

The Advocate

Official Publication
of the Idaho State Bar
Volume 54, No. 10
October 2011

Child Custody

Indian Law Rebutal

 **116th Returns**

Sponsored by the
Family Law Section





Protect the best interests of *your* client.

Does your client have a real estate need?

When it comes to leasing, re-leasing, or buying commercial space, it's not just about the cost per square foot. Functionality, location, operational costs, floor plate efficiency, physical plant HVAC, triple net fees and current vacancy rates all effect the equation. How do you help your client make the best possible deal?

Put our market expertise and real estate knowledge to work on your client's team.

We'll help you keep the client informed and comfortable in their knowledge of what's available in today's commercial real estate market.

Whether it's evaluating space, considering fully loaded operational costs, or contemplating growth options, Tenant Realty Advisors can help ensure you're protecting the best interests of your client.

Tenant Realty Advisors is the *only* commercial real estate firm in the greater Boise area that works *exclusively* for tenants and buyers, so we have no conflict of interest issues resulting from representing the other side of the negotiation table. Our fees are contractually paid by the landlord or seller, so there's no cost to you or your client. Protect the best interests of your client by consulting an experienced, independent, and unbiased commercial real estate broker. **Call Bill Beck today at (208) 333-7050.**



William R. Beck SIOR, Principal

208.333.7050

www.tenrealad.com

beck@tenrealad.com



*Earning trust and confidence
for over 100 years.*

Managing and guiding your clients' complex financial planning means putting your reputation on the line.

When it's time for you to recommend a corporate trustee, you can be assured that Washington Trust's Wealth Management and Advisory Services team will protect your professional integrity.

We are a corporate trustee that understands our role in supporting the legal counsel you provide your clients. Our full-range of trust services are complemented by our technical expertise, sensitivity, confidentiality, and a well-earned reputation for personalized and unbiased portfolio management.

Learn more about our expert fiduciary services at: watrust.com/LegalFAQ



BOISE 208.345.3343 | COEUR D'ALENE 208.667.7993 | SPOKANE 509.353.3898
SEATTLE 206.667.8989 | BELLEVUE 425.709.5500 | PORTLAND 503.778.7077

Families Struggling with Alzheimer's, Dementia and Other Chronic Health Care Issues Need Expert Assistance



Sisson & Sisson, The Elder Law Firm, PLLC

Life Care Planning • Medicaid & Estate Planning

Asset Protection/Benefits Planning

Comprehensive Legal and Financial Planning
For Seniors and Disabled Persons:

- **Asset protection:** Protection of the home, other real property and life savings for spouse and children.
- **Estate planning:** Elder law focused documents to protect senior clients facing long-term care costs.
- **Medicaid and Veteran's benefit planning:** Comprehensive planning to help pay for expensive nursing home and other long-term care costs.
- **Family empowerment in times of great need:** The power to be informed and to achieve all the benefits they are entitled to, while protecting assets, loved ones and independence.

For five years, The Elder Law Firm employed a health care professional to help its senior clients and their families coordinate care issues. In 2010, Pete Sisson formed The Care Management Team to more comprehensively address all the health care issues faced by seniors with chronic illness – issues that need ongoing advocacy and intervention. The Care Management Team is composed entirely of licensed professionals (nurses and social workers) who have in-depth experience in geriatric and long-term care issues and understand the health care system, its complexities, resources and services.

Pete Sisson is a National Board Certified Elder Law Attorney (www.nelf.org) and a VA Accredited Attorney. Since 1993, The Elder Law Firm has helped thousands of Idaho seniors and their families avoid the financial ruin that is caused by long-term care costs.

Sisson & Sisson, The Elder Law Firm, PLLC

Life Care Planning • Medicaid & Estate Planning

2402 W. Jefferson St., Boise, ID 83702
Tel: (208) 387-0729
www.IdahoElderLaw.com

The Care Management Team, LLC

Protecting Your Quality of Care and Quality of Life

Care Management, Coordination, and Advocacy

Comprehensive Care Management Services
For Persons With Chronic Health Care Concerns:

- **A team of nurses and social workers** assisting disabled and older people and their families find ways to gain the greatest degree of independence, safety and comfort.
- **On-site needs assessments** and development of care plan and recommendations. Advocacy and coordination with health care providers, insurers, Medicare and Medicaid. Crisis intervention, management and follow through, with status reports to loved ones.
- **Assistance with transitions** to identify in-home care resources, appropriate assisted living facilities or nursing homes and facilitating the transition. Ongoing monitoring of care thereafter.
- **Peace of mind** for the entire family.

The Care Management Team, LLC

Protecting Your Quality of Care and Quality of Life

2402 W. Jefferson St., Boise, ID 83702
Tel: (208) 344-3993
www.TheCareManagers.com

The Advocate

The Official Publication of the Idaho State Bar
54 (10), October 2011

Section Articles

- 19 **The State of the Idaho Family and the Idaho Family Law Section**
Linda Pall
- 21 **Standards Evolve on Domestic Violence and Child Custody Cases**
Fred G. Zundel and Ryan S. Hunter
- 25 **Child Custody Evaluations in the State of Idaho; A Call for a New Approach**
Kelly Kumm
- 28 **Trying to Fit a Square Peg Into a Round Hole? Applying Idaho Rules of Evidence and Procedure to Child Custody Evaluations**
Mary Shea Huneycutt
- 31 **Examining Military Retirement Payments and Divorce**
Jefferson H. West
- 44 **Using Quotations Marks Correctly**
Tenielle Fordyce-Ruff
- 46 **Advocates In Action: Bittersweet Conclusion in Iraq**
Stephen A. Stokes
- 48 **Criminal Jurisdiction in Indian Country; Complicated by Design, but Not Lawless**
Douglas P. Payne
- 50 **Idaho State Bar Practice Sections Invite Participation**
- 53 **It Takes Money to Make Change: Why IOLTA Revenue Matters**
Carey Shoufler

Columns

- 9 President's Message, *Reed W. Larsen*
14 Executive Director's Report, *Diane K. Minnich*
40 ABA Delegate Report, *Larry C. Hunter*
42 Federal Court Corner, *Tom Murawski*

News and Notices

- 8 Continuing Legal Education (CLE) Information
10 Discipline
13 News Briefs
35 Idaho Court of Appeals and Idaho Supreme Court
36 Cases Pending
51 In Memoriam
52 Classifieds



On the Cover

The cover photograph was taken by Boise attorney and photographer Lisa Shultz, whose work is featured at www.bouncelightphoto.com. Pictured is Fataouma Z., an artisan from Guinea-Bissau in Western Africa, as she displays her works at the Capital City Market in Boise. Refugee families settling in Idaho have struggled to make a fresh start due to the poor economy and lack of jobs. Traditional crafts and garden produce help some refugee families to make ends meet.

Section Sponsor

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

Cover art sought

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

Editors

Special thanks to the October editorial team: Jennifer Schindele, Brent Wilson, T. Hethe Clark.

Letters to the Editor

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

Selected
"Best Court Reporting Firm"

Naegeli Reporting CORPORATION

Court Reporting
Trial Presentation
Legal Videography
Vide Conferencing
Language Interpreters
Copying and Scanning

Because Your Case
Is Our Priority
Anywhere!

One call to Naegeli Reporting Corporation and your scheduling is professionally managed. With thirty years of experience, we have the knowledge and expertise to give you the excellence you demand and the professionalism you deserve.

Look to us for a comprehensive range of litigation support and the resources to provide you with professional court reporters and document management services, certified legal videographers, worldwide videoconferencing, interpreters and expert multi-media trial presentation services. Naegeli Reporting Corporation is committed to making a daunting task easy, letting you focus on the most important thing: Winning your case.

(800) 528-3335

Schedule@NaegeliReporting.com

Serving all of Washington, Oregon, Idaho and the Nation

Boise
(208) 334-7000

Seattle
(206) 622-3376

Tacoma
(253) 565-4400

Spokane
(509) 838-6000

Coeur d'Alene
(208) 667-1163

Portland
(503) 227-1544

Bend
(541) 385-8300

Medford
(541) 776-7500

Healthcare costs are a growing concern.

Does your firm have the benefit plan you need?



The Plan is not insurance and does not participate in the state guaranty association.

ALPS, in partnership with the Idaho State Bar, has a solution.

As a member of the Idaho State Bar you are entitled to apply for participation in a self-funded group health plan tailored to meet the specific needs of lawyers and law firm employees. Members will benefit from:

- Quality Coverage
- Competitive Rates
- Superior Customer Service
- A Voice in Plan Design and Management
- Long-Term Stabilization of Health Benefit Costs



www.IdahoLawyerBenefit.com

For more information call: 1 (800) FOR-ALPS

The Advocate

Official Publication of the Idaho State Bar

EXECUTIVE DIRECTOR

Diane K. Minnich

EDITORIAL

ADVISORY BOARD

Scott E. Randolph, *Chairperson*

Dean Bennett

Hethe Clark

Anna E. Eberlin

Tenielle Fordyce-Ruff

Daniel J. Gordon

Brian P. Kane

Denise Penton

Gene A. Petty

Jennifer M. Schindele

Hon. Kathryn A. Sticklen

Brent T. Wilson

Commissioner Liaison

Molly O'Leary

BOARD OF COMMISSIONERS

Reed W. Larsen, *President*

Paul W. Daugharty, *Commissioner*

Molly O'Leary, *Commissioner*

William H. Wellman, *Commissioner*

Robert T. Wetherell, *Commissioner*

ADVOCATE STAFF

Dan Black

Managing Editor

dblack@isb.idaho.gov

Bob Strauser

Senior Production Editor

Advertising Coordinator

rstrauser@isb.idaho.gov

Kyme Graziano

Member Services Assistant

LRs Coordinator

kgraziano@isb.idaho.gov

www.idaho.gov/isb

(208) 334-4500



Copyright© 2011 The Idaho State Bar. The editorial contents of this publication are the opinions of the authors and do not necessarily represent or reflect the policies or opinions of the Idaho State Bar. *The Advocate* has the authority to edit material

submitted for publication. Appearance of an advertisement in *The Advocate* does not constitute a recommendation or endorsement by *The Advocate* or the Idaho State Bar of the goods or services offered therein. The Idaho State Bar Editorial Advisory Board reserves the right to reject advertising determined not to be in keeping with the publication's standards.

The Advocate (ISSN 05154987) is published the following months: January, February, March, April, May, June, August, September, October, November, and December by the Idaho State Bar, 525 W. Jefferson Street, Boise, Idaho 83702. Subscriptions: Idaho State Bar members receive *The Advocate* as part of their annual dues payment. Nonmember subscriptions are \$45 per year. Periodicals postage paid at Boise, Idaho.

POSTMASTER: Send address changes to:

The Advocate

P.O. Box 895

Boise, Idaho 83701

Upcoming CLEs

October

October 6

Current Issues in Immigration

Co-Sponsored by the Business and Corporate Law Section and the International Law Section

1:00 – 3:00 p.m. (PDT)

Holiday Inn and Suites, Hayden

2.0 CLE credits

October 14

The New and Improved Family Law Handbook & Representing Children in Child Protection Cases

Sponsored by the Family Law Section

9:00 a.m. – 4:30 p.m. (MDT)

Owyhee Plaza, Boise

6.25 CLE credits– RAC

October 17

Idaho Foreclosure Act

Sponsored by Idaho Law Foundation

12:30 – 1:15 p.m. (MDT)

Telephonic Conferencing

.75 CLE credits – RAC

October 19

CLE Idaho: Replay and Lunch

Sponsored by the Idaho Law Foundation

11:15 a.m. – 1:30 p.m. (Local time)

2.0 CLE credits

Boise – The Law Center

Grangeville – Super 8 Motel

Mountain Home – Mountain Home City Hall

Preston – Franklin County Courthouse

Silver Valley – Shoshone Medical Center (Smelterville)

October (cont'd)

October 21

The New and Improved Family Law Handbook & Representing Children in Child Protection Cases

Sponsored by the Family Law Section

9:00 a.m. – 4:30 p.m. (MDT)

Hilton Garden Inn, Idaho Falls

6.25 CLE credits– RAC

October 24

Idaho Rule of Professional Conduct 3.5 and Ex-Parte Communication

Sponsored by Idaho Law Foundation

12:30 – 1:15 p.m. (MDT)

Telephonic Conferencing

.75 CLE credits of which 0.75 is ethics (RAC)

October 28

The New and Improved Family Law Handbook & Representing Children in Child Protection Cases

Sponsored by Family Law Section

9:00 a.m. – 4:30 p.m. (PDT)

Hampton Inn and Suite, Coeur d'Alene

6.25 CLE credits (RAC)

November

November 8

Ethical Perspectives from Justice Daniel T. Eismann

Sponsored by the Professionalism and Ethics Section

8:30 – 9:30 a.m. (MDT)

The Law Center, Boise

Statewide Webcast

1.0 CLE Ethics Credit

*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.

Attend a CLE that keeps you on the cutting edge

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 more contact Beth Conner Harasimowicz at (208) 334-4500 or bconner@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 Beth Conner Harasimowicz at (208) 334-4500 or bconner@isb.idaho.gov.





PRESIDENT'S MESSAGE

WHAT CAN I DO? AND DOES IT MAKE A DIFFERENCE?

Reed W. Larsen
*President, Idaho State Bar
Board of Commissioners*

In our quest for mentoring, the question is asked, "What can I do?" There are a lot of opportunities currently available. Two programs that are currently being used are the University of Idaho's Professionalism and Mentoring Program for first year law students and the Idaho Academy of Leadership for Lawyers (IALL).

The Professionalism and Mentoring program has been going on for some years. I got involved in the fall of 2009. It is a great experience. The sight of fresh and eager first-year law students renews and reinvigorates my commitment to be a lawyer. We as mentors and professionals are there to teach and give guidance to new students, but in my three years of participation, I feel that I have been the biggest beneficiary. I remember why I went to law school and what I wanted to do to change the world. For that experience I have to say "Thank You" to Dean Burnett and Julia Crossland who have been the principal moving forces for the program. It is fun. I have met some really bright young students. My first-year class will graduate this spring and will be lawyers next fall. I got to play some small role in their education. That is pretty neat.

The Idaho Academy of Leadership for Lawyers is sponsored through the Bar and President Ferguson gave a great overview of the program in one of her *Advocate* articles. She deserves a lot of credit for the idea and its implementation. The first class of lawyers is set to start in October. I hope they are as excited about the program as we are in the Bar. I think the skills learned in this program will mold future bar leaders and community leaders for our state.

So does a day here in training or a few hours rubbing shoulders make a difference? Does it really matter? Does spend-

ing time with young law students change the world? Will six or seven weekends change the outcome of a legal career? I think the answer is YES.

My little story for proof starts in the early 1970s. I received my Eagle Scout award. The council for Magic Valley arranged a special awards banquet for all Eagle recipients. The guests of honor were Jack Simplot and Governor Andrus. I was sixteen years old and thought it was a huge honor to meet the governor of the state of Idaho. There was a reception line and everyone got to go through and shake hands with Mr. Simplot and the governor. In squeaky 16 year-old voice I told the governor that my name was Reed Larsen. The governor shook my hand said some nice things about being an Eagle Scout and moved me through the line. It was memorable, but it gets better.

I met Governor Andrus again while in Boise as an attorney. It was a nice and cordial meeting, but nothing I thought would be memorable. I told him I was an attorney in Pocatello. But somehow governor Andrus remembered my name from an Eagle Scout banquet. I was really impressed.

In the mid 1990s I took my teenage son to the NCAA playoffs in Boise. We went into the stadium to watch four hours of basketball. As luck would have it, our tickets happened to be right next to Governor Andrus. I greeted him and amazingly he again remembered my name. We had a wonderful conversation. At the first break my son and I went out for something to eat and all he could say to me is how would a governor and former secretary of the interior know who the heck I was? My son was really impressed on two levels. Firstly, that he got to meet Governor Andrus and secondly that somehow Governor Andrus knew who we were. I myself was amazed. I still am amazed. I don't know if Governor Andrus has such a prefect memory to recall names or if there was some other way that he was able to pick up information on a casual basis to remember names. But he was good. I only wish that I had that skill.

So, how does it make a difference? Each contact for large or small can have an effect for good and last well beyond the years. A person can be inspiring by their

Will six or seven weekends change the outcome of a legal career? I think the answer is YES.

words and actions. I wasn't a better father or lawyer for taking my son to a basketball game, but my stature in my son's eyes was elevated, because someone else, who happened to be a prominent leader, showed some basic skills of a good mentor. Be kind. Give of yourself. Build up those around you, rather than building up just yourself.

I don't know if any of the first year law students who have gone through the professionalism and mentoring program will remember any of the values or ideas we discussed, but their law education began with values and ideas. Maybe someday they will reach back in their memories and make some small decisions for the good and will avoid mistakes that others have made.

I am convinced that it makes a difference. We make a difference. But we have to get involved to do it. Maybe that is why Nike's motto is so successful. "Just Do it."

About the Author

Reed W. Larsen is a founding partner at Cooper & Larsen in Pocatello. His practice includes auto accident cases, repetitive trauma injuries in the workplace, Federal Employer Liability Act (FELA) litigation, railroad crossing cases, personal injury insurance defense, agricultural litigation and Indian law.

He is a 1985 graduate from the University of Idaho College of Law. He has served as a Commissioner for the Sixth and Seventh Judicial Districts since 2009 and is currently serving a year term as President of the Idaho State Bar Board of Commissioners. Reed is married to Linda M. Larsen and together they have three children.

MITCHELL R. BARKER

(Withheld Suspension/Probation)

On September 15, 2011, the Idaho Supreme Court issued a Disciplinary Order suspending Boise attorney Mitchell R. Barker for a period of 60 days, with the entire 60 days withheld, and placing him on disciplinary probation. The Idaho Supreme Court's Order followed a stipulated resolution of an Idaho State Bar reciprocal disciplinary proceeding.

Mr. Barker was previously and is currently admitted to practice law in Oregon and Idaho. Effective November 3, 2010, the Oregon Disciplinary Board approved a stipulation for discipline suspending Mr. Barker in Oregon for 60 days. Mr. Barker's violation arose from his representation of a client in a traffic infraction case in Oregon during a period of time when he was administratively suspended in Oregon because of deficiencies with his MCLE requirements. The Oregon disciplinary case also involved an admission that Mr. Barker provided an incomplete description of the scope of his representation of that client. The client was a client of another Idaho lawyer and Mr. Barker originally represented that he was only tangentially involved with that client, but since he had appeared in the case and had negotiated a resolution with the district attorney, Oregon disciplinary counsel did not believe Mr. Barker was totally forthcoming about his initial description of the scope of his representation.

In this disciplinary case, Mr. Barker argued that since Oregon did not fully consider his medical disabilities as mitigating factors in the Oregon case, an identical sanction in Idaho was not appropriate. Mr. Barker supplied Bar Counsel with medical information that was not supplied in the Oregon proceeding. The parties concluded that a departure from the identical Oregon sanction was appropriate since Bar Counsel's primary concern was to assure that Mr. Barker remains compliant with his medication and physician's regimen while practicing law in Idaho.

The Idaho Supreme Court's Order imposed a 60 day suspension, with the entire 60 days withheld and placed Mr. Barker on a two year period of probation, upon terms and conditions, including conditions that he shall remain under his physician's care; his physician shall provide reports to Bar Counsel every four months regarding Mr. Barker's circumstances; that Mr. Barker shall fully comply with any treatment regimen prescribed by his physician, including, but not limited to,

compliance with any prescribed medications; and if Mr. Barker admits or is found to have violated any of the Idaho Rules of Professional Conduct for which a public sanction is imposed for any conduct during his period of probation, the entire withheld suspension shall be imposed.

The withheld suspension and probation do not limit Mr. Barker's eligibility to practice law.

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

RUSTY B. HANSEN

(Suspension)

On September 14, 2011, the Idaho Supreme Court issued a Disciplinary Order suspending Pocatello attorney, Rusty B. Hansen, from the practice of law for a period of two years, with 15 months of that suspension withheld and placing him on probation following any reinstatement.

The Idaho Supreme Court found that Mr. Hansen committed a violation of I.R.P.C. 1.7(a)(2) [Conflict of interest based on a lawyer's personal interests], and two violations of I.R.P.C. 1.16(a) [Failure to withdraw when physical or mental condition materially impairs lawyer's ability to represent clients], 8.4(b) [Commission of a criminal act that reflects adversely on lawyer's honesty, trustworthiness or fitness as a lawyer], and 8.4(d) [Conduct prejudicial to the administration of justice]. The Idaho Supreme Court's Disciplinary Order followed a stipulated resolution of an Idaho State Bar discipline case in which Mr. Hansen admitted that he violated those Idaho Rules of Professional Conduct.

Mr. Hansen's misconduct related to two client matters and the commission of a criminal act. Mr. Hansen failed to appear in court proceedings on behalf of two of his criminal clients, without explanation or excuse. In both of those cases, Mr. Hansen was charged with contempt. In one case, Mr. Hansen appeared at the trial on his contempt charge, apologized to the court and pled guilty. He was ordered to meet with another attorney to discuss appropriate calendaring methods. In the other contempt case, Mr. Hansen appeared for the show cause hearing, informed the judge that he had completed a six-month inpatient substance abuse rehabilitation program and the contempt charge was withdrawn. In each of those client matters, Mr. Hansen also failed to withdraw from representation when his physical or

mental condition materially impaired his ability to represent his clients.

In one client matter, Mr. Hansen admitted that he used methamphetamine with a client and had a sexual relationship with that client, although the sexual relationship preceded his representation. Mr. Hansen admitted that he had an impermissible conflict of interest because the representation of his client was materially limited by his personal interests. This conduct occurred before he completed his rehabilitation program.

Mr. Hansen also admitted that he committed a criminal act that reflected adversely on his fitness as a lawyer in other respects. Mr. Hansen was arrested and charged with misdemeanor exhibition of a deadly weapon and the disturbing the peace. Mr. Hansen pled not guilty to both charges approximately three days before entering the rehabilitation program. Mr. Hansen pled guilty to misdemeanor disturbing the peace and the weapon charge was dismissed. Mr. Hansen acknowledged that he had been abusing substances at the time of his arrest. The Disciplinary Order requires Mr. Hansen to demonstrate that, medically and psychologically, he will be able to resume the practice of law in a fashion that will not be detrimental to the integrity of the Bar, to the administration of justice or against the public interest before he can be reinstated following his suspension.

The Disciplinary Order provides that 9 months of the suspension will be served and 15 months will be withheld. Mr. Hansen will serve a three-year probation following any reinstatement, subject to conditions of probation specified in the Order. Those conditions include that Mr. Hansen will serve the additional 15 month suspension if he admits or is found to have violated any of the Idaho Rules of Professional Conduct for which a public sanction is imposed for any conduct during Mr. Hansen's period of probation; Mr. Hansen must remain under his physician's care; comply with any treatment regimen prescribed by his physician; participate in, at his own expense, and comply with a substance abuse monitoring program; practice under a supervising attorney; and provide monthly reports to Bar Counsel attesting that he is representing his clients consistent with his responsibilities under the Idaho Rules of Professional Conduct.

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

DISCIPLINE

NOTICE TO TOM HALE OF CLIENT ASSISTANCE FUND CLAIM

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

NOTICE TO TOM HALE OF CLIENT ASSISTANCE FUND CLAIM

Pursuant to *Idaho Bar Commission Rule 614(a)*, the Idaho State Bar hereby gives notice to Tom Hale that a Client Assistance Fund claim has been filed against him by former client, Cynthia Martin, in the amount of \$800. Please be advised that service of this claim is deemed complete fourteen (14) days after the publication of this issue of *The Advocate*.

NOTICE TO MARK McHUGH OF CLIENT ASSISTANCE FUND CLAIM

Pursuant to *Idaho Bar Commission Rule 614(a)*, the Idaho State Bar hereby gives notice to Mark McHugh that a Client Assistance Fund claim has been filed against him by former client, Brenda Tesch, in the amount of \$1,300. Please be advised that service of this claim is deemed complete fourteen (14) days after the publication of this issue of *The Advocate*.

Is It Your MCLE Reporting Year?

No one likes last minute scrambling for MCLE credits. If your MCLE reporting period ends on December 31, 2011 and you need more credits, visit the Idaho State Bar website at isb.idaho.gov for lists of upcoming live courses, approved online courses and audio/video rental programs. Do not wait until November or December to get the credits you need. Start working on it now. If you have questions about MCLE compliance, contact the MCLE Department at (208) 334-4500 or jhunt@isb.idaho.gov.



ALTERNATIVE DISPUTE RESOLUTION

Merlyn W. Clark

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

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

- Arbitration
- Mediation
- Discovery Master
- Hearing Officer
- Facilitation
- Education Seminars
- Small Lawsuit Resolution Act



Phone: 208.388.4836
Fax: 208.342.3829
mclark@hawleytroxell.com

877 Main Street • Suite 1000
Boise, ID 83702
www.hawleytroxell.com



Associates, Inc.

Freelance Legal Research and Writing



Joshua L. Smith (ISB #7823)

Delegate

... as you would delegate to an associate within your firm.

Types of projects:

- Trial motions and briefs
- Appellate briefs
- Memoranda of law
- Pleadings
- Jury instructions

Your firm ... & Associates.

Email: joshuasmith@and-associates.net

Telephone: (208) 821-1725

Website: www.and-associates.net



Linked-In Profile:
"Joshua Lange Smith"

*Dear inventor of trial
by fire, shame on you!*

Managing your business is no place for experimentation or practice-makes-perfect.

We understand that cash flow, invoicing, tracking expenses and keeping your business organized isn't what your practice is all about. Ours is!



Consilio
BUSINESS MANAGERS

*Let us make it easier
for you to do your job.*

208.376.1696 | www.thinkconsilio.com |

**MULTI-FACETED
EXPERIENCE:
IMPARTIAL AND INSIGHTFUL
DISPUTE RESOLUTION**



Larry C. Hunter
Mediation, Arbitration, Evaluations,
Administrative Hearings
(208) 345-2000
lch@moffatt.com

KEEPING UP WITH CASE LAW?

