

The Advocate

Official Publication
of the Idaho State Bar
Volume 55, No. 1
January 2012

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Commercial Law and
Bankruptcy Section

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The Advocate

The Official Publication of the Idaho State Bar
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On the Cover

This photo was taken at sunrise on a late winter ski outing in the Cameron Pass area of the Colorado-Wyoming borderlands by attorney Galen Woelk. On this particular morning, Woelk and his partner aborted their attempt to ski the far peak because of avalanche danger. Mr. Woelk began his practice of law in Teton County, Idaho in 1998, where he remained until relocating to Wyoming in 2004, where he continues to practice law.

Section Sponsor

This issue of *The Advocate* is sponsored by the Commercial Law and Bankruptcy Section.

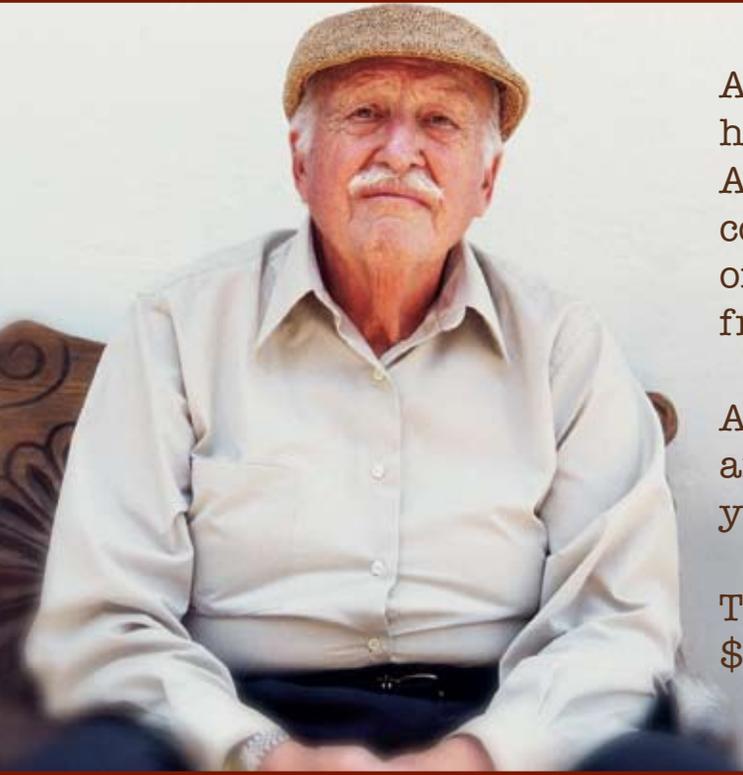
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Special thanks to the January editorial team: Scott E. Randolph, Daniel J. Gordon, Brent T. Wilson, Anna E. Eberlin, A. Denise Penton.

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.

“Dad Couldn’t Remember How To Get Home”



An estimated 4.5 million Americans have Alzheimer’s disease. The number of Americans with Alzheimer’s disease will continue to grow — by 2050 the number of individuals with Alzheimer’s could range from 11.3 million to 16 million.

A person with Alzheimer’s disease will live an average of eight years and as many as 20 years or more from the onset of symptoms.

The average nursing home cost in Idaho is \$84,000 per year.

The legal and financial challenges posed by Alzheimer’s disease can only be answered on an individual basis by an attorney whose practice is concentrated on elder law, Medicaid planning, and estate planning. Whether planning ahead or in a crisis, we can provide help when one of your clients — or a loved one — is faced with long-term care needs.

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Upcoming CLEs

January

January 20

Representing Family Law Clients in the Downed Economy

Sponsored by Family Law Section

Idaho Supreme Court ~ Boise

8:45 a.m.

6.0 CLE credits of which .75 is Ethics

January 26

Day with the Idaho Supreme Court

Sponsored by the Idaho Law Foundation

The Grove Hotel ~ Boise

9:00 a.m.

5.0 CLE credits (RAC)

February

February 10

CLE Idaho: Movie and Lunch

Sponsored by the Idaho Law Foundation

Blackfoot – Bingham County Courthouse

Moscow – University Inn Best Western

11:00 a.m. (Local time)

2.0 CLE credits (RAC)

February 16-19

30th Annual Bankruptcy Seminar

Sponsored by the Commercial Law and Bankruptcy Section

Sun Valley Resort ~ Sun Valley

12.5 CLE credits of which 1.0 is Ethics

**Keep an eye out for these CLEs in 2012.
Details forthcoming.**

February 24

Real Property Section Annual Seminar

Idaho Falls

March 1 -3

Family Law of Community Property States Symposium

The Coeur d'Alene ~ Coeur d'Alene

March 9

Workers Compensation Section Annual Seminar

Sun Valley Resort ~ Sun Valley

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

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

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PRESIDENT'S MESSAGE

HAPPY NEW YEAR 2012

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

One of the most enjoyable parts of being a bar commissioner and now president is participating in the Road Show each November. We get to see old friends; be amazed at the stories from the recipients of the Professionalism and Pro Bono awards; and feel the spirit that each district of the bar possesses. The themes of service, dedication, and perseverance ring through each of the meetings. I am just so proud to be associated with you as lawyers. I hope you are proud of your individual accomplishments, large or small; it all makes a difference in people's lives. After two weeks of being on the road, we are tired, but there is a bond that is felt by the commissioners. We know we have been part of something excellent. So thank you. Thank you for coming to the Road Show and thank you for all you do.

We now head into 2012. Stories have circulated that according to the Mayan calendar this is the end of days. That is a fairly pessimistic view of the world: That it will all end in some cataclysmic event, like the Yellowstone caldera blowing up, (hence the movie).

My two boys are more into the concept of some zombie apocalypse. Frankly, I don't have a clue what they are talking about, other than it sounds like they would all be moving home and my food and fuel budget would be increased, because my house has a lot of "defensible space." (Truth is I live in the sticks and no one would want to come around, which is also why they moved out, go figure.) I personally don't see the end of the world this year. I think the Mayans were so optimistic that they planned the future out long past the peak of their prominent civilization. But

if you have planned a calendar out a couple thousand years, isn't that the ultimate statement of optimism? That is seeing the future and making a difference.

So what are your goals for 2012? What are your plans? What will bring you happiness and success? I am a firm believer in goals. I also believe in the adage that, "A goal not written is only a wish." With that in mind, the Nov/Dec issue of *The Federal Lawyer* had an excellent article by Philip W. Savrin. Mr. Savrin said:

"Even without a serious problem developing, however, the stress of being a lawyer can creep up without much notice, taking a toll on one's physical and emotional health. There are no panaceas or magical solutions to these problems, but there are steps we can take as lawyers to avoid some of the pitfalls."

Mr. Savrin went on to give five suggestions to address those concerns or five areas for goals. Reviewing those areas caused me some reflection. I could say I was succeeding in some areas and definitely needing help in others. I will give my brief self evaluation.

1. Maintain your physical health. Eat well. Go to the doctor for routine examinations. On this front, I have failed miserably. I eat too much and my exercise pattern is not what it was 10 years ago. My routine exams have been limited to trips to the ER to fix damage from accidents related to my somewhat dangerous hobbies. (But this will prove to be a good thing as you will read below.) Needless to say, this is one of my goals for the New Year. Eat better. Exercise more and, oh boy, go schedule that colonoscopy that I have put off for four years. And you thought I wasn't going to have fun in 2012.

2. Set aside time for family and friends and don't talk about work. This is actually something I have excelled in doing. Our family has always done a lot together and I cherish that time. While there may be room for improvement, I feel like I am on track.

3. Find interests outside the law. On this point I can say I have succeeded and may-

be even excelled. I love the outdoors. I truly love my horses and team roping. When I talk about goals, one of the silly goals I set about eight years ago was to win a saddle team roping on both ends, Heading and Heeling. Well, in 2007, I won a saddle Heading and this fall I won a saddle Heeling. It has been a lot of fun and it is surprising how many people don't know that I am a lawyer, when I am on a horse.

4. Do volunteer work. This is a goal that can always be expanded and yet the enjoyment derived from service to the bar, service to the community and service to church can be some of the most uplifting things we do. As lawyers we truly should strive to loose ourselves in the service of others. It brings joy.

5. Become a leader in your legal associations. I hope I have answered that call. I hope I can continue to answer the call to lead and to follow.

Will 2012 be the end of the world? I doubt it. Will it be the being of new challenges and adventures? I hope so. I hope you set goals high enough to make you stretch to be a better person and thus a better lawyer and in doing so I wish you the very best for 2012.

If I don't see you before, I hope to see you at the annual meeting in Boise in July.

About the Author

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

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



Reed W. Larsen

**JON R. COX
(Withheld Suspension)**

On November 28, 2011, the Idaho Supreme Court issued a Disciplinary Order suspending Boise attorney Jon R. Cox from the practice of law for a period of one year with the entire one year withheld and placing him on disciplinary probation.

The Idaho Supreme Court found that Mr. Cox violated Idaho Bar Commission Rule 505(b) [Conviction of a Serious Crime]. The Idaho Supreme Court's Disciplinary Order followed a stipulated resolution of an Idaho State Bar disciplinary proceeding and related to the following circumstances.

In November 2008, Mr. Cox was charged with felony driving under the influence. Mr. Cox pled guilty to the felony driving under the influence charge and was sentenced on May 6, 2009. The Court entered an Order Withholding Judgment and Order of Probation and placed Mr. Cox on supervised probation for six years on terms and conditions contained in an Agreement of Supervision.

In December 2008, Mr. Cox entered an inpatient treatment facility, completed the four week inpatient program and then completed a twelve week relapse prevention outpatient program. He has also complied with the recovery plan prepared during his relapse prevention sessions. In addition, since the November 14, 2008, Mr. Cox has been tested for alcohol or controlled substances and has not tested positive.

The Disciplinary Order provides that Mr. Cox's one year suspension is withheld subject to the terms and conditions of probation, through May 6, 2015, which include: avoidance of any alcohol or drug related criminal acts, or alcohol or drug related traffic violations; a program of random urinalysis, with provision that if Mr. Cox tests positive for alcohol or other tested substances or misses a random urinalysis test, without prior approval, the entire withheld suspension shall be immediately imposed; and if Mr. Cox admits or is found to have violated any of the Idaho Rules of Professional Conduct for a which a public sanction is imposed for any conduct during his period of probation, regardless whether that admission or determination occurs after the expiration of the probationary period, the entire withheld suspension shall be imposed.

The withheld suspension does not limit Mr. Cox's eligibility to practice law.

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

**RICHARD A. BERGESEN
(Disbarment)**

On October 31, 2011, the Idaho Supreme Court issued a Disciplinary Order disbaring Boise attorney Richard A. Bergesen from the practice of law in the State of Idaho. The Idaho Supreme Court's Order followed a stipulated resolution of an Idaho State Bar disciplinary proceeding in which Mr. Bergesen admitted that he violated Idaho Rules of Professional Conduct ("I.R.P.C.") 1.5(a) (unreasonable fees), 1.5(b) (failure to communicate basis or rate of fees and expenses), 1.5(f) (failure to provide accounting), 1.7 (conflict of interest), 1.8(f) (accepting compensation from third person where there is interference with attorney-client relationship), 1.15(a) (failure to hold client property separate), 1.15(b) (failure to deposit legal fees into trust), 1.16(d) (failure to refund unearned fees upon termination), 4.1(a) (false statement of material fact or law to third person), 4.2 (communication with person represented by counsel), 4.4(a) (respect for rights of third persons), 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) and 8.4(d) (conduct prejudicial to the administration of justice).

On October 22, 2010, the Idaho State Bar filed with the Idaho Supreme Court a Petition for Interim Suspension of License to Practice Law. On November 16, 2010, the Idaho Supreme Court entered an Order granting the Petition and placed Mr. Bergesen on interim suspension effective November 15, 2010.

On December 10, 2010, the Idaho State Bar filed an Amended Complaint against Mr. Bergesen, alleging nine counts of professional misconduct. With respect to Count One, Mr. Bergesen admitted he violated I.R.P.C. 1.7, 4.2 and 4.4 in connection with his representation of D.B. D.B. was an 82-year-old woman who paid Mr. Bergesen \$5,000 to provide criminal defense representation to a young man, A., who had befriended her and to whom she had provided over \$10,000 in "loans." D.B.'s sister, P., petitioned for a conservatorship based on A.'s undue influence and was named temporary conservator. Mr. Bergesen sought to represent D.B. in the

conservatorship proceeding and filed an ex parte motion to release \$7,000 from D.B.'s account for his retainer fee. The Court declined to authorize payment of the retainer fee and instructed Mr. Bergesen to submit his request for payment of hourly fees to P. Two days later, Mr. Bergesen drove D.B. to P.'s home, demanded immediate payment of his retainer fee and threatened to have P. thrown in jail for contempt. P. telephoned her attorney, who reiterated to Mr. Bergesen the Court's instruction that requests for payment of hourly fees be submitted in writing. Mr. Bergesen then filed a Notice of Appearance for D.B. and a motion to release her funds based on a fee agreement she signed earlier that day. P. moved to disqualify Mr. Bergesen based on a conflict of interest, with specific reference to A.'s alleged exploitation of D.B. and Mr. Bergesen's recent court appearance for A. on strangulation charges. Mr. Bergesen ultimately withdrew and the Court appointed P. as guardian and conservator for D.B., who was deemed incapacitated due to significant dementia.

With respect to Count Two, Mr. Bergesen admitted he violated I.R.P.C. 1.5(a), 1.5(f), 1.16(d), 4.1(a), 8.4(c) and 8.4(d), in connection with his representation of J.C. J.C. was a 75-year-old woman charged with multiple criminal counts. J.C. signed Mr. Bergesen's fee agreement providing for a \$200,000 fixed fee for lifetime representation. By the terms of the fee agreement, the \$200,000 fee was due within three weeks and deemed earned upon receipt. J.C. paid Mr. Bergesen \$50,000 by check and instructed her bank to issue Mr. Bergesen a check for \$102,653, reflecting all remaining funds in her checking and savings accounts. Mr. Bergesen drove J.C. to the bank and obtained the check, which he cashed later that day. One day after that payment, J.C. instructed her bank to liquidate her retirement and annuity accounts and issue a \$100,000 check to Mr. Bergesen. A bank representative advised J.C. to withhold a portion of those funds to pay her tax obligations. Mr. Bergesen called the representative and demanded that no funds be withheld because the prosecutor in J.C.'s criminal case demanded upfront restitution and J.C. purportedly needed all available funds as a "bargaining chip" to stay out of prison. The bank representative advised that no payment would be issued until Mr. Bergesen verified the funds would be held in trust. Mr. Bergesen falsely informed the representative that J.C.'s previous pay-

DISCIPLINE

ments of over \$152,000 had been deposited into his trust account. Prior to the final payment, J.C. retained other counsel and sent Mr. Bergesen a letter terminating his services, demanding an itemized accounting and refund, and requesting that he refrain from contacting her. Mr. Bergesen did not provide an accounting or refund and continued to contact J.C. against her wishes. Thereafter, Mr. Bergesen did not respond to repeated requests from J.C.'s new counsel for an accounting and refund of her payments.

With respect to Count Three, Mr. Bergesen admitted he violated I.R.P.C. 1.5(a), 1.5(f), 1.16(d), 4.1(a), 4.4(a), 8.4(c) and 8.4(d) in connection with his representation of C.S. in two cases. C.S. retained Mr. Bergesen pursuant to a \$25,000 fixed fee agreement. Her friend, J., paid \$15,000 of the retainer fee and agreed to pay the remainder two months later. One week after he was retained, Mr. Bergesen requested that C.S. pay the final \$10,000. C.S. declined and, one week later, terminated the representation and requested a \$14,000 refund. Mr. Bergesen refused to provide a refund and informed C.S. that he had filed court documents alleging she was mentally incompetent. That day, he filed a Notice of Appearance and a motion for an examination to determine C.S.'s mental competency. Mr. Bergesen then contacted J.'s assistant, G., to demand the final \$10,000 payment. G. was unaware that C.S. had terminated the representation or that the final payment was not due and therefore provided Mr. Bergesen with a \$5,000 check, which he cashed that day. After a public defender was appointed to represent C.S., Mr. Bergesen continued to call G. to demand the final \$5,000 payment and falsely informed her that his representation of C.S. continued. J. contacted Mr. Bergesen, advised him that G. had erroneously provided the \$5,000 check based on misrepresentations and requested an accounting and refund. Mr. Bergesen falsely informed J. that C.S. had been ruled incompetent, threatened to sue J. if the \$5,000 balance was not paid and refused to provide an accounting or refund.

With respect to Count Four, Mr. Bergesen admitted he violated I.R.P.C. 1.5(a), 1.5(f), 1.16(d) and 4.4(a) in connection with his representation of T.A. T.A.'s 93-year-old father, R., retained Mr. Bergesen to represent T.A. in three criminal cases for a \$3,000 fixed fee. After R. declined Mr. Bergesen's repeated requests

for additional fees, Mr. Bergesen negotiated with T.A. in jail to represent her in three other criminal cases for a \$10,000 fee. T.A. signed documents prepared by Mr. Bergesen granting him power of attorney to handle her legal and financial affairs while she was in custody and instructing her financial advisor to liquidate her accounts and wire \$10,000 to Mr. Bergesen. Two days after the \$10,000 transfer was completed, T.A. terminated Mr. Bergesen's representation and requested a \$13,000 refund. Mr. Bergesen refused to provide an accounting or refund.

With respect to Count Five, Mr. Bergesen admitted he violated I.R.P.C. 1.5(a), 1.15(a), 1.15(b), 1.5(f) and 1.16(d) in connection with his representation of R.C. R.C. retained Mr. Bergesen to represent him in a DUI case for a \$10,000 fee. R.C.'s friend initially paid that fee by check, which Mr. Bergesen cashed. Several days later, R.C. attempted to terminate the representation and requested an accounting and refund. Mr. Bergesen threatened to have R.C. institutionalized, told him he could not "switch attorneys" because it would constitute breach of contract and filed a Notice of Appearance. Mr. Bergesen subsequently executed a Substitution of Counsel but refused to provide an accounting or refund.

With respect to Count Six, Mr. Bergesen admitted he violated I.R.P.C. 1.5(a), 1.5(b), 1.8(f), 1.15(a), 1.15(b), 1.16(d), 4.1(a), 4.4(a), 8.4(c) and 8.4(d), in connection with his representation of R.M. R.M.'s elderly father, F., retained Mr. Bergesen to represent R.M. in two criminal matters through sentencing. The fee agreement provided for a \$25,000 fixed fee, which F. paid by check. Thereafter, F. paid Mr. Bergesen an additional \$25,000, based on Mr. Bergesen's representation that the funds were purportedly needed to pay physicians to evaluate R.M. for Mental Health Court. Mr. Bergesen did not deposit those funds into a client trust account. When Mr. Bergesen later contacted F. to request additional payments for physicians' costs, F. informed Mr. Bergesen that he did not have the money because he was providing hospice care for his wife. Mr. Bergesen then visited R.M. in jail and requested an additional \$20,000 to obtain a physician's evaluation for Mental Health Court. F. ultimately sent Mr. Bergesen a \$5,000 check but reconsidered and stopped payment. Mr. Bergesen advised F. that he would report him to the police for writing a bad check unless he

submitted a \$2,500 payment immediately. F. declined and requested a refund. Mr. Bergesen refused to refund any portion of the \$50,000.

With respect to Count Seven, Mr. Bergesen admitted he violated I.R.P.C. 1.5(a), 1.5(b), 1.5(f), 1.8(f), 1.15(a), 1.15(b), 1.16(d), 4.1(a), 4.4(a), 8.4(c) and 8.4(d) in connection with his representation of K.L. in a criminal case. K.L.'s father, B., retained Mr. Bergesen to represent her for a \$40,000 fixed fee. B. paid that fee in cash installments as Mr. Bergesen requested over a three-month period. Mr. Bergesen subsequently requested that B. pay an additional \$50,000 because K.L.'s "life and freedom [were] at stake." B. paid Mr. Bergesen \$47,500 in additional fees by cash deposit. Thereafter, Mr. Bergesen's live-in girlfriend, Brenda, whom he identified only as his "investigator," requested that B. wire an additional \$10,000 to her bank account so that she could conduct research at the University of Idaho law library. B. deposited \$10,000 into Brenda's bank account and paid Mr. Bergesen an additional \$2,500, by cash deposit, based on Mr. Bergesen's false representation that funds were needed for a grand jury transcript. Mr. Bergesen then requested an additional \$15,000 for final trial preparations. B. paid Mr. Bergesen an additional \$5,000. Shortly thereafter, K.L. accepted a plea offer and Mr. Bergesen requested an additional \$10,000 to represent K.L. at sentencing. B. declined and requested an accounting and refund. Mr. Bergesen refused to provide an accounting or refund of B.'s payments totaling over \$100,000.

With respect to Count Eight, Mr. Bergesen admitted he violated I.R.P.C. 1.5(a), 1.8(f) and 1.16(d) in connection with his representation of W.T. in a criminal case. W.T. was arrested after his girlfriend, M., contacted the police, directed them to W.T. and his methamphetamine and requested that he be held in police custody because he had threatened her and her family. Thereafter, W.T. retained Mr. Bergesen. M. signed Mr. Bergesen's fee agreement and paid \$1,000 of his \$3,000 fixed fee. Mr. Bergesen withdrew from W.T.'s case before any action was taken, citing the conflict of interest resulting from M.'s identification as a State's witness. Despite his withdrawal, Mr. Bergesen refused to provide a refund of unearned fees.

With respect to Count Nine, Mr. Bergesen admitted he violated I.R.P.C.

DISCIPLINE

1.15(a) and (b), by using funds held in his client trust account for personal expenses, including payments to a local restaurant, jeweler and running shop.

Based on the admitted violations, discussed above, the Idaho Supreme Court disbarred Mr. Bergesen and ordered that he shall not apply for admission to the Idaho State Bar sooner than five years from the effective date of the disbarment. If Mr. Bergesen applies for admission, he will have the burden of overcoming the rebuttable presumption of “unfitness to practice law.” The Court further ordered that prior to any such admission, Mr. Bergesen must

reimburse the Client Assistance Fund all monies paid by the Fund as a result of his dishonest conduct and refund all unearned fees to clients and third parties named in the Amended Complaint who did not receive full reimbursement through the Client Assistance Fund, criminal restitution or as the result of any civil case.

This disbarment notice shall be published in *The Advocate*, the *Idaho Statesman* and the *Idaho Reports*.

