

The Advocate

Official Publication
of the Idaho State Bar
Volume 53, No. 8
August 2010

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53 (8), August 2010

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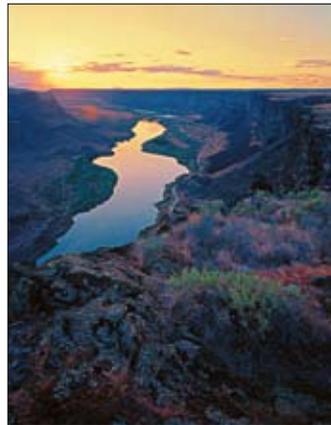
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The photograph by Boise attorney Don Gadda shows The Morley Nelson Snake River Birds of Prey National Conservation Area (NCA), in southwest Idaho, which was established in 1993 to protect a unique environment that supports one of the world's densest concentrations of nesting birds of prey.

Section Sponsor

This issue of *The Advocate* is co-sponsored by the Employment and Labor Law and Workers Compensation Sections.

Editors

Special thanks to the August *The Advocate* editorial team: Hon. Kathryn Sticklen, Sara Berry and Karin Jones.

Letters to the Editor

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August

August 4

Lunch and a Movie - Constitutional Interpretation Theory (part 1)

Sponsored by the Idaho Law Foundation
12 - 1 p.m.

The Law Center, Boise, ID 1.0 Credits

August 11

Lunch and a Movie - Constitutional Interpretation Theory (part 2)

Sponsored by the Idaho Law Foundation
12 - 1 p.m.

The Law Center, Boise, ID 1.0 Credits

August 18

Criminal Law: Ethical Issues for Prosecutors and Defense Attorneys from Discovery to Sentencing

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11:30 a.m. - 1 p.m.

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September

September 10-11

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PRESIDENT'S MESSAGE

WITH RESPECT AND GRATITUDE

James C. Meservy
*President, Idaho State Bar
Board of Commissioners*

It has been quite a privilege to serve as a Commissioner, representing the Third and Fifth Districts. During my tenure as President, I would like to focus on the profession and professionalism, for the Good of the Order, so to speak.

You don't have to be in very many meetings before the question of how to improve the reputation of lawyers and the judicial system comes up. In my view, the answer starts at home, with each of us. For most of my generation, corporal punishment was still in vogue when we were children. We were taught to respect our parents, our grandparents, our "elders," and to be respectful of others. There were consequences when we didn't.

When you consider those lawyers who have received the Distinguished Lawyer Award, or those in your community or District whom you really respect, they have some commonality. They respect the profession and they act like it. In other words, they are professionals in every sense of the word. The Distinguished Lawyer is a zealous advocate for the client while at the same time acting as a counselor at law. The professional knows that the case is not about him or her. The professional realizes that families, family relationships, business relationships, will remain in one context or another after the case is over and works toward resolution which may preserve those relationships as best he or she can under the circumstances. These professionals realize that wise, even kind, counsel over the long term cements attorney-client relationships and raises one's stature in the community.

The reputation of the profession and the standing of lawyers within any given

community will take care of itself when we act like the professionals we are meant to be. Over the past two years, I have had the opportunity to be in many meetings and gatherings with members of the Bar. It isn't hard to recognize the good ones. While I could name many who are exemplary professionals, two who are good ambassadors for the profession, bench, and Bar are Dick Fields and Larry Hunter and their lovely wives, Shirley and Iris. Wherever they go, whatever the setting, they simply represent us very well. They are inclusive, acting with kindness and charity toward all. They are gracious.

In the world of professional athletes we see many tremendous athletes fail to live up to their athletic potential because they do not respect their profession. We are no better. At the end of the day, we are not going to be very good at something (and everyone around knows it) if we don't respect what we do. When many disrespect their sport, the reputation and popularity of the sport is affected. When lawyers disrespect our profession we experience the same fate, individually and collectively.

Professionals also display another important character trait — gratitude. A little humility together with a grateful heart is a good thing. Most acknowledge that the ability to practice law, in whatever form, has blessed their lives. For some, the rewards are financial. For others, there are opportunities for service, careers, etc. For most, a law degree opens doors and windows or provides paths probably not contemplated as a youth. A successful practice, or career, not only blesses the individual, but families, perhaps for generations. Professionals recognize those who have assisted them along the way, and take the opportunity to give back. Being grateful, they are often heard to say "Thank you."

In my view, of all professions, we should be most grateful. While we may not save lives, we can, and do bring order to chaos. We have the opportunity to provide counsel that can prevent harm, injury, financial destruction, etc. If we take the opportunity, we have a chance to serve

The reputation of the profession and the standing of lawyers within any given community will take care of itself when we act like the professionals we are meant to be.

and help the poor and needy, the disadvantaged, our communities, even our nation.

As you consider the Distinguished Lawyer or the professional you have looked up to as an example or a mentor, I think you will find that person to freely express gratitude for the many blessings the practice of law has afforded him or her. Where you find a grateful heart, you will find a man or woman respectful of his or her profession. If all members of the Bar were professionals, Bar counsel would have a lot less to do.

Considering the Good of the Order, being professional is something to think about.

About the Author

James C. Meservy was raised on a farm in Dietrich, Idaho. Jim graduated from Dietrich High School in 1971. He attended the University of Idaho, graduating with a Bachelor of Science degree in 1975. He attended the University of Idaho Law School 1976-1979. Jim married Cherie Wiser on July 31, 1979. They have six children: Ashley, Chris, Tyler, Mallory, Baillie, and Jordan.

Jim was Deputy Prosecuting Attorney for Twin Falls County from September 1979 until January 1981. He has been in private practice in Jerome, Idaho, since that time. From May 1, 1990 to the present, Jim has been a partner in the law firm Fredericksen, Williams & Meservy, with the firm known presently as Williams, Meservy & Lothspeich.

DARREN L. McKENZIE
(Interim Suspension)

On June 2, 2010, the Idaho Supreme Court issued an Order Granting Petition for Interim Suspension of License to Practice Law immediately suspending the license of Nampa attorney Darren L. McKenzie. The Idaho Supreme Court also ordered that Mr. McKenzie shall comply specifically with I.B.C.R. 506(j) until further order of the Court

A formal charge complaint has been filed and that case is pending before the Professional Conduct Board.

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

ERIC J. BOYINGTON
(Suspension/Probation)

On June 8, 2010, the Idaho Supreme Court issued a Disciplinary Order suspending Boise attorney, Eric J. Boyington from the practice of law for a period of five years, with two years of that suspension withheld and placing him on probation following any reinstatement. The three year suspension started effective March 20, 2009, the date Mr. Boyington voluntarily disqualified himself from the practice of law.

The Idaho Supreme Court found that Mr. Boyington violated: (1) I.R.P.C. 1.2 [Failure to pursue client's objectives]; 1.3 [Diligence]; 1.4 [Communication]; and 1.16(a) [Failure to withdraw based on impairment] with respect to ten different client matters; (2) I.R.P.C. 8.4(d) [Conduct prejudicial to the administration of justice] with respect to nine client matters; (3) I.R.P.C. 1.16(d) [Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, including refunding any advance payment of fee that has not been earned] with respect to eight client matters; (4) 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 I.B.C.R. 505(e) [Failure to respond to a lawful demand for information from a disciplinary authority] with respect to three different requests for information from Bar Counsel; (5) I.R.P.C. 8.4(c) [Conduct involving dishonesty, fraud, deceit or misrepresentation] with respect to two client matters;

and (6) I.R.P.C. 1.5 [Fees]; and 1.5(f) [Failure to provide an itemized accounting of fees] each with respect to one client matter.

The Idaho Supreme Court's Disciplinary Order followed a stipulated resolution of an Idaho State Bar disciplinary proceeding in which Mr. Boyington admitted that he had violated the Idaho Rules of Professional Conduct set forth in the preceding paragraph. The stipulation also dismissed five alleged violations of I.R.P.C. 1.1 [Competence] for lack of clear and convincing evidence.

Mr. Boyington's misconduct related to a number of client matters. With respect to ten client matters, Mr. Boyington failed to appear in court proceedings on behalf of his clients, without explanation or excuse, and in six of those matters, Mr. Boyington failed to respond to motions or file pleadings. In those matters, Mr. Boyington also failed to pursue his clients' objectives, failed to act with reasonable diligence and promptness in representing his clients, failed to keep his clients reasonably informed about the status of their matters, did not promptly comply with reasonable requests for information about his clients' representation and failed to withdraw based upon an impairment, depression. In addition, Mr. Boyington failed to provide many of those clients with an accounting of fees and costs or failed to refund advance payments of fees or expenses that had not been earned or incurred.

The Disciplinary Order also found that with respect to three client grievances, Mr. Boyington failed to respond to requests for information from Bar Counsel. In two client matters, Mr. Boyington misrepresented some of the circumstances related to his representation, which the clients relied upon to their detriment. Those misrepresentations sought to minimize Mr. Boyington's lack of diligence in those cases.

During the times that Mr. Boyington was representing these clients, he was suffering from depression and anxiety. Prior to and during the period of his voluntary withdrawal from the practice of law in March 2009, Mr. Boyington had been receiving treatment for his depression. However, the parties agreed that, because the medical evidence demonstrated that Mr. Boyington currently remains affected by depression and anxiety, he needs to demonstrate a meaningful and sustained period of successful rehabilitation to as-

sure a reoccurrence of such professional misconduct is unlikely before he resumes practicing law. The Stipulation and Order require a specific showing by Mr. Boyington that these conditions will not prevent him from representing his clients in a manner consistent with the Idaho Rules of Professional Conduct before he can be reinstated following his suspension.

In addition, Mr. Boyington voluntarily made all of the payments in restitution to his clients requested by Bar Counsel, totaling \$11,837. Another client also settled a malpractice case against Mr. Boyington, which resulted in a recovery of her losses related to Mr. Boyington's representation.

The Disciplinary Order provides that three years of the suspension will be served and two years of the suspension will be withheld. Mr. Boyington will serve a two year period of probation following any reinstatement, subject to conditions of probation specified in the Order. Those conditions include that Mr. Boyington will serve an additional two year suspension if he admits or is found to have violated any of the Idaho Rules of Professional Conduct for which a public sanction is imposed for any conduct during Mr. Boyington's period of probation. During his probation, Mr. Boyington must also remain under his physician's care, comply with any treatment regimen prescribed by his physician, practice under a supervising attorney and provide monthly reports to Bar Counsel attesting that his representation of his clients is consistent with his responsibilities under the Idaho Rules of Professional Conduct.

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

NOTICE

Prelitigation hearing panelists – licensed nursing facilities

Pursuant to Idaho Code Section 6-2302 the Board of Commissioners is responsible for appointing attorney members to the prelitigation hearing panels for claims against licensed nursing facilities. The Idaho Nursing Home Administrators Board is in need of panelist from northern and eastern Idaho. If you are interested in serving as a panelist, please contact Diane Minnich at dminnich@isb.idaho.gov.

Appellate rule amendment — scanning the record

Appellate Rule Amendment — Scanning the Record. Appellate Rule 27 has been amended effective July 1, 2010, to allow for the option of scanning the entire district court file as the appellate record in lieu of designating certain documents to be included in the record. The cost is 65 cents a page and the record will be sent in CD format to the Supreme Court and the parties. The option is only available in those counties that have agreed to this procedure and those counties will be listed on the court's website. Currently the counties participating are Ada, Kootenai, Fremont and Jerome. The rule can be found on the court's website at <http://www.isc.idaho.gov/rulesamd.htm>.

Idaho State Bar warns attorneys about fresh scams

Idaho attorneys are seeing more sophisticated attempts at fraud. Some of the recent fraudulent schemes request assistance in divorce matters and commercial collections. The schemes appear to be directed to most of the bar and even experienced attorneys report being recruited to represent seemingly legitimate business interests. The Idaho State Bar advises lawyers to thoroughly research the prospective client's identity before doing business. We also advise lawyers to be particularly careful about receipt of checks from clients that involve requests to transfer a portion of such funds from a trust account. Lawyers should assure that such funds have been honored and deposited by the bank in the trust account, before issuing any trust account check for those funds. To report attempts at fraud, call the Idaho Attorney General's Consumer Division at (208) 334-4135.

Expanded online attorney search available

The Idaho State Bar online attorney directory has been expanded to allow searching by partial last names. It is no longer necessary to know the full correct spelling of the last name to use the online program. Now the public can search using only the first few letters of the last name. Fewer letters broaden the search and more letters narrow it. A list of attorneys that match search criteria allows choosing an attorney. The online records include names, mailing addresses, firms, phone and fax numbers, email and website addresses, current status and admission date. The records are updated weekly.

To use the online attorney search, visit www.isb.idaho.gov and click on Attorney Directory under "Find an Attorney" on the home page. Contact the Licensing Department at (208) 334-4500 if you have questions about the attorney membership records.

University of Idaho's third year law program in Boise

The Accreditation Committee of the American Bar Association Section of Legal Education and Admissions to the Bar has recommended approval of the U of I's plan to offer a full third-year program in Boise, commencing this fall. The Committee's recommendation, made after a hearing in Washington D.C., on June 24, will go to the Council of the Section for a final action during the ABA's annual meeting at San Francisco in the first week of August.

The University of Idaho Board of Regents (State Board of Education) earlier approved the third-year program and authorized the University of Idaho to col-

laborate with the Idaho Supreme Court to develop in Boise an Idaho Law Learning Center that will contain the University's legal education program, the Idaho State Law Library, judicial education offices, and an innovative venue for public education and outreach on the rule of law in a democratic society. While plans for the Idaho Law Learning Center move forward, the College's third-year program will be housed initially in the University of Idaho/Boise Center ("Water Center" Building) at Broadway and Front Streets. The Idaho Law Learning Center is envisioned to become the permanent home of the program and eventually to be the location of a full three-year branch program of the College of Law in Boise.

Check MCLE course approval online

You can now search our MCLE approved courses records — both past and future courses — online. If you attended a course or are thinking of attending one, start by checking for Idaho MCLE approval. Visit our website at www.isb.idaho.gov and go to "Search Approved Courses" in the CLE menu. Search for live courses by date and recorded courses by sponsor. The records include all approved courses back to 2006 — over 16,000 listings.

If the course has not been approved, apply for accreditation right away. Application processing currently takes about three weeks and will take longer as the end of the year approaches. If the course is approved, check "Attendance List Received" and submit a self-verification of attendance form if appropriate.

Contact the MCLE Department at (208) 334-4500 if you have any questions about MCLE approval.

LETTER TO THE EDITOR

Key Bank accepts form

To the Editor,

Thank you for the opportunity to respond to the letter in your May, 2010 issue regarding KeyBank National Association's policy on Power of Attorney forms.

KeyBank is a national bank with branches in 15 states, including Idaho.

We strive to set policies and procedures across our entire footprint that allow us to serve our clients in an efficient manner while protecting their interests and those of the bank. We would like to apologize if our policy caused any inconvenience to our customers.

We support the Idaho legislature's goal of establishing a power of attorney form that provides Idaho residents with

an inexpensive, non-judicial method to handle property management. As a result, KeyBank has instituted a process to accept properly acknowledged Idaho Statutory Form of Power of Attorney.

Sincerely,

Joel Hickman
Idaho District President
KeyBank N.A.



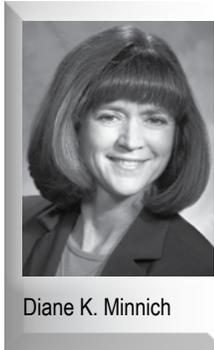
2010 RESOLUTION PROCESS

Diane K. Minnich
Executive Director, Idaho State Bar

Proposed resolutions due September 25

Do you, your section, committee or district bar association have an issue, proposed rule revision or legislative matter that you think should be voted upon by the Idaho State Bar membership? If so, the fall resolution process, or "Roadshow" is the opportunity to propose issues for consideration by members of the Bar.

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



Diane K. Minnich

Idaho Bar Commission Rule 906 (page 288 of the 2010-2011 Directory) governs the resolution process. Resolutions for the 2010 resolution process must be submitted by September 25, 2010. If you have questions about the process or

how to submit a resolution, please contact me at dminnich@isb.idaho.gov or (208) 334-4500.

Bar and Foundation leadership changes

Each year at the annual meeting, the leadership of the state bar changes. In July, Lewiston attorney Doug Mushlitz completed his term as ISB president. Doug shared his presidential year with Boise attorney Newal Squyres. New President Jim Meservy will serve as President until January 2011, when President-elect Deborah Ferguson assumes the Presidency until July 2011.

The time required to serve as a bar commissioner is substantial. Past commissioners have estimated that they spent from 300 to 400 hours per year fulfilling their duties as a Bar Commissioner. Idaho attorneys' willingness to contribute the time, along with their energy and expertise, is essential to the success of the Bar and its activities. Newal and Doug join the many lawyers who serve the Bar and its members because they care deeply about the Idaho legal profession. We thank Newal and Doug for their service.

The 2010-11 Bar Commissioners are:

- Jim Meservy, Jerome, President
- Deborah Ferguson, Boise, President-elect
- Reed Larsen, Pocatello
- Molly O'Leary, Boise
- Paul Daugharty, Coeur d'Alene

At the Annual Meeting, a new Idaho Law Foundation President was also elected, Katherine Moriarty from Idaho Falls. Katherine has served as a member of the board since 2004, and as the vice president for the past two years. She follows Chuck Homer, also an attorney in Idaho Falls. Chuck served the last two years as ILF President.

Linda Judd completed her service on the Foundation Board at the Annual Meeting. She served as a member of the Board since 1999, include two years as the Foundation President. Thank you also to Linda and to Chuck for their commitment to the profession through their service as an ILF Director.

The 2010-2011 ILF Board of Directors are:

- Katherine Moriarty, Idaho Falls, President
- Susan Weeks, Coeur d'Alene, Vice President
- Susan Eastlake, Boise, Treasurer
- Michael Felton, Buhl, Secretary
- Charles Homer, Idaho Falls
- Hon. Daniel Eismann, Boise
- Hon. Carl Kerrick, Lewiston
- Kevin Satterlee, Boise
- Ridgley Denning, Boise
- Paul EchoHawk, Pocatello
- Zoe Ann Olson, Boise
- Dean Don Burnett, Moscow
- Craig Meadows, Boise

2010 District Bar Association Resolution Meetings		
District	Date/Time	City
First	Nov. 9, Noon	Coeur d'Alene
Second	Nov. 10, 6 p.m.	Moscow
Third	Nov. 16, 6 p.m.	Nampa
Fourth	Nov. 17, Noon	Boise
Fifth	Nov. 17, 6 p.m.	Twin Falls
Sixth	Nov. 18, Noon	Pocatello
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WAIT A MINUTE, I DON'T PRACTICE EMPLOYMENT LAW!

Erika Birch
Strindberg & Scholnick, LLC

Before you say to yourself, “*Wait a minute, I don’t practice employment law,*” and toss this issue into the recycling bin, ask yourself: “*Am I an employee?*” or “*Am I an employer?*” If you answered “yes” to one of those questions, then even if you don’t practice in this area, it impacts what you do (or shouldn’t do) on a weekly basis. Therefore it is my pleasure to be able to offer you an array of articles written by members of the Labor & Employment and Worker’s Compensation Sections of our Bar, the sponsors of this issue of *The Advocate*.

Employment law is a relatively new area of practice. It was in 1964 that the Civil Rights Act passed including Title VII which made it illegal to discriminate against employees on the basis of their race, color, religion, sex, or national origin. Later laws, such as Americans with Disabilities Act of 1990 and the Age Discrimination in Employment Act of 1995, have added protections for disabled and older workers. This is an area of the law that is ever devel-



Erika Birch

oping and changing, with amendments to established statutes and passage of new ones, as discussed in Kara Heikkila’s article on page 13. Likewise, it is an area that is developed and modified by myriad decisions from administrative, state and federal courts. For example, Dean Bennett’s article on page 16 discusses a recent Idaho Supreme Court decision and its impact on the burden of proof in Idaho employment cases. And you can read about the Idaho Industrial Commission’s decision on impacting what worker’s compensation benefits undocumented workers are entitled to in Jon Bauman’s article on page 19.

Perhaps now more than ever, employment law is truly a hot topic. With the severe downturn in the economy, thousands of employees find themselves unemployed for the first time in their lives. Employers are faced with having to determine how to cut costs and downsize their operations, which often means terminating employees. To learn more about the rights and responsibilities of employers and employees in these tough economic times, read Scott Gingras’s article on page 22 detailing how the Department of Labor determines an employee’s eligibility for unemployment compensation benefits. Justin Steiner’s article on page 25 illuminates the impact of a slowing economy on the enforcement of non-compete agreements. Since we are all employers or employees, we need to know something about employment law;

so, in that way, and certainly if you practice in this fascinating area of law, you’ll want to save this issue of *The Advocate* instead of tossing it in the recycling bin!

A hearty thanks to those who took time from their busy practices to write these articles. To learn more about employment law, I encourage you to become a member of our Sections. The Labor & Employment Section sponsors 10 half-hour CLEs on various employment-related topics throughout the year. We meet the fourth Wednesday of the month at noon at the Idaho State Bar Law Center and lunch is provided to our members who attend in person. Many of our members from afar call in for the CLEs. To join or learn more about the Worker’s Compensation Section you can contact the current chair of that Section, Tom Callery of Jones, Brower & Callery, PLLC in Lewiston.

About the Author

Erika Birch is the immediate past chair of the Labor & Employment Section. She is a partner at Strindberg & Scholnick, LLC, a small regional firm focusing on employment and labor law. Erika has litigated plaintiff’s employment and civil rights cases since graduating from University of Colorado School of Law in 2000. She moved to Boise in the fall of 2007 so she could open up and manage the firm’s Boise office. Erika is licensed in state and federal courts in Idaho, Utah and Colorado.

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KEEPING UP WITH CHANGES IN EMPLOYMENT LAW

Kara L. Heikkila
Hall, Farley, Oberrecht
& Blanton, PA

Keeping up with the many changes in employment law has taken on new meaning in the last several years. This article reviews just some of the many changes of the last two years as well as the potential reforms still to come in this active period of change.

Employment law in a bad economy

The economic downturn has had a deep and lasting effect on employers and employees across virtually all industries, resulting in layoffs and unemployment rates on a local and national level topping 10 percent. For lawyers working in the field of employment law, it has been a time of change and shifting client needs. For example, what was once an occasional, if not rare, read of the federal WARN Act¹ in order to advise a client on a planned layoff has become a routine and regular practice.

Attributed in part to these difficult economic times, two years of record high employment discrimination charges were filed in 2008 and 2009 with the Equal Employment Opportunity Commission (“EEOC”), the federal agency tasked with investigating and enforcing federal discrimination laws.² Age discrimination claims, despite an employer-friendly holding from the U.S. Supreme Court in 2009 on the higher burden of proof associated with this type of claim,³ were at their second highest level according to the EEOC’s 2009 charge statistics. Disability discrimination charges, mirroring the expansion in 2009 of the federal Americans with Disabilities Act (“ADA”), were also at record high levels at the EEOC last year.

Idaho’s state equivalent to the EEOC, the Idaho Human Rights Commission (“IHRC”), has seen a slight increased trend in the total number of charges filed over the past three years.⁴ Often associated with layoffs, age discrimination claims held steady at the state level between



Kara L. Heikkila

With the now-broadened definition of who is disabled and covered by the ADA, there is a shift away from analyzing coverage toward the obligation of reasonable accommodation of an individual with disability.

2008 and 2009. However, the agency saw a significant jump in the number of disability discrimination claims in 2009. Because exhaustion of an administrative remedy (filing a charge with the federal or state agency) is a mandatory pre-requisite to filing a discrimination suit in either federal or state court in Idaho, this increased charge activity and resultant litigation has also visibly impacted the world of employment law.

Significant changes to federal laws

Complicating the world of employment law in this challenging economic climate over the last year were significant changes to two federal laws, the ADA and the Family Medical Leave Act (“FMLA”), both of which went into effect in January 2009. Neither had been appreciably amended in the 15 or more years that each has been in place. A colleague and I spoke to a large group of HR professionals just after these amendments took place early last year. As a former HR director in my life before the law, I was focused on how overwhelming it would be to grapple with the many significant changes to both of these laws at the same time and on giving practical advice to implement new policies, forms, training and practices associated with each. Our best practice advice to clients was to realistically be aware of and as possible implement priority parts of these two major legislative and regulatory changes. At the end of the presentation, an HR designee stood up not to ask a question about these amendments, but to use the opportunity to look for new work in the face of a layoff after multiple years in her role with a company. To hear her story was wrenching, as the period of change we were living through was affecting a much more basic level of need than implementing new forms or training supervisors.

The ADA Amendments Act (or “ADAAA”) overturned years of U.S. Supreme Court decisions that had narrowed the definition of who is disabled and potentially covered by the ADA.⁵ Viewed as a significant employee-friendly amendment, the findings and purpose set out in the Act were to “restore the intent and protections of the ADA.”⁶ This law applies to employers with 15 or more employees, while the Idaho state-equivalent Human Rights Act applies to employers with five or more employees.⁷ With the now-broadened definition of who is disabled and covered by the ADA, there is a shift away from analyzing coverage (who is disabled under the Act) toward the other fundamental requirement of this law, the obligation of reasonable accommodation of an individual with disability.⁸

The ADAAA is still too new for cases to have been decided at the appellate level and for trends to be more than speculation. However, the new focus on the process of accommodation and its requirement of an individualized assessment of the job that either the employee is seeking or holds will predictably mean more disability cases will survive summary judgment. The one thing for certain is that these amendments will have a long-term impact on the practice of employment law.

At the same time, sweeping, revised regulations from the federal oversight Department of Labor (“DOL”) regarding the FMLA went into effect on January 16, 2009.⁹ The FMLA applies to certain employers with 50 or more employees in a 75-mile radius and generally provides employees up to 12 weeks of unpaid leave per year for their own serious health condition or to care for family members in certain circumstances.¹⁰ These regulatory changes addressed years of a lack of guidance and sometimes inconsistent interpretation by the DOL and by various

courts on provisions of the FMLA and are viewed overall as employer-friendly modifications. Some of the more significant changes included heightened notice requirements for employers, increased accountability on the part of employees to provide information regarding the need for leave, and interpretation of the 2008 amendments to the FMLA regarding leaves of absence for military caregivers. There is no state equivalent to the FMLA in Idaho, which was in this instance a good thing given the confusion that arose last year from state statutes modeled after the FMLA that were then in conflict with the revised federal regulations.¹¹

Notably, the DOL has issued only one opinion letter on the FMLA over the past year. Coupled with the several pieces of proposed legislation in Congress that would amend the FMLA (among other things, to lower the threshold number of employees for application of this law and to require paid leave), there is widespread speculation that additional amendments under the new administration will pull back and reverse the 2009 employer-friendly regulatory changes to the FMLA.

A climate of change in Washington

The first piece of legislation signed by President Obama just after he took office was the Lilly Ledbetter Act, or “Fair Pay Act,”¹² which amended various federal laws and now allows an employee to file a charge of compensation or pay discrimination within a statutorily proscribed period after each paycheck is received, as opposed to when the alleged discriminatory pay decision was made. This law was a response to a 2007 U.S. Supreme Court case that limited the filing period to the date of the pay decision, which presumptively could have been years earlier.¹³ In May 2010, following this Congressional dictate, the U.S. Supreme Court applied the same procedural timing reasoning to a certain type of Title VII discrimination case in *Lewis v. City of Chicago*.¹⁴ In *Lewis*, the Supreme Court recognized that its holding might “result in a host of practical problems for employers and employees alike . . . [but] its charge [was] simply to give effect to the law Congress enacted.”¹⁵ Once again, this new law is expected to dramatically shift the playing field for these types of employment claims.

And the Fair Pay Act was just the first piece of legislation in this climate of change. More than 20 employment and labor bills were introduced in Congress in 2009 that would impact employers, em-

More than 20 employment and labor bills were introduced in Congress in 2009 that would impact employers, employees, and the practice of employment law, sometimes significantly.

ployees, and the practice of employment law, sometimes significantly. Consideration on most of the bills was delayed due to the debate over health care reform. While the political climate in Washington may have shifted since last year, particularly as we look toward the fall mid-term elections, it appears we can expect continued efforts towards reform from Washington.

Employment lawyers love a good acronym. We were pleased when the ADA was amended by the ADA AAA, an acronym that takes no small amount of practice to roll from the tongue. We deal with the ADA AAA, the FMLA, the FLSA,¹⁶ the USERRA,¹⁷ the WARN Act, and the ADEA,¹⁸ among others. One of the remarkably frustrating and complicated aspects of employment law practice is that each federal law and its potential state equivalent may have different minimum employee threshold requirements for coverage, different administrative exhaustion requirements, and different remedial schemes. And just when you have mastered the various acronyms and their nuances, Congress is poised to introduce a whole slate of new reforms — and acronyms. A sampling of some of the more interesting and potentially viable pieces of legislation follows.

FOREWARN:¹⁹ In yet another wonderful example of the evolution of a good acronym, the Federal Oversight, Reform, and Enforcement of the WARN Act would amend the WARN Act to reduce the requisite number of employees for application of this law, thereby requiring more employers to predict and give notice of certain layoffs or plant closings. It would also increase the notice timeframe from 60 to 90 days, would give the DOL oversight for compliance, and would increase potential damages associated with a violation of this law.

