saves the cost of purchasing that waste (as part of any input that is not completely consumed in the production process) but also the cost of disposal. Further, reduction of waste may translate into a positive impact on the business' reputation in the community. Redesigning a product to facilitate recycling might do the same, anticipating that consumers would then attribute greater value to the product.

## Greater expectations for corporate citizens

The social contract can be defined as society giving business (both generally as well as specifically in each business charter) a license to operate in exchange for certain expected behaviors. In the United States, these expectations have included the

creation of employment, earning of profits, and the provision of goods and services. Originally, the terms of our social contract, loosely resembling *laissez faire* policy, seemed more favorable to business (or “capital”). Over the last two centuries, however, largely due to abuse or crisis, business has become more responsible for the costs associated with its activities, from anticompetitive behaviors, to terms of employment and worker protection, consumer rights and environmental protection, among others.

The Sarbanes-Oxley Act of 2002 also can be seen as a modification of the social contract in that it increases the duties owed to stakeholders in terms of corporate governance. Historically, it seems apparent that, as our national market developed, expansion of the meaning of the commerce clause was inevitable to facilitate social management of interstate business activities and their consequences given limitations on the ability of individual states to reach beyond their jurisdictional borders. The reduction of, or shifting responsibility for, these “externalities” (negative impacts of business behavior, such as pollution, worker injury, consumer injury) is much of the story of corporate social responsibility. Through the Internet, the time frame for being held accountable and responsible is now much shorter.

Business in the US has had to absorb increasing levels of responsibility for the social costs of its operations, making the effect on global competitiveness just that much more dramatic. What we have seen is the opening up of our markets to competition from places where the local (foreign) domestic social contract may impose fewer of these social contract costs and restraints on business. Additionally, our businesses seek to compete in other markets against those same competitors.<sup>5</sup> This places clear pressures for increases in productivity or cost reductions, either by resisting the shifting of responsibility for these costs (externalities) or by relocating to where costs or limitations are lower. To be sure, not all lower costs elsewhere are the result of lower responsibilities for negative externalities, such as due to lax labor or environmental standards. In part, wages in foreign countries may be lower simply because cost of living is lower and not due to worker abuse. Furthermore, some locations can bear certain levels and kinds of pollution without the need for abatement. Nevertheless, competitive pressures on cost structures are growing.

### Elusive standards

For the business that wants to do the “right thing” and be a good corporate citizen, for business or legal reasons, it is increasingly difficult to define “the right thing” in an increasingly global marketplace. There are the local voices of the immediate community that might themselves be conflicting. For example, the local mill creates jobs but it also pollutes. Legislatures might want to address industry problems that a particular business does not cause. National activist groups want to protect environmental areas from which a business draws necessary resources, and international activists are concerned about the labor standards of your sources of goods or components. Some industries have codes of conduct, while some stakeholders are pushing global codes such as the U.N. Global Compact<sup>6</sup> and still other stakeholders want to see an annual sustainability report.<sup>7</sup> These myriad voices may often reflect conflicting expectations but, even where similar, they may have differing standards. The struggle within this context for an attorney is to deliver accurate legal advice, while balancing these competing interests.

Some of these emerging standards have the character of international law. This includes standards to which countries

adhere as a result of treaty obligations, such as International Labor Organization conventions, U.N. Human Rights Conventions (e.g., regarding Civil and Political Rights, and Economic, Social and Cultural Rights), and the OECD Anti-bribery Convention.<sup>8</sup> These standards usually find their force through legislative enactments.

Customary international law is potentially another source, though less likely to apply to economic obligations. Other standards arise from “soft” international law. This would include normative, carrying informal sanctions, but non-legally binding instruments including U.N. resolutions, e.g. on the environment, human rights, the 1980 U.N. Draft Code of Conduct for Transnational Corporations, the OECD Guidelines for MNCs (revised 2000), the U.N. Global Compact’s “10 Principles”, and the Draft U.N. Norms on the Responsibility of Transnational Corporations (human rights).

These various standards may be global, regional, national, or local in scope. Some emanate from industry groups; others cut across industry. They vary on subjects covered. Some are general and cover many sets of expectations, and some are focused on one or two subjects. Some address broad classes of stakeholders, others one class. Some require engagement with external groups, other do not. In principle,<sup>9</sup> the subjects of international law are nation states, but the principles and standards of conduct established there are often translated into national public policy applicable to private actors, sometimes as part of direct state obligations taken on under treaty provisions or via other legal or social mechanisms.

### Standardized expectations

Recognizing this growing and confusing potpourri of new expectations, the International Organization for Standardization (ISO) decided in 2005 to enter into the field by attempting to create a unifying code for social responsibility. The result will be the product of a process that involves an international working group and the participation of national standards bodies<sup>10</sup> through which members of six stakeholder groups<sup>11</sup> of experts provide the input. Since 2005, the effort has proceeded through the steps of working drafts and a Committee Draft to reach the current Draft International Standard phase. It is slated for the final International Standard release by the middle of 2010. The process is intended to be entirely transparent and the current Draft International Standard is available online along with most of the process documents.<sup>12</sup>

“The aim of Social Responsibility is to contribute to sustainable development.”<sup>13</sup> The ISO standard is intended to promote common understanding in the field of social responsibility, be useful for all types of organizations, provide encouragement for compliance with the law, including “international norms” and recommend aspirational practices beyond mere legal compliance. Given the current proliferation of social and environmental “standards” available, the standard, increasingly being referred to as the “Guidance,” is currently defined as much by what it is not as by what it is.

First, it is not to be referred to as an International Standard in the traditional sense, although it currently uses that language. This is in contrast to the more familiar ISO standards: ISO 9000, on quality control, and ISO 14000, on environmental management. Also differing from its cousins, the standard is not a management system standard and is not intended or appropriate for certification purposes or for regulatory or contractual use. Further, while from its inception it has been intended that its specific standards for behavior should be based on “international norms”, the standard is not intended to provide a proper basis

for legal actions, complaints, defenses, or other claims. In other words, it is not meant to be evidence for determining standards of care or due diligence, and it is not intended to be cited as evidence of the evolution of customary international law and, therefore, binding upon nation states generally. On the other hand, if it is successful at framing a comprehensive and broadly-based coalition on social responsibility, it will certainly in practice and effect become many of these things, and this is the most direct impact upon the role of legal counsel.

The standard defines social responsibility as the:

“responsibility of an organization for the impacts of its decisions and activities on society and the environment through transparent and ethical behavior that contributes to sustainable development, including health and the welfare of society; takes into account the expectations of stakeholders; is in compliance with applicable law and consistent with international norms of behavior; and is integrated throughout the organization and practiced in its relationships.”<sup>14</sup>

The standard specifies certain fundamental principles of social responsibility including accountability, transparency, ethical behavior, and respect for stakeholder interests, the rule of law, international norms of behavior and human rights. During the drafting process, there has been much debate and disagreement on the definition of international norms as the definition directly affects what specific conduct is encouraged or discouraged as well as having implications for the progressive development of customary international law. That aside, the bulk of the specific standards and expectations find their source in documents of international law, giving a strong legal implication to the term “responsibility,” irrespective of the stated intent of the document.

The standard provides guidance on the recognition and practice of an organization’s social responsibility through the identification of impacts on society and stakeholders, stakeholder interests and expectations, and how to address issues that are determined to be significant within the contexts of the “core subjects and issues,” assuming continuous stakeholder identification and engagement, within the organization’s sphere of influence. Thus, the document implies varying levels of responsibility beyond the organization’s own activities to include the activities and impacts of others with or over whom the organization has some influence, which ranges from actual control to the ability to enter into or withhold contractual relationships. This is, of course, not uncommon today as highly visible businesses, such as WalMart, are routinely held accountable for the behaviors of their suppliers and even subcontractors of their suppliers.

### Defining the Scope of Standardization

The heart of the standard is the identification of “core subjects” and related “issues” that define further what an organization’s social responsibility may entail, accepting that each organization must explore and determine for itself what its business and social environment requires. These core subjects are:<sup>15</sup>

- organizational governance
- human rights
- labor practices
- the environment
- fair operating practices
- consumer issues
- community involvement and development

Each of these subjects is further expanded into specific issue areas. For instance, the core subject of labor practices includes:<sup>16</sup>

- Issue 1: Employment and employment relationships
- Issue 2: Conditions of work and social protection
- Issue 3: Social dialogue
- Issue 4: Health and safety at work
- Issue 5: Human development and training in the workplace

The environment portion includes:<sup>17</sup>

- Issue 1: Prevention of pollution
- Issue 2: Sustainable resource use
- Issue 3: Climate change mitigation and adaptation
- Issue 4: Protection and restoration of the natural environment

The last section of the standard provides “how to” instructions for integrating social responsibility into the fabric of the organization, thereby affecting its culture. It is widely-accepted among Ethics and CSR consultants that driving these ethical principles and practices deep into the structures and practices of the organization is essential not only to accomplish organizational change and risk management, but also to achieve the enhancements to value-creation and competitive advantage that are possible with good CSR. With this in mind, the standard suggests that the organization understand its social responsibility environment, and adopt practices for integrating social responsibility and communicating on its policies and actions. It also provides counsel on enhancing credibility regarding socially responsible initiatives, reviewing and improving actions and practices, and taking voluntary initiatives.

As a participant in the ISO 26000 drafting process, this author has experienced something of the scenario of the blind men trying to describe the elephant. While understanding and definition of the developing CSR field continues, even the experts continue to approach it with differing perspectives. That said, not only have some of the world’s best minds been brought to bear on the project, but the involvement of the national standards bodies and the various stakeholder groups has ensured that most of the issues have been raised and interests represented. The process should go a long way toward bringing a common understanding to the field. To that extent, for those organizations that consider it and use it wisely, the standard is a tool that can help to identify not just potential risk resulting from the failure to meet certain stakeholder expectations, legal or otherwise, and perhaps provide a safe harbor, but also to identify those gems of potential value-added incentives that come from understanding stakeholder expectations and meeting them ahead of the competition.

*The standard suggests that the organization understand its social responsibility environment, and adopt practices for integrating social responsibility and communicating on its policies and actions.*

## Conclusion

It is clear that the standard seeks to encourage behavior beyond compliance with the law. However, as the drafters have sought for the most part to limit the sources of standards to international norms, as largely reflected in international law, the standard goes a long way towards defining the sphere of potential legal expectations that a client may face in its operations. Also defined, therefore, is the minimum scope of legal competence necessary to adequately advise the client in ways that meet legal counsel's own ethical standards, including the standard of competence. Of course this aggressive mix of a "floor of conduct," with higher aspirational intentions should be fairly routine for attorneys familiar with our own Rules of Professional Conduct. Compliance with the minimum is generally less than sufficient.

As the environment of the client has expanded to include the global marketplace, the role of counsel has necessarily expanded and increasingly includes heightened domestic, foreign and international legal expectations. A good place to start is with an examination of the standards ultimately put forth in the ISO 26000 Guidance. Counsel can play a significant role in advising or representing clients with regard to navigating or negotiating changes in the domestic and global regulatory framework, or in legitimately preempting them, and perhaps finally seeing far enough ahead to help the client turn the wider forces of changing stakeholder expectations into competitive opportunity.

## About the Author

**Mark A Buchanan**, *Professor of Law and International Business (J.D., LL.M.) is a licensed Minnesota attorney and has lived and worked in the United States, China, Australia, Canada, Thailand, Vietnam, and Spain. Prior to coming to Boise in 1996 he was on the Faculty of Law, University of New South Wales, Sydney, Australia (1990-1995). He has twice been awarded overseas Fulbright Professorships. He has taught courses in international trade and investment law and has long focused his research interests on Corporate Social Responsibility in the international context, including interfaces with World Trade Organization-related policies with an emphasis on international labor standards. He is a member of the U.S. Technical Advisory Group to the ISO 26000 Guidance on Social Responsibility and has also worked with the Global Reporting Initiative in Amsterdam. He is also a member of the International Law Sections of the Idaho and American Bar Associations.*

## Endnotes

<sup>1</sup> Freshfields Bruckhaus Deringer, *A Legal Framework for the Integration of Environmental, Social and Governance Issues into Institutional Investment* (2005), UNEP FI Asset Management Working Group, at 6. Accessible at [http://www.unepfi.org/fileadmin/documents/freshfields\\_legal\\_resp\\_20051123.pdf](http://www.unepfi.org/fileadmin/documents/freshfields_legal_resp_20051123.pdf).

<sup>2</sup> *Id.*, at 13. Emphasis mine.

<sup>3</sup> *Fiduciary responsibility: Legal and practical aspects of integrating environmental, social and governance issues into institutional investment*, United Nations Environmental Programme, July 2009. Accessible at <http://www.unepfi.org/fileadmin/documents/fiduciaryII.pdf>

<sup>4</sup> <http://www.youtube.com/watch?v=5YGc4zOqozo>. The video, with a five star rating, has received over 5 million viewers in the first two months since posting in early July, 2009. The Times of London reported that United's stock price plunged 10% in the four days following the video's posting. See, [http://www.timesonline.co.uk/tol/comment/columnists/chris\\_ayres/article6722407.ece](http://www.timesonline.co.uk/tol/comment/columnists/chris_ayres/article6722407.ece).

<sup>5</sup> For instance, the Foreign Corrupt Practices Act, enacted in 1977 following disclosures of corporate conduct abroad during Watergate, restricts US enterprises from bribing foreign officials, even where local law or practice does not effectively preclude competitors from engaging in such bribery, placing US firms at a competitive disadvantage. Because of this, the US worked for many years towards what was accomplished with the OECD Anti-bribery Convention, resulting in similar rules for firms from other developed countries.

<sup>6</sup> See, <http://www.unglobalcompact.org/>

<sup>7</sup> A sustainability, or CSR, or Citizenship report discloses any of a variety of social and environmental impacts of a business and its policies towards or programs to address those impacts. It is usually separate from annual financial reporting. For example, see Coca Cola's Sustainability Review at [http://www.thecoca-colacompany.com/citizenship/pdf/2007-2008\\_sustainability\\_review.pdf](http://www.thecoca-colacompany.com/citizenship/pdf/2007-2008_sustainability_review.pdf).

<sup>8</sup> See, [http://www.oecd.org/departement/0,3355,en\\_2649\\_34859\\_1\\_1\\_1\\_1\\_1,0\\_0.html](http://www.oecd.org/departement/0,3355,en_2649_34859_1_1_1_1_1,0_0.html).

<sup>9</sup> It should be mentioned that increasingly, the trend is toward applying international law to individual actors, most visible in the establishment of the International Criminal Court, but also in the presently uncertain expansion of standing under the U.S. Alien Tort Claims Act.

<sup>10</sup> In the U.S., it is the American National Standards Institute.

<sup>11</sup> The stakeholder groups are industry, government, labor, consumer, NGO and "other".

<sup>12</sup> The general project web site is located at [www.iso.org/sr](http://www.iso.org/sr). The Draft International Standard can be found at [http://isotc.iso.org/livelink/livelink/etch/2000/2122/830949/3934883/3935837/ISO\\_DIS\\_26000\\_Guidance\\_on\\_Social\\_Responsibility.pdf?nodeid=8385026&vernum=0](http://isotc.iso.org/livelink/livelink/etch/2000/2122/830949/3934883/3935837/ISO_DIS_26000_Guidance_on_Social_Responsibility.pdf?nodeid=8385026&vernum=0).

<sup>13</sup> *Id.*, at Clause 1: Introduction.

<sup>14</sup> *Id.*, at Clause 2.1.18: Definitions.

<sup>15</sup> *Id.*, at Clause 6.1: Core Subjects.

<sup>16</sup> *Id.*, at Clause 6.4: Labor practices.

<sup>17</sup> *Id.*, at Clause 6.5: The Environment.

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# DOES 'ACT OF STATE' MEAN 'OUT OF LUCK'? THE PERILS OF DOING BUSINESS WITH FOREIGN STATES AND THEIR STATE-OWNED COMPANIES

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Foreign sovereign states constitute significant players in the international commercial arena, contracting for goods and services much like traditional business entities. Many foreign states pursue their commercial interests in part through vast networks of state-owned companies ("SOCs"). For example, approximately 150 Chinese companies report directly to the Chinese central government, and China's central, provincial, and municipal governments exert varying degrees of control over thousands of other Chinese business entities.<sup>1</sup> These SOCs are often indistinguishable from their non-state competitors: they sell and purchase goods and services around the globe, invest in foreign markets, publicly trade their stock, and acquire foreign subsidiaries.

Gazprom, the world's largest natural gas company, provides a fascinating case study on foreign sovereigns' ability to blur the lines separating the public and private spheres. On the one hand, the Russian government holds a 50.002% interest in Gazprom,<sup>2</sup> and the Kremlin has reportedly played a role in Gazprom's periodic decisions to halt the flow of natural gas to Ukraine and its pro-NATO government.<sup>3</sup> On the other hand, Gazprom's stock is publicly traded and the company has the structure of a traditional multinational corporation. Gazprom and its approximately 60 subsidiaries own gas distribution companies throughout Europe, engage in gas exploration and production in Venezuela, Libya, and Algeria, and have retail supply operations in Denmark, France, Hungary, Scandinavia, the United Kingdom, and the United States. In fact, Gazprom has publically declared its goal of "surpass[ing] Exxon Mobile as the world's largest publicly traded company" by 2014.<sup>4</sup>

Due to foreign states' expansion in the global marketplace, U.S. companies increasingly find themselves selling their goods and services—either wittingly or unwittingly—to foreign sovereigns. Like non-state companies, foreign states and SOCs sometimes breach their contracts by failing or refusing to pay money owed. When a foreign sovereign breaches its contract with a U.S. company, however, the U.S. company may have to overcome a formidable obstacle before truly having its day in a U.S. court - the act of state doctrine.

The act of state doctrine prohibits U.S. courts from inquiring into the validity of the public acts taken by a recognized foreign sovereign (including its SOCs) within its own territory. In 1976, in *Alfred Dunhill of London, Inc. v. Republic of Cuba*,<sup>5</sup> the U.S. Supreme Court issued a plurality opinion that articulated a "commercial activity" exception to the act of state doctrine, suggesting U.S. courts could consider claims arising from foreign sovereigns' commercial activities. However, only four justices endorsed such an exception to the act of state doctrine, meaning that *Dunhill* does not constitute binding precedent on this issue.

Subsequently, the U.S. Court of Appeals for the Eleventh Circuit has expressly denied the existence of a commercial activities exception to the act of state doctrine, and the other

federal circuit courts have repeatedly side-stepped the issue. Accordingly, U.S. companies that sue foreign states or SOCs to enforce contractual rights in U.S. courts might discover that the act of state doctrine bars adjudication of their claims. In other words, for these U.S. companies, "act of state" might mean "out of luck."

## Foreign Sovereign Immunities Act and its commercial activities exception

Although this article focuses on the act of state doctrine, rather than the Foreign Sovereign Immunities Act ("FSIA"), these two topics are intertwined when it comes to the issue of a U.S. court's ability to consider cases involving foreign states and SOCs. Indeed, most cases involving the act of state doctrine begin with an analysis of whether the U.S. court may exercise jurisdiction over the foreign sovereign under the FSIA.

The FSIA provides the exclusive jurisdictional basis for actions against foreign states, establishing that foreign states are immune from the U.S. courts' jurisdiction unless a statutory exception applies.<sup>6</sup> Foreign SOCs generally enjoy the FSIA's protections as well, because the term "foreign state" encompasses entities that are "organ[s] of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof."<sup>7</sup>

Notably, § 1605(a)(2) of the FSIA empowers U.S. courts to exercise jurisdiction over claims arising from a foreign sovereign's "commercial activity." A foreign state engages in "commercial activity" under the FSIA "when it exercises only those powers that can also be exercised by private citizens, as distinct from those powers peculiar to sovereigns. Put differently, a foreign state engages in commercial activity . . . only where it acts in the manner of a private player within the market."<sup>8</sup>

In summary, a U.S. court will look to the FSIA to determine whether or not it has jurisdiction over a lawsuit involving a foreign state or SOC. If the lawsuit revolves around a foreign sovereign's "commercial activity" as defined in § 1605(a)(2) (or one of the statute's other exceptions), then the U.S. court can exercise its jurisdiction. Yet, as explained below, the fact that a U.S. court can exercise its jurisdiction over a lawsuit involving a foreign SOC does not necessarily mean that the U.S. court can actually consider the merits of that lawsuit.

## Act of state doctrine and its lack of commercial activities exception

Unlike the FSIA, the act of state doctrine has nothing to do with the U.S. courts' jurisdiction. Rather, the act of state doctrine is a judicially-created rule of decision that bars the U.S. courts from "inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory."<sup>9</sup> The instrumentalities of foreign sovereigns—including SOCs—may invoke the act of state doctrine to protect themselves against claims brought in U.S. courts.<sup>10</sup>

As the U.S. Supreme Court has explained, the policies underlying the act of state doctrine are "international comity, respect for the sovereignty of foreign nations on their own territory, and the avoidance of embarrassment to the Executive Branch in its conduct of foreign affairs."<sup>11</sup> This final policy of "avoidance of embarrassment to the Executive Branch," which has featured especially prominently in the U.S. Supreme



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Court's act of state doctrine jurisprudence, derives from judicial adherence to the separation of powers established under the U.S. Constitution. Specifically, the U.S. Constitution vests in the Executive Branch the power to establish and pursue foreign policy, and the Judicial Branch fears that ruling on the validity of the public acts of foreign sovereign states might undermine that foreign policy.<sup>12</sup>

In sharp contrast to the FSIA, the act of state doctrine lacks a clear "commercial activities" exception. As noted above, the U.S. Supreme Court addressed this issue in *Alfred Dunhill of London, Inc. v. Republic of Cuba*.<sup>13</sup> In *Dunhill*, three U.S. tobacco importers had purchased cigars from several Cuban cigar manufacturing companies both before and after the Cuban government expropriated these cigar companies in 1960 and placed them under the control of Cuban SOCs.<sup>14</sup> Following Cuba's expropriation of the cigar companies, the U.S. importers paid the Cuban SOCs for certain pre-expropriation shipments of cigars, mistakenly believing the Cuban SOCs were entitled to these payments.<sup>15</sup> In fact, the former owners of the expropriated cigar companies had the exclusive right to collect these payments.<sup>16</sup> During the ensuing legal wrangling, the U.S. importers claimed they were entitled to recover the mistaken payments from the Cuban SOCs by way of set-off and counterclaim.<sup>17</sup> The Cuban SOCs responded that any repayment obligation they might owe to the U.S. importers constituted a "quasi-contractual debt having a situs in Cuba and that their refusal to honor the obligation was an act of state not subject to question in [the United States] courts."<sup>18</sup>

Justice White authored a plurality opinion that rejected the Cuban SOCs' act of state doctrine argument. Defining the term "sovereign act" as "the public act of those with authority to exercise sovereign powers," the White plurality held that Cuba's repudiation of a commercial debt was not a sovereign act within the meaning of the act of state doctrine.<sup>19</sup> The White plurality based this determination on the fact that "[n]o statute, decree, order, or resolution of the Cuban Government itself was offered into evidence indicating that Cuba had repudiated its obligations in general or any class thereof or that it had as a sovereign matter determined to confiscate the amounts due."<sup>20</sup> This holding, which appeared in Part II of Justice White's opinion, served as the basis for the U.S. Supreme Court's decision.

In Part III of Justice White's opinion, however, the White plurality advanced an alternative basis for rejecting the Cuban SOCs' act of state doctrine argument: the adoption of a commercial activities exception. Specifically, the White plurality argued that "[t]he concept of an act of state . . . should not be extended to include the repudiation of a purely commercial obligation owed by a foreign sovereign or by one of its commercial instrumentalities."<sup>21</sup> Given that the Cuban SOCs' refusal to return the U.S. importers' mistakenly paid funds "was an act arising out of the conduct by Cuba's agents in the operation of cigar businesses for profit," the White plurality asserted that this "act was not an act of state."<sup>22</sup>

Only Chief Justice Burger, Justice Powell, and Justice Rehnquist joined Part III of Justice White's opinion, meaning that a majority of the U.S. Supreme Court declined to create a commercial activities exception to the act of state doctrine.<sup>23</sup>

In fact, Justice Marshall authored a dissenting opinion—joined by Justices Brennan, Stewart and Blackmun—in which he vehemently argued against the recognition of such a commercial activities exception.<sup>24</sup> These dissenting justices asserted that the act of state doctrine should have barred the U.S. importers' claims against the Cuban SOCs.<sup>25</sup>

Accordingly, *Dunhill* did not establish a commercial activities exception to the act of state doctrine.