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

LETTER TO THE EDITOR

To the members of the Idaho State Bar,

Somewhere along the road of my 18-year legal career, I took a wrong turn. It's called compulsive gambling; an evil, insidious and progressive addiction that robs a person of his morals, his soul and his mind. And though all of us sometimes feel we deserve a second chance, I know that I will not get one. It's a painful reminder that we never get a second chance to do things right the first time. I am profoundly sorry for all of the harm that I caused.

Sincerely,
Rick Bergesen

NEWS BRIEFS

UI honors Allen Derr on 40th Anniversary of *Reed v. Reed*

Forty years ago a Supreme Court case argued by Idaho attorney Allen Derr changed the legal landscape. The landmark decision has been commemorated by the Aug. 3, 2011 issue of the *National Law Journal*, the *Idaho Statesman* and the *Spokesman Review*. Mr. Derr and Justice Ruth Bader Ginsburg were recently honored at the National Press Club in Washington, D.C. and, closer to home, at the University of Idaho College of Law's Boise Campus.

UI held a reception on November 30 to honor 1959 College of Law alumnus Allen Derr and mark the 40th anniversary of the landmark *Reed v. Reed* decision. Allen represented Sally Reed of Boise who was seeking to be appointed to administer her son's estate over her ex-husband. At that time, Idaho law favored males over females in estate and probate proceedings. Allen saw the case through numerous appeals. When the U.S. Supreme Court took the case, Justice Ruth Bader Ginsberg, a Rutgers law professor at the time, joined Allen in the case and wrote the brief. Allen successfully gave oral arguments before the U.S. Supreme Court. On November 22, 1971, the U.S. Supreme Court ruled that the Idaho law was unconstitutional under the equal protection clause of the Constitution, a ruling used numerous times since then to advance equal rights.

Over 100 people came out to honor Allen at the reception held at the College of Law Boise campus in the Water Center in downtown Boise. Dean Don Burnett welcomed everyone on behalf of the College of Law and spoke about the



Photo Courtesy of University of Idaho

Allen Derr visits with former ISB president Jim McMahon at the University of Idaho College of Law's Boise campus.

groundbreaking significance of the *Reed* decision. Marty Peterson, who recently retired as the Special Assistant to the President of the University, and long-time friend offered personal remarks about Allen's law career and service to Idaho.

Attendees also included Chief Justice Roger Burdick, Judge Stephen Trott of the Ninth Circuit Court of Appeals, Senators Bart Davis, Joe Stegner and many members of the bench and bar along with personal friends and family members.

NEWS BRIEFS

Resolutions approved by the membership

All four resolutions presented to the Idaho State bar membership were approved by the membership. Turnout for the ballot was 897, or 19% of the eligible voting membership. The resolutions were presented at District Bar Association Resolution meetings held around the state in November. The rules proposed in Resolutions 11-01, 11-02 and 11-03 will be submitted to the Idaho Supreme Court for its consideration. Resolution 11-04 will be provided to the Idaho Federal Judges and the Idaho Congressional Delegation. Summary text of the resolutions and total state tallies are as follows:

11-01 Amendments to IBCR 206 Reciprocal Applicants; Years of practice requirement (ISB Board of Commissioners) – Request that the members of the Idaho State Bar recommend to the Idaho Supreme Court that Idaho Bar

Commission Rule 206 be amended to amend the years of practice requirement for attorneys seeking reciprocal admission. The proposed rule would impose the same years of practice requirement on attorneys seeking reciprocal admission in that jurisdiction if that jurisdiction's years in practice requirement is greater or more stringent than Idaho's. 825 voted Yes, 62 voted No.

11-02 Amendments to IBCR Section III and the addition of IBCR Section XIII, and amendments to I.R.C.P. 1.15 (ISB Board of Commissioners and Idaho Law Foundation Board of Directors) – Request that members of the Idaho State Bar recommend to the Idaho Supreme Court that IBCR Section III Licensing be amended as proposed, that a new IBCR Section XIII Trust Accounts be added to the Bar Commission Rules, and revisions to I.R.P.C. 1.15 be adopted. 730 voted Yes, 106 voted No.

11-03 Reciprocal Admission for Spouses of military stationed in Idaho (ISB Bar Member Bradley Mumford, in collaboration with, and on behalf of, the Military Spouses JD Network) – Recommends that the Idaho State Bar recommend to the Idaho Supreme Court that a Rule 229 Military Spouse Provisional Admission be added to IBCR Section II Admissions. 724 voted Yes, 138 voted No.

11-04 Third Federal District Judge (The Litigation, Family Law, Diversity, Real Property, Intellectual Property Law and Workers Compensation Sections of the Idaho State Bar; Idaho Women Lawyers; Idaho Association of Defense Counsel; American Board of Trial Advocates (Idaho chapter); Federal Bar Association (Idaho chapter)) - Urges Idaho lawyers to encourage Congress to support the addition of a third Federal District Judge for the District of Idaho. 844 voted Yes, 38 voted No.

2011 Resolutions – Meeting Attendance and Vote Tally											
District	1st	2nd	3rd	4th	5th	6th	7th	OSA*	Totals	Percentage	
Members eligible to vote	433	214	238	1,953	308	217	388	963	4,714		
% of total membership	9%	5%	5%	41%	7%	5%	8%	20%	100%		
Members voting	111	54	61	390	76	87	112	6	897		
% of members voting	26%	25%	26%	20%	25%	40%	29%	1%	19%		
Number in attendance	36	21	35	63	25	46	65	3	294		
% in attendance	8%	10%	15%	3%	8%	21%	17%	0%	6%		
11-1 Reciprocal Applicants; Years of Practice											
For	101	49	55	354	70	84	108	4	825	93%	
Against	9	4	4	31	6	3	3	2	62	7%	
Total	110	53	59	385	76	87	11	6	887		
11-2 Licensing Trust Account Rules											
For	89	46	50	307	67	72	95	4	730	87%	
Against	18	7	9	39	7	12	12	2	106	13%	
Total	107	53	59	346	74	84	107	6	836		
11-3 Military Spouse Admission											
For	86	47	41	307	69	73	98	3	724	84%	
Against	23	4	18	65	7	11	10	0	138	16%	
Total	109	51	59	372	76	84	108	3	862		
11-4 3rd Federal District Judge											
For	103	51	56	367	73	84	108	2	844	96%	
Against	8	2	3	19	1	1	3	1	38	4%	
Total	111	53	59	386	74	85	111	3	882		

*Out of State Active

OfficeMax® Boise Community Fund

ILF earns \$5,000 grant from OfficeMax

The Idaho Volunteer Lawyers Program, (IVLP), has been awarded \$5,000 from the OfficeMax Boise Community Fund. The grant will help IVLP continue providing volunteer lawyers for those who need legal services but cannot afford to pay for representation. IVLP Legal Director Mary Hobson said, "We are thrilled and honored to have this kind of support."

Lawyers line up for the 6.1 Challenge

The Fourth District Bar once again invites lawyers to take the 6.1 Challenge, a competition to celebrate pro bono and public service activities by members of the Fourth District Bar Association. Firms and individuals in various categories have an opportunities at light-hearted competition, logging their volunteer and pro bono work with the Idaho Volunteer Lawyers Program, (IVLP). The winners for each category of law will be presented with awards at the Law Day reception in the spring. The winning offices will receive a plaque located in the Ada County Courthouse. To participate, simply download the 6.1 Challenge form from the ISB. <http://www.isb.idaho.gov/ilf/ivlp/challenge.html>. Then fill out the form and turn it in to the IVLP before April 6, 2012. For more information, contact IVLP program manager Anna Almerico at (208) 334-4500.

Visit the Wall of Fame

If you have been wondering about what your colleagues in the Idaho Bar have



ISB staff prepares the 2012 licensing packets. The packets were mailed on November 18. Please contact the Licensing Department if you did not receive yours.

been doing over the last year for those in our communities who cannot pay for legal services, check out the Wall of Fame at http://www.isb.idaho.gov/pdf/ivlp/wall_of_fame_2010.pdf. From civil rights, to child protection, bankruptcy, immigration, nonprofit formation, family law and many other areas, Idaho lawyers in virtually every part of the profession (law clerks, solo practitioners, big firm lawyers, corporate lawyers, part-timers, emeritus lawyers and every other professional permeation) have been getting involved and providing pro bono legal services. Take a look at the list on the website, take time to thank your colleagues, and if somehow your name does not appear there, rest assured it can be added as soon as you are ready to be "famous". Contact Mary S. Hobson, Idaho Volunteer Lawyers Program Director, mhobson@isb.idaho.gov or (208)334-4510 for more information.

Licensing deadline is February 1, 2012

The 2012 licensing deadline is February 1, 2012. Your payment and forms must be physically received in the Idaho State Bar office or completed online by deadline to avoid the late fee. Postmark dates do not qualify. If your licensing is going to be late, be sure to include the

appropriate late fee: Active, Out of State Active and House Counsel - \$50; Affiliate and Emeritus - \$25.

Pay online to avoid the licensing late fee

The online licensing renewal program is available 24/7. Use it to pay your fees and complete your forms any time before the February 1, 2012 deadline. Visit our website at www.isb.idaho.gov to access the licensing renewal program.

Need an MCLE extension?

If you did not complete your MCLE requirements by your December 31, 2011 deadline, you can get an extension until March 1, 2012 to obtain the extra credits you need. Send a written request and \$50 MCLE extension fee to the Licensing Department or choose to pay the extension fee online.

Remember, the licensing deadline is February 1, 2012 and your licensing must be physically received in the Idaho State Bar office or completed online by that date to avoid the licensing late fee. The MCLE certificate may be submitted separately if the an extension is requested. The final licensing deadline is March 1, 2012. Please contact the Licensing Department at (208) 334-4500 or astrauser@isb.idaho.gov if you have any questions.



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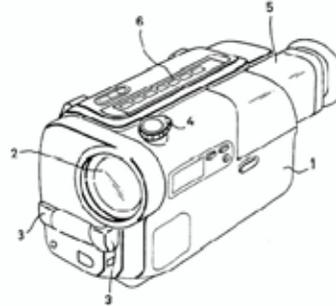
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2011 ISB MEMBERSHIP SURVEY

Diane K. Minnich
Executive Director, Idaho State Bar

In 1994, 1999, 2007, and again in 2011, the Idaho State Bar conducted a survey of its membership. The purpose of the survey was to establish a demographic profile of the membership, their attitudes and actions toward pro bono and public service, and a snapshot of the state of the practice of law for Idaho lawyers.

In October 2011, every licensed member of the bar received a membership survey. Most members received the survey by email. Those without email addresses were mailed a copy of the survey.



The response rate was 33%, slightly lower than the 2007 response rate of 38%.

General demographics

The survey included some questions for which the responses can be verified by information in the bar's records. These questions help us to confirm that the respondents fairly reflect the bar membership.

Sex: The percentage of women lawyers increased slightly since 2007; 73% of the respondents were male, 27% female (the actual statistic is 75% male, 25% female). This is a 2% increase in woman lawyers since 2007; however, female bar membership has only increased 1% since 1999.

Gender

	1999	2007	2011
Male	76%	77%	75%
Female	24%	23%	25%

Age: The Bar continues to age. In 2007, 47% of the membership was over 50; in 2011, 51% was over 50. The percentage of members under 30 have decreased from 5.8% to 4.5%.

The percentage of lawyers that thinks Idaho lawyers have an image problem continues to decrease; the percentage that say yes has declined from 69% in 1999 to 46% in 2011.

Age

	1999	2007	2011
Under 37	25.3%	25.7%	23%
37 - 49	42.5%	30.5%	28.2%
50 - 59	23.3%	30.7%	28.3%
Over 59	7.3%	16.6%	22.5%

Diversity: The number of bar members who identify themselves as non-Caucasian remains at 5%, the same percentage as the 1999 and 2007 surveys.

Years in the Bar: This category reaffirms that the bar is aging; 46.5% of bar members were admitted more than 20 years ago. This is a 1.5% increase over 2007 and a 16.5% increase over 1999. Attorneys admitted less than 5 years remained steady at 17%.

Firm Size: About 47% of Idaho lawyers practice in firms of 1-3 attorneys. This is a slight decrease (2%) from the 1999 survey. About 25% of lawyers practice in firms with 4-10 lawyers.

Type of Practice: 43% of bar members hold a license in more than one state, an increase of 13% over 2007.

The percentage of attorneys indicating they are in private practice has decreased 3% since the 2007 survey. Those indicating they are unemployed increased 1%.

Sole practitioners have decreased 2% to 20% since 2007 as have partners or shareholders in firms, from 25% to 23%. In 1994, 35% of the survey respondents indicated they were partners or shareholders in firms.

Income: As in 2007, the largest percentage of respondents indicated they made between \$50,000 and \$75,000, 22.4%; followed closely by \$75,000 - \$100,000 at 17.4%. Fifty-eight percent of Bar respondents' income was \$100,000 or less.

Income

	1999	2007	2011
Under \$50,000	40%	22%	18%
\$50,000 - 75,000	20%	26%	22%
\$75,000 - \$100,000	16%	17%	17%
\$100,000 - \$150,000	12%	16%	18%
\$150,000 - \$200,000	5.5%	8%	9%
Over \$200,000	4%	9%	10.5%

Pro bono and public service

The survey included an expanded section on pro bono and public service activities. Idaho attorneys continue their commitment to pro bono and volunteer service.

More than 50% of the respondents indicated they did more than 10 hours of pro bono work in the past year. Another 27% noted that they performed no pro bono service. The survey results indicated that most employers or firms do encourage pro bono service (83%) by their attorneys, with 30% of employers/firms having a pro

bono policy. As you would expect, the main factor noted for not providing pro bono legal services was lack of time; 69% were discouraged from doing pro bono work due to lack of time.

More than 70% of the respondents regularly give legal advice over the phone without expectation of payment. Almost 60% of the attorneys state they offer initial case evaluation and/or consultation free of charge.

About half of the respondents indicate that they participate in a legal related organization such as bar sections or committees, ITLA or Idaho Women Lawyers. Bar members are committed to serving the profession and public through volunteer service and pro bono legal services.

Lawyer professionalism job satisfaction

Job Satisfaction: As in the past surveys, lawyers responded that they are fairly satisfied with their income, job, and career opportunities. Over 70% indicated that their expected income was good, very good, or excellent. Nearly 80% noted that their job satisfaction and career opportunities were good, very good or excellent. This compares to the results in the 2007 survey, although the good, very good and excellent career opportunities percentage was slightly lower than 2007.

Consistent with the last two surveys, almost 90% of the lawyers responding plan to continue to work in the legal profession until they retire.

Public Image: The percentage of lawyers that thinks Idaho lawyers have an image problem continues to decrease; the percentage that say yes has declined from 69% in 1999 to 46% in 2011.

When asked what factors contribute to the public perception problem, more than 90% of the respondents indicated that the public's misunderstanding of the legal system contributes; followed by the public's perception that attorneys charge too much (84%), and the public's perception that attorneys don't solve clients problems quickly enough (76%). These percentages are consistent with the 2007 survey but considerably higher than the 1999 percentages.

Idaho attorneys believe that their fellow attorneys are, for the most part, honest, ethical and courteous; although the percentages are slightly lower than in the previous survey.

Advertising: Attorneys who indicate they do not advertise has increased slightly from 50 to 53%. Internet advertising has increased about 10% and yellow pages advertising decreased by the same percentage from 2007, but decreased 25% since 1994.

Economics and office practice

Workload: Given the economic climate for the past few years, it is not surprising that less than half the attorneys stated that 2010 was more profitable than 2009. In the last two surveys about 65% said the current year was more profitable than the previous year. The percentage of lawyers that noted they have enough work or more work than they can handle has decreased 16% since 1999.

Billable Hours: Thirty seven percent of the respondents state that billable hours are not applicable to them. This is consistent with the 2007 survey results.

Billable hours per week

	1999	2007	2011
Less than 10 hours	3%	3%	5%
10 - 24 hours	11%	12%	12%
25 - 39 hours	33%	31%	30%
40 - 50 hours	16%	13%	13%
More than 51 hours	3.5%	2.5%	4%

Total hours worked

	1999	2007	2011
Less than 25 hours	6%	10%	11%
25 - 39 hours	14%	12%	13%
40 - 49 hours	42%	42%	37%
50 - 60 hours	29%	28%	27%
Over 60 hours	7%	9%	12%

Hourly rates

	1999	2007
Less than \$75	1%	1%
\$76 - \$100	19%	3%
\$101 - \$150	39%	24%
\$151 - \$200	9%	25%
Over \$200	1%	12%

Hourly rates

	2011
Less than \$75	1.5%
\$76 - \$125	4.5%
\$126 - \$175	19%
\$176 - \$225	23%
\$226 - \$275	10%
\$276 - \$325	5%
Over \$325	4%

Professional liability insurance

Sixty-five percent of the respondents indicate they have professional liability insurance, a 3% increase from 2007. This is slightly lower than the percentage of lawyers that certify through licensing that they have malpractice coverage, which is about 70%.

Technology

Only one technology question was on this year's survey, "Which of the following legal research databases does your office use?" The two main legal research tools used by Idaho lawyers are WestLaw and Casemaker. Seventy-nine percent of the respondents use WestLaw and about 73% use Casemaker. About 60% indicate that they use LexisNexis.

As I noted at the beginning of this article, this is the fourth time in the last 17 years that we have conducted a survey of Idaho Bar members. The changes in the Bar during these years are considerable:

- The Bar continues to grow older. In the 1994 survey only 19.4% of bar members were over 50, in 2011 it is 51%. Also in 1994 only 22.5% of Bar members had been members for more than 20 years, it 2011 that percentage is 46.5%.
- The Bar is becoming more diverse but very slowly. In 17 years, woman members have increased from 15% to 25%. Ethnic diversity has only increased 1.7% since 1994.
- Income and hourly rates continue to increase but legal work is in shorter supply.
- Fewer lawyers think that lawyers have a public image problem; a 36% decrease since 1994.
- Although the questions have differed over the years, the Bar is still committed to pro bono and public service. A large percentage of members give of their time to provide services to those in need and volunteer for law-related entities.

Thank you to those lawyers who completed the survey. We appreciate your participation. The information is valuable to the Bar and its members as we plan for the future. The complete survey results for the 2011 and 2007 surveys are posted on the Idaho State Bar website: www.isb.idaho.gov.

WHAT EVERYONE SHOULD KNOW ABOUT BANKRUPTCY: AN ATLAS FOR DANGEROUS WATERS

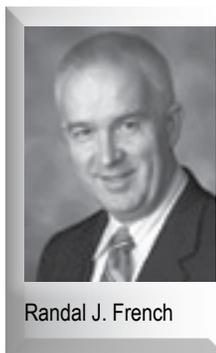
Randal J. French
Bauer & French

The Commercial Law and Bankruptcy Section is pleased to sponsor this issue of *The Advocate*. As the Great Recession drags on, bankruptcy plays an ever greater role in the lives of the public and a correspondingly greater role in the practice of law.

Since Congress passed the Bankruptcy Reform Act of 1978, debtors generally could file bankruptcy under Chapter 7, 11, or 13 or starting in the late 1980s, Chapter 12. Chapter 7 provides for a liquidation of equity in non-exempt assets. The other chapters are forms of reorganization or repayment.

Chapter 7, "Liquidation," offers the bankruptcy debtor a discharge of debt, with relatively few exceptions. In exchange, a debtor must disclose to a chapter 7 trustee all of the debtor's assets. An individual debtor is allowed to exempt certain assets according to the applicable exemption law, which, in Idaho, is largely state exemption law. The trustee is given the opportunity, and has the obligation, to collect and liquidate any of the debtor's assets which will net the trustee any money to pay to the debtor's creditors.

Chapters 11, 12, and 13 are all forms of bankruptcy which allow a debtor to propose a plan to repay some of the debt owed to the debtor's creditors. Chapter 13 allows individuals, but not artificial entities such as corporations or limited liability companies, to set up repayment plans to achieve certain discrete goals. A



debtor may use Chapter 13 to reamortize and lower payments on debt secured by personal property such as cars, trucks or furniture; cure defaults on home mortgage payments to avoid the loss of a home; and pay "priority" debt like past due taxes or past due alimony or child support. A debtor could also use Chapter 13 to pay to creditors the value of assets that a Chapter 7 trustee would liquidate, and thereby "buy" the assets back from the estate.

Chapter 11 and 12 are other forms of bankruptcy which allow a debtor to propose a repayment plan by which a debtor will pay to creditors the value of the assets the debtor retains. Chapter 11 was designed for use by public corporations, but can be used by any form of business and by any individual. Chapter 12 is limited to use by a specific group of people, defined as family farmers and family fishermen, if, *inter alia*, they receive at least fifty percent of their income from their farming or fishing activities. Few Idaho salmon and steelhead fishermen would qualify as family fishermen.

Chapter 13 allows individuals, but not artificial entities such as corporations or limited liability companies, to set up repayment plans to achieve certain discrete goals.

In 2005, Congress passed BAPCPA, The Bankruptcy Abuse Protection and Consumer Protection Act. Congress intended to curb perceived abuses of the bankruptcy code, including dismissing the chapter 7 cases of those individuals who had the ability to repay some of their debt and forcing them to either forego bank-

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ruptcy relief at all, or to file Chapter 13 or Chapter 11. Courts are unanimous in their evaluation of BAPCPA- it is a poorly worded statute which has created a multitude of problems. One can find numerous examples of courts finding specific parts of the BAPCPA to be unambiguous, yet coming to opposite conclusions in their interpretations.

BAPCPA introduced a means test, by which individuals or couples who filed Chapter 7, but whose income exceeded certain limits, would face dismissal of their Chapter 7 cases. If they needed protection from their creditors, they would be allowed that protection under Chapter 11, 12, or most commonly, Chapter 13. Chapter 13 has its own means test which is used for Chapter 11 also, and which is intended to establish the minimum amount to be paid to unsecured creditors.

Robin Long addresses an important aspect of Chapter 13: the situation in which a Chapter 13 debtor owns a primary residence which is worth less than the debt secured by a senior lien, and which also secures a debt secured by a junior lien. Robin explains the potential benefit, in the form of lien-stripping, which Chapter 13 may afford, and the challenges of realizing that benefit.

The majority, by far, of bankruptcies filed in Idaho and across the county are Chapter 7 Bankruptcies. Every Chapter 7 bankruptcy case has a Chapter 7 trustee appointed to administer the case and the assets of the estate.

