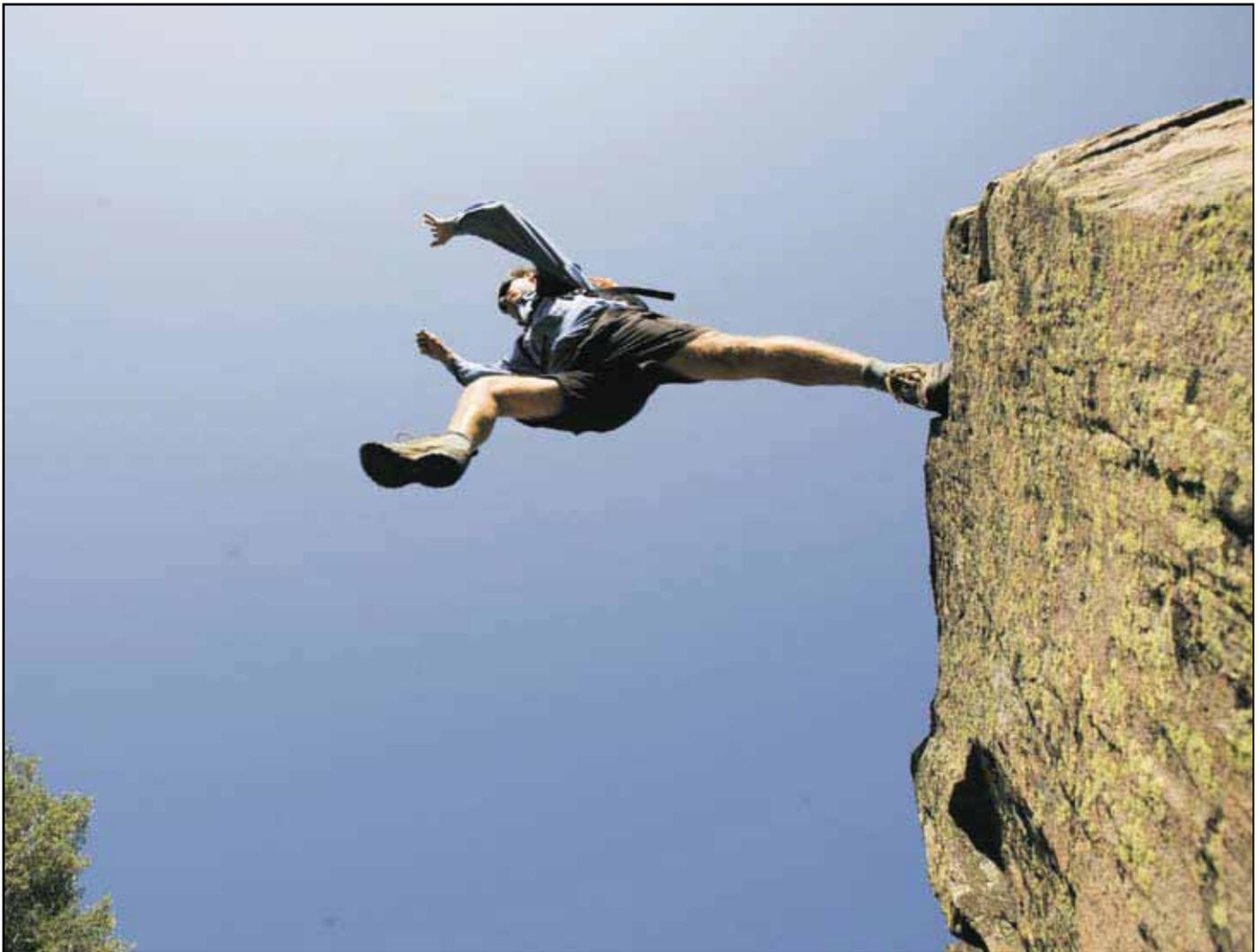


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Official Publication
of the Idaho State Bar
Volume 53, No. 1
January 2010

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On the Cover

A red fox near his den on the west side of Lake Cascade eyes the photographer, Assistant United States Attorney Monte Stiles. Stiles is an avid outdoor photographer and his work is profiled at www.montestilesphotography.com

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This issue of *The Advocate* is sponsored by the Professionalism & Ethics Section.

Editors

Special thanks to the January *The Advocate* editorial team: Matthew T. Christensen, Karin D. Jones, Scott E. Randolph and Honorable Kathryn A. Sticklen.

Submissions

The Advocate welcomes letters to the editor or article submissions on topics important to the Bar. Send your ideas to Managing Editor Dan Black at dblack@isb.idaho.gov.



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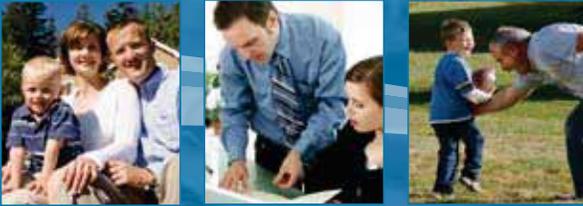
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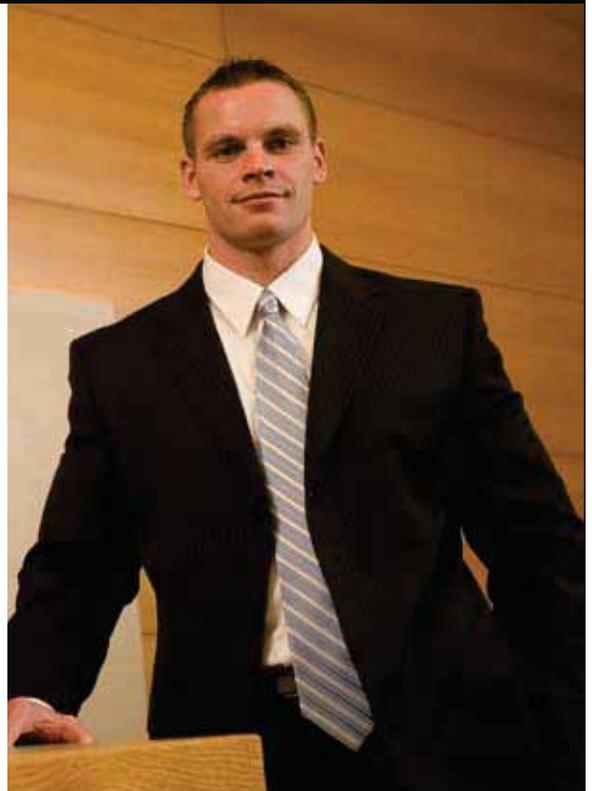
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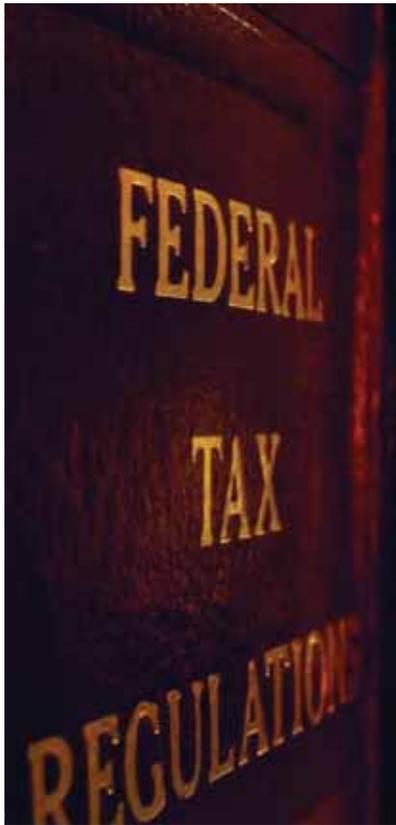
January 29

The Complete Legal Negotiator
8:30 a.m. - 4:15 p.m. (MST)
The Grove Hotel, Boise
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February 1

Lunch and a Movie
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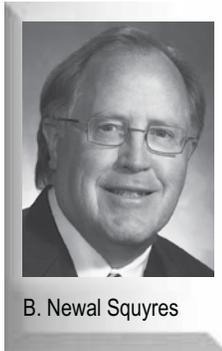
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It is almost Christmas as I write this (meaning, among other things, that I have pushed my deadline to its limit), and it will be 2010 as you are reading it. The Millennium seems like only yesterday, but that's another story. So, in the spirit of the season and looking ahead to the New Year, I am going to reflect on how two great lawyers and wonderful human beings were described at memorial services in Atlanta, Georgia, and Boise, Idaho, during 2009.

In Boise, I am talking of course about Allyn Dingel, about whom much has been written in these pages and who could well be the subject of a story being told about him at this very moment. His obituary, published in the Idaho Statesman on April 30, 2009, makes good reading and provides a thoughtful, and humbling, reminder of Allyn's contribution to the law and the lives of so many people, lawyers and non-lawyers alike. If you were around Allyn for very long, or even a few minutes for that matter, you would likely learn he was a proud and devoted Episcopalian. But his family, knowing that the beautiful chapel at St. Mark's Cathedral would not accommodate the crowd that would gather, held his service at the larger Cathedral of the Rockies.

The church was packed to overflowing with dignitaries—the Governor, former governors, current and former state legislators (from both sides of the aisle), and other state and local elected officials. Current and former Supreme Court justices, federal and state court judges, court personnel and, of course, lawyers of all ages from public and private practice from all corners of the state, made up part of the crowd. But there were many more “regular” people from all walks of life whose lives Allyn touched. I sat next to a woman who came up from California because of her friendship with Allyn and his wife Fran.



B. Newal Squyres

What's the point? Allyn Dingel was admired and respected, well liked and, yes, loved by all these people. He was a trial lawyer. He was a powerful and influential man. Allyn's great friend John Magel, from their childhood days in Twin Falls to their many years as law partners, chose these words, after telling some fine Dingel stories, to describe Allyn—“He was a kind man.”

Those exact words were used by his old friend, fellow trial lawyer and partner Frank Jones, to describe Georgia lawyer Griffin B. Bell at his memorial service in Atlanta on January 9, 2009. Judge Bell, as he was known to all from his 15 years on the bench of the U.S. Court of Appeals for the Fifth Circuit—having been appointed by President Kennedy after managing his successful presidential campaign in Georgia—until he returned to private practice in early 1976, served as Attorney General of the United States, managing partner of one of the country's premier law firms, and President George H.W. Bush's private attorney during the Iran-Contra investigation, just to cite a few of the many things he did in 55 years of practice. Like Allyn, Judge Bell rose from a humble beginning in a small town to become a powerful and influential man. Every corner of the huge Second-Ponce de Leon Baptist Church was filled with lawyers and judges, former U.S. Senators and Representatives, a former U.N. Representative (Andrew Young), and included the Attorney General and former President Carter. And there were many everyday folks in the diverse crowd. Judge Bell's life and career likewise make interesting reading as a Google search will reveal.

By virtually any measure by which a person could be judged, Allyn Dingel and



M. Allyn Dingel

Griffin Bell achieved a level of extraordinary success. They were skillful lawyers, representing their clients with vigor, zeal and persuasive advocacy. They had to be tough and aggressive; they were required to hold the line and be firm to advance the interests of their clients or achieve the goals of various public service activities in which they engaged. Judge Bell turned a Washington press corps that was skeptical (and even critical) of his appointment to strong supporters by simply being open and candid. And there was never much doubt about Allyn's views on whatever topic he was addressing.

Definitions of “kindness” include compassion, generosity, a helping act, and service. Each of these is an attribute to which good lawyers should aspire. Synonyms that seem particularly appropriate to what we do are courtesy, humanity, indulgence, patience, thoughtfulness, tolerance and understanding. Each of these qualities are associated with professionalism, and the common watchword today, civility. But until I heard Judge Bell and Allyn described as kind men, I had not really thought about that characteristic as summing up the essence of professionalism and civility. So as we move into the New Year (and begin again the process of working to make a living in the service of our clients and the public) perhaps we can all endeavor to keep in mind how Allyn Dingel and Griffin Bell were described at the end of their distinguished careers.

Since this is my last article and marks the end of my term as President (although I have six months left on the Commission), I want to close by expressing my appreciation for the incredibly dedicated staff of the Bar, each and every one of whom serve us all better than we deserve. And thank you for the opportunity to be a Bar Commissioner. As Fred Hoopes often said to me, it is a most rewarding experience.

About the Author

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



Honorable Griffin B. Bell

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S. CRISS JAMES
(Notice of Disqualification from
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Notice is hereby given that effective November 3, 2009, Soda Springs attorney, S. Criss James voluntarily disqualified himself from the practice of law until further notice. A Professional Conduct Board Recommendation that includes

a recommended suspension is pending before the Idaho Supreme Court and the time Mr. James spends while disqualified will be credited toward any eventual sanction he may receive in that case.

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

Amendment to Criminal
Rule 35

A new subsection has been added to Rule 35 providing that motions to correct the computation of credit for time served prior to sentencing may be made at any time. The amendment is effective immediately. The order can be found at <http://www.isc.idaho.gov/rulesamd.htm>.

LETTER TO THE EDITOR

Justice Expedited — Not
Justice Delayed

In 1993, after having been cajoled for six years, the Idaho Supreme Court promulgated Idaho Court Administrative Rule 4, thus implementing Article V, §12, of the Idaho Constitution-adopted in 1889.

In April 15, 2009, the opposing lawyers in a strenuously-contested child custody case, elected (and agreed) to save time, money, and stress, for their clients, by using ICAR 4, in tandem with IRCP 16(p).

In compliance with the provisions of IRCP 4, the attorneys agreed upon a third attorney, experienced in family law, and obtained her agreement to serve as judge pro tempore. To make it official, the Administrative District Judge signed an order appointing her.

The judge borrowed a robe, the attorneys commandeered a courtroom, and the

Clerk was enlisted to handle the recording of the proceedings and take notes.

Going one step further, opposing counsel consented to the Informal Custody Trial procedure, as authorized in IRCP 16(p).

Pursuant to the latter rule, the judge questioned each of the parties (the attorneys not being allowed to do so). Also as provided by the rule, the judge allowed the parties to submit documents in support of their respective positions.

In less than a week following the trial, the judge sent written findings of fact and conclusions of law, and a final child custody and support order.

Expediting matters in this fashion resulted in a trial and a decision, in fewer than three weeks from the day on which the temporary judge agreed to serve.

The parties were pleased, as they were spared the stress, time, and cost of formal proceedings — which could have taken many months.

The sitting Magistrate had one more matter quickly removed from his calendar.

The attorneys avoided the filing and arguing of the myriad motions usually associated with a custody case, and did not have to spend days in court, examining and cross-examining numerous witnesses.

Everyone was a winner!

The Supreme Court has not previously tracked the use of ICAR 4, or IRCP 16(p), but a poll of the Administrative District Judges, in the seven districts, disclosed that the former has been utilized only a few times, in the Fifth and Seventh Districts, and IRCP 16(p) has been used in just a few cases in the Second (2), Third (1), and Fifth (2) Districts.

Widespread and routine use of these two rules would be of immense benefit to the bar, the courts, litigants, and the general public.

— *Reginald R. Reeves*
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EXECUTIVE DIRECTOR'S REPORT

2009 RESOLUTION RESULTS

Diane K. Minnich

The 2009 resolution meetings held in each of the judicial districts were attended by over 300 Bar members. The meetings included information about each of the resolutions and the presentation of the Professionalism, Pro Bono, and Retiring Judges awards.

Four resolutions were presented to the membership this year; all four resolutions were approved by the membership. The resolutions will be submitted to the Idaho Supreme Court for its consideration.

Attorney license fees are established by statute and Idaho Bar Commission Rule so the proposed changes to IBCR Section III will be submitted to the legisla-



Diane K. Minnich

ture and to the Idaho Supreme Court for consideration.

The explanation of the resolutions and the voting and attendance results follow:

09-1 Amendment to Idaho Rules of Professional Conduct 1.0 and 1.10: Requests that members of the Idaho State Bar recommend to the Idaho Supreme Court that Idaho Rules of Professional Conduct 1.0 and 1.10 and the comments there to be amended consistent with the amendments to ABA Model Rules of Professional Conduct adopted by the House of Delegates in February 2009. In favor - 692. Against - 52.

09-2 Amendment to Idaho Rule of Professional Conduct 3.8: Requests that members of the Idaho State Bar recommend to the Idaho Supreme Court that Idaho Rule of Professional Conduct 3.8 be amended consistent with the amendments to ABA Model Rules of Professional Conduct adopted by the House of

Delegates in February 2008. In favor - 683. Against - 63.

09-3 Increase in License Fees: Requests that Section III of the Idaho Bar Commission Rules and Idaho Code Section 3-409 be amended to provide for an increase of the annual license fees. The proposed increase in the annual license fees to be phased in over a two (2) year period, with one half of the increase in 2011 and one half of the increase in 2012. In favor - 487. Against - 271.

09-4 Amendment to Section II "Admissions" of the Idaho Bar Commission Rules: Requests that the members of the Idaho State Bar recommend to the Idaho Supreme Court that Section II "Admissions" of the Idaho Bar Commission Rules be amended consistent with the proposed Amendments to Section II of the Rules proposed by the Admission Rules Review Committee. In favor - 632. Against - 105.

2009 Resolutions – Meeting Attendance and Vote Tally											
District	1st	2nd	3rd	4th	5th	6th	7th	OSA*	Totals	Percentage	
Members eligible to vote	425	205	223	1,888	300	201	368	861	4,471		
% of total membership	10%	5%	5%	42%	7%	4%	8%	19%	100%		
Members voting	88	46	59	327	58	72	74	43	767		
% of members voting	21%	22%	26%	17%	19%	36%	20%	5%	17%		
Number in attendance	47	16	36	89	23	46	50	0	307		
% in attendance	11%	8%	16%	5%	8%	23%	14%	0%	7%		
09-1 IRPC 1.0 and 1.10											
For	82	37	51	288	55	70	72	37	692	93%	
Against	5	7	7	26	1	1	2	3	52	7%	
Total	87	44	58	314	56	71	74	40	744		
09-2 IRPC 3.8											
For	79	40	51	287	56	63	71	36	683	92%	
Against	9	4	7	27	0	9	3	4	63	8%	
Total	88	44	58	314	56	72	74	40	746		
09-3 Increase in License Fees											
For	49	28	34	199	40	57	55	25	487	64%	
Against	38	18	21	125	18	14	19	18	271	36%	
Total	87	46	55	324	58	71	74	43	758		
09-4 Admissions Section II											
For	70	37	45	266	52	67	64	31	632	86%	
Against	18	6	12	44	4	3	10	8	105	14%	
Total	88	43	57	310	56	70	74	39	737		

2009 District Bar Resolution Meetings



Photo courtesy of Flammia & Solomon, PC
Sue S. Flammia was honored for receiving a Professionalism Award at the 1st District Resolution Meeting in Coeur d'Alene.



Photo courtesy of Clements, Brown & McNichols, PA
Eric K. Peterson was acknowledged for receiving a Professionalism Award at the 2nd District Resolution Meeting in Lewiston.



Photo courtesy of Susan P. Roy
Susan P. Roy was recognized for receiving a Professionalism Award at the 5th District Resolution Meeting in Twin Falls.



Photo by Kyme Graziano / Idaho State Bar
Honorable Kathryn A. Sticklen speaks to crowd during the 4th District Resolution Meeting in Boise.



Photo by Carol Craighill / Idaho State Bar
Chad Campos addresses the crowd upon receiving his Pro Bono Award at the 7th District Resolution Meeting in Idaho Falls.

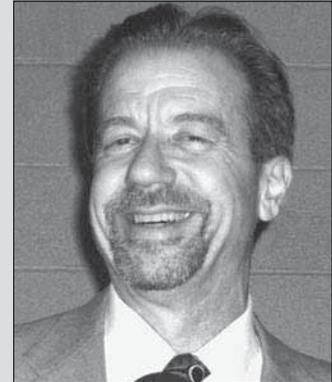


Photo by Carol Craighill / Idaho State Bar
David E. Kerrick shares a laugh with the audience at the 3rd District Resolution Meeting after receiving his Professionalism Award in Caldwell.



Photo by Carol Craighill / Idaho State Bar
Monte Gray speaks to the crowd at the 6th District Resolution Meeting after receiving his Pro Bono Award in Pocatello.



Photo by Kyme Graziano / Idaho State Bar
Trudy Hanson Fouser speaks to the audience at the 4th District Resolution Meeting after receiving her Professionalism Award in Boise.

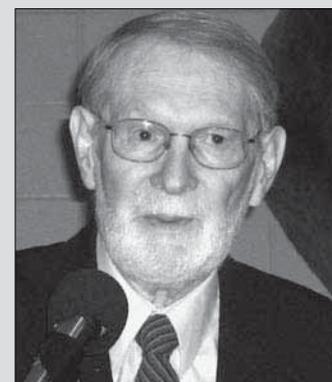


Photo by Carol Craighill / Idaho State Bar
Honorable Wayne Fuller speaks to the crowd after receiving his Pro Bono Award at the 3rd District Resolution Meeting in Caldwell.

