

The Advocate

Official Publication
of the Idaho State Bar
Volume 53, No. 9
September 2010

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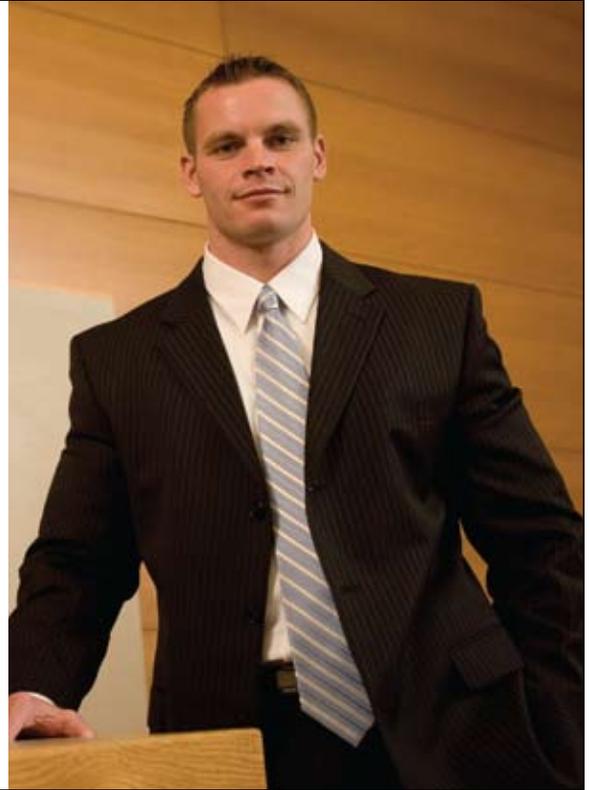
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On the Cover

Lance Foster took this photo of the Boise River in Northwest Boise. The red and amber hues are produced by “Rayleigh Scattering” or color generated by hitting molecule-size gas particles. Foster is a freelance photographer in Boise, Idaho who has chronicled his visits across the globe through pictures. Discovering his passion for photography while serving in Sarajevo in 1996, he has come to appreciate the essence of the moment that can be documented through pictures. Subscribing to the idea that all genres of the art should be attempted, he has shot everything from high profile weddings to NCAA football games. Lance lives in Boise with his wife and 11 year-old son.

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This issue of *The Advocate* is co-sponsored by the Business and Corporate Law Section.

Editors

Special thanks to the September editorial team: Scott Randolph, Brent Wilson, Dan Gordon.

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September 10-11

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Sun Valley Resort in Sun Valley, ID

10.0 CLE credits of which 1.0 will be ethics credit

September 29

Idaho Tort Claims Act

Sponsored by the Government & Public Sector Lawyers Section

8:30 – 10:30 a.m. (MDT) at the Idaho Law Center in Boise, ID

Webcast Statewide

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September 30

CLE Program Replays

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3.5 CLE credits of which 1.0 will be ethics credit **RAC**

October

October 1

Idaho Practical Skills

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5.5 CLE credits of which 1.0 will be ethics credit **RAC**

October 8

Issues and Strategies in The Evolving Family Law of Idaho:

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8:30 a.m. – 4:30 p.m. (MDT) at the Doubletree Riverside

in Boise, ID

6.0 CLE credits

October (continued)

October 15

Issues and Strategies in The Evolving Family Law of

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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:

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November

November 19

Headline News

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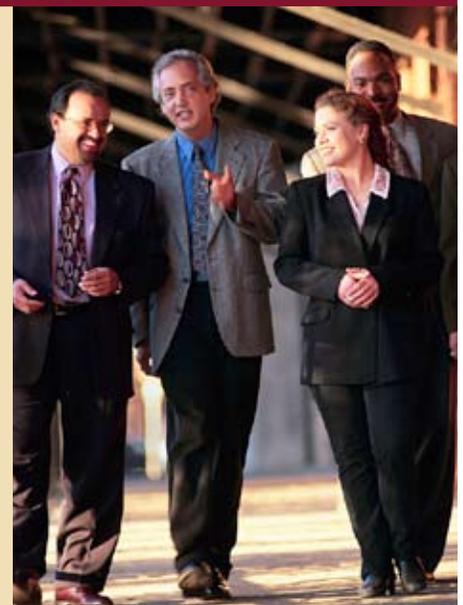
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SOME THOUGHTS FOR THE YOUNG PROFESSIONALS

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

When I first started practicing law in Twin Falls, there were many outstanding law firms in the community. Some of the firms were Lloyd Webb, Riley Burton, Monte Carlson, Ken Pederson and their young lawyers; John Hepworth, Bill Nungester and Mike Felton with their young lawyers; Jim May and his young guns. Ed Benoit and Bob Alexander's firm was noted for defense work; along with John Doerr and his firm. Tom Nelson and John Rosholt's firm was prominent as well. Quite frankly, there was a wealth of fine attorneys to watch, to learn from, and to emulate.

I would like to share some of the things I learned from many of them. I hope it will help you to be successful professionally, financially and, perhaps, even make life in the practice of law a little better.

First and foremost don't lie and don't misrepresent. The Idaho State Bar isn't that large, even in Boise. What goes around comes around, and it can do so quickly. Lawyers who have a reputation for not being straight are quickly identified and it significantly affects their ability to resolve matters. It will cost you money. Lawyers build their practice on the back of referrals. If other attorneys have confidence in you, if they respect you, they will send you conflicts and matters they can't handle. If they don't trust you, they won't. Pretty simple.

Be yourself. Don't try to be something you are not. I heard John Hepworth describe how he would, as a young lawyer, go to court and watch a prominent local litigator. After a time he realized that he would never be that lawyer. While he did learn many things, for him to be suc-

cessful he had to be himself. The rest is history.

This may seem odd, but always be kind to the clerks of the court. The running of a court-involved law firm and the courts/clerks is intertwined. Return phone calls. Don't go to the local coffee shop and bad-mouth the judge, especially in smaller communities. When attorneys publicly bad-mouth the local judge, it makes them look small and petty in the eyes of the public. After all, the public believes the judge is right, and we should follow his or her rulings. If you disrespect the court, it is unlikely that those within earshot are going to come see you when you or their friends have a legal problem. If you have an interest in being a judge someday, you will not rise to the top of the candidate list by bad-mouthing the judges. Some have tried. I haven't seen one of them appointed yet.

Years ago, I was at a Bar function where a lawyer mentioned above took a minute to talk with me. Perhaps it was apparent that I was having a bad day, frustrated, thinking about all the things that had gone wrong. He really didn't know me very well, had very few cases with me, but took the time to offer some valuable insight. "Jim, they call it the practice of law for a reason", he said. He went on to relate that we "practiced" law every day. It put a new perspective on things. He didn't have to offer the encouragement. I am glad he did.

Act like a professional. While some may disparage lawyers and delight in telling lawyer jokes, most see their local attorney as someone who is well-educated, professional, and in good standing within the community. Don't disappoint them. There is never a reason not to be courteous, whether you are at the restaurant, the country club, the local fair, whatever. Too much hubris combined with arrogance may well distinguish you in the community, but it won't be in a good way.

Become involved in the community. Coach soccer, hockey, Little League baseball. Try not to yell at the officials (too much). Participate in service clubs, school activities or events. Give back

some time and money to the community that is helping you become successful in the practice. The building of relationships will help you professionally, financially and personally.

Don't forget your family. There is no success that you can have professionally that is worth the loss of your loved ones. I am not suggesting that you don't work hard. You won't be successful unless you put in the time. Nonetheless, there is time to zealously practice law and still devote time and attention to those most precious to you.

Finally, the highs are never as high as they seem - neither are the lows. Don't let euphoria over a good day or result create a false impression of permanent success. Never let a bad day or bad result result in a state of significant depression or despondency. An esteemed lawyer told me once that you could celebrate the highs and medicate the lows, every day, depending on the events of the day. Considering that most attorneys can easily practice 40 years plus, celebration rituals followed by self-medicating over many years can be destructive. Keeping perspective is always a good thing.

There are always the nuts and bolts of the practice of law to learn. Seminars teach them well. I suggest a lot can be learned from the reputable professionals within your community. They have helped me along the way, more than any of them will ever know. Take the time to listen and learn. Watch what they do. As you progress in the practice, you will understand what I am talking about. Time marches quickly. It will not be long before you will be the distinguished lawyers and model professionals in your community.

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.



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

Benjamin E. Hoopes, as an associate with the firm.

Ben, a registered patent agent, holds a B.S. in electrical engineering from Brigham Young University and is a recent graduate from the University of Minnesota law school.

He is an experienced web programmer and was previously employed with the law firm of Brooks, Cameron & Huebsch, PLLC in Minneapolis, MN.

Ben can be reached at hoopes@zmjlaw.com or 208-562-4900.



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MARK T. MCHUGH
OF CLIENT ASSISTANCE FUND
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Pursuant to Idaho Bar Commission Rule 614(a), the Idaho State Bar hereby gives notice to Mark T. McHugh that a Client Assistance Fund claim has been filed against him by former client Jason Bair, in the amount of \$1,000. Please be advised that service of this claim is deemed complete fourteen (14) days after the publication of this issue of *The Advocate*.

**CRAIG D. ODEGAARD
Resignation in Lieu of Discipline**

On July 19, 2010, the Idaho Supreme Court entered an Order accepting the resignation in lieu of discipline of Coeur d'Alene attorney, Craig D. Odegaard. The Idaho Supreme Court's Order followed a stipulated resolution of a formal charge disciplinary proceeding requesting disbarment and related to the following conduct.

In November 2007, Mr. Odegaard was indicted by a federal grand jury in the United States District Court for the District of Idaho for bankruptcy fraud in conjunction with his personal bankruptcy. The indictment alleged that Mr. Odegaard concealed contingency fee rights from the trustee and creditors. On June 4, 2008, Mr. Odegaard entered into a Rule 11 Plea Agreement. Mr. Odegaard pled guilty to one count of bankruptcy fraud in violation of 18 U.S.C. §§ 2 and 152(1). Mr. Odegaard was sentenced to a 15 month prison term which commenced on January 7, 2009. Mr. Odegaard is on supervised probation for two years following his release. Mr. Odegaard was also ordered to pay monetary penalties of a \$100 assessment and a \$2,500 fine.

Based upon the foregoing, Mr. Odegaard admitted the factual allegations contained in the Amended Complaint in the disciplinary case and that he violated I.B.C.R. 505(b), I.R.P.C. 8.4(b), 3.3(a), 8.4(c) and 8.4(d). In December 2008, the

Idaho State Bar and Mr. Odegaard entered into a stipulation for interim suspension of his license to practice law. On January 6, 2009, the Idaho Supreme Court suspended Mr. Odegaard's license. The parties agreed, and the Idaho Supreme Court ordered, that the time that Mr. Odegaard spent on interim suspension was to be credited toward any eventual sanction he received in the disciplinary case. Thus, the resignation in lieu of discipline is effective January 6, 2009.

By the terms of the Order, Mr. Odegaard may not make application for admission to the Idaho State Bar sooner than January 6, 2014. If he does make such application for admission, he will be required to comply with all bar admission requirements found in Section II of the Idaho Bar Commission Rules and shall have the burden of overcoming the rebuttable presumption of "unfitness to practice law." Mr. Odegaard's name was also stricken from the records of the Idaho Supreme Court and his right to practice law before the courts in the State of Idaho was terminated.

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

**THOMAS K. OKAI
Resignation in Lieu of Discipline**

On July 28, 2010, the Idaho Supreme Court entered an Order accepting the resignation in lieu of discipline of Thomas K. Okai, of Ontario, Oregon. The Idaho Supreme Court's Order followed a stipulated resolution of a formal charge disciplinary proceeding requesting disbarment and related to the following conduct.

Mr. Okai was previously admitted to practice law in Oregon and on April 22, 2009, the Oregon Supreme Court issued an Order suspending Mr. Okai from the practice of law in Oregon for a period of four years. Mr. Okai has been an inactive member of the Idaho State Bar and has not engaged in the practice of law in Idaho since March 2007. The Oregon

proceedings and the admissions to the allegations in the Idaho disciplinary case related to five different matters. In the first matter, Mr. Okai failed to appear on behalf of his client. In the second matter, Mr. Okai admitted there was a significant risk that his representation of a client would be materially limited by his interest in obtaining prescription drugs from that client. In the third matter, Mr. Okai failed to act diligently and reasonably communicate with his client about the status of his client's matters. In the fourth matter, Mr. Okai failed to render an accounting for and refund an unearned portion of a client's fees. In the fifth matter, Mr. Okai pled guilty to two criminal charges, theft relating to insufficient funds to cover checks that he had written and possession of methamphetamine.

Based upon the foregoing, Mr. Okai admitted the factual allegations contained in the Complaint in the Idaho disciplinary case and that he violated the Idaho Rules of Professional Conduct set forth in each of the five counts of the Complaint.

The Idaho Supreme Court accepted Mr. Okai's resignation effective July 28, 2010. By the terms of the Order, Mr. Okai may not make application for admission to the Idaho State Bar sooner than five years from the date of his resignation. If he does make such application for admission, he will be required to comply with all bar admission requirements found in Section II of the Idaho Bar Commission Rules and shall have the burden of overcoming the rebuttable presumption of "unfitness to practice law."

By the terms of the Idaho Supreme Court's Order, Mr. Okai's name was stricken from the records of the Idaho Supreme Court and his right to practice law before the courts in the State of Idaho was terminated on July 28, 2010.

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

NEWS BRIEFS

**Amendments to IRCP 83(a).
Appeals from decisions of
magistrates, effective Sep-
tember 1, 2010**

Rule 83(a) has been amended to incorporate the recent changes to I.A.R. 11.1 and I.R.C.P. 54(a) regarding the definition of a judgment that states "Judgment" as used in these rules means a separate docu-

ment entitled Judgment or Decree that does not contain a recital of pleadings, the report of a master, the record of prior proceedings, the courts legal reasoning, findings of fact, or conclusions of law. An exception has been made for domestic violence protection orders. No exception is needed for child protection orders because an appeal is provided by statute from these such that they fall under subsection (4),

now (6), of Rule 83(a). An exception has also been made for final orders entered upon current forms approved by the Idaho Supreme Court; otherwise, orders terminating parental rights or modifying custody, etc., will have to be followed up with judgment in accord with I.R.C.P. 54(a). The order can be found at <http://www.isc.idaho.gov/rulesamd.htm>.



NAYLOR & HALES, P.C.
ATTORNEYS AT LAW

Jim began a long and distinguished career as a trial attorney with the Ada County Prosecutor's Office in 1982, then in private practice, and most recently as a Deputy Attorney General in the Civil Litigation Division of the Idaho Attorney General's Office. Jim is licensed to practice law in all courts in the state of Idaho, and is admitted to the Ninth Circuit Court of Appeals and the United States Supreme Court. Jim's trial practice will continue to include civil rights, constitutional law, administrative law, corporate liability, personal injury, appellate law, employment law, and law enforcement liability. Jim can be contacted at 947-2071 or jdc@naylorhales.com.

Other Members of the Firm Include:

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|-------------------------------------|--------------------|
| Kirtlan G. Naylor | Roger J. Hales |
| Robert G. Hamlin, <i>Of Counsel</i> | Bruce J. Castleton |
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We are pleased to announce that **James D. Carlson** has become *Of Counsel* to the Firm



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UNIFORM BAR EXAMINATION

Diane K. Minnich
Executive Director, Idaho State Bar

This fall, one of the resolutions presented by the Idaho State Bar will propose that the bar adopt the Uniform Bar Examination (UBE). Law is unique in that it lacks a common licensing test. The bar exam varies from jurisdiction to jurisdiction, even though many states use the same or similar tests. For example, all but 2 states administer the Multistate Bar Exam. Two-thirds administer some sort of performance test and almost all states administer some



Diane K. Minnich

form of essay exam. The National Conference of Bar Examiners (NCBE) is promoting the concept of a uniform test because it believes that an individual who performs to an acceptable level on a high quality licensing test should be able to have that performance accepted in other jurisdictions. The UBE consists of three components to the bar exam, the Multistate Bar Examination (MBE), Multistate Essay Examination (MEE), the Multistate Performance Test (MPT). These three tests are prepared by the NCBE and administered by the individual jurisdictions. The Idaho State Bar exam already includes all three of these components. Currently,

the only difference between the exam administered by the Idaho State Bar and the UBE is that the Idaho exam includes one Community Property Law question.

The UBE is designed to be consistent in content and administration across jurisdictions that opt to use the UBE. Under the UBE plan, the three test components (MBE, MEE and MPT) involving 6 hours of testing on each of 2 days, would be weighted equally, and the score that resulted from one test administration would be portable from one state to another for as long as the receiving jurisdiction is willing to accept the score (probably three years for Idaho). Each state may set its own passing score. Just because an applicant passes the UBE in one state does not guarantee the score will be accepted by another jurisdiction as a passing score.

If Idaho adopts the UBE, the ISB would continue to:

- Decide who may sit for the bar exam and who will be admitted.
- Determine underlying educational requirements.
- Make all character and fitness decisions.
- Determine how long incoming UBE scores will be accepted.
- Make ADA decisions.
- Grade the MEE and MPT.
- Determine our own pre-release re-grading policies.
- Assure candidate knowledge of additional local content using methods we choose.
- Limit the number of times exam-

inees may take the bar examination in our jurisdiction if we so choose.

Currently, two states have adopted the UBE, Missouri and North Dakota. Several other states, along with Idaho, are considering the adoption of the UBE.

Chief Justice Dan Eismann, Bar Exam Preparation Committee Chair Lane Erickson, and Admissions Director Carol McDonald have been involved in the discussions regarding the creation and structure of the UBE. Their view, along with the Bar Commissioners, is that the UBE be adopted in Idaho.

Reminder - proposed resolutions due September 25

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

Idaho Bar Commission Rule 906 (page 288 of the 2010-2011 Directory) governs the Resolution Process. Resolutions for the 2010 Resolution Process must be submitted by September 25, 2010. If you have questions about the process or how to submit a resolution, please contact me at dminnich@isb.idaho.gov or (208) 334-4500.

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

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Legislature rejected euthanasia

Dear Editor:

I have several concerns with the article in the recent August, 2010 Advocate by Kathryn Tucker entitled “Aid in Dying: Law, Geography and Standard of Care in Idaho.” Whatever one may think of Euthanasia, whether denominated “Aid in Dying” as the author calls it, or “physician assisted suicide” or “mercy killing”, as it is also known, the article’s suggestion that Idaho, like Montana, could legally adopt that practice by judicial decision, simply by changing the standard of care for doctors, is a gross misunderstanding of Idaho law. The article’s statement that “Most medical care is not governed by statute or court decision, but is instead governed by the standard of care,” relies solely on 61 Am. Jur. 2d, for that statement, without recognizing that the standard of care for doctors in Idaho is established by statute, I.C. 6-1012. The article’s implication that Idaho courts can change that standard simply by judicially adopting the statutory euthanasia policies of Washington, Oregon or Montana is simply an attempt to conduct an end run around the legislature with the kind of judicial activism that prevailed in many U.S. courts during the 1970s and 80s, and which not only diminished the public’s respect for the courts, but has turned judicial elections into expensive partisan contests. The author’s suggestion that Idaho can judicially adopt euthanasia is false and dangerous, and fails to recognize that in both the Idaho criminal statutes as well as I.C.6-1012, the Idaho legislature has rejected physician assisted suicide.

Hon. Robert E. Bakes
Retired Chief Justice
Idaho Supreme Court

Montana doesn’t permit it

Dear Editor:

I am a Montana State Senator. I disagree with Kathryn Tucker’s discussion of our law in her article, “Aid in Dying: Law, Geography and Standard of Care in Idaho.” (August, 2010). Contrary to her implication, a physician can still find himself criminally or civilly liable for assisting a suicide in Montana. The recent Supreme Court decision merely gives

physicians a potential defense to criminal liability. I have also proposed a bill, “The Montana Patient Protection Act,” which would overrule the Supreme Court decision to eliminate the defense and render it clear that assisted suicide is prohibited in Montana.

The vast majority of states to consider legalizing assisted suicide, have rejected it. The most recent states to reject it are Connecticut and New Hampshire. Only two states allow it.

Assisted suicide, regardless, provides a path to elder abuse and steers citizens to take their own lives. These results are contrary to our state’s public policies designed to value all of our citizens regardless of age.

Senator Greg Hinkle
Thompson Falls, MT

Heirs will abuse older people

Dear Editor:

I am a State Representative in New Hampshire where, in January, we voted down an Oregon-style “aid in dying” law. I write in response to Kathryn Tucker’s article promoting such laws, which she claims promote “choice” for patients at the end of life. [Tucker & Salmi, “Aid in Dying: Law, Geography and Standard of Care in Idaho,” August 2010]

Aid in dying is more commonly known as assisted suicide. In New Hampshire, many legislators who initially thought they were for the law, became uncomfortable when they studied it further. Contrary to promoting “choice,” it was a prescription for abuse. The vote to defeat it was 242 to 113 (nearly 70%).

Assisted suicide laws empower heirs and others to pressure and abuse older people to cut short their lives. This is especially an issue when the older person has money. There is NO assisted suicide law that you can write to correct this huge problem.

Do not be deceived.

Representative Nancy Elliott
Merrimack, New Hampshire

No assisted suicide in Idaho

To the Editor:

This letter questions your decision to publish “Aid in Dying: Law, Geography

and Standard of Care in Idaho” in the August 2010 edition of *The Advocate*. Either the legal reasoning contained in the “Aid in Dying” article was reviewed prior to its publication in *The Advocate* or it was not. Hopefully, no attorney associated with the Bar read and endorsed the legal arguments contained in this article. I will only cite two of the most obvious fallacies in the authors’ reasoning:

(1) the claim that a recent Montana Supreme Court case recognizing the possibility of using a “consent defense” to a charge of homicide as is allowed under Montana statutory law in cases of physician assisted suicide would provide any defense to a charge of homicide for the same conduct in Idaho, and
(2) the claim that, because Oregon, Washington and Montana allegedly permits physician assisted suicide, Idaho courts would likely find that physician assisted suicide meets the local community standard of care for doctors practicing in Idaho.

At its core, the authors’ argument in “Aid in Dying: Law, Geography and the Standard of Care” amounts to no more than a plea to Idaho doctors that they ignore Idaho law and instead act based upon the law of the surrounding states. What Idaho lawyer would provide this advice to any doctor client?

Perhaps “Aid in Dying” was published in *The Advocate* out of some misguided notion of free speech rights as providing Idaho attorneys a platform to express their personal views. Although the authors certainly have a right to advocate for their personal views, they have no right to do so in *The Advocate*. And, even if one were to contend that allowing such advocacy in *The Advocate* is a good idea, that would not justify *The Advocate* allowing publication of an article falsely claiming that assisted suicide was already legal under Idaho law.

False claims about what the law of Idaho actually is, published in *The Advocate*, cannot possibly benefit public debate on this issue. If presented to Idaho doctors as a peer reviewed legal analysis of the law related to assisted suicide in Idaho, “Aid in Dying” could actually lead some Idaho doctor to assist a patient take his or her life in reliance upon the legal analysis presented in this article. While achieving this result may be understood as an important milestone in the authors’

quest to legalize assisted suicide in Idaho, the particular doctor used by those authors to make their point may feel betrayed if an Idaho court fails to find the legal analysis contained in their article applicable to the Idaho doctor's conduct. And, whatever the court ultimately decides about the legality of the doctor's conduct will come too late for the doctor's former "patient" by now likely buried in Idaho.

Richard A. Hearn, M.D.
Racine Olson Nye Budge & Bailey, Chtd.

Wrong article for *The Advocate*

Dear Editor:

I was appalled to read the article "Aid in Dying: Law, Geography and Standard of Care in Idaho" in the last issue of *The Advocate*. What was your rationale for publishing such malarkey? Was this a vain attempt on your part to increase readership, or do you have a more sinister political motive?

According to your website:

"*The Advocate* features articles written by attorneys on topics of interest to members of the legal community."

Kathryn L. Tucker is not an Idaho attorney. She is an extremely well-paid political activist stirring up controversy through her erroneous rhetoric. I find it extremely difficult to believe that this subject matter would be of interest to the majority of your readers. Which leads me to ask why publish such an article? Are you using your position as editor to help promote your own political agenda?

Robin Sipe
Eagle, ID

Oregon's law doesn't work

Dear Editor:

I am a doctor in Portland Oregon where assisted suicide is legal. I disagree with Kathryn Tucker's rosy description of our assisted suicide law, which she terms "aid in dying."

