

The Advocate

Official Publication
of the Idaho State Bar
Volume 53, No. 6/7
June/July 2010

Open Meetings Law

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2010 ISB ANNUAL CONFERENCE

July 14-16 in Idaho Falls at the Shilo Inn

You are invited to the 2010 Idaho State Bar Annual Conference, the only statewide event for the entire membership! The Idaho Falls Shilo Inn welcomes the state's legal community, providing incredible opportunities for inspiration, growth and networking. This is your chance to honor your colleagues, reconnect with friends, share stories, stimulate the mind and earn CLE credits. Learn what's new, important and essential for practicing law in the state of Idaho. At this Annual Conference, attorneys practicing three years or less can earn CLEs without a fee. The CLE topics are listed on page 54.

— Agenda at a Glance —

Wednesday, July 14

- 8:30 a.m. – 3:00 p.m. **Board of Commissioners Meeting**
VIP Board Room
- 6:00 – 7:00 p.m. **President's Reception**
Idaho Falls Country Club Patio
- 7:00 p.m. **Distinguished Lawyer Dinner**
Idaho Falls Country Club Dining Room

Thursday, July 15

- 7:30 a.m. - 5:00 p.m. **Registration and Exhibitor Hall Open**
Shilo Inn Lobby
- 8:45 – 9:45 a.m. **Plenary Session**
Welcome from ISB President, Douglas L. Mushlitz
State of the Court, Chief Justice Eismann
Keynote Presentation by author William Bernhardt
Grand Teton Room
- 9:00 a.m. – 12:00 p.m. **Idaho Law Foundation Board of Directors**
VIP Board Room
- 10:00 – 11:30 a.m. **CLE Breakout Session**
- 12:00 – 1:15 p.m. **Service Award Lunch**
Grand Teton Room
- 1:30 – 5:00 p.m. **CLE Breakout Session**
- 5:30 – 6:30 p.m. **ILF Donor Recognition Reception**
Art Museum of Eastern Idaho
- 6:00 – 8:00 p.m. **BBQ at the Park**
Capitol Avenue Park

Friday, July 16

- 7:30 a.m. - 5:00 p.m. **Registration and Exhibitor Hall Open**
Shilo Inn Lobby
- 7:30 – 8:30 a.m. **District Bar Presidents Breakfast**
Riverview Room
- 8:30 – 11:45 a.m. **CLE Breakout Session**
- 12:00 – 1:15 p.m. **50/60 Year Attorney Recognition Lunch**
Grand Teton Room
- 1:30 – 3:30 p.m. **CLE Breakout Session**
- 4:00 p.m. **Conference Adjourns**

For more information visit our website at: www.isb.idaho.gov

The Advocate

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On the Cover

The photograph of the Idaho State Capitol Building was taken by attorney Lane Erickson of Racine, Olson, Nye, Budge & Bailey, Chtd. in Pocatello. The building was completed in 1920 at a cost of over \$2 million. The design of the building was modeled after the United States Capitol in Washington, D.C. The Capitol Building was designed by Boise architects John E. Tourtellotte and Charles F. Hummel, partners who designed many church and educational buildings in Boise, and the Administration Building at the University of Idaho in Moscow. An extensive two-year \$120 million renovation project was completed on January 9, 2010.

Section Sponsor

This issue of *The Advocate* is sponsored by the Government & Public Sector Lawyers Section.

Editors

Special thanks to the June/July *The Advocate* editorial team: Scott Randolph, Gene Petty and Dan Gordon.

Letters to the Editor

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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The Advocate (ISSN 05154987) is published the following months: January, February, March, April, May, June, August, September, October, November, and December by the Idaho State Bar, 525 W. Jefferson Street, Boise, Idaho 83702. Subscriptions: Idaho State Bar members receive *The Advocate* as part of their annual dues payment. Nonmember subscriptions are \$45 per year. Periodicals postage paid at Boise, Idaho.

POSTMASTER: Send address changes to:

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"The spoken word perishes; the written word remains."

IDAHO STATE BAR DISTINGUISHED LAWYER AWARD DINNER

Wednesday, July 14

at the Idaho Falls Country Club located at 11611 South Country Club Drive

Reception begins at 6:00 p.m. with the dinner following at 7:00 p.m.

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



John D. Hansen
Idaho Falls



William A. Parsons
Burley



Dean Cathy R. Silak
Boise

IDAHO STATE BAR / IDAHO LAW FOUNDATION SERVICE AWARDS LUNCHEON

Thursday, July 15

at the Grand Teton Room in the Shilo Inn Suites Hotel located at 780 Lindsay Blvd., Idaho Falls

Service Awards Luncheon begins at 12:15 p.m.

The Service Awards are presented to those members of the profession who have contributed their time and talent to serve the public and improve the profession. The recipients of the 2010 Service Award are:

Scott E. Axline - Blackfoot

Michael J. Fica - Pocatello

Joel P. Hazel - Coeur d'Alene

Charles A. Homer - Idaho Falls

Thomas South - Boise

Theodore V. Spangler, Jr. - Boise

James A. Spinner - Pocatello

Hon. Scott L. Wayman - Coeur d'Alene

Carole I. Wesenberg - Pocatello

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Join friends and colleagues as we honor these members of the Bar. For more information about attending these events, please contact Dayna Ferrero at (208) 334-4500 or dferrero@isb.idaho.gov.

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IDAHO STATE BAR 50/60 YEAR ATTORNEYS LUNCHEON

Friday, July 16

at the Shilo Inn Suites Hotel located at 780 Lindsay Blvd., Idaho Falls

50/60 Recognition Luncheon begins at 12:00 p.m.

Join friends and colleagues as we honor those members of the Bar who have given decades of service to their clients and the public.

60-YEAR ATTORNEYS

Admitted to the Idaho State Bar in 1950

Carl Burke - Boise

Stanford University Law School

Phillip Dolan - Coeur d'Alene

Gonzaga University

Blaine Evans - Boise

Harvard Law School

James McClure - Boise

University of Idaho College of Law

Ray Rigby - Rexburg

University of Idaho College of Law

50-YEAR ATTORNEYS

Admitted to the Idaho State Bar in 1960

James Annest - Burley

University of Idaho College of Law

Peter Church - Las Vegas, NV

University of Idaho College of Law

Vern Herzog - Pocatello

University of Idaho College of Law

Everett Hofmeister - Hayden

University of Idaho College of Law

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DISCIPLINE

FIONA A. C. KENNEDY

(Withheld Suspension/Public Censure)

On May 4, 2010, the Idaho Supreme Court issued a Disciplinary Order suspending Rathdrum attorney Fiona A. C. Kennedy from the practice of law for eighteen months with all eighteen months withheld pursuant to I.B.C.R. 506(c) and 507, placing her on probation for two years, and imposing a public censure pursuant to I.B.C.R. 506(d), based on professional misconduct.

The Idaho Supreme Court's Order followed a Professional Conduct Board Recommendation and stipulated resolution of an Idaho State Bar (ISB) disciplinary proceeding in which the Court found, and Ms. Kennedy admitted, violations of the I.R.P.C. On September 8, 2009, the ISB filed a formal charge disciplinary Complaint against Ms. Kennedy alleging six counts of professional misconduct, and on March 5, 2010, the ISB filed an Amended Complaint alleging an additional count of misconduct. With respect to Counts One and Two of the Amended Complaint, the Idaho Supreme Court found that Ms. Kennedy violated I.R.P.C. 1.3 [Diligence], 1.4(a) [Communication], 3.4(c) [Knowingly disobeying an obligation under the rules of a tribunal] and 8.4(d) [Conduct prejudicial to the administration of justice] for failing to appear at several scheduled court appearances in Kootenai County. With respect to Count Three of the Amended Complaint, the Court found that

Ms. Kennedy violated I.R.P.C. 1.3 [Diligence], 1.4(a) [Communication], 1.16(d) [Failure to return unearned fees upon termination of representation] for accepting a fee from the mother of a criminal defendant, failing to perform the work for which she was hired, and for failing to return the unearned fee upon termination of the representation. The Court found that Ms. Kennedy violated I.R.P.C. 1.3 [Diligence], 3.2 [Failure to make reasonable efforts to expedite litigation], 3.4(c) [Knowingly disobeying an obligation under the rules of a tribunal] and 8.4(d) [Conduct prejudicial to the administration of justice] with respect to Count Four of the Amended Complaint for her failure for six months to comply with a court directive that she prepare and submit an order in a child custody case. The Court found that Ms. Kennedy violated I.R.P.C. 1.2(a) [Failure to abide by client's decisions concerning the objectives of representation], 1.3 [Diligence], 1.4 [Communication], 1.16(d) [Failure to return unearned fees upon termination of representation] with respect to Count Seven of the Amended Complaint for accepting a fee and partially performing the work for which she was hired, but then failing to communicate with the client after her phone was disconnected, failing to complete the representation or return any unearned fee. Finally, with respect to Counts Four and Six of the Amended Complaint, the Court found that Ms. Kennedy violated I.R.P.C. 8.1(b) [A lawyer in connection with a disciplinary

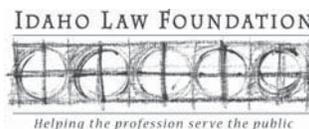
matter shall not knowingly fail to respond to a lawful demand for information from a disciplinary authority] and I.B.C.R. 505(e) [Failure to respond to a request from Bar Counsel shall be grounds for imposition of sanctions] for failing to respond to Bar Counsel's Office in its disciplinary investigation of the grievances relating to two of the counts in the Amended Complaint.

The Disciplinary Order provided that in addition to the eighteen-month withheld suspension, Ms. Kennedy shall receive a public censure and will serve a two-year probationary period subject to the conditions of probation specified in the Order. Those conditions include that Ms. Kennedy will serve the entire eighteen-month withheld suspension if she admits or is found to have violated any of the Idaho Rules of Professional Conduct for which a public sanction is imposed for any conduct during her period of probation, in addition to any other sanctions that may be imposed for any such admission or determination of misconduct during that time period. Other conditions of probation are that Ms. Kennedy shall have a supervising attorney during the first year of her probation and shall make restitution to the two clients from whom she accepted a fee and did not perform, or fully perform, the work for which she was hired.

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

In Memoriam of: Fred J. Hahn as of May 19, 2010

The Idaho Law Foundation has received generous donations in memory of: **Fred J. Hahn** from **Diane Minnich & Mike Stoddard, Jensen Poulsen & Company, Thel Casper, Mrs. Karl E. Rippel, Ball Ventures, Paul & Alexis Rippel, Tim & Anne Hopkins.**





PRESIDENT'S MESSAGE

IN DEFENSE OF BEING PERSNICKETY, CHARMING, OR A MERE THINKER

Douglas L. Muhlitz
President, Idaho State Bar
Board of Commissioners

Much is made these days of simply “doing your best” - without ever pushing yourself hard enough to know what your best is.

I recently completed a deposition that can only be described as boring to anyone unacquainted with the facts of the case, and even to a few people who were. Piles of “red-tape” documents and forays into general practices of the deponent nearly put the opposing counsel to sleep, and I’m pretty sure I heard him sighing into his coffee cup. Nonetheless, there is no substitute for cultivating a habit of meticulous, thoughtful work. While jobs worth doing are worth doing well — or some, even poorly (or even late, as is often my habit), many others are cases where the Devil, and countless of his attending minions, are in the details. Lawyers are often, and I believe, unfairly, maligned by the uninitiated, for their making much of “technicalities,” or a “fine print.” Even the definition of “meticulous” gives short shrift:

Me-tic-u-lous: – adjective 1. taking or showing extreme care about minute details; precise; thorough. 2. finicky; fussy: meticulous adherence to technicalities.

Perhaps a look at a synonym, “Careful,” provides some redemption:

Careful: – adjective marked by attentive concern and solicitude b: marked by wary caution or prudence. c: marked by painstaking effort to avoid errors or omissions.

While I do not advocate a conversation with your waiter about the “minute details” in the menu at lunchtime, or get-

ting “fussy” with your spouse about the choice of new tires on the car, the practice of law, just like the practice of medicine, or the production of microchips, demands our careful, even persnickety attentions. And that’s not such a bad thing.

Much is made these days of just being yourself, but for most of us, being solicitous, or even charming, involves some work that takes us a bit outside of ourselves.

I get some grief from my administrative assistant about my office, which is largely surrounded by windows. I keep the blinds open. Some days, it is hard to get anything done, because I get so many visitors: current clients, former clients, old friends, fellow attorneys, someone off Main Street needing directions. Fortunately, another very attentive assistant directs and channels much of the traffic headed to my office. The truth is I like the open feel of my office, and I enjoy visiting with people, even though I doubt I will ever be charismatic. The other truth is that it’s still a lot of work to accomplish a day’s worth of tasks and be available, kind, and have “presence” with so many people in my life.

cha-ris-ma – noun, plural -2. a spiritual power or personal quality that gives an individual influence or authority over large numbers of people.— Synonyms 2. charm, magnetism, presence.

While it would be nice to be charismatic, I’m okay with being a friend. It’s worth the extra effort, and it’s not a bad way to relate.

Much is made these days of relativism, and what is true in your experience. My experience is that I have to pay deep attention to the intellectual approaches taken by others, in order to sharpen my own.

Intellectual pursuits may get even less respect than meticulousity. I find it interesting that the province of critical thinking, pondering, rigorous questioning and analysis is criticized for its tendency to produce elitism and arrogance, or even a

threat to the American way of life. On a side note, true intellectual pursuits should make us more humble, rather than less, because they reveal to us how little we actually know. More importantly, the intellectual pursuits on the ground — those that bring us face to face with gritty realities in our endeavors to apply reason, truth and our own particular, American definition of justice in a practical way — force us into continued questioning and comparison of ideas with others. Fortunately, we also believe in other types of “honest” work: the kind that clears your head. This is why I clear brush on my property on the weekend.

in-tel-ec-tu-al-adjective 1. appealing to or engaging the intellect: intellectual pursuits. 2. of or pertaining to the intellect or its use: intellectual powers. 4. guided or developed by or relying on the intellect rather than upon emotions or feelings.

While it would be easier to just develop an over-fondness of my own opinions, I’m open, as a lawyer, to a humble life of questions — intellectual and basic, answered and otherwise. And that’s not such a bad way to live, either.

About the Author

Douglas L. Muhlitz is a partner in the Lewiston Law Firm of Clark & Feeney. In 1982 he received a Bachelor’s Degree in Accounting & Business Administration from Idaho State University. He attended the University of Idaho College of Law, where he received his Juris Doctor Degree in 1985. He was admitted to practice before the state and federal Courts in Idaho in 1985; and was subsequently admitted to practice before the U. S. Ninth Circuit Court of Appeals in 1990, and the U. S. Supreme Court in 1995.

Doug and his wife, Anne, reside in Lewiston. Anne is Health Manager for ATK. He has two daughters, Morgan and Allison. Doug is a member of the Board of Directors of Potlatch No. 1 Federal Credit Union, is a member of the Board of Directors for the Lewiston Roundup Association, and is a founding member of the Board of Directors for the Gina Quesenberry Breast Cancer Foundation, Inc.

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GREG BRADFORD



Zarian Midgley & Johnson, PLLC, a Boise-based firm specializing in **intellectual property matters and complex litigation**, is pleased to announce that **Greg**

Bradford has joined the firm's paralegal team – which now includes two litigation paralegals, a patent paralegal, and a trademark paralegal.

Greg has extensive experience working as a litigation paralegal, and is the current Vice President of Education for the Idaho Association of Paralegals.

Greg received his Paralegal Certificate from the University of California, Santa Cruz, and his Bachelor of Arts degree in Philosophy from California State University, Fresno.

Greg can be reached at bradford@zarianmidgley.com or 208-562-4900.



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ALTERNATIVE DISPUTE RESOLUTION

Merlyn W. Clark

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

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

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2010 IDAHO STATE BAR ANNUAL CONFERENCE JULY 14-16, IDAHO FALLS

Diane K. Minnich
Executive Director, Idaho State Bar

Please join us at this year's Annual Conference – for the first time in eastern Idaho. The conference includes reasonably priced CLE programs, recognition of your peers and colleagues, as well as social and networking opportunities. This year, we are offering free CLE programs to attorneys in practice 3 years or less and attorneys currently not employed.

The full conference registration offers 13 educational programs, a potential of 9.5 CLE credits, two hosted receptions, two dinners, two lunches and two continental breakfasts. The full registration at \$300 (\$200 for first-time attendees) is the best value but you can register for individual programs or events. We hope you will sign up for as many or as few activities as you can fit into your schedule.

The conference begins with the President's Reception and Distinguished Lawyer dinner on Wednesday night and concludes on Friday afternoon with a CLE program featuring Chief U.S. District Judge for the District of Idaho Lynn Winmill and Idaho Supreme Court Chief Justice Daniel Eismann.

The CLE program choices include:

- Superior Legal Writing: Winning with Words
- Supporting the Rule of Law in Mexico and Why it Should Matter to Idahoans
- Criminal Law – Ethics Issues for Prosecutors and Defense Attorneys from Discovery to Sentencing
- Substance Use and Depression Among Lawyers



Diane K. Minnich

Farewell

Deputy Executive Director Terri Muse left the Bar and Foundation at the end of May to become the Fund Development Director for the University of Idaho College of Law. During her nearly 10 years with ISB/ILF, she worked for IVLP, Bar Counsel, as Legal Education Director, and then became the first Deputy Executive Director. We thank Terri for her many contributions to the organized bar and for her commitment to improving the services provided to bar members and the public. We will miss her as part of the staff; however, we look forward to working with her in her new position with UI College of Law.