- * Case summaries every other week to your Inbox or mailbox
- * Complete opinions and online research tools
- * Timely, affordable, reliable, authorized advance reports

*ISCR/ICAR – Idaho Supreme Court Report /
Idaho Court of Appeals Report*

IBCR – Idaho Bankruptcy Court Report

GOLLER PUBLISHING CORPORATION

208-336-4715

info@gollerpublishing.com

www.gollerpublishing.com



**PEDERSEN &
COMPANY, PLLC**

INTELLECTUAL PROPERTY LAW

PATENTS • TRADEMARKS • COPYRIGHTS • LITIGATION

Ken J. Pedersen
Patent Attorney

Barbara Schaefer Pedersen
Patent Agent

208-343-6355

www.pedersenco.com

1410 N. 28th Street • Boise, Idaho 83703

ABA President warns against neglecting the courts

President of the American Bar Association Wm. T. (Bill) Robinson III visited with lawyers, state leaders and law students over two full days of events sponsored by The University of Idaho College of Law last month. Mr. Robinson represents 400,000 lawyers on the national stage and made a clarion call to support the rule of law, especially by avoiding deep cuts into the court system during difficult economic times.

“The public needs to be awakened,” he said between speaking events in Boise. “I’m willing to debate anybody anywhere about this.”

He warned that state legislatures’ budget cuts have hampered the courts’ ability to function. He noted several examples of mass layoffs, judges resigning and courtroom closures across the country. At stake, he said, is the very foundation of our democracy - a balance of power between the three branches of government.

“Civics has not been taught for two generations,” he warned, and Idaho spends only 1.1 percent of its budget on



Wm. T. (Bill) Robinson III

its courts, which is lower than in many states. The ABA has established a non-partisan task force to address the court funding issue. At issue, he said, “is the very stability of society. We need to stand up for our courts.”

While in Idaho, Mr. Robinson participated in workshops with law students and delivered the keynote address to the Bellwood Lecture in Moscow. The next day in Boise, he participated in the “220th Celebration of the Bill of Rights,” and delivered its keynote lecture. He also made time to meet with Idaho State Bar leaders and prominent members of the legal community.

UI School of Law Dean Don Burnett played a key role in Mr. Robinson’s appearance. While he was dean of the Louis D. Brandeis School of Law in Louisville, KY, Dean Burnett attended a guest lecture by Mr. Robinson. They also knew each other through the Kentucky Bar Association and its charitable foundation. Dean Burnett later learned that as president of the ABA, Mr. Robinson would promote an improved appreciation for the judiciary and so he proposed Robinson for the lecture to the Bellwood Lecture Committee,



Donald L. Burnett, Jr.

consisting of the Idaho State Bar president, the Chief Justice of the Supreme Court, which they accepted.

Lawyers take on hunger, literally

The Young Lawyers Section has adopted a novel and personal way to combat hunger in this fall’s “Attorneys Against Hunger” campaign. What is being called “an exercise in empathy” the participating lawyers will live on \$4.30 of nourishment per day. This is the total amount that an average Idahoan receiving food stamps survives on. From Oct. 1 – 7, participating lawyers will explain their austerity and challenge friends and colleagues to make a pledge to the Idaho Foodbank. Foodbanks across the state have seen a sharp rise in those needing basic foodstuffs to survive.

“Attorneys Against Hunger” will also include opportunities for sponsorship, which include prominent placement of logos on the website www.idahoyoung-lawyers.org, and other places. To add fun, the law firm and ISB practice Section with the highest numbers of challenge participants and pledge contributors will receive special recognition, including mention in *The Advocate*. Finally, the District Bar Association with the highest proportional participation and pledging will receive similar recognition.

Online MCLE Courses

Are MCLE courses scarce in your area? Idaho approved online courses are a great alternative. Visit the Idaho State Bar website at isb.idaho.gov to get a list of our preapproved online MCLE courses. These courses are always available and are an easy way to get the extra credit you need. Please remember online recorded courses are always considered self-study and the self-study credit limit is 15 per reporting period. Contact the MCLE Department at (208) 334-4500 or jhunt@isb.idaho.gov if you have any questions about MCLE compliance.



**CHANTIX
YAZ/YASMIN/OCELLA**

WE ARE CURRENTLY PURSUING CLAIMS FOR PERSONS INJURED BY THE ABOVE DANGEROUS DRUGS. WE APPRECIATE YOUR REFERRALS OR ASSOCIATION.

JAMES, VERNON & WEEKS, P.A.
1626 LINCOLN WAY, COEUR D'ALENE, ID 83814
HELPING PEOPLE SOLVE PROBLEMS®
ATTORNEYS LICENSED IN IDAHO, WASHINGTON & MONTANA

PHONE: (888) 667-0683
WWW.INLANDNORTHWESTATTORNEYSFORJUSTICE.COM

Mediation/Arbitration

John C. Lynn

36 years experience

Boise, Idaho

Phone: (208) 860-5258

Email: johnlynn@fiberpipe.net

ACCESS TO CIVIL JUSTICE - PRO BONO AWARD RECIPIENTS

Diane K. Minnich
Executive Director, Idaho State Bar

Mr. and Mrs. Jones called the Idaho Volunteer Lawyers Program (IVLP) seeking custody of their grandchildren because their daughter was incarcerated due to a drug related conviction. Kim contacted IVLP seeking a divorce from her abusive husband. John calls requesting help with custody of his children due to the inability of their mother to care for the children. Multiple calls similar to these are received every day by Idaho Legal Aid Services (ILAS) and Idaho Volunteer Lawyers Program (IVLP). Many of the callers receive help from the programs; many do not due to staff and funding limitations.

The economic problems faced by our country have an impact on all of us, but low-income families and individuals similar to the examples above, are especially hard hit when the economy falters. The demand for civil legal services continues to increase while the funding sources to provide services continue to decrease.

Every year, the Bar presents awards to lawyers that have provided extraordinary pro bono service. These individuals are only a few of the many bar members who give of their time and resources to provide legal services to those who cannot afford it.



Diane K. Minnich

The following lawyers will be honored at this year's resolution meetings for their pro bono service.

First Judicial District

Stephen T. Snedden
Berg & McLaughlin, Chtd., Sandpoint

Stephen T. Snedden was selected for his work on a contested custody case for a young mother who was a victim of domestic violence and was trying to protect her 3-year old child from a drug-addicted father. After performing 69 hours of pro bono service, he was able to obtain sole

legal and physical custody for the mother.

In addition to serving as a city Councilman in Sandpoint, his volunteer work also involves serving as legal counsel for the Pend d' Oreille Bay Trail Project and as counsel for the Bonner Community Housing Agency.



Stephen T. Snedden

He explained his motivation for doing pro-bono service:

"Pro bono service makes me happy. I am grateful for my education, health, family and community. This is one of the ways that I can express my gratitude and serve others. I enjoy being involved in projects that aim to improve a community, whether it is through art, conservation, business or otherwise. Pro bono service helps me find new interests and develop relationships within those areas."

Second Judicial District

Chip Giles
Moscow

Chip Giles has done extensive pro bono work with the Idaho Volunteer Lawyers Program, the Idaho Community Action Network and University of Idaho pro bono clinic. He plans to begin work this fall at Telquist, Ziobro, McMillen, in Richland, Washington. "I look forward to taking pro bono cases to the extent my supervisors allow," he said.

Chip Giles has been involved with Citizenship Week and Citizenship Day programs, and was the University of Ida-

These individuals are only a few of the many bar members who give of their time and resources to provide legal services to those who cannot afford it.

ho alternative spring break pro bono program coordinator. He has done pro bono work at the Gem County Prosecutor's Office and helped create the Ada County landlord-tenant eviction informational video. He also has done pro bono work with the EcoHawk Law Office, and for the Sho-Ban Tribe.



Chip Giles

"As a law student, and a young lawyer you have no experience, and it is difficult to find opportunities to get experience. Volunteering throughout law school gave me the opportunity to work on real issues, learn from experienced attorneys, and really help people. Doing pro bono work really reminded me why I went to law school, and I think that is why I volunteered so much. As a law student and an attorney you have a lot of power to do good, and there is just such a need in our community. Times are tough and it is really true that those who need legal assistance the most are not in a position to pay for it. To me, there is nothing more compelling than fighting for what is right. As a lawyer you have a lot of power to fight for what is right, and I believe all lawyers should use that power to help their community."

Third Judicial District

Danielle C. Scarlett
Scarlett Law, PLLC, Nampa

Danielle Scarlett is no stranger to helping out when needed. She referred a mother of three young children to IVLP for screening before accepting the mother's

case to answer a motion for modification from her abusive ex-husband. The husband had been mistreating the teen-aged children and was controlling and abusive toward the mother. After extensive discovery, court hearings and motions, Ms. Scarlett was able to settle the matter on the day of trial. She donated 70 hours of pro bono legal services. In a separate divorce and custody case, she agreed to work through IVLP and donated an additional 59 hours of service to assist a woman facing a violent husband who was suffering from mental illness. And in a third divorce case closed in 2010 for a victim of domestic violence, Scarlett obtained a judgment against the abuser after putting in 35 volunteer hours.



Danielle C. Scarlett

She gave credit to her legal assistant/paralegal Rachelle Smith, who also worked with her at Canyon County in the Juvenile Unit as well as at the City of Nampa. "I certainly wouldn't be receiving this award if it weren't for all of her help. She spent many hours working on my pro bono cases."

Dannielle C. Scarlett serves on the pro bono committee for the Third District Bar Association and separately has volunteered to take some Idaho Legal Aid work. She explained how she has integrated pro bono to make her practice more meaningful:

"I was a prosecutor for five years at the Canyon County Prosecutors Office and for two years at the Nampa City Prosecutors Office. I saw many women who were in relationships with violent men. I saw many children who had witnessed such violence. My heart went out to these women and their children as many women hadn't worked outside the home and felt that they had no choice but to stay in their relationships. At that point, there wasn't anything I could do for them on the civil side of things as I was the prosecutor on the case. Once I opened my own practice I was able to help women in similar situations take the first step to getting out of their relationships by offering reduced-fee or pro bono divorce and/or custody assistance."

Fourth Judicial District

Jeremy C. Chou

Givens Pursley LLP, Boise

Jeremy C. Chou is a board member for the Kempthorne Institute for Public Pol-

icy and Philanthropy, board member and vice president of the Idaho Licensed Beverage Association and pro bono counsel for the Twiga Foundation.

He accepts work from the Idaho Volunteer Lawyers Program, for which he was nominated. In one such case, he donated 150 hours assisting a father negotiate a settlement that clearly protected the vulnerable children and allowed the father primary custody with appropriate visitation to the mother. Even though Chou admitted it was a difficult case, he said: "The harder the cases are the more rewarding they seem."

Myron D. Gabbert, Jr. *Gabbert Law Office, McCall*

Myron D. Gabbert, Jr., of McCall, was nominated for his pro bono service through the Idaho Volunteer Lawyers Program. In a divorce case, he contributed 100 hours representing a mother of two young boys. The husband was suffering from addictions and depression and acting irresponsibly toward his family. The family became destitute and was living on church welfare. Both parents wanted to take the children to different states. Myron guided the case through a home study/custody evaluation, two rounds of mediation (with no agreement), pre-trial and trial. His client was very grateful for the result he achieved.

Tim E. Murphy

Micron Technology, Inc., Boise

Tim E. Murphy donated about 100 hours in a case through Idaho Volunteer Lawyers Program. His work limited a two-year-old child's exposure to the abusive father. The father intimidated the



Jeremy C. Chou

mother to the point that she would not call the police and would not even report the violence to their counselor. Finally, when a fight erupted on a public street, in the mother's car, bystanders intervened and called the police.

Tim said pro bono provides "an opportunity to really dig into cases, unconstrained by how much the client is willing to pay. Also, I've learned a tremendous amount about areas of the law that I would never be exposed to as a patent attorney. From a personal perspective, it gives me great satisfaction to help someone out who would otherwise be left to navigate the legal system themselves, without any clear direction of even what all their options are. Public service gives me an opportunity to do those things that inspired me to go to law school in the first place: manage interesting cases and help out others."

The federal court also commended Tim for pro bono work on a case in which he represented an inmate from the Pocatello Women's Prison. He was appointed in May 2009, filed a Second Amended Complaint in August 2009, and worked until the case was completed in January 2011. He negotiated a settlement with the prison officials without formal mediation (a rare occurrence). He was praised by a federal court official for his diligent and successful work on the case and for not even billing all his legitimate expenses. His comment was he wasn't doing that because "this was true pro bono." His donation in this case was almost 150 hours.

Taylor L. Mossman

Mossman Law, Boise

Taylor L. Mossman received training from Catholic Charities of Idaho and IVLP to assist victims of crime and domestic violence who are newcomers to the United States. Then she very readily accepted a case for a young woman who had been sexually abused. Taylor worked with

Pro bono provides "an opportunity to really dig into cases, unconstrained by how much the client is willing to pay ..."

- Tim E. Murphy



Tim E. Murphy



Myron D. Gabbert

the client who cooperated with the police and the perpetrator was prosecuted. The status case involved gathering extensive evidence regarding the crime and the circumstances of their lives in this country. Taylor was successful in obtaining a U Visa for the young woman and her mother enabling them to stay legally in the United States.



Taylor L. Mossman

She donated approximately 65 hours in the case and called the case a very fulfilling one. The young woman is almost ready to graduate from high school and is looking forward to working and contributing to her host country.

Janis T. Dotson

U.S. Courts, District of Idaho, Boise

Janis T. Dotson was nominated by Judge Candy Dale, Chief U.S. Magistrate Judge. She gave pro bono legal services organizing and establishing the Kuna Club as part of the Boys and Girls Clubs of Ada County.



Janis T. Dotson

Janis has donated a tireless number of hours by drafting articles of incorporation for the organization's non-profit status, attending organizing meetings, preparing agendas, minutes, and conducting follow-up meetings. She has drafted legal documents and organized public meetings to ensure compliance with city, county and state statutory requirements pertinent to the property upon which the Kuna facility will operate.

Judge Dale said, "I also add a comment about her exemplary professional career, which has been measured by her significant contributions to the federal court, and the advancement of the rule of law and the improvement of society as a whole."

Janis spoke about a sense of duty to society:

"Giving time and money to good causes is one of the best ways for me to refine my character. When I feel grumbly about this project that seems to be going on forever, I try to remember C.S. Lewis's comment that it isn't really charity if it isn't a personal sacrifice."

"I do a fair amount of lobbying members of the Bar to volunteer for our federal court pro bono panel, and wouldn't think

Lynn helped develop a National Guard proposal to recruit, train and coordinate a statewide pro bono program supporting military members and their families during a major National Guard deployment.

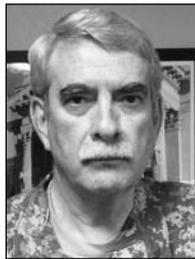
it fair to ask someone to do something that I am not willing to do myself."

Fifth Judicial District

M. Lynn Dunlap

Twin Falls

Lieutenant Colonel David Dahle nominated M. Lynn Dunlap of Twin Falls for his pro bono efforts assisting members of the U.S. military. Lynn developed a program in his private practice that single-handedly provided an extraordinary volume of pro bono legal services for deployed military members and their families. He has provided no cost legal services for over 200 clients, giving over 65 hours of pro bono service.



M. Lynn Dunlap

Lynn helped develop a National Guard proposal to recruit, train and coordinate a statewide pro bono program supporting military members and their families during a major National Guard deployment. Approximately 150 Idaho attorneys were recruited and trained to handle legal problems. As of March of this year, Lynn has referred at least 38 pro bono cases through this program.

Selim A. Star

Star Law Office, PLLC, Hailey

Hailey attorney Selim Star represented the mother of a young man with paranoid schizophrenia and learning disabilities who was uncooperative and often dangerous when he refused to take his medication. Selim spent 25 hours in the case establishing guardianship. He also volunteers with local Domestic Violence Advocates, mentors other attor-



Selim A. Star

neys in volunteer work and regularly offers low-cost legal services.

Sixth Judicial District

David E. Alexander

Racine, Olson, Nye, Budge & Bailey, Chtd., Pocatello

David Alexander has considerable pro bono credentials. He represented a young mother in a case in which her child was taken away from her in a guardianship proceeding of which she received no notice. David spent 90 hours on the complicated case that included terminating the guardianship and establishing a custody arrangement with the child's father through contested proceedings.



David E. Alexander

He also regularly represented CASA volunteers in Bannock County child protection cases and serves as a member of the Pro Bono Commission.

"Sometimes the kind of cases you take on pro bono are the ones that make you most proud of the work you do," he said.

"I believe we are privileged to be members of the legal profession, and with that privilege comes a responsibility to help make sure that legal services are available to those that need it."

David Gardner

Moffatt, Thomas, Barrett, Rock & Fields, Chtd., Pocatello

David Gardner commented about his pro bono activities:

"I have actively taken cases for CASA for several years and enjoy working with them. I have also accepted several family law cases through IVLP and have had



David P. Gardner

some great experiences working on those cases. For me, pro bono work is very fulfilling. We are in a professional service profession, with a strong emphasis on the service. I consider myself to be in the profession of solving problems, and pro bono work allows me to help others in that regard. The personal satisfaction of helping another person, solely for that purpose alone, is a great feeling.”

He gave credit to his mentors as examples of selfless and personal service:

“I had the opportunity to clerk for Judge N. Randy Smith who is a living example of service. His dedication to the law and helping others is without limits. I have also had great examples of service here in my firm. I believe that pro bono service includes service to the legal profession as well. These great individuals have been examples in helping me to recognize the importance of pro bono service in rounding out a complete legal career.”

Seventh Judicial District

Robert Lynn Harris

Holden, Kidwell, Hahn & Crapo, PLLC, Idaho Falls

Robert L. Harris has been working with the Seventh District Court Appointed Special Advocate Program since 2005. He was appointed to represent the volunteer Guardian ad Litem in a case in 2005 that

remained open until 2010 and involved more than 85 hours. CASA directors said of him: “Rob has always taken on cases when asked. He is knowledgeable on the child protection system and has been a valuable resource for the program. Rob keeps the focus in the courtroom on what is in the best interest of the child.”

He spoke about how pro bono fits with his personal and professional goals:

“While all legal work is important, there is something about children that elevates work on their behalf above any other legal work because they often are not old enough to know what is in their best interests. These kids might be babies that cannot communicate, or teenagers who have suffered through a difficult past and may not feel like they have much of a say in what happens. The cases often present difficult situations, but working through a difficult situation results in greater personal satisfaction to me, especially for children who could get lost in the system.”

“My parents taught me that service for others is important, and they have been



Robert Lynn Harris

While all legal work is important, there is something about children that elevates work on their behalf above any other legal work because they often are not old enough to know what is in their best interests.

- Robert Lynn Harris

great examples of performing service for others. I was also encouraged by my mentoring attorney, Kent Foster, to help with CASA the day I arrived at the firm. I was also encouraged by my law school dean, Don Burnett, to engage in pro bono work in order to have a balanced career and to give back to the community.

2011 District Bar Association Resolution Meetings

| District | Date/Time | City |
|----------|-----------------|---------------|
| First | Nov. 9, Noon | Coeur d’Alene |
| Second | Nov. 9, 6 p.m. | Lewiston |
| Third | Nov. 14, 6 p.m. | Nampa |
| Fourth | Nov. 15, Noon | Boise |
| Fifth | Nov. 15, 6 p.m. | Twin Falls |
| Sixth | Nov. 16, Noon | Pocatello |
| Seventh | Nov. 17, Noon | Idaho Falls |

Accepting referrals for arbitration mediation and SLRA evaluations.

GEORGE D. CAREY

P.O. Box 171391
Boise, Idaho 83717
Telephone: (208) 866-0186
Email: georgedcarey@gmail.com



Home of the best Child Support Program

**PO Box 44930 (208) 376-7728
Boise, ID 83711 www.idchildsupport.com**

HALL | FARLEY

HALL, FARLEY, OBERRECHT & BLANTON, P.A.



PHILLIP S. OBERRECHT

Construction and Commercial Mediation Services
33 years of Construction and Commercial Litigation Experience

Key Financial Center | 702 West Idaho Street, Suite 700
Post Office Box 1271 | Boise, Idaho 83701
Telephone: (208) 395-8500 | Facsimile: (208) 395-8585
e-mail: psob@hallfarley.com
www.hallfarley.com

STEPHEN J. OLSON, P.C.



- Experienced civil tort and commercial litigation attorney.
- Available for contract research, drafting and discovery assistance, as well as formal case associations.
- 21 years' experience.
- Reasonable rates, with detailed time entries to be supplied with work product.
- Fully insured with client trust fund.
- Licensed in Idaho (ISB #4074) and Utah (USB #13116).

Stephen J. Olson, P.C.
P.O. Box 2206 Eagle, ID 83616
Toll free voicemail: (888) 464-3335
Telephone: (208) 761-1646
Fax: (208) 965-8505
Email: sjopdx@runbox.com

Martelle, Bratton & Associates, P.A.

Idaho's Mortgage Modification
and Foreclosure Alternative Law Firm

Martelle, Bratton & Associates is proud to announce that we now assist clients with Mortgage Loan Modifications.

- HAMP Modifications
- Forbearance Agreements
- Foreclosure Alternatives
- Chapter 13 Bankruptcy



Martelle, Bratton & Associates, P.A.

873 East State Street, Eagle, ID 83616

Telephone: (208) 938-8500

Website: www.martellelaw.com

No Obligation Consultation

IDAHO LAWYERS

Stop Wasting Your Time and Your Clients' Money...

We are currently providing service to the following Courts:

4th Judicial District

Valley/Cascade

Judge McLaughlin

Ada County/Boise

Judge Owen

5th Judicial District

Twin Falls

Judge Bevan

Judge Stoker

**WHY
TRAVEL?**



- No travel time when using CourtCall®
- No gasoline or parking expenses
- No waiting in Court for brief appearances
- Status Conferences, Motions, Trial Settings, etc.



CourtCall®

Telephonic Court Appearances

888.882.6878 www.courtcall.com

CIVIL | FAMILY | PROBATE | CRIMINAL | BANKRUPTCY

THE STATE OF THE IDAHO FAMILY AND THE IDAHO FAMILY LAW SECTION

Linda Pall
Law Office of L. Pall

The Idaho State Bar Family Law Section took a bold step back in 2008 at its statewide strategic planning session. The Section refocused its mission on the legal health of the family in all aspects rather than just from the narrow perspective described by divorce, child custody and child support. The Section's Governing Council wanted to look at the bigger picture, beyond the forensics of a failed marriage.

Family law is about so much more.

From reproductive law and issues surrounding conception and birth, to matters involving aging and the end of life, family law touches all aspects of life. The Family Law Section reached out to include children and the law, child protection, and juvenile justice in its mission. The Section has joined the courts and other sections of the Bar to provide further education and skills to meet the needs of children in the justice system.



Linda Pall

The Family Law Section now includes in the scope of its mission a wide range of matters important to the Section's members. Grandparents raising grandchildren, reducing high conflict divorce, finding the needed resources to deal with mortgage foreclosures, food and nutrition needs for growing children, giving children a shot at higher education and rungs on the ladder to a positive future: these are all of concern to members of the Family Law Section and its mission.

Right now, the Idaho family is under deep and unremitting stress. Medical

The Section has joined the courts and other sections of the Bar to provide further education and skills to meet the needs of children in the justice system.

care for pregnant women is at risk, including vitamins and obstetric care, birth and post-natal care and encouragement of breast feeding. Securing adequate housing for young families is another stressor for Idaho families. The Idaho economy, hallmarked by high unemployment, unacceptably high mortgage default rates and inadequate business expansion is of major concern to the welfare of Idaho families. Fundamental financial support for education in Idaho has eroded over the last decade, putting the welfare of generations of future Idahoans at risk. Veterans of war returning to Idaho are in deep financial and emotional distress, often bringing their families into the court system. Idaho lawyers need to know how to effectively and economically represent these families under stress. Family lawyers are at ground zero for these matters. The skills they need to aid their clients could mean the difference between life and death.

The Family Law Section has taken positive steps to address the lamentable status of Idaho families and the stresses they face:

- Each year, under the leadership of Tom Dial, leading Eastern Idaho family law attorney, the Idaho Family Law Handbook has added scholarly, comprehensive articles on critical issues in family law across Idaho. The annual October trio of con-

tinuing legal education seminars features additions to the Handbook: Friday, Oct. 14 in Boise; Friday, Oct. 21 in Idaho Falls; and Friday, Oct. 28 in Coeur d'Alene. A new feature this year that comes with the new edition of the Handbook is the searchable index, giving a welcome research tool.

- Each year since 2008, the Family Law Section has donated substantial sums to the Partners Against Domestic Violence, the Idaho Volunteer Lawyers Program outreach, Sound Start, support for law students and others in public service roles to attend Family Law Section CLEs and a grant to Idaho Legal Aid to provide assistance for translation services for domestic violence divorce cases. These contributions are direct responses to the deepening need for assistance for families afflicted by domestic violence, and to the need to try to short circuit some of the deficiencies in Idaho's service delivery system for families.

- The Section participates in the annual Family Law Council of Community Property States Symposia, where leaders of family law in the nine community property states come together to discuss and compare treatment of community property issues among the states. The Family Law Section will host the 23rd Annual Symposium at the Coeur d'Alene Resort

Family Law Section

Chairperson

Linda Pall
Law Office of L. Pall
P.O. Box 8656
Moscow, ID 83843
Telephone: (208) 882-7255
Fax: (208) 882-9115
Email: lpall@moscow.com

Vice Chairperson

Debra Jean Alsaker-Burke
Idaho Supreme Court
967 E. Parkcenter Blvd.
Boise, ID 83706
Telephone: (208) 344-5993
Fax: (208) 344-0677
Email: dburke@idcourts.nett

Secretary/Treasurer

Lisa B. Rodriguez
Wright Brothers Law Office, PLLC
PO Box 226
Twin Falls, ID 83303-0226
Telephone: (208) 733-3107
Fax: (208) 733-1669
Email: lrodriguez@wrightbrotherslaw.com

on March 1, 2, and 3, 2012. The topic is the community property treatment of creditors' rights. The symposium begins Thursday night with a hosted reception and continues with a full day of CLEs Friday, a gourmet dinner Friday night and concludes on Saturday with a discussion of community property case decisions and concerns from each state. Idaho practitioners will have plenty of opportunities for networking with outstanding community property experts, to address their own challenges and get new approaches and ideas.