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

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

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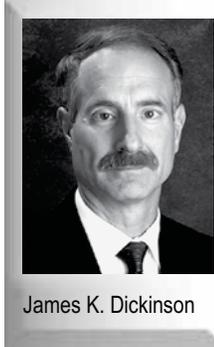
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WELCOME FROM THE PROFESSIONALISM AND ETHICS SECTION

James K. Dickinson
Ada County Prosecutor's Office

The Professionalism & Ethics section of the Idaho State Bar is proud to sponsor this issue of *The Advocate*. As our name implies, the Professionalism & Ethics Section was not formed with a focus towards any practice specialty, but rather to advance the conduct of all members of the Bar.

Given that charge, we would like to extend an invitation to everyone to join our Section! We meet the first Tuesday of each month at the Idaho State Bar building in Boise. Lunch is provided to attendees. Members who are not able to meet with us can join by telephone. Our meetings often include a 30-minute Ethics CLE program.



James K. Dickinson

The Professionalism & Ethics Section is active. We published *A Lawyer's Guide to Idaho Attorneys* as well as *Standards for Civility in Professional Conduct Guidelines*. Each can be found on the Bar's website. The Section has sponsored a number of CLE programs, the most recent was presented by Brad Andrews, Idaho State Bar Counsel, last December.

Our major undertaking is a partnership with the Idaho State Bar and the Univer-

sity of Idaho School of Law. Each year members of the Idaho Supreme Court, the state and federal courts of appeal, the federal bench, state bench, and practitioners from all regions of the state travel to Moscow to assist with the first-year law students' orientation. Groups, consisting of two justices, judges and/or practitioners interact with small groups of first-year students to discuss professionalism and ethics, laying an early foundation for the ethical and professional practice of law. The Professionalism & Ethics Section contributes to the transportation and hotel costs for judges and practitioner traveling from around the state. We utilize our Section dues and rely heavily on the generosity of other Bar Sections and the Fourth District Bar Association to defray the costs of this program.

The Professionalism & Ethics Section hopes you find this issue interesting and helpful. We have included an article about the ethical considerations involved with guardian ad litem and conservators authored by Boise Attorney Bob Aldridge. University of Idaho law professor Lee Dillion writes about the current status of the law school's first-year

Groups, consisting of two justices, judges and/or practitioners interact with small groups of first-year students to discuss professionalism and ethics.

orientation program. Frequent contributor Mark Fucile explores the proposed "screening" amendment to IRPC 1.10. Jonathan Medema, Larry Hunter and I share thoughts about a recent ruling from ABA regarding a prosecutor's IRPC 3.8 obligations.

Lastly, please feel free to contact any of our officers, Ammon Hanson, Gene Petty or me with any thoughts about how our Section can better serve you. Please remember you are always invited to join our monthly meetings.

About the Author

James K. Dickinson is the chair of the Professionalism and Ethics Section of the Bar. He is a Senior Deputy Prosecutor in the Ada County Prosecuting Attorney's Office. He is a graduate of the University of Idaho and its College of Law. He is a frequent lecturer for the Idaho Prosecuting Attorneys Association, has served as a faculty member for the National Advocacy Center and was one of the authors of *Doing Justice: A Prosecutor's Guide to Ethics and Civil Liability*. He is a recipient of a 2009 Outstanding Service Award from the Idaho State Bar.

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PRACTICAL ETHICS AND PROFESSIONALISM OF THE GUARDIAN AD LITEM

Robert L. Aldridge
Robert L. Aldridge, Chtd.

This article reviews the practical requirements to be an ethical and professional guardian ad litem in a conservatorship or guardianship case.

In June of 2006, I wrote an *Advocate* article about the ethical obligations of the attorney as guardian ad litem in a conservatorship/guardianship case, primarily focusing on the Idaho Probate Code and the Rules of Professional Conduct. In this article, I will focus on the practical aspects of ethics as they apply to the guardian ad litem (referred to as the "GAL" hereafter). For convenience, I will call the subject of the case the "ward".



Robert L. Aldridge

Statutory background

The statutory background to acting as a GAL, for the purposes of this article:

15-5-414. Compensation and expenses

If not otherwise compensated for services rendered, any visitor, lawyer, physician, conservator or special conservator appointed in a protective proceeding is entitled to reasonable compensation from the estate.

15-5-434. Guardian ad litem – duties

Subject to the direction of the court, the guardian ad litem shall have the following duties, which shall continue until the resignation of the guardian ad litem or until the court removes the guardian ad litem or no longer has jurisdiction, whichever occurs first:

(1) To conduct an independent factual investigation of the circumstances of the protected person including, without limitation, the circumstances described in the petition;

(2) To file with the court a written report stating the results of the investigation, the guardian ad litem's recommendations, and such other information as the court may require. The guardian ad litem's written report shall be delivered to the court, with copies to all parties to the case, at

There is often a perception by the petitioner that, since the GAL is appointed by the Court, the GAL will either be paid by the Court or is furnished without charge as part of the Court system.

least five (5) days before the date set for the adjudicatory hearing;

(3) To act as an advocate for the protected person for whom appointed at each stage of the proceedings under this chapter and to be charged with the general representation of the protected person. To that end, the guardian ad litem shall participate fully in the proceedings to the degree necessary to adequately represent the protected person, and shall be entitled to confer with the protected person and the protected person's immediate family including, but not limited to, spouse, parents, siblings, children and next of kin;

(4) To facilitate and negotiate to ensure that the court, the department of health and welfare, if applicable, and the protected person's attorney, if any, each fulfill their obligations to the protected person in a timely fashion;

(5) To monitor the circumstances of a protected person, if the protected person is found to be within the purview of this chapter, to assure compliance with the law, and to assure that the terms of the court's orders are being fulfilled and remain in the best interest of the protected person;

(6) To meet any parent or other person having legal or physical custody of the protected person, record the concerns of the parent, and report them to the court or, if no such meeting occurs, file an affidavit stating why no meeting occurred;

(7) To maintain all information regarding the case confidential and to not disclose such information except to the court or to other parties to the case;

(8) To determine whether existing powers, trusts, and other measures may adequately give the protected person the legal protection otherwise provided by a conservator, or whether such powers, trusts or other measures could be reasonably created and, if so, to recommend that either no conservatorship be granted or that only a suitably limited conservatorship be granted; and

(9) To exercise such other and further duties as may be expressly imposed by court order.

15-5-435. Guardian ad litem – rights and powers.

(1) The guardian ad litem has the rights and powers set forth in this section, which shall continue until the resignation of the guardian ad litem or until the court removes the guardian ad litem or no longer has jurisdiction, whichever occurs first.

(2) The guardian ad litem shall have the right and power to file pleadings, motions, memoranda and briefs on behalf of the protected person, and to have all of the rights of the protected person, whether conferred by statute, rule of court, or otherwise.

(3) All parties to any proceeding under this chapter shall promptly notify the guardian ad litem, and the conservator's attorney, if any, of all hearings, staff hearings or meetings, investigations, depositions, and significant changes of circumstances of the protected person.

(4) Except to the extent prohibited or regulated by federal law, upon presentation of a copy of the order appointing the guardian ad litem, any person or agency including, without limitation, any hospital, school organization, department of health and welfare, doctor, nurse or other health care provider, psychologist, psychiatrist, police department, or mental health clinic, shall permit the guardian ad litem to inspect and copy pertinent records relating to the protected person necessary for the proceeding for which the guardian ad litem has been appointed.

Conflicts between the GAL and the parties

The biggest complaint I hear in cases involving a GAL is the fees and expenses charged by the GAL. Some of these complaints result from a lack of com-

munication to the petitioning party at the initiation of the case that the GAL will be charging for his or her services. There is often a perception by the petitioner that, since the GAL is appointed by the Court, the GAL will either be paid by the Court or is furnished without charge as part of the Court system. At least at present, this is obviously not the case. I expect the attorney for the petitioner to educate the petitioner about the fees and costs involved in the action. However, whenever I am appointed as the GAL in a case, I always send a letter to the petitioning party, with the above statutes attached, explaining my role, the actions I will take, and the charges I will make. I do not believe that it is ethical for a GAL to request a retainer for fees and costs, although it may sometimes be necessary for the GAL to request that the Court issue one or more orders as to how GAL, and Court Visitor if applicable, fees and costs should be paid.

The second reason for complaints about GAL fees and costs is the amount charged. Sometimes the case simply blows up, and the GAL legitimately will have larger than normal fees and costs. Also, the GAL has a duty to review the inventory and accountings by the conservator, and the status reports of the guardian. If these are incorrect, especially in pro se petitioner cases, the GAL may involve considerable time in trying to straighten out the reports. Subject to the discussion below about monitoring, these fees are also legitimate. However, there have been a number of cases I have reviewed where the GAL fees were in fact excessive, for a variety of reasons that will be discussed in this article.

One major change in the landscape of conservatorships has occurred since my prior article which may eliminate or greatly reduce the problem with inaccurate reports and resulting GAL fees. As I described in detail in the prior article, the Idaho legislature had created a Pilot Project, co-chaired by Judge Lowell Castleton and myself, to, among other duties, initiate a monitoring system for the State of Idaho for both conservatorships and guardianships. The Pilot Project ran monitoring modules of different types in six Idaho counties to test for the best method of monitoring conservatorships. As of the 2009 legislative session, the Pilot Project has now become a permanent Supreme Court committee. Funding is through the increased filing and reporting fees for conservatorships and guardianships. Two methods of monitoring have now been established for the

As to the ward, the GAL must make clear the difference between a purely attorney-client relationship and the role of a GAL.

44 counties in Idaho. One, so far only in Ada County, continued the Guardianship Monitoring Program of Ada County for both guardianships and conservatorships. The remaining 43 counties, as to conservatorships, are monitored through the Supreme Court. Guardianship monitoring in those counties is a work in progress.

The result in Ada County is a change in how the GAL fits into the monitoring process for the 90-day inventory and annual reports. The guardian ad litem should still review any such inventories or reports. If an error or omission is detected, the guardian ad litem should notify the Guardianship Monitoring Program of Ada County of the name of the case, the type of report, and the error or omission, by phone or in writing. The program will then start a process of letters to the conservator, followed by a status conference or show cause hearing if the conservator does not respond. The guardian ad litem will be involved, as and if needed, at whatever stage of the proceedings the program determines is appropriate, most probably at the status conference or show cause stage if that is actually reached.

In the other counties, a different method, but with much the same result, is used, currently for conservator filings. The deputy clerk for the case will submit a copy of the reports (and other court documents) to the Supreme Court. There is currently one part-time person at the Supreme Court who reduces these documents to pdf format. Two CPAs, already Supreme Court personnel but devoting part time to monitoring, review these documents. A report is then sent back to the court and the court then determines what action is appropriate, again involving the GAL as appropriate. If the GAL has detected an error or omission in the reports as filed, the GAL should inform the deputy clerk, not the Supreme Court, by phone or in writing.

These changes are a major step forward in monitoring and will take a great deal of pressure off the GAL, since the GAL will not need to follow up with the

petitioning attorney or appointed conservator on errors or omissions. Additionally, and very importantly, the GAL will not be incurring billable time on routine types of mistakes or omissions by the conservator or guardian, which can often be cleaned up by the monitoring system through communication with the filing person and some education about proper methods for reporting. From an ethical viewpoint, the GAL should let the system work and avoid unneeded fees and costs.

My observation is that the most common reason for overcharges by the GAL is a misunderstanding of the role of the GAL. First, the GAL is not a caseworker. There can be the temptation for the GAL to inject themselves into the case as the solver of all problems. However, the GAL has a limited role, defined largely in the statutes set forth above, and should stay within that role unless expanded by the Court. Getting personally involved with extraneous issues can be very costly and can also create great resentment by others involved in the case, including the other professionals. Second, the GAL is not representing anyone in the case except the ward. The GAL will interact with other interested persons in the case, including the petitioning party, but the role of the GAL as representing the ward must be kept clear. Above all, the other interested persons cannot regard the GAL as also “their attorney” or as a family attorney. In that regard, Rule 4.3. is important:

Rule 4.3: Dealing with unrepresented person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of

such a person are or could have a reasonable possibility of being in conflict with the interests of the client.

As to the ward, the GAL must make clear the difference between a purely attorney-client relationship and the role of a GAL. As a checklist, at minimum communicate to the ward (if possible), and to any representatives of that person, including temporary guardians and/or conservators, and to the other persons involved in the case, that:

1. the GAL will represent the ward's best interests, which may or may be the same as the ward's wishes;

2. the GAL will use information gained in interviews with the ward and others to further the ward's best interests, but that this information may be disclosed to the Court, including the wishes of the ward.

The GAL must also remember that he or she is not generally a witness, and especially not an expert witness. The GAL may make actual factual statements such as the expressed wishes of the ward, or perhaps the actions of the ward to the extent actually observed by the GAL. But otherwise the function of the GAL is primarily to analyze and recommend based on the visitor's report or other credible evidence or documents and the GAL's perception of the best interests standard.

General Observations

GAL status, by its very nature, requires independence from the other parties to the action. This independence must not only be stated, but also demonstrated. Guardianships often line up into competing camps, and the GAL must do as much as possible to avoid being identified as on one side or the other. This can be very difficult, since part of the role of the GAL is recommend who should be conservator and/or guardian. You cannot please everyone. The GAL also is not a mediator. If mediation might help, the GAL should recommend it.

...the function of the GAL is primarily to analyze and recommend based on the visitor's report or other credible evidence or documents and the GAL's perception of the best interests standard.

Can a GAL ethically "withdraw"? There are no provisions in the Idaho code for this, and the duties and powers quoted above for a GAL make it clear that the GAL is in for the duration of the case except for unusual circumstances. The GAL could, by motion, seek to withdraw at the discretion of the Court. Grounds might include that the office is no longer needed – for example if the conservator is the spouse, in a 50 year marriage, of the ward, and the sole assets and income are the home and social security income, and there are no estate planning issues. However, in general, the statutes make it clear that the appointment of a conservator and/or guardian does not remove the duties and powers of the GAL, but instead requires those duties and powers to be actively, diligently, and competently pursued. In contrast, the petitioning attorney can withdraw. However, if there is no GAL or attorney for the person (for example, a minor guardianship either before the enactment of the GAL/attorney provisions or in which no GAL or attorney was appointed), and the petitioning attorney remains in the case, the petitioning attorney would have a duty to continue to represent the petitioning client, who is often now the guardian and/or conservator. Failure to monitor whether inventories and reports are filed therefore could be a serious breach and possibly malpractice.

The statutes requires that the conservator preserve the estate plan of the ward. The conservator can petition for the creation of a trust if appropriate. However, the GAL must be careful to represent the best interests of the ward, not the rest of the family, which can lead to some real confrontations regarding gifts and similar matters. The GAL should also be aware of potential Medicaid issues if the ward is elderly or disabled, and tax consequences. This may require obtaining independent expert advice.

The bottom line for the practical ethics of acting as a GAL: (1) place the best interests of the ward as the number one priority; (2) recognize the proper role of the GAL; (3) no unnecessary charges.

About the Author

Robert L. Aldridge was admitted to the Idaho State Bar in 1970. He is the author of many bills in the Idaho legislature on the probate code and has lectured and written extensively in that area. He has appeared twice before the U.S. Senate Special Committee on Aging as an expert on guardianship issues. He was co-chair of the Pilot Project, established by the Idaho legislature to create a monitoring system for conservatorships and guardianships in the State of Idaho. He is a past chair of both the Professionalism & Ethics Section and the Taxation, Probate & Trust Section of the Idaho State Bar.

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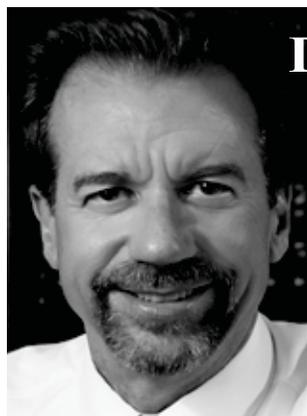
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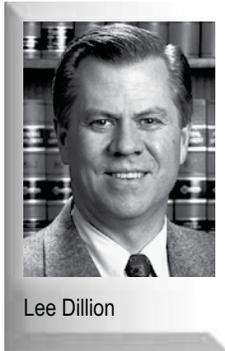
University of Idaho

Since 2004, the membership of the Professionalism and Ethics Section has grown to over 100 members committed to Russ's vision that we, as attorneys, "should live and breathe professionalism and ethics." It is a message and vision that the Professionalism and Ethics Section has taken seriously, as evidenced by the number and range of professionalism and ethics programs offered by the Section each year.

One of the most important (and financially costly)¹ efforts by the Section is the yearly program for first-year law students at the University of Idaho College of Law, entitled "Professionalism: First Step in Law School — Foundation of a Career." The goals of the program are to emphasize the importance of professionalism at the very outset of a legal education, to instill in the students that the practice of law remains a high calling, and to convey to students that they have a responsibility of service to both their profession and to the public good.

As Dean Don Burnett recently articulated:

Because the development of professional identity and purpose is (and perhaps always should have been) a centerpiece of American legal education, it ought to begin on the first, formative day of law school. Idaho has been a leader, incor-



Lee Dillion

I want to lobby on behalf of the Professionalism and Ethics Section for new members. The mission of this Section is arguably the most important mission of any Section and yet it has one of the smallest memberships of any Section. We practice family law or real property law or water law or litigation or one of 17 active practice Sections. We have over 4,000 lawyers licensed in Idaho yet we only have about 60 members of the Professionalism and Ethics Section. I guess as lawyers we don't practice professionalism and ethics. As lawyers we shouldn't practice professionalism and ethics. As lawyers we should live and breathe professionalism and ethics. Every one of us should be a member of the Professionalism and Ethics Section.

- 2004 President's Message by Russell G. Kvanvig

porating professionalism into its law school orientation since 2003. The "day one" timing is both functional and symbolic. It informs students at the outset that law school is not just another form of graduate education. Moreover, it gets the students' ethical gyroscopes spinning early, and it validates the worthy impulses of students who have been attracted to the law as a service profession. For those who may be less altruistically motivated, or who are simply seeking a flexible career, the program sends an up-front message that genuine success and professionalism are linked in any context. This message is strengthened by the symbolism of being delivered in person, before doctrinal legal education has even begun, by judges and lawyers whose personal achievements have been shaped by professional values.²

A series of break-out sessions are the heart of the program, where small groups of six to eight students are paired with two seasoned judges or lawyers – known

as the mentors – who are selected by the Bar in consultation with the College. The primary criterion for selection is a reputation for high ethical standards. The mentors guide the discussion and stimulate student participation as each group discusses five scenarios that contain fact patterns framing ethics and professionalism dilemmas.

Since the program first began in 2003, nearly 200 members of the bench and bar have participated as mentors in the program. This unselfish participation has provided over 800 first year law students the unique opportunity to confront ethical and professional dilemmas with the input and guidance from justices of the Idaho Supreme Court, judges of the Idaho Court of Appeals, federal judges, state trial judges, attorneys engaged in civil or criminal trial work, administrative law practitioners, and transactional lawyers from all parts of Idaho, plus a few from Washington.

These mentors take one to two days out of their busy schedules to give back to the profession – evidencing what it means to live and breathe the path of a professional. On behalf of the University of Idaho College of Law and the Professionalism and Ethics Section of the Idaho State Bar, thank you.

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 Caralee Lambert, *Boise*
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 Katherine Moriarty, *Idaho Falls*
 Terri Muse, *Boise*
 Michael Peacock, *Kellogg*
 Sunil Ramalingam, *Moscow*
 Jean Uranga, *Boise*
 Terrance White, *Nampa*
 Judge Williams, *Boise*

2008

Fafa Alidjani, *Boise*
 Maria Elena Andrade, *Boise*
 Bradley Andrews, *Boise*
 Dwight E. Baker, *Blackfoot*
 Jan M. Bennetts, *Boise*
 Judge Brudie, *Lewiston*
 Judge Buchanan, *Sandpoint*
 Ronaldo Coulter, *Eagle*
 Julia Crossland, *Boise*
 Judge Dale, *Boise*
 Thomas Dial, *Boise*
 James Dickinson, *Boise*
 Margaret "Peg" Dougherty, *Boise*
 Sue Flammia, *Coeur d'Alene*

Judge Gutierrez, *Boise*
 Judge Haynes, *Coeur d'Alene*
 Justice Horton, *Boise*
 Mary Huneycutt, *Pocatello*
 Molly Huskey, *Boise*
 Justice Jones, *Boise*
 Linda Judd, *Boise*
 Brian Kane, *Boise*
 Julie Kane, *Lapwai*
 Caralee Lambert, *Boise*
 Chief Judge Lansing, *Boise*
 Judge Lee, *Nampa*
 Albert Matsuura, *Pocatello*
 Judge Mitchell, *Coeur d'Alene*
 Patricia Olsson, *Boise*
 Michael Peacock, *Kellogg*
 Newal Squyres, *Boise*
 Cynthia Yee-Wallace, *Boise*

2009

Robert Aldridge, *Boise*
 Fafa Alidjani, *Boise*
 William Boyd, *Coeur d'Alene*
 Christian Christensen II, *Boise*
 Julia Crossland, *Boise*
 James Dickinson, *Boise*
 Anne Dwell, *Moscow*
 Paul EchoHawk, *Pocatello*
 Chief Justice Eismann, *Boise*
 Deborah Ferguson, *Boise*
 Mary Giannini, *Spokane, WA*
 Karen Gowland, *Boise*
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 Heidi Gudgell, *Lapwai*
 Judge Gutierrez, *Boise*
 Judge Heise, *Sandpoint*
 Lisa Holmes, *Hayden*
 Justice Horton, *Boise*
 Justice Jones, *Boise*
 Judge Judge, *Moscow*
 Brian Kane, *Boise*
 Julie Kane, *Lapwai*
 Shasta Kilminster-Hadley, *Boise*
 Caralee Lambert, *Boise*
 Chief Judge Lansing, *Boise*
 Reed Larsen, *Pocatello*
 Judge Lee, *Nampa*
 April Linscott, *Coeur d'Alene*
 Judge Mitchell, *Coeur d'Alene*
 Michael Peacock, *Kellogg*
 Sunil Ramalingam, *Moscow*
 Peter Smith IV, *Coeur d'Alene*
 Kim Toryanski, *Boise*
 Judge Verby, *Sandpoint*
 William Yost III, *Nampa*
 John Zarian, *Boise*

About the Author

Lee Dillion is the External Programs Director and Instructor for the University of Idaho, College of Law where he manages both the externship program (with Katie Ball) and the Small Business Legal Clinic. Prior to his appointment as the External Programs Director, he was engaged in a private practice that emphasized business organization and planning, business and real estate acquisitions, health law, and general commercial law. Lee graduated from the University of Illinois with honors, and received his J. D. at the University of Chicago. He is a past chair of the Professionalism and Ethics Section of

the Idaho State Bar and currently chairs the CLE Committee for the Idaho Law Foundation.

