

# The Advocate

Official Publication  
of the Idaho State Bar  
Volume 55, No. 6/7  
June/July 2012

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# The Advocate

The Official Publication of the Idaho State Bar  
55 (6/7), May 2012

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## On the Cover

The photo was taken by Jennifer Cafferty-Davis at her family's cabin, which is located in Lowman, ID. Her family spends several weekends throughout the year up at the cabin, enjoying the quiet life of the mountains. They have a favorite swimming hole where they spend the majority of their days, and the dragonflies seem to be regular summer visitors.

Ms. Cafferty-Davis is a litigation paralegal at Anderson, Julian & Hull, and is also the owner of Memory Lane Photography. She specializes in outdoor, natural light photography. When she's not booked up with weddings and family photoshoots, she loves exploring outdoor Idaho with her family with camera in hand.

## Section Sponsor

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

## Editors

Special thanks to the June/July editorial team: Scott E. Randolph, Anna E. Eberlin and Jennifer M. Schindele.

# “My Mother Could No Longer Take Care Of Herself”



It started when Mom began calling me at work several times a week. “I went out to walk my little dog,” she would say, “and I forgot my key. I’m calling from my neighbor’s apartment, could you come over with your key and let me in?”

When I went in, I was shocked. My mother, who had always been so neat, was living in the middle of a mess. Then one day she left something on the stove and started a small fire.

Finally, there came a day when she fell and broke her hip. My mother could no longer take care of herself. But I didn’t know what to do: In-home care? Assisted living? Nursing home?

**And how was I supposed to pay for it?**

Thanks to the miracles of modern medicine and healthier lifestyles, seniors are living longer than ever before. Unfortunately, many are outliving their own ability to care for themselves. The average nursing home cost in Idaho is \$84,000 per year.

The legal and financial challenges posed by extended old age can only be answered on an individual basis by an attorney whose practice is concentrated on Elder Law, Medicaid, VA, 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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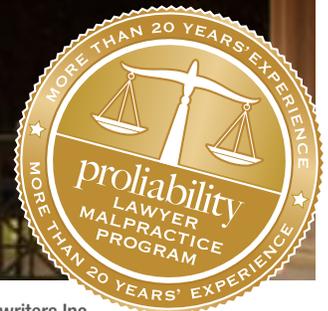
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# Upcoming CLEs

## June

10% off all Idaho Law Foundation CLE rentals and publications purchased through the Law Center Library in the month of June. For more information please contact Beth Conner Harasimowicz at (208) 334-4500 or [bconner@isb.idaho.gov](mailto:bconner@isb.idaho.gov).

### **Breakfast with Legends: Lessons from Major Leagues of the Bench and Bar CLE Series**

Sponsored by the Young Lawyers Section

8:00 - 9:30 a.m. (Local time)

1.0 CLE credit

**June 8** – University Inn Best Western, Moscow

**June 15** – Elmer's Restaurant, Boise

**June 20** – Smitty's Pancake & Steak House, Idaho Falls

**June 22** – Twin Falls Senior Center, Twin Falls

**June 6** – Elmer's Restaurant, Pocatello

### **June 8**

*Golfing for Ethics*

Sponsored by Professionalism and Ethics Section

8:30 a.m. (MDT)

Warm Springs Golf Club – Boise

2.0 CLE credits, of which 2.0 is ethics

### **June 14**

*Bankruptcy Appellate Panel Luncheon*

Cosponsored by Commercial Law and Bankruptcy Section and the Idaho Chapter of the Federal Bar Association

Noon (MDT)

Rose Room – Boise

.5 CLE credits

## July

### **July 11-13, 2012**

*Idaho State Bar Annual Meeting*

The Riverside Hotel

Boise, ID

Opportunity to obtain at least 10 CLE credits

## August

### **August 22**

*Handling Your First or Next Divorce*

Sponsored by the Idaho Law Foundation

8:30 - 9:30 a.m. (MDT)

Law Center, Boise/Statewide Webcast

2.0 CLE Credits **(RAC)**

### **August 29**

*CLE Idaho: Lunch and a Movie*

Sponsored by the Idaho Law Foundation

11:15 a.m. - 1:15 p.m. (Local time)

Bonner General Hospital, Sandpoint

Red Lion Hotel Canyon Springs, Twin Falls

2.0 CLE credits **(RAC)**

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

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

## Attend a CLE that keeps you on the cutting edge

### **Live Seminars**

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

### **Online On-demand Seminars**

Pre-recorded seminars are available on demand through our online CLE program. You can view these seminars at your convenience. To check out the catalog or purchase a program go to [isb.fastcle.com](http://isb.fastcle.com).