Matthew Christensen and Chapter 7 Trustee Jeremy Gugino provide substantial insight into satisfying the trustee that a debtor is fully complying with the debtor's obligations under the bankruptcy code. An entirely inadequate summary of their suggestions might be "disclose fully, disclose timely, disclose effectively."

As the Great Recession has led to a tsunami of foreclosures, lenders have been challenged on their foreclosure practices.

An important part of bankruptcy is exemption planning. With exemption planning, a debtor can exempt from the reach of creditors and a bankruptcy trustee certain assets. Judy Geier identifies the issues, and the serious consequences which flow from exemption planning which becomes abusive. As she explains, even the use of exemptions provided by law may come under attack as improper or excessive.

As the Great Recession has led to a tsunami of foreclosures, lenders have been challenged on their foreclosure practices. Kelly Greene McConnell addresses some issues which homeowners have raised in their challenges, including some homeowners' argument that a flaw in a foreclosure proceeding should leave them with a home that is free and clear of liens.

The bankruptcy courts of the United States preside over more than a million bankruptcies each year, resolving a variety of disputes. However, bankruptcy courts are Article I courts, whose jurisdiction is limited. Noah Hillen discusses the recent decision of the U.S. Supreme Court in *Stern v Marshall*. There, the U.S. Supreme Court addressed the constitutionality of subject matter jurisdiction granted to bankruptcy courts, because of

their status as Article I courts, at least as to entertain certain kinds of "core" proceedings, those most commonly associated with bankruptcy court jurisdiction.

We at the Commercial Law and Bankruptcy Section hope that you enjoy these articles, and hope that these articles give you some insight into bankruptcy. I encourage you to join the Commercial Law and Bankruptcy Section and attend the Section's annual seminar in Sun Valley on February 16-19, 2012 and immerse yourself in a fascinating area of the law.

About the Author

Randal J. French is a partner in the firm of *Bauer & French*. He graduated *Boise State University* in 1980 and the *University of Idaho College of Law* in December 1982, and was admitted to the *Idaho State Bar* in 1983. He clerked for the *Honorable Jesse R. Walters*, then the *Chief Judge of the Idaho Court of Appeals*, and for the *Honorable Alfred C. Hagan*, *U.S. Bankruptcy Judge for the District of Idaho*. He practices in the areas of *bankruptcy and commercial litigation*, in the *U.S. Bankruptcy Court for the District of Idaho* and in state court. He is also admitted to the *Ninth Circuit Court of Appeals* and the *U.S. Supreme Court*.

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HELP FOR HOMEOWNERS: CHAPTER 13 LIEN AVOIDANCE

Robin M. Long
Bauer & French

Introduction

The recent housing crisis has affected millions of American homeowners and has brought lien avoidance, more commonly known as lien “stripping,” to the forefront of bankruptcy law. There are many aspects of stripping liens on a debtor’s primary residence and the various issues remain hotly debated throughout American bankruptcy courts. The basic premise of a lien strip is this: a debtor’s primary residence is worth less than what is owed on the first mortgage and the home has a junior mortgage(s). For example, the first mortgage is \$250,000.00 and there is a second mortgage of \$50,000.00. Due to the precipitous drop in housing prices, the fair market value of the house is only \$200,000.00. Under this scenario there is absolutely no value in the second mortgage; therefore, it is wholly unsecured.

Bankruptcy in a nutshell

Most individuals, or married couples, have two options when filing bankruptcy. Most debt is eliminated in either a Chapter 7 or a Chapter 13 bankruptcy; however, the two function very differently.

A Chapter 7 bankruptcy is often referred to as a “liquidation.” There are several issues to be considered in determining whether a Chapter 7 is the appropriate bankruptcy to file. The bankruptcy amendments of 2005 require all debtors to file a “means



Robin M. Long

test.” The starting point in this test is a six month look-back at all sources of income the debtor has received, with few exceptions. If the debtor is above median, as set by the U.S. Census Bureau, they may not be eligible for a Chapter 7. Another consideration is whether the debtor has assets that cannot be protected by either the federal exemption code or the state exemptions. If a debtor has non-exempt assets and files a Chapter 7, the bankruptcy trustee will liquidate those assets for the benefit of creditors. A debtor can only receive a Chapter 7 discharge every eight years. If they are within that eight year period, and need to file a bankruptcy, they would have to file a Chapter 13.



A Chapter 13 Bankruptcy is often referred to as a “restructuring.” The basic premise of a Chapter 13 is that the debtor either doesn’t qualify for a Chapter 7, has assets they wish to keep, or has certain types of debt that are non-dischargeable in a Chapter 7, for instance tax debts. If a debtor is delinquent on a secured debt, they can amortize the arrears in a Chapter 13 plan. Another benefit to a Chapter 13 bankruptcy is called a “cramdown.” This allows a debtor to pay the value of the collateral on a secured debt, as opposed to the amount owed. The interest on secured property, other than a primary residence, can also be “crammed-down.” An example of a cramdown might be a vehicle with a loan of \$10,000 and an 18% interest rate; the vehicle is only worth \$6,500 and a reasonable interest rate is 6%. In a Chapter 13 a debtor could pay the \$6,500 at 6% interest with the remainder of the debt being deemed unsecured. The main difference between a cramdown and a lien strip is that a lien on residential property cannot be bifurcated, nor can interest rates be modified.

The current economy has led many Americans to file a Chapter 13 Bankruptcy in order to pay mortgage arrears over a three to five year period and/or strip underwater liens. During the housing boom, lenders were offering sub-prime mortgages, 100% loans, home equity lines of credit, and multiple loans on a single residence. When the balloon burst in 2007 – 2008, millions of homeowners were left with negative equity in their homes. The unemployment rate has further exacerbated the financial crisis many Americans are facing, and they simply cannot afford their mortgage(s). Lenders have been unwilling to modify mortgages leading to unprecedented foreclosure rates throughout the country.

The bankruptcy code

In order to determine whether or not a debt is secured or unsecured we must look to 11 U.S.C. § 506(a). This section applies to all chapters of bankruptcy and classifies creditors’ allowed claims against the debtor into secured and unsecured claims. It states:

An allowed claim of a creditor secured by a lien on property in which the estate has an interest ... is a secured claim to the extent of the value of such creditor’s interest ..., and is an unsecured claim to the extent that the value of such creditor’s interest or the amount so subject to set-off is less than the amount of such allowed claim....

Pursuant to 11 U.S.C. § 1322 of the Bankruptcy Code, individual debtors have the ability to adjust their indebtedness through a repayment plan approved by the court. Section 1322 sets forth the requirements of a confirmable plan, one of which allows modification of the rights of both secured and unsecured creditors. It provides that the plan may:

modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor’s principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims.

The exception to this section is referred to as the “anti-modification” provision. The anti-modification provision applies only to claims secured by a debtor’s principal residence, not claims secured by any other real property. The questions that courts have faced is how to apply this section to liens with no value and whether liens are entitled to protection under the anti-modification clause.

The United States Supreme Court on lien stripping

Lien stripping is not allowed in a Chapter 7 bankruptcy. That issue was laid to rest by the Supreme Court's ruling in *Dewsnup v. Timm*. The *Dewsnup* court expressly prohibited lien stripping via 11 U.S.C. §506(a) in Chapter 7 cases.

The *Dewsnup* decision did not address the issue of lien stripping in Chapter 13 bankruptcy cases, leaving unresolved the issues of stripping an under-secured mortgage lien, and stripping a wholly unsecured junior mortgage lien. In 1993, the Court resolved one of those issues in *Nobleman v. American Savings Bank*. The issue in *Nobleman* was whether a partially secured claim, secured by a debtor's primary residence could be bifurcated into secured and unsecured components. The court determined whether 11 U.S.C. §1322(b)(2) prohibited a chapter 13 debtor from relying on 11 U.S.C. §506(a) to reduce or bifurcate an under-secured home mortgage to the fair market value of the residence. In *Nobleman*, the fair market value of the home was less than what was owed on the first mortgage; however, there were no junior mortgages. Therefore, there was some value in the lien held by the mortgagee. The *Nobleman* court held that 11 U.S.C. §1322(b)(2) does prohibit a debtor from stripping-down the under-secured portion of the mortgage to its fair market value. Left unanswered was whether or not a debtor could strip a wholly unsecured junior lien on the debtor's primary residence.

The law on wholly unsecured mortgage liens

Without Supreme Court direction, the issue of stripping a wholly unsecured home mortgage lien has been frequently litigated. The majority of courts that have addressed this issue are in favor of allowing Chapter 13 debtors to strip-off wholly unsecured home mortgage liens.

The Ninth Circuit Court of Appeals in *Zimmer v. PBS Lending* determined that the application of 11 U.S.C. § 506(a) and § 1322(b)(2) must be reconciled. The court decided that if, pursuant to the valuation process under 11 U.S.C. § 506(a), there is no value above what is owed to the first lien holder, the junior lien holder merely has a wholly unsecured claim and the creditor is not protected by the anti-modification clause in 11 U.S.C. § 1322(b)(2). Therefore, in the scenario in which the home had a first mortgage of \$250,000, a junior mortgage of \$50,000, and a fair market value of \$200,000, the junior lien holder's claim for \$50,000 is unsecured and its lien would be stripped.

The majority of courts that have addressed this issue are in favor of allowing Chapter 13 debtors to strip-off wholly unsecured home mortgage liens.

The timing of the lien strip

The timing of the lien avoidance has not been directly addressed by the Ninth Circuit. The question becomes is the lien avoided at the time a Chapter 13 plan is confirmed, i.e. approved by the court, or is the lien avoided when the debtor has made all payments under the confirmed plan.

The argument for avoiding the lien upon confirmation is that once the determination has been made under 11 U.S.C. § 506(a) that a lien is wholly unsecured, § 506(d) states that "to the extent a lien secures a claim against a debtor that is not an allowed secured claim the lien is void." The code does not say the lien is void upon completion of a Chapter 13 plan rather, it states once the lien is determined to be wholly unsecured it is void.

The argument in favor of stripping the lien upon completion of the plan is that 11 U.S.C. § 506(d) does not provide a mechanism for lien avoidance in chapter 13; rather, 11 U.S.C. § 1322 is the only available option. Under this analysis, 11 U.S.C. § 506(a) provides the means to value the lien however, a lien that is deemed unsecured is not avoided until the plan is completed.

The Chief Bankruptcy Judge for the District of Idaho, Judge Terry Myers, recently ruled in *In re Oldenborg*, that a lien is not permanently avoided until completion of the plan. Judge Myers agreed with the Chapter 13 trustee holding that § 1322(b)(2) is the true source of lien avoidance, and as such a Chapter 13 plan purporting to permanently strip a lien upon confirmation is not confirmable. Judge Myers cited several cases that held that a lien on a debtor's primary residence is not permanently avoided until the Chapter 13 plan is successfully completed.

Lien stripping when a debtor is not entitled to a discharge

The latest debate within bankruptcy courts is whether a debtor who is not entitled to a Chapter 13 discharge can strip a wholly unsecured mortgage lien. This is

often referred to as a "Chapter 20," which occurs when a debtor files a Chapter 13 within four years of receiving a Chapter 7 discharge.

The Eighth Circuit Court of Appeals was the first federal appellate court to address this issue. The case, *In re Fisette* involved a debtor who filed a Chapter 7 in 2009 and received a discharge of debts. The debtor kept his home with the intent of making payments, but he did not reaffirm the debt on any of the mortgages. Therefore, his personal liability on the mortgages was discharged in the Chapter 7. The debtor soon began to fall behind on mortgage payments and filed a chapter 13 in order to catch up on the arrears. Because he had received a Chapter 7 discharge within four years of filing the Chapter 13 he was not eligible for a discharge in his new Chapter 13. His personal liability on the mortgages had already been discharged in the prior Chapter 7 bankruptcy, but the liens remained in place.

The debtor's Chapter 13 plan stated that his home was appraised at a value of \$145,000 and his first mortgage had a total balance owed in excess of \$145,000. Since the fair market value of the home was less than what was owed on the first, his second and third mortgages were unsecured. Based on the fact that there was no value to secure the second and third liens the debtor's Chapter 13 plan proposed to strip them off using bankruptcy code section 506(a).

The appeals court agreed with the debtor that sections 1322(b)(2) and 506(a) should be read together to allow wholly unsecured junior mortgage liens to be stripped on a debtor's primary residence. The Eighth Circuit joined the unanimous voices of other federal appeals courts in approving the availability of this remedy for Chapter 13 debtors. The court went a step further and allowed lien stripping in Chapter "20" cases where no discharge could be granted. It rejected arguments that section 1325(a)(5)(B) required full payment of an unsecured junior mort-

gage unless the debtor was eligible for a Chapter 13 discharge, holding that section 1325(a)(5) applies only to secured creditors. Once a mortgage is deemed to have no value the creditor simply has an unsecured claim.

The bankruptcy courts within the Ninth Circuit are divided. The United States Bankruptcy Court for the Eastern District of California agreed with the *Fisette* court that the stripping of a wholly unsecured mortgage lien is not dependent on a debtor's right to a discharge. The United States Bankruptcy Court for the District of Nevada agreed with this line of reasoning. The courts agree that a debtor must propose a plan in good faith, one that accomplishes a substantive reorganization, as opposed to merely be conditioned on the stripping of a wholly unsecured mortgage lien. In contrast, the United States Bankruptcy Court for the Southern District of California in, *In re Victorio* ruled that a Chapter "20" debtor cannot permanently avoid a wholly unsecured mortgage lien without a discharge, or without paying the debt in full.

There is currently no case in the District of Idaho which addresses whether or not a debtor can strip a lien in a no-discharge Chapter 13. For attorneys that handle Chapter 13 bankruptcies, a decision on this issue cannot come soon enough.

There is currently no case in the District of Idaho which addresses whether or not a debtor can strip a lien in a no-discharge Chapter 13.

Conclusion

The housing market is fraught with problems. As housing prices continue to fall, and lenders refuse loan modifications, it seems likely that Chapter 13 lien stripping will continue to be a source of relief for many homeowners. Practitioners who have clients that are in default on their mortgage payments may want to consider a Chapter 13 bankruptcy if it is a viable financial option. As can be seen by the above analysis bankruptcy has become convoluted and rife with issues. Anyone considering a bankruptcy should consult with an attorney skilled in this area.

About the Author

Robin M. Long is an attorney with the firm of *Bauer & French* located in Boise,

Idaho. She has practiced bankruptcy law for seven years, representing individuals and small businesses in chapter 7 and chapter 13 bankruptcies. Robin received her law degree in 1994 from the University of Idaho, College of Law.

Endnotes

- ¹ 502 U.S. 410 (1992).
- ² 508 U.S. 324 (1993).
- ³ 313 F.3d 1220 (9th Cir. 2002).
- ⁴ Idaho Bankruptcy Case No. 11-00832.
- ⁵ ⁶ 2011 WL 3795138 (8th Cir.BAP (Minn.))
- ⁷ "with respect to each allowed secured claim the plan provides that . . ."
- ⁸ *In re Frazier*, 448 B.R. 803 (Bkrcty.E.D. Cal. 2011).
- ⁹ *In re Okosisi*, 2011 WL 2292148 (Bkrcty.D.Nev.).
- ¹⁰ *In re Victorio* 2011 WL 2746054 (Bkrcty S.D.Cal. 2011).

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TIPS, TRICKS AND SUGGESTIONS OR HOW TO KEEP YOUR CHAPTER 7 TRUSTEE HAPPY

Matthew T. Christensen
Angstman Johnson
Jeremy Gugino
Chapter 7 Bankruptcy Trustee

There are, of course, many ways to diligently and competently represent a debtor in bankruptcy. No matter what, in a Chapter 7 or 13 case, you must deal with a bankruptcy trustee who is reviewing your client's petition, schedules, and statements, as well as examining all of their assets, liabilities, and past dealings with creditors. Accordingly, keeping that trustee happy is extremely helpful to your client. To that end, we offer the following tips, tricks, and suggestions.

Preliminarily, it is important to understand the function of the Chapter 7 trustee. The trustee does not exist simply to make your life unpleasant or miserable; rather, he or she has a distinct role in the bankruptcy system, and an important and thorough job to

accomplish. The main duties of the trustee are (1) to ensure the debtor has complied with all of the requirements of the Bankruptcy Code; (2) to locate and recover any assets that have value in excess of any applicable liens or exemptions, and liquidate those assets; (3) find and pursue any litigation that could and should be pursued by the bankruptcy estate; and (4) close the Chapter 7 case as quickly and efficiently as possible.¹ While the tips and suggestions contained here are designed to make your own life pleasant and productive, they also assist the trustee in performing these functions.

General tips, tricks and suggestions

In every bankruptcy case, a petition is filed, accompanied by several schedules of assets, debts, and other items. While some of our suggestions below are specific to those schedules and other items, there are some general suggestions that apply to every document, or every bankruptcy case.



Matthew T. Christensen



Jeremy Gugino

While the tips and suggestions contained here are designed to make your own life pleasant and productive, they also assist the trustee in performing these functions.

✓ Do a thorough job of filling out the petition, schedules, and statement of financial affairs ("SOFA"). Not only is this required by the Bankruptcy Code, but a failure to do so causes unnecessary delay as Meetings of Creditors (sometimes called "341

meetings") get continued and, ultimately, may lead to the dismissal of your client's case or loss of your client's discharge.

✓ If, for some reason, you goof, omit, or otherwise fail to include something on your client's schedules or SOFA, don't

wait three, four, or five weeks (or even longer) to amend the schedules and SOFA. Get it done as soon as possible.

✓ Proofread. While spelling errors are inevitable, chronic misspellings across a multitude of cases are a sign of incompetence. The documents filed with the court are the final version of your work product and what your client ultimately sees as a reflection of your work. Simple (or egregious) spelling errors do not instill confidence.

✓ Check the final version of what you are filing on behalf of your client. Take the time to do a professional job on the documents that are filed. If it is impossible to do a professional job for what you are charging, charge more.

✓ Do not forget the ethical duties you owe. While you have plenty of duties to your client, you also have ethical duties to the court and the trustee. The key is finding the balance between your duties to each of those parties. Some specific ethical rules include:

• Rule 1.1: Competence. Competent representation includes more than just knowing bankruptcy law. It also includes having the skill, thoroughness, and preparation necessary to adequately represent your client.²

• Rule 1.4: Informing your client. Lawyers must keep their client reasonably informed about the status of each matter. This includes passing along requests for information to the client and complying with those requests for information. Do not forget, Section 727 of the Bankruptcy Code allows the trustee to seek to revoke your client's discharge for failing to comply with reasonable requests for information.

✓ Meet with your client at least once before the 341 meeting takes place. The client should not be meeting their lawyer for the first time at the 341 meeting. Take the time to review the client's schedules/SOFA with them before the meeting.

✓ Investigate your client's assets prior to filing the petition. The trustee is going to run a vehicle title report for your client, as well as investigate any real property records regarding your client. You should do the same prior to filing the petition so you are not surprised at the 341 meeting when the trustee asks about the Maserati that shows up as titled to your client. Also, check the Idaho Repository for pending or recent court cases involving your client.

✓ Review your client's bank statements prior to filing. The trustee will be reviewing those bank statements too, asking your client questions about them (the trustee actually reviews the documents that he asks you to provide). If there is a big payment of \$15,000.00 to Grandma Mae occurring six months prior to the bankruptcy petition, there is a reasonable chance the trustee is going to pursue Grandma Mae for recovery of those funds. Your client,

at the very least, deserves to be warned that the trustee is going to inquire about those funds and, possibly, pursue Grandma Mae.

✓ If there has been a delay between the initial creation of the schedules and SOFA and the actual signing or filing of the documents, ensure that the numbers and amounts of the assets have not changed since the initial draft was finalized.

✓ Review with your client what to expect at the 341 meeting. For most of your clients, this meeting is the most stressful part of the bankruptcy process. Taking five minutes to explain what questions are going to be asked, and otherwise prepare them for what the meeting will be like, will greatly ease your client's stress levels.

✓ Make sure your client has proof of his SSN and identity for the 341 meeting. If he does not, the meeting is going to be continued. Give your client enough notice of this requirement so that he is not scrambling at the last minute to find a social security card that may not exist.

✓ Be on time. Showing up late for the 341 meeting shows contempt for the bankruptcy process. The 341 meeting is not a "formality" to be endured on the path to gaining a discharge. Instead, in most cases, the 341 meeting is the only time when your client is on the record, under oath, answering questions about his case. It is an integral part of the process. Indeed, it may just be the beginning – not the end – of the bankruptcy process for them.

✓ Tell the truth. Tell your client to tell the truth. While your client is the one who is under oath at the 341 meeting and who signs the declarations under penalty of perjury, you have an independent duty to do more than merely accept what your client says as the truth.³ Use common sense, and the internet if necessary, to verify what your client says. For instance, if your client swears up and down that he does not have any vehicles at all, do a title search. If the title report shows four vehicles in your client's name, ask him about the vehicles — the Trustee definitely will. If he sold them to Grandpa Bill, ask how much they were sold for and when. If your client states that he does not own any interest in any LLCs, but a search of the Idaho Secretary of State's website shows that your client is the registered agent for 17 Idaho LLCs, it is probably a good idea to ask your client what relationship he has to those LLCs.

In most cases, the 341 meeting is the only time when your client is on the record, under oath, answering questions about his case. It is an integral part of the process.

✓ Tell your clients, at the 341 meeting:

- They should not be chewing gum when questioned; better yet, they should not be chewing gum at all.
- They should speak up.
- They should both answer questions (if there is more than one client).
- They should answer "yes" or "no" rather than "uh-uh" or "yuh-huh."
- They should turn off their cell phones.

✓ Do not tell your client to call the trustee for advice that you should be providing. The client paid you for advice, not the trustee. Beyond that, usually the trustee is not their friend.

✓ When providing tax returns to the trustee, make sure to include any and all schedules to those returns. Returns, without the supporting and accompanying schedules, are worthless and fail to comply with the requirements of turning over tax returns.

✓ If your client went through a recent divorce, provide the trustee a copy of the divorce decree and property settlement agreement.

✓ When the trustee requests documents, upload them to the Doclink system. All Boise trustees use this system (and we believe all the trustees in the state are also either using it or will soon be using it). This provides you with a written record that the requested documents have been provided. If you choose to otherwise provide documents to the trustee, do so in writing, via email, or hand-delivery (with a receipt for the trustee or the assistant to sign). This way you have a written record that the documents were provided.

✓ Do not wait until the morning of the 341 meeting to send the requested documents. The trustee will not have had time to review whatever was requested and will likely continue the 341 meeting in order to have time to review the documents and ask questions, if necessary.

