

The Advocate

Official Publication of the Idaho State Bar
Volume 54, No. 2 February 2011

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The Advocate

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On the Cover

This photograph of Redfish Lake was taken by Jennifer Cafferty-Davis while on an outdoor photography excursion with a fellow photographer. Jennifer is a paralegal at Wilson & McColl and owns Memory Lane Photography in Boise. Her work is profiled at www.memorylanephoto.wordpress.com.

Section Sponsor

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

Editors

Special thanks to the February editorial team: Brent Wilson, Sara M. Berry, Scott Randolph.

Letters to the Editor

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



CLE: University of Idaho 2011 Symposium on Water Law

One Source

Evolution of the Policies Surrounding Ground and Surface Water Management In the West

The 2011 Idaho Law Review Symposium will facilitate a discussion about the challenges facing the West with regard to the evolution of our understanding of the intertwinement of law and science in conjunctive management. The goal is to provide a forum wherein members of the legal and scientific communities throughout the West can speak to their state's unique perspectives on conjunctive management.

- * The evolution of conjunctive management - Perspectives across the West
- * How conjunctive management will evolve as the West moves from an agricultural to an urban landscape
- * How science and law might work together to better accomplish conjunctive management.
- * How the sovereigns of the West might work together to better manage water

8:30AM April 15, 2011 **\$80 for CLE admission \$30 for non-CLE admission**
 Boise City Hall **Information - contact:**
 City Council Chambers **Emmi Blades: eblades@vandals.uidaho.edu**
or Dylan Hedden-Nicely: dylan.hedden@gmail.com



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EVANS KEANE LLP Attorneys at Law

Evans Keane, LLP is pleased to announce that effective January 1, 2011, **Victor S. Villegas** has been made a partner in the firm.

Victor maintains a real estate, land use and litigation practice, with an emphasis on commercial and residential real estate development, representation of parties before administrative tribunals, and general litigation.

Victor volunteers as a member of the Eagle Planning and Zoning Commission and serves as chairman of the Idaho Drinking Water and Wastewater Professionals Board, but the volunteer activity he most enjoys is coaching his daughters' soccer teams for Meridian PAL Soccer.

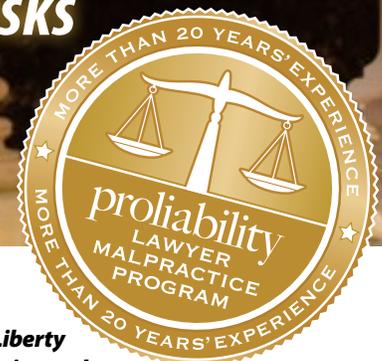
Victor earned his undergraduate degree from the University of Nevada Las Vegas and his law degree from Gonzaga University. Prior to joining Evans Keane, Victor clerked for the Honorable Daniel T. Eismann at both the Fourth Judicial District Court (2000) and Idaho Supreme Court (2001 - 2004). Victor can be contacted at (208) 384-1800 or vvillegas@evanskeane.com.



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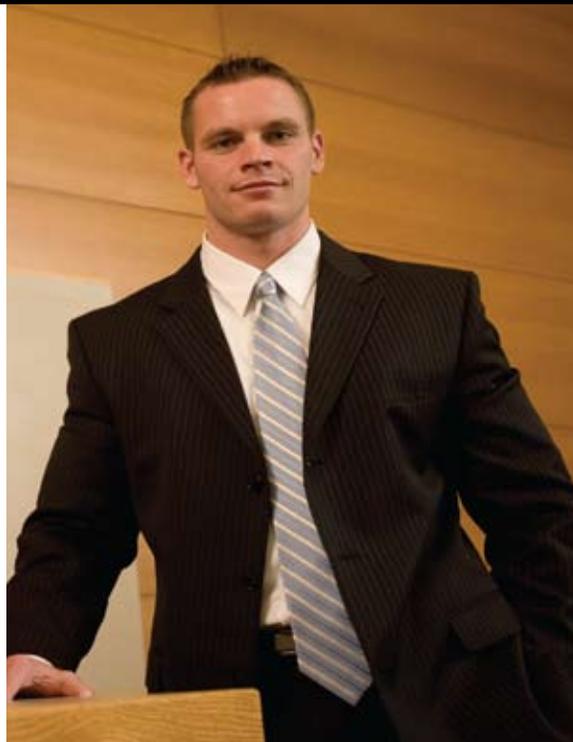
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February

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Boise Centre – Boise, ID

6.0 CLE credits of which 1.0 is ethics

March

March 3-5

Commercial Law and Bankruptcy Annual Seminar

Sponsored by the Commercial Law and Bankruptcy Section
U.S. Courthouse and Federal Building / The Coeur d'Alene –
Coeur d'Alene, ID

13.5 CLE credits of which 1.0 is ethics

March 4-5

Trial Skills Academy (open to attorneys who have practiced 10 years or less)

Sponsored by the Litigation Section
U.S. Courthouse and Federal Building – Boise, ID

13.0 CLE credits

March 11

Workers Compensation Annual Seminar

Sponsored by the Workers Compensation Section
Sun Valley Resort – Sun Valley, ID

6.0 CLE credits of which 1.0 is ethics

March 16

First or Next Adoption Case

Sponsored by the Idaho Law Foundation
8:30-9:30 p.m. (MST) at the Idaho Law Center –
Boise, ID / Webcast Statewide

1.0 CLE credit RAC

*RAC—These programs are approved for Reciprocal Admission Credit pursuant to Idaho Bar Commissions Rule 204A(e)

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

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Live Seminars

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

Online On-demand Seminars

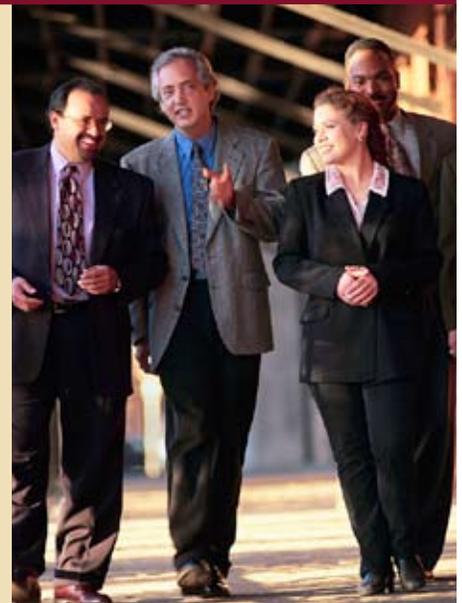
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Webcast Seminars

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

Recorded Program Rentals

Pre-recorded seminars are also available for rent in DVD, VCR and audio CD formats. To visit a listing of the programs available for rent, go to isb.idaho.gov, or contact Eric White at (208) 334-4500 or ewhite@isb.idaho.gov.





PRESIDENT'S MESSAGE

NEW PRESIDENT WORKS FOR LEADERSHIP PROGRAM, LEGAL AID FUNDING

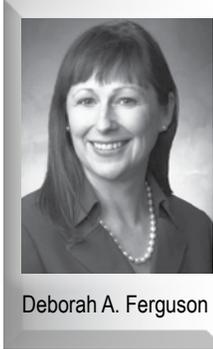
Deborah A. Ferguson
*President, Idaho State Bar
Board of Commissioners*

During the past two and half years I have served on the Idaho State Bar Commission, I have had two aspirations in mind. I would like to see the Bar establish a leadership program like those of many of our sister bars around the country. I also strongly believe the Bar needs to help establish some form of state funding for Idaho Legal Aid Services. Idaho remains the only state in the nation yet to do so.

Both of these goals are works in progress. With the able assistance of Mahmood Sheikh, our new Deputy Executive Director, the Board of Commissioners has formed the Idaho Academy of Leadership for Lawyers, or IALL. The purpose of the program is to foster professional growth and leadership skills for Idaho attorneys. A steering committee is creating an excellent curriculum. We initially envision an annual class of about 12 attorneys and a series of sessions over the course of a year. We hope to have an inaugural class begin this fall. I welcome your ideas and participation in this exciting endeavor.

The funding issue for Idaho Legal Aid presents a greater challenge. This year Idaho Legal Aid faces a budget shortfall of approximately \$270,000. Without revenue to fill this gap, it will spend all of its reserves. The shortfall threatens its mission to provide equal access to justice to low income people through quality advocacy and education. Currently, Idaho Legal Aid serves roughly one in five poor Idahoans who need civil legal assistance. It is unacceptable to allow this situation to continue, let alone worsen.

I am pleased to report real progress, despite Idaho's unprecedented economic challenges. As we know, the state budget is in dire straits. Deep budget cuts in 2011 are necessary to balance the budget.



Deborah A. Ferguson

The Idaho Supreme Court convened a series of meetings in December to brainstorm as to viable funding sources for Idaho Legal Aid.

The state courts are not exempt from these cutbacks, and are operating on a reduced budget that threatens even essential services. At the same time, the state's district court civil case load has increased 35% in the past five years. Fundamental to our rule of law is access to the courts. This is denied if the courts cannot be adequately staffed or operate full time. The state budget shortfall precludes, for the present and near future, any funding for Idaho Legal Aid from the general state appropriations fund.

With both creativity and determination, the Idaho Supreme Court convened a series of meetings in December to brainstorm as to viable funding sources for Idaho Legal Aid. As history has shown, the Idaho Supreme Court's efforts in this regard are crucial. No state has obtained funding for its Legal Aid Services without the backing of its Supreme Court, and state bar. From this collaboration, the Children and Families Legal Services Fund bill was proposed and drafted. This fund would be financed by a \$20 marriage license fee increase. Approximately 14,000 couples married in Idaho last year, a number which should grow with Idaho's population. The fund is projected to generate approximately \$280,000 annually for Idaho Legal Aid and would be a reliable and substantial contribution to its budget. If passed, this could meet Idaho Legal Aid's immediate need for its projected budget shortfall. The proposed legislation is not a full solution, but it represents an historic step in providing state funding for Idaho Legal Aid. I hope that as Idaho attorneys and judges we support this creative and thoughtful proposal before the Idaho Legislature. In the words of Victor Hugo, we must remember that perseverance is the secret of all triumphs.

As your new Bar President, these are my priorities. Serving as President over the next six months comes at the end of my three-year term as a Bar Commissioner. As other Commissioners have reported, serving on the Board is a very gratifying experience. It has certainly broadened my horizons and heightened my appreciation of how effectively our Bar functions. We are the smallest Board of Commissioners of any bar in the country, with only five elected members, but serve more than 5,000 Idaho attorneys throughout our seven judicial districts. There is some magic in this arrangement. Each Commissioner's voice is heard, and opinions are freely shared and respected. It allows for consensus-building without factions that often dominate larger organizations. The Commissioners I have served with are exceptionally fine people and attorneys. Our Executive Director, Diane Minnich, Bar Counsel, Brad Andrews, and Bar staff do a wonderful job assisting the Bar Commission in effectively fulfilling its duties.

It is a great honor to serve as your Idaho State Bar President as we move forward in 2011.

Please do not hesitate to contact me with your ideas or concerns.

About the Author

Deborah A. Ferguson has been an Assistant United States Attorney in the District of Idaho since 1995. She practices in the civil division and specializes in federal environmental litigation. She is a 1986 graduate of Loyola University Chicago School of Law. She has served as a Commissioner for the Fourth Judicial District since 2008, and is currently serving a six-month term as President of the Idaho State Bar Board of Commissioners. Deborah is married to Richard Ferguson and together they have four children.

Attorneys Against Hunger Week to kick off during Hunger Action Month

The Young Lawyers Section will extend its annual Attorneys Against Hunger project into a week-long event to generate awareness about hunger in Idaho and raise funds for the Idaho Foodbank. On September 30, 2011, as national Hunger Action Month comes to a close, the Section will challenge all new ISB admittees to join with attorneys across the state and to eat for seven days on \$4.30 a day — the

average food stamp benefit for individuals in Idaho.

The challenge, modeled after similar awareness-building projects around the country, will run from Saturday, October 1, through Friday, October 7, culminating in a reception Friday afternoon where challenge participants will share their experiences from the week. Participants and the Young Lawyers Section will recruit their colleagues, staff, and all Bar members to pledge support with money donations for each day they stick to the challenge. The section is resolving, through

law firm and individual sponsorships, to keep event costs at \$0, so that all donation pledges can be passed through directly to the Idaho Foodbank.

More information will be released this spring by email and a website with details about the week. Law firms and individuals interested in sponsoring the week, as well as anyone who wants to help with project coordination, should contact Young Lawyers Section chair-elect Ritchie Eppink at ritchieeppink@idaholegalaid.org or (208) 345-0106, ext. 103.

DISCIPLINE

STEPHEN M. JOHNSON (Suspension)

On October 7, 2010, the Idaho Supreme Court issued a Disciplinary Order relating to the suspension of Stephen M. Johnson. The Idaho Supreme Court's Order followed a stipulated resolution of an Idaho State Bar reciprocal disciplinary proceeding that resulted in the identical sanctions that were imposed in Arizona, a suspension for six months and one day effective October 11, 2003 through April 12, 2004 and a second suspension for six months and one day, effective May 27, 2004 through November 28, 2004.

Mr. Johnson was previously and is currently admitted to practice law in Arizona. Mr. Johnson was admitted to practice law in Idaho in September 1995, but has never been an active member of the Idaho State Bar. He has been on inactive status since February 1996. Mr. Johnson was suspended twice in Arizona. During both Arizona suspensions, Mr. Johnson was an inactive member in Idaho and consequently not able to practice law in Idaho.

With respect to Mr. Johnson's first disciplinary case in Arizona, on April 28, 2003, he entered into an Agreement for Discipline by Consent. Mr. Johnson agreed to the imposition of a suspension for a period of six months and one day, probation and the assessment of costs. Mr. Johnson admitted violations of Arizona Disciplinary Rules ER 1.2, ER 1.3, ER 1.4, ER 1.15(b), ER 1.16(d), ER 8.1(b), and ER 8.4(c) and (d). Those disciplinary rules correspond to the Idaho Rules of Professional Conduct. On September 11, 2003, the Supreme Court of Arizona entered its Order suspending Mr. Johnson

for a period of six months and one day effective October 11, 2003, and following the suspension, placed Mr. Johnson on probation for a period of two years upon terms and conditions, which included that he participate in the Law Office Management Assistance Program, that he participate in the Member Assistance Program, that he be assigned a practice monitor for the period of probation, that he be required to participate in the State Bar Trust Account's Ethics Enhancement Program, and that he pay the costs and expenses of the disciplinary proceeding.

With respect to Mr. Johnson's second suspension in Arizona, the parties agreed to a resolution of that disciplinary case without filing a complaint or a determination of probable cause. In that case, a client filed a complaint against Mr. Johnson with the Arizona State Bar, claiming that he failed to adequately communicate with his client during the course of representation and that he was not diligent in the representation. In Mr. Johnson's response, he included a copy of a letter, which was purportedly sent to his client upon his appointment to the case. However, the letter was fabricated. The parties agreed that Mr. Johnson's conduct violated Arizona Disciplinary Rule ER 8.1(a), which corresponds to I.R.P.C. 8.1(a). On May 27, 2004, the Supreme Court of Arizona entered its Order suspending Mr. Johnson for a period of six months and one day and assessing the costs and expenses of that disciplinary proceeding.

After Mr. Johnson served those two suspensions, he was reinstated to the Arizona State Bar effective October 30, 2007 and placed on probation for two years on the terms and conditions specified in the first suspension order. Mr. Johnson suc-

cessfully completed his probationary period in Arizona and was licensed to practice in Arizona, without conditions, on July 8, 2010. Mr. Johnson has not has any disciplinary incidents in Arizona since returning to practice in October 2007.

Mr. Johnson reported his Arizona circumstances to the Idaho State Bar in an appropriate fashion as an inactive member. Mr. Johnson has also recently requested the Idaho State Bar Board of Commissioners approve a transfer from inactive to active status in Idaho under I.B.C.R. 304. The Board authorized Bar Counsel to seek reciprocal discipline before further considering Mr. Johnson's request to transfer to active status and recommended that the reciprocal suspensions be contemporaneous with the Arizona suspensions. The Board also decided that in addition to the reciprocal sanctions, Mr. Johnson's request to transfer to an active license would be referred to the Character and Fitness Committee of the Idaho State Bar to make a recommendation to the Board about Mr. Johnson's character and fitness competency. If he is found to have the appropriate character and fitness competency, he will be required to take and pass the Multistate Professional Responsibility Examination before being reinstated.

The Idaho Supreme Court's Disciplinary Order also provided that Mr. Johnson's suspensions in Idaho will be a public record of the Idaho Supreme Court, open for inspection by anyone requesting to see it and that the notice of suspensions be published in *The Advocate*.

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

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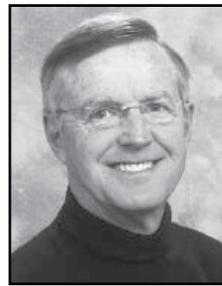
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Stephen C. Smith, former Chairman of the Washington State Bar Association Disciplinary Board, is now accepting referrals for attorney disciplinary investigations and proceedings in Washington, Idaho, Hawaii, and Guam.

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EXECUTIVE DIRECTOR'S REPORT

2010 — THE IDAHO STATE BAR YEAR IN REVIEW

Diane K. Minnich
Executive Director, Idaho State Bar

As we begin 2011, we highlight the Bar's activities in 2010.

Admissions

Reciprocal applicants from 28 states are currently eligible to apply for admission in Idaho. Since reciprocal admission was established in late 2001, 632 attorneys have been admitted reciprocally.



Diane K. Minnich

Bar Exam/Reciprocal Admission		
Year	2009	2010
Bar exam applicants	193	180
Bar exam pass rate	81%	78%
Reciprocal admittees	94	91

Licensing/Membership

As of December 2010, of the 5,510 lawyers licensed by the Idaho State Bar, 4,400 were active members, 187 judges, 26 house counsel members, 893 affiliate members, and 4 emeritus attorneys.

ISB Membership			
	12/09	12/10	% Change
	5,367	5,510	2.7%

Bar Counsel

Discipline			
	2009	2010	Change
Phone inquiries	1,555	1,392	-10.5%
Grievances	463	453	-2%
Complaints opened	119	91	-23%
Ethics questions answered	1,775	1,657	-7%

Fourteen formal charge cases were opened in 2010, 14 cases were closed. Of the 14 closed cases, three resigned in lieu of discipline, two were suspended, two received public censures, five received public reprimands, and one case was dismissed.

Fee Arbitration

The number of fee arbitration cases filed in 2010 was consistent with 2009;

53 cases were opened in 2009, 54 were opened in 2010.

Client Assistance Fund

In 2010, 11 CAF claims were opened and 11 cases were closed, 11 cases were pending at the end of the year.

Client Assistance Fund		
Year	Claims Paid	Total Paid
2009	11	\$53,439
2010	7	\$19,079

Lawyer Referral Service

The referral service has an online option for individuals seeking a referral to an attorney. This has reduced the number of calls while providing the service 24/7. About 45% of those individuals receiving a referral contacted the attorney. This is about a 10% increase from previous years. The LRS continues to work closely with IVLP and other agencies to provide referrals for callers to attorneys and other appropriate services.

Lawyer Referral Service			
	2009	2010	Change
Calls	3,710	2,856	-23%
Referrals	2,530	1,942	-23%

Annual Meeting

The 2010 Annual Meeting was held in Idaho Falls for the first time. Although attendance was less than the 2009 event in Boise, the attendance was the highest at an Annual meeting outside Boise since 1995. The support of the eastern Idaho bar members was outstanding. Due to the success in Idaho Falls, the Commissioners decided to establish a five-year rotation for the Annual Meeting: one year north Idaho, one year eastern Idaho, two years Boise and one year Sun Valley.

Annual Meeting			
	2009 Boise	2010 Idaho Falls	Change
Total Attendees	472	398	-16%
Attorneys and Judges	283	255	-10%

Casemaker

The Casemaker legal research library continues to offer a comprehensive, easily searchable, continually updated database

of case law, statutes and regulations. The service is available to all ISB active members and judges. To access Casemaker, go to the ISB website, www.isb.idaho.gov. If you need your password or have comments or recommendations for improving the services, please let us know.

Sections

The Sections of the Bar continue to actively assist their members with education, public service activities and opportunities to meet and work with attorneys that practice in similar areas. There are now 20 Sections of the Bar. Section membership increased slightly in 2010 from 2,765 to 2,796.

Communications:

Website/Advocate/E-Bulletin

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LITIGATION SECTION AUTHORS DELIVER USEFUL UPDATES

John N. Zarian
Zarian Midgley & Johnson, PLLC

Welcome to the Litigation Section-sponsored issue of *The Advocate*. In this issue, our authors address issues of substantial interest and importance – including developments in the law of municipal finance, the 2010 rules on expert witness disclosure, and insurance payouts prior to settlement.

For example, many local government attorneys are still wrestling with the fallout of the *Frazier* and *Fuhrman* decisions, which establish criteria for borrowing by local governments. Daniel Dansie explores the Idaho Supreme Court precedent and its impact on virtually every local taxing entity in the state.



