

# The Advocate

Official Publication  
of the Idaho State Bar  
Volume 53, No. 10  
October 2010

**Developments  
in Health Law 20-39**

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# The Advocate

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## On the Cover

The photograph was taken by Assistant United States Attorney Monte Stiles of his shadow, while hiking on Checkersboard Mesa on the east side of Zion National Park located near Springdale, Utah. Stiles is an avid outdoor photographer and his work is profiled at [www.montestile-photography.com](http://www.montestile-photography.com).

## Section Sponsor

This issue of *The Advocate* is sponsored by the Health Law Section.

## Editors

Special thanks to the October editorial team: Gene Petty, T. Hethe Clark and Tenielle Fordyce-Ruff.

## 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](mailto:dblack@isb.idaho.gov).

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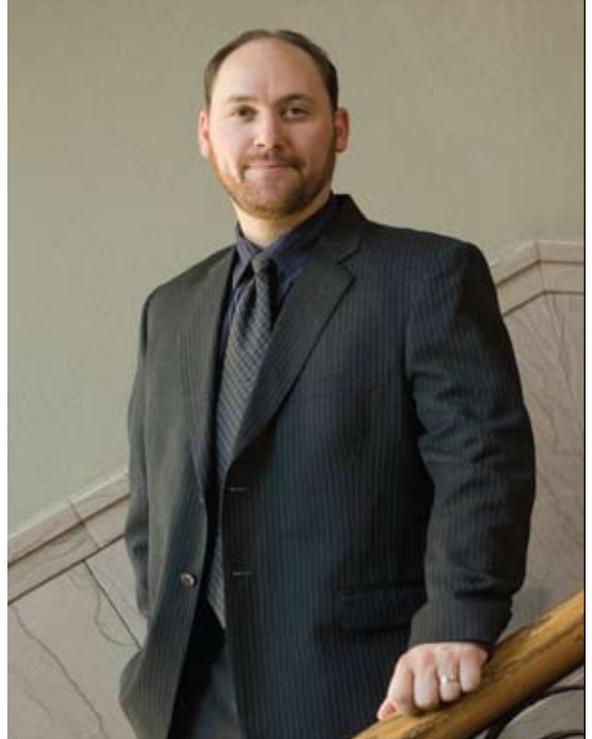
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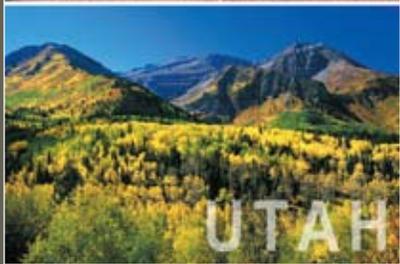
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## October

### October 8

*Issues and Strategies in The Evolving Family Law of Idaho: Relocation, Custody, Bankruptcy*  
Sponsored by the Family Law Section  
8:30 a.m. – 4:30 p.m. (MDT) at the Doubletree Riverside in Boise, ID  
6.0 CLE credits

### October 15

*Issues and Strategies in The Evolving Family Law of Idaho: Relocation, Custody, Bankruptcy*  
Sponsored by the Family Law Section  
8:30 a.m. – 4:30 p.m. (MDT) at the Ameritel Inn in Pocatello, ID  
6.0 CLE credits

### October 22

*Issues and Strategies in The Evolving Family Law of Idaho: Relocation, Custody, Bankruptcy*  
Sponsored by the Family Law Section  
8:30 a.m. – 4:30 p.m. (PDT) at the Coeur d'Alene Inn in Coeur d'Alene, ID  
6.0 CLE credits

### October 28-29

*Practicing Law in the Digital Information Age: What You Need to Know*  
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## November

### November 19

*Headline News*  
Sponsored by the Idaho Law Foundation  
8:30 a.m. – 3:45 p.m. (PST) at the Coeur d'Alene in Coeur d'Alene, ID  
6.0 CLE credits of which 1.0 will be ethics

## December

### December 3

*Headline News*  
Sponsored by the Idaho Law Foundation  
8:30 a.m. – 3:45 p.m. (MST) at the Hilton Garden Inn in Idaho Falls, ID  
6.0 CLE credits of which 1.0 will be ethics

### December 10

*Headline News*  
Sponsored by the Idaho Law Foundation  
8:30 a.m. – 3:45 p.m. (MST) at the Oxford Suites in Boise, ID  
6.0 CLE credits of which 1.0 will be ethics

**Dates and times are subject to change. The ISB website contains current information on CLEs. If you don't have access to the Internet please call (208) 334-4500 for current information.**

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Throughout the year, live seminars on a variety of legal topics are sponsored by the Idaho State Bar Practice Sections and by the Continuing Legal Education program of the Idaho Law Foundation. The seminars range from one hour to multi-day events. Upcoming seminar information and registration forms are posted on the ISB website at: [isb.idaho.gov](http://isb.idaho.gov). To register for an upcoming CLE contact Dayna Ferrero at (208) 334-4500 or [dferrero@isb.idaho.gov](mailto:dferrero@isb.idaho.gov).

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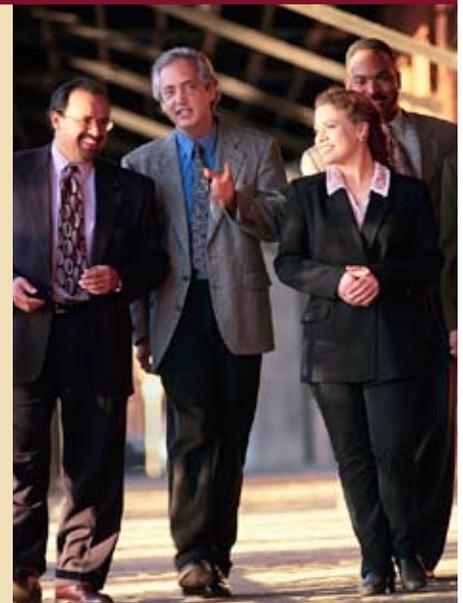
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### Webcast Seminars

Many of our one-to three-hour seminars are also available to view as a live webcast. Pre-registration is required. These seminars can be viewed from your computer and the option to email in your questions during the program is available. Watch the ISB website and other announcements for upcoming webcast seminars. To learn how contact Eric White at (208) 334-4500 or [ewhite@isb.idaho.gov](mailto:ewhite@isb.idaho.gov).

### Recorded Program Rentals

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THIS ISN'T ABOUT US

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

Over the last two years I have listened to several speakers render their opinions on the future of the legal profession. There seems to be a general consensus that if the needs of the public are not being served by the legal profession and the judiciary, the winds of change will force changes to be made.

It is perhaps an oversimplification, but the impetus for health care reform appears to be twofold: (1) health care is too expensive. Costs need to be driven down. The cost is bankrupting states, businesses, individuals, etc.; (2) quality health care should be made available to all.



James C. Meservy

Those who take stewardship of the profession realize that the concerns that apply to health care apply to the legal profession and the judiciary, as well. When the profession, its professionals, and the judiciary think the public exists to serve us, provide us a living and to allow us to exert authority over others, we are in trouble.

In response to the public need, small claims courts have been established which

While we may feel that the profession and the judiciary is proactive in dealing with these issues, others do not.

help make the courts accessible to everyone, at least in smaller cases. Recognizing the cost of incarceration and the need to correct criminal behavior, we now have drug, mental health, and DUI courts. Legal Aid furnishes legal services to the poor. All of us are encouraged to provide pro bono services and to have a pro bono policy whether the firm is solo, small, or large.

While we may feel that the profession and the judiciary is proactive in dealing with these issues, others do not. It is fair to say that there are those who, like health care, believe that the cost of legal services is too high and, as a result, many do not have access to quality legal services. One lawyer framed the problem this way: "Could you afford to go to yourself for your legal work?"

Those who have thusly opined pointed out the huge number of sites on the World Wide Web that provide legal forms. They indicated that sophisticated and complex forms are readily available and inexpensive (some say cheap). I am somewhat skeptical remembering the first few months of law school. It is one thing to purchase the product. It is another to understand what it says or means.

tion to stop the availability of such forms or products by most governmental agencies. For the most part, there is no desire to pursue unauthorized practice of law claims against businesses or providers of such forms since such businesses provide a legal product at a reasonable price and which is available to almost everyone.

Florida and Missouri bar associations have suits pending relative to legal product web sites relative to the unauthorized practice of law. Executive Director Diane Minnich and Bar Counsel Brad Andrews are watching these cases. Some also argue that you should be able to become a family law advocate, a criminal advocate, etc.; that there's no need for a law school degree to adequately serve the public.

If Congress did decide to act what would the limits, if any, be? Would the Bar still determine the standards for admissibility of those who desire to practice here? Would the Bar handle discipline? If a lawyer passes the Bar in California, is employed by a California firm, but works out of his home in Boise, is he practicing law in Idaho or California?

Of course, the practice of law is changing as a result of the advancement of technology. The federal court essentially functions electronically. Some of us remember when there was great consternation because you could serve by fax. We shouldn't doubt that electronic

service of pleadings is around the corner. Considering the cost of postage (what is your average postage bill?), firms, the Judicial Branch, the counties would save thousands of dollars each year by using electronic service.

The legal office of the future may be a lot smaller. More staff may work from home, using the computer to get the job done. The need for physical space will likely be reduced. In fact, some argue that a paper file will almost cease to exist. Why should the office file be much different than the electronic file found at the federal court building? How far away are we from figuring out how to sign or attest a Will electronically?

The legal profession and its professionals will either meet the needs of the public, the consumer, or we will have change forced upon us. All the more reason to make sure that, as practitioners, we are respectful of the public and their concerns. Likewise, the judiciary should be courteous and respectful of those who come before them. We should all remember the confusion we felt the first year of

*The legal profession and its professionals will either meet the needs of the public, the consumer, or we will have change forced upon us.*

law school learning a new discipline and essentially a foreign language. If we appear disrespectful, elitist, etc., we will likely find substantial changes thrust upon us, reminding us that it isn't about us, but about the people we serve.

#### **About the Author**

**James C. Meservy** was raised on a farm in Dietrich, Idaho. Jim graduated from Dietrich High School in 1971. He attended the University of Idaho, graduating with a Bachelor of Science degree in 1975. He attended the University of Idaho

Law School 1976-1979. Jim married Cherie Wiser on July 31, 1979. They have six children: Ashley, Chris, Tyler, Mallory, Baillie, and Jordan.

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

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## DISCIPLINE

### CRAIG W. PARRISH (Public Reprimand)

The Professional Conduct Board of the Idaho State Bar (ISB) has issued a Public Reprimand to Pocatello lawyer Craig W. Parrish, based on professional misconduct.

The Professional Conduct Board Order followed a stipulated resolution of an ISB disciplinary proceeding in which Mr. Parrish was found to have violated Idaho Rules of Professional Conduct 1.2(a) [Abiding by a client's decisions regarding objectives of representation], 1.3 [Diligence], 1.4 [Communication], and 8.4(d) [Conduct prejudicial to the administration of justice].

The formal charge complaint involved Mr. Parrish's representation of a woman, L.S., in a post-conviction proceeding following her conviction for second degree murder and imposition of a fifteen-year fixed sentence. The deadline for filing her post-conviction relief application ("PCR application") was December 30, 2003. On September 12, 2003, L.S. sent a letter to the District Court in Oneida County listing several grounds for relief and requesting that a public defender be appointed to consult with her in prison and review her case. On October 6, 2003, the District Court appointed Mr. Parrish, the conflict public defender for Oneida

County, to represent L.S. in filing her PCR application. Mr. Parrish met with his client in November 2003, but did not file her PCR application with the District Court by December 30, 2003, and did not have any further communication with her for the next several months.

On April 1, 2004, L.S. sent Mr. Parrish a letter asking him whether he had filed the PCR application or gotten an extension, and requested copies of all documents he filed in her case. He did not respond. Mr. Parrish thereafter discontinued his contract as Oneida County's conflict public defender and moved to withdraw from L.S.'s case. On May 3, 2004, the District Court denied Mr. Parrish's withdrawal request and ordered him to contact his client immediately, but he did not.

Almost one year later, on April 4, 2005, L.S. sent Mr. Parrish a letter asking him whether the District Court would allow him to file her PCR application. On April 15, 2005, Mr. Parrish filed a Motion to Extend Time for filing his client's PCR application. In his supporting affidavit, Mr. Parrish stated that he was "unaware that [his client] did not have a Post Conviction Relief Petition already filed with the Court." He further stated that at the time of his appointment in October 2003, he had assumed that the District Court intended only for him to represent L.S. in

presenting argument regarding the PCR application, and that upon review of the file, he discovered that no application was filed. Therefore, based on his "oversight and through no fault of [his client]," he requested that the time to file the PCR application be extended. On May 3, 2005, the District Court denied the motion and explained that the PCR application was due December 30, 2003, and noted that the "time has long passed for filing such an application." On May 12, 2005, Mr. Parrish informed his client that the motion had been denied and explained that she could file a pro se habeas corpus petition.

In May 2006, L.S. filed a pro se PCR application and a motion requesting counsel. The District Court issued a notice of intent to dismiss based upon the application's untimeliness, to which L.S.'s new public defender responded that L.S. was entitled to equitable tolling of the statute of limitation. The District Court summarily dismissed L.S.'s PCR application, which the Idaho Court of Appeals affirmed in January 2008. Due to Mr. Parrish's failure to timely file L.S.'s PCR application, it was never considered by any court on its merits.

The public reprimand does not limit Mr. Parrish's eligibility to practice law.

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

## NEWS BRIEFS

### Business law and ethics symposium in Pullman

For the third year, the Department of Accounting, the College of Business at Washington State University, Cengage, Inc., the Pacific NW Academy of Legal Studies in Business, the University of Washington School of Law Federal Tax Clinic, the Division of Governmental Studies and Services at Washington State University, and others around the Northwest are sponsoring the highly regarded Business Law and Ethics Symposium in Pullman, Washington, at Washington State University, November 11 and 12. It is titled, "Ethics and the Professions in the New Economy: Are there 'New Rules' for conducting ourselves in the 'New Economy?'"

The Symposium is directed toward lawyers, judges, academics, and senior business people in the Pacific Northwest as well as law students and graduate students. This free day-long symposium offers participants a singular opportunity to

explore critical legal and ethical problems in this new economic environment and discuss potential solutions in an interactive setting. Special guests include Justice Gerry Alexander of the Washington Supreme Court, Justices Roger Burdick and Joel Horton of the Idaho Supreme Court, Federal District Judge George Whaley of the Eastern District of Washington, and District Judge Carl Kerrick of Idaho's Second Judicial District.

Topics include: Corporate Political Contributions in light of *Citizens United v. FEC*; Corporate Social Responsibility (CSR) Post-Bailout: Challenges and Opportunities; Ethical Lending Practices; The Role of Corporate Counsel in the "New Economy;" Professional Rules of Conduct in the Social Networking Age; etc.

CLE credit in Oregon, Washington and Idaho is being requested.

The Symposium begins with a reception on Thursday evening, November 11, at 7 p.m. at LaQuinta Inn in Moscow, Idaho. The Symposium proper begins Fri-

day morning, November 12 at the Lewis Alumni Center on the WSU campus in Pullman, Washington.

Request registration information by e-mailing Linda Pall, J.D., Ph.D., Symposium Coordinator, at [lpall@wsu.edu](mailto:lpall@wsu.edu). She can also be reached at 509-335-3080. The number of Symposium participants is limited and registration is essential. *There is no charge for this symposium.* Sponsors are underwriting the event — including the Business and Cooperate Law Section of the Idaho State Bar.

### 2011 licensing packets

The 2011 licensing packets will be mailed in mid-November. Be sure your packet reaches you by verifying and updating your address information before November 1. Visit the ISB website at [isb.idaho.gov](http://isb.idaho.gov) to check your records in the Attorney Directory. Use the online form or contact the Licensing Department at (208) 334-4500 or [astrouser@isb.idaho.gov](mailto:astrouser@isb.idaho.gov) to update your information.

## L.M. Cunningham Foundation pledges \$1 million for Law Learning Center

The face of public legal education in Idaho is getting a lift thanks to the generous support of the Laura Moore Cunningham Foundation. The Idaho-based nonprofit – committed to educational excellence for students and institutions – has committed \$1 million to the University of Idaho College of Law to develop an Idaho Law Learning Center in Boise at the historic Ada County Courthouse. The Law Learning Center is a collaborative undertaking of the university and the Idaho Supreme Court.

“The Idaho Supreme Court, the University of Idaho and the Laura Moore Cunningham Foundation all have a long and rich history of serving the state of Idaho,” said University President Duane Nellis. “This gift links to a shared heritage and moves us forward. We are gratified by the foundation’s investment in the university’s and college’s mission to provide public legal education to the state.”

The gift will enable the university to implement the specific renovations needed to transform the courthouse building into the future home of the Idaho Law Learning Center, a joint vision of the College of Law and the Idaho Supreme Court. The building, which is owned by the state of Idaho, also will undergo general renovations planned by the Division of Public Works in the State Department of Administration.

The renovated facility will become home to the College of Law third-year program; to the Idaho State Law Library, operated by the college under an agree-

ment with the Supreme Court; and will be a venue for judicial education and law-related public education – all of the components of the “law learning center” concept.

“The Laura Moore Cunningham Foundation is dedicated to strengthening Idaho by investing in the institutions that support our state’s advancement,” said Laura Bettis, director of the Laura Moore Cunningham Foundation. “Our foundation values the University of Idaho’s leadership and contributions to the state’s development. The Idaho Law Learning Center is a tremendous partnership between the university and the Idaho Supreme Court that will increase the level of statewide access to quality public legal education and important legal resources. The foundation is proud to support this distinctive collaboration.”

The partnership for the center in Boise supports the University of Idaho’s mission to provide statewide public legal education for the state, said College of Law Dean Don Burnett.

“Idaho’s public College of Law is distinctive in its ability to serve the state through a unified program that offers opportunities in two locations,” said Burnett. “Our state benefits from having homegrown legal expertise that supports local economic development and other legal services that Idaho families and communities need. The public also will benefit from enhancements to the Idaho State Law Library, which is used by the general citizenry and by students throughout the Treasure Valley, as well as by the judiciary and the legal profession. We are profoundly grateful to the Idaho Supreme Court for its leadership in developing this concept.”

The third-year law program in Boise, accredited by the American Bar Association, will focus on business law, economic

development and entrepreneurship. While renovation work is being completed at the courthouse building, law classes will meet at the University of Idaho-Boise location at Front and Broadway in Boise. Classes for the initial group of 30 third-year students started on Aug. 23. In 2008, the State Board of Education approved the college’s third-year program in Boise and the university’s collaboration with the Idaho Supreme Court to create the Idaho Law Learning Center.

## Amendments to the civil rules

The Idaho Supreme Court has entered an order amending I.R.C.P. 40(d)(1) to add “petitions for judicial review” to the types of matters in which a party may seek a disqualification without cause. The rule also clarifies that the exception to the right to disqualification without cause in cases in which a judge is acting in an appellate capacity under IRCP 40(d)(1)(I) is intended to apply when that judge is acting in that capacity “from another court” unless the appeal is a trial de novo. The effective date is October 1, 2010.

In the same order, the Idaho Supreme Court has adopted a new rule, IRCP 24(d), entitled “de facto custodian intervention.” The rule was adopted to correspond to recent legislation that allows relatives seeking the care, custody and control of a child to request custody by filing a new petition or by way of a motion for permissive intervention in an existing custody case. The new rule seeks to clarify the procedures to be used in seeking permissive intervention. The effective date of this new rule is also October 1, 2010.

The order can be found on the court’s website at <http://www.isc.idaho.gov/rule-samd.htm>.

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## Dutch law allows euthanasia

Dear Editor:

I am a physician who has studied assisted-suicide and euthanasia since 1988, especially in the Netherlands. I respond to Margaret Dore's article, which quotes me for the proposition that those who believe that legal euthanasia and/or assisted suicide will assure their "choice," are naive. ("Aid in Dying: Not Legal in Idaho; Not About Choice"). The quote is accurate. I am also very concerned to see that Compassion & Choices, formerly known as the Hemlock Society, is beginning operations in Idaho to promote "aid in dying," which is a euphemism for euthanasia and assisted-suicide.

In the Netherlands, Dutch law calls for performing euthanasia and assisted suicide with the patient's consent. This is not, however, always done. Indeed, over time, assisted-suicide on a strictly voluntary basis evolved into allowing euthanasia on an involuntary basis. Euthanasia is also performed on infants and children, who are not capable of giving consent.

2005 is the most recent year for which we have an official report from the Dutch government. The report is "spun" to defend its law, but nonetheless concedes that 550 patients (an average of 1.5 per day) were actively killed by Dutch doctors "without an explicit request." The report also concedes that an additional 20% of deaths were not reported to the authorities as required by Dutch law.

Compassion & Choices holds out the carrot of "choice" to induce the public into believing that euthanasia and assisted suicide are somehow benign. Do not be misled.

William Reichel, M.D.  
Georgetown University  
Washington DC

## Article deserves clarification

Dear Editor:

I would like to respond to the criticism received on the article recently published in the August 2010 edition of *The Advocate* entitled "Aid in Dying: Law, Geography and Standard of Care in Idaho." The article was not intended to serve as legal advice or to suggest that, under the current state of the law in Idaho, physicians need not fear criminal prosecution or civil liability in this context. Rather, the message intended was that terminally-ill Idahoans should be able to request aid in dying from their physician, as is allowed

in Oregon, Washington, and Montana and that arguably this option is no different than what is permitted under current Idaho legislation, which empowers Idaho citizens to refuse or direct withdrawal of life-prolonging medical treatment. The intent was simply to advocate for a clarification of the law in this manner.

I would like to further clarify that, although I provided research and editing support for the article, any views expressed in the article are those of the author and are not necessarily those of my law firm.

Christine M. Salmi,  
Perkins Coie, LLP  
Boise, ID

## Doctors should embrace aid in dying

Dear Editor:

In medical school, I occasionally met physicians who told me that they enjoyed working with their dying patients. While I accepted this as true for them, I knew it would take time and experience for me to understand.

Today, after a decade of private practice in family medicine, the grace and strength of the dying and of their families inspire me every time. I am honored to help them through this most intimate and sacred transition.

Palliative care involves relieving pain, anxiety and fear, and enabling conscious and loving communication within families. If unable to find refuge from unbearable suffering, patients with terminal illness deserve my greatest expression of empathy: empowering them to choose a comfortable and timely death.

I read Kathryn Tucker's article and heard about her presentation on end-of-life issues at the Idaho Medical Association conference in Boise in July, 2010. Ms. Tucker is a resident of Ketchum, Idaho, and Director of Legal Affairs for Compassion & Choices, a nonprofit organization dedicated to protecting and expanding the rights of terminally ill patients. Her presentation to the IMA focused on the fact that Idaho law does not address the intervention known as aid in dying. Physician aid in dying (PAD) refers to providing a mentally competent, terminally ill patient with a prescription for medication which the patient can self-administer to bring about a peaceful death if the patient finds their dying process unbearable.

Because Idaho has no statute or court decision pertaining to the practice, it is

subject to regulation as a matter of standard of care. Idaho law positions individuals as the final arbiters in decisions about their medical care. Unlike surrounding states, we have no explicit public policy on aid in dying. It is time for Idaho's medical community to unequivocally embrace aid in dying within our standard of care so that we can make PAD available to our mentally competent, terminally ill patients who choose it.

Tom Archie, MD  
Hailey, ID

## Elder abuse a growing problem

Dear Editor:

I am the executive director of the Euthanasia Prevention Coalition, and chair of the Euthanasia Prevention Coalition, International. Thank you for running Margaret Dore's article, "Aid in Dying: Not Legal in Idaho; Not About Choice." She correctly describes some of the many problems with physician-assisted suicide. I write to comment on elder abuse.

A 2009 report by MetLife Mature Market Institute describes elder financial abuse as a crime "growing in intensity." (See p.16.) The perpetrators are often family members, some of whom feel themselves "entitled" to the elder's assets. (pp. 13-14.) The report states that they start out with small crimes, such as stealing jewelry and blank checks, before moving on to larger items or coercing elders to sign over the deeds to their homes, change their wills, or liquidate their assets. (p. 14.) The report also states that victims "may even be murdered" by perpetrators. (p. 24.)

With assisted suicide laws in Washington and Oregon, perpetrators can instead take a "legal" route, by getting an elder to sign a lethal dose request. Once the prescription is filled, there is no supervision over the administration. As Ms. Dore describes, even if a patient struggled, "who would know?"

In Canada, a bill that would have legalized euthanasia and assisted-suicide was recently defeated in our Parliament, 228 to 59. When I spoke with lawmakers who voted against the bill, many voiced the opinion that our government's efforts should be focused on helping our citizens live with dignity, rather than developing strategies to get them out of the way.

Alex Schadenberg  
Euthanasia Prevention Coalition  
London ON, Canada

**2010 PROFESSIONALISM AWARD RECIPIENTS**

Diane K. Minnich  
*Executive Director, Idaho State Bar*

**Please join the Board of Commissioners, District Bar officers, and your colleagues at the resolution meeting in your district. The meeting schedule is on page 18.**

At the resolution meetings, we will honor the 2010 professionalism and pro bono award recipients. The following attorneys will receive this year's professionalism awards in their respective districts.



Diane K. Minnich

**First District - Dennis M. "Denny" Davis**

*Witherspoon, Kelley*

Mr. Davis is a shareholder, board member, and managing attorney in the Coeur d'Alene office of Witherspoon Kelley. His practice emphasizes real estate law, creditors' rights and counseling business clients in transactional and other matters.



Dennis M. Davis

Mr. Davis said his wife of 32 years, Kathy Canfield-Davis, Ph.D., University of Idaho Professor, has been a major inspiration to him. He said with her, "professionalism is a daily mantra."

He also credits his mother, Mary Davis, who "instilled in me a strong and honest work ethic" that inspired him during his career.

He has taken on numerous leadership roles in his community including serving as a board member and Chair of the Lake City Development Corporation, board member of Jobs Plus, Inc., an economic development corporation, the ISB Judicial Fairness Committee, ISB UPOL Commit-

tee, and the Real Property Law Section Governing Council. He also served on the Idaho Judicial Council from 1999-2005 and as president of the Coeur d'Alene Sunrise Rotary.

Mr. Davis served as a founding and former board member and officer of the Human Rights Education Institute, Inc. He served as a Coeur d'Alene Planning Commissioner, Idaho State Senator, and as a member of the Idaho State Permanent Building Fund Council, University of Idaho Research Park Advisory Board, Coeur d'Alene Area Chamber of Commerce and the Inland Northwest Community Foundation Gift Planning and Marketing Committee.

He said the essence of professionalism means "engaging one's colleagues with respect, honesty, competence and an appropriate amount of humility."

Mr. Davis is an avid fly fisherman and hopes to one day acquire an Airstream trailer to make a fishing journey of North America.

**Second District - David R. Risley**  
*Risley Law Office*

Mr. Risley is the sole member of Risley Law Office, PLLC in Lewiston. He is married to Jane Bremner Risley, who practices law in Asotin County, Washington. The couple enjoy their Harley Road King and have travelled throughout the West. Mr. Risley said Jane brought her son and his wife and three wonderful grandchildren into his life. He added that his sons in live in Moscow, Idaho; and Moscow, Russia; and have made him proud.



David R. Risley

He said being chosen for the Professionalism Award is "both unexpected and highly appreciated. To paraphrase Abraham Lincoln, this award brings to mind the points where I have failed in this standard much more than those in which I was moderately successful.

The law has brought me the opportunity, often poorly appreciated, of acquiring a sensible humility."

He continued:

Partly, this opportunity came from truly remarkable lawyers I have had the pleasure to work with and against. I never met a better gentleman than Russ Randall. Wynne Blake was a fine friend and a formidable adversary. Judge Worden met me when I was a very green prosecutor. He took the time to try to impart his years of experience to a young lawyer that sorely needed his guidance. These fine lawyers, and many more too numerous to mention, set standards I strive for.

The law has also offered me bright and gifted adversaries who insisted on showing me the shortcomings in my case, my preparation and my understanding of the law. A few hard knocks taught me that I should take my opponent's critique as an opportunity to refine my understanding of my case and perhaps avoid later embarrassment in a more public forum. Seen that way, opposing counsel is not the enemy but the one person most likely to reveal the defects in my case and give me the best chance to be fully prepared.

It helps to take into account what a hard job we do. Lawyers take nerve-shattering risks; make critical decisions under smothering time deadlines; and we take our lumps in open court with a permanent record made of victories but also our defeats. The stress of this hard work can cause a lawyer to act badly. When opposing counsel acted in this way, it often made me angry and subject to the urge to respond in kind. This sort of conflict makes our job even more difficult.

It helped me to realize that it is better to ascribe the shortcomings of my opponent to the demands of our profession, where we all fall short sometimes, and avoid personal conflicts. Moreover, experience has taught me that I should keep in mind that it is all too likely that the lawyer who falls short next time might be me.

I cannot discuss professionalism without mentioning my staff, Natalie Holman and Maggie Norman. A lawyer's legacy is the quality of his work. To the extent I have been seen as doing a good job, it is mostly because of their diligence, attention to detail and unfailing courtesy. Thank you, to my staff for their loyalty and hard work.