### Post-Dunhill case law

In the wake of *Dunhill*, federal courts have splintered over the issue of whether the act of state doctrine applies to purely commercial acts that foreign sovereigns take within their own territories. At the federal appellate level, the Eleventh Circuit has flatly rejected the commercial activities exception;<sup>26</sup> the Sixth Circuit has expressed serious reservations about the exception's validity;<sup>27</sup> the Second Circuit has hinted that it might recognize such an exception,<sup>28</sup> and several other circuits have expressly declined opportunities to weigh in on the issue.<sup>29</sup> The federal district courts have also divided over the commercial activities exception's existence, with several expressly recognizing the exception, at least one expressly rejecting it, and many remaining uncommitted.<sup>30</sup>

The Eleventh Circuit's rejection of the commercial activities exception in *Honduran Aircraft Registry, Ltd. v. Honduras*<sup>31</sup> serves as a cautionary tale for U.S. companies that sell goods and services to foreign states and SOCs. In *Honduran Aircraft*, a Honduran company and its Bahamian subsidiary contracted with the Honduran government to upgrade and modernize the Honduran civil aeronautics program to comply with international standards.<sup>32</sup> After the companies provided Honduras roughly two years' worth of goods and services under the contract, the leadership of Honduras changed.<sup>33</sup>

Without prior notice to the companies, the new Honduran government abrogated the contract and refused to pay the companies for the goods and services they had already furnished.<sup>34</sup>

The companies sued Honduras in the U.S. District Court for the Southern District of Florida, seeking damages of more than \$1 million dollars for breach of contract, unjust enrichment, and other claims.<sup>35</sup> Honduras filed a motion to dismiss the companies' lawsuit on act of state doctrine grounds, but the district court denied this motion based on the commercial activities exception.<sup>36</sup>

On appeal, the Eleventh Circuit began its analysis by determining whether or not the FSIA granted it subject matter jurisdiction over the companies' claims against Honduras.<sup>37</sup> The Eleventh Circuit determined that "[a]ll of [Honduras's] underlying activities were commercial in nature and of the type negotiable among private parties."<sup>38</sup> Accordingly, the Eleventh Circuit determined that the FSIA's commercial activities exception applied, and, therefore, that the U.S. federal courts had subject matter jurisdiction over the lawsuit.<sup>39</sup>

The Eleventh Circuit then turned to the issue of whether the act of state doctrine should nevertheless preclude the U.S. courts from considering the companies' case against Honduras.<sup>40</sup> Without significant analysis or citation to case law, the Eleventh Circuit stated: "[T]here is no commercial exception to the

*The Eleventh Circuit's rejection of the commercial activities exception in Honduran Aircraft Registry, Ltd. v. Honduras serves as a cautionary tale for U.S. companies that sell goods and services to foreign states and state-owned companies.*

act of state doctrine as there is under the FSIA. The factors to be considered . . . may sometimes overlap with the FSIA commercial exception, but a commercial exception alone is not enough.<sup>41</sup> Therefore, the Eleventh Circuit remanded the case to the district court and opened the door to the district court's possible dismissal of the companies' lawsuit on act of state doctrine grounds.<sup>42</sup>

When the two companies in *Honduran Aircraft* contracted with Honduras, they almost certainly assumed this contract afforded them certain enforceable rights, including the right to receive payment for the goods and services they provided. Indeed, the two companies may have even known that the FSIA's commercial activities exception would enable the U.S. courts to exercise jurisdiction over any contract claims they might have against Honduras. They likely did not anticipate, however, the possibility that the U.S. courts might nevertheless invoke the act of state doctrine and turn a blind eye to Honduras' sudden abrogation of the contract.

Given the U.S. courts' current act of state doctrine jurisprudence, U.S. companies that contract with foreign states or their SOCs run the risk of encountering unpleasant surprises. Accordingly, until the U.S. Supreme Court or Congress definitively establishes a clear commercial activities exception to the act of state doctrine, U.S. companies must tread with additional caution when contracting with foreign states and SOCs.

### **Practical advice for U.S. companies that contract with foreign sovereigns and SOCs**

Although *Honduran Aircraft* illustrates the risks U.S. companies face under the act of state doctrine when contracting with foreign SOCs, these risks certainly should not automatically dissuade companies from entering into such contracts. Each day, countless U.S. companies sell their goods and services to foreign sovereigns, and these foreign sovereigns rarely attempt to use the act of state doctrine as a shield from contractual liability. Foreign states and SOCs, like their non-state competitors, must operate within an increasingly interconnected global business community. Thus, foreign states and SOCs generally cannot afford to earn reputations for habitually relying on judicially-created doctrines to shirk their contractual obligations.

Nevertheless, *Honduran Aircraft* demonstrates that foreign states and SOCs can and will hide behind the act of state doctrine when it suits their interests. Before entering into contracts with foreign states and SOCs, therefore, U.S. companies should take at least two basic steps to address the act of state doctrine's current lack of a commercial activities exception.

First, a U.S. company should perform some due diligence before agreeing to sell significant amounts of goods or services to a foreign buyer, so as to determine whether the foreign buyer qualifies as a foreign sovereign capable of invoking the act of state doctrine. Sometimes, determining whether a foreign buyer enjoys sovereign status is easy. For example, because the companies in *Honduran Aircraft* contracted directly with the Honduran government, these companies knew or should have known they were contracting with a foreign sovereign.

As explained above, however, foreign SOCs often appear identical to their non-state competitors, potentially making it difficult to discern whether the act of state doctrine might be lurking around the corner. Thus, it may take some digging to determine whether, and to what extent, a foreign state exercises control over a potential foreign buyer. In general, the greater the control a foreign sovereign exercises over a foreign buyer, the greater the likelihood a U.S. court will allow the foreign buyer to invoke the act of state doctrine. Through careful analysis of

a potential foreign buyer's financial records and various sources of publicly available information, U.S. companies can seek to identify and evaluate risks related to the act of state doctrine.

Second, once a U.S. company identifies such risks, the U.S. company should seek to minimize its risk through contractual payment terms and international commercial risk insurance. As for payment terms, a U.S. company should try to avoid open account and other payment arrangements that allow a foreign state or its SOCs to obtain significant quantities of goods and services before having to make payment. Otherwise, the foreign sovereign, like Honduras in the *Honduran Aircraft* case, might accept large amounts of goods and services, abrogate the parties' agreement, invoke the act of state doctrine, and leave the U.S. company empty handed.

Even if a U.S. company lacks the necessary negotiating leverage to secure favorable payment terms, it can at least seek an international commercial risk insurance policy that covers risks associated with government action. International commercial insurers provide such "political risk" coverage to varying degrees, with some policies only covering commercial risks, other policies only covering political risks, and still others covering a range of commercial and political risks. U.S. companies should work with their international trade credit insurers to secure a policy that, to the greatest extent possible, covers situations in which a foreign sovereign refuses to pay for goods or services on act of state doctrine grounds.

Although these two suggested steps will not eliminate the risks arising from the act of state doctrine, they will at least place U.S. companies on firmer footing when selling goods and services to foreign states and SOCs. And such firm footing might mean the difference between being compensated and simply being out of luck.

### **About the Author**

**Jason E. Prince** is an attorney in the Litigation Practice Group of *Stoel Rives LLP*. He represents and counsels multinational and exporting businesses on an array of international commercial law issues, including the Foreign Corrupt Practices Act and the Export Administration Regulations. Prior to joining *Stoel Rives*, he served as a Law Clerk for Judge Susan H. Black of the U.S. Court of Appeals for the Eleventh Circuit.

### **Endnotes**

<sup>1</sup> Jonathan R. Woetzel, *Reassessing China's State-Owned Enterprises*, MCKINSEY QUARTERLY, July 8, 2008, available at [http://www.forbes.com/2008/07/08/china-enterprises-state-lead-cx\\_jrw\\_0708mckinsey.html](http://www.forbes.com/2008/07/08/china-enterprises-state-lead-cx_jrw_0708mckinsey.html).

<sup>2</sup> *Annual Report / Stars of the New Russia*, GLOBAL FINANCE, June 2008, available at <http://www.gfmag.com/archives/27-june2008/411-features.html>.

<sup>3</sup> Phillip Riblett, *A Legal Regime for State-Owned Companies in the Modern Era*, 18 J. TRANSN'L LAW & POL'Y 1, 26-27 (2008).

<sup>4</sup> See Andrew E. Kramer, *As Gazprom Goes, So Goes Russia*, N.Y. TIMES, May 11, 2008, at 1.

<sup>5</sup> 425 U.S. 682 (1976).

<sup>6</sup> 28 U.S.C. § 1604.

<sup>7</sup> *Id.* § 1603(b)(3).

<sup>8</sup> *Saudi Arabia v. Nelson*, 507 U.S. 349, 360 (1993); see also 28 U.S.C. § 1603(d) (providing the statutory definition of "commercial activity").

<sup>9</sup> *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964).

<sup>10</sup> See, e.g., *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1167 (D.C. Cir. 2002) (applying the act of state doctrine to bar adjudication of a claim against a corporation wholly owned by Kazakhstan).

<sup>11</sup> *W.S. Kirkpatrick & Co., Inc. v. Env'tl Tectronics Corp., Int'l*, 493 U.S. 400, 408 (1990).

<sup>12</sup> See *id.* at 404; *Sabbatino*, 376 U.S. at 431-33.

<sup>13</sup> 425 U.S. 682 (1976).

<sup>14</sup> *Id.* at 685-86. The opinion refers to these Cuban government-installed managers as "interventors." See *id.*

<sup>15</sup> *Id.* at 686.  
<sup>16</sup> *Id.* at 687.  
<sup>17</sup> *Id.*  
<sup>18</sup> *Id.*  
<sup>19</sup> *Id.* at 694-95.  
<sup>20</sup> *Id.* at 695.  
<sup>21</sup> *Id.*  
<sup>22</sup> *Id.* at 706.  
<sup>23</sup> *Id.* at 684 n.\*.  
<sup>24</sup> *Id.* at 715, 724-30.  
<sup>25</sup> *Id.* at 715-16. Although this Article focuses on the act of state doctrine's potential implications for U.S. companies that sell their goods and services abroad, *Dunhill* demonstrates that U.S. importers should also take notice of the doctrine.  
<sup>26</sup> *Honduran Aircraft Registry, Ltd. v. Honduras*, 129 F.3d 543, 545 (11th Cir. 1997).  
<sup>27</sup> *Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia*, 729 F.2d 422, 425 n.3 (6th Cir. 1984).  
<sup>28</sup> *Republic of the Philippines v. Marcos*, 806 F.2d 344, 358-59 (2d Cir. 1986).

<sup>29</sup> See, e.g., *Env'tl. Tectronics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1059 (3d Cir. 1988) (expressly declining to address whether the act of state doctrine has a commercial activities exception); *Airline Pilots Ass'n, Int'l, AFL-CIO, v. Taca Int'l Airlines, S.A.*, 748 F.2d 965, 970 n.2 (5th Cir. 1984) (same); *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404, 408 (9th Cir. 1983) (same).  
<sup>30</sup> See, e.g., *Sampson v. Fed. Republic of Germany*, 975 F. Supp. 1108, 1121 (N.D. Ill. 1997) (recognizing the commercial activities exception); *Mol, Inc. v. People's Republic of Bangladesh*, 572 F. Supp. 79 (D. Or. 1983) (rejecting the commercial activities exception).  
<sup>31</sup> 129 F.3d 543 (11th Cir. 1997).  
<sup>32</sup> *Id.* at 545.  
<sup>33</sup> See *id.* at 546.  
<sup>34</sup> *Id.*  
<sup>35</sup> *Id.*  
<sup>36</sup> *Id.* at 550.  
<sup>37</sup> *Id.* at 546.  
<sup>38</sup> *Id.* at 547.  
<sup>39</sup> *Id.* at 548.  
<sup>40</sup> *Id.* at 549.  
<sup>41</sup> *Id.* at 550.  
<sup>42</sup> See *id.*; see also *Glen v. Club Mediterranee*, 450 F.3d 1251, 1252 n.2 (11th Cir. 2006) (“[W]e have unequivocally stated that ‘there is no commercial exception to the act of state doctrine.’”) (quoting *Honduran Aircraft*, 129 F.3d at 550).

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# 'THE UGLY AMERICAN' REDUX – LESSONS IN INTERNATIONAL BUSINESS AND LAW

Russell Case  
Hawley Troxell

I still remember the first time I was asked to help a company expand internationally. After literally begging to join the international law group at the large regional firm where I worked, I was finally invited to take part in a client due diligence trip to Chile to evaluate an acquisition. That is when I discovered that I had no idea what to do. Luckily, the group's senior partner was also going to Chile. He had been to France a few times and had advised clients on international tax issues. I could simply follow his lead.

It was an eye-opening experience. We had seven days in Santiago to validate a business plan. Everyone on the client team had a role. Finance pored over the target's books, aided by U.S. and local accountants, working to mesh disparate accounting principles into a clear financial picture. Technical and sales personnel worked to confirm expansion potential and identify capital costs for added infrastructure. Business analysts worked their spreadsheets, calculating discount rates based on capital requirements and country risk profiles. The deal "lead" met with embassy staffers, gauged local regulatory environments and coordinated daily information downloads from all team members.

The legal team met with our local law firm. My boss asked the Chilean counsel whether the seller, a U.S. entity, could sell its Chilean subsidiary to another U.S. entity in a country without ownership restrictions. He also undertook personally to investigate the local business market by driving around town in a taxi. He then confidently informed the due diligence team that no market existed for any business expansion. It was not likely, he advised, that local electricians, carpenters, cleaning services, mechanics and other service providers, some of whom travelled by horse-drawn cart, would join the wealthy elite as cellular subscribers.

When my boss left that evening, flying first class back to the U.S. and leaving me behind, I was actually relieved. For three days I had been thinking about "The Ugly American," a classic 1958 political novel by Eugene Burdick and William Lederer. As far as I was concerned, my boss had demonstrated the same arrogant superiority that had given Americans (actually U.S. citizens, as a Canadian border guard once admonished me) such a bad name abroad.

My boss had landed in a foreign country of fascinating cultural interaction and remarkable political history and done nothing to appreciate how the Chilean way of doing things might be different, and potentially more advantageous, than the American way. Worse, by assuming that Chilean and U.S. law and practice would approach matters in similar fashion, he missed a critical legal distinction that turned out to be the difference between doing the deal and not doing the deal.



## Six Core Principles

From my original experience in Chile, I developed four core principles which I have applied throughout my career:

1. Approach each international opportunity with open eyes and an open mind. The business and legal approaches are seldom, if ever, the same.
2. The "American" way is not always the best way. The local way may be better.
3. Use all available resources to help you understand the stated and, more importantly, practical legal and business approaches in each country.
4. Keep and constantly upgrade an issues checklist outlining the legal and business items to evaluate in each business venture. Beg, borrow and swap any checklists you can from other international business lawyers (all good ones have them), regardless of practice area or industry.

Through subsequent professional adventures, I added two more principles to this list:

5. Never think a new international transaction will be like one you encountered before.
6. Take every opportunity to share stories with others involved in international business.

These core principles have served me well over years of acquisitions, sales, ventures, green field startups and operational support in dozens of countries.

## Six Lessons Learned

As a further result of my experiences, I have learned six lessons about international law and business. Some of these lessons were learned on my own. Others come from the experiences of colleagues and friends. In strict adherence to the last of my core principles, I am taking this opportunity to share these lessons through stories and examples.

**Lesson 1: Little Things Can Make All the Difference.** Once, in a Latin American business deal, the business plan appeared to be failing by just a few percentage points. The primary culprit was an eight percent bad debt reserve, which was substantially higher than the norm. The cause was the marketing team's conclusion that local consumers would purchase the product only if they could make payments over time, coupled with the finance team's discovery that the local consumer debt market would not support automatic credit card payments. Amidst the frustration, however, in-country counsel advised the analysts to slash the bad debt reserve to nearly zero. The company, he said, could use post-dated customer checks and an off-duty police officer who would call on consumers during the weekend if a check bounced. As proposed, the bad debt reserve was dropped to two percent and the deal went forward. *Reason:* The legal system allowed for imprisonment of debtors and the policeman's visit, though unofficial, effectively reminded people what might

come next. *Conclusion:* Do not reach business conclusions based solely on U.S. legal strictures and customs. Local laws may be entirely unlike U.S. laws, and even minor distinctions can make all the difference.

**Lesson 2: *Stare De-what?*** U.S. lawyers are taught to look at statutes, regulations and court decisions before rendering a reasoned opinion that takes legal precedent into account. I tried this approach abroad only once, in Peru, when a client wanted a probability analysis on how local courts would interpret an ambiguous regulation. Our local attorney predicted a favorable outcome, but then reminded me that *stare decisis* did not exist in Peru. In fact, he advised, the same judge could reach contradictory conclusions based on the same set of facts in different cases. *Conclusion:* Do not assume that foreign legal systems act in similar fashion to our own system. Be prepared to tell your client that legal outcomes may be completely unpredictable.

**Lesson 3: The Answer May Be Correct, But Have Different Meanings.** Sometimes you can ask all the right questions, get correct answers, and still reach the wrong conclusion. This next situation involved a German joint venture. When the partners disagreed concerning future strategic direction, two local partners decided to pursue the market on their own. They purchased competing businesses and announced their intention to divest their interests in the joint venture to avoid anti-competition challenges. The client contacted outside U.S. counsel for advice. Outside counsel confirmed that the venture agreement prohibited the German local partners from investing in competing businesses and validated his conclusion by calling German counsel. Two days later, however, outside U.S. counsel was forced to withdraw the legal conclusion after in-house counsel learned of the advice given and asked whether outside U.S. counsel had specifically asked German counsel about injunctive relief. At that point, outside counsel contacted his German counterpart again, only to discover that injunctive relief was not an available remedy. The remedy available was damages, to be pursued in litigation and only after posting a multi-billion Euro bond. *Conclusion:* Ask questions, but do not assume the answer necessarily means the same thing you think it does.

**Lesson 4: The Answer May Be Correct, But Reality Might Be Different.** This next example involved a country with currency exchange restrictions. All of the partners wanted to repatriate in-country cash profits and to use the cash elsewhere. However, the currency exchange necessary to convert local revenues into exportable dollars was not high on the government's priority list. The local partners proposed the establishment of a jointly-owned offshore company that would provide services to the in-country entity to be paid with dollars, a use of currency much higher on the government priority ladder. Local counsel to the client advised that this approach

was not in accord with local laws and regulations. Nevertheless, when counsel to the local partners objected and explained the basis for his contrary recommendation, U.S. counsel overruled local counsel's advice and went forward with the plan. *Reason:* Counsel to the local partners was the former head of the country tax commission. He explained that the same approach had been used at least two thousand times by prominent families, politicians and businesses in the country. *Conclusion:* Make sure the advice you are getting and giving is not only correct from the legal perspective, but from the practical perspective as well.

**Lesson 5: Sometimes, Local Law Can Be Better.** Many U.S. companies try to protect themselves abroad by writing U.S. contracts and choosing to apply U.S. laws. Even so, it is often common, by way of example, for U.S. companies to run into trouble when they engage foreign distributors, dealers, agents and sales representatives under U.S. contract terminology, particularly when the same words can mean different things in different countries. The lesson I have learned is that, in some cases, local laws can be more helpful to a client. This lesson is illustrated by a situation that involved a client's investment in an Israeli consumer electronics business. The business sold imported products, successfully placing thousands of products in consumer hands. When a software glitch was discovered that required consumers to bring in their products for a flash download, product supplier's in-house counsel disclaimed liability for damages. Although this was an accurate legal conclusion based on the supplier's standard terms and conditions and choice of law, a further legal review identified Israeli consumer protection laws that raised the spectre of Israeli regulatory action on behalf of all consumers against the product supplier, causing the supplier to capitulate and help fund the costs of the recall. *Conclusion:* Know how local regulatory and legal structures can be used for and against your client.

**Lesson 6: Use Local Partners, Cautiously.** Some U.S. companies pursue overseas expansion alone. Often, their product importation efforts, in-country sales operations or plant building plans do not go as planned. As a result, companies that do not withdraw altogether eventually embrace relationships with local distributors, managers or joint venture investors. When done right, this works well. However, when done without appropriate investigation of partners, local customs and business approaches, things can go very badly. The situation discussed here involved an acquisition structured in the expectation that international financing organizations would require the country to modify its foreign ownership restrictions as a condition to loans or guarantees, something that had happened before in other countries. The client had accepted the business risk that this might never occur and proceeded forward with two prominent local partners. The client took responsibility for implementation,

*Counsel to the local partners was the former head of the country tax commission. He explained that the same approach had been used at least two thousand times by prominent families, politicians and businesses in the country.*

and the partners provided local business insight. A year or so later, the client hired a highly-qualified local executive without consulting its local partners. That decision ultimately led to an FCPA investigation by the U.S. government. Like a tragic comedy, the local executive had broken off his engagement to a local partner's daughter, the local partner then insisted the executive be fired, the client balked, the local partner insisted again, the client terminated the executive and the executive sent a letter to U.S. authorities alleging in-country legislator bribery (to get the ownership restrictions dropped), leading to an FCPA investigation and significant defense costs. *Conclusion:* Select local partners with caution, then consult with them regularly.

### Three Helpful Resources

I am not sure whether the last saga above could have been avoided. Perhaps another couple of bullet points on an issues checklist, better use of resources, more advanced thinking, an in-depth understanding of local approaches, and an inquisitive, open and slightly paranoid mindset could have avoided the result. Maybe nothing would have helped. I just don't know.

On the other hand, there are a few things that all U.S. companies can do, when they expand abroad, to reduce the risk of unexpected consequences. In particular, every company can and should take advantage of three simple, efficient and readily available resources.

**U.S. Department of Commerce.** Companies expanding abroad should take full advantage of our government's willingness to help. The website portals for the U.S. Department of Commerce (DOC) -- <http://www.export.gov/> and <http://www.buyusa.gov/boise/> -- contain extensive information to help U.S. companies doing business abroad. Moreover, regional offices can help your client understand the local business climate, identify local partners to call, investigate potential partners, help facilitate your client's foreign activities, and put you in touch with embassy staffers who will give you and your client first hand information and in-country assistance. For valuable assistance in Boise, you can contact Amy Benson, our local DOC representative, at (208) 364-7791 or [Amy.Benson@mail.doc.gov](mailto:Amy.Benson@mail.doc.gov).

**State of Idaho Department of Commerce.** The Idaho Department of Commerce (IDC) has extensive contacts throughout the world as a result of its efforts to bring international business to Idaho and to promote Idaho as a tourist destination. The IDC is a great and accessible resource for identifying people in-country that can provide useful information and contacts. You can find the IDC's website at <http://commerce.idaho.gov/>. You should click on the "export support" balloon centered at the top and observe what you see.

**In-Country Businesses.** Businesses that have preceded your client into a particular country can be an extraordinary resource. Whether based in Idaho or elsewhere, my personal experiences demonstrate that these businesses -- especially their in-house attorneys, external lawyers and accounting firms -- enjoy providing introductions and straight talk about in-country business approaches, in-country professional service providers, potential in-country relationships, and issues they have encountered in their excursions into the country.

These resources draw on a wealth of experience and are uniquely qualified to help. Through them you can obtain a

tremendous amount of knowledge, guidance and contacts that will significantly increase a company's ability to succeed abroad.

By the way, most (if not all) of the persons you come in contact with will smile if you tell them you have read "The Ugly American."

### About the Author

**Russell "Rusty" Case** practices corporate and securities law. He moved to Boise in 2007 after 20 years in international business representing clients as outside counsel, working within corporate legal departments and serving in business positions with responsibility for international expansion strategy and implementation. His practical insights on business matters can be followed on his blog <http://fromredtoblack.wordpress.com/> and he can be reached via email at [rcase@hawleytroxell.com](mailto:rcase@hawleytroxell.com) or via twitter at [http://twitter.com/rcase\\_red2black](http://twitter.com/rcase_red2black).



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# ATTORNEY COMPETENCE, ETHICAL COMPLIANCE, AND TRANSNATIONAL PRACTICE

Emile Loza  
Technology Law Group

## Introduction

Ucon, Idaho, population 943, provides one of my favorite stories about transnational legal practice. From this tiny town comes a powerful illustration of how globalized Idaho's legal environment truly is.

The owner of a specialty plastics manufacturing business there called me. In just a few minutes, his story crossed many borders. The man needed help negotiating and finalizing a joint venture with a Canadian business. Part of the deal involved his consultation with the prospective purchaser during which the parties transfer production technology and know-how to manufacturers in a third country and import the popular products back into the United States. Demand also looked promising in numerous other countries, each market bringing with it advertising, tax, transportation, intellectual property protection, and other issues involving international and foreign domestic, as well as domestic law here in the States.<sup>1</sup>

This small story from Ucon drives home the compelling message that transnational legal matters have or shortly will come before virtually every practicing attorney in the state. These matters bring many new and challenging dimensions to professional practice. Prime among them is the challenge to understand and evaluate what these matters demand with regard to attorney competency to the ethical standards required under the Idaho Rules of Professional Conduct ("Rules").<sup>2</sup>

This article explores the ethical mandate for international competency first by identifying and discussing relevant ethical rules, commentary, and ethics opinions. The article next provides a short illustration of the requirements of ethical competency from my own transnational practice. Finally, the work issues a call to ethical action for all practicing attorneys in Idaho.

## The Globalization of Legal Practice

Many trends drive attorneys to expand international perspectives in their practices and to adopt an internationalized ethical mandate for competency. Global economic integration, worldwide markets, the ubiquitous nature of the Internet, rampant popularity of online businesses and social networks, rapid technological advances, and increasingly multinational families reflect just a few of these trends.

More than a trend, the increasingly globalizing legal environment reflects a massive structural change reshaping the contexts within which attorneys now practice. International and foreign laws, including regulatory schemes, are complex, voluminous, and rapidly evolving.<sup>3</sup> Further, they operate within a plethora of often competing international and foreign domestic legal regimes and legal cultures often very different from our own common law heritage.

