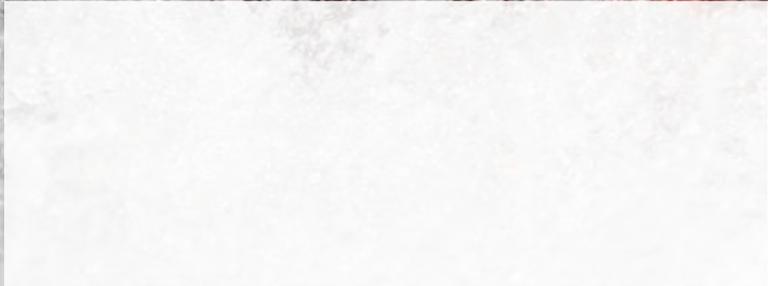


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Official Publication  
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Volume 54, No. 9  
September 2011

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## Section Sponsor

This issue of *The Advocate* is sponsored by the Business & Corporate Law Section.

## Editors

Special thanks to the August editorial team: Sara M. Berry, Jennifer M. Schindele and Dan Gordon.

## Letters to the Editor

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

## On the Cover

The photographer is Chris Nye, a partner at White, Peterson, Gigray, Rossman, Nye & Nichols, P.A., in Nampa. The cover shot and those below were taken near Cascade during a world-class competition earlier this year. They show a kayaker facing upstream as the water flows from left to right. The series below shows the stages of the trick just above the rapids. The cover shows the kayaker immediately after doing a "loop." Chris explained: "Imagine surfing a wave - in the ocean the wave is moving and the surfer surfs down the wave (using gravity). On a river, the wave is stationary so the kayaker, facing upstream, is surfing down an endless wave, just before the curl. The trick is called a loop — the kayaker surfs down the wave and buries the nose of the kayak into the oncoming water — the kayak nose goes under and the kayak goes up and the kayaker tucks forward and more or less does a somersault landing back in the wave."

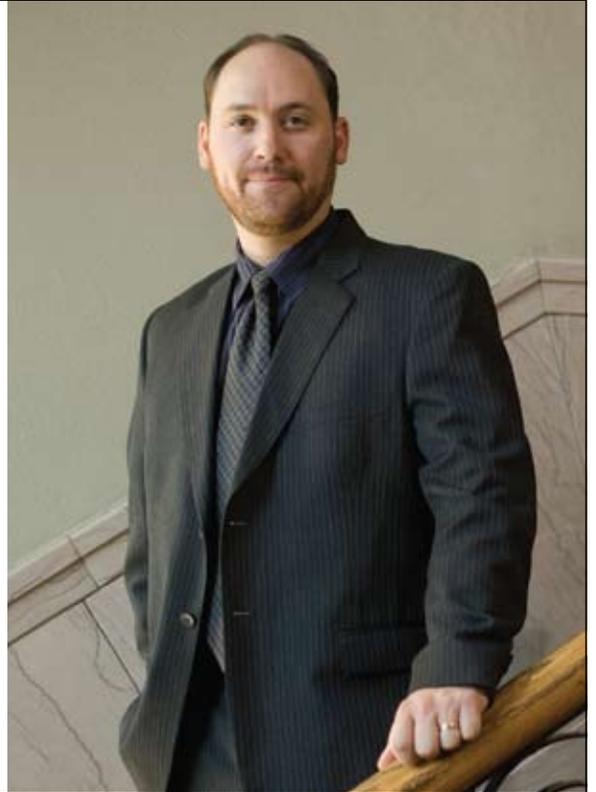


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### ADVOCATE STAFF

Dan Black

Managing Editor

[dblack@isb.idaho.gov](mailto:dblack@isb.idaho.gov)

Bob Strauser

Senior Production Editor

Advertising Coordinator

[rstrauser@isb.idaho.gov](mailto:rstrauser@isb.idaho.gov)

Kyme Graziano

Member Services Assistant

LRs Coordinator

[kgraziano@isb.idaho.gov](mailto:kgraziano@isb.idaho.gov)

[www.idaho.gov/isb](http://www.idaho.gov/isb)

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## September

### September 9-10

#### *Annual Advanced Estate Planning Seminar*

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Sun Valley Resort, Sun Valley, ID  
9.0 CLE credits of which 1.0 is ethics

### September 26

#### *Ethical Considerations in Starting and Sustaining a Solo or Small Group Practice*

Sponsored by the Idaho Law Foundation  
Telephonic Conferencing  
12:30 – 1:15 p.m. (MDT)  
.75 CLE credits of which .75 is ethics

### September 29

#### *CLE Program Replays*

Sponsored by the Idaho Law Foundation  
Law Center, Boise, ID  
1:00 – 4:45 p.m. (MDT)  
3.5 CLE credits of which 2.0 is ethics – RAC

### September 30

#### *Idaho Practical Skills*

Sponsored by the Idaho Law Foundation  
Boise Centre, Boise, ID  
8:00 a.m. – 3:30 p.m. (MDT)  
6.0 CLE credits of which 1.0 is ethics – RAC

## 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 (cont'd)

### 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: Lunch and a Video*

Sponsored by the Idaho Law Foundation  
11:15 a.m. – 1:30 p.m. (Local time)  
2.0 CLE credits  
Boise – Law Center  
Grangeville – Super 8 Motel  
Mountain Home – City Hall  
Preston – Franklin County Courthouse  
Silver Valley – Health and Education Center  
(Smelterville)

### 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

\*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.  
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### MENTOR INSPIRED A YOUNG LAWYER TO STAND UP FOR HIMSELF

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

As I write this article we have completed the Bar's Annual Meeting. We honored four lawyers as being "Distinguished Lawyers": Judge Larry M. Boyle, L. Lamont Jones, John Evan Robertson, and Richard Wayne Sweney. I thought the Annual Meeting was a great success. It is great to see the accomplishments of lawyers. We have changed the world and continue to change the world for good, despite what some media reports might suggest. Just the achievements of these Distinguished Lawyers tell each of us that we make a difference.

We have also lost, in recent months, some former Distinguished Lawyer recipients and some lawyers who were certainly distinguished lawyers, but had not actually received the award. I did not know Jack Barrett or Carl Burke very well. I never had the pleasure of meeting Gene Miller, but had heard great things about him. John Hepworth, I knew and it is his influence that leads me to this article.

When I was a young lawyer, I had a deposition with John Hepworth. My supervising attorney, at the time, who is now my partner, Gary Cooper, told me I needed to go to Tacoma, Washington, to do a deposition of an eye witness to an accident that happened near Castelford. I may have had a week advanced notice of the deposition, but it may have been shorter than that. All I knew was I had been out of law school for less than a year and John Hepworth was taking the deposition and it may be used in lieu of trial testimony. I knew that I could really screw things up and John Hepworth was a really, really, good lawyer. I was scared, well actually, I thought I would wet my pants and jeopardize the case.



Reed W. Larsen

I read the witness statement given to the investigating officer and I talked to the witness over the phone. I was basically prepared. The deposition was at the witnesses' house in Tacoma about 25 miles from the airport. I rented a car and arrived about 20 minutes before the deposition. About 5 minutes before the deposition was to start a cab pulled up and Mr. Hepworth got out. We had a cordial conversation. I told him I went to law school with his son Jeff and basically tried to establish some rapport. John complained about the distance from the airport and the cab ride. So I offered him a ride to the airport when the deposition was done. He thought that was a great idea and the witness whose kitchen we were in took in the entire conversation.

As the deposition progressed, John asked some questions and the witness was helping my case and not really helping John. John didn't give up. He came at this witness from 5 or 6 different angles. At some point I had the thought, be it ever so delayed that I might want to object to the questions as they had been asked and answered. Of course, I didn't get my objection out very well and it interrupted John's flow. We had one of those moments that happen in a deposition from time to time where you feel like you have to stand up for yourself and I did. It got a little heated and I knew I was over matched. The witness, who could tell that I was easily over matched at that point determined it was time to intervene on my behalf. As I remember it he said: "Mr. Hepworth, apparently you don't remember who is taking you back to the airport." The court reporter broke out laughing and it was enough to defuse the situation. John and I completed the deposition.

On the ride to the airport, John complimented me for doing a good job in the deposition. I was amazed!! I cherished the positive feedback. I told him I was a little intimidated by his skills and reputation as a trial lawyer. I also told him that as a fifth grader I had a basketball coach who was just a little mean guy who demanded you play hard and stand up for yourself. Once you stood up and had confidence he was a great guy and a great coach. My fifth grade coach was also a Golden Gloves boxer which was pretty scary to a little

"Each time a man stands up for an ideal, or acts to improve the lot of others, or strikes out against injustice, he sends forth a tiny ripple of hope . . . and crossing each other from a million different centers of energy and daring those ripples build a current that can sweep down the mightiest walls of oppression and resistance."

- Robert F. Kennedy

kid. I then asked John if he was by chance related to Merlie Hepworth, my fifth grade basketball coach. I told him they looked a lot alike. John then told me that Merlie was his brother.

Over the years I had a number of cases with John Hepworth. I learned a lot from watching and listening to him. I am a better lawyer for that association. In strange ways as a young boy and as a young lawyer I was mentored by two brothers who could have never known their paths would cross in the life of another lawyer. I never really got to properly tell either Merlie or John thanks for being a positive influence and demanding a good fight. I hope this helps Charlie and Jeff realize the scope of influence their father has had in just some of the small ways that make a big difference.

Mentoring is not about a program. It is about a spirit. It is about an example. Let us try to catch that spirit and continue to do some good in the world.

#### About the Author

**Reed W. Larsen** is a founding partner at Cooper & Larsen in Pocatello. 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.



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## THOMAS G. MAILE IV (Suspension)

On July 28, 2011, the Idaho Supreme Court issued a Disciplinary Order suspending Eagle attorney Thomas G. Maile IV from the practice of law for a period of six (6) months based on professional misconduct. The Idaho Supreme Court found that Mr. Maile violated Idaho Rules of Professional Conduct (“I.R.P.C.”) (effective through 6-30-04) 1.7(a) [A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless the lawyer reasonably believes the representation will not adversely affect the relationship with the other client and each client consents after consultation], 1.7(b) [A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s own interests, unless the lawyer reasonably believes the representation will not be adversely affected and the client consents after consultation], and 1.9 [A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the lawyer reasonable believes the representation will not be adversely affected and the former client consents after consultation]. The Court also ordered Mr. Maile to reimburse the Idaho State Bar (“ISB”) its costs incurred in investigating and prosecuting this matter.

The Idaho Supreme Court’s Disciplinary Order followed a hearing before the Professional Conduct Board (“PCB”) in an ISB formal charge disciplinary proceeding in which the PCB found clear and convincing evidence that Mr. Maile violated the Idaho Rules of Professional Conduct set forth above. The misconduct stems from a conflict of interest arising from Mr. Maile’s long term representation of Theodore L. Johnson (“Ted”) and his subsequent purchase of real property belonging to Ted.

Mr. Maile represented Ted from approximately 1992 to 2002, when Ted passed away at the age of 78. In 1997, Ted executed a Revocable Trust Agreement and created the Theodore L. Johnson Revocable Trust (“Trust”), which Mr. Maile prepared. The Trust designated Ted as the trustee and his niece Beth and her husband as co-successor trustees. Ted’s three nephews, the Taylors, were resid-

ual beneficiaries of the Trust. The Trust owned forty acres of undeveloped property on Linder Road in Ada County, Idaho (“the Property”).

In May 2002, Ted received an unsolicited offer from F.W. to purchase the Property for \$400,000. Ted thereafter met with Mr. Maile to review the terms of the offer. Ted informed Mr. Maile that the offer was for the same property that Maile had previously indicated he was interested in buying, and asked Mr. Maile if he was still interested. Mr. Maile confirmed that he was still interested in purchasing the Property and asked Ted whether that interest caused Ted any difficulty in having him review the F.W. offer. Ted responded that it did not and that he was not aware of the Property’s fair market value.

Mr. Maile thereafter contacted Ted’s accountant to discuss the tax implications of the offer on the Property. The accountant indicated that the \$400,000 offer might be too low and referenced another of her client’s sale of forty acres of undeveloped land in the area for \$850,000 in 1996. In June 2002, Mr. Maile wrote a letter to F.W.’s attorney stating that based upon comparable values in the area, he and Ted believed the offer was “extremely low.” F.W.’s offer expired on June 20, 2002, without being accepted or a counteroffer being made.

In late July 2002, Ted showed up at Mr. Maile’s office unannounced with a recent appraisal that appraised the Property’s current value at \$400,000. Ted asked if Mr. Maile was still interested in purchasing the Property. Mr. Maile informed Ted that he was and asked about the sale price. Mr. Maile also advised Ted as follows: “Because I have represented you in the past there may be a question of a conflict of interest. So if you want, and it’s your choice, if you want another attorney to draw up the real estate agreement, you have the right to seek independent counsel to do so, if you want to.” Ted replied, “No, I trust you.” Mr. Maile again told Ted: “You should, and it is your choice, seek independent counsel either to review the contract or create the contract. Write the contract.” Ted replied, “No, I trust you.”

On or about July 22, 2002, Mr. Maile prepared an Earnest Money Agreement (“EMA”) to purchase the Property for \$400,000 which he and his wife signed. On July 25, 2002, Mr. Maile met with Ted at his home and reviewed some of the terms with him, but did not read the EMA

with Ted line by line. The EMA identified Mr. Maile as a realtor who was representing himself and his wife in the transaction. Ted signed the EMA at the conclusion of the meeting.

On August 1, 2002, Mr. Maile and his wife formed Berkshire Investments, LLC (“Berkshire”) for the purpose of acquiring the Property from the Trust and developing it. Sometime thereafter, Mr. Maile was informed that Ted had a heart attack. On August 15, 2002, pursuant to an Assignment of Earnest Money Agreement prepared by Mr. Maile, he and his wife assigned their rights under the EMA to Berkshire. In return, Berkshire agreed to pay the unpaid balance of the purchase price and released Mr. Maile “from all future liability.” Beth, pursuant to a Power of Attorney, signed the Assignment on behalf of Ted.

The EMA provided for closing on September 15, 2002. Before the closing Beth and her husband sought independent legal review of the EMA and Assignment of EMA to Berkshire by a Boise attorney, D.W. That attorney advised them that because the EMA was already executed “it was too late to provide any substantive input” but urged them to request Mr. Maile to substitute a standard form deed of trust, including a due on sale provision and require payment of taxes before the same became delinquent. Beth requested that Mr. Maile follow D.W.’s advice. He agreed to do so but the deed of trust document he prepared did not contain either of D.W.’s suggestions.

On September 14, 2002, Mr. Johnson died before the transaction closed. On September 16, 2002, Mr. Maile closed the sale on the Property with Beth and her husband acting as successor trustees. Prior to the closing, Mr. Maile did not consult with Beth and her husband to explain the transaction documents nor did he provide copies to D.W. Beth testified at the hearing that she was under a great deal of stress at that time due to her uncle’s death, the funeral and family arriving for the funeral.

Thereafter the Taylors, the beneficiaries under the Trust, indicated they would challenge the sale of the Property. On May 7, 2003, Beth sent Mr. Maile a letter terminating his employment “in any capacity as attorney” for the Trust or Ted’s estate because she did not want the Trust involved in a lawsuit. On May 19, 2003, Mr. Maile sent Beth a check for Berkshire’s first annual payment under the EMA. On July

7, 2003, one of the Trust's beneficiaries wrote to Mr. Maile alleging that he purchased the Property for less than the fair market value and accused him of violating the I.R.P.C.

In December 2003, Mr. Maile prepared a Release and Reconveyance agreement which purported to release any and all claims against him and his wife and recorded it on January 20, 2004. On January 8, 2004, Mr. Maile finalized a commercial loan for the development of the Property and sent Beth a check in the amount of \$293,848.03, representing Berkshire's final payment on the Property. On January 22, 2004, the Taylors filed a lis pendens against the Property and on January 23, 2004, the Taylors filed a civil complaint against Mr. Maile, his wife and Berkshire in Ada County District Court. In February 2004, Mr. Maile prepared a second Release and Reconveyance agreement containing broad release language which purported to release any and all claims against Berkshire. Mr. Maile initially used the Release and Reconveyance documents as affirmative defenses in the litigation filed by the Taylors.

On June 6, 2006, the District Court entered a Judgment on Beneficiaries' Claims which provided that the purchase and sale of the Property was void as a matter of law, that the purchase price of \$400,000 should be returned to Mr. Maile and that title to the Property was quieted to the Trust in fee simple.

With respect to I.R.P.C. 1.7(a) and (b), although Mr. Maile claimed that his attorney client relationship with Ted and the Trust ended in early July 2002 at the conclusion of his advising Ted on F.W.'s offer to purchase the Property, the PCB found that Mr. Maile never terminated that relationship. The PCB found that although the EMA identified Mr. Maile as a realtor who was representing himself and his wife in the transaction, under the circumstances of this transaction that was not adequate notice of termination of the attorney client relationship. The PCB further found that the statement by Ted "No, I trust you," in response to Mr. Maile's disclosure of a possible conflict of interest, was not adequate consent for Mr. Maile to enter into the purchase and sale transaction with his client, the Trust, and that Maile's own interests as purchaser of the Property adversely affected the Trust. The PCB found that the statement by Ted that he trusted Mr. Maile indicated he was still relying on Mr. Maile to provide him impartial representation. The PCB found

that Mr. Maile should have realized Ted's confusion, but Mr. Maile was considering his own interests instead of Ted's. With respect to I.R.P.C. 1.7(a), the PCB found that a disinterested lawyer would conclude that a client in Ted's position should not agree to be represented by Mr. Maile under these circumstances. Therefore, Mr. Maile could not ask for consent and should not have continued with the transaction without Ted and the Trust being represented by independent counsel. With respect to the violation of I.R.P.C. 1.7(b), the PCB concluded that Mr. Maile's participation in closing the transaction with the Trust was a clear violation of that rule because there was still an attorney client relationship between Mr. Maile and the Trust; that Mr. Maile was now representing himself, his wife and their LLC; that Mr. Maile could not reasonably believe the representation of the Trust would not be adversely affected; and that Mr. Maile failed to consult with the Trust and seek its consent.

With respect to the violation of I.R.P.C. 1.9, the PCB found that the attorney client relationship between Mr. Maile and the Trust was officially terminated by Beth's May 7, 2003 letter. The PCB found that Mr. Maile was clearly representing himself, his wife and their LLC when preparing and submitting the Release and Reconveyance documents in early 2004, both of which contained broad release language, and that Mr. Maile's interests were clearly adverse to the Trust at that time because of the threatened litigation and then the filing of the lawsuit during that time period. The PCB concluded that there was clear and convincing evidence of overreaching on the part of Mr. Maile by including the release language in the documents; that Mr. Maile's interests were clearly adverse to those of the Trust when he prepared those documents; that Mr. Maile never consulted with nor explained to the Trust trustees the meaning of the release language he included in the Release and Reconveyance documents; that Mr. Maile never obtained consent of the Trust to permit him to represent himself, his wife and their LLC when their interests were clearly adverse to those of the Trust; and that Mr. Maile clearly advanced his own self interest and ignored the interests of his former client, the Trust.

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

### **EDGAR J. STEELE (Resignation in Lieu of Discipline)**

On August 1, 2011, the Idaho Supreme Court entered an Order accepting the resignation in lieu of discipline of Coeur d'Alene attorney, Edgar J. Steele. The Idaho Supreme Court's Order followed a stipulated resolution of a disciplinary proceeding that related to the following conduct.

On June 11, 2010, a warrant for Mr. Steele's arrest was issued by the United States District Court for the District of Idaho pursuant to a criminal complaint. On July 20, 2010, a federal grand jury issued a Superseding Indictment. The Superseding Indictment charged Mr. Steele with four criminal counts.

On May 5, 2011, following trial, a federal jury found Mr. Steele guilty of all four counts of the Superseding Indictment. Those counts were: Count One, Use of Interstate Commerce Facilities in the Commission of Murder for Hire, 18 U.S.C. § 1958; Count Two, Use of Explosive Material to Commit Federal Felony, 18 U.S.C. § 844(h); Count Three, Possession of a Destructive Device in Relation to a Crime of Violence, 18 U.S.C. § 924(c)(1)(B)(ii); and Count Four, Tampering with a Victim, 18 U.S.C. § 1512(b)(3). Following the jury verdict, Mr. Steele self-reported to the Idaho State Bar that he had been found guilty of those felonies.

The Idaho Supreme Court accepted Mr. Steele's resignation effective August 1, 2011. By the terms of the Order, Mr. Steele may not make application for admission to the Idaho State Bar sooner than five years from the date of his resignation. If he does make such application for admission, he will be required to comply with all bar admission requirements found in Section II of the Idaho Bar Commission Rules and shall have the burden of overcoming the rebuttable presumption of "unfitness to practice law."

By the terms of the Idaho Supreme Court's Order, Mr. Steele's name was stricken from the records of the Idaho Supreme Court and his right to practice law before the courts in the State of Idaho was terminated on August 1, 2011.

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

**DARREN S. ROBINS  
(Suspension/Withheld  
Suspension/Probation)**

On July 27, 2011, the Idaho Supreme Court issued a Disciplinary Order suspending Darren S. Robins from the practice of law in Idaho. The Idaho Supreme Court's Order followed a Professional Conduct Board recommendation after a disciplinary hearing.

On April 30, 2010, the Idaho State Bar filed a formal charge Complaint against Mr. Robins. The Complaint alleged two violations of Idaho Rules of Professional Conduct 1.3 [Lack of Diligence], 1.4 [Communication], 3.2 [Expediting litigation], 3.4(c) [Fairness to opposing party and counsel] and 8.4(d) [Conduct prejudicial to the administration of justice]. The Complaint alleged one violation of Idaho Rules of Professional Conduct 1.2 [Scope of representation], 1.16(d) [Failure to return unearned fees], and 8.4(b) [Failure to respond to Bar Counsel in connection with a disciplinary matter] and Idaho Bar Commission Rule 505(e) [Failure to cooperate with or respond to a request from Bar Counsel]. On May 24, 2010, Mr. Robins filed his Answer to the Complaint admitting some of the material allegations of the Complaint, admitting the allegations that he violated I.R.P.C. 8.1(b) and I.B.C.R. 505(e) and denying the remaining alleged violations of the Idaho Rules of Professional Conduct.

The disciplinary hearing was scheduled on April 12, 2011. On April 11, 2011, Mr. Robins filed a Motion to Continue. At the hearing, the Idaho State Bar objected to the Motion to Continue and the Hearing Committee denied the motion. Mr. Robins did not appear at the hearing and the Idaho State Bar presented its witnesses and exhibits.

The allegations and the hearing primarily related to two client matters in the Seventh Judicial District and the following facts and circumstances. In one matter, Mr. Robins entered an appearance on behalf of a client charged with felony domestic battery and assault. Mr. Robins failed to appear on his client's behalf at the status conference and preliminary hearing. The same client also hired Mr. Robins for a civil child custody case and paid him \$1,500 for representation in the criminal case and the civil child custody case. In the civil child custody case, Mr. Robins never did what he told the client he was going to do. The client and his ex-wife resolved the custody matter by themselves. Mr. Robins never provided

his client with an invoice or statement reflecting services rendered in either case and did not refund the money to his client, despite a request for a refund from the client's mother.

In the second client matter, a client retained Mr. Robins and paid a \$500 retainer fee for representation in a criminal felony case. Mr. Robins failed to attend the scheduled pre-trial conference. Thereafter, the court issued a show cause order requiring Mr. Robins to appear and show cause why he should not be held in contempt. Mr. Robins appeared at the show cause hearing and the court agreed to reserve sanctions if Mr. Robins contacted Bar Counsel regarding his personal circumstances. Mr. Robins did contact Bar Counsel. In that case, Mr. Robins failed to communicate with his client about plea agreements, did not file pleadings and his client testified that he received no value from Mr. Robins' representation.

Mr. Robins admitted that he failed to respond to Bar Counsel about those clients' grievances.

The Hearing Committee and the Idaho Supreme Court found that Mr. Robins violated all of the Idaho Rules of Professional Conduct set forth above. The Idaho Supreme Court ordered that Mr. Robins be suspended from the practice of law in Idaho for four years, and two years of the suspension is withheld. The period of withheld suspension shall not commence until Mr. Robins requests, and is granted, permission to transfer his inactive license to active status. The Court ordered that before being reinstated, Mr. Robins shall comply with I.B.C.R. 516 and 517 and shall reimburse the Idaho State Bar for all costs and expenses associated with the disciplinary proceeding. In addition, before being eligible to be reinstated to the active practice of law in Idaho, Mr. Robins must first receive approval to transfer his license from inactive status to active status under the applicable Idaho Bar Commission Rules. The Court also ordered that before being eligible to be reinstated, Mr. Robins must pay his two clients \$1,300 and \$500 plus interest.

The Idaho Supreme Court's Order also provided that Mr. Robins shall serve a four-year period of probation following reinstatement. The conditions of probation include that Mr. Robins will serve the withheld two-year 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 from the date of his suspension through the period of probation. During

his probation, Mr. Robins shall avoid any alcohol or drug-related criminal acts or alcohol or drug-related traffic violations; at his own expense, enroll in a program of random urinalysis testing for alcohol, including EtG testing and any other panel of tests the testing entity believes is appropriate; remain under his physician's care and comply with any treatment regimen prescribed by his physician; practice under a supervising attorney; provide monthly reports to Bar Counsel attesting that his representation of his clients is consistent with his responsibilities under the Idaho Rules of Professional Conduct; and maintain errors and omissions legal malpractice insurance.

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

**A. ELIZABETH BURR-JONES  
(Public Censure)**

On August 1, 2011, the Idaho Supreme Court issued a Disciplinary Order imposing a Public Censure upon Burley attorney, A. Elizabeth Burr-Jones, based upon her professional misconduct.

The Idaho Supreme Court found that Ms. Burr-Jones violated I.R.P.C. 1.5(f) [A lawyer shall provide an accounting upon request], 1.15(a) [A lawyer shall hold property of clients that is in the lawyer's possession separate from the lawyer's own property], 1.15(c) [A lawyer shall promptly deliver to the client any funds the client is entitled to receive], 1.15(d) [A lawyer shall keep property in which two or more persons claim an interest separate until the dispute is resolved and shall distribute all portions of the property as to which the interests are not in dispute] and 1.16(d) [A lawyer shall return unearned fees and costs upon termination of representation].

The Idaho Supreme Court's Disciplinary Order followed a stipulated resolution of an Idaho State Bar disciplinary proceeding in which Ms. Burr-Jones admitted that she had violated the Idaho Rules of Professional Conduct set forth in the preceding paragraph.

The Complaint filed in this proceeding related to Ms. Burr-Jones' representation of two clients in civil cases. In the first matter, the client paid Ms. Burr-Jones a \$1,600 retainer fee in January 2009. In February 2009, the client terminated the representation and requested the return of his file and an itemized accounting. At the time of termination, Ms. Burr-Jones owed the client a \$947.95 refund. Ms.

## DISCIPLINE

Burr-Jones did not provide the requested file, accounting or refund despite multiple requests. The client filed a grievance in December 2009. In January 2011, Ms. Burr-Jones provided the \$947.95 refund. In April 2011, she paid the client an additional \$108.50 in interest.

In the second matter, the client paid Ms. Burr-Jones a \$1,500 retainer fee. In October 2002, the Court ordered the client's ex-husband to pay her \$1,815, reflecting \$1,500 in attorney fees and \$315 in costs for an airline ticket. In July 2009,

the client's ex-husband was arrested and posted bond. In August 2009, the Court converted \$2,200 of the bond to pay court-ordered obligations to the client. The payment was sent to Ms. Burr-Jones and deposited into her office's general account. Between September 2009 and May 2010, the client called Respondent's office numerous times requesting the \$1,815 payment. The client received varying responses regarding the amount and status of the funds she was entitled to receive. In July 2010, the client filed a grievance and,

later that month, Ms. Burr-Jones provided the \$1,815 payment. In April 2011, Ms. Burr-Jones paid the client an additional \$94.82 in interest.

This public censure shall be published in *The Advocate*, the Times-News and the *Idaho Reports*. The public censure does not limit Ms. Burr-Jones' 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.

## NEWS BRIEFS



Paul L. Arrington



Javier L. Gabiola



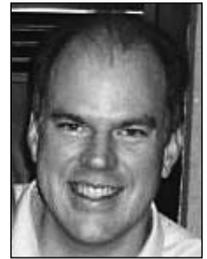
Nicole C. Hancock



R. William Hancock,  
Jr.



Paul D. McFarlane



Gene A. Petty



Joseph N. Pirtle



Benjamin C. Ritchie



Monica E. Salazar



Christine M. Salmi



Timothy W. Tyree



Jonathan M. Volyn

### Idaho Academy of Leadership for Lawyers announces inaugural class

The Idaho Academy of Leadership for Lawyers (IALL) proudly announces the 2011-12 inaugural class. The class is comprised of 12 lawyers from different practice areas with a variety of experiences from various parts of Idaho. This diverse group will build upon their leadership skills and promote leadership experiences. Participants have committed 7 days over the next year which begins on September 30, 2011 and concludes on July 12, 2012. IALL is an interactive leadership training program designed specifically for lawyers who have practiced law for a minimum 5 years. For more information please contact Mahmood Sheikh, Deputy Executive Director, at (208) 334-4500.