**Third District – William F. Nichols**  
*White, Peterson, Gigray, Rossman, Nye & Nichols, P.A., Nampa, shareholder.*

Mr. Nichols is Past Chair and Council member of the ISB Real Property Section; Past President, Idaho Municipal Attorneys; current member of ISB Fee Arbitration Panel and of the Oregon State Bar Fee Arbitration Panel; former member, Oregon State Bar Local Professional Responsibility Committee; and Member, arbitration panel for court annexed mandatory arbitration in Oregon Circuit Court.



William F. Nichols

He looked back on his early career to describe his major influences:

In my career as a lawyer, my practice has been greatly influenced by the partners in my first law firm in Oregon. Those Oregon lawyers, Gene Stunz, Steve Fonda, and Burdette Pratt, taught me what it means to work hard as a lawyer, and how to treat clients, judges, court personnel, and opposing parties and their counsel. Integrity of word and deed were paramount in everything they did. They worked tirelessly for their clients, but did so in a manner that earned respect from the opponents and their lawyers. Some of those opposing parties became clients the next time they needed a lawyer.

Professionalism is a matter of respect – for the people we work with, the clients we serve, the courts and other forums in which we represent clients, and for the opposing parties and their counsel. It means learning to disagree without becoming disagreeable. The request for an extension that comes to us today may be the same thing we need from another lawyer tomorrow. Professionalism also requires preparation – knowing your case better than your opponent, and knowing the law.

Mr. Nichols lives in Nampa with his wife and two daughters. His practice emphasizes municipal, real property, collections, business entities, estate planning and probate. He has been part of White Peterson for almost 11 years, having been with his previous firm for almost 19 years.

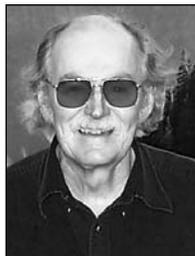
**Fourth District – Thomas J. McCabe**  
*Westberg, McCabe & Collins*

In 2006 Mr. McCabe became “of Counsel” to his law firm, Westberg, McCabe & Collins, Chtd. He joined the firm in 1981 after being a law clerk to two federal judges, Chief Judge Ray McNichols and Senior Judge Fred Taylor. In recent years his plans changed. “I had thought that I would keep practicing for a lot longer,” he said. “But after undergoing chemotherapy for lymphoma, I decided it was time to expand my horizons.” He added:

When I started out, I took on any type of case that came in the door, as most lawyers do. But I fairly quickly realized that criminal defense was the only kind of law that I really enjoyed. I was fortunate that the Supreme Court appointed me to various committees over the years, including the Evidence Committee, Misdemeanor Rules and Criminal Jury Instructions. My major achievement in this area was helping to found the Idaho Association of Criminal Defense Lawyers (IACDL), the first organization in the state exclusively for criminal defense attorneys.

Throughout my career, I was influenced by my time working for Ray McNichols. He was a wonderful judge with a great sense of humor. He had a knack for deflating egos with humor as well as helping the citizens who came to his court, whether as litigants, jurors or spectators, to relax in court and yet respect the court and the judicial process. Maybe that's what being a professional really is: doing your job to the best of your ability without taking yourself too seriously.

Mr. McCabe said he has been fortunate to be able to teach two semesters of Advanced Criminal Procedure at the U of I. This has allowed him to share some of his hard-earned experience while continuing to be focused on criminal law. He also continues to present an annual update



Thomas J. McCabe

seminar for magistrates and district judges around the state. Fortunately, he said, “This still leaves me lots of time to bike and birdwatch and travel.”

**Fourth District - Monte J. Stiles**  
*Assistant U.S. Attorney, District of Idaho*

Monte Stiles has served his entire professional career of 28 years as a state and federal prosecutor. He was born and raised in Emmett, Idaho. After high school, he attended college and law school at Brigham Young University. After graduating from BYU's J. Reuben Clark Law School in 1982, Mr. Stiles was hired as a deputy prosecutor in the Ada County Prosecutor's Office. In 1984, he was appointed as the Supervising Attorney of the new Ada County Drug Prosecution Unit. Soon thereafter, Monte was appointed as a Special Assistant U.S. Attorney to work with the federal drug task force.



Monte J. Stiles

In 1987, Monte was hired by the U.S. Attorney's Office to run the federal Organized Crime Drug Enforcement Task Force – a group of agents and prosecutors who investigate and prosecute high-level drug trafficking organizations. As a federal prosecutor for the last 23 years, Monte has worked closely with numerous foreign, federal, state and local law enforcement agencies in investigating and prosecuting major drug traffickers.

Because of his expertise in the areas of international drug smuggling and money laundering, Monte has taught advanced narcotics and money laundering for the National Advocacy Center in South Carolina. Monte has also been an instructor for five regional organized crime seminars held in various locations in Eastern and Central Europe.

In addition to the prosecution of drug traffickers, Mr. Stiles is a frequent speaker in public school assemblies and other groups. This happens to be his most rewarding work, he said, because he is a strong believer in drug education as a significant part of the Department of Justice's war on drugs. Since October 1997, as part of the U.S. Attorney's Community Outreach program, Monte has talked to over 150,000 children and adults in Idaho - giving approximately 700 different presentations.

One of his proudest personal and career achievements was helping organize and implement the statewide “Enough

is Enough” anti-drug campaign. Approximately 173,000 Idahoans attended at least one event and over 1 million people watched a drug seminar on television due to media partnerships.

Many awards followed, including the U.S. Department of Justice’s National Award for Volunteer Service. He also received the Attorney General’s Award for Participation in Litigation for prosecution of major international drug smuggling and money laundering organizations.

In 1997, Monte was the recipient of the 1997 Boise River Festival “Pride of Boise” award in the Humanitarian category, for Monte’s efforts with drug education and prevention.

He went on to earn many awards for his work as a prosecutor and as a volunteer. In 2009, Monte received a national award from the Organized Crime Drug Enforcement Task Force in Washington D.C. for his prosecution of *United States vs. Jones*, a 16-defendant case which tracked 30 years of criminal drug activity across the United States.

Away from the office, Stiles served 10 years as a commissioner on the Boise City Parks and Recreation Board. Mr. Stiles has also served in many leadership positions at the local Boy Scout organization. He taught for 10 years as an adjunct professor at Boise State University in the Criminal Justice Department and late in his life, he became an award-winning nature photographer.

Monte and his wife, Sandi, are the proud parents of five children and six grandchildren.

#### **Fifth District - John A. Doerr**

*John Doerr Law Office*

Mr. Doerr was born and raised in Napoleon, North Dakota, a town of about 1,000 European immigrants. He attended elementary school in Napoleon and after his freshman year transferred to St. John’s Prep School in Minnesota. After graduation, he continued at the associated University, and after two years transferred to the University of North Dakota, where he graduated with a B.A. degree in 1956 and law degree in 1958.

After graduation and being admitted to the North Dakota Bar, Mr. Doerr moved his family back to Napoleon, where he practiced law with his father until 1963, when they moved to Idaho. He married Rosemarie Hansen in



John A. Doerr

1958 and the couple has four children and 12 grandchildren.

His hobbies include flying (small aircraft), hunting for birds and big game, fishing, skiing, reading and gardening.

While in North Dakota, Mr. Doerr served as deputy States Attorney for Logan County and served on several ND Bar Association Committees. In Idaho, he was a member and president of the Fifth District Bar Association, Idaho Association of Defense Counsel and American Board of Trial Advocates (Idaho), and has served on some Idaho State Bar committees. His previous associations have been with Murphy, Schwartz and Cunningham, Doerr and Trainor, and Benoit, Alexander, Sinclair, Doerr, Harwood and High.

Doerr said his father, August, was his primary inspiration “as an individual and as a lawyer because of his adherence to principles of hard work in his representation of his clients, and his strict moral and legal ethics. In addition, I have had the benefit of former partners and associates and a number of fellow lawyers who have guided me over the years to the high ideals required of a merit-worthy client-attorney relationship as defined by the Code of Ethics of the Idaho State Bar.”

He added: “Would I take the same professional route again? Absolutely! The happiest and most rewarding years of my life years have been with my family, my avocations and in the trial of cases, (in that order). I have tried hundreds of cases to juries and courts and well-know the spiritual and physical (rush of adrenalin) that comes with winning a trial. Too many years of running to and from courtrooms, hearing to hearing, attending depositions, and making final arguments in my bedroom when I should have been sleeping, took a toll on my health — but I regret not a minute of the time spent representing clients in the manner I knew best. My plans are to continue doing so until my inert body is hauled from my office; in the meantime I sincerely look forward to continued practice of this honored profession of public service devoted to the ultimate ends of the discernment of truth, right and justice to which we lawyers are called.”

#### **Sixth District - Hon. Thomas W. Clark**

*Bannock County Magistrate Court*

Thomas W. Clark has practiced law in Pocatello, for 27 years. He practiced with his father, Mark B. Clark, for 6 years. When his father retired in 1989, he joined forces with John Souza, Monte Whittier, Isaac McDougall, and Bryan Murray. They had the public defender contract in all six counties in the Sixth Judicial Dis-

trict for most of the six years he was with this firm. In December, 1995, he became a partner with the Pocatello law firm of Merrill & Merrill, Chtd. He worked with this firm for 14 years until his appointment as a magistrate judge with chambers in Bannock County.

Judge Clark has served as president of the Sixth District Bar Association and president of The Portneuf Inn of Court. He has been a Rotarian for 21 years and in July he finished a one-year term as president of the Rotary Club of Pocatello.

Judge Clark has also been involved as an adult leader in the Boy Scouts of America and has served as a Varsity Scout Coach, Venturing Crew Advisor, Wood Badge Course Director 2008, and Tendoy District Chair 2006-09. He is the recipient of the District Award of Merit and the Silver Beaver Award. He has also been active in his church, having served as a bishop and stake president. He and his wife, Camille, just celebrated their 31<sup>st</sup> Anniversary. They have five children and four grandchildren.

Judge Clark said that every lawyer he has ever practiced with has been his mentor, starting with his dad, who passed away this past August. Five of his former partners are now Judges. They include The Honorable N. Randy Smith of the 9<sup>th</sup> Circuit Court of Appeals; District Judges David C. Nye, Stephen S. Dunn and Robert C. Naftz and Magistrate Judge Bryan K. Murray. According to Clark, the essence of professionalism is always doing the right thing even when it might be difficult or be harmful to your case. Also, he advised lawyers be a zealous advocate for their clients, while at the same time, treat the opposition with kindness and respect.

#### **Seventh District - Alan C. Stephens**

*Thomsen Stephens Law Offices*

Mr. Stephens is a member of Thomsen Stephens Law Offices, PLLC in Idaho Falls. He has been a member of the Idaho Bar since 1978 and the Wyoming Bar since 2005. He is presently one of the Lawyer Representatives to the 9<sup>th</sup> Cir-



Hon. Thomas W. Clark



Alan C. Stephens

cuit Conference of the U.S. Courts, and served the Idaho State Bar for eight years as a member of the professional conduct board.

Besides the many great lawyers he has worked for, with and against over the years, he said his major influences include his parents who raised him to have faith in God and to work hard; and his wife Ann, who for almost 37 years, has been sup-

portive and the one he would not want to disappoint.

Mr. Stephens said he believes that the essence of professionalism is to give your best to your client while practicing the Golden Rule in your conduct toward others.

Alan and Ann are the parents of seven children and have five grandchildren. Alan is active in Rotary and his church. When

his children were young, much of his free time was spent coaching his children and their friends in basketball and baseball. As they grew, he attended their high school and college games. Now he enjoys his family, particularly his grandchildren, and, when he can find the time, he likes to ski, fish, whitewater rafting and run.

*Special thanks to Dan Black and Kyme Graziano for their contributions to this article.*

### 2010 District Bar Association Resolution Meetings

District	Date/Time	City
First	Nov. 9, Noon	Coeur d'Alene
Second	Nov. 10, 6 p.m.	Moscow
Third	Nov. 16, 6 p.m.	Nampa
Fourth	Nov. 17, Noon	Boise
Fifth	Nov. 17, 6 p.m.	Twin Falls
Sixth	Nov. 18, Noon	Pocatello
Seventh	Nov. 19 Noon	Idaho Falls

## ALTERNATIVE DISPUTE RESOLUTION

Merlyn W. Clark

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

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

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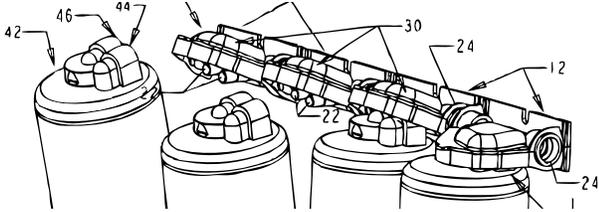
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# THE NEW WORLD OF HEALTH LAW

J. Kevin West  
Hall, Farley, Oberrecht &  
Blanton, PA

When I was in law school in the 1980s, there was no course on “health law.” Later, when I entered legal practice in 1986, I do not recall anyone referring to themselves as a “health law attorney.” There were medical malpractice attorneys and business lawyers, but no “health law” lawyers. Health law is a relatively new specialty and those of us who practice in the area have largely learned the law (by necessity) as we went along. The major laws that shape the health care landscape today – the Stark law, the Anti-Kickback Statute, HIPAA, National Practitioner Data Bank, and others too numerous to mention – did not exist 15-20 years ago.



J. Kevin West

The breadth of health law is amazing. Health law has strong crossovers to:

- Employment law (medical staffing and peer review)
- Business/corporate law (purchase and sale of physician practice and other business deals)
- Real estate law (land use and zoning of medical facilities)
- Criminal law (Medicare fraud and abuse, federal qui tam actions)
- Elder law (guardianship and conservator proceedings)
- Litigation
- Probate/estate planning (living wills, powers of attorney, Medicare/Medicaid)



## Health Law Section

- Personal injury (medical record confidentiality, medical experts, Medicare set-asides)
- Medical malpractice (what more needs to be said?).

Lawyers who do health law often need to have a basic knowledge of the above specialties; conversely, lawyers practicing in those specialties will surely bump up against health law issues.

Even before the advent of this year’s health care reform, and its myriad of provisions, the health care industry was one of the most, if not the most, regulated in the United States. Now, the recent legislation out of Washington, D.C., and the extensive regulations that will follow, have added even greater complexity for health care providers, patients, health insurers, employers, and the lawyers who represent them.

It is difficult to imagine anyone, lawyer or not, who is not affected by health laws on a regular basis. The articles in this issue of *The Advocate* offer a small glimpse of the breadth and diversity of legal issues in the field of health law. Sally Reynolds discusses GINA, which involves the cutting edge issue of genetic testing and how the information from such

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testing may or may not be used. Colleen Zahn and Sally Reynolds teamed together to address the Medicare Secondary Payer Act and how it is impacting personal injury litigation. Pat Miller takes on one of the hottest topics at the moment – “health care reform,” as found in the recently enacted federal legislation. Steve Hippler reviews the 2010 Idaho legislative session. Kim Stanger provides a survey of laws applicable to health care transactions. Tom Mortell addresses the topics of apparent authority and negligent credentialing. Lastly, my article deals with the recent amendments to the HIPAA Privacy and Security Rules.

I hope you find the articles helpful.

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# AN INTRODUCTION TO THE GENETIC INFORMATION NONDISCRIMINATION ACT OF 2008 (GINA) FOR ATTORNEYS PRACTICING HEALTHCARE LAW

Sally J. Reynolds  
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## Introduction

On May 21, 2008, President Bush signed the Genetic Information Nondiscrimination Act of 2008 (GINA), Pub. L. 110-233, codified at 42 U.S.C. 2000ff, *et seq.* Congress enacted GINA in recognition of achievements in the field of genetics such as the decoding of the human genome and the creation and increased use of genomic medicine. GINA was enacted to address concerns of the general public about whether they may be at risk of losing access to health coverage or employment if insurers or employees have their genetic information. GINA prohibits discrimination based on genetic information and restricts acquisition and disclosure of such information. GINA includes two titles—Title I

which addresses the use of genetic information in health insurance and Title II which prohibits the use of genetic information in employment, prohibits the intentional acquisition of genetic information

about applicants and employees, and imposes strict confidentiality requirements.

Title I prohibits health plans from discriminating against covered individuals based on genetic information. It applies to group health plans, issuers in the health insurance markets, and issuers of Medicare supplemental (Medigap) insurance. Title I generally prohibits discrimination in group premiums based on genetic information and it states that health insurers may not use genetic information to make eligibility, coverage, underwriting, or premium-setting decisions. On October 1, 2009, the Department of Labor, the Internal Revenue Service and the Department of Health and Human Services released the joint, final interim regulations under Title I of the Genetic Information Nondiscrimination Act of 2008.

Title II of GINA makes it illegal to discriminate against employees or applicants because of genetic information. It prohibits using genetic information to make employment decisions, prohibits acquisition

of genetic information by employers, and limits disclosure of genetic information by employers. The proposed regulations were published last year, and the final regulations were initially expected to be published in May of 2010, but publication of the final rule has been delayed. The effective date of Title II was November 21, 2009.

Title II of GINA applies to employers with 15 or more employees.<sup>1</sup> All entities subject to Title II of GINA are described collectively as “covered entities” by the U.S. Equal Employment Opportunity Commission (EEOC), the agency charged with enforcing Title II of GINA.<sup>2</sup> Under Title II, “covered entities” are private, state and local government employers with 15 or more employees.<sup>3</sup> This term also applies to labor unions, employment agencies, joint labor-management training programs, Congress and federal executive branch agencies.<sup>4</sup> The term “employees” is defined by this act as including applicants and former employees.<sup>5</sup> The regulations define “genetic information” as information about an individual’s genetic tests, genetic tests of a family member, and family medical history.<sup>6</sup> This term is broadly defined to include information about “the manifestation of disease or disorder in family members of the individual” and also includes information about an individual’s or family member’s request for or receipt of genetic services.<sup>7</sup> A “family member” is defined as up to a fourth degree relative which includes dependents but is limited to persons who are or become related to an individual through marriage, birth, adoption, or placement for adoption.<sup>8</sup> Genetic information does not include information about the sex or age of an individual or the individual’s family members, or information that an individual currently has a disease or disorder.<sup>9</sup> Genetic information also does not include tests for alcohol or drug use.<sup>10</sup>

GINA’s Title II prohibits use of genetic information in making decisions related to any terms, conditions, or privileges of em-

ployment, prohibits covered entities from intentionally acquiring genetic information, requires confidentiality with respect

to genetic information, and prohibits retaliation.

An exception exists for “inadvertent acquisition” of genetic information by an employer. Circumstances in which an employer is deemed to have inadvertently acquired such information include a “water cooler” situation, i.e., where a supervisor overhears an employee discussing genetic information with a co-worker, or where an employer receives genetic information as part of the documentation an employee submits in support of a request for reasonable accommodation under the Americans with Disabilities

Act (ADA) or other similar law. Genetic information may also be inadvertently acquired during the certification process for FMLA leave (or leave under similar state laws). It is permissible for an employer to obtain genetic information as part of health or genetic services, including wellness programs, offered by the employer on a voluntary basis. Genetic information acquired from publicly available sources such as newspapers or electronic media are also deemed to be an inadvertent disclosure. Other instances include when the information is obtained for genetic monitoring of the biological effects of toxic substances in the workplace, and when the employer conducts DNA analysis for law enforcement purposes.

GINA’s rules on confidentiality require covered entities in possession of genetic information about applicants or employees to treat the information the same way they treat medical information generally. Covered entities must keep written information apart from other personnel information in separate medical files. This even includes information obtained inadvertently.

Violations of Title II of GINA can result in the aggrieved individual seeking reinstatement, hiring, promotion, back pay, injunctive relief, pecuniary and non-

*It is permissible for an employer to obtain genetic information as part of health or genetic services, including wellness programs, offered by the employer on a voluntary basis.*



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pecuniary damages and attorney's fees and costs (the same remedies available under Title VII).

### Family medical history

On March 2, 2009, the EEOC issued a proposed rule to implement Title II of GINA.<sup>11</sup> The proposed rule includes a definition of "family medical history" because it is a term used in the statute's discussion of prohibited employment practices, but this is a term which is not specifically defined by the statute. In the legislative history of GINA, Congress noted that the term "family medical history [should] be understood as it is used by medical professionals when treating or examining patients."<sup>12</sup> The Senate Report states as follows:

[T]he American Medical Association (AMA) has developed an adult family history form as a tool to aid the physician and patient to rule out a condition that may have developed later in life, which may or may not have been inherited. This form requests information about the patient's brothers, sisters, and their children, biological mother, the mother's brothers, sisters, and their children, maternal grandfather, maternal grandmother, biological father, the father's brothers, sisters, and their children, paternal grandfather and paternal grandmother. The committee expects that the use of "family history" in this bill will evolve with the medical profession and the tools it develops in this area.<sup>13</sup>

Title II of GINA will not apply to information obtained by a health care professional in the course of a medical examination, diagnosis, or treatment unrelated to a determination of fitness for duty.<sup>14</sup> Thus, a physician or health care professional may ask for an employee's family medical history when such information is obtained in the course of a medical examination unrelated to a determination of fitness for duty, except when the information is obtained as part of an employer-provided voluntary wellness program subject to part 1635.8(b)(2) of the proposed rule.<sup>15</sup> However, health care providers should be aware that if a covered entity (e.g. an employer) requests and receives records which would include an employee's family medical history, that entity will not be considered to have acquired such information "inadvertently" and the entity's acquisition of such information would be in violation of GINA.

*GINA regulates health insurers and employers, not health-care professionals, and goes on to state that, "[t]he law should not keep you from taking a comprehensive family history."*

The proposed regulation notes an exception under the Americans with Disabilities Act (ADA) for a covered entity (employer) who obtains genetic information after an individual (employee) has made a request for reasonable accommodation under the ADA.<sup>16</sup> In this circumstance, the acquisition of genetic information provided in support of the individual's request is considered inadvertent, as long as the request was not overly broad.<sup>17</sup> However, the EEOC's comments on the proposed regulations state:

[T]hough the ADA allows an employer to require a medical examination of all employees to whom it has offered a particular job, for example, to determine whether they have heart disease that would affect their ability to perform a physically demanding job, GINA would prohibit inquiries about family medical history of heart disease as part of such an examination.<sup>18</sup>

Employers are prohibited from obtaining family medical history through any type of medical examination to determine an employee's continued fitness for duty.

The EEOC comments to the proposed rule put the burden of complying with GINA on the employer and state that, "[c]overed entities should ensure that any medical inquiries they make or any medical examinations they require are modified so as to comply with the requirements of GINA."<sup>19</sup>

In May of 2010, the Genetics and Public Policy Center, the National Coalition for Health Professional Education in Genetics, and the Genetic Alliance jointly published a document entitled, "A Discussion Guide for Clinicians."<sup>20</sup> This publication is directed to health-care professionals and provides a basic introduction to GINA for clinicians. It reminds clinicians that GINA regulates health insurers and employers, not health-care professionals, and goes on to state that, "[t]

he law should not keep you from taking a comprehensive family history."<sup>21</sup> This publication puts the burden on the health insurer or the employer who requests a patient's medical history from a health care provider to specify: "do not provide genetic information..." and notes that "GINA does not directly require health professionals to delete genetic information when providing medical records."<sup>22</sup> While GINA does not specifically require health-care professionals to delete genetic information, it would be advisable for health-care professionals to develop a method to provide requested records without disclosing genetic information, such as family medical histories, to employers and health insurers.

The proposed comments for Title II also provide an example of a best practice to be utilized when an employer asks an employee to have a health care professional provide documentation about a disability (after the employee has requested a reasonable accommodation under the ADA).<sup>23</sup> The proposed comment advises that the safest practice in this situation would be for the covered entity to specifically indicate in the request to the medical care provider that family medical history or other genetic information about the employee not be provided.<sup>24</sup> The burden should be placed on the "covered entity", i.e., the employer, to notify the health care provider that they should not provide documentation or information to the employer regarding any family medical conditions disclosed by the employee. If this burden is placed on the health care provider, this could potentially inhibit an effective diagnosis as the medical care provider would be unable to inquire of any family member's medical conditions and such inquiry may be necessary to make a diagnosis.

### Conclusion

GINA does not regulate the practice of medicine—it affects health insurers and employers. Further, a final regulation

has not yet been published as to Title II of GINA. Accordingly, it is permissible for medical providers to continue to ask for the patient's family medical history. However, employers who seek medical information from practitioners will have to take precautions not to ask for or obtain the prohibited information.

#### About the Author

**Sally J. Reynolds** is an associate with the law firm Hall, Farley, Oberrecht & Blanton, P.A. where she represents health care professionals and employers. She graduated from the University of Montana and obtained her J.D. from Gonzaga School of Law.

#### Endnotes

<sup>1</sup> Regulations Under the Genetic Information Nondiscrimination Act of 2008, 74 Fed. Reg. at 9058 (Mar. 2, 2009) (29 C.F.R. pt. 1635).

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

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 9058-59; Genetic Information Nondiscrimination Act of 2008, 42 U.S.C. 2000ff-1(a)(1).

<sup>6</sup> 74 Fed. Reg. at 9059; Genetic Information Non-

discrimination Act of 2008 § 201(4)(A).

<sup>7</sup> Genetic Information Nondiscrimination Act of 2008 § 201(4)(A)-(B).

<sup>8</sup> Genetic Information Nondiscrimination Act of 2008 § 201(B); 74 Fed. Reg. at 9058.

<sup>9</sup> 74 Fed. Reg. at 9059.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 9056.

<sup>12</sup> S. Rep. No. 110-48, at 16.

<sup>13</sup> *Id.*

<sup>14</sup> 74 Fed. Reg. at 9061.

<sup>15</sup> *Id.*

<sup>16</sup> For additional information see EEOC's Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, EEOC Notice No. 915.002 (Oct.

*GINA does not regulate the practice of medicine—it affects health insurers and employers.*

17 2002), <http://www.eeoc.gov/policy/docs/accommodation.html>. Accessed August 12, 2010.

<sup>17</sup> 74 Fed. Reg. at 9061-62.

<sup>18</sup> *Id.* at 9061.

<sup>19</sup> *Id.* (emphasis added).

<sup>20</sup> Genetics and Public Policy Center, National Coalition for Health Professional Education in Genetics, Genetic Alliance. A discussion guide for clinicians. <http://www.dnapolicy.org/resources/GINAFinal-discussionguide-3June10.pdf>. Accessed August 6, 2010.

<sup>21</sup> *Id.* at p. 3.

<sup>22</sup> *Id.*

<sup>23</sup> 74 Fed. Reg. at 9062.

<sup>24</sup> *Id.*

## ELAM & BURKE ATTORNEYS AT LAW

is pleased to announce that

### Ms. Kristina J. Wilson

has joined the firm as an associate in August of 2010.



Ms. Wilson graduated from College of Idaho and received her J.D. from the University of Idaho College of Law in 2008. Ms. Wilson served as a law clerk for the Honorable Roger Burdick, Idaho Supreme Court. She is admitted in Idaho state and federal courts and practices in the area of civil litigation. Ms. Wilson is a member of the Idaho State Bar, Idaho Women Lawyers and American Inns of Court.

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# THE MEDICARE SECONDARY PAYER ACT AND PRACTICAL IMPLICATIONS FOR ATTORNEYS

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When the federal Medicare program was initially enacted in 1965, Medicare was considered the “primary payer” for beneficiaries.<sup>1</sup> In 1980, Congress enacted the “Medicare Secondary Payer Act” (MSP) which made Medicare the “secondary payer” when a beneficiary’s medical expenses were caused by, or the responsibility of, a third party, including liability insurance. The MSP introduced the concept of the “conditional lien,” whereby Medicare paid benefits first, but conditionally, while it waited for the primary payer to eventually satisfy the medical bills. The MSP granted the federal government the right to pursue third parties for repayment of conditional expenses previously paid by Medicare.



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Until 2007, the MSP was not widely enforced outside of the Worker’s Compensation arena. However, with the passage of the Medicare, Medicaid and Schip Extension Act of 2007<sup>2</sup> (MMSEA), the government put more teeth into the MSP. The MMSEA shifted the burden for reporting settlements to the federal government from beneficiaries to primary payers and imposed penalties for non-reporting.<sup>3</sup>

Taking the MSP and MMSEA into account when negotiating a settlement is essential to prevent the federal government knocking on counsel’s door, demanding reimbursement for expenses paid by Medicare. This article briefly reviews the history of the MSP, when it applies to cases, obligations imposed on counsel by the MSP and steps counsel need to take to protect themselves and their clients when settling cases involving MSP considerations.

## Medicare as the secondary payer (MSP)

Medicare is a secondary payer when another entity is required by law to pay for covered services before Medicare. For

*The United States may file suit to recover against any primary payers or parties that received primary payments, including an insurer, employer, attorney, physician, and others.*

instance, Medicare is secondary to group health plans, liability insurance (includes a self-insurance plan), homeowners’ liability insurance, malpractice insurance, product liability insurance, general casualty insurance, no-fault insurance, and workers’ compensation.<sup>4</sup> Medicare is also a secondary payer to payments under state “wrongful death” statutes that provide for medical damages. These entities are referred to as the “primary payer.” The Centers for Medicare & Medicaid Services (CMS), part of the Department of Health & Human Services, is responsible for oversight of the Medicare program.

