



The Advocate

Official Publication
of the Idaho State Bar
Volume 54, No. 3/4
March/April 2011

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The Advocate

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54 (3/4), March/April 2011

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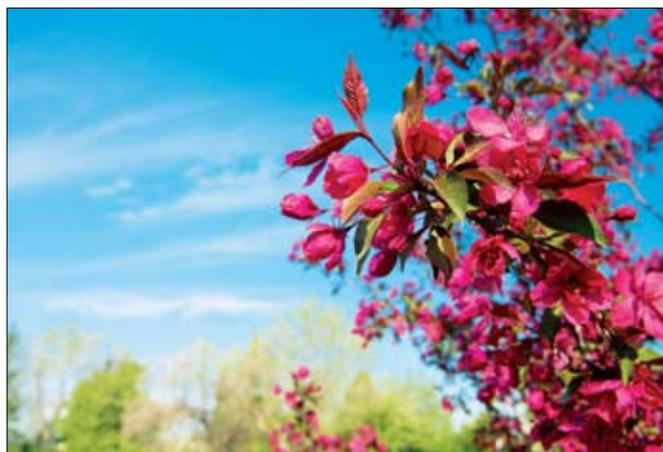
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On the Cover

Crabapple trees are among the first fruit to bloom in Idaho. This shot, courtesy of the Idaho Falls Chamber of Commerce, captures blooms from last spring.

Cover art sought

Bar members are encouraged to send their digital photos to Managing Editor Dan Black at dblack@isb.idaho.gov.

Editors

Special thanks to the March editorial team: Thomas Hethe Clark, Tenielle Fordyce-Ruff and Jennifer May Schindele.

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.

University of Idaho - 2011 Symposium on Water Law

One Source

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

A discussion about the challenges facing the West with regard to the evolution of our understanding of the intertwinement of water law and science in conjunctive management.

A forum where members of the legal and scientific communities throughout the West can speak to their state's unique perspectives on conjunctive management.

8:30AM April 15, 2011

Boise City Hall

City Council Chambers

information & registration

www.onesource2011.com

**\$80 for CLE admission \$30 for non-CLE admission
(breakfast and lunch included)**

**Information - contact: Emmi Blades: eblades@vandals.uidaho.edu
or Dylan Hedden-Nicely: dylan.hedden@gmail.com**

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Upcoming CLEs

March

March 11

Workers Compensation Annual Seminar

Sponsored by the Workers Compensation Section

8:00 a.m. – 4:15 p.m. (MST)

Sun Valley Resort – Sun Valley, ID

6.0 CLE credits

March 16

First or Next Adoption Case

Sponsored by the Idaho Law Foundation

9:00 – 10:00 a.m. (MDT)

The Law Center – Boise, ID Webcast Statewide

1.0 CLE credits RAC

March 30

A Bankruptcy Primer For the Non-Bankruptcy Lawyer; Debtors' & Creditors' Perspectives: An Alternative to Foreclosure

Sponsored by the Young Lawyers Section

8:30 – 9:30 a.m. (MDT)

The Law Center – Boise, ID Webcast Statewide

1.0 CLE credits

April

April 1

Courtroom Strategy in the 21st Century Video Replay

Sponsored by the Idaho Law Foundation

10:00 a.m. – 4:00 p.m. (MDT)

College of Southern Idaho, Taylor Room 277 – Twin Falls, ID

5.0 CLE credits of which 1.0 will be ethics

April 6

Intellectual Property Transactions: Identifying and Transferring Ownership

Sponsored by the Idaho Law Foundation

8:30 – 9:30 a.m. (MDT)

The Law Center – Boise, ID Webcast Statewide

1.0 CLE credits

April (Cont'd)

April 20

Preparing For Your First or Next Workers Compensation Case

Sponsored by the Young Lawyers Section

8:30 – 9:30 a.m. (MDT)

The Law Center – Boise, ID Webcast Statewide

1.0 CLE credits

April 22

Courtroom Strategy in the 21st Century Video Replay

Sponsored by the Idaho Law Foundation

10:00 a.m. – 4:00 p.m. (PDT)

University of Idaho College of Law – Moscow, ID

5.0 CLE credits of which 1.0 will be ethics

April 28

CLE Replays

Sponsored by the Idaho Law Foundation

1:30 – 4:30 p.m. (MDT)

The Law Center – Boise, ID

3.0 CLE credits of which 1.0 will be ethics RAC

April 29

Idaho Practical Skills

Sponsored by the Idaho Law Foundation

8:00 – 3:00 p.m. (MDT)

The Boise Centre – Boise, ID

5.5 CLE credits of which 1.0 will be ethics RAC

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

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

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Live Seminars

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

Online On-demand Seminars

Pre-recorded seminars are available on demand through our online CLE program. You can view these seminars at your convenience. To check out the catalog or sign up for a program go to <http://www.legalspan.com/isb/catalog.asp>.

Webcast Seminars

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

Recorded Program Rentals

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



WHAT REALLY MATTERS

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

The Ninth Circuit set an expedited briefing schedule and a Monday oral argument in Seattle in one of my cases a few seasons back. Our son's freshman college orientation was scheduled in Tacoma, Washington the weekend before the appellate argument. What luck, I thought. These events will dovetail nicely. I took this as a good omen.

It started out normally enough — an eight-hour drive to Tacoma with my husband and college-bound son. In between our son's iPod breaks, my family conducted a moot court, as I used the opportunity to practice my oral argument. Our son, a debater, critiqued me candidly and shared his debate team insight. Apparently all debaters know you start out speaking slowly and then really hit the gas, to fit it all in. I expressed my skepticism this technique would pass judicial muster.

We arrived in Tacoma and helped him move into his dorm on Saturday. He realized he had forgotten to pack any gear for a weekend wilderness orientation beginning the following day, so a trip to Goodwill and REI was in order. All in all, it was a pretty typical college departure and noticeably more poignant for me than our 18-year old. I shared my last bit of unneeded and unheeded advice that evening and we exchanged our hugs and goodbyes until Thanksgiving.

That night our car was burglarized in front of our bed and breakfast. Much to my alarm, my briefcase was stolen, along with all of my materials for my oral argument. The university was alerted and remarkably assembled a team of upper graduates who arrived Sunday morning in

a large van. They searched the neighborhood dumpsters and yards near campus, and spread flyers door to door to recover the stolen property. No luck in that regard but an inspiring effort. In the meanwhile, I reconstructed my oral argument as my husband cleared the mountains of glass from our vehicle. An effort to replace the window on a Sunday was in vain, so he fashioned a window with a shower curtain and duct tape. That night we drove to Seattle in a deluge of rain, as the shower curtain thumped along in the storm.

I considered whether to inform the appellate panel of my lack of notes, outline or record and decided against it. I reasoned, if the argument went poorly, I could always beg for some mercy on those grounds, or try my son's debating tip. I managed a smile as I began to address the Court that Monday morning from my three by five inch bed and breakfast stationary. When the light on the attorney podium turned red indicating my allotted time had ended, I was flooded with relief and returned to counsels' table. I thought with a sigh, it went reasonably well and better yet, it was over. I was startled out of my reverie with a request to return again to the podium for another round of Q and A.

We headed home toward Idaho with the shower curtain intact until we were met with gale force winds in Oregon. A traffic accident on the expressway occurred near the Idaho-Oregon border, which stopped traffic in all directions. We phoned home to explain our delay to our high school aged son and learned the extreme winds and soaring summer temperatures had sparked a wildfire that created a true emergency. A neighborhood adjacent to ours was ablaze. When our son asked us what to do as he saw the smoke rise over the ridge we instructed him to prepare to evacuate. What to take? Clearly the only thing in the house we needed was him, and if possible our family labrador, Maggie.

Hugging our younger son later that night in our home, I felt incredible relief that he was safe and the fires had not spread further. I learned my co-counsel's

Much to my alarm, my briefcase was stolen, along with all of my materials for my oral argument.

family had evacuated their home, but fortunately it was not destroyed. Tragically many families did lose their homes, including one of our bar staff members. Even more tragically, one woman lost her life.

All in all, it was a very eventful weekend on many levels - and a reminder of what really matters to all of us. Within remarkable turnaround, the Ninth Circuit issued a favorable ruling just two days later. But somehow the victory did not seem quite as important as I believed just a few days earlier.

As attorneys, our work matters. What we do affects our clients, communities and directly and indirectly, society as a whole. Of course we work hard and do our best, with what we have, in the time we have been given. Yet it is important to pause now and then and remember the bigger picture too, and, in the end, what really matters.

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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NOTICE TO RICHARD A. BERGESEN OF CLIENT ASSISTANCE FUND CLAIM

Pursuant to *Idaho Bar Commission Rule 614(a)*, the Idaho State Bar hereby gives notice to Richard A. Bergesen that a Client Assistance Fund claim has been filed against him by former client Tyson McGuire, in the amount of \$19,000. Please be advised that service of this claim is deemed complete fourteen (14) days after the publication of this issue of *The Advocate*.

NEWS BRIEFS

Those wishing to serve on the ILF board should express their interest

Each year, current and new members are nominated to serve on the Idaho Law Foundation (ILF) Board of Directors. The ILF is a nonprofit charitable corporation that administers legal education, IOLTA, pro bono and law related education programs. The Board of Directors consists of 13 members; 10 attorneys or judges, the Dean of the University of Idaho College of Law and two non-lawyer members. The nominated individuals are then elected by the membership of the Idaho Law Foundation. If you are interested in serving on the ILF Board of Directors, now or in the future, please contact ILF/ISB Executive Director Diane Minnich at dminnich@isb.idaho.gov.

2011 nominations for ISB commissioners due April 5

Attorneys in the Third, Fifth and Fourth Districts will be electing new representatives to the Idaho State Bar Board of Commissioners this spring. The new commissioners will replace James Mesery of Jerome and Deborah Ferguson of Boise.

Pursuant to Idaho Bar Commission Rule 900, the new commissioner representing the Third and Fifth Districts must reside or maintain an office in the third district.

Commissioners of the Idaho State Bar, the elected governing body of the Bar, serve for three years, beginning on the last day of the ISB annual meeting following their elections. The Board of Commissioners is charged with regulating the legal profession in Idaho, which includes the admission and licensing of attorneys,

NEWS BRIEFS

overseeing disciplinary functions and administering mandatory continuing legal education requirements.

Nominations must be in writing and signed by at least five members of the ISB in good standing, and eligible to vote in the districts. The executive director must receive nominations no later than the close of business on April 5, 2011. The nominating petition is available on the Idaho State Bar website or a petition may be obtained by calling the office of the executive director at (208) 334-4500.

Ballots will be mailed to all members eligible to vote in the Third, Fifth and Fourth Districts on April 18, 2011. All ballots properly cast and returned to the executive director will be counted by a board of canvassers at the close of business on May 3, 2011.

Plans move ahead for integrated management of state law library

The College of Law and the Idaho Supreme Court are moving forward with plans to integrate the management of the Idaho State Law Library and the College's library assets in Boise, under a memorandum of agreement. The plans provide for the most frequently used components of the State Law Library collection, currently housed at the Key Bank Building in downtown Boise, to be relocated to space on the fifth floor of the Idaho Water Center next to the third-year program of the College of Law. The relocation is expected to occur during the spring of 2011. The College will add staff in Boise, including a professional law librarian with both J.D. and Master of Library Science degrees. The College will augment the collection and the operating hours of the library, making it a more useful facility for the legal profession, the courts, and the public. The College also will promote and conduct civic outreach programs from the library.

Ultimately, the collaborative plans of the Supreme Court and the College of Law provide for the integrated library and the College's legal education program to reside in a permanent home at the historic old Ada County Courthouse, when that building's renovation as the "Idaho Law Learning Center" is complete. Further information about plans for relocating and improving the State Law Library can be obtained from Professor John Hasko, jhasko@uidaho.edu, the College's Law Library Director.

Native American Law Conference in Moscow will focus on economic development

On March 25, 2011, the College of Law will conduct its annual Native American Law Conference, addressing issues of economic development in Indian Country. The conference, titled "Reconnecting Economies: Indigenous Networks and Commerce," will be held at the Menard Law Building in Moscow. Organized by Professor Angelique EagleWoman, the conference will feature speakers from Idaho's principal tribes as well as Debra Juarez, partner and chair of the tribal practice group at the Williams Kastner law firm in Seattle; Carl Ullman, director of the Water Adjudication Project for the Klamath Tribes of Oregon; and Tonya Gonnella Frichner, North American Regional Representative to the United Nations Permanent Forum on Indigenous Issues.

Further information about the conference is available from Professor EagleWoman, eaglewoman@uidaho.edu. A conference brochure and registration information can be found on the College of Law website.

An uptick in hiring for lawyers?

Job openings in the legal industry jumped nearly 97 percent in December, compared to the same month last year, according to a jobs search engine. The figures are from Simply Hired, the *New York Times* reports. The search engine has posted about 5 million job postings in all industries that are pulled from job boards and the websites of hiring companies, government agencies, staffing agencies and nonprofits. A breakdown by occupation rather than industry shows a 76 percent increase in jobs for lawyers, judges and legal support staffers, compared to December of 2009.

Desk Book updates

We are preparing the 2011-2012 Idaho State Bar Desk Book Directory. All address updates must be received by March 4, 2011 to be included in the upcoming edition. Please check your address information on the ISB website (www.isb.idaho.gov) and send any changes to the Licensing Department at astrauser@isb.idaho.gov by March 4, 2011.

FBI issues email scam alert for attorneys

The Federal Bureau of Investigation has issued an alert that law firms have been targeted in an email scheme. Issued by the Salt Lake City Field Office, the alert describes a ruse that has become familiar to many attorneys and bar organizations across the country. In the scheme, a client asks the attorney or firm to collect a settlement amount from a third party. The third party sends a check or cashier's check to the attorney, and the client requests payment, minus attorney's fees. After the attorney remits money to the client, the original settlement check is found to be fake – and both the client and third party are nowhere to be found. Variations of this scheme have been reported in other FBI field offices. Please report any information concerning this type of scheme to the Salt Lake City FBI at (801) 579-1400.

Federal judiciary mourns loss of Judge John Roll

The federal judiciary mourned the death last month of Chief District Judge John M. Roll of the United States District Court for the District of Arizona. Judge Roll was among six people killed at a political event in Tucson.

Flags were flown at half mast at many federal courthouses in memory of Judge Roll, who had his chambers in Tucson. He had been attending an event organized by Rep. Gabrielle Giffords of Tucson, who also was shot and critically wounded. As many as 16 more people were injured in the shooting.

"All of us in the Ninth Circuit court family were shocked and terribly saddened to learn today of the death of Chief

District Judge John M. Roll. Our hearts go out to his family and to all of the families of those killed or injured in this senseless tragedy," said Chief Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit.

"Judge Roll was a widely respected jurist, a strong and able leader of his court, and a kind, courteous and sincere gentleman. He worked tirelessly to improve the delivery of justice to the people of Arizona. He was always upbeat, optimistic, enthusiastic and positive in his outlook. He touched many lives and will be sorely missed by all who knew him – colleagues, court staff, members of the bar." Judge Ranier Collins of Tucson is expected to assume the role of chief district judge for the Arizona court.

2011 Annual Meeting scholarships available

The Idaho State Bar is offering a limited number of scholarships to the 2011 Annual Meeting July 13-15 in Sun Valley. The scholarships include the annual conference registration fee and a per diem (up to \$50 per day) for travel and lodging. The scholarships are designed to provide assistance to those attorneys who, due to financial or professional circumstances, would otherwise be unable to attend. To apply for a scholarship, contact the ISB Commissioner who represents your judicial district or ISB Deputy Director Mahmood Sheikh at (208) 334-4500.

Website, volunteers help public with legal questions

Volunteer attorneys in Idaho have begun answering common legal questions through the Idaho State Bar's website, www.isb.idaho.gov. The new service,

called the "Ask-A-Lawyer," offers an opportunity to find legal resources and ask questions at the link "Have a Legal Question?"

A volunteer attorney will respond to unanswered questions via e-mail or phone at no charge.

"We hope this service will provide another resource for those seeking legal help," said Idaho State Bar Executive Director Diane Minnich. She said the site also includes links to resources for many kinds of legal questions that are frequently asked of the Idaho State Bar.

Volunteer lawyers initiated the Ask-A-Lawyer program in an effort to help people unfamiliar with the legal system gain access to legal services. To promote better access to justice for all Idaho residents, the Idaho State Bar, in conjunction with the Idaho State and Federal Courts, created the Pro Bono Commission in 2007. It promotes volunteer service by attorneys and encourages law offices to institute a pro bono policy and report pro bono hours to the Idaho Law Foundation's Idaho Volunteer Lawyer Program. Volunteer work is encouraged by the Idaho State Bar, which challenges each attorney to render at least 50 hours of pro bono public legal services per year. Last year, volunteer attorneys helped more than 1,200 low-income people with legal services.

2011 licensing receipts and stickers

The 2011 licensing receipts and membership card stickers will be mailed in mid-March. Please contact the Licensing Department at (208) 334-4500 or jhunt@isb.idaho.gov if you need a new membership card.

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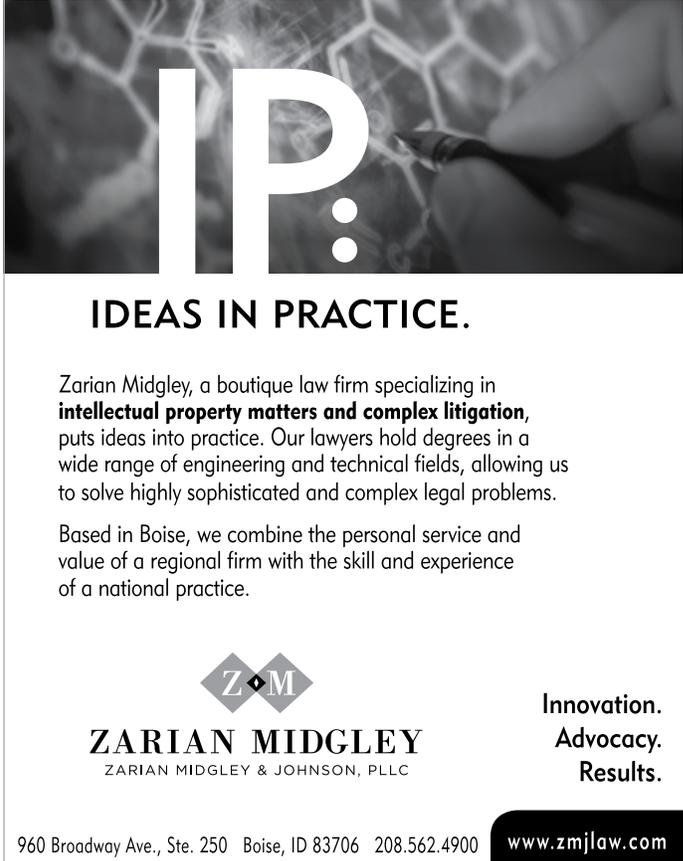
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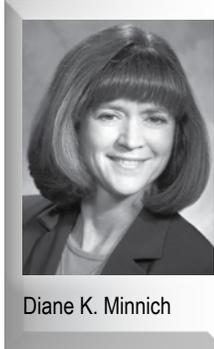
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2010 – THE IDAHO LAW FOUNDATION YEAR IN REVIEW

Diane K. Minnich
Executive Director, Idaho State Bar

The programs and activities of the Idaho Law Foundation are designed to improve the public's access to and understanding of the legal system and enhance the competency of practicing lawyers and judges through educational programs. The financial and volunteer support provided by Idaho lawyers and judges helps the Foundation meet its financial and educational goals. Highlights of the past year's efforts and achievements follow.