In Oregon, the so-called safeguards in our law have proved to be a sieve. Although we are reassured that "only the patient" is supposed to take the lethal dose, there are documented cases of family members administering it.

Family members often have their own agendas and also financial interests

that dovetail with a patient's death. Yet the true extent of such cases is not known as the only data published comes from second- and even third-hand reports (often from doctors who themselves who were not present at the death and who are active suicide promoters). What we do know about assisted suicide in Oregon is essentially shrouded in secrecy.

The scant information provided by the "official" Oregon statistics report that the majority of patients who have died via Oregon's law have been "well educated" with private health insurance. See official statistics at <http://www.oregon.gov/DHS/ph/pas/docs/year12.pdf>.

In other words, they were likely people with money. Was it really their "choice?"

Preserve choice in Idaho. Reject assisted suicide.

William L. Toffler MD
Professor of Family Medicine
OHSU--FM
Portland, OR

Doctors not always right

Dear Editor:

I live in Idaho, but formerly lived in Washington state where assisted suicide is legal. I was appalled to see Kathryn Tucker's article promoting "aid in dying," which is not only a euphemism for assisted suicide, but euthanasia. Indeed, in 1991, an "aid in dying" law was proposed in Washington State, which would have legalized direct euthanasia "performed in person by a physician." Legalizing these practices is bad public policy for many reasons. One personal to me is that doctors are not always right.

In 2005, I was diagnosed with a rare form of terminal endocrine cancer. This, along with having contracted Parkinson's disease, has made for a challenging life. Like most people, I sought a second opinion from the premier hospital in the nation that treats this form of cancer, M.D. Anderson, in Houston. But they refused to even see me, indicating they thought it was hopeless. Now five years later, it's obvious they were wrong.

Tucker's article refers to "aid in dying" is an "option." A patient hearing this "option" from a doctor, who he views as an authority figure, may just hear he has an obligation to end his life. A patient, hearing of this "option" from his children,

may feel that he has an obligation to kill himself, or in the case of euthanasia, be killed. As for me, I would have missed some of the best years of my life. These are but some of the tragedies of legalized "aid in dying."

I can only hope that the people of Idaho will rise up to chase this ugly issue out of town.

Chris Carlson
Medimont, ID

Article's lousy legal analysis

Dear Editor:

I read with some dismay the article on aid in dying in the August *Advocate*. While I realize that Ms. Tucker and Ms. Salmi have strong opinions on the subject, that is no excuse for *The Advocate* to publish a diatribe so lacking in rational analysis.

The authors first address an Idaho statute dealing with "euthanasia, mercy killing, ... or... an affirmative or deliberate act or omission to end life" and, in conclusory fashion, state that this passage does not include "aid in dying." Worse, they go on to cite the Montana Supreme Court case on the application of homicide statutes in support of the conclusion that Idaho physicians "should feel safe" in helping their patients to kill themselves. I wonder what percentage of the Idaho Bar would be willing to give this advice to a physician client when that client faces loss of liberty and/or their license to practice medicine should the attorney prove to be wrong? This article is editorial comment masquerading as legal analysis and, at the very least, should have been accompanied by someone making a counter-argument.

Robert Moody
Boise, ID

Oregon mistake cost lives

Dear Editor:

I was disturbed to see that the suicide lobby group, Compassion & Choices, is beginning an attempted indoctrination of your state, to accept assisted suicide as somehow promoting individual rights and "choice." I have been a cancer doctor in Oregon for more than 40 years. The combination of assisted-suicide legalization and prioritized medical care based on prognosis has created a danger for my

LETTERS TO THE EDITOR

patients on the Oregon Health Plan (Medicaid).

The Plan limits medical care and treatment for patients with a likelihood of 5% or less 5-year survival. My patients in that category who have a good chance of living another three years and who want to live, cannot receive surgery, chemotherapy or radiation therapy to obtain that goal. The Plan guidelines state that the Plan will not cover "chemotherapy or surgical interventions with the primary intent

to prolong life or alter disease progression." The Plan WILL cover the cost of the patient's suicide.

Under our law, a patient is not supposed to be eligible for voluntary suicide until they are deemed to have six months or less to live. In the cases of Barbara Wagner and Randy Stroup, neither of them had such diagnoses, nor had they asked for suicide. The Plan, nonetheless, offered them suicide. Neither Wagner nor Stroup saw this event as a celebration of

their "choice." Wagner said: "I'm not ready, I'm not ready to die," They were, regardless, steered to suicide.

In Oregon, the mere presence of legal assisted-suicide steers patients to suicide even when there is not an issue of coverage. One of my patients was adamant she would use the law. I convinced her to be treated. Ten years later she is thrilled to be alive. Don't make Oregon's mistake.

Kenneth Stevens, MD
Sherwood, OR

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AID IN DYING: NOT LEGAL IN IDAHO; NOT ABOUT CHOICE

Margaret K. Dore
Law Offices of Margaret K.
Dore, P.S.

“Those who believe that legalizing euthanasia and/or assisted-suicide will assure their ‘choice,’ are naive.”

-William Reichel, MD
Coeur d’Alene Press
June 30, 2010¹

Introduction

Last month, *The Advocate* ran an article by Kathryn Tucker, Director of Legal Affairs for Compassion & Choices, a successor organization to the Hemlock Society.² Tucker argued that “aid in dying” is legal in Idaho such that “physicians should feel safe to provide [it]” and that this option will give patients “choice.”³

“Aid in dying” is a euphemism for euthanasia and physician-assisted suicide.⁴ Tucker’s article appears to be limited to physician-assisted suicide. Regardless, an Idaho doctor who undertakes such practice is subject to criminal and civil liability. It is also untrue that legalization will assure patient choice.

Physician-assisted suicide

The American Medical Association (AMA) defines physician-assisted suicide, as follows:

“Physician-assisted suicide occurs when a physician facilitates a patient’s death by providing the necessary means and/or information to enable the patient to perform the life-ending act (e.g., the physician provides sleeping pills and information about the lethal dose, while aware that the patient may commit suicide).”⁵

The AMA rejects assisted suicide.⁶ Assisted suicide is also opposed by disability rights groups such as the Disability Rights Education and Defense Fund, and Not Dead Yet.⁷

Most states and Canada do not allow assisted suicide

The vast majority of states to consider assisted suicide, have rejected it.⁸ This year, New Hampshire and Canada rejected it by wide margins.⁹

There are just two states where assisted suicide is legal: Oregon and Washington. These states have statutes, which give



Photo courtesy of Rani Kay Sampson

Julie Brown of Seattle holds a sign she used at a protest against a Washington law that allows assistance for suicide.

doctors immunity from criminal and civil liability.¹⁰ In Montana, there is a court decision, which gives doctors a potential defense to criminal prosecution, but does not legalize assisted suicide by giving doctors criminal and civil immunity.¹¹

Not what the voters were promised

The Oregon and Washington acts were passed via initiatives in which voters were promised that their “choice” would be assured.¹² Both acts, however, have significant gaps so that patient choice is not assured. For example, neither act requires witnesses at the death.¹³ Without disinterested witnesses, the opportunity is created for someone to administer the lethal dose to the patient without his consent. Even if he struggled, who would know?

Oregon and Washington are also “Don’t Ask, Don’t Tell” states. Required official forms and reports do not ask about or report on whether the patient consented at the time of death.¹⁴ Consent at the time of death is also not required by the language of the acts themselves.¹⁵ Once again and contrary to marketing rhetoric, patient “choice” is not assured.

New Hampshire

In January 2010, an assisted suicide bill was defeated in the New Hampshire House of Representatives, 242 to 113.¹⁶ The major reason was elder abuse.¹⁷ New Hampshire Representative Nancy Elliott

states: “These acts empower heirs and others to pressure and abuse older people to cut short their lives. This is especially an issue when the older person has money. There is no assisted-suicide bill that you can write to correct this huge problem.”¹⁸

Patients are not necessarily dying

Oregon and Washington’s acts apply to “terminal” patients, defined as having no more than six months to live.¹⁹ Such patients are not necessarily dying. Doctor prognoses can be wrong.²⁰ Moreover, treatment can lead to recovery. Oregon resident, Jeanette Hall, who was diagnosed with cancer and told that she had six months to a year to live, states:

I wanted to do our law and I wanted my doctor to help me. Instead, he encouraged me to not give up and ultimately I decided to fight. I had both chemotherapy and radiation...

It is now nearly 10 years later. If my doctor had believed in assisted suicide, I would be dead.²¹

Expanded definitions of “terminal”

Compassion & Choices has proposed expanded definitions of terminal for the purpose of assisted suicide laws, which, if enacted, will cause these laws to apply to people who are clearly not dying. This was the case with the New Hampshire bill described above. When originally introduced, it contained the following definition of “terminal condition”:

XIII. "Terminal condition" means an incurable and irreversible condition, for the end stage of which there is no known treatment which will alter its course to death, and which, in the opinion of the attending physician and consulting physician competent in that disease category, will result in premature death.²²

Commentator Stephen Drake explains the definition's ramifications, as follows: "[T]erminality is defined as having a condition that is irreversible and will result in a premature death. My partner [a motorized wheelchair user] would fit that definition. Many people I work with also fit the definition. . . . None of them are dying."²³

In Montana, Compassion & Choices proposed another broad definition of "terminally ill adult patient," as follows: "[An adult] who has an incurable or irreversible condition that, without the administration of life-sustaining treatment, will, in the opinion of his or her attending physician, result in death within a relatively short time."²⁴ Attorney Theresa Schrempp and doctor Richard Wonderly provide this analysis:²⁵

[The] definition is broad enough to include an 18 year old who is insulin dependent or dependent on kidney dialysis, or a young adult with stable HIV/AIDS. Each of these patients could live for decades with appropriate medical treatment. Yet, they are "terminally ill" according to the definition promoted by [Compassion & Choices].

It's not about choice

Once a patient is labeled "terminal," the argument can be made that his treatment should be denied in favor of someone more deserving.²⁶ This has happened in Oregon where patients labeled "terminal" have not only been denied coverage for treatment, they have been offered coverage for assisted suicide instead.²⁷ The most well known case involves Barbara Wagner, who had lung cancer.²⁸ The Oregon Health Plan refused to pay for a drug to possibly prolong her life and offered to pay for her assisted suicide instead.²⁹

After Wagner's death, Compassion & Choices's president, Barbara Coombs Lee, published an editorial in *The Oregonian* arguing against Wagner's choice to try and beat her cancer.³⁰ Coombs Lee also defended the Oregon Health Plan and argued for a public policy change to discourage people from seeking cures.³¹

This editorial, combined with Compassion & Choices' expanded definitions of terminal, provide a glimpse into Compassion & Choices' true agenda: It's not the promotion of personal choice.

According to Donna Cohen, an expert on murder-suicide, the typical case involves a depressed, controlling husband who shoots his ill wife...

In Idaho, assisted suicide is prohibited by the common law

Criminal Liability

The Idaho Code provides that when there is no statute governing a matter, the common law of England applies.³² "At common law, an aider and abettor [of suicide] was guilty of murder. . . ."³³

Prior to 1994, there were no statutes in Idaho addressing assisted suicide. Assisted suicide was prohibited by the common law and chargeable as murder.

In 1994, the Idaho Legislature passed an act to establish procedures for Do Not Resuscitate Orders.³⁴ As part of this act, the legislature included a provision that assisted suicide was not being made legal. The provision stated: "This act does not make legal and in no way condones, mercy killing, assisted suicide or euthanasia."³⁵

In 2001 and 2007, the provision was re-codified.³⁶ Now part of the Medical Consent and Natural Death Act, it states: "This chapter does not make legal, and in no way condones, euthanasia, mercy killing, or assisted suicide or permit an affirmative or deliberate act or omission to end life, other than to allow the natural process of dying."³⁷

Per the above provision and common law, assisted suicide remains a crime in Idaho. Assisted suicide can also be statutorily charged as murder. Idaho Code § 18-4001 defines "murder" as the "unlawful killing of a human being . . . with malice aforethought," while Idaho Code § 18-4002 states that "malice" is a "deliberate intention unlawfully to take away the life of a fellow creature."³⁸ With assisted suicide prohibited by common law and not subsequently made legal, a doctor who assists a suicide with "deliberate intention" is guilty of such unlawful killing. He can be statutorily charged with murder.

Civil liability

In 2009, the Idaho Supreme Court decided *Cramer v. Slater*, which states that doctors "can be held liable for [a] patient's suicide."³⁹ In *Cramer*, doctors negligently informed a patient about his HIV/

AIDS status, which allegedly caused him to commit suicide.⁴⁰

Tucker does not address *Cramer*. She argues instead that Idaho doctors are free to perform assisted suicide due to the law in Oregon, Washington and Montana.⁴¹ Ignoring for the moment that assisted suicide is not actually legal in Montana, this is like saying that because a brothel is legal in Nevada, the same brothel is legal in Utah. This is obviously not the case.

Tucker also argues that the above provision in the Medical Consent and Natural Death Act does not prohibit "aid in dying" because aid in dying is not "suicide."⁴² She made a similar argument as counsel for the plaintiffs in *Blick v. Connecticut*.⁴³ The Court disagreed and dismissed the case.⁴⁴ Judge Aurigemma stated:

[T]he legislature intended the statute to apply to physicians who assist a suicide and intended the term "suicide" to include self-killing by those who are suffering from unbearable terminal illness.

The language and legislative history of § 53a-56 compel the conclusion that the defendants [state's attorneys] would not be acting in excess of their authority if they prosecuted the plaintiffs under § 53a-56 for providing "aid in dying."⁴⁵

Tucker concludes her article by holding out assisted suicide as a solution to murder-suicide in elderly couples. According to Donna Cohen, an expert on murder-suicide, the typical case involves a depressed, controlling husband who shoots his ill wife: "The wife does not want to die and is often shot in her sleep. If she was awake at the time, there are usually signs that she tried to defend herself."⁴⁶ If assisted suicide were legal, the wife, not wanting to die, would still be a victim.

Conclusion

Physician-assisted suicide is not legal in Idaho. A doctor who engages in such practice is subject to criminal and civil liability.

About the Author

Margaret Dore is an attorney in Washington state, where assisted suicide is legal. Her publications include *Death with Dignity: A Recipe for Elder Abuse and Homicide (Albeit not by Name)*, 11 *MARQUETTE ELDER'S ADVISOR* 387 (2010), available at http://www.margaret-dore.com/pdf/Dore-Elder-Abuse_001.pdf. For further information see www.margaret-dore.com.

Endnotes

¹ William Reichel, MD, Letter to the Editor, *Aid in Dying: See Dutch for Disasters*, *Coeur d'Alene Press*, June 30, 2010, at A9.

² Kathryn Tucker & Christine Salmi, *Aid in Dying: Law, Geography and Standard of Care in Idaho*, 53 *THE ADVOCATE: OFFICIAL PUBLICATION OF THE IDAHO STATE BAR* No. 8, 42-45, 45 (2010); IAN DOWBIGGIN, *A CONCISE HISTORY OF EUTHANASIA* 129 (2007) (The Hemlock Society was formed in 1980 and "dedicated to the decriminalization of assisted suicide and active voluntary euthanasia"); *id.* at 146 (In 2003, Hemlock changed its name to End-of-Life Choices, which merged with Compassion in Dying in 2004, to form Compassion & Choices.)

³ Tucker, *Aid in Dying*, at 43.

⁴ See, e.g., 1990 Petition to put Initiative 119 on the ballot in Washington State (defining "aid-in-dying" as euthanasia "provided in person by a physician") (copy on file with author); Int'l Task Force on Euthanasia & Assisted Suicide, *Attempts to Legalize Euthanasia/Assisted Suicide in the United States* (2009), http://www.internationaltaskforce.org/pdf/200906_attempts_to_legalize_assisted_suicide.pdf (regarding Initiative 119, referring to "aid-in-dying" as "euthanasia and physician-assisted suicide"); video transcript of Barbara Wagner, <http://www.katu.com/news/26119539.html?video=YH1&t=a> (last visited Aug. 8, 2010) ("physician aid in dying" [is] better known as assisted suicide").

⁵ A.M.A. Code of Medical Ethics, Opinion 2.211, available at <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion2211.shtml> (last visited August 7, 2010).

⁶ *Id.*

⁷ See http://www.dredf.org/assisted_suicide/index.shtml; see also www.notdeadyet.org.

⁸ Int'l Task Force, cited at note 4 ("Between January 1994 and June 2009, there were 113 legislative proposals in 24 states. All were either defeated, tabled for the session, or languished with no action taken.")

⁹ On January 13, 2010, the New Hampshire House of Representatives defeated an assisted suicide bill, 242 to 113. See Roll Call for H.B. 304, at <http://www.gencourt.state.nh.us>. In April 2010, the Canadian Parliament defeated a bill that would have legalized assisted suicide, 228 to 59. See NATIONAL POST, *The Week in Letters: Readers give a big thumbs down to 'death with dignity'*, April 26, 2010, available at <http://www.nationalpost.com/Week+Letters+Readers+give+thumbs+down+death+with+dignity/2951087/story.html>

¹⁰ See OR. REV. STAT. § 127.800-995 (2005); WASH. REV. CODE ANN. § 70.245.010-904 (2009).

¹¹ See, e.g., Greg Jackson & Matt Bowman, *Analysis of Implications of the Baxter Case on Potential Criminal Liability, for the Montana Family Foundation* (April 2010), available at http://www.montana-family.org/portfolio/pdfs/Baxter_Decision_Analysis_v2.pdf

¹² See e.g. Margaret Dore, "Death with Dignity": A Recipe for Elder Abuse and Homicide (Albeit not by Name), 11 *MARQUETTE ELDER'S ADVISOR* 387, 387 (2010), available at http://www.margaret-dore.com/pdf/Dore-Elder-Abuse_001.pdf

¹³ OR. REV. STAT. § 127.800-.995 (2005); WASH. REV. CODE ANN. § 70.245.010-904 (2009).



Photos courtesy of Rani Kay Sampson

On March 5, 2010, demonstrators protest Washington Assisted Suicide Act in front of the University of Washington Hospital in Seattle while several TV stations interview Eileen Geller.

¹⁴ *Id.* See also ALL official forms and reports for both acts, which can be viewed at <http://www.oregon.gov/DHS/ph/pas/index.shtml/shtml> and <http://www.doh.wa.gov/dwda/>.

¹⁵ Both acts contain provisions requiring that a determination of whether a patient is acting "voluntarily" be made in conjunction with the lethal dose request, not later. For more information, see Dore, *A Recipe for Abuse*, cited at note 12, 390.

¹⁶ Roll Call for New Hampshire H.B. 304 (January 13, 2010), cited at note 9.

¹⁷ New Hampshire State Representative Nancy Elliott and other sources.

¹⁸ Nancy Elliott, Letter to the Editor, *Right to Die is Prescription for Abuse*, *HARTFORD COURANT*, May 28, 2010.

¹⁹ OR. REV. STAT. 127.800 § 1.01(12); WASH. REV. CODE ANN. § 70.242.010(13).

²⁰ Nina Shapiro, *Terminal Uncertainty*, *SEATTLE WEEKLY*, January 14, 2009, available at www.seattleweekly.com/2009-01-14/news/terminal-uncertainty (Last visited August 8, 2010).

²¹ Jeanette Hall, Letter to the Editor, *Second life*, *MISSOULA INDEPENDENT*, June 17, 2010. Author confirmed accuracy with both Ms. Hall and her doctor.

²² New Hampshire Bill, H.B. 304.

²³ Stephen Drake, *New Hampshire Poised to Redefine "Terminally Ill" to PWDs and others for Assisted Suicide Eligibility*, January 30, 2009, <http://notdeadyetnewscommentary.blogspot.com/2009/01/new-hampshire-poised-to-redefine.html>. Drake's partner is Diane Coleman, founder of the disability rights organization, Not Dead Yet, who uses a motorized wheelchair.

²⁴ *Plaintiffs' Responses to State of Montana's First Interrogatories, Baxter v. Montana*, No 2007-787, (Mont. 1st Dist., May 16, 2008). Copy attached to letter from Richard Wonderly, MD, and Theresa Schrempp, Esq., to Alex Schadenberg, Executive Director of the Euthanasia Prevention Coalition, October 22, 2009, <http://www.euthanasiaprevention.on.ca/ConnMemo02.pdf>

²⁵ Wonderly & Schrempp, note 24.

²⁶ *Id.*

²⁷ *Id.*; Susan Donaldson James, *Death Drugs Cause Uproar in Oregon*, ABC News, Aug. 6, 2008, <http://www.abcnews.go.com/Health/Story?id=5517492&page=> (last visited Aug. 9, 2010)[A-52]; video transcript at note 4.

²⁸ Susan Donaldson James, at note 27; video transcript at note 4.

²⁹ *Id.*

³⁰ Barbara Coombs Lee, *Sensationalizing a sad*

case cheats the public of sound debate, *THE OREGONIAN*, November 29, 2008, available at http://www.oregonlive.com/opinion/index.ssf/2008/11/sensationalizing_a_sad_case_ch.html

³¹ *Id.* She stated: "The burning health policy question is whether we inadvertently encourage patients to act against their own self interest, chase an unattainable dream of cure, and foreclose the path of acceptance that curative care has been exhausted. . . . Such encouragement serves neither patients, families, nor the public."

³² IDAHO CODE ANN. § 73-116 (1919) states: "The common law of England, so far as it is not repugnant to, or inconsistent with, the constitution or laws of the United States, in all cases not provided for in these compiled laws, is the rule of decision in all courts of this state."

³³ *In re Joseph G.*, 667 P.2d 1176, 1179 (Cal. 1983).

³⁴ 1994 Idaho Sess. Laws, Ch. 298, H.B. 881, Sec. 1, § 39-150.

³⁵ *Id.*, Sec. 1, § 39-152.

³⁶ 2001 Idaho Sess. Laws, Ch. 110 (H.B. 198)(re-designating § 39-152, as § 56-1022); and 2007 Idaho Sess. Laws, Ch. 196 (H.B. 119)(re-designating § 56-1022 as § 39-4514(2)).

³⁷ IDAHO CODE ANN. § 39-4514(2).

³⁸ IDAHO CODE ANN. § 18-4001 (2002); IDAHO CODE ANN. § 18-4002 (1972).

³⁹ Cramer, 146 Idaho 868, 878, 204 P.3d 508 (2009), states:

[T]he district court found "that when a psychiatrist, psychologist, or doctor fails to properly assess a patient's suicidal ideations and consequently fails to take steps to prevent the suicide, these professionals can be held liable for the patient's suicide." (Citing 81 A.L.R. 5th 167 § 6[a] (2000)). This analysis is supported by the Court's decision in *Brooks*.

⁴⁰ 146 Idaho at 868.

⁴¹ Tucker, cited at note 2, 44.

⁴² *Id.*, 43.

⁴³ *Blick & Levine v. Office of the Division of Criminal Justice*, et al. (*Blick v. Connecticut*) (Conn. Super. Ct.), CV-09-5033392, Memorandum of Decision on Motion to Dismiss, filed June 2, 2010, at 1, *id.* at 8.

⁴⁴ *Id.*, 13-14, 16, 22, 24-26.

⁴⁵ *Id.*, at 25.

⁴⁶ WebMD, *Murder-Suicides in Elderly Rise: Husbands commit most murder suicides—without wives' consent*, January 30, 2005, <http://www.medicinenet.com/script/main/art.asp?articlekey=50782> See also Cohen's biography, <http://amhd.cbc.usf.edu/vita.php?t=60089779199be42cd7b05>

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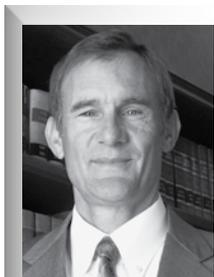
YOU GOTTA READ THIS STUFF! (E.G., YOU WILL WANT TO REVIEW THE ARTICLES IN THIS ISSUE.)

David Hammerquist
Ringert Law, Chtd.

You may have already heard the saying: “If you remember the 70s (or whichever decade you were in your late teens and early twenties), you were not there.”

If we believe that business and corporate law is currently the “same old, same old,” then the articles in this issue may suggest to us that we have not been paying attention.

In the May 2010 Business and Corporate Law Section’s annual seminar, we learned from Denver lawyer Thomas M. Kim that there exists creative legal work for our struggling corporate clients in this dismal economy. Jace Richard’s “Triple Triangular Perspective” article in this issue follows this theme with ideas on how we can assist our clients through these difficult financial times and how local resources exist in this endeavor.



David Hammerquist

Tonn Petersen reveals the privacy struggles we face in the social-networking age.

Rebecca A. Rainey alerts us to the concerns our engineer clients face should they consider lien recordation.

