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of the Idaho State Bar  
Volume 54, No. 6/7  
June/July 2011

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## On the Cover

The cover photograph was taken by Monte Stiles in Hell's Canyon in April. Monte retired from the U.S. Attorney's Office in March in order to promote drug education efforts in Idaho and elsewhere. Stiles is an avid outdoor photographer. His work is featured at [www.montestiles.com](http://www.montestiles.com).

## Section Sponsor

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

## Cover art sought

Bar members are encouraged to send their digital photos to Managing Editor Dan Black at [dblack@isb.idaho.gov](mailto:dblack@isb.idaho.gov).

## Editors

Special thanks to the June/July editorial team: Sara M. Berry, Scott E. Randolph and Tenielle Fordyce-Ruff.

## Letters to the Editor

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

## IDAHO STATE BAR DISTINGUISHED LAWYER AWARD DINNER

Wednesday, July 13 at the Sun Valley Inn, Limelight Terrace, Limelight B.

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

The Distinguished Lawyer Award is presented each year at the Idaho State Bar Annual Meeting to attorneys who have distinguished the profession through exemplary conduct through their many years of dedicated service to the legal profession and to the citizens of Idaho.

In 2011, the Idaho State Bar honors four renowned Idaho lawyers:



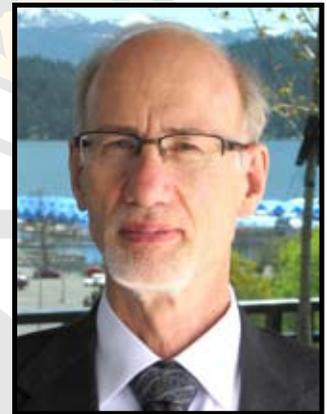
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## IDAHO STATE BAR / IDAHO LAW FOUNDATION SERVICE AWARDS LUNCHEON

Thursday, July 14 at the Sun Valley Inn, Limelight B.

Service Awards Luncheon begins at 12:00 p.m.

The Service Awards are presented to individuals from the state who have contributed their time and talent to serve the public and improve the legal profession. The recipients of the 2011 Service Award are:

**Gary L Cooper** - Pocatello  
**Steve L. Fields** - Boise\*  
**Sara T. Hope** - Jerome\*  
**Leander Lee James** - Worley  
**David S. Jensen** - Boise

**Paula Landholm Kluksdal** - Boise  
**John T. Lezamiz** - Twin Falls  
**Sharon L. McQuade Grisham** - Boise  
**M. Jay Meyers** - Pocatello

\* Non Lawyer

Join friends and colleagues as we honor these members of the Bar. For more information about attending these events, please contact Dayna Ferrero at (208) 334-4500 or [dferrero@isb.idaho.gov](mailto:dferrero@isb.idaho.gov).  
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### His 10,000-MILE JOURNEY SHOWED A WAY HOME

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

I have dedicated my last column to my father, Richard Borrowdale, who is not a lawyer. I have learned many things from him and by his example. He will turn eighty this August. The first seventy years he lived in Chicago. Now he has a home on Marco Island, Florida.

The youngest of three boys, he was taken out of school at fifteen to work for his father's business, as his brothers had done before him. That marked the end of his formal education. Over the next thirty five years, interrupted only by his military service in the Korean War, he persevered at the family business. He designed and built very large custom industrial photographic equipment, before the age of computers. Once fabricated, he would disassemble the equipment, load it into the trailer of a semi truck and drive, often across country, to deliver and install it. At fifty, he left the difficult dynamics of the family business. It is hard for me to imagine starting a new career at that age, without a high school diploma, or a job reference.

With my step mother he began one of the first charter boat businesses on Chicago's lakefront. They offered cruises to private parties and corporations for special events. Free Spirit Yacht Cruises grew to a fleet of three boats and considerable success, before it was sold to one of my step brothers, two years ago.

Last year, for the first time, the whole family went on a seven day cruise. I brought my computer and a small table top microphone to plug into it, so that I could interview my father. Before the trip I had been thinking there is so much I don't know about his life. I thought this would be interesting way to preserve some family history.

Midweek, the cruise ship was docked in Panama. On a day trip we crossed the isthmus on a vintage restored train, and saw the Panama Canal. It was not what I had expected. The canal is a series of lakes and locks cut through a swatch of jungle. While the train cars swayed back and forth, steaming through the tropical



air, my father shared with me how he navigated a boat through the Panama Canal in 1956, when he was 25 years old. His father had taken possession of the 55 foot yacht in San Diego, as repayment of a business debt. My father and his brother were summoned to retrieve the boat and to bring it back to Chicago. It was too large to travel over land on the highways, so there was only one alternative- by sea.

What I find remarkable is that he was a 25 year old who had no previous nautical experience. He had not done many of the things a trip of that magnitude would require. But he hired two deck hands and figured it out. He chartered a course down the coast of Mexico to Central America, through the Panama Canal. From there he traveled across the Caribbean, up the Atlantic seaboard, into the St. Laurence Seaway, through the Great Lakes to Chicago. In total the journey was over 10,000 miles.

I see the Panama trip as a metaphor for his life. He has met the challenges and opportunities his life has presented head on. And to this day, he simply figures it out. Most of all, I admire my father's persistence, work ethic, intellectual curiosity and spirit of adventure. I try to bring the same determination, creativity and resourcefulness to my own life and career. I

certainly have had no lack of an example. I encourage all of you to spend time to talk to your family and other loved ones to learn the details of their experiences and life stories. Like me, you will walk away enriched and inspired.

It has been my privilege and pleasure to serve the Bar the past three years as a Commissioner and now as President. I hope the service I have given has been as useful as all I have learned and experienced from it. The most significant aspect has been the relationships I have made during my tenure. I have met some wonderful people all across Idaho. Thank you for the opportunity to serve you and our profession.

#### 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.

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## Image of first woman attorney in Idaho surfaces

Debora Kristensen, author of the historical compilation, *The First 50 Women in Idaho Law*, reported her recent discovery about the very first woman admitted to the bar in 1895, Helen Louise Young:

“Even though I finished the “First 50 Women” project back in 2005, I have never given up hope of finding a picture of Helen. In fact, that was my greatest regret throughout the entire process – not knowing what she looked like. I swear I felt like I knew her after spending so much time looking for her and researching her background. I finally found a picture – by chance – after getting an email from Ancestry.com inviting me to take a free 14 day trial. I did – not to look into my own family history, but specifically to look for Helen Young. I’m not very good at navigating through Ancestry.com’s site, but eventually I found her passport application from Sept. 1924. It didn’t give me any more info that I had already and almost gave up again, until I realized that the next page in that book was by her brother, William Nichols, who was “attesting” on his sister’s behalf so that she could prove citizenship. That page included a picture for the passport office – and presto! I finally saw what Helen Young looked like.”

Kristensen’s book states Young learned law from her stepfather, Daniel Waldron, in North Idaho, and she earned the endorsement of Idaho’s most prominent attorneys, who petitioned Idaho Supreme Court for her acceptance to the bar. Kristensen writes: “At the time of Young’s application, Idaho statues limited the admission of attorneys in Idaho to “white males.” Young went on to work as a suffragist and later as a scholar of Christian Science in New York City.

## Beware of email client scam

Attorneys are still being exploited in a sophisticated fraud scam, according to the Federal Bureau of Investigation’s Salt Lake City office. The schemes request assistance in collecting personal and business debt and they target all attorneys, despite experience and firm size.

The Idaho State Bar advises lawyers to thoroughly research the prospective cli-

ent’s’ identity before doing business. Lawyers are asked to be particularly careful about accepting checks from clients who ask to transfer a portion of those funds from a trust account. Lawyers should assure that such funds have been honored and deposited by the bank in the trust account, before issuing any trust account check for those funds. To report attempts at fraud, call the Idaho Attorney General’s consumer Division at (208) 334-4135.

## Carol McDonald honored

M. Carol McDonald, recently retired Admissions Director for the Idaho State Bar, and member of the Council of Bar Admissions Administrators (CBAA), will be honored on August 12 by Philip M. Madden, chair of the National Conference of Bar Examiners (NCBE), at the NCBE/CBAA Annual Meeting in Boulder, Colorado. McDonald will be recognized for her outstanding service as a bar admissions administrator for the past 23 years. McDonald has been an active member of the CBAA since 1988 and served as its chair during the 1999–2000 term.



Carol McDonald

## Judicial Council position

The Idaho State Bar Board of Commissioners is accepting applicants for a lawyer member of the Idaho Judicial Council; for a six-year term that commencing on July 1, 2011.

In making its selection, the Commission will be guided by the following statutory considerations, found in Idaho Code Section 1-2101:

- Appointment shall be made with due consideration for area representation.
- Not more than three of the permanent appointed members shall be from one political party (please include party affiliation, if any, in application).
- No member of the Judicial Council, except a judge or justice, may hold any other office or position of profit under the United States or the state.

Attorneys interested in the position should submit a letter of interest along with a resume or biographical sketch to the Idaho State Bar office by June 24, 2011. Submissions should include infor-

mation about the applicant, why he or she is interested in the position, and the political party affiliation of the applicant, if any.

Letters and questions may be directed to: Diane Minnich, Executive Director, Idaho State Bar, P.O. Box 895, Boise, ID 83701, 208-334-4500, dminnich@isb.idaho.gov.

## Know a great courthouse? Submit your article

The Idaho Legal History Society seeks authors to research and write for November issue of *The Advocate* about Idaho’s courthouses. The articles need not be comprehensive, but merely accurate and focused on the unique. To find out more, or to pitch your idea, contact Dan Black at (208) 955-8866, dblack@isb.idaho.gov, or Ernest Hoidal at ehoidal@hoidal-law.com. The deadline for submissions is September 13. Photos and anecdotes are welcome.

“Public buildings often accurately reflect the beliefs, priorities, and aspirations of a people. ... For much of our history, the courthouse has served not just as a local center of the law and government but as a meeting ground, cultural hub, and social gathering place.” - former U.S. Supreme Court Justice Lewis F. Powell, Jr.

## MCLE reminder

Reminder emails were sent in May to all members with an MCLE reporting deadline of December 31, 2011. Please check your records to make sure all the courses you attended have been approved for Idaho MCLE credit. You can check your MCLE attendance records on our website at [www.isb.idaho.gov](http://www.isb.idaho.gov). Questions should be directed to the MCLE Department at (208) 334-4500 or [jhunt@isb.idaho.gov](mailto:jhunt@isb.idaho.gov).

## DISCIPLINE

### NOTICE TO TOM HALE OF CLIENT ASSISTANCE FUND CLAIM

Pursuant to Idaho Bar Commission Rule 614(a), the Idaho State Bar hereby gives notice to Tom Hale that a Client Assistance Fund claim has been filed against him by former client, Teresa Ogren, in the amount of \$500. Please be advised that service of this claim is deemed complete fourteen (14) days after the publication of this issue of *The Advocate*.

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## MARCUS, CHRISTIAN, HARDEE & DAVIES, LLP

is pleased to announce:

Bo Davies has joined the firm as a partner and Greg K. Hardee has joined the firm as an associate attorney.

**Mr. Davies** has been a practicing attorney since 1992. Bo was the former Vice-President and General Counsel of TitleOne Corporation. He was also the former President of the 4th District Bar Association, former board member of Big Brother/Big Sisters, and former Co-Chairman of the March of Dimes Real Estate Forum.

**Mr. Hardee** is a 2011 graduate of the University of Idaho College of Law. He recently became a member of the Idaho Bar and the U.S. District Court, District of Idaho. Mr. Hardee will focus his practice in all aspects of family law. In addition, he has extensive experience in the areas of financial planning and the mortgage industry.

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**FAREWELL AND WELCOME**

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

At the end of May, two longtime Bar and Foundation staff members retired; Carol Craighill, Idaho Volunteer Lawyers (IVLP) Program Director and Carol McDonald, Admissions Director. The two Carols have a combined 43 years of service to the legal profession and public through their work with the Bar and Foundation.

Bar Admissions has experienced many changes since Carol McDonald started in 1988. She has shepherded nearly 5,500 applicants through the admissions process, administered 47 bar exams, and worked with over 1,000 bar exam graders. During her tenure, the bar implemented reciprocal admission, conditional admission, taking the bar exam by computer, a complete revision of the admission rules, and adopted the uniform bar exam. Her attention to detail and commitment to service created a well respected and efficiently administered admission department.

Carol earned the respect of applicants, attorneys, staff, and the bar admission professionals she worked with her counterparts throughout the country. She takes with her a wealth of institutional knowledge and leaves behind many friends and colleagues.



Diane K. Minnich



Carol McDonald



Carol Craighill

*I offer my personal thanks to Carol Craighill and Carol McDonald for their dedication, professionalism, passion, energy, and friendship.*

Carol Craighill is passionate about helping those who cannot afford legal services. She worked tirelessly to obtain funds to support IVLP's work and to develop innovative ways to provide legal services. She partnered with other community groups to coordinate the limited resources available to provide services for those with critical legal needs. IVLP has provided legal services to thousands of individuals, families, and groups during Carol's tenure with IVLP.

Carol too leaves behind an extensive institutional memory as well as friends, coworkers and colleagues that will miss her commitment and her kind, compassionate, and generous demeanor.

I offer my personal thanks to Carol Craighill and Carol McDonald for their dedication, professionalism, passion, energy, and friendship. It will not be the same at the bar and foundation without them. We will miss them.

**New staff members**

We are pleased to welcome Maureen Ryan Braley as the new Admissions Administrator and Anna Almerico as the new IVLP Program Manager.

Maureen Braley is a 2004 graduate of Gonzaga University School of Law. After graduation, Maureen spent a year clerking for then Idaho Supreme Court Chief Justice Gerald Schroeder. Following her clerkship, Maureen was in private practice in Boise for 5 years. Most recently, she worked at the Ada County Prosecuting Attorney's office.



Maureen Ryan Braley



Anna Almerico

Maureen is a member of the State Bars of Washington and Idaho. She is a former Chair of the Idaho Young Lawyers Section and the Idaho Foodbank Warehouse.

Anna Almerico joins IVLP after working several years with Catholic Charities of Idaho. She has a long history of working in the field of community service, both as an employee of organizations and as a volunteer. She has worked specifically in the areas immigration law and domestic violence. She also has experience with non-profit program management, grant development and grant writing. She holds a B.A. degree from University of St. Thomas in Minnesota.

Maureen and Anna are excited to join the bar and foundation staff. We look forward to their insights, experience and contributions to continuing and improving the services providing by Admissions and IVLP.

If you have the opportunity, please offer your congratulations to our retiring staff members Carol Craighill and Carol McDonald and our new staff members Maureen Braley and Anna Almerico.

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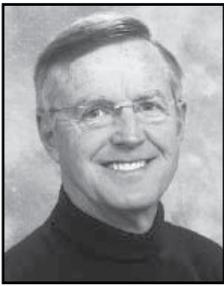
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# WELCOME FROM THE INTELLECTUAL PROPERTY LAW SECTION

Dana M. Herberholz  
Zarian Midgley & Johnson, PLLC

Welcome to the Intellectual Property Law Section-sponsored issue of *The Advocate*. In this issue, our authors address recent developments in the rapidly changing laws governing intellectual property, including patents, copyright, trademarks, and the right of publicity.

Elizabeth Herbst-Schierman starts off the issue by explaining the differences between various types of intellectual property protection and discussing whether our clients need such protection in her article, *Patent, Trademark & Copyright Protection: Necessities or Luxuries?* Benjamin Hoopes warns that our clients may inadvertently find themselves as defendants in a copyright infringement lawsuit in his article, *Avoiding the Pitfalls that Lead to Righthaven's Four-Figure 'Gotcha!'*. Jeff Parry discusses a body of law influenced, in large part, by celebrities and provides insight on how our clients (celebrities or not) can protect their right of publicity and avoid violating the rights of others in his article, *Protect Your Identity With the Right of Publicity*.



Dana M. Herberholz

*The Section has furnished the Idaho State Law Library with a comprehensive patent law treatise, co-sponsored a major CLE in Sun Valley, and recently announced that it will award a scholarship.*

The next three articles highlight the many changes to our nation's patent system. John Zarian discusses controversial developments in the law of patent damages and highlights the recent scrutiny placed on an expert damages opinions in his article, *Uniloc and the Developing Law of Patent Damages: Is There Still a Need for Reform?* My article, *America Invents Act: How Landmark Patent Reform Will Impact Idaho Inventors and Companies*, discusses patent reform legislation which, if signed into law, will fundamentally change the way in which America's patent system has operated for over 200 years. Finally, Chris Cuneo takes us back in time and reminds us how much technology has changed in a fascinating article, *A Brief History of the First Patents Awarded to Idahoans*.

The Intellectual Property Law Section invites you to attend our CLE programs and business meetings. We generally of-

fer a one-hour CLE to all members of the Idaho State Bar every other month. The Section holds a brief business meeting in alternating months and concludes the meeting with a 30-minute CLE geared toward intellectual property law practitioners. The Intellectual Property Law Section is committed to improving our educational outreach efforts and welcomes your feedback in that regard. Over the past few years, the Section has furnished the Idaho State Law Library with a comprehensive patent law treatise, co-sponsored a major CLE in Sun Valley, and recently announced that it will award a scholarship to a law student with a demonstrated interest in pursuing a career in intellectual property law. For more information about the Intellectual Property Law Section, please visit [http://isb.idaho.gov/member\\_services/sections/ipl/ipl.html](http://isb.idaho.gov/member_services/sections/ipl/ipl.html). We hope you enjoy this issue of *The Advocate*.

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# PATENT, TRADEMARK, & COPYRIGHT PROTECTION: NECESSITIES OR LUXURIES?

Elizabeth Herbst Schierman  
TraskBritt, P.C.

Realistically, not every author needs a copyright registration, not every business needs to register its trademarks, and not every inventor needs a patent. Rather, innovators need to understand the relative benefits and costs of formally securing intellectual property rights so as to make the right decisions about how to allocate limited resources for the broadest protection of IP rights.

The questions I am most frequently asked in my practice begin with “Do I need,” followed by “a copyright for my work?” or “a trademark for my business or product name?” or “a patent for my invention?” In an ideal world, inventors would file patent applications in each and every patenting country for each and every invention and improvement thereon. Inventors would file those applications immediately upon conception of those inventions and improvements. Inventors would also prosecute each and every one of those applications to issuance of a patent. Patent owners would pay all maintenance fees for each and every issued patent to keep those patents alive for as long as possible. Businesses would register, in each and every country of use, trademarks for every product name, business name, and logo used. Authors would register copyrights for every piece of creative work, including product packaging, website designs, logo designs, and software code. Such a strategy may be available to billion-dollar international corporations, but it certainly is not practical for most independent inventors, startups, or growing companies.

Formally securing intellectual property rights often requires a significant investment of finances and time. Though it is easy enough to register a copyright for less than \$100, a certificate of registration may not arrive for several months. The cost for a federal trademark registration will likely run a business or individual several hundred dollars or more, and take a year to a year-and-a-half from filing to



Elizabeth Herbst  
Schierman

*Allocate limited resources as part of an intellectual property protection strategy appropriate given priorities of the individual or business.*

registration. The cost for acquiring a patent for an invention will likely total at least \$10,000, and it is all too common for the patent prosecution process to take several years. With trademark registrations and patents, owners must pay additional fees, after securing the rights, to renew or maintain the formal protection. Therefore, any owner of intellectual property must thoughtfully allocate its limited resources as part of an intellectual property protection strategy that is appropriate given the resources available and the priorities of the individual or business. Answering the “do I need” questions in the current economic environment requires careful consideration of the relative benefits and costs of securing copyright, trademark, and patent rights.

## Copyright registration

As soon as an original work of authorship has been fixed in a tangible medium of expression<sup>1</sup>, the work falls under the protection of copyright law.<sup>2</sup> A copyright claim may then be registered with the Copyright Office.<sup>3</sup> Though registration is not necessary for a work to be copyrighted, registration is necessary to enforce the copyright.<sup>4</sup>

A copyright may be registered at any time during the term<sup>5</sup> of the copyright.<sup>6</sup> Even so, there can be benefits to registering a copyright without delay. First, the remedies available to a copyright owner in a copyright infringement action are generally limited to an injunction, impounding and disposition of infringing articles, the owners’ actual damages, and the infringer’s additional profits.<sup>7</sup> However, if a copyright is registered within three months of publication or prior to commencement of an infringement, the copyright owner may elect to seek statutory damages, rather than actual damages and profits, and may also recover costs

and attorney’s fees.<sup>8</sup> Statutory damages amount to between \$750 and \$30,000, for trademark infringement, generally, and up to \$150,000 for willful trademark infringement.<sup>9</sup> Because it is often quite difficult to prove actual damages have been incurred or that the infringer has had significant profits from an infringement, the ability to seek statutory damages and recover costs and attorneys fees may be the best hope for the copyright owner to recover any money from an infringer. Therefore, often, when a copyright has been registered “late,” the copyright owner usually must bear the cost of the litigation to enforce the copyright without any realistic hope of recovering any money.

There are other benefits to registering a copyright besides the ability to enforce the copyright and the possibility of seeking statutory damages and attorney’s fees. For example, registering a copyright provides a public record of the claim; registering within five years of publication is prima facie evidence of the validity of the copyright; and a registration may be recorded with the U.S. Customs and Border Protection Service for use in protecting against importation of infringing copies.<sup>10</sup>

All in all, then, copyright owners who have absolutely no interest in ever exercising their copyright rights and preventing infringement have little to no reason to seek registration of the copyright. Those who are most concerned about being able to stop infringement, should it occur, but who are not concerned about recovering money from the infringer, also have little reason to register a copyright unless and until an infringement is discovered. On the other hand, for those who will suffer financially or competitively if a copyright infringement occurred, copyright registration is more of a necessity than a luxury. These copyright owners would be wise to register their copyrights early.

## Trademark registration

As with copyright, registration of a trademark is not a prerequisite to establishment of trademark rights. Rather, rights are based on *use* of the trademark in commerce. Registration of a trademark is not even a prerequisite to instituting a lawsuit to stop an infringement. That is, owners of unregistered trademarks may have enforceable common law trademark rights.

Though registration is not mandatory for establishing or enforcing trademark rights, there are particular and significant benefits to registration. The primary benefit is that registration provides a constructive area of use and a presumption of ownership of the mark in an area equal to the geographic territory in which the trademark is registered. Therefore, the owner of a federally-registered trademark enjoys presumptive ownership of and exclusive right to use the mark nationwide on or in connection with the goods/services listed in the registration.<sup>11</sup> On the other hand, unregistered marks enjoy protection only in their area of actual use, which can often be much more limited than a nationwide scope and much more difficult to prove.

Federal trademark registration also provides public notice of the claim to ownership of the mark in the territory in which the mark is registered.<sup>12</sup> This notice makes it less likely that another will be able to register the same or a similar mark, and thereby limit other's abilities to register marks or to expand trademark use within the country. An owner of a not-yet registered mark may one day find it impossible to register the mark if a more junior user has first acquired a registration for the same or a confusingly-similar mark. That junior user's trademark registration may then effectively trap the senior common law trademark owner to its current geographic area of actual use with little to no hope for expanding the use of its mark into other areas of the country.

Other benefits to federal trademark registration, in particular, include assured standing to bring an action concerning the trademark in federal court; the use of the U.S. registration as a basis for foreign registration; the opportunity to record the registration with U.S. Customs and Border Protection Service so as to prevent importation of infringing goods; and the right to use the mark in association with the ® symbol.<sup>13</sup> Additionally, registration can be helpful in combating cybersquatting under provisions of the Anticybersquatting Consumer Protection Act (ACPA)<sup>14</sup> or the Uniform Domain-Name Dispute-Resolution Policy (UDRP)<sup>15</sup>. Under both

*Though trademark registration is not mandatory for establishing or enforcing trademark rights, registration is far from a mere luxury.*

the ACPA and the UDRP, success against a cybersquatter requires proof of ownership of trademark rights, and a trademark registration goes a long way toward providing that proof.

Thus, though trademark registration is not mandatory for establishing or enforcing trademark rights, registration is far from a mere luxury. Registration is usually a worthwhile endeavor for any business that has an interest in expanding its business or in preventing or stopping use of confusingly-similar marks by others or cybersquatting. For those trademark owners, registering the trademark that is used most often as the symbol of the business, whether that mark is the business's name or the business's logo, is likely the first priority. Registering any secondary trademarks may be a second priority. A secondary trademark may include the design or logo that accompanies a primary, plain-word<sup>16</sup> mark, or it may be the name of the product or products that the business offers under its primary business name. In any regard, registration of a trademark should be a high-priority consideration for all businesses and individuals offering goods or services in association with a name, brand, logo, or the like.

## Patent issuance

Patent rights are different from copyright and trademarks rights in many respects, particularly in the requirement of formal protection for the rights to come into existence. That is, potentially-enforceable patent rights arise not from creation or conception of an invention, but only from the issuance of a patent from a patenting authority, which, in the United States, is the U.S. Patent and Trademark Office (USPTO).<sup>17</sup> Therefore, for any inventor wishing to acquire U.S. patent rights, filing a patent application with the USPTO is an absolute necessity.

Another significant difference between securing patent rights and securing other intellectual property rights is the potentially short deadline to file a patent application. Generally, under the patent laws

as of the writing of this article, a patent application for an undisclosed invention may be filed at any time unless and until the inventor or inventors have abandoned the invention. However, once the inventor takes the invention to the marketplace, a one-year, nonextendable window opens in which the inventor may file a patent application.<sup>18</sup> If more than twelve months pass after the offering for sale of the subject invention, the inventor is barred from seeking a U.S. utility patent.<sup>19</sup> Therefore, inventors who want to sell their inventions to others and who want any hope of acquiring patent protection (*i.e.*, the ability to exclude others from making, using, selling, offering for sale, or importing into the United States the claimed invention) need to file a patent application before they are barred by statute from doing so.

It is important to keep in mind that a patent provides a means by which to stop others from practicing the claimed invention<sup>20</sup>. When an invention is such that a competitor could purchase the associated product and dissect it to figure out how to make a competing version, having a patent may be the only way to stop the competitor from doing so. Inventors of such reverse-engineerable inventions likely find patent protection more of a necessity than a luxury. That said, if an invention is not reverse engineerable, keeping the details of the invention a secret could provide better protection against competition than seeking a patent. A patent for a non-reverse-engineerable invention would serve to disclose to potential competitors the details of how to make and practice the invention, which details would have remained undisclosed and secret had a patent never been sought. Once the patent expires, or if a patent never issues, the competitors have all the information necessary to compete in the open market with the original inventor. Had the inventor of the non-reverse-engineerable invention merely kept the details a secret, such competition might not exist. Still, non-reverse-engineerable inventions are rare. Likely, the majority of inventions created

today are dissectible upon inspection of the product, thus making patent protection important as perhaps the only means to stop cheap, knock-off products from finding their way to the store shelves beside the inventor's original product.