Diane K. Minnich

Mission Statement:

The Idaho Law Foundation supports the right of all people to live in a peaceful community. Our mission is to educate all people about the role of law in a democratic society, to provide opportunities for people to avoid and resolve conflicts; and to enhance the education and competence of lawyers.

1. Enhance public understanding of and respect for the law and the legal system.
2. Provide and improve access to legal services.
3. Provide programs and services that enhance the competency of members of the Bar.
4. Aid in the advancement of the administration of justice.
5. Generate the necessary funding to fulfill the mission and goals of the organization.
6. Maintain effective administration and management of the Foundation's resources.

Law Related Education (LRE)

Law Related Education (LRE) is a civic learning program, primarily for K-12 students. It educates young people to become effective, knowledgeable citizens who understand both their rights and responsibilities as citizens. The LRE program staff and volunteers coordinate teacher outreach and training programs, the High School Mock Trial Competition, Lawyers in the Classroom, Citizens Law Academy, and assist with Law Day activities.

In 2010, nearly 150 educators participated in training programs offered by the LRE program, 300 students and 145 volunteers participated in the High School Mock Trial Competitions and 50 teaching teams of lawyers and classroom teachers worked together to teach over 2,500 students about law, government and citizenship. Additionally, LRE distributed more than 20,000 copies of *Turning 18 in Idaho* to high school seniors.

Idaho Volunteer Lawyers Program (IVLP)

IVLP continues to provide legal services to low-income individuals, families and groups. Through case representation by volunteer attorneys, brief services, advice and consultation, clinics and workshops, IVLP served over 1,000 individuals last year. The program works with Idaho Legal Aid Services, and the statewide Court Assistance Offices to assist those with legal needs and limited resources.

IVLP continues to expand initiatives to create more opportunities for attorneys to provide pro bono services. The Idaho Pro Bono Commission, chaired by Idaho Supreme Court Justice Jim Jones, is developing strategies to encourage law firms, corporate law departments, and government agencies to maximize the involvement of attorneys in pro bono service and to explore the development of means and incentives to support attorneys in providing pro bono services.

To accurately convey the commitment of Idaho lawyers to pro bono, the Commission has asked law firms to adopt pro bono policies and lawyers to report their pro bono hours to IVLP. Those hours are included in the donated hours listed on the following table.

Idaho Volunteer Lawyers Program		
	2010	2009
Calls received	5,812	4,908
Cases referred to volunteer attorneys	849	756
Donated hours	15,747	16,791
Donated services value	\$2,362,050	\$2,518,650
Legal resource line calls	670	1,055

Interest on Lawyers Trust Accounts (IOLTA)

Over the past 25 years, the IOLTA program has granted over \$5.8 million to law related programs and services throughout Idaho. The organizations funded in 2010 were: Idaho Legal Aid Services, Idaho Volunteer Lawyers Program, ILF Law Related Education, ILF Legal Resource Line, Idaho YMCA Youth Government, Idaho State 4-H Know Your Government Conference, and law school scholarships. Funds granted for 2010 decreased 38% from 2009 grants funded. Due to the decrease in interest rates, IOLTA grant funds have decreased over 50% in the last two years.

Continuing Legal Education (CLE)

The Idaho Law Foundation and the Idaho State Bar Sections offer legal education programs throughout the state.

ISB/ILF Continuing Legal Education		
	2010	2009
Total live program attendance	1,783	1,915
Tape/DVD rentals	641	725
Online transactions	804	604
Webcast attendance	297	201

Fund Development

Donations		
	2010	2009
General Fund, IVLP, LRE	\$85,404	\$99,102
Endowment Fund	\$5,885	\$1,450
Total	\$91,289	\$100,552

The Idaho Law Foundation is indebted to the attorneys that volunteer their services and donate their resources to ILF programs and activities. The mission and goals of the organization are only realized with the help and support of our members. Thank You.

ISB/ILF Committees

Volunteer Opportunities

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

Please let us know if you are interested in contributing to the activities of the Idaho State Bar and the Idaho Law Foundation by serving on one of the committees, or participating in one of the programs listed below.

Please indicate your 1st, 2nd, or 3rd choice.



IDAHO STATE BAR VOLUNTEER COMMITTEES

- The Advocate Editorial Advisory Board
(meets monthly)
- Bar Exam Grading
(twice a year)
- Lawyer Assistance Program
(meets quarterly)
- Disciplinary Committees
(meet as needed)
 - Professional Conduct Board
 - Client Assistance Fund
 - Unauthorized Practice of Law
- Admissions Committees
(meet as needed)
 - Character and Fitness
 - Reasonable Accommodations

IDAHO LAW FOUNDATION VOLUNTEER COMMITTEES

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

I would like more information about the Bar Sections.

I would like more information about the District Bar Associations.

I would like more information about participating in the Foundation's Law Related Education Programs such as Mock Trial, or Lawyer in the Classroom.

I am interested in providing pro bono service through the Foundation's Idaho Volunteer Lawyers Program.

Name: _____ Firm: _____

Address: _____ City: _____ Zip: _____

Phone: _____ Email: _____

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

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

Please return this form no later than June 3, 2011
ISB/ILF Committees
P.O. Box 895
Boise, ID 83701
Or email your committee interests to dminnich@isb.idaho.gov



Idaho State Bar 2011 Professional Award Nominations

The Idaho State Bar Board of Commissioners is now soliciting nominations for the 2011 professional awards. These awards were initiated by the Board of Commissioners to highlight members who demonstrate exemplary leadership, direction and commitment in their profession.

Distinguished Lawyer - This award is given to an attorney (or attorneys) each year who has distinguished the profession through exemplary conduct and many years of dedicated service to the profession and to Idaho citizens.

Professionalism Awards - The awards are given to at least one attorney in each of Idaho's seven judicial districts who has engaged in extraordinary activity in his or her community, in the state, or in the profession, which reflects the highest standards of professionalism.

Pro Bono Awards - Pro bono awards are presented to the person(s) from each of the judicial districts that have donated extraordinary time and effort to help clients who are unable to pay for services.

Service Awards - Service awards are given each year to lawyers and non-lawyers for exemplary service to the Bar and/or Idaho Law Foundation.

Outstanding Young Lawyer - The purpose of the award is to recognize an Idaho State Bar young lawyer who has provided service to the profession, the Idaho State Bar, Idaho Law Foundation, and to the community and who exhibits professional excellence.

Section of the Year - The Idaho State Bar Practice Section of the Year Award is presented in recognition of a Section's outstanding contribution to the Idaho State Bar, to their area of practice, to the legal profession, and to the community.

Recipients of the awards will be announced in May. The Distinguished Lawyer and Service Awards will be presented at the annual meeting. Professionalism and Pro Bono Awards will be presented during each district's annual resolutions meeting in the fall.

Award nominations should include the following:

- Name of the award
- Name, address, phone, and email of the person(s) you are nominating
- A short description of the nominee's activity in your community or in the state, which you believe brings credit to the legal profession and qualifies him or her for the award you have indicated
- Any supporting documents or letters you want included with the nomination
- Your name, along with your address, phone, and email

You can nominate a person for more than one award.

The nomination deadline is March 28, 2011. Submit nominations to: *Executive Director, Idaho State Bar, PO Box 895, Boise ID 83701, fax (208) 334-4515, dminnich@isb.idaho.gov.*



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A CASUAL TWEET TO FORMAL REPRIMAND: THE PRECARIOUS PRESENCE OF SOCIAL MEDIA IN LEGAL CIRCLES

Brian Kane

Idaho Office of the Attorney General

Imagine a brutal day in trial, ruling after ruling goes against you, objections are overruled and the opponents sustained. Your head is aching, your shoulders are sore and you log into Facebook and decide to let off a little steam: “brutal trial day, judge is an evil unfair witch!” You head off to bed, wake up in the morning, log back in to see a series of supportive comments, and a bunch of likes and feel ready to face the court again. When you arrive at the courthouse, the judge asks you to step into her chambers with opposing counsel, and there on the screen is your Facebook page. Never happen, right? No one would do something this dumb...or would they?

The example above is a modification of a situation in which an attorney blogged about a case he was trying.¹ Notably, the Florida Bar found five bar violations including Florida Bar Rules 3-4.3 (commission of an unlawful act), 4-8.2(a) (Lawyer shall not make a statement known to be false), 4-8.4(a) (Lawyer shall not knowingly violate Rules of Professional Conduct), 4-8.4(c) (A lawyer shall not engage in conduct involving dishonesty), 4-8.4(d) (Lawyer shall not engage in conduct prejudicial to the administration of justice).² This blog post resulted in a fine and reprimand from the Florida Bar.³ This example is not an isolated incident.

Social media gaffes are occurring at every level within the judicial system. From attorneys badmouthing judges, to judges friending parties and attorneys before them, to jurors jumping the gun, social media provides an outlet for attorneys and judges that includes an inherent risk. Consider an attorney who friended a judge on Facebook, who then asked for a trial continuance to deal with a death in her family.⁴ The Judge logged into Facebook and ran into picture after picture and post after post of partying, drinking mojitos, and other non-grief related expres-



Brian Kane

Divorce attorneys have hit the goldmine with Facebook. Even the IRS and Department of Justice have publicly acknowledged their use of social networking sites to investigate taxpayers and suspects.

sions.⁵ The attorney then had the audacity to request a second continuance from the Judge, who confronted the attorney with her Facebook postings and pictures.⁶

Lying to a judge is bad enough—but how about revealing client confidences? A public defender was terminated from her position and faces disciplinary proceedings when it was discovered that she authored a blog that was not only critical of the judiciary (Judge was “clueless”), but also used her client’s jail id numbers or names as she blogged about her client’s situations.⁷ This resulted in disciplinary action being initiated for the following violations:

1. Revealing of client confidence. (Rule 1.6)
2. Failing to have a client rectify a fraud on the court. (Rule 1.2)
3. Failure to disclose a material fact to the tribunal. (Rule 3.3)
4. Conduct involving dishonesty. (Rule 3.3)⁸

Although pending, it appears from the complaint that this attorney faces fairly severe sanctions both for revealing client confidences, and for additionally aiding her client in perpetrating a fraud on the Court. Most interesting in this case is that the attorney’s blog was not password protected and entitled “The Bardd (sic) Before the Bar – Irreverant (sic) Adventures in Life, Law, and Indigent Defense.” Following her termination and commencement of disciplinary proceedings, she has begun a new password protected blog entitled, “A Bird In A Roomful Of Cats.”

Facebook = EvidenceBook

Many attorneys have come to realize the benefit of social media sites such as Facebook and Twitter. The news is replete with tales of defendants being caught post-

ing the details of their crimes, or pictures of them with the stolen goods.¹⁰ Divorce attorneys have hit the goldmine with Facebook.¹¹ Even the IRS and Department of Justice have publicly acknowledged their use of social networking sites to investigate taxpayers and suspects.¹² Most importantly, there is no privilege for social media conversations.

For example, a party was required to reveal both user id information as well as the passwords associated with the account once it was determined that relevant information was contained within a Facebook account. In an opinion on a motion to compel, the judge noted that the presence of a third party generally negates an existent privilege.¹³ The conclusion reached was that anyone participating in social media has a general awareness that the information shared is done so with the knowledge that it will be viewed, shared, and commented on by others, as well as the likelihood of sharing beyond a participants network of “friends.”¹⁴ Based upon the sharing and exchange of information, it is clear that if social networking sites contain information relevant to a lawsuit—access to that information will likely be granted. This result signals that an “oversharing” attorney may be subject to not just a disciplinary proceeding, but also a party to a malpractice action.

Another example where attorneys need to exercise caution is with their accumulation of friends. It is entirely predictable that an attorney could have included within a collection of 250 Facebook “Friends” an opposing witness, or even a party in a suit. This “friendship” could serve as the basis for a complaint arising under Rule 1.7 (Conflict of Interest). Imagine a client reviewing your “friends” in Facebook and coming upon an opposing witness or the opposing party. It is advisable for at-

torneys, as part of their ordinary conflicts checks, to review their Facebook connections, and if necessary get an informed consent from your client regarding any questionable Facebook connections.

Jurors heart Facebook

Facebook in particular is an extremely rich source of information for attorneys. For example, many jurors maintain Facebook and Twitter feeds, and even update them during the trial. As an attorney, those updates could be significant. Recognizing the availability of information online, at least one court has implied that attorneys likely have a duty to conduct some modicum of research about prospective or empaneled jurors.¹⁵ The court specifically recognized that based on advances within technology, litigants have a duty to bring information about venire members to the court's attention at an earlier stage.¹⁶ The Missouri court went further and expressly directed that trial court ensure parties have an opportunity to "make a timely search prior to the jury being impaneled."¹⁷

Just as Facebook and the Internet are replete with gaffes of attorneys, parties, and others, it is a rich source of questionable juror conduct. For example, during the public corruption trial of Pennsylvania State Senator Vincent Fumo, juror Eric Wuest posted updates on Facebook and Twitter. The Judge in the case met with Juror Wuest, went extensively through his Facebook posting and Twitter updates (which had been reported by a TV station) but did not remove him from the jury.¹⁸ Wuest remained on the jury, and no mistrial was declared because his postings failed to reflect either an "extra-record influence,"¹⁹ or a predisposition toward an outcome.

But not all juror postings are as innocuous. In Arkansas, a mistrial was declared after it was revealed that a juror had tweeted: "Nobody buy Stoom. Its bad mojo and they'll probably cease to Exist, now that their wallet is 12m lighter."²⁰ In another case, a juror tweeted himself off the Chandra Levy murder trial jury by tweeting: "Guilty, guilty...I will not be swayed. Practicing for jury duty," prior to being sworn in as a juror.²¹

Perhaps the greater risk to attorneys, are jurors who self research. Prior to the Internet, it would have been an extremely difficult undertaking in most instances for a juror to independently investigate the various components of a trial. The Internet, and particularly social media, has made such an undertaking routine. Think about the ease with which a juror can

In another case, a juror tweeted himself off the Chandra Levy murder trial jury by tweeting: "Guilty, guilty...I will not be swayed. Practicing for jury duty," prior to being sworn in as a juror.

Google the parties in a case, or the attorneys, or look up a claimed medical condition and then inject those extra-record influences into the jury box.

The simple solution upon learning of a juror's independent research would be dismissal. But recently in Florida, upon learning of an individual juror's research, the judge questioned the rest of the jury and learned that eight additional jurors had done their own research.²² Within the Florida case, the mistrial was declared after eight weeks of trial — a tremendous burden on both the court system and the parties involved, but after the juror's research resulted in consideration of evidence specifically excluded, as well as discussions with the other jurors, no alternative was left.²³

As attorneys, it is essential to recognize both the ease and the lure of the Internet. With Google, Bing, and Yahoo, virtually limitless answers and explanations are at our fingertips. But it must also be recognized that this ease and lure threaten the very essence of the judicial adversarial system. For example, numerous rules apply to the introduction of evidence and testimony as systemic safeguards, but a few clicks of the mouse, or taps on a smartphone can extinguish all of those safeguards as a juror seeks a fuller explanation of a point from Wikipedia. Attorneys and judges must be aware and on the lookout for situations such as those highlighted above popping up.

Judges struggle with social media as well²⁴

As has been demonstrated above, attorneys and jurors have struggled mightily with the Internet and Social Media. Judges, it appears, are equally human. In North Carolina, a judge was issued a Public Reprimand for exchanging posts on Facebook with an attorney appearing before him.²⁵ The judge "friended" the attorney after an in-chambers discussion with opposing counsel (who indicated unfamiliarity with Facebook) about Face-

book.²⁶ Included within the posts following the judge's friending of the attorney, was the following exchange (A= attorney, J= judge):

A: How do I prove a negative?

J: Two good parents to choose from.

J: Terry feels he will be back in court.

A: I have a wise judge.²⁷

Other exchanges followed, and the judge additionally "Googled" one of the party's websites and stated on the record that he enjoyed her photography and poetry.²⁸ This resulted in the judge being issued a formal reprimand by the North Carolina Judicial Standards Commission, most notably for engaging in ex parte contact and independent ex parte research about a party before the court.²⁹ In this instance the judge let down his guard based on both the casualness of social media contact, as well as the ease with which independent research can be conducted. Both attorneys and judges need to guarded as they interact through social media to insure their conduct remains above reproach.

To friend or not to friend

Social media presents yet another conundrum for attorneys and judges, particularly in Idaho. As a small state and an even smaller bar, many attorneys and judges are longstanding friends who attended law school, college, high school, and even elementary school together. Social media is a natural collecting point for individuals who share these common bonds, which presents a significant ethical question: Should judges friend attorneys on Facebook or other social media?

Several judicial commissions have examined this issue, and the verdict at this point is split. Florida has taken the most restrictive position because it perceives the public listing of lawyers who are "friends" with judges equates to an impression that these lawyers may be in a special position to influence the judge.³⁰ Ohio, New York, and South Carolina

permit “friending” between lawyers and judges but with caveats.³¹

There are two primary caveats that attend to any judge/ lawyer “friending” activity. First, the judge and attorney (or any other person) cannot engage in any *ex parte* contact regarding any pending or likely to be pending matter.³² Second, if the interaction between a lawyer and judge through the social networking site would lead a casual observer to conclude that the interactions rose to the level of a “close social relationship,” it would trigger the requirements of disclosure and recusal.³³ In short, judges and lawyers need to be acutely aware of the perceptions that social media interactions create. Within chambers, judges may also have a duty to be consciously aware of the social media activities of their clerks and assistants. The Florida Judicial Ethics Advisory Committee acknowledged that a judicial assistant’s use of social media independent of the judge, including the addition of lawyers who appear before the judge was permissible. But the Committee also cautioned that consistent with Canon 3C(2), a lawyer who attempts *ex parte* communication through a social networking site connection with the assistant should be immediately “de-friended,” and reported to the judge.³⁴

Be professional, perceptive, and aware!

