



The Advocate

Official Publication
of the Idaho State Bar
Volume 53, No. 5
May 2010

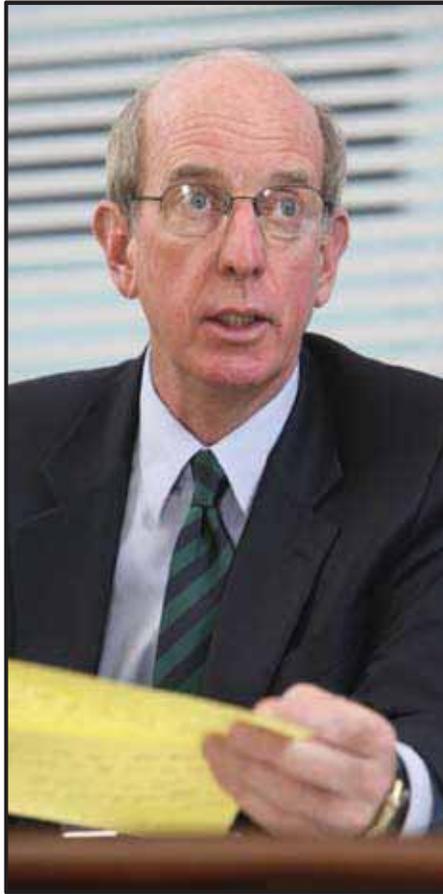
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Feature Articles

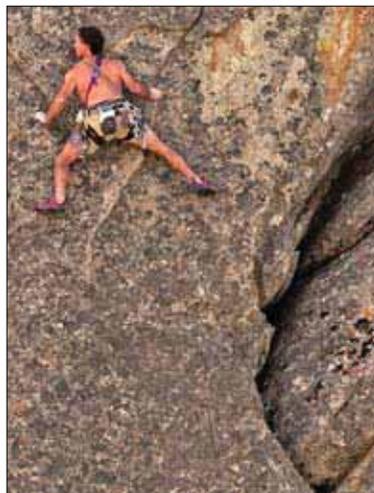
- 16 **Welcome from the Real Property Section**
Arthur B. Macomber
- 17 **Land Use Considerations for Siting an Energy Facility in Idaho**
Deborah E. Nelson and Gary G. Allen
- 21 **Relocating an Easement Under Idaho Code**
Jonathan Burky
- 24 **Mechanic's Lien Priorities vs. Other Encumbrances**
Douglas R. Hookland
- 27 **Tenant Occupation in HOAs: War ... or Peace by Other Means?**
Arthur B. Macomber
- 30 **The Fair Housing Amendments and Why it Matters to Homeowners Associations**
John J. Browder
- 33 **What's a Homeowners' Association to Do? Collecting Dues and Assessments During Difficult Financial Times**
Jill Mazirow Eshman
- 37 **Assignments and Standing for Real Estate Lenders in Bankruptcy Court**
Laura E. Burri
- 13 **A New Analysis of When Public Defender Conflicts of Interest are Imputed**
Brad Andrews
- 49 **Managing E-Mail Overload: Don't Pardon the Interruption**
Stephen M. Nipper
- 51 **Less is Better**
Mark T. Peters, Sr.
- 53 **Marketing for Law Firms and Attorneys**
Merilee Marsh
- 63 **IOLTA Brings Lawyers, Bankers Together for All Idahoans**
Tonya Westenskow

Columns

- 9 President's Message, *Douglas L. Mushlitz*
14 Executive Director's Report, *Diane K. Minnich*
40 ABA Mid-Year Message, *Michelle R. Points*
47 Federal Court Corner, *Tom Murawski*

News and Notices

- 3 2010 Idaho State Bar Annual Conference
11 Discipline
12 Letter to the Editor
41 Idaho Court of Appeals and Idaho Supreme Court
43 Licensing Cancellations
43 Licensing Reinstatements
44 Cases Pending
54 In Memoriam
59 Of Interest
62 Classifieds
63 Law-Related Education Program Completes Mock Trial Season
67 Continuing Legal Education Information (CLE)



On the Cover

Photo was taken by Chris Nye, a partner at White, Peterson, Gigray, Rossman, Nye & Nichols, P.A., in Nampa. He took the photo at City of Rocks National Reserve which is located in south-central Idaho. Chris is an avid outdoorsman and writes a bi-weekly outdoor column for the Idaho Press Tribune.

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This issue of *The Advocate* is sponsored by the Real Property Section.

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Special thanks to the May *The Advocate* editorial team: Karin Jones, Matthew Christensen, and Brent Wilson.

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.

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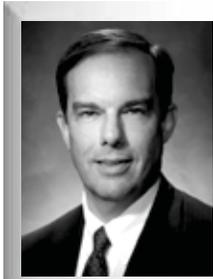
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MENTORING: SOME FRANK, IMAGINARY CORRESPONDENCE BETWEEN US

A quality mentoring relationship has no cap on value. We hear that all the time. For new attorneys, my opinion is that there is no substitute for the opportunity to work closely with a more experienced attorney, with whom you have a comfortable and frank relationship. For more experienced attorneys, I believe that an associate who is able to work both independently and in tandem with you, is a huge asset. How do we get to that point? While there is a wealth of material on this topic, my two cents is captured in the following, imaginary letters between a new attorney and a veteran attorney.



Douglas L. Mushlitz



Dear New Attorney,

Welcome from the small world of law school, to the impossibly smaller world of practice in your local district. I remember thinking during this transition process, how nice it would have been if some experienced attorney had given me a few pointers. This letter is an attempt to offer some bits of wisdom to make the road a little less bumpy for you.

1. Beware of the wild goose chase. When you receive a request for assistance or an assignment from a senior attorney in your office, it might be something straightforward, that can be accomplished with use of the resident form bank. More likely, it will require some legal research into the law of neighboring states, and your best Westlaw or Lexis search will require you to read three hundred cases. Case number 268 might be on all fours - but you are still on a wild goose chase. Ask the senior attorney how likely you are to find the wild goose, and how long she wants you to spend on the hunt. Then, request feedback on your work.

2. Beware of your fellow attorneys. Send a follow-up letter when dealing with other attorneys, recapturing discussions,

details and agreements. Keeping these records protects you from any misinterpretations and keeps everyone honest.

3. Most of all, beware of yourself. Be humble. Treat other attorneys, your clients, your staff and the court clerks not just politely, but as equals. For example, a staff member that is treated like a partner, will probably rise to the occasion, and become the best asset in your practice. A court clerk that is treated in a condescending manner will not save your bacon when you have to make that last minute, panicked call. As one attorney in my office has stated it, the toes you step on today may be attached to something you have to kiss tomorrow...

But not too humble. When you walk into the courtroom, you have a choice about what to focus on. You can focus on feeling new and nervous about this, or you can focus on what's important about your client's case. Choose the latter. First, because that's the right thing to do for your client. Second, this is the only way to get to a place where you really do know what you're doing.

Be realistic. When working with your clients, give yourself a reasonable amount of time to complete a task: do not tell the client that you will have a letter in the mail this Friday if you do not need to. If

you say that the letter will be done in two weeks, and then it is mailed early, the client will be happy, perhaps impressed. If you tell them it will be done in two weeks, and then deliver, they will be indifferent. If you tell them it will be done this Friday, and don't get to it until next week, they will be irate. You're smart: you do the math.

4. Beware of the bill. The practice of law is a business. Learn to calculate the value of the case, the likely hours that you will have to spend to prosecute to some resolution, and the ability of the client to pay. Thus, the case you decide not to take today, may be the most important decision you make as a young attorney. Impose the discipline upon yourself to review your billings and receipts. For the business of practicing law to work, your client has to be able to pay your bill, and you have to be able to pay the electric bill.

5. Let's do coffee. I probably view the practice of law differently than you do, and I look forward to hearing your viewpoints. I wish you the best of luck in your new endeavor.

Very Truly Yours,

Veteran Attorney

Dear Veteran Attorney,

It's been awhile since you graduated. Do you remember how overwhelming it can be to start practicing law? To help you understand what I think and feel about starting out, please take a moment to read some requests I may not be brave enough to say out loud:

1. Please explain the assignment. If this is a wild goose chase (see above), please tell me. If this is straightforward, please tell me about a form I can use, an analytical approach I can take, or a time-limit to the legal research needed, so that I don't reinvent the wheel.

2. Please give me feedback. I need to know what you want done differently, and why. Also, after three years of the Socratic method in law school, and being a typical, Type-A (I'm probably hard on myself), I probably need to know what I'm doing well. Both will make me a better attorney, of course, but it will also help me become more useful to you.

3. Please share. Share the cases that matter, in terms of the learning curve. Share the cases that will actually help me pay the bills, and the ones that matter in terms of justice. If I'm going to approach this career as pure business, without any other purpose, I will probably soon be

jaded and burnt-out. Thus, the case I choose to take today, might be the most important decision I make as a young attorney. For the everyday stuff that may now be humdrum to you, please share the wisdom, too. How do I best depose this particular witness? What will be the unintended consequences of settling on these terms? How likely are we to collect attorneys fees, even if we win at trial? Sharing the collective wisdom perpetuates the goodwill of your firm, and the goodwill of those you mentor. Like me.

4. Please remember that practicing law is not my whole life. I backpack, ski, quilt, bake, or golf. I parent, volunteer or travel. My plan may be to avoid a stroke by 50, instead of making a million by 50. I may need some guidance on approaching the practice of law as a business, while still striking a net gain on a whole, other balance sheet.

5. Let's do coffee. I probably view the practice of law differently than you do, and I look forward to hearing your viewpoints. Thanks in advance for sharing your wisdom.

Very Truly Yours,

New Attorney

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.

Doug is a former President of the Second Judicial District Bar Association, and is a member of the Idaho Trial Lawyers Association.

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DANIEL N. GORDON
(Public Reprimand)

The Professional Conduct Board has issued a Public Reprimand to Eugene Oregon lawyer, Daniel N. Gordon, based on professional misconduct.

The Professional Conduct Board Order followed a stipulated resolution of an Idaho State Bar reciprocal disciplinary proceeding. On February 23, 2009, an Oregon Disciplinary Board approved a stipulation for discipline, publicly reprimanding Mr. Daniel N. Gordon for violating RPC 8.4(a)(4) [Conduct Prejudicial to the Administration of Justice]. Idaho Rule of Professional Conduct 8.4(d) is identical to Oregon Rule of Professional Conduct 8.4(a)(4). The Oregon public reprimand and this reciprocal public reprimand relate to the following facts and circumstances.

In April 2006, Mr. Gordon filed a lawsuit in Oregon circuit court in which he alleged that the defendant owed his client some money. Thereafter, Mr. Gordon received full payment of the outstanding debt from the defendant. Despite this payment, Mr. Gordon filed with the court an affidavit in support of an ex parte motion for an order of default in which he represented that the defendant still owed his client money. At the time Mr. Gordon prepared the affidavit and filed it with the court, he failed to check his records and determine that the defendant had made payments and had satisfied her debt. Based on this motion and affidavit, the court entered an order of default and general judgment against defendant. In April 2008, upon Mr. Gordon's motion, the court vacated the judgment.

This public reprimand does not limit Mr. Gordon's eligibility to practice law.

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

MATTHEW R. AYLWORTH
(Public Reprimand)

The Professional Conduct Board has issued a Public Reprimand to Eugene Oregon lawyer, Matthew R. Aylworth, based on professional misconduct.

The Professional Conduct Board Order followed a stipulated resolution of an Idaho State Bar reciprocal disciplinary proceeding. On March 14, 2008, an Oregon Disciplinary Board approved a stipulation for discipline, publicly reprimanding Mr. Matthew R. Aylworth for

violating RPC 3.5(b) [Ex Parte Communications] and 8.4(a)(4) [Conduct Prejudicial to the Administration of Justice]. Idaho Rule of Professional Conduct 3.5(b) corresponds to Oregon Rule of Professional Conduct 3.5(b) and Idaho Rule of Professional Conduct 8.4(d) is identical to Oregon Rule of Professional Conduct 8.4(a)(4). The Oregon public reprimand and this public reprimand relate to the following facts and circumstances.

Mr. Aylworth represented the plaintiff in a lawsuit filed in Oregon circuit court. The defendant retained a lawyer to represent her in the matter. Mr. Aylworth's client decided to dismiss the lawsuit. Mr. Aylworth agreed with the defendant's lawyer that if the lawsuit was dismissed then the defendant was entitled to recover her reasonable attorney fees and costs. Mr. Aylworth subsequently signed and filed with the court a notice for general judgment of dismissal without prejudice in which he inaccurately represented that the dismissal was without costs to any of the parties. Mr. Aylworth failed to serve a copy of the notice on the defendant's lawyer. On that same day, Mr. Aylworth also filed with the court a general judgment of dismissal without prejudice. Mr. Aylworth failed to serve a copy of the proposed judgment on defendant's lawyer not less than three days prior submitting to the court, as required by UTCR 5.100. The court signed the proposed judgment.

The Oregon disciplinary stipulation recited that Mr. Aylworth was negligent and that he failed to review carefully the notice he signed and the proposed judgment before submitting them to the court and failed to determine that the documents were not being properly served on defendant's lawyer. Mr. Aylworth subsequently signed a stipulation to set aside the improperly obtained judgment when it was brought to his attention.

This public reprimand does not limit Mr. Aylworth's eligibility to practice law.

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

DANNIS M. ADAMSON
(Resignation in Lieu of Discipline)

On March 24, 2010, the Idaho Supreme Court entered an Order accepting the resignation in lieu of discipline of Pocatello attorney, Dannis M. Adamson.

The Idaho Supreme Court's Order followed a stipulated resolution of a formal charge disciplinary proceeding requesting disbarment and related to the following conduct.

In October 2008, Mr. Adamson was charged in Idaho federal court by Criminal Information. The Criminal Information charged one count that as president of Northwest BEC Corporation, Mr. Adamson deducted and collected federal income taxes and FICA taxes from his employees' total taxable wages, and willfully failed to pay those taxes over to the IRS in violation of 26 U.S.C. § 7202, a felony. Mr. Adamson pled guilty to that count and judgment was entered and he was sentenced in April 2009. Mr. Adamson was sentenced to a 27 month prison term and ordered to make restitution to the IRS. Upon release, he will be on supervised probation for 3 years. Mr. Adamson admitted that his criminal conviction reflected adversely on his honesty, trustworthiness, or fitness as a lawyer in violation of I.R.P.C. 8.4(b) and I.B.C.R. 505(b).

The Idaho Supreme Court accepted Mr. Adamson's resignation effective March 24, 2010. By the terms of the Order, Mr. Adamson may not make application for admission to the Idaho State Bar sooner than five years from the date of his resignation. If he does make such application for admission, he will be required to comply with all bar admission requirements found in Section II of the Idaho Bar Commission Rules and shall have the burden of overcoming the rebuttable presumption of "unfitness to practice law."

By the terms of the Idaho Supreme Court's Order, Mr. Adamson's name was stricken from the records of the Idaho Supreme Court and his right to practice law before the courts in the State of Idaho was terminated on March 24, 2010.

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

PALMER A. HOOVESTAL
(Public Censure/Reciprocal Discipline)

On April 15, 2010, the Idaho Supreme Court issued a Disciplinary Order imposing a Public Censure upon Montana Attorney Palmer A. Hoovestal, based upon his professional misconduct.

The Idaho Supreme Court's Order followed a Professional Conduct Board recommendation and a stipulated resolution of an Idaho State Bar reciprocal

DISCIPLINE

disciplinary proceeding. Mr. Hoovestal was publicly censured by the Montana Supreme Court on May 22, 2007. In that proceeding, Mr. Hoovestal was found to have violated Montana Rules of Professional Conduct 3.3, 3.4(b), 4.1(a), 8.1, and 8.4. Idaho Rules of Professional Conduct 3.3, 3.4(b), 4.1(a), 8.1, and 8.4 correspond to those Montana Rules of Professional Conduct. The Montana public censure and this reciprocal public censure relate to the following facts and circumstances.

In 2000, Cheryl Clifford retained Mr. Hoovestal to defend her against felony charges of fabricating physical evidence and threats of improper influence. Cheryl's husband, Larry, then a police officer for the City of East Helena was also charged. The charges against the Cliffords arose out of allegations that members of the LDS Church and law enforcement personnel in the Helena area received letters threatening their lives and referring to graphic sexual acts that would happen to them. Those letters indicated they had been generated and sent by a family named "Hurst." Law enforcement suspected that the Cliffords created the letters in an effort to incriminate the Hurst family, which had been investigated by Larry Clifford. The Cliffords' home was searched and specific evidence linking the Cliffords to those letters was obtained.

The case went to trial in January 2003. Mr. Deschamps prosecuted the case on behalf of the state of Montana. On February 4, 2003, Larry Clifford was acquitted. Cheryl Clifford was convicted.

On February 7, 2003, Mr. Hoovestal's office received a fax from the Cliffords. The fax referred to an entry on a Mormon dating service website called LDSSingles.com and used the identifier of "eternal

mom," the name Cindy Hurst once used to identify herself. This document appeared to incriminate Hurst and exculpate the Cliffords.

Mr. Hoovestal was aware of the fax sent by the Cliffords. On February 10, 2003, Mr. Hoovestal's then Office Manager, Rachael Spirlin, showed the fax to Mr. Hoovestal. Ms. Spirlin asked Mr. Hoovestal if it was okay to send the fax to Mr. Deschamps. When Ms. Spirlin persisted in wanting to send the fax, Mr. Hoovestal told Ms. Spirlin "I don't care what you do with it." Another employee overheard Mr. Hoovestal authorize Ms. Spirlin to send the fax to Mr. Deschamps.

Mr. Hoovestal knew the fax had been sent to Mr. Deschamps on February 10, but he did not contact Mr. Deschamps at any time on or following that date to advise that the fax had been sent by mistake. The State of Montana then investigated the creation and distribution of the "eternal mom" fax. An investigator determined that the fax was a printer copy of a web page from the LDSSingles.com website. In the investigator's opinion the web page was created by Cindy Hurst, who was a person implicated by the Cliffords in their first criminal case. The state's investigation led to additional charges filed against Larry and Cheryl Clifford for tampering with or fabricating physical evidence.

The state obtained an investigative subpoena to interview Ms. Spirlin and she was interviewed by Mr. Deschamps, the investigator, and the agent in charge of the Department of Justice's Computer Crime Unit on August 28, 2003. Mr. Hoovestal represented Ms. Spirlin during the interview. Ms. Spirlin testified that prior to the interview, Mr. Hoovestal advised her to tell the authorities that the fax was discovery and that she faxed it to Mr.

Deschamps on her own. Mr. Hoovestal admits, "coaching" Ms. Spirlin to say that the fax was discovery, which he did not consider a "lie" but nothing else. Ms. Spirlin later admitted to making a number of false statements during the interview. For example, she told the interviewers that she sent the fax because she thought it was discovery related, that she did not talk to anyone before sending the fax and that she did not advise Mr. Hoovestal that she had sent the fax. During the interview, Mr. Hoovestal did not attempt to correct Ms. Spirlin or the record.

In October 2003, Mr. Hoovestal drafted an affidavit for Ms. Spirlin to sign in the criminal case in support of the Cliffords' Motion to Dismiss and Motion to Suppress. The affidavit was filed, and Ms. Spirlin subsequently admitted that the affidavit contained a number of false statements, including that Ms. Spirlin sent the fax by mistake and that she did not advise anyone that she sent the fax. Mr. Hoovestal admitted that the affidavit submitted to the Court contained at least one falsehood.

Based upon the foregoing, the Montana Supreme Court determined Mr. Hoovestal violated M.R.P.C. 3.3 [Candor Toward the Tribunal], 3.4 [Fairness to Opposing Party and Counsel], 4.1 [Truthfulness in Statement to Others], 8.1 [Bar Admission and Disciplinary Matters], and 8.4 [Misconduct]. Those Montana rules correspond to the same Idaho Rules of Professional Conduct.

The public censure does not limit Mr. Hoovestal's eligibility to practice law in Idaho, although he is currently an inactive member of the Idaho State Bar.

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

LETTER TO THE EDITOR

Bank not cooperating

Dear Editor,

In 2008 The Idaho legislature adopted a series of statutes to create a durable power of attorney form and a set of rules for the use of the forms for the benefit of Idaho residents and the business and financial institutions with whom they deal.

KeyBank refuses to honor the Idaho statutory form. In doing so, the bank places the agent of the customer in the position of having to sue the bank to obtain access

to the customer's funds. Idaho attorneys need to be aware of this problem.

The Idaho Code authorizes courts to award attorney fees against banks which refuse to honor a properly executed Idaho power of attorney form, but the cost and delay can subject customers to late payment penalties, shut-off of utilities or repossessions or foreclosures by creditors. In the meantime, KeyBank holds the customer's money and pays little or no interest on the customer's funds.

Customers of KeyBank who have executed powers of attorney to authorize someone to handle their business affairs for them would be well-advised to have KeyBank pre-approve the form they have executed or move their accounts and CD's to another bank.

Donald J. Chisholm
Chisholm Law Office
Burley, Idaho

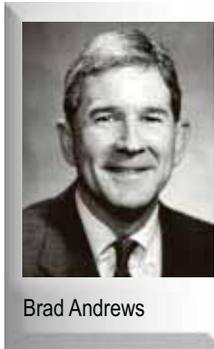
A NEW ANALYSIS OF WHEN PUBLIC DEFENDER CONFLICTS OF INTEREST ARE IMPUTED

Brad Andrews

Bar Counsel, Idaho State Bar

Two cases have recently revised the analysis of when public defenders' conflicts are imputed to other members of their office.¹

The new analysis differs from the imputed conflict analysis in Idaho Rule of Professional Conduct 1.10. In *Severson*, the Idaho Supreme Court referenced *Cook* and clarified the conflict analysis public defenders should utilize in determining when conflicts of interests are imputed. Thus, the analysis starts with *Cook*.



In *Cook*, the Court of Appeals analyzed whether the concurrent representation of a prosecution witness by one public defender constituted a disqualifying conflict of interest when another public defender from the same office was representing the defendant. The *Cook* Court determined that when one member of the public defenders' office represents a prosecution witness (in another case) and another member represents the defendant in the case in which the witness will testify, the public defenders are on opposite sides of the issue of the defendant's culpability and an actual conflict of interest is inherent in that concurrent representation. The *Cook* Court delineated the potential conflicts arising from concurrent representation of a prosecution witness and a defendant.²

The next issue the *Cook* Court determined was whether under Idaho Rules of Professional Conduct 1.0 and 1.10, one public defender's conflict of interest was imputed to the other public defender. The *Cook* Court concluded that rather than adopt a per se rule that the conflict is imputed to the other member of the public defenders' office, as I.R.P.C. 1.10 provides, it was more appropriate to determine on a case-by-case basis whether, "the circumstances demonstrated a potential conflict of interest and a significant likelihood of prejudice" and if so, "the

The Court held that whether public defender conflicts are imputed to the entire office is to be determined on a case-by-case basis. In essence, the Court determined that a public defenders' office does not fall within the definition of a "firm" under Idaho Rule of Professional Conduct 1.0.

presumption of both an actual conflict of interest and actual prejudice will arise without the necessity of proving such prejudice."³ The *Cook* Court's rationale for the apparent exception to the Idaho Rules of Professional Conduct was essentially that (1) concurrent representation by public defenders generally will create no incentive (economic or otherwise) for diminished advocacy in such cases and (2) a per se rule imputing conflicts of interests to affiliated public defenders would potentially deprive defendants of competent local public defenders.⁴

Building on *Cook*, in *Severson*, the Idaho Supreme Court clarified when public defenders' conflicts of interest will be imputed. The Court held that whether public defender conflicts are imputed to the entire office is to be determined on a case-by-case basis. In essence, the Court determined that a public defenders' office does not fall within the definition of a "firm" under Idaho Rule of Professional Conduct 1.0. The *Severson* Court explained that to make the determination whether conflicts are imputed, the district court, and presumably, before the matter is presented to the district court, the public defender, is to determine whether the circumstances demonstrate a potential conflict of interest and a significant likelihood of prejudice.⁵ Finally, the *Severson* Court indicated that in assessing the significant likelihood of prejudice, screening or other protective measures undertaken by public defenders are to be considered by the courts.⁶

I believe that in *Severson*, the Idaho Supreme Court has specifically recognized that the analysis of when public defenders' conflicts of interests are imputed to other members of the office is different than the analysis under Idaho Rule of Pro-

fessional Conduct 1.10. Public defenders' conflicts of interest are not automatically imputed to other members of the public defenders' office. Instead, whether public defender conflicts are imputed to the entire office is determined on a case-by-case basis and following an analysis whether the circumstances demonstrate a potential conflict of interest and a significant likelihood of prejudice. Similarly, unlike the corresponding analysis under Idaho Rule Professional Conduct 1.10, screening or other protective measures may be considered by public defenders and trial courts to determine whether there is a significant likelihood of prejudice.

However, given that a defendant has a Sixth Amendment right to be represented by conflict-free counsel, and the trial court's affirmative duty to inquire into a potential conflict of interest whenever it knows or reasonably should know that a particular conflict may exist, public defenders should disclose potential conflicts of interest to the trial court to assure that the trial court may conduct the hearings mandated by case law and *Severson* to determine whether the circumstances demonstrate a potential conflict of interest and whether a significant likelihood of prejudice exists. Failure to bring potential conflicts of interest to the trial court's attention may result in a basis for appeal, claims of ineffective assistance or disciplinary grievances.

Endnotes

¹ *State v. Cook*, 144 Idaho 784, 171 P.3d 1282 (Id. App. 2007) and *State v. Severson*, 147 Idaho 694, 215 P.3d 414 (2009).

² 144 Idaho at 789, 171 P.3d at 1290.

³ 144 Idaho at 793, 173 P.3d at 1291.

⁴ 144 Idaho at 794, 173 P.3d. at 1292.

⁵ 147 Idaho at 706, 215 P.3d. at 426

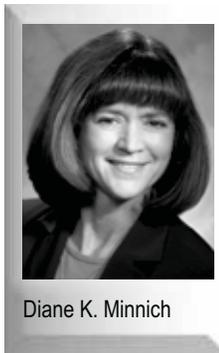
⁶ 147 Idaho at 707, 215 P.3d at 427.

VOLUNTEER OPPORTUNITIES

Diane K. Minnich

Bar and Foundation activities depend on the volunteer efforts of Idaho lawyers and non-lawyers. The Bar Commissioners and the Foundation Directors are recruiting attorneys interested in volunteering their time to assist with ISB and ILF programs and activities.

If you are interested in one of the volunteer opportunities listed, please complete the form on Page 13; and, return it to the ISB/ILF offices or email me your preferences. If you have any questions about the committees please contact me: dminnich@isb.idaho.gov or call 208-334-4500.



Diane K. Minnich

Committee appointments are made at the July ILF and ISB Board meetings. In selecting committee replacements board members consider geographic diversity, areas of practice, and other previous or current committee assignments.

Idaho Law Foundation (ILF) Committees

Note: Committee appointments are for three-year terms. Chairpersons are appointed for one-year terms.