✓ If there are going to be issues or problems with your client's case, let the trustee

know as soon as possible. This allows the trustee to be prepared for the problems and to address them as efficiently as possible.

Specific schedule and SOFA suggestions *Schedule A (Real Property)*

Schedule A is the debtor's chance to list any interest he or she has in any real estate. It is important to remember that this schedule includes *any* interest (not just fee simple) in *any* real estate, anywhere in the world.

✓ If the debtor owns any real estate, Schedule A should always have the property description, including the street address and county, where the property is located.

✓ If a tax parcel number is available (as it usually should be), that is also extremely helpful.

✓ The description of property should include something more than just "12 acres" with no further description. This description is absolutely worthless. Your client will eventually have to provide the actual description for the property, so doing it from the beginning is much easier and more helpful.

✓ Clearly state the basis for your client's valuation of the property. If an appraisal was performed, or it is based on the assessed value, state as much on Schedule A. If the client drew their valuation out of thin air, state that on the schedule. Remember, however, that the valuation is your client's stated value, not yours or your staff's. Your client is the one testifying (or certifying) to the value of the property.

✓ If the property is jointly owned, and the other owner is not involved in the bankruptcy case already, state the name of any co-owners of the property. Be prepared to also provide the address and phone number for those co-owners — the trustee *will* be contacting those co-owners to inquire about the property.

Schedule B (Personal Property)

Schedule B is the debtor's opportunity to list any and all interests he or she has in any personal property. While Schedule B separates the property into various categories, there is always a "catch-all" category at the end for "any and all personal property not previously disclosed." Again, *any* interest the debtor has in *any* personal property must be listed on this Schedule.

✓ *Everyone, always*, has some amount of cash on hand. Do not file a petition that lists "\$0.00" for the amount of cash on hand. Even if it is just loose change in a jar somewhere, *every* debtor has cash on hand.

✓ Similarly, *everyone* should have internet or telephone access to the current balances in their bank accounts. Make sure the balances shown on Schedule B accurately reflect the balances as of the day of the petition.

✓ Idaho provides debtors with a \$7,500 exemption (per person) for household goods and furnishings. However, it would be extremely rare for a person to have exactly \$7,500 worth of household goods and furnishings. Nevertheless, you would be amazed at how many Idaho residents have exactly that amount of goods and furnishings — at least as claimed on their Schedule B. Make sure the debtor is accurately valuing the goods and furnishings your client has. Remember, you do not have to use the entire exempt amount. If your client has less than that, it is okay. Alternatively, if the value of the furniture is greater than the exempt amount, it is bankruptcy fraud to claim the furniture is only worth the exempted value. For instance, a debtor who owns a home worth \$2 million very rarely has only \$7,500 worth of furniture in that house. Expect the trustee to pay a visit to your client's home, with his auctioneer in tow, to review the goods and furnishings.

✓ An inventory of household goods, attached to the Schedule B, is extremely helpful. However, do not get too bogged down in the minute details of every asset the debtor owns. For instance, the trustee does not need to know how many forks, spoons, knives, and serving spoons your client has. However, he would be interested to know that your client has "kitchen utensils."

✓ Also, remember that some household goods and furnishings have more value than others. For instance, kitchen utensils made out of stainless steel will rarely have the same value as the set of silver

Listing a "retirement account" without reviewing the document to see that it actually qualifies for an exemption is a sure way to get sued by your client for malpractice.

utensils your client inherited from her great-grandmother. Additionally, collectible items may have more value than your client believes.

✓ Everyone has at least one book, DVD, CD, computer and audio/video equipment, even if that consists of the family Bible, an old Christmas movie, the CD they received 15 years ago (when people still bought CD's), the old Atari they used to play games on, and a cheap radio they have had for years. These items should be separately listed on the schedule.

✓ With very few exceptions, everyone has some jewelry. Make sure your clients are accurately valuing the jewelry they own. If a client walks into the signing meeting in your office with a three-carat diamond ring on her finger, but only listed \$500 in jewelry, something may be amiss.

✓ Firearms should also be accurately listed, including the manufacturer and year, caliber or gauge, model name or number, and condition of the firearm. In reviewing this information with your client, make sure they accurately value the weapon. "Old" does not equal "worthless."

✓ Accurately list all retirement and investment accounts. If you are claiming exemptions in these accounts, make sure the exemption actually applies to that sort of account. Be aware of recent Idaho decisions regarding the exemptions that can be claimed. For instance, if a debtor has a generic stock brokerage account stashed away for "retirement," that does not entitle him to an exemption under Idaho Code § 11-604A (which provides an exemption for various forms of retirement accounts). Listing the asset as a "retirement account" is a big red flag for trustees. Furthermore, listing a "retirement account" without reviewing the document to see that it actually qualifies for an exemption is a sure way to get sued by your client for malpractice.

✓ For partnerships, LLCs, corporations, or other joint ventures in which your debt-

or has an interest, list the purpose of the business. For instance, if the sole asset of the LLC is a parcel of real property, state that and include a description of the property which it owns. If it is a joint venture created for the purpose of inventing a roller-blade brake, include that description in the schedule. Also, if it is a company in which your debtor has co-owners, include the name of the co-owner, and be prepared to provide the trustee with the address and phone number — those people will be contacted.

✓ If the debtor has an interest in a probate estate, disclose it. Additionally, 11 U.S.C. § 541(a)(5) states that any interest the debtor has in a probate estate which arises within 180 days of the petition is property of the bankruptcy estate as well. Thus, if the debtor has a relative or friend who passes away during that time period (especially if they expect any sort of inheritance), the schedules should be amended to disclose the possible probate inheritance. Remember that the debtor becomes entitled to the inheritance immediately upon the death of the grantor — not when the ultimate distribution is made. Warn your debtor that a failure to disclose the death and possible right to inheritance is grounds for denying or revoking their discharge.

✓ For any unique property (and even some not-so-unique property), the trustee is most likely going to want to see it. Have your client take digital pictures of the item and send them to you, so you have them ready in case the trustee asks to view it.

Schedule C (Exemptions)

In Schedule C, the debtor attempts to exempt certain property listed on Schedules A or B from the bankruptcy estate. By exempting property, the debtor is "protecting" that property from collection and liquidation by the bankruptcy trustee.

✓ Know Idaho's homestead exemption statute.⁴ It can be complicated — especially if your debtor has multiple pieces of

property and does not qualify for an automatic homestead.

✓ The values listed on Schedule C should mirror those listed on Schedules A and B. Additionally, make sure the exemption amounts claimed also match the values claimed. (For instance, if originally the debtor had \$100 in their bank account, and you claimed an exemption of \$75, but on the day of their signing, you changed the value of the bank account to \$50 — based, of course, on an internet review of the balance on that day — make sure to change the exemption amount as well. Otherwise, you will just have to do an amendment later.)

✓ Specify the exemption statute and the amount being claimed as exempt. For instance, “disposable earnings” (Idaho Code § 11-207) contained in bank accounts are typically only 75% percent exempt — do not claim 100% of the account exempt unless you have a good faith reason for doing so. Otherwise, you will receive a stern email from the trustee requesting an amendment. Also, make sure the exemptions you claim are allowed for the type of property you are claiming exempt. For instance, in Idaho, a vehicle exemption cannot be used for an ATV,⁵ while a pet exemption may be used for horse.⁶

✓ Make sure the “wildcard” exemption is used for “tangible personal property.” For instance, money in a bank account is not “tangible personal property;” an LLC interest is similarly not “tangible personal property.” Real property is not “tangible personal property.”

Schedules D, E, F, G, and I (Creditors and other Issues)

In Schedules D, E, and F, the debtor lists all of his creditors, both secured and unsecured. In Schedule G, the debtor lists any unexpired leases or contracts. On Schedule I, the debtor lists his current income. Special attention should be paid to each of these schedules.

✓ Make sure, on Schedule D, to include the current payoff of the loans owed, not the total amount that would be paid if the payments continued (i.e., the current payoff vs. the amount paid over the next 30 years with interest). Similarly, do not simply use the face amount of the note.

✓ Make sure the addresses for all creditors are included, including the name/address of any attorney who is representing the creditor. Without including the attorney’s address, you risk the creditor’s at-

torney continuing with collection efforts after the bankruptcy is filed, which potentially causes the creditor’s attorney more work to “undo” whatever happened after the filing.

✓ Do not list debts as “unknown,” “disputed,” “contingent,” or “unliquidated” unless they really are.

✓ If you list leases on Schedule G, have a copy of the lease available for the trustee so she can determine whether to assume or reject the lease.

✓ If the amount of income on Schedule I is drastically different from the income listed on SOFA 1, include an explanation as to why the income changed. For instance, if SOFA 1 discloses that last year the debtor made \$150,000 in income, but Schedule I only disclosed monthly income of \$5,000, some explanation as to why the income changed so much is needed. The trustee is just going to ask about the disparity at the 341 meeting if you do not include it on Schedule I.

Statement of Financial Affairs

The purpose of the Statement of Financial Affairs (“SOFA”) is to give the trustee information regarding the debtor’s past income, past payments to creditors, items which the debtor may have previously owned, information regarding any companies the debtor holds an interest in, and some other miscellaneous information to assist the trustee in investigating the debtor’s assets.

✓ The most common problem on the Statement of Financial Affairs is failing to list all property transferred in response to Question 10. Any property, transferred to anyone within the last two years prior to the filing, should be listed. A boat sold to the debtor’s cousin for \$10,000? List it. A safe full of guns given to your brother just prior to bankruptcy? List it. Transfers of real estate from the debtor’s name into an LLC? List it. A capital contribution to an LLC in which the debtor is a member? List it. (The debtor may not think these last two were transfers, since they still own the LLC; however, these are transfers that need to be listed. Generally, it is good practice with any debtor who has any sort of company interest to ask about anything that the debtor contributed or gave to the company in the last two years.) Read 11 U.S.C. § 101(54) which defines “transfer” very broadly.

✓ Similarly, any payments made by the debtor in the period leading up to the

bankruptcy to creditors, whether insiders or not, need to be accurately listed. Additionally, if the debtors list a loan repayment to Grandma Judy of \$20,000 in the month before filing bankruptcy, the debtors should be warned that the Trustee will most likely be contacting Grandma Judy to seek a return of those funds.

Obviously, this is a non-exhaustive list of things to keep in mind. However, following these simple steps will allow your client to navigate their bankruptcy case more easily, allow you to more competently and efficiently represent your client, and allow the trustee to receive the information needed in the most efficient way possible (thus helping to alleviate stress on your client when the trustee sends them an irate letter wondering why they have not complied with his requests). As we work together with the trustees and our clients, we can help maintain the professionalism and competence of the bankruptcy bar, while helping our clients to comfortably receive the discharge they are seeking.

About the Authors

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Endnotes

¹ See 11 U.S.C. § 704.

² See *In re Dean*, 08.4 I.B.C.R. 180 (Bankr. D. Idaho 2008).

³ See *Fed. R. Bankr. Proc.* 9011; 11 U.S.C. § 707(b)(4)(A), (B); *In re Dean*, *supra*.

⁴ See I.C. § 55-1001, *et seq.*

⁵ See *In re: Bosworth*, 11.1 IBCR 37 (Bankr. D. Idaho 2011).

⁶ At least under certain circumstances. See *In re: Gallegos*, 226 B.R. 111 (Bankr. D. Idaho 1998). If you have a few extra minutes, take a moment to read this opinion. Judge Pappas makes extensive use of quotes from the famous “Mr. Ed” in deciding that a horse may qualify as a household pet.

PRE-BANKRUPTCY PLANNING: WHEN DOES A FRESH START BECOME A HEAD START? ¹

Judy L. Geier
Evans Keane, LLP

A certain level of conversion of non-exempt assets to exempt assets on the eve of bankruptcy has been historically accepted.² It is common for debtors to conduct some pre-bankruptcy planning efforts, even on the eve of filing for bankruptcy. However, those planning efforts are not risk-free. Uninformed pre-bankruptcy planning may make not only the debtors' claimed exemptions susceptible to challenge, but more importantly place their discharge at risk.

Although some level of pre-bankruptcy planning is not *per se* fraudulent, it is likewise not *per se* legitimate, nor insulated from scrutiny or avoidance.³ The Bankruptcy Code balances competing policies of ensuring an equitable distribution of debtors' assets among their creditors and of providing honest debtors with a fresh start free from exorbitant debt.⁴

The basis for the debtors' fresh start is their exempt assets. Thus, debtors are motivated to protect their post-bankruptcy future through some level of pre-bankruptcy planning.⁵ Substantial gray area exists between when legitimate pre-bankruptcy planning fades into fraudulent conversion. The inquiry is case specific and fact intensive. Debtors, creditors, trustees and their counsel, as well as the courts grapple with where the proverbial line exists between legitimate pre-bankruptcy planning and fraud.⁶

Idaho's exemptions

Those all-important exemptions are found either in the Bankruptcy Code⁷ or in a given State's code for those States that have opted-out of the federal exemption statutes and elected to provide their own statutory scheme of exemptions. Idaho is an "opt-out" state.⁸ Idaho's exemptions lie in several different statutes.⁹ Idaho's public policy supports limitless protections for some exempt assets while placing a monetary cap on others. For example, Idaho law caps the amount that debtors may claim as exempt in certain personal property and in a homestead or residence. However, exemptions for some payment

Substantial gray area exists between when legitimate pre-bankruptcy planning fades into fraudulent conversion.

entitlements, retirement accounts and certain insurance policies, such as annuities, are limitless as to the amount that may be paid in and protected.¹⁰ Further, with few exceptions such as the parameters found in Idaho's *Unlawful Transfers Act*, debtors have no statutory limitation as to the timing of when they can convert a non-exempt asset into an exempt asset.

Grounds to attack pre-bankruptcy planning activities

Pre-bankruptcy planning transfers are typically subject to attack by trustees and/or creditors under the following grounds:

- As a fraudulent transfer subject to both Idaho's *Unlawful Transfers Act* (I.C. § 55-901, *et. seq.*) and a trustee's avoidance claim (11 U.S.C. § 548);
- Upon a trustee's objection to claim of exemption (*Fed. Bankr. R. Proc.* 4003);
- Upon either a trustee's or a creditor's objection to discharge (11 U.S.C. § 727); or
- Upon a claim of bad faith.¹¹

The analysis for attacking debtors' pre-bankruptcy planning efforts is similar, whether rooted in Idaho's *Unlawful Transfers Act* or in the Bankruptcy Code and subsequent case law. The focus is whether the debtors intended to hinder, delay or defraud when converting an asset from non-exempt to exempt.¹² Since direct evidence of intent is rare, a determination of the debtor's intent is made inferentially, based on the facts and circumstances surrounding the conversion.¹³ An objecting party is not required to prove fraud, however, but may prove only that the debtors had intent to hinder or to delay.¹⁴

Burden of proof

A presumption of validity exists in the Bankruptcy Code regarding debtors' claims of exemption.¹⁵ The exemption statutes are construed liberally in favor of the debtor.¹⁶ The objecting party has

the burden of proving by a preponderance of the evidence that a debtor's claim of exemption is not proper.¹⁷ Once the objecting party presents sufficient evidence to rebut the *prime facie* validity of the exemption, the burden to prove that the exemption is proper shifts to the debtor.¹⁸ Similarly, an objecting party need only prove by a preponderance of the evidence that a discharge should be denied.¹⁹

Badges of fraud

Each of the grounds listed above for challenging a debtor's pre-bankruptcy planning effort turns on an examination of the "badges of fraud" that may have been present at the time the asset was converted. Idaho's *Unlawful Transfers Act* provides the following nonexclusive list of "badges of fraud" in *Idaho Code* § 55-913 (2):

- (a) The transfer or obligation was to an insider;
- (b) The debtor retained possession or control of the property transferred after the transfer;
- (c) The transfer or obligation was disclosed or concealed;
- (d) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
- (e) The transfer was of substantially all the debtor's assets;
- (f) The debtor absconded [absconded];
- (g) The debtor removed or concealed assets;
- (h) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
- (i) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;



Judy L. Geier

(j) The transfer occurred shortly before or shortly after a substantial debt was incurred; and

(k) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.²⁰

Some form of these “badges of fraud” echoes through the Bankruptcy Code as well as the case law analyzing claims asserting that a debtor undertook a given action with intent to hinder, delay or defraud creditors.²¹

How many badges of fraud must be present?

At least in the District of Idaho, the Bankruptcy Court has determined that the mere timing of the transfer on the eve of a bankruptcy filing alone is not enough to find that the debtor acted with the requisite intent to hinder, delay or defraud.²² In *In re Ganier*, after analyzing the Ninth Circuit Court of Appeals rationale in *Wolkowitz v. Beverly (In re Beverly)*, the *Ganier* Court found that some combination of the size or amount of the exemption claimed as well as the timing of the transfer is enough to establish the requisite intent to hinder, delay or defraud.²³ The *Ganier* case was analyzed in the context of a motion to dismiss in an adversary avoidance action.²⁴ This case is notable in that few cases in Idaho have directly commented on the analytical framework for determining intent.

The Idaho courts have also analyzed the question of intent within the context of a trustee’s objection to exemption based on bad faith.²⁵ In *In re Varney* the court found that the debtor lacked the requisite intent for bad faith after its examination of the totality of the facts and circumstances.²⁶ The court grappled with facts that showed the debtor: failed to completely disclose to the trustee and on her petition, schedules and Statement of Financial Affairs (“SOFA”), a large, lump-sum disability payment; failed to completely alert her attorney to the payment and acted on her attorney’s uninformed advice; and ultimately placed the funds in a bank account held in her father’s name.²⁷ The court concluded that although the facts established an extremely close case, the court was persuaded by the debtor’s testimony that the debtor lacked the requisite intent.²⁸

Within the context of an objection to an exemption, the rule in the Ninth Circuit Court of Appeals appears to be established by the *Beverly* case in which some combination of the transfer of large amounts of assets combined with the timing of the transfer, or some other evidence of actual

The Crater Court organized the various “badges of fraud” into three categories and described how they relate to a determining intent.

fraud, will constitute a finding of requisite intent.²⁹ Neither the courts in the Ninth Circuit, nor in Idaho have spoken directly on the requisite combination of “badges of fraud” that must be present to deny a debtor a discharge.³⁰

Categorization of badges of fraud: *In re Crater*

In the *Crater* case, the U.S. Bankruptcy Court for the District of Arizona grappled with this question of the requisite intent required to deny a discharge and whether the required proof necessary to sustain an objection to an exemption would satisfy the evidentiary burden necessary to deny a discharge.³¹ In its review of the state of the law in the various circuit courts, including the Ninth Circuit, the *Crater* Court concluded that, because the consequences of denial of discharge are so severe, certain “badges of fraud” standing alone do not imply actual fraud.³² The *Crater* Court organized the various “badges of fraud” into three categories and described how they relate to a determining intent.

The first category consists of those badges that are “themselves indicative of concealment, deception or fraudulent intent” such as the debtor retaining possession or control of the property after the transfer; the debtor acting to conceal the transfer; the debtor absconding; and/or the debtor removing or concealing assets.³³

The second category consists of badges that “do not implicitly suggest fraud, but do suggest there must have been a motivation other than the transaction itself because it was not an economically rational decision for a debtor to make but for its effect to hinder or delay creditors.”³⁴ This includes such badges as transfers to insiders; transfers made without reasonably equivalent consideration; and/or transfers of essential assets of the business to a lienor who transferred the assets to an insider of the debtor.³⁵

The third category consists of “badges that may be innocent in themselves, or are merely timing factors that become suspicious only when combined with other factors.”³⁶ This includes such badges as the

debtor is being sued or threatened with suit before the transfer was made or obligation incurred; the transfer consists of substantially all of the debtor’s assets; the debtor is insolvent or becomes insolvent shortly after the transfer or obligation; and/or the transfer occurs shortly before or after a substantial debt is incurred.³⁷

By categorizing the badges, the *Crater* Court created a workable framework for analyzing whether the evidence of the debtors’ intent fell within either of the more serious categories — “indicative of fraud” or “suspicious” — which indicates unlawful intent, or simply within the “merely timing factors,” which standing alone do not necessarily indicate unlawful intent.³⁸

Conclusion

The current state of the law regarding pre-bankruptcy planning is gray with little guidance as to the level of proof needed to establish the requisite intent to sustain an objection to exemption or denial of discharge. Although the *Crater* case is not controlling in this district, its analysis is persuasive. The framework outlined in the case provides guidance to debtors as well as creditors as to what combination of badges will establish the requisite intent and what combination will not. Until similar guidance is established in this district or by the Ninth Circuit, prudent counsel should at minimum advise clients that some, if not all, levels of pre-bankruptcy planning are subject to scrutiny. In short, ill-informed debtors could find not only their claims of exemption, but also their discharge, at risk for challenges from a trustee or creditor based on an allegation that pre-bankruptcy transfers of exempt assets were made with the “intent to hinder, delay or defraud” creditors.

About the Author

Judy L. Geier practices law at *Evans Keane, LLP*, primarily in bankruptcy representing trustees and creditors, as well as in commercial litigation, including real estate title defense, and in commercial transactions, such as entity formation and business sales. She recently accepted

a director position on the board of Wish Granters, Inc., a nonprofit organization, whose purpose is to grant wishes for terminally ill adults.

Endnotes

¹ See, *Albuquerque National Bank v. Zouhar* (In re Zouhar), 10 B.R. 154, 156 (Bankr. D. N.M.1981) (“As so aptly observed by able and astute counsel for the Bank, the debtor here did not want a mere fresh start, he wanted a head start.”).

² *Gill v. Stern* (In re Stern), 345 F.3d 1035, 1043(9th Cir. 2003) (citing *Wudrick v. Clements*, 451 F.2d 988 (9th Cir. 1971)).

³ *Gugino v. Ganier* (In re Ganier) 403 B.R. 79, 84 (Bankr. D. Idaho 2009). See also, *Wolkowitz v. Beverly* (In re Beverly), 374 B.R. 221, 226 (9th Cir. BAP 2007), aff’d 551 F.3d 1092 (9th Cir. 2008) (“We publish to dispel the myth that the toleration of bankruptcy planning for some purposes insulates such planning from all adverse consequences—it does not.”). Accord, *Fitzgerald v. Hawkins* (In re Hawkins), 91 I.B.C.R. 54, 55 (Bankr. D. Idaho 1991) (“While the fact that [debtors] may have availed themselves of the annuity contract exemption on the eve of the filing of their bankruptcy case is not in itself, conclusively fraudulent, Plaintiff is entitled to an opportunity to present other evidence of their fraudulent intent. This proof may come from showing the existence of a variety of facts, or ‘badges of fraud.’”)