Another circumstance in which patent protection is less of a necessity and more of a luxury is when the available patent protection for the invention is quite narrow. The scope of patent protection extends only to the breadth of the invention as claimed in an issued patent, and the breadth of the claims largely depends upon the presence of prior art, such as earlier-issued patents, earlier-published patent applications, and earlier-published non-patent literature. When the field of prior art is crowded, acquiring patent protection can require very narrowly claiming the invention in a patent application. The more narrow the resulting patent, the easier it is for a competitor to design around the patent and avoid patent infringement while still being competitive in the marketplace. For example, if an inventor creates a thingamajig, and, in order to acquire a patent, must claim that thingamajig as a thingamajig that is uniformly blue, then a competitor might easily make an identical thingamajig with the exception of its being uniformly yellow and then sell that yellow thingamajig without threat of being sued for patent infringement. In that hypothetical, having a patent for a blue thingamajig likely cost the inventor thousands of dollars with little likelihood of being able to enjoy a monopoly in the thingamajig marketplace.

### Take-away considerations

No, not every author needs to register his or her copyright, not every business needs a registration for its trademark, and not every inventor needs a patent. Copyright owners, trademark owners, and inventors who are absolutely sure they will never want to stop anyone from copying their work may find formal IP protection a mere luxury. Nonetheless, careful consideration of the benefits and costs of securing IP rights should be given before making the sometimes-irreversible decision to seek or not to seek formal protection. When deciding how to allocate scarce resources, consider the most important assets of the business or individual and decide, early on, to protect those assets first. If the success of a business relies upon being the only company on the market with the latest and greatest widget, that business likely needs to acquire a patent for the widget in order for the business to survive. Where a business wants to brand itself in a crowded field and grow down

**Consider the most important assets  
of the business or individual and decide,  
early on, to protect those  
assets first.**

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the road, the business may need to register that trademark to stop infringements quickly and to avoid the confining brick wall that would arise if another were to register a similar mark first. Finally, authors of creative works at risk of suffering a financial or competitive injury, should their work be copied and distributed by others without permission, need to seek registration of the copyrights in their work, preferably within three months of publication or at least before an infringement begins.

### About the Author

**Elizabeth Herbst Schierman** is a registered patent attorney with *TraskBritt, P.C.* whose practice focuses on helping businesses and individuals identify and secure patent, trademark, and copyright rights. Ms. Schierman holds degrees in chemical engineering and law from the University of Idaho and is the immediate past Chair of the ISB Intellectual Property Law Section.

### Endnotes

<sup>1</sup> "A work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is 'fixed' . . . if a fixation of the work is being made simultaneously with its transmission." 17 U.S.C. § 101.

<sup>2</sup> 17 U.S.C. § 102(a).

<sup>3</sup> 17 U.S.C. § 408(a).

<sup>4</sup> 17 U.S.C. § 411(a) ("[N]o civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made . . .").

<sup>5</sup> As used here, "term of the copyright" refers to the duration of the copyright in the associated work. The duration of rights is set forth by U.S. Copyright law and depends upon the circumstances of the creation of the work, such as the creation date; the publication date; whether the author is an individual, multiple individuals, or a business; and the lifetime of the author. See 17 U.S.C. § 302–305.

<sup>6</sup> 17 U.S.C. § 408(a).

<sup>7</sup> 17 U.S.C. § 412 & 502–503.

<sup>8</sup> 17 U.S.C. § 504–505.

<sup>9</sup> 17 U.S.C. § 504(c).

<sup>10</sup> U.S. Copyright Office, *Circular 1: Copyright Basics*, 7 (Jul. 2008), available at <http://www.copyright.gov/circs/circ01.pdf>.

<sup>11</sup> U.S. Patent & Trademark Office, *Trademark FAQs*, <http://www.uspto.gov/faq/trademarks.jsp> (last visited Apr. 11, 2011).

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

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

<sup>14</sup> "A person shall be liable in a civil action by the owner of a mark, including a personal name which is protected as a mark under this section, if, without regard to the goods or services of the parties, that person – (i) has a bad faith intent to profit from that mark . . . ; and (ii) registers, traffics in, or uses a domain name that – (I) in the case of a mark that is distinctive at the time of registration of the domain name, is identical or confusingly similar to that mark; [or] (II) in the case of a famous mark that is famous at the time of registration of the domain name, is identical or confusingly similar to or dilutive of that mark . . ." 15 U.S.C. § 1125(d).

<sup>15</sup> The UDRP is a policy of the Internet Corporation for Assigned Names and Numbers (ICANN) and provides an administrative proceeding by which trademark right owners can seek to have domains (websites) cancelled or transferred from the domain registrant to the trademark owner if the registrant's domain name is "identical or confusingly similar to a trademark or service mark in which the complainant has rights;" the registrant has "no rights or legitimate interest in respect of the domain name;" and the "domain name has been registered and is being used in bad faith." Internet Corporation for Assigned Names & Numbers, *Uniform Domain Name Dispute Resolution Policy*, (1999), available at <http://www.icann.org/en/udrp/udrp-policy-24oct99.htm>.

<sup>16</sup> As used here, a "plain-word" mark refers to a trademark consisting solely of words, letters, or numbers. This type of mark is also known as a "standard character mark." A "plain-word" or "standard character" mark "protects the wording itself, without limiting the mark to a specific font, style, size, or color." U.S. Patent & Trademark Office, *Basic Facts About Trademarks*, 6 (2010), available at [http://www.uspto.gov/trademarks/basics/BasicFacts\\_with\\_correct\\_links.pdf](http://www.uspto.gov/trademarks/basics/BasicFacts_with_correct_links.pdf).

<sup>17</sup> 35 U.S.C. § 271(a) ("Except as otherwise provided in this title, whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States, or imports into the United States any patented invention during the term of the patent therefore, infringes the patent.") (emphasis added).

<sup>18</sup> 35 U.S.C. § 102 ("A person shall be entitled to a patent unless . . . (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States . . .").

<sup>19</sup> *Id.*

<sup>20</sup> As used here "practicing the claimed invention" refers to someone, other than a patent owner, engaging in any of the actions a patent owner may rightfully exclude others from taking, namely, the making, using, selling, offering for sale, or importation of the invention as it is claimed in the associated patent.

# AVOIDING THE PITFALLS THAT LEAD TO RIGHTHAVEN'S FOUR-FIGURE 'GOTCHA!'

Minimizing copyright infringement liabilities while interacting online; a brief guide for attorneys, their loved-ones, clients, and prospective clients

Benjamin E. Hoopes  
Zarian Midgley & Johnson PLLC

Nevada-based Righthaven LLC ("Righthaven") began filing its first suits for copyright infringement in March of 2010. In 2010 alone, Righthaven filed over 200 suits alleging copyright infringement. Most of these lawsuits are purportedly settling for between \$1,500 and \$3,000 – a mere fraction of the five to six figure damages requested in the complaints.

One reason these suits are alarming is because they are not preceded by a cease-and-desist letter, and the overwhelming majority of them are directed to individuals, small and unsophisticated businesses, and those owning or running user contribution-based forums and blogs.<sup>1</sup> They evoke, to a certain extent, the infringement campaign that the Recording Industry Association of America ("RIAA") brought against peer-to-peer music sharers in the last decade. However, while the RIAA cases generally dealt with people who actually did violate copyrights, Righthaven is suing people who have relatively strong legal defenses to their claims.

Given the fact that such a large percentage of the American population interacts via online mediums such as blogs, Facebook, YouTube, forums, twitter, and other similar sites that promote user generated content, and because these mediums are largely constructed around the theory of content sharing, there are a large number of people who are unaware that they may be directly in the crosshairs of groups like Righthaven and therefore risk being sued for hundreds of thousands of dollars. Therefore, it is of paramount importance to be educated as to the rights and responsibilities that accompany "consuming" and creating copyrighted works, to be aware of the mechanisms through



*Righthaven locates those individuals and companies that are copying articles and images from its clients and files suit alleging copyright infringement.*

which one might protect oneself, and to avoid the behavior that might lead to increased attention from Righthaven and other like-minded entities.

## Righthaven's history of copyright claims

Formed by Steven Gibson, a partner in the Las Vegas office of Dickenson Wright, Righthaven allegedly purchases the copyright for articles and images published in client newspapers and on client websites.<sup>2</sup> In essence, Righthaven buys the right to a lawsuit. Righthaven locates those individuals and companies that are copying articles and images from its clients and files suit alleging copyright infringement.

Righthaven is co-owned by Stephens Media (through SI Content Monitor, LLC), and Gibson's own Net Sortie Systems, LLC. Stephens Media publishes over 30 newspapers in eight states. One of Stephens Media's papers, the *Las Vegas Review-Journal* ("LVRJ"), was Righthaven's first client. It now appears, however, that Righthaven is also working with MediaNews Group, owner of 56 newspapers in 12 states including the *Denver Post* and the *Salt Lake Tribune*.

Righthaven has filed suits against a variety of people and companies. In one of Righthaven's cases, it sued an individual for copying portions of a LVRJ article that was published based on that individual's own research — research that was provided to the LVRJ free of charge.<sup>3</sup> In another case, Righthaven sued an unemployed woman from Boston who ran a non-commercial cat blog — from which she posted from the perspective of a cat.<sup>4</sup> Apparently, the "catblogger" copied material from a LVRJ story about a fire killing some birds. The defendant in that action included both a credit and a link to the LVRJ website.<sup>5</sup> Nevertheless, Righthaven sued for thousands of dollars, claiming that the blogger violated its copyrights. In another case, Righthaven sued Broad-

bandreports.com because a user posted a LVRJ article on the website's message board.<sup>6</sup> In another case, Righthaven sued the Democratic Underground because a user posted approximately five sentences of a 50 sentence LVRJ article on the Democratic Underground's community forum.<sup>7</sup> Notably, Righthaven recently settled a lawsuit that it had filed accusing Matt Drudge of the Drudge Report of copyright infringement.<sup>8</sup>

In spite of the risks associated with fighting the Righthaven suits, some of the accused infringers are fighting back. For instance, in response to Righthaven's suit against the Democratic Underground, the Electronic Frontier Foundation has stepped up to the plate to defend the website. Not only is the Democratic Underground defending itself against Righthaven, but it has filed counterclaims against both Righthaven and Stephens Media thereby making it virtually impossible for Righthaven to extract itself from the lawsuit without an order from the court.<sup>9</sup> Should Righthaven prevail, it would not be surprising to see Righthaven's web of clients increase and any number of Righthaven clones pop up.

## Copyright law applies without formal registration

Practically speaking, to make a prima facie case for copyright infringement, a copyright holder need only prove ownership and that the defendant violated one of the copyright holder's rights.<sup>10</sup> A copyright holder's exclusive rights give him or her control over the (1) reproduction, (2) distribution, (3) preparation of derivative works, (4) public performance and display, (5) and sound recordings based on an underlying work.<sup>11</sup>

Perhaps the most misunderstood aspect of copyright law is that there is no need to formally register a work in order to have a copyright therein.<sup>12</sup> In fact, arguably<sup>13</sup> every American from the age of

three or older is a copyright holder: the three year old preschooler's finger painting is likely copyrighted;<sup>14</sup> the teenager's book report for English class is likely copyrighted;<sup>15</sup> and your home videos are also likely copyrighted.<sup>16</sup> Technology gives our society the means of creating — with relative ease — mountains of “creative” works, and the state of copyright law is such that it is virtually all copyrighted. Given the ease of creation and the abundance of copyrighted works, it is therefore also very easy to take copyrights for granted. Furthermore, given advances in technology, it is also easier than ever to infringe upon a copyright holder's rights.

### “Fair use” is only useful after breaking the bank

Among the mechanisms available to protect oneself against a suit for copyright infringement — and perhaps the most commonly invoked defense thereto — is fair use. Fair use is an affirmative defense, and can quickly turn a simple lawsuit for copyright infringement into an expensive and complex affair. The doctrine of fair use finds its statutory basis in 17 U.S.C. § 107. Its statutory support notwithstanding, the fair use defense is very loosely defined. Courts must decide whether or not the potential infringer's burden has been met based on a hodge-podge of judicial balancing factors including, but not limited to, whether (1) the use is transformative; (2) whether the use is commercial; (3) whether the copying was done in good faith; (4) whether the copy was a parody; (5) whether the original work is published or unpublished; (6) whether the original work is fact or fiction; (7) how much of the original work was copied; (8) whether the amount copied was more than necessary; (9) quantitatively speaking, whether the copy reproduced the most important part of the underlying work; (10) whether the copy is going to be a replacement for the underlying work; and (11) whether, in the aggregate, the use will supplant the underlying work.<sup>17</sup>

Equally troubling for those who desire to call upon the fair use defense is the fact that, procedurally speaking, fair use cannot be used to dismiss a case until after a substantial investment — both monetary and also in terms of time and resources — has been made into the case.<sup>18</sup> And while the Copyright Act includes a statutory mechanism for prevailing party attorney's fees,<sup>19</sup> pursuing the defense is a gamble that most confronted with accusations from Righthaven will not be willing to take.

## The substantial costs that are required to mount a fair use or similar defense are such that many defendants in Righthaven's suits settle.

### Protection mechanisms exist

Perhaps the first step in avoiding a lawsuit from Righthaven, some Righthaven clone, or any other copyright holder, is being aware of what one is “consuming,” sharing, or receiving and whether it enjoys copyright protection. Modern technology makes the reproduction of copyrighted works completely effortless. For instance, with the technology and increasing quality of cell phone cameras, it is not uncommon to see someone using a handheld device to snap a photo of a book or magazine in a bookstore.<sup>20</sup> Some may have even seen a person taking a photo of the screen that displays pictures of visitors plunging down the waterfall of Splash Mountain at Disneyland.<sup>21</sup> The Internet and the power of web browsers makes it as easy as a mouse click to save a copy of an image, or to copy and paste the text from a website, and thereby make an unauthorized copy of a copyrighted work. While some of these acts might be protected under fair use, it would be prudent to avoid any unauthorized copying — especially on the Internet — while Righthaven is on the prowl.

For those who run or moderate blogs and forums and who risk having users post potentially infringing material, it would be prudent to take advantage of the “safe harbor” provisions carved out for website owners and internet service providers (“ISP”) under the Digital Millennium Copyright Act (“DMCA”). To take advantage of the statutory protections, the website owner must register for service by a DMCA takedown agent.<sup>22</sup> An agent is essentially a point of contact to whom takedown notices may be sent when a third party posts infringing material on a site owned by someone else.<sup>23</sup> In some circumstances, this step forces Righthaven to first send the website owner or ISP a takedown notice before being able to file suit against the ISP or website owner for the actions of a third party.<sup>24</sup>

Finally, and perhaps most importantly, one must recognize the *source* of content that is dangerous to share. If you are an

avid reader of the LVRJ, the Salt Lake Tribune, or the Denver Post, then it would be wise to not link to,<sup>25</sup> copy, or paraphrase the content from those sites. Additionally, one would be well advised to at least review the growing list of Righthaven affiliate news outlets to make sure that one does not create even the slightest semblance of actionable behavior around the Righthaven hornets' nest and thereby risk a copyright infringement lawsuit from Righthaven.<sup>26</sup>

### Conclusion

The substantial costs that are required to mount a fair use or similar defense are such that many defendants in Righthaven's suits settle rather than running the risk of being slapped with a six-figure damage award plus the possibility of attorney's fees. Righthaven has effectively taken advantage of this fact and has filed more than 250 lawsuits in approximately one year's time. Therefore, one would be well-advised to “consume” and share media with a heightened prudence in this climate in order to avoid any possible semblance of infringing behavior.

### Endnotes

<sup>1</sup> The Bureau of National Affairs has written a scalding review of the Righthaven approach to copyright enforcement. Anandashankar Mazumdar, *Righthaven's Litigation Tactics Raise Concern for Online Publishers*, 38 Media Law Reporter (BNA) No. 40 (Oct. 19, 2010), available at <http://ipcenter.bna.com/pic2/ip.nsf/id/BNAP-8A9MUL?OpenDocument> (last visited April 26, 2011).

<sup>2</sup> Righthaven recently suffered what appears to be a rather significant setback in one of its cases. Apparently, Righthaven had not secured exclusive rights to the copyright prior to filing suit and thus did not have the right to sue on the copyright in question. See Kurt Opsahl, *Why Righthaven's Copyright Assignment is a Sham – And Why it Matters*, April 18, 2011, <https://www.eff.org/deeplinks/2011/04/why-righthaven-s-copyright-assignment-sham-and-why> (last visited April 30, 2011).

<sup>3</sup> *Righthaven LLC v. LVA In The Media et al.*, 2:10-cv-01018 (D. Nev. June 25, 2010). See also Mike Masnick, *Newspaper Publisher Sues Guy for Posting Article Based on Research he Gave the Paper for Free*, TECHDIRT.COM, July 14, 2010, <http://www.techdirt.com/articles/20100709/02000910144.shtml>

(last visited April 26, 2011).

<sup>4</sup> Righthaven LLC v. Wong et al., 2:10-cv-00856 (D. Nev. June 4, 2010).

<sup>5</sup> Steve Green, *Judge Questions Righthaven Over R-J Copyright Suit Costs*, LAS VEGAS SUN, Aug. 26, 2010, <http://www.lasvegassun.com/news/2010/aug/26/judge-questions-righthaven-over-r-j-copy-right-suit/> (last visited April 26, 2011).

<sup>6</sup> Righthaven LLC v. Silver Matrix LLC et al., 2:10-cv-01281 (D. Nev. July 29, 2010). See also Steve Green, *Another Company Fights Back Against Copyright Lawsuit*, LAS VEGAS SUN, Sept. 11, 2010, <http://www.lasvegassun.com/news/2010/sep/11/defendant-calls-copyright-lawsuits-parisitical-abu/> (last visited April 26, 2011).

<sup>7</sup> Righthaven LLC v. Democratic Underground LLC, 2:10-cv-01356 (D. Nev. Aug. 10, 2010).

<sup>8</sup> Righthaven LLC v. Drudge et al., 2:10-cv-02135 (D. Nev. Dec. 8, 2010).

<sup>9</sup> Fed. R. Civ. P. 41(a). See also Steve Green, *R-J Owner Faces Counterclaim in Copyright Lawsuit Campaign*, LAS VEGAS SUN, Sept. 28, 2010, <http://www.lasvegassun.com/news/2010/sep/28/r-j-owner-faces-counterclaim-copyright-lawsuit-cam/> (last visited April 26, 2011).

<sup>10</sup> *Latimer v. Roaring Toyz, Inc.*, 601 F.3d 1224, 1232-33 (11th Cir. 2010) (quoting *Feist Publ'n Inc. v. Rural Tel. Serv. Co. Inc.*, 499 U.S. 340, 361 (1991)).

<sup>11</sup> 17 U.S.C. § 106.

<sup>12</sup> *Kodadek v. MTV Networks, Inc.* 152 F.3d 1209, 1211 (9th Cir. 1998); 17 U.S.C. §§ 102(a) and 411.

<sup>13</sup> There is potentially room for debate with regards to the statutory phrase "original works of authorship." 17 U.S.C. § 102(a).

<sup>14</sup> See *id.*

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

<sup>16</sup> *Id.*

<sup>17</sup> See e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (weighing and balancing many different fair use factors).

<sup>18</sup> Steve Green, *Righthaven Defendant Wins First Lawsuit Dismissal Motion*, LAS VEGAS SUN, Oct. 20, 2010, <http://www.lasvegassun.com/news/2010/oct/20/righthaven-defendant-wins-first-lawsuit-dismissal/> (last visited April 26, 2011) (quoting a copyright scholar opining that "it is extremely unusual to win a fair use defense on a motion to dismiss. Procedurally, the court (at this point) must accept all of Righthaven's factual allegations as true, and the court is not permitted to resolve any factual disputes between the parties. I could see Righthaven protesting that the court made its decision based on disputed facts. . . . This ruling could be vulnerable on those procedural grounds."); Steve Green, *Righthaven Loses Second Fair Use Ruling Over Copyright Lawsuits*, LAS VEGAS SUN, March 18, 2011, <http://www.lasvegassun.com/news/2011/mar/18/righthaven-loses-second-fair-use-ruling-over-copyr/> (last visited April 26, 2011) (noting that both this case and the case in the preceding article of this footnote are being appealed by Righthaven).

<sup>19</sup> 17 U.S.C. § 505.

<sup>20</sup> Based on fair use, among other things, taking a picture of a page or of the cover of a book or magazine may or may not be an infringement of the author's rights. However, it is clearly a case of copying something.

<sup>21</sup> This is another area where the person taking the picture may or may not be violating a copyright; another issue is whether or not there was a copyright in

the underlying work in the first place.

<sup>22</sup> It costs approximately \$100 to register a DMCA takedown agent. New Media Rights is an organization that provides pro bono legal resources on this subject. Its website includes an excellent summary of what is required to register for DMCA service. See [http://www.newmediarights.org/guide/copy-right/how\\_register\\_dmca\\_agent](http://www.newmediarights.org/guide/copy-right/how_register_dmca_agent) (last visited April 26, 2011).

<sup>23</sup> David Kravets, *The \$105 Fix That Could Protect You From Copyright-Troll Lawsuits*, WIRED.COM, Oct. 27, 2010, <http://www.wired.com/threatlevel/2010/10/dmca-righthaven-loophole/> (last visited April 30, 2011).

<sup>24</sup> *Id.* 17 U.S.C. § 512(c)(2).

<sup>25</sup> Stephens Media, owner of the LVRJ, states "Stephens Media welcomes hypertext links to its electronically-published textual content. The appropriate method for linking to Stephens Media content is to post only the headline and the first paragraph of a story and then a link to the original textual material." StephensMedia.com, Copyright, Stephens Media LLC., <http://www.stephensmedia.com/copyright/> (last visited April 26, 2011). In the name of prudence, and in light of some of the suits that Righthaven has filed, one would be well-advised to avoid linking to Stephens Media sites altogether.

<sup>26</sup> The Righthaven Victims blog keeps track of the suits filed and includes a list of those websites that one should avoid any linking, sharing, or copying from. Righthaven Victims, Newspaper Blacklist, <http://righthavenvictims.blogspot.com/p/participating-newspapers.html> (last visited April 26, 2011).



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# UNILOC AND THE DEVELOPING LAW OF PATENT DAMAGES: IS THERE STILL A NEED FOR REFORM?

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On January 4, 2011, the U.S. Court of Appeals for the Federal Circuit issued its opinion in *Uniloc USA, Inc. v. Microsoft Corp.*<sup>1</sup> – vacating a \$388 million jury award and marking a milestone in a recent line of cases modifying the law of patent damages. Many continue to believe that Congress should methodically reform the law of patent damages, while others argue that the Federal Circuit’s recent decisions obviate the need for any such legislation.<sup>2</sup> Informed in part by this debate, the patent reform bill recently passed by the U.S. Senate did *not* include any provisions to limit or narrow compensatory damages awards in patent cases.<sup>3</sup> How significant are the legal changes made by the Federal Circuit, and is there still a need for reform?

## The analytical framework

The governing statute in patent cases provides that a successful claimant is entitled to damages “adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer,” together with interest and costs.<sup>4</sup> These damages are typically divided into two categories – (1) lost profits, available to patent owners who would have made sales but for the infringement, and (2) reasonable royalties available as a “floor” of damages to anyone, including non-practicing entities.<sup>5</sup> In appropriate cases involving willfulness, the court may award enhanced damages up to three times the amount of actual damages.<sup>6</sup> In exceptional cases, the court may also award reasonable attorney fees.<sup>7</sup>

In patent cases, an award of reasonable royalties is determined by multiplying the infringer’s total sales of infringing product by a “reasonable royalty rate.” The most commonly used approach for determining a reasonable royalty rate traces its origins to the 1970 district court opinion in *Georgia-Pacific Corp. v. United States*



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*Highly-publicized “outlier” cases raise significant concerns because they influence the licensing and settlement negotiations that resolve the vast majority of patent disputes.*

*Plywood Corp.*, articulating 15 factors to be used in determining the amount that an infringer would have been willing to pay a willing licensor, prior to the beginning of any infringement, in a hypothetical arm’s length negotiation.<sup>8</sup>

## The push for legislative reform

Modern legislation aimed at reforming the U.S. patent laws first emerged in 2005, in the wake of reports by the Federal Trade Commission (2003) and the National Academy of Sciences (2004) recommending significant changes to the U.S. Patent system.<sup>9</sup> In 2011, the FTC published another report specifically focusing on patent notice and patent infringement remedies.<sup>10</sup> The report was released one day before the U.S. Senate passed its version of patent reform legislation; thus, the report likely had a relatively minor impact on the Senate bill. Notably, however, the report contained various recommendations that courts limit patent damages awards by, among other things, excluding unreliable expert testimony, requiring that damages calculations recognize competition among patented technologies, and capping royalty damages to the incremental value of an invention over alternative technologies.<sup>11</sup>

To be sure, some studies argue that the empirical data does not reveal evidence of a systematic or pervasive problem of excessive damages awards in patent infringement cases.<sup>12</sup> As stated in the FTC’s 2011 report, however, highly-publicized “outlier” cases raise significant concerns because they influence the licensing and settlement negotiations that resolve the vast majority of patent disputes.<sup>13</sup> Furthermore, in our modern marketplace, there is a heightened risk of excessive awards because a patented invention is likely to be just one component of many in a very complex product – like a personal com-

puter that may be covered by *thousands* of patents.<sup>14</sup> In such cases, there is an increased need to isolate the incremental value of a particular invention.

These and similar considerations have been driving the push to revise the patent statute so as to limit patent damages awards that may not reflect the true economic value of an invention. In recent years, Federal Circuit opinions have begun to address these issues in earnest as well. As noted above, the *Uniloc* case marks the most recent milestone in this recent line of cases.

## The background in *Uniloc*

In *Uniloc*,<sup>15</sup> the plaintiff alleged that Microsoft’s “product activation” authentication feature infringed U.S. Patent No. 5,490,216, covering an anti-pirating software registration and licensing system utilizing a particular algorithm.<sup>16</sup>

*Uniloc*’s damages expert, Mr. Gemini, focused his analysis on an internal pre-litigation Microsoft document saying that a “product key is worth anywhere between \$10 and \$10,000 depending on usage,” and concluded that \$10 was the “isolated value” of product activation.<sup>17</sup> Relying on the widely used “25 percent rule of thumb,” Mr. Gemini hypothesized that 25 percent (or \$2.50) of the value of product activation would have gone to the patent owner.<sup>18</sup> Then, he applied the *Georgia-Pacific* factors to “adjust this 25% up or down,” but nevertheless ended up with a \$2.50 royalty rate which, multiplied by the number of licenses over the relevant time period, resulted in a royalty damages calculation of \$565 million.<sup>19</sup> Finally, Mr. Gemini performed a reasonableness “check” by estimating the gross revenue for the accused products (\$19.28 billion) and determining that the resulting royalty rate was approximately 2.9%.<sup>20</sup> He even presented a pie chart at trial illustrating

the narrow (and thus reasonable) magnitude of a 2.9% rate.<sup>21</sup> The jury awarded \$388 million – exactly 2% of the estimated gross revenue.<sup>22</sup>

### The holding on appeal

On appeal, the Federal Circuit vacated the jury's award against Microsoft. The opinion reflects a significant development in the law of patent damages in at least two respects. *First*, the court ruled that Microsoft was entitled to a new trial on damages because Uniloc's expert at trial misused the "entire market value rule" in performing a reasonableness "check" on the royalty rate applied to calculate compensatory damages for patent infringement.<sup>23</sup> *Second*, the court held that, as a matter of Federal Circuit law, the "25 percent rule of thumb" is a fundamentally flawed tool for determining a baseline royalty damages rate in a hypothetical negotiation. The court concluded that evidence relying on the 25 percent rule failed to tie a reasonable royalty base to the facts of the case, and should have been excluded.<sup>24</sup>

### The entire market value rule

The entire market value rule allows a patent holder to recover damages based on the entire market value of an accused product *only* where the patented feature creates the "basis for customer demand" or "substantially create[s] the value of the component parts."<sup>25</sup> In 2009, the Federal Circuit considered this rule in *Lucent Technologies v. Gateway, Inc.*, another case against Microsoft involving the "date-picker" function in Outlook.<sup>26</sup> In that case, reversing a \$358 million damages award, the court held that to the extent the jury relied on an "entire market value calculation" to arrive at a lump-sum royalty damages amount (based on an 8% rate), the award was speculative and not supported by substantial evidence.<sup>27</sup> However, the Federal Circuit appeared to announce that the entire market value of a product could be used in a running royalty calculation of damages if a reasonable, evidence-supported "multiplier" were applied that was small enough to account for the proportion of the product revenue base represented by the infringing feature.<sup>28</sup>

In *Uniloc*, the Federal Circuit expressly eliminated this opening left by its opinion in *Lucent*, stating that "[t]he Supreme Court and this court's precedents do not allow consideration of the entire market value of accused products for minor patent improvements simply by asserting a low enough royalty rate."<sup>29</sup> The court also rejected Uniloc's argument that Mr. Gemini had not employed the entire market val-

*As a threshold matter, Uniloc reaffirms the patentee's burden of proving royalty damages by sufficiently tying any expert opinions to the facts of a particular case.*

ue because his comparison of calculated royalties and total product revenues was only used as a reasonableness "check."<sup>30</sup> Instead, the court agreed with Microsoft that the testimony tainted the jury's deliberations,<sup>31</sup> pointing out that the case provided a good example of "the danger of admitting consideration of the entire market value" of an accused product where the patented component does not create the basis for customer demand.<sup>32</sup> On this ground, the court held that Microsoft was entitled to a new trial on damages.