You may want to know if your clients involve themselves in political campaigns and be ever mindful of what Linda Pall shares with us. Please understand that her article is severely edited and you may want to contact her for the full scoop.

Richard Seamon nails down the current Punitive Damages case law so that



we may properly advise our clients of the risks.

Brent Wilson tackles for us concerns from the state and the federal level when advising and serving on nonprofit boards.

We can all take to heart Mark Peter’s article about “Nuts and Bolts Lawyering” in our quests to serve our clients as fully as possible.

I thank my predecessors and especially David Jensen for his past two years of leadership and guidance for our Section, and in particular, for me. In the past year, the section’s finance committee and other members have worked beyond the call of duty to develop a very ambitious mission statement and guidance plan for Section administrations into the future. Also, I thank all who have prepared articles to this issue. This administration hopes to reach out across the state to our members in furtherance of the planning and work accomplished by the finance committee and others who have thanklessly volunteered their time and skill for the benefit of all the Section members.

Finally, yes, Tobi Mott, I thank you for spearheading and gently prodding all article contributors for this year’s issue of the September 2010 Advocate.

If we believe that business and corporate law is currently the “same old, same old”, then the articles in this issue may suggest to us that we have not been paying attention.

About the Author

David Hammerquist is a shareholder at Ringert Law Chartered having joined the firm in 1989. Prior to joining Ringert Law Chartered he was employed as a corporate counsel and also has been an assistant City Attorney for Boise City. He attended Pepperdine University School of Law and the University of Idaho College of Law.

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THE TRIPLE TRI-ANGULAR PERSPECTIVE (3TAP): A FRAMEWORK FOR THE MANAGEMENT OF A TURNAROUND

Steve Neighbors
Jace Richards
*Strategic & Operational
Solutions, Inc.*

The world of turnarounds

Turnaround practitioners advise on, and typically execute, the changes necessary for a struggling company to optimize its profit and performance. A corporate turnaround requires a well-constructed strategy and near-flawless execution, always taking into account stakeholder¹ demands. A business turnaround's success is due in largest part to: (1) the turnaround consultant's outside perspective from that of existing management, (2) the consultant's lack of personal investment in the past, and (3) the variety of tools in the consultant's toolbox.

This article is not a "how-to" for lawyers on dealing solely with legal issues but, rather, a "how-to" for lawyers who wish to truly be *counselors* to their business clients. Effective business attorneys must understand the fundamentals of how every business operates; they must be able to think and speak holistically to business' management. Additionally, since law firms are themselves businesses, law firms can also benefit from the perspective provided in this article.

A business and its management

A business is a unique entity with personality, character, and responsibilities. A company's existence, unlike humans, is totally utilitarian. It must have purpose, and it must fulfill that purpose. A company makes commitments to its stakeholders, and these stakeholders make up its being and character. Management is responsible for ensuring that the company's purpose is responsibly fulfilled and obligations met so the business remains healthy. Management must also help it grow and mature, while protecting it from abuse by its stakeholders or, more often, by management itself. The heart of a turnaround deals with management's failure to marshal all its stakeholders and resources to meet the company's obligations.



Steve Neighbors



Jace Richards

Management is generally the problem. A company is six times more likely to fail because of internal forces (management and controls) than external ones.² Management, however, tends to blame external forces (e.g., the economy) for its failures. These economic times and external forces are now the norm, and the business community is undergoing extreme stress by changes in every realm of the business world (e.g., global markets and competition, technology, regulation, etc.). Management must see the company as living within an ongoing turnaround, remaking itself for the unavoidable new and different tomorrow. Every company is either in some stage of change or some stage of failure.

Self-diagnosis is the common problem. Those who generally attempt to diagnose a company's woes (e.g., management, accountants, attorneys, etc.) rarely deal with the real root causes. Why? Because as humans, we tend to attack symptoms. Further, we do so with our limited tool sets: accountants tend to attack a problem with historic numbers; lawyers tend to attack a problem with the law; and managers/owners tend to attack a problem from within the biased box of their own construction, likely based on past performance but, blinded to the future and the true situation at hand. Additionally, and fundamentally, it is human nature to become defensive, justify ourselves, and lay blame on other people or forces. Management's failure to deal with root causes, and the blinding bias we all have as humans, are the reasons why most companies fail.

The corporate attorney should examine how to keep communication open for owners and company directors to question the company's management team.

Management must have a contrite heart with eyes that see and ears that hear. Generally, management's perception of its work, priorities, and image is incredibly flawed. Employees tend to know far more about the many failings and idiosyncrasies of management than does management itself. In theology, "turnaround" means "repent." Likewise in the context of a corporate turnaround: management must see the truth, recognize its failures, accept responsibility, and then change course. In a turnaround's execution, the true acceptance of blame by managers, and the resulting humility, can be extremely motivating. Management's failure to accept responsibility is a common denominator in almost every failure. The corporate attorney should examine how to keep communication open for owners and company directors to question the company's management team. Such a big-picture vantage looks beyond narrow legal questions and, instead, fuels the soul-searching needed for a successful restructuring.

Management, alone, should not define the issues or solution or execute the turnaround plan. A competent physician would never allow a patient to diagnose and treat himself because, as patients, we don't know what we don't know, and what we do know is only part of the problem. Instead, the physician takes a patient history and then uses that information along with her training and experience to determine a diagnosis and treatment. The same goes for a corporate turnaround. The overwhelming majority of managers or leaders know but a portion of what is really happening within their company, the industry in which it operates, and the overall economy upon which the company depends. Furthermore, the skill sets necessary for a turnaround are different than those of routine management. Consider a typical fact pattern: The company is se-

verely struggling with cash flow and has negative or low stockholder equity. Morale is low, key employees are leaving or have left, and stakeholders are questioning management's character and competency. Sales are critically low, suppliers have the company on COD or priced noncompetitively, and competition is usurping what remains of the company's market share. The company is in default on credit agreements, legal costs have skyrocketed, and credit sources have dried up.

And what is the typical response? Resize the balance sheet and let management continue in a Chapter 11 bankruptcy proceeding, declaring symptoms as the root cause and forcing a cram down³ plan on the creditors without making any substantive changes to the organization or its strategy. With facts like this, it is no wonder the vast majority (upwards of 90%) of Chapter 11 debtors never successfully emerge from bankruptcy.⁴

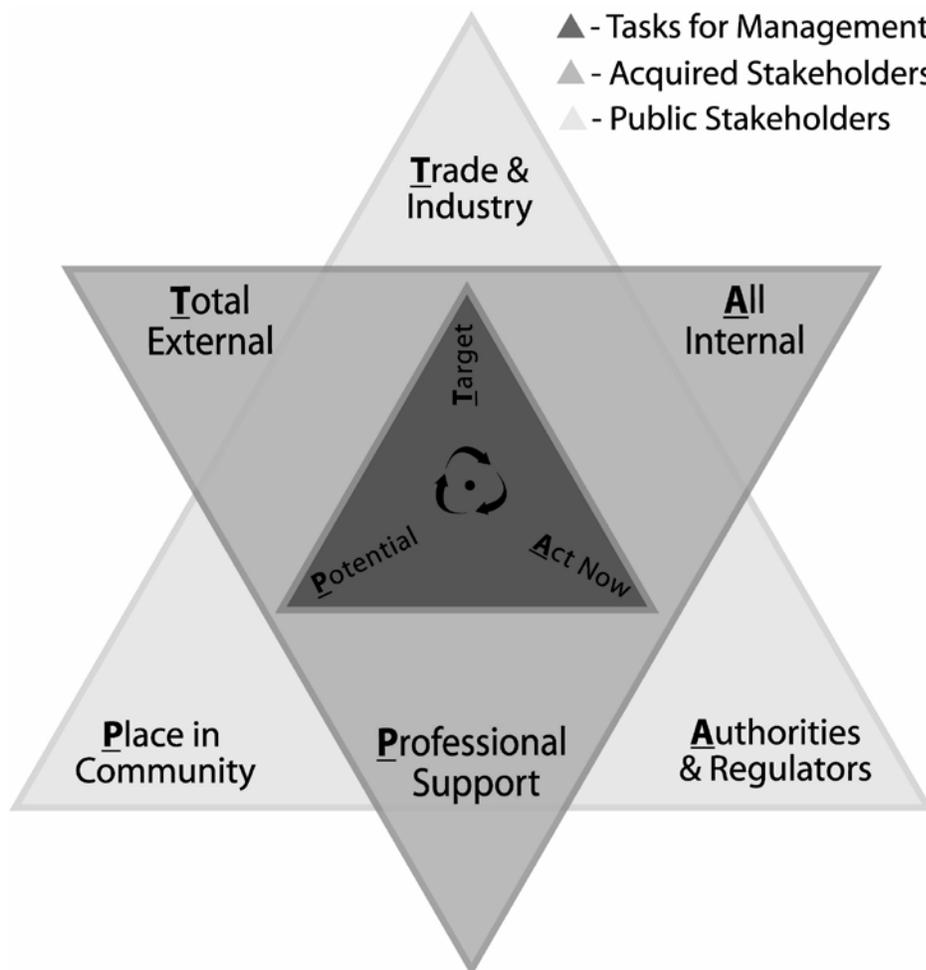
Management is the cardinal asset of a company. It goes without saying that a turnaround is doomed without effective management. Management is in the best position to truly embrace the perspective of a company's obligations to *all* its stakeholders. In an attempt to communicate this view to management, we use a framework we call the Triple Tri-Angular Perspective Method ("3TAP Method"). As counselors, you may find the 3TAP Method helpful in sharpening your critical eye to offer your clients a more objective and sobering perspective during tough times.

Triple Tri-Angular Perspective Method (3TAP Method)

Managing a business or turnaround is not a smooth or linear process. Management must have acute multitasking capabilities to service concurrent stakeholder demands that all look to the same resources for satisfaction. A company's stakeholder obligations are never naturally aligned but must be managed, particularly as stakeholders and their demands change. The 3TAP Method described below is the method, albeit highly simplified, that can be used to train management as well as drive a turnaround.

Triangle 1: Tasks for management

Management must always be mindful of the concurrent duties that a company has to its stakeholders. A simple tool that can tap into the core issues for assessing management is the center piece of the 3TAP Method: the Task Triangle. Imagine this triangle as a pinwheel, constantly rotating and directing all three of its points to each of the six stakeholder



groups. Management must continually review, develop, and adjust the specific stakeholders in each group as well as the overall relationships of all groups. The three points of the Task Triangle are:

Target. Management must see the clear target of the company's obligations to its stakeholders and must employ metrics to track fulfillment of the company's responsibilities. Efforts to satisfy the target for each stakeholder must be balanced with those of all other stakeholders. Each commitment is uniquely different per stakeholder; therefore, management must actively understand and manage those specific targets and commitments.

Act Now. There is a constant need for up-to-date action items to rectify problems as they occur. These action items are reviewed to evaluate management's understanding of its purpose and to assess its foresight. Understanding how management got into dire straits speaks volumes about existing management.

Potential. Every stakeholder group has the potential to be more committed to the company, to present more resources,

and to be further developed to assist the company in fulfilling its purpose and obligations. If the company is stagnant, it is on borrowed time. The company must continually learn, grow, and change, and the only way to do so is to develop its potential.

Management rarely attempts to identify all of its stakeholders and commitments. Instead, management generally deals with stakeholder issues independent of the others. Moreover, management typically fails to proactively address foreseeable issues with the stakeholders or to cultivate the potential power in each stakeholder or group. Every company will fail if management neglects its stakeholders; thus, the other two triangles of the 3TAP Method are comprised of the stakeholders to which the Task Triangle is always directed. The stakeholders of a company are sorted into two triangles: (1) the Acquired Stakeholders (company-specific), and (2) the Public Stakeholders (universal to all companies based on law, industry, and society).

Triangle 2: Acquired stakeholders

Acquired Stakeholders make companies unique. Different companies may have common components and stakeholders, but the *combination* itself is unique to each company. A company's identity lies in its Acquired Stakeholders, its relationships with them, and how it leverages and improves those relationships. The three points of the Acquired Stakeholders Triangle are:

Totally External. These stakeholders are the company's most fragile relationships. For communicating the overall framework, external stakeholders can be generally categorized as follows:

Customers. A key element to a successful business is how it attracts, services, and retains customers compared to its competitors. A company must be customer-centric as this is the most delicate of all stakeholders.

Creditors. This group includes lenders, vendors, and landlords.

Critical Relationships. This group includes special relationships specific to a given company such as franchisors and license holders.

All Internal. Effectively balancing all internal stakeholders is rare among management teams. Most managers focus on the squeaky wheel, resulting in misevaluation of resources, inefficient structure, and abuse by, or of the, owners. Internal stakeholders can be generally categorized as follows:

Operating Resources. This group includes employees, equipment, processes, facilities, technologies, and cash.

Operating Structure. This group includes organizational structure, management, paper flow, communication channels, performance metrics, and resource employment strategy.

Owners. Owners are to be rewarded only after all other stakeholder commitments are fulfilled. Therefore, it behooves owners to have responsible and capable management.

Professionals. This stakeholder group comprises perhaps the least fragile of the acquired stakeholders as they are paid for specific functions or purposes. Professional stakeholders can be generally categorized as follows:

Tax & Accounting. Credibility on numbers, tax returns, and implications is a key element in all turnarounds (and all businesses). Frequently, CPAs are not fully utilized by management, despite CPAs having perhaps the best overall reputation

As part of the turnaround team, you become more involved in the company's lifecycle, and you play an instrumental role as your client grows and succeeds.

among professional groups. A good CPA is also a powerful weapon in negotiations.

Legal. Management must actively engage counsel for the company's organizational structure and general operations. However, management typically fails to engage good counsel from the outset (often due to cost), but then pays a price in the long run for its short-sighted savings. In a turnaround, a skilled and reputable corporate attorney is critical, often supplemented by skilled bankruptcy counsel. A creditor-specific attorney is also helpful to assist the team with stakeholder understanding and negotiations.

Task-Specific Functions. This group includes skill sets specific to a given company such as lean engineers,⁵ turnaround practitioners, advertising consultants, and IT professionals.

Triangle 3: Public stakeholders

All companies have responsibilities to Public (or non-acquired) Stakeholders. The three points of the Public Stakeholders Triangle are:

Trade & Industry. Failure to maintain proactive involvement with one's trade associations results in erosion of the company's core competencies and inhibits its ability to learn, grow, and change. This is a common error of management. Trade associations can be great sources of assistance, networking, resources, and understanding of the current state of the industry.

Authorities & Regulators. Federal, state, and local authorities and regulators can not only negatively affect a business by way of sanctions, but they can also be a tremendous ally and leveraged in a way to help a company better fulfill its obligations to all stakeholders. Tremendous advantages can be harvested from the EPA, IRS, and other like agencies traditionally feared by companies.

Place in Community. A company's community is perhaps the most unrecognized and abused Public Stakeholder, yet it is a potentially enormous value-add.

Untold benefits often result when management seeks to align the company's values with that of its community. The community provides a wealth of employees, professionals, vendors, customers, and literally every local resource a company needs; its image and network in the community can bring far-reaching value to the company.

How this relates to you as an attorney

Although attorneys alone cannot make a turnaround, they can certainly break one. The traditional legal mindset – the adversarial “us against them” approach – can doom the company at breakneck speed. The law is a necessary element for any turnaround, but it does not comprise the entire framework. Too often, we have seen attorneys attempt to justify their existence by starting fires only to show off their firefighting prowess, and that, it seems, is very short-sighted. The best thing you, as an attorney and counselor, can do for your client, is to look beyond the client's diagnosis with an eye toward the simple truth that the client's diagnosis is only part of the story. Consider discussing with the client the issues presented here, encourage the client to retain a qualified turnaround practitioner, and then jump on board for the myriad of legal work to be done during the turnaround process. As part of the turnaround team, you become more involved in the company's lifecycle, and you play an instrumental role as your client grows and succeeds.

Additionally, law firms are not immune from the perils of mismanagement, so consider applying the 3TAP Method to your own practice and managing your firm according to the framework discussed here.

Conclusion

Management is the key element in a successful business or turnaround. We successfully retain management in the vast majority of turnarounds, but they must wrestle with the issues revealed by the 3TAP Method. The knowledge gath-

ered from employing the 3TAP Method drives the turnaround strategy and business plan, all in conformance with a Chapter 11 reorganization plan if the need arises. Moreover, the 3TAP Method creates a communication channel between all stakeholders, with trust and cooperation being gained throughout the process because someone with credibility (an outside professional) is proactively and openly communicating with them, as existing management is always suspect in the eyes of injured stakeholders.

The 3TAP Method unites the stakeholders for success of the firm for their greatest payback, and there is a greater willingness on the part of the stakeholders to bear some of the pain when they see the holistic picture and a viable future.

The 3TAP Method trains management in their stewardship responsibilities going forward. Management, if retained, always ends up with a changed perspective and better insight into its various roles. Employing the 3TAP Method results in stronger internal and external relationships that are then further developed into more and better resources, greater performance, a brighter future, and thus more value to all.

...[T]here is a greater willingness on the part of the stakeholders to bear some of the pain when they see the holistic picture and a viable future.

About the Authors

Strategic & Operational Solutions, Inc. ("SOS"), is a turnaround firm based in Meridian, Idaho. SOS President Steve Neighbors, CFFA, CMAP, holds a Masters in Organizational Leadership and post-graduate certificates in Strategy (MIT) and Turnaround Management (Harvard Business School). This article was co-authored by Tom Schiers (Vice President) and Jace A. Richards, Esq. (General Counsel).

Endnotes

¹ A "stakeholder" refers to all parties to which a business enterprise owes a responsibility. Stakeholders include customers or clients, owners, employees, suppliers, creditors, professionals, regulators, etc.

² Hass, William and Lagrange, Patrick. "What every investor should know about lenders and the turnaround process." Turnaround Management, January 7, 2003.

³ A Chapter 11 "cram down" is when a bankruptcy court imposes a reorganization plan upon the creditors despite one or more objections by the creditors. See, generally, <http://www.investopedia.com/terms/c/cramdown.asp>.

⁴ See, generally, <http://www.onemint.com/2008/11/11/what-is-chapter-11-bankruptcy>, 11 Nov. 2008; and <http://www.articlesbase.com/finance-articles/understanding-chapter-7-bankruptcy-chapter-13-bankruptcy-chapter-11-bankruptcy-218914.html>, 22 Sep. 2007.

⁵ "Lean engineers" generally refers to those skilled in the area of efficiency whose main goal is to target and eliminate waste. See, generally, http://en.wikipedia.org/wiki/Lean_manufacturing.

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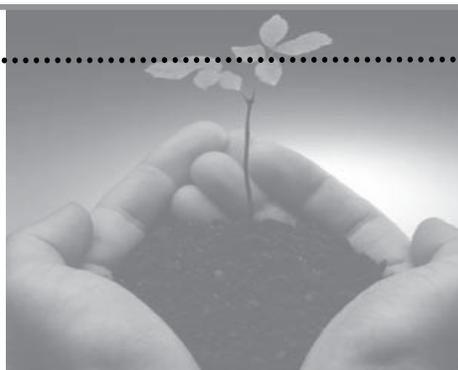
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Like Susan and her daughter.

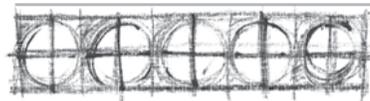
Idaho Volunteer Lawyers Program helped recruit and prepare a volunteer attorney to represent Susan's daughter who was suffering from abuse at the hands of a family member. Susan obtained a permanent protection order to stop visitation from the abusive family member when her daughter was present. Thanks, in part, to an IOLTA grant IVLP is able to **provide legal aid to the poor** and Susan was able to ensure the safety of her child. Where attorneys place IOLTA funds impacts how much the IOLTA grant program offers. Banks that partner with ILF to pay competitive interest rates on IOLTA accounts determine whether the Foundation is able to help people like Susan and her daughter.

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REDEFINING “PRIVACY” IN THE ERA OF SOCIAL-NETWORKING

Tonn Petersen
Perkins Coie, LLP

In today’s business world, international corporations and local “mom and pop” shops alike are scrambling to keep up with the ever-changing computer culture. Indeed, technology has infiltrated every aspect of business. Accountants have long since abandoned the art of keeping business records in ledgers and instead routinely rely on computer databases and spreadsheets to store any critical information. Any remaining typewriters are now found only in vintage stores. Employers seemingly spend more time communicating with their employees using email than good old fashioned face-to-face communication, even when an employee might be just down the hall.

Much like email and instant messaging, both thought to be a novelty used only by a few gadget-savvy consumers, social networking is now being embraced in the corporate world and is being leveraged as a valuable resource. However, the rapidly changing advances in technology do not come without increased risk to those companies and business professionals that put such advances to use. With the growing popularity of social networking sites such as Facebook, MySpace, LinkedIn and Twitter, more and more businesses are being confronted with the legal consequences that can stem from activity on social websites, especially as they relate to privacy concerns. Relating a personal experience or posting a “private” message on a social networking page may in fact not be a private matter at all. Content posted on a personal social networking site is often presented to a jury in a court of law as Exhibit “A.” Employers and employees alike are therefore asking the question: “What is privacy anyway?”



Tonn Petersen

However, the rapidly changing advances in technology do not come without increased risk to those companies and business professionals that put such advances to use. With the growing popularity of social networking sites such as Facebook, MySpace, LinkedIn and Twitter, more and more businesses are being confronted with the legal consequences that can stem from activity on social websites, especially as they relate to privacy concerns. Relating a personal experience or posting a “private” message on a social networking page may in fact not be a private matter at all. Content posted on a personal social networking site is often presented to a jury in a court of law as Exhibit “A.” Employers and employees alike are therefore asking the question: “What is privacy anyway?”

The exploding popularity of social networking

Social networking sites attract millions of users each year. In June 2010, Facebook reported over 400 million users, of whom approximately 50% are reported to log on to the site in any given day.¹

The law has not been able to keep up with the frantic pace set by rapidly changing technology.

MySpace, launched in 2004, boasts more than 113 million active users around the world. Of that number, 76 million users are American.² That means roughly one in four Americans currently has a MySpace page. Users of Facebook, MySpace and other such sites create profiles and can post comments, pictures and details about their interests and daily activities. These contents can then be viewed by the public as a whole. Alternatively, a user can limit who sees his or her personal page by limiting access to “friends,” a term that refers to other users who are invited to view a user’s personal page. It is not uncommon for a user to have hundreds of “friends.” That user can then request to view data from his or her friends’ friends. Hundreds, and even thousands, of individuals are then linked together this way to view and share information.

More recently, multiple networking sites have been developed that exclusively target professionals, such as LinkedIn and Plaxo. Along with Facebook and MySpace, these sites promote casual and informal communication, oftentimes between business professionals, but sometimes between complete strangers. This type of online forum provides for a more relaxed method of communication. Coupled though with a sense of perceived anonymity that comes with communicating from behind a keyboard as compared to face-to-face communication, a startling degree of candor is often displayed. It is no doubt then as to why litigators are turning to social networking content more and more in search of those truly incriminating statements.

For instance, one commentator recently noted that The American Academy of Matrimonial Lawyers has reported that 81 percent of its members have used or faced evidence in divorce cases found on Facebook, MySpace, Twitter and other social networking sites over the last five years.³ In addition, there have been an increasing number of cases in which an employee’s activity on his or her personal social net-

working page has led to the employee’s termination. According to a recent study conducted by Proofpoint, an Internet security firm, of those companies surveyed with 1,000 employees or more, 8% reported having terminated an employee for comments posted on a social networking site. Often, the termination is a result of the employee not using common sense when posting about work life, either by sharing sensitive corporate details, or by making disparaging comments about a supervisor or fellow co-worker.⁴ A user’s statement that begins with, “You cannot tell another soul this, but . . .” is often recorded permanently for the world to see. Unbeknownst to the user at the time, these statements can have a devastating effect in the court room.

What about privacy?

Are there legal limits as to what a lawyer can access from a person’s social networking profile during litigation? Does a person not have a reasonable expectation of privacy as it relates to the content of what he or she chooses to post on a social networking page? Does it make a difference whether the user chooses a “public” or “private” setting? The answers to these questions remain largely unanswered. The law has not been able to keep up with the frantic pace set by rapidly changing technology.