PFA:²⁰ The Paycheck Fairness Act would amend the Equal Pay Act of 1963, a little used law, even by the EEOC, that

prohibits discrimination in pay rates between men and women. The amendment would eliminate certain defenses currently available to employers in these kinds of cases, would add the availability of compensatory and punitive damages, would add a retaliation provision, and would provide for PFA class action claims.

POWADA:²¹ The Protecting Older Workers Against Discrimination Act would overturn the employer-friendly 2009 U.S. Supreme Court decision in *Gross*, referenced above, which currently holds plaintiffs to a higher standard of proof in age discrimination cases. This legislative fix would put the standard of proof in an age case on par with the standards in place for other types of discrimination cases under Title VII.

ENDA:²² In a bill that has had widespread support, the Employment Nondiscrimination Act would prohibit intentional discrimination against gay, bisexual, and transgender employees, who are currently not protected under federal or Idaho state law. It would amend Title VII to prohibit discrimination based on sexual orientation or gender identity and its remedial scheme would be consistent with other Title VII protected statuses.

Enforcement changes and other trends impacting employers

Several other trends are notable. Employers can expect increased enforcement from federal agencies such as the Department of Labor (investigating wage and hour violations), the Occupational Safety and Health Administration (investigating workplace safety issues) and Immigration and Customs Enforcement (investigating I-9 compliance), among others. Even the EEOC received a substantial boost in funding and staffing in the last year, which should result in improved charge processing times and increased investigations. This is starkly different from agency funding on a local level, where the Idaho Human Rights Commission, facing a pro-

posed loss of general fund support from the state, recently merged with the Idaho Department of Labor. Despite this, the merger of the Commission with the state Department of Labor is expected to allow the Commission to maintain its independent and vital role and to improve administrative support to the Commission.

Finally, health care and immigration reforms on a federal level may also fundamentally change how businesses operate. The recently-passed health reform measure will impact how employers provide and administer health benefits to employees. According to the Idaho Department of Labor, the number of Idaho employers offering health benefits to full-time employees, just 56% in 2009, continues to decline.²³ While the state of Idaho has sued to prevent imposition of health care reform, much uncertainty remains with respect to both that litigation and the eventual impact of health care reform on employers. Proposed federal and state immigration reforms would increase attention on employment verification and enforcement schemes. Undoubtedly, the debate over these national reforms, as well as potential local responses, will continue to add complexity to the world of employment law.

Conclusion

Everything is changing. People are taking the comedians seriously and the politicians as a joke.

~ Will Rogers

It is an exciting, always interesting, sometimes frustrating period of tremendous activity and change in the field of employment law. Enjoy the ride.

About the Author

Kara L. Heikkila is an attorney with the law firm of Hall, Farley, Oberrecht & Blanton, P.A., where she maintains a litigation practice in federal and state courts with an emphasis on employment law con-

Health care and immigration reforms on a federal level may also fundamentally change how businesses operate.

sultation and defense. A native of Idaho, Kara received her undergraduate degree in health care administration from Idaho State University and her law degree from Seattle University, with a program emphasis in employment law. She has worked in the health care and legal fields in the northwest for the past 22 years. Kara is currently licensed to practice in state and federal courts in Idaho, Washington and Alaska, the United States Court of Appeals for the Ninth Circuit, and the United States Supreme Court.

Endnotes

¹ Worker Adjustment and Retraining Notification Act of 1988, 29 U.S.C. §§ 2101-2108. The WARN Act is a federal law that requires employers in certain circumstances to provide a 60-day notice of an intended mass layoff or plant closure.

² U.S. Equal Employment Opportunity Comm'n, Charge Statistics FY 1997 Through FY 2009, <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited June 2010).

³ *Gross v. FBL Fin. Serv. Inc.*, 129 S. Ct. 2343 (2009). In *Gross*, the U.S. Supreme Court held that in age discrimination cases, a plaintiff must prove that age was the "but for" cause of the adverse employment action, which is a higher burden than in Title VII discrimination cases (covering discrimination on the basis of sex, race, religion, and national origin) where the status must only be a motivating factor in the adverse decision.

⁴ Idaho Human Rights Commission, *Profile of Cases Managed and/or Key Services Provided FY 2009*.

⁵ 42 U.S.C. §§ 12102 - 12213, as amended by the ADA Amendments Act of 2008 (P.L. 110-325).

⁶ The ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

⁷ 42 U.S.C. § 12111(b)(5)(A); I.C. § 67-5902(6). Idaho courts are guided by federal law in interpreting the Idaho Human Rights Act. *Ostrander v. Farm Bureau Mut. Ins. Co.*, 851 P.2d 946, 949 (Idaho 1993).

⁸ 42 U.S.C. § 12112(b)(5)(A), (B). According to IHRC statistics for 2009, 42% of the disability discrimination charges were based on a failure to reasonably accommodate. Idaho Human Rights Commission, *supra* note 4.

⁹ The FMLA is found at 29 U.S.C. §§ 2601-2654. The DOL's revised regulations are found at 29 C.F.R. § 825.

¹⁰ 29 C.F.R. § 825.102.

¹¹ By way of example, both Oregon and Washington have state-equivalent acts that were in conflict with the amended regulations during this time.

¹² Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

¹³ *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

¹⁴ *Lewis v. City of Chi.*, 560 U.S. ____ (No. 08-974, May 24, 2010).

¹⁵ *Id.* slip op. at 10.

¹⁶ The Fair Labor Standards Act, 29 U.S.C. §§ 201 - 219 is the federal wage and hour law.

¹⁷ The Uniformed Services Employment and Re-employment Rights Act, 38 U.S.C. §§ 4301 - 4335, prohibits employment discrimination based on military service. Notably, this federal law applies to virtually all employers.

¹⁸ The Age Discrimination in Employment Act, 29 U.S.C. §§ 621 - 634, is the federal law protecting individuals age 40 and older from discrimination based on their age.

¹⁹ H.R. 3042, S. 1374, 111th Cong. (2009).

²⁰ H.R. 12, S. 182, 111th Cong. (2009).

²¹ H.R. 3721, S. 1756, 111th Cong. (2009).

²² H.R. 3017, S. 1584, 111th Cong. (2009).

²³ IDOL Press Release: *Survey: Fewer Idaho Employers Offered Health Coverage in 2009* (February 26, 2010), available at <http://labor.idaho.gov/news>.

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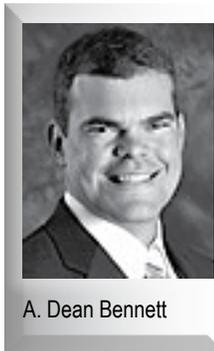
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FURTHER REVIEW OF IDAHO'S VERSION OF *McDONNELL DOUGLAS* IS NECESSARY

A. Dean Bennett
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Until recently, no Idaho appellate court had addressed the application of one of the most well known analyses in employment law—the *McDonnell Douglas* burden-shifting analysis. The burden-shifting analysis, first applied by the United States Supreme Court in 1973 in determining the merits of a claim under Title VII of the Civil Rights Act of 1964 (“Title VII”),¹ is now widely used at summary judgment to evaluate an array of federal employment law claims, including Title VII, the Americans With Disabilities Act (“ADA”), the Age Discrimination in Employment Act (“ADEA”), and other statutory claims.²

Courts have also adopted and applied the burden-shifting analysis in evaluating state statutory claims, including whistleblower claims.³ Only recently, however, did a case present the Idaho Supreme Court an opportunity to adopt the analysis.⁴ Not surprisingly, like so many courts before it, the Idaho Supreme Court adopted the *McDonnell Douglas* burden-shifting analysis as its own.



A. Dean Bennett

Or did it?

A comparison of the traditional *McDonnell Douglas* burden-shifting analysis to the analysis adopted by the Idaho Supreme Court in *Curlee v. Kootenai County Fire & Rescue*, 148 Idaho 391, 224 P.3d 458 (2008), demonstrates that the Idaho Supreme Court adopted the analysis in name only. And this has potentially significant ramifications to a defendant-employer’s ability to defend against a meritless case at summary judgment and at trial.

The traditional burden-shifting analysis

The traditional *McDonnell Douglas* burden-shifting analysis has been characterized as a “legal proof structure . . . to assist plaintiffs at the *summary judgment* stage so they may reach trial.”⁵ Under the

analysis, if a plaintiff makes out a *prima facie* case, she is entitled to a “presumption of discrimination.”⁶ Because of the presumption created, “the burden of *production* . . . shifts briefly to the employer to explain why it took the challenged action.”⁷ If the employer rebuts the presumption, “[t]he burden of *production* then shifts back to the plaintiff to introduce evidence from which the fact-finder could conclude that the employer’s proffered reason was pretextual.”⁸ At all times, the burden of *persuasion* remains with the plaintiff employee.⁹

The Idaho Supreme Court’s burden shifting analysis as adopted in *Curlee*

The Idaho Supreme Court departed from the traditional analysis. In *Curlee*, the Idaho Supreme Court held that “the burden shifting rule of *McDonnell Douglas* . . . has little or no application at the summary judgment stage.”¹⁰ The Court reversed the district court on that basis, holding that “it was error for the district court to apply [the *McDonnell Douglas* analysis] at the summary judgment stage.”¹¹ The Idaho Supreme Court further stated that “the rule explicitly governs the burden of *persuasion* at trial.”¹²

Traditional Analysis	<i>Curlee’s</i> Analysis
Applies at Summary Judgment	Applies Only at Trial
Shifts the Burden of Production	Shifts the Burden of Persuasion

The good news, however, is that the Idaho Supreme Court’s decision to depart from the traditional analysis has a simple and straightforward explanation. The Idaho Supreme Court adopted its analysis from the North Dakota Supreme Court—a jurisdiction that has distanced itself from

the traditional analysis. The North Dakota Supreme Court has explained its departure from the traditional *McDonnell Douglas* analysis by recognizing that its evidence rule regarding presumptions is “dramatically different” than the Federal rule.¹³

The problem with the Idaho Supreme Court’s decision to depart from the traditional analysis is that Idaho does not have the same rule regarding presumptions as North Dakota. Idaho’s presumption rule instead mirrors the Federal rule. Therefore, Idaho’s departure from the traditional *McDonnell Douglas* analysis is likely in need of further explanation or review.

Understanding the issue

To understand why further explanation by the Idaho Supreme Court is necessary, a reminder of the difference between a burden of production and burden of persuasion may be helpful. And it will also be helpful to become familiar with Federal Rule of Evidence 301, North Dakota Rule of Evidence 301, and Idaho Rule of Evidence 301.

A burden of production v. a burden of persuasion

A burden of production is defined as “[a] party’s duty to *introduce* enough evidence on an issue to have the issue decided by the fact-finder, rather than decided against the party in a peremptory ruling such as a summary judgment or a directed verdict.”¹⁴ A burden of persuasion is defined as “[a] party’s duty to *convince* the fact-finder to view the facts in a way that favors that party.”¹⁵ A burden to introduce evidence to create a need for a determination by a fact-finder (burden of production) is substantially less onerous than the burden to convince the fact-finder of your position (burden of persuasion).

The relevant presumption rules

The term presumption is defined as “[a]

The Idaho Supreme Court adopted the analysis in name only.

legal inference or assumption that a fact exists, based on the known or proven existence of some other fact or group of facts.”¹⁶ A presumption can shift a burden of production or persuasion to the opposing party.¹⁷

The Federal rule governing presumptions is Federal Rule of Evidence 301. This rule shifts the burden of production only. It reads in relevant part: “[A] presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, *but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion*, which remains throughout the trial upon the party on whom it was originally cast.”¹⁸ Therefore, the traditional analysis of *McDonnell Douglas* makes sense. Only the burden of *production* shifts to the employer, and upon the introduction of evidence that it took the adverse employment action for a legitimate non-retaliatory reason, the burden of production shifts back to the employee. At all times the employee retains the burden of persuasion to convince the fact-finder that the employer violated the law.

The North Dakota rule governing presumptions is North Dakota Rule of Evidence 301. This rule shifts the burden of persuasion. It reads in relevant part: “A party against whom a presumption is directed *has the burden of proving that the nonexistence of the presumed fact is more probable than its existence.*”¹⁹ This rule provides a hornbook definition of a burden of persuasion. It is not enough to introduce evidence that raises an issue of fact as to whether the employer had a legitimate reason for the adverse employment action. Instead, the party against whom the presumption is directed must introduce evidence that necessarily will *convince* the trier of fact.

Idaho’s presumption rule, Idaho Rule of Evidence 301, contains identical language to the Federal rule. And the Idaho rule continues with language that is even more direct. “The burden of going forward is satisfied by the introduction of evidence sufficient to permit reasonable minds to conclude that the presumed fact does not exist.”²⁰ In other words, so long as there is an issue of fact created as to whether the employer has a legitimate, non-retaliatory reason, the burden of production shifts back to the employee. Because Idaho’s rule, like the Federal rule, shifts only the burden of production, the

In Curlee, the Idaho Supreme Court concluded that the application of the McDonnell Douglas burden-shifting analysis to Idaho’s whistleblower statute requires departure from the traditional analysis.

traditional *McDonnell Douglas* analysis should apply. So, why did the Idaho Supreme Court depart from the traditional analysis?

The Idaho Supreme Court’s departure explained

In *Curlee*, the Idaho Supreme Court concluded that the application of the *McDonnell Douglas* burden-shifting analysis to Idaho’s whistleblower statute requires departure from the traditional analysis. The Court quoted the North Dakota Supreme Court and said: “While other courts have found the *McDonnell Douglas* framework useful in approaching cases under state whistleblower statutes, those courts have also noted that the ‘burden shifting rule of *McDonnell Douglas* . . . has little or no application at the summary judgment stage . . . [and] explicitly governs the burden of persuasion at trial.”²¹ But it is not the application of the burden-shifting analysis to whistleblower statutes that requires departure from the traditional analysis. Instead, it is the North Dakota rule that shifts the burden of persuasion.

The Idaho Supreme Court relied for its departure from the traditional *McDonnell Douglas* analysis on *Heng v. Rotech Medical Corporation*, 688 N.W.2d 389 (N.D. 2004). This case is the product of a long line of North Dakota Supreme Court cases, including *Schweigert v. Provident Life Insurance Company*, 503 N.W.2d 225 (N.D. 1993), in which the North Dakota Supreme Court specifically distinguished the traditional *McDonnell Douglas* burden-shifting analysis from the analysis applied by North Dakota courts. The Court explained that the North Dakota Rule of Evidence is “dramatically different” from the Federal rule.²² The court went on to explain that under North Dakota Rule of Evidence 301, “[a] party against whom

a presumption is directed has the burden of *proving* that the nonexistence of the presumed fact is more probable than its existence.”²³ The court noted that “[o]ur rule gives presumptions a stronger effect than they are given under the comparable Federal Rules of Evidence, which imposes only a burden of producing evidence to rebut a presumption.”²⁴ Because the burden placed on a defendant is to convince the trier of fact, it makes some sense that the North Dakota Supreme Court applies this analysis not at summary judgment, but at trial.²⁵

The possible effect on defendant-employers in Idaho

The Idaho Supreme Court’s holding in *Curlee* may: (1) prevent defendant-employers from ever prevailing at summary judgment; and (2) place the ultimate burden of proof at trial on the defendant-employer.

If a plaintiff makes out a *prima facie* case, he is likely entitled to a trial, notwithstanding the legitimacy of the defendant-employer’s reason for the adverse employment action. Under *McDonnell Douglas*, a plaintiff may make out a *prima facie* case through an admittedly “weak showing.”²⁶ But that showing only entitles the plaintiff to “a commensurately small benefit, a transitory presumption of discrimination.”²⁷ Because the Idaho Supreme Court has now set a higher burden on defendant-employers, the “weak showing” by a plaintiff, without more, may entitle that plaintiff to move beyond summary judgment and to trial. For example, in *Curlee*, the Court concluded that “proximity in time between the protected activity and the adverse employment action,” a mere *prima facie* case of retaliatory discharge, was enough to move beyond summary judgment.²⁸

Also under *Curlee's* holding, to prevail at trial, an employer is likely going to have to convince the trier of fact that its proffered legitimate, non-retaliatory reason is the reason for the adverse employment action. This is because the Idaho Supreme Court has placed the burden of persuasion on the defendant-employer to convince the trier of fact of its proffered reason for the adverse employment action before the presumption directed against it is removed. Ultimately, this places the burden on the defendant-employer to avoid liability when the burden properly rests with the plaintiff to prove the merits of her case.

Further explanation or review is necessary

The North Dakota authority cited by the Idaho Supreme Court does not appear to apply in a jurisdiction like Idaho, where only the burden of production shifts to the defendant-employer. Moreover, a plain reading of Idaho Rule of Evidence 301 supports application of the traditional *McDonnell Douglas* analysis at summary judgment. The holding in *Curlee*, appar-

ently to the contrary, is likely in need of further explanation or review.

About the Author

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Endnotes

- ¹ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).
- ² See, e.g., *Budnick v. Town of Carefree*, 518 F.3d 1109, 1114 (9th Cir. 2008) (ADA); *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 888 (9th Cir. 1994) (ADEA).
- ³ See e.g. *McClain v. Pfizer, Inc.*, 2010 WL 746780, *8 (Feb. 26, 2010) (“An action pursuant [to Connecticut’s whistleblower statute] is subject to the *McDonnell Douglas* burden shifting analysis.”); *Buytendorp v. Extencicare Health Servs., Inc.*, 498 F.3d 826, 834 (8th Cir. 2007) (applying the *McDonnell Douglas* burden-shifting framework to claims under the Minnesota Whistleblower Statute).
- ⁴ *Curlee v. Kootenai County Fire & Rescue*, 148 Idaho 391, 224 P.3d 458 (Idaho 2008).
- ⁵ *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 855 (9th Cir. 2002) (emphasis added).

- ⁶ *Id.*
- ⁷ *Id.*
- ⁸ *Id.*
- ⁹ *Id.*
- ¹⁰ *Curlee*, 148 Idaho at 396, 224 P.3d at 463.
- ¹¹ *Id.*
- ¹² *Id.*
- ¹³ *Schweigert c. Provident Life Ins. Co.*, 503 N.W.2d 225, 228 (N.D. 1993) (quoting North Dakota Rule of Evidence 301).
- ¹⁴ Black’s Law Dictionary 209 (8th ed. 2004) (emphasis added).
- ¹⁵ *Id.*
- ¹⁶ *Id.* at 1223.
- ¹⁷ *Id.*
- ¹⁸ Fed. R. Evid. 301 (emphasis added).
- ¹⁹ North Dakota R. Evid. 301 (emphasis added).
- ²⁰ Idaho R. Evid. 301.
- ²¹ *Curlee*, 148 Idaho at 396, 224 P.3d at 463.
- ²² *Schweigert*, 503 N.W.2d at 228.
- ²³ *Id.* (quoting North Dakota R. Evid 301).
- ²⁴ *Id.* at 229.
- ²⁵ *Heng v. Rotech Med. Corp.*, 688 N.W.2d 389 (N.D. 2004) (“The rule explicitly governs the burden of persuasion at trial and creates a presumption of wrongful employment activity if the employee presents a prima facie case.”).
- ²⁶ *Desert Palace, Inc.*, 299 F.3d at 855.
- ²⁷ *Id.*
- ²⁸ *Curlee*, 148 Idaho at 396, 224 P.3d at 463.

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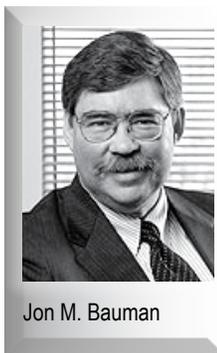
Jon M. Bauman
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On November 20, 2009, the Idaho Industrial Commission entered a decision addressing the kinds of worker's compensation benefits an undocumented worker may claim.¹¹ The Commission has since denied reconsideration of that decision.²² This article will spell out some of the background for and practical consequences of that decision.

Background

Worker's compensation differs from common law remedies in several important respects. Worker's compensation systems are statutory, no-fault systems generally administered by a state agency required to construe the law broadly in order to fulfill its remedial purposes. Worker's compensation is a compromise, intended to provide sure and certain relief in lieu of common law remedies for wage workers who experience industrial injury or occupational disease. This has important consequences. First, worker's compensation is the exclusive remedy for the injured worker against the employer and the exclusive form of liability for the employer to an employee who has sustained an on-the-job injury or disease. A second consequence is that the worker is not made "whole" under the worker's compensation system. Thus, instead of seeking tort damages for pain and suffering, lost wages, loss of consortium, loss of future earning capacity or punitive damages, the worker is limited to statutorily-defined benefits. The worker must prove compensability by:

1. Showing the alleged injury or disease was produced by an accident arising out of and in the course ("course and scope") of a non-exempt employment; and
2. Establishing by expert medical evidence to a reasonable degree of medical probability that the injury or condition complained of resulted from the alleged accident or disease. If a claim is compensable, the worker may be entitled to medical care, potentially for life, and in-



Jon M. Bauman

The dispute arose over whether Diaz should receive compensation for loss of access to a labor market in Idaho or the United States to which he never had legal access.

come benefits. Income benefits is a broad term encompassing time loss benefits paid during the period of recovery; benefits for permanent physical impairment (based on a "rating" or medical assessment); benefits for permanent disability (loss of earning capacity) above and beyond permanent impairment; and in proper cases, retraining. Benefits paid for disability, whether temporary or permanent, are not to be equated with damages paid for lost wages or loss of future earning capacity. A worker who is totally and permanently disabled may recover income benefits for life.

The Diaz decision

Diaz v. Franklin Building Supply and Liberty Northwest Insurance Corporation squarely presented the Industrial Commission with the question of whether an undocumented, industrially, injured worker qualifies for benefits for permanent partial disability. Diaz, the injured worker (Claimant), admitted he entered the United States illegally around 2004 as an adult and purchased a fictitious resident alien card and fictitious permanent resident card, in a fictitious name, which contained the false declaration that he had been a U.S. resident since 1992. Diaz also assumed the name Jesus Diaz, the name on the false documents. In 2005, he presented the card to Franklin Building Supply, (employer), and was hired. He admitted he did not disclose his real name or identity when he applied; Franklin offered testimony that the card did not appear to be altered or suspicious. Diaz was injured on the job and was found by different physicians to have permanent physical impairment of 4% or 6% of the whole person. The surety Liberty Northwest did not dispute his entitlement to benefits for medical care, time loss or permanent impairment. The Commission found that

Diaz admitted he had not sought work since his accident. But as Commissioner Thomas Baskin observed in his dissenting opinion, Diaz actually did testify that he had looked for work following his industrial injury and was hindered in doing so by his physical limitations. Diaz presented expert vocational evidence that he had permanent disability in excess of his impairment rating due to his injury and impairment. The dispute arose over whether Diaz should receive compensation for loss of access to a labor market in Idaho or the United States to which he never had legal access.

Idaho Code Section 72-204(2) provides that employees and employers in private employment, "subject to the provisions of this law," include "[a] person, including a minor, whether lawfully or unlawfully employed, in the service of an employer under any contract of hire or apprenticeship, express or implied... if employed with the knowledge, actual or constructive, of the employer." It was not disputed that Diaz's employment at Franklin was covered employment.

The Industrial Commission voted 2-1 to adopt the recommended decision of the referee that Diaz was not entitled to benefits for permanent partial disability. The referee cited previous Commission decisions holding that a worker could be found to have no disability beyond impairment where work restrictions imposed for a condition independent of the industrial injury exceeded the restrictions imposed for the industrial injury.³³ The referee also cited a Commission decision from 2006 holding that an undocumented worker was not entitled to benefits for permanent disability beyond impairment on the grounds that he had not sought work since his accident because he was considering moving back to Mexico or because he knew he did

not have the documents needed to work in the United States.⁴⁴ Analogizing to the latter case, the Commission found Diaz's loss of earning capacity was attributable to his volitional decisions arising from his undocumented status, and not from his industrial injury. Underlying the Commission's previous decisions on disability was the assumption that the worker had the ability to engage in lawful employment. Observing that these past decisions did not evaluate labor markets for shoplifters, drug traffickers, and the like, the Commission refused to assess permanent disability here based on presumptions of future illegal conduct. Current law also precluded a finding of disability based on loss of access to a labor market in Mexico, and in any event, Diaz denied any intent to return to Mexico.

Commissioner Baskin's dissent

Commissioner Thomas Baskin dissented on the grounds that a real and significant market for undocumented workers exists in Idaho. In other words, legal access to that labor market is not the same as actual access. He argued that Diaz's employment is not unlawful because of the nature of the work he was hired to do, but because of his immigration status.⁵⁵ Commissioner Baskin felt it would do more violence to the administration of the law to adopt the fiction that no labor market exists for undocumented workers than to recognize that Diaz lost access to the actual market that exists for undocumented workers. This circumstance is a non-medical factor of the kind the Commission must otherwise take into account in determining the extent of permanent disability.⁶⁶ To assess Diaz's disability, he contended, the Commission should consider not only his vocational history and physical restrictions, but whatever labor market he could successfully access by presenting his false documents to employers who either did not care about his illegal status or were deceived by them. Based on the vocational evidence, Commissioner Baskin would have awarded Diaz's 13% permanent disability inclusive of his impairment rating.

Commissioner Baskin's dissent focused on Diaz's status as an undocumented worker: "The employment of Claimant is illegal, not because of any impropriety associated with the gainful activity, but rather, because of Claimant's status as an illegal alien."⁷⁷ He continued: "In performing its assessment of Claimant's disability, for the Commission to recognize that Idaho employers, wittingly or

Employers should not be able to circumvent the requirements of the worker's compensation law by hiring undocumented workers.

not, employ undocumented workers does not 'offend justice, condone illegal activity and dramatically alter the meaning and evaluation of disability."

While it is true that the Commission did not focus on whether the work Diaz was hired to perform was itself lawful or not, it is difficult to dispute that there was some "impropriety associated with the gainful activity." After all, Diaz admitted that in order to obtain work, he engaged in a series of improper acts, including obtaining two forms of false identification, representing himself as someone he was not, representing himself as having lived longer in the United States than he had, and repeatedly providing false identification to prospective employers with the intent that they rely on it. After his injury, as Commissioner Baskin pointed out, Claimant also attempted to obtain other employment, presumably by making the same false representations. Lying about one's identity may also entail lying about one's age and date of birth, which are factors that can bear on the propriety – even the legality – of a worker's performing certain kinds of work. It is also entirely plausible, as the Commission noted, that employers engage in unlawful conduct in hiring undocumented workers. Thus, it may not be easy to separate the legality of the means by which the work was obtained from the legality of the work itself, or from the legality of having the particular worker perform the duties of the particular job. Commissioner Baskin's analysis offers a tribunal an option it may find none too savory, namely, agreeing to award benefits to workers who have willfully misrepresented their legal status and identity based on lost access to a labor market consisting of employers who are either so corrupt they do not care whether they are being offered false identification or so gullible they will accept the false identification without realizing they have been deceived.

What next?

On February 23, 2010, the Industrial Commission denied Diaz's Motion for

Reconsideration, declaring it would not re-weigh the evidence and arguments simply because a party did not prevail. The Commission reiterated that it had determined Diaz did not sustain permanent disability beyond his impairment because of his injury and impairment, but because of his status as an undocumented worker.⁸ Therefore, Diaz failed to prove permanent disability in excess of his impairment.

Particularly significant is that the surety in this case accepted the claim and paid the other worker's compensation benefits Diaz sought, including medical benefits, time loss, and benefits for his permanent physical impairment, without being ordered to do so. Strong policy considerations dictate that employers should not be able to circumvent the requirements of the worker's compensation law by hiring undocumented workers. Moreover, Idaho Code Section 72-204 provides, and has provided since 1971, that employees in private employment are subject to the worker's compensation law, "whether lawfully or unlawfully employed." The statute, however, does not distinguish among the types of benefits to which a worker may be entitled based on whether he was lawfully or unlawfully employed. The surety addressed that issue by asserting that Diaz was not permanently disabled from work because of his injury and resultant impairment but because he elected not to seek work after his injury based on his illegal status. The Commission agreed. Diaz offered no assurance to the Commission that he would ever seek lawful access to his labor market and the Commission refused to presume future illegal access. In other words, Diaz failed to prove a causal connection between his injury and impairment on the one hand, and his loss of earning capacity on the other. But as Commissioner Baskin observed, Diaz actually testified that he had looked for work following his industrial injury and was hindered in doing so by his physical limitations.

By basing its holding on a lack of causal relationship between the injury and the purported disability, the Commission

might have avoided relying on the premise that an undocumented worker cannot claim benefits for permanent disability beyond impairment because that requires showing a loss of ability to engage in gainful activity, and since the worker could not lawfully engage in gainful activity in the first place, he could not lose what he never had. But the Industrial Commission nevertheless grasped this particular nettle, observing it is implicit that future earning capacity is evaluated according to a worker's ability to engage in lawful, as opposed to unlawful, gainful activity. The Commission recognized that unlawful employments exist but declared its decisions have not addressed permanent disability resulting from loss of access to such employments. Certainly the employer might realize a windfall to the extent it was not required to pay for permanent disability, but that result was deemed preferable to rewarding Diaz's illegal conduct based on his presumed future illegal conduct and the possible future illegal conduct of employers. Thus, the employer did not reap a complete windfall by hiring an undocumented worker and the employee was precluded from reaping one by reason of his "status" (or fraudulent submission of forged identification). It appears the Commission was willing to give each side half a loaf.