### The 25 percent rule

The so-called 25 percent rule is a tool that has been used to approximate the reasonable royalty rate that the manufacturer of a patented product would offer to pay to the patentee during a hypothetical negotiation.<sup>33</sup> The Rule suggests that the licensee would pay a royalty rate equivalent to 25 percent of its expected profits for the product that incorporates the intellectual property at issue.<sup>34</sup> In recent years, lower courts have invariably admitted evidence based on the 25 percent rule, largely in reliance on its widespread acceptance.<sup>35</sup>

As noted by the district court in *Uniloc*, however, "the concept of a 'rule of thumb' is perplexing in an area of the law where reliability and precision are deemed paramount."<sup>36</sup> On appeal, the Federal Circuit grouped criticism of the rule into three categories: (a) it fails to account for the unique relationship between the patent and the accused product; (b) it fails to account for the unique relationship between the parties; and, (c) the rule is essentially arbitrary and does not fit within the model of the hypothetical negotiation within which it is based.<sup>37</sup>

Agreeing with the critics of this rule, the *Uniloc* court categorically held that "the 25 percent rule of thumb is a fundamentally flawed tool for determining a baseline royalty rate in a hypothetical negotiation."<sup>38</sup> Under well settled law, the patentee bears the burden of proving damages and, to properly carry this burden, the patentee must sufficiently tie any ex-

pert damages opinions to the *facts* of the case.<sup>39</sup> Any use of the 25 percent rule fails to pass muster under these legal standards and necessarily taints a jury's damages calculations.<sup>40</sup>

In reaching this result, the *Uniloc* court summarized the "clear" meaning of its recent opinions concerning patent damages to be that "there must be a basis in fact to associate the royalty rates used ... to the particular hypothetical negotiation at issue."<sup>41</sup> In this regard, reliance on the 25 percent rule of thumb in a reasonable royalty calculation was "far more unreliable and irrelevant" than reliance on parties' unrelated prior patent licenses – which the court had rejected in at least three cases over the preceding two years.<sup>42</sup> The 25 percent rule of thumb "does not say anything about a particular hypothetical negotiation or reasonable royalty, industry, or party."<sup>43</sup>

Thus, the *Uniloc* court held that Mr. Gemini's testimony based on use of the 25 percent rule "had no relation to the facts of the case, and as such, was arbitrary, unreliable, and irrelevant."<sup>44</sup> On this additional ground, Microsoft was entitled to a new trial on the issue of damages.<sup>45</sup>

### Is there still a need for reform?

The Federal Circuit's opinion in *Uniloc* is significant. As a threshold matter, *Uniloc* reaffirms the patentee's burden of proving royalty damages by sufficiently tying any expert opinions to the *facts* of a particular case. The Federal Circuit's unqualified rejection of the 25 percent rule, after years of passive assent, underscores a renewed emphasis on having patent damages established by proof that has something relevant to say about the particular hypothetical negotiation, industry, products and parties in a given case.

Furthermore, the *Uniloc* court went out of its way to explain that, in proving patent damages, an entire line of recent cases require that there be a basis in fact for associating any royalty rates used with the particular hypothetical negotiation at issue. Applying those cases in the light of

*Uniloc*, an expert damages opinion now should be expected to:

- use prior license agreements that are directed to a situation similar to the hypothetical licensing scenario at issue and commensurate with what the defendant allegedly misappropriated in the case at hand;
- explain the specific subject matter of the patents that are the subject of any prior license agreements used to determine the reasonable royalty rate in a particular case;
- explain the relationship between the patented technology licensed in the prior license agreements, on the one hand, and the licensee's products, on the other hand;
- avoid reliance on prior licenses with little or no relationship to the claimed invention, including licenses of patents with little or no discernible link to the claimed technology;
- avoid confusing reliance on patent licenses granting rights that are materially different from the rights at issue on the patents-in-suit;<sup>46</sup>
- in connection with any reliance on lump sum royalties set forth in prior license agreements, describe how the parties calculated each lump sum, the licensees' intended products, and how many products each licensee expected to produce; and,
- avoid the conflation of license agreements with lump sum royalty payments and license agreements providing for running royalties.

In addition, *Uniloc* is important because it closes the gap previously opened by the *Lucent* opinion with respect to the entire market value rule – by expressly holding that the entire market value of an accused product cannot be used to determine patent damages simply by asserting a low enough royalty rate. Presumably, the weight of the precedent now shifts back to the rule's traditional underpinnings. That is, patentees must either present reliable evidence tending to apportion damages as between the patented feature and any unpatented features, or show that the entire value of the accused product is "properly and legally attributable" to the patented feature.

Notwithstanding *Uniloc*, many questions and problems remain involving the calculation of reasonable royalty damages in patent infringement cases. For example, in the modern case of a personal computer that may be covered by thousands of patents, what does it mean to calculate a "reasonable royalty" for one such pat-

## Do the courts need guidelines to assist them in applying the entire market value rule, in replacing the vague appraisal of a "basis of customer demand" test with a more nuanced inquiry?

ent involving a particular feature in a certain component of a particular processor, where the actual customer demand for the finished product may be driven by dozens of equally important product features and each of those features may be only marginally relevant to the final purchasing decision, or where the patented feature is too technical even to command the notice of a typical consumer?

As suggested by the FTC's 2011 report, any reasonable approach to such damages calculations must be economically grounded and reflect the realities of the modern marketplace. Should the first 14 of the *Georgia-Pacific* factors be recognized as only a list of evidence categories, to be applied to the fifteenth factor (a hypothetical negotiation) as part of a conceptual framework more closely grounded in modern economics? Should courts be required to consider the role that competition plays in establishing the economic value of an invention, by recognizing that the incremental value of a patented invention over the next-best alternative establishes the maximum amount that a willing company would pay in a hypothetical negotiation to license such patented technology? Do the courts need guidelines to assist them in applying the entire market value rule, in replacing the vague appraisal of a "basis of customer demand" test with a more nuanced inquiry, or in determining the circumstances under which a component rather than an entire product is the more appropriate base to be used in a royalty calculation? Should judges be required to exercise their gatekeeper role to test the admissibility of expert testimony on patent damages to insure that any evidence is reliable and based on sufficient data?

Clearly, there are many issues yet to be resolved concerning the calculation of reasonable royalty damages in patent cases. To be sure, the case law in this area now appears to be developing at a comparatively rapid pace. Ironically,

however, this may be one of the strongest arguments for tackling these matters systematically through legislation. Ultimately, the incremental approach of case law, marked by fits and starts, may not provide the necessary certainty and predictability that companies require to make decisions in the modern economy.

### About the Author

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### Endnotes

<sup>1</sup> *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292 (Fed. Cir. 2011), *reh'g denied* (Mar. 22, 2011).

<sup>2</sup> Tony Dutra, *Patent Infringement Damages Experts Assess Need for Reform After "Uniloc," Earlier Cases*, 81 PAT. TRADEMARK & COPYRIGHT J. 1999 (January 21, 2011).

<sup>3</sup> See S. 23, 112<sup>th</sup> Cong. (2011) (America Invents Act, as approved by the U.S. Senate).

<sup>4</sup> 35 U.S.C. § 284.

<sup>5</sup> See Mark A. Lemley, *Distinguishing Lost Profits from Reasonable Royalties*, 51 WM. & MARY L. REV. 655, 655 (2009). The term "non-practicing entity" generally refers to a patent owner that does not manufacture or use the claimed invention but, instead, seeks to enforce its rights through litigation and licensing demands.

<sup>6</sup> 35 U.S.C. § 284.

<sup>7</sup> 35 U.S.C. §§ 284, 285.

<sup>8</sup> *Georgia-Pacific Corp. v. U.S. Plywood Corp.*, 318 F. Supp. 1116, 1121 (S.D.N.Y. 1970), *modified and aff'd*, 446 F.2d 295 (2d Cir.). The *Georgia-Pacific* approach is not the only possible approach to computing reasonable royalty damages. See *TWM Mfg. Co. v. Dura Corp.*, 789 F.2d 895 (Fed. Cir. 1986). Other potential methodologies include proof of an "established" royalty for a particular patent and the existence of multiple related licenses in a narrow range of rates. See *Methodologies for Determining Reasonable Royalty Damages*, available at <http://www.fr.com/reasonableroyalty/> (last visited April 13, 2011).

<sup>9</sup> See Federal Trade Commission Report, *To Promote Innovation: The Proper Balance of Competition &*

*Patent Law & Policy*, 66 PAT. TRADEMARK & COPYRIGHT J. 727 (October 31, 2003); *A Patent System for the 21<sup>st</sup> Century*, 67 PAT. TRADEMARK & COPYRIGHT J. 586 (April 23, 2004). See also U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Enforcement & Intellectual Property Rights: Promoting Innovation & Competition* (April 2007), available at <http://www.ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf> (last visited April 13, 2011).

<sup>10</sup> Federal Trade Commission, *The Evolving Marketplace: Aligning Patent Notice & Remedies with Competition* (March 2011), available at <http://ftc.gov/os/2011/03/110307patentreport.pdf> (last visited April 13, 2011). This report took some aim at "patent assertion entities," (sometimes referred to as "patent trolls") that focus on purchasing and asserting patents against manufacturers already using the technology, rather than developing and licensing technology.

<sup>11</sup> *Id.* at 179-212.

<sup>12</sup> Michael J. Mazzeo et al., *Are Patent Infringement Awards Excessive?: The Data Behind the Patent Reform Debate*, Social Science Research Network (Feb. 24, 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1765891](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1765891) (last visited April 13, 2011).

<sup>13</sup> *The Evolving Marketplace*, *supra* note 10 at 161-62.

<sup>14</sup> *Id.* at 162-63.

<sup>15</sup> *Uniloc*, 632 F.3d 1292.

<sup>16</sup> *Id.* at 1295.

<sup>17</sup> *Id.* at 1300.

<sup>18</sup> *Id.* at 1311.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 1311.

<sup>21</sup> *Id.* at 1311-12.

<sup>22</sup> *Id.* at 1311.

<sup>23</sup> *Id.* at 1318-21.

<sup>24</sup> *Id.* at 1312-18.

<sup>25</sup> *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1336-37 (Fed. Cir. 2009) (tracing origins of entire market value rule to several U.S. Supreme Court cases). The rule is derived from U.S. Supreme Court precedent requiring that "the patentee . . . must in every case give evidence tending to separate or apportion the defendant's profits and the patentee's damages between the patented feature and the unpatented features, and such evidence must be reliable and tangible, and not conjectural or speculative," or show that "the entire value of the whole machine, as a marketable article, is properly and legally attribut-

able to the patented feature. *Garretson v. Clark*, 111 U.S. 120, 121 (1884).

<sup>26</sup> *Lucent*, 580 F.3d 1301.

<sup>27</sup> *Id.* at 1336-39.

<sup>28</sup> *Id.* at 1338-39 ("Simply put, the base used in a running royalty calculation can always be the value of the entire commercial embodiment, as long as the magnitude of the rate is within an acceptable range (as determined by the evidence . . . . Microsoft surely would have little reason to complain about the supposed application of the entire market value rule had the jury applied a royalty rate of .1% (instead of 8%) to the market price of the infringing programs.")

<sup>29</sup> *Uniloc*, 632 F.3d at 1320.

<sup>30</sup> *Id.* *Uniloc* "exacerbated the situation" with its cross-examination of Microsoft's expert, which further implied a relationship between the entire market value of the accused products and the patent-in-suit.

<sup>31</sup> *Id.* at 1319-20 ("The disclosure that a company has made \$19 billion dollars in revenue from an infringing product cannot help but skew the damages horizon for the jury...the \$19 billion cat was never put back into the bag," and the jury may have "used the \$19 billion figure to 'check' its significant award of \$388,000,000.")

<sup>32</sup> *Id.* at 1320. In *Lucent*, the patentee provided no evidence that the "date-picker" function created the basis for customer demand for Microsoft's Outlook and other products. *Lucent* 580 F.3d at 1337-38.

<sup>33</sup> See Robert Goldscheider et al., *Use Of The 25 Per Cent Rule in Valuing IP*, 37 *les Nouvelles* 123, 123 (Dec. 2002).

<sup>34</sup> *Id.*

<sup>35</sup> *Uniloc*, 632 F.3d at 1314.

<sup>36</sup> *Id.* at 1312.

<sup>37</sup> *Id.* at 1313-14.

<sup>38</sup> *Id.* at 1315. The court acknowledged that use of the 25 percent rule had been "passively" tolerated in the past where its acceptability had not been the focus of a case. *Id.* at 1314. Furthermore, the admissibility of the 25 percent rule had never been "squarely" presented to the court before. *Id.*

<sup>39</sup> *Uniloc*, 632 F.3d at 1315 (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 591 (U.S. 1993); *Lucent*, 580 F.3d at 1324).

<sup>40</sup> *Id.* at 1318. The court rejected *Uniloc's* argument that Mr. Gemini had only employed the 25 percent rule as a "starting point" in calculations. *Id.* The court stated, "It is of no moment that the 25 percent rule of thumb is offered merely as a starting point to which the *Georgia-Pacific* factors are then applied to bring the rate up or down. Beginning from a fun-

damentally flawed premise and adjusting it based on legitimate considerations specific to the facts of the case nevertheless results in a fundamentally flawed conclusion." *Id.* at 1317.

<sup>41</sup> *Id.* at 1317; see *Lucent*, 580 F.3d at 1328-31 (rejecting evidence relying on eight prior license agreements involving patents in which (i) the specific subject matter of the patents was not explained to the jury, (ii) the license was directed to a vastly different situation than the hypothetical licensing scenario of the case at hand, and (iii) the relationship between the patented technology licensed therein and the licensee's products was not explained).

<sup>42</sup> *Id.* at 1317; see *ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 870 (Fed. Cir. 2010) (rejecting evidence for relying on prior licenses with no relationship to the claimed invention to drive the royalty rate up to unjustified double-digit levels, and for looking at licenses that did not mention the patents and had no other discernible link to the claimed technology; holding that the district court "must consider licenses that are commensurate with what the defendant has appropriated"); *Wordtech Sys., Inc v. Integrated Networks Solutions, Inc.*, 609 F.3d 1308, 1319-21 (Fed. Cir. 2010) (rejecting evidence relying on thirteen patent licenses previously granted to third parties for rights to some or all of the patents-in-suit, where (i) eleven of the licenses were running royalty licenses (the patentee had only asked for a lump sum payment) and represented far lower rates than the jury returned, and (ii) the remaining two licenses (both for lump sum payments) did not describe how the parties calculated each lump sum, the licensees' intended products, or how many products each licensee expected to produce).

<sup>43</sup> *Id.* ("[*ResQNet* and *Lucent*] at least involved the same general industry and at least some of the same parties . . . , [and] *Wordtech* even involved licenses to the patents in suit entered into by the patentee-plaintiff.")

<sup>44</sup> *Id.* at 1317-18 ("[T]he 25 percent rule of thumb would predict that the same 25%/75% royalty split would begin royalty discussions between . . . (a) TinyCo and IBM over a strong patent portfolio of twelve patents covering various aspects of a pioneering hard drive, and (b) Kodak and Fuji over a single patent to a tiny improvement in a specialty film emulsion.")

<sup>45</sup> *Id.*

<sup>46</sup> The term "Patents-in-Suit" generally refers to the patents at issue in litigation, that is, the patents that are allegedly infringed or allegedly invalid.

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# PROTECT YOUR IDENTITY WITH THE RIGHT OF PUBLICITY

Jeffrey C. Parry  
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Your clients probably understand that if they distribute a copyrighted image without permission, they can be liable for copyright infringement. They no doubt also know that by using another's trademarked name or logo with their own products or services, they can be liable for trademark infringement. What they may not realize, however, is that names, images, or other "indicia of identity" of another person, even if not protected by copyright or trademark, may still be protected under the legal doctrine known as the "right of publicity." If your client were to use such a protected name or image in commerce (to sell or advertise a product, for example), he could be liable for violating the right of publicity of the individual depicted. In most states, the right of publicity is afforded to every person, famous or not.

## What is the right of publicity?

In a nutshell, the right of publicity gives an individual the right to prohibit the use of one's name, voice, signature, photograph, likeness, or other forms of identity in connection with sales, advertising, or other commercial activities.<sup>1</sup> Some courts characterize the right of publicity as a property right while others describe it as a personal right.<sup>2</sup>

The Third Restatement of Unfair Competition defines a right of publicity violation as "using without consent the person's name, likeness, or other indicia of identity for purposes of trade . . . ."<sup>3</sup> States that have codified the right of publicity include Washington,<sup>4</sup> California,<sup>5</sup> and Utah.<sup>6</sup> Both Washington and California's right of publicity statutes define a violation as using that person's name, voice, signature, photograph, or likeness in connection with selling or advertising any products or services without consent.<sup>7</sup> Washington and California also both distinguish between an "individual" (any person) and a "personality" (an individual whose identity "has commercial value").<sup>8</sup> Utah defines a right of publicity violation



Jeffrey C. Parry

*In three of the most famous right of publicity cases, the courts protected the individuals in circumstances where the advertisers did not use their actual voice, signature, or image.*

as an advertisement that implies that the individual approves or endorses the subject matter of the advertisement, when the individual has not consented to such advertisement.<sup>9</sup>

The right of publicity is unique and distinct from its siblings, trademark and copyright (although at times the three overlap).

## Comparison of the right of publicity with trademark and copyright

These three types of intellectual property—trademark, copyright, and right of publicity—are similar, but distinct. Trademark law protects a "word, phrase, symbol, or design, or a combination thereof, that identifies and distinguishes the source of the goods of one party from those of others."<sup>10</sup> Protected marks are those used in commerce.<sup>11</sup> Overlap between trademark and right of publicity can develop in scenarios where a person's name or likeness are used in connection with a commercial activity and thus receive trademark protection.<sup>12</sup> Trademark rights are generally created upon the first commercial use of the mark.<sup>13</sup> Right of publicity typically does not require prior commercial use of one's name or likeness to be established.<sup>14</sup>

A copyright may protect any original work or authorship that is fixed in a tangible medium, such as a written piece, audio recording, or photograph.<sup>15</sup> A copyright exists as soon as the work is created.<sup>16</sup> The person who created the work is the owner of the copyright, unless she created it as a "work for hire," in which case the person or entity that commissioned the work is the copyright owner.<sup>17</sup> Thus, if a photographer took a person's picture, the photographer would own a copyright to the picture. If a third person later wanted to use that picture to sell a product, the third person not only would need to obtain a copyright license from the photographer to avoid li-

ability under copyright law, but additionally would need to receive consent from the subject of the photograph to avoid violating the subject's right of publicity.

## Illustrative cases

Courts that have considered the right of publicity have interpreted "indicia of identity" very broadly. In three of the most famous right of publicity cases, the courts protected the individuals in circumstances where the advertisers did not use their actual voice, signature, or image.

### *Midler v. Ford Motor Co.*<sup>18</sup>

Ford Motor Company approached singer/actress Bette Midler about using excerpts of her song *Do You Want to Dance* from her 1973 album *The Divine Miss M*. Midler's manager immediately declined Ford's offer, at which point Ford hired Midler's backup singer Ula Hedwig to imitate Midler. Hedwig was instructed to "sound as much as possible like the Bette Midler record" (but to omit a few "'ahhs' unsuitable for the commercial"). After hearing the commercial, many people thought that Midler was the singer in the commercial.<sup>19</sup>

Midler sued for violation of her publicity rights. On appeal, the Ninth Circuit found that voice is a distinctive component of one's identity and held that "when a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs and have committed a tort . . . ."<sup>20</sup>

### *Carson v. Here's Johnny Portable Toilets, Inc.*<sup>21</sup>

In 1976, a company named "Here's Johnny Portable Toilets, Inc." (the self-proclaimed "World's Foremost Comedian") began renting and selling its "Here's Johnny" portable toilets. The Eastern District of Michigan determined that the right of publicity only applied to "'name or likeness,' and 'Here's Johnny'"

did not qualify.”<sup>22</sup> On appeal, the Sixth Circuit reversed, holding that the phrase “Here’s Johnny” identified Carson and accordingly, Here’s Johnny Portable Toilets, Inc. violated Carson’s publicity rights even though it did not use his name or likeness.<sup>23</sup>

### **White v. Samsung Electronics America, Inc.**<sup>24</sup>

Samsung Electronics America published an advertisement that depicted a robot version of *Wheel of Fortune*’s Vanna White without her consent.<sup>25</sup> White sued Samsung, alleging a violation of her right of publicity. The Central District of California dismissed White’s claims on summary judgment because the ads did not appropriate her “name or likeness.”<sup>26</sup>

The Ninth Circuit reversed, holding that the relevant inquiry is *whether* there was an appropriation of the person’s identity, not *how* the appropriation was effected.<sup>27</sup> As the Sixth Circuit held in *Carson v. Here’s Johnny*, an identity can be misappropriated by different means than simply using a person’s name or likeness.<sup>28</sup> Because the Samsung advertisement evoked White’s identity (by portraying a robot possessing several of her famous characteristics), it violated her right of publicity.<sup>29</sup>

### **Right of publicity in Idaho**

Courts in Idaho have not yet considered the right of publicity, nor has the state legislature enacted legislation to codify the right of publicity. However, the lack of treatment here does not mean your clients can ignore this doctrine. Of course, they can be haled into court in other jurisdictions that recognize the right of publicity. It is also possible that Idaho courts could apply right of publicity laws from other forums as a result of choice of law provisions or rules.<sup>30</sup>

One *could* expect that Idaho courts might enforce a common law right of publicity here if confronted with the question, based on this trend: courts in every state that have been presented with the issue, save two, have implemented publicity rights. Additionally, the legislatures of the two states where courts declined to recognize a right of publicity, Nebraska and New York, created a statutory right to publicity following each court’s refusal to recognize the right.<sup>31</sup>

If (or when) Idaho courts or the state legislature recognize a right of publicity similar to other states, such a law would protect the publicity rights of everybody, from celebrities living in Sun Valley or

*The Ninth Circuit reversed, holding that the relevant inquiry is whether there was an appropriation of the person’s identity, not how the appropriation was effected.*

McCall, to engineers and scientists at INL, to potato farmers throughout the state.

### **Conclusion**

Although the concept of right of publicity may overlap somewhat with trademark and copyright law, the right of publicity is a useful doctrine to prevent others from using one’s indicia of identity in commerce without consent, even if not covered by trademark or copyright. Courts have held that virtually any identifying characteristic is an “inducium of identity” protectable under the right of publicity. Armed with familiarity of this concept, you can better advise your clients on protecting their own right of publicity and avoiding violations of the right of publicity of others.

### **About the Author**

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### **Endnotes**

<sup>1</sup> *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 837 (Cal. 1979) (right of publicity is “the right of each person to control and profit from the publicity values which he has created or purchased” (citations omitted)); see also *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953).  
<sup>2</sup> 5 § 46 (1995).  
<sup>4</sup> WASH. REV. CODE §§ 63.60.010 *et seq.* (2008).  
<sup>5</sup> CAL. CIV. CODE § 3344 (2010).  
<sup>6</sup> UTAH CODE §§ 45-3-1 *et seq.* (1999).  
<sup>7</sup> CAL. CIV. CODE § 3344(a); WASH. REV. CODE § 63.60.050.  
<sup>8</sup> CAL. CIV. CODE § 3344.1(h); WASH. REV. CODE § 63.60.020. In California, a personality’s publicity rights are protected for 70 years after the death of the deceased personality. CAL. CIV. CODE § 3344.1(g). In Washington, a personality’s publicity rights are protected for 75 years after death while a mere individual’s publicity rights are protected for only 10 years. WASH. REV. CODE § 63.60.040.

<sup>9</sup> UTAH CODE § 45-3-3.

<sup>10</sup> U.S. Patent and Trademark Office (USPTO), BASIC FACTS ABOUT TRADEMARKS, 1 (2010), available at <http://www.uspto.gov/trademarks/basics/index.jsp> (follow “Basic Facts About Trademarks” hyperlink) (last visited April 4, 2011).

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

<sup>12</sup> *Lugosi v. Universal Pictures*, 25 Cal. 3d at 818 (“The tie-up of one’s name, face and/or likeness with a business, product or service creates a tangible and saleable product in much the same way as property may be created by one who organizes under his name a business to build and/or sell houses”).

<sup>13</sup> USPTO, BASIC FACTS ABOUT TRADEMARKS, 1.

<sup>14</sup> *E.g.*, WASH. REV. CODE § 63.60.030(2) (“A property right [in the use of his or her name, voice, signature, photograph, or likeness] exists whether or not such rights were commercially exploited”).

<sup>15</sup> U.S. Copyright Office, COPYRIGHT IN GENERAL, (2006), <http://www.copyright.gov/help/faq/faq-general.html> (last visited April 4, 2011).

<sup>16</sup> *Id.*

<sup>17</sup> *E.g.*, *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (2003).

<sup>18</sup> *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1989)

<sup>19</sup> *Id.* at 461-62.

<sup>20</sup> *Id.* at 463.

<sup>21</sup> *Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983).

<sup>22</sup> *Id.* at 833.

<sup>23</sup> *Id.* at 835-36 (“If the celebrity’s identity is commercially exploited, there has been an invasion of his right”).

<sup>24</sup> *White v. Samsung Electronics America, Inc.*, 971 F.2d 1395 (9th Cir. 1992) (petition for rehearing denied, 989 F.2d 1512 (9th Cir. 1993)).

<sup>25</sup> According to the court, the robot Vanna White did not depict White’s “likeness,” but it imitated her hair, clothing, jewelry, and her role on *Wheel of Fortune*. *Id.* at 1396.