Acknowledging the advances in technology, the Advisory Committee on Civil Rules did at least recognize the need to amend the Federal Rules of Civil Procedure to account for the new methods of electronic communication and storage and bring the same within the scope of the discovery process. Accordingly, the amended Federal Rules of Civil Procedure were submitted and upon approval by the Supreme Court, became effective on December 1, 2006. The amended Rules introduced the phrase “electronically stored information” (or, “ESI”) and expressly state that ESI is discoverable. Some commentators point out that social networking pages seem to fit nicely within the intend-

ed scope of ESI, because the amended Rules, as well as the Federal Rules of Evidence and applicable state rules, (including Idaho's), do not specifically address social networking web sites (which just began to gain popularity when the amended Rules took effect), Courts are left to apply the existing e-discovery regulations to social media as best they can.⁵ As a result, different judges have taken different approaches to determining whether social networking content can be used in litigation. Take for instance a Tennessee judge who recently concluded that the best way to determine whether social networking content should be discoverable in a civil case was to create a Facebook page himself. The judge then directed the plaintiff to invite him as a "friend" so that he could view her photos and comments posted on her personal Facebook page in camera.⁶ A novel approach indeed, but the handful of other recent cases addressing social networking sites reveals no other common consensus among the courts.

For example, an Ohio court recently concluded that a party to a lawsuit had no expectation of privacy with respect to content included on her personal MySpace page when she made that page available for viewing to others. In the court's view, the plaintiff could "hardly claim an expectation of privacy regarding [such] writings."⁷

Even more recently, a California court drew a brighter line, or perhaps even a different line, with respect to the issue of privacy as it relates to social networking. In May 2010, in the case of *Crispin v. Audigier*, a California district judge quashed subpoenas served on Facebook and MySpace in a copyright infringement lawsuit that sought private messages sent through the social sites. The California judge ruled that "private" Facebook and MySpace messages are protected information under the Stored Communications Act. In quashing the subpoenas served on Facebook and MySpace, the district judge reversed a magistrate judge who earlier held that the messages sent through the sites were not protected under the law because they were public communications. The district judge reversed the magistrate judge's ruling because, according to the district judge, the magistrate judge failed to take into account the fact that both sites allow users to send private messages to selected "friends" that are not available to all users. Because the user had opted to employ private settings on the Facebook and MySpace sites, the court ruled that



the social networking sites did not have to produce the messages.⁸

While the *Crispin* decision is certainly a good starting point for understanding how courts might treat social networking content in the future, commentators and legal analysts say the court left a number of questions unanswered. For instance, the case can arguably be read to only address the narrow issue of subpoenas to third-party social networking companies, to which the Stored Communications Act is directly applicable. In theory, though, the defendant in the *Crispin* case, fashion designer Christian Audigier, could still seek the same information directly from the plaintiff in the case, who accused the designer of copyright infringement. The court did not signal how such a direct request would be treated, so the ruling does not mean that the private content is completely protected.⁹

Other issues are still in dispute as well. For instance, if a user has invited hundreds of "friends" to view his or her social networking page, is the "private" content shared by that user really private at all? Does the definition of privacy merely turn on whether a user chooses a public or private setting by the click of a mouse? If so, can a user involved in litigation make critical information inaccessible simply by changing privacy settings on his or her Facebook or MySpace pages?

These are some of the questions courts will undoubtedly have to address in the

near future. One thing is clear though, the world of social networking is most certainly re-defining the definition of privacy, and that this process is far from complete.

About the Author

Tonn Petersen focuses his practice in the areas of commercial litigation, labor/employment litigation and business disputes. Tonn earned his J.D. from the University of Denver Sturm College of Law and his B.A. from Utah State University. He is an associate attorney at Perkins Coie in Boise.

Endnotes

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SHAKY FOUNDATIONS: ENGINEERS RELY ON QUESTIONABLE PRIORITY DATES TO SUPPORT THEIR MECHANIC'S LIEN CLAIMS

Rebecca A. Rainey
Moffatt, Thomas, Barrett, Rock
& Fields, Chtd.

Introduction

The recent economic downturn has contributed to a number of failed subdivision projects, spawning an unprecedented amount of mechanic's lien litigation. Much of this litigation stems from the 1971 statutory amendments, which added professional engineers and licensed surveyors as a class of lien claimants. These amendments gave rise to two significant questions regarding the priority of an engineer's lien: (i) whether a lien for an engineer's pre acquisition work has priority over a purchase money mortgage, and (ii) whether a lien for an engineer's pre construction work attaches prior to commencement of construction. This article identifies the priority conflicts arising from an engineer's pre acquisition and/or pre construction work and provides a basic overview to aid the practitioner in advising clients – whether lenders or engineers – who find themselves in the midst of unstable development projects.



Rebecca A. Rainey

Typical fact pattern

The typical scenario driving lenders and engineers into costly priority litigation is as follows: In contemplation of a development project, the developer retains an engineer to assist with feasibility studies or initial preliminary plat work. Based on the engineer's initial work, the developer elects to pursue the project and begins acquiring the property. The engineer moves forward with the platting process and, after expending considerable time and effort, learns that the developer has run out of money. Though the viability of the project is called into question early on, the engineer obtains extensions on approvals for the preliminary plat, continues to work on final plats, and otherwise does whatever he can to help the developer salvage the project, all the while incurring additional fees and expenses. As the struggling project drags on, the engineer begins looking to his mechanic's lien rights as an in-

Eventually, the inevitable can no longer be denied, the engineer stops work on the project, records a claim of lien and, six months later, files suit to foreclose.

creasingly important source of payment. Eventually, the inevitable can no longer be denied, the engineer stops work on the project, records a claim of lien and, six months later, files suit to foreclose.

In the foreclosure, the engineer claims priority over all other mortgages on the property. The basis for this position is Idaho Code Section 45-506, which provides "The liens provided for in this chapter ... are preferred to any lien, mortgage or other encumbrances, which may have attached subsequent to the time when ... professional services were commenced to be furnished." As described above, in almost every case, the engineer has commenced work before the property was acquired and before construction commenced (if at all). However, as the following demonstrates, Idaho law is unsettled regarding the priority date for engineers engaging in pre acquisition and pre construction work and lenders are increasingly using this unsettled law to challenge the alleged priority date of engineers. Accordingly, prior to incurring additional costs and fees in an effort to salvage a struggling development, the engineer needs to be aware of the risk that he will not be able to maintain a pre acquisition or pre construction priority date.

Pre-acquisition work

For many lien claimants, the priority analysis begins and ends with Idaho Code Section 45-506, which provides that "The liens provided for in this chapter ... are preferred to any lien, mortgage or other encumbrances, which may have attached subsequent to the time when ... professional services were commenced to be furnished." Lurking beyond the confines of this single statute, however, is a trap for lien claimants who engage in the pre-acquisition work typical of many engineers. This trap gives rise to the question: if an engineer enters into a contract with a prospective developer who does not own the

property, how does work under contract with a non-owner confer lien rights?

Statutory priority of purchase money mortgage

Looking beyond Idaho Code Section 45-506, it becomes evident that there are significant problems with the position that liens for pre-acquisition work will have priority over subsequently recorded purchase money mortgage. First, Idaho Code Section 45-501 provides that a mechanic's lien can only arise for work "furnished at the instance of the owner of the building or other improvement or his agent." The Idaho Supreme Court has concluded that, by such requirement, "it does not appear that permission or knowledge that the work is being done is sufficient to bind the owner's interest in the land." Accordingly, unless the contracting party has an ownership interest in the land, a mechanic's lien will not attach.

Second, Section 45-505 provides that a lien cannot attach to an interest in property greater than that held by the contracting party, as it provides that when person contracting for services that gives rise to a claim of lien "owns less than a fee simple estate in such land, then only the interest of the person or persons causing the services or improvement therein is subject to such lien." While it has been recognized that a vendee's interest in a land sale contract is sufficient ownership interest to give rise to a claim of lien, such claim of lien only attaches to the vendee's interest – not to the fee simple estate in the land. Again, if the contracting party owns less than a fee simple interest in the land at the time of contracting, the prospective lien claimant must be cognizant of the limitations of his potential lien rights.

Finally, Idaho Code Section 45-112, which is entitled "Priority of purchase money mortgage," reads: "A mortgage given for the price of real property, at the time of its conveyance, has priority over

all other liens created against the purchaser, subject to the operation of the recording laws.” This statute, read in conjunction with Idaho Code Sections 45 501 and 45 505, provides strong evidence that the Idaho legislature intended that lien rights accruing against the purchaser in a land sale contract are statutorily subordinate to the purchase money mortgage. Accordingly, though an engineer may have done significant pre acquisition work, Idaho Code Section 45-112 may prevent him from claiming a pre-acquisition priority date.

The Idaho Supreme Court has not specifically addressed the relative priority of a purchase money mortgage vis-à-vis a mechanic’s lien. The closest decision touching upon the issue was found in the case of *Poynter v. Fargo*, where the Court expressly noted that the precise issue was not before it. Lien claimants will argue that courts should ignore Idaho Code Section 45 112 and rely, instead, on Idaho’s liberal policy in favor of enforcing mechanic’s lien. However, such approach renders Idaho Code Section 45-112 a nullity and cannot be supported under a plain reading of Idaho statutes. Accordingly, reading Idaho Code Section 45-112 in conjunction with Idaho’s mechanic’s lien statutes, the weight of the authority suggests the issue left open in *Poynter v. Fargo* will be resolved in favor of finding priority for the purchase money mortgage. Accordingly, it is very risky for a potential lien claimant to rely upon pre acquisition priority dates as the basis for its lien claim.

Pre-construction work

Not only should engineers be concerned about the stability of pre-acquisition priority dates, they should be equally concerned about pre-construction priority dates. It goes without saying that mechanic’s lien statutes vary widely between jurisdictions. Nevertheless, one thread that remains uniform is that there must be some mechanism to give competing encumbrancers notice of potential lien rights. States typically adopt one of two mechanisms for accomplishing this goal: either requiring the lien claimant to record notice of commencement of lienable activity at the time the off-site work was commenced, or by requiring commencement of visible on-site construction before any lien claim can attach.

Traditionally, judicial interpretation of Idaho’s mechanic’s lien statutes has relied on commencement of construction activity to provide notice of potential lien claims. Commencement of construction

Accordingly, there does not appear to be any authority, either in Idaho’s mechanic’s lien statutes or judicial decisions, suggesting that engineers should be entitled to pre-construction priority dates not available to other classes of lien claimants.

was recognized as the earliest priority date in the landmark decision of *Pacific States Savings, Loan & Building Co. v. Dubois*. Recently, this decision was upheld by the Idaho Supreme Court in *Ultrawall v. Washington Mutual Bank, FSB*. These two decisions confirmed that lien rights attach at one of two times: either the commencement of construction or, if the lien claimant was not involved in commencement of construction, the time the lien claimant actually began providing services or materials to the project.

The simplicity of *Pacific States’* formula was disrupted when the Idaho legislature added professional engineers as a class of lien claimants. While it is undeniable that Idaho’s lien statutes provide lien rights to engineers for pre-construction work, it is less clear what is meant by “commenced to be furnished” language found in Idaho Code Section 45-506 and, therefore, when those lien rights attach. While the Idaho legislature allowed liens for pre-construction work, it is not clear whether it intended to allow for pre-construction priority dates, which would give engineers more liberal priority dates than those available to all other classes of lien claimants.

Engineers attempt to gain pre-construction priority date

The lack of specific direction on this matter has caused engineers to read the statute with an eye towards gaining priority rights the moment they commence pre construction engineering services, even though pre-construction priority dates are not available to other classes of lien claimants. In support of the position that they are entitled to pre-construction priority dates, engineers point to the type of work that is lienable and argue that if they are entitled to a lien for such work, then such lien should attach as of the very moment they began such work, regardless of when (or if) construction is ever commenced.

As additional support for their position, engineers point to *Ultrawall’s* approval and summary of the *Pacific States*

decision, explaining that *Pacific States* construed the statute “to mean that the particular lien claimant must either commence to furnish professional services such as engineering or surveying, commence the physical construction of building, improvement or structure, or, if that person or entity was not involved with either of the above activities, begin to work or furnish materials in order for that lien claimant’s lien to attach.”

From that, they argue that *Ultrawall’s* summary of *Pacific States* establishes an engineer’s right to a pre-construction priority date. The problem with this argument is that the priority date of a professional engineer was not the issue before the Idaho Supreme Court in *Ultrawall* and this summary is, at best, dicta.

No basis for pre-construction priority date for engineers

In contrast to the support that engineers find in the *Ultrawall* decision is the holding of *Beall Pipe & Tank Co. v. Tumas Intermountain, Inc.* In that case, the Idaho Court of Appeals interpreted the language “commenced to be furnished,” as it applies to materialmen. The *Beall Pipe* court held that “commenced to be furnished” meant the date that materials were first delivered to the project site, not the date the lien claimant first began to prepare the materials for shipment. In reaching this conclusion, the Court of Appeals relied on a California Supreme Court decision, which considered the priority date of an architect’s services. The California Supreme Court made it clear that, under California’s lien statute, liens for pre-construction professional services cannot claim a pre-construction priority date:

When actual construction commences on the ground or material for construction is delivered to the site, the lien of the architect which then attaches is of course for all services rendered by him, including services rendered theretofore and which contributed to the construction.

The *Beall Pipe* Court then noted that the Idaho Supreme Court apparently adopted this rule as early as 1905.

In 2001, more than 15 years after the Court of Appeals issued its decision in *Beall Pipe*, the Idaho legislature amended Idaho Code Section 45-506; however, the amendment did nothing to address *Beall Pipe*'s holding, making no effort to give "commenced to be furnished" different meanings for professionals and materialmen. Arguably, such legislative inactivity constitutes tacit approval of *Beall Pipe*. Accordingly, there does not appear to be any authority, either in Idaho's mechanic's lien statutes or judicial decisions, suggesting that engineers should be entitled to pre-construction priority dates not available to other classes of lien claimants.

Neither *Beall Pipe* nor *Ultrawall* directly addresses whether engineers are entitled to a pre-construction priority date. *Pacific States*, *Ultrawall*, *Beall Pipe*, and the subsequent legislative inaction suggest that the priority date of any lien claimant (including engineers) must rest on either the commencement of construction or, if the lien claimant was not involved at the commencement of construction, then the date the lien claimant actually delivered labor, materials or professional services to the project site. Nevertheless, engineers are not expected to allow these indicators to settle the matter and will continue to claim pre-construction priority dates until the issue is resolved by the Idaho Supreme Court or the Idaho legislature.

Conclusion

In sum, the Idaho Supreme Court has not directly addressed whether engineers are entitled to pre-acquisition and/or pre-construction priority dates. Because engineers often engage in both pre acquisition and pre construction work, there is substantial risk to the engineer who engages in this work without realizing the unsettled state of Idaho law. Likewise, there is substantial risk to the lender who

Lenders are increasingly challenging an engineer's right to claim these more favorable priority dates.

may be the ultimate source of repayment if an engineer's mechanic's lien is given a pre-acquisition or pre-construction priority date.

As discussed previously, lenders are increasingly challenging an engineer's right to claim these more favorable priority dates. Until these issues are resolved, engineers must be aware of the high risk of litigation and take proactive measures to ensure payment for the work they invest in struggling development projects. If engineers do elect to continue to incur expenses trying to salvage unstable projects, they are advised not to rely on tenuous lien rights as an important source of repayment.

In addition to challenging alleged pre-acquisition and pre-construction priority dates in litigation, lenders are advised to look specifically for pre acquisition and/or pre construction work performed by engineers that would not otherwise be apparent through a typical site inspection. Because any future unpaid work is lienable and will relate back to the original priority date, lenders need to take all reasonable precautions to obtain lien releases, subordination agreements, and otherwise ensure that there are mechanisms in place to make sure the engineer is paid so that lien rights with the potential for pre-acquisition or pre-construction priority dates do not arise.

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- ¹ *Parker v. Northwestern Inv. Co.*, 44 Idaho 68, 75, 255 P. 307 (1927).
- ² Idaho Code Section 45-505.
- ³ *Poynter v. Fargo*, 48 Idaho 271, 281 P. 1111, 1112 (1929); *Parker v. Nw. Inv. Co.*, 44 Idaho 68, 255 P. 307 (1927).
- ⁴ 48 Idaho 271, 281 P. 1111, 1112 (1929) ("It will be noted that the question of a vendor's lien and a vendor's rights thereunder as against the mechanic's lien are not in the case at bar, nor is there anything to show that the mortgages were purchase price mortgages.")
- ⁵ *Boise Payette Lumber Co. v. Sharp*, 45 Idaho 611, 617, 264 P. 665 (1928) ("The provisions of our lien laws must be liberally construed with a view to effect their objects and promote justice." With this rule in mind, we are constrained not to apply the strict rule of construction "...")
- ⁶ Idaho Code Section 45-501.
- ⁷ 135 Idaho 832, 836, 25 P.3d 855, 859 (2001).
- ⁸ *Walker v. Lytton Savings and Loan Association of Northern California*, 465 P.2d 497, 84 Cal.Rptr. 521 (1970).
- ⁹ Whether architects are entitled to lien rights under Idaho's mechanic's lien statute is another unsettled question.
- ¹⁰ *Id.*, at 157, n. 5.
- ¹¹ *Beall Pipe*, 108 Idaho at 492, 700 P.2d at 115.
- ¹² In 2001, the Idaho legislature amended Idaho Code Section 45-506 to add lien rights for lessors of equipment.
- ¹³ Lenders electing to challenge these claims should be aware that Idaho Code Section 45513 provides a one-way attorneys fees statute in favor of lien claimants.



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CORPORATE CITIZENS AND POLITICAL SPEECH: THE PERILS SURROUNDING A SUPREME COURT GAME-CHANGER: CITIZENS UNITED V. FEDERAL ELECTION COMMISSION, 558 U.S. 50 (2010)

Linda Pall
Law Office of L. Pall

The U.S. Supreme Court altered the political landscape profoundly with a sharply divided opinion on corporate political speech and the role of corporations in electoral politics in its January 21, 2010 decision in *Citizens United v. Federal Election Commission*¹. This paper briefly addresses the content of the majority opinion that strikes down a key provision of BCRA, the Bipartisan Campaign Reform Act, 2 U.S.C. 441b, the concurring opinion of Chief Justice Roberts, and the 90-page dissent of Justice John Paul Stevens. The paper concludes with a discussion of reactions to this Supreme Court opinion among scholars, practitioners as well as the executive branch and Congress. Even in this 2010 November election cycle, the political landscape is already feeling the reverberation of *Citizens United* with the first forays of corporations into partisan political contests. The conclusion finds that this decision will change the way corporations may take on political issues, should they choose to do so and that the major effect will not likely be felt primarily in partisan elections for local, state and federal office holders but in judicial elections.



Linda Pall

Citizens United v. FEC: the opinion

Justice Anthony Kennedy wrote for a five-justice majority, striking down the provisions of the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. Section 441b, hereafter BCRA, prohibiting corporations and unions from making independent contributions from corporation and union general treasury funds involving “electioneering communications” or expressly advocating the election or defeat of a federal candidate. This case came to the Supreme Court as a result of a request by Citizens United, a large, well-funded nonprofit conservative advocacy corporation, for declaratory and injunctive relief

...[T]he major effect will not likely be felt primarily in partisan elections for local, state and federal office holders, but in judicial elections.

from the provisions of BCRA concerning electioneering communications (2 U.S.C. 441b) and the BCRA disclaimer, disclosure and reporting requirements, BCRA Sections 201 and 311. Citizens United produced a movie highly critical of Hillary Rodham Clinton, Democratic candidate for President in the Democratic primaries of 2008, intending to publicize video-on-demand availability of the movie, *Hillary: The Movie*, widely on broadcast and cable television within 30 days of primary elections. Before paying the outlets for time on the media, faced with the potential of civil and criminal penalties from the Federal Election Commission for violating Section 441b, Citizens United went to United States District Court, asking the United States District Court for the District of Columbia for its opinion.

The District Court denied Citizens United’s request for an injunction. The Federal Elections Commission (FEC) filed and was granted its motion for summary judgment by the District Court. Citizens United took the appeal to the U.S. Supreme Court where it was argued initially on March 24, 2009. In an extraordinary move, the Supreme Court requested the parties to re-argue the case before the Court September 9, 2009. The Court asked the parties to address the continued validity of *Austin v. Michigan Chamber of Commerce*,² and *McConnell v. Federal Election Commission*.³ Should the Supreme Court sustain the limitations on electioneering communications codified in 441b and allow the restriction of political speech on the basis of the speaker’s corporate identity? The stage was set for a direct confrontation between Congress and the Court over the control of exploding campaign finance expenditures, including

those by corporations, given the size and importance of the corporate megaphone in American political discourse.

Congress had struggled for many years to find a supportable basis for getting some sort of hold on the exploding rate of political spending in the face of political action committees and Section 527 tax-exempt political organizations (26 U.S.C. 527) and thought that the McCain-Feingold legislation would fill the bill. Many 527s are run by interest groups and used to raise money to spend on issue advocacy and voter mobilization outside of the restrictions on PACs. These organizations include literally hundreds of groups, such as the Swift Boat Veterans for Truth, so prominent in the defeat of John Kerry in the Kerry-Bush presidential contest of 2004; Emily’s List, a perennial advocacy organization for women in politics; and Move-On.org, a progressive advocacy group that has taken a major role in pressing the Obama legislative agenda. These organizations have significant reporting and disclosure requirements to preserve their tax-exempt status but few restrictions on expenditures and contributions. The remaining restrictions before the *Citizens United* decision focused on the long-held prohibition of direct contributions from corporate treasuries to candidate advocacy expenditures.

As a direct result of this decision, Justice Kennedy found that *Austin v. Michigan Chamber of Commerce*⁴ is in direct opposition to the First Amendment’s ban on Congressional actions that abridge freedom of speech, in that Section 441b prohibits direct corporate and union expenditures and attaches criminal sanctions to violations. *Austin*’s reliance on an argument justifying restrictions on indepen-

dent corporate expenditures in political campaigns was based on a governmental interest in preventing “the corrosive and distorting effects of immense aggregates of wealth . . . that have little or no correlation to the public’s support for the corporation’s political ideas.”⁵ Justice Kennedy rejected this anti-distortion rationale, finding that corporations, as the source of corporate political expenditures, are not any more corrupt than expenditures from very wealthy individuals or unions. *Austin*, authored by Justice Thurgood Marshall, was explicitly overruled as well as the relevant sections of *McConnell v. Federal Election Commission*⁶.

The five-member Court majority in *Citizens United* explicitly overruled the earlier 6-3 decision of the Supreme Court in *Austin* and its extension in *McConnell v. Federal Election Commission*, addressing prohibition of corporate independent expenditures.

Despite the seismic quality of Justice Kennedy’s majority rejection of Section 441b and removal of expenditure restrictions on corporations and unions, the provisions of the law requiring disclaimers and disclosure of sources of such expenditures were affirmed over the objections of *Citizens United*. While disclosure requirements place a burden on the corporation or union seeking to participate in democratic dialogue, the Court found that disclosure serves a proper governmental interest, especially in light of the practice of some groups to select misleading names as sponsors and to hide the true identity and interests of the speakers.

Chief Justice Roberts’ concurring opinion

The Chief Justice, joined by Justice Samuel Alito, wrote separately to address “the important principles of judicial restraint and *stare decisis* implicated in this case.”⁷ This is especially telling in light of the remarks by both justices during their confirmation hearings concerning *stare decisis*. The Chief Justice characterized the Government’s position as advocating direct prohibition of political speech, extending to the prohibition of newspapers owned by corporate entities from running editorials or opinion pieces relating to candidates in upcoming elections. He stated that such a position meant that the government could restrict First Amendment rights to natural individuals only, “subverting the vibrant public discourse that is at the foundation of our democracy. The Court properly rejects that theory, and I join its opinion in full. The First Amendment protects more than just the

Rejecting a century of history is unwise and a departure from the respect for precedent and stare decisis that should guide the Court.

individual on a soapbox and the lonely pamphleteer.”⁸

Neither an “inexorable command,”⁹ nor a “mechanical formula of adherence,”¹⁰ following *stare decisis* is a principle of policy, not merely upholding past decisions but requiring those past decisions to have been decided correctly. With two rounds of briefing, two oral arguments and 54 *amicus* briefs, the Court had all it needed to arrive at the correct decision, according to the Chief Justice.¹¹

Justice Stevens’ dissent

A strongly worded, 90-page dissent by Justice John Paul Stevens, joined in by three other members of the Court, Justices Ginsburg, Breyer, and Sotomayor, followed the specific concurring opinion of Chief Justice Roberts and Justice Samuel Alito. The underlying issue only is “*how* the appellant may finance its electioneering.”¹² Did the wealthy, well-funded non-profit corporation have the right, within the 30-day pre-election period, to use general treasury funds for partisan, anti-candidate broadcasts?