- The Section has focused on strengthening the practice of family law in every corner of Idaho. The Section's Strategic Plan in 2010 put additional emphasis on community outreach in Idaho's seven judicial districts. Moscow and Boise will be the site for Section volunteers to assist the Diversity Section in its Pipeline Project to bring students of diverse backgrounds into the legal profession. Along with the University of Idaho College of Law's Bellwood Lecture series, September 13 and 14, a program called, "Love the Law!" will team lawyers and judges with students from local high schools to be "ambassadors" to answer questions, get to know the students and act as interpreters for background to the seminars and discussions. "Love the Law!" will follow these students to encourage them to finish high school and attend college, and perhaps eventually, law school. Former Family Law Section chair Tore Beal Gwartney is chairing this effort.

- The Section's Governing Council has made a significant effort to maintain geographic balance among its members. Completing their 2010-2012 term are John Schroeder, Boise; Tom Dial, Pocatello; Kent Fletcher, Burley; and Fred Zundel, Pocatello. Newly elected this summer for 2011-2013 are Michael Kraynick, Hailey; Melanie Baillie, Coeur d'Alene; Jennifer Brumley, Coeur d'Alene; Karin Seubert, Lewiston. Officers serve their two-year term, ending in July 2012: Linda Pall, Moscow, chair; Deborah Alsaker-Burke, vice chair, Boise; and Lisa Rodriguez, secretary, Twin Falls. Joanne Kibodeaux, Boise, chairs the CLE Committee for the Section.

Since 2008, the membership in the Family Law Section has steadily grown, with many new members recognizing the financial benefits of section membership and appreciating the professional opportunities afforded to Section members. But most importantly, the nearly 300 members

The Section's Strategic Plan in 2010 put additional emphasis on community outreach in Idaho's seven judicial districts.

of the Idaho State Bar Family Law Section are dedicated to improving the lives of Idaho families and improving the status of Idaho families from their beginning to their end. And we have plenty to do, so join us in our efforts! You are urgently needed!

Finally, the Family Law Section of the Idaho State Bar is very pleased to share some of its best practitioners and writers with *The Advocate* in this issue! You will find some information that may enlighten you, help direct further research, or bring a new view to a difficult problem in your practice. At the very least, you will find new contacts who will generously share their perspectives in family law with you, should you need another excellent contact.

Eastern Idaho gets the prize for article submissions! The coordinator of this issue, Brett Anthon, is from Rupert and cleverly gave 'awards' to those who submitted their articles on time! I received the 'Best Leading Actress Award,' which I accepted from New Orleans as I was auditioning for the part of Blanche DuBois in *A Streetcar Named Desire*. Three of the four certified authors are from Pocatello!

Fred Zundel, staff attorney for Idaho Legal Aid Services in Pocatello, has written a masterful article discussing domestic violence and child custody determinations. One of the most damaging things parents can do to their children is to expose them to domestic violence, either directly through child abuse or indirectly as the audience of their parents' conflicts. Walking through this minefield is complicated. The judicial decisions since the legislation was adopted, making domestic violence a factor in custody determinations, need careful analysis and treatment during hearings and custody trials.

Kelly Kumm, an experienced family law attorney from Pocatello, presents a careful and complete analysis of custody evaluations and their use in contested custody cases. The courts need neutral, professional analysis of the parties and

their interactions with their children to help fashion a solution to the question, "What is in the best interests of THESE children?" The ethical requirements of psychologists in this role deserve extra attention. Kelly's article is a great beginning to becoming articulate and expert in dealing with evaluators and clients in contested custody matters.

Mary Huneycutt, Pocatello attorney and mediator, expert in the area of family law and chair of the Sixth District Family Law Section, has included her work on dealing with custody evaluations and the Rules of Evidence and the Rules of Procedure. Family Law has an undeserved reputation for being rather casual about evidence and procedure. This article gives practical assistance to those of us confronted with a custody evaluation in a hearing or trial and how to navigate the considerations that arise.

Last but certainly NOT least, is Jefferson West's authoritative article on military retirement issues. Jefferson is a member of Idaho's National Guard as well as being a Boise attorney with a large portion of his practice dedicated to family law. He is a terrific resource for anyone confronting a military retirement in the division of property at divorce in Idaho. This article will answer most questions you might have.

Enjoy these submissions and look for another issue in the future!

About the Author

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

STANDARDS EVOLVE ON DOMESTIC VIOLENCE AND CHILD CUSTODY CASES

Fred G. Zundel
Idaho Legal Aid Services
Ryan S. Hunter
University of Idaho Law School

Introduction

Domestic violence is now one among several factors that an Idaho court must consider in making a custody determination. This article will discuss the legislative history of this requirement, Idaho cases that interpret this requirement, and practical suggestions for attorneys, judges, and the legislature.

Legislative history

Idaho Code Section 32-717 articulates a list of various factors that a trial court shall consider in assessing what custodial arrangement is in the best interests of the children involved in a divorce action. In 1992, the Idaho Legislature amended this list to include “[d]omestic violence as defined in Section 39-6303, Idaho Code, whether or not in the presence of the child.”¹ Idaho Code Section 39-6303(1) defines “domestic violence” as “the physical injury, sexual abuse or forced imprisonment or threat thereof of a family or household member, or of a minor child by a person with whom the minor child has had or is having a dating relationship, or of an adult by a person with whom the adult has had or is having a dating relationship.” Idaho Code Section 32-717(B) (4) provides that “absent a preponderance of the evidence to the contrary, there shall be a presumption that joint custody is in the best interests of a minor child or children.”

In 1994, the Idaho Legislature amended Idaho Code Section 32-717B to provide that “[t]here shall be a presumption that joint custody is not in the best interests of the minor child if one (1) of the parents is found by the court to be a habitual perpetrator of domestic violence as defined in Section 39-6303, Idaho Code.”² Although the words “joint custody” were drafted in language that initially seems synonymous with “joint physical custody” (in that both are intended to “assure the child or children of frequent and continuing contact



Fred G. Zundel



Ryan S. Hunter

with both parents”), the remaining language in Section 32-717B(1) discussing “joint custody” suggests that an award of “joint custody” may include either “joint physical custody or joint legal custody or both.” An award of “joint physical custody” is an order that the parents are given “significant periods of time” during which a child is in their physical care and enjoys “frequent and continuing contact” with each parent. Presumably sole physical custody then means an award where one parent has physical care of a child for an insignificant period of time or during which the contact between the child and that parent is not frequent and continuing.

An award of “joint legal custody” means that after the divorce each parent continues to have the right to be involved in decision-making regarding a child, and an award of “sole legal custody” therefore means that the parent with that right will alone have the right to make decisions regarding the child. Therefore, pursuant to the 1994 amendments, a court’s finding that one parent was a habitual perpetrator of domestic violence is a presumptive reason to find that either joint legal custody or joint physical custody or both are not in the best interests of a minor child. Such a finding will justify removing that parent from any decision-making regarding the child, or denying that parent frequent and continuing contact with the child, or both.³

The Idaho 1994 Session Laws noted the incompatibility of a history of physical violence with joint legal custody:

A court’s finding that one parent was a habitual perpetrator of domestic violence is a presumptive reason to find that either joint legal custody or joint physical custody or both are not in the best interests of a minor child.

The legislature finds that joint custody requires the ability of parents to cooperate in joint decision-making. In relationships where there is a history of physical violence, joint custody is inappropriate since the requirement of cooperative decision-making is not evident. The spirit and intent of joint custody arrangements is compromised by custody orders that result in or maintain hostility and the risk of further violence. Therefore, custody arrangements should not effectively maintain a level of continuous turmoil in the family or hinder the ability of the parent to make appropriate and timely decisions regarding the child and the child’s safety.⁴

Although this language focuses on the harm that may result in awarding joint *legal* custody where one parent has a history of physical violence, this language is not inconsistent with the incompatibility of joint *physical* custody where one parent has been found to be a habitual perpetrator of domestic violence. In light of a court’s finding that there is reason to believe that the violent parent will have difficulty controlling his or her anger, manipulative behaviors, or propensity toward violence, awarding sole physical custody to the other parent may be the best way of limiting the damage that may occur while the child is in the violent parent’s care.

These legislative changes were passed at a time of increasing national awareness of the harmful effects on children in relationships where domestic violence is present. In 1994 the National Council of Juvenile and Family Court Judges, in their Model Code on Domestic Violence, made this recommendation: “In every proceeding where there is an issue as to the custody of a child, a determination by the court that domestic or family violence

has occurred raises a rebuttable presumption that it is detrimental to the child and not in the best interests of the child to be placed in sole custody, joint legal custody, or joint physical custody with the perpetrator of family violence.⁵ Currently all 50 states and the District of Columbia mandate that courts consider domestic violence by one parent against the other when making custody determinations. As of 2010, 22 of those states, including Idaho, also have statutes creating a rebuttable presumption against awarding joint custody to the perpetrator of domestic violence.⁶ The “habitual perpetrator of domestic violence” standard invoking the rebuttable presumption against joint custody appears unique to Idaho. Most other similar state statutes use language including a “history” or “pattern” or “one or more acts” of domestic violence as invoking the presumption.⁷

Case developments

There are only a handful of Idaho appellate decisions that address the meaning of “habitual perpetrator of domestic violence” or the presumption in favor of sole custody when the court has determined a parent to be a habitual perpetrator of domestic violence. The first case to address either of these topics was *King v. King*.⁸ This case involved a divorce, and the trial court awarded the parents joint legal custody of their only child and awarded the father primary physical custody.⁹ On appeal the mother challenged the judge’s finding that her husband was not a habitual perpetrator of domestic violence in light of the evidence offered at trial. The Idaho Supreme Court determined that:

There was evidence that both parties initiated violence against the other with [the father] initiating violence against [the mother] more often than she did against him. [The mother] also testified, however, that the incidents of violence varied, depending upon whether [the father] was taking his medications. Dr. Cobiella [father’s psychiatrist] testified that before [the father] began taking Dyprexam, the incidents of violence resulted from his mental illness. Considering the evidence in the record, the magistrate’s finding that Justin was not a habitual perpetrator of domestic violence is supported by substantial and competent evidence.¹⁰

The court otherwise noted that the parents “had a dysfunctional relationship,” that each parent had their “strengths and weaknesses,” and that each made numerous allegations of misconduct against each other.¹¹ It appears that, in light of the

The “habitual perpetrator of domestic violence” standard invoking the rebuttable presumption against joint custody appears unique to Idaho.

murky evidence before the lower court, the Idaho Supreme Court chose not to second guess the trial court’s finding that the mother did not sustain her burden of proof that her husband was a habitual perpetrator of domestic violence. One hopes that the court did not mean to suggest that acts of domestic violence resulting from a mental illness do not count as acts of domestic violence in support of one’s being a habitual perpetrator of domestic violence. Surely an award of sole custody would be even more compelling under such circumstances.

The next case to offer any guidance with regard to custody and domestic violence was *Schultz v. Schultz*.¹² In this case the mother fled with her daughter to Oregon to escape domestic abuse by the father of their child. She obtained a protection order in Oregon, and the father filed a motion seeking to require the mother to return to Idaho with the daughter or surrender custody. The mother submitted two affidavits that documented an “extensive history of domestic abuse between the parents and in the presence of [the daughter].”¹³ Without examining all of the evidence to determine the minor child’s best interests and reaching a supported and well-reasoned conclusion before entering its order, the judge ordered that the mother return to Idaho with the daughter or surrender custody to the father.¹⁴ The Idaho Supreme Court found that the magistrate’s order was an abuse of discretion, reversed the magistrate’s order, and remanded the case to another magistrate for further consideration.¹⁵ In dicta, the Supreme Court noted that “[w]hile there is no finding by the magistrate, *four unrefuted instances* of domestic abuse, one of which resulted in [the father] pleading guilty to domestic battery, could lead to the conclusion that he is a habitual perpetrator of domestic abuse.”¹⁶

In *Danti v. Danti*, the Idaho Supreme Court affirmed the magistrate’s decision awarding joint legal custody to the parties but sole physical custody to the wife.¹⁷

However, the award of sole physical custody was based on considerations other than domestic violence. The Supreme Court noted that “domestic violence was of little concern to the court because there was *no established pattern* of violent behavior by either party. Rather, there was *only one occasion* of reported violence committed by [the father]. Because there was no evidence of habitual domestic violence, the court also concluded that the presumption in favor of joint custody applied.”¹⁸ The incident in question was one in which the father had become “enraged and grabbed [his wife] by the arms, pushing her up against the laundry room door while screaming at her and poking her in the chest with his finger.”¹⁹ This occurred in front of the couple’s youngest daughter. The father was subsequently charged with domestic battery and pled guilty to disturbing the peace.²⁰

The Idaho Supreme Court issued its most expansive treatment of a habitual perpetrator of domestic violence in the case of *Michalk v. Michalk*.²¹ The trial court awarded the parties joint legal custody with the mother having primary physical custody and the father having reasonable visitation under certain conditions.²² On appeal the mother argued that the father’s prior conviction for two counts of lewd and lascivious conduct with a minor child met the definition of a “habitual perpetrator of domestic violence.”²³ The Supreme Court noted, in light of evidence that the father was convicted on two counts of lewd and lascivious conduct with a minor (one with his daughter and one with his daughter’s friend), that:

[H]abitual is defined as “customary; usual . . . recidivist.” *Black’s Law Dictionary* (8th ed. 2004). “Perpetrator” is defined as “a person who commits a crime or offense”. *Black’s Law Dictionary* (8th ed. 2004). Thus, [father] must have committed *more than one incident* of domestic violence for the magistrate court to apply the presumption set forth in I.C. Section 32717B(5).

The definition of “domestic violence” in I.C. Section 39-6303(1), as applied in this case, would require a showing that [father] had sexually abused a family or household member or a minor child of the person with whom he had a dating relationship. [F]ather’s conduct with his twelve year old daughter clearly fits within this definition. However, there is no evidence in the record that his daughter’s friend fits within the definition of the person against whom [father] could perpetrate “domestic violence” as contemplated by the statute. That is, the record does not show that [father’s] daughter’s friend was a family or household member or a minor child of a person with whom he had a dating relationship. Thus, the only possible way that [father] could be a “habitual perpetrator of domestic violence”, as contemplated by I.C. Section 32-717B(5), is if there were more than one allegation on the record of physical or sexual abuse against his daughter, another family member, or the child of someone with whom he had a dating relationship.²⁴

Since the mother had not provided evidence of this, the court found that she failed to establish that the father fit within the definition of “habitual perpetrator of domestic violence” under I.C. Section 32-717B(5).²⁵

Practical considerations: Practitioners, judges and legislators

In light of the foregoing legislative history and case developments, the authors would suggest some practical considerations for attorneys, judges, and the legislature. First, for attorneys representing victims of domestic violence. A request for sole legal custody in a domestic violence setting assumes that the success of joint decision-making is at risk because of the controlling, manipulative, or violent behaviors of one parent or because of the emotional difficulty in having to deal with a parent who has traumatized the other parent. A request for sole physical custody would be based upon a reasonable risk to a child while under the physical care of one parent for the same reasons. For counsel representing a parent who reasonably believes that sole legal and physical custody should be granted by the court, counsel should meticulously develop the evidence for all threats as well as all acts of domestic violence that have occurred during the relationship of the parties together. Idaho Code Section 39-6303(1) defines domestic violence in terms of

The great jurists who have had something to say about child custody have recognized this and have avoided generalizations and absolutes.

both acts and threats, and a record on both should be developed as part as one’s case in chief. Threats that have been preceded by actual physical violence should be given special weight, although threats preceding actual physical violence should also be considered by the court, especially where the circumstances of the threat suggest a serious intent.

On the judge’s part, “[t]he central problem has been and still is, that in custody cases there is no substitute for hard and meticulous fact-finding by the trial court. The great jurists who have had something to say about child custody have recognized this and have avoided generalizations and absolutes. Less sensitive and knowledgeable judges have found it convenient to apply presumptions, doctrines, or rules of thumb.”²⁶ It is the responsibility of the trial court to work through the testimony and other evidence, assess credibility, and find where the preponderance of the evidence lies. It is the responsibility of counsel for victims of domestic violence to provide the court with as much direct and corroborating evidence as counsel can reasonably obtain so that the court has an adequate record from which to determine whether a parent has been a habitual perpetrator of domestic violence.

On the legislative side, there is a need to expand the rebuttable presumption language beyond a parent who is a habitual perpetrator of domestic violence to include a parent who, for example, commits an act resulting in serious bodily harm or serious emotional trauma. A single domestic violence incident of having a gun held to one’s head or having been the victim of attempted strangulation or marital rape will not qualify a parent as being a habitual perpetrator of domestic violence under the Idaho Supreme Court’s interpretation of the existing legislation but could well constitute a reason for granting sole legal and physical custody to the parent who was the victim. It seems contrary to the State’s interest in protecting victims of domestic violence and their children to

deny a request for sole custody simply for the reason that only one act of domestic violence has occurred.²⁷

Conclusion

There is a rebuttable presumption that joint custody is in the best interests of a minor child.²⁸ The provision that this presumption may be overcome by a finding that one parent is a habitual perpetrator of domestic violence is simply one way to overcome the presumption.²⁹ Courts often award sole legal or sole physical custody to one parent because of the compelling relevance of other factors, including the extremely general factor of “the character and circumstances of all individuals involved.”³⁰ The characterization of a classic domestic violence personality as one who is motivated by power and control over another person could qualify as an aspect of the character of that person, and so the character of the domestic violence person, quite apart from his or her acts and threats as defined at Idaho Code Section 39-6303, could be of sufficient degree to warrant a finding of sole custody.

About the Authors

Fred G. Zundel is an attorney in the Pocatello Office of Idaho Legal Aid Services. He is currently a member of the Idaho Coalition Against Sexual Assault and Domestic Violence Task Force and serves as an at-large member of the ISB Family Law Section Council. He wishes to acknowledge that he could not have written this article without the able research and early draft of **Ryan S. Hunter**, a second year law student at the University of Idaho College of Law. His contribution was such that he deserves recognition as co-author of this article.

Endnotes

- ¹ 1992 Idaho Laws, Chapter 228; I.C. § 32-717(1).
- ² 1994 Idaho Laws, Chapter 340; I.C. § 32-717B.
- ³ For a discussion of the claim that “sole physical custody” has “no definite meaning” and “primary physical custody” is “without meaning”, see “Of That Of Which There Ain’t,” R. Michael Redman, *The Advocate*, December 1987 at 7.

⁴ *Id.* (emphasis added). The “Statement of Purpose” of the bill notes that “some courts have held that even domestic violence does not overcome [the] presumption [in favor of joint custody]. This simply makes the law clear that if the court finds there has been habitual domestic violence, that should give rise to a presumption against joint custody.”

⁵ Nat’l Council of Juv. & Fam. Ct. Judges, MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE § 401 (1994). There is a mountain of social science research underlying this recommendation. For one of the best short summaries of this research, see “When Parents Fight: Alaska’s Presumption Against Awarding Custody to Perpetrators of Domestic Violence,” Lisa Bolotin, *Alaska Law Review*, Vol. 25:2 (2008). For a full and extensive summary, see *Domestic Violence, Abuse, and Child Custody: Legal Strategies and Policy Issues*, Mo Therese Hannah, Ph.D. and Barry Goldstein, J.D. (Civic Research Institute, 2010).

⁶ Leslie Joan Harris, *Failure to Protect from Exposure to Domestic Violence in Private Custody Contests*, 44 FAM. L.Q. 169, 171–74 (2010); see also Annette M. Gonzalez & Linda M. Rio Reichmann, *Representing Children in Civil Cases Involving Domestic Violence*, 39 FAM. L.Q. 197, 197–99 (2005).

⁷ See, e.g., ALASKA STAT. § 25.24.150(g) (“history of perpetrating domestic violence”); ARIZ. REV. STAT. ANN. § 25-403.03(D) (“significant history of domestic violence”); NEV. REV. STAT. ANN. § 125C.230, 125.480 (“one or more acts of domestic violence”); N.D. CENT. CODE § 14-09-06.2(1)(j) (“pattern of domestic violence”); OR. REV. STAT. ANN. § 107.137 (“committed abuse [one or more acts]”); WASH. REV. CODE ANN. § 26.09.191(1), (2)(a) (“history of acts of domestic violence”). But see, e.g., CAL. FAM. CODE § 3044 (“perpetrated domestic violence”); HAW. REV. STAT. ANN. § 571-46(9) (“family violence”).

⁸ 137 Idaho 438, 50 P.3d 453 (2002).

⁹ *Id.* at 441.

Courts often award sole legal or sole physical custody to one parent because of the compelling relevance of other factors, including the extremely general factor of “the character and circumstances of all individuals involved.”

¹⁰ *Id.* at 443.

¹¹ *Id.* at 441 and 445.

¹² 145 Idaho 859, 187 P.3d 1234 (2008).

¹³ *Id.* at 865.

¹⁴ *Id.* at 861.

¹⁵ *Id.* at 865.

¹⁶ *Id.* at 866, note 6 (emphasis added).

¹⁷ 146 Idaho 929, 204 P.3d 1140 (2009).

¹⁸ *Id.* at 936 (emphasis added).

¹⁹ *Id.* at 933.

²⁰ *Id.*

²¹ 148 Idaho 224, 220 P.3d 580 (2009).

²² *Id.* at 585.

²³ *Id.* at 588.

²⁴ *Id.* at 588–589.

²⁵ *Id.* at 589.

²⁶ See Henry H. Foster & Doris Jonas Freed, *Life with Father: 1978*, 11 FAM. L.Q. 321, 331 (1978).

²⁷ See Bolotin *supra* at 281 “For the purposes of the [Alaska] child custody statute, a ‘perpetrator’ of domestic violence has either committed one incident of domestic violence that leads to serious bodily injury or has committed multiple incidents of domestic vio-

lence (citation omitted). Alaska, unlike many other states, does not require multiple incidents of abuse to invoke its presumption (citation omitted). Idaho, on the other hand, requires a parent be a ‘habitual perpetrator’ of domestic violence before its presumption against custody arises (citation omitted). Requiring ongoing abuse is designed to protect a parent whose violent episode is not characteristic of his ability to parent. However, labeling a single incident of abuse as an anomaly carries dangers as well: an abuser may be able to use just one incident of abuse to control the other parent, effectively maintaining sole decision-making power if he is awarded joint custody because he can still manipulate the victim (citation omitted). Therefore, awarding joint legal custody to such a parent is not in the child’s best interests. Further, a child can be traumatized by just one incident of abuse if he is aware of it. (citation omitted). Giving physical custody to such a parent would not be in a child’s best interests.” (emphasis added).

²⁸ Idaho Code Section 32-717B(4).

²⁹ Danti *supra* at note 15.

³⁰ Idaho Code Section 32-717(1)(e).

JAMS WELCOMES

HON. WILLIAM F. DOWNES (RET.)

UNITED STATES DISTRICT COURT, DISTRICT OF WYOMING



We are extremely proud to announce that **JUDGE WILLIAM F. DOWNES (RET.)** is now available at JAMS. Judge Downes presided over hundreds of jury and bench trials as a federal judge in the United States District Court of Wyoming for 17 years, including 12 years as the Chief Judge. He served as a visiting judge in the Districts of Arizona, Colorado, Idaho, Montana, New Mexico, the Eastern and Northern Districts of Oklahoma and Utah.

Judge Downes’ experience as both a judge and a trial lawyer provides him with a great deal of insight and enables him to evaluate resolution options and efficiently guide parties to settlement. Whether it is a complex dispute between two businesses or a sensitive medical malpractice injury matter, he is able to rely on his understanding of the parties’ reputations, emotions and ongoing dynamics in order to move the case to resolution. Judge Downes will serve as a mediator, arbitrator, special master and discovery referee in cases involving business/ commercial, employment, energy/utility, insurance, personal injury/torts, professional liability and real property.

Case Manager: Emma Butler
303.474.3213 or ebutler@jamsadr.com
Available Nationwide | www.jamsadr.com



CHILD CUSTODY EVALUATIONS IN THE STATE OF IDAHO; A CALL FOR A NEW APPROACH

The role of child custody evaluations and how we use them

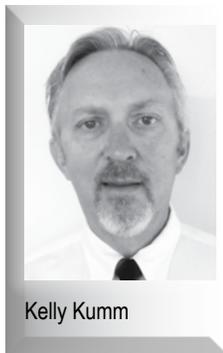
Kelly Kumm
Kumm Law Offices, PLLC

As family law practitioners are well aware, child custody evaluations (CCEs) play an influential, and often outcome-determinative, role in resolving custody disputes. Despite this significance, family law practitioners would agree that there is little consistency and reliability in these evaluations. Most will also agree that the recommendations in these evaluations are dependent more on the evaluator than on any other single factor.¹

One study shows that both attorneys and judges perceive mental health professionals' involvement in CCEs as very important and most lawyers and judges want evaluators to make specific recommendations about custody schedules to the court.² However, there is tension between such specific recommendations and the legal requirement that expert testimony meet expert witness standards.³

In 2005, Timothy Tippins and Jeffrey Wittmann⁴ addressed this tension in their article "Empirical and Ethical Problems with Custody Recommendations: A Call for Clinical Humility and Judicial Vigilance."⁵ The article classifies the data presented in a CCE into four levels and discusses the propriety and admissibility of the different levels of data. Of most importance, Tippins and Wittmann conclude that specific custody recommendations based on a best interests analysis are improper and inadmissible. The article gave rise to a flurry of responses, both agreeing and disagreeing with Tippins & Wittmann's conclusions.

This article will examine Tippins & Wittmann's findings and provide an overview of the law on the admissibility of CCEs. Finally, recommendations are offered for all practitioners to consider when using CCEs.



Kelly Kumm

The Guidelines do not exude confidence in the ability of clinical or forensic psychologists to make final child custody opinions.