One can imagine other issues that may arise to test the parameters of the *Diaz* decision. For instance, a corollary of that decision would presumably be that an undocumented worker may not claim entitlement to retraining under Idaho Code Sec. 72-450 because the worker would only be retrained in order to restore access to a labor market that he could not legally access in the first place. Nothing about the retraining would alter the worker's "status" or inhibit him/her from once again passing false identification. And, while the permanent impairment and likely disability benefits were not particularly large

But the Industrial Commission nevertheless grasped this particular nettle, observing it is implicit that future earning capacity is evaluated according to a worker's ability to engage in lawful, as opposed to unlawful, gainful activity.

in *Diaz*, it is easy to conceive of a case where a young, undocumented worker becomes presumptively totally and permanently disabled under section 72-407, Idaho Code, by reason of an injury that causes the loss of both eyes, both arms, or one of the other conditions provided for there, that would normally require payment of lifetime income benefits. The equities of such a case would strongly militate in favor of awarding disability benefits because absent clear and convincing evidence to the contrary, the worker is deemed totally and permanently disabled. Still, under the reasoning in *Diaz*, such relief plausibly could be barred.

While controversy will no doubt continue to flare around the question of what legal rights undocumented workers may have in worker's compensation proceedings, Idaho employers and sureties are relying on *Diaz* to negotiate settlements that minimize or do not include compensation for permanent disability beyond impairment.

About the Author

Jon M. Bauman is a shareholder at *Elam & Burke, P.A.* where he chiefly represents employers and sureties in worker's compensation litigation. He has served as a hearing officer (referee) at the Industrial Commission and since 1995 has taught

worker's compensation law for the University of Idaho College of Law. He has also taught legislation for the College of Law since 2005 and has drafted legislation and testified before the legislature on worker's compensation, insurance, term limits, and ballot initiatives. He graduated magna cum laude from the University of Utah in 1976 and was awarded an M.A. in English by the same school in 1980. He obtained his J.D. from the University of Idaho College of Law in 1982.

Endnotes

¹ *Diaz v. Franklin Building Supply and Liberty Northwest Ins. Corp.*, 2009 IIC 0652.

² *Id.*, Order Denying Reconsideration, 2010 IIC 0148.

³ *Colby v. WalMart Stores, Inc.*, 2007 IIC 0065; *Casper v. Idaho Falls Care Center*, 2006 IIC 0683.

⁴ *Ruiz v. Blaine Larsen Farms, Inc.*, 2006 IIC 0314.

⁵ This distinction was found to be determinative under a statute containing the same language as quoted above from Idaho Code Sec. 72-204(2), in *Bowers v. General Guaranty Ins. Co.*, 430 S.W.2d 871 (Tenn. 1968).

⁶ See, Idaho Code Secs. 72-425 and 72-430.

⁷ Emphasis in original.

⁸ Idaho Code Sec. 72-423 provides that permanent disability results "when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected." (Emphasis added.)

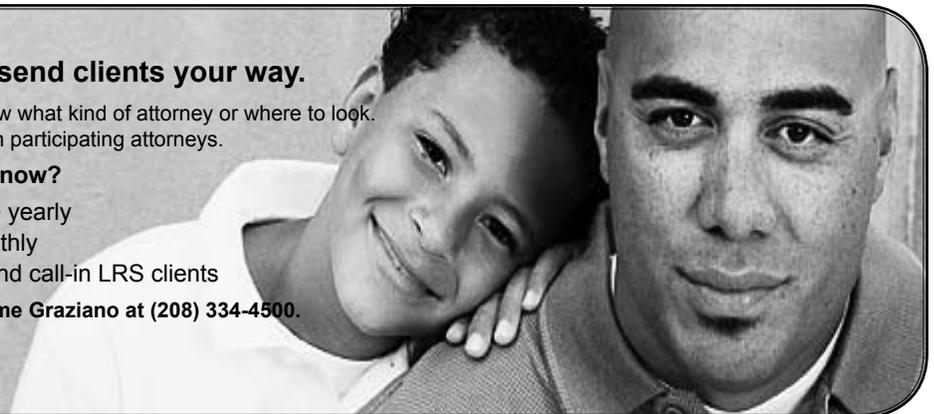
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AN INTRODUCTION TO IDAHO UNEMPLOYMENT LAW FROM A CLAIMANT ATTORNEY'S PERSPECTIVE

Scott A. Gingras
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Introduction

As of May 7, 2010, the State of Idaho owes the federal government for loans incurred to pay unemployment insurance benefits of \$202 million¹. One of the biggest impacts of the recent recession across the country, and no more so than in the state of Idaho, is the overall loss of jobs. With that obviously comes a stark rise in unemployment claims, a rise in unemployment-insurance tax rates and a dramatic rise in unemployment insurance benefits paid out by the states. In 2009, Idaho paid an all-time record of approximately \$627 million in regular, extended, and supplemental unemployment insurance benefits. This was a sharp increase from 2008's entire total of \$247 million.² Idaho's peak rate of unemployment for this current recession is 9.5 percent in February, 2010. This rate is slightly below Idaho's all time peak rate of 9.6 percent from December 1982 through February 1983.³

Due to this nearly unprecedented and unpredictable rise in unemployment, in June of 2009, Idaho began to tap into interest-free loans from the federal government to pay unemployment benefits. As of May 7, 2010, Idaho was one of 33 states to have an outstanding loan balance from the Federal Unemployment Account. Idaho's neighbors Washington, Montana, Oregon, Wyoming and Utah did not have outstanding balances. Still, Idaho's \$200 million dollar debt is in fact minor compared to California's \$6.6 billion. The total balance owed by the states totals \$37.5 billion dollars.

Because unemployment levels continue to be a serious problem across the country, the federal government has attempted to step in and adopt legislation to provide for additional extended benefits for unemployed individuals whose regular unemployment eligibility periods are ending. Congress and the President initially signed a 60-day extension in April of 2010, and as of *The Advocate* goes to press, they are attempting to pass ad-



Scott A. Gingras

ditional legislation, H.R. 4213 American Workers, State and Business Relief Act of 2010, that would grant an extension of unemployment insurance benefits possibly through the end of 2010.⁴

These facts demonstrate the significance of unemployment and benefits and the potential opportunity for pro bono work for claimants.

Idaho unemployment law

Obtaining a determination of eligibility for unemployment benefits is not always as black and white as many claimants initially believe. Simply because an employee is "unemployed" does not mean that he or she is entitled to unemployment insurance benefits. In Idaho, when an employment separation occurs a claimant is eligible for unemployment insurance benefits only if unemployment is not due to the fact that he or she left her employment voluntarily without good cause connected with his or her employment, or that he or she was discharged for misconduct in connection with his or her employment.⁵

The burden of proof of eligibility for benefits depends upon whether the employee was "discharged" or "quit." When a discharge has occurred the burden of proof that a claimant employee is not entitled to benefits rests with the employer. The burden of proof on the employer is to prove by a preponderance of the evidence that a claimant was discharged for employment-related misconduct.⁶ However, it is still the claimant's initial burden of proving by a preponderance of the evidence that a discharge occurred in the first place. Only if the claimant proves discharge, does the burden to shift to the employer to prove misconduct.⁷

Misconduct that disqualifies an individual from obtaining unemployment benefits must be connected with the individual's employment and involve one of three things: (1) a disregard of the

employer's interest, (2) a violation of a reasonable rule of the employer, or (3) a disregard of the employer's standard of behavior. If the employer fails to meet its burden of proving one of those disqualifying misconducts by a preponderance of the evidence, benefits must be awarded to the claimant.⁸ A "disregard of employer's interest" is a willful, intentional disregard of the employer's interest.⁹ A "violation of reasonable rules" is a deliberate violation of the employer's reasonable rules.¹⁰ A "disregard of standards of behavior" is a disregard of a standard of behavior which the employer has a right to expect of his employees.¹¹ In the standards of behavior analysis, there is no requirement that the individuals conduct be willful, intentional, or deliberate. The claimant's subjective state of mind is irrelevant. The conjunctive test for misconduct in "standard of behavior cases" is: (1) whether the claimant's conduct fell below the standard of behavior expected by the employer; and (2) whether the employer's expectation was objectively reasonable in the particular case.

In a discharge case, some of the practical issues are:

- Inability of an individual to perform his or her job. Ordinarily negligence and non-job related conduct is not considered misconduct connected with employment to disqualify an individual for benefits.¹²
- After-the-fact reasons for discharge. Although not set out in statute or code, it has been held that an after-the-fact reason or basis for a discharge alleged by an employer during an unemployment case, but not stated by the employer as its original reason (i.e. the cause for the termination), should not be considered in the Department of Labor's eligibility determination. Therefore, it is important to determine whether there is a termination record and compare what the stated reason for discharge is in the record and to compare

The burden of proof of eligibility for benefits depends upon whether the employee was "discharged" or "quit."

that with what the employer is arguing for the discharge in the unemployment case. Then, if the employer is arguing additional reasons for the termination beyond what is stated in the documentation, the claimant or his representative should argue that the employers' other reasons should not be considered in the determination for eligibility of benefits.

Unlike a discharge, when an individual quits his or her job, that person has the burden of proof to establish that he or she voluntarily left the employment with good cause in connection with the employment to be eligible for benefits.¹³ This can be a difficult burden to meet. "Good cause" in Idaho unemployment law is a standard of reasonableness as applied to the average man or woman. Whether good cause is present depends upon whether a reasonable person would consider the circumstances resulting in the claimant's unemployment to be real, substantial, and compelling.¹⁴ To be good cause "connected with employment," a claimant's reason for leaving the employment must arise from the working conditions, job tasks, or employment agreement. If the claimant's reason for leaving the employment arises from personal/non-job related matters, the reason is not connected with the claimant's employment.¹⁵ Some of the issues to be considered when working through an analysis of an unemployment "quit" case are:

- In order to constitute good cause, the circumstances which compel the decision to leave employment must be real, not imaginary, substantial, not trifling, and reasonable, not whimsical. There must be some compulsion produced by extraneous and necessitous circumstances.¹⁶ Additionally, when an employee has viable options available, voluntary separation without exploring those options does not constitute good cause for obtaining unemployment benefits.¹⁷ However, there is no requirement that a claimant must pursue all viable options.¹⁸
- Quitting work that is not suitable is always good cause for leaving employment.¹⁹ Also an employee leaves his employment with good cause when conditions were unsuitable when compared to the conditions of the job as originally offered.²⁰
- An individual whose unemployment is due to health or physical conditions which makes it impossible to continue to perform the duties of the job shall be deemed to have quit with good cause connected with employment.²¹

The examiner's file will most often include the examiner's notes of his or her conversations with the claimant and the respondent employer.

- An individual who leaves his or her job because of a reasonable and serious objection to the work requirements of the employer on moral or ethical grounds and is otherwise eligible, shall not be denied benefits.²²
- A wage reduction in claimant's pay can constitute a substantial adverse change in conditions giving claimant good cause to leave employment.²³

Process and procedure for obtaining benefits in Idaho

Initially a claimant files a claim of unemployment with the local office of the Department of Labor. The determination of the local office examiner shall become final unless, within 14 days after notice, an appeal is filed by an interested party with the Department of Labor. Some of the potential issues to keep in mind when considering representation of an unemployment claimant in an appeal of a local office determination are:

- Has the time to appeal expired? The 14-day clock begins to run upon "notice" of the determination. Notice under the applicable statute is deemed served on the date of mailing to the last known address.²⁴ If the claimant or a representative for the claimant is going to file an appeal it is important to note that an appeal must be in writing or submitted on a Request for Appeals Hearing form and should include the specific determination that is being appealed, the claimant's Social Security number, and the signature of an interested party or the party's representative attorney.²⁵
- What is the respondent employer's position, and what facts and evidence to support the denial of benefits? An easy way to obtain this information and see exactly what is being argued on both sides of the unemployment battle is to ask the potential client to go to their local office and request a complete copy of their unemployment file. The examiner's file will most often include the examiner's notes of his or her conversations with the claimant and

the respondent employer. This will give a clearer understanding of the facts and potential issues that may be faced in representing the claimant on appeal.

Once the local office determination has successfully been appealed a telephonic hearing is scheduled to affirm, modify, set aside or reverse the determination or redetermination involved. The telephonic hearing is to afford the interested parties and/or their representatives a reasonable opportunity for a fair hearing.²⁶ The proceeding before an appeals examiner is a hearing de novo.²⁷ During the telephonic hearings the appeals examiners generally allow the parties or their representatives to present and/or defend their cases in a trial format, with the party who will bear the burden of proof presenting its case first. Some of practical matters to keep in mind for preparing for an unemployment telephonic hearing are:

- What evidence is needed to establish that the claimant is entitled to unemployment benefits? Evidence in unemployment cases can come from a variety of sources, including but not limited to employment handbooks, letters, e-mails, and even sometimes the "employers response form" from the initial determination made by the local office. Generally the appeals examiner will not allow anything into evidence that was not provided to the opposing party prior to the telephonic hearing. The appeals examiner may also exclude evidence that is irrelevant, unduly repetitious, or excludable on constitutional or statutory grounds, or on the basis of any evidentiary privilege provided by statute or recognized in the courts of Idaho.²⁸
- Are there any witnesses necessary to provide testimony to establish that the claimant is entitled to unemployment benefits? If so, but there are concerns that the witness may just be voluntarily available for the hearing or is reluctant about testifying, the appeals examiner may issue a subpoena for the witness.²⁹ In order to obtain the subpoena, the Department

of Labor must have a request in advance containing information about the witnesses including name, address, phone number and a brief description of what you believe the witness's information and/or testimony will be. If a person fails to respond to a subpoena issued by mail, the appeals examiner will proceed with the scheduled hearing and determine, after hearing the available testimony, whether the subpoena is still necessary and reasonable. If so, the hearing will be continued and a second subpoena will be issued and personally served.³⁰

- What happens if the parties fail to appear for the telephonic hearing? If it is determined that no party appeared to present additional evidence the appeals examiner can still make an eligibility determination based upon the existing record.³¹

The determination of the appeals examiner shall become final unless, within fourteen (14) days after notice, a claim for review of the appeals examiner's decision, as provided in Idaho Code Section §72-1368, is made in writing, signed by the person claiming the review or by his attorney or agent, and filed with the Idaho Industrial Commission, (the Department of Labor).³²

At the Idaho Industrial Commission level the record before the commission shall consist of the record of the proceedings before the appeals examiner, unless it appears to the commission that the interests of justice require that the interested parties be permitted to present additional evidence. In that event, the commission may, in its sole discretion, conduct a hearing or may remand the matter back to the appeals examiner for an additional hearing and decision. If a new hearing is not granted at the commission level and/or the matter is not sent back to the appeals examiner, the parties are usually given the

opportunity to submit briefing. The commission will then affirm, reverse, modify, set aside or revise the decision of the appeals examiner or may refer the matter back to the appeals examiner for further proceedings. At this point, the decision of the commission becomes final and conclusive as to all matters unless within twenty (20) days from the date of filing of the decision any party moves for reconsideration.³³ In addition, even after the commission's determination has each party has the ability pursuant to statute to appeal any decision or order of the Industrial Commission to the Idaho Supreme Court in the time and manner prescribed by the rules of the Idaho Supreme Court.³⁴

Conclusion

Overall, unemployment determinations are often driven by different and diverse facts, the evidence available and the burden of proof. Representing claimants can be some of the most rewarding work for truly deserving people that are grateful for the help. An attorney who receives contact from a potential client looking for help on an unemployment case should consider taking it on a pro bono basis. This is because people who are contacting attorneys for help on an unemployment claim have found themselves in a Catch 22: they are being asked to pay an hourly rate for an attorney's representation, but they are unemployed with no income stream; they have been denied unemployment benefits and don't understand why; and they need help but are in the position of either paying for an attorney's services or paying their mortgage bills.

About the Author

Scott A. Gingras is the vice chair of the Idaho State Bar Employment and Labor Law Section. Mr. Gingras is an associate attorney with the Coeur d'Alene

firm James, Vernon & Weeks, P.A. His practice primarily focuses on personal injury and employment law.

Endnotes

- ¹ Idaho Department of Labor – Communications and Research – May 2010.
- ² Idaho Department of Labor Press Release 12/18/09.
- ³ Idaho Department of labor Press Release 6/04/10
- ⁴ Idaho Department of Labor; H.R. 4213, a description can be found at www.opencongress.org/bill/111-h4213/show.
- ⁵ I.C. §72-1366(5).
- ⁶ IDAPA 09.01.30.275.01 (03-19-99).
- ⁷ *Johnson v. Idaho Central Credit Union*, 127 Idaho 867, 869, 908 P.2d 562, 564 (1995).
- ⁸ *Roll v. City of Middleton*, 105 Idaho 22, 25, 665 P.2d 721, 724 (1983).
- ⁹ IDAPA 09.01.30.275.02.a. (3-19-99).
- ¹⁰ IDAPA 09.01.30.275.02.b. (3-19-99).
- ¹¹ IDAPA 09.01.30.275.02.c. (3-19-99).
- ¹² IDAPA 09.01.30.275.03 (3-19-99); IDAPA 09.01.30.275.04. (03-19-99).
- ¹³ IDAPA 09.01.30.450.01 (3-19-99).
- ¹⁴ IDAPA 09.01.30.450.03 (3-19-99).
- ¹⁵ IDAPA 09.01.30.450.02 (3-19-99).
- ¹⁶ *Burroughs v. Employment Security Agency*, 86 Idaho 412, 414, 387 P.2d 473, 474 (1963).
- ¹⁷ *Ellis v. Northwest Fruit & Produce*, 103 Idaho 821, 823, 654 P.2d 914, 916 (1982).
- ¹⁸ *Reedy v. M.H. King Co.*, 128 Idaho 896, 902, 920 P.2d 915, 921 (1996).
- ¹⁹ *Clay v. BMC West Truss Plant*, 127 Idaho 501, 504, 903 P.2d 90, 93 (1995).
- ²⁰ *Clay v. Crooks Industries*, 96 Idaho 378, 379, 529 P.2d 774, 775 (1974).
- ²¹ IDAPA 09.01.30.450.05 (3-19-99).
- ²² IDAPA 09.01.30.450.04 (3-19-99).
- ²³ *Kyle v. Beco Corp.*, 109 Idaho 267, 269, 707 P.2d 378, 380 (1985).
- ²⁴ I.C. §72-1368(5).
- ²⁵ Idaho Department of Labor at <http://labor.idaho.gov/dnn/Default.aspx?tabid=686>.
- ²⁶ I.C. 72-1368(6).
- ²⁷ IDAPA 09.01.06.026.10 (4-05-00).
- ²⁸ IDAPA 09.01.06.026.13 (4-11-06).
- ²⁹ IDAPA 09.01.06.026.06 (3-19-99).
- ³⁰ IDAPA 09.01.06.026.07 (3-19-99).
- ³¹ IDAPA 09.01.06.026.04 (4-11-06).
- ³² IDAPA 09.01.06.066.01 (4-05-00).
- ³³ I.C. §72-1368(7).
- ³⁴ I.C. §72-1368(9).

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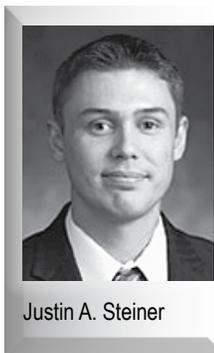
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EFFICIENT AND EFFECTIVE NON-COMPETE AGREEMENTS IN A DOWN ECONOMY

Justin A. Steiner
Givens Pursley LLP

In a down economy, businesses must zealously pursue every business advantage while vigorously protecting the business advantages they already possess. In a competitive business environment sharpened by the worst economy in years, those two goals are often difficult to reconcile among competing businesses. A business may, in the pursuit of a business advantage, seek to hire a key employee away from a competitor. The competitor, however, will not stand idly by while a key employee is hired away. It is in this context that noncompete agreements (“non-competes”) enter the fray.² Non-competes prohibit employees from working for competitors of the ex-employer for a specific period of time in a specific geographical area following separation of employment. Businesses frequently utilize noncompetes to protect their most valuable asset: the intellectual capital of its employees. When employees with non-competes attempt to join competitors, employers can seek judicial intervention to enforce the noncompete.



The employment picture, both nationally and in Idaho, remains difficult. The national unemployment rate in May 2010 was 9.7 percent.³ Total nonfarm payroll employment grew by 431,000 in May, but largely reflected the hiring of 411,000 temporary employees to work on Census 2010. Private sector employment added only 41,000 jobs.⁴ The number of long-term unemployed (those jobless for 27 weeks or more) was roughly unchanged from April at 6.8 million, equaling 46 percent of unemployed persons.⁵ Thus, the national unemployment picture is seeing small improvements, but remains weak. Idaho is faring slightly better than the nation at large, with unemployment at 9 percent.⁶ While May 2010 was the third straight month Idaho’s unemployment rate had fallen after thirty-one straight monthly increases, it is still higher than any other time since June 1983.⁷ More than 68,000

Businesses frequently utilize noncompetes to protect their most valuable asset: the intellectual capital of its employees.

Idaho workers remained jobless in May, and about 4,000 have exhausted state and federal unemployment benefits without finding work.⁸

Given the painful employment picture, it is tempting to believe noncompete issues would be a secondary concern for employers. If there are a large number of unemployed individuals, ready and available to work, why would a business seek to hire another business’s employee or, alternatively, why would a business concern itself with losing a single employee? The short answer is that many employees add unique value to a business through contacts, relationships, etc., and if a valuable employee leaves, the business will be adversely affected in multiple ways. One might also think that in a difficult economy, employees would cling to their current jobs and try not to make waves. However, an employee who views her job as unstable may seek a job she perceives as more stable in an effort to protect herself from the economic difficulties.

In any event, a down economy forces employers and employees alike to strongly pursue any action they believe protects them from the economic difficulties. Employers will actively seek new advantages and fervently protect the advantages they have, while employees will seek and accept new employment viewed as more stable or promising.⁹ The result is often that of valuable employees changing teams and, if the employee has signed a non-compete agreement, a lawsuit to prevent a competitor from gaining any advantage at the ex-employer’s expense. Therefore, it is important for employers to ensure they understand the state of the law in Idaho regarding noncompetes, including the effect of the Idaho Noncompete Act (the “Act”), and how to draft and enforce noncompetes in an efficient and effective manner.¹⁰ As such, it is an opportune time for attorneys and their clients to review:

(i) Idaho law relating to noncompetes; (ii) the differences and impact, if any, of the Act; and (iii) practical advice for drafting and enforcing noncompetes in the current environment.

The state of noncompete law in Idaho

On July 1, 2008, the Idaho Noncompete Act, Idaho Code § 44-2701 *et seq.*, went into effect. The Act made no seismic shifts to Idaho noncompete law and generally maintained the previous framework created by Idaho courts. However, the Act represents a significant change in the attitude towards and focus in evaluating noncompetes in Idaho. More importantly, the key differences between prior law and the Act, combined with the current state of the economy, provide employers valuable information necessary for efficient and effective noncompete utilization which benefits businesses without overly burdening employees.

Noncompete law in Idaho prior to the Idaho Noncompete Act¹¹

Policy in Idaho prior to June 1, 2008 was that covenants not to compete were “disfavored” and “strictly construed against the employer.”¹² To be enforceable, a covenant not to compete was required to be ancillary to a lawful contract, supported by adequate consideration, and consistent with public policy.¹³ To be consistent with public policy, a covenant not to compete had to be reasonable as applied to the employer, the employee, and the public.¹⁴ In other words, a covenant not to compete was reasonable only if the covenant: (1) was not greater than necessary to protect the employer in some legitimate business interest; (2) was not unduly harsh and oppressive to the employee; and (3) was not injurious to the public.¹⁵ Whether a covenant not to compete was not unduly harsh and oppressive to an employee depended on whether it was reasonable as to

duration, geographical area, and/or scope of activity.¹⁶ Courts were empowered to modify noncompete agreements, but not when the noncompete was so lacking in essential terms the court would have had to rewrite the noncompete.¹⁷

Noncompete law in Idaho subsequent to June 1, 2008¹⁸

Under the Idaho Noncompete Act, key employees and key independent contractors can enter into noncompetes protecting the employer's legitimate business interests.¹⁹ The noncompete may prohibit the key employee or key independent contractor from engaging in employment or a line of business that is in direct competition with the employer's business.²⁰ Such noncompetes, however, must be no greater than reasonably necessary to protect the employer's legitimate business interest and must be reasonable as to duration, geographical scope, and scope of activity.²¹ Courts are directed to limit or modify unreasonable noncompetes to reflect the intent of the parties and render the noncompetes reasonable. Key employees and key independent contractors are defined as those employees and independent contractors who ". . . have the ability to harm an employer's legitimate business interests."²² Legitimate business interests include, but are not limited to, "an employer's goodwill, technologies, intellectual property, business plans, business processes and methods of operation, customers, customer lists, customer contacts and referral sources, vendors and vendor contacts, financial and marketing information, and trade secrets."²³

The Act creates several rebuttable presumptions relating to the reasonableness of a noncompete's restrictions. Specifically: (i) postemployment terms of eighteen months or less are presumed reasonable; (ii) geographical restrictions limited to those areas in which the key employee or key independent contractor provided services or had a significant presence or influence are presumed reasonable; and (iii) scope of activity restrictions limited to the type of employment or line of business conducted by the key employee or key independent contractor while employed by the employer are presumed reasonable.²⁴ The employee bears the burden of rebutting these presumptions.²⁵

Key changes resulting from enactment of the Idaho noncompete act

Upon careful review of the Idaho Noncompete Act, the substantive changes to prior law are minor. Moreover, if published decisions, or the lack thereof,

The Act creates several rebuttable presumptions relating to the reasonableness of a noncompete's restrictions.

are any indication, the Act has not drastically impacted noncompete enforcement. Nonetheless, the Act reflects a fundamental change in how noncompete agreements are viewed in Idaho. In addition, the Act focuses on the necessity of noncompete agreements to protect legitimate business interests with the reasonableness of restrictions supporting that primary focus.

Policy changes to Idaho's existing noncompete law

Prior to enactment of the Act, noncompetes were strongly disfavored by Idaho courts. Courts limited the enforceability of noncompete agreements and, despite authority to do so, often refused to modify overbroad noncompete agreements.²⁶ The Idaho Legislature altered Idaho policy regarding noncompetes by: (i) expressly providing for the creation and enforcement of noncompete agreements; (ii) providing rebuttable presumptions of reasonableness for durational, geographical, and scope of activity restrictions in noncompetes, which place the burden of proof on the employee and not the employer; and (iii) directing courts to limit or modify unreasonable noncompete agreements and specifically enforce the agreements as limited or modified.²⁷ The cumulative effect of these changes is a broader policy change in Idaho favoring noncompetes.

The importance of the change in Idaho policy favoring noncompete agreements cannot be overstated. However, the policy shift represents a dangerous temptation to employers. Employers may draft noncompete agreements as broadly as possible, knowing a court must modify and specifically enforce the agreement. This approach, however, impedes efficient and effective use of noncompetes. Moreover, a court could, finding a noncompete unreasonable, significantly limit the restrictions in the noncompete. A court is directed by Idaho Code § 44-2703 to limit or modify noncompetes as it deems necessary to reflect the intent of the parties and render it reasonable. This direction provides significant discretion to courts to modify

noncompetes. While requiring modification is an improvement over prior law for employers, there is no guarantee employers will be satisfied once the modifications are made.

The Idaho noncompete act focuses on the protection of legitimate business interests

Noncompete law in Idaho prior to enactment of the Idaho Noncompete Act required a determination that the employer had a legitimate business interest worthy of protection and placed the burden of proving the extent of that interest on the employer.²⁸ However, once a court determined the employer did have a legitimate business interest to protect, the analysis turned to the reasonableness of the durational, geographical, and scope of activity restrictions.²⁹ Courts did not engage in an additional analysis of whether the noncompete agreement imposed no greater restraint than necessary to protect the employer's legitimate business interest. In this regard, it is possible that a noncompete agreement's durational, geographical, and scope of activity restrictions could be reasonable, but more narrowly drawn to protect the employer's legitimate business interest. Under the Act, noncompetes must be "reasonable as to its duration, geographical area, type of employment or line of business, **and** . . . not impose a greater restraint than is reasonably necessary to protect the employer's legitimate business interests."³⁰ This language suggests an analysis of both the necessity and the reasonableness of the noncompete's restrictions.

It is possible there is no practical difference between a single reasonableness determination under prior law and separate necessity and reasonableness determinations under the Act. In other words, courts may find a noncompete's durational, geographic, and scope of activity restrictions reasonable only if they are strictly necessary to protect the employer's legitimate business interest. Nonetheless, the language of the Act requiring both a

reasonableness and necessity analysis emphasizes the paramount importance of focusing upon the concept of protecting legitimate business interests with restrictions which are as narrowly drawn as possible when drafting and evaluating noncompetes.