Endnotes

¹ The Professionalism program for first year law students would not be possible without the generous assistance of other Sections of the Bar as well as contributions to the law school from private sources including retired professor Myron Schreck's family foundation.

² "Because the development of professional identity and purpose is (and perhaps always should have been) a centerpiece of American legal education, it ought to begin on the first, formative day of law school. Idaho has been a leader, incorporating professionalism into its law school orientation since 2003. The "day one" timing is both functional and symbolic. It informs students

at the outset that law school is not just another form of graduate education. Moreover, it gets the students' ethical gyroscopes spinning early, and it validates the worthy impulses of students who have been attracted to the law as a service profession. For those who may be less altruistically motivated, or who are simply seeking a flexible career, the program sends an up-front message that genuine success and professionalism are linked in any context. This message is strengthened by the symbolism of being delivered in person, before doctrinal legal education has even begun, by judges and lawyers whose personal achievements have been shaped by professional values." Dean Don Burnett, *A Pathway of Professionalism: The first day of Law School at the University of Idaho*, 52 Advocate 17 (Feb 2009).

SCREENING: AN IDEA WHOSE TIME HAS COME?

Mark J. Fucile
Fucile & Reising, LLP

When the Idaho Rules of Professional Conduct (“RPC’s”) were last amended in 2004, they did not include a screening rule to avoid imputed conflicts when lawyers move laterally from firm to firm in private practice. The approach with our “firm unit rule” — RPC 1.10 — was influenced significantly by the American Bar Association’s rejection of screening for lateral movement in private practice in 2002 when the ABA revised its influential Model Rules of Professional Conduct upon which Idaho and most states pattern their RPCs. In 2009, however, the ABA revisited screening and adopted a lateral-hire screening rule for private practice similar to the ones that have been available to governmental lawyers and judges since the ABA Model Rules were first adopted in 1983.

In light of the sea change at the ABA, the Board of Commissioners recommended that our screening rule be revised based on the recent ABA amendments. The membership approved the change in the just completed annual resolution process and, as I write this, the proposal is under review by the Supreme Court. If adopted by the Supreme Court, Idaho would join an increasing number of states that now permit lateral hire screening in private practice. This article concurs in the recommendation of the Commissioners and the membership that it is time to revisit screening for private practice in Idaho. A short history of screening is first presented for context. The mechanics of screening are then outlined. Finally, the screening debate is surveyed and concludes with the suggestion that Idaho adopt screening patterned on the corresponding ABA rule.

Screening: A short history

“Screening” is defined by Idaho Rule of Professional Conduct 1.0(k) as “the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that

Under RPC 1.10, which is often called the “firm unit rule,” one lawyer’s professional conflict is imputed to the lawyer’s firm as a whole.

are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.” We already have a definition of screening in our RPCs because screening is already available to avoid imputed conflicts in three circumstances: (1) under RPC 1.11, when a lawyer moves between government and private practice; (2) under RPC 1.12, when a lawyer moves from a judicial or other adjudicative position to private practice; and (3) under RPC 1.18, when a firm declines representation of a prospective client.

When the Idaho RPCs were last significantly revised in 2002 and 2003 and then adopted by the Supreme Court in 2004, screening for lateral movement between firms in private practice was considered but ultimately rejected.¹ At the time, the ABA’s “Ethics 2000” Commission had recommended screening for lateral movement in private practice but the ABA’s House of Delegates did not adopt that aspect of the Ethics 2000 Commission’s proposals.² Idaho’s own “E2K” Committee, which subsequently reviewed our rules in 2002 and 2003 in light of the changes to the ABA Model Rules approved as part of the ABA Ethics 2000 process, concurred.³ The version of RPC 1.10 that the E2K Committee recommended and that was adopted by the Supreme Court in 2004 did not include screening for lateral movement in private practice.

Under RPC 1.10, which is often called the “firm unit rule,” one lawyer’s professional conflict is imputed to the lawyer’s firm as a whole. When a lawyer leaves one firm to join another, the lawyer’s clients from the “old” firm who do not follow the lawyer to the “new” firm become the lawyer’s former clients for conflict purposes under the former client conflict rule, RPC 1.9. If the lawyer is working

opposite the new firm and the client involved remains behind when the lawyer moves to the new firm, the lawyer’s former client conflict will be imputed to the new firm by RPC 1.10. In that instance, the new firm will be disqualified from that ongoing matter unless the lawyer’s former client consents.⁴ As a practical matter, consent is rare under those circumstances and, if consent is declined, it effectively bars the lawyer from moving to the new firm (at least until the matter giving rise to the conflict is concluded).⁵

The ABA revisited screening in February 2009 and amended ABA Model Rule 1.10 to include a provision that now permits it for lateral movement in private practice.⁶ In doing so, the ABA Standing Committee for Ethics and Professional Responsibility, which recommended the change to the ABA’s House of Delegates, noted in its report accompanying the proposed amendment that an increasing number of states had adopted screening for lateral movement in private practice without any significant disciplinary problems resulting.⁷ Regionally, the ABA Ethics Committee Report lists Arizona, Colorado, Montana, Nevada, Oregon, Utah and Washington as jurisdictions that have adopted screening for lateral movement in private practice.⁸ Following the 2009 ABA amendments, the Board of Commissioners recommended that Idaho adopt similar amendments.

How would it work?

Under ABA Model Rule 1.10(a)(2) as amended in 2009 and the current proposal here, there are three primary elements to an effective screen.⁹

First, the lawyer being screened must not participate in the matter involved at the new firm.¹⁰ The comment to the definition of screening in the ABA Model Rules, which is identical to the corresponding Idaho comment, describes the essence of an effective screen:



Mark Fucile

The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.¹¹

Second, the former client must be given timely notice of the screen so that the former client can challenge it if the former client believes that it is inadequate. ABA Model Rule 1.10(a)(2)(ii), which the Idaho proposal mirrors, provides in this regard:

[W]ritten notice . . . [must be] . . . promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures[.]

Nearly a quarter century's experience with screening without incident under RPC 1.11 and 1.12 suggests that screening under RPC 1.10 should not lead to problems either.

Third, at the conclusion of the matter (or at periodic intervals if requested by the client), the new firm must certify compliance with the screening rule and the accompanying procedures. ABA Model Rule 1.10(a)(2)(iii), which the Idaho proposal again mirrors, outlines this concluding requirement:

[C]ertifications of compliance with these Rules and with the screening procedures . . . [must be] . . . provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

Should Idaho adopt screening?

The ABA Ethics Committee Report and an accompanying Minority Report summarize the debate over screening. The proponents have argued that screening facilitates lawyer mobility in an era when lawyers no longer typically remain at a single firm for an entire career. The opponents, in turn, have focused on the appearance of "side switching" and perceived risks to client confidentiality based on that same mobility.

With both, the central concern threading through the debate has been the need to ensure client confidentiality. I respectfully suggest the proponents have the better argument for two reasons.

First, lawyers and their firms are both subject to very exacting standards of client confidentiality and the penalties for violating that duty are severe. For individual lawyers, RPC 1.6, which governs confidentiality generally and RPC 1.9, which addresses responsibilities to former clients, impose a strict duty to maintain a former client's confidentiality under pain of regulatory discipline. For their firms, these same rules and the underlying fiduciary duty they reflect suggest equally severe sanctions in the form of disqualification (see, e.g., *Parkland Corp. v. Maximium Co.*, 920 F. Supp. 1088 (D. Idaho

1996) (disqualification based on former client conflict)) and claims for breach of fiduciary duty (see, e.g., *Damron v. Herzog*, 67 F.3d 211 (9th Cir. 1995) (casting continuing duties to former clients under Idaho law in fiduciary terms)). Perhaps because lawyers readily appreciate both the duty of confidentiality and the corresponding sanctions for failing to do so, the ABA Ethics Committee Report noted that jurisdictions with screening report few problems:

The Committee inquired of states with screening and received responses from disciplinary counsel, state bar association officials, and practicing lawyers in those jurisdictions that properly established screens are effective to protect confidentiality. Moreover, the Committee considered the applicable case law, and found that courts have exhibited no difficulty in reviewing and, where screening was found to have been effective, approving screening mechanisms.¹²

Second, screening has been a part of the Idaho RPCs since they were first adopted in 1986. During that time, government lawyers moving to private practice (and between private practice and the government) have had the benefit of screening under RPC 1.11 as have judicial personnel under RPC 1.12.¹³ During that time, there were only two reported decisions dealing with either rule: *State v. Cherry*, 139 Idaho 579, 83 P.3d 123 (2004), which addressed RPC 1.11; and *Foster v. Traul*, 145 Idaho 24, 175 P.3d 186 (2007), which addressed RPC 1.12. Both were disqualification decisions in which lawyers moved, respectively, from the local public defender to the prosecutor's office and from a judicial clerkship to a firm representing one of the litigants in a case pending before the former clerk's judge. In both instances, the lawyers involved took no part in the matters at issue in their new positions

and did not divulge confidential information from their former employers to the new ones to benefit the new employer's clients. The trial courts in each refused disqualification and the appellate courts affirmed. Nearly a quarter century's experience with screening without incident under RPC 1.11 and 1.12 suggests that screening under RPC 1.10 should not lead to problems either.

Concluding comments

Screening is a practical solution to an increasingly common fact of practice life. It accommodates lawyer mobility while ensuring that client confidentiality is protected. In light of the change to the ABA Model Rule, Idaho should, as the Board of Commissioners and the membership have recommended, permit screening for lawyers moving laterally in private practice.

About the Author

Mark Fucile of *Fucile & Reising LLP* handles professional responsibility, regulatory and attorney-client privilege matters and law firm related litigation for lawyers, law firms and legal departments throughout the Northwest. He is a past chair of the Washington State Bar Rules of Professional Conduct Committee, is a

past member of the Oregon State Bar's *Legal Ethics Committee* and is a member of the Idaho State Bar Professionalism & Ethics Section and is a co-editor of the *WSBA's Legal Ethics Deskbook* and the *OSB's Ethical Oregon Lawyer*. He can be reached at 503.224.4895 and Mark@frllp.com.

Endnotes

¹ See December 9, 2002 Minutes of the Idaho State Bar Ethics 2000 Committee ("E2K Committee") at 1.

² See American Bar Association, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2005* (2006) at 250-58.

³ See E2K Committee, December 9, 2002 Minutes at 1.

⁴ Under the judicially created "hot potato rule," a law firm cannot "fire" a current client to "cure" a conflict. See generally *Unified Sewerage Agency v. Jelco*, 646 F.2d 1339, 1345 n.4 (9th Cir. 1981).

⁵ In my experience, when consent is granted, it is usually conditioned on voluntary screening of the lawyer involved. See, e.g., *Spur Products Corp. v. Stael Rives LLP*, 142 Idaho 41, 122 P.3d 300 (2005) (involving a voluntary screen).

⁶ The text of the ABA Model Rule and the accompanying report of the ABA Standing Committee on Ethics and Professional Responsibility ("ABA Ethics Committee Report") are available on the ABA

Center for Professional Responsibility's web site at www.abanet.org/cpr.

⁷ ABA Ethics Committee Report at 3.

⁸ *Id.* at 1 n. 1.

⁹ Screening is directed primarily at lawyers. Under RPC 5.3, however, lawyers have a duty to ensure the ethical conduct of nonlawyer staff. Therefore, screening should also be an available tool for staff lateral hires. See ABA Model Rule 1.10, cmt. 4 (so stating); see, e.g., *Daines v. Alcatel*, 194 F.R.D. 678 (E.D. Wash. 2000) (lateral hire staff member properly screened under Washington's corresponding rule).

¹⁰ Under ABA Model Rule 1.10(a)(2)(i), the lawyer must also not be directly apportioned any part of the fee involved. Comment 8 to the Model Rule clarifies that this does not prohibit the screened lawyer from receiving a salary or partnership share established by prior agreement based on overall firm revenues.

¹¹ Comment 10 to ABA Model Rule 1.10 further notes on the timing of the screen: "In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening."

¹² RPC 1.18 deals with prospective clients and, as noted earlier, contains a screening mechanism if a prospective client does not become a client of the firm. RPC 1.18 was new to the RPCs with the amendments which became effective in 2004.



JUSTIN STEWART

ZM ZARIAN•MIDGLEY

Zarian Midgley & Johnson, PLLC, a Boise-based firm specializing in intellectual property matters and complex litigation, is pleased to welcome **Justin Stewart** to the firm. Stewart, a registered patent attorney, holds a Bachelor of Science in Mechanical Engineering and a Juris Doctor, cum laude, from Brigham Young University.

Justin's areas of practice include a wide range of technologies, from telecommunications and financial systems to optical networking and mechanical/industrial devices. Justin was previously employed with Baker Botts, LLP in Dallas, Texas and Alverson, Taylor, Mortensen & Sanders in Las Vegas, Nevada.

Justin can be reached at stewart@zarianmidgley.com or 208-562-4900.

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PROSECUTOR'S DUTY TO DISCLOSE FAVORABLE EVIDENCE

Jim Dickinson

Ada County Prosecutor's Office

Idaho Rule of Professional Conduct 3.8(d) requires that Idaho prosecutors disclose any evidence or information they know about that tends to negate the guilt of the accused. The same requirements extend to sentencing. No doubt this concept is familiar. Regardless of the nature of your practice or specialty, sharing exculpatory evidence is a principle deeply imbedded in the practice of criminal law. Since the genesis of this rule in 1963, it has become part of the curriculum in the first year of law school.

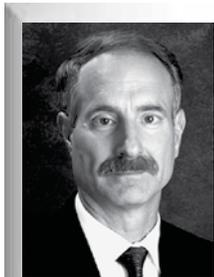
Brady v. Maryland

In *Brady v. Maryland*, the Supreme Court interpreted the Due Process Clause of the United States Constitution as requiring evidence favorable to a criminal defendant to be disclosed. Perhaps less known was the fact that the Supreme Court considered, but did not overturn John Brady's First Degree Murder conviction. It did allow him a new sentencing hearing.

The Brady saga began when John Brady and his girlfriend discovered they were expecting a child. Not newly discovered was the fact she was married and Brady was not her husband. Faced with no job and a soon-to-be family, Brady concluded his only plausible option was to rob a bank. Brady and his co-defendant, Donald Boblit (his girlfriend's brother) determined that the successful bank robber would need a fast car. A new Ford Fairlane was the logical choice.

Brady's friend William Brooks had a fast new Ford Fairlane. Brady and Boblit placed a log across the road near Brook's home. As expected, when Brooks drove down the road he had to get out of his car to move the log. After Brooks got out, Brady and Boblit knocked him out, took his wallet and drove him to the country. Brooks was later found strangled in a nearby wooded area.

After their arrests, Brady and Boblit admitted being involved in the murder, including the decision to kill Brooks.



Jim Dickinson

The risk of having a conviction overturned by failing to disclose "inconsequential" evidence to the defense is too great.

The consistency ended when each accused the other of the actual killing. In his fifth interview, Boblit admitted he alone killed Brooks. The contents of Boblit's last statement were not shared with Brady's attorney and became the basis of the court's ruling.

Brady's attorney appealed both his client's conviction and the death penalty he received. The Supreme Court declined to grant a new trial to determine Brady's guilt, deciding instead that the evidence of guilt was clear. The Court did remand Brady's case for resentencing in light of the new evidence. Justice Douglas wrote: "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to the guilt or to punishment...."

Brady did not further define materiality. But later cases held that evidence is material if there is a "reasonable probability" that disclosing it would have changed the outcome of the proceeding. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. Brady also defined the reach of exculpatory evidence narrowly, as evidence that would tend to negate guilt or reduce punishment. *Giglio v. United States* expanded Brady's rule to include evidence that would tend to impeach government witnesses, such as payments to witnesses or promises of leniency.

This is the state of the law today.

ABA Formal Opinion

In July of 2009, the American Bar Association's Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 09-454 regarding a "Prosecutor's Duty to Disclose Evidence and Information Favorable to the Defense." The ABA's Synopsis of the decision explains:

Rule 3.8(d) of the Model Rules of Professional Conduct requires a prosecutor to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to ne-

gate the guilt of the accused or mitigates the offense, and, in connection with sentencing, [to] disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor." This ethical duty is separate from disclosure obligations imposed under the Constitution, statutes, procedural rules, court rules, or court orders. Rule 3.8(d) requires a prosecutor who knows of evidence and information favorable to the defense to disclose it as soon as reasonably practicable so that the defense can make meaningful use of it in making such decisions as whether to plead guilty and how to conduct its investigations. Prosecutors are not further obligated to conduct searches or investigations for favorable evidence and information of which they are unaware. In connection with sentencing proceedings, prosecutors must disclose known evidence and information that might lead to a more lenient sentence unless the evidence or information is privileged. Supervisory personnel in a prosecutor's office must take reasonable steps under Rule 5.1 to ensure that all lawyers in the office comply with their disclosure obligations.

The ABA Opinion is clear that Model Rule of Professional Conduct 3.8 subjects a prosecutor to potential sanctions for conduct that would not result in a defendant's conviction being overturned. So the question is, if Idaho adopts a similar interpretation of I.R.P.C. 3.8, is it likely to further justice here?

Perhaps the first step in answering the question is to decide whether the opinion will have any practical effect on the way prosecutors handle discovery. It is far easier to determine after a trial that evidence was not material to the outcome than before. Indeed, this appears to be the chief argument of proponents of the view set forth in the ABA opinion. Although unable to speak for all, your authors believe most prosecutors already recognize this fact and disclose all evidence that is even arguably favorable to the defense.

It seems counter-intuitive that a prosecutor would conclude that a piece of evidence is so inconsequential that it would have no effect on the outcome of the trial. The risk of having a conviction overturned by failing to disclose “inconsequential” evidence to the defense is too great. In circumstances where a privilege exists or there is a concern about the safety of a witness, prosecutors can and should seek a protective order.

If the interpretation of the rule expressed in the ABA opinion is unlikely to have a substantial practical effect on the way the majority of prosecutors conduct discovery, are there drawbacks to reading the rule so broadly? For the purposes of a Brady analysis a prosecutor’s duty to disclose material extends to all state agents who have a significant role in investigating a criminal case. A convicted criminal defendant could allege that a prosecutor had failed to disclose evidence favorable to the defense even though such evidence was unknown to the prosecutor. The appellate court could determine that such evidence, while arguably favorable to the defense, would not have changed the outcome of the trial and, therefore, no Brady violation occurred. And yet, if a grievance was filed the prosecutor would find himself or herself answering an inquiry from Bar Counsel about why he or she did not deliver the favorable information to the defense, even though the prosecutor was unaware the information existed. Anyone who has represented a large corporate client will recognize the difficulties in making sure that every employee of the corporate client has communicated to the lawyer every document and detail that the lawyer finds relevant to litigation. Would there be a similar response in a civil setting even after the Idaho Supreme Court had conclusively ruled that the failure to disclose information had no effect on the outcome of the litigation? We suggest there would not be ethical ramifications where the attorney was not aware of the information and it was not supplied to the defendant.

Conclusion

Prosecutors understand and accept this high ethical obligation. The rules explain prosecutors are not just advocates, but also ministers of justice. Prosecutors who intentionally withhold information from a defendant’s attorney to gain a tactical advantage, as most conclude the prosecutors in Brady did, should be reprimanded. In Brady, while the co-defendant’s admission to being the killer was immaterial to Brady’s guilt, it cer-

Prosecutors understand and accept this high ethical obligation. The rules explain prosecutors are not just advocates, but also ministers of justice.

tainly may have affected whether Brady was sentenced to death. Brady is still a good example of the type of information that must be shared. Your authors doubt this ABA Opinion will change the current practice of sharing all exculpatory evidence, material or not.