Model standards of practice

The American Psychological Association (APA) has published Guidelines for Child Custody Evaluations in Divorce Proceedings.⁶ These Guidelines offer a framework for clinical psychologists serving as child custody evaluators and list the psychological factors that an evaluator should assess, including parenting attributes, the psychological needs of the child, and the fit between the two.⁷ The Guidelines also recommend that the scope of the evaluation should be determined by the custody evaluator based on the nature of the issue raised by the person or court referring the question to the evaluator.⁸ The evaluator should use multiple methods to gather data, as appropriate, which may include "clinical interviews, observation, and/or psychological assessments."⁹

The Guidelines explicitly state that "[a]lthough the profession has not reached consensus about whether psychologists should make recommendations to the court about the final child custody determination (*i.e.*, 'ultimate opinion' testimony), psychologists seek to remain aware of the arguments on both sides of the issue and are able to articulate the logic of their positions on this issue."¹⁰ However, the APA states that if an evaluator chooses to make recommendations, the recommendations should be "derived from sound psychological data," and should be based on articulated assumptions, interpretations, and inferences "that are consistent with established professional and scientific standards."¹¹ In other words, the Guidelines do not exude confidence in the ability of clinical or forensic psychologists to make final child custody opinions.

The Association of Family and Conciliation Courts (AFCC) has developed Model Standards of Practice for child custody evaluators. These standards focus on mental health professionals as a whole rather than only psychologists. For exam-

ple, the standards address whether formal assessment instruments are to be used.¹² The standards also contemplate a "team approach" to CCEs.¹³

Daubert and the Legal Standard for Expert Child Custody Testimony

Can a mental health professional testify that a child is a better "fit" with one parent or the other? Is there reliable scientific methodology to support such an opinion? Should a mental health professional offer opinions on a custody schedule, whether legal custody should be joint, or what day of the week and time of day custody should be exchanged? How can such opinions be supported under current notions of expert witness standards? Mary Huneycutt addresses these questions in her article, *Trying to Fit a Square Peg into a Round Hole? Applying Idaho Rules of Evidence & Procedure to Child Custody Evaluations*, found on page 28 in this issue of *The Advocate*.

Various types of information evaluators can offer the court: Tippins & Wittmann's levels of data

Tippins & Wittmann classify the information offered by child custody evaluators into four levels. In a simplified form, these levels can be conceived of in concentric circles, categorized by their level of relevancy, with factual observations in Level I, farthest away from the ultimate issue of the child's best interests, moving inward toward Level IV at the center of the circle, recommendations regarding the core issue of best interests.¹⁴

Level I data is what the clinician observes with his or her senses. These observations may include such statements as "She hung her head low and was often tearful," "Aaron clung to his mother's leg throughout our session," "There is an elevation on scale two of the MMPI-2," and

‘Father would not compliment mother in any way regarding her parenting.’”¹⁵

Level II information is conclusions “about the psychology of a parent, child or family.” These conclusions are those inferences that are supported by a rigorous body of psychological tests and study. Tippins & Wittmann offer the following as part of a non-exclusive list of examples of Level II data: parenting skills and skills-deficits, intellectual/cognitive functioning, developmental status, child-temperament variables, substance abuse tendencies, attachment constructs, interpersonal style, criminality, domestic violence tendencies, adequacy of parent-child boundaries, social support, impulse control, and family-level constructs (emotional boundaries, enmeshment, etc.).¹⁶ Tippins & Wittmann describe the studies that demonstrate an association between such Level II observations and positive or negative child outcomes.¹⁷ Tippins & Wittmann caution that Level II information should be offered in a child custody evaluation only if the information has been validly shown to be associated with inferences affecting child custody.¹⁸ In essence, Tippins & Wittmann deplore the offering of Level II inferences without “an empirically supportable connection” between those inferences and child outcomes, a practice which leaves attorneys and judges with the decision whether such information is relevant.¹⁹ Additionally, Level II data is complicated by the fact that any particular psychological construct may be currently under debate, may change over time, and may vary in significance between cultures.²⁰

Level III information is the evaluator’s conclusions about the impact of Level II information on custody and access arrangements. These are the conclusions about any aspect of a child’s “psychological best interests.”²¹ “Multiple days away from mother, this child’s primary psychological parent, will be emotionally stressful,” or “[t]here is a poor fit between Jason’s need for parental empathy regarding his ADHD and his father’s blunt and authoritarian approach,” are examples of Level III information.²² Level III inferences comment on the “fit” between a child’s needs and a parent’s ability to meet those needs.²³

Tippins & Wittmann caution that such Level III information should be couched in terms of potential risks/advantages, such as: “(1) Primary placement with the father in this matter includes the risk of long-term exposure to Mr. Smith’s chronic tendencies toward derogatory and violent behavior with women. (2) Primary

The danger remains that Level III and IV opinions expressed in an evaluation tend to usurp the role of the court in child custody matters.

placement with mother includes the risk of substantial, weekly exposure to her now, well established and self-admitted tendencies toward alcohol abuse while under stress, tendencies that interrupt her ability to meet this toddler’s needs for careful supervision.”²⁴ Importantly, the risk-focused presentation does not take an “affirmative stance about whether the specific risks should be determinative and allows substantial room for negotiation, as well as for the *finder of fact to make the ultimate, socio-moral value judgments* about whether such risks should be attended to in the final access plan and how they should be weighted.”²⁵

Beyond risk/advantage statements, there are few Level III statements which can be supported by scientific study.²⁶ Although there is research supporting the effects of circumstances such as domestic violence and alcoholism on children, there is a lack of study supporting clinical judgments weighing the relative effects of variables on long-term child outcomes.²⁷

Level IV statements are those conclusions about what access schedule and other parameters the court should put in place. One type of Level IV statement is when an evaluator recommends a specific schedule of hours of custody exchange. Another example is whether a parent should only be permitted supervised access to a child.²⁸ Tippins & Wittmann advocate for a clear distinction between “the function of an expert witness to expound from the specialized knowledge base (i.e., the ‘whats’) and that of the judge to make the ultimate legal-socio-moral determination (i.e., the ‘shoulds’).”²⁹ Tippins & Wittmann assert there is no valid psychological method for reliably combining Level I, II, and III information into Level IV recommendations.³⁰ They posit that custody evaluations are asked to answer the question: “What initial state of mother, father, children, extended family, and other important relationships, and what contextual variables, when considered in the context of the scores of potential access plans for a given family, will result

in what later negative or positive state in the children?” Evaluators often attempt to answer such questions even though there is no scientific basis to adequately answer these questions.³¹

Evaluators in Idaho should not provide level III or IV recommendations even if such opinions are couched in terms of potential risks/or advantages. No matter how well qualified the expert may be, the danger remains that Level III and IV opinions expressed in an evaluation tend to usurp the role of the court in child custody matters.

Recommendations

Based on the feedback provided by various surveys and considering the interplay between Idaho Rule of Evidence 702 and the concerns expressed by Tippins and Wittmann, I offer the following recommendations to those practitioners involved in child custody cases:

1) Ideally, magistrate judges in Idaho should develop and adhere to a specific standard for child custody evaluators. California has developed such standards. The standard should describe Level III or IV recommendations and establish the standard for admissibility of either type of opinion. I strongly urge the magistrate judges to reject “best interests” opinions or opinions on custody arrangements based on the inherent lack of reliability and/or validity of such opinions. Indeed, if magistrate judges want such opinions, consideration should be given to the appointment of masters. Magistrates should avoid boilerplate orders for the appointment of evaluators. Rather, orders should strive to delineate the scope of the evaluation and specific issues needing more scrutiny.³²

2) Family law attorneys must be mindful of the ethical and legal issues posed by the use of child custody evaluators. They should urge the party-retained evaluator to avoid Level III and IV recommendations. Attorneys should insist that the recommendations in a child custody evaluation meet the *Daubert* criteria and object

when they do not. (Being mindful that *Daubert* is not the law in our state courts, our family law court should be urged to apply a similar analysis to CCEs.) When evidence fails a *Daubert*-like test, attorneys should be zealous in objecting to its admissibility, just as they would object to opinions on other issues when the opinion fails to meet evidentiary minimums. It is not enough that an opinion will aid the magistrate judge, the opinion must be reached by the application of scientifically sound principles.

3) Potential evaluators should be cognizant of the danger of making Level IV recommendations and avoid entering territory reserved for the court. When asked/pressured by the court or an attorney to make such a recommendation, they should decline. Those who perform CCEs must be aware that the most valuable contribution they can make will reflect a scientifically sound approach to the legally relevant issues. Evaluators could take a great step towards policing themselves and the types of evaluations they produce by making sure the evaluations fall within the standards set forth in the APA and/or the AFCC Guidelines. Custody evaluators should strive to avoid conflicts of interest and multiple relationships in conducting the evaluations, including any self-referrals for future treatment to a particular evaluator or mental health professional.

4) There are systemic issues with the manner in which CCEs are ordered and conducted. More scrutiny should be given to the issue. Some areas of change which should be given consideration are as follows:

(a) Why mental health providers? Most data is observational and specific professional criteria is unnecessary. The court should consider using non-mental health providers as appropriate to conduct or assist with CCEs. All prior standards, including the Model Standards, contemplate mental health professionals as the appropriate professional to conduct CCEs. I would submit this emphasis on mental health providers places too much importance on behavioral, social, and developmental issues of the family and allows other issues, such as medical, educational, and legal to be understated. I recommend consideration of other professionals who have a demonstrated knowledge of family dynamics and constructs be considered as appropriate evaluators. Also, those with less than a Master's Degree should also be considered, provided they have dem-

onstrated knowledge and experience with family and divorce-related issues.

Chemical dependency counselors, teachers, principals, nurse practitioners, family law attorneys, social workers, and others could all, in the right circumstance, provide excellent Level I or II recommendations. At the very least, they could be an adjunct to the mental health professional appointed by the court.

(b) In the same vein, consideration should be given to using a team evaluator approach.³³

(c) All involved should be mindful of the sometimes prohibitive costs of CCEs. Efforts to reduce those costs could include the use of less expensive evaluators, assessing court fees and fines against those convicted of drug and alcohol offenses or domestic battery, with an amount dedicated to CCEs.

(d) Courts should insist on strict, but reasonable timelines, and follow up on the deadlines issued. The follow up could be accomplished by Family Court Services.

(e) I was a member of a committee of attorneys and judges who promulgated local rules for the implementation of Interim Parenting Time Evaluations (IPTE). I regret having done so. Temporary evaluations create a number of risks. They create an unlevel playing field for the parties and should be discouraged.³⁴

In the words of one New York court, “[e]xperts, who predict future consequences based on their professional theories and examinations of subject children, should not be elevated to the singular importance of, in effect, overriding the array of pertinently balanced jurisdictional protections afforded to decrees affecting one of society’s most sacrosanct relationships – parent and child.”³⁵

Conclusion

The use of CCEs merits closer scrutiny. Those involved with CCEs vary widely in their perceptions of how and when CCEs should be utilized and what type of opinions should flow from an evaluation. It is clear that the admissibility of some of the opinions of evaluators should be scrutinized more carefully. Opinions outside the expertise of the witness should not be allowed, just as in any other type of litigation. Hopefully, this article will provide the stimulus to our family law professionals to examine the use of CCEs more closely. Our collective goal should be the acquisition of reliable, consistent information concerning families immersed in divorce proceedings.

About the Author

Kelly Kumm has been in private practice in Pocatello since 1984 and has been the owner of Kumm Law Offices, PLLC since 1996. His practice is focused on criminal defense, administrative law, commercial litigation and family law. He is the father of two and grandfather of one. He loves whitewater rafting, golf and bowling. The author wishes to thank Naomi Leiserowitz and R. Brad Willis for their very significant contributions to the drafting of this article.

Endnotes

¹ A variety of studies have been conducted regarding the use of CCEs. Note, “Relying on the Unreliable: How a Court rule Could Alleviate the Problems Inherent in the Neutral Mental Health Evaluation Process in Child Custody Cases,” 48 FAM. CT. REV. 574 (2010); Huneycutt, Mary, “Trying to Fit a Square Peg Into A Round Hole? Applying Idaho Rules of Evidence & Procedure to Child Custody Evaluations,” THE ADVOCATE (2011).

² See James Bow & Francella Quinell, *Critique of child custody evaluations by the legal profession*, 42 FAM. CT. REV. 115-126 (2004).

³ E.g., *Daubert v. Merrell Down Pharm., Inc.*, 509 U.S. 579 (1993).

⁴ In 2005, Tippins was a divorce attorney practicing in New York state and Wittmann was a licensed psychologist, family therapist, custody evaluator, and divorce mediator in Albany, New York. See Andrew Schepard, *Editorial Notes*, 43 FAM. CT. REV. 187-190, 188 and 222 (2005).

⁵ Timothy M. Tippins & Jeffrey P. Wittmann, *Empirical and Ethical Problems with Custody Recommendations: A Call for Clinical Humility and Judicial Vigilance*, 43 FAM. CT. REV. 193-222 (2005).

⁶ GUIDELINES FOR CHILD CUSTODY EVALUATIONS IN FAMILY LAW PROCEEDINGS (2009) available at <http://www.apa.org/practice/guidelines-evaluation-child-custody-family-law.pdf>.

⁷ *Id.* at Section I.3.

⁸ *Id.* at Section III.8.

⁹ *Id.* at Sections III.11 and III.12.

¹⁰ *Id.* at Section III.13.

¹¹ *Id.* at Section III.13.

¹² *Family Court Review*, Vol. 45, #1, “Model Standards of Practice for Child Custody Evaluations,” Std. 6, p. 82 (Jan. 2007).

¹³ *Id.* at Std. 7, p. 84.

¹⁴ Tippins & Wittmann, at 207.

¹⁵ Tippins & Wittmann, at 194.

¹⁶ Tippins & Wittmann, at 196.

¹⁷ Tippins & Wittmann, at 196.

¹⁸ Tippins & Wittmann, at 197.

¹⁹ Tippins & Wittmann, at 198-99.

²⁰ Tippins & Wittmann, at 199.

²¹ Tippins & Wittmann, at 199.

²² Tippins & Wittmann, at 194.

²³ Tippins & Wittmann, at 200.

²⁴ Tippins & Wittmann, at 200.

²⁵ Tippins & Wittmann, at 201 (emphasis added).

²⁶ Tippins & Wittmann, at 201.

²⁷ Tippins & Wittmann, at 202.

²⁸ Tippins & Wittmann, at 203.

²⁹ Tippins & Wittmann, at 203.

³⁰ Tippins & Wittmann, at 204.

³¹ Tippins & Wittmann, at 204.

³² See AFCC Model Stds, Std. 5.1.

³³ See AFCC Model Standard 7.

³⁴ *Family Court Review*, *supra*, at p.65.

³⁵ *Mtr. of Sayeh R. v. Monroe County DSS*, 91 N.Y.2d 306, 693 N.E. 2d 724.

TRYING TO FIT A SQUARE PEG INTO A ROUND HOLE? APPLYING IDAHO RULES OF EVIDENCE AND PROCEDURE TO CHILD CUSTODY EVALUATIONS

Mary Shea Huneycutt
Attorney at Law

Attorneys and judges throughout Idaho have come to depend on neutral child custody evaluators to help the parties seriously consider settling parenting differences outside of the courtroom. A good custody evaluator can help identify parenting or personal issues that the litigants, their attorneys, and the court may not have recognized without the evaluator's expertise. Custody evaluators can uncover facts that the sometimes cumbersome and expensive discovery process has overlooked. Custody evaluators can make helpful referrals or treatment recommendations to meet the specific needs of the family. Custody evaluators can eliminate the need to call children as witnesses by conducting forensic interviews.

Despite our continued reliance upon them, the use of child custody evaluations has come under fire in recent years. Nationwide, child custody evaluators have been accused of failing to behave ethically, to follow appropriate standards or methodology, or to offer reliable evidence. Some evaluators, including evaluators in Idaho, have been sued for malpractice for offering their opinions in child custody cases.¹ Just last year, the Idaho Supreme Court weighed in on Board of Psychology disciplinary proceedings against a psychologist child custody evaluator who began dating the father she had just favorably evaluated.² According to the Ethics Committee of the American Psychological Association (APA), child custody evaluations are the second biggest source of complaints to the APA about psychologists, second only to complaints about sexual misconduct.³

As Kelly Kumm notes in his companion article on page 25, there have been numerous criticisms published in recent years complaining that the opinions of child custody evaluators lack essential scientific reliability and should not be admissible evidence. Some defenders of child custody evaluations have essentially argued that because we like custody eval-



Mary Shea Huneycutt

Idaho departs from the Daubert standard in that it does not require that expert testimony be consistent with "commonly agreed" or "generally accepted" principles in the field of the expertise.

uations and find them useful, they should be admissible.⁴ Unfortunately, the Idaho Rules of Evidence have not been amended to accommodate the unique problems associated with the use of custody evaluations in the judicial process. This article analyzes Idaho Rules of Evidence and argues that many of the conclusions or opinions we commonly seek from neutral child custody evaluators may not be admissible. This article further proposes that Idaho should consider adopting specific rules of evidence or procedures to address the admissibility concerns and to make neutral child custody evaluations more uniform and useful for the resolution of parenting conflicts.

Rules governing the admissibility of expert witness testimony in Idaho

Child custody evaluators in Idaho are typically appointed as "neutral" experts under Idaho Rule of Evidence 706.⁵ Under this rule, a court appointed expert can be selected by the court or by the agreement of the parties, on the court's motion, or upon motion of one the parties.

Although the Idaho Rules of Evidence are modeled on the federal rules of evidence, Idaho has declined to adopt the tests for admissibility of expert witness testimony established by federal decisions. Idaho focuses exclusively on whether the expert witness will assist the trier of fact in understanding the evidence or determining facts at issue. Idaho has explicitly rejected application of the *Frye* test,⁶ or any other "per se rule" governing the admissibility of expert witness testimony, relying instead on the language of Idaho Rule of Evidence 702.⁷

More recently, the Idaho Supreme Court has declined to adopt the modern *Daubert* test⁸ for admissibility of expert testimony, again relying instead on the language of Rule 702.⁹ The Idaho Supreme Court has stated, however, that Rule 702

is consistent with significant portions of the *Daubert* test for admissibility and those parts of the *Daubert* test will be applied by the Idaho courts. Specifically, the Court explained that in order to assist the trier of fact, the evidence offered by the expert must be "reliable." If the proffered opinion testimony is based in science, it must be consistent with reliable scientific methodology. Expert testimony may be disallowed if it is "speculative," and/or if the methodology has not been "tested, published, peer reviewed, or otherwise shown to be reliable."¹⁰ The Idaho Supreme Court recognizes, consistent with Ninth Circuit case law, that where there is good reason for the lack of scientific studies, such as ethical restrictions, other indicia of reliability may be enough to allow the admission of the expert testimony.¹¹

Idaho departs from the *Daubert* standard in that it does not require that expert testimony be consistent with "commonly agreed" or "generally accepted" principles in the field of the expertise. To determine admissibility of expert witness testimony, the Idaho courts are instructed to focus on the methodology and not necessarily the conclusions or any consensus in the field regarding the conclusions.¹²

Although Idaho Rule of Evidence 704 expressly permits expert witnesses to opine on the "ultimate issue" coming before the trier of fact, Idaho follows the majority rule that in order for an expert to offer any testimony at all, the opinions offered must go to issues beyond the ability of the trier of fact to understand without the expert's help.¹³ This is consistent with the plain language of Rule 702, which requires all expert testimony to "assist the trier of fact to understand the evidence or to determine a fact in issue." Thus, despite Rule 704, expert testimony is inadmissible if it offers conclusions or opinions that the trier of fact would be qualified to draw from the facts, utilizing common sense and normal experience.¹⁴

It is also important to note that Idaho Rule of Evidence 703 states that expert opinions can rely on inadmissible evidence if it is the type of evidence “reasonably relied upon by experts in the particular field.” This Rule does not render the inadmissible evidence admissible – it can only be offered to the trier of fact if the probative value outweighs the prejudice. Rule 705 requires the expert witness, whether court-appointed or party-retained, to disclose the factual basis for all opinions, and if the court finds the expert opinions are not based on facts properly in the record, the expert opinion may be disallowed.¹⁵

These rules for the admissibility of expert testimony open the door for significant challenges to the admissibility of most, if not all, custody evaluations that opine on the “ultimate issue,” the best interests of a child.¹⁶ There simply is no reliable methodology or science to justify anyone’s ability to opine on which specific child custody arrangement will be “in the best interests” of a child. A custody evaluator usually is no more qualified than is the judge to make this determination.

At most, custody evaluators may be able to establish reliable methods in their areas of expertise for identifying issues that may impact the best interests of the minor child. Examples might include abuse or communication challenges between the parents or between the parents and the child; inappropriate and/or damaging parenting behaviors, such as abuse of drugs or alcohol or other negative behaviors; or personality or psychological traits of the parents that may be identified through reliable expert methodology. There may be reliable methodology and/or science to allow a custody evaluator to offer opinions on whether a proposed parenting plan is consistent with the developmental needs of a child.¹⁷ By identifying issues and rendering opinions on them within the limits of Rule 702, the custody evaluator may guide the court in determining the best interests of the child. The custody evaluator likely has no reliable method justifying any expert opinion about the ultimate custody decision or conclusions compelled by the requirements of Idaho Code Section 32-717, or about the specifics of a custody/visitation schedule.

Additionally, the rules of evidence preclude the admission of any speculative opinions contained within custody evaluations. Any opinions that are not supported by facts in the record should be stricken. Professional “hunches” or any other type of speculation offered by custody evaluators will not satisfy the requirements of

There simply is no reliable methodology or science to justify anyone’s ability to opine on which specific child custody arrangement will be “in the best interests” of a child.

Rule 702. Custody evaluator opinions based on hearsay may be admissible, but the alleged hearsay is not. Any opinions based on inadmissible evidence should be stricken if they are unsupported by the record in the case.

Custody evaluators should not be permitted under Rule 702 to opine on the credibility of any witness, because the judge usually does not require expertise to determine witness credibility.¹⁸ Unless the custody evaluator can prove he or she is especially qualified to render opinions regarding the believability of witnesses,¹⁹ it is more appropriate for the evaluator to point out inconsistent statements made by witnesses/collateral contacts, or other facts that may affect the evaluator’s opinions, and allow the judge to draw conclusions about credibility based on the facts on the record.

While Idaho does not require custody evaluators to demonstrate any consensus in the field regarding their conclusions, compliance with generally accepted methodology and guidelines applicable to custody evaluations may help demonstrate the necessary “reliability” of the opinions required by Rule 702. As some experts have pointed out, attorneys should look to both the American Psychological Association standards, and the guidelines published by the Association of Family and Conciliatory Courts, to question a custody evaluator’s methodology or opinions.²⁰ They should look also to minimum or mandatory ethical standards in the custody evaluator’s area of expertise.

How other states regulate the use and admissibility of custody evaluations

Many state courts have enacted procedural and evidentiary rules and mandatory guidelines that specifically address the concerns I have outlined. California, Florida, Illinois, and Utah have specific statutes and/or rules for custody evaluations that apply statewide. California’s rules and statutes governing child custody evaluations are often cited because they are the most detailed.²¹ Utah takes a sim-

ilarly detailed approach, outlining what must be included in a custody evaluation and requiring special certifications for custody evaluators who offer opinions on controversial subjects that can be difficult to determine factually, such as domestic violence or child abuse.²²

Florida’s statutes specifically state that the technical rules of evidence do not apply to child custody evaluations. Florida additionally provides some malpractice protection to evaluators by presuming that a psychologist appointed by the court to make parenting time recommendations acts in “good faith.”²³

Michigan uses its “Friend of the Court” service, which is part of the Michigan judiciary, to perform custody evaluations under specific procedures and guidelines.²⁴ New Jersey similarly authorizes the family division of the judiciary to order an investigation of the “character and fitness” of the parties in a child custody dispute, to be performed by a mental health professional “qualified by licensure, experience, and training.” Additionally, New Jersey courts may authorize probation and parole officers to conduct periodic reviews regarding child custody, and the judge may *sua sponte* re-open a custody case based upon the reports of these probation and parole officers.²⁵

Local courts also adopt rules for their jurisdictions. The First Circuit of Hawaii has produced a detailed guideline outlining the procedures the judges must use in appointing child custody evaluators. Similarly, the 19th District of Illinois has adopted detailed procedures for its court appointed custody evaluators, and only professionals who commit to abide by the rules of court will be appointed by the judges.²⁶

Conclusion

It is time for Idaho to enact procedural and evidentiary rules that are in line with our practical use of custody evaluations, to protect the integrity of the judicial process, and to protect our child custody evaluators. We value the services custody evaluators provide. We need to establish

clear rules for the experts, the attorneys, and the courts to follow so that we do not lose these services in Idaho.

About the Author

Mary Shea Huneycutt is an attorney in solo practice in Pocatello, Idaho, with an emphasis on family law and mediation, and general civil litigation. She is also the Interim Program Coordinator and Faculty for the Paralegal Studies Program at Idaho State University. Mary is the current chair of the 6th Judicial District Family Law Section and current Board President for Idaho Legal Aid Services, Inc. Before moving to Idaho, she was an Assistant Attorney General for the Virginia Attorney General's Office from 1993-2001, specializing in complex civil litigation in the practice areas of civil rights and personal injury. She was a law clerk for the Virginia Supreme Court from 1990-1993. She received her J.D. from the University of Richmond, T.C. Williams School of Law, and her B.A. from the College of William and Mary.

Endnotes

¹ Daniel B. Pickar, *On Being a Child Custody Evaluator: Professional and Personal Challenges, Risks and Rewards*, 45 Fam. Ct. Rev. Vol. 1, p. 103, 107-09 (Jan. 2007).

² *Wright v. Board of Psychological Examiners*, 148 Idaho 542, 224 P.3d 1131 (2010).

³ Pickar, supra note 2, p. 108.

⁴ Nicholas Bala, *Tippins and Wittman Asked the Wrong Question: Evaluators May Not be "Experts," But They Can Express Best Interests Opinions*, 43 Fam. Ct. Rev. Vol. 4, p. 554, 555 (October 2005).