The impetus to internationalize attorney competency to an ethical standard is clear and urgent. In our globalized professional world, virtually every legal practitioner has been or will be asked to represent clients on matters that invoke or are impacted by international law or foreign domestic law. For

each such transnational matter, attorneys must ensure their competence in international law, foreign domestic law, conflict of laws, comparative international law, and other areas of international expertise.<sup>4</sup>

A *status quo* approach of perceiving attorney competence as purely a domestic affair is insufficient and unethical in our globalized professional world. To rely upon such an outdated approach is to jeopardize clients' interests and to risk both ethical hazards and professional liability.<sup>5</sup>

## Evolving Standards of Competence

Judicial and bar associations increasingly have embarked on initiatives to explore and address the way in which international developments impact legal ethics, the administration of justice, and the integrity of the legal profession.<sup>6</sup> For instance, Carolyn Lamm, the American Bar Association's ("ABA's") newly-elected president, recently established the Ethics 20/20 Commission, stating:

*Technological advances and globalization have changed our profession in ways not yet reflected in our ethics codes and regulatory structure. Technologies such as email, the Internet and smart phones are transforming the way we practice law and our relationships with clients, just as they have compressed our world and expanded international business opportunities for our clients.<sup>7</sup>*

Some law schools also have led the pioneering way by integrating international concepts in their professional responsibility curricula.<sup>8</sup> These organizations recognize that what constitutes competency to an ethical standard has changed and will continue to change as the world and its societies evolve.

A 1957 ABA ethics opinion demonstrates how much the standard for attorney competency in transnational has changed.<sup>9</sup> There, a principal issue was whether a New York-licensed attorney acted ethically when assisting clients in New York to obtain Mexican divorces.<sup>10</sup> The opinion labeled that practice illegal and unethical due to the invalidity on Mexican divorces under New York law. The opinion approved the provision of legal advice under Mexican law by the New York attorney, however, stating, "There is no impropriety in the New York lawyer advising on Mexican law, for a lawyer of one state may advise on the law of another state."<sup>11</sup> The opinion went on to say that, in advising under Mexican law, the attorney made a representation of his competence to do so to the client.<sup>12</sup> The opinion then cautioned the attorney that he should not undertake to render advice under Mexican law if he were not competent to "skillfully and properly" do so.<sup>13</sup>

With the passage of five decades, few attorneys today would venture into such a *pantano*.<sup>14</sup> Except for the few competent to advise on Mexican law, most attorneys trained and licensed in the United States likely would recognize that they would not be competent and, therefore, could not ethically opine on Mexican law. They would recognize that such incompetence could have profound custody, citizenship, immigration, property, and other consequences for clients. Fortunately, as discussed *infra*, ethical avenues exist by which attorneys may achieve competence.

## Rules Governing Attorney Competency

### A. Controlling Authority and Choice of Law

Commentary to Rule 8.5 calls out the manner in which choice of law is determined for attorney disciplinary actions.



This choice of law regime applies to attorney discipline in transnational practice matters, “unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.”<sup>15</sup>

Subject to Rule 8.5, the authority that generally controls the determination of ethical compliance for Idaho attorneys is the aggregate of relevant state statutes, regulations, court rules, Rules, and ethics opinions.<sup>16</sup> Although the Idaho State Bar has not issued formal ethics opinions for many years,<sup>17</sup> ethical inquiries should encompass any relevant archived Idaho opinions that have not been disavowed or otherwise continue in force.<sup>18</sup> In addition, one should consult the ABA’s Model Rules of Professional Conduct (“Model Rules”), the predecessor rules, and ethics opinions and related materials, along with other jurisdictions’ ethical rules and opinions.<sup>19</sup> Judicial decisions in malpractice cases and the Restatement (Third) of Law Governing Lawyers and other secondary sources also provide important guidance.<sup>20</sup>

### B. Ethical Competence Under Rule 1.1

Rule 1.1 is the principal ethical rule establishing the standards of attorney competence.<sup>21</sup> It is intended as “a strong positive statement of commitment to provide competent professional service.”<sup>22</sup> Under Rule 1.1, attorneys have a strict duty to render competent legal services and advice.<sup>23</sup> Even a single instance of attorney incompetence is subject to discipline.<sup>24</sup>

Rule 1.1 states, “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”<sup>25</sup> To be competent, an attorney must satisfy Rule 1.1’s “reasonably necessary” standard<sup>26</sup> for each of these four conjunctive elements: (1) legal knowledge, (2) legal skill, (3) thoroughness, and (4) preparation.<sup>27</sup> Further, the attorney competence must be achieved on a per-matter basis.<sup>28</sup>

#### 1. Legal Knowledge and Legal Skill Elements of Competence

Commentary to Rule 1.1 instructs that some factors relevant to determining ethical compliance for these first two competency elements include, without limitation:

- a. “the relative complexity and specialized nature of the matter,” albeit without clarification as to the basis for comparing complexity and specialization;
- b. the attorney’s general experience;
- c. the attorney’s training and experience in the subject field;
- d. the amount of study and preparation that the attorney is able to devote to the matter in question; and
- e. whether it is feasible for the attorney associate or consult with or to refer the matter to “a lawyer of established competence” in the subject field.<sup>29</sup>

Generally, special training or prior experience is not necessarily required to achieve the standards of competency for legal knowledge and skill.<sup>30</sup> Some client matters, however, may require “expertise in a particular field of law.”<sup>31</sup> Examples of transnational matters requiring special expertise include those dealing with international trade,<sup>32</sup> intellectual property and domain name disputes,<sup>33</sup> divorce and child custody,<sup>34</sup> and online consumer protection.<sup>35</sup>

To maintain the competence elements of international legal knowledge and legal skill, an attorney should monitor changes in international law and practice and should engage in continuing education and study.<sup>36</sup>

#### 2. Thoroughness and Preparation Elements of Competence

As to these two competency elements, the Rules provide guidance in a single comment.<sup>37</sup> Under Comment 5 to Rule 1.1, an attorney must conduct an inquiry into and analyze the relevant factual and legal elements of each transnational legal matter.<sup>38</sup>

Here, the greater complexity of transnational legal matters requires an important note about managing client expectations. The time and effort to thoroughly inquire into and analyze the relevant facts and legal issues, to prepare for client meetings and proceedings, and to prepare appropriate legal documents likely will result in greater client expense than would be incurred in a purely domestic legal matter. Attorneys should take care to properly manage client expectations in light of the costs associated with competent transnational legal advice.

Comment 5 also addresses attention and preparation, implicitly equating attention to the thoroughness element of competence.<sup>39</sup> Comment 5 sets forth that whether an attorney’s representation on a specific client matter is competent to an ethical standard is, in part, contextual.<sup>40</sup> As in all legal matters, the attention and preparation required for a transnational legal matter depends upon “what is at stake.”<sup>41</sup> In this regard, the Comment contrasts complex transactions and major litigation with “matters of lesser complexity and consequence.”<sup>42</sup> Bear in mind that, for entrepreneurial ventures, small businesses, and families, matters that are of lesser complexity nevertheless may be of profound consequence.

#### 3. A Limited Exception to the Ethical Requirement of Competence

The Commentary to the Rules suggest that a limited and temporary exception to ethical competency may be permissible, that being in an emergency or another situation where avenues to competency, *e.g.*, reasonable preparation, necessary study, referral to or consultation or association with an attorney with the required competency, are impractical.<sup>43</sup>

Even within such an exception, the legal representation must be circumscribed to that reasonably necessary under the circumstances because of the jeopardy to clients’ legal well-being that can be created where an attorney acts beyond his or her level of competence.<sup>44</sup>

#### 4. Ethical Avenues to Competency

If an attorney does not have an international legal education, continuing international legal education, or international legal experience, that attorney still may be able to achieve competence to an ethical standard by engaging in the required study in a wholly new field of practice, such as international law, through necessary study.<sup>45</sup>

Another and more expeditious, cost-efficient, and practical avenue to competency is by “association of a lawyer of established competence” or by outsourcing the work to an attorney competent in transnational practice.<sup>46</sup> For decades, the ABA and numerous other bar associations have approved of such collaborative practice, and they provide guidelines and procedures for achieving competency by this means.<sup>47</sup>

Partnerships<sup>48</sup> or appropriate fee-sharing<sup>49</sup> with foreign attorneys is also permissible and often necessary as legal practice become increasingly globalized. These and other approved and innovative methods of achieving competence in transnational legal matters mirror trends in other jurisdictions and contexts.<sup>50</sup>

If an attorney is not competent or opts not to achieve competency as permitted under the Rules, he or she must limit the scope of representation to those matters as to which he or

she is competent, provided the limitation is permissible under Rule 1.2.<sup>51</sup> In such a permissible limitation, the scope of the limitation is a factor in the determination of whether the attorney ethically satisfies the four elements of competence.<sup>52</sup>

### An Example from a Transnational Practice

Delving into transnational legal matters is like working on a Swiss watch. Like a master-crafted timepiece, these matters have a hundred or more jeweled “movements,” each of which must operate in precision with the others. Even an otherwise seemingly rudimentary factual inquiry to identify a client or potential litigant can become a convoluted and complicated undertaking in light of language differences, varying degrees of transparency and the rule of law, market globalization, industry consolidations, and more.<sup>53</sup>

Some legal skills, such as issue-spotting, are essential to all legal matters.<sup>54</sup> Because of their universal applicability to each legal matter, such skills are so foundational that attorneys must possess them to achieve even a minimum standard of competency.<sup>55</sup> Issue-spotting in transnational matters is perhaps one of the greatest hurdles to competency and ethical compliance for practitioners.

Noting a brief example from my transnational practice, I have reviewed hundreds of manufacturing, design, development, distribution, and other operational and intellectual property agreements drafted by numerous, otherwise very talented in-house attorneys. Those agreements repeatedly utilized what some might consider wholly acceptable boilerplate choice of law and forum selection provisions. Most designated Idaho, California, or some other state’s law as the choice of law. Most also designated courts in the corresponding jurisdiction for resolving disputes.

Behind such typical choice of law and forum provisions lurks a significant issue of legal risk. For example, even if a domestic choice of law is applied, that application, in itself, may invoke international law.<sup>56</sup> Notwithstanding this application, competent international attorneys would have justifiable concerns about the risks arising from a blinkered over-reliance upon a strictly domestic legal approach.<sup>57</sup> The risk is that agreements drafted in this way will be unenforceable if, or rather when, disputes arise with foreign parties. Further, even if the client prevails in a dispute brought in the United States, there is a significant risk that the judgment would be unenforceable in the other party’s home jurisdiction or only enforceable at great expense.<sup>58</sup>

By contrast, competent drafting of transnational agreements would include dispute resolution provisions informed by an understanding of international comity, foreign jurisdictions’ resistance to the extraterritorial application of United States law, and the status of the rule of law in other nations, for example. To proceed otherwise likely would result in the nullification of choice of law and forum selection provisions, if not, in effect, the entire contract. Thus, competent international counsel would understand that the up-front investment in finely-crafted transactional instruments yields excellent returns by greatly reducing legal risk, enhancing the self-enforcing operation of the documents, and foreclosing many cross-border disputes and the significant time and expense required to resolve them.

### Conclusion and Call to Ethical Action

Competency is a foundational ethical requirement for all attorneys. Although client matters have become increasingly globalized, many, if not most, practitioners have not yet achieved competence for transnational legal matters as required under Rule 1.1.

Too often, attorneys fail to see or frankly disregard the relevant facts and legal issues involved in international legal matters. In so doing, they fail to ethically serve clients, and they undermine the administration of justice and the integrity of the legal system and the profession.<sup>59</sup> In even one such instance, they risk malpractice liability and disciplinary action.

Irrespective of their practice emphases, all Idaho attorneys should evaluate and address their competence to advise on transnational legal matters now. Through diligent self-inquiry into and the vigorous pursuit of such competence, attorneys can work prospectively to avoid attorney discipline actions and reduce malpractice claims. By fully engaging within the globalizing legal environment, attorneys ethically serve their clients’ best interests and contribute to the betterment of our society and profession.

### About the Author

**Emile Loza** founded *Technology Law Group* in 2003. Her practice emphasizes international, intellectual property, Internet, and entrepreneurship law and litigation. Emile also provides consultation services to attorneys on transnational legal matters. Emile holds a juris doctorate from The George Washington University Law School, a master’s degree in business administration, and a technology undergraduate degree. Emile thanks Bar Counsel Brad Andrews and staff for making certain reference materials available for this work. Please reach Emile at [ELoza@TechnologyLawGroup.com](mailto:ELoza@TechnologyLawGroup.com) or visit her blog at [www.TechnologyLawGroup.com](http://www.TechnologyLawGroup.com).

### Endnotes

<sup>1</sup> Herein, “international law” refers to the law governing relations between nations and includes general principles of law, customary international law, and treaty law, including as interpreted in judicial decisions and teachings of imminent international jurists. See Statute of the International Court of Justice § 38(1). “Foreign domestic law” refers to the law of and within a nation other than the United States while “domestic law” refers federal and state law within the United States.

<sup>2</sup> See IDAHO RULES OF PROFESSIONAL CONDUCT (2004) (“RULES”), <http://www.isb.idaho.gov/pdf/rules/irpc.pdf>.

<sup>3</sup> Similarly, complex, rapid, and voluminous developments in environmental, tax, and securities law have raised the bar as to attorney competency in these highly-specialized fields. See, e.g., ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 346 (revised) (1982) (“*Tax Law Opinions in Tax Shelter Investment Offerings*”); *Environmental Law Practice Has Many Ethical Hazards*, [10 Current Rep.] *Laws. Man. on Prof. Conduct* (ABA/BNA) 165-68 (June 15, 1994).

<sup>4</sup> See generally Laurel S. Terry, *Centennial Universal Congress of Lawyers Conference – Lawyers and Jurists in the 21st Century: U.S. Legal Ethics: The Coming of Age of Global and Comparative Perspectives*, 4 WASH. U. GLOBAL STUD. L. REV. 463 (2005), <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=869376](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=869376)>.

<sup>5</sup> Compare, e.g., *Environmental Law Practice Has Many Ethical Hazards*, *supra*, note 3; see RICHARD A. ZITRIN & CAROL M. LANGFORD, *LEGAL ETHICS IN THE PRACTICE OF LAW* 30 (1995) (citation omitted).

<sup>6</sup> See, e.g., ABA, *ABA President Carolyn B. Lamm Creates Ethics Commission to Address Technology and Global Practice Challenges Facing U.S. Lawyers* (Aug. 4, 2009); Terry, *supra*, note 4 at 463-533 & 530 n.298.

<sup>7</sup> ABA, *ABA President Carolyn B. Lamm Creates Ethics Commission to Address Technology and Global Practice Challenges Facing U.S. Lawyers* (Aug. 4, 2009). Technology, like globalization, is a significant driver in the evolution of attorney competency. For example, to be competent to an ethical standard in a bankruptcy practice includes the requirement to become trained to file pleadings electronically and to use that means of filing exclusively. See [24 Current Rep.] *Laws. Man. on Prof. Conduct* (ABA/BNA) 221-22 (Apr. 30, 2008) (discussing *In re Harris*, 180 P.3d 558 (Kan. 2008) (three-month suspension)); see also generally Ellie Margolis, *Surfin’ Safari – Why Competent Lawyers Should Research on the Web*, 10 YALE J. OF LAW & TECH. 82-119 (2007).

<sup>8</sup> See, e.g., Mary C. Daly, *The Ethical Implications of the Globalization of the*

*Legal Profession: A Challenge to the Teaching of Professional Responsibility in the Twenty-first Century*, 21 FORDHAM INT'L L.J. 1239 (1998).

<sup>9</sup> See ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 248 (1942), in AMERICAN BAR ASSOCIATION, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES WITH THE CANONS OF PROFESSIONAL ETHICS ANNOTATED AND THE CANON OF JUDICIAL ETHICS ANNOTATED 495-96 (1957) [hereinafter ABA OPINIONS]; see also, e.g., ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1442 (1979) ("Propriety of Lawyer who Lacks Expertise in Particular Area in Understanding Representation when so Instructed by Superior"), in STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY, AMERICAN BAR ASSOCIATION, FORMAL AND INFORMAL ETHICS OPINIONS 346-50 (1985).

<sup>10</sup> See ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 248 (1942), in ABA OPINIONS, *supra* note 9, at 495. The New York attorney acquired the practice of a Mexican attorney when the latter permanently retired and inquired as to whether he could continue that apparently lucrative practice. See *id.* at 495-96.

<sup>11</sup> See *id.* at 495. Although this 1942 opinion issued under the predecessors to the ABA Model Rules, competence has always been among the highest ethical requirements. See MODEL CODE OF PROF'L RESPONSIBILITY (Aug. 1982), reproduced at STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 465-537 (2000); *id.* at 465 (quoting MODEL CODE OF PROF'L RESPONSIBILITY CANON 1 ("A lawyer should assist in maintaining the integrity and competence of the legal profession.")); *id.* at 508 (quoting MODEL CODE OF PROF'L RESPONSIBILITY CANON 6 ("A lawyer should represent a client competently")); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 346 (revised) (1982) ("Tax Law Opinions in Tax Shelter Investment Offerings"), published in [1984] Laws. Man. on Prof. Conduct (ABA/BNA) § 801:101-107.

<sup>12</sup> See ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 248 (1942), in ABA OPINIONS, *supra* note 9, at 496.

<sup>13</sup> *Id.* at 496 (quoting *Degan v. Steinbrink*, 202 App. Div. 477, 195 N.Y.S. 810 (App. Div. 1922), *aff'd*, 236 N.Y. 669 (1923)).

<sup>14</sup> Spanish translation, "morass."

<sup>15</sup> RULE 8.5 cmt. 7; see, e.g., Ethics Comm., Int'l Crim. Bar, *Draft Code: Proposed Code of Conduct and Disciplinary Procedure Applicable to Counsel Appearing Before the International Criminal Court*, 11 LAW & BUS. REV. AM. 83 (Winter 2005).

<sup>16</sup> See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 08-451, 1 n.1 (2008) ("Lawyer's Obligation When Outsourcing Legal and Nonlegal Support Services") (aggregate controlling authority); RULES pmb1., cmt. 14.

<sup>17</sup> The last formal ethical opinion in Idaho was issued in 1999 and, prior to that, in 1992. See Idaho State Bar, *Formal Ethics Opinions of the Idaho State Bar*, <[http://www.isb.idaho.gov/bar\\_counsel/formal\\_opinions.html](http://www.isb.idaho.gov/bar_counsel/formal_opinions.html)>. Helpful informal guidance is readily available, however.

<sup>18</sup> No archived Idaho ethics opinion addresses competence, international law, foreign law, or transnational practice. *Accord id.*

<sup>19</sup> See generally ABA MODEL RULES OF PROF'L CONDUCT (2009), [http://www.abanet.org/cpr/mrpc/model\\_rules.html](http://www.abanet.org/cpr/mrpc/model_rules.html) [hereinafter MODEL RULES].

<sup>20</sup> See generally *id.*; RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS (2000).

<sup>21</sup> The following Rules and commentary also address attorney competence:

1. Comment 7 to Rule 1.2, which governs the scope of an attorney's representation;
2. Comments 2 and 5 to Rule 1.3, which addresses the duty as to diligence, the former of which requires that an attorney control his or her workload so as to maintain the required standard of competence for each client matter and the latter of which requires attorneys' succession plans;
3. Comment 7 to the client communications Rule 1.4 and which restricts attorney referrals to other attorneys whom the referring attorney reasonably believes are competent to handle the client matter to be referred;
4. Rule 1.7(b)(1), the Rule which provides general rules regarding conflicts of interest among current clients, which, in that Section and Comment 15 sets and discusses the threshold for representation to clients as to which the attorney reasonably believes that he or she can deliver competent and diligent representation;
5. Comment 14 to Rule 1.8, which provides specific rules for conflicts of interest as to current clients, that explains that their potential to undermine attorney competence and diligence is the reason that agreements prospectively limiting attorney malpractice liability are prohibited unless the client has independent legal representation in making those agreements;
6. Comment 1 to Rule 1.6, which admonishes an attorney to decline a prospective client representation unless she or he can satisfy the competency and other threshold requirements;

7. Comment 7 to Rule 1.17 under which an attorney selling a law practice, like an attorney involving other attorneys in a particular client matter, has a duty to competently identify a purchaser who is qualified, including as to competence, to operate the practice and serve the clients thereunder;

8. Comment 4 to Rule 2.1 deals with an attorney's role as a candid advisor with the duty to exercise independent professional judgment and instructs that, in exercising competence to an ethical standard, an attorney should consult with professionals in other fields when the client's matter involves problems touching on those other fields;

9. The Comment to Rule 3.2 judges the reasonableness of an attorney's protraction of a litigation matter against the standard of whether a competent attorney acting in good faith would consider that such an extension to serve a substantial purpose in the client's interests, that is, a purpose other than mere delay;

10. Comment 15 to Rule 3.3 advises that the candor required of attorneys toward the tribunal may lead to an "extreme deterioration" in the attorney-client relationship to the extent that the attorney's competency to continue in the representation is so undermined as to necessitate withdrawal from the representation under Rule 1.16; and

11. Comment 2 to Rule 6.2 states that a lack of competence is good cause for an attorney to decline a tribunal's appointment to represent a person.

<sup>22</sup> CENTER FOR PROFESSIONAL RESPONSIBILITY, AMERICAN BAR ASSOCIATION, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES 36 (1987) [hereinafter MODEL RULES LEGIS. HIST.] (Rule & comments as originally adopted in 1983). The force of this statement should not be underestimated. Indeed, in promulgating the Model Rules, the ABA House of Delegates specifically rejected an amendment that sought to exclude from ethical discipline a sole instance of an attorney's incompetence due to ordinary negligence. *Id.*

<sup>23</sup> See generally RULE 1.1.

<sup>24</sup> Idaho adopted Model Rule 1.1 virtually *verbatim*. In promulgating Model Rule 1.1, the ABA House of Delegates specifically rejected an amendment that sought to exclude from ethical discipline even one occurrence of attorney incompetence through ordinary negligence. See MODEL RULES LEGIS. HIST., *supra* note 20, at 36-37 (discussing amendment offered by an Ohio bar association at February 1983 midyear meeting).

<sup>25</sup> RULE 1.1.

<sup>26</sup> *Id.* Rule 1.0(h) defines "reasonable" or "reasonably" used as regards an attorney's conduct to denote "the conduct of a reasonably prudent and competent lawyer." RULE 1.0(h). Thus, an objective standard controls inquiries into attorney competence.

<sup>27</sup> See RULE 1.1.

<sup>28</sup> See *id.*; *id.* cmt. 1 (per-matter inquiry).

<sup>29</sup> RULE 1.1 cmt. 1.

<sup>30</sup> *Id.* cmt. 2.

<sup>31</sup> *Id.* cmt. 1.

<sup>32</sup> *Accord, e.g.*, Softwood Lumber Agreement Between the Government of Canada and The Government of the United States (2006).

<sup>33</sup> *Accord, e.g.*, Internet Corporation for Assigned Names and Numbers, Uniform Domain Name Dispute Resolution Policy (1999).

<sup>34</sup> *Accord, e.g.*, Convention of 25 October 1980 on Civil Aspects of International Child Abduction, Oct. 25, 1980, 1343 U.N.T.S. 89.

<sup>35</sup> *Accord, e.g.*, Australian Competition & Consumer Commission, *Doing Business with Consumers on the Internet*, <http://www.accc.gov.au/content/index.phtml/itemId/815391> (discussing application of Trade Practice Acts, 1974 (Austl.) to & additional guidance of Organisation of Economic Co-operation and Development [OECD], *Guidelines for Consumer Protection in the Context of Electronic Commerce* (adopted by OECD Council, Dec. 9, 1999)).

<sup>36</sup> See RULE 1.1 cmt. 6. A competent attorney must monitor legal developments, but is not expected to be "clairvoyant" as to future changes. See *Negligence - Diligence*, [12 Current Rep.] Laws. Man. on Prof. Conduct (ABA/BNA) 425-27 (Dec. 25, 1996) (discussing & digesting *Watkiss & Saperstein v. Williams*, 931 P.2d 840 (Utah 1996) (changes to statute of limitation during 16 month delay in filing action)). That said, Idaho Rule of Civil Procedure 11, like its federal counterpart, permits pleadings to set forth "a good faith argument for the extension, modification, or reversal of existing law," and competency to an ethical standard may require attorneys to consider and set forth such arguments, including as to the application of the relevant statute of limitations. I.R.C.P. 11(a)(1). The duty of diligence also should argue against the extended filing delay seen in *Watkiss*. See RULE 1.3.

<sup>37</sup> See RULE 1.1 cmt. 5.

<sup>38</sup> See *id.*

<sup>39</sup> The ABA's legislative history for the Model Rules provides no explanation of the use of the word "attention" in Comment 5, as opposed to "thoroughness," as used in Rule 1.1 and other Comments thereto. See generally MODEL RULES LEGIS. HIST., *supra* note 20.

<sup>40</sup> See RULE 1.1 cmt. 5.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> See RULE 1.1 cmt. 3; RULE 1.1 cmt. 2 ("necessary study"); RULE 1.1 cmt. 4 ("reasonable preparation").

<sup>44</sup> See RULE 1.1 cmt. 3.

<sup>45</sup> See RULE 1.1 cmt. 2.

<sup>46</sup> *Id.*

<sup>47</sup> See, e.g., ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 08-451 (2008) ("Lawyer's Obligation when Outsourcing Legal and Nonlegal Support Services"); Legal Ethics Comm., San Diego County Bar Ass'n, Op. No. 2007-1 (undated); Comm. on Legal Ethics, Los Angeles County Bar Ass'n, Formal Op. No. 426 (1984) ("Aiding the Unauthorized Practice of Law: Employing Attorneys not Admitted to California Bar"); ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 263 (1944)

<sup>48</sup> See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-423 (2001) ("Forming Partnerships with Foreign Lawyers"); Comm. on Prof'l Ethics, N.Y. St. Bar Ass'n, Op. No. 658 (Feb. 14, 1984); see also James I. Ham, 2008 Global Legal Practice Symposium: Ethical Considerations Relating to Outsourcing of Legal Services by Law Firms to Foreign Service Providers: Perspectives from the United States, 27 PENN ST. INT'L L. REV. 323 (2008).