This conclusion is also reflected in the rebuttable presumptions created by the Idaho Legislature relating to reasonableness. By creating rebuttable presumptions, the Idaho Legislature has effectively limited the importance of the reasonableness analysis, leaving the necessity analysis as the primary determination. Presumably, employers will attempt to stay within the safe harbor of the presumptions. When employees attempt to rebut the presumptions, one anticipates their arguments will revolve around the proposition that the restrictions are greater than necessary to protect the employer's legitimate business interests. Thus, rebutting the presumptions will likely turn back to the primary focus of the Act: protecting legitimate business interests only to the extent strictly necessary. Also, the Act limits noncompetes to "key employees" and "key independent contractors," defined as those employees and independent contractors who "have the ability to harm or threaten an employer's legitimate business interests."³¹ This further reinforces the primary focus of the Act as protecting legitimate business interests only to the extent strictly necessary, with the reasonableness of restrictions playing a supporting role.

Certainly, there may be little practical difference between a necessity analysis and a reasonableness analysis for noncompete restrictions. However, the framework of the Act suggests a change in focus towards protecting an employer's legitimate business interests only as strictly necessary, instead of whether a noncompete's restrictions are reasonable in isolation. The temptation in the reasonableness analysis has always been viewing the restrictions on an island, separated from the interests the employer actually seeks to protect. This temptation often led employers astray, leading to problems for employers and employees alike. The Act emphasizes that durational, geographical, and scope of activity restrictions are merely a means of protecting an employer's legitimate business interests and should be created by reference to the ultimate issue: protecting employer's legitimate business interests only as strictly necessary.

This further reinforces the primary focus of the Act as protecting legitimate business interests only to the extent strictly necessary.

The key changes to the Idaho noncompete act and the current state of the economy should inform noncompete drafting and enforcement

One would expect the state of the economy, particularly the difficult employment picture, to have a significant impact on noncompete enforcement. In evaluating a noncompete agreement, courts are faced with competing interests – the employer's interest is protecting its legitimate business interests and the employee's interest in a new job. During difficult economic times, these interests are particularly acute and difficult to reconcile. With unemployment high, courts would be understandably reluctant to prohibit an individual from working at her chosen job. It is not a stretch to suggest public policy would view with disfavor any barrier to employment in this current economic climate. Certainly one would expect the state of the economy to impact a court's thinking in evaluating a noncompete.³²

The difficult economy and anticipated impact on noncompete enforcement would seemingly be counteracted by the policy shift represented by the Act. The Act sanctions noncompetes and specifically directs courts to enforce them, including modifying and specifically enforcing unreasonable noncompetes. Thus, whatever influence the economy may have on a court, the court cannot simply invalidate the noncompete. However, courts still have the discretion, under Idaho Code § 44-2703, to modify and limit a noncompete upon a finding of unreasonableness. Therefore, a court could be influenced by the economy, find a noncompete unreasonable, and limit it to such an extent it no longer provides the protection the employer hoped for or, worse, needed.

Given economic considerations, the expectation employees will utilize arguments related to the economy, and the potential for such arguments to resonate with courts, employers are well-advised

to draft noncompetes as narrowly as possible so their legitimate business interests are protected only to the extent absolutely necessary. Despite the Idaho Noncompete Act's acceptance of noncompetes, courts retain the discretion to modify and limit noncompetes, and if employers do not draft noncompetes to protect their legitimate business interests only to the extent absolutely necessary, employers risk courts exercising that discretion.

The following guidelines should assist employers in drafting and enforcing noncompetes efficiently and effectively, consistent with current Idaho policy and law, as well as avoiding any pitfalls the economic situation may present to noncompete enforcement.

1. In drafting and enforcing noncompetes, businesses should focus on the legitimate business interests implicated by the specific employee. Instead of trying to determine every possible interest a business may possess, determine the interests an employee will actually affect and draft the noncompete to protect only those interests. Draft durational, geographic, and scope of activity restrictions in the context of protecting the legitimate business interests an employee actually has the ability to harm, and not in isolation.
2. A form noncompete should not be used for all employees and all situations. Instead, tailor noncompetes to particular employees and, again, the legitimate business interests actually implicated by that employee.
3. Do not automatically disregard waiving a noncompete agreement when an employee requests it or forgoing enforcing a noncompete agreement when an employee violates it. Determine if any real injury will result from the employee's actions. Whether to enforce a noncompete should be primarily a business decision supported by a legal analysis of the enforceability of the noncompete. However, an employer who waives or chooses not to enforce a noncompete should clearly document the

reasons why, and all noncompetes should include appropriate provisions relating to waiver.

4. If the decision has been made to seek judicial intervention to enforce a noncompete, file as quickly as possible. Courts are less persuaded that an employer will suffer immediate and irreparable harm if there is a significant delay in filing. However, be sure to have sufficient evidence to support your argument, and be willing to delay filing until sufficient evidence is developed.

5. In seeking to enforce a noncompete, utilize the law but do not rely on it. Instead, focus on the story which should, if at all possible, be sympathetic. Also, an employer should be able to tell the court: (i) it informed the employee of her obligations; (ii) it warned the employee about her violations more than once; and (iii) it now seeks the court's assistance as a last, but necessary, resort. In other words, have a persuasive and sympathetic story supported by both the facts and the law.

About the Author

Justin A. Steiner is an Associate at Givens Pursley LLP. Justin's practice emphasizes employment law, healthcare law, and general civil litigation. He graduated from Washington State University and Vanderbilt University Law School. Justin is currently the Vice-Chairperson of the Employment and Labor Law Section of the Idaho State Bar.

Endnotes

¹ The author was assisted by Robert B. White of Givens Pursley LLP, who provided valuable insight and feedback for this article.

² This article will refer to both covenants not to compete contained in an employment agreement and stand-alone non-competition agreements as "non-competes." All information contained in this article applies equally to covenants not to compete and non-competition agreements. Also, non-solicitation and confidentiality agreements are often effectively utilized along with covenants not to compete and non-competition agreements, but will not be addressed in this article.

³ See *Employment Situation – May 2010*, Economic News Release, U.S. Bureau of Labor Statistics, U.S.

Department of Labor, June 4, 2010, at 1., available at www.bls.gov/bls/newsrels.htm (last visited June 14, 2010).

⁴ *Id.*

⁵ *Id.*

⁶ See *Idaho Jobless Rate Drops for Third Straight Month*, Press Release, Department of Labor, State of Idaho, June 4, 2010, at 1, available at <http://labor.idaho.gov/news/> (last visited June 14, 2010).

⁷ *Id.*

⁸ *Id.*

⁹ Employers seeking new advantages and protecting old advantages, and employees being interested in better employment opportunities, are not phenomena unique to difficult economic times. However, in a robust economy, employers and employees are more likely to become complacent. Moreover, a difficult economy may change the mindset of employers and employees, causing employers to be overly aggressive in pursuing and protecting business advantages and causing employees' morale to plummet until they seek employment viewed as "safer."

¹⁰ On July 1, 2008, Idaho Code § 44-2701 *et seq.* went into effect, titled "Agreements and Covenants Protecting Legitimate Business Interests." The authors are not aware of any shorthand name for Idaho Code § 44-2701 *et seq.* As a result, this article will refer to Idaho Code § 44-2701 *et seq.* as "the Idaho Noncompete Act" or simply "the Act."

¹¹ No attempt is made to exhaustively recite Idaho law regarding noncompetes prior to July 1, 2008. Instead, only a general statement of the law is provided as necessary to discuss the key changes made by the Idaho Noncompete Act.

¹² *Freiburger v. J-U-B Eng'rs, Inc.*, 141 Idaho 415, 419, 111 P.3d 100, 104 (2005).

¹³ *Pinnacle Performance, Inc. v. Hessing*, 135 Idaho 364, 367, 17 P.3d 308, 311 (2001).

¹⁴ *Pinnacle Performance*, 135 Idaho at 367, 17 P.3d at 311; *Marshall v. Covington*, 81 Idaho 199, 202, 339 P.2d 504, 506 (1959).

¹⁵ *Pinnacle Performance*, 135 Idaho at 367, 17 P.3d at 311.

¹⁶ See *Id.*

In seeking to enforce a noncompete, utilize the law but do not rely on it. Instead, focus on the story which should, if at all possible, be sympathetic.

¹⁷ *Freiburger*, 141 Idaho at 422-23, 111 P.3d at 107-08.

¹⁸ No attempt is made to describe all provisions or aspects of the Idaho Noncompete Act. Instead, the basics of the Act are provided to the extent necessary to discuss the key changes made by the Act.

¹⁹ I.C. § 44-2701.

²⁰ *Id.*

²¹ *Id.*

²² I.C. § 44-2702(1).

²³ I.C. § 44-2702(2).

²⁴ I.C. § 44-2704(2)-(4).

²⁵ See *Id.*

²⁶ *Freiburger*, 141 Idaho at 422-423, 111 P.3d at 107-08; *Pinnacle Performance*, 135 Idaho at 369-371, 17 P.3d at 313-15.

²⁷ See I.C. § 44-2701 *et seq.*

²⁸ *Freiburger*, 141 Idaho at 420, 111 P.3d at 109; *Pinnacle Performance*, 135 Idaho at 367, 17 P.3d at 311.

²⁹ See *Freiburger*, 141 Idaho 415, 111 P.3d at 104; *Pinnacle Performance*, 135 Idaho 364, 17 P.3d at 308; *Marshall*, 81 Idaho 199, 339 P.2d 504.

³⁰ I.C. § 44-2701 (emphasis added).

³¹ I.C. § 44-2702(1).

³² Daniel Johnson Jr., Larry L. Turner, and Erica E. Flores reviewed noncompete jurisprudence during the recession and concluded courts are treating noncompetes under the same basic framework that developed during robust economic times and that the rough economy has had little impact. While there are various potential explanations for this conclusion, it is still reasonable to assume courts and parties will be affected by and their decisions will reflect (if not expressly) the down economy in evaluating and enforcing noncompetes, and employers should be cognizant of those possible affects. Law360, *Non-compete Jurisprudence during the Recession*, available at <http://www.morganlewis.com/index.cfm/personID/b9cbab59-c2a8-4d76-9344-14a0d0ffdbfe/fromSearch/0/fuseaction/people.viewBio> (last visited June 15, 2010).

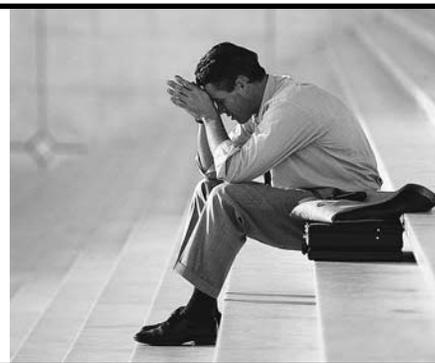
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COURT INFORMATION

OFFICIAL NOTICE SUPREME COURT OF IDAHO

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Roger S. Burdick
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Warren E. Jones
Joel D. Horton

Regular Fall Terms for 2010

Boise. August 23, 25, 27 and 30
Boise September 1
Idaho Falls September 22 and 23
**Note: afternoon times scheduled*
Pocatello. September 24
Boise September 27 and 29
Twin Falls. November 3, 4 and 5
Boise November 8 and 10
Boise. December 1, 3, 6, 8 and 10

By Order of the Court
Stephen W. Kenyon, Clerk

NOTE: The above is the official notice of the 2010 Fall Terms of the Supreme Court of the State of Idaho, and should be preserved. A formal notice of the setting of oral argument in each case will be sent to counsel prior to each term.

OFFICIAL NOTICE COURT OF APPEALS OF IDAHO

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

2nd Amended - Regular Fall Terms for 2010

Boise. July 21
Boise. August 10, 12, ~~17~~ and 19
Boise. September 8, ~~9~~, 14 and ~~16~~
Boise. October 12, 14, 19 and 21
Boise. November 9, 12, 16 and 18
Boise. December 7 and 9

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NOTE: The above is the official notice of the 2010 Fall Terms of the Court of Appeals of the State of Idaho, 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 for August 2010

Monday, August 23, 2010 – BOISE

8:50 a.m. Williams v. Board of Real Estate Appraisers.....#36642
10:00 a.m. State v. Bennett (Petition for Review).....#36678
11:10 a.m. State v. Thorngren (Petition for Review).....#36926

Wednesday, August 25, 2010 – BOISE

10:00 a.m. State v. Windom (Petition for Review).....#36656
11:10 a.m. John Doe I v. Jane Doe (2009-09).....#36572

Friday, August 27, 2010 – BOISE

10:00 a.m. Terra-West, Inc. v. Idaho Mutual Trust.....#36523
11:10 a.m. Peter Renzo v. Dept. of Agriculture.....#36672

Monday, August 30, 2010 – BOISE

10:00 a.m. Vickers v. Lowe.....#36619
11:10 a.m. Simpson v. Trinity Mission Health & Rehab.....#36144

Oral Argument for September 2010

Wednesday, September 1, 2010 – BOISE

8:50 a.m. State v. Longest.....#36083
10:00 a.m. State v. Ciccone (Petition for Review).....#36877

Wednesday, September 22, 2010 – IDAHO FALLS

1:30 p.m. Bagley v. Thomason.....#36041
2:45 p.m. Wanner v. Dept. of Transportation.....#37059

Thursday, September 23, 2010 – IDAHO FALLS

1:30 p.m. Steele v. City of Shelley.....#36481
2:45 p.m. Sirius LLC v. Erickson.....#36466
4:00 p.m. Climax, LLC v. Snake River Oncology.....#36613

Friday, September 24, 2010 – POCATELLO

8:50 a.m. Kuhn v. Coldwell Banker Landmark, Inc.....#29794
10:00 a.m. Sierra Pacific Mortgage Co. v. Archibald.....#36438
11:10 a.m. State v. Adamcik.....#34639

Monday, September 27, 2010 – BOISE

10:00 a.m. Brian and Christie, Inc. v. Leishman Electric.....#35929
11:10 a.m. Shenango Screenprinting v. Dept. of Labor.....#36367

Wednesday, September 29, 2010 – BOISE

8:50 a.m. State v. Hartwig.....#36460
10:00 a.m. State v. Ruiz, Jr. (Petition for Review).....#36514
11:10 a.m. BHC Intermountain Hospital v. Ada County.....#37352

Idaho Court of Appeals Oral Argument for August 2010

Tuesday, August 10, 2010 – BOISE

9:00 a.m. State v. Hanson.....#35403
10:30 a.m. State v. Castillo.....#36235
1:30 p.m. State v. Anderson.....#36319

Thursday, August 12, 2010 – BOISE

9:00 a.m. State v. Tams.....#36539
10:30 a.m. McDaniel v. Dept. of Transportation.....#36744
1:30 p.m. State v. Ruiz.....#35425

Thursday, August 19, 2010 – BOISE

9:00 a.m. State v. Lombard.....#36454
10:30 a.m. State v. Nanney.....#36548
1:30 p.m. State v. James.....#36210

Idaho Supreme Court and Court of Appeals
NEW CASES ON APPEAL PENDING DECISION
(Update 7/01/10)

CIVIL APPEALS

BOND FORFEITURE

1. Whether the district court abused its discretion in concluding that the interests of justice did not require exoneration of the bond.

State v. Two Jinn, Inc.
S.Ct. No. 37251
Court of Appeals

INSURANCE

1. Does Idaho Code § 49-2417(1) and (2) require that coverage be provided under the umbrella policy at issue?

*Farm Bureau Mutual Insurance
Company of Idaho v. Schrock*
S.Ct. No. 37172
Supreme Court

LAND USE

1. Did the district court err by affirming the decision of the Lewiston Zoning and Planning Commission denying a permit to replace a recreational vehicle in a manufactured home park?

Eddins v. City of Lewiston
S.Ct. No. 37209
Supreme Court

POST-CONVICTION RELIEF

1. Did the court err in denying Mendiola's petition for post-conviction relief and in denying his claim that his guilty plea was not voluntary?

Mendiola v. State
S.Ct. No. 35473
Court of Appeals

2. Did the court err in summarily dismissing Gordon's successive petition for post-conviction relief?

Gordon v. State
S.Ct. No. 36243
Court of Appeals

3. Did the district court err in summarily dismissing Holman's claim that his defense attorneys rendered ineffective assistance of counsel by failing to file a motion to suppress evidence found in a warrantless search of his bedroom?

Holman v. State
S.Ct. Nos. 36609/36610
Court of Appeals

SANCTIONS

1. Did the trial court abuse its discretion by dismissing Kugler's case as a sanction for failure to comply with discovery orders?

Kugler v. Maguire
S.Ct. No. 36644
Court of Appeals

SUMMARY JUDGMENT

1. Whether the court erred in holding that Zingiber Investment lacked the requisite standing to prosecute its complaint for declaratory relief against the highway district.

*Zingiber Investment, LLC v.
Hagerman Highway District*
S.Ct. No. 36298
Supreme Court

2. Was the court correct in finding Butters had failed to exhaust his administrative remedies and in granting summary judgment in favor of prison officials?

Butters v. Valdez
S.Ct. No. 36856
Court of Appeals

3. Whether the district court erred by granting summary judgment in favor of Drs. Hunter and Witte on the basis of I.C. §§ 6-1012 and 6-1013.

Hoover v. Hunter
S.Ct. No. 36912
Supreme Court

4. Did the court err by granting summary judgment in favor of Fletcher and by finding Fletcher breached no duty owed to Soignier?

Soignier v. Fletcher
S.Ct. No. 37123
Supreme Court

5. Whether Boomers breach of duty caused Jones injury such that the district court erred in granting summary judgment in favor of Boomers.

Jones v. Starnes
S.Ct. No. 37179
Supreme Court

TERMINATION OF PARENTAL RIGHTS

1. Did the magistrate err in terminating Doe's parental rights when evidence failed to show that any condition of the home caused actual harm to the children?

*Department of Health & Welfare
v. Jane Doe II*
S.Ct. No. 37472
Supreme Court

2. Did the magistrate err in its finding that there was clear and convincing evidence that John Doe II willfully abandoned his son?

John Doe I v. John Doe II
S.Ct. No. 37486
Supreme Court

3. Was the termination of Jane Doe's parental rights supported by substantial, competent evidence?

*Department of Health & Welfare
v. Jane Doe I*
S.Ct. 37557
Court of Appeals

4. Whether the magistrate erred when it determined John Doe had no parental rights to the minor child.

*Department of Health & Welfare
v. John Doe*
S.Ct. No. 37453
Supreme Court

5. Did the magistrate court err in finding the statutory condition of neglect existed?

*Department of Health & Welfare
v. Jane Doe*
S.Ct. No. 37600
Court of Appeals

CRIMINAL APPEALS

DUE PROCESS

1. Did the district court err when it concluded the state could only re-file a charge dismissed without prejudice if it discovered new evidence after the dismissal or believed the judge ordering the dismissal had committed legal error?

State v. Moser
S.Ct. No. 36933
Court of Appeals

2. Did a fatal variance exist between the information alleging aggravated assault and rape and the jury instructions and evidence adduced at trial?

State v. Heilman
S.Ct. No. 36554
Court of Appeals

3. Did the state violate Harris' right to a fair trial by committing prosecutorial misconduct during closing argument?

State v. Harris
S.Ct. No. 36771
Court of Appeals

LICENSE SUSPENSION

1. Did the magistrate err in concluding the filing of the advisory with the court ten days after the refusal violated Kling's due process rights and by dismissing the license suspension proceedings?

State v. Kling
S.Ct. No. 37322
Court of Appeals

Idaho Supreme Court and Court of Appeals
NEW CASES ON APPEAL PENDING DECISION
(Update 7/01/10)

PLEAS

1. Did the court abuse its discretion by denying Flower's post-sentencing motion to withdraw his guilty plea?

State v. Flowers
S.Ct. No. 36036
Court of Appeals

RESTITUTION

1. Did the court violate Blair's right to due process by denying her motion for a restitution hearing and entering a restitution order based on the evidence presented at trial?

State v. Blair
S.Ct. No. 36328
Court of Appeals

2. Did the district court abuse its discretion when it ordered Ramos to pay \$129,000 in restitution?

State v. Ramos
S.Ct. No. 36544
Court of Appeals

SEARCH AND SEIZURE – SUPPRESSION OF EVIDENCE

1. Did the district court abuse its discretion when it denied Lopez's motion to suppress evidence and found Lopez voluntarily consented to the search of her car?

State v. Lopez
S.Ct. No. 34977
Court of Appeals

2. Did the district court err in concluding Ray was seized merely because the officer activated his emergency lights to stop another vehicle and subsequently approached the vehicle in which Ray was riding to communicate with Ray and the driver that they were free to leave?

State v. Ray
S.Ct. No. 36797
Court of Appeals

3. Did the court err in partially denying Payne's motion to suppress evidence seized in a search of his vehicle?

State v. Payne
S.Ct. No. 36837
Court of Appeals

4. Did the court err in denying McNabb's motion to suppress and in finding the traffic stop was supported by reasonable, articulable suspicion?

State v. McNabb
S.Ct. No. 36552
Court of Appeals

5. Did the district court err in denying Skurlock's motion to suppress the search and in finding it was conducted during the daytime as required by the search warrant?

State v. Skurlock
S.Ct. No. 36818
Supreme Court

6. Did the court correctly find that Blackmon failed to prove that the state materially interfered with his ability to get a second BAC test?

State v. Blackmon
S.Ct. No. 37041
Court of Appeals

SENTENCE REVIEW

1. Did the district court abuse its discretion by revoking probation?

State v. Vander Esch
S.Ct. No. 37008
Court of Appeals

2. Did the court abuse its discretion by relinquishing jurisdiction and by also failing to *sua sponte* reduce Mendoza's sentence?

State v. Mendoza
S.Ct. No. 37190
Court of Appeals

3. Did the district court err when it determined that its written order regarding probation prevailed over its oral pronouncement regarding what remedy was to be imposed on her probation violation?

State v. Langworthy
S.Ct. No. 36279
Court of Appeals

4. Did the district court execute a vindictive sentence when it ordered Dumas to pay the costs of prosecution associated with his trial?

State v. Dumas
S.Ct. No. 36592
Court of Appeals

5. Did the district court err by denying Moore's motion to remove the 2003 PSI from the possession of the IDOC?

State v. Moore
S.Ct. No. 36578
Supreme Court

6. Did the district court abuse its discretion when it relinquished jurisdiction?

State v. Moseley
S.Ct. No. 36738
Court of Appeals

7. Did the district court err in *sua sponte* holding a hearing to reconsider the previous order granting Mosho's Rule 35 motion, when no party to the case requested the hearing and no motion for reconsideration was filed?

State v. Mosho
S.Ct. No. 36836
Court of Appeals

SUBSTANTIVE LAW

1. Did the district court err when it ruled that it was without authority to grant Hardwick relief because the amendments to I.C. § 19-2604(3) did not operate in an *ex post facto* manner with respect to Hardwick?

State v. Hardwick
S.Ct. No. 37178
Supreme Court

Summarized by:
Cathy Derden
Supreme Court Staff Attorney
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Dave's specific practice areas include technologies such as mechanical and medical devices, video display and projection systems, and nuclear waste disposal methods. Dave is a licensed professional civil engineer who has served as outside patent counsel for Hewlett-Packard and Idaho National Laboratory. He earned both his Bachelor of Science in Civil Engineering and his Juris Doctor, cum laude, from Brigham Young University. He is licensed to practice law in Utah.

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MORGAN'S DOLLAR: EARNING A TIMELESS LEGACY

Honorable Larry M. Boyle
United States Court District of Idaho

(Adapted from comments made at the New Lawyer Admission Ceremony on April 27, 2010.)

I hold in my hand a magnificent piece of art. It is an 1880 United States *Morgan Dollar*. This coin is named after its designer, George T. Morgan, a 30-year-old immigrant from England. It is obvious the engraver took great care in creating his design. After more than a century, the *Morgan* is known as the *King of Collector Coins*.

This silver dollar is 130 years old and has never been in circulation. As you can see, it is kept in a protective container. This beautiful coin is in virtually the same condition today as it was in 1880 when placed in a bag with ninety-nine other newly stamped silver dollars at the San Francisco Mint. I purchased this coin in 1980 — at that time it was 100 years old. It is truly a thing of beauty.

This coin has been graded by numismatic experts as a *Gem*, *Cameo* and *Proof-like*. It is a “collectible” and a masterpiece in every sense of the word. As it is circulated and passed among you during this ceremony, take a moment to study its extraordinarily precise and delicate detail before passing it on to the person next to you. The fine lines engraved into this silver dollar are a visual symphony. Study the peaceful, yet resolute, beauty of Lady Liberty. Admire the fierce majesty of the American eagle on the reverse.

I also have with me today another nearly identical silver dollar. This coin is also an 1880 *Morgan Dollar*, minted the same year, at the same United States Mint, perhaps even at the same time. Unlike the mint condition silver dollar in the protective container, however, it is apparent that this coin has been in circulation most of its life. It is not a collectible. Even though it is in fairly good condition, this dollar, having lost its original luster and shine, is known as a “common” coin.

As it is circulated among you, take time to study this “other” silver dollar. It is beautiful in design. It is really an identical coin, but has been used and treated much differently. Unlike the protected and preserved silver dollar



Photo by Melissa Niu

Federal Judge Larry Boyle offers new attorneys some observations about what to do with their education. He likened the ideals of the legal system to a Morgan Dollar kept pristine for 130 years and another “working coin” of the same mint.

which sat in the darkness of a drawer, or was kept in a sack of new coins, or stored in a box for many of its 130 years, this “other” coin has been well-used.

A “working coin” is a good way to describe this other silver dollar.

I refer to the “working coin” as *Gulliver* because we can safely conclude it has had many travels. The pristine coin is known to me as *Michelangelo* because of its unmarred beauty and luster.

Yet, as I closely study both coins, the well-used, working coin is somehow more interesting to me than is the beautiful, pristine coin.

Even though it has been worn, scratched and marred — and certainly is not as valuable on the coin market as

the mint condition silver dollar — the “working” coin intrigues me.

Perhaps the working coin, *Gulliver*, evokes my curiosity and interest because it has done something in its life — it contributed something while it was being used for its intended purpose.

In a word, the working coin has “character” — and a history we can only imagine. Like many of us here, it has, so-to-speak, grey hair and white whiskers.

We can only imagine its history, how it has been used, and where it has been. We are limited only by the extent of our creativity and imaginations. But there is no doubt, this other coin, like the fictional *Gulliver*, has traveled. Certainly it hasn't



Photo by Melissa Niu

traveled to exotic places like Jonathon Swift’s character and the imaginary lands he visited, but I am sure this coin has made many interesting, and perhaps colorful journeys.

For a moment, let’s speculate and imagine together about where this working coin may have been, and what it has done. Of course, there is no way to know, but let’s ask ourselves *where has it traveled?* If it could talk, what would it tell us? Where has it been? During its 130 years, how many times has this silver dollar changed hands? Was it somebody’s first dollar? In whose pocket or purse was it placed? What did it purchase? How many meals for families did it buy? Was it a week’s wages for a laborer? Was it left as a tip by a high roller? How many gallons of gasoline did it purchase? Did it buy a pair of shoes, a shirt or blouse? Was it lost and won in a Las Vegas gambling parlor? Was it a birthday gift from a rich uncle? Was it the last dollar of a flat-broke man? Did it buy passage on a railroad line, a stage coach or a Mississippi steamer? Was it ever the widow’s mite? How many were simply grateful to have this dollar in his pocket?

The list is endless, limited only by our imaginations.

Whatever its use and history, this “working coin” still clearly bears the brilliance of the designer’s genius. In

fact, when the two coins are closely compared, much of the fine detail and beauty of the much-traveled coin remains. While its luster may be diminished, its once bright shine gone, the underlying beauty of its design may still be seen and enjoyed.

At this point, some of you may be asking yourselves, “*What does this have to do with us, new members of the Bar?*” Metaphorically speaking, it applies to each of us.

In the work of lawyers and judges great care must be taken, just as that taken by George Morgan when he designed his famous silver dollar. Did Morgan realize at the time he was creating a lasting and enduring masterpiece, or did he think he was designing just another coin? In my opinion, little did Morgan know that 500,000,000 (yes, a half *billion*) silver dollars would be stamped and minted from the design that would become his lasting legacy.

Do we as lawyers sometimes think, as perhaps George Morgan may have when beginning his work, “Is this just another client, just another case?” Or, as required by our ethical duties, do we give the full commitment, focus and attention which the client deserves, or in our responsibilities as judges, all the consideration and justice the parties to litigation are fairly entitled to receive?

A review of Morgan’s career from the time he was given the assignment to design the silver dollar is instructive. He prepared himself by serving as an apprentice to a master engraver. He also worked as an assistant engraver. Then, with all of that training, when Morgan was given his assignment to create the image for the new silver dollar, he even searched for just the right young woman to model for Lady Liberty’s profile. He made countless drafts before deciding on the final design. The foundation for the *Morgan Dollar* was laid long before the first proof was stamped in 1878.

During this preliminary and foundational process, Morgan paid meticulous attention to detail, focused on his work, gave it his best, honest effort, and, in the end, created a lasting masterpiece.

In our work as lawyers and judges, I am convinced that we must do the same. We must require it of ourselves. We have no alternative when providing our services but to discipline ourselves and create the finest legal product possible. We must also demand of ourselves that we provide that service with competency, integrity and honor.