⁵ This appears to be the only rule in Idaho authorizing the appointment of a neutral expert in child custody cases.

⁶ *Frye v. United States*, 293 F.1013 (D.C. Cir. 1923).

⁷ *State v. Crea*, 119 Idaho 352, 806 P.2d 445 (Idaho 1991); *State v. Iwakiri*, 106 Idaho 618, 682 P.2d 571 (Idaho 1984).

⁸ *Daubert v. Merrell Down Pharm., Inc.*, 509 U.S. 579 (1993); *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999) (extending the same Daubert test for admissibility to the "soft sciences" and non-scientific experts).

⁹ *Weeks v. Eastern Idaho Health Services*, 143 Idaho 834, 153 P.3d 1180 (2007); see also *Swallow v. Emergency Medicine of Idaho*, 138 Idaho 589, 67 P.3d 68 (2003), fn 1.

¹⁰ *Swallow*, 138 Idaho at 592, 67 P.3d at 72.

¹¹ *Weeks*, 143 Idaho at 838, 153 P.3d at 1185.

¹² *Weeks*, 143 Idaho at 838, 153 P.3d at 1184.

¹³ *Chapman v. Chapman*, 147 Idaho 756, 215 P.3d 476 (2009) (disallowing expert testimony that concluded premises were "hazardous," but allowing expert to demonstrate the facts showing dangerousness); *Athay v. Stacey*, 142 Idaho 360, 128 P.3d 897 (2005) (disallowing expert testimony that attempted to prove causation and defendant's subjective "reckless disregard" in police pursuit tort action).

¹⁴ *Athay*, 142 Idaho at 366, 128 P.3d at 903-04.

¹⁵ *J-U-B Engineers, Inc. v. Security Ins. Co. of Hartford*, 146 Idaho 311, 193 P.3d 858 (2008) (disallowing expert affidavits that did not disclose the factual basis for opinions).

¹⁶ Timothy M. Tippins & Jeffrey P. Wittman, *Empirical and Ethical Problems with Custody Recommendations: A Call for Clinical Humility and Judicial Vigilance*, 43 Fam. Ct. Rev. 193 (April 2005).

¹⁷ This is an emerging area of empirical research

and I believe it would still be subject to significant challenge regarding reliability of the methodology used to reach specific conclusions. See generally, John Hartson and Brenda Payne, *Creating Effective Parenting Plans: A Developmental Approach for Lawyers and Divorce Professionals*, ABA Publishing, 2006.

¹⁸ See *State v. Hoisington*, 104 Idaho 153, 657 P.2d 17 (Idaho 1983) (holding that the reliability of eyewitness testimony is generally within the competence of the jury); *United States v. Barnard*, 490 F.2d 907 (9th Cir. 1973) (credibility of evidence is the province of the jury).

¹⁹ See *State v. Wright*, 147 Idaho 150, 206 P.3d 856 (Ct. App. 2009) (holding that expert testimony may be admissible on reliability of eyewitness testimony if it is beyond the capacity of ordinary jurors).

²⁰ APA Guidelines for Child Custody Evaluations in Family Law Proceedings (February 2009), found at <http://www.apa.org/practice/guidelines/child-custody.pdf>; AFCC Model Standards of Practice for Child Custody Evaluation (May 2006), found at <http://www.afccnet.org/pdfs/Model%20Standards%20of%20Practice%20for%20Child%20Custody%20Evaluation%20May%202006.pdf>.

²¹ California Rules of Court, §§ 5.220, 5.225; California Family Code, §§ 3110-3118; 750 ILCS 5/604(b) and 750 ILCS 5/605.

²² Utah Code of Judicial Administration, Rule 4-903; <http://www.utcourts.gov/resources/forms/custodyeval/memo.pdf>; see also California Family Code §§ 1815, 1816, and 311; California Rules of Court Rules 5.225 and 5230.

²³ Florida Statutes § 61.20; § 61-122.

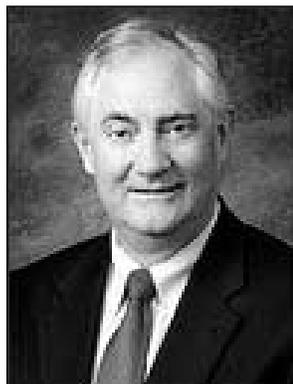
²⁴ <http://courts.michigan.gov/scao/resources/publications/manuals/focb/cpinvmln.htm>.

²⁵ New Jersey Rules of Supreme Court, Rule 5:8-1. New Jersey Rules of Supreme Court, Rule 5:8-2.

²⁶ <http://www.courts.state.hi.us/docs/1FP/cespmemo.pdf>. <http://www.19thcircuitcourt.state.il.us/resources/Pages/rules11.aspx>.

MEDIATION SERVICES IDAHO & WYOMING

Member Idaho Supreme Court & Idaho Federal Court
Panel of Civil Mediators
33 years litigation experience



Alan C. Stephens

Thomsen Stephens Law Offices

2635 Channing Way
Idaho Falls, Idaho 83404
(208) 522-1230
alan@ts-lawoffice.com

THE JamesStreet GROUP

Structured Settlements

- 100% Tax Free Income, Including Interest Earned
- Guaranteed Payments & Rates Of Return
- Preservation Of Government Benefits
- Financial Protection & Peace Of Mind
- No Ongoing Fees Or Management Expenses

Idaho's Trusted
Source For
Structured
Settlements &
Structured
Attorney Fees



Audrey Kenney

akenney@tjsg.com
(208) 631-7298
www.tjsg.com

EXAMINING MILITARY RETIREMENT PAYMENTS AND DIVORCE

Jefferson H. West
Fletcher & West, LLP

Having served six years on active duty and provided legal assistance to a number of military members, it is apparent that there is widespread misunderstanding regarding military retirement in divorce. Perhaps you have experienced the military member who enters your office and proposes to educate you that his or her spouse is not entitled to any military retirement because they have not been married for ten years. The 10/10/10 rule, as it is affectionately known, has caused some military members to revel in a false sense of security. Under the Uniformed Services Former Spouse Protection Act, a court is given the authority to treat military retired pay as property of a military member and his or her spouse.¹ In short, a court of competent jurisdiction is granted the authority to divide military retirement pay in a divorce action.

10/10/10 Rule

The Defense Finance and Accounting Service (DFAS) can make a direct payment to the former spouse of the divided retirement. DFAS can only, however, make the payment directly to the soon to be ex-spouse if the 10/10/10 rule is satisfied. This rule requires ten years of creditable service (creditable toward retirement), 10 years of marriage, and at least 10 years of marriage and 10 years of creditable service that overlap one another. In other words, in order to receive direct payment from DFAS, there must be 10 years of creditable military service performed during the marriage. If 10 years of creditable service is not performed during the marriage, this does not preclude the court from dividing military pay, it simply means that the former spouse must go after their ex directly for payment of his or her share of the retirement.

DFAS can only pay a maximum of 50 percent of a military retiree's disposable military retired pay. This does not mean a court is precluded from awarding an amount in excess of 50 percent of disposable retired military pay, it only means that if the military member is obligated to

Under the Uniformed Services Former Spouse Protection Act, a court is given the authority to treat military retired pay as property of a military member and his or her spouse.

pay more than 50 percent of disposable military retired pay, any amount in excess of 50 percent will have to be acquired directly from the military service member and not from DFAS.

20/20/20 Rule

Under the 20/20/20 rule, 20 years of creditable military service performed during the marriage means your non-member client is a dependent and eligible for medical benefits.² As long as your client does not 1) get remarried or 2) get coverage under an employer sponsored health plan, he or she is going to enjoy the same medical benefits as his or her ex. Additionally, your client is eligible to receive commissary and exchange benefits.³

20/20/15 Rule

The 20/20/15 rule involves 20 years of marriage and 20 years of military service and 15 years of marriage overlap with 15 years of military service.⁴ The benefits received by someone who qualifies under the 20/20/15 rule are expanded.⁵ Essentially, the benefits under this rule are intended to be transitional. One who qualifies can count on a year of medical benefits after divorce and can purchase additional coverage for another 24 months. Furthermore, the person would be entitled to commissary and exchange benefits for one year.⁶

Types of retirement

Subject to changes that may be coming due to the current economic situation in our country, there are essentially two types of military service retirements 1) an active duty retirement and 2) a reserve/guard retirement.

Active duty

If a military member completes 20 years of active duty service, he or she is eligible for an active duty retirement. A creditable year would be a year of active service. If a member gets out, goes into the reserves and then re-enters ac-

tive duty, an active duty retirement is still possible, but time would need to be made up to compensate for the time not served on active duty. The benefits for an active duty retirement is payable immediately upon retirement from active duty. One can expect that if the minimum 20 years is served, the retired member will receive about one half of his or her pay, with additional cost of living adjustments (COLAs) throughout the years. If one serves more than 20 years of active duty, he or she receives amounts above and beyond one half of the pay based on established pay guidelines.

Reserve/Guard

Reserve or guard retirement is different. If a guardsman or reservist serves for 20 years they can also retire. However, for now, one cannot draw guard or reservist retirement, except in limited circumstances, until age 60. There is discussion to raise the age to over 60. A creditable year for retirement purposes means one acquires at least 50 points, 15 points for just being a member, 12 for the two week annual tour and 12 days of inactive duty training for certain reservists or, if you are a "weekend warrior," two points for each drill weekend (which, times 12 months equals 24 points). If one fails to acquire the requisite 50 points in a year, that year will not count towards retirement and one would need to serve an additional year toward his or her 20 years. The amount of pay a retired guardsman or reservist will acquire depends upon rank and number of points received over the years.

Military retirement orders

When dividing military retirement, most practitioners will find guidance in a publication on the DFAS website.⁷ This helpful tool suggests there are basically four ways to divide an active duty award and provides suggested language to be included in a military retirement order (highlighted on the next page):



Jefferson H. West

The fixed award: **“The former spouse is awarded ___ percent [or dollar amount] of the member’s disposable military retired pay.”** The problem with this type of award is that it does not account for COLAs. Additionally, it does not account for changes in military pay. A fixed dollar amount for a captain in 2011 may be very different from a fixed dollar amount for a captain in 2022.

A formula award: **“The former spouse is awarded a percentage of the member’s disposable military retired pay, to be computed by multiplying 50% times a fraction, the numerator of which is ___ months of marriage during the member’s creditable military service, divided by the member’s total number of months of creditable military service.”** This award accounts for COLAs and changes in military pay. You must provide DFAS with the number of months of military service that were performed during the marriage. If you give DFAS the date of marriage and date of divorce, DFAS will not calculate the number of months of military service performed or fill in the blank for you. To avoid the necessity of a motion to clarify, it seems prudent to include the months of marriage that occurred during the creditable military service.

The hypothetical award: **“The former spouse is awarded ___% of the disposable military retired pay the member would have received had the member retired with a retired pay base of ___ and with ___ years of creditable service on ___.”** The hypothetical award does not give the former spouse the benefit of any of the pay increases or increased service time after the divorce. Reasonable minds can differ regarding whether the hypothetical award is more consistent with Idaho community property laws than the formula award. While it is true the higher rank is achieved after divorce, the foundation for that higher rank would not be possible without the community effort expended. The hypothetical award is intended to keep the former spouses award to retirement amounts at the time of the actual divorce. The hypothetical award does seem to provide a clean break as of the date of the divorce, but this is debatable.

A hypothetical award at the time retirement is paid: **“The former spouse is awarded ___% of the disposable military retired pay the member would have received had the member retired on his actual retirement date with the**

A fixed dollar amount for a captain in 2011 may be very different from a fixed dollar amount for a captain in 2022.

rank of ___ and with ___ years of creditable service.” This would keep the former spouse from receiving any benefit of rank achieved after divorce, but give the former spouse the benefit of inflationary changes to the amounts in the pay tables. Some may argue this method is the most consistent with Idaho community property law because it does not give the former spouse the benefit of subsequent rank advancement after divorce, but does give the former spouse increases for inflation at the rank actually achieved at retirement.

The language for the formula and hypothetical awards is different for a reservist or guardsman. The language for the fixed award for the reservist or guardsman retirement remains the same. Unlike the active duty formula and hypothetical awards, the reservist or guardsman formula and hypothetical awards require points to be specified, as opposed to number of months of service. Military members should have access to a point credit summary, which outlines points earned as a reservist or guardsman. Additionally, a service history outlines years that will be counted towards retirement and years that will not and how many total points have been earned during military service.

The helpful tool referenced before suggests the following language for a reservist or guardsman retirement: The formula award: **“The former spouse is awarded a percentage of the member’s disposable military retired pay, to be computed by multiplying 50% times a fraction, the numerator of which is ___ reserve retirement points earned during the period of the marriage, divided by the member’s total number of reserve retirement points earned.”**

The hypothetical award: **“The former spouse is awarded ___% of the disposable military retired pay the member would have received had the member become eligible to receive military retired pay with a retired pay base**

of ___ and with reserve retirement points on ___.”

A hypothetical award at the time retirement is paid: **“The former spouse is awarded ___% of the disposable military retired pay the member would have received had the member become eligible to receive retired pay on the date he [or she] attained age 60, with the rank of ___, with ___ reserve retirement points, and with ___ years of service for basic pay purposes.”**

TSP and retirement orders

Fortunately or unfortunately, the quest to find what else a former spouse may or may not be entitled to does not end with an analysis of a military service retirement. Military members also have the option to save for retirement through the Thrift Savings Plan (TSP). TSP is a contribution plan that is akin to a 401(k) plan and available to military servicemen and women as well as certain federal civilian employees. An order regarding the TSP must comport with the United States Code.⁸ Again, practitioners will find guidance in a publication that provides valuable information regarding sample language for a TSP retirement order.⁹ Essentially, there are three suggested ways to divide retirement from the TSP:

The fixed dollar amount: **“ORDERED: [payee’s name, Social Security number (SSN), and address] is awarded \$ ___ from the [civilian and/or uniformed services] Thrift Savings Plan account* of [participant’s name, SSN, and address].”**

The percentage award: **“ORDERED: [payee’s name, SSN, and address] is awarded ___% of the [civilian and/or uniformed services] Thrift Savings Plan account[s]* of [participant’s name, SSN, and address] as of [date].”**

The fraction award: **“ORDERED: [payee’s name, SSN, and address] is awarded [fraction] of the [civilian and/**

or uniformed services] Thrift Savings Plan account[s]* of [participant's name, SSN, and address] as of [date].”

Note that the suggested language requires social security numbers and addresses from both the payee and the participant spouse. Further, it requires the order to identify whether the money is to come from the civilian TSP, the uniformed services TSP, or both. A civilian TSP and a Uniformed TSP share the same account number. The TSP account number will also be required in the order.

If the military member is a guardsman or a reservist or has already achieved an active duty military retirement, the military member may also be a civilian employee. While civilian retirement is outside the scope of this article, it should be understood that federal civilian employees also have their own retirement system that is, in most cases, separate and apart from the military retirement system.

It seems likely, due to current circumstances of the economy, the current military retirement system will undergo changes. However, it is unclear how quickly those changes will occur or how broad those changes will be. What will likely not change is the complexity of mil-

itary retirement and the existence of those who believe they have more protections under the system than they actually have.

About the Author

Jefferson H. West is a graduate of the University of Idaho College of Law, he was an active duty JAG officer with the United States Air Force from 2001 to 2007. He continues to serve as a Category B Reservist with the United States Air Force Jag Corp and currently fulfills his reserve duties at the Mountain Home Air Force Base Legal Office in Mountain Home, Idaho. Jefferson is currently self-employed at Fletcher & West, LLP in Boi-

Again, practitioners will find guidance in a publication that provides valuable information regarding sample language for a TSP retirement order.

se, Idaho and his areas of practice focus primarily on family and criminal law.

Endnotes

- ¹ See 71 U.S.C. § 1408.
- ² See 55 U.S.C. §§ 1072(2)(F) and 1086(c)(3).
- ³ See 54 U.S.C. § 1062.
- ⁴ See 55 U.S.C. § 1072(2)(H).
- ⁵ See 55 U.S.C. § 1086a.
- ⁶ See 54 U.S.C. § 1062.
- ⁷ Available at <http://www.dfas.mil/dfas/garnishment/usfspa/attorneyinstructions.html>.
- ⁸ See 84 U.S.C. §§ 8435(c) and 8467. For additional information see 5 U.S.C. § 1653.
- ⁹ Available at <https://www.tsp.gov/PDF/formspubs/oc01-7.pdf>.

Do you have clients with **TAX PROBLEMS?**

Martelle, Bratton and Associates
represents clients with
Federal and State tax problems

- OFFERS IN COMPROMISE
- APPEALS
- BANKRUPTCY DISCHARGE
- INNOCENT SPOUSE
- INSTALLMENT PLANS
- PENALTY ABATEMENT
- TAX COURT REPRESENTATION
- TAX RETURN PREPARATION
- MORTGAGE MODIFICATIONS



Martelle, Bratton and Associates
208-938-8500
873 East State Street
Eagle, ID 83616
E-mail:attorney@martellelaw.com
www.martellelaw.com

IDAHO LEGAL STAFFING

Your legal staffing
resource for part-time and
full-time employees.

We are accepting applications and resumes from experienced paralegals and other professional office staff.

Contact Merrily Munther
or Mary Lou Brewton-Belveal
at (208) 344-4566
info@idaholegalstaffing.com

Mediation and Arbitration Services

D. Duff McKee

Practice limited to alternative dispute resolution services

Post Office Box 941
Boise, Idaho 83701

Telephone: (208) 381-0060
Facsimile: (208) 381-0083

Email: ddmckee@ddmckee.com

CHASAN



WALTON

ATTORNEYS AT LAW

PROFOUND INJURY CASES

FEE SPLIT ARRANGEMENTS

ANDREW M. CHASAN

*Martindale-Hubbell AV Rated
Past President, Idaho Trial Lawyers Association*

TIMOTHY C. WALTON

*Martindale-Hubbell AV Rated
Past President, Idaho Trial Lawyers Association*

208.345.3760

800.553.3760



1459 Tyrell Lane • PO Box 1069 • Boise, Idaho 83701

www.chasanwalton.com

andrew.chasan@chasanwalton.com • tim.walton@chasanwalton.com

COURT INFORMATION

OFFICIAL NOTICE SUPREME COURT OF IDAHO

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

2nd AMENDED - Regular Fall Terms for 2011

| | |
|--|--------------------------|
| Idaho Falls | August 23 and 24 |
| Pocatello | August 25 and 26 |
| Boise | August 31 |
| Boise | September 23 and 30 |
| Coeur d'Alene and Moscow Lewiston | September 26, 27, and 28 |
| Twin Falls | November 2, 3, and 4 |
| Boise | November 7, 9, and 30 |
| Boise | December 2, 5, 7, and 9 |

By Order of the Court
Stephen W. Kenyon, Clerk

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

OFFICIAL NOTICE COURT OF APPEALS OF IDAHO

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

2nd Amended - Regular Fall Terms for 2011

| | |
|-----------------|-------------------------------------|
| Boise | August 9, 11, 18 and 23 |
| Boise | September 8, 9, 12 and 13 |
| Boise | October 6, 11, and 18 20 |
| Boise | November 8, 10, 15, and 17 |

By Order of the Court
Stephen W. Kenyon, Clerk

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

Idaho Supreme Court Oral Argument for October 2011

Wednesday, October 12, 2011 – BOISE

10:00 a.m. In Re: Constitutionality of Idaho Legislative Reapportionment Plan of 2002 (2002 Plan L97) and of 2002 Congressional Reapportionment Plan.....#39127-2011

Oral Argument for November 2011

Wednesday, November 2, 2011 – TWIN FALLS

8:50 a.m. Habib Sadid v. Idaho State University.....#37563-2010
10:00 a.m. Thomas Weisel v. Beaver Springs Owners Assoc.#37800-2010
11:10 a.m. Maclay v. Real Estate Commission.....#37946-2010

Thursday, November 3, 2011 – TWIN FALLS

8:50 a.m. Paul Morrison v. Northwest Nazarene University#37850-2010
10:00 a.m. Gary Brown v. The Home Depot#38076-2010 (Industrial Commission)
11:10 a.m. Current v. Haddons Fencing, Inc.#37740-2010 (Industrial Commission)

Friday, November 4, 2011 – TWIN FALLS

8:50 a.m. County of Boise v. ICRMP.....#37861-2010
10:00 a.m. V. J. Magee v. Thompson Creek Mining#36352-2009 (Industrial Commission)
11:10 a.m. Farrell v. Whiteman#37712-2010

Monday, November 7, 2011 – BOISE

8:50 a.m. T. J. T., Inc. v. Ulysses Mori#37805-2010
10:00 a.m. Nava v. Rivas-Del Toro#37613-2010
11:10 a.m. Zinman v. Resler#37772-2010

Wednesday, November 9, 2011 – BOISE

8:50 a.m. State v. John Joseph Delling#36920/36921-2009
10:00 a.m. State v. Daniel Johnson#37758-2010
11:10 a.m. Isabel Enriquez v. Idaho Power Co.#37812-2010

Idaho Court of Appeals Oral Argument for October 2011

Thursday, October 6, 2011 – BOISE

10:30 a.m. Naranjo v. Dept. of Correction.....#37027-2009
1:30 p.m. State v. Decker.....#38104-2010

Tuesday, October 11, 2011 – BOISE

10:30 a.m. Graves v. Dept. of Transportation.....#38103-2010
1:30 p.m. State v. Ligon-Bruno.....#37847-2010

Tuesday, October 18, 2011 – BOISE

9:00 a.m. State v. Eateringer.....#38289-2010
10:30 a.m. State v. Voss.....#38366-2010
1:30 p.m. Wilkinson v. Dept. of Transportation.....#38335-2010

Idaho Supreme Court and Court of Appeals
NEW CASES ON APPEAL PENDING DECISION
(Updated 9/1/11)

CIVIL APPEALS

ADVERSE POSSESSION AND PRESCRIPTIVE EASEMENTS

1. Whether the district court erred when it determined an implied easement by necessity existed.

Machado v. Ryan
S.Ct. No. 37888
Supreme Court

ATTORNEY FEES AND COSTS

1. Did the court err by finding the arbitrator exceeded his authority in determining Blue Dog RV, Inc. was entitled to an award of attorney's fees incurred in the arbitration, and in denying Blue Dog RV those fees?

Blue Dog RV, Inc. v. Treaty Rock, Inc.
S.Ct. No. 37870
Court of Appeals

CONTRACT

1. Do the facts support the trial court's conclusion that an implied in fact contract existed requiring Zebe and Lawson to reimburse Clayson?

Clayson v. Zebe
S.Ct. No. 38471
Supreme Court

EVIDENCE

1. Did the district court err in denying O'Shea's motion for judgment notwithstanding the verdict?

O'Shea v. High Mark Development, LLC
S.Ct. No. 37869
Supreme Court

LIENS

1. Does a mortgage securing a loan whose proceeds are used entirely to fund the purchase of real property lose its purchase money status when the buyer/borrower pledges additional security?

Insight LLC v. Gunter
S.Ct. No. 38158
Supreme Court

POST-CONVICTION RELIEF

1. Did the district court err in denying Murphy's motion for appointment of counsel?

Murphy v. State
S.Ct. No. 37254
Court of Appeals

2. Did the court err in summarily dismissing Hannington's untimely petition?

Hannington v. State
S.Ct. No. 37621
Court of Appeals

3. Did the court err when it dismissed Elston's petition for post-conviction relief because the court failed to take proper judicial notice of the underlying case or improperly relied on the court's memory?

Elston v. State
S.Ct. No. 37895
Court of Appeals

4. Did the court err by dismissing two claims asserted in Olson's amended petition because they were dismissed for reasons other than those stated in the state's motion for summary dismissal?

Olson v. State
S.Ct. No. 38042
Court of Appeals

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

Watts v. State
S.Ct. No. 37748
Court of Appeals

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

Lash v. State
S.Ct. No. 37983
Court of Appeals

7. Did the court err in summarily dismissing Alvarez's successive motion for post-conviction relief?

Alvarez v. State
S.Ct. No. 37580
Court of Appeals

SUBSTANTIVE LAW

1. Whether a deed of trust conveying community property is void *ab initio* without the signature of one of the spouses.

New Phase Investments, LLC v. DAFCO, LLC
S.Ct. No. 38447
Supreme Court

2. Did the court err in finding the Director of Idaho Department of Health and Welfare had the authority to abolish the position of Regional Director in several regions?

Arambarri v. Armstrong
S.Ct. No. 38351
Supreme Court

SUMMARY JUDGMENT

1. Did the court err in granting summary judgment to Dixon and Blackfoot Medical Clinic by weighing the evidence, failing to give inferences to Doherty and refusing to consider Doherty's affidavit opposing summary judgment?

McCallister v. Dixon
S.Ct. No. 38196
Supreme Court

2. Did the court err in granting summary judgment to NIC on Johnson's Idaho Human Rights Claim?

Johnson v. North Idaho College
S.Ct. No. 38605
Supreme Court

3. Whether the district court erred in granting Hedstead summary judgment and in finding I.C. §§ 49-1610 and 49-1839 require the surety to have a judgment before paying bond claims.

Hedstead v. Western Surety Company
S.Ct. No. 38467
Supreme Court

TERMINATION OF PARENTAL RIGHTS

1. Did the court err by finding clear and convincing evidence that Jane Doe neglected her children as contemplated by I.C. § 16-1602(25)?

Dept. of Health & Welfare v. Doe (2011-14)
S.Ct. No. 38890/38906
Supreme Court

CRIMINAL APPEALS

DUE PROCESS

1. Was Marmentini deprived of his due process right to a fair trial by the prosecutor's misconduct during closing arguments?

State v. Marmentini
S.Ct. No. 38273
Court of Appeals

2. Did the prosecutor's comments during closing argument amount to fundamental error?

State v. Cavanaugh
S.Ct. No. 37705
Court of Appeals

EVIDENCE

1. Did the court abuse its discretion in finding relevant and in admitting testimony of statements made by Landon about committing a robbery?