- Tribal Law and Order
- How to Get on the Bench in Idaho
- A Perspective from Idaho's Newest Justices
- What Every Non-Employment Lawyer Needs to Know About Employment Law
- Packing the Supreme Court – FDR's Biggest Political Blunder and the Gravest Constitutional Crisis Since the Civil War
- Lessons From the Masters
- Courtcall
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Special thanks to our sponsors for their support of the Annual Conference. Their contributions allow us to offer the conference at a reasonable cost, while maintaining the quality of events. To date, our sponsors include:

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- Concordia University College of Law
- Hopkins Roden Crockett Hansen & Hoopes, PLLC
- Parsons, Smith & Stone, LLP
- Seventh District Bar Association

Annual Conference brochures were mailed in mid-May. For more information, about the conference, visit the ISB website at www.idaho.gov/isb or contact us at 208-334-4500.

At the Wednesday night dinner, we will honor the 2010 Distinguished Lawyers, John Hansen, Idaho Falls, William Parsons, Burley, and Cathy Silak, Boise.

At the Thursday and Friday lunches we will honor lawyers and non-lawyers for their service to the legal profession and the public. We will also recognize and honor those Idaho lawyers who have practiced law for 50 and 60 years.

An exhibit hall, featuring products, information, and service to assist you will be available during the conference, including:

- All-Search & Inspection, Inc.
- ALPS
- Concordia University School of Law

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WELCOME FROM THE GOVERNMENT & PUBLIC SECTOR LAWYERS SECTION

David E. Wynkoop
Sherer & Wynkoop, LLP

Our Section members include private and government attorneys who represent federal, state, county, city and other governmental agencies. We meet on the first Friday of each month to examine topics of interest to attorneys who practice public sector law. Approximately nine times per year, a free CLE is provided at the lunch meeting. Participation by telephone is encouraged.

This last year, our Section members received information on a broad range of topics. Kent Bailey updated members regarding the passage and impact of the Americans with Disability Act Amendments Act. Justice James Jones and Danielle Quade educated the members on novation and multi-year government contracts. Brian Kane once again presented his popular Legislative Preview and Legislative Review CLEs. Ryan Armbruster instructed members on urban redevelopment agencies. Cheryl Meade offered insight into new case law involving attorney fees for government entities. Assistant U.S. Trustee David Newmann trained our members on bankruptcy basics for government attorneys.



David E. Wynkoop



This coming year, several talented individuals have agreed to inform and enlighten our members on topics ranging from social networks to the Idaho Tort Claims Act. Upcoming speakers include: Deputy Attorney General Brian Benjamin, Deputy Attorney General Karl Kline, Lynnette McHenry, Matt Walters, Deputy Attorney General Mike Gilmore, and Assistant Boise City Attorney Matt Wilde. The Section appreciates the hard work our speakers continue to devote to improving the quality of legal services provided to clients at all levels of government.

In this issue of *The Advocate*, our members examine several legal issues related to public sector law. Cherie Ruch explores a Code of Conduct for Administrative Hearing Officers. Jill Holinka

analyzes Judicial Review of Local Land Use Decisions, and Brian Kane discusses Idaho's Open Meeting Statutes.

We welcome your attendance and membership. Please feel free to contact myself or other Section officers if you have questions, comments or suggestions for CLE topics.

About the Author

David E. Wynkoop is Chair of the Government & Public Sector Lawyers Section. He is a partner in Sherer & Wynkoop, LLP. His practice includes the representation of numerous governmental agencies. Mr. Wynkoop graduated from the University of Washington School of Law in 1979. He is a cellist in the Meridian Symphony Orchestra and performs music with several other groups.

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WHAT ETHICAL CODE GOVERNS A \$54 MILLION PAIR OF PANTS IN IDAHO?

Cheri Ruch
Idaho Industrial Commission

Idaho has professional codes of conduct governing the professional behavior of attorneys and judges. However, there is no comprehensive code of conduct pertaining specifically to the ethical challenges facing individuals who serve as hearing officers for administrative proceedings. Do we need one in Idaho?

Recall the case that caught the media's attention a few years ago when a judge sued a dry cleaning establishment in Washington, D.C., for \$54 million over a lost pair of pants. To many, the behavior of Roy L. Pearson, Jr., was an abuse of his position. Apparently, that behavior also spoke volumes about the conduct he displayed when presiding over the administrative hearings assigned to him. In 2007, the Commission on Selection and Tenure of Administrative Law Judges for Washington, D.C., voted against reappointing Judge Pearson, citing not only the lawsuit, but his work and temperament as a judge.¹

The case of Judge Pearson is extraordinary. Nevertheless, it bears some relevance to this discussion because administrative proceedings play an important role in Idaho's day-to-day governmental functions and in the lives of its citizens. Whenever a state agency administers a benefit or a property right, the parties interested in that benefit or right are entitled to due process before that right is impaired. Generally, that means that the individual whose right or benefit is at stake is entitled to notice and an opportunity for a hearing before a fair and impartial adjudicator. Individuals who provide such hearings on behalf of executive branch agencies — administrative judges or hearing officers — can wield as much power as judges do in the judiciary. Ask anyone who has had to defend an action instituted by the Occupational Licensing Board or sought relief from a tax levy from the Board of Tax Appeals if the adjudicator did not appear to have the same power in rendering a decision as a judge or magis-



Cheri Ruch

Because there is no formal administrative judiciary, there is no formal mechanism to police the conduct of hearing officers in the same manner that the Idaho Judicial Council supervises the conduct of judges on the bench.

trate. Parties, particularly lay members of the public, who appear in front of these administrative tribunals do not draw much distinction between them and appearances in a district court on a traffic citation.

Yet, Idaho does not have an organized administrative judiciary. Because there is no formal administrative judiciary, there is no formal mechanism to police the conduct of hearing officers in the same manner that the Idaho Judicial Council supervises the conduct of judges on the bench. Nor is there a means comparable to the manner in which the Idaho State Bar supervises the conduct of attorneys. Should a hearing officer in Idaho exhibit conduct similar to that of Judge Pearson, there are limited means of formally addressing the behavior. But more importantly, the lack of a relevant code of conduct for administrative hearing officers leaves them without an ethical roadmap to readily rely upon when facing an ethical question.

This is no small consideration; many Idaho Executive Branch agencies hold administrative hearings. If an agency can issue an order to resolve a contested matter, the agency must have a process for accomplishing that task. Rules promulgated under the Idaho Administrative Procedures Act (IDAPA) set out a process governing how hearings are held, the contents of the orders, and judicial review of those orders.²

Agencies vary in their approaches to selecting individuals to conduct administrative hearings. Some agencies have hearing officers on their staffs, while many more contract with private individuals to serve as hearing officers. Some hearing officers are attorneys and some are not. Yet anyone serving as a hearing officer in an administrative proceeding could be faced with an ethical dilemma.

Shortcomings of existing ethical frameworks

Generally, the rules that apply to the conduct of judges and parties in district court proceedings also apply to the administrative proceedings that state agencies conduct. There are rules guarding against *ex parte* contact with the judge or hearing officer. There are rules imposing a duty to disclose possible conflicts of interest and, in extreme cases, disqualification. These rules help ensure the fairness of the proceedings. Therefore, the ethical rules designed to ensure that the balance of fairness is maintained in a formal court proceeding are equally necessary in administrative proceedings, even though administrative proceedings are far less formal.

However, judges serving in the judicial branch and administrative hearing officers serving in the executive branch are not as similar as one might assume. There are some significant differences between the two kinds of adjudicators that would make the application of the Idaho Code of Judicial Conduct to administrative hearing officers an imperfect solution to this conundrum.

The description of a "hearing officer" in the Attorney General's rules offers some insight into the differences between the adjudicator in an administrative proceeding and the judge who derives power under Article V of the Idaho Constitution. IDAPA 4.11.01.410 provides:

A hearing officer is a person other than the agency head appointed to hear contested cases on behalf of the agency. Unless otherwise provided by statute or rule, hearing officers may be employees of the agency or independent contractors. Hearing officers may be (but need not be) attorneys. Hearing officers

who are not attorneys should ordinarily be persons with technical expertise or experience in issues before the agency. The appointment of a hearing officer is a public record available for inspection, examination and copying.

The Idaho Rules of Judicial Conduct assume that the adjudicator is a full-time member of that judiciary who is free to exercise complete independence in decision-making. Arguably, such a definition would not include a hearing officer employed by an agency of the executive branch.

Other IDAPA rules that address the ethical conduct of hearing officers acknowledge the unique characteristics of an administrative hearing officer. However, those rules are limited in scope. Specifically, the provisions in the Attorney General's rules are limited to the basis and procedure for disqualifying a hearing officer. A specific regulation provides that any party shall have a right to seek the disqualification of a hearing officer on the basis of bias, prejudice, or interest in the case. The rule goes on to describe the process for seeking that disqualification.³ Some agencies have adopted the Attorney General's rules for their own administrative proceedings; therefore, the ethical rules are limited to those noted above.⁴

Still, other agencies have their own rules. The rules promulgated by specific agencies for administering their contested proceedings may include other ethical considerations, but those provisions are just as lacking as they are in the Attorney General's rules; they are generally limited to provisions covering *ex parte* communications and admonitions that hearing officers conduct themselves in a professional manner.⁵ Therefore, in the case of a hearing officer faced with an ethical consideration other than disqualification or dealing with *ex parte* communication, the agency's administrative rules probably will be of little use. An individual called upon to adjudicate an administrative matter, regardless of his or her profession, will have to look to other resources for guidance on ethical issues.

Attorneys are expected to adhere to the Idaho Rules of Professional Conduct and the Standards for Civility in Professional Conduct in all of their professional affairs. Where applicable, those rules would apply to attorneys when serving as administrative hearing officers. However, those rules contemplate an attorney's role as an advocate for a client, not as an

An adjudicator, on the other hand, imposes a result based on the law and the evidence, not the parties' desires. Though the resources are many, no single resource or code of conduct addresses all of the ethical considerations an administrative hearing officer could face. Even taken together, the resources still leave gaps in the fabric.

independent adjudicator acting on behalf of an administrative agency. Certainly, an attorney has to be aware of the rules regarding conflicts of interest if a current or former client comes before that attorney acting as an administrative hearing officer. Nevertheless, the Idaho Rules of Professional Conduct do little to address other ethical concerns unique to the attorney's new role as an adjudicator of a contested proceeding. Further, those rules have no application to a professional other than an attorney hired by an agency to hear and issue decisions in contested proceedings. Rules governing a mediator's ethical responsibilities can be useful, but a mediator is tasked with facilitating the parties' entry into an agreement of their own making. An adjudicator, on the other hand, imposes a result based on the law and the evidence, not the parties' desires. Though the resources are many, no single resource or code of conduct addresses all of the ethical considerations an administrative hearing officer could face. Even taken together, the resources still leave gaps in the fabric.

Model code of judicial conduct for state administrative law judges

In 1995, the American Bar Association published a Model Code of Judicial Conduct for State Administrative Law Judges. Adopted in whole or in part by many states for their administrative judiciaries, the Model Code provides guidance for the most problematic ethical issues for hearing officers. The Code follows the canons of other codes of judicial conduct, but is tailored to address the unique characteristics of state agency adjudicators who often serve part-time, in addition to their other professional pursuits. The Code also covers the ethical friction inherent in

the role of an adjudicator working for an executive branch agency.

However, now over a decade old, the ABA's Model Code is in need of updating to reflect changes in our society. The Code offers no guidance for the ethical issues raised by social networking sites and blogging by its members. As in other aspects of our society, technology is advancing faster than our legal and ethical systems can adapt. Ideally, a code of conduct for administrative hearing officers would address these issues, taking into consideration the circumstances unique to that position.

Further, while drafting and adopting a code of conduct specific to the unique circumstances of administrative hearing officers is a step, it is only a step. As pointed out by Hon. Leonard R. Omielecki, Jr., Appeals Referee for the Pennsylvania Unemployment Compensation Board of Review, canons of professional responsibility:

are a code to live by, but if there is a shortcoming, it is that in Pennsylvania, there is no entity that an [Administrative Law Judge] could go to for binding advice. That is if you ask for direction concerning a particular situation and you follow the advice, you cannot be disciplined for following the advice. Such an entity or agency would be more helpful in following the rules of the road.⁶

Indeed, the State of Oregon's Office of Administrative Hearings specifically states that the canons of professional conduct it has adopted are aspirational only and have no binding authority.

Other states have taken a more proactive approach. The Office of Administra-

tive Hearings for the State of Washington has a procedure for handling complaints regarding improper conduct of an administrative law judge. The information about filing a complaint admonishes users that it is not a remedy for an adverse decision in the merits of the case. Genuine complaints regarding the behavior displayed by an administrative law judge or the conduct of a hearing officer are investigated by the chief administrative law judge who then issues a decision. Any discipline is handled internally.⁷

West Virginia has probably one of the most progressive models for addressing ethical issues in the administrative judiciary. The West Virginia State Ethics Commission drafted its ALJ Code of Conduct based in part on the ABA's Model Code. The ALJ Code is a codified part of West Virginia's statutes. The West Virginia State Ethics Commission is also responsible for enforcement. The Ethics Commission can issue advisory opinions for ALJs as well as investigate complaints.⁸

West Virginia's model is the exception rather than the rule. For states that have formal codes of conduct specifically for administrative hearing officers, the codes and methods for dealing with infractions lie somewhere between Oregon and Washington in the scale. Nevertheless, states that have adopted codes, even when there is no means of enforcement behind them, have done so because a need was recognized.

Conclusion

Attorneys and other professionals who serve as hearing officers in administrative proceedings perform a key function for the citizens of Idaho. The relaxed nature of the rules of evidence and procedural rules in comparison to the more formal rules of district courts does not mean that administrative hearing officers are faced

Some of the members of the Government and Public Sector Lawyers Section of the Idaho State Bar are pondering this issue and contemplating the need for a Code of Conduct that addresses the unique needs of administrative hearing officers. We invite anyone with an interest in this subject to join us in the discussion. We want to hear from you.

with fewer ethical concerns. Yet, to date, the available codes do not speak to the unique role of an administrative hearing officer.

Some of the members of the Government and Public Sector Lawyers Section of the Idaho State Bar are pondering this issue and contemplating the need for a Code of Conduct that addresses the unique needs of administrative hearing officers. We invite anyone with an interest in this subject to join us in the discussion. We want to hear from you. For more information on the meetings of our Section and how to become involved, feel free to contact the author by email at cruch@iic.idaho.gov

About the Author

Cheri Ruch became a referee for the Idaho Industrial Commission in 1997. There, she reviews appeals and prepares decisions in Unemployment Insurance cases. Ms. Ruch joined the Idaho Bar in 1999 and is an active member in the Government and Public Sector Lawyers Section. In addition, Ms. Ruch is an active

member of the National Association of Unemployment Appeals Boards (NAUIAB), serving terms as a member of the Board of Governors from 2001-2002 and 2004-2007. She was involved in the development of the NAUIAB Model Code of Judicial Conduct. Ms. Ruch earned her law degree from Vermont Law School in 1987 and an M.P.A. from Boise State University in 1998. The research, analysis, and opinions in this article are solely hers and are not attributable to the Idaho Industrial Commission or any other agency of the State of Idaho.

Endnotes

- ¹ Keith L. Alexander, *Judge Set to Lose Job*, *Sources Say*, The Washington Post, October 23, 2007.
- ² I.C. §§ 67-5242-5244, 5248, 5270.
- ³ Idaho Administrative Code r. 4.11.001.412 (2009).
- ⁴ *Id.* r. 4.11.001.02.
- ⁵ *Id.* r. 36.01.01, 58.01.23.
- ⁶ Hon. Leonard R. Omolecki, *Ethical Rules of the Road for Administrative Adjudicators*, The NAALJ News, February 2009, at 4.
- ⁷ Wash. Rev. Code §§ 34.05.202, 34.12.030.99-20-115 (2008); Wash. Admin. Code § 10-16-010 (2008).
- ⁸ 158 W. Va Code R. 13, 5 (2009).



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JUDICIAL REVIEW OF LOCAL LAND USE DECISIONS IN THE 21ST CENTURY

Jill S. Holinka

Moore Smith Buxton & Turcke, Chtd.

Introduction

Nearly four decades ago, Idaho adopted the Local Land Use Planning Act of 1975¹ (“LLUPA”). LLUPA grants broad planning and zoning authority to local governments and provides both mandatory and exclusive means for a city’s or county’s implementation of their planning and zoning authority. It also authorizes judicial review of certain governing boards’² decisions related to such planning and zoning authority.

Several recent decisions of the Idaho Supreme Court have significantly modified the long-standing test for what constitutes a decision subject to judicial review under LLUPA. This article examines the development of the rules of judicial review under LLUPA and discusses the 2010 legislative changes that are helpful, but not necessarily complete.



Jill S. Holinka

Early interpretations: The quasi-judicial v. legislative framework

Idaho Code § 65-6719(4) provides a right of judicial review to “[a]n applicant denied a permit[.]”³ Similarly, affected persons “aggrieved by a decision” may seek judicial review after all remedies have been exhausted.⁴ An affected person under LLUPA is “one having an interest in real property which may be adversely affected by the issuance or denial of a permit authorizing the development.”⁵ The original enabling legislation included the right of judicial review of planning and zoning decisions. This right has remained virtually unchanged since 1975.