John N. Zarian

In another article, Joshua Evett reviews the new federal rules for expert witness disclosure. He offers a robust critique of the amendments, including limits on an attorney's ability to inquire as to the guidance given by opposing counsel to an expert witness.

Mark Fucile, a frequent contributor, explores a growing problem in this age of electronic communication – inadvertent production – and cohesively surveys the ethical landscape. Scott Randolph and Dean Bennett explore a related challenge to litigators – managing electronically stored information – and discuss how conflicts in this area can be minimized



through the effective use of discovery conferences.

Bryan Nickels offers a straightforward and very useful practice pointer – “claim that docket fee!”

Gregory Giometti and Joshua Pellant, in turn, review *Weinstein v. Prudential* and the burden placed on insurance companies to pay ongoing medical bills, even before a final settlement.

Jason Prince returns to pages of *The Advocate* and addresses judicial efforts to deal with issues of foreign law in an increasingly global world. He notes that there is no easy way to reconcile vastly different legal systems, then provides some helpful trail markers.

Finally, Lance Schuster explains how a recent Idaho Supreme Court decision expands the litigation privilege, or immunity from suits for conduct during the course of judicial proceedings.

I want to thank our authors for their excellent work in tackling such interesting and useful topics!

If you are a more recent law graduate, I also want to invite you to participate in the upcoming “Trial Skills Academy,” scheduled for March 4 and 5 in Boise. This event brings together some of the finest trial lawyers and judges in Idaho,

and gives young lawyers a unique opportunity to work with mentors and develop their practical trial skills. Subjects to be covered include *voir dire*, opening statements, witness examination (direct and cross), authenticating exhibits, making objections, and closing arguments. There are 13 CLE credits available and the registration deadline is February 18.

Finally, on behalf of our Governing Council, I invite you to participate in the Litigation Section's regular meetings, generally held on the third Friday of each month. In addition to a (brief) monthly business meeting, in alternating months, we schedule “lunch with the judge” or a 30-minute CLE on an issue of general interest. For more information, visit http://isb.idaho.gov/member_services/sections/lit/lit.html.

Best regards.

About the Author

John N. Zarian's legal practice emphasizes intellectual property and complex business litigation. He has served as lead counsel in matters involving patents, trademarks, copyrights, trade secrets, unfair competition, class actions, contractual disputes, business torts, securities, antitrust, real estate, commercial law and wrongful death claims.

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“URGENCY” AND “UNCERTAINTY” ARE THE KEYWORDS FOR LOCAL GOVERNMENTS AFTER *FRAZIER* AND *FUHRIMAN*

Daniel Dansie
Holden, Kidwell, Hahn & Crapo
PLLC

Two recent decisions of the Idaho Supreme Court, *City of Boise v. Frazier*¹ and *City of Idaho Falls v. Fuhriman*,² may create a fertile field of litigation for attorneys representing Idaho’s cities, counties, school districts, and other units of local government. These two cases modify what had been a fairly well-defined line of authority regarding local government expenditures and establish a new test for determining whether a given expenditure is valid.³ The court’s new framework leaves unanswered questions and will likely create increased litigation and expense for local governments.

Local government expenses and the Idaho Constitution

In general, local governments cannot incur financial obligations extending beyond their current budget year without a confirming vote of the electorate.⁴ However, if an expense is “ordinary and necessary,” the constitution does not require a vote.⁵ This exception, known as the “proviso clause,”⁶ is extremely important to local governments because they frequently encounter circumstances which require expenditures or obligations extending beyond the budget year.⁷ Some are large scale expenditures, such as a county’s construction of a wastewater treatment facility or a school district’s construction of a new high school, which the county or school district can legitimately expect to put to a vote. However, local governments also routinely make smaller scale expenditures which are not practical or cost effective to submit to a vote. These include everything from labor or insurance contracts to leases of equipment or real property to franchise agreements with power providers or waste management services.⁸

Given the fairly well-established case law interpreting the proviso clause, before *Frazier* local governments frequently made long-term expenditures based on

Rather than examining the expenditures at issue under its existing framework, the court imposed a new element of analysis: whether the expense is “urgent.”

an opinion from a qualified attorney that the expenditure was ordinary and necessary.⁹ This was an efficient and relatively inexpensive way for local governments to handle the routine, small-scale obligations that arise in the ordinary administration of local government. A local government’s other options for incurring long-term obligations – an authorizing vote or a judicial confirmation action pursuant to Idaho Code § 7-1301 et seq. – are costly and time consuming.¹⁰

History of the Proviso Clause

The initial draft of the constitution did not contain the proviso clause.¹¹ That draft would have absolutely prohibited local governments from incurring any long-term debt without a vote.

Though the “Idaho Constitution is imbued with the spirit of economy,”¹² its drafters were practical.¹³ They recognized that the proposed debt limitation would have severely impeded the “ordinary administration of [local government] affairs.”¹⁴ They also understood the impracticality of constant electioneering to pay routine expenses. Thus, during the debates on the proviso clause, the drafters argued that local governments should have some flexibility for incurring debt:

[I]f you pass that section in the way it is you will absolutely require that when a witness wants to get his fees, after he has attended upon the court, before he can do it the county commissioners have got to stop and submit at a special election to the whole vote of the people as to whether they will pay them or not.¹⁵

The drafters intended that the proviso clause would apply to expenses that arise “in the ordinary administration of affairs,” or in other words, that the constitution’s voting requirement would only apply “to such indebtedness as does not arise under the ordinary administration of the county [or other local government].”

Interpretation of the Proviso

The proviso clause does not clearly indicate which local government expenditures arise in the course of the ordinary administration of local government affairs and, therefore, require no vote. Nevertheless, the Idaho Supreme Court, over time, developed a jurisprudence that identified ordinary and necessary expenses.¹⁸

As early as 1905, the court held that “indebtedness accrued on account of salaries of city officers and employees” was an ordinary and necessary expense,¹⁹ in subsequent years the court affirmed that salaries of public employees fall within the proviso clause.²⁰ The court has also held that expenses related to repair or rehabilitation of public facilities are ordinary and necessary,²¹ as are those made to preserve public health and safety.²² Other expenses the court has held to be within the proviso clause include an appropriation to pay for a city’s snow removal, police and fire protection,²³ a multi-year contract with an electrician to perform continuing work for a school district,²⁴ and expenses for acquiring temporary public facilities.²⁵ The character of these obligations shows that they were essential to providing routine, customary, or ordinary governmental services. This well-established case law provided local governments with predictability in determining whether an expense was ordinary and necessary.

A change in the landscape

Frazier and *Fuhriman* represent a shift from the Idaho Supreme Court’s earlier jurisprudence.²⁶ Rather than examining the expenditures at issue under its existing framework, the court imposed a new element of analysis: whether the expense is “urgent.”²⁷

The *Frazier* case came to the court as an appeal of a district court’s decision that proposed long-term indebtedness to finance an expansion of the Boise Airport’s parking structure was an ordinary and necessary expense. The Idaho Supreme



Daniel Dansie

Court stated that standards set forth in earlier decisions “[do] not assist the court in distinguishing truly necessary expenditures from those that are merely desirable or convenient.”²⁸ To provide the clarity it sought, the court adopted language from an 1897 case, *Dunbar v. Board of Commissioners of Canyon County*,²⁹ where the court stated that:

[T]o come within the constitutional proviso or exception, expenditures made in excess of the revenues of any current year must not only be for ordinary expenses, such as are usual to the maintenance of the county government, the conduct of its necessary business, and the protection of its property, but there must exist a necessity for making the expenditure at or during such year.

Based on this language, the Frazier court stated that “[t]he meaning of ‘necessary’ in the proviso clause takes on added clarity under the *Dunbar* test because expenditures qualify as ‘necessary’ only if they are truly urgent.”³¹

Although the court claimed to have clarified its ordinary and necessary jurisprudence in *Frazier*,³² the decision arguably made it more difficult for local governments to determine whether their expenditures were urgent or whether the urgency requirement even applied to expenditures dissimilar to those at issue in *Frazier*. According to one commentator, “[t]he supreme court’s decision in *Frazier* has stopped many municipalities and political subdivisions in the debt-incurring tracks, and likely it was intended to do so.”³³ The net result of *Frazier* was that “most potential [local government-sponsored] projects are facing a difficult election or a long and costly judicial confirmation process.”³⁴



David Frazier

Three years after *Frazier*, the *Fuhriman* case arose when City of Idaho Falls was contemplating renewing a long-term power purchase contract with the Bonnaville Power Administration (BPA) for a term of 17 years.³⁵ The city had reason to believe, under the court’s previous jurisprudence, that a true power purchase contract was an ordinary and necessary expenditure.³⁶ Nevertheless, the city was uncertain whether *Frazier*’s urgency requirement would apply to a long-term power purchase contract and, if so, whether the BPA contract was an urgent obli-

gation. Given this uncertainty, the City of Idaho Falls brought a judicial confirmation action to confirm its authority to enter into the contract with BPA. The city argued that the court’s analysis should focus on the character of the debt and that the urgency requirement announced in *Frazier* should be limited to cases “involving large capital projects.”³⁷

In a 3-2 decision, the *Fuhriman* court rejected the city’s argument and noted that because the new contract with BPA would not commence until October 1, 2011, “Idaho Falls could have submitted this proposed contract to its taxpayers for a confirmatory vote.”³⁸ Relying heavily on *Frazier*, the court held that “[c]learly

Taking matters into their own hands, three constituencies, unsatisfied with the uncertainty created by the court’s new urgency analysis, secured amendments to art. VIII, § 3 in 2010. These amendments now codify the circumstances under which public hospitals, airports, and municipal power utilities can make long-term expenditures. However, these amendments do not resolve the uncertainty of what constitutes urgency for the multitude of obligations that other local governments must incur in the ordinary administration of government affairs.

Neither Frazier nor Fuhriman established a complete framework for analyzing urgency and neither case explicitly overruled any of the court’s prior case law.

there was no urgency which required that the agreement be entered into ‘during such year’; thus, the proposed power purchase contract was not within the proviso.³⁹

What this means for local governments

In *Fuhriman*, the court emphasized that *Frazier*’s urgency requirement is the standard for all local government expenditures, not just large-scale construction like the project at issue in *Frazier*. However, neither *Frazier* nor *Fuhriman* established a complete framework for analyzing urgency and neither case explicitly overruled any of the court’s prior case law. In fact, *Frazier* specifically cited earlier repair and public safety cases with approval. For example, the court observed that “[t]he district court accurately cited to our decisions in *Board of County Commissioners* and *Peterson* for the proposition that expenses incurred in the repair and improvement of existing facilities can qualify as ordinary and necessary under the proviso clause.”⁴⁰

Local governments are left to wonder whether *Frazier* and *Fuhriman* mean that the court’s earlier cases dealt with obligations that were inherently urgent; whether they must show that a proposed expense is consistent with the court’s earlier cases and that it is also urgent; or whether they must only show that an obligation is urgent without comparison to the court’s well-established case law.⁴¹ Moreover, the statement in *Fuhriman* that the BPA contract was not urgent because the city had time to conduct a vote prior to the commencement of the contract term leaves open the possibility that local governments can create their own urgency by simply putting off expenditures until there is no longer time to conduct a vote before making the expenditure.



Mayor Jared D. Fuhriman

The court will have to address these and other questions arising out of the *Frazier* and *Fuhriman* decisions. In the meantime, it is unlikely that local governments will be able to rely on attorney opinions as a basis for incurring any of the long-term debts or obligations that arise in the ordinary administration of local government affairs. Because of the uncertainty created by *Frazier* and *Fuhriman*, Idaho practitioners will increasingly have the opportunity to represent local governments in judicial confirmation actions intended to show that a proposed expense is urgent.

About the Author

Daniel Dansie is an associate with *Holden, Kidwell, Hahn & Crapo PLLC* in Idaho Falls. Mr. Dansie and Dale W. Storer were counsel for the City of Idaho Falls in the *Fuhriman* case.

Endnotes

¹ 143 Idaho 1, 137 P.3d 388 (2006).
² 149 Idaho 574, 237 P.3d 1200 (2010).
³ S. C. Danielle Quade, Not to Build: City of Boise v. Frazier Further Restricts Local Governments' Ability to Finance Public Projects, 43 IDAHO L. REV. 329, 331 (2007).
⁴ IDAHO CONST. art. VIII, § 3.
⁵ Id.
⁶ Frazier, 143 Idaho at 3, 137 P.3d at 390.
⁷ The constitutional debt limitation applies to any "indebtedness or liability" which extends beyond one year. IDAHO CONST. art. VIII, § 3. "[T]he word 'liability,' which is used in our Constitution, . . . is a much more sweeping and comprehensive term than the word 'indebtedness' . . . the framers of the Constitution meant to cover all kinds and character of debts and obligations for which a city may become bound . . ." Feil v. City of Coeur d'Alene, 23 Idaho 32, 50, 129 P. 643, 649 (1912), superseded by statute on other grounds as stated by Village of Moyie Springs v. Aurora Mfg.Co., 82 Idaho 337, 343, 353 P.2d 767, 771 (1960). See also Fuhriman, 149 Idaho at ___, 237 P.3d at 1203 n.6.
⁸ Some obligations are only offered to local governments on a multi-year basis and some are made on a multi-year basis because there is significant savings in doing so.
⁹ Quade, supra note 3, at 347.
¹⁰ Id. at 346-48.
¹¹ DENNIS C. COLSON, IDAHO'S CONSTITU-

TION: THE TIE THAT BINDS 198-99 (1991).
¹² Frazier, 143 Idaho at 5, 137 P.3d at 392 (quoting Williams v. City of Emmett, 51 Idaho 500, 505, 6 P.2d 475, 476 (1931)).
¹³ Fuhriman, 149 Idaho at ___, 237 P.3d at 1206 (J. Jones, J., dissenting).
¹⁴ I.W. HART, PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF IDAHO, 588 (1912).
¹⁵ Id.
¹⁶ Id.
¹⁷ Id. at 589.
¹⁸ To determine whether an expense falls within the proviso clause, a court must evaluate whether it is ordinary and separately evaluate whether the expense is necessary. Frazier, 143 Idaho at 4, 137 P.3d at 391 (quoting Asson v. City of Burley, 105 Idaho 432, 443, 670 P.2d 839, 850 (1983)). In both Frazier and Fuhriman the expenses were held to be ordinary and cases were decided under the necessary prong.
¹⁹ Butler v. City of Lewiston, 11 Idaho 393, 404, 83 P. 234, 238 (1905).
²⁰ See Corum v. Common School Dist. No. 21, 55 Idaho 725, 730, 47 P.2d 889, 891 (1935) (holding that the "employment of teachers" is an "ordinary and necessary" expense within the meaning of the proviso clause); Hanson v. City of Idaho Falls, 92 Idaho 512, 514, 446 P.2d 634, 636 (1968) (holding that contributions to the police officers' retirement fund fell within the proviso because "[o]ne of the most fundamental and necessary expenses of municipal government is that which is incurred in the provision of adequate police protection for persons and property").
²¹ See, e.g., Hickey v. City of Nampa, 22 Idaho 41, 46, 124 P. 280, 281 (1912) (holding that repairs to public facilities may be ordinary and necessary, even where repairs "only occur at infrequent intervals"); Bd. of County Comm'rs of Twin Falls County v. Idaho Health Facilities Auth., 96 Idaho 498, 510, 531 P.2d 588, 600 (1974) (holding that "[i]t is certainly an ordinary and necessary undertaking to keep existing hospitals operational and in good repair").
²² See, e.g., City of Pocatello v. Peterson, 93 Idaho 774, 778, 473 P.2d 644, 648 (1970) (finding that expenses incurred in construction of a new airport terminal were within the proviso clause because "[i]nsuring the safety of air travel is undoubtedly a legitimate, necessary, and ordinary function to be performed by a municipality").
²³ Thomas v. Glindeman, 33 Idaho 394, 398, 195 P. 92, 93 (1921).
²⁴ Ray v. Nampa School Dist. No. 131, 120 Idaho 117, 120, 814 P.2d 17, 20 (1991).
²⁵ Bannock County v. C. Bunting & Co., 4 Idaho

156, 167, 37 P. 277, 280 (1894), overruled on other grounds by Veatch v. City of Moscow, 18 Idaho 313, 319, 109 P. 722, 724 (1910).
²⁶ One commentator has posited that in Frazier the court "reined in what had arguably become a fairly expansive view of the ordinary and necessary exception to article VIII section 3." Quade, supra note 3, at 340.
²⁷ Frazier, 143 Idaho at 6, 137 P.3d at 393; Fuhriman, 149 Idaho at ___, 237 P.3d at 1204. Thus, the analysis changed from an objective analysis of the character of the debt or obligation to a subjective analysis of the obligation's urgency.
²⁸ Frazier, 143 Idaho at 4, 137 P.3d at 391.
²⁹ Id. (citing Dunbar v. Bd. of County Comm'rs of Canyon County, 5 Idaho 407, 49 P. 409 (1897)).
³⁰ Dunbar, 5 Idaho at 412, 49 P. at 411.
³¹ Frazier, 143 Idaho at 4, 137 P.3d at 391. In Fuhriman, Justice Jones criticized the court's use of the Dunbar standard: "Finding that the expenditure was not ordinary, the [Dunbar] Court had no need to rule upon the necessity prong, rendering as dicta the Court's observation in that regard. The Frazier Court's reliance on Dunbar for determining the necessity provision, therefore, is on rather infirm ground." 149 Idaho at ___, 237 P.3d at 1209 (J. Jones, J., dissenting).
³² Id.
³³ Quade, supra note 5, at 349.
³⁴ Id.
³⁵ Fuhriman, 149 Idaho at ___, 237 P.3d at 1202.
³⁶ The court had earlier suggested, in dicta, that true power purchase contracts are not barred by the constitution's debt limitation. Asson v. City of Burley, 105 Idaho 432, 443, 670 P.2d 839, 850 (1983).
³⁷ Fuhriman, 149 Idaho at ___, 237 P.3d at 1204-05.
³⁸ Id. at ___, 237 P.3d at 1204.
³⁹ Id.
⁴⁰ Frazier, 143 Idaho at 6, 137 P.3d at 388 (internal citations omitted).
⁴¹ Part of the uncertainty for local governments comes from the court's treatment of its claim, made in both cases, that "[t]he required urgency can result from a number of possible causes, such as . . . a legal obligation to make the expenditure without delay." Frazier, 143 Idaho at 6-7, 137 P.3d at 393-94 (internal citations omitted); Fuhriman, 149 Idaho at ___, 237 P.3d at 1204. The City of Idaho Falls specifically argued that it had a legal obligation to provide power to its citizens. Fuhriman, 149 Idaho at ___, 237 P.3d at 1205. Assuming the existence of a legal duty, the court nevertheless found that the BPA contract was not an urgent expenditure and that a vote was required. Id.

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THE 2010 FEDERAL EXPERT WITNESS DISCLOSURE AMENDMENTS - A CRITICAL VIEW

Joshua S. Evett
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Introduction

On April 28, 2010, the U.S. Supreme Court approved amendments to Federal Rules of Civil Procedure 26(a)(2) and (b)(4), which relate to the disclosure and discovery of expert opinion. These amendments went into effect on December 1, 2010. The changes substantially alter a party's ability to thoroughly discover expert opinion in federal court litigation. The general purpose of the amendments is to protect attorney-expert discussions under the work product doctrine while allowing for continued discovery into expert opinion, the factual bases of such opinion, and financial compensation of experts. The changes also protect drafts of expert reports from discovery.

While there was strong support for these amendments by lawyers and bar organizations,¹ in important respects the changes are antithetical to the broad nature of discovery. Given the trial strategy of most lawyers to claim that his or her expert is unbiased and dispassionate, the amendments arguably foreclose productive discovery aimed at undermining this particular narrative. Given the importance of expert opinion, it is questionable whether a lawyer's influence on an expert witness's opinion should be insulated from discovery.

The point of this article is to summarize some of the federal amendments, and to argue against their implementation into the Idaho Rules of Civil Procedure.

Federal expert discovery before December 2010

The 1993 amendments to Rule 26(a)(2)(B) were interpreted by the federal courts as opening the door to discovery of all communications between a lawyer and an expert. That rule mandated that a retained expert's report contain the data or other information considered by the witness in forming his or her opinion. Other information has been construed to include communications from counsel.² Since 1993, it has been open season in federal



Joshua S. Evett

Given the importance of expert opinion, it is questionable whether a lawyer's influence on an expert witness's opinion should be insulated from discovery.

court on discovery into all communications between an expert and attorney. This has led to lengthy depositions and subpoenas to experts for emails, files, and any other documentary evidence that might permit one side to attack the other's expert for influence by counsel. In Idaho state court, Idaho Rule of Civil Procedure 26(b)(4)(A)(i) permits the discovery of all opinions to be expressed and the basis and reasons therefore, and the data or other information considered by the witness in forming the opinions. Accordingly, broad discovery into expert opinion and communications between an expert and lawyer remains the rule in Idaho state court.