Idaho Volunteer Lawyers Program (IVLP) Policy Council

Plans and reviews programs, activities, policies and procedures for IVLP's pro bono efforts. As needed, makes recommendations to ILF Board of Directors. *Meets quarterly; 13-14 members (3-4 non-lawyers).*

Law-Related Education (LRE) Committee

Promotes and oversees law-related education programs, such as the High School Mock Trial competition, Lawyers in the Classroom and the Citizens Law Academy. *Meets 3-4 times a year; 14-15 members (5-6 non lawyers).*

IOLTA Fund Committee

Reviews and considers IOLTA grant applications. Recommends grant recipients to the Board of Directors. *Meets once a year; 10 members.*

Continuing Legal Education (CLE) Committee

Plans and oversees Idaho Law Foundation CLE programming of subjects, speakers, course materials and policies. *Meets three times a year; 15-16 members.*

Idaho State Bar Committees

Professional Conduct Board

Exercises general control over attorney discipline. Acts as an "intermediate appellate court" in attorney discipline matters. Receives and considers formal charge complaints, and makes recommendations for disposition to the Idaho Supreme Court. The newly adopted Rules for Review of Professional Conduct (Section V of the Idaho Bar Commission Rules), allow for additional members to be appointed to the Professional Conduct Board (PCB). *Meets in three-member panels as needed; includes both lawyers and non-lawyers.*

Advocate Editorial Advisory Board

Determines the theme, selects/recruits authors for lead articles, and reviews the contents of each issue of *The Advocate*. *Meets the third Wednesday of each month; 10-12 members.*

Lawyer Assistance Program Committee

Oversees the LAP program; which helps and supports lawyers who are experiencing problems associated with alcohol and/or drug use, or mental health issues. *Meets quarterly; 15-17 members.*

Lawyer Referral Service Committee

Reviews policies for and operation of the Lawyer Referral Service. Considers and evaluates ideas for increasing LRS participation and enhancing the services provided by the program. *Meets 2-3 times a year; 3 members.*

Character and Fitness Committee

Reviews bar exam applicants for character and/or fitness issues. Makes recommendations to the Board of Commissioners on whether applicants should be allowed admission to the practice of law in Idaho. *Meets 4 to 6 times a year; 9 members (2 non-lawyers).*

Client Assistance Fund Committee

Reviews claims against Client Assistance Fund for attorney misappropriation of funds due to dishonesty. *Meets as needed; 5 members (2 non-lawyers).*

Other Volunteer Opportunities

ILF Law Related Education

Attorneys are needed to assist with the high school mock trial competition, the Lawyers in the Classroom program, Law Day activities, Citizens' Law Academy and help with Youth Court. Contact Carey Shoufler, cshoufler@isb.idaho.gov.

Sections of the Bar

ISB Sections welcome assistance with program planning, newsletters, publications and public service projects. There are currently 20 Idaho State Bar Sections.

ILF Idaho Volunteer Lawyers Program

Attorneys are needed to provide pro bono assistance to low-income individuals through direct case representation, brief legal services, workshops or mentoring. Contact Carol Craighill at ccraighill@isb.idaho.gov.

District Bar Associations

As a member of your local district bar association, you can assist with educational programs, social events, and public service activities.

District Bar Association and Section contact information is available on the Bar and Foundation website: www.idaho.gov/isb

We offer our thanks to those of you who have committed your time, expertise and energy to the work of the Bar and Foundation. The organizations are able to provide needed service to the profession and the public because of your volunteer efforts.

ISB/ILF Committees

Volunteer Opportunities

Member participation is vital to the success of the Idaho State Bar and Idaho Law Foundation. Lawyers can and do make a difference by participating on one of the many committees listed below. Committee assignments are three-year terms, and each year there are generally one to three openings available on each committee. Time commitments vary with each committee depending upon its function and meeting schedule. In the appointment process, consideration is given to geographic distribution, areas of practice, and other committee assignments or ISB/ILF involvement.

Please let us know if you are interested in contributing to the activities of the Idaho State Bar and the Idaho Law Foundation by serving on one of the committees, or participating in one of the programs listed below. Please indicate your 1st, 2nd, or 3rd choice.



IDAHO STATE BAR VOLUNTEER COMMITTEES

- The Advocate Editorial Advisory Board
(meets monthly)
- Bar Exam Grading
(twice a year)
- Character and Fitness
(meets as needed)
- Professional Conduct Board
(meets as needed)
- Lawyer Assistance Program
(meets quarterly)

- I would like more information about the Bar Sections.
- I would like more information about the District Bar Associations.



IDAHO LAW FOUNDATION VOLUNTEER COMMITTEES

- Continuing Legal Education
(meets quarterly)
- Law Related Education
(meets three times a year)
- Idaho Volunteer Lawyers Program Policy Council
(meets quarterly)

- I would like more information about participating in the Foundation's Law Related Education Programs such as Mock Trial, or Lawyer in the Classroom.
- I am interested in participating in the Foundation's Idaho Volunteer Lawyers Program.

Name: _____ Firm: _____

Address: _____ City: _____ Zip: _____

Phone: _____ Email: _____

Have you previously participated as a member of an ISB and/or ILF Committee?

- No
- Yes – Most recent committee assignment(s) _____

Please return this form no later than June 4, 2010

ISB/ILF Committees

P.O. Box 895

Boise, ID 83701

Or email your committee interests to dminnich@isb.idaho.gov

WELCOME FROM THE REAL PROPERTY SECTION

Arthur B. Macomber
Macomber Law, PLLC

The Real Property Section welcomes you to this month's Advocate issue. As spring approaches, we attempt to parallel nature's renewal and invigorate efforts to address evolving trends in real property law. A hot subject we address is the law governing a mortgage lender's standing before a bankruptcy court. Another creditor-debtor issue is the priority of mechanic liens over other real property secured debt. In many areas, land use regulations require condominium governance, includ-

ing for single family detached site condominium projects. For example, Kootenai County has over 250 homeowner associations, the vast majority of which remain governed by volunteers, which occurrence across Idaho provides legal counsel ample opportunity to assist such governance. Articles this month



Arthur B. Macomber

address homeowner association dues and assessments collection, the application of the Fair Housing Act to association governance, and imposition of owner-occupancy ratios. In the area of easement law, we discuss a servient estate's relocation of a dominant estate's easement.

Finally, a current land use issue sparking societal dissonance becomes grounded with this month's article on energy facility siting, which discourages impulsive siting decisions to insulate them from citizen resistance and general societal overload. Have a great spring!

Real Property Section

**Real Property Section
 Chairperson**

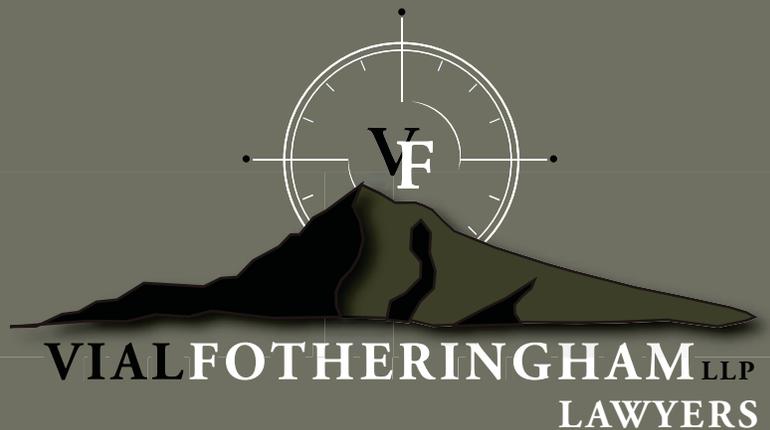
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LAND USE CONSIDERATIONS FOR SITING AN ENERGY FACILITY IN IDAHO

Deborah E. Nelson
Gary G. Allen
Givens Pursley

Introduction

You receive a panicked call from a wind energy developer who has filed an application to site 50 wind turbines on a ridge in a rural county. The planning and zoning commission hearing on a conditional use permit is this evening, over 200 letters of opposition have come in since the public notice went out, and one of the county commissioners (who would live in the shadow of one of the turbines) came out in the paper today against the developer's project. The developer wants you to represent her and to make the presentation at the hearing that evening.

Thanks to Idaho's recent growth, coupled with federal power deregulation,¹

many Idaho land use practitioners may have stories to rival what we describe in the previous paragraph (this story is made up, fortunately). Even in these bad economic times, we are seeing many applications to site new energy facilities in the state. Energy facilities come in many forms: wind turbines, solar panels, transmission lines and nuclear, coal, natural gas, geothermal and hydroelectric generation facilities. The siting of all of these facilities creates unique and difficult challenges for the land use practitioner, whether he or she represents the project developer, the jurisdiction in which the facility is proposed, or concerned neighbors. This article provides an overview of some of the biggest challenges and some tools that might aid in their resolution.

No state or regional siting commission

A growing number of western states have created energy facility siting com-

In Idaho, each individual county or city sets the standards and decides whether to approve any energy facility proposed within its jurisdiction.

missions with primary or supplemental jurisdiction. Idaho is not among them.² In Idaho, each individual county or city sets the standards and decides whether to approve any energy facility proposed within its jurisdiction.

The lack of a state siting commission in Idaho has generated an interesting public policy debate in recent years, largely as a result of controversial projects such as Sempra's proposed coal plant in Jerome County in 2005, MidAmerican's proposed nuclear plant in Payette County in 2008, and Alternate Energy Holdings' proposals to site a nuclear plant in one of several counties. There are certainly pros and cons to this arrangement.

On the one hand, a local jurisdiction can be more attuned than a state commission to the compatibility of a project or lack thereof given first-hand knowledge of the particular site and surrounding land uses. Also, a local process can be less expensive and faster than a state process, which can involve more studies, broader-ranging criteria, and more layers of review.

On the other hand, significant public policy concerns can arise where a project creates localized tax benefits but regionalized impacts. Also, short-term local politics can interfere with long-term, statewide energy production needs. Further, local jurisdictions might lack the resources to address the complicated environmental, financial, and other issues involved in siting large-scale energy facilities.

Local decision under the Local Land Use Planning Act

With limited exceptions of possible preemption discussed further below in this article, the legal framework for siting an energy project on private land in Idaho is the same as for other large development projects. Local jurisdictions will review an energy facility application under the same statutes—collectively known as the Local Land Use Planning Act, or "LLUPA"—and under the same

local comprehensive plan and zoning ordinance they use to address residential development applications. Only the challenges are far different.³

LLUPA requires every city and county to adopt a comprehensive plan that includes an analysis of, among many other things, "power plant sites [and] utility transmission corridors."⁴ LLUPA also mandates that zoning ordinances (which includes zoning decisions) be "in accordance with" the plan⁵ and that special or conditional use permits shall be issued only when "not in conflict with" the plan.⁶ Siting applicants should consult the comprehensive plan (and applicable ordinances) from the outset. In some cases, changes in the plan may be required in order to authorize the specific zoning or other action sought. Further, any application should include a detailed discussion of applicable comprehensive plan provisions and how the proposed project is consistent.

Patchwork regulations

Despite LLUPA's direction, many jurisdictions' comprehensive plans have not yet addressed whether and where they would like to site particular types of energy production facilities within their borders. Likewise, many zoning ordinances say little to nothing about energy production facilities.

Of Idaho's 44 counties, 33 have zoning ordinances that specifically contemplate energy projects in some fashion. Most of these counties recognize energy production or power plants as a conditionally-allowed use in certain zones. Some of these counties only recognize specific types of energy facilities such as wind, geothermal, hydroelectric, transmission, or gas pipelines. Only a few counties have adopted ordinances with specific standards for siting energy projects, and these primarily have been focused on wind generation facilities, with no consideration for other large facilities such as coal, nuclear or gas-fired power plants.



Deborah E. Nelson



Gary G. Allen

The lack of consistent or complete siting regulations creates some real complications and uncertainties for counties, applicants, and other interested parties. Before a project can move forward, the applicant and/or the jurisdiction first have to determine if the existing ordinances are sufficient or if they need to be amended prior to any project applications. This requires a close and careful look at the controlling zoning ordinance, including at the allowed uses; height, setback and bulk limitations; and timing limitations.

For example, some ordinances that do not list power production as an allowed use in the applicable zone might list similar uses like “industrial production facilities” or “public service projects.” Or they might only have a catch-all provision such as “uses with similar impacts to other uses allowed in the zone.” Are these descriptions sufficient to authorize a wind generation facility? A merchant nuclear power plant?

Generally speaking, Idaho courts will defer to a County’s interpretation and application of its ordinances. In August 2009, a district court in the Seventh District upheld Bingham County’s decision that a privately-funded wind farm qualified as a “public service facilities” use.⁷ Interestingly, the Bingham County Commissioners had settled on that use after rejecting the applicant’s and planning and zoning commission’s attempt to characterize the wind farm as an “agriculture related processing” use.

Where a local jurisdiction supports a project, or at least is open to considering it fully, amending weak or problematic provisions in the ordinance can be helpful in the long-run, especially to protect any approval against third-party challenges. Ordinance amendment can be a slow and expensive process, but it can serve to eliminate future uncertainties in getting an approval, or in defending an approval. For complicated or controversial projects, such as coal or nuclear generation facilities, it is especially important to have sufficient ordinances (and comprehensive plan provisions) in place from the start to protect the project from challenge and to provide sufficient assurance to investors that the project may be built.

Even if the ordinance is already deemed sufficient (or is successfully amended) and even if the jurisdiction strongly supports a project, an applicant must still carefully shepherd a project through the process, with careful attention to detail. It is really important to understand that a county is not necessarily equipped to handle the entitlement process for a unique and complicated energy facility project, with

The lack of consistent or complete siting regulations creates some real complications and uncertainties for counties, applicants, and other interested parties.

multiple applications, phasing, and numerous special conditions. Additionally, the county might not be accustomed to dealing with significant public opposition, including personal pressure on the individual elected officials. It takes careful attention from the applicant to make sure everything is done exactly as required by law, including proper posting of the property for hearings, allowing sufficient time for all interested parties to be heard, and preparation of a sufficiently detailed “reasoned statement” to support the decision.⁸

Possible preemption of local authority

Under certain circumstances, the Idaho Public Utility Commission (“PUC”) can preempt the local government and force the siting of an electric transmission line or other facility (e.g., a substation or generating plant) even though it conflicts with the local government’s wishes. Idaho Code section 67-6528, which is part of LLUPA, states:

If a public utility has been ordered or permitted by specific order, pursuant to title 61, Idaho Code, to do or refrain from doing an act by the public utilities commission, any action or order of a governmental agency pursuant to titles 31, 50, or 67, Idaho Code, in conflict with said public utilities commission order, shall be insofar as it is in conflict, null and void if prior to entering said order, the public utilities commission has given the affected governmental agency an opportunity to appear before or consult with the public utilities commission with respect to such conflict.

Even when the PUC has approved an order that is sufficiently specific to be seen as in conflict with a local government zoning ordinance or action, the PUC still must consult with the local government before the PUC order can be declared preemptive. This means that in most cases a county or city will, as a practical matter, have substantial authority in the siting of an energy facility even though the PUC has approved it. Notably, whatever preemptive authority there is under section 67-6528 applies to only to a “public utility.” That term is not defined by LLUPA. The PUC’s position or practice is that

public utilities includes only those entities that have received a certificate of convenience and necessity under the state’s utility laws, and the term does not extend to “qualifying facilities” that provide power to utilities under the Public Utility Regulatory Policies Act (“PURPA”).

The federal government might also preempt transmission facilities located in a “national interest electric transmission corridor” established by the United States Department of Energy under section 1221 of the Energy Policy Act of 2005, 16 U.S.C. section 824p. The Idaho Legislature enacted a section of the public utilities code to address a state’s responsibility, where such corridors are established, to provide “efficient and timely review” of facilities proposed within such corridors. Idaho Code sections 61-1701 to 61-1709. The authority expressly authorizes IPUC preemption of local government decisions. Idaho Code sections 61-1703. However, as of this writing in early 2010, no such corridors have yet been established in Idaho.

Complicated and controversial projects

Siting new energy facilities often is both complicated and controversial, and thus usually requires careful development and implementation of a comprehensive strategy with legal, technical, governmental and public relation components.

On a large project, such as a coal or nuclear plant, you may be part of an enormous team of professionals including air and water quality engineers, wildlife biologists, wetlands scientists, hydrologists, seismologists, geologists, sound engineers, civil engineers, firefighting experts, security experts, and others. Often, your job will include making sure that the testimony of all of these experts, both written and oral, is stated in language that lay commissioners can understand. And, by the way, your audience will not want you to take all night to make your point!

A large project could take years or even a decade or more to build. It is critical that the entitlements granted are strong enough to survive the opposition and changes in politics and law that will

undoubtedly occur over the course of a complex project.

You may see opposition unlike anything you have experienced in your practice, to the point that the developer may need to employ a full-time public relations team. Many projects also benefit from holding pre-application charrettes with neighbors and special interest groups.

A complicated project may call for additional procedures and interactions with decision-makers, such as applicant-funded, independent consultants to advise the county on technical matters; informational public work-sessions with the County Planning and Zoning Commission and/or Board of County Commissioners; discussion of exactions or impact fees to address project impacts;⁹ exploration of decision-maker bias;¹⁰ and early private (i.e. ex parte) discussions with decision-makers (ex parte contacts are discussed in more detail in the following section).

Finally, the land use permitting process is only one of many overlapping steps to siting a large energy project. Projects typically involve coordination of numerous technical consultants and lawyers to handle a variety of critical issues, including water rights, real estate, environmental concerns, and governmental affairs.

Ex Parte Contacts

For large, controversial energy siting projects, ex parte contacts may be very helpful to identify preliminary questions and concerns such as whether the project should even be pursued, whether the comprehensive plan or zoning ordinance should be amended first, and what additional expertise may be needed to support the County's consideration of the project.

Under Idaho law, ex parte contacts are allowed in the land use context as long as the communication is subsequently disclosed in a manner that gives the public an opportunity to respond to the information that was provided ex parte. Specifically, the following information must be disclosed: (1) the identity of the individuals involved in the communication; (2) the date of the communication; and (3) a reasonable description of the subject matter of the communication.¹¹

Nonetheless, some county attorneys still advise their commissioners not to engage in ex parte contacts, making it much more difficult to gauge preliminary questions and concerns. Restriction of ex parte contacts also removes the elected decision-makers' ability to talk with their constituents about what may be the most important decision ever made in



the jurisdiction, something any politician does at his or her peril. Further, without ex parte contacts, the opportunity for course correction may be lost, as the first opportunity to engage the decision-maker might not occur until a public hearing, at which point a strategy had long been selected and set in motion.

Conclusion

Given all the complications and risks in siting energy facilities, the wind farm developer in our example may have called you too late, notwithstanding your considerable persuasive skills. The message for anyone pursuing one of these projects is to get your whole team of supporting experts on board from the beginning, work closely with your neighbors and the affected jurisdiction, and maintain your credibility at all costs. Forget any of these steps, and you may be in for some long and painful nights at the county commission.

About the Authors

Gary Allen is a partner at Givens Pursley LLP where he practices land use and environmental law. He has worked on some of Idaho's most complex and difficult entitlement matters, including several large energy facilities. He is recognized in *The Best Lawyers in America*, *Chambers USA*, *America's Leading Lawyers for Business*

and *Mountain States Super Lawyers* for his land use and zoning expertise. Along with Deborah Nelson and others, he is an author of the *Idaho Land Use Handbook*, a land use treatise used widely around the state. Gary received his law degree from Stanford Law School, where he was an editor of the *Stanford Environmental Law Journal*, and his undergraduate degree from Dartmouth College, where he graduated magna cum laude and was co-captain of the varsity tennis team.

Deborah Nelson is a partner at Givens Pursley LLP where she practices land use, water, real estate and environmental law. Deborah's land use practice focuses on helping clients navigate and obtain the legal entitlements required for the siting, operation, or expansion of a business or development. She has experience with industrial, commercial, energy, agricultural, resort, and mixed-use projects. She is recognized in *Chambers USA* as a land use expert and is a recipient of the *Tribute to Women and Industry award* (2009), *Idaho Business Review's Women of the Year award* (2008), *Idaho Women Lawyers' distinguished Kate Feltham award* (2008), and *Idaho Business Review's Accomplished 40 Under 40 award* (2003). Deborah earned her J.D. and a *Certificate in Environmental and Natural Resources Law* from Northwestern School

of Law of Lewis and Clark College and her B.A. in International Studies from Rhodes College.

Endnotes

¹ The federal Energy Policy Act of 1992 and other federal and state actions have served to increase the number of applications for electrical generating facilities in Idaho and around the country. The effect has been to permit power project developers to site energy facilities that do not necessarily or exclusively serve the utility service area in which they are located and to permit open access to the transmission grid to transport the power they generate. These facilities are known as “merchant plants” because they have to find buyers for the power they generate in the wholesale electricity market.

² The Idaho legislature has considered a handful of energy facility siting bills in recent years, but only one has passed and it stopped short of shifting approval authority away from local jurisdictions. Passed in 2007, the Energy Facility Site Advisory Act, Idaho Code sections 67-2351 through 67-2355, serves two purposes. First, the legislation creates a system for counties and cities to obtain information from state government departments when they are considering a large energy project. Second, the legislation prohibits a county or city from considering the following factors or attributes of an energy facility (because the duty to analyze such factors rests with the Public Utilities Commission, the electricity cooperative, or the city council overseeing a municipal electric system): (a) the need for or use of the energy; (b) the resource plan or financial characteristics of an electric utility or purchaser of the energy; or (c) alternative resource options or alterna-

tive energy facility sites that were considered by the applicant or utility owner or purchaser, or that may be or were available or should have been considered for comparative purposes.

³ Although outside the scope of this article, it is important to note that the siting process is very different on public lands, with each affected public agency—typically, the Idaho Department of Lands or the United States Bureau of Land Management—having its own unique standards and processes.

⁴ Idaho Code § 67-6508(h).

⁵ Idaho Code §§ 67-6511 and 67-6535(a).

⁶ Idaho Code § 67-6512(a).

⁷ *Natural Guardian Limited Partnership v. Bingham County* (7th Dist, Idaho, Aug. 13, 2009) (overturning the permit on other grounds, including conflict of interest and failure to properly consult with the Idaho Department of Lands).

⁸ Idaho Code § 67-6535(b).

⁹ See Idaho Code §§ 67-8201 – 8214 (the Idaho De-

velopment Impact Fee Act, describing the requirements for adoption of impact fees in Idaho).

¹⁰ Applicants and other affected persons in permit application proceedings are entitled to have the application heard by unbiased decision-makers. “[A] decision by a zoning board applying general rules or specific policies to specific individuals, interests or situations, are [sic] quasi-judicial in nature and subject to due process constraints.” *Chambers v. Kootenai County Bd. of Comm’rs*, 125 Idaho 115, 118, 867 P.2d 989, 992 (1994). The same is true of an appeal of such a decision to a board of county commissioners. See *Comer v. County of Twin Falls*, 130 Idaho 433, 438-39, 942 P.2d 557, 562-63 (1997) (analyzing whether the county board violated due process in the appeal of a P&Z decision).

¹¹ *Eacret v. Bonner County*, 139 Idaho 780, 786, 86 P.3d 494, 500 (2004); *Idaho Historic Preservation Council, Inc. v. City Council of Boise*, 134 Idaho 651, 656, 8 P.3d 646, 651 (2000).

It is really important to understand that a county is not necessarily equipped to handle the entitlement process for a unique and complicated energy facility project, with multiple applications, phasing, and numerous special conditions.

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.

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RELOCATING AN EASEMENT UNDER IDAHO CODE § 55-313

Jonathan Burky
Macomber Law, PLLC

In light of the changing demographic and the near 20 percent population growth rate in Idaho over the past 10 years,¹ a discussion of property law and the laws on easements is both timely and relevant. In the coming years, developers will continue to build on previously uninhabited lands. New developments will spring up next to cabins on five-acre parcels. Idahoans, who treasure their independence and take great pride in land ownership, will be challenged by investors and transplants who continue to purchase scenic swatches of the state.



As the importance of demarcation of property lines and the preservation of easement rights grows, a clear understanding of Idaho Code § 55-313 will become more important. Under Section 55-313:

[T]he person or persons owning or controlling the private lands shall have the right at their own expense to change such access to any other part of their private lands, but such change must be made in such a manner as not to obstruct motor vehicle travel, or to otherwise injure any person or persons using or interested in such access.

As of the publication date of this article, there are no cases in Idaho that interpret this particular code section.² Without clear interpretive guidance from the courts in Idaho, at least two questions arise. First, what does it mean to “otherwise injure any person or persons using or interested in such access”? Second, can the owner of the servient estate relocate the easement without consent of the easement holder?

Injury to any person or persons using or interested in access to private lands

Idaho Code § 18-4308 and Idaho Code § 42-1207 are statutes related to appurtenances such as irrigation ditches and waterways, and they allow a servient

Statutes related to appurtenances such as irrigation ditches and waterways, and they allow a servient owner to move them without “otherwise injur[ing] any person or persons using or interested in such access.”

owner to move them without “otherwise injur[ing] any person or persons using or interested in such access.” Section 42-1207 states in pertinent part:

[T]he person or persons owning or controlling said land shall have the right at their own expense to change said ditch, canal, lateral or drain or buried irrigation conduit to any other part of said land, but such change must . . . not . . . impede the flow of the water therein, or . . . otherwise injure any person or persons using or interested in such ditch, canal, lateral or drain or buried irrigation conduit.

The language in Section 18-4308 is essentially identical to that of Section 42-1207, with the exception that Section 18-4308 contains a provision for a misdemeanor for noncompliance with the statute.

Idaho courts have decided several cases interpreting these statutes. In *Savage Lateral Ditch Water Users Association v. Pulley*, 125 Idaho 237, 869 P.2d 554 (1993), the servient estate holder relocated the Savage Lateral Ditch that ran through his property. Consequently, downstream water users’ flow decreased, and these users were forced to increasingly rotate ditches.³ Applying Idaho Code § 42-1207, the Court noted that the statute “is broadly worded and does not specify that it is only the amount of water to which downstream users are entitled under the water laws of this state which may not be impeded.”⁴ The Court also found that maintenance of the ditch was more difficult and time consuming because of the relocation. The combination of the decreased flow, the increased maintenance, and the fact that downstream users were forced to rotate their ditches resulted in a finding that the relocation of the ditch was injurious under Section 42-1207.⁵

The case of *Simonson v. Moon*, 72 Idaho 39, 237 P.2d 93 (1951), involved a complicated series of diversions and relocation of irrigation ditches. In its decision, the Court stated, *inter alia*, that the plaintiffs had the right to remove a certain branch lateral and that the plaintiffs should clean a specified portion of the main lateral at their own expense or allow the defendants reasonable access for that purpose.⁶ The Court noted that prior to the enactment of Section 42-1207 and Section 18-4308, the “right of the owner of a servient estate to change the place or location of an easement did not exist.”⁷ Plaintiffs had the burden to prove that they provided the defendants with an alternate ditch that would convey the water without impeding the flow and without injury to the defendants.⁸ The Court further noted that:

a mere increase in the length of ditch, or other conditions, which result in a comparatively unimportant increase in maintenance, would be [insufficient] to deny the servient owner the right to change the location of a ditch. But, when such an increase in the burden is accompanied by the requirement of rotating the use of the ditch, then the impediment to the flow of the water will be considered substantial and an injury within the statute.⁹

The language in Idaho Code § 55-313 closely parallels the language in both Section 42-1207 and Section 18-4308. In deciding an argument involving Section 55-313, a court in Idaho would necessarily turn to these other two statutes for guidance. In *Simonson*, the Court allowed the servient estate owner to remove a lateral, but required that the plaintiff clean the lateral at his own expense. The Court in these cases appears to have taken a whol-

ly utilitarian approach to applying these statutes. In *Simonson*, the Court said that “mere” increases in lengths of ditches and minor increases in maintenance would not prevent a servient estate holder from relocating an easement, but that requiring a user to rotate ditches did cause a substantial injury. In a case involving Idaho Code § 55-313, an Idaho court would also likely focus specifically on the hard utility of the relocated easement versus mere inconveniences that the easement holder may suffer. A court might allow an easement relocation requiring the easement holder to drive a further distance, but might disallow a relocation that prevents the easement holder from clearing or maintaining the easement in inclement weather. Impeding flow to water in an irrigation channel has serious consequences to other users of the channel, which is reflected in the fact that violating Section 18-4308 may result in a criminal misdemeanor. Similarly, in applying Section 55-313, a court should find that the injury to the holder of the easement be substantial.