About the Author

James K. Dickinson is a Senior Ada County Deputy Prosecuting Attorney. He has worked in both the criminal and civil divisions. He is a graduate of the University of Idaho and its College of Law. He is a frequent lecturer for the Idaho Prosecuting Attorneys Association, has served as a faculty member for the National Advocacy Center and was one of the authors of “Doing Justice: A Prosecutor’s Guide to Ethics and Civil Liability.” He is Chair of the Professionalism and Ethics Section of the Bar and a 2009 recipient of the Outstanding Service Award. His current practice is civil litigation.

Endnotes

¹ *Brady v. Maryland*, 373 U.S. 83; 835 S. Ct. 1194, 10 L. Ed. 2d 215, (1963)

² 373 U.S. 83, 87; 83 S. Ct. 1194, 1196-1197

³ Bibas, Stephanos, *The story of Brady v. Maryland: From Adversarial Gameship Toward the Search for Innocence?* University of Pennsylvania Law School, Scholarship at Penn Law, Paper 81, at 6 (2005).

⁴ While others may disagree with this conclusion, it finds some support in the relatively few number

of cases where an Idaho appellate court has found a *Brady* violation.

⁵ The ABA opinion states that the rules of professional conduct would not extend to information in the government’s file if the prosecutor was unaware of the information and had otherwise been diligent in reviewing information submitted. How Bar Counsel is to determine ‘diligence’ is not clear.

⁶ We can’t know for certain because Brady was never resentenced. His attorneys chose not to have Brady resentenced out of fear of another death sentence. After nearly 15 years in prison Brady finally moved for re-sentencing. At that point the State decided not to proceed and Brady was released.

⁷ A current conundrum for prosecutors is presented in *Nation v. State, Dept. of Corrections*, 144 Idaho 177, 158 P.3d 953 (2007). *Nation* explains that there are potential privacy claims where certain personal information is shared in criminal discovery: “We also note that disclosing this type of identifying information is not the best practice. Rather, investigatory agencies should redact this type of information and if it becomes evidence in a prosecution, the attorneys should request *in camera* review of the evidence for authentication purposes.” *Id.* at 189.

⁸ A current conundrum for prosecutors is presented in *Nation v. State, Dept. of Corrections*, 144 Idaho 177, 158 P.3d 953 (2007). *Nation* explains that there are potential privacy claims where certain personal information is shared in criminal discovery: “We also note that disclosing this type of identifying information is not the best practice. Rather, investigatory agencies should redact this type of information and if it becomes evidence in a prosecution, the attorneys should request *in camera* review of the evidence for authentication purposes.” *Id.* at 189.

MCLE Extension

If you did not complete your MCLE requirements by your December 31, 2009 deadline, you can get an extension until March 1, 2010 to obtain the extra credits you need. Send a written request and \$50 MCLE extension fee to the Membership Department. Remember the licensing deadline is still February 1, 2010 and the rest of your licensing must be physically received in the Idaho State Bar office by that date to avoid the late fee. Courses taken to complete your MCLE requirements will be counted on previous reporting period. The final licensing deadline is March 1, 2010. Your MCLE requirements must be completed by that date. Please contact the Membership Department at (208) 334-4500 or astrauser@isb.idaho.gov if you have any questions.

Idaho's New Judiciary in 2009

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

Idaho Court of Appeals

Honorable John Melanson – Governor C.L. “Butch” Otter appointed Fifth Judicial District Judge John Melanson to the Idaho Court of Appeals filling the vacancy left by the retirement of Judge Darrel Perry, who retired on September 30, 2009.

Judge Melanson served as a District Judge for 8 years and prior to that as Magistrate Judge in Lincoln County for 6 years. Judge Melanson has lived in Idaho since the age of 13 having relocated to Blackfoot from Connecticut. He received his bachelor’s degree in Business Administration from Idaho State University and his law degree from the University of Idaho. He is also a Vietnam Veteran having served in the U.S. Army from 1969-1970 as a hovercraft operator in the 9th Infantry Division.



Honorable John Melanson

In the First Judicial District

Honorable Robert Caldwell – was appointed as a Magistrate Judge for Kootenai County, effective January 2, 2009 filling the vacancy left by the retirement of Judge Eugene Marano.

Judge Caldwell was raised in the Coeur d’Alene area after moving there in the early 1970’s. He graduated from Coeur d’Alene High School, earned a Bachelor’s Degree in Economics from Washington State University and his JD from the University of Idaho, College of Law. He was admitted to the Idaho State Bar in 1993 and worked with the Law office of Charles F. Bean, with Regence Blue Shield of Idaho/Regence Group and was a partner



Honorable Robert Caldwell

As of November 9, 2009 there have been ten new Idaho judges appointed: one new Court of Appeals Judge, five new District Judges and four new Judges of the Magistrate Division.

with the law firm of Witherspoon, Kelley, Davenport & Toole, PS, prior to his appointment to the bench. Judge Caldwell is married to Julia Caldwell and they have two children. He enjoys snow skiing, running, and watching his children participate in school and club sports.

In the Second Judicial District

None

In the Third Judicial District

Honorable Bradly Ford – was appointed as a District Judge for the Third Judicial District, effective April 16, 2009 filling the vacancy left by the retirement of Judge Gordon Petrie.

Judge Ford is a Bakersfield, California native who grew up in Nampa, graduating from Nampa High School. He has a bachelor’s degree from the College of Idaho in Caldwell and a law degree from the University of Idaho. He served Canyon County as a Magistrate Judge from May of 1997 until April of 2009.



Honorable Bradly Ford

Honorable Brian Lee – was appointed as a Magistrate Judge for Payette County, effective October 1, 2009 filling the vacancy left by the retirement of Judge William Dillon.

Judge Lee attended Brigham Young University and received his undergraduate degree from the Boise State University. He received his law degree from the University of Idaho. He served as deputy prosecuting attorney



Honorable Brian Lee

in Payette County from October of 1999 to January 2000. After leaving the prosecuting attorney’s office in 2000, Judge Lee maintained a private law practice in Fruitland, Idaho, until he was elected as prosecuting attorney for Payette County in January of 2005, a position he held until his appointment to the bench.

Honorable Dayo Onanubosi – was appointed as a Magistrate Judge for Canyon County, effective August 10, 2009 filling the vacancy left by Judge Bradly Ford who was appointed as a District Judge in the Third Judicial District.

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



Honorable Dayo Onanubosi

Honorable Susan Wiebe – was appointed as a District Judge for the Third Judicial District, effective October 13, 2009 filling the vacancy left by the retirement of Judge Stephen Drescher.

Judge Wiebe is a North Carolina native with a bachelor’s degree from Boise State University and a law degree from the University of Idaho. Prior to her appointment,



Honorable Susan Wiebe

she worked for the Boundary County Prosecutor in Bonners Ferry, the Coeur d'Alene City Attorney, and the Kootenai County Prosecutor in Coeur d'Alene and as a deputy attorney general before going into private practice in Boise and later Caldwell.

In the Fourth Judicial District

Honorable Richard Greenwood – was appointed as a District Judge for the Fourth Judicial District, effective February 6, 2009, filling the vacancy left by the retirement of Judge Kathryn Sticklen.

Judge Greenwood is a Nebraska native with a bachelor's degree from Jamestown College in North Dakota and a law degree from the University of North Dakota. He practiced law in Twin Falls from 1977 until his appointment to the bench.



Honorable Richard Greenwood

In the Fifth Judicial District

None

In the Sixth Judicial District

Honorable David Kress – was appointed as a Magistrate Judge for Caribou County, effective July 6, 2009 filling the vacancy left by the retirement of Judge Ronald Hart.

Judge Kress was raised in southeastern Idaho and graduated from American Falls High School in 1986. He earned his



Honorable David Kress



Bachelor of Science Degree in Political Science and then went on to attend law school at the University of Idaho, graduating in 1994. Since graduating from law school, he has worked continuously for Maguire and Kress.

He is the past president of the Sixth District Bar Association, was the Regional Director of the Idaho Trial Lawyers Association and is a member of the Portneuf Inns of Court. He was a member of the Defense Panel for the Federal Court under the Criminal Justice Act and also a past member of the Board of Directors of the Salvation Army. He is married to Nyla Robinson and has four children. He loves being with his family and can't get enough of the outdoors!

Honorable Robert Naftz – was appointed as a District Judge for the Sixth Judicial District, effective October 9, 2009 filling the vacancy left by the retirement of Judge Peter McDermott.

Judge Naftz is a Colorado native with a bachelor's de-



Honorable Robert Naftz

gree from Colorado State University and a law degree from the University of Idaho. He was in private practice until going to work as a deputy attorney general in 2000, and was appointed a Bannock County Magistrate in 2004.

In the Seventh Judicial District

Honorable Gregory Moeller – was appointed as a District Judge for the Seventh Judicial District, effective April 24, 2009 filling the vacancy left by the retirement of Judge Brent Moss.

Judge Moeller is a Norwalk, California native who grew up in Fremont County, graduating from St. Anthony's South Fremont High School. He has a bachelor's degree from Brigham Young University and a law degree from the J. Reuben Clark Law School at BYU. Prior to his appointment to the bench, he was a partner in the Rexburg law firm of Rigby, Andrus & Moeller, Chartered.



Honorable Gregory Moeller

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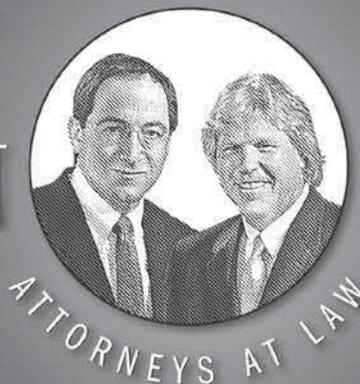
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COURT INFORMATION

OFFICIAL NOTICE SUPREME COURT OF IDAHO

Chief Justice
Daniel T. Eismann

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

Regular Spring Terms for 2010

Boise January 13, 15, 19, 20 and 22
Boise February 10, 12, 16, 17 and 19
Coeur d'Alene, Moscow, Lewiston . . . April 5, 6, 7, 8 and 9
Boise (Eastern Idaho) May 3, 5, 7, 10 and 12
Boise (Twin Falls) June 2, 4, 7, 9 and 11

By Order of the Court
Stephen W. Kenyon, Clerk

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

OFFICIAL NOTICE COURT OF APPEALS OF IDAHO

Chief Judge
Karen L. Lansing

Judges
Sergio A. Gutierrez
David W. Gratton
John M. Melanson

Regular Spring Terms for 2010

Boise January 14, 21, 26 and 28
Boise February 11, 18 and 23
Boise March 11, 16, 18 and 19
Boise April 8, 13, 15 and 20
Boise May 11, 13, 18 and 20
Boise June 10, 15, 17 and 22

By Order of the Court
Stephen W. Kenyon, Clerk

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

Idaho Supreme Court Oral Argument Dates

Wednesday, January 13, 2010 – BOISE

8:50 a.m. Weinstein v. Prudential Property #34970
10:00 a.m. Jorgensen v. Coppedge #35575
11:10 a.m. Potlatch Ed. Assoc. v. Potlatch School Dist. No. 285 #35606

Friday, January 15, 2010 – BOISE

8:50 a.m. Eby v. State (Petition for Review) #36568
10:00 a.m. Bach v. Harris #31716
11:10 a.m. Bach v. Harris #31717

Tuesday, January 19, 2010 – BOISE

8:50 a.m. Pizzuto v. State #34845
10:00 a.m. Barrett v. Barrett #35763
11:10 a.m. State v. Rawley (Petition for Review) . . . #36061

Wednesday, January 20, 2010 – BOISE

8:50 a.m. Noble v. Kootenai County #35201
10:00 a.m. State v. Johnson #33691
11:10 a.m. Nelson v. City of Bonners Ferry #35878

Friday, January 22, 2010 – BOISE

8:50 a.m. T.J.T. Inc. v. Ulysses Mori #35079
10:00 a.m. Bedke v. City of Oakley #35217/35943
11:10 a.m. Wright v. Board of Psychologist Examiners #35647

Idaho Court of Appeals Oral Argument Dates

Thursday, January 14, 2010 – BOISE

9:00 a.m. State v. Cantrell #35826
10:30 a.m. State v. Two Jinn, Inc. #36339
1:30 p.m. Truman v. Dept. of Transportation #36082

Thursday, January 21, 2010 – BOISE

9:00 a.m. Dutt v. State #36156
10:30 a.m. Cooke v. State #32447/34820
1:30 p.m. Total Success Investments v. ACHD #36069

Tuesday, January 26, 2010 – BOISE

9:00 a.m. State v. Tapp #35536
10:30 a.m. State v. Two Jinn, Inc. #36176

Thursday, January 28, 2010 – BOISE

9:00 a.m. State v. Ashworth #35773
10:30 a.m. State v. Jockumsen #34581
1:30 p.m. Gibson v. Merrill #35629

February 2010 Idaho State Bar Examination Applicants (as of December 4, 2009)

Listed below are the applicants who have applied to sit for the February 2010 Bar Examination. The Board of Commissioners publishes the names of these applicants for your review and requests any information of a material nature concerning moral character and fitness of an applicant be brought to the attention of the board of Commissioners in a signed letter by February 1, 2010. Direct correspondence to: Admissions Director, Idaho State Bar, PO Box 895, Boise, ID, 83701.

Brandi Lynn Archer Seattle, WA <i>University of Idaho College of Law</i>	Brandon David Fiala Twin Falls, ID <i>University of Idaho College of Law</i>	Melissa Nicole Karns Chehalis, WA <i>Gonzaga University</i>	Tonn Kimball Petersen Meridian, ID <i>University of Denver Sturm College of Law</i>	Elisa L. Sue Eagle, ID <i>University of San Diego</i>
Ashley Jean Ruen Aumick Hope, ID <i>University of Idaho College of Law</i>	Kevin Christopher Fisher Boise, ID <i>Brigham Young University</i>	Matthew G. Kerbs Pocatello, ID <i>University of Idaho College of Law</i>	Todd Durney Pingel Ammon, ID <i>Washburn University</i>	Holly Marie Swenson Rasmussen aka Holly Marie Swenson Provo, UT <i>Brigham Young University</i>
Scott Dale Blickenstaff Boise, ID <i>University of California, Hastings College of Law</i>	Robyn J. Follett aka Robyn Jackson Pocatello, ID <i>Brigham Young University</i>	Valerie A. Kraml Berkeley, CA <i>University of California, Hastings College of Law</i>	Diane Pitcher Preston, ID <i>University of Idaho College of Law</i>	Giles Norman Turner Concord, NH <i>Franklin Pierce Law Center</i>
Tamara L. Boeck Star, ID <i>University of the Pacific, McGeorge School of Law</i>	Patrick James Gaffney Mack's Inn, ID <i>Suffolk University Law School</i>	Abe Luca Calabasas, CA <i>Pepperdine University School of Law</i>	Nicholas James Powers Star, ID <i>Creighton University School of Law</i>	Ace Clinton Van Patten North Las Vegas, NV <i>University of Nevada, Las Vegas, Wm S Boyd School of Law</i>
George R. Brown Moscow, ID <i>University of Idaho College of Law</i>	Sharon Rosa Hammer aka Sharon R. Buser Sun Valley, ID <i>Southern Illinois University School of Law</i>	Aubrey Dean Lyon Lake Oswego, OR <i>Lewis and Clark College</i>	Lacey Bree Rammell- O'Brien Moscow, ID <i>University of Idaho College of Law</i>	Sheila Thomas Hudson Vonderharr aka Sheila A. Hudson aka Sheila Adele Thomas Athol, ID <i>Gonzaga University</i>
John Joseph Bulger Aberdeen, ID <i>University of Montana School of Law</i>	Benjamin Allan Heiner Sheridan, WY <i>University of Montana School of Law</i>	Alaine Holly MacKenzie aka Lanni MacKenzie Kooskia, ID <i>University of Idaho College of Law</i>	Nathan Dane Rivera Pocatello, ID <i>University of Nevada, Las Vegas, Wm S Boyd School of Law</i>	Craig C. Weaver Folsom, CA <i>University of Idaho College of Law</i>
Steven Luke Dalling Moscow, ID <i>University of Idaho College of Law</i>	Matthew J. Holden Boise, ID <i>Gonzaga University</i>	Ana Elida Mamani- Haymes aka Ana Elida Mamani Eugene, OR <i>University of Oregon School of Law</i>	Daniel Day Royce Lawrence, KS <i>The University of Kansas School of Law</i>	Lenden Franklin Webb Fresno, CA <i>California Western School of Law</i>
Doyna Varulezka Dardon San Diego, CA <i>California Western School of Law</i>	Jason Lee Hudson Boise, ID <i>University of Colorado School of Law</i>	Michael Shawn McNeely Edmond, OK <i>University of Oklahoma College of Law</i>	Sarah Kathleen Schmid Twin Falls, ID <i>University of Idaho College of Law</i>	Kendall Aline Woodcock Boise, ID <i>Willamette University College of Law</i>
Michael D Davidson Nampa, ID <i>Gonzaga University</i>	Jeremiah Matthew Hudson Salt Lake City, UT <i>University of Utah S.J. Quinney College of Law</i>	Thomas James Moore Salt Lake City, UT <i>University of Utah S.J. Quinney College of Law</i>	Kyle O'Neal Schou Moscow, ID <i>University of Idaho College of Law</i>	Jessica Mockbee Ysursa aka Jessica Mockbee McGibbon Reno, NV <i>Thomas Jefferson School of Law</i>
Heather Lynn DeBlieck Spokane, WA <i>Gonzaga University</i>	Nathan LaMar Hutchings Franklin, ID <i>Indiana University School of Law- Bloomington</i>	Brian Thomas O'Bannon Caldwell, ID <i>Lewis and Clark College</i>	Saul Herseth Seyler Missoula, MT <i>University of Montana School of Law</i>	Michael Nicolas Ysursa aka Mick Ysursa Reno, NV <i>Thomas Jefferson School of Law</i>
John Cecil Dewey Idaho Falls, ID <i>Baylor University School of Law</i>	Dustin O'Neal Jansen Nampa, ID <i>University of Utah S.J. Quinney College of Law</i>	Jeremi Lynn Ossman Ponderay, ID <i>Michigan State University College of Law</i>	Michael Peter Sinks Moscow, ID <i>University of Idaho College of Law</i>	
Timothy Michael Domek Cheyenne, WY <i>University of Arkansas- Fayetteville</i>	Dana M. Johnson aka Dana Marie Fountain Troy, ID <i>University of Idaho College of Law</i>	Jamie Kay Parkinson Boise, ID <i>University of San Diego</i>	Rebecca Kay Smith Missoula, MT <i>University of Montana School of Law</i>	
Ryan Mayes Fawcett Boise, ID <i>University of Idaho College of Law</i>		Timothy Glen Pershing Boise, ID <i>Gonzaga University</i>	Justin Neil Stewart Boise, ID <i>Brigham Young University</i>	

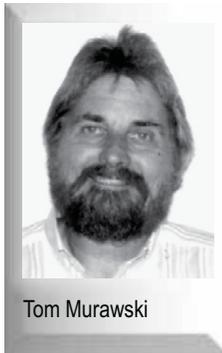


FEDERAL COURT CORNER

Tom Murawski
United States District and Bankruptcy Courts

New Amendments to Federal Rules

As you know, the new amendments to the Federal Rules of Civil, Criminal, Bankruptcy and Appellate Procedure became effective on December 1, 2009. Many changes in the Rules were necessitated by an attempt to standardize time computation in multiples of seven-day increments. Please note that 12 revised Federal Rules of Bankruptcy Procedure resulted in a reduction by one day (from 15 to 14 days) of the time to take action. The affected rules are Bankruptcy Rules 1007, 1019, 1020, 2015, 2015.1, 2016, 3015, 4001, 6004, 6007, 4002 and 8009. The new and amended official and procedural national bankruptcy forms are listed on the U.S. Courts website at:



Tom Murawski

<http://www.uscourts.gov/bankform/index.html> and have been incorporated into our local forms directory.

Because of the volume of the number of Federal Rules of Civil, Criminal, Bankruptcy and Appellate Procedure amended this year, we did not attempt to summarize the changes, but would encourage you to review them on the U.S. Courts official website at: <http://www.uscourts.gov/rules/archive.htm#proposed0807>.