The 2010 amendments

The ABA's 2010 Annual Review by the Committee on Expert Witnesses took the position that the litigation generated by parties' efforts to discover draft reports and lawyer communications with experts has been wasteful and generally unproductive. The ABA also concluded that efforts by litigants to show that an expert's opinions were shaped by the attorney retaining the expert's services are usually a waste of time, and that cross-examination of an expert's substantive opinions alone is more effective.

Among the ills identified by the Committee is the apparently widespread practice in complex litigation of hiring two experts: a non-disclosed consulting expert to formulate opinions and discuss them with counsel, and a disclosed expert retained to express those opinions through testimony. The Committee believes that the amendments will cut costs by streamlining discovery into expert opinion and forcing the parties to focus on the substance of those opinions.

Protection of lawyer-expert communications

Federal Rule 26(b)(3)(A) and (B) shield communications between a party's lawyer and an expert witness who is required to prepare a report by Rule 26(a)

(2)(B). It protects those communications, regardless of form, except to the extent they: (i) relate to compensation for the expert's study or testimony; (ii) identify facts or data that the party's attorney provided to the expert and that the expert considered in forming the opinions to be expressed; or (iii) identify assumptions that the party's attorney provided to the expert and that the expert relied on in forming the opinions to be expressed.³

Putting aside whether discovery into an expert's compensation is truly more important than discovery into a lawyer's efforts to influence an expert's opinion (which is debatable given that many litigators believe that juries do not typically care that much about expert compensation since experts on both sides tend to be well compensated), the Committee Note explains subsections (ii) and (iii) with the comment that further communications about the potential relevancy of the facts or data [identified] are protected. The amendments do not appear to permit further discovery into lawyer-expert communications beyond mere identification of facts, data, and assumptions provided by the lawyer. The amendment provides the further qualification that these had to have been considered by the expert (in the case of facts and data) or relied upon by the expert (in the case of lawyer provided assumptions).

While one may question why, if the mere identification of facts, data, and assumptions provided by a lawyer are discoverable further inquiry regarding communications about those facts, data, and assumptions is off limits, this is the new landscape in federal court. With the exception of inquiry into communications regarding compensation, further inquiry on any subject discussed by a lawyer and expert appears off limits.

Accordingly, it appears that in federal court a lawyer may now freely and openly communicate with an expert in an effort to tailor the expert's opinions without fear

that those communications may be discovered. This does not seem particularly fair, given the habit of most counsel at trial to spin an expert's opinions as being unbiased, independently arrived at, and a product of the expert's skill, training, and expertise.

Protection of draft reports

The new amendments provide that drafts of an expert's report are also not discoverable. Federal Rule 26(b)(4)(B) provides that Rules 26(b)(3)(A) and (B) protect draft reports from discovery, regardless of the form of the draft. The amended rule reads as follows: "Trial-Preparation Protection for Draft Reports or Disclosures. Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded."

Although Federal Rule 26(b)(3)(A) will continue to permit the discovery of work product upon a showing of substantial need,⁴ such relief seems unlikely as a party may always hire its own expert to counter the work of an opposing expert. Since a party may do the same work by hiring its own expert, it is difficult to imagine being able to show a substantial need for the draft expert reports of an opposing expert.

Implications and criticism

The implications of the rule changes are significant for those with a federal practice. Many who practice litigation have had cases where an attorney's input into an expert's opinion assisted in the defense of a case. The new rules in federal court promise to end most inquiry into attorney-expert interaction, which is significant and bears on the expert witness's

credibility. For example, I experienced a situation in a case where an opposing expert testified in a deposition, and then later on cross-examination under oath at trial, that counsel had reviewed his opinions in a draft report and altered three of them. This same expert on direct examination had told the jury that his work was impartial and neutral. Testimony of counsel's participation in the creation of the expert's opinion significantly undercut the expert's credibility. In federal court under the 2010 amendments, information about counsel's input into his expert's final opinions could not have been learned.

While the goals of the amendments are understandable, primarily to cut costs associated with expert discovery, the changes are troubling. The importance of expert testimony is crucial. It permits a party, in shorthand, to express an opinion to a jury that can make or break a case. This is recognized by our case law, which stresses that it is fundamental that opportunity be had for full cross-examination of experts.⁵ The importance of expert testimony is further demonstrated by disclosure rules and by the detailed requirements of some district court scheduling orders regarding the disclosure of expert testimony.

Experts qualify to testify under I.R.E. 702 because of their unique knowledge, skill, or training. Jurors should be entitled to understand counsel's influence (if any) on an expert's opinions. A legitimate trial tactic is to attack an expert's objectivity and independence. Considering this, it is questionable whether the discovery rules should be modified to shield a lawyer's influence on expert opinion from discovery.

Conclusion

Given the importance of expert testimony, it makes little sense to forbid

inquiry into the process the expert went through to arrive at his or her opinions, including his or her interactions and communications with counsel. While that is now the rule in federal court, it should not be the rule in Idaho state court.

About the Author

Joshua S. Evett is a member of the firm's executive committee and founder of *Elam & Burke's Commercial Law Group*. He practices primarily in the area of civil litigation, with an emphasis on business and commercial litigation, banking litigation, general insurance defense, insurance coverage, product liability, and mass toxic torts. Mr. Evett provides consultations on a range of business-related topics, including business formation, partnership and shareholder disputes, and corporate dissolutions. He also works on a pro bono basis representing parties involved in child custody disputes.

Mr. Evett joined *Elam & Burke* as an associate in 2002 and became a shareholder in 2005. Mr. Evett grew up in Boise, graduating from Boise High School in 1983. He and his wife returned to Boise in 1997. Mr. Evett was formerly associated with the San Francisco law firm of *Brobeck, Phleger & Harrison* where he practiced civil litigation in the areas of mass toxic torts and premises liability.

Endnotes

¹ Supporters include the American College of Trial Lawyers, the American Trial Lawyers Association, the Federation of Defense & Corporate Counsel, and the U.S. Department of Justice.

² See *Reg'l Airport Auth. v. LFG, LLC*, 460 F.3d 697, 716 (6th Cir. 2006).

³ See FRCP 26(a)(2)(B)(i)-(iii).

⁴ See FRCP 26(b)(3)(A)(ii).

⁵ See, e.g., *Clark v. Klein*, 137 Idaho 154, 158 (2002).

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INADVERTENT PRODUCTION IN ELECTRONIC TIMES

Mark J. Fucile
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Few areas of lawyering have seen such constant change over the past 20 years as inadvertent production. The principal reason is the equally constant evolution of technology over that same period. When paper reigned supreme, courts were much less forgiving of lawyers that inadvertently produced confidential communications that were labeled plainly with law firm or office of general counsel letterhead. As communications between lawyers and their clients moved increasingly to electronic form, however, it both increased the volume of documents requiring screening for privilege and made the screening process more difficult. That technological change, in turn, has significantly affected the development of the law of inadvertent production on ethical duties, procedural rules and evidentiary privilege.

Ethical duties

Before the Rules of Professional Conduct were amended in 2004, there was not a specific ethics rule governing inadvertent production. Instead, ethical duties were largely defined by two American Bar Association formal ethics opinions, Opinion 92-368 (1992) and Opinion 94-382 (1994). These opinions counseled that a lawyer receiving what appeared to be inadvertently produced privileged or otherwise confidential materials from an opponent had a duty to stop reading, notify opposing counsel and follow the directions of opposing counsel on returning or destroying the documents involved. The opinions, in many respects, were cobbled together from the law of bailment and other legal precepts similarly removed from the professional rules. If the recipient believed that the privilege had been waived through inadvertent production, these opinions also counseled that the final determination of privilege waiver was for the court in which the case was pending.

The explicit link between technological change and inadvertent production in the ABA opinions is best reflected in the

We recognized that, in this advanced technological age with its frequent use of facsimile machines and electronic mail, such inadvertent disclosures frequently occur, and that today's beneficiary of such disclosures may likely become tomorrow's victim.

— ABA Opinion - 382

introduction to Opinion 94-382, commenting on Opinion 92-368:

“We recognized that, in this advanced technological age with its frequent use of facsimile machines and electronic mail, such inadvertent disclosures frequently occur, and that today's beneficiary of such disclosures may likely become tomorrow's victim.”¹

In 2002 and 2003, the ABA amended its influential Model Rules of Professional Conduct. That process produced a specific Model Rule, 4.4(b), and two accompanying comments, Comments 2 and 3, on inadvertent production. The new rule directly addresses notification: “A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.” Comment 2 leaves to procedural law whether any other actions are necessary and leaves to evidence law whether privilege has been waived. Comment 3, in turn, commits the voluntary return of inadvertently produced material to the receiving lawyer's discretion (subject to procedural and evidentiary law). In light of these changes, the ABA withdrew opinions 92-368 and 94-382 and replaced them with two new opinions, Opinion 05-437 (2005) and Opinion 06-440 (2006). The new opinions essentially track Model Rule 4.4(b) and its comments.²

When the Idaho Rules of Professional Conduct were amended in 2004 to reflect the changes to the ABA Model Rules, the amendments included the new RPC 4.4(b) and the new accompanying comments, which are Comments 4 and 5 in Idaho's formulation. The new rule applies to both Idaho state court proceedings and, under U.S. District Court Local Civil Rule 83.5(a), Idaho federal court. Although RPC 4.4(b) only addresses notification,

the duty to return or sequester pending court resolution of privilege waiver formerly found in ABA Formal Ethics Opinions 92-368 and 94-382 has now shifted to the state and federal procedural rules discussed below.

Procedural rules

The amendments adopted in 2006 to both the Idaho and Federal Rules of Civil Procedure address the procedural mechanism for litigating possible privilege waiver through inadvertent production. Both sets of amendments were developed in response to the increasingly central role of electronically stored information in discovery.³ The Advisory Committee Report for the federal amendments observed on this point:

Ever since the Committee began its intensive examination of discovery in 1996, a frequent complaint has been the expense and delay that accompany privilege review. . . . The Committee's more recent focus on electronic discovery revealed that the problems of privilege review are often more acute in that setting than with conventional discovery. The volume of electronically stored information responsive to discovery and the varying ways such information is stored and displayed make it more difficult to review for privilege than paper. The production of privileged material is a substantial risk and the costs and delay caused by privilege review are increasingly problematic. The proposed amendment... addresses these problems by setting up a procedure to assert privilege and work-product protection claims after production.

Although the respective state and federal rules are similar, they are not identical. Idaho's rule, IRCP 26(b)(5)(B), which was adopted effective July 1, 2006, reads:



Mark J. Fucile

When a party produces information without intending to waive a claim of privilege it may, within a reasonable time, notify any party that received the information of its claim of privilege. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies. The producing party must comply with Rule 26(b)(5)(A) [addressing privileged information generally] with regard to the information and preserve it pending a ruling by the court.

The federal rule, FRCP 26(b)(5)(B), which was adopted effective December 1, 2006, provides:

If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.⁴

A related amendment, FRCP 26(f)(3)(D), also encourages parties to enter into so-called “claw back” agreements under which they stipulate in advance to return inadvertently produced material.⁵

A recipient who does not follow the appropriate rule may be subject to discovery sanctions. Further, a case from the U.S. District Court in Seattle, *Richards v. Jain*,⁶ illustrates a primary reason for seeking a court ruling on privilege waiver rather than simply using the information involved: disqualification risk to the recipient. *Richards* itself was not an inadvertent production case. The plaintiff in *Richards* was a former senior executive of a high tech company who sued his former employer over stock options when he left the company. On his way out, Richards downloaded the entire contents of his hard drive onto a disk and gave it to his lawyers. The disk included 972 privileged communications with both outside and inside counsel. The lawyers did not notify the company or its counsel. Instead, the lawyers used the communications in formulating their complaint and related case strategy without first litigating the issue of whether privilege had been waived.

The court also disqualified the plaintiff's lawyers on the theory that there was no other way to “unring the bell” in terms of their knowledge of the defendant's privileged communications.

When the documents surfaced during the plaintiff's deposition, the defendant moved for both the return of the documents and for disqualification of the plaintiff's lawyers. The court found that the documents were privileged and that privilege had not been waived. It then ordered the documents returned. More significantly, however, the court also disqualified the plaintiff's lawyers on the theory that there was no other way to “unring the bell” in terms of their knowledge of the defendant's privileged communications. In doing so, the court relied on inadvertent production principles, including the ABA ethics opinions discussed above.

Evidentiary privilege

Privilege waiver based on inadvertent production has also seen significant recent developments.

In September 2008, Federal Rule of Evidence 502 became law, which created specific criteria for waiver through inadvertent production. FRE 502 applies to all federal proceedings regardless of the basis for federal jurisdiction and binds state courts if a ruling in a federal case comes first. It applies to both the attorney-client privilege and the work product rule. FRE 502(b) is framed in the negative and finds that no waiver occurs if: “(1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following . . . [FRCP] 26(b)(5)(B).” Once the document involved is found to be privileged, FRE 502 now controls the analysis of waiver through inadvertent production.⁷

Again, the principal driver for the new federal evidence rule was the increasing use of electronic communications and the attendant cost of screening that material for privilege. The Report on Senate Bill 2450,⁸ which became FRE 502, noted in this regard:

The increased use of email and other electronic media in today's busi-

ness environment have exacerbated the problems with the current doctrine on waiver. Electronic information is even more voluminous and dispersed than traditional record-keeping methods, greatly increasing the time needed to review and separate privileged from non-privileged material. As the time spent reviewing documents has increased, so too has the amount of money litigants on all sides must spend to protect against the potential waiver of privilege.⁹

Idaho does not currently have a comparable amendment to either the general rule of privilege, IRE 502, or the rule governing waiver through voluntary disclosure, IRE 510. Similarly, the precise standards for waiver through inadvertent production have not been directly addressed by appellate court decision. Especially in light of IRCP 26(b)(5)(B), however, there is nothing to suggest that Idaho's state courts will take a markedly different approach to this issue than federal court.¹⁰

Summing up

As technology evolves, parties to litigation tend to face voluminous collections of electronically stored data relevant or related to the issues of a case. This increase in electronic case-related information has increased the potential for the inadvertent disclosure of privileged or confidential information not otherwise subject to discovery in litigation. Collectively, the evolving ethics, procedural and evidence rules offer a progressively more cohesive approach to inadvertent production analysis. This is increasingly important in an era when electronic communications and data storage have made inadvertent production a much more common occurrence than in the days when paper reigned supreme.

About the Author

Mark J. Fucile of *Fucile & Reising LLP* handles professional responsibility, regulatory and attorney-client privilege matters and law firm related litigation for lawyers, law firms and legal departments

throughout the Northwest. He is a past chair and a current member of the Washington State Bar Rules of Professional Conduct Committee, is a past member of the Oregon State Bar's Legal Ethics Committee and is a member of the Idaho State Bar Litigation and Professionalism & Ethics Sections and is a co-editor of the WSBA's Legal Ethics Deskbook and the OSB's Ethical Oregon Lawyer. He can be reached at 503.224.4895 and Mark@frllp.com.

Endnotes

¹ ABA Comm. On Prof'l Ethics and Grievances, Formal Op. 94-382, 1.(1994).
² ABA Formal Ethics Opinion 06-442 (2006) addresses the related issue of "metadata" embedded within electronically transmitted documents. The ABA opinions noted are available on the ABA Center for Professional Responsibility's web site at www.abanet.org/cpr.
³ See Idaho Supreme Court Order Amending Rules, signed March 17, 2006 (available on the Idaho Courts' web site at: http://www.isc.idaho.gov/rules/Discovery_rule306.pdf); Report of the Civil Rules Advisory Committee, dated May 27, 2005 (available on the U.S. Courts' web site at: http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/supct1105/Excerpt_CV_Report.pdf).
⁴ The federal rules contain a specific provision ad-

ressing subpoenas similarly, FRCP 45(d)(2)(B). The corresponding Idaho rule, IRCP 45(d), does not, but would likely reach the same result because it permits a person served with a subpoena to challenge it on the basis of privilege or analogous protection from discovery.
⁵ See, e.g., *Adams v. United States*, No. CV-03-0049-E-BLW, 2008 WL 126629 (D. Idaho Jan. 10, 2008) (unpublished), *on reconsideration*, 2009 WL 1117392 (D. Idaho April 23, 2009) (unpublished) (enforcing such an agreement).
⁶ 168 F. Supp.2d 1195 (W.D. Wash. 2001).
⁷ See, e.g., *Multiquip, Inc. v. Water Management Systems LLC*, No. CV 08-403-S-EJL-REB, 2009 WL 4261214 (D. Idaho Nov. 23, 2009) (unpublished) (holding that an email was privileged and then applying FRE 502 to conclude that privilege had

not been waived through inadvertent production). *Truckstop.net, L.L.C. v. Sprint Communications Co., L.P.*, Nos. CV-04-561-S-BLW, CV-05-0138-S-BLW, 2006 WL 3894914 (D. Idaho Jan. 8. 2006) (unpublished), *appeal dismissed*, 547 F.3d 1065 (9th Cir. 2008), provides an illustration of the predicate question of whether the document involved is privileged in the first place.
⁸ Under 28 U.S.C. § 2074(b), Congress must approve any rule creating or affecting an evidentiary privilege.
⁹ Senate Report 110-264 at 2.
¹⁰ See generally *Farr v. Mischler*, 129 Idaho 201, 207, 923 P.2d 446 (1996) (noting without applying the general approach developed nationally on waiver through inadvertent production now recognized expressly in FRE 502).

This increase in electronic case-related information has increased the potential for the inadvertent disclosure of privileged or confidential information not otherwise subject to discovery in litigation.



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Your brow furrows. "But I already claimed filing fees up above." Curiosity piqued, however, you jump on the web, and call up the statute: § 1923. Docket fees and costs of briefs:

(a) Attorney's and proctor's docket

fees in courts of the United States may be taxed as costs as follows: \$20 on trial or final hearing (including a default judgment whether entered by the court or by the clerk) in civil, criminal, or admiralty cases, except

that in cases of admiralty and maritime jurisdiction where the libellant recovers less than \$50 the proctor's docket fee shall be \$10; \$20 in admiralty appeals involving not over \$1,000; \$50 in admiralty appeals involving not over \$5,000; \$100 in admiralty appeals involving more than \$5,000; \$5 on discontinuance of a civil action; \$5 on motion for judgment and other proceedings on recognizances; \$2.50 for each deposition admitted in evidence.

(b) The docket fees of United States attorneys and United States trustees shall be paid to the clerk of court and by him paid into the Treasury.

(c) In admiralty appeals the court may allow as costs for printing the briefs of the successful party not more than: \$25 where the amount involved is not over \$1,000; \$50 where the amount involved is not over \$5,000; \$75 where the amount involved is over \$5,000.

You scratch your head, and are somewhat concerned by the number of refer-

No matter how characterized, however, these can be claimed in conjunction with the \$20 "trial or final hearing" docket fee.

ences to admiralty and maritime law. And what is a proctor?

Weighing your options, you realize that you're ultimately faced with a Hobson's choice: claim the cost, without really knowing what it is, at the risk of triggering an objection by opposing counsel; research what exactly a Docket Fee is, and, for hourly clients, invariably spend the money you're trying to claim (and then some); or ignore it altogether, and not claim it.

The short answer is to simply claim it.

What is it?

A lengthy recitation of the statute's history and its potential application to any multitude of litigation scenarios is well beyond the scope of this short note. Skipping, then, to the punch line: § 1923 docket fees are, bluntly, "nominal attorney's fees."¹ Authorized as a cost item by 28 U.S.C. § 1920(5), § 1923 docket fees are, then, a quirky exception to the American Rule which generally requires litigants to bear their own attorneys' fees.² In fact, the Second Circuit once rejected a Docket Fee claim on the grounds that it constituted an attorney fee in violation of 28 U.S.C. § 2412 (governing fee and cost awards where the United States is a party).³ Dispute on that point, however, seems resolved, and courts generally find that docket fees are properly taxable pursuant to § 1920(5).⁴

When can I claim it?

The statute allows for \$20 upon "trial or final hearing (including a default judgment whether entered by the court or by the clerk)[.]" While the "trial" and "default judgment" language is self-explanatory, courts have had to evaluate what constitutes a "final hearing." The short answer: generally any order that ends the litigation in federal court, even if no actual "hearing" was held. For example:

- A summary judgment order constitutes a "final hearing."⁵

- A remand of an action to state court most likely constitutes a "final hearing."⁶

- A consent judgment most likely constitutes a "final hearing."⁷

- A settlement, however, does not constitute a "final hearing."⁸

The lower \$5 awards for the "discontinuance of a civil action" and "on motion for judgment and other proceedings on recognizances" appear to be rarely broached, and will likely not be at issue in most civil matters.⁹

Can I also claim depositions?

Yes - subsection (a) also allows for "\$2.50 for each deposition admitted in evidence" — but likely only if you've given it to the Court in some fashion during trial or summary judgment briefing.