#### The 2011 - 12 IALL class:

**Paul L. Arrington**  
*Barker Rosholt & Simpson, LLP*  
5th District

**Javier L. Gabiola**  
*Cooper & Larsen*  
6th District

**Nicole C. Hancock**  
*Stoel Rives LLP*  
4th District

**R. William Hancock, Jr.**  
*Merrill & Merrill, Chtd.*  
6th District

**Paul D. McFarlane**  
*Moffatt Thomas Barrett Rock & Fields,*  
*Chtd.*  
4th District

**Gene A. Petty**  
*Ada County Prosecuting Attorney*  
4th District

**Joseph N. Pirtle**  
*Elam & Burke*  
4th District

**Benjamin C. Ritchie**  
*Moffatt Thomas Barrett Rock & Fields,*  
*Chtd.*  
7th District

**Monica E. Salazar**  
*Catholic Charities of Idaho*  
3rd District

**Christine M. Salmi**  
*Perkins Coie, LLP*  
4th District

**Timothy W. Tyree**  
*Hawley Troxell Ennis & Hawley LLP*  
4th District

**Jonathan M. Volyn**  
*Racine, Olson, Nye, Budge & Bailey,*  
*Chtd.*  
6th District



Newly sworn-in Chief Justice Roger S. Burdick took a moment during the Investiture Ceremony to thank his family.

### Justice Burdick Sworn In

Governor Butch Otter administered the oath the oath of office to Justice Roger S. Burdick in a ceremony August 9, officially beginning his term as Chief Justice of the Idaho Supreme Court. Justice Burdick was unanimously elected to replace Justice Daniel T. Eismann, who has led the court for the last four years and who will continue on the court. Burdick thanked Justice Eismann for his leadership, and said he would try to follow his example.

Justice Burdick also pledged to retain independence of the judiciary that reflects Idahoans' independence.

Justice Burdick has served for 30 years in various capacities within the Idaho Judiciary, including service as a Magistrate Judge in Jerome County, a District Judge in Twin Falls County, the Administrative Judge for the Fifth Judicial District and the judge overseeing the Snake River Basin Adjudication. In August 2003, he was appointed to the Idaho Supreme Court by Gov. Dirk Kempthorne and was retained by popular vote in 2004 and 2010. In 2007, he became Vice Chief Justice of the Idaho Supreme Court.

Justice Burdick received his undergraduate degree in Finance from the University of Colorado in 1970 and graduated from the University of Idaho School of Law in 1974.

### Public comment needed on reappointment of U.S. Judge Terry L. Myers

The current term of the Honorable Terry L. Myers, U.S. Bankruptcy Judge for the District of Idaho, is due to expire in August 2012. The U.S. Court of Appeals for the Ninth Circuit is considering the reappointment of the Judge to a new term of office of 14 years. The Court invites comments from the bar and public about Judge Myers' performance as a bankruptcy judge. The duties of a bankruptcy judge are specified by statute, and include conducting hearings and trials, making final determinations, and entering orders and judgments.

Members of the bar and public are invited to submit comments concerning Judge Myers for consideration by the Court of Appeals in determining whether or not to reappoint him. Anonymous responses will not be accepted. However, respondents who do not wish to have their identities disclosed should so indicate in the response, and such requests will be honored.

Comments should be submitted no later than Friday, October 14, 2011, to the following address: Office of the Circuit Executive, P.O. Box 193939, San Francisco, CA 94119-3939, Attn: Reappointment of U.S. Bankruptcy Judge Myers, Fax: (415) 355-8901.

### Judge Gregory Culet announces his retirement

Third District Judge Gregory M. Culet announced he will retire effective December 31, 2011. Judge Culet has served as an Idaho judge for over 31 years. He was originally appointed to serve as a Magistrate Judge in Washington County commencing June 1, 1980. He was appointed by Governor Dirk Kempthorne to serve as a District Judge, effective October 1, 2001. Upon his retirement, he will continue to serve on a part-time basis as a senior judge as assigned by the Idaho Supreme Court.

### Bellwood Lecture to feature ABA President, Bill of Rights

Wm. T. (Bill) Robinson III, President of the American Bar Association, will deliver the 2011-12 Sherman J. Bellwood Memorial Lecture at the University of Idaho in Moscow at 3:30 p.m., Tuesday, Sept. 13 at the Administration Auditorium. While in Moscow, he will meet with faculty, students and guests. He will also

address law students on opportunities and challenges in the legal profession. The next day, he will deliver keynote remarks as part of an extended Bellwood program in Boise at the Boise Centre beginning at noon. The keynote lecture is titled, "The American Judiciary: Underfunded, Misunderstood, and More Important than Ever."

The 2011-12 Bellwood program will combine President Robinson's appearance with a celebration of the 220th anniversary of the Bill of Rights in the United States Constitution. The program in Moscow will include panel discussions on limited government and enumerated rights; community values and the First Amendment; and the rights and powers of states in our federal system. In Boise the program will include panel discussions on the worldwide impact of the U.S. Bill of Rights; lessons from history when rights have been subjugated; due process and the accuracy of judgments in capital criminal cases; and competing philosophies on judicial interpretation of the Bill of Rights.

The Bill of Rights component of the Bellwood program is a civic education outreach effort by the College of Law in collaboration with generous sponsors and volunteers from the Idaho State Bar, including the Diversity and Family Law sections. Members of the legal profession can attend lectures and panel discussions for CLE credits at modest cost. Selected programs also will be available free of charge to the public, to undergraduate students in Moscow-Pullman and Boise, and to high school teachers and students at both locations.

### Citizens Law Academy returns this fall

The Fourth and Seventh District Bar Associations have announced their fall lineup for Citizens Law Academy featuring a faculty of prominent Idaho attorneys and judges. The weekly two-hour evening classes offer an insider's view of how our justice system works. Class sizes are limited and participants are chosen from applications. For more information, check the Idaho State Bar website: <http://isb.idaho.gov/ilf/lre/cla.html>



Wm. T. (Bill) Robinson III

**\* 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](http://www.westerncapitalbank.com). Thanks for reading.



For more information contact **Jeff Banks**  
208.332.0718 | [Jeff.Banks@westerncapitalbank.com](mailto:Jeff.Banks@westerncapitalbank.com)



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## R. Bruce Owens Attorney at Law

of the Firm,



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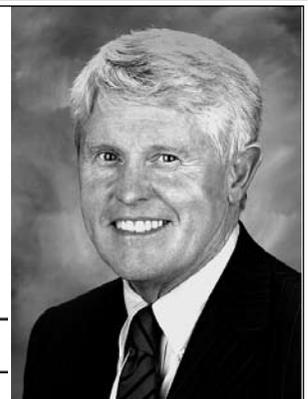
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## RECOGNIZING SERVICE TO THE PROFESSION AND THE PUBLIC

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

At the Annual Meeting in July, several Bar members and non-lawyer volunteers were honored for their service to the legal profession and the public. The Bar and Idaho Law Foundation are fortunate to have the benefit of committed volunteers who give generously of their time, energy and expertise. The work of the organizations depends on the service of its members. The Bar and Foundation are able to fulfill their missions and accomplish their goals due to the generosity of volunteers like those who received service awards this year.



Diane K. Minnich

**Lee James, Coeur d'Alene** – Lee, managing member James, Vernon & Weeks, P.A, currently serves on the ISB Professional Conduct Board. He has served as the President of the Idaho Trial Lawyers Association and is currently its Amicus Chairperson. His volunteer activities include serving as a current board member for Lutherhaven, a church youth camp, a CASA attorney, and president and board member of ICARE, an organization that helps to prevent abuse and neglect of children.



Lee L. James

He explained his philosophy: "Most of my public service has been dedicated to the health and safety of children. Professionally, a good portion of my practice is now devoted to the representation of children and survivors of childhood sexual

*The Bar and Foundation are able to fulfill their missions and accomplish their goals due to the generosity of volunteers like those who received service awards this year.*

abuse. My social goal with this work is to make our society safer for children. Most recently, I was a principle negotiator in a clergy abuse case that resulted in a \$161.1 million settlement along with non-monetary terms that committed the Northwest Jesuits to institute changes for the protection of children."

Lee's practice emphasizes personal injury, mass tort, representation of survivors of child sexual abuse, property litigation, insurance law, medical malpractice and employment law.

**Steven Fields, Boise** – Steve is a longtime non-lawyer member of the ISB Character and Fitness Committee.

Over the years Fields has volunteered for Ducks Unlimited, the Idaho Civil War Volunteers, Les Bois Kiwanis, several bicycle organizations, and elementary school boys' soccer.

"Public service seemed like the right thing to do because so many adults in my life had made sure I had leadership in Scouts, church, and school activities. Since I retired I've had time to get back to shooting – especially clays, rifle and handguns with the EE-Da-How Long Rifles. I am very happy my skills and knowledge in accounting have been useful to the Character and Fitness subcommittee."



Steven L. Fields

"I began working for the Idaho State Tax Commission after graduation in 1969 as an individual income tax auditor," Fields said.

"It was very interesting learning about different kinds of taxes and over my years with the Tax Commission, I have been assigned fiduciary income tax, handling trusts and estates, kilowatt hour tax and finally my favorite, auditing multistate/multinational corporations. I traveled all over the U.S. visiting corporate headquarters performing the audits."

**David S. Jensen, Boise** – David, a shareholder at Moffatt, Thomas, Barrett, Rock & Fields has supported the Bar by serving on the governing councils of the Real Property and the Business and Corporate Law Sections. He is a past chair of each Section and continues to serve on the Business and Corporate Law Section Governing Council.

David also belongs to the Commercial Law and Bankruptcy Section, and the Professionalism and Ethics Section.

In addition to his work in the legal community, David has worked with Troop 33 of the Boy Scouts for a number of years as an assistant scoutmaster. He has held numerous coaching and umpiring positions over the years for his children's soc-



David S. Jensen

cer and baseball teams. His service work is an extension of his lifestyle, which revolves around his work and his family.

**Paula Kluksdal, Boise** – Paula, a partner at Hawley Troxell, recently served as president of the Fourth District Bar. She has assisted with various bar-related activities, including the Citizens’ Law Academy, Partners Against Domestic Violence, and chair of the Fourth District Spring Case Review.



Paula Landholm Kluksdal

Paula stated: “One of my passions is the Idaho Partners Against Domestic Violence project. That passion extends to supporting women and children through organizations such as the Idaho Coalition Against Sexual and Domestic Violence, Idaho Volunteer Lawyers Program and Idaho Legal Aid Services. Further, I was honored to serve as the 2011 TWIN Committee Chair for the Women and Children’s Alliance, as well as the chair of the annual Grapes Against Wrath event. I also find joy in volunteering at my children’s school.”

She explained her attitude about service to the community and the profession: “I have always been fortunate to be surrounded by generous and caring individuals. It is both my personal and professional goal to assist those in need and to mentor upcoming leaders of our community.”

**Sharon McQuade Grisham, Boise**

– Sharon has served as a Bar exam grader for 21 years and is a consummate community volunteer. “I have been honored and privileged to be a part of the Idaho State Bar grading team for many years. I deeply appreciate their confidence in my abilities. The people volunteering are gracious and extremely competent. It is a great distinction to be included among them.”



Sharon L. McQuade Grisham

“I believe that anything I have done for others is merely following my father’s philosophy of helping when one can. He often said, ‘It’s not what you acquire in life that counts, but what you do with it for others that makes a difference.’”

Sharon was the oldest of eight children. She recalled that her father, Idaho

*“I believe that anything I have done for others is merely following my father’s philosophy of helping when one can.”*

*- Sharon McQuade Grisham*

Supreme Court Justice Henry F. McQuade, raised her. “As part of our upbringing, my father often stated, ‘You can’t keep taking from society. You have to give back and make a difference.’ Also, he would often say, ‘If you need a helping hand, you will find one at the end of your right arm.’ It is with that philosophy, I have tried to give back in any way possible.”

She elaborated with an example: “In 1992, I met a girl at a party from the then war-torn Yugoslavia. Her father was trapped in Baja Luka and her mother was in a refugee camp in the then Czechoslovakia. At the time I met her, I was an adjunct professor at the College of Idaho. After committing my salary to her tuition, coupled with a tennis scholarship, she graduated magna cum laude. The girl and her mother lived with me for two years, until the father was able to get out of Yugoslavia, after hiding for one year in Belgrade awaiting asylum status from the United States.

**Sarah T. Hope, Jerome** - Sarah is

being recognized as one of the non-lawyer members of the Idaho State Bar’s Professional Conduct Board. She lives in Jerome with her husband and five children. Sarah graduated in 1979 from Brigham Young University with a degree in nursing and worked several years as a registered nurse in the operating rooms of several hospitals around the Northwest.



Sarah T. Hope

For the last 25 years she has enjoyed actively volunteering in the school systems, most recently as the accompanist for the high school choir and in the library at Jerome High School. From 2001 to 2006 Sarah was chosen to serve as president of an 1,100-member women’s organization. This appointment involved

overseeing nine units, as well as teaching and in-service training. She has also been involved in many church and civic activities. Currently Sarah is involved in teaching and delivering motivational presentations.

She said she believes all human beings should contribute to the greater good. “It is important to volunteer in public service in order to improve conditions in our schools, our communities and our nation,” she said, adding, “If each individual will give back in a positive way, we can all reap the benefits of improving our world. If we don’t contribute we can’t complain! If we do contribute positively we won’t need to complain.”

**John Lezamiz, Twin Falls** - John had a civil law practice with emphasis in personal injury with Hepworth, Lezamiz & Janis for 30 years and retired two years ago. With the exception of clerking one year for the Idaho Supreme Court, he had the same job with the same law firm doing trial work until retiring.



John T. Lezamiz

“I am flattered to be honored with the Service Award this year,” he said, “but I have to confess that it was sort of involuntary. I helped a solo practitioner who needed medical attention and then discovered that there really wasn’t any help available to solo practitioners, so I found myself helping out by default.”

He lives part-time in Mackay, Idaho, he said, “where I chase cows and grow hay. At least the cows don’t complain and usually no one can find me so I manage to enjoy myself.”

**Gary Cooper, Pocatello** – Gary, a partner with Cooper and Larsen, earned this award for his work on the ISB Pro-

Professional Conduct Board, on which he has served since 2002. Past positions include Idaho Federal Court local rules committee, Idaho Federal Bar Association Executive Committee, and the Idaho Association of Defense Counsel Section co-chair.

"I watched my mentors like John Gunn, Lou Racine and Bill Olson perform public service and I could see it enriched their lives. That inspired me," he said, adding that "Practice is very demanding and adversarial. Participation in public service helps advance the profession and create lasting friendships."

Gary has practiced law in Pocatello since 1975. Cooper has served on the Sixth Judicial District Magistrate Commission, the Idaho Supreme Court Rules Committee, and the ISB Worker's Compensation Section Governing Council. Gary was the 1999/2000 president of the Portneuf Inn of Court, a member of the American Inns of Court and was a recipient of the Idaho State Bar's 1996 Professionalism Award.



Gary L. Cooper

Currently he serves on the United States Federal Court Local Rules Committee and is a co-chair of the professional liability section of the Idaho Association of Defense Counsel. He is also a trial judge for the Shoshone-Bannock Tribal Court. In 2010, Gary was inducted as a fellow of the American College of Trial Lawyers.

**M. Jay Meyers, Pocatello** – Jay, Meyers Law Office, has served two terms on the Idaho Supreme Court Civil Rules Committee, nine years on the ISB Professional Conduct Board, and two terms on the ISB Character and Fitness Committee.



M. Jay Meyers

Throughout his career, Jay has enjoyed and maintained an active professional and public service approach. At age 35 he had worked his way through the leadership ranks to be elected President of Idaho Trial Lawyers Association.

Other community involvement includes serving as a director to Tri-State Bank in Montpelier, director to the Idaho

*Jay mixes law  
with a traditional  
ranch life.*

---

Cattleman's Assoc., and on community boards such as the Power County Hospital Board, the Pocatello Airport Board, and the Pocatello Zoo Board. Jay now serves on the Non Professional Committee for the National Reined Cow Horse Association.

Jay mixes law with a traditional ranch life. He and his wife, Ranae, operate a third-generation commercial cattle and registered quarter horse ranch in eastern Power County. In 2010, Meyers was inducted into the Eastern Idaho Horseman Hall of Fame.

His philosophical approach to law is that thorough preparation through hard work accompanied by strong ethical advocacy will, more often than not, see justice obtained for the client.



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Sixth	Nov. 16, Noon	Pocatello
Seventh	Nov. 17, Noon	Idaho Falls

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# SECTION SHEDS LIGHT ON BUSINESS AND CORPORATE LAW

Brent T. Wilson  
Evans Keane, LLP

Welcome to this issue of *The Advocate* sponsored by the Business and Corporate Law Section. The Section hoped to provide the Bar with a strong mix of both technical and practical information in this issue – a worthy challenge that we feel our members and friends stepped up to and met with the articles offered here. I took this challenge personally while writing an article focusing on the rules and regulations that certain tax exempt organizations must follow in setting compensation for top-level employees. Nonprofit and tax exempt organization governance is a subject I feel strongly about, and I hope the information provided in this article finds interest with and benefits the many members of the Bar who donate their personal time to nonprofit organizations across the state.



Brent T. Wilson

Elizabeth Herbst Schierman, a friend of the Section and a frequent *Advocate* contributor, provides insight into transactions involving the transfer of intellectual property. Elizabeth focuses specifically on copyrights, but the concepts are broadly applicable to any transaction involving the transfer of intellectual property, which is more and more common in business transactions.

Will Varin, another friend of the Section, writes about a litigator's perspective on a few key transactional matters that litigators come across when a deal turns to litigation. While transactional lawyers tend to focus on preparing the documents necessary to get a deal done, Will deliv-

ers some reminders for transactional lawyers that deal documents should also be prepared with litigation in mind. Wendy Gerwick-Couture, an Associate Professor of Law at the University of Idaho, writes about a subject that every attorney helping a client form a limited liability company must consider: whether a membership interest in an LLC is a security (not to give it away, but that is the prudent approach). Of course, securities are highly regulated under both state and federal law, so it is vital to know the starting point in counseling with clients.

Brian Buckham takes the discussion of securities law matters to the next level in his review of private placement transactions and many of the issues practitioners must consider when working with clients seeking to generate capital through the sale of unregistered securities. Brian's treatment of this subject is thorough and informative. Finally, Dick Riley addresses the "new" Uniform Limited Liability Company Act ("ULLC") and some of the criticisms leveled against the ULLC three years out from its adoption by the Idaho legislature. Dick reiterates the flexibility and scope of the ULLC, which provides attorneys with the means to adjust and formalize relationships among members in more sophisticated business arrangements while preserving basic, baseline rules for less sophisticated business relationships.

*Not to pat ourselves too hard on the back, but the Business and Corporate Section has accomplished several things we are especially proud of this past year.*

I want to personally thank these authors for their time and effort, and for writing interesting and informative articles on behalf of the Business and Corporate Law Section. I also want to thank the members of the Section's Governing Council for their hard work and assistance in accomplishing the Section's goals and mission. In particular, past Chair David Jensen and immediate past Chair David Hammerquist deserve kudos for their support in making a smooth transition into a new Governing Council and leadership in the Section.

Not to pat ourselves too hard on the back, but the Business and Corporate Section has accomplished several things we are especially proud of this past year. In particular the Governing Council recently voted to contribute a total of \$23,300 to important business law related endeavors. This includes contributions to: (1) Intellectual Property Education for Small Business (a partnership between the Bar, the University of Idaho School of Law, and Boise State University's Small Business Development Center (SBDC) to enable statewide training on intellectual property matters to small and emerging businesses; (2) the Idaho Volunteer Lawyers Program (IVLP)/Volunteers for Emerging Business Leadership (VLEB) for a "start up" program administered in conjunction with

## Business & Corporate Law Section

### Chairperson

Brent T. Wilson  
Evans Keane, LLP  
P.O. Box 959  
Boise, ID 83701-0959  
Telephone: (208) 384-1800  
Email: [bwilson@evanskeane.com](mailto:bwilson@evanskeane.com)

### Vice Chairperson

D. Michelle Gustavson  
Hawley Troxell Ennis & Hawley, LLP  
P.O. Box 1617  
Boise, ID 83701  
Telephone: (208) 344-6000  
Email: [mgustavson@hawleytroxell.com](mailto:mgustavson@hawleytroxell.com)

### Secretary/Treasurer

Elizabeth D. Oliphant  
Boise, Inc.  
1111 W. Jefferson Street, Ste. 200  
Boise, ID 83702  
Telephone: (208) 384-7689  
Email: [betsyoliphant@boiseinc.com](mailto:betsyoliphant@boiseinc.com)

the Microenterprise Training and Assistance Project (META), the Bar and the SBDC that focuses on assisting new and emerging businesses with legal needs, in part, through volunteer and pro bono legal assistance; and (3) the Idaho Business Law Gems ([www.businesslawgems.com](http://www.businesslawgems.com)), a website operated by the University of Idaho School of Law focusing on business law decisions by Idaho courts and how those decisions impact business law practitioners and their counsel to clients. The Business and Corporate Law Section will stay busy during this next year as well. On the immediate horizon the Section is forming a subcommittee to study a proposed new law from the Uniform Law Commissioners called the Harmonized Uniform Business Organizations Code (HUBOC), which proposes to harmonize the language of the unincorporated entity laws.

We hope to continue the Business and Corporate Section's strong tradition of

*On the immediate horizon the Section is forming a subcommittee to study a proposed new law from the Uniform Law Commissioners.*

providing guidance, leadership and a forum for Idaho business attorneys throughout this next year. We welcome all members of the Idaho Bar to join our Section and to join us for our monthly meetings and CLE presentations, which are held on the second Wednesday of each month. On behalf of the Business and Corporate Law Section and the Section's Governing Council, I hope you all enjoy the articles

in this issue of *The Advocate* and find them both interesting and useful.

**About the Author**

**Brent T. Wilson** is an attorney with *Evans Keane, LLP's* Boise office. Brent's law practice concentrates on general business transactions with a particular interest in working with small businesses, Idaho nonprofits and outdoor recreation businesses.

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# COMPENSATION AND PRIVATE INUREMENT IN CHARITABLE ORGANIZATIONS: How Much is Too Much?

Brent T. Wilson  
Evans Keane, LLP

Anyone interested in sports knows that college football is a big deal. Over the past decade or so, it has evolved into a very big deal here in Idaho. The Fiesta Bowl in particular has played a significant role in putting the state of Idaho on the college football map. As part of the “Bowl Championship Series” operated by the so-called power conferences, the Fiesta Bowl is an important part of college football’s business machine. The four bowl games that make up the BCS, the Rose Bowl, the Orange Bowl, the Sugar Bowl and the Fiesta Bowl, took in an estimated \$28 million in revenue during 2009.<sup>1</sup> The chief executives of these BCS bowl games make significant annual salaries, ranging from \$425,000 to \$674,000.<sup>2</sup> Interestingly, the BCS bowl games are also nonprofit, tax exempt organizations.

Many criticize nonprofits for generating revenues and/or paying their employees what they view as exorbitant salaries. Like any other business (and nonprofits are businesses), a nonprofit must generate revenue to survive. Nonprofits also compete with other employers, including for-profit businesses and government entities, to attract the best available employees. For those few nonprofits able to pay fair market wages, this is an important aspect of attracting talented workers. Contrary to some persisting philosophies, the law does not prohibit a nonprofit organization from making money or from paying its employees a competitive wage. What the law prohibits in the nonprofit world is “private inurement.” The purpose of this article is to discuss this concept of private inurement, its relationship to compensation and the legal standards for how a charitable organization may properly determine wages for its employees.

## Private inurement – the prohibition against private, personal gain

The concept of private inurement and the rule against it arises from federal tax law, which states that a charitable organization must operate so that “...no part

*One of the most common private inurement scenarios involves excessive compensation paid by the nonprofit to its executives, officers or key employees.*

of the net earnings [of the organization] inures to the benefit of any private shareholder or individual....”<sup>3</sup> In other words, the profits of the organization cannot be used to benefit an individual. The law does not further define private inurement. Nonetheless, it is viewed as a broad, wide-ranging legal doctrine prohibiting individual or private gain arising from the organization or operation of a tax exempt entity.<sup>4</sup> Private inurement is the fundamental difference between nonprofit and for-profit entities.<sup>5</sup> For-profit businesses encourage and require private inurement, nonprofits are prohibited from it. The presence of private inurement is often determined by looking at the purpose for which the nonprofit operates – if operation of the nonprofit benefits persons in their individual capacity, and not in the performance of a tax exempt purpose, private inurement is a problem.<sup>6</sup>

An “insider” is the usual type of individual that may benefit from private inurement. An insider has a special relationship to the tax exempt organization, often arising out of a leadership or management position such as a director, trustee or officer.<sup>7</sup> A founder, donor, or even vendor may also be considered an insider if that person plays a significant role in shaping policies or running the organization.<sup>8</sup> Private inurement also applies when any specific individual or a private interest is served by the organization instead of the general public.<sup>9</sup> Commercial activity by a charitable organization, however, does not necessarily implicate private inurement in and of itself. Commercial activities by charitable organizations are acceptable as long as the activity serves an exempt purpose.<sup>10</sup> In short, tax exemptions are available to organizations that operate for an appropriate purpose such as providing benefits to the general public; when the organization’s actual focus turns to benefiting the private interests of an individual, that inurement destroys the exempt purpose.

## Excess benefit transactions and the intermediate sanctions

Private inurement problems may arise in any number of transactions or situations involving the tax exempt organization and an insider, including the purchase and sale of assets, lending money, leasing property or other arrangements between an organization and an insider. One of the most common private inurement scenarios involves excessive compensation paid by the nonprofit to its executives, officers or key employees. These types of dealings between the tax exempt organization and the insider are not necessarily prohibited; the existence of private inurement as a result of the transaction is prohibited. While there are no hard and fast rules, the most significant factors in evaluating any transaction for a private inurement is whether it was fair and reasonable, or undertaken at fair market value.<sup>11</sup>

For a significant time, the only penalty for private inurement was denial or revocation of tax exempt status.<sup>12</sup> Revocation was a rather harsh penalty, particularly for smaller instances of private inurement. As a result, penalties known as “Intermediate Sanctions” were implemented in the Tax Code for private inurement situations where a penalty short of revocation is warranted.<sup>13</sup> Under the Intermediate Sanctions, private inurement is referred to as an “excess benefit transaction” and insiders are referred to as “disqualified persons.”<sup>14</sup> An excess benefit transaction is one in which a benefit conferred by an “applicable tax-exempt organization” to the disqualified person, whether directly or indirectly, exceeds the value of consideration received by the organization for providing the benefit.<sup>15</sup> A disqualified person is one in a position to exercise substantial influence over the affairs of the organization, a family member of the person with substantial influence, or an entity in



Brent T. Wilson

which the person with substantial influence controls 35% or more of the voting power.<sup>16</sup> Applicable tax-exempt organizations (i.e. the types of nonprofits subject to these Intermediate Sanctions) are those organizations described under section 501(c)(3) (charitable organizations) or 501(c)(4) (civil leagues and social welfare organizations) and tax exempt under section 501(a) of the federal Tax Code.<sup>17</sup>

Even though the Intermediate Sanctions act as a penalty short of denial or revocation, they are nonetheless a stiff sanction. Offending parties are subject to significant excise taxes based on the amount of the excess. The disqualified person is required to pay an excise tax of 25% of the excess benefit.<sup>18</sup> An excise tax in the amount of 10% of the excess is further levied against any "organization manager" (board members, for example) who knowingly approved the excess benefit transaction, unless participation in the approval was not willful and was due to reasonable cause.<sup>19</sup> To make things worse, if the disqualified person fails to pay the initial excise tax of 25% during the applicable taxing period, an additional tax of 200% is applied to the total excess benefit in the subsequent taxing period.<sup>20</sup> Obviously, these penalties are significant and would probably bankrupt most employees of nonprofits regardless of the level of compensation. Further, the availability of Intermediate Sanctions notwithstanding, in extreme cases revocation of an organization's tax exemption is still possible.<sup>21</sup> Based on these potential penalties, it is imperative for nonprofit organizations to carefully ensure that compensation packages offered to employees are reasonable.