Revised District and Bankruptcy Court Local Rules

After a 30-day comment period, during which the Bar had an opportunity to comment on the proposed changes, both the revised District and Bankruptcy Court Local Rules became effective on December 1, 2009, to coincide with the effective date of the National Rules. Many of the District and Bankruptcy Local Rule revisions reflect new time computations in conformance with the new National Rules which attempt to standardize time periods in multiples of seven-day increments. The electronic case filing system (ECF) will automatically calculate all new time computations. With respect to the District Local Rules, the Alternative Dispute Resolution (ADR) Rule has been revised and re-numbered and a new Voluntary Case Management Conference (VCMC) has been added to Civil Rule 16.1. A new Patent Law section has also been created, which became Part III of the District Court Local Rules. A new Bankruptcy Local Rule (1017.1) covering the conversion and dismissal of certain cases, was adopted. Informative presentations were made on the proposed

District and Bankruptcy Local Rules at the Annual District Conferences held in Moscow and Boise. The adopted District and Bankruptcy Local Rules are available on our website at: www.id.uscourts.gov.

New Clerk of Court/Court Executive

Libby Smith has been selected as the new Clerk of Court/Court Executive for the District of Idaho. Libby will be relocating to Idaho from Michigan, and expects to be in the office beginning January 4, 2010. Libby has extensive court administration experience and most recently served as the Chief Deputy Clerk for the U.S. District Court for the Eastern District of Michigan. Prior to that, Libby served in the state court system as the Deputy Court Administrator for Michigan's largest trial court. Please join us in welcoming Libby to the District of Idaho.

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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Sixth District Family Law Section Chairman

Idaho Supreme Court and Court of Appeals
NEW CASES ON APPEAL PENDING DECISION
(Update 12/01/09)

CIVIL APPEALS

ATTORNEY FEES AND COSTS

1. Did the district court abuse its discretion in awarding J-U-B \$35,600 in attorney's fees for defending against BECO's contract claim?

*BECO Construction v.
J-U-B Engineers, Inc.*
S.Ct. No. 35873
Supreme Court

CONTRACT

1. Whether the district court erred in its interpretation of the contractual language of the promissory note.

Page v. Pasquali
S.Ct. No. 36429
Supreme Court

DUTY TO INFORM

1. Did the district court err by finding that counsel for Medical Recovery Services had a duty to inform Carnes of exemption rights when there had been no garnishment or court order to turn the funds over to plaintiff?

Medical Recovery Services v. Carnes
S.Ct. No. 36500
Court of Appeals

INSURANCE

1. Did the district court err in resolving the "resident" ambiguity in the insurance contract in favor of the insurer, Farm Bureau?

*Farm Bureau Mutual Insurance Co. v.
Brookbank*
S.Ct. No. 36607
Supreme Court

LAND USE

1. Whether Ordinance 1034 exceeds the authority granted by Section 67-6515A of the Local Land Use Planning Act.

*KGF Development, LLC v.
City of Ketchum*
S.Ct. No. 36162
Supreme Court

POST-CONVICTION RELIEF

1. Whether the district court erred by denying Nicolai's petition for post-conviction relief when Nicolai's trial counsel provided ineffective assistance of counsel.

Nicolai v. State
S.Ct. No. 35444
Court of Appeals

2. Did Martinez present an issue of material fact that his trial counsel was ineffective for failing to move for a mistrial based on jury contamination such that the court erred in summarily dismissing his petition for post-conviction relief?

Martinez v. State
S.Ct. No. 35749
Court of Appeals

3. Did the court abuse its discretion by dismissing the post-conviction for inactivity pursuant to I.R.C.P. 40(c)?

Angulo-Lopez v. State
S.Ct. No. 35847
Court of Appeals

4. Did the court err in summarily dismissing Fackrell's ineffective assistance of counsel claim?

Fackrell v. State
S.Ct. No. 36133
Court of Appeals

5. Did the court err in summarily dismissing Lightner's petition as untimely?

Lightner v. State
S.Ct. No. 35740
Court of Appeals

6. Did the court err in concluding Boylan failed to prove ineffective assistance of counsel?

Boylan v. State
S.Ct. No. 36022
Court of Appeals

7. Did the district court err in summarily dismissing Jacobs' petition for post-conviction relief and in finding he had raised no genuine issue of material fact?

Jacobs v. State
S.Ct. No. 35261
Court of Appeals

8. Whether the court erred by denying Beitz's petition for post-conviction relief without addressing all of his claims.

Beitz v. State
S.Ct. No. 35922
Court of Appeals

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

Workman v. State
S.Ct. No. 36216
Court of Appeals

STATUTE OF LIMITATIONS

1. Whether the trial court erred in granting the defendant's motion for summary judgment based on the statute of limitation in the wrongful death claims

Castorena v. General Electric
S.Ct. Nos. 35123/35124/35852
Supreme Court

SUBSTANTIVE LAW

1. Whether the Local Economic Development Act facially violates the provisions of the Idaho Constitution that prohibit a municipality from incurring, outside of "ordinary and necessary expenses" an indebtedness or liability exceeding income and revenue for a specific year without the assent of qualified electors, as provided by Idaho Const. Art. VIII, § 3 and 4.

Nampa Development Corp. v. Alldredge
S.Ct. No. 36333
Supreme Court

SUMMARY JUDGMENT

1. Whether the district court erred by entering summary judgment and quieting title in favor of the Bagleys.

Bagley v. Thomason
S.Ct. No. 36041
Supreme Court

CRIMINAL APPEALS

DEATH PENALTY CASES

1. Whether the district court order forbidding communications with jurors unless Hall can first demonstrate that such communications are necessary to protect his substantial rights violates his rights under the First, Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

Hall v. State
S.Ct. No. 35055
Supreme Court

DUE PROCESS

1. Was it error to permit the state to offer evidence and argument implicating Pickens in certain prior bad acts, where that evidence was not admissible and was highly prejudicial?

State v. Pickens
S.Ct. No. 34500
Court of Appeals

2. Did the court err in denying Hayes' motion for a new trial?

State v. Hayes
S.Ct. No. 35482
Court of Appeals

**Idaho Supreme Court and Court of Appeals
NEW CASES ON APPEAL PENDING DECISION
(Update 12/01/09)**

EVIDENCE

1. Did the officers' testimony that they believed Smith was intoxicated impermissibly invade the province of the jury and constitute fundamental error?

State v. Smith
S.Ct. No. 34855
Court of Appeals

2. Did the state present sufficient evidence to support a finding that Peregrina committed two aggravated batteries during two divisible courses of conduct such that two firearm enhancements were supported?

State v. Peregrina
S.Ct. No. 35115
Court of Appeals

3. Did the court err in admitting the North Dakota judgment of conviction because it was not certified or authenticated?

State v. Moore
S.Ct. Nos. 35486/36033
Court of Appeals

**SEARCH AND SEIZURE –
SUPPRESSION OF EVIDENCE**

1. Did the court err in denying Precht's motion to suppress his initial warrantless seizure and in finding the officers had reasonable articulable suspicion that he was engaged in criminal activity?

State v. Precht
S.Ct. No. 34664
Court of Appeals

2. Did the court err in denying Vargas-Tinoco's motion to suppress and in finding she had no expectation of privacy in the hotel room?

State v. Vargas
S.Ct. No. 35212
Court of Appeals

3. Did the officer possess a reasonable, articulable suspicion that Oviedo was armed and dangerous so as to support a search of his car for weapons as part of the traffic stop?

State v. Oviedo
S.Ct. No. 35991
Court of Appeals

SENTENCE REVIEW

1. Did the district court lack jurisdiction to sentence Miller as a persistent violator because no information or amendment to the information was ever filed charging Miller with being a persistent violator?

State v. Miller
S.Ct. No. 35845
Court of Appeals

SUBSTANTIVE LAW

1. Did the court err by not making its dismissal order with prejudice to re-filing the charges?

State v. Naranjo
S.Ct. No. 35966
Court of Appeals

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

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More and more of your clients, or their parents, are going to need long-term care as time goes on. That care is very expensive. Average costs in Idaho are: \$6,000-\$8,000/month for nursing home care; \$2,500-\$4,500/month for assisted living care; and \$18-\$25/hour for in-home care. Medicaid benefits can help pay for these care costs. Never, ever file a Medicaid application for a client until you are sure that the applicant qualifies! When applying for Medicaid or other public benefits (Veteran's benefits), there are often many hidden potholes, obstacles, and dangerous curves in the road. We understand these problems, as we have driven this road before – and we are prepared to address and solve these problems for your client and their families.

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IDAHO COURTS CORNER

Michael Henderson
Legal Counsel, Idaho Supreme Court

Providing more justice with fewer resources; How the Bar can help

No one needs to be told of the effect that the sharp economic downturn has had on state revenues, and the resulting problem of providing necessary government services while balancing the budget. But the judicial branch faces a special challenge as it strives to fulfill its constitutional and statutory responsibilities with reduced resources. We would like to have the help of the members of the Bar in meeting this challenge.

First, let's look at the problem. The facilities for Idaho's trial courts are, for the most part, not funded by the state. Under Idaho Code § 1-1613, the counties "provide suitable and adequate facilities for the district court" and "the staff, personnel supplies, and other expenses of the district court." Similarly, under Idaho Code § 1-2217, the counties provide the facilities, staff and expenses for the magistrate's division. The salaries and compensation of our judges, which are set by statute, make up 64% of the Judicial Branch budget. Another 9% goes toward compensation of court reporters, and 21% to the compensation of other court personnel, including Supreme Court and Court of Appeals staff, the Administrative Office of the Courts, and trial court administrators. That leaves only 6% for other operational expenses. It is difficult to find any area where cuts can be made without impairing essential court services.

Nevertheless, the courts continue to strive to meet the budgetary challenge. The Judicial Branch adopted budget reductions of nearly \$2 million in FY 2009 out of a general fund budget of about \$30 million. The courts participated in the Governor's order in the fall of 2009 with an additional 2.5% holdback of \$745,600. How has this been done?

- In an unprecedented move, all of Idaho's justices and judges agreed to work two days without pay during the first six months of 2009.

- Other employees were given two days' leave without pay during that same time frame.

- A hiring freeze has been put into effect on all non-judicial positions.

- Travel was cut, and meetings were held by telephone conference.

- Many personnel costs were shifted to the Drug Court, Mental Health Court and Family Court Service Fund, and to the ISTARs Technology Fund. But these dedicated funds cannot support these costs for long before being exhausted.

The courts continue to look for ways to achieve economies, but the caseloads are increasing and the need to provide justice in a timely fashion continues. The economic downturn has, predictably, brought an increase in lawsuits. During 2009, district court civil case filings statewide have increased 14% over 2008. In some of our larger counties the impact has been more dramatic. The increase in Canyon County was 31%; in Ada County it was 21%. As the strain of hard times wears on individuals and families, an increase in the need for court services in other areas can be expected. This may be seen in the need for Family Court Services and in certain criminal cases, such as DUIs.

It should also be borne in mind that some of the services and programs provided by the Judicial Branch can ease the burden on other parts of the state budget. The effectiveness of our drug courts and mental health courts, for instance, has a significant impact on the Department of Correction budget.

One of the proposals from the judiciary at the upcoming legislative session will be an emergency surcharge, in an amount of no more than \$15, to be paid by those found to be have committed crimes or infractions. The surcharge

would have a sunset date and would be in effect for no more than five years. The surcharge would help to fund needed court services and programs, including: (1) drug courts and mental health courts; (2) senior judges, whose services allow for the dynamic use of judicial resources and permit the judiciary to deal with the burgeoning caseload while limiting the need for new judge positions; (3) Family Court Services, whose assistance in dealing effectively with cases involving families and children will be essential during these times; (4) replacement of obsolete computers and servers, whose failure would jeopardize the ability of trial court personnel, clerks of the district court, and deputy clerks to conduct the business of the courts; (5) strengthening efforts to collect millions of dollars of court-ordered obligations; and (6) expanded use of video conferencing to save travel dollars. Without this surcharge, the ability of the courts to continue to fulfill their responsibilities will be in serious jeopardy.

We would like to have the help of the members of the Bar as we strive to fulfill our mission and provide the services needed to meet the challenge of these difficult times. Many of you deal directly with the courts on a day-to-day basis. You get to see what works, what doesn't, and what could be made to work better. If you have any thoughts on how we can make our court system operate more efficiently or economically, please let us know. You can direct letters to me or to Patti Tobias, the Administrative Director of the Courts, or you can contact me directly at (208) 334-2246 or at mhenderson@idcourts.net. We appreciate and value your assistance as we work together to provide the people of our state with the best possible system of justice.

About the Author

Michael Henderson is Legal Counsel for the Idaho Supreme Court. He previously served as a Deputy Attorney General for 18 years (seven of those years as Chief of the Criminal Law Division), and before that was a Deputy Prosecuting Attorney in Ada, Blaine and Twin Falls Counties.

SOCIAL MEDIA OPENS UP A VARIETY OF NEW PROFESSIONAL CONNECTIONS

Stephen M. Nipper
Dykas, Shaver & Nipper, LLP

Back when we were kids, if our parents were asked to define the term “social media,” they would have likely come up with a pad of paper used in a game of charades. Not a bad definition, even if it is a bit dated.

So what is “social media?” Wikipedia gives us the general definition of “[s]ocial media is media designed to be disseminated through social interaction, created using highly accessible and scalable publishing techniques.” Such a broad definition includes how we communicate, how we collaborate, how we share multimedia, and even how we share information about businesses.



Stephen M. Nipper

For attorneys, one of the most relevant applications of social media is in the “communication” area. For any businessperson (including attorneys), your success is defined by the size of your network. Thus, there is a great incentive for attorneys to examine the possibilities offered by social media. The three social media platforms best suited to this purpose are: LinkedIn, Facebook and Twitter.

LinkedIn

Of the three social networks discussed here, LinkedIn (<http://linkedin.com>) is the most “professional.” LinkedIn is, in a lot of ways, easiest understood as being your on-line curriculum vitae, much akin to what Martindale-Hubbell does in print (and on the web). LinkedIn is a way for people to build networks by connecting with clients, former employees/employers, and former classmates. LinkedIn even allows your past clients (with your permission) and colleagues to provide recommendations to your services.

One of the advantages of LinkedIn is that it is a closed network: an individual cannot add you as a contact unless they



have your permission first. They can't even initiate the connection process without first demonstrating to LinkedIn that they have sufficient contact with you (e.g., your email address). Through such screening processes, LinkedIn does a lot of the work of eliminating and reducing the potential SPAM that is inherent in social media. Attorneys should remember the model rules as they create their LinkedIn profile, making sure to not define their “specialties” in a manner which would violate the rules. In my opinion, of these tools, LinkedIn is one tool which every Idaho attorney should be using.

Facebook

LinkedIn can be used to show your “professional” (work) side, whereas Facebook (<http://facebook.com>) is how you show your “personal” (home) side. While the lines between work and home are not very well defined, both do have a role in a lawyer's social media presence on the Internet. Facebook, at its core, is what the old website Classmates.com should have been, that is to say, a way to connect people online who know one another, whether that be old high school or college classmates. While Classmates.com was around for years before Facebook started, Facebook quickly overtook Classmates.com, likely due to the price (Facebook is free, whereas Classmates.com charges a membership fee). Facebook eventually went beyond the “connection” aspect, evolving into an entertainment platform where friends can connect with one another, play games together, share photos, chat, etc. Recently, the fastest growing group of Facebook users has become the Baby Boomer generation; something has surprised a number of people.

Attorneys should remember the model rules as they create their LinkedIn profile, making sure to not define their “specialties” in a manner which would violate the rules. LinkedIn is one tool which every Idaho attorney should be using.

Facebook has recently expanded its offerings to include providing “pages” where businesses (including law firms) can establish a presence on Facebook and connect/engage with their customers. While that function may be terrifying to some attorneys, it does provide one additional venue for lawyers to connect with their clients and stay in touch with what is important in their clients' lives.

While Facebook can be an excellent way to network with your customers, friends and colleagues, it can quickly become quite overwhelming, much akin to trying to drink from a fire hose. One tip I give to attorneys looking at trying out Facebook is to be very, very careful whom you add as “friends” on Facebook. If it is not someone you are close with or if it is not someone with whom you have reason to build a personal or professional connection, you should consider

carefully whether or not you want to add them as a friend. This is due to the fact that every “friend” that you add increases the volume of information which you must filter or sort through in order to have conversations with people. Also, a savvy attorney will make sure to examine Facebook’s privacy options carefully (and regularly) to control who has access to what information you provide.

Twitter

Twitter (<http://twitter.com>) is the other common social media platform used by attorneys. As of last count, there are about a dozen Idaho attorneys I am aware of which use Twitter regularly. Twitter is a “micro-blogging” platform whereby the blog posts are 140 characters or less in length. The 140 character limitation is imposed because the platform was built to be friendly with cell phone text messaging, 140 characters being the maximum length of a text message. While most people do not use Twitter via text messaging, the 140 character limitation has remained...forcing people to more quickly get to the point (something attorneys tend to be horrible at).

Think of Twitter as tool for facilitating conversations between people on whatever topics they choose: from what they had for breakfast, what they are working

A savvy attorney will make sure to examine Facebook’s privacy options carefully (and regularly) to control who has access to what information you provide.

on at work, to requests for a referral to a local attorney. The local attorney example is true: in the past few months, I have referred a number of clients to Idaho attorneys I know based upon posts on Twitter asking for recommendations. Of course, attorneys whom themselves respond to such inquiries need to remember to follow the applicable model rules, including but not limited to the rules regarding “solicitation.”

As with Facebook, Twitter can itself be rendered useless by the sheer volume of people using it who are connected to you and can insert messages into the stream you are reading. Because of that, it makes sense to limit the number of people you befriend on Twitter, or use Twitter’s “lists” feature to help you filter out the messages of people you truly want to follow the status of, versus the

people you only occasionally have conversations with.

While it is a bit more complicated than charades, all attorneys should be aware of the social media tools their clients, friends and colleagues are using... tools that can be used to find new jobs, meet new clients, stay in touch with your friends and colleagues, monitor breaking news developments in your practice area, and even for simply enriching your social life.

About the Author

Stephen M. Nipper is a Registered Patent Attorney with Dykas, Shaver & Nipper, LLP in Boise. If you would like to test using any of the social media tools listed above with Mr. Nipper, you can find links to his social media accounts at <http://iMetNipper.com>.

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EMOTIONAL INTELLIGENCE IN LAW PRACTICE

Jan Salisbury M.S.
Salisbury Consulting

Of all the skills and knowledge required for success and exemplary performance in the practice of law, perhaps none is so overlooked, yet so essential, as Emotional Intelligence. Of course, attorneys need superb analytic and communication skills. But knowledge, control and management of emotions has become increasingly recognized as vital to an attorney's success.¹

The educational psychologist, Howard Gardner, revolutionized education by presenting the scientific evidence for the existence of multiple intelligences.² It was Daniel Goleman, however, in his globally popular book, *Emotional Intelligence*, who first proposed that our emotional intelligence, our capacity to be interpersonally and intrapersonally skilled, matters as much or more to our success at work than traditional IQ.³ Indeed, during the last two decades the measurement, research and application of emotional intelligence (EI) in schools and business has surged.⁴ Goleman and others define Emotional Intelligence as Four Components:

1. Self-Awareness, the ability to recognize and understand your moods, emotions, and drives as well as our impact on others;
2. Self-Management, the ability to control one's moods, emotions and stress as well as such characteristics self-confidence, adaptability;
3. Social Awareness, the ability to have accurate empathy for others, understand diverse perspectives and cultures and organizations;
4. Relationship management, the ability to develop and influence others, build bonds and collaborate on teams, and manage conflict and change. Often called professionalism, or peopleskills, these complex competencies make a difference in our efficacy as professionals.

In my work as an expert and consultant to law firms and in conversations



Jan Salisbury

... knowledge, control and management of emotions has become increasingly recognized as vital to an attorney's success.

with ten successful attorneys, I find the role of EI is critical to an attorney's success. What are the vital emotional intelligence competencies of the best attorneys? It depends. The practice of law requires attorneys to wear multiple hats including: the business owner and supervisor, leader, team member, mentor and trainer, trusted advisor and consultant, as well as expert. Each of these roles require different emotional abilities. For example, working in a corporate environment as a member of a multi-disciplinary team may require different organizational skills than working in a small practice. Interacting with diverse individuals and groups, all of these roles entail working with emotions.

The role of emotions

In a profession where grasping the nuanced legal argument and mastering case law is fundamental to the training of lawyers, what is the role of emotions? Consider the emotionality of clients seeking redress or representation, or the role that emotions play in influencing a jury to give large awards, or what creates an environment where a firm consistently attracts and retains high performing staff. In each of these situations, emotions play a prominent role. It's important to understand that emotions are information, and although we can ignore their presence, emotions affect our thinking and behavior.⁵ Whether or not a jury likes

you or the witnesses can be pivotal to the outcome. One attorney told me he believes that an important qualification for judges should be that they have sat in the same room while their client cried. Another described that being "emotionally present" for your client and believing in the cause should help determine whether or not you take the case. In other words, an attorney's emotional connection to the case can be as important as the facts and law. Lack of self-awareness of our emotions and what they mean can also lead to disruptive behavior. The attorney who yells and tries to intimidate witnesses through sarcastic and bombastic behavior may actually be compensating for an underlying fear or lack of confidence. Or, he may just believe this is what gets results.