No one is immune from the lure of social networking sites, and understandably so. Social networking offers a convenient means with which we can stay connected across the great divides of life. But the very essence of social networking involves a corresponding trade-off in privacy. As we connect with people on professional and social levels, an inherent part of the connection “deal” is that we will share information with one another through comments, pictures, chat, videos, and reflections on the mundane. This sharing creates an air of casualness, that at times results in casualties. A few key points are worth remembering when interacting in social media:

1. Maintain professionalism — the Rules of Professional Conduct and Judicial Code follow you online.
2. Consider the use of one networking site for professional contacts and another for purely social.
3. Remember CONFIDENTIALITY!!! (And remind your clients too!)
4. Don’t let social media destroy your credibility.

5. Do use it to research clients, jurors, witnesses etc.
6. Do not pretext to do so.
7. Be aware of the perceptions created by who your “friends” are.
8. Remember to inquire as to social media in *voir dire*, monitor during trial, and disclose immediately to a judge any misconduct.
9. Do not attempt *ex parte* contact through social media.
10. Remember the visibility of your posts, picture, and blogs. If you can find it so can someone else...!

Social media brings the world to your doorstep, but it also brings you to the world. As a powerful informational resource, social media and the internet carry with them a responsibility for appropriate use. By striking the appropriate balance, attorneys and judges can harness this unparalleled resource, while remaining compliant with their respective ethical requirements.

About the Author

Brian Kane is a Deputy Attorney General in the Idaho Office of Attorney General. The views and opinions within this article are the author’s own and should not be imputed to the Attorney General, the Office of the Attorney General, or the State of Idaho in any way.

Endnotes

- ¹ See Letter from Florida State Bar to Sean William Conway, dated April 3, 2007 (and attachments).
- ² See Letter from Florida State Bar to Sean William Conway, dated November 7, 2007.
- ³ Conway was fined \$1200, see <http://jonathanturley.org/2009/09/30/florida-supreme-court-upholds-sanction-against-lawyer-who-called-judge-a-witch-on-a-blog/>
- ⁴ See Facebooking Judge Catches Lawyer In Lie, Sees Ethical Breaches, July 31, 2009, available at: <http://www.abajournal.com/weekly/facebooking-judge-catches-lawyers-in-lies-crossing-ethical-lines-abachicago>
- ⁵ Id.
- ⁶ Id.
- ⁷ See *Complaint, In the Matter of Kristine Ann Peshek*, ¶ 11 & ¶¶ 4, 6, & 8, (No. 6201779, Filed August 25, 2009).
- ⁸ Other violations were alleged, but these are the most significant, and the ones most likely implicated by any use of social media. *Complaint* at ¶¶ 13 & 17 (Listing violations).
- ⁹ This blog has since been deleted or ended by the author.
- ¹⁰ *Burglar Posts Picture Of Himself On Facebook*, December 16, 2010, available at: <http://abclocal.go.com/kgo/story?section=news/bizarre&id=7847736> , See also Barb Dybald, *BUSTED: Burglar Arrested After Checking Facebook During Robbery*, Sept. 17, 2009

(available at: <http://mashable.com/2009/09/17/facebook-robber-arrested/>).

¹¹ Belinda Luscombe, *Facebook and Divorce: Airing the Dirty Laundry*, Time, June 22, 2009, (available at: <http://www.time.com/time/magazine/article/0,9171,1904147,00.html>).

¹² See IRS Course on Internet Tools to locate taxpayers, available at: http://www.irs.gov/efile/files/filenode/social_network/training_course.pdf ; see also Obtaining and Using Evidence from Social Networking Sites, available at: http://www.irs.gov/efile/files/filenode/social_network/20100303_crim_socialnetworking.pdf

¹³ *McMillen v. Hummingbird Speedway, Inc.*, No. 113-2010 CD Ct. Comm. Pleas at 5, (Jefferson Cnty, Pa., September 9, 2010) citing *In re Condemnation by City of Philadelphia*, 981 A.2d 391, 397 (Pa. Commw. Ct. 2009).

¹⁴ *McMillen* at 5.

¹⁵ *Johnson v. McCullough*, 306 S.W. 3d 551, 558-59 (Mo. 2010).

¹⁶ Id.

¹⁷ Id. at 559.

¹⁸ *U.S. v. Fumo*, 2009 WL 1688482, 58 (E.D.Pa. 2009).

¹⁹ *United States v. Resko*, 3 F.3d 684, 690 (3d Cir. 1993).

²⁰ This tweet is reproduced as written with the typos as in the original text. Available at: <http://www.out-law.com/page-9879>

²¹ *Prospective Juror Tweets Self Out of Levy Murder Trial*, Oct. 22, 2010, available at: <http://www.nbcwashington.com/news/local-beat/Prospective-Juror-Tweets-Self-Out-of-Levy-Murder-Trial-105553253.html>

²² John Schwarz, *As Jurors Turn To Web, Mistrials Are Popping Up*, NY Times, March 17, 2009, available at: <http://www.nytimes.com/2009/03/18/us/18juries.html>

²³ Id.

²⁴ Upon review of a draft of this article, Jim Carlson, Executive Director of the Idaho Judicial Council commented: “Involvement by judges with social networking sites is discouraged because of prohibitions of Canons 2, 3, and 4.”

²⁵ Public Reprimand, B. Carlton Terry, Jr, District Court Judge, Judicial District 22, North Carolina, No. 08-234, March 25, 2009.

²⁶ Id. at ¶ 3.

²⁷ Id. at ¶ 5.

²⁸ ID. at ¶¶ 7 & 8-13.

²⁹ Id. see also North Carolina Code of Judicial Conduct Canon 3A(4).

³⁰ Florida Supreme Court Judicial Ethics Advisory Committee, Op. No. 2009-20 at 3 (November 17, 2009).

³¹ Supreme Court of Ohio, Board of Commissioners on Grievances and Discipline, Op. No. 2010-7 at 8 (December 3, 2010); New York, Advisory Committee on Judicial Ethics, Op. No. 08-176 (2009); South Carolina, Advisory Committee on Standards of Judicial Conduct, Op. 17-2009 (2009).

³² Ohio Op. No. 2009-30 at 6.

³³ Id., compare New York Op. Nos. 07-141 with 06-149; see also New York Op. No. 08-176.

³⁴ Florida Judicial Ethics Advisory Committee, Op. No. 2010-04 (March 19, 2010).

MAKING THE MOST OF LIMITED RESOURCES: MULTISTATE ENFORCEMENT ACTION

Stephanie Guyon
Idaho Office of the Attorney General

State attorneys general first worked together to enforce federal antitrust laws against prominent corporations like Standard Oil Company. They were as active, if not more so, than their federal counterparts in exercising the enforcement authority granted by state antitrust laws. For example, between 1890 and 1902, attorneys general brought 28 antitrust actions compared to the Department of Justice's 19 actions.¹

As their states' chief law enforcement officers, attorneys general have a duty to act in the best interest of their states and to enforce the laws that their state legislatures assign to them. When unlawful conduct occurs in intrastate commerce, the attorneys general usually investigate and prosecute the matter, but when the unlawful conduct affects multiple states, the attorneys general often will pool their resources to investigate the matter.²

Multistate litigation has produced historic changes to how some of the largest industries conduct business. Where the bottomless resources of corporations might render individual state litigation difficult, if not impossible, attorneys general can work cooperatively through multistate groups to level the playing field and enforce an industry's compliance with their respective state laws.

The most legendary multistate settlement is the states' 1998 Master Settlement Agreement (MSA) with the largest tobacco companies. After years of misrepresentation and subterfuge negatively affecting America's health, youth, and taxpayers, the attorneys general began filing lawsuits in 1994 to change the industry's business practices and recover the states' continued costs for treating smoking-related illnesses.³ The result of the individual state lawsuits is the MSA, which requires tobacco companies to make annual payments to the states. It also prohibits them from targeting youth in their ads and marketing programs, sponsoring youth events or team sports, distributing brand-name merchandise, and, among other things,



Stephanie Guyon

Since the 1980s, the veil of mystery that once enveloped multistate groups has thinned. While the attorneys general's activities during a multistate enforcement action are confidential, how multistates form and operate is not a secret.

misrepresenting the health consequences of smoking.⁴

Given Idaho's limited resources, its ability to obtain such a remarkable settlement on its own would have been daunting and time-consuming. Although the Attorney General's Office may be Idaho's largest law firm, its Consumer Protection Division has but three attorneys and only one of the three attorneys specializes in tobacco and antitrust issues. But combining its resources and expertise with other states, Idaho's limited size is no longer an obstacle to effecting justice for its citizens and taxpayers.

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Formation of multistates

The National Association of Attorneys General (NAAG), a nonpartisan organization of 51 state attorneys general and five U.S. territorial attorneys general, is instrumental in organizing multistate efforts. Founded in 1907, NAAG began issuing multistate enforcement guidelines in the 1980s to coordinate how states exercised their authority in antitrust multistates.⁵ Additional guidelines followed, including guidelines for air travel advertising and the car rental industry.⁶ Today, the NAAG Multistate Task Force and the NAAG Antitrust Multistate Task Force coordinate multistate litigation to "ensure consistent enforcement of state antitrust and consumer protection laws."⁷

While the multistate formation process has varied through the years, generally when one or more states believes an issue is appropriate for a multistate, they may notify NAAG which organizes an initial meeting between all interested states to discuss the issues and projected

goals of the group. An executive committee (EC) usually is appointed to represent the group during the investigative contacts with the business entity and any settlement negotiations. The EC provides a point of contact for the business and is responsible for maintaining communications with the rest of the states. In addition to the state or states that initiated the multistate, the states that comprise the EC may have, among other factors: (1) a large number of consumer complaints; (2) have the resources to travel, conduct depositions, or review large numbers of documents; or (3) have a special interest or expertise in the subject matter. Every state, however, commits to attending all multistate meetings and, when necessary, conducting state-specific investigative activities, reviewing and summarizing evidence, and preparing state-specific litigation or settlement documents.

For example, in 2008 a small coalition of states began investigating allegations that DISH Network LLC had engaged in and was continuing to engage in unlawful advertising and other business practices. That small group evolved into a 46-state multistate investigation. The Idaho Attorney General's Consumer Protection Division joined the group because the division had received an excessive number of complaints in which consumers voiced problems with DISH Network that were similar to those that the other states identified.

An EC formed to represent the interests of the entire group. Through a series of conference calls, meetings, and written communications between the states and with DISH Network, the group narrowed its focus to the most egregious business practices – those that garnered the highest number of consumer complaints. The states' investigation and subsequent settlement negotiations with DISH Network took more than two years, but produced

a comprehensive and fair agreement that addressed the states' concerns, implemented a consumer restitution program, and required DISH Network to pay \$5.9 million to the states to reimburse them for their costs and expenses.

Purpose of multistates

Absent the Idaho Attorney General Office's participation in multistates, its ability to address the conduct of various national and multi-national corporations under Idaho's consumer protection and antitrust laws and recover consumer or state restitution, civil penalties, attorney's fees, or investigative costs would be greatly reduced. The recovered penalties, fees, and costs are deposited in the Consumer Protection Fund to fund the office's consumer education efforts and future enforcement actions, as appropriated by the Legislature. Through direct payments to Idahoans and mandated consumer redress programs, multistates also have returned millions of dollars in restitution to injured consumers. The office also has obtained Medicaid reimbursement dollars through multistate litigation with drug companies.

But multistate groups do much more than investigate the business activities of specific entities or industries. Groups meet on a regular basis to share enforcement ideas, report new legislation, or discuss consumer complaint trends. At any given time, the three deputy attorneys general with the Idaho Attorney General's Consumer Protection Division participate in dozens of multistate investigations, task forces, and issue-specific groups concerning a variety of consumer protection issues – from health care, debt management, and immigration fraud to class actions, auto advertising, and Internet privacy.

Multistates also benefit large corporations. Rather than negotiating with the states individually or defending against a multitude of state-specific allegations, corporations can resolve each state's concerns through one standardized agreement.

That is not to say, however, that multistates are problem free. Group projects never are. Even in the Internet age, sometimes communication is lacking. While the EC always knows the status of an investigation, it may fail to keep the group members informed. Such communication conflicts, however, are remedied easily through regular conference calls and listservs. Under no circumstances does the EC accept a settlement agreement without consulting with the entire group, and no settlement is binding upon a state until it is accepted by that state's attorney general.



Multistates also do not provide quick results. Depending on the complexity of the investigation, some multistates linger for five or more years before concluding. And much like life, despite the time committed to the investigation, the multistate may not end with a satisfactory result. Financially unstable companies, for example, may declare bankruptcy or the companies' owners may disappear, only to regroup and continue their unlawful activities under a different name.

Criticisms of multistates

Critics of multistate actions, mostly business organizations and lobbyists, claim attorneys general pursue cases based on untenable legal theories, extending the limits of their statutory and common law authority. Pointing to the MSA as an example, critics contend that the attorneys general have usurped federal authority, violating the separation of powers doctrine and becoming "a shadow Congress that would dictate national law in many areas of business regulation."⁸ These criticisms are without merit.

Putting aside that no court has agreed with such arguments, what critics forget is that the Supreme Court has held repeatedly that state governments are not subject to "the concept of separation of powers."⁹ States are separate sovereigns with laws that a business must follow when doing business in that state. And while there are instances where Congress has preempted a state from regulating a certain field,

Industries that continue to disappoint regulators through their intentionally deceptive and sometimes dangerous behavior are pointing their fingers in the wrong direction.

such preemption analysis begins with a presumption against preemption, particularly when a state's historic police powers are at issue.¹⁰ As the Supreme Court has stated: "[When Congress legislates] in a field which the States have traditionally occupied . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."¹¹ In any event, attorneys general can act only after the legislature has acted, and prosecuting entities that violate consumer protection or antitrust laws is an executive function, not a usurpation of legislative authority.

Multistate opponents also contend that the attorneys general's investigations extort settlements from businesses because the cases impose such a considerable liability threat to the targeted company.¹² This claim relies on the ever popular, yet legally unsustainable "stop-picking-on-me" theory. Industries that continue to disappoint regulators through their intentionally deceptive and sometimes dangerous behavior are pointing their fingers in the wrong direction. Reputable companies on the other hand recognize that, rather than blaming attorneys general for doing their jobs, it is more productive to work cooperatively with the states to ensure their business activities comply with the law.¹³

Future of multistates

Critics of multistate actions no doubt will persist with their complaints. But in the end, no one can dispute the injunctive and monetary benefits that multistate actions bestow on each state's citizenry, which attorneys general have taken an oath to protect from deceptive business practices.

Through its 2010 multistate actions, the Idaho Attorney General's Office stopped the allegedly unlawful business activities of Abbott Laboratories, Amerix Corporation, AstraZeneca Pharmaceuticals LP, DirecTV, Inc., Dannon Company, Inc., LifeLock, Inc., and Novartis Pharmaceuticals Corporation. These settlements, along with the dozens of others that the Attorney General's Office has obtained, illustrate the continued importance of multistate actions to states like Idaho that lack the resources to pursue independent actions against every corporate offender. And as state budgets tighten, it is likely that, in an effort to conserve those limited resources, more multistates will form. So, while multistate actions may garner disapproval from some business organizations, they will remain an invaluable tool in the attorneys general's arsenal for preventing

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harm to consumers, competition, and the economy.

About the Author

Stephanie Guyon is a deputy attorney general in the Attorney General's Consumer Protection Division. She handles a variety of consumer matters, including auto advertising, charitable solicitations, Internet sales and privacy, mortgage servicing, telemarketing, and work-at-home schemes. The opinions expressed in this article are those of the author and do not reflect the opinions or position of the Attorney General's Office or the State of Idaho.

Endnotes

¹ James May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1918*, 135 U. PA. L. REV. 495, 500-501 (1987).
² For a more detailed history of multistates, see Jason Lynch, Note, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation*, 101 COLUM. L. REV. 1998 (2001).
³ Idaho's lawsuit was filed in 1997. See *State of Idaho v. Philip Morris, Inc., et al.*, Fourth Judicial District, Ada County, No. CVOC 9703239D (Idaho).
⁴ The Master Settlement Agreement is available on the Idaho Attorney General's Office's website at: <http://www.ag.idaho.gov/tobacco/masterSettlement.html>.
⁵ NAAG Vertical Restraints Guidelines (1995), published in 4 Trade Reg. Rep. (CCH) ¶ 13,400.NAAG. Horizontal Merger Guidelines (1993), published in

4 Trade Reg. Rep. (CCH) ¶ 13,406. Voluntary Pre-Merger Disclosure Compact (1994), published in 4 Trade Reg. Rep. (CCH) ¶ 13,410. Protocol for Joint Federal-State Merger Investigations (1994), published in 4 Trade Reg. Rep. (CCH) ¶ 13,420.

⁶ Guidelines for Air Travel Advertising, 53 Antitrust & Trade Reg. Rep. (BNA) No. 1345, at S-1 (Dec. 17, 1987); Report and Recommended Guidelines of NAAG's Task Force on the Car Rental Industry, 55 Antitrust & Trade Reg. Rep. (BNA) No. 1395, at 1022 (Dec. 15, 1988).

⁷ Copies of all guidelines and protocols, a description of each task force's purposes, and a database of multistate actions are available on NAAG's website at www.naag.org.

⁸ Hal Stratton, *Attorneys General in State of Collusion*, WALL ST. J., June 10, 1988, at 22.

⁹ *Sweezy v. New Hampshire*, 354 U.S. 234, 255 (1957); see also *Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring) ("[T]he distribution of powers among the branches of a State's government raises no questions of federal constitutional law, subject to the requirement that the government be republican in character.")

¹⁰ *Maryland v. Louisiana*, 451 U.S. 725, 726 (1981).

¹¹ *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

¹² See Michael DeBow, *Restraining State Attorneys General and Curbing Government Lawsuit Abuse*, 437 POLICY ANALYSIS 1, 5 (May 10, 2002).

¹³ Following a settlement with Sears, Roebuck & Company, a company representative remarked that dealing with all of the attorneys general at one time was beneficial, saving time and allowing Sears to refund customers faster. See Myron Levin, *Teaming Up to Aid Consumers*, L.A. Times, July 6, 1999, at column one (July 6, 1999).

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PRACTICAL AND ETHICAL ISSUES WHEN DEALING WITH A *PRO SE* LITIGANT

Stephen Adams
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Pro se plaintiffs come in all shapes and sizes, from the relatively uneducated to the highly educated. While there have always been *pro se* litigants, I anticipate that economic conditions will cause the number of *pro se* litigants to increase in the near future.¹ In fact, with the increase of *pro se* litigants, it is not unheard of for a civil appeal to have *pro se* litigants on both sides.²

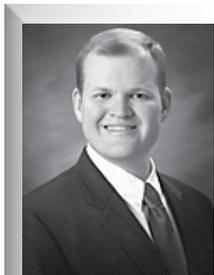
Though *pro se* litigants are not bound by the rules of ethics³, attorneys are and must avoid certain pitfalls when a *pro se* litigant is on the other side. Below are some suggestions which will hopefully assist attorneys in dealing with *pro se* litigants.