### **Webcast Seminars**

Many of our one-to three-hour seminars are also available to view as a live webcast. Pre-registration is required. Watch the ISB website and other announcements for upcoming webcast seminars. To learn more contact Dayna Ferrero at (208) 334-4500 or [dferrero@isb.idaho.gov](mailto:dferrero@isb.idaho.gov).

### **Recorded Program Rentals**

Pre-recorded seminars are also available for rent in DVD, VCR and audio CD formats. To visit a listing of the programs available for rent, go to [isb.idaho.gov](http://isb.idaho.gov), or contact Beth Conner Harasimowicz at (208) 334-4500 or [bconner@isb.idaho.gov](mailto:bconner@isb.idaho.gov).





CONCORDIA UNIVERSITY  
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-BOISE, IDAHO-

## Get to Know Concordia Law Developing Research & Writing Skills



Members of Concordia University School of Law's founding faculty have been selected and are busy preparing for the arrival of the inaugural class. Tenielle Fordyce-Ruff, the law school's Director of Legal Research and Writing, was attracted to Concordia Law because of its forward-thinking vision for legal education. She is confident that the dedication of the faculty, staff, and students will make the law school an ongoing contributor to Boise and the legal community.

Tenielle Fordyce Ruff,  
Director of Legal Research  
and Writing

"I have met many of the incoming students, and they are well-prepared to deal with the demands of law school," Fordyce-Ruff said. "I know their enthusiasm and energy will carry into the classroom. I am anticipating a year of hard work surrounded by wonderful students and colleagues."

In 2008, Fordyce-Ruff was invited to teach at the University of Oregon School of Law, her alma mater and one of the country's top five Legal Research and Writing programs. "I am excited to develop a high quality program at Concordia Law," Fordyce-Ruff said. "Our students will graduate with strong research skills and with the ability to clearly communicate critical legal analysis."

Concordia University School of Law will integrate ethics and public service into the curriculum and will seek the active involvement of practicing attorneys in the education of its students. The Legal Research and Writing program at Concordia Law shares in this vision. "There are opportunities built right into the curriculum for members of the Bar," Fordyce-Ruff said. "For example, members will participate in panel discussions on interviewing clients and serve as judges for oral argument exercises. We are also exploring ideas that will enable students to assist with legal research for pro bono programs."

### Q&A with Professor Fordyce-Ruff

#### Q. What attracted you to Boise?

A. My father is from Boise, and by the time I had finished law school my family lived here. I had always enjoyed my visits to Boise. The combination of a great town and proximity to family drew me to settle here to start my legal career.

#### Q. What attracted you to teaching?

A. I have always loved to read and write. I chose a career that allows me to use that passion to help others. Now, I'm fortunate enough to be able to teach.

#### Q. Why were you successful in law school?

A. I think I was successful in law school because I put in the time and the work it took, but I also thought critically about how I approached studying, and consciously chose methods that worked for me.

### GETTING TO KNOW TENIELLE FORDYCE-RUFF

#### FAMILY

Charlie Ruff (husband)  
and two Airedale Terriers  
(rescues) Sadie and  
Steamboat

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## PRESIDENT'S MESSAGE

### THANK YOU AND YOU'RE WELCOME

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

As the past three years come to a close as a commissioner, I would like to pause, reflect and express thanks for so many who have made this a positive experience. Dwight Baker was a great example and really huge shoes to try to fill. I couldn't fill his shoes, so I just tried to wear my own. Dwight is always positive and happy, two traits that would make a successful attorney, and bar president. Thanks Dwight.

As a commissioner, some attorneys you know and respect, you also get the pleasure of serving with on the commission. Newal Squyres is a great lawyer. But more important, he is a gentleman. I don't think it is just because he is from the South (Texas is south). He was kind, respectful, and thoughtful as he did the business of the bar. I learned a lot from Newal. I could go on and on. Thanks Newal.