The impact of our emotions in groups has been well researched as emotional contagion. In a controlled experiment, trained actors who either behaved in a negative or positive manner during a group task exercise influenced groups. Videos of the groups revealed that the actor's mood was reflected in the participant's report, even though they did not identify the cause. More importantly, groups who experienced the positive actor were more collaborative and showed less conflict. When people feel good, they tend to be more creative, understand information better and feel more opti-

mistic about their ability to achieve.⁷ In particular, leaders of groups need to understand their own needs and emotions and moderate their moods carefully. One judge, known for his quips and disdain for the “scorched earth behavior” of attorneys who are combative and treat everything as adversarial, told me that without humor he wouldn’t have survived the gravity of the criminal cases over which he presided. He believed that humor diffused difficult emotions and created an atmosphere that was more collegial, less stressful and ultimately more productive. Managing positive or negative emotions effectively comes from understanding what our emotions mean to us and the impact emotions have on others. Aristotle said it best: “To be angry is simple, but to be angry with the right person, in the right way, at the right time, and for the right reason is not simple.”⁸

Empathy and social intelligence

Social intelligence is universally accepted as a key competency for mediators. Judges and attorneys believe that through their empathy and understanding of the pain and anger that led to the dispute, effective mediators are more able to persuade attorneys and their clients to seek the common ground. As one attorney put it, she won’t budge for mediators who just demand more money. Mediators who begin by authentically communicating: “I appreciate the effort you are making to explore settling and I respect your client’s position” are more likely to create a positive climate where trust and open communication facilitate a win-win outcome. Goleman and Boyatzis assert that such socially intelligent behaviors like empathy, engagement, and attunement actually foster neurobiological changes that create changes in specific social neurons which in turn reproduce the same effect in others.⁹ In their studies, delivering critical feedback in a good natured, positive manner was more likely to feel positive to participants than the same feedback delivered with negative nonverbal behavior. Great mediators intuitively know that the way we manage difficult conversations can either positively motivate someone to perform better or it can discourage them from doing so.

Social intelligence is the hallmark of attorneys who represent clients successfully and who build great practices. These attorneys are passionate about first building a trusting client relationship. They offered the following as their priorities with clients: “What are their issues,

She has a knack for putting herself in the position of jurors, in their everyday lives and understanding what they must be thinking and feeling in response to the case.

where are they going? It’s more important to listen than talk. Appreciate all the different perspectives. If I listen to them, they will listen to me when they need to because they trust me. I tell them I’m taking care of this. Talk to me as often as you need to. Here’s how you can reach me or my paralegal. You don’t need to lose sleep, we will take care of this!”

Keeping clients well informed and prepared for situations also build exceptional client relationships and enables the client to hear bad news about their position or unfavorable feedback about their organization. Unquestionably, the EI reflected in these examples lead to a loyal and satisfied client base.

The ability to understand other perspectives is clearly visible in courtroom acumen. A colleague described a trial attorney in her firm that is highly respected for her ability to take a complex legal argument and make it understandable to anyone. She has a knack for putting herself in the position of jurors, in their everyday lives and understanding what they must be thinking and feeling in response to the case. When she talks to them, it is

Many of the derailers described in the leadership literature also hold true for attorneys: (1) perfectionism, or failure to set realistic goals; (2) defensive and blames others; (3) driving others too hard by micromanaging instead of delegating; (4) blind ambition and extreme disregard for colleagues and subordinates.

as though they are having a conversation over a cup of coffee.

Attorney as business owner and Leader

Perhaps no role is as demanding and as uncomfortable for attorneys than that of the boss or supervisor. One attorney described it this way: “running a business tends to be a sideline in the practice of law.” Or as another in a small firm lamented, “I spent a whole afternoon on personnel issues and didn’t have a single moment for my cases.” The focus on billable hours in the law and other “expert” professions (consulting, accounting, etc.) as the only measurable index of success contributes to undervaluing other vital roles, the stress they can produce and the emotional intelligence they require. Yet how personnel issues are handled and the emotional environment created by attorneys affect turnover, staff performance and the ability of an organization to maximize productivity.¹⁰

Indeed, the growing literature on leadership affirms that emotional intelligence is a key competency for high performing leaders in business.¹¹ Practitioners and researchers point out that qualities such as self-confidence, teamwork, conflict management, collaboration, developing others, communication and empathy make a significant difference in leader’s performance.¹³ Attorneys describe similar qualities in the leaders that bring out their best and inspire them as: one who is not full of himself; Is straightforward; accepts different points of view, gives constructive feedback; communicates “job well done;” allows learning from mistakes, cares about me, and makes fair decisions about my work.

Leading emotionally intelligent teams

Teams thrive on emotional intelligence in a different way. Multiple studies show that when team members feel they belong to a unique and worthwhile group that performs well and that together they are more effective than apart, they will be more creative and productive. It is trust, group efficacy and identity that

propels teams to engage wholeheartedly and do together what they could never do individually.¹⁴

How do attorneys use emotional intelligence to build great legal teams? Many attorneys honestly attribute their early training out of law school not to other attorneys but to their experienced legal assistants and paralegals. They understand that their success is dependent on building a formidable team of staff and attorneys. How do you, as one attorney said, get them and keep them? They value their team members by involving them in client meetings, taking them on trips to meet the client who sees them as part of their team and by asking for and valuing their opinions. Everyone is treated with respect and dignity.

Successful EI practices include: involving their staff on all client meetings and taking them on trips to meet clients; making the team, not just the lead attorney, responsible for client communication and managing the case; asking and valuing the team member's opinion; and treating everyone with dignity and respect. Over time, these behavioral practices create teams where the group norms result in productive work environments and stellar service to clients.

Toxic environments, blind spots, derailers

Almost all of us have worked for people who discouraged our best selves at work. Toxic workplace traits range from dissonant messages and poorly expressed missions to destructive habits, including negative attitudes, coercive rules and hostile climates.¹⁵ Legal workplaces are replete with high expectations and stressful demands. When they also include characteristics such as little positive regard, acrimonious communication, and favoritism, mistakes flourish and costly turnovers are more likely. Such behaviors were a significant factor in costing Washington state \$17 million. The Seattle-Times reported that two assistant attorneys general were embroiled in turf battles and hostile communication throughout a major case against the state. Their spiteful relationship was reflected in emails including one in which the lead attorney rejected another attorney's request to be at a meeting "so that I am not so much in the dark." The icy reply was, "There is a meeting, but it was determined that your presence was not necessary." When the documents that triggered the appeals process were not forwarded to the lead attorney, the state did not file its response in time and the

IMPLEMENTING EMOTIONAL INTELLIGENCE

This article refers many articles and resources that will help attorneys understand and begin to apply emotional intelligence. In particular, Goleman's articles and book on *Primal Leadership* are excellent. However, the best books for self-assessment and specific strategies are Nadler's *Leaders' Playbook* and Caruso & Salovey's book, *The Emotionally Intelligent Manager*.

plaintiff's attorney requested payment for the largest personal injury lawsuit ever filed against Washington state.

Blind spots or "derailers" also undermine our success at work. Blind spots are deficiencies in self-awareness. Derailers are a pattern of behavior that undermines one's ability to succeed.¹⁷ The key to developing emotional intelligence is understanding what they are and how to manage them. The Center for Creative Leadership has identified an early warning "derailment checklist" so that

He formed strong relationships with his legal assistant and other attorneys and relied on them to help him stay on track. Essentially, he used other people's strengths to complement his own and formed a highly effective team.

high potential leaders can diagnose their potential weaknesses and find challenging assignments, mentors and coaching that would help them learn and grow.¹⁸ Many of the derailers described in the leadership literature also hold true for attorneys: (1) perfectionism, or failure to set realistic goals; (2) defensive and blames others; (3) driving others too hard by micromanaging instead of delegating; (4) blind ambition and extreme disregard for colleagues and subordinates.¹⁹

The list suggest that some of our greatest weakness may be our strengths over done. One leader who manages a large staff and a team of public attorneys

lives his open door policy. Each year he unfailingly meets with every member of his office with a tablet, pen, and a goal to ask questions and listen carefully to his employees' experiences and needs. His commitment to open, honest feedback and his follow-up on issues earn him immense respect and motivated employees.

Another way to compensate for derailers is to hire and value others whose strengths are different. A colleague of mine worked with a brilliant attorney. He researched problems and issues and was fascinated by what he called the "shiny things" of a legal theory or argument. Aware of this trait, he would openly share with others his tendencies to veer off in directions that would keep him from reaching the end goal. He formed strong relationships with his legal assistant and other attorneys and relied on them to help him stay on track. Essentially, he used other people's strengths to complement his own and formed a highly effective team.

Learning Emotional Intelligence

A prevailing myth about emotional intelligence is that you are either born with it or not. While it's true that children exhibit gifts for managing their emotions and interacting and influencing others, life experiences are just as important.²⁰ Further, research and practice demonstrate that Emotional Intelligence can be learned. At its heart, Emotional Intelligence is not just a concept, it is a series of practices that can be valued, communicated, and developed. To achieve high levels of performance in their multiple roles, attorneys should first begin by valuing each role and identifying the practices that lead to success. Then invest in developing them.

Emotional Intelligence in law schools

Developing and valuing emotionally intelligent attorneys should begin in law school. While emotional intelligence can be taught in the classroom, developing EI competencies are effectively learned when students are observing and practicing law. Integrating EI concepts and development into internships allows students to see its

relevance to their profession as they interact with attorneys and judges. Law schools may best integrate Emotional Intelligence into their curriculum through an interdisciplinary approach, including special expertise in measuring and developing EI competencies.²¹

Law practices and organizations

As in business, law firms should build Emotional Intelligence into their organizational values and their professional development training for new attorneys. Mentors can be trained and selected, not only for their legal skills, but for their ability to develop others by coaching and modeling EI practices. If the organization's performance evaluations include EI competencies, the entire culture will strive to achieve them. Firm committees could be designed to stretch and develop new competencies as well as maximize the organization's long term performance.²² Finally, firms should encourage attorneys to seek out education from other professions that address the challenges of running a business and leading others.

Executive coaching

During the last 10 years, organizations have increasingly invested in growing their leaders.²³ Executive coaching has become a powerful tool for developing exemplary leaders because it "produces targeted results in less time than other learning interventions".²⁴ Further, organizations are learning to act before there is a problem or crisis. Occasionally firms require an attorney whose derailing or inappropriate behavior has created a potential liability for the business to attend training or coaching. While these strategies can be successful, the better return on investment is to offer coaching to attorneys as they strive to reach their potential in their multi-role career.²⁵ Experienced coaches use valid assessments and other feedback to help professionals

and leaders identify their strengths and opportunities for growth. Because the average coaching engagement occurs over months in small increments of time, it is an effective method for reaching goals and sustaining changes.

Conclusion

The practice of law requires attorneys to serve in diverse roles throughout their career. Excelling in these roles requires not only technical mastery, but competence in Emotional Intelligence. Law schools, firms and attorneys who invest in developing EI practices are more likely to achieve high levels of performance in individuals and teams and create workplaces that attract and retain the best attorneys and staff.

About the Author

Jan Salisbury M.S. is a certified executive coach and consultant. For over 25 years, Salisbury Consulting has served the diverse needs of organizations in the areas of leadership and team development, emotional intelligence, intercultural communication and organizational development. Jan has taught courses on leadership, emotional intelligence and managing cultural differences at Boise State University. She is published in the areas of coaching, sports psychology and the psychology of harassment and served as an expert witness in federal and state courts from 1984-2007.

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Mark T. Peters, Sr.
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Write in plain English. As lawyers, we hear it all of the time. Statutes are passed that require consumer forms to be prepared in plain English. We all have some idea of what plain English is, so why aren't more legal documents crafted for simplicity and brevity?

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We copy what other people have written, and then we reuse what we have written because it worked. A boss of mine once said, "If it ain't broke, don't fix it." And to a certain extent that is true; as long as nobody complains, the document works. I believe that writing simply will do two things to make your documents better. First they will be concise. Lawyers use too many words. The reader gets lost in the words looking for the thought. Second, they will be precise. Again, too many words can hide the meaning. Brevity and precision give our work the power of clear thinking.



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We should write more simply for two reasons. First, it will help your client to understand the issues contained in the document. Second, it will make your life easier.

With respect to the first reason, have you noticed that sometimes the worst clients are the smartest? They hone in on every little detail and make you think about and then explain why you are doing something. Peter was like that for me. I was working for an automobile manufacturing company and had inherited a five-year supply agreement that was then into its third year and had not been finalized (and you wonder why the automobile industry is in the shape it is in). The agreement was a mess, and I undertook to rewrite it to get rid of the legalese. I sent a copy to Peter and set up a meeting to go over my changes. We went through three or four sections, and he kept asking: "Is this a legal issue or is it just language?" I scrambled to justify



my changes, until we came to a section and Peter said: "We can't agree to this!" That provision had been in the document from the beginning of negotiations, but nobody on our side had understood what it meant until I had translated it into simpler language.

Taking the time and making the effort to write simply will also make your life easier. I was general counsel for a small computer leasing company. The company had been using a Master Lease Agreement ("MLA") for years before I arrived. Typically, negotiations would drag on as the parties discussed a variety of changes the lessee would want in the MLA. I thought the agreement was a mess, so I cleaned up the language, restructured the agreement, and put it into two columns, and from that point forward, except for minor issues that I was not prescient enough to have considered, negotiations focused on four issues, all of which were business issues and did not require changes to the MLA language. I did not have to be involved in most of the negotiations and could focus my efforts on other issues confronting the company.

The common thread in both cases is that I reduced the number of words and the number of pages used in the original agreements. Problems arise when too many words are used. For example, everybody knows that a joint tenancy has rights of survivorship. However, if you draft a deed in Michigan and state that the grantees are "joint tenants with full rights of survivorship," you have created something different than a typical joint tenancy. The Michigan Supreme Court addressed this issue in *Schulz v. Brohl*.¹ The Court reasoned that, if possible, all words in a document have to be given meaning. The result of the attorney adding seven words to the deed is that he, unintentionally, created a completely new type of property interest: joint life estates with contingent remainders in the

...it would behoove us as lawyers to write more simply. First, it will help your client to understand the issues contained in the document. Second, it will make your life easier.

grantees.

Let me give you an example of the types of changes that can be made to simplify language. The Idaho Code provides circumstances where a good Samaritan cannot be sued for providing aid:

That no action shall lie or be maintained for civil damages in any court of this state against any person or persons, or group of persons, who in good faith, being at, or stopping at the scene of an accident, offers and administers first aid or medical attention to any person or persons injured in such accident unless it can be shown that the person or persons offering or administering first aid, is guilty of gross negligence in the care or treatment of said injured person or persons or has treated them in a grossly negligent manner. The immunity described herein shall cease upon delivery of the injured person to either a generally recognized hospital for treatment of ill or injured persons, or upon assumption of treatment in the office or facility of any person undertaking to treat said injured

person or persons, or upon delivery of said injured person or persons into custody of an ambulance attendant.²

This section has 158 words. I would propose rewriting the section as follows:

Nobody may maintain an action in any court of this state against a person who, in good faith, administers first aid or medical attention to any person injured in an accident unless the person administering the first aid is guilty of gross negligence in the care of the injured person or has treated the injured person in a grossly negligent manner. This immunity ceases when the injured person: (1) is delivered into the custody of an ambulance attendant, (2) is delivered to a hospital generally recognized for the treatment of ill or injured persons, or (3) is treated in the office or facility of a person who undertakes to treat the injured person.

The revised section contains 113 words. I believe that the second version states the same ideas contained in the original language.³ The voice in both sentences has been changed from passive to active. Because of that, a number of auxiliary verbs (e.g., “shall” and “can be”) are deleted, unnecessary prepositions (e.g., “herein” and “upon”) are removed, and participles are transformed into active verbs (e.g., “undertaking” becomes “undertakes.”) The main point is that the second version is easier to read. While this is only one section, if you can make these same transformations to an entire document, the change is significant.

My experience with legal writing has centered on contracts, explanatory memos and employee handbooks. These kinds of documents are essentially reci-

...legal writing has centered on contracts, explanatory memos and employee handbooks. These kinds of documents are essentially recipes, telling the parties what to do. They are not the great American novel and don't require creativity with respect to the language. What they do require is the people reading them understand what they say and what to do if a situation arises.

pes, telling the parties what to do. They are not the great American novel and do not require creativity. But they must be easily understood, especially what to do if a situation arises.

I intend to write about legal writing in the coming months. For instance, I will address how to make complicated writing simpler, avoid “nouniness” and why verbs are our friends.

I will then attempt to go into an area that I do not believe is discussed much by the writers on style, that is, the structure of the document. I will start this with a topic near and dear to my heart, that of right-branching versus left-branching sentences. After that, I will propose that contracts are basically five-part documents: definition, obligation, default, remedy and boilerplate. I believe that if a structure of a document is planned, it forces the drafter to write with that structure in mind and avoid stream-of-consciousness writing.

I hope that you find this endeavor useful and worthwhile. If you have a drafting question, please send it to me and maybe we can use it as an example for everybody.

About the Author

Mark Peters graduated from the

University of Michigan with a B.A. in Political Science and Economics and the University of Michigan Law School. He has been a member of the State Bar of Michigan for about 30 years and a member of the Idaho Bar since September, 2009. Most of his career has been spent as in-house counsel for a number of corporations drafting a variety of agreements and documents. You may contact him at mpeters47@cablone.net.

Endnotes

¹ 74 N.W. 1012 (1898).

² I.C. Sec. 5-330

³ There are some changes that some may think go beyond mere language. However, by trying to make the language simple, I think that we can discover that any change in concept merely clarifies the main thought of the provision. First, I use the term “a person” rather than “any person or persons, or group of persons.” In the context of the sentence, “a person” includes anybody that is a member of a group of persons. I have also deleted all reference to how the good Samaritan came to be on the scene; it doesn't matter, what does matter is that the good Samaritan is performing first aid. Finally, I deleted the word “offers” because we are dealing with the actions of the good Samaritan, not whether he or she breached a contract to perform services for the injured party.

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LAWYER REFERRAL SERVICE MATCHES PUBLIC WITH PARTICIPATING ATTORNEYS

Kyme Graziano
LRS Coordinator

A recent survey by the research firm Ipsos found that 25 million Americans avoided seeking legal help over the past two years because they didn't know how to choose the right lawyer.

-June 2007 San Jose Mercury News

This is where I come in. As the Lawyer Referral Service Coordinator, I take great satisfaction in matching clients with our attorney panel members.

So what do we do? The Lawyer Referral Service (LRS), operated by the Idaho State Bar, screens public calls and matches them with LRS panel members in the area of law they need. LRS is not a pro bono program but a referral program



Kyme Graziano

where the public finds an attorney who can help them. When they registered, each LRS attorney agreed to offer an initial half-hour consultation at \$35 to LRS referred clients. The LRS panel members benefit by having their clients screened prior to referral, whereas the public is assured the attorney practices in the area of law they need. The LRS received over 4,000 calls in 2009 while getting almost 900 internet hits each month. That's quite a few potential clients for our panel members!

In 2009 the LRS had 280 registered panel members and I would like to thank them for their ongoing interest in the program and their willingness to 'train' me when I called them with questions. I'd also like to invite those of you who have not participated in the LRS to take advantage of our 'first-time panel member' registration rate of only \$50. Attorneys in their first year of practice also pay only \$50 to register and LRS is a great way to help build a new client base. Returning members who have been in practice 2-5 years can register for \$100 and those in practice for 6 years or longer for only

\$125. It's a small investment for a large return of pre-screened clients.

The Lawyer Referral Service has become increasingly important for people who need a quality referral. We help them define what area of law they may need and what action they are looking to explore. Our main call areas include family law, personal injury and real property issues; however, this past year we've seen a large increase in calls involving bankruptcy. Along with these areas of law, the LRS hopes to recruit panel members in the more rural areas of our beautiful state. If you practice in any of these areas or live in an area with few attorneys, I strongly urge you to call and register!

Today, the LRS program is growing and evolving into an even greater public service. Along with our new tiered registration rate we are upgrading our screening process to constantly improve the quality of our referrals. I invite you to become a panel member of the Lawyer Referral Service and utilize the pre-screened clients. Please contact (208) 334-4500 anytime with your questions on registration or program dynamics.



Let the Lawyer Referral Service send clients your way.

Many people who need an attorney don't know what kind of attorney or where to look. The LRS matches clients with participating attorneys.

Did You Know?

- Over 4,000 people call the LRS service yearly
- 900+ people use the online LRS monthly
- Your name is available to both online and call-in LRS clients

To learn how to sign-up for LRS contact Kyme Graziano at (208) 334-4500.

Wright Brothers Law Office adds two attorneys to Twin Falls firm

Wright Brothers Law Office, PLLC is pleased to announce that Patricia Migliuri and Steven R. McRae have joined the firm's Twin Falls office as associates.

Ms. Migliuri has joined the firm's litigation and family law practice groups. Previously, Ms. Migliuri was a judicial law clerk with the Honorable John K. Butler in Jerome County, Idaho. Ms. Migliuri received her J.D., *magna cum laude*, from the Willamette University College of Law and her B.A., *magna cum laude*, from Gonzaga University.