<sup>26</sup> *Id.* at 1396-7.

<sup>27</sup> *Id.* at 1398.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 1399.

<sup>30</sup> *Love v. Associated Newspapers, Ltd.*, 611 F. 3d 601, 609-11 (9th Cir. 2010) (applying choice of law analysis to determine which forum’s right of publicity doctrine should apply).

<sup>31</sup> NEB. REV. ST. § 20-202 (2010); N.Y. CIV. RIGHTS § 50 (2011).

# AMERICA INVENTS ACT: HOW LANDMARK PATENT REFORM LEGISLATION WILL IMPACT IDAHO INVENTORS AND COMPANIES

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To say that technology has advanced since 1952 would be an understatement. In the past 60 years, American innovation produced the polio vaccine, put men on the moon, and fundamentally changed the way in which the world communicates. From switchboards to smart phones, technology has undeniably redefined our way of life. While technology has advanced immeasurably in the past five decades, the U.S. Patent Act<sup>1</sup> – the law designed to facilitate and protect innovation – has not. Congress is well on its way to passing legislation in an attempt to match the U.S. patent system to the reality of this century.

This article provides a basic primer on the mechanics of the first-to-invent system currently in place in the United States as well as the first-inventor-to-file system proposed in the legislation. The article summarizes arguments for and against a first-inventor-to-file system, discusses Idaho's unique role in the debate over patent reform legislation, and concludes by analyzing how this landmark legislation will impact Idaho inventors if signed into law.



Dana M. Herberholz

## Background on the proposed changes

The last major overhaul of the Patent Act occurred in 1952, and American inventors and corporations have felt the impact of this outdated legislation for some time. In 1952, less than 70,000 patent applications were filed at the U.S. Patent and Trademark Office (“USPTO”).<sup>2</sup> Last year, the USPTO received over 500,000 patent applications, and the office is currently struggling with a backlog of over 700,000 patent applications.<sup>3</sup> With this backlog and the lack of adequate resources, a patent application remains pending at the USPTO for an average of nearly three years.<sup>4</sup>

On March 8, 2011, in an attempt to address these concerns, the U.S. Senate passed a substantial revision to the Patent

*Congress is well on its way to passing legislation in an attempt to match the U.S. patent system to the reality of this century.*

Act, the America Invents Act (“the Act”), by an overwhelming, bipartisan vote of 95-5.<sup>5</sup> On March 30, 2011, the U.S. House of Representatives unveiled a substantially similar version of the Act (H.R. 1249).<sup>6</sup> Supporters of the Act argue that it will improve efficiency at the USPTO, stimulate the economy, create jobs, and weed-out questionable patents.<sup>7</sup> The Act has garnered widespread support, and the Senate's passage of the Act drew praise from President Obama, who is eager to sign patent reform legislation into law.<sup>8</sup>

But others are skeptical. Both of Idaho senators<sup>9</sup> and Idaho's largest high-tech company, Micron Technology, Inc. (“Micron”)<sup>10</sup> oppose the legislation in its current form. Perhaps the most controversial provision of the Act is the proposed change from a nation that, since 1790, has awarded patents to the first-to-invent to a nation that awards patents to the first-to-file a patent application on the invention. If signed into law, the legislation will substantially change the manner in which patent applications are examined and the manner in which United States patents are ultimately awarded.

## From invention date to filing date

Current law provides a rebuttable presumption that the first to file a patent application made the invention before the second to file a patent application on the same invention and is, therefore, entitled to priority to the invention.<sup>11</sup> The later-filing party may rebut this presumption, however, if she can show that she was the first to “conceive” the invention and that she exercised reasonable diligence in reducing the invention practice.<sup>12</sup> This is done through interference proceedings—the highly technical and costly administrative procedure for resolving disputes between inventors claiming priority to the same invention.<sup>13</sup> Because the Act awards

priority to the first-inventor-to-file without regard to the inventors' respective dates of conception, passage of the Act will eliminate these priority contests and will encourage inventors to file their patent applications quickly.

The Act also redefines and broadens the scope of prior art that the USPTO may use to reject a patent application. Under current law, an applicant is not entitled to a patent if the invention was “known or used” by others in the United States “*before the invention*” thereof by the applicant” or if the invention was patented or described in a printed publication in the United States or a foreign country “*before the invention*” thereof by the applicant.<sup>14</sup> Accordingly, because the date of invention may be as early as the date on which the inventor conceived the invention, under current law, an inventor may overcome a rejection based on prior art that predates her patent application but post-dates the date on which she conceived the invention.<sup>15</sup> This procedure is referred to as “swearing behind” or “antedating” the prior art.<sup>16</sup>

The proposed legislation, however, redefines prior art in this section of the Patent Act as that which was available to the public “*before the effective filing date* of the claimed invention....”<sup>17</sup> Accordingly, applicants will no longer be able to overcome rejections by swearing behind prior art unless (1) the subject matter of the prior art was obtained from the inventor or (2) the inventor disclosed his invention before the date of the prior art.<sup>18</sup> Because the Act redefines prior art as that which existed before the *filing date* of the patent application, the applicant's date of invention will no longer define what is and is not prior art to a patent application if the Act is signed into law.<sup>19</sup>

## Arguments in support of the act's first-inventor-to-file provisions

Reception of the Act has been mixed, and the substantial focus of the controversy has been directed at the legislation's first-inventor-to-file provisions. Proponents of the Act note that every industrialized nation other than the United States employs a first-to-file patent system. They argue that transition to a first-inventor-to-file system will harmonize United States patent law with the laws of every other country. This, according to the Senate bill's sponsor, Senator Patrick Leahy (D-VT), "will provide American inventors a more efficient system for obtaining patent protection globally."<sup>20</sup> In addition, proponents argue that the Act promotes public policy by encouraging early disclosure of inventions, regardless of whether inventors ultimately seek patent protection for their inventions.<sup>21</sup>

Proponents also argue that a first-inventor-to-file system will promote fairness, provide transparency, and simplify the process of obtaining and enforcing patents.<sup>22</sup> Under the proposed first-inventor-to-file system, an inventor need not worry that her patent application will be rejected based on a later-filed application by another who was the first to conceive the invention.<sup>23</sup> In addition, the first-inventor-to-file system will ensure that those sued for patent infringement can clearly identify prior art without fear that the patent holder will swear behind that prior art by claiming an invention date that may be months, or even years, before the patent holder filed her application.

Support for the Act has been widespread. Large companies, such as IBM, support the legislation,<sup>24</sup> as do some small business groups such as the Small Business & Entrepreneurship Council, who criticized the current first-to-invent system as "ambiguous and costly," and "bad news for businesses and individual inventors."<sup>25</sup> The Obama administration also supports the legislation and its first-inventor-to-file provisions, believing that the law will "increase transparency and certainty for inventors."<sup>26</sup>

## Arguments against the act's first-inventor-to-file provisions

Opponents of the Act offer several arguments against the proposed first-inventor-to-file system, most based on fear that the proposed system will hurt independent inventors and small businesses. Critics argue that the legislation establishes a "race to the patent office" that favors large corporations with research and development budgets, in-house patent counsel and oth-

*Although Idaho's Senators agree that the Patent Act is outdated and in need of revision, neither believes that the legislation is acceptable in its current form.*

er resources to beat independent inventors and small businesses in these races to the patent office. The National Small Business Association succinctly summarized these concerns:

By repealing the invention date as the priority date, compared to prior art, the pressure to establish filing date priority will require applicants to file more frequently, at every stage of development, without perfecting their inventions. The costs of increased filings—more frequent invention reviews, earlier and more frequent hiring of outside patent attorneys, and new patenting costs—will be felt most strongly by small businesses. Some small firms will lose their patent protection altogether, as they will be unable to afford a doubling of their application filing rate.<sup>27</sup>

But the most-criticized aspect of the first-inventor-to-file system is the erosion of the one-year "grace period" currently afforded to inventors.<sup>28</sup> This grace period allows an inventor to publically use, sell, offer to sell, or disclose her invention (for example, at a trade show) to market the invention so long as she files a patent application within one year of such activity.<sup>29</sup> The grace period in the proposed legislation, however, extends only to "a disclosure made 1 year or less before the effective filing date of the claimed invention...." In part because the Act does not define "a disclosure," opponents believe that the proposed legislation, excludes from the grace period public use, sales, and offers to sell the invention. Accordingly, if such activities are not subject to the one-year grace period, an inventor who offers his invention for sale and files a patent application on that invention the following day, for example, may forfeit his patent rights.<sup>30</sup> One outspoken critic of the legislation says changing this grace period "stabs a dagger in the heart of the U.S. Patent bargain."<sup>31</sup>

## Idaho's voice in the debate

While historically famous for potatoes, Idaho has become one of the nation's

leaders in innovation. In 2000, 1,616 patents issued to Idaho inventors compared to just 192 a decade earlier.<sup>32</sup> Idaho is now a leader in patents issued per capita, and in 2009, Forbes.com ranked Idaho as number two on its list of the Top 15 Most Creative States.<sup>33</sup> To sustain this growth and to foster the growth of more high-tech companies in Idaho, passing suitable patent reform legislation should be a priority for Idaho's legislators.

Although Idaho's Senators agree that the Patent Act is outdated and in need of revision, neither believes that the legislation is acceptable in its current form. Senators Risch and Crapo both voted against the Senate bill,<sup>34</sup> and both cosponsored Sen. Feinstein's (D-CA) unsuccessful amendment to remove the first-inventor-to-file provisions of the legislation.<sup>35</sup> In anticipation of this article, Senator Risch provided the author with a written statement, including this excerpt:

For some time there has been nearly unanimous consensus to reform our outdated patent laws and I have supported these efforts. However, I could not support the final version of this legislation because it fundamentally shifts our patent system in a way that hurts America's innovative leadership while trying to conform to other patent systems outside the U.S. This change does not help the U.S. compete in the global marketplace because it shifts the focus from innovation to knowledge of the patent filing system.<sup>36</sup>

Senator Crapo's office fears that the legislation will hurt Idaho's small businesses and Idaho's high-tech industry:

For a Senator from Idaho, it is important to take into account the impact of any patent reform proposal on Idaho's high-tech industry. Idaho's high tech industry has consistently been among the leaders in the nation and the world in innovation and patent generation. The patent reform bill proposed in the Senate was opposed by many high-tech and small business groups. Sena-

tor Crapo supported many amendments during Senate consideration of the bill, which were intended to improve the bill and create a greater balance, so that the movement toward patent reform would not be tilted against small business and high-tech industries.<sup>37</sup>

Like Senators Risch and Crapo, Micron strongly supports patent reform legislation and believes that revising the Patent Act will boost the economy. In 2009, before the Senate Judiciary Committee, Steven Appleton, Chairman and Chief Executive Officer of Micron, testified:

[F]laws in our outdated patent law are shackling our most innovative companies — slowing development of new products and services and the new jobs they would create, and diverting substantial resources that otherwise would be devoted to research and development into litigation costs. The longer we wait to address these widely-acknowledged problems, the more we will deplete the innovation potential of the technology industry and deprive our economy of the resulting job creation and growth.<sup>38</sup>

Micron and Hewlett-Packard, whose printer operations are located in Boise, are also members of the Coalition for Patent Fairness (the “Coalition”) — a trade group whose members include Apple, Autodesk, Cisco Systems, Dell, Google, Intel, Oracle, RIM, SAP, and Symantec. The Coalition believes that patent reform is necessary to discourage “burdensome unjustified patent litigation” and to prevent continued abuse of the patent system.<sup>39</sup> Like Senators Risch and Crapo, however, the Coalition opposes the legislation, including its first-inventor-to-file provisions. The Coalition does not appear to oppose a first-to-file system as a general concept;<sup>40</sup> however, it opposes the first-inventor-to-file system proposed in the Senate bill because it does not provide safeguards for “prior users” accused of patent infringement.<sup>41</sup> Notably, the House bill includes defenses for prior users.<sup>42</sup>

Those in favor of including defenses for prior users in the legislation, including large companies that do not seek patent protection for all of their inventions, fear that the failure to include a prior use defense will encourage lawsuits. For example, Cisco Systems, Inc., is concerned that “domestic opportunists and offshore adversaries will accelerate the patent mills they have today to file [patent applications] on every minor change in an American product, and then use our courts to try to extract damages from the true innova-

*Despite Idaho’s opposition to the legislation, the Act is a significant step in the right direction to reforming an extremely outdated body of law.*

tors here....”<sup>43</sup> But those opposed to including a defense for prior users find such fears unfounded and unrealistic in light of Supreme Court case law.<sup>44</sup> Gene Quinn, a Registered Patent Attorney and founder of a renowned intellectual property law blog, believes that including a prior use defense “reward[s] those who hide innovation from the public and penalizes those who disclose their inventions to the public.”<sup>45</sup>

In the end, the debate over including a prior use defense in the final legislation may be the “poison pill that kills patent reform.”<sup>46</sup> Indeed, on April 14, 2011, the House Judiciary Committee approved the House bill (with the prior user provisions), and the bill is now on its way to a vote before the full House of Representatives.<sup>47</sup> Whether Idaho’s Representatives will support or oppose the bill, including its prior user provisions, remains to be seen.

### **Patent reform legislation’s impact on Idaho inventors**

If Congress passes patent reform legislation with the proposed first-inventor-to-file system, the impact will be felt far beyond Silicon Valley and will undoubtedly affect Idaho inventors. Passage of the legislation should encourage Idaho inventors to file patent applications for their inventions as early as possible. Because the legislation broadens the scope of prior art<sup>48</sup> and narrows the one-year grace period currently afforded to inventors,<sup>49</sup> Idaho inventors can expect more difficulty obtaining patents, particularly where the technology area is well-developed and crowded with prior art.

Whether the Act is signed into law, Idaho inventors should carefully consider whether obtaining patent protection is right for them. Applying for a patent can be costly and time consuming, and it may be in the inventor’s best economic interests to forego patent protection and maintain the invention as a trade secret.<sup>50</sup> Idaho inventors should also consider filing a provisional application at their earliest opportunity. A provisional application is

not examined by the USPTO<sup>51</sup> and serves as a placeholder to preserve the inventor’s patent rights for one year.<sup>52</sup> Filing a provisional application — even under the proposed first-inventor-to-file regime — will allow the inventor to market her invention without fear that her post-filing conduct will jeopardize her patent rights. If the inventor wishes to pursue patent protection on her invention after filing a provisional application, she must file a utility application within one year of filing the provisional application.<sup>53</sup> With a filing fee of only \$110 for small entities, a provisional application is a relatively inexpensive method of preserving one’s patent rights and ensuring that another will not beat the inventor in the feared race to the patent office.<sup>54</sup>

Despite Idaho’s opposition to the legislation, the Act is a significant step in the right direction to reforming an extremely outdated body of law. Transition to a first-inventor-to-file system will bring much needed clarity to inventors who seek patent protection, to parties who seek to avoid infringing others patent rights, and to patent holders and accused infringers in patent infringement litigation.

### **About the Author**

*Dana M. Herberholz is an attorney with Zarian Midgley & Johnson, PLLC where his practice emphasizes patent litigation and complex litigation. He has a B.S. in Cellular and Molecular Biology from the University of Washington and received his J.D. from Gonzaga University School of Law. Dana serves as Chair of the Intellectual Property Law Section of the Idaho State Bar.*

### **Endnotes**

<sup>1</sup> 35 U.S.C. §§ 1-376.

<sup>2</sup> Table of Annual U.S. Patent Activity Since 1790, U.S. Patent and Trademark Office, available at [http://www.uspto.gov/web/offices/ac/ido/oeip/taf/h\\_counts.htm](http://www.uspto.gov/web/offices/ac/ido/oeip/taf/h_counts.htm).

<sup>3</sup> U.S. Patent and Trademark Office Data Visualization Center, available at <http://www.uspto.gov/dashboards/patents/main.dashxml> (last visited May 2, 2011).

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

<sup>5</sup> America Invents Act (“AIA”), S.23, 112th Congress (2011), available at <http://www.gpo.gov/fdsys/pkg/BILLS-112s23es/pdf/BILLS-112s23es.pdf>.

<sup>6</sup> America Invents Act (“AIA”), H.R. 1249, 112th Congress (2011), available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr1249ih/pdf/BILLS-112hr1249ih.pdf>.

<sup>7</sup> Press Release, Senator Patrick Leahy (D-VT), available at <http://leahy.senate.gov/imo/media/doc/PRESS-GoodForJobs-OnePager-FINAL.pdf>.

<sup>8</sup> See Statement by the President on Senate Passage of the America Invents Act (March 8, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/03/08/statement-president-senate-passage-america-invents-act>.

<sup>9</sup> U.S. Senate Roll Call Votes, (S.23 as Amended), 112th Congress, available at [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=112&session=1&vote=00035](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=112&session=1&vote=00035).

<sup>10</sup> See Press Release, *Coalition for Patent Fairness Statement on Passage of S. 23*, Coalition for Patent Fairness (March 8, 2011), available at <http://www.patentfairness.org/media/press/>.

<sup>11</sup> *Falko-Gunter Falkner v. Inglis*, 448 F.3d 1357, 1361 n. 2 (Fed. Cir. 2006).

<sup>12</sup> *Cooper v. Goldfarb*, 154 F.3d 1321, 1327 (Fed. Cir. 1998).

<sup>13</sup> See 35 U.S.C. § 135.

<sup>14</sup> 35 U.S.C. § 102(a) (emphasis added).

<sup>15</sup> 37 C.F.R. § 1.131.

<sup>16</sup> *Id.*

<sup>17</sup> AIA § 102(a) (emphasis added).

<sup>18</sup> AIA, § 102(b)(1); Filing-Date-Focused System – *The Key is the Scope of the Grace Period*, Patentlyo.com, March 2, 2011, <http://www.patentlyo.com/patent/2011/03/filing-date-focused-system-the-key-is-the-scope-of-the-grace-period.html>.

<sup>19</sup> AIA § 102(a)(1).

<sup>20</sup> See e.g., Press Release, Senator Patrick Leahy (D-VT), available at <http://leahy.senate.gov/imo/media/doc/PRESS-FirstInventorToFile-OnePager-FINAL.pdf>.

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

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

<sup>23</sup> See *id.*

<sup>24</sup> IBM Intellectual Property Law Blog, *IBM Hails Introduction of Patent Reform Legislation in U.S. House of Representatives*, dated March 31, 2011, <http://ibmip.com/2011/03/31/ibm-hails-introduction-of-patent-reform-legislation-in-u-s-house-of-representatives/>; IBM Intellectual Property Law

Blog, *IBM Commends Senate Approval of Patent Reform Bill*, dated March 8, 2011, <http://ibmip.com/2011/03/08/ibm-commends-senate-approval-of-patent-reform-bill/>.

<sup>25</sup> Letter from Karen Kerrigan, President & CEO of the Small Business & Entrepreneurship Council, to Members of the United States Senate (Feb 28, 2011), available at <http://www.sbecouncil.org/legaction/display.cfm?ID=4259>.

<sup>26</sup> Statement of Administration Policy, S.23, America Invents Act (February 28, 2011), available at [http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saps23s\\_20110228.pdf](http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saps23s_20110228.pdf); Statement by the President on Senate Passage of the America Invents Act (March 8, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/03/08/statement-president-senate-passage-america-invents-act>.

<sup>27</sup> Letter from Todd O McCracken, President of the National Small Business Association, to Senator Harry Reid (D-NV) (February 15, 2011), available at [http://www.nsbabiz/docs/patent\\_reform.pdf](http://www.nsbabiz/docs/patent_reform.pdf).

<sup>28</sup> *Id.*

<sup>29</sup> 35 U.S.C. § 102(b).

<sup>30</sup> See AIA § 102(b)(1)(B); see also Filing-Date-Focused System – *The Key is the Scope of the Grace Period*, Patentlyo.com, March 2, 2011, <http://www.patentlyo.com/patent/2011/03/filing-date-focused-system-the-key-is-the-scope-of-the-grace-period.html>.

<sup>31</sup> John Schmid, *Patent System Reforms Can Squeeze Out Startups*, Milwaukee Journal Sentinel, March 22, 2011, available at <http://www.jsonline.com/business/118475979.html>.

<sup>32</sup> Patent Counts by Country/State and Year, U.S. Patent and Trademark Office, p. 1, available at [http://www.uspto.gov/web/offices/ac/ido/oeip/taf/cst\\_all.pdf](http://www.uspto.gov/web/offices/ac/ido/oeip/taf/cst_all.pdf).

<sup>33</sup> Melanie Linder, *The Most Creative States*, Forbes.com, May 7, 2009, available at <http://www.forbes.com/2009/05/07/ibm-xerox-intel-entrepreneurs-technology-patents.html>.

<sup>34</sup> U.S. Senate Roll Call Votes, *supra* note 9.

<sup>35</sup> S. Amend 133, 112th Cong. (2011) (amendment to S.23), Cong. Rec. March 2, 2011 S1145-1146, available at <http://www.gpo.gov/fdsys/pkg/CREC-2011-03-02/pdf/CREC-2011-03-02-pt1-PgS1145-2.pdf#page=1>.

<sup>36</sup> Written statement from Senator James E. Risch to author (April 8, 2011).

<sup>37</sup> Written statement from Lindsay Northern, Press Secretary to Senator Mike Crapo, to author (April

5, 2011).

<sup>38</sup> *The Patent Reform Act of 2009: Hearing on S.515 Before the Senate Comm. on the Judiciary*, March 10, 2009, 111th Cong. (testimony of Steven R. Appleton, Chairman and Chief Executive Officer, Micron Technology, Inc.), available at <http://judiciary.senate.gov/pdf/09-03-10Appletontestimony.pdf>, pp. 1-2.

<sup>39</sup> Coalition for Patent Fairness, *Why Change is Needed*, <http://www.patentfairness.org/learn/why/>.

<sup>40</sup> See Press Release, *CPF: Committee Action on Patent Reform Bill an “Important Step Forward” on Meaningful Reform*, Coalition for Patent Fairness (April 2, 2009) (praising the Senate Judiciary Committee for advancing out of committee S. 515, the Patent Reform Act of 2009, which included a first-to-file provision), available at <http://www.patentfairness.org/media/press/>.

<sup>41</sup> Press Release, Coalition for Patent Fairness (March 30, 2011), available at <http://www.patentfairness.org/media/press/#2011-03-30-1>.

<sup>42</sup> See AIA (H.R. 1249) § 273.

<sup>43</sup> America Invents Act: *Hearing on H.R. 1249 Before the U.S. House of Representatives*, 112th Cong. (Prepared Statement of Mark Chandler, Senior Vice President and General Counsel, Cisco Systems Inc.), March 30, 2011, available at <http://judiciary.house.gov/hearings/pdf/Chandler03302011.pdf>, p. 5.

<sup>44</sup> Gene Quinn, *Sensenbrenner to Kappos: Prior User Rights is Poison Pill*, IPWatchdog.com, March 30, 2011, <http://ipwatchdog.com/2011/03/30/sensenbrenner-to-kappos-prior-user-rights-is-poison-pill/id=16082/>.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Press Release, United States House of Representatives Committee on the Judiciary, *Committee Approves Patent Reform Proposal* (April 14, 2011), available at <http://judiciary.house.gov/news/Patent%20Reform.html>.

<sup>48</sup> AIA § 102(a)(1).

<sup>49</sup> AIA § 102(b)(1).

<sup>50</sup> Although trade secrets rights are beyond the scope of this article, see the Idaho Trade Secrets Act for more information. Idaho Code §§ 48-801-807.

<sup>51</sup> Manual of Patent Examining Procedure §201.04(b).

<sup>52</sup> See 35 U.S.C. §§111(b), 119(e).

<sup>53</sup> *Id.*

<sup>54</sup> 37 C.F.R. §§ 1.16(d), 1.27(a).

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# IDAHO: A HISTORY OF INVENTION

Christopher J. Cuneo<sup>1</sup>  
*Zarian Midgley & Johnson, PLLC*

Idaho consistently ranks among the leading states in innovation.<sup>2</sup> The lofty ranking is in keeping with the innovative and entrepreneurial spirit characteristic to Idahoans since its early days as a territory. Insight into the history of Idahoan innovation can be read from the patents of the age, and this article briefly details the first few patents awarded to Idahoans, which helped pave the way for today's continued climate of ingenuity.

Idaho inventors were awarded 1,290 U.S. patents in calendar year 2010.<sup>3</sup> This may not be surprising to those of us that live and work in the state; we know about the proclivity and success of our high-tech residents.<sup>4</sup> However, what is more representative of Idaho's spirit of innovation is that those patents were awarded in fields of technology ranging from apparel to zeolites and everything alphabetically in-between.<sup>5</sup>

This breadth of technology can be traced back to the first Idaho patents which were also awarded in a wide range of industries. Of course, the technology of the mid-nineteenth century was based more on metal and steam compared to today's silicon and electron. Nonetheless, as recounted below, the innovations spanned a wide gamut of fields.

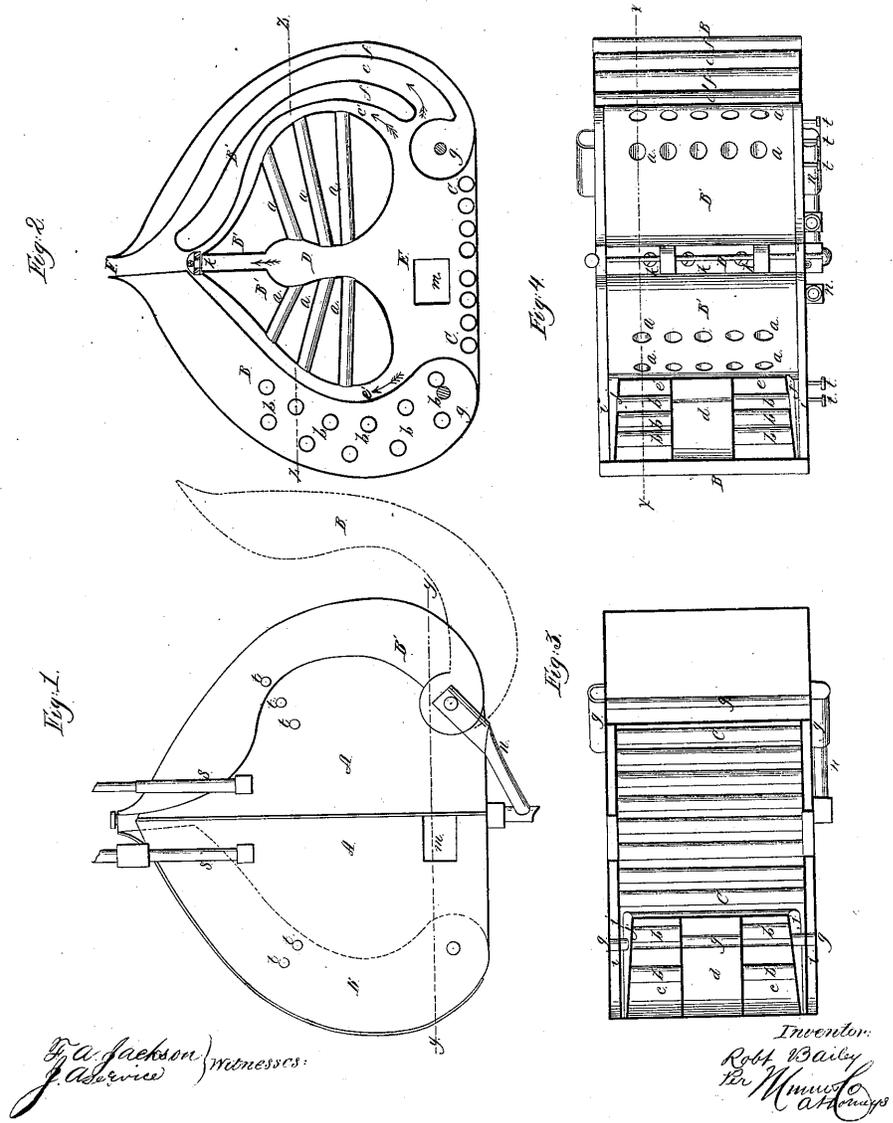
The first patent in Idaho dates back to 1866, when U.S. Patent No. 60,611 issued to Robert Bailey of Idaho City, in the Territory of Idaho. Not surprisingly, the invention related to mining, a key industry of the early Territory, and was an improvement in steam boilers that



was "particularly adapted to mining purposes in distant interior localities, where transportation is difficult and expensive."<sup>6</sup> The mining camps in Idaho, *circa* 1866, certainly fit the description of distant interior localities where transportation was difficult.