### **Criteria of reasonableness and the compensation safe harbor**

Certainly, employees of nonprofit organizations are entitled to reasonable compensation: "[t]he law places no duty on individuals operating charitable organizations to donate their services; they are entitled to reasonable compensation for their efforts."<sup>22</sup> So what is reasonable? That requires a fact-specific, case-by-case analysis.<sup>23</sup> Relevant factors may include:

- what similar organizations (for profit, nonprofit and government) in the same community or region pay for comparable jobs;
- the organization's need for the services;
- the employee's qualifications;
- whether the amount of pay was determined by an arm's length negotiation;
- the organization's size and complexity (assets, income, total number of employees);

*Based on these potential penalties, it is imperative for nonprofit organizations to carefully ensure that compensation packages offered to employees are reasonable.*

- the employee's prior compensation;
- the scope of job duties;
- the employee's compensation compared to the compensation of other employees; and
- the amount of time the employee devotes to the work.<sup>24</sup>

An important part of this analysis is the scope of "compensation." Compensation consists of all economic benefits provided by the tax exempt organization in exchange for the services provided by the employee.<sup>25</sup> This includes payments of all cash and noncash compensation such as salary, bonuses, deferred compensation, severance, benefit plans, certain liability insurance premiums, fringe benefits (other than small, minimal fringe benefits), retirement and pension benefits, use of nonprofit assets and resources for non-work purposes, and so forth.<sup>26</sup>

The IRS has lent a hand to those organizations striving to pay reasonable compensation to their employees by issuing regulations creating a "safe harbor" for setting compensation. This safe harbor applies as long as organization managers take specific steps in setting the compensation. If compensation is paid within the parameters of the safe harbor, the organization creates a rebuttable presumption that the compensation package paid to an insider is reasonable. To invoke this safe harbor, the organization's governing body must take three specific steps:

- approve the terms of the compensation package in advance, with any member having a conflict of interest abstaining from the vote;
- obtain and rely on appropriate comparability data prior to making a decision;
- adequately document its basis for its decision on the compensation package concurrently with making the decision.<sup>27</sup>

For purposes of the safe harbor, reliance on appropriate comparability data is vital. In general, the governing body must have sufficient information to arrive at a conclusion that the compensation pack-

age, in its entirety, is reasonable.<sup>28</sup> This includes reliable information about: (1) compensation paid by similarly situated organizations (for-profit and nonprofit) for functionally comparable positions; (2) the availability of similar services in the area where the tax-exempt organization is located; (3) current compensation surveys prepared by independent consulting firms; and (4) actual written offers from competing organizations for the services of the disqualified person.<sup>29</sup> The governing body may also document its decision based on other reliable data relevant to the question of reasonable compensation. For small nonprofit organizations, those with gross revenues of less than \$1 million per year, the governing body is considered to have appropriate comparability data when it has compiled compensation data from three comparable organizations in the same or similar communities for similar services.<sup>30</sup>

To sufficiently document its decision, the governing body must retain electronic or written notes establishing: (1) the terms of the compensation package and the date of approval; (2) the members of the body present during any debate on the issue of compensation and those who voted for approval; (3) the comparability data the body relied on and how it was obtained; (4) any actions taken by any member of the body with respect to the decision to approve the compensation who had a conflict of interest.<sup>31</sup> If the organization's governing body takes the steps to invoke the safe harbor and properly documents its decision, the IRS may rebut a presumption of reasonableness of the compensation paid to an insider only by developing sufficient contrary evidence.<sup>32</sup>

### **Conclusion**

Many talented, dedicated individuals work in the nonprofit sector. These employees are entitled to earn fair market compensation for the services they provide to their nonprofit employer. Nonetheless, tax exempt organizations risk serious penalties if payment of that compensation

constitutes an excess benefit transaction. Therefore, it is imperative that applicable tax-exempt organizations carefully follow the mandated process for determining and paying compensation to insiders in order to invoke the safe harbor and create a rebuttable presumption of reasonableness for the total compensation package offered to their employees. By way of disclaimer, the above information provides a general overview of the process required by the Internal Revenue Service to determine fair market compensation for nonprofit organizations. The applicable provisions of the tax code and internal revenue regulations are, as expected, complex and require serious analysis and review of a number of matters well beyond the scope of this article. Reference to the applicable statutes and regulations, and/or consultation with a qualified attorney, is a must for any organization attempting to navigate the issue of identifying a reasonable compensation package to pay to an insider.

#### About the Author

**Brent Wilson** is an attorney with Evans Keane, LLP's Boise office. Brent's law practice concentrates on general business transactions with a particular interest in working with small businesses, Idaho nonprofits and outdoor recreation businesses.

#### Endnotes

- <sup>1</sup> Katie Thomas, *Fiesta Bowl Spending and Donations Questioned*, N.Y. Times, March 30, 2011, at B11 (available at: <http://www.nytimes.com/2011/03/30/sports/ncaafootball/30fiesta.html>) (last visited July 1, 2011).
- <sup>2</sup> Associated Press, *Orange Bowl CEO got \$150K Raise in '09*, April 8, 2011, (available at: <http://sports.espn.go.com/ncf/news/story?id=6307313>) (last visited on July 1, 2011).
- <sup>3</sup> See 26 U.S.C. § 501(c)(3). Other tax exempt organizations are likewise statutorily prohibited from allowing private inurement. These include social welfare organizations (§ 503(c)(4)), business leagues (§ 501(c)(6)), social and recreational clubs (§ 501(c)(7)); voluntary employees' benefit associations (§ 501(c)(9)); teachers' retirement fund association (§ 501(c)(11)), cemetery companies (§ 501(c)(13)), a post or organization of past or present members of the Armed Forces (§ 501(c)(19)). See also 26 C.F.R. § 53.4958-2(a) (prohibiting tax exempt charities and social welfare organizations from "excess benefit transactions," which apply when employees of tax exempt organizations receive excessive compensation).
- <sup>4</sup> Bruce R. Hopkins, *THE LAW OF TAX EXEMPT ORGANIZATIONS*, p. 264 (6<sup>th</sup> ed. 1992).
- <sup>5</sup> Bruce R. Hopkins, *650 ESSENTIAL NONPROFIT LAW QUESTIONS ANSWERED*, p. 103 (2006).
- <sup>6</sup> *Id.*, at p. 104.
- <sup>7</sup> *Id.*, at p. 105.
- <sup>8</sup> *Id.*
- <sup>9</sup> Hopkins, *supra*, n. 4, at 266.
- <sup>10</sup> *Id.*, at p. 265; see also 26 C.F.R. § 1.501(c)(3)-1(e).
- <sup>11</sup> Karl E. Emerson, *The Private Inurement Prohibition, Excess Compensation, Intermediate Sanctions,*

*and the IRS's Rebuttable Presumption: A Basic Primer for 501(c)(3) Public Charities*, Guide Star, p. 2, (2009).

<sup>12</sup> See Judah I. Kupfer, *What is Reasonable Nonprofit Compensation? A Guide to Avoid IRS Penalties*, THE NONPROFIT QUARTERLY, June 5, 2001 (available at: [http://www.nonprofitquarterly.org/index.php?option=com\\_content&view=article&id=12866:what-is-reasonable-nonprofit-compensation-a-guide-to-avoid-irs-penalties&catid=153:features&Itemid=336](http://www.nonprofitquarterly.org/index.php?option=com_content&view=article&id=12866:what-is-reasonable-nonprofit-compensation-a-guide-to-avoid-irs-penalties&catid=153:features&Itemid=336)) (last visited July 1, 2011).

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

<sup>14</sup> See 26 U.S.C. § 4958.

<sup>15</sup> 26 U.S.C. § 4958(c)(1)(A).

<sup>16</sup> 26 U.S.C. § 4958(f)(1); 26 C.F.R. § 53.4958-3.

<sup>17</sup> 26 U.S.C. § 4958(e).

<sup>18</sup> 26 U.S.C. § 4958(a)(1).

<sup>19</sup> 26 U.S.C. § 4958(a)(2).

<sup>20</sup> 26 U.S.C. § 4958(b).

<sup>21</sup> See Kupfer, *supra*, n. 12; see also 26 C.F.R. § 1.501(c)(3)-1(f)(ii).

<sup>22</sup> See Hopkins, *supra* n. 4, at p. 276 (quoting *World Family Corporation v. Commissioner*, 81 T.C. 958 (1983)).

<sup>23</sup> See Emerson, *supra*, n. 11, at p. 3.

<sup>24</sup> Bruce R. Hopkins, *THE LAW OF INTERMEDIATE SANCTIONS A GUIDE FOR NONPROFITS*, § 2.4, pp. 37-38, § 4.6(b), p. 125 (2003); See also 26 C.F.R. § 53.4958-4(b)(ii)(A).

<sup>25</sup> See 26 C.F.R. § 53.4958-4(b)(ii)(B); See also Kupfer, *supra*, n. 12.

<sup>26</sup> See 26 C.F.R. § 53.4958-4(b)(ii)(B).

<sup>27</sup> See 26 C.F.R. § 53.4958-6(a).

<sup>28</sup> See 26 C.F.R. § 53.4958-6(c)(2)(i).

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

<sup>30</sup> 26 C.F.R. § 53.4958-6(c)(2)(ii).

<sup>31</sup> 26 C.F.R. § 53.4958-6(c)(2)(ii).

<sup>32</sup> See 26 C.F.R. § 53.4958-6(b).

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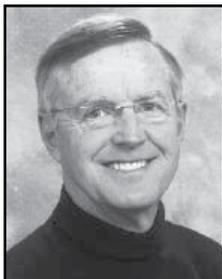
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**Martelle, Bratton & Associates, P.A.**

873 East State Street, Eagle, ID 83616

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# IP TRANSACTIONS: QUESTIONS TO ASK BEFORE BUYING COPYRIGHTS RIGHTS

Elizabeth Herbst Schierman  
TraskBritt, P.C.

Most intellectual property rights, like real property rights, may be transferred from one owner to a new owner, then to another, and then another *ad nauseam*. Of course, one cannot transfer that which one does not own, and not all IP rights are transferable. Thus, there are certain inquiries that should be made prior to seeking an assignment or license of patent, trademark, or copyright rights.<sup>1</sup> These include the following all-important questions: (1) who created the intellectual property; (2) do the rights still exist; and (3) are the rights transferable?

This article will examine these questions in the context of an expected assignment or license of copyright rights.<sup>2</sup> In this context, an “assignment” is essentially a complete transfer of the ownership of an exclusive right by an assignor to an assignee, while a “license” is essentially a waiver by a licensor of the right to sue a licensee for infringement based on a licensed activity.

## Copyright rights: An introduction

The copyright rights discussed in this article are those rights associated with a work of original authorship that is fixed in tangible form.<sup>3</sup> The “work” may be a book, a movie, a painting, an architectural work, recorded music, software code, etc.<sup>4</sup> The scenario contemplated is a business transaction involving the sale and purchase of one or more copyright rights. Notably, it is the *rights* that are to be assigned or licensed. This transaction does not necessarily involve a transfer of ownership in the work itself, such as a purchase of a piece of artwork, a sale of a DVD movie, or the gifting of a particular book.<sup>5</sup>

A copyright owner generally has the exclusive right to reproduce the work; to adapt the work to produce derivative works; to distribute copies of the work by sale, rental, lease, lending, etc.; and to perform or display the work publicly.<sup>6</sup> With certain works of visual art “moral rights” are also created.<sup>7</sup> These “moral rights” include the rights of attribution (*e.g.*, to have the work correctly attributed to the



Elizabeth Herbst  
Schierman

author) and integrity (*e.g.*, to prevent intentional distortion, mutilation, or modification of the work in a way that would damage the author’s reputation).<sup>8</sup>

Copyright rights are recognized by federal law, not state law, and exist throughout the entire United States.<sup>9</sup> Notably, this national scope of copyright protection does not depend on registration of the copyright with the U.S. Copyright Office. Moreover, though there is no such thing as an “international copyright,” protection may even be available in other countries.<sup>10</sup> For purposes of this article, however, the discussion is limited to a transaction involving U.S. copyright rights.

## Question 1: Who created the intellectual property?

Because one cannot transfer that which one does not own, it is important for any prospective purchaser of IP rights to identify the individuals or entities that properly own the rights at the time of the would-be transfer. Just as with a real estate transaction, a diligent purchaser is wise to trace the chain of title in the IP rights back to the time of their creation, and retrace all rights transfers forward to the would-be seller, to ensure that the seller is the rightful rights owner at the time of the transaction.

In each of the three main categories of intellectual property (*i.e.*, patent, trademark, and copyright), identifying the original owner of the associated intellectual property rights requires knowing which individuals and entities were involved in the creation of the IP. This is because, generally, associated IP rights come into existence at the time the property is created.

A copyright is created at the time the work of original authorship is fixed in tangible form.<sup>11</sup> To be subject to the protections of copyright law, the work does not need to be marked with a ©, published, sold, registered with the Copyright Office, or sealed in an envelope and sent through

the mail back to the author. The simple act of creation in a fixed tangible form creates potentially valuable and potentially transferable copyright rights.<sup>12</sup>

The original owner of copyright rights is the “author” or “authors” of the work.<sup>13</sup> The author is, by default, the person who actually created the work. Therefore, often the author of the work will be the novelist who sat at the keyboard and wrote the words of the book, the artist who put paintbrush to canvas, the musician who put pen to paper to write the lyrics, the draftsman who prepared the blueprints, or the website developer who used mouse, keyboard, etc., to put together the website layout. However, if the actual creator of the work was hired by another to create the work, the work may be a “work made for hire” and fall outside of the default creator-is-the-author situation.<sup>14</sup>

Under the provisions of the Copyright Act, the actual creator of the work is not the “author,” and therefore not the original copyright owner, if the work either (1) was prepared by an employee within the scope of his or her employment or (2) falls within at least one of a set list of categories and the work was prepared in conjunction with an express written agreement that the work shall be considered a work made for hire.<sup>15</sup> For such a work made for hire, the hirer is the “author” and the original owner of the copyright rights.<sup>16</sup>

If only one individual or hirer was involved in the creation of the work, determining the author and original owner of the copyright rights is usually quite straightforward. However, if more than one individual, hirer, or combination thereof was involved in the creation, determining the original ownership of the copyright rights can be a bit tricky, and any purchaser of rights should take care.

In the multiple-creator circumstances, all those who each made an independently-copyrightable contribution to the work may be an “author” of the work and an

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original owner of the associated copy-right rights, provided that those contribu-tors had, at the time of creation, the in-tentions of being co-authors in the work.<sup>17</sup> Each of these co-authors has an independ-ent right to exercise or license his, her, or its copyright rights, though the exerciser or licenser must account to the other co-owners for any profit earned.<sup>18</sup> Therefore, a purchaser seeking to acquire exclusive copyright rights must be sure to acquire rights from *all* joint authors. Otherwise, for example, should a business want to market and sell a particular software pro-gram authored by four individuals, ac-quiring the rights of only three of the four may find the business with a competing copy of the software on the market, with no recourse other than a right to account-ing from the fourth author.

### Question 2: Do the rights still exist?

Copyright rights, technically speaking, have an expiration date, and a prospective purchaser would be wise to be sure that he or she is buying a right that has not already expired or that is not soon to expire.

The term of a copyright begins with the fixation of the work in tangible form and continues for several decades.<sup>19</sup> The exact duration of the term depends on the date the work was created and the author-ship. For example, the copyright in a work created in 1978 or later by a solo author, but not a work made for hire, will expire at the end of the calendar year 70 years after the author dies.<sup>20</sup> If the work was created by more than one author, but not a work made for hire, the expiration will be based on the last surviving author.<sup>21</sup> If the work was a work made for hire or an anonymous or pseudonymous work, the death of the authors has no impact on the copyright term.<sup>22</sup> Rather, the term will expire at the end of the year that is 120 years after creation of the work or the end of the year that is 95 years after publica-tion, whichever is earlier.<sup>23</sup> The foregoing terms may be very different if the work was created before 1978.<sup>24</sup> Also, the fore-going terms apply to the traditional copy-right rights, whereas moral rights expire at the end of the calendar year that the last-surviving author dies.<sup>25</sup>

### Question 3: Are the rights transferable?

The traditional copyright rights, i.e., the exclusive right to reproduce, adapt to create derivative works, distribute copies, and perform or display the work publicly, may generally be transferred by assign-ment or license.<sup>26</sup> The ownership of the copyright can be transferred in whole or

*Also not transferable by assignment or license are the moral rights held by a visual artist. However, unlike the termination right, moral rights may be waived.*

in part.<sup>27</sup> Therefore, any exclusive right may be transferred and owned separately.

Not all copyright-associated rights are transferable, however. For example, in addition to the copyright rights introduced above, the author of a work (other than a work made for hire) has a non-trans-ferable transfer termination right. That is, a transfer of a right under a copyright in a work (other than a work made for hire) may be terminated by the author be-tween thirty-five and forty years after the transfer.<sup>28</sup> The author cannot transfer this right to another,<sup>29</sup> cannot waive the right, and cannot otherwise contract away this right.<sup>30</sup> Therefore, a novelist who assigns his copyright to a publisher tomorrow may, in 2047, decide to terminate the ear-lier assignment and thereby reacquire his original copyright rights. The publisher cannot be absolutely sure that it will retain the copyright forever.

The author's right to terminate a copy-right transfer is not as obscure a right as some may think. Recently, this right was center stage in a dispute between Marvel Management Company and the heirs of the artist who "played a key role in the creation of a number of iconic characters, including 'The Fantastic Four,' 'The In-credible Hulk,' and 'The X-Men.'" <sup>31</sup> The artist's heirs sought to terminate a 1972 assignment transferring, *inter alia*, the artist's copyright to Marvel. *Id.* The court concluded that the transfer of rights in the iconic super heroes could not be termi-nated because the work was a work made for hire and therefore not subject to the termination right. *Id.* Nonetheless, copy-right assignees take heed of this *fantastic* reminder of the *invisible thing* called a "Termination Notice" that may lurk in the distance like a *torch-bearing villager* or a *brewing storm*.

Also not transferable by assignment or license are the moral rights held by a visu-al artist.<sup>32</sup> However, unlike the termination right, moral rights may be waived.<sup>33</sup> To be effective, the waiver must be express and in writing.<sup>34</sup>

It should also go without saying that rights not owned by the would-be assign-or cannot be transferred. Therefore, it is important to trace the entire title of own-ership of the copyright rights involved to the assignor and to ask about any other as-signments, rights contracts, or licenses the assignor has entered into that may affect the ownership of the present copyright rights.

For a very common example, many employers require their workers to sign contracts in which each worker "assigns and agrees to assign all right, title, and interest" in intellectual property created by the worker to the employer. In the copyright context, these contracts may not always affect the ownership of the copyright. After all, a work made for hire is deemed authored by the employer, such that the employer is the original owner of the work. However, outside of the work made for hire situation, *e.g.*, an independ-ent contractor relationship without a contract specifying that work will be con-sidered a "work made for hire," the type of employment contract clause previously mentioned, while not divesting the worker of the title of "author" of the work, may very well prevent the worker from subse-quently assigning or transferring rights to another.<sup>35</sup>

### Conclusion

The questions discussed above are certainly not the only questions one should ask before purchasing any copy-right right, but they should be included in the inquiry. Do not stop merely to ask for the names of those who say they are the authors of the work; ask who put pen to paper or sat at the keyboard. Do not pay three of four authors for the right to be the "exclusive" distributor of a piece of soft-ware only to find the market flooded with copies rightly distributed by the fourth au-thor. Be aware of the creation date of the copyright and calculate the copyright ex-piration date (and, if applicable, pay atten-tion to the passing of the author(s)). Know whether and to what extent the rights to be

assigned are even available to be transferred, what other rights the transferee or author retains, and how the exercise of transferred rights may be limited by the author's retained rights. Finally, before buying an assignment or license from a seller, always diligently trace the chain of title back to the author of the work and then forward to the would-be seller to ensure the chain of title has not been broken or splintered.<sup>36</sup>

## About the Author

**Elizabeth Herbst Schierman** is a registered patent attorney licensed in Idaho and holds degrees in Chemical Engineering and Law from the University of Idaho. Her practice is focused on helping innovators secure U.S. and foreign protection of patent, trademark, and copyright rights. She is a past Chair of the ISB Intellectual Property Law Section.

## Endnotes

<sup>1</sup> This article is focused on intellectual property transactions involving a transfer of rights by assignment or license. Intellectual property rights may be transferable by other types of transactions, such as by inheritance or bequeathal, by operation of law, or in bankruptcy. The discussion in this article does not necessarily apply to these other types of transfers.

<sup>2</sup> For more information regarding these questions, particularly as they also apply to trademark and patent transactions, please refer to "Intellectual Property Transactions: Identifying and Transferring Ownership," a Continuing Legal Education program recorded April 6, 2011, which is available online from the Idaho State Bar and Idaho Law Foundation online CLE catalog at <http://www.legalspan.com/isb/catalog.asp>, under the "Intellectual Property" category.

<sup>3</sup> "Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. § 102(a). Trademark rights, on the other hand, are associated with symbols used as distinctive indications of a particular source, origin, sponsorship, or endorsement of goods or services. U.S. Patent & Trademark Office, *Trademark FAQs*, <http://www.uspto.gov/faq/trademarks.jsp> (last visited July 11, 2011). Patent rights are associated with the invention or discovery of a new and useful process, machine, manufacture, or composition of matter. 35 U.S.C. § 101.

<sup>4</sup> Copyright protection extends to (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works. 17 U.S.C. § 102.

<sup>5</sup> "Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object." 17 U.S.C. § 202. The

same is true of moral rights. 17 U.S.C. § 106A(e) (2) ("Transfer of ownership of any copy of a work of visual art, or of a copyright or any exclusive right under a copyright, shall not constitute a waiver of the [moral] rights . . .").

<sup>6</sup> 17 U.S.C. § 106.

<sup>7</sup> 17 U.S.C. § 106A.

<sup>8</sup> *Id.* For more information regarding moral rights, see Elizabeth Herbst Schierman, *Moral Rights Under Federal Law*, 51 THE ADVOCATE 23 (Aug. 2008), available at <http://isb.idaho.gov/pdf/advocate/issues/adv08aug.pdf>.

<sup>9</sup> 17 U.S.C. § 301.

<sup>10</sup> For information regarding the extension of copyright protection in other parts of the world, refer to the U.S. Copyright Office's publication entitled "International Copyright Relations of the United States." U.S. Copyright Office, *Circular 38A: International Copyright Relations of the United States* (Nov. 2010), available at <http://www.copyright.gov/circs/circ38a.pdf>.

<sup>11</sup> 17 U.S.C. § 302(a) ("Copyright in a work created on or after January 1, 1978, subsists from its creation . . .").

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

<sup>13</sup> 17 U.S.C. § 201(a).

<sup>14</sup> 17 U.S.C. § 201(b).

<sup>15</sup> 17 U.S.C. § 101. The categories in which works, outside of an employer-employee relationship, may be considered a "work made for hire" with an accompanying agreement in that regard are (1) a collective work; (2) a motion picture or other audio visual work; (3) a translation; (4) a supplementary work; (5) a compilation; (6) an instructional text; (7) a test; (8) an answer material for a test; and (9) an atlas. *Id.*

<sup>16</sup> 17 U.S.C. § 201(b).

<sup>17</sup> 17 U.S.C. § 101; see, e.g., *Carell v. Shubert Org., Inc.*, 104 F. Supp. 2d 236, 256 (S.D.N.Y. 2000) ("The Second Circuit has established a two-part test for joint authorship, whereby each putative co-author must have (1) fully intended, at the time of creation, to be a co-author, and (2) made independently copyrightable contributions to the work.") (citing *Thomson v. Larson*, 147 F.3d 195, 200 (2d Cir. 1998) (citing *Childress v. Taylor*, 945 F.2d 500, 507-08 (2d Cir. 1991)); see also *Gaiman v. McFarlane*, 360 F.3d 644, 658 (7th Cir. 2004) ("[T]he assistance that a research assistant or secretary or draftsman or helpfully commenting colleague provides in the preparation of a scholarly paper does not entitle the helper to claim the status of a joint author." There has to be some original expression contributed by anyone who claims to be a co-author, and the rule . . . is that his contribution must be independently copyrightable.") (quoting *Seshadri v. Kasraian*, 130 F.3d 798, 803 (7th Cir. 1997)) (emphasis in original).

<sup>18</sup> *Gaylord v. U.S.*, 595 F.3d 1364, 1376 (Fed. Cir. 2010) (citing *Cnty. for Creative Non-Violence v. Reid*, 846 F.2d 1485, 1498 (D.C. Cir. 1988), *aff'd*, 490 U.S. 730 (1989)).

<sup>19</sup> 17 U.S.C. § 302(a).

<sup>20</sup> *Id.*; 17 U.S.C. § 305 ("All terms of copyright provided by sections 302 through 304 run to the end of the calendar year in which they would otherwise expire.")

<sup>21</sup> 17 U.S.C. § 302(b).

<sup>22</sup> See 17 U.S.C. § 302(c).

<sup>23</sup> *Id.*

<sup>24</sup> See 17 U.S.C. §§ 303 & 304.

<sup>25</sup> 17 U.S.C. § 106A(d).

<sup>26</sup> 17 U.S.C. § 201(d).

<sup>27</sup> 17 U.S.C. § 201(d)(1).

<sup>28</sup> 17 U.S.C. § 203.

<sup>29</sup> However, if the author is dead, the author's termination right may be exercised by heirs or joint authors, where applicable. 17 U.S.C. § 203(a)(1) & (a)(2).

<sup>30</sup> 17 U.S.C. § 203(a)(5) ("Termination . . . may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.")

<sup>31</sup> *Marvel Worldwide, Inc. v. Kirby*, No. 10 Civ. 141 (CM) (KNF), 2011 WL 3207794, \*1 (S.D.N.Y. July 28, 2011).

<sup>32</sup> 17 U.S.C. § 106A(e).

<sup>33</sup> *Id.*

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

<sup>35</sup> See *Filmtec Corp v. Allied-Signal Inc.*, 939 F.2d 1568, 1572 (Fed. Cir. 1991) ("If an assignment of rights in an invention is made prior to the existence of the invention, this may be viewed as an assignment of an expectant interest. . . . In such a situation, the assignee holds at most an equitable title. . . . Once the invention is made and an application for patent is filed, however, legal title to the rights accruing thereunder would be in the assignee. . . . and the assignor-inventor would have nothing remaining to assign."); but see *Arachnid, Inc. v. Merit Indus., Inc.*, 939 F.2d 1574, 1581 (Fed. Cir. 1991) ("Although an agreement to assign in the future inventions not yet developed may vest the promise with equitable rights in those inventions once made, such an agreement does not by itself vest legal title to patents on the inventions in the promise: 'The legal title to an invention can pass to another only by a conveyance which operations upon the thing invented after it has become capable of being made the subject of an application for a patent.'" (quoting G. Curtis, *A Treatise on the Law of Patents*, § 170 (4th ed. 1873) (emphasis added)). Though these cases discuss an assignment of patent rights, assignment principles in all areas of intellectual property, including copyright, are closely related.

<sup>36</sup> With regard to tracing the chain of title for a copyright, note that transfers of ownership or other documents pertaining to a copyright may be recorded in the U.S. Copyright Office. 17 U.S.C. § 205(a). If there is a question between the effectiveness of two transfers, for example, whether or not the first transfer document was recorded can impact whether or not it will prevail over the subsequent transfer. See, e.g., 17 U.S.C. § 205(d).

# A LITIGATOR'S PERSPECTIVE ON A FEW KEY TRANSACTIONAL CONCEPTS & TERMS

J. Will Varin  
Varin Wardwell LLC

With few exceptions, lawyers view themselves primarily as either transactional attorneys or litigators. Large firms divide their practice groups between corporate and litigation groups; small firms or solo practitioners often hold themselves out to be “trial” or “business” law firms. Yet in most, if not all, commercial litigation, the documents transactional attorneys draft delineate the issues and control the outcome of the lawsuit. Therefore, a healthy dialogue between transactional attorneys and litigators is beneficial to both practice areas.

This article discusses a few key concepts such as attorney fees, integration clauses, and alternative dispute resolution that, from a commercial litigator's perspective, every “transactional” attorney should keep in mind when drafting a commercial contract.

## **Paying the piper: actual versus reasonable attorney fees and costs**

Litigation is expensive, and your client would rather have her adversary pay your legal bill in a dispute. To maximize your client's chances of winning her attorney fees, careful drafting is essential.

Idaho law requires either a statutory or contractual basis to support an attorney fee award to the prevailing party.<sup>1</sup> In addition, pursuant to Idaho Code section 12-121 and Idaho Rule of Civil Procedure 11(a)(1), a court always has the discretion to award attorney fees if a suit is found to be frivolous or without merit.<sup>2</sup> But only the most egregious abuses of the judicial process warrant sanctions pursuant to Section 12-121 or Rule 11—and you should not rely upon a Section 12-121 or Rule 11 award in a business context given the clear alternative avenues that exist to recovery of attorney fees.

In the commercial context, Idaho Code section 12-120(3) is a common statutory basis for an attorney fee request and award. Section 12-120(3) provides “the prevailing party shall be allowed a reasonable attorney's fee to be set by the court,



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to be taxed and collected as costs.” Idaho Rules of Civil Procedure 54(d)(1) and 54(e), in turn, control the court's prevailing party analysis and limit the bounds of its discretion in awarding costs and fees to the prevailing party. Consistent with Section 12-120(3)'s “reasonable attorney fee” standard, the concept of reasonableness is reiterated throughout Rule 54(e).