State v. Landon
S.Ct. No. 37950
Court of Appeals

1. Did the court err in admitting testimony regarding unrelated bad acts by Hernandez?

State v. Hernandez
S.Ct. No. 38021
Court of Appeals

INSTRUCTIONS

1. Did the district court provide the jury with an erroneous "*falsus in uno, falsus in omnibus*" instruction that impermissibly restricted the jury's power to weigh the credibility of the witnesses and the evidence?

State v. Bedolla
S.Ct. No. 37537
Court of Appeals

**Idaho Supreme Court and Court of Appeals
NEW CASES ON APPEAL PENDING DECISION
(Updated 9/1/11)**

**SEARCH AND SEIZURE –
SUPPRESSION OF EVIDENCE**

1. Did the court err in denying Tincknell's motion to suppress evidence and by ruling his traffic stop was not impermissibly extended?

State v. Tincknell
S.Ct. No. 38165
Court of Appeals

2. Did the court err in denying Long's motion to suppress and in concluding the search warrant was supported by probable cause?

State v. Long
S.Ct. No. 38580
Court of Appeals

3. Did the court err in denying Gonzalez's motion to suppress and in finding the officer had probable cause to believe Gonzalez drove a car upon private property open to the public while under the influence of alcohol?

State v. Martinez-Gonzalez
S.Ct. No. 37737
Court of Appeals

4. Did the court err in denying Lott's motion to suppress because the search of her purse pursuant to the arrest of another person was not within the scope of searches incident to arrest pursuant to *Arizona v. Gant*?

State v. Lott
S.Ct. No. 36390
Court of Appeals

5. Did the court err in finding the stop of Jenkins' car was supported by reasonable, articulable suspicion and in denying Jenkins' motion to suppress the evidence found in her car?

State v. Jenkins
S.Ct. No. 38169
Court of Appeals

6. Did the district court err in granting Clark's motion to suppress evidence of his felony DUI?

State v. Clark
S.Ct. No. 38565
Court of Appeals

SENTENCE REVIEW

1. Did the court correctly interpret I.C. 19-2520G as requiring a mandatory minimum determinate sentence of fifteen years?

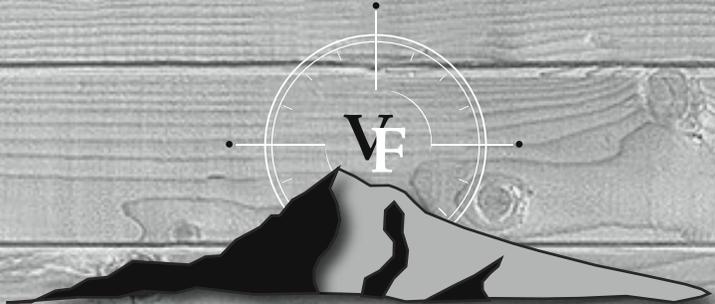
State v. Ephraim
S.Ct. No. 38284
Court of Appeals

SUBSTANTIVE LAW

1. Did the district court err in admitting Marsh's purported judgments of conviction because they were not properly certified or authenticated?

State v. Marsh
S.Ct. No. 37185
Court of Appeals

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



**VIALFOTHERINGHAM^{LLP}
LAWYERS**

Vial Fotheringham is your full-service homeowner association law center, providing education, representation, and litigation on behalf of associations. We are committed to proactive assistance by offering comprehensive education, training, and answers to HOA questions, in order to help associations navigate community life. For more info visit: www.vf-law.com

Now offering complimentary educational courses! Hosting informational lunches for professional association managers and training courses for HOA board members. Please join us!

12828 LaSalle St, Suite 101 Boise, ID 83713
Phone: 208.629.4567 Fax: 208.392.1400
Email: lawfirm@vf-law.com

**UNITED STATES DISTRICT AND BANKRUPTCY COURT
DISTRICT OF IDAHO
NOTICE
September 1, 2011**



TO: INTERESTED MEMBERS OF THE IDAHO STATE BAR

The Judges of the United States District and Bankruptcy Court for the District of Idaho intend to appoint a Lawyer Representative to serve on the Ninth Circuit Conference of the United States Courts for a three-year term to replace Alan Stephens. In addition to Alan Stephens, the District of Idaho's current Lawyer Representatives are Thomas High and Trudy Fouser. Debora Kristensen currently serves as Chair of the Ninth Circuit Lawyer Representative Coordinating Committee and Larry Westberg serves as a Ninth Circuit Appellate Lawyer Representative.

Effective November 1999, the Board of Judges adopted a Lawyer Representative Selection Plan, based upon current bar membership, which ensures state-wide representation. This plan calls for selection of lawyer representatives as follows: 2010 - 4th District; 2011 - 1st and 2nd District; 2012 - 4th District; 2013 - 6th and 7th District; 2014 - 3rd and 5th District; 2015 - repeat above.

Based upon the Plan, this year's lawyer representative must come from the 1st or 2nd District.

Applicants are required to:

1. Be a member in good standing of the Idaho State Bar and be involved in active trial and appellate practice for not less than 10 years, a substantial portion of which has been in the federal court system;
2. Be interested in the purpose and work of the Conference, which is to improve the administration of the federal courts, and be willing and able actively to contribute to that end;
3. Be willing to assist in implementing Conference programs with the local Bar;
4. Be willing to attend committee meetings and the annual Ninth Circuit Judicial Conference.

Reimbursement of actual expenses will be allowed for attending the Ninth Circuit Judicial Conference as well as the expenses to attend committee meetings and the Annual District Conference. Typical duties include: serving on court committees, making recommendations on the use of the Court's non-appropriated fund, developing curriculum for the District Conference, serving as the representative of the Bar to advance opinions and suggestions for improvement, and assisting the Court in the implementation of new programs or procedures. Any persons interested in such an appointment should submit a letter setting forth their experience and qualifications, **no later than November 1, 2011, to the following:**

Ms. Diane K. Minnich
Executive Director
Idaho State Bar
P. O. Box 895
Boise, Idaho 83701-0895

The Commission will then select six applicants for referral to the Judges of the United States District Court in Boise, Idaho, who will make the final selection by December 1, 2011, or as soon thereafter as possible.
DATED this 1st day of September, 2011.

B. Lynn Winmill, Chief Judge
United States District Court
District of Idaho



IDAHO LEGAL RESEARCH
Consulting & Services LLC

Let me go online for you!

With over 20 years of experience as a Research Specialist, I am an expert at online legal research.

I can find the information you need to achieve the best results for your client.

Quick, Efficient, Accurate & Affordable
If it's out there, I can find it!

Contact:

Teresa Zywicki, JD
Phone: (208)724-8817
Email: tzywicki@cableone.net
Web: idaholegalresearch.com



IDAHO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

I A C D L

STANDING TALL FOR THE ACCUSED

FOR THOSE WHO TAKE
CRIMINAL DEFENSE SERIOUSLY.

2011 REGIONAL SEMINARS

- OCTOBER 14 IN BOISE
- NOVEMBER 4 IN POCATELLO

Speakers include:

Chris Gauger from the San Francisco Public Defender's Office, Tom McCabe, Sara Thomas and Sarah Tompkins.

For More Information:
Contact IACDL

Executive Director Debi Presher
(208) 343-1000 or dpresher@nbmlaw.com

R. Bruce Owens
Attorney at Law

of the Firm,



OWENS & CRANDALL, PLLC

Admitted ID and WA

Association or fee split on Malpractice & other Serious Injury Cases
Mediation, Arbitration & ADR Services in a new office facility

Martindale-Hubbell AV rated
Named "Best Lawyers in America" since 1993
Named "Mountain States Super Lawyer" in 2010
Certified Civil Trial Specialist since 1995

208-667-8989
1-877-667-8989

8596 N. Wayne Dr., Suite A
Hayden, ID 83835

Email: bruce@cdaalawyer.com



TORF Environmental Management

Air, Waste Water, Storm Water
Soil, Groundwater, Waste

Environmental Litigation Support

Advice, Reports, Deposition & Testimony
Compliance Audits, Permits, Pollution Prevention
www.torf.us (208) 345-7222 mtorf@torf.us

**Know a Lawyer that needs help with
drugs/alcohol or mental health problems?**

Please contact the Lawyer Assistance Program for help.
www.SouthworthAssociates.net 800.386.1695

CONFIDENTIAL Toll free Crisis Line

24
HOUR **866.460.9014**
HOTLINE

Larry C. Hunter
*Idaho Delegate
to ABA House of Delegates*

The American Bar Association recently held its annual meeting in Ontario. That would be the Province of Ontario, Canada, in the city of Toronto, not the self-proclaimed onion capital of the world across the Snake River. Aside from the fact that Toronto is an international city of renown, there is an American nexus to Canada's largest city. The United States once conquered and occupied the city (it was a town then) during the War of 1812. Some Canadians like to remind us that it was us against them at that time, even though 200 years have passed. Actually we also torched the town, which may have given impetus to the British burning Washington, D.C. later in the war. Of course Washington was not much more than a town at the time either — just a fairly important town. Nonetheless, letting bygones be bygones, Toronto welcomed us and our devalued dollar to the city and we had a productive set of meetings.

At an ABA annual meeting the governance portion can accurately be divided into three sections (there are also multiple informative CLE programs and themed lunch meetings which I will not discuss). The three sections are: (1) the meeting of the House of Delegates to debate and vote on resolutions brought before it; (2) hearing presentations from visiting officials and special programs; and (3) election of officers which includes meetings of the nominating committees and hearing speeches from candidates and elected officers. I will briefly discuss all three of those areas.

There were 47 resolutions brought before the House during the two day session. Some were heavily debated either before or during the session.

Once such resolution that was heavily debated was a proposal by the National



Larry C. Hunter



Conference on Uniform Laws that an ABA-approved Uniform Collaborative Law Rule/Act be passed. Many of you already know what collaborative law is, but briefly it is a practice of dispute resolution in which two parties agree to try to resolve a dispute without litigation. It differs from mediation in that it is more structured, and it is different than arbitration in that no witnesses are called or formal evidence presented. The twist to the collaborative law technique is that if no resolution is reached, the attorney representing a party cannot represent the party in ensuing litigation. The reasoning behind that provision is that the attorneys for the parties are integral participants in the collaborative law process. The debate centered around that disqualification being a hindrance to the right a party has to choose its own attorney and the possibility of abuse of that disqualification on the disapproval side. On the approval side, the greater "access to justice" allowed by adopting the collaborative law technique was emphasized (collaborative law is used heavily in the domestic relations practice). Mention was made that collaborative law was already being utilized in numerous jurisdictions and at least three states had passed collaborative law statutes. Hence, it would not be the ABA adopting collaborative law but merely providing a

It would not be the ABA adopting collaborative law but merely providing a mechanism for its uniform utilization. In the end, the status quo held sway and the resolution was defeated.

mechanism for its uniform utilization. In the end, the status quo held sway and the resolution was defeated. It remains to be seen if the supporters will redraft the proposed legislation and try again.

Without deprecating the significance of the other 44 resolutions, I will report on only two other resolutions. The first was whether to allow Guam, the Northern Mariana Islands (NMI), and American

Samoa full representation in the House of Delegates. Previously Guam and the NMI shared a seat and American Samoa was unrepresented. The resolution passed and each now have one delegate in the House. Another resolution involved an issue that I was unaware of. Apparently, on law school (and perhaps other schools) admission applications, applicants check an ethnicity box showing them to be Native American when they are not in order to qualify for minority status in the application process. Therefore, a resolution was passed to urge ABA-approved law schools to include a heritage statement, tribal citizenship, or enrollment number for those who claim Native American heritage.

The second area was the presentation by guest speakers. At the opening ceremonies, we heard from the justice of the Canadian Supreme Court, Justice Stephen Breyer of the United States Supreme Court, and Stephen Zack, then President of the ABA. A common theme among the American speakers was the woeful lack of funding for state judicial systems. During the meeting itself, there were speeches from the incoming President, William T. (Bill) Robinson, III (this year's Bellwood lecturer at the University of Idaho) and the President-Elect Laurel Bellows. This year's honorees for the ABA Presidential

Medal were Ted Olson and David Boies, sterling examples of trial attorneys (the opposing counsel in the *Gore v. Bush* election case for example). They currently co-chair the ABA special commission on the preservation of the judiciary, so it is obvious what their remarks emphasized.

The program presented by the Committee on Issues of Importance to the Profession related to the ethics 20/20 committee which is examining emerging ethical issues relating to confidentiality as it relates to portable devices, outsourcing, both foreign and domestic, social networking in the client development work, and alternative law firm practice structures. This panoply of speakers presented a range of information which could fill many articles such as this.

The final element of the meeting was the election of officers. Briefly, the new President is William T. (Bill) Robinson, III from Kentucky. The President-Elect is Laurel Bellows of Illinois. The races for President-Elect nominee and Chair of the House are down to one candidate each from three. While the official election is in February, it is clear that Jim Silkenat of New York will be the President-Elect nominee and Bob Carlson of Montana will be the next Chairman of the House of Delegates. Both are friends of Idaho.

A resolution was passed to urge ABA-approved law schools to include a heritage statement, tribal citizenship, or enrollment number for those who claim Native American heritage.

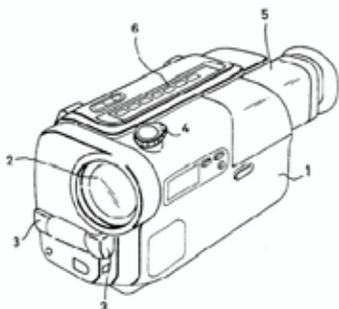
About the Author

Larry C. Hunter is a partner with *Moffatt, Thomas, Barrett, Rock and Fields in Boise*. His practice includes general and commercial litigation, administrative law, and alternative dispute resolution. He is a past president of the Idaho State Bar. He received his J.D. from Northwestern University School of Law. He has an A.B. from Harvard University (cum laude). Contact information for Larry is: (208) 345-2000, or lch@moffatt.com.

Dykas & Shaver LLP

"The day I made that statement, about the inventing the internet, I was tired because I'd been up all night inventing the Camcorder." - Al Gore

Comprehensive Protection for Your Intellectual Property



- . Patents
- . Trademarks
- . Trade Secrets
- . Copyrights
- . Licensing
- . Domain Names
- . Litigation

Dykaslaw.com

1403 W. Franklin - Boise, Idaho 83702

208-345-1122

ADR SERVICES MEDIATION • ARBITRATION • EVALUATION

JOHN MAGEL



**40 years' experience
Litigation & ADR
More than 850 mediations
jm@elambuke.com**

Elam & Burke

251 E. Front St., Ste. 300, P.O. Box 1539, Boise, ID 83701
Tel: 208-343-5454 • Fax: 208-384-5844
www.elamburke.com



FEDERAL COURT CORNER

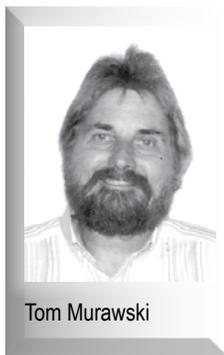
Tom Murawski
*United States District
and Bankruptcy Courts*

Judge Boyle Receives Distinguished Lawyer Award

Congratulations to U.S. Magistrate Judge Larry M. Boyle who is the recipient of the Idaho State Bar's 2011 Distinguished Lawyer Award. This honor recognizes attorneys who have distinguished themselves through exemplary conduct, professionalism, and years of dedicated service to the legal profession and the citizens of Idaho. Judge Boyle's legal career has spanned 39 years, including 25 years as a state and federal court judge. He has served as a state district court judge, a Justice of the Idaho Supreme Court and a United States Magistrate Judge. In addition to hearing federal court cases, Judge Boyle is a frequent instructor at the U.S. Department of Justice Advocacy Center and has taught the rule of law and American jurisprudence to judges in Azerbaijan, a former Soviet Union province. In addition, he has taught the rule of law, human and civil rights and other topics to prosecutors and judges in the Islamic Republic of Pakistan, and has also taught appellate and trial advocacy to law students in the Ukraine.

Dedication of Liberty Bell at United States Courthouse in Pocatello

Mission Accomplished! The official dedication ceremony celebrating the permanent placement of the Liberty Bell at the United States Courthouse in Pocatello was held on August 29. U.S. Ninth Circuit Court of Appeals Judge N. Randy Smith, U.S. Chief District



Tom Murawski

Judge B. Lynn Winmill, U.S. Bankruptcy Judge Jim D. Pappas and U.S. Magistrate Judge Larry M. Boyle presided over the ceremony, which was attended by approximately 300 people from the Pocatello community and included many dignitaries. This event was literally years in the making and signified the culmination of

much hard work and the tireless efforts of numerous patriotic Idahoans. Special thanks go to Lowell Hawkes, who was the driving force behind the project to move the Liberty Bell from its most recent site in Brady Park to the grounds of the U.S. Courthouse in Pocatello. Remarks were also made by Mike Sutton, past Grand Master of the Masonic Building Association, who actually owns the Liberty Bell. Jenni Scott then sang a moving rendition of "God Bless the USA," which was followed by the unveiling of the Dedication Rocks and the ringing of the Liberty Bell (in E-flat).

Idaho's NBA Wins Award for Outstanding Newsletter

The Idaho Chapter of the Federal Bar (FBA) was recently selected as a recipient of the Federal Bar Association's 2011 Outstanding Newsletter Recognition Award. President Keely Duke, accepted the award at the FBA National Convention in Chicago in September. Newsletters are judged by a national panel of lawyers on design, layout, content and relevance to its bar members. The Idaho Chapter's newsletter, called *Sidebar*, is the primary vehicle for reaching out to and communicating with its members. It provides practitioners with a quick and thorough glimpse of happenings in the federal courts in Idaho by listing federal court complaints filed in the district, summarizing trials in the district and their results, and summarizing recent significant Supreme Court and Ninth Circuit Court of Appeals decisions. Idaho FBA Executive Director Susie Headlee and Publisher Jackie Hildebrand were jointly commended for their outstanding efforts and contributions.

Annual District Conference - Federal Practice Program

The U.S. Courts Annual District Conference/Federal Practice Program is scheduled for Friday, Oct. 14 at the Best Western Inn in Coeur d'Alene and Friday, Nov. 4 at the Boise Centre. Please mark your calendars. We have an all-star line-up of all Idaho attorneys presenting a case from Commencement to Appeal. Registration fees remain \$75 for attorneys and \$35 for law clerks/law students/paralegals. See the Conference website at <http://www.id.uscourts.gov/DistConf2011/index.html> for additional information and registration form.

*The Idaho
Chapter's newsletter,
called Sidebar
provides practitioners
with a quick
and thorough
glimpse of
happenings in
the federal
courts in
Idaho.*

Criminal Justice Act (CJA) Panel

The United States District Court for the District of Idaho is currently accepting applications for positions on the Criminal Justice Act (CJA) Panel for appointment to indigent cases in the District of Idaho. Prospective Panel applicants must meet the following minimum criteria: be a member in good standing of the federal Bar of this District; have at least three years experience as a member of the Bar; have demonstrated experience in, and knowledge of the Federal Rules of Criminal Procedure, Federal Rules of Evidence, and Federal Sentencing Guidelines; be a registered participant in the District of Idaho's Electronic Case Filing System (ECF) and familiar with its procedures; and have eight hours of continuing legal education in the criminal and constitutional law areas every two years. A separate panel will be selected for the Southern, Central/Northern and Eastern divisions. An online application is available on the Court's website. The deadline is October 31, 2011.

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.



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

ETHICS & LAWYER DISCIPLINARY INVESTIGATION & PROCEEDINGS



hawleytroxell.com | 208.344.6000 | Boise · Hailey · Pocatello · Reno
HAWLEY TROXELL ENNIS & HAWLEY LLP

In the financial wilderness...

...ONE SOLUTION STANDS OUT FROM THE REST.

Trust & Investment Services

Send your clients to a local institution you can trust. With over 100 years of experience, our Trust & Investment Services* can offer your clients solid fiduciary and investment management solutions.

- Investment Management
- Trustee Appointments
- Estate Settlements
- Retirement Accounts
- Serving Idaho Statewide



Panhandle State Bank
and its locally operated divisions
Intermountain Community Bank
Magic Valley Bank

(208) 415-5705

Strong, Steady Trust & Investment Services to help you Prosper in Every Season.

*Trust & Investment Services is a Division of Panhandle State Bank. Its investments are not a deposit; not FDIC insured; not guaranteed by the bank; not insured by any federal government agency; and may lose value.

Huegli

Mediation & Arbitration

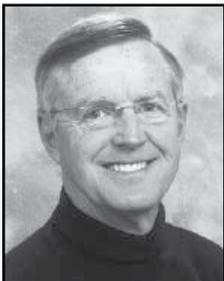
Serving Idaho, Oregon and Washington

Personal injury, commercial disputes, construction law, professional liability.

Available Statewide.

39 years litigation experience.

Martindale-Hubbell AV Rated.



James D. Huegli

1770 West State Street, Suite 267
Boise, ID 83702

Phone: (208) 631-2947

Fax: (208) 629-0462

Email: jameshuegli@yahoo.com

Web: www.hueglimediation.com

208.484.6309

www.QnAcourtreporting.com

realtimeQnA@msn.com



QnA Court Reporting, LLC

776 East Riverside Drive, Suite 200
Eagle, Idaho 83616

Questions and Answers...

in black and white.

"The spoken word perishes; the written word remains."



USING QUOTATIONS MARKS CORRECTLY

Tenielle Fordyce-Ruff
Rainey Law Office

This spring the blogosphere erupted into a debate on the correct placement of closing of quotation marks. I was enthralled. The great quotation mark debate of 2011 started when Ben Yagoda declared that we are witnessing a great paradigm shift in the use of quotations marks from the American style — placing commas and periods to the left of the quotation mark, colons and semi-colons to the right — to the British style — placing all punctuation marks to the right of the quotation mark. The motivation for this shift? Yagoda asserted that British style is simply more logical than the American style.

Well, the logic argument didn't sit well with some well-known grammarians. David Marsh argued that Mr. Yagoda oversimplified the British rule. According to Mr. Marsh, British rules are more complex than Mr. Yagoda would have us believe: punctuation placement depends on whether the quoted material is a complete unit. Another prominent grammarian, Carol Saller, picked up on this same point and asked if she was the only one who realized that the British rules were so complex. Nonetheless, Ms. Saller believes that reader expectations and consistency should determine which rules you should follow.

While we may be witnessing a great paradigm shift in the placement of commas, periods, and closing quotation marks, I agree with Ms. Saller. Our use of quotation marks should be consistent and take into account reader expectations. We write for American readers, educated in the American style, so we should follow the American rules when using quotation marks. With that in mind, I offer the following tips for correctly using quotation marks in your writing.

Closing quotation marks and other punctuation marks

Placement of quotation marks is a primary front in the battle between British and American usage of quotation marks. The first American rule is very simple.



Tenielle Fordyce-Ruff



Always place periods and commas to the left of (or inside) the closing quotation mark: “The right to collect rates or compensation for the use of water supplied to any county, city, or town, or water district, or the inhabitants thereof, is a franchise, and can not be exercised except by authority of and in the manner prescribed by law.”

The second American rule is also very simple. *Always* place semi-colons and colons to the right of (or outside) quotation marks. The Idaho Constitution declares that all men have “certain inalienable rights”: defending life and liberty, possessing property, pursuing happiness, and securing safety.

The third rule, however, is tricky. The placement of dashes, question marks and exclamation points depends on context. If the mark is part of the original quoted material, place it to the left of (or inside) the closing quotation mark. If the mark is not part of the original quotation, place it to the right of (or outside) the closing quotation mark.

These rules are simple, but they aren't enough to ensure that your writing is error free when it comes to quotations.

Correctly indicating quoted material

We writers must take care to quote a source's words exactly. Note that I said *source's* and *words*; don't use quotation marks for a single word unless that word is used in a special manner and never use quotation marks to emphasize your own words.

If you change the quoted material or omit part of the quoted material, indicate your changes and omissions to the reader. Do this through the use of ellipses and brackets.

Our use of quotation marks should be consistent and take into account reader expectations.

Changes

Sometimes, we need to change the material we quote. In most cases, we will change capitalization or verb tense for readability, or add information for clarity. You must tell the reader you've made such a change with brackets.

“For the purposes of all classification and administration of the laws of the state of Idaho, and all administrative orders and rules pertaining thereto, the breeding, raising, producing or marketing of [ratites and ratite products] by the producer shall be deemed an agricultural pursuit”

Omissions

You may wish to trim a quotation down or focus the reader's attention by removing some of the source's words. To indicate that you have omitted part of the original text, use an ellipsis. An ellipsis is three periods with spaces between them (. . .). It is used in place of the omitted word or words.

If you are omitting words from the middle of the sentence, keep any other

necessary punctuation marks, such as commas or semi-colons. For instance, "All men are by nature free and equal, and have certain inalienable rights, . . . acquiring, possessing and protecting property; pursuing happiness and securing safety."

If you are omitting words at the end of the sentence, replace the words with an ellipsis and then include the fourth period to punctuate the end of the sentence. Thus, there will be a space between the last word and the first period. If the omission is after the end of one sentence, place the period at the end of the sentence and then use the ellipsis. Thus, there will be no space between the last word and the first period.

The exercise and enjoyment of religious faith and worship shall forever be guaranteed; and no person shall be denied any civil or political right, privilege, or capacity on account of his religious opinions No person shall be required to attend or support any ministry or place of worship, religious sect or denomination, or pay tithes against his consent; nor shall any preference be given by law to any religious denomination or mode of worship. . . .

If the omission comes at the beginning of the sentence, the lower case letter tells your reader that you are not beginning your quotation at the beginning of a sentence, so you don't use an ellipsis.

Finally, if you are quoting a phrase or a clause, don't use an ellipsis before or after the quoted material. The government may confiscate firearms "actually used in the commission of a felony" as an exception to the right to bear arms.

Block Quotes

You have probably noticed that I set off one of my examples in the omissions section as a block quote. Quotations of 50 words or more should be set off as a block quote. (Use the word count function

If you are omitting words at the end of the sentence, replace the words with an ellipsis and then include the fourth period to punctuate the end of the sentence.

on your word processing program to save yourself the time it would take to count.) Don't use quotation marks around these quotes (unless you're appearing before a court that requires this). Instead, block quotes are single-spaced and indented on both the left and the right to indicate the quoted material to the reader.