But your work as a practicing attorney does not end with a finished legal product. You must have productive and satisfying lives when away from your work. This, of course, applies to

judges as well. As members of the Bar, we must reach out, help people, serve the profession and our communities. As examples, look to my state and federal judicial colleagues on the raised platform behind me as men and women to emulate. Look to the Bar Commissioners in front of you, as former Chief Justice Warren Burger encouraged us to do, as “*the living exemplars*” of the legal profession. In the process of building our careers, each of us must commit to make a truly lasting contribution. Remember, time is short. Almost as if in the blink of an eye, you will be the senior members of the legal profession. Until then, you must do all you can to make a difference. Just as we who precede you have a duty to the great ones we followed and who helped us chart our course, you already have a duty to those who will follow you. Your duty and responsibility to the legal profession, and to those who follow, begins today.

Let me give some examples. A judge who is making a difference is Judge Jim Pappas of our Court. In addition to his regular duties as a Bankruptcy Judge, he is now the Chief Judge of the 9th Circuit Bankruptcy Appellate Panel. Another is Idaho State District Judge Tom Neville, whose son is among you as a new member of the Bar. Judge Neville is a graduate of the Naval Academy with a distinguished judicial career marked by excellence, commitment and unassuming dignity. Attorneys routinely make significant contributions outside their practices. Boise attorney Walter Bithell was recently awarded the *Silver Beaver Award* from the Boy Scouts of America for his lifetime of service. Other attorneys serve in the Legislature, on school boards, in their churches, coach youth athletic programs, and otherwise give remarkable community service. There are many more examples of fine lawyers and judges I could give, but these are sufficient to illustrate the point.

In extending our influence for good, we should ask not what did we gain by our service, but rather what have we given.

I can promise you one thing. If you wrap yourself in a protective, self-limiting cocoon, and decide not to give of yourselves to make a meaningful difference in the law, the community, to society and to your families, or fail to treat litigants and opposing counsel with respect and dignity, you will not create a masterpiece as a practicing lawyer.

Our reputations can, and must, like the pristine, collectible coin, be placed securely into a protective container and safely preserved. A priceless reputation may be the real masterpiece of our careers.

Are there still “legal” masterpieces waiting for today’s lawyers? Of course, there are!

An Idaho attorney, Alan Derr, appealed a probate case involving precious little money all the way to the United States Supreme Court. The law of equality and women’s rights was changed forever for the better because of it. Another Idaho lawyer, Kenneth Howard, represented a mother and son who ventured too close to the Aryan Nations compound near Coeur d’Alene and were assaulted. As a result of his filing a legal action against the white supremacy group, a scar on the face of northern Idaho was removed.

Yes, masterpieces in the law remain for us to create. We just have to recognize them when they come along, and then do what is necessary to see that justice is served.

We’ve given a great deal of well-deserved attention to the traveled, working silver dollar and what it teaches us, but what about *Michelangelo*, the pristine silver dollar preserved in its protective container? Even though it hasn’t done much during its 130 years, can we nonetheless learn something from it? Of course we can. After 130 years it remains magnificent, beautiful and unspoiled, unspotted and preserved in its original mint condition.

Certainly, the protected silver dollar does not have the colorful or interesting history, or the intrigue of our working coin, but it, too, can teach us an important principle. On the obverse of the coin, Lady Liberty is nice to look at, but she is much more than a pretty face. Scratched, marred and traveled she is not, but this *Cameo, Proof-like, Gem* serves as a reminder that to preserve something valuable, we must protect and care for it.

The greatest personal trait for an attorney is his or her reputation. A

reputation is composed of many facets; competence, thoroughness, reliability, and perhaps most importantly, that of integrity and moral excellence. Names like Allyn Dingel, Jess and Jack Hawley, Howard Manweiler, Wes Merrill, Louis Racine, Edith Miller Klein, Perce Hall, Lloyd Webb, Jerry Smith, Ed Benoit, Fred Hahn, Mary Smith, Ted Pike, Dean Miller, Bill Holden, Sid Smith and many others come to mind. Our reputations can, and must, like the pristine, collectible coin, be placed securely into a protective container and safely preserved. A priceless reputation may be the real masterpiece of our careers.

Both of these Morgan silver dollars, *Gulliver*, the working coin, and *Michelangelo*, the mint condition coin, teach great principles of what is most precious to us as attorneys and judges. As with the silver dollar metaphor, in our lives often the difference between the two is not dramatic, but perhaps merely a matter of degree. I am convinced that each of us are *Morgans* to one extent or another.

I hope you enjoy the practice of law as much as I have. My practice gave me the privilege to work in the courts of many states and serve many clients, large and small. My counsel to you is while in the process of earning a living, serving your clients and your communities to the full measure of your abilities and skills, take time to enjoy your families. They are your personal masterpieces and greatest treasures.

Your work begins today. Welcome to the legal profession.

About the Author

Judge Larry M. Boyle has served the state and federal judiciaries since 1986 as an Associate Justice of the Supreme Court of Idaho, a State of Idaho District Judge and as a United States Magistrate Judge.



FEDERAL COURT CORNER

Tom Murawski
United States District and Bankruptcy Courts

U.S. District Court case assignment, draw and consent process

Members of the Idaho Bar often wonder exactly how the United States District Court for the District of Idaho determines which case is assigned to which judge. Although case assignment procedures have changed and evolved over the years because of a variety of factors, the following provides an overview of the current case assignment practices and procedures used in federal court in Idaho. Because fairness and randomness are of paramount importance in the development and implementation of assignment procedures, the District of Idaho employs a “blind draw” process that is fully computerized, despite the use of words such as “cards” and “deck” which might connote something manual in nature. Each electronic deck is designed to mimic a deck of playing cards, but instead of having four aces, four kings, etc., the deck has a



Tom Murawski

mix of Judge Winmill cards, Judge Lodge cards, and so on. The specific criteria that determine the electronic deck composition are complicated and dependent upon numerous considerations. The variables include case type, judge group, percentage, deck code, deck name, cards in deck, and status. The percentage of cases assigned to each judge is periodically examined to prevent a significant disparity in workload and to make adjustments, if necessary, to the case assignment formulas to rectify imbalances. As a whole, however, the blind draw process is randomized and designed to prevent “judge shopping.”

Civil cases

When a civil case is filed in the District of Idaho, it is randomly assigned to a judge using a draw from a deck composed for the Division in which the case is filed.



For these decks, the Northern and Central Division are combined, while a separate deck exists for the Southern Division and the Eastern Division. Once a card is drawn, if an automatic conflict exists with the judge drawn or the judge recuses, that judge’s card immediately goes back into the deck. However, certain types of cases by their nature dictate direct assignment, not to a particular judge, but rather to a certain category of judges. For example, all Social Security cases and all prisoner pro se civil cases are assigned initially to the magistrate judges, but also in the blind draw process.

Criminal cases

When an Indictment is filed or an Information is filed by the U.S. Attorney’s Office in the District of Idaho, its assignment is initially dependent upon the nature of the suit. All felony and Class A & B misdemeanor cases are randomly assigned to one of our two district judges, using a draw from a statewide deck. All petty offenses, Class C misdemeanor cases, miscellaneous, non-statistical, search warrants, Rule 5(c)’s, and complaints are randomly assigned to the magistrate judges using a draw from a statewide deck.

Although by law our magistrate judges cannot conduct a trial in a felony criminal case (although they can conduct jury selection with consent), our magistrate judges generally are assigned pretrial motions relating to detention issues and take guilty pleas through a Report & Recom-

As a whole, however, the blind draw process is randomized and designed to prevent “judge shopping.”

mendation (R&R) to the district judge. These assignments are also statewide in scope.

Impact of visiting Judges

The assignment of cases to visiting judges undoubtedly has had some impact and ramifications upon the case assignment process in the District of Idaho, reflected in part by the following statistical data. During the past few years, the District received the assistance of 25 visiting judges during 2008 and 17 visiting judges during 2009. Collectively, visiting judges conducted 22 criminal and civil trials in our District during the 2008 calendar year and 15 criminal and civil trials during 2009. To further illustrate the magnitude of the dependence upon visiting judge assistance, during 2008 visiting judges accounted for over 36% of all combined district judge trial and hearing hours in the District of Idaho. It is hoped that the Dis-

trict of Idaho's request for a third district judge will be given serious consideration and we anticipate that the Idaho Congressional delegation will fully support the District of Idaho in this endeavor.

Consent cases and the use of Magistrate Judges

United States Magistrate Judges are utilized in the District of Idaho to the fullest extent allowed by law. (See 28 U.S.C. § 631 *et seq.*) Consent to magistrate judge forms are supplied to parties in all civil cases through a Notice of Assignment for cases initially drawn or assigned to a magistrate judge and through a Notice of Availability for most of the cases initially drawn or assigned to a district judge. (See Local Rules 72.1 and 73.1) Consent of each party must be express (in writing) and unanimous among all parties. Because Idaho has only two district judges and because only district judges can conduct felony criminal trials, consenting to stay with the magistrate judge initially assigned to a civil case or consenting to re-assignment to a magistrate judge in cases initially drawn by a district judge might result in the parties obtaining earlier hearing and trial dates.

We have two full-time magistrate judges in the District of Idaho and, at least for the time being, retain the added benefit and resources of two retired magistrate judges in "recalled" status, who collectively, represent more than 45 years of legal expertise and experience. All four magistrate judges are held in the highest esteem by their colleagues on the Bench as well as by members of the Bar. This fact helps further promote the consent to a magistrate judge process in civil cases. Furthermore, attorneys who have had

We have two full-time magistrate judges in the District of Idaho and, at least for the time being, retain the added benefit and resources of two retired magistrate judges in "recalled" status.

previous experience in cases assigned to magistrate judges are more likely to utilize this option in the future.

Our magistrate judges currently draw randomly approximately 36% of all standard civil cases in each division for all purposes, including trial and entry of judgment, subject, of course, to the express consent of all parties. In addition, our magistrate judges are assigned all non-dispositive motions in certain civil cases, and often prepare Reports and Recommendations to the assigned district judge on dispositive motions (motions to dismiss, summary judgment motions, etc.).

During 2009, our magistrate judges conducted 62 judicial settlement conferences, with a success rate of approximately 65%. In all instances, these involved cases assigned to other judges. Our magistrate judges are also used to mediate discovery disputes between parties on cases assigned to other judges.

New for 2010 is the full implementation of the Voluntary Case Management Conference (VCMC), now set forth in Local Rule 16.1. This is a tool whereby a

magistrate judge hosts an informal meeting with counsel in civil cases to identify areas of agreement, clarify and focus the issues, and encourage the parties to enter procedural and substantive stipulations, as well as lay out a detailed discovery plan, if applicable, and perhaps facilitate early mediation.

If you have any specific questions or concerns about the case assignment and consent process, or anything relating to Court policies and procedures in the District of Idaho, please do not hesitate to contact the Clerk's office. We also encourage your continued participation and involvement in the Idaho Chapter of the Federal Bar Association. Finally, do not hesitate to contact one of our current Lawyer Representatives — Steven Andersen, Alan Stephens, and Thomas High — or our Ninth Circuit Lawyer Representatives Debora Kristensen and Larry Westberg.

About the Author

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



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**UNITED STATES DISTRICT AND BANKRUPTCY COURT
DISTRICT OF IDAHO
NOTICE**

June 1, 2010



TO: INTERESTED MEMBERS OF THE IDAHO STATE BAR

The Judges of the United States District and Bankruptcy Court for the District of Idaho intend to appoint a Lawyer Representative to serve on the Ninth Circuit Conference of the United States Courts for a three-year term to replace Steven Andersen. In addition to Steven Andersen, the District of Idaho's current Lawyer Representatives are Alan Stephens and Thomas High. Debora Kristensen currently serves as Chair of the Ninth Circuit Lawyer Representative Coordinating Committee and Larry Westberg serves as a Ninth Circuit Appellate Lawyer Representative.

Effective November 1999, the Board of Judges adopted a Lawyer Representative Selection Plan, based upon current bar membership, which ensures state-wide representation. This plan calls for selection of lawyer representatives as follows: 2005 - 4th District; 2006 - 1st and 2nd District; 2007 - 4th District; 2008 - 6th and 7th District; 2009 - 3rd and 5th District; 2010 - repeat above.

Based upon the Plan, this year's lawyer representative must come from the 4th District.

Applicants are required to:

1. Be a member in good standing of the Idaho State Bar and be involved in active trial and appellate practice for not less than 10 years, a substantial portion of which has been in the federal court system;
2. Be interested in the purpose and work of the Conference, which is to improve the administration of the federal courts, and be willing and able actively to contribute to that end;
3. Be willing to assist in implementing Conference programs with the local Bar;
4. Be willing to attend committee meetings and the annual Ninth Circuit Judicial Conference.

Reimbursement of actual expenses will be allowed for attending the Ninth Circuit Judicial Conference as well as the expenses to attend committee meetings and the Annual District Conference. Typical duties include: serving on court committees, making recommendations on the use of the Court's non-appropriated fund, developing curriculum for the District Conference, serving as the representative of the Bar to advance opinions and suggestions for improvement, and assisting the Court in the implementation of new programs or procedures.

Any persons interested in such an appointment should submit a letter setting forth their experience and qualifications, **no later than September 1, 2010, to the following:**

Ms. Diane K. Minnich
Executive Director
Idaho State Bar
P. O. Box 895
Boise, Idaho 83701-0895

The Commission will then select six applicants for referral to the Judges of the United States District Court in Boise, Idaho, who will make the final selection by October 31, 2010, or as soon thereafter as possible.

DATED this 1st day of June, 2010.

B. Lynn Winmill, Chief Judge
United States District Court
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AID IN DYING: LAW, GEOGRAPHY AND STANDARD OF CARE IN IDAHO

Kathryn L. Tucker
Compassion & Choices
Christine Salmi
Perkins Coie, LLP

MERIDIAN – An elderly couple is dead after shots were fired in a Meridian home Sunday evening. . .

Ada County Coroner . . . says 87-year-old Robert Emerson shot and killed his wife, 90-year-old Olive Emerson, and then turned the gun on himself.

Meridian Police . . . say investigators were told by family members that Robert and Olive were both suffering from terminal cancer . . . ¹

Introduction

The news report above reflects a tragedy that arises when terminally ill patients feel trapped in a dying process they find unbearable, yet don't feel they can turn to their physician to obtain a prescription for medication that can be consumed to bring about a peaceful death. Idaho law empowers citizens with broad autonomy over medical decisions, including specifically decisions relating to end of life care. However, Idaho has no legislation either permitting or prohibiting the end of life option known as "aid in dying." Aid in dying refers to the practice of a physician prescribing medication that a mentally competent, terminally-ill patient can ingest to bring about a peaceful death if the dying process becomes unbearable.² A fraction of terminally-ill patients – including those who have excellent pain and symptom management – confront a dying process so prolonged, and marked by such extreme suffering and deterioration, that they decide aid in dying is preferable to the alternatives. This practice has become increasingly accepted among medical and health policy organizations, including the



Kathryn L. Tucker



Christine Salmi



American Public Health Association.³ Having the option of aid in dying provides comfort to terminally ill patients even if they do not consume the medication to bring about death. The experience in Oregon, where aid in dying has been affirmatively legal for a dozen years, reflects this: roughly one-third of the patients who obtain the medication each year do not go on to ingest it. They are comforted by this option, but die of their underlying disease. Oregon's data also tells us much about why patients choose aid in dying: loss of autonomy, loss of dignity, and decreasing ability to participate in activities that made life enjoyable are the most frequently mentioned reasons.

This article reviews the law in Idaho governing end-of-life care, the law and practice in the surrounding states, and the possible implications for Idaho of being situated among states that affirmatively permit aid in dying. It is time for Idaho to join the surrounding states by including aid in dying among end-of-life options available for patients with terminal illnesses. This article posits that Idaho can do so under the current state of the law by incorporating this intervention into medical practice subject to the standard of care.

Idaho law governing end of life care

Idaho statutes include The Medical Consent and Natural Death Act (MC-NDA), I.C. §§ 39-4501 to -4515. This statute empowers citizens to refuse or di-

Idaho has no legislation either permitting or prohibiting the end of life option known as "aid in dying."

rect withdrawal of life-prolonging medical treatment. In enacting this statute, the Idaho Legislature set forth the following policy statements:

- (1) The legislature recognizes the established common law and *the fundamental right of adult persons to control the decisions relating to the rendering of their medical care*, including the decision to have life-sustaining procedures withheld or withdrawn. . . .
- (2) *In recognition of the dignity and privacy which patients have a right to expect, the legislature hereby declares that the laws of this state shall recognize the right of a competent person to have his or her wishes for medical treatment and for the withdrawal of artificial life-sustaining procedures carried out even though*

that person is no longer able to communicate with the physician.⁴

The MCNDA includes a provision stating that this Act “does not make legal, and in no way condones, euthanasia, mercy killing, or assisted suicide or permits an affirmative or deliberate act or omission to end life, other than to allow the natural process of dying.”⁵

This raises the question whether aid in dying could fall within this exclusion. Those who consider the act of allowing a dying patient to ingest medication to achieve a peaceful death a form of suicide would argue that it does. Others who recognize that the choice of a dying patient for a peaceful death is something fundamentally different from suicide would argue that this exclusion does not apply to aid in dying.⁶ In any event, the statute does not contain a prohibition against aid in dying.

A critical analysis of the law in Idaho supports the contention that Idaho patients should be able to access aid in dying because there is no logical distinction between a terminally-ill patient’s right to refuse life-sustaining treatment and such patient’s right to have access to medication which the patient could ingest to bring about a peaceful death.

One might argue that aid in dying could be prosecuted under Idaho’s criminal statute, I.C. § 18-4014, which provides, in part:

Every person who, with intent to kill, administers or causes or procures to be administered, to another, any poison or other noxious or destructive substance or liquid, but by which death is not caused, is punishable by imprisonment in the state prison not less than ten (10) years, and the imprisonment may be extended to life.⁷

However, this statute only applies if the patient does not die. A patient who ingests medication prescribed by their physician for aid in dying will almost certainly achieve the desired death.⁸ If the patient does achieve the desired death, an aggressive prosecutor might argue that the physician could be prosecuted for homicide. This situation was recently addressed in Montana, and the Montana Supreme Court squarely rejected the possibility of a homicide charge being brought against a physician who provided aid in dying.⁹

Based on this landscape, Idaho physicians should feel safe to provide aid in dying to their competent, terminally-ill patients, free of fear of criminal prosecu-

tion.¹⁰ The matter has not been discussed in the medical or legal literature in Idaho. Yet, there is growing support for aid in dying, reflected in the fact that three neighboring states now affirmatively permit the practice, and in the growing support for the practice in the medical and health policy communities.

Aid in dying in surrounding states

Oregon

Oregonians approved the passage of the Oregon Death with Dignity Act (Dignity Act) in 1994.¹¹ The Dignity Act allows a mentally-competent, terminally-ill patient to obtain medication from his or her physician, which the patient can consume to bring about a peaceful death.¹² The experience in Oregon demonstrates that when this option is available, it does not place patients at risk, as those who oppose aid in dying have advocated.¹³ Oregon’s experience has caused even staunch opponents to admit that continued opposition to such a law can only be based on moral or religious grounds.¹⁴

The option of aid in dying has not been unwillingly forced upon those who are poor, uneducated, uninsured, or otherwise disadvantaged.¹⁵ In fact, those with a baccalaureate degree or higher were 7.9 times more likely than those without a high school diploma to choose aid in dying.¹⁶ One hundred percent of patients opting for aid in dying had private health insurance, Medicare, or Medicaid, and were overwhelmingly enrolled in hospice care.¹⁷ Furthermore, during the first 12 years in which it was a legal option, only 460 Oregonians chose it.¹⁸ Terminally ill adults who chose this option in 2009 represented 19 deaths for every 10,000 Oregonians who died that year. Roughly one-third of those patients who complete the process of seeking medications under the Dignity Act do not go on to consume the medications.¹⁹

Simultaneously, Oregon doctors increased efforts to improve their ability

to provide adequate end-of-life care, including increasing their knowledge of pain medication usage for the terminally ill, becoming more informed at recognizing depression and other conditions that could impair decision making, and referring their patients to hospice programs with greater frequency.²⁰ The option of aid in dying also has psychological benefits for terminally ill patients. The availability of the option gives a terminally-ill patient autonomy, control, and choice, which physicians in Oregon have identified as the predominant motivational factors behind the decision to request assistance in dying.²¹

Washington

Washington passed a Dignity Act virtually identical to Oregon’s in November 2008.²² The Washington Department of Health publishes information about the types and quantities of forms received under the Dignity Act on its website²³ and updates this information weekly.²⁴ The Department of Health also publishes an annual report that includes information on how many prescriptions are written under the Act, and how many people ingest the prescribed medication. The first annual report includes data from March 2009 through December 31, 2009.²⁵ Statistical reports will be completed annually thereafter.

Montana

Montana recognizes the right of its citizens to choose aid in dying through a decision of the Montana Supreme Court. In *Baxter v. State*, Robert Baxter, a 75-year-old U.S. Marine veteran and long-haul truck driver dying of lymphocytic leukemia, sued the State to establish his right to choose aid in dying.²⁶ Baxter was married, with four grown children, and was fiercely independent; he wanted the option for a peaceful death on his own terms if his suffering became unbearable.²⁷ Additional plaintiffs included four Montana physicians who treat patients with termi-

The Montana Supreme Court squarely rejected the possibility of a homicide charge being brought against a physician who provided aid in dying.

nal illnesses and Compassion & Choices, the national non-profit organization that advocates on behalf of terminally ill persons.²⁸

The plaintiffs challenged the application of Montana's homicide statute to a physician providing a prescription to a terminally-ill, mentally-competent patient for medication that the patient could consume to bring about a peaceful death if he found his dying process unbearable.²⁹ The case invoked the Montana State Constitution's guarantees of privacy and dignity.³⁰ Commentators speculated that constitutional claims of this nature had a good chance of success given the state constitution's text and the body of law construing these provisions, which was robustly protective of individual decision-making.³¹

Plaintiffs asserted an alternative argument that under the consent as a defense doctrine, a doctor who provided aid in dying could not be subject to prosecution for homicide.³² The patient would have consented to the physician's assistance in precipitating the patient's death and there was no public policy reason to deny the consent defense under these circumstances.³³ The plaintiffs in *Baxter* had the advantage of being able to point to many years of data from Oregon's implementation of its statute affirmatively making aid in dying legal, which made clear that risks to patients do not arise when patients have the option to choose aid in dying.³⁴ The argument—that risks will still be present if aid in dying is an option—had been central to the states' efforts to prevent courts from finding a right to choose this intervention.³⁵

On December 5, 2008, the Montana State District Court issued summary judgment in favor of the Plaintiffs, holding that the state constitution's Individual Dignity Clause and the stringent right of privacy are "intertwined insofar as they apply to Plaintiffs' assertion that competent terminal patients have the constitutional right to determine the timing of their death and to obtain physician assistance in doing so."³⁶ The district court further concluded that "[t]he decision as to whether to continue life for a few additional months when death is imminent certainly is one of personal autonomy and privacy."³⁷ In an odd synchronicity, Plaintiff Bob Baxter died the same day the lower court ruling was issued. The State appealed.

The Supreme Court held 5-2 that terminally ill Montanans have the right to choose aid in dying under state law.³⁸ The court declined to reach the constitutional issues.³⁹ Instead, it resolved the case on the alternative ground under the consent defense to the homicide statute, finding:

Most medical care is not governed by statute or court decision, but is instead governed by the standard of care.

"no indication in Montana law that physician aid in dying provided to terminally ill, mentally competent adult patients is against public policy."⁴⁰

... [A] physician who aids a terminally ill patient in dying is not directly involved in the final decision or the final act. He or she only provides a means by which a terminally ill patient *himself* can give effect to his life-ending decision, or not, as the case may be. Each stage of the physician-patient interaction is private, civil, and compassionate. The physician and terminally ill patient work together to create a means by which the patient can be in control of his own mortality. The patient's subsequent private decision whether to take the medicine does not breach public peace or endanger others.

... There is thus no indication in the homicide statutes that physician aid in dying—in which a terminally ill patient elects and consents to taking possession of a quantity of medicine from a physician that, if he chooses to take it, will cause his own death—is against public policy.

The Rights of the Terminally Ill Act very clearly provides that terminally ill patients are entitled to autonomous, end-of-life decisions, even if enforcement of those decisions involves direct acts by a physician. Furthermore, there is no indication in the Rights of the Terminally Ill Act that an additional means of giving effect to a patient's decision—in which the patient, without any direct assistance, chooses the time of his own death—is against public policy.⁴¹

Montana has not enacted statutes with specific requirements governing provi-

sion of aid in dying.⁴² Accordingly, the limitations of the laws in Oregon and Washington do not apply in Montana, although certain boundaries recognized by the Court are similar to the Oregon and Washington requirements; all three states require that the patient be terminally ill, mentally competent, and that the physician involvement be limited to providing a prescription that the patient can self-administer.

Aid in dying in Idaho should be governed by the standard of care

Most medical care is not governed by statute or court decision, but is instead governed by the standard of care.⁴³ In determining the standard of care, Idaho courts apply an objective community standard test that looks at what a similarly situated practitioner in the local community would do, taking into account his or her training, experience, and fields of medical specialization.⁴⁴

Oregon's, Washington's and Montana's practices of affirmatively permitting mentally competent, terminally ill patients to choose aid in dying will appropriately influence the standard of care in Idaho. Idaho is particularly well situated to be the first state that adopts this approach, given that it has no legislation specifically addressing the matter and is surrounded by states where the practice is now an established option available to patients dying of terminal illnesses.

Conclusion

Most Americans "believe a person has a moral right to end their life if they are suffering great pain and have no hope of improvement."⁴⁵ It is critically important that patients can turn to their physician for aid in dying. When a patient does not feel able to discuss the desire for aid in dying with his or her physician or cannot find a physician willing to provide it, the patient may seek assistance in precipitating death from a family member or loved one. Tragically, these incidents often involve a violent means to death, such as gunshot.

Cases of this nature appear with disturbing frequency in the newspapers, as noted at the outset of this article.⁴⁶ However, should aid in dying emerge as an end-of-life option in Idaho, it is hopeful that such tragedies can be avoided in the future.

About the Authors

Kathryn L. Tucker is Director of Legal Affairs for Compassion & Choices. She was co-counsel to the plaintiffs in *Baxter v. State*, discussed in this article. Ms. Tucker previously practiced with Perkins Coie, LLP, and teaches Law, Medicine and Ethics at the End of Life at the University of Washington, Seattle University, Lewis and Clark, and Loyola Schools of Law. She can be reached at ktucker@compassionandchoices.org.

Christine Salmi practices commercial litigation with the Boise office of Perkins Coie, LLP. Ms. Salmi provided research and editing support for this article.

Endnotes

¹ KTVB & Associated Press, *Coroner: Meridian couple planned murder-suicide*, KTVB.COM, April 5, 2010, available at <http://www.ktvb.com/news/Meridian-police-involved-death-investigation-89888732.html>.

² "Aid in dying" is a recognized term of medical art. See, e.g., Kathryn Tucker, *At the Very End of Life: The Emergence of Policy Supporting Aid in Dying Among Mainstream Medical & Health Policy Associations*, 10 HARV. HEALTH POL'Y REV. 45, 45 (2009), available at http://www.compassionandchoices.org/documents/Harvard_Health_Policy_Rvw_Tucker.pdf.

³ See *id.*

⁴ IDAHO CODE ANN. § 39-4509(1), (2) (2005) (emphasis added).

⁵ IDAHO CODE ANN. § 39-4514(2) (2005).

⁶ Mental health professionals recognize a distinct difference between "suicide" and the choice of a dying patient for a peaceful death. See *Gonzales v. Oregon*, 126 S. Ct. 904 (2006).

⁷ IDAHO CODE ANN. § 18-4014 (1972).

⁸ OR. DEP'T OF HUMAN SERVS., TWELFTH ANNUAL REPORT ON OREGON'S DEATH WITH DIGNITY ACT tbl.1 at 2 (2010), available at <http://www.oregon.gov/DHS/ph/pas/docs/yr12-tbl-1.pdf>.

⁹ *Baxter v. State*, 224 P.3d 1211, 1215 (Mont. 2009).

¹⁰ Concerns about possible criminal prosecution are the primary reason physicians fear providing aid in dying. Another concern is that professional disciplinary action can be taken against a physician for providing such care.

¹¹ OR. REV. STAT. § 127.800–995 (2005); see *Lee v. Oregon*, 891 F. Supp. 1429 (D. Or. 1995), vacated, 107 F.3d 1382 (9th Cir. 1997).

¹² OR. REV. STAT. § 127.865 (2009). The Dignity Act requires that Oregon collect extensive data about who uses the Dignity Act each year and publish the findings in annual reports. See OR. DEP'T OF HUMAN SERVS., DEATH WITH DIGNITY ACT ANNUAL REPORTS [hereinafter ANNUAL REPORTS], available at <http://oregon.gov/dhs/ph/pas/ar-index.shtml>.

¹³ Margaret P. Battin et al., *Legal Physician-Assisted Dying in Oregon and the Netherlands: Evidence Concerning the Impact on Patients in "Vulnerable" Groups*, 33 J. MED. ETHICS 591 (2007).

¹⁴ See Daniel E. Lee, *Physician-Assisted Suicide: A Conservative Critique of Intervention*, 33 Hastings Center Rep. 17, (Jan.–Feb. 2003).