Fair warning: courts give *pro se* litigants significant leeway

It seems that the Courts tend to be more forgiving with *pro se* litigants than with represented litigants. For example, while the 9th Circuit has indicated that *pro se* litigants are expected to know and follow the rules of civil procedure⁴, many judges give *pro se* litigants more leeway than a represented party would receive.⁵ Thus, pleadings, memoranda, and other documents which give some inkling of what a *pro se* litigant is arguing will likely not be rejected because they do not have the proper format, or are inartful in presentation.⁶

First steps

Many of the mistakes made by a *pro se* plaintiff are made at the outset of the lawsuit. When first looking at a *pro se* complaint, it is usually worth checking to see if any 12(b) motions⁷ or other applicable procedural requirements apply. For example, upon receipt of a complaint, an attorney should confirm with the client how and when the complaint was served. I have had numerous cases where the *pro se* litigant has failed to properly execute service. In most of these cases, the *pro se* litigant simply mailed the complaint and summons. However, state rules generally do not allow service by mail upon individ-



Stephen Adams

If there is an attorney working in the background with the pro se litigant, it is recommended to confirm the status of the relationship before engaging in any communications with the pro se litigant.

uals⁸ or corporations.⁹ The Federal rules also require personal service on individuals¹⁰ and corporations.¹¹

Of course, failure to properly serve a complaint and summons deprives a Court of jurisdiction over the suit, subjecting the suit to dismissal.¹²

Also, it is advisable to determine whether the complaint was served in a timely manner (120 days for a federal lawsuit¹³ and six months for an Idaho state lawsuit).¹⁴ This process can be easily handled by either checking the Idaho Repository¹⁵ or the Idaho Federal Court Electronic Filing System.¹⁶

If the pleading is so vague and ambiguous as to make it impossible to respond or even comprehend what is being alleged, the rules allow a party to move for a more definite statement.¹⁷ Courts will dismiss cases where complaints are unintelligible or incomprehensible.¹⁸

If the case gets to discovery, it may become necessary to depose the *pro se* litigant. It is important to ask the *pro se* litigant whether they have ever met with an attorney or obtained legal help from any source. If the *pro se* litigant is obtaining legal help or advice from an attorney, that may be sufficient for them to be considered represented. As discussed in more detail below, if the *pro se* litigant is represented, communications with the litigant may be limited by the Idaho Rules of Professional Conduct. If there is an attorney working in the background with the *pro se* litigant, it is recommended to confirm the status of the relationship before engaging in any communications with the *pro se* litigant. Further, if the *pro se* litigant has been represented in the past, this knowledge is helpful in suggesting whether there are any liens for legal work that could affect settlement negotiations. Always ask questions about what legal services the *pro se* litigant has received.

Motions to dismiss and motions for summary judgment

As discussed above, courts are extremely solicitous of *pro se* litigants. The Federal Court for the District of Idaho even goes so far as to issue a document entitled “Notice to *Pro se* Litigants of the Summary Judgment Rule Requirements,” which outlines federal and local rules for responding to motions to dismiss and for summary judgment. Frequently, *pro se* litigants ignore this document, or fail to follow the rules set explained therein.

Should grounds be available for a motion to dismiss or for summary judgment, I heartily recommend that you become familiar with the local rules, and specifically local federal civil rule 7.1(e). This rule states that failure to respond to an argument may be deemed a waiver of that argument, subjecting the claim to dismissal.¹⁹ Similarly, local rules have specific requirements for response documents, and failure to follow these rules may lead to waiver under 7.1(e).²⁰

Improper practice of law

It is not uncommon for a *pro se* litigant to attempt to bring claims on behalf of others. Idaho law does not allow for unlicensed persons to represent other people or entities in legal claims.²¹ For example, a non-lawyer husband may not represent a spouse.²² Idaho Supreme Court cases have held that corporations cannot be represented by another business entity.²³ Similarly, corporations²⁴, limited liability corporations²⁵, and trusts²⁶ cannot be represented by a non-lawyer. Claims brought by a *pro se* litigant for any other person or entity are subject to dismissal.²⁷

The federal rule is similar.²⁸ Federal cases have held that *pro se* litigants may not represent estates²⁹, their own children³⁰, churches³¹, trusts³², unincorporated associations³³, or other persons or entities.³⁴ If there are any claims in the suit

for any person or entity other than the *pro se* litigant, a motion to dismiss would be appropriate.

That being said, expect the unexpected from *pro se* litigants. In one of my cases, a *pro se* plaintiff was representing a company he owned. When I filed a motion to dismiss the company's claims, the *pro se* plaintiff promptly responded by having the company assign to him personally all of the causes of action, which is allowed under Idaho law.³⁵ Needless to say, this made the improper practice of law issue moot.

Communication and settlement negotiations

Communication with a *pro se* litigant is difficult at best, and at worst, can lead to violations of the Idaho Rules of Professional Conduct.

Particular care must be taken to address ethical concerns when an attorney is involved in settlement negotiations with a *pro se* litigant. It can be unwise and potentially unethical to provide an analysis of the value of the case to the *pro se* litigant. The Idaho rules specifically state that when communicating with an unrepresented party, "a lawyer shall not state or imply that the lawyer is disinterested."³⁶ Though the rule does not say so, it is good practice to indicate the contrary in any communication. In other words, tell the *pro se* litigant that you represent an opposing party and that your interest may be opposite the *pro se* litigant's interests.

Lawyers also have a duty to correct any possible misunderstandings and are prohibited from giving legal advice.³⁷ One recommendation is to include in every letter to a *pro se* litigant that you do not represent the *pro se* litigant, are not writing the letter for the purpose of giving legal advice, and that the *pro se* litigant may contact an attorney to obtain representation.

However, even these precautions may not be sufficient. For example, in *Hopkins v. Troutner*, 134 Idaho 445, 4 P.3d 557 (2000), the Idaho Supreme Court found that a settlement negotiation between a represented party and a *pro se* litigant constituted overreaching on the part of the represented party's attorney, resulting in setting aside the settlement.³⁸ During settlement negotiations, the *pro se* litigant inquired of the opposing party's attorney as to the value of the case. The attorney provided his opinion,³⁹ and the case settled shortly thereafter.⁴⁰ The attorney recommended the *pro se* litigant should obtain legal counsel; however, the *pro se* litigant signed the settlement documents

The Court determined that the original attorney had engaged in overreaching simply because the attorney gave an "opinion" as to the value of the case.

without consulting an attorney.⁴¹ Thereafter, the *pro se* litigant obtained counsel who objected to the settlement, and the settlement was set aside.⁴²

The Court determined that the original attorney had engaged in overreaching simply because the attorney gave an "opinion" as to the value of the case.⁴³ The fact that counsel informed the *pro se* litigant that they should obtain legal counsel was not sufficient to uphold the prior settlement agreement.

The lesson learned from *Troutner* is that communications with a *pro se* litigant should be straightforward, simple, and the attorney should avoid communicating any information that could be construed to be an opinion or legal advice. For example, settlement communications should be phrased as, "our settlement offer is . . ." rather than "the case is worth . . ." One recommended method of avoiding ethical concerns in settlement negotiations is to utilize a mediator. Most civil forums have a no-cost mediation option, which interposes a third party between the attorney and the *pro se* litigant relieving some of the ethical concerns that direct communications might create.

Conclusion

Dealing with a *pro se* litigant can be frustrating, but should never be taken lightly. Hopefully these recommendations provide some insight and help avoid ethical pitfalls.

About the Author

Stephen Adams is an Associate Attorney at Anderson, Julian & Hull, LLP in Boise, where he has worked since he graduated from Vanderbilt University Law School in 2006. He is a member of the Idaho and Utah bars, and his practice focuses on education, employment, and municipality defense. He is married and has recently discovered he loves to bake.

Endnotes

¹ See, e.g. Madelynn Herman, *Self-Representation: Pro Se Statistics*, available at: <http://www.ncsconline.org/wc/publications/memos/prosestatsmemo.htm> (last accessed October 5, 2010). See also Robert L. Jeffs, *The Pro Se Quandary*, 23 Utah Bar Journal 6, 8 (2010).

² See, e.g., *Hausladen v. Knoche*, 149 Idaho 449, 235 P.3d 399 (2010). Admittedly, respondent John Sahlin is a licensed Idaho attorney.

³ *Dawson v. Cheyovich Family Trust*, 149 Idaho 375, 234 P.3d 699, 706 (2010).

⁴ *Weik v. Shinn (In re Weik)*, 2008 Bankr. LEXIS 481 (Bankr. D. Ariz. Feb. 15, 2008). See also *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987) ("Pro se litigants must follow the same rules of procedure that govern other litigants."); *Ghazali v. Moran*, 46 F.3d 52, 54 (9th Cir. 1995) ("pro se litigants are bound by the rules of procedure."); *Jacobsen v. Filler*, 790 F.2d 1362, 1364 (9th Cir. 1986) ("pro se litigants in the ordinary civil case should not be treated more favorably than parties with attorneys of record.")

⁵ See, e.g., *Brazil v. United States Dep't of the Navy*, 66 F.3d 193, 199 (9th Cir. 1995). See also *Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 623 (9th Cir. 1988) (discussing extra protections given to *pro se* litigants).

⁶ But see *Liponis v. Bach*, 149 Idaho 372, 234 P.3d 696, 699 (Idaho 2010) (where a *pro se* argument is "so lacking in coherence, citations to the record, citations of applicable authority, or comprehensible argument," the court may reject it).

⁷ See Idaho R. Civ. P. 12(b); Fed. R. Civ. P. 12(b).

⁸ Idaho R. Civ. P. 4(d)(2).

⁹ Idaho R. Civ. P. 4(d)(4). Limited exceptions apply to service upon statutory agents.

¹⁰ Fed. R. Civ. P. 4(e).

¹¹ Fed. R. Civ. P. 4(h). Note that the federal rule also deems service proper if the state rule is followed.

¹² *Direct Mail Specialists, Inc. v. Eclat Computerized Technologies, Inc.*, 840 F.2d 685, 688 (9th Cir. 1988).

¹³ Fed. R. Civ. P. 4(m).

¹⁴ Idaho R. Civ. P. 4(a).

¹⁵ Idaho Repository – Main Page, available at: <https://www.idcourts.us/repository/start.do> (last accessed February 10, 2011).

¹⁶ District of Idaho Live CM/ECF-Login, available at: <https://ecf.idd.uscourts.gov/cgi-bin/login.pl> (last accessed February 10, 2011). Requires a login and account to utilize.

¹⁷ Fed. R. Civ. P. 12(e); Idaho R. Civ. P. 12(e).

¹⁸ See, e.g., *Liponis*, 149 Idaho at *3; *Brazil*, 66 F.3d at 199; *Hearns v. San Bernardino Police Dep't*, 530 F.3d 1124, 1131 (9th Cir. 2008).

¹⁹ Dist. Idaho Loc. Civ. R. 7.1(e).

²⁰ Dist. Idaho Loc. Civ. R. 7.1(c).

²¹ Idaho Code Ann. § 3-104 (2011).

²² *Citibank (South Dakota), N.A. v. Carroll*, 148 Idaho 254, 260, 220 P.3d 1073, 1079 (2009).

²³ *White v. Idaho Forest Indus.*, 98 Idaho 784, 788, 572 P.2d 887, 891 (1977).

²⁴ *Kyle v. Beco Corp.*, 109 Idaho 267, 271 – 72, 707 P.2d 378, 382 – 83 (1985).

²⁵ *Indian Springs LLC v. Indian Springs Land Inv. LLC*, 147 Idaho 737, 743 – 45, 215 P.3d 457, 463 – 65 (2009).

²⁶ *Id.*

²⁷ *Indian Springs LLC*, 147 Idaho at 745.

²⁸ Dist. Idaho L. Civ. R. 83.7. See also 28 U.S.C. § 1654 (“In all courts of the United States the parties may plead and conduct their own cases personally or by counsel . . .”) (emphasis added).

²⁹ *Iannaccone v. Law*, 142 F.3d 553, 559 (2d Cir. 1998); *Pridgen v. Andresen*, 113 F.3d 391, 393 (2d

Cir. 1997). Note there may be an exception to this rule where an administrator of the estate may proceed *pro se* on behalf of the estate if the administrator is the sole beneficiary of the estate, and there are no creditors. See *Pridgen*, 113 F.3d at 393. See also *Marble v. Missoula County*, 2006 U.S. Dist. LEXIS 72834 (D. Mont. Mar. 31, 2006).

³⁰ *Johns v. County of San Diego*, 114 F.3d 874, 877 (9th Cir. 1997).

³¹ *Church of the New Testament v. United States*, 783 F.2d 771, 773 (9th Cir. 1986).

³² *C.E. Pope Equity Trust v. United States*, 818 F.2d 696, 697 (9th Cir. 1987).

³³ *Church of the New Testament*, 783 F.2d at 773.

³⁴ *McShane v. United States*, 366 F.2d 286, 288 (9th Cir. 1966).

³⁵ *Purco Fleet Servs. v. Idaho State Dep’t of Fin.*, 140 Idaho 121, 126, 90 P.3d 346, 351 (2004).

³⁶ *Id.*

³⁷ *Id.*

³⁸ 134 Idaho 445, 447 – 48 (2000).

³⁹ *Id.* at 446.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 448.



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

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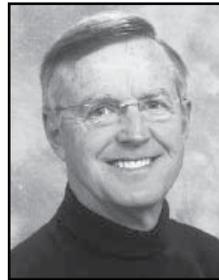
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FINDING A NICHE: THIS IDAHO LAWYER HAS 1,632 TWITTER FOLLOWERS, BUT HOW MANY WILL BECOME CLIENTS?

Dan Black
Managing Editor

Don't know a hash-tag from your metadata? No worries. A Boise attorney has created a new kind of law practice.

With its truncated spelling, implicit urgency and insider culture, social media appears to be growing in popularity by the hour. But who will offer legal counsel for those of us who can't seem to wrap our heads around it?

Last year Lisa McGrath left her job with Greener Burke Shoemaker, P.A. to build a solo practice around new media, "and right now, I'm surviving," she said recently. "The first year is the hardest."

Lisa lectures, blogs and tweets about cutting-edge communications with the ease of a digital native – she grew up with the Internet. A consummate networker, she created a niche legal service drawn from her interests, expertise and her drive to be out in front of the next big thing. But are social media questions big enough to support a law practice?

To get her practice going, Lisa leveraged relationships with other social media attorneys nationwide and used her connections with technology start-up companies, and of course, an army of online friends. Currently, there are 1,631, (make that 1,632), "followers" reading her every tweet. Comments range from the latest technical developments to where to meet for a beer.

A year ago Lisa surveyed the market and found attorneys who specialize in narrow niches were doing well, even in the recession. Given her options, Lisa said the choice to create a new kind of law practice was clear. She wanted a flat-fee practice that focused on questions surrounding new media.

"The legal issues involved are very real," Lisa said, adding that "sometimes people don't take it seriously."

Lisa's clients want to know how social media issues jibe with existing intellectual property and employment law. They want social media policies "that maximize the benefits and minimize the risk," Lisa said. And they need to handle privacy and discrimination issues that surface between employers and their employees' social media presence. She compliments her knowledge of new media with her knowledge of public relations and the law.



Lisa McGrath, chair of the Young Lawyers Section, recently began a solo practice dealing with legal issues surrounding new media.

Q. What advice do you have for law school students facing a difficult job market?

A. During law school is the time to be creative. They really have to brand themselves to stand out. Use social media to do it. The resume is dying out. Certainly clerkships and internships are important.

Q. What do young lawyers wish the rest of the Bar knew about them?

A. Young lawyers are very community – oriented. We do a lot of pro bono work and volunteering for charity. We also have a tremendous willingness to be mentored. There is some feeling of isolation.

Q. What makes for a sophisticated user of new media?

A. It's not about technology. It's about creating relationships very quickly. At first just sit back and watch. It's listening to other people. Get back with them, engage them. Promote other people and talk about other people, not just yourself. It's just like conversation skills. Social media is really customer relationship management. Measure your online presence. Find out where your traffic is coming from.

Lisa's twitter trail shows a stark functionality. A recent tweet from tweetmzg:

nice reminder for attys/mktg/ad ppl to make social media posts compliant w/ FTC Guides <http://bit.ly/hYbRjN> (@InternetLaw)

“Education is a big part of what I do,” Lisa said, adding that she is in the faculty certification process for the University of Phoenix and is a faculty adjunct at Broadview University.

So how did Lisa, who recently passed her 30th birthday, wind up sailing confidently into such uncharted waters? She and her three sisters grew up around a robust family business, Action Couriers, a Meridian-based company that serves southern Idaho and has hundreds of employees. “We learned the importance of hard work,” she said. “My dad is an incredible entrepreneur,” and “there was a pull to join the family business.”

But Lisa said her parents raised her to be “strong willed,” and she “wanted to go to the top.”

An advanced student in high school, she interned in the governor’s office when Phil Batt was in office, and was enthralled with public service.

“I was in love with the system,” she said, and imagined a career in government. Naturally, a law degree would provide the best background. While at American University in Washington, D.C., she took a full time job as a clerk for the U.S. Senate Judiciary Committee, which threw her into an intense environment of policy papers, press releases and news cycles. “I was outrageously ambitious,” she said, and loved being in the middle of events such as reauthorization of the Patriot Act, and confirmation hearings for Justices Samuel Alito and John Roberts.

The Hill staffers, her colleagues, “were dysfunctional Type As,” she said, and “I fit in perfectly. The pay was terrible, you work late hours, but it’s like the Hollywood of politics.”

But those colleagues, many of whom left large firms to do public policy work,

Her market research showed that while young lawyers were struggling and big firms were laying people off, “niche soloists were thriving.”

influenced Lisa. Talking with them, Lisa developed “an early skepticism” about big firms.

During summers in Maryland, she worked as an intern for the federal prosecutor and also did pro bono defense work. “I wanted to cover my bases” learning different kinds of law, she said, adding that while she enjoyed the work, “I could see how criminal law could become repetitive.”

Eventually, the big-city schedule wore her down. “It was nice to come back here and breathe. I really did rush things in my 20s,” Lisa said.

She moved back to Idaho and accepted a clerkship at Idaho Supreme Court, an experience she found “extremely rewarding - seeing cases litigated through the appeals process.” She had weekends off and found time for skiing and friends. After that, she worked for nearly two years at Greener Burke Shoemaker PA, but wanted to chart a new path.

Her market research showed that while young lawyers were struggling and big firms were laying people off, “niche soloists were thriving.” She sized up the market, her skills and interests and came up with a plan. She designed a flat-fee practice “that focuses on value, not billable hours,” which she said puts clients at ease. She also ratcheted up her networking. This winter, Lisa spoke

to the Idaho Nonprofit Association, the Idaho Library Association and has addressed several other groups looking for help with laws relating to social media.