At least one court has treated the deposition docket fee as an "attorney's deposition fee."¹⁰ Another court, however, has limited the attorney fee recovery at the \$20 under § 1923 — but still also awarded the deposition cost, in effect treating it as a cost reimbursement.¹¹ No matter how characterized, however, these can be claimed in conjunction with the \$20 "trial or final hearing" docket fee.¹² Although "admitted into evidence" would appear to limit recovery only to those depositions that were actually admitted in one form or another,¹³ some case law suggests that depositions only taken — but not necessarily utilized formally in evidence — can be claimed with showing that they were "necessarily obtained for use in the case."¹⁴ However, the Ninth Circuit has struck somewhat of a middle ground, not requiring formal admission, but merely some usage in the trial context.¹⁵ Note that deposition docket fees can also be awarded for depositions taken by written questions (per FRCP 31], not just those taken orally.¹⁶



Bryan A. Nickels

So just claim it!

The docket fees cost provision of 28 U.S.C. § 1923 is a curious oddity, and the cost-benefit of researching whether or not you can recover that extra \$20 or so likely discourages many attorneys from more confidently writing in their claim for those amounts. However, as the Eastern District of Virginia explained, an attorney need not trouble themselves with the “why?”:

It is not the duty of the Court to inquire into the intent of Congress in providing for the taxation of small docket fees to be paid to attorneys and proctors under § 1923. Whether it is by way of supplementing compensation to counsel or in the nature of a penalty is immaterial. In the exercise of proper discretion, it is as much a part of the taxable costs as any other item.¹⁷

Instead, the only moment’s pause an attorney should give this cost item is, “how much?” In summary, the short answer for most cases: \$20 for winning at trial or on summary judgment, and an additional \$2.50 for each deposition (or excerpt thereof) formally read into the record, used at trial for cross-examination or to refresh, or submitted via affidavit on summary judgment.

About the Author

Bryan A. Nickels is an associate at Hall, Farley, Oberrecht & Blanton, P.A., practicing primarily in the areas of insurance coverage and insurance defense. Mr. Nickels received his B.A. and M.A. (Anthropology) from the University of Idaho in 1995 and 1998, respectively, and received his J.D. from Boston College Law School in 2001.

Endnotes

¹ Berryman v. Epp, 884 F. Supp. 242, 244 (E.D. Mich. 1995).

² See, e.g., Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 256, 95 S.Ct. 1612, 1621(1975) (“Against this background, this Court understandably declared in 1967 that with the exception of the small amounts allowed by § 1923, the rule ‘has long been that attorney’s fees are not ordinarily recoverable . . .’”; a brief history of § 1923 can also be found at n.29); accord, Kenny v. U.S., 118 F. Supp. 907, 909 (D.N.J. 1954) (“It is the general rule that attorneys fees, except the conventional docket fees authorized by § 1923 of Title 28 U.S.C., 28 U.S.C.A. § 1923, are not taxable as costs in the absence of express statutory authority.”); Department of Highways v. McWilliams Dredging Co., 10 F.R.D. 107, 109 (W.D. La. 1951) (“As to the attorneys’ docket fees claimed as of December 8, 1948, there is no authority for the allowance of any attorneys’ fees except the \$20.00 covered by Title 28 U.S.C.A. § 1923.”)

³ McConville v. U.S., 197 F.2d 680, 684 (2d Cir.

1952). However, the Comptroller General later clarified that, in light of a 1966 amendment to 28 U.S.C. 2412, the statutes could indeed be harmonized, and that docket fees were, in fact, recoverable. See Decision of the Comptroller General, In the Matter of Payment of Docket fees by United States, July 11, 1974, available on Westlaw at 54 Comp. Gen. 22.

⁴ See, e.g., Terry v. Allstate Ins. Co., 2007 WL 3231716, *4 (E.D. Cal. 2007). This is, of course, still a discretionary determination by the court as to whether or not to award costs in general, and the award of docket fees will still be subject to the same kinds of considerations as other Bill of Costs items. See, e.g., U.S. v. Bowden, 182 F.2d 251, 252 (10th Cir. 1950); Karsoules v. Moschos, 16 F.R.D. 363, 364 (E.D. Va. 1954).

⁵ Berryman v. Epp, 884 F.Supp. at 245 (“Although the section’s language refers to “trial or final hearing” to entitle a party to \$20.00, this Court believes that the word “final” rather than the word “hearing” is the determining factor as to whether the party is entitled to \$20.00.”); Meador-Bey v. Jones, 1993 WL 76228, at *1 (6th Cir. 1993), cert. denied, 509 U.S. 913, 113 S.Ct. 3019, 125 L.Ed.2d 708 (1993).

⁶ Oil Well Service Co. v. Underwriters at Lloyd’s London, 302 F. Supp. 384, 385 (D. Cal. 1969); Karsoules v. Moschos, 16 F.R.D. at 365; but see Kramer v. Jarvis, 86 F. Supp. 743, 745 (D. Neb. 1949).

⁷ U.S. v. Southern Ry. Co., 278 F.Supp. 60, 61 (D. N.C. 1967) (“This Court is of the opinion that a consent judgment does constitute a final hearing within the meaning of the statute and the allowance of the attorney’s docket fee as a part of the costs is within the discretion of the Court.”); but see U.S. v. New York Cent. R. Co., 97 F.Supp. 727 (D. Ohio 1951) (in matter decided prior to addition of “default judgment” language in current version of 28 U.S.C. 1923, held not recoverable in case treating consent judgment as default judgment).

⁸ Oakley v. Norfolk & W. Ry. Co., 42 F.R.D. 653, 654 (E.D. Va., 1967) (“Nor is the taxed attorney’s fee under 28 U.S.C.A. § 1923 allowable as the case was settled and there was no ‘hearing.’”).

⁹ There do not appear to be any published decisions address what encompasses the “discontinuance of a civil action” (likely due to the amount at issue, \$5), although one District Court has indicated it is limited to circumstances where the plaintiff files a dismissal of suit. Horacek v. Eberly, 2006 WL 2844170, at n.3 (E.D. Mich., 2006). As to the “motion on judgment,” this language was added as a substitute for the prior reference to writs of scire facias, which were abolished by FRCP 81(b). See, e.g., Berryman v. Epp, 884 F. Supp. at 246. One cautionary note, however - the Sixth Circuit, in two unpublished decisions, has obliquely suggested that the remainder of the sentence, “other proceedings on recognizances”,

Instead, the only moment’s pause an attorney should give this cost item is, “how much?”

applies to preexisting agreement, contract or obligation, but only in the negative ‘this isn’t one of those cases’ context. See Seaton-El v. Toombs, 72 F.3d 130, 1995 WL 723195, at *1 (6th Cir. 1995) (unpublished); Miller-Bey v. Hosey, 16 F.3d 1220, 1994 WL 43454 at *1 (6th Cir. 1994) (unpublished).

¹⁰ Hancock v. Albee, 11 F.R.D. 139, 141 (D. Conn., 1951).

¹¹ Department of Highways v. McWilliams Dredging Co., 10 F.R.D. at 109.

¹² See, e.g., id.; accord, Owens v. Sprint/United Management Co., 2005 WL 147419, at *4, (D. Kan., 2005), ruling on Bill of Costs claiming \$20 trial docket fee plus additional \$27.50 for deposition docket fees, as available at <https://ecf.ksd.uscourts.gov/cgi-bin/ShowIndex.pl>, Case No. 03-2371, Docket No. 152 (Exhibit D).

¹³ Courts that have tried to limit recovery to those actually in evidence have still construed this broadly, however. See, e.g., Templeman v. Chris Craft Corp., 770 F.2d 245, 249 (1st Cir. 1985) (held that all six claimed deposition docket fees were awardable; although only 2 of 6 claimed depositions actually read to jury, all six were “read into the record ‘in order to determine which parts will be read to the jury.’”); Lindeman v. Textron, Inc., 136 F.Supp. 157, 158 (D. N.Y. 1955) (“Excerpts from all of these depositions were admitted into evidence at the trial. That is sufficient to meet the requirement in section 1923(a) that the deposition be admitted in evidence.”).

¹⁴ Jones v. Siegelman, 2002 WL 1162406, at *3 (M.D. Ala., 2002); Hope Basket Co. v. Product Advancement Corp., 104 F.Supp. 444, 450 (D. Mich. 1952).

¹⁵ Firemen’s Fund Ins. Co. v. Standard Oil Co. of Cal., 339 F.2d 148, 157-58 (9th Cir. 1964). It does not appear the Ninth Circuit has specifically addressed how this might work in, e.g., the summary judgment context, but the Firemen’s decision appears to suggest that the mere taking of a deposition - without later use such as submission via affidavit in summary judgment briefing - would render it unclaimable as a deposition docket cost. Do be aware, however, that at least one unpublished District of Oregon decision refused to award deposition docket fees where submitted in conjunction with summary judgment briefing, noting: “I do not interpret this docket fee as applying to evidence in a summary judgment motion.” Oregon Azaleas, Inc. v. Western Farm Service, Inc., 2002 WL 31432771, at *1 (D. Or., 2002). However, no authority is cited for this proposition, nor has this decision, itself, been subsequently cited as authority for that proposition.

¹⁶ Perlman v. Feldmann, 116 F.Supp. 102, 113 (D. Conn. 1953).

¹⁷ Karsoules v. Moschos, 16 F.R.D. at 365.

WEINSTEIN V. PRUDENTIAL: PAY ONGOING CLAIMS BEFORE A FINAL SETTLEMENT?

Gregory R. Giometti
Joshua M. Pellant
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Associates, P.C.

Introduction

On June 1, 2010, the Idaho Supreme Court issued its opinion in *Weinstein v. Prudential Property and Casualty Insurance Company*, 149 Idaho 299, 233 P.3d 1221 (2010), an insurance bad faith case arising out of an uninsured motorist (“UM”) claim. The court affirmed the judgment in favor of the plaintiffs.

During opening statement at the trial in September 2007, plaintiff’s counsel commented that this was a “landmark case.”¹ This assessment is entirely accurate. The underlying insurance issue was whether an insurer in handling a UM claim must pay the insured’s ongoing medical expenses on a piecemeal basis rather than waiting to make a one-time settlement payment to the insured at the conclusion of the claim. The insurer’s insistence that it had no obligation to pay ongoing medical benefits under the UM coverage was the basis of the plaintiffs’ bad faith claim, which resulted in a jury verdict of \$6 million in punitive damages, later reduced by the trial court to \$1,890,000. This article will address the Idaho Supreme Court’s reasoning in affirming the bad faith judgment.

Legal background

The novel underlying issue involved in the *Weinstein* case was whether an insurer must offer to pay, on an ongoing basis, undisputed medical bills of its insured under a UM policy. While the court did not rule specifically on that general issue, important lessons can be learned by examining the court’s analysis as well as previous cases discussing the issue. The Idaho Supreme Court first recognized the independent tort of breach of the duty of good faith in *White v. Unigard Mutual Insurance Company*, where it stated that “where an insurer ‘intentionally and unreasonably denies or delays payment’ on a claim, and in the process harms the claimant in such a way not fully compensable at contract, the claimant can bring an action in tort to recover for the harm done.”²

The court held that even though the insurer’s duty to pay was not yet triggered by agreement or arbitration, the insurer was not shielded from liability for “intentionally and unreasonably delaying the settlement process”.

Since the *White* case, the court has issued many decisions on the topic of insurance bad faith. The court specifically addressed the issue of an insurer’s failure to pay undisputed amounts in *Inland Group of Companies, Inc. v. Providence Washington Insurance Company*³ In *Inland Group*, the insurer

refused to pay the undisputed amount of business loss under a commercial general liability policy after the insured’s business was destroyed by a fire. The insurer took the position that the policy called for mandatory arbitration and therefore it was not required to pay the undisputed amount of business loss until the arbitration was concluded. The court disagreed, finding that the duty to act in good faith exists at all stages of the settlement process and is independent of any breach of the obligation to pay.⁴ The court held that even though the insurer’s duty to pay was not yet triggered by agreement or arbitration, the insurer was not shielded from liability for “intentionally and unreasonably delaying the settlement process.”⁵ The court in essence found that even though the insurer was under no contractual duty to pay the undisputed business loss amount, it still breached the independent duty to act in good faith by delaying payment.

The Idaho Court of Appeals also addressed this issue in *Chester v. State Farm Insurance Co.*⁶ In *Chester*, the insured’s barn was destroyed by a fire. There was a dispute over whether the policy provided for the payment of the replacement cost of the barn or the cash value of the barn. However, there was no dispute that the policy covered the value of the personal property destroyed by the fire, the clean

up cost, and at least the cash value of the barn. The court upheld the jury verdict finding the insurer acted in bad faith in delaying payment of the undisputed amount of the claim, concluding that there was evidence that the insurer acted unreasonably and intentionally in delaying payment on the undisputed claims.⁷

The common theme linking *Chester*, *Inland Group*, and *Weinstein* appears to be that if any portion of an insured’s claim is undisputed, the insurer may want to think twice before delaying or refusing to pay the undisputed portion of the claim. This is true even if the insurer is under no contractual obligation to pay the claim. The *Weinstein* case did not necessarily break new ground on this particular issue, but instead reinforced the general rule established in *Chester* and *Inland Group*. *Weinstein* is important, however, because it not only solidifies that rule, but it demonstrates that the financial consequences of failing to pay an undisputed claim can be severe if a jury determines that the insurer acted in bad faith sufficient to warrant punitive damages.

Factual background of *Weinstein*

On September 30, 2002, Linda Weinstein was driving with her daughter, Sarah Weinstein, in the passenger seat when a 16-year-old uninsured driver failed to yield when pulling out of a driveway, striking an oncoming pickup, which in turn collided with the Weinstein’s car. Both Sarah and Mrs. Weinstein suffered non life-threatening injuries but were taken to the hospital by ambulance and released later that day. At the time of the accident, the Weinstein’s were insured by Prudential Property and Casualty Insurance Company, which was subsequently purchased by Liberty Mutual Insurance Company (“Liberty”). The insurance policy provided \$5,000 per person in medical (“MedPay”) coverage and \$250,000 per person in UM coverage.



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Liberty was notified of the accident and immediately determined that the uninsured driver was solely at fault. Both Mrs. Weinstein and Sarah received on-going treatment for their injuries, incurring significant medical bills. The Weinstains notified Liberty Mutual in January 2003 that they were receiving threatening phone calls regarding unpaid medical bills. In May 2003, Mrs. Weinstein told the Liberty adjuster that MRI scans showed that Sarah had sustained a labral tear of her left hip and she would need surgery. Beginning in May 2003, the Weinstains continued to receive regular letters and phone calls from doctors' offices and collection agencies about unpaid medical bills, and Mrs. Weinstein again notified Liberty in September 2003 that the Weinstains' credit was ruined. Sarah's MedPay benefits of \$5,000 were exhausted on September 3, 2003, and Mrs. Weinstein requested Liberty to pay the past-due medical bills out of the UM coverage. Liberty responded that it would not pay under the UM coverage until the Weinstains were ready to settle the entire claim. Liberty stated that it was the company's policy not to make ongoing, piecemeal payments, but instead to wait until the insured was ready to settle the entire claim before it made any UM payments. The Weinstains then retained counsel but the demand for payment of medical bills continued to go unanswered. In June of 2004, Liberty offered to pay \$10,000 as an advance on a future settlement if the Weinstains agreed that the payment did not constitute any admission of liability on the part of the uninsured motorist. The Weinstains did not agree to the terms and filed suit. Before trial, Liberty paid the Weinstains \$60,000 for Sarah's injuries, \$17,000 for prejudgment interest, and \$3,000 for attorney fees.

The case was ultimately tried in Ada County, and the jury found that Liberty had breached the contract and acted in bad faith in handling the Weinstains' UM claim. The jury awarded the Weinstains \$210,000 in compensatory damages and \$6 million in punitive damages. The jury also found that Sarah had sustained \$250,000 in damages due to the accident. Liberty filed motions for a new trial, judgment notwithstanding the verdict and a remittitur. The trial court denied the post-trial motions, but ruled it was prepared to grant the motion for new trial on punitive damages unless the Weinstains would accept a reduction in punitive damages to \$1,890,000. Liberty appealed the judgment and the denial of its post-trial motions, and the Weinstains cross-appealed.

Liberty stated that it was the company's policy not to make ongoing, piecemeal payments, but instead to wait until the insured was ready to settle the entire claim before it made any UM payments.

Legal issues

In its 43-page opinion, the majority addressed far too many issues to review in this brief article. This article will focus on the issues of most consequence to practitioners in the area of motor vehicle insurance law and bad faith, including the novel ruling that Liberty breached the contract and acted in bad faith by failing to make ongoing payments of medical benefits under the UM coverage.

The first-party bad faith standard in Idaho

The Idaho Supreme Court rejected Liberty's argument that the trial court erred by failing to grant its motions for a directed verdict, judgment notwithstanding the verdict and new trial on the grounds that the Weinstains failed to prove their claim of insurance bad faith. In Idaho, a claim for first-party insurance bad faith includes four elements: "1) the insurer intentionally and unreasonably denied or withheld payment; 2) the claim was not fairly debatable; 3) the denial or failure to pay was not the result of a good faith mistake; and 4) the resulting harm is not fully compensable by contract damages."⁸ Idaho law is unique in that it has incorporated the fairly debatable standard as one of the elements of a first-party bad faith claim. In other states, whether the claim is "fairly debatable" is simply used as a test of whether the insurer's conduct in handling the particular claim is reasonable.⁹

Breach of contract

The court first addressed the issue of breach of contract, noting that "to find that Liberty Mutual committed bad faith in handling the UM provision, there must also have been a duty under the contract that was breached."¹⁰ With respect to the breach of contract claim, Liberty argued that Idaho law does not require a UM carrier to pay a UM claim on a piecemeal basis. On the bad faith issue, Liberty asserted that whether such an obligation exists presented a debatable legal issue of first impression.

The insuring agreement stated that "we will pay"¹¹ UM benefits, up to the limit of liability, "when an insured or an insured's car is struck by an uninsured motor vehicle or trailer."¹¹ Liberty relied on contract language stating that its "payment is based on the amount that an insured is legally entitled to recover for bodily injury but could not collect from the owner or operator of the uninsured motor vehicle..."¹² Liberty argued that because the terms "payment" and "amount" are singular, the policy contemplated a single payment and nothing in the policy required it to make piecemeal payments of UM benefits. The court rejected this argument, noting that "[t]he phrase 'we will pay' cannot reasonably be construed as indicating" that Liberty would make only one payment.¹³ The court pointed out that the same "we will pay" language was found in the MedPay coverage and there could be no contention that only one payment is required under MedPay coverage.¹⁴ Furthermore, the court recognized that in the part of the policy captioned "How We Will Settle" there was no language stating that Liberty would settle a claim under the UM coverage by making only one payment.¹⁵

The court found that since liability for the accident was undisputed, Liberty's "analysis in deciding whether to pay particular medical bills under UM coverage would be no different from its analysis in deciding whether to pay those bills under MedPay coverage[.]"¹⁶ Liberty's decision not to pay medical bills on an ongoing basis after its MedPay coverage was exhausted was based upon its own internal policies. However, Liberty "was not entitled to delay payments based solely upon its internal policies that were not part of the policy."¹⁷ The court recognized that under well-established Idaho law, "[w]here no time is expressed in a contract for performance, the law implies that it shall be performed within a reasonable time[.]"¹⁸ Therefore, Liberty was under a contractual obligation "to pay under the UM coverage within a reasonable time."¹⁹ Liberty's presentation

of evidence that the common practice of the insurance industry is only to make a one-time payment of UM benefits was of no avail because such “common practice cannot alter or supplement the terms of the Weinstains’ insurance policy.”²⁰ Thus, the court found there was substantial evidence to support the jury’s finding that Liberty breached the insurance contract by failing to pay UM benefits within a reasonable time.

Bad faith and the fairly debatable standard

The court also found that there was substantial evidence to support all of the elements of the Weinstains’ claim for bad faith. The evidence supported the conclusion that there was intentional or unreasonable delay in payment because the delay was based upon Liberty’s standard procedures in handling UM claims, not because of any delay by the Weinstains’ counsel in providing Liberty with medical records. The court emphasized that “Liberty Mutual’s position was that it was not required to make any payments under UM coverage until the entire UM claim was settled, even if liability and the medical bills were undisputed.”²¹ Liberty could not identify a single provision in the insurance policy supporting its position.

The majority rejected the dissent’s argument that a UM claim does not exist until the claimant is ready to prove the full extent of the damages he or she is legally entitled to recover from the tortfeasor. The majority noted that Liberty “did not base its construction of the policy on how this Court should, or other courts have, construed those words.”²² Rather, Liberty based its entire argument on the fact that the words “payment” and “amount” were singular rather than plural. The majority found that “[i]f Liberty Mutual wants its policy to provide that it does not have to pay anything under UM coverage until all damages recoverable under that coverage have been agreed upon or determined, then it must include such a provision.”²³

The court also rejected Liberty’s argument that its claim handling was “fairly debatable” because the case raised an issue of first impression. The court noted that Liberty’s in-house counsel testified that the policy contains no provision stating when payment for UM benefits is due.²⁴ Further, Liberty’s in-house counsel was aware of the well-established rule that when a contract specifies no time for performance, performance must be made within a reasonable time.²⁵ Liberty did not provide any legal argument as to why this well-settled rule should not apply to payments under UM coverage.