When talking about elections, Justice Stevens recognized fundamental differences between corporate speakers and human speakers. He reminds us that corporations have made wonderful contributions to society but they are not actually members. They are unable to vote or hold office. They can be owned and managed by non-residents, even aliens, whose interests might be antithetical to those of the public in a given state. Legislators have a responsibility to take steps to protect their citizens from the potentially negative effects of corporate spending in local, state and national elections.

Contrary to the majority, the history of control of corporate influence in campaign financing goes back to the adoption of the Tillman Act in 1907¹³, and has met with judicial approval since then consistently.¹⁴ Rejecting a century of history is unwise and a departure from the respect for precedent and *stare decisis* that should guide the Court.

Justice Stevens, apologizing for the length, took the next 87 pages to strongly

dissent from the majority’s principal holding by showing the procedural history of the case and the proper, narrower basis that was the preferred foundation of this decision, the misguided position of the majority on *stare decisis*, the departure of the majority from Supreme Court jurisprudence in declaring the Section 203 facially unconstitutional, the mistaken assumptions of the majority that BCRA “bans” corporate political speech, that identity-based distinctions may not be drawn in the political realm, and that the two principal cases overruled in this case were unrepresentative of the tradition of First Amendment jurisprudence, and *finally* by illustrating the errors of the majority in dealing with the anti-corruption, anti-distortion and shareholder protection rationales for regulation of campaign financing and corporate electioneering.

This is ground zero of judicial activism, a trait roundly criticized by the very justices in the majority in this decision.

Many other avenues remain open for electoral communication for the small businessperson, (he or she can take an advertisement out in his or her own name), or for the employee at a corporation. (PAC expenditures are widely available for personal contributions and expenditures). Contrary to the contention of the majority, *Austin* and *McConnell* do not ban corporate political speech and sustaining BCRA does not open a door to government censorship that could reach all the way to *Mr. Smith Goes to Washington*, the movie. The provisions of Section 203 function as time, place and manner restrictions for a small class of advocacy messages. If *Citizens United* had wanted to broadcast *Hillary: The Movie* via on-demand cable DVD services, it could have funded the activity without using corporate donations or elected to fund it through its highly successful and well-funded conservative political action committee.

Finally, after explaining why this case was not an appropriate one in which to overrule *Austin* and *McConnell* and showing that those decisions *are* congruent with First Amendment principles, Justice Stevens took on the goal of anti-distortion

as a justification for corporate election finance regulation. A fundamental concern of the First Amendment is to protect the individual's interest in self-expression. The concern, expressed in *Austin* and ridiculed by the majority, directed toward the potential for corporate domination of the political process is based on concern for facilitating First Amendment values by preserving the opportunity for individuals to have access to the marketplace of ideas and not have the marketplace inundated and controlled by corporate messages about campaigns and candidates.

Shareholder protection is not understood by the majority, according to Justice Stevens, and should be viewed as support for the anti-distortion rationale, rather than an individual basis for justifying regulation of corporate campaign expenditures. Shareholders may not support the corporate advertising efforts and not be inclined to take on the difficult task of a shareholder derivative suit under the circumstances. Further, if the corporation has a political action committee, a shareholder may not be sure of the source of the advertisement, whether it is the PAC or the corporate treasury.

At base, the dissent concluded that the narrow majority had preferred its own opinion over the "long-standing consensus on the need to limit corporate campaign spending."¹⁵ The decision was far outside the mainstream of First Amendment principles as well as political evidence and experience in the twentieth century.

Reaction to *Citizens United*

When *Citizens United* was announced on January 21, 2010, an avalanche of public comment ensued. From Adam Liptak's *New York Times* article on the ruling characterizing the decision as the product of a bitterly divided Supreme Court¹⁶ to the Lyle Denniston report on the U.S. Supreme Court Blog, SCOTUS¹⁷ that created a hypothetical of General Motors running for Congress from Michigan, this decision shook political foundations in the United States. Liptak recognized the profound doctrinal shift the decision represents, both in its breadth and its form. Major practical and political consequences will certainly follow, according to specialists in campaign finance law, reshaping the way elections are conducted. While labor unions, often at odds with corporate interests, are similarly freed of restrictions and regulation, labor unions are far less powerful economically than corporations as a group. Thus, the net beneficiaries of this decision are corporations, able to spend

Contests for state supreme court seats are highly susceptible to corporate contribution manipulation and tend to be vicious and expensive.

directly in candidate electioneering, with the approving imprimatur of the 5-4 majority.

Denniston's blog analysis continued its discussion of the full extension of personhood and its privileges to corporations, saying that the decision elevated corporations to the equal status of human beings where free speech was concerned. Though the right-to-vote scenario might be considered remote, the decision succeeded in rehabilitating the image of corporations in the political process and exposed a fundamental difference of interpretation of corporate attributes on the Court. The potential for corruption and distortion of elections was rejected by the majority.

Will the enhanced nature of corporate rights reflected in this decision encourage corporations to examine the outer limits of corporate personhood? Denniston believes that is the likely result, particularly given the Court's decision limiting the criminal reach of the Department of Justice with federal criminal fraud laws and the continuing debate at federal and state levels over the size of punitive damages in corporate tort cases.

New Yorker magazine columnist and Supreme Court watcher Jeffrey Toobin blogged that the blithe overturning of years of precedent and the activist stance the Court majority took is not likely to result in a flood of major corporate contributions in the 2012 presidential campaign. Rather, it is much more likely to affect judicial elections across the country. These elections are rarely the object of great voter involvement and attention. Contests for state supreme court seats are highly susceptible to corporate contribution manipulation and tend to be vicious and expensive. Corporate interests have obvious payoffs if they can further intervene without regulation in state judicial contests. Decisions of state supreme courts control civil cases and the all-important tort world of punitive damages. Having justices who reflect your corporation's views is quite literally money in the bank.¹⁸

In *Originally Speaking*, an online debate series of the Federalist Society, Barry

Friedman, Erik Jaffe, Trevor Potter, Larry Ribstein and Howard M. Wasserman discussed the decision, the soundness of its reasoning, and its implications.¹⁹ The opinions ranged from viewing the decision as an unseemly activist act to a decision long awaited and richly deserved. Viewing corporations as Frankenstein monsters is inappropriate and untenable. Yet those who must review elections and provide encouragement, indeed regulation requiring fairness, are at a loss with this decision as to how that fairness and equality is to be achieved. One interesting observation of these largely conservative scholars and commentators on the law is that the decision may well have been based on insufficient information concerning the real political effects of corporate contributions on elections, opening the way for mischief in electioneering since the practical effects were not adequately addressed.

Conclusion

Citizens United was a departure from responsible judicial decision making, taking an activist stance and demolishing the respect for *stare decisis*. The damage may not be readily apparent in federal and state elections for the legislative and executive branches but concern for the judicial branch elections is well-founded and serious.

President Obama's remarks during his State of the Union message shortly after the decision was announced by the Court squarely criticized the Court in the most public of settings.

The federal response in Congress has been to offer the DISCLOSE Act, Democracy is Strengthened by Casting Light on Spending in Elections Act, HR 5175, introduced by Representative Chris Van Hollen (D-Md) and Senator Chuck Schumer (D-NY). The proposed legislation adopts new provisions for campaign communication by corporations and associations but exempts certain large member groups, including the AARP and the National Rifle Association as well as unions. The legislation was the subject of weeks of bargaining to find enough votes to pass

it in June. However, at the last moment, the results of the horse trading so offended supporters of the objective of the bill that its supporters withdrew it to return to the drawing board to see if a revision could be resuscitated. To date, the bill appears not to be moving.

State legislatures will be reviewing their state campaign laws to determine whether they need to loosen the reins more for their corporate citizens. Good government groups, from the League of Women Voters to public interest organizations, will want to look at possible responses to this decision. States, including Idaho, will certainly be encouraged to examine their judicial election procedures, including the Constitutional and statutory requirements, to determine whether this would be the appropriate time to consider ending judicial head-to-head elections and revising judicial elections to retention elections only, as Idaho has for magistrate judges. The potential of "justice for sale" is real and immediate. Recent Idaho Supreme Court elections provide warning signs of this very problem.

Idaho corporations, while looking at the *Citizens United* decision, may think they have a new invitation to become active in partisan political contests. They would be well advised to think twice or three times, not because of the likelihood of a shareholder derivative action and its attendant costs. Rather, the publicity and general public reaction might well be more negative than positive. The cost of pressing one's political preferences, especially candidate preferences, would not net a positive return when compared with the potential for adverse public reaction to the corporation's involvement. Shareholders are not necessarily in sync with the opinions of corporate directors or officers as to public policy preferences or even policy preferences that might be favorable to the corporation, including

which candidates would actually be best suited to advance those alleged interests. It is just fraught with negative potential that does not provide enough possible positive result to encourage full-blown participation in political campaigns, especially candidate contests.

Nonprofit corporations are well advised to take scrupulous care of their Internal Revenue Service designation for tax exempt purposes. Charitable nonprofits can engage in a variety of voter education activities, but before going in that direction, it would be wise to obtain professional advice and review the policy thoroughly within the Board of Directors. The decision in *Citizens United* does not allow 501(c)(3)s to engage in political activity and does not affect federal laws other than the BCRA and section 401b and the disclosure/disclaimer requirements. Incidentally, *Citizens United* is a 501(c)(4) nonprofit corporation and those authorized under (c)(4), including labor unions, trade associations, chambers of commerce and others, are treated differently from the (c)(3) organizations.

A Washington State University doctoral dissertation in 1986 took a position very similar to that of the dissent, authored by Justice Stevens in this opinion. The dissertation found the statements of Justice Rehnquist, objecting to *Buckley* and *Bellotti*, a highly reasonable and defensible position:

"A State grants to a business corporation the blessings of potentially perpetual life and limited liability to enhance its efficiency as an economic entity. It might reasonably be concluded that those properties, so beneficial in the economic sphere, pose special dangers in the political sphere... I would think that any particular form of organization upon which the State confers special privileges or immunities different from those of natural persons would be subject to like regula-

tion, whether the organization is a labor union, a partnership, a trade association, or a corporation."²⁰

About the Author

Linda Pall has a general private civil law practice in addition to her appointment as Coordinator of Business Law for the College of Business at Washington State University. She is the coordinator of the Washington State University Business Law and Ethics Symposium, an annual Pacific Northwest meeting of practitioners, scholars and business leaders, committed to improving the ethical practice of law and business. Pall is currently chair of the Idaho State Bar Family Law Section and the Diversity Section and is on the governing council of the Business and Corporate Law Section.

Endnotes

- ¹ 510 U.S. 50 (2010)
- ² 494 U.S. 652 (1990)
- ³ 540 U.S. 93 (2003)
- ⁴ 94 U.S. 652 (1990)
- ⁵ 494 U.S. at 660
- ⁶ 540 U.S. 93 (2003)
- ⁷ 558 U.S. 50 (2010) at p. 1.
- ⁸ *Ibid.*
- ⁹ *Lawrence v. Texas*, 539 U.S. 558 (2003)
- ¹⁰ *Citizens United*, at 6, Roberts' concurring opinion, citations omitted
- ¹¹ *Citizens United*, at v 14, Roberts' concurring opinion.
- ¹² *Citizens United*, at 1, Justice Stevens' dissent.
- ¹³ , ch. 420, 34 Stat. 864
- ¹⁴ See *FEC v. National Right to Work Comm.*, 459 U.S. 197 (1982).
- ¹⁵ *Citizens United*, p.90, Justice Stevens' Dissent.
- ¹⁶ NEW YORK TIMES, January 22, 2010, at 1.
- ¹⁷ Available at: <http://www.scotusblog.com/2010/01/analysis-the-personhood-of-corporations/>
- ¹⁸ <http://www.newyorker.com/online/blogs/news-desk> January 22, 2010
- ¹⁹ Available at: <http://www.fed-soc.org/debates> February 3, 2010
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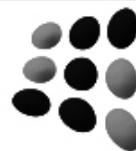
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A FRESH LOOK AT PUNITIVE DAMAGES

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Introduction

The Idaho Supreme Court's recent decision in *Weinstein v. Prudential Property & Casualty Insurance Co.* addresses a difficult, recurring question about punitive damages: When does the U.S. Constitution permit the jury to consider conduct by the defendant that has harmed people other than the plaintiff?¹ The U.S. Supreme Court has addressed that question in several decisions that are discussed in *Weinstein* and that warrant a fresh look in light of *Weinstein*.

This article identifies five situations in which a jury may, consistently with the U.S. Supreme Court precedent, consider the defendant's harmful conduct toward others when assessing punitive damages. The article also identifies an important issue related to the constitutionality of punitive damages that was addressed in *Weinstein* but has yet to be addressed by the U.S. Supreme Court.



Richard Seamon

U.S. Supreme Court cases

The U.S. Supreme Court has struck down state-court awards of punitive damages three times under the Due Process Clause of the Fourteenth Amendment. In all three cases, the Court held that the jury improperly considered the defendant's harmful conduct toward people other than the plaintiff.

In *BMW v. Gore*, Dr. Gore sued BMW for selling him a car, as new, without telling him that it had been repainted.² In state court, Gore won \$4000 in compensatory damages and \$2 million in punitive damages. The U.S. Supreme Court invalidated the punitive damages award. This was the first time the Court had ever found a punitive damages award unconstitutional-ally excessive.³

The Court identified three "guideposts" for assessing the size of a punitive damages award: (1) the reprehensibility of the defendant's conduct; (2) the relationship between the actual or potential harm to the plaintiff and the punitive damages

...[T]he Court in *Philip Morris* said that harm to others can be considered in assessing the reprehensibility of the defendant's conduct toward the plaintiff...

awarded; and (3) a comparison of the punitive damages award to the civil penalties authorized in comparable cases.⁴ Under these guideposts, the \$2 million awarded to Dr. Gore was "grossly excessive."⁵

The Court also held that the jury improperly considered evidence that BMW had sold more than 900 repainted BMWs as new outside of Alabama.⁶ The Court emphasized that BMW's out-of-state conduct was not shown to be unlawful. The Court said, "[A] State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasor's lawful conduct in other States."⁷

The Court in *BMW v. Gore* did not completely bar consideration of the defendant's out-of-state conduct. The Court said that out-of-state conduct "may be relevant to the ... reprehensibility of the defendant's conduct."⁸ The Court explained:

Evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law. Our holdings [recognize] that a recidivist may be punished more severely than a first offender.⁹

The Court did not find BMW's out-of-state conduct relevant because BMW could reasonably have believed that its conduct was not illegal or tortious in other States.¹⁰

In *State Farm Mutual Automobile Insurance Co. v. Campbell*, the Court again invalidated a punitive damages award that was based partly on evidence of harm to people other than the plaintiff.¹¹ An insured sued State Farm for bad faith. The insured showed that State Farm's shoddy conduct toward the insured was consistent with company practices nationwide.¹² The insured recovered \$1 million in compensatory damages and \$145 million in punitive damages.

The U.S. Supreme Court held that the jury's consideration of State Farm's nationwide practices was improper for two reasons. First, it was not shown to be unlawful under the law of the other states, and its consideration was thus improper under *BMW v. Gore*.¹³ Second, the conduct was too different from State Farm's conduct toward the plaintiff. The Court said: "A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages."¹⁴ The Court explained, "Lawful out-of-state conduct may ... demonstrate[] the deliberateness and culpability of the defendant's action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff."¹⁵

In *Philip Morris v. Williams*, a wife sued Philip Morris in Oregon state court for her husband's death from smoking Marlboros.¹⁶ At trial, plaintiff's lawyer told the jury to think about the other people in Oregon who had died and would die from smoking Marlboros. The plaintiff recovered \$500,000 in compensatory damages and \$32 million in punitive damages. The Court invalidated the punitive damages award, holding: "The Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation."¹⁷

As in *BMW v. Gore* and *State Farm v. Campbell*, the Court in *Philip Morris* said that harm to others can be considered in assessing the reprehensibility of the defendant's conduct toward the plaintiff:

Evidence of actual harm to nonparties can help show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible.¹⁸

The *Philip Morris* decision imposed a procedural limitation on using evidence of harm to nonparties. The Court held that States must “provide assurance” that juries are considering the evidence only to assess reprehensibility.¹⁹ This seems to mean that, when the plaintiff puts on evidence of harm to others to show reprehensibility, the defendant is entitled upon request to an instruction telling the jury that they cannot consider that evidence for purposes of punishing the defendant directly for harm to others.

Weinstein v. Prudential Property & Casualty Insurance Company

The Idaho Supreme Court applied the U.S. Supreme Court’s teaching on punitive damages in *Weinstein v. Prudential Property & Casualty Co.*²⁰ The court in that case upheld a jury verdict finding Prudential and the company that purchased it, Liberty Mutual, liable for bad faith in handling payments to its insureds under the Uninsured Motorist (“UM”) provision of their policy. The Court also upheld an award of \$210,000 in compensatory damages and \$1.89 million in punitive damages. Chief Justice Eismann wrote the majority opinion and Justice Warren Jones dissented. (The majority used “Liberty Mutual” to refer to both insurance companies, and this article does the same.)

The jury heard evidence that Liberty Mutual’s handling of the Weinstains’ claim under the UM provision accorded with company policy nationwide. Liberty Mutual’s policy was not to pay out a dime to an insured under the UM provision until the insured was ready to settle the entire claim. Before then, the company would not make payments even for undisputedly legitimate medical bills and even when -- as in the Weinstains’ case -- Liberty Mutual had established the liability of the uninsured driver.²¹

The Idaho Supreme Court rejected Liberty Mutual’s argument that the jury improperly considered the company’s nationwide policy. The Court held that the trial court properly instructed the jury, “You may not assess an amount of punitive damages against these defendants to punish them for injury they may have inflicted on others who are not party to this lawsuit.”²² The jury instruction and the Idaho Supreme Court’s approval of it are consistent with the U.S. Supreme Court’s decision in *Philip Morris*.

The jury in the *Weinstein* case also heard argument that its decision would affect the way Liberty Mutual and other insurance companies operated in Idaho in the future. The trial judge accordingly

For now, though, the use of punitive damages to deter others is permissible in Idaho under Weinstein.

instructed the jury, “You may assess punitive damages for the purpose of changing the defendants’ or others’ behavior in the State of Idaho, but ... not ... with the intent and purpose of changing defendants’ or others’ conduct in other states or outside the State of Idaho.”²³ This second instruction was also approved by the Idaho Supreme Court.

This second instruction accorded with the U.S. Supreme Court’s decision in *BMW v. Gore* by barring the jury from seeking to deter future wrongful conduct outside of Idaho. The instruction raised an unsettled issue, however, by allowing the jury to consider the need to deter individuals or entities *other than the defendants* from future misconduct.

In 1991, the U.S. Supreme Court seemingly approved a jury instruction that said the purpose of punitive damages is “protecting the public by [detering] the defendant *and others* from doing such wrong in the future.”²⁴ Since 1991, however, the Court has tightened constitutional restraints on punitive damages. In particular, *BMW v. Gore*’s reprehensibility “guideposts” focuses on the wrongfulness -- and corresponding need to deter recurrence -- of only defendant’s wrongful conduct, seeming to leave no room for considering the need to deter wrongful conduct by others.

For now, though, the use of punitive damages to deter others is permissible in Idaho under *Weinstein*.

When due process permits the jury to consider harm to others

It can be hard to determine when, under U.S. Supreme Court precedent, a jury can consider evidence of harm to others in assessing punitive damages. I believe that the Court’s decisions allow such consideration in at least five situations.

Evidence of harm to others as evidence of “recidivism”

The Court in *BMW v. Gore* approved consideration of evidence of defendant’s wrongful conduct towards others as evidence of recidivism that required strong deterrent medicine. Under *State Farm v. Campbell*, though, the conduct by defendant that has harmed others must be the same or highly similar to the conduct that

harmed the plaintiff. In addition, under *BMW v. Gore*, there must be sufficient evidence that defendant knew or should have known that its prior conduct was wrongful.

Suppose, for example, a nationwide carpet cleaning company was shown regularly to charge people for pricier, “environmentally friendly” carpet cleaning jobs when it actually performed the standard, environmentally unfriendly carpet cleaning jobs. The company should know that this fraudulent conduct is wrongful, and evidence of that conduct occurring in other States could show the need for strong deterrent medicine in a lawsuit brought by one particular victim.

Evidence of harm to others to show deliberateness of defendant’s conduct toward the plaintiff

The Court in *State Farm v. Campbell* said that evidence of defendant’s out-of-state conduct could “demonstrate[] the deliberateness” of the defendant’s conduct toward the plaintiff.²⁵ In this situation, evidence of harm to others is used to show that the defendant’s conduct toward the plaintiff was not merely accidental.

In the carpet cleaning scenario described above, proof that the company regularly charged customers for the more expensive service without actually performing it could show that the company was acting deliberately when it mischarged the plaintiff.

Evidence of harm to others to show defendant’s awareness of a significant risk to the Plaintiff

The Court in *State Farm* approved evidence of harm to others as proof not only of deliberateness but also of the “culpability” of Defendant’s conduct toward Plaintiff.²⁶ Thus, evidence that defendant’s conduct has harmed others may show that Defendant was highly culpable in disregarding great risk of danger to the plaintiff.

Suppose a company makes portable heaters that, it learns, easily tip over and have caused hundreds of fires. Also suppose that despite the reports of multiple

fires the company decides not to correct the design defect. Its sale of a heater to the plaintiff at this point is arguably more reprehensible than its sale of the first heater with the faulty design.

Evidence of harm to others to show substantial risk to the public

In this situation, evidence that the same conduct that harmed the plaintiff also harmed others is used to show that the defendant's conduct endangered the general public. This use was approved in *Philip Morris*.²⁷

Suppose the defendant is a pizza delivery company that guarantees its pizzas will be delivered in 15 minutes or they're free; that this guarantee causes its drivers to drive dangerously; and that one of these drivers hits another motorist. The jury can consider other injuries caused by the company's drivers as evidence of the broad risk to the public that defendant's conduct posed. The existence of the risk to the public, in turn, bears on the reprehensibility as well as the need for deterrence.

Evidence of harm to others to show defendant has engaged in similar wrongful conduct that is hard to detect

In *BMW v. Gore*, the Court said a higher ratio of punitive damages to compensatory damages "may be justified in cases in which the injury is hard to detect."²⁸ The idea is that when a defendant engages in a pattern of conduct that is hard to detect, punitive damages can take into account the many instances in which the defendant will have engaged in wrongful conduct that did not result in liability.

Recall the carpet cleaning company that charges customers for a pricier service than is actually performed. How many people will be able to tell whether

...[T]he fraudulent scheme makes economic sense even if the company is occasionally caught and held liable. Punitive damages are justified to change that calculus.

their carpet was cleaned by an environmentally friendly method? Indeed, the company may calculate that the fraudulent scheme makes economic sense even if the company is occasionally caught and held liable. Punitive damages are justified to change that calculus.

Summary

This article has reviewed U.S. Supreme Court case law and the Idaho Supreme Court's recent decision in *Weinstein* to identify five situations in which a jury, when assessing punitive damages, may consider the defendant's wrongful conduct toward others. The *Weinstein* decision raises an important, related issue that has not yet been addressed by the U.S. Supreme Court. That is the permissibility of using punitive damages for general deterrence.

About the Author

Richard Seamon is a professor at the University of Idaho College of Law. He teaches and writes about constitutional law, among other subjects. Before becoming a law professor, he practiced law for about 10 years. His practice primarily involved appellate litigation in the federal courts. He has presented oral argument in 15 cases before the U.S. Supreme Court.

Endnotes

- ¹ --- P.3d ---, No. 34970-2008, 2010 WL 2163391 (Idaho June 1, 2010).
- ² 517 U.S. 559, 563-567 (1996).
- ³ *Id.* at 599 (Scalia, J., dissenting).
- ⁴ *Id.* at 574-575.
- ⁵ *Id.* at 574.
- ⁶ *Id.*
- ⁷ *Id.* at 572.
- ⁸ *Id.* at 574 n.21.
- ⁹ *Id.* at 576-577.
- ¹⁰ *Id.* at 577-578.
- ¹¹ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).
- ¹² *Id.* at 413-416.
- ¹³ *Id.* at 420-422.
- ¹⁴ *Id.* at 422-423.
- ¹⁵ *Id.* at 422.
- ¹⁶ *Philip Morris USA v. Williams*, 549 U.S. 346 (2007).
- ¹⁷ *Id.* at 353.
- ¹⁸ *Id.* at 355.
- ¹⁹ *Id.*
- ²⁰ --- P.3d ---, No. 34970-2008, 2010 WL 2163391 (Idaho June 1, 2010).
- ²¹ *Id.* at *1, *10-*11.
- ²² *Id.* at *36.
- ²³ *Id.* at *37.
- ²⁴ *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991) (emphasis added).
- ²⁵ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003).
- ²⁶ *Id.* at 422.
- ²⁷ *Philip Morris USA v. Williams*, 549 U.S. 346, 355 (2007).
- ²⁸ *BMW of North Am., Inc. v. Gore*, 517 U.S. 559, 582 (1996).