Mr. Bailey continued his innovative ways, earning the second patent in the Territory in 1867 with an improved quartz-crusher.<sup>7</sup> Again, locality being the mother of invention, the quartz crusher

*R. Bailey,*  
*Sectional Steam Boiler.*  
*No. 60,611.* *Patented Dec. 18, 1866.*



reflected the difficulties of life on the mining frontier "where transportation is difficult and expensive, [and the crusher could] be made principally of materials on the ground."<sup>8</sup>

One hundred miles southwest of Idaho City, another mining boom-town, Silver City, was large and cosmopolitan enough in 1865 to publish the territory's first newspaper, the *Owyhee Avalanche*.<sup>9</sup> There, in 1869, John S. Butler, the publisher of a competing paper, *The Tidal Wave*, which eventually merged in 1870

with the *Owyhee Avalanche*, invented an improvement in copy holders for use in type setting.<sup>10</sup> The purported advantages of the copy holder were that it held the paper in place securely, while taking up little space and not obstructing any of the type-boxes holding the letters to be used in printing the day's news.<sup>11</sup>

In 1871, the fourth and fifth patents in the Idaho Territory, came again out of Silver City, when William E. Phillips invented an improvement in oil lubricators for machinery.<sup>12</sup> In that same year, and same

city, another improvement for machinery was invented by Charles P. Bowen, who invented a governor to regulate the speed of steam engines.<sup>13</sup> Again, both inventions most likely found applicability in maintaining and operating the steam engines and machines driving the industries of the day.

Later, in 1873, two miners, Henry T. Lantis and Nelson Davis, invented an improvement for wire rope-ways<sup>14</sup> specially adapted for operation in mining tunnels.<sup>15</sup> Messrs. Lantis and Davis resided in the town of Atlanta, Idaho. One novel feature of their arrangement was the use of split pulleys to allow a load bearing hook, connected to the wire-way, to pass through the pulley and still support the load. This allowed for a more compact construction and enabled the wire-way to turn sharper corners which had obvious advantage in the mining tunnels.<sup>16</sup> Such an arrangement can still be seen in use on the ski lifts of Idaho today.

The city of Boise made its first contribution to the innovation assets of the territory, when in 1876, William C. Carlton, was granted the seventh patent in the territory for an improvement in bolt and rivet cutters.<sup>17</sup> An interesting tool, it allowed for a pivoting cutter head to reach into difficult places where "common forms of tools" would not fit.<sup>18</sup> No doubt the cutter facilitated the construction of the "bridges and machinery" vital to the railroad, mining, and other industries of the time.<sup>19</sup>

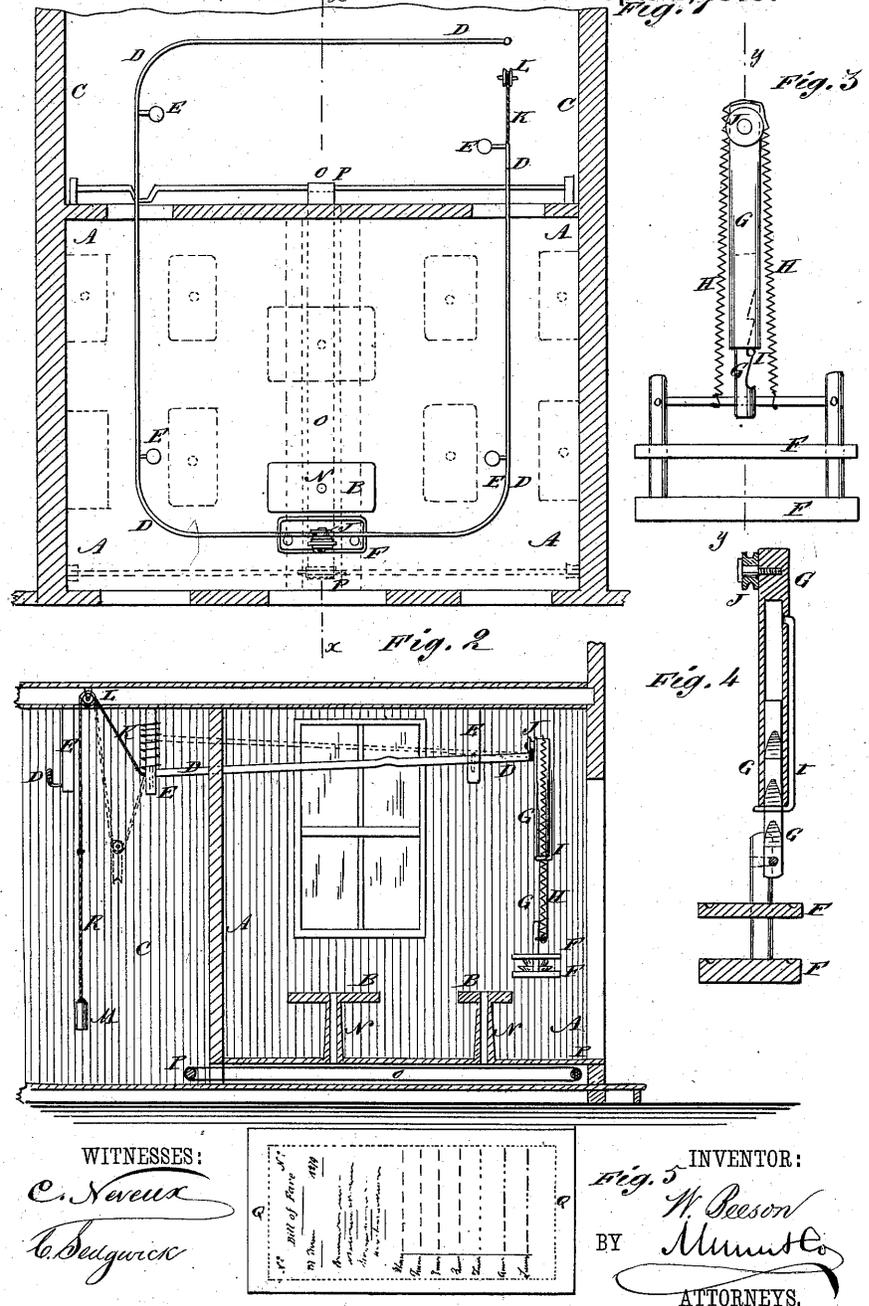
That same year, 1876, Charles M. Hayes of Idaho City received the eighth patent in the Idaho Territory for developing a ruler to aid in bookkeeping.<sup>20</sup> In something of an ergonomic improvement, the ruler was slotted to enable "one using it to see, without stooping, rising, or changing his position (at a table or desk) the figures under which a balancing line is to be drawn[.]"<sup>21</sup> Mr. Hays went on to be the publisher of the previously noted *Idaho City Avalanche* in 1882.<sup>22</sup>

Mr. Bowen, also from Idaho City, was awarded two more patents in 1878, the territory's ninth and tenth.<sup>23</sup> The ninth was for a machine to aid in the agricultural industry and comprised a fruit pitter and slicer, and had applicability in quartering peaches and simultaneously removing the pits.<sup>24</sup> Mr. Bowen's other invention supported the mining industry and was an amalgamator used to process ore by "thoroughly stirring the ore with mercury."<sup>25</sup>

In 1879, David B. Kimmel earned a patent<sup>26</sup> in another key industry of the territory, the railroad. Mr. Kimmel invented a balance slide valve for steam engines

W. BEESON.  
Automatic Table-Waiter.

No. 219,200. Patented Sept. 2, 1879.



that was "especially fitted for locomotive-engines, in which the valves and ports are large and, the valves are subject to great pressure and rapid motion."<sup>27</sup> In that same year, William Beeson, of the settlement of Eagle Rock along the Union Pacific's Utah and Northern Rail Road,<sup>28</sup> received a patent for an improvement in automatic table waiters. Perhaps arising out of a shortage of man-power in then sparsely settled Oneida County,<sup>29</sup> Mr. Beeson's

patent discloses a food ordering and delivery machine operable by a single cook in a kitchen and intended "to take the place of waiters in restaurants, saloons, and other places."<sup>30</sup> It is not known whether any hungry Utah and Northern Rail Road patrons were ever served by the automatic waiter, but one hopes so, because it would have been something to see.

As the decade of the 1870's came to a close, and still some 20 years from state-

hood, inventors in the Idaho Territory had been awarded almost 20 patents. As can be appreciated, these early innovators advanced the industries of the time: agriculture, mining, printing, railroads, and more. This tradition continues in Idaho today in the high tech industries of this age.

#### About the Author

**Chris Cuneo**, *Of Counsel at Zarian Midgley Johnson*, is a registered patent attorney practicing primarily patent litigation and prosecution. Previously an Examiner at the U.S. Patent Office, working in green technologies such as wind, wave, and solar power generation, he has a JD from George Washington University, and an MS (Physics) from Oregon State University.

#### Endnotes

- <sup>1</sup> The author wishes to acknowledge the extremely useful search tools provided by the Historical Idaho Patents Database at the University of Idaho, available at <http://db.lib.uidaho.edu/patents/> (last visited April 26, 2011) and the research detailed in the informative article by Karen F. Hertel, *Idaho Ghost Towns: Patents as a key to the past*, 3 Intellectual Property (IP) Journal of the PTDLA, 1 (2003), which proved invaluable in researching this paper.
- <sup>2</sup> According to the Idaho Department of Commerce, "Idaho is one of the most innovative states in the nation, consistently ranking 2nd in patents issued (per capita) by the U.S. Patent Trademark Office." See <http://commerce.idaho.gov/investments/resources/>

- <sup>3</sup> Total taken from USPTO.gov database search for Idaho as inventor state and issue year of January 1, 2010 through December 31, 2010.
- <sup>4</sup> For example, Hewlett-Packard, Idaho National Laboratory, and Micron Technology all have a significant presence in Idaho.
- <sup>5</sup> See, e.g., U.S. Patent No. 7,673,350 (filed Jan. 31, 2005) (a cap) and U.S. Patent No. 7,713,423 (filed Feb. 4, 2008) (reactive filtration using zeolites).
- <sup>6</sup> U.S. Patent No. 60,611 p. 1 (issued Dec. 18, 1866).
- <sup>7</sup> U.S. Patent No. 64,060 (issued Apr. 23, 1867), titled "Improved Quartz Crusher," and issued to Robert Bailey of Idaho City.
- <sup>8</sup> U.S. Patent No. 64,060 p. 1 (issued Apr. 23, 1867).
- <sup>9</sup> Karen F. Hertel, *Idaho Ghost Towns: Patents as a key to the past*, 3 Intellectual Property (IP) Journal of the PTDLA, 1, 12 (2003).
- <sup>10</sup> U.S. Patent No. 96,391 (issued Nov. 2, 1869), titled "Improvement in Copy Holders," and issued to John S. Butler of Silver City.
- <sup>11</sup> U.S. Patent No. 96,391 p. 2 (issued Nov. 2, 1869).
- <sup>12</sup> U.S. Patent No. 114,194 (issued Apr. 25, 1871), titled "Improvement in Lubricators," and issued to William E. Phillips of Silver City.
- <sup>13</sup> U.S. Patent No. 120,366 (issued Oct. 31, 1871), titled "Improvement in Governors for Steam and Other Engines," and issued to Charles P. Bowen of Silver City. This patent later reissued as RE 4,931 on Jun. 4, 1872.
- <sup>14</sup> U.S. Patent No. 142,857 (filed Jun. 26, 1873), titled "Improvement in Elevated Wire-Ways," and issued Sep. 16, 1873 to Henry T. Lantis and Nelson Davis of Atlanta City.
- <sup>15</sup> U.S. Patent No. 142,857 p. 3 (filed Jun. 26, 1873).
- <sup>16</sup> U.S. Patent No. 142,857 p. 3 (filed Jun. 26, 1873).
- <sup>17</sup> U.S. Patent No. 183,640 (filed Apr. 29, 1876), titled "Improvement in Bolt Cutters," and issued Oct.

- 24, 1876 to William C. Carlton of Boise City.
- <sup>18</sup> U.S. Patent No. 183,640 p. 2 (filed Apr. 29, 1876).
- <sup>19</sup> U.S. Patent No. 183,640 p. 2 (filed Apr. 29, 1876).
- <sup>20</sup> U.S. Patent No. 185,102 (filed Apr. 29, 1876), titled "Improvement in Rulers," and issued Dec. 5, 1876 to Charles M. Hays of Silver City.
- <sup>21</sup> U.S. Patent No. 185,102 p. 2 (filed Apr. 29, 1876).
- <sup>22</sup> Karen F. Hertel, *Idaho Ghost Towns: Patents as a key to the past*, 3 Intellectual Property (IP) Journal of the PTDLA, 1, 12 (2003).
- <sup>23</sup> U.S. Patent No. 204,189 (filed Feb. 16, 1878) and U.S. Patent No. 208,509 (filed Apr. 22, 1878), respectively. U.S. Patent No. 204, 189 (filed Feb. 16, 1878), and titled "Improvement in Machines for Pitting and Cutting Fruit," and issued May 28, 1878 to Charles P. Bowen of Silver City. U.S. Pat. No. 208,509 (filed Apr. 22, 1878), titled "Improvement in Amalgamators," and issued Oct. 1, 1878 to Charles P. Bowen of Silver City.
- <sup>24</sup> U.S. Patent No. 204,189 p. 3 (filed Feb. 16, 1878).
- <sup>25</sup> U.S. Patent No. 208,509 p. 2 (filed Apr. 22, 1878).
- <sup>26</sup> U.S. Patent No. 219,161 (filed Jun. 16, 1879), titled "Improvement in Balance Slide Valves," and issued Sep. 2, 1879 to David B. Kimmel of Idaho City.
- <sup>27</sup> U.S. Patent No. 219,161 p. 2 (filed Jun. 16, 1879).
- <sup>28</sup> Idaho State Historical Reference Series No. 335, 1971.
- <sup>29</sup> Idaho State Historical Reference Series No. 335, 1971. The largest of Idaho's original 1864 set of counties, Oneida had "everything necessary for a successful government operation except population."
- <sup>30</sup> U.S. Patent No. 219,200 p. 2 (filed Jul. 23, 1879).

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FEE SPLIT ARRANGEMENTS

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**Idaho Supreme Court and Court of Appeals**  
**NEW CASES ON APPEAL PENDING DECISION**  
(Updated 5/1/11 )

**CIVIL APPEALS**

**ATTORNEY FEES AND COSTS**

1. Whether the district court abused its discretion in not ruling the Harveys were the sole prevailing parties.

*Lower Payette Ditch Company v. Harvey*  
S.Ct. No. 38163  
Supreme Court

**CORPORATION**

1. Did the court err in finding the gravamen of Count I to be derivative in nature, rather than an individual direct action as characterized by the plaintiff?

*McCann v. McCann*  
S.Ct. No. 37547  
Supreme Court

**HABEAS CORPUS**

1. Did the district court err in finding I.C. § 20-223(b) and (c) do not confer a liberty interest in parole?

*Smith v. Craven*  
S.Ct. No. 38136  
Court of Appeals

2. Did the district court abuse its discretion in dismissing Gray's petition for writ of habeas corpus?

*Gray v. Current Warden of the ICC*  
S.Ct. No. 38309  
Court of Appeals

**LICENSE SUSPENSION**

1. Whether the district court erred in upholding Bell's administrative driver's license suspension.

*Bell v. Department of Transportation*  
S.Ct. No. 37865  
Court of Appeals

**POST-CONVICTION RELIEF**

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

*Godfrey v. State*  
S.Ct. Nos. 37218/37230  
Court of Appeals

2. Did the district court abuse its discretion when it summarily dismissed Freeman's post-conviction petition?

*Freeman v. State*  
S.Ct. No. 37036  
Court of Appeals

3. Did the court err when it denied Mayes' petition for post-conviction relief based on a claim of trial counsel's failure to investigate?

*Mayes v. State*  
S.Ct. No. 37492  
Court of Appeals

**PROCEDURE**

1. Did the trial court err in finding the amended complaint did not relate back to the filing date of the original complaint, when the original complaint was served after the expiration of the statute of limitation?

*Ketterling v. Burger King Corporation*  
S.Ct. No. 38050  
Supreme Court

**PUBLIC RECORD**

1. Did the court err in concluding that the records and related documents that Henry sought were not public records?

*Henry v. Taylor*  
S.Ct. No. 38016  
Supreme Court

**SUMMARY JUDGMENT**

1. Did the district court err in granting the respondent's declaratory relief claim in its motion for summary judgment, alleging that the City of Lewiston Storm Water Utility fee is a tax and not a fee and therefore was improperly enacted and imposed?

*Lewiston Independent School District v. City of Lewiston*  
S.Ct. No. 38116  
Supreme Court

2. Whether the restriction was based upon the fundamental mutual mistake that the improvements were located in the setback.

*Weisel v. Beaver Springs Owners Association*  
S.Ct. No. 37800  
Supreme Court

3. Did the court err in granting summary judgment in favor of Security Financial Fund?

*Security Financial Fund, LLC v. Thomason*  
S.Ct. No. 37203  
Supreme Court

**CRIMINAL APPEALS**

**DUE PROCESS**

1. Did the statements of the prosecutor during closing argument constitute prosecutorial misconduct rising to the level of fundamental error?

*STATE V. WILLIAMS*  
S.Ct. No. 36885  
Court of Appeals

**EVIDENCE**

1. Did the court err when it denied Suriner's motion for judgment of acquittal because the state failed to prove the corpus delicti independent of Suriner's confessions and statements?

*State v. Suriner*  
S.Ct. No. 37433  
Court of Appeals

2. Did the district court err in holding the magistrate judge properly ruled that the proper foundation had been laid to admit the intoxilyzer results when the Standard Operating Procedure had not been followed?

*State v. Healy*  
S.Ct. No. 37509  
Court of Appeals

**JURY INSTRUCTIONS**

1. Were Munkel's rights to due process and a jury trial violated by the instruction given the jury regarding battery with intent to commit rape?

*State v. Munkel*  
S.Ct. No. 36954  
Court of Appeals

**PLEA**

1. Did the court err in denying Bakke's second motion to withdraw his guilty plea?

*State v. Bakke*  
S.Ct. No. 37006  
Court of Appeals

**RESTITUTION**

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

*State v. Oppelt*  
S.Ct. No. 35559  
Court of Appeals

**Idaho Supreme Court and Court of Appeals  
NEW CASES ON APPEAL PENDING DECISION  
(Updated 5/1/11 )**

2. Did the court abuse its discretion when it ordered restitution for the stolen items that were not recovered in the investigation?

*State v. Blackmer*  
S.Ct. No. 37704  
Court of Appeals

**SENTENCING**

1. Did the court abuse its discretion when it relinquished jurisdiction over Hardt and executed the original sentence?

*State v. Hardt*  
S.Ct. No. 35490  
Court of Appeals

**SUBSTANTIVE LAW**

1. Did the court err in granting Forbes' motion to dismiss pursuant to I.C. § 19-2604?

*State v. Forbes*  
S.Ct. No. 37851  
Court of Appeals

**SUPPRESSION OF EVIDENCE**

1. Did the court err in denying Colton's motion to suppress and in finding his arrest was supported by probable cause?

*State v. Colton*  
S.Ct. No. 37949  
Court of Appeals

2. Did the court err when it denied Jones' motion to suppress evidence found incident to her arrest for reckless driving?

*State v. Jones*  
S.Ct. No. 37146  
Court of Appeals

3. Did the court err in denying Andersen's motion to suppress when it held the police had not violated his right to counsel during questioning?

*State v. Andersen*  
S.Ct. No. 37420  
Court of Appeals

4. Did the court err in denying Kessler's motion to suppress and in concluding both the investigatory detention and pat search for weapons were constitutionally reasonable?

*State v. Kessler*  
S.Ct. No. 37921  
Court of Appeals

**VENUE**

1. Did the court abuse its discretion in denying Hadden's motion to change venue?

*State v. Hadden*  
S.Ct. No. 37523  
Court of Appeals

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

**ALTERNATIVE DISPUTE RESOLUTION**

Merlyn W. Clark

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

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

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# H

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## IDAHO COURTS

### HIGHLIGHTS OF THE 2011 RULE AMENDMENTS

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

#### Supreme court rules advisory committees

The following is a list of rule amendments that will go into effect on July 1, 2011. The orders amending these rules can be found on the Internet on the Idaho Judiciary's home page at <http://www.isc.idaho.gov/rulesamd.htm>.

#### Idaho appellate rules

The Appellate Rules Advisory Committee is chaired by Chief Justice Daniel Eismann.

Rule 14. Time for filing appeals. In July 2010 the length of time for retained jurisdiction was changed from 180 days to 365 days. I.A.R. 14 provided that the length of time to file an appeal in these cases was enlarged by the time the court retained jurisdiction and that the time for an appeal commenced to run when the court released jurisdiction or placed the defendant on probation. Waiting a year makes for an untimely appellate process and a defendant who wishes to challenge the conviction itself should not have to wait a year to do so.



Catherine Derden

The 2011 amendment requires that a challenge to the conviction be filed within 42 days of the judgment. The sentence may also be appealed at that time or it may be appealed after the court enters an order relinquishing jurisdiction or placing the defendant on probation; however, the time for an appeal from the order relinquishing jurisdiction or placing the defendant on probation begins to run separately from that order. Thus, if the defendant has appealed the judgment of conviction, then a separate notice of appeal will have to be filed if he or she later decides to also appeal from the order entered after the period of retained jurisdiction.

*Waiting a year makes for an untimely appellate process and a defendant who wishes to challenge the conviction itself should not have to wait a year to do so.*

Rule 17. Notice of appeal - contents. The amendment to this rule was made necessary by the amendment to Rule 14. It clarifies that an appeal from a judgment of conviction does not include a later order relinquishing jurisdiction after a period of retained jurisdiction or an order granting probation following a period of retained jurisdiction.

Rule 24. Reporter's transcript. The time for the transcript to be prepared has been changed so that it does not start to run until the reporter is given notice of the transcript request by the Supreme Court. The title is amended to delete a reference to payment to the clerk in trust.

Rule 25. Reporter's transcript - Contents. The amendment is to subsection (c) and clarifies that the standard transcript only applies to criminal appeals.

Rule 34. Briefs on appeal. The amendment clarifies that the original brief must be bound.

Rule 42. Petition for rehearing. The amendment reflects that an original and six copies of the brief are due instead of nine copies. This is the same number of copies for the court for briefs on appeal.

#### Idaho civil rules of procedure

The Idaho Civil Rules Advisory Committee is chaired by Justice Warren Jones.

New Rule 3(c). Privacy protections for filings made with the court. In 2009 the Idaho Supreme Court appointed the Ad Hoc Committee on Protecting Information in Court Files, chaired by Justice Jim Jones. The court was concerned about public access to personal identifying information in court files. The Committee reviewed the federal rules on pro-

tecting identifying information as well as rules from other states and proposed both a civil and criminal rule. The civil rule has been widely circulated and revised a number of times to address concerns presented by attorneys, judges, court clerks, and state agencies. At this time the court has adopted a civil rule only.

The rule states that the parties shall refrain from including or shall partially redact, where inclusion is necessary, certain personal data identifiers from all documents filed with the court. This includes exhibits, but only if those exhibits are actually filed with the court. If the personal data identifiers are needed, then the party has two choices. The party may file a redacted copy of the documents along with a reference list that identifies each item of redacted information. This list is exempt from disclosure, pursuant to I.C.A.R. 32. The other option is to file the redacted document along with an unredacted copy, in which case the unredacted copy will be exempt from disclosure. However, it should be noted that I.C.A.R. 32 does provide that records that are otherwise exempt from disclosure are still accessible by the parties to the action and their attorneys, except for adoption records, records in proceedings to terminate parental rights, documents filed in camera and the family law case information sheet. Judges, clerks, trial court administrators and other staff employed by or working under the supervision of the courts who are acting within the scope of their duties have access to all documents that are exempt from disclosure pursuant to Rule 32. So, even if the reference sheet or unredacted original is made exempt from disclosure, parties will have access to it, as will court personnel.

There are several exceptions stated in the rule, including cases that are already exempt from disclosure such as adoptions or cases involving termination of parental rights, and cases that are required by statute to have certain personal data identifiers. This is in recognition that 42 USC § 666, entitled “requirement of statutorily prescribed procedure to improve effectiveness of child support enforcement”, requires recording of social security numbers in certain cases. Other examples are the Uniform Interstate Family Support Act and I.C. § 7-1026, which require personal information to be in the pleadings when a person seeks to establish or modify a support order or determine parentage, including residential addresses, social security numbers and dates of birth of each child.

There is also a section on orders of the court that again has exceptions, including an exception for orders that are required by statute to include personal data identifiers. This includes orders for child support.

Rule 5(b). Service- how made. This rule now allows for service by email if the person consents in writing. The rule has also been reorganized.

Rule 6 (c) (6). Child support guidelines. The tax tables are updated to reflect recent changes to federal tax laws.

Rule 16(j). Child custody mediators. This rule has been amended to clarify the requirements to be placed on the Supreme Court roster. Several licensed professionals have been added to the list of individuals who may become mediators consistent with the terms used by the Idaho Board of Licenses. The rule now requires that the training required to be placed on the roster be completed within two years of the application. The rule further requires that the initial training to be placed on the roster be in person and not via on-line training. The rule changes the timing to complete CEUs from two years to three years with the CEU hours per year remaining the same. The rule also adds a requirement that two of the required training hours have an ethics component.

Rule 81(g). Nature of Trial, and Rule 83(d). Record of proceeding of magistrates division. The court hearing a small claims action is now required to make a verbatim record or recording of the proceeding.

Filing Fee Schedule. There are additional statutory fees required for all divorces that add up to an extra \$41.00. While there is usually no fee for a counterclaim, the fee schedule notes that if

*The rule addresses confidentiality and states that mediation proceedings are privileged in all respects and not reported or recorded.*

the counterclaim is for divorce when the original complaint did not allege a claim for divorce then the extra \$41 must be paid. The fee schedule has been amended to also collect this additional \$41 when a cross-claim for divorce is filed when the original complaint did not include a divorce.

#### **Idaho criminal rules**

The Idaho Criminal Rules Advisory Committee is chaired by Justice Roger Burdick.