She’s happy with her decision. As a soloist, she has time for pro bono work and for hobbies such as giving ski lessons at Brundage, Start-Up Weekends and Social Media Club Boise. It gives her lifestyle the flexibility and meaning she didn’t expect working for a firm.

Another benefit, she said, has been discovering the beauty of a more simple life as a solo practitioner. “I’ve changed my habits to be more responsible,” she said, making fewer purchases and living modestly. “Solos are working for their own food. It’s a fabulous life.”



Dan Black

About the Author

Dan Black is Managing Editor of *The Advocate*. A graduate of the University of Montana School of Journalism, his articles have appeared in the *Idaho Statesman*, *Idaho Press Tribune*, *Idaho Business Review*, *Boise magazine* and *The Capital Press*.

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Portrait of



a Litigator

Merlyn Clark remembers his mother saying, “You are NOT going to be a miner.”

Raised in Wallace, Merlyn said his family emphasized education as the road to a better life. His father worked as a mechanic at Hecla Mining Company’s Star Mine, and “back then you could make a living working in the mines,” he said, so staying put was a real option.

Merlyn spoke recently about his journey from the mining town to the ninth floor offices of Hawley Troxell Ennis & Hawley in the Wells Fargo Building in downtown Boise. A consummate storyteller, Merlyn shared scenes from his life, lessons he has learned and things that are important to him. All these things contributed to his considerable success as a trial lawyer.

Professional success aside, Merlyn enjoys good health, and at age 73, runs long distances in relays and fun runs. He beams when talking about his six children, grandchildren, great-grandchildren and wife, Sandy. He talks happily about mentoring young lawyers, teaching and serving as an Idaho State Bar Commissioner.

Some lawyers might know Merlyn from his presentation at “Lessons from the Masters” at the ISB Annual Conference in 2009, and he remains in high demand for arbitration, mediation and corporate litigation cases, including serving as a hearings examiner for the high-profile “megaloads” case, which made headlines this winter.

None of that success has come without relying on core values fashioned from his unique personal history. Merlyn spoke plainly about how those core values developed. Because his parents wanted something more for their son than a lunch box, hard hat and drill, the path out of Wallace was clear — education and hard work. In addition to his paper route delivering *The Wal-*

lace Times, Merlyn went to work in the evenings and weekends for his father, who owned his own auto mechanic’s shop.

“At 12, I started working in the shop cleaning parts,” he said, adding that having a car as a teenager helped his social life. “I had a ’36 Ford, and kept it running,” he said with some pride.

He also set pins at the local bowling alley and delivered groceries after school. “I didn’t have time for athletics,” he said, and the family was focused on his education. He was sent to Gonzaga Prep School in Spokane for a semester, but found it difficult. “I was homesick,” he said. But higher education still figured in his plans.

Adventure and learning about a good alibi

Merlyn enrolled at the University of Idaho and started working on a degree in Business Administration. He joined Delta Sigma Phi fraternity, which he credits for teaching him good study habits and formal manners.

He also discovered the big world of ideas. After his first year, he and a friend, Lee Fushel, took some time off school to hitchhike to the East Coast with hopes of working aboard a freighter to Europe. While they didn’t make it that far, they had several memorable adventures, ones that Merlyn recalls vividly.

Hitching rides wasn’t uncommon in the 1950s, but

Merlyn said he was struck by people’s kindness toward him and his friend, Lee, and how strangers offered them meals and places to stay. He learned that cooperation and friendliness were essential life skills.

They made it to Maryland, where they hoped to find work aboard a coal freighter headed for Yugoslavia. They stayed for two months at the DSP fraternity house at the University of Maryland waiting for a National Maritime Union strike to end. Eventually they got a meeting with the union

president to discuss their prospects. He told them the strike could go on for some time. “Our money was running low so we decided to go home to Idaho,” he said.

Their adventure wasn’t over. Lee’s father told them that if they were ever in need of a place to stay, “just go to the city jail and ask to spend the night,” Merlyn recounted. Travelling through rural Illinois, that’s what happened. The local police obliged, but said they would be locked up between 10 at night until 5 in the morning. The young men agreed. After moving on down the road, they suddenly found themselves surrounded by police, now suspects in an armed robbery. The hitchhiking pair

He said that if I was going to be a lawyer I shouldn't take advantage of people.

By Dan Black, *Managing Editor*



Merlyn grew up in Wallace, a place that left a strong impression. At left, is Merlyn with his mother, Lilia. At center is the infant Merlyn in a sleigh, and at right, Merlyn stands with his sister, Barbara, who now lives in California. These photos were compiled by Merlyn's children for a slideshow shown during his 70th birthday party.

perfectly matched the suspects' description, "even down to the details of a red-checkered shirt," Merlyn said. "We told them we couldn't possibly have done it because we were spending the night in jail in Long Island, Illinois," Merlyn said. "We asked them to contact the police." Finally, word came back and "they cleared us." At that point, the police were friendly, even jovial.

If it weren't for the jailhouse sleepover, "we might still be there," he said.

Studies at the University of Idaho

Back at the university, Merlyn married, started a family and took jobs at a gas station and with the Student Union Building, where he washed dishes, bussed tables and oversaw ticket sales for student events. Merlyn learned that even modest jobs come with unexpected rewards. Merlyn moved up to supervisory role and got to meet big-time travelling jazz acts such as Louis Armstrong and the Kingston Trio.

He did well at his studies and further refined the values that would lead to a successful career. "It's clear to me looking back, I had some good mentors," he said, recalling word-for-word a conversation he had with economics professor Irwin Graue, some five decades ago.

"I said lawyers could charge what the market would bear," Merlyn said. "And he was very upset. He said that if I was going to be a lawyer I shouldn't take advantage of people."

"Don't take advantage of people," Merlyn repeated, as though the conversation were still happening.

Another professor wanted to nominate Merlyn as a Rhodes Scholar. "He said I had an intellect and that I could succeed. I told him I was married and had a child and I just couldn't do it (study internationally). But it gave me confidence."

In another lesson, Merlyn recounted how he ended up needing a two-credit Math of Finance class in his last semester as an undergraduate. He and the teacher had a falling out and his grade "was a big frog."

"When I went across the stage," he said, "it was a blank diploma. My parents were not happy. But at that time you could attend law school if you had 96 credits with passing grades. I thought someday I'll go back. But I never did pick it up."

Merlyn shrugged unapologetically and said, "It doesn't affect my life."

Starting the practice of law

During his final year at law school, Merlyn worked for Blake, Givens & Feeny in Lewiston.

“It was a great experience,” he said. “I learned a lot from all three. Givens’s dad was on the Idaho Supreme Court and the partners taught me those values,” Merlyn said, speaking about the mindset of a consummate jurist.

“Blake taught me to use my own judgment. He would not let me go to the form books (to get boilerplate language). He wanted me to do thorough research, and THEN I could go to the form books to check my work.”

In another auspicious beginning, Merlyn took the Bar oath at the Nez Perce County Courthouse, and, moments later, presented arguments before the Idaho Supreme Court. Merlyn and colleague Bob Brown were admitted together and had an appeal and the case schedule just happened to coincide with the Bar ceremony.

“Blake said ‘if you can do this, you will have the confidence to appear in any court - either sink or swim,’” Merlyn said. “We lost the case, but it was a good experience.”

The firm had Potlatch Co. as a major client, which required some high-stakes litigation early in his career. Nervous about an upcoming case in federal court, he confided his doubts to District Judge Paul Hyatt “who had been around forever,” Merlyn said. “He said, ‘Clark, you have appeared in my court and you can appear anywhere.’”

The phrase stuck. Later, Merlyn travelled to San Francisco to argue the case, despite not having been admitted to practice in the California federal court. He said that in the courtroom “there were maybe 20 attorneys, all of them with long, flowing hair. I had a crew cut, the same as the judge. I told him, ‘Your Honor, I am not approved to address the court, but I am asking permission.’ He said, ‘Mr. Clark you can address this court any time.’”

These events made formative impressions. “For a kid just out of law school, climbing into a corporate jet to San Francisco was pretty heady stuff.”

However, living in Lewiston, there was also plenty of general practice. “I learned I didn’t like divorce or bankruptcy work,” Merlyn said, but he developed a passion for real estate and corporate litigation.

He said the firm dissolved and “some of the clients went with me. That was the end of my corporate law career.”

Finding a niche

Merlyn formed a new firm with Ted Creason and Jack Curtin, and was later appointed Prosecutor to Nez Perce County. He hired his partners to help out. Merlyn was elected to one more term, “but it didn’t pay enough for the workload,” he said.

In his first year, Merlyn prosecuted five first-degree murder cases, which stressed the budget. When



Sandy and Merlyn at Christmas in Boise.

asked if the experience soured his view of prosecutorial practice, he clarified: “It soured my view of compensation for both prosecution and defense. Nobody wants to pay for it. The system gets good people. But some cases get the short end.”

Merlyn added, “I found myself wheeling and dealing.”

Compensation and compromise aside, Merlyn said prosecution gave him valuable experience, “especially in managing cases.” The following years in private practice were fruitful, giving Merlyn exposure to many areas of law.

After a few years, his partners wanted to start a bank, and the firm dissolved. Shortly afterward, while serving as a Bar Commissioner with Jack Hawley, “Jack asked me to come to Boise. It was a huge opportunity.”

“When I moved down here (to Boise), I didn’t know it, but I disqualified myself” from continuing to serve as a commissioner from the Second District, he said. He never became a Bar president because ISB commissioners serve as president during the last part of their three-year term. However, Merlyn later served as president of the Idaho Law Foundation and for five years as chairman of the evidence rules committee.

Immersed in the profession, Merlyn was able to focus on his favorite kinds of law — real estate and commercial litigation. Lengthy complex litigation, however, also sparked an interest in a trend making its way across the legal landscape — mediation.

Mediation and arbitration

An oversized map hangs in Merlyn’s office. It shows the route of Napoleon’s campaign from Poland to Moscow, a wide swath representing the size of his army as it went. Beginning the drive with

For a kid just out of law school, climbing into a corporate jet to San Francisco was pretty heady stuff.



442,000 soldiers, Napoleon's force diminished to a mere 10,000 at its return. Inscribed above the picture is a saying: "Is the Quest Worth the Cost?"

The problem with litigation, Merlyn points out, is that it takes a long time, a lot of resources and the outcome is uncertain. Like many litigators, Merlyn sought a less confrontational way to resolve disputes. In 1989, for Law Day, then Deputy Attorney General Jack McMahon initiated a program to teach mediation. A Pepperdine University professor, Randy Lowery, presented a two-day seminar and Merlyn attended. He said that at the time, mediation was growing around the country, "but it still didn't exist" in Idaho.

"As a lawyer I wanted to learn these skills to help my clients," he said.

After the class, "I had some success as a mediator and started to get phone calls from other lawyers." In 1995, Merlyn became certified as a professional mediator, and things took off from there. His reputation grew and mediation accounted for about half of his practice. In part, Merlyn credits his success with being in on the ground floor. The market soon became flooded with mediators.

When the legislature created senior status for retired judges, they were allowed to practice mediation. Many entered the field as mediators and "my practice reduced," Merlyn said. Currently, "there's not enough mediation in Idaho to do it full time."

Animated with the topic, Merlyn explained:

"I get a lot of people who come and ask my advice on how to do a mediation practice. I tell them to 'get gray hair, get experience, do litigation, build a reputation.' It also requires understanding the intangible — their clients' needs and interests. When you start to focus on that, then you touch on what motivates them. Most people want instant gratification. You explain that litigation is a long process and that they might never see the result they hope for."

Taking high-profile cases

His skills in high demand, Merlyn did mediation work for state agencies and public officials. He was asked by the Idaho Attorney General to draft the contract with Corrections Corporation of America to operate a private prison in Idaho. He was also asked by the Idaho Supreme Court to negotiate a resolution with a contractor, and he served as an arbitrator for administrative appeals for the Idaho Transportation Department. These experiences led to being asked to serve as a hearings examiner for the Highway 12 "megaloads" case



On professionalism, Merlyn said true success comes with setting high ethical standards: "The one thing we all start out with, and the one thing you can lose, is integrity. You can gain knowledge of law and procedures, but you can't get your integrity back."

in front of the ITD in December, 2010. Merlyn didn't initially grasp the high-profile nature of the case, but the daily headlines about it didn't faze him.

Four shipments of giant oil refinery equipment were stalled at the Port of Lewiston awaiting permission to move along Highway 12 to Montana. Making headlines every day for weeks, the ship-

ments were highly controversial because the loads were so large and could set a precedent for 200 more loads. Merlyn issued an opinion that the permits would not break the law and they were eventually issued.

"There are times when acting as a neutral decision maker that I apply the facts to the law and reach a conclusion, and render a decision that is not my personal preference," Merlyn said. He has spent considerable time on the Clearwater River fishing and is familiar with the road's scenic qualities.

"The laws that give the department the authority, its rules, etc. are pretty clear. The concerns of the interveners were not supported by the facts or the record. They are more concerned with the 207 more loads that are planned. But that was not part of what I was presented with."

Making the best of it

Not every one of Merlyn's efforts has met with success. A few years ago Merlyn trained to qualify for the Boston Marathon. He didn't make the cut, "but I comforted myself by saying at least I tried."

In a three-month trial the plaintiff sought a several million-dollar settlement. Eventually, the sum was reduced to \$3 million. "My partner said it was a victory, but I felt it was a failure," Merlyn said. "I've been fortunate I have not had a lot of failures."

Asked why, Merlyn said, "I'm pretty conservative. I don't stick my neck out much and when I do, it's calculated."

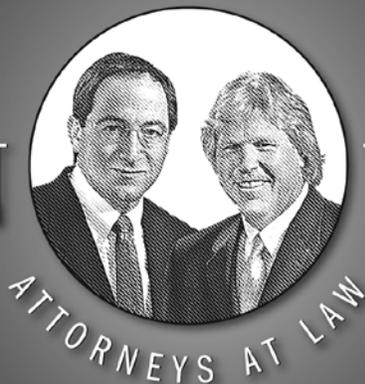
Another strategy helps — "manage your weakness." For Merlyn, that means delegating computer research to the younger associates. "I'm not fooling anyone," he said, adding that the firm has some tremendous talent. "When you use a team, be sure to give credit."

In his personal life, Merlyn said "There have been times when I have ignored issues. But it doesn't work. When I have addressed difficult issues, I get a good feeling. I have gained respect."

On losing cases, Merlyn shared his view: "Many people set unreasonable expectations — especially young lawyers. They think they have to win every case. They forget their job is to put forth the best effort within the system. It's not about winning or losing. It's about putting forth my best effort to represent the needs of my clients."

With that kind of commitment, Merlyn's chosen profession allowed for a rich and colorful journey. Far from his tiny hometown of Wallace, Merlyn built his own style of personal and professional success — one that derives from his unique journey.

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1st AMENDED - Regular Spring Terms for 2011

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

By Order of the Court
Stephen W. Kenyon, Clerk

NOTE: The above is the official notice of the 2011 Spring Terms of the Supreme Court of the State of Idaho, and should be preserved. A formal notice of the setting of oral argument in each case will be sent to counsel prior to each term.

OFFICIAL NOTICE COURT OF APPEALS OF IDAHO

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

4th AMENDED - Regular Spring Terms for 2011

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

By Order of the Court
Stephen W. Kenyon, Clerk

NOTE: The above is the official notice of setting of the year 2011 Spring Terms of the Court of Appeals, of the State of Idaho and should be preserved. A formal notice of the setting of oral argument in each case will be sent to counsel prior to each term.

Idaho Supreme Court Oral Argument for April 2011

Monday, April 4, 2011 – BOISE

8:50 a.m. Stuart Mackay v. Four Rivers Packing Co. #35974-2008
10:00 a.m. Fuller v. Callister #37035-2009
11:10 a.m. Soignier v. Fletcher #37123-2009

Tuesday, April 5, 2011 – BOISE

8:50 a.m. Idaho Power Co. v. Dept. of Water Resources #37348-2010
10:00 a.m. Building Contractors Assn. of SW Idaho v. IPUC #37293-2010
11:10 a.m. State v. Ellington #33843-2007

Thursday, April 7, 2011 – COEUR D'ALENE

8:50 a.m. Allied Bail Bonds, Inc. v. County of Kootenai #36861-2009
10:00 a.m. Mareci v. Coeur d'Alene School District #271 #37624-2010
11:10 a.m. Stafford v. Kootenai County #37320-2010

Friday, April 8, 2011 – LEWISTON

8:50 a.m. Caldwell v. Cometto #37157-2009
10:00 a.m. Ciszek v. Kootenai Co. Board of Commissioners #37562-2010
11:10 a.m. Taylor v. AIA Services Corporation #36916-2009

Wednesday, April 13, 2011 – BOISE

8:50 a.m. State v. Draper #34667-2007
10:00 a.m. Williams v. Blue Cross of Idaho #37623-2010
(Industrial Commission)

**Please note:
Supreme Court
will NOT hear oral arguments
in March of 2011.**

Idaho Court of Appeals Oral Argument for March 2011

Tuesday, March 8, 2011 – Boise

9:00 a.m. State v. Grove #36211-2009
10:30 a.m. Mubita v. State #36913-2009
1:30 p.m. Peterson v. IDHW #37408-2010

Thursday, March 10, 2011 – BOISE

9:00 a.m. State v. Fraser #37510-2010
10:30 a.m. Dept. of Transportation v. Van Camp #37714-2010
1:30 p.m. State v. Reid #37107-2009

Tuesday, March 15, 2011 – BOISE

~~10:30 a.m.~~ **moved to 3:00 p.m.** Lineberry v. Dept. of Transportation #37743-2010
1:30 p.m. State v. Sowers #36887-2009

Idaho Supreme Court and Court of Appeals
NEW CASES ON APPEAL PENDING DECISION
(Updated 2/1/11)

CIVIL APPEALS

ATTORNEY FEES AND COSTS

1. Whether the district court abused its discretion by determining Pines Grazing Association was the prevailing party and awarding attorney fees.

Pines Grazing Association v. Flying Joseph Ranch
S.Ct. No. 37236
Supreme Court

CONTEMPT

1. Did the court err in failing to find the Merrills in contempt for not completely removing Gibson's personal property from their property to Gibson's specified location pursuant to the court's order?

Gibson v. Merrill
S.Ct. No. 36978
Court of Appeals

HABEAS CORPUS

1. Did the district court abuse its discretion by dismissing Storm's petition for a writ of habeas corpus?

Storm v. Smith
S.Ct. No. 37789
Court of Appeals

LICENSE SUSPENSION

1. Does an administrative suspension of a commercial driver's license pursuant to I.C. § 49-335 violate the principles of double jeopardy?

Buell v. Idaho Transportation Department
S.Ct. No. 37404
Court of Appeals

2. Whether an administrative license suspension under I.C. § 18-8002A violates double jeopardy principles because, although it is civil in nature, under the multi-factored *Hudson* analysis, it is so punitive in effect that it is transformed into a criminal penalty.