<sup>49</sup> See [23 Current Rep.] Laws. Man. on Prof. Conduct (ABA/BNA) 115 (Mar. 7, 2007) (discussing Comm. on Prof'l Ethics, N.Y. St. Bar Ass'n, Op. No. 806 (Jan. 29, 2007)).

<sup>50</sup> For example, the U.S. Securities and Exchange Commission approved cross-jurisdictional practice for securities arbitration in 2008. See [24 Current Rep.] Laws. Man. on Prof. Conduct (ABA/BNA) 67-68 (Feb. 6, 2008) (discussing Financial Industry Regulatory Authority rule changes adopted by U.S. Securities and Exchange Commission). Additionally, most states now provide methods for attorneys to engage in multi-jurisdictional practice, and for foreign lawyers to advise U.S. clients on the laws of their home countries. See, e.g.,

[23 Current Rep.] Laws. Man. on Prof. Conduct (ABA/BNA) 121 (Mar. 7, 2007) (discussing rule changes in Rhode Island, New Hampshire & 30 other jurisdictions, including Idaho); [23 Current Rep.] Laws. Man. on Prof. Conduct (ABA/BNA) 560-61 (Oct. 31, 2007) (discussing rule changes in Delaware & 28 other jurisdictions, including Idaho).

<sup>51</sup> RULE 1.2(c); see RULE 1.1 cmt. 5; RULE 1.2 cmt. 7.

<sup>52</sup> See RULE 1.2 cmt. 7.

<sup>53</sup> See Katherine McCullough, *Current Development 2005-2006: Out with the Old and in with the New: The Long Struggle for Judicial Reform in Afghanistan*, 19 GEO. J. LEGAL ETHICS 821, 828-29 (2006); Bruce Zagaris, *International Tax and Related Crimes: Gathering Evidence, Comparative Ethics, and Related Matters*, in THE ALLEGED TRANSNATIONAL CRIMINAL: THE SECOND BIENNIAL INTERNATIONAL CRIMINAL LAW SEMINAR 386-87 (Richard D. Atkins, ed., 1995) (citing, in part, Roger J. Goebel, *Professional Responsibility Issues in International Law Practice*, 29 AM. J. OF COMP. L., 1-58 (Winter 1981)).

<sup>54</sup> Accord RULE 1.1 cmt. 2.

<sup>55</sup> Accord *id.*

<sup>56</sup> Accord, e.g., Christine E. Nicholas, *A Comparison of the U.N. Convention on Contracts for the International Sale of Goods Convention and Idaho's Uniform Commercial Code*, 52 ADVOCATE 35-37 (2009).

<sup>57</sup> See generally, e.g., Louise Ellen Teitz, *Business Transactions and Disputes: International Litigation: Parallel Proceedings – Sisyphean Progress*, 36 INT'L L. 423-34 (Katherine Birmingham Wilmore, ed., 2002).

<sup>58</sup> Unenforceability of judgments has been the basis of malpractice claims, creating a risk of ethical complaints on competency grounds. See, e.g., *Burden of Proof—Collectability*, [12 Current Rep.] Laws. Man. on Prof. Conduct (ABA/BNA) 327-28 (Oct. 2, 1996) (discussing & digesting *Kituskie v. Corbman*, 682 A.2d 378 (Penn. Super. Ct. 1996), *aff'd* 714 A.2d 1027 (1998)); *Burden of Proof – Collectability of Judgment*, [10 Current Rep.] Laws. Man. on Prof. Conduct (ABA/BNA) 272 (Sept. 21, 1994) (discussing & digesting *Fernandes v. Barrs*, 641 So.2d 1371 (Fl. Dist. Ct. App. 1994)).

<sup>59</sup> See Comm. on Prof'l Ethics, N.Y. St. Bar Ass'n, Op. No. 658 (Feb. 14, 1994) ("[A] lawyer has an ethical obligation to maintain and improve the integrity and competence of the bar[.]."), quoted & digested in [10 Current Rep.] Laws. Man. on Prof. Conduct (ABA/BNA) 60 (Mar. 23, 1994).



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## IDAHO IMMIGRATION LAW PRO BONO NETWORK: ANSWERING THE CALL

Mikela "Mike" French, *Idaho Supreme Court*  
Kristi Wilson, *Idaho Supreme Court*

Every Monday morning, in a tiny windowless room in the corner of a federally owned building located in Boise, Idaho, hearings are held that set in motion removal proceedings for many Idaho immigrants. At these hearings, as many as 40 individuals show up to answer for their alleged illegal immigration status after having received a notice to appear. Then, approximately every six weeks, an immigration judge, employed by the U.S. Department of Justice's Executive Office of Immigration Review (EOIR), is flown in from out-of-state to preside over individual deportation hearings in the same windowless room. There are no court-appointed attorneys in removal proceedings. So, while there are a handful of dedicated private practitioners in Idaho who are familiar with the legal framework for deportation proceedings, a respondent with little or no ability to pay is often left unable to effectively fight against deportation, even if he or she has a case with merit.

In November 2008, a group of local immigration attorneys met with the presiding EOIR immigration judge. During that meeting, the judge remarked on the dearth of pro bono representation at removal proceedings in Idaho and encouraged those practitioners to address the issue. Since December 2008, those practitioners have collaborated with other individuals and organizations to develop a network—the Idaho Immigration Law Pro Bono Network (IILPBN)—with the goal of providing representation for low-income individuals facing deportation in Boise.

To begin addressing the need for pro bono representation immediately, IILPBN, which includes representatives from Idaho Volunteer Lawyers Program, Idaho Legal Aid, Idaho Catholic Charities, the American Civil Liberties Union of Idaho, and Federal Defender Services of Idaho, along with individual practitioners, decided to focus on cases in which an individual has already received a notice to appear from the U.S. Immigration and Customs Enforcement or Citizenship and Immigration Services. Between 2000 to 2008, an average of 417 notices to appear were issued annually from the Boise EOIR<sup>1</sup>. A notice to appear is essentially a charging document that commences removal (commonly known as deportation) proceedings in immigration court. Persons who have received a notice to appear are often in more immediate need of defense from government action, as opposed to other immigrants who may have time to file affirmative petitions seeking legal status. Individuals who end up in removal proceedings often have a legal basis for remaining in the U.S., but have not previously acted on that basis. This is often due to a lack of information about how to navigate complex immigration laws or an inability to pay the fees for applications and legal representation.

After deciding to concentrate on notices to appear, IILPBN considered how to inform those in need of representation about

the network's existence while simultaneously screening for eligibility to receive services. IILPBN's plan is to advertise throughout the Treasure Valley for a once-monthly informational meeting, or *charla* ("chat"), to be held in Boise. The *charla* will be conducted in Spanish and interpreted into English, and it will consist of an overview of the U.S. immigration system and removal proceedings in particular. IILPBN will charge a small fee to attend the *charla* to cover the cost of interpreters. At the conclusion of the *charla*, those individuals who have brought their notices to appear with them will be invited to meet with volunteers and interpreters for an initial screening interview. If eligible, those people will proceed to meet with an attorney for further screening and initial counseling. The *charla* and subsequent screening interview session is expected to last about two hours. Once individuals with eligible cases have been identified, the network will assign them to volunteer attorneys and transfer any notes and paperwork to those attorneys. If necessary, the network will also assign a mentor attorney and interpreter for the case.

The economic criteria for an eligible immigrant will require that his or her income not exceed 125% of the federal poverty guidelines. Until the network is more fully developed with qualified volunteers, the substantive criteria for eligibility will require not only that immigrants have been served with a notice to appear, but that their cases fall into one of three categories of removal proceedings. The first will be cases wherein the individual is not a legal permanent resident, but is nonetheless a candidate for cancellation of removal and lawful permanent residence. These cases, while labor intensive, are typically less legally complex than cases involving immigrants who are already legal permanent residents.

The second type of case will involve immigrants who are eligible for cancellation of removal through the relief of a Violence Against Women Act (VAWA) petition, a U-visa, or an I-751 petition. A VAWA petition allows battered or abused spouses and children of citizens or lawful permanent residents to petition for lawful permanent residency without the abuser's assistance or knowledge. A U-visa allows a victim of certain serious crimes to obtain temporary legal status if he or she cooperates with the investigation or prosecution of the crime and meets other criteria established by law. An I-751 petition case involves individuals who are conditional permanent residents through U.S. citizen spouses or step-parents who failed to

*Individuals who end up in removal proceedings often have a legal basis for remaining in the U.S., but have not previously acted on that basis. This is often due to a lack of information about how to navigate complex immigration laws or an inability to pay the fees for applications and legal representation.*



Mikela "Mike" French



Kristi Wilson

seek timely removal of the condition because of domestic violence or divorce. Pro bono attorneys have already begun to represent clients making affirmative applications in these categories, and with a little more training they could handle these same types of cases in a removal setting.

Finally, the third subset of removal cases that the network will initially handle will involve people who have a strong case for asylum, have been in the U.S. less than one year (so that the case will not involve overcoming a time bar), and who have no criminal convictions. A person seeks asylum because he or she has been subjected to, or fears being subjected to, persecution based on political opinion, membership in a particular social group, race, religion, or nationality in his or her country of origin.

All three subsets of removal cases are not likely to be fee-generating cases as they often involve individuals who do not have a network of citizen or legal permanent resident family members who can provide financial support. They are also less legally complex than other immigration cases and yet can be very rewarding for all volunteers. At the conclusion of a case, the network will provide an opportunity for the volunteer attorney and the network to evaluate one another. The network will also invite feedback from clients.

*Most critically, the network needs attorneys — to become trained in basic immigration law, to screen clients, to take cases, to recruit and train others, and to mentor.*

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This plan is ambitious but crucial to equal access to representation in the courts. In order to be successful, the network will need meeting space for the *charlas* and volunteers to design and distribute advertising materials. It will also require non-attorney volunteers to help screen clients and to translate and interpret during attorney-client meetings. Most critically, the network needs attorneys — to become trained in basic immigration law, to screen clients, to take cases, to recruit and train others, and to mentor. Once the network is up and running, it will be expanded to serve the needs of people beyond the Treasure Valley. In this way, the network will answer not only the call of the EOIR, but of Idaho Rule of Professional Conduct 6.1. To contribute to this important work, please contact The Law Office of Nicole R. Derden at (208) 287-4200 or idahoimmigration@gmail.com.

#### About the Authors

**Mikela “Mike” French** is a 2008 graduate of the Idaho College of Law and serves as a law clerk to the Honorable Justice Joel Horton of the Idaho Supreme Court. She is a founding member of the IILPBN.

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#### Endnotes

<sup>1</sup> Cases in the nine northernmost counties of Idaho are handled through immigration courts based in Washington, so this average does not reflect the number of notices to appear issued statewide.

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# LEGISLATING THE RIGHT TO MEMORY IN SPAIN AND BASQUE COUNTRY

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## Introduction

In 2007, the national Spanish government enacted the “Law of Historical Memory,” 71 years after General Francisco Franco’s military rebellion led to the Spanish Civil War and 32 years after Franco’s death. The Law’s stated purpose was to affirm Spain’s transition to democracy by declaring the illegitimacy of Franco’s regime and recognizing the rights of those who suffered persecution or violence for ideological reasons. Specifically, it professed to fulfill the government’s duty to commit to law the right of victims to recover and express personal and family memories arising from the repression, while avoiding the imposition of a particular collective or official memory of the Franco era. Accordingly, the Law called for steps to facilitate access to government archives; obtain information about the location of mass graves; catalogue buildings and infrastructure constructed by forced labor and concentration camp prisoners; and establish places, events, and monuments to commemorate those who had resisted Francoism.

The Law endorsed the value of public reflection about an ignored past to “close wounds still open” and avoid repetition of intolerance and human rights abuses of the kind committed during the war and Franco’s dictatorship. It acknowledged that Franco’s opponents often played key roles in the struggle to restore democracy and dissidents were unlawfully imprisoned, subjected to forced labor, exile, deprived of property, employment, and citizenship, and often executed. The law provided modest measures to recognize and symbolically “repair” such injuries for surviving victims or their family members.

Several years prior to the enactment of the national Law of Historical Memory (2002-2006), the government of the autonomous community of the Basque Country adopted a series of administrative measures commonly referred to as historical memory decrees. In issuing the decrees, the Basque government recognized that, although no amount of money could “return to the persons affected and their relatives what they [had] lost because of the repression and seclusion suffered in their struggle for freedom, justice require[d] some monetary compensation.” The decrees also called for cultural and symbolic reparative actions to honor Basque victims of Francoism who lost their lives or liberty defending democracy and survival of Basque identity.

Legislating a right to memory is rooted in a growing body of international law known as “transitional justice,” which seeks to address a country’s previously ignored legacy of wide-scale human rights abuses. This area of law is anchored in concepts of human rights, right to democratic governance, and state responsibility. In Spain and in Basque Country, the proponents of historical memory laws intended them to serve as a counterweight to Spain’s amnesty law and the ensuing politics of “amnesia” and general disregard for the Franco regime’s victims.

## Historical Background

Tens of thousands of people were tortured and summarily murdered by Francoist forces or executed pursuant to illegitimate political sentences during and after the Spanish Civil War, including those detained, abducted, and executed without any official record.<sup>1</sup> The remains of many victims still lie in unmarked mass graves throughout Spain.<sup>2</sup> An estimated 400,000 to 700,000 actual and perceived political opponents were held by the Franco regime in prisons, forced labor, and concentration camps.<sup>3</sup> Hundreds of thousands of citizens were forced into exile.<sup>4</sup> Communist and other forces fighting Franco also committed serious breaches of human rights and humanitarian law. However, many of their crimes were officially recognized and punished, and their victims—unlike Franco’s—were often commemorated.

The Basque Country was devastated during the war and dictatorship, initially drawing Franco’s ire for its strong assertions of Basque identity and autonomy. In 1937, Francoist forces issued orders allowing the Nazi Condor Legion to test new methods of air attack in the Basque Country, which included the carpet-bombing of civilian populations with incendiary bombs. One of the first targets was Gernika, the center of Basque history and culture and Boise’s sister city. Numerous Basque political leaders were hunted by Francoist troops and forced into exile. Approximately 30,000 Basque children were evacuated to other countries; many never returned.<sup>5</sup>

During the dictatorship, Basques suffered repression simply for being Basque. Use of the Basque language and other expressions of Basque culture were punishable crimes. Disappearances and summary executions were routine. Many Basque prisoners were forced to work on public and private infrastructure projects.<sup>6</sup>

After Franco’s death, Spain’s political parties agreed to “excuse” and “forget” human rights and humanitarian law violations committed during the civil war and dictatorship. This unwritten agreement, known as the “Pact to Forget,” was predicated on a political determination that official silence and “amnesia” about the recent past was necessary to move forward to democracy. This pact was reflected in Spain’s 1977 amnesty law which precluded prosecution of alleged criminal perpetrators of even egregious violations of human rights and laws of war. The amnesty law, in turn, reinforced the pact to forget. The results included quasi-official myths of the war and the Franco dictatorship, which interpreted them as reasonable responses to Communist and anti-sovereign threats.<sup>7</sup>

Fear and shame borne of decades of legal repression and social demonization of Franco’s opponents, both real and imagined, combined with the politics of amnesia to constrain public discussion and questioning of what had happened and why.<sup>8</sup> Furthermore, it was easier for many, in and out of government, to focus on other issues related to the development of the fledgling Spanish democracy.

This silence about systematic war crimes and human rights abuses during the Franco era extended to the Basque Country, where public opinion remains divided on issues of nationalism, autonomy, and independence. These were the very subjects that had provoked Franco’s harsh treatment of the Basque population. Risk still attaches to publicly questioning such treatment, in part, because of complicated politics surrounding the ongoing conflict between the Spanish government and ETA, an armed Basque separatist organization.<sup>9</sup>



Victims of the war and the dictatorship in Spain and the Basque Country promoted historical memory laws to counteract widespread amnesia and spur public remembrance of the entire past rather than a selective piece of it. These efforts began as grassroots activities in many instances. Nevertheless, as discussed below, such historical memory laws are supported by international legal norms.

### The Right to Memory in International Law

International and regional treaties, resolutions, and jurisprudence require states party or signatory to the applicable instruments to establish mechanisms of accountability for government sanctioned or tolerated human rights abuses, even if they occurred under predecessor regimes. Spain has endorsed the legal rules relevant to this obligation by ratifying applicable treaties and often uses them to press for accountability of alleged human rights abusers in other countries. Applying such rules at home, however, has been difficult politically.

International legal norms recognize that public accountability measures should offer broad possibilities of justice for victims, including investigation of allegations, prosecution of alleged perpetrators, punishment of those convicted, and appropriate remedies and reparations for victims. A truthful public rendering of what was done to them and why is critical. This normative framework provides a legal foundation for transitional justice programs, the emerging right to personal and public memory, and the elaboration of laws of memory to cement this right.<sup>10</sup>

Transitional justice refers to processes associated with a society's attempts to come to terms with a historical legacy of wide-scale abuse and political turmoil. The goals of transitional justice are to: (1) strengthen and consolidate democratic and transparent governance; (2) promote respect for human rights; (3) establish responsibility for violations; (4) transform governmental structures to limit future violations; (5) recognize victims as rights-bearers; (6) gain a deeper understanding of the causes, mechanisms, and results of the abuses committed; (7) provide victims and their families some degree of justice; and (8) foster societal reconciliation.<sup>11</sup>

Examples of transitional justice initiatives include: (1) truth commissions (South Africa, several Latin American countries); (2) criminal prosecutions (Cambodia, Sierra Leone); (3) monetary and "moral" reparations such as the creation of public memorials, museums, and commemoration ceremonies (Germany); (4) publishing compendiums of systemic and individual violations (Argentina); (5) facilitating access to military and police archives (former East Germany); (6) forensic investigations and excavations of graves to establish circumstances of death and identify remains to return to family members (Argentina); (7) nullifying sentences imposed to punish political dissidents (Argentina); and (8) official apologies (Germany).

If such measures are not fully possible, at a minimum, states are expected to take meaningful, public actions to maximize the recovery of knowledge of the causes and nature of abuses, what happened to victims, and why. States must also undertake

to publicly restore the dignity and reputation of victims. Fundamentally, the state bears a responsibility to officially and publicly recognize victims in a manner that legitimizes their actions in the eyes of society, which is a form of individual and social justice. The emerging international human right to individual, historical, and public memories and corresponding domestic legislation arises from these obligations.<sup>12</sup>

Ideally, recuperation of such memories is a process of individual and collective historical construction in which diverse private and public actors participate. Well-crafted memory initiatives are not intended to fixate on past suffering or foster vengeance. Instead, they allow individuals and societies to move forward with a more complete understanding of their personal and national identities and to guard against present and future violations.<sup>13</sup>

### Memory Initiatives in Spain and Basque Country: "Pinochet's Revenge?"

Spain's commitment to the Pact to Forget resulted in successive governments failing to comply with international norms supporting the establishment of accountability mechanisms to address human rights and humanitarian law violations. They also failed to adopt and implement appropriate reparative, restorative, and remedial measures for victims. Inherent in the Pact to Forget was the denial of any right to individual and public knowledge and memory.

In the 1990s, grassroots victims groups started their own "memory initiatives" to uncover, reconstruct, and preserve individual and public knowledge of the fates of victims. To the extent possible without public support, they excavated mass graves believed to contain the remains of Franco opponents, provided forensic analysis of the identities of victims and manner of death, located documents related to victims, and advocated public commemoration of those who had been imprisoned or killed in the struggle to defend and restore democracy. However, the absence of laws to facilitate the work hindered these efforts. It was often impossible for individuals to access records about their own imprisonment or the fates of family members, or to obtain government cooperation in locating clandestine graves and to receive permission to excavate them.

While continuing to resist efforts to confront its own legacy of gross human rights violations, the Spanish government became famous for its contributions to the development of transitional justice, most notably by invoking the doctrine

of universal jurisdiction to initiate prosecutions of alleged perpetrators of crimes against humanity in other countries. The most famous—the 1996 prosecution of former Chilean president Augusto Pinochet in Spanish courts—was one of several catalysts for increased domestic and international demands on the Spanish government to face its own history of Francoist abuse, a phenomenon sometimes referred to as "Pinochet's revenge." The 2007 Spanish law and the Basque decrees of historical memory were products of this pressure.

### Brief Assessment of the Spanish Law and Basque Decrees

In substance and in implementation, the Spanish law and the

*Well-crafted memory initiatives are not intended to fixate on past suffering or foster vengeance. Instead, they allow individuals and societies to move forward with a more complete understanding of their personal and national identities and to guard against present and future violations.*

Basque decrees of historical memory fall short of their stated purposes and international legal norms. Still, signs of progress can be observed. Several examples of their shortcomings and potential advances are discussed below.

The Spanish law has been praised for declaring illegitimate the criminal convictions that the Franco dictatorship imposed on genuine or perceived ideological opponents; however, it failed to nullify those convictions. The law also failed to specify mechanisms, timetables, or funding to implement its provisions. The law did not elaborate protocols for locating and exhuming graves or even accessing information in government archives. This latter omission is especially problematic because those who seek recognition of individual unlawful convictions and even symbolic reparations bear the duty of providing documents that are found only in official archives.

In October 2008, the United Nations Human Rights Committee observed that the Law of Historical Memory law did not meet Spain's international obligations in certain respects, including, for example, its failure to repeal the 1977 amnesty law. The Committee found this deficit incompatible with Spain's duty to guarantee judicial remedies for crimes against humanity despite previous amnesties. The Committee "not[ed] with satisfaction" the memory law's potential to clarify the fates of those executed or disappeared, but expressed concern that victims and their families continued to encounter judicial and administrative impediments to locating graves, gaining permission to excavate, and obtaining the means to identify remains. The Committee recommended removing these obstacles and urged the Spanish government to support the creation of a commission of independent experts to oversee the recuperation of knowledge and understanding of human rights violations committed during the war and the dictatorship.

Since enactment of the Spanish memory law, disputes have erupted among federal and regional judges and the federal prosecutor about whether national or regional courts have proper jurisdiction to adjudicate questions regarding Franco-era disappearances. Spain's federal prosecutor also has argued that the historical memory law forecloses judicial examination of disappearances because the law of historical memory provides other adequate measures for victims. These and other legal disputes are pending.

Nevertheless, gains have been made in realizing the provisions of Spain's historical memory law. Its passage has generated broader public discussion about the causes and effects of the war and the dictatorship, and wider questioning of previous negative beliefs about those who opposed Francoism. In recent months, federal decrees have designated primary administrative responsibility to the Ministries of the President and Justice for implementation of a number of provisions, and have also established a coordinating Office for Victims of the War and Dictatorship. These ministries have begun to elaborate structures to effectuate parts of the law. The Justice Ministry, for example, has published procedures to permit the acquisition of Spanish citizenship by children and grandchildren of individuals forced to forfeit their citizenship because of political exile.

The Basque historical memory decrees offered the possibility of monetary reparations for individuals who had been imprisoned, confined in concentration camps, or subjected to forced labor by the Franco regime. The decrees also declared generalized support for initiatives to recover memory. However, many members of victims' associations and some Basque government officials agree that the decrees have largely failed and even caused "re-victimization," for several reasons. First, the government imposed unnecessary and unrealistic

evidentiary burdens on claimants by limiting the types of documents that could be used to prove they had been victims of the deprivations of liberty recognized by the decrees. Second, the government refused to recognize certain forced laborers as victims until sustained pressure from victims' associations caused reconsideration. Third, instead of creating a special office or designating the already-existing Office of Human Rights to coordinate implementation of the decrees, the Basque government allocated work to discrete departments, often on the basis of party politics rather than functionality or expertise. Fourth, the decrees' public memory initiatives to foster better understanding and knowledge of Francoist repression in Basque Country have been criticized as random and incoherent.<sup>14</sup>

Still, the Basque decrees provided reparations to some victims. They have prompted Basque government funding for several memory initiatives, including a 2008 reunion in Bilbao of several dozen Basques who, as children, had been sent abroad for safety and were unable to return home. Their reunion coincided with a week of public discussions and the inauguration of a museum exhibit which began to reconstruct their histories.

In 2006, the Basque government adopted a "Plan for Peace and Co-existence," which comprised strategies to improve individual and public recognition for victims of Francoist and ETA violence. In 2008, the Basque Parliament enacted the Law of Recognition and Reparations to Victims of Terrorism, which corresponds to the part of the Plan focused only on ETA's victims. The Parliament has yet to pass similar comprehensive legislation to address victims of Francoist terror.

### Implications for International Law and Practice

The citizenry of Spain and Basque Country must find their own way, as is their right; however, their governmental representatives, especially, should not lose sight of broader international legal norms.

Spain and Basque Country remain laboratories for theories and practices of transitional justice and the human right to memory. A detailed analysis of these points is beyond the reach of this article, but the Spanish and Basque experiences with legislating memory are already highlighting the importance of:

- contextualizing the content and scope of a right to memory in a manner consistent both with the needs of a specific set of circumstances and with international standards;
- delineating the relationship between memory and justice;
- articulating the purposes and goals of a particular law of memory prior to drafting it;
- confronting "competing" memories and victims;
- addressing the role of party politics in exacerbating an already politically charged process;
- considering additional challenges that may be posed where considerable tension exists between the national polity and strong autonomous governments; and
- tackling issues of effective implementation.