New Rule 18.1. Mediation in criminal cases. In 2010 the Idaho Supreme Court appointed an ad hoc committee to consider a rule on criminal mediation, to be chaired by Senior Judge Barry Wood. The new rule is a result of the work of that committee. Any party or the court may initiate a request for mediation to resolve some or all of the issues. Participation is voluntary and requires agreement of all the parties. Mediation is defined as well as the matters subject to mediation. After considering the recommendations of the parties, the court selects the mediator from those maintained on a roster provided by the Administrative Director of the Courts. The roster will include senior or sitting judges or justices who have indicated a willingness to mediate and who have had at least 12 hours of training in mediation. The role of the mediator is defined. The rule addresses confidentiality and states that mediation proceedings are privileged in all respects and not reported or recorded. No statement made by a participant in mediation shall be admissible at the trial of any defendant in the case or be considered for any purpose in sentencing of the defendant. Any agreement reached must be approved by the court. Permissible communications between the mediator and the court and the mediator and attorneys are addressed. The court, the mediator or any party may terminate the mediation at any time.

Rule 32. Standards and procedures governing presentence investigations and

reports. The amendment allows presentence investigators to have expanded access to the defendant’s earlier presentence reports from previous cases.

Rule 33.3. Evaluation of persons guilty of domestic assault or domestic battery. The amendments relate to those persons who are maintained on the Idaho Supreme Court roster of Domestic Assault and Battery Evaluators and who conduct evaluations on persons who plead guilty or are found guilty of domestic assault and battery. The amendment clarifies that the evaluator may get national Criminal History Record Information from local law enforcement or any other authorized individual or agency to use in the course of an evaluation. The amendment also requires evaluators to sign confidentiality agreements relating to the receipt and handling of this criminal justice information.

Rule 35(c). Credit for time served. This rule provided that a motion to correct the computation for time served prior to sentencing may be corrected at any time. However, it was noted that post-judgment credit for time served might arise from a bench warrant for a probation violation where the defendant is kept in jail until the matter can be heard. The amendment to Rule 35 as it relates to credit for time served is meant to clarify that it applies to time served both prior and post-judgment. This is accomplished by referring to credit granted pursuant to I.C. § 18-309 that refers to time served pre-judgment and I.C. § 19-2603 that refers to time served after a probation violation. The intent is also to make it clear that credit for time served does not refer to a calculation by the Department of Correction.

Rule 41. Search and seizure. A definition of daytime is added for purposes of executing a daytime only search warrant. Daytime is defined as the hours between 6:00 a.m. and 10:00 p.m. according to local time.

New Rule 43.3. Forensic Testimony by Video Teleconference. This new rule allows forensic testimony to be submitted in court proceedings via simultaneous video teleconference. Everyone must be able to see and hear each other and simultaneously communicate. The party wishing to present by video teleconference must give the other party 28 days notice and the other party must object or agree in writing no later than 14 days before the proceeding. The video testimony is recorded in the same manner as any other testimony, and it is up to the party offering the testimony to coordinate the audio visual feed into the courtroom. There is no duty placed on court personnel.

The rule was prompted by the fact that the state experts who analyze blood, breath, and urine are located in Coeur d'Alene or Pocatello. Allowing forensic testimony by video teleconference will not only help alleviate the travel costs associated with forensic testimony, but will also allow those laboratories to operate more efficiently as it will cut back on time the forensic scientists are traveling or waiting in a courtroom and thus help with the turnaround time in test results. This is a benefit to both the state and defendants.

Rule 54.1. Appeals from a magistrate to a district court - Appealable judgments and orders. In 2008, I.C.R. 2.2 was amended so that the administrative district judge, rather than the Supreme Court, has the authority by order to appoint a specific attorney magistrate to hear and try one or more specific actions which are otherwise triable only by a district judge, or by order to enlarge categories of cases assignable under Rule 2.2(c) to the attorney magistrates of the judicial district. The amendment to 54.1 clarifies that the appeal in this case goes directly to the Supreme Court.

### **Idaho rules of evidence**

The Evidence Rules Advisory Committee is chaired by Judge Karen Lansing.

Rule 512. Comment upon or inference from claim of privilege; instruction. The amendment is intended to clarify that the purpose of Rule 512(a) is to prevent drawing inferences from invocation of only those privileges that are created in Evidence Rules, e.g., the attorney/client privilege or the physician/patient privilege, and that it does not prevent drawing an inference from the invocation of a constitutional privilege in cases where that would otherwise be allowed.

### **Idaho juvenile rules**

The Juvenile Rules Advisory Committee is chaired by Judge John Varin.

New Rule 12.1. Mediation in criminal cases. The same rule on criminal mediation that is part of the criminal rules was also made part of the juvenile rules.

Rule 33. Summons (C.P.A.) and Rule 34 Endorsement on summons (C.P.A.). These rules relate to the removal of a child in a child protection action when a court order is sought to remove the child. The amendments are made to conform to statutory changes made several years ago replacing the term "endorsement on the summons" with "Order of removal". There are also several minor changes to reflect current practice relating to who may file the petition and the process by which a parent seeks appointment of counsel. Finally, several minor grammatical changes were made.

### **Idaho misdemeanor rules**

The Idaho Misdemeanor/Infraction Rules Advisory Committee is chaired by Judge Michael Oths.

Bail Bond Schedule. The bond schedule has been amended for a charge of second DUI or an enhanced DUI. The bond amounts are the same but there is now a provision that the person bonding out must appear in court for arraignment within 48 hours, excluding weekends and holidays. The purpose of the amendment is to bring the defendant before a magistrate judge so that conditions of release may be added if appropriate.

Rule 5. Uniform citation – issuance-service- form – number – distribution. A new subsection (b) has been added to this rule that states a defendant arrested or cited and subsequently released for DUI, second offense, or DUI, enhanced penalty, shall personally appear before the magistrate for arraignment within 48 hours, excluding weekends and holidays. The arraignment may be postponed if the defendant is hospitalized or otherwise in a condition that prevents the defendant from being taken before the magistrate judge.

Rule 6. First appearance and plea before the clerk of the court. The amendment just refers to the above exception noted in Rule 5.

### **Administrative court rules**

Rule 32. Records of the Judicial Department-examination and copying-exemption from and limitations on disclosure. The new rule on privacy protections for filings made with the court also requires an amendment to Rule 32 to add the reference list of personal data identifiers or an unredacted copy of a document

filed pursuant to I.R.C.P. 3(c) to the items exempt from disclosure.

Rule 47. Criminal history checks. Domestic assault and battery evaluators are added as a category of individuals subject to a criminal history check.

New Rule 54. Guardianships and Conservatorships. This new rule relates to the Guardianship and Conservatorship on-line training course that has been developed under the oversight of the court and the Guardianship and Conservatorship Committee. The on-line training is designed to teach prospective guardians and conservators about the duties and responsibilities of those roles. The rule requires every individual seeking appointment as a guardian or conservator to complete the training prior to appointment. The rule further provides that the court may impose a \$25 fee to cover the cost of providing this training.

New Rule 59. Vexatious Litigation. This rule addresses the problem of persons who engage in vexatious litigation and consequently hinder the effective administration of justice. It provides that an Administrative District Judge (ADJ) may find a person to be a vexatious litigant based on a finding that the person: (1) in the past seven years, has commenced or maintained pro se at least three litigations, other than small claims, that have been determined adversely to that person; (2) after a litigation has been finally determined against the person, has repeatedly relitigated or attempted to relitigate, pro se, the validity of the determination; (3) while acting pro se, repeatedly files unmeritorious motions, pleadings or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay; or (4) has previously been declared to be a vexatious litigant by a state or federal court. If the ADJ finds the person to be a vexatious litigant, the judge may enter a prefiling order prohibiting that person from filing any new litigation pro se in any Idaho court without first obtaining leave of the judge of the court where the litigation is to be filed. The ADJ would first issue a proposed prefiling order and the person would have 14 days to file a written response. If a response is filed, the ADJ would have discretion to grant a hearing on the proposed order. A prefiling order could be appealed to the Supreme Court. The Administrative Director of the Courts will maintain a list of persons subject to prefiling orders.



## IDAHO COURTS CORNER

### COURT BILLS CLARIFY AND IMPROVE PROCEDURES

Michael Henderson  
*Legal Counsel,  
Idaho Supreme Court*

During this year’s session the Legislature enacted several bills proposed by the Supreme Court that will have an effect on judicial procedures. This column will review a few of these bills and the resulting changes.

#### Juvenile competency

In criminal cases, the standards and procedures for determining whether a defendant is competent to set trial are set out in Idaho Code §§ 18-210, 18-211 and 18-212. But until now, there has been no statutory framework for determining the competency of juveniles in Juvenile Corrections Act (JCA) proceedings. Courts have been left to improvise based on the standards set by case law and whatever analogy could be drawn to the criminal competency statutes.

HB 140aa remedies this deficiency in the JCA. It restates the constitutional standard for determining competency, which requires: (1) a sufficient ability to consult with a lawyer with a reasonable degree of rational understanding; (2) a rational and factual understanding of the proceedings; and (3) the capacity to assist in preparing a defense. It provides a procedure for a competency examination whenever the court determines that there is good cause to believe that the juvenile is incompetent, and specifies the minimum standards to be applied in making the assessment. When there is reason to believe that the juvenile’s possible incompetency is due to a developmental disability, an evaluation committee – an interdisciplinary team of persons specially qualified in the diagnosis and treatment of persons with a developmental disability – will be appointed to examine and report on the juvenile’s mental condition.



Michael Henderson



Where the court determines that the juvenile is incompetent but may be restored to competency, the court shall order a plan of treatment to be developed by the Department of Health and Welfare. In determining the competency restoration program, the Department will identify the least restrictive alternative consistent with public safety. This may include a community based program, which will avoid the need for more expensive inpatient treatment.

These provisions have been tailored to the special problems presented in evaluating the competency of juveniles, restoring them to competency, and addressing their needs. It represents a major step forward in addressing these complex situations.

#### Problem solving courts

Two of the Court-proposed bills are aimed at enhancing the effectiveness of drug and mental health courts. HB 225 broadens the eligibility for drug courts. Since 2001, Idaho Code § 19-5604 has forbidden the admission of violent offenders to drug courts. This was motivated in part by the desire to maintain eligibility for federal funds. Currently, however, our drug courts receive no federal funding. HB 225 provides that a drug court may admit a person charged with or convicted of a violent crime after consultation with the drug court team and with the consent of the prosecuting attorney. This may help to facilitate the creation of veter-

*Until now, there has been no statutory framework for determining the competency of juveniles in Juvenile Corrections Act (JCA) proceedings.*

erans courts, which are now operating in 21 states and which have proven effective in addressing the special mental health and substance abuse problems faced by returning veterans.

The availability of restricted driving permits to participants in problem-solving courts was increased by HB 227aa. Until 2009, all repeat DUI offenders were required to serve a license suspension of one year with absolutely no driving privileges. In that year, legislation was adopted providing that judges presiding over drug courts (including DUI courts) could grant restricted driving privileges to

participants who had served 45 days of a license suspension with no driving privileges, provided that all of the participant's vehicles were equipped with an ignition interlock and that the participant showed proof of the required liability insurance. The restricted privileges can be used only for driving to and from work, school or alcohol treatment. HB 227 extends this provision to mental health courts and other problem-solving courts. This will give problem-solving court participants a better opportunity to succeed in these programs, as well as an added incentive to comply with the program's requirements to maintain their driving privileges. This provision will go into effect on January 1, 2012.

### Setting aside convictions

Under Idaho Code § 19-2604, offenders who have been placed on probation can ask the court to set aside their convictions. The statute has provided that this relief can be granted only if the offender has complied "at all times" with the terms of probation. The court would then have discretion to grant the relief, but could do so only if it is convinced that this would be compatible with the public interest.

The "at all times" requirement meant that a minor violation of the terms of probation would make the offender permanently ineligible for this relief, even if there had been no probation violation proceeding or the court had not found the defendant in violation of the terms of probation. See, *State v. Thompson*, 140 Idaho 796, 102 P.3d 1115 (2004) (defendant failed to make restitution payments, but probation violation charge was dropped who probation officer reported at hearing that the defendant was now current

on payments; defendant was ineligible for relief under Idaho Code § 19-2604). HB 226 provides that an offender may still be eligible to have a conviction set aside as long as there no admission or finding, in a probation violation proceeding, of a violation of the terms of probation.

### Collection of debts owed to the courts

Idaho Code § 19-4708 has allowed district court clerks, with the approval of the administrative district judge, to enter into contracts with collections agencies for the collection of debts owed to the courts. These debts include fines, court costs, fees, restitution and other payments ordered in criminal cases. HB 67 will permit the Supreme Court to enter into state-wide contracts with collection services for the collection of these debts. It is hoped that this will result in more efficient collection of these court-ordered payments.

### Service of out-of-state defendants

Idaho Code § 5-508 is a statute that dates back to 1907. It has provided that a plaintiff who wishes to effect service on a defendant who is out of state can submit an affidavit to the court and get an order permitting out-of-state service.

But in 1961 Idaho adopted its "long arm" statute, Idaho Code § 5-514, giving Idaho courts jurisdiction over many out-of-state persons and entities. Idaho Code § 5-515 states that those subject to Idaho jurisdiction may be served personally outside the state "with the same force and effect as though summons had been personally served within this state." In view of this provision, the submission of an affidavit and the obtaining of a court order are no longer necessary to effect out-of-state service, as the Supreme Court held 45 years ago. *B.B.P. Association, Inc. v.*

*Cessna Aircraft Co.*, 91 Idaho 259, 420 P.2d 134 (1966).

Despite this, some lawyers still sought to obtain court orders permitting out-of-state service. SB 1009 is aimed at removing this confusion. It amends Idaho Code § 5-508 by eliminating the language regarding obtaining a court order to permit out-of-state service, and adds language stating that service upon any person subject to the jurisdiction of Idaho courts under Idaho Code § 5-514 may be made in the manner provided by Idaho Code § 5-515.

### Notice of hearing on motions to modify child support withholding

Under Idaho Code § 32-1215, a person who is subject to an income withholding order to satisfy a child support obligation may file a motion to quash, modify or terminate the withholding order. The statute has provided that a copy of the motion and notice of the hearing on the motion must be served upon the obligee at least five days before the hearing. This conflicts with Rule 7(b)(3) of the Idaho Rules of Civil Procedure, which requires at least 14 days' notice of the hearing on any motion. SB 1010 removes this conflict by removing the five days' notice provision from the statute and stating that notice is to be given in the time and manner provided by the Idaho Rules of Civil Procedure.

### About the Author

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



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## FIVE TOOLS FOR WRITING FIXES: STOCKING THE LEGAL WRITER'S TOOLBOX

Tenielle Fordyce-Ruff  
*Smith, Fordyce-Ruff & Penny,*  
PLLC

As a child I was fascinated by my grandfather's toolbox. Because my father fixed everything with duct tape, my mother frequently had to call her own father for house repairs. He would arrive carrying a green, homemade wooden toolbox that always had exactly what he needed to complete the job. Stuck door? Out came the file to get rid of that pesky bit of wood that was catching on the frame. Leaky water-heater? He arrived with a selection of pipe wrenches (and a razor to cut through Dad's duct tape fix!). Had I become a carpenter, I would have loved to inherit his toolbox.

Instead, I went to law school, so I've had to create my own toolbox. Through trial and error, I've learned the resources I need to remedy a sticky writing problem. So long as I keep five resources at my fingertips, I can answer almost every question I have while drafting and easily fix any writing problems I encounter at the editing or polishing stage. Add a desk book, grammar guide, usage dictionary, writing text, and citation manual to your toolbox, and you'll find that your writing goes much more smoothly.



Tenielle Fordyce-Ruff

### Procedural rules

First, every attorney should keep copies of the procedural rules handy. By keeping copies of procedural and local rules at your disposal, you will never wonder for long about the page limits for a brief or whether you need to number the lines in a document. Fortunately, Idaho attorneys can keep important rules handy either in print or online. Both Michie and Thomson include the Idaho Court Rules in their print versions of the Idaho Code. If you prefer not to clutter your workspace, the website of Idaho courts provides a link to these rules and more: <http://www.isc.idaho.gov/rulestxt.htm>. You can easily bookmark it in your browser and refer to it whenever you have formatting or filing questions.



### Grammar guide

Because our profession puts such a premium on clear communication, every attorney should invest in a good grammar guide. You should choose a grammar guide that you are comfortable using and that has enough depth to contain lesser-known rules. If you already have a grammar guide, pull it out and keep it handy. If you're looking for a good grammar guide, I love the *Chicago Manual of Style*, but it's a thick book with a lot of detail, which can be overwhelming. The *Aspen Handbook for Legal Writers: A Practical Reference* by Deborah E. Bouchoux has a very accessible section on grammar, punctuation, and spelling. And of course, Bryan Garner's *The Redbook: A Manual on Legal Style* likewise has excellent sections on grammar and punctuation, both filled with legal examples to help the reader understand the rules. Either of these last two guides will serve you well, and as an added bonus each covers style.

No matter which grammar guide you choose, customize it. It's a great idea to add tabs to the pages containing the rules you struggle with and those you consult often. Once you have settled on a guide and made it your own, it's easy to quickly determine if the words you've written convey the meaning you intend.

### Usage dictionary

If I know my sentence is grammatically correct, but I'm still struggling, I'm likely having a wording problem. So I've learned to keep a usage dictionary handy. I prefer a usage dictionary to a standard dictionary because it offers details about how to use words, not just their meaning. Moreover, these dictionaries tell you whether a particular usage is widely accepted. Such information is great to have at your fingertips, particularly if you want your analysis or argument to shine without awkward words distracting the reader.

*No matter which grammar guide you choose, customize it. It's a great idea to add tabs to the pages containing the rules you struggle with and those you consult often.*

If you don't have a usage dictionary, consider looking for Miriam-Webster's *Dictionary of English Usage*, Henry Fowler's *A Dictionary of Modern English Usage*, or Garner's *Modern American Usage*. These are general, but very easy to use. Of course, *A Dictionary of Modern Legal Usage* by Bryan Garner is another great choice and particularly useful to attorneys because it's tailored to legal writers.

### Writing text

Yes, attorneys are professional writers, not professional students. However, we are also busy writers and sometimes we just need a quick answer about a better way to structure an argument or a helpful reminder about persuasive writing techniques. When I simply cannot think of a better way to write what I am attempting to get down on the page, a quick glance at a legal writing text has saved me time and mental effort.

If you still have your legal writing text from law school, keep it where you do most of your writing. Chances are your

familiarity with its structure will help you find quick answers or guidance. If you no longer have one, or yours is out-of-date, consider finding another to keep handy. *A Lawyer Writes: A Practical Guide to Legal Analysis* by Christine Coughlin, Joan Malmud, and Sandy Patrick has great practical advice about creating well-organized professional intra-office documents. For advocacy documents, *Just Briefs* by Laurel Oates, Anne Enquist, and Constance Krontz has wonderful advice on persuasive techniques and practical considerations when drafting advocacy documents. *A Practical Guide to Appellate Advocacy* by Mary Beth Beazley is another great choice for the sophisticated brief writer who needs some quick advice or wants to improve her writing.

### Citation manual

Finally, no legal document is polished until the citations are perfect, so every legal writer needs to have a citation manual within arm's reach. Either *The Bluebook: A Uniform System of Citation* or the *ALWD Citation Manual: A Professional System of Citation* can be used in Idaho. The resulting citations will be virtually identical. I find that *ALWD* is easier to use because it is designed for practitioners, and I prefer the structure of having all the rules for one type of citation in one section. Once again, you should make your

*Finally, no legal document is polished until the citations are perfect, so every legal writer needs to have a citation manual within arm's reach.*

citation manual your own. Put tabs on the rules you use frequently or highlight abbreviations that give you trouble. Really make the book function for you.

### Conclusion

Crafting well-written, perfectly edited and polished documents becomes much easier once you add simple tools to your toolbox. Take some time to assemble these five tools, and you will be able to quickly fix your next pesky writing problem. I'm off to see if I can find a lovely wooden box for my books. I just might paint it green and keep it on my desk!

### Source

Eugene Volokh, *Correcting Students' Usage Errors*, 58 J. LEGAL EDUC. 533, 537 (2009).

*A version of this essay appeared in the Legal Writer Column of the June, 2010 issue of the Oregon Bar Bulletin.*

### About the Author

**Tenielle Fordyce-Ruff** is a member of Smith, Fordyce-Ruff & Penny, PLLC. 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. You can reach her at [tfordyce-ruff@sfrplaw.com](mailto:tfordyce-ruff@sfrplaw.com).

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## CAROL CRAIGHILL REFLECTS ON HELPING LOW-INCOME CLIENTS

During her 19 years at the Idaho Volunteer Lawyers Program, Carol Craighill developed a soft spot for Idaho attorneys willing to help those who can't afford legal services.

"The entire profession is about service," she said. "I feel good about the profession to see them do this work. It's really a privilege to be working with them."

Carol will leave the Idaho Law Foundation in June to do contract work for the National Association of Pro Bono Professionals. She'll assist with membership and the organization's annual conference working part time from Boise.

The high point from two decades with IVLP, Carol said, has included "working with the attorneys and seeing their generosity and professionalism – seeing how respectfully they work with low-income clients."

Carol started out in 1990 as the intake coordinator under then-IVLP director Denise O'Donnell Day. The intake coordinator talks with potential clients about what they need and establishes whether or not the person is eligible for free legal services.

Before coming to Idaho Law Foundation, Carol worked as a community organizer, educator and paralegal at Idaho Legal Aid in Pocatello. All those experiences helped develop an appreciation for what Idaho Volunteer Lawyers Program can do.

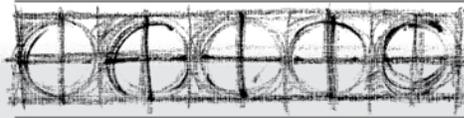
Working with victims of sexual and domestic violence, she said, requires a holistic approach involving several professions. "It's a puzzle," she said, with assistance and empowerment coming from counseling, shelters, monetary assistance and legal services.

Seeing how IVLP fits in among other community services is key. "IVLP is all about partnerships," Carol said. "We need those partnerships. Unfortunately,

*Pro bono is definitely a peak experience for many of our volunteer attorneys.*

— Carol Craighill

### IDAHO LAW FOUNDATION



*Helping the profession serve the public*



Carol Craighill ended 19 years at the Idaho Law Foundation's Idaho Volunteer Lawyers Program in May. She will continue working with the National Association of Pro Bono Professionals.

there are just not enough resources so prioritizing is essential."

An abusive relationship can be difficult to leave, Carol said. "Where will she go? Who will take the kids to the doctor or to day care? How will she survive? It's easy to write off some problems as due to laziness or selfishness, but there are complex reasons. She needs the village."

Part of the screening process clarifies the client's responsibility to "help them focus" on how to resolve a difficult situation, Carol said. It also helps make any pro bono work have more impact. That's part of the empowerment role of IVLP.

"We try to hear where they are, to see how we can help," she said.

In keeping with that empowerment philosophy, Carol oversaw the Program as it worked with the court, conducting pro se workshops, which eventually be-

came Court Assistance Offices, an important resource for those unable to pay for simple advocacy.

"Pro bono is definitely a peak experience for many of our volunteer attorneys," she said, adding that with the creation of the Pro Bono Commission and other efforts, "The amount of pro bono is definitely increasing. There is real progress. It's very encouraging."

It appears her appetite for public service will follow Carol into retirement. She looks forward to her role at the National Association of Pro Bono Professionals, where she has been a member and has served on various committees. For a vacation, she plans a trip with her husband to Costa Rica for a service project. "That's just who I am," she said.

- Dan Black

# LAWYER ASSISTANCE PROGRAM ADDRESSES COMPLEXITY OF ADDICTIONS

Jamie Shropshire  
Chairperson, LAP Committee

Alcoholism, drug abuse and mental health issues affect a great number of the population in general and more so for the legal profession. Studies report that while about 10% of the general population is affected by alcohol abuse, anywhere from 15% to 18% of the legal profession is afflicted with the same problem. Many lawyers and judges carry large workloads and have daily pressures that can lead to inordinate stress. Frequently, this leads to an “escape” through the use of alcohol or drugs. Recent national reports have shown that the majority of disciplinary issues involve some form of chemical dependency or abuse or emotional stress.

In response to this critical problem, in 2001, the Idaho State Bar Board of Commissioners established the Idaho Lawyer Assistance Program (LAP) and appointed a committee of lawyers and judges to serve on the LAP Committee. The Committee and the State Bar also has the services of Southworth Associates, a drug and alcohol counseling center to provide professional oversight of lawyers who have taken advantage of the program.

Participation in the program is voluntary and the Committee seeks to help support lawyers and judges who are experiencing problems with alcohol, drug abuse and mental health issues. All services are confidential and Committee members are not informed of the names of the lawyers who are being served.

The program also provides education to the legal profession and to the family and friends of those experiencing problems about the causes, effects, and treatment available to their colleagues and relatives. The “LAP Survival Guide for Lawyers” is available on the ISB website at: [http://isb.idaho.gov/member\\_services/lap.html#guide](http://isb.idaho.gov/member_services/lap.html#guide).

The program provides:

- A twenty-four hour confidential phone line.
- Guidance for the impaired lawyer and referral services.



Jamie Shropshire

*Guilt and shame drive it underground. But it's a disease like cancer or diabetes. The problem with this disease is that people wait until it's too late.*

— John Southworth

- Educational information relating to alcohol, drug abuse and mental health treatment.
- Monitoring, interventions and family support.
- Guidance and assistance in re-entering the workplace.
- Assistance in finding lawyers who will volunteer time as a temporary replacement for those lawyers going to treatment.
- Recommendations for appropriate treatment centers.

If you know of lawyer who needs the help of the committee, or if you are in need of help with addiction, chemical abuse or

mental health issues you can contact the 24 hour hotline at: (866) 460-9014, or contact Southworth Associates at: (208) 891-4726. You can also reach them by email at: [Southworth.associates@gmail.com](mailto:Southworth.associates@gmail.com) or visit their website at: [www.southworthassociates.net](http://www.southworthassociates.net). The State Bar also publishes a pamphlet with all of the Committee contacts and additional information which is available by contacting the Bar.

All calls and information given to the Committee and to Southworth Associates are confidential. The Committee is not connected to the disciplinary staff of the State Bar. While you may find it difficult to reach out for help, especially for a colleague, you may be saving his or her life and career.

## Addictions take their toll

Even common prescription drugs pose a risk to those vulnerable to addictions. Sober for 20 years, John Southworth knows all about it. He has gone through his share of hitting bottom and climbing back – accumulating hard-earned lessons he has passed along during his 19 years as a chemical dependency counselor.

John is the principal at Southworth Associates, which contracts with the Idaho State Bar to help attorneys address substance abuse and addictive behavior. The company helps those in other high-stress professions including athletes, musicians, actors, dentists and doctors. John said among many contributing factors the primary cause of addiction is found in a person's genetics.

“Guilt and shame drive it underground. But it's a disease like cancer or diabetes. The problem with this disease is that people wait until it's too late,” John said. “They think, ‘I can handle it.’ Denial is always there. But there are warning signs.”

He said those signs can include depression, absenteeism, or doctor-shopping for prescriptions. People in high-stress

situations need to be aware that use can become abuse, even for common medications. Some people develop marital problems, or come to associate exclusively with other users. In later stages, addiction to alcohol or other drugs can manifest as psychosis, grandiose behavior, or in manic episodes, as displayed by Charlie Sheen's now-famous rants.