With respect to decisions related to zoning, Idaho’s appellate courts have always adhered to the rule that promulgation or enactment of general zoning plans and ordinances is legislative action.⁶ However, in *Cooper v. Board of County Commissioners of Ada County*,⁷ the Idaho Supreme Court, for the first time, drew a

*The Court clarified the distinction between legislative activity and quasi-judicial activity as follows:
Legislative activity by a zoning entity is differentiated from quasi-judicial activity by the result—legislative activity produces a rule or policy which has application to an open class whereas quasi-judicial activity impacts specific individuals, interests or situations.*

distinction between “a zoning entity’s action in enacting general zoning legislation and its action in applying existing legislation and policy to specific, individual interests as in a proceeding on an application for rezone of particular property.”⁸ In drawing this distinction the court noted that such quasi-judicial decisions (including site-specific rezones) are subject to judicial review under the standards set forth within Idaho Code §§ 67-6519 and 67-6521.⁹

Three years after *Cooper*, the Idaho Supreme Court revisited the legislative versus quasi-judicial framework in *Burt v. City of Idaho Falls*.¹⁰ *Burt* involved a denial of a request for annexation, comprehensive plan amendment and initial zoning that was appealed under Idaho Code § 67-6521. Although the district court had originally dismissed the appeal on the grounds that no decision granting or denying a land use permit was involved,¹¹ the Idaho Supreme Court framed the issue on appeal as whether the district court “erred in characterizing as ‘legislative’ the activity of the City of Idaho Falls in the annexation, amendment of its comprehensive plan, and zoning of the annexed land.”¹² In holding that the annexation, comprehensive plan amendment, and initial zoning were legislative activities not subject to judicial review, the Court clarified the distinction between legislative activity and quasi-judicial activity as follows:

Legislative activity by a zoning entity is differentiated from quasi-judicial activity by the result—legislative activity produces a rule or policy which has application to an

open class whereas quasi-judicial activity impacts specific individuals, interests or situations.¹³

Following *Cooper* and *Burt*, the general state of the law has been that quasi-judicial zoning decisions are subject to judicial review under LLUPA, while legislative activities such as annexations, comprehensive plan amendments, and initial zoning are not subject to judicial review under LLUPA. However, the latter category of cases may be scrutinized by means of collateral actions such as declaratory judgment actions.¹⁴ This has been true even though LLUPA does not speak directly to zoning decisions as “permits authorizing development.”

Permits authorizing development: *Giltner Dairy* and beyond

Fast forward twenty-five years. In March 2008, the Idaho Supreme Court issued the first in a series of opinions moving away from the quasi-judicial versus legislative framework, focusing instead on the strict language of LLUPA. Most notably, the Court began to rely on the “permit authorizing development” language of Idaho Code § 67-6521, and similar language in Idaho Code § 67-6519,¹⁵ to deny judicial review in cases where judicial review would have been allowed under the quasi-judicial analysis. This change in analytical framework resulted in the odd situation that an application for annexation and initial zoning is not subject to judicial review (because no permit is involved), but an application for a conditional rezone with a corresponding development agreement is subject to

judicial review (because that application is the functional equivalent of a permit authorizing development).

Comprehensive plan map amendments and *Giltner Dairy*

In *Giltner Dairy, LLC v. Jerome County*,¹⁶ the Court unanimously affirmed the dismissal of Giltner Dairy's petition for judicial review of Jerome County's approval of an amendment to its comprehensive plan map. Giltner Dairy argued that it was entitled to judicial review under the Idaho Administrative Procedures Act ("IDAPA")¹⁷ and the judicial review provisions of LLUPA.¹⁸ The Court quickly dismissed Giltner Dairy's argument under the IDAPA, noting that a board of county commissioners is not an agency for purposes of the IDAPA.¹⁹ With respect to judicial review under Idaho Code § 67-6521, the Court determined that Giltner Dairy was not an affected person under the statute because the ordinance amending the comprehensive plan map does not authorize development.²⁰ Similarly, in rejecting Giltner Dairy's argument that it was entitled to judicial review under Idaho Code § 67-6519(4), the Court determined that the request to change the comprehensive plan map was not an application for a permit, thereby precluding Giltner Dairy's right to judicial review.

By all accounts, *Giltner Dairy* is an important case not so much for its outcome — which in this author's view would have been the same under the quasi-judicial versus legislative framework — but for its notable shift in statutory interpretation. Although the Court alluded to its prior opinions holding that comprehensive plans are legislative policy decisions of local governing boards, *Cooper* and its progeny are not cited in *Giltner Dairy*. Rather, the Court, for the first time, used the language of LLUPA to deny the right of judicial review.

Initial zoning: the *Highlands Development* decision

Shortly following its decision in *Giltner Dairy*, a divided Idaho Supreme Court issued its opinion in *Highlands Development Corp. v. City of Boise*.²¹ Much like it had done in *Burt*, the Court *sua sponte* dismissed an appeal seeking judicial review of the annexation and initial zoning of property.²² Relying on its recent decision in *Giltner Dairy*, the Court concluded that LLUPA grants the right of judicial review only to those "persons who have applied for a permit required or authorized under [the statute] and were denied the permit or aggrieved by the decision on the application for the permit."²³

Relying on its recent decision in Giltner Dairy, the Court concluded that LLUPA grants the right of judicial review only to those "persons who have applied for a permit required or authorized under [the statute] and were denied the permit or aggrieved by the decision on the application for the permit." Of the permits required or authorized by LLUPA, the Court reasoned, a permit relating to the initial zoning of land annexed by a city is not included.

In the Court's words, "[a]n application for a zoning change, like a request for an amendment to a comprehensive plan, is not an application for a 'permit,' and thus no review is authorized under the LLUPA.

Of the permits required or authorized by LLUPA, the Court reasoned, a permit relating to the initial zoning of land annexed by a city is not included.²⁴ Additionally, because Highlands' application did not involve the granting or denial of a permit authorizing development, judicial review was unavailable under Idaho Code § 67-6521.²⁵

Rezoning: *Burns Holdings*

A year after deciding *Highlands*, the Idaho Supreme Court was again faced with the question of whether a site-specific zoning decision (this time a straight rezoning) was subject to judicial review under LLUPA. In *Burns Holdings, LLC v. Madison County Board of County Commissioners*,²⁶ a divided Court²⁷ again held steadfast to its strict interpretation of the

LLUPA judicial review provisions, concluding that a rezoning was not subject to judicial review under either Idaho Code § 67-6519 or § 67-6521. In the Court's words, "[a]n application for a zoning change, like a request for an amendment to a comprehensive plan, is not an application for a 'permit,' and thus no review is authorized under the LLUPA."²⁸

Taylor: the "functional equivalent test"

Further confusing the landscape of the standard to be applied in reviewing decisions regarding zoning of specific parcels of property is the Idaho Supreme Court's decision in *Taylor v. Canyon County*.²⁹ In *Taylor*, a different 3-2 majority³⁰ found that a decision regarding a rezoning with a conditional zoning development agreement pursuant to Idaho Code § 67-6511A was subject to judicial review because the development agreement was found to be a "permit authorizing development" under Idaho Code § 67-6521.³¹ Although the Court noted that a conditional use permit and a conditional rezoning are generally not functional equivalents, for the purposes of its decision, it held that the conditional rezoning coupled with a development agreement was functionally equivalent to a conditional use permit.³² The Court explained its decision as follows:

Because the end result of the Board's approval of the conditional rezoning and corresponding Development Agreement is to authorize the development without further approval from the Board, the Board's approval of the conditional rezoning and corresponding Development Agreement is the functional equivalent

lent of an approval of a conditional use permit, which as set forth below is a “permit authorizing development.”³³

Such functional equivalency was sufficient to allow the Court to review the Board’s decision.

Other post-*Giltner Dairy* decisions utilized this same strict construction approach to deny judicial review to annexations and initial zoning,³⁴ denials of requests for annexation,³⁵ requests for comprehensive plan amendments,³⁶ and requests for rezones.³⁷ Of these, the decisions denying judicial review to initial zoning upon annexation and of rezones raise concern because they would effectively require applicants and affected persons to resort to the more lengthy and costly declaratory judgment procedure to challenge decisions related to site-specific zoning applications. From the perspective of local governing boards, this would mean that approval or denial of a site-specific zoning decision could be subject to challenge months or years after the decision, in contrast to the short, 28-day time limit for filing a petition for judicial review.

The 2010 legislative fix

In response to the confusion created by *Highlands*, *Burns Holdings* and *Taylor*, Representative Jim Clark, working with various stakeholder groups, introduced legislation in the 2010 legislative session, clarifying that judicial review is available to the types of zoning decisions at issue in *Highlands*, *Burns Holdings* and *Taylor*. The Statement of Purpose for the bill, H605, states in part,

This bill remedies the confusion arising from [Highlands, Burns Holdings and Taylor] by expressly providing that all final decisions [on] applications for the establishment of one or more zoning districts upon annexation, changes in the zoning of specific parcels or sites, and conditional rezoning would be subject to judicial review by the District Court, where the standard of review set forth in Idaho Code § 67-5279 would apply in exactly the same manner as with subdivisions, variances, special use permits, or other similar applications required or authorized under LLUPA.³⁸

As amended, Idaho Code § 67-6521(1)(a) defines an “affected person” as one having a “bona fide interest in real property which may be adversely affected by” either (i) the “approval or failure to act upon an application for a subdivision, variance, special use permit and such

Although a local governing board could (as Blaine County did in Rollins) adopt a zoning district that requires a certain type of permit prior to development, does that permit necessarily become a “permit required or authorized” under LLUPA? If so, is it then subject to judicial review?

other similar applications required or authorized pursuant to this chapter”; (ii) initial zoning upon annexation or the approval or denial of a rezone pursuant to Idaho Code § 67-6511; or (iii) approval or denial of conditional rezoning pursuant to Idaho Code § 67-6511A.³⁹ Under Idaho Code § 67-6519(4), as amended, an applicant denied an application or aggrieved by a final decision concerning any of the matters identified in Idaho Code § 67-6521(1)(a) has the right to judicial review.⁴⁰ The bill further clarifies Idaho Code §§ 67-6519 and -6521 by removing all references to the word “permit” and replacing it with “application.” Receiving widespread support in both the House and Senate, H605 passed and was signed by Governor Butch Otter.

Remaining questions

Although the amendments to the judicial review provisions of LLUPA are welcome news to local governing boards and would-be applicants alike, some questions remain. For example, What, exactly, is subject to judicial review? As amended, Idaho Code §§ 67-6519 and -6521 now authorize judicial review for applicants denied a decision or aggrieved by a final decision, and to affected persons, relating to “applications for zoning changes, subdivisions, variances, special use permits and such other similar applications required or authorized pursuant to this chapter.” The follow-up question thus becomes what is a “similar application required or authorized pursuant to this chapter.”

In *Highlands* and *Taylor*, the Idaho Supreme Court noted that building permits are one type of permit “required or authorized” by LLUPA.⁴¹ As noted by Justice Jim Jones in his *Highlands* dissent, however, Idaho Code § 67-6517 only deals with permits “for development on any lands designated upon the future acquisitions map.”⁴² It does not deal “with the great number of building permits based

upon existing land use ordinances.”⁴³ The implication from Justice Jones’ statements is that all building permit applications, to the extent they allow a specific development to proceed or prevent it from doing so, constitute the type of “similar application” that would be subject to judicial review under LLUPA’s amended provisions.

Another “similar application” could also include a site alteration permit, as discussed by the Court in *Rollins v. Blaine County*.⁴⁴ There, the Court dismissed the petition for judicial review on the grounds that Rollins had not exhausted his administrative remedies prior to filing his petition for judicial review. At issue was a determination of whether Rollins’ property was within the county’s Mountain Overlay District (“MOD”) and construction of a home on the property. In dismissing the appeal, the Court noted that the county had not issued or denied a permit; rather, it had simply decided that the property was in fact in the MOD and that a site alteration permit is required before any further site alteration could take place.⁴⁵ Because the Court did not engage in any discussion about whether a site alteration permit would or would not be subject to judicial review under LLUPA, it is difficult to determine precisely how the Court would ultimately rule on the issue; site alteration permits are not mentioned anywhere in LLUPA. Thus, although a local governing board could (as Blaine County did in *Rollins*) adopt a zoning district that requires a certain type of permit prior to development, does that permit necessarily become a “permit required or authorized” under LLUPA? If so, is it then subject to judicial review?

The question of whether building permits, site alteration permits, or other such construction-related permits are subject to judicial review has not recently been addressed by Idaho’s appellate courts. Obviously, such permits are required

and enforced by local ordinance. Many subdivision ordinances and zoning ordinances include as a condition of approval of the application, a requirement to obtain a building permit or a site alteration permit prior to construction. However, these types of permits are generally applied via the local building code ordinance. Other than the reference to building permits in Idaho Code § 67-6517, LLUPA does not require or authorize building permits, site alteration permits, or other types of construction-related permits.

Conclusion

The 2010 LLUPA amendments help resolve the confusion caused by the *Highlands*, *Burns Holdings* and *Taylor* decisions. When the amendments go into effect on July 1, 2010, local governing boards and would-be applicants alike will have some degree of predictability and comfort in knowing that quasi-judicial decisions like rezones, initial zoning and conditional rezoning will be subject to judicial review. It remains to be seen where the new focus of litigation and interpretation of LLUPA will take us over the next 25 years.

About the Author

Jill Holinka is a senior associate at Moore Smith Buxton & Turcke, Chtd. in Boise, focusing primarily on municipal law, civil litigation and land use law. Ms. Holinka serves as general counsel to various governmental entities, as well as representing private individuals and corporate entities in civil litigation in the areas of land use and real property law. Ms. Holinka is a member of the Idaho State Bar (Government & Public Sector; Real Property Sections). She received a B.A. in Political Science, cum laude, from Pacific University in 1996 and graduated from Willamette University College of Law in 2002.

Endnotes

¹ LLUPA is codified at Idaho Code §§ 67-6501 to

67-6538.

² "Governing board" is defined in Idaho Code § 67-6504 as a city council or board of county commissioners.

³ This same language is used in Idaho Code § 67-6520 to apply to decisions of hearing examiners.

⁴ I.C. § 67-6521(d).

⁵ I.C. § 67-6521(1)(a).

⁶ See *Dawson Enter., Inc. v. Blaine County*, 98 Idaho 506, 567 P.2d 1257 (1977); *Harrell v. City of Lewiston*, 95 Idaho 243, 506 P.2d 470 (1973); *Cole-Collister Fire Prot. Dist. v. City of Boise*, 93 Idaho 558, 468 P.2d 290 (1970); *Idaho Falls v. Grimmett*, 63 Idaho 90, 117 P.2d 461 (1941).

⁷ 101 Idaho 407, 614 P.2d 947 (1980).

⁸ *Cooper*, 101 Idaho at 409, 614 P.2d at 949.

⁹ The Court's statement as to the applicability of the judicial review provisions of LLUPA appeared in a footnote; the Court did not otherwise address the applicability of LLUPA. This is notable because, when the case arose (*i.e.* the time of the original application for rezone), LLUPA had not yet been adopted. Thus, although the Court appears to have required the district court on remand to apply LLUPA standards, the case was not decided under LLUPA.

¹⁰ 105 Idaho 65, 665 P.2d 1075 (1983).

¹¹ Upon Burt's motion to vacate the original order, the district court ultimately entered an order and decision finding that the action complained of was "legislative" and was not "quasi-judicial" in nature. *Burt*, 105 Idaho at 66, 665 P.2d at 1076.

¹² *Id.*

¹³ *Id.* at 67, 665 P.2d at 1077.

¹⁴ *Cooper*, 105 Idaho at 66, n.2, 665 P.2d at 1076, n.2.

¹⁵ Idaho Code § 67-6519(4) provides in part, "An applicant denied a permit or aggrieved by a decision may within twenty-eight (28) days after all remedies have been exhausted under local ordinance seek judicial review under the procedures provided by chapter 52, title 67, Idaho Code." (emphasis added).

¹⁶ 145 Idaho 630, 181 P.3d 1238 (2008) (abrogated on other grounds by *Neighbors for Resp. Growth v. Kootenai County*, 147 Idaho 173, 207 P.3d 149 (2009)).

¹⁷ I.C. §§ 67-5201.

¹⁸ I.C. § 67-6519(4), § 67-6521.

¹⁹ 145 Idaho at 632, 181 P.3d at 1240.

²⁰ *Id.*, 145 Idaho at 632-33, 181 P.3d at 1240-1241.

²¹ 145 Idaho 958, 188 P.3d 900 (2008).

²² However, the analysis utilized by the Court in reaching the decisions in *Burt* and *Highlands Development* is different: *Burt* utilized the legislative versus quasi-judicial framework to deny the right to judicial review; *Highlands Development*, in contrast, utilized the strict language of LLUPA.

²³ *Highlands Development*, 188 P.3d at 903.

²⁴ 188 P.3d at 903.

²⁵ *Id.*

²⁶ 147 Idaho 660, 214 P.3d 646 (2009).

²⁷ The *Burns Holdings* majority consisted of Chief Justice Eismann and Justices Horton and W. Jones. The dissent was written by Justice J. Jones, with Justice Burdick concurring. The *Highlands Development* decision also saw this same split, the only difference being that Chief Justice Eismann drafted the opinion in *Highlands*, while Justice Horton drafted the majority opinion in *Burns Holdings*.

²⁸ *Burns Holdings*, 214 P.3d at 650.

²⁹ 147 Idaho 424, 210 P.3d 532 (2009).

³⁰ Justice Burdick, writing for the majority, was joined by Justices J. Jones and W. Jones. Justice Horton wrote for the dissent with Justice Trout, pro tem, joining.

³¹ 147 Idaho at 435, 210 P.3d at 543.

³² 147 Idaho at 434, 210 P.3d at 542.

³³ *Id.*

³⁴ *Highlands Development*, 145 Idaho 958, 188 P.3d 900. As the Court noted in *Highlands Development*, at the time the petition for judicial review was filed, there was no statute granting the right to obtain judicial review of the annexation and initial zoning of property. 145 Idaho at 961, 188 P.3d at 903. The legislature has since enacted Idaho Code § 50-222 which permits judicial review of the decision of a city council to annex and zone lands under certain circumstances.

³⁵ *Black Labrador Investing, LLC v. Kuna City Council*, 147 Idaho 92, 205 P.3d 1229 (2009).

³⁶ *Neighbors for Responsible Growth v. Kootenai County*, 147 Idaho 173, 207 P.3d 149 (2009).

³⁷ *Burns Holdings*, 147 Idaho 660, 214 P.3d 646.

³⁸ H605, Statement of Purpose, 60th Legislature, Second Regular Session (Idaho 2010). The bill also amends other sections of LLUPA not pertinent to the discussion herein. Those amendments include (1) a statement that attorneys are within the class of persons who may act as a hearing examiner; and (2) a clarification that all final decisions on land use applications must be accompanied by a notice of the applicant's right to request a regulatory takings analysis under section 67-8002, Idaho Code.