A carefully drafted contract, however, can simplify the attorney fee award analysis and can alter or amend the Rule 54(d)(1) prevailing party test and provide a basis for an award of **actual** attorney fees and costs incurred — removing the award from the operation and requirements of Rules 54(d)(1) and 54(e) and the necessity that the court review and limit the award only to “reasonable” attorney fees. For instance, in *Zenner v. Holcomb*,<sup>3</sup> the Idaho Supreme Court held the district court properly awarded actual attorney's fees incurred in the litigation and the requirements of Rule 54(d)(1) and 54(e) did not apply under the specific language of the parties' contract.<sup>4</sup>

In *Zenner*, the parties had agreed, “[s]hould any kind of proceeding including litigation or arbitration be necessary to enforce the provisions of this agreement the prevailing party shall be entitled to have it's [sic] attorney's fees and costs paid by the other party.”<sup>5</sup> The district court found this language called for an award of actual attorney fees, and Justice Burdick, writing for a unanimous Idaho Supreme Court, agreed.<sup>6</sup> The Supreme Court went on to caution, however, that contractual language granting actual attorney fees does not provide an unqualified right to unlimited attorney fees because the losing party can still challenge the award on the basis that the award constitutes an unconscionable penalty.<sup>7</sup>

Therefore, when drafting language contemplating an attorney fee award, consider including a clearly defined test for determining the prevailing party as well

as language authorizing an award of actual attorney fees to the prevailing party. Obviously, keep in mind that an award of actual attorney fees could be a double edged sword if your client finds herself on the losing end of a dispute. A clause agreeing to payment of actual attorney fees to the prevailing party may not be appropriate in all contexts.

## **Integration clauses and the uniform commercial code's statute of frauds**

We all prefer a written contract to an oral agreement, and in many cases, a written contract is required to establish an enforceable agreement. Capturing the parties' agreement can be difficult, but leaving material terms ambiguous or building in the opportunity for a creative attorney to offer parol evidence could be an invitation to a long hard battle for your client.

Contracts for the sale of goods for the price of \$500 or more are subject to Idaho's codification of the Uniform Commercial Code's (UCC) statute of frauds, Idaho Code section 28-2-201, that requires a writing to establish an enforceable contract between the parties.<sup>8</sup> Section 28-2-202 contains the UCC's version of the common law parol evidence rule, and provides:

### **FINAL WRITTEN EXPRESSION — PAROL OR EXTRINSIC EVIDENCE.**

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

(a) By course of performance, course of dealing, or usage of trade (section 28-1-303); and

(b) By evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

A modification to any contract subject to the UCC statute of frauds is itself subject to the statute of frauds.<sup>9</sup>

Pursuant to the UCC's parol evidence rule, a court's construction of an unambiguous written contract is limited to the four corners of the document, if the court first concludes the parties' writing was intended "as a complete and exclusive statement of the terms of the agreement (total integration)."<sup>10</sup> Therefore, to avoid the introduction of parol evidence to explain or supplement the painstakingly drafted terms of a commercial contract, consider and discuss with your client whether you have addressed and articulated all material deal points and include in your contract an integration or merger clause that limits your adversary's ability to offer evidence from "outside" the face of the contract. Not only is a dispute less likely to occur when a contract is fully integrated, but if a dispute does arise, interpreting and applying the terms of a well drafted contract is much less expensive and fact-intensive than exploring the parties' course of conduct and each party's subjective understanding of a contract and its meaning.

It is also important to note that the UCC's statute of frauds writing requirement is subject to several notable exceptions and exemptions. The Idaho Supreme Court recently addressed one important exception, performance of the contract as orally modified, in *Apple's Mobile Catering, LLC v. O'Dell*.<sup>11</sup> *Apple's Mobile Catering, LLC* involved the sale of a mobile catering business. The parties entered into a written purchase and sale agreement that stipulated the catering equipment "complied with the minimum standards, regulations and/or requirements of the National Interagency Fire Center."<sup>12</sup> After the sale closed, however, the purchaser discovered the equipment did not meet these standards. In order to resolve the dispute over the adequacy of the equipment, the parties orally agreed, apparently without the benefit of counsel, that the seller would reduce the purchase price by a substantial amount, and the seller paid this reduced amount.

After reviewing the facts of *Apple's Mobile Catering, LLC*, Chief Justice Eismann, writing for a unanimous court, upheld the trial court's ruling granting summary judgment and holding that the parties fully performed the contract as orally modified and, therefore, the oral

modification was not barred by the statute of frauds.<sup>13</sup> Proper documentation of the parties' oral modification of the written purchase and sale agreement likely would have saved both parties the expense of litigation. Moreover, a properly counseled and informed client would not have agreed to an oral modification in the first place.

### The importance of a carefully crafted ADR provision

If you think a dispute over the contract may arise, should you opt your client out of the court system altogether? Agreeing to an alternative dispute resolution (ADR) mechanism, such as mediation or arbitration, before a dispute arises, can save your clients both time and money. Mandatory ADR provisions are typically enforceable in Idaho, and such provisions are becoming commonplace in commercial contracts.<sup>14</sup>

The decision to require ADR should not be taken lightly, however. Your client's needs and the ultimate goals of a mandatory ADR provision must be considered. While requiring some form of ADR prior to, or in lieu of, litigation can often lead to efficient resolution of a contractual dispute, by agreeing to ADR up front, your client may be giving up important substantive rights available in litigation, such as the right to a jury trial, the right to conduct written discovery or take depositions, or the right to appeal an adverse arbitration finding or award. Make sure your client understands what they may be giving up by agreeing to ADR.

A properly drafted ADR clause should include, at a minimum, a definition of the scope of the provision (e.g., "any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be subject to the provisions of this paragraph"); how the ADR process should be initiated and a neutral selected; the venue for the ADR proceeding; how the cost of the ADR proceeding will be allocated between the parties; any specific rules that will be applied during the ADR (such as the American Arbitration Association (AAA) Commercial Arbitration Rules); and whether the arbitrator or neutral has the authority to grant an attorney fee award at the conclusion of the proceeding.<sup>15</sup>

A poorly drafted ADR clause, on the other hand, could end up costing your client his day in court as well as creating unnecessary confusion and wasting the parties' time and money as they seek to interpret its scope or enforceability. ADR clauses have their place, but do not include one in contractual boilerplate without first giving it careful thought and

*ADR provisions are typically enforceable in Idaho, and such provisions are becoming commonplace in commercial contracts.*

without crafting it to fit your client's current circumstances.

### Conclusion

Each contract is unique, and the above illustrations and examples are by no means an exhaustive list of all potential litigation pitfalls. Rather, this discussion is intended to highlight a few areas you may wish to consider when drafting your next contract and to foster a productive dialogue between transactional attorneys and litigators.

### About the Author

**J. Will Varin** is a partner and founder at *Varin Wardwell LLC* located in Boise, Idaho. He focuses his practice on civil litigation, with a particular emphasis on commercial litigation and professional malpractice defense. Will obtained his J.D. at U.C. Hastings College of Law.

### Endnotes

- <sup>1</sup> IDAHO R. CIV. P. 54(e)(1) (2010).
- <sup>2</sup> IDAHO CODE § 12-121 (2010); IDAHO R. CIV. P. 11(a) (1) (2010).
- <sup>3</sup> 147 Idaho 444, 210 P.3d 552 (2009).
- <sup>4</sup> *Id.* at 452, 210 P.3d at 451.
- <sup>5</sup> *Id.* at 446, 210 P.3d at 554.
- <sup>6</sup> *Id.* at 51, 210 P.3d at 559.
- <sup>7</sup> *Id.*
- <sup>8</sup> The UCC also has a specific statute of frauds for leases at Idaho Code section 28-12-201, and Idaho's general statute of frauds is codified at Idaho Code section 9-505. Discussion of these other SOFs is beyond the scope of this article, but the same, or similar, general principles of law may apply.
- <sup>9</sup> IDAHO CODE § 28-2-209 (2010).
- <sup>10</sup> *Anderson & Nafziger v. Newcomb*, 100 Idaho 175, 180, 595 P.2d 709, 714, (1979); cf. *Borah v. McCandless*, 147 Idaho 73, 205 P.3d 1209 (2009).
- <sup>11</sup> 149 Idaho 211, 233 P.3d 142 (2010).
- <sup>12</sup> *Id.* at 212, 233 P.3d at 143.
- <sup>13</sup> *Id.* at 216, 233 P.3d at 147.
- <sup>14</sup> See *Wattenbarger v. A.G. Edwards & Sons, Inc.*, 150 Idaho 308, 315, 246 P.3d 961, 968 (2010).
- <sup>15</sup> The AAA provides helpful ADR drafting checklists and model ADR clauses on its website available at: <<http://www.adr.org/si.asp?id=4125>>, last visited June 27, 2011.

## WARNING: YOUR LLC INTEREST MIGHT BE A SECURITY

Wendy Gerwick Couture  
University of Idaho  
College of Law in Boise

If an interest in a limited liability company (“LLC”) is a security — whether under federal law, Idaho law, or both — there are serious implications. Securities cannot be offered or sold without either registering them or satisfying an exemption from registration.<sup>1</sup> Moreover, securities are subject to the antifraud provisions of the Securities Exchange Act and the Idaho Uniform Securities Act.<sup>2</sup> Yet, despite these important implications, the question of whether an LLC interest is a security under federal law and/or Idaho law is far from clear.

This article offers some clarity as to whether an LLC interest is a security. First, it analyzes the question under federal law, recommending specific ways to lower the likelihood that an LLC interest will qualify as a security under federal law. Second, it analyzes the question under Idaho law, explaining that the Idaho Uniform Securities Act arguably defines “security” more broadly than federal law in the context of LLC interests. Finally, it posits that, despite this arguable reading of the Idaho statute, courts should interpret Idaho law on this issue consistently with federal law.

### Is your LLC interest a security under federal law?

The Securities Act and the Securities Exchange Act, the primary federal statutes regulating securities, each defines the term “security,”<sup>3</sup> and the U.S. Supreme Court has interpreted these two definitions as “essentially identical.”<sup>4</sup> Each definition includes a laundry list of items, such as “stock” and “investment contracts,” that qualify as securities. LLC interests are not mentioned by name in these definitions, but they may qualify as “investment contracts.”<sup>5</sup>

The U.S. Supreme Court has identified four elements that must be met in order to qualify as an investment contract under the federal securities acts: (1) an investment of money; (2) in a common enterprise; (3) with an expectation of profits; (4) based solely on the efforts of others.<sup>6</sup> The first

*Limited partnership interests, whose owners usually do not exercise control over the partnership, are usually securities.*

three elements of this test are typically met with respect to LLC interests. First, the “investment of money” prong can be satisfied by investing goods or services, rather than merely by investing cash.<sup>7</sup> Second, the “common enterprise” prong, as interpreted by the Ninth Circuit, is satisfied if the investors’ interests are pooled (so-called “horizontal commonality”) or if the “fortunes of the investors are linked with those of the promoters”<sup>8</sup> (so-called “vertical commonality”).<sup>9</sup> Third, most LLC investors anticipate profits, absent unusual circumstances.

The ambiguity in analyzing whether an LLC interest is an investment contract usually arises with the fourth element — the “solely on the efforts of others” prong. The Ninth Circuit, among others, has declined to interpret the word “solely” literally, adopting instead the following more realistic test: “whether the efforts made by those other than the investor are undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise.”<sup>10</sup>

Many courts, when analyzing whether the “solely on the efforts of others” prong is met with respect to LLC interests, analogize interests in manager-managed LLCs to limited partnership interests and interests in member-managed LLCs to general partnership interests because of the similarities among these business entities. Limited partnership interests, whose owners usually do not exercise control over the partnership, are usually securities.<sup>11</sup> By analogy, interests in manager-managed LLCs are more likely to be securities.<sup>12</sup> General partnership interests, whose owners usually exercise at least some control over the partnership, are presumed not to be securities, absent a circumstance in which “the investor nonetheless can demonstrate such dependence on the promoter or on a third party that the investor was *in fact* unable to exercise meaningful partnership powers.”<sup>13</sup> By analogy, interests in a member-managed LLC are less likely to be securities.<sup>14</sup>

Although this analogy to limited and general partnerships is convenient, it is not completely apt. That is, limited partners are often statutorily barred from exercising any meaningful control over the limited partnership, lest they lose their limited liability,<sup>15</sup> while members of manager-managed LLCs are subject to no such restriction.<sup>16</sup> As a consequence, members of manager-managed LLCs may rely less on the efforts of others than limited partners of limited partnerships.<sup>17</sup> Moreover, partners of general partnerships are subject to personal liability,<sup>18</sup> thus encouraging them to be active in the management of the business. Members of member-managed LLCs are protected from personal liability,<sup>19</sup> however, suggesting that they may be less motivated to engage actively in the business.<sup>20</sup>

Therefore, the “solely on the efforts of others” analysis should not end with the distinction between member-managed and manager-managed LLCs. For instance, courts have considered the following additional factors when analyzing whether an LLC interest is a security: (1) whether the members have the right to manage the business;<sup>21</sup> (2) whether the members have the power to participate in the authorization of distributions;<sup>22</sup> (3) whether the members have the right to call meetings;<sup>23</sup> (4) whether the members’ power is diluted;<sup>24</sup> and (5) whether the members have the power to remove the manager for cause.<sup>25</sup>

### Is your LLC interest a security under Idaho law?

The Idaho Uniform Securities Act, like the federal securities acts, defines the term “security” as including “investment contracts.”<sup>26</sup> In addition, the Idaho statute codifies the U.S. Supreme Court’s four-part test to qualify as an investment contract: “‘Security’ includes as an ‘investment contract’ an investment in a common enterprise with the expectation of profits to be derived primarily from the efforts of a person other than the issuer.”<sup>27</sup>



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Couture

Consistent with the Ninth Circuit's interpretation of this test, Idaho's securities act replaces the troublesome word "solely" with the word "primarily" and recognizes that the "common enterprise" element can be satisfied by both horizontal and vertical commonality.<sup>28</sup> If the Idaho Uniform Securities Act contained no additional references to LLC interests, the analysis of whether an LLC interest is a security would be identical under federal and Idaho law.

The Idaho statute, however, includes the following additional provision: "'Security' includes as an 'investment contract,' among other contracts, an interest in a limited partnership and a limited liability company and an investment in a viatical settlement, life settlement or senior settlement or similar agreement."<sup>29</sup> This provision is capable of two interpretations: (1) an LLC interest is always an investment contract, regardless of whether it satisfies the four-part investment contract test; or (2) an LLC interest is an investment contract only if it satisfies the four-part investment contract test. No Idaho court has resolved this issue; this article briefly outlines the arguments in favor of each interpretation.

The first interpretation — that an LLC interest is always an investment contract under Idaho law — is supported by the most straightforward reading of the following statutory language: "'Security' includes as an 'investment contract' . . . an interest in . . . a limited liability company."<sup>30</sup> Indeed, several secondary sources, citing this provision, have interpreted Idaho law in this manner.<sup>31</sup> Moreover, in an opinion letter about an interest in a limited partnership (which is also listed in the provision), the Idaho Securities Bureau appeared to treat this statutory language as creating a per se rule that limited partnership interests are securities.<sup>32</sup> Further, when adopting the Uniform Securities Act, some other states explicitly adapted this provision so as to include only those LLC interests that satisfy the four-part investment contract test.<sup>33</sup> Additionally, a federal district court in Michigan, analyzing this provision of the Uniform Securities Act in the context of a viatical settlement (which is also listed in this provision), treated this language as creating a per se rule that all interests listed therein are securities, regardless of whether they satisfy the four-part investment contract test.<sup>34</sup> Finally, this per se interpretation of the Idaho statute would further the policy interest of certainty by providing a clear answer to the question of whether an LLC interest is a security under Idaho law.

*No Idaho court has resolved this issue; this article briefly outlines the arguments in favor of each interpretation.*

The second interpretation — that an LLC interest is an investment contract under Idaho law only if it satisfies the four-part test — is supported by a more nuanced interpretation of the Idaho statute. Arguably, if the drafters intended to define all LLC interests as securities, LLC interests would have been included in the laundry list alongside investment contracts, rather than as a subset of investment contracts. By treating LLC interests as a subset of investment contracts, the statute arguably applies the four-part investment contract test to LLC interests. Indeed, the Commentary to the Uniform Securities Act — the source of this provision — explains that this provision is intended to clarify that LLC interests are securities "when consistent with the court decisions interpreting the investment contract concept."<sup>35</sup> Moreover, this interpretation is consistent with the "uniformity principle" recognized elsewhere in the Idaho Uniform Securities Act, pursuant to which "maximizing uniformity in federal and state regulatory standards" is a policy consideration.<sup>36</sup> Further, this interpretation would further the policy interest of efficiency by allowing business owners to perform a single analysis of the question of whether an LLC interest is a security under federal and Idaho law.

This article endorses the second interpretation because it further advances the delicate relationship between federal and state regulation of securities. Federal law supplants state law in some circumstances, such as by exempting certain "covered securities" from state regulation when it would be duplicative.<sup>37</sup> Similarly, federal law defers to state law in other circumstances, such as by exempting intrastate offerings from federal registration because they pose primarily a state concern.<sup>38</sup> Finally, federal and state law dually regulate securities in many circumstances, including antifraud enforcement.<sup>39</sup> This carefully crafted scheme is premised on the notion that the same interests qualify as securities under federal and state law. It remains to be seen, however, how courts

will interpret the question of whether an LLC interest is a security under Idaho law.

## Conclusion

If you are analyzing whether an LLC interest is a security, you should first apply the four-part investment contract test. If the four-part investment contract test is satisfied, you must ensure compliance with the federal and Idaho securities acts. If the four-part investment contract test is not met, you must assess — in light of the foregoing discussion — whether to nonetheless comply with the Idaho Uniform Securities Act out of an abundance of caution, lest you inadvertently run afoul of the Act's registration requirements.

## About the Author

*Wendy Gerwick Couture is an Associate Professor at the University of Idaho College of Law. She teaches securities regulation and other business and commercial law courses to law students enrolled in the Boise Third-Year Program.*

## Endnotes

<sup>1</sup> 15 U.S.C. § 77e; IDAHO CODE § 30-14-301.

<sup>2</sup> 15 U.S.C. § 78j; IDAHO CODE § 30-14-301.

<sup>3</sup> 15 U.S.C. § 77b(a)(1); 15 U.S.C. § 78c(a)(10).

<sup>4</sup> *SEC v. Edwards*, 540 U.S. 389, 393 (2004).

<sup>5</sup> See, e.g., 2 RIBSTEIN & KEATINGE ON LTD. LIAB. COS. § 14.2 (2010) (analyzing whether LLC interests are securities by applying "investment contract" analysis); James J. Wheaton, *Current Status of Securities Issues*, Limited Liability Entities – 2006: New Developments in Limited Liability Companies and Limited Liability Partnerships (ALI-ABA March 16, 2006) ("LLC interests are not listed as securities by the 1933 Act . . . , but another item, 'investment contract,' has become the catch-all through which interests that are not otherwise listed can be drawn within the coverage of the securities laws.").

<sup>6</sup> *SEC v. Howey*, 328 U.S. 293, 298-99 (1946).

<sup>7</sup> *Int'l Bhd. of Teamsters v. Daniel*, 439 U.S. 551, 560 n. 12 (1979).

<sup>8</sup> *SEC v. Eurobond Exch., Ltd.*, 13 F.3d 1334, 1339 (9th Cir. 1993).

<sup>9</sup> *Hocking v. Dubois*, 885 F.2d 1449, 1459 (9th Cir. 1989).

<sup>10</sup> *SEC v. Glenn W. Turner Enters., Inc.*, 474 F.2d 476, 482 (9th Cir. 1973).

<sup>11</sup> *Reeves v. Teuscher*, 881 F.2d 1495, 1500 n.6 (9th Cir. 1989).

<sup>12</sup> E.g., *Keith v. Black Diamond Adv.*, 48 F. Supp. 2d 326, 333 n.3 (S.D.N.Y. 1999).

<sup>13</sup> *Holden v. Hagopian*, 978 F.2d 1115, 1119 (9th Cir. 1992).

<sup>14</sup> E.g., *Keith v. Black Diamond Adv.*, 48 F. Supp. 2d 326, 334 (S.D.N.Y. 1999); *SEC v. Shreveport Wireless Cable Tel. P'ship*, No. Civ.A. 94-1781, 1998 WL 892948 (D.D.C. Oct. 20, 1998).

<sup>15</sup> See REV. UNIF. LTD. P'SHIP ACT § 303 (1985) ("RULPA"); but see UNIF. LTD. P'SHIP ACT § 303 (2001) ("Re-RULPA").

<sup>16</sup> See REV. UNIF. LTD. LIAB. CO. ACT § 304 (2006).

<sup>17</sup> *Great Lakes Chem. Co. v. Monsanto Co.*, 96 F. Supp. 2d 376, 391-92 (D. Del. 2000).

<sup>18</sup> See UNIF. P'SHIP ACT § 306 (1997).

<sup>19</sup> See REV. UNIF. LTD. LIAB. CO. ACT § 304 (2006).

<sup>20</sup> *Ak's Daks Comms. v. Maryland Sec. Div.*, 771 A.2d 487, 498 (Ct. of Sp. App. of Md. 2001); *Great Lakes Chem. Co. v. Monsanto Co.*, 96 F. Supp. 2d 376, 390 (D. Del. 2000); *Nutek v. Ariz. Corp. Comm'n*, 977 P.2d 826, 833-34 (Ariz. Ct. App. 1998).

<sup>21</sup> *Compare Nutek*, 977 P.2d at 831 (holding that LLC interests were securities where, among other factors, management agreement turned all principal management functions over to another), with *Keith*, 48 F. Supp. 2d at 333 (holding that LLC interests were not securities where, among other factors, members had right to manage business).

<sup>22</sup> *Compare Shirley v. JED Capital, LLC*, No. 09-C-7894, 2010 WL 2721855, at \*3 (N.D. Ill. July 8, 2010) (holding that LLC interests were securities where, among other factors, manager had sole power to authorize distributions), with *Keith*, 48 F. Supp. 2d at 333 (holding that LLC interests were not securities where, among other factors, members had right to participate in detailed cash flow distribution structure).

<sup>23</sup> *Compare Shirley*, 2010 WL 2721855, at \*3 (holding that LLC interests were securities where, among other factors, membership meeting could not be called without manager's consent), with *Keith*, 48 F. Supp. 2d at 333 (holding that LLC interests were not securities where, among other factors, members had right to call meetings of members).

<sup>24</sup> *Compare Nutek*, 977 P.2d at 832 (holding that membership interests in a member-managed LLC were securities where, among other factors, large number of geographically dispersed investors diluted power to such extent that prevented members from exercising effective control), with *Great Lakes*, 96 F. Supp. 2d at 392 (holding that LLC interests were not securities where member was sole owner and thus power was not diluted).

<sup>25</sup> *Compare Shirley*, 2010 WL 2721855, at \*3 (holding that LLC interests were securities where, among other factors, manager had veto power over change in manager and operating agreement had no provision for removal of manager for cause), with *Great Lakes*, 96 F. Supp. 2d at 392 (holding that LLC inter-

*Similarly, federal law defers to state law in other circumstances, such as by exempting intrastate offerings from federal registration because they pose primarily a state concern.*

ests were not securities where members had power to remove any manager with or without cause).

<sup>26</sup> IDAHO CODE § 30-14-102(28).

<sup>27</sup> IDAHO CODE § 30-14-102(28)(d).

<sup>28</sup> IDAHO CODE § 30-14-102(28)(d) ("Common enterprise" means an enterprise in which the fortunes of the investor are interwoven with those of either the person offering the investment, a third party, or other investors.").

<sup>29</sup> IDAHO CODE § 30-14-102(28)(e). A viatical settlement is "[a] transaction in which a terminally or chronically ill person sells the benefits of a life-insurance policy to a third party in return for a lump-sum cash payment equal to a percentage of the policy's face value." BLACK'S LAW DICTIONARY 1497 (9th ed. 2009) (defining "viatical settlement" within definition of "settlement").

<sup>30</sup> IDAHO CODE § 30-14-102(28)(e).

<sup>31</sup> PETER M. FASS & DEREK A. WITTMER, BLUE SKY PRACTICE FOR PUBLIC AND PRIVATE DIRECT PARTICIPATION OFFERINGS, App. 13A (2010) ("[In Idaho,] LLC interests are defined as securities."); James J. Wheaton, *Current Status of Securities Issues*, Limited Liability Entities – 2006: New Developments in Limited Liability Companies and Limited Liability Partnerships (ALI-ABA March 16, 2006) ("Under the standard version of the 2002 Uniform Act, LLC interests and limited partnership interests are lumped together and deemed to be within the definition of 'investment contract.' Idaho, Maine, South Dakota and Vermont have adopted this language without modification.").

<sup>32</sup> Idaho Department of Finance, Opinion Letter at 2 (March 20, 2006), available at <http://finance.idaho.gov/Securities/NoActionOpinionLetters.aspx>.

<sup>22</sup> See, e.g., OKLA. STAT. ANN. tit. 71, § 1-102 cmt 5 ("[T]he words 'a third party managed' were added before the phrase 'limited liability company' to

narrow the scope of the definition, with respect to limited liability company interests, to those interests meeting the elements of an investment contract, i.e., investment interests in limited liability companies from which expected profits are to be derived primarily from the efforts of a person other than the investor."); KAN. STAT. ANN. § 17-12a102(28)(E) (clarifying that investment contracts "may include" LLC interests) (emphasis added); MO. ANN. STAT. § 409.1-102(28)(E) (same as Kansas).

<sup>34</sup> *In re Trade Partners, Inc. Investors Litig.*, No. 1:07-MD-1846, 2008 WL 3992168, at \*4 (W.D. Mich. Aug. 22, 2008) (not reported) (applying Oklahoma law) (analyzing viatical settlements pre-dating the enactment of this provision pursuant to the four-part investment contract test and treating viatical settlements post-dating the enactment as securities per se).

<sup>35</sup> UNIF. SEC. ACT § 102 cmt. 28 (2002) ("Section 102(28)(E) is consistent with state and federal securities laws which have recognizes interests in limited liability companies and limited partnerships in some circumstances as 'securities.'") (emphasis added).

<sup>37</sup> IDAHO CODE § 30-14-608(b).

<sup>38</sup> 15 U.S.C. § 77r; 142 CONG. REC. S12093-02 (daily ed. Oct. 1, 1996) (statement of Sen. Sarbanes) (discussing the rationales for the National Securities Markets Improvement Act of 1996) ("[D]ual regulation need not mean duplicative regulation.").

<sup>39</sup> 15 U.S.C. § 77c(a)(11); Notice of Adoption of Rule 147 Under the Securities Act of 1933, Securities Act Release No. 5450 (January 7, 1974) ("Section 3(a)(11) was intended to allow issuers with localized operations to sell securities as part of a plan of local financing. . . . In theory, the investors would be protected both by their proximity to the issuer and by state regulation.").

<sup>40</sup> E.g., 15 U.S.C. § 77r(c) (preserving fraud authority of securities commission of any state).

## 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](mailto:tpark@thomaswilliamsllaw.com)

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# PRIVATE PLACEMENTS OF SECURITIES IN A NEW ERA OF REGULATION AND ENFORCEMENT - TRAPS FOR THE UNWARY

Brian R. Buckham  
Corporate Counsel, IDACORP,  
Inc.

## Introduction

In the early days of Idaho's history, the offer and sale of a security was largely unregulated, and vast fortunes were made through the issuance of securities of mining companies. The prospect of colossal wealth through passive ownership of a mining venture created a rich environment for the sale of very speculative, and sometimes fraudulent, securities. Undoubtedly, there existed in many instances a fine line between sales of securities for speculative but otherwise honest mining ventures versus outright fraud. The largely undeveloped state securities laws that were enacted in the early twentieth century, and the mechanisms in place to monitor and enforce them, were inadequate to curtail deceptive practices.<sup>1</sup> These practices contributed to the blockbuster stock market crash of 1929.

Shortly thereafter, the U.S. Congress adopted the Securities Act of 1933 (Securities Act) and the Securities Exchange Act of 1934 (Exchange Act), and formed the Securities and Exchange Commission (SEC) to administer the federal securities laws. Stated generally, the



Brian R. Buckham

Securities Act governs the offer and sale of securities, whereas the Exchange Act regulates, among other items, securities markets and imposes continuous disclosure obligations and corporate governance requirements on certain classes of issuers of securities. One basic premise of the Securities Act can be captured with a single sentence: "Every sale of a non-exempt security must be either registered or exempt from registration." Failure to adhere to this seemingly straightforward concept has all too frequently resulted in enforcement actions by the SEC and state securities regulators and criminal prosecution by federal and state agencies.