Those who get a confidential evaluation, he said, are being proactive, and stand a real chance at recovery. Otherwise, “addiction is a fatal disease.”

Southworth hangs his reputation on a simple slogan, “Lending a hand any time, any place.” He said it's important for those with any doubts about substance abuse call for an evaluation. Those wanting help can get it, he said, at treatment facilities that are confidential and have a good track record. “Don't guess, just call,” he said, adding he has built a network of treatment options around the world.

John's work helping people deal with their addictive behaviors is featured on the Emmy-award winning reality television series “Intervention” that airs on A&E Channel on Monday nights. It's one of the ways to build awareness about addiction, he said.

— Dan Black

## IDAHO ACADEMY OF LEADERSHIP FOR LAWYERS TO DEBUT IN SEPTEMBER

Attorneys, perhaps more than others, find themselves in leadership roles. But leadership, which means how we manage change, requires distinct skills. "If we study the science of leadership," said Cassia County Magistrate Judge Mick Hodges, "It could make us more effective in what we do."

Judge Hodges serves on a steering committee to develop a leadership training program in Idaho. It will debut this fall. Idaho State Bar Deputy Director Mahmood Sheikh said the Idaho Academy of Leadership for Lawyers will provide executive training specialized for the legal profession.

ISB President Deborah Ferguson said she wanted to see a leadership program in Idaho and that the shape and scope of the program was developed through extensive research. In late 2007, then-ISB Deputy Director Terri Muse suggested the idea, which earned the ISB Board of Commissioners' approval in 2008. Sheikh said leadership programs from 17 state bars were studied.

The Idaho program's scope was partially developed by Roland B. Smith, Ph.D., senior faculty at the Center for Creative Leadership, a nonprofit global institution devoted to leadership development and research. Smith's involvement "brings a lot of value to the program," Ferguson said, adding that he started a successful program for the North Carolina Bar that serves as a model. "I hope we are establishing something for the long term."



Roland B. Smith

*Topics will address essential leadership skills such as communication, team dynamics, self-awareness, strategic planning, consensus, wellness, and personal balance.*

Sheikh said participants will develop leadership skills for their employee, for the community and will get mentoring from existing leaders. The program will help attorneys recognize their own personal leadership style and make the most of it, Judge Hodges said. "The networking, alone, will be a huge asset for participants."

Sheikh said the one-year program will include six sessions and applications will be available starting June 24 from the Idaho State Bar website, [www.isb.idaho.gov](http://www.isb.idaho.gov) and the Law Center in Boise. He said class size will be limited to 12-15 people representing a spectrum of attorneys. Applicants will need to have been licensed for 5 years and be in good standing with the Bar. Smith, based in Colorado Springs, said those selected must foremost be accomplished in practicing law.

The steering committee will make the selections and the registration cost will be \$750, which pays for group meals, course materials and programming. He said some assistance will be available for those unable to meet the expense.

Topics will address essential leadership skills such as communication, team dynamics, self-awareness, strategic planning, consensus, wellness, and personal balance. Sessions will be interactive,

Sheikh said, adding that presenters will include civic leaders, politicians, attorneys and professional development experts. In the future, the ISB Annual Meeting will serve as a touchstone, with graduation ceremony and the possible announcement of new participants.

When asked to help plan the seminar, Smith said, "The committee wanted a world-class program that meets the needs of Idaho Lawyers."

Smith, who will teach during the first session, may be a globe-trotting guru to executives, but he has considerable Idaho connections. He earned his Bachelor's degree in Finance and a Master's degree in Instructional/Performance Technology from Boise State University, and his Ph.D. from the University of Idaho. Those interested in discussing the program can contact Sheikh at (208)334-4500.

### Key dates:

- June 24 - Applications will be available from the ISB website and the Law Center in Boise.
- Aug. 5 - Deadline for applications.
- Aug. 15 - Selected participants will be announced.
- September 23,24 - Inaugural session begins.

— Dan Black

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## IN MEMORIAM

### Robert Marion Kerr, Jr. 1914 - 2011

Robert Marion Kerr Jr., the oldest living continually licensed attorney in the State of Idaho, died on April 28, 2011 at his home in Mapleton, Utah, at the age of 97.

He graduated with a law degree from the University of Idaho in 1936 at age 22. He served as an assistant to the Attorney General for the State of Idaho, as Bingham County prosecutor, and maintained an active legal practice for 66 years. In World War II, he was a flight instructor in the Army Air Corp.

Active in the Boy Scouts of America throughout his life, he also served as President of the Tendoy Scout Council and was awarded the Silver Beaver. As a dedicated member of the Church of Jesus Christ of Latter-day Saints his church service included over 20 years in the stake presidency as a counselor and stake president. He served as a counselor to two temple presidents in the Idaho Falls Temple.

He married Aloha McMurray on April 1, 1942 in the Logan Temple and they had five children. Aloha died in 1969. He married Ann Thueson a year later.

Funeral services were held at the Blackfoot Stake Center, 1650 Highland Dr., Blackfoot, Idaho, on May 3.

### Judge Thomas G. Nelson 1937 - 2011

The Hon. Thomas G. Nelson, a senior judge of the United States Court of Appeals for the Ninth Circuit and longtime leader in professional organizations, died May 4, 2011, at his home in Boise, Idaho. He was 74.

Judge Nelson served the bar in various capacities over the years. He was president of the Idaho State Bar, the Idaho Chapter of the American Board of Trial Advocates and



Robert Marion Kerr, Jr.

the Idaho Association of Defense Counsel. He served two terms on the Idaho Supreme Court Committee on Appellate Rules. He was a Fellow of the American College of Trial Lawyers and the American Bar Foundation, and a member of the American Judicature Society and the American Bar Association, serving in its House of Delegates in 1974 and from 1987 to 1989.

Nominated by President George H.W. Bush, Judge Nelson received his judicial commission in 1990. He took senior status on November 14, 2003, but continued hearing cases through 2009. He maintained his chambers in Boise until last December. At the time of his death, he ranked 23rd in seniority among the court's 46 active and senior judges.

"Judge Nelson was widely respected by the bench and bar. His decisions reflected both legal acumen and common sense. And he did much to advance the practice of law in his home state and the nation," said Chief Judge Alex Kozinski of the Ninth Circuit Court of Appeals.

Prior to coming onto the federal bench, Judge Nelson was in private practice in Twin Falls, Idaho. He worked at Parry, Robertson and Daly from 1965 to 1979, and was a principal partner at Nelson, Rosholt, Robertson, Tolman & Tucker from 1979 until his federal appointment. He began his legal career in the Idaho Office of the State Attorney General, where he worked from 1963 to 1965 as an assistant state attorney general, then as chief deputy state attorney general.

While a member of the U.S. Army Reserve, he served in the Judge Advocate General's Corps from 1965 to 1968. Judge Nelson attended the University of Idaho College of Law, receiving his LL.B. in 1962.

Active in the community, Judge Nelson served on the Twin Falls City Council and as a director of the local United Way. He chaired citizen committees that established a temporary shelter for non-delinquent children and a facility providing special services to children with developmental disabilities.

Noteworthy opinions authored by Judge Nelson include:

In re Slatkin, 525 F.3d 805 (9th Cir. 2008), a bankruptcy case that held that once the existence of a Ponzi scheme was established, payments received by inves-

tors as purported profits were deemed to be fraudulent transfers as a matter of law. The case involved a massive scheme in which hundreds of investors lost a total of more than \$240 million.

LaGrand v. Stewart, 173 F.3d 1144 (9th Cir. 1999), which held that Arizona's use of lethal gas to execute inmates was unconstitutional, and that petitioner had not waived his right to challenge the method simply because he had chosen it over lethal injection.

U.S. Court of Appeals Judge N. Randy Smith of Pocatello, said, "Judge Nelson was very bright, succinct, and well prepared in all that he did. He was an excellent trial lawyer and a better judge. I always said that Tom Nelson did law work the old fashioned way, he earned a great reputation and wonderful results for his clients with hard work and preparation. He was always courteous and cordial with everyone. Judge Nelson always had a good story to tell everyone; one could never leave speaking with him without a chuckle or a hard laugh."

Judge Nelson is survived by his wife of nearly 30 years, Sharon and their four children, Kyle Nelson and Curt Cutler of Boise, Hal Nelson of Claremont, California, and Carrie Musicant of San Diego.

Memorial services for Judge Nelson will be held in Boise on September 16.

### Ronald Dean Stephenson 1943 -2011

Longtime non-lawyer member of the Idaho State Bar's Professional Conduct Board, Ronald Dean Stephenson died on May 4, 2011, after battling esophageal cancer for a year. He was the subject of a feature article in the May issue of *The Advocate*.

Ron served as Commissioner of the Big Sky Conference after a career in college athletics. He worked under storied Boise State coach Lyle Peterson, and served in numerous community leadership positions.

Survivors include his wife Barbara of Boise, his sons, Mike and Caden Stephenson serving in the U.S. Army.



Ronald Dean Stephenson



Hon. Thomas G. Nelson

**Mathieu and Ranum  
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Elizabeth L. Mathieu, Esq. and Carla Ranum, Esq. announced the launch of Mathieu & Ranum, PLLC a law firm dedicated to trust, estate, charitable, and business succession planning with offices in Boise and Sun Valley.

**Elizabeth Mathieu** has been providing Federal tax, fiduciary and planning guidance to individuals and tax-exempt organizations since 1991 at the Chase Manhattan Private Bank, Neuberger Berman Trust Companies, AMA-Eagle, a multi-family office, and in her own firm in New York. She recently moved to Idaho and joined the Idaho Bar to practice law.

Her articles have been published in the *Journal of Estate Planning*; *Journal of Gift Planning*; *Journal of Private Portfolio Management*, etc. She has been quoted in *Forbes*, *Fortune*, and the *Financial Times*.

She has addressed such groups as the American Bar Association, the Securities Industry Institute, various state and local bar associations.

Elizabeth is licensed to practice law in Idaho, New York and before the US Supreme Court. She is a member of the Idaho State Bar's Taxation, Probate and Trust Law, and Family Law, Sections, the New York State Bar Association, the American Bar Association, and the Society of Trust and Estate Practitioners. She is a past member of Boards and Treasurer of both the Committee of 200 and its foundation, as well as past member of the board of the Estate Planning Council of New York City.

She holds a BA from Vassar College, a JD from Suffolk University Law School, and a Masters in International Affairs from Columbia University. She is a member of the Society of Trust and Estate Practitioners and is licensed to practice law in Idaho, New York, and before the US Supreme Court.

**Carla Ranum** has been practicing law for 19 years both in the US and abroad and has been in private practice in Boise, Idaho since 2004. Ms. Ranum focuses on estate, retirement, and business succession planning. She also practices, and has extensive experience in, domestic and in-



Elizabeth L. Mathieu

ternational business law. She is a member of Idaho State Bar Taxation, Probate and Trust Law Section.

Before entering private practice, Carla held senior legal positions in several large companies in Bermuda and Chicago, providing a broad range of transactional and business structuring advice and legal services across multiple jurisdictions. Carla's experience includes simple and complex estate planning, business formations, acquisitions and succession planning; corporate governance; joint ventures; negotiating and structuring business transactions; advice on tax and regulatory issues; and evaluation of hedge funds, capital market and insurance products for estates and insurance companies.

Carla holds a BA from University of New Mexico, a JD from DePaul College of Law in Chicago, an MBA from the University of Texas at Austin, and an ARM from the Illinois Insurance Institute. She is licensed to practice law in Idaho and Illinois and is an approved FINRA arbitrator.

For more information, please visit [www.mathieuranum.com](http://www.mathieuranum.com) or contact the Boise/Garden City office at (208) 375-5249 or the Sun Valley office at (208) 928-6975.

**Judd hired by Trout Jones  
Gledhill Fuhrman Gourley**

Trout Jones Gledhill Fuhrman Gourley, P.A. is pleased to announce the addition of a new attorney to its firm. **Erika P. Judd** (Associate) joined the firm in April 2011.

Erika Judd practices primarily in the areas of commercial litigation, construction litigation, real estate, insurance defense, criminal defense, and family law.

Erika received her J.D. from the University of Idaho in 2009, where she was a member of the Bankruptcy Moot Court Team, president of the Board of Student Advocates, and a legal intern with the



Carla Ranum

Small Business Legal Aid Clinic. Following graduation, Erika clerked for the Hon. Thomas J. Ryan, Third Judicial District of Idaho, chambered in Caldwell, Idaho. Erika's clerkship provided her with an opportunity to gain experience in nearly all aspects of criminal and civil litigation and the judicial process.

Erika is admitted to practice in all courts in the State of Idaho, and the United States District Courts of Idaho.

**Coyne joins Martelle, Bratton**

**Justie Coyne** has joined the firm of Martelle, Bratton and Associates as an associate attorney. Ms. Coyne is focusing her practice primarily on bankruptcy and mortgage loan modifications.



Justie Coyne

Justie obtained her J.D. from the University of Denver Sturm College of Law in 2007. Justie is also a 2004 graduate of Colorado State University, where she obtained Bachelor's degrees in Accounting and Political Science while completing the in-depth Honors Program and Thesis. Justie was licensed to practice law in Colorado in 2007 and has been an active member in good standing since then.

Justie moved to Idaho last year and was sworn in to practice law the fall of 2010. Justie is a member of Idaho Women Lawyers, Idaho Young Lawyers.

**Wasden opens firm**

**Mark R. Wasden** announced the opening of Wasden Law Offices in March 2011. The practice focuses on all aspects of Worker's Compensation, Personal Injury, Wills, Trusts, Guardianships and Conservatorships. Mr. Wasden received his JD from the University of Idaho in 1991. He clerked for the Honorable Daniel Meehl and the Honorable J. William Hart for 2 years prior to entering private practice.



Mark R. Wasden

Wasden Law Offices can be contacted at 208-734-3883 or by email at [mrw@qwestoffice.net](mailto:mrw@qwestoffice.net). The office is located at 137 Gooding St. West, Twin Falls, ID 83303.

**NEW ADMITTEES  
 DIRECTORY UPDATES  
 Admitted 04/28/11 and 4/29/11**

Andrew A. Adams  
 Sarah Marie Anderson  
 Michael John Archibald  
 Brian Taylor Aune  
 Brian J. Babcock  
 Timothy Daniel Beaubien  
 Lane Arland Blake  
 Daniel A. Brown  
 George R. Brown  
 Ryan Channon Bush  
 Jessica Cafferty  
 Brett Raymond Cahoon  
 Jonathan Joseph Cavanagh  
 Jennifer Rose Chadband  
 Kara Lanette Chatterton  
 Bradley Clayton Crockett  
 Matthew Zachary Crotty  
 Ramina Dehkhoda-Steele  
 Jason Reilly Doucette  
 Bryninn Tyel Erickson  
 David Mark Gaba  
 Janelle Rae Gates  
 John Stuart Grover  
 Michael C. Hale  
 Gregory K. Hardee  
 John Edward Hayes III  
 Tyler Vance Heath



Gregory Curtis Hesler  
 Scott James Hoffert  
 Alison Gorczyca Johnson  
 Tige Keller  
 Jeremy George Knight  
 Joe R. Larson  
 Stephanie Michelle Lemmon

Kelly Christina Lotz  
 Lucas Todd Malek  
 Dustin Whitney Manwaring  
 Elham Marder  
 Kenneth W. Maxwell  
 Justin Jeremiah McCarthy  
 Philip A. McGrane

Sarah Kathryn Mello  
 William Jake O'Connor  
 Nathan Spear Ohler  
 Jacqueline Racquel Papez  
 Christian J. Phelps  
 Nathan Dane Rivera  
 Jennifer April Roark  
 Ashley Rokyta  
 Brandon Roper  
 Dale L Russell  
 Robert Stephen Russell  
 Jeffrey S. Salisbury  
 Ryan Matthew Scoville  
 Randy Lee Searle  
 John Richard Shackelford  
 Leah F. Shotwell  
 Adam Michael Starr  
 Kimberli Ann Stretch  
 Vincent G. Toenjes  
 Jennifer C. Underwood  
 Joseph Mark Wager Jr.  
 Jason D. Wagner  
 Keith Scott Weiser  
 Brian Michael Werst  
 Kendall Aline Woodcock



The University of Idaho College of Law would like to congratulate our graduates who passed the February 2011 Idaho State Bar Exam:

Michael John Archibald  
 George R. Brown  
 Brett Raymond Cahoon  
 Jennifer Rose Chadband  
 Bryninn Tyel Erickson  
 Gregory K. Hardee  
 Joseph Chaddock Hickey  
 Lucas Todd Malek

Lyndon Phuoc Nguyen  
 Jacqueline Racquel Papez  
 Jennifer April Roark  
 Ashley Rokyta  
 Andreas Christian Schou  
 Leah F. Shotwell  
 Kimberli Ann Stretch  
 Jason D. Wagner

**University of Idaho**  
 College of Law

## July 2011 Idaho State Bar Examination Applicants (as of May 6, 2011)

Listed below are the applicants who have applied to sit for the July 2011 Bar Examination. The Board of Commissioners publishes the names of these applicants for your review and requests any information of a material nature concerning moral character and fitness of an applicant be brought to the attention of the board of Commissioners in a signed letter by June 15, 2011. Direct correspondence to: Admissions Administrator, Idaho State Bar, PO Box 895, Boise, ID, 83701.

**Michael George Ackerman**  
San Jose, CA  
*University of California,  
Hastings College of Law*

**Gregory Afghani**  
aka Gregory Houman Afghani  
Orange, CA  
*University of Montana School  
of Law*

**Jeremy J. Andrew**  
Oakley, ID  
*The Thomas M. Cooley Law  
School*

**David Hughes Arkoosh**  
Boise, ID  
*University of Idaho College of  
Law*

**Kathleen Renee Arnold**  
Moscow, ID  
*University of Idaho College of  
Law*

**Nancy Heiner Austin**  
aka Nancy Heiner  
Twin Falls, ID  
*The University of Chicago Law  
School*

**Stephanie Hall Barclay**  
aka Stephanie Hall  
Paul, ID  
*Brigham Young University*

**Mistie Marie Bauscher**  
Boise, ID  
*University of Idaho College of  
Law*

**Brian John Bean**  
Spokane, WA  
*Gonzaga University*

**Gregory Scott Bean**  
Idaho Falls, ID  
*William & Mary Law School*

**Kristian Scott Beckett**  
Sammamish, WA  
*University of Idaho College of  
Law*

**Kenton Abrams Beckstead**  
Alexandria, VA  
*Georgetown University Law  
Center*

**Danielle June Berish**  
Moscow, ID  
*University of Idaho College of  
Law*

**Allison Mima Blackman**  
Boise, ID  
*University of Idaho College of  
Law*

**Emmi L. Blades**  
aka Emmi L. Zollman  
Moscow, ID  
*University of Idaho College of  
Law*

**Robert Mark Bleazard**  
Boise, ID  
*University of Idaho College of  
Law*

**Daniel Tsubasa Blocksom**  
Menlo Park, CA  
*Stanford University Law  
School*

**Shawn D. Boyle**  
Boise, ID  
*University of Idaho College of  
Law*

**Ronald Walter Brilliant**  
Boise, ID  
*Whittier Law School*

**Jason Michael Brown**  
Moscow, ID  
*University of Idaho College of  
Law*

**Sarah Kathleen Brown**  
aka Sarah K. Schmid  
Boise, ID  
*University of Idaho College of  
Law*

**Bret F. Busacker**  
Boise, ID  
*The Ohio State University  
Moritz College of Law*

**Thomas Maxson Callery**  
Boise, ID  
*University of South Dakota  
School of Law*

**Jonathan Charles Callister**  
Henderson, NV  
*Penn State University, The  
Dickinson School of Law*

**Lesley Nicole Casner**  
aka Lesley Nicole Turner  
Appomatox, VA  
*Liberty University School of  
Law*

**Felicity Abigail Miranda  
Chamberlain**  
Issaquah, WA  
*University of Oregon School  
of Law*

**William Dustin Charters**  
Moscow, ID  
*University of Idaho College of  
Law*

**Shannon Marie Clark**  
aka Shannon Marie Farmer  
Moscow, ID  
*University of Idaho College of  
Law*

**Kiley Cobb**  
Moscow, ID  
*University of Idaho College of  
Law*

**Ruth Coose**  
aka Ruth Amanda Wooldridge  
Moscow, ID  
*University of Idaho College of  
Law*

**Kellen C. Corbett**  
Grace, ID  
*Gonzaga University*

**Sean H. Costello**  
Boise, ID  
*University of Idaho College of  
Law*

**Jeffrey Lee Cotton II**  
Moscow, ID  
*University of Idaho College of  
Law*

**Ryan Jeffrey Crandall**  
Moscow, ID  
*University of Idaho College of  
Law*

**Tanner Fred Crowther**  
Moscow, ID  
*University of Idaho College of  
Law*

**S. Ellis Cunningham**  
Salem, OR  
*Willamette University College  
of Law*

**Robert Maxwell Curran**  
Ketchum, ID  
*Seattle University School of  
Law*

**Thomas Richard Cuthbert**  
Roseville, MN  
*Hamline University*

**Brian Richard Dickson**  
Moscow, ID  
*University of Idaho College of  
Law*

**Tyson James Dobbs**  
Henderson, NV  
*Gonzaga University*

**Ryan Staker Dustin**  
Moscow, ID  
*University of Idaho College of  
Law*

**Michael K. Englesby**  
Moscow, ID  
*University of Idaho College of  
Law*

**Theodore James Fairchild**  
aka Jimmy Fairchild  
aka Jim Fairchild  
Ketchum, ID  
*University of Idaho College of  
Law*

**Megan J. Fernandez**  
Idaho Falls, ID  
*University of Idaho College of  
Law*

**Michael John Ferrigno**  
Arlington, VA  
*Catholic University of America,  
Columbus School of Law*

**Arthur E. Fisher**  
Siletz, OR  
*University of California,  
Hastings College of Law*

**Dean Rosser Floerchinger**  
Spokane, WA  
*Gonzaga University*

**Fredrick William Freeman**  
Caldwell, ID  
*University of Idaho College of  
Law*

**Willow C.G. Fuentes**  
Seattle, WA  
*University of Miami School of  
Law*

**Jay Eugene Fuson**  
Vale, OR  
*University of South Dakota  
School of Law*

## July 2011 Idaho State Bar Examination Applicants (as of May 6, 2011)

**Jonathan M. Gaffney**  
Washington, DC  
*The George Washington  
University Law School*

**Donald James Gamble**  
Moscow, ID  
*University of Idaho College of  
Law*

**Reyes Junior Garcia**  
Boise, ID  
*University of Idaho College of  
Law*

**Mary R. Grant**  
Boise, ID  
*University of Idaho College of  
Law*

**Matthew Gunn**  
Boise, ID  
*Columbia University School  
of Law*

**Gregory Thomas Haller**  
Lewiston, ID  
*University of Idaho College of  
Law*

**Isaac Steven Hardman**  
Moscow, ID  
*University of Idaho College of  
Law*

**Jennifer Ann Hearne**  
aka Jennifer Shaub  
Boise, ID  
*University of Idaho College of  
Law*

**Cheyenne Moana House**  
Ketchum, ID  
*University of Idaho College of  
Law*

**Gregory Russell Hurn**  
Nampa, ID  
*University of Idaho College of  
Law*

**Tara Jalali**  
Moscow, ID  
*University of Idaho College of  
Law*

**Timothy Steven Jones**  
Cincinnati, OH  
*University of Cincinnati  
College of Law*

**Andrew Seth Jorgensen**  
Moscow, ID  
*University of Idaho College of  
Law*

**Thomas J. Katsilometes**  
Boise, ID  
*University of Utah S.J.  
Quinney College of Law*

**Cameron Oatman Kistler**  
New Haven, CT  
*Yale Law School*

**Amy Kathleen Klind**  
Seattle, WA  
*Seattle University School of  
Law*

**Aaron Jacob Kraft**  
Boise, ID  
*University of Oregon School  
of Law*

**Rebecca Ann Kulaga**  
aka Rebecca Ann Elder  
Council Bluffs, IA  
*Creighton University School  
of Law*

**Timothy Ryan Kurtz**  
Englewood, CO  
*University of Denver Sturm  
College of Law*

**Tristan L. Leavitt**  
Alexandria, VA  
*Georgetown University Law  
Center*

**Kirsten Anne Lindstrom**  
Salt Lake City, UT  
*University of Utah S.J.  
Quinney College of Law*

**Lindsay Marie Lofgran**  
Rexburg, ID  
*Brigham Young University*

**Kimberly Elizabeth Loges**  
Culdesac, ID  
*University of Nevada, Las  
Vegas, Wm S Boyd School of  
Law*

**Jay Weston Logsdon**  
Brighton, MA  
*Boston University*

**Jonathan Andrew Lowell**  
West Des Moines, IA  
*Drake University Law School*

**Eric Schuyler Monroe  
Ludlow**  
aka Eric Schuyler Ludlow  
Wayzata, MN  
*University of Minnesota Law  
School*

**Tecla Elizabeth Markosky**  
Moscow, ID  
*University of Idaho College of  
Law*

**Megan Elizabeth Marshall**  
Jerome, ID  
*University of Idaho College of  
Law*

**Ryan Lee Martinat**  
Boise, ID  
*University of Idaho College of  
Law*

**Laurel Vivian McCord**  
Jerome, ID  
*University of Idaho College of  
Law*

**John Reilly McDevitt**  
Moscow, ID  
*University of Idaho College of  
Law*

**Ben Patrick McGreevy**  
Moscow, ID  
*University of Idaho College of  
Law*

**Lindsay McKlveen**  
Boise, ID  
*Gonzaga University*

**Kirk Alan Melton**  
Provo, UT  
*Brigham Young University*

**Shawn G. Miller**  
Irving, TX  
*Oklahoma City University  
School of Law*

**Stephen R. Miller**  
San Francisco, CA  
*University of California,  
Hastings College of Law*

**Amanda Rae Montalvo**  
Moscow, ID  
*University of Idaho College of  
Law*

**Daniel Edward Mooney**  
Moscow, ID  
*University of Idaho College of  
Law*

**Christopher Randall Moore**  
Salem, OR  
*Willamette University College  
of Law*

**E. Alex Muir**  
Moscow, ID  
*University of Idaho College of  
Law*

**Dru Williams Nakaya**  
Boise, ID  
*University of Idaho College of  
Law*

**Heather Elizabeth O'Leary**  
Ketchum, ID  
*University of Idaho College of  
Law*

**Tyler Kevin Olson**  
Moscow, ID  
*University of Idaho College of  
Law*

**Kristen Ann Pearson**  
Post Falls, ID  
*Widener University-Harrisburg*

**Aaron Thoreau Penrod**  
Egg Harbor Township, NJ  
*Duquesne University School  
of Law*

**Timothy Glen Pershing**  
Boise, ID  
*Gonzaga University*

**Daniel Earl Peterson**  
Willard, UT  
*University of Utah S.J.  
Quinney College of Law*

**Jessica Elizabeth Pollack**  
Boise, ID  
*University of Idaho College of  
Law*

**Nicholas James Powers**  
Boise, ID  
*Creighton University School  
of Law*

**Sarah Maureen Reed**  
Orange, CA  
*University of North Dakota  
School of Law*

**Kip Joel Reiswig**  
Brandon, MS  
*Mississippi College School of  
Law*

**Chelsea Williams Rengel**  
aka Chelsea M. Williams-  
Rengel  
aka Chelsea Michelle Williams  
Spokane, WA  
*Gonzaga University*

**Paulina Elena Rodriguez  
Kelso**  
aka Paulina Elena Rodriguez  
aka Paulina Elena Kelso  
Chubbuck, ID  
*Seattle University School of  
Law*

**Paul Norwood Jonas Ross**  
Hazelton, ID  
*Oklahoma City University  
School of Law*

**Sarah Elizabeth Rupp**  
Driggs, ID  
*Lewis and Clark College*

## July 2011 Idaho State Bar Examination Applicants (as of May 6, 2011)

**Leon Jean Samuels**  
Moscow, ID  
*University of Idaho College of Law*

**Steven Jacob Sattler**  
Sebewaing, MI  
*The Thomas M. Cooley Law School*

**Jonathan Kent Sawmiller**  
Boise, ID  
*University of Idaho College of Law*

**Lisa M. Schoettger**  
aka Lisa Marie VanderWyst  
Moscow, ID  
*University of Idaho College of Law*

**Katie M. Sherritt Edburg**  
aka Katie Marie Sherritt  
Pullman, WA  
*University of Idaho College of Law*

**Erika Danielle Shinpaugh**  
Boise, ID  
*University of Idaho College of Law*

**Allison Gullickson Simonton**  
Washington, DC  
*The George Washington University Law School*

**Roger Weston Smith**  
Boise, ID  
*University of Idaho College of Law*

**David Duane Snider**  
Troy, ID  
*University of Idaho College of Law*

**Slade Dean Sokol**  
East Lansing, MI  
*Michigan State University College of Law*

**Kristoffer Ryan Sperry**  
Salem, OR  
*Willamette University College of Law*

**Serhiy Stavynskyy**  
Idaho Falls, ID  
*Valparaiso University*

**Robert Thurston Steiner**  
Meridian, ID  
*University of Idaho College of Law*

**Jason Gardner Stoddard**  
Grace, ID  
*The University of Iowa College of Law*

**Michael Jonathan Stump**  
Bakersfield, CA  
*University of California, Hastings College of Law*

**Matthew Kent Taylor**  
Albany, NY  
*Albany Law School of Union University*

**Adrienne Sue Thommes**  
Spokane, WA  
*Gonzaga University*

**John Michael Tippetts**  
Michael Tippetts  
Naples, FL  
*Ave Maria School of Law*

**Ian Christopher Weight**  
Las Vegas, NV  
*University of Nevada, Las Vegas, Wm S Boyd School of Law*

**Michael George Whittaker**  
Moscow, ID  
*University of Idaho College of Law*

**Jason Bart Williams**  
Boise, ID  
*University of Montana School of Law*

**Abraham Edward Wingrove**  
Grand Forks, ND  
*University of North Dakota School of Law*

**Amy Goldie Zavidow**  
Manhattan Beach, CA  
*University of Arizona*



*Leaders are made, they are not born. They are made by hard effort, which is the price which all of us must pay to achieve any goal that is worthwhile.*

— Vince Lombardi

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Deadline to apply is August 5, 2011

For more information  
please contact Mahmood Sheikh at (208) 334-4500

# CLASSIFIEDS

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Medical/Legal Consulting. Available to assist with discovery and assistance in Medical/Injury/Malpractice cases; backed by a cadre of expert witnesses. You may contact me by e-mail renaed@cableone.net, (cell) (208) 859-4446, or (fax) (208) 853-6244. Renae Dougal, MSN, RN, CLNC, CCRP.