The court also found that there was substantial evidence to support all of the elements of the Weinstains’ claim for bad faith.

As further support for its conclusion that substantial evidence supported the jury’s finding that the matter was not fairly debatable, the court cited *Inland Group*,²⁶ discussed above, in which it upheld an award of punitive damages where an insurance company failed to pay the undisputed portion of the insured’s claim under a fire insurance policy. “Similarly, Liberty Mutual’s contractual duty of good faith required that it timely pay the undisputed sums owing under the Weinstains’ insurance policy.”²⁷ Moreover, the court rejected Liberty’s assertion that there were debatable issues about the extent of Sarah’s injuries. The court pointed out that because Liberty paid about half of Sarah’s bill for hip surgery under the MedPay coverage, under which payment was only due for bodily injury caused by a car accident, the jury reasonably could have concluded that Liberty’s “refusal to pay the balance under UM coverage was not based upon any good faith belief that it was fairly debatable as to whether the labral tear was caused by the accident.”²⁸ Next, the court pointed out that Liberty’s argument that Sarah’s need for future medical expenses was questionable “does not make her past medical expenses fairly debatable.”²⁹ Likewise, Liberty’s contention that the Weinstains never submitted a demand for Sarah’s general damages or proof of future medical expenses, “does not make the amount of her actual medical expenses fairly debatable.”³⁰

Conclusion

The *Weinstein* decision raises significant issues for future handling of UM and UIM claims. On the one hand, the opinion suggests, but does not specifically hold, that UM/UIM carriers must pay “undisputed” amounts on an ongoing, piecemeal basis. On the other hand, the opinion appears to be limited to the specific facts of this case. If the policy had provided for a different method of payment of benefits, or clearly stated that Liberty’s obligation to pay UM benefits only arose if the parties agreed to the amount the insured was

legally entitled to recover from the uninsured motorist, the outcome of the case would have been different. The result in *Weinstein* boils down to the fact that Liberty could point to no specific language in the policy justifying its position. Rather, Liberty tried to support its position by relying upon its own internal procedures and the custom and practice of the insurance industry in general.

The most serious question raised by *Weinstein* is what happens if there is a genuine dispute over liability, causation or damages, which makes it unclear what damages the insured is legally entitled to collect from the uninsured motorist. For example, what happens in such a case if the insured submits his or her ongoing medical bills to the insurer and demands payment? Even after *Weinstein*, it seems that insurers have no obligation to make ongoing payments of benefits if there is a legitimate dispute as to the actual amount owed. What caused difficulty for Liberty in *Weinstein* was the fact that liability, causation and the amount of Sarah’s medical bills were all undisputed.

In sum, while some attorneys may try to apply *Weinstein* broadly to require insurers to make ongoing payments of so-called “undisputed” benefits in UM and UIM cases, the effect of the case is likely to be more limited. Cases still must be decided on a case-by-case basis, depending upon the particular policy language and the particular facts demonstrating that the insured is legally entitled to recover damages from the uninsured or underinsured motorist.

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Endnotes

¹ *Weinstein*, 149 Idaho at ____, 233 P. 3d at 1256.
² 112 Idaho 94, 98-99, 730 P.2d 1014, 1018-19 (1986)
³ 133 Idaho 249, 985 P.2d 674 (1999)
⁴ *Id.* at 255, 985 P.2d at 680.
⁵ *Id.*
⁶ 117 Idaho 538, 789 P.2d 534 (Idaho Ct. App. 1990)
⁷ *Id.* at 541, 780 P.2d at 537.
⁸ *Weinstein*, 149 Idaho at ____, 233 P. 3d at 1256 (citing *Robinson v. State Farm Mut. Auto. Ins. Co.*, 137 Idaho 173, 176, 45 P.3d 829, 832 (2002)).
⁹ See, e.g., *Pham v. State Farm Mut. Auto. Ins. Co.*,

In sum, while some attorneys may try to apply Weinstein broadly to require insurers to make ongoing payments of so-called “undisputed” benefits in UM and UIM cases, the effect of the case is likely to be more limited.

70 P.3d 567, 572 (Colo. App. 2003).
¹⁰ *Weinstein*, 149 Idaho at ____, 233 P.3d at 1237.
¹¹ *Id.* at 1238.
¹² *Id.*
¹³ *Id.*
¹⁴ *Id.*
¹⁵ *Id.* at 1239.
¹⁶ *Id.* at 1240.
¹⁷ *Id.*
¹⁸ *Id.*
¹⁹ *Id.*
²⁰ *Id.*
²¹ *Id.* at 1241.
²² *Id.* at 1242.
²³ *Id.* at 1244.
²⁴ *Id.*
²⁵ *Id.*
²⁶ 133 Idaho 249, 985 P.2d 674 (1999).
²⁷ *Weinstein*, 149 Idaho at ____, 233 P.3d at 1244.
²⁸ *Id.* at 1245.
²⁹ *Id.*
³⁰ *Id.*



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CHIPPING AWAY AT THE “WALL OF STONE”: FOREIGN COUNTRY LAW AND FEDERAL RULE OF CIVIL PROCEDURE 44.1

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The challenge of applying foreign law in U.S. courts has long perplexed judges and attorneys. Indeed, even legendary U.S. Supreme Court Justice Oliver Wendell Holmes, Jr. expressed frustration over the difficulty of trying to comprehend a foreign jurisdiction's law. In the 1923 case of *Diaz v. Gonzalez*, which required the U.S. Supreme Court to review a ruling issued under Puerto Rico's Spanish civil law system, Justice Holmes summed up his concerns about foreign law as follows:

When we contemplate such a system from the outside it seems like a wall of stone, every part even with all the others, except so far as our own local education may lead us to see subordinations to which we are accustomed. But to one brought up within it, varying emphasis, tacit assumptions, unwritten practices, a thousand influences gained only from life, may give to the different parts wholly new values that logic and grammar never could have got from the books.¹

In other words, Justice Holmes believed no amount of book study could truly enable an English common law jurist like himself to decipher the subtle nuances of a Spanish civil law system. And if Justice Holmes viewed foreign law as an impenetrable “wall of stone,” then it should come as no surprise that the legal profession has generally struggled to accommodate foreign law in U.S. courtrooms.

Nevertheless, nearly a century's worth of advancements in global transportation and communications has increased the introduction of foreign law into the U.S. legal system at a rate Justice Holmes likely never imagined. Today's U.S. courts—especially those at the federal level—face a steady stream of cases that implicate foreign law in some way. For example, a traditional conflict of laws analysis in a personal injury case may point to



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the law of Kyrgyzstan;² the choice of law provision in a bill of lading may require the application of Singaporean law to an attorneys' fees petition;³ or review of the enforceability of a settlement agreement may necessitate consideration of Venezuelan law.⁴ Such scenarios present judges and advocates with the formidable task of identifying, interpreting, and applying foreign law.

Federal Rule of Civil Procedure 44.1 offers the procedural framework for performing this task in civil proceedings.⁵ Adopted in 1966, Rule 44.1 provides as follows:

A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.

This seemingly simple, three-sentence rule actually raises as many questions as it answers. What is the latest point at which a party may introduce an issue of foreign law? May a judge reject the un rebutted testimony of a party's foreign law expert? If a judge conducts independent research on the applicable foreign law, must the parties have an opportunity to review and challenge the judge's research findings? Over the past 45 years, the federal courts have gradually fleshed out answers to these types of questions.

Despite the steady rise of foreign law in other federal courts, the District of Idaho has apparently had few, if any, chances to address Rule 44.1 in detail. In fact, a recent online database search identified only two cases in which the District of Idaho cited Rule 44.1.⁶ One of these citations appeared in a footnote⁷ and the other one appeared in a string citation.⁸

As Idaho continues to integrate itself into the global community through international business and tourism, however, the question is increasingly becoming not *whether* the District of Idaho will have an opportunity to grapple with Rule 44.1, but *when* the District of Idaho will have such an opportunity. Accordingly, this article seeks to provide Idaho's federal practitioners a basic primer on each of Rule 44.1's three sentences, focusing in particular on the Advisory Committee Notes and Ninth Circuit case law.

When should a party provide notice of foreign law issues?

“A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing.”

According to the Advisory Committee, the first sentence of Rule 44.1 seeks to “avoid unfair surprise” and requires that notice of an intent to raise an issue of foreign law “shall be ‘written’ and ‘reasonable.’”⁹ The determination of what constitutes “reasonable” written notice depends on the facts of each case, and such notice need not always appear in the pleadings. Rather, “[i]n some cases the [foreign law] issue may not become apparent until the trial and notice then given may still be reasonable.”¹⁰ When ruling on the reasonableness of a party's notice of foreign law, the Advisory Committee suggests that courts should consider such factors as (1) “[t]he stage which the case had reached at the time of the notice,” (2) “the reason proffered by the party for his failure to give earlier notice,” and (3) “the importance to the case as a whole of the issue of foreign law sought to be raised.”¹¹ Moreover, once a party provides notice of foreign law, such notice “need not be repeated by any other and serves as a basis for presentation of material on the foreign law by all parties.”¹²

Remaining true to the Advisory Committee's guidance, the Ninth Circuit has generally adopted a case-by-case ap-

proach to determining the reasonableness of a party's notice of foreign law. The Ninth Circuit has, however, provided at least one rule of thumb, stating: "Absent extenuating circumstances, notice of issues of foreign law that reasonably would be expected to be part of the proceedings should be provided in the *pretrial conference* and contentions about applicability of foreign law should be incorporated in the *pretrial order*."¹³ According to the Ninth Circuit, treating the Rule 16(d) pretrial conference as the presumed cut-off point for introducing foreign law serves the interests of judicial economy, which "favor early notice so that the parties may plan and present argument on any issues pertinent to an application of foreign law."¹⁴ Although the Ninth Circuit has "left open the possibility that there may be some circumstances in which consideration of foreign law may be appropriate after trial and on appeal (but not for the first time after oral argument), that is not the normal practice consistent with Rule 44.1's requirement of reasonable notice."¹⁵

The Ninth Circuit's holding in *DP Aviation v. Smiths Industries Aerospace & Defense Systems Ltd.* serves as a cautionary tale for parties who neglect to provide express pretrial notice of their intention to rely on foreign law. DP Aviation ("DPA") sued Smiths Industries Aerospace & Defense Systems Ltd. ("SIADS") for allegedly breaching the parties' exclusive sales representation agreement by refusing to pay DPA certain incentive fees.¹⁶ After prevailing at trial in the Western District of Washington, DPA submitted a proposed judgment that calculated prejudgment interest at twelve percent in accordance with Washington law.¹⁷ In response, SIADS urged the district court to apply English law and submitted an affidavit from an English barrister attesting to a lower prejudgment interest rate.¹⁸ DPA countered that SIADS had failed to comply with Rule 44.1.¹⁹ Although the district court did not expressly address DPA's Rule 44.1 argument, it calculated prejudgment interest according to Washington law.²⁰

On appeal, the Ninth Circuit affirmed the district court's prejudgment interest calculation, holding that SIADS had failed to provide reasonable notice of English law under Rule 44.1.²¹ Although SIADS contended it had provided such notice by alluding to English law in its summary judgment briefing, the Ninth Circuit determined that SIADS had failed to "explicitly say that English law govern[ed] prejudgment interest."²² Moreover, the Ninth Circuit rejected SIADS's argument that "it should not be required to give no-

According to the Ninth Circuit, treating the Rule 16(d) pretrial conference as the presumed cut-off point for introducing foreign law serves the interests of judicial economy.

tice on the foreign law governing prejudgment interest unless and until its liability was determined."²³ According to the Ninth Circuit, SIADS "should reasonably have expected that prejudgment interest would be an issue if liability were to be determined."²⁴ In short, SIADS waived its ability to rely on English law when it allowed the pretrial conference to pass without providing the requisite written notice under Rule 44.1.

How should a judge determine the applicable foreign law?

"In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence."

Recognizing the "peculiar nature" of foreign law, the Advisory Committee drafted the second sentence of Rule 44.1 to "provide flexible procedures for presenting and utilizing material on issues of foreign law by which a sound result can be achieved with fairness to the parties."²⁵ Rule 44.1 expressly "free[s] the judge, in determining foreign law, from restrictions imposed by evidence rules," including the Federal Rules of Evidence governing expert witness testimony.²⁶ Under this rather *laissez faire* approach to determining foreign law, judges may consider an array of material and sources, including:

[A]ffidavits and expert testimony from an Australian Federal Judge, a Peruvian Minister of Agriculture, and a South African attorney; certified translations of Bolivian Supreme Decrees; foreign case law; a student note in a Philippine Law Review; information obtained by a law clerk in a telephone conversation with the Hong Kong Trade Office and presented *ex parte* to the court; and the court's "own independent research and analysis" of a Yugoslavian law.²⁷

Although a district court may rely entirely on the parties' materials and testimony, it may also reject the parties'

submissions and "engage in its own research and consider any relevant material thus found."²⁸ In permitting judges to do their own homework on foreign law, the Advisory Committee recognized that "[t]he court may have at its disposal better foreign law materials than counsel have presented, or may wish to reexamine and amplify material that has been presented by counsel in partisan fashion or in insufficient detail."²⁹ Furthermore, "[t]here is no requirement that the court give formal notice to the parties of its intention to engage in its own research on an issue of foreign law which has been raised by them, or of its intention to raise and determine independently an issue not raised by them."³⁰

Despite the Advisory Committee's efforts to provide district courts virtually unfettered flexibility when determining foreign law under Rule 44.1, the Ninth Circuit has placed certain parameters on that flexibility. In *Universe Sales Co. v. Silver Castle, Ltd.*, Universe Sales Co. ("Universe") sued Offshore Sportswear, Inc. ("Sportswear") in California state court, seeking restitution for royalties it paid to license trademarks from Sportswear.³¹ Universe asserted Sportswear did not own the trademarks, and, therefore, was not entitled to any royalties.³² After removing the case to the Central District of California, Sportswear filed counterclaims seeking unpaid royalties on the trademarks.³³

Universe asserted in its summary judgment briefing that, under Japanese *trademark* law, Sportswear did not own the trademarks at issue.³⁴ In response, Sportswear filed a cross-motion for summary judgment, contending Japanese *contract* law governed the parties' royalty dispute, and, under that body of law, Sportswear owned the trademarks and deserved the royalties.³⁵ To support its argument, Sportswear submitted the declaration of a Japanese attorney who specialized in Japanese trademark and contract law.³⁶ This Japanese attorney asserted

that Sportswear owned the trademarks under Japanese contract law.³⁷ Although Universe did not rebut the testimony of Sportswear's Japanese law expert, the district court analyzed the royalty issue under Japanese trademark law and granted summary judgment to Universe.³⁸

The Ninth Circuit reversed the district court's grant of summary judgment to Universe and granted Sportswear's cross-motion for summary judgment, holding that the district court had erred by failing to consider properly the declaration of Sportswear's Japanese law expert.³⁹ As an initial matter, the Ninth Circuit acknowledged that district courts "may ascertain foreign law through numerous means" under Rule 44.1.⁴⁰ However, the Ninth Circuit emphasized that "expert testimony accompanied by extracts from foreign legal materials has been and will likely continue to be the basic mode of proving foreign law."⁴¹

After analyzing the testimony of Sportswear's Japanese law expert, the Ninth Circuit noted that Universe had passed up numerous opportunities to rebut this testimony, and the district court had apparently performed no independent research on Japanese law.⁴² The Ninth Circuit then asserted the district court should have (1) considered Sportswear's Japanese law expert's testimony about Japanese contract law, and (2) performed its own research or instructed Universe to submit rebuttal evidence.⁴³ Because the district court had failed to take these steps, the Ninth Circuit accepted the uncontested testimony of Sportswear's Japanese law expert and granted Sportswear's cross-motion for summary judgment.⁴⁴ In the wake of *Universe Sales*, therefore, a district court may not reject a foreign law expert's un rebutted testimony without at least conducting its own research and articulating how that research counsels in favor of disregarding the foreign law expert.

What is the standard of review for rulings based on foreign law?

"The court's determination must be treated as a ruling on a question of law."

Prior to the enactment of Rule 44.1, U.S. federal courts followed the English approach of requiring parties to plead and prove foreign law like any other fact.⁴⁵ Thus, the jury, rather than the judge, determined foreign law, and the appellate courts reviewed these foreign law findings for clear error.⁴⁶

The Advisory Committee abandoned this centuries' old fact-based approach in the third sentence of Rule 44.1, declaring that a "determination of an issue of foreign law is to be treated as a ruling on a

The Advisory Committee abandoned this centuries' old fact-based approach in the third sentence of Rule 44.1, declaring that a "determination of an issue of foreign law is to be treated as a ruling on a question of 'law,' not 'fact.'"

question of 'law,' not 'fact.'"⁴⁷ In the Advisory Committee's estimation, "the jury is not the appropriate body to determine issues of foreign law" and appellate review should not be "narrowly confined by the 'clearly erroneous' standard of Rule 52(a)."⁴⁸

Accordingly, the Ninth Circuit applies a *de novo* standard of review to a district court's determination of foreign law.⁴⁹ Under *de novo* review, the Ninth Circuit may take such steps as conducting its own research on the applicable foreign law,⁵⁰ ordering the parties to submit additional briefing on foreign law issues,⁵¹ and determining foreign law "on its own analysis."⁵²

Rule 44.1 practice pointers

The Advisory Committee Notes and Ninth Circuit case law reviewed above—especially *DP Aviation* and *Universe Sales*—give rise to at least three Rule 44.1 guidelines for attorneys who practice in the District of Idaho and elsewhere in the Ninth Circuit:

1. *Determine from the outset whether your client's case implicates foreign law, keeping in mind that such post-trial issues as prejudgment interest and attorneys' fees may bring foreign law into play.* Presumably, the defendant in *DP Aviation* did not realize English law afforded a lower prejudgment interest rate than Washington law until after the plaintiff prevailed at trial. But at that point the defendant was too late. By spotting potential foreign law issues, identifying the applicable foreign law, and developing a strategy for addressing this foreign law before filing any pleadings, parties can avoid suffering the same fate as the *DP Aviation* defendant. Moreover, as the defendant in *DP Aviation* learned the hard way, parties should focus not only on the application of foreign law to claims and defenses, but also on post-trial issues like prejudgment interest calculations and the availability of attorneys' fees.

2. *Provide written notice of your client's intent to raise an issue of foreign law at the first available opportunity and no later than the Rule 16(d) pretrial conference.* As the Ninth Circuit stressed in *DP Aviation*, parties should almost always raise issues of foreign law before the Rule 16(d) pretrial conference. Ideally, the parties will satisfy their respective Rule 44.1 obligations even earlier than that—e.g., in the pleadings, during the Rule 26(f) discovery planning conference, or during the Rule 16(b) initial scheduling conference. The sooner the parties raise foreign law issues, the sooner they will be able to develop their discovery and trial strategies with foreign law in mind, resulting in more efficient and cost-effective litigation.

3. *Identify and submit the sources and materials that will best enable you to help the judge understand and apply the foreign law.* In *Universe Sales*, the Ninth Circuit (a) chastised the plaintiff for declining to rebut the testimony of the defendant's Japanese law expert, and (b) criticized the district court for failing to conduct its own research on the applicable Japanese law. Thus, under Rule 44.1, the parties and the district court share responsibility for determining foreign law. That said, the parties should seek to take the laboring oar in this endeavor, providing the district court with the sources and materials it needs to reach a sound decision. Furthermore, the parties should keep in mind that the Federal Rules of Evidence do not apply to foreign law determinations, meaning that otherwise off-limits sources and materials are fair game and could prove decisive to the court's determination of foreign law.

When foreign law inevitably finds its way into the District of Idaho, the three sentences of Rule 44.1 will be waiting. At that point, the court and the parties' attorneys will have the opportunity to tackle the challenge Justice Holmes identified in *Diaz*. Although this article certainly does

not eliminate the concerns Justice Holmes raised about applying foreign law in U.S. courts, it hopefully provides Idaho's federal practitioners a starting point for chipping away at the "wall of stone."