³⁹ H605, Section 3.

⁴⁰ H605, Section 1.

⁴¹ I.C. § 67-6517. See *Highlands Development*, 145 Idaho at 961, 188 P.3d at 903 and *Taylor*, 147 Idaho at 435, 210 P.3d at 543, respectively.

⁴² *Highlands Development*, 145 Idaho at 963-64, 188 P.3d at 906-907 (J. Jones, J. dissenting).

⁴³ *Id.*

⁴⁴ 147 Idaho 729, 215 P.3d 452 (2009).

⁴⁵ *Id.*

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A Simple Premise, A Simple Process: A Practical Approach to Idaho's Open Meeting Law

Brian Kane
Office of the Attorney General

Idaho's Open Meeting Law dates to 1961.¹ It was born out of the efforts of the Freedom of Information Committee, a collection of newspaper editors seeking more open government. Interesting, this earliest version did not include any provision for penalties: the focus of the law was on compliance, not how it would be enforced. The primary purpose of the law, the conduct of the people's business in the open, remains as valid today as it did almost 50 years ago.

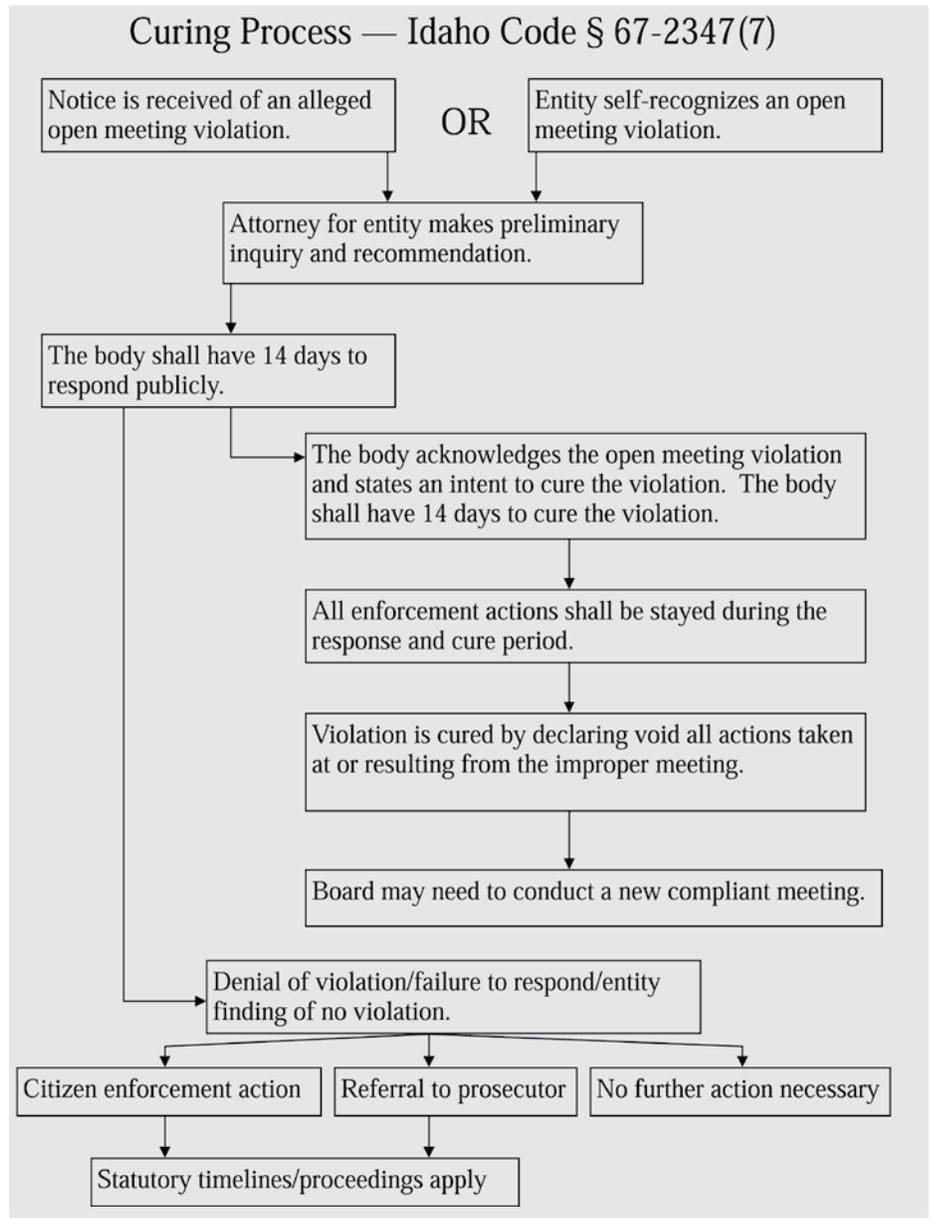
Approximately a year ago, the Idaho Legislature enacted Senate Bill 1142, which contained a series of amendments to Idaho's Open Meeting Law, all of which were designed to ensure ongoing compliance with the law. Senate Bill 1142 addressed a number of recurring questions with regard to Idaho's Open Meeting Law. Three areas of the law seem to represent the majority of the issues that arise when advising an entity on compliance with the law. This article will highlight the updates contained within Senate Bill 1142, as well as provide some guidance with respect to advising clients within these situations and address the emerging dilemma of technology and the Open Meetings Law.



Brian Kane

Provide clear notice and agendas

Agendas are required to be posted with the notice of a meeting.² The agenda is posted to provide the public with notice of what will be discussed within the meeting. Prior to the 2009 amendments, the law permitted changes to the agenda up to and including the hour of the meeting. Based upon the posting requirement and the purpose of posting the agenda, a vigorous debate developed over the precise meaning of the phrase "up to and including the hour of the meeting." Some argued that an agenda once posted could be changed. Others claimed that it could be changed if done in good faith. The dilemma created by the prior statute was that inability to amend an agenda during a meeting creates a scenario in which governmental entities are not given the latitude in which to



govern. For example, some entities meet only once or twice a year, and to preclude them from discussing a necessary item until their next meeting might create more problems than it would solve. Similarly, recognizing the geography and weather of Idaho, an agenda item may need to be moved to a later point in the meeting to accommodate a late arrival. The need for agencies to have discretion and flexibility within their agendas appears to outweigh the risk that agenda amendments will be used to permit them to evade the process. Generally, the consensus was that an agenda could be amended during a meeting provided it was done so in good faith,

and not to "sandbag" or otherwise avoid public oversight of controversial topics.

The 2009 amendments brought much needed clarity to this section, eliminating the nebulous phrasing, and providing a clear process by which agendas could be amended within certain circumstances. Agendas must still be posted with the notice of the meeting, but now the agenda may be amended in one of three ways:

1. An agenda may be amended by notice if posted more than 24 hours prior to the meeting.³
2. Less than 24 hours prior to the start of the meeting but prior to the start of the meeting, the agenda may be

amended by posting the change and confirming the change with a vote at the start of the meeting.⁴

3. During the meeting, the agenda may be amended by a motion and vote of the body and must include a good faith reason why it was not included in the original agenda posting.⁵

One of the primary criticisms of S. 1142 was that it would permit agendas to be amended during a meeting. This criticism was raised because there is an ongoing perception that entities are attempting to manipulate agendas to prevent the public from observing their government address controversial issues. Attorneys should recognize that within this criticism is a public interest concern, which will require a careful balancing as they provide advice to their clients.

Practice tips on notice and agendas:

1. Make sure clients understand the timeline for posting notice and agendas and the implications of a failure to do so.
2. Ensure clients understand the process for amending an Agenda.
3. Remember: Amendment of agendas should be the exception as opposed to the rule.

Provide informed advice on executive sessions

The Open Meeting Law sections governing executive sessions raise a significant number of questions. Public interest and criticism regarding these provisions are most likely heightened because they permit government to discuss specific issues outside the public eye. In order to provide a glimpse of what transpires within executive sessions, the law now requires that a roll call vote be taken prior to entering an executive session.⁶ The entity must also identify the specific statutory subsection authorizing the executive session, as well as the topic and purpose of the executive session.⁷

The purposes for entering an executive session were also narrowed because concerns were raised that governmental entities were using the exceptions as an umbrella to allow an executive session to meander into tangentially related, but not specifically exempt topics. For example, the exception to discuss hiring was amended to specifically eliminate the ability to discuss general staffing or budget needs.⁸ Similarly, the exception for litigation was narrowed to specifically address pending or imminent litigation and to provide for direct communication with legal counsel within the executive session.⁹

There is an ongoing perception that entities are attempting to manipulate agendas to prevent the public from observing their government address controversial issues. Attorneys should recognize that within this criticism is a public interest concern, which will require a careful balancing as they provide advice to their clients.

In an effort to prevent unnecessary use of executive sessions, the legislature included a provision directing that the exceptions for executive sessions be construed narrowly.¹⁰ This provision also prohibits the entity from changing the topic while in an executive session to one that is not provided for by the motion to enter executive session.¹¹ This change will hopefully assist entities stay on topic within the executive session.

These changes tend to provide more notice and accountability to the public in executive session circumstances. This will serve to mitigate against one of the constant criticisms of the executive session provisions, which is that the public does not understand the need for executive session when entities simply list all of the exceptions for an executive session. Notably, identification of the specific statutory provision, topic and purpose will assist the public in recognizing the validity of the session, while allowing the entity to preserve necessary confidentiality. For example, when entering an executive session to discuss pending litigation, it is likely appropriate to identify the case which the body will be discussing in the executive session. This provides the public with an identifiable reason for the session, and instills confidence within the intent and purpose of the executive session.

Practice tips on executive sessions:

1. Remember, the Open Meetings Law never requires that an executive session take place.
2. Carefully evaluate the necessity of an executive session and make an appropriate recommendation to your client. Just because an exception exists, it does not mean it must be used.
3. Ensure that the agenda and minutes reflect the specific statutory authority, topic, purpose and roll call vote.

4. Recommend that as much information as possible regarding the executive session without compromising its purpose be placed in the minutes. Case names in pending litigation are likely appropriate.
5. Discuss the purpose and necessity of executive sessions with your client—there is no point in having an executive session if a member blabs its content all over town and may subject the entity to significant liability exposure.
6. Be wary of frequent executive session use.
7. Advise that meetings be “observer-friendly.” Place executive sessions at the beginning or end of a meeting so that the public is not forced to “wait around.”
8. Ensure that the entity comes out of the executive session, and returns to an open session on the record, reflected in the minutes, prior to conducting any business or adjournment.

If a mistake occurs, fix it

The Open Meeting Law contains enforcement provisions, although the law has been amended to ensure that only “bad actors” will be penalized. If an entity is attempting to comply with the law and receiving and following good advice from counsel, there should be few worries about being assessed an Open Meeting Law penalty. The primary enforcement mechanism of the law has changed to create three circumstances in which a fine may be levied:

1. Any member who participates in a meeting violating the provisions is subject to a \$50.00 fine. (Strict Liability).¹²
2. A knowing violation now carries a \$500 fine.¹³
3. A repeated violation, which occurs within 12 months of a prior viola-

tion may be subject to a \$500.00 fine.¹⁴

The amendments also include a statutory process by which entities can cure violations of the law.¹⁵ In other words, the statute recognizes that the goal is compliance, and in order to achieve compliance, entities must have the ability to correct their mistakes. Under the cure provision, an entity can correct an open meeting violation upon self-recognition of a complaint, or upon receipt of an open meeting complaint.¹⁶

Under the cure provision:

1. An agency may self-recognize or receive a complaint of a violation;
2. Within 14 days of the complaint or recognition, declare the meeting and all actions taken void;¹⁷
3. Cure the violation by holding a meeting in accordance with the law to address any of the voided actions;
4. Enforcement actions are stayed during the cure period;¹⁸
5. A cure acts as a bar to the imposition of the civil fines in Idaho Code § 67-2347(2) and a self-recognized cure will act as a bar to the fine in Idaho Code § 67-2347(4).¹⁹

These provisions give governmental entities the ability to cure violations on their own, as well as respond appropriately to citizen complaints. They do not affect the other remedies under the act such as private actions to have an action declared void, although there was an amendment made in Idaho Code § 67-2347(6) to clarify that the statute of limitations begins to run at the meeting in which the decision or act being challenged is made. When confronted with an alleged violation of the Open Meeting Law, entities now have all the tools necessary to assess their actions, and correct them.

Practice tips on enforcement

1. Treat Alleged Open Meetings Violations Seriously.
2. Upon receipt of a complaint, conduct a quick review to determine if a violation occurred. If a violation occurred, recommend curing it. If no violation occurred, be prepared to explain why—a written analysis may be helpful.
3. If a cure is needed, be prepared to conduct open meeting training and insure that your clients know and understand the requirements of the Open Meeting Law.
4. Understand the statutes of limitation: lawsuits to have an action or decision declared null and void on grounds of lack of compliance must be commenced within thirty

Anyone who has attended a meeting has likely observed members of the governing body texting, instant messaging, scrolling through e-mails, and similar activities. Aside from being impolite to those presenting to the body, and taking the board member's attention away from the business of the meeting, a greater threat is posed by the exchange of information that is beyond the observation of the public.

days of the meeting during which the decision was made or action taken.

Be wary of in-meeting cell phone, blackberry, and e-mail use

Probably the greatest threat to open meetings within Idaho is the proliferation of cell phones, Blackberries, iPhones, and laptop use. Anyone who has attended a meeting has likely observed members of the governing body texting, instant messaging, scrolling through e-mails, and similar activities. Aside from being impolite to those presenting to the body, and taking the board member's attention away from the business of the meeting, a greater threat is posed by the exchange of information that is beyond the observation of the public. In essence the ability to undermine the very purpose of the Open Meetings Law has been placed directly into the hands of virtually everyone. Attorneys should carefully counsel clients with regard to the use of these devices and media during open meetings.

Practice tips on electronic devices and media

1. Recommend that Board members not text, e-mail, or otherwise communicate during meetings: whether among themselves, with audience members, or anyone else.
2. Consider recommending that the Board adopt policies directing that these devices not be used during meetings.

Conclusion

Idaho's Open Meetings Law insures that the public has the opportunity to observe its government. By providing clients with informed practical advice, attorneys can insure that both the letter and the spirit of Idaho's Open Meetings Law are met.

Practice point open meetings law

1. When in doubt, have an open meeting!

About the Author

Brian Kane is the Assistant Chief Deputy Attorney General in the Idaho Office of Attorney General. As an attorney, he has attended numerous meetings. The views and opinions expressed within this article are solely the author's and should not be considered an opinion of the Attorney General.

Endnotes

¹ The full text of former Idaho Code section 59-1024 read as follows:

That all meetings, regular and special, of boards, commissions and authorities created by or operating as agencies of any county, city or village not now declared to be open to the public are hereby declared to be public meetings open to the public at all times; provided, however, that nothing contained in this act shall be construed to prevent any such board, commission or authority from holding executive sessions from which the public is excluded, but no ordinances, resolutions, rules or regulations shall be finally adopted at such executive session.

Act of Mar. 13, 1961, § 1, at 482. *repealed by* Act of Apr. 12, 1974, ch. 187, § 9, 1974 Idaho Sess. Laws 1495.

² Idaho Code § 67-2343.

³ Idaho Code § 67-2343(4)(a).

⁴ Idaho Code § 67-2343(4)(b).

⁵ Idaho Code § 67-2343(4)(c).

⁶ Idaho Code § 67-2345(1).

⁷ Idaho Code § 67-2345(1) & § 67-2344(2).

⁸ Idaho Code § 67-2345(1)(a).

⁹ Idaho Code § 67-2345(1)(f).

¹⁰ Idaho Code § 67-2345(3).

¹¹ *Id.*

¹² Idaho Code § 67-2347(2).

¹³ Idaho Code § 67-2347(3).

¹⁴ Idaho Code § 67-2347(4).

¹⁵ Idaho Code § 67-2347(7).

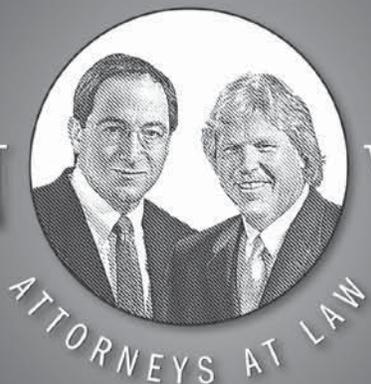
¹⁶ Idaho Code § 67-2347(7)(a)(i-ii).

¹⁷ Idaho Code § 67-2347(7)(a)(ii) & (b).

¹⁸ Idaho Code § 67-2347(7)(c).

¹⁹ Idaho Code § 67-2347(7)(d).

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COURT INFORMATION

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

Regular Fall Terms for 2010

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

By Order of the Court
Stephen W. Kenyon, Clerk

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

OFFICIAL NOTICE COURT OF APPEALS OF IDAHO

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

Regular Fall Terms for 2010

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

By Order of the Court
Stephen W. Kenyon, Clerk

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

Idaho Court of Appeals Oral Argument for June 2010

Thursday, June 10, 2010 – BOISE

9:00 a.m. Baxter v. State #36299
10:30 a.m. Gable v. State #36233
1:30 p.m. Burton v. Dept. of Transportation #36540

Thursday, June 17, 2010 – BOISE

1:30 p.m. State v. James #36210

Tuesday, June 22, 2010 – BOISE

9:00 a.m. State v. Schultz #36445
10:30 a.m. State v. Sukraw #36373
1:30 p.m. Tiegs v. Robertson #35921

Idaho Supreme Court Oral Argument for June 2010

Wednesday, June 2, 2010 - BOISE

8:50 a.m. Gracie, LLC v. State Tax Commission #36111
10:00 a.m. St. Luke's v. Gooding County Commissioners
..... #36467
11:10 a.m. Adams County v. Lattin #35768

Friday, June 4, 2010 - BOISE

8:50 a.m. Parkwest Homes LLC v. Barnson #36246
10:00 a.m. Farm Bureau Insurance Co. v. Brookbank #36607
11:10 a.m. Smith v. Washington County #35851

Monday, June 7, 2010 - BOISE

8:50 a.m. Fields v. State #35679/36704
10:00 a.m. KGF Development, LLC v. City of Ketchum #36162
11:10 a.m. State v. Stewart #36116

Wednesday, June 9, 2010 - BOISE

10:00 a.m. State v. Yeoman #35689
11:10 a.m. Wasden v. Board of Land Commissioners #37528

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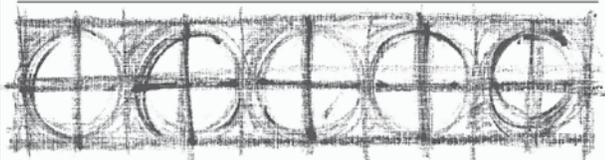
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HIGHLIGHTS OF THE 2010 RULE AMENDMENTS

Catherine Derden
Staff Attorney and Reporter
Idaho Supreme Court
Rules Advisory Committees

Supreme court rules advisory committees

The following is a list of rule amendments that have gone into effect since January 1, 2010, or that will go into effect on July 1, 2010. The orders amending these rules can be found on the Internet on the Idaho Judiciary's home page at <http://www.isc.idaho.gov/rulesamd.htm>.