¹⁵ E.g., CTR. FOR DISEASE PREVENTION & EPIDEMIOLOGY, OR. HEALTH DIV., DEP'T OF HUMAN RES., OREGON'S DEATH WITH DIGNITY ACT: THE FIRST YEAR'S EXPERIENCE, 7 (1999), available at <http://oregon.gov/dhs/ph/pas/docs/year1.pdf>.

¹⁶ OFFICE OF DISEASE PREVENTION & EPIDEMIOLOGY, OR. DEP'T OF HUMAN SERVS., EIGHTH ANNUAL REPORT ON OREGON'S DEATH WITH DIGNITY ACT, 12 (2006), available at <http://oregon.gov/dhs/ph/pas/docs/year8.pdf>.

¹⁷ *Id.* at 23.

¹⁸ ANNUAL REPORTS, *supra* note 12, YEAR 12 – 2009 SUMMARY (2010).

¹⁹ *Id.*

²⁰ See Linda Ganzini et al., *Experiences of Oregon Nurses and Social Workers with Hospice Patients Who Requested Assistance with Suicide*, 347 NEW ENG. J. MED. 582, 584-85 (2002); Lawrence J. Schneiderman, *Physician-Assisted Dying*, 293 JAMA 501, 501 (2005).

²¹ See Kathy L. Cerminara & Alina Perez, *Therapeutic Death: A Look at Oregon's Law*, 6 PSYCHOL. PUB. POL'Y & L. 503, 512–13 (2000); See also Ganzini, *supra* note 20.

²² Washington Death with Dignity Act, WASH. REV. CODE § 70.245 (2008).

²³ WASH. STATE DEP'T OF HEALTH, CENTER FOR HEALTH STATISTICS, DEATH WITH DIGNITY ACT, <http://www.doh.wa.gov/dwda> (last visited July 1, 2009).

²⁴ *Id.*, FORMS RECEIVED, <http://www.doh.wa.gov/dwda/formsreceived.htm> (last visited Apr. 6, 2010).

²⁵ *Id.*, 2009 DEATH WITH DIGNITY ACT REPORT, http://www.doh.wa.gov/dwda/forms/DWDA_2009.pdf

(last visited July 1, 2009).

²⁶ 224 P.3d at 1214.

²⁷ *Id.* at 1224.

²⁸ *Id.* at 1214.

²⁹ *Id.*

³⁰ MONT. CONST. art. II, §§ 4, 10.

³¹ Kathryn L. Tucker, *Privacy and Dignity at the End of Life: Protecting the Right of Montanans to Choose Aid in Dying*, 68 MONT. L. REV. 317 (2007); James E. Dallner & D. Scott Manning, *Death with Dignity in Montana*, 65 MONT. L. REV. 309 (2004); Scott A. Fisk, *The Last Best Place to Die: Physician-Assisted Suicide and Montana's Constitutional Right to Personal Autonomy Privacy*, 59 MONT. L. REV. 301 (1998).

³² MONT. CODE ANN. § 45-2-211(2)(d) (2009).

³³ *Id.*

³⁴ OR. REV. STAT. §§ 127.800-897 (2003). See also ANNUAL REPORTS, *supra* note 14.

³⁵ See, e.g., Kathryn L. Tucker, *The Chicken and the Egg: The Pursuit of Choice for a Humane Hastened-Death as a Catalyst for Improved End-of-Life Care; Improved End-of-Life Care as a Precondition for Legalization of Assisted Dying*, 60 N.Y.U. ANN. SURV. AM. L. 355 (2004).

³⁶ *Baxter v. Montana*, No. 2007-787 (Mont. 1st Dist. Dec. 5, 2008).

³⁷ *Id.*

³⁸ *Baxter*, 224 P.3d at 1222.

³⁹ *Id.* at 1216.

⁴⁰ *Id.* at 1215.

⁴¹ *Id.* at 1217-18.

⁴² Sen. Greg Hinkle, R-Thompson Falls, quickly responded to the decision by filing a draft request for a bill with the short title "Prohibit physician-assisted suicide." See Dan Person, *Political notes*, BOZEMAN DAILY CHRONICLE, Feb. 14, 2010, available at http://www.bozemandailychronicle.com/news/article_90d2cbd4-966d-5901-9405-d10e053-b983c.htm.

⁴³ See 61 AM. JUR. 2D *Physicians, Surgeons, Etc.* § 189 (2002).

⁴⁴ IDAHO CODE ANN. § 6-1012 (1976); see also *Dulaney v. St. Alphonsus Reg'l Med. Ctr.*, 137 Idaho 160, 164, 45 P.3d 816, 820 (2002).

⁴⁵ News Release, Pew Research Center: For The People & The Press, More Americans Discussing — and Planning — End-of-Life Treatment: Strong Public Support for Right to Die 1 (Jan. 5, 2006), <http://people-press.org/reports/pdf/266.pdf>.

⁴⁶ See also, Carla Rubinski, *Spotlight on Assisted Suicide in Connecticut*, available at <http://www.neilrogers.com/news/articles/2005030818.html> (last visited July 1, 2010).

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LAW, ECONOMICS, AND THE QUALITY OF LIFE FOR NATIONS NEXT DOOR

Donna Emert

University of Idaho College of Law

While there are 562 federally recognized tribes and at least 35 states with sovereign, tribal nations within their boundaries, there are only a few law schools offering academic programs that address the onion-like layers of federal, state and tribal laws governing Native Americans and their enterprises.

“Right now in the field of Native American Law, very few practitioners had the benefit of taking Native Law courses when they were in law school,” said Angelique EagleWoman (Sisseton-Wahpeton Oyate), University of Idaho associate professor of law. “Native law programs allow students to think deeply and broadly about Native law. This is really the first time in history that law students have that opportunity, and can bring that expertise into their practices.”

The College of Law launched its Native American Law academic emphasis in 2009, providing that specialization for upper-level laws students. The rigorous program incorporates a 12-credit academic emphasis on Native law as part of the College’s 90-credit J.D. program, requires participation in the Native American Law Student Association, and integrates direct collaboration with regional tribal nations. It also requires completion of a substantial, final research paper and 20 hours of service learning experience — each with Native Law focus and direct application. The emphasis provides a specialization designation recognized within the legal field and acknowledged on program graduates’ official transcripts.

“Native Law is fundamentally different from other American law,” said Moira Ingle, who earned one of the first Idaho juris doctor degrees with emphasis in Native American Law, awarded this past spring. “Federal

Indian law is based primarily on treaties and U.S. Supreme Court decisions. And within Indian Country, tribes create their



Donna Emert



Photo courtesy of University of Idaho

Pictured left to right are Brett Hathaway, Professor Angelique EagleWoman, and Moira Ingle. Hathaway and Ingle, 2010 College of Law graduates, are the first to earn the Juris Doctor degree with Native American Law Emphasis from University of Idaho.

own tribal codes. Because it’s so specialized, it’s critical to educate lawyers to understand the idiosyncrasies in jurisdiction and applicability, especially in the Pacific Northwest where there are many tribes with their own sovereign territories,” Ingle said.

“Despite the federal government claim that Native Americans are in a ‘self-determination’ era, tribes face huge bureaucratic and economic hurdles to achieve that self-determination,” said Ingle. “Even if it’s one of the few tribes with steady income from casino operations, federal law limits how tribal sovereign governments can spend income and taxes to support their communities; municipal and state governments do not have such tight restrictions. Land placed in trust for tribes means it’s difficult to get mortgages and to finance capital projects. Criminal jurisdictional intricacies leave Native women in limbo if their non-Native partners inflict domestic violence on them. The possibilities are endless and tribal determination is strong; but the path to self-sufficiency is a bureaucratic maze strewn with procedural obstacles.”

EagleWoman, chief architect of Idaho’s academic emphasis in Native Law, modeled its components on the two major Native American Law programs in North America: one at University of Tulsa, Oklahoma, and the other at University of New Mexico.

She has firsthand experience of Tulsa curriculum, having earned her master’s degree in law there. EagleWoman also studied political science at Stanford University and holds a juris doctor from University of North Dakota. She is the James E. Rogers Fellow in American Indian Law at University of Idaho and currently serves as immediate past chair and secretary of the Association of American Law Schools (AALS) Section on Indian Nations & Indigenous Peoples. EagleWoman joined the Idaho College of Law faculty in 2008 and also serves on the university’s American Indian Studies (AIST) faculty.

In addition to providing students a valuable, relevant specialization, the program also raises student awareness of the issues facing the nations next door. “The University of Idaho sits on historic Nez Perce territory, with the

Coeur d' Alene, Spokane, and Kootenai Tribes to the north and the Shoshone-Bannock to the south," said Ingle. "We live and study surrounded by Indian Country, but most people—even law students—don't know much about its status. Most Americans think the "Indians" were taken care of long ago, and can't conceive that those long-ago treaties might still mean something today. Most of what they hear in the news is about prosperous casinos, and nothing about the continuing widespread poverty in Indian Country."

The College's new Native Law emphasis has reinvigorated an annual Native Law Conference, also shaped by EagleWoman. "I pick a topic each year that is central to what's going on with Idaho tribes," she explained. "Then we invite leading scholars to our law school to discuss related challenges and solutions."

In 2009, the conference addressed Indian water rights, a focus reflecting a series of adjudications on water rights in Idaho that year. The 2010 Native American Law Conference, titled "Living in Balance: Tribal Nation Economics and Law," was held last March.

Most Americans think the "Indians" were taken care of long ago, and can't conceive that those long-ago treaties might still mean something today.

"This year, I hope people walked away with the understanding that building tribal economies presents great opportunity not only for the tribes, but for the regions in which tribal economic development happens," said EagleWoman.

"For example, the Coeur d'Alene Tribe recently conducted a study that measured tribal economic impact demonstrating that the Tribe is one of the two most significant economic engines in northern Idaho. Those impacts need to be made known in order to illustrate the positive role tribes can have in rural communities, and how law undergirds economic systems. I think it's important for lawyers to understand

that strong tribal laws, a strong judiciary, and comprehensive governmental regulations provide the stability for good business in Indian country."

"Lawyers have a real role in economic stability," said EagleWoman. "This is my primary area of interest and scholarship: law, economics, and raising the quality of life for tribal citizens."

About the Author

Donna Emert is a writer with University of Idaho Communications, where she has worked for five years. She also has worked as a freelance writer for more than 20 years. She is based in Coeur d'Alene.

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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IN MEMORIAM

Elbert Ernest Gass

1919 - 2010

At the age of 90, on the 27th day of June, 2010, Elbert Ernest Gass, Hap as he is known to family and friends, joined his parents Ernest Leslie Gass and Esther Baker in the great beyond. Born one of twin boys on the 15th day of December 1919 in Valentine, Nebraska, Hap earned his nickname for his 'happy' demeanor as a child.

Hap graduated from Valentine High School in 1938, and moved to Lincoln Nebraska where he worked as a haberdasher and subsequently a secretary for the governor of the state of Nebraska.

In March of 1942, Hap enlisted and entered the service in Ft. Leavenworth, Kansas. His military schooling in Aerial Gunnery was completed in Harlingen, Texas. Serving as an Aerial Tail Gunner 611, in the 231st Army Air Force Base Unit, Hap was stationed at Gowen Field Air Base in Idaho and in the European-African-Middle Eastern Theater. Hap flew B-24 observation missions in North Africa and Italy. Hap spent one month in the Azores after encountering mechanical problems during one mission. Sergeant Gass was discharged on the 26th day of November 1945 in Sioux City, Iowa, having received the Good Conduct Medal, American Theater Service Medal, European-African-Middle Eastern Service Medal, Service Stripe, and World War II Victory Medal.

Early 1946 Hap enrolled in the Lincoln School of Commerce, Lincoln, Nebraska, later that year enrolling at Creighton University, in Omaha, Nebraska. On the 14th day of September 1947, he married the love of his life Mildred 'Millie' Sarah Thomas (Valentine), in Valentine, then traveled to Omaha on their honeymoon so that Hap could enroll in his second year at Creighton University. Hap subsequently enrolled in law school at Creighton and graduated with his JD in 1952. Hap was very much impressed with the state of Idaho, while stationed at Gowen Field, which influenced his decision to move to Boise following the completion of the Idaho State Bar Exam in 1954.

Initially while in Idaho, Hap worked as an insurance adjuster, graduating from the 16th Claims Department Adjusters' School for Farmers Insurance Group. It



Elbert Ernest Gass

was at this time that Hap and Millie developed a life-long friendship with former Boise residents Dick and Doris Schneider, now residing in Stanley, Idaho. In 1956, however, Hap began his long career in law as an Assistant for the Attorney General of the Great State of Idaho. In June of 1958, Hap and Millie Gass moved to Montpelier, Idaho with their two young sons, Tim and Tom, to begin his career in civil law. In addition to acting as City Attorney for Montpelier, Hap was also nominated in 1960 to serve as the Prosecuting Attorney for Bear Lake County, Idaho. While in Montpelier, Millie and Hap welcomed their third child, a daughter, Mary Beth into the world. The family was complete along with their legendary dachshund Herman. In March of 1967, the family moved back to Boise (wise decision), where he joined the law firm of Clemmons, Skiles and Greene, handling the Boise City legal issues. This parlayed into a permanent position as the City Attorney for Boise, Idaho, which consumed Hap's life until his decision to enter private practice in 1977. At the time of Hap's retirement from the City Attorney's Office, then Mayor Dick Eardly said, "He was a tremendous city attorney and we will miss him."

Hap continued practicing law, handling the affairs for the Ada County Drainage District #2 and #4, and the Bench Sewer District, and other civil functionaries until 1996. At the age of 77, after 40 years of legal practice, Hap finally decided to leave the profession of law, and along with his wife Millie, who had been functioning as his secretary, retired to their residence in Eagle, Idaho. Now retired, Hap had time to devote to his passion of genealogy, spending countless hours researching the family history and that of his Scottish clan, the MacLennans. Hap also enjoyed coin collecting, sending and receiving email from family and friends, caring for his five acres, and spending time with his grandsons.

Hap is survived by his wife of nearly 63 years, Mildred S. Gass; sons, Timothy J. Gass of Eagle, Idaho, Thomas J. Gass of San Diego, CA; daughter, Mary Beth Carson of Eagle; grandsons Thomas C. Carson and Alec J. Carson of Eagle; many wonderful in-laws; numerous nephews (9), nieces (8); a myriad of great and great-great nieces and nephews; and many wonderful friends including Greg Carson and Chester McLemore.

His parents, twin brother Robert, older sister Roberta, and brother Raymond preceded Hap in death.

Most who knew Hap were aware of his great affection for his hometown of Valentine in the Sandhills of Nebraska. He chose to be laid to rest in the family plot at Mount Hope Cemetery in Valentine, which took place Saturday, July 3. There was a celebration of his life in Boise that included an ice cream social in remembrance of Hap's passion for ice cream with salted peanuts and chocolate topping. It took place Saturday, July 10 at Covenant Presbyterian Church.

The family requests no flowers, but suggest memorials be made to St. Lukes Mountain States Tumor Institute, Boise.

In finality, a quote from one of Hap's favorite books, *The Prophet*, Kahlil Gibran:

Only when you drink from the river of silence shall you indeed sing.

And when you have reached the mountain top, then you shall begin to climb.

And when the earth shall claim your limbs, then shall you truly dance.

Now Elbert E. Gass, begin to dance...

Honorable Brent John Moss

1944 - 2010

Hon. Brent John Moss, 65 of Rexburg, died Thursday, June 24, 2010 at his home following an extended illness. He was born August 23, 1944 at Ogden, Utah to John Calvin Moss and Jessie Ruth Bingham Moss. He married LaRae Johnson on June 3, 1966 in the Idaho Falls LDS temple. He graduated from Ricks College, Brigham Young University in Provo, Utah and the University of Utah. After graduating he worked for a law firm in Salt Lake City, Utah then in 1976 he moved to Rexburg and was a partner in the law firm of Smith, Hancock and Moss. He was the Madison County prosecuting attorney and assistant prosecuting attorney for Teton County. He was a magistrate judge and a judge in the Seventh District Court. He worked hard, with others, to make the drug courts and mental health courts a success in Madison County.

Judge Moss was a member of The Church of Jesus Christ of Latter-day Saints, serving a mission to the Gulf States, serving as a bishop and stake president, gospel doctrine teacher, ordinance worker in the Rexburg Temple, and he



Honorable Brent John Moss

IN MEMORIAM

sang in the ward choir. He loved horses, Idaho, family and fishing.

He is survived by his wife LaRae Moss of Rexburg, children Kristen (Shane) Bahr, Kathy (Chad) Dickemore, Elizabeth (Lo) Nestman, Jonathan (Lindsay) Moss, Jacob (Mandi) Moss, Michael Moss, brothers; Kevin (Suzan) Nield, Curtis (Meta) Nield, Robert (Denise) Nield, Myron (Devry) Nield, sisters; Rosa Lee (Dan) Staiger, Ann Marie (Joe) McMurtrey, Lisa (Kurtis) Humphreys and 11 grandchildren.

He is preceded in death by his parents and his step-father Ralph P. Nield.

Funeral services were held Wednesday, June 30, 2010 at the Rexburg LDS East Stake Center with Bishop Brad Smith of the Rexburg 4th Ward officiating.

Joseph Charles Adams

1946 - 2009

Joseph Adams Jr. was born April 23, 1928, in Logan, Utah, and died Dec. 19, 2009, in Seattle.

Joseph Charles Adams Jr. graduated from Logan High School in 1946, after which he entered the U.S. Army. He completed his basic training at Fort McClellan, Ala. Joe served on the Military Government Team in Aomori, Japan, from 1946 to 1947.

He received an honorable discharge as a sergeant and enrolled in Utah State University, where he majored in business administration and minored in economics and military. He graduated in 1950.

Joe was commissioned as a second lieutenant in June 1950. He was called up to active duty again June 11, 1951. Joe attended artillery school at Fort Sill, Okla., and served with the 213th Field Artillery Battalion in Korea through 1952. He was released from active duty March 21, 1953, as a first lieutenant. During his service, Joe was awarded the Silver Star and three Bronze Stars.

A true story recording the heroic events of Mr. Adams and the 213th can be read in the book, "A Hill Called White Horse: A Korean War Story," by Anthony Sobieski.

Joe was employed as a bartender and waiter from 1953 to 1955. He later entered law school at the University of Utah and graduated with his law degree in June

1958. After taking his bar exam, he began practice in Lewiston, where he practiced until retiring in 2000.

During his years of practice he served as justice of the peace from 1960 to 1962, was deputy prosecuting attorney from 1970 to 1974, and served on the legal services board of directors for five years and on the mental health board of directors for five counties for five years.

He was the post commander at the Veterans of Foreign Wars in Lewiston, was exalted ruler for the Lewiston Elks Lodge, was on the board of directors for the Valley Boys and Girls Club of Lewiston-Clarkston for 12 years, and was on the board of directors for the Orchards Sports Inc., for eight years.

Joe and Marian Peterchick were married Aug. 28, 1955. Three children, Audrey Case, Scott Adams and Murriel Briggs, were born to the couple, and they later divorced. He married Verna Adams Aug. 17, 1982, and became stepdad to two children, Debra Chamberlin and Kelly Giese.

After retiring Joe and Verna traveled extensively for four years and resettled in Lewiston in 2007.

Mr. Adams was preceded in death by his parents and two sisters. Besides his wife, children and stepchildren, his brother, Gerald Adams of the Tri-Cities, survives him.

Memorial services were held on July 16 at the Lewiston VFW Post located at 1104 Warner Ave., Military graveside services followed at Fix Ridge Cemetery.

Robert W. Bartlett II

1933 - 2010

Robert W. Bartlett II, 76, retired attorney and newspaper reporter, died Tuesday (July 13) at his home in Hailey after a two-year battle with cancer.

A Wood River Valley resident for 25 years, he was best known for his twin passions: a commitment to the environment and a commitment to helping the "little guy" find his way through the legal system.

"Bob cared passionately about the kind of world that he would be leaving to his grandnieces and grandnephews. He was a donor to environmental organizations. He spoke tirelessly with conservation leaders and

offered his opinions and suggestions for direction," said state Rep. Wendy Jaquet.

"As an attorney, Bob was well known in the vulnerable communities as a 'go-to guy' whenever someone needed help," she added. He worked at reduced fees for dozens of people who otherwise could not have afforded legal help.

Mr. Bartlett once helped an environmentalist file bankruptcy after she spent too much time helping the organizations she loved. He then donated the equivalent of his fee to her favorite organization so that her salary could continue for a few more months.

A lifelong bachelor, he liked having his friends around. When he moved to Idaho from San Francisco, he first lived in a condo carefully selected for its location within walking distance of Sun Valley's River Run ski lift. "If I had an extra bedroom by the lift, I knew I would have as much company as I wanted," he said.

Ketchum resident Jo Murray was one of those frequent visitors in the 80s and 90s. "Bob worked with my husband at the San Francisco Chronicle," she said. "After my husband died, Bob knew I needed an escape during the holidays. He wrote me a note saying, 'My house is your house.' I spent three Christmases as his houseguest until I got my own place. I doubt that I would have moved here otherwise."

He made a point of keeping in touch with old friends. He went to Yale reunions whenever possible. When Pulitzer Prize winner and historical author David McCullough signed books in Ketchum, it was Mr. Bartlett who introduced him.

Mr. Bartlett devoted hours to reading and keeping up with current events. He was never shy with his opinions. "He loved a good argument," said longtime friend Marge Sloten of Twin Falls. "I think that is why he enjoyed the law so much."

In the weeks before his death, he often told friends that he should have paid more attention to his health. He said it without bitterness; it was just fact. He specifically asked that his obituary include one statement: He hoped his death would persuade others to have regular colon examinations and other preventive medical care when their doctors advise it.

Mr. Bartlett was born in Atlantic City, N.J., on Sept. 8, 1933. He was a graduate of Lawrenceville School in Lawrenceville, N.J., in 1951; Yale College in 1955 and the University of California Hastings College of the Law in 1966.

After college, he worked as a reporter for the *St. Petersburg Times* before join-



Joseph Charles Adams



Robert W. Bartlett II

IN MEMORIAM

ing the U.S. Army, serving in counter-intelligence in Germany. The Army was a necessity to fulfill his military obligation but not his concept of the ideal job. Years later he remembered that he was on active duty for 3 years, 4 months, 17 days, 9 hours and 22 minutes.

After leaving the military, he worked as a reporter for the *Dayton Daily News* and *The Wall Street Journal* Chicago bureau. When that job ended, he searched the ads and found an opening at the Twin Falls *Times-News* in 1959. It was there that he learned to appreciate Idaho's mountains and wildflowers, which he frequently photographed. He also began skiing, a sport he enjoyed as recently as last winter.

Mr. Bartlett left the Twin Falls newspaper for San Francisco and law school

at Hastings. While in law school, he also worked as a reporter for the *San Francisco Chronicle*, where he covered environmental issues.

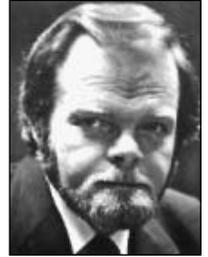
He returned to Idaho in 1985, working as an attorney in Twin Falls, Wendell and Hailey before his retirement.

Mr. Bartlett is survived by his brother and sister-in-law, Ben and Ann Bartlett of St. Petersburg, Fla.; his nephew, Lee Bartlett of Oxford, Ohio; his nieces, Kathy Peterson of Apex, N.C., and Beth Bartlett and Amy Pope, both of St. Petersburg; and 9 grandnieces and grandnephews. At his request, there will be no services.

Donations may be made in his memory to the Wrexham Foundation, Aka Manuscript Society.

Ellison M. Matthews 1938 - 2010

Ellison Marler Matthews, 72, cherished father and attorney, died on July 10, 2010 of natural causes. A memorial service was held at the Rookery in Kathryn Albertson Park on Monday, July 19. A celebration of his life followed at The Stagecoach. In lieu of flowers, please consider making a contribution to the Southern Poverty Law Center in his memory.



Ellison M. Matthews

OF INTEREST

Banducci Woodard Schwartzman adds to team

Banducci Woodard Schwartzman, PLLC has recently added three new team members to its Boise office.

Jennifer Schrack Dempsey has 10 years of litigation experience and is licensed to practice in California and Idaho. Jennifer is also a director of Idaho Women Lawyers and represents children who are within the custody of the State. Jennifer is an active volunteer within the Boise refugee community, and is a director for the Evelyn Grace Foundation.



Jennifer Schrack
Dempsey

Susan Moss recently returned to Idaho after 3 years as a litigation associate with O'Melveny and Myers LLP in Washington, D.C. She graduated summa cum laude from the University of Idaho College of Law and has a B.S. in Chemistry from the University of Oregon. Susan is licensed to practice law in Idaho and Washington, D.C.



Susan Moss

Jeri Rose, a legal assistant with over 30 years experience, also joined the firm in May. Jeri is actively involved with the local, state and national Associations for

Legal Professionals, having held many leadership positions.

New staff at Idaho State Bar

The Idaho State Bar has hired a new Deputy Executive Director, Mahmood Sheikh. He comes to the ISB from the University of Colorado Foundation as an Assistant Athletic Director. Prior to joining CU, he worked for the University of Idaho in Boise in athletics and program development. He is a native Idahoan and is excited about returning home to work for the Bar and Foundation.



Mahmood Sheikh

Lou Engelhardt has joined IVLP staff as Intake Coordinator. She has been in Boise since early 2009, having lived previously in South Dakota, Las Vegas and Northern California. She has a Masters in School Counseling and teaching experience in Special Education. She has worked as a paralegal at private law firms and as an advocate with other agencies, including Protection and Advocacy and County Welfare offices, where she has assisted clients similar to those that utilize the services offered by IVLP. The IVLP staff is



Lou Engelhardt

looking forward to having someone with Lou's experience join them.

Utah patent lawyer joins Zarian Midgley

David R. McKinney has joined Zarian, Midgley and Johnson, PLLC, McKinney will work in both Boise and Salt Lake City, Utah.

McKinney is a registered patent attorney and licensed professional civil engineer. His practice focuses on domestic and foreign patent prosecution and licensing. He has handled matters involving a wide range of technologies, including mechanical and medical devices, video display and projection systems, and nuclear waste disposal methods. He has also prepared opinions concerning patentability, infringement and validity for clients in a wide range of business areas.

Prior to joining Zarian Midgley, McKinney was in private practice in Salt Lake City. He has served as outside counsel for the Hewlett-Packard Company and the Idaho National Laboratory and, in the early 1990s, worked as a civil engineer for Keller Associates in Boise.

Zarian Midgley has hired a new Firm Administrator to help meet increased business demands. The addition of Dean Larson to this position reorganizes the firm's administrative support team. Among other things, Shauna Knowles has been



David R. McKinney

appointed as Zarian Midgley's new Controller. Larson will manage the firm's day-to-day operations.

"When we launched the firm two-and-a-half years ago, we could not have anticipated the rate at which our team would expand" said John Zarian, managing partner for Zarian Midgley. "The addition of Dean Larson and the reorganization of our administrative support team will help our legal professionals remain focused on our clients, and ensure that the firm's day-to-day operations run smoothly."

Dean Larson joins the Zarian Midgley team from Concrete Construction Supply in Boise, where he served as Vice President and General Manager for more than 10 years. Larson holds a Bachelor of Arts in Economics with an emphasis in International Economics from Boise State University. He is also a veteran of the United States Air Force and completed undergraduate studies at the Air Force Academy.

2010 Advocate Awards

At the Annual Conference Service Award luncheon, recognition was given to contributors of *The Advocate*, including for Best Article, Best Issue and Best Cover. The selections were made by the 11-member Editorial Advisory Board this spring. The awards are as follows:

Best Article – "The United States Court for the District of... Thailand?" by Judge Larry M. Boyle. The author shared his experience travelling to Thailand to hear cases of U.S. citizens brought before the Thai judicial system in the October, 2009 issue. According to his nomination, "The author's wit, candor and vivid descriptions bring his experiences alive. It was fascinating."

Judge Boyle is U.S. Magistrate Judge in Boise.



Dean Larson



Shauna Knowles



Honorable Larry M. Boyle

Best Issue – Business and Corporate Law Section: September, 2009. The issue featured timely and substantive articles that deeply explored several developments facing corporate law, including varying views of Idaho's new LLC ACT, an issue that has closely engaged the Section for the past few years.

Best Cover – Chris Nye captured remarkable colors for the June/ July edition with his photo of the Snake River at Shoshone Falls during April. The enormous waterfall plunges 212 feet, 50 feet higher than Niagara Falls. Nye, a regular contributor to *The Advocate*, is an avid outdoorsman and writes a column for the Idaho Press Tribune in Nampa.

All issues of *The Advocate* since 2006 are available online at the State Bar's website, www.isb.idaho.gov, which also provides a search tool and indexes for articles going back to 2003.

Team from Supreme Court / Court of Appeals recognized for public service

Each year, the Fourth District's Bar honors those who have contributed to pro bono and public service activities with its "6.1 Challenge." This year, a team of law clerks from the Supreme Court and Court of Appeals was recognized for contributing hundreds of hours to projects like Citizenship Day, the Boise Rescue Mission, and the Idaho Immigration Law Pro Bono Network. Special recognition went to Mikela French, a law clerk for Justice Horton, for nearly 500 hours spent with the Immigration Network project at the Fourth District Law Day reception.