Doug Mushlitz is the pride of North Idaho, a fellow classmate at the University of Idaho, class of 1985. Doug never looked for credit, he just looked for work to do. He traveled down from Lewiston so many times. Days out of the office for bar meetings. Doug was always prepared and had the right attitude to help see the big picture and be responsible. I enjoyed Doug in law school, but I am truly proud of Doug for what he has become as a lawyer. What a great tribute to the University of Idaho. Thanks Doug.

Jim Meservy is a man from Jerome, via Dietrich. You just about have to be from the Magic Valley to even have a clue where Dietrich is, let alone know what great values come from that small little farm community. Jim had more adversity as a bar commissioner than you can ever imagine. He blew out his knee on a trip to North Dakota. He and his wife were attacked and bitten by a dog. Both Jim and Cheri had severe injuries. Still, Jim made every meeting. He provided a well reasoned and grounded view with a great sense of humor. To think I wouldn't have known Jim if I hadn't had the opportu-



Photo by Dan Black

Reed Larsen addresses new lawyers at the Admissions Ceremony in May at the Capitol Building in Boise. His term as Bar President ends in July. Seated behind him are members of the state and federal judiciary.

nity to serve. I know I am a better person for my association with Jim Meservy. Thanks Jim.

Where would you start with Deb Ferguson. I count Deb's friendship as a great treasure from three years of service. Deb has the perspective of the Midwest, from Chicago, but she is all Idaho. Deb stood up for what was and is right. She represented her views and values with conviction and energy. She and Rick, her husband, are a dynamic team. Not many people could talk about environment, energy, fishing, skiing and cattle range. All with great reason and great conviction. This is Idaho! I am so happy I got to know Deb and Rick. Thanks Deb.

The door for commissioners revolves in Idaho and that is a good thing. I had never had the pleasure of meeting Paul Daugharty before he came on the commission. After our first trip together and cooking a few dinners at my house, I was

convinced that Paul was my younger Catholic brother. Paul helped me buy a car for my wife and that got me out of the dog house, for a while at least. You always know where Paul stands and what he stands for. Can you imagine as a parent having a better tribute? I can't. Paul is just an absolute good guy with a great heart. Thanks Paul.

Molly O'Leary came to the commission the same time as Paul and it was so nice to have two women on the commission at the same time and serve with her. Molly has a journalist background, so she sees the world from a variety of perspectives. The Fourth District was inspired when they elected Molly. She has the courage to remind us all that there are other views that are important and need to be considered. We have talked of diversity and the need for diversity, but until you listen and learn from those with other views, you don't really understand what

it means. I learned from Molly. Thanks Molly.

Bill Wellman, from the Third District is just a gem. There is no way I will ever be able to match his golfing skills, but that unique talent does not define him. And he is a really really good golfer. Bill is patient and listens intently until he forms an opinion. I have admired his approach to the commission. It is amazing to me the sacrifice that Bill makes to serve as a commissioner. As a solo lawyer, it takes a lot of commitment to give this level of service. Thanks Bill.

Have you ever met "little" Bobby Wetherell, from Mountain Home, Idaho? It only takes one visit to know that you have met someone special. Bob is one intelligent person. He also understands how to get things done and how to make people feel good about themselves. You know if you are with Bob that everyone will know who you are; that you are a lawyer; and you will have fun. How good is that? Thanks Bob.

All of us in the bar know that none of this would be possible without Diane Minnich. I could write a whole column on all of Diane's talents and knowledge. She is a treasure for our bar. Everywhere we have gone as bar commissioners, when they hear Idaho, they say, boy do we

wish we had a person as talented as Diane Minnich. Diane is constantly teaching bar leaders what to do and how to do it. It is kind of like the movie "Ground Hog Day" for her. She puts up with big egos or personalities and never misses a beat. No success of our bar association for the past 25 plus years would have happened without Diane. Thanks so much Diane.

Finally, I could have never done this job without two great partners. One, my wife Linda, and the other, Gary Cooper, my law partner. Linda has put up with expected and unexpected guests, trips and late nights. She never complained and was always happy. Linda is always happy. I wish I had that trait. Gary has been supportive of my service and the joint sacrifices that have gone with the job. Thanks Gary and Linda.