Catherine Derden

Idaho appellate rules

Chief Justice Daniel Eismann chairs the Appellate Rules Advisory Committee. The following amendments to the Appellate Rules were effective on February 1, 2010.

Rule 12.1. Permissive appeal in custody cases. This rule has been amended to state that, in the event a notice of appeal to the district court is filed prior to the motion for permissive appeal, the magistrate shall retain jurisdiction to rule on the motion and, in the event the motion is granted by the Supreme Court, the appeal to the district court shall be dismissed.

Rule 17. Notice of appeal. A line has been added to this form to indicate if the appeal is an expedited appeal pursuant to Rule 12.2 so that the district clerk and the Supreme Court can take appropriate action.

Rule 23. Filing fees and clerk's certificate of appeal. The fee schedule has been amended to delete the appellate filing fee for an appeal from the review of a violent sexual predator designation.

Rule 28. Preparation of clerk's or agency's record. Language has been deleted that previously allowed the parties

To address the continuing confusion over what constitutes a final appealable judgment, the definition of a judgment contained in this rule has been amended. A judgment is defined as a separate document entitled "judgment" or "decree". All references to an "order" have been eliminated.

— Rule 54(a). Judgments-Definition-Form

to request that certain documents be filed as an exhibit on appeal rather than as part of the clerk's record.

Rule 30. Augmentations or deletions from transcript and record. This rule was amended to address documents with no filing stamp by allowing the moving party to establish by citation to the record or transcript that the document was presented to the district court.

Rules 42 and 118. Petitions for rehearing and petitions for review. Both rules have been amended to clarify that the time for filing a petition for rehearing or review after an opinion has been modified is only referring to a substantive modification and not opinions that are modified to correct clerical errors.

Rule 49. Appellate settlement conferences. It is now the responsibility of the parties to file a request for such a conference and to select a conference judge from a list of settlement justices and judges maintained by the Administrative Director of the Courts. If the request is granted, an order will be entered suspending the case for 49 days while the parties attempt a settlement but at the end of that time the appeal process shall resume. The parties are responsible for payment of costs and for scheduling the settlement conference at a time convenient to all.

The following amendments to the Appellate Rules are effective July 1, 2010.

To address the continuing confusion over what constitutes a final appealable judgment, the Supreme Court has amended I.R.C.P. 54(a) on the definition of a judgment. This amendment required that a number of appellate rules also be amended to incorporate that definition.

Rule 11. Appealable judgments and orders. This rule on appeals as a matter of right was amended in civil actions to provide appeals may be taken from final judgments as defined in I.R.C.P. 54(a).

Rule 11.1. Appealable judgments from the magistrate court. The amendment deletes references to the word "order" and states that an appeal as a matter of right may be taken to the Supreme Court from any "final judgment, as defined in Rule 54(a) of the Idaho Rules of Civil Procedure, granting or denying a petition for termination of parental rights or granting or denying a petition for adoption." Final judgments in accord with the definition of a judgment set out in I.R.C.P. 54(a) will need to be entered in these cases to start the time for an appeal.

Rule 12. Appeal by permission. The amendments to this rule delete the word "decree" and substitute the word "judgment".

Rule 12.1 and 12.2. Permissive appeal in custody cases, and expedited review for appeals in custody cases brought pursuant to Rule 11.1 or Rule 12.1. The amendments incorporate references to

judgments as defined in I.R.C.P. 54(a).

Rules 13 and 14. Stay of proceedings upon appeal or certification, and time for filing appeals. The amendments to these rules delete references to “decrees”.

Rules 15, 17 and 18. Cross-appeal after an appeal, notice of appeal and notice of cross-appeal. The amendments to these rules delete references to “decrees”.

Rule 31. Exhibits, recordings and documents. This rule requires the court clerk to make copies of all documents, charts and pictures offered or admitted as exhibits that are requested in the notice of appeal and send them to the Supreme Court. In some cases the parties have already provided these exhibits to the district court on a CD. The amendment allows the district court clerk to provide these copies to the court on a CD so long as the exhibits are in pdf format that includes an index. This is also an option for the copies sent to the Office of the Attorney General and appellate counsel for the defendant in criminal cases.

Reminder

As of July 1, 2009, all appeals from an order granting or denying a termination of parental rights or an adoption are to be filed to the Supreme Court, and the notice of appeal must be filed within **14 days** of the order. Appealing to the district court is no longer an option. These appeals are expedited. Please see I.A.R. 11.1, I.A.R. 12.2 and I.R.C.P. 83(a).

Idaho child support guidelines

Judge Deborah Heise chairs the Child Support Guidelines Advisory Committee. The following amendments to the Guidelines are effective on July 1, 2010.

Section 8. Adjustments to the basic child support. A new subsection (e) is added to Section 8, and is entitled “Disability dependency benefits or retirement dependency benefits” and provides those benefits paid by an obligor to a child support recipient should be considered in determining a child support award and the child support payment should be reduced by any dependency benefits paid to the support recipient. The obligated parent is not entitled to any reimbursement of any dependency benefits that exceed the child support amount. Finally, any payments received based on the disability of a child cannot be credited against a support obligation.

Section 11. Disability and retirement benefits paid to a child. This section of



the Guidelines was deleted based on concerns that the section penalized a conscientious obligor with a pending disability claim. Further, there was a concern that the allocation of child support credits is a policy issue that is outside the scope of the Guidelines. The last sentence of Section 11, which states that payments received as a result of the child’s disability are not income as to either parent, has been moved to Section 6, which defines income.

Section 6. Guidelines income determination. This section was amended to delete the reference to Section 11 since the section has been eliminated.

Idaho civil rules of procedure

The Civil Rules of Procedure Advisory Committee is chaired by Justice Warren Jones. The following amendments are effective on July 1, 2010.

Rule 54(a). Judgments-Definition-Form. To address the continuing confusion over what constitutes a final appealable judgment, the definition of a judgment contained in this rule has been amended. A judgment is defined as a separate document entitled “judgment” or “decree”. All references to an “order” have been eliminated. The new rule provides that a judgment shall state the relief to which a party is entitled on one or more claims for relief in the same action and that such relief can include dismissal with or without prejudice. The rule already stated that a judgment shall not contain a recital of pleadings, the report of a master, or the record of proceedings and the amendment adds that it also shall not contain the court’s legal reasoning,

findings of fact, or conclusions of law. It also provides that a judgment is final if either it is certified as final pursuant to (b)(1) of the rule or judgment has been entered on all claims for relief, except costs and fees, asserted by or against all parties to the action.

Rule 58(a). Entry of judgment. The statement in this rule that every judgment shall be set forth on a separate document has been amended to add “as required in rule 54(a)” and to include a reference to amended judgments.

Rule 83(a). Appeals from decisions of magistrates. The rule provides that an appeal may be taken to the Supreme Court from the judgment of a magistrate who has been assigned to what would otherwise be a district judge matter. The amendment reflects the fact that the administrative district judge may now make such an assignment without having to obtain an order from the Supreme Court.

Filing Fee Schedule. New categories have been added to the fee schedule mainly due to the need for ISTARS to track certain types of cases for statistical purposes.

1. New statutes on de facto custodians were just signed into law and the new I.C. § 32-1704 provides that the action can be initiated by filing a petition seeking a determination that the person is a de facto custodian pursuant to I.C. § 32-1703, or by filing a motion seeking permissive intervention pursuant to I.R.C.P. 24 in a pending custody proceeding seeking a determination that the person is a de facto custodian. Another new

statute, I.C. § 66-356, allows persons who have previously been found mentally ill or incompetent, and ordered not to ship, transport, possess or receive any firearms or ammunition, to file a petition for relief from the order and to remove the firearm disability. Thus, on the fee schedule under A. "All initial case filing of any type", the court has added two new subtypes: 13. "De facto custodian" and 14. "Relief from firearm disability". Additionally, under I.1. on the fee schedule, "Initial appearance by persons other than plaintiff or petitioner", there is a new addition "(a) motion for permissive intervention – de facto custodian."

2. An administrative order has been entered assigning all petitions for judicial review of any decision regarding administration of water rights from the Department of Water Resources to the presiding judge of the SRBA court effective July 1, 2010. To make sure these cases get assigned to the SRBA court, a special category has been added for these cases under L. 3. "Appeal or petition for judicial review or cross-appeal or cross-petition from commission, board or body to district court", the court add (a) "petition for judicial review of IDWR adjudication of water rights".

3. According to I.A.R. 23, there is no filing fee in an appeal from a post-conviction proceeding or a habeas corpus proceeding. Thus, L. 4. on the fee schedule "Civil appeal or cross-appeal to Supreme Court" has been amended to clarify there is no fee for these appeals.

4. Contempt. "Court initiated contempt of court" has been added to the category of cases with no filing fee. A separate category for these cases allows the court clerk to set up a case for the purpose of entering and distributing any fine imposed by a court in these contempt cases.

Idaho infraction rules

The Misdemeanor and Infraction Rules Advisory Committee is chaired by Judge Michael Oths. The amendments to both sets of rules took effect on April 15, 2010.

Rule 5(c). Uniform citation – issuance-service. This section on service of a uniform citation was amended to accommodate the fact that on an e-citation there is no way to indicate service if a defendant refuses to sign and for the fact that, even if the defendant does sign, his

With the enactment of House Bill 687, an emergency surcharge fee of \$50 was added to the penalty to be paid by defendants found guilty of committing a misdemeanor on or after April 15, 2010. The \$50 surcharge has been added to all of the misdemeanors that are "payable" misdemeanors under Misdemeanor Rule 14.

— Rule 13. Bail Schedule

or her signature will not appear on the court's copy. The amendment states that for e-citations the officer may serve the citation on the defendant by personal delivery to the defendant and indicate such service on the face of the citation. A check box to indicate service is being added to the e-citation.

Rule 9. Judgment- fixed penalty for infractions. With the enactment of House Bill 687, an emergency surcharge fee of \$10 was added to the penalty to be paid by defendants found guilty of committing an infraction on or after April 15, 2010. Thus, the infraction penalty schedule in Rule 9 has been amended to add the \$10 surcharge to every offense, except a failure to fasten seat belt for adults, which by statute is still limited to a total penalty of \$10. In addition, the infraction penalty for "failure to carry life preservers in watercraft" was amended to read "failure to carry required equipment in watercraft" so that the penalty for similar types of safety violations would be the same.

Idaho misdemeanor criminal rules

Rule 5(c). Uniform citation – issuance-service. This section on service of a uniform citation was amended in exactly the same way as Rule 5(c) of the Infraction Rules to state that for e-citations the officer may serve the citation on the defendant by personal delivery to the defendant and indicate such service on the face of the citation. A check box to indicate service is being added to the e-citation

Rule 6(e). First appearance of defendant. This rule sets out a suggested form for a trial date notice or continuance notice. The suggested form was amended to eliminate unnecessary references to personal data identifiers.

Rule 9.1(c). Notice of Penalties for Subsequent Violations. This rule sets out a suggested form for a notice of penalty for subsequent violations. The suggested form was amended to eliminate unnecessary references to personal data identifiers.

Rule 13. Bail Schedule. With the enactment of House Bill 687, an emergency surcharge fee of \$50 was added to the penalty to be paid by defendants found guilty of committing a misdemeanor on or after April 15, 2010. The \$50 surcharge has been added to all of the misdemeanors that are "payable" misdemeanors under Misdemeanor Rule 14. These are the misdemeanors to which, by Rule 14, the defendant is allowed to plead guilty and pay the bond amount as the final penalty without going before a judge. In addition, there are some misdemeanors where the bond has been deliberately set slightly above the payable amount so that the defendant is required to appear before a judge and these bonds were also raised by \$50 so that they would not become payable through the clerk. When the bond for "36-409 (d), failure to validate or attach own tag to big game animal -Idaho resident" was raised \$50 from \$150 to \$200 so that it would not become payable, it became the same as the bond for a non-resident. Since the bond amount for a non-resident is to be higher, the non-resident bond was raised from \$200 to \$250. The other bond amounts were not raised because for those offenses the court will impose the court costs if the defendant is found guilty.

At the request of the Idaho Department of Transportation, a new bond was added for a violation of I.C. § 49-432(3) for exceeding the number of temporary

permits allowed in a calendar year. The bond is \$300, the bond amount for similar violations. A violation of I.C. § 49-1801, abandoning a vehicle, was removed from the bond schedule, as in 2002 this offense was changed to an infraction and was added to the infraction schedule.

Rule 14. Disposition of citations by written plea of guilty. The offenses for which a written plea of guilty may be accepted is limited by the amount of the required bond. The bond limits under this rule have all been raised by \$50.

Idaho court administrative rules

Rule 27. Attendance of court reporters in district court. The amendment provides that when a court reporter is not available due to an anticipated absence, including a vacancy in a position that has not been staffed, the administrative district judge may suspend application of the rule as to proceedings that require a reporter and order recording by electronic means until such time as the court reporter absence or vacancy has passed. This rule took effect on May 1, 2010.

Rule 45. Cameras in the courtroom. The amendment defines “broadcast” and clarifies that orders permitting audio/visual coverage of court proceedings shall not include any restrictions on how

The amendment defines “broadcast” and clarifies that orders permitting audio/visual coverage of court proceedings shall not include any restrictions on how the coverage is aired or published. Language was added that all images or audio recordings by the pool photographer or video and broadcast camera operator shall be shared as required by the rule. The amendments to this rule took effect on January 1, 2010.

— *Rule 45. Cameras in the courtroom*

the coverage is aired or published. Language was added that all images or audio recordings by the pool photographer or video and broadcast camera operator shall be shared as required by the rule. The amendments to this rule took effect on January 1, 2010.

Rule 58. Assignment of Resident Chambers. This new rule was adopted on February 26, 2010, and was effective on March 1. It addresses the assignment of

resident chambers for district judges by the administrative district judge within each judicial district.

The various rules advisory committees meet as the need dictates. Agenda items may be submitted to the chair of the particular committee or the reporter for the committee. A listing of Supreme Court Committees and their membership can be found at <http://www.isc.idaho.gov/commlist.html>.

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Idaho Supreme Court and Court of Appeals
NEW CASES ON APPEAL PENDING DECISION
(Update 5/01/10)

CIVIL APPEALS

ADVERSE POSSESSION AND PRESCRIPTIVE EASEMENTS

1. Did the district court commit error in granting the Kennedys' claim of adverse possession against Schneider when the Kennedys failed to prove that they had paid property taxes on the land they sought to adversely possess?

Kennedy v. Schneider
S.Ct. No. 36853
Supreme Court

1. Whether the trial court committed error when it determined that the fence line agreement extinguished any easement rights that Coward may have had over Hadley's property?

Coward v. Hadley
S.Ct. No. 36981
Supreme Court

ATTORNEY FEES AND COSTS

1. Whether the district court erred in denying Sallaz an award of attorney fees under I.C. § 12-120(3)?

Stephen v. Sallaz & Gatewood, Chtd.
S.Ct. No. 36322
Supreme Court

2. Did the court err by awarding attorney fees to the co-signers even though there was no determination on the merits of the underlying action and thus no "prevailing party" and even though the court's order expressly permitted the bank to refile its lawsuit to recover the deficiency after the foreclosure was concluded?

Bank of America, N.A. v. Boespflug
S.Ct. No. 36860
Supreme Court

CONTRACT

1. Whether the district court erred in ordering specific performance of the agreements to purchase properties where the Fazzios had an adequate remedy at law and specific performance was not feasible.

Fazio v. Mason
S.Ct. No. 36068
Supreme Court

JURISDICTION

1. Whether the trial court erred in holding that it lacked jurisdiction to review the decision of the Jerome County Board of Commissioners to rezone the subject property.

Giltner Dairy, LLC v. Jerome County
S.Ct. No. 36528
Supreme Court

LAND USE

1. Did the district court err in holding that, under I.C. § 67-5279, Hawkins' petition for judicial review should be dismissed because he had no substantial rights prejudiced by the issuance of the permit he was contesting?

Hawkins v. Bonneville County Board of Commissioners
S.Ct. No. 36742
Supreme Court

POST-CONVICTION RELIEF

1. Did the district court err by denying McCoy's motion for leave to file a successive petition?

McCoy v. State
S.Ct. No. 36405
Court of Appeals

2. Did the district court err by summarily dismissing Garcia's petition for post-conviction relief?

Garcia v. State
S.Ct. No. 36161
Court of Appeals

3. Did the court err in summarily dismissing Vickrey's petition for post-conviction relief as untimely?

Vickrey v. State
S.Ct. No. 36768
Court of Appeals

4. Did the district court err when it concluded Tortolano did not establish that his counsel was ineffective?

Tortolona v. State
S.Ct. No. 35987
Court of Appeals

5. Did the court abuse its discretion in denying Drummond's motion for appointment of counsel?

Drummond v. State
S.Ct. No. 36507
Court of Appeals

6. Did the court err in summarily dismissing Hyer's petition for post-conviction relief?

Hyer v. State
S.Ct. No. 36802
Court of Appeals

7. Did the court commit err in denying Park's motion for appointment of counsel to assist him in preparing his successive petition?