Relocation of an Easement Without the Consent of the Easement Holder

Both Section 42-1207 and Section 18-4308 state that “[t]he written permission of the owner of a ditch ... must first be obtained before it is changed . . .” Section 55-313 is silent as to whether consent is required before relocating an easement. Resolving this issue merits discussion of the majority and minority views of relocating easements. The Restatement (Third) of Property (Servitudes), the minority view, states that unless denied by the express terms of the easement:

[t]he owner of the servient estate is entitled to make reasonable changes in the location or dimensions of an easement, at the servient owner’s expense, to permit normal use or development of the servient estate, but only if the changes do not (a) significantly lessen the utility of the easement, (b) increase the burdens of the owner in its use and enjoyment, or (c) frustrate the purpose for which the easement was created.¹⁰

In *MacMeekin v. Low Income Housing Institute, Inc.*,¹¹ 111 Wash. App. 188 (Wash. Ct. App. 2002), the Washington Court of Appeals explicitly declined to follow the Restatement rule and adopted the majority or traditional rule that “easements may not be relocated absent mutual consent of the owners of the dominant and servient

Section 55-313, the court must determine whether an obstruction or an injury occurred, which may require a threshold injury inquiry, rather than a degree of harm analysis.

estates, regardless of how the easement was created.”¹¹ In *MacMeekin*, the relocation of the easement would require the easement holder to make three 90-degree turns before reaching his property. *MacMeekin* further argued that the relocation would lower his property value and would be extremely inconvenient.¹² In its discussion, the court cited to *Davis v. Bruk*, 411 A.2d 660, 664-66 (Me. 1980), for the theory that judicial “relocation of established easements would introduce uncertainty in real estate transactions.”¹³ In discussing the minority view, the *MacMeekin* court noted that the minority rule increased utility by increasing the value of the servient estate without lowering the value of the dominant estate.¹⁴ The majority rule favors uniformity, stability, predictability, and property rights. The minority approach favors flexibility and development potential of the servient estate.¹⁵ Under the minority approach, the court noted that a court could order relocation of the easement because: (a) a zig-zag course of 90-degree turns was not significantly different from the straight path because both arrived at the same end destination without significantly reduced utility; (b) visitors’ decreased ability to locate the street address was a mere inconvenience that did not increase the burden of the easement owner; and (c) the easement still allowed ingress, egress, and utilities, and thus did not frustrate the purpose.¹⁶ However, the court then held that “Washington adheres to the traditional rule that easements, however created, are property rights, and as such are not subject to relocation absent the consent of both parties.”¹⁷ The minority rule may actually reduce the chances of litigation over an easement.¹⁸ Under this theory, the servient estate cannot relocate an easement to the detriment of the dominant estate. The dominant estate holder has an incentive to influence the servient estate’s relocation of the easement, and the servient estate has an incentive to consider the dominant estate’s interests lest the court later determine that the reloca-

tion was injurious.¹⁹ On the other hand, the minority rule could increase litigation because there is less certainty in the rule and more latitude for making fairness, injury, and equity arguments.

Interpretation of Idaho Code § 55-313

Litigating a relocation of easement case stems from at least three common scenarios. First, the new location is not as good as the old location. Second, the easement holder does not have a close relationship with the owner of the servient estate and is taking advantage of the servient estate owner. Third, the servient estate owner is changing the character of the estate, and the easement holder is attempting to interfere with the new development.²⁰

It appears that the Idaho legislature has adopted a variation of the minority rule under Idaho Code § 55-313. The minority rule in the Restatement is more specific than the rule in Section 55-313 in that it lists more factors for a court to consider in deciding whether the relocation caused injury. In the Restatement, the servient estate can relocate the easement if the relocation does not: “(a) significantly lessen the utility of the easement, (b) increase the burdens of the owner in its use and enjoyment, or (c) frustrate the purpose for which the easement was created.”²¹ Under Section 55-313, the servient estate holder can relocate the easement so long as he or she does not obstruct motor vehicle travel or otherwise injure any person or persons using the easement. When comparing Idaho’s rule with the minority rule of the Restatement, it appears that Section 55-313 is a blend between the minority and majority rule. Section 55-313 speaks in more absolute terms than the shades of grey in the Restatement. Under Section 55-313, the court must determine whether an obstruction or an injury occurred, which may require a threshold injury inquiry, rather than a degree of harm analysis.

Section 55-313 uses the same lan-

guage – “or to otherwise injure any person or persons” – as Section 42-1207 and Section 18-4308. However, Section 55-313 does not expressly state whether the servient estate owner must obtain the easement holder’s consent before relocating the easement. The fact that the language related to consent in both Section 42-1207 and Section 18-4308 has been removed from Section 55-313 supports the notion that the Idaho legislature has adopted a variation of the minority rule. In the future, Idaho courts will likely see more cases involving Section 55-313 and will be tasked with better defining what it means to obstruct use of the easement or otherwise injure the easement holder. Two factors discussed above are likely common scenarios in Idaho. First, the servient estate holder may relocate the easement in a manner that is inconvenient or not as good for the easement holder. Second, the easement holder may object to the relocation simply because he or she is trying to hamper development. In theory, the minority rule encourages the two property owners to communicate before relocating the easement. However, considering that that investors and out-of-state residents are often buyers in Idaho, a common scenario may involve relocation of the easement without any communication at all. Consequently, a lawsuit may later be brought to determine whether the relocation was injurious.

In conclusion, it is likely that an appellate court in Idaho will soon be tasked with interpreting Idaho Code § 55-313.²² Presently, courts in Idaho would likely turn to Section 42-1207 and Section 18-4308 for guidance, as the language and intent of these statutes is markedly similar to Section 55-313. The irrigation cases interpreting these two statutes help delineate the

The irrigation cases interpreting these two statutes help delineate the degree of injury required when contesting the relocation of an easement.

degree of injury required when contesting the relocation of an easement. However, a court should also consider that Section 42-1207 and Section 18-4308 explicitly require written consent before relocating a ditch or irrigation channel, which is consistent with the traditional or majority rule on easement relocation. It appears that Section 55-313 favors a variation of the minority rule.²³

About the Author

Jonathan Burky is an associate attorney at Macomber Law, PLLC in Coeur d’Alene, and currently focuses on real property, contracts, and water law. Mr. Burky received his Juris Doctor and Bachelor’s of Science from Washington University in St. Louis, MO. During law school, Mr. Burky was an associate editor of the Washington University Global Studies Law Review. Before attending law school, he was an environmental engineer at URS Corporation in San Francisco.

Endnotes

¹ State and County Quick Facts, available at <http://quickfacts.census.gov/qfd/states/16000.html> (last visited on March 5, 2010).
² Idaho Code. § 55-313 was mentioned but was not discussed in Benninger v. Derifield, 142 Idaho 486, 129 P.3d 1235 (2006).

³ 125 Idaho at 240, 869 P.2d at 557.
⁴ Id. at 242, 869 P.2d at 559.
⁵ Id. at 243, 869 P.2d at 560.
⁶ 72 Idaho at 45, 237 P.2d at 96-97.
⁷ Id. at 45, 237 P.2d at 97, citing to 28 C.J.S. Easements § 84; Am. Jur. Easements § 87.
⁸ Id. at 45-46, 237 P.2d at 97-98.
⁹ Id. at 46, 237 P.2d at 97-98.
¹⁰ Restatement (Third) of Property (Servitudes) § 4.8 (2000).
¹¹ 111 Wash. App. 188, 190.
¹² Id. at 194.
¹³ Id. at 200.
¹⁴ Id. at 204, citing to Restatement (Third) of Property (Servitudes) § 4.8, Comment f (2000).
¹⁵ Id. at 206.
¹⁶ Id.
¹⁷ Id. at 207.
¹⁸ Susan F. French, Relocating Easements: Restatement (Third), Servitudes § 4.8 (3), 38 Real Prop. Prob. & Tr. J. 1, 7 (2003-04), citing to Lewis v. Young, 705 N.E.2d 649, 653 (N.Y. 1998).
¹⁹ Id.
²⁰ Id. at 12.
²¹ Restatement (Third) of Property (Servitudes) § 4.8 (2000).
²² As of the publication date of this article, a case involving I.C. § 55-313 is pending before the Idaho Supreme Court.
²³ Again, I could not locate any published opinions interpreting Idaho Code § 55-313, and it will be interesting to learn how the courts analyze these issues.



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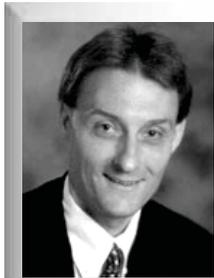
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MECHANIC'S LIEN PRIORITIES VS. OTHER ENCUMBRANCES

Douglas R. Hookland
Scott Hookland, LLP

Introduction

In today's economic environment, with financially struggling property owners and developers giving back to their lenders projects in various stages of completion, questions of priority between construction lenders and mechanics or materialmen's lien claims often arise. This article analyzes the priorities between an Idaho mechanics lien (collectively "mechanics lien") and other encumbrances (often the trust deed or mortgage of a construction lender) against the real property involved. Generally, a mechanics lien enjoys priority only if the mechanics lien claimant began furnishing its work before the competing lien, mortgage or other encumbrance attached or was recorded.



Douglas R. Hookland

I.C. § 45-506

Section 45-506 of the Idaho Code addresses the priority of mechanics liens compared to other liens against the real property, which are typically trust deeds or mortgages. This statute provides as follows:

45-506. LIENS PREFERRED CLAIMS. The liens provided for in this chapter shall be on equal footing with those liens within the same class of liens, without reference to the date of the filing of the lien claim or claims and are preferred to any lien, mortgage or other encumbrance, which may have attached subsequent to the time when the building, improvement or structure was commenced, work done, equipment, materials or fixtures were rented or leased, or materials or professional services were commenced to be furnished; also to any lien, mortgage, or other encumbrance of which the lienholder had no notice, and which was unrecorded at the time the building, improvement or structure was commenced, work done, equipment, materials or fix-

Generally, a mechanics lien enjoys priority only if the mechanics lien claimant began furnishing its work before the competing lien, mortgage or other encumbrance attached or was recorded.

tures were rented or leased, or materials or professional services were commenced to be furnished.

In 2001, the Idaho Supreme Court reaffirmed its 1905 decision in *Pacific States Sav. & Loan & Bldg. Co. v. Debois*¹ by holding the priority of each mechanics lien dates back to the date the lien claimant first began furnishing its labor, materials, equipment, or professional services, and if a trust deed or mortgage was recorded prior to that date, the trust deed or mortgage has priority, but if the trust deed or mortgage was recorded after the first date of furnishing work by the mechanic's lien claimant, the mechanics lien claimant has priority.² Likewise, a mechanics lien claimant who begins performing its labor before a judgment creditor's attachment levy, but who does not complete its performance until after the attachment levy, has priority over the judgment creditor's attachment.³

The mechanics lien rights of one providing labor and material not having notice of a mortgage that was unrecorded have priority over the unrecorded mortgage.⁴ A mortgage which has been assigned has priority over a mechanics lien attaching prior to the assignment but after the mortgage is executed.⁵ One who commences to provide labor and materials, equipment or professional services before a mortgage or trust deed is recorded, and then does not perfect mechanics lien rights based on representations by the lender having the trust deed or mortgage, may have claims against the lender because in reliance they did not perfect mechanics lien rights that would have had priority over the lender.⁶

Subsequent loan disbursements or advances

Of course, often a mechanics lien claimant will begin work after the original loan disbursement was made (and deed or mortgage recorded). However, subsequent loan disbursements are made prior

to the mechanics lien claimant completing work on the property, raising the question of the mechanics lien priority over the subsequent loan advances. The starting point is I.C. § 45-108, which provides as follows:

45-108. LIEN FOR PERFORMANCE OF FUTURE OBLIGATIONS -- VALIDITY -- PRIORITY.

A lien may be created by contract, to take immediate effect, as security for the performance of obligations not then in existence, which lien, if not invalid on other grounds, shall be valid as against all persons. The validity of such contracts and liens as security for any obligation is not affected as against any person by the fact that the contract does not specify, describe or limit the obligations to be secured as to purpose, nature, time, or amount of the obligations to be secured. All such liens, if otherwise valid, are valid against and prior and superior to all rights, liens and claims acquired by other persons in the property subject thereto after the contract creating such liens was made, *except in cases where the person in whose favor the obligation secured by such lien was created, had actual notice of the existence of such subsequent right, lien or claim at the time such obligation was created*, and are prior and superior to such subsequent rights, liens or claims irrespective of such or any notice in the following cases:

1. Where the person, in whose favor the obligation secured thereby was created, was legally bound to make the advance or give the consideration resulting in such obligation.
2. Where the consideration for such obligation was necessarily and actually applied to the maintenance and/or preservation of the property sub-

ject to the lien. Making the advance or giving the consideration to result in an obligation not in existence at the time such a contract creating a lien to secure the same is made, is optional with the person making the advance or giving the consideration unless he is bound by an express contract to the contrary which shall not be implied from the fact that the contract to secure such obligation was made. Obligations otherwise within the limits and description of those specified in any contract creating a lien to secure the performance of obligations not then in existence, but created in favor of any person to whom the original party to be secured by the lien created by such contract has transferred such contract, shall also be secured thereby in like manner as similar obligations between the original parties thereto. Contracts of mortgage of real property are subject to all the provisions of this section as amended.

The key language in this statute is the exception in cases where the lender had actual knowledge of the mechanics lien claim at the time it either disbursed loan proceeds or made an advance on a credit line. However, the statute then provides that where the lender is legally obligated to make the progress payment or provide the advance, the lien for such progress payment or advance will relate back to the date the trust deed or mortgage was recorded. The Idaho Supreme Court has construed Section 45-108 to follow the general rule that if a future advance is obligatory, it takes its priority from the original date of the mortgage, and a subsequent creditor is junior to it; however, if the advance is optional, and the mortgagee has notice when the advance is made that a subsequent creditor has acquired an interest in the land, the advance loses its priority to the subsequent creditor.⁷ Therefore, if a trust deed or mortgage requires the lender to disburse funds or make future advances, the priority for such disbursements or future advances, even if made with knowledge of a mechanics lien claim, should date back to when the mortgage or trust deed was recorded, and the mechanics lien claimant will have priority only if it began furnishing work prior to the mortgage or trust deed being recorded.

Judgment liens

The priority between a mechanics lien claim and a judgment lien should turn on whether the judgment became a lien be-



fore or after the mechanics lien claimant began furnishing its work. A judgment becomes a lien on all real property of the judgment debtor in a county from the time a transcript or abstract of the judgment is recorded with the recorder of **that** county.⁸ Therefore, a mechanics lien claimant will have priority over a judgment lien only if it began furnishing work before a transcript or abstract of the judgment creditor's judgment was recorded in the county where the construction project is situated.

Failure to designate

The mechanics lien statute requires that the lien state the amount due. In many cases, however, the mechanics lien claimant will be performing work on several different properties, with different amounts due for each property. If the claimant fails to adequately designate the amount due on each property, could they become subordinated to the deed, mortgage or judgment lien that otherwise would be subordinate to the mechanics lien?

By statute a mechanics lien claim filed against two or more buildings or other improvements owned by the same person must designate the amount due on each building or improvement, or the lien is postponed to other liens.⁹ Idaho courts have consistently held that a mechanics lien which fails to comply with this designation requirement is subordinate to other liens, but is not void.¹⁰ It does seem clear that a mechanics lien which fails to designate amounts due on each improvement

will subordinate its lien to other mechanics lien claims that do so designate.

However, the statute is not clear as to whether this subordination extends to a trust deed, mortgage or judgment lien over which the mechanics lien claimant would otherwise have priority but for the lack of designation of amounts due on each improvement. The statute states that the mechanics lien is postponed to "other liens". It does not limit postponement to "other liens provided for in this chapter", which is how Section 45-506 begins. This lack of limitation may support an argument that subordination extends to trust deeds, mortgages and judgment liens. In contrast to the "other liens" phrase in Section 45-508, a similar statute in Washington makes it clear that subordination is limited to other mechanics liens by use of the language "other liens that may be established under this chapter".¹¹

The second sentence of I.C. 45-508 limits a mechanics lien to the amount designated as against other lien creditors, which may also support an argument that a mechanics lien claim failing to designate amounts due on each improvement is subordinate to trust deeds, mortgages, or judgment liens recorded or perfected after the mechanics lien claimant began furnishing its work. The author is not aware of any cases addressing this issue.

Summary

The priority of a mechanics lien dates from when that lien claimant began furnishing its labor, materials, equipment or professional services. Therefore, if the

mechanics lien claimant began furnishing its work prior to the attachment of any other lien, trust deed, mortgage or other encumbrance, the mechanics lien claimant should have priority pursuant to Section 45-506 of the Idaho Code. Likewise, a mechanics lien claimant who begins furnishing its work at the time any lien, trust deed, mortgage or other encumbrance was unrecorded and for which the mechanics lien claimant had no notice should also have priority under Section 45-506. Construction lenders are sophisticated, and typically record their trust deed or mortgage prior to the commencement of any labor, materials, equipment or professional services being provided, and they obtain, as a precondition to lending, subordination agreements from anyone that has already started furnishing any labor, materials, equipment, or professional services. Therefore, in most cases a mechanics lien claim will be subordinate to a lender's trust deed or mortgage. If the property owner does not save the project, and gives the property back to its lender, subordinate mechanics lien claims probably have little or no value.

About the Author

Douglas R. Hookland is the managing partner in the Tigard, Oregon law firm of Scott — Hookland LLP. He has been a

By statute a mechanics lien claim filed against two or more buildings or other improvements owned by the same person must designate the amount due on each building or improvement, or the lien is postponed to other liens.

member of the Idaho State Bar since 2003, and his practice emphasizes enforcement of creditor's rights and construction law. He received his law degree from Willamette University College of Law. He is a frequent author and presenter of written materials to attorneys and trade groups in the area of creditor's rights and construction law.

Endnotes

- ¹ 111 Idaho 319, 83 P.2d 513 (1905).
- ² Ultrawall, Inc. v. Washington Mutual Bank, 135 Idaho 832, 25 P.3d 855 (2001).
- ³ See White v. Constitution Min. & Milling Co., 56 Idaho 403, 55 P.2d 152 (1936).
- ⁴ Poynter v. Fargo, 48 Idaho 271, 281 P.1111 (1929).
- ⁵ Finlayson v. Waller, 64 Idaho 618, 134 P.2d 1069 (1943).
- ⁶ See Cooper v. Wesco Builders, Inc., 73 Idaho 383, 253 P.2d 226 (1953).

⁷ Idaho First National Bank v. Wells, 100 Idaho 256, 596 P.2d 429 (1979).

⁸ See I.C. 10-1110.

⁹ See I.C. 45-508.

¹⁰ See e.g. Phillips v. Salmon River Mining & Dev. Co., 9 Idaho 149, 72 P. 886 (1903); Treasure Valley Plumbing & Heating, Inc. v. Earth Resources Co., 106 Idaho 920, 682 P.2d 322 (Ct. App. 1984).

¹¹ RCW 60.04.131 provides as follows:

In every case in which the notice of claim of lien is recorded against two or more separate pieces of property owned by the same person or owned by two or more persons jointly or otherwise, who contracted for the labor, professional services, material, or equipment for which the notice of claim of lien is recorded, the person recording the notice of claim of lien shall designate in the notice of claim of lien the amount due on each piece of property, otherwise the lien is subordinated to other liens that may be established under this chapter. The lien of such claim does not extend beyond the amount designated as against other creditors having liens upon any of such pieces of property. (Emphasis added).

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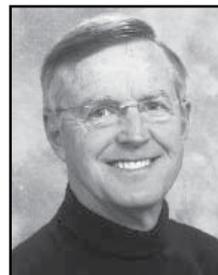
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TENANT OCCUPATION IN HOAs: WAR... OR PEACE BY OTHER MEANS?

Arthur B. Macomber
Macomber Law, PLLC

Introduction

During challenging economic times, owners in homeowners' associations and condominium buildings seek ways to uphold their property values. Some owners perceive that property values are better maintained if tenant occupancy rates are low. This article explores implementation of owner-occupancy ratios in both existing single-family detached homeowner associations and condominium buildings.

What is a condominium?

Pursuant to Idaho Code Section 55-101B, "[a] condominium is an estate consisting of (i) an undivided interest in common in real property, in an interest or interests in real property, or in any combination thereof, together with (ii) a separate interest in real property, in an interest or interests in real property, or in any combination thereof." Therefore, in Idaho, the estate in land called a condominium may include both condominium ownership of a single-dwelling unit within a single building of multiple units, but also a homeowners' association of single-family detached residences. The Department of Housing and Urban Development refers to the latter type of condominium estate as a "site condominium."¹ Idaho Code section 55-1501, *et seq.*, govern the establishment of condominium projects in Idaho, although ongoing governance is largely left to the articles of incorporation, the developer's declaration of covenants, conditions and restrictions ("CC&Rs"), the bylaws, and other rules created pursuant to those governing documents. Generally, Idahoans are not currently burdened, or benefited, as one's perspective may conclude, by statutory restrictions or requirements related to owner-occupancy ratios for condominium projects.

Why limit tenancies in condominium projects?

Whether correct or not, many have found that maintenance of real property

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Arthur B. Macomber

is more promptly and thoroughly accomplished by those who have more than a single month's rent at stake. Arguably, tenancies for longer periods should engender or extend better quality care of real property by occupants. Ultimately, the line is drawn between occupants who are title owners and occupants who are lessees. Generally, owners of property tend to remain longer and maintain their property better than tenants. The resulting community dislocation and lack of maintenance brought by tenants to communities can severely impact property values within a neighborhood. In order to address this issue, homeowners' associations or condominiums may find it prudent and reasonable to limit tenancies in their communities.

Are owner-occupancy limits lawful?

In condominium projects, limiting the number of tenants is a limitation on alienation of possession, a common law right held by owners. In Idaho, "because restrictive [CC&R] covenants are in derogation of the common law right to use land for all lawful purposes, the Court will not extend by implication any restriction not clearly expressed."² "Further, all doubts are to be resolved in favor of the free use of land."³ If expressly found in the governing declaration, the Idaho Supreme Court has found Idaho recognizes the validity of covenants that restrict the use of private property.⁴ Therefore, owner-occupancy limits are likely lawful in Idaho, if they are expressly contained within the declaration of CC&Rs and include provisions for mitigating potentially adverse circumstances negatively impacting an owner's ability to alienate possession. Further, since most homeowners' associations in Idaho are or-

ganized under the Idaho Nonprofit Corporation Act,⁵ the directors and officers are obligated to act "in good faith; with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and in a manner the [director or officer] reasonably believes to be in the best interests of the corporation."⁶ Thus, in addition to being expressly stated in the CC&Rs, owner-occupancy restrictions must be imposed with ordinary care, in good faith, and be reasonable and in the best interests of the corporation.

Within which governing document should restrictions be found?

Restrictions of an owner's right to alienate possession of his land to a third-party lessee must appear in the governing document commonly known as the declaration of CC&Rs.⁷ Since the bylaws of a nonprofit Idaho corporation govern internal management, voting and elections, maintenance and repair, and budgeting, it would be improper to include owner-occupancy restrictions in the bylaws.⁸ Each condominium project has a hierarchy of governing documents. Sometimes the documents conflict on the same point of governance. Usually, the Declaration of the CC&Rs overrules both the Articles and the by-laws, and both the latter, whatever their order in the hierarchy, overrule any rules and regulations that may be found in a separate document. Owner-occupancy-related restrictions on alienation must be in the highest-level document in the hierarchy, which is usually the Declaration of the CC&Rs. Amendments to CC&Rs may require as much as an 80 percent affirmative vote of the unit owners to become controlling. Additionally, some documents require the affirmative votes of some percentage of the mortgag-

ees, or the first mortgagees, if the amendment is detrimental to a mortgagee's interests. It cannot be assumed that imposition of an owner-occupancy ratio is not detrimental to a mortgagee, because after implementation, the salability of a unit may become more difficult. These considerations argue for imposing the desired ratio at project implementation, because educating owners and gathering votes of owners and mortgagees after project units are fully sold, or when a project is past the developer's control period, may be an impossible task.

Ranges of owner-occupancy ratios that are lawful and prudent

Idaho does not set any standards for owner-occupancy ratios in condominium projects, whether they are site condominiums or multi-unit condominiums within buildings. However, federal lending requirements for mortgage insurance or loans do provide such limits, and common sense in a particular situation should be considered.

For mortgage insurance in new multi-unit condominium projects within buildings, the Federal Housing Administration ("FHA") requires "at least 50% of the units of a project [to] be owner-occupied or sold to owners who intend to occupy the units."⁹ Owner-occupancy limitations do not apply to FHA mortgage insurance procured for site condominiums.¹⁰ To obtain Fannie Mae loans or mortgage insurance for new or newly-converted condominium projects, "at least 70 percent of the total units in the project . . . must have been conveyed or be under a bona fide contract for purchase to principal residence or second home purchasers."¹¹ The percentage was 51 percent in 2007.¹² Therefore, owner-occupancy restrictions are not only lawful in Idaho, but are considered prudent by major lenders and insurers such as Fannie Mae and the FHA.

What specific owner-occupancy ratios should be provided?

For new projects, developers may reasonably create owner-occupancy ratios as high as 80%. However, due to the likely occurrence of adverse and foreseeable circumstances, developers may want to avoid higher ratios. For example, in seniors-only housing, the occurrence of medical illness may place unjustified hardships on multiple owners within the same time period. Likewise, in developments with high concentrations of young families, job transfers or calls to military service may bring hardships not envisioned by the

Overall, whether for a new or existing project, it is likely that an Idaho court would find, and the owners would benefit from, owner-occupancy ratios that are between 60 and 80 percent.

original developers. Thus, while on one hand, an extremely low owner-occupancy ratio development may not pass requirements for federal loans or mortgage insurance, a high owner-occupancy ratio may bring avoidable hardship to the development's community. Further, amendment of CC&Rs is purposefully difficult; it frequently requires member approval of above 70%, and mortgagee approval may be required for amendment of provisions that adversely affect the lender. If the owner-occupancy ratio is too high, it may preclude purchasers and thus lending into the community. Thus, while it may appear initially that high owner-occupancy ratios would always benefit lenders, the tightness of the restriction on owners may prevent sales and the new loans that accompany those sales.

For existing projects, the condominium community may already be experiencing owner-occupancy ratios lower than 60% and correctly perceive that federal loans and insurance may rapidly dry up if only a few more units become rented. It is likely that during difficult economic times, many owners feel financial pressures sufficient to make them vote against any further restrictions on alienation. Also, as mentioned above, those serving in the military or those worried about job transfers may feel that their ability to rent their homes quickly should they need to relocate could stave off foreclosure.

Overall, whether for a new or existing project, it is likely that an Idaho court would find, and the owners would benefit from, owner-occupancy ratios that are between 60 and 80 percent.

Specific provisions that are prudent and reasonable

Amendment of CC&Rs is a difficult task. The homeowner community must be pre-educated with information to address and allay their fears of further restrictions on alienation. Most CC&Rs re-

quire meetings of the membership where the agenda specifically discusses this type of change. Further, the directors of the homeowners' association would be well-advised to know the demographics of their association, in order to design a path toward owner-occupancy ratios that avoid hardship.

A well-crafted grandfather provision may allow the requisite number of votes to be obtained, so that the homeowners are not scared off by an immediate application of the new rules. Even if a case is made that the homeowners' property values will benefit from immediate implementation of such rules, many homeowners will be more concerned with the immediate, personal financial impact than they are concerned about the long-term impact of deterioration in property values in the development generally. A grandfather provision could allow every homeowner to rent his unit freely for a period of five or ten years after the rule change is made, thus allowing owners to vote for such rules and benefit from the rule upon sale without being unduly constrained by it. The five-year period would be appropriate during periods of property value appreciation, and the ten-year period could be implemented during deteriorating economic periods. Further, an owner who decides to terminate a lease and move back in to make it an owner-occupied unit should be able to "sell" the remaining time of his grandfather provision to another unit owner lessor, who needs more time under an existing lease, or who, due to other circumstances, needs the extra time. This would be an appropriate use of market-based mechanisms to increase the desirability of such rules without unduly restricting a given owner. Finally, the homeowners' association may decide to levy a fee on transfers between unit owners of such grandfather provision time periods, in order to offset the book-

keeping necessary to monitor the restrictions on alienation.