Section 5 of the Securities Act makes it unlawful for any person to sell securities through a means of interstate commerce unless a registration statement for

*One basic premise of the Securities Act can be captured with a single sentence: "Every sale of a non-exempt security must be either registered or exempt from registration."*

the securities has been filed with the SEC and is in effect. Section 3 lists categories of securities that are exempt from registration, and Section 4 describes a variety of transactions that are exempt from registration. Under its rulemaking authority under the Securities Act, the SEC has promulgated a number of rules providing other exemptions from Section 5 of the Securities Act.<sup>2</sup>

For issuers desiring to avoid the costly and time-intensive registration process under the Securities Act, and the continuous disclosure and other Exchange Act obligations that follow, the structure and mechanics of the sale of securities is important, as exemptions from registration are easily lost. Once an exemption is no longer available, all offers and sales that were made in reliance on the exemption will have been made in violation of Section 5, with all of the attendant consequences. This article discusses a few common traps and pitfalls for the unseasoned issuer of securities and its legal counsel.

## Exempt sales of securities — traps for the unwary

Compliance with regulatory requirements surrounding the offer and sale of securities, whether the transaction is registered or exempt, requires careful attention to transaction structuring. A select few of the important, but sometimes overlooked, compliance pitfalls that may arise in connection with private placements of securities pursuant to an exemption from registration are described below.

### The inadvertent sale of securities

If you have recently provided legal counsel in connection with the offer or sale of tenant in common interests in real property, limited liability company membership interests, limited partnership interests, promissory notes for investment purposes, stock or stock options is-

sued to employees, or any instrument or interest that could loosely be considered an "investment contract," brace yourself. Federal and state securities laws apply to transactions in each of these instruments, with limited exceptions. Section 2(a)(1) of the Securities Act defines a "security" broadly, and includes in the definition "any note, stock, treasury stock, security future, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate," and several other designated items.

Most notably, the SEC and courts have given considerable attention to the term "investment contract" in that definition. In *SEC v. W. J. Howey Co.*, the U.S. Supreme Court stated, "[A]n investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party."<sup>3</sup> Subsequent court cases have generally been investor-favorable by refining the word "solely" in the *Howey* definition to mean "primarily" or "substantially."<sup>4</sup> Transactions involving limited partnership interests, LLC interests (an interesting question under Idaho state law)<sup>5</sup>, and tenant in common and other fractional interests in real estate have all been found to involve the sale of a security under the auspice of constituting an investment contract. Promissory notes in many contexts are also securities. It probably goes without saying, but derivative instruments, such as stock options, are themselves securities. Practitioners should be mindful of the expansive definition of a "security," and thus the risk of triggering the application of federal and

state securities laws, when assisting with any capital raising, compensatory, investment, fractional interest in real property, and business formation or capitalization transaction.

### **Beware the states**

Each state has an analog to the Securities Act, and to a more limited extent, the Exchange Act, referred to as the “blue sky” laws. Unlike the federal securities laws, which are premised on full disclosure, state securities laws may impose a substantive scrutiny in the form of evaluating the merit of an offering. For an offering of securities that will be made in several states, complying with the individual registration and exemption requirements of each state can be costly and time-consuming.

In 1996, Congress enacted the National Securities Markets Improvement Act of 1996 (NSMIA),<sup>6</sup> which effectively resulted in preemption of certain state securities regulations. Notably, NSMIA preempted state regulations for offerings conducted pursuant to Rule 506, the most commonly relied upon federal exemption from registration.<sup>7</sup> Importantly, however, NSMIA did not *entirely* preempt state laws for offerings conducted pursuant to Rule 506. Many states, including Idaho,<sup>8</sup> require that issuers conducting a Rule 506 offering deliver a notice of the offering, pay a filing fee, and execute a consent to service of process. Thus, issuers relying on exemptions at the federal level must continue to analyze the state law requirements applicable to the securities offering and, notwithstanding NSMIA, issuers should be aware that they may need to make state filings even in a Rule 506 offering.

### **Disclosure is your friend — the private placement memorandum**

Even in the absence of a mandatory disclosure obligation under some exemptions from registration, disclosing material information regarding the issuer and its securities to prospective investors is generally a prudent approach. This disclosure obligation is mandatory under some federal exemptions, perhaps implied by some federal rules for other federal exemptions, and expressly required by some state securities laws. While Sections 3 and 4 of the Securities Act eliminate the registration requirement for some securities and transactions, they do not eliminate the application of the anti-fraud provisions or potential liability for fraud under the Exchange Act. The more detached the investors are from the issuer’s financial and operating plans and results, the greater the need for a comprehensive disclosure doc-

*The more detached the investors are from the issuer’s financial and operating plans and results, the greater the need for a comprehensive disclosure document.*

ument, often referred to as a private offering or private placement memorandum. The memorandum typically includes, most notably, a description of the terms of the offering, the issuer’s capital structure, material risks to which the company and offering are subject, details on the issuer’s management, financial statements, and a description of the issuer’s governing instruments and documents material to the transaction. The two important purposes of the private placement memorandum are (a) to ensure prospective investors have access to current information about the issuer, from which they can make an informed investment decision; and (b) if well drafted, protection for the issuer in the event of an investor suit for fraud, misrepresentation, or omission in connection with the sale of the securities. It is a rare case where the burden of preparing a private placement memorandum outweighs the benefits of providing prospective investors with a well-prepared private placement memorandum.

### **Keep it quiet — prohibition on advertising and general solicitation**

Not surprisingly, most exemptions from registration under the Securities Act require that no advertising or general solicitation be used in connection with the securities offering, thus ensuring that the offering is not a “public” offering. Clearly, newspaper advertisements, the contents of websites accessible to the general public, and other broad means of dissemination of information about an offering are prohibited. Generally stated, it is a prudent practice to seek as investors only those persons with whom the issuer and its agents (including broker/dealers retained by the issuer) have a pre-existing relationship and who are reasonably believed to satisfy the sophistication, accredited investor, and other standards imposed by the applicable exemption. If an issuer has engaged in advertising and solicitation in contravention of the applicable exemption, it may be necessary to

suspend the offering for a period of time, as a cooling-off period. As this lengthy delay can be damaging to the issuer, legal counsel should advise clients early and often of the prohibition on advertising and general solicitation.

### **Attorneys beware — aiding and abetting liability**

It is relatively settled that Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, key anti-fraud provisions of federal securities laws, do not permit private plaintiffs to sue aiders and abettors for federal securities fraud.<sup>9</sup> However, the blue sky laws of numerous states extend joint and several liability to persons who had a material role in a securities transaction, which in many cases could include the issuer’s or other offering participants’ lawyers and accountants.<sup>10</sup> The blue sky laws of some states, but not all, limit offering participants’ who are liable for aiding and abetting to those who had a culpable state of mind.<sup>11</sup> Attorneys advising clients on securities offerings should take note of the states in which the securities are being offered, familiarize themselves with the availability of aiding and abetting claims in those states, and understand (and plan for) the risks.

### **Beware the troublemakers**

In May 2011, the SEC issued a proposed rule to implement a provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act)<sup>12</sup> that would impact eligibility to use the Rule 506 exemption. Under the proposed rule, an issuer would be unable to rely on the Rule 506 exemption if the issuer or any other person covered by the rule had a “disqualifying event” such as a criminal conviction or court injunction and restraining order. The proposed rule broadly covers the issuer and any affiliated issuers; directors, officers, general partners, and managing members of the issuer; 10 percent beneficial owners and promoters of the issuer; and persons compensated for soliciting investors, as well as the

general partners, directors, officers, and managing members of any compensated solicitor. Rule 262 under the Securities Act already imposes so-called “bad actor” disqualifiers for Regulation A offerings, which are infrequently conducted.<sup>13</sup> Once the final rules are effective, practitioners will need to develop appropriate questionnaires and certifications to ensure that the persons and entities involved in a Rule 506 exempt offering would not disqualify the issuer from use of the exemption.

### **The money is not in the bag**

Private placements are commonly structured as best efforts, contingency offerings where the placement agent does not purchase the securities and the closing of the offering is contingent upon the receipt of subscriptions for a minimum offering amount. Two important, but perhaps unintentionally overlooked, rules under the Exchange Act have direct application in this circumstance. Rule 10b-9 prohibits an issuer from making a representation in connection with the offer or sale of a security in a contingent offering that it is being sold on an “all-or-none” (i.e., contingent) basis unless all the securities are sold at a specified price within a specified time and the total amount due to the issuer is received by a specified date.<sup>14</sup> Rule 15c2-4 then requires broker-dealers participating in the contingent offering to deposit subscription proceeds in a separate account until the contingencies have occurred.<sup>15</sup> Thus, when issuers are contemplating a contingent offering, the issuer and its placement agents must be reminded of these requirements and structure the offering and the disclosure documents used in the offering accordingly.

### **Your employees are securities plaintiffs**

While often times there is no exchange of monetary consideration when an employer issues securities to an employee for services rendered, the issuance of those securities is nonetheless a transaction governed by the Securities Act and state securities laws. For companies that are not subject to the reporting requirements of the Exchange Act and are not investment companies under the Investment Company Act of 1940, Rule 701 under the Securities Act permits an issuer to offer securities pursuant to a written contract or plan to its employees, directors, general partners, trustees, consultants, and advisors.<sup>16</sup> The dollar amount of securities that may be issued is limited, and the issuer must deliver limited disclosure documents to employees for the sale of in excess of \$5 million in securities in a

## *Issuers must carefully structure the benefit plan and issuances under the plan to stay within the boundaries of the exemption.*

12-month period.<sup>17</sup> Issuers must carefully structure the benefit plan and issuances under the plan to stay within the boundaries of the exemption.

### **Seller beware — your neighbor is no longer qualified to purchase**

Whether an investor qualifies as an “accredited investor” is of great significance for a number of exemptions from registration, including Rule 506 under Regulation D. Section 413(a) of the Dodd-Frank Act requires the definition of “accredited investor” to exclude the value of a person’s primary residence for purposes of determining whether the person qualifies on the basis of having a net worth in excess of \$1 million. This change to the net worth standard was effective upon enactment by operation of the Dodd-Frank Act, and the SEC has proposed rules to implement the change.<sup>18</sup> According to the SEC, this change to the definition decreased by 28 percent the number of U.S. households that qualify for accredited investor status.<sup>19</sup> Section 413(b) of the Dodd-Frank Act requires the SEC to undertake a review of the definition of the term “accredited investor” as it applies to natural persons every four years, and authorizes the SEC to engage in rulemaking to make adjustments to the definition after each such review. As a result, practitioners should update investor qualification questionnaires used in connection with private offerings and should closely monitor the SEC’s rulemaking in this area.

### **The rules have changed — amendments to Form D and electronic filing**

The rules have changed for Regulation D and Section 4(6) exempt offerings. SEC rules require, as they have for a number of years, that a notice on Form D be filed within 15 days after the first sale of securities in an offering conducted under the Regulation D or Section 4(6) exemptions. Until recently, a Form D could be filed into the abyss of the SEC’s public

reference room in paper format. However, the SEC now requires that the form be submitted electronically using the SEC’s EDGAR (electronic gathering, analysis and retrieval) system. To file electronically, the issuer must have a unique filer identification number and a set of access codes, the acquisition of which requires a separate filing with the SEC. Issuers should incorporate this process into the offering timeline and checklist. Also, issuers should be aware that the information in the Form D is publicly available and now very easily accessible, so if the information required by a Form D could be sensitive to the issuer, the issuer may desire to consider structuring the offering with the use of an exemption that does not require the filing of a Form D.

The SEC also recently clarified the circumstances under which an amendment to a previously filed Form D is required to be filed, which include (a) to correct a material mistake of fact or error in the previously filed notice, as soon as practicable after discovery of the mistake or error; (b) to reflect a change in the information provided in the previously filed notice, with some exceptions, as soon as practicable after the change; and (c) annually, on or before the first anniversary of the most recent previously filed notice, if the offering is continuing at that time.

### **“Finders” are not keepers**

Many issuers consider the use of “finders” to assist in locating prospective investors. However, using a finder who is not a registered broker/dealer can be to the issuer’s peril, as sales of securities by unregistered broker/dealers can run afoul of a number of federal and state securities laws. Determining whether a person acting on behalf of the issuer must be registered as a broker/dealer requires a careful consideration of several factors, such as the nature of the compensation paid to the person, the scope of solicitation activities, and the level of participation in the nego-

tiation and sale process. The scope and nature of securities selling-related efforts that do not require broker/dealer registration is very narrow. Issuers considering the use of finders rather than registered broker/dealers should be advised of the risks of doing so, and in many cases counseled against the use of finders.

### **Avoid the perils of integration**

Under the integration doctrine, the SEC may review multiple offerings to see if they should be treated as one combined offering. If two or more purportedly exempt offerings are integrated, they must together meet the applicable exemption, or the offerings risk violating Section 5 of the Securities Act. That is, it is possible that two or more offerings, when combined, will not have the attributes that entitled them to rely upon an applicable exemption. The SEC has issued safe harbor rules for integration,<sup>20</sup> and the SEC and courts have implemented a five-factor test for determining whether offers should be integrated.<sup>21</sup> Counsel to issuers should undertake a careful review of all offers and sales of securities made within at least the 12-month period prior to a proposed offering and analyze both (a) whether the prior offering could be integrated and (b) whether integration could result in the loss of the exemption upon which the issuer intended to rely. Practitioners should also be cognizant of any future securities transactions in which the issuer intends to engage, and analyze the integration risks of those offerings.

### **Not so fast! — restrictions on resale**

It bears mentioning again - *every* sale of a non-exempt security must be either registered or exempt from registration. Thus, secondary transactions (i.e., resales) by existing securityholders implicate Section 5's registration requirement. Section 4(1) of the Securities Act provides an exemption from registration for resales by persons other than an "issuer, underwriter, or dealer," which effectively exempts many day-to-day transactions effected in public markets. But securities purchased in a private placement, or that are owned by "affiliates" of the issuer (a factual question of control over the issuer), are generally subject to restrictions on resale, as the holder of the securities may be deemed a statutory "underwriter" under the Securities Act, thus rendering Section 4(1) unavailable. The Securities Act provides that an "underwriter" is one who acquires securities from the issuer with a

*Prior to the resale of restricted securities or securities held by affiliates, practitioners should conduct a careful evaluation of the limitations on resale imposed by the Securities Act.*

"view to distribution," which requires a careful factual analysis.<sup>22</sup> However, Rule 144 under the Securities Act provides a non-exclusive safe-harbor from "underwriter" status. In general, Rule 144 requires restricted securities to be held for a particular length of time, and imposes other conditions that must be satisfied prior to the resale of the shares. The rule applies differently to affiliates and non-affiliates of the issuer of the securities, and in some cases imposes a disclosure obligation. Thus, prior to the resale of restricted securities or securities held by affiliates, practitioners should conduct a careful evaluation of the limitations on resale imposed by the Securities Act.

### **The inadvertently public company**

While there is a certain glamour associated with conducting an initial public offering, and advantages of doing so (most notably, more ready access to the capital markets), in most instances the disadvantages will outweigh the benefits for smaller companies. Some companies have discovered, much to their dismay, that an initial public offering of securities under the Securities Act is not the only method by which a company may become a "public company." Even if a company has not conducted a registered offering of securities under the Securities Act, under Section 12(g)(1) of the Exchange Act it must file an Exchange Act registration statement, and is then subjected to the periodic reporting and other onerous obligations of the Exchange Act, if it has more than \$10 million in total assets and a class of equity securities owned by 500 or more holders.<sup>23</sup> In essence, by triggering Section 12(g)(1) the company undertakes the obligations attendant to being a public company but without the capital-raising benefit of effecting a registered initial public offering of securities under the Securities Act.

Rule 12g5-1 under the Exchange Act provides that the number of shareholders

for purposes of triggering Section 12(g)(1) is calculated based on record owners of the securities, not the number of beneficial owners. Rule 12g5-1(a)(3) provides a special counting method for securities held in a custodial capacity for a single trust, estate, or account. Institutional custodians and commercial depositories are not considered single holders of record; instead, each of the depository's accounts for which the securities are held is a single record holder. A broker-dealer is the record owner of securities held in street name by the broker-dealer. As the number of equity holders in a company begins to expand into the triple-digits, attention to Section 12(g)(1) and its corresponding rules becomes paramount.

### **Conclusion**

At the same time that the Dodd-Frank Act has mandated that the SEC undertake a massive rulemaking process, the SEC has undertaken an initiative of late to review the regulatory burdens imposed on private capital raising. This initiative is in answer to the separate call from the business community and legislators who are concerned with the implications of over-regulation of capital raising in the United States. While there are rumblings that change could be on the way, the fact remains that there are still significant regulatory burdens, and a commensurate number of potential compliance pitfalls, on private capital formation in the United States. Developing and maintaining a working knowledge of the rules and the structural solutions and approaches available to avoid those pitfalls, and actively monitoring developments in federal and state securities laws, is vital to practitioners seeking to counsel clients in the capital markets.

### **About the Author**

**Brian R. Buckham** is corporate counsel at IDACORP, Inc., where his practice is focused on securities, corporate finance, and corporate governance.

Formerly, he was an attorney at Greenberg Traurig LLP and Davis Wright Tremaine LLP, where his practice focused on securities, domestic and cross-border mergers and acquisitions, venture capital, and corporate finance. He obtained a degree in mining engineering from the University of Idaho, an MBA from Gonzaga University, and a J.D. from the University of Idaho.

## Endnotes

<sup>1</sup> Idaho adopted its blue sky laws in 1913, during a time when adoption of blue sky laws by the states accelerated. See Idaho Securities Act, ch. 117, 1913 Idaho Sess. Laws 454, 455-56.

<sup>2</sup> The most commonly relied upon federal exemption is Rule 506, 17 C.F.R. § 240.506, promulgated under the Securities Act. The lack of a dollar limit on the securities offered and sold, and the federal preemption provided by Section 18(b)(4) of the Securities Act, are the primary reasons for the popularity of Rule 506.

<sup>3</sup> 328 U.S. 293, 298-99 (1946).

<sup>4</sup> See, e.g., *United Hous. Found., Inc. v. Forman*, 421 U.S. 837 (1975); *SEC v. Koscot Interplanetary, Inc.*, 497 F.2d 473, 480-81 (5th Cir. 1974).

<sup>5</sup> For an analysis of the treatment of limited liability company interests as securities under Idaho law, see the article authored by Professor Wendy Gerwick Couture, in this edition.

<sup>6</sup> Pub. L. 104-290, 110 Stat. 3416 (October 11, 1996).

<sup>7</sup> 17 C.F.R. § 230.506 (2010); see also note 2, *supra*.

<sup>8</sup> IDAHO ADMIN. CODE r. 12.01.08.053.02 (2011).

<sup>9</sup> *Stoneridge Investment Partners, LLC v. ScientificAtlanta, Inc.*, 552 U.S. 148 (2008).

<sup>10</sup> See, e.g., OR REV. STAT. §59.115(3), which provides that “every person who participates or materially aids in the sale” of a security can be held liable for the seller’s securities fraud.

<sup>11</sup> See, e.g., CAL CORP. CODE § 25504.1, which imposes liability on persons who materially assist in the sale of securities by means of a material misstatement or omission, but only if that person acted with the “intent to deceive or defraud.”

<sup>12</sup> Pub. L. No. 111-203, 124 Stat. 1376 (2010).

<sup>13</sup> 17 C.F.R. § 230.262.

<sup>14</sup> 17 C.F.R. § 240.10b-9.

<sup>15</sup> 17 C.F.R. § 240.15c2-4.

<sup>16</sup> 17 C.F.R. § 230.701.

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

<sup>18</sup> Net Worth Standard for Accredited Investors, Securities Act Release No. 33-9177, 76 Fed. Reg. 5307 (Jan. 31, 2011).

<sup>19</sup> See *id.*

<sup>20</sup> These include (i) Rule 502(a) under Regulation D, 17 C.F.R. § 230.502(a); (ii) Rule 147(b)(2), 17 C.F.R. § 230.147(b)(2), for intrastate offerings; (iii) Rule 251(c), 17 C.F.R. § 230.251(c), for Regulation A offerings; (iv) Rule 701(f), 17 C.F.R. § 230.701(f), for employee benefit plans; and (v) Rule 144A(e), 17 C.F.R. § 230.144A, for resales to qualified institutional buyers. Rules 152, 17 C.F.R. § 230.152, and 155, 17 C.F.R. § 230.155, under the Securities Act apply to the integration of public and private offerings of securities.

<sup>21</sup> SEC Release No. 33-4434, 26 Fed. Reg. 11896 (Dec. 6, 1961); SEC Release No. 33-4552, 27 Fed. Reg. 11316 (Nov. 6, 1962).

<sup>22</sup> 15 U.S.C. § 77b(a)(11).

<sup>23</sup> 17 C.F.R. § 240.12g-1.

## ALTERNATIVE DISPUTE RESOLUTION

Merlyn W. Clark

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

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

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# RESPONSE TO “CRITIQUE OF THE IDAHO UNIFORM REVISED LIMITED LIABILITY COMPANY ACT”

Richard A. Riley  
*Hawley Troxell Ennis & Hawley  
LLP*

In the September 2009 issue of *The Advocate*, Mr. Winston Beard published “A Critique of the Idaho Uniform Revised Limited Liability Company Act.” The following article reviews the criticisms leveled by Mr. Beard (identified below in italics). The author disagrees with Mr. Beard’s assertions of fundamental defects in the Act but concurs with a number of his concerns.

**Background:** In 2008, Idaho became the first state<sup>1</sup> to adopt the Revised Uniform Limited Liability Company Act (*RULLCA*), drafted by the Uniform Law Commission (also known as the National Conference of Commissioners on Uniform State Laws). The Idaho Uniform Limited Liability Company Act (*IULLCA*)<sup>2</sup> initially applied to limited liability companies (*LLCs*) first formed on or after July 1, 2008 and, following a two-year transition period, has applied since July 1, 2010 to all previously formed LLCs.



Richard A. Riley

## **IULLCA Provides Default Rules**

**WB:** *The 2007 Idaho Legislature wasted the opportunity “to provide Idaho with limited liability company (LLC) laws particularly suited for medium-sized entities with simple capital, management, authority, and management liability structures.”*

IULLCA expressly provides that, with certain enumerated exceptions<sup>3</sup>, the statutory provisions are default rules that apply only if the operating agreement (which can be oral, written, implied, or any combination thereof<sup>4</sup>) does not address a particular matter.<sup>5</sup> As an organizing principle, the drafters designed RULLCA to provide default rules that operate only in the arena where the members fail to address a particular issue in their operating agreement. This arena is more likely to be populated by unsophisticated business partners who do not regularly consult an attorney than by more sophisticated business persons who own or operate medium

or larger-sized businesses and are used to consulting lawyers. The latter, more savvy group, is much more likely to obtain legal counsel to document the agreement among the owners; in that situation the operating agreement should contain operative provisions that supersede the default rules of the statute.

In considering Mr. Beard’s critique of the statute, keep in mind that he is commenting on default rules which, for the most part, can and likely will be superseded by provisions in the members’ operating agreement. Accordingly, IULLCA’s default rules should be viewed in the context of those situations involving relatively unsophisticated business partners who do not reduce their agreement to writing.<sup>6</sup> Much more important to more sophisticated business persons is the nearly complete flexibility that IULLCA allows in structuring the internal affairs of an LLC, including flexibility in allocating distributions and tax items among members that is not readily available in the corporate form.

## **Limited Liability**

**WB:** *“Business leaders are not fiduciaries.” IULLCA “undermines the very concept of limited liability by treating managers and owners like trustees.... The new law ... exposes management to greater liability than exists under any other Idaho entity law, except for general partnerships.”*

These statements conflate the limited liability of LLC members to third parties (external liability) with the duties owed by members to the other members of a member-managed LLC and by managers to members of a manager-managed LLC (internal duties). Corporation, limited liability partnership, and LLC statutes limit liability of managers and owners to third parties. They do not limit liability of managers to owners or owners to owners.

*IULLCA does not undermine,  
but rather reinforces, the limited liability  
of members and managers  
to third parties.*

Let’s consider external liability and internal duties separately.

**External Liability:** Like the Idaho Business Corporation Act (“*IBCA*”), IULLCA shields LLC owners from liability to third parties for company obligations.<sup>7</sup> In comparison to the IBCA, however, IULLCA’s limited liability provisions are even more protective: IULLCA expressly shields managers, as well as members, against liability for company obligations to third parties. There is no comparable provision in the IBCA that protects corporate directors or officers. Further, in contrast to corporate law where failure to maintain formalities may result in loss of the limited liability shield and subject shareholders to liability for the corporation’s obligations,<sup>8</sup> IULLCA expressly provides that “failure ... to observe any particular formalities relating to the exercise of its powers or management of its activities is not a ground for imposing liability on the members or managers for the debts, obligations or other liabilities of the company.”<sup>9</sup> IULLCA does not undermine, but rather reinforces, the limited liability of members and managers to third parties.

**Internal Duties: Fiduciary Nature of Duties of Care and Loyalty:** IULLCA fiduciary duties do not materially differ from the duties owed by management and owners of corporate entities. Under the IBCA, corporate directors and officers owe duties of care and undivided loyalty to the corporation and its shareholders.<sup>10</sup> Although the IBCA does not expressly provide that these duties are fiduciary in nature, the Idaho Supreme Court has held them to be fiduciary duties.<sup>11</sup> Similarly, managers of a manager-managed LLC owe fiduciary duties of care and loyalty to the company and its members.<sup>12</sup>

As for entity owners, a member of a manager-managed LLC does not have any fiduciary duty to the LLC or to any other

member by reason of being a member,<sup>13</sup> just as a shareholder generally has no fiduciary duty to other shareholders or to the corporation.

In a member-managed LLC, in contrast, the fiduciary duties of care and loyalty are owed by each member to the other members.<sup>14</sup> This rule reflects the partnership law genesis of RULLCA and appears to be the source of Mr. Beard's concern that IULLCA imposes greater liability on management than any entity other than a general partnership. However, while it is true that corporation statutes do not impose fiduciary duties on shareholders, courts have imposed such duties on controlling shareholders of closely-held corporations.<sup>15</sup> In the analogous context in which IULLCA's default rules are designed to operate (i.e., the small group of unsophisticated business partners who choose to operate as a member-managed LLC because of its flexibility and lack of formality), the principles of partnership law make sense and are consistent with courts' treatment of closely-held corporations.<sup>16</sup>

Mr. Beard's assertion that business leaders are not fiduciaries is incorrect. The duty of loyalty under the IBCA, which requires directors and officers to act in the best interests of the corporation and not their own self-interest, is clearly fiduciary, as is the duty of care.<sup>17</sup> Any concern that fiduciary duties imposed on business leaders could impair their willingness to take risk is vitiated by the business judgment rule, which "immunizes the good faith acts of directors when acting within the powers of the corporation and within the exercise of their honest business judgment."<sup>18</sup> As discussed below, the business judgment rule applies to Idaho LLCs as well.

**Internal Duties: Duty of Care:** IULLCA reformulates the standard of care established by Idaho's previous LLC statute (Idaho Code §§53-601 *et seq.*, the "*Old Act*"),<sup>19</sup> conforming it to the IBCA standard — that is, subject to the business judgment rule, a member of a member-managed LLC or a manager of a manager-managed LLC must act with the care that a person in like position would reasonably exercise under similar circumstances and in a manner the member or manager reasonably believes to be in best interests of LLC.<sup>20</sup> This duty does not invoke the higher duty of care imposed on trustees<sup>21</sup> and is consistent with the duty of care owed by directors and officers under the IBCA.

*The duty of loyalty under the IBCA, which requires directors and officers to act in the best interests of the corporation and not their own self-interest, is clearly fiduciary.*

**Internal Duties: Duty of Loyalty:** The duty of loyalty includes three listed components:<sup>22</sup> (1) the duty to account and hold as trustee any property, profit or benefit derived by the member or manager from use of LLC property or appropriation of LLC opportunity; (2) the duty to avoid conflicting interest transactions with the LLC (subject to the defense that the transaction is fair to the LLC or that the transaction has been authorized or ratified by the members after full disclosure of all material facts);<sup>23</sup> and (3) the duty not to compete with the company. Presumably, these duties to the LLC and its members are the subject of Mr. Beard's assertion that IULLCA treats owners and managers like trustees. In particular, Mr. Beard suggests that the duty to hold as a trustee any profit derived by the member includes compensation, fringe benefits, and distributions. This is an incorrect reading of the statute: The statute is directed at a member's or manager's profit or benefit derived from personal use of LLC property or appropriation of an LLC opportunity without consent of the members, not at profit or benefit from distributions to members or compensation paid or fringe benefits provided to managers.<sup>24</sup>

IULLCA's default prohibitions of appropriation of LLC property or opportunities, related party transactions, and competitive activities — the three components of the duty of loyalty specified by IULLCA — are entirely consistent with duty of loyalty imposed on corporate directors and officers. Each of the IULLCA components finds corresponding provisions in the IBCA: The duty of loyalty of corporate directors and officers is embodied in Idaho Code §30-1-830, which provides that a director must act in good faith and in a manner the director reasonably believes to be in the best interest of the corporation.<sup>25</sup> As a corollary, corporate directors and officers have a duty to account for (1) any financial benefit to which they are not entitled, (2) the use of corporate property for personal purposes, and (3) the ap-

propriation of a corporate opportunity.<sup>26</sup> Similarly, the duty to avoid conflicting interest transactions is evidenced by detailed IBCA provisions defining "director's conflicting interest transaction" and providing safe harbors for such transactions approved by disinterested directors or shareholders, or otherwise proven by the interested director to be fair to the corporation.<sup>27</sup> The duty of loyalty of corporate directors also involves duties of confidentiality and disclosure,<sup>28</sup> which would likely be violated by competition with the corporation.