### MEDICAL/LEGAL CONSULTANT GASTROENTEROLOGY

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

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### FORENSIC ENGINEERING EXPERT WITNESS

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

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## PROCESS SERVERS

### POWERSERVE OF IDAHO

Process Serving for Southwest Idaho Telephone: (208) 342-0012 P.O. Box 5368 Boise, ID 83705-5368. Visit our website at [www.powerserveofidaho.com](http://www.powerserveofidaho.com).

## LEGAL ETHICS

### ~ LEGAL ETHICS ~

Ethics-conflicts advice, disciplinary defense, disqualification and sanctions motions, law firm related litigation, attorney-client privilege. Idaho, Oregon & Washington. Mark Fucile: Telephone (503) 224-4895, Fucile & Reising LLP [Mark@frllp.com](mailto:Mark@frllp.com).

## OFFICE SPACE

### OFFICE SHARING

Two office suites with client waiting areas and secretarial space. Great Bench Location with ample parking. Receptionist-phones and Equipment available. Client & Case Referral Possible, Terms are Negotiable depending on needs. Contact: Sallaz & Gatewood, Law Offices, PLLC. (208) 336-1145, 1000 S. Roosevelt, Boise, ID 83705 or email: [sallaz@sallazlaw.com](mailto:sallaz@sallazlaw.com)

### CLASS A-FULL SERVICE DOWNTOWN BOISE

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### TWO EXECUTIVE OFFICE SUITES

Two executive office suites available in the US Bank Plaza. Access to conference room, break room & work/administrative areas within premises, \$500 per month including internet and phone. Two parking spaces in basement of building available for lease. Fully furnished. Sherilyn (208) 246-8888.

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Class A building. 1-3 Large offices and 2 Secretary stations. Includes: DSL, Receptionist/Administrative assistant, conference, copier/printer/scanner/fax, phone system with voicemail, basic office & kitchen supplies, free parking, janitor, utilities. Call Bob at (208) 344-9355 or by email at: [drozdarl@drozdalaw.com](mailto:drozdarl@drozdalaw.com).

### CLASS "A" OFFICE SPACE

#### Plaza One Twenty One 121 N. 9th St., Ste. 300

One to four Class "A" offices available for lease within existing law firm, with secretarial cubicles also available. Flexible terms and menu of services. Call Thomas, Williams & Park, LLP, (208) 345-7800.

### CLASS "A" DOWNTOWN BOISE OFFICE SPACE

355 W. Myrtle Boise, Idaho 83702. Two blocks from Ada County Courthouse. Manweiler, Breen, Ball and Hancock has three office suites available for rent. Offices include internet, shared reception area, conference room and break room. Free parking is available on site. Receptionist services are included in lease. Terms are negotiable. Contact Mark Manweiler or Jim Ball at (208) 424-9100.

### DOWNTOWN BOISE OFFICE SPACE

McCarty Building located at 9th & Idaho (202 N.9th) offices spaces for sale or lease. Single offices \$375 - \$450 or a full suite with multiple offices, reception, break room \$2,500/mo, full service including janitorial & security. Customer parking on street or in parking garages. For more information call Sue (208) 385-9325.

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Approximately 1,000 square feet of shared office space available for rent at 618 N. 4th Street, Coeur d'Alene, Idaho. Space includes two offices plus secretarial area, work center and use of full kitchen and two conference rooms. Contact Susan Servick at (208) 667-1486 or Kevin Holt at (208) 667-5011.

### EAGLE OFFICE SUITE FOR RENT

Full service office suite for rent in prime Eagle location and office building. \$750 per month. Includes corner office, reception, conference room, copier, fax, postage machine, phone and Internet. Call 938-9500 for further info.

# JOHN ADAMS TO GUANTANAMO: REMARKS FROM LAW DAY LUNCHEON ON MAY 4

Hon. Jon J. Shindurling  
*Seventh District Court*

## John Adams

I was asked to comment on the role of lawyers in our society “from John Adams to Guantanamo”. Let’s start with John Adams. Adams was born in 1835 in what is now Quincy, Mass. His father was a farmer, a church deacon, an officer in the local militia and a town councilman. His was a modest family, but afforded to send young John to Harvard College to study to be a clergyman. However, he resisted the “calling” and instead became a teacher. He taught for a time after graduation, then read the law, and was admitted to bar in 1758. His practice flourished and he became a respected advocate and political thinker in Massachusetts.

John was not as charismatic as his second cousin Samuel Adams (Boston tea party), but began playing a leading role in the changing political winds in Boston, and added a scholarly voice to the nascent revolutionary movement. He was, of course, Jefferson’s collaborator in the Declaration of independence and became the second President of the United States.

In the winter of 1769-1770, Boston had experienced several months of unrest due to the British forces’ occupation and the frequent skirmishes between soldiers and townspeople. On March 5, 1770, a young apprentice to a local wigmaker, one Gerrish, began yelling at a Captain Lieutenant Golfinch in the street outside the Customs House about a debt he claimed Golfinch owed to his master for a wig (it later turned out the debt had been paid). A crowd began to gather. A Private White was the Customs House sentry. He confronted Gerrish, and, in the heat of argument, hit Gerrish in the jaw with his rifle butt. The crowd got larger and angrier. White fled the sentry box and took refuge in Customs House. Captain Thomas Preston, the Officer of the Day on duty, dispatched a noncommissioned officer and several soldiers with fixed bayonets to rescue White. They were surrounded at the sentry box, and the crowd began throwing snowballs and other objects at the soldiers. One of soldiers was hit by a club swung by a tavern keeper, and he got up and fired into the crowd. The soldiers then volleyed into the crowd as well, killing several and wounding others. The fray quickly became known as “the Boston Massacre”. Preston and the soldiers were indicted for



murder several days later, after the army that had been occupying the town had been withdrawn to the garrison.

The soldiers tried frantically, but couldn’t get legal representation. Preston finally sought help of Adams who, after much pleading, agreed to represent them. Adams was at the threshold of his public career. He had been nominated to House of Representatives and was taking an increasingly prominent role in Boston politics. Accepting the defense was politically and professionally dangerous, but he believed that the soldiers deserved a fair trial and competent defense. He was joined by Josiah Quincy II and Robert Auchmuty. Preston was tried first, then the soldiers. Preston and seven soldiers were acquitted and only two were convicted of voluntary manslaughter. Adams managed to persuade the judge not to execute them, but instead to order punishment by branding their thumbs. For all his months of work Adams received but a few guineas in payment.

However, Adams later said:

The part I took in the defense of Captain Preston and the soldiers procured me Anxiety and Obloquy (abusive language) enough. It was, however, one of the most gallant, generous, manly, and disinterested actions of my whole life, and one of the best pieces of service I ever rendered my Country.

## Citizen lawyers

Those citizen lawyers of the revolution, John Adams, Thomas Paine, Thomas Jefferson, John Marshall, and James Monroe, and the like, left a great heritage

of public service, public mindedness, and dedication to the protection of the poor, the deprived, and the downtrodden of society. From the beginning their design was to preserve the rights of the individual citizen in the face of unfettered public power. They voiced it in the Declaration of Independence; they wrote it into the Constitution; and they shouted it out in the Bill of Rights. They believed it, they lived it and they died by it.

The next generation of citizen lawyers in private practice shaped and preserved the national identity. The likes of Daniel Webster, Abraham Lincoln, and toward the end of the century, Clarence Darrow, all taught us much about the duty of lawyers to stand up and be counted at their peril for the preservation of freedom and a dignified society. We should also here reference those from our own ranks such as James H. Hawley, William Borah, who met in the famous Diamondfield Jack trial and worked tirelessly to shape our early statehood, (Hawley also faced Clarence Darrow in the momentous Haywood-Pettibone-Orchard trial in 1907, resulting from the murder of Governor Frank Steunenberg), and Justice James F. Ailshie who was the dean of the early legal and judicial communities in Idaho.

In the late 1800’s, increasing focus on industrialization and the motives of profit turned most lawyers to the private interests of their clients. There was an ebb in the focus of lawyers toward public service for several decades. However, the resurgence of the populist movements of 1920’s and 30’s brought renewed interest within the bar to make society better and safer for all. We saw the be-

ginnings of civil rights awareness. Great public service lawyers such as Louis Brandeis, Elihu Root, and Harlan Fiske Stone fought for social and labor reform, child labor laws, utility rate regulation, anticorruption measures and civil service reform, things that we take for granted today. They were followed in our time by selfless public interest lawyers such as Gustavo C. Garcia and Carlos Cadena who took their farmworker client's case to the United States Supreme Court in *Hernandez v. Texas* (1954), where the Court unanimously declared equal protection for all citizens under the fourteenth amendment, and Thurgood Marshall who argued *Brown v. Board of Education* (1954) establishing the right to unsegregated equal education.

Unfortunately, we have again been in a swing away from public mindedness among lawyers for the past 30 or 40 years. John T. Baker, president of the Colorado Bar Association, has said:

Today, as the number of lawyers entering the profession increases, the number of lawyers in private practice engaging in public minded projects is decreasing. This decline is attributed to the needs of those private clients who demand loyalty from their lawyers. At times, the needs of some private clients may be contrary to the public interest. For some lawyers, the time demands of their private clients exclude meaningful pro bono work for the common good or other civic activities.

(See, President Baker's excellent article in *The Colorado Lawyer*, Vol. 38, No. 9 (September 2009), from which I borrowed many thoughts here presented).

We as lawyers have developed a bad habit of relying on fixed public assistance groups — legal aid, public defenders, and organizations such as ACLU, NAACP, Anti-defamation League, Common Cause, the Federalist Society, and political pressure groups, PACs, and think tanks — to do our public service for us. Lawyer participation in public bodies is at an all-time low. It has been said that much of the political chaos of our day is due, at least in part, to a markedly diminished participation of lawyers in state legislatures, city and county governments, school boards, and the like.

Too often we see lawyers who strive to shape reality, indeed to torture it, to serve the personal, economic or business needs of their clients. We have developed "Rambo Lawyers" who are willing to lay waste to the law without any consideration for truth or for civility toward

other lawyers, litigants, or judges. We should be referenced to what Adams said during the Boston Massacre trials:

Facts are stubborn things; and whatever may be our wishes, our inclination, or the dictates of our passions, they cannot alter the state of facts and evidence.

We would be well reminded as a society of a few things Abraham Lincoln said to and about lawyers:

Let's have faith that right makes might, and in that faith, let us, to the end, dare to do our duty as we understand it. There is a popular belief that lawyers are necessarily dishonest. . . . Let no young man choosing the law for a calling for a moment yield to the popular belief. Resolve to be honest at all events; and if in your own judgment you cannot be an honest lawyer, resolve to be honest without being a lawyer. Discourage litigation. Persuade your neighbors to compromise whenever you can. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.

### Progress

We are fighting back. Bar associations and lawyer groups throughout the country are encouraging bar members to engage meaningfully in pro bono representation and public service. Corporations and businesses are being successfully recruited to second their legal staffs, on their own dime, to do such work. Idaho has a Pro Bono Commission jointly sponsored by the State Bar and the Idaho Supreme Court to organize such efforts. Lawyers in our community are providing hundreds of hours of their own time to public causes and private representation at no cost to assist the those with nowhere else to turn. We see lawyers regularly representing the special interests of children through CASA, representing the deserved needy through the Lawyer Referral Service, etc., and volunteering on their own just because there is a need. Lawyers take on unpopular causes because it is the right thing to do. We honored the passing of one of our own, John Radin, this last week, a solo practitioner who regularly took on the hard and messy defense at low remuneration. Some in our state have donated their time to the Guantanamo defense — in spite of the popular sentiment in this state — because it needed to be done and they felt it was right, not that they sympathized with terrorists, but because they honor liberty.

Such is the legacy of John Adams, to stand for the right because it is right, even when it is not convenient or comfortable to be right.

Attorney General Eric Holder, speaking to the Pro Bono Institute, has recently commented:

As you may know, advancing the cause of justice sometimes means working for the sake of the fairness and integrity of our system of justice. This is why lawyers who accept our professional responsibility to protect the rule of law, the right to counsel, and access to our courts—even when it requires defending unpopular causes or clients—deserve the praise and gratitude of all Americans. They also deserve respect. Those who reaffirm our nation's most essential and enduring values do not deserve to have their own values questioned. Let me be clear about this: Lawyers who provide counsel for the unpopular are, and should be treated as what they are: patriots.

We need your help. We need all lawyers to dedicate themselves to the public good. We need the public to expect that. We need businessmen and women to notice that, to expect that, to demand that, and whenever possible to facilitate that in the lawyers they hire and with whom they associate. Ours is an honorable profession, but it an honor and respect we must continue to earn, not only through good legal work, but selfless service to the public good.

### About the Author

**Hon. Jon Shindurling**, *Juris Doctorate at University of Idaho in 1977. He began legal practice in Twin Falls in 1977, moving to Idaho Falls in 1990. He left private practice in 1994 to take a position with the Bonneville County Prosecuting Attorney, where he served for five years as Chief Deputy. In 2000, he was appointed to the District Court in the Seventh Judicial District by Governor Dirk Kempthorne, and has since been re-elected to that position in 2002, 2006, and 2010. In April 2009 he was elected by his fellow district judges and currently serves as the Administrative District Judge for the Seventh Judicial District.*

*Judge Shindurling has served on numerous committees for the Idaho State Bar, Idaho Law Foundation, and Idaho Supreme Court. He supervised the Felony Drug Court in Bingham County from 2001 to 2009, and helped establish and has supervised the Seventh District's JoAn Wood Pilot Project problem solving/dual diagnosis court since 2008.*

## The Legacy of John Adams from Boston to Guantanamo



### FOURTH DISTRICT OBSERVES LAW DAY WITH SEVERAL EVENTS

The Fourth District Bar Association's Law Day Committee promotes the goals of Law Day by organizing volunteer opportunities for local attorneys, educating area students, encouraging and rewarding pro bono civic and legal service, and honoring members of the community who embody the Law Day mission. Law Day is an ABA-sponsored, national event that celebrates the rule of law, underscoring how law and the legal process have contributed to the freedoms that all Americans share.

It provides the organized bar and bench with an opportunity to highlight the role of the nation's courts in our constitutional democracy and to foster public understanding about the judiciary. Law Day programs are conducted across the country for both youth and adults and are designed to help people understand how law keeps us free and how our legal system strives to achieve justice.

#### School outreach

Across the Fourth District, attorneys gave presentations at more than 10 different schools, where approximately 870 students learned about the law. These visits are separate from presentations that occur as part of the Lawyers in the Classroom project sponsored by the Idaho Law Foundation's Law Related Education program. School Outreach Volunteers included the following:

Ken Jorgensen, Steven Price, Mikela French, Mark Perison, Edith Pacillo, Jana Gomez, Dave Lorello, Jennifer Dempsey, Katherine Georger, Marie Callaway, Gabe McCarthy, Jeff, Brownson, Walt Donovan, Ritchie Eppink

#### Ask-A-Lawyer

This year's Ask-A-Lawyer program was somewhat overshadowed by the Royal Wedding which seemed to detract some of our early morning publicity that Larry Gebert usually provides. Nonetheless, many attorney volunteers came to participate in the program and we were able to answer every call that we received. The

volunteers began taking calls at 4:30 a.m. and finished at 4 p.m. with a reception in the Rose Room in downtown Boise. Volunteers included:

Alison Graham, Angela Hermsillo, Annie Pelletier, Barbara Beehner, Chris Christensen, Dan Gordon, David Smethers, Denise Baird, Erika Birch, Heather McCarthy, Jennifer Schindele, Jim Huegli, Joe Mallet, John McGown, Julianne Hall, Katie Ball, Kira Pfister, Laurie Fortier, Lisa Brownson, Marie Callaway, Marisa Swank, Mark DeMeester, Mark Freeman, Mike Crawford, Mike Howell, Pamela Howland, Rob Vail, Ron Caron, Sally Reynolds, Sarah Simmons, Tessa Bennett

#### Liberty Bell

In conjunction with Law Day, the Liberty Bell Award is given to acknowledge outstanding community service by a person or persons who have:

- Promoted better understanding of the rule of law,
- Encouraged a greater respect for law and the courts,
- Stimulated a sense of civic responsibility, and
- Contributed to good government in the community.

This year's recipient was John Jackson of Jackson Food Stores.

In 2003, the Idaho Partners for Domestic Violence invited John Jackson to be the major corporate sponsor of the annual fundraising event of the annual fundraising event to prevent domestic violence and teen dating violence through community awareness and provide free legal assistance for victims of domestic violence through volunteer and Legal Aid Attorneys. Since that time, Jacksons Food Stores have participated in the "Give the Gift of Peace" Campaign at their stores initially in Southern Idaho, but now in neighboring states as well.

Through the Give the Gift of Peace campaign, a one dollar Dove was available from Thanksgiving to December 31

for customers to purchase and contributed to a worthy cause. In 2008, the campaign raised over \$50,000 for programs addressing domestic violence in Idaho.

Mr. Jackson matches dollar for dollar contributions in Idaho, Oregon, Washington and Nevada. In 2010, he matched over \$47,000, \$19,000 alone in Idaho contributions. Since 2003, Mr. Jackson has personally contributed over \$150,000.

Mr. Jackson has been referred to as the backbone of the Idaho Partners for Domestic Violence's success. Further, Jacksons Food Stores has been repeatedly called a leader in taking steps to preventing and responding to domestic violence.

#### 6.1 Challenge

The 6.1 Challenge, named after Idaho Rule of Professional Conduct 6.1, is an event to encourage and formally recognize pro bono and public service activities from members of the Fourth District Bar through office team participation. Rule 6.1 states that every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least fifty (50) hours of pro bono legal services per year to persons of limited means or to charitable, religious, civic, community, governmental and educational organizations.

For the 6.1 Challenge, the Idaho Volunteer Lawyers Program noted 12 entries from firms and private attorneys. There was a total of 4,943 hours spent on legal services at no fee or reduced fee to people with limited means or organizations serving them. This is an average of 50 hours per attorney that participated. There were four categories.

Submissions were reviewed by a distinguished panel, including members of the federal and state judiciary and local community leaders. The panel evaluated the type and quality of the pro bono activities as well as the number of hours conducted on behalf of the community. The different categories recognized included: small, large and government law offices.

## The Legacy of John Adams from Boston to Guantanamo



### LAW DAY: (CONTINUED)

A reception was held on April 29 recognizing the tremendous accomplishments of all the participating teams and awarding a commemorative plaque to the winners in each separate category.

#### Small Firm Category

Winner is the C.K. Quade Law firm whose 3 attorneys provided many, many pro bono service hours in matters pertaining to Medicaid, Social Security Disability claims, and Special Education matters.

#### Solo Practitioner Category

Winner is James D. Huegli. Mr. Huegli came to Idaho in 2009 as a reciprocal admission to the Idaho Bar and during the last twelve months performed over 600 hours of pro bono service, the majority (but not all) of which were spent on a constitutional law case in federal court involving the constitutional rights of prisoners to be safe in prison.

#### Large Firm Category

Winner is the law firm of Perkins Coie, LLP. This firm has been recognized several times in this Challenge for their pro bono work. This year the Judges were especially impressed with their work with domestic violence victims to secure civil protection orders, their commitment to the CASA program, and the large number of hours donated to family law and civil suits for victims.

#### Government Lawyers Category

Winner is the legal staff of the U. S. District Courts. The 6.1 Judges were particularly impressed with this group's dedication to public service projects ( it is particularly difficult for law clerks and other employees of the federal courts to taken on clients for pro bono representation), as well as their assistance with IVLP's family law clinics.

This years' winning team in the government category from the U.S. Courts was jointly organized and spearheaded by law clerks Kira Pfisterer and Janis Dotson. The team collectively logged 132.9 hours providing pro bono legal services;



Winning the Fourth District Bar's 6.1 Challenge in the government category are, from left, Kira Pfisterer, Brandon Karpen, Craig Durham, Janis Dotson, Daphne Huang, Lisa Brownson, and Daniel Gordon.

113 hours in activities to improve law, the legal system and profession; and 858.5 hours in other charitable service to non-profit organizations in the community. Over half of the law clerks from both the U.S. District and Bankruptcy Courts for the District of Idaho took part in this year's Challenge. In the words of Chief United States Magistrate Judge Candy W. Dale, "Without a doubt, these lawyers deserve our congratulations and recognition. They provide true meaning to Rule 6.1, as they not only aspire to perform pro bono service but they also, due to restrictions on their ability to represent litigants in court actions, seek opportunities outside the courts to meet their personalized pro bono commitments. They and the other participants in the Challenge are indeed an inspiration for other lawyers who have the education, knowledge and ability to represent litigants with limited means to

represent themselves effectively. Without this inspiration, Idaho's state and federal courts will continue to struggle with meeting an ever increasing need for pro bono representation."

#### Fourth District Law Day Committee

Sean Beaver (Cox Law, PLLC)  
Chris Christensen  
(Andrade Law Office, Inc.)  
Laurie Fortier  
(Boise City Attorney's Office)  
Dan Gordon (U.S. Courts)  
Nicole Hancock  
(Stoel Rives LLP)  
Mary Hobson  
(Idaho Law Foundation)  
Heather McCarthy  
(Ada County Prosecutor's Office)  
Jason Prince (Stoel Rives LLP)

# Upcoming CLEs

## June

### June 15

#### *Maintaining an Ethical Law Practice*

Sponsored by the Young Lawyers Section

8:30 – 9:30 a.m. (MST) at the Law Center, Boise / Statewide webcast

1.0 CLE credits of which 1.0 is ethics ~ RAC\*

### June 24

#### *Water Law Essentials and Update for Business Lawyers and Marketing to and Representing Generation Y Clients*

Sponsored by the Business and Corporate Law Section

1:30 – 3:30 p.m. (PST) at North Idaho College, Student Union Building, Blue Creek Room, Coeur d'Alene

2.0 CLE credits ~ RAC\*

## July

### July 13 – 15

#### *Idaho State Bar Annual Meeting*

Sponsored by the Idaho State Bar

Sun Valley Resort, Sun Valley

Opportunity to obtain 10.0 CLE credits including 3.0 ethics credit. Sample courses include:

- Leadership for Lawyers
- Real Property – A View from Inside and Outside Counsel
- Idaho Legal History: Advancing the Rule of Law
- Ethics and Paralegal

## August

### August 8

#### *CLE Idaho: Replay and Lunch*

Sponsored by Idaho Law Foundation

11:15 a.m. – 1:30 p.m. (local time)

2.0 CLE credits of which 1.0 towards Ethics

Boise – Idaho Law Center

Coeur d'Alene – Iron Horse Bar and Grill

### August 15

#### *CLE Idaho: Replay and Lunch*

Sponsored by Idaho Law Foundation

11:15 a.m. – 1:30 p.m. MST

2.0 CLE credits of which 1.0 towards Ethics

Boise – Idaho Law Center

Idaho Falls – Law Firm of Hopkins Roden Crockett

Hansen & Hoopes, PLLC

### August 22

#### *CLE Idaho: Replay and Lunch*

Sponsored by Idaho Law Foundation

11:15 a.m. – 1:30 p.m. MST

2.0 CLE credits of which 1.0 towards Ethics

Boise – Idaho Law Center

Burley – Burley City Hall

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

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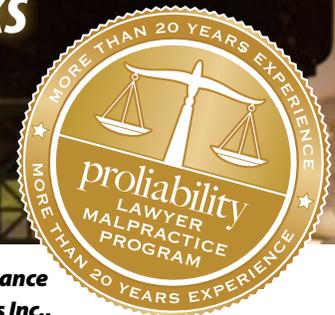
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Pete Sisson is a National Board Certified Elder Law Attorney ([www.nelf.org](http://www.nelf.org)) and a VA Accredited Attorney. Since 1993, The Elder Law Firm has helped thousands of Idaho seniors and their families avoid the financial ruin that is caused by long-term care costs.

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