Ultimately, the Spanish law and Basque decrees of historical memory illustrate the challenges of legislating memory and effecting change that touches the very roots of a relatively new democracy.

### About the Author

**Monica Schurtman** joined the University of Idaho College of Law faculty in 2000. She currently teaches international human rights law, immigration law, and advocacy and supervises the

college's Immigration Law Clinic. Previous positions included founding director of the International Human Rights Clinic at St. Mary's University School of Law in San Antonio, Texas, legal counsel to the Human Rights Watch Arms Division, staff attorney with the Legal Aid Society of New York, and director of the Central American Refugee Program in New York City.

Professor Schurtman has written on a variety of subjects including human rights, humanitarian, and immigration law. She received a J.D. from New York University School of Law and her B.A. from the State University of New York at Stony Brook. In 2008 she spent a five month sabbatical in Basque Country conducting research relevant to this article.

**Endnotes**

- <sup>1</sup> See generally, Antonio Martin Pallin y Rafael Escudero Alday (eds.), *Derecho y Memoria Historica* (2008) at 10-11; Emilio Silva, *Las Fosas de Franco, Cronica de un desagravio* (2005)
- <sup>2</sup> See Silva, *supra* note 1.
- <sup>3</sup> See, e.g., Jose Anonio Martin Pallin y Rafael Escudero Alday (eds.), *Derecho y Memoria Historica* (2008) at 10-11.
- <sup>4</sup> See generally *id.*
- <sup>5</sup> See Dorothy Legarreta, *The Guernica Generation: Basque Refugee Children of the Spanish Civil War* (1984)
- <sup>6</sup> See generally Cameron Watson, *Modern Basque History* (2003) at 282-318.
- <sup>7</sup> See generally Santos Julia Diaz, "Memoria, Historia, y Politica de un Pasado de Guerra y Dictadura" in Santos Julia (ed.), *Memoria del Guerra y del Franquismo* (2006).
- <sup>8</sup> Author interviews in Basque Country, Barcelona, Madrid (Spring 2008).
- <sup>9</sup> Initially formed in 1959 as a political group committed to Basque nationalism, democracy, and resistance against Franco, ETA subsequently took up arms against the dictatorship, and continues to this day to use violence in an effort to achieve independence from Spain. See, e.g. Robert P. Clark, *The Basques: The Franco Years and Beyond* (1979) 156-157; Watson, *supra* note 7 at 320-334.
- <sup>10</sup> See generally Felipe Gomez Isa (ed.), *El Derecho a La Memoria* (2006).

- <sup>11</sup> See generally United Nations Secretary General Report, "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies" (2004).
- <sup>12</sup> See generally, U.N. Human Rights Commission, Updated Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, U.N. Doc. E/CN.4/2005/102/Add.1, Feb. 8, 2005; *Amnesty International (Spanish Section)*, Poner Fin Al Silencio y a la Injusticia La Deuda Pendiente con Las Victimas de la Guerra Civil Espanol y del Regimen Franquista, July 18, 2005 at 27-30, 41-42,44-48; Felipe Gomez Isa, "El Derecho de las Victimas a la Reparacion por Violaciones Graves y Sistematicas de los Derechos Humanos" in *El Derecho a La Memoria*, *supra* note 10.
- <sup>13</sup> See generally Gomez Isa, *supra* note 12.
- <sup>14</sup> See generally Mikel Urquijo, *Denied Memory: the Crossroads of the Institutional Route in the Case of the Basque Government and the Victims of Francoism* (2007).



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# ALL IN AND A CALL: HAS ONLINE POKER RAISED STATE SOVEREIGNTY STAKES?

Brian Kane

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## Introduction

With the introduction of a small innovation that allowed observers to know what cards the players were holding without the other players at the table knowing, Texas Hold-Em Poker became the Cadillac of gambling. Turn on the television on virtually any night and you can not only see poker being played by the best in the world, but you are also inundated with invitations to “learn, play and chat with the pros” on poker websites. Reading the fine print that accompanies these advertisements, often they state that the games are for entertainment purposes only and not played for real money. But there is a subtlety that many casual observers likely overlook—the advertisement is for a domain name with a dot net (.net) suffix. This suffix will take you to a free play site, but if you type in the standard dot com (.com) suffix, you will be taken to a live poker site, where you can play for real money. Based on this seemingly mainstream endorsement through television, advertisements and the Internet, it is easy to see how someone would not realize that online Poker, particularly in Idaho, is illegal. Although illegal in Idaho, that illegality has been challenged internationally, and is currently being challenged in Congress by a determined alliance of players.

This article will provide a brief overview of the federal and state regulatory systems, a quick analysis of the Antigua decision and outcomes from the WTO, and finally look at pending federal legislation that may dramatically alter the online poker landscape.

## Playing Without Borders

### *Complex Regulation*

Throughout the United States, gambling laws are generally left to the desires of the individual states. Idaho, for example, has created a largely prohibitive regime through its adoption of Article III, § 20 of the Idaho Constitution. Other states such as Nevada and New Jersey have more permissive gambling laws, and still other states create a distinction between games of “skill” versus “chance.” Even more confusing is the fact that only seven states expressly outlaw online gambling.<sup>1</sup> Added to this overlay is a series of federal laws designed to assist the states in the enforcement of their gambling regimes, as well as provide for federal enforcement of interstate gambling.

But the federal regime is as complex as the state regimes. For example, the Wire Act<sup>2</sup> prohibits anyone from transmitting information to assist in wagering by using a wire communications facility. Two primary issues arise under the Wire Act. First there is a question as to whether it applies to the Internet. Second, it is debatable whether the Wire Act was intended to prevent anything other than sports wagering.<sup>3</sup> Two other acts ostensibly operate as a prohibition of online gambling” The Travel Act<sup>4</sup> and the Illegal Gambling Business Act.<sup>5</sup> The Travel Act is intended mainly to prevent racketeering and other unlawful business enterprises from crossing state lines. The Illegal Gambling Business Act was intended to combat large

scale syndicated gambling operations, which also crossed state borders. Unfortunately, none of these statutes directly address online gambling, in large part since their passage mostly predates the explosion of Internet gambling.

The confusion over the applicability of these Acts was supposedly cleared up by the adoption of The Unlawful Internet Gambling Act of 2006.<sup>6</sup> The Act prohibits the transfer of funds from a financial institution to an Internet gambling site. Exceptions are made for fantasy sports, online lotteries, and horse/ harness racing. In response, a number of publicly traded Internet gambling sites immediately announced that they would block U.S. users from their sites and reject attempted transactions. A number of privately held sites had the opposite response. But even the seemingly clear prohibition on transactions from financial institutions may be impossible from an enforcement standpoint.

## Complex Technology

### *Finding the Right Wallet to Hit*

The biggest challenge to enforcement is the seemingly limitless evolvability of the Internet and electronic banking transactions. In 2002, the New York Attorney General led a lawsuit that resulted in the major credit card companies prohibiting the use of their cards for Internet gambling. This step was a relatively easy one at the time because of the way that credit card companies and card issuers coded their transactions. Considering Internet gambling is estimated to be a \$12 billion industry, it is evident that participants did not want to fully close a potentially highly profitable door.

The technology of the transactions and sophistication of the participants evolved. Now, these transactions are often done bank to bank through the Automated Clearing House network (ACH). The ACH is an electronic processing system used by the Federal Reserve that cannot differentiate between a gambling transaction and a legitimate one such as a car or mortgage payment. This dilemma is compounded as additional electronic payment systems have come into existence, and through the insertion of language in the Unlawful Internet Gambling Enforcement Act (UIGEA) that directs payment processors to avoid blocking apparently legitimate transactions. This language may have seemingly created a presumption of legitimacy for these transactions making it harder for banks to prohibit a transaction without some obvious sign of illegality.

### *Finding the Right Sites To Block*

The Act also requires the federal government to provide Internet Service Providers (ISPs) with a list of gambling sites, which the ISPs must then block. In essence, this requirement puts the speed and creativity of the Internet into direct competition with the speed and creativity of the federal government. This is much the same as matching Usain Bolt with a toddler in a 100-meter dash.

Notably, online gambling sites have proven both their nimbleness and creativity when faced with similar blocking actions. In 2004, California sued Yahoo and Google, among other websites to force them to stop accepting advertisements from Internet gambling sites. Both Google and Yahoo settled and agreed to block the Internet gambling sites, but the sites quickly morphed themselves into new sites and established ads that would be taken down, only to be put up again and again. At least one court has expressly recognized the difficulty in trying to keep up with these sites: “much like bacteria that mutate in



order to survive antibiotics, would be on-line gambling operators change their tactics to escape detection, necessitating different enforcement techniques by the defendants.<sup>77</sup> This evolution showed the difficulty of blocking content from particularly savvy participants, as well as the dilemma posed in trying to establish lists of prohibited sites.

An even larger obstacle to states may exist within constitutional free speech and commerce provisions.<sup>8</sup> Recently, Minnesota withdrew an effort to require ISPs to block access to approximately 200 poker and gambling sites. Eleven ISPs were served with written notice instructing them to prohibit Minnesota residents from accessing the sites. The sites and the Poker Players Alliance responded by seeking an injunction, which in turned caused Minnesota to back off of its request.<sup>9</sup>

### **Small Nation, Big Win**

#### *The Trade Negotiations*

Further complicating Internet gambling within the United States is the overlay of the World Trade Organization (WTO). The WTO officially came into being in 1995 to supervise and liberalize international trade. Internet gambling is most directly affected through the WTO by the General Agreement on Trade in Services (GATS),<sup>10</sup> where it falls under the negotiating term of “other recreational services.” In simplest terms, during the negotiations in the Uruguay Round<sup>11</sup> in the early 1990s, the U.S. negotiating team agreed that there were no obstacles to member nations to access gambling within the United States.<sup>12</sup> This concession was made in spite of the existence of three federal statutes<sup>13</sup>, and numerous state statutes prohibiting gambling and Internet gambling throughout the nation. These obstacles would later haunt the U.S. and its states.

#### *Antigua’s Win*

In 2003, the nation of Antigua brought a complaint to the WTO alleging that significant obstacles existed within the United States at the federal level, as well as the state level—specifically Utah, Louisiana, Massachusetts, and South Dakota – with regard to the United States commitments to gambling and betting services under the sub-sector “Other Recreational Services.” The United States defended against this action citing an exception from inclusion within the commitment for protection of public morals and public order.<sup>14</sup> But there were significant holes within that defense.

The central premise of the WTO and GATS agreements is that foreign governments receive the same access to the provision of goods and services as domestic suppliers. For example, a Muslim nation could ban liquor imports, but only if domestic distillers, brewers, or suppliers were similarly banned. The problem for the United States is found in the Interstate Horseracing Act<sup>15</sup>, which permits interstate wagering on horse races. The hole grew larger because three of the named states within Antigua’s complaint permitted gambling of some form or another. South Dakota, Louisiana, and Kentucky all permit variations of casinos, tribal gaming, horseracing, and other forms of gambling to occur within their states. Utah was the only state within the complaint to have a strictly prohibitive regime.

In short, Antigua prevailed over the United States primarily due to the permissive gambling regimes at both the national and

state levels. The United States had committed to equal treatment when it included “gambling and other betting services” within the Uruguay round of negotiations.<sup>16</sup> Following the decision of the WTO Appellate Body, which upheld the earlier panel findings, the United States was placed in the position of having to remove the obstacles to Antigua’s provision of gambling and betting services to the United States.

#### *The Secret Concessions*

Faced with this loss, the United States was in a particularly difficult spot. Congress was not likely to simply repeal the Wire Act, the Travel Act or the Illegal Business Gambling Act, nor was it likely to preempt state gambling regulations. Instead, the U.S. Trade Representative withdrew the commitment with regard to gambling and betting services completely from the negotiations. The basis for the withdrawal was that it was due to an oversight on the part of the negotiators during the Uruguay round because they could not have foreseen the rapid evolution of Internet gambling.<sup>17</sup> But this belies the fact that more than 100 countries in the GATS negotiations excluded gambling by not including it within the terms of their negotiating schedule, or expressly opted out of a commitment to allow foreign countries to provide cross-border gambling. In other words, an oversight by the U.S. Trade Representative placed Idaho’s constitutional gambling prohibition in jeopardy.

Although it would be easy to blame the USTR for this threat to Idaho, the reality is that the issue is much more sophisticated. First, the very nature of the WTO and GATS should have prevented Antigua from bringing a complaint in the first place. The agreement is structured around broad categories with the understanding that the details can be worked out among nations over time. In simplest terms, the USTR was correct in stating that his office was unaware of the scope or penetration of Internet gambling when GATS was negotiated. A secondary concern with the Antigua complaint is the degree to which it was an actual complaint of Antigua’s or a more generalized complaint of the gambling industry. It appears that much of the complaint and advocacy was underwritten by private gambling interests, which may not have all been Antiguan citizens.<sup>18</sup> A concern presented by the gambling industries underwriting of Antigua’s complaint is whether these are actually transnational disputes or leveraging mechanisms for private corporations.<sup>19</sup> But even with all of this as background, the WTO found against the U.S., and that finding had to be addressed.

Even with the U.S.’s withdrawal of its commitment to gambling and other betting services, there was still an issue of damages, as well as a murky backdrop with regard to other nations making claims similar to Antigua’s. Most significantly, the U.S.’s withdrawal permits other nations to make trade demands in order to compensate for lost trade revenue caused by the withdrawal of the previous commitment. As compensation, the U.S. agreed to open four markets, which had previously been closed.<sup>20</sup> From a sovereignty perspective, these latest concessions are just as threatening as the gambling oversight because they likely will conflict with state environmental and siting regulations.

For example, two of the areas the U.S. opened were within warehousing and storage along with research and development.

*On June 2, 2009, thousands of online poker players received a harsh wake up, when they found that there accounts had been frozen.*

Warehousing and storage includes the storage of oil, gas, and chemicals. In simplest terms, a foreign firm seeking to open a storage facility such as a tank farm could challenge local or state zoning regulations with regard to the siting of the facility as a barrier to trade under GATS. Application of GATS and the WTO has created a sophisticated game of Whac-a-Mole when addressing issues of state sovereignty.

### Illegal...In Concept?

*Busted!*

On June 2, 2009, thousands of online poker players received a harsh wake up, when they found that their accounts had been frozen. The U.S. Attorney for the Southern District of New York ordered four banks to seize approximately \$30 million in payments and deposits belonging to around 27,000 poker players. The federal prosecutors identified U.S. companies processing payments for online sites based overseas. A countersuit has been filed in the Southern District of California seeking a return of the funds.<sup>21</sup> A hearing in the matter was held on August 21, 2009.

### Outright Federal Preemption?

Although the United States appears to have taken a more aggressive posture with regard to online gambling,<sup>22</sup> the issue is far from resolved. First, there are still lingering issues regarding the GATS commitments relating to gambling,<sup>23</sup> as well as the ripple effect on sovereignty of subsequent commitments. Second, poker players, through an organization called the Poker Players Alliance have initiated a concerted effort to lobby Congress for legalization of online poker. Representative Frank is the lead sponsor on the bill,<sup>24</sup> which he unsuccessfully sponsored in 2007. But since 2007, the landscape has changed politically, and the government may have more enthused interest in potential tax revenue that has been estimated at more than \$10 billion if approved and regulated.

Although this bill permits states to opt out of the federal legalization of online poker, it alters the landscape. First, the bill permits the governor to make the determination for a state as to whether the state will permit online gambling to be offered.<sup>25</sup> Second, tribes are given the option to determine whether they will permit online poker to be offered within the boundaries of their reservations. This is particularly interesting in the context of Idaho because a tribe would be able to permit online poker to be played on its reservation, but not permit live poker to be played within its casinos pursuant to their respective gaming compacts.

### Conclusion

It would be easy to conclude that the threat of Internet poker preempting state gambling prohibitions such as Idaho's is remote, but that conclusion would belie the reality of the increasing pressure being brought to bear on the national and international levels. In 2005, Great Britain legalized online gambling. Complaints about the US's denial of market access within this area continue to be voiced. Finally, nationally, a growing and organized group of poker players are making

*Application of GATS and the WTO has created a sophisticated game of Whac-a-Mole when addressing issues of state sovereignty.*

their voices heard with respect to their calls for legalization. Television broadcasts and the relentless onslaught of the game online combine to not only legitimize online poker as a game, but also erode the surviving arguments concerning morality. Although Idaho directly prohibits gambling in all of its forms, in light of the current push to legalize online poker, now may be the time for Idaho to protect its hand by directly prohibiting online gambling and poker through statute.<sup>26</sup>

### About the Author

**Brian Kane** is a Deputy Attorney General in the Idaho Office of Attorney General. The views and opinions within this article are the author's own and should not be imputed to the Attorney General, the Office of the Attorney General, or the State of Idaho in anyway.

### Endnotes

<sup>1</sup> Illinois, Indiana, Louisiana, Montana, Nevada, Oregon, and South Dakota. Many authors have made this point, but it fails to account for states such as Idaho, which prohibit all forms of gambling. Consider Article III, § 20 (2), which prohibits "any electronic or electromechanical imitation or simulation of any form of casino gambling." Given the broad sweep of this language it is difficult to argue that this would not cover online gambling systems.

<sup>2</sup> 18 U.S.C. § 1084.

<sup>3</sup> *In Re MasterCard Int'l*, 132 F. Supp. 2d 468, 472 (E.D. La. 2001). (plain language of Wire Act limited to gambling on a sporting event or related contest and not prohibitive of non-sports Internet gambling). Compare *People v. World Interactive Gaming Corp.*, 185 Misc. 2d 852, 714 N.Y.S.2d 844 (Sup. Ct. 1999) (state and federal law prohibit offering of Internet gambling to New York residents).

<sup>4</sup> 18 U.S.C. § 1952.

<sup>5</sup> 18 U.S.C. § 1955.

<sup>6</sup> 31 U.S.C. §§ 5361-5367. UIGEA was adopted by an attachment to the SAFE Port Act through a Conference Report adopted by both chambers which waived reading of the report.

<sup>7</sup> *Cisneros v. Yahoo*, CGC-04-433518 (Cal. Sup. Ct. 2008).

<sup>8</sup> An interesting case to consider with regard to the dormant commerce aspect of the myriad state gambling regimes is *Granholt v. Heald*, 544 U.S. 460 (2005). See also, Linda J. Shorey et al, *Do State Bans on Internet Gambling Violate the Dormant Commerce Clause?* 10 Gaming L. Rev. 240.

<sup>9</sup> A consistent latent issue within these actions is market protection. For example, Minnesota permits gambling including poker within tribal casinos, but seeks to prohibit it from being offered online. Similarly, Kentucky permits gambling including poker, and recently seized 141 domain names partially because Kentucky gambling establishments, including horse racing, lose revenue to online gambling. See *Commonwealth ex rel. Brown v. 141 Internet Domain Names* (Ky. Franklin Cir. Ct. 2008).

<sup>10</sup> General Agreement on Trade in Services, Apr. 15, 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1144,1167 (1994).

<sup>11</sup> The negotiations are often referred to as rounds with the location of the negotiations becoming the title of the Round. The Uruguay Round was particularly significant because it was the first time that international agreements regarding many service sectors that had traditionally not been included in the previous trade agreements were created. Currently, these agreements are undergoing negotiation under the Doha Round initiated in 2001. The sophistication of these negotiations is reflected in the length of time it takes to complete a round—the Uruguay Round took 87 months, or 7.5 years, to complete.

<sup>12</sup> See Statement of Deputy United States Trade Representative John K. Veronau Regarding U.S. Actions under GATS Article XXI, May 3, 2007. Available at: <http://www.ustr.gov/about-us/press-office/press-releases/archives/2007/may/statement-deputy-united-states-trade-represen>

<sup>13</sup> Wire Act, Travel Act, and Illegal Gambling Business Act

<sup>14</sup> Article XIV of GATS.

<sup>15</sup> 15 U.S.C. §§ 3001 *et seq.*

<sup>16</sup> State Attorneys General have brought this to the attention of the USTR at least twice, once in 2003 and again in 2005. Idaho is a signatory to both the 2003 and 2005 letters. The 2005 letter to USTR Rob Portman, which noted the difficulty

with the gambling provisions specifically included concern with the continued erosion of state sovereignty as additional service sectors were being considered for commitment. 28 other State Attorneys General joined Idaho on this letter. Letter to USTR Rob Portman, dated May 31, 2005. See also Letter to USTR Robert Zoellick, dated July 2, 2003.

<sup>17</sup> See Statement of Deputy United States Trade Representative John K. Veronau.

<sup>18</sup> Paul Blustein, *Against All Odds: Antigua Besting U.S. In Internet Gambling Case at WTO*, The Washington Post, August 4, 2006. (Accessible at: <http://www.washingtonpost.com/wp-dyn/content/article/2006/08/03/AR2006080301390.html>).

<sup>19</sup> *Id.* For example within the article, this agreement had been in existence for several years without any complaint by Antigua. The article goes on to further make the point that without industry financing of the complaint, Antigua likely would not have ever made this complaint.

<sup>20</sup> Further compounding state frustration with the USTR, the WTO, and GATS, the concessions made following the withdrawal of gambling from the U.S.'s schedule were declared secret under Executive Order 12958 (April 17, 1995). Several entities made FOIA requests, which were subsequently denied because the disclosure of the trade concessions would jeopardize national security. The areas in which concessions have been made have been disclosed, but no details as to the actual concessions have been provided.

<sup>21</sup> *In Re All Funds On Deposit at Union Bank*, No. 3:09-cv-01495-JM-RBB (Notice of Motion and Motion for Return of Property; Memorandum of Points & Authorities; Declaration of Counsel; Exhibits, July 10, 2009). Interestingly, the suit was brought seeking equitable jurisdiction. Venue was sought in California because all of the seized funds were located there. Tactically California may be more receptive to a release of the funds because it likely has a more relaxed attitude towards gambling and poker in particular owing to the numerous casinos and cardrooms found throughout the state.

<sup>22</sup> The US has additionally entered into settlements with online poker sites, including a recent settlement of \$105 million with PartyGaming in April of this year.

<sup>23</sup> The European Commission recently argued that the US was still in violation of WTO rules because online betting on horse racing is allowed. The Commission appears to favor a negotiated resolution as opposed to filing a complaint with

the WTO at this point. Eric Pfanner, *A New Chance for Online Gambling in the U.S.*, *N.Y. Times* (Apr. 26, 2009).

<sup>24</sup> At the time this article was written, HR 2267, the Internet Gambling Regulation, Consumer Protection, and Enforcement Act had more than 50 co-sponsors, including Idaho Congressman Walt Minnick. <http://www.govtrack.us/congress/bill.xpd?bill=h111-2267> (last visited Aug. 6, 2009).

<sup>25</sup> Section 5386(a)(1) of HR 2267 (Introduced June 12, 2009). Interestingly the language of the bill designates the governor or "other chief executive officer" as the authorizing official, which likely would lead to confusion, if not litigation, over legislative authority foreclosing or, alternatively, mandating opt-out. An additional question arises in Idaho given Article III, § 20, which arguably could be overridden by an executive order through operation of the federal legislation if adopted. More philosophically, if an Idaho governor permitted online poker to be offered, would that be consistent with his oath/duty to uphold the *State's* laws and constitution—i.e., to take even an otherwise federally-sanctioned action when not compelled by federal law to do so?

<sup>26</sup> In addition to the constitutional prohibition on gambling, Chapter 38 of Title 18 prohibits and sets forth the statutory structure for the crime of gambling. Notably, Idaho Code § 18-3802 prohibits gambling on "real or personal property." A computer would likely fall under "personal property," but an express prohibition eliminates any argument to the contrary.

## Online MCLE Courses

Are MCLE courses scarce in your area? Remember, Idaho approved online courses are a great alternative. Visit the Idaho State Bar website at [isb.idaho.gov](http://isb.idaho.gov) to get a list of our preapproved online MCLE courses. These courses are always available and are an easy way to get the extra credit you need. Please remember online courses are considered self-study and the limit of self-study credits is 15 per reporting period. Contact the Membership Department at (208) 334-4500 or [jhunt@isb.idaho.gov](mailto:jhunt@isb.idaho.gov) if you have any questions about MCLE compliance.

## ALTERNATIVE DISPUTE RESOLUTION

Merlyn W. Clark

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

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

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# 2009 ABA ANNUAL MEETING REPORT: All of us need to educate public

Larry Hunter

*Idaho State ABA House of Delegates*

The annual meeting returned to Chicago, the headquarters of the ABA and, of course, the home of President Obama. Besides the traditional welcome from the governor and mayor of the host state and city, President Obama sent his greetings via a taped presentation in which he acknowledged the role of the ABA in promoting the rule of law. It was the first greeting from a sitting president in many years.

Besides President Obama, recently retired associate Justice Souter addressed the assembled guests at the opening ceremonies. Justice Souter directed his remarks to the dearth of secondary instruction in the American public school system on the American governmental system – civics. Many, if not most, public school systems have dropped civics instruction at the high school level – including the school districts of Idaho. This had led to a distressing lack of knowledge and seeming disinterest in the American populace about how and why our system works. Checks and balances may as well be what you do to your car tires rather than the interaction of the three branches of government.