Technically, Medicare could refuse to pay for a beneficiary’s covered expenses where payment has been made or can reasonably be expected to be made under a worker’s compensation plan, an automobile or liability insurance policy or plan, or no-fault insurance.<sup>5</sup> The MSP, however, authorizes Medicare to step in and make a “conditional payment” if the primary payer will not pay or will not pay promptly.<sup>6</sup> The responsibility of the primary payer to reimburse Medicaid may be demonstrated by a judgment, a payment conditioned upon the recipient’s compromise, waiver, or release (whether or not there is an admission of liability) of payment for items or services included in a claim against the primary payer or the primary payer’s insured, or by other means.<sup>7</sup>

## The MMSEA’s new reporting requirements

One of the most significant features of the MMSEA was to impose new reporting

requirements on self-insured employers, group health plans, liability insurers, no fault insurers, and worker’s compensation plans.<sup>8</sup> CMS refers to these entities as Responsible Reporting Entities (RRE’s). RRE’s are required to submit, on a quarterly basis, information of work-related injury claims involving Medicare beneficiaries. They must report all claims that involve a Medicare beneficiary where (on or after July 1, 2009) there is a settlement, judgment, award or other payment that constitutes payment or reimbursement for medical costs, regardless of whether there was a determination of liability.<sup>9</sup> Reports are required with both partial and full resolution of a claim.

CMS has set specific deadlines for the RREs to register with CMS, compile required data for an initial report, and submit their first report to CMS.<sup>10</sup> CMS has extended implementation of the MSP reporting deadline several times, most recently giving insurers and self-insured programs until January 1, 2011 to report to CMS.<sup>11</sup> Once implemented, RREs that fail to file timely reports with CMS are subject to a civil monetary penalty of \$1,000 for each day of noncompliance with respect to each claimant.<sup>12</sup>

## Statutory rights to recovery

CMS has a statutory right to recovery and may either file suit against the party that received a payment or against the third party payer.<sup>13</sup> Medicare has not made an overpayment until settlement is reached, and thus, Medicare cannot demand reimbursement until after the case is settled and payment for medical expenses conditionally paid by Medicare has been made by a third party payer.<sup>14</sup> If the beneficiary or other party receives a third party payment, Medicare has the right to collect interest on the amount owed if it is not paid 60 days from the date CMS was notified of settlement.<sup>15</sup> Penalties and in-

terest will also apply to payment made to CMS 60 days after settlement.<sup>16</sup> The reporting requirements do not eliminate this obligation.

The United States may file suit to recover against any primary payers or parties that received primary payments, including an insurer, employer, attorney, physician, and others.<sup>17</sup> In the case of liability insurance settlements and disputed claims under employer group health plans, workers' compensation insurance or plan, and no-fault insurance, the third party payer must reimburse Medicare even though it has already reimbursed the beneficiary or other party.<sup>18</sup> This applies if a third party payer makes payment to an entity other than Medicare when it is, or should be, aware that Medicare made a conditional primary payment.<sup>19</sup> If the government is forced to take legal action to recover from the primary payer, the government is entitled to double damages.<sup>20</sup> There is no statute of limitations for such suits by the government. The law also provides the government is subrogated to any right to payment with respect to an item or service under a primary plan.<sup>21</sup>

### **Primary payer's obligation to notify Medicare of settlement payment**

If a primary payer learns that CMS made a Medicare primary payment for services for which the third party payer has made or should have made primary payment, it must give notice to the Medicare intermediary or carrier that paid the claim.<sup>22</sup> The notice must describe the specific situation and the circumstances, including the particular type of insurance coverage and, if appropriate, the time period during which the insurer is primary to Medicare.<sup>23</sup> If a plan is self-insured and self-administered, the employer must give the notice to CMS. Otherwise, the insurer, underwriter, or third party administrator must give the notice.<sup>24</sup> The same monetary penalty of \$1,000 applies for each day a primary payer fails to report the settlement payment.<sup>25</sup>

### **The importance of Medicare set-asides**

A Medicare Set-Aside (MSA) is a fund created in the settlement of a workers' compensation or liability case to cover future medical expenses. MSA's may be necessary if an injured party is expected to receive Medicare benefits in the future as a result of an injury that is caused by, or the responsibility of, a third party. Primary payers and recipients of third party payment funds, including legal counsel, may face potential reimbursement liability if the MSA is insufficient to cover all

*If the government is forced to take legal action to recover from the primary payer, the government is entitled to double damages.*

future medical expenses and Medicare is forced to step in and make conditional payments. Whether counsel calculates the set-aside herself or retains a consultant specializing in such calculations, a number of factors should be examined to calculate the set-aside, including the date and nature of the injury, the extent of the injury, the rated age, Medicare entitlement history, a comprehensive review of medical records, and physician recommendations into the future.<sup>26</sup> MSA funds must be set up in a variety of ways and may be managed by either the claimant or through a custodial account.

### **Alternatives to repaying the full amount to Medicare**

If you or your client find yourself the recipient of a CMS demand for reimbursement, note that Medicare reduces its demand to account for the cost of procuring the judgment or settlement.<sup>27</sup> If you or your client are unable to pay the full demand, there are two potential options for reducing the amount claimed. First, a compromise of the full amount owed is possible. In an MSP situation, a compromise represents the acceptance by the Regional Office of less than the full debt owed to Medicare. An individual who accepts a compromise has no right to appeal the remaining debt.

The second option is a partial waiver, which is a decision by Medicare to relinquish the right to collect a portion of a debt from a specific entity. A partial waiver does not arise from negotiation or offer and, therefore, is not the same as a compromise. Section 1870(c) of the Social Security Act allows a partial waiver to a person who is without fault, or where the adjustment or recovery would defeat the purpose of the Act (essentially a hardship), or be against equity and good conscience.<sup>28</sup> An individual may appeal a determination if Medicare grants only partial waiver of a debt.

### **Court decisions concerning the MSP**

• *United States v. Harris*, 2009 WL 891931 (N.D. W. Va. 2009) – Following settlement of a personal injury case,

CMS filed suit against Plaintiff's counsel, seeking recovery of the amount of its conditional lien plus interest. The court granted summary judgment in favor of the government, finding Plaintiff's counsel individually liable for the lien amount of Medicare's conditional lien.

• *Tomlinson v. Landers*, 2009 WL 1117399 (M.D. Fla. 2009) – Six days after verbally agreeing to settle the case for policy limits, the insurer mailed a check to plaintiffs' counsel, which was made payable to plaintiffs, their attorney, and Medicare. Plaintiffs' counsel returned the check because Medicare was identified as a payee, agreed to satisfy any Medicare liens directly from the settlement funds, and agreed to hold the insurer harmless for any Medicare claims. The insurer declined to remove Medicaid from the check. The court denied the insurer's motion to enforce the settlement, concluding that there was no legal requirement for the insurer to include Medicare as a payee on the settlement check and no meeting of the minds regarding settlement terms.

• *Snook v. Lorey*, 2009 WL 2710081 (E.D. Mich. 2009) – The parties participated in a settlement conference and agreed that Defendants would pay Plaintiff \$75,000. As part of the agreement, Plaintiff agreed to satisfy a Medicare lien for medical care and treatment related to his injuries. Plaintiff's counsel later informed the court and defense counsel that the Medicare lien was less than \$10,000 and settlement would go forward as previously agreed. The following day Plaintiff's counsel stated the settlement documents looked acceptable. Almost two weeks later, Plaintiff's counsel stated his client did not want to sign the settlement documents because they did not cover his liability if the Medicare lien was more than \$10,000. The court granted defense counsel's motion to enforce the settlement.

• *Gray v. Doe*, 2010 WL 3199347 (E.D. Ky. 2010) – Plaintiff filed suit after suffering a slip and fall at his home. He

included the United States Department of Health and Human Services (HHS) as a defendant, and sought to both determine the amount of the Medicare lien to be satisfied from any judgment, and to require Medicare to continue paying for his medical care during the pendency of the litigation. The Court granted HHS's motion to dismiss, holding that the Secretary of HHS may not be compelled to intervene in a common law tort action.

### **Determining whether your case requires Medicare considerations**

If an attorney has a case that potentially involves Medicare benefits (such as a personal injury or medical malpractice case), she must first determine whether the plaintiff is a Medicare beneficiary or future beneficiary<sup>29</sup>:

(1) Has the injured party been Medicare-eligible<sup>30</sup> (look at *eligibility* to enroll, not whether the party has actually enrolled) since the time of the injury, and will the injured party be Medicare-eligible when the injured person is 65 years of age or older, or has the injured party been on Social Security disability for 24 months or longer or does the beneficiary have end-stage renal disease?

(2) Is there a reasonable expectation that the injured party will become Medicare-eligible within 30 months of settlement or judgment?

If the answer to any of these questions is "yes," then Medicare's interests must be addressed in any settlement.

### **Responsibilities of plaintiff's attorneys under the MSP**

When taking a case that involves a Medicare beneficiary, Plaintiff's attorneys must first notify Medicare of a potential liability lawsuit, and then contact Medicare to negotiate the repayment amount for the conditional lien. Both of these actions should be taken before settling the case in order to ensure compliance with the requirements that MSP imposes on counsel, but also so the settlement amount covers any Medicare lien. This will prevent delay in getting your client their portion of the check. Typically, Medicare will not provide the plaintiff with a final lien amount until 10 days after it is notified that the case has settled, and the lien amount will probably include charges that are unrelated to the accident. If you have to dispute any charges, anticipate more than 45 days for Medicare to evaluate and remove unrelated charges from their lien.

Insurance companies and defense counsel are taking steps to ensure plaintiff's attorneys take responsibility for

*Before finalizing a settlement, a plan should be put in place by plaintiff's counsel which will ensure Medicare's interests are protected, both for past and future medical expenses.*

resolving Medicare liens before issuing payment of any settlement check. Insurers may also issue multiparty checks (beneficiary and CMS both as named payees) or two separate checks as a means to ensure CMS recovery for Medicare-covered services. Medicare beneficiaries who receive a liability settlement, award, judgment, or other payment have an obligation to refund any conditional payments made by Medicaid within 60 days of receiving such funds from a third party. Payment must be made after judgment, settlement, or award regardless of whether there is a determination or admission of liability.

### **Defense attorneys — how to prepare**

The previously mentioned reporting requirements are not only triggered if the plaintiff was a Medicare beneficiary *at the time of treatment*, but also if the plaintiff was a Medicare beneficiary *at the time the settlement payment is made*. Defense counsel should, therefore, determine early on in a case whether the plaintiff is a Medicare beneficiary or soon to be a beneficiary. If the plaintiff is Medicare-eligible, defense counsel should determine what, if any, amounts have been paid in the past. Insurers may be considered RREs and be required to report information about the litigation and plaintiff. Many insurers require defense counsel to prepare correspondence to plaintiff's counsel advising them of plaintiff's obligations under the MSP. Defense counsel may find it beneficial to advise plaintiff's counsel as early as possible in the settlement process that Medicare will either need to sign off on the settlement agreement or that the settlement check may need to have Medicare as an additional payee.

Defense counsel may inquire about a plaintiff's eligibility status through interrogatories. The interrogatories should ask whether the plaintiff already receives Medicare benefits or whether they have or plan to apply for Medicare benefits. Additional required information includes the patient's date of birth, social security num-

ber, the health insurance claim number ("HICN"), and gender. Requests for the production of documents should include a request for a copy of the patient's health insurance card and may include a request that the plaintiff complete a Consent for Release of Information to the Social Security Administration to obtain information about the patient's Medicare claim/coverage. This information will allow RREs to complete their reporting obligations and also allow defense counsel to verify the accuracy of lien amount(s).

### **Settlement**

If medical expenses are claimed and/or released, the settlement, judgment, or other payment must be reported to CMS regardless of any allotment made by the parties or a determination by the court. CMS is not bound by any allocation made by the parties, even where a court has approved such an allocation. Before the parties appear for mediation, counsel should be certain all parties are aware of the Medicaid issue, how it will affect the plaintiff's recovery, and that it will need to be addressed in the settlement documents and/or settlement check.

Before finalizing a settlement, a plan should be put in place by plaintiff's counsel which will ensure Medicare's interests are protected, both for past and future medical expenses. This will necessitate alerting Medicare of the settlement.<sup>31</sup> Remember that Medicare pays only a portion of the costs of care and there is typically a deductible. Releases should include precise language to address Medicare liens.

Links to additional information:

- <http://msprc.info/>
- <http://www.cms.gov/MedicareSecondPayerandYou/>

### **About the Authors**

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## Endnotes

<sup>1</sup> Medicare is a Federal program that pays for certain covered health care provided to enrolled individuals age 65 or older, certain disabled individuals, and individuals with permanent kidney failure. See 42 U.S.C. §§ 1395c, 1395o (1989).

<sup>2</sup> Medicare, Medicaid and Schip Extension Act of 2007, P.L. 110-173, 121 Stat. 2492.

<sup>3</sup> 42 U.S.C. § 1395y(b)(2)(B)(ii) (2008).

<sup>4</sup> 42 U.S.C. § 1395y(b)(2).

<sup>5</sup> 42 U.S.C. § 1395y(b)(2)(A)(ii).

<sup>6</sup> 42 U.S.C. § 1395y(b)(2)(B)(i).

<sup>7</sup> 42 U.S.C. § 1395y(b)(2)(B)(ii).

<sup>8</sup> 42 U.S.C. § 1395y(b)(7), (b)(8).

<sup>9</sup> See 42 U.S.C. 1395y(b) (Section 1862(b) of the Social Security Act); 42 C.F.R. pt. 411 (2008).

<sup>10</sup> See <https://www.cms.gov/MandatoryInsRep/Downloads/RevQuickRefGuide032910.pdf>;

See also <https://www.cms.gov/MandatoryInsRep/Downloads/RevTimeline032910.pdf>

<sup>11</sup> See [http://www.cms.gov/MandatoryInsRep/04\\_Whats\\_New.asp#TopOfPage](http://www.cms.gov/MandatoryInsRep/04_Whats_New.asp#TopOfPage)

<sup>12</sup> 42 U.S.C. § 1395y(b)(8).

<sup>13</sup> 42 U.S.C. § 1395y(b)(3)(A).

<sup>14</sup> This is not true in workers' compensation cases.

<sup>15</sup> 42 U.S.C. § 1395y(b)(2)(B)(ii). This amount is the lesser of the total sum of the settlements, judgments, or awards related to the underlying workers' compensation, no-fault or liability claim; or the amount that was paid out by Medicare, less any applicable share of procurement costs. CMS should be the first point of contact regarding recovery claims.

<sup>16</sup> See *id.*

<sup>17</sup> 42 C.F.R. § 411.24(e), (g).

<sup>18</sup> 42 C.F.R. § 411.24(i)(1).

<sup>19</sup> 42 C.F.R. § 411.24(i)(2).

<sup>20</sup> 42 U.S.C. § 1395y(b)(2)(B)(iii); See also 42 C.F.R. § 411.24(c)(2).

<sup>21</sup> 42 U.S.C. § 1395y(b)(2)(B)(iv).

<sup>22</sup> 42 C.F.R. § 411.25.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> 42 U.S.C. § 1395y(b)(8).

<sup>26</sup> A number of private companies may be retained to

establish the MSA. MSAs are necessary when there is foreseeable, ongoing medical treatment related to the claim being settled, and occur most often in workers' compensation cases.

<sup>27</sup> 42 C.F.R. § 411.37(a).

<sup>28</sup> 42 C.F.R. § 404.506. A waiver request should not be made until after receipt of the settlement check as CMS cannot consider such a request until an overpayment exists.

<sup>29</sup> In wrongful death cases, a determination should be made as to whether the decedent was a Medicare beneficiary.

<sup>30</sup> Potential Medicare beneficiaries include individuals who (a) are age 65 and older, or (b) are under 65 and have certain qualifying disabilities, or (c) have end-stage renal disease at any age. 42 U.S.C. § 1395c.

<sup>31</sup> The insurer is required (as a RRE) to contact Medicare to notify them of the potential of plaintiff's recovery. Defense counsel is not permitted to notify Medicare of settlement unless they are named as an account designee or agent by the RRE's account manager.

**Before the parties appear for mediation, counsel should be certain all parties are aware of the Medicaid issue.**



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# HEALTH REFORM IS NOT JUST INSURANCE REFORM: SIGNIFICANT CHANGES IN FRAUD AND ABUSE ENFORCEMENT

Patrick J. Miller  
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## Summary

Whether “health reform” survives judicial scrutiny or changes in political winds, successful health reform requires cost savings. The Affordable Care Act (“ACA”)<sup>1</sup> passed by Congress and signed into law by President Obama on March 23, 2010, seeks to control future cost savings by improving the quality of care, reforming the health delivery system, appropriately pricing and modernizing the financing system for health care and fighting waste, fraud and abuse. Of these four strategies, fighting waste, fraud and abuse enjoys the most political support and is the least likely to change with any shift in political winds.

The changes in fraud and abuse law directly impact medical providers. The advice medical providers receive from their lawyers is critical. This article summarizes the most significant of the changes in the fraud and abuse environment.

## The cost environment

It is estimated that in 2010, Americans will spend over \$2.6 trillion on health care.<sup>2</sup> This amounts to approximately 17.8% of GDP.<sup>3</sup> Without cost reform, it is anticipated that by the year 2035, Americans would spend 31% of GDP on health care.<sup>4</sup>



Patrick J. Miller

Without cost reform, Medicare spending is projected to grow at an average annual rate of 6.8%, reaching an annual cost of roughly \$978 billion by the year 2019.<sup>5</sup> One of the strategies to slow the increase in costs of health care is to focus more attention on fighting health care fraud.

The National Health Care Anti-Fraud Association estimates that \$60 billion of total health care spending (public and private) each year is accounted for by fraud. The anti-fraud provisions in the ACA are primarily directed to the Medicare and Medicaid programs and are projected to save nearly \$5 billion over the next 10 years.<sup>6</sup> It is hoped that changes in Medicare law will also spill over into the manner in which private health insurance pays

*The changes in fraud and abuse law directly impact medical providers. The advice medical providers receive from their lawyers is critical.*

for health care and will thereby reduce waste, fraud and abuse on the private side as well.

## ACA's principal changes affecting fraud and abuse enforcement

### *Changes to the civil False Claims Act*

The federal False Claims Act (“FCA”)<sup>7</sup> provides, among other matters, that any person who knowingly presents a false or fraudulent claim to an officer or an employee of the U.S. Government is liable for a civil penalty of not less than \$5,000 and not more than \$10,000 *plus* three times the amount of damages which the U.S. Government sustains because of the false claim. Under the “Qui Tam” provisions of the FCA,<sup>8</sup> private individuals may bring a civil action for a violation of the FCA on behalf of the U.S. Government. If the U.S. Government chooses to proceed with the action, the person who originally brought the Qui Tam action shall receive not less than 15%, but not more than 25% of the proceeds of the action. If the U.S. Government chooses not to proceed, the individual may proceed and if successful, shall receive not less than 25% and not more than 30% of the proceeds of the action.<sup>9</sup>

Prior to enactment of the ACA, a principal impediment to a Qui Tam action was the requirement that the alleged fraudulent activity not previously have been publicly disclosed or if publicly disclosed, the Qui Tam “relator” was the original source of the information. Under the ACA, the definition of “public disclosure” has been narrowed.

The ACA provides that the public disclosure bar does not apply to information that is publicly available from state and local administrative reports, audits and investigations. Under the ACA, only information disclosed in federal actions or the news media will be subject to the pub-

lic disclosure bar.<sup>10</sup> Moreover, the ACA eliminates what was an absolute bar to a Qui Tam action, providing that the court shall dismiss a Qui Tam action if publicly disclosed “unless opposed by the government.” As a result, even if the information was technically publicly disclosed, the action would not be dismissed without the U.S. Government’s consent.<sup>11</sup>

In addition, the ACA expands the definition of an “original source.” As noted above, the “public disclosure” bar does not apply if the Qui Tam relator was the original source of the information. To be an original source, the original previously had to have direct and independent knowledge of the fraudulent claim. The ACA eliminated this requirement and now, an original source need only provide information to the Government prior to a public disclosure and the information must be independent and materially add to any publicly disclosed allegations.<sup>12</sup>

Section 6402 of the ACA requires that a provider report and return any Medicare or Medicaid overpayment within 60 days of the date such overpayment is identified. The retention of an overpayment becomes a violation of the FCA and, thereby subjects the provider to potential FCA liability for retaining an overpayment and subject to potential claims raised by a Qui Tam relator.<sup>13</sup>

### *Changes to the “Stark” self-referral law<sup>14</sup>*

Under the anti-self-referral law, commonly known as “Stark,” a provider of health services may not bill Medicare for certain “designated health services” (“DHS”) if such services were referred by a physician with a financial relationship with the DHS provider unless an exception exists. An exception used by almost all medical practices is the “in-office ancillary service exception.” This excep-

tion allows a physician to refer for x-ray services within the physician's office and still bill Medicare for such services. This exception has also allowed physicians to own in-office MRI, CT and PET scanners.<sup>15</sup>

To continue to qualify for the in-office ancillary service exception, however, a provider who refers for an MRI, CT or PET scan performed within the physician's office, must now (effective January 1, 2010) notify the patient that the patient may obtain such services from other suppliers and provide the patient with a list of other suppliers where the patient resides that can provide such services.<sup>16</sup>

The ACA's changes to the Stark Law also impacts the future ability of physicians to own hospitals. Under the Stark Law, a physician cannot own an interest in a hospital unless the physician's ownership interest qualifies under the "whole hospital" or the "rural provider" ownership exceptions. The ACA, however, limits the whole hospital and rural provider exceptions (as applied to hospitals) to existing, physician-owned hospitals.<sup>17</sup> As a result, no new physician-owned hospital will be able to bill Medicare. The ACA further provides that existing hospitals cannot increase percentage of total value of physician ownership after March 23, 2010, and places limitations on the ability to expand the number of beds or operating rooms after March 23, 2010.<sup>18</sup> Changes to the whole hospital exception and rule exception do not, however, affect a physician's ownership in an ambulatory surgery center ("ASC") because ASCs are not covered by the Stark Law.

The ACA further amends the Stark Law to provide that the U.S. Department of Health and Human Services ("HHS") must, by September 23, 2010, establish a process for voluntarily disclosing potential Stark Law violations.<sup>19</sup> The change enables HHS to compromise the amount due as a result of a Stark Law violation considering factors such as the nature and extent of the improper legal practice and the timeliness of such self disclosure. Under current law, the Government is given no direction to compromise on a potential claim and, therefore, providers may be more reluctant to disclose a potential violation for fear of not being able to compromise a contested claim.

#### *Changes to the anti-kickback statute*

The anti-kickback statute provides that it is illegal for any individual or entity to knowingly and willfully offer, pay, solicit or receive any form of remuneration in order to induce the referral of a patient for

***The physician's office, must now (effective January 1, 2010) notify the patient that the patient may obtain such services from other suppliers and provide the patient with a list of other suppliers where the patient resides that can provide such services.***

items or services covered by Medicare, Medicaid or other federally funded program.<sup>20</sup> A violation of the anti-kickback statute is a felony.<sup>21</sup> The Ninth Circuit Court of Appeals held in *Hanlester v. Shalala*, 51 F.3d 1390 (9th Cir. 1995), that the "knowingly and willfully" requirement in the anti-kickback statute required proof that the defendants (1) knew that the AKS prohibits offering or paying remuneration to induce referrals and (2) engaged in prohibited conduct with the specific intent to disobey the law. As a practical matter, the Ninth Circuit's holding in the *Hanlester* case made prosecution of anti-kickback statute cases in the Ninth Circuit nearly impossible. The ACA legislatively overruled *Hanlester* and provides that a person may violate the anti-kickback statute even if such person did not know the anti-kickback statute existed and did not specifically intend to violate the anti-kickback statute. Specifically, the ACA provides that in order to establish an AKS offense, "a person need not have actual knowledge of [the anti-kickback statute] or specific intent to commit a violation of this section."<sup>22</sup> This reduced scienter requirement will likely result in more anti-kickback statute cases in the district in the Ninth Circuit.

The ACA also amends existing law to provide that a violation of the anti-kickback statute constitutes a false and fraudulent claim for purposes of the FCA. As a violation of the FCA, an anti-kickback statute violation in turn becomes subject to the Qui Tam provisions of the FCA. As a result, it will be possible for private individuals to bring anti-kickback statute claims in the United States District Court. In light of the reduced scienter requirement for anti-kickback statute claims, it is certainly foreseeable that we will see more anti-kickback statute cases in the United States District Court for the District of Idaho.

#### *Transparency, enforcement and disclosure*

A. Stricter Enrollment Standards. In addition to the substantive changes in fraud and abuse law (the more significant of which are discussed above), the ACA endeavors to reduce waste, fraud and abuse by requiring greater transparency and disclosure and devoting additional dollars to enforcement. For example, enrollment in Medicare will be subject to a more thorough screening process, including licensure checks and perhaps background checks, fingerprints, unannounced site visits prior to enrollment and database inquiries.<sup>23</sup> The purpose of the highly scrutinized enrollment process is the result of discoveries that in some states, providers seeking to enroll and bill Medicare were nothing but empty storefronts.

B. Disclosure by Drug and Device Manufacturers. The ACA will require drug and device manufacturers to report payments or transfers of value to physicians, including reporting provision of free samples distributed to physicians' offices.<sup>24</sup> In order to address abuses in DME and home health industries, physicians who order DME or certified home health services must be enrolled in Medicare in order for the DME or home health supplier to receive payment and physicians or mid-levels must have a face-to-face encounter with a patient prior to ordering DME or certifying home health services.<sup>25</sup> These provisions are designed to address abuses such as the certification of medical need for a motorized wheelchair by a physician who is not enrolled in Medicare and has never seen the patient.

C. Additional Resources. In an effort to enhance the Government's ability to detect and prosecute health care waste, fraud and abuse claims, the ACA provides for an additional \$100 million of funding for fiscal year 2011 and an additional \$250

million per year through 2016.<sup>26</sup> This represents the largest budgetary increase for pursuing waste, fraud and abuse since 1997 and reflects a belief by many that every dollar spent on health care waste, fraud and abuse enforcement returns far more dollars to the Medicare trust fund.

### Conclusion

Whether “health reform” as currently described in the ACA survives the many challenges raised to it, perceived or actual waste, fraud or abuse will undoubtedly continue to receive political attention. It is unlikely, therefore, that the ACA’s changes to current law designed to address waste, fraud and abuse will change. In short, it is safe to assume that increased health care waste, fraud and abuse enforcement is here to stay.

### About the Author

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*This represents the largest budgetary increase for pursuing waste, fraud and abuse since 1997.*

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### Endnotes

<sup>1</sup> Pub. L. 111-148, 124 Stat. 119.

<sup>2</sup> Center for Medicare and Medicaid Services, Office of the Actuary, at Table 5 (April 22, 2010), [http://www.cms.gov/ActuarialStudies/Downloads/PPACA\\_2010-04-22.pdf](http://www.cms.gov/ActuarialStudies/Downloads/PPACA_2010-04-22.pdf).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* See also Congressional Budget Office, The Long-Term Outlook for Medicare, Medicaid, and Total Health Care Spending (June 2009), <http://www.cbo.gov/ftpdocs/102xx/doc10297/Chapter2.5.1.shtml>.

<sup>5</sup> *Id.*

<sup>6</sup> Center for Medicare and Medicaid Services, <http://www.cms.gov/apps/docs/ACA-Update-Implementing-Medicare-Costs-Savings.pdf>.

<sup>7</sup> 31 U.S.C. Section 3729, *et seq.*

<sup>8</sup> 31 U.S.C. Section 3730(b)-(d).

<sup>9</sup> 31 U.S.C. Section 3730(d).]

<sup>10</sup> See Affordable Care Act at Section 10104(j)(2).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> See Affordable Care Act at Section 6402(d).

<sup>14</sup> 42 U.S.C. Section 1395(nn), *et seq.*; 42 C.F.R. Section 411.350, *et seq.*

<sup>15</sup> 42 U.S.C. Section 1395 nn(b)(2).

<sup>16</sup> See Affordable Care Act at Section 6003.

<sup>17</sup> See Affordable Care Act at Section 6001.

<sup>18</sup> See Affordable Care Act at Section 6001, 10601 and Reconciliation Act at 1106.

<sup>19</sup> See Affordable Care Act at Section 6409.

<sup>20</sup> 42 U.S.C. Section 1320(a) – 7(b); 42 C.F.R. 1001-952, *et seq.*

<sup>21</sup> *Id.*

<sup>22</sup> See Affordable Care Act at Section 6402(f).

<sup>23</sup> See Affordable Care Act at Section 6401.

<sup>24</sup> See Affordable Care Act at Sections 602 and 604.

<sup>25</sup> See Affordable Care Act at Sections 6407 and 10605.

<sup>26</sup> See Affordable Care Act at Section 6402(i).