Patricia Migliuri

Mr. McRae has joined the firm's business and transactional practice group. Previously, Mr. McRae was a judicial law clerk with the Honorable R. Barry Wood in Gooding County, Idaho. Mr. McRae received his J.D. from the University of Idaho College of Law and his B.A., *summa cum laude*, from Brigham Young University – Hawaii.



Steven R. McRae

Both can be reached at (208) 733-3107.

Clerk of Federal District and Bankruptcy Court appointed

Chief District Judge B. Lynn Winmill, Chief Bankruptcy Judge Terry L. Myers and Chief Magistrate Judge Candy W. Dale are pleased to announce that Elizabeth "Libby" Smith has been named as Clerk of Court for the United States District and Bankruptcy Court for the District of Idaho. Smith is expected to begin her new duties as Clerk of Court by January, 2010.

As Clerk of Court for the District of Idaho, Smith will be responsible for leading and directing all of the administrative and operational areas of the District Court and Bankruptcy Court, through offices in Boise, Pocatello, Coeur d'Alene and Moscow. As the primary court ex-

ecutive and chief administrator, Smith will advise the judges of the court and be responsible for areas such as financial management, space and facilities, jury services, human resource administration, information technology services, policy and procedural implementation, strategic planning, statistical analysis, interaction with the Bar, and public relations.

Smith is currently the Deputy Court Administrator for the United States District Court for the Eastern District of Michigan. Prior to her work in the federal courts, she served as the Deputy Court Administrator for the Sixth Judicial Circuit Court in Oakland County, Michigan's largest state trial court.

Smith received a Master of Science in Business Information Technology and a Bachelor of Business in Business Administration from Walsh College in Troy, Michigan. In 2008, she was appointed to a two-year term on the federal judiciary's Information Technology Advisory Council and is currently participating in the Federal Court Leadership Program.



Elizabeth "Libby" Smith

Hall recognized in Best Lawyers in America

Hall, Farley, Oberrecht & Blanton, P.A. is proud to announce that Richard E. Hall has been named as the "Boise Best Lawyers Personal Injury Litigator of the Year" for 2010, by Best Lawyers, the oldest peer-review publication in the legal profession.

After more than a quarter of a century in publication, Best Lawyers is designating "Lawyers of the Year" in high-profile legal specialties in large legal communities. Only a single lawyer in each specialty in each community is being honored as the "Lawyer of the Year."

Best Lawyers compiles its lists of outstanding attorneys by conducting exhaustive peer-review surveys in which thousands of leading lawyers confidentially evaluate their professional peers.



Richard E. Hall

The current, 16th edition of *The Best Lawyers in America* (2010), is based on more than 2.8 million detailed evaluations of lawyers by other lawyers.

The lawyers being honored as "Lawyers of the Year" have received particularly high ratings in our surveys by earning a high level of respect among their peers for their abilities, professionalism, and integrity.

Magistrate Commission appoints Thomas W. Clark

Sixth District Magistrate Commission appointed Thomas W. Clark as the newest magistrate judge in Bannock County, replacing Honorable Rob C. Naftz.

Mr. Clark has practiced law in Pocatello for 23 years. He grew up in Pocatello and graduated from Pocatello High School. He got a bachelor's degree from Brigham Young University in Business Finance with minors in Accounting and English in 1980. He graduated from the University of Idaho Law School in 1983.

Mr. Clark and his wife, Camille, have been married 28 years and have five children and two grand children. They enjoy spending time with their family.

Chief Justice Eismann honors volunteers

The Honorable Chief Justice Daniel T. Eismann issued a proclamation on Oct. 23 at Capital Park in Boise to recognize the volunteers who give their time and resources to protect Idaho's children through the Court Appointed Special Advocate Program.

By signing the proclamation, Chief Justice Eismann publicly recognized the citizens appointed as Guardian ad Litem volunteers. Through their service to the Court Appointed Special Advocate Program, the volunteers represent the interests of abused and neglected children



Thomas W. Clark



Chief Justice Daniel T. Eismann

OF INTEREST

Discussing the American court system at the Fifth Judicial District are, from left to right: Samuel Suh, Interpreter; Shelli Tubbs, Admin. Assist.; Hwang Seongmi, Associate Judge; Eom Min Yeoung, Assistant Court Officer; Yang Soeur, Associate Judge; Kim Jyae Ryung, Judge; Randy J. Stoker, District Judge; Bae Kwangkuk, Presiding Judge; Park Seong Jong, Assistant Court Officer; Woo Guem Do, Clerk of Court; Kim Il Su, Clerk of Court; Jerry Woolley, Jury Commissioner.



Photo by Diane Schozman

who are involved in child protection courts.

“These selfless individuals are working hard to provide a voice for the children who need it the most. They’re giving back to the community and ultimately contributing to the quality of life among our citizens,” said Chief Justice Eismann. In 2008, 71 percent of abused and neglected children in Idaho were appointed a Guardian ad Litem volunteer, and those volunteers donated 26,753 hours.

In an effort to raise awareness for those children who fall victim to abuse and neglect, the volunteers also implemented a statewide initiative called No Forgotten Children. The proclamation capped off a 7 a.m. public event hosted by No Forgotten Children. Cutouts of 386 children holding messages to the community were displayed throughout Capital Park and a booth with information on foster care and the Idaho Court Appointed Special Advocate program was on site.

“This thoughtful endeavor will move us toward our goal of providing every abused and neglected child, through the voice of a Guardian ad Litem volunteer, a chance for a safe, permanent home and an opportunity to thrive,” said Chief Justice Eismann.

ABA offers scholarships

The American Bar Association Scholarship Fund is accepting applications for the 2010-2011 school year. The ABA Legal Opportunity Scholarship Fund is intended to encourage racial and ethnic minority students in ABA-accredited law schools. An award to an entering first-

year student may be renewable for two additional years. The application is available for download at <http://www.abanet.org/fje>.

Korean judges visit Idaho to learn about courts

On October 22 & 23, the Fifth Judicial District hosted a Korean delegation of judges and judicial officials. The Supreme Court of Korea sent 25 delegations to visit 49 different courts in the United States as part of an effort to consider implementing jury trials. As luck would have it, every jury trial scheduled in the district settled and the visitors to Idaho were not able to observe an actual trial. However, District Judge Randy J. Stoker spent the majority of the visit with them explaining the history and process of the jury system and answering questions from the delegation. Jerry Woolley, Twin Falls County Jury Commissioner, also explained the process by which our juries are summoned to service and selected to serve. The delegation also observed preliminary hearings and small claims trials during their visit to Twin Falls.

Comment sought on rules

The Judicial Conference of the United States Committee on Rules of Practice and Procedure is accepting comments on a preliminary draft of proposed amendments to the Federal Rules of Bankruptcy and Criminal Procedure, and on the preliminary draft of the proposed comprehensive style revision of the Federal Rules of Evidence.

Copies of the proposed amendments can be obtained by calling the Rules Committee Support Office at (202) 502-1820, or writing to the Rules Committee Washington, D.C., 20544. The language can be found at www.uscourts.gov/rules

Oregon attorneys stand up for environment

The Oregon State Bar Board of Governors has adopted two measures that embrace concepts of sustainability. At its 2009 annual planning retreat on Oct. 30, 2009, the BOG adopted a new article for the Oregon State Bar Bylaws to embrace principles of sustainability and establish a sustainability coordinator for Bar operations. The board also authorized the formation of a permanent Sustainable Future Section of the Bar. The Oregon Lawyers for a Sustainable Future urged the board to take action based on the findings of a task force and the urging of almost 500 lawyers.

Licensing deadline is Feb. 1

The 2010 licensing deadline is February 1, 2010. Your payment and forms must be physically received in the Idaho State Bar office by deadline to avoid the late fee. Postmark dates do not qualify. If your licensing is going to be late, be sure to include the appropriate late fee: Active, Out of State Active and House Counsel – \$50; Affiliate and Emeritus – \$25. The final licensing deadline is March 1, 2010.

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

OF INTEREST



Lauren Paul



Kendra Raver



Lisa M. Warren



Greg Bradford



Lisa Hoag



Kathryn Brandt



Annette Bottaro-Walket

IAP elects new officers

The Idaho Association of Paralegals, Inc. recently elected a new slate of officers for 2009 – 2020 year. The officers are:

- President: Lauren Paul, URS Corporation, Boise
- Vice President of Policy and Public Affairs: Kendra Raver, Finch & Associates, Boise
- Vice President of Membership: Lisa M. Warren, Office of the Attorney General, Division of Human Services, Boise
- Vice President of Education: Greg Bradford, Goicoechea Law, Nampa
- National Affairs Representative: Lisa Hoag, Idaho Transportation Department, Boise
- Treasurer: Kathryn Brandt, Elam & Burke, Boise
- Secretary: Annette Bottaro-Walket, URS Corporation, Boise

IN MEMORIAM

Monte Ray Whittier 1955 - 2009

Monte Ray Whittier passed away peacefully in his home in Eagle, Idaho on the morning of Dec. 3 after a courageous two-year battle against Lou Gehrig's disease.

Monte was an inspiration to all those who knew and loved him. Monte was born the youngest of three children on June 28, 1955 in Pocatello, Idaho to his loving parents Marjorie Lucille and Raymond "Max" Whittier. He graduated from Highland High School in Pocatello where he participated in basketball and golf. He received a B.S. degree from the University of Utah and graduated with a law degree from the University of Idaho, finishing his education a year and a half early.



Monte Ray Whittier

After graduating from law school Monte joined his father's law firm in Pocatello and became a partner a few years later. After 18 years of private practice, Monte moved his family to Idaho Falls to try his hand at corporate law. During this time the family enjoyed

many weekends in the Teton Valley, skiing, hiking, and building a cabin. Fate brought them to Boise five years later, where Monte found employment with Liberty Mutual Insurance, focusing on workers compensation law. He loved this job and the people he worked with and only stopped when he could no longer lift his files and was too weak to put in a full day's work. Monte had an amazing work ethic and only missed a handful of sick days his entire career. Before he was stricken with this devastating disease, he was very active, enjoying biking, snow skiing, coaching and supporting his children's sporting events.

After moving to Boise, he started refereeing high school soccer games and eventually some college games. Monte didn't like to do things unless he was really good at them and luckily he was good at a lot of them. Out of all his many accomplishments he made it known that he most wanted to be remembered for being a good husband and father. We will truly miss him and his contagious, boisterous laugh so often heard as it carried from room to room.

Monte was preceded in death by his mother Lucille, who passed away a month before him, and his father. He is survived by his wife Denise, and children Jason, Sarah, and Sadie. He also leaves behind sisters, Cheryl (Doug) Whittier,

Charlene (Mark) Burk, half sister Tonia Cooper, and several adoring nieces and nephews.

Monte was an active member of The Church of Jesus Christ of Latter-Day Saints. Funeral services were held on Dec. 7 at the LDS Eagle Stake Center, 2090 N. Eagle Road, Eagle. Burial was followed at Dry Creek Cemetery.

In lieu of flowers, consider donating to ALS Research in Monte's honor in hopes that a cure can be found. <https://www.als.net/GetInvolved/Donate.aspx> (In the Comment section of the webpage reference: Monte Whittier Memorial); or by mail to ALSTDI, In Honor of Monte Whittier, c/o Vanessa Winfield, 215 First St., Cambridge, MA 02142.

Aaron Charrier 1971 - 2009

On Dec. 7, 2009 Aaron Charrier passed away at Saint Alphonsus Hospital leaving behind a loving family, good friends, work colleagues and dirt bike buddies. His charm, keen intelligence, sense of humor and passion will be missed by all that knew him. The Texas Longhorns, Dallas Cowboys, and Boise State Broncos have lost one of their most stalwart fans.

Aaron was born on July 24, 1971 to John and Teresa Charrier in Monroe,

IN MEMORIAM

Louisiana. He spent most of his boyhood and teenage years, however, in Texas.

After graduating from South Garland High School in Garland, Texas, Aaron joined the U.S. Air Force in 1990. To his pleasant surprise,

he was stationed at Mountain Home Air Force Base, a place he envisioned to be as lovely as its name. Despite the initial shock, Aaron learned to love Mountain Home and the great state of Idaho. So much so, that he vowed to never leave. During the first Gulf War Aaron was stationed in Saudi Arabia, the Philippines and Columbia. Aaron was honorably discharged in 1994, and leaves behind many air force pictures of his buddies and himself experiencing desert life.

While serving in the air force, Aaron met and married Deborah Hanson of Meridian, Idaho. Aaron and Deborah had one son, Brady David born on March 1, 1998. They were later divorced in 2004.

Boise State University was Aaron's next destination where he graduated Magna Cum Laude in 1998 in Philosophy. After graduating from college Aaron served for a short time as an Ada County



Aaron Charrier

Probation Officer. Then he moved on to a related field, law school, attending Drake University in Des Moines, Iowa. While at Drake, Aaron distinguished himself academically by graduating with honors and serving as the Projects Editor for the Drake Law Review.

Aaron became a member of the Idaho State Bar and Idaho Trial Lawyers' Association in 2003. In this capacity he worked with several firms. At the time of his death he was a partner in the firm of Greener, Burke, and Shoemaker. Aaron often would go to the office as early as 5:00 A.M. to work on behalf of his clients.

At a Christmas party in 2003, Aaron met his future wife, Becca Harris. They began dating almost immediately and were married in February of 2005. Aaron and Becca enjoyed many wonderful times in the six years they were together, most notably trips to Jamaica, the Oregon Coast and Hawaii. Beyond merely a husband, Aaron was Becca's best friend. They shared an intense love and respect for one another that was rare and mutual. In November of 2008, their daughter Claire Kayanna was born.

Aaron loved the outdoors. Nothing made him happier than going up in the mountains ready to take off on his dirt bike. Broken bones, injured shoulder, nothing stopped him from heading out to ride.

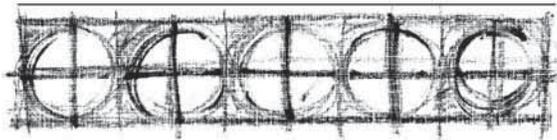
Aaron's many friends and family will always remember his love for his two children, Brady 11, and Claire 1. He and Brady did so many things together; biking, playing video games, going to movies. They shared jokes and Aaron hardly ever missed one of Brady's activities. Aaron called Claire "beautiful baby girl" and was the first person to make her giggle and laugh when he made her fly and reach for the sky. Aaron deeply loved and admired both of his children for all of their unique and special talents.

Aaron was a generous and loyal friend. He never met a stranger, but rather connected with people so easily he was always surrounded by friends. Aaron treasured his many friendships, and so often found comfort and courage through his friends.

Aaron is survived by his mother, Teresa Starks and her husband, Larry Starks, his sister, Lisa Charrier and her three children (John, Alexis and Isaiah), and his brother Andrew Charrier. He also is survived by his wife, Becca and children, Brady and Claire. Aaron's father John preceded him in death. Go with God now, Aaron.

A memorial service was held on Monday, Dec. 14, 2009 at Cloverdale Funeral Home in Boise. A reception followed the service. Condolences to the family may be submitted online at www.CloverdaleFuneralHome.com.

IDAHO LAW FOUNDATION



Helping the profession serve the public

The Idaho Law Foundation has received a generous donation from **Timothy and Anne Hopkins**, in memory of: **M. Allyn Dingel, Jr. and Edward (Ted) Wallace Pike**.

The Idaho Law Foundation has received a generous donation from the **Honorable Alan Lance**, in memory of: **M. Allyn Dingel, Jr.**

The Idaho Law Foundation has received a generous donation from the **Idaho Chapter Federal Bar Association**, in memory of: **M. Allyn Dingel, Jr.**

The Idaho Law Foundation has received a generous donation from **Linda Pall** in honor of: **The opening of Camacho Mendoza Coulter Law Group and Zach Pall upon his graduation from Law School.**

UPDATES TO IDAHO STATE BAR ATTORNEY DIRECTORY

10/8/09 – 12/1/09

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

Douglas Gregg Abenroth
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Twin Falls

Gregory Marshall Adams
Richardson & O'Leary, PLLC
Boise

Randall Richmond Adams
Carey Perkins, LLP
Coeur d'Alene

John F. Adlard
Law Offices of John F. Adlard
Portland, OR

Gaylon Rich Andrus
Rigby, Andrus & Rigby, Chtd.
Rexburg

Brett Carl Anthon
Coffel, Anthon & Beaber, PC
Nampa

Melissa Kay Aston
Rupert

Donna W. Aurand
Colorado State University
Fort Collins, CO

Shirley Bade
Shirley Bade Law Firm, PC
Coeur d'Alene

Kimberly J. Bailey
Middleton

David Joseph Barber
Boise

J. Craig Barrile
J. Craig Barrile, PS
Deer Park, WA

Aaron J. Bazzoli
Mimura Law Offices, PLLC
Caldwell

Jayme Lynn Beaber
Coffel, Anthon & Beaber, PC
Nampa

Paul M. Beeks
Twin Falls

Christopher James Beeson
Givens Pursley LLP
Boise

William Lyman Belnap
Belnap Law, PLLC
Boise

James Michael Bendell
Bendell Law, PLLC
Post Falls

Dwight F. Bickel
Phoenix, AZ

Amy Catherine Bistline
Bistline Law
Coeur d'Alene

Kelsey Dionne Bolen
Mililani, HI

Virginia Ann Bond
Bond Law, Chtd.
Payette

Joseph Walden Borton
Borton Law Offices
Boise

Allan Ray Bosch
Capitol Law Group, PLLC
Boise

Daniel Wayne Bower
Belnap Law, PLLC
Boise

Amanda Anneliese Breen
NW5 2RB, UNITED KINGDOM,

Mary Elizabeth Bridge
Idaho Conservation League
Boise

Jennifer Kauth Brizee
Powers Tolman, PLLC
Twin Falls

Susan Corisis Brooks
Boise

Daniel Stephen Brown
Fuller Law Offices
Twin Falls

Hon. Mitchell W. Brown
Sixth District Court
Soda Springs

Jeremy Dean Brown
Carey Perkins, LLP
Idaho Falls

Keith D. Brown
Randall/Danskin
Spokane, WA

Kent M. Brown
Callister Nebeker & McCullough
Salt Lake City, UT

Leslie Skinner Brown
Carey Perkins, LLP
Boise

Wayne Robert Brydon
Cibolo, TX

Bernadette Cecile Buentgen
Eagle

Muriel M. Burke
Muriel M. Burke, PC
Coeur d'Alene

Jonathan Andrews Burky
Macomber Law, PLLC
Coeur d'Alene

ELAM & BURKE

ATTORNEYS AT LAW

IS PLEASED TO ANNOUNCE THAT
WILLIAM G. DRYDEN
HAS BECOME A FELLOW OF
THE AMERICAN COLLEGE OF TRIAL LAWYERS



The induction ceremony at which Mr. Dryden became a Fellow took place recently before an audience of approximately 974 persons during the 2009 Annual Meeting of the College in Boston.

Founded in 1950, the College is composed of the best of the trial bar from the United States and Canada.

William G. Dryden is a shareholder of Elam & Burke, P.A. and has been practicing in Idaho for 30 years.

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UPDATES TO IDAHO STATE BAR ATTORNEY DIRECTORY

10/8/09 – 12/1/09

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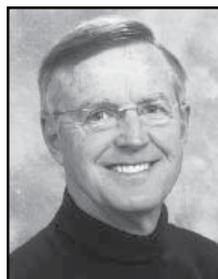
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Historic McCarty Building at 9th & Idaho, office spaces for sale or lease. Single offices to half-floors available, \$18.00 per square foot full service. For more information contact L. D. Knapp & Assoc. (208) 385-9325.

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1,522 sq. ft. – consisting of 1 large private office or conference room, 2 small private offices, a copy/file room, and a large open reception/secretarial area. Common areas include bathrooms and kitchen. Located on the Boise bench, one block southeast of the intersection of Latah and Cassia, at 812 La Cassia Drive. Free parking. Five minutes from downtown. Lease rate is \$8 per sq. ft. per year, full service except janitorial. Call (208) 336-8858.

DOWNTOWN BOISE OFFICE SPACE

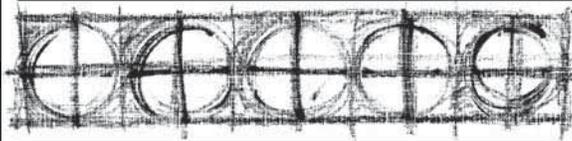
Professional downtown Boise office Great location for start-up or existing business. ½ and full suite available. All utilities, janitorial, wi-fi, and shredding included. Kitchen, full bath, and storage. Plenty of metered street parking and private, permit lot optional. Inside/outdoor signage with full suite. 6-month or month-to-month lease. Prices range from \$425-950. 512 W. Bannock St. (208) 409-1614.

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Attorney's office available in Eagle with Reception Service-Includes access to reception area, conference room, break room and 2 bathrooms. 12'x 9' window office with new blinds. Easy to find location in downtown Eagle (Kitty Hawk Plaza). High speed internet included. Access to copier and fax. Includes all utilities (phone extra). Possible overflow of legal work for general practitioner. Willing to negotiate rent for work on our cases. Professional space with great parking. Available immediately. For more information call (208) 938-8500.