Indeed, many people forget the role that an independent judiciary plays in that system of checks and balances. Periodically, the role of the justice system hits the news, such as during Justice Sotomayor's confirmation hearings. However, even that brief illumination of the courts often demonstrates the lack of understanding of the court's role – even from members of the Senate who confirm the appointment of federal judges. Amongst the general populace, surveys reveal that more Americans can name a judge on American Idol than a justice of the Supreme Court. The ABA has recently emphasized the need for each of us, as attorneys and officers of the court, to try to work for increased civic education – preferably in the high school, but at least through adult education opportunities, such as the Citizen Law Academy that we have in Idaho.

For the first time in a number of years, Idaho's delegation was without Allyn Dingel's presence. Not only we Idahoans, but many others in the House of Delegates, expressed their sadness at Allyn's untimely passing. He will be missed at many levels.

At the end of the session, Tim Hopkins of Idaho Falls became a member of the Board of Governors. Without going into great detail about the ABA's governance, suffice it to say that Idaho has a right to a seat on the Board of Governors only once every 12 years. Tim will have a positive and significant influence in that body for the next three years. The Idaho delegation in the House of Delegates attending this meeting was Larry Hunter, the new state delegate, and Craig Meadows, who served as the state bar delegate. Tim joined us and is an ex officio member

of the House as a member of the Board of Governors. Eugene Thomas is a lifetime member of the House as a former chair of the House and president of the ABA. Four is about as many as we can hope for unless someone rises through the ranks of a section to become a section delegate or a woman or minority delegate at large.

With regard to the other offices of the organization, Carolyn Lamm of Washington D.C. became the new president of the organization with Stephen Zack of Miami as president-elect and Bill Robinson of Kentucky as president-elect designee. There will be further elections at the February meeting for chairman of the House of Delegates and secretary and treasurer of the organization.

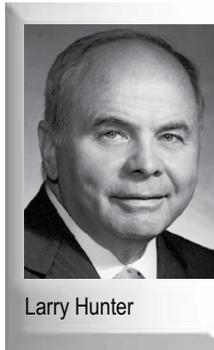
With regard to the substantive measures considered by the House, there were several considered, but none that evoked the debate as did the screening amendment to the Rules of Professional Conduct. There was difference of opinion between the Litigation Section and the Family Law Section on a recommendation regarding the representation of children in abuse and neglect scenarios. After multiple emails supporting one or the other, the resolution was withdrawn to see if a consensus could be reached. We will see it again in October.

Contrary to some reports, the House did not endorse same sex marriage. But it did pass a resolution recommending that couples whose same sex union was legally sanctioned by the state they lived in be eligible for federal benefits as a married couple. It remains to be seen whether a resolution to recognize same sex marriage will be considered by the House.

There were additional resolutions, 43 in all, which dealt with everything from patent law to paralegals. A summary of actions taken is available on the ABA website. As a whimsical conclusion to this report, it should be reported that the Senior Lawyers Division withdrew its resolution changing the name of the group to the Elder Law and Experienced Lawyers Division. Apparently, practicality won out over political correctness.

## About the Author

**Larry Hunter** serves as the Idaho State Delegate to the American Bar Association House of Delegates. He is a partner with Moffatt, Thomas, Barrett, Rock and Fields in Boise. His practice includes general and commercial litigation, administrative law, and alternative dispute resolution. He is a past president of the Idaho State Bar. He received his J.D. from Northwestern University School of Law. He has an A.B. from Harvard University (cum laude). Contact information for Larry is: (208) 345-2000, or [lch@moffatt.com](mailto:lch@moffatt.com).



Larry Hunter

## Ethics Credits – Need More?

If you plan to rent an ethics DVD or tape before the end of the year, do not wait to order it. The 2010 licensing packets will be mailed in mid-November. Once they are received, the demand for ethics disks and tapes will increase. If you wait until November or December, they may not be available. Contact Eric White at (208) 334-4500 or [ewhite@isb.idaho.gov](mailto:ewhite@isb.idaho.gov) for rental information.

## 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

**5th AMENDED - Regular Fall Terms for 2009**

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

By Order of the Court  
Stephen W. Kenyon, Clerk

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

**Idaho Supreme Court**  
Oral Argument Dates  
As of September 9, 2009

**PLEASE NOTE THE FOLLOWING:  
The Idaho Supreme Court will NOT  
have any oral arguments for the month of October**

**Wednesday, November 4, 2009 – TWIN FALLS**

8:50 a.m. . . . . Funes v. Aardema Dairy & State Insurance Fund . . #35923  
10:00 a.m. . . . . Idaho Dairymen’s Assoc. v. Gooding County. . . . #35980

**Thursday, November 5, 2009 – TWIN FALLS**

8:50 a.m. . . . . Meyers v. Hansen . . . . . #35534  
10:00 a.m. . . . . State v. Wegner (Petition for Review). . . . . #36238  
11:10 a.m. . . . . Urban Renewal Agency of the City of Rexburg v. Hart . . . . . #35435

**Friday, November 6, 2009 – BOISE**

8:50 a.m. . . . . State v. Maybee . . . . . #35200  
10:00 a.m. . . . . Carroll v. MBNA Bank . . . . . #34765  
11:10 a.m. . . . . Citibank v. Carroll. . . . . #35053

**Monday, November 9, 2009 – BOISE**

8:50 a.m. . . . . The Grease Spot Inc. v. Harnes . . . . . #35321  
10:00 a.m. . . . . Evco Sound & Electronics v. Seaboard Surety Co. #34898  
11:10 a.m. . . . . Melton v. State (Petition for Review) . . . . . #35855

**Thursday, November 12, 2009 – BOISE**

8:50 a.m. . . . . Stuart v. State . . . . . #34200  
10:00 a.m. . . . . BHC Intermountain Hospital v. Ada County . . . . #35904  
11:10 a.m. . . . . Spokane Structures Inc. v. Equitable Investment . . #35349

**OFFICIAL NOTICE  
COURT OF APPEALS OF IDAHO**

**Chief Judge**  
Karen L. Lansing  
**Judges**  
Sergio A. Gutierrez  
David W. Gratton  
John M. Melanson

**3rd AMENDED - Regular Fall Terms for 2009**

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

By Order of the Court  
Stephen W. Kenyon, Clerk

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

**Idaho Court of Appeals**

Oral Argument Dates  
As of September 9, 2009

**Thursday, October 15, 2009 – BOISE**

9:00 a.m. . . . . State v. Musick . . . . . #35141

**Tuesday, October 20, 2009 – BOISE**

9:00 a.m. . . . . Barcella v. State . . . . . #35502  
10:30 a.m. . . . . Craig v. Gellings . . . . . #35231  
1:30 p.m. . . . . Carr v. State . . . . . #35271

**Thursday, October 22, 2009 – BOISE**

9:00 a.m. . . . . Esquivel v. State . . . . . #35792  
10:30 a.m. . . . . State v. Estes . . . . . #35767  
1:30 p.m. . . . . State v. Belden . . . . . #35284

## COURT NEWS

### **Amendments to the misdemeanor and infraction rules, effective October 1, 2009**

Misdemeanor Rule 14 allows for disposition of certain misdemeanor citations by written plea of guilty and provides that in those instances the amount of the fine and court costs to be assessed for the offense shall be the bail bond amount provided in Rule 13. In order to accommodate a recent \$12 increase in the amount that goes to the victim’s compensation fund, the bail bond amounts in Rule 13 have been raised by \$12 with regard to all offenses that qualify for disposition under Rule 14. The limits set out in Rule 14 for these “payable misdemeanors” have also been raised by \$12. Other bail bond amounts that were close to the limits of Rule 14 have been raised by small amounts so that they remain outside the provisions of Rule 14 as to disposition. Please note that not all bond amounts have changed, as persons charged with offenses that fall outside of Rule 14 will appear in court where the court can impose court costs upon a conviction.

In addition, Misdemeanor Rule 15 and Infraction Rule 13 have been amended to reflect that the use of a credit card or debit card is not dependent upon authorization by the Administrative Director of the Courts or the Administrative District Judge but rather upon whether the county is set up to accept such payments.

All of these amendments are effective October 1, 2009. The order and attached bail bond schedule can be found on the Idaho Supreme Court website at <http://www.isc.idaho.gov/rulesamd.htm>

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

**CIVIL APPEALS**

**DIVORCE, CUSTODY, AND SUPPORT**

1. Whether the quitclaim deed from Ann to Ann and Greg constituted a valid conveyance of a one-half community interest in the real property to Greg.

*Barrett v. Barrett*  
S.Ct. No. 35763  
Supreme Court

**LAND USE**

1. Did the court err as a matter of law in finding the denial of the applications for the planned unit development were not an unreasonable, capricious, arbitrary and discriminatory denial of substantive due process?

*Kirk-Hughes Development v.  
Kootenai County Board of Commissioners*  
S.Ct. No. 35730  
Supreme Court

2. Whether the district court erred in finding the Land Board's decision to deny the proposed dock permits did not satisfy the IAPA when substantial evidence supported the Land Board's determinations that the proposed docks would have encroached on a state highway without the requisite ITD permits and the plaintiffs failed to establish ownership of the littoral rights required for a lake encroachment permit.

*Lake Coeur d'Alene Investments LLC v.  
Idaho Department of Lands*  
S.Ct. Nos. 35323/35326  
Supreme Court

**POST-CONVICTION RELIEF**

1. Did the district court abuse its discretion by not taking judicial notice of documents in a matter before the professional conduct board of the Idaho State Bar?

*Newman v. State*  
S.Ct. No. 35568  
Court of Appeals

2. Did the trial court err by summarily dismissing Currin's petition for post-conviction relief and in finding he failed to raise a genuine issue of material fact in relation to any of his ineffective assistance of counsel claims?

*Currin v. State*  
S.Ct. No. 35688  
Court of Appeals

3. Did the court commit reversible error when it dismissed an untimely successive petition before ruling upon a request for counsel?

*Ochieng v. State*  
S.Ct. No. 35612  
Court of Appeals

**PROCEDURE**

1. Whether Antonicchio's claim should be dismissed for failure to post a bond pursuant to I.C. § 6-610.

*Antonicchio v. Kootenai County*  
S.Ct. No. 35862  
Court of Appeals

**QUIET TITLE**

1. Did the court err in granting summary judgment to Cornwall as to 15.85 acres of Flying Elk Investments, LLC's deeded land where Flying Elk's predecessor in interest knew the history of the present fence and testified no agreement existed creating a boundary?

*Flying Elk Investments, LLC v. Cornwall*  
S.Ct. No. 35853  
Supreme Court

**SUBSTANTIVE LAW**

1. Whether the district court erred when it held that I.C. § 23-615 is unconstitutional.

*Alcohol Beverage Control v. Boyd*  
S.Ct. No. 36124  
Supreme Court

2. Does Credit Bureau of Eastern Idaho have standing to assert that I.C. § 11-204 is unconstitutional?

*Credit Bureau of Eastern Idaho, Inc. v.  
Lecheminant*  
S.Ct. No. 36381  
Supreme Court

**SUMMARY JUDGMENT**

1. Did the district court err by finding the crop insurance contract was a reinsurance contract exempt from the filing requirements of I.C. § 41-1812?

*Rain and Hail, LLC v. Brown*  
S.Ct. No. 35977  
Supreme Court

2. Did the district court err by granting summary judgment on Mortensen's claim for breach of the title insurance contract?

*Mortensen v.  
Stewart Title Guaranty Company*  
S.Ct. No. 35949  
Supreme Court

3. Whether the district court erred by granting summary judgment in favor of Re/Max and its agents on the Blackmores' claims of negligence.

*Blackmore v. Re/Max Tri Cities L.L.C.*  
S.Ct. No. 36189  
Supreme Court

**TORT**

1. Whether the district court erred in holding as a matter of law that Paint & Supply, Inc., Automotive Paint Warehouse, Ernest and Davis are not liable for tortious interference with Wesco's employment and customer contracts and prospective business advantage.

*Wesco Autobody Supply, Inc. v. Ernest*  
S.Ct. No. 35732  
Supreme Court

**CRIMINAL APPEALS**

**DUE PROCESS**

1. Did the prosecutor engage in misconduct during the rebuttal portion of her closing argument?

*State v. Lehl*  
S.Ct. No. 35129  
Court of Appeals

2. Did the court abuse its discretion by not *sua sponte* ordering an evaluation to determine Hawkins' competency to stand trial?

*State v. Hawkins*  
S.Ct. No. 35281  
Court of Appeals

3. Did the prosecutor commit misconduct in closing argument?

*State v. Cobell*  
S.Ct. No. 35410  
Court of Appeals

4. Were Erickson's rights to due process and to be free from self incrimination violated when the prosecutor elicited testimony from a detective that Erickson refused to come in for an interview?

*State v. Erickson*  
S.Ct. No. 35436  
Court of Appeals

**EVIDENCE**

1. Whether Anderson's Rule 39 motion for judgment of acquittal should have been granted.

*State v. Anderson*  
S.Ct. No. 35946  
Court of Appeals

2. Was there sufficient evidence to convict Allen of felony forgery when, as a matter of law, a payee could not pass or attempt to pass a check without a signature?

*State v. Allen*  
S.Ct. No. 35557  
Court of Appeals

3. Was there substantial, competent evidence at trial from which the jury could find beyond a reasonable doubt that McNeil was guilty of aggravated assault on a law enforcement officer?

*State v. McNeil*  
S.Ct. No. 35526  
Court of Appeals

4. Did the district court abuse its discretion by allowing the county sheriff to give expert testimony on the trajectory of .44 caliber bullets after they hit the water?

*State v. Jackson*  
S.Ct. No. 35600  
Court of Appeals

5. Did the court err in denying McDonnell's motion to dismiss in accordance with I.C. § 19-2117?

*State v. McDonnell*  
S.Ct. No. 35948  
Court of Appeals

#### JURISDICTION

1. Was Pierce's right to be free from trial by information after a grand jury has ignored a charge violated such that the district court lacked subject matter jurisdiction over the alleged crime?

*State v. Pierce*  
S.Ct. No. 35063  
Supreme Court

#### PLEAS

1. Did the district court abuse its discretion when it denied Blanchard's motion to withdraw his guilty plea?

*State v. Blanchard*  
S.Ct. No. 35975  
Court of Appeals

#### SENTENCE REVIEW

1. Are Pratt's claims presented in his seventh Rule 35 motion to correct an illegal sentence procedurally barred by res judicata?

*State v. Pratt*  
S.Ct. No. 35602  
Court of Appeals

2. Did the district court abuse its discretion by refusing to place Reusser on probation and relinquishing jurisdiction?

*State v. Reusser*  
S.Ct. No. 34908  
Court of Appeals

#### SUBSTANTIVE LAW

1. Did the court err in denying Yeoman's motion to dismiss the information and in finding that I.C. § 18-8304 required him to register in Idaho as a sex offender?

*State v. Yeoman*  
S.Ct. No. 35689  
Supreme Court

**Summarized by:**  
**Cathy Derden**

**Supreme Court Staff Attorney**  
**(208) 334-3867**

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# THE UNITED STATES COURT FOR THE DISTRICT OF... THAILAND?

Honorable Larry M. Boyle  
*United States District Court*

After nearly a quarter of a century serving on the state and federal appellate and trial benches, and having been a juror in a twelve week criminal trial, I thought I had seen just about everything that a judge could experience. Fortunately, learning is a life-long process and this principal was reinforced in me when I was appointed by the Administrative Office of the United States Courts to conduct hearings for American prisoners incarcerated in The Kingdom of Thailand in 2007.

As we all understand, the United States has entered into treaties with most nations governing a variety of topics, such as extradition, trade, and many other international issues. One special type of treaty relates to agreements existing between the United States and most foreign countries concerning American citizens who have been convicted of serious crimes and are incarcerated in that country's prisons.

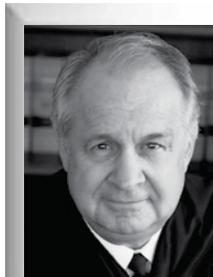
The treaty under which I conducted hearings in Thailand was executed in Bangkok, Thailand in 1982 by William French Smith, Attorney General of the United States, and Siddii Savetsila, Minister of Foreign Affairs of Thailand. This particular treaty consists of eight Articles and is entitled *Treaty on Cooperation in the Execution or Penal Sentences Between the Government of the United States of America and the Government of the Kingdom of Thailand*.

These unique and interesting transfer hearings are authorized by Chapter 306 of title 18 of the United States Code which sets forth the required procedures in transferring criminal offenders to or from foreign countries. The Congressional authorization for the procedures which guided my work in Thailand is contained in 18 U.S.C. §§ 4101, 4107, 4108, *et seq.*

Once I was designated to be the presiding judge over the Thailand proceedings, my first responsibility was to provisionally appoint a Federal Defender to represent the American prisoners. The formal appointment of counsel would be finalized at the hearings. Having great respect for Idaho's senior Federal Defender, Richard Rubin, I called him. Mr. Rubin was approved, but he couldn't accept the appointment because his daughter Amy, herself a Federal Defender in Spokane, was getting married the following week. Knowing the Administrative Office wanted a senior or chief Federal Defender, I requested that it designate the defense attorney. Within a few days, I provisionally appointed Elizabeth Ford from the Eastern District of Tennessee to represent the American prisoners whose hearings I would conduct.

While there is a United States embassy in Bangkok, there is, of course, neither a United States courthouse nor U. S. Marshalls available to transport prisoners. As such, the hearings had to be held in the Klong Prem Central Prison where the prisoners were incarcerated.

As required by 18 U.S.C. §4107(e) and §4108(e), the hearings had to be recorded so that verbatim transcripts could be made upon my return to the United States and accompany my findings, conclusions and orders of Transfer. Our District of Idaho court executive, Cam Burke, and systems specialist, Doug Ward, obtained a high quality digital recorder which worked perfectly.



Honorable Larry M. Boyle

It was slightly larger than two decks of playing cards held together and fit easily into my carry-on brief case along with the court files.

Upon arrival in Bangkok, I was met at the airport by an FBI Agent who was assigned to be my security officer and taken to a hotel across the street from the Embassy. The next morning, I spent most of the day with the United States Embassy Chief of American Services and Consul, and the U. S. Department of Justice resident legal officer, who gave me a briefing on local culture (e.g., what to avoid for safety and security purposes), and explained what I could expect at the prison and while in Bangkok. Along with the customary precautions to take when in a foreign country, the diplomatic officer strongly emphasized four practical pointers: 1) don't drink anything but bottled water *period*, even in the best hotels, 2) never cross the street except by using the *overhead* bridge-type cross walks because the highest rate of fatalities and serious injuries to Americans visiting Bangkok is being struck by a motorcycle or automobile while trying to cross streets, 3) never pat or touch a child on the head because that is considered the sacred part of the body where the soul lives, and 4) be respectful when speaking of the royal family, especially the King. We were carefully reminded that the movie *The King and I* is still officially banned in Thailand.

The day of the first hearing we were driven to the Klong Prem Central prison, located in the Chatuchak district of Bangkok, and escorted into a screening area. All of our personal belongings, camera and cash were checked in at the front security area because they, if lost or stolen from us, could be used as contraband inside the prison.

While the exterior of this medium-to-high security prison built in 1944 for up to 20,000 prisoners is imposing, the administrative area where I was to use the Warden's conference room for the hearings was in a beautiful courtyard setting. The hedges, orchids and greenery was as beautiful and manicured as any four star hotel garden area. The entire courtyard was meticulously maintained by prison trustees. However, over the tops of the one-story courtyard buildings in all directions could be seen three story barrack-type buildings, rusted and faded yellow in color, the metal bars rusted. Notwithstanding the magnificent front entrance grounds and the inner courtyard, make no mistake about it, this is indeed a prison.

As I had learned by studying the prisoners' files, Thai law has a literal "no-tolerance" policy for criminal behavior, especially involving drug crimes. There are also stark differences from United States courts in conducting court proceedings. In Thailand's Constitution there is a requirement that at least two judges preside over every hearing and trial. There are no jury trials in the Thai judicial system and no verbatim record or transcripts are made of hearings or trials.

*In Thailand's Constitution there is a requirement that at least two judges preside over every hearing and trial. There are no jury trials in the Thai judicial system and no verbatim record or transcripts are made of hearings or trials.*

While in Bangkok, I met with Dr. Thammanoon (Thammasat) Phitayaporn, Chief Judge attached to Office of the President of the Supreme Court. Notably, Judge Thammasat had been a Barrister at-law, having obtained his JD from Columbia and an LLM from Yale, in addition to his native Thailand education.

At the request of Judge Thammasat, I was invited to sit in the spectator section of a Thai courtroom to observe the proceedings of a trial. Judge Thammasat served as my interpreter. The Bangkok courthouse is modern and similar in design to the Ada County Courthouse on Front Street in Boise. The lawyers and their clients sat at tables facing each other instead of facing the bench where two judges sat. The dialogue and colloquia was completely between counsel and witnesses and was not directed to the two judges listening to what was being said. The lawyers wore robes similar to those worn by the judges and during the time that I was in the courtroom, I heard no objections made by counsel. As a former appellate judge, of great interest to me was the making of the “record.” While the questions were being asked and witnesses answering, one of the judges on the bench was speaking quietly, almost whispering, into a microphone. Judge Thammasat explained that the judge was stating his understanding and interpretation of the evidence being presented. The other judge listened to the proceedings and took an occasional note.

The “record” of the hearing I had just observed was, of course, not a verbatim recording of the proceeding. Instead, a transcript of the interpretation of the judge speaking into the microphone while listening to the witnesses and counsel would become the “record” and based upon that transcript a two-judge decision would be rendered.

The Thai judicial system is, like our United States’ court systems, multi-tiered. The 1997 Thai Constitution provides for an independent judiciary and basic civil liberties for its citizens. Courts of first instance include juvenile and trial courts. There are nine trial courts, one in Bangkok and eight others in provincial capitals. There are nine regional courts of appeal and a Court of Appeal sitting in Bangkok which hears cases for the entire Kingdom, and the Supreme Court of Thailand, which sits in Bangkok, decides cases only on points of law. Judges are appointed and removed by the King, and all appointments are subject to initial approval by a judicial commission.

Much like the state and federal courts in the United States, the Thai judicial system is experiencing a dramatic increase in both civil and criminal filings. As a result of the heavy caseload, as I understand from his writings, Judge Thammasat is a strong advocate for reform in the Thai judicial system. He is an open advocate for a more independent and efficient judiciary, and for utilizing more frequently case management and mediation in civil and criminal cases. His paper detailing his recommendations, is entitled *Strengthening the Independence and Efficiency of the Judiciary in Thailand* and was presented in Singapore at the December, 2003 ASEAN Law Association General Assembly.

Delays are an even greater problem in the Thai courts than in our American judicial system. Judge Thammasat wrote that in addition to the constitutional requirement of two judges presiding when one could easily decide the case, delays were caused by piecemeal-type of proceedings in even the simplest of civil cases. He explained, for instance, “If a hearing is not finished in one day,

a continuation hearing will typically be scheduled for one to two months out.”

Under the prisoner transfer treaty, after an American prisoner has served a certain portion of his or her sentence, and there are no appeals pending or motions remaining to be filed, upon the agreement of both countries, the person may be transferred to a United States prison to complete the remainder of the sentence. Make no mistake about it, the transfer from a foreign prison to a federal prison in the United States is not a “get out of jail free” card. The prisoner will serve the remainder of the Thai court’s sentence, many up to life imprisonment, in a federal prison in the United States.

Before I share my impressions about the Thai judicial system, let me share some insight into the nature of the transfer hearings conducted at the Klong Prem Central Prison by telling the stories of two prisoners. Unlike the modern Bangkok courthouse and courtroom I had visited with Judge Thammasat, these hearings were held in a well-appointed conference room adjacent to the warden’s office at a large conference table. Seated at the far end of the table was the prisoner. Seated along both sides of the table were prison guards, the FBI Agent assigned to be my security officer, the United States Embassy Chief of American Services and Consul, and the U. S. Department of Justice resident legal officer. Beside the prisoner sat Ms. Ford. I remember the scene vividly because I was struck by the contrast of the aging and rusting prison that I could see through the windows behind the prisoner, and the beauty of the manicured inner courtyard gardens.

Now, the stories of two Americans imprisoned in the Klong Prem Central prison:

In 2003, Peter, a 54 year-old painter and English teacher, had been arrested and convicted in Chiang Mai Province for illegal possession of methamphetamine, heroin, opium and marijuana.

The smartest thing Peter did was immediately confess to the charges. The Thai courts reward those who admit to the charged offenses. In December 2004, Peter was sentenced by the Thai provincial court to 116 months in prison which was a reduction by one-third for his cooperation. In addition, he was sentenced to an additional 24 months for failure to pay the fine of 400,000 Baht (approximately \$12,000.00). In all, Peter was sentenced to a total of 140 months in a Thai prison and will serve the remainder of his sentence in the United States.

In 2003, Benji, a 36 year-old jeweler and artist, had been arrested and convicted in Chiang Mai Province for illegal possession and sale of heroin and marijuana. For the sale of heroin, he received a 48-month sentence. For the possession of heroin with intent to sell, he was sentenced to 390 months incarceration and a 700,000 Baht fine. For the marijuana possession, Benji was sentenced to 12 months incarceration and fined an additional 700,000 Baht.

Again, Benji also did something smart. He confessed. The sentences imposed by the provincial court were apparently considered so harsh that he appealed to the Thai Supreme Court and his sentences were substantially reduced because of his cooperation. The Court of Appeals also reexamined all three of his sentences and reduced them again to a total of 210 months in prison and lowered his fine to 350,000 Baht.