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# IDAHO LEGISLATIVE CHANGES AFFECTING HEALTH CARE PROVIDERS: VERSION 2010

Steven J. Hippler  
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The Second Session of the Sixtieth Legislature of the State of Idaho was notable for the legislature's struggle to address dwindling state budgets. There were also a number of bills proposed that would affect health care providers in the state of which health care attorneys should be aware. This article will provide a brief overview of health care related legislation that passed, as well as legislation that was considered but did not become law during the 2010 legislative session.

## Legislation enacted during the 2010 legislative session

This past legislative session was again, of necessity, focused primarily on budgetary issues. These budgetary issues affected health care providers in a number of varying ways. Significantly, medical education was spared the cuts experienced by many other Idaho programs. Idaho's funding for seats in medical school multi-state cooperative programs was not decreased. Funding for Idaho's medical residency programs also was not reduced. Medicaid, on the other hand, has seen some significant changes. The legislature authorized the state Medicaid program to take various measures<sup>1</sup> to stay under budget. One of the most profound impacts of this legislation was realized when Medicaid withheld payments from providers for nearly a month at the end of the fiscal year in June 2010, so that Medicaid could meet budget. In addition to the significant impact such withholds had on providers, it also means that in this fiscal year, Medicaid paid nearly a month of claims that ordinarily should have been paid last year. Absent substantial additional funding this session, this will likely result in a similar holdback next June.<sup>2</sup>

The actions of the Idaho legislature affecting health care providers were not limited to budgetary issues. Also in the spotlight was Idaho's decision to authorize the Attorney General to challenge the Obama Administration's landmark health



Steve Hippler

*The act provides immunity to the health care provider and their employer for the refusal to provide care pursuant to the act.*

insurance reform.<sup>3</sup> Idaho has joined a number of other states in a suit pending in federal court in the Northern District of Florida, which seeks to prevent the implementation of key components of the legislation.<sup>4</sup>

The Idaho legislature also considered and passed a number of additional measures that affect health care providers, and of which healthcare attorneys should be aware. One of the laws passed is designed to encourage physicians to provide "curbside" consultations without fear of liability. As a predominately rural state, Idaho lacks significant numbers of physicians in a number of medical sub-specialties. Thus many primary care physicians must treat patients without the benefit of formally involving specialists in the care of their patients. To address their patients' more complex needs, primary care physicians often attempt to consult informally with specialists; however, many specialists are reluctant to provide informal consultations for fear of being named as defendants in lawsuits.<sup>5</sup> This situation prompted the legislature to pass S.B. 1399,<sup>6</sup> which expressly excludes from the definition of a physician-patient relationship, for purposes of malpractice liability, a physician who provides a consultation for another physician, but does so without seeing or examining the patient and without expectation of payment for the consultation. The legislation also provides that such a physician may not be put on a special verdict to support a comparative fault defense absent an independent basis for liability.<sup>7</sup>

The legislature also passed other "immunity" legislation affecting health care providers. S.B. 1353,<sup>8</sup> the "Freedom of Conscience for Health Care Professionals" act provides broad immunity for physicians and other healthcare providers to refuse to provide certain types of non-emergent care that violate the providers'

conscience or religious beliefs. The law's coverage does not include contraception, but does include "abortifacients," which, as defined, include drugs like the "morning after" pill but not other medications that may have such a potential side effect but are not prescribed for that purpose. The statute also covers end-of-life care. Specifically, the statute states that no health care provider shall be compelled to provide "health care services" (defined as abortion, abortifacients, embryonic stem cell research or treatment or cloning and end-of-life treatment and care) that violate his or her conscience. What constitutes "providing" of such services is broadly defined. In order to invoke the protection, a health care provider must give advanced written notice to their employer of the services to which they have a conscientious objection. No reason for the objection must be provided. An employer may not discriminate against a health care professional based upon such advanced written notice so long as it is provided in a manner permitted by the act, unless the employer can show that accommodating the objection presents the employer with an undue hardship. The act provides immunity to the health care provider and their employer (civil and administrative – including through professional licensing agencies) for the refusal to provide care pursuant to the act. While the basic coverage of the act is broad, there is a significant limit as a provider must provide emergency services if no other health care provider is immediately available. Further, the law does not permit a health care provider or her employer to refuse to provide services because of a patient's federally protected civil rights, including race, color, religion, sex, age, disability or national origin.

S.B. 1353 is not without controversy. The governor allowed the bill to become law without his signature, noting a concern with how this might affect patient

care.<sup>9</sup> In addition, it would be fair to expect employer-employee liability disputes as well as patient-provider lawsuits to emerge as a result of this legislation. Furthermore, there may also be a potential for health care providers to run afoul of various federal laws and mandates when acting in accordance with this state-based legislation.

The legislature enacted additional legislation providing immunity for health care providers when it enacted S.B. 1390.<sup>10</sup> S.B. 1390 creates qualified immunity for persons and businesses that have automated external defibrillators (AEDs), as well as the physicians who write the prescription for AEDs, amending Idaho Code Section 5-337. The legislation provides that absent gross negligence, recklessness or willful and wanton misconduct, such entities, the owners and their employees and the prescribing physicians (who prescribe AEDs in good faith) shall be immune from civil liability for the use of AEDs in emergency situations. The law also provides specific requirements regarding the registration of AEDs with emergency responders. S.B. 1390 also describes requirements for the maintenance and calibration of AEDs. The law also requires mandatory training of persons who may be expected to use such devices.

Another significant change that will affect attorneys that represent health care providers is an amendment to Idaho Code Section 54-1806(4).<sup>11</sup> This amendment now gives the Idaho Board of Medicine subpoena power in the *investigative* phase of a disciplinary matter. The Board's power to subpoena and compel testimony had been reduced years ago such that the Board had subpoena power only after the full board voted to initiate a formal prosecution – not during the investigation that precedes such a decision. Now the Board is again armed with subpoena power to obtain records and to compel testimony during the investigative phase. The actual effect of this legislation is somewhat more nuanced than described above. Notwithstanding the prior lack of subpoena power during an investigation, the Board did have the ability to obtain records from the target physician, as the failure to provide documents maintained in the practice of medicine (or affiliated practice governed by the board), when demanded by the Board, was a ground for discipline itself. The biggest change will be that the Board can now depose the target physician (or affiliated practitioner) and third parties in the investigative phase, and may compel the production of records from third parties, including insurers, medical practice

*This amendment now gives the Idaho Board of Medicine subpoena power in the investigative phase of a disciplinary matter.*

groups, and hospitals during the investigation. Third parties receiving such subpoenas should consult counsel to carefully review, among other things, Idaho's peer review statute (Section 39-1392 et seq.) as well as HIPAA to determine if a subpoena improperly seeks privileged or protected information.

The Idaho legislature also settled a longstanding dispute within the medical community regarding the propriety of physician assistants (PAs) owning their own medical practices. Some within the medical community have felt that the Board of Medicine's policy against the corporate practice of medicine precluded such ownership, while others believe that Idaho's professional corporations act permits such ownership. S.B. 1314 expressly permits PAs to own their own medical practice, whether solely, or in partnership with physicians and/or other PAs. However, such PAs still must have a supervising physician who is liable for the oversight of the PA and must be available to consult with the PA. The legislation also clarified that a PA's scope of practice must be within the scope of their supervising physician's actual practice. In other words, a PA cannot perform services that their supervising physician does not perform or is not qualified to perform.<sup>12</sup>

In addition to these legislative fixes, the legislature has also proposed a constitutional amendment that would allow government-owned hospitals (and other governmental entities) to use debt to fund improvement to facilities without first obtaining public support via a bond or levy vote. The measure will be on the ballot this fall.

#### **Legislation proposed, but not enacted, during the 2010 legislative session**

For health care attorneys, the 2010 legislative session may be most notable for the legislation that did not pass and will likely be seen again next year in the same or a modified form. One bill that will undoubtedly be seen again is a version of S.B. 1373,<sup>13</sup> which passed the Senate,

but was held in committee in the House. This legislation would have reversed the Idaho Supreme Court's 2009 decision in *Harrison v. Hartford et al.*, 214 P.3d 631 (2009), in which the Court, in a divided opinion, held that the immunity from liability found in Idaho Code Section 39-1392c for a health care organization's "use" of any peer review information does not include immunity for the decision made by the organization "using" the information in credentialing a physician. Thus the Court held a hospital does not have immunity for claims by patients for negligent credentialing, or absolute immunity for claims by physician that they were wrongfully denied privileges. A revised version of this bill will likely resurface next session.

In addition, the legislature rejected attempts to change Idaho's "any willing provider" law. Specifically, in rejecting H.B. 528,<sup>14</sup> the legislature refused to require hospital provider networks to accept any willing provider. Networks are currently excluded from the reach of the any willing provider law as long as they are not insurers or managed-care entities. Likewise, the legislature rejected H.B. 530,<sup>15</sup> an attempt by insurers and managed care providers in Idaho to revoke the any willing provider statute altogether.

Finally, the legislature failed to pass a bill providing immunity for physicians who report to the Idaho Department of Motor Vehicles (DMV) that a patient has an impairment that makes it unsafe for them to drive. While currently under Idaho's privacy laws and HIPAA, a reasonable argument can be made that a physician can make such a report without violating the law, the immunity provision would have provided clarity to the issue and removed a physician's fear that they may face a lawsuit for making such a report in good faith. This bill was slowed by the amendment process and could not be passed before adjournment. It is likely that a version of this bill will be presented again this next session.

#### **Conclusion**

While most of the "action" in health

care law has been at the federal level this past year, the Idaho legislature considered and passed several important measures. In addition, it rejected other measures that will likely be taken up again in the next session. While most health care lawyers realize that they have to be vigilant to keep track of frequent changes to the hundreds of thousands of pages of statutes and regulations, Medicare rules, carrier manuals, payor contract requirements, and case law; it is also important to remember to keep track of changes taking place at the state level. While Idaho's regulation of health care professionals is minimal in comparison to many other states, it is not insignificant. The constant change in health care laws and regulations both at the federal and state level make the practice interesting, but also dangerous for those who may try to dabble in providing advice to those who work in the most regulated industry in the country – the delivery of and payment for health care services.

#### About the Author

**Steven J. Hippler** is a partner at the Boise firm of Givens Pursley LLP. His practice is dedicated to representation of health care providers and related industries in business and regulatory matters and in the health care related litigation. Steve is a founding member and past president of the Idaho State Bar's Health Law Section. Steve would like to acknowledge the Idaho Medical Association and Medical Insurance Exchange of California, both of which track legislative changes affecting health care providers in Idaho and share this information with their respective members and insureds.

#### Endnotes

- <sup>1</sup> See H.B. 701, 60th Leg., 2nd Sess. (Idaho 2010).  
<sup>2</sup> Compounding the problem and the onerous impact

### *S.B. 1314 expressly permits PAs to own their own medical practice, whether solely, or in partnership with physicians and/or other PAs.*

on providers who are dependant on Medicaid reimbursement has been the failure of the Idaho Department of Health and Welfare's new Medicaid payment processing contractor to correctly and timely process claims. Indeed, for many providers, the problems experienced with the new contractor have been so significant and widespread, as to threaten the continued viability of the providers. In this author's view, the state will likely be facing significant liability claims because of the problems with the processing of payments by the new contractor. See Press Release, Office of the Governor of the State of Idaho, Molina Meets with Medicaid Providers, Governor Otter about Payment Issues (August 23, 2010), available at [http://gov.idaho.gov/mediacenter/press/pr2010/praug10/pr\\_054.html](http://gov.idaho.gov/mediacenter/press/pr2010/praug10/pr_054.html) (last visited September 1, 2010) for Idaho's latest press release regarding this ongoing problem.

- <sup>3</sup> H.B. 391a, 60th Leg., 2nd Sess. (Idaho 2010).  
<sup>4</sup> See *Florida et al v. United States Department of Health and Human Services et al.*, Case No. 3:10-cv-91 (N.D. Florida filed March 23, 2010).  
<sup>5</sup> The advent of telemedicine has helped provide some specialty care to rural areas, but the lack of resources, technology and payor recognition makes telemedicine at best a long term potential fix to an acute shortage of available specialists.  
<sup>6</sup> S.B. 1399, 60th Leg., 2nd Sess. (Idaho 2010).  
<sup>7</sup> This latter point was a concession to trial lawyers concerned that such consulting physicians would be used by defendants as an empty chair at trial. However, this language does not likely change the outcome because, due to this new statutory definition, a physician would not have a physician-patient relationship with the patient and, therefore, the physician would have owed no duty to the plaintiff, leaving no basis to include the physician on the verdict form in the first instance.  
<sup>8</sup> S.B. 1353, 60th Leg., 2nd Sess. (Idaho 2010).

<sup>9</sup> See *ConscienceRights* for health care workers becomes law without Otter's signature, by Brad Iversen-Long, IdahoReporter.com (March 30, 2010), <http://www.idahoreporter.com/2010/conscience-rights-for-health-care-workers-becomes-law-without-otter%E2%80%99s-signature/> (last visited Sept., 3 2010). Much of the concern related to not only the availability of healthcare providers in a state with a provider shortage, but also how those with end of life directives (such as a DNR order) might be treated by a person with a conscience objection to withholding care, despite the patients wishes, in emergent situations.

- <sup>10</sup> S.B. 1390, 60th Leg., 2nd Sess. (Idaho 2010).  
<sup>11</sup> S.B. 1313, 60th Leg., 2nd Sess. (Idaho 2010).  
<sup>12</sup> Attorneys representing PA-owned entities should also review Medicare rules regarding PA ownership. For example, Medicare regulations currently provide that a PA can be a 99% owner in a practice, and that practice ownership must comply with state law. To comply with Idaho's corporate practice of medicine rule and the professional corporations act, it is advisable to have a physician be at least a 1% owner in a practice.  
<sup>13</sup> See <http://www.legislature.idaho.gov/legislation/2010/S1373.htm> (last visited September 1, 2010) for bill status and history.  
<sup>14</sup> H.B. 528, 60th Leg., 2nd Sess. (Idaho 2010). See <http://www.legislature.idaho.gov/legislation/2010/H0528.htm> (last visited September 1, 2010) for bill status and history.  
<sup>15</sup> H.B. 530, 60th Leg., 2nd Sess. (Idaho 2010). See <http://www.legislature.idaho.gov/legislation/2010/H0530.htm> (last visited September 1, 2010) for bill status and history.

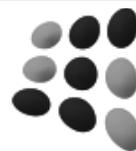


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# WHAT YOU DON'T KNOW MAY HURT YOU: LAWS AFFECTING HEALTH CARE TRANSACTIONS

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To protect the integrity of the practice of medicine as well as the government health care budget, federal and state statutes limit arrangements between medical referral sources. Those laws and regulations potentially affect any transactions between health care providers, including service contracts, compensation structures, ownership interests, investments, leases for space or equipment, joint ventures, acquisitions, gifts, donations, discounts, and virtually any other exchange of remuneration. Violations may result in significant administrative, civil and criminal fines. The new health care reform law dramatically increased exposure for violations by expanding the statutory prohibitions, increasing penalties, and broadening the government's power to prosecute violations. Lawyers and other professionals must beware the laws and regulations as they advise health care clients and structure transactions.

## Anti-Kickback Statute (AKS)

The federal AKS prohibits anyone from knowingly and willfully soliciting, offering, receiving, or paying any form of remuneration to induce referrals for any items or services for which payment may be made by any federal health care program.<sup>1</sup> The AKS is a criminal statute: its violation is a felony and may result in a \$25,000 fine and/or imprisonment for up to five years.<sup>2</sup> In addition, the new Patient Protection and Affordable Care Act makes a violation of the AKS also a violation of the federal False Claims Act,<sup>3</sup> which exposes the defendants to additional civil penalties and private qui tam actions.<sup>4</sup> The AKS is very broad—it applies to any form of remuneration, including kickbacks, free or discounted items or services, business opportunities, perks, or anything else of value offered in exchange for referrals. The statute applies if “one purpose” of the transaction is to generate improper referrals.<sup>5</sup> It applies to any



Kim C. Stanger

*The new health care reform law dramatically increased exposure for violations by expanding the statutory prohibitions, increasing penalties, and broadening the government's power to prosecute violations.*

persons who are in a position to make or influence referrals, including health care providers, management, program beneficiaries, vendors, and even attorneys. In *U.S. v. Anderson*,<sup>6</sup> for example, physicians, hospital administrators, and outside attorneys were indicted for entering contracts with physicians to provide medical director services as a way to generate referrals from the physicians and business for the hospital.

Despite its breadth, the AKS does have limitations. First, it applies only to referrals for items or services payable by government health care programs such as Medicare or Medicaid.<sup>7</sup> If the parties to the arrangement do not participate in government programs or are not in a position to make referrals relating to government programs, then the statute should not apply. Second, because of its potential breadth, the federal government has issued statutory exceptions and regulatory safe harbors which offer protection if the transaction fits all the specified requirements.<sup>8</sup> For example, exceptions and safe harbors apply to employment or personal services contracts, space or equipment leases, investment interests, etc., so long as those transactions meet regulatory requirements.<sup>9</sup> Third, interested persons who are concerned about a transaction may obtain an Advisory Opinion from the Office of Inspector General (“OIG”) concerning the proposed transaction. Past Advisory Opinions are published on the OIG’s website, [www.hhh.oig.hhs.gov/fraud](http://www.hhh.oig.hhs.gov/fraud). Although the Advisory Opinions are binding only on the parties to the specific opinion, they do provide guidance for others seeking to structure a similar transaction.

## Ethics in patient referrals act: (Stark)

The federal Stark law prohibits physicians from referring patients for certain

designated health services to entities with which the physician (or a member of the physician’s family) has a financial relationship unless the transaction fits within a regulatory safe harbor.<sup>10</sup> Stark also prohibits the entity that receives the improper referral from billing for the items or services rendered per the improper referral.<sup>11</sup> Unlike the AKS, Stark is a civil statute: violations may result in civil fines ranging up to \$15,000 per violation and up to \$100,000 per scheme in addition to payments received for services rendered per improper referrals.<sup>12</sup>

Also unlike the AKS, Stark is a strict liability statute; it does not require intent.<sup>13</sup> Additionally, Stark applies only to referrals by physicians, i.e., M.D.s, D.O.s, podiatrists, dentists, chiropractors, and optometrists,<sup>14</sup> or with members of such physicians’ families; it does not apply to transactions with other health care providers. Finally, unlike the AKS, Stark applies only to referrals for certain designated health services, (DHS), payable by Medicare and Medicaid;<sup>15</sup> it does not apply to referrals for other items or services.

However, like the AKS, Stark is very broad—it applies to any type of financial relationship between physicians (or their family members) and a potential provider of DHS, including any ownership, investment, or compensation relationship.<sup>16</sup> Thus, the statute applies to everything from ownership or investment interests to compensation among group members to contracts, leases, waivers, discounts, professional courtesies, medical staff benefits, or any other transaction in which anything of value is shared between the parties. If Stark applies to a financial relationship, then the parties must either structure the arrangement to fit squarely within one of the regulatory safe harbors<sup>17</sup> or not refer patients to each other for the designated

health services covered by the statute and regulations.

### **Civil Monetary Penalties Law: (CMP)**

The CMP prohibits certain transactions that have the effect of increasing utilization or costs to federally funded health care programs or improperly minimizing services to beneficiaries.<sup>18</sup> For example, the CMP prohibits offering or providing inducements to a Medicare or Medicaid beneficiary that are likely to influence the beneficiary to order or receive items or services payable by federal health care programs.<sup>19</sup> This law may affect health care provider marketing programs as well as contracts or payment terms with program beneficiaries.<sup>20</sup> Similarly, the CMP law prohibits hospitals from making payments to physicians to induce the physician to reduce or limit services covered by Medicare.<sup>21</sup> Thus, the CMP law usually prohibits so-called “gainsharing” programs in which hospitals split cost-savings with physicians.<sup>22</sup> Finally, the CMP law prohibits submitting claims for federal health care programs based on items or services provided by persons excluded from health care programs.<sup>23</sup> As a practical matter, the statute prohibits health care providers from employing or contracting with persons or entities who have been excluded from participating in federal health care programs.<sup>24</sup> Violations of the CMP statute may result in significant penalties ranging from \$2,000 to \$50,000 per violation.<sup>25</sup>

### **Medicare reimbursement rules**

The Center for Medicare and Medicaid Service, (CMS), has volumes of esoteric rules that apply to reimbursement for services provided under government health care programs that are buried in federal regulations and program manuals. For example, the rules govern such items as when a health care provider may bill for services provided by another entity, supervision required for such services, and the location that such services may be performed. In addition, the amount of government reimbursement may differ depending on how the transaction is structured, e.g., whether it is provided through an arrangement with a hospital or by a separate clinic or physician practice. The rules concerning reimbursement and reassignment should be considered in structuring health care transactions if the entities intend to bill government programs for services.

### **Idaho Anti-Kickback Statute**

Idaho has its own, little-known version of the federal AKS. Idaho prohibits

*The Idaho Board of Medicine has used the Medical Practices Act to challenge arrangements in which physicians share ownership or control of a practice with non-physicians.*

health care providers from paying others to make referrals to the provider or from providing services to someone who was referred in exchange for a payment for the referral.<sup>26</sup> In addition, the statute also prohibits health care providers from engaging in a regular practice of waiving, rebating, giving, paying, or offering to waive, rebate, give or pay all or a part of a person’s health insurance deductible.<sup>27</sup> Persons who violate the statute may be subject to a \$5,000 fine.<sup>28</sup> The Idaho statute is potentially broader than the federal AKS or Stark in that it is not limited to items or services covered by government health care programs. Nevertheless, the statute does contain some potentially significant limitations. First, the statute was passed by insurance companies that were attempting to limit inducements for services covered by health insurance. To that end, the statute applies to services provided to “claimants,”<sup>29</sup> which presumably means those patients who submit claims to health insurance; it is not clear to what extent the statute would apply to others. Second, by its express terms, it only applies to the “treatment of physical or mental illness or injury arising in whole or substantial part from trauma.”<sup>30</sup> Arguably, it would not apply to treatment for other conditions.

### **Idaho Medical Practices Act**

Idaho’s Medical Practices Act and similar licensing statutes prohibit “feesplitting”, i.e., the dividing of fees or gifts received for professional services in exchange for referrals, or giving or receiving rebates for services provided.<sup>31</sup> It also prohibits offering rebates for such services. The violation of the statute could result in professional discipline and loss of licensure.<sup>32</sup> Although there do not appear to be any reported Idaho cases directly interpreting or applying the statute, the statute may apply in any situation between physicians and potential referral sources where some benefit is conferred in exchange for referrals.<sup>33</sup> To that end, it is potentially broader than the federal AKS. The Idaho Board of Medicine has

used the Medical Practices Act to challenge arrangements in which physicians share ownership or control of a practice with non-physicians.

### **Corporate Practice of Medicine Doctrine (CPOM)**

Under the corporate practice of medicine doctrine, only certain licensed health care professionals (e.g., physicians) may practice medicine; corporations may not employ physicians to practice medicine due to the risk that such an arrangement would improperly influencing medical judgment. It is not clear to what extent the CPOM doctrine applies in Idaho. In *Worlton v. Davis*, the Idaho Supreme Court declared (arguably in dicta):

It is well established that no unlicensed person or entity may engage in the practice of the medical profession through licensed employees; nor may a licensed physician practice as an employee of an unlicensed person or entity. Such practices are contrary to public policy.<sup>34</sup>

*Worlton* appears to be an anomaly in Idaho law: there do not appear to have been any Idaho CPOM cases preceding it, and *Worlton* has been largely ignored since it issued. Idaho statutes expressly or impliedly authorize hospitals, managed care organizations, (MCOs), and certain other licensed health care entities to make health care available through employed physicians, and the corporate code allows physicians and other health care providers to practice through professional service corporations and associations.<sup>35</sup> Accordingly, hospitals and other health care entities commonly employ physicians and other health care professionals. Nevertheless, the Idaho Board of Medicine has periodically cited the Medical Practices Act<sup>36</sup> and *Worlton* to warn that certain physician employment arrangements (outside the scope of hospitals, MCOs, and other licensed health care entities) may violate the Medical Practices Act if they unduly

interfere with the physician's independent medical judgment.<sup>37</sup> Health care providers should at least consider the possibility of CPOM issues when structuring employment relationships with physicians.

### Conclusion

The foregoing is only a brief summary of some of the more significant laws and regulations that may affect common health care transactions. As in all cases, the devil is in the details (as well as the Code of Federal Regulations and CMS Medicare Manuals). Attorneys and other professionals who advise health care providers should review the relevant laws and regulations whenever structuring a health care transaction, especially if that transaction involves potential referral sources or implicates federal health care programs.

### About the Author

**Mr. Stanger** is a past President of the Health Law Section of the Idaho State Bar Association, past President of the Idaho Association of Healthcare Risk Managers; a founding member of the Idaho HIPAA Coordinating Council; past President and founding member of the J. Reuben Clark Law Society, Boise Chapter; and a mem-

ber of the American Health Lawyers Association and the Health Law Section of the American Bar Association. He is a recipient of the St. Luke's Regional Medical Center Certificate of Merit (2003).

### Endnotes

- <sup>1</sup> 42 U.S.C. § 1320a-7b(b) (year).
- <sup>2</sup> 42 U.S.C. § 1320a-7b(b)(2)(B).
- <sup>3</sup> Patient Protection and Affordable Care Act Pub L. No. 111-148 § 6402(f)(1), 124 Stat. 119 (2010); see 31 U.S.C. § 3729 *et seq.*
- <sup>4</sup> See, e.g., 42 U.S.C. § 1320a-7a(5); 42 U.S.C. § 1320a-7(b)(7); 31 U.S.C. § 3729-3733; *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 20 F. Supp. 2d 1017 (S.D. Tex. 1998).
- <sup>5</sup> *United States v. Kats*, 871 F.2d 105 (9th Cir. 1989); *United States v. Greber*, 760 F.2d 68 (3d Cir.), *cert. denied* 474 U.S. 988 (1985).
- <sup>6</sup> *United States v. Anderson*, Case No. 98-20030-01/07 (D. Kan. 1998).
- <sup>7</sup> See 42 U.S.C. § 1320a-7b(b)(2)(B).
- <sup>8</sup> 42 U.S.C. § 1320a-7b(3); 42 C.F.R. § 1001.952 (year).
- <sup>9</sup> 42 U.S.C. § 1320a-7b(3); 42 C.F.R. § 1001.952.
- <sup>10</sup> 42 U.S.C. § 1395nn; 42 C.F.R. § 411.351 *et seq.*
- <sup>11</sup> 42 C.F.R. § 411.353(b).
- <sup>12</sup> 42 U.S.C. § 1395nn.
- <sup>13</sup> See 42 C.F.R. § 411.353(a)-(b).
- <sup>14</sup> *Id.* at § 411.351.
- <sup>15</sup> The "designated health services" covered by Stark include clinical laboratory services; physical therapy, occupational therapy and speech-language pathology services; radiology and other imaging services; radiation therapy; durable medical equipment and supplies; prosthetics, orthotics, prosthetic devices and supplies; home health services; outpatient

- prescription drugs; inpatient and outpatient hospital services; and parenteral and enteral nutrients. *Id.* at § 411.351.
- <sup>16</sup> *Id.* at § 411.351.
  - <sup>17</sup> *Id.* at § 411.355 to 411.357.
  - <sup>18</sup> 42 U.S.C. § 1320a-7a.
  - <sup>19</sup> 42 U.S.C. § 1320a-7a(a)(5).
  - <sup>20</sup> See OIG Special Advisory Bulletin, "Offering Gifts and Other Inducements to Beneficiaries" (August 2002); OIG Special Fraud Alert, "Routine Waiver of Part B Co-Payments/Deductibles" (May 1991).
  - <sup>21</sup> 42 U.S.C. § 1320a-7a(b).
  - <sup>22</sup> See, e.g., OIG Special Fraud Alert, "Gainsharing Arrangements and CMPs for Hospital Payments to Physicians to Reduce or Limit Services to Beneficiaries" (July 1999).
  - <sup>23</sup> 42 U.S.C. § 1320a-7a(a)(1)(C) and (2). (I don't understand what this citation means: is it 7a(a)(2)?)
  - <sup>24</sup> OIG Special Advisory Bulletin, "The Effect of Exclusion from Participation in Federal Health Care Programs" (September 1999).
  - <sup>25</sup> See *id.* at § 1320a-7a(a) and (b).
  - <sup>26</sup> I.C. § 41-348(1).
  - <sup>27</sup> *Id.* at § 41-348(2).
  - <sup>28</sup> *Id.* at § 41-348(4).
  - <sup>29</sup> *Id.* at § 41-348(1).
  - <sup>30</sup> *Id.* at § 41-348(3)(a).
  - <sup>31</sup> I.C. § 54-1814(8)-(9).
  - <sup>32</sup> See *id.*
  - <sup>33</sup> See *Miller v. Haller*, 19 Idaho 345, 924 P.2d 607 (1996) (suggesting that the prohibition in the statute applies where the division of fees or money has changed hands in direct exchange for referrals). This citation needs pinpoint page numbers
  - <sup>34</sup> 73 Idaho 217, 221, 249 P.2d 810 (1952). This citation also needs pinpoint page numbers
  - <sup>35</sup> See, e.g., I.C. § 30-1301 *et seq.*
  - <sup>36</sup> I.C. §§ 54-1803--1804.
  - <sup>37</sup> See, e.g., Idaho Board of Medicine, "The Report" (Spring 2006); Memorandum from J. Uranga to Idaho State Board of Medicine, Corporate Practice of Medicine (February 26, 2007).