Park v. State
S.Ct. No. 36835
Court of Appeals

PROCEDURE

1. Did the district court err in dismissing the complaint against Farmers without prejudice because Hoover failed to timely serve Farmers?

Hoover v. Farmers Insurance Group
S.Ct. No. 36627
Court of Appeals

EVIDENCE

2. Did the district court err in finding the mediation produced a settlement contract?

Vanderford Company, Inc. v. Knudson
S.Ct. No. 37061
Supreme Court

SEX OFFENDER REGISTRATION

1. Did the court abuse its discretion by denying the petition for release from registration requirement?

State v. Robertson
S.Ct. No. 36901
Court of Appeals

STATUTE OF LIMITATION

1. Is the five year statute of limitations for enforcement of a written contract applicable given that the state is a party to the contract?

Collection Bureau, Inc. v. Dorsey
S.Ct. No. 36734
Supreme Court

SUBSTANTIVE LAW

1. Does I.C. § 55-313 prohibit a landowner from relocating the existing access of a private road where such access currently enters onto a public roadway?

Statewide Construction, Inc. v. Pietrie
S.Ct. No. 36934
Supreme Court

2. Did the district court abuse its discretion in refusing to allow the Bells to present their defenses at trial on the lien claim when the excluded evidence would have eliminated any right of PCM to an award on its lien claim?

Perception Construction Management v. Bell
S.Ct. No. 36955
Supreme Court

SUMMARY JUDGMENT

1. Whether the district court correctly entered summary judgment in favor the Homeowner's Association.

Bear Lake Homeowners Association v. Heitman
S.Ct. No. 36283
Court of Appeals

CRIMINAL APPEALS

DUE PROCESS

1. Did the state violate Felder's right to a fair trial by committing multiple acts of prosecutorial misconduct during closing argument?

State v. Felder
S.Ct. No. 35523
Court of Appeals

JURY INSTRUCTIONS

1. Did the court err in refusing to give Leas' proposed jury instruction regarding the elements of malicious harassment?

State v. Leas
S.Ct. No. 36416
Court of Appeals

NEW TRIAL

1. Did the district court err in granting a new trial because it made several legal and factual errors in determining that the testimony of Black constituted newly discovered evidence that would merit a new trial?

State v. Anderson
S.Ct. No. 36319
Court of Appeals

RESTITUTION

1. Did the court err by imposing restitution following Ruiz plea of guilty, when the restitution was not the result of his criminal act or consented to as required by I.C. § 19-5304?

State v. Ruiz
S.Ct. No. 35425
Court of Appeals

SEARCH AND SEIZURE – SUPPRESSION OF EVIDENCE

1. Did the court err in denying Pearce's motion to suppress and in finding the issuance of the search warrant was supported by probable cause?

State v. Pearce
S.Ct. No. 36169
Court of Appeals

2. Did the district court err when it denied Martinez's motion to suppress the results of the forcible blood draw because the forcible blood draw violated his Fourth Amendment rights as outlined in *Schmerber*?

State v. Martinez
S.Ct. No. 35438
Court of Appeals

3. Whether Flores' blood draw result and other evidence should be suppressed due to a lack of probable cause to expand the scope of the traffic stop.

State v. Flores
S.Ct. No. 36630
Court of Appeals

SENTENCE REVIEW

1. Was Rainey denied due process at sentencing by relying on a no contact order that may or may not have existed?

State v. Rainey
S.Ct. No. 35774
Court of Appeals

SUBSTANTIVE LAW

1. Whether I.C. § 37-2732(a) is constitutionally vague because there is no way to distinguish between charging a felony or a misdemeanor for the same conduct.

State v. Fluewelling
S.Ct. No. 36648
Supreme Court

2. Whether cattle urine and feces qualifies as "other waste substance" and thus falls under the plain language of I.C. § 18-3906 which prohibits the placing of "any debris, paper, litter, . . . trash or garbage . . . or other waste substance" upon a highway.

State v. Tams
S.Ct. No. 36539
Court of Appeals

Summarized by:
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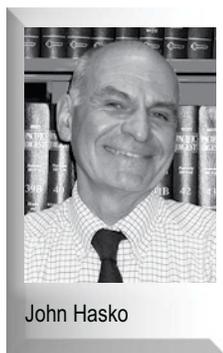
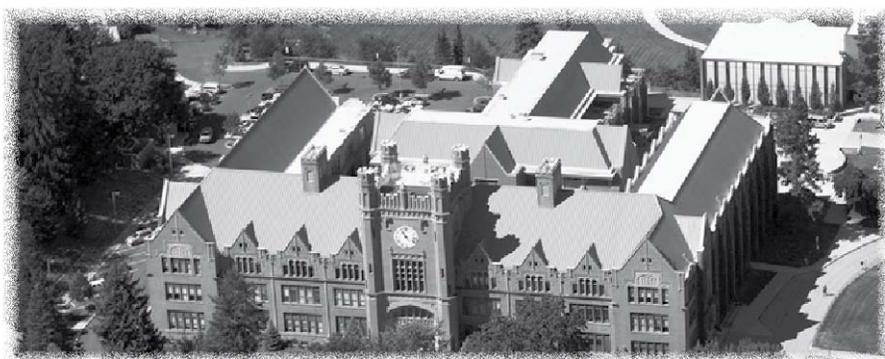
University of Idaho College of Law

The University of Idaho College of Law Library has long been a keeper of print copies of Idaho Supreme Court records and briefs, with the materials for the oldest opinion going back to two *Idaho Reports*. The collection resides in compact shelving on the Ground Floor of the Law Library, and takes up a considerable amount of space.

Idaho Supreme Court briefs are available in electronic format on LEXIS (since 2000) and WESTLAW (since 1990), but in the case of both publishers, only the texts of the briefs themselves are entered into their databases. Missing from both are the transcripts and appendices

connected with the briefs. Most often, when researchers use the briefs housed in the College of Law Library, they are more interested in the material that supplements the briefs, rather than in the briefs themselves. Not having that additional information available on LEXIS and WESTLAW lessens the usefulness of the Idaho Supreme Court briefs in those databases.

To provide access to the transcripts and appendices connected with the Idaho Supreme Court briefs, the University of Idaho College of Law Library contracted



John Hasko

with the Idaho Supreme Court late last year to have the transcripts and appendices of the Court's briefs digitized in Boise. These documents are sent electronically to the College of Law Library, where they are entered into a database which is available free of charge through the University Library's online catalog. The procedure is now set up so that the transcripts and appendices of all future briefs will automatically be digitized and be entered into the College of Law Idaho Supreme Court Records and Briefs database.

In time, there's the expectation that the Idaho judicial system will adopt electronic filing of court documents, and when that happens, digitization of the transcripts and appendices will no longer be required. At that point, the intention is to begin the retroactive digitization of transcripts and appendices to create a more complete electronic record. A secondary result of this expanded database would be to obviate the need to continue to store all those paper transcripts and appendices, and al-

low us to reclaim some badly needed shelf space.

The database of transcripts and appendices starts in January 2010, and documents can be accessed by key word, docket number, litigant name, *Idaho Reports* citation, or *Pacific Reporter* citation. You can get to the database through the University of Idaho College of Law Library home page (<http://www.uidaho.edu/law/library>). From the menu on the left of the home page, choose "Idaho Resources." Then, from the page that then comes up, choose "Transcripts and Appendices of Idaho Supreme Court Briefs Beginning with January 2010." Then, start searching and downloading.

About the Author

John Hasko received his J.D. from St. Mary's University in San Antonio, Texas and his M.S. in Library Science from the University of Illinois/Urbana-Champaign. He has been the Director of the University of Idaho College of Law Library since 1997.



The University of Idaho College of Law would like to congratulate our graduates who passed the February 2010 Idaho State Bar Exam:

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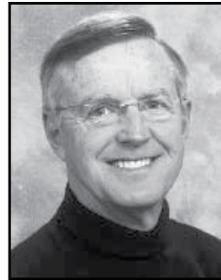
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How many times have you seen a contract where a paragraph is almost the entire page, or horror of horrors, more than one page? Seeing it once is too much but all too often long paragraphs inundate legal drafting. I think part of the problem is that the lawyers get used to seeing the same words over and over and (think they) understand what they mean. Unfortunately, the lawyers forget that they are not writing for themselves and for other attorneys, but are writing for their clients.

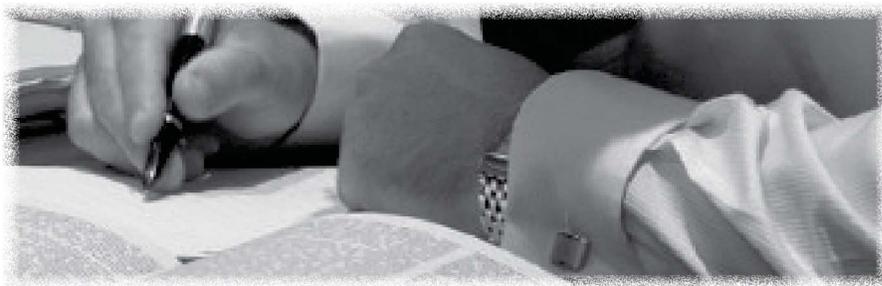


Mark T. Peters, Sr.

The point of the legal document is to help the parties understand what their respective rights and responsibilities are; it is not to help keep the attorney fully-employed by having to explain what various provisions of the contract mean. In order to make sure that the parties understand what the document means, without interpretation, the attorney must step outside of his or her comfort zone and think like the client. Look at good business writing; the sentences are short and so are the paragraphs. The attorney can do the same thing in legal documents. Let me show you what I mean.

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Except to the extent expressly permitted herein or as from time



to time consented to in writing by the Company (which consent may be withheld in the Company's sole and absolute discretion), Distributor shall not use the trademarks, or any other Licensed Trademarks, or any other Non Licensed Trademark as set forth on Exhibit C, in connection with any trade shows, seminars or other training and/or educational programs, either for Distributor's employees, Customers or others, or in connection with any trade, corporate, or business name. The Company with Distributor's consent (not to be unreasonably withheld) may from time to time update the list of Non Licensed Trademarks. Distributor agrees that nothing in this Agreement or in connection with Distributor's performance of this Agreement shall give to Distributor any right, title, or interest in any patents, trade secrets, trademarks, service marks, trade names, domain names, copyrights, licenses, artwork, logos, formulas, methods and processes (including, without limitation, the Licensed Trademarks and the Non Licensed Trademarks), and all rights and interests relating thereto currently owned or hereafter developed by the Company, and any new trademarks created during the Term by either or both parties primarily with respect to the Products (collectively the "Intellectual Property"). Such Intellectual Property shall be the exclusive property of the Company. Distributor agrees that it will not directly or indirectly engage in any activity to exploit or commercialize the technology covered by any Intellectual Property, except as specifically permitted in this Agreement. Distributor and/or its Affiliates and subsidiaries will not directly or indirectly commercialize or aid the development

The point of the legal document is to help the parties understand what their respective rights and responsibilities are; it is not to help keep the attorney fully-employed by having to explain what various provisions of the contract mean.

of other technologies or products which compete against the Products during the Term.

When may the Distributor use a Company trademark? Is the paragraph just about trademarks? Can the Distributor use a trademark if it is not in connection with a trade show? I'll bet you had to go back and read the paragraph a couple of times in order to answer those questions. Now admittedly, part of the problem is that the sentences are not written simply, but because the paragraph is long, separate ideas are mixed together and it is difficult to separate those ideas.

Remember, a paragraph is supposed to be about one idea. In my own drafting I may err by making my paragraphs too short; many times they are only a sentence long. However, doing that makes it easier to find a specific idea and, if structured correctly, makes the document flow logically.

Using these concepts, let's take a look at the subject paragraph. First, the Distributor may not use the Company's trademarks without permission. However, two

specific uses are prohibited: the trademarks cannot be used for tradeshows, etc. and the Distributor cannot use the trademarks as part of a name.

The next sentence then says that the Company can update the trademarks subject to the agreement.

The third sentence then in a long, roundabout fashion, states the agreement does not give the Distributor any ownership interest in the trademarks, even if the Distributor develops one of the trademarks! That bit of information is buried at the end of that sentence. Now it is probable that the Distributor has no interest in developing a trademark for the Company or for the Company's products, but isn't this concept of no ownership of something developed by the Distributor too important to be included in a drive-by clause?

Now we get to the heart of the paragraph. The concept that should be the lead-in for this entire section is buried in the middle. The Company owns the trademarks! Everything else contained in this section revolves around this idea.

The next two sentences seem to deal with the trademarks, but if you read these sentences closely, you will see that there only connection to the trademarks is to use them as a basis for identifying technology that the Distributor may not commercialize or compete with. Would it surprise you to learn that another section of the agreement addresses this issue as well? I think that these two sentences probably don't belong in this section, but regardless, they definitely don't belong in the paragraph.

So how do we rewrite the paragraph? Let's try something like this:

1 Ownership. Company owns any trademark, service mark, trade name, domain name, copyright, license, artwork, logo, formula, method and process including, without limitation, the Licensed Trademarks and the Non Licensed Trademarks, and any interest relating to them currently owned or later developed by the Company (collectively "Marks"). Company must notify any new Mark that becomes subject to this Agreement.

2 No Rights. This Agreement does not confer upon Distributor any right of any nature to the Marks.

3 No Use. Except as provide in Section *.* , Distributor may not use any Mark for any purpose without Company's consent.

4 Non-Competition.

(a) Distributor may not, directly or indirectly, engage in any activity to exploit or commercialize the technology covered

The rewrite reduced the number of words used from 272 to 157. But more importantly, by dividing the original paragraph into subparagraphs, we can clarify the concepts being addressed.

by any Mark, except as specifically permitted in Section *.* of this Agreement.

(b) During the Term, Distributor may not, directly or indirectly, commercialize or aid the development of any technology or product which competes against the Products.

Of course, the first thing I do is count words. The rewrite reduced the number of words used from 272 to 157. But more importantly, by dividing the original paragraph into subparagraphs, we can clarify the concepts being addressed. Take the first sentence. Company is the owner of the marks and the definition of what is covered is stated up front, not later in the paragraph. (A side note: I did delete the reference to patents and trade secrets. There is another section of the agreement that deals with the use of the Company's technology and the Distributor's proper use of it. This paragraph dealt with the use of the Company's trademarks and including the other intellectual property only confused what the paragraph was dealing with.) In addition, the Company can add marks that are subject to the agreement by notifying the Distributor of that fact. It makes no sense to give the Distributor an ability to veto the Company's ability to use a trademark in relation to products subject to the agreement.

I have included the second paragraph because it was originally in the original. There is a part of me that wonders if it is necessary since we have already stated that Company owns all of the rights in the marks. However, given that the misuse of the marks by the Distributor might give it some rights in the marks, it doesn't hurt to include the concept.

The third section is probably the most significant rewrite of the paragraph. The Distributor cannot use the marks for any reason without the Company's consent. (Another side note: In my boilerplate, I have a section concerning notices and consents. In it, I state that in order for a notice or consent to be effective, it must be in writing. Therefore, I don't have to repeat throughout an agreement that a

notice or a consent must be in writing.) Rather than identify specific types of conduct that is prohibited, just state that any use is improper unless the Company consents. That is, essentially, what the first sentence of the original paragraph stated. It just took a long time to get there.

Finally, while I think that the non-competition section probably belongs in another part of the agreement, I included it here to show that the two concepts contained in it should be shown as two separate subparagraphs. I think that this helps the parties reading it to understand the two separate prohibitions.

I was recently commiserating with another attorney regarding clients and their insistence that the parties knew what they wanted and all that the attorney had to do was put that down. She said that she has to explain that she is not drafting the agreement for the parties, but for a third person who may have to interpret the agreement because a dispute has arisen. The same concept applies, believe it or not, to attorneys. We should not be drafting agreements for other attorneys; we should draft them so that the parties can read them and understand them without having them interpreted by their counsel. Breaking long paragraphs into shorter paragraphs and ordering those paragraphs in a logical flow helps that process.

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. His practice now focuses on doing legal work for new and small companies. You may contact him at mtpeters47@cableone.net.

Endnotes

¹ *On-Writing Well*, 6th Edition; Zinsser, William; HarperCollins Publishers; New York; 1998, p. 80.

MANAGING E-MAIL OVERLOAD: HACKING YOUR OWN E-MAIL

Stephen M. Nipper
Dykas, Shaver & Nipper, LLP

This is the last in a three-part series on “Managing E-mail Overload.” Part I, titled “Managing E-mail Overload: Reducing Volume by Being Mindful of Others,” can be found in the March/April 2010 issue of *The Advocate* (pages 42-43), Part II, titled “Managing E-mail Overload: Don’t Pardon the Interruption,” can be found in the May 2010 issue of *The Advocate* (page 49). This article provides my final hacks (tips and tricks) for helping you manage email overload. Note: while these tips are Outlook and/or “Google Mail” (gMail/Google Apps) specific, almost all of them can be used with other email clients.



Stephen M. Nipper

1. Start a mail folder (Outlook) or label (Google Mail) (hereinafter “folder”) name with a non-alphanumeric character (e.g., ~, @, *), will typically result in that folder being listed first alphabetically. This is a great way to, when you have more than a screen’s worth of folders, force one or more “important” folders to the top of the list.

2. Create a mail folder and label it “@Waiting.” Anytime you send someone an email and “put the ball in their court” to take an action, put a copy of the email in your “@Waiting” folder. Then, daily, review the “@Waiting” folder to see if you need to follow up with them regarding needing their response. Doing so will help decrease the chances that you will “drop the ball” and miss a deadline, or forget to finish a client’s project. My staff hates this folder...they know that if I ask them to do something, I will magically remember to follow up with them and ask if they did it.