⁴ *First Beverly Bank, et.al. v. Adeeb* (In re Adeeb), 787 F.2d 1339, 1345 (9th Cir.1986).

⁵ H.R. Rep. 95-595, at (1977), reprinted in, 1978 U.S.C.C.A.N. 5963, 6317 (“As under current law, the debtor will be permitted to convert nonexempt property into exempt property before filing of the bankruptcy petition. This practice is not fraudulent

as to creditors, and permits the debtor to make full use of the exemptions to which he is entitled under the law.”) (Emphasis in original); S. Rep. No. 95-989 at 76 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5862. Quoted in *Beverly* at 244; *Murphey v. Crater* (In re Crater) 286 B.R. 756, 761 (Bankr. D. Ariz 2002)

⁶ William L. Norton, Jr. *The limits of permissible exemption planning* (Code § 522(o)), 3 Norton Bankr.L. & Prac. 3d § 56:34 (3d ed. updated 2011). See also, Asset Protection: Legal Planning, Strategies, and Forms, *Prebankruptcy Planning—Generally*, WGL Asset ¶ 12.02 (2011 Supp No. 3). Timothy D. Moratzka, *Fresh Start, Head Start or Running Start: Bankruptcy Exemption Planning*, 22 APR Am. Bankr. Inst. J., 10 (April 2003). John M. Norwood, *An Historical Analysis of Pre-Bankruptcy Conversion Cases On A Circuit-By-Circuit Basis*, 103 Com. L.J. 154 (Summer 1998).

⁷ 11 U.S.C. § 522.

⁸ See. I.C. § 11-609.

⁹ See e.g. I.C. § 11- 601, et. seq.(with regard to personal property); I.C. § 55-1001, et seq. (with regard to homesteads); and I.C. § 41-1801, et.seq.(with regard to insurance or annuity policies).

¹⁰ See I.C. § 11-603. See also, I.C. § 41-1836 (limited only as to monthly payment amount but not as to face value of the annuity contract).

¹¹ *In re Christina M. Varney*, Bankruptcy Case No. 10-41896-JDP, Memorandum Decision issued April 25, 2011.

¹² I.C. §§ 55-906 and 55-913 (1)(a). Cf. 11 U.S.C. §§ 522 (o), 523 (2) & (4), 548 (a) (1) (A) and 727 (a) (2).

¹³ *Beverly*, at 235.

¹⁴ *Id.*

¹⁵ *In re Wilcox*, 2008 WL 450816, *1 (Bankr. D. Idaho 2008).

¹⁶ *In re Kline*, 350 B.R. 497, 502 (Bankr. D. Idaho 2005).

¹⁷ *Gill v. Stern* (In re Stern) 345 F.3d 1036, 1043 (9th Cir.2003) (citing to *Grogan v. Garner*, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991). Accord, *Beverly*, at 235. See also, *In re Wilcox*, 2008 WL 450816, *1 (Bankr. D. Idaho 2008).

¹⁸ *Wilcox at *1.*

¹⁹ *Beverly*, at 243.

²⁰ I.C. § 55-913.

²¹ See *Rainsdon v. Kirtland* (In re Kirtland) 2011 WL 4621959, *5 (Bankr. D. Idaho 2011). See generally *Cirilli v. Bronk* (In re Bronk), 444 B.R. 902 (Bankr. W.D. Wis. 2011); *Wolkowitz v. Beverly* (In re Beverly), 374 B.R. 221 (9th Cir.2007); and *Murphey v. Crater* (In re Crater), 286 B.R. 756 (Bankr. D. Ariz. 2002). 11 U.S.C. §§ 522 (o), 523 (2) & (4), 548 (a) (1) (A) and 727 (a) (2). See also secondary authorities cited in note 6, *supra*.

²² *In re Ganier*, 403 B.R., at 86.

²³ *Id. Cf. Beverly*, 374 B.R. at 245.

²⁴ *Id.*

²⁵ *In re Christina M. Varney*, Bankruptcy Case No. 10-41896-JDP, Memorandum Decision issued April 25, 2011.

²⁶ *Id.*

²⁷ See generally, *Id.*

²⁸ *Id.*

²⁹ *Beverly*, 374 B.R. at 245. See also, *Crater*, 286 B.R. at 763.

³⁰ See generally, *Murphey v. Crater* (In re Crater), 286 B.R.756 (Bankr. D. Ariz. 2002).

³¹ *Id.*

³² *Id. at 764.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

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NO FREE HOUSES: FEW MORTGAGES HAVE FATAL FLAWS

Kelly Greene McConnell
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These are historic times. Among the many facets of the economic crisis facing America is the foreclosure crisis. While we may debate the various possible causes of the crisis, no one can doubt that the increasing number of foreclosures nationwide is perniciously persistent. Unfortunately for Idaho, its foreclosure rates are consistently among the highest in the country.¹

Idaho apparently has also been following a related trend of defaulting homeowners filing lawsuits against their mortgage lenders. In a few rare out-of-state cases, judges have found that sloppy mortgage loan practices have rendered the mortgages unenforceable, effectively awarding a free house to the borrowers. National media attention on issues like “robo-signing” coupled with a collective anger over economic hardship has no doubt fueled the rapidly rising number of lawsuits.² While many troubled homeowners are trying to keep their heads above the murky waters of foreclosure and modification procedures, others are clearly just trying to win the free house lottery.³

This article cannot possibly address the multitude of claims asserted by troubled homeowners. It is tempting to digress by addressing some of the more unusual theories, giving highest tribute to the creativity of the plaintiffs’ bar. Without intentionally indulging that temptation, however, this article will instead focus on one of the more common claims that homeowners raise: a claim of quiet title in an attempt to remove the mortgage⁴ lien from their residence.

Quiet title

In a quiet title action, the plaintiff is requesting the court to declare that he has good title to real property and to forever bar particular adverse claims.⁵ The primary purpose of many of these new cases is the elimination of the mortgage lien on the property. The plaintiff has the burden of proof to show that he owns the property free of the mortgage.⁶ There are several theories under which the plaintiff will at-

While many troubled homeowners are trying to keep their heads above the murky waters of foreclosure and modification procedures, others are clearly just trying to win the free house lottery.

tack the validity of the mortgage in a quiet title action. The plaintiff may argue that the mortgage should be eliminated where (1) the defendant cannot produce an original promissory note, (2) Mortgage Electronic Registration Systems, Inc. (MERS) is acting as a nominee for the beneficiary under a deed of trust, or (3) ownership of the note was transferred or securitized.

The tender rule

As a preliminary matter, before the plaintiff even gets to the merits of the quiet title claim, he must satisfy the tender rule. That is, a mortgagor cannot quiet title against a mortgagee without showing that he has paid or tendered payment of the debt.⁷ The tender rule is emerging as a threshold issue. A quiet title complaint intended to remove a mortgage will not survive a motion to dismiss without an allegation that the obligation securing the mortgage has been paid.⁸ This is true even if the mortgage is unenforceable under the statute of frauds.⁹

The bottom line is that “[w]ithout evidence or even an assertion that Plaintiffs can or are willing to tender payment on their loan, they cannot succeed on their quiet title action, as a matter of law.”¹⁰ Because most of these cases involve homeowners who are unable to make their payments, they will be unable to make it past the pleading stage.¹¹

Produce the note

Despite the passage of the industrial age into the internet age, many attorneys seem stuck on the idea that there is some overriding magical quality in the physical existence of paper. In a nutshell, the assertion is that an original “wet ink” promissory note is required for enforcement of the note and mortgage. Without any legal authority whatsoever, plaintiffs raise a claim that the mortgage lender cannot foreclose a defaulted mortgage without the original loan documents.

First, it is worth noting that these plaintiffs typically admit that they borrowed money, admit they signed a promissory note and admit the note is in payment default. Many plaintiffs will then tiptoe around not admitting that a particular copy of the note is accurate. A stray pencil squiggle on a copy becomes a windfall of an excuse for avoiding the admission of plaintiff’s signature. An endorsement on the back of a note seems to provide an even better excuse for avoiding the admission of plaintiff’s signature on the front of the note. The bottom line is that when a plaintiff admits borrowing money, admits signing the note, admits the default, and a copy of the note is available, the existence of the actual original piece of paper is not, and should not, be required to enforce the obligation.

Idaho Courts are in agreement.¹² An original wet ink note is not required to foreclose a deed of trust.¹³

Role of MERS

Mortgage Electronic Registration Systems, Inc., (MERS), is a private electronic database “that tracks the transfer of the ‘beneficial interest’ in home loans, as well as any changes in loan servicers.”¹⁴ Many home loan deeds of trust refer to MERS as the beneficiary and the nominee for the beneficiary. The owner or lender is the entity that is ultimately entitled to the beneficial interest, which is repayment of the loan.¹⁵ A loan servicer is the entity that “collects payments from the borrower, sends payments to the lender, and handles administrative aspects of the loan.”¹⁶

It has become common practice for lenders who originate a mortgage loan to subsequently resell the loan or even bundle the beneficial interest in individual loans and sell them to investors as part of mortgage backed securities. “MERS was designed to avoid the need to record multiple transfers of the deed by serving as the nominal record holder of the deed on behalf of the original lender and any



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subsequent lender.¹⁷ Thus, even where the ownership of the mortgage loan paper changes, the role of MERS as a nominee for the beneficial interest remains unchanged.

Numerous challenges have been raised to the authority of MERS to act on behalf of the holder of the beneficial interest. A few out-of-state cases have held that MERS does not have the authority to transfer the promissory note.¹⁸ A few others have held that MERS does not have the authority to appoint a trustee under a deed of trust or conduct foreclosure proceedings.¹⁹ Idaho judges, however, have consistently upheld the authority of MERS to appoint a trustee in a deed of trust and conduct a foreclosure sale.²⁰ To my knowledge, not a single Idaho case has denied MERS authority as a matter of law.²¹ However, this issue is currently pending in front of the Idaho Supreme Court in *Trotter v. Bank of New York*, and we should soon learn whether the unanimity of the Idaho state courts is in accord with the ultimate authority on the issue.²²

If the Idaho Supreme Court holds that MERS cannot appoint a trustee and initiate a foreclosure, the bar could be gainfully employed for years with the messy aftermath from the thousands of Idaho foreclosure sales conducted in this manner. The ambiguities created by those wrongful foreclosures may wreck our already crippled real estate markets.²³ For the moment, we can only wait and see.

Note transfers

One primary theory used to attack the authority of MERS to act on behalf of the beneficial interest has come to be known as the “split the note” theory.²⁴ To understand the “split the note theory” it is helpful to start with the basic functioning of a real estate secured loan under Idaho law. In a typical Idaho real estate finance transaction, a deed of trust grants a security interest for the repayment of an obligation, usually a promissory note.²⁵ If there is a breach of the note, the deed of trust may be enforced by foreclosure.²⁶ Therefore, the deed of trust is enforced by its beneficiary who is also the holder of the note that was breached.

The “split the note theory” comes into play where the holder of the note is a different person than the beneficiary under the deed of trust. If the holder of the note no longer has an interest in the deed of trust, it cannot enforce the note by foreclosing the deed of trust.²⁷ In this case, the note is said to be “split” from the deed of trust, potentially making the deed of trust unenforceable.

If the Idaho Supreme Court holds that MERS cannot appoint a trustee and initiate a foreclosure, the bar could be gainfully employed for years.

Like many states, Idaho law allows the assignment of loans.²⁸ When a note secured by a deed of trust is assigned, the deed of trust follows the note.²⁹ However, the mere fact that a transfer occurred does not sever the note from the deed of trust.³⁰ In order for a plaintiff to successfully invalidate the deed under this theory, they must show that the holder of the loan is a *different* entity than the beneficiary under the deed of trust. The deed would only become unenforceable where the note and deed were irreparably split when “MERS or the trustee, as nominal holders of the deeds, are *not* agents of the lenders.”³¹ Because MERS *is* acting in a representative capacity for the beneficiary, the involvement of MERS alone is insufficient to invalidate the deed.

Who owns the note?

Another popular theory with the goal of invalidating mortgage obligations is the “who owns the note” theory. A plaintiff raising this point simply states that the mortgage obligation should not be enforced because the plaintiff does not know who currently owns the paper behind that obligation.³² Of course, there is nearly always a servicer of the loan that is responsible for collecting payments and distributing to the person so entitled. The plaintiff asserts that he should not be required to make payments to the servicer without knowing the exact identity of the person entitled to the ultimate payment.

However, as long as the identity of the servicer is clear and the borrower knows where to send payments, disclosure of the ultimate person entitled to payment is not a defense to payment. The United States Bankruptcy Appellate Panel for the Ninth Circuit issued an opinion earlier this year with an extensive analysis of Article 3 of the Uniform Commercial Code on exactly this point.³³ The *Veal* court concluded that “[u]nder established rules, the maker [borrower] should be indifferent as to who owns or has an interest in the note so long as it does not affect the maker’s ability to make payments on the note.”³⁴ Further, “it is thus irrelevant whether the Note has been fractionalized or securitized—so

long as they do know who they should pay.”³⁵

Article 3 of the Uniform Commercial Code contains no provisions that entitle the maker of a promissory note to any information regarding the subsequent transfers or negotiation of that note.³⁶ The only information relevant to the borrower is where to send payment, which is typically to the servicer. As long as that information is clear, payment must be sent and there is no basis for quiet title against the deed of trust under the “who owns the note” theory.

Miscellaneous theories

Congress has enacted a wide array of conflicting, confusing and probably often worthless legislation in attempts to address the foreclosure crises. Plaintiffs have concocted a creative variety of claims under these statutes to challenge their mortgages in quiet title actions. However, “the mere existence of a federal statute does not create a private cause of action.”³⁷ Therefore, homeowners will not win the free house lottery because their lender or servicer (1) obtained TARP funds, (2) did not give them a loan modification, or (3) violated a federal policy to preserve home ownership.³⁸ A plaintiff inclined to bring a claim under any federal statute must be prepared to cite the Court to the specific provision that sets out a private right of action. A plaintiff that cannot find that specific authority should not bring the claim.

Conclusion

The financial systems of this country are apparently ill equipped to handle the volume of foreclosures occurring now. Mistakes do happen, even in Idaho, and even among the better run institutions. Where there are legitimate mistakes, there may be grounds for challenging a foreclosure or defending repayment of a loan. Counsel to troubled homeowners will best serve their clients by carefully reviewing a foreclosure or a loan modification for material and actual mistakes. Remedies may be rightfully available.

People are not entitled to a free house, however, just because their deed of trust contains the word “MERS” or their promissory note was transferred, securitized or lost. The local legal authority on these points is becoming so voluminous that attorneys need to take a hard look at their Rule 11 obligations before asserting these types of claims. Blindly filing meritless complaints copied off the internet further adds litigation stress and expense to people who are already overburdened with stress and expense, and that goes for the homeowners, too.

About the Author

Kelly Greene McConnell is a partner at the law firm of Givens Pursley LLP, she has extensive experience in all facets of bankruptcy and reorganization issues, having worked on credit recovery in agriculture, healthcare, real estate, and a variety of other industries. In addition, Ms. McConnell routinely handles complex financial transactions and state regulations of financial institutions. Committed to financial literacy, she works with the Board of Trustees for the Commercial and Bankruptcy Section of the Idaho Bar Association in promoting their financial education program. She received her B.S. in International Business Administration from California State University in 1986 and her J.D. from the University of the Pacific, McGeorge School of Law in 1989.

Endnotes

¹ *Idaho Remains Among Top 10 States in Foreclosure Rate*, IDAHO STATESMAN, August 11, 2011. Citing RealtyTrac, the Statesman reports that Idaho foreclosure rates have ranked among the top 10 states for 30 consecutive months, dating back to 2009.

² Givens Pursley is currently representing loan servicers in well over two dozen Idaho lawsuits. To my knowledge, other Idaho law firms have similar case loads. We have no statistics on the number of currently pending “free house” cases, but anecdotally at least the numbers are substantial.

³ For lack of a better description, my team has dubbed these lawsuits “free house cases.” Derrick O’Neill deserves credit as the genesis of that reference from his public lament during last year’s Bankruptcy Section annual meeting along the lines of – all of a sudden everyone thinks they should get a free house because the word MERS is in their deed of trust. Unfortunately, I don’t remember the exact quote.

⁴ The instrument almost always at issue is, in fact, a deed of trust. However, where the legal analysis does not involve a point particular to the form of the instrument, this article may reference the instrument as a “mortgage.”

⁵ 65 Am. Jur. 2d *Quieting Title* § 1, p. 6.

⁶ *Lossee v. Idaho Co.*, 148 Idaho 219, 222, 220 P.3d 575, 578 (2009).

⁷ *Trusty v. Ray*, 73 Idaho 232, 236, 249 P.2d 814, 817 (1952).

⁸ *Russell v. OneWest Bank FSB*, 2011 WL 5025236, *12 (D. Idaho, October 20, 2011) (dismissing a quiet title claim where the plaintiff did not allege that the mortgage obligation had been paid); *Gilbert v. Bank*

A plaintiff taking up the sword to invalidate an obligation presents a different situation than a creditor taking up the sword to seek stay relief.

— In re Sheridan

of America, 2011 WL 4345004, *2 (D. Idaho, September 15, 2011).

⁹ *Trusty*, 73 Idaho at 236, 249 P.2d at 817.

¹⁰ *Gilbert*, 2011 WL 4345004 at *12.

¹¹ In fact, our experience has been that nearly all or all of the free house cases fail at the pleading stage.

¹² *Doan v. Columbia Mortgage*, District Court for the Fifth Judicial District for the State of Idaho, Blaine County Case No. 11-0516, Memorandum Decision on Defendants’ Motion to Dismiss (October 12, 2011); *Doan v. Sun Valley Brokers*, District Court for the Fifth Judicial District for the State of Idaho, Blaine County Case No. 11-0517; Memorandum Decision on Defendants’ Motion to Dismiss (October 12, 2011); see also, *In re Veal*, 450 B.R. 897, 910 (9th Cir. 2011).

¹³ *Id.*; see also I.C. § 28-3-308 (negotiable instruments are still enforceable if the original was lost, destroyed or stolen).

¹⁴ *Cervantes v. Countrywide Home Loans*, 656 F.3d 1034, 1038 (9th Cir.2011).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ E.g., *Bellistri v. Ocwen Loan Servicing, LLC*, 284 S.W.3d 619 (Mo. 2009).

¹⁹ See *MERS v. Graham*, 44 Kan. App. 2d 547, 2010 WL 1873567 (Kan. App. 2010) (citing to the well known decision on these issues of *Landmark National Bank v. Kesler* 289 Kan. 528, 216 P.3d 158 (Kan 2009)).

²⁰ *Washburn v. Bank of America*, United States District Court for the District of Idaho, Case No. 11-0193-EJL-CWD, Report and Recommendation on Motion to Dismiss, docket # 28 (October 21, 2011); *Doan v. Columbia Mortgage*, District Court for the Fifth Judicial District for the State of Idaho, Blaine County Case No. 11-0516, Memorandum Decision on Defendants’ Motion to Dismiss (October 12, 2011); *Doan v. Bank of America*, District Court for the Fifth Judicial District for the State of Idaho, Blaine County Case No. 11-517, Memorandum Decision on Defendants’ Motion to Dismiss (October 12, 2011); *Edwards v. MERS*, District Court for the First Judicial District of the State of Idaho, Kootenai County Case No. 10-2745, Memorandum Decision and Order Re: Defendants’ Motion for Summary Judgment (November 16, 2010); *Trotter v. Bank of New York, et.al.*, District Court of the First Judicial District of the State of Idaho, Kootenai County Case No. 10-95, Memorandum Decision and Order Re: Defendants’ Motion to Dismiss (July 2, 2010).

²¹ MERS must have its documentation in order, like any other foreclosing party. This statement only applies to the authority of MERS as a legal principle and not upon any particular factual situation where the underlying foreclosure documentation may or may not have been handled properly. See *In re Sheridan*, 2009 WL 631355 (Bkrcty.D.Idaho) (holding even if MERS’ authority in a representative capacity is valid, it must be prepared to make a showing on

proper documents of the real party in interest with standing to bring a motion for stay relief); See also, *Gomes v. Countrywide*, 192 Cal.App.4th 1149 (Cal. Ct. App. 2011) (holding that the grantor agreed to MERS’ authority to foreclose per the express language in the deed of trust).

²² *Russell v. OneWest Bank FSB*, 2011 WL 5025236 (D. Idaho, October 20, 2011) (withholding a decision on the issue of whether MERS has the authority to initiate foreclosure proceedings pending the Idaho Supreme Court decision in *Trotter v. Bank of New York*).

²³ I.C. § 45-108 prevents a challenge to a foreclosure sale if it was conducted correctly. It would remain to be seen whether this statute as analyzed in *Russell v. OneWest Bank FSB* would prevent a post-foreclosure challenge to a foreclosure sale initiated by MERS if the Idaho Supreme Court overturns *Trotter*.

²⁴ See *In re MERS*, 2011 WL 251453 (D. Ariz., January 25, 2011) (identifying the “split the note theory” and rejecting it as a basis for quiet title, slander of title and unjust enrichment).

²⁵ See I.C. §§ 45-1502(3) and 45-1503(1).

²⁶ See I.C. § 45-1503(1).

²⁷ *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1039 (9th Cir. 2011) (“The deed and note must be held together because the holder of the note is only entitled to repayment, and does not have the right under the deed to use the property as a means of satisfying repayment. Conversely, the holder of the deed alone does not have a right to repayment and, thus, does not have an interest in foreclosing on the property to satisfy repayment.”).

²⁸ See I.C. § 28-3-201.

²⁹ RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 5.4(a) (1997) (“A transfer of an obligation secured by a mortgage also transfers the mortgage unless the parties to the transfer agree otherwise.”).

³⁰ *In re Tucker*, 441 B.R. 638, (Bkrcty. W.D. Mo. 2010) at *6 (holding severance does not occur if the note holder and deed of trust beneficiary are the same, even for subsequent parties to whom the note has been properly assigned).

³¹ *Cervantes*, 656 F.3d at 1044 (emphasis added).

³² A plaintiff taking up the sword to invalidate an obligation presents a different situation than a creditor taking up the sword to seek stay relief. See *In re Sheridan*, 2009 WL 631355 (Bkrcty.D.Idaho). A defendant does not need to prove his “standing” to be in the action.

³³ *In re Veal*, 450 B.R. 897 (9th Cir. 2011).