I requested to tour the prison after completing the hearings. The warden gladly accommodated my request. In the central

*I remember the scene vividly because I was struck by the contrast of the aging and rusting prison that I could see through the windows behind the prisoner, and the beauty of the manicured inner courtyard gardens.*

courtyard area were well-maintained, one-story buildings with a computer lab, dance classroom, library and music room. Each room was occupied and busy with students at computer stations, reading books and learning traditional Thai dance, but the one that was most impressive was the music room where a full orchestra with every kind of musical instrument including strings, brass, percussion, reed and instruments native to Thailand were being played. I was impressed with what I had seen, but I asked if I could tour the main cell block areas.

Initially, I was told that it was “meal time” and they did not have enough guards to give me a tour. I said I was willing to wait. I was then advised it would be “shift change” time and, again, not enough guards were available to allow for a tour. Both rejections of my requests were expressed very politely as is customary in Thai conversation. Finally, after I presented a third alternative, I was again politely told I could walk to the back of the courtyard to see an outdoor holding area, but it would not be possible to go into the area of the main cellblocks. At the back of the courtyard was a large two-story barrack raised on steel poles. It reminded me of the 1950s era motels on stilts where the guests’ automobiles were parked under the motel at ground level. In the shade under the cover of the building, were several hundred young Thai men squatting down as is a custom in that part of the world, wearing only flip-flop sandals, white boxer shorts and light weight, white basketball style shirts. This dormitory was surrounded only by a chain-link fence.

All of the men were noticeably young, appearing to me to be between 17-19 years of age. I asked the warden, who had not left my side since we left the office conference room, what these youthful prisoners had done to be imprisoned. He explained, “They have done nothing, it is a lesson for them, to teach them.” “Why, then, are they in prison?” I asked. The warden explained, “They are boys who were beginning to run around in bad company. The police picked them up, brought them here. This experience, up to sixty or ninety days here, gives them a taste of prison and they usually are good citizens after being here.”

While in the library, I was shown around the room by an Australian prisoner who told me he was serving a life sentence for narcotics trafficking. He appeared to be in his late forties or early fifties. He initially had been given the death penalty but he admitted that he was guilty and plead for mercy to the King, who on occasion granted amnesty from the death penalty. This man’s story best illustrated the zero-tolerance policy of Thailand toward criminal activity, particularly involving drugs.

Before leaving for the assignment in Thailand I was encouraged by a judicial colleague to rent the 1999 movie *Brokedown Palace*. It is a movie about two young American women who told their parents they were going to Hawaii on spring break. Instead, they went to Thailand, met some bad guys, were used and betrayed, arrested, convicted and imprisoned in a Thai women’s prison. It’s worth watching if you know anyone, especially a young person who may be immature and not use good judgment, who may be planning on traveling to Thailand.

I was favorably impressed with the Thai judicial system and the judicial officers I met while in Bangkok. Its appellate courts recognized the unduly harsh sentences imposed on Benji, one of the prisoners whose petition to transfer to a federal prison in the United States I approved.

I have no personal knowledge upon which to base this assumption, but it is interesting to speculate. If there is one Benji whose case was given favorable consideration and an unduly harsh sentence reduced, how many others slip through the cracks?

Thailand is a major cross road of Asia, a favorite on the world tourist scene, and its courts operate under strict criminal

laws and its judges have remarkably heavy case loads. My accommodating acquaintance, Judge Thammasat, a dignified and brilliant jurist, has strongly urged his native courts to use more technology, apply better case management techniques, become more efficient, remain independent, and make a verbatim record of all court proceedings. I suggested he consider adding jury trials. He nodded his approval. It is apparent to me that his legal educational experience in two of America’s finest universities has given him a perspective that certainly benefits the Thai legal and judicial systems.

What my experience in Thailand gave me was a reminder of the strength of our American legal systems. While not perfect by any means, I am convinced nonetheless that our state and federal courts and its judges are women and men of integrity, intelligence, experience and the courage to make the tough calls. Likewise, our legal community is made up of intelligent, honest and capable attorneys, willing to take on meritorious cases, even tough ones, whether civil or criminal.

Another important lesson from my experience in Thailand is the reinforcement of an abiding conviction I have had for many years. While conducting court proceedings for accused defendants who have need for an interpreter, I have often wondered how bewildering it must be to be in front of a judge who does not speak their language. Since my Thailand experience, I have revisited that question, and have wondered how frightening it would be to be wrongfully accused, arrested, taken into a court where I did not understand either the language or the proceedings, where the judge did not understand my language or my circumstances, and to have to rely on the integrity and competence of an attorney who did not speak English.

What I have concluded is that we are very fortunate to live in a nation with what I am absolutely convinced is governed by an inspired Constitution and applied fairly by a judiciary, state and federal, of women and men who do their level best to see that justice is given to all who appear before them, and a practicing Bar which does its level best to assist in that process.

Over the years on the bench, I have had several occasions to consider whether foreign law applies to claims made by American citizens or businesses. For instance, in one case before me several years ago an American tourist was injured on a cruise line excursion in the Mediterranean and brought a claim in federal court. Another case involved an issue over the validity of duties and taxes imposed by trade agreements with a foreign nation, and another in a criminal action raised the issue whether a foreign national sought in a criminal action in the United States had to appear absent full compliance with that foreign nation’s extradition laws. Some of these examples arose out of treaties. However, the assignment to conduct federal court proceedings in a Thailand prison was a first-hand and personal experience of the differences existing in our judicial systems.

Interestingly, as I reflect on that experience, I never felt uncomfortable while working in Thailand, whether it was in the Klong Prem Central Prison or working with the Thai authorities. Rather, my experience was positive, particularly when reflecting on the policy and purpose of the Thai/United States treaty under which these proceedings were conducted. What I learned from this experience is a clear illustration to me that the government of a free people, regardless of which country they live, are as interested and deserving of freedoms as we are in this country. In my view, the greatest lesson to me is that we are not the only free nation interested in the rule of law and assurance of justice to its people.

**Mark B. Clark  
1920 - 2009**

Mark Bigler Clark, age 88, died peacefully on Saturday, August 29, 2009 surrounded by loved ones.

Mark was born Oct. 10, 1920 in St. Anthony, Idaho. He was the oldest of eight children born to LuVern Thomas Clark and Cynthia Bigler. He graduated from North Fremont High School in 1939. The Clarks moved to Pocatello shortly after this so that the children could attend college while living at home.

On September 11, 1947, he married Helen Louise Odekirk in the Salt Lake Temple. They had seven children: Kerry Gallup, Sandy, Utah; Carol Poole, Murray, Utah; James B. Clark, Murray, Utah; Karma Ward, Murray, Utah; Thomas W. Clark, Pocatello; Connie Vining, Cottonwood Heights, Utah; and Cyd Heiner, Syracuse, Utah.

Mark attended the University of Idaho, Southern Branch (ISU), from 1939 to 1942. In the fall of 1942 he attended the University of Idaho in Moscow. While home for Christmas vacation, he received a package from the U.S. Army Air Corps inviting him to be part of World War II. Upon his return from war, Mark enrolled at the University of Utah in January 1946 where he received a Bachelors degree. He received his law degree from the U of U in June of 1949.

Mark was admitted to practice law in the state of Idaho in 1949. He moved his family to Pocatello and started to sell real estate and insurance for his father and practiced law on the side. It wasn't long before he became so busy that he focused just on practicing law. He bought out Judge Jeffries' practice and brought on Jason Holladay as a partner. A couple of years later he was in Soda Springs in court and met an attorney by the name of Callis Caldwell. He hired Mr. Caldwell on the spot, and when he returned to Pocatello he had to explain what he had done to his partner, Jason. After several years, Mark went out on his own until he hired a lawyer fresh out of the University of Utah Law School by the name of Kenneth E. Lyon, Jr. After several more years, Mark again practiced on his own until 1982 when he hired a lawyer fresh out of the University of Idaho by the name of Thomas W. Clark, his son.

In 1950 Mark was admitted to the Judge Advocate General's Department of the U.S. Air Force. Then in 1955, he was admitted to practice before the U.S. Court of Military Appeals and the U.S. Supreme Court. Mark had a long and distinguished law career during which he was able to help thousands of people with their legal problems. He retired from the practice of law in 1989 to care for his ailing wife, Helen, who passed away in October 1993.

On Oct. 15, 1994, Mark married Glynis Honor Roberts in the Salt Lake Temple. Glyn had six children by a prior marriage: Hadyn Hulley, Tarryn Neibaur, Pocatello, Idaho; Stuart Hulley, Johannesburg, South Africa; Delwyn Farnsworth, Biloxi, Mississippi; Lauren Bell, Denver, Colorado; and Kirstin Arnold, Boise, Idaho. Together they have 13 children, 54 grandchildren, and 42 great-grandchildren.



Mark B. Clark

Mark has served in many positions in the LDS Church, and with the Boy Scouts of America. Mark and Glyn served an 18-month mission at the Washington, D.C. Temple. He also served in the PTA at Lewis and Clark Elementary and Alameda Junior High School, and was an officer in the Pocatello Junior Chamber of Commerce.

He is survived by his loving wife, Glynis Clark; three brothers, Robert Clark, Stephen Clark, and Rodney Clark; two sisters, Maurine Carlson and Althea Havlicak. He was preceded in death by his parents, his first wife, Helen, two sisters, Vernetta Hemming and Nelle Bartlett, and a grandson, Jonathan Gallup.

Funeral services were held Friday, September 4, 2009, at 11 a.m. at the Cedar 3<sup>rd</sup> Ward, 550 W. Cedar, with Bishop Robert Murdoch conducting. Family members would like to express appreciation to Creekside Home Health and Hospice (Star, Daniel, Toni, Courtney, Kirk and Adam) for their excellent care and loving kindness. In lieu of flowers, family and friends who wish to do so may make a donation in Mark's name to the LDS Church Perpetual Education Fund.

**Zarian-Midgley adds new patent attorney to Boise firm**

BOISE — Zarian, Midgley and Johnson, PLLC announced that **Jamie Parkinson** has joined the firm's Boise office as an associate.

Parkinson is a registered patent attorney. Her areas of practice include intellectual property litigation, complex business litigation, patents, trademarks and copyrights.

Parkinson received her Juris Doctor from University of San Diego in 2008 and her Bachelor of Science in Microbiology from Idaho State University in 2001. Prior to completing her education and joining Zarian Midgley, she spent seven years in various positions with a major telecommunications company. She was responsible for the management of wireless, voice over Internet protocol, Internet and conferencing needs for numerous Fortune 1000 companies.



Jamie Parkinson

**Jameson joins Risch Pisca as associate**

BOISE — Risch Pisca, PLLC, Law and Policy is pleased to announce that **John Jameson** has joined the firm as an associate attorney. A native of Coeur d'Alene, Idaho, Mr. Jameson graduated in 2004 from the University of Idaho with a degree in accounting and went on to receive his juris doctor from the College of Law in 2007. Since graduation, Mr. Jameson has served as a corporate tax compliance officer and accounting specialist, working with mergers and acquisitions, corporate and individual tax law, foreign corporation tax law, auditing and state licensing. He has formerly served as a law clerk to the Hon. First District Judge, Charles Hosack, and as an appropriations intern in the United States Senate.



John Jameson

## OF INTEREST

### Anderson appointed by Mayor Design Review Committee

BOISE — The firm of Anderson, Julian and Hull is pleased to announce that founding partner, **Robert A. Anderson** has been appointed by Mayor Bieter to the Design Review Committee for the City of Boise for a three year term expiring in 2012. In that capacity, Mr. Anderson will assist the committee in its review of applications for Design Review permits to ensure the protection of property rights and values, the enhancement of important environmental features and orderly and harmonious development within the community. Mr. Anderson specializes in design/construction law and looks forward to this interesting new opportunity to be of service.



Robert A. Anderson

### Hall Farley announces new associates

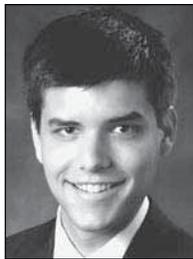
BOISE — The law firm of Hall, Farley, Oberrecht & Blanton, P.A. is pleased to announce that **Leslie M. G. Hayes** and **Noah G. Hillen** have become associates of the firm.

Leslie M. G. Hayes is a native of Seattle and joined the firm in August 2009. She received a B.B.A., with an emphasis in Finance, from the University of Portland in 2002 and her J.D., cum laude, from Gonzaga University in 2007. Prior to joining the firm, Ms. Hayes spent two years clerking for the Honorable Warren E. Jones at the Idaho Supreme Court. Ms. Hayes is licensed to practice law in all courts in the State of Idaho, all Washington State Courts and the U.S. District Court for the District of Idaho. She is a member of the American Bar Association, the Idaho State Bar and the Washington State Bar.



Leslie M.G. Hayes

Noah G. Hillen joined the firm in August 2009. He received his B.A. degree in Politics and Economics, cum laude, from the College of Idaho in 2004. Mr. Hillen received his J.D. from the University of Idaho in 2007. Following his graduation from law school, Mr. Hillen spent two years clerking for the Honorable Joel D. Horton at the Idaho Supreme Court. Mr. Hillen is currently licensed to practice in all courts in the State of Idaho and the United States District Court for the District of Idaho. He is a member of the Idaho State Bar, the American Bar Association, and the American Inn of Court No. 130 in Boise, Idaho. Mr. Hillen is also a member of the Commercial Law and Bankruptcy Section of the Idaho State Bar.



Noah G. Hillen

### Reynoldson selected to Idaho Legal Aid Services Board of Directors

BOISE — Congratulations to **Lauren Reynoldson** for her selection to serve as the Fourth District Bar's representative on the Idaho Legal Aid Services Board of Directors. The Fourth District Bar Association thanks Jacque Palmer, who represented the Fourth District Bar on the ILAS Board of Directors for the past five years.



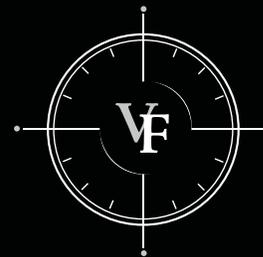
Lauren Reynoldson

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# UPDATES TO IDAHO STATE BAR ATTORNEY DIRECTORY

8/2/09 – 9/1/09

The attorneys listed have had a change in their membership information (name, firm, address, phone, fax, email, website or status) during the time period indicated. For complete information, please visit our website at [www.isb.idaho.gov](http://www.isb.idaho.gov).

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Office of the Attorney  
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Boise

**Elizabeth Kelly Allen**  
Nampa

**Stephanie Anne Altig**  
Office of the Attorney  
General  
Meridian

**Kenneth Larry Anderson**  
Kenneth L. Anderson,  
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Ninth Circuit Court of  
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**Lindsey Anne Blake**  
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**Tyler Harrison Neill**  
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EMC Corporation  
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**Hon. Onadayo O. Onanubosi**  
Canyon County  
Magistrate Court  
Caldwell

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8/2/09 – 9/1/09

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& Blanton, PA  
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**JAMIE PARKINSON**

**ZM ZARIAN•MIDGLEY**

Zarian Midgley & Johnson, PLLC, a Boise-based firm specializing in intellectual property matters and complex litigation, is pleased to welcome **Jamie Parkinson** as an associate to its growing firm. Jamie is a registered patent attorney who earned her law degree from the University of San Diego. Her practice emphasizes patents, intellectual property matters and litigation.

Jamie's prior work experience includes seven years in various positions with a major telecommunications company, including the management of wireless, voice over internet protocol, internet and conferencing needs for numerous Fortune 1000 companies.

Jamie can be reached at [parkinson@zarianmidgley.com](mailto:parkinson@zarianmidgley.com) or 208-562-4900.

**WWW.ZARIANMIDGLEY.COM**

**ELAM & BURKE**  
ATTORNEYS AT LAW

is pleased to announce that

**JADE C. STACEY**  
has become a shareholder of the firm



Mr. Stacey joined the firm as an associate in August of 2009. Prior to joining Elam & Burke, Mr. Stacey served as a law clerk for the Honorable Deborah Bail, District Judge, Fourth Judicial District. He practices primarily in the area of civil litigation.

251 E. Front Street • Suite 300 • Boise, ID 83702  
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# STATEMENT OF OWNERSHIP

**UNITED STATES POSTAL SERVICE® (All Periodicals Publications Except Requester Publications)**

**Statement of Ownership, Management, and Circulation**

1. Publication Title: The Advocate  
 2. Publication Number: 0 5 1 5 4 9 8 7  
 3. Filing Date: September 2, 2009

4. Issue Frequency: The Advocate is published the following months: January, February, March, April, May, June, August, September, October and November.  
 5. Number of Issues Published Annually: 10  
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7. Complete Mailing Address of Known Office of Publication (Not printer) (Street, city, county, state, and ZIP+4®): 525 West Jefferson Street, Boise, Ada County, ID 83702  
 Contact Person: Dan Black  
 Telephone (include area code): (208) 334-4300

8. Complete Mailing Address of Headquarters or General Business Office of Publisher (Not printer): P.O. Box 895 Boise, ID 83701-0895

9. Full Names and Complete Mailing Addresses of Publisher, Editor, and Managing Editor (Do not leave blank):  
 Publisher (Name and complete mailing address): Idaho State Bar P.O. Box 895 Boise, ID 83701-0895  
 Editor (Name and complete mailing address): Dan Black, Idaho State Bar P.O. Box 895 Boise, ID 83701-0895  
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10. Owner (Do not leave blank. If the publication is owned by a corporation, give the name and address of the corporation immediately followed by the names and addresses of all stockholders owning or holding 1 percent or more of the total amount of stock. If not owned by a corporation, give the names and addresses of the individual owners. If owned by a partnership or other unincorporated firm, give its name and address as well as those of each individual owner. If the publication is published by a nonprofit organization, give its name and address.)  
 Full Name: Idaho State Bar  
 Complete Mailing Address: P.O. Box 895 Boise, ID 83701-0895

11. Known Bondholders, Mortgagees, and Other Security Holders Owning or Holding 1 Percent or More of Total Amount of Bonds, Mortgages, or Other Securities. If none, check box:  None  
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12. Tax Status (For completion by nonprofit organizations authorized to mail at nonprofit rates) (Check one):  
 Has Not Changed During Preceding 12 Months  
 Has Changed During Preceding 12 Months (Publisher must submit explanation of change with this statement)

PS Form 3526, September 2007 (Page 1 of 3 (Instructions Page 2)) PSN 7530-01-000-9051 PRIVACY NOTICE: See our privacy policy on www.usps.com

13. Publication Title: The Advocate  
 14. Issue Date for Circulation Data Below: September 2009

15. Extent and Nature of Circulation

		Average No. Copies Each Issue During Preceding 12 Months	No. Copies of Single Issue Published Nearest to Filing Date
a. Total Number of Copies (Net press run)		5,400	5,500
b. Paid Circulation (By Mail and Outside the Mail)	(1) Mailed Outside-County Paid Subscriptions Stated on PS Form 3541 (include paid distribution above nominal rate, advertiser's proof copies, and exchange copies)	3,290	3,331
	(2) Mailed In-County Paid Subscriptions Stated on PS Form 3541 (include paid distribution above nominal rate, advertiser's proof copies, and exchange copies)	1,918	1,937
	(3) Paid Distribution Outside the Mail Including Sales Through Dealers and Carriers, Street Vendors, Counter Sales, and Other Paid Distribution Outside USPS®	-0-	-0-
	(4) Paid Distribution by Other Classes of Mail Through the USPS (e.g., First-Class Mail®)	-0-	-0-
c. Total Paid Distribution (Sum of 15b (1), (2), (3), and (4))		5,208	5,268
d. Free or Nominal Rate Distribution (By Mail and Outside the Mail)	(1) Free or Nominal Rate Outside-County Copies included on PS Form 3541	43	49
	(2) Free or Nominal Rate In-County Copies included on PS Form 3541	33	37
	(3) Free or Nominal Rate Copies Mailed at Other Classes Through the USPS (e.g., First-Class Mail)	32	43
	(4) Free or Nominal Rate Distribution Outside the Mail (Carriers or other means)	24	32
e. Total Free or Nominal Rate Distribution (Sum of 15d (1), (2), (3), and (4))		131	161
f. Total Distribution (Sum of 15c and 15e)		5,339	5,429
g. Copies not Distributed (See Instructions to Publishers #4 (page A3))		61	71
h. Total (Sum of 15f and g)		5,400	5,500
i. Percent Paid (15c divided by 15f times 100)		97.54%	97.03%

16. Publication of Statement of Ownership:  
 If the publication is a general publication, publication of this statement is required. Will be printed in the October 2009 issue of this publication.  Publication not required.

17. Signature and Title of Editor, Publisher, Business Manager, or Owner:   
 Date: September 2, 2009

I certify that all information furnished on this form is true and complete. I understand that anyone who furnishes false or misleading information on this form or who omits material or information requested on the form may be subject to criminal sanctions (including fines and imprisonment) and/or civil sanctions (including civil penalties).

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- 36 years, civil litigator
- Former Idaho Attorney General
- Practice limited exclusively to ADR

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 E-Mail: tpark@twplegal.com

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The 2010 licensing packets will be mailed in mid-November. Be sure your packet reaches you by verifying and updating your address information before November 6. Visit the ISB website at [isb.idaho.gov](http://isb.idaho.gov) to check your records in the Attorney Directory. Use the online form or contact the Membership Department at (208) 334-4500 or [astrouser@isb.idaho.gov](mailto:astrouser@isb.idaho.gov) to update your information.

## Research, Drafting, & Editing

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

**JAMES M. SMIRCH**  
ATTORNEY AT LAW

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 208-940-1901 • [jsmirch@custertel.net](mailto:jsmirch@custertel.net)  
 WEBLOG: [jsmirch.blogspot.com](http://jsmirch.blogspot.com)

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

## 8th Annual Grapes Against Wrath

A wine and beer tasting and social affair to raise funds for  
Idaho Partners Against Domestic Violence & FACES

Thursday, October 15th  
5:30 to 8:30 at the Barber Park Event Center  
4049 S. Eckert Road

**\$35 per person**

Purchase tickets at [www.idahopartners.org](http://www.idahopartners.org)

Tickets can be purchased at the door for \$40 per person

Featuring Idaho's finest wine distributors through the  
efforts of the Boise Co-op Wine Department

Hor d'oeuvres Jazz by Mike Lakey Silent Auction

Funds will benefit victims of family violence served by:  
Family Advocacy Center & Education Services (FACES)  
Idaho Legal Aid Services

Idaho Volunteer Lawyers Program

Idaho Coalition Against Sexual & Domestic Violence

The Idaho Partners Against Domestic Violence will take  
this opportunity to thank and honor former Co-Chair  
Merlyn Clark and former Executive Committee member  
Allyn Dingel for all their contributions to  
The Idaho Partners Against Domestic Violence.

Wine will be available for purchase with a percentage  
generously donated by the Boise Co-op.

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

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IDAHO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

# I A C D L

STANDING TALL FOR THE ACCUSED

## IACDL

PRESENTS ITS

### BOISE FALL SEMINAR

IN BOISE

ON FRIDAY, NOVEMBER 20, 2009

AT THE HOTEL 43.

SPEAKERS WILL BE:

**TOM McCABE, MICHAEL BARTLETT,  
ERIC FREDERICKSEN, GUS CAHILL  
AND AMIL MYSHIN**

For More Information:

Contact IACDL

Executive Director Debi Presher

(208) 343-1000 or [dpresher@nbmlaw.com](mailto:dpresher@nbmlaw.com)

Family Law Section presents

## INTRODUCTORY COLLABORATIVE LAW TRAINING

Nov. 6 - 7

8:30 a.m. – 5:00 p.m. at Hotel 43 in Boise

*Resolve family and other legal conflicts in a less adversarial process.*

Special rate for a limited number of Family Law Section Members: \$300. *If registered by Oct. 12, must be a member of the Family Law Section at the time of registration.*

General rate for all others: \$500.

Co-sponsored by Intermountain Collaborative Alliance, Boise.

For more information call or write the Member Services Department, Idaho State Bar, PO Box 895, Boise ID 83701.

Phone: (208) 334-4500;

email [dferrero@isb.idaho.gov](mailto:dferrero@isb.idaho.gov)



### Presenters:

**J. Mark Weiss;**  
Law Office of J. Mark Weiss, Seattle

**Rachel Felbeck;** Attorney practicing exclusively in non-litigation dispute resolution; co-founder of King County Collaborative Law

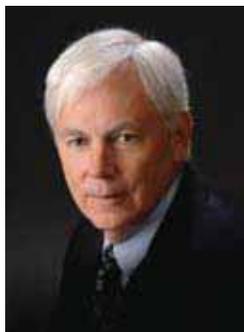
**Anne Lucas;**  
Mental health counselor in Washington

**John Twitchell;**  
Economist and certified divorce financial analyst

*This course complies with training standards of the International Academy of Collaborative Professionals.*

*14 Idaho CLE credits applied for. Limited number of places available*

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Personal Injury  
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# UPCOMING CLEs

## October 1

### *CLE Program Replays*

The programs being replayed are:

- *Effective Written Advocacy*
- *Candor Toward the Tribunal: A View from the Bench*
- *Lawyer Advertising and Ethics*

9:00 a.m. - 1:00 p.m.

The Law Center, Boise

3.5 CLE Credits of which 2.0 are  
Ethics Credits **RAC\***

## October 2

### *Idaho Practical Skills*

8:30 a.m. - 4:00 p.m.

Boise Centre, Boise

6.0 Credits of which 2.0 are Ethics  
Credit **RAC\***

## October 2

### *Navigating the Shoals of a Family Law Case*

8:45 a.m. - 4:15 p.m.

Shilling House, Blackfoot

6.0 CLE credits **RAC\***

## October 9

### *Navigating the Shoals of a Family Law Case*

8:45 a.m. - 4:15 p.m.