Conclusion

I hope this has helped you better understand the American rules governing quotation marks and meet your readers' expectations for correct punctuation. I'm off to read some more fascinating grammar blogs. Hopefully I can find another great debate!

Sources

1. ANNE ENQUIST & LAUREL CURRIE OATES, *JUST WRITING: GRAMMAR, PUNCTUATION, AND STYLE FOR THE LEGAL WRITER*, 240-47 (3d ed. 2009).
2. DARBY DICKERSON, ASSOCIATION OF LEGAL WRITING DIRECTORS, *ALWD CITATION MANUAL: A PROFESSIONAL SYSTEM OF CITATION R. 49* at 351-355 (3d ed. 2006).
3. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 5 at 44-47 (Columbia Law Review Ass'n et als. eds., 17th ed. 2000).
4. BRYAN A. GARNER, *THE REDBOOK: A MANUAL ON LEGAL STYLE*, 31-34 (2d ed. 2006).
5. Carol Fisher Saller, "Logical Punctuation" and *Quotation Marks: In Defense of CMOS*, THE SUBVERSIVE COPY EDITOR

BLOG, May 25, 2011, <http://www.subversivecopyeditor.com/blog/2011/05/logical-punctuation-and-quotation-marks-in-defense-of-cmos.html>.

6. Ben Yagoda, *Logical Punctuation: Should We Start Placing Commas Outside Quotation Marks?*, SLATE, May 12, 2011, <http://www.slate.com/id/2293056/page-num/all/#p2>.

7. David Marsh, "The British Style"? "The American Way?" *They Are Not So Different*, GUARDIAN.CO.UK, May 19, 2011, <http://www.guardian.co.uk/media/mind-your-language/2011/may/19/mind-your-language-punctuation-quotations>.

The examples used in this essay were taken from the Idaho Constitution and Idaho Code § 25-3601.

About the Author

Tenielle Fordyce-Ruff is a partner at Rainey Law Office. Her practice focuses on civil appeals. She was a visiting professor at University of Oregon School of Law teaching Legal Research and Writing, Advanced Legal Research, and Intensive Legal Writing and, prior to that, clerked for Justice Roger Burdick of the Idaho Supreme Court. While clerking for Justice Burdick, she authored *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 tfr@rebeccaraineylaw.com.

Mediator/Arbitrator

W. Anthony (Tony) Park

- 36 years, civil litigator
- Former Idaho Attorney General
- Practice limited exclusively to ADR

P.O. Box 1776
Boise, ID 83701

Phone: (208) 345-7800
Fax: (208) 345-7894

E-Mail: tpark@thomaswilliamsllaw.com



Commercial Real Estate Needs?
I'm your Expert!
24 years local market experience

Debbie Martin SCORE
Commercial Real Estate Broker
Principal, DK Commercial
O. 208.955.1014 C. 208.850.5009
www.dkcommercial.com

ADVOCATES IN ACTION: BITTERSWEET CONCLUSION IN IRAQ

Stephen A. Stokes
Meyers Law Office, PLLC

I am writing this last column with a heavy heart but a jubilant soul. Our mission is complete, our time in Iraq has come to a close and the 116th Cavalry Brigade is coming home to family and friends. I am happy to redeploy, but it is hard to part with the friends and colleagues we made in Iraq. It is also hard to leave knowing that the U.S. mission in Iraq will be complete in four months and we will not be here to see it through. A small part of me wishes I could be here for the final U.S. tactical road march out of Iraq.

The 116th had a very successful tour. The process began two years ago when the 116th received its official deployment orders. The soldiers of the 116th immediately jumped to action. Pre-deployment training was planned and completed, the unit was restructured to meet mission needs, soldiers conducted specialized training to handle our unique mission, line units conducted extra gunnery training, and additional annual trainings were scheduled. After a lengthy and grueling train-up, in September 2010, the 116th traveled to Camp Shelby, Mississippi where it conducted additional pre-mobilization training. In November, the 116th conducted movement through Kuwait to Iraq. The 116th is now redeploying through Fort Lewis, Washington and we should be home by the end of September 2011.

Because of the nature of the 116th's mission, the unit was spread throughout Iraq. Two elements of the 116th – 3rd Squadron, Oregon National Guard and 163rd Infantry Battalion, Montana National Guard – were assigned as force protection units and escorted convoys in northern and southern Iraq, respectively. The 1-148 Field Artillery Regiment was assigned as the Rear Area Operations Command (RAOC) in the International Zone (formerly known as the Green Zone). The 1-148 RAOC successfully turned over the IZ to a Department of State entity, the Office of Security Cooperation-Iraq, on Aug. 1, 2011. The 116th BSTB was assigned as the Garrison Command at Camp Taji, a military post north of Baghdad. The 2nd



Stephen A. Stokes



At the Change of Command Ceremony, August 31, 2011: from left: CPT Steve Stokes; MAJ Paul Boice; MAJ Darren Ream; MAJ Mark H. Metcalfe (149th MEB Brigade Judge Advocate, Kentucky National Guard, the unit replacing the 116th).

Squadron was the Base Defense Operations Command at the Victory Base Complex (VBC) outside of Baghdad. Finally, the headquarters of the 116th was assigned as the Garrison Command of the VBC, a military installation as large as Fort Hood or Fort Bragg. MG Bernard Champoux, commander of the 25th Infantry Division, said he could not travel anywhere in Iraq without seeing the distinctive and beloved snake patch of the 116th.

At the VBC, the 116th was responsible for the well-being of the 35,000 personnel living and working on the VBC. However, the 116th's primary mission was to prepare the VBC for closure and turnover to the government of Iraq. We successfully closed and turned over three camps, Camp Slayer, Camp Striker and Camp Cropper. This doesn't sound like much, but these camps consisted of 90 million square feet of facilities and 34 acres of real property. We also developed drawdown plans for the remaining camps, Camp Victory, Camp East Liberty, Camp West Liberty and Camp Steeler, which will be turned over later this year. Come Dec. 1, 2011, the VBC will be completely closed and returned to the government of Iraq.

The 116th JAG team had a very successful deployment. As the Brigade's Contract/Fiscal Law, Administrative Law, and Legal Assistance attorney, I was involved in many actions critical to the success of the base closure and drawdown mission. I handled 399 terrain management actions, including preparing and executing land leases, preparing show cause notices for contractors and tenants in violation of U.S. military policy and serving vacation/eviction notices advising tenants when they would have to leave the VBC. In conjunction with CPT Chris Coy, a 25th

MG Bernard Champoux, commander of the 25th Infantry Division, said he could not travel anywhere in Iraq without seeing the distinctive and beloved snake patch of the 116th.

ID attorney, I developed a standard operating procedure for disposing of abandoned contractor personal property, which was adopted Iraq-wide and which will likely be used in Afghanistan as the United States draws down there. I reviewed 144 contract and acquisition packets for legal sufficiency, with a total value of over \$110 million. Finally, I helped over 600 soldiers work through legal issues in areas such as divorce, child support and estate planning.

MAJ Paul Boice, the Deputy Brigade Judge Advocate, was responsible for handling all military justice actions against soldiers as well as any civilian misconduct on VBC. In April 2011, MAJ Paul Boice was detailed as Trial Counsel by the 25th ID for a General Court Martial in the case of United States v. Carrasquillo. In the early morning hours of April 1, 2011, at Al Asad Airbase, Iraq, three U.S. soldiers robbed an Iraqi at gunpoint of over

\$384,000 U.S. Two of the soldiers were Military Police (MPs) with a New York National Guard unit that was set to leave Iraq the next day. MAJ Boice was assigned to prosecute one of the MPs, SPC Carrasquillo. A general court martial was convened and a trial was held on August 16-18.

The court martial required significant coordination and planning. Many of the Government witnesses had to be flown back to Iraq from the United States to testify. The victim was brought from Al Asad to the VBC and an interpreter was required at trial to enable the victim to testify. SPC Carrasquillo was found guilty of conspiracy to commit burglary, conspiracy to commit robbery, burglary and robbery. He was sentenced to 10 years confinement, total forfeiture of pay and allowances and a dishonorable discharge. MAJ Boice has been the 116th's trial counsel since 2004, and this trial and subsequent conviction were the highlight of his tour as trial counsel.

MAJ Darren Ream, as the Brigade Judge Advocate, was the lynchpin of our success. The JAG office expertly handled over 1,500 actions while in theater. He ensured that his team met and exceeded their duties, while also instilling a sense of camaraderie and teamwork. MAJ Ream worked hard to maintain good relations with the 25th Infantry Division JAG of-

fice and the United States Forces – Iraq legal team. MAJ Ream also successfully integrated his JAG officers into Brigade operations and ensured that we were used often at all levels of command. His steady hand and solid leadership ensured the success of the JAG mission, which was critical to the overall success of the 116th's mission in Iraq.

The successes of the 116th did not come without a cost. In addition to numerous injuries and casualties, the 116th lost two of its own. SPC Nicholas Newby and SGT Nathan Beyers were killed on July 7, 2011 when insurgents attacked their convoy with an improvised explosive device. Their ultimate sacrifice will not be forgotten.

Of course any successes we achieved on the battlefield could not have been possible without the unwavering love, support and dedication of our families. Military families are the unsung heroes. While soldiers are off in faraway places, military families are taking the kids to school, paying bills, and dealing with all of the minutiae of day-to-day life that becomes so much more difficult during a deployment. We would also like to thank our employers, Meyers Law Office in Pocatello, and the Ada County Highway District in Boise, for their constant support and sacrifice. We would like to again thank the rear JAG team, LTC David Dahle, LTC M.

His steady hand and solid leadership ensured the success of the JAG mission, which was critical to the overall success of the 116th's mission in Iraq.

Lynn Dunlap and MAJ(P) Laura Rainey, for their continued support during our deployment. Finally, special thanks to the members of the Idaho State Bar for supporting Idaho citizen soldiers and families during the mobilization. We'll see you soon. Sine Mora!

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, where he practices in the areas of family law, commercial planning, general litigation, and personal injury.

*** Fine print has its place.** Just not in a banking relationship. That's why we developed straight-forward, real-world banking solutions for legal professionals. Frankly, we work hard to understand some of the unique banking needs of law firms. Like how progress billing affects cash flow. Or the financial implications of professional partnerships. And, believe us, we're not just hurling platitudes or marketing slogans here. We've actually put a team in place with significant experience helping law firms both with their day-to-day banking needs as well as more complex transactions such as buying real estate. We even work closely with our attorney clients to better integrate their business and personal banking matters in a way that makes sense. It's only logical. Sorry, we're starting to ramble. And we're not even to the part about our competitive rates and stability (did we mention we have the highest capital ratio in Idaho?). Really, we should stop. But hopefully you understand what we're trying to say. If you don't or if you have questions about how we can help you, let's talk: call us at 208.332.0700 or visit www.westerncapitalbank.com. Thanks for reading.



For more information contact **Jeff Banks**
208.332.0718 | Jeff.Banks@westerncapitalbank.com



Ron Schilling

Alternative Dispute Resolution Services

ARBITRATION ❖ MEDIATION ❖ OTHER ADR SERVICES

- Over 28 years judicial experience
- Over 900 settlement conferences, mediations, and arbitrations conducted
- Extensive dispute resolution training including:
 - Harvard Law School Program of Instruction for Lawyers
 - Pepperdine School of Law Advanced Mediation
 - Northwest Institute Advanced Mediator's Forum
 - Annual ABA Dispute Resolution Section Conferences 2004, 2006 & 2008
 - ABA Section of Dispute Resolution Arbitration Training Institute 2009
 - Northwest Institute for Dispute Resolution 2010

Telephone: (208) 898-0338

P.O. Box 1251

Facsimile: (208) 898-9051

Meridian, ID 83680-1251

Email: adresolutions@cablone.net

CRIMINAL JURISDICTION IN INDIAN COUNTRY; COMPLICATED BY DESIGN, BUT NOT LAWLESS

A prosecutor in Indian Country responds to assertions published in the August issue of *The Advocate*

Douglas P. Payne
Benewah County Prosecutor

“Abandon all reason, ye who enter here,” read the sign over the door. The firm practiced law relating to Native Americans, or “Indian Law” as it is commonly known and indexed.

Despite the sign, I entered years ago, compelled to do so by my duty to prosecute all state-law crimes in a county much of which is concurrent with an Indian reservation. One-fourth of all Idaho counties are similarly situated. If you believe this subject does not pertain to you and you can afford to ignore it, you will likely soon learn as a lawyer — and as a citizen — you were mistaken.

I tried to avoid the topic myself, but one Indian law issue after another came up. At first the warning sign seemed to prove true. Indian law is inconsistent not only over time, but by subject, state and reservation. Researching it is a leap into a torrent of change, contradiction and seeming conflict with the most basic principles of constitutional law. To see the order in it, you must keep your head above water long enough to stop panic.

This article will focus only on criminal jurisdiction on Indian reservations in Idaho. It is one of the clearer and more stable areas of Indian law, although made murkier by a lot of misinformation being passed around about it.

The Foundations of Indian Country Jurisdiction

First, it is important to keep in mind that two governments can exercise authority in the same place at the same time, although usually over different subject matter. The United States and individual states are the obvious example. The main difference with the relationship between tribes and states is that they exercise authority over similar subject matter, but



Douglas P. Payne

That misrepresentation may contribute to lawlessness on reservations by non-tribal members who think they are in a jurisdictional void, but will be disappointed to find themselves in a county jail being prosecuted.

different *subjects*. That is, they have *personal jurisdiction* over different people.

The malaise, or at least the attempts to solve it can, of course, be blamed on congress. Congress’ only express authority relating to Indian Tribes is found in Art. I, Sec. 8, Clause 3 and Art. II, Sec. II, Clause 2 of the U.S. Constitution. The first says, “The Congress shall have the power...to regulate commerce with the Indian Tribes.” The second creates congressional treaty power. These limited powers however, through “creeping constitutionalism”¹ and a series of Supreme Court decisions, have become nearly absolute.² In short, Congress decides who has jurisdiction on Indian reservations.

The State of Idaho is primarily responsible for prosecuting non-Indians on reservations

In the August issue of *The Advocate*, Brian McClatchey, in-house counsel for the Coeur d’Alene Tribal Resort and Casino, makes the assertion that “the state has no jurisdiction” [on Indian reservations]. The issue raised by Mr. McClatchey is not merely the degree of federal power over the very existence of Indian reservations, but the claim that Idaho lacks general police power within them. That misrepresentation may contribute to lawlessness on reservations by non-tribal members who think they are in a jurisdictional void, but will be disappointed to find themselves in a county jail being prosecuted by a county prosecutor, just like they would be anywhere else in Idaho. The statement may contribute to a false and divisive impression that the majority of crimes committed against tribal members and complained of by Mr. McClatchey, are committed by non-members.

Mr. McClatchey wrote, “Beginning in the 1830s and continuing today, the Supreme Court has held that state laws generally do not apply on Indian reservations.” That might be true, if not overstated, be-

cause it is true state laws do not apply generally to *tribal members* on a reservation. The state only has jurisdiction over tribal members on a reservation for a few subjects, most notably the operation of motor vehicles on state roads.³ Mr. McClatchey never mentions that even on reservations states may prosecute non-Indians committing crimes against non-Indians,⁴ or that tribal criminal jurisdiction over non-tribal members has been completely abolished.⁵ Or more correctly stated, it never existed, at least not since tribes were subsumed by the United States.⁶

The Supreme Court has been clear, “State sovereignty does not end at a reservation’s border. Though tribes are often referred to as sovereign entities, it was ‘long ago’ that ‘the court departed from Chief Justice Marshall’s view that the laws of [a state] can have no force’ within reservation boundaries...it is now clear, ‘an Indian reservation is considered part of the territory of the State.’”⁷

The Supreme Court could scarcely be more to the point than in its conclusion in the famous *Oliphant* decision: “Indian tribes do not have inherent jurisdiction to try and to punish non-Indians.”⁸

Tribal criminal jurisdiction is structurally limited to tribal members

The functional result of the evolution of Indian law in Idaho is that within the boundaries of federally recognized Indian reservations, the respective tribe is primarily responsible for criminal prosecution of tribal members and states are primarily responsible for the prosecution of all other persons, each of these general rules being subject to exceptions.⁹

This dichotomous scheme seems awkward to most of us. How can two governments, neither subordinate to the other as states are to the United States, exist in the same territory at the same time? The idea is inapposite to the concept of sovereignty.¹⁰

For lawyers the key to conceptualizing it is as personal jurisdiction. On a reservation the state and tribe have primary jurisdiction in the same place over different persons. Which persons fundamentally depends upon whether or not the person has a right to vote and participate in the government exerting its power.¹¹

This issue has been at the root of Indian country jurisdiction (and our country) since the beginning. In 1883 before the Major Crimes Act the Court had to decide whether U.S. law applied to an Indian on a reservation without the specific direction of Congress.¹² A century later the reverse; whether tribal law applied to a non-member on a reservation.¹³ In each case jurisdiction was found not to exist because of the citizenship of the person; that in each case the U.S. and the tribe was attempting to extend its law, "over the members of a community separated by race [and] tradition...from the authority and power which seeks to impose upon them the restraints of an external and unknown code..."¹⁴

The problem is organic and asymmetrical. One-person/one-vote is a foundational assumption to equality and a necessary concomitant to our basic rights as Americans if not as human beings, and it applies to Indian tribes.¹⁵ Tribal members are state citizens with a right to vote in state and county elections. Non-tribal members, whether they live within a reservation boundary or not, have no vote in tribal matters because tribal membership is defined by race. Outside the unique circumstances of Native Americans such a system would never survive constitutional scrutiny.

The question posed by the Supreme Court is whether even Congress can ever constitutionally "subject United States citizens 'within our domestic borders to a sovereignty outside the basic structure of the constitution..."¹⁶

"Indians are within the geographical limits of the United States. The soil and people within these limits are under the political control of the Government of the United States, or of the States of the Union. There exist in the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they...exist in subordination to one or the other of these."¹⁷

"Protection of territory within its external political boundaries is, of course, as central to the sovereign interests of the United States as it is to any sovereign nation. But from the formation of the Union and adoption of the Bill of Rights, the United States has manifested an equally great solicitude that its citizens be protect-

ed by the United States from unwarranted intrusions into their personal liberty. By submitting to the overriding sovereignty of the United States, Indian tribes necessarily give up their power to try non-Indian citizens..."¹⁸

The *Oliphant* decision dealt with inherent jurisdiction thus leaving open the question of whether Congress could grant tribes full criminal jurisdiction. Some tribes, most obviously the Coeur d'Alene Tribe, are in the preliminary stages of a campaign to get Congress to do just that. Considering the longstanding doubt expressed by past and current justices, and the equal protection, due process and republican form of government clauses, (the analysis of which is too lengthy to address here), such would likely be found unconstitutional, at least with the current makeup of the Court.

A complex problem with no easy solution

Mr. McClatchey's solution to an invented non-tribal crime wave and the jurisdictional complexity of Indian reservations is to "authorize tribal justice systems to prosecute any offenders within the reservation..." He fails to recognize the diversity of the over 300 reservations, ranging from the Augustine Reservation in Riverside, California, abandoned for 50 years, which is one square mile in size with eight members and a casino; to the Navajo Nation, which at 27,000 square miles is the size of West Virginia (larger than 10 of the states), has 300,000 resident members and owns or controls over 99% of the land within its boundaries. One size fits all will never work in Indian law.

The Coeur d'Alene Reservation, of which Mr. McClatchey speaks, contains 523 square miles and had 1,066 resident members in 2009.¹⁹ But the tribe owns only one-fifth of the land within the reservation and the reservation has 5,500 non-tribal residents.²⁰ Mr. McClatchey's solution would ignore these facts and strip five-sixths of reservation citizens, because of their race, of their right to representative government and their most fundamental rights as Americans. The result would be not only a recipe for violence, (if not organized resistance to authority), but likely be found unconstitutional.

Conclusion

Reservations were originally diverse and have evolved more so. They no longer resemble each other or fit the oxymoronic dependent sovereignty analysis which defines them. Congress should consider a Native American 'new deal' which recognizes the reality of each reservation individually or in related groups ranging

perhaps from something that functions like statehood for the Navajo reservation (because the Navajo reservation is state-like) to something that looks more like joint property ownership for those small reservations that bear more resemblance to a family estate than a sovereign.

Somewhere in the middle are Idaho's reservations; medium sized, complex and offering opportunity for creative thinking toward a better way forward; one that provides representative government for Native Americans without taking it away from other Americans. But let there be no mistake, if you are a non-tribal member and you commit a crime on a reservation, expect the State of Idaho to come knocking' just like it has been for over a century.

About the Author

Douglas P. Payne received his B.A. from Adams State College of Colorado in 1982, J.D. from the University of Idaho in 1993, lives within the Coeur d'Alene reservation and Benewah County. He has been the elected Benewah County Prosecuting Attorney since 1996.

Endnotes

¹ Professor Philip P. Frickey, "A Common Law for Our

Age of Colonialism," 109 Yale L.J. 1, 82, (1999)

² See e.g. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978)

³ Idaho Code Section 67-5101 G., *State v. Ambro*, 123

P.3d 710, 142 Idaho 77, (Ct App 2005)

⁴ See, *United States v. McBratney*, 104 U.S. 621(1882)

⁵ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191

⁶ *Nevada v. Hicks*, 533 U.S. 353,(2001)

⁷ *United States v. Kagama*, 118 U.S. 375, 379(1886)

⁸ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978)

⁹ These exceptions are primarily found in the Major Crimes Act (18 USC 1152), Indian Country Crimes Act (18 USC 1153) and Idaho's acceptance of limited criminal jurisdiction, known as Public Law 280 jurisdiction (Idaho Code Section 67-5101). As a practical matter these laws have resulted in most tribal members being prosecuted in tribal court except for major felonies and traffic offenses; and most non-tribal members being prosecuted in state court, except when the victim is a tribal member.

¹⁰ See *United States v. Lara*, 541 U.S. 193, (2004) Justice Thomas concurring.

¹¹ *United States v. Lara*, 541 U.S. 193, (2004) Justice Kennedy concurring.

¹² *Ex Parte Crow Dog*, 109 U.S. 556(1883)

¹³ *Oliphant v. Suquamish Tribe*, 435 U.S. 191(1978)

¹⁴ *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 210(1978)

¹⁵ 25 U.S.C. 1302(8)

¹⁶ *United States v. Lara*, 541 U.S. 193, 212(2004)

¹⁷ *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 211(1978), *United States v. Kagama* 118 U.S. 375, 379(1886)

¹⁸ *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 210(1978)

¹⁹ Coeur d'Alene Tribe Community Report Fiscal Year 2009

²⁰ 2000 U.S. Census

IDAHO STATE BAR PRACTICE SECTIONS INVITE PARTICIPATION



David E. Kerrick



Brent T. Wilson



Kimbell D. Gourley



Linda Pall



Scott A. Gingras



Andrea L. Courtney



Michael S. Keim



Mark C. Peterson



Brian P. McClatchey



Scott D. Swanson



Zachary A. Pall



Kendal A. McDevitt



Ammon R. Hansen



Tracy V. Vance



Ronald G. Caron, Jr.



Andrew J. Waldera



Bradford S. Eidam



Richard A. Eppink

2010 - 2011 Idaho State Bar Section Chairpersons

The Idaho State Bar proudly sponsors 19 Practice Sections. Any member of the Bar is welcome to join Practice Sections, which are involved with many projects such as publications, Continuing Legal Education seminars, sponsoring an issue of *The Advocate*, and public service activities. Pictured here are the Section Chairs of the Governing Councils for all ISB Sections. To learn more about a Section please contact a Section Chairperson directly or ISB Deputy Director Mahmood Sheikh at (208) 334-4500.

Alternative Dispute Resolution

David E. Kerrick
davidkerrick@yahoo.com

Business and Corporate Law

Brent T. Wilson
bwilson@evanskeane.com

Commercial Law and Bankruptcy

Kimbell D. Gourley
kgourley@idalaw.com

Diversity Section

Linda Pall
lpall@moscow.com

Employment and Labor Law

Scott A. Gingras
sag@winstoncashatt.com

Environment and Natural Resources

Andrea L. Courtney
andrea.courtney@idwr.idaho.gov

Family Law

Linda Pall
lpall@moscow.com

Government and Public Sector Lawyers

Michael S. Keim
keims@dhw@idaho.gov

Health Law

Mark C. Peterson
mcp@moffatt.com

Indian Law

Brian P. McClatchey
bmclatchey@cdacasino.com

Intellectual Property Law Section

Scott D. Swanson
swanson@dykaslaw.com

International Law Section

Zachary A. Pall
pall@yu.edu

Litigation

Kendal A. McDevitt
kendal.mcdevitt@ag.idaho.gov

Professionalism and Ethics

Ammon R. Hansen
arhansen@hollandhart.com

Real Property

Tracy V. Vance
tvv@rmcos.com

Taxation, Probate and Trust Law

Ronald G. Caron, Jr.
roncaron@me.com

Water Law

Andrew J. Waldera
ajw@moffatt.com

Workers Compensation

Bradford S. Eidam
beidam@eidamlaw.com

Young Lawyers

Richard A. Eppink
ritchieppink@idaholegalaid.org

IN MEMORIAM

Robert "Mickey" Turnbow 1936 -2011

Robert "Mickey" Turnbow, 74, died August 27. He was counsel to some of Idaho's largest companies including Boise Cascade Corporation during its dramatic growth years. In that capacity he participated in its acquisition and financing transactions, including industrial revenue bond financing. Mickey was a member of the Idaho Law Foundation committees which prepared and sponsored revision and modernization of the Idaho Business Corporation Act in 1979 and the Idaho Limited Partnership Act in 1982. In 2010, Mickey celebrated 50 years of practicing law and was honored by the Idaho State Bar. He practiced business acquisitions and sales, corporate and commercial law, antitrust and trade regulation law.

He was raised in Kellogg and earned his J.D. from the University of Idaho College of Law. He then began his law practice with the firm of Richards, Haga



Robert "Mickey"
Turnbow

and Eberle, now known as Eberle, Berlin, Kading, Turnbow & McKlveen, Chtd.