³⁴ *Id.* at 912.

³⁵ *Id.*

³⁶ *Edwards v. MERS*, District Court for the First Judicial District for the State of Idaho, Kootenai County Case No. 10-2745 (“...this Court concludes that the Note and Deed of Trust may be sold one or more times without prior notice to the Borrower.”).

³⁷ *Id.*

³⁸ *Russell v. OneWest Bank FSB*, 2011 WL 5025236 (D. Idaho, October 20, 2011).

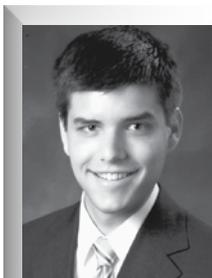
STERN LESSON: THE U.S. SUPREME COURT CALLS INTO QUESTION THE JURISDICTION OF BANKRUPTCY COURTS

Noah G. Hillen

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

In June of 2011, the United States Supreme Court issued what may turn out to be one of the most significant bankruptcy decisions in the last 30 years. In *Stern v. Marshall*, the Court found by a five to four majority that Section 157(b)(2) of the Bankruptcy Amendments and Federal Judgeship Act of 1984 is unconstitutional, at least in part.¹ That statute grants jurisdiction to bankruptcy courts over “core proceedings,” which are the types of proceedings commonly associated with bankruptcy courts.² Because bankruptcy courts derive their authority from Article I of the U.S. Constitution, and not Article III like federal district and appellate courts, the *Stern* court held that the U.S. Constitution prohibits bankruptcy judges from entering a final judgment on a state law compulsory counterclaim asserted by a debtor where the counterclaim is not resolved in the process of ruling on a creditor’s proof of claim.³ Writing for the majority, Chief Justice Roberts noted the Constitution requires that an Article III judge enter such a final judgment.⁴

In the wake of *Stern*, lower courts have grappled with the question whether bankruptcy courts possess the necessary constitutional jurisdiction to render final judgments in proceedings that were previously considered part and parcel to the bankruptcy system. While some courts have narrowly construed *Stern* and its effect on the constitutionality of 28 U.S.C. § 157(b)(2), other courts have held that other core proceedings enumerated in the statute also require adjudication by an Article III judge. Decisions authored by Judge Pappas, from the U.S. Bankruptcy Court for the District of Idaho, and Judge Kirscher, from the U.S. Bankruptcy Court for the District of Montana, take divergent views regarding the application of *Stern* and the jurisdiction of bankruptcy courts.



Noah G. Hillen

Decisions authored by Judge Pappas, from the U.S. Bankruptcy Court for the District of Idaho, and Judge Kirscher, from the U.S. Bankruptcy Court for the District of Montana, take divergent views regarding the application of Stern and the jurisdiction of bankruptcy courts.

The *Stern* Case

Facts and procedural history

The *Stern* case arose from an inheritance dispute concerning the Texas millionaire J. Howard Marshall II (“Howard”), Howard’s wife Vickie Lynn Marshall (better known as Anna Nicole Smith and hereafter “Anna”), and Howard’s son E. Pierce Marshall (“Pierce”). Shortly before Howard’s death, Anna filed suit against Pierce in Texas state court, claiming that Pierce persuaded Howard to cut Anna out of Howard’s estate.⁵ Anna argued that Howard had meant to provide for her after his death through a trust and Pierce tortiously interfered with that gift.⁶ After Howard’s death, Anna filed a Chapter 11 bankruptcy in California. Pierce filed a proof of claim in Anna’s bankruptcy case alleging that Anna had defamed Pierce when, shortly after Howard’s death, Anna’s lawyers told reporters that Pierce had engaged in forgery, fraud, and overreaching to gain control of Howard’s assets.⁷ Pierce also initiated an adversary proceeding in the bankruptcy case seeking to except his defamation claim from discharge.⁸ Anna counterclaimed, alleging, among other claims, tortious interference with the expected trust gift. This was a compulsory counterclaim under Federal Rule of Bankruptcy Procedure 7013 and Federal Rule of Civil Procedure 13(a).

The bankruptcy court ruled against Pierce and awarded Anna more than \$425 million in damages.⁹ While the matter was pending on appeal, the Texas state court issued a conflicting judgment in favor of Pierce.¹⁰ After further appeals and one decision by the U.S. Supreme Court, the Ninth Circuit, on remand, held that Anna’s counterclaim was not a “core proceeding” under 28 U.S.C. § 157(b)(2)(C)

because resolution of her claim was not necessary to resolve the claims asserted against her by Pierce.¹¹ The U.S. Supreme Court granted certiorari.

The court’s analysis

The Court agreed with Anna that the bankruptcy court possessed the statutory authority to enter a final judgment on her counterclaim under 28 U.S.C. § 157, but it held that the U.S. Constitution required that an Article III judge resolve Anna’s common law counterclaim. Article III of the Constitution defines the judicial power of the United States and provides federal judges with important salary and tenure protections designed to prevent the political branches from encroaching on the power of the judicial branch.¹² Bankruptcy judges, however, are appointed pursuant to Article I of the Constitution, which confers Congress the power to “establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.”¹³ Therefore, the Court reasoned that bankruptcy judges lack the constitutionally imposed salary and tenure protections held by their Article III colleagues.

Relying on *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 284 (1856), the Court held that Congress violated Article III of the Constitution when it provided a bankruptcy judge with the authority to resolve Anna’s state law counterclaim.¹⁴ In other words, only an Article III judge could enter final judgment on Anna’s common law counterclaim. The Court concluded such a result was consistent with its plurality decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (plurality opinion), in which the Court held a statute’s grant of jurisdiction

to bankruptcy judges to issue final decisions on state law contract claims violated Article III of the Constitution.¹⁵ 28 U.S.C. § 157 was enacted in response to the *Northern Pipeline* decision.

A broad interpretation of *Stern*

In *In re Blixseth*, Chief Bankruptcy Judge Kirscher from the United States Bankruptcy Court for the District of Montana recently interpreted *Stern* and concluded that the bankruptcy court lacked the constitutional authority to adjudicate a fraudulent conveyance action brought under the Bankruptcy Code.¹⁶ The *Blixseth* court relied upon the reasoning from *Stern* that the U.S. Constitution's system of separation of powers prohibits Congress from removing cases from the Article III judiciary that are "the subject of a suit at the common law, or in equity, or admiralty."¹⁷ As stated by the *Stern* court: "When a suit is made of 'the stuff of the traditional actions at common law tried by the courts at Westminster in 1789,' and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article III judges in Article III Courts."¹⁸

The *Blixseth* court also observed that in order for a bankruptcy court to adjudicate claims normally heard by an Article III court, the claim must fall within one of the recognized exceptions to Article III. Previously recognized exceptions include territorial courts, courts martial, and the "public rights" exception.¹⁹ Noting that the U.S. Supreme Court held in *Granfinanciera, S. A. v. Nordberg*, 492 U. S. 33, 50 (1989), that fraudulent conveyance claims by bankruptcy trustees are quintessentially suits at common law that more nearly resemble state law contract claims, the *Blixseth* court held that fraudulent conveyance actions are more accurately characterized as a private rather than a public right.²⁰ The *Blixseth* court noted that actions tied to the claims allowance process would fall within the public rights exception as integrally related to the federal administration of bankruptcy cases, while actions to augment the estate would not. Relying upon *Granfinanciera* and *Stern*, the *Blixseth* court concluded that because a fraudulent conveyance claim is essentially a common law claim attempting to augment the estate, not stemming from the bankruptcy estate, and would not be resolved by the claims allowance process, "it is a private right that must be adjudicated by an Article III Court."²¹

The Bujak court determined that bankruptcy courts possess the necessary constitutional jurisdiction to adjudicate fraudulent conveyance claims.

A narrow interpretation of *Stern*

In *In re Bujak*, Judge Pappas, from the United States Bankruptcy Court for the District of Idaho, recently interpreted *Stern* and reached the opposite conclusion of the *Blixseth* court. The *Bujak* court determined that bankruptcy courts possess the necessary constitutional jurisdiction to adjudicate fraudulent conveyance claims.²² The *Bujak* court relied upon the *Stern* court's characterization of its holding as "a narrow one," and the constitutional infirmity identified in 28 U.S.C. § 157(b) (2) as limited to "one isolated respect."²³ The *Bujak* court also noted that the majority in *Stern* indicated their decision should have few practical consequences and that the removal of certain counterclaims from core bankruptcy jurisdiction would not meaningfully change the division of labor in the current statute.²⁴ Accordingly, the *Bujak* court discounted the arguments that *Stern* had much more broad implications on bankruptcy jurisdiction. The *Bujak* court declined to extend the reach of *Stern*'s constitutional analysis and indicated it would carefully apply *Stern*'s holding in its cases, "and refrain from extending that holding to facts different from those in *Stern*."²⁵ Because the fraudulent conveyance claims at issue in *Bujak* were premised upon the Bankruptcy Code, the court differentiated the case from *Stern*, which involved a counterclaim founded on state tort law.

Conclusion

Whether the *Stern* decision renders unconstitutional 28 U.S.C. § 157(b)(2) regarding core proceedings involving matters other than counterclaims by the estate against persons filing claims against the estate is a hotly contested issue. Bankruptcy courts have come down on both sides of this issue; interpreting *Stern* narrowly to the facts of that case, and expanding the scope of *Stern* to other core proceedings enumerated in Section 157(b) (2), including proceedings to determine,

avoid, or recover fraudulent conveyances. The U.S. Court of Appeals for the Ninth Circuit is set to review the implications of *Stern* on bankruptcy court jurisdiction sometime this year.²⁶ However, given the divergence of opinions regarding the impact of *Stern*, the U.S. Supreme Court may again be called upon to determine Anna's impact on bankruptcy jurisdiction.

About the Author

Noah G. Hillen is an associate in the Boise, Idaho, office of Moffatt, Thomas, Barrett, Rock & Fields and practices in the areas of creditors' rights and business law, and specializes in bankruptcy law. Previously, Mr. Hillen served as a law clerk for the Honorable Joel D. Horton at the Idaho Supreme Court and worked with Ford Elsaesser in his capacity as a chapter 7 trustee.

Endnotes

¹ 131 S. Ct. 2594, 2620 (2011).

² 28 U.S.C. § 152(b)(2).

³ 131 S. Ct. at 2617.

⁴ *Stern*, 131 S. Ct. at 2620.

⁵ *Marshall v. Marshall*, 457 U.S. 293, 300 (2006).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 301.

⁹ *Id.* at 302.

¹⁰ *Id.* at 303.

¹¹ 131 S. Ct. at 2602.

¹² *Id.* at 2601.

¹³ U.S. CONST. art. I, § 8.

¹⁴ 131 S. Ct. at 2611.

¹⁵ *Id.* at 2618-19.

¹⁶ *Blixseth v. Blixseth*, 2011 WL 3274042 at *12 (Bankr. D. Mont. Aug. 1, 2011).

¹⁷ *Id.* at *10.

¹⁸ 131 S. Ct. 2609 (citations omitted) (quoting *Northern Pipeline*, 458 U.S. at 90 (Rehnquist, J., concurring in judgment)).

¹⁹ *Blixseth*, 2011 WL 3274042 at *11.

²⁰ *Id.*

²¹ *Id.*

²² *In re Bujak*, 2011 WL 5326038 *2 (Bankr. D. Idaho Nov. 3, 2011).

²³ *Id.* at *1 (citing *Stern*, 131 S. Ct. at 2620).

²⁴ *Id.* (citing *Stern*, 131 S. Ct. at 2619-20).

²⁵ *Id.*

²⁶ *In re Bellingham Ins. Agency, Inc.*, Case No. 11-35162, CR 35 (9th Cir. Nov. 4, 2011).

A HEFTY AND GENERAL STARTING POINT

At first glance, the “Complete Guide to Credit and Collection Law” by Arthur and Jay Winston (Aspen Publishers, 2011), is somewhat daunting. Advertised as a comprehensive treatise on debt collection, this hefty book boasts over 2000 pages and contains 19 chapters on a variety of topics such as: legal terminology in a collection case; legal remedies for business creditors; checks, notes and guarantees; repossession of property; and the Fair Debt Collection Practices Act.

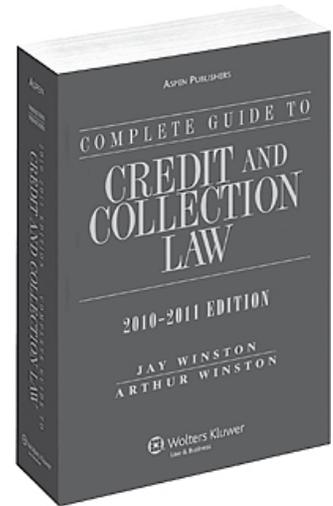
Nevertheless, each chapter contains a clear, plain-English explanation of legal concepts and applicable statutory and case law, along with useful tips geared toward the practical aspects of collection. For example, Chapter 2 gives guidelines on preparing demand letters and calling debtors and lists the top ten most frequently used excuses and how to respond to them. In addition, most of the chapters include

appendices containing excerpts from the federal code (e.g. the Gramm-Leach-Bliley Act, the Truth in Lending Act, and the Real Estate Settlement Procedures Act), various rules (e.g. AAA Commercial Arbitration Rules), state surveys of laws (e.g. state statutes of limitation, state laws governing commercial collection, and social security numbers by state) and/or other useful information. While a few of the appendices do provide information relevant to Idaho law, most of the book’s state specific content focuses on New York (where the authors practice law) and other high population states.

Therefore, while it may not directly provide the answer to an Idaho specific question, this practical and well-organized reference manual is a good general resource and research starting point for attorneys and others in the credit and collection industry.

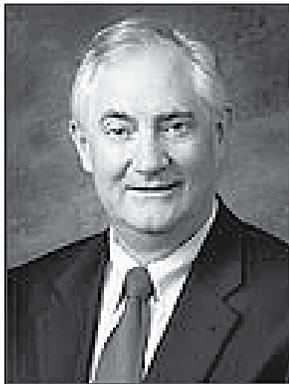
— Amber N. Dina, Boise

BOOK REVIEW



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Joel D. Horton

1st AMENDED - Regular Spring Terms for 2012

Boise. **January 5**
Boise. January 11, 13, 17, 18, and 20
Boise. February 8, 10, 14, 15, and 17
Coeur d'Alene. April 2, 3, and 4
Moscow April 5
Lewiston April 6
Eastern Idaho (Boise) May 2, 4, 7, 9, and 11
Twin Falls (Boise) June 4, 6, 8, 11, and 13

By Order of the Court
Stephen W. Kenyon, Clerk

NOTE: The above is the official notice of the 2012 Spring Terms of the Supreme Court of the State of Idaho, and should be preserved. A formal notice of the setting of oral argument in each case will be sent to counsel prior to each term.

OFFICIAL NOTICE COURT OF APPEALS OF IDAHO

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Regular Spring Terms for 2012

Boise. January 10, 12, 19, and 24
Boise. February 9, 16, 22, and 23
Boise. March 13 and 15
Northern Idaho March 20, 21, and 22
Boise. April 10, 17, 19, 24, and 26
Boise May 8, 10, 17, and 22
Boise. June 5, 7, 12, and 14

By Order of the Court
Stephen W. Kenyon, Clerk

NOTE: The above is the official notice of the 2012 Spring Terms of the Court of Appeals of the State of Idaho, and should be preserved. A formal notice of the setting of oral argument in each case will be sent to counsel prior to each term.

Idaho Supreme Court Oral Argument for January 2012

Thursday, January 5, 2012 – BOISE

2:00 p.m. Twin Falls County, et al. v. Idaho Commission on Redistricting#39373-2011

Wednesday, January 11, 2012 – BOISE

8:50 a.m. Stevenson v. Windermere Real Estate#38121-2010
10:00 a.m. Burns Holdings, LLC v. Teton County#38269-2010
11:10 a.m. Stonebrook Construction v. Chase Home Finance#37868-2010

Friday, January 13, 2012 – BOISE

8:50 a.m. Leslie Benz v. D.L. Evans Bank#37814-2010
10:00 a.m. Gomez v. Dura Mark, Inc. (Industrial Commission)#38809-2011
11:10 a.m. Bollinger v. Fall River Rural Electric#38248-2010

Tuesday, January 17, 2012 – BOISE

8:50 a.m. Bridge Tower Dental v. Meridian Computer#37931-2010
10:00 a.m. David F. Oakes, M.D. v. Boise Heart Clinic#38146-2010
11:10 a.m. Huskinson v. Nelson#38066-2010

Wednesday, January 18, 2012 – BOISE

8:50 a.m. Printcraft Press v. Beck#36556/36567-2009
11:10 a.m. Manning v. Campell#37728-2010

Friday, January 20, 2012 – BOISE

8:50 a.m. State v. Gomez (Petition for Review)#38889-2011
10:00 a.m. Ketterling v. Burger King Corp.#38050-2010
11:10 a.m. McNulty v. Sinclair Oil Corp.#38331-2010
(Industrial Commission)

Idaho Court of Appeals Oral Argument for January 2012

Tuesday, January 10, 2012 – BOISE

9:00 a.m. State v. Grist, Jr.#37372-2010
10:30 a.m. State v. Carter#38038-2010
1:30 p.m. State v. Randle#38047-2010

Thursday, January 12, 2012 – BOISE

9:00 a.m. State v. Two Jinn, Inc.#38620-2011
10:30 a.m. State v. Vargas#38274-2010
1:30 p.m. State v. Lynch#37303-2010

Thursday, January 19, 2012 – BOISE

9:00 a.m. State v. Stewart#37767/38051/38078-2010
10:30 a.m. State v. Wicklund#38310-2010

Tuesday, January 24, 2012 – BOISE

10:30 a.m. Kendall v. Orthman#38397-2011
1:30 p.m. State v. Smelser#38420-2011

Idaho Supreme Court and Court of Appeals
NEW CASES ON APPEAL PENDING DECISION
(Updated 12/1/11)

CIVIL APPEALS

Attorney fees and costs

1. Whether Fuchs was a prevailing party entitling him to seek costs and attorney fees pursuant to I.C. § 12-117.

Fuchs v. Alcohol Beverage Control
S.Ct. No. 38714
Supreme Court

Condemnation

1. Did the district court err in granting ITD summary judgment on HI Boise's access and circuitry claims on the basis *State ex. rel. Moore v. Bastian* does not permit a condemnee to collect damages for circuitry of travel caused by a condemnation, when *State ex. rel. Rich v. Fonburg* indicates that a condemnee is entitled to damages for all resulting inconveniences?

Transportation Board v. HI Boise, LLC
S.Ct. No. 38344
Supreme Court

License suspension

1. Based on the officer's stated observations of speeding and driving off the road, did the court err in finding the officer had authority to initiate the stop of Hansen outside the officer's jurisdictional boundaries based on I.C. § 67-2337 and 49-1405(1)(b)'s allowance for an extrajurisdictional stop?

Hansen v. Dept. of Transportation
S.Ct. No. 38435
Court of Appeals

2. Did the district court err in sustaining the license suspension of Mecham by adopting the hearing officer's findings and conclusions that Mecham had not met his burden of proof on issues of actual physical control and the fifteen minute observation period before testing?

Mecham v. Dept. of Transportation
S.Ct. No. 38502
Court of Appeals

3. Whether the district court exercised sound discretion in upholding the hearing officer's decision affirming Hubbard's driver's license suspension.

Hubbard v. Dept. of Transportation
S.Ct. No. 38969
Court of Appeals

Post-conviction relief

1. Whether the court erred by summarily dismissing Fisher's petition for post-conviction relief.

Fisher v. State
S.Ct. No. 38505
Court of Appeals

2. Did the court err in denying Reed's petition for post-conviction relief?

Reed v. State
S.Ct. No. 37773
Court of Appeals

3. Did the court err when it denied Rossignol's petition for post-conviction relief as he demonstrated his counsel was ineffective for failing to inform him it was his decision as to whether to testify regardless of his attorney's advice and that, had he testified, there is a reasonable probability the result of his trial would have been different?

Rossignol Jr. v. State
S.Ct. No. 38501
Court of Appeals

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

Stokes v. State
S.Ct. No. 37915
Court of Appeals

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

Johnson v. State
S.Ct. No. 38425
Court of Appeals

Property

1. Whether the district court properly found that Indian Springs possessed legal title to the real property sufficient to eject the Andersens from the real property.

Indian Springs v. Andersen
S.Ct. No. 38369
Supreme Court

Procedure

1. Did the district court err in determining that Kugler did not timely appeal from the magistrate decision and thus the court was without jurisdiction to consider the issues presented?

Kugler v. Heikes
S.Ct. No. 38352
Court of Appeals

Substantive law

1. Whether the district court erred in granting recognition, pursuant to I.C. § 10-1401 et. seq., to a German judgment on a claim that had been merged into a prior California judgment and was therefore barred by the doctrine of res judicata under both Idaho and California law.

Markin v. Grohmann
S.Ct. No. 37981
Supreme Court

2. Did the district court err in granting IDFG's motion to dismiss Wool Grower's amended complaint for failure to state a claim?

Idaho Wool Growers Assoc. v. State of Idaho
S.Ct. No. 38743
Supreme Court

Summary judgment

1. Whether the district court erred in holding that no genuine issues of material fact existed on the Van Engelen's affirmative defenses and in therefore granting summary judgment in favor of the bank.

Washington Federal Savings v. Engelen
S.Ct. No. 38484
Supreme Court

2. Whether the district court erred in interpreting the deed of conveyance at issue and in determining the boundary between the parties' property.

Marek v. Lawrence
S.Ct. No. 38827
Supreme Court

3. Did the court err in granting summary judgment on the settlement negotiation contract?

Tapadeera v. Knowlton
S.Ct. No. 38498
Supreme Court

4. Whether there was any question of material fact precluding the entry of summary judgment for the state on the basis of qualified immunity on the Rammell's 42 USC § 1983 claims.

Rammell v. State
S.Ct. No. 38724
Supreme Court

Termination of parental rights

1. Whether the court erred in terminating the parental rights of Jane Doe under the best interest analysis.

IDHW v. Doe
S.Ct. No. 39247
Supreme Court

Wills

1. Was it error for the court to grant summary judgment in favor of Washington Trust Bank and to rule that the advance of funds to the Ryan Bowman Trust and the execution of a promissory note and deed of trust which was recorded against real property owned by the Althea Lorraine Bowman Trust was authorized by the Last Will and Testament and by Idaho Law?