Oxford Suites, Boise

6.0 CLE credits **RAC\***

## October 15

### *Trolls: Bad for Harry, Bad for Bilbo, & Bad for Your Clients*

8:30 - 9:30 a.m.

The Law Center, Boise

1.0 CLE credit

Available as a Live Webcast

## October 15

### *Navigating the Shoals of a Family Law Case*

8:45 a.m. - 4:15 p.m.

Coeur d'Alene Inn, Coeur d'Alene

6.0 CLE credits **RAC\***

## October 30

### *Ethics and the Pro Se Opponent: A View From the Bench*

8:30 - 9:30 a.m.

The Law Center, Boise

1.0 CLE ethics credit **RAC\***

Available as a Live Webcast

## November 6 -7

### *Introductory Collaborative Law Training*

8:30 a.m. - 5:00 p.m.

Hotel 43, Boise

12 CLE Credits pending

## November 13

### *The Complete Legal Negotiator*

8:30 a.m. - 3:30 p.m.

The Grove Hotel, Boise

6.0 Credits

## November 20

### *Headline News—Year in Review*

8:30 a.m. - 4:00 p.m.

University Inn, Moscow

6.0 CLE credits of which 1.0 is

Ethics Credit **RAC\***

## December 4

### *Headline News—Year in Review*

8:30 a.m. - 4:00 p.m.

Red Lion Hotel, Pocatello

6.0 CLE credits of which 1.0 is

Ethics Credit **RAC\***

## December 11

### *Headline News—Year in Review*

8:30 a.m. - 4:00 p.m.

Oxford Suites, Boise

6.0 CLE credits of which 1.0 is Ethics  
Credit **RAC\***

## December 15

### *Rule 1.10 Revised—Screening for Conflicts*

8:30 - 9:30 a.m.

The Law Center, Boise

1.0 Ethics CLE credit

Available as a Live Webcast

## December 18

### *Ethical Advocacy Strategies—An Interactive CLE*

8:30 - 10:30 a.m.

Oxford Suites, Boise

2.0 Ethics CLE Credit **RAC\***

\*RAC—These programs are approved for  
Reciprocal Admission Credit pursuant to  
Idaho Bar Commissions Rule 204A(e).



Photo by Ray Gadd from Steve Smith Photography

From left are Naphtali Lineberger, Elliot Dickison, and Tim Schultz as plaintiff witnesses in the championship round of the 2009 Mock Trial State Competition at the Idaho Supreme Court. All three were seniors from Logos Secondary School in Moscow.

## STUDENTS TO TACKLE TRIAL OF THE CENTURY

Carey Shoufler

*Law-Related Education Director*

A new generation of Idahoans will soon learn the details of how a battle between labor and management played out in a Boise courtroom. Over the last six months, a group of Idaho attorneys including Chris Christensen, Ritchie Eppink, Mike Fica, and Colleen Zahn have volunteered their time to become experts on the Haywood Trial and tailor it into a case that would fit with the mock trial format.

They were charged with the difficult task of wading through all the information from the original trial, including several historical accounts of the case. The result is a mock trial case that will help bring to life what has been called one of the most important events Idaho's history and perhaps one of the most famous criminal trials in U.S. history.

In the original case, Haywood was charged with assassinating Idaho Governor Frank Steunenberg. In this adapted case, Haywood is transformed to B.B. Haywood and has been charged with conspiracy to commit murder. When the case is released in October, teams of high school students from schools in all parts of Idaho will begin working with the adaptation of the 100-year-old case to learn the facts, create strategies, and bring the trial's witnesses to life.

Prosecution witnesses for this mock trial case include:

- **Harlen Orchard**, who confessed to committing the assassination of Governor Steunenberg, but has become the key state witness in the prosecution of B.B. Haywood.
- **Jax McParland**, a Pinkerton detective who specializes in investigation of crimes by the labor movement and who secured the confession by Harlen Orchard.
- **Scout Adkins**, Harlen's accomplice in the assassination who can corroborate Orchard's version of events.

Defense witnesses will include:

- **B.B. Haywood**, a nationally-known labor leader and the defendant, accused of conspiracy to commit a murder for hire of Governor Steunenberg.

- **Casey Sterling**, A detective for the Mine Owners of America who will try to refute the version of events told by Orchard and McParland.
- **Charlie Pettibone**, a labor activist and Western Federation of Miners official, brought in to back up B.B. Haywood and refute Orchard.

This new take on the Trial of the Century will be tried as part of the 22nd Annual Idaho High School Mock Trial Competition, which involves over 300 high school students on 40 teams across Idaho. When teams of six to nine students arrive at their regional competitions, they will have spent months learning the facts of the case, developing case theories, writing opening and closing statements, and developing questions for examination and cross examination of witnesses with the support of their teacher and attorney coaches.

Regional competitions are held in late February and early March and winners of the regional competitions are invited to compete in the state competition held in Boise in late March.

The mock trial competition is recognized as one of the most exciting hands-on educational opportunities available to Idaho students. It promotes affinity among the legal community, educators, and students. Perhaps most importantly, it gives students an occasion to participate on a team and hone their analytical and communication skills, while prosecuting and defending a case in a courtroom setting. None of this happens without tremendous amounts of effort.

Every year the Law-Related Education Program relies on the support of over 200 teachers, judges, attorneys, and other community leaders who donate their time to serve as coaches, advisors, judges, and coordinators for regional and state competitions, and this year is no different. The Mock Trial Program needs judges and coaches for the 2010 competition.

For more information on how to help with this year's mock trial competition, contact Carey Shoufler at (208) 334-4500 or [cshoufler@isb.idaho.gov](mailto:cshoufler@isb.idaho.gov). Please consider volunteering your time to help make this year's mock trial competition successful for Idaho students.

# Pro Bono Commission Gets Rolling



Across Idaho, attorneys and judges have challenged each other to step up their pro bono commitment. Last year, a joint resolution was adopted by the Idaho Supreme Court, the U.S. Federal District Court of the District of Idaho, and the Idaho State Bar and establishes a Pro Bono Commission. It works with the judiciary, private firms and lawyers in corporate offices and government and public sector agencies to promote and expand legal services for those unable to pay.

## Celebration to Announce Pro Bono Commitments

What: Public Sector Commits to Pro Bono Policies

Where: Steps of the Idaho Supreme Court, 451 W. State Street, Boise

When: 10 a.m., Wednesday, Oct. 28, 2009

Why: Announcements of concerted pro bono efforts by the following:

- **Lawrence G. Wasden**, Idaho Attorney General
- **Thomas Moss**, United States Attorney for the District of Idaho
- **Greg Bower**, Ada County Prosecuting Attorney
- **Cary B. Colaianni**, Boise City Attorney
- **Samuel Richard Rubin**, Federal Defender Services of Idaho
- **Alan E. Trimming**, Ada County Public Defender

### Idaho's celebration

Idaho's celebration comes during the American Bar Association's first annual National Pro Bono Celebration Week, slated for Oct. 25 through 31. The celebration is a coordinated 50-state effort to showcase the difference that pro bono lawyers make to the U.S. system of justice, its communities and, most of all, to the clients they serve. The week is also dedicated to the quest for more pro bono volunteers to meet the ever-growing legal needs of this country's most vulnerable citizens.

### Honor Roll

To recognize the commitment of law offices adopting a pro bono policy, the Idaho State Bar will start publishing an "Honor Roll" in the February edition of *The Advocate*. Firms, corporate law departments and government offices should contact the Idaho Volunteer Lawyers Program, which is keeping track of the entities adopting pro bono policies, at (208) 334-4510 and ask for Legal Director Mary Hobson, or send email to mhobson@isb.idaho.gov.



### Local Bar Pro Bono Committees Are Being Formed

Local Pro Bono committees are being formed in each judicial district to spread the word and encourage law offices to adopt pro bono policies as well as to serve local needs. The following judges and Bar members have agreed to serve on the local District Bar Pro Bono Committees:\*

#### First District

District Judge John T. Mitchell  
Magistrate Debra Heise

#### Second District

District Judge John R. Stegner  
Magistrate John Judge  
Second District Bar President Karin Seubert  
John Tait

#### Third District

District Judge Gregory M. Culet  
Magistrate George Southworth  
Magistrate Frank Kotyk  
Terry Michaelson

#### Fourth District

District Judge Ronald J. Wilper  
Magistrate Russ Comstock  
Magistrate Chris Bieter  
Fourth District Bar President Jim Martin  
Trudy Hanson Fouser

#### Fifth District

District Judge Michael R. Crabtree  
Magistrate Mick Hodges  
Fifth District Bar President David Heida

#### Sixth District

District Judge David Nye  
Magistrate Gaylen Box  
Magistrate Rick Carnaroli  
Sixth District Bar President Jim Spinner

#### Seventh District

District Judge Jon Shindurling  
Magistrate Earl Blower  
Magistrate Scott Hansen  
Seventh District Bar President Curtis Smith

\*Members are still being recruited.  
If interested in serving, contact  
Mary Hobson at (208) 334-4510.

# HON. DARREL PERRY LEAVES LEGACY OF SERVICE, CLEAR WRITING AND HARD WORK AFTER 16 YEARS AT THE IDAHO COURT OF APPEALS

Dan Black  
*The Advocate Managing Editor*

Court of Appeals Judge Darrel Perry's retirement this fall reflects some unlikely math. At age 54, he has served the Idaho judiciary half his life, or 27 years. Appointed a magistrate judge at age 27, he was one of the youngest judges ever recommended for the bench. The Legislature shortly thereafter raised the minimum age to 30, but grandfathered Judge Perry.

"Some people say I've spent half my life preparing for the bench and then half serving on the bench," he said on a recent crisp autumn morning in his office.

"Which would mean my life is pretty much over," he said with a wry smile. "I prefer to think that I've spent a third preparing for the bench, a third serving, and now I have a third left to give back to the bench, Bar and community in a different way."

Judge Perry has senior status and will sit with the Court of Appeals and Idaho Supreme Court as needed. He expects to spend 35 to 50 days a year with the court and already has plans to sit at three pending oral arguments in October. Beyond that, he's non-committal about specifics, but simply plans to stay in Idaho and serve the legal system.

Judge Perry said he's following the advice of friends who urged him to avoid large commitments for a year or so after retirement. His retirement announcement, though not specific, suggested he might teach: "he also plans to pursue his interests in court/media relations and teaching at the undergraduate and law school levels."

Judge Perry is no stranger to serving the community or teaching. Indeed, he's methodical about it. One of his hallmark values, according to clerks and colleagues, stems from a commitment that attorneys should help the community. His clerk for the previous two years, Chris Christensen, said the judge requires all his clerks to commit an hour of non-legal volunteer work in the community every week. The judge must approve the work, and the rule has led to countless hours of service

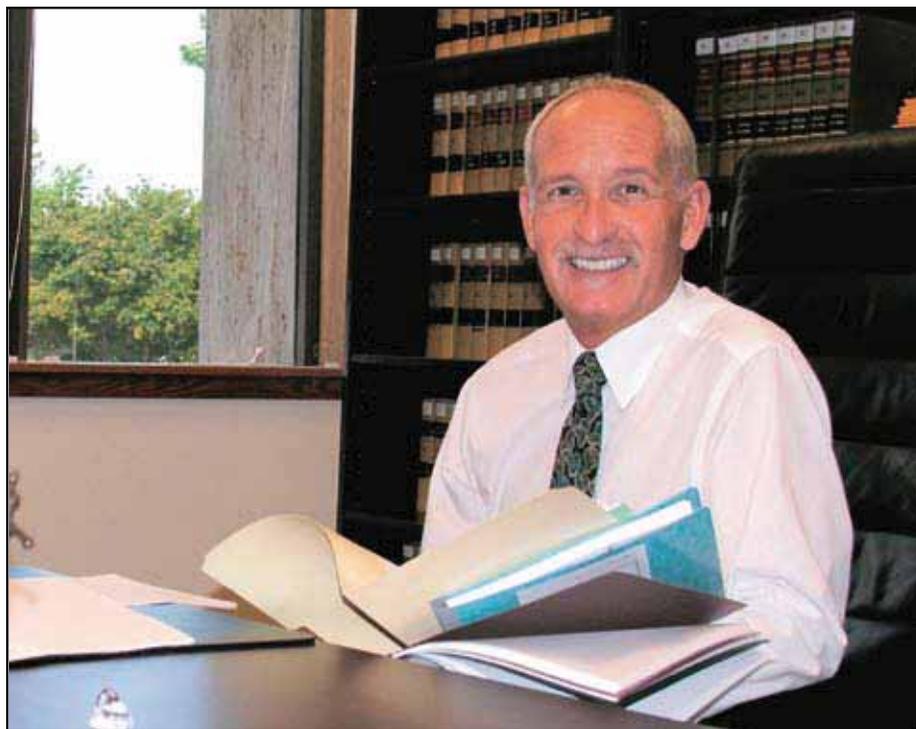


Photo by Dan Black, Idaho State Bar

Idaho Court of Appeals Judge Darrel Perry in his office.

## Judge Darrel Perry

- Raised in Pocatello
- Graduated from University of Idaho College of Law, 1979
- Appointed Magistrate Judge for Nez Perce County, 1981
- Appointed by Governor Cecil Andrus to Idaho Court of Appeals, 1993
- Served four terms as Chief Judge of the Court
- Member of the Supreme Court's Judicial Education and Media in the Courts Committees
- Elected to six-year terms in 1994, 2000 and 2006
- Judge Perry has two grown daughters, one in Boise, and another serving in AmeriCorps in Los Angeles
- Judge Perry retired as of Sept. 30, 2009
- Governor Butch Otter appointed John Melanson, 61, to fill Judge Perry's term

to groups such as the Boy Scouts, Meals on Wheels, and other charitable efforts, to say nothing of the habits engendered by his clerks, all of whom serve for two years each.

Christensen said the judge takes his own role as mentor seriously, offering considerable instruction, and demanding logical, well-reasoned work.

"I wouldn't say it's an easy job," said Christensen. "But he never makes you

feel stupid or that you can't do it."

"He really takes the time so you understand" the long-term implications of a particular legal analysis, Christensen said, adding that Judge Perry "demands a lot of attention to detail," which makes clerking with him so rewarding.

Judge Perry admits he's a rigorous taskmaster. He said he expects clerks' work to be "thorough, efficient and precise. I do spend a lot of time editing

their writing,” not just making changes, but explaining why things are changed.

Christensen added that the judge himself is “very scrupulous with his language choices,” and he has a special ability “to take broad legal concepts and narrow it down to the common sense issue that’s just so logical.”

Judge Perry speaks the same way. That’s his style. After pausing to consider the right words, he delivers simple ones. Clarity, the judge says, is essential for appellate court decisions.

“It needs to be clear, concise and instructive,” he said, “so a district judge or magistrate knows how to use it. If something is going to be a precedent, it needs to be written in a way so the reasons are understood. That way, the law can develop with continuity, predictability and stability.”

While clarifying subtle points of law, Judge Perry keeps the practical implications in mind.

If the case law is clear, he said, “that helps prosecutors and defense attorneys negotiate and settle. It helps the case load if they know what this court might do if it got here.”

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*“If something is going to be a precedent, it needs to be written in a way so the reasons are understood.*

*That way, the law can develop with continuity, predictability and stability.”*

*— Honorable Darrel Perry*

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Decisions, he said, should “provide an ongoing refinement of the parameters,” and address grey areas. He added that “a big part of our job is to be able to explain why this person may win or lose,” and in the process, “we set standards of conduct for trial lawyers and police.”

Along with a legacy of community service and clarity, Judge Perry is also known for his work ethic. Christensen said Judge Perry often arrives about one and one-half hours before the rest of the office.

Perry, like his fellow judges on the Court of Appeals, strives to find consensus

in a decision, whenever possible. Among the four appellate court judges, three hear a case and one will take the lead and write the decision.

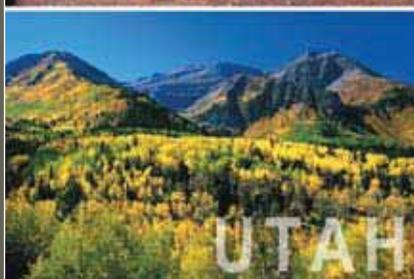
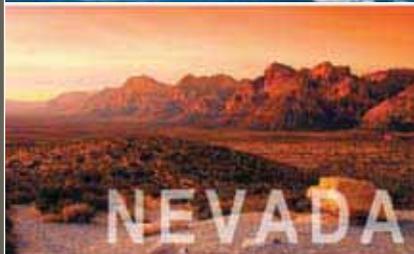
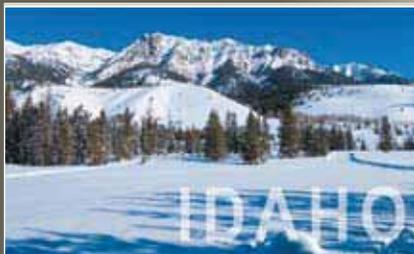
A prolific writer, Perry authored 2,250 opinions during his 16 years on the Court of Appeals. His philosophy is to work hard to produce “the best possible decision with the hopes that they, (fellow judges), don’t have to take a lot of time” editing the proposed opinion in the case.

By all measures, the Court of Appeals operates with a unique camaraderie. Judges usually stay for many years and share a great mutual respect.

“There’s not much turnover,” Judge Perry deadpanned.

“I view my chambers as a team,” he added, especially crediting his judicial assistant Sue Stover, who has been with him through the entire tenure at the Court of Appeals. Christensen said Judge Perry has a great sense of humor and that his ironic wit “helps bring it all into perspective.”

“We work hard,” Christensen said, “but it’s like a family.”



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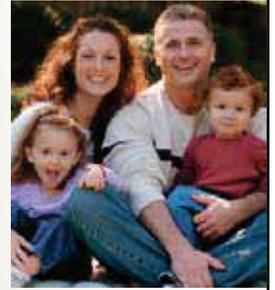
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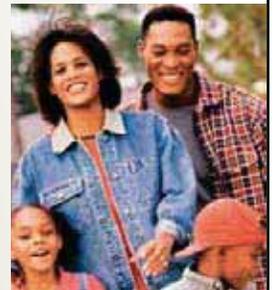
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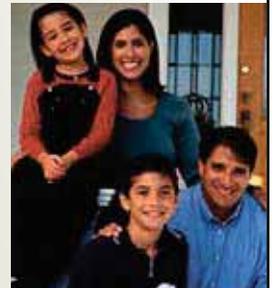
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# IN-THE-TRENCHES LAW EDUCATION FOSTERS INSIGHTS AND PROMOTES 'A JUDICIARY THAT LOOKS LIKE THE GENERAL PUBLIC'

Donna Emert  
*University of Idaho*

Experience is a great teacher, but sometimes it demands a little translation from seasoned professionals.

University of Idaho College of Law students will have the opportunity to learn from experience, and from experienced attorneys, beginning this fall, when the University of Idaho's Women's Law Caucus, a student organization, partners with Idaho Women Lawyers Inc., a professional non-profit organization, to deliver on-the-job training and online mentoring.

"As women emerge more visibly in the legal field, it is important for them to have strong role models who have the experience of both being a woman and being an attorney in practice," said second second-year law student Allison Blackman, WLC co-president. "Idaho's women attorneys who are dedicated to sharing their experiences will provide an invaluable resource to current students. WLC believes that the shared experience will empower both mentors and mentees alike, and help to cultivate strong relationships between present and future Idaho legal practitioners."

The program is open to students of both genders, pairing students with female attorneys throughout the state. The intent is to provide students opportunities to ask questions about real-life experiences and to learn about current legal practices in the field. The program also provides networking opportunities for students, for practicing professionals and for participating College of Law faculty and staff.

Mentoring will include live and virtual elements: in addition to providing students the opportunity to shadow professional women lawyers as they work, the WLC and IWL will provide an Internet forum for easy communication between mentors and mentees. Throughout the semester, the online forum will be used to introduce formal topics for participants to discuss. The University of Idaho WLC also hopes to bring members of IWL to campus to speak to students.

The mission of the WLC is to encourage the development, recognition and discussion of women's contributions to the legal field. The organization works for the benefit of all underrepresented groups in Idaho.

IWL's mission is to promote equal rights and opportunities for women and minorities within the legal profession and the judicial system; to promote full participation by women and minorities in the organized bar and in the legislative and judicial branches of government; and to provide opportunities for women and minorities in the legal profession to support and educate one another.

"Encouraging participation in all facets of Idaho's legal community begins when law school career paths are being considered," said Peg Dougherty, deputy attorney general, Human Services Division in Boise, and president of IWL. "Through this WLC mentoring program, members of IWL have the opportunity to shed light on the many possible careers available to women and minorities.



The Idaho's Women's Law Caucus, a student organization, is partnering with Idaho Women Lawyers Inc., a professional non-profit organization, to deliver on-the-job training and online mentoring. The caucus includes from top, left to right: Tecla Markosky, treasurer, Leah Ricks, Secretary, Jessica Pollack. On bottom from left: Heather O'Leary, co-president, Allison Blackman, co-president.

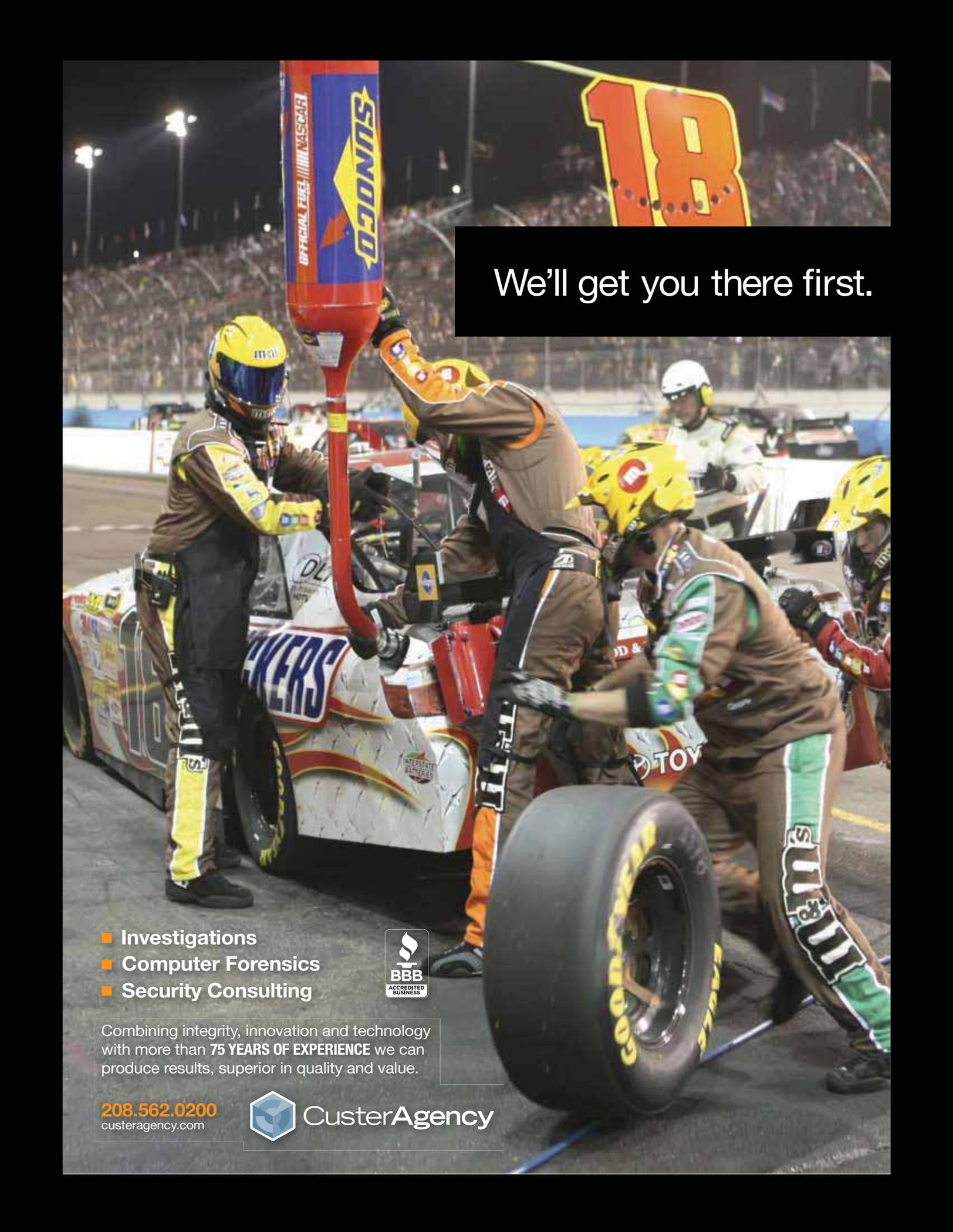
"For example, a woman law student may not even be considering a career as a judge, but an IWL member can utilize IWL's information on how to get on the bench in Idaho, and plant a seed that may ultimately lead that woman to the judiciary," said Dougherty. "In that example, the benefit to the citizens of Idaho is a judiciary that begins to look like the general public."



Peg Dougherty

Membership in WLC and IWL is open to both men and women, and all functions of the mentoring partnership will be open to the law school community.

Women attorneys and University of Idaho students interested in participating in the program can contact Blackman at [allisonblackman@vandals.uidaho.edu](mailto:allisonblackman@vandals.uidaho.edu) or Heather O'Leary, WLC co-president, at [olea2395@vandals.uidaho.edu](mailto:olea2395@vandals.uidaho.edu).



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