Most importantly, IULLCA expressly permits the members to restrict or eliminate each of these components of the duty of loyalty.<sup>29</sup> So, for example, the operating agreement of a family LLC would authorize family members to use the LLC's vacation cabin for personal purposes; a physician who owns a medical office building could be authorized to lease the building to the PLLC in which the physician participates in a group practice with other providers; and the manager of a real estate investment company could be permitted to devote time to management of other real estate investments, including properties that might compete in the same marketplace.

**Internal Duties: Contractual Obligation of Good Faith and Fair Dealing:** This obligation is not a fiduciary duty or a generalized duty of good faith, but rather arises out of the contract-based nature of LLCs.<sup>30</sup> It applies to members and managers alike,<sup>31</sup> requiring them to discharge the duties under IULLCA or the operating agreement and to exercise any rights consistently with the contractual obligation of good faith and fair dealing. It is intended to protect, but not allow the court to remake, the members' agreement.<sup>32</sup> The author agrees with Mr. Beard that this contract-based obligation is consistent with business practices and should not pose a problem to Idaho lawyers or their clients.

### Internal Duties: “Uncabined” Duties:

**WB:** *IULLCA allows a judge to impose unspecified and unknown duties.*

Whereas the Revised Uniform Partnership Act “cabins in” fiduciary duties within a statutory formulation,<sup>33</sup> the drafters of the Revised Uniform Limited Liability Company Act decided that RULLCA should not exhaustively codify or “cabin in” the fiduciary duties of LLC members and managers.<sup>34</sup> This open-ended structure leaves uncertainty for LLC members who fail to limit the scope of IULLCA duties in their operating agreement. The Idaho Supreme Court’s decision in the *Bushi* case gives credence to Mr. Beard’s concern that IULLCA allows courts to impose fiduciary duties not contemplated by the LLC members when they formulated their agreement.<sup>35</sup>

Nevertheless, IULLCA allows the careful drafter of an operating agreement to “cabin in” the scope of these duties by contract. For the more sophisticated, medium-sized businesses that concern Mr. Beard, IULLCA allows substantial flexibility in modifying or eliminating various duties of managers and members. In contrast to the IBCA (which makes no provision for alteration of statutory duties of care and loyalty), an LLC operating agreement may, if not “manifestly unreasonable”, restrict or eliminate the specifically identified components of the duty of loyalty, identify specific types or categories of activities that do not violate the duty of loyalty, alter the duty of care, and alter any other fiduciary duty including eliminating particular aspects of that duty.<sup>36</sup>

IULLCA provides guidance for court application of the “manifestly unreasonable” standard: The court must consider the circumstances as of date of the operating agreement, not in hindsight at the time of complaint; and the court may invalidate a challenged term of an operating agreement only if, in light of the purposes and activities of the LLC, it is readily apparent that (1) the objective of the term is unreasonable or (2) the term is an unreasonable means to achieve the objective.<sup>37</sup> To date, this provision has not been applied or interpreted by an Idaho court. It remains to be seen whether this standard achieves the RULLCA drafters’ objectives of curtailing any inclination by a court to rewrite the members’ agreement. Mr. Beard’s observations that “facts and circumstances tests are common in the IULLCA” and “there are few solid guidelines for business” may prove prescient in this context.

*Far from being unfriendly to business, IULLCA provides statutory clarity that cannot be gleaned from, for example, the Delaware Limited Liability Act.*

### **Unfriendly to Business?**

**WB:** *IULLCA “adds new complexity making Idaho unfriendly to business.”*

Many of the IULLCA provisions are not new;<sup>38</sup> and, to the extent that IULLCA adds complexity, that complexity resolves questions unanswered by Idaho’s earlier LLC statute<sup>39</sup> and enables the flexibility that makes LLCs so supremely useful for “the complex and variegated world”<sup>40</sup> of sophisticated financial and business deals. Far from being unfriendly to business, IULLCA provides statutory clarity that cannot be gleaned from, for example, the Delaware Limited Liability Act.

**WB:** *IULLCA’s authorization of direct actions invites suits by disgruntled members.*

IULLCA authorizes direct actions by members against the LLC, managers or other members, but only to the extent of an actual or threatened injury that is not solely the result of an injury suffered by the LLC.<sup>41</sup> To have standing to bring a direct action, a member must be able to show a harm that occurs independently of the harm caused or threatened to be caused to the LLC.<sup>42</sup> Where the harm is caused or threatened to be caused to the LLC, a member may bring a derivative action to enforce a right of the LLC, following demand (or demand futility) and the opportunity for the LLC to convene a special litigation committee to investigate the claim to determine whether pursuit of the claim is in the LLC’s best interest.<sup>43</sup>

These provisions correlate closely with the IBCA<sup>44</sup> and corporate case law in Delaware and other jurisdictions, which don’t seem to have overly encouraged direct actions by disgruntled shareholders. They represent the norm, not some business-unfriendly innovation.

### **Operating Agreement**

**WB:** *Uncertainties result from IULLCA’s allowance of operating agreements made or amended by oral agreement or course of conduct.*<sup>45</sup>

A person becoming a member or a lender taking a pledge of a membership interest to collateralize a loan should take precautions to ascertain fully the contents of the operating agreement and the actual authority of transaction document signatories.<sup>46</sup> Mr. Beard correctly notes that a written operating agreement cannot be relied upon absent a current certification of all members that there are no other oral agreements or unanimous consents changing its terms and that the business is operated in accordance with the operating agreement.

Mr. Beard points to extensive Official Comments trying to interface IULLCA’s definition of operating agreement with the statute of frauds and the parole evidence rule, concluding that there are no meaningful guidelines on enforceability of a requirement that the operating agreement (or presumably any amendment of the operating agreement) be in writing. A merger clause should be included in any written operating agreement but, under general principles of contract law, will not protect against subsequent amendments by oral agreement or course of conduct.

IULLCA, however, provides that the operating agreement may specify that its amendment require satisfaction of a condition.<sup>47</sup> To minimize the problem of oral or implied-by-conduct amendments, consider providing in the operating agreement that it may be amended only upon written consent of a specified percentage of the members and that this provision is intended to be a “condition” that must be satisfied under IULLCA -112(1).

The problems posed by allowance of oral or implied operating agreements or amendments similarly existed under the Old Act, which defined operating agreement as “any agreement, written or oral, of all of the members.”<sup>48</sup> Some of these problems could potentially be solved by a statutory requirement that, to be enforceable, the operating agreement must be in writing. However, such a rule would not be well-adapted to the many unsophisti-

cated small business operators who never get around to writing up an agreement.<sup>49</sup>

Under the heading “Contributions”, Mr. Beard observes that the Old Act provides that a promise to contribute is not enforceable unless set forth in a writing signed by the member.<sup>50</sup> In contrast, under IULLCA, a creditor of an LLC that extends credit or otherwise acts in reliance on a person’s obligation to make a contribution to the LLC may enforce the obligation.<sup>51</sup> Mr. Beard is correct that the enforceability of an oral promise to contribute could be problematic for the creditor, member, and LLC.<sup>52</sup>

### Capital Structure

**WB:** *Capital is central to business persons and the IRS, but irrelevant under IULLCA. IULLCA “assumes the entity has no capital.” Per capita distribution and voting rights are anathema to business.*

IULLCA expressly contemplates capital contributions by the members.<sup>53</sup> However, Mr. Beard correctly observes that IULLCA allocates rights to distributions or to participate in management based on the relative amounts of members’ capital contributions. Like the Old Act<sup>54</sup>, IULLCA’s default voting rights and distribution rights are per capita, not per capital.<sup>55</sup> On dissolution, the LLC’s assets are distributed first to each person owning a transferable interest that reflects the member’s previously unreturned contributions, and then to the members per capita.<sup>56</sup> Whether these default rules are more or less appropriate (*i.e.*, consistent with reasonable expectations of the unsophisticated partners for whom the default rules were designed) than rules that would allocate such rights based on invested capital is debatable; but, from a practical standpoint, the question is moot since there will be very few LLCs where the members have not agreed, orally if not in writing, how to manage the business and divvy up the profits. In the event of a falling out among members who have only an oral agreement, Mr. Beard’s view that profits, losses, and distributions should be allocated based on contributed capital may be well-taken; how management rights should be allocated in the event of a falling out is less clear.

**WB:** *IULLCA lacks provisions coordinating with IRC 704(b) rules.*

The author is unaware of any LLC statute in any state that attempts to codify IRC 704(b) capital accounting rules or the valuation of members’ capital accounts or the allocation of tax items among members for federal tax purposes, or that distinguishes capital interests from profits

*IULLCA’s complexity enables the flexibility needed to address the myriad of business purposes and organizations.*

interests of LLC members. Considering that IULLCA’s default provisions are intended for the most unsophisticated business partners, the tax allocations are likely to follow the distributions to the members, and not require detailed special allocation provisions to comply with the 704(b) regulations under the Internal Revenue Code. Further, any attempt to capture the thousands of pages of federal partnership tax rules in the Idaho LLC statute would be counterproductive and likely would deprive sophisticated businesses of the flexibility to design distribution waterfalls and special allocations of tax items to meet specific needs. Mr. Beard is correct that an intimate understanding of federal partnership tax and capital accounting rules is necessary to competently draft an operating agreement for nearly any business arrangement other than a simple partnership; but a state LLC statute is not the vehicle to provide that guidance.

### Authority

**WB:** *Under IULLCA, apparent authority of members and managers is a facts and circumstances test.*

Managers of manager-managed LLCs have actual authority to decide exclusively any matter relating to the LLC’s activities.<sup>57</sup> IULLCA de-codifies the “statutory apparent authority” of members that existed under the Old Act.<sup>58</sup> With that exception, the law applicable to the authority of LLC members and managers is unchanged. Although IULLCA specifies default rules for internal management of an LLC<sup>59</sup>, the facts and circumstances tests of actual and apparent authority under general principles of agency law continue to apply to the LLC’s external activities involving third parties.

IULLCA provides for filing a statement of authority with Idaho Secretary of State to state or limit the authority of any member or manager (identified by position or specific person) to bind the LLC.<sup>60</sup> A filed statement of authority concerning real property provides constructive no-

tice of authority concerning real property transactions. However, a filed statement of authority granting or limiting authority regarding matters other than real property is NOT constructive notice. Actual knowledge is required to bind a third party.

Mr. Beard advises that the only safe position is to file a statement of authority. However, a statement of authority has only marginal utility because it provides constructive notice concerning authority to conduct real property transactions, but not as to other matters. Nevertheless, actual delivery of a statement of authority can serve to disclose management structure and as alternative to disclosure of entire operating agreement when authority is at issue.

### Summary

**WB:** *The problems in IULLCA overwhelm its utility. Business lawyers cannot reasonably advise their clients to take the risks inherent in forming or operating an LLC under IULLCA.*

The fact that LLCs continue to be the entity of choice in Idaho demonstrates that IULLCA is not unfriendly to business.

While IULLCA’s default rules are more complex than the default rules under the Old Act, IULLCA’s complexity enables the flexibility needed to address the myriad of business purposes and organizations – from small closely-held partnerships to sophisticated investment vehicles — needed and used by Idaho businesses. The fiduciary duties established by the default rules do not materially differ from the fiduciary obligations owed by corporate managers to the corporation and its shareholders.

For more sophisticated business persons, IULLCA allows substantial flexibility in eliminating or altering those duties to fit the needs of any particular enterprise, flexibility that is not available to businesses conducted in corporate form. IULLCA’s default rules – preservation of limited liability notwithstanding failure to observe formalities, fiduciary duties of

loyalty and care, and the contractual obligation of good faith and fair dealing – are well-calibrated for the needs of unsophisticated partners who do not address these matters in their operating agreement.

IULLCA's direct / derivative action provisions essentially mirror the IBCA, where they have not proven to invite direct suits against the corporation or shareholders.

The default rules on per capita voting and distribution voting rights may theoretically be problematic; but from a practical perspective, there will be few situations where members have not reached at least oral agreement on management and profit distributions, thereby overriding the default rules.

Actual and apparent authority issues remain, but they are not new or unique to IULLCA.

In the author's experience, out-of-state lenders and investors often want to deal with a Delaware LLC. But for Idaho businesses and their attorneys, IULLCA provides a highly workable framework and substantial guidance for drafting Idaho LLC operating agreements to adapt default rules to meet clients' needs. The author respectfully disagrees with Mr. Beard's conclusion that business lawyers cannot reasonably advise clients to form or operate Idaho LLCs.<sup>61</sup>

### About the Author

**Richard A. Riley** is a partner in the Business/Finance Practice Group at Hawley Troxell Ennis & Hawley LLP. During more than 30 years of practice, Mr. Riley has focused on corporation, partnership and LLC law; business organization, financing, governance, transactions and litigation; federal and state securities regulation; and state insurance company regulation. He served on Idaho State Bar study committees that vetted the 1979 and 1997 revisions of the Idaho Business Corporation Act (IBCA), the Idaho Uniform Securities Act enacted in 2004 and the Idaho Uniform Limited Liability Company Act (IULLCA) enacted in 2008, participating with Winston Beard on the IULLC and 1997 IBCA committees.

### Endnotes

<sup>1</sup> Since that time, five other states have enacted RULLCA: Iowa (2008), Nebraska (2010), Wyoming (2010), District of Columbia (2011) and Utah (2011).

<sup>2</sup> Idaho Code §§ 30-6-101 et seq. ("IULLCA"). For brevity, citations to IULLCA are abbreviated by dropping the reference to "Idaho Code § 30-6".

<sup>3</sup> The exceptions are stated in IULLCA -110(3) (a)-(k). Mr. Beard complains that these provisions impair freedom of contract. However, the business community and the bar have not suffered because of the long-standing existence of similar provisions

in the Idaho Uniform Partnership Act or the Idaho Uniform Commercial Code. See Idaho Code § 28-9-602 (prohibiting debtor or obligor from waiving or varying certain statutory rules); Idaho Code § 53-3-103 (specifying certain nonwaivable provisions of Act which cannot be varied by a general partnership agreement).

<sup>4</sup> IULLCA -102(15). The Official Comment to IULLCA -110 observes that IULLCA -102(15) "delineates a very broad scope for an 'operating agreement.' As a result, once an LLC comes into existence and has a member, the LLC necessarily has an operating agreement."

<sup>5</sup> IULLCA -110(1) ("Except as otherwise provided in subsections (2) and (3) of this section, the operating agreement governs . . ."); IULLCA -110(2) ("To the extent the operating agreement does not otherwise provide for a matter described in subsection (1), this chapter governs the matter.")

<sup>6</sup> Even unsophisticated partners who forgo a written agreement will have a basic agreement, established orally and perhaps modified by course of conduct, on governance and profit distributions. The default rules come into play if proof problems arise when the partners have a falling out.

<sup>7</sup> IULLCA -304(1) ("The debts, obligations or other liabilities of a limited liability company, whether arising in contract, tort or otherwise: (a) Are solely the debts, obligations or other liabilities of the company, and (b) Do not become the debts, obligations or other liabilities of a member or manager solely by reason of the member acting as a member or manager acting as a manager.") Compare Idaho Code §30-1-622(2) ("Except as provided in the articles of incorporation, a shareholder of a corporation is not personally liable for the acts or debts of the corporation except that he may become personally liable by reason of his own acts or conduct.")

<sup>8</sup> See *VFP VC v Dakota Company*, 109 P.3d 714, 141 Idaho 326, 335 (Idaho 2005); *Alpine Packing Company v. H.H.Keim Company, Limited*, 121 Idaho 762, 764, 828 P.2d 325 (Idaho Ct. App. 1991).

<sup>9</sup> IULLCA -304(2).

<sup>10</sup> Idaho Code §§ 30-1-830(1), -831.

<sup>11</sup> See *Waters v. Double L, Inc.*, 769 P.2d 582, 115 Idaho 705, 707 (Idaho 1989) (quoting former Idaho Code § 30-1-35, which provided that a director shall perform his duties "in good faith, in a manner he reasonably believes to be in the best interests of the corporation, and with such care as an ordinarily prudent person in a like position would use under similar circumstances": "This is the standard of fiduciary duty by which [the director's] conduct must be measured.") See also *Mannos v. Moss*, 143 Idaho 927, 933, 155 P.3d 1166 (Idaho 2007) ("In a closely-held corporation, the corporate directors owe a fiduciary duty to one another, to the corporation and to the shareholders.") *Accord, McCann v. McCann*, 61 P.3d 585, 590, 138 Idaho 228 (Idaho 2002); *Steelman v. Mallory*, 716 P.2d 1282, 110 Idaho 510, 513 (Idaho 1986) ("That the directors of a closely held corporation owe a fiduciary duty to the minority shareholders is well recognized.)

<sup>12</sup> IULLCA -409(1), (2), (3), (7).

<sup>13</sup> IULLCA -409(7)(e)

## Actual and apparent authority issues remain, but they are not new or unique to IULLCA.

<sup>14</sup> IULLCA -409(1); see *Bushi v. Sage Health Care PLLC*, 146 Idaho 764, 203 P.3d 694 (Idaho 2009). Sage Health Care PLLC was a member-managed LLC. Limited to its facts, *Bushi* does not speak to the duties of members of manager-managed LLCs. The decision does appear, however, to have expanded IULLCA's fiduciary duties to include a fiduciary duty of good faith (as opposed to the contractual duty of good faith and fair dealing), i.e., a duty not to take action, even in accordance with the operating agreement, to obtain financial advantage over another member. *Id.* at 770-71.

<sup>15</sup> See *Steelman v. Mallory*, 716 P.2d 1282, 110 Idaho 510, 513 (Idaho 1986); *Fox v. Cosgriff*, 66 Idaho 371, 381-83, 159 P.2d 224 (Idaho 1945). The gravamen of Steelman's complaint was that the majority shareholders / directors were attempting to squeeze out a minority shareholder. The Court quoted O'Neal, *Close Corporations* § 8.07 (2d ed.) with approval as follows: "This view that the controlling shareholders and the directors do not owe fiduciary duties to minority shareholders appears outmoded, at least as applied to squeeze-outs and other attempts to eliminate minority shareholders or to deprive them of their proportionate rights and powers without just equivalent. Where several owners carry on an enterprise together (as they usually do in a close corporation), their relationship should be considered a fiduciary one similar to the relationship among partners." In *Fox*, the Court noted that a fiduciary duty may arise from a relationship of confidence and trust between a majority controlling shareholder and a minority shareholder.

<sup>16</sup> *Bushi*, *supra* note 14, was decided under the Old Act, suggesting that, even without the new LLC statute, the Idaho Supreme Court would have held that the members of closely-held LLCs owe fiduciary duties to one another. Adding IULLCA to the mix at least allows the flexibility to modify the default framework in order to effectuate the members' intent and protect against judicial second-guessing.

<sup>17</sup> *Steelman v. Mallory*, 716 P.2d 1282, 110 Idaho 510, 513 (Idaho 1986) ("Idaho courts have recognized that a director has a fiduciary responsibility to both the corporation and to shareholders. . . . As fiduciaries, corporate directors are bound to exercise the utmost good faith in managing the corporation."); *Weatherby v. Weatherby Lumber*, 492 P.2d 43, 94 Idaho 504, 507 (Idaho 1972). *Accord, McCann v. McCann, supra.* See also note 11 and accompanying text.

<sup>18</sup> *Steelman*, *supra* at 513; *McCann, supra* at 590.

<sup>19</sup> Idaho Code § 53-622 (member / manager not liable to LLC or members absent gross negligence or willful misconduct).

<sup>20</sup> Idaho Code § 30-1-830 (A director must discharge his duties with "the care that a person in a like position would reasonably believe appropriate under the circumstances" and act "in a manner the director reasonably believes to be in the best interests of the corporation.")

<sup>21</sup> See, e.g., Idaho Code § 15-7-302 ("[T]he trustee shall observe the standards in dealing with the trust assets that would be observed by a prudent man dealing with the property of another . . .")

<sup>22</sup> IULLCA -409(2) provides: “The duty of loyalty of a member of a member-managed limited liability company includes the duties: (a) To account to the company and to hold as trustee for it any property, profit or benefit derived by the member: (i) In the conduct or winding up of the company’s activities; (ii) From a use by the member of the company’s property; or (iii) From the appropriation of a limited liability company opportunity; (b) To refrain from dealing with the company in the conduct or winding up of the company’s activities as or on behalf of a person having an interest adverse to the company; and (c) To refrain from competing with the company in the conduct of the company’s activities before the dissolution of the company.” These duties are imposed on the manager of a manager-managed LLC. IULLCA -409(7). In keeping with concept that duties are “uncabined” (see notes 34-35 and accompanying text), the Official Comment to IULLCA -110(4) indicates there may be other uncodified aspects of the duty of loyalty.

<sup>23</sup> IULLCA -409(5), (6).

<sup>24</sup> Note that these components of IULLCA’s duty of loyalty are not new. The Old Act imposes virtually the same obligation on every member and manager to account for and hold as trustee any profit or benefit derived by that person without consent of disinterested members or managers. Idaho Code § 53-622(2).

<sup>25</sup> Corporate officers owe the same duty of loyalty as directors. Idaho Code § 30-1-842.

<sup>26</sup> The existence of this duty is evidenced by the express statutory exceptions to IBCA provisions authorizing exculpation and indemnification of directors. Idaho Code § 30-1-202(4)(d) (allowing exculpation of directors from liability to the corporation or its shareholders for money damages) and (e) (authorizing indemnification of directors) both except liability for receipt of a financial benefit to which the director is not entitled, intentional infliction of harm on the corporation or its shareholders, unlawful distributions, and intentional violation of criminal law. Compare IULLCA -110(7), which provides:

The operating agreement may alter or eliminate the indemnification for a member or manager provided by section 30-6-08(1), Idaho Code, and may eliminate or limit a member or member’s liability to the limited liability company for money damages except for: (a) reach of the duty of loyalty; (b) A financial benefit received by the member or manager to which the member or manager is not entitled; (c) A breach of a duty under section 30-6-406 [liability for improper distributions]; (d) Intentional infliction of harm on the company or a member; or (e) An intentional violation of criminal law.

<sup>27</sup> Idaho Code §§ 30-1-860 *et seq.*

<sup>28</sup> *Jordan v Hunter*, 865 P.2d 990, 124 Idaho 899 (Idaho Ct. App. 1993) (“As an agent, an officer owes his principal, the corporation, the fiduciary duties of good faith and fair dealing. ... Good faith and fair dealing require that the officer make a full, fair and timely disclosure of facts within his knowledge that are material to the transaction and which might affect the corporation’s rights and interests or influence its actions.”)

<sup>29</sup> IULLCA -409(4)(a).

<sup>30</sup> Official Comment to IULLCA -409(4)

<sup>31</sup> IULLCA -409(4) (applying to members of member-managed or manager-managed LLC), (7)(c) (applying to managers of manager-managed LLC).

<sup>32</sup> Official Comment to IULLCA -409(4).

<sup>33</sup> Idaho Code § 53-3-404(a) (“The fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care set forth in subsections (b) and (c) of this section.”)

<sup>34</sup> See Official Comment to IULLCA -409 re “uncabined” fiduciary duties of loyalty and care and other (unspecified) fiduciary duties. See IULLCA -110(4) (d) authorizing alteration of “any other fiduciary duty” (*i.e.*, other than the fiduciary duties of care and

loyalty and the contractual obligation of good faith and fair dealing).

<sup>35</sup> See notes 14 and 16 re the *Bushi* case.

<sup>36</sup> IULLCA -110(4). Many other provisions of IULLCA must be read in light of IULLCA -110(3) and (4): Section -110(3) restricts the ability of the operating agreement to vary a number of provisions of the Act (including fiduciary duties and the contractual duty of good faith and fair dealing as provided in IULLCA -409); but in some cases (detailed in -110(4)) IULLCA allows elimination or restriction of certain duties if not “manifestly unreasonable”. For example, IULLCA’s standard of care may not be eliminated but may be altered, if (i) not “manifestly unreasonable” and (ii) except that the altered standard may not authorize intentional misconduct or knowing violation of law. IULLCA -110(3)(d) and (4)(c). Similarly, -110(3) (d) provides that the duty of loyalty may not be eliminated; but -110(4)(b) permits the operating agreement, if not manifestly unreasonable, to eliminate or restrict all listed components of the duty of loyalty (*e.g.*, to allow competition with the LLC), and also permits the operating agreement to identify specific types or categories of activities that do not violate the duty of loyalty. (The Official Comment to IULLCA -110 indicates there may be uncodified aspects of duty of loyalty that would survive.) Likewise, -110(3) (d) provides that any other fiduciary duty may not be eliminated; but -110(4)(d) provides that the operating agreement can “alter any other fiduciary duty, including eliminating particular aspects of that duty”. It is unclear how courts will interpret the “manifestly unreasonable” standard or what “other fiduciary duty” might be implied by the courts. (See notes 14 and 16.) Nevertheless, IULLCA allows substantial leeway to LLC members or their counsel to adapt the duties among members and between managers and members to meet the members’ particular needs and objectives, rather than being subject to the one-size-fits-all approach of the IBCA.

<sup>37</sup> IULLCA -110(8).

<sup>38</sup> IULLCA retains the principal features of the Old Act, such as member-management absent operating agreement provision for manager-management, limited liability of members and managers, lack of need to maintain formalities, per capita voting and distribution default rules, distinction between transferable (economic) interest and other rights of membership, charging orders, and authority to exculpate members and managers from liability for money damages for breach of duties. Cross-Reference Tables correlating the provisions of IULLCA and the Old Act and a narrative comparison of their respective provisions may be viewed at <http://www.hawleytroxell.com/news-events/archives/>.

<sup>39</sup> For example, IULLCA expressly establishes the primacy of the members’ operating agreement, authorizes single member LLCs, provides for managing members and noneconomic members, spells out detailed information rights of managers and members, specifies members’ remedies for oppressive conduct, authorizes direct and derivative actions and use of special litigation committees, and provides that dissociation of a member no longer constitutes an event of dissolution. A more detailed list of the new provisions may be viewed at <http://www.hawleytroxell.com/news-events/archives/>.

<sup>40</sup> Official Comment to IULLCA 409(1) and (2).

<sup>41</sup> IULLCA -901.

<sup>42</sup> See Official Comment to IULLCA -901.

<sup>43</sup> IULLCA -905.

<sup>44</sup> Idaho Code §§ 30-1-740 *et seq.*

<sup>45</sup> Read together, IULLCA -102(15) and -110(1) define “operating agreement” to mean the agreement

of the members, whether written, *oral, implied* or a combination thereof, governing the relations among the members and between the members and the LLC, the rights and duties of managers, the company’s activities, and the means and conditions for amending the operating agreement.

<sup>46</sup> See Official Comment to IULLCA -110(2).

<sup>47</sup> IULLCA -112(1).

<sup>48</sup> Idaho Code § 53-601(11)

<sup>49</sup> For a thoughtful analysis of other problems that arise from a written agreement requirement, see Goforth, C.R., “Why Arkansas Should Adopt The Revised Uniform Limited Liability Company Act”, 30 UALR 31, 33-37 (2007).

<sup>50</sup> Idaho Code § 53-627.

<sup>51</sup> IULLCA -403(2).

<sup>52</sup> The suggestion that a provision in the operating agreement could change the new rule back to the old one is incorrect. By statutory definition, the operating agreement affects only the relations among the members, managers and LLC. See note 45. The operating agreement may not restrict the rights under IULLCA of a person other than a manager or a member. IULLCA -110(3)(k).

<sup>53</sup> IULLCA -402, -403 (Creditor of LLC that extends credit or otherwise acts in reliance on person’s obligation to contribute to LLC may enforce obligation.)

<sup>54</sup> Idaho Code §§ 53-623, -632. Similarly, under the default rules in the Idaho Uniform Partnership Act, each partner has an equal right to partnership profits and losses and an equal right in the management and conduct of the partnership business. Idaho Code § 53-3-401(b),(f). In contrast, unless the limited partnership agreement provides otherwise, the Idaho Uniform Limited Partnership Act allocates profits, losses and distributions among the partners on the basis of the value of unreturned contributions made by each partner. Idaho Code §§ 53-229, -230. General partners of a limited partnership, however, vote per capita unless the partnership agreement provides otherwise. Idaho Code § 53-226.

<sup>55</sup> IULLCA -407(2)(b) (In a member-managed LLC, each member has equal rights in management and conduct of company activities); IULLCA 407(3) (b) (In a manager-managed LLC, each manager has equal rights in management and conduct of company activities); IULLCA -404(1) (distributions must be in equal shares).

<sup>56</sup> IULLCA -708(2)(b).

<sup>57</sup> IULLCA -407(3).