Hardship provisions are very advisable, because they allow for flexibility. If a family breadwinner is transferred, the association will not benefit from an empty unit, especially in site condominiums where a vacant unit may draw vandalism, thereby deteriorating property values, and if the homeowner is restricted from leasing his unit, he may be placed in an inequitable financial bind. If an owner loses his job and needs to move to less expensive living quarters, it would also be inequitable to enforce the owner-occupancy ratio to prevent a financially-viable tenancy. Further, even though lenders may not be on everyone's party invitation list, restrictions on leasing that prevent a foreclosing mortgagee from renting the property may result in the loss of that mortgagee's vote to amend the CC&Rs. Reasonable directors will understand both existing and potential demographics of their homeownership community, so that proper and equitable hardship provisions may be created.

Finally, as mentioned above, the homeowners' association itself or its management company may experience higher costs due to the administration of owner-occupancy provisions. It should be current practice that a homeowners' association require lessees to receive and sign an acknowledgment that they have received copies of the governing documents and agree to abide by them, and that copies of all leases are given with such certification to the board of directors, through a management company where one is utilized. Such costs should be tracked, so that budget planning can be adequately completed.

Reasonable directors will understand both existing and potential demographics of their homeownership community, so that proper and equitable hardship provisions may be created.

Conclusion

In order to maintain Idaho's real property values within homeowners' associations and condominium buildings, lawful owner-occupancy ratio provisions are prudent and reasonable to include in CC&Rs. With proper legal and implementation planning, the required member percentages can be obtained in a vote of homeowners and mortgagees where necessary, and appropriate and equitable hardship and grandfather provisions can ease the transition.

About the Author

Arthur B. Macomber has an undergraduate degree in business from George Fox University. Prior to attending the University of California Hastings College of the Law he enjoyed 25 years in business, real estate and construction. Mr. Macomber runs Macomber Law, PLLC with one associate and a paralegal in Coeur d'Alene, focusing on real property, land use, water and construction law.

Endnotes

¹ Mortgagee Letter 2009-46 B, 11/6/09, Dep't of Housing & Urban Dev. ("Site Condominiums are defined as single family totally detached dwellings (no shared garages or any other attached buildings)

encumbered by a declaration of condominium covenants or condominium form of ownership.")

² *Shawver v. Huckleberry Estates, LLC*, 140 Idaho 354, 363, 93 P.3d 685, 694 (2004); *Post v. Murphy*, 125 Idaho 473, 475, 873 P.2d 118, 120 (1994), citing *Thomas v. Campbell*, 107 Idaho 398, 404, 690 P.2d 333, 339 (1984).

³ *Id.*

⁴ *Nordstrom v. Guindon*, 135 Idaho 343, 345, 17 P.3d 287, 289 (2000); *Pinehaven Planning Bd. v. Brooks*, 138 Idaho 826, 829, 70 P.3d 664, 667 (2003).

⁵ I.C. § 30-3-101, *et seq.* (2007)

⁶ I.C. §§ 30-3-80 (Directors) and 30-3-85 (Officers).

⁷ I.C. § 55-1505(2)(f) ("[a] statement of the purposes for which the building and each of the units are intended and restricted as to use") and (q) ("such other provisions not inconsistent with this act as the owner or owners may deem desirable in order to promote, facilitate or preserve the property or the project or the use, development or administration thereof.")

⁸ I.C. § 55-1507.

⁹ Mortgagee Letter 2009-46 B, 11/6/09, Dep't of Housing & Urban Dev..

¹⁰ *Id.*

¹¹ Fannie Mae Announcement 08-34, Project Eligibility Review Serv. & Changes to Condominium & Cooperative Project Policies, 12/16/08, p. 6.

¹² Fannie Mae, Announcement 07-18, Lender Delegation of Project Review Processes & Related Changes for Condominiums, Cooperatives, & Planned Unit Devs. ("PUDs"), 11/15/07, p. 6.

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THE FAIR HOUSING AMENDMENTS AND WHY IT MATTERS TO HOMEOWNERS' ASSOCIATIONS

John J. Browder
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What happens when a community's covenants, conditions and restrictions ("CC&Rs")¹ impact a disabled resident's access to and enjoyment of his or her property such that he or she requests an accommodation to the provision? How should a homeowners' or condominium association address a request made by a disabled person to modify his or her premises in a way that will conflict with the CC&Rs? How can a homeowners' or condominium association discharge its obligation to faithfully enforce the CC&Rs while at the same time avoid running afoul of laws intended to prevent discrimination and to ensure disabled persons' equal access to housing?

The best approach for the homeowners' or condominium association, as well as its legal counsel, is to have a thorough understanding of what the relevant law requires and to have in place a procedure for addressing requests for reasonable accommodation and modifications to existing premises.



John J. Browder

The statute that the homeowners' or condominium association most likely will have to confront is the federal Fair Housing Amendments Act ("FHAA").² By understanding what this statute requires when faced with a request at odds with the CC&Rs, and having a robust procedure in place for addressing requests for reasonable accommodation and modifications to premises, associations and their attorneys can balance the rights of property owners, on one hand, with the rights of the disabled person, on the other.

The purpose of the FHAA and general overview

In 1988, Congress enacted the FHAA in large part to prevent discrimination and to provide equal opportunity in housing to those with handicaps.³ It is a broad statute that makes unlawful a variety of acts including: (1) discrimination against those with handicaps in the sale and rental of real estate;⁴ (2) discrimination against

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those with handicaps in the provision of real estate services; (3) interference, intimidation or coercion in the enjoyment and exercise of rights afforded under Sections 3603 through 3606 of the FHAA; and (4) discrimination in residential real estate services.⁵ Sections 3604, 3606 and 3617 prohibit housing-related practices, but do not specify who can be held responsible for the proscribed acts.⁶ In a civil action enforced by a private individual and in which the court concludes that a "discriminatory housing practice has occurred," the plaintiff can obtain a permanent or temporary injunction enjoining the defendant from engaging in the offending practice, actual and punitive damages, and attorneys fees and costs.⁷

Section 3604(f)(2) deems it unlawful to "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of --

- (A) that person; or
- (B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or
- (C) any person associated with that person."

Section 3604(f)(3) includes two definitions of "discrimination" to which homeowners' and condominium associations should pay particular attention. The one seemingly discussed most often in the reported cases, 42 U.S.C. § 3604(f)(3)(B), defines "discrimination" to include "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may

be necessary to afford such person equal opportunity to use and enjoy a dwelling."⁸ The other, 42 U.S.C. § 3604(f)(3)(A), states that "discrimination" includes a "refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises" Both of these definitions of "discrimination" can pose potential problems for the homeowners' or condominium association.

Reasonable accommodations in rules, policies, practices or services

Courts have held that a reasonable accommodation in "rules, policies, practices, or services" may require the non-enforcement of a restrictive covenant that results in a disabled person being precluded from residing in a community.¹⁰ Thus, to reasonably accommodate a disabled person, a person, group or entity may have to affirmatively change a facially valid deed restriction, policy or rule so as to "to make its burden less onerous on the handicapped individual."¹¹ To the extent a restrictive covenant or deed restriction "compels a discriminatory result," it will be held by the courts as "unlawful and void."¹²

Moreover, homeowners' and condominium associations cannot seek to avoid liability under the FHAA by using terms of CC&Rs or governing documents "as a shield."¹³ In other words, a court likely would reject the argument that the homeowners' or condominium association was obligated to enforce the CC&R pro-

vision and lacked the power to amend it to make it comply with the FHAA. One of the key cases in this area, *Gittleman v. Woodhaven Condominium Association, Inc.*,¹⁴ illustrates how a court may address the interplay between provisions in an association's governing documents and the FHAA.

In *Gittleman*, Mr. Gittleman, who allegedly suffered a handicap as defined by the FHAA, requested exclusive use of a parking place that he claimed was necessary to afford him "equal opportunity to use and enjoy" his unit.¹⁵ The Woodhaven Condominium Association, Inc. (the "Association") denied Mr. Gittleman's request, relying on a provision of the condominium's Master Deed that stated the condominium's parking places were for the "non-exclusive use of the unit owners."¹⁶

The Association had responded that, because Mr. Gittleman's request for an accommodation affected the owners' rights to the common areas, the Association would have to make a material amendment to the Master Deed. Material amendments to the Master Deed required the affirmative vote of at least two-thirds of the owners. The Association apparently put the vote before the unit owners, who reportedly voted against materially amending the Master Deed. Thereafter, Mr. Gittleman sued, seeking, in part, relief under the FHAA. The Association moved for summary judgment on the FHAA claim, which the court denied.¹⁷

In denying the Association's motion for summary judgment, the court rejected the contention that the Association itself, as opposed to the individual owner-members, lacked the power to "bring use of the common elements in compliance with federal law."¹⁸ Instead, the court concluded that, under the FHAA, the Association had a duty to avoid enforcing provisions of the Master Deed that had discriminatory effects. To the extent the Master Deed included provisions that, when applied, would violate Mr. Gittleman's rights under the FHAA, they were unlawful, and enforcement of such would subject the Association to liability under the FHAA. In so holding, the court relied on 24 C.F.R. § 100.80(b)(3), which made unlawful the enforcement of covenants, deeds, and lease or trust provisions that resulted in proscribed discrimination. Furthermore, the court observed that the FHAA's legislative history demonstrated that the intent of the statute was to bar discrimination "based on the enforcement of private agreements."¹⁹ As such, the reach of the FHAA included the power to invali-

Given the penalties for violating the FHAA, the homeowners' or condominium association faced with a request for a reasonable accommodation or for a modification of an existing premise should have in place a procedure for expeditiously and fairly addressing the request.

date those portions of private agreements that had discriminatory effects.²⁰

The lesson of *Gittleman* is clear. When the application of a CC&R provision or rule will run afoul of the FHAA and result in a discriminatory affect, the homeowners' or condominium association cannot enforce the provision without risking being held liable under the FHAA. With that said, an association also has the responsibility to ensure that the requested accommodation is necessary for the person's equal opportunity to use and enjoy the premises. As discussed in more detail below, much of this responsibility can be discharged by having the proper procedure in place for addressing requests for accommodation.

Modifications of existing premises

In addition to a request for a reasonable accommodation to a rule, policy or practice, homeowners and tenants also may request permission to make a modification to an existing premise. Pursuant to 42 U.S.C. § 3604(f)(3)(A), a disabled person is authorized to make "reasonable modifications of existing premises" if the modifications are necessary to the person's "enjoyment" of the premises.²¹ The person requesting the modification must pay for it.²² The federal regulation broadly defines "premises" to include the "interior or exterior spaces, parts, components or elements of a building, including individual dwelling units and the public and common use areas of a building."²³ The examples of required modifications that the regulations describe focus only on modifications to the interior of the premises, including the installation of grab bars in a bathroom and the widening of an interior bathroom door.²⁴ But the plain terms of 42 U.S.C. § 3604(f)(3)(A) make it clear that the "public and common use areas of a building" can be the subject of a request for a modification. As such, the homeowners' or condominium associa-

tion should ensure that, if faced with such a request to modify, it addresses it in the appropriate manner and makes sure that its actions are in accord with the FHAA.

Procedure for addressing requests for a reasonable accommodation and modification to existing premises

What types of restrictive covenants, deed restrictions or rules could a homeowners' or condominium association be required to change to comport with the FHAA's reasonable accommodation and modification of premises requirements? The reported cases reveal that the following types of covenants, restrictions, rules or situations are those often implicated by the FHAA's requirements: (1) rules regulating the use of enjoyment of parking spaces; (2) rules applied to prohibit the construction of wheelchair ramps; (3) rules applied to deny disabled persons from purchasing properties; and (4) rules construed to prohibit service animals or pets.²⁵ This list of categories, however, is not exhaustive.

Given the penalties for violating the FHAA, the homeowners' or condominium association faced with a request for a reasonable accommodation or for a modification of an existing premise should have in place a procedure for expeditiously and fairly addressing the request. At a minimum, such a procedure should:

- Require that all requests for a reasonable accommodation or modification to existing premises be addressed in writing to the association.
- Require that such a request include the requesting party's contact information, whether the requesting party owns or leases the property, a copy of any lease, if applicable, and a description of the requesting party's condition.
- Require that such a request also include a detailed statement of how the

association's rule, policy, practice or service affects or impacts the requesting party. The association should encourage the requesting party to explain what he or she would like the association to do. If the person is requesting a modification to an existing premise, the request should specifically identify what modifications are desired.

- Require that the association acknowledge that it has received the request and that the request will be addressed as promptly as possible in light of the character, nature and urgency of the request.

- Ensure that the appropriate people within the association are apprised of the request, including board members and officers. If deemed necessary, the association's legal counsel should be consulted.

- If the association needs additional information from the requesting party, require that it should ask for the additional information in writing.

- Require that the association ascertain the cost of the request and whether granting it is required under the FHAA.

- Require that, upon making its decision, the association should timely advise the requesting party in writing.

By adopting a procedure to address requests for reasonable accommodation and modifications to existing premises, the homeowners' or condominium association can minimize its exposure to claims under the FHAA and treat fairly owners or tenants living within its neighborhood and who are affected by a disability.

About the Author

John Browder is an attorney at Lopez & Kelly, PLLC primarily practicing in insurance related and complex civil litigation. He obtained his law degree from the Sandra Day O'Connor College of Law, Arizona State University, and is

a member of the Idaho and Arizona state bars. After graduation, John clerked for the Honorable Susan A. Ehrlich of the Arizona Court of Appeals and practiced at a Phoenix law firm before joining Lopez & Kelly, PLLC.

Endnotes

¹ More and more condominiums and single family residences throughout Idaho are subject to covenants, conditions and restrictions, or what are commonly referred to as CC&Rs. CC&Rs often include rules and policies that affect where residents can park, whether they can have a pet or not, or if and in what manners they can modify their properties. They are contractual in nature and, to that end, residents who own property subject to them often will have a right to expect that their homeowners' or condominium associations will enforce CC&R provisions in a lawful manner.

² The Americans with Disabilities Act ("ADA") bars discrimination of disabled people in places of public accommodation. See 42 U.S.C. § 12182. Because homeowners' and condominium associations are not places of public accommodation, the ADA typically will not apply to them. Nonetheless, a homeowners' or condominium association may have property under its control that is open to the public, such as a swimming pool, parking lot or other public facility, and, accordingly, could be within the purview of the ADA.

³ See *Gittleman v. Woodhaven Condo. Ass'n, Inc.*, 972 F. Supp. 894, 896-97 (D.N.J. 1997); *Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328, 333 (2d Cir. 1995).

⁴ The FHAA defines "handicap" to mean a "physical or mental impairment which substantially limits one or more of such person's major life activities." 42 U.S.C. § 3602(h)(1).

⁵ See 42 U.S.C. §§ 3603 -3606.

⁶ See Robert G. Schwemm, *Housing Discrimination: Law and Litigation* 12B-1 (2003).

⁷ See 42 U.S.C. § 3613(1)(c).

⁸ 42 U.S.C. § 3604(f)(3)(B).

⁹ 42 U.S.C. § 3604(f)(3)(A).

¹⁰ See *Canady v. Prescott Canyon Estates Homeowners Ass'n*, 60 P.3d 231, 234 (Ariz Ct. App. 2002); see also *Martin v. Constance*, 843 F. Supp. 1321 (E.D. Mo. 1994) ("Even if there was a consistent policy and practice of enforcing the restrictive covenant against perceived violations, the Court finds that under the facts of this case the attempt to enforce the covenant constituted a refusal to make a 'reasonable accommodation' necessary to afford plaintiffs an equal opportunity to use and enjoy a dwelling.")

¹¹ *Canady*, 60 P.3d at 234.

¹² See *Gittleman v. Woodhaven Condo. Ass'n, Inc.*, 972 F. Supp. 894, 900 (D.N.J. 1997); see also 24 C.F.R. § 100.80(b)(3) (stating that it is unlawful to enforce any deed or covenant, lease provision or trust that bars the rental or sale of a dwelling to a person because of color, race, sex, handicap, familial status or national origin.).

¹³ See *id.*

¹⁴ 972 F.Supp. 894 (D.N.J. 1997).

¹⁵ *Id.*, at 895.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 899.

¹⁹ *Id.*

²⁰ *Id.*

²¹ 42 U.S.C. § 3604(f)(3)(A); see also 24 C.F.R. § 100.203.

²² 42 U.S.C. § 3604(f)(3)(A).

²³ 24 C.F.R. § 100.201.

²⁴ *Id.*

²⁵ See *Gittleman*, 972 F.Supp. 894 (affirming 3604(f)(3)(B) cause of action by disabled person for designated parking space despite condominium association's deed restriction providing that parking spaces were common areas for the exclusive use of every owner); *Hunter v. Trenton Housing Auth.*, 698 A.2d 25 (N.J. Super. Ct. App. Div. 1997) (discussing ruling that housing authority's refusal to permit handicapped tenant to construct wheelchair ramp violated reasonable accommodation requirement of state and federal fair housing laws); *Trovato v. City of Manchester, New Hampshire*, 992 F.Supp. 493 (D.N.H. 1997) (holding that city failed to reasonably accommodate claimant with muscular dystrophy when it denied request to install paved parking place in front of home); *United States v. Wagner*, 940 F.Supp. 972 (N.D. Tex. 1996) (holding that deed restrictions cannot be applied to exclude group home from neighborhood); *United States v. Scott*, 788 F. Supp. 1555 (D. Kan. 1992) (holding that residents' CC&R enforcement action to prevent group home for mentally disabled violates FHAA); *Elliot v. Sherwood Manor Mobile Home Park*, 947 F.Supp. 1574 (M.D. Fl. 1996) (addressing claim that mobile home park violated FHAA when it denied tenant's request for accommodation to install ramp to mobile home that would enable use of scooter); *United States v. Country Club Garden Owners Ass'n, Inc.*, 159 F.R.D. 400 (E.D.N.Y. 1995) (holding that disabled owner was entitled to intervene in action addressing claim that association violated FHAA by denying request for parking space and to modify existing terrace necessary to access parking space).

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WHAT'S A HOMEOWNER'S ASSOCIATION TO DO?

COLLECTING DUES AND ASSESSMENTS DURING DIFFICULT FINANCIAL TIMES

Jill Mazirow Eshman
Jill Eshman Law

Without dues and assessments a homeowners' association cannot function. The funds are necessary for maintaining common area landscaping, exterior building maintenance and repair, common area spaces (such as gyms or other recreation areas), management fees for the property manager and for all other related common area issues. Yet, when a homeowner is strapped financially, payment of homeowners' association dues and assessments

(collectively, "assessments") is likely to be a low priority. This is primarily because the homeowner will continue to receive the benefits of common area maintenance for quite a while (and possibly continually) without paying assessments. Further, if the homeowner has a loan on the property that is more than the market value of the property, payment of assessments is even less likely to occur. Foreclosure of a lien for assessments and taking the property subject to a loan that exceeds the market value of the property is not a reasonable option for the association, as the association will not want to own a property with debt that exceeds the value. So, what is a homeowners' association to do?

Homeowners' associations tend to be passive and patient in pursuing payment of assessments because all of the members of the homeowners' association are neighbors, and it is natural for members to be sympathetic. The prudent course of action for a homeowners' association, however, is to diligently implement consistent procedures with very short time frames for collection of assessments, and then pursue all of the association's rights and remedies. Passive or selective enforcement may lead to a breach of fiduciary responsibility on the part of the association's board members. Aggressively pursuing unpaid assessments, before such delinquent amounts accumulate with additional assessments and interest, in a consistent manner will resolve the delinquencies before there is risk of extinguishment by foreclosure or bankruptcy.



Jill Mazirow Eshman

Homeowners' associations tend to be passive and patient in pursuing payment of assessments because all of the members of the homeowners' association are neighbors, and it is natural for members to be sympathetic.

In Idaho, a homeowners' association has rights created by statute set forth at Idaho Code section 45-810 ("association lien statute"). However, if a property is subject to and governed by the Condominium Property Act, then the condominium association will look to Idaho Code section 55-1518, which sets forth the lien rights for condominium association assessments.¹ This article will focus on homeowners' associations, unincorporated or incorporated, (hereinafter referred to as "the association" or "an association") that are not governed by the Condominium Property Act, but rather the association lien statute. In addition to the rights created by the association lien statute, an association has rights created by contract pursuant to recorded declarations setting forth covenants, conditions and restrictions, which govern the property in question.

Since 2002, associations have had the association lien statute to look to for a framework for liens arising from assessments. The legislative history indicates that there was a case challenging the right to file a lien in a county recorder's office absent a lien right in the Idaho Code. Therefore, according to the legislative history, the association lien statute was enacted to afford associations a statutory lien right so that associations have the same legal basis as condominium associations to pursue unpaid assessments from owners.²

An important issue to consider is whether an association is limited solely to the statutory lien provisions, or whether an association, which provides for additional contractual rights in its declarations that are more favorable and/or provide greater rights to the association than authorized in the association lien statute, are enforceable. The language of Idaho Code section 45-810 does not specifically limit the association's rights solely to the statute. For

example, the language found in its introductory phrase does not include "notwithstanding the provisions of the declaration" or words of similar meaning. However, the statute also does not indicate that there may be rights other than the statutory rights by providing language such as "unless the declaration provides otherwise." Association declarations have been construed as legally enforceable contracts with owners upon the owner's acceptance of title to the restricted property, and normal rules governing the interpretation of contracts apply.³ Since the statute has no limiting language and since it was only recently enacted in 2002, it may be reasonable to conclude that an association is entitled to collect assessments as may be provided by contract in its declarations as well as under the statutory framework of the Idaho Code.

Statutory framework

The association lien statute gives an association rights to file a lien and/or to pursue a money judgment; however, there are specific stated limitations to these rights.

Idaho Code section 45-810(1) provides lien rights to associations for unpaid assessments for "reasonable costs incurred in the maintenance of common areas"; the statute does not specify that the lien may include interest, costs and attorney's fees and penalties. In addition, associations' rights to lien are limited to a lien for "unpaid assessments accrued in the previous twelve (12) months."⁴ If the homeowner fails to pay subsequent assessments, Idaho Code section 45-810(2)(b) provides "then so long as the original or any subsequent unpaid assessment remains unpaid, such claim shall automatically accumulate the subsequent unpaid assessments without the necessity for further filings." Further, Idaho Code section 45-810(3) provides that when subsequent unpaid assessments

have accumulated under a filed claim, the claims regarding each subsequent unpaid assessment “shall be deemed to have been filed at the time such unpaid assessment became due.” Idaho Code section 45-810(2)(c) also requires the association to serve by personal delivery or certified mail a copy of the recorded lien within twenty-four (24) hours after recording it. The association lien statute does not expressly provide that the lien can be enforced non-judicially under the rules for deeds of trust.⁵ Self help, such as eliminating landscape maintenance or turning off water to a home, is also not authorized by the statute.

Analysis of the association lien statute, especially when compared to the Condominium Property Act statute governing liens,⁶ gives rise to the following questions: (1) whether interest, costs, attorneys fees and penalties may be included in the assessment and the lien; (2) once a lien is filed and there are subsequent unpaid assessments that become part of the original lien, whether they can be wiped out by intervening liens; and (3) if the association fails to provide notice of the recorded lien within twenty-four (24) hours of its recording, whether the lien is invalid. With respect to providing notice of the lien within twenty-four (24) hours of recording, recent legislation modified this time period to five (5) business days and the change will be effective on July 1, 2010.⁷

The association lien statute specifies the requirements of a written lien at Idaho Code section 45-810(2)(a). A lien filed in accordance with the statute is valid for one (1) year, but may be extended by recording an extension for an additional one (1) year period.

Idaho Code section 45-810(5) specifies that in addition to the recording of a lien, an association may maintain an action to recover a money judgment for the unpaid assessments or may take a deed in lieu of foreclosure in satisfaction of the lien. Recovery on an action for such unpaid sums will satisfy the lien, or the portion thereof, for which recovery is made. The association lien statute further indicates that the association may be incorporated or unincorporated, but that it must have the authority pursuant to the recorded covenants, bylaws or other governing instruments to assess and record liens against the real property of its members.⁸ The statute also has additional requirements for unincorporated associations.⁹

Based upon the foregoing, an association will have a valid statutory lien on property only after complying with the statutory provision, which requires,

It appears that under the association lien statute, the association does not have the right to foreclose under the power of sale. Therefore, an association must foreclose judicially if it elects the remedy of pursuing a lien.

among other things, recordation of the unpaid amounts claimed for the prior twelve (12) months. It appears that under the association lien statute, the association does not have the right to foreclose under the power of sale. Therefore, an association must foreclose judicially if it elects the remedy of pursuing a lien. The association needs to comply with the statute in a timely manner as unpaid assessments that have accrued beyond a one (1) year period are not specifically included in the recoverable amounts under the statute. If the association is pursuing foreclosure of the lien judicially, the attorney for the association should file a notice of lis pendens¹⁰ after the commencement of a foreclosure lawsuit, but prior to entry of judgment to provide constructive notice of the foreclosure of the lien.¹¹ When foreclosing judicially, the lawsuit should name the record title owner and any junior lien holders. Ultimately, a junior lien holder may pay the delinquent assessments to protect its interest in the property.¹² At the same time as the association pursues the statutory lien foreclosure, the association may pursue a money judgment, presumably for the same limited unpaid assessments for which a statutory lien may be obtained against the non-paying owner.

Governing documents

Associations should have their declarations and bylaws reviewed to determine compliance with the association lien statute and to clearly identify the rights and remedies available to the association. At a minimum, the governing documents should meet the requirements of the statute to avoid prejudicial and/or costly mistakes in collecting assessments on behalf of an association. In addition to the statutory rights, the declarations may provide for additional rights that may be pursued on a contract claim basis. As noted above, however, it is not entirely clear if these additional rights will be enforceable.

Most assessment provisions in the governing documents will provide that assessments are a personal obligation of the owner and will constitute a lien against

the home in question. Similar to the association lien statute, the declarations may provide the association with an opportunity to pursue foreclosure of the lien and/or to pursue an action for money damages against the owner under a breach of contract claim. Other common provisions that are found in or that may be provided for in the declarations include the following: (i) the right of the association to include all costs of collecting the assessments (attorneys fees, penalties and interest); (ii) the right of the association to pursue all unpaid assessments, not just those that accrued in the statutory twelve (12) month period; (iii) the right to foreclose non-judicially; (iv) perfection of the lien at the time the declarations are recorded rather than when notice of a delinquent assessment is recorded; and (v) identify what liens, if any, will have priority over the association's lien. Since these provisions provide greater rights to the association than the association lien statute, it is unclear if such rights are enforceable. As a practical matter, it will be difficult for an association to foreclose non-judicially, even if authorized and agreed to in the declarations. It is unlikely a title company will agree to serve as trustee or provide services and/or reports for such a sale. Consideration should also be given as to whether certain provisions, such as lien perfection and priority provisions, will affect an owner's ability to obtain financing.

Assessments should be due and payable more frequently than once a year. The declarations should clearly specify this and when such payments become delinquent. As a result, the cause of action will accrue more frequently than once a year and allow the association to be more proactive with respect to collection of the assessments. Finally, the association may want to consider providing in their declarations that after a stated period of time, notice, and procedure that the association board has the discretion to declare the unpaid and uncollected assessments as common area expenses. The declarations could further provide that, at such

time, the association may reallocate the unpaid and uncollectible assessments on a prorata basis and collect from all other owners and from subsequent owners of the delinquent owner, or its successors or assigns.