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# LIABILITY OF HEALTH CARE PROVIDERS IN IDAHO – APPARENT AUTHORITY AND NEGLIGENT CREDENTIALING

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Two recent decisions of the Idaho Supreme Court open new doors of potential liability for Idaho's health care providers.

In *Jones v. Healthsouth Treasure Valley Hospital*, the Supreme Court allowed a patient's estate to seek recovery from a hospital for the negligent acts of an independent contractor who worked in the hospital's operating room.<sup>1</sup> In extending the doctrine of "apparent authority" into the health care setting, the court provides an additional avenue of recovery against Idaho's health care providers.

Similarly, in the case of *Harrison v. Binnion*, the Supreme Court recognized for the first time a cause of action against a hospital for the negligent credentialing of a member of the hospital's medical staff.<sup>2</sup> The court declined to apply the immunity of Idaho's peer review statute, Idaho Code § 39-1392c, to the credentialing decisions made by Idaho's hospitals. Instead, the court limited that immunity to the "furnishing" and "use" of the information and opinions that underlie the credentialing decision.

## Apparent authority — *Jones v. Healthsouth Treasure Valley Hospital*

In *Jones v. Healthsouth Treasure Valley Hospital*, the Supreme Court allowed a patient to seek recovery from the hospital for the negligent actions of an independent contractor who worked in the hospital's surgery suite. According to the court, the doctrine of "apparent authority" allowed the patient to seek recovery from the hospital for an alleged mistake made by a cell-saver technician, an employee of a company that was an independent contractor of the hospital.<sup>3</sup>

In *Jones*, the employer of the cell-saver technician provided autotransfusion services to the hospital as an independent contractor. In return for those services, the hospital paid the company a flat fee and then billed its patients for the servic-

*In practical terms, this case means that plaintiffs may seek to build malpractice cases against hospitals, ambulatory surgery centers and physician practices based on mistakes allegedly made by independent contractors.*

es. Before the district court, the deceased patient's estate did not allege that the hospital itself was negligent, but only that the hospital was liable for the negligence of the cell-saver technician because it appeared to the patient that the cell-saver technician was acting on behalf of the hospital. According to the Supreme Court, a hospital can be held responsible for the conduct of its independent contractors if: (1) "conduct" by the hospital "would lead a person to reasonably believe" the independent contractor was acting "on the hospital's behalf," e.g., the hospital "holds out" the independent contractor as the hospital's agent; and (2) the patient "reasonably believes" the service is rendered on behalf of the hospital.<sup>4</sup>

In applying this test, the Supreme Court pointed out that the hospital's consent forms did not indicate that independent contractors may be performing services in the hospital. It also noted that the cell-saver technicians wore the same hospital scrubs as other members of the surgery team and that the scrubs contained no logos or other information distinguishing between hospital employees and independent contractors.

In practical terms, this case means that plaintiffs may seek to build malpractice cases against hospitals, ambulatory surgery centers and physician practices based on mistakes allegedly made by independent contractors. In addition, the "apparent authority" argument could be used to impose liability based on the negligent actions of physicians, even if the physician is not an independent contractor for the hospital or surgery center.

Idaho's health care providers can lessen the potential for liability by taking steps to inform the patient that an independent contractor may provide some of the care the patient will receive from the health care provider. For instance, the provider's

consent forms may explain to the patient that not everyone interacting with the patient will be an employee of the provider or will be within the provider's control. The consent form could include language indicating that the patient understands that independent contractors may be involved in the patient's care, understands that physicians are not agents of the hospital, and agrees to discharge the duties of the provider as to services that will be performed by independent contractors. The consent form might also include language in which patients acknowledge that by discharging the provider from its duty to provide the service, the patient is giving up their right to hold the provider liable for negligence of the independent contractor. In addition, health care providers can consider a separate consent form (with the independent contractor listed and contact information included) for any services that will be performed by an independent contractor.

As the *Jones* Court pointed out, other factors may assist in eliminating confusion about who is providing what services. Varying the color of the scrubs or including the name of the independent contractor (or his or her employer) on the scrubs or on identification badges worn by the independent contractor may be helpful. Similarly, signs or information on provider websites may be used to clarify which team members are not employees of the provider. Additionally, health care providers can ensure that their independent contractor agreements require the contractor to indemnify the hospital for any liability caused by acts of the contractor and maintain appropriate insurance.

## Negligent credentialing — *Harrison v. Binnion*

In *Harrison v. Binnion*, the Idaho Supreme Court recognized for the first time a cause of action against a hospital for the



Thomas J. Mortell

negligent credentialing of a medical staff member. The Court's decision was relatively narrow, but still opens the door for potential negligent credentialing claims against health care organizations in the future.<sup>5</sup>

In *Harrison*, the plaintiff sued his physician for injuries he allegedly suffered during a hospital stay. He later sought leave to amend his complaint to add a negligent credentialing claim against the hospital, arguing that the hospital was negligent in granting privileges to the physician given his alleged history of substance abuse. The trial court denied the motion to amend, concluding the Idaho's peer review statute bars any claim for negligent credentialing in Idaho.<sup>6</sup> That statute, Idaho Code § 39-1392c, provides:

[t]he furnishing of information or provision of opinions to any health care organization or the receiving and use of such information and opinions shall not subject any health care organization or other person to any liability or action for money damages or other legal or equitable relief.<sup>7</sup>

The trial court concluded that if a health care organization has immunity for using information and opinions when making a credentialing decision, then it must also have immunity for the credentialing decision ultimately made. Accordingly, the trial court held that no cause of action exists in Idaho for negligent credentialing.

On appeal, the Supreme Court reversed the trial court and remanded the case. The Supreme Court distinguished the gathering and consideration of information preliminary to making a decision from the ultimate credentialing decision itself. It concluded that, by its plain terms, section 39-1392c only provides immunity for providing, receiving or using information in a credentialing action – it does not bar

## The Supreme Court has expanded the liability risks faced by Idaho's health care providers.

claims based on the decision that is made based on that information.<sup>8</sup> Thus, the Supreme Court held that the trial court erred in holding that section 39-1392c bars negligent credentialing claims in Idaho, and remanded the case against the hospital for further proceedings.

Accordingly, to prevail on a negligent credentialing claim in Idaho, the plaintiff will likely have to prove: that the provider's malpractice resulted in damage; that the health care organization failed to properly credential the negligent provider consistent with applicable regulations, accreditation standards, and/or local standards; and that proper credentialing would have prevented the injury to the patient, e.g., that negligent credentialing was a proximate cause of the patient's injury.<sup>9</sup> In addition, the plaintiff will likely have to overcome Idaho's peer review privilege to obtain the evidence he or she needs to prevail.<sup>10</sup> Nevertheless, the mere fact that the Supreme Court has recognized the claim makes it easier for plaintiffs to sue health care organizations, thereby exposing such organizations to potential liability and the costs and burdens of defense.

### Conclusion

By extending the doctrine of "apparent authority" into the health care setting and recognizing a claim for negligent credentialing, the Supreme Court has expanded the liability risks faced by Idaho's health care providers. Whether your clients are

health care providers or adverse to health care providers, these recent cases may affect the advice and counsel you provide to them.

### About the Author

**Thomas J. Mortell** is a partner at *Hawley Troxell Ennis & Hawley LLP* and a member of the firm's *Health Law Group*. Mr. Mortell represents hospitals and physicians in joint ventures and business transactions, as well as representing hospitals in a broad range of health care matters.

### Endnotes

<sup>1</sup> *Jones v. Healthsouth Treasure Valley Hosp.*, 147 Idaho 109, 206 P.3d 473 (2009).

<sup>2</sup> *Harrison v. Binnion*, 147 Idaho 645, 214 P.3d 631 (2009).

<sup>3</sup> Typically, a principal (here the hospital) is not liable for the negligence of an independent contractor because the principal does not control the means and method the independent contractor uses to accomplish the work.

<sup>4</sup> *Jones*, 147 Idaho at 116, 206 P.3d at 480.

<sup>5</sup> "Credentialing" is the process used by hospitals, surgery centers and other health care facilities to evaluate the qualifications of physicians who desire to provide services at the facility. The credentialing process typically results in a physician's medical staff membership with privileges to perform certain procedures or provide certain services at the facility.

<sup>6</sup> *Harrison*, 147 Idaho at 648, 214 P.3d at 634.

<sup>7</sup> I.C. § 39-1392c.

<sup>8</sup> *Harrison*, 147 Idaho at 649, 214 P.3d at 635.

<sup>9</sup> See 18 West's Causes of Action 2d 329 (2008); Benjamin J. Vernia, Annotation, *Tort Claim for Negligent Credentialing of Physician*, 98 A.L.R.5th 533 (2002).

<sup>10</sup> See I.C. § 39-1392b.

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# THE FIRST MAJOR CHANGES TO HIPAA: THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009

J. Kevin West  
Hall, Farley, Oberrecht &  
Blanton, PA

Since HIPAA was enacted seven years ago in 2003, there had been no significant changes to this groundbreaking health care law. That has now changed.

The American Recovery and Reinvestment Act of 2009 (ARRA), or Stimulus Package, was passed by Congress on February 17, 2009. ARRA is an extensive piece of legislation (406 pages) which includes the Health Information Technology for Economic and Clinical Health Act (HITECH Act). The HITECH Act provides incentives for certain healthcare providers, including physician group practices and individual physicians, to implement and utilize electronic health records. The HITECH Act also amends the Health Insurance Portability and Accountability Act of 1996 (HIPAA) with the goal of increasing health information privacy and security and preventing medical identity theft.



J. Kevin West

## Electronic health record incentives

The HITECH Act defines an electronic health record as “an electronic record of health-related information on an individual that is created, gathered, managed, and consulted by authorized health care clinicians and staff.” “Eligible professionals” who use “certified” electronic health records in a “meaningful” way could receive incentive payments through additional reimbursements via Medicare or Medicaid.

“Eligible professionals” include physicians, dentists, certified nurse-midwives, nurse practitioners, and physician assistants who are practicing in Federally Qualified Health Centers or Rural Health Clinics led by a physician assistant. The Centers for Medicare and Medicaid Services is working with the Office of Civil Rights, the agency in charge of enforcing HIPAA, to define “meaningful” and “certified” electronic health records technology and establish criteria for the incentives programs. The Centers for Medicare and

*Further, upon the request of the patient,  
the provider was required to give the  
patient a written “accounting”  
of these disclosures.*

Medicaid Services plans to publish proposed rules in late 2009. Once the rules are published, supportive programs will be implemented to educate and support eligible professionals.

Financial incentives (up to \$44,000 in Medicare incentive payments spread out over five years) will begin January 2011 for qualified eligible professionals and will end after 2016. Beginning in 2015, Medicare payment reductions will be imposed on eligible professionals who are not meaningful electronic health record users.

## HIPAA privacy and security changes

The HITECH Act addresses the potential for increased security and privacy breaches associated with more widespread use of electronic health information by amending the privacy and security regulations of HIPAA.

The HITECH Act amends both the Privacy and Security parts of HIPAA. The reach of these laws is now significantly broader and more stringent, as will now be discussed.

## Changes to HIPAA privacy

There are five significant changes to the HIPAA Privacy Rule.

“Minimum Necessary” Rules. First, the HITECH Act clarifies the so-called minimum necessary rule. Previously, under that rule, when a health care provider was asked to disclose protected health information (PHI), and disclosure was permissible, the provider was required to disclose only the minimum necessary information needed to fulfill the requesting party’s request. Unfortunately, what “minimum necessary” meant was never defined. Now, under the HITECH Act, there is a presumption that the minimum necessary PHI that may be disclosed must exclude the following:

- Name
- Address
- Telephone and fax number
- E-mail address
- Social Security number
- Medical record numbers
- 9 other personal identifiers

A provider will always be safe in disclosing information that excludes the above. If it discloses more, it will have to justify doing so — primarily by referring to specific release language signed by the patient.

## Disclosure accounting

Second, as originally enacted, HIPAA required providers to keep a log of only limited types of disclosures of PHI to third parties. Further, upon the request of the patient, the provider was required to give the patient a written “accounting” of these disclosures. Under the old rules, most “routine” disclosures of PHI (e.g., to other treating doctors, to insurance payors, etc.) were exempt from the logging and accounting requirements. HITECH changes that for health care providers who use an electronic health record. For such providers, there will no longer be exemptions from logging and accounting. Accordingly, most disclosures of PHI will have to be logged and accounted for.

If a provider acquires an electronic health record after January 1, 2009, the new rules will apply to disclosures of PHI made after January 1, 2014 (i.e., there will be a 5-year phase-in period). These rules will also apply to disclosures by business associates, which is a significant new burden. Business associates, under HIPAA terminology, are those (e.g., medical transcriptionists, IT vendors, collections agencies) who provide services to health care providers and those services involve access to or use of patient health information.

**Restriction Requests**

Third, HITECH increases the patient’s right to request restrictions on disclosure of the patient’s PHI. Under the old rules, the provider could decline to agree to the patient’s request to restrict routine disclosures of PHI. Now, providers must agree to patients’ requests to restrict disclosure of PHI to an insurance company if the patient paid cash for the service.

**Prohibition of sale of records**

Fourth, HITECH adds a brand new provision prohibiting providers from receiving payment in exchange for disclosing PHI to third parties, unless the patient signs a release specifically stating that such may occur. An important exception to this rule applies to the sale or merger of medical practices.

**Patient access to electronic health records**

Fifth and finally, HITECH adds a new provision requiring providers, if they maintain PHI in electronic form, to provide that PHI to the patient in electronic form if the patient so requests.

The five new requirements discussed above take effect on the following dates:

**Changes to HIPAA security**

The HITECH Act makes two major

Rule	Effective Date
• Minimum Necessary	Upon publication of regulations
• Disclosure Accounting	January 1, 2014 for electronic health records acquired as of 1/1/09; January 1, 2011 for electronic health records acquired after 1/1/09.
• Restriction Requests	February 17, 2010
• Prohibition on Sale of Records	August 18, 2010
• Patient Access to Electronic Health Records	February 17, 2009

changes to the HIPAA Security Rule, as discussed below:

**Technical safeguards**

First, under the old Security rules, no specific technical systems (hardware, software, etc.) was mandated, nor was any particular security safety technique. Now, the Department of Health and Human Services (DHHS) will be required, each year, to publish guidance on the “most effective and appropriate technical safeguards for use in carrying out the HIPAA security safeguards.” Although health care providers will not be required to follow these published guidelines, they will have to document their reasons for not doing so.

In essence, the published guidelines create a safe harbor if they are followed, but do not necessarily create liability if they are not followed.

**Notification to patients of breach of privacy**

Second, the HITECH Act creates a new requirement for providers to notify patients if the provider discovers a “breach” (i.e., unsecured disclosure) of PHI. Written notification to patients must be provided by first class mail. If the breach affects 10 or more patients whose contact information is not known to the provider, notification must be on the provider’s website (if it has one), or in major print or broadcast media. If the breach

involves more than 500 patients, notification must also be made to prominent news outlets in that state.

The above notifications must all be made within 60 calendar days after discovery. The notice must also contain the following information:

1. A brief description of how the breach happened, including the date;
2. The steps the patients should take to protect themselves from potential harm; and
3. A description of what the provider is doing to investigate the breach, mitigate its effect and prevent it from reoccurring.

*As a result, all existing business associate agreements needed to be revised by February 17, 2010, the date that this part of the HITECH Act went into effect.*

Providers must also give written notice to DHHS of all breaches, and must keep a log of all breaches, which must be submitted annually to DHHS.

It is critical to note that the above rules apply only to breaches involving “unsecured protected health information” (unsecured PHI). PHI will not be deemed “unsecured” (and thus will not invoke the rules above if there is a breach) if (1) it is encrypted or destroyed using approved methods, or (2) the health care provider uses the technologies and methodologies published by DHHS (see above discussion). This, obviously, is an additional reason to follow DHHS’s annual published guidance.

Business associates of providers must be required, through business associate agreements, to notify the provider of breaches of unsecured PHI. The provider, in turn, must then follow the rules discussed above in notifying the patient.

The rules discussed above took effect on September 17, 2009.

**Impact on business associates**

One of the most far reaching consequences of the HITECH amendments will be the extension of many of the HIPAA policy and security rules to business associates of providers. It should be recalled that “business associates” are generally those whom the provider pays to render a service to him/her, and that service involves access to PHI. (Examples include medical transcriptionists, lawyers, accountants, and computer (IT) consultants.)

Previously, business associates were not directly subject to HIPAA enforcement and the jurisdiction of the DHHS. Rather, their compliance obligations were created through contracts – business associate agreements. Now, however, the HITECH Act states that most of the HIPAA security rules will apply directly to business associates and such will be enforced by DHHS.

As a result, all existing business associate agreements needed to be revised by

February 17, 2010, the date that this part of the HITECH Act went into effect.

In addition, the HITECH Act makes some Privacy Rule requirements directly applicable to business associates as of February 17, 2010. For example, business associates who disclose PHI in a way that violates their business associate agreements, will be liable not only to the health care provider, but also to DHHS. The other new additions to the Privacy Rule, as added by the HITECH Act (see Section A, above) also will now apply directly to business associates.

### New enforcement provisions

A major criticism of HIPAA has been that it lacked “teeth” from an enforcement standpoint. This criticism had merit – published statistics show no fines or penalties imposed under HIPAA since its enactment.

The HITECH Act ups the ante on HIPAA enforcement in four ways.

First, the HITECH Act creates a tiered system of “civil monetary penalties” that can be imposed on providers who violate HIPAA. These penalties range from a minimum of \$100 per day up to a maximum of \$1.5 million. The provider’s intent and the number of violations will determine whether a penalty is imposed, and if so, the amount of the penalty. These new penalties took effect in February 2009.

Second, and significantly, if DHHS finds that a HIPAA violation resulted from “willful neglect,” it is mandatory that a penalty be imposed. Previously, all penalties for HIPAA violations were discretionary. “Willful neglect” will be defined in future regulations. A finding of willful neglect would likely be made against a provider who fails to have any type of HIPAA compliance program in his/her office. The new mandatory penalties will take effect February 17, 2011.



Third, the HITECH Act will now allow state attorneys general to investigate and enforce HIPAA violations. Previously, HIPAA was enforced solely by federal agencies.

Fourth, in the HITECH Act, Congress gave DHHS additional authority to audit health care providers to determine if HIPAA violations have occurred. It is unclear what will trigger such audits: in the past, there were audits only when a complaint was made, but the new law may lead to some random audits. This part of the law took effect on February 17, 2010.

### Implications for attorneys

Attorneys who represent health care providers will be impacted by the above-discussed changes to HIPAA in two major ways. First, they will need to be prepared to properly advise clients on HITECH’s new requirements. Second, attorneys who take on the role of Business Associates will now be directly regulated under HIPAA and will need to see that their of-

*Second, and significantly, if DHHS finds that a HIPAA violation resulted from “willful neglect,” it is mandatory that a penalty be imposed.*

fices are compliant with HIPAA’s requirements. This could prove to be an unanticipated and unwelcome aftermath of the HITECH amendments to HIPAA.

### About the Author

**J. Kevin West** is a partner in the Boise law firm of Hall, Farley, Oberrecht & Blanton, P.A., where he specializes in the areas of health law and employment law.

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## COURT INFORMATION

### OFFICIAL NOTICE SUPREME COURT OF IDAHO

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

#### 2nd AMENDED - Regular Fall Terms for 2010

Boise . . . . . August 23, 25, 27 and 30  
Boise . . . . . September 1  
Idaho Falls, Pocatello and Boise . . . . .  
September 22, 23, 24, 27 and 29  
**Boise** . . . . . **October 1**  
Coeur d'Alene, Moscow, Lewiston and Boise. . . . .  
November 3, 4, 5 and 8  
Boise, **Twin Falls**, and Jerome. . . . .  
December 1, 2, 3, 6 and 8

By Order of the Court  
Stephen W. Kenyon, Clerk

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

### Idaho Court of Appeals

#### Oral Argument for October 2010

##### Thursday, October 14, 2010 – BOISE

10:30 a.m. Kugler v. Maguire.....#36644

##### Tuesday, October 19, 2010 – BOISE

9:00 a.m. Dept. of H&W v. Doe.....#37746

10:30 a.m. State v. LeClercq.....#37191

1:30 p.m. State v. Kling.....#37322

##### Thursday, October 21, 2010 – BOISE

9:00 a.m. State v. Moran-Soto.....#36166

10:30 a.m. State v. Scott.....#37018

1:30 p.m. State v. Ray.....#36797

### Is It Your MCLE Reporting Year?

No one likes last minute scrambling for MCLE credits. If your MCLE reporting period ends on December 31, 2010 and you need more credits, visit the Idaho State Bar website at [isb.idaho.gov](http://isb.idaho.gov) for lists of upcoming live courses, approved online courses and audio/video rental programs. No need to wait until November or December to get the credits you need. Start working on it now. If you have questions about MCLE compliance, contact the MCLE Department at (208) 334-4500 or [jhunt@isb.idaho.gov](mailto:jhunt@isb.idaho.gov).

### Idaho Supreme Court

#### Oral Argument for October 2010

##### Friday, October 1, 2010 – BOISE

9:00 a.m. Laughy v. ITD and ConocoPhillips Company.....  
#37985/37994

#### Oral Argument for November 2010

##### Wednesday, November 3, 2010 – COEUR D'ALENE

8:50 a.m. Mussman v. Kootenai Co. (Industrial Commission) .....  
#36693

10:00 a.m. IDHW v. Jane Doe I (2009-19) (Petition for Review) ....  
#37707

11:10 a.m. Cheh v. EG&G Idaho, Inc. (Industrial Commission) .....  
#37081

2:00 p.m. Frank v. Bunker Hill Co. (Industrial Commission).....#34696

##### Thursday, November 4, 2010 – MOSCOW

8:50 a.m. Halvorson v. N. Latah County Highway District...#36825

10:00 a.m. Kennedy v. Schneider.....#36853

11:10 a.m. Eddins v. City of Lewiston .....#37209

##### Friday, November 5, 2010 – LEWISTON

8:50 a.m. Krempasky v. Nez Perce Co. Planning & Zoning...#36943

10:00 a.m. Collection Bureau, Inc. v. Dorsey.....#36734

11:10 a.m. Jones v. Starnes.....#37179

1:30 p.m. Coward v. Hadley.....#36981

##### Monday, November 8, 2010 – BOISE

8:50 a.m. State v. Skurlock.....#36818

10:00 a.m. State v. Moore.....#36578

11:10 a.m. State v. Howard III (Petition for Review).....#37627

### OFFICIAL NOTICE COURT OF APPEALS OF IDAHO

#### Chief Judge

Karen L. Lansing

#### Judges

Sergio A. Gutierrez

David W. Gratton

John M. Melanson

#### 3rd Amended - Regular Fall Terms for 2010

Boise . . . . . July 21

Boise . . . . . August 10, 12 and 19

Boise . . . . . September 8 and 14

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

**Idaho Supreme Court and Court of Appeals**  
**NEW CASES ON APPEAL PENDING DECISION**  
(Updated 9/1/10)

## CIVIL APPEALS

### DAMAGES

1. In a wrongful death case, does Idaho Code § 6-1603 impose a single cap on noneconomic damages on all heirs of a single decedent?

*Aguilar v. Coonrod*  
S.Ct. No. 36980  
Supreme Court

2. Did the trial court abuse its discretion by refusing to grant Boise Tire Company's motion for a new trial for the reason that the damages awarded by the jury were given under the influence of passion or prejudice?

*Carrillo v. Boise Tire Company*  
S.Ct. No. 37026  
Supreme Court

### DIVORCE, CUSTODY, AND SUPPORT

1. Did the district court correctly conclude the magistrate court erred in concluding as a matter of law that it lacked authority to hear the petition to modify visitation based upon a finding of criminal contempt?

*Rodriguez v. Rodriguez*  
S.Ct. No. 37375  
Court of Appeals

2. Did the trial court err in finding the parties' Amity property was burdened by a life estate and discounting the fair market value of the community property by an amount urged to reflect a discount for that life estate?

*Miner v. Miner*  
S.Ct. No. 37069  
Court of Appeals

### EVIDENCE

1. Did Mackay present substantial competent evidence to support a jury finding that the parties entered into a valid and binding oral contract of employment for a period of ten years or until such time as Mackay retired?

*Mackay v. Four Rivers*  
S.Ct. No. 35947  
Supreme Court

2. Whether plaintiffs failed to offer sufficient evidence of willful and wanton misconduct.

*Phillips v. Erhart*  
S.Ct. No. 36801  
Supreme Court

### INJUNCTIVE RELIEF

1. Did the district court err by dismissing Allied's claims against the Kootenai County Sheriff for failing to comply with Idaho Code § 6-610?

*Allied Bail Bonds, Inc. v.  
County of Kootenai*  
S.Ct. No. 36861  
Supreme Court

### LAND USE

1. Whether the court erred in finding Hettinga's use of the subject property was in violation of the Residential Agricultural zoning of the property.

*County of Twin Falls v. Hettinga*  
S.Ct. No. 37047  
Court of Appeals

### POST-CONVICTION RELIEF

1. Did the district court err when it dismissed Morgan's petition for post-conviction relief?

*Morgan v. State*  
S.Ct. No. 36411  
Court of Appeals

2. Did the district court commit any error in relation to McCabe's request for counsel?

*McCabe v. State*  
S.Ct. No. 36129  
Court of Appeals

3. Did the district court err when it summarily dismissed Gonzales's petition and denied his motion for appointment of counsel?

*Gonzales v. State*  
S.Ct. No. 36625  
Court of Appeals

4. Did the district court err by summarily dismissing Vasquez's claims of ineffective assistance of counsel?

*Vasquez v. State*  
S.Ct. No. 36687  
Court of Appeals

5. Did the district court err by summarily dismissing Field's successive petition for post-conviction relief and in finding that neither Field's new DNA evidence nor his new affidavits would probably produce an acquittal at trial?

*Fields v. State*  
S.Ct. No. 36508  
Supreme Court

6. Whether the court erred by summarily dismissing the petition for post-conviction relief without granting an evidentiary hearing on the claim of ineffective assistance of counsel.

*Lazinka v. State*  
S.Ct. No. 36854  
Court of Appeals

7. Did the district court err by summarily dismissing McClellan's ineffective assistance of counsel claim regarding failure to inform McClellan of possible defenses?

*McClellan v. State*  
S.Ct. No. 35205  
Court of Appeals

### PROCEDURE

1. Did the district court err in dismissing Lightner's prisoner civil rights complaint for failure to exhaust his administrative remedies?

*Lightner v. Tidwell*  
S.Ct. No. 36657  
Court of Appeals

2. Whether the district court erred in finding no defendant was served with process and in dismissing the complaint.

*Ullrich v. Hines*  
S.Ct. No. 37558  
Court of Appeals

### QUIET TITLE

1. Whether the court erred in denying the Caldwells the right to completely remove mature trees from the secondary easement area for the purposes of maintenance of the travelway and roadway.

*Caldwell v. Cometto*  
S.Ct. No. 37157  
Supreme Court

### STANDING

1. Whether the district court erred in dismissing the petition for writ of mandate on the basis the plaintiffs lacked standing.

*Bayes v. State*  
S.Ct. No. 37469  
Court of Appeals

### STATUTE OF LIMITATIONS

1. Whether the district court correctly dismissed Ford's action for professional malpractice as being time barred by the statute of limitations.

*Ford v. Kehne*  
S.Ct. No. 37235  
Court of Appeals

**Idaho Supreme Court and Court of Appeals**  
**NEW CASES ON APPEAL PENDING DECISION**  
(Updated 9/01/10)

**SUBSTANTIVE LAW**

1. Does City Ordinance 11-3H-1, et. seq., conflict with the provisions of Idaho Code § 40-301, et. seq. and Idaho Code § 67-6528, which provide that only the State can control access to the state highway system, render the ordinance void under the doctrine of field preemption?

*Wylie v. State*  
S.Ct. No. 37279  
Supreme Court

**SUMMARY JUDGMENT**

1. Whether the district court erred by entering summary judgment in favor of the Bagleys and in awarding the water share certificates to them.

*Bagley v. Thomason*  
S.Ct. No. 37487  
Supreme Court

2. Did the district court err as a matter of law when it concluded Sportsman's had no duty to warn business invitees of hazards located on the sidewalk in front of its store and near the entrance of its store?

*McDevitt v. Sportsman's Warehouse*  
S.Ct. No. 37244  
Supreme Court

**TERMINATION OF PARENTAL RIGHTS**

1. Whether the magistrate erred in concluding that the Department proved the existence of grounds for terminating the parent-child relationship by clear and convincing evidence.

*Department of Health & Welfare v. John Doe I*  
Docket No. 37828  
Supreme Court

2. Whether the court erred in finding sufficient evidence to terminate Doe's parental rights.

*Department of Health & Welfare v. Jane Doe*  
Docket No. 37770  
Court of Appeals

3. Whether the magistrate incorrectly required the natural parents to show that removing the guardian and granting custody to the natural parents was in the children's best interest, even though the circumstances giving rise to the guardianship had ended.