3. In Outlook, if you right click on a folder, you can make it a “favorite,” causing it to be displayed in the upper left portion of the screen. Your “favorite” folders should include at least: Inbox, Unread Items, Spam, Sent Items, and a “@Waiting” folder (discussed above).

4. Learn to use filters. Most email programs allow you create “filters” that



filter your email based upon your wishes (filters are referred to as “Rules and Alerts” in Outlook’s “Tools” menu). For instance, is there a spam email from a vendor that always makes it through your spam filter? Create a filter that automatically marks it as read and places it in the trash can. Why not filter your client emails into folders as you receive them? Perhaps you should flag certain emails as “HOT” based upon the sender? Perhaps it would be helpful to have copies of emails from the court automatically forwarded to your assistant. All of these things can be accomplished via filters.

5. Most attorneys do not have a system where their email is integrated directly into their document management system. For them, email is a separate “silo” of client information, a silo that is not typically stored (or backed up) along with the client’s files. Thus, it makes sense to consider how you will back up your email and archive it. One way is to filter all client email into folders and regularly copy those folders to your file server on a client by client basis (in Windows you can drag and drop emails from Outlook to your server). Another way is to use Adobe Acrobat’s “email archiving” feature that allows you to select folders in Outlook and convert them into PDFs. Another way to archive your email is to use an Outlook plug-in like “MessageSave” by TechHit (<http://www.techhit.com/messagesave/>). Ultimately, you want to find a way to get all of your client information in a single place (and make sure it is backed up accordingly).

6. Have you ever received an email from a client pointing out that the attachment you mentioned wasn’t attached? It’s really easy to prevent that from happen-

Email is a separate “silo” of client information, a silo that is not typically stored (or backed up) along with the client’s files. Thus, it makes sense to consider how you will back up your email and archive it. One way is to filter all client email into folders and regularly copy those folders to your file server on a client-by-client basis.

ing. There are a number of third party “attachment reminder” scripts for Outlook that are available on the Internet. As for Google Mail, as of February 2010, it is a standard feature.

7. Always put your docket number in the subject lines of the emails you send. Then, if you need to search for an email later, it is much easier to find the email you are looking for. Plus, you could set up a filter to filter all emails with certain text in the subject line (e.g., specific docket numbers) into a specified folder.

8. Outlook has a feature called “Suggest names while completing To, Cc, and Bcc fields” which can be found in the Options (Options->E-mail Options-

->Advanced E-mail Options). Ethical issues abound in potentially sending an email to your opposing counsel "Dan" instead of your client "Dan." Thus, it makes sense to disable that feature in Outlook.

9. Consider purging your existing "Suggest names" entries in Outlook regularly to reduce the chance of misaddressed emails. This is as simple as using the up/down arrows to select similar email addresses, and hitting the delete key. Doing so doesn't delete the person from your address book, it merely removes the email address from the "AutoComplete list."

10. Consider using your email footer to remind clients of what other areas of law you practice in.

11. Have your IT guru set up email aliases for your office (e.g., everyone@yourdomain.com, partners@yourdomain.com) that automatically forwards the message on to the predefined recipients.

12. Most email programs allow you to click a button and paste a "signature." Consider using this feature as a way to post not "signatures" but frequently used

Consider purging your existing "Suggest names" entries in Outlook regularly to reduce the chance of misaddressed emails. This is as simple as using the up/down arrows to select similar email addresses, and hitting the delete key. Doing so doesn't delete the person from your address book, it merely removes the email address from the "AutoComplete list."

information (e.g., directions to your office, boilerplate information you give to prospective clients, etc.). The newer versions of Outlook have a feature called "Quick Parts" that is specifically made for just this purpose.

None of us will ever be able to completely control email, but hopefully these articles have given you some ideas regarding how to reduce the volume of email you receive at work, how to reduce the interruption email makes in your work life, and how to "hack" your email to create additional efficiencies.

If you have any questions about any of these tips, or find any of them particularly useful, I'd love to hear about it. Please drop me a line.

About the Author

Stephen M. Nipper is a Registered Patent Attorney with Dykas, Shaver & Nipper, LLP in Boise. Mr. Nipper is also the writer of *The Invent Blog*® (<http://InventBlog.com>), a legal blog started in 2004 which focuses on tech tips for intellectual property attorneys. Mr. Nipper's contact information can be found at <http://iMetNipper.com>.

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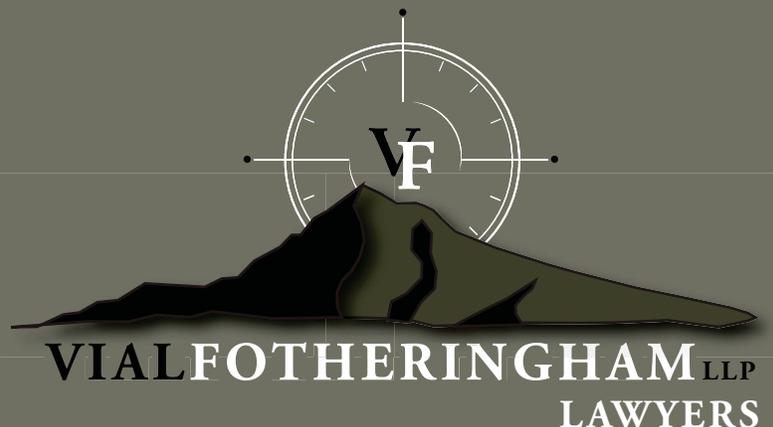
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IN MEMORIAM

George Kneeland 1918 - 2008

Sun Valley pioneer George Kneeland passed away on Sunday, Oct. 5 in Las Vegas, Nev., at the age of 90. From his first visit to the Wood River Valley 60 years ago, George was an active participant in Wood River businesses and civic affairs.

George was born in Shelton, Wash., on May 28, 1918.

He received a teaching degree from Central Washington College and then a law degree from the University of Washington. After serving as a Naval aviator in World War II, George practiced law in Seattle. His



George Kneeland

first visit to Sun Valley was a fishing trip in the fall of 1947. A few months later, he returned to ski and to build one of the first homes on the lake near Sun Valley Lodge. By 1950, George had become one of Sun Valley's first full-time residents.

The early years in Sun Valley provided George the opportunity to meet many people such as Averill Harriman, Ernest Hemingway and the Shah of Iran. He often spoke about the great mix of interesting people who gravitated to the area, and how wonderful it was that all types of people from all walks of life could get along so well. He was quoted many times as saying that one of the most unusual aspects of Sun Valley was that friendships were truly built around a person's passion, not their social status—if one loved to ski, fish or play golf, it did not matter whether a person was a CEO or a bartender.

Kneeland was one of the first three attorneys to practice in the Wood River Valley and was one of the first prosecuting attorneys. In his 60-year private practice he was honored to be partnered with attorneys like Stratton Laggis, Bruce Collier, Bob Korb and Ann Legg.

George's interests were diversified. His other businesses include being an original partner in what became Atkinsons' Market and building the Christiana Motor Lodge with partners Chuck Atkinson and Clarence Kilpatrick. Later on, he and Don Siegel built the Christiana Restaurant, which is now approach-

ing its 50th anniversary. George became a regular at the "Christy," entertaining many well-known people at the large, round table centered in the dining room. The current proprietor is George's dear friend, avid skier and chef Michel Rudigoz.

George was an active member of the Republican Party in Idaho, a member of the Arid Club in Boise and served on the College of Southern Idaho Foundation Board with his longtime friend Bud Purdy. The two men advocated for and sponsored CSI's decision to expand its campus to Blaine County.

George was CEO and the major stockholder in Sun Valley Title Co. which has been managed for the past 28 years by President Cassie Jones.

George was instrumental in the founding of the Sun Valley Gallery Association, which helped Ketchum evolve into a center for art. In 1982, George and Diane opened the Kneeland Gallery, a gallery well known for its representation of plein-air painters and other prestigious and talented artists. George loved his gallery and all of the talented and beautiful directors and staff that have been a part of it through the years. The gallery has been managed for the past 12 years by Director Carey Molter, with the devoted team of Ingrid Cherry and Teresa Pidgeon.

In addition to his love of art, poetry and business, George had a passion for golf. Even into his 80s, he was often on the course, playing 36 holes with the likes of Rip Sewell, Ed Dumke and Hillard Hicks. He was a deadly putter and a fierce competitor — especially if there was a wager on the line. He and Diane loved many of the same activities. The two shared a love of art, golf and springer spaniels.

George is survived by his loving wife, Diane; his daughters and son, Nancy Kneeland of Sun Valley, Georgine Kneeland of Hamilton, Mont., and Bill Kneeland of San Diego; and stepsons William L. Coulthard and James C. Coulthard (Margaret C. Coulthard) of Las Vegas. He and Diane share the love of eight grandchildren, Michelle, Amy, Danielle, Lane, Emma, Autumn Rose, Will and Blake; eight great-grandchildren, Casey, Erica, Tomi, Kelsey, Kristofer, Briena, Alyssa, Colten; and one great-great-granddaughter, Tyleigh Michelle.

Hon. Robert Mellen Rowett, Sr. 1931 - 2010

Hon. Robert Mellen Rowett, Sr., 78 of Mountain Home passed away on Monday, April 26, 2010. Bob was born on July 14, 1931, in Mountain Home, to Victor Charles and Lottie Mellen Rowett. He died at home, three blocks from the home where he was born.



Hon. Robert Mellen Rowett, Sr.

In the 78 years between those two events was a life filled with service. Service to his family, his community, his church, the State of Idaho, and his country.

Bob graduated from Mountain Home High School in 1949. He attended the University of Idaho and graduated in 1953 with a business degree and a commission in the United States Air Force. He received an LLB from the University of Idaho in 1959.

Bob practiced law with Perce Hall in Mountain Home from 1959 to 1970. He served as an Idaho State Senator from 1967 to 1970; served as Elmore County Prosecutor and was elected to serve as an Elmore County Magistrate from 1970 to 1976. In 1976 he was appointed to the bench and served as a Fourth Judicial District Court Judge from 1976 until he retired in 1996.

Bob was a member of Delta Chi Fraternity; 50 year member of Masonic Lodge #30; charter member of Mountain Home Elks Lodge; member of the board of the Idaho Episcopal Foundation and served on its finance committee; Elmore County Historical Society and Idaho State Bar. Bob was the Senior Warden for St. James Episcopal Church for many years.

Bob married Maxine L. Miller of Moscow, Idaho on December 28, 1952. He is survived by his wife of Mountain Home and four children: Victor Charles Rowett, Robert Mellen Rowett Jr. (Dana), Patricia Rowett-Matlock (David), and Rosemary Rowett Ash (Jerry). He has seven surviving grandchildren: Robert Mellen Rowett III, Adam Gentle (Marie), Klea Gentle, Benjamin Rowett, Brendan Ash, Corbin Ash, Caiden Ash, and numerous nieces and nephews.

IN MEMORIAM

He was preceded in death by his parents, two older brothers, Victor John and Charles Williams Rowett, and sister Marjorie Sutherland. Bob's life was a testament to his love of family and church. He gave of himself willingly and without question no matter what was asked. His quiet wit often took us unaware and his kindness to all never wavered.

A viewing was held on Thursday, April 29, 2010 at Rost Funeral Home, McMurtrey Chapel in Mountain Home. Funeral services were held on Friday, April 30, 2010, at Rost Funeral Home, McMurtrey Chapel.

Memorials in Bob's name may be made to St. James Episcopal Church, P.O. Box 761, Mountain Home, ID 83647 or The American Cancer Society, 2676 So. Vista, Boise, ID 83705.

Nicholas M. Lamanna Sr. 1941 - 2010

Lifelong Priest River resident Nicholas M. Lamanna Sr., regarded as one of Idaho's most respected lawyers, passed away on Thursday, May 6 after a courageous battle with cancer. He was 69-years old.

Public servant exemplified, Lamanna worked diligently over a 35-year career as owner and partner of the Cooke & Lamanna Law Firm where he would earn numerous accolades and set precedents in the cases he argued at the local, state and federal level.

"He was exceptionally positive, never angry, never lost his cool and he was a mentor to a lot of young lawyers like me, "fellow attorney and friend, Ford Elsaesser said. He would go on to refer to Lamanna as "one of the most respected lawyers in the state and a community leader."

The eldest of seven children, Nick was born in 1941 to Mike and Ann Lamanna in Priest River, where he would stay to graduate from high school before going on to earn a B.A. with honors from Gonzaga University in 1963. He would continue post-graduate degrees and certificates while teaching for six years in the Priest River school system.

Nick started his career following in his father's footsteps, the namesake behind Priest River Lamanna High School. With construction completed in 1981 the new high school would be named to honor Mike Lamanna for his years of service in positions including teacher, principal and superintendent.

During the same time, Nick would meet Kathleen Bryant and the two would be married by 1964. They would have four children; Nick Jr., Patricia, Ann and Laura while enjoying a large extended family during their 25 years of marriage.

Lamanna first began his legal career after running for State Representative for the First Legislative District of Idaho, race he would lose by just 33 votes.

A desire to continue his calling of public service returned Nick to Gonzaga University where he attended school at night and taught at Havermale Junior High School during the day.

His unrelenting motivation would lead to his graduation with honors from Gonzaga Law in 1973 while a love for his birthplace would bring Nick back to Priest River. The same year, he would begin his work with the Cooke & Lamanna Law Firm and remain a leader within the community until his retirement in April of 2008.

During his career, Lamanna was a member or numerous organizations and received a laundry list of accolades in-

cluding: first Public Defender for Bonner County, President of the 1st District Bar Association from 1977-78, Idaho State Bar District Lawyer Award in 1977, Fellow of the American College of Trial Lawyers in 1997, rated an 'A' lawyer by the national attorney rating firm while also being listed as one of the best lawyers in the country.

Lamanna was also admitted to practice law before the Supreme Court of the State of Idaho, the U.S. Supreme Court for the District of Idaho and the Supreme Court of the United States. He also served as a member of the Idaho State Bar, the Idaho Trial Lawyers Association and several other legal associations.

And as a leader in the Priest River community, he would become a member of the Knights of Columbus, contribute several hours of service to the West Pend Oreille Fire District, Priest River Airport and many other groups.

Over his 35 years of service, Lamanna was regarded as a "saint in the legal community," and the personification of what it meant to be a servant not just to the public but his hometown. The community that came together during his retirement to recognize Nick for his unrelenting commitment will continue to do so in his wake.

Boise attorney Jack Gjording said, "Nick was always a gentlemen, always had a smile on his face and treated everyone with the utmost respect. He was one of those lawyers that went above and beyond."

A funeral ceremony was held on May 15 at Priest River Lamanna High School. Burial service at the Priest River Evergreen Cemetery followed immediately after the ceremony.

In Memoriam of: Sidney Smith as of May 19, 2010

The Idaho Law Foundation has received a generous donation in memory of: **Sidney Smith** from **Linda Judd and Hon. James F. Judd.**



District Bar Associations elect presidents

Savi Grewal, of Grewal & Hayden, PLLC in Coeur d'Alene, was selected president of the First District Bar Association. Savi served seven years on the Governing Council of the Bankruptcy and Commercial Law Section of the Idaho State Bar; served for two years as President of the Coeur d'Alene Chapter of the John P. Gray Inn of Court. Savi does Pro Bono work for the Idaho Volunteer Lawyers Program and has assisted training CASA volunteers. Savi enjoys playing bridge, cooking, sewing, knitting, and taking trips with an RV. She said district bars can "educate the public about legal access; sponsor continuing education which meets the needs of local district bar members; promote dialogue among members in various counties."

Karin Seubert, of Keeton and Tait in Lewiston, was elected President of the Second District Bar Association. She serves as a board member of Idaho Legal Aid Services, Inc., is an active member of St. Stanislaus Church, and formerly served as a board member of Family Promise of Lewis Clark Valley. Karin said she enjoys camping, fishing, and spending time with family and friends. She said that "in the Second District, the local bar is working to serve the profession by organizing local CLEs on a regular basis, establishing a mentoring program to provide newer members of the bar the opportunity to meet and learn from senior bar members in the area, and encouraging pro bono efforts and support of law-related programs that serve the community at large."

Matthew A. Johnson, of White, Peterson in Nampa, was elected Third District Bar President. Matthew's volunteer activities include work for the First United Presbyterian Church of Nampa, and Sigma Chi Chapter Advisor at the College of Idaho. He enjoys soccer, fishing, and hiking.

He said: "District bars can serve the profession by



Matthew A. Johnson

providing opportunities to build relationships and share information across practice area boundaries with the other attorneys in your area. This includes in particular creating chances for younger attorneys to meet with experienced colleagues in the area to establish mentoring relationships and also develop an understanding for the history of the legal profession in the area. Additionally, the district bar can look for ways to encourage and provide resources for its member to interact with and provide additional services to the district's communities, particularly in identifying pro bono needs and opportunities."

Paula Landholm Kluksdal of Hawley Troxell Ennis & Hawley LLP in Boise, has been elected as Fourth District Bar President. She serves on the Executive Committee of the Idaho Partners Against Domestic Violence, Chair of the Grapes Against Wrath Committee and volunteers at her children's school Washington Elementary. Paula said she enjoys running, family and hiking. Regarding District Bars, she said they "can continue to educate the community about the amount of community service and the commitment to the community by the bar and the legal community in general. District bars can continue to educate the community about the legal system so that the system does not seem so foreign."

She said the legal system should be "more accessible and easier to maneuver," adding that "district bars can continue to encourage its members to volunteer in the community and to invest in making the community a better place."

Brooke Baldwin, of Wright Brothers Law Office, PLLC in Twin Falls, was elected president of the Fifth District Bar Association. Her volunteer activities include serving on the Board of Directors at Idaho Legal Aid Services, and working with county Democrats. She said her hobbies include reading,

baseball, Frisbee golf, and hiking. She said district bars "should facilitate events that allow the attorneys in its area to have meaningful interaction with other attorneys and provide educational and training opportunities."