Pursuing a lien and/or money judgment

Under the association lien statute or a provision of the governing documents, the association does not necessarily have to elect which remedy to pursue. The association may pursue a lien against the property and a money judgment against the owner. When considering remedies, the cost to pursue both should be considered by the association as well as the likelihood of recovery, bankruptcy and foreclosure. Pursuing owners personally for a money judgment may be preferable because as noted above, taking property subject to a senior lien for a may not make sense for a variety of reasons. Also, foreclosure is a harsh remedy for collecting a generally nominal amount of money in comparison to the value of the real estate.

Depending upon the amount of money in question, a small claims action may be available and less costly to the association to pursue. The benefit of a money judgment is that it may become a lien against the property once the judgment is recorded. The association may also garnish wages, other sources of income and other assets of the owner without foreclosing on the property. A judgment may also be domesticated to pursue execution on the owner's assets in another state. The money judgment will remain valid for five (5) years and is renewable¹³ whereas the statutory lien is valid for one (1) year and is renewable for only one (1) additional year. Even if the property is foreclosed by a senior lien holder, and the association's lien against the property is extinguished, the money judgment remains collectible until it is discharged or satisfied for five (5) years, or longer if renewed. If the non-paying owner does not declare bankruptcy, patience and perseverance will also payoff for the association because money judgments accrue interest. When the owner eventually sells the property or refinances it, acquire other property, or obtain credit for personal property purchases, the recorded judgment will be an obstacle and may result in a payoff to the association at that time.

If an association obtains a money judgment, it may be discharged in bankruptcy. The secured lien in the real property, however, may not be discharged provided the association recorded the lien prior to the bankruptcy filing.¹⁴ Post-bankruptcy fil-

As difficult as it may be when dealing with neighbors and friends, associations must be diligent, disciplined, timely and consistent in pursuing unpaid assessments.

ing assessments may not be discharged in bankruptcy so long as the debtor has a "legal, equitable or possessory ownership interest in" the property.¹⁵ In addition to the foregoing, the judgment lien may be subject to the homestead exemption provided under Idaho Code section 55-1003.¹⁶ As with the statutory provisions, recording the lien and acting quickly may provide an association with some bankruptcy protection.

Fair debt collection practices act

An association, as the creditor, is not bound by the federal law with respect to debt collection under the federal Fair Debt Collection Practices Act ("FDCPA").¹⁷ However, if the association hires a person or an entity to collect the debt, that third party may be bound by the FDCPA. If an association retains an attorney to collect such debt, the prudent course of action for the attorney is for the attorney to comply with the provisions of the FDCPA to avoid potential liability.

Conclusion

In summary, during difficult financial times, associations should be proactive in dealing with unpaid assessments and not delay in pursuing collection. As difficult as it may be when dealing with neighbors and friends, associations must be diligent, disciplined, timely and consistent in pursuing unpaid assessments. Declarations should be reviewed and updated to ensure that associations have identified all available methods and remedies to collect unpaid assessments. All rights available to an association should be utilized, and, at a minimum, the statutory rights for a secured lien and a money judgment should be pursued. Such actions will reduce losses due to foreclosure and bankruptcy and, more importantly, will encourage prompt payment by owners.

About the Author

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Endnotes

¹ In order for a project and/or property to be governed by the Condominium Property Act, among other requirements set forth at I.C. § 55-1504, the recorded declaration or plat must contain an expression of intent to create a project which is subject to the provisions of the Condominium Property Act.

² While an association and a condominium association have the same legal basis to pursue assessments, that being a statutory lien, the association lien statute and The Condominium Property Act lien statute at I.C. §§55-1518 are very different and provide different statutory rights. Some of the differences are noted in footnotes v. and vi., infra, however, there are other differences as well that are sufficient in number to warrant a separate article on the topic.

³ *Twin Lakes Village Prop. Ass'n, Inc. v. Twin Lakes Inv.*, 124 Idaho 132, 135 (1993).

⁴ See I.C. § 45-810(1).

⁵ Unlike the association lien statute, the Condominium Property Act statute, I.C. § 55-1518, governing a condominium lien, specifically provides the right to enforce a lien and conduct the sale of the property in the manner permitted by law for the exercise of powers of sale in deeds of trusts or any other manner permitted by law.

⁶ There are a number of differences between the Condominium Property Act statute, I.C. § 55-1518 governing a condominium lien, and I.C. § 45-810, including the right to enforce under the deed of trust rules as described in footnote v, supra, and the specific reference to allow for the collection of interest, costs and attorney's fees, and penalties.

⁷ Ch. 41, S.B. No. 1287 was approved into law on March 9, 2010 and becomes effective July 1, 2010. There were no modifications to the association lien statute by this legislation other than the change of the notice period to five (5) business days.

⁸ See I.C. § 45-810(6).

⁹ See I.C. § 45-810(7).

¹⁰ See I.C. § 5-505.

¹¹ See *Credit Bureau of Lewiston-Clarkston, Inc. v. Idaho First Nat'l Bank*, 117 Idaho 29 (1989) (holding that it is necessary to file a *lis pendens* in connection with an action to foreclose a mechanic's lien in order to give constructive notice of the foreclosure of the lien beyond the statutory six-month period required for commencing such an action).

¹² See I.C. § 45-114.

¹³ See I.C. §§ 10-1110 and 10-1110.

¹⁴ See Title 11 U.S.C. § 523(a)(16).

¹⁵ See Title 11 U.S.C. § 523(a)(16).

¹⁶ I.C. § 55-1003 provides: "homestead exemption amount shall not exceed the lesser of (i) the total net value of the lands, mobile home, and improvements as described in section 55-100, Idaho Code; or (ii) the sum of one hundred thousand dollars (\$100,000)."

¹⁷ See 15 U.S.C. § 1692 et. seq.

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ASSIGNMENTS AND STANDING FOR REAL ESTATE LENDERS IN BANKRUPTCY COURT

Laura E. Burri
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Two recent decisions of the Idaho Bankruptcy Court have raised the issue of standing and real-party-in-interest for mortgage lenders: *In re Sheridan*¹ and *In re Wilhelm*². The issue raised in both cases was whether the mortgage lender filing a motion for relief from stay in the bankruptcy court had standing to file the motion.³ The motions were filed in order to obtain relief from the bankruptcy stay under 11 USC § 362 to be allowed to enforce various promissory notes and deed of trust under Idaho state law.⁴ The conclusion reached in both cases is that the lenders must document possession of the promissory note or provide proof of a transaction by which they acquired ownership of the note. Otherwise, the lender lacked standing and the motion would be denied.⁵

In re Sheridan

In *Sheridan*, the bankruptcy trustee objected to a motion for relief from stay on the basis of the mortgage lender's standing. The debtors filed a Chapter 7 bankruptcy petition on June 24, 2008. They listed an ownership interest in a residence in Post Falls, Idaho, in their bankruptcy schedules. They further listed two secured mortgage loans on the property. Thereafter, a motion for relief from stay was filed by "Mortgage Electronic Registration Systems, Inc., as nominee HSBC Bank USA, National Association, as Indenture Trustee of the Fieldstone Mortgage Investment Trust Series 2006-3." Attached to the motion was a promissory note executed by the debtors and payable to "Fieldstone Mortgage Company" as "Lender." The note was secured with a deed of trust recorded in Kootenai County, Idaho. The deed of trust listed the "Lender" as Fieldstone Mortgage Company and the "beneficiary" as Mortgage Electronic Registration Systems, Inc. (MERS). The deed of trust indicated that MERS is acting solely as a nominee for the lender.

The trustee objected to the motion alleging that MERS failed to establish its interest in the property or its standing to seek relief.⁶ The court concluded that



Laura E. Burri

The conclusion reached in both cases is that the lenders must document possession of the promissory note or provide proof of a transaction by which they acquired ownership of the note. Otherwise, the lender lacked standing and the motion would be denied.

to obtain relief from stay a motion must be brought by a party with standing and a pecuniary interest⁷. In connection with secured lenders, the party in interest is the entity that is entitled to payment from the debtor and to enforce security for such payment. The party in interest must bring the motion or, if the motion is filed by the servicer or nominee or other agent of the secured lender with claimed authority to bring the motion, the motion must identify and be prosecuted in the name of the real party in interest.

The court further concluded that Fieldstone Mortgage Company would be a party in interest and have standing.⁸ Fieldstone Mortgage Company had an economic interest according to the note; it had an interest in the property according to the deed of trust. The motion was filed by MERS as nominee for the Lender. The note did not contain any indication of transfer by Fieldstone Mortgage Company to MERS. The motion and record before the court lacked documentation related to that issue. Therefore, the motion was denied.

In re Wilhelm

Wilhelm was a joint decision of five different bankruptcy cases in which motions for relief from stay had been filed for mortgage lenders. In two of the cases, *Applegate* and *Wilhelm*, the trustee objected to the motion asserting failure to show an interest in the note. In *Laford*, the trustee stipulated to relief from stay. In *Lenhart*, the trustee filed a notice of non-opposition. In *Crofts*, the trustee did not respond to the motion. Despite the lack of opposition in all five cases, the court denied the motions on the basis that the lenders failed to show that they had standing to seek relief.⁹

The factual issues common to each case were as follows: 1) none of the promissory notes named the party filing the motion as the payee; 2) none of the notes were endorsed, either in blank or to

any specific person or entity; 3) neither the motions nor the supporting declarations established the lenders possessed the notes they sought to enforce; and 4) each deed of trust named MERS as the beneficiary under the deed of trust "solely as nominee for the Lender."¹⁰ In four of the five cases, *Applegate*, *Laford*, *Lenhart* and *Wilhelm*, the lender submitted an assignment in which MERS assigns to the lender the deed of trust together with the promissory note.¹¹

The court noted that to obtain stay relief, each lender must have standing, and be the real party in interest under Federal Rule of Civil Procedure 17, citing *Sheridan*.¹² For standing, each party must show that it has an interest in the note and that it has been injured by the debtor's conduct, presumably by default on the note. The lenders must also show they were the real party in interest by having the right to enforce the notes under applicable substantive law. These issues came down to two questions of whether: 1) the lenders established an interest in the notes, and 2) whether the lenders could enforce the notes.

The court found that, to resolve the standing and real-party-in-interest issues, the court had to determine who had the right to enforce the notes. Since bankruptcy law does not provide for enforcement of promissory notes, the court looked to applicable non-bankruptcy law and found Article 3 of Idaho's Uniform Commercial Code governs negotiable instruments.¹³ Under Article 3, persons entitled to enforce a note include the 1) holder of the instrument; and 2) a non-holder in possession of the instrument who has the rights to a holder.¹⁴ A holder is one who possesses the note and the note must be payable to the person in possession or to bearer pursuant to Idaho Code § 28-1-201(b)(21) (A).

In the five cases, none of the notes were endorsed, either to the lender filing the motion or in blank. Neither did the lenders show possession of the notes or prove any transaction by which they acquired ownership of the notes. The court concluded the lenders lacked standing to seek stay relief. The motions were denied.

Implications of the Decisions

Based upon the principles of the *Sheridan* and *Wilhelm* decisions, Idaho state courts will be required to address the standing of mortgage lenders and servicers in other contexts. Judicial and non-judicial foreclosure actions will likely be the subject of higher scrutiny by the court. A foreclosure action brought in the name of MERS or a party not named in the note and deed of trust could be found to be invalid due to lack of standing. The issues would be similar to those in *Sheridan*. For instance, can MERS establish an interest in the property sufficient to show it is the proper party in interest to pursue foreclosure? A foreclosure commenced by a party other than MERS that is not listed as beneficiary on the note and deed of trust has the same issues. The foreclosing entity should be required to prove that it has an interest in the property sufficient to be the real party in interest.

Based on the two bankruptcy court decisions, a party intending to commence a foreclosure action in Idaho would be advised to obtain an assignment of the deed of trust from the original beneficiary to the foreclosing party and record the assignment prior to commencing the foreclosure. An assignment from MERS to the foreclosing party may be sufficient. The deed of trust should not be foreclosed in the name of MERS without some proof of beneficial interest by MERS. There should also be an endorsement of the Note from the original beneficiary to the foreclosing party. This can be done by an endorsement on the note to the foreclosing party

A foreclosure action brought in the name of MERS or a party not named in the note and deed of trust could be found to be invalid due to lack of standing.

or an endorsement in blank on the note. A separate allonge referencing the note and assigning the note to the foreclosing party would also be sufficient. If these steps are taken, the foreclosing party can establish an interest in the Note and Deed of Trust as required by *Sheridan* and *Wilhelm*.

Conclusion

Based upon the recent Idaho bankruptcy cases of *Sheridan* and *Wilhelm*, secured real estate lenders must have proper documentation in order to file a motion for relief from the automatic stay under 11 United States Code § 362. The lender or servicer must show that the party filing the motion has standing and is the proper party in interest. Lenders should attach to the motions a copy of the promissory note in the name of the moving party. In the alternative, there must be a proper endorsement or series of endorsements to show that the party filing the motion is the current holder of the Promissory Note. Without proper documentation the moving party will not have standing and the motion will be denied. These procedures are equally applicable to foreclosure actions in Idaho state courts. The foreclosing party must show that it has a beneficial interest in the Note and Deed of Trust sufficient to establish standing to pursue the foreclosure.

About the Author

Laura E. Burri is a partner in the law firm of Ringert Law Chartered in Boise, Idaho. Her practice includes the areas of

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Endnotes

- ¹ 09.1 IBCR 24, 2009 WL 631355, 2009 Bankr. LEXIS 552, Case Number 08-20381 TLM, (Bankr. D. Idaho March 12, 2009).
- ² 407 B.R. 392, 2009 Bankr. LEXIS 1857, 69 U.C.C. Rep. Serv. 2d (Callaghan 582, (Bankr D. Idaho July 7, 2009).
- ³ *Sheridan*, 2009 Bankr. LEXIS *2, *Wilhelm*, 407 B.R. at 394.
- ⁴ *Sheridan*, 2009 Bankr. LEXIS at*1, *Wilhelm*, Id.
- ⁵ *Sheridan*, 2009 Bankr. LEXIS at*7, *Wilhelm*, 407 B.R. at 405.
- ⁶ *Sheridan*, 2009 Bankr. LEXIS at *1.
- ⁷ *Id.* at *4.
- ⁸ *Id.* at *6.
- ⁹ *Wilhelm*, 407 B.R. at 394.
- ¹⁰ *Id.* at 397.
- ¹¹ *Id.*
- ¹² *Id.*
- ¹³ See Idaho Code § 28-3-102(a).
- ¹⁴ Idaho Code §28-3-301(i)(ii).

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ABA MID-YEAR MESSAGE

Michelle R. Points

Idaho Delegate to ABA House of Delegates

The 71st Midyear Meeting of the American Bar Association (the “ABA”) was held February 8-9, 2010 in Orlando, Florida. I attended the meeting as the newly appointed State Bar Delegate for Idaho. Although I have been dues paying member of the ABA for several years, until I attended this meeting, I did not understand or appreciate my membership, or frankly, the scope of the role the ABA has in forming (or in influencing the formation of) the law and policy of the respective branches of government in United States, or the extent to which impacts the practice of attorneys.

Also attending the meeting to represent Idaho were Larry Hunter, the Idaho State Delegate, and Tim Hopkins, who is a member of the ABA Board of Governors. Both were helpful and instructive in “showing me the ropes” and also in introducing me to many accomplished and respected members of the ABA.



Michelle R. Points

It was an honor representing Idaho with Tim and Larry, who were both approached by fellow members throughout the meeting with respect and admiration for their continued service.

William C. Hubbard of South Carolina, Chairman of the House, conducted the meeting. President Carolyn B. Lamm of the District of Columbia was present throughout the meeting and addressed the House of Delegates, speaking about the many issues and challenges that the ABA was involved with and had faced throughout her term, which of course was been heavily influenced by the state of the economy. We also heard from President-Elect Nominee William T. Robinson.

There were many substantive discussions led by judges, practitioner members, members of the House and Senate, and scholars. Topics ranged from accessibility of the legal system by immigrants, veterans, and the most vulnerable

The common thread throughout all the discussions was that the ABA must strive to ensure that as an association, it continues to make bold decisions and be a strong voice for America’s lawyers and the populations those lawyers serve.

citizens in the United States population, to methods to ensure an effective and impartial judiciary, including those in state courts, federal courts and immigration courts. There was a very lively and informative panel which presented perspectives on methods for improving the “contentious” nomination and confirmation of Supreme Court Justices. It appeared the consensus by all was that it is a “false hope” politics will ever be removed from the process, as the process as it was designed, is political. Also worthy of mention is the comprehensive dues study recently conducted by the ABA, which included a survey of over 9,000 attorneys (members and non-members). The goal of the study and resulting recommendations (including several dues reductions to specific categories of practitioners) is to obtain 50 percent penetration into the legal community so that the ABA could represent “the voice of the legal profession.”

The substantive measures considered by the House of Delegates were many. Most involved voting on recommended policy proposals from various sections of the ABA, which in turn will be recommended by the ABA to the various branches of government and other entities. A complete list of reports and resolutions is available on the ABA website. Most were considered and passed without much debate. However, several generated heated discussion, including whether the ABA should examine and/or take a formal position regarding the U.S. News and World Report ranking of law firms. The publication has long ranked law schools. The perceived “risks” of

the rankings of law firms was thoroughly discussed. It was agreed that the ABA would “examine any efforts to publish a national, state, territorial and local rankings of law firms and law schools.” One motion that anticipated much debate, the motion to approve the Uniform Collaborative Law Act, was withdrawn. The House of Delegates also urged Congress, the Executive Branch and commercial lenders to introduce programs to relieve the heavy debt burden on law students and newly graduated attorneys. A series of criminal justice resolutions, particularly focused on juvenile law, were also adopted, including simplified Miranda warnings for juveniles. Resolutions were also passed regarding the creation of a new Article I court, with both trial and appellate divisions, to adjudicate immigration and removal cases and to otherwise improve immigration courts.

The common thread throughout all the discussions was that the ABA must strive to ensure that as an association, it continues to make bold decisions and be a strong voice for America’s lawyers and the populations those lawyers serve. It was a productive meeting, and set up several important resolutions to be reviewed and voted on in the upcoming annual meeting this August in San Francisco.

About the Author

Michelle Points is the Idaho State Bar Delegate to the American Bar Association House of Delegates. Michelle is a Partner with Hawley Troxell Ennis & Hawley, LLP. Her practice focuses on a wide variety of civil litigation.

COURT INFORMATION

OFFICIAL NOTICE SUPREME COURT OF IDAHO

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

Regular Fall Terms for 2010

Boise. August 23, 25, 27 and 30
BoiseSeptember 1
Idaho FallsSeptember 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 Supreme Court Oral Argument for May and June 2010

Monday, May 3, 2010 - BOISE

8:50 a.m. Harrison v. Underwriters at Lloyd's London #35678
10:00 a.m. Rain and Hail, LLC v. Neil E. Brown #35977
11:10 a.m. Kelly v. State (Petition for Review) #36659

Wednesday, May 5, 2010 - BOISE

8:50 a.m. Stoddart v. Pocatello School District #25 #36434
10:00 a.m. Blackmore v. RE/MAX Tri-Cities #36189
11:10 a.m. High Valley Concrete v. Sargent #35313

Friday, May 7, 2010 - BOISE

8:50 a.m. Credit Bureau of Eastern Idaho v. Lecheminant..... #36381
..... #36381
10:00 a.m. Dawson v. Cheyovich Family Trust ... #34712/35334
11:10 a.m. Liponis v. Bach #34713
10:00 a.m. Beco Construction Co. v. J-U-B Engineers, Inc..... #35873
..... #35873
11:10 a.m. Wattenbarger v. A.G. Edwards & Sons, Inc. . #36245

Wednesday, May 12, 2010 - BOISE

8:50 a.m. Hill v. American Family Mutual Insurance Co. #36311
..... #36311
10:00 a.m. Castorena v. General Electric, et al. #35123/35124/35852
..... #35123/35124/35852

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
..... #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

Idaho Court of Appeals Oral Argument for May 2010

Thursday, May 13, 2010 - BOISE

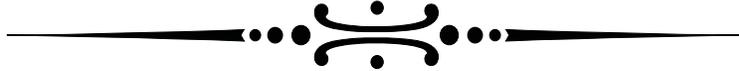
9:00 a.m. State v. Green #36723
10:30 a.m. Willie v. State #35506
1:30 p.m. State v. Key #35955

Tuesday, May 18, 2010 - BOISE

9:00 a.m. State v. Wagner #36232
10:30 a.m. State v. Cash #36147
1:30 p.m. Cook v. State #36225

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LICENSING CANCELLATIONS

Order to cancel license to practice law for non-payment of 2010 license fees

The Commissioners of the Idaho State Bar by and through their Executive Director have filed with the Clerk of this Court evidence that the following named attorneys have not paid the 2010 Idaho State Bar license fees required by Section 3-409, Idaho Code, and have not given notice of withdrawal from the practice of law to the Idaho State Bar and this Court,

NOW, THEREFORE, IT HEREBY IS ORDERED that the LICENSE TO PRACTICE LAW IN THE STATE OF IDAHO of the following named persons be, and hereby is, CANCELLED, and said persons are placed on INACTIVE STATUS FOR FAILURE TO PAY THE 2010 IDAHO STATE BAR LICENSE FEES:

HOWARD LEROY ARMSTRONG; MICHELE RENE BARTLETT; VALERIE BITTNER; MICHAEL EDWIN BOSTWICK; JUDITH MIRIAM BRAUER; CHARLES R. BRINK; MATTHEW CRAIG CAMPBELL; STANLEY G. COLE; SCOT MICHAEL ELDER; GEORGE PIERCE FISHER; THOMAS DANIEL FREY; GAMEWELL D. GANTT; SYLVIA M. GEDDES; LOUIE GORRONO; WILLIAM J. GRISMER; KEITH SCOTT HADFORD; ALAN FRANK HAEUSER; JOHN RULON HANSEN JR.; PAULA R. HARRISON; NASH JOHN HEDRICK JR.; HEATHER HENDERSON; MARK WAYNE HENDRICKSEN; RICHARD DONALD HIMBERGER; IDA RUDOLPH LEGGETT; KIM ELIZABETH LONDON; ANGELA ROBERTS MARSHALL; MARY K. MCINTYRE; DARREN LANCE MCKENZIE; FATIMAE. MOHAMMADI; ROBERT S. MOORE; WILLIAM WRIGHT MORGAN; BRENT HATCH NIELSON; SHAWN CHRISTOPHER NUNLEY; BRADFORD MICHAEL PURDY; STANTON PARISH RINES JR.; DARREN S. ROBINS; KARL JONATHAN RUNFT; SPENCER A'LEE WILDIG STROMBERG; SCOTT DWAIN STUFFLEBEAM; JOHN L. SULLIVAN; MARGARET ELISABETH THOMAS; WADE DEVIN THOMAS; GEORGE WARREN TOWER IV; CALVIN P. VANCE; MATTHEW ADAM WAND; SUZANNE KELLER WEATHERMON; ANTHONY ISHAM WEST and CHRISTOPHER JOHN WRIGHT

IT FURTHER IS ORDERED AND NOTICE IS HEREBY GIVEN, that the above named persons are no longer licensed to practice law in the State of Idaho unless otherwise provided by an Order of this Court.

IT FURTHER IS ORDERED that Bar Counsel of the Idaho State Bar is directed to distribute, serve or publish this Order as provided in the Idaho State Bar Commission Rules.

DATED THIS 4TH DAY OF MARCH 2010.
Daniel T. Eismann, Chief Justice

Order to cancel license to practice law for non-compliance with Idaho Bar Commission Rule 406(d)

The Commissioners of the Idaho State Bar by and through their Executive Director have filed with the Clerk of this Court evidence that the following named attorney has not complied with the mandatory continuing legal education requirements required by Idaho Bar Commission Rule 406(d), and have not given notice of withdrawal from the practice of law to the Idaho State Bar and the Court,

NOW, THEREFORE, IT HEREBY IS ORDERED that the LICENSE TO PRACTICE LAW IN THE STATE OF IDAHO of the following named attorney be, and hereby is, CANCELLED and said attorney shall be placed on INACTIVE STATUS for failure to comply with the mandatory continuing legal education requirements:

THOMAS R. THARP

IT FURTHER IS ORDERED AND NOTICE IS HEREBY GIVEN, that the abovenamed attorney is NO LONGER LICENSED TO PRACTICE LAW IN THE STATE OF IDAHO unless otherwise provided by an Order of this Court.

IT FURTHER IS ORDERED that Bar Counsel of the Idaho State Bar is directed to distribute, serve or publish this Order as provided in the Idaho State Bar Commission Rules.

DATED THIS 14TH DAY OF APRIL 2010.
Daniel T. Eismann, Chief Justice

LICENSING REINSTATEMENTS

Order granting petition for reinstatement as active member in the Idaho State Bar

As of the dates indicated, the following attorneys' licenses were reinstated:

Darren Lance McKenzie; Active Status, March 8, 2010.

Bradford Michael Purdy; Active Status, March 9, 2010.

Stanley G. Cole; Active Status, March 9, 2010.

Angela Roberts Marshall; Active Status, March 11, 2010.

Scott Dwain Stufflebeam; Active Status, March 11, 2010.

Richard D. Humberger; Active Status, March 17, 2010.

Christopher J. Wright; Active Status, March 17, 2010.

Shawn Christopher Nunley; Active Status, March 29, 2010.

Karl Jonathan Runft; Inactive Status, April 12, 2010

Kim Elizabeth London; Inactive Status, April 12, 2010

Judith Mariam Brawer; Active Status, April 19, 2010

Wade Devin Thomas; Active Status, April 19, 2010

Mary K. McIntyre; Out of State Active Status, April 19, 2010

Idaho Supreme Court and Court of Appeals
NEW CASES ON APPEAL PENDING DECISION
(Update 4/02/10)

CIVIL APPEALS

ATTORNEY FEES AND COSTS

1. Did the court err in denying Archibald's request for attorney fees and costs?
Sierra Pacific Mortgage Co. v. Archibald
S.Ct. No. 36438
Supreme Court

DRIVING PRIVILEGES

1. Did McDaniel meet his burden of proof, as set forth in I.C. § 18-802A(7), to contest the suspension of his driving privileges?
McDaniel v. Department of Transportation
S.Ct. No. 36744
Court of Appeals

DUE PROCESS

1. Whether the North Latah County Highway District denied plaintiffs due process and equal protection of the law when it failed to acquire a right of way under I.C. § 40-605 or § 40-1310, eminent domain or condemnation proceeding.
Halvorson v. North Latah County Highway District
S.Ct. No. 36825
Supreme Court

EMINENT DOMAIN

1. Whether a taking of property occurred that triggered application of the business damages provisions of I.C. § 7-711(2).
Curtis-Klure, PLCC v. Ada County Highway District
S.Ct. No. 36647
Supreme Court

INSURANCE

1. Whether the district court erred in determining the policy language excluded Dumoulin's claim for benefits under the policy.
The Estate of Judy Dumoulin v. CUNA Mutual Group
S.Ct. No. 36828
Supreme Court

LAND USE

1. Whether the Planning and Zoning Commission's decision granting the conditional use permit application for the Tuscan Wedding and Event Center was arbitrary and capricious or an abuse of discretion in violation of I.C. § 67-5279(3).
Krepansky v. Nez Perce County
S.Ct. No. 36943
Supreme Court

LIEN

1. Did the district court err by ruling that Knife River could enforce its lien against Western's property for work performed at Eagle Investment Properties' request?
Hap Taylor & Sons, Ltd. v. Western Horizons, Inc.
S.Ct. No. 36525
Supreme Court

POST-CONVICTION RELIEF

1. Did the district court err in summarily dismissing Bagshaw's untimely successive petition for post-conviction relief?
Bagshaw v. State
S.Ct. No. 35030
Court of Appeals

2. Did the district court err in summarily dismissing Coburn's untimely petition for post-conviction relief?
Coburn v. State
S.Ct. No. 35416
Court of Appeals

3. Did the court err in the dismissal of Low's successive petition for post-conviction relief?
Low v. State
S.Ct. No. 36173
Court of Appeals

4. Did the court err in concluding Baxter received effective assistance of trial and appellate counsel?
Baxter v. State
S.Ct. No. 36299
Court of Appeals

5. Did the court err in summarily dismissing Stewarts's petition as untimely?
Stewart v. State
S.Ct. No. 35398
Court of Appeals

6. Did the court err in denying Gable's ineffective assistance of counsel claim that trial counsel failed to file a timely motion to suppress?
Gable v. State
S.Ct. No. 36233
Court of Appeals

7. Did the district court err in summarily dismissing Fox's successive petition for post-conviction relief?
Fox v. State
S.Ct. No. 36256
Court of Appeals

8. Did the court err in summarily dismissing Hoskins petition for post-conviction relief in which he claimed ineffective assistance of trial counsel?
Hoskins v. State
S.Ct. No. 36337
Court of Appeals

9. Did the district court err by concluding Meier did not receive ineffective assistance of counsel in relation to the filing of a motion to suppress?
Meier v. State
S.Ct. No. 36112
Court of Appeals

10. Did the court err in summarily dismissing Judge's petition for post-conviction relief?
Judge v. State
S.Ct. No. 36650
Court of Appeals

PROCEDURE

1. Whether the district court erred in dismissing the City's petition for judicial review as untimely under Erickson v. Idaho Board of Professional Engineers and Professional Land Surveyors, where IDWR failed to properly serve its order on reconsideration, re-issued it, and then deemed the original date of service to be the date commencing the appeal period.
City of Eagle v. Idaho Department of Water Resources
S.Ct. No. 36970
Supreme Court

RESTRICTIVE COVENANTS

1. Did the court err by granting Brighton's motion to dismiss, eradicating Harris's constitutionally protected right to enter into a private contract, by ruling that the condemnation of the restrictive covenants as to the school district destroyed Harris's private contractual rights against Brighton under the restrictive covenants contained in the agreement?
Harris Family Ltd. Partnership v. Brighton Investments, LLC
S.Ct. No. 36410
Supreme Court

RESULTING TRUST

1. Did the trial court misapply the law with regard to the elements of resulting trust, specifically, whether the Kelleys paid the purchase price or incurred an absolute obligation to pay the purchase price?
Kelley v. Yadon
S.Ct. No. 36705
Supreme Court

STANDING

1. Whether the court erred in ruling the plaintiff lacked standing to maintain a declaratory judgment action against Camas County when the plaintiff owned property intended for development that was rezoned, and when property adjacent to that owned by the plaintiff was rezoned, thereby having a negative fiscal impact on the plaintiff.