*John Doe II v. John Doe III*  
S.Ct. No. 37739  
Supreme Court

**CRIMINAL APPEALS**

**EVIDENCE**

1. Did the court err in allowing the state to present evidence of alleged prior bad acts of Sanchez occurring between 1993 and August of 2007, because the evidence was not relevant and was overly prejudicial?

*State v. Sanchez*  
S.Ct. No. 36474  
Court of Appeals

2. Did the court err when it admitted prior bad acts evidence against Truman?

*State v. Truman*  
S.Ct. No. 36194  
Court of Appeals

3. Did the district court err by allowing prior bad acts evidence to be admitted against Gomez?

*State v. Gomez*  
S.Ct. No. 35209  
Court of Appeals

4. Did the district court, in its appellate capacity, correctly conclude there was substantial competent evidence presented to establish for purposes of Idaho Code § 18-8004 that the parking lot in which Bulkley was arrested was private property open to the public and as such he was guilty of DUI?

*State v. Bulkley*  
S.Ct. No. 37112  
Court of Appeals

**PLEAS**

1. Did the court err in denying Bostick's motion to withdraw his guilty plea and dismiss his charge when Bostick admitted violating terms of his probation?

*State v. Bostick*  
S.Ct. No. 37065  
Court of Appeals

2. Did the district court abuse its discretion when it denied Smith's motion made before sentencing to withdraw his guilty plea?

*State v. Smith*  
S.Ct. No. 37243  
Court of Appeals

3. Did the court abuse its discretion in denying Thomas's motion to withdraw his guilty plea in which he alleged he had not been informed that his sentences could be run consecutively to a sentence he was already serving?

*State v. Thomas*  
S.Ct. No. 36947  
Court of Appeals

**RESTITUTION**

1. Did the court err in imposing restitution for the cost of the investigation?

*State v. Gomez*  
S.Ct. No. 36545  
Court of Appeals

**SEARCH AND SEIZURE – SUPPRESSION OF EVIDENCE**

1. Did the district court err in affirming the magistrate court's denial of Jacobson's motions to suppress and dismiss?

*State v. Jacobson*  
S.Ct. No. 36257  
Court of Appeals

2. Did the district court err when it denied Brian's motion to suppress because his due process rights were violated when he was coerced into confessing to officers involuntarily?

*State v. Draper*  
S.Ct. No. 34667  
Supreme Court

3. Whether the court erred in denying Emery's motion to suppress and in finding the search warrant was supported by probable cause.

*State v. Emery*  
S.Ct. No. 37171  
Court of Appeals

4. Did the district court err in granting Turek's motion to suppress evidence that was lawfully seized during a probation home visit?

*State v. Turek*  
S.Ct. No. 36596  
Court of Appeals

5. Did the district court err when it found there was probable cause to search Anderson's van and denied the motion to suppress?

*State v. Anderson*  
S.Ct. No. 36406  
Court of Appeals

6. Did the court err in holding the frisk of Crook after his detention was an objectively reasonable measure taken for officer safety and in denying the motion to suppress evidence found on his person?

*State v. Crooks*  
S.Ct. No. 37068  
Court of Appeals

**Idaho Supreme Court and Court of Appeals  
NEW CASES ON APPEAL PENDING DECISION  
(Updated 9/01/10)**

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*State v. Huckaby*  
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*State v. Reed*  
S.Ct. No. 37192  
Court of Appeals

**Summarized by:  
Cathy Derden  
Supreme Court Staff Attorney  
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Michelle R. Points  
*Idaho Delegate  
to ABA House of Delegates*

The 2010 Annual Meeting of the American Bar Association the ABA House of Delegates was held August 9-10, 2010 in San Francisco. This was my second meeting as the State Bar Delegate for Idaho. Also attending the meeting with me representing Idaho were C. Timothy Hopkins, who is a member of the ABA Board of Governors, and Larry Hunter, the Idaho State Delegate. For those of you who are not familiar with the structure of the ABA, the House of Delegates is the policy-making body of the association, and meets twice a year at the ABA annual and midyear meetings. The actions taken by the House of Delegates on specific issues become official ABA policy, allowing the ABA to thereafter lobby before Congress and the executive branch on the issues.

This annual meeting was historic. There is not enough space to write about everything that was discussed and voted on, so I will attempt to summarize the highlights from the meeting.

One of the first resolutions discussed and voted on by the House of Delegates was the adoption of the "ABA Model Access Act."

This was also referred to as "Civil Gideon" throughout the meeting. The Model Act contains legislative findings and a proposed "template" for jurisdictions to work from to establish and administer a system

to provide for the "fundamental right to counsel" to persons who cannot afford a lawyer in adversarial proceedings involving basic human needs, including shelter, sustenance, safety, health and child custody. The Model Act sets forth that in order for residents to enjoy fair and equal access to justice "when their basic human needs are at stake, the state government accepts its responsibility to provide them



Michelle R. Points

*The underlying premise of the Act  
is that fair and equal access to justice is  
a fundamental right in a democratic society.*

with lawyers at public expense." The underlying premise of the Act is that fair and equal access to justice is a fundamental right in a democratic society.

In the area of criminal law, resolutions were passed to urge federal, state, tribal and local governments to provide funding to state and federal public defender offices and legal aid programs specifically for the provision of advice to non-citizens regarding the immigration ramifications of criminal proceedings, to improve various forensic testing areas, and to provide funds and other resources necessary to assure that the accused in criminal cases can obtain testing or retesting of evidence and are provided with expert or other assistance when necessary to assure a fair trial. The House of Delegates also adopted a resolution urging federal, state and territorial governments to enact laws requiring that newly manufactured semi-automatic pistols be fitted with micro stamping technology to better enable law enforcement officials to identify the serial number of the pistol used in a crime.

Of interest to those who practice in the area of Medicare and Medicaid compliance, a resolution was passed that urges Congress to amend the Medicare, Medicaid and SCHIP Extension Act of 2007 to create a safe harbor provision precluding the assessment of civil penalties against responsible reporting entities that rely upon information verified by claimants regarding entitlement to or receipt of Medicare benefits.

In the area of civil rights, the House of Delegates passed a resolution urging state, territorial and tribal governments to eliminate all of their legal barriers to civil marriage between two persons of the same sex who are otherwise eligible to marry. Introducing the proposal, former ABA President Robert Grey argued that the fundamental issue was one of equal-

ity. "There was an era in which we as a nation needed to consider gender equality, equality for all races and equality for people with disabilities," he said. "Denial of civil marriage harms [same-sex couples] and their families, excluding them from critical legal protections married people take for granted." Although emotional at times, the debate on the resolution, in my opinion, was presented from the perspective of a practitioner representing same-sex couples, and the difficulties those practitioners face due to the legal barriers that affect their clients. The majority of the House of Delegates found that promoting the elimination of those legal barriers to be appropriate for the ABA to adopt as a policy for the association.

The Honorable Ruth Bader Ginsberg was presented with the ABA Medal of Honor for her "model of passion and civility" for her contributions to law and the professions. Justice Ginsberg's comments were soft spoken yet profound, particularly her discussion of the evolving role of women as the peer of man.

The ABA also swore in a new President, Stephen N. Zack. Zack is the ABA's first Hispanic President. In 1961 as a 14 year old, he and his family were detained in Cuba while attempting to flee. Separated from his family in his own cell, Zack explained that "the last thing I could have imagined was a day like today." It was a pretty emotional moment.

Zack went on to outline four core initiatives for his tenure as President of the ABA. The first was preservation of the justice system. Zack talked about the detrimental effects the financial crisis has had on the judicial system and that "closing courtrooms" prevents access to justice. Zack has put together a task force made up of judges and lawyers around the country to look at underfunding of the justice system and how the ABA can advance solutions to address it.

The second initiative addresses civic education. Zack explained that one of the great threats to self-governance is our society's lack of understanding about our government. By way of example he said: "Ask anyone 20 to 30 years of age who the judges on American Idol are and they can name them all. Ask them who the Justices of the Supreme Court are or what the three branches of government are and they don't know..." Civic education needs to be restored in public schools now. Zack described the ABA's new commission on civic education in the nation's schools which will draw on the talents of attorneys, judges and educators to "aggressively" promote civic education as a national priority and to create opportunities for innovative programs in schools throughout the county.

The third initiative addresses "critical legal issues affecting the fastest growing segment of our population" — Hispanic Americans. Zack described the newly appointed Commission on Hispanic Legal Rights, which is an advisory committee made of judges, attorneys, educators and community leaders who will identify so-

*Zack explained that one of the great threats to self-governance is our society's lack of understanding about our government.*

lutions to important legal issues affecting Hispanics — "issues that present barriers to full participation by Hispanics within the fabric of our nation."

The final initiative addresses disaster preparedness. Based on experiences from Hurricane Katrina, it was determined that a comprehensive crisis plan to address institutional, domestic and international disasters is needed. The example posed by Zack was "what would the ABA's response be ... if after a new terrorist attack the President suspended habeas corpus? Or if our legal and judicial systems were rendered inoperable due to destruction of courts, prisons and legal records .." Zack

described the ABA Special Committee on Disaster Response and Preparedness, which assesses the association's readiness and outlines resolutions to address key issues.

It was an inspiring meeting, and much good work was done.

#### **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.*



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## FEDERAL COURT CORNER

Tom Murawski  
*United States District  
and Bankruptcy Courts*

### Annual district conference and federal practice program

Just a reminder that the United States District and Bankruptcy Courts for the District of Idaho will hold its 2010 Annual District Conference and Federal Practice Program in Pocatello on October 22 at the Red Lion, and in Boise on November 5 at the Boise Centre. In Pocatello, "The Rule of Law: The Mediator's Perspective," will be the key address with guest speakers the Honorable N. Randy Smith of the Ninth Circuit Court of Appeals and Professor Francis McGovern from Duke University. In Boise, the key presentation will be "Abraham Lincoln - A Man of Ideas" with guest speakers the Honorable Stephen S. Trott of the Ninth Circuit Court of Appeals and Professor Allen Guelzo, Henry Luce Scholar, Gettysburg College. Professor Guelzo's presentation is provided courtesy of George Mason University School of Law, Arlington, Virginia. In addition to these key addresses, the Conference will include presentations



Tom Murawski



on Bankruptcy Law, Criminal Practice and Voir Dire in the 21st Century. Registration information is available on the U.S. Court's website at [www.id.uscourts.gov](http://www.id.uscourts.gov). The registration deadlines are: October 15 for Pocatello and October 29 for Boise. CLE credits will be available.

### Revision of electronic case filing (ECF) procedures

The District of Idaho is in the process of revising its Electronic Case Filing (ECF) procedures. Some of the expected changes are expected to include a revision of the current requirement for the filing of original hard copy signatures for all bankruptcy petitions, amendments, schedules and statements of financial affairs, the elimination in bankruptcy court of the

need to file sealed documents in paper format, the importance of creating a pdf directly from the word processor application and thereby minimizing the amount of scanned documents being electronically filed, various changes and updates in IT-related standards, such as the increase in the size of files capable of being sent electronically and changes in scanner settings and computer issues relating to Pay.gov. The final version the revised ECF Procedures adopted by the Court will be available on our website.

### About the Author

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

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## FINDING THE LAW WITH *FindLaw*

John Hasko

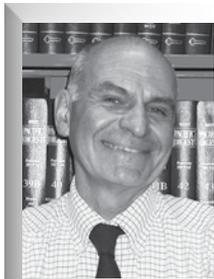
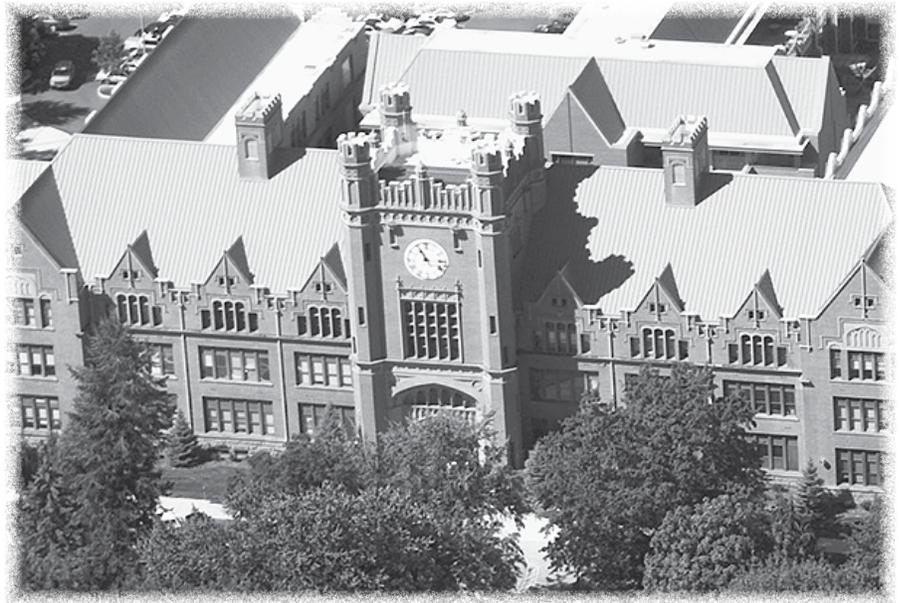
University of Idaho College of Law

One of the most popular free consumer law sites in the United States is FindLaw (<http://www.findlaw.com>). Launched in 1996, and owned by West Group, a subsidiary of Thomson Reuters, since 2001, FindLaw provides the person on the street with an informed introduction and explanation as to how the U. S. legal system operates. One can find discussions of such topics such as bankruptcy, health care law, employee rights, and starting a business. There are also links at the site to videos dealing with issues like divorce, medical malpractice, and the stages of a criminal case. Consumer blog posts on legal issues are also accessible, along with articles on current news dealing with the law (e.g., the BP oil spill and the Toyota recall lawsuits). Rounding out the sources of information for the public-at-large is a link, "Find Lawyers," to help them locate attorneys dealing with specific areas of the law operating in different geographic areas of the country.

While the major purpose of FindLaw is to create a more legally informed American public, it also provides information of special interest to the legal profession. Not very well displayed, but located at the top right corner of the FindLaw homepage, is a link, "Are You a Legal Professional? Visit our professional site." And, buried in a number of other links at the bottom of that homepage is a similar link, "For Lawyers: Visit our professional site." Using either of these links will bring you to a page that caters exclusively to attorneys.

Included in this section of the FindLaw database are some of the sources of information located in the consumer piece, such as the blogs and the articles on current legal issues. In addition, several research collections will make the life of an attorney much easier. Under "Browse Research Materials," there are three classifications:

"by Research Type" includes caselaw on both the federal and state levels.



John Hasko

United States Supreme Court coverage starts in 1893, while Ninth Circuit opinions begin in 1994, and Idaho Supreme Court and Court of Appeals decisions begin in 1997. The caselaw databases can be searched by party names, docket numbers, and free text. A unique feature of the caselaw databases is that links to the full text of each court's most recent opinions are displayed in reverse chronological order following the search choice options. Statutory and administrative codes on the federal and state levels are also included in the "by Research Type" category.

"by Jurisdiction" provides access to resources from all three branches of the Federal government, including links to agencies, boards and commissions, and indexes and guides to federal information. There are also links to materials from each of the states. For Idaho, for instance, in addition to the caselaw and codes included in "by Research Type," above, there are career resources, Idaho practice support (e.g., expert witnesses, process servers), and Idaho news and media. Included in "by Practice Areas" are primary and secondary sources about specific areas of law, and attorney advertising for those areas.

The listings under the category "Find an Expert," in addition to listing expert witnesses and process servers, have advertising for things like legal software, legal technology, and legal marketing. And, rounding out the professional page

*While the major purpose of FindLaw is to create a more legally informed American public, it also provides information of special interest to the legal profession.*

is a link to legal forms, which lists both free and for purchase forms.

While the primary materials available on FindLaw, especially the caselaw, is not as deep as what you would find on LEXIS or WESTLAW, there are several other sources of information available through the database that can be tapped into to enhance your practice. And the best thing is that access to this database is free.

### About the Author

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

# DONOR INTENT AND THE FAILURE OF THE HONOR SYSTEM

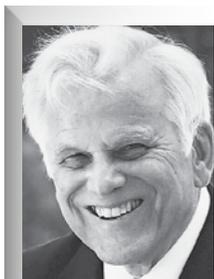
David L. Wilkinson  
Former Attorney General of Utah

“... [A]ssets declined an average of 28% in 2008.” No, not the assets of a Fortune 500 company. Rather, the assets of charitable foundations in the USA, according to a study by The Chronicle of Philanthropy.<sup>1</sup> This was the biggest drop of the past four decades. The loss to the nonprofit organizations they fund and to society is actually much greater due to the multiplying effect of the charitable dollar. (A study by The Philanthropic Collaborative calculated that the \$43 billion foundations distributed in 2007 generated identifiable social and economic benefits of \$368 billion.)

Americans are in the habit of giving generously to charity. The future? According to the Council on Foundations, the country’s philanthropic endowments could grow from their present \$500 billion to \$6 trillion by mid-century.<sup>2</sup>

Yet at a time when government resources are being stretched, government’s long-time partner from the private sector is also suffering. Charities have come under fire in the eyes of the most important Americans – those who contribute, which includes 65% of all households with family incomes below \$100,000. A 2007 survey showed that 59 percent of 3,040 respondents were more concerned than they were a decade earlier that their charitable donations were not getting to the people who need it the most; and 46% said they are more worried today about charity fraud or theft of funds or services.<sup>3</sup> Based on a recent survey of more than 1,000 foundations, the Foundation Center estimates an 8.4% drop in giving in 2009, the steepest yearly decline since at least 1975.<sup>4</sup>

But perhaps the most serious threat to the health of charitable giving, at least for large donors, arises from the decades-old controversy surrounding donor intent having come back to haunt us. One law professor begins a recent leading law review article on the subject: “The cat is out of the bag: donors are fast discovering what was once a well-kept secret in the



David L. Wilkinson

*Attorney General offices are not staffed to monitor how each charity administers its restricted gifts*

philanthropic sector – that a gift to public charity donated for a specific purpose and restricted to that purpose is often used by the charity for its general operations or applied to other uses not intended by the donor.”<sup>5</sup> In most states, the Attorney General is the only entity having standing to enforce such gifts. But in a great majority of states, including Idaho, Attorney General offices are not staffed to monitor how each charity administers its restricted gifts, leaving the charities for the most part on the honor system. The Uniform Trust Code, adopted in 23 states, but not Idaho, does give the settlor (donor) standing to enforce the restrictions in his own gift; but that is a small step forward since the settlor is usually dead before the gift’s administrator wants to divert the gift to another purpose. And case law is scant and mixed on whether standing is had by the settlor’s personal representative or by an heir.

## **Diversion from charitable purpose**

The honor system fails when the charity wishes to change the purpose for which the gift has been made on the grounds that conditions have changed since the donation was made. The law provides a way for the charity to legally do this, but only where pursuit of the original purpose has become “unlawful, impracticable, impossible to achieve, or wasteful.”<sup>6</sup> And only a court can sanction a change for which it must hold a hearing to which all interested parties, including the Attorney General, are invited. If the original purpose of the gift is found to no longer fit the new circumstances by the narrow definition, a new purpose may be ordered which is “as near as possible,” (cy pres, in French), to the original.

If the charity knows that no heir objects to whatever new purpose it has in mind, the temptation is great to forget about petitioning a court and going through what could be a time-consuming process easier to just make the change. The charity is on

its honor to go through the prescribed legal channels, but often does not. Or, in some cases, the charity makes the change without knowing that the law requires court approval, often relying for its authority, ironically, on the consent of the donor’s spouse or living children, even though they have no authority without court approval, to effect or consent to a change. In a recent case involving Trinity College, the administration gained the approval of several children and procured a letter from the donor’s 102-year old widow approving the change it wanted to make, but not spelling out that change differed from the donor’s desires. The widow later recanted her approval and the College abandoned its plan after being chastised by the Connecticut Attorney General for intending to stray from donor intent.

## **Robertson v. Princeton**

That donors are more aware today of what is being done with charitable gifts than they were previously is seen in the rash of lawsuits brought in the last decade. The most publicized recent case is the suit brought against Princeton University by children of Charles and Marie Robertson, heirs to the A&P grocery fortune. Filed in 2002 and settled several weeks before the scheduled trial date in early 2009, the case amassed almost a half million pages of internal documents in its court file and each side reportedly spent roughly \$40 million in legal fees before the prospect of spending millions more in a trial led the parties to settle. Princeton had to return to the family about \$100 million, but was allowed to keep an endowment fund of about \$600 million to \$800 million, which grew from the original \$35 million gift that was made in 1961. During the course of the trial, Princeton acknowledged using about \$800,000 improperly and returned that amount to the Robertson gift fund. Even today, the parties are fighting passionately over who got the better of the settlement, (most, but not all, observers

think it was Princeton), and who would have won. A score of articles have been written on the subject.

The *Robertson* case validates the claim by a philanthropy scholar that “no two words in the philanthropic and nonprofit world stir up more passions on all sides than the words ‘Donor Intent.’”<sup>77</sup>

### Surge in donor intent cases

Other major institutions caught up in recent donor-intent controversies most of them not involving a clash of ideologies, just the alleged misuse of donated funds – include Brandeis University, Florida State, the University of New Mexico, the University of South Dakota, Randolph College in Virginia (formerly Randolph-Macon Woman’s College), Trinity College, Vanderbilt University, Fiske University, St. Olaf College, UCLA, USC, and the Metropolitan Opera. A suit closely watched is the one brought against Tulane University by two distant heirs of Josephine Louise Newcomb whose 1886 gift of \$100,000 and later donations established a stand-alone women’s college at Tulane which the University, in the wake of Hurricane Katrina, sought to fold into one unified college. A key issue is whether under Louisiana law “would-be heirs have standing to sue to enforce conditions in a will or gift.”

Gift restrictions have always been a component of charitable gift planning. Two philanthropy scholars note, however, that “...while gift restrictions are not new, the increasing number of lawsuits filed by donors and their families to enforce gift intent represent an alarming recent trend.”<sup>78</sup> Matching the increase in lawsuits is the proliferation of online articles, comments, and two-way discussions on the subject.

### Essential to hire a lawyer and other professionals

As one makes his/her way through this burgeoning body of literature, one notices a common characteristic. Every written piece assumes that the donor will be represented by counsel, from the initial gift instrument through all the stages the gift may wend its way. It is inconceivable to these dozens of veteran practitioners and academics that a donor would consider making a six-figure or more gift to charity without seeking continuing assistance from experienced philanthropy professionals.

One gains an understanding of why this is so from reading the many horror stories where innocent donors feel cheated or shortchanged in some way in their

*A key issue is whether under Louisiana law “would-be heirs have standing to sue to enforce conditions in a will or gift.”*

attempts to have their donations managed in the way they wish. “Perhaps the most common and emotionally painful risk that philanthropists face,” according to a prolific author on the subject, “...is the violation of donor intent. ... When donor intent is flagrantly violated it is something akin to a total loss for the ‘philanthropic investor’.”<sup>79</sup> There are many ways a simple restricted gift can go wrong. One early way is in the structuring, and wording, of the gift in the gift instrument. The charity’s representative has been trained to persuade the donor to make the gift unrestricted. He knows a number of ways in which this objective can be achieved. The representative may be himself law-trained. If not, there is a lawyer to back him up. For a donor to wade into negotiations over his intended gift without separate representation is asking for heartache down the road.

### Danger in relying on charity’s counsel

It is understandable that a donor, having warm feelings toward the charity to begin with, would also favorably view the lawyers and accountants working for the charity. The donor might be excused for thinking that the charity’s counsel and accountants would always be on the lookout for wrongdoing on the part of the charity. It cannot be assumed, however, that the charity, through its legal department, will be neutral in seeing that its gift administrators observe donor intent. Its lawyers are being paid to support the gift administrators, not to protect the unrepresented donor. Their legal advice will be oriented toward achieving the result desired by the charity, not toward applying the law to the facts regardless of where that may lead. That the law firm representing the charity is large and established is no guarantee it will not seek to color its legal advice in favor of the source of its fees. As for the charity’s accountants, their objectives will be different from the interests of the donor.

### Need for other professional advice

For a restricted gift which will require extensive accounting by the gift’s administrator, a donor may need the advice of an accountant, both in planning and executing the restricted gift; and, in checking on the periodic accounting statements usually provided by the charity.

The larger the gift, the greater may become the need for a professional investment advisor. Charities which administer multiple restricted gifts/trusts may wish to manage for investment purposes the different funds in a single all-purpose investment account (although the law requires that separate records and separate banking and other accounts be kept). The donor’s intent may call for more liquidity, or more income vs. capital appreciation, than the charity’s single account will provide. Finally, there are always tax considerations requiring tax expertise.

The charity of course would prefer to do business with the donor alone. But giving money away is hard and tricky work and should not be undertaken alone. A donor will naturally have warm feelings about his intended charity or he would not have chosen it. But caution should temper those feelings.

### Protecting one’s gift from future diversions

First and foremost, it is essential that the donor and charity freely communicate with each other at all phases of a restricted gift and that both understand what the expectations of the other are. It is crucial that the parties agree to any restrictions before the instrument is drafted.

A traditional way to prevent the charity from diverting the gift away from the purpose stated in the deed instrument, even to use the money in opposition to that purpose, is to write into the deed instrument a reverter clause, providing that if the charity no longer applies the gift as the donor intended, the gift reverts to another charity, or is to be used for another purpose chosen by the donor.

Some charitable gifts are structured so that a small board of trusted friends who share the same charitable vision as the donor are invested with the sole ability to change the purpose for which the gift is to be used. That way the charity cannot invoke the *cy press* doctrine in order to apply the gift to its new favored purpose.

Many other tricks to outfox the charity, of varying degrees of complexity, have been developed by resourceful professional advisors. But a donor who wishes to use one of those tricks without assistance from counsel is taking an unnecessary risk.

The donor traditionally wishes to have his gift exist "in perpetuity." But that is the feature of restricted gifts most galling to charities. As John D. Rockefeller said, "Perpetuity is a long time." And charities lose patience with gifts which can never be changed. More and more scholars advise donors to forget about making perpetual gifts except for those to museums. They accept as reality that donor intent inevitably erodes over time.

Some sophisticated philanthropists, such as Warren Buffet and Bill Gates, take a pragmatic approach and do not provide

that the gift be in perpetuity. Instead they select a duration, such as 75 years, which they calculate will be long enough to accomplish their philanthropic goal and at the same time weaken any petition for a substituted purpose filed by the charity pursuant to the *cy pres* doctrine.

They thus increase the probability that the fund they created will be distributed in the way they will have set forth in the gift instrument, not the way a judge decides after a free-for-all hearing, which could last months.

### Conclusion

Not all charities, of course, are as intent on pursuing their own agenda as the above text may suggest. But enough are that a donor wishing to have his money used according to his wishes, after engaging professional assistance, should interact with every charity at arms length and plan the gift so as to retain control of it after his death. This is particularly true of gifts to higher education, a chronic violator of donor intent. Meanwhile, state legislatures need to address the woeful lack of enforcement mechanisms,

a situation which currently encourages charities to further mock the broken-down honor system.

### About the Author

**David L. Wilkinson** served as the elected Utah Attorney General for two terms from 1981-1989. In that capacity he learned of the problems a state attorney general has in enforcing charitable trusts. He now is retired and resides in Buena Vista, Virginia.

### Endnotes

- <sup>1</sup> New York Times Op-Ed, February 23, 2009
- <sup>2</sup> Opinion, USA Today, May, 2008
- <sup>3</sup> Contribute Magazine/Harris Interactive survey. The Washington Times, September 28, 2008
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- <sup>7</sup> Curtis W. Meadows, Jr., Director, RGK Center for Philanthropy and Community Service, Lyndon B. Johnson School of Public Affairs, University of Texas at Austin, November 22, 2002
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# THE FIRST 50 MEN IN IDAHO LAW

Debora K. Kristensen  
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In 2005, I authored a book entitled *1895-1975: The First 50 Women in Idaho Law*, summarizing the personal and professional histories of the first 50 women admitted to practice law in Idaho. Ever since, people have asked me to do something similar for the first 50 men to practice law in Idaho. This article – while not as detailed as my previous book – identifies the first 50 men admitted to practice

law before Idaho's Territorial Supreme Court. In particular, it highlights the accomplishments of the first two lawyers admitted to practice in Idaho – Hartwell Lytton Preston, a Harvard graduate from Ohio, who was an outspoken

anti-slavery activist and successful lawyer; and Edward J. Curtis, a Princeton-educated lawyer, who served Idaho in many capacities, including as its long-serving and much beloved Secretary of the Idaho Territory. The remaining “first 50” men – including Idaho's first (serving) U.S. Attorney, Boise's first mayor and delegates to Idaho's Constitutional Convention – are also identified and discussed.

## In the beginning: Creation of the Territory of Idaho

The Idaho Territory was organized by Act of Congress on March 3, 1863, out of portions of Washington, Utah, Nebraska, and the Dakota Territory. This Act vested the judicial power of the Territory in a Supreme Court, district courts, probate courts, and justices of the peace.<sup>1</sup> The Act also provided that the Supreme Court should consist of a Chief Justice and two Associate Justices, appointed by the President of the United States for a four year term. The Territory was divided into three judicial districts.<sup>2</sup> In addition to serving on the Supreme Court, each justice was required to “ride circuit” as a district court judge in one of the three judicial districts.