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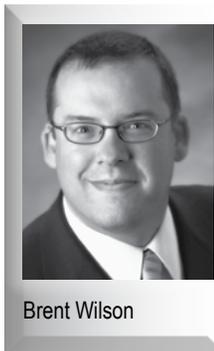
The surest and quickest way to raise the ire of a nonprofit executive or leader is to inform them that nonprofit corporations are not really any different than “regular” corporations when it comes to internal governance and management. Sometimes there is no teaching substitute for the experience of making an uninformed comment. Of course, the reaction is warranted. Sure, nonprofit corporations are governed by boards of directors and may have officers or executives who oversee the day-to-day management of the nonprofit corporation, but that is often where the similarities end.

Many Idaho attorneys provide legal advice, often on a pro bono basis, or sit on the governing board of nonprofit organizations because of an interest in the corporation’s charitable purpose or to “give back” to a cause important to the attorney. This is in-line with the Idaho Code of Professional Responsibility. Idaho attorneys share a professional responsibility to provide pro bono services to, among others, charitable, religious, civic, community or educational organizations that assist persons of limited means or to charities, religious, civic, community or educational organizations in matters in furtherance of their organizational purposes.¹

As with any other area of the law, however, nonprofit organizations, corporations in particular, are governed by a special set of statutes and administrative regulations that, if not properly understood, may lead to inappropriate or inaccurate legal advice. Further complicating the attorney’s role in assisting a nonprofit organization is the fact that the Internal Revenue Service (“IRS”) has taken an increasingly aggressive stance toward monitoring the internal governance practices of tax exempt organizations, a traditionally state-law regulated matter.

The purpose of this article is to outline a few areas of nonprofit law that are particularly important for Idaho attorneys

The Idaho Supreme Court abolished the doctrine of charitable immunity in the case of Bell v. Presbytery of Boise.



Brent Wilson

who donate their time and legal expertise to nonprofit organizations. This discussion applies equally to attorneys who advise nonprofit organizations on a pro bono basis or those who sit on a governing board and are expected to contribute with legal expertise. While nonprofit organizations may take several different forms, including corporations, trusts or unincorporated associations, the discussion here will focus on charitable nonprofit corporations. This is because a corporation is generally the most common business entity formed by nonprofits for organizational purposes and many tax exempt organizations are formed for a charitable purpose. Nonetheless, many of these same issues apply equally to trusts and other forms of nonprofit organizations as well as non-charitable tax exempt entities.

The interplay between state and federal law in nonprofit corporations

A nonprofit corporation is purely a creature of state law. In Idaho, a nonprofit corporation is formed pursuant to the Idaho Nonprofit Corporation Act (the “Act”).² Just because an entity is formed as a nonprofit corporation under Idaho law, however, does not necessarily mean that the entity will be recognized as a “tax exempt” organization under federal law. Charitable organizations in particular must file an application with the Internal Revenue Services (“IRS”), the Form 1023, and receive a determination letter from the IRS recognizing that the corporation qualifies for tax exempt status as a charity.³ Thus a charitable nonprofit corporation is not exempt from payment of federal taxes until the IRS determines that the corporation satisfies the tax exempt requirements under federal law.

Not all tax exempt organizations are designated as “charities” under federal law. The IRS recognizes a number of different tax exempt organizations beyond

those that have a charitable purpose satisfying section 501(c)(3) of the Internal Revenue Code (the “Code”). These designations, in turn, have an impact on purposes for which the corporation may operate and federal tax consequences, both in terms of the payment of tax on income and donations, membership fees or other payments to the corporation. Therefore, while terms such as “nonprofit” or “tax exempt” or “charitable” are often used interchangeably to generally describe an organization that operates to provide a benefit to the community or general public, it is important that attorneys serving the organization understand the legal meanings and implications of these terms under both Idaho and federal law.

The scope and limits of Idaho nonprofit corporation duties and liabilities

Common Law Charitable Immunities

Idaho nonprofit corporations are not entitled to a “charitable immunity” for tort liabilities under any circumstances. The Idaho Supreme Court abolished the doctrine of charitable immunity in the case of *Bell v. Presbytery of Boise*.⁴ Prior to this case, charitable organizations enjoyed immunities for tort liability based on theories of “public policy,” protection of trust funds, or an implied waiver as a result of acceptance of benefits provided by the organization.⁵ In abolishing this doctrine, the court reasoned that: “[p]ersonal injury is no less painful, disabling, costly or damage-producing simply because negligent harm is inflicted by a charitable institution rather than a non-charitable one.”⁶ More recently, the Idaho Supreme Court re-affirmed that a nonprofit entity is not entitled to immunity simply because it has a charitable purpose. In *Steed v. Grand Teton Council of the Boy Scouts of America*, the court stated that to the extent previous Idaho case law may have

left open the possibility of immunity to a charitable organization for tort liability to a non-paying beneficiary, that loophole too is closed.⁷ Therefore, nonprofit corporations may not rely on the doctrine of charitable immunity to avoid tort liabilities.

Nonprofit board of director duties and immunities

The Act provides a qualified statutory immunity to officers and directors of nonprofit corporations under some circumstances, primarily when officers and directors appropriately fulfill their duties. The Act requires that directors carry out their duties in good faith, with the care of an ordinarily prudent person and in a manner the director believes to be in the corporation's best interest.⁸ In discharging these duties, directors of nonprofit corporations are entitled to rely on information, opinions, reports or statements made by officers of the corporation, legal counsel or accountants or board committees.⁹ The Idaho Attorney General describes the duties and rights of directors as the three "R's":

- **Role:** a director's role is akin to that of a fiduciary, *i.e.* one who holds a position of trust and from whom good faith and candor are expected, and where active involvement in and ultimate responsibility for the organization's charitable mission and assets is required;
- **Rights:** a director's rights include the right of access to information about the organization and the right to rely on information received from staff, lawyers, accountants, committees and other outside advisors; and
- **Responsibilities:** a director's responsibilities include: (1) a duty of care to be informed and actively participate in governance, (2) a duty of loyalty to promote the organization's interests and to avoid personal gain and conflicts of interest, and (3) a duty of obedience to keep the organization focused on its charitable purpose and to help maintain compliance with organizing documents and controlling law.¹⁰

If a director satisfies these statutory duties and obligations, the Act provides a qualified immunity so that the director is not liable to the corporation or its members (if any) or any other person for actions taken or not taken as a director.¹¹

Idaho law provides an additional statutory personal immunity from civil liability to those serving without compensation as

If a director satisfies these statutory duties and obligations, the Act provides a qualified immunity...

volunteers of "charitable" nonprofit corporations organized under the Act, including directors and officers. For purposes of this personal immunity, a charitable corporation is one that is operated exclusively for the exempt purposes identified under section 501(c)(3) of the Code and has been granted a 501(c)(3) tax exempt status by the IRS, or one that regularly benefits the community at large.¹² This personal immunity is granted to volunteers for acts arising from their duties as a volunteer and undertaken at the direction of the corporation.¹³ This personal immunity, however, does not extend to: (a) willful, wanton or intentional violations of the law, (b) an intentional breach of a duty owed by a director to the nonprofit corporation, (c) to the extent the conduct is covered by a liability insurance policy, (d) intentional misconduct or fraud, (e) insider benefit transactions, (f) damages arising from an auto accident, or (g) for a violation of section 30-3-82 of the Act (which prohibits the corporation from loaning money to or guaranteeing the obligation of an officer or director of the nonprofit corporation).¹⁴ For purposes of determining whether a volunteer of the nonprofit corporation qualifies for this personal immunity, reimbursement for actual expenses incurred in carrying out the volunteer's duties is not considered compensation.¹⁵

Immunities under federal law

The federal Volunteer Protection Act of 1997 provides another qualified immunity to volunteers of nonprofit organizations.¹⁶ The Volunteer Protection Act immunizes volunteers from liability for their acts or omissions on behalf of the entity if the volunteer: (1) was acting within the scope of the volunteer's responsibilities when the harm occurred, (2) is properly licensed, certified or authorized by the appropriate governmental authority for the activities performed on behalf of the entity if licensure, certification or authorization is appropriate or required, (3) did not act willfully, recklessly, grossly negligent, criminally or with a flagrant indifference to the rights or safety of the person harmed, and (4) did not cause the harm while operating a motor vehicle or other vehicle

for which the state requires the operator to possess a license to operate or the owner to maintain liability insurance.¹⁷ The immunity extends to volunteers of nonprofits that are tax exempt under 501(c)(3) of the Code or not-for-profit organizations that are organized for a public benefit and have a charitable mission.¹⁸ Volunteers, including directors and officers, eligible for this federal statutory immunity are those that do not receive compensation or anything in lieu of compensation in excess of \$500 per year.¹⁹ The federal law does not address reimbursements for actual travel expenses.

The Volunteer Protection Act includes several exceptions, including exceptions to volunteer liability protection such as where state law requires the charitable organization to carry liability insurance (*i.e.* such a state law provision is deemed not to be inconsistent with the federal law) and exceptions to the limits on a volunteer's personal liability for actions that constitute terrorism, sex crimes, violent crimes, hate crimes, violations of civil rights or where the volunteer was under the influence of alcohol or drugs at the relevant time.²⁰ The Volunteer Protection Act provides no immunity for the charitable entity.²¹ It appears one goal of the Volunteer Protection Act is, therefore, to shift the aim for tort liabilities away from volunteers to the organization itself.

The most interesting aspect of the Volunteer Protection Act is that it expressly preempts state law on volunteer immunities to the extent state law is inconsistent with federal law or where the federal law offers additional or more extensive immunities than offered under an applicable state law.²² The Volunteer Protection Act allows state legislatures to provide that state law controls over the federal law in that state, in cases involving all citizens of that state, by enacting legislation that cites the Volunteer Protection Act and expressly elects state law to apply over the federal law.²³ Idaho's volunteer immunity statute does not follow this process to elect state law application over the federal law. The extent to which the Volunteer Protection Act may preempt Idaho's statutory volun-

teer immunities seems unclear. Both Idaho law and the federal law have a similar scope in terms of the types of volunteers and organizations eligible for the immunity, and the extent of the immunities available to volunteers. The federal law appears have more extensive exceptions to limits on liability. The Idaho volunteer immunity statute does state, however, that it does not “supersede, abrogate, or limit any immunities or limitation of liability otherwise provided by law.”²⁴ Therefore, to the extent there is an issue or question as to the co-existence of Idaho and federal volunteer immunity law, it appears Idaho law preserves immunities and limits on liability otherwise available under other laws, including the Volunteer Protection Act.

The IRS’s regulation of nonprofit corporation governance

The IRS’s Role in Governance

Perhaps the most significant issue for Idaho attorneys either advising nonprofit corporations or serving on a board of directors is the changes made in the past few years by the IRS to the nonprofit informational tax return (IRS Form 990 – the Return Of Organization Exempt From Income Tax) and the internal governance issues addressed in the informational tax return. The rules for governance of nonprofit corporations have traditionally been the realm of state law. The relevant provisions of the Code do not address governance or authorize the IRS to regulate the internal governance of a nonprofit corporation. Nonetheless, the IRS sees good governance and improved tax compliance as going hand-in-hand.

At a November 2008 conference, the then Commissioner of the IRS Tax Exempt and Government Entities division explained that the new IRS Form 990, which all nonprofit organizations (except churches and religious organizations) were required to file beginning in tax year 2009, and its governance section, were the “crown jewel” of the IRS’s efforts to become more active in the day-to-day governance of nonprofit corporations.²⁵ A primary goal of the IRS, according to the Commissioner, is to help provide a mechanism to ensure that charitable organizations are managed by an active and independent governing board that is accountable for the organization’s assets and mission.²⁶ A purpose behind this push is partially policy based: tax exempt organizations receive a significant tax “subsidy” and it is important to make certain that the general public is getting a good return on its investment.²⁷ The numbers

[I]t is important to understand that the Form 990 is not a purely accounting exercise. Many of the questions posed about governance issues involve legal analysis of state law.

at least seem to support this contention. In a subsequent address in June 2009, the new Commissioner of the Tax Exempt and Government Entities division explained that in 2008 there were 1.9 million approved tax-exempt organizations (not including churches) and of the charities required to file a return with the IRS, there was a reported \$2.2 trillion dollars in assets accounted for in 2005.²⁸

The new IRS Form 990 and filing requirements

The pertinent issues for Idaho attorneys advising Idaho nonprofit corporations are the filing requirements of and governance and policy information required by the Form 990. Whether the attorney is advising the nonprofit corporation or sitting on the board, it is important to understand that the Form 990 is not a purely accounting exercise.²⁹ Many of the questions posed about governance issues involve legal analysis of state law. Non-attorneys may risk the unauthorized practice of law by responding to many of the governance issues covered by the Form 990 in addition to providing potentially inaccurate advice. Therefore, attorneys advising nonprofit corporations or sitting on the board of directors should take an active role in this process.

The Form 990 comes in three different versions: (1) Form 990, (2) Form 990EZ, (3) Form 990-N and (4) the Form 990 PF. The version of the Form 990 a nonprofit organization is required to file depends primarily on the organization’s finances or entity structure:

- Organizations with gross receipts equal to or greater than \$500,000 and assets equal to or greater than \$1.25 million must file a Form 990;
- Organizations with gross receipts less than \$500,000 and assets less than \$1.25 million may file a Form 990EZ or a Form 990;
- Organizations with gross receipts that are normally less than or equal to \$25,000 may file a Form 990-N (also called the e-Postcard because this form may be filled

out electronically on-line and only involves a few questions as compared to the other versions of the Form 990);

- All private foundations, regardless of financial activity and assets, must file a Form 990-PF.

The IRS will phase in the receipts/asset thresholds for determining which version of the form must be filed, with the requirements becoming permanent beginning with the 2010 tax year:

- Organizations with gross receipts normally less than or equal to \$50,000 may file a Form 990-N
- Organizations with gross receipts less than \$200,000 and total assets less than \$500,000 may file the Form 990-EZ;
- Organizations with gross receipts equal to or greater than \$200,000 or assets equal to or greater than \$500,000 must file a full Form 990.

The most immediate concern for smaller nonprofit corporations is the requirement that *all* tax exempt organizations file a Form 990. Prior to tax year 2007, smaller nonprofits were not required to file anything with the IRS. The Pension Protection Act of 2006 amended the Code to require that all tax exempt organizations, regardless of size, file the applicable Form 990 during tax years ending after 2007.³⁰ The above receipt and asset thresholds are a result of this legislation. The Pension Protection Act mandates that even small nonprofit organizations that fail to file a 990 for three consecutive years will lose their tax exempt status beginning on the filing due date of the third consecutive year of failing to file a return. Those organizations will have to reapply for a tax exempt determination as well as risk being taxed on all contributions or other income received during the revocation period.

Fortunately, the Form 990-N or e-Postcard for small nonprofits is a short and simple return that may be filed electronically. The Form 990 is due every year by the 15th day of the 5th month after the close of the organization’s tax year.³¹

That means for most small nonprofits that had not filed a return in the past, May 15, 2010, was the deadline to file an e-Postcard (since May 15 fell on a Saturday this year, the deadline was actually May 17, the next business day) without risking revocation of tax exempt status. Unfortunately, many smaller nonprofit corporations failed to file their Form 990-N by that deadline. The IRS recognized the potential problem this presents in a May 18, 2010 statement, and indicated that the IRS is working to assist small nonprofits from losing their tax exempt status and is encouraging them to file a Form 990-N even though the deadline has expired.³² On July 26, 2010, the IRS issued further guidance on this issue stating that for Form 990-N and 990-EZ filers, the IRS is providing a one-time relief to allow for filing and to retain tax exempt status.³³ Form 990 or 990-PF filers remain subject to automatic revocation of tax exempt status for failure to file. The IRS has also provided a state-by-state list of all tax exempt organizations facing revocation. According to IRS records, somewhere between 1,400 and 1,500 (or perhaps more) Idaho nonprofit corporations will have their tax exempt status revoked for failing to file a tax return.³⁴

The concern for larger nonprofit corporations and their attorneys or attorney board members is appropriately responding to the governance related questions in the new Form 990. The core Form 990 consists of eleven parts that require the nonprofit to provide summary information, and includes trigger questions that direct the organization to attach one or more of sixteen detailed schedules, as the circumstances dictate. For attorneys, the most relevant part of the core Form 990 is Part VI, which addresses government, management and disclosure, and Schedule O, which corresponds with Part VI and indicates when more detailed responses are required. It is important that attorneys advising nonprofit corporations participate in responding to Part VI of the Form 990 not only because many of the questions have legal implications, but also because the Form 990 is a document that is disclosed to the public and may be reviewed by donors, members, government agencies, grant makers and others interested in the responses.³⁵ Attorneys should review the information for legal compliance and also to advise the organization as to when other professionals, such as public relations specialist, may need to be involved the dissemination of this information.

Part VI of the Form 990 is divided into three sections: (A) governing body

A conflicts of interest policy is particularly important to attorneys serving on the governing board if the organization decides to hire the attorney or the attorney's firm for legal work.

and management, (B) governance policies, and (C) disclosure practices. Section A includes questions about issues such as whether directors are independent, business and family relationships between directors, maintenance of meeting minutes and resolutions, and whether the Form 990 was provided to board members to review and approve prior to filing and, if so, requires further explanation of that process in Schedule O. This last question is particularly important to attorneys serving as board members for nonprofit corporations. While a review by the board prior to filing is not mandatory, it relates to the IRS's focus to encourage active and engaged boards and a prior review by board members is advisable.

Section B of Part VI asks for information about the governance-related policies a nonprofit organization may have in place. Policies may include conflict of interest, compensation, whistleblower, document retention and destruction, governance disclosure, governing document changes, chapter relations (if applicable), audits and so forth. These policies are not required by the Code, but the IRS has strongly implied that a properly operated nonprofit will have applicable policies in place.³⁶ All Idaho nonprofit corporations should at least have a conflict of interest policy in place because the Act prohibits interested transactions involving directors.³⁷ A conflicts of interest policy is particularly important to attorneys serving on the governing board if the organization decides to hire the attorney or the attorney's firm for legal work. Engaging the attorney board member or his or her firm presents a conflict of interest because the attorney has an interest in that transaction. An appropriate conflicts of interest policy will identify the necessary procedure for the board to properly retain the attorney board member or his or her firm without running afoul of any restrictions on private inurement. The need for other policies suggested by the IRS primarily depends on the nature of the nonprofit corporation

and the need for a specific policy. Finally, Section C of Part VI requires information about a nonprofit's disclosure practices such as whether and how it makes its governing documents, Form 990's, Form 1023, policies and financial information available for review. The IRS believes that making this information available increases transparency and tax compliance. The availability of this information may also be important to grant makers, donors and similar parties.

Considering the many legal implications involved in responding to the Form 990, attorneys advising Idaho nonprofit corporations or serving on the board of directors should take an active role in this process. To provide guidance to charitable tax exempt corporations on "good" governance, the IRS has published "Governance and Related Topics – 501(c)(3) Organizations".³⁸ This publication outlines much of the IRS's position on pertinent governance matters and practices. In determining which policies a corporation should consider adopting, attorneys and attorney board members advising nonprofits should at least take note of the IRS's position on these governance practices.

Conclusion

Attorneys who give their time to advise nonprofit organizations or serve as members of the nonprofit's governing board no doubt provide a valuable and necessary service by providing legal expertise where it may not otherwise be available. Nonetheless, in doing so, Idaho attorneys should be aware of the legal framework and legal issues unique to nonprofit organizations. This is particularly true when it comes to advising a nonprofit about governance and governance related policies given the IRS's position on these matters.

About the Author

Brent Wilson is an attorney with *Evans Keane, LLP's* Boise office. Brent's law practice concentrates on general business transactions with a particular interest in

working with Idaho nonprofit corporations and outdoor recreation businesses.

Endnotes

¹ I.R.P.C. 6.1(a)(2), (b)(1).

² See generally Idaho Code § 30-3-1, *et. seq.*

³ Any entity that satisfies the requirements section 501(c) of the Code, including those that are not "charitable," may file an application and seek a determination letter from the IRS regarding the entity's tax exempt status. Depending on the circumstances, the IRS Form 1024 may be the applicable form.

⁴ 91 Idaho 374, 421 P.2d 745 (1966).

⁵ *Id.*, at 375, 421 P.2d 746.

⁶ *Id.*, at 376, 421 P.2d at 747.

⁷ 144 Idaho 848, 855-56, 172 P.3d 1123, 1130-31 (2007).

⁸ IDAHO CODE § 30-3-80(1).

⁹ IDAHO CODE § 30-3-80(2).

¹⁰ OFFICE OF ATTORNEY GENERAL, SERVICE ON AN IDAHO NONPROFIT BOARD OF DIRECTORS (January 2010) (available at: <http://www2.state.id.us/ag/consumer/manuals/ServiceOnCharitableOrganization.pdf>) (last visited August 3, 2010).

¹¹ IDAHO CODE § 30-3-80(4).

¹² IDAHO CODE § 6-1601(1), (6). Exempt purpose include charitable, religious, educational, scientific, literary, testing for public safety, fostering national or international amateur sport competition and prevention of cruelty to animals and children purposes. 26 U.S.C. § 501(c)(3). The IRS has further defined "charitable" purposes to include providing relief to the poor and underprivileged, advancement of reli-

gion, advancement of education or science, building or maintaining public buildings or works, lessening the burdens of government, lessening neighborhood tensions, eliminating discrimination and prejudice, defending human and civil rights as established by law and combating community deterioration and juvenile delinquency. 26 C.F.R. § 1.501(c)(3)-1(d)(2).

¹³ IDAHO CODE § 6-1606(1).

¹⁴ *Id.*

¹⁵ IDAHO CODE § 6-1601(2).

¹⁶ 42 U.S.C. § 14501, *et. seq.*

¹⁷ 42 U.S.C. § 14503(a).

¹⁸ 42 U.S.C. § 15505(4).

¹⁹ 42 U.S.C. § 15505(6).

²⁰ 42 U.S.C. § 14503(d), (f).

²¹ 42 U.S.C. § 14503(c).

²² 42 U.S.C. § 14502(a).

²³ 42 U.S.C. § 14502(b).

²⁴ IDAHO CODE § 6-1606(3).

²⁵ Steven T. Miller, Commissioner, Tax Exempt and Government Entities, Internal Revenue Service, Address at the Western Conference on Tax Exempt Organizations, Los Angeles, California (Nov. 20, 2008) (available at: http://www.irs.gov/pub/irs-tege/stm_loyolagovernance_112008.pdf) (last visited August 3, 2010).

²⁶ *Id.*

²⁷ *Id.*

²⁸ Sarah Hall Ingram, Commissioner, Tax Exempt and Government Entities, Internal Revenue Service, address Georgetown University Law Center Continuing Legal Education (June 23, 2009) avail-

able at: http://www.irs.gov/pub/irs-tege/ingram_town_governance_062309.pdf) (last visited August 3, 2010).

²⁹ See generally Lisa A. Runquist & Michael E. Malamut, *The IRS's New Regulation of Nonprofit Governance*, Business Law Today, July-August 2009, at 29.

³⁰ Section 1223(a), (b) of the Pension Protection Act of 2006, Pub. L. No. 109-208 (codified as amended in Title 26 of the U.S. Code).

³¹ See <http://www.irs.gov/charities/article/0,,id=169250,00.html> (last visited August 3, 2010).

³² See May 18, 2010, Statement of IRS Commissioner Doug Shulman on Filing Deadline for Small Charities, available at: <http://www.irs.gov/newsroom/article/0,,id=223609,00.html> (last visited August 3, 2010).

³³ See July 26, 2010, Statement of IRS on One-Time Relief for Small Organizations That Failed to File for Three Consecutive Years, available at: <http://www.irs.gov/charities/article/0,,id=225705,00.html> (last visited August 3, 2010).

³⁴ Available at: <http://www.irs.gov/charities/article/0,,id=225705,00.html> (last visited August 3, 2010).

³⁵ See Runquist & Malamut, end note xxviii, *supra*.

³⁶ *Id.*

³⁷ Idaho Code § 30-3-81.

³⁸ Governance Related Topics, available at: http://www.irs.gov/pub/irs-tege/governance_practices.pdf (last visited August 3, 2010).