Brebner v. Idaho Transportation Department
S.Ct. No. 37405
Court of Appeals

3. Does an administrative suspension of a commercial driver's license pursuant to I.C. § 18-8002A, violate the principles of double jeopardy?

Ely v. Idaho Transportation Department
S.Ct. No. 37406
Court of Appeals

POST-CONVICTION RELIEF

1. Did the court err by summarily dismissing Osborn's petition for post-conviction relief?

Osborn v. State
S.Ct. No. 36855
Court of Appeals

2. Did the court err by dismissing Schultz's untimely petition for post-conviction relief?

Schultz v. State
S.Ct. Nos. 37370/37371
Court of Appeals

3. Did the court err in summarily dismissing Zivkovic's petition for post-conviction relief?

Zivkovic v. State
S.Ct. No. 37287
Court of Appeals

4. Did the court err when it allowed post-conviction counsel to withdraw and thereafter failed to appoint substitute counsel to represent Loftis in the post-conviction proceeding?

Loftis v. State
S.Ct. No. 35376
Court of Appeals

5. Did the court err in providing insufficient notice of its intent to dismiss and thereby deny Keller an opportunity to respond?

Keller v. State
S.Ct. No. 37491
Court of Appeals

6. Did the district court err in summarily dismissing Wolf's petition for post-conviction relief and in finding Wolf did not raise a genuine issue of material fact as to whether he had ineffective assistance of counsel?

Wolf v. State
S.Ct. No. 37863
Court of Appeals

7. Did the court err in denying Frank's petition for post-conviction relief after an evidentiary hearing on his claims of ineffective assistance of counsel?

Franks v. State
S.Ct. No. 37199
Court of Appeals

SUMMARY JUDGMENT

1. Did the court err by concluding there were no genuine issues of material fact and by granting summary judgment to NNU exclusively on the basis of the release signed by Morrison?

Morrison v. Northwest Nazarene University
S.Ct. No. 37850
Supreme Court

2. Whether the district court erred in determining Pooley was required to exhaust administrative remedies prior to bringing the present suit, and that he failed to do so.

Pooley v. City of Eagle
S.Ct. No. 36908
Supreme Court

3. Did the court err in finding that, pursuant to I.C. § 6-1607(2), Rivas was not wholly or partially engaged in Cranney Farms business at the time of the accident?

Nava v. Rivas-Del Toro
S.Ct. No. 37613
Supreme Court

4. Whether the district court erred as a matter of law in determining that the Option terminated in April 2006 pursuant to the language of Section 19.13 of the Lease and Option.

Steel Farms v. Croft & Reed, Inc.
S.Ct. No. 37776
Supreme Court

CRIMINAL APPEALS

EVIDENCE

1. Was there substantial competent evidence presented at trial upon which the jury found beyond a reasonable doubt that Lee was guilty of failure to register as a sex offender, in violation of I.C. § 18-8309?

State v. Lee
S.Ct. No. 37213
Court of Appeals

2. Was there substantial competent evidence presented at trial from which the jury could find beyond a reasonable doubt that Jones was guilty of the first count of rape?

State v. Jones
S.Ct. No. 36841
Court of Appeals

Idaho Supreme Court and Court of Appeals
NEW CASES ON APPEAL PENDING DECISION
 (Updated 2/1/11)

3. Was there substantial competent evidence admitted at trial from which the jury found beyond a reasonable doubt that Betancourt was guilty of possession of methamphetamine?

State v. Betancourt
 S.Ct. No. 37139
 Court of Appeals

INSTRUCTIONS

1. Did the district court err by denying Jolley's requested jury instruction on the lesser included offense of simple assault?

State v. Jolley
 S.Ct. No. 37374
 Court of Appeals

PLEAS

1. Did the district court err when it denied McElhiney's motion to withdraw his guilty plea made before sentencing?

State v. McElhiney
 S.Ct. No. 36536
 Court of Appeals

PROBATION

1. Did the district court err by denying Kilgore's motion to amend the terms of his probation?

State v. Kilgore
 S.Ct. No. 37286
 Court of Appeals

SEARCH AND SEIZURE – SUPPRESSION OF EVIDENCE

1. Whether the district court erred when it denied Hurst's motion to suppress because his statements were obtained in violation of the Fifth Amendment to the U.S. Constitution.

State v. Hurst
 S.Ct. No. 37431
 Court of Appeals

2. Did the court err when, consistent with *State v. Diaz*, it denied Briggs' motion to suppress the results of a forcible blood draw?

State v. Briggs
 S.Ct. No. 36602
 Court of Appeals

3. Did the district court err when it concluded the officer searching Jones' home did not exceed the scope of Jones consent to search?

State v. Jones
 S.Ct. No. 36949
 Court of Appeals

4. Did the court err in denying Powers' motion to suppress and in finding her traffic stop was supported by substantial evidence that she committed a traffic offense?

State v. Powers
 S.Ct. No. 37158
 Court of Appeals

SENTENCE REVIEW

1. Did the court abuse its discretion when it failed to *sua sponte* order a psychological evaluation of Allen pursuant to I.C.R. 32?

State v. Allen
 S.Ct. Nos. 37355/37356/37357
 Court of Appeals

2. Did the district court err by denying Stone's request for a hearing on his Rule 35 motion and in denying the motion?

State v. Stone
 S.Ct. No. 37672
 Court of Appeals

3. Is the court's order placing Dickson on probation void because the court could not extend the jurisdiction granted to it by I.C. § 19-2601(4) by ordering a sham probation, following the first period of retained jurisdiction, for the sole purpose of circumventing the jurisdictional limitation of I.C. § 19-2601(4) that prohibits the ordering of immediately successive periods of retained jurisdiction without an intervening period of probation?

State v. Dickson
 S.Ct. No. 37467
 Court of Appeals

SUBSTANTIVE LAW

1. Whether the application of the Sexual Offender Registration Act, as amended in 2001, to Johnson violates the Idaho and United States Constitutions' prohibition against *ex post facto* laws.

State v. Johnson
 S.Ct. No. 37758
 Supreme Court

2. Did the court err when it ruled the state's amendment to the complaint, upgrading it to a second offense DUI, did not violate the constitutional ban on *ex post facto* laws as well as the due process clause?

State v. Lamberson
 S.Ct. No. 37797
 Court of Appeals

Summarized by:
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Mediator/Arbitrator

W. Anthony (Tony) Park

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 ·Former Idaho Attorney General
 ·Practice limited exclusively to ADR

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IDAHO COURTS

Chief Justice Daniel T. Eismann
Idaho Supreme Court

State of the Judiciary Address

January 19, 2011

In spite of the challenges resulting from the economic downturn, the judiciary is still fulfilling its constitutional responsibilities to the people.

As with other state agencies, the Judicial Branch has experienced significant budget cuts. We commenced a hiring freeze two years ago for nonjudicial positions. In addition, we now have three magistrate judge positions that we have held open. The emergency surcharge on infractions, misdemeanors, and felonies enacted last year has enabled the Judicial Branch of government to continue to fulfill its constitutional responsibilities. One of our judges did his part by receiving a traffic ticket the first day the surcharge went into effect.

Last year, I told you about two national awards received by the judiciary. In 2010, judges in Idaho continued to be recognized. The Idaho legislature was the first in the nation to adopt legislation authorizing the establishment of Domestic Violence Courts statewide. A team from the Ada County Domestic Violence Court was recently highlighted at an international conference for its work, progress, and innovation.

One of the challenges in domestic violence cases is the victim being pressured to dismiss the case or refuse to testify. Domestic violence courts provide victims with early access to advocacy and services. We have seen a decrease in dismissed cases and a 20% increase in guilty pleas, with 87% of the offenders doing so.

In addition, the accelerated disposition of these cases expedites offenders entering treatment and reduces recidivism, while providing close probation supervision to



Chief Justice
Daniel T. Eismann

ensure compliance with all court conditions and promote safety for the victim.

The domestic violence courts are just one type of our problem-solving courts. We also have 56 drug and mental health courts throughout the state, which include DUI courts. The current prison population is significantly below the projection made several years ago, and I believe that our drug and mental health courts are partly responsible. These courts are currently at capacity, with over 2,300 adults and juveniles receiving treatment and supervision while being held accountable for their conduct. Outcome evaluations of our drug and mental health courts have proved their effectiveness in reducing recidivism and in helping those with substance abuse and mental health issues lead productive lives. Similar evaluations of four well-established DUI courts have also shown their effectiveness, with a 50% reduction in recidivism.

Last year, 30 babies were born to clean and sober women in drug and mental health courts, which brings the total to 228 drug free babies born to mothers in those courts. The mothers also have the ability to provide the care and nurturing needed for normal child development.

Idaho judges are working after hours to apply what we have learned from problem-solving courts to other issues. One such effort is attendance courts, which have resulted in increased school attendance where they have been tried. We know that dropping out of high school increases the risk of children becoming involved in self-destructive behaviors and decreases their opportunities for success.

We are also working to start a veterans' court in Ada County to deal more effectively with veterans struggling with

Outcome evaluations of our drug and mental health courts have proved their effectiveness in reducing recidivism and in helping those with substance abuse and mental health issues lead productive lives.

substance abuse, post-traumatic stress disorder, traumatic brain injury, or other mental health issues. We will be proposing a modification to the statutory eligibility guidelines for drug and mental health courts to allow us to provide additional help for our returning veterans.

Drug-addicted parents are a significant factor in child abuse and neglect. We have four child protection drug courts that address parental substance abuse and other issues in cases of child abuse and neglect. They are an effort to free the parents from the grip of addiction and to equip them to meet the needs of their children in a safe, loving, and nurturing home environment so that the family can remain intact. A federal grant has enabled three of these courts to expand and to undertake a thorough evaluation of their outcomes.

In many instances of child abuse, neglect, or abandonment, the rights of the parents are terminated. Cases involving the termination of parental rights and adoptions are tried in the magistrate court. Prior to 2009, appeals would go first to the district court and then to the Supreme Court, which took 2 to 3 years. During that time, there was no final decision as to whether the parental rights would be terminated or the adoption confirmed, and the children were in limbo.

In July 2009, we implemented an expedited appellate process for those cases, with the appeals going directly from the magistrate court to the Supreme Court. Now, it takes on average 126 days from the entry of judgment in the magistrate court to oral argument on appeal in the Supreme Court or Court of Appeals.

In my view, the judiciary works in partnership with various state and local entities to provide justice to Idahoans.

Last year, I wrote to various state agencies and nongovernmental entities offering to meet with them to discuss any suggestions, complaints, or other issues they may have with the judiciary, and I met with those who responded. I have also traveled to over half of the counties to meet with county officials seeking the same input. I am pleased with the positive response concerning the performance of our courts, which indicates that our judges are working hard and doing a good job.

One county commissioner told me that whatever I do, do not let the local magistrate judge be promoted out of the county. Another commented that in all of his years as a county commissioner, I was the first elected official outside the county who came to meet with them seeking their input.

The primary issue raised by the counties was the cost of the criminal justice system, including prosecution, public defenders for indigent defendants, and county jails. The Criminal Justice Commission, consisting of representatives from all three branches of government and local officials, is also looking into the delivery of legal services to indigent criminal defendants. The Commission has concluded that there are issues that need to be studied to ensure that Idaho is complying with Constitutional mandates regarding the provision of effective counsel.

We have also seen an increased need for foreign language interpreters in the trial courts. In addition to providing due process for criminal defendants who are not proficient in the English language, the courts must also comply with federal and state statutory mandates applicable in both criminal and civil cases. In just Ada, Canyon, and Twin Falls counties, interpreters have been required for 48 different languages literally from A to Z, from Albanian, to Hindi (hin-dee), to Oromo (aw-roh-moh), to Tagalog (tah-gah-lawg), to Zapotec (sah-paw-tek).

With the economic downturn, we have seen an increase in divorce and child custody filings. Over the last three years, domestic relations cases in the Third and Sixth Judicial Districts have increased 28% and 16% respectively. Requests for assistance for Family Court Services have been steadily increasing, with over 30,000 parents accessing those services. Over 11,300 of Idaho's children have benefited from their parents attending parent education classes to learn ways to reduce their children's exposure to parental conflict.

Many of the people involved in civil cases cannot afford legal counsel. We have court assistance offices throughout

the State to provide legal forms, assistance in filling them out, and information about court procedures. Last year, almost 55,000 people requested help from the court assistance offices. We have also collaborated with Idaho Legal Aid Services on a nationally recognized project to provide online assistance through an interactive interview process to complete 160 court-approved forms. Those forms have been used in all of Idaho's counties.

However, court assistance offices and online interactive forms are not an effective replacement for legal counsel in many domestic relations cases, especially those involving children. There is a need to provide assistance for many litigants in such cases who cannot afford an attorney. One possible solution would be to increase the cost of a marriage license by \$20, which would generate about \$280,000 a year that could be used to provide legal assistance in civil cases involving children and families.

As I mentioned last year, in the 1980's you funded the statewide case management system known as ISTARS, which was the first system in the nation that included every trial court case filed in the state. Over the years, we have continually updated and improved ISTARS, and a nationally recognized expert recently characterized it as "the best statewide system of its kind in the country." It not only assists our judges in managing their cases, it has also helped decrease costs to other state agencies by providing information electronically about case dispositions to eliminate the need for repetitive data entry.

ISTARS also identifies those people who owe more than \$50 and sends that information electronically, along with identifying information, to the State Tax Commission. Last year, the Commission intercepted over \$3.2 million dollars in income tax refunds which were used to make payments of restitution to crime victims, fines, and court costs that were past due in over 16,000 cases statewide. My office received numerous telephone calls from people demanding to know why the Supreme Court took their tax refunds.

The courts have worked with law enforcement, including the Idaho State Police, to develop and implement electronic citations, or e-citations. The officer uses a computer to generate a printed citation, and the data is transmitted to the courts electronically. This process reduces the average traffic stop time from 12 minutes to 3 minutes per stop. The number of law enforcement agencies

using e-citations has increased, resulting in significant clerical savings and operational efficiencies for both law enforcement and the courts.

We are continually seeking ways to use technology to increase productivity and reduce costs. We intend to implement electronic filing of documents in trial courts so that attorneys and private citizens can file documents over the internet. This will lessen the court's reliance on paper records, which will reduce the amount of courthouse space devoted to court files.

District court civil cases have increased dramatically over the past five years, with the greatest increase in Idaho's most populous counties. The increase has been 31% in Kootenai County, 56% in Canyon County, and 71% in Ada County. This has put an increased work load on our district judges because many of those cases are complex business, medical, and financial cases that are time consuming and demanding.

We have also seen an increased difficulty in attracting qualified candidates to apply for district judge positions. The last two district judge openings attracted only two qualified applicants, one for each position. Two years ago we appointed Judges Lansing and Gutierrez of the Court of Appeals to chair a committee to investigate hindrances to attorneys applying for judicial positions, and we are now pursuing strategies to encourage more qualified applicants to apply.

Before closing, I want to acknowledge the many Idaho judges who are working evenings and weekends in an attempt to keep up with the increasing caseloads. Part-time senior judges have played a critical role in enabling the judiciary to dispose of cases in a timely manner. Last year, the days worked by senior judges were the equivalent of almost nine judicial positions, which translates into significant savings to the citizens of Idaho and the general fund.

We appreciate the outstanding working relationship we have with the other branches of government, and on behalf of Idaho's judges I thank you for your support, especially during these difficult economic times.

About the Author

The Hon. Daniel T. Eismann has been on the Idaho Supreme Court since January 1, 2001. He has served as Chief Justice since January 2, 2007. The views expressed in this article are those of the author and should not be interpreted as a formal statement of law or policy of the Idaho Supreme Court.

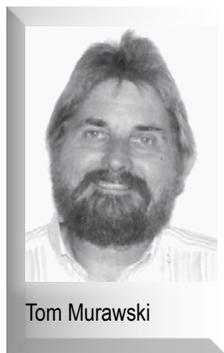


FEDERAL COURT CORNER

Tom Murawski
United States District and Bankruptcy Courts

Annual bankruptcy seminar in Coeur d'Alene

On March 3-5, 2011, the Commercial Law & Bankruptcy Section of the Idaho State Bar will hold its annual seminar in Coeur d'Alene. The first day of the seminar will be held at the U.S. Courthouse in Coeur d'Alene. Presenters include the Honorable Terry L. Myers, the Honorable Jim D. Pappas, the Honorable Ralph B. Kirscher, court staff and several Washington, Montana, and Idaho practitioners. The topics include: effective use and demonstration of evidence presentation technology in the federal courthouse; new procedures and issues encountered in the clerk's office; decision updates; legislative updates; and much more.



Tom Murawski

District of Idaho announces availability of community grant funds for 2011

The District of Idaho has announced that a total of \$9,165 will be available for the Community Grant Program for 2011. The purpose of this Program is to enhance public trust and confidence in the judiciary, promote better understanding of the judiciary and legal processes, and improve



communication with the public about the role of courts and the legal process. This grant funding must be related in some way to community education. Applications should briefly describe the organization, association or group, the date organized, history, purpose and tax status. Applications must be submitted or co-signed by an active member of the Bar of the U.S. District and Bankruptcy Court for the District of Idaho. Only one application can be submitted by a single organization or entity. Preference will be given to non-profit agencies or organizations. Deadline for submission of completed applications is May 1, 2011 and should be e-mailed in pdf format to Clerk@id.uscourts.gov. Applications and other information on this program is available on our website

at: www.id.uscourts.gov under Community Outreach.

Annual district conference - federal practice program

The dates for the District of Idaho Annual District Conference/Federal Practice Program will be Friday, October 14 at the Best Western Conference Center in Coeur d'Alene and Friday, November 4 at the Centre-on-the-Grove in Boise. Please mark your calendars. Detailed program brochures and on-line registration materials will be forthcoming.

About the Author

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



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Questions and Answers...

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CREATING SEPARATION AND EMPHASIS IN YOUR WRITING PART II: USING PUNCTUATION WITHIN SENTENCES

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

Last month I began a discussion on style — separation and emphasis in your writing — by discussing how to join independent clauses. I wrote about using punctuation to show the reader the relatedness of your ideas, and I covered how to use those punctuation marks correctly. I also promised that I would cover using punctuation correctly to create separation and emphasis within a sentence.

All writers want to add elegance to their writing, but many are often too busy or lack the confidence to try. I'm positive that once we cover how to correctly introduce ideas or set off ideas you will have the confidence to drop in a dash or add those parentheses!

Introducing ideas: commas and colons

Crafting any well-written document requires that you link your ideas for the reader. While there are many useful writing techniques for linking ideas, one of the most common is introducing the reader to your idea in general and then moving to the specifics of that idea. (In fact, I just used this type of construction in the last sentence.) When you use this type of construction in one sentence, you have two punctuation options: the comma and the colon. (See, I just did it again!)