Federal Bench, Bar to recognize Boise attorney at Ninth Circuit Judicial Conference

Attorney Paul "Larry" Westberg of Boise, Idaho, will be honored at the 2010 Ninth Circuit Judicial Conference, an annual gathering of the federal bench and bar from the western United States.

Mr. Westberg will be presented with the John P. Frank Award, which recognizes an outstanding lawyer practicing in the federal courts of the Ninth Circuit. Steve Cochran, chair of the Ninth Circuit Advisory Board, will present the award on August 18 following the conference's

bench bar education program.

Mr. Westberg, a partner in the Boise law firm of Westberg McCabe & Collins, is widely regarded as one of Idaho's top criminal defense lawyers and also practices general litigation. His career spans four decades and includes service as a federal prosecutor in the Office of the U.S. Attorney for the District of Idaho. He is admitted to practice before the Idaho federal district court, the Ninth Circuit Court of Appeals and the Supreme Court of the United States.

Long active in efforts to improve the bar and judicial system, Mr. Westberg served as a director of the Federal Defenders of Eastern Washington and was the incorporator and first president of the Federal Defenders Services of Idaho, Inc. He is a founding member of the Idaho Association of Criminal Defense Attorneys and the National Association of Criminal Defense Attorneys, and is currently a Criminal Justice Act (CJA) attorney representing indigent defendants in Idaho. He also was instrumental in organizing the Idaho chapter of the Federal Bar Association, served as its first president, and represented it to the National Federal Bar Association. He currently chairs the national FBA's Government Relations Committee.

In nominating Mr. Westberg for the John P. Frank Award, the Board of Judges of the District of Idaho pointed to his lengthy and distinguished record, both as a practicing attorney and bar leader.

The Ninth Circuit Judicial Conference is held annually pursuant to Section 333 of Title 28 of the United States Code "for the purpose of considering the business of the courts and advising means of improving the administration of justice." In addition to attending business meetings, attendees participate in a rich educational program focusing on important developments in law, economics, science and other fields.

Trout Jones Gledhill Fuhrman Gourley, P.A. adds to firm

Trout Jones Gledhill Fuhrman Gourley, P.A. is pleased to announce the addition of attorneys to the firm. Steven J. Meade, of counsel, and Ben Slaughter, of counsel, both joined the firm in July 2010.



Paul "Larry" Westberg



Chris Nye

R. Bruce Owens
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Western Pacific Timber,
LLC
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- Hay, Reid William**
Boise
- Haynes, Robin Lynn**
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Fort Huachuca, AZ
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- Jacquot, David C.**
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Issaquah, WA
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Riverton, UT
- Klein, Karl Thomas**
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Brian D. Knox, Attorney at
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Soha & Lang, PS
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Eagle
- Meade, Steven James**
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5/2/10 – 7/1/10

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Alexandria, VA

Mott, Tobi J.
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Moulton, Webb Tempest
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Muse, Terri L.
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Owens, Julie Ann
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Phillips Autonomy Law
Mami, FL

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Pitcher & Holdaway, PLLC
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Rasmussen, Troy E.
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Richbourg, P.C.
Tifton, GA

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Lewiston

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Washington, DC

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Ruchti & Beck Law Offices
Pocatello

Sakoi, Jeffrey Marc
Seed IP Law Group
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Sasser, M. Anthony
Sasser Law Office
Pocatello

Schroeder, Laura A.
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PC
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Seibert, Kail Queen
Seibert Law Offices
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**Sheehan, Karen Preset
Overly**
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Siddoway, Lauri Hobbs
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Appeals, Division III
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Simon, Lindsey Renee
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Fitzgerald, LLP
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Yturri Rose, LLP
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Taylor, Jordan Eriksen
Fifth District Court
Jerome

Tetrick, Julie Shannon
U.S. District Courts,
District of Idaho
Boise

**Thompson, James
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Obsidian Law, PLLC
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Public Defender's Office
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Walter, Neil Orin
Post Falls

Wand, Matthew Adam
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Gresham, OR

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Jr.**
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Petrillo**
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**Whitehead, Jarom
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Service & Spinner
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at Law
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W. Anthony (Tony) Park

·36 years, civil litigator

·Former Idaho Attorney General

·Practice limited exclusively to ADR

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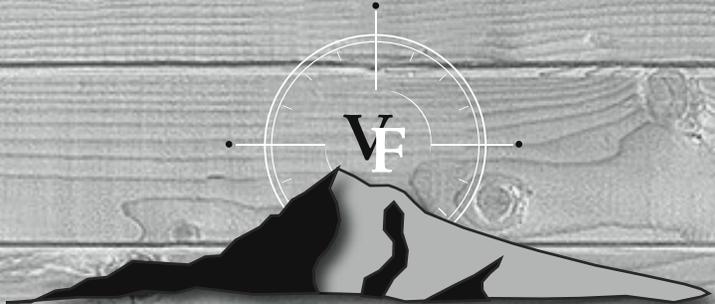
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CISA 262 Legal Assistant Two

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This course offered over two terms provides training simulated to a minimum of six months actual on-the-job training, thereby allowing completers of the major to qualify as legal secretaries and eventually pursue the Professional Legal Secretary (PLS) designation. Class will be offered online through the CSI Blackboard system; students must have a computer and Internet access. Please register before August 25 for CISA 261 Legal Assistant 1.

If you have any questions, call:
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THE WHAT AND WHYS OF THE PRO BONO SURVEY

Honorable Candy W. Dale
United States Court District of Idaho

Late last fall, I co-authored a letter with Idaho Supreme Court Justice Jim Jones that was sent, along with an informal survey, on behalf of the Idaho Pro Bono Commission to all private and public law firms and law departments in Idaho with five or more lawyers. The survey asked for information regarding pro bono legal service policies and, in the letter, we encouraged all firms to implement a written policy if they did not have one currently in place. While expressing appreciation to those of you who responded to the survey, I thought you might be interested in the survey results and also in learning more about the activities members of our state and federal judiciary are continuing to take to encourage pro bono legal services throughout Idaho.

Before the survey

Before sending out our letter and the survey, members of the Idaho Pro Bono Commission held meetings around the state and initiated discussions at the state and federal level regarding members' efforts to develop templates for pro bono policies and, if organizations did not have policies in place, to encourage private, corporate and government law firms to adopt pro bono policies. Justice Jim Jones and I, along with Sixth District Magistrate Judge Rick Carnaroli, are the three judicial officers currently serving on the Commission and on the judicial sub-committee of the Commission. While the Commission as a whole was reviewing templates for policies drafted by sub-committees, we did our best to initiate conversation among members of the Bar about pro bono representation and pro bono policies, which included the facilitation of Dialogues with lawyers at the Federal Courthouses in Boise and Coeur d'Alene and the Bannock County Courthouse in Pocatello.

At all three Dialogues, attendance was good and we held open discussions about pro bono service and pro bono policies, although I share the observation reported by Magistrate Judge Rick Carnaroli in his article in the February 2010 Advocate that we were met also by "healthy skepticism



Honorable Candy W. Dale



For sample pro bono policies visit the Idaho Pro Bono Commission's website at http://isb.idaho.gov/ilf/ivlp/pro_bono_comm.html#Temp Use these "templates" as a starting point and delete, add or modify to suit your firm.

and concern." Since then, however, we have experienced a genuine outgrowth of enthusiasm and follow-through by lawyers and law firms across the state who have not only adopted policies but increased their time and commitment to helping those that do not have the means to hire a lawyer or otherwise obtain access to the judicial system and courts.

Results of the survey

Out of 91 letters sent, 27 completed surveys were returned, although a few more dwindled in after the initial compilation, along with written policies some firms were willing to share. From the first 27 returned, 9 firms (or one-third of the respondents) indicated they had a written pro bono policy and another 4 indicated they were interested in having a written policy. The remainder indicated "no" regarding the existence of a written policy, but the majority of these respondents indicated also that they have encouraged and allowed pro bono service by the lawyers in their firms but do not have either a pro bono service requirement or a written policy on the subject. After the survey was taken, we received additional information from law firms about written pro bono policies and practices implemented

in law firms around the state. The Idaho Pro Bono Commission is compiling all the information received to date, as we plan to publish the list of firms that have a written policy in place in an upcoming edition. To be included in the published list, please contact Mary Hobson, Idaho Volunteer Lawyers Program Legal Director at (208) 334-4500 and let her know if you have a written policy but did not respond to the survey or your firm finalized a policy sometime later.

Why have a written policy?

Both before, during and after our survey, I have been asked why it is necessary for a firm to have a written policy if the firm otherwise provides pro bono legal services and encourages lawyers in the firm to do so without the existence of a "formal" policy. When I hear this, it reminds me of times in my prior life in private practice when I counseled employer clients about the importance of written anti discrimination and harassment policies. If something is not in writing, it may as well not exist. Beyond this reason for having a policy in writing, analogies can be made to goal setting. It is more difficult to meet a goal if the goal and the steps to achieving it have not been reduced to

writing. Finally, we all know how difficult it can be to enforce an unwritten agreement or handshake deal.

I have given a lot of thought to this, and concluded some firms may not like the concept of a “policy” because they do not want to be accused of not following their own policy. Keep in mind that Rule 6.1 of the Idaho Rules of Professional Responsibility does not mandate pro bono service, but strongly encourages it as part of your professional responsibility (and oath) as a lawyer. Therefore, if you are reluctant to accept the concept of or the term “policy,” consider the fact that a pledge or statement of support might have the same result. In either event, reducing your commitment to writing is a great first step toward fully integrating Rule 6.1 of the Idaho Rules of Professional Conduct into your work and overall responsibilities as a lawyer.

One of the government firms that responded to the survey by indicating it was working on its policy was the Ada County Prosecuting Attorney’s Office. After receiving our letter, Ada County Prosecuting Attorney Greg H. Bower established a pro bono committee in December of 2009 that developed and organized the pro bono efforts of the lawyers in his office. That committee developed a pro bono guideline for their attorneys and organized an impressive 6.1 Pro Bono Challenge submission in April of 2010, reflecting the fact that two thirds of their lawyers participated in providing pro bono service.

From the corporate law firm respondents, we received one written policy and recently received a copy of the newly adopted J.R. Simplot Corporate Legal Department Pro Bono Commitment. General Counsel for the J.R. Simplot Company, Terry T. Uhling, serves on the Idaho Pro Bono Commission and, with regard to Simplot’s Commitment, he authorized me to quote him as follows: “At the J.R. Simplot Company our lawyers welcome the opportunity to serve as volunteer attorneys in meeting the pro bono needs within our communities. The Simplot legal team is committed to being a corporate pro bono leader in providing legal services that are in the public interest and for folks who cannot afford or find the representation necessary to protect their rights.”

There are other benefits of a written policy or pledge, such as recruiting new lawyers and clients. Many law students, and in particular those that attend the University of Idaho College of Law, have pro bono service hour requirements for graduation and already are “primed” for pro bono legal service when they are applying and interviewing for jobs for pay. It may be hard to convince an applicant that you do allow pro bono legal service, as approved by the firm, if you do not have

The Idaho pro Bono Commission and The Advocate would like to know if your firm — regardless of size — has a written pro bono policy, so that you can be recognized in an upcoming Advocate article. Please contact Mary Hobson, Idaho Volunteer Lawyers Program Legal Director at mhobson@isb.idaho.gov or (208) 334-4510 and tell us you have a policy or if you would like more information.

— Justice Jim Jones, Idaho Pro Bono Commission Chair

your “policy” in writing. With regard to clients, consider the fact that many corporations are community minded and some, such as Simplot, may prefer or even require outside firms to whom they assign litigation work to have a proven pro bono policy and commitment.

What can Judges do to encourage pro bono service?

First, I should start by telling you that the Idaho Supreme Court recently adopted a revised Canon 4C(3)(b)(iii) that addresses judicial encouragement of pro bono activities. The Canon now reads that Idaho state judges:

(iii) shall not use or permit the use of the prestige of judicial office for fund-raising or membership solicitation, *provided that a judge may encourage participation by a lawyer or lawyers in pro bono activities as long as the encouragement is not coercive in nature.*

The amendment, italicized above, is consistent with the ABA Model Code of Judicial Conduct Rule 3.7(B) and the Canons applicable to federal judges, such that appointing lawyers to represent indigent parties and encouraging lawyers to participate in pro bono legal service, as long as the judge does not employ coercion, does not abuse the prestige of judicial office.

As one member of the Commission commented at a recent meeting, we are not “holding out tin cups and asking for coins” from lawyers. We are not soliciting for charity, but we are encouraging lawyers to engage in pro bono service as the means for providing access to and enhancing the administration of our system of justice. The lack of legal representation for those less fortunate impedes access to justice for everyone, as pro se appearances often delay court proceedings and fail to efficiently utilize judicial resources. Therefore, as judges, we have

the opportunity—and an obligation—to use our positions to promote and to provide access to justice. Encouraging members of the bar to help those who cannot afford to hire a lawyer to represent them is one way we can accomplish the goal of providing equal access to justice.

A written commitment

Thank you to everyone who responded to the survey either initially or in more recent months. As judges and lawyers, our commitment to pro bono service should never wane. Over the past 18 months while I have worked on the judicial subcommittee of the Idaho Pro Bono Commission, I have seen tremendous efforts by many members of the Idaho State Bar toward this commitment we share.

Finally, I encourage you to visit the Pro Bono Commission’s page on the Idaho Law Foundation’s web site, www.isb.idaho.gov/ilf, where you can find the three templates for reducing your pro bono policy or commitment to writing.

About the Author

Judge Candy W. Dale was appointed United States Magistrate Judge by the United States District Court for the District of Idaho, entering duty on March 31, 2008. She was appointed Chief United States Magistrate Judge in October of 2008. Among her other duties, she is the supervisor of the Pro Se and Capital Habeas Unit; supervisor of the ADR Program and ADR Coordinator; which includes the Pro Bono Program; and Chair of the Local Civil Rules Advisory Committee. She also serves on the District’s re-entry team, START (Success Through Assisted Recovery and Treatment), in Boise and Moscow. She is the District of Idaho’s representative on the Magistrate Judge’s Executive Board for the Ninth Circuit, a member of the Jury Trial Improvements Committee for the Ninth Circuit, and a member of the Idaho Pro Bono Commission.

TRADING FLIP FLOPS FOR SNOW PACS: IDAHO LAW STUDENTS TAKE ALTERNATIVE SPRING BREAK

Donna Emert
University of Idaho
Chip Giles
University of Idaho intern to
Idaho State Bar

The word “alternative” likely starts to resonate in the phrase “Alternative Spring Break” when a law student with a week off boards a bush plane headed for the Alaskan tundra.

Over spring break this year, four University of Idaho College of Law students, members of the Volunteer Income Tax Assistance (VITA) program, flew into a remote region of Alaska to help rural citizens file their 2009 income tax returns. Other law students headed to Washington D.C., Boise, and Twin Falls to help veterans access benefits, help homeowners prevent foreclosure and assist legal permanent residents become naturalized citizens.

During Alternative Spring Break 2010, 20 Idaho law students performed over 1,000 hours of pro bono service, providing legal aid to more than 200 people. University of Idaho VITA members traveled to the Alaskan Peninsula and the northernmost city in North America, Barrow, AK to help rural Alaskans file tax returns. Students polished legal skills, and were rewarded with the gratitude of the people they helped. Students also had the chance to view the planet’s most renowned light show, the Northern Lights, an experience not available from more traditional Spring Break venues, such as Waikiki.

“Bright green streaks filled the sky from east to west,” said third-year law student Matthew VanZeipel. “My hands were numb from operating my camera outside of the bulky gloves that would



have otherwise kept them warm. It was cold enough to give me a brain freeze, like I was eating ice cream too fast. I nevertheless loved that we were able to see the lights in person.”

While the universe rewarded VITA members, law students also gave time and expertise in other areas. Students worked over spring break at Citizenship Day events and Foreclosure Clinics in Idaho and at the National Veterans Legal Services Program in Washington D.C. They include Kiley Cobb, Seth Diviney, Sande Flores, Chip Giles, Sam Nelson, Jessica Pollack, Benjamin Pratt, Zaida Rivera, Jason Wagner, Jennifer Chadband, Cody Yoshimura, Dan Records, Ruth Coose, Jordan Beck, Christi Phillips, Vincent Humphrey and Gavin Giraud.

The graduating class of 2010 demonstrated exceptional dedication to public service by completing approximately 10,000 hours of pro bono work while attending the University of Idaho College of Law. Last spring The University of Idaho College of Law honored two 2010 graduates with the Above and Beyond Award for exemplary pro bono service.

Marie Callaway, a 2010 graduate, provided pro bono service as a Court Appointed Special Advocate (CASA). The CASA program provides guardians ad litem for children in guardianship and custody cases. In addition to her hard work as a CASA volunteer, Callaway employed her leadership and people skills to keep the CASA program going last year. Through her efforts, Callaway ensured that many more of Idaho’s children will receive a CASA guardian in the future.

In addition to CASA, Callaway performed pro bono service during a summer externship, volunteered with the law school’s landlord tenant clinic and sat on the Latah County Accountability Board.

“It’s nice to get away from the day-to-day of law school and be reminded of why you went to law school in the first place.”

- Marie Callaway

In all, Callaway logged about 250 hours of pro bono service, and was instrumental in creating pro bono service opportunities for other students.

“It’s a great opportunity to learn about areas of the law, Callaway said. “It’s nice to get away from the day-to-day of law school and be reminded of why you went to law school in the first place.”

Some cases teach more than others, said Callaway. She recalls one particular CASA case that provided her the opportunity to truly advocate for the interest of the children. Callaway said, “I wrote letters, made phone calls, and attended hearings on their behalf. It allowed me to see how important it is that someone advocate for them. It also made me aware of how things that seemed easy for me to do like write a letter or make a phone call could affect positive change in the lives of others.”

The other Above and Beyond Award recipient was Gabriela Marrufo. Marrufo logged an astounding 600 hours of pro bono service while studying law at the University of Idaho. She has found that there are lessons to be taken from the real world that just aren’t available in text books or simulations. Among those lessons, she said, is effective communication:

“Talking to clients can be confusing because they come in with so many questions and so many details they want to tell you,” Marrufo said.

“So it’s important to listen carefully and figure out what their issues are. Also, it’s important to be able to explain to the client the law, and the complexities of their cases, as well as the services that you will be providing.”

As a law clerk for legal aid, Marrufo addressed cases on housing, consumer law, employment law and argued a case

in front of the U.S. Ninth Circuit Court of Appeals. Marrufo has also worked extensively in the U.S.-Mexico border region with immigration issues. While in school, Marrufo was one of the “go-to” translators at the College of Law Immigration Clinic. By combining life experience, work ethic and legal education, Marrufo has changed many lives, and hasn’t even sat for the bar exam yet.

“Across the board, the pro bono work performed by students speaks volumes about the spirit of excellence and service represented in the University of Idaho College of Law,” said Ruth Coose, Public Interest Law Group president for the 2009-2010 academic year. “Their professionalism has repercussions far beyond the walls of our school.”

While pro bono service has long been an element of legal education in Idaho, in 2006 Dean Don Burnett and the law faculty officially established 40 hours of pro bono service as a requirement for a University of Idaho Juris Doctorate. Many students exceed that minimum, and there is evidence that those who provide pro bono service as students continue to do so throughout their careers.

“Being an attorney is a privilege,” said Callaway. “I think it’s important for attorneys to remember that they hold keys to our society that not everyone is so fortunate to have. I truly feel it is a duty that comes with the privilege of working

Legal knowledge is your superpower: Be a hero on Citizenship Day, Sept. 17

All Idaho attorneys interested in providing meaningful, life-altering, pro bono service are invited to participate in one of many Citizenship Day activities throughout the state.

Idaho Community Action Network, Catholic Charities of Nampa and the Idaho Volunteer Lawyers Program have teamed up to create events to assist individuals with the naturalization process. Legal expertise is very much needed.

Immigration law experience is not necessary. All volunteers will be trained and supervised by an immigration attorney.

Citizenship Day provides opportunities to do something great for the community and to network with other attorneys. Your participation in Citizenship Day may change someone’s life by helping them become a United States citizen.

Please contact any of the following organizations for information on a Citizenship Day event near you: Idaho Community Action Network: (208) 385-9146; Idaho Volunteer Lawyers Program: (208) 334-4510; Catholic Charities of Nampa (208) 466-9926.

in the legal arena to do what you can to help others.”

About the Authors

Donna Emert is a writer with *University of Idaho Communications*, where she has worked for five years. She also has worked as a freelance writer for more than 20 years. She is based in Coeur d’Alene.

Chip Giles is currently enrolled at the *University of Idaho College of Law* where

he will begin his third-year attending the Boise third year program. He is the Boise project coordinator for the College of Law Public Interest Law Group (PILG) and has been involved with PILG and the College of Law Pro Bono program since his first year of law school. He is currently working as a summer intern for the Office of Bar Counsel and the Idaho Volunteer Lawyers Project.

Law Foundation releases 2010 Annual Report

The Idaho Law Foundation recently released its 2009-2010 annual report. This report contains information about ILF programs, including Idaho Volunteer Lawyers Program, Law Related Education, Continuing Legal Education, and Interest on Lawyers’ Trust Accounts. It also includes a financial statement for the period ending December 31, 2009.

Some of the Law Foundation’s accomplishments for 2009-2010 include:

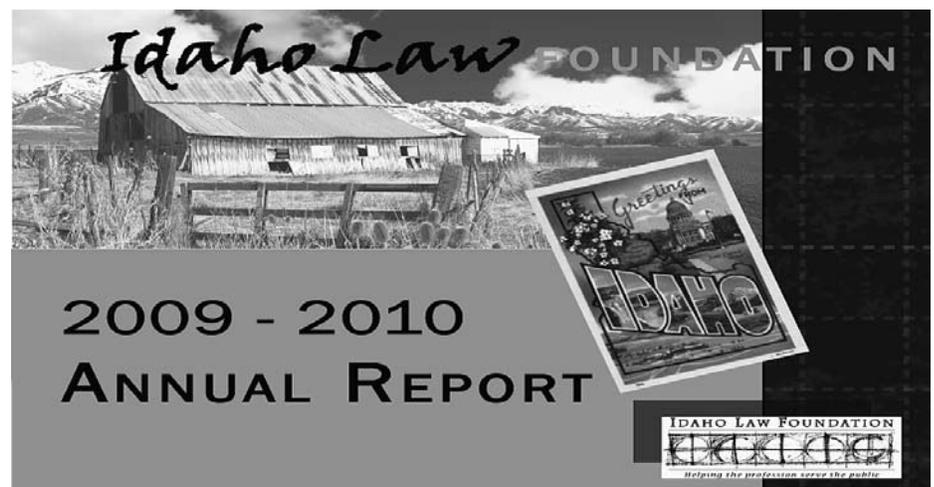
- Idaho Volunteers Lawyers Program provided direct legal services in 657 cases to over 1,200 family members and individuals.
- Law Related Education helped over 300 students and 145 volunteers participate in the 2010 Idaho High School Mock Trial Competition.
- The IOLTA Grant Program granted \$220,000 to community programs in all parts of Idaho.

- Continuing Legal Education 350 programs via its on-line on-demand service.

A copy of the annual report has been mailed to people and organizations that made donations to ILF between July 1, 2009 and June 30, 2010. Additionally, a

copy of the report has been placed on the Idaho Law Foundation website.

If you have any questions or would like to make a donation to or volunteer your time with any of the Foundation’s programs, contact Carey Shoufler, ILF Development Director, at 208-334-4500 or cshoufler@isb.idaho.gov.





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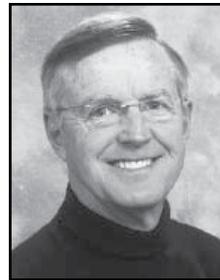
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SERVICE AWARDS GIVEN AT ANNUAL CONFERENCE IN IDAHO FALLS

The Idaho State Bar honored 10 individuals with its Service Award at its awards luncheon in Idaho Falls on July 15. The following are the 2010 Service Award recipients.

Scott Axline

Scott was born in Albuquerque, New Mexico, and raised in Idaho Falls, Idaho. He received his Juris Doctorate Degree from the University of Idaho in 1984 and is licensed to practice in the State and Federal Courts of Idaho, the 9th Circuit Court of Appeals, and the Supreme Court of the United States. He was the Law Clerk for the Honorable Arnold T. Beebe and in 1986, he started his own solo law practice, which he continues to this day.

Mr. Axline has been the Public Defender for Bingham, Butte, and Custer Counties, serving the last two for approximately 10 years. He volunteered as a Civil Mediator during Settlement Week in Bingham County for many years at the request of the Honorable James C. Herndon. He is a member of the Eagle Rock Chapter of the American Inns of Court in Idaho Falls, Idaho.

He served for many years on the Idaho Supreme Court's Criminal Rules Committee, and was President of the Seventh Judicial District Bar Association in 2008-2009, serving for 5 years as an officer, is a member of the Idaho Trial Lawyers Association and the Idaho Association of Criminal Defense



Scott E. Axline

Lawyers. He is certified as a Civil Mediator and a Child Custody Mediator by the Idaho Supreme Court and he volunteers as the Co-Chair of the Citizens Law Academy for the Seventh Judicial District Bar Association. He currently serves on the 7th Judicial District Magistrates' Commission and has volunteered to grade bar exams for more than 20 years. In 2003, he received the Idaho State Bar's Denise O'Donnell-Day Award for pro bono work. He is currently volunteering to represent members of the Idaho National Guard who are being deployed to Iraq.

He is a member of the Blackfoot Elks Lodge and for 18 years has volunteered as Chairman of the Demolition Derby for the Elks, which is the primary fundraiser for its youth activities. He volunteers as a judge for the Veterans of Foreign Wars Oratorical contest each year and volunteered

Service Awards

The Service Awards are presented to those members of the profession who have contributed their time and talent to serve the public and improve the profession.

as a Judge for the Idaho Law Foundation Mock Trial Program for many years.

He is married to Jackie, from Burley, Idaho, has four children and six grandchildren, with two more on the way. He loves to golf, jet ski and especially to spend time with his grandchildren.

He was inspired to do public service by the example of his parents, Pat and Keith Axline, who tirelessly worked for many public service and charitable organizations. Regarding this award, Scott says:

The little I have done for the legal community in Idaho pales in comparison to what the legal profession, attorneys, judges, clerks, and clients have done for me over the years. I believe it is truly an honorable profession filled with honorable people whom it is an absolute privilege for me to associate with. I count being an attorney as one of the many blessings in my life. I also have to give credit to my paralegal of 18 years, Diana Steinmetz, without whom I could not have done nearly as much as I have. My wife, Jackie, also deserves credit since she has to spend time alone when I'm off volunteering.

Michael Fica

U.S. Attorney's Office, Pocatello

Mr. Fica has worked in the United States Attorney's Office, Pocatello, Idaho, for the past 11 years. He has served on the Law-Related Education committee the past 13 years. Mr. Fica specifically volunteers with the Mock Trial program as a coach and judge. He has also assisted in several bar grading sessions. He is active in the Boy Scouts of America, having served in several different positions over the past 10 years. He also volunteers at youth sports in the community, including

coaching flag football, and officiating high school football, softball, and baseball.

Mr. Fica explained what inspires him to do community work:

Kids, particularly my own, are what inspires me to do public service. I enjoy nothing more than spending time with my kids, who I consider to be my best friends. I look for service activities that will allow me to spend time with them, and also show an example to them of the importance of service. In the greater sense, I really enjoy working with young people. Their vigor for activity is contagious. Even more so, working as a prosecutor, you naturally develop a bit of a pessimistic attitude toward human nature. Working with kids, whether it is in the mock trial capacity, or outdoor and sports activities refreshes me and gives me an inspired outlook on humanity. I think it helps me to be a better attorney, and a better person as a whole. I am continually amazed at the breadth of young people's abilities and their insights into the world. My association with them really drives my professional experience.

In addition to my great kids, I have the most terrific wife in the world, and a mom who lives with us and is an essential part of our family. Our hobbies include any type of outdoor activities. My boys and I especially like car and motorcycle racing. I also really enjoy traveling to National Park sites and other locations



Michael J. Fica

2010 SERVICE AWARDS

of historical significance. My future plans are pretty much just chasing my kids around to all their activities.

Mr. Fica currently is assigned to the Department of Justice Organized Crime Drug Enforcement Task Force, working on several regional drug prosecutions.

Joel Hazel

Witherspoon Kelley, Coeur d'Alene

Mr. Hazel works at Witherspoon, Kelley in Coeur d'Alene, where he has served the Bar and community. Volunteer activities have included serving as a Member of the First District Bar Association, and Member of the John P. Gray Inn of Court. He has been Pro Tem Judge for both Kootenai County and Spokane County DUI Courts and a member of the Coeur d'Alene Rotary. Asked about his personal goals, Mr. Hazel said, "I've felt compelled to give back to the profession that I love by serving on both the Character and Fitness Committee and the Professional Conduct Board."

As for his personal life, he said, "I have a wife and two kids, ages 7 and 8 that keep me fulfilled and busy outside of work. I also enjoy cycling, camping and skiing when I have the time."

Charles A. Homer
Holden, Kidwell, Hahn & Crapo, PLLC, Idaho Falls

Mr. Homer practices in the areas of real estate transactions, commercial litigation, banking, commercial lending, creditor's and debtor's rights and business law. He serves as corporate counsel for several local businesses. He is admitted to practice before all state and federal courts in the State of Idaho. Mr. Homer has lectured at seminars on real estate transactions and real estate foreclosures sponsored by the Idaho Law Foundation.