Martin v. Camas County
S.Ct. No. 36605
Supreme Court

STATUTE OF LIMITATIONS

1. Whether the district court erred in finding Stuard's injury occurred concurrently with the defendant's negligence such that it did not need to determine whether there was some objective evidence of injury.

Stuard v. Jorgensen
S.Ct. No. 36844
Supreme Court

SUBSTANTIVE LAW

1. Did the trial court apply the correct standard in granting statutory immunity under I.C. § 16-606 to two of the defendants?

Davidson v. Davidson
S.Ct. No. 36535
Court of Appeals

SUMMARY JUDGMENT

1. Did the district court err in granting partial summary judgment to respondents Mallo and McMurtie in the tort action?

Wisdom v. Mallo
S.Ct. Nos. 36616/36617/36976
Court of Appeals

TAXES

1. Did the district court err in finding that, pursuant to I.C. § 63-604, the one acre parcel excluded by the respondents from the agricultural exempt property was not exempt for purposes of tax evaluation?

Kimbrough v. Idaho Board of Tax Appeals
S.Ct. No. 36726
Supreme Court

TERMINATION OF PARENTAL RIGHTS

1. Did the court err in determining there was sufficient evidence to terminate Doe's parental rights?

Department of Health & Welfare v. Jane Doe
S.Ct. No. 37207
Court of Appeals

CRIMINAL APPEALS

EVIDENCE

1. Did the court err in admitting, pursuant to I.R.E. 404(b), evidence concerning the existence of a no-contact order in Snowball's underlying domestic battery case?

State v. Snowball
S.Ct. No. 36214
Court of Appeals

2. Did the district court err in admitting a copy of a prior judgment of conviction for indecent exposure where the state failed to present sufficient evidence demonstrating Wright was the same person referred to in the judgment?

State v. Wright
S.Ct. No. 35297
Court of Appeals

INSTRUCTIONS

1. Did the court commit reversible error by omitting an element of the offense in the jury instruction?

State v. Sukraw
S.Ct. No. 36373
Court of Appeals

LICENSE SUSPENSION

1. Whether the district court erred in its determination that Wanner is entitled to an administrative hearing on his non-commercial driving privileges pursuant to I.C. § 18-8002 and/or 18-8002A.

Wanner v. Idaho Department of Transportation
S.Ct. No. 37059
Supreme Court

PLEAS

1. Did the district court err in denying Schultz' motion to withdraw his guilty plea and in finding no plea agreement had been reached at the time Schultz waived juvenile jurisdiction?

State v. Schultz
S.Ct. No. 36445
Court of Appeals

RESTITUTION

1. Was the district court's order of restitution supported by substantial evidence?

State v. Lombard
S.Ct. No. 36454
Court of Appeals

SEARCH AND SEIZURE –

SUPPRESSION OF EVIDENCE

1. Did the court err in failing to suppress the out-of-court and subsequent in-court identification of Rodriguez because the original photographic line up was overly suggestive?

State v. Rodriguez
S.Ct. No. 36448
Court of Appeals

SENTENCE REVIEW

1. Did the court abuse its discretion when it failed to sua sponte order a mental health evaluation for the purposes of sentencing?

State v. Schultz
S.Ct. No. 33310
Court of Appeals

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

Mediator/Arbitrator

W. Anthony (Tony) Park

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·Former Idaho Attorney General

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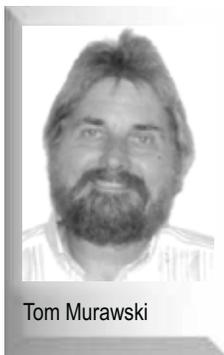
Tom Murawski
United States District and Bankruptcy Courts

Judge Pappas inducted into American College of Bankruptcy

Judge Jim D. Pappas, United States Bankruptcy Judge for the District of Idaho, was inducted as a Fellow in the American College of Bankruptcy at a ceremony at the Great Hall of the United States Supreme Court on March 12, 2010.

The mission of the College is to honor and recognize distinguished bankruptcy professionals who are qualified for membership in an effort to set standards of achievement for others in the insolvency community. Membership in the College is by invitation of its Board of Regents only, and those selected as Fellows have the highest professional qualifications and ethical standards and have demonstrated a commitment to scholarship, teaching and writing about bankruptcy law and practice, and to the overall improvement of the bankruptcy process. There are approximately 650 Fellows in the College, which was formed in 1989.

Judge Pappas graduated from Idaho State University in 1974, and received his law degree from the University of Idaho College of Law in 1977. After practicing in Idaho and throughout the Northwest in the area of commercial law, banking, workouts, secured transactions and all aspects of bankruptcy law, Judge Pappas was appointed to the bench in 1990. In addition to serving as one of Idaho's two bankruptcy judges, in August 2005, Judge Pappas was appointed by the Ninth Circuit Court of Appeals to serve as one of six permanent judges on the Ninth Circuit's Bankruptcy Appellate Panel, a court



Tom Murawski



Hon. Jim D. Pappas



that reviews the decisions made by other bankruptcy courts throughout the Western United States.

Judge Dale receives award from Idaho Women Lawyers, Inc.

The Idaho Women Lawyers, Inc. (IWL) has selected Chief Magistrate Judge Candy Wagahoff Dale as the 2010 recipient of their prestigious Kate Feltham Award. This award is intended to honor individuals who have made extraordinary efforts to promote equal rights and opportunities for women and minorities within the legal profession and legal justice system in Idaho. Past recipients include Cecil Andrus, Mary Smith, Susan Graham, Cathy Silak, Debora Kristensen, Betty Richardson, Kelly Miller, Deborah Nelson, and Leslie Goddard.

The honor bestowed upon Judge Dale recognized her accomplishments throughout her legal career, both as a lawyer in private practice as well as Chief U.S. Magistrate Judge for the District of Idaho. The award acknowledges her tireless and effective advocacy for equal rights for women and minorities in the workplace, and lauded her efforts in implementing programs that extend the protection of the law to cover these groups and ensure fairness.

Three-judge appellate panel and open house at Pocatello courthouse

The Bar is invited to attend a rare sitting of a three-judge panel from the Ninth Circuit Court of Appeals to be held Monday, May 24, 2010 at 9 a.m. in the Federal

Courthouse in Pocatello. This will be followed by a ceremony at 1 p.m. to commemorate the completion of an extensive remodeling project in connection with the chambers of resident Ninth Circuit Court of Appeals Judge N. Randy Smith. Chief Ninth Circuit Judge Alex Kozinski and other judges and dignitaries are expected to be in attendance.

Changes in bankruptcy code and forms

On April 1, 2010, automatic adjustments were made to dollar amounts stated in various provisions of the Bankruptcy Code, and several Bankruptcy Forms. The statutory adjustments are calculated at three-year intervals on the basis of the change in the Consumer Price Index and rounded to the nearest \$25. The dollar amount changes affected **Official Forms 1, 6C, 6E, 7, 10, 22A and 22C**, and Director's **Forms 200 and 283**. For a detailed description of the Bankruptcy Code sections and dollar amount changes see our website at www.id.uscourts.gov.

In addition, the new reaffirmation forms which became effective on April 1, 2010, **Forms 240A, 240A/B Alt and 240C Alt**, have caused a certain amount of confusion. Use of the proper reaffirmation form is dependent upon whether a separate Reaffirmation Agreement is attached and whether the required disclosures are contained in the Agreement itself or in the disclosure portion of the form(s). A more detailed explanation of the alternatives can be found on our website.

Upcoming district conference news

The District of Idaho and George Mason University, Law and Economic Center, have collaborated to provide two outstanding guest speakers for our 2010 District Conferences. Professor Michael



Hon. Candy Wagahoff Dale

Trebilcock, Chair in Law and Economics with the University of Toronto, will present in Pocatello on October 22, 2010. Professor Allen Guelzo, from Gettysburg College at the University of Pennsylvania, will be in Boise, November 5, 2010. Additional details will be forthcoming.

CM/ECF electronic filing reminder and tip

When electronically filing documents in CM/ECF, remember that when you convert your document to pdf format, please do so directly from your word processing application, (Word or Word Perfect) and **do not** scan it. Not only does scanning re-

sult in a significantly larger size document, it also creates a graphic, which prevents or significantly inhibits and complicates the use of all editing features built into the Adobe software, such as the search capability, cut-and-paste, etc. Tech tip: to create a "section" character § in CM/ECF, hold down the Alt key and press 21 using the right-hand number pad.

Upcoming mediation training at Federal Courthouse in Boise

The James A. McClure Federal Building and U.S. Courthouse in Boise will be the site of two upcoming Mediation Training sessions during May, 2010. "The Liti-

gator's Guide to Effective Performance in Mediation" will be presented on May 25th and "The Dual Role of the Judicial Mediator" will be presented on May 26th. Both programs are sponsored by the Northwest Institute for Dispute Resolution of the University of Idaho, College of Law. For additional information please contact Susie Headlee at 208-334-9067 or e-mail Susie_Boring-Headlee@id.uscourts.gov.

About the Author

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

Mediation/Arbitration

John C. Lynn

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MANAGING E-MAIL OVERLOAD: DON'T PARDON THE INTERRUPTION

Stephen M. Nipper
Dykas, Shaver & Nipper, LLP

This article is Part 2 of a three part series on "Managing E-Mail Overload." Part 1, 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).

As I noted in Part 1, a study showed that a person whose work is interrupted takes 15 minutes to get back to productive work. This article provides tips and tricks you can use to reduce the "interruptions" caused by email.

Schedule your email

When I was a young attorney, an older, more experienced attorney, told me of how he only takes/returns phone calls in two blocks during the day, staying focused on work the rest of the day. Under his plan, unless it is an emergency, he is "unavailable" to take calls except between 10-11 a.m. and 3-4 p.m., allowing him to focus on work uninterrupted. It is something he has to discuss with his clients...letting them know that he works more efficiently and thoroughly for them if he isn't constantly interrupted by phone calls. He also guarantees to clients that he will call them back within a few hours. For him and his clients, it is a system that works really well.

Why not apply the same teaching to email? Think of how much more focused your work would be if you didn't pause every 5-15 minutes to quickly respond to an email you just received. Think of how much more efficient (and productive) you could be if you did that. The benefits of doing it substantially outweigh the drawbacks.

For example, you could set up a system where you only check your email when you first get into the office, and then every couple of hours during the day. You could also include a reminder in your email footer regarding how you handle email, for instance: "I usually check my e-



Stephen M. Nipper

For me, I tell my email program to only check for new messages every 60 minutes (I can always push the "send and receive" button to check for new messages manually) and I disable all pop-up notifications regarding "new" emails being received.

mail every few hours. I typically respond to the e-mails I receive within 24 hours. Please call me if your matter is urgent and needs my immediate attention."

Have a conversation with your clients

How many of you have your email program (or Blackberry) checking for new messages every 5 minutes? Do you realize that means that you effectively check your email over 100,000 times a year? Do your clients REALLY expect you to check your email 100,000 times a year? Do your clients REALLY need you to respond to their emails within 5 minutes of receipt? Do they REALLY expect you to check your email late at night? Do your clients like that other clients constantly interrupt the work you are doing for them, causing their work to not have your full attention or efficiency?

Part of being a good attorney is having conversations with your clients about communication. Don't presume that your clients "expect" you do act a certain way without discussing it with them. Have an honest conversation regarding this with your existing clients...you'll likely be surprised by what they tell you.

Constant interruptions

You wouldn't tolerate one of your staff members interrupting your work every five minutes...so why do you let your email program do it? Learn your email program's settings regarding how often it checks email for you and what pop-up messages/balloons it gives you every time you receive an email. Then, consider changing those settings to reduce the number of interruptions you receive a day.

For me, I tell my email program to only check for new messages every 60 minutes (I can always push the "send and receive"

button to check for new messages manually) and I disable all pop-up notifications regarding "new" emails being received.

Sure, there are times when you are waiting on a very important email that must be immediately review/responded to, but typically, email can wait. Trust me, the less interruptions you have, the more efficient you'll be.

Your assistant as your client's assistant

Not all of the questions your clients ask you are "legal" in nature, but they are questions that your clients need answered (e.g., status updates). Thus, you should encourage your clients to contact your assistant for simple questions and invest in training your assistant to answer simple questions and to know when to forward the question on to you. I use my email footer to help reinforce this concept, including text that reminds the reader that: "My assistant is [name]. Please feel free to contact her at [email address] or [phone number] if [he/she] can be of assistance to you." You'll be surprised how many of your clients take you up on the offer and contact your assistant instead of you.

By reducing the number of daily interruptions email causes each and every one of us, we can each be a little more efficient and focused, benefiting both our clients and us.

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 focusing on tech tips for intellectual property attorneys. Mr. Nipper's contact information can be found at <http://iMetNipper.com>.

LESS IS BETTER

Mark T. Peters, Sr.
Solo Practitioner

Last month I said that I was going to discuss why it is important to use fewer words in writing. William Zinsser in the 6th Edition of his book, *On Writing Well*, was admiring the writing style of Thoreau, when he said:

“How can the rest of us achieve such enviable freedom from clutter? The answer is to clear our heads of clutter. Clear thinking becomes clear writing; one can’t exist without the other. It’s impossible for a muddy thinker to write good English. He may get away with it for a paragraph or two, but soon the reader will be lost, and there’s no sin so grave, for the reader will not be easily lured back.”¹

More words mean more clutter; more clutter means sloppy thinking.

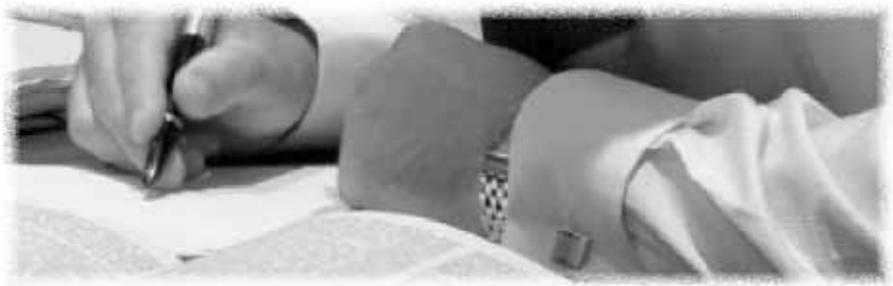
Recall in my first article when I proposed changes to Idaho’s Good Samaritan statute. I got rid of a number of words and, in doing so, showed that there were extra thoughts contained in the statute that didn’t need to be there. Props to Fritz Ziegler (a member of the Idaho Bar, but located in Covington, Louisiana), one of the two people that I know read the article in pointing out to me that I still had not done enough to get rid of unnecessary words. He asked why it was necessary to have two separate gross negligence phrases in my version of the statute. The answer is, it wasn’t necessary.

The rewrite was as follows:

Nobody may maintain an action in any court of this state against a person who, in good faith, administers first aid or medical attention to any person injured in an accident unless the person administering the first aid is guilty of gross negligence in the care of the injured person or has treated the injured person in a grossly negligent manner. This immunity ceases when the injured person (1) is delivered into the cus-



Mark T. Peters, Sr.



tody of an ambulance attendant, (2) is delivered to a hospital generally recognized for the treatment of ill or injured persons, or (3) is treated in the office or facility of a person who undertakes to treat the injured person.

I had taken a statute of 158 words and reduced it to 113. But then Fritz made his suggestion that gross negligence needed to be referenced only once. So if we focus on that language we can do this:

...administers first aid or medical attention to any person injured in an accident unless the person is grossly negligent in administering the first aid or in treating the person...

In looking at the language and in thinking about the concepts, a question arises as to what is the difference between “first aid,” “medical attention,” and “treating the person?” Isn’t first aid the same as medical attention, or does it require that a non-professional provide first-aid and a medical person provide medical attention? Since the immunity applies to any person, not just a medical professional, do these different concepts really matter? I don’t think so.

Therefore, I would now rewrite the section as follows:

Nobody may maintain an action in any court of this state against a person who, in good faith, provides medical treatment to any person injured in an accident unless the person is grossly negligent in treating the injured person. This immunity ceases when the injured person (1) is delivered into the custody of an ambulance attendant, (2) is delivered to a hospital generally recognized for the treatment of ill or injured persons, or (3) is treated in the office or facility of a person who

I had taken a statute of 158 words and reduced it to 113. But then Fritz made his suggestion that gross negligence needed to be referenced only once.

undertakes to treat the injured person.

The section has now been reduced to 91 words with no loss of meaning; I think that the meaning is more clear because it is now clear that anyone treating a person injured in an accident must be grossly negligent for an action to lie against them; no question of first-aid, how the person happened to be at the accident, etc.

The point is that concise writing is clear writing; clear writing promotes clear thinking and clear thinking promotes clear writing.

So how do we get rid of clutter in our writing? I hope that a couple of examples will help. Here is some language from an actual lease: “Except as otherwise expressly provided in this Lease, all Rent shall be due in advance monthly installments on the first day of each calendar month during the Term.” How many times have you seen the “except as otherwise provided” language and noted that there were no other exceptions in the document? This is an example of lazy writing. The author doesn’t know if there are any exceptions and doesn’t want to take the time to look. If there is an exception,

call out the specific section; if not, get rid of the language.

Another problem with the language is the reference to a calendar month. When a court construes a document, it looks to their standard usage unless there is a specific reason not to. So why refer to a “calendar month?” Related to this is that the author doesn’t really think that we understand that rent is to be paid monthly. Just before this sentence, the lease had stated what the monthly installment amounts were and what the yearly totals were for the lease term. Why are monthly installments “due in advance on the first day of each calendar month?”

And then we have the use of the word all in the phrase “all Rent shall be due.” Is the author afraid that if he didn’t use the word “all,” that some rent would not be paid? So let me trim the sentence: Rent is due in installments on the first day of each month during the Term. (What about: “Rent is due on the first day of every month.”)

My final example is the following clause: “Seller conveys any and all of its right, title and interest...” There are two issues. First, in this usage both “any” and “all” mean the same thing. Second, doesn’t the word “interest” in this context

When a court construes a document, it looks to their standard usage unless there is a specific reason not to. So why refer to a “calendar month?”

cover also any right or title since both of those are an interest in the property being conveyed? I personally prefer to use the word “any” since, as I will discuss in another column, I use the singular whenever possible. Simple, straightforward writing would change the clause to: “Seller conveys any interest it may have...” It is clear that nothing less than the entire seller’s interest is being sold.

In a future column, I will talk about how the structure of a document may make it easier to read. I think it may be an excellent time to talk about right- and left-branching sentences as well.

Also, I appreciate hearing your thoughts on writing, including any corrections (thanks again, Fritz) or topics you would like to see addressed.

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 mpeters47@cableone.net.

Endnotes

¹ *On Writing Well*, 6th Edition; Zinsser, William; HarperCollins Publishers; New York; 1998. P. 9

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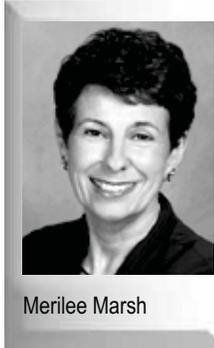
MARKETING FOR LAW FIRMS AND ATTORNEYS

Merilee Marsh
Marketing Consultant

When the U.S. Supreme Court overturned the rule that attorneys could not solicit business through advertising [Bates v. State Bar of Arizona, 433 U.S. 350 (1977)], the legal landscape changed. To remain competitive, it became important for law firms to recognize and seize marketing opportunities. Today, developing those marketing opportunities includes identifying and pursuing viable prospects and educating them about the firm's legal capabilities. Whether the marketing focus is on practice areas or specific attorneys, added awareness creates revenue.

Attorneys throughout Idaho face marketing challenges:

time committed to client matters leaves fewer moments for marketing actions; financial resources dedicated to overhead cause shortages for business development. It has been my experience in working with attorneys and law firms that the most effective marketing is targeted and consistent. For example, an estate planning attorney formerly located in a small town in the Idaho Panhandle said, "Early on, the most effective marketing that our firm did was to offer seminars." You need to reach the clients who can use your services and will pay for those services.



Merilee Marsh

Since marketing involves business development, relationship-building, public relations, advertising, networking, and related spheres, here are familiar and uncommon steps you can take to market yourself. The goals are to differentiate you and your law firm, identify and evaluate the markets for your legal services, and retain current clients.

Elevator speech

First, be prepared to describe what you do. Develop an "elevator speech" (which is about as long as the time it takes to go from one floor to another in a slow elevator) to explain who you are and what you offer. Generally speaking, an elevator speech should be 25 words or less. An



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example would be, "My name is Adam Smith and I'm a corporate attorney with Smith, Jones, and Green. My practice focuses on compensation and benefit matters."

Differentiate yourself

Differentiate yourself from other attorneys in general and specifically from other attorneys in your practice area. If you're a tax attorney, offer tax tips in a column or blog. If the construction industry is your market, give a seminar in conjunction with an association. If you're an intellectual property attorney, get involved with groups that include manufacturers or scientists. Personal relationships are pivotal to all areas of the law. Build your reputation and raise awareness through participation.

Target market

Who is your target market? To be relevant to the prospects, a law firm may cover several practice areas yet focus on a particular one when doing specific outbound marketing. For instance, Jeff Sykes—a partner with Meuleman Mollerup, LLP—writes occasional Construction Law Columns which the weekly business paper, *Idaho Business Review*, publishes in special *Idaho Construction Review* sections. The articles accomplish several goals:

- The writing and research serve as professional development for the attorney.
- He increases his familiarity with the members of the press.
- The content reaches the target audience.

- The columns reinforce Sykes' industry knowledge.
- The information alerts the media that the attorney is a resource.

Carefully decide the industry you want to target, identify the markets for your legal services, select where you will market yourself as an attorney, and craft what the message will be. As a result, you will build a personal brand for yourself and develop name recognition so prospects will know to call you.

Mold your own market

An attorney once commented to me, "My work speaks for itself." While that is accurate, you can boost the results. Of course, your legal work is the primary way to gain attention in a specific market, but legal work is different from networking. As you get to know the contacts in that industry, build and nurture the relationships, wherever those may be. Recently a corporate attorney told me that he does all of his work out of state and has no clients in his own state. Another acknowledged that she is in a regional firm and therefore cultivates regional relationships.

If a specific industry or issue interests you—whether that's healthcare, insurance, or water rights—learn as much as you can so you will understand the legal needs as well as the challenges facing your client. If you develop a niche, expand your connections so your prospects can find you. Have the attitude to be proactive and the fortitude to maintain business development activity.

Online

While law is usually based on precedent, successful marketing is future-oriented and the future involves Web 2.0 and other Internet capabilities. How extensive is your online presence? Since prospects search for law firms, at a minimum have a website that is current and informative. For example, the Law Offices of Charles F. Bean, located in Coeur d'Alene, offers descriptions about personal injury, with more narrow classifications such as brain injury cases. Keep your website fresh and updated.

Technology can make it easy for prospects to connect with you. Are you listed in the Online Lawyer Referral Service for the Idaho State Bar? If so, what area(s) of law have you selected? In what directories are you listed? Two directories are LawLink.com and Lawyers.com.

From LinkedIn (for professional contacts) to a blog, social media is a way that attorneys can market themselves and attract new clients. Legal OnRamp, for

Many attorneys market themselves through speaking engagements, seminars, and trade shows. When you present at a conference, you elevate your reputation among the attendees.

example, is a collaboration system for in-house counsel and invitees. If you use Facebook, be sure to keep a company profile page that is separate from your personal profile.

Is there a webinar that would appeal to your target market? Know whom you want to reach and develop a webinar that provides information. Publicize, promote, and follow-up with attendees to enhance your success. Then post the relevant information on your firm's website.

While these technologies are changing rapidly, there are still fundamentals.

Public relations

Public relations differ from advertising in a major respect: you have no control over whether or not a press release will be published. However, publicity is often regarded as more credible than advertising (which is a paid message), so it behooves you to develop a press release schedule that involves significant content and relevance.

Writing and disseminating press releases help attorneys market themselves and attract new clients. Keep alert for opportunities to send appropriate press releases:

- Expanding practice areas or services
- Receiving an award
- Earning a designation
- Publishing an article
- Chairing a fund-raiser
- Joining a board of directors
- Giving a speech
- Announcing a new hire or promotion
- Holding a seminar
- Opening a new location

If you want to be a resource to the media, feed them information. Alert the media in relevant industries about changes in the law. Write about legal trends and reveal your knowledge. When you send out press releases, add law journals and law school publications to your publishing list. Free media distribution outlets in-

clude: www.betanews.com/contact, www.businesswire.com/, www.pr.com, www.prlog.org, and www.przoom.com. Build relationships among the media and get to know the reporters. For those who are local, invite them to visit you at your firm, sit down over breakfast, and get to know one another. You want to create top-of-mind awareness.

Articles/presentations

Writing and publishing articles is another way for attorneys to market themselves and attract new clients. There are many options. You could write Client Alerts, which build credibility. Look for examples at Hawley Troxell where Partner Kim C. Stanger, Chair of the firm's Health Law Group, has written more than 33 Legal Alerts since January 2008. The topics range from *EMTALA and Non-Emergency Care* to *Medical Liens Under Idaho Law*.

Authorship opportunities are numerous. Write an article for an industry association newsletter or website to associate your familiarity with that trade. "Touch points" is a term that refers to maintaining contact with your clients. Survey your clients in a specific profession as one of your touch points and use the results as the basis for writing about industry trends.