<sup>58</sup> Compare IULLCA -301 (“A member is not an agent of a limited liability company solely by reason of being a member.”) with Old Act 53-616(1) (providing in pertinent part that, in member-managed LLC, “every member is an agent of the limited liability company for the purpose of its business or affairs, and the act of any member ... for apparently carrying on in the usual way the business or affairs of the limited liability company ... binds the limited liability company ...”), -617 (member’s admission or representation is binding) and -618 (member’s knowledge and notice to member are binding).

<sup>59</sup> IULLCA -407 (specifying separate management rules for member-managed LLCs and manager-managed LLCs).

<sup>60</sup> IULLCA -302. A statement in the certificate of organization is not effective as a statement of authority. IULLCA -201(3).

<sup>61</sup> Mr. Beard is a highly respected business lawyer with substantial experience in structuring LLCs and drafting operating agreements. To the extent his conclusion might be proffered as evidence of the standard of practice of Idaho lawyers, the author believes Mr. Beard’s conclusion is unequivocally incorrect.

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](http://www.chasanwalton.com)**

[andrew.chasan@chasanwalton.com](mailto:andrew.chasan@chasanwalton.com) • [tim.walton@chasanwalton.com](mailto: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.

### Idaho Supreme Court

#### Oral Argument for September 2011

##### Friday, September 23, 2011 – BOISE

8:50 a.m. Joseph M. Verska, M.D. v. St. Alphonsus .....#37574-2010  
10:00 a.m. Paul J. Montalbano, M.D. v. St. Alphonsus #37573-2010  
11:10 a.m. Hernandez v. Ausburn .....#37779/37780-2010

##### Monday, September 26, 2011 – COEUR D'ALENE

8:50 a.m. Beaudoin v. Davidson Trust Company .....#37828-2010  
10:00 a.m. Rigoli v. Wal-Mart Associates (Industrial Commission) .  
..... #37887-2010  
11:10 a.m. Hillside Landscape v. City of Lewiston .....#37398-2010

##### Tuesday, September 27, 2011 – COEUR D'ALENE

8:50 a.m. Belstler v. Sheler (Conine) .....#37893-2010  
10:00 a.m. Bishop v. Owens .....#37992-2010  
11:10 a.m. Carillo v. Boise Tire Company .....#37026-2009

##### Wednesday, September 28, 2011 – MOSCOW

8:50 a.m. Trotter v. Bank of New York Mellon .....#38022-2010  
10:00 a.m. McCann v. McCann .....#37547-2010  
11:10 a.m. Lewiston Independent School District #1 v. City of  
Lewiston .....#38116-2010

##### Friday, September 30, 2011 – BOISE

8:50 a.m. State v. Schulz .....#37354-2010  
10:00 a.m. State v. Almaraz, Jr. ....#35827-2008  
11:10 a.m. State v. Gurney .....#37823-2010

### OFFICIAL NOTICE COURT OF APPEALS OF IDAHO

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

#### 1st Amended - Regular Fall Terms for 2011

Boise. . . . . August 9, 11, 18 and 23  
~~Idaho Falls . . . . . September 8~~  
~~Twin Falls . . . . . September 9~~  
Boise. . . . . September 8, 9, 12 and 13, ~~27~~  
Boise. . . . . October 6, 11, 18, and 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 Court of Appeals

#### Oral Argument for September 2011

##### Thursday, September 8, 2011 - BOISE

9:00 a.m. State v. Summers .....#38108-2010  
10:30 a.m. State v. Roberts .....#37413-2010  
1:30 p.m. Rencher v. Brown .....#37957-2010

##### Friday, September 9, 2011 – BOISE

9:00 a.m. Ada County v. Crump .....#37534-2010  
10:30 a.m. State v. Molifua .....#38018-2010  
1:30 p.m. State v. Tiffany .....#37636-2010

##### Monday, September 12, 2011 – BOISE

9:00 a.m. State v. Shepperd .....#38286-2010  
10:30 a.m. State v. White .....#38030-2010  
1:30 p.m. State v. Herrera .....#34193/34818-2007/37619-2010

##### Tuesday, September 13, 2011 – BOISE

9:00 a.m. Mayes v. State .....#37492-2010  
10:30 a.m. Dept. of Health & Welfare v. Doe (EXPEDITED) .....  
..... #38795-2011  
1:30 p.m. State v. Pentico .....#37834-2010

**Idaho Supreme Court and Court of Appeals**  
**NEW CASES ON APPEAL PENDING DECISION**  
(Updated 8/1/11)

**CIVIL APPEALS**

**ATTORNEY FEES AND COSTS**

1. Whether the complaint complied with I.C. § 12-120(4) or alleged a claim in excess of \$25,000.

*Bennett v. Patrick*  
S.Ct. No. 38138  
Supreme Court

2. Did the court err by denying the Randels' attorney fees pursuant to I.C. § 12-117?

*City of Osburn v. Randel*  
S.Ct. No. 37965  
Supreme Court

**EVIDENCE**

1. Did the court err in denying Bridge Tower Dental's motion for judgment notwithstanding the verdict because Meridian Computer Center failed to present any evidence at trial that it was exercising due care when it destroyed Bridge Tower's good hard drive?

*Bridge Tower Dental v. Meridian Computer Center*  
S.Ct. No. 37931  
Supreme Court

**LANDLORD/TENANT**

1. Did the district court err in holding the Beckvolds' failed to comply with the requirements of I.C. § 55-2005 and in dismissing their claim?

*Beckvold v. Barnes*  
S.Ct. No. 38231  
Court of Appeals

**POST-CONVICTION RELIEF**

1. Did the district court err in summarily dismissing Harvey's successive petition for post-conviction relief?

*Harvey v. State*  
S.Ct. No. 37495  
Court of Appeals

2. Did the district court abuse its discretion in denying Ramsey's motion for appointment of counsel?

*Ramsey v. State*  
S.Ct. No. 38142  
Court of Appeals

3. Did the court err when it granted the state's motion for summary dismissal because Smith presented material issues of fact that his attorney provided deficient performance when he failed to move to suppress identification evidence?

*Smith v. State*  
S.Ct. No. 37819  
Court of Appeals

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

*Cardona v. State*  
S.Ct. No. 38118  
Court of Appeals

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

*Oliver v. State*  
S.Ct. No. 38115  
Court of Appeals

**PROBATE**

1. Did the court err in ruling that I.C. § 15-3-108 applied and that the action to probate the estate was not filed within three years of the decedent's death?

*Erickson v. McKee*  
S.Ct. No. 38130  
Supreme Court

2. Did the magistrate have authority to order supervised administration of the probate?

*Mertens v. Estate of Mertens*  
S.Ct. No. 37908  
Court of Appeals

**PROCEDURE**

1. Did the court err in determining Naranjo failed to show good cause for service of the summons and complaint upon the IDOC at the time more than six months from the issuance of the summons?

*Naranjo v. Department of Correction*  
S.Ct. No. 37027  
Court of Appeals

**PROPERTY**

1. Does Idaho common law permit a district court to determine the location of an express but undefined easement when direct evidence is absent, without considering the intent of the easement's grantor for the placement and limits on that location?

*Manning v. Campbell*  
S.Ct. No. 37728  
Supreme Court

2. Whether the trial court erred as a matter of law by applying the defense of good faith or bona fide purchaser for value to a validly created public road.

*Trunnell v. Fergel*  
S.Ct. No. 37984  
Supreme Court

**SANCTIONS**

1. Did the trial court abuse its discretion in issuing sanctions?

*Atkinson v. Laux*  
S.Ct. No. 38105  
Court of Appeals

**SUBSTANTIVE LAW**

1. Did the district court on remand abuse its discretion in granting Dawson's Rule 60(b) motion for relief from judgment?

*Dawson v. Bach*  
S.Ct. No. 38370  
Supreme Court

**SUMMARY JUDGMENT**

1. Is the seller of a residential home obligated to disclose facts known by the seller that materially affects the use and enjoyment of the home?

*James v. Mercea*  
S.Ct. No. 38135  
Supreme Court

2. Did the district court err in granting Cuevas' summary judgment and in holding that the prior judgment in favor of Barraza was void?

*Cuevas v. Barraza*  
S.Ct. No. 38493  
Supreme Court

**CRIMINAL APPEALS**

**JURY INSTRUCTIONS**

1. Did the court instruct the jury in a manner that allowed for conviction based on proof insufficient to meet the constitutionally required reasonable doubt standard?

*State v. Brown*  
S.Ct. No. 37432  
Court of Appeals

**PROBATION**

1. Did the district court err by dismissing Ligon-Bruno's alleged probation violation for lack of jurisdiction?

*State v. Ligon-Bruno*  
S.Ct. No. 37847  
Court of Appeals

**SEARCH AND SEIZURE –  
SUPPRESSION OF EVIDENCE**

1. Did the district court abuse its discretion when it denied Myer's motion to enlarge time to file a suppression motion and found he had not demonstrated excusable neglect or good cause for the extension?

*State v. Myers*  
S.Ct. No. 38161  
Court of Appeals

2. Does the question of whether a school policy or procedure is "justified at the inception" as it relates to one's rights under the Fourth Amendment differ once the student is an adult?

*State v. Voss*  
S.Ct. No. 38366  
Court of Appeals

**SENTENCE REVIEW**

1. Did the application of the persistent violator enhancement to Smith's felony DUI sentence violate double jeopardy?

*State v. Smith*  
S.Ct. No. 38232  
Court of Appeals

**Summarized by:**  
**Cathy Derden**  
**Supreme Court Staff Attorney**  
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# SIX STEPS TO CORRECT COMMAS: ACHIEVING PUNCTUATION PEACE OF MIND

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

When I taught, I wished my students would love commas as much as I do. My husband, ever the realist, pointed out that all I could hope to achieve was to make my students hate commas less, since they probably didn't spend their Saturday afternoons enjoying grammar guides. Lowering my expectations, I set out to create a way to prevent my students from cringing when I informed them that they would have to comb over each sentence in their assignments to ensure they had used commas correctly.

The result was six simple steps to correct commas. These steps ensure that your meaning will be clear to the readers the first time they read a sentence and that your sentence will have the commas your educated readers expect. Work through all six simple steps and your readers will be impressed by your mastery of commas, even if you missed the comma class in law school. You may even find yourself loving them!

## Step one: independent clauses

Ask yourself if your sentence has one or two independent clauses. (Remember, an independent clause could serve as a complete sentence.) If you find that you have two independent clauses smashed into one sentence, you can correctly join them with a comma so long



Tenielle Fordyce-Ruff

as you also use a coordinating conjunction. A quick way to remember the seven coordinating conjunctions is FANBOYS. This mnemonic stands for "For," "And," "Nor," "But," "Or," "Yet," and "So." If you have two independent clauses and a FANBOYS, place a comma before the FANBOYS and you will be well on your way to a perfectly punctuated document. For example, "The associate wrote a correctly punctuated memo, and the partner was impressed" needs a comma before the "and" because "The associate wrote a correctly punctuated memo" and "The partner was impressed" are both com-



plete sentences. However, "The associate wrote a correctly punctuated memo and pleased the partner" does not need a comma before the "and" because "pleased the partner" is not a complete sentence.

(If you really don't want to use a comma and a FANBOYS, you can still correctly punctuate these two clauses. First, you can turn each independent clause into one sentence, so what once was one sentence becomes two sentences. Next, if the clauses are closely related, you can create one sentence by joining the independent clauses with a semicolon, but don't also include a FANBOYS. For instance, "The associate wrote a correctly punctuated memo; the partner was impressed.")

## Step two: clarification

Step Two ensures that your sentence will be clear and have the meaning you intended. To do this, ask yourself three simple questions. First, would your readers understand your meaning the first time without a comma? If the answer is no, you should add a comma to prevent a possible misreading. For instance, suppose you wrote "Those who can usually walk." Did you mean "Those who can, usually walk"? Or did you forget to complete your thought: "Those who can usually walk the trail could not that day because of the torrential rain"? Either way, you need something more to help the readers understand your meaning on their first reading.

Second, does your sentence have an introduction of four or more words? If so, set that introduction off with a comma. This comma will help ensure that your readers know when the real heart of the sentence starts. Trust me – all busy readers appreciate knowing when they have to start really paying attention!

*Work through all six simple steps and your readers will be impressed by your mastery of commas, even if you missed the comma class in law school.*

Finally, does your sentence contain information that is helpful, but that doesn't affect its meaning? This rule can be somewhat tricky because whether or not you need to use commas can depend on the context. To figure this out, read the sentence without the information. If the meaning remains the same, you should point that out to your readers by surrounding the extra, helpful information with commas. For instance, does the sentence "My sister Tiana just finished school" need commas around Tiana? To determine that, you need to know whether Tiana is my only sister. She isn't, so taking her name out of the sentence makes it ambiguous. "My sister just finished school" leaves you wondering *which* sister. Therefore, when you add the clarifying name of my well-schooled sister, you should not use commas around her name. On the other hand, the sentence "My sisters, Amanda and Tiana, are coming to visit next month" must have the commas because they are my only sisters. The

sentence would have the same meaning without including their names.

### Step three: contrasts, transitions, and interruptions

Step Two had three easy questions, and Step Three has two simple questions. First, ask yourself if your sentence contains a phrase of contrast. Phrases of contrast are set off from the rest of the sentence, so you should make sure to surround that contrasting information with commas. For instance: The professor, not the students, loved commas.

Next, does your sentence have a transition or interrupting word? Like phrases of contrast, transitions and interrupters are set off with commas. Remember that dates, addresses, and geographic locations are frequently used as transitions, so make sure those are correct. For “October 25, 2011,” style dates, use two commas: one after the day and one after the year. For addresses, use a comma after every element of the address, but remember that state and zip code are one element. Likewise, for geographic locations, use a comma after every element. Therefore, if a transition comes at the beginning or in the middle of your sentence, you will always have a comma after the last element.

Whew! You’re halfway through making sure your commas are correct. I promise the hard part is behind you. Can you feel yourself beginning to love commas?

### Step four: modifiers

You need to make sure that your modifiers are correctly punctuated. Ask yourself if your sentence contains two or more adjectives before a noun. Then, ask yourself if those adjectives modify the noun but aren’t joined by an “and.” (If you aren’t sure whether both modify the noun, reverse their order; if your sentence still

*Phrases of contrast are set off from the rest of the sentence, so you should make sure to surround that contrasting information with commas.*

makes sense, then both adjectives modify the noun.) For example, “I love long, peaceful walks in the hills” needs a comma between long and peaceful because they both modify walks. The sentence would still make sense if you reversed their order, “I love peaceful, long walks in the hills.”

### Step five: lists

If your sentence doesn’t have a list, just skip ahead to Step Six. If you see a list before you, ask yourself whether it’s a complex list. If each item in your list contains helpful, extra information that you have already set off with commas, you need to help the reader by changing up the punctuation. Use semicolons to separate the items. If you have a simple list — one without internal commas — stick with commas. But remember, whether you need to separate the items with commas or semicolons, you must separate every item — put that punctuation mark after the second-to-last item!

### Step six: quotations

And for the grand finale: Use this step when you quote text from another source. If the quotation needs a comma after it to fit grammatically in the sentence make sure you put the comma inside of the closing quotation marks. “This court holds

you in contempt of commas,” the judge said.

### Conclusion

So you see creating a document with correct commas is really just a matter of walking through six simple steps. I bet you hate commas a little less now!

Source: ANNE ENQUIST & LAUREL CURRIE OATES, JUST WRITING: GRAMMAR, PUNCTUATION, AND STYLE FOR THE LEGAL WRITER (3d ed. 2009).

A version of this essay appeared in the *Legal Writer Column* of the November, 2009 issue of the Oregon Bar Bulletin as *Punctuation You Can Learn to Love: Six Simple Steps to Correct Commas*.

### About the Author

**Tenielle Fordyce-Ruff** is a member of *Smith, Fordyce-Ruff & Penny, PLLC*. She clerked for Justice Roger Burdick of the Idaho Supreme Court and taught *Legal Research and Writing, Advanced Legal Research, and Intensive Legal Writing* at the University of Oregon School of Law. She is also the author of *Idaho Legal Research, a book designed to help law students, new attorneys, and paralegals navigate the intricacies of researching Idaho law*. You can reach her at [tfordyce-ruff@sfrplaw.com](mailto:tfordyce-ruff@sfrplaw.com).

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University of Idaho librarian Michael Greenlee talks about the extensive Law Library collection, now located on the fifth floor of the Water Center Building, 322 E. Front Street.

## IDAHO STATE LIBRARY COLLABORATION BRINGS NEW RESOURCES TO REVITALIZE HISTORIC INSTITUTION

Michael Greenlee  
*University of Idaho*  
*College of Law*

Through a Memorandum of Understanding negotiated with the Idaho Supreme Court, the University of Idaho College of Law has assumed management of the Idaho State Law Library. Although the State Law Library historically operated under the direction of the Court, this collaborative effort between the Supreme Court and the College of Law is an important step in the development of a larger project to establish a center for legal education in Boise, known as the Idaho Law Learning Center (ILLC).

By working together, the Court, the College of Law, and the State Law Library hope to issue in a new era of legal education in Idaho, while at the same time bringing renewed vitality to a traditional Idaho legal institution.

The Idaho State Law Library has been a part of Idaho legal history from its earliest days. The Territorial Law Li-

brary Fund was established in 1869 for the purchase of law books and law reports under the direction of the judges of the Supreme Court.<sup>1</sup> By 1875, the collection had grown sufficiently to place the circulation of materials from the territorial law library under the control of the territorial librarian. At that time, use of library materials was limited to the judges of the supreme and district courts, or for use in court during trials.<sup>2</sup> The "State" Library was established in 1891 and continued to operate under the control and management of the Idaho Supreme Court.<sup>3</sup> It was located by statute in the Capitol building and \$1,200 was appropriated for care of the law library.<sup>4</sup> In 1925, two additional state law libraries were established in the cities of Lewiston and Pocatello, probably to address the growing population and the difficulty in traveling between the Capitol and outlying regions of the state.<sup>5</sup> These new law libraries also operated under the control of the Supreme Court. However, in 1951, state control of the law libraries in Pocatello and Lewiston was abolished

and management of those law libraries passed to their respective counties.<sup>6</sup>

The Supreme Court continued to manage the State Law Library in Boise and in 1969 the legislature granted permission for the library to be relocated to the Supreme Court and Law Library building.<sup>7</sup> In its new location the Law Library could boast of many improvements, including enlarged and comfortable quarters, air conditioning, expanded hours, and sound-proof typing rooms.<sup>8</sup> The Law Library remained at the Supreme Court building for the next 39 years, until 2008, by which time the collection had grown to approximately 190,000 volumes and occupied portions of the basement and first floor.

The State Law Library was not the only Idaho institution experiencing significant growth and for the Idaho Court of Appeals such growth was beginning to be troublesome. Established in 1982 to ease pressure on the Supreme Court, the Court of Appeals was beginning to feel that same pressure due to a 250 percent increase in its own caseload.<sup>9</sup> Based on the recom-

mendations issued by the “Blue Ribbon Task Force on the Court of Appeals,” the Idaho Legislature declared that an emergency existed concerning the Court of Appeals and took action to add a new fourth judge; it also amended Idaho Code §4-101 to eliminate the requirement that the Law Library be located at either the Capitol or the Supreme Court building.<sup>10</sup> The space occupied by the State Law Library in the Supreme Court building became the new chambers for the Court of Appeals and the Law Library was relocated to the fourth floor of the nearby Key Bank building in downtown Boise. Although this relocation was a significant boon to the Court of Appeals, the amount of space available to the Law Library was tremendously reduced — from approximately 20,000 square feet to 8,000 square feet. Much of the library collection was put into storage, either in the basement of the Supreme Court or in other locations around Boise, and access to those materials was greatly reduced.

Like many Idaho state agencies, the State Law Library was significantly challenged by the budget holdbacks that took effect in 2009. The judiciary was forced to lay off part-time staff, leave positions unfilled, eliminate training and travel budgets, and participate in salary holdbacks and work furloughs. The State Law Library was not spared from these restrictions. In addition, its hours of operation were reduced and all print subscriptions were cancelled with the exception of approximately 20 titles. The number was further reduced over the next two years as another half-dozen subscriptions were eliminated. Fortunately, patrons of the State Law Library could still rely on the public Westlaw terminals for up-to-date access to primary legal resources and the library’s subscription to the Hein Online database for access to law journals and other research materials. Nevertheless, the possibility of further budget restraints left the future of the State Law Library uncertain and closure of the library entirely was not out of the question.<sup>11</sup>

It was during this same period that the University of Idaho College of Law was engaged in strategic planning to examine the future of legal education in Idaho. In July 2007, the College of Law and the Idaho State Bar sponsored a “Conclave on Idaho Legal Education in the 21<sup>st</sup> Century” to consider three approaches for the future, all of which would increase the law school’s presence in Boise. The following year, in August 2008, the College of Law was authorized by the State Board of Education to expand its offerings in Boise to

a full third-year curriculum, allowing law students in Moscow to finish their legal education in Boise. In July 2010, the College of Law received the green light of approval from the ABA Accreditation Committee to begin offering a third-year law program in Boise — currently housed at the University of Idaho Boise Center (the “Idaho Water Center” building).

While the College of Law developed plans for opening a full three-year law program in Boise, a new collaboration emerged between the law school and the Idaho Supreme Court to create an innovative center of legal education, known as the Idaho Law Learning Center (ILLC). Planning for the ILLC designated the old Ada County Courthouse, situated adjacent to the State Capitol and the Idaho Supreme Court, as its future location. As a center for legal education, the ILLC will serve several functions as the future home for the College of Law Boise programs, judicial education, public outreach and civic education, and as a “new” location for the Idaho State Law Library.

In March of this year, the State Law Library moved from its location at the Key Bank building in downtown Boise to the fifth floor of the Idaho Water Center. Now operating primarily under the management of the College of Law, the shared location of the State Law Library and the College of Law Boise program is an important step in accomplishing the vision of the ILLC and the benefits of this collaboration are already manifest. Law students have access to a 30,000 volume collection of materials including federal, state, and regional legal resources, in addition to current and historical Idaho materials. Likewise, patrons of the State Law Library can access a variety of electronic databases, using the public Westlaw terminals or many of the legal and non-legal databases available through the College of Law. In addition, essential legal materials that were previously cancelled due to budgetary restraints will be added back into the collection. Development of the library collection will broaden to incorporate titles suitable for an academic law library, while continuing to fulfill the needs of judges, attorneys, and the public. The new location also offers quick access to and from the “new” Ada County Courthouse and the potential for developing outreach programming to the bench and bar.

There are exciting times ahead for the Idaho State Law Library. In the upcoming months there will be new additions to the library’s print and electronic collection, weeding of duplicate and out-of-date

materials, and a concerted effort to create a modern law library for the 21<sup>st</sup> century. Look to these pages for updates.

## About the Author

**Michael Greenlee** is the Associate Law Librarian for the University of Idaho College of Law and manages the Idaho State Law Library collection.

## Endnotes

<sup>1</sup> 1868-69 Idaho Sess. Laws 96.

<sup>2</sup> 1874-75 Idaho Sess. Laws 783.

<sup>3</sup> 1890-91 Idaho Sess. Laws 197.

<sup>4</sup> *Id.* at 232.

<sup>5</sup> 1925 Idaho Sess. Laws 120.

<sup>6</sup> 1951 Idaho Sess. Laws 157.

<sup>7</sup> 1969 Idaho Sess. Laws 614.

<sup>8</sup> *Improved Service of the State Law Library*, Advocate (Idaho State Bar), Sept. 1970, p. 2.

<sup>9</sup> *Legislature Adjourns with Historic Action on Court of Appeals*, Idaho Supreme Court Judicial/Administrative News, April 2008.

<sup>10</sup> 2008 Idaho Sess. Laws 38.

<sup>11</sup> *Notice from the Idaho State Law Library*, Advocate (Idaho State Bar), March/April 2009, p. 49.

## Idaho State Law Library

### Titles “on order” or recently acquired:

- United States Reports
- United States Code
- United States Code Annotated
- Statutes at Large
- Code of Federal Regulations
- Tax Court Reports
- Federal Practice and Procedure – Wright/Miller
- Standard Federal Tax Reporter
- BNA Tax Management Portfolios
- West’s Legal Forms

### Electronic Databases:

- BNA Labor and Employment Law Library
- BNA Tax Management Library
- CCH Research Network
- CIS Congressional Universe (Lexis)
- EBSCO databases
- Hein Online
- Index to Legal Periodicals
- Lexis-Nexis Academic Universe
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## ISB WELCOMES NEW COMMISSIONERS WELLMAN AND WETHERELL

Idaho State Bar Board of Commissioners welcomed **Robert T. Wetherell** of Boise and **William H. Wellman** of Nampa to the Commission at the Annual Meeting in July. **President Deborah A. Ferguson** of Boise and Past President **James C. Meservy** of Jerome were thanked for their extensive service.

Mr. Wetherell represents the Fourth Judicial District and Mr. Wellman represents the Third and Fifth Judicial Districts. They were elected in May by their peers in their respective districts. The new president of the Commission is **Reed W. Larsen**, of Pocatello. He represents the Sixth and Seventh Judicial Districts. Here is a brief biography of the new commissioners.

### William H. Wellman

Mr. Wellman was born in West Virginia. He has a B.A. from Miami University, Oxford Ohio in 1974 and J.D. from West Virginia University in 1979. He and his wife, Debbie, have lived in Idaho since 1979. They are parents to three adult children, all of which live in the Boise area. Debbie is a licensed counselor and child custody mediator in Nampa.

Bill served as a Canyon County and Nampa City prosecuting attorney early in his career. He was Third District Bar president in 1987. He is currently the Owyhee County Public Defender. He has 32 years of law practice in Canyon County and maintains an active solo general civil and criminal practice in Nampa.

He has assisted several nonprofit organizations over the years including Friends of the Court, Inc., (predecessor to the Ada County Family Court Service), Nampa Youth Golf, Inc., the United States Golf Association, and currently is a board member for OG'sBAD, a continuation school in Nampa. He is a member of the Fam-

*Originally from Mountain Home, Robert attended the University of Salzburg in Austria and graduated St. John's University in the Honors Program.*

ily Law Section and earned recognition in 1987 with the Idaho Law Foundation's Pro Bono Award.

Bill's off-time passion is golf. He captained his college team at Miami and was MAC champion in 1974. He played professional mini-tours for two years and has also competed in three U.S. Amateurs in three decades.

### Robert T. Wetherell

Bob is a partner at Brassey, Wetherell & Crawford, LLP, where he practices trial and appellate work, insurance, product liability, mediation, civil rights and employment law. He and his wife, Deborah, live in Boise. They have two children. Marie, 23, who attends U of I College of Law, and John, 20, who attends U of I as an undergraduate.

Originally from Mountain Home, Robert attended the University of Salzburg in Austria and graduated St. John's University in the Honors Program. He attained his J.D. from the University of Idaho College of Law.

An avid fisherman, it is said "if there were a pothole in the parking lot, Bob

could catch a fish out of it." He does carpentry and his work product has been described as "not half bad."

He has worked construction since high school, has built several decks on homes and has made furniture. Bob is a



Robert T. Wetherell



William H. Wellman

gardener and almost-chef and both activities have brought a compliment or two, although some of his spicier dishes have generated controversy for the taste bud challenged.

Asked about other hobbies, he said he hunts birds four or five times a year. On the links, he said, "I golf poorly, but can putt with the lights out."

### About the Commission

The Board of Commissioners is the elected governing body of the Bar and consists of five commissioners, elected from Idaho's seven judicial districts. Two commissioners are elected from the Fourth District, one represents the First and Second Districts, one the Third and Fifth Districts and one the Sixth and Seventh Districts. Commissioners serve staggered three-year terms.

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## IN MEMORIAM

### Amil N. Myshin 1946 -2011

A longtime advocate for indigents' rights, Amil N. Myshin died on Saturday, Aug. 6, 2011, at a care center in Boise.

Amil worked for the Ada County Public Defenders office for the past 25 years, earning high praise from judges and attorneys as he represented those accused of the most serious crimes. A front-page article in *The Idaho Statesman* about his passion for protecting the rights of those accused was published after his death on August 10. In it, his colleagues praised his intense dedication and work ethic.

Amil graduated from George Washington University Law Center, Washington, D.C. in 1971. Early in his career, he practiced in Virginia, and moved to Boise in 1977. He worked for Idaho Legal Aid Services and joined the Ada County Public Defenders in 1985. In July 2011, he retired due to medical reasons.

In 2001, Amil received the Idaho State Bar Professionalism Award and the next year received



Amil N. Myshin

the Idaho Association of Criminal Defense Lawyers' Nevin Professionalism Award. Amil was inducted into the American College of Trial Lawyers in March of 2010.

Amil was an avid wildlife photographer. He also enjoyed scuba diving, skiing, and hiking in the foothills of Idaho. Amil's pride and joy was his sons, Morgan, Andrew, and Michael. He loved volunteering as a baseball umpire during the years when Andrew and Michael played baseball.

He is survived by his sons Morgan Myshin of California, Andrew Myshin and Michael Myshin of Boise and sisters Elizabeth Myshin and Carol Sadowski.