Bowman v. Washington Trust Bank
S.Ct. No. 38426
Supreme Court

**Idaho Supreme Court and Court of Appeals
NEW CASES ON APPEAL PENDING DECISION
(Updated 12/1/11)**

CRIMINAL APPEALS

Due Process

1. Did the court err in denying Watkins' motion for a mistrial, made after a state's witness revealed that Watkins had an earlier trial and appeal in this case?

State v. Watkins
S.Ct. No. 37906
Court of Appeals

2. Did the prosecutor commit misconduct during closing argument by asking the jury to draw an inference based on Lester's exercise of his right to remain silent?

State v. Lester
S.Ct. No. 38023
Court of Appeals

Evidence

1. Was there substantial competent evidence to support Hambrick's conviction for trafficking in cocaine?

State v. Hambrick
S.Ct. No. 38271
Court of Appeals

Pleas

1. Did the district court abuse its discretion when it denied Rendon's motion to withdraw his guilty plea?

State v. Rendon
S.Ct. No. 38275
Court of Appeals

**Search and seizure –
suppression of evidence**

1. Did the court err in denying Gwin's motion to suppress evidence found as a result of his traffic stop?

State v. Gwin Jr.
S.Ct. No. 38636
Court of Appeals

Sentence review

Did the court abuse its discretion when it revoked Alvarez-Martinez's probation?

State v. Alvarez-Martinez
S.Ct. No. 38168
Court of Appeals

Summarized by:

Cathy Derden
Supreme Court Staff Attorney
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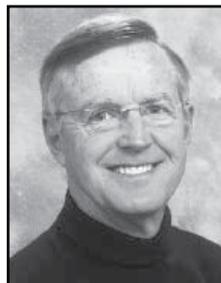
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FEDERAL COURT CORNER

Elizabeth A. "Libby" Smith *United States District and Bankruptcy Courts*

On September 30, 2011, the U.S. Courts for the District of Idaho had a retirement celebration to honor four employees who collectively possessed 97 years of institutional knowledge and experience. The four retirees were: Ronda Buck (who actually retired on June 30, Suzi Butler, Vicki Jones and Tom Murawski.

Ronda Buck began working for the courts in 1992 as a deputy clerk in the Pocatello Office. In April of 2004 Ronda became the deputy-in-charge of the Coeur d'Alene divisional office. In this position Ronda was responsible for many accomplishments, perhaps her most crowning achievement was her role in the development of the Coeur d'Alene Courthouse which was completed in 2008. Ronda exemplified the highest qualities and attributes required of her position as deputy-in-charge, never asking any of her staff to do something she would not do. She instilled in her staff the importance of learning, expanding knowledge and growing. Ronda fostered harmonious relations throughout the years with Probation & Pretrial Services, the U.S. Attorney's Office, the bankruptcy trustees, and others. Ronda is hoping to spend her retirement in some warm tropical places, full of family and friends.



Elizabeth A. "Libby" Smith

Suzi Butler was pretty much an institution here at the District of Idaho. She was hired in 1980 for her knowledge of the IBM Mag-Card memory typewriter and the IBM System-6, which means she had been here a very long time. Suzi started in docketing and became the resident criminal expert; she handled ALL the criminal work in the Boise office. In 2000 Suzi became the District of Idaho's Training Specialist. Truly, Suzi's reputation as one of the most highly regarded trainers in the federal judiciary is well known in both the district and bankruptcy circles. She traveled extensively training judges, law

clerks, court staff, attorneys and paralegals on the district and bankruptcy's court's policies and procedures and CM/ECF. Suzi has likely conducted hundreds of internal training and development programs for our court. She was also widely recognized as an expert regarding the CJA system. In fact, in addition to her primary job as a training specialist, she spent the last two years as the CJA expert and facilitated the implementation of new, greatly improved CJA computer systems. Suzi is described by her co-workers as a mentor, friend, confidante, avid BSU fan, golf enthusiast and someone who possesses a contagious laugh.

Vicki Jones began her career at the District of Idaho in 1984 as a deputy clerk for the bankruptcy court. In the mid-80s there were no computers; everything was prepared on a typewriter and if you needed a copy, you had to make a carbon copy! In 1987 Vicki was promoted to case administrator, where she performed her job responsibilities using a file bin full of what was affectionately referred to as "old hard docket sheets." Vicki's attention to detail and dedication were rewarded with yet another promotion to her last position as electronic sound recorder. She understood just how important her job was and that you only get one shot at getting the record. She was a consummate professional, always willing to take the long and difficult hearings and *always* had court covered. Vicki served the District of Idaho with great pride in her work for 27 years.

Tom Murawski first started with the District of Idaho in 1991, in connection with the implementation of the Civil Justice Reform Act, (*aka* the Biden Bill) whereby Congress appropriated sufficient money for each District in the country to assemble a Committee to study and analyze certain factors which might help reduce the costs and delays associated with federal civil litigation. Tom has served as administrative supervisor, deputy clerk administrative analyst, deputy clerk analyst and administrative analyst. Much of his work was done behind the scenes, but his contributions to this District have been substantial. While Tom's work product, which frequently includes reports substantiating the heavy workload and justifi-

The high level of detail and statistical data has no doubt contributed to the District of Idaho's reputation as one of the finest District and Bankruptcy Courts in the nation.

cation for increased judicial officers, may only be visible to a few, that work has benefited all of us. The high level of detail and statistical data has no doubt contributed to the District of Idaho's reputation as one of the finest District and Bankruptcy Courts in the nation. Wherever Tom's journeys take him, we wish him the best. To loyal Tom is to know that you have a very loyal and dedicated friend.

We will miss all of these individuals and the knowledge and expertise they brought to the District and wish them the very best in this exciting new chapter of their lives.

About the Author

Elizabeth A. "Libby" Smith has served as the Clerk of Court for the United States District and Bankruptcy Court for the District of Idaho since December 2009. Ms. Smith received a Master of Science in Business Information Technology (*Summa Cum Laude*) and a Bachelor of Business in Business Administration (*Magna Cum Laude*) from Walsh College in Troy, Michigan, graduating with honors. She is a 2010 graduate of the Federal Court Leadership Program and is currently enrolled in the Michigan State University Judicial Administration program. Ms. Smith is also a 2004 recipient of the Oakland County Bar Association's Liberty Bell Award. Ms. Smith resides in Boise with her husband and has two grown children who live in Michigan.



IDAHO'S NEW JUDICIARY IN 2011

Judge Michael R. McLaughlin and Judge Debra A. Heise
Co-Directors of *Judicial Education Director, Idaho Supreme Court*

As of Nov. 9, there have been three new Idaho judges appointed: one new District Judge and two new Judges of the Magistrate Division.

In the Fourth Judicial District

Judge Lynn Norton was appointed as a District Judge for the Fourth Judicial District, effective October 3, 2011 filling the vacancy left by the retirement of Judge Darla Williamson. Lynn Norton grew up in Alabama and received her bachelor's and law degrees from the University of Alabama. She also has served 21 years as an attorney in the United States Air Force and Air Force Reserve, rising to the rank of colonel. Norton served with the 366th Fighter Wing at Mountain Home Air Force Base from 2008 to 2010. She and her husband, Einar, have four children.



Judge Lynn Norton

In the Fifth Judicial District

Judge Nicole Cannon was appointed as a Magistrate Judge for Twin Falls County, effective March 9, 2011 filling the vacancy left by the retirement of Judge Howard Smyser. Following graduation from the University of Utah College of Law in 1996, Judge Cannon returned to her hometown of Rupert, Idaho, where she served as a deputy prosecuting attorney for approximately 11 years prior to being appointed prosecuting attorney for a year and a half to finish the term of her predecessor, Jason Walker, who had been selected as the new magistrate in Camas County. As a prosecuting attorney in a smaller, rural county, Judge Cannon handled all levels of criminal cases and civil matters for the county. She then worked for the law firm of Powers Tolman, PLLC, in Twin Falls, where her primary practice was insurance



Judge Nicole Cannon

defense, including medical malpractice cases.

In the Seventh Judicial District

Judge Michelle Fay Mallard was appointed as a Magistrate Judge for Bonneville County, effective January 3, 2012 filling the vacancy left by the retirement of Judge Earl Blower. Michelle Mallard attended the University of Idaho earning her Bachelor's Degree in 1993 and her law degree in 1996 from the same University. She was a law clerk in Latah County for the Judge John Bengtson and for the Honorable Ted Wood in Bonneville County. She was an associate with the Moffatt Thomas law firm. In May of 1997, she took a position with the Bonneville County Prosecutor's Office as a deputy prosecutor. In 2003, she joined the U.S. Attorney's Office for Idaho as an Assistant U.S. Attorney.



Judge Michelle Fay Mallard

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CONFUSING WORD PAIRS

Tenielle Fordyce-Ruff
Rainey Law Office

While I am admittedly prone to picking apart the written word to make one's writing more accurate, my inner noodle is generally more subdued when it comes to the spoken word. Speech is different than formal writing. First, it's generally more casual: the audience and setting are different. Second, we don't have to consider the rules of proper punctuation when speaking. Fortunately, the physical exchange between the speaker and the listener during speech takes the place of those pesky grammar and punctuation rules.

My general good-humor and acceptance of the relaxed standards of the spoken word do, however, have their limits. Sometimes, the words used are simply incorrect. While this may not confuse the meaning of your message, it may impact your credibility with the listener. For example, I recently got into an argument with my TV after hearing Mercedes's new commercial, the one in which a man announces his car has "*less doors*."

Did I hear that right? "*Less doors*"? Or was it "*Fewer doors*"? Which should it have been? This isn't casual speech — this is a national advertising campaign — and you would think Mercedes might take the time to get it right. Of course, after I got over my initial shock, I took a deep breath and embraced the commercial as inspiration for this month's article. For those of you who share my concern about misuse of confusing word pairs, here are some tips to make fewer mistakes.

Fewer v. Less

To take it easy on Mercedes, this pair is easy to mix-up; both *fewer* and *less* mean the opposite of more. But, it is important to note that they are used in different circumstances.

The basic rule is you use *fewer* with count nouns and *less* with mass nouns. A count noun is something you can count in-



dividually, and it can be plural. We can count the doors on a Mercedes. Therefore, if that commercial had otherwise inspired me to trade in my station wagon in for a convertible, my new car would have *fewer doors*!

Where count nouns are something that can be counted and can be plural, mass nouns are the opposite: they cannot be counted and they cannot be plural.

My station wagon has *less* appeal than that new Mercedes.

You can't quantify the appeal of that new car and you would never make it plural, saying that my new car has many *appeals*.

There are, of course, times when it is difficult to determine if a noun is a mass noun or a count noun. Because I cannot think of an automotive example, we'll go with coffee. If you are in charge of making coffee for a convention and it's nearly over, you would need to make *less* coffee. This is because coffee here is referring to a mass liquid beverage. If you are waiting tables at this convention and it's nearly over, you would need to bring out *fewer* coffees. This is because coffee here really means cups of coffee. Of course, a good tip off here is that the word coffees is plural in the second example, showing that you could count them.

And, like all good English rules, there are a few exceptions. Generally, we use *less* to describe time, money, and distance — even though their specific units of measurement can be counted. The deposition lasted *less* than three hours. I hope to pay *less* than \$1000 for the transcript. He traveled *less* than four blocks before being stopped for erratic driving.

We're going to keep counting, but you can stop worrying about mass and counting nouns. The choice *between* the two prepositions "among and between" depends on how many people or possibilities are involved.

Amount v. Number

To continue with the counting theme, amount and number are also used in different circumstances. Both can mean a quantity, but you use *amount* with mass nouns and *number* with count nouns. The *amount* of interest in this topic is surprising.

The *number* of readers of this article is astounding.

Likewise, the man in the Mercedes commercial is amazed at the *number* of doors on the car.

Among v. Between

We're going to keep counting, but you can stop worrying about mass and counting nouns. The choice *between* the two prepositions "among and between" de-



Tenielle Fordyce-Ruff

depends on how many people or possibilities are involved.

Use *among* when talking about three or more people or things. Use *between* when talking about two people or things.

That Mercedes is *among* the best in its class.

I had to choose *between* buying a new car and replacing my refrigerator.

Between you and me, I'd rather not choose.

(For the grammar lovers out there: Notice that *between* must be followed by pronouns in the objective case: you, me, him, them. The pronoun that follows *between* is always the object of *between*.)

This distinction between *among* and *between* can get a little fuzzy when describing the relationship of a thing to surrounding things both severally and individually. For instance, it is correct to write "The space *between* three points."

Which v. That

This distinction is one most people tend not to notice in speech. Nonetheless, because there is a difference and your meaning can change dramatically depending on which pronoun you use, it's worth spending a few minutes to learn the distinction.

Gear up for some grammar here. Use *which* with nonrestrictive clauses. A nonrestrictive clause adds information that a reader does not need to have to understand the sentence. Use *that* with restrictive clauses. A restrictive clause adds information that a reader must have to understand the sentence. Omitting the information following *that* could confuse the reader.

The victim identified the defendant's car, *which* was a convertible, as the vehicle that hit her.

You will also notice that 'which' is always used with a comma — this also tips you off that the information isn't necessary to the meaning.

The victim identified the defendant's car *that* was a convertible as the vehicle that hit her.

In the first example the defendant has only one car, so the reader doesn't need to know anything more about the car. *Which was a convertible* is not necessary to understand the sentence; it is simply extra information. In the second example, the defendant has two cars, and the victim makes it clear that she was struck by the convertible.

Let's try another example:

The judge read the briefs, *which* are good.

The judge read the briefs *that* are good.

In the first example, the judge read all the briefs and noted their excellence. In the second example the judge didn't read the briefs that were poorly written!

You will also notice that *which* is always used with a comma — this also tips you off that the information isn't necessary to the meaning.

Conclusion

I hope these tips have helped lessen your confusion regarding word pairs and, in the future, I promise to watch fewer TV commercials.

About the Author

Tenielle Fordyce-Ruff is a partner at Rainey Law Office. Her practice focuses on civil appeals. She was a visiting professor at University of Oregon School of Law teaching Legal Research and Writing, Advanced Legal Research, and Intensive Legal Writing and, prior to that, clerked for Justice Roger Burdick of the Idaho Supreme Court. While clerking for Justice Burdick, she authored *Idaho Legal Research*, a book designed to help law students, new attorneys, and paralegals navigate the intricacies of researching Idaho law. You can reach her at tfr@raineylawoffice.com.

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Perhaps more than those in any other profession, lawyers intuitively know the value of mentoring. Going beyond the basics of professionalism — a handshake, a warm smile, remembering names — some gentle career advice can do wonders for an attorney's self-confidence and success.

Collaboration with a mentor is especially helpful in an economy riddled with pitfalls. Mentoring also passes on the best of the profession to the next generation of lawyers. Perhaps that's why Idaho State Bar Commissioner Reed Larson has made mentoring a top priority during his tenure as president.

Reed has written about the importance of his own mentors in his president's column in recent issues of *The Advocate*, and he spoke about mentoring during the Resolution Roadshow meetings across the state this fall.

"When you have achieved a certain point in your career, you owe a debt of gratitude to those who helped you out. The only way to give back is to help others," he said. "There will always be people who will tell you that you can't do it," he said. "Whether you are a teacher, a lawyer or a cowboy, you will always need a person to tell you that you CAN do it."

The Idaho State Bar developed a formal mentorship program in 1996 that matches willing mentors and those wanting the advice. Deputy Director Mahmood Sheikh said he takes names throughout the year and he currently has nine mentorship matches.

"I talk with them about what they are looking for, practice areas and their general interests," he said. "Some meet regularly, and others meet just a few times. It just depends on the individuals."

Going solo in this economy

New graduate Jeremiah Hudson was one of those seeking a mentor. He moved to Boise to look for a job in 2010. "It was pretty bleak," he said. But rather than just mail out resumes and wait for an offer, he decided to take the plunge. He began taking cases.

He was looking for a little advice and called Mahmood, who matched him up with Mark Perison. The two first met at Mark's office. "He was laid back and put me at ease," Jeremiah said. "We just talked, drank coffee and he helped me



Photo by Dan Black

Jeremiah Hudson, left, has enjoyed the collaboration with his mentor, Mark Perison. "I would have an issue on my mind," Jeremiah said. "I'd bounce it off him. He'd help me work through my own problems. It never hurts to have a second opinion, especially about practice and running a business."

problem-solve my plans. Mark was really supportive. I always thought I would be in business," Jeremiah said. "So I decided to just run with it. I had a lot of resistance with my friends, but not from Mark."

"You have a limited pot of money to start with so you have to be careful," Mark said. "I told him to resist the temptation to work out of your home. There's just something about a professional work space that clients notice."

Jeremiah wasn't sure what area of law to practice, but Mark suggested he not worry about it. Doing general litigation will expose him to different areas of law and you don't need to be exclusive at the start.

The two talked about marketing, branding and how to establish a good reputation. Jeremiah signed up with the ISB's Lawyer Referral Service, joined the Young Lawyers Practice Section, and bought some advertising. The phone started ringing. Mark recommended a graphic designer for a logo, something that didn't occur to Jeremiah. He needed a polished look for his business cards, letterhead and office sign.

"These materials get passed around," Mark said. "You need a professional look."

Jeremiah found an attorney's office with a shared receptionist, so he wouldn't have to answer his own phone. "If you are

constantly getting interrupted taking calls and filing, then you are not utilizing your assets," he said. "As a lawyer, your product is your time." One of the most helpful tips was a daily log essential for time management and billing.

Mark said he has thoroughly enjoyed mentoring Jeremiah and showing him what is possible. "I talked to him about where he wants to go. Then he set a direction and he can push toward that goal."

Through their collaboration, Jeremiah got a web page and purchased a new laptop computer. Now, after several months, Jeremiah says his business is doing well and he's getting plenty of calls. He and his mentor meet less often now, but Jeremiah appreciates bouncing ideas off Mark, especially for practice tips.

One-on-one interaction is key for those wanting some personalized advice, no matter how trivial, Mahmood said. Those practicing law will always be mindful of their own strengths, and curious about ways to improve their image and performance.

— Dan Black

To be assigned a mentor,
or to serve as mentor,
contact Mahmood Sheikh
at (208) 334-4500
or msheikh@isb.idaho.gov

IN MEMORIAM

Andrew E. (Andy) Schepp 1971 - 2011

Andrew E. (Andy) Schepp, 40, died in a paragliding accident near Swan Falls on Saturday, Oct. 15. Andrew was born May 8, 1971. He grew up in St. Louis, Missouri. He received a Bachelor of Arts in Political Science from Western State College in Gunnison, Colorado in 1994 and a Juris Doctorate from University of Idaho College of Law in 2000.



Andrew E. (Andy) Schepp

At the time of his death he was employed as an attorney at Brady Law Chartered of Boise. Andrew excelled at parenthood, helping to care for his children as infants and reading to them nightly as toddlers. Andrew's sense of humor included much silliness such as memorizing all the lines of comedy films such as "Caddy Shack."

He also appreciated nature, spending as much time outdoors as possible. He went the extra mile for his legal clients and enjoyed doing so. A loving husband and father, Andrew is survived by his wife Christine (Keavy) Schepp and their two sons, Ethan, 4, and Cameron, 2; his parents, Edwin (Ted) and Renate Schepp, and Janice and Anson Eickhorst; his sister, Martha (Schepp) Granirer.

Mark Stephen Moorer 1958 - 2011

Mark Stephen Moorer, 52, died from complications following surgery at Whitman Hospital and Medical Center in Colfax, Wash., on Oct. 18.

Mark was born Oct. 24, 1958, to Winfred and Beverly Moorer in Spokane, Wash. Mark was a graduate of Moscow High School and held degrees in agriculture science, Master of Business and Juris Doctorate from the University of Idaho.

Mark married Sharon Stoll in 1981 and they had two children, Amanda Stoll-Moorer, 24, and Rachal Stoll-Moorer, 22. Mark built a successful law practice and business in Moscow, Idaho. He was well known for his civic and community affairs, and was a devoted member of the Elmore United Methodist Church outside of Potlatch, Idaho.

He served as a member of the Potlatch School Board, was a former member of the State School Board Association, chairman

of the board of the Elmore United Methodist Church, member of the Idaho and Washington State Bar associations, American Bar Association, Idaho Federal Defenders and former president of the Second District Bar Association. Mark was affectionately known in the community as "Farmer Mark" because of his lifelong love of farming and ranching. Mark also loved the practice of law and helping others in need.

The family wishes to extend special thanks to: Pullman Regional Hospital surgical team, Medstar Life flight team and the emergency staff at Whitman County Medical Center. Donations can be made to Elmore United Methodist Church, Box 584 at 6147 Highway 95, Potlatch, ID 83855.

Edwin V. "Win" Apel Jr. 1949 - 2011

Win Apel, 62, of Winston-Salem, NC, and formerly of Boise, died Nov. 28 at Wake Forest University Baptist Health in Winston-Salem, NC after a year-long bout with a brain tumor.

Win was born in Oil City, PA, and married Mary Loretta "Lorrie" Marconi in 1973.

Win graduated from Yale University with a B.A. in Philosophy in 1972 and in 1977 he graduated from the University of Idaho College of Law.

He was an attorney in the U.S. Courts in Boise, ID from 1977 to 1978, then for Hawley Troxell Ennis & Hawley law firm from 1978 to 1990. From 1990 to 2008, he was an attorney for Morrison Knudson and then Washington Group International in Boise. He was the General Counsel for Weeks Marine in Cranford, NJ from 2008 until 2011.

Win ran marathons in all 50 states, Washington D.C., and on all seven continents. In total, Win ran 76 marathons. He was an extensive world traveler, having visited over 35 foreign countries. He was



Mark Stephen Moorer



Edwin V. "Win" Apel Jr.

also an avid amateur photographer and classic car enthusiast.

He is survived by his wife, of Winston-Salem and three sons.

William E. Anderson 1936 - 2011

William E. Anderson, 75, a retired Moscow attorney and active civic leader, died peacefully Dec. 2, from complications following surgery. He was surrounded by loved ones. A memorial celebration was held on December 17 at the Moscow Church of the Nazarene.

Bill was born to William and Florence Oberg Anderson at the family home in Moscow, Idaho. After graduating from Moscow High School, he enrolled in the University of Idaho and received his Bachelor of Science Degree in Business in 1959. Following graduation, he attended officer's candidate school and served four years in the U.S. Navy. He loved being a navigator and enjoyed studying the stars. He was a loyal member of the SAE fraternity, serving the chapter and its members from his heart. On October 29, 2011, he received the Merit Key Award, SAE's second highest honor. He was thrilled by this recognition and the time he spent with much loved brothers.