Write an article for your law school alumni magazine to connect with other attorneys who could give you referrals. Be advised that your involvement with the alumni association of your law school could help with those connections. Create a column or a blog, which could reveal different layers of the type of law you practice. Finally, write a book, which could be a compilation of—or an expansion of—your columns or blog.

Many attorneys market themselves through speaking engagements, seminars, and trade shows. When you present at a conference, you elevate your reputation among the attendees. If you speak before an industry group that is your target market, you gain credibility and are perceived as a specialist in that industry. When you are a speaker, be sure that you tailor your

information to that industry. You also could create a seminar to reach your target market. One of the law firms with which I worked created a seminar for hospital administrators. Before the attendees had left the room, the attorneys already had new business. Present at a trade show where your target market is likely to attend. One of my clients told me that the biggest value of a particular trade show was the contacts he made between presentations.

Follow-up

It is important to be proactive rather than reactive. Use strategic tactics, including effective follow-up, for marketing. Collect contacts. When you meet someone (perhaps at a conference or networking event where you are face-to-face with prospects)—and exchange business cards—jot the date, name of the event, and a point about the person on the back of that business card so you may follow-up. Otherwise it's difficult to remember when you look at a pile of business cards that you accumulated over a period of time. Say you connected with three individuals. The next day, send a follow-up email to each person, perhaps with an invitation to get together over coffee. Stay in touch and send occasional information that would be helpful to each contact. Your goal is to

If you want to be a resource to the media, feed them information. Alert the media in relevant industries about changes in the law. Write about legal trends and reveal your knowledge.

build relationships through credibility and consistency.

Consider your community presence. Be active in a service club such as Rotary or Kiwanis. Support the sports and culture. Michael Spink and JoAnn Butler, founding partners of Spink Butler, LLP, opened their home to the Boise Art Museum (BAM) for a members' fundraiser event. Whether you open your home to a group for a good cause or actively participate and support a non-profit, your numerous rewards include the community's respect.

Develop an excellent reputation so your name is the one someone thinks of when there is a legal need. Building that reputation takes experience, time, and

persistence—along with strategic marketing action steps. Marketing techniques for successful attorneys are composed of knowing what you do, reaching the target who is willing and able to pay you for your services, and repeating the process.

About the Author

Merilee Marsh, M.A., has been consulting with law firms and attorneys and presenting marketing workshops and speeches for law firms and legal organizations, since 1994. To subscribe to her courtesy weekly email *Marketing Tip for Attorneys*, email mm@merileemarsh.com. For additional information, call 208-921-5328, email mm@merileemarsh.com, or visit www.merileemarsh.com.

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IN MEMORIAM

Richard James Hayden 1950 - 2010

Richard James Hayden returned to his home in heaven on May 16, 2009. Rick was born to Robert and Estelle Hayden in New York, N.Y. on August 17, 1950. He grew up in Miami, Fla.

He received his bachelors and two masters degrees from Florida State University. Rick served as a captain in the U.S. Air Force and was the U.S. Liaison to IDAC, the Inter-American Defense College, based in Washington D.C. After leaving the military, Rick attended Gonzaga University School of Law, from which he graduated cum laude in 1984. During the next 25 years, Rick built a large regional law practice specializing in bankruptcy law and creditors' rights.

Rick was a dedicated Catholic, a devoted family man, and a wine enthusiast. He enjoyed coaching basketball for his son's team at Cataldo Catholic School. He also enjoyed celebrating Christmas every day of the year, and was happiest when surrounded by friends and family as the host of the party.

Rick is survived by his wife of 35 years, Sandy, and their four children of whom he was so proud: Tara, Sara, Ryan, and Lara, as well as his brother Robert, Robert's wife Maria, and their children Bob and Kate. He was preceded in death by his parents, Bob and Estelle Hayden and his son, Gavin. The memorial service was held on May 26, 2009 at Sacred Heart Church.

Janice Dilley Newell 1938 - 2010

Janice Dilley Newell, born Janice Mae Dilley, in Spokane, WA, July 23, 1938, passed away at home in Boise on Feb. 10, 2010. She valiantly fought her breast cancer to the very last.

She is survived by her companion Marv Horn, and her family: her daughter, Margaret Faye Newell (and Don Turriaga) of Seattle, WA; her son David Bryan Newell (and Heather Patrick) and her beloved grandson Sean Patrick and much loved granddaughter Shannon



Janice Dilley Newell

Mae of Gaithersburg, MD; her brother, Larry Dilley of Spokane, WA and her sister, Joy Hummer of Boise, ID.

Janice led a diverse life, being a business owner, a rancher, a Realtor, and then returning to Gonzaga Law School to become an attorney. After law school, Janice came to Boise where she clerked for Judge Alfred (Bud) Hagan in the bankruptcy court and then joined the IRS District Counsel for 10 years. Janice had by then become one of the best in her specialty of bankruptcy law; she ultimately worked for the Ada County Prosecutor's Office and hoped to get back on the job there soon 'cause she wasn't ready to retire!

Everyone working with Janice respected her extraordinary knowledge of the bankruptcy practice and her willingness to share this expertise. Janice's diligence, generosity, and resourcefulness will be missed by her co-workers, friends and family. She gathered people together wherever she went and left friends everywhere. She had energy and drive, loved the outdoors and was always ready for a getaway or an adventure. She was tough, but she cared deeply.

Janice loved garage sales and collecting rocks. Anyone receiving a surprise box was in for a treat! They were her specialty. She grew the most beautiful flowers - a mixed bouquet from her garden was sure to bring happiness to the lucky recipient. From teapots to glass slippers, she collected them all, just as she gathered together a diverse group of people who will each miss her greatly.

A celebration of life was held on, March 12, at Cloverdale Funeral Home. In lieu of flowers, the family requests a random act of kindness, a contribution to a breast cancer research institution of your choice, or a donation to the Gonzaga University Law School. Checks can be made out to Gonzaga University School of Law - write Janice Newell in the memo line - and mail to: Development Office, PO Box 3528, Spokane, WA 99220-3528.

George C. Petersen, Jr. 1924 - 2010

George C. Petersen Jr., 85, of Idaho Falls, died Feb. 28, 2010, at Eastern Idaho Regional Medical Center.

George was born April 23, 1924, in Salt Lake City, Utah, the oldest of six chil-

dren born to George Clarence Petersen and Muriel Rausch Petersen. At the age of 17, he joined the U.S. Marine Corps during World War II and was involved in the invasions at Tarawa, Saipan and Tinian, as part of the battalion intelligence

team. He received a Bronze Star for his service. The military selected him to attend the University of North Carolina as part of a very special program. After an honorable discharge, he further pursued his education at the University of Utah in Law. He continued to practice law for 60 years.

On March 22, 1949, he married Evelyn Brey on the "Bride and Groom Radio Show" in Hollywood, California. Their marriage was solemnized in the Salt Lake City LDS Temple.

George has lived in Idaho Falls for the past 60 years. He was very civic minded and served in many service organizations, including the Idaho Falls Kiwanis Club, where he served as President of the local club; Governor of the Utah-Idaho District; and on the International Board. He was involved with the Jaycees, Elks, Lions and many other organizations. He also served as a City Councilman of Idaho Falls from 1951 to 1959.

George was an active member of The Church of Jesus Christ of Latter-day Saints and served in various church callings, his favorite being Sunday School Teacher for the youth and Sunday School President.

George's favorite thing to do was to spend time with his family, especially skiing in Sun Valley and "sailing" at Balboa Island. He was a very dedicated husband, father and grandfather. His hobbies included golfing, scuba diving, fishing and working.

Survivors include children, Tera Lee (Michael) Oldroyd of Idaho Falls, Vickie (Kirk) Norman of El Dorado Hills, Calif., Cyndy Shelton of South Jordan, Utah, James Douglas Petersen of Salt Lake City, Utah, J'Lene (Paul) Krass of Saratoga Springs, N.Y., Laurie (Bill) Croft of Idaho Falls and Deneen (David) Bybee of Kaysville, Utah; 23 grandchildren; 11 great-grandchildren; brothers, Vic-



George C. Petersen, Jr.

IN MEMORIAM

son-in-law, Niel Shelton; and a grandson, James Brandon Oldroyd.

Funeral services were held on March 4, at the Idaho Falls LDS Boulevard Ward. In lieu of flowers, donations can be made in his honor to the Oxalosis and Hyperoxaluria Foundation, 201 East 19th St., Suite 12E, New York, NY 10003; or at www.ohf.org.

Edward J. Berrett **1928 - 2010**

Edward J. Berrett, 81, of Pocatello, died Friday Morning, March 12, 2010, at the home of his daughter and son-in-law in Ammon, Idaho.

He was born on June 22, 1928, in Provo, Utah, to Edward Hyrum and Amy Jackson Berrett. Edward graduated from the University of Utah Law School in 1955 with his Doctorate. He married Jean Chambers on August 31, 1951, in the Idaho Falls L.D.S.

Temple. She preceded him in death in July of 1975. Edward worked as an Attorney of Law, first in private practice and then as a partner with Merrill and Merrill. In 1986 he semi-retired, but continued to practice law. While he was



Edward J. Berrett

in private practice, he created a foundation trust for the Kasiska Family. This Foundation continues to provide scholarship funding for students in health care at Idaho State University. At the time of his death he was living independently despite a myriad of health problems, practicing law, spending time with his family, and fishing.

Edward believed his family was his greatest source of joy and happiness. He enjoyed fishing, golfing and Scrabble. Edward's claim to fame was his catch of a 13-pound 14-ounce hybrid rainbow and native trout, which he caught on a 3 1/2 ounce fly rod in Spring Creek on the Fort Hall Indian Reservation.

Edward was a member of the Church of Jesus Christ of Latter-Day Saints, having served an L.D.S. Mission in Southern California. He is survived by four daughters, Elesa Shuman, Pocatello; Nina Gardner and Kirie (Bob) Brown, Idaho Falls; Lori Grow, Pocatello, and a son, Mark (Sue) Berrett, South Jordan, Utah; 24 grandchildren and 24 great-grandchild-

dren; a brother, David Hyrum Berrett, Blackfoot; and a sister, Rozilla Berrett Jorgensen, Pleasant Grove, Utah. He was preceded in death besides his wife, Jean, by two sons, Matthew Reed Berrett and John Richard Berrett.

Funeral services were held March 17, 2010, at the Cornelison Funeral Chapel.

Sheldon A. Vincenti **1938 - 2010**

Sheldon A. Vincenti died March 31 following a nine-month battle with cancer. Sheldon was born Sept. 4, 1938, in Ogden, Utah, to Arnold and Mae Vincenti. Following his childhood in Utah, he traveled to Boston, Mass., to attend Harvard, where he completed his undergraduate degree in 1960 and then went on to receive his J.D. from Harvard Law School in 1963. In 1964 he married Elaine Wacker. They divorced in 1996 after raising their two children. Sheldon served in the U.S. Army Intelligence and Security Branch, where he rose to the rank of captain. After the Army, he practiced law in Ogden for several years before becoming the legislative and administrative assistant to U.S. Congressman Gunn McKay in Washington, D.C.



Sheldon A. Vincenti

In 1973 Sheldon and his young family moved to Moscow after he accepted a faculty position at the University of Idaho College of Law. He served the law school in many capacities over his nearly 30-year career there, including 12 years as dean. The law school was a perfect place for him to combine his passions for both the law and education. He also enjoyed teaching several semesters at the New England School of Law in Boston.

In 1997 Sheldon married Donna Allen and they spent their days together sharing books, reading and writing poetry and enjoying their peaceful property on Moscow Mountain. Sheldon loved to tackle projects around the house with his dad, enjoyed cooking delicious meals for his family and was an avid Red Sox fan. Most evenings you could find him gazing at the breathtaking, panoramic view of the rolling Palouse from his front window or deck and listening to classical music.

Sheldon was immensely proud of his children and grandchildren and will be dearly missed by all who knew him. He is survived by his wife, Donna; his father, Arnold; his son, Matt and wife, Renae; his daughter, Amanda and husband, Michael; and his grandchildren Dru, 12, Ashlynn, 3, Quinn, 4, and Eliot, 6 months. A memorial service was held on April 10 at the University of Idaho College of Law. Memorial donations may be made to the University of Idaho College of Law.

Fred J. Hahn **1933 - 2010**

Fred J. Hahn passed away peacefully in his sleep Saturday, April 3, 2010, in Idaho Falls, Idaho.

Fred was born August 22, 1933, to Fred J. and Rebecca Hahn. He was raised in Idaho Falls and attended Holy Rosary Catholic School and Idaho Falls High School. Fred graduated in 1955 from Carroll College in Helena, Montana, and went on to earn a law degree from Georgetown

University in Washington, D.C. Upon graduation from law school in 1958, Fred entered the graduate program at Georgetown and received an LLM in Labor Law in 1959. While obtaining his LLM, he was employed as a staff attorney by the National Labor Relations Board in the enforcement division, advocating in many Federal Circuit Courts of Appeal.

In summer 1959, Fred returned to Idaho Falls and joined William S. Holden, Robert Holden and Vern Kidwell at the firm of Holden, Holden and Kidwell, where he practiced law for many years. Fred retired from Holden, Kidwell, Hahn, and Crapo in 1995. During his years of practice, Fred was honored with many outstanding accomplishments. In the early 1960s, Fred was named the first civilian probation officer in the state of Idaho. He was the president of the Seventh Judicial Bar, Commissioner and President of the Idaho State Bar Association, Director and President of the Idaho Law Foundation, a member of the Advisory Board for the University of Idaho Law School and served on numerous Idaho Supreme Court Committees. Fred was the recipi-



Fred J. Hahn

IN MEMORIAM

ent of the Idaho State Bar Certificate of Achievement, the Idaho State Bar Professionalism Award, and in 2000, was honored to receive the Distinguished Lawyer Award (the highest recognition given by the Idaho State Bar). Fred was also active in the Catholic Church and served on the Board of the Idaho Catholic Foundation, as well as Catholic charities including the Knights of Columbus, eventually serving as the Grand Knight for the state of Idaho.

In 1962, Fred married Pearl Marie Marcon, and together they raised four children.

Fred is survived by his wife, Pearl; his four children, F.J. (Neccia) Hahn of Idaho Falls, Gretchen Gleason of Lewiston, Peter Hahn of Idaho Falls and Kimberly Hahn of Idaho Falls; seven grandchildren, Hannah, Tyson, Sam, David, Lucas, Adam and Benjamin; and one great-grandson, Tai. He is also survived by brothers, Dr. Richard Gillis (Toni) Hahn and Ralph Holden; as well as sisters, Dixie (Gaylord) Smith and Shirley (Stan) Bray, Joan Hahn and Fern Holden; and many nieces, nephews and dear friends.

He was preceded in death by his parents, Fred Hahn and Rebecca Holden; stepfather, C.R. Holden; brothers, Dr. Robert F. Hahn and C. R. Holden Jr.; brother-in-law, Robert Fisher; and sisters, Mary Fisher and Lois Holden.

Fred enjoyed many passions in life and had a great love of music, dancing, skiing, tennis and the piano. His love of life touched many.

Funeral services were held on April 10, 2010, at Holy Rosary Catholic Church. In lieu of flowers, please send a donation to the Sen. Mike Mansfield Scholarship Fund at Carroll College, 1601 Benton Ave., Helena, MT 59625; or the Idaho Law Foundation, P.O. Box 895, Boise, ID 83701.

A funeral Mass was held on April 10, at Holy Rosary Catholic Church in Idaho Falls.

Emil Francis Pike Jr. 1932 -2010

Emil Francis Pike Jr. 77, of Kimberly, Idaho passed away on April 7, 2010 at St. Luke's Magic Valley Medical Center in Twin Falls, Idaho.

Emil was born August 22, 1932 in Colfax, WA, to Emil Francis and Ethel Taylor Pike of Pullman, WA. He was raised in Pullman and attended Pullman

High land in 1954. After completing his studies at Oxford, he graduated from the University of Idaho Law School in 1962. After graduation, he served as a clerk for the Idaho Supreme Court until moving to Twin Falls in 1964; where he practiced law until the day of his death.

Emil enjoyed solving people's problems and had a deep love for the law. He was a member of the Idaho State Bar, the Idaho Trial Lawyers Association, the Lion's Club, and was active in the Full Gospel Business Men's Fellowship, the Christian Men's Fellowship, and served as Chaplain for Truck Stop Ministries. He served on the board of the Salvation Army for many years and was a member of Saint Edward's Catholic Church.

On August 28, 1960, he married Ruth Nelson in Clarkston WA. Emil and Ruth moved to the Twin Falls area in 1964 where they raised their five children. He loved the Lord and his family first and foremost. He also enjoyed studying history and the Hispanic culture, fishing with his cousin Ken, and story-telling. He was a true patriarch to the community and will be greatly missed.

He is survived by Ruth, his wife of 49 years; brother Gerald (Brenda) Pike of Oak Harbor WA; sons Derek (Cindy) Pike of Spanaway, WA, Brian (Robin) Pike of Twin Falls, ID, Kevin (Christine) Pike of Clearwater, FL; daughters Amy (Wyly) Jones of Kimberly, ID, and Julie (Bradley) Burgess of Kimberly, ID; 17 grandchildren and 6 great-grandchildren. He was preceded in death by his parents.

A Funeral Mass was held at Saint Edward's Catholic Church on April 13.

Donations in Emil's memory can be made to the Paralyzed Veterans of America at 01 Eighteenth Street NW, Washington, DC 20006.

The family would like to extend a special thanks to Emil's doctor and friend, A.C. Emery, MD and the excellent nursing staff of Saint Luke's in Twin Falls.

Ronald B. Webster 1942 -2010

Ronald B. Webster, long time Colfax attorney, suddenly passed away on Thursday, April 8, 2010 at Whitman



Emil Francis Pike Jr.

Hospital in Colfax. A memorial service was held on Tuesday, April 13 at Peace Lutheran Church in Colfax.

Ron was born June 11, 1942 in Cle Elum, WA to Burnette and Lucille (Beck) Webster. The Webster family moved to Coeur d'Alene, ID until Ron was four years old. They then moved to Spokane where Ron attended Grant Elementary and graduated from Lewis & Clark High School

in 1960. He continued his education at the University of Washington where he graduated with a degree in Political Science in 1964. In 1964 and 1965 Ron studied at the Sorbonne in Paris, France and traveled throughout Europe. He returned to Spokane in 1965 and enrolled at Gonzaga Law School. Ron graduated with his Juris Doctorate in 1969, then began his legal career as a Deputy Prosecutor in Longview, WA.

He met Gail Skinner in the Kelso/Longview area while she was working as a social worker for DSHS. The couple married on June 26, 1971 in Olympia, WA. In 1973, Ron and Gail moved to Colfax where he joined the law office of Lawrence Hickman. He continued in private legal practice until his death.

Ron was very active in the community through his involvement with Cub and Boy Scouts with his son Noel; member and council member at Peace Lutheran Church; Past-President and long time member of Colfax Rotary Club by whom he was honored with the Paul Harris Fellow award; Past-President of Whitman County Library Board; Past-President and member of Whitman County Cougar Club; Past-President of Colfax and Community Fund; member of Washington State Bar Association, Washington State Trial Lawyers Association and Whitman County Bar Association; board member of Colfax Golf Club; volunteer for Northwest Justice Project and Whitman County Bar Association Volunteer Lawyer Program; board member of Center Stage theater in Spokane; and member of the Whitman County Civil Service Commission.

Ron was also active in community theater in which he played the memorable roles of Pappy Yokum in Lil' Abner,



Ronald B. Webster

IN MEMORIAM

Uncle Max in *The Sound of Music*, the Governor in *The Best Little Whorehouse in Texas*, among many others.

Over the years, the Webster family hosted five exchange students through Rotary Youth Exchange. Ron also participated in many outdoor activities including spending time at the family cabin and boating on Lake Coeur d'Alene, downhill skiing, jogging and golf, all of which he enjoyed with many friends and family members throughout the years.

In recent years, Ron and Gail traveled to Belize, England and Scotland, Vietnam, Cambodia and Thailand, and most recently to Mexico and Cuba.

Ron was a beloved member of the Colfax and Spokane communities, adored by many friends, and is thought of with fondness, laughter, and good humor by all who were fortunate to know him.

Ron was a wonderful father and father figure, and was adored by his children and the many young people that spent time in the Webster household throughout the years. He was a caring and compassionate individual and attorney, always willing to give of himself through pro bono and discounted legal services, volunteerism, and other contributions.

Ron loved the practice of law and took pleasure in serving his many clients. He appreciated living in Colfax and was a proud citizen of the Palouse.

Ron is survived by his wife Gail, his children Noel Webster and wife Christy in Gig Harbor, WA, and Michelle Webster and her fiancé, Leyland McGann in Washington, DC, and sister Judy Allemand and husband Lonnie in Worley, ID. He is also survived by Vijitra Duangdee and her husband Brian in Eugene, OR, as well as six nieces and nephews.

Ron was preceded in death by his parents, Burnie and Lucille, and his brother, Jerry.

In lieu of flowers, the family suggests memorials be made to Peace Lutheran Church, 309 N. Lake St., Colfax; the Whitman Hospital Foundation, 1200 W. Fairview, Colfax; Colfax and Community Fund, P.O. Box 185, Colfax; and Lutheran World Relief, www.lwr.org.

Jerry Vickers Smith 1924 - 2010

Jerry Vickers Smith (Big Daddy) (Grandpa) and (Boppa), who practiced law in Lewiston for nearly 60 years and amassed an incredible record of public service, including a term as president

of the Idaho State Bar, a member of the American College of Trial Lawyers, president of the Western States Bar Conference, and a recipient of both the Professionalism and Pro Bono awards, died Sunday, April 11, 2010, at St. Joseph Regional Medical Center in Lewiston, surrounded by his loving family and friends. At 85 years old, Jerry passed away from secondary injuries he suffered while doing what he liked best, going for a walk with his best friend, his dog.

Smith, a native of Boise, was a partner for many years in the law firm of Smith and Cannon, located in Lewiston. In 2002, after practicing law for 52 years, Jerry received the Idaho State Bar's highest honor, the Distinguished Lawyer Award. His long-time friend, Merlyn Clark said, "I know of no recipient of the Distinguished Lawyer Award more worthy than Jerry Smith. He is the ideal of our profession, in demeanor, intellect, courage and empathy." Jerry loved practicing law and continued his practice well into his retirement years, much the same as his friend and professional role model, Laurel Elam, a Boise attorney who practiced law until three weeks before he died at the age of 87.

Jerald Vickers Smith was born in Boise on May 3, 1924, the second child of Walter E. Smith Sr. and Laurel Vickers Smith. Jerry grew up in Boise's north end with his big brother Billy (Judge W. E. Smith) as a typical 1930s Boise youngster. He attended Lowell School through the eighth grade, and Boise High School, graduating in 1942. He enrolled in the University of Idaho and was a member of the Kappa Sigma fraternity. Like many young men of this time, Jerry left UI before graduation and entered the U.S. Navy as an aviator cadet. He learned to fly PBYS and obtained the rank of lieutenant. After the end of World War II, Jerry returned to Moscow and his beloved UI, to finish his degree.

Jerry had planned to seek a career in hotel management, but his brother Bill was entering UI Law School and asked Jerry to join him. At that time, the Cornell University School of Hotel Management was only taking New York residents and Jerry decided that many of the classes he would take in law school would be ad-



Jerry Vickers Smith

vantageous in his "chosen" career of hotel management. So, he joined his brother in Moscow, and loved the courses, loved the discussions and loved the camaraderie among the students. He never gave hotel management another thought and finished his law degree at UI in 1950. He loved practicing law in those years. It was a time when a handshake with an opposing attorney was a binding agreement.

Several lawyers and judges mentored Jerry through the years. An example can be taken from a direct quote from Jerry in 2002: "Judge Leo McCarty, in Lewiston, initially appointed me to my first case. I was to defend a couple of alleged cattle rustlers in Lewis County. We were in a remote area and both of us were staying in the county seat, Nezperce. The first evening after the difficult initial day of trial, the judge started telling me what I should do the next day, and the next, and every evening he would coach me on what I should do in the courtroom the next day. Through the years Judge McCarty continued to be a great resource for me." Another instance Jerry used to refer to was his relationship with Paul Hyatt. Jerry used to say he was the kind of guy who would set anything aside he was doing and walk him through whatever legal problem he was having with never a moment's hesitation.

Smith served as an adjunct professor of law at UI, where he taught students such things as taking depositions, drafting pleadings and other typical practical information. At the end of each semester he would invite his class to visit his law office.

He was known to instill in his students one of his cardinal rules of practicing law: "Always be courteous to other lawyers." He would say, "You can disagree, but do it in a professional manner." He was fond of telling the story of one "prickly" lawyer who everyone found difficult. But typical to Jerry's style, he didn't let this lawyer get under his skin. He always treated him with courtesy regardless of how abrasive the lawyer became. Later in Jerry's career, this lawyer provided him some very important background information for one of his cases. So, true to what Jerry believed and practiced - what goes around comes around.

Jerry was an outdoorsman. He loved playing tennis, riding his bicycle, fly-fishing and snow skiing - activities he pursued his whole life. Following his

IN MEMORIAM

retirement in 2005, Jerry enjoyed following the Lewis-Clark State College Warriors baseball team, and you would see him in the stands of most home games. He also loved the Seattle Mariners and all UI Vandal sports.

Jerry married his wife, Paulette Stonebraker, in 1976, blending the family with Paulette's three children: Steve, Toniann and Brady with Jerry's son Brad. Jerry was loving as a parent and as a stepparent.

Relatives who survive Jerry are his wife, Paulette; sons Brad Smith of Edmonds, Wash., Steve Tilden of Lewiston, and Brady Bly and wife April of Lewiston; daughters Marcia Torrey and her husband Jerry of Portland, Ore.; Joan Nelson and her husband Dick of Sacramento, Calif., and Toniann Jurgensen and her husband Jeff of Bellevue, Wash.; his sister-in-law, Eileen C. Smith of Boise; numerous grandchildren and great-grandchildren; many nieces and nephews; and of course his beloved Norwich terrier, Doozie.

Jerry was preceded in death by his parents, his brother Bill and a wife, Betty Lou Braddock.

Services were held on April 24 at Vassar-Rawls Funeral Home in Lewiston.

The family suggests memorial gifts be made to the LCSC baseball team, c/o: Robin Bogar, 500 Eighth Ave., Lewiston, ID 83501; or YWCA, 300 Main St., Lewiston, ID 83501.

Sidney Earl Smith 1914 -2010

Sidney Earl Smith, a longtime resident of Coeur d'Alene, passed away Friday, April 23, 2010, four days short of his 96th birthday.

Sid was born in Superior, Wisconsin, April 27, 1914, the son of Claude Earl Smith and Artie Marion Swanson. He was the oldest of four children, all of whom have predeceased him. The family moved to Morgan Park (Duluth) Minnesota in



Sidney Earl Smith

1915 where he was raised and educated through high school. He graduated Duluth Jr. College in 1934; University of

Minnesota (Twin Cities) 1937; attended University of Colorado law school in Boulder, Colorado, 1937-1940, graduating in June 1940. During that time in Boulder he met his forever bride, Mary Louise (Nickey) Nixon of Pocatello, Idaho. She was a student in interior design. They were married December 27, 1940, in Pocatello, Idaho. Nickey passed away November 16, 2006. He self-financed his education by working as a dishwasher in Yellowstone Park, a steelworker, as a railroad car man's helper, a janitor and a truck driver. He studied for and passed the Idaho bar in 1941. Their daughter, Penney K., was born in November of that year.

In October 1942, he received orders to report for induction for Officer Candidate Training, U.S. Army. (He was a member of the Minnesota National Guard 1932-1936.) After completing Officer Candidate Training, he served in overseas combat service in the European Theatre returning in 1945 with the rank of Captain. After leaving active military service, he became a member of the U.S. Officers Army Reserve, with the rank of Major, in the artillery branch.