Mickey was a dedicated conservationist. He was a founding member of Idaho Steelhead and Salmon Unlimited and provided the legal representation needed for its formation. For many years he served as a director and the editor of its newsletter.

Mickey's hobbies included watching sports, listening to jazz music, reading, playing the trumpet and last, but certainly not least, fishing with family and friends. He is survived by his sister Lynne Cummings of Kellogg, five sons, five grandchildren and seven great-grandchildren.

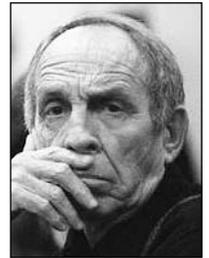
Jay Webb 1934 -2011

Former legislator and Boise city councilman Jay Webb died at age 76. He was a founding member in the firm now known as Givens Pursley, served as a prosecutor and also on the Northwest Power Planning Council. His life was the subject of a front-page feature article in *The Idaho Statesman*, which stated "Jay Webb was a man who believed in the practice of reason and civility in law, in politics and in life."

Jay was born in Idaho Falls and earned his J.D. from the University of Idaho Col-

lege of Law. He later worked for different firms and joined the military JAG Corps as a captain. In 1977, Webb and three colleagues founded what would become Givens Pursley. Webb and his partners hired Ed Miller, who told the *Statesman* that Jay was a great mentor: "He was like a lot of those old great lawyers at the time. He did everything," Miller said. "He was a good litigator as well as a good business and transaction lawyer. Frankly, he was more diverse than a lot of lawyers are today."

Jay was twice elected to the Idaho House of Representatives as a Republican, the first term in 1966. He was also once elected as a county prosecutor and also worked as a public defender. He was elected to the Boise City Council in 1985 and focused on city revitalization with special emphasis on the city's neighborhoods. He leaves behind his wife of 50 years, Mary Jane, and two adult children, Peter and Anna.



Jay Webb

David Kerrick

Mediation Conciliation Neutral Evaluation

1001 Blaine
PO Box 44
Caldwell, ID 83606
208-459-4574
208-459-4573 fax

www.davidkerrick.com

CLASSIFIEDS

EXPERT WITNESSES

MEDICAL/LEGAL CONSULTANT GASTROENTEROLOGY

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

EXPERT COMPUTER FORENSIC SOLUTIONS

Expert Computer Forensic Solutions, E-Discovery, and Expert Witness services available at competitive prices: fast, thorough and client friendly. We have never had an investigation thrown out of court! From cell phones and flash drives to multi-network RAID hard drives, we are a full service company. Data Recovery and First Responder services are available. www.ComputerForensicsAssociates.com Deleted data is recoverable. Call for a free initial consultation. (800) 685-1914 We make finding clients' resolution easier.

INSURANCE AND CLAIMS HANDLING

Consultation, testimony, mediation and arbitration in cases involving insurance or bad faith issues. Adjunct Professor Insurance Law; 25+years experience as attorney in cases for and against insurance companies; developed claims procedures for major insurance carriers. Irving "Buddy" Paul, Telephone: (208) 667-7990 or Email: bpaul@ewinganderson.com.

FORENSIC ENGINEERING EXPERT WITNESS

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

FORENSIC DOCUMENT EXAMINER

Retired document examiner and handwriting expert from the Eugene Police Department. Fully equipped laboratory. Board certified. Qualified in several State and Federal Courts. Contact James A. Green: (888) 485-0832. Visit our website at www.documentexaminer.info.

EXPERT WITNESSES

CONSULTANT/EXPERT WITNESS INSURANCE BAD FAITH CLAIMS

Call Dave Huss, JD, CPCU at phone: 425.776.7386 or email at dbhuss@hotmail.com. Former claims adjuster and defense attorney.

SERVICES

ARTHUR BERRY & COMPANY

Certified business appraiser with 30 years experience in all Idaho courts. Telephone:(208)336-8000.Website: www.arthurberry.com

PROCESS SERVERS

POWERSERVE OF IDAHO

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

LEGAL ETHICS

~ LEGAL ETHICS ~

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

OFFICE SPACE

CLASS A-FULL SERVICE DOWNTOWN BOISE

ALL inclusive—full service includes receptionist, IP Phones, Fiber Optic internet, mail service, conference rooms, coffee service, printer/fax/copy services, administrative services and concierge services. Parking is included! On site health club and showers also available. References from current tenant attorneys available upon request. Month-to-month lease. Join us on the 11th floor of the Key Financial Building in the heart of downtown Boise! Key Business Center. karen@keybusinesscenter.com; www.keybusinesscenter.com, (208) 947-5895. (Virtual offices also available).

TWO EXECUTIVE OFFICE SUITES

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

OFFICE SPACE

OFFICE SHARING

One large office available for lease on the first floor of Beautiful Old Victorian House within existing law firm in Coeur d'Alene, with secretarial desk available. Access too reception area, conference room, copier and fax. Cost is \$500.00 per month which includes internet and telephone. Courthouse is located across the street from office. Call Robert at (208) 664-2191 or by e-mail:brownjusth@cdaat-torneys.com.

EXECUTIVE OFFICE SUITES AT ST. MARY'S CROSSING 27TH & STATE Class A building. 1-3 Large offices and 2 Secretary stations. Includes: DSL, Receptionist/Administrative assistant, conference, copier/printer/scanner/fax, phone system with voicemail, basic office & kitchen supplies, free parking, janitor, utilities. Call Bob at (208) 344-9355 or by email at: drozdarl@drozdalaw.com.

CLASS "A" OFFICE SPACE

Plaza One Twenty One 121 N. 9th St., Ste. 300 One to four Class "A" offices available for lease within existing law firm, with secretarial cubicles also available. Flexible terms and menu of services. Call Thomas, Williams & Park, LLP, (208) 345-7800.

DOWNTOWN BOISE OFFICE SPACE

McCarty Building located at 9th & Idaho (202 N.9th) offices spaces for sale or lease. Single offices \$375 - \$450 or a full suite with multiple offices, reception, break room \$2,500/mo, full service including janitorial & security. Customer parking on street or in parking garages. For more information call Sue (208) 385-9325.

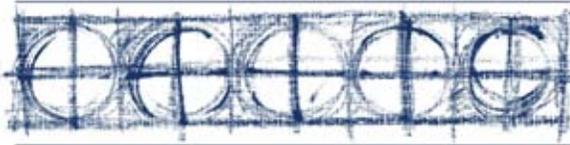
CLASS A OFFICE SPACE AVAILABLE

Class A office space available in the Chase building at 199 N. Capitol Blvd. 1800 square feet to be shared with 1 or 2 attorneys. Two premium offices available overlooking City Hall. Reception area, conference room, break room, secretarial space, copier with scanning ability, DSL, etc. Call (208) 336-4144.

POSITIONS

COUNTY PROSECUTING ATTORNEY

The Custer County Board of Commissioners seeks an attorney, licensed to practice in the State of Idaho, who is interested in being appointed as the Custer County Prosecuting Attorney. Please contact Mrs. Barbara Tierney, the Custer County Clerk and Recorder, for further information. Her contact information is: 801 E. Main Avenue, Challis, ID 83226. She can also be reached by telephone at : (208) 879-2360, or by email at: bbreedlove@co.custer.id.us.



IT TAKES MONEY TO MAKE CHANGE: WHY IOLTA REVENUE MATTERS

Carey Shoufler
Development Director
Idaho Law Foundation

In last month's issue of *The Advocate*, Jim Davis outlined some proposed rule changes to IOLTA, which, in the long run, are meant to stabilize IOLTA funding. The Idaho Law Foundation needs your help to ensure that we are able to carry out our core mission of helping the profession serve the public. It is also important to know who would be impacted by these proposed changes and how this issue relates to the national landscape. Consider:

- Two in three Americans do not know how many justices sit on the Supreme Court, only one in three can name even one Supreme Court Justice, and only one in 10 can name all nine Justices.
- Only one in four low-income Americans are able to access the help they need for their civil legal issues.
- In the last four years, IOLTA funds have dropped by nearly 50 percent and will drop by another 15 percent in the upcoming grant cycle.

As a nation we lack access to, and literacy of, our legal system. If we are not able to find ways to support programs that address these critical needs, our justice system risks becoming just a quaint idea of the past. These are tough challenges in our current economic environment. We've all had to learn to live with less.



Carey Shoufler

Of course, this is nothing new for the non-profit organizations supported by IOLTA funds. They learned how to do more with less a long time before our economy dropped off the cliff. At this point many of these organizations have gone from operating frugally to barely being able to carry out their core missions. Organizations like Idaho Legal Aid and Idaho Volunteer Lawyers Program and programs like the Law Related Education Program and the YMCA's Youth Govern-

ment Program heroically press ahead with their important work. If we are not able to stem the downward trend in resources, many of these organizations run the risk of falling short of their missions.

This is why it's important to support the rule changes for IOLTA. The vast majority of Idaho attorneys will not be impacted by the proposed changes, but the Idaho organizations that benefit from IOLTA funds will be. As you consider these changes, it's important to look at the work of some of IOLTA's programs and remember that, while the organizations supported by IOLTA funds may have different goals, all of them advance justice and the rule of law. Consider how these people are impacted by IOLTA.

• **Legal Services for the Disadvantaged:** Last year Idaho Volunteer Lawyers Program helped facilitate civil legal services in 728 cases, serving 1,700 people like Susan. Susan's daughter was suffering from abuse at the hands of a family member and a volunteer attorney recruited by IVLP was able to help Susan obtain a permanent protection order to stop visitation from the abusive family member when her daughter was present. Thanks in part to IOLTA funding, Susan and her daughter were able to get the legal assistance they needed. Imagine what life might have been like for this mother and daughter if IOLTA funds continue to decrease.

• **Law Related Education for the Public:** During the 2010 – 2011 school year, 100 teachers and attorneys partnered to teach over 2,500 Idaho students about the law and our legal system. One such pair was Cindy and Glenda who have partnered through the Lawyers in the Classroom Project for the last several years. Working together, Cindy and Glenda are able to foster positive attitudes among the students about law as a basis for a democratic society. Stable IOLTA funding can

help ensure that the next generation of Americans has adequate access to civic education.

• **Law School Scholarships:** Every year several University of Idaho College of Law students take unpaid summer positions in public interest law. One such student was Tiana who received a prestigious fellowship with the Harvard Legal Aid Bureau that provides pro bono legal service to low-income clients who otherwise could not afford legal representation. An IOLTA scholarship helped defer some of her costs.

Everywhere you look in our state, there are people whose lives have benefited from IOLTA funds. To ensure these positive impacts continue, the Law Foundation asks that you approve the IOLTA rule changes. That's the beauty of IOLTA. As an attorney you can have a significant impact on important and necessary community programs without paying a dime of your own money. Simply ensure Idaho's IOLTA trust money is placed in an account that optimizes interest by voting FOR rate comparability.

About the Author

Carey Shoufler has served as the Development Director for the Idaho Law Foundation for over six years. She also works to ensure the Foundation generates the necessary funding to fulfill its mission and goals, including developing both marketing and fundraising campaigns. As part of these efforts she oversees Idaho's IOLTA revenue enhancement efforts.

Prior to joining the Law Foundation, Carey was an independent communication consultant who helped clients develop marketing and funding strategies. She obtained her Bachelor's Degrees in English Literature and Spanish from Mills College in Oakland, California and her Master's Degree in Instructional and Performance Technology from Boise State University.

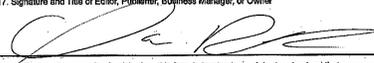
As you consider these changes, it's important to look at the work of some of IOLTA's programs.

STATEMENT OF OWNERSHIP

UNITED STATES POSTAL SERVICE® (All Periodicals Publications Except Requester Publications)
Statement of Ownership, Management, and Circulation

| | | | | | |
|--|--|--|--|--|--|
| 1. Publication Title The Advocate | | 2. Publication Number 0 5 1 5 _ 4 9 8 7 | | 3. Filing Date September 10, 2011 | |
| 4. Issue Frequency Monthly except July and December. | | 5. Number of Issues Published Annually 10 | | 6. Annual Subscription Price \$45.00 | |
| 7. Complete Mailing Address of Known Office of Publication (Not printer) (Street, city, county, state, and ZIP+4®) 525 West Jefferson Street, Boise, Ada County, ID 83702 | | | | Contact Person Dan Black Telephone (include area code) (208) 334-4500 | |
| 8. Complete Mailing Address of Headquarters or General Business Office of Publisher (Not printer) P.O. Box 895 Boise, ID 83701-0895 | | | | | |
| 9. Full Names and Complete Mailing Addresses of Publisher, Editor, and Managing Editor (Do not leave blank) Publisher (Name and complete mailing address) Idaho State Bar P.O. Box 895 Boise, ID 83701-0895 Editor (Name and complete mailing address) Dan Black, Idaho State Bar P.O. Box 895 Boise, ID 83701-0895 Managing Editor (Name and complete mailing address) Dan Black, Idaho State Bar P.O. Box 895 Boise, ID 83701-0895 | | | | | |
| 10. Owner (Do not leave blank. If the publication is owned by a corporation, give the name and address of the corporation immediately followed by the names and addresses of all stockholders owning or holding 1 percent or more of the total amount of stock. If not owned by a corporation, give the names and addresses of the individual owners. If owned by a partnership or other unincorporated firm, give its name and address as well as those of each individual owner. If the publication is published by a nonprofit organization, give its name and address.) Full Name Complete Mailing Address Idaho State Bar P.O. Box 895 Boise, ID 83701-0895 | | | | | |
| 11. Known Bondholders, Mortgagees, and Other Security Holders Owning or Holding 1 Percent or More of Total Amount of Bonds, Mortgages, or Other Securities. If none, check box <input checked="" type="checkbox"/> None Full Name Complete Mailing Address N/A | | | | | |
| 12. Tax Status (For completion by nonprofit organizations authorized to mail at nonprofit rates) (Check one) The purpose, function, and nonprofit status of this organization and the exempt status for federal income tax purposes: <input type="checkbox"/> Has Not Changed During Preceding 12 Months <input type="checkbox"/> Has Changed During Preceding 12 Months (Publisher must submit explanation of change with this statement) | | | | | |

PS Form 3526, September 2007 (Page 1 of 3 (Instructions Page 3)) PSN 7530-01-000-9031 **PRIVACY NOTICE:** See our privacy policy on www.usps.com

| | | | |
|---|--|---|---|
| 13. Publication Title The Advocate | | 14. Issue Date for Circulation Data Below September 2011 | |
| 15. Extent and Nature of Circulation | | Average No. Copies Each Issue During Preceding 12 Months | No. Copies of Single Issue Published Nearest to Filing Date |
| a. Total Number of Copies (Not press run) | | 5,700 | 5,700 |
| b. Paid Circulation (By Mail and Outside the Mail) | (1) Mailed Outside-County Paid Subscriptions Stated on PS Form 3541 (Include paid distribution above nominal rate, advertiser's proof copies, and exchange copies) | 3,478 | 3,495 |
| | (2) Mailed In-County Paid Subscriptions Stated on PS Form 3541 (Include paid distribution above nominal rate, advertiser's proof copies, and exchange copies) | 1,982 | 2,003 |
| | (3) Paid Distribution Outside the Mail, Including Sales Through Dealers and Carriers, Street Vendors, Counter Sales, and Other Paid Distribution Outside USPS® | -0- | -0- |
| | (4) Paid Distribution by Other Classes of Mail Through the USPS (e.g. First-Class Mail®) | -0- | -0- |
| c. Total Paid Distribution (Sum of 15b (1), (2), (3), and (4)) | | 5,460 | 5,498 |
| d. Free or Nominal Rate Distribution (By Mail and Outside the Mail) | (1) Free or Nominal Rate Outside-County Copies included on PS Form 3541 | 48 | 54 |
| | (2) Free or Nominal Rate In-County Copies Included on PS Form 3541 | 35 | 38 |
| | (3) Free or Nominal Rate Copies Mailed at Other Classes Through the USPS (e.g. First-Class Mail) | 25 | 25 |
| | (4) Free or Nominal Rate Distribution Outside the Mail (Carriers or other means) | 25 | 25 |
| e. Total Free or Nominal Rate Distribution (Sum of 15d (1), (2), (3) and (4)) | | 133 | 142 |
| f. Total Distribution (Sum of 15c and 15e) | | 5,593 | 5,640 |
| g. Copies not Distributed (See Instructions to Publishers #4 (page #3)) | | 107 | 60 |
| h. Total (Sum of 15f and g) | | 5,700 | 5,700 |
| i. Percent Paid (15c divided by 15f times 100) | | 97.62% | 97.48% |
| 16. Publication of Statement of Ownership <input checked="" type="checkbox"/> If the publication is a general publication, publication of this statement is required. Will be printed in the <u>October 2011</u> issue of this publication. <input type="checkbox"/> Publication not required. | | | |
| 17. Signature and Title of Editor, Publisher, Business Manager, or Owner  | | | Date September 16, 2011 |

I certify that all information furnished on this form is true and complete. I understand that anyone who furnishes false or misleading information on this form or who omits material or information requested on the form may be subject to criminal sanctions (including fines and imprisonment) and/or civil sanctions (including civil penalties).

PS Form 3526, September 2007 (Page 2 of 3)

Idaho Partners Against Domestic Violence and the Fourth District Bar Association invite you to

Grapes Against Wrath

Thursday, October 13th 6:00 p.m. to 8:30 p.m.

Barber Park Event Center 4049 S. Eckert Rd.
\$40 per person in advance \$50 per person at the door
 Featuring fine wines coordinated by the Boise Co-Op Wine Shop
 Appetizers by Metro Gourmet • Jazz by Steve Eaton
 All proceeds benefit victims of violence served by
 Idaho Coalition Against Sexual & Domestic Violence,
 FACES, Idaho Legal Aid Services and Idaho Volunteer Lawyers Program

Visit our website to purchase tickets
www.idahopartners.org
 Call 384-0419 ext. 308 for any questions.

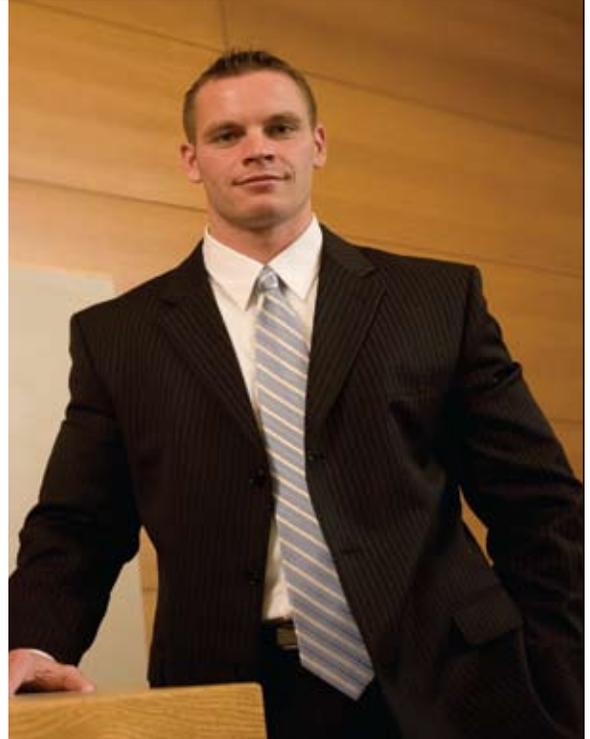
A wine tasting & social affair that makes a difference

40%

40% of Eide Bailly's forensic accounting work involves fraud investigations.



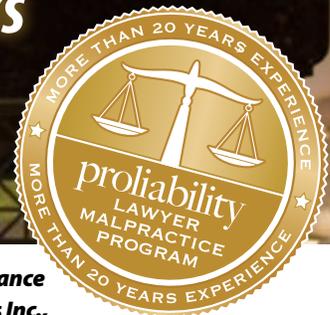
FORENSIC ACCOUNTING
& INVESTIGATIVE SERVICES



208.424.3510 | www.eidebailly.com

» Proliability Lawyer Malpractice Program: Administered by Marsh U.S. Consumer, a service of Seabury & Smith, Inc.

Your practice doesn't face the *same risks* as a big law firm with hundreds of attorneys. So why pay for a malpractice plan that's focusing on those big firms?



According to statistics, 78% of attorneys are in a solo practice or a firm with just two to five lawyers.

Yet many malpractice insurance companies would rather focus on bigger firms with hundreds of attorneys ... leaving smaller firms with off-the-shelf plans that simply don't fit their real-world risk.

Now you can set up reliable protection that's tailored to your firm with the Proliability Lawyer Malpractice Program.

Underwritten by:
Liberty Insurance Underwriters Inc.
55 Water Street, New York, New York 10041
May not be available in all states. Pending underwriter approval.

AR Ins. Lic. #245544 CA Ins. Lic. #0633005
d/b/a in CA Seabury & Smith Insurance Program Management
51604, 51605, 51606, 51607, 51608, 51609, 51610, 51611
©Seabury & Smith, Inc. 2011

MARSH

Liberty Insurance Underwriters Inc.,
a member company of
**Liberty Mutual Group. Liberty is rated
A (Excellent) by A.M. Best Company.**

To obtain your customized quote, contact:

1-800-574-7444

Denise Forsman
Client Executive—Professional Liability
www.proliability.com/lawyer

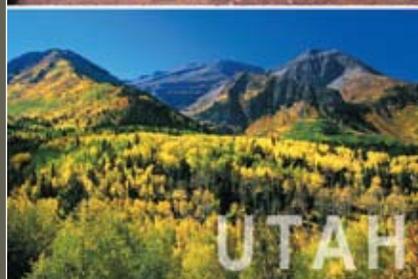
HEALTHY GROWTH.



In light of health care reform, an LLM in Health Law can prepare you to expand your legal practice, and only Loyola offers you an innovative program—**entirely online**. This nationally ranked curriculum is designed to expand your knowledge, and prepare you for new opportunities ahead.



Educating the Health Law Leaders of Tomorrow. • LUC.edu/healthlawllm • 800-424-3986



Sage



FORENSIC ACCOUNTING

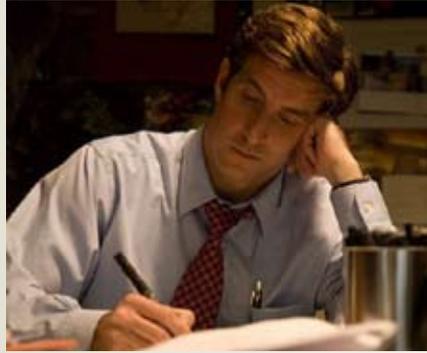
What is forensic accounting?

Forensic accounting is the integration of accounting, auditing and investigative skills either in anticipation of legal proceedings or for use in a court of law.

Sage Forensic Accounting is one of the largest firms of its kind in the intermountain west. Our professionals are highly trained and equally comfortable testifying in a court of law or digging through deleted accounting files to piece together the real story of a business's operations.

To see how Sage can help you, visit our website:

www.sagefa.com



Introducing the New and Improved
FAMILY LAW HANDBOOK

with its searchable index!!!

PLUS

REPRESENTING CHILDREN IN CHILD PROTECTION CASES CLE

Friday, October 14, 2011
Boise
Owyhee Plaza
1109 West Main Street

Friday, October 21, 2011
Idaho Falls
Hilton Garden Inn
700 Lindsay Blvd.

Friday, October 28, 2011
Coeur d'Alene
Hampton Inn & Suites
1500 West Riverstone Drive

9:00 a.m. - 4:30 p.m.

6.25 hours CLE RAC approved

Speakers include:

- **Stanley W. Welsh:** *Valuation and Division of Retirement Plans at Divorce in Idaho plus an added bonus of QDRO drafting instructions*
- **Mary S. Huneycutt:** *Trying to Fit a Square Peg into a Round Hole? Applying Idaho Rules of Evidence & Procedure to Child Custody Evaluations*
- **James A. Bevis:** *Spousal Maintenance Child Protection Law for Private Attorneys*
- **Elizabeth B. Brandt:** *Protection Law for Private Attorneys*

Registration: (Includes 6.25 CLE credits, Family Law Handbook - hardcopy and CD, and lunch.)

Early Bird (through Sept. 30)

- \$225 - Family Law Section Members
- \$240 - Non Family Law Section Members

Standard Registration

- \$250 - Family Law Section Members
- \$275 - Non Family Law Section Members

Register on the ISB website: www.isb.idaho.gov

The Family Law Section





SIMMONS

COURT REPORTERS, INC.

“WHEN QUALITY COUNTS”

- Certified Realtime Reporters
- Reporters specializing in complex medical and construction litigation
- Competitive rates
- Quick turnaround
- 24/7 access available to all transcripts and exhibits through our online repository
- Complimentary E-Transcript with every transcript order
- Exhibits available digitally and/or in hard copy format
- Complimentary full-service conference rooms available in both downtown Boise and Eagle



AMY E. SIMMONS

CSR No. 685, RPR, CRR

amy@simmonsreporters.com

PROFESSIONAL
RELIABLE
ACCURATE

702 West Idaho Street, Suite 1100

Boise, ID 83702

Phone: (208)392-1710

Fax: (208)392-1711

www.SimmonsReporters.com



EnCase®
Certified Examiners



CusterAgency

208.562.0200

custeragency.com



COMPUTER FORENSICS & INFORMATION SECURITY

- Forensic Imaging
- Data Analysis
- Expert Testimony
- E-Discovery
- Data Security
- Penetration Testing
- Risk Assessments
- Incident Response



Severe injuries can be scary.

We can help you help your client.

Now accepting referrals.

**Personal Injury
Workers' Compensation
Employment Law**

The best way to help your client may be a referral to an attorney who has a track record of success in severe personal injury and workers' compensation cases.

SEINIGER

LAW OFFICES

BRECK SEINIGER
www.SeinigerLaw.com
wbs@SeinigerLaw.com



Breck Seiniger has been selected for "The Best Lawyers in America" – "Mountain States SuperLawyers" – AV Rating

(208) 345-1000 • 942 W. Myrtle St. • Boise, Idaho 83702