The theme for this year has been "A Spirit of Mentoring." I hope you can see that the real beneficiary of this mentoring has been me. I would be very ungrateful if I didn't say thank you. I hope you reflect on your career whether it is long or short and realize you didn't do this alone. Say thank you to those who deserve it and say you're welcome in return.

#### **About the Author**

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

*The theme for this year has been "A Spirit of Mentoring." I hope you can see that the real beneficiary of this mentoring has been me.*

*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.*



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

— Vince Lombardi

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Applications available June 24, at [www.isb.idaho.gov](http://www.isb.idaho.gov) or at the Law Center, 525 W. Jefferson St., Boise, ID  
Deadline to apply is August 5, 2011

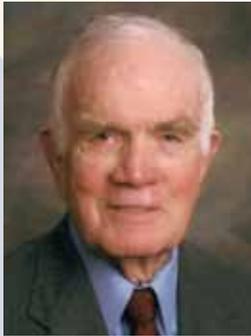
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# IDAHO STATE BAR DISTINGUISHED LAWYER AWARD DINNER

Wednesday, July 11 at The Riverside Hotel in the Ponderosa Room.  
Reception begins at 6:00 p.m. with the dinner following at 7:00 p.m.

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

In 2012, the Idaho State Bar honors three renowned Idaho lawyers:



Hon. Charles F.  
McDevitt, *Boise*



Scott W. Reed,  
*Coeur d'Alene*



Archibald W. Service  
*Pocatello*

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

Thursday, July 12 at The Riverside Hotel in the Ponderosa Room.  
Service Awards Luncheon begins at Noon

The Service Awards are presented to individuals who have contributed their time and talent to serve the public and improve the legal profession. The recipients of the 2012 Service Award are:



Hon. Rick Carnaroli,  
*Pocatello*



Hon. Jim Jones,  
*Boise*



Brian P. Kane,  
*Boise*



Mark T. Monson,  
*Moscow*



Reginald R. Reeves,  
*Idaho Falls*



Monica Shurtman,  
*Moscow*



Marcia Wing,  
*Boise*



William "Bud" F. Yost  
III, *Nampa*

\*Non-lawyer

For more information about attending this event,  
please contact Dayna Ferrero at (208) 334-4500 or [dferrero@isb.idaho.gov](mailto:dferrero@isb.idaho.gov).  
2012 Idaho State Bar Annual Meeting • The Riverside Hotel • Boise • July 11-13

# IDAHO STATE BAR CELEBRATING 50 AND 60 YEARS OF PRACTICE

Friday, July 13 at The Riverside Hotel in the Ponderosa Room.

Celebrating 50 and 60 Years of Practice begins at 12:00 p.m.

Join friends and colleagues as we honor those members of the Bar who have given decades of service to their clients and the public.

## 60-YEAR ATTORNEYS

*Admitted to the Idaho State Bar in 1952*

**Leonard H. Bielenberg** — Moscow  
*University of Idaho College of Law*

**James B. Green** — Pocatello  
*University of Utah S. J. Quinney College of Law*

**Wayne C. MacGregor Jr.** — Grangeville  
*University of Idaho College of Law*

**Reginald R. Reeves** — Idaho Falls  
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**Richard Rosenberry** — Caldwell  
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The University of Idaho College of Law would like to congratulate our graduates who passed the February 2012 Idaho State Bar Exam:

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

**STEPHEN M. JOHNSON  
(Public Reprimand  
and Probation)**

On May 3, 2012, the Professional Conduct Board of the Idaho State imposed the sanction of a public reprimand upon Arizona and Idaho attorney Stephen M. Johnson for professional misconduct. The Professional Conduct Board also placed Mr. Johnson on probation through July 29, 2013.

The Professional Conduct Board Order followed a stipulated resolution of an Idaho State Bar reciprocal disciplinary proceeding. Mr. Johnson was previously and is currently admitted to practice law in Arizona. Mr. Johnson was admitted to practice law in Idaho September 1995, was on inactive status in Idaho from February 1996 through June 1, 2011. Mr. Johnson has been on active status in Idaho since June 1, 2011.

With respect to Mr. Johnson's disciplinary case in Arizona, by judgment and order of the presiding disciplinary judge, dated July 28, 2011, Mr. Johnson was publicly reprimanded for misconduct and placed on two years probation. The terms of probation include that he submit to the Arizona State Bar's Law Office Management Assistance Program examination of his office procedures and obtain a practice monitor.