About the Author

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Endnotes

- ¹ 261 U.S. 102, 106 (1923).
- ² *Baker v. Booz Allen Hamilton, Inc.*, 358 Fed. Appx. 476, 480-81 (4th Cir. 2009).
- ³ *APL Co. v. UK Aerosols Ltd.*, 582 F.3d 947, 955-56 (9th Cir. 2009).
- ⁴ *Northrop Grumman Ship Sys., Inc. v. Republic of Venezuela*, 575 F.3d 491, 496-98 (5th Cir. 2009).
- ⁵ Federal Rule of Criminal Procedure 26.1, which governs the use of foreign law in criminal proceedings, generally tracks the language of Federal Rule of Civil Procedure 44.1. Compare Fed. R. Crim. P. 26.1 with Fed. R. Civ. P. 44.1.
- ⁶ LEXIS search conducted on January 14, 2011 in the "ID Federal District Courts" database and using the search term "44.1."
- ⁷ *Gibson v. Credit Suisse AG*, 2010 U.S. Dist. LEXIS 45945, at *10 n.4 (D. Idaho May 11, 2010).
- ⁸ *Sullivan v. Sullivan*, 2010 U.S. Dist. LEXIS 2395, at *10 (D. Idaho Jan. 13, 2010).
- ⁹ Fed. R. Civ. P. 44.1 advisory committee's note.
- ¹⁰ *Id.*
- ¹¹ *Id.*
- ¹² *Id.*
- ¹³ *DP Aviation v. Smiths Indus. Aerospace & Def. Sys. Ltd.*, 268 F.3d 829, 848 (9th Cir. 2001) (emphasis added).
- ¹⁴ *Id.*
- ¹⁵ *Id.*

In the wake of Universe Sales, therefore, a district court may not reject a foreign law expert's un rebutted testimony without at least conducting its own research and articulating how that research counsels in favor of disregarding the foreign law expert.

¹⁶ *Id.* at 833.

¹⁷ *Id.* at 845.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ See *id.* at 846 n.15.

²¹ *Id.* at 849.

²² *Id.* at 846.

²³ *Id.* at 848.

²⁴ *Id.*; cf. *APL Co.*, 582 F.3d at 955-56 (holding district court abused its discretion in determining plaintiff failed to give reasonable notice of reliance on Singapore law for attorneys' fees petition)

²⁵ Fed. R. Civ. P. 44.1 advisory committee's note.

²⁶ *Id.*

²⁷ *United States v. Mitchell*, 985 F.2d 1275, 1280 (4th Cir. 1993) (internal citations omitted) (summarizing cases from various federal courts involving Rule 44.1).

²⁸ Fed. R. Civ. P. 44.1 advisory committee's note.

²⁹ *Id.*

³⁰ *Id.*; *Jinro Am. Inc. v. Secure Investments, Inc.*, 2001 U.S. App. LEXIS 25987, at *17 (9th Cir. Sept. 14 2001) ("Although it might have been better for the court to have disclosed its sources, perhaps enabling the parties to respond and allowing for more meaningful appeal of possibly erroneous decisions on foreign law, we do not believe the district court erred by not doing so here.")

³¹ 182 F.3d 1036, 1037 (9th Cir. 1999).

³² *Id.*

³³ See *id.*

³⁴ See *id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 1037-38.

³⁸ *Id.*

³⁹ *Id.* at 1040.

⁴⁰ *Id.* at 1038.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 1039; cf. *Jinro Am. Inc.*, 2001 U.S. App. LEXIS 25987, at *14-17 (affirming district court where district court considered and rejected un rebutted testimony of Korean legal expert and relied on its own research on Korean law).

⁴⁵ See generally Arthur Miller, *Federal Rule 44.1 and the "Fact" Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine*, 65 MICH. L. REV. 613, 617-18 (1967).

⁴⁶ See *id.*; Fed. R. Civ. P. 44.1 advisory committee's note.

⁴⁷ Fed. R. Civ. P. 44.1 advisory committee's note.

⁴⁸ *Id.*

⁴⁹ *Shalit v. Coppe*, 182 F.3d 1124, 1127 (9th Cir. 1999).

⁵⁰ *Pazcoguin v. Radcliffe*, 292 F.3d 1209, 1216 (9th Cir. 2002) (asserting that Ninth Circuit had "reviewed the Philippine statute at issue and [had] conducted [its] own research into Philippine law" in an immigration case).

⁵¹ *United States v. Peterson*, 812 F.2d 486, 491 (9th Cir. 1987) (noting that Ninth Circuit requested supplemental briefs on issue of propriety of wiretaps under Philippine law).

⁵² *In re Grand Jury Proceedings (Marsoner)*, 40 F.3d 959, 964 (9th Cir. 1994) (stating that district court erred by failing to consider implications of Austrian law, but nevertheless affirming district court after independently reviewing affidavits of defendant's two international law and Austrian banking law experts).



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USING THE MANDATORY RULE 26 (F) DISCOVERY CONFERENCE TO MANAGE ESI PAYS DIVIDENDS THROUGHOUT LITIGATION

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Arguably the biggest headache for litigators is the cumbersome and complex discovery process, particularly given that almost every lawsuit involves electronically stored information (“ESI”). To successfully manage discovery in the world of ESI, attorneys must effectively utilize the discovery conference required by Rule 26(f) of the Federal Rules of Civil Procedure. Under Rule 26(f), unless the court orders otherwise, the parties must meet “as soon as practicable” to discuss many issues relating to the discovery and pretrial process.¹ The Rule specifically requires the parties to address the proper timing and scope of discovery in light of the type and complexity of the dispute, to address document preservation issues, and to attempt to reach an agreement on methods for harvesting and producing ESI.

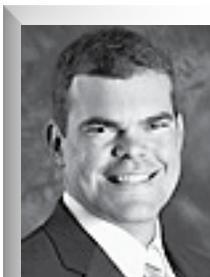
Unfortunately, many attorneys fail to effectively utilize the Rule 26(f) conference and some fail to adhere to the Rule at all. Often, this is because counsel do not know the questions to ask or the issues that need to be addressed at a Rule 26(f) conference. This article provides a checklist of topics to cover during a Rule 26(f) conference, defines terms commonly used in the world of ESI, and makes practical suggestions to simplify the process of producing ESI.

Preparing for a Rule 26(f) conference

Many attorneys fail to adequately prepare for a Rule 26(f) conference. Failure to adequately prepare undermines any chance for having a successful conference. Thus, it is essential for counsel to spend time before the Rule 26(f) conference working through the issues that will be covered at the conference. Attorneys should consider working with their firm’s information technology (“IT”) professional and often a paralegal to understand what software product their firm or vendors use to review and produce ESI. Next, counsel



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should work with his client (and his client’s IT personnel, if appropriate) to determine the potential sources of ESI. For example, if the client is a corporate entity, counsel needs to understand whether there is a server that houses all data for the client that may be relevant to the litigation or whether that information also exists on individual computers or other sources. And if the client is an individual, counsel needs to understand what technology his client is using and where she stores electronic information. Most often, data is spread over many sources, including servers, local computers, personal devices such as BlackBerrys or iPads, and back-up devices. Counsel should actively question his clients about all potential sources of data to ensure that relevant ESI has been preserved for the litigation. This process will allow counsel to learn how many people may have ESI that is relevant to the lawsuit as well as estimate the cost of gathering the data. This information will prove invaluable during the Rule 26(f) conference because it will allow counsel to speak intelligently about the sources of data and the potential costs of production.

Rule 26(f) conference checklist

At the conference, counsel should work to address each of the following issues regarding production of ESI. Coverage of these issues will go a long way to a more organized, efficient, and cost-effective discovery process.² Ignoring these issues will likely result in long-term inefficiencies, because counsel and client

Counsel should actively question his clients about all potential sources of data to ensure that relevant ESI has been preserved for the litigation.

often end up doubling back on previous discovery efforts to complete tasks that could have been accomplished with an effective Rule 26(f) conference.

Define the scope of ESI relevant to the lawsuit

Before counsel can manage ESI, the parties must have a candid conversation about the relevant scope of ESI. Counsel should discuss and agree on the basic parameters of ESI, including who are the key persons or “custodians” of the relevant information and the location of ESI maintained by the custodian within the organization.³ In most cases, the servers, computers, PDA’s, and other storage devices used by the custodians represent the scope of ESI for a particular case. If counsel take this process seriously during the Rule 26(f) conference, the parties can save significant resources as the litigation develops. Early resolution of the scope of potential ESI allows the parties to “eliminate duplicative discovery and help ensure that the searches remain narrowly focused on the core issues present in this case.”⁴

Identify each parties’ document retention policies and ensure that they are enforced

It is essential for counsel to identify their clients’ document and information retention policies, to follow up with their clients to make sure that those policies are being enforced, and to disclose that information to the other side. It is also important to request the same information from opposing counsel to ensure that the opposing party has a document retention policy in place. Moreover, at the Rule 26(f) conference it is equally important to inquire of opposing counsel how he or she is going to follow up with his or her client to confirm that preservation policies are satisfied. This is essential because ESI can be easily destroyed. Once destroyed,

it can be extremely expensive to recover. And in some cases, data may be permanently deleted and lost forever.

Send compliant litigation hold letters and confirm that opposing counsel has done the same

Destruction of ESI, inadvertent or intentional, can have serious consequences for client and counsel, including sanctions and spoliation instructions at trial.⁵ If a party destroys documents relevant to the lawsuit, even inadvertently, courts can sanction a party with a spoliation instruction. A spoliation instruction allows the jury to infer that the evidence lost or destroyed would have been adverse to the producing party.⁶ Parties also could face monetary or other sanctions, including the striking of pleadings.⁷

The Rule 26(f) conference presents the opportunity to communicate to opposing counsel the steps that have been taken to preserve existing information that is potentially relevant to the lawsuit.⁸ Counsel should also ask candid questions of opposing counsel about the same issue including whether they have a litigation hold letter in place, to whom it was addressed, and what safeguards are in place to ensure compliance with the requirements of the letter. There is a significant amount of literature available regarding the proper scope of a litigation hold, who the litigation hold should go to, instructions to be contained in a litigation hold, and ways to monitor compliance with the litigation hold.⁹ Having a meaningful conversation about these issues during the Rule 26(f) conference should eliminate questions later in the litigation about whether a party reasonably should have preserved particular evidence after litigation was filed or anticipated to be filed.

Identify preferred search methodologies

After ESI is collected, there can be hundreds of gigabytes or even terabytes of information that is potentially related to the lawsuit and thus is subject to discovery.¹⁰ The only way to find information that is relevant to the issues raised by the pleadings is to cull or narrow the information down to a workable data set for review. The Rule 26(f) conference provides an excellent opportunity for counsel to discuss and agree on initial keywords and date ranges that can be used to identify relevant material and reduce the collected information. The parties should also consider whether more sophisticated search methods might be appropriate. For example, the parties can agree to the use of Boolean searches, which can be

The analogy to “Sure, come over to my office and look through the conference room full of unorganized files” has been rejected.

significantly more effective than simple keywords in culling information down to a workable set.¹¹ Similar to a search on Westlaw or Lexis, the parties can search for two words in the same sentence, words in the same paragraph, or multiple words in the same document.

No matter the preferred method, counsel should reach a firm agreement on this subject. This avoids the situation where one side later objects that his opponent failed to deploy reasonable methods to locate all responsive documents within the larger dataset of ESI. If counsel cannot agree on search methodologies, they should raise the issues with the court during the Rule 16 scheduling conference. This minimizes any potential risk that a party may later be forced to expand the scope of the search terms and expend hours and valuable resources on a process that could have been avoided by resolving the issue at the outset of the litigation.

Identify the form of production

By failing to proactively request production of ESI in a specific form during the Rule 26(f) conference, a party diminishes its chances of later obtaining that information in its preferred format.¹² The Federal Rules allow the requesting party to identify how the other side shall produce ESI.¹³ It is counsel’s obligation to identify upfront that ESI should be produced in a particular format, including that the information be produced in a specific file type that may be loaded into counsel’s database software.¹⁴ It is also beneficial to ask opposing counsel about her preferred format for production. This will lessen the chance of a discovery battle or the prospects of being forced to produce ESI in more than one format—a costly and unnecessary proposition.

Producing documents that are not user friendly to opposing counsel is not looked upon favorably by the rules committee or by the courts. The analogy to “Sure, come over to my office and look through the conference room full of unorganized files” has been rejected.¹⁵ Playing roulette

with the other side over these issues is not in the best interest of either party.

Acknowledge the need for and agree to rolling productions

It is not realistic to think that a party can collect information from 10 to 20 custodians, review it for responsiveness, review it for privilege, and produce it in a useable format in the short period allowed by the rules governing initial disclosures and discovery in general.¹⁶ It is also not realistic to think that a party receiving documents will have the resources to review all of the ESI immediately. A workable solution to these practical difficulties is to agree to rolling productions of ESI so that the producing party can harvest, cull, review, and produce responsive documents concurrently with the other side’s review. Rolling productions should be discussed at the Rule 26(f) conference because it can help to efficiently move litigation to resolution in a more timely manner. Again, if opposing counsel will not agree to rolling productions, there is no good reason not to raise this with the court during the Rule 16 conference. If good cause exists, counsel should seek to have the rolling production schedule included in the discovery order entered by the court.

Discuss whether it makes sense to image dynamic devices

Dynamic devices are electronic devices that remain in service during the pendency of litigation. It is costly to take computers, PDAs, or other storage devices out of service for the duration of a lawsuit. Clients routinely need to use these devices while the litigation is underway. The Federal Rules contemplate the continued use of these dynamic devices.¹⁷ To enjoy protection under the Rules, counsel need to take reasonable steps to maintain relevant ESI. Beyond litigation hold instructions to a client, counsel can and should be proactive to ensure that relevant information from these devices is preserved in a format that can later be produced if necessary. A preferred way to resolve this dispute is to

“image” the dynamic devices that likely contain relevant information. Imaging is a relatively low-cost process that allows the data to be preserved while the original device can return to service.

The Rule 26(f) conference is a proper forum to discuss whether imaging of dynamic devices is appropriate. If counsel are unable to agree, counsel can raise the issue with the court at a scheduling conference and the court can decide whether it is necessary to image certain devices and, if so, which party should bear the costs. Whether resolved by agreement of counsel or by the court, imaging dynamic devices provides counsel with comfort that they have properly preserved responsive information for later use in discovery.

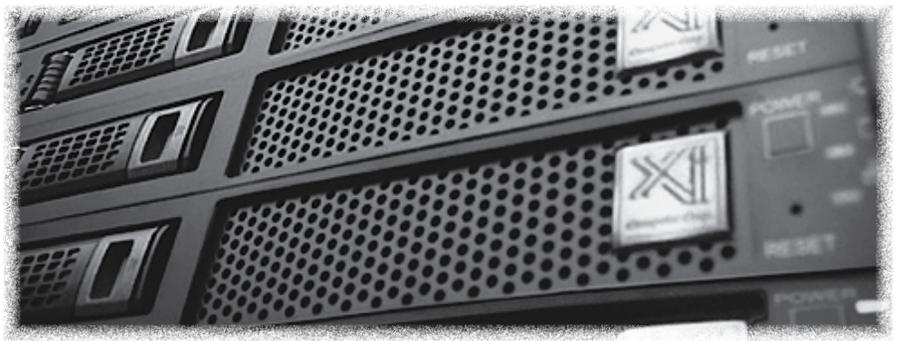
Stipulate to a Rule 502 non-waiver and file it with the court

A relatively new rule that is beginning to gain visibility among litigators is Federal Rule of Evidence 502. Under Rule 502, “[a] Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not waived in any other Federal or State proceeding.”¹⁸ The Rule became effective September 19, 2008.

An order entered under Rule 502 has the effect of protecting parties against inadvertent disclosure of privileged or work-product material and the subject matter waiver that can accompany disclosure of privileged or otherwise protected information. Without such protection, inadvertent disclosure of a single privileged or work-product protected document can potentially waive a privilege otherwise provided for by the rules.¹⁹ Moreover, Rule 502 “allows parties in an action in which an order is entered to limit their costs of pre-production privilege review.”²⁰

“[E]lectronic discovery may encompass ‘millions of documents’ and to insist upon ‘record-by record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation.”²¹

Rule 502 provides counsel and client with protection in all cases, not just in cases involving millions of documents. But the protection only extends to the parties who are proactive and actually enter into a Rule 502 stipulation that is subsequently reduced to an order. Otherwise, the stipulation is binding only on the parties to the agreement and may not have controlling effect in other forums.²² Counsel should strongly consider raising Rule 502 in their



next discovery conference and incorporating it in their next discovery plan.

Stipulate to a protective order

Discovery regularly requires the disclosure of documents that contain either confidential personal information or confidential business information such as proprietary or trade secret documents. Almost every case involves documents that clients do not want in the general public domain and that are protectable from disclosure to third parties through stipulation. Rule 26(f) requires the parties to address this issue in the discovery conference.²³

Counsel should discuss the need for a protective order and use the Rule 26(f) conference forum to reach an agreement that can control the conduct of the parties throughout the remainder of the litigation. Again, counsel who are unable to reach an agreement should consider raising the dispute with the court during the Rule 16 scheduling conference so that the court can order relief as appropriate.

Consider sharing a vendor and cost sharing

Litigation is adversarial by nature and, as a matter of fact, parties to a lawsuit have opposing or competing interests. That does not mean, however, that the parties should not address sharing management, and possibly even the cost, of producing ESI in the course of litigation. Sharing a vendor, or agreeing upfront to allocation of costs, is beneficial to both sides. When the parties share costs, both sides are more likely to make only reasonable

ESI discovery requests, taking away some of the gamesmanship all too often used in the discovery process. Moreover, sharing the costs to employ a single vendor allows for uniform productions of documents and may provide for a central repository of ESI for all parties which saves time, resources, and makes for a more organized process from start to finish.

Conclusion

Effective use of the Rule 26(f) discovery conference requires preparation by counsel. This preparation pays dividends

in the form of efficiencies throughout the discovery process. If counsel properly utilizes the Rule 26(f) conference, he will be in a position to negotiate with opposing counsel over the scope of discovery and whether any modifications are required to the presumptive limitations provided by the Federal Rules of Civil Procedure.

This preparation also minimizes the risk of inadvertent destruction of discoverable information. Additionally, counsel can protect himself and his clients against waiver of the attorney-client privilege by implementing an effective non-waiver agreement under Rule 502 of the Federal Rules of Evidence. Finally, counsel can protect against the disclosure of sensitive information by negotiating a protective order. The alternative is not attractive. Even in the best case, unprepared counsel can expect to experience an inefficient and duplicative discovery process that could have been avoided with preparation prior to the Rule 26(f) conference. And

Rule 26(f) ESI Check List

- *Define the Scope of ESI*
- *Document Retention Policies*
- *Litigation Hold Letters*
- *Identify Search Methodologies*
- *Format of Production*
- *Rolling Productions*
- *Image Dynamic Devices*
- *Rule 502 Agreement*
- *Protective Order*
- *Cost Sharing*

without preparation, counsel lose out on the chance to implement desirable protections that the rules allow.

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Scott E. Randolph, with *Holland & Hart LLP*, focuses his practice on complex commercial litigation and the defense of employment claims. Mr. Randolph received his B.S., *summa cum laude*, from Oregon State University and his J.D., with honors, from the University of Texas at Austin.

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Endnotes

¹ FED. R. CIV. P. 26(f)(1).

² See Sedona Conference Working Group Series, The Sedona Principles: Second Edition - Best Practices Recommendations & Principles for Addressing Electronic Document Production (2007), http://www.thosedonaconference.org/content/misc_Files/TSC_PRINCP_2nd_ed_607.pdf (last visited December 10, 2010).

³ *Romero v. Allstate Ins. Co.*, 2010 WL 4138693, *13 (E.D. Pa. Oct. 21, 2010) (“Cooperation ... requires ... that counsel adequately prepare prior to conferring with opposing counsel to identify custodians and likely sources of relevant ESI, and the steps and costs required to access that information. It requires disclosure and dialogue on the parameters of preservation.”) (quoting *Trusz v. UBS Realty Investors LLC*, ___ F.R.D. ___, 2010 WL 3583064, at *4-5 (D. Conn. Sep. 7, 2010) (quoting “The Case for Cooperation,” 10 SEDONA CONF. J. 339, 344-45 (2009)).

⁴ *Id.* at *14.

⁵ See *Kearney v. Foley & Lardner, LLP*, 590 F.3d 638, 649 (9th Cir. 2009) (“Spoliation of evidence is the destruction or significant alteration of evidence, or the failure to preserve property for another’s use as evidence, in pending or future litigation.”).

⁶ *Millenkamp v. Davisco Foods Intern., Inc.*, 562 F.3d 971, 981 (9th Cir. 2009) (noting that the adverse inference instruction is based on “the common sense observation that a party who has notice that a document is relevant to litigation and who proceeds

When the parties share costs, both sides are more likely to make only reasonable ESI discovery requests, taking away some of the gamesmanship all too often used in the discovery process.

to destroy the document is more likely to have been threatened by the document” and “allowing the trier of fact to draw an adverse inference presumably deters parties from destroying relevant evidence”).

⁷ *In re Prudential Insurance Co. Sales Practices Litigation*, 169 F.R.D. 598, 617 (D.N.J. 1997) (imposing a sanction of \$1,000,000 plus requestor’s attorneys’ fees for destruction of data that should have been preserved); see also *Stewart v. Deutsche Bank Nat. Trust. Co.*, No. 3:08-cv-475, 2010 WL 1882068, *2 (E.D. Tenn. May 11, 2010) (considering and ultimately rejecting defendant’s request for dismissal of the plaintiff’s complaint due to plaintiff’s failure to appear for Rule 26(f) conference).