## OF INTEREST

### Smith Horras adds Robert "Neal" Burns to firm

Smith Horras, P.A. announces the addition of its new associate attorney, Robert "Neal" Burns. Neil's practice primarily focuses on commercial litigation, real estate, business law, personal injury, and family law.

Neil received his Juris Doctorate from the University of Idaho in 2009. He graduated with a B.A. from the University of Idaho in 2004, with honors in English and History. During his undergraduate studies Neil also attended University College London, in the United Kingdom, studying English literature and the history of modern British warfare.

While in law school Neil was a student attorney with the University of Idaho's Small Business Legal Clinic. In that capacity Neil advised his clients in entity formation, drafting contracts and legal documents, and advising clients with commercial legal decisions. Prior to his time in the legal clinic Neil served as a Summer Associate at a law firm located in Caldwell, Idaho. In that position his practice focused on family law and criminal defense. Neil also practiced for approximately one year with a Boise and Caldwell law firm.

Neil is admitted to practice in all courts of the State of Idaho as well as the United States District Court of Idaho. He



Robert "Neal" Burns

is a member of the Young Lawyers, Family Law, and Litigation Sections of the Idaho State Bar.

Neil's family has been living in Idaho since the late 1800's, he is a fourth generation Idahoan, and grew up in north Boise.

For more information please visit [www.smithhorras.com](http://www.smithhorras.com) or contact Smith Horras, P.A. at [contact@smithhorras.com](mailto:contact@smithhorras.com) or (208) 697-5555.

### Barrera joins Angstman Johnson to lead new immigration practice

Attorney John C. Barrera has joined Angstman Johnson as an associate to lead the firm's separate immigration practice, Achieve Immigration.

Prior to joining Angstman Johnson, Barrera was an attorney with Labrador Law Offices. Angstman Johnson acquired Congressman Raul Labrador's (R-Idaho) immigration practice in December 2010.

Barrera brings to the firm his immigration experience in dealing with matters involving family and employment based visas, applications for Adjustment of Status, asylum applications, U-visa applications and removal proceedings. Over the years, Barrera established a successful track record in defending clients in removal proceedings and successfully assisting clients become legal permanent residents and United States citizens.



John C. Barrera

Barrera has co-hosted a weekly hour-long radio show answering immigration questions from the Treasure Valley Community. John is fluent in Spanish and he is Member of the American Immigration Lawyers Association (AILA), the National Immigration Project and the Idaho Association of Criminal Defense Lawyers.

Angstman Johnson and Achieve Immigration welcome many new support team members from Labrador Law Offices, who will continue providing high-quality, personal service to each Achieve Immigration client.

### Stanish joins Holland & Hart

Holland & Hart is pleased to announce the addition of David Stanish to the firm's Boise office.

Stanish, a member of the firm's environment, energy, and natural resources group, represents and advises clients on endangered species, public lands, project permitting, water rights and water quality, in addition to other environmental and natural resources matters. He previously practiced in the natural resources division of the Idaho Attorney General's office.

Stanish is a 2005 graduate of the University of Idaho College of Law, and he also holds a master's degree in environmental science from the University of Idaho.



David Stanish



The Idaho Municipal Attorneys Association recognized five of its members for outstanding service at its summer meeting held on June 24 in Boise. Left to right: Mike Moore, Don Roberts, Emily Kane, Steve Tuft and Dale Storer.

Photo courtesy of Jill S. Holinka

## Idaho Municipal Attorneys Association recognizes achievement of its members

The Idaho Municipal Attorneys Association recognized five of its members for outstanding service at its summer meeting held on June 24, in Boise. Dale W. Storer, Idaho Falls, and Steve A. Tuft, Heyburn, received the Pillar of the Community Award for their devotion to their client cities and the legal profession. Michael C. Moore, Boise, and Don L. Roberts, Lewiston, received Career Achievement Awards for their outstanding contributions and service to the municipal law profession. Emily D. Kane, Meridian, received the Promising Newcomer Award for her service to the IMA and interest in furthering her knowledge of municipal law.

## Blackburn elected Vice President of Uniform Law Commission

Rex Blackburn, an attorney in Boise, has been elected to serve a one-year term as vice president of the Uniform Law Commission (ULC). Mr. Blackburn was elected vice-president at the 120th Annual Meeting of the Uniform Law Commission which recently concluded in Vail, Colorado. Mr. Blackburn is senior vice president and General Counsel of Idaho Power.

Founded in 1892, the ULC is an organization comprising more than 350 practicing attorneys, judges, law professors, legislators and other state officials – all lawyers – appointed by every state, the

District of Columbia, Puerto Rico, and the U.S. Virgin Islands to draft and promote enactment of uniform laws that are designed to solve problems common to all the states. Commissioners donate their time as a pro bono public service.

At the 120th Annual Meeting of the ULC, four new uniform acts were approved: the Uniform Electronic Legal Material Act; the Uniform Certificate of Title Act for Vessels; the Harmonized Uniform Business Organizations Code; and the Model Protection of Charitable Assets Act.

Other officers elected at the ULC's 120th Annual Meeting are: Michael Houghton, partner in the Wilmington, Delaware, law firm of Morris, Nichols, Arsht & Tunnell, President; Anita Ramasastry, D. Wayne & Anne Gittinger Professor of Law at the University of Washington School of Law in Seattle, Washington, Secretary; and Charles A. Trost, Of Counsel with the Nashville, Tennessee, law firm of Waller, Lansden, Dortch & Davis, Treasurer.

Mr. Blackburn was first appointed to the ULC from Idaho in 1993. As an Idaho uniform law commissioner, he has served on numerous drafting committees, including the Uniform Limited Liability Company Act and the Uniform Limited Partnership Act. He also served as Chair of the Drafting Com-

mittee on the Uniform Discovery of Electronically Stored Information Act. He currently chairs the Drafting Committee on the Uniform International Choice of Court Agreements Act.

Mr. Blackburn assumed the responsibilities of senior vice president and general counsel of Idaho Power on April 1, 2009. He joined Idaho Power in January 2008 as lead counsel. Mr. Blackburn graduated from the College of Idaho and the University of California, Hastings College of Law. From 1980 through 2007, he was a trial lawyer in private practice in Boise.

Uniform law commissioners come together as the Uniform Law Commission once a year to study and consider drafts of specific statutes in areas of the law where uniformity between the states is desirable. U.S. President Woodrow Wilson, former U.S. Supreme Court Justices Louis Brandeis and David Souter, and former U.S. Supreme Court Chief Justice William H. Rehnquist, have all served as uniform law commissioners. Since its inception in 1892, the ULC has promulgated more than 200 uniform acts, among them such bulwarks of state statutory law as the Uniform Commercial Code, the Uniform Probate Code, the Uniform Partnership Act, the Uniform Securities Act, the Uniform Child Custody Jurisdiction and Enforcement Act, and the Uniform Interstate Family Support Act.

Further information on the Uniform Law Commission can be found at the ULC's website at [www.uniformlaws.org](http://www.uniformlaws.org).



Rex Blackburn

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## COMING THIS FALL TO A ROAD SHOW NEAR YOU — RATE COMPARABILITY

James J. Davis  
Chair, IOLTA Revenue  
Enhancement Committee, Idaho  
Law Foundation

This fall, attorneys will be asked to vote to change the rules governing Interest On Lawyers' Trust Accounts (IOLTA) accounts to make Idaho a "rate comparability" state. The purpose of this article is to explain: (1) the proposed rule; (2) the recommendation to adopt the rule; (3) how little the rule change will affect Idaho attorneys; and (4) the process used to develop the rule.

### The proposed rule

Rate comparability requires attorneys to place IOLTA accounts at banks that agree to pay the highest rate of interest paid on similar non-IOLTA accounts. Under existing rules, IOLTA accounts are set up as interest-bearing checking accounts regardless of the balance of the account or the length of time the money is in the account. The interest rate paid on checking accounts is minimal. There are historical reasons for IOLTA accounts having initially been created as checking accounts.<sup>1</sup> Over time, however, banks have created different types of accounts that have the features required for trust accounts — a high level of safety for the principal and high liquidity — that pay higher rates of interest than are paid on IOLTA accounts. Rate comparability simply requires attorneys to place their IOLTA accounts at banks that agree to treat IOLTA accounts similar to non-IOLTA accounts.

### Fairness, need and stability support rate comparability

There are three principal reasons rate comparability for IOLTA accounts should be adopted in Idaho. The first reason is fairness. There is no justification for treating IOLTA accounts any differently than non-IOLTA accounts. If an IOLTA account meets the same requirements as a non-IOLTA account, why should the interest paid on the two accounts differ? Fairness dictates equal treatment of the two accounts.



James J. Davis

The second reason rate comparability is recommended is the need for increased revenue from IOLTA accounts to support law-related, public-interest programs. The interest earned on IOLTA accounts is channeled through the Idaho Law Foundation, Inc. (ILF) to be used for specified charitable programs. The vast majority of the revenue is used to provide funding for legal services to the disadvantaged. Traditionally, those funds have been awarded to Idaho Legal Aid services and the Idaho Volunteer Lawyers Program. The need for legal services for the disadvantaged is well-known and documented in Idaho. The disadvantaged are under-represented by any standard. IOLTA funds are also awarded to programs that provide law related education to students at all grade levels through civic and youth-government programs and scholarships for University of Idaho Law School students who are willing to provide public service.

The need for IOLTA funds for these essential and worthwhile programs has grown far beyond the interest currently earned on IOLTA accounts, particularly since the American economy faltered. Indeed, IOLTA grant funds have decreased more than 50% in the last two years.<sup>2</sup>

The increased interest earned from rate comparability will help to bridge the gap between the growing needs and the available revenue. In the 30-plus states where rate comparability has been adopted, income has increased. In some cases, when the economy was churning (2004-2006), the increased revenue from rate comparability was dramatic. Florida, for instance, experienced 300% growth in the income from June 2004 to June 2006. In the short term, it is not expected that the revenue increase will be as dramatic as that experienced in Florida; however, once the economy starts to grow, and interest rates increase, the increased revenue will be significant.

*Most attorneys will not even know a change occurred. The experience in the 30-plus states that have already adopted rate comparability supports that conclusion.*

The third reason to adopt rate comparability is predictability. The proposed rule standardizes the means of determining the rates of interest paid and, thereby, provides future revenue predictability. Currently, the rates of interest paid on IOLTA accounts wildly fluctuate between banks and sometimes at the same bank. The proposed rule places uniformity on the rate—the highest rate paid on similar non-IOLTA accounts or 70% of the Federal Fund Rate. The rule also requires more standardized reporting by banks to ILF to facilitate better monitoring of the rates paid. The changes in the proposed rule will tend to provide a more predictable level of future revenue.

### How rate comparability will affect Idaho attorneys

When rate comparability has been discussed with Idaho attorneys, the most-asked question has been: "How will a change to rate comparability affect me?" Typically, the question is preceded with some statement like, "I live in a small town and I have a close working relationship with my banker."

The short answer is that most attorneys will not even know a change occurred. The experience in the 30-plus states that have already adopted rate comparability supports that conclusion. There are multiple reasons attorneys will not be affected, including:

- Attorneys who are not engaged in private practice or do not manage or handle client or third-person trust funds need not have IOLTA accounts.
- Attorneys who do not have offices in Idaho need not have IOLTA accounts in Idaho.
- Rate comparability does not apply to attorneys' business checking, savings, and other bank accounts.
- Rate comparability does not apply to

trust accounts created for specific clients who receive the interest from the account.

- Rate comparability only applies if a bank offers higher rates of interest on non-IOLTA accounts. Thus, IOLTA accounts at banks that do not pay higher interest on similar non-IOLTA accounts are not impacted.

- Banks have three options from which to choose to pay a comparable rate of interest. Two of those options — treating IOLTA accounts as non-IOLTA accounts or paying 70% of the Federal Fund Rate — do not require change in the attorney-bank relationship.

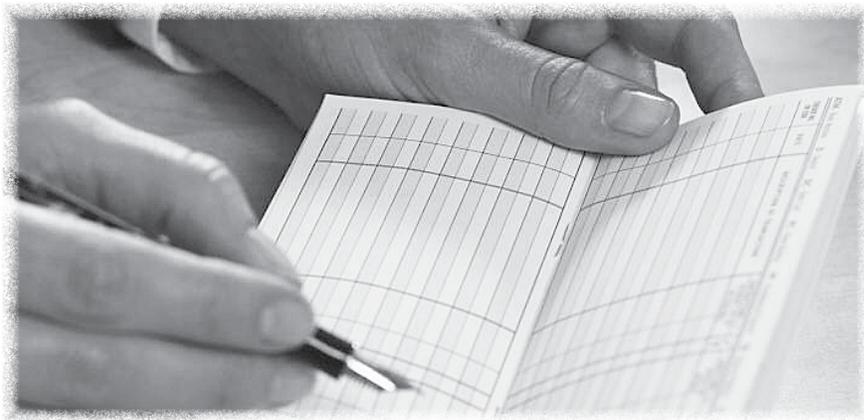
- Staff at the Idaho State Bar (Bar) and/or ILF will initially work with banks to determine the appropriate rate of interest to be paid and will continue to monitor IOLTA account activity.

A very small percentage of Idaho attorneys will be affected by the adoption of rate comparability. Currently, a few Idaho attorneys “opt-out” of IOLTA. Idaho is only one of six states that allow opt-out. The current opt-out provision will be eliminated because rate comparability does not work when attorneys can bow out of IOLTA. One state attempted rate comparability with free opt-out. The effort failed because bank participation was minimal. As a result, the state eliminated the opt-out rule. While the proposed Idaho rule eliminates free opt-out, it does have a limited opt-out provision discussed below.

Some attorneys will be asked by their banks to sign a new IOLTA account agreement. As addressed above, banks have three options to meet the rate comparability requirement. One of those options is for the bank to create a new type of account. If a bank chooses that option, the attorney may be asked to sign a new IOLTA account agreement.

Finally, it is possible that a bank may pay higher rates of interest on non-IOLTA accounts and choose to not pay the higher rate on IOLTA accounts. In that event, unless the attorney receives an exemption from the Bar, the attorney will need to move the IOLTA account to a different bank. In the more than 30 states that have adopted rate comparability, it is rare that a bank chooses not to pay the higher rate of interest on IOLTA accounts. For instance, when Utah adopted rate comparability, only two small banks chose not to pay the higher non-IOLTA rates on IOLTA accounts.

The experience in Utah is not surprising. After all, banks already have in place



the means to pay higher interest rates because they are doing so on non-IOLTA accounts. Banks profit on the higher-rate accounts. Otherwise, the accounts would not be offered to customers. Why, then, would banks not want to treat IOLTA accounts the same? Further, one would expect attorneys to be preferred customers for banks. The benefits to banks from holding other attorney accounts should far outweigh the additional interest paid under rate comparability. Despite the benefits to banks of having attorney customers, the Idaho rule recognizes that it is possible a bank may choose to not pay a higher interest rate. In some circumstances, where the rule creates undue hardship, and it would be extremely impracticable because of the geographic distance between the attorney's office and the nearest participating bank, the attorney can seek an exemption from the Bar. Indeed, exemptions were granted in Utah to the attorneys who had their IOLTA accounts at the two small banks that did not agree to increase interest rates on IOLTA accounts.

### **The process to develop the proposed rule**

The process to develop the rate comparability rule for Idaho has taken over three years. In March 2008, ILF created a temporary committee — the IOLTA Revenue Enhancement Committee (Committee) — to study rate comparability. At the time, 21 states had already adopted rate comparability. By June 2008, the Committee recommended, and ILF approved, an IOLTA Revenue Enhancement Campaign (Campaign). The Campaign's focus was to attempt direct negotiation with banks to voluntarily increase interest rates on IOLTA accounts. The Campaign also sought assistance from attorneys to encourage their banks to voluntarily increase the interest rates. Banks that agreed to pay interest of at least 70% of the Federal Fund

*In the more than 30 states that have adopted rate comparability, it is rare that a bank chooses not to pay the higher rate of interest on IOLTA accounts.*

Rate and waive fees on IOLTA accounts were designated Leadership Banks. For more information about the creation of the Committee and its recommendation to ILF in June 2008, see, Jim Davis, *We Are Stuck in 1982!*, Vol. 51, No. 8 *The Advocate* 38 (August 2008).

The Committee also recommended to ILF in June 2008 that the voluntary program be reviewed after one year to determine its viability. By February 2009, the Campaign enjoyed limited success. Ten banks agreed to raise interest rates to the Leadership Bank level; one national bank ignored attempted contacts; and 23 banks had not yet agreed to voluntarily increase interest rates.<sup>3</sup>

The Campaign then collapsed with the American economy. Banks that had previously committed to pay higher rates of interest quit doing so without notice to ILF. The experience demonstrates significant limitations to the current IOLTA structure. The program as set up does not provide a dependable revenue stream. It

is dependent upon too many uncontrollable factors. Further, it requires inordinate time and expense to negotiate interest rates with 30-plus banks every time there is an economic change.

As a result of the limited success of a voluntarily negotiated program, in October 2010, the Committee recommended Idaho follow the now more than 30 states (including the neighboring states of Utah, Washington, and California) that have adopted rate comparability. The proposed rule was unanimously approved by ILF at the Idaho State Bar Annual Meeting in July 2011.

The proposed Idaho rule was taken directly from the rule adopted by the Utah Supreme Court. After it was drafted, and before it was approved by ILF, the proposed rule was reviewed by an American Bar Association technical committee, "The Joint Technical Assistance Committee of the ABA Commission on IOLTA and National Association of IOLTA Programs." The technical committee provided significant, meaningful input that was included in the final rule. As a result, the proposed rule is the most up-to-date, "best practices" version of a rate comparability rule in the country. The proposed rule is

*After it was drafted, and before it was approved by ILF, the proposed rule was reviewed by an American Bar Association technical committee.*

currently undergoing review by ISB Bar Counsel and will be available in its final form in the near future.

### Conclusion

This fall, Idaho attorneys have the opportunity to vote to approve rate comparability in Idaho and, thereby, have a significant impact on the IOLTA program's ability to fund important and necessary services for Idaho communities. Each of you is urged to vote for rate comparability at your local road show. Any questions about this article or rate comparability may be directed to Jim Davis at [jdavis@davisjd.com](mailto:jdavis@davisjd.com); Carey Shoufler at [cshoufler@isb.idaho.gov](mailto:cshoufler@isb.idaho.gov), Staff Liaison to the

Revenue Enhancement Committee; or Diane Minnich at [dminnich@isb.idaho.gov](mailto:dminnich@isb.idaho.gov), Executive Director of the Idaho State Bar and Idaho Law Foundation.

### About the Author

**James J. Davis** is an attorney in Idaho, and the Chair of the Idaho Law Foundation IOLTA Revenue Enhancement Committee.

### Endnotes

<sup>1</sup> See, Jim Davis, *We Are Stuck in 1982!*, Vol. 51, No. 8 *The Advocate* 38 (August 2008).

<sup>2</sup> Diane K. Minnich, 2010—*The Idaho Law Foundation Year in Review* Vol. 53, No. 3, *The Advocate* 14 (March/April 2011).

<sup>3</sup> Jim Davis, *My Bank Is A Leadership Bank! Is Yours?*, Vol. 52, No. 2 *The Advocate* 33 (February 2009).

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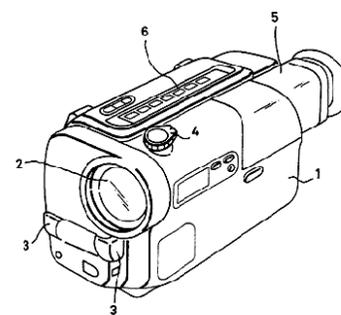
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## SUMMERS AT THE COURTHOUSE BROUGHT KEELY DUKE TO THE LAW

Susie Boring-Headlee

*ADR/Pro Bono Coordinator U.S. District Court*

Keely Duke's personal values and hard work were seeds planted during childhood. Keely grew up in Missoula, Montana and spent her summers under the watchful eye of her Grandma Helen. Grandma Helen taught Keely that as a woman, Keely could do and be anything she set her mind to. As an avid "people watcher," Grandma Helen would take young Keely on day trips to many places in Missoula, including the airport and the Missoula County Courthouse to watch courtroom dramas unfold.

Those trips had a profound impact on Keely. She watched as what her grandmother called "everyday folk" went into the courthouse to have disputes decided by their neighbors; something Grandma Helen explained was a special and important part of this great country. Keely learned about attorneys and judges, and the important role they play in the judicial process and how the attorneys assisted those in need through stressful times.

Those summers with Grandma Helen formed what would be life-changing decisions for Keely. As a result, and at a young age, Keely set her mind on law school. To continue learning as much as she could about the law, each summer while Keely was in college she worked as a runner for an insurance defense law firm in Missoula. She enjoyed the law, and deeply respected the attorneys in the firm where she worked.

That interest in the defense never subsided and after completing law school in Oregon, Keely moved to Boise to join Hall, Farley, Oberrecht & Blanton. Twelve years later, she has defended hundreds of clients, handled numerous jury trials, and is respected as a defense attorney across Idaho.

Keely's first venture into the federal court pro bono world involved her representing an African American woman in an employment lawsuit against the woman's employer. When Keely was asked to accept this appointment, she did not hesitate and when reading the complaint, quickly realized that most plaintiff attorneys would not consider it an economically feasible case because the damages were limited. However, to the pro se client, a middle-aged homeless woman living in a shelter, this was her life. Keely was impressed with the caliber of her client who was an "absolute pleasure" to work with, as she was articulate, appreciative, and had reasonable expectations.

The case moved into mediation with U.S. Magistrate Judge Larry M. Boyle who Keely said treated her client with the utmost dignity and respect. Ultimately, a settlement was reached for her client who was extremely grateful and Keely provided the name of a reputable financial planner to help her client manage her money.

This experience for Keely was very rewarding and she plans to continue this service throughout her legal career. As for Grandma Helen, she is also now teaching Keely's 8 year old twin daughters, Abby and Elizabeth, that they can be anything they want to be. In addition, this October, as she celebrates her 90<sup>th</sup> birthday, Grandma Helen can be sure that those courthouse trips made a lasting impression on her granddaughter.



Susie Boring-Headlee



Keely Duke's pro bono work helped an African American woman assert her rights in an employment discrimination dispute. Ms. Duke was inspired to help people from all walks of life by her "Grandma Helen," pictured below.



### About the Author

*Susie Boring-Headlee currently serves as the Federal Pro Bono Coordinator and ADR Coordinator. She spent 10 years at the Ninth Circuit Court of Appeals, where she completed a two-year capital case management plan for Judge Arthur Alarcón. She is married to Paul Headlee, and they enjoy gardening, hiking with their yellow lab Benelli, and riding their Harley Davidson.*

### Editor's Note

In an effort to increase awareness of pro bono work provided by Idaho attorneys, *The Advocate* will regularly spotlight individuals and their cases. If you would like to take a pro bono assignment that meets your time constraints and interests, contact Idaho Volunteer Lawyers program at (208) 334-4500, or the Federal Court Pro Bono Program at (208) 334-9067.



J. Charles Blanton shows his “60 Years of Practice” award honoring an extensive career that included serving as the director of the Idaho State Bar Foundation from 1959 to 1969 and the as President of the Idaho Association of Defense Counsel, among other positions.

## ANNUAL MEETING SHINES WITH CAMARADERIE AND PROFESSIONAL RECOGNITION

The well-attended 2011 Annual Meeting at the Sun Valley Resort drew attorneys from across Idaho who recognized achievements of their peers, heard presentations and earned CLE credits. Its special focus was pro bono service and top-flight CLEs. Inspirational talks were given by keynote Justice Gregory H. Hobbs of the Colorado Supreme Court and Salvador A. “Sal” Mungia, Immediate Past-president of the Washington State Bar, and a special CLE about Idaho legal history was given by former ISB president Deborah Kristensen, Ernest Hoidal and Judge Candy Dale.

The awards banquets recognized extraordinary accomplishment and service. Presentations included the Distinguished Lawyer Awards, Service Awards, Young Lawyer of the Year Award and for those practicing 50, 60 and 65 years. A new award, Section of the Year, was presented to the Taxation, Probate and Trust Law Section. And The Advocate awards, Section meetings and the Idaho Law Foundation meeting were all wrapped in between the 15 CLE offerings.

The 378 overall attendance figure for the 2011 Annual Meeting was the largest for a Sun Valley Annual Meeting since 2000 and tied with the 2007 Annual Meeting which was held in Boise. Corporate sponsors included U.S. Bank, ALPS, University of Idaho College of Law, Moreton and Company, RehabAuthority, Ataraxis, BizPrint and Cooper & Larsen Chtd.



Brooke Baldwin-Redmond of Twin Falls accepts the Outstanding Young Lawyer of the Year Award. She serves on the Lawyer Referral Service Committee, has been President of Fifth District Bar Association and serves on the Board of Directors for Idaho Legal Aid Services.



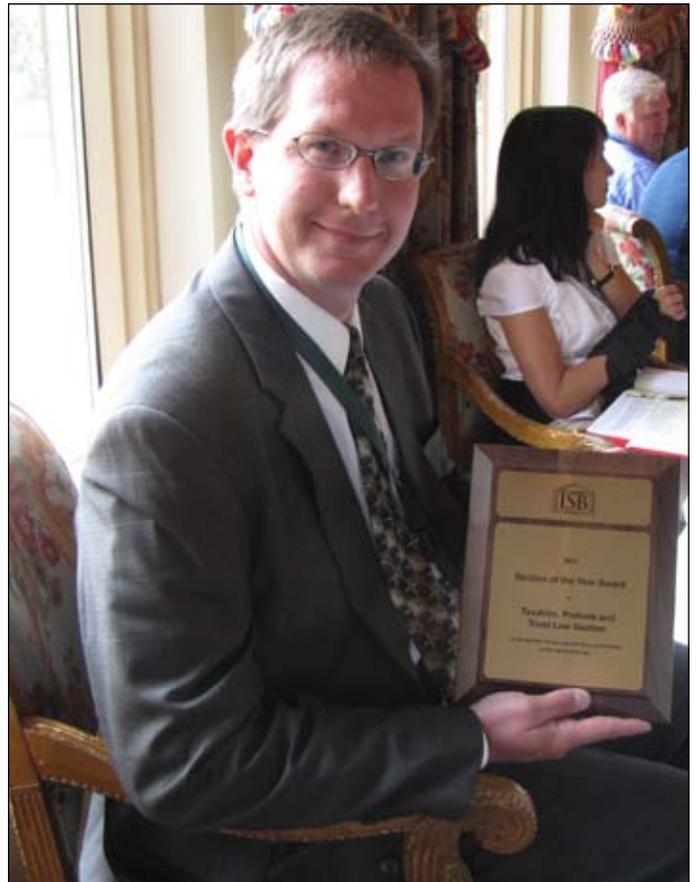
Robert A. Anderson visits with past ISB president John J. McMahon and his wife, Peggy in the lobby of the Sun Valley Resort.



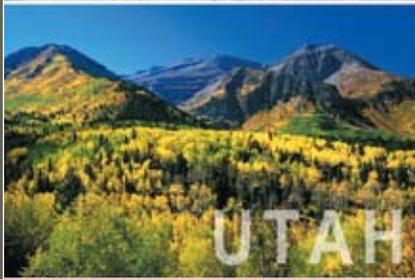
Idaho State Bar Commission Past President James C. Meservy, left, and Past President Deborah A. Ferguson, right, welcome incoming President Reed W. Larson, center, to the position.



New Idaho State Bar President Reed Larson laughs with Sarah T. Hope during the Service Award ceremony.



Representing the Tax, Probate and Trust Law Section, Chairman Ronald George Caron Jr. accepts the Section of the Year Award.



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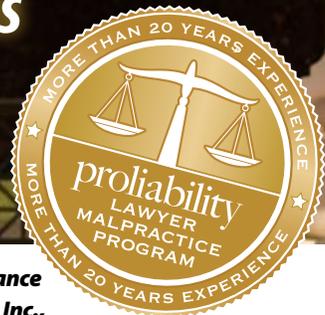
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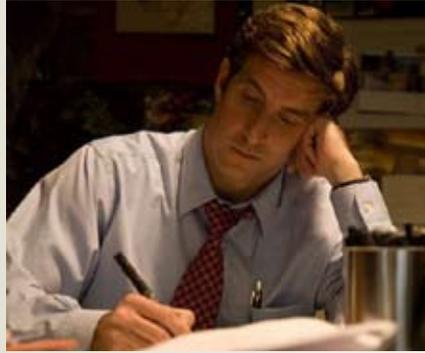
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Pete Sisson is a National Board Certified Elder Law Attorney ([www.nelf.org](http://www.nelf.org)) and a VA Accredited Attorney. Since 1993, The Elder Law Firm has helped thousands of Idaho seniors and their families avoid the financial ruin that is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

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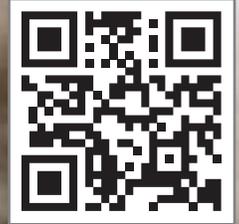
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