In the Arizona disciplinary case, Mr. Johnson failed to communicate with his client regarding a criminal post-conviction relief matter for six months while Mr. Johnson was preparing for and conducting a capital jury trial. Mr. Johnson further failed to withdraw from the matter when he could not devote enough time to it due to his preparations for the capital jury trial. Mr. Johnson's negligent conduct in that regard caused a six-month delay in his client's post-conviction relief proceedings. Mr. Johnson was found to have violated the Arizona Rules of Professional Conduct 1.2 [Scope of representation]; 1.3 [Diligence]; 1.4 [Communication]; 1.16(a) [Failure to withdraw] and 8.4(d) [Conduct prejudicial to the administration of justice], and ordered to pay \$1,200 in costs to the Arizona State Bar.

The Idaho Professional Conduct Board's Order provides that Mr. Johnson be publicly reprimanded, comply with all the terms and conditions of his Arizona probation and provide a quarterly report to Idaho Bar Counsel reporting to and attesting to his compliance with the terms

and conditions of his Arizona and Idaho probations.

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

**W. TIMOTHY SEIBLY  
(Suspension)**

On May 10, 2012, the Idaho Supreme Court issued a Disciplinary Order relating to the suspension of W. Timothy Seibly. The Idaho Supreme Court's Order followed a stipulated resolution of an Idaho State Bar reciprocal disciplinary proceeding that resulted in the identical sanction that was imposed in Washington, a suspension for two-years, effective June 19, 2001 through August 18, 2003.

Mr. Seibly was previously and is currently admitted to practice law in Washington. Mr. Seibly was admitted to practice law in Idaho in September 1989. Mr. Seibly was an active member of the Idaho State Bar until he became an inactive member in March 2002, he has been an inactive member since that time and consequently has not been able to practice law in Idaho since March 2002.

With respect to Mr. Seibly's disciplinary case in Washington, Mr. Seibly stipulated to a two-year suspension, and on June 19, 2001, the Supreme Court of Washington issued an Order approving the suspension. That Order placed Mr. Seibly on suspension for two years upon terms and conditions he was required to meet prior to reinstatement. The conditions of reinstatement included full restitution to all clients, 10 hours of law office management classes and an agreement that if he accepts nonrefundable fees in the future, he provide each client with advance written notice of the nonrefundable nature of the fees and have the client sign an acknowledgment. After Mr. Seibly served the two-year suspension, the Washington State Bar indicated he had complied with his reinstatement requirements and he was reinstated to the practice of law in Washington on August 18, 2003.

The Washington disciplinary case related to eight different client matters. With respect to the first client matter, Mr. Seibly stipulated that he had paid himself his client's advance fee deposits without earning those funds and failed to maintain client funds in a trust account in violation of the Washington Rule of Professional Conduct ("RPC") 1.14(a); that he failed to complete records of client funds in his possession and provide his client with an accounting of those funds in violation of

RPC 1.14(b)(3); failed to communicate and entered into a settlement without his client's knowledge in violation of RPC 1.4 and 1.2(a); and failed to appoint an in-state agent, publish a notice to creditors and inform his client of the need of an inventory, in violation of RPC 1.1 and/or 1.3. With respect to the other seven client matters, Mr. Seibly stipulated that he failed to promptly complete the work he was hired to do; failed to expedite litigation for those clients; failed to inform his clients that he considered his fee nonrefundable; failed to advise those clients that he was closing his practice and to take appropriate steps to protect their interests upon termination of representation; and failed to clearly specify that his fees were nonrefundable. In relation to those seven client matters, Mr. Seibly violated RPC 1.3, 3.2, 1.4, 1.5(b), 1.5, and 1.15.

Mr. Seibly has also recently requested the Idaho State Bar Board of Commissioners approve a transfer from inactive to active status in Idaho under I.B.C.R. 304. The Disciplinary Order provides that before being eligible to be reinstated to the active practice of law in Idaho, Mr. Seibly must receive approval from the Board of Commissioners to transfer from inactive status under the applicable Idaho Bar Commission Rules.