⁸ The Rule 37 Safe Harbor Provision requires good faith. By conferring on these issues, counsel can minimize the risk of sanctions for inadvertent destruction of documents. See Fed. R. Civ. P. 37(e).

⁹ See, e.g., Suggested Protocol for Discovery of Electronically Stored Information (“ESI”), United States District Court for the District of Maryland, available at <http://www.mdd.uscourts.gov/news/news/esiprotocol.pdf>, at 7-11 (last visited December 10, 2010).

¹⁰ A gigabyte is one billion bytes while a terabyte is one trillion bytes.

¹¹ *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 261 n.9 (D. Md. 2008) (“Boolean proximity operators are derived from logical principles, named for mathematician George Boole, and focus on the relationships of a ‘set’ of objects or ideas. Thus, combining a keyword with Boolean operators such as “OR,” “AND,” “NOT,” and using parentheses, proximity limitation instructions, phrase searching instructions, or truncation and stemming instructions to require a logical order to the execution of the search can enhance the accuracy and reliability of the search.”) (citing The Sedona Conference Best Practices Commentary on the Use of Search & Infor-

mation Retrieval Methods in E-Discovery, 8 SEDONA CONF. J. 189, 200, 202, 217-18 (2007)).

¹² *Phillip M. Adams & Assocs., L.L.C. v. Fujitsu Ltd.*, No. 1:05-CV-64, 2010 WL 1901776, at *3 (D. Utah May 10, 2010) (citing Fed. R. Civ. P. 34(b)(1)(C) and holding that where a party asks for ESI in a particular format, the other side is required to produce it in that format); see also *Brinkerhoff v. Town of Paradise*, No. CIV. S-10-0023 MCE GGH, 2010 WL 4806966, *10-11 (E.D. Cal. Nov. 18, 2010) (slip opinion) (denying demand for production of imaged computers where party failed to request production of ESI during Rule 26(f) conference).

¹³ See FED. R. CIV. P. 34(b)(1)(C).

¹⁴ *Phillip M. Adams & Assocs., L.L.C.*, 2010 WL 1901776, at *3.

¹⁵ See Fed. R. Civ. P. 34(b) and comments to the 2006 Amendment (noting that a party must produce ESI as it is kept in the usual course of business).

¹⁶ See FED. R. CIV. P. 26(a)(1)(C), 34(b)(s)(A).

¹⁷ See FED. R. CIV. P. 37(e) (creating a safe harbor for ESI “lost as a result of the routine, good faith operation of an electronic information system”).

¹⁸ See FED. R. EVID. 502(d).

¹⁹ *Hopson v. Mayor and City Council of Baltimore*, 232 F.R.D. 228, 236 (D.Md. 2005) (“Any disclosure inconsistent with maintaining the confidential nature of the attorney-client relationship waives the attorney-client privilege.”) (quoting *In re Grand Jury Proceedings*, 727 F.2d 1352, 1357 (4th Cir.1984)).

²⁰ See FED. R. EVID. 502 Committee Letter.

²¹ FED. R. EVID. 502, Explanatory Note (rev’d 11/28/2007) (citing *Hopson v. City of Baltimore*, 232 F.R.D. 228, 224 (D. Md. 2005)).

²² See FED. R. CIV. P. 34(e).

²³ See FED. R. CIV. P. 26(f)(3)(F), 26(c).



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TAYLOR V. MCNICHOLS: EXPANDING THE LITIGATION PRIVILEGE

Lance J. Schuster
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The Idaho Supreme Court has recently expanded the litigation privilege which protects attorneys from being sued by current or former adversaries of their clients. The Court has ruled that the litigation privilege protects not only statements which occur during the course of litigation, but conduct as well.

The litigation privilege is a common law doctrine that states that judges, attorneys, parties and witnesses are immune from civil suits for defamation occurring in the course of judicial proceedings.¹ The privilege has deep roots in the common law which date back to medieval England.² As adopted by American courts, the litigation privilege has usually applied where communications were pertinent and material to the case.³

Typically, the litigation privilege has been used by attorneys to shield themselves from defamation suits arising from comments, questions, or statements made in the course of judicial proceedings. However, more recently, courts have expanded the privilege to include causes of action other than defamation, including negligence, breach of confidentiality, abuse of process, intentional infliction of emotional distress, negligent infliction of emotional distress, invasion of privacy, civil conspiracy, interference with contractual or advantageous business relations and even fraud.⁴

Taylor v. McNichols

In the recent decision of *Taylor v. McNichols*,⁵ the Idaho Supreme Court reviewed the litigation privilege and expanded the scope of its protection to include actions beyond defamation and libel. In *Taylor*, the plaintiff, Reed Taylor, sued two corporations which he had been managing. He also sued his fellow board members of those corporations. Taylor claimed that he was a creditor of the corporations and that the corporations owed him \$6 million.⁶

After nearly two years of litigation, Taylor filed a second lawsuit against the attorneys representing the defendants

The litigation privilege is a common law doctrine that states that judges, attorneys, parties and witnesses are immune from civil suits for defamation occurring in the course of judicial proceedings.

from his first suit. Taylor sued both the attorneys and their respective law firms claiming that the defendant attorneys: (1) aided and abetted in the commission of tortious acts in the underlying case; (2) converted and misappropriated assets of the defendant corporations; (3) violated the Idaho consumer protection act; and (4) committed professional negligence and or breach of fiduciary duties.⁷

The District Court subsequently granted the defendant attorneys' motion to dismiss. Taylor appealed to the Idaho Supreme Court, which affirmed the dismissal of all claims against the attorney respondents.

The Idaho litigation privilege

In a unanimous decision⁸ the Idaho Supreme Court first reviewed the litigation privilege across various jurisdictions. The Court quoted with approval from the Texas Court of Appeals which held that "an attorney's conduct, even if frivolous or without merit, is not independently actionable if the conduct is part of the discharge of the lawyer's duties in representing his or her client."⁹ The Court further quoted from the Supreme Court of West Virginia which considered the policy considerations behind the litigation privilege including:

- (1) promoting the candid, objective and undistorted disclosure of evidence;
- (2) placing the burden of testing the evidence upon the litigants during trial;
- (3) avoiding the chilling effect resulting from the threat of subsequent litigation;
- (4) reinforcing the finality of judgments;
- (5) limiting collateral attacks upon judgments;
- (6) promoting zealous advocacy;
- (7) discouraging abusive litigation practices; and
- (8) encouraging settlement.¹⁰

The Court went on to note that several jurisdictions have found no difference between communications and conduct. The Idaho Supreme Court therefore held

that the litigation privilege should extend "to protect attorneys against civil actions which arise as a result of their conduct or communications in the representation of a client, related to a judicial proceeding."¹¹

Exceptions to the privilege

The Idaho Supreme Court noted that there are exceptions to the rule. An attorney is not immune from all suits brought by opponents of their clients in a current or former lawsuit.¹² The Idaho Supreme Court noted that the litigation privilege would not apply in instances where the claimant alleges malicious prosecution, fraud, or tortious interference with a third-party's interests "out of a personal desire to harm."¹³

The Court noted that the litigation privilege applies so long as the attorney is acting within the scope of his employment, and not solely for his personal interests.¹⁴ To surmount the privilege a plaintiff would need to plead facts "sufficient to show that the attorney has engaged in independent acts, that is to say acts outside the scope of his representation of his client's interests, or has acted solely for his own interests and not his client's."¹⁵

Timing

In *Taylor*, the Idaho Supreme Court also addressed the timing issue in regard to a lawsuit against opposing counsel. The *Taylor* Court noted that the suit against the respondent attorneys had been initiated even before the underlying action had been resolved or decided.¹⁶ The Court looked at timelines for filing actions related to legal malpractice and malicious prosecution and noted that neither can be brought until the underlying case is concluded and damages are incurred.¹⁷ The *Taylor* Court found that in addition to being barred by the litigation privilege, the claims made against the defendant attorneys were not ripe for litigation as the underlying case had not been finished prior to the filing of the claims against the attorneys.¹⁸ The



Lance J. Schuster

Idaho Supreme Court therefore held that a cause of action against a party opponent's attorney may not be brought prior to the conclusion of the underlying litigation.¹⁹

Expanded privilege and professional conduct

The *Taylor* decision buttresses the ethical responsibilities of an Idaho lawyer. A lawyer is required to zealously advocate on behalf of his client.²⁰ A lawyer should not be worried about being sued for the motions she files, the allegations she makes, or the questions she asks in a deposition or at trial.

A lawyer should also not have to second guess the actions he takes on behalf of a client wondering whether he will be sued in tort by the adverse party. A lawyer who assists a client to break a contract, to dissolve a legal relationship, or avoid a contractual relationship, should not be liable where the actions are not wrongful and advance the client's objectives.²¹ The *Taylor* decision secures a lawyer's professional responsibility to "take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor."²²

The expanded litigation privilege protects lawyers and ensures that they can carry out their ethical responsibilities on behalf of their clients without fear of retaliatory lawsuits.

About the Author

Lance J. Schuster is a shareholder at *Beard St. Clair Gaffney PA* and is the firm's litigation team leader. He graduated with his B.A. and M.A. from Brigham Young University and his J.D. from the University of Idaho (1996). His practice focuses on real estate and construction litigation.

Endnotes

- ¹ *Carpenter v. Grimes Pass Placer Mining Co.*, 19 Idaho 384, 114 P. 42 (1911).
- ² *E.g., Cutler v. Dixon*, 76 Eng. Rep. 886, 887-88 (K.B.1585) (holding that allowing action for words spoken in "course of justice" would hinder litigation for "those who have just cause for complaint"); *Buckley v. Wood*, 76 Eng. Rep. 888, 889 (K.B.1591) (finding that "no action lies" for defamation even if words were false when spoken in "course of justice"); *Hodgson v. Scarlett*, 171 Eng. Rep. 362, 363 (C.P.1817) ("It is necessary to the due administration of justice; that counsel should be protected in the ex-

ecution of their duty in Court; and that observations made in the due discharge of that duty should not be deemed actionable.").

- ³ *Carpenter*, 19 Idaho 384, 114 P. 42.
- ⁴ T. Leigh Anenson, *Absolute Immunity from Civil Liability: Lessons for Litigation Lawyers*, 31 PEPP. L. REV. 915, 927-928 (2004).
- ⁵ No. 36130, No. 36131, 2010 Ida. LEXIS 161 (Idaho Sept. 3, 2010).
- ⁶ *Id.* at *3.
- ⁷ *Taylor*, 2010 Ida. LEXIS 161 at *4.
- ⁸ Justice Hosack, Pro tem, wrote a short specially concurring opinion.
- ⁹ *Taylor*, 2010 Ida. LEXIS 161 at *28 (quoting *Alpert v. Crain, Caton & James, P.C.*, 178 S.W.3d 398 (Tex App. 2005)).
- ¹⁰ *Id.* at *29 (quoting *Clark v. Druckman*, 624 S.E.2d 864, 870 (W. Va. 2005) (citations omitted)).
- ¹¹ *Id.* at *32.
- ¹² *Id.*
- ¹³ *Id.* at *37.
- ¹⁴ *Id.* at *38.
- ¹⁵ *Id.* at *40.
- ¹⁶ *Id.* at *44.
- ¹⁷ *Id.* at *45-46.
- ¹⁸ *Id.* at *68.
- ¹⁹ *Id.* at *46.
- ²⁰ IDAHO RULES OF PROF'L CONDUCT 1.3[1].
- ²¹ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 57(3) (2000).
- ²² IDAHO RULES OF PROF'L CONDUCT 1.3[1].

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

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

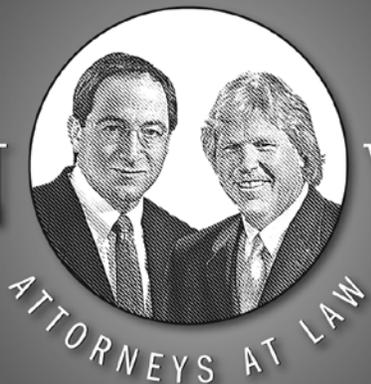
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Jim Jones
Warren E. Jones
Joel D. Horton

1st AMENDED - Regular Spring Terms for 2011

Boise January 10, 12, 14, 18 and 19
Boise February 7, 9, 11, 14 and 15
Boise April 4, 5, 6, and 13
Coeur d'Alene April 7
Lewiston. April 8
Boise (Eastern Idaho) May 2, 4, 6, 9 and 11
Boise (Twin Falls) June 1, 3, 6, 8 and 10

By Order of the Court
Stephen W. Kenyon, Clerk

NOTE: The above is the official notice of the 2011 Spring 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 February 2011

Monday, February 7, 2011 – BOISE

8:50 a.m. Lloyd Lumber Company v. Sales.....#36782-2009
10:00 a.m. Frank J. Fazzio, Jr. v. Edward J. Mason.....#36068-2009
11:10 a.m. Hawkins v. Bonneville County Commissioners
.....#36742-2009

Wednesday, February 9, 2011 – BOISE

8:50 a.m. Knipe Land Company v. Robertson.....#37002-2009
10:00 a.m. Peter Hoover v. Ellen B. Hunter, M.D.#36912-2009
11:10 a.m. Charles E. Bratton v. John R. Scott.....#36275-2009

Friday, February 11, 2011 – BOISE

8:50 a.m. The Vanderford Company v. Paul Knudson...#37061-2009
10:00 a.m. Jason Miller v. ISP.....#37032-2009
11:10 a.m. Jon Wakelum v. Thomas A. Hagood.....#36940-2009

Monday, February 14, 2011 – BOISE

8:50 a.m. State v. Corbus (Petition for Review).....#36846-2009
10:00 a.m. State v. Hardwick.....#37178-2009
11:10 a.m. Stephen v. Sallaz & Gatewood.....#36322-2009

Tuesday, February 15, 2011 – BOISE

10:00 a.m. State v. Flowers.....#36036-2009
11:10 a.m. Perception Construction Management v. Bell
.....#36955-2009

OFFICIAL NOTICE COURT OF APPEALS OF IDAHO

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

2nd AMENDED Regular Spring Terms for 2011

Boise January 11, 13 and 20
Boise February 8, 10, 17, 22 and 28
Boise March 8, 10, 15 and 17
Boise April 12, 14, 19 and 21
Boise May 10, 12, 17 and 19
Boise June 14, 16, 21 and 23

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NOTE: The above is the official notice of the 2011 Spring 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 February 2011

Tuesday, February 8, 2011 – BOISE

10:30 a.m. Veenstra v. State.....#35310-2008/36838-2009
1:30 p.m. Wright v. State.....#37331-2010

Thursday, February 10, 2011 – BOISE

9:00 a.m. State v. Joyner.....#36215/36766-2009
10:30 a.m. State v. Sutton.....#36819-2009

Thursday, February 17, 2011 – BOISE

9:00 a.m. Moffett v. Moffett.....#37383-2010
10:30 a.m. Vasquez v. State.....#36687-2009
1:30 p.m. Antim v. Fred Meyer Stores.....#37456-2010

Tuesday, February 22, 2011 – BOISE

9:00 a.m. State v. Norton.....#37241-2009
10:30 a.m. Hayes v. State.....#36637-2009
1:30 p.m. State v. Pecom.....#37314/37315-2010

Monday, February 28, 2011 – BOISE

10:30 a.m. Dept. of Health & Welfare v. Doe (EXPEDITED)
.....#38173-2010

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Idaho Supreme Court and Court of Appeals
NEW CASES ON APPEAL PENDING DECISION
(Updated 1/11/11)

CIVIL APPEALS

EVIDENCE

1. Did the court err in ruling that Harris failed to prove damages?

Harris, Inc. v. Foxhollow Construction
S.Ct. No. 36601
Supreme Court

FAMILY LAW

1. Whether the magistrate erred in denying Hernandez's motion to dismiss and in finding I.C. § 32-717(3) is the only law to consider when determining the custody of children between a parent and grandparent.

Hernandez v. Ausburn
S.Ct. Nos. 37779/37780
Supreme Court

LICENSE SUSPENSION

1. Whether the findings of fact made by the Hearing Officer for the Idaho Transportation Department are supported by the record.

Lineberry v. Idaho Transportation
S.Ct. No. 37743
Court of Appeals

POST-CONVICTION RELIEF

1. Did the court abuse its discretion in denying the motion by Mubita's counsel to withdraw?

Mubita v. State
S.Ct. No. 36913
Court of Appeals

2. Whether the district court erred by summarily dismissing the petition for post-conviction relief without providing adequate notice.

Musgrove v. State
S.Ct. No. 37407
Court of Appeals

PROCEDURE

1. Was there appropriate service of process on the Parrishes to enable a default judgment to be entered against them?

Discover Bank v. Parrish
S.Ct. No. 37852
Court of Appeals

SUMMARY JUDGMENT

1. Did the court err in granting Prouty's motion for summary judgment on Stem's ordinary negligence claim by ruling as a matter of law that it was not reasonably foreseeable that Stem would be injured as a result of Prouty's failure to take steps to replace the water meter cover that was inadequate to support the weight of forklifts operated in the area?

Stem v. Prouty
S.Ct. No. 37641
Supreme Court

2. Did the district court err in granting summary judgment in favor of the school district?

Mareci v. Coeur d'Alene School District #271
S.Ct. No. 37624
Supreme Court

CRIMINAL APPEALS

DUE PROCESS

1. Did the state violate Jackson's right to a fair trial by committing prosecutorial misconduct?

State v. Jackson
S.Ct. No. 36968
Court of Appeals

2. By misstating the evidence in closing argument, did the prosecutor engage in misconduct necessitating a new trial?

State v. Landell
S.Ct. No. 37214
Court of Appeals

EVIDENCE

1. Did the state present sufficient evidence to support Patton's convictions for possession of marijuana with intent to deliver and possession of methamphetamine?

State v. Patton
S.Ct. No. 36100
Court of Appeals

2. Did the district court err when it admitted the state's late proffered allegations of prior bad acts evidence against Naranjo?

State v. Naranjo
S.Ct. No. 36473
Court of Appeals

3. Is the jury verdict supported by substantial evidence upon which any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt?

State v. Escobedo
S.Ct. No. 37050
Court of Appeals

4. Did the court abuse its discretion by admitting photographs showing post-mortem damage to the bodies of the victims?

State v. Reid
S.Ct. No. 37107
Court of Appeals

5. Did the court abuse its discretion and violate I.R.E. 404(b) by allowing the jury to hear impermissible character evidence in the form of testimony from both lay and expert witnesses that gang members commit crimes and acts of violence?

State v. Almaraz
S.Ct. No. 35827
Supreme Court

6. Was there substantial evidence admitted at trial from which the jury could find beyond a reasonable doubt that Sowers was guilty of two counts of trafficking in marijuana?

State v. Sowers
S.Ct. No. 36887
Court of Appeals

SEARCH AND SEIZURE

- SUPPRESSION OF EVIDENCE

1. Did the district court err in denying Hunter's motion to suppress the search of his vehicle?

State v. Hunter
S.Ct. No. 36728
Court of Appeals

2. Did the court err in denying a motion to suppress evidence found in a car in which Johnson was a passenger?

State v. Johnson
S.Ct. No. 36932
Court of Appeals

STATUTORY INTERPRETATION

1. Did the district court err when it granted Schulz's motion to dismiss and concluded that the definition of "household member" did not include the parent/child relationship?

State v. Schulz
S.Ct. No. 37354
Supreme Court

Summarized by:
Cathy Derden

Supreme Court Staff Attorney
(208) 334-3867

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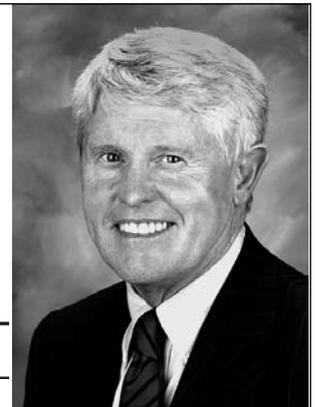
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Zarian Midgley & Johnson, PLLC, a Boise-based firm specializing in **intellectual property matters and complex litigation**, is pleased to welcome **James E. Lake** as Of Counsel to the firm.

James is a registered patent attorney specializing in client counseling and the procurement of intellectual property rights in the U.S. and abroad. Prior to joining Zarian Midgley, he was a shareholder with Wells St. John, P.S., in Spokane, Washington. James holds a bachelor's degree in chemical engineering and received his Juris Doctor from Brigham Young University.

James can be reached at lake@zmjlaw.com or 208-562-4900.