He began his law practice in Idaho Falls in the spring of 1946, but moved to Coeur d'Alene in the fall of that year. They bought a house on Montana Avenue which was then near the city limits of Coeur d'Alene. It was while living here that their son Sidney N. Smith was born in June 1947.

For most of his career, Sid practiced law in Coeur d'Alene; however in 1970 he was appointed by President Richard M. Nixon to the position of Deputy General Counsel for the General Services Administration, serving for one year in Washington, D.C., From January 25, 1971, through May 20, 1975, he served as the United States Attorney for the State of Idaho in Boise, also under the Nixon administration.

During his career, Sid has received numerous awards from various organizations such as the Kootenai Bar Association (founding president 1978), Idaho Law Foundation (Board of Directors 1982-1988), Board of Commissioners of the Idaho State Bar, Idaho Association of Defense Counsel. But the award he treasured most was the Idaho State Bar Professionalism Award presented to him in 2004. This award states: "To Sidney E. Smith, First Judicial District, who has,

over a long and distinguished legal career, by his ethical and personal conduct, commitment and activities, exemplified for his fellow attorneys the epitome of professionalism." This statement could describe Sid's entire life.

In addition to his law career his civic service was commendable. He was a member of the Chamber of Commerce (president 1956); Rotary International Club of Coeur d'Alene (president 1979-1980 and Paul Harris fellow); first chairman of the Idaho Commission for the Blind; two years on the Idaho Board of Health, and later a director of Blue Cross of Idaho; instrumental in creating the Kootenai Medical Center hospital district and also served on the board of directors and as legal counsel for Coeur d'Alene Homes and Heritage Place; longtime member of VFW and the Idaho American Legion, where he served as state commander; one of the founders of the Coeur d'Alene Public Golf Course and has been a member of the Hayden Lake Country Club since 1946. He was a candidate for Lt. Governor in 1965. He was a member of the Presbyterian church, serving as a board trustee and Ruling Elder. He was also a member of the Sessions at the church.

In his early years, Sid enjoyed lake swimming, racquet ball, horseback riding, golf, and travel with Nickey. In his later years, he enjoyed tennis and snow skiing (into his mid-80s), Hawaii vacations, reading, and writing his memoirs.

Sid was predeceased by his parents, two sisters, one brother; his wife, Mary (Nickey) in November 2006; and his daughter, Penney, in November 2009. He is survived by his son, Sidney N. Smith (Kathy) of Coeur d'Alene; grandsons Mark Sales (Leigh) of Coeur d'Alene; Darin Sales of Hailey, Idaho; Brian Smith (Cindi) of Burbank, Calif.; great-granddaughters, Sydney and Lindsey Sales and Morgan Smith, and great-grandson, Carson Smith.

Memorial services was held April 27, 2010 at the First Presbyterian Church, 521 E. Lakeside, Coeur d'Alene.

In lieu of flowers, the family suggests contributions to the Idaho chapter of the American Legion or VFW; Hospice of North Idaho, First Presbyterian Church Building Fund or the Rotary International Foundation directly, or in care of English Funeral Chapel, 133 No. 4th, Coeur d'Alene, Idaho 83814.

OF INTEREST



Kristin Campbell



Mary Hainline



Natalie Holman



Kathy Johnston



Kim Kline



Barbara Neils



Jennifer Pratt

IDALS elects new officers

IDALS . . . the association for legal professionals recently elected a new slate of officers for the 2010-2011 year. The officers are:

- President: Kim Kline, Elam & Burke, Boise
- President-Elect: Natalie Holman, Risley Law Office, Lewiston
- Secretary: Jennifer Pratt, Whitehead, Amberson & Caldwell, Coeur d'Alene
- Treasurer: Kristin Campbell, Cantrill Skinner Sullivan & King, Boise
- Director of Certification and Education: Kathy Johnston, CPS, PLS, CLA, Stoel Rives, Boise
- Director of Membership and Marketing: Barbara Neils, Whitehead, Amberson & Caldwell, Coeur d'Alene
- Parliamentarian: Mary Hainline, Cantrill Skinner Sullivan & King, Boise

IDALS the association for legal professionals is a tri-level organization consisting of the national association, NALS, and local chapters around the state.

NALS is dedicated to enhancing the competencies and contributions of members in the legal services profession. NALS accomplishes its mission and supports the public interest through:

- Continuing legal education and resource materials;
- Networking opportunities at the local, state, regional, and national levels;
- Commitment to a Code of Ethics and professional standards, and Professional certification programs and designations.

People can join by going to the IDALS.org or NALS.org and downloading the membership application.

Anderson, Julian & Hull LLP, announce new partners and new member to their firm

Anderson, Julian & Hull LLP, is pleased to announce that Mark D. Sebastian and Matthew O. Pappas have been named as partners of the firm and that Thomas V. Munson has joined the firm.

Mark Sebastian's current practice includes insurance defense, contracts and transactional work, construction law, education law, defense of governmental entities, employment law, personal injury defense, professional malpractice defense and commercial litigation. He graduated in 1996 from Boise State University with a Bachelor's degree in Accounting. He obtained his Juris Doctor degree from the University of Idaho in 1999.



Mark Sebastian

Matthew Pappas's practice primarily involves the areas of insurance defense, worker's compensation law, personal injury, construction, probate and appellate practice. He graduated in 1997 from the University of Idaho with a Bachelor of Science degree in Political Science. He obtained his Juris Doctor degree from the University of Idaho in 2000.



Matthew Pappas

Mr. Munson has 29 years of legal experience emphasizing worker's compensation, litigation and appellate practice. His primary practice area with the firm is worker's compensation.

Mr. Munson is admitted to the Ninth Circuit Court of Appeals and the United States Supreme Court.

Mr. Sebastian, Mr. Pappas and Mr. Munson can be reached at, Anderson, Julian & Hull LLP, C.W. Moore Plaza, 250 South Fifth Street, Suite 700, P.O. Box 7426, Boise, Idaho, 83707-7426; (208) 344-5800; or by email at: msebastian@ajhlaw.com, mpappas@ajhlaw.com and tmunson@ajhlaw.com.



Thomas V. Munson

Bolinder appointed to B.S.U. Foundation Board

Givens Pursley partner Clint R. Bolinder was recently appointed as a member of the board of directors for the Boise State University Foundation (the "Foundation"). Clint will serve a two-year term, and joins a distinguished group of men and women with diverse economic, geographic and educational backgrounds who are responsible for supporting the excellence of Boise State University. The Foundation was organized in 1964 as a nonprofit Idaho organization to raise and manage private funds and support for the benefit of Boise State University, and to act as liaison between the University and its constituents. To learn more about the Boise State University Foundation, please visit www.universityadvancement.org.

Clint received his BBA in accounting from Boise State University; his Juris Doctorate from the University of Idaho



Clint R. Bolinder

Clint received his BBA in accounting from Boise State University; his Juris Doctorate from the University of Idaho College of Law; and his Masters of Laws (LL.M.), with distinction, in taxation from Georgetown University College of Law. He focuses his practice primarily in real estate and business transactions, related federal and state tax issues, and estate planning and wealth preservation.

You can reach Mr. Bolinder at Givens Pursley LLP, P.O. Box 2720, Boise, ID 83701; (208) 388-1200; or by email at: cbolinder@givenspursley.com.

Teffeteller Joins Camacho Mendoza Coulter Law Group PLLC as Of Counsel

Robert Teffeteller has joined Camacho Mendoza Coulter Law Group PLLC as Of Counsel. Robert brings a business and transactional background to the firm to add to the existing practices in Employment, Workers Compensation, Title VII, and Federal Contract Compliance. The firm is able to help small and medium sized businesses with many of the legal issues faced on a day-to-day basis.



Robert Teffeteller

Previously, Robert was a law firm consultant with West. Robert has been licensed to practice law in California since 1993, and became a member of the Idaho State Bar in October, 2009. Robert received his J.D. from Golden Gate University School of Law in San Francisco, and he holds a B.A. in Economics from the University of California, Berkeley.

You can reach Mr. Teffeteller at Camacho Mendoza Coulter Law Group, PLLC, 776 E. Riverside Drive, Ste. 200, Eagle, ID 83616; (208) 672-6112; or by email at: rgtesq@gmail.com.

Nelson has joined the firm of Naylor & Hales

Eric F. Nelson has joined the firm of Naylor & Hales, P.C., as an associate attorney. He received his Bachelor of Science degree in print journalism from Brigham Young University-Idaho, and was awarded his law degree from Creighton University School of Law. Prior to joining Naylor & Hales, P.C., Eric served as general counsel for Matthew

D. Hutcheson, LLC., where he drafted and maintained pension, profit-sharing, and 401(k) plans for a variety of business entities throughout the United States. From 2007 to 2009, he served as a judicial clerk for the Honorable John A. Manglona of the Supreme Court of the Northern Mariana Islands. Eric's practice focuses on all aspects of civil and commercial litigation. You can reach Mr. Nelson at Naylor & Hales, P.C., 950 W. Bannock St., Suite 610, Boise, Idaho, 83702; (208) 947-2079; or by email at efn@naylorhales.com.



Eric F. Nelson

Munson joins Anderson, Julian & Hull

Anderson, Julian & Hull LLP, is pleased to announce that Thomas V. Munson has joined the firm.

Mr. Munson has 29 years of legal experience emphasizing worker's compensation, litigation and appellate practice. His primary practice area with the firm is worker's compensation.

Mr. Munson is admitted to the Ninth Circuit Court of Appeals and the United States Supreme Court.

You can reach Mr. Munson at Anderson, Julian & Hull LLP, C.W. Moore Plaza, 250 South Fifth Street, Suite 700, P.O. Box 7426, Boise, Idaho, 83707-7426; (208) 344-5800; or by email at: tmunson@ajhlaw.com.

2010 Idaho Women of the Year

Wright Brothers Law Office, PLLC is pleased to announce that Lisa B. Rodriguez and Brooke Baldwin were recently selected as 2010 Idaho Women of the Year by the Idaho Business Review.

Mrs. Rodriguez practices in the firm's family law practice area, where she handles divorce, child custody and guardianship matters. Mrs. Rodriguez also serves on the



Lisa B. Rodriguez

Idaho State Bar Association's Family Law Section Council and the Idaho Fifth District Bar Association's Family Law Continuing Legal Education Committee. Mrs. Rodriguez received her J.D., magna cum laude, from the University of Idaho College of Law and her B.A. from Albion College.

Ms. Baldwin practices in the firm's litigation practice area, where she handles contract, property and employment matters. Ms. Baldwin also serves as President of the Idaho Fifth District Bar Association and on the Board of Directors of Idaho Legal Aid Services, Inc. Ms. Baldwin received her J.D., magna cum laude, from the Hamline University School of Law and her B.A. from Boise State University.



Brooke Baldwin

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

Other Idaho attorneys selected as 2010 Idaho Women of the Year by the Idaho Business Review were: Cynthia Melillo, partner and attorney, Givens Pursley, Boise and Betty Hansen Richardson, of counsel, Richardson & O'Leary; campaign manager, Allred for Idaho, Boise.

New restatement of the law of torts published by the American Law Institute

The culmination of more than a decade of scholarly drafting, analysis, and revision, covers the basic topics of the book, *Restatement Third, Torts: Liability for Physical and Emotional Harm, Volume 1*, is now available. Michael Green, a professor at Wake Forest University School of Law, and William Powers, Jr. president of the University of Texas at Austin, served as the Reporters for this new Restatement.

Volume One supersedes comparable provisions in the Restatement Second of Torts. A second volume, dealing with affirmative duties, emotional harm, landowner liability, and liability of actors who retain independent contractors, will complete this work and is expected to be published in 2011. The American Law Institute provides details and ordering information at www.ali.org.

Report measures public defenders caseloads

A report by the National Legal Aid and Defender Association says that Idaho's public defenders are working more cases than national standards recommend. It also found in the seven counties it studied: "While there are admirable qualities of some of the county indigent defense services, NLADA finds that none of the public defense systems in the sample countries are constitutionally adequate."

The Criminal Justice Commission is expected to study the issue and make recommendations this fall.

Prosecutors select association leader

Idaho Prosecuting Attorneys Association selected Bonneville County Prosecutor Dane H. Watkins Jr. the 2010 president of the association during the group's winter training conference.

"It is humbling to consider the responsibility of representing Idaho prosecutors," Watkins told the Idaho Falls Post Register.

The IPAA is a nonprofit corporation designed to educate, train and assist Idaho's 44 elected prosecuting attorneys in the pursuit of justice.

907 members respond to ISB communications survey

A communications survey sent in early February to the entire Bar revealed a wealth of information. Fortunately, the response was large. From 5,346 members, 907 responded, for a 17 percent response.

What did those responses tell us? We heard that nearly half of all attorneys reads the E-Bulletin every week. The same goes for those who read *The Advocate*. The results also told us there are many members who would rather use an online version of the Desk Book Directory.

Given a choice, there were 38 percent who would sometimes use an online version of the Desk Book and 38 percent who would not like a hard-copy version, if it were offered online, while 47% would still prefer to use a hard copy. The comments section helped identify some problems with the web site, as well as other issues. There were 157 comments written about all manner of things relating to the website, *The Advocate*, and the *Desk Book Directory*.

"I want to thank the respondents," said Dan Black, ISB Communications Director, adding that "many comments

were specific and immediately useful and others gave good ideas for future changes." Black said.

Rule Changes

The 2010 Idaho Legislature passed, and the Governor signed into law, House Bill 687 enacting an Emergency Surcharge on fees listed under the Bail Bond Schedule in Misdemeanor Criminal Rule 13(b) and fees listed under the Infraction Penalty Schedule in Infraction Rule 9(b). The new fees will take effect on April 15, 2010. To see other amendments to the Misdemeanor Criminal Rules and Infraction Rules, please see the orders on the Court's website at <http://www.isc.idaho.gov/rulesamd.htm>.

The Idaho Supreme Court has also amended the Idaho Civil Rules of Procedure and the Idaho Appellate Rules to more clearly define what is a final, appealable judgment. These amendments take effect on July 1, 2010. The order amending these rules can also be found on the on the Court's website at <http://www.isc.idaho.gov/rulesamd.htm>. An article highlighting upcoming rule changes in more detail will be coming in the June-July edition of *The Advocate*.

In Memoriam of: Fred J. Hahn

as of April 22, 2010

Fred left a legacy of great legal skills and honorable and ethical conduct in the practice of law and as a community leader. ~ Reed Moss

We were all saddened to hear of the passing of Fred Hahn, a former member of our law firm, a founding member of the Idaho Law Foundation, and a most cheerful and compassionate man. ~ Dale Storer of Holden, Kidwell, Hahn & Crapo



The Idaho Law Foundation has received generous donations in memory of: **Fred J. Hahn** from **Holden, Kidwell, Hahn, & Crapo, Martin & Eskelson, Michael McNichols, John and Karen Rosholt, Reed and Elizabeth Moss, Ray and Chris Cammack, Merlyn and Sandy Clark, Craig Meadows, Thomsen Stephens Law Offices, William Parsons, Ovard Construction, Linda Judd and Hon. James F. Judd, Circle Valley Produce, William and Jeanne Rigby and Sean and Lora Breen and Family.**



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Theodore W. Bohlman, M.D. Licensed, Board Certified Internal Medicine & Gastroenterology Record Review and medical expert testimony. To contact call telephone: Home: (208) 888-6136, Cell: (208) 841-0035, or by Email: tbohlman@mindspring.com.

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Jeffrey D. Block, PE Civil, Structural, Building Inspection, Architectural, Human Factors and CM Coeur d'Alene Idaho. Licensed ID, WA, CA. Correspondent-National Academy of Forensic Engineers, Board Certified-National Academy of Building Inspection Engineers. Contact by telephone at (208) 765-5592 or email at jdblock@imbris.net.

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IOLTA BRINGS LAWYERS, BANKERS TOGETHER FOR ALL IDAHOANS

Tonya Westenskow
Bank of the Cascades

If you're an attorney, then where you bank matters. Thanks to the Idaho Law Foundation's (ILF) Interest on Lawyers Trust Accounts (IOLTA) program, law firms and banks have been coming together since 1975 to generate funds that support legal aid, legal education for the public, and other activities to improve the quality of justice. This funding resource continues to enhance the quality of life for thousands of Idaho residents. As a member of ILF's Revenue Enhancement Committee, I'm privileged to be part of this very successful partnership between the legal and financial communities.



Tonya Westenskow

ent, net of bank charges or administrative fees, are placed in a pooled interest-bearing trust account. Participating financial institutions remit the interest from these accounts at least quarterly to ILF. Interest earned on IOLTA accounts funds services to those who ordinarily wouldn't have access to legal services and education.

The program has several goals: provide legal aid for low-income citizens, provide law-related education programs for the community, provide scholarships and student loans, and improve the administration of justice. Since its inception, ILF has distributed more than \$5.5 million dollars to worthy organizations that empower the most vulnerable in our society, build strong communities and ensure there is justice for all. In 2009, the IOLTA Grant Program granted \$360,000 to community programs in all parts of Idaho.

How banks contribute to IOLTA

Financial institutions are critical to the success of the IOLTA program. The amount of funding generated through IOLTA each year is dependent upon several factors, including interest rates and bank-imposed service fees. Law firms can help ILF by establishing IOLTA accounts at a bank that is committed to maximizing the rate of return.

FDIC coverage updated

Remember that the FDIC has expanded insurance coverage on your client IOLTA funds. In 2008, the FDIC announced the Temporary Liquidity Guarantee Program. Under this Program, noninterest bearing transaction accounts have unlimited FDIC deposit insurance. The FDIC has amended the definition of "noninterest bearing transaction accounts" to include IOLTA funds. Specifically, under this new definition, IOLTA funds are now fully FDIC insured with no limit through June 30, 2010.

About the Author

Tonya Westenskow is an Assistant Vice President and Relationship Banking Officer at the Bank of the Cascades Meridian Branch. Bank of the Cascades, named a Leadership Bank by the Idaho Law Foundation, offers solutions to investment issues, best management practices of IOLTA funds, customized business services and planning with accessible local decision-makers. Through a shared commitment to give back to Idaho communities, Bank of the Cascades is dedicated to community and business development and investment, employee volunteerism, and support for education, arts, environment, and social services programs.

How law firms contribute to IOLTA

If you aren't familiar with this program, here's how it works: Client funds that are too small in amount or held for too short of a time to earn interest for the cli-

Interest on Lawyers' Trust Accounts

WHERE YOU BANK CAN HELP SOMEONE MAKE A NEW LIFE

Special Thanks...

The Idaho Law Foundation would like to thank the following banks for continuing to pay competitive interest rates during these difficult economic times.

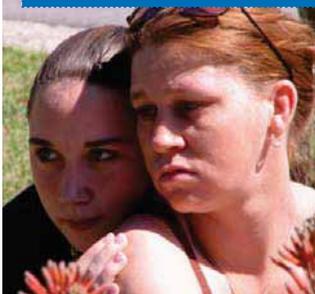
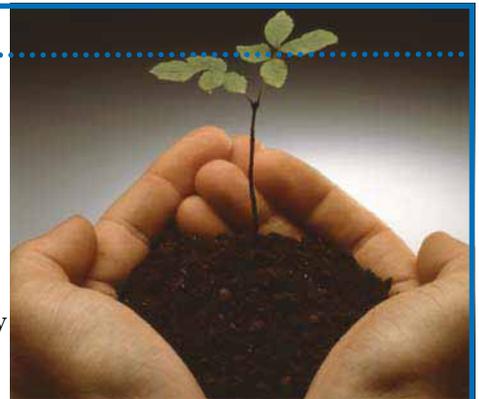
- ❖ Bank of the Cascades
- ❖ Idaho Banking Company
- ❖ Idaho Central Credit Union
- ❖ Idaho Independent Bank
- ❖ Idaho Trust Bank
- ❖ Syringa Bank
- ❖ Wells Fargo Bank

Like Susan and her daughter.

Idaho Volunteer Lawyers Program helped recruit and prepare a volunteer attorney to represent Susan's daughter who was suffering from abuse at the hands of a family member. Susan obtained a permanent protection order to stop visitation from the abusive family member when her daughter was present. Thanks, in part, to an IOLTA grant IVLP is able to **provide legal aid to the poor** and Susan was able to ensure the safety of her child.

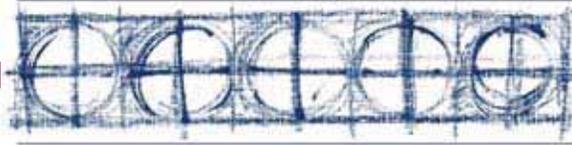
Where attorneys place IOLTA funds impacts how much the IOLTA grant program offers. Banks that partner with ILF to pay higher interest rates on IOLTA accounts determine whether the Foundation is able to help people like Susan and her daughter.

To find out more about IOLTA banks, visit www.idaholawfoundation.org or call Carey Shoufler, ILF Development Director, at (208) 334-4500.



IT MATTERS WHERE YOU BANK.





LAW-RELATED EDUCATION PROGRAM COMPLETES MOCK TRIAL SEASON

For the seventh consecutive year, Logos Secondary School from Moscow won Idaho's Annual High School Mock Trial Competition, sponsored by the Idaho Law Foundation.

This year mock trial teams had the opportunity to try a criminal case based on the Haywood trial. The Law-Related Education Program was proud to be able to introduce a whole new generation of Idahoans to what has been called one of the most important events in Idaho's history and perhaps one of the most famous criminal trials in U.S. history.

Thirty-nine teams registered to compete in one of four regional tournaments held throughout Idaho during late February and early March. From the regional tournaments, 12 teams advanced to the state tournament held in Boise on March 25 and 26. The teams who advanced included:

Pocatello Regional

Blackfoot High School
Kimberly High School

Coeur d'Alene Regional

Lewiston High School
Logos Secondary School (2 teams)

Boise Regional

The Ambrose School (2 teams)
Boise High School
Centennial High School

Caldwell Regional

Skyview/Nampa High School
Vallivue High School (2 teams)

The quarter-final rounds of the state competition, held at the Ada County Courthouse in Boise, included the four teams who advanced to the semi-final rounds held at the Federal Courthouse. These four teams included two teams from Logos Secondary School, as well as two teams from The Ambrose School.

In the championship round held at the Idaho Supreme Court, Logos defeated Ambrose. Logos will now advance to the



Photo courtesy of Valerie MacMahon from Pictoria: pictoriaphoto.com

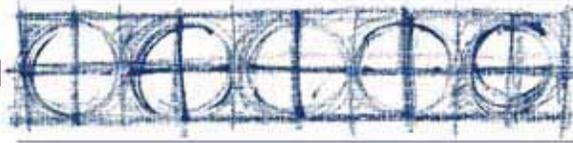
Morgan Schlect, from Logos Secondary School, stands at counsel table. Sara Nardreau is seated next to her.

National High School Mock Trial Championship in Philadelphia that will be held on May 6 to 9.

The Law-Related Education staff would like to thank the many volunteers who ensured a successful mock trial sea-

son. They would especially like to thank the Mock Trial Committee, who spent countless hours putting together a wonderful case and the Fourth and Sixth District Bar Associations for their generous financial support.

IDAHO LAW FOUNDATION



Helping the profession serve the public

For information about volunteering for or making a contribution to the Idaho High School Mock Trial Program, contact Carey Shoufler, Law Related Education Director, at 208.334.4500 or cshoufler@isb.idaho.gov.

Mock Trial Volunteers and Donors

Mock Trial Committee

Chris Christensen
Ritchie Eppink
Mike Fica
Colleen Zahn

Mock Trial Donors

Fourth District Bar Association
Sixth District Bar Association
Seventh District Bar Association

Pocatello Regional Competition

Dave Bagley
Hon. Rick Carnaroli
Sam Creason
Dorothy Fica
Mike Fica
Cassie Morinville
Hon. Steven Thomsen

Boise Regional Competition

Brenda Bauges
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Matt Osterman
Hon. Patrick Owen
Brindee Probst
Pamela Packard
Hon. Michael Reardon
Ryan Warburton
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Colleen Zahn

Coeur d'Alene Regional Competition

John Cafferty
Ruth Fullwiler
Hon. Charles Hosack
Tevis Hull
Hon. John Luster



Photo courtesy of Valerie MacMahon from Pictoria: pictoriaphoto.com

From left are Tatiana Shaner, Megan Wilford, Branden Pritchett, from The Ambrose School.

Kinzo Mihara
Elissa Nass
Jessica Shulsen
Hon. Steven Verby
Kacey Wall
Susan Weeks

Caldwell Regional Competition

Shonda Ary
Kierstin Fiscus
Scott Keim
Elisa Massoth
Laura Mattern
Joe Miller
Bill Morrow

Bobbi Richart
Leif Skyving
Shelli Stewart
Christ Troupis
Phillip Tuttle
Jeff White
Hon. Susan Wiebe
Michael Witry

State Competition

Emil Berg
Leslie Bigham
Hon. Ronald Bush
Walt Donovan
Kitty Fleischman
Mikela French

Hon. Richard Greenwood
Bethany Haase
Hon. Timothy Hansen
Justice Joel Horton
Pamela Howland
John Keenan
Becca Kittleson
Stacy Langton
Eric Nelson
Mardi Pacheco
Joan Reukauf
Kevin Satterlee
Jeff Simmons
Joanne Station
Hon. Daniel Steckel

IDAHO LAW FOUNDATION



Helping the profession serve the public



Photo courtesy of Valerie MacMahon from Pictoria: pictoriaphoto.com

From left Jeff Simmons, John Keenan, and Justice Joel Horton listen to Megan Wilford, from The Ambrose School, during the championship round.

Glenda M. Talbutt
Stan Tharp
Ted Tollefson
Brandie VanOrder
Cynthia Yee-Wallace
Tonya Westenskow

Attorney and Teacher Coaches

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Vicki Armstrong
Aaron Bazzoli
Robert Bellomy
Capt. Marc Carns
Pam Danielson
Greg Dickison
Shari Dodge
Brian Douglas
Clint Evans
David Goodwin
Jared Harris

Jared Helm
Jeff Howe
Jeanette Jackson
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Erica Kallin
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Susannah Pyle
Mike Riedle
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Randy Smith
Jordan Taylor
Erick Thomson
Carla Turner
Julie Underwood
Teri Whilden (Kaptein)

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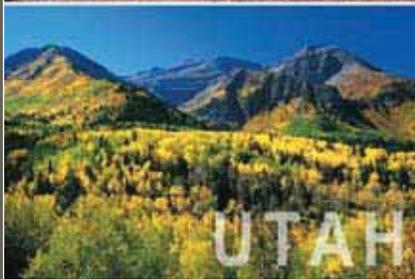
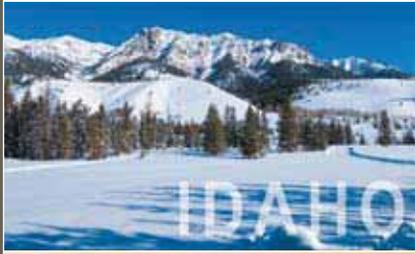
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Jeana Reiner
Reporter

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UPCOMING CLEs

May

May 7

Handling Your First or Next Estate Plan
8:30 - 9:30 a.m. (MDT)
The Law Center, Boise
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1 CLE credit
Webcast Statewide

May 21

Annual Business Section Seminar
Boise Centre, Boise

May 26

Deposition Ethics
Sponsored by the ISB Young Lawyers Section
8:30 - 9:30 a.m. (MDT)
The Law Center, Boise
1 CLE Ethics credit (RAC)
Webcast Statewide

June

June 23

Building a Case from Discovery to Trial and Beyond: Dispositive Motion Practice and Pre-Trial Motions
Sponsored by the ISB Young Lawyers Section
8:30 - 9:30 a.m. (MDT)
The Law Center, Boise
1 CLE Ethics credit (RAC)
Webcast Statewide

July

July 14-16

Idaho State Bar Annual Conference
Idaho Falls, Idaho

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September 10-11

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