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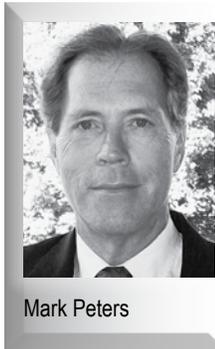
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NUTS AND BOLTS LAWYERING

Mark Peters
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There are obviously a multitude of types of lawyers. However, for purposes of this article, I am going to classify three general types of business attorneys. The first are the litigators. They are the fighter pilots of the law. They have the entire airspace of the law to explore and use to achieve their goals. Not only that, but they are in direct conflict with other lawyers who are attempting to thwart their achieving their goals.

The second type of lawyer is the deal-maker. He or she is a bomber pilot. They have specific targets that they have to achieve and generally, they proceed along certain pathways to get there. They bring a lot of firepower to achieve their client's aims, many times bringing a sortie of bombers to make sure the target is achieved.



Finally, there are the nuts and bolts attorneys. They are cargo and tanker pilots. They fly specific routes, generally to the same places over and over again. They may have to refuel the litigators and the deal-makers in mid-flight, but usually their work is done before the litigators and deal-makers are consulted. If the nuts and bolts attorneys do their jobs well, it makes life easier not only for their clients, but for the litigators and the deal-makers. If their jobs are done poorly, both the litigators and the deal-makers may go down in flames.

Enough of the flying metaphors; what is nuts and bolts lawyering? Tax attorneys, contract drafters, employment counselors, insurance specialists are all examples of nuts and bolts lawyers. In my opinion, good nuts and bolts attorneys don't just respond to the client's request for information. They help the client by adjusting the language, the policies or procedures before a problem arises. In other words, if you think that "if it ain't broke, don't fix it" is the correct approach to taking care of your clients, then you are probably not a good nuts and bolts attorney.

Let me give you a couple of examples. Companies have to use form agreements in order to transact business. When were

The good nuts and bolts attorney needs to delve into the client's business, talk with him or her and find out how he or she does business.

those agreements last reviewed, not only for legal issues, but also for readability and ease of comprehension? My company used a standard form master lease agreement in its business. However, there would be interminable negotiations with customers over language. We redrafted the contract by using simpler language and reorganizing so it flowed more logically. That wasn't the end of the matter. On occasion, a customer would raise an issue that had not been addressed in the revised agreement. Rather than just making a change for that customer, we revised the form agreement. The end result was that negotiations from that point forward primarily focused on four business issues, not on the language of the agreement.

Another example was the company's employee handbook. It had been drafted by someone who was very concerned that the employees understood that they were employees-at-will, but not with clearly stating what the policies of the company were with respect to standard employment issues. There also had been a noticeable lag in keeping the handbook up-to-date regarding issues such as equal employment opportunity and sexual harassment. The original handbook had been bound and provided to each employee. When we issued the new version of the handbook, it was in a three-ring binder. We also made an electronic version available on the company website. This allowed changes as needed to address new issues, major and minor, e.g. same-sex marriages or a change in the vesting or vacation time, without having to make a major production of reissuing the handbook.

There are two key tools that a good nuts and bolt attorneys have: their ears and their brains.

One of the key abilities of a good nuts and bolts attorney is to be a good listener. Generally, the client will tell you what his or her concerns are. I knew an attorney who was taking over an internal client. The attorney became upset because the

client asked if he was fast. The attorney didn't think that good legal work should be put on a timetable. Perhaps good legal work should not be put on a timetable, but the attorney wasn't listening. The client needed quick results to be able to meet the department's needs.

I have a friend who used to do employment litigation in Chicago. Her client wanted a list of options on an issue he was confronting outside her area of expertise. She went to the partner in charge and told the partner of the need and that the client didn't want a lengthy analysis, just a list of options. The partner prepared a memorandum that my friend said "smelled like \$10,000," and the client went elsewhere. He didn't listen to what the client wanted.

However, good listening is not enough. The good nuts and bolts attorney needs to use his or her brain to delve into the client's business, talk with him or her and find out how he or she does business. It is entirely possible to provide good legal advice on cruise control. The attorney knows his or her field and has form answers to common issues. However, that probably works 80 percent of the time. How does the client interact with its customers, suppliers, employees; what are questions he or she confronts on a regular basis? Is the client familiar with the legal and business issues confronting him or her? If the attorney can answer these questions, the legal solution will be better than an answer that works 80 percent of the time. In other words, if the attorney uses his or her knowledge (i.e. brain) to apply the law to the facts, the attorney will not only be doing a better job, but making a happier client.

I have a friend who wanted to invest in a real estate transaction here in Idaho. He passed the paperwork by an attorney whose response was that the transaction was "risky." There was approximately \$1million involved, so the attorney may have thought that the client was a sophis-

ticated investor. That was far from the case. With the downturn, there was a default and my friend had to bring a civil action. It turns out that the question of whether a personal guarantee for a lease can be enforced is unsettled here in Idaho. His litigation counsel, after approximately \$40,000 in fees and expenses, informed my friend that it may be in his best interests to settle the case. Apparently, this had not been explained at the beginning of the case.

My friend lost approximately \$150,000 on the transaction plus the legal fees. From those of us with experience in these types of transactions, it seems that my friend made out fairly well. However, since nobody explained ahead of time what could happen, he thinks that the attorneys were out to help themselves, not him. Because of these experiences, my friend now dislikes using attorneys.

Both when the documentation had been reviewed and when the litigation was commencing, if the attorneys had bothered to investigate, in the one instance, my friend's knowledge of real estate transactions and, in the second, his lack of knowledge of how litigation worked, he would have a better feeling for the usefulness of attorneys. In other words, if they had used all of their brains when performing the services, they would not have a client who was unhappy with them.

Here is the crux of the issue. By preventing problems, good nuts and bolts at-

...[T]he attorney becomes a trusted adviser, called upon more often because the client knows that the attorney is looking out for the client's best interest and will not generate more work just to make more income.

torneys actually reduce the need for business clients to use attorneys. What generally happens in this situation is that the attorney becomes a trusted adviser, called upon more often because the client knows that the attorney is looking out for the client's best interest and will not generate more work just to make more income.

Getting back to those fighter and bomber pilots, they also appreciate the work of the nuts and bolt attorney. Suppose an ex-employee brings an action for unjust termination. If the employee handbook clearly states the terms of employment and that no employee may be terminated because he or she belongs to a protected class, it will make the case easier for the litigator. Likewise, if the form agreements provide proper indemnification provisions, the deal-maker will have one less issue to cover in the sale of assets agreement.

Finally, to use a different metaphor, good nuts and bolts attorneys are good referees and umpires. When nobody notices the official in the game, the official is doing a good job. When nobody notices that the legal issues are taken care of promptly, with no fuss, the nuts and bolts attorney is doing his or her job.

About the Author

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

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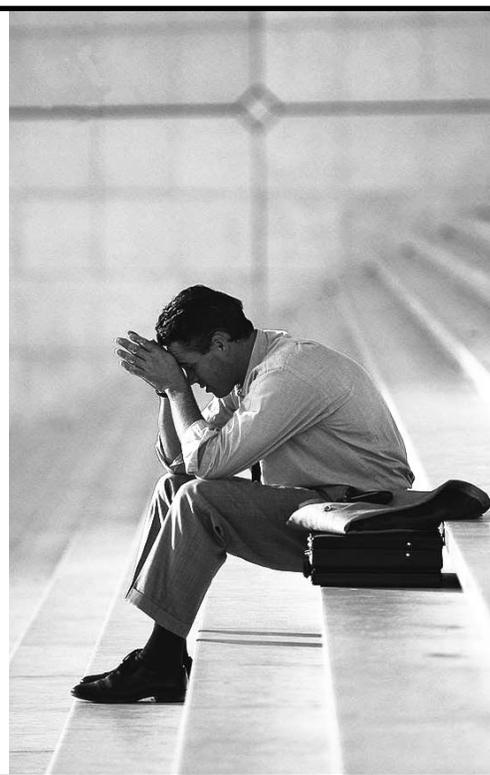
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Daniel T. Eismann
Justices
Roger S. Burdick
Jim Jones
Warren E. Jones
Joel D. Horton

1st AMENDED - Regular Fall Terms for 2010

Boise August 23, 25, 27 and 30
Boise September 1
Idaho Falls September 22 and 23
Pocatello September 24
Boise September 27 and 29
Coeur d'Alene. November 3
Moscow. November 4
Lewiston. November 5
Boise November 8 ~~and 10~~
Boise. December 1, 3, 6, 8 ~~and 10~~
Twin Falls. December 2
Jerome December 3

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 Supreme Court

Oral Argument for September 2010

Wednesday, September 1, 2010 – BOISE

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

Wednesday, September 22, 2010 – IDAHO FALLS

1:30 p.m. Bagley v. Thomason..... #36041/37487
2:45 p.m. Wanner v. Dept. of Transportation.....#37059
4:00 p.m. John Doe I v. John Doe II (2010-09).....#37486

Thursday, September 23, 2010 – IDAHO FALLS

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

Friday, September 24, 2010 – POCATELLO

8:50 a.m. Kuhn v. Coldwell Banker Landmark, Inc.....#29794
10:00 a.m. Sierra Pacific Mortgage Co. v. Archibald.....#36438
11:10 a.m. State v. Adamcik.....#34639
1:30 p.m. IDHW v. John Doe (2010-04).....#37453

Monday, September 27, 2010 – BOISE

8:50 a.m. Woods v. Sanders Pollak.....#37483
10:00 a.m. Brian and Christie, Inc. v. Leishman Electric.....#35929
11:10 a.m. Shenango Screenprinting v. Dept. of Labor.....#36367

Wednesday, September 29, 2010 – BOISE

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

NOTE: No Oral Arguments in October

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 Court of Appeals

Oral Argument for September 2010

Wednesday, September 8, 2010 - BOISE

9:00 a.m. Mendiola v. State.....#35473
10:30 a.m. State v. Digiallonardo.....#35755
1:30 p.m. State v. Hill.....#36296

Tuesday, September 14, 2010 – BOISE

9:00 a.m. State v. Horton.....#36435
10:30 a.m. State v. Moser.....#36933

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

Idaho Supreme Court and Court of Appeals
NEW CASES ON APPEAL PENDING DECISION
(Updated 8/1/10)

CIVIL APPEALS

Contract

1. Did the trial court erroneously fail to decide whether the employment contracts are ambiguous or unambiguous?

Knipe Land Company v. Robertson
S.Ct. No. 37002
Supreme Court

2. Did the district court err in finding as a matter of law that the doctrine of merger applied to the agreement between the parties that the Fullers were to receive the proceeds from ACHD?

Fuller v Callister
S.Ct. No. 37035
Supreme Court

Damages

1. Did the district court err in granting Partin's motion for judgment notwithstanding the verdict on the grounds that the damages provision of a performance agreement was an unenforceable liquidated damages provision?

Schroeder v. Partin
S.Ct. No. 37228
Supreme Court

Easements

1. Did the district court properly construe I.C. § 5-246 in finding that the servient estate can unreasonably interfere with the dominant estate's use and enjoyment of its prescriptive overflow easement?

Twin Falls Canal Co. v. Choules
S.Ct. No. 37058
Supreme Court

2. Did the district court err in ruling the Torrences do not have a prescriptive easement through the Baker property to the Annette Torrence property?

Torrence v. McCay
S.Ct. No. 35747
Court of Appeals

License Suspension

1. Whether the hearing officer erred in finding Masterson was properly notified of the consequences of failing the evidentiary test for breath alcohol pursuant to I.C. § 18-8002A(7)(e).

Masterson v. Idaho Department of Transportation
S.Ct. No. 37385
Court of Appeals

Post-Conviction Relief

1. Did the court err in concluding Halbesleben did not establish that he received ineffective assistance of counsel and in dismissing his petition?

Halbesleben v. State
S.Ct. No. 36547
Court of Appeals

Standing

1. Whether the court erred in its interpretation of I.C. §§ 36-2114 and 36-2115 in finding Black Dog Outfitters lacked standing to initiate proceedings with regard to its request to investigate "use" issues.

Black Dog Outfitters, Inc. v. Idaho Outfitters and Guides Licensing Board
S.Ct. No. 36573
Supreme Court

Substantive Law

1. Did the district court err in dismissing Olson's complaint filed against the City of Idaho Falls based on Olson's failure to file a bond pursuant to I.C. § 6-610 ?

Olson v. McKenna
S.Ct. No. 36052
Supreme Court

2. Whether the district court erred in holding that I.C. § 42-203B does not authorize the Director of the Department of Water Resources to add at the time of licensing a condition limiting a hydropower water right to a specific term.

Idaho Power Co. v. Idaho Department of Water Resources
S.Ct. No. 37348
Supreme Court

Termination of Parental Rights

1. Was the decision terminating the parental rights of John Doe II and Jane Doe II supported by substantial and competent evidence?

Department of Health & Welfare v. Jane Doe II and John Doe II
S.Ct. Nos. 37628/37629
Court of Appeals

CRIMINAL APPEALS

Double Jeopardy

1. Was Corbus twice placed in jeopardy for the same offense when he pled guilty to and was sentenced for both the greater offense of felony eluding and the lesser included offense of misdemeanor reckless driving?

State v. Corbus
S.Ct. No. 36681
Court of Appeals

Due Process

1. Did the court abuse its discretion by dismissing, without prejudice, the criminal case filed against Porter?

State v. Porter
S.Ct. No. 36494
Court of Appeals

Evidence

1. Was it error for the district court to affirm the magistrate's ruling allowing the state to admit Maynard's criminal history, including misdemeanor convictions and the nature of those convictions?

State v. Maynard
S.Ct. No. 36938
Court of Appeals

Jury Instructions

1. Did the district court err by refusing to instruct the jury on the affirmative defense of necessity?

State v. Beavers
S.Ct. Nos. 36183/36191
Court of Appeals

Pleas

1. Did the district court abuse its discretion by refusing to be bound by the Rule 11 plea agreement at sentencing, after it had the benefit of the psychosexual and polygraph examinations?

State v. Ball
S.Ct. No. 35627
Court of Appeals

2. Did the district court abuse its discretion by denying Crow's motion to withdraw his guilty plea as he presented a just reason for withdrawal and the state would not have been prejudiced?

State v. Crow
S.Ct. No. 36470
Court of Appeals

Probation Revocation

1. Did the court err when it revoked Giannini's probation because his violation was not willful and other alternatives to incarceration still existed?

State v. Giannini
S.Ct. No. 36758
Court of Appeals

Search and Seizure – Suppression of Evidence

1. Did the district court err in denying Nicholson's motion to suppress because he was unlawfully seized and because he was subject to custodial interrogation in violation of *Miranda*?

State v. Nicholson
S.Ct. No. 36509
Court of Appeals

**Idaho Supreme Court and Court of Appeals
NEW CASES ON APPEAL PENDING DECISION
(Updated 8/01/10)**

2. Did the district court err in affirming the magistrate's order suppressing evidence because the stop was legal under Idaho statutes and because, even if illegal under the statutes, there was no violation of Scott's constitutional rights and therefore no grounds for suppression of evidence?

State v. Scott
S.Ct. No. 37018
Court of Appeals

3. Whether LeClerc's breath alcohol test results should be suppressed based upon the officer's coercive threat to take her for a forcible blood draw during the implied consent stage of the investigation.

State v. LeClerc
S.Ct. No. 37191
Court of Appeals

Sentence Review

1. Did the state offer sufficient credible evidence to find that Allen had violated probation by drug use?

State v. Allen
S.Ct. No. 37140
Court of Appeals

2. Did the district court abuse its discretion by revoking probation and ordering Zepeda's underlying sentences executed?

State v. Zepeda
S.Ct. Nos. 37093/37133/37134
Court of Appeals

Summarized by:
Cathy Derden
Supreme Court Staff Attorney
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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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SUPREME COURT ISSUES REVISED CRIMINAL JURY INSTRUCTIONS

Michael Henderson
Legal Counsel,
Idaho Supreme Court

The Idaho Supreme Court is issuing a significant revision of the Idaho Criminal Jury Instructions based largely on recommendations of the Criminal Jury Instructions Committee. These new instructions will be in effect beginning September 1, 2010, and may be found at the Supreme Court’s website, www.isc.idaho.gov. They contain revisions based on recent legislation defining new criminal offenses and modifying the definitions of existing offenses. But they also make important changes in at least three specific areas: the definition of proof beyond a reasonable doubt, included offenses, and warnings to jurors on the use of electronic devices for communication or research.

Proof beyond a reasonable doubt

In *State v. Holm*, 93 Idaho 904, 478 P.2d 284 (1970), and *State v. Cotton*, 100 Idaho 573, 602 P.2d 71 (1979), the Supreme Court endorsed the instruction on proof beyond a reasonable doubt adopted by the California courts, an instruction dating back to the case of *Commonwealth v. Webster*, 59 Mass. 195 (1850). When the Idaho Criminal Jury Instructions were issued in 1995 this became ICJI 103, which defined reasonable doubt as follows:



Michael Henderson

It is not a mere possible doubt, because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is the state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.



The Court also included an alternative instruction, ICJI 103A, which gave a differing definition of reasonable doubt:

A reasonable doubt is not a mere possible or imaginary doubt. It is a doubt based on reason and common sense. It is the kind of doubt which would make an ordinary person hesitant to act in the most important affairs of his or her own life. If after considering all the evidence you have a reasonable doubt about the defendant’s guilt, you must find the defendant not guilty.

The California instruction replicated in ICJI 103 was approved by the United States Supreme Court in *Victor v. Nebraska*, 511 U.S. 1 (1994), but the Court expressed severe doubts about the use of the term “moral certainty” in defining proof beyond a reasonable doubt. The Court pointed out that the “common meaning of the phrase has changed since it was used in the *Webster* instruction, and it may continue to do so to the point that it conflicts” with constitutional standards. 511 U.S. at 16. Commentators have also criticized the use of the “hesitant to act” language to define reasonable doubt. See, Newman, *Beyond “Reasonable Doubt,”* 68 N.Y.U. L. Rev. 979, 982-83 (1993).

Accordingly, the new Idaho Criminal Jury Instructions dispense with the old ICJI 103 and 103A and include a new ICJI 103 containing the following definition:

A reasonable doubt is not a mere possible or imaginary doubt. It is a

doubt based on reason and common sense. It may arise from a careful and impartial consideration of all the evidence, or from lack of evidence. If after considering all the evidence you have a reasonable doubt about the defendant’s guilt, you must find the defendant not guilty.

In its comment to this instruction, the Court states, “The above instruction reflects the view that it is preferable to instruct the jury on the meaning of proof beyond a reasonable doubt. This instruction defines that term concisely while avoiding the pitfalls arising from some other attempts to define this concept.”

Included offenses

The manner in which a jury is to consider included offenses is clearly delineated in Idaho Code § 19-2132 (c): “[T]he court shall instruct the jury that it may not consider the lesser included offense unless it has first considered each of the greater offenses within which it is included, and has concluded in its deliberations that the defendant is not guilty of each of such greater offenses.” ICJI 225 reflects this approach, stating that the jury must consider an included offense after acquitting the defendant of the charged offense.

The old instructions setting forth the elements of the various offenses, however, seemed to lead juries to consider the included offenses before turning to the question of whether the defendant was guilty of the greater charged offense. For instance, in the old instructions, ICJI

540 sets forth the elements of theft, and ICJI 542 then instructs the jury on the elements that may elevate a petit theft to grand theft. In the new instructions, ICJI 542A contains a complete definition of the elements of grand theft, while ICJI 542B provides the elements of petit theft. This approach is more likely to lead juries to consider charged and included offenses in the prescribed order.

Use of electronic communications

Concerns have spread throughout the country about jurors' use of the new generation of electronic devices, either for communication during a trial or research into facts relating to the case. The new ICJI 108 addresses this issue. It states that the prohibition on discussion of the case during the trial "means no emailing, test messaging, tweeting, blogging, posting to electronic bulletin boards, and any other form of communication, electronic or otherwise." The instruction goes on to direct:

Do not make any independent personal investigations into any facts or locations connected with this case. **Do not** look up any information from any source, including the Internet. **Do not** communicate any private or special knowledge about any of the facts of this case to your fellow jurors. **Do not** read

It states that the prohibition on discussion of the case during the trial "means no emailing, test messaging, tweeting, blogging, posting to electronic bulletin boards, and any other form of communication, electronic or otherwise."

or listen to any news reports about this case or about anyone involved in this case, whether those reports are in newspapers or the Internet, or on radio or television.

In our daily lives we may be used to looking for information online and to "Google" something as a matter of routine. Also, in a trial it can be very tempting for jurors to do their own research to make sure they are making the correct decision. You must resist that temptation for our system of justice to work as it should. I specifically instruct that you must decide the case only on the evidence received here in court.

Emphasis in original

As always, the Court welcomes comments on the instructions. If you have any suggestions or corrections, you may contact me at mhenderson@idcourts.net or at (208) 334-2246. You may also contact any of the members of the Criminal Jury Instruction Committee. The rosters of all of the Court's committees can be found at <http://www.isc.idaho.gov/commlist.html>.

About the Author

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

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IN MEMORIAM

Luis "Louie" Gorrono 1919 - 2010

Luis Gorrono, 91, affectionately known as Louie, gallantly passed away Tuesday, July 27, 2010 at Walter Knox Memorial Hospital in Emmett. Louie was born in Emmett on March 2, 1919, to Basque immigrants Bruno and Luisa Gorrono. He was the fourth of five children, which included brothers George, Manuel (Mono), and Bruno Jaime (Jimmy), and sister Anita Gorrono Boles. He attended schools in Barber and Boise and graduated from Emmett High School.



Luis "Louie" Gorrono

He interrupted his studies at the University of Idaho to enlist in the Army Air Force in 1942, serving in the North Africa theatre and was discharged as a major. After leaving active duty, he resumed his classes at the University of Idaho and graduated magna cum laude with his juris doctor degree. He returned to Emmett to open his law practice in 1948, marking the beginning of a lengthy and illustrious career that spanned over eight decades.

Lou married Marie McCarron of Warwick, Rhode Island, in 1952; their son Randy was born in 1953, and a second son, Bryan, died at birth in 1956.

Lou was legendary for his unwavering, ardent and continually loving support of the town of Emmett and all its residents. He was always an enthusiastic advocate for this town he truly loved. During all his 91 years, he preferred Emmett to any other place on Earth. With the exception of his war and college years, he seldom left his hometown. By his family's estimate, that amounted to a total of only a few weeks during his entire adulthood years! He often said he couldn't figure any logical reason why he would want to leave for even a day. Is it any wonder that in 2007 the town that he so loved returned his affection and showed their love for him with a "Louie Toast and Roast" in his honor? Attendees enthusiastically recalled his many contributions to the community, and generously responded in kind to Lou's highly-developed, unparalleled sense of humor. He was truly humbled by the event and was so grateful for the outpouring of love and affection. Many of his jokes throughout the years are still

remembered by family and friends, who have enjoyed sharing many of them in the past few days.

Lou's civic accomplishments, memberships, participations, and awards have been many, and while too numerous to mention them all some include membership in the local American Legion unit for over 50 years, having first joined with his long-time friend Bernie Gratton in the late 1940's when Bernie organized the group and became the first commander after World War II; he was an inductee in the Emmett High School Hall of Fame; a deputy director of civil defense, and past Commander of the Emmett Air Force Ground Unit Wing, a unique group formed during the Cold War to help spot possible enemy air invasions. Their local spotting post was atop a tower at the airport landing strip where volunteers would watch the skies for any incoming and unusual traffic and report their findings via shortwave radios.

Lou was a long-time member of the Idaho State Bar; President of the Third District Bar Association; Gem County prosecuting attorney from 1951 through 1968; and city attorney for numerous years. Lou was honored as Gem County Man of the Year; received the Idaho Statesman Distinguished Citizen award; was a member of the Order of Kentucky Colonels; was a life-long member of the Gem County Republican Committee; was a member of the Kiwanis Club with perfect attendance for over 50 years; was a member of the Chamber of Commerce and of the Gem County Historical Society, and was a supporter of the Cherry Festival, having been honored one year as Grand Marshal of the parade. He continued to participate and enjoy the annual event, including this year's parade in June when he rode as a "member of the greatest generation" in a restored military jeep provided by his friend Denny White of Valley Pump & Equipment. In addition to his participation in parent-teacher associations, county development corporations, scouting groups, and charitable organizations, Lou was instrumental in developing a community swimming pool, the golf course, and the airport.