Mr. Homer has served on the Board of Directors and is currently President of the Idaho Law Foundation. He is also a member of the Real Estate Section of the Idaho Bar, and has previously served as chair of that organization. Mr. Homer is a member of the Idaho State Bar and the American Bar Association.



Joel P. Hazel



Charles A. Homer

He graduated from Brigham Young University with a Bachelor of Arts degree in 1971 and was graduated from the University of Idaho School of Law in 1974 with a Juris Doctor degree, cum laude. While at law school, Mr. Homer served as Articles Editor of the *Idaho Law Review*.

Tom South

LeMaster Daniels, PLLC, Boise Office

Mr. South is a non-lawyer member of the Client Assistance Fund Committee for the Idaho State Bar. As a Certified Public Accountant, he has been involved with over 180 cases during the past 26 years. Those included divorce, bankruptcy, voluntary/ involuntary disposition of business interest, antitrust, malpractice, personal injury, wrongful termination/employment, wrongful death, fraud, breach of contract and related damage calculations.

Volunteer activities include serving as a Member, American Institute of Certified Public Accountants; Member, Idaho Society of Certified Public Accountants; Member, Idaho State Board of Accountancy; Director of the Idaho Golf Association, (IGA); Treasurer of Idaho Junior Golf Foundation; Treasurer of Boise Capitals Soccer Foundation; and Member, Boise Sunrise Rotary. He spoke about why he enjoys public service. "The people I associate and have gotten to know over the years are great people and make the volunteer work fun. And that is what life is all about."

Asked about what inspired him to do public service, Mr. South said:

As a young child I remember my Dad taking me to Lions Club meetings on a regular basis and I always thought it was my Mom's way of making sure Dad did not over indulge with the Boys. I also remember my Dad always introducing me to his friends and making sure I shook their hand (firmly of course) and look them in the eye. One time on the way home after a meeting, I asked him why he went to those silly meetings and what was up with making me shake hands. I will never forget his comment, "Two reasons, first it is not what you know in life, it is who you know; and secondly, if everyone was a taker and did not give back to



Thomas South

their communities, it would not be a very fun place to live!

Mr. South has a daughter, Aly Anderson, CPA, 26, Idaho Alum, married to Mike Anderson, Defensive Graduate Assistant Football Coach at University of Washington, they live in Seattle. A son, Greg South, CPA, 24, Idaho Alum, works for Perry-Smith CPAs in San Francisco; and a daughter, Kate South, 21, is a senior at the University of Idaho majoring in Secondary Education.

Ted Spangler

Mr. Spangler recently retired after 35 years with the Idaho Attorney General's Office as a Deputy Attorney General. He was assigned lead deputy AG at the Idaho State Tax Commission in Boise. His activities for the profession include serving on the Bar Examination Committee, and a Bar Exam Grader. He has also served as Chair of the Uniformity Committee and Multistate Tax Commission, which consists of attorneys and policy makers from tax administration agencies of more than 40 states. Mr. Spangler is active in the Litigation Committee of the Multistate Tax Commission. The Committee conducts CLEs on tax matters. He also served on the Attorneys Section of the International Fuel Tax Agreement.

He continued:

My service with the Idaho Bar resulted from the realization that the Bar really depends on the voluntary efforts of Idaho lawyers to meet its important responsibilities both to Idaho lawyers and to the people of Idaho. Grading exams and serving on the exam preparation committee was a useful and personally interesting way I could contribute to the Bar.

Mr. Spangler continues to serve on the Bar Exam Prep Committee and does some pro bono assistance to state taxation organizations.

Mr. Spangler worked 22 years with the Idaho Army National Guard and he is now a retired Colonel. He was Inspector General for the Idaho State Area Command. Mr. Spangler said, "My entire professional career has been devoted to public service both as a Deputy Attorney General and as a National Guard officer."



Theodore V. Spangler, Jr.

2010 SERVICE AWARDS

James (Jim) Spinner

Service & Spinner, Pocatello

Mr. Spinner is an owner in the Pocatello firm of Service & Spinner. He obtained his law degree from the University of Idaho in 1985 and has a busy private practice. He is also a special deputy attorney general for the Idaho Department of Health and Welfare, Child Support Services.

Mr. Spinner serves as a member of the governing council for the Commercial Law and Bankruptcy Section, (2004-2010, chairman, 2009); has been an officer of the Sixth District Bar Association, (2007-2010, president, 2009); and serves on the Sixth District Bench/Bar committee.

Mr. Spinner is on the executive committee of the Idaho State University Tax Institute and has previously served on the Idaho Law Foundation's Law-Related Education committee and served on the local bankruptcy rules committee. Mr. Spinner

is a past recipient of the Commercial Law and Bankruptcy Section Professionalism Award and a Pro Bono Award from the Idaho State Bar. He is also a CASA volunteer and an adjunct instructor in the Idaho State University paralegal program, as well as serving on the paralegal program advisory committee. When he can fit it in his work schedule, Jim also does volunteer work with Habitat for Humanity.

Although "time" seems to become more and more of a precious commodity to him, volunteer work is important and complements his personal and professional goals. Mr. Spinner said volunteer work gives him a different perspective on the law and circumstances faced by people, and it provides personal satisfaction.

Mr. Spinner and his wife, Jeri, have been married for 28 years. Jeri is an Assistant Professor at Idaho State University. They have two children, Hannah and Jesse, both of whom are in college. Mr. Spinner enjoys traveling, numerous outdoor activities.

Hon. Scott Wayman

Kootenai County Magistrate Court, Coeur d'Alene

Judge Wayman has served as a Magistrate Judge since December, 2000. He has

been an active member of the Idaho State Bar, the First District Bar Association, the Kootenai Bar Group, and The John P. Gray Bench/Bar Forum. He has served on the Client Assistance Fund Committee for many years and has been the chairperson since 2006. He also volunteers as alternate presiding judge for the Kootenai County Mental Health Court. When not on the bench or participating in some law-related activities, Judge Wayman can be found exploring some of Idaho's back roads on his motorcycle.



Hon. Scott L.
Wayman

Carol Wesenberg

U.S. Courts, Ninth Circuit Court of Appeals, Pocatello

Ms. Wesenberg works at the United States Court of Appeals for the Ninth Circuit in Pocatello. She was nominated for her service to both community and profession. Ms. Wesenberg has volunteered regularly to grade the Idaho State Bar exam.

She has also served as leadership for the Eagle Rock Inns of Court and has donated time for the Museum of Idaho, ISU/Bannock County Law Library Committee; and ISU Paralegal Advising Committee. She reflected on her commitment to service and said:

I have been fortunate in my life, therefore, I believe that I should give back to the local community and the bar. I also enjoy working with and meeting different people outside of my job. People such as Carol McDonald, Diane Minnich, make volunteering with the Idaho State Bar a pleasure.

John Zarian

Zarian Midgley & Johnson PLLC, Boise

Mr. Zarian has served as a member of the Local Civil Rules Committee, U.S. District Court for the District of Idaho (2009-present) as well as Chairperson of *The Advocate* Editorial Advisory Board, (2008-present and has been a member since 2006). Asked about public service, Mr. Zarian said:

There is really no sharp distinction between public service, personal goals, and professional goals. Public service is inherently gratifying and advances personal goals in areas where one has a passion. Public service can also foster professional contacts and help a lawyer develop important skills. Public service has allowed me to make wonderful friendships over the years.

Asked about what inspired Mr. Zarian to do public service, he said:

Early in my career, the lawyers I admired most were those who found time and ways to do service. These lawyers became my role models. Eventually, I realized I had come to regard public service as a "tithe" of sorts. Lawyers should spend at least 10% of their time in "public service" – improving the profession, doing pro bono work, giving back to the community, etc.

Mr. Zarian especially enjoys spending time with family. He said:

My wife (Leisa) and I are celebrating our 25th wedding anniversary this year with a trip to Scotland in the Fall. Our family enjoys travel - we spent Spring Break in Italy. My oldest son, Justin, is serving an LDS mission in London. My younger son, Michael, will be a freshman at BYU this year. My daughter, Christina, will be a sophomore at Eagle High School.

Mr. Zarian has taken the following leadership positions and activities in the legal community:

- Chairperson, Litigation and Intellectual Property Sections, Idaho State Bar Chairperson, J. Reuben Clark Law Society, Boise chapter (2007-08).
- Fellow and Idaho State Delegation Co-Chair, Litigation Counsel of America, Trial Lawyer Honorary Society (2007-present).

Zarian has served in numerous education and political positions over the years.



John N. Zarian



James A. Spinner



Carole I. Wesenberg



A display of previous recipients of the Distinguished Lawyer Award gets attention at the 2010 Annual Conference Distinguished Lawyer Award Dinner at the Idaho Falls Country Club in July. Those being honored were Cathy Silak, John Hansen and William Parsons.

INTERVIEWER HUMBLLED BY THE BIG PICTURE

Kyme Graziano
Idaho State Bar

Interviewing the 50- and 60-year attorney award recipients each year is more than a privilege, it allows me a window into the practice of law during an era where camaraderie, integrity and honor were above all else in the profession - and in life.

Each year the Idaho State Bar recognizes members who entered the bar 50 and 60 years ago. The awards are announced at a luncheon during each annual conference.

To help create the awards brochure for the luncheon, I am charged with contacting each of the recipients to interview them about their practicing years. This is a daunting task when you are calling luminaries such as Senator Jim McClure, Blaine Evans and Ray Rigby, asking questions that seem silly in contrast to their extensive careers.

This is my favorite time of year. Each phone call offers a view of a life lived with the intent of service to state and country, of a career full of anecdotes, stories and landmark cases. These are the attorneys that have shaped the profession, who have in essence, shaped the laws we now live by, each of them setting prec-

edents both in their court cases and their communities.

I spoke this year with Zoe Ann Shaub, one of the first 50 women in Idaho Law. She practiced only briefly, but a great deal and in a remarkable fashion. She began as a legal secretary for the attorney whose children she babysat. She worked after school, on the weekends and during the summer. When she graduated from high school, she wanted to go to law school, having developed a deep love of the profession. In order to help pay for law school, she entered beauty pageants and was crowned Miss Twin Falls, Miss Idaho and competed in the Miss America Pageant. She used her winnings to pay for her education. After graduating law school she practiced briefly with a firm then became the youngest female judge in the country at the time. She worked in the juvenile courts and enjoyed this work immensely. She said, "I was young and could relate to the kids."

After a short time, Zoe Ann retired from the bench, married and began a family.

Vern Herzog coined it just right, saying "If I had it all to do over again, I would. I am delighted with having spent my life at a job that in the long run I can say I had great friends and helped a lot and enjoyed in general."

Everett Hofmeister loves doing adoption cases, "They touch my heart. There is always great joy in helping to create a family." Others would try to give me a glib answer but the true meaning shines through, "There is very little about the law that I don't love and respect, except judges that disagree with me" James Annest said with tongue in cheek.

Many of this year's awards go to veterans who put aside their education during World War II and the Korean War. They didn't dwell on it, but simply stated that there was a pause during their college years. Some finished their undergraduate or law degrees upon returning home. This simple statement of sacrifice amazed me but falls in line with the humble and pure telling of their love of the rule of law. In a sheepish tone, I would thank them for their service, feeling very honored.

When asked what advice they would give to young lawyers just admitted to the bar, many would joke briefly but then get very serious, offering:

"Be patient, go slow and don't think you know it all."- Carl Burke

"Go out and serve people's needs, solve their problems and do it in a way that will help them."- Ray Rigby

"Deeply care about the types of cases you do and adhere to the rule of law." - Zoe Ann Shaub

"Be friendly with those you encounter...don't ever lie."- Vern Herzog. These are statements from individuals who truly lived by the advice they offer.

Of the 16 recipients of the 50/60 year award this year, I truly enjoyed speaking to each and every one who took the time to tell me their stories. Some took the time to speak with me for awhile on the phone, worked with me to gather information online and even invited me into their homes to sit and chat. For these moments, I was blessed with the honor of being in the presence of true pioneers in law, and I am deeply thankful for it.



Kyme Graziano



Donalee Meek and her son, Talmage, grab a barbecue dinner at Capital Avenue Park in Idaho Falls. Kristopher Meek works at Hopkins Roden in Idaho Falls.



Ernesto Sanchez was honored by the Diversity Section's *Justice for All Award* for his four decades of advocacy and accomplishment providing legal services for all Idahoans.



Photos by Dan Black

Reed Moss receives his 50-year Attorney Award from Commissioner Deborah Ferguson.

IDAHO STATE BAR ANNUAL CONFERENCE, 2010

Renewing a strong connection with the legal profession, attorneys sought out classes, lectures, old friends and new acquaintances at the Idaho State Bar Annual Conference July 14-16.

For the first time, the conference was held in Idaho Falls. The program featured legal luminaries and scholars who taught various topics including lectures on legal writing from keynote speaker William Bernhardt. Other prominent presenters were Idaho Supreme Court, Chief Justice Daniel Eismann, Attorney General Lawrence Wasden, University of Idaho College of Law Dean Don Burnett, Ninth Circuit Court of Appeals Judge Stephen Trott, Idaho Court of Appeals Judge Sergio Gutierrez and others. The venerable “Les-

sons from the Masters” program included trial attorney Walt Bithell; U.S. Judge for Idaho District, B. Lynn Winmill; former U.S. Attorney for Idaho Betty Richardson; and Dean of the Concordia School of Law Cathy Silak.

For the first time, the CLE fees were waived for attorneys practicing up to three years, and the number of young attorneys present seemed higher than in past years. The conference also included several awards presentations. Perhaps for all these reasons, attendance was higher than other conventions held outside the Boise area.

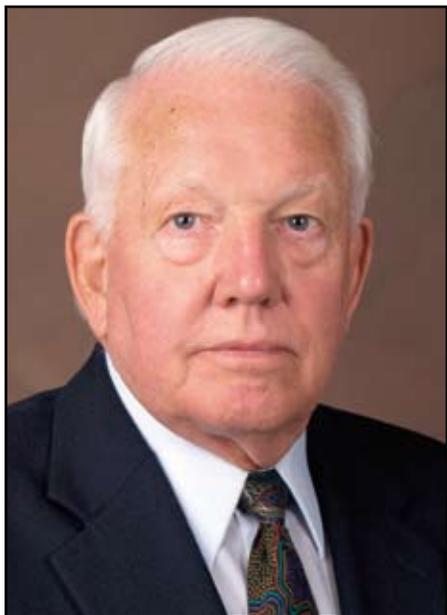
While most of the event was held at the Shilo Inn Convention Center, the first event, the Distinguished Lawyer Award Dinner, was sold out at the Idaho Falls

Country Club. The profession honored John D. Hansen, William A. Parsons and Dean Cathy R. Silak. The conference also honored Service Award winners, attorneys practicing 50 and 60 years, The Outstanding Young Lawyer, and best contributions to *The Advocate*.

Many lawyers updated their understanding of timely legal issues with CLEs, including some innovative presentations such as the “Criminal Law: Ethical issues for Prosecutors and Defense Attorneys from Discovery to Sentencing;” as well as “Constitutional Interpretation Theory;” and “Stress-Related Issues for Lawyers.”

Next year’s Annual Conference will be in Sun Valley during July.

THREE HONORED WITH ISB DISTINGUISHED LAWYER AWARDS



John D. Hansen

The Idaho State Bar honored three leaders in the legal community on July 14 in Idaho Falls with its highest award, the Distinguished Lawyer Award. They include John D. Hansen, Hon. Cathy Silak, and William A. Parsons.

John D. Hansen is a partner in the firm of Hopkins Roden Crockett Hansen & Hoopes with offices in Idaho Falls and Boise, Idaho. A native and lifelong resident of Idaho, he graduated from the University of Idaho with degrees in Agricultural Economics and in Law in 1959. He practiced with firms in both Boise and Idaho Falls before founding a law partnership with his brother, Orval Hansen. His rich career has humble beginnings and included state politics and other extensive public service.

John Hansen grew up on a farm west of Idaho Falls and initially had little exposure to the law. He recounted his start:

“A 9th grade teacher encouraged me to think about becoming a lawyer and I took the advice seriously. I was not personally acquainted with a single lawyer before I entered law school and I had never stepped inside a law office until after I had graduated. I doubted I would ever make it, but I kind of liked the idea of a profession with a high calling. I was hoping to test myself against it. At the end of the third year of law school, I wondered if I had made a good decision. I loved law school but had no idea about how

Distinguished Lawyer Award

The Distinguished Lawyer Award is presented each year at the Idaho State Bar Annual Conference to one or more attorneys who have distinguished the profession through exemplary conduct and through their many years of dedicated service to the legal profession and to the citizens of Idaho. In 2010, the Idaho State Bar honors three renowned Idaho lawyers.

to practice law. I was hired by a small firm in Boise and was green as a gourd.”

Fortunately, he was mentored and went on to develop solid legal practice skills and developed a reputation within the legal community.

“The key to success is hard work and preparation, period,” he said. He was inspired by an orthopedic surgeon who returned to his home town and counseled Hansen “Don’t worry about money. Put the profession first and everything will work out fine,” Hansen recounted.

“As things turned out,” he said, “the practice of law was a good choice for me.”

Mr. Hansen is a past member of the Association of Trial Lawyers of America, the Idaho Trial Lawyers Association, and current member of the Idaho State Bar and Past President of the Seventh Judicial District Bar Association. He has served the profession as a member of various Supreme Court, state and local bar committees.

He was elected to the Idaho State Senate in 1986 and served six terms. In the Senate he served as Chairman of the Human Resources Committee, the Education Committee and the State Affairs Committee. He also served on the Resource and Environment Committee, the Joint Finance and Appropriations Committee (JFAC) and Agricultural Affairs Committee. Mr. Hansen was also Idaho Commissioner and Vice Chairman of the Education Commission of the States. He was a member and Chairman of the Six State Pacific Fisheries Legislative Task Force and he served on the Advisory Group for the Center on National Education Policy. He was Co-Chair of the Joint Senate-House Select Committees on Electric Deregulation and Technology Deregulation, and various interim committees.

During his career, Mr. Hansen has served in a variety of civic and community roles, including The Idaho Heritage Trust, Boy Scouts of America-Eagle Rock District, United Way of Idaho Falls and Bonneville County, Development Workshop Foundation, Eastern Idaho Technical College Advisory Board, the Museum of Idaho and Idaho Agricultural Credit Association. He currently serves on the Idaho Falls Higher Education Advisory Council and is a member of Rotary.

“I can honestly say that earning money was not the prime consideration in my decision to become a lawyer. It may sound corny, but I always felt satisfaction when I could reflect on a just-completed legal matter and conclude that the client had benefited from my services.”

Mr. Hansen is married to Michele A. Hansen and has three children. His hobbies and recreational interests include golf, fly-fishing, skiing and white water rafting, and spending time in Sun Valley and Phoenix.



2010 DISTINGUISHED LAWYERS



Honorable Cathy Silak

Former Justice Cathy Silak cherishes history and reflects on her own with a quiet and matter-of-fact demeanor. She grew up in Queens, New York and attended New York University where she earned her bachelor's degree in French literature and sociology. While at Harvard, where she earned a master's in city planning, she took her first law class. The professor noticed her talents and encouraged her to take another class. Cathy found that law was "a language [she] could speak."

It offered an established structure or a framework within which to operate and solve problems, an aspect of law that she loves. From there, she earned a law degree from the University of California at Berkeley School of Law, and a master of laws degree from the University of Virginia.

Former Justice Silak currently serves as the Dean of Concordia University's School of Law in Boise, which recently broke ground on a new facility.

Dean Silak was admitted to the bar in Idaho (1983), in California (1977), and in the District of Columbia (1979).

Prior to being appointed by former Governor Cecil Andrus as the first woman member of the Idaho Court of Appeals, she served a two-year term to the American Judicature Society's board of directors — a nonpartisan organization with national membership of judges, lawyers and non-legally trained citizens interested in the administration of justice.

Two of her most historic roles came into being after former Governor Cecil Andrus became familiar with her outstanding work and reputation for the law, and "because of her vast background and experience," he appointed her to the Court of Appeals and then to the Supreme Court.

Dean Silak was appointed as an appellate judge and served on the Idaho Court of Appeals from 1990 to 1993 and on the Idaho Supreme Court from 1993 to December 2000.

Dean Silak "is an intelligent woman, and one of the finest trial lawyers we'll ever know," declared Governor Andrus.

"She served the state in an excellent capacity regardless of political consequences, proving to the world that a woman can serve as a Supreme Court justice in a manner that puts most male lawyers to shame. With a broad understanding and sensitivity of people, she is always willing to serve the people and the broader good, beyond serving a single client."

From 2001 to 2004, she practiced law and served as a partner at Hawley Troxell Ennis and Hawley. She also served as President and CEO of Idaho Community Foundation from 2004 to 2008.

While her resume is formidable, Dean Silak is a warm, approachable person who is involved in her community beyond her contributions to our system of law.

She places the utmost value on her husband, Nicholas G. Miller and her three children, Hartley, Martha and Michael. Just mentioning her name to people who know her solicits an energetic response that shows they are proud to call her a friend, colleague or acquaintance. As Jim Everett, director of the Boise Family YMCA, notes, "Cathy is the one of the classiest people I know."

Dean Silak is a founding board member of the Idaho Coalition for Adult Literacy and the Learning Lab. She currently serves as an advisory board member of the Learning Lab. She served on the board of the Treasure Valley YMCA, and is a past chair of the Idaho YMCA Youth Government Statewide Committee. She was a recipient of a 1998 Service to Youth Award from the YMCA and served as an advisory board member of United Way Success by Six.

Everett is particularly excited about the contributions that Dean Silak made with the Youth Government program that allows more than 1,500 young people in the state to conduct mock hearings and learn

more about our system of government. "She was able to build consensus and bring people together to strengthen the program."

Everett goes on to note, "Cathy serves as an exceptional role model to everyone, but especially to young women. She balances the roles of being a tremendous state leader with her abilities to be a great mom and her value of family and community."

Other civic service includes work on various committees and boards including Boise State University Foundation, St. Luke's Regional Medical Center, Boise Southeast Rotary Club, Diocesan Review Board, Bishop Kelly High School Foundation, American Law Institute and American Bar Association

Dean Silak is an inspirational woman of character, whose achievements are too great to list. Suffice it to say that she is an "outstanding individual who has a unique ability to mix parental nurturing with the law," noted Governor Andrus. "She is an outstanding public servant whom the state owes a great debt."

Excerpted, with permission, from the Boise State University *Women Making History* magazine. Author, Melissa Wintrow, former Coordinator of the Boise State Women's Center, and now Assistant Director for Residential Education and Marketing at Boise State University.



2010 DISTINGUISHED LAWYERS



William A. Parsons

William Parsons was born in Twin Falls, Idaho, in the winter of 1932 to Jess and Evelyn Parsons. He graduated Burley High School 1950 and went on to University of Idaho, where he earned a degree in Business Administration. While at U of I, he was Student Body President in 1953. He graduated from the U of I School of Law in 1957 and was soon admitted to practice in Idaho and Federal Courts. William Parsons founded the Law Firm with Dick Smith which is now Parsons, Smith,

Stone, Loveland & Shirley in 1962. He has served as City Attorney for Burley 28 years. He still practices at Parsons, Smith, Stone, Loveland & Shirley in Burley.

Parsons said while in the Boy Scouts he was influenced to become a lawyer by Burley lawyer who was involved with the Boy Scouts. "The lawyer was well respected in the legal profession and was looked up to by the citizens of Burley," and "I thought that law might be a good idea."

Later, at the U of I, he met Bev on a blind date and upon their graduation he and Bev were married in 1954. Bev got a job working for the Navy ROTC, when he entered law school which was in the third floor of the Administration Building. Bill and Bev have one daughter, Karen Walker.

Bill and Bev returned to Burley as the city was ready for a new young lawyer. "It was tough, economically, at the start," he said. "But it was like I thought it would be". "Burley was good to my family and was good to us getting started and I saw that giving back civically as well as to the legal profession was appropriate," and he began a career rich in public and professional service.

Later, as the Burley City Attorney, he faced the challenges of municipal law. "It was invigorating, new and it placed me in contact with many outstanding people with diversified interests."

Parsons said "he believes his success comes from the support of Bev and treating people honestly having respect for

other lawyers and getting your work done. Do your very best. Never try to cut corners." Parsons is very appreciative of his partners, Dick, Randy, Lance and Dave. Dick Smith and Bill have been partners since 1962.

Parsons has served in numerous professional and public service organizations. He is a member of the American College of Trial Lawyers, for which he served two terms on the State Committee, one of which as Chairman. He served as a member of the Idaho Judicial Council for six years. He is a member of Theron Ward Inns of Court. Parsons was on the Advisory Committee for the University of Idaho School of Law from 2003-2009. He is a member of the American Bar Association.

He also served as a member of the Idaho State Bar Professional Conduct Board for two terms. He was awarded the Fifth District Professionalism Award in 1996. He is a member of the Burley Masonic Lodge and El Korah Shrine as well as the Burley Lions club. While in the Burley Lions Club, he has served as president, earned the Melvin Jones Award in 2007 and a 50-year membership award in 2009. From 1997 to 2003, Parsons served on the Board of the College of Southern Idaho Foundation. He was named Businessman of the Year in 1999 for Mini Cassia. Currently he serves on the board of directors of the Mini-Cassia Commerce Authority.

"If I had it to do over again," he said, "I would do the same thing."





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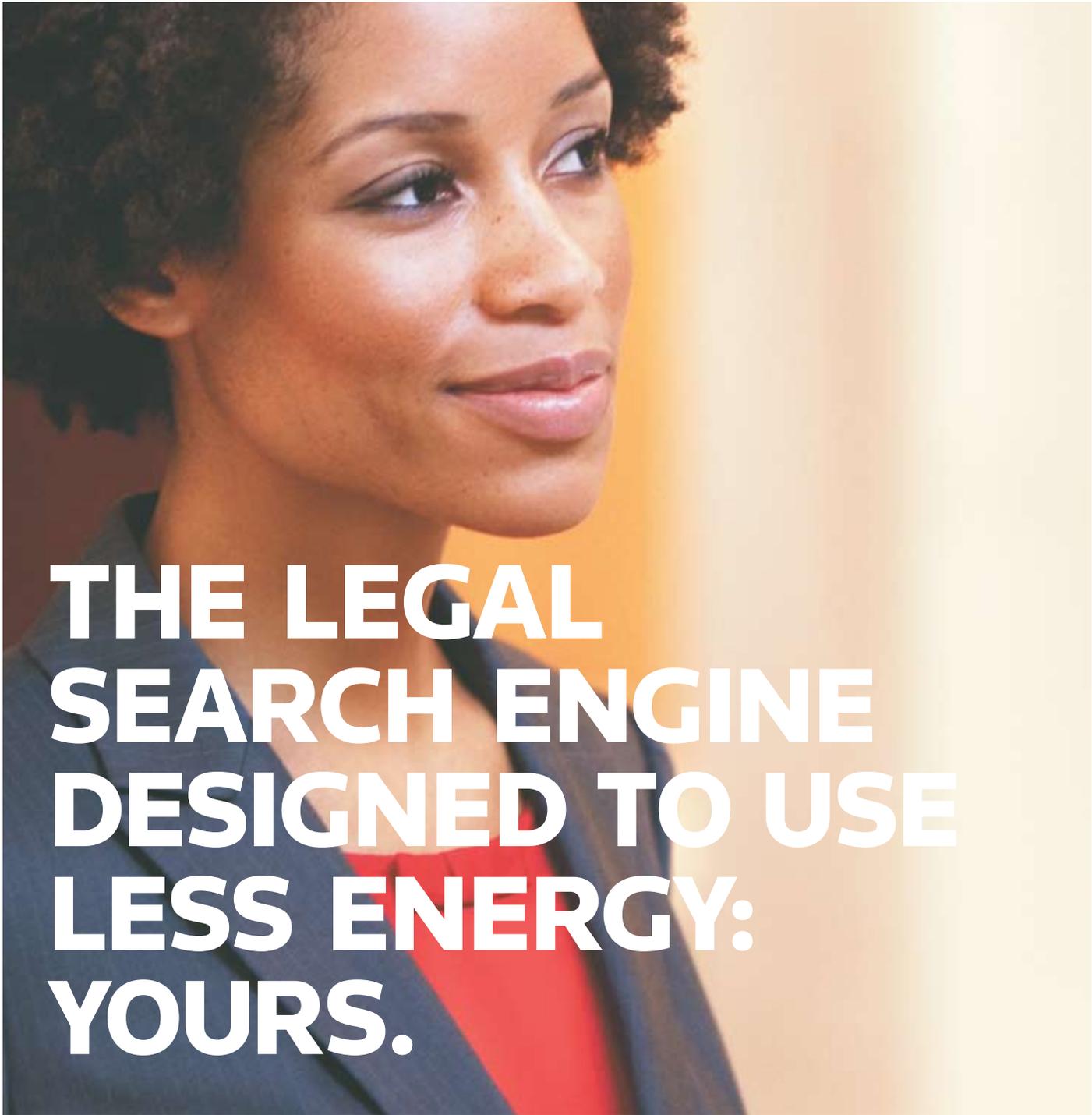
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