Brooke Baldwin

Angela Jensen, of Idaho Legal Aid Services, Inc. in Pocatello, was elected president of the Sixth District Bar Association. She recently served on the Guardianship and Conservatorship Supreme Court Committee Pilot Project, gives various presentations on elder law issues including grandparents raising grandchildren, Medicaid and long-term care planning. Away from work, Angela said she enjoys bass fishing, camping, hiking, gardening, and scrapbooking.

In the Seventh District, **Hon. Penny Stanford** was elected president. She serves as Magistrate Judge and lives in Dubois. She volunteers with Lions Club activities and said her hobbies include wandering aimlessly in the desert, gardening and painting. Penny said district bars could make resources more available to members and help improve communication.

Annual Conference set for July 14 to 16

This year the Annual Conference at the Shilo Inn in Idaho Falls will offer CLEs free to those who have been in practice less than three years, or who are unemployed. It also features a *New York Times* bestselling author and writing coach for the legal world, William Bernhardt. He will deliver the keynote address and teach legal writing during two sessions. The conference offers an opportunity to honor colleagues, hear what's new in the legal community and reconnect with the profession. This is the first time the Annual Conference has been held in eastern Idaho. Those interested can find details at www.isb.idaho.gov.

Paine Hamblen welcomes associate

Paine Hamblen LLP recently hired Julie A. Owens as an associate in the Coeur d'Alene office. Ms. Owens' practice emphasis is in Civil Litigation. She earned her J.D. from St. Louis University School of Law and her Bachelor of Science in Nursing from Truman State University. Ms. Owens is admitted to practice in the states of Idaho, Washington, Missouri and Illinois.



Julie A. Owens

Healthwise welcomes new general counsel Eileen Casal

Eileen Casal joins Healthwise of Boise, Idaho, as general counsel, and will manage strategic business and legal-related matters for the organization. Casal was most recently vice president, general counsel, and secretary for Teradyne, Inc. Prior to that, she served as vice president and general counsel for various technology companies in Massachusetts. She currently serves on the Board of Governors for Tufts Medical Center in Boston.



Eileen Casal

"Eileen brings to us a reputation for legal excellence in the high-tech and software licensing world," said Healthwise Chairman and CEO Don Kemper. "In addition, her passion for quality health care complements the depth and flavor of the Healthwise executive team."

"I've wanted to apply my legal experience to the health care industry for a long time," said Casal. "Joining Healthwise gives me the opportunity to help people become more involved in their own care and ultimately improve health care overall."

Healthwise partners with health plans, hospitals, disease management

companies, and health Web sites to provide up-to-date, evidence-based information.

Concordia University School of Law to host groundbreaking

Concordia University School of Law's Groundbreaking Ceremony will be held Tuesday, June 22, 2010, 10:00-11:30 a.m. at 501 W. Front St. in downtown Boise. Earlier this month, Concordia closed on the purchase of this building and property. The Groundbreaking Ceremony kicks off renovations to the existing 17,000-square-foot structure, and construction of an additional three-story, 33,000-square-foot addition, planned for completion in summer 2011. The expanded building will meet the law school's need for a library, classrooms, legal clinics and offices. Read more at http://www.cu-portland.edu/news/detail.cfm?news_id=6172. In the meantime, the Law School's interim office is located in the Boise Metro Chamber of Commerce, 250 South 5th St., 3rd floor, Boise, Idaho.

Second District Bar Association elects officers

At a meeting held on March 30, in Lewiston, Idaho, the membership of the Second District Bar Association elected the following attorneys to serve as officers for 2010/2011: Karin Seubert was re-elected as President; Deborah McCormick was re-elected as Vice President; and Jessica Moser was elected as Secretary/Treasurer.



Jessica Moser

Karin Seubert practices with the law offices of Keeton and Tait in Lewiston, Idaho. She has served as President of the Second District Bar Association since April 2009 and previously served as Vice President from April 2008 to March 2009. She received her J.D. from American University in Washington, DC, a master's degree in community planning from the University of Maryland, and her B.A. from Wake Forest University in Winston-Salem, NC.

Deborah McCormick is a sole practitioner in Moscow, Idaho. She has served as Vice President of the Second District Bar Association since April 2009.

Jessica Moser practices in the Lewiston office of Idaho Legal Aid Services, Inc.

Additionally, Lisa Martin, Coordinator of the Problem Solving Courts in the Second Judicial District, made a presentation to those in attendance. The Problem Solving Courts are treatment centered programs for people with drug and alcohol problems. Those in the Second Judicial District include Adult Drug Court in Clearwater, Latah and Nez Perce Counties; Mental Health Court in Clearwater and Nez Perce Counties; DUI Court in Nez Perce County; and Family Reunification Court in Nez Perce County.

The membership of the Second District Bar Association approved a \$1,300 donation to the Problem Solving Courts of the Second Judicial District to fund rewards, incentives and graduation supplies for clients who are demonstrating continued improvement throughout the program. A copy of an informational flyer is attached. For additional information, contact Lisa Martin at (208) 790-1748.

MCLE reminder

Reminder letters were recently sent to all members with an MCLE reporting deadline of Dec. 31, 2010. Please check your records to make sure all the courses you attended have been approved for Idaho MCLE credit. Avoid the last-minute scramble by applying for accreditation now. You can check your MCLE attendance records on our website at www.isb.idaho.gov. Questions should be directed to the MCLE Department at (208) 334-4500 or jhunt@isb.idaho.gov.

Board of Commissioners to meet

The Idaho State Bar Board of Commissioners will meeting on the following dates and locations:

Wed. , July 14 - Shilo Inn, Idaho Falls

Fri., Sept. 10 - The Law Center, Boise

Fri., Oct. 8 - The Law Center, Boise

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LAW DAY, 2010, FEATURED PRO BONO SERVICE, EDUCATION

Dan Black
Advocate Managing Editor

Once again, attorneys across Idaho performed pro bono service and public education in connection with Law Day, an ABA-sponsored national event held around May 1 of each year.

In the Fourth District, Laurie Fortier helped organize a volunteer team of 56 members to offer the "Ask-A-Lawyer" program. On April 30, volunteers took 360 calls, far above last year's 295. At the end of the day, there were still 60 calls unanswered. Volunteers came from small, large and public sector shops. The volunteers began taking calls at 4 a.m. and finished at 4 p.m. with a reception in the Rose Room in downtown Boise. The recent trends the last two years have involved a lot more bankruptcy, criminal, debtor/creditor, and family law issues.

The Fourth District Liberty Bell Award was given to Jan Reeves, a longtime community advocate for refugees and currently the Director of the Idaho Office of Refugees. The IOR has been operating since 1998 and Jan has been the director since then. Since 1998, IOR has provided assistance to more than 6,700 refugees representing 30 countries and 66 languages, through contracts with the resettlement agencies and the English Language Center. In addition to directly administering federal funds specifically targeted to refugees, he plays a key role in coordinating main stream services in education, health, transportation, and employment.

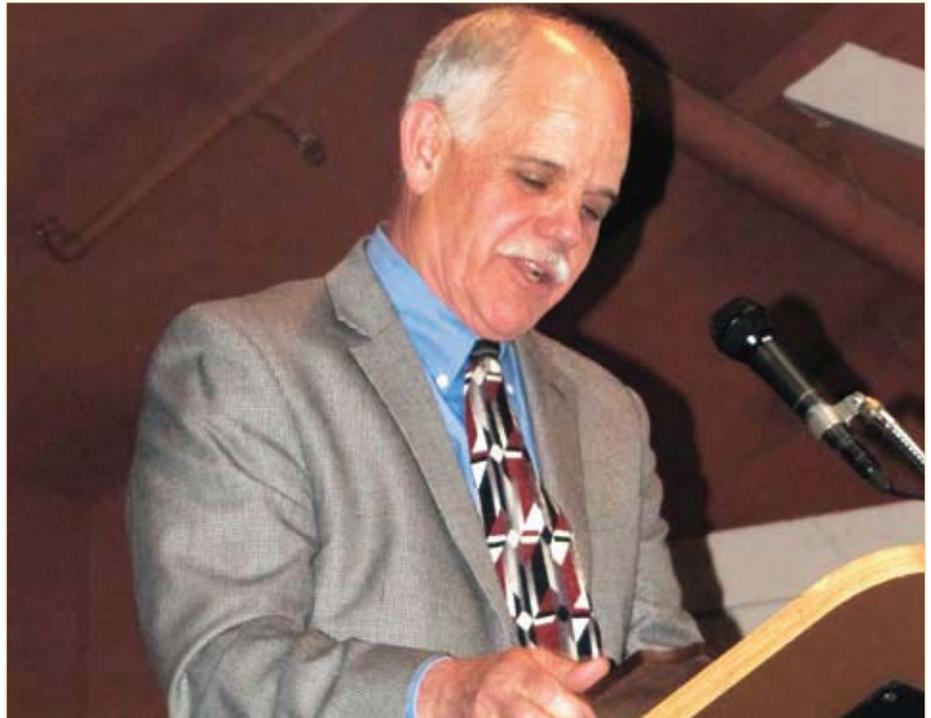
Jan works to assure that refugees have economic opportunity and security as well as a community that welcomes, supports and values them. Idaho is considered a model resettlement site for refugees and Jan's leadership in the field is widely acknowledged by his peers.

Law Day activities across the Fourth District:

School Outreach - Attorneys were matched with classrooms to present on a variety of legal subjects. More than 1,000 students (from as far away as Homedale) had an attorney visit their classrooms.

Oral Argument 101 - A real, live oral argument by practitioners before a three-judge panel from the Idaho Court of Appeals was presented on April 29 at Boise High School's auditorium for the benefit of students.

6.1 Challenge - This recognized attorneys with outstanding pro bono service. Here are the winners this year: Government Law Office: The clerks of the U S District Court of the District of Idaho. The Large Firm award was given to two firms that tied - Holland & Hart LLC and Perkins Coie LLC. The Small Firm Award went to solo practitioner Kahle Becker. There were 13 total entries, accounting for literally thousands of hours of pro bono and public service work contributed by over 200 Boise area lawyers.



Jan Reeves, longtime advocate for persecuted refugees, accepts the 2010 Fourth District Bar Liberty Bell Award at the Law Day reception in Boise.

2010 Law Day Volunteers from the Fourth District

Alison Graham	Gabriel McCarthy	Lorna Jorgensen	Reed Smith
Allen Derr	Garrick Baxter	Marisa Swank	Ron Caron
Annie McDevitt	Gery Edson	Mark Freeman	Rondee Blessing
Beth Smethers	Glenda Talbutt	Mark Perison	Scott Campbell
Beth Taylor	Heather McCarthy	Mark Peters	Scott McKay
Brenda Bauges	Jane Newby	Matt Wade	Sean Beck
Brian Ragen	Joanna Rebich	Megan Goicoechea	Shannon Romero
Bruce Castleton	John McGown	Megan Mooney	Steve Rutherford
Chris Christensen	Joseph Mallet	Michael Crawford	Tami Boeck
Dan Gordon	Kate Ball	Michael Orr	Tom Morris
David Smethers	Kimberly Watt	Mikela French	Tony Pantera
David Young	Kira Pfisterer	Mindy Willman	Tyson Nelson
Denise Baird	Laurie Fortier	Nicole Owen	William Dalling
Erik Fredericksen	Lisa Brownson	Paul Winward	

In the Seventh District, U.S. Attorney for Idaho Thomas Moss spoke at the annual Law Day dinner at the Red Lion. The Liberty Bell Award went to Stacey McAlevy, Executive Director of CASA for the Seventh District. And Judge Penny Stanford became the President of the Seventh District.



Stacey McAlevy



IN THE 6.1 CHALLENGE, WINNING ISN'T EVERYTHING

Mary Hobson
*Legal Director, Idaho Volunteer
 Lawyers Program*

The Fourth District Bar's "6.1 Challenge," is billed as a "friendly competition" between law offices. The true purpose of the Challenge, however, is to encourage and formally recognize the pro bono and public service activities of Bar members. This year, there were 13 entries, accounting for the contribution of literally thousands of hours of pro bono and public service work by over 200 Boise area lawyers. "Viewed in the context of its goal, this year's 6.1 Challenge was an amazing success and all of its entrants deserve our respect and thanks," says Fourth District Bar President, Paula Kluksdal.

Early in the history of the Challenge, its judges determined that not all law offices could fairly be compared against each other, so they created the "large firm," "small firm" and "government law office" categories. This year's winner in the government office category was the **Clerks of the U.S. District Court** whose

14 participating members contributed over 3,000 hours of pro bono and public service to the community.

Kira Phisterer helped that law office compile their impressive submission. But that team was not the only winning government law office. On the **Clerks of the Idaho Supreme Court and Court of Appeals** team, law clerks contributed hundreds of hours to projects like Citizenship Day, the Boise Rescue Mission and the Idaho Immigration Law Pro Bono Network. **Mikela French**, a Supreme Court law clerk received special recognition for



Mary Hobson



Soundstart, a project of the Idaho Volunteer Lawyers Program, received the Honorable Mention Award "for innovation and effectiveness in providing access to justice for those in poverty through pro bono" in the Pro Bono Best Practices Spotlight Contest. Pictured above are Larry Hunter, Soundstart contact of Moffatt, Thomas, Barrett, Rock & Fields, Chtd. and Carol Craighill, IVLP Program Director. The award is sponsored by the National Association of Pro Bono Professionals (NAPBPro, Inc.) The national competition is held each year to highlight examples of outstanding pro bono projects throughout the country.

her nearly 500 hundred hours of work on the Immigration Network project at the Fourth District Law Day reception. The **Ada County Prosecuting Attorney's Office** submitted a collective application with almost 2,400 hours of service. "The biggest hurdle that this large governmental office had was encouraging the attorneys to actually write down all of their great work that they have done over the past year" said **Heather McCarthy**, who spearheaded that effort. McCarthy reported "a committee was formed to develop a pro-bono office guideline, distribute it to every attorney, and then

track down the attorneys to encourage them to submit their time." Sixty of the 66 attorneys in the office submitted time sheets—a huge response from a government law office. The teamwork in this office was also fostered by the committee's purchase of a bulletin board to post pro-bono opportunities and a countdown to the 6.1 Challenge deadline. The effort and ingenuity displayed by the three government law offices demonstrates every office can make a major contribution if they commit themselves.

Five small firms entered the Challenge this year. **Dean Arnold**, a solo practi-

tioner contributed his expertise assisting persons charged with criminal offenses as well as participating in activities aimed at improving the legal system and profession. Meanwhile, **Pickens Law, P.A.**, a two-lawyer firm, donated over 200 hours to Idaho Legal Aid and served in eight CASA cases. **C.K. Quade Law, PLLC**, has three lawyers who averaged nearly 70 hours each in pro bono representation of persons with Medicaid, Social Security, elder abuse, guardianship and education issues. **Victoria Loegering** from the **Huntley Law Firm, PLLC** was singled out for recognition by the 6.1 Challenge judges for her pro bono service, which included spending 232 hours representing a refugee mother seeking return of her children from Department of Health and Welfare. As outstanding as these four submissions are, the actual small firm 6.1.Challenge award went to Boise solo practitioner **J. Kahle Becker**, who clocked close to 300 hours representing two Idaho nonprofits as well otherwise promoting the profession through his work with the Young Lawyers Section and local educational organizations.

The five firms competing in the “large firm” category (i.e., those firms with more than 10 lawyers in the Fourth District) were **Zarian Midgley & Johnson PLLC**, **Hawley Troxell Ennis & Hawley LLP**, **Stoel Rives LLP**, **Perkins Coie LLP** and **Holland & Hart, LLP**. Together these firms contain 127 lawyers, the vast majority of whom participated in providing pro bono service in this Challenge year. Each firm’s submission depicted a wide range of pro bono services including representing inmates in civil rights cases, immigrants in matters coming under the Violence Against Women Act, obtaining civil protection orders for persons subject to domestic violence, and assisting a whole host of other low-income people in need of critical legal representation. In addition, lawyers from these firms generously donated their legal services to a long list of non-profit organizations in the Boise area. While space does not allow recounting the outstanding individuals or the full array of projects covered by these dedicated firms, Justice Roger Burdick, speaking for the panel of 6.1 Challenge judges, emphasized how impressed the judges were with the quality and quantity of the pro bono work completed this year by the participating offices. Perhaps nothing speaks as well of the commitment to service of these firms as the fact that



Thomas K. Rosenthal, President, Boise Sunrise Rotary Club presents a check to IVLP on May 18 for \$1,000 to the Soundstart program. It will help provide legal assistance to low-income families using volunteer attorneys. Pictured above, left to right, are David Penny, Cosho Humphrey, LLP; Molly Tomlinson, Soundstart Coordinator; Carol Craighill, IVLP Program Director; and Thomas Rosenthal.

the large firm competition ended in a tie between **Perkins Coie LLP** and **Holland & Hart, LLP**—with each firm reporting a per-attorney average of more than 50 hours of service—thereby exceeding the “aspirational” pro bono goal set out in Idaho Rule of Professional Conduct 6.1.

When it comes to the 6.1 Challenge, winning isn’t everything and partici-

pation brings its own reward. **J. Kahle Becker** put it well when he said, “There have been many late nights and weekends spent working on some of these cases but at the end of the day, I’ve found that my *pro bono* cases are the reason I decided to practice law in the first place.” The Fourth District is fortunate to have so many “winners” in its midst.

Soundstart provides opportunities for volunteer attorneys to help young, low-income families establish secure legal foundations. The goal of the program is to educate parents about the need for obtaining court orders for custody, paternity, child support, guardianships and other family-related matters and motivate them to act before domestic problems arise. Larry Hunter serves as a liaison, recruiting members of his firm to make the Soundstart presentations and interact with the parents in the proactive program that helps prevent domestic violence.

Idaho Partners Against Domestic Violence

Preventing domestic violence through community awareness

Responding through civil legal assistance

We thank the following law firms, corporations, and individuals for their generosity and support in contributing more than \$100,000 in funds and services for victims of domestic violence.

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