Bill returned to Moscow where he worked at First Federal Savings and Loan for a year and then enrolled at the University of Idaho College of Law. He served as Alternate Police Judge and Alternate Justice of the Peace in 1964, Police Judge and Justice of the Peace in 1965-66, Probate Judge Pro-Tem in 1967 and deputy prosecuting attorney. Upon graduation, he joined the law office of Felton and Bielenberg and later became a partner. The firm became Bielenberg, Anderson and Walker.

In 1969, Bill was elected Prosecuting Attorney for Latah County and served two terms. He excelled in the courtroom, and liked serving clients in private practice. He appreciated knowing he had helped people. Bill was committed to the local community through volunteer work such as the Executive Board for the University of Idaho Alumni Association and served as President in 1979-80. He also served on the American Festival Ballet Board of Directors, Moscow Chamber



William E. Anderson

IN MEMORIAM

of Commerce Board of Directors, KUID Board of Directors, Central Business District Committee, Moscow Downtown Association.

Bill believed in a thriving downtown and the small business owner. He was influential in rerouting traffic to Jackson and Washington streets, planting trees and revitalizing Main Street.

Bill appreciated nature and animals and was delighted by the wildlife around

his home on Moscow Mountain. He was a gifted athlete and enjoyed all things physical including golf, racquetball, skiing, and boating. He loved jumping the wake and slapping his skis on the water; growing geraniums and begonias; a good book; eating lots of Dungeness crab; attending Vandal games; singing made up songs in the shower; the color green, the number 7 and fireworks with a big bang. He made

Potatis Korv sausage to celebrate his Swedish heritage. Cruising on his 1954 Ford Jubilee tractor gave him great joy.

He is survived by his long time companion Sue Smith; his daughters, Pamela Smallwood and husband Neil of Houston and Anne Anderson of Palouse; his cousins Mary Miller Lyon, Kathryn Anderson and Nancy Ruth Peterson of Moscow; John Miller of Sequim; and his much-loved dogs Johnson and Maggie.

OF INTEREST

John J. Burke named Regional Director for Defense Research Institute

The Defense Research Institute, (DRI) recently installed John J. Burke of Hall, Farley, Oberrecht & Blanton, P.A., as a Regional director during its annual meeting recently held in Washington, D.C.

Burke has had 19 years of law practice and has been a DRI member since 1996. His practice focuses on civil litigation, emphasizing professional and medical malpractice, pharmaceutical and medical device litigation and defense of civil rights (Section 1983) claims. He has served as the DRI Idaho State Representative from 2004-2007. He has served as a member of the Board of Directors for the Idaho Association of Defense Counsel (IADC) since 2006 and is the immediate past president of the IADC.

Burke will serve as a regional director from 2011-2014. He will serve alongside fellow newly elected regional directors. DRI will host more than 20 seminars and dozens of webcasts throughout 2012 that will focus on a variety of substantive law topics.

Powers Tolman names Portia L. Rauer shareholder

Portia L. Rauer has become a shareholder at Powers Tolman, PLLC. Portia began practicing law in 2005 and associated with Powers Tolman upon its formation in 2008. She graduated from the University of Idaho, *summa cum laude*, with

a Bachelor of General Studies degree in 2003. She received her Juris Doctorate degree from the University of Idaho, College of Law in 2005. During law school, Portia was Editor-in-Chief of the Idaho Law Review, vice-president of the Women's Law Caucus, and winner of the Idaho State Bar Water Law Writing Competition.

Her legal career began in 1983 as a secretary for the Honorable Thomas G. Nelson in Twin Falls, Idaho. In her secretarial capacity, she worked on the Swan Falls Agreement and the lawsuit that began the Snake River Basin Adjudication. She moved back to her roots in eastern Idaho in 1985 and was a paralegal for 15 years at Rigby, Thatcher, Andrus, Rigby, Kam & Moeller in Rexburg, Idaho. Portia is admitted to practice law in all courts of the State of Idaho, the United States District Court for the District of Idaho, all courts of the State of Washington, the United States District Court for the Eastern District of Washington, and the United States Court of Appeals for the Ninth Circuit.

Her practice at Powers Tolman, PLLC focuses on complex civil litigation, with an emphasis on professional licensing, credentialing, and privileging matters for healthcare providers; defense of professional liability claims; commercial and casualty litigation; product liability, and healthcare litigation. Throughout her legal career, Portia has participated in over two dozen bench and jury trials. In addition, Portia has participated in a number of appeals before the Idaho Supreme Court. Portia also has experience in government

relations as a registered lobbyist for physicians, having appeared before the Idaho legislature on healthcare issues.

Creason named Fellow to American College of Trial Lawyers

Theodore O. Creason has become a Fellow of the American College of Trial Lawyers, one of the premier legal associations in America.

The induction ceremony at which Theodore Creason became a Fellow took place recently before an audience of approximately 800 persons during the recent 2011 Annual Meeting of the College in La Quinta, California.

Founded in 1950, the College is composed of the best of the trial bar from the United States and Canada. Fellowship in the College is extended by invitation only and only after careful investigation, to those experienced trial lawyers who have mastered the art of advocacy and whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility and collegiality. Lawyers must have a minimum of 15 years trial experience to be considered for Fellowship. Membership in the College cannot exceed one percent of the total lawyer population of any state or province.

Admitted to the Bar in 1973, Creason is a partner in the firm of Creason, Moore, Dokken & Geidl and has been practicing in Lewiston for 36 years. The newly inducted Fellow is an alumnus of the University of Idaho School of Law.



John J. Burke



Portia L. Rauer



Theodore O. Creason

OF INTEREST

Zarian Midgley merges with Parsons Behle & Latimer

Zarian, Midgley & Johnson, PLLC, Idaho's today announced its merger with Salt Lake City-based Parsons Behle & Latimer, one of the oldest and best-known law firms in the Intermountain region. The merger enhances the resources available to Zarian Midgley's clients and deepens the firm's strength in handling high-stakes litigation. The merger significantly expands Parsons Behle & Latimer's intellectual property practice and enlarges its geographic footprint to include offices in Salt Lake City, Reno, Las Vegas and Boise.

The Zarian Midgley legal team will remain intact through the merger, with 14 attorneys (including 12 registered patent attorneys) and staff joining Parsons Behle & Latimer. Zarian Midgley is now known as the Boise office of Parsons Behle & Latimer. John N. Zarian will become the



John N. Zarian

managing partner of the firm's Boise office. Peter M. Midgley and Rexford A. Johnson will co-chair Parson Behle & Latimer's firm-wide intellectual property law department.

"Zarian Midgley has enjoyed fast-paced growth since its founding in 2007," said John N. Zarian, founding partner of Zarian, Midgley & Johnson. "Combining the skills of national-caliber lawyers with the service and value of an Idaho firm has allowed us to offer clients a tremendous value proposition."

After a great deal of consideration, however, Zarian Midgley's partners determined that merging with Parsons Behle & Latimer was a perfect marriage, bringing together two law firms with compatible quality of services, cultures, billing rates, and strategic plans.

"The merged firm will have greater reach and significantly greater resources, without being too big," said Zarian. "The merger also allows us to recruit more ef-



Peter M. Midgley

fectively in the Utah legal market, which has a deep pool of registered patent attorneys."

Zarian Midgley's registered patent attorneys and lawyers hold technical degrees in electrical engineering, computer engineering, physics, chemical engineering, microbiology, genetics, molecular and cellular biology, aeronautical engineering, mechanical engineering, civil engineering, manufacturing engineering, and computer science.

"This merger is an important move for our firm," said Raymond J. Etcheverry, president and CEO of Parsons Behle & Latimer. "With the recent passage of the America Invents Act, intellectual property and patent law will continue to be one of the fastest-growing areas of legal specialization. The Zarian Midgley team has a national reputation for its expertise and skill. They bring a great benefit to current and future clients of our firm."



Rexford A. Johnson

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- Erin Melissa Carr Agidius**
aka Erin Melissa Carr
Moscow, ID
University of Idaho College of Law
- Todd Christopher Amick**
Boise, ID
University of Montana School of Law
- Jeremy J. Andrew**
Garden City, ID
The Thomas M. Cooley Law School
- Amy Elizabeth Asher**
Los Angeles, CA
Pepperdine University School of Law
- Stephanie Claire Asher**
Los Angeles, CA
Pepperdine University School of Law
- Sean Patrick Bartholick**
Sugar City, ID
Washburn University
- David Peter Barton**
Boise, ID
University of California-Berkeley
- Kristian Scott Beckett**
Sammamish, WA
University of Idaho College of Law
- Suzanne Christine Benko**
Dana Point, CA
City University of New York
- Aaron K. Bergman**
Smithfield, UT
University of the Pacific, McGeorge School of Law
- Alex Bezu**
aka Alexander Bezugly
Federal Way, WA
Washburn University
- Jesse R. Binnall**
Fairfax, VA
George Mason University School of Law
- Nikeela Renae Black**
aka Nikeela Renae Crater
Jerome, ID
University of Idaho College of Law
- Theodore Braden Blank**
aka Thad Blank
Boise, ID
University of California-Berkeley
- Alan Joseph Boehme**
Athens, GA
University of Georgia School of Law
- Shawn D. Boyle**
Shelley, ID
University of Idaho College of Law
- Steven Dewey Brignone**
Yakima, WA
University of Idaho College of Law
- Jason Michael Brown**
Chubbuck, ID
University of Idaho College of Law
- Jennifer Lynn Brozik**
aka Jennifer Lynn Perkins
Pullman, WA
University of Idaho College of Law
- Keith Reiferd Burch**
Orofino, ID
University of Idaho College of Law
- Jonathan Charles Callister**
Henderson, NV
Penn State University, The Dickinson School of Law
- Eric Robert Carty**
aka Eric Robert Powers
Henderson, NV
Rutgers University-State Univ of NJ-School of Law-Camden
- Felicity Abigail Miranda Chamberlain**
Portland, OR
University of Oregon School of Law
- Lee Wayne Clark**
Meridian, ID
Santa Clara University School of Law
- Ruth Coose**
aka Ruth Amanda Wooldridge
Boise, ID
University of Idaho College of Law
- Kellen C. Corbett**
Spokane, WA
Gonzaga University
- Jeffrey Lee Cotton II**
Boise, ID
University of Idaho College of Law
- Brandon Paul Crane**
Aliso Viejo, CA
University of California, Hastings College of Law
- Seth Hayden Diviney**
Boise, ID
University of Idaho College of Law
- Laura Ladd Dodge**
Coeur d'Alene, ID
University of Utah S.J. Quinney College of Law
- Ryan Ernest Farnsworth**
Idaho Falls, ID
University of Utah S.J. Quinney College of Law
- Michael John Ferrigno**
Meridian, ID
Catholic University of America, Columbus School of Law
- Dijon Michelle Fiore**
aka Dijon Michelle Townsend
San Diego, CA
Thomas Jefferson School of Law
- Fredrick William Freeman**
Boise, ID
University of Idaho College of Law
- Lorrie J. Haug**
aka Lorrie Jean Pollard
Henderson, NV
University of Nevada, Las Vegas, Wm S Boyd School of Law
- Dylan Reyner Hedden-Nicely**
Moscow, ID
University of Idaho College of Law
- Kathryn Jean Ivers**
aka Kathryn Ivers-Thomason
Boise, ID
Columbia University School of Law
- Trevor Elliott Jack**
Eagle, ID
Notre Dame Law School
- Roxana Angelica Jimenez**
aka Roxana Dunteaman
Coeur d'Alene, ID
Loyola University Chicago School of Law
- Lucy R. Juarez**
Rita Lucia Juarez
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University of Utah S.J. Quinney College of Law
- Gary Mitchell Kirkham**
aka Mitch Kirkham
Moscow, ID
University of Idaho College of Law
- Timothy Ryan Kurtz**
Boise, ID
University of Denver Sturm College of Law
- Shawnee S. Lane**
aka Shawnee Suzanne Ireland
Boise, ID
University of the Pacific, McGeorge School of Law
- Braden John Lang**
Boise, ID
The University of Chicago Law School
- F. Scott Larsen**
Findlay, OH
Ohio Northern University-Claude W. Pettit College of Law
- Benjamin Oliver Layman**
Pocatello, ID
University of Idaho College of Law
- J. Kelso Lindsay**
aka Kelly Lindsay
Long Beach, CA
Loyola Law School, Loyola Marymount University
- Laura Beth McClinton**
Liberty Lake, WA
Gonzaga University
- Sandra Anne McCune**
Orofino, ID
University of the Pacific, McGeorge School of Law
- Kurt V. Merritt**
Boise, ID
Arizona State University
- Shawn G. Miller**
Irving, TX
Oklahoma City University School of Law
- Tanaz Moghadam**
Boise, ID
Columbia University School of Law
- Jeremy Ray Morris**
Moneta, VA
Liberty University School of Law
- Jessica Laraine Partridge**
aka Jessica Laraine Schoeder
San Diego, CA
University of San Diego
- William Lindsay Partridge**
San Diego, CA
University of San Diego
- Kristen Ann Pearson**
Post Falls, ID
Widener University-Harrisburg
- Aaron Thoreau Penrod**
Egg Harbor Township, NJ
Duquesne University School of Law
- Grover Cleveland Peters III**
aka Pete Peters III
Pullman, WA
University of Nevada, Las Vegas, Wm S Boyd School of Law

February 2011 Idaho State Bar Examination Applicants

(as of December 7, 2011)

Susan Roche Pierson
aka Susan Mary Roche
Boise, ID
*University of Maryland
School of Law*

Scott N. Pugrud
aka Doo Il Kang
Boise, ID
*Willamette University
College of Law*

Matthew David Purcell
Boise, ID
*William & Mary Law
School*

**Georgianna Elizabeth
Gaines Ramsey**
aka Annie Elizabeth
Gaines
Virginia Beach, VA
*Washington and Lee
University School of
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**Chad Craig
Rasmussen**
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College of Law*

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Rexburg, ID
Washburn University

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Sarah Elizabeth Rupp
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David Duane Snider
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*University of Idaho
College of Law*

Kimberly Anne Soyer
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Smith
aka Melissa Smith
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**Teague Steven
Thorne**
Blackfoot, ID
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aka Rachel Erin
Balcerzak
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Matthew Joseph Vook
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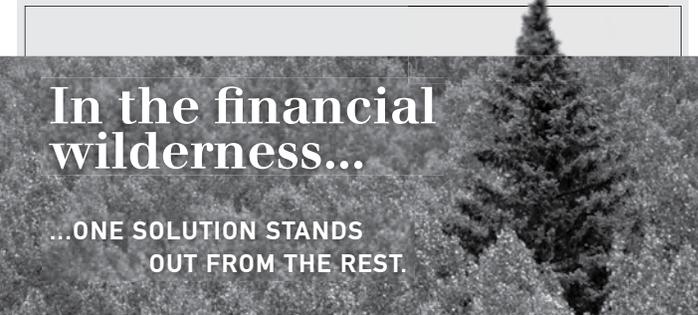
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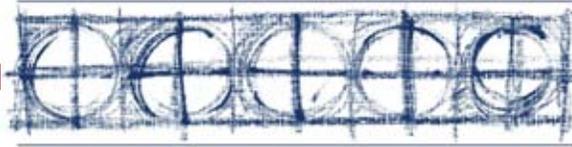
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Idaho Law Foundation, Inc. Law Related Education Program

For funding to help Idaho citizens to understand law as the basis of a democratic society and teach students participative democracy skills. Program components include: High School Mock Trial, Law-

yers in the Classroom, Teacher Training, the LRE Resource Library, and Citizens' Law Academy.

Treasure Valley Family YMCA Youth Government Program

For financial assistance to students participating in Youth Government, administered by the Treasure Valley YMCA.

Idaho Law Foundation, Inc. Legal Resource Line

For general expenses of the Legal Resource Line, which offers a limited consultation with a lawyer by telephone to Idaho residents, supplementing the services provided by Court Assistance Offices.

Idaho State 4-H Office 4-H Know Your Government Conference

For general support of the Idaho State 4-H Know Your Government Conference which allows for 182 Idaho 4-H members an opportunity to learn about the legislative and judicial branches of government.

IU of I College of Law Scholarship Program

To award Public Interest Fellowships to encourage students to and reward them for taking unpaid summer positions that serve the public interest.

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Moffatt Thomas is pleased to announce the addition of Norman M. Semanko as an Attorney of Counsel with the firm. Mr. Semanko's experience includes:



- Executive Director & General Counsel, Idaho Water Users Association, Inc.
- President & Director, National Water Resources Association
- President & Director, Idaho Council on Industry and the Environment
- General Counsel, Republican National Committee
- Western States Water Council
- Advisory Committee, Family Farm Alliance
- President, Coalition for Idaho Water
- Eagle City Council
- Chairman, Idaho Republican Party
- President, Food Producers of Idaho

Mr. Semanko's extensive experience in water resources issues and his working relationships with members of local, state, and federal government and regulatory agencies further bolsters Moffatt Thomas's expertise in agricultural law, water rights, environmental law, land use, mining, and public lands. Mr. Semanko joins the firm's water and natural resources practice group: Scott Campbell, Andy Waldera and Dylan Lawrence.

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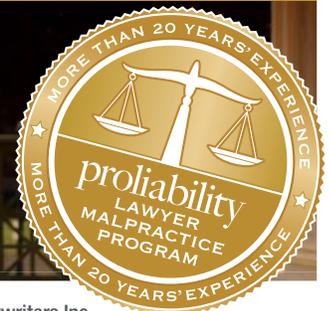
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The law firm of Greener Burke + Shoemaker
is pleased to announce that

Tara Martens Miller
has joined the firm as a Partner.



A native of Idaho, Tara has practiced as a partner at other Boise and Twin Falls firms during the last thirteen years. Tara's practice focuses on litigation with an emphasis on professional malpractice defense, insurance defense and commercial matters. She also practices in the areas of health care, business and real estate transactions.

tmiller@greenerlaw.com
(208) 319-2600
Banner Bank Building
950 W. Bannock Street, Suite 900
Boise, Idaho 83702

greener|**burke**|shoemaker|p.a.
attorneys at law

Portia L. Rauer



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Powers Tolman, PLLC, with offices in Boise and Twin Falls, is proud to welcome as Partner, **Portia L. Rauer**.

Portia has over 25 years of experience in the legal community. Her practice is focused on professional licensing and privileging matters for healthcare litigation and insurance bad faith.

Powers Tolman, PLLC, specializes in complex civil litigation, including medical malpractice defense, healthcare liability, commercial and casualty litigation, and insurance coverage analyses.

Portia L. Rauer can be reached at
plr@powerstolman.com
or 208-577-5100.

2012 Annual Meeting

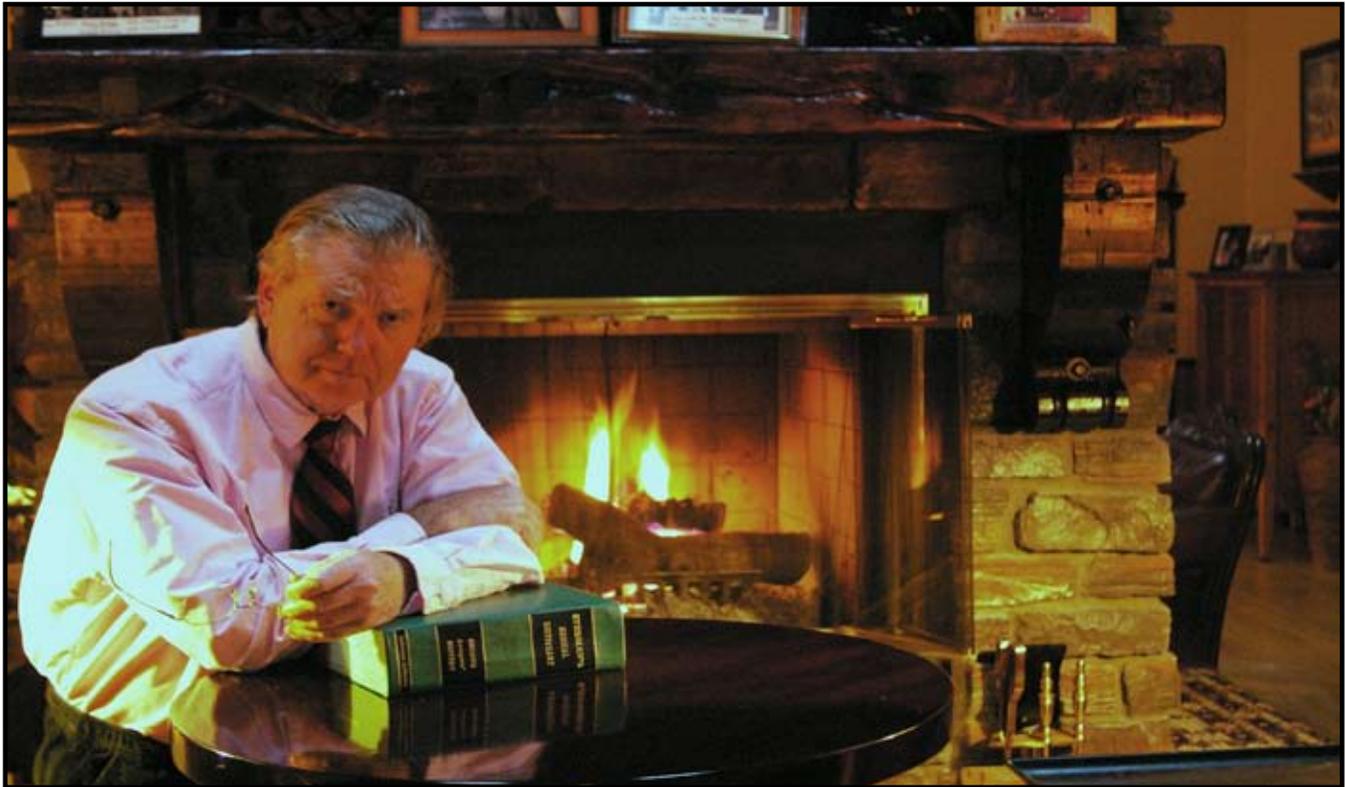
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Idaho Law Review Health Care Symposium Guide, 2008.



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Visit Habitat Lodge soon; also check out my website at: Schlenderlaw.net. Let's discuss your case. Free copies of my book on trying a medical case are still available!

Member, Idaho and Washington Bar Associations; Author, *Medical Negligence Law for The Patient's Lawyer*, 2001, ISBN:0-9711450-0-8; Lib. of Cong. 2001091179.

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