On March 10, 1863, seven days after the organization of the Territory, President Abraham Lincoln appointed Idaho's first members of the Territorial Supreme Court: Aleck C. Smith and Samuel C.



Debora K. Kristensen

*These men were not chosen so much for their legal ability, as their political party affiliation (Republican) and close personal ties to President Lincoln.*

Parks were appointed as Associate Justices, and Sidney Edgerton was appointed Chief Justice. These men were not chosen so much for their legal ability, as their political party affiliation (Republican) and close personal ties to President Lincoln. None of them was from Idaho.

## Members of the Territorial Supreme Court

Aleck Smith was born in Jacksonville, Illinois around 1838 and traveled to the

Washington Territory in the 1850's where he served for a short time as a prosecuting attorney. There, he met his future wife, the daughter of the surveyor-general of the Washington Territory, Anson Henry, and one of President Lincoln's closest

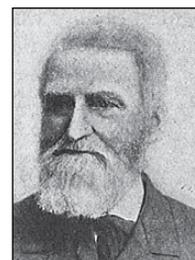
friends. Henry was instrumental in the creation of the Idaho Territory and in getting his son-in-law appointed to the bench. Smith was only twenty-five at the time of his appointment and was assigned to cover the First District by Governor William Wallace. Inexperience and his reputation for hard-drinking led to Smith's removal from office in 1866.

Samuel Parks was a close personal friend of President Lincoln as the two had practiced law in the same Illinois courts years before. Parks's educational and legal credentials were stronger than those of Smith and Edgerton. He had a bachelor's degree from Indiana University, he studied law between 1838 and 1839, and had a master's degree from Illinois College. Parks administered the oath of office to the first Idaho Territorial Legislature on December 7, 1863. Governor Wallace assigned the Second District to Parks

who, in the absence of Justice Smith, held a special term of court in Lewiston in January 1864 for the high-profile trial of Lloyd Magruder's murderers. Shortly thereafter, Justice Parks convened the Territory's first term of a district court in Idaho City on February 23, 1864. After issuing a venire for thirty-six jurors and admitting a number of attorneys “having shown to the court that they had been admitted in other states and territories,” Justice Parks addressed those in his courtroom on that historic day:

To some, and perhaps to a considerable extent, the property, the liberty and the lives of many men depend upon my action in this court. I do not think that a judge can always decide aright; I know that I cannot. All that I promise is that to the best of my ability I will discharge the duties incumbent upon me, and by so doing strive to secure the confidence of the bar and of the people. . . Amid the difficulty and embarrassments of an untried position, of an unfamiliar practice and heavy responsibility, I rely for success much upon your assistance and generosity. In some degree my reputation depends upon the result of this court; if it shall not succeed, I am sure the fault will not be yours. Hoping that it may not fail, and that the just expectation of the community may not be disappointed, I enter upon the discharge of the duties of the office assigned me.<sup>3</sup>

In April 1864, Parks returned east for a three-month leave of absence, later extended to four months because of faulty



Justice Samuel Parks

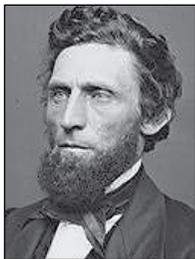


Justice Aleck Smith

stage service.<sup>4</sup> Parks finally returned to Idaho in August 1864, but left for Illinois again in the fall when one of his children died. Parks resigned from the Territorial Supreme Court shortly thereafter. His successor, Justice Milton Kelly, was appointed on April 17, 1865.

Chief Justice Sidney Edgerton, Idaho's first Chief Justice, never performed an official act while on the Court. Edgerton was born in Cazenovia, New York in 1818. He attended country schools during his childhood and later the Genesee Wesleyan Seminary in Lima, New York. In 1844, he moved to Ohio and began working in the law office of Congressman Rufus P. Spaulding, while teaching for an academy in Tallmadge, Ohio.<sup>5</sup> He studied law and graduated from the Cincinnati Law School in 1845. In 1846, Edgerton was admitted to the Ohio bar and began practice in Akron, Ohio. In 1848, he married Mary Wright and was a delegate to the convention that formed the Free Soil Party. Edgerton was a successful lawyer, serving as prosecuting attorney of Summit County, Ohio from 1852 to 1856, whereupon he was nominated to be a probate judge (which he declined). Instead, Edgerton, who was an outspoken abolitionist, served as a delegate to the first Republican National Convention in 1856. Later, he served in Congress from 1858-1864 and as a colonel for the Union Army during the Civil War. At the time of his appointment to the Supreme Court in Idaho, Edgerton was a lame-duck congressman from Ohio.

Idaho's first territorial Governor, William H. Wallace, assigned Edgerton to the Third District, then composed of present-day Montana and eastern Wyoming. When Edgerton set out for Idaho, he was turned back by the snow in the Bitterroot Mountains (and the fact that his wife was pregnant). As explained by Bradley B. Williams in "Idaho's First Territorial Judges": "Stuck in what was to become Montana, Edgerton began working for the creation of that territory out of Idaho. Edgerton resigned before he heard a single case on the Idaho bench in order to accept his next appointment in 1864, governor of Montana Territory."<sup>6</sup> His successor, Silas Woodson, was appointed on July 28, 1864, but also failed to qualify and enter on the duties of the Chief Justice. Thus, on February 14, 1865, Chief Justice John R. McBride<sup>7</sup> was appointed to succeed him.



Sidney Edgerton

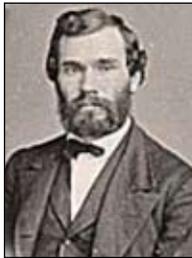
*The first order of business was to admit H. L. Preston as an attorney and counselor of the Court. Mr. Preston thereby became the first person admitted to practice law in Idaho.*

### First session of Territorial Supreme Court

Convening a full Supreme Court proved as difficult as appointing each of its members. The first session of the Territorial Supreme Court was scheduled to convene at Lewiston (the territorial seat of government at the time) on August 1, 1864. However, because no justices were present, Court was adjourned from day to day by the Sheriff until August 8, 1864 when Justice Smith was present, and, even then, adjourned until December 4, 1864.

On December 4, 1864, the Supreme Court convened at Lewiston with Justice Smith in attendance. Once again, a quorum could not be reached so Court adjourned "until the next regular session unless sooner convened by law." No term of the Territorial Supreme Court was held during 1865. Although an attempt was made to hold a term in January 1866, only Justice Kelly was present and, therefore, he adjourned Court to May 14, 1866. On that day, Court was opened; however once again, only one justice was present and Court was adjourned from day to day until May 30, 1866. On May 30, 1866, Chief Justice McBride was present, but no court business was done.

On May 31, 1866, Chief Justice John R. McBride, Justice Milton Kelly and Justice Aleck Smith, sat together for the first time and convened Idaho's Territorial Supreme Court in Lewiston.<sup>8</sup> The first order of business was to admit H. L. Preston as an attorney and counselor of the Court.<sup>9</sup> Mr. Preston thereby became the first person admitted to practice law in Idaho.



Chief Justice John R. McBride

### H.L. Preston – First attorney admitted to practice in Idaho

Hartwell Lytton ("H.L.") Preston was born on June 20, 1821 in Campbell Coun-

ty, Virginia on a small farm his parents owned about 6 miles west of Lynchburg. Preston was the ninth child in a family of sixteen. His parents, Peter and Abi Hole Preston, were anti-slavery Quakers who moved to a farm near Hanoverton, Ohio in 1825. It is believed that Preston attended and graduated from Harvard.



Hartwell Preston

In 1845, Preston was a teacher in southern Ohio at Fort Soakum. There, he joined with other early anti-slavery activists and the Underground Railroad. Soon, it "became known that [Preston] was a prominent anti-slavery man, and he had the manhood to declare his sentiments in public."<sup>10</sup> Preston regularly lectured on the subject of slavery and, on one particular night, aroused the anger of a mob who "all full of whiskey and with their best and only arguments, rotten eggs and scandalous and blasphemous language . . . took possession by force and besmeared the school room, books and many ladies dresses with rotten eggs, and gave Mr. Preston more than his share."<sup>11</sup> These types of incidents only seemed to harden Preston's resolve to speak out against slavery. Preston began traveling around the countryside to lecture against slavery. Indeed, according to the 1850 Census, Preston was engaged as a "Free Soil Lecturer" – he traveled around the country, advocating the political view that any new states admitted to the union not be allowed to hold slaves.

By 1854, Preston's travels had taken him to Crescent City, California where he began the practice of law and became a noted criminal lawyer. He continued his anti-slavery lectures and was very involved in politics. In 1853, Preston was appointed chairman of the Crescent City Democratic County Convention. In 1855, Preston's brother, Lindley Murray Pres-

ton, joined him in Crescent City to practice law. Preston continued to practice law and remained involved in local politics in California until 1863, when he and others in Crescent City organized a Union League to support the government in combating the southern rebellion. Although there is no record that Preston ever served in the military, he is often referred to as “Colonel Preston” after the Civil War.

In 1866 – three years after Idaho was admitted as a territory – Preston made his way to Idaho, presumably to continue his anti-slavery lecturing. On May 31, 1866, Preston was admitted to practice law in Idaho – becoming the first lawyer admitted to practice before the Idaho Territorial Supreme Court. Preston practiced law with J.B. Rosborough through approximately 1873. In 1870, Preston lived and worked in Silver City.

In April 1872, Preston – perhaps weary of traveling on the lecture circuit – and his brother purchased a vineyard near Cloverdale, California with the purpose of retiring there to grow grapes. After tying up his practice in Idaho, Preston moved to California in October 1872. The local paper reported the event:

H. L. Preston came down on Thursday from Idaho City where he had been to settle up the Vantine estate, and left Saturday morning for Silver City. He will travel thence to San Francisco where he will make his headquarters. He and his brother have purchased a vineyard in Sonoma County. Between the vineyard and the practice of his profession in San Francisco, we take it the Colonel will engage his time pleasantly. We are sorry to spare him from Idaho, but he has our best wishes wherever he may be.<sup>12</sup>

Preston practiced law in San Francisco from 1874 to 1876. During this time, he met Emily Lathrop Appleton Burke. Emily was well known and had a busy (unlicensed) practice as a spiritual leader and healer who prescribed her own home-brewed remedies and concoctions. They were married on May 30, 1875 and moved to the property near Cloverdale in 1877 or 1878 with plans to retire. But retirement proved difficult for Emily because her patients followed her seeking treatment. Concluding that it was God’s will that she continue to work, the Prestons built a hospital and medicine house for Emily’s practice and devoted followers were allowed to build houses on the Preston land. The Prestons held church services in their home and Preston gave spiritual lectures

*Curtis urged legislators to devote their attention to correcting inconsistencies in existing laws rather than the enactment of new ones.*

in the meeting house. Emily professed to be able to “read the words of God written on walls of light” and would present these messages to their assembled group. Preston fully endorsed his wife’s calling and believed in the divine inspiration for her gifts. The Preston ranch grew and became known as the Preston community. Both H.L. and Emily were highly respected in Sonoma County.

Preston died at the age of 69 on December 12, 1889 in the town that came to bear his name, Preston, California.

### **Remaining “First 50” Men admitted to Idaho Supreme Court**

During 1866, the Territorial Supreme Court admitted a total of twenty-nine attorneys to practice law in the territory. Some of them include:

2. Edward (“Ned”) J. Curtis (admitted on May 31, 1866). Curtis was born in Worcester, Massachusetts in 1827. After graduating from Princeton University in 1848, Curtis went to Boston and studied law under the celebrated jurist Rufus Choate. While there, he received news of the discovery of gold in California and decided to head west, arriving in San Francisco in 1849. After a short time seeking gold, he resumed his legal studies with Judge Chipman in San Jose and Judge Murray in Sacramento. In 1851, he became the editor of the newspaper in Yreka and was twice elected to the Legislature from Siskiyou County. In April 1856, he was admitted to the California bar and began practice in Weaverville. Curtis also served as judge of the Court of Sessions in Trinity County for two years.

In 1856, Curtis married Susan L. Frost, a popular school teacher in Sacramento. They were the parents of five chil-

dren. Their eldest, Edward L. Curtis, later served as Secretary of the Territory and Acting Governor (like his father) and register of the land office, until his early death in 1890. Their remaining children were Anna, William R., John J., and Henry C. Curtis’s oratory skills were unmatched, as exemplified by his being elected to the Oregon legislature after a brief stop in southern Oregon on his way to the Willamette Valley in 1856. Curtis heard that a democratic convention was being held there and dropped in to the hall where he met a friend who asked him to make a speech. Curtis complied and “so electrified the convention that although a non-resident, and really a republican in politics, he was nominated for the Legislature, stopped over and made the campaign, was elected and served the term.”<sup>13</sup>

At the outbreak of the Civil War, Curtis was commissioned as a second lieutenant by Governor John L. Downey, in a company of the Second Brigade of California volunteers, but his command was never ordered to the front. When his property in Weaverville, California was destroyed by a flood, he moved to Virginia City, Nevada where he formed a law partnership with Thomas Fitch.

In 1864, Curtis traveled to Idaho with Richard T. Miller and Hill Beachy<sup>14</sup> and set up a practice with Miller in the new and prosperous mining camp of Silver City. Curtis was admitted to practice before the Territorial Supreme Court of Idaho on the first day it convened, May 31, 1866. Thereafter, on July 1, 1868, Curtis’s law partner – Miller – was appointed as one of the Associate Justices of the Idaho Territory.

On May 4, 1869, Curtis was appointed Secretary of the Territory by President Grant, whereupon he moved to Boise. Under Idaho’s Organic Act, the Secretary of the Territory acted as Governor whenever a vacancy existed in the Governor’s office or the Governor was absent. Given that the first few men appointed as Governor of the Idaho Territory failed to take



Edward J. Curtis

the office (e.g., Gilman Marston, Alexander H. Conner, and Thomas M. Bowen), Curtis had the distinction of holding the office of Governor longer than any of them (although never appointed to such office). One of Curtis's first acts as Secretary was to take steps to establish a working state library and, in a message to the Idaho Legislature on December 8, 1870, Curtis urged legislators to devote their attention to correcting inconsistencies in existing laws rather than the enactment of new ones.

In 1874, Curtis (as Secretary of the Territory) was directed by the legislature to compile the laws of Idaho, both general and special, from first to seventh sessions, inclusive. The legislature further instructed him to have 300 copies printed and distributed, provided Congress would make an appropriation to pay the expense of publication and distribution. Curtis compiled the laws as directed, but it appears that Congress failed to make the necessary appropriation for the printing. Curtis offered his manuscript to the eighth legislature for \$3,500. This offer was accepted and the legislature ordered territorial warrants to be issued in payment thereof. Before the end of the session, however, members of the legislature concluded that Curtis's compilation was not sufficiently complete and, therefore, passed an act creating a board of three members, to serve without pay, to make a thorough code revision. An appropriation of \$1,400 was made to cover the cost of printing the revised edition and the board was authorized to include all acts from the eighth session of the legislature, although not all of the acts of that session were included for some reason.

Curtis was appointed a delegate to the Republican National Convention in 1872 and served as Adjutant-General of the Territory at the time of the Indian War in 1877-1878, whereupon he secured several peace treaties with "hostile chiefs" in southern Idaho. Given his "excellent record," President Chester Arthur appointed him as Secretary of the Territory in February 1889 "entirely without solicitation on the part of Judge Curtis, and even without his previous knowledge."<sup>15</sup> Curtis was reappointed by President Harrison in February 1889, holding the office until the state was admitted. From 1890-1893, Curtis served as Adjutant-General for the newly-formed State of Idaho.

Early lawyers in the Idaho Territory were known for their vast book collections, which were sometimes loaned out. Curtis was no exception, being the proud owner of a valuable law library that was,

***Curtis served as Adjutant-General of the Territory at the time of the Indian War in 1877-1878, whereupon he secured several peace treaties with "hostile chiefs" in southern Idaho.***

unfortunately, destroyed by fire in 1882. Undaunted, Curtis continued to advocate for libraries, traveling to Washington, D.C., to secure a \$5,000 appropriation to establish the Idaho Law Library. In addition, he donated a book collection in 1886 to start the territorial penitentiary's first library.<sup>16</sup>

After Idaho became a state, Curtis went back to the practice of law for a short time until his death on December 29, 1895. Governor Hawley referred to "Governor" Curtis as "one of the most distinguished members of the early Idaho bar."<sup>17</sup> He is buried in Boise's Pioneer Cemetery.<sup>18</sup>

14. George Ainslie (admitted on June 6, 1866). Ainslie was born on October 30, 1938 in Boonville, Missouri. Shortly thereafter, his family moved to Scotland until 1844 when they returned to Missouri. Ainslie attended St. Louis University in 1856 and 1857 and graduated from the Jesuit College at St. Louis with a law degree and was admitted to the Missouri bar in 1860. Ainslie practiced law briefly in Boonville, Missouri but moved to Colorado in 1860. In 1862, Ainslie moved to Elk City, Idaho to mine. One year later, Ainslie moved to Idaho City.



George Ainslie

Ainslie married Sara Owens on March 27, 1866 in Boise, and was admitted to practice in the Territory of Idaho on June 6, 1866. Ainslie practiced with R. E. Foote in Idaho City, mined, and edited the *Idaho World* newspaper (1869-1873). He was elected to serve as a member of the Territorial Council (1865-1867) and as district attorney for the Second District from 1874 to 1876. In 1878 Ainslie was elected as the territorial representative to Congress, but was defeated for re-election in 1882. Given his political involvement and service as Chairman of the Democratic Party, Ainslie was elected to the Idaho

Constitutional Convention as a delegate from Boise County. According to Dennis Colson in *Idaho's Constitution: The Tie That Binds*, "Ainslie was an important spokesman for the Democratic caucus at the constitutional convention, even though he was more highly regarded for his writing than speaking. He was chosen to author the address encouraging the adoption sent by the convention with the constitution." Thereafter, Ainslie continued his active involvement with the Democratic Party and served on the national Democratic committee from 1896 to 1900.

Ainslie moved to Boise in 1890 where he worked to form the Boise Rapid Transit Company and the Artesian Hot and Cold Water Company. He was vice-president of the Artesian Water Company for 10 years and served as one of its directors until 1902. Ainslie and his wife had two children, Lucy and Adelma. Ainslie moved to California in 1908 and died in Oakland, California on May 9, 1913.<sup>19</sup>

22. Samuel A. Merritt (admitted on June 11, 1866). Merritt was a successful lawyer and politician prior to moving to Idaho and is perhaps best remembered as the last man to serve as Chief Justice of Utah's Territorial Supreme Court.

Merritt was born in Staunton, Virginia on August 15, 1827. He attended the Staunton Military Academy and graduated from Washington College (now Washington and Lee University) in Lexington, Virginia, in 1848. Merritt moved to Mariposa County, California in 1849 and served as county clerk and public administrator in 1850. He served as a member of the California State Assembly in 1851 and 1852, representing Mariposa and Tulare counties. Merritt studied law and was admitted to



Samuel Merritt

the California bar in 1852, when he began practicing. He continued his public service, being elected to the California State Senate in 1857-1862.

In 1862, Merritt moved to the Territory of Idaho and was admitted to the Idaho bar on June 11, 1866. As he did in California, Merritt continued to be involved in politics (as a Democrat). Merritt served as a delegate to the U.S. House of Representatives from the Territory of Idaho from March 4, 1871 through March 3, 1873. However, after losing his bid for re-nomination, Merritt moved to Salt Lake City, Utah and engaged in mining operations and the practice of law. There, Merritt continued to pursue his interest in politics, serving as city attorney from 1888-1890 and as a member of the Democratic National Committee in 1892.

Given his prominence in the bar and in democratic politics, U.S. President Grover Cleveland appointed Merritt to serve as Chief Justice of the Supreme Court of the Territory of Utah in January 1894. He held that position until Utah's statehood in 1896. Merritt died in September 1910 at the age of 83.<sup>20</sup>

25. Henry E. Prickett (admitted on June 14, 1866). Prickett was born in England in 1839 and lived with his wife Martha and daughter Ida in Black River Falls, Wisconsin. In the 1860's, he served one term in the Wisconsin state legislature before moving his family west to Idaho City, then to Boise in 1865.



Henry Prickett

On June 14, 1866, Prickett was admitted to practice before the Territorial Supreme Court of Idaho. Prickett worked as a lawyer in Boise on tax matters and eventually opened a law firm with Joseph Miller – Miller & Prickett.

Prickett may be best remembered as the first mayor of Boise, but that distinction came about in an unusual way. On December 12, 1864, the Idaho legislature incorporated "Boise City" and required its residents to approve a city charter. In the election of March 21, 1865, the charter failed by twenty-four votes. On January 11, 1866, the charter again failed – fueled by anti-government sentiment of its residents. The legislature forced the issue by stipulating that a temporary mayor and council be named in the next charter. On May 7, 1866, the mayor-elect and newly-

*In January 1868 – just two months after taking office – Prickett resigned as mayor of Boise, having successfully started the city's form of government.*

elected city council refused to take the oath of office, having run against the charter previously. On January 21, 1867, the "anti-charter" party easily won, but city officials refused to organize. Eventually, the threat of losing land convinced the voters of Boise to approve a city charter (e.g., without a municipal government, it was difficult for Boise residents to secure title to city lots). Thus, the citizens of Boise "grudgingly" approved a commission form of city government in 1867 – although anti-charter leaders still refused to participate. Indeed, mayor-elect L. B. Lindsey refused to take the oath of office, leaving city leaders without a mayor.

By 1867, Prickett had become a distinguished member of the Boise community, being a practicing attorney with political experience. Accordingly, city leaders asked Prickett to step into the role of mayor of Boise when Lindsey refused to do so. Prickett accepted this appointment and was sworn into office in the chambers of Judge John Cummings, thus becoming the first mayor of Boise.

Prickett's first day in office was November 18, 1867, and his first official act as mayor of Boise was to establish a "Town Site Fund" for the purpose of running the city. The city council authorized Prickett to solicit up to \$600 in loans in order to pay for basic improvements. In January 1868 – just two months after taking office – Prickett resigned as mayor of Boise, having successfully started the city's form of government. Prickett returned to his law practice in Boise and later ran unsuccessfully for the territorial council of Ada County. Despite this election setback, Prickett was rewarded for his efforts with an appointment to the Territorial Supreme Court as Associate Justice on January 19, 1876.

On December 28, 1880, the Territorial Legislature passed an act, authorizing the publication of a volume which "shall contain all the decisions for the court from its organization to the present time." Previously, a small volume of de-

isions from 1867 had been published and called "Volume 1 of Idaho Reports." But, those decisions were out of print and hard to find. The Legislature authorized the publication of the Supreme Court's decisions "because the public interests and the spirit of public discussion and of freedom of inquiry require that everything that so closely concerns the community should be known and understood." 1 Idaho iii (1904). To distinguish the new reports from the previous publication, the new volume was designated "Volume 1, New Series." Justice Prickett was assigned the arduous task of pulling together all of the Supreme Court's decisions from 1866 through 1880 for publication. The result of his work, Volume 1, was published in 1904 with the following introductory remarks from Prickett himself:

The pressure of official duties has prevented the reporter from completing the work for the printer as early as he desired, and if he is entitled to any praise, it must be founded on the accuracy with which it has been performed; and we must remain content with the hope that, in this respect, the result of our labors will be found not entirely wanting.<sup>21</sup>

Prickett retired from the Court in 1884 and entered into private practice with Boisean John B. Lamb. Prickett was also a mason at Boise's Shoshone Lodge.

Prickett died in his sleep during a visit to Hailey on June 14, 1885. His body was sent back to Boise via rail to Kuna, where a delegation of officials (including Mayor James Pinney, John Lemp, John Lamb, and Adam Gasser) met him and took him to the Masonic Hall. Prickett was buried at the Pioneer Cemetery. His wife, Martha, died on August 13, 1890 and was buried at his side.<sup>22</sup>

28. George C. Hough (admitted on August 6, 1866). Although President Lincoln appointed Richard Williams to serve as the first U.S. Attorney for the District

of Idaho on March 10, 1863, Williams declined soon thereafter and the U.S. Attorney's post sat vacant until February 29, 1864. On that day, President Lincoln appointed George C. Hough as U.S. Attorney for the Territory of Idaho. Hough was the only Idaho resident among the first batch of territorial officials appointed. He had been endorsed by Territorial Governor Wallace and by a number of prominent Idaho Republicans. Hough served as U.S. Attorney from 1864 to 1867, thereby having the distinction as the first person to serve as U.S. Attorney for the Territory of Idaho. Thereafter, Hough served as a Special Indian Agent in Idaho, dealing with the Nez Perce tribe. Hough is listed as "removed from Territory" as of 1881.<sup>23</sup>

Of these 29 men, few remained in Idaho long. Indeed, by September 1881 (when the first Idaho Report was published): five had died; 19 had been "removed from the Territory"; one had been appointed to sit as an Associate Justice on the Supreme Court (Henry E. Prickett); and only four were still practicing law in Idaho (Edward J. Curtis, Albert Heed, George Ainslie and Frank Ganahl).<sup>24</sup>

### The Idaho Bar nearing statehood

The last term of the Territorial Supreme Court was held from January through March 1890 and adjourned on March 5, 1890. The justices comprising the Court at that time were Chief Justice James H. Beatty<sup>25</sup> and Associate Justices Willis Sweet and C. H. Berry. During its 27-year existence, the Territorial Supreme Court rendered 268 decisions – an average of about 10 cases per year (all of which appear in the 1<sup>st</sup> and 2<sup>nd</sup> Idaho Reports). In all, 141 attorneys were admitted to the Territorial Supreme Court before statehood on July 3, 1890.<sup>26</sup>

### Epilogue

Having spent a good deal of time researching the earliest practicing lawyers in Idaho, I have a great appreciation for the personal and professional challenges they faced along the way. While many interesting facts can be gleaned from these histories, perhaps one of the most interesting facts (and a reflection of the changing roles of men and women in society) is the amount of time it took for men and women to be admitted to practice.

Between May 31, 1866 and January 19, 1870, the newly formed Supreme Court for the Territory of Idaho admitted 50 men to the practice of law. In comparison, it took more than 100 years (e.g., until 1975) for 50 women to be admitted to the practice of law in Idaho. The first

*Having spent a good deal of time researching the earliest practicing lawyers in Idaho, I have a great appreciation for the personal and professional challenges they faced along the way.*

woman, Helen L. Young, a school teacher from Wallace, was admitted to practice before the Idaho Supreme Court on October 26, 1895. Ms. Young's admission is remarkable for many reasons, not the least of which is the fact that at the time of her admission, women did not have the right to vote in Idaho and an Idaho statute limited the admission of attorneys to "white males."

### About the Author

**Debora K. Kristensen**, is a former Idaho State Bar President and a partner at Givens Pursley, LLP where she is a general business litigator in state and federal courts, with a particular emphasis in the areas of First Amendment litigation, copyright/trademark litigation, and public records and courtroom access.

Ms. Kristensen has a B.A. in psychology from the University of California at Berkeley 1987, and a J.D. from Santa Clara University School of Law 1990. She was the Editor-in-Chief of the Santa Clara Law Review. She was admitted to the California Bar in 1990; Washington 1991; Idaho 1996 and the U.S. District Court, District of Idaho in 1996.

### Endnotes

<sup>1</sup> The Organic Act provided that probate judges would be elected in each county for 4-year terms, and justices of the peace would be elected in townships or cities for 2-year terms. The Territorial Supreme Court had appellate jurisdiction over all subordinate courts and each district court exercised appellate jurisdiction over the probate and justice courts in its district.

<sup>2</sup> After the Montana Territory was created in 1864, reducing Idaho to its present size, the First District was made up of all of North Idaho and court was to be held in Florence in Idaho County, Lewiston in Nez Perce County, and Pierce City in Shoshone County. The Second District was made up of Boise County which included all of the territory south of the Salmon River to the Oregon and Nevada border. The county seat was at Bannock (the present-day Idaho City). The Third District included all of southeastern Idaho. "The experience of a 600-mile ride on a horse or mule to hold court was not likely to encourage lengthy judicial careers for territorial justices." *Justice for the Times: A Centennial History of the Idaho State Courts* at 12 (Ed. Carl F. Bianchi, 1990).

<sup>3</sup> James H. Hawley, Vol. 1 *History of Idaho* at 588-89 (1920).

<sup>4</sup> After Justice Parks's departure in April 1864, George C. Hough, the Idaho U.S. Attorney and only Idaho resident among the territorial officials, wrote Governor Wallace a lament of Parks which typified local hostility toward non-resident appointees: "Great God can we not have judges from among ourselves or at least from Oregon, California or Washington who understand us & can stay with us. [Parks] gets \$2500 from Government, \$2500 from the Territory & a docket fee of \$10 – in each case 5 to \$7,000 more, & stays 8 weeks in fifteen or sixteen month[s]." "Absence of Idaho Territorial Officials -1864", Idaho State Historical Reference Series No. 376 at 2 (July 13, 1966).