Tenielle Fordyce-Ruff

Using a comma is the most common and more conventional way to introduce your reader to an idea. It simply tells the reader that you have concluded the introduction and are beginning the heart of the idea in your sentence. Use a comma after most introductory phrases to help your reader understand which ideas in the sentence to concentrate on.

But, a comma does not emphasize the idea that follows the introductory phrase. If you want to emphasize the heart of your idea, use a colon instead of a comma.

Using a colon is the strongest way to create emphasis. A colon tells the reader



that key information is coming. It signals the importance of the idea that follows it. For instance, adding a colon before a list of elements for a cause or action or a key fact the case turns on can help ensure the reader understands the importance of the information that follows.

Because colons create so much emphasis, however, it is important to use them correctly. You don't want to draw your reader's attention to a grammar error! First, the part of the sentence *before* the colon must be an independent clause. This means that you could replace the colon with a period and the clause could function as a grammatically correct sentence. Second, make sure that if you are introducing a list you punctuate the list correctly. Use commas for simple lists (lists of items without any internal punctuation) and semi-colons for complex lists (lists of items that contain internal punctuation). Additionally, if the list has three or more items, you should use serial commas — place a comma between the last two items. For instance, "Negligence has four elements: duty, breach, causation, and damages."

Setting off ideas: dashes, parentheses, and commas

The ideas legal writers want to express are often complex. Words and ideas within sentences must be defined or explained. Because of this complexity, many sentences in legal writing contain interrupters — words that break from the main idea of the sentence.

These interrupters can be set off with dashes, commas, and parentheses. The choice of which mark to use depends on how much emphasis you want to draw to the interrupter.

Using a colon is the strongest way to create emphasis. A colon tells the reader that key information is coming. It signals the importance of the idea that follows it.

Using dashes creates the most emphasis. Dashes signal to the reader that the information set off is important or crucial, and may even be more important than the information in the main sentence. For instance, "I have known — and still know — many attorneys whose work I respect" focuses the reader's attention on the fact that I still know. The dashes emphasize my current knowledge.

A few quick words to help you use dashes correctly. If the interrupter comes in the middle of the sentence be sure to use a pair of dashes. You can, however, use a dash to set off information at the beginning or end of the sentence. In those instances, the first word or terminal punctuation replaces the second dash. Additionally, make sure to use dashes and not hyphens.

Using parentheses provides the reader with a visual distinction, but also signals to the reader that the information in the interrupter isn't crucial to her understand-

ing of the sentence. Parentheses are used instead to set off useful or interesting information. Because of this, they do not add emphasis to the ideas within the parentheses; indeed, readers frequently skip over that information. For example, “I have known (and still know) many attorneys whose work I respect” does not emphasize my current knowledge. My use of parentheses here told the reader that my current knowledge was not crucial information, and, therefore, the reader may have skipped the parenthetical information entirely.

Finally, using commas to set of interrupters creates no emphasis. Because the use of commas is so common, a reader smoothly absorbs the information in the interrupter. Take, for example, “I have known, and still know, many attorneys whose work I respect.” The commas here create a balanced sentence and draw no particular attention to any part of the sentence.

Conclusion

I hope this discussion of style has helped you understand how punctuation

*Because the use of commas is so common,
a reader smoothly absorbs the information
in the interrupter.*

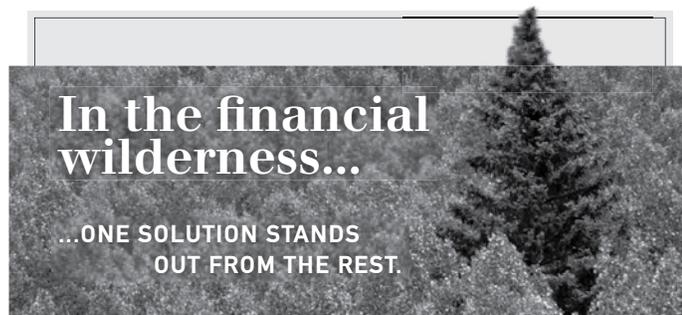
can add elegance and emphasis to your writing and helped you have the confidence to spice up your writing with a dash or two.

Sources

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

About the Author

Tenielle Fordyce-Ruff is a member of *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.



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ADVOCATES IN ACTION: ADMINISTRATIVE DUTIES FOR JAGs IN IRAQ

Stephen A. Stokes
Meyers Law Office, PLLC

Since the last column, the Judge Advocate Office (JAG) has settled into a comfortable “battle rhythm,” to use military speak. As previously mentioned, the 116th Cavalry Brigade Combat Team is the Garrison Command of the Victory Base Complex (VBC) in Baghdad, Iraq. “Garrison” is the collective term for a body of troops stationed in a particular area to guard it or to use it as a home base. Hence, as Garrison Command, it is our mission to properly manage the VBC to support all troops stationed here and to administer the VBC’s day-to-day activities. Imagine the Garrison Command acting like a city’s government to manage the affairs of about 30,000 inhabitants.

Because the Garrison Command’s administrative duties require managing contractors, facilitating the acquisition process and overseeing the VBC’s physical terrain, our legal support is primarily of a contract, fiscal and administrative nature, which is my area of responsibility. Most logistical services at the VBC are provided by civilian contractors. Each service specification requires a separate contract. When a new contract is needed, or as a contract approaches its expiration date, origination or renewal packets are prepared, each of which requires a legal review. To date, I have reviewed contracts for various projects, services and acquisitions totaling approximately \$43.5 million. Terrain management is another focus area. All tenants, whether military or civilian, require a land-use agreement, or a Memorandum of Understanding (MOU). In conjunction with the Directorate of Public Works, I created the master MOU used by Garrison Command, and I provide a legal review whenever a new MOU is generated. JAG also generates and serves notices of eviction.



Stephen A. Stokes

MAJ Paul Boice, Brigade Trial Counsel, has continued to be busy with military justice. So far, his criminal cases have involved prosecuting violations of the Uniform Code of Military Justice, such as insubordination and failure to follow lawful orders, and breaches of General Order 1A, which is the famous prohibition against



Photo courtesy of Stephen A. Stokes

Idaho lawyers pose with the chief investigative judge of the Iraqi Central Criminal Court at the Patton Room of 25th Infantry Division Headquarters in Baghdad. From left are: 1LT Stephen A. Stokes, Judge Fa'iq Zaidan Khalef, MAJ Paul A. Boice and CPT Rob Gaddy.

alcohol, pornography, fraternization and cohabitation of male/female soldiers. We have seen some serious cases involving burglary, larceny, sexual assault and battery. Fortunately, these cases have not involved members of the 116th CBCT. He has also been occupied with prosecuting actions against contractors and civilians who have engaged in misconduct. They are usually barred from post, but criminal actions can proceed against them under the Military Extraterritorial Jurisdiction Act.

MAJ Darren Ream, Command Judge Advocate, is the personal legal advisor to the Brigade Commander, COL Guy E. Thomas. He integrates legal functions into the rest of the Brigade’s operations by coordinating with the other non-attorney staff members, including the personnel,

To date, I have reviewed contracts for various projects, services and acquisitions totaling approximately \$43.5 million.

intelligence, operations, supply, plans, signal and finance officers. Each staff section has unique legal challenges requiring support and advice from MAJ Ream.

We have also met and socialized with our attorney counterparts at the 25th Infantry Division and XVIII Airborne Corps JAG offices. Thus far, the 25th ID has required our presence at their Christmas party, the “JAG fun night” and a “brown bag” discussion dinner with the 25th ID Commanding General, MG Bernard Champoux. We’ve also found other Idaho attorneys here; specifically, CPT Rob Gaddy, Trial Counsel, 25th ID. After graduating from Idaho State University in 2002 he attended the University of Idaho College of Law, graduating in 2008. CPT Gaddy was involved with ROTC at ISU and is a former member of the 1-148 Field Artillery Battalion, 116th CBCT. Although he is stationed in Hawaii, his current home of record is Eagle, Idaho and he is married to Kelsey Gaddy (Bolen), who is also a UofI Law alumna, class of 2007.

Beyond meeting-and-greeting, we were able to attend an outstanding officer development program hosted by the 25th ID JAG office.

Judge Fa’iq Zaidan Khalef, Chief Investigative Judge of the Iraqi Central Criminal Court, spoke about the composition of the Iraqi judicial system and challenges facing the Iraqi judiciary as U.S. Forces leave Iraq.

As opposed to our familiar common law structure, the Iraqi legal system based

Judge Fa’iq Zaidan Khalef, Chief Investigative Judge of the Iraqi Central Criminal Court, spoke about the composition of the Iraqi judicial system and challenges facing the Iraqi judiciary as U.S. Forces leave Iraq.

on a civil law or inquisitorial system. In Iraq, judges drive both investigations and trials, and there are many different courts with separate and distinct areas of jurisdiction.

The High Federal Court, established in 2003, is the highest court in Iraq. Its main purpose is to hear constitutional cases. The Cassation Court is the equivalent of the U.S. Supreme Court. It consists of approximately 30 judges divided into different panels, which hear cases in specific areas of the law. It issues decisions that make “case law” for other lower judges to follow. A true appellate court, it deals only with the record; trials de novo are not allowed. The Cassation Court is seated in Baghdad.

Courts of Appeal are the next tier. There is one in each province and two in Baghdad. Each is made up of a panel of three judges. Trials de novo are required, and only civil matters are considered.

Criminal Courts are seated in each province with three judges per court, plus the prosecutor. They hear cases where punishment is greater than five years’ incarceration. The Central Criminal Court, which was established in 2003 by the Coalition Provisional Authority, handles serious cases such as terrorism, government corruption, kidnapping and murder.

Misdemeanor, Investigative, Commencement and Family Courts round out the bottom tier. Misdemeanor Courts hear less important criminal matters, with only

one judge presiding. Investigative Courts play the most important role in the Iraqi legal system since Investigative Judges help develop the facts of each criminal case and route the matter to the next court level. Criminal cases only proceed if the Investigative Judge is satisfied with the evidence against an accused. Sometimes case files will go back and forth between the Investigative Court, the prosecutor and the police several times to gather sufficient evidence before the Investigative Judge is satisfied that he or she can either move the case forward to a trial court or dismiss the case. Commencement Courts, presided over by a single judge, hear solely civil matters. Finally, Family Courts hear purely family law cases.

Our deployment is speeding along. As of the publication of this column, we will have been gone five months. Next month’s article will take a look at our adventures in extreme tourism.

About the Author

Stephen A. Stokes received his J.D. from the University of Idaho in 2005. He is an associate with Meyers Law Office, PLLC in Pocatello, Idaho. He is a Judge Advocate serving as a First Lieutenant in the Idaho Army National Guard and is currently deployed to Iraq. He can be reached by telephone at 208-233-2141 or 208-406-2861 or by email at stephenandrewstokes@gmail.com or stephen.stokes@iraq.centcom.mil.

In Iraq, judges drive both investigations and trials, and there are many different courts with separate and distinct areas of jurisdiction.



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LAW CLINICS OFFER ADVOCACY EXPERIENCE AND REAL-WORLD COMPLEXITY

Donna Emert

University of Idaho College of Law

In University of Idaho College of Law classrooms, students learn the law. In its law clinics, they learn how to practice law.

“Clinics give students an opportunity not only to learn how to lawyer, but also to realize what kind of law they want to practice,” said Maureen Laffin, director of clinical programs and professor of law. “They apply what they’ve learned to a real situation.”

Clinic services are offered free of charge to clients who are selected according to the legal and factual merits of their cases, their income levels, their location/physical proximity to the clinics, the educational value of issues raised in their case, and other criteria. Some cases are referred from the state and federal courts when judges or clerks determine that *pro se* litigants – those defending themselves in court – need representation to proceed.

Not surprisingly, a real-life case is often messier than a classroom exercise.

“The main difference between a live client and a simulation is the factual and legal complexity that’s introduced by having a real person there,” said Laffin.

Like the rest of us, attorneys must live and work in an imperfect world, Laffin suggests.

“We represent people who don’t always make prudent choices,” she said. “Clinic students have to ask themselves, ‘How do you work with the reality of the client’s situation?’ Clinic work also can reveal bad laws, and students learn to work with that, at times seeking a change in the law.”

Reality creates some pretty inflexible parameters for clinic students. “You must accept the facts that are given to you and the circumstances in which you must operate,” Laffin said.

Only third-year law students who hold a limited license to practice law from the Idaho Supreme Court can participate in clinics. Students are directly supervised by licensed attorneys – their University



Photo courtesy of University of Idaho College of Law

Jordan Taylor discusses with Jennifer Currin about their case during the University of Idaho’s College of Law Trial Advocacy’s course where students participate in a day-long mock trial at the conclusion of the week-long course.

of Idaho law professors. Students also often work with practicing legal experts to investigate specific facets of the law pertaining to their cases.

With faculty mentors overseeing all student cases, clinics serve as a safe place to sharpen vital skills.

“I wanted to learn how to mediate,” said Alex Muir, a third-year law student working in the General Clinic and the Mediation Clinic. “And I wanted to know what is the first thing you need to do as a lawyer when you represent someone: how to get a case started and move it forward, how to organize a case and how to work with your client to get all the proper documents submitted. “You don’t learn that in law school so much. You learn the law, but not really how to practice.”

Muir found that clients are more complex than their cases.

“When you’re actually representing someone, they share with you their life, and you have to parse out the legal aspects,” Muir said.

In the General Law Clinic, which addresses misdemeanor defense, family law, consumer protection, landlord-tenant disputes, probate, and civil rights cases, Muir has mastered several practical lawyering skills, including mediation, conducting initial client interviews, working with clients to gather information, the process of putting together a case, and the crucial

skills of properly filling out and submitting paperwork. For example, “I know how to draft a divorce complaint, and file it. I’ve spent time doing that,” said Muir. “Hopefully I will be more marketable because of that experience.”

While the practical skills acquired help build law student resumes, the experience also plants the seed for continued pro bono work.

“Our legal system is complicated. It’s hard to navigate through it, and it’s costly,” Muir said. “Working with people in the clinics gives you that unique perspective, and hopefully translates into a greater ability to help clients in the future.”

Actively promoting justice remains an essential component of the clinic experience as well.

“The clinics have given me opportunity to represent people who would not otherwise have access to a lawyer or to legal services. It gives me the chance to give back,” Muir said. “I believe that’s a good thing.”

Learn more about the University of Idaho College of Law Clinics and Clinical Labs at www.uidaho.edu/law/academics/clinicsprofessionalskills/clinics.

About the Author

Donna Emert is a writer with *University of Idaho Communications*, where she has worked for five years. She also has worked as a freelance writer for more than 20 years. She is based in Coeur d’Alene.



Donna Emert

Q&A WITH MAUREEN LAFLIN, DIRECTOR OF UNIVERSITY OF IDAHO COLLEGE OF LAW CLINICAL PROGRAMS

Q. Has the role of the University's law clinics changed in recent history?

A. The first clinic was established in 1975. Today we have many clinics under the umbrella of our clinical program. The role of the clinics hasn't changed, but the number of people we serve and the number of students who participate have both expanded. Thus the variety and number of cases we can take on has significantly grown.

Q. Are all students required to participate in clinics, and if not, what is the process required for students to participate?

A. Participation in clinics is not mandatory, although we have a professional skills requirement and a pro bono requirement. Students select clinics as a course. We offer an informational meeting to inform second-year law students about clinic options. They go through an application process, and we attempt to give each student his or her first choice.

Q. Are clinics a primary role of the Boise program?

A. A large number of students participating in the Boise third-year program participate in externships and in-house clinics, including a tax clinic and small business clinic. Next year we will introduce another clinic, an economic development Clinic. Boise law students have a choice to take clinical courses but may also be full time classroom students. Students have an array of doctrinal classes taught by University of Idaho law professors and adjunct professors. For example, Idaho's two bankruptcy judges and a leading practitioner teach bankruptcy, and Judge Winmill and Dave Metcalf will be teaching a complex litigation course. So Boise students are taught by Idaho faculty and by adjuncts who are well respected members of the bench and bar. Our Boise campus has really outstanding faculty and adjuncts.

Q. How much supervision do the students need in the clinics, and what does that supervision entail?

A. All students are supervised. The intensity of the supervision depends in part upon the skill level of the students coming in, as well as the complexity of the cases. We attempt to have the students serve as primary counsel, with supervision from UI faculty, which includes reading and proofing all written communication, brainstorming, mooted oral arguments



Photo courtesy of University of Idaho College of Law

Law clinic director Maureen Laflin talks with third-year law student Alex Muir about applying legal concepts to complex real-world issues.

and trial preparation and being available to answer their questions. As the semester progresses students' skill levels generally increase which allows them to handle more complex matters.

Q. Does law clinic participation help students find internships or jobs?

A. What clinics give students is experience with a safety net, and the safety net is the faculty supervisor. Clinic work also means the student will graduate with significant legal experience. For some employers, it is important that a student has already represented an array of people in family or criminal cases, presented an oral argument before the Ninth Circuit or drafted articles for incorporation in the business clinic. Some of our clinic alums call us when they are looking to hire a new lawyer.

Q. What makes University of Idaho clinics unique?

A. We have a uniform clinical program, which means that while our students may be assigned to practice in a specific clinic, they also get exposure to other areas of the law. We now have eight in-house clinics (<http://www.uidaho.edu/law/academics/clinicsprofessionalskills/clinics>) and will have nine next year. This provides a broad array of opportunities for our students.

The program allows students to understand how decisions in one area may significantly impact our clients in another

aspect of their lives. For example, they learn that criminal charges can impact a client's immigration status. Students in our general clinic collaborate with peers in the immigration clinic.

The clinic experience also allows students to take on significant work while they are still in school. Clinic students have briefed and argued cases before the Ninth Circuit Court of Appeals and the Idaho Appellate Courts, participated in a weeklong trial in federal district court, assisted in briefs to the U.S. Supreme Court, advocated for the rights of victims, negotiated disputes and drafted transactional documents for clients.

Clinics also give students the experience of working with practitioners in the field, not only their supervisors, but with other attorneys who help out, lending their expertise. Students also have access to the expertise of the entire law faculty. They regularly consult with Professor Seamon on administrative law matters, Professor Brandt on family law questions, and Professor Satz on consumer issues. Faculty volunteer to moot the students before significant oral arguments.

Clinic teaches students the value of collaboration and the importance of consulting with others when they are in unfamiliar areas of the law. Clinic students get to do significant legal work with a safety net, and they get to learn how to do it correctly.

IN MEMORIAM

Michael Forrest Barron 1946 -2011

Michael Forrest Barron, 64, of Craig, Alaska, died earlier this year. He and his wife Linda spent recent winters in Coeur d'Alene, their former hometown, as a base for their travels. A graduate of Gonzaga University, Michael married Linda in 1964 and they served together in the Peace Corps in Chile. Following his passion for architecture, Michael designed a "dream home" in Alaska.

He is survived by his wife, Linda Barron; and son Troy Barron; daughter Sarah Barron of Coeur d'Alene; and sister Paula Bailey of Kansas.