Lou was a true patriot in every respect, and was always proud of his military service. Prior to his military experience, the largest city he had ever seen was Boise, Idaho, but when he was stationed overseas during the war, he traveled extensively serving as officer liaison. He was sent to several countries including Iran, Iraq, Italy, India and North Africa. Many

years later he would recall his amazement at being in India and Africa and having East Indian Sikh men assigned to protect his every move and take care of his every need, including "High Tea" each afternoon. For years, he recalled their dedication and devotion to the men to which they were assigned. During his military career he met several Hollywood stars including Cary Grant, and historical figures such as Dwight Eisenhower, Winston Churchill, and Josef Stalin. He was also a liaison officer for the U.S. Air Force Academy. Following his active duty, he joined the Air Force Reserves and achieved the rank of Lt. Colonel.

Lou loved the law and never tired of practicing his beloved profession. His first office was situated on the second floor of the old First Security Bank building at the corner of Main and Washington, on the site of what is now the Wells Fargo Bank. Other tenants included a dentist, a doctor, and the community's library. After a few years in the old bank, he built a triplex office on Hayes Street where he practiced until reluctantly retiring just a few months ago.

Louie is survived by his son, Randy, his sister Anita Gorrono Boles, his niece Rusti (Ken) Horton, and nephews George (Cindy), Larry (Hazel), Jim (Denise), Steve (Jody), and Jon Gorrono. He was also especially fond of Rusti's two children, Marie and Mike.

He was preceded in death by his wife Marie, son Bryan, his parents, his brothers George, Manuel and Bruno Jaime, and his nephew Rick. Lou and his son Randy had a very special relationship, and it was Randy's devotion to Lou that brought Randy back to Idaho in 1999 to help his dad through the remaining years, something for which Lou was very grateful.

Services were held at Potter Funeral Chapel, Emmett, Idaho on Monday, August 2 with Fr. Tom Faucher of St. Mary's Catholic Church, Boise officiating. The family expressed gratitude for any contributions made to Potter Funeral Chapel.

The family and many friends of Lou are experienced an immense loss - he was certainly one of a kind and his "mold" has truly been broken. We will all miss him. Lou's long-time legal secretary and good friend, Delores Robbins, recently summed up his life's essence with the comment "... he helped so many people, and often times some of them didn't even know it. It seems that his life's purpose was to help people who sometimes couldn't help themselves."

IN MEMORIAM

William Henry MacAllister 1921 - 2010

William MacAllister died of natural causes Friday, July 30 at his home in Los Angeles. He was 89.

Born in Wilmington, DE and raised in Penns Grove, N.J., he enrolled in Dickinson College with the intention of becoming a Methodist minister. The 1941 attack on Pearl harbor led him to interrupt his education and enlist in the U.S. Navy, where he served four years in the South Pacific on an LCI (landing craft infantry), rising to the rank of lieutenant, j.g. After the war, he completed his education and enrolled



William Henry
MacAllister

at Dickinson Law School, specializing in patents. His first job was at the RCA Corp. in New Jersey where, after the invention of transistor, he specialized in the new science of semiconductors. In 1957, he moved to Los Angeles to join Hughes Aircraft, where he rose to the position of chief patent counsel. While at Hughes, he wrote the patent for the self-aligned gate Mosfet transistor, a key component of modern electronic devices, developed by Robert W. Bauer. He was also a key player in litigation over the patents for satellites in synchronous orbit. In 1982, he retired from Hughes and moved to Hewlett-Packard Corp in Palo Alto, rising to Associate General Counsel. He was admitted to the Idaho State Bar in 1983. He retired in 1998 and eventually moved to Casper, WY., but continued to consult for the company.

A devout Christian, he played key roles in the construction of Schultz Memorial

United Methodist Church in Cranbury, St. John's in the Valley in Canoga Park, West Anaheim United Methodist Church and La Palma United Methodist Church. He served in many other roles, including lay leader, and always sang in the choir.

He moved back to Los Angeles in 2007 to be near his family. An inveterate model railroader, he always had a layout in progress and was working on his trains when he passed.

He is survived by his wife of 67 years, Irma Ruth MacAllister; two sons, Thomas Alan of Los Angeles and William Henry III of Half Moon Bay; four daughters, Kathy Maugh and Linda MacAllister of Los Angeles, Julie Haynes of Placentia and Mollie Parrish of Casper; 11 grandchildren and three great-grandchildren.

Services were held Thursday, August 5 at Forest Lawn Memorial-Parks and Mortuaries in Cypress.

OF INTEREST

National media award honors Idaho drug courts

Idaho, and specifically 4th Judicial District Judge Ron Wilper, along with Boise KBOI Channel 2 (the CBS affiliate), was recognized with a national media award, at the recent National Association of Drug Court Professionals conference in Boston. The award was given for developing a public service announcement in support of drug courts in Idaho. This spot features William Petersen, former star (Gil Grissom) of the television series CSI. Petersen is an old high school buddy and continuing friend of Judge Wilper and has been very eager to support the work of drug courts.

The PSA, filmed in the Ada County Courthouse, and later customized with scenes from Idaho problem-solving courts, also carries the tag line for the national association's "All Rise" drug court campaign. This PSA and Judge Wilper were in pretty august company, including awards presented to Newsweek Magazine, National Public Radio, and the Public Broadcasting System's "Newshour" for their stories on aspects of drug court. The official award was presented to KBOI



Hon. Ron Wilper

at the Ada County Drug Court graduation held July 28.

Tajikistani delegation visits Canyon County Courthouse

Local criminal justice officials and staff and a delegation of attorneys and judges from Tajikistan exchanged kind words and gifts during a luncheon at the Canyon County Courthouse on Friday, August 13.

The group from the central Asian republic visited the Canyon County Courthouse as part of the American Bar Association's Rule of Law Initiative Legal Education and Exchange Program. The program gives legal professionals from foreign countries an opportunity to gain first-hand knowledge and experience of America's justice system.

Representatives of the group said the experience has been beneficial and thanked those who made it possible.

"Despite the fact that the two systems are quite different, there are so many elements, positive elements, that are applicable to Tajikistan," defense attorney Nurmahmad Khalilov, who works with an organization called Human Rights Center, said through a translator.

Khalilov said he was especially struck by the cooperative relationship between judges, attorneys and law enforcement and the extent to which information technology can streamline judicial proceedings. In Tajikistan, it is difficult for a judge to

review more than two cases in a day, he said.

Local officials and Tajikistanis offered one another gifts to commemorate the visit.

The delegation presented Deputy Prosecutor Bryan Taylor, who previously worked with the program in Belarus and helped orchestrate the visit to Canyon County, and his fiancée, with traditional Tajikistani wedding garments.

"Not only did both groups benefit from the cultural exchange and newfound friendships, but the attorneys and judges who participated from Canyon County were able to provide the delegation with practical guidance for developing the criminal justice system in Tajikistan," Canyon County Prosecutor John Bujak said in an e-mail.

"In some respects, Tajikistan is going through the same process the United States went through 200 years ago when we established our Constitution and system of laws," Bujak said. "It is very satisfying to know that, through this exchange, we have advanced the causes of democracy and justice at an international level."

The visitors also had opportunities this week to spend time with host families and take in some local culture.

"The most important thing, the people here are very sincere, very friendly. These people have sincerely done a lot in order to welcome us to experience not only the legal system in America, but also cultural

OF INTEREST

life,” Khalilov said. “We visited cultural places, we communicated with ordinary people and the general impression is quite positive.”

“If ever someone will ask me where to learn about the American criminal justice system, I will tell them Idaho and this Canyon County,” he added.

Idaho attorney named VP at Granite Construction

Terry K. Eller, an Idaho State Bar member since 1984, has been named vice president, general counsel and corporate secretary for Granite Construction Incorporated, based in Watsonville, CA.



Terry K. Eller

She had previously worked for Morrison Knudson and later Washington Group International and joined Granite in May of 2010 as deputy general counsel.

“Terry brings a wealth of knowledge to Granite,” said Granite’s president and chief executive officer, William G. Dorey. “I am confident that under her leadership Granite will remain a leader in the industry for its high ethical standards.”

In her new role, Eller will oversee all legal, compliance and corporate secretary activities as well as provide strategic counsel to the Board of Directors and senior management. She has served in a variety of legal roles for other construction and engineering companies, including international legal counsel and principal for the consulting firm 5 RMK and vice president of investor relations and vice president of international law at Washington Group International.

Karen Sheehan joins her husband, Jeff Sheehan

Jeffrey Sheehan has expanded his practice to include his wife, Karen Sheehan. Jeff will continue to practice mainly in the area of family law, including divorce, custody issues and adoptions. Karen will primarily handle bankruptcy, business and estate planning matters. They can be reached in Boise at (208) 287-4499. Their websites are www.idahofamilylaw.com and www.boise-bankruptcy.com.



Karen Sheehan

Burke recognized for service

After serving as law clerk at the Kootenai County Courthouse in Coeur d’Alene for 24 years, Janelle Burke retired this summer. She began as a Staff Attorney to the Honorable Watt E. Prather and Honorable Gary Haman from 1983 to 1985. After that she went into private practice. She returned as clerk in 1988 to again work with Judge Haman for 12 more years. Upon Judge Haman’s retirement in 2000, Janelle served as Judicial Staff Attorney to the Honorable John Patrick Luster for the next 10 years. She was instrumental in overseeing “Settlement Week” held every year in Coeur d’Alene, which brought together volunteer attorney mediators to resolve conflicts. District Judge John



Janelle Burke

Mitchell said Janelle organized every investiture and retirement in the last two decades and has “really been a blessing here in the First District.” Janelle oversaw other court projects such as Court Tours for local schools, Community Law Day Education and informational updates to attorneys at Bar Luncheons.

Janelle’s retirement reception was held on June 24.



Angela A. Levesque



Angela J. Richards

Levesque Law PLLC opens

Angela A. Levesque and Angela J. Richards announce the opening of Levesque Law PLLC in Meridian. Their practice focuses on all aspects of immigration law, including deportation defense, legalization, citizenship, and business visas, as well as family law, including divorces, child custody, modifications, and guardianships. They can be contacted at (208) 473-2344 or Angela@LevesqueLaw.us or Arichards@LevesqueLaw.us.

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THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION: THE SPREZZATURA OF THE FEDERAL JUDICIARY

Susie Boring-Headlee
*Executive Director, Idaho
Chapter, FBA*

There is no term more fitting than sprezzatura to describe the qualities possessed by the seven sitting federal judges who serve on the United States Judicial Panel on Multidistrict Litigation (MDL Panel), which held a session in Boise recently.

The sixteenth century author Baldassare Castiglione described the ideal courtier in *The Book of the Courtier*, as one possessing a certain sprezzatura, or nonchalance while excelling in everything from arms and athletic events to music and dancing. No matter how daunting the task, the ideal courtier appeared in control, infallible, and accomplished with no apparent effort.

Judge John G. Heyburn II of the Western District of Kentucky chairs the MDL panel. The Panel is charged with (1) determining whether civil actions pending in different federal districts involve one or more common questions of fact, such that the actions should be transferred to one federal district for coordinated or consolidated pretrial proceedings; and (2) selecting the district and judge or judges to conduct the proceedings.

Appointed by the Chief Justice of the United States Supreme Court, the Panel tackles a large and complex docket. The Panel centralized 37,515 actions in the first seven months of 2009 alone. The actions stem from the transfer of the most complex class action cases, environmental, securities, and other complicated matters. Impressively, they also carry full caseloads in their respective circuits and districts.

A quick glance of the MDL docket (www.jpml.uscourts.gov), shows the importance, volume and variety of matters centralized by the Panel. Here is but a sampling: In re: Terrorist Attacks on September 11, 2001; In re: Polar Bear Endangered Species Act Listing & 4(d) Rule Litigation; In re: Xerox Corp. Securities Litigation; In re: Federal Home Loan Mortgage Corp. Securities & Derivative Litigation (No. II); and In re: Air Crash at Belle Harbor, New York, on November 12, 2001.

High profile cases and a busy travel schedule are routine for the MDL Panel.

As I was sitting in the Courtroom, I was struck with the sheer weight of these extraordinary cases — so many people will be affected by the Panel's decisions.



Susie Boring-Headlee



Front, left to right: Senior Circuit Judge David R. Hansen, Cedar Rapids, Iowa; Judge Robert L. Miller, Jr., South Bend, Indiana; Judge John G. Heyburn II, Louisville, Kentucky; Chief District Judge Kathryn H. Vratil, Kansas City, Kansas. Back, left to right: Judge Frank C. Damrell, Jr., Sacramento, California; Judge Barbara S. Jones, New York, New York; and Senior District Judge W. Royal Furguson, Jr., Dallas, Texas. Photo taken at the James A. McClure Federal Building & U. S. Courthouse, Boise, Idaho.

Recently, the Panel heard cases in San Diego and Chicago, and it is soon to hear cases at Vanderbilt Law School in Nashville, Tennessee (September 30, 2010); and at Duke Law School in Durham, North Carolina (November 18, 2010). Moreover, the Panel has recently initiated a study to identify how the MDL hearing process can be made more efficient. Also attending the hearings in Boise was Professor Francis McGovern of Duke University, a prominent mediator, who has been retained to gather data, tabulate results, and make recommendations to the Panel.

If Castiglione were in Boise on July 29, he would likely have found the MDL

Panel members possess sprezzatura in abundance. Sitting at two benches, four on the upper, and three on the lower, judges allowed only one to six minutes for each lawyer's oral arguments. Eleven cases were on the oral argument docket for Boise's inaugural sitting; with media attention focused on In re: Oil Spill by the Oil Rig 'Deepwater Horizon' in the Gulf of Mexico on April 20, 2010; and In re: BP p.l.c. Securities Litigation. Additionally, nine other separate but complex cases were on the docket, which involved Fortune 500 companies such as Google Inc., Toyota Motor Corp., and others.

Primarily because of the BP cases, representatives of many media organizations attended the hearings, including the Associated Press, *The Wall Street Journal*, *The National Law Journal* and *The Globe and Mail*. John Schwartz, National Legal Correspondent for *The New York Times* emailed his thanks: “[t]he arrangements for reporters were absolutely first rate. It was great to know that we would be able to use our computers in the courtroom, and the thoughtfulness that went into every detail — power strips!! A media filing room with open high-speed wifi! — made working with you all a pure pleasure!”

Also sitting with the journalists was John Berendt, author of the best-selling novel, *Midnight in the Garden of Good and Evil*, who is conducting research for a book he is writing about New Orleans.

Three hundred attorneys, an impressive media contingent, and many members of the public attended the hearings. There was speculation that the James A. McClure Federal Building and U.S. Courthouse in Boise might be unable to accommodate such a large gathering. However, any concerns proved to be unwarranted. Federal court staff, the U.S. Marshal’s Service, and Federal Protection Service were organized, and well prepared, providing ample space, parking, strict security, and top flight logistical support including video streaming between two courtrooms. Several out-of-state attorneys expressed appreciation to the federal court staff in Boise for

Sitting at two benches, four on the upper, and three on the lower, judges allowed only one to six minutes for each lawyers’ oral arguments.

helping with directions and procedures. Christopher Murphy, an Associate at Bingham McCutchen, LLP in Washington, D.C. sent an email, “[M]y colleagues and I were very impressed with how smoothly the entire day went, especially considering the media and sheer number of lawyers running around your courthouse.”

And, of course, MDL staff attorneys traveled with the Panel to assist with other logistics and prepare case materials, all of which ensured that the day’s full schedule went apace.

For the Idaho bench and bar, the MDL’s presence was extraordinary. The Idaho Chapter of the Federal Bar Association welcomed the Panel to its first Boise visit with a warm reception on the evening before the hearing. The MDL panel staff attorneys also attended, taking a well-deserved break from their day-long meetings with the Panel Judges.

Benjamin Schwartzman, Banducci, Woodard, Schwartzman of Boise, Idaho sent an email stating, “After attending

several sessions of the MDL panel, I marvel at the intellectual dexterity displayed by the judges . . .”

As I was sitting in the Courtroom, I was struck with the sheer weight of these extraordinary cases — so many people will be affected by the Panel’s decisions. Castiglione would describe them as having sprezzatura I would simply call them super heroes of the federal judiciary.

About the Author

Susie Boring-Headlee spent the past 10 years working for Chief Judge B. Lynn Winmill at the United States District Court. She currently serves as the part-time ADR Coordinator, while working part-time for Judge Winmill. She spent 10 years at the Ninth Circuit Court of Appeals, where she completed a two-year capital case management plan for Judge Arthur Alarcón. She is married to Paul Headlee, and they enjoy gardening, hiking with their yellow lab Benelli, and riding their Harley Davidson.

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LAWYERS OF IDAHO: A TIME FOR SERIOUS DISCUSSION AND CONSIDERATION OF HEALTH SOLUTIONS

Terrence R. White
*Chair, Board of Trustees of the
ALPS Health Solutions Idaho
Lawyers Trust*

We have a unique opportunity to control our destiny as much as possible in this world of escalating health insurance premiums.

We cannot control the health costs side of the equation, but we can control the administrative costs in addition to determining the mix of benefits we want to provide ourselves, our partners and associates, our staff, and our families. The time is now to take advantage of this opportunity and it is up to each of us to act.

I am requesting every lawyer and law firm to take a hard, serious, business-driven look at the Idaho Lawyer Benefit Plan. This plan is a MEWA (Multiple Employer Welfare Agreement) that retains an actuary to establish premiums, contracts with Allegiance to administer claims, and purchases reinsurance for medical claims over \$75,000. It is controlled by a board of trustees which ultimately will be elected from members of the Idaho State Bar. It is only available to members of the Idaho State Bar.

Many Idaho law firms and individuals have not seen the premium increases other states have been experiencing. Bob Minto, CEO of ALPS, (or Attorney Liability Protection Society), tracks these things and states law firms in other states are seeing 10-30% increases again. Idaho has not. I would submit one reason for that is the competition (known affectionately as the "Blues") is aware of our existence and would prefer we just went away. In a way, all Idaho lawyers buying health insurance are benefiting from lower premiums that are, in all probability, caused by a reaction to the Idaho Lawyer Benefit Plan.

Here is our firm's personal experience in the health insurance world. My firm, White Peterson, is a small firm in Nam-



Terrence R. White

pa. In October of 2007, our carrier raised our rates 27% from \$299 to \$379 per employee per month. In October, 2008, our rates were going to take an increase of 22% from \$379 to \$463 per employee. At that time, we decided to switch to the Idaho Lawyer Benefit Plan. The premiums for 2008 reduced to \$380 per employee. Premiums for 2009 are \$399 per employee or about a 5% increase of less than \$20 per month. Premiums for spouses and family in 2009 actually took a decrease. You might ask, "What are the differences in the two?" The deductible is \$500 where previously it was \$750. Out of pocket is \$1,000 where previously it was \$2,000 in network and \$3,000 out of network. Coverage is 80/20, where previously it was 70/30. We have a \$500 preventive care benefit where previously we had none. We have a \$20 co-pay that previously was \$30 primary or \$45 specialized.

No one likes to take time away from the practice of law to go over health insurance. It is about as fun as a root canal. Doing nothing is always easy. It is, however, not always the wisest course. I am requesting each lawyer responsible for health care decisions to go the person in their office who often actually makes the decisions and tell them the following: "We want to change our health benefits coverage to the Idaho Lawyers Benefit Plan. I am directing this change as a policy decision. If you do not feel it is in your firm's and all Idaho lawyers' best interests to do this, then you need to convince me otherwise as a business matter both on a short- and long-term basis."

I am requesting each firm go through this type of analysis from the point of view that you will make the change unless compelling reasons exist not to.

When I started practice at White Peterson 39 years ago we provided, as a firm paid benefit, health insurance to all attorneys, staff and their families. We did it because it was the right thing to do. Economics simply do not allow that to exist today. It is still the right thing to do with employee participation in the cost. As I begin my descent (or ascent, I am not sure which) into the unknown world of Medicare, I still believe as lawyers we have an obligation to ourselves, our partners, our associates, our staff, and families to provide the best health coverage we can for both the short and long term.

The Idaho Lawyer Benefit Plan can only exist if all Idaho Lawyers support it. With lawyers in other states looking at 10-30% premium increases again this year, Idaho will soon join their ranks without our arrangement. Lawyers in other states are looking at us as well as other professional organizations in Idaho. Let's be a leader and take advantage of this opportunity.

We only have one agent for the state and he is Todd Points. Please visit with him as soon as it can be scheduled. His number is 208-409-3825.

About the Author

Terrence White is past Bar Commissioner and President of the Idaho State Bar. He practices at White Peterson in Nampa.

CHRISTENSEN HONORED WITH OUTSTANDING YOUNG LAWYER AWARD

Earlier this year, the Idaho State Bar Board of Commissioners created the Outstanding Young Lawyer Award, which was given to Christian Christensen at the ISB Annual Conference held in Idaho Falls in July. In presenting the award, past-president and former Idaho State Bar Commissioner Newal Squyres said the award won't necessarily be given every year, but its creation was inspired by the dedication and work shown by Chris Christensen.

Chris is a member and past president of the Young Lawyers Section, was a founding member of the Idaho Immigration Pro Bono Network and served on the Governing Council of the Diversity Section. He has been Law Day Committee Chair and conducted numerous other pro bono activities. He clerked for Idaho Appellate Judge Darrel Perry and now practices at the Andrade Law Office in Boise. Chris was kind enough to answer a few questions for *The Advocate*.

Q: How do you view young lawyers' role in the legal profession?

A: I believe that the role of a young lawyer in the legal profession is to learn as much as possible from those who have gone before us. With that knowledge, young lawyers can improve upon techniques that have worked in the past and change what has not been successful. I believe that the role of lawyers in general is to help people live better lives by navigating the legal system for them, advocating for their rights, and generally improving our overall society.

Q: How is it for young lawyers in a down economy?

A: I believe that the economy has been very tough on young lawyers. It seems like many attorneys who graduate and face the bar are not finding gainful employment and instead are going right out on their own. In my line of work, the clients do not have much money to begin with. We try very hard to make our services as affordable as possible because of the lack of resources, pro bono assistance, and because the consequences are often extreme.

Q: What leadership positions and/or activities have you done in the legal community?

A: I was a founding member of the Idaho Immigration Law Pro Bono Network. I also participated in several of the "charlas" as a screener. I also participated with several other immigration attorneys in further screening those cases for eligibility for placement with a pro bono attorney. I have also participated in approximately

five Family Law Pro Bono clinics at the Bar, helped recruit for those clinics, and helped the organization secure a location in Caldwell for clinics.

In 2009 and 2010, I served on the committee that wrote the Idaho High School Mock Trial case. I participated as a judge as well. Since 2007, I have been very involved in the Young Lawyer and Diversity Sections. In 2009 I was chair of the Young Lawyers Section and a Diversity Section governing council member. In 2008, I chaired the Attorneys Against Hunger effort, a fundraiser for the Idaho Food Bank. I have also served as a Law Day Committee Member and chaired the school outreach program in 2009. In 2010, I served as the Law Day Committee Chair. I have also graded bar exams on three different occasions. I have also participated in Citizenship Day the last two years and helped people fill out citizenship applications.

Q: What other volunteer work have you done?

A: Assistant scoutmaster with Troop 49. I also helped sort food at the Boise Rescue Mission several times.

Q: What attracted you about the profession?

A: I went to law school because I knew that knowledge of the law would empower me to help people live better lives. I love my job because I get to do that on a daily basis. I have only been actively practicing immigration law for about nine months and have already had many clients tear up when they thanked me for the work our firm did on their case and the impact we made in their lives. My professional goal is to continue helping as many people as I can and to become a better and more efficient advocate for those who have little voice in our society. My personal goal is to someday start a family of my own.

Q: What has been your inspiration?

A: The biggest inspirations in my life have all been in my family. My grandfather is a prime example. He was raised on a homestead in eastern Oregon and served in France during WWII where he received the purple heart. I have never heard the man use profanity or say a bad word about anyone. He is a rock. My mother is the most loving and caring person I know. She has an incredibly kind heart and always puts the needs of others before her own. I have never doubted that her love for me is unconditional.

My father is the hardest worker and most generous man I know. He is a pillar in the



Christian C. Christensen

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community. He has run the Little League Football program in Caldwell for approximately 30 years, he has been a scout leader for 20 years, he ran the Little Britches Rodeo, coached basketball and baseball, does volunteer budget counseling, works with the Exchange Club and much, much more all while maintaining a successful accounting firm.

With family like this, there is no need to turn elsewhere for inspiration!

Q: What are your hobbies?

A: I love outdoor activities, including backpacking, camping, fishing, and bird hunting. Most of these I do with my dad and my brother. I also love tennis. I play in several leagues and lots of tournaments throughout the year. My dad is my primary doubles partner and we make a formidable team.

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