DOWNTOWN BOISE OFFICE SPACE

Office share in Veltex Building downtown. Amenities include reception, phone/copy/fax, conference room, etc. Great location in the heart of downtown Boise. If interested call (208) 343-1211.



IVLP Special Thanks

While a few hours of pro-bono work can be relatively simple for the attorney, such assistance can make a profound effect on the clients, and leave the attorney with a deep sense of satisfaction. A recent pro bono case for a Somali refugee nicely illustrates the point.

In June 2009, Patrick Mahoney, Mahoney Law, PLLC was contacted by the Idaho Trial Lawyers Association, who had previously been contacted by Representative Walt Minnick's office. Minnick's office was looking for a lawyer to help a recently immigrated Somali refugee family with an auto accident matter. Mahoney accepted pro bono volunteer representation and began work on the matter.



Patrick Mahoney

The father of the family, Ahmed, was on his way home from one of his two jobs (this one his night job) when he was struck blindsided by a drunk driver who had run a red light. He was hospitalized for about a day-and-a-half. Ahmed lives in Boise in a small apartment with his wife and five children. He speaks very limited English.

Ahmed did not suffer permanent injuries, but the family's only car was totaled in the wreck and his medical bills totaled about \$15,000. He had no medical insurance, so the healthcare providers (including the hospital) had liens against him. Mahoney's office confirmed that the opposing driver, who was cited and charged, was driving without insurance. Thankfully, Ahmed had good insurance of his own and Mahoney made a claim for him under the Uninsured Motorist provision of his own auto insurance.

Mahoney said that "once their claim was laid out, and it's a righteous claim, these people still don't have a clue where to go. They don't know what their rights are, or where to start. Even just to point

them in the right direction is a huge service."

After much back and forth negotiating, a settlement was reached with the insurance company under the uninsured motorist provision of the policy and that paid the medical bills and released the liens. Mahoney said, "This is the most rewarding kind of work you can do. Can't tell you how grateful this family has been. They tried to give cash, but sent a card."

Mahoney also assisted the family in submitting various pieces of information through the victim witness coordinator to the prosecuting attorney relating to the charges against the drunk driver. Mahoney's office also assisted the family in finding and purchasing a used vehicle with part of the settlement funds.

Since Mahoney did not accept a fee in connection with the representation of Ahmed and his family, the insurance settlement not only paid the direct expenses of the accident but provided funds that the family is considering using for a down payment on a home. Patrick Mahoney reported this work to Idaho Volunteer Lawyers Program (IVLP) in response to a general request to Idaho lawyers report the pro bono work they perform. In doing so, Mahoney emphasized that the firm's paralegal, Dawn Kirby, deserves special recognition since she did a substantial amount of the work in assisting the immigrant family under Mahoney's supervision. IVLP thanks Patrick Mahoney and Dawn Kirby for their outstanding service.



Dawn Kirby

IVLP compiles and reports the pro bono service of ISB members because benefits the Idaho Law Foundation and Idaho State Bar to tell the public how much pro bono service Idaho lawyers provide. Mahoney has also accepted cases through IVLP that benefitted resi-

dents of Manufactured Housing Communities and a homeless shelter. IVLP thanks Patrick Mahoney and Dawn Kirby for their outstanding service.

Mock trial judges needed for 2010 high school mock trial competition

The Law Related Education Mock Trial Program needs judges for the 2010 competition. Competition staff is currently recruiting judges and attorneys to judge for regional and state competitions. This year we mock trial teams will have the opportunity to try a criminal case based on the Haywood trial.

Competition dates and times are as follows:

- **Saturday, February 13, 2010:** Regional Competition in Pocatello; 8:00 AM to 4:00 PM
- **Saturday, February 13, 2010:** Regional Competition in Boise; 8:00 AM to 4:00 PM
- **Saturday, February 20, 2010:** Regional Competition in Coeur d'Alene; 8:00 AM to 4:00 PM
- **Saturday, March 6, 2010:** Regional Competition in Caldwell; 8:00 AM to 4:00 PM
- **Thursday March 25 2010:** State Quarterfinals in Boise; 4:00 to 10:00 PM
- **Friday March 26, 2010:** State Semi-Finals in Boise; 9:00 to 11:30 AM
- **Friday March 26, 2010:** State Finals in Boise; 1:30 to 4:30 PM

Please consider volunteering your time to help make this year's mock trial competition successful for Idaho students. Contact Ashley McDermott at (208) 334-4500 or amcdermott@isb.idaho.gov if you have any questions or are interested in volunteering.



The Complete Legal Negotiator

January 29, 2010 from 8:30 a.m. - 4:15 p.m.
at the Grove Hotel, Boise
Sponsored by the Idaho Law Foundation
6 CLE credits
www.isb.idaho.gov

Gerry Williams will put you on the proven path toward being a *great negotiator*. He's seen and cataloged great negotiators. He's taught them. He knows how they got there and he knows how to *make you one of them*.

Gerald Williams

- Professor of Law Emeritus at Brigham Young University's Law School.
- Serves as director for Scientific Negotiation Research and Training, LLC.
- His textbook, *Legal Negotiation and Settlement* has been adopted by more than 150 law schools.
- His monograph, *Negotiation as a Healing Process* is a reprint of the award winning article that appeared in the *Journal of Dispute Resolution* in 1996.

Lawyers are not litigators. Lawyers are negotiators. Even those few who specialize in litigation generally settle more cases than they take to trial. The practice of law has evolved to a point where negotiated or mediated outcomes are the most obvious measure of your value to your clients. How does this program stand out amid the flood of promises you hear about other CLE programs?

- Gerry and his pioneering team have studied the negotiating practices and effectiveness of 1,100 lawyers.
- Gerry's team discovered and documented two conflicting paths to effectiveness in legal negotiation 1) the cooperative, problem-solving approach that seeks win-win outcomes and 2) the aggressive or combative approach that seeks win-lose outcomes.
- Lawyers who deal skillfully with one type of opponent are often ineffective in dealing with the other. Success in negotiation requires a repertory of skills and techniques. It is not based on a "one-size-fits-all" approach.
- Negotiation fulfills important social and psychological needs in individuals and organizations that cannot be satisfied in other ways. Gerry Williams will help you see that negotiation is a process that can be polished every day.

Program Highlights

- See video of negotiations, broken down so that you can watch as strategies unfold and tactics come together (or fall apart).
- Learn to recognize signs of weakness in opponents; how to thwart their tactics; help them overcome their weakness; and in so doing, strengthen your position.
- Voluntary exercises are interspersed in the program to lead you to that moment when you realize, "Oh that's how or why that works!"

UPCOMING CLEs

January

January 11

Lunch and a Movie-Maintaining an Ethical Practice
12:00 - 1:00 p.m. (MST)
Law Center, Boise
Sponsored by the Idaho Law Foundation
1 Ethics Credit

January 13

A View from Idaho's Newest Court of Appeals Judges
8:30 - 9:30 a.m. (MST)
Law Center, Boise
Sponsored by the Professionalism and Ethics Section
1 Ethics Credit, Webcast Statewide

January 25

Lunch and a Movie-Filing for Divorce or Custody
11:30 a.m. - 1:00 p.m. (MST)
Law Center, Boise
Sponsored by the Idaho Law Foundation
1.5 CLE Credits

January 29

The Complete Legal Negotiator
8:30 a.m. - 4:15 p.m. (MST)
The Grove Hotel, Boise
Sponsored by the Idaho Law Foundation
6 CLE Credits

February

February 1

Lunch and a Movie-The Future of the Practice of Law
11:30 a.m. - 1:00 p.m. (MST)
Law Center, Boise
Sponsored by the Idaho Law Foundation
1.5 CLE Credits
*RAC—These programs are approved for Reciprocal Admission Credit pursuant to Idaho Bar Commissions Rule 204A(e).

POCATELLO ATTORNEY CREATES JAPANESE GARDEN TO WELCOME VISITORS

Dan Black
Advocate Managing Editor

Worn stones at gentle angles, rock lanterns and carefully-raked beds of rocks inspire reflection and the simple beauty of the countryside. Drawn from a 1,000-year-old tradition, Pocatello attorney Jesse Robison has created something totally unique in Idaho – a large, authentic Japanese garden.

He works about half the year, which allowed him to research Japanese gardens, form a committee, write grants and organize a massive volunteer campaign to carry through a landscaping plan for the newly remodeled Pocatello Airport terminal. And then there was the shoveling – lots and lots of shoveling.

“I got down to my college weight,” Robison said during a phone interview in December. “We had some long days.”

It was worth it. The two-year labor of love was complete in November, just before Robison took a well-earned vacation to Kyoto Japan to compare his efforts with those of the masters. There, among the hundreds of gardens associated with temples, shrines, castles and parks, he drank in their ancient art. The stones, trees, pathways, water and space are carefully proportioned for an experience of harmony, civility and peace.

“We got it right,” he said with satisfaction, inspired from touring Japan’s cultural birthplace.

The project involved four other Pocatello attorneys, local Japanese Americans, landscape architects, a work-release detail courtesy of the Bannock County Sheriff’s department, and numerous others in the community. The garden will be dedicated during a ceremony in June of 2010 during a visit by dignitaries from Pocatello’s Sister City, Iwamizawa, Japan. The cross-cultural theme works especially well for Pocatello, Robison said, because Eastern Idaho has many Japanese Americans. The World War II-era internment camp at Minidoka is nearby, which inspired some volunteers to pay a long overdue respect to the community’s culture.

But how did the solo practitioner get



Photos courtesy of Jesse Robison

Jesse Robison pours the first batch of 60,000 pounds of white gravel. An inmate crew distributed the rest of the gravel. In all, 125 tons of material were placed at the airport Japanese garden by community volunteers.

inspired to create a city landmark? During a trip to the small town of Livingston, Montana, five years ago, Robison saw a tiny Japanese Garden and it left a subtle but lasting impression. He later thought that something similar would look nice in Pocatello, which had to make some security changes at its airport terminal.

“After 9/11 they had to put in a berm and I thought, what a great opportunity for art,” Robison said. “We did something similar for the Federal Building when they added a bomb blast wall.”

Meanwhile, his globe-travelling son, Patrick, had become fluent in Japanese and taught the language in several countries before living in Japan. Patrick helped educate his dad about Japanese gardens and helped fuel enthusiasm for the project. After its completion, Robison caught up with his son in Kyoto, where they shared their reunion among the stones, shrubs and lanterns in Kyoto’s gardens.

“I live a privileged life,” Robison said, fortunate to learn and experience other cultures. Of all the places he’s vis-

ited, perhaps Kyoto was the most impressive.

“I could live there a year,” he said. “I could live there forever.”

The Pocatello native, however, feels content in Eastern Idaho. After spending 20 years as a trial attorney, Robison now splits his time between mediation and doing insurance claims consulting. The mix suits him, he said, and the work “is something I like to do.”

“Bringing people to a peaceful resolution gives me a great deal of satisfaction,” he said, but could no longer see himself in the courtroom.

He volunteers for numerous boards and community efforts, especially for public art.

Pokey’s new Japanese garden, he said, exists only because of a great deal of work by many people. Robison found a willing team of volunteers and they studied ancient texts on Japanese Gardens. Japanese Americans helped chart the course, as did a landscape architect. Nothing is placed by accident. They found certain themes associated with

the concept of welcoming strangers, including special stone lamps naturally suited for a portal to the town, to create a friendly gateway. And, due to their shape, Robison said, the lanterns are especially beautiful in the snow. Certain rocks represent male and female forces in nature. Raked rocks are a metaphor for water. Robison said four huge stones represent the islands of Japan.

With a cost estimate of \$100,000 and no money available from the city's airport, Robison started writing grants. With money from IFFT Foundation (from longtime family owners of the Idaho State Journal), the Japanese American Citizens League, and the City of Pocatello, Robison raised \$50,000. Not one entity turned down a request for the project, Robison said.

The rest of the cost was made up from in-kind gifts including expertise from Cindy Marshall, a master gardener who oversaw the planting of more than 500 trees and plants. Her husband, John Marshall, arranged for donated use of heavy equipment which moved enormous stones; all told, there was about 125 tons of material brought onto the site and 75 percent of that was placed by hand, Robison said.

Architectural services were donated by Bill Vaughn, who created the master plan from months of committee work. Robison said Vaughn "lived on a farm in Minidoka where Japanese internees worked during WWII. Their humble service in the face of unfair internship touched him as a small boy, and divinely inspired his work on the garden."

Ironically, both convicts and the prosecutors who sought their convictions worked on the project.

"At different times, of course," Robison said.

Bannock County Prosecutor Mark Hiedeman, along with his deputies Vic Pearson, Ken Webster and Jeanne Hobson worked for two days to shovel tons of dirt and mulch into the garden. The six inmates apparently outperformed the lawmen, however, by moving all 60,000 pounds of white gravel by shovel and



Pathways, carefully placed rocks, water elements and a gazebo create a unique sense of place for Pocatello. The Japanese American community helped design and build the project.

wheelbarrow. They worked in the bitter cold, Robison said, and ice crystals formed on their busy hands.

Authentic Japanese heirlooms were donated by the local family of Hugh Suenaga and Robison credited Hugh for working hard on the project, even in ill health.

Numerous local businesses gave material and services, Robison said, which made this a true community effort. Robison encourages all members of the Bar to visit the garden which is directly in front of the airport terminal.



Numerous large stones were hand-picked to represent nature. These two reflect both male and female energy.

Ironically, both convicts and prosecutors who sought their convictions worked on the project.

About the Author

Dan Black is Managing Editor of *The Advocate* and is Communications Director for the Idaho State Bar. He has been a writer and editor for newspapers in Montana, Washington and Idaho since 1987.

LAW AND BORDERS: NEW IDAHO FACULTY MEMBER BRINGS INTERNATIONAL EXPERTISE TO ONE-OF-A-KIND ENVIRONMENTAL LAW PROGRAM

Donna Emert
University of Idaho

In its Chronicle of Higher Education want ad, the University of Idaho College of Law listed an opening for a candidate with interest and background in public international law and international environmental law.

“For me, it was an ideal match,” said Anastasia Telesetsky, who was hired to fill the faculty position this fall.

Telesetsky began researching climate change and the Kyoto Protocol in 1997. She earned a juris doctorate from the University of California at Berkeley and is completing an LL.M. degree in international environmental law at the University of British Columbia. She also holds a bachelor’s degree, summa cum laude, from Vanderbilt and a master’s degree from the University of California at Santa Barbara.

Her legal and research experience also is international: she served as a consultant to the Ethiopian-Eritrean Claims Commission in Berkeley and Hague, Netherlands, and as a Bosch Foundation Fellow in Berlin and Cologne, Germany, and has worked as a Fulbright Fellow at the Environmental Legal Assistance Center in the Philippines. She practiced environmental law with the firm of Briscoe, Ivester & Bazel, LLP, in San Francisco, and Native American and environmental law with Ziontz, Chestnut, Varnell, Berkeley, and Slonim, in Seattle.

Her research focuses on the international legal dimensions of environmental, natural resources and global warming issues. She will teach international environmental law at Idaho beginning spring semester.

“Environmental issues require transnational problem solving,” said Telesetsky. “Water usage, air quality and biodiversity are issues that transcend boundaries. Deforestation in the Philippines is having an impact here on the Palouse. It’s all connected. That’s the central concept of ecology.”

Since natural resources are shared, and finite, determining who has the right to use them and how they can be used sustainably across legal jurisdictions is emotionally charged, politically difficult, and legally complex.

“Conflicts over how to best manage limited resources become readily apparent when you observe the growing gap



Photo courtesy of University of Idaho

Anastasia Telesetsky’s research focuses on the international legal dimensions of environmental, natural resources and global warming issues. She will teach international environmental law at Idaho beginning spring semester.

Deciding which jurisdiction’s laws will apply in a transboundary dispute is just one facet of the complexity of international environmental law.

between the negotiations for new international environmental laws and the implementation of existing domestic environmental laws,” said Telesetsky. “Global environmental quality daily declines as countries debate over politics rather than

focus on the ominous facts of declining fisheries and rapid deforestation.”

Deciding which jurisdiction’s laws will apply in a transboundary dispute is just one facet of the complexity of international environmental law. Attorneys

and litigants also need to understand the limits of the ecological systems in question in order to find workable approaches to sustaining environmental quality, water quality and resource uses.

“When considering transboundary environmental law issues, the science is as important as the policy,” said Telesetsky. “We have to understand the problems on a scientific level or we can’t know what the limits of an ecological system are. Without understanding the science, it is impossible to find sustainable legal solutions.”

Yet, teaching law students both the science and the law necessary to shape sustainable solutions is a relatively new endeavor; only a handful of law schools offer such training.

The University of Idaho Waters of the West (WoW) program is the only environmental and natural resource law program in the nation that offers concurrent juris doctor/master’s of science and juris doctor/PhD degrees.

“With the recent addition of Professor Telesetsky, we have now developed what I think is one of the best programs in Natural Resources and Environmental Law in the country,” said Barbara Cosens, a professor of law and geologist who

With the recent addition of Professor Telesetsky, we have now developed what I think is one of the best programs in Natural Resources and Environmental Law in the country.

leads the law facet of the university’s interdisciplinary WoW program.

Cosens believes the interdisciplinary approach to environmental and resource law is the wave of the future. “If we don’t have the scientific understanding and the legal understanding, we can’t address environmental issues holistically,” she said.

“Anastasia’s expertise is vital because law students can’t really practice law, particularly environmental or water resource law, without some understanding of international law,” Cosens adds. “Students need a clear understanding of the many cross-boundary issues.”

In addition to Cosens and Telesetsky, Idaho’s WoW natural resource and environmental law faculty includes: Dale Goble, a leading expert on the federal Endangered Species Act, wildlife law,

and public lands; Jerrold Long, who holds a dual JD/PhD. In addition to his on-the-ground insights into that interdisciplinary legal training, he has expertise in land use and its relationship to environmental issues; Angelique EagleWoman, expert on Native American natural resource law, is creator of a Native Law emphasis in the University of Idaho law school curriculum; and Richard Seamon, an expert in administrative law, including federal and state agency management of natural resources.

Some WoW and other College of Law faculty already are pursuing research in international law. In addition to her own research, Telesetsky hopes to provide support for their endeavors. She is interested in researching the polluter pays principle and its application to international environmental law.

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Wright Brothers Law Office, PLLC is pleased to welcome Steven R. McRae as an associate in its Twin Falls, Idaho practice. Mr. McRae has joined the firm’s business and transactional practice group.

Previously, Mr. McRae was a judicial law clerk with the Honorable R. Barry Wood in Gooding County, Idaho. Mr. McRae received his J.D. from the University of Idaho College of Law and his B.A., *summa cum laude*, from Brigham Young University – Hawaii.

Mr. McRae can be reached at smcrae@wrightbrotherslaw.com or 208-733-3107

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Wright Brothers Law Office, PLLC is pleased to welcome Patricia Migliuri as an associate in its Twin Falls, Idaho practice. Ms. Migliuri has joined the firm’s litigation and family law practice groups.

Previously, Ms. Migliuri was a judicial law clerk with the Honorable John K. Butler in Jerome County, Idaho. Ms. Migliuri received her J.D., *magna cum laude*, from the Willamette University College of Law and her B.A., *magna cum laude*, from Gonzaga University.

Ms. Migliuri can be reached at pmigliuri@wrightbrotherslaw.com or 208-733-3107

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Save the Date

July 2010

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
				1	2	3
4	5	6	7	8	9	10
11	12	13	ISB Annual Conference July 14 - 16 in Idaho Falls		17	
18	19	20	21	22	23	24
25	26	27	28	29	30	31



Idaho State Bar Annual Conference July 14 - 16, 2010 in Idaho Falls

- ⚙ Legal seminars
- ⚙ Awards and social events
- ⚙ Connect with colleagues
- ⚙ Close to Yellowstone and Grand Teton National Parks
- ⚙ Great location for a family getaway
- ⚙ Close to world-class fishing



Superior Legal Writing: Winning *with* Words

A Legal Writing CLE Seminar by

William Bernhardt

Idaho State Bar Annual Conference
July 14 – 16 in Idaho Falls
Sponsored by the Idaho Law Foundation

William Bernhardt, New York Times bestselling author of more than twenty novels and a former trial lawyer, tells lawyers what they really need to know to succeed on the printed page, based upon personal experience and extensive interviews with judges and practitioners. Bernhardt takes participants through a practical and systematic consideration of the writing process, peppered with practical assignments based upon real world legal scenarios.

Bernhardt focuses on helping lawyers develop skills and strategies for communicating in a rapidly changing legal environment, with a special emphasis on the abilities needed to frame your case, present it persuasively—and win. Bernhardt covers common writing errors, the pitfalls of legalese, the importance of strategic issue-framing, capturing a reader's imagination (the best way to persuade), drafting briefs, memos, and client letters, building a bulletproof argument, giving your pleadings and briefs focus and direction, setting a winning tone from the first sentence, the critical importance of tight editing for clarity and impact, and creating a compelling story that best represents your client.

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