Michael Forrest Barron

Philip Edwin Dolan 1919 - 2011

Philip Edwin Dolan, 91, a veteran of World War II and longtime Coeur d'Alene attorney and philanthropist, died January 11, 2011. Philip Dolan died of natural causes at Kootenai Medical Center, which contains a treatment room in the cardiac department named for him and his family, the result of his philanthropy. His wife of 63 years, Mary, was at his side.

The lifelong Kootenai County resident was born in Spirit Lake on Jan. 20, 1919. Before his 16th birthday, Phil began working at Spirit Lake's Panhandle Lumber sawmill, where his uncle Frank Moran was on the management team. Along with his father and two brothers, Phil fought the devastating forest fire which gutted the mill in 1939. That same year, his lifelong friend from Spirit Lake, Dr. Edward Hamacher, was completing his first year of university studies at Gonzaga in Spokane. He approached the Jesuits there to see if his buddy could enroll, even though Phil had only saved up \$300 from his mill work. Phil was accepted, and he began working daily with the college's sole



Phillip Edwin Dolan

maintenance man to pay his tuition. Majoring in accounting while hoping to later study law, he received his BA in 1941 just six months before the United States entered the war.

Phil fought Hitler's troops in Algeria and Tunisia, earning several awards including a sharpshooter badge. He was with U.S. forces who helped liberate Italy from fascist rule in 1945 just as nearby Mount Vesuvius was erupting.

Phil returned to Gonzaga after the war and earned his law degree in 1947. Today, Gonzaga's Law Library contains a plaque in honor of the benefactor's subsequent contributions.

While studying law in Spokane, Phil met Mary Louis Hazen, a nurse from Oregon. They were married in Seattle in October 1947, the same year he was admitted into the Washington State Bar, followed by the Idaho Bar in 1948. After moving to Coeur d'Alene with his bride, Phil set up a private practice. Later he handled all the workers comp cases in the North Idaho region for the State Insurance Fund. Phil is probably best remembered by many area residents for the legal aid he rendered to clients who could not afford to pay him.

Phil served on the Kootenai County Planning Commission and was an integral member of the Cd'A Elks Club and the GYROS group that fosters friendship between the USA and Canada. The Spirit Lake Roman Catholic church was built in the mid 60's on his donated land. Along with his wife Mary, Phil also played an important role in helping to establish care and educational facilities for mentally handicapped children and adults in the Cd'A area.

Phil is survived five children: Stephen, James, Timothy, David and Anne, along with nine grandchildren and 14 great grandchildren.

Francis H. Hicks 1924 - 2011

Francis H. Hicks, 86, of Mountain Home, died Feb. 5, at a Meridian hospital.

Frank was born Christmas Day 1924 in a farm house in Twin Falls County. He spent one year at the University of Idaho, where he decided to join the United States Marine Corps to serve his country during World War II. The Marine Corps ordered him to the University of Notre Dame,

where he graduated with honors receiving a Bachelor of Law degree. He also attended the University of Edinburgh in Scotland.

He practiced law in Boise from 1949 to 1957, during which time he met Barbara J. Nicholson. They were married in Boise in 1953. In 1957, they moved to Mountain Home, where he opened a law practice with Barbara as his legal secretary.

Frank always found time while building his law practice and raising his family to take an active role in civic and political activities. He was Elmore County prosecuting attorney twice and was city attorney in Mountain Home, Glens Ferry and Atlanta. He also served two years as an Elmore County commissioner and was a member of the board of directors for the county's Community Action Program.

In the early 1960s, he was a charter member and chairman of the board of directors for Idaho Legal Aid. In 1979, he was appointed by Governor John Evans to the Idaho State Board of Pharmacy, the board's first public member. He served until 1988.

In 1972, he was president of the Mountain Home Chamber of Commerce, then became a member of the Military Affairs Committee. He was a member of the Elmore County Historical Foundation, Friends of the Library, American Legion, Knights of Columbus and the Idaho State Bar. He was a charter member and director of High Reachers, Inc., an organization dedicated to helping handicapped adults.

He served on the Idaho State Bar Ethics Committee and was honored in 1989 with the ISB Pro Bono Award.

He loved tending his roses and reciting Shakespeare, Kipling, Longfellow and Frost, among others. He said many times, "I want to live life at the side of the road and be a friend to all mankind," and that he did. Frank is survived by his son, George; daughter, Mary Susan "Susie"; son, Jim; son, Tom Hicks of Boise; daughter, Libby; sister, Catherine Lang of Twin Falls; 13 grandchildren; and seven great-grandchildren. He was preceded in death by his wife, Barbara.



Francis H. Hicks

OF INTEREST

Mendoza appointed to Board of Directors of Northwest Area Foundation

Natalie Camacho Mendoza of Boise was recently appointed to the Board of Directors of the Northwest Area Foundation, the philanthropic organization established in 1934 by Louis W. Hill. She will serve a three-year-term. The foundation selects its board from an eight-state region covered by the Great Northern Railroad founded by James J. Hill, to support "efforts by the people, organizations and communities in eight states to reduce poverty and achieve sustainable prosperity," according to a press release.



Natalie Camacho Mendoza

Willis opens firm

Bradley Willis announced the opening of Willis Law Offices in January, 2011. The practice focuses on all aspects of family law, criminal defense, adult and juvenile guardianship matters and estate

planning. In addition to a litigation practice, Mr. Willis is a trained child custody mediator with experience in family law mediation and civil mediation. He offers a sliding fee scale for conducting family law mediation to help people with low incomes who are working to resolve divorce and custody issues.



Bradley Willis

Mr. Willis received his J.D. from the University of Idaho College of Law in 2007 and graduated from Utah State University magna cum laud with a B.A. in History and a B.A. in Liberal Arts & Sciences. He clerked with the Honorable Ronald Bush and the Honorable Stephen Dunn in Bannock County prior to entering private practice with Kumm Law Office. He is interested in the area of child protection and volunteers as an attorney for CASA in Bannock County CPA cases.

Willis Law Offices can be contacted at (208) 530-2937 or by email at legalworkidaho@gmail.com. The office is located at 1402 South First Avenue in Pocatello.

Wilson & McColl relocate

After 18 years at the same place of business, Jeffrey M. Wilson and Brian F. McColl, of the firm Wilson & McColl, have moved their offices. They can now be found in The 36th Street Garden Center, located at the corner of 36th Street and Hill Road, 3858 N. Garden Center Way, Suite 200, Boise, Idaho 83703; telephone: (208) 345-9100; facsimile: (208) 384-0442.

Five attorneys named in Idaho Business Review's Top 50 Women

The Idaho Business Review recently announced its Top 50 Women, and five attorneys were included. From 136 nominees from a wide variety of professions, in various geographic locations, the attorneys included: Amy Howe, U.S. Attorney's Office for the District of Idaho; Michelle Michaud, Michaud Law group & Conflict Resolution Center, LLC; Kelsey Jae Nunez, Givens Pursley, LLP; Melanie Rubocki, Perkins Coie, LLP; and Mindy Willman, Moffatt, Thomas, Barrett, Rock & Fields, Chtd.

Idaho State Judiciary



2010 Annual Report



Available online at www.isc.idaho.gov/annual_cov.htm

Law Day Features Events, Recognition of John Adams

Laurie Fortier
Fourth District Bar
Law Day Chair

Please join the Fourth District Bar Association on April 29 for the many activities surrounding Law Day 2011! The 2011 Law Day theme is "The Legacy of John Adams, From Boston to Guantanamo." The theme provides us with an opportunity to assess and celebrate the legacy of John Adams, explore the historical and contemporary role of lawyers in defending the rights of the accused, and renew our understanding of and appreciation for the fundamental principle of the rule of law.



Laurie Fortier

Law Day Reception: Come enjoy free appetizers and drinks on Friday, April 29 after work. The Law Day Reception will be hosted at the Rose Room beginning about 4:30 p.m. and everyone is welcome. Please join us as we present the 2011 Liberty Bell Award, the 6.1 Challenge award recipients, and hear about each of our Law Day events.

Ask a Lawyer: The Ask a Lawyer provides free legal advice to members of

the public. The event runs from 5 a.m. to 4 p.m. at the Ada County Courthouse and volunteers are needed to take incoming calls (something law clerks can do) and call the public back with answers to their legal questions. We need attorney volunteers from every aspect of the law. Please contact Heather McCarthy at ida-hoaskalawyer@gmail.com to learn more or get involved.

6.1 Challenge: The 6.1 Challenge is a competition to see which person or entity provided the most pro bono hours during the last year. There are categories for small and large firms and the government sector. To learn more visit, www.isb.idaho.gov/pdf/ivlp/6.1_challenge_web_description.pdf. For forms to enter the Challenge go to www.isb.idaho.gov/pdf/ivlp/6.1_challenge_volunteer_hours_form.pdf. Forms must be received by the Idaho State Bar by April 8.

Liberty Bell Award: The Liberty Bell Award is given to acknowledge outstanding community service and is most commonly awarded to a layperson, but it can also go to a lawyer or a judge in the right circumstances. On occasion, the award is given to an organization, rather than a person. The recipient of the Liberty Bell Award is someone who embodies the theme of the year, promotes a better understanding of the rule of law, encourages a greater respect for law and the courts, stimulates a sense of civic responsibility, and contributes to good government in the community. The Law Day Committee is

now accepting nominations for the 2011 Liberty Bell Award. Please send the name of your nomination and a short summary describing why your nomination should receive the award to Jason Prince at je-prince@stoel.com. All nominations must be received no later than March 16.

School Outreach: The School Outreach Program matches local attorneys with classrooms of students ranging from first grade through seniors in high school. The attorneys present on a variety of topics and answer questions posed by the students. The program has been incredibly successful the last few years and we have matched nearly 50 attorneys with local schools. We need a significant number of attorney volunteers for this worthwhile program and volunteering may require as little as one hour of your time. To learn more or volunteer please email Chris Christensen at IdahoLawDay@gmail.com.

If you have any questions, comments or suggestions about this year's Law Day programs, please feel free to contact our Law Day Chair, Laurie Fortier, at lfortier@cityofboise.org or (208) 384-3870.

About the Author

Laurie Fortier is an Assistant City Attorney with the Boise City Attorney's Office, where her practice focuses on criminal prosecution and providing legal advice and support to Purchasing and the City's Ethics Commission. Ms. Fortier graduated with her B.S. Business - Accounting and J.D. from the University of Idaho.

PRO BONO COMMISSION ANNOUNCES POLICY HONOR ROLL

The Pro Bono Commission, which was established in 2007 and currently chaired by Justice Jim Jones, has adopted an initiative to encourage all firms (regardless of size) as well as corporate and public sector law offices to adopt policies that encourage pro bono work by their attorneys.

The Commission has also requested that offices that have such policies report that information. As of February 1, 2011 the following have reported the adoption of written pro bono policies:

- Benoit, Alexander, Harwood & High, LLP
- Boise City Attorney's Office
- Cooper & Larsen
- Courts of the State of Idaho
- EchoHawk Law Offices, PLLC
- DisAbility Rights Idaho
- Gjording & Fouser, PLLC
- Hamilton, Michaelson & Hilty, LLP
- Hawley Troxell Ennis & Hawley, LLP
- Holden, Kidwell, Hahn & Crapo, PLLC
- Holland & Hart, LLP
- J.R. Simplot Company
- Keeton & Tait
- Ken Nagy, Attorney at Law
- Kenneth L. Anderson, Attorney at Law
- Moffatt, Thomas, Barrett, Rock & Fields, Chtd.
- OfficeMax Incorporated
- Paine Hamblen, LLP
- Perkins Coie, LLP
- Racine, Olson, Nye, Budge & Bailey, Chtd.
- Richardson & O'Leary, PLLC
- Service & Spinner
- Stoel Rives, LLP
- U.S. Attorney's Office
- University of Idaho College of Law
- Williams, Meservy & Lothspeich, LLP
- Yturri Rose, LLP

The Pro Bono Policy Honor Roll is a work in progress. The Commission intends to update and republish it at regular intervals. If your office has a pro bono policy and it is not listed here, please contact Justice Jim Jones jjones@idcourts.net or 947-7577 or Chief Federal Magistrate Candy Dale 334-9111.

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

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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.

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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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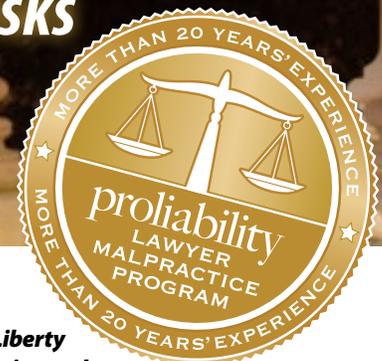


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MEMORIAL CEREMONY

For deceased Idaho Judges and Attorneys

Thursday, March 24, 2011 - 10:00 a.m.

Idaho Supreme Court Building

Judges	Residence City	Deceased
Hon. Glenn A. Phillips	Arco, ID	1/28/10
Hon. Robert M. Rowett, Sr.	Mountain Home, ID	4/26/10
Hon. Brent J. Moss	Rexburg, ID	6/24/10
Hon. John H. Maynard	Lewiston, ID	11/22/10
Hon. William Andrew Stellmon	Lewiston, ID	12/18/10

University of Idaho – Law School	Residence City	Deceased
Sheldon A. Vincenti	Moscow, ID	3/31/10

Attorneys	Residence City	Deceased
George Kneeland	Las Vegas, NV	10/5/08*
*Note: notified 5/10/10		
Joseph C. Adams, Jr	Seattle, WA	12/19/09*
*Note: notified 7/12/10		
L. Charles Johnson	Phoenix, AZ	1/22/10
Janice Dilley Newell	Boise, ID	2/10/10
George C. Petersen, Jr.	Idaho Falls, ID	2/28/10
Edward J. Berrett	Pocatello, ID	3/12/10
Frederick Joseph Hahn	Idaho Falls, ID	4/3/10
Emil Francis Pike, Jr.	Kimberly, ID	4/7/10
Ronald B. Webster	Colfax, WA	4/8/10
Jerald Vickers Smith	Lewiston, ID	4/11/10
Sidney Earl Smith	Coeur d'Alene, ID	4/23/10
Nicholas M. Lamanna, Sr.	Priest River, ID	5/6/10
Elbert E. "Hap" Gass	Eagle, ID	6/27/10
Ellison Marler Matthews	Boise, ID	7/10/10
Robert W. Bartlett, II	Hailey, ID	7/13/10
Luis "Louie" Gorrone	Emmett, ID	7/27/10
William H. MacAllister, Jr.	Los Angeles, CA	7/30/10
Eugene C. Thomas	Idaho Falls, ID	9/13/10
Michael L. Schindele	Boise, ID	10/20/10
Beverly B. Bistline	Pocatello, ID	10/23/10
Stanton Parish Rines, Jr.	San Diego, CA	10/25/10
Blaine F. Evans	Boise, ID	11/29/10
David Ray Samuelson	Boise, ID	12/9/10
John Charles "Jack" Riddlemoser	Kuna, ID	12/27/10

2011 Annual Meeting

Sun Valley, Idaho
July 13 - 15, 2011



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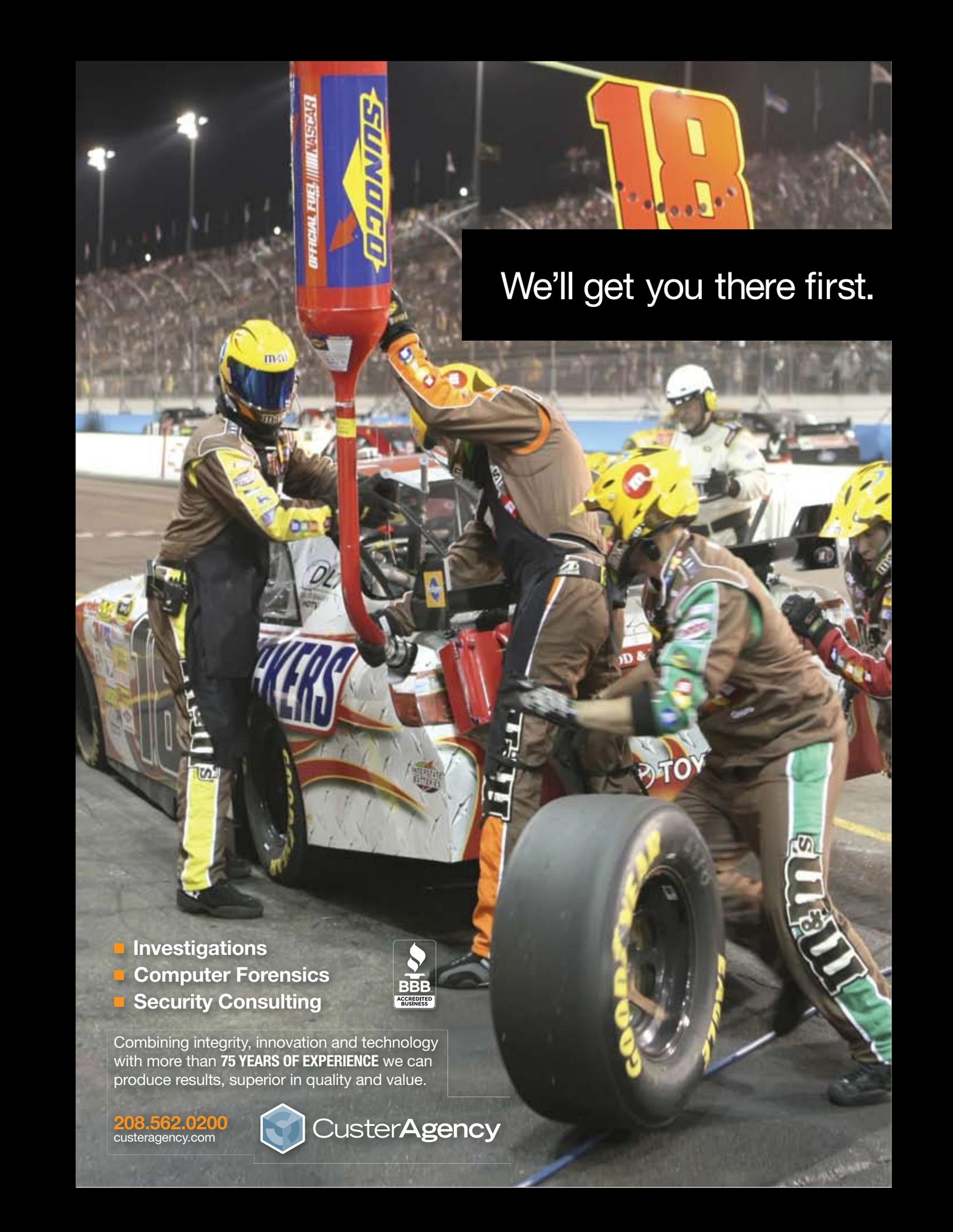
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