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CREATING SEPARATION AND EMPHASIS IN YOUR WRITING PART I: JOINING INDEPENDENT CLAUSES

Tenielle Fordyce-Ruff
Smith, Fordyce-Ruff, & Penny
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I admit: I am a punctuation nerd. I celebrate National Punctuation Day by decorating cupcakes with various punctuation marks and hoping someone will give me a grammar guide as a gift. I mentally insert serial commas into lists when I am speaking. My favorite blog is the Society for the Protection of Good Grammar (you should check it out: <http://grammatically.blogspot.com>), and I am a fan of the *Chicago Manual of Style* on Facebook.

I admit, I am also a realist. I understand that not everyone has a love affair with punctuation. However, I believe that those who write for a living understand how punctuation can lend an elegance to writing by creating emphasis and suggesting the relatedness



Tenielle Fordyce-Ruff

of ideas. I believe busy writers want to stretch beyond the comma and period, to use a dash or a semi-colon with panache (and to use them correctly!). So, here is the first of a two-part guide on how to join and emphasize your ideas. We will get to using punctuation to add emphasis within a sentence in another essay. This essay covers joining ideas contained in separate sentences, or independent clauses for my fellow grammar nerds.

First, some background. Independent clauses each have a subject and a verb and could stand alone as a grammatically correct sentence. For instance, “I enjoy walking on the beach,” “I disliked the hot humid weather,” and “I presented at a legal writing conference in Florida last summer” are all independent clauses. Each idea is a complete package; it has a subject and a verb and can function as a sentence. How I link them together with punctuation, however, can subtly change their meanings and shift the emphasis for the reader. It can also help the reader better understand how my ideas are related.

Separate sentences

My first option is to leave each idea as a separate sentence.



I presented at a legal writing conference in Florida last summer. I enjoyed walking on the beach. I disliked the hot, humid weather.

This choice leaves the most separation between the ideas, suggesting to the reader that each sentence is a complete thought, separate from the previous sentence and the next sentence. In this instance, the context of having the ideas in the same paragraph is all that suggests a relationship between them to the reader. In other words, the terminal punctuation—the period—is like a bow on a present. (Hopefully, that present is the newest edition of the *Chicago Manual of Style*!) A gift recipient knows that the entire gift is under that bow just as a reader knows that an entire thought comes before the period.

Semi-colon

I could also choose to show the reader that some of my ideas are more closely related to each other, that my thoughts are fluid, and that more information is coming by using a semi-colon.

I presented at a legal writing conference in Florida last summer. I enjoyed walking on the beach; I disliked the hot, humid weather.

Here I haven’t added any new ideas, but this choice lets the reader know that my feelings about walking on the beach go beyond enjoyment. It creates a subtle sense of anticipation for the reader, showing her that there is more to come after “beach.” It also creates in the reader the sense that clarification is coming.

This option is like wrapping the *Aspen Handbook for Legal Writers: A Practical Reference* and *The Redbook: A Manual on Legal Style* separately and then putting one ribbon and bow on the two presents. Just as I would know the presents were related through the use of one ribbon, the

I believe that those who write for a living understand how punctuation can lend an elegance to writing by creating emphasis and suggesting the relatedness of ideas.

reader knows that the two go closely together through the use of the semi-colon.

If you choose this option be careful to use the semi-colon correctly. Semi-colons can be used only to join two independent clauses. The information on each side of the semi-colon must be able to stand alone as a grammatically correct sentence. For instance, “I enjoy walking on the beach; but dislike heat and humidity” is *not* grammatically correct because “but dislike heat and humidity” lacks a subject and cannot stand alone as a sentence. However, “I enjoyed waling on the beach” and “I disliked the hot, humid weather” could each be a correct sentence, so it is acceptable to join them with a semi-colon.

A comma with a coordinating conjunction

Finally, I could join the ideas by using a comma with a coordinating conjunction (more on what these are in a minute).

I presented at a legal writing conference in Florida last summer. I enjoyed walking on the beach, but I disliked the hot, humid weather.

This option more strongly links the final two ideas for the reader. The comma lets the reader know my thought isn't finished, and the coordinating conjunction "but" explicitly tells the reader the relationship between the two ideas. It also distributes the emphasis between the ideas equally, creating very little separation between them. Neither the first nor the second clause is emphasized. Instead, the comma lets the reader know that the idea before and the idea after the comma are equally important. Like shaking a present and hearing two distinct rattles inside lets you know that there are two parts to a gift inside the package, the comma here lets you know that the two ideas are closely related.

Another word of warning: a comma can be used to join two independent clauses only if you use a coordinating conjunction after the period and before the independent clause. There are seven coordinating conjunctions: for, and, nor, but, or, yet, so. Use the mnemonic "FANBOYS" to help you remember them.

Rewriting

Of course, I may decide that none of the punctuation options creates the emphasis that I want or shows the reader the relationship between your ideas. In that instance, I could choose to rewrite the ideas to subordinate the less important idea and create a subordinate clause.

I presented at a legal writing conference in Florida last summer. While I enjoyed walking on the beach, I disliked the hot, humid weather.

This option links the ideas in the final two clauses even more closely than the comma; my use of "while" subordinates the enjoyment of the beach and emphasizes my dislike of humidity. Had I felt that my enjoyment of the beach was more important than my discomfort in the weather, I could have written, "While I disliked the hot, humid weather, I enjoyed walking on the beach."

Conclusion

So, while you may have gift ideas beyond grammar guides and citation manuals, I hope this essay has helped you

understand how to correctly and more elegantly link the ideas in your writing.

Sources

The idea for using punctuation for separation and emphasis came from a Boise State University Writing Center Handout on punctuation hierarchy available at <http://www.boisestate.edu/wcenter/resources.html> (last visited August 10, 2010). The punctuation rules are from Anne Enquist & Laurel Currie Oates, *Just Writing: Grammar, Punctuation, and Style for the Legal Writer* (3d ed. 2009).

About the Author

Tenielle Fordyce-Ruff is a member of the Idaho State Bar. She clerked for Justice Roger Burdick of the Idaho Supreme Court and taught Legal Research and Writing, Advanced Legal Research, and Intensive Legal Writing at the University of Oregon School of Law. She is also the author of *Idaho Legal Research*, a book designed to help law students, new attorneys, and paralegals navigate the intricacies of researching Idaho law.

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On September 17, 2010, in a ceremony held before a standing room only audience at the federal courthouse in Boise, and televised live to the Pocatello courthouse, Wendy J. Olson was sworn in as the United States Attorney for the District of Idaho.

In addition to Idaho's federal judges, her family, friends, members of the Bar, court and government employees, in the courtroom were her distinguished predecessors in office, Guy Hurlbutt, Maurice Ellsworth, Betty Richardson and Thomas Moss.

In his remarks, Chief District Judge B. Lynn Winnmill noted it was *Constitution Day* and pointed out that all three branches of the United States government were involved in Ms. Olson's appointment. She had been nominated by the President, confirmed by the Senate, and the oath of office administered by a federal judge.

Finding success in virtually everything she has ever undertaken, Judge Winnmill commented on her many accomplishments. She was an honor student and an all-state athlete in multiple women's sports at Pocatello High School, attended Drake University where she was an academic All-American tennis player, excelled at Stanford law school, served a federal court clerkship in Seattle, worked as a civil rights trial attorney in the United States Department of Justice, and was then hired in 1997 by United States Attorney Betty Richardson. She served as President of the Idaho chapter of the Federal Bar Association. A highly skilled trial attorney, Wendy Olson is well prepared to serve as Idaho's newest United States Attorney.

While it is important to recognize Ms. Olson's individual accomplishments leading to her appointment, understanding her roots provides considerable perspective. Her father, retired Pocatello attorney William D. Olson, represents all that is good in the legal profession. As former Chief Justice Warren Burger once wrote, senior lawyers should be, like Bill Olson and many others are, "living exemplars" of the best in the legal profession. As a capstone to his successful career in the law, he received the Distinguished Lawyer Award from the Idaho State Bar.

I have known Bill Olson for more than 40 years. When my wife Beverly and I were first married, she worked as a legal secretary in his law office. Later, during my private practice years I fre-



William D. Olson



Wendy J. Olson

quently came into contact with Bill and we litigated many cases against each other including product liability, tort and a variety of civil cases in the state and federal courts.

Bill was an exceptionally skilled trial attorney, and in all those years, representing our opposing clients in sharply contested, major litigation, I do not recall that he and I ever exchanged a cross word. In his approach to the practice, every experience we had proved him to be a man of integrity and a professional in every respect.

Always finding ourselves on opposite sides of a case, Bill and I nonetheless became friends and often drove in the same car together if engineering or other experts' depositions were nearby, for example, at the University of Utah in Salt Lake City. We always had dinner together following depositions when out of state, the most memorable in my mind being in Chicago where we settled his part of a significant products liability case. One time we got lost, taking the wrong exit from the freeway in a large city — we laughed often when working together. Bill knew when to push, when to pull, and when to let off. It was a pleasure to practice law with him.

In addition to having a sharp legal mind, and exceptional skills as an advocate, Bill was blessed with a keen sense of humor. In a deposition where my partner John Hansen's client was an injured Idaho state trooper whose patrol car was rear-ended while stopped on the shoulder of a highway, Bill asked John's client something to the effect, "Why did you put your patrol car in reverse and accelerate it rapidly backwards, crashing it into the front end of my client's car?" In another case, Bill and I tried to figure out how to interpret and use the Japanese medical records of a van load of Okinawa tourists injured on their way to Yellowstone. The only recognizable words contained in 15 pages of Japanese kanji were the words, "Rexburg, Idaho USA." We gave up.

Although Bill Olson made it enjoyable to practice law from a personal

relationship perspective, when it came time to argue motions to the court, or go to trial before a jury, or take a key deposition, he was the consummate professional, always prepared, on top of the case law, and all business.

In each of my experiences with Bill Olson he was a teacher by example even though he probably didn't realize he was teaching. It was simply his strength of character that made him a teacher. Bill didn't have to tell me how to treat law partners. I saw how he respected and treated his partners Lou Racine, Mark Nye and Gary Cooper. Bill didn't have to tell me how to treat other attorneys, especially younger lawyers, because I appreciated how he treated me. He didn't have to tell how an ethical lawyer conducted legal affairs. He always kept his word.

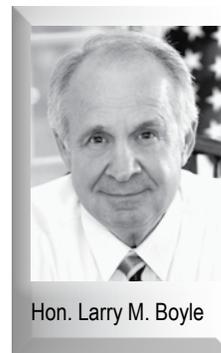
Bill didn't have to tell me how to examine an expert witness whether it be an economist, physician, engineer, metallurgist, or chemist. He showed me. In one of the several products liability cases we tried to a jury, I watched in great dismay as he effectively neutralized my economist during the most effective cross examination of an expert I had ever seen. Bill was a teacher in the best sense of the word.

Bill Olson's legacy is that of a living exemplar of the legal profession as contemplated by Chief Justice Warren Burger. In fact, Wendy Olson's accomplishments as a student of the law, a coveted judicial clerkship, her service as a Justice Department attorney at the highest levels, and the remarkable record of success she has experienced as a trial lawyer appears to mirror, and is really not much different, than that experienced by her father in the civil side of private practice.

In my view, when it comes to Bill Olson and his daughter Wendy, the apple did not fall far from the tree. Like father, like daughter.

About the Author

Judge Larry M. Boyle has served the state and federal judiciaries since 1986 as an Associate Justice of the Supreme Court of Idaho, a State of Idaho District Judge and as a United States Magistrate Judge.



Hon. Larry M. Boyle

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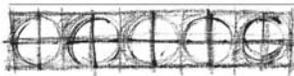
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IN MEMORIAM

Blaine Evans 1923 - 2010

Blaine Evans, 86, died on Nov. 29, 2010. He was a founding member of Evans Keane LLC, in Boise. He was a former Fourth District Bar officer, Ada County Prosecutor and Idaho State Senator.



Blaine Evans

Born in St. Anthony, Blaine attended University of Idaho until World War II, when he served in the United States Army Air Corps. After the war, he returned to college and married Lucille Nelson. After graduating, the couple moved to Boston and Blaine obtained a law degree from Harvard University.

Blaine practiced law in Boise for more than 50 years. He served as Ada County Prosecuting Attorney from 1952 to 1956, Idaho State Senator from 1957 to 1959, president of the Fourth District Bar Association from 1968-1969, Chairman of the ISB Committee on Recertification of Attorneys from 1974-1978, and the Rules of Evidence Committee during 1980-1985. He was a member of the American Board of Trial Advocates, Association of Trial Lawyers of America, Idaho Trial Lawyers Association, and the International Association of Defense Counsel.

Named one of Boise's Most Distinguished Citizens by the *Idaho Statesman*, Blaine was one of four partners to build the Warm Springs Golf Course. Further pursuing his love of golf, Blaine was also one of the three original owners of Soft Spikes golf cleats. Blaine is survived by his wife, Lucille, son John P. Evans of Seattle, Wash., twin daughters Andria Buchberger of Bellevue, Wash., and Tianna Stanek of Maple Valley, Wash., and his brother, Evan Evans, M.D. of Ogden, Utah. Granddaughter Mandi remembers him as an extremely intelligent, classy, and downright hilarious father figure whom she could look up to in all aspects of life. She always enjoyed being around him.

She describes him as someone who was constantly successful yet always reminded her to relax, enjoy life and laugh.

David Ray Samuelson 1932 - 2010

David Ray Samuelson died Dec. 9, 2010, in Boise. Born in Hettinger, North Dakota and raised in Salt Lake City, David graduated from the University of Idaho College of Law.



David Ray Samuelson

He discovered a lifelong love of golf while studying at the Boise Junior College and was the first-ever golf pro at the McCall Golf Course.

With a law career spanning 47 years, David began in 1963 by representing the Idaho Transportation Department. He then moved to private practice with Clemmons, Skiles and Green which evolved into Clemmons, Cosho, Humprey and Samuelson. Later David practiced law with Bert Poole and then with T.J. Jones at Jones, Jones and Samuelson. He was a member of the Idaho State Bar, the American Bar Association and a charter member of the Idaho Lawyer Assistance Program.

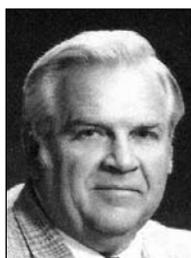
David and his wife, Ann Irvin, would have celebrated their 50th wedding anniversary this summer. They had three daughters: Lynn (Danton) Killian, Lisa Weigle and Laurie (Don Blackstone) Samuelson.

William Andrew Stellmon 1933-2010

William Andrew Stellmon died Dec. 18, 2010, at his Lewiston home. Known as "Big Bill" he was born to Elbert and Zola Geddes Stellmon in 1932.

He married his high school sweetheart, Marlene Haag, in 1954. After serving in the United States Marines Corps he graduated from the University of Idaho College of Law in 1960. He then moved Marlene and their three boys to Lewiston, where he joined his father's law firm.

Those early years of practice began a life of community service, including membership on the Lewiston School Board from 1972 to 1981, director and



William Andrew Stellmon

past president of the Lewiston Roundup Association, later serving as the parade grand marshal, director on the board of the Lewiston Boy's Club, member of the State of Idaho Parks and Recreation board, president of Lewis-Clark Legal Services, chairman of the Lewiston Vandal Boosters, an early supporter and participant in the Lewiston Civic Theatre, and a member of the Elks, the Masons, the Shriners and the Rotary Club.

In 1968, Bill was honored as the Jaycees Distinguished Man of the Year. As an attorney, Bill served as assistant Nez Perce County prosecutor and was the Lewiston city attorney from 1964 to 1971. In private practice Bill was truly an advocate for those in need, spending hours on the phone at home giving advice to whomever needed his help without concern for pay or acknowledgement. He would often receive payments, not in cash but in beef, wild game, chickens or broken-down vehicles. Bill served as magistrate judge from 1990 to 1997 and was awarded the 50-year attorney award in 2010.

He coached his children in football, basketball and baseball, leaving a lasting impression on hundreds of Lewiston youth. He was a Boy Scout leader and a lifelong member of the Church of Jesus Christ of Latter-day Saints, serving twice as bishop as well as being a member of the Stake Presidency.

Bill is survived by his wife, Marlene; his daughter, Lisa Mangum; sons Jacob, John and Daniel; his sister Gail Williams.

Jack Riddlemoser 1932 - 2010

Jack Riddlemoser, 78, of Kuna, died Dec. 27, 2010. He was born in Oxford, Nebraska and moved with his family to the Treasure Valley when Jack was a teenager. He attended Boise Junior College and graduated from the University of Idaho College of Law in 1955.



Jack Riddlemoser

Upon his graduation from U of I Law School in 1955, Jack became a practicing lawyer. In addition to his 55 years in private practice, he was a Justice of the Peace and Assistant Prosecuting Attorney for Bonneville County, a trial attorney for the Idaho Department of Transportation,

IN MEMORIAM

a Magistrate for Ada County, the City Attorney for Kuna and represented the Meridian Athletic Association. He was awarded a 50-year attorney award in 2005.

Jack also did a great deal of pro-bono work for various community, civic, fraternal, and religious organizations. Jack was a charter member of St. Paul's Methodist Church and a founding member

of the Jaycees, both in Idaho Falls, Idaho. He was a member of the Eastern Star and Masonic Lodge for over five decades. He was also a Founding Member of Meridian Kiwanis, a member of Meridian Optimists, and Past President of the Meridian Library Board. His long service to the Meridian Dairy & Stock Show Board was rewarded in 2009 when it selected him Dairy Days Parade Grand Marshal.

Jack also sang every day, sometimes to himself, often as he rode one of his many horses, but mostly for weddings, funerals, and in church choirs.

He is survived by his wife of 56 years, Jacque Riddlemoser, and their 3 children: Michael Riddlemoser, Colonel (ret) Gregory Scott Riddlemoser and Mary Katherine Visser. He is also survived by his sister, Suzan Heater.

OF INTEREST

Sheehan accepts fellowship

The American Academy of Adoption Attorneys (AAAA) accepted Jeffrey T. Sheehan as a Fellow in their organization. AAAA has 350 members nationwide who specialize in adoption law. Jeff Sheehan is the only non-judicial member of AAAA in the Treasure Valley.



Jeffrey T. Sheehan

Mr. Sheehan's practice areas include adoption, assisted reproductive technology, and divorce. He can be reached at (208)287-4499 or jeff@idahofamilylaw.com.

Cannon selected as Twin Falls Magistrate Judge

Nicole Cannon has been selected as a Twin Falls Magistrate Judge. She replaces retiring Judge Howard Smyser, and will be sworn in on March 9, 2011.

Ms. Cannon has been practicing law since 1998. For over 11 years, she was

a deputy prosecuting attorney, then prosecuting attorney, in Minidoka County, Idaho.

After leaving public office, Ms. Cannon joined the law firm of Tolman & Brizee, PC, in January 2009. Ms. Cannon graduated from the University of Utah, College of Law, in 1996.



Nicole Cannon



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Dave, an Idaho native, returned to Boise to practice law in 1982, after working in law enforcement in Reno and Sacramento. Dave was the Legal Advisor for the Boise Police Department, then in private practice from 1984 through 2000, and most recently was a Loss Control Attorney for Idaho Counties Risk Management Program (ICRMP) from 2000 until his return to private practice. Dave is licensed to practice law in all courts in the state of Idaho, is admitted to the Ninth and Tenth Circuit Courts of Appeals and the United States Supreme Court. Dave's practice concentrates on advising, representing, and training local government officials and entities throughout the state, with emphasis on governance issues, employment law, civil rights, law enforcement and governmental operations, liability and litigation. Dave can be contacted at (208) 383-9511 or dave@naylorhales.com.

We are pleased to announce that
Dave Sasser has joined our Firm as Senior Counsel.



Other Members of the Firm Include:

- | | |
|-------------------------------------|-------------------------------------|
| Kirtlan G. Naylor | Roger J. Hales |
| Bruce J. Castleton | James R. Stoll |
| Eric F. Nelson | Lynnette L. McHenry |
| Robert G. Hamlin, <i>Of Counsel</i> | James D. Carlson, <i>Of Counsel</i> |

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NAYLOR & HALES, P.C.
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Lynnette has joined the firm after 16 years of local government service. She served as a Nez Perce County Deputy Prosecuting Attorney, as well as its Chief Deputy Prosecutor, and most recently, as a Loss Control Attorney for Idaho Counties Risk Management Program (ICRMP), a member-owned and governed property and casualty insurance program created exclusively for Idaho local governments with more than 750 members. She is licensed to practice law in all courts in the state of Idaho. Her practice will continue to concentrate on representing and training local governments throughout the state, with an emphasis on employment law, general governance issues, law enforcement liability, planning and zoning issues, administrative procedures, public records, open meetings and contracts. Lynnette can be contacted at 208-947-2084 or llm@naylorhales.com.

We are pleased to announce that
Lynnette L. McHenry has joined our Firm as Senior Counsel.



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- | | |
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A close-up portrait of Brian Lee, a man with short brown hair and blue eyes, wearing a dark suit jacket, a blue shirt, and a striped tie. He is smiling slightly and looking towards the camera. The background is a blurred office setting with warm lighting.

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I NEED
WITHOUT
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