<sup>5</sup> Edgerton was a cousin of millionaire Anson Green Phelps, which may explain his connections with people in politics and power.

<sup>6</sup> Edgerton was not well-received by the people of the Territory of Montana as they felt little loyalty to the United States. Nonetheless, Edgerton put together a quick census so that an election could be held. After a number of Democrats were elected, confrontations between Governor Edgerton and the Democrats frequently occurred, causing trouble for the Montana Legislature. In 1864, after numerous acts of lawlessness and with no help from the non-existent court system, Governor Edgerton and his nephew, Wilbur Sanders, began the Montana Vigilantes. This group met in secret and began trying and lynching suspected criminals. In 1865, Edgerton went east to get funds for his territory – he had previously given large sums of his own money to pay the expenses of the Territory. After his gubernatorial term expired in 1866, Edgerton returned to Akron, Ohio to practice law. He died on July 19, 1900.

<sup>7</sup> Sixteen years later, on April 6, 1891, Chief Justice McBride – then a lawyer in private practice – earned the additional distinction of being the first attorney admitted before the newly-created U.S. District Court and Circuit Court for the District of Idaho (Hon. James H. Beatty, presiding).

<sup>8</sup> During territorial days, from March 3, 1863 until July 3, 1890, eleven men were appointed as Chief Justice to the Territorial Supreme Court: (1) Sidney Edgerton; (2) Silas Woodson; (3) John R. McBride; (4) Thomas J. Bowers; (5) David Noggle; (6) Madison E. Hollister; (7) Williams G. Thompson; (8) John T. Morgan; (9) James B. Hayes; (10) H.W. Weir; and (11) James H. Beatty. During that same time, fifteen men were appointed Associate Justice: (1) Aleck C. Smith; (2) Samuel C. Parks; (3) Milton Kelly; (4) John Cummins; (5) Richard T. Miller; (6) John R. Lewis; (7) William C. Whitson; (8) Madison E. Hollister; (9) John Clark; (10) Henry E. Prickett; (11) Norman Buck; (12) Case Broderick; (13) C. H. Berry; (14) John Lee Logan; and (15) Willis Sweet. Most of these men were eastern and midwestern

lawyer-politicians who obtained their appointment as a result of service to the Republican Party. Indeed, only two justices were residents of the Territory when appointed – Henry E. Prickett and Willis Sweet. This can be explained in large part because the Republican administration in Washington, D.C., made the appointments, but Idaho was politically dominated by Democrats more sympathetic to the South during the Civil War.

<sup>9</sup> The first case submitted to the Territorial Supreme Court was that of *Hill Beachy v. B.F. Lamkin*, 1 Idaho 50 (1866). Albert Heed represented the Territorial Treasurer in this matter, which was dismissed by the Court on consent of counsel.

<sup>10</sup> C.E. Dickenson, *History of Belpre Washington County, Ohio* (1920).

<sup>11</sup> *Id.*

<sup>12</sup> *Idaho Tri-Weekly Statesman* (Oct. 3, 1872).

<sup>13</sup> James H. Hawley, Vol. 1 *The History of Idaho* at 211 (1920).

<sup>14</sup> Hill Beachy, the proprietor of the Luna House in Lewiston, is perhaps best known as the man who tracked down a group of outlaws who had murdered his friend and prominent Lewiston packer, Lloyd Magruder. Beachy followed the men to San Francisco and had them brought back to Lewiston where Justice Parks held the first district court proceedings in the Territory of Idaho for Magruder's murder. The men were found guilty and hanged.

<sup>15</sup> *An Illustrated History of the State of Idaho* at 94 (Lewis Publishing Company 1899).

<sup>16</sup> *Ned Curtis: Governor/Lawyer/Librarian*, Vol. II:3 Idaho Legal History Society Newsletter at 3 (July 2010).

<sup>17</sup> James H. Hawley, Vol. 1 *The History of Idaho* at 596 (1920).

<sup>18</sup> A number of the earliest men admitted to practice in Idaho did not stay in the territory long. For that reason, I have listed them in order of their date of admittance, but have not discussed them in any great detail herein. The third through fourteenth lawyers admitted in Idaho fall into this category: (3) William Law, Jr. (admitted on May 31, 1866) - listed as "removed from Territory" as of 1881; (4)

Albert Heed (admitted on May 31, 1866) – served as District Attorney for Ada County and in private practice; (5) John Landesman (admitted on May 31, 1866) - listed as "removed from Territory" as of 188; (6) Theodore Burmester (admitted on June 1, 1866) – practiced with Scaniker & Burmester. Listed as "removed from Territory" as of 1881; (7) Joseph Miller (admitted on June 1, 1866) – practiced with Henry Prickett in Miller & Prickett in Boise. Listed as "removed from Territory" as of 1881; (8) Wyatt A. George (admitted on June 1, 1866) – practiced with Curtis & George. Listed as "removed from Territory" as of 1881; (9) James S. Reynolds (admitted on June 1, 1866) – listed as "removed from Territory" as of 1881; (10) I. N. Smith (admitted on June 1, 1866) – listed as deceased as of Sept. 1881; (11) Joseph Combs (admitted on June 2, 1866) – listed as "removed from Territory" as of 1881; (12) John C. Henly (admitted on June 4, 1866) – practiced with Gilbert & Henly. Listed as deceased as of 1881; and (13) J.B. Rosborough (admitted on June 5, 1866) – practiced with Rosborough & Preston. Listed as "removed from Territory" as of 1881.

<sup>19</sup> The fifteenth through twenty-first lawyers admitted in Idaho are as follows: (15) N.T. Caton (admitted on June 7, 1866) – listed as "removed from Territory" as of 1881; (16) C.B. Waite (admitted on June 7, 1866) – practiced with Rosborough & Waite. He represented Appellant in first reported case in Idaho Reports, *J.B. Bloomingdale v. B.M. DuRell & Co.*, 1 Idaho 33-41 (1866) and served as District Attorney for Boise County. Waite is listed as "removed from Territory" as of 1881; (17) C. Sims (admitted on June 7, 1866) – listed as deceased as of Sept. 1881; (18) E. W. McGraw (admitted on June 8, 1866) – practiced with May & McGraw. He represented Respondent in first reported case in Idaho Reports, *J.B. Bloomingdale v. B.M. DuRell & Co.*, 1 Idaho 33-41 (1866) and served as District Attorney for Boise County. McGraw is listed as "removed from Territory" as of 1881; (19) D. W. Douthitt (admitted on June 8, 1866) – listed as "removed from Territory" as of 1881; (20) Charles H. Larabee (admitted on June 9, 1866) – listed as "removed from Terri-

tory" as of 1881; and (21) William H. Davenport, II (admitted on June 11, 1866) – listed as "removed from Territory" as of 1881.

<sup>20</sup> N.W.O. Margery (admitted on June 12, 1866) was the twenty-third attorney to be admitted in Idaho, although his admission is a bit of a question mark. His name has a strike mark through it on the original Roll of Attorneys without any further explanation and his name does not appear on the list of attorneys provided by the Supreme Court in 18 Idaho xxxiii-xli (1918). R. E. Foote (admitted on June 13, 1866) is the twenty-fourth man admitted Idaho. He is listed as deceased as of Sept. 1881.

<sup>21</sup> 1 Idaho at iv.

<sup>22</sup> Franklin Miller (admitted on June 14, 1866) was the twenty-sixth man admitted in Idaho. He is listed as "removed from Territory" as of 1881. Andrew Huggan (admitted on August 6, 1866) was the twenty-seventh man admitted in Idaho. He practiced as Huggan & Ganahl, but is listed as deceased as of Sept. 1881.

<sup>23</sup> Frank Ganahl was the twenty-ninth man admitted to practice in Idaho on August 7, 1866. He practiced in a firm called Huggan & Ganahl.

<sup>24</sup> The remaining "first 50" Idaho attorneys were: (29) Frank Ganahl; (30) George I. Gilbert; (31) V.S. Anderson; (32) S.P. Scaniker; (33) Edward Nugent; (34) Francis E. Ensign; (35) Henry Martin; (36) A. C. Isaacs; (37) Richard Z. Johnson (later, the first President of the Idaho State Bar); (38) John A. McQuaid; (39) J.C.N. Moreland; (40) Seth Weldy; (41) J.J. May; (42) Silas L. Howard; (43) Edward H. McDaniel; (44) Jeremiah Brumback; (45) E. T. Beatty; (46) P.E. Edmondson; (47) Jonas W. Brown; (48) J. W. Huston; (49) L.P. Higbee; and (50) R.H. Lindsay.

<sup>25</sup> Shortly thereafter, on March 7, 1891, Beatty was commissioned as a federal judge for the newly created District of Idaho and began holding court, although his appointment was not confirmed by the Senate until February 1892.

<sup>26</sup> At that time, lawyers could be admitted by the Supreme Court to practice as "attorneys and counselors" in all courts of the state, or they might be admitted by a district court to practice only in that court. See Revised Idaho Statutes §3990 and §3991 (1887). In 1909, the legislature removed the opportunity for attorneys to be admitted only before the district courts. See 1909 Idaho Session Laws at 109-110.

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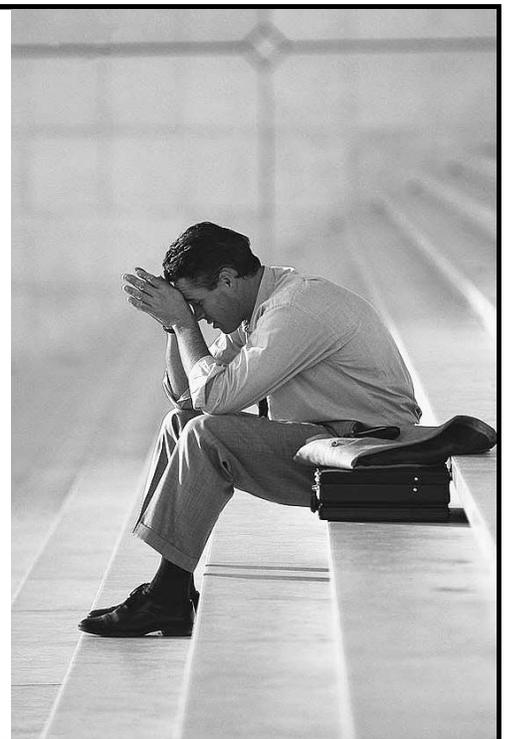
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## ADVOCATES IN ACTION

Stephen A. Stokes  
Meyers Law Office, PLLC

Approximately 1,500 Idaho soldiers of the 116th Cavalry Brigade Combat Team are deploying in support of Operation New Dawn. Three Idaho Judge Advocates will deploy: MAJ Darren Ream, a Texan who has lived in Idaho for the last year, MAJ Paul Boice, a Boise attorney who works for the Ada County Highway District, and 1LT Steve Stokes, an attorney with a family law practice in Pocatello. SFC Reynario Leija, from Twin Falls, will work as lead NCO paralegal. This column will document our experiences, both as soldiers and as attorneys, in Iraq over the next year.

The 116th will depart Idaho for Camp Shelby, Mississippi on September 20, 2010 where it will receive pre-mobilization training. After six weeks, the brigade will travel to Iraq. During the deployment, the JAGs will provide legal advice in each of the core military legal disciplines: military justice, legal

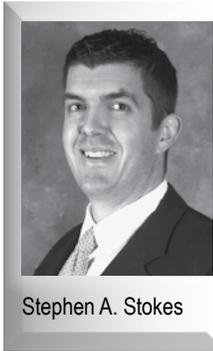


Photo courtesy of Stephen A. Stokes

Soldiers from left to right are, MAJ Paul Boice, 1LT Stephen Stokes, and MAJ Darren Ream.

assistance, claims, contracts and fiscal law, administrative law, and international and operational law.

This is a historic time to work in Iraq. With Operation New Dawn, the focus has shifted to helping the Iraqis govern and police themselves. With that shift will come complex legal issues involving turning over equipment, supplies and resources to the Iraqis. We will also oversee hundreds of contracts between US forces and civilian contractors. Finally, we will have criminal jurisdiction over approximately 9,000 soldiers under

the Uniform Code of Military Justice. Many other unusual legal issues are sure to arise with the continued drawdown in Iraq.

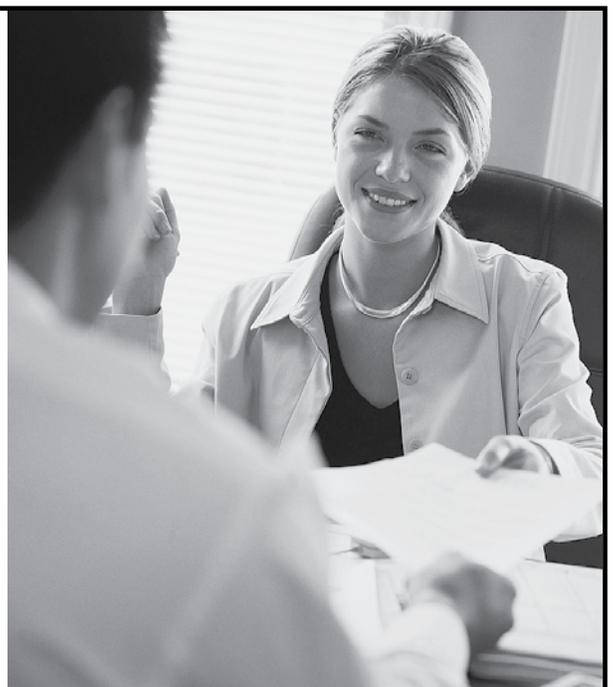
We look forward to sharing our experiences with you.

### About the Author

Stephen A. Stokes received his Juris Doctorate from the University of Idaho College of Law in 2005. After law school, Steve returned to Pocatello where he served a one-year clerkship for the Honorable Ronald E. Bush. Steve joined Meyers Law Office, PLLC, in 2006.

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Stephen C. Smith, former Chairman of the Washington State Bar Association Disciplinary Board, is now accepting referrals for attorney disciplinary investigations and proceedings in Washington, Idaho, Hawaii, and Guam.

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**CHRISTOPHER J. CUNEO**



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

**Christopher J. Cuneo**, as Of Counsel with the firm.

Chris is a registered patent attorney who, prior to joining the firm, was associated with Howry, LLP in Washington, D.C. His practice will focus primarily on patent litigation, patent

prosecution, licensing and complex litigation. Chris holds a master's degree in physics and received his law degree from the George Washington Law School.

Chris can be reached at [cuneo@zmjlaw.com](mailto:cuneo@zmjlaw.com) or 208-562-4900.



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## IN MEMORIAM

### Eugene C. Thomas 1931- 2010

Eugene C. Thomas was born in Idaho Falls, Idaho, on February 8, 1931, to Clifford E. and Margaret A. Thomas. He died at home in Boise on September 13, 2010.

In his early teen years, the family moved to Boise where he met Jody Raber. They graduated from Boise High School in 1948 before Gene headed off to Columbia University in New York City and Jody went to the University of Idaho.

In December, 1950, they were married

at St. Mary's Catholic Church in Boise, spending the next few years in New York while Gene completed college and law school, also at Columbia. Gene began his legal career as U. S. District Judge Fred Taylor's first law clerk. Then



Gene Thomas

he worked as a prosecuting attorney in the Ada County prosecutor's office, first as an appointed chief deputy, and later, at the age of 24, was elected to the office of Ada County Prosecuting Attorney.

He and Jody began raising a family when their son Michael was born in 1952, soon to be followed by Stephen in 1953.

In these busy years, Gene also entered into a partnership with an experienced, highly regarded Boise lawyer, Willis Moffatt, and they began the law firm Moffatt Thomas, now known as Moffatt Thomas

Barrett Rock & Fields. Although he practiced in many areas of the law — business, health care, utility law, banking, and legislative advocacy — Gene initially made his name as a trial lawyer. He believed in service to the profession.

At age 40, he was elected President of the Idaho State Bar. Later, in the 1980s, he would serve as the State Bar delegate to the American Bar Association (ABA) House of Delegates. From there he rose to Chairman of the House of Delegates in 1985 and was elected President of the American Bar Association in 1986-1987. He was also a founding member of the Idaho Law Foundation.

In addition to his law practice, Gene was deeply involved with his community and two of his favorite causes were health care and education. He served on the St. Luke's board of directors from 1963 to 1998, including ten years as its chairman. He was also one of the creators of St. Luke's affiliate, Mountain States Tumor Institute. Gene served on the board of the College of Idaho for about two decades.

In recent years, he became particularly interested in the Boy Scouts of America, designing and funding a program for children of limited means so that they could participate fully in the Boy Scout activities.

The University of Idaho College of Law has also been one of his interests where he has funded research and scholarly work on topics in the development of the law. He held honorary LL.D. degrees from both the University of Idaho and the College of Idaho.

Gene was joined in the practice of law by both of his sons. He was fond of telling his sons that law was a terrific career because you never had to retire from it. Indeed, he was serving clients and participating with his usual vigor in board meetings even in the last two months of his life.

Gene Thomas is survived by his wife Jody. They would have celebrated 60 years of marriage this December. He is survived by his sons and their wives, Mike and Martha Thomas and Steve and Maureen Thomas, his grandchildren Katherine, John, Nicholas, Peter and his wife Rachael, and Andrew, and his great granddaughter Casey. Gene is also survived by his nieces Karen Love (and her husband David and their children Kristin Boscia, Christopher, Kourtney, and Kevin) and Kim Cook. He was preceded in death by his parents and his sister Marjorie Cook.

Gene was a great lover of animals during his life, beginning with his black Cocker Spaniel, Diablo, and including his several Springer Spaniels (all named Sunday) and his cat, Rosebud.

Gene's family would like to thank Dr. Paul Montgomery, St. Luke's Hospice, and all who brought him comfort in his last few weeks. The family suggests in lieu of flowers contributions to St. Mary's School, Mountain States Tumor Institute, the Boy Scouts, the Idaho Humane Society, or a favorite charity.

His funeral service was held at St. Mary's Catholic Church at 2612 West State Street on Monday, September 20, a reception to followed at the Arid Club.

## OF INTEREST

### New Magistrate Judge for Seventh District

The Seventh Judicial District Magistrates Commission has selected Steven Alan Gardner as the new Bonneville County Magistrate Judge. Mr. Gardner will fill the vacancy left by the Honorable Linda J. Cook. Judge Cook has served the people of the State of Idaho, the Seventh Judicial District, and



Hon. Steven A. Gardner

Bonneville County as a Magistrate Judge for 35 years.

The Magistrates Commission Chair, Administrative District Judge Jon Shindurling, announced the appointment. Judge Shindurling indicated that there were four highly qualified applicants interviewed and that both he and the Magistrates Commission were confident that the people of Bonneville County would be well served by the appointee, Steve Gardner.

Mr. Gardner, a native of Nampa, Idaho, received his B.A. from Brigham Young University in 1977, and completed his law degree at Gonzaga University School of Law in 1980. He played varsity football

for BYU as an undergraduate. Mr. Gardner was then admitted to the Idaho State Bar and has maintained a civil practice of law in Idaho Falls since 1980. He has been actively involved in civic and religious affairs and has served on the City of Idaho Falls Civil Service Commission since 1997, as a Special Deputy Attorney General for the State of Idaho since 1993, and also served as President of the Seventh District Bar Association in 1993.

Upon appointment, magistrate judges serve an 18-month probation, after which they stand for retention election in the county in which they are seated and, if retained, serve a term of four years.

## Accomplished Washington D.C. patent attorney joins Boise IP law firm

Christopher E. Cuneo has relocated from the Washington D.C. area to join Zarian, Midgley and Johnson, PLLC (Zarian Midgley), Idaho's largest law firm specializing in intellectual property matters (especially patent law), intellectual property litigation, and complex business litigation.



Christopher E. Cuneo

Cuneo, formerly with the nationally renowned Howry, LLP law firm, brings a wealth of experience in high-stakes patent litigation and sophisticated analysis of patent validity and enforcement issues. His practice will focus primarily on patent litigation, patent prosecution, licensing and complex litigation.

"Chris's background and expertise will allow him to hit the ground running," said John Zarian, managing partner of Zarian Midgley. "Our firm has worked with Chris and his former law firm over the years, and we are delighted to have someone with his expertise and talents join our team."

Prior to joining the firm, Cuneo represented numerous large corporations in patent litigation matters, including BMW, General Electric, Ford Motor Company and Sun Microsystems. He was also a patent examiner at the U.S. Patent and Trademark Office in the mid-1990s, specializing in the examination of patents relating to electric motors and electrical power generation including green technologies such as wind, wave, and solar power generation. Cuneo has authored several articles concerning patentability, non-infringement, invalidity, and freedom to operate.

Cuneo earned his undergraduate degree in Physics from University of Connecticut, his Master's degree in Physics from Oregon State University and his Juris Doctor from the George Washington Law School.

## Wood joins Service & Spinner

The law firm of Service & Spinner is pleased to announce that S. Douglas Wood is joining the firm as a new associate. Doug is the son of Lea and the late Steven Wood. He was raised in Pocatello

and received his degree in political science from Idaho State University in 2001. Doug attended law school at Southern Illinois University where he received his J.D. in 2007. During law school he devoted much of his time working in the Elder Law Clinic. After law school Doug's family moved back to Idaho where he had the opportunity to work as law clerk for Judges Don L. Harding, and Judge Mitchell W. Brown. Doug is married to Rikki Ayers and their family currently resides in Soda Springs, Idaho. Doug's practice will focus on estate planning, elder law, municipal and commercial law.



S. Douglas Wood

## Kirby opens law practice in Spokane

Patrick J. Kirby, J.D., announces the opening of his law practice in Spokane, WA, focusing on Employment Law and business Litigation.

Mr. Kirby graduated from Marquette University with a B.S. degree in business economics. He served in the U.S. Navy as a lieutenant aboard a destroyer and ashore from 1984 through 1990. Mr. Kirby graduated cum laude from Gonzaga University School of Law. Since 1994 he has focused his practice in labor and employment law (primarily management).

Mr. Kirby has represented and advised employers in administrative hearings and civil litigation involving labor and employment claims, which include discrimination, wrongful termination, retaliation, harassment, disability accommodation, workers' compensation, wage and hour, the Family and Medical Leave Act, employment benefits, NLRB representation elections, OSHA/WISHA safety violations, covenants not to compete and trade secrets.

His trial experience includes defending companies against claims of disability discrimination and retaliation. Mr. Kirby has successfully tried cases before juries in cases involving claims of religious and race discrimination, wrongful discharge and wrongful withholding of wages. His practice also includes drafting employment handbooks and contracts, and defending employers against allegations by the Washington Department of Labor and Industries for violations of prevail-

ing wage law and OSHA/WISHA safety regulations. Mr. Kirby has participated in several successful mediations of employment-related cases.

He is a regular speaker and guest lecturer to employer groups on labor and employment issues. Mr. Kirby is a member of the Washington State Bar Association and the Idaho State Bar, and their respective employment law sections.

He is a member of the Spokane County Bar Association. Mr. Kirby can be reached at 509-835-1200 or [pkirby@pkirbylaw.com](mailto:pkirby@pkirbylaw.com).



Patrick J. Kirby

## Attorney recognized for contributions to community

Regence BlueShield of Idaho has awarded Eagle attorney Natalie Camacho Mendoza its 2010 Latino Hero award. The award is part of Regence's ongoing commitment to the Latino community, and honors individuals of Latino descent who have given back to the community and have impressive professional or educational accomplishments.



Natalie Camacho Mendoza

"Through her volunteer work, public speaking and legal advocacy, Natalie has been a voice for Idaho Latinos for more than 20 years," said Francisco Garbayo, who leads Regence's Latino outreach efforts. Her commitment to Latinos and other minority communities truly embodies the spirit of the Latino hero Award."

Camacho Mendoza, the daughter of migrant farm workers, was born and raised in Pocatello. In 1989 she started her law career at the Idaho Legal Aid Services and worked in the Migrant Law Unit. Now she owns her own law firm, Camacho Mendoza Coulter Law Group PLLC, where she practices the areas of Indian law, worker's compensation, and business law.

Outside the office, Camacho Mendoza is a motivational speaker with expertise in workplace leadership and diversity. She was also one of many who were instrumental in establishing the Hispanic Cultural center of Idaho.

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**The Advocate**

## SUMMIT FOR DOMESTIC VIOLENCE TO INTEGRATE DISCIPLINES

Dan Black

*Advocate Managing Editor*

Those who work with sexual abuse and domestic violence say the social problem defies a simple solution. Quick and consistent law enforcement helps. Education makes a huge difference, but also has limits, as do counseling, legal representation and healthcare. Three Idaho agencies continue to share resources and expertise to make their efforts more comprehensive and more effective: The Idaho Volunteer Lawyers Program, The Idaho Coalition Against Sexual and Domestic Violence, and Idaho Legal Aid Services.

Since 2005, these three have come together to create the Idaho Partners Against Domestic Violence. Partners organizes fundraising, education and practical tools to help all three agencies do a better job. Once again, the Partners will sponsor its day-long free seminar on Wednesday, Oct. 20 at the Boise Center, called the "Idaho Summit on Domestic Violence and Health: Making the Connection." This year's event will focus on integrating the healthcare aspects of this complicated problem.

"We try to bring disciplines and resources together to address the big picture," said Coalition director Kelly Miller. She



Dan Black

has been organizing the annual event for several years under co-sponsorship with Partners and with help from a federal grant.

She said responses to domestic violence typically focus on a particular professional discipline, such as law enforcement, the courts, social workers, child welfare, etc. To address the problem in context, she said, agencies need a broad vision.

The free summit includes workshops and nationally-known speakers. It is intended for lawyers, healthcare providers, advocates, social workers, educators, victim witness coordinators, judiciary, and mental health counselors. For more information and to register, check the website, [www.idvsa.org](http://www.idvsa.org).

As its main activity, Idaho Partners Against Domestic Violence sponsors an annual campaign soliciting contributions from corporations, law firms, attorneys, and individuals. Two-thirds of the funds raised are distributed to Idaho Legal Aid Services and the Idaho Law Foundation's Idaho Volunteer Lawyers Program for free civil legal services to victims of domestic violence.

Over the last 15 years the Coalition has raised more than \$1 million in private donations. As a result, Idaho Legal Aid Services and Idaho Volunteer Lawyers Program have been able to enhance the safety and stabilize the lives of more than 50,000 victims of domestic violence and their children (an average of 3,500 victims and their children per year).

## WHAT DO THESE GROUPS DO?

**Idaho Volunteer Lawyers Program,** (IVLP), matches qualifying low-income people with donated legal services. In 2009, the IVLP received 4,908 requests for legal assistance, processed 754 applications and closed 400 cases, providing legal assistance to more than 1,000 people. These cases included 174 victims/survivors of domestic violence and their 373 household members. In 2009, Idaho attorneys and other professionals in the legal field reported donating over 8,000 hours to low-income clients through individual case representation, regular pro se family law clinics assisting individuals in preparing forms for pro se representation, monthly legal clinics at senior citizen centers throughout Idaho, Youth Court programs, legal work for non-profit groups serving low-income people, and direct assistance to IVLP clients in conducting phone interviews and providing legal research.

**Idaho Legal Aid Services, Inc.** (ILAS) is a statewide non-profit law firm providing free civil legal representation to low-income Idahoans. The firm, established in 1968, is the state's primary provider of civil legal representation to

the poor, with seven regional service offices. ILAS also provides assistance to seniors, veterans, homeless, abused and neglected children, migrant farmworkers and Native Americans. In 2009, ILAS staff attorneys provided free civil legal assistance in 4,361 cases. Domestic violence comprise 29% of its cases. ILAS also operates statewide hotlines for domestic violence and seniors. ILAS has more than 300 public legal documents on its website to increase access to the legal system by low-income individuals. Thirty-six free online legal form packets are available for those who wish to represent themselves in court. These include English and Spanish language protection order applications and a range of family law, housing, small claims, name changes and senior related packets. ILAS can be found on the web at [www.idaholegalaid.org](http://www.idaholegalaid.org).

**The Idaho Coalition Against Sexual and Domestic Violence** is a statewide non-profit organization that provides education, assistance and support to individuals, programs and organizations dedicated to ending sexual assault and domestic violence. Established in 1980, the organization provides statewide summits and

regional training events, technical assistance, current research information on domestic violence and sexual assault, a multi-media lending library, and educational materials for Sexual Assault and Domestic Violence Awareness Month. The organization facilitates statewide projects to promote systemic change with:

- Start Strong Idaho Building Healthy Teen Relationships initiative promotes the development of healthy relationship skills for 11 to 14-year olds.
- Idaho Teen Dating Violence Prevention and Awareness Project provides education to teens, parents, and professionals on building healthy teen relationships and preventing teen dating violence.
- Men Today, Men Tomorrow, (MT2), supports men who are allies with women in the fight against sexual and domestic violence.
- Idaho Victim Assistance Academy provides an interdisciplinary academic setting for professionals who work with crime victims.

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– Delaware Open MRI Radiology Associates v. Howard B. Kessler, et al.

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A close-up portrait of Ben Skjold, a man with short brown hair, wearing a dark suit jacket, a light blue dress shirt, and a purple patterned tie. He is smiling slightly and looking towards the camera. The background is blurred, showing what appears to be a bookshelf.

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