The Idaho Supreme Court's Disciplinary Order also provided that Mr. Seibly's suspension in Idaho will be a public record of the Idaho Supreme Court, open for inspection by anyone requesting to see it and that the notice of suspension be published in the Advocate.

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

**MCLE Reminder**

Reminder emails were sent in May to all members with an MCLE reporting deadline of December 31, 2012. Please check your records to make sure all the courses you attended are Idaho MCLE credit approved. Avoid the last minute scramble by applying for accreditation now. You can check your MCLE attendance records on our website at [www.isb.idaho.gov](http://www.isb.idaho.gov). Questions should be directed to the MCLE Department at (208) 334-4500 or [jhunt@isb.idaho.gov](mailto:jhunt@isb.idaho.gov).

## Logos mock trial team earns fifth place at nationals

Idaho's state champion mock trial team from Logos High School in Moscow, Idaho placed fifth at the National High School Mock Trial Championship held in Albuquerque, NM on May 4 and 5. This is the highest place ever achieved by a team from Idaho.

Logos qualified to represent Idaho at the national tournament by winning the state title at the Idaho High School Mock Trial Championship held in Boise in March.

Mock trial is the premiere law related academic tournament for high school students and is recognized as one of the most exciting hands-on educational opportunities available to students. It offers students the chance to experience the drama and excitement of a court proceeding while fostering a better understanding of the legal system and hone their analytical and communication skills.

Idaho's team members from Logos High School include: McKenzie Evans, Rebekka Hoeft, Will Isenberg, Kira Langworthy, Gavin Myer, Jacqueline Nance, Lydia Ryan, Madeline Schlect, and Morgan Schlect. They are lead by teacher coach, Chris Schlect and attorney coach, Sam Creason.

The first two rounds of the competition took place on Friday, May 4. In Round 1 against Utah, Idaho played the role of prosecution and won 3 to 0. Coach Schlect indicated: "Our team put on a clean, solid performance from opening statement to closing arguments. No Round 1 jitters or fumbles." Round 2 saw Idaho's team play the role of defense in another 3 to 0 decision against the team from Nevada.

Saturday, May 5 saw a still undefeated Idaho team play the role of defense against Florida in a very close round with the split-decision win for Idaho. In their final round of the competition, and their only loss of the tournament, Idaho's prosecution faced Minnesota's defense in another split-decision, decided by only a few point differential. Though the loss precluded the team from moving on to the final championship round, they earned high praise from the judging panel. One of the judges, Richard Segal, an attorney from Albuquerque said, "Each of the judges for this round felt that both teams were winners, despite the need to make evaluations and decisions. Both of the teams were absolutely phenomenal

## Paul B. Rippel of Idaho Falls elected to serve on the Idaho State Bar Board of Commissioners

Paul B. Rippel was chosen by his peers to serve as a commissioner of the Idaho State Bar beginning in July for a three-year term. The Board of Commissioners is the elected governing body of the Bar.



Paul B. Rippel

Mr. Rippel is a member of the Family Law and Workers' Compensation Sections (past section president), and has received the Idaho State Bar Professionalism Award in 2003 and the Idaho State Bar Service Award in 2005. He is a partner at Hopkins Roden Crockett Hansen & Hoopes, PLLC, the firm where he began his practice in 1982.

Mr. Rippel is also a member of the Idaho Association of Defense Counsel. He has spoken at workers' compensa-

tion seminars and served on the Idaho Industrial Commission Rehabilitation Task Force and on the State Bar Examination Committee. He is currently chairman of the State Bar Examination Reasonable Accommodation Committee and a volunteer for the YMCA.

Paul was born in Borger, Texas, but his family soon moved to Idaho Falls where he grew up. After graduating from Skyline High School, he attended Idaho State University and the University of Idaho where he earned a degree in Rangeland Management from the College of Forestry. He then obtained a masters degree from New Mexico State University before returning to the University of Idaho where he earned his law degree in 1981. After law school, he clerked for the Honorable Arnold T. Beebe, who impressed upon him the importance of legal scholarship in the practice of law.

Paul and his wife, Alexis, have a son and a daughter. They enjoy outdoor activities and sports events together. He also works to keep the weeds down and his old tractor running on the farmhouse they share south of town.

and a joy to watch in action. Their top-5 finishes were richly deserved. I hope you will communicate to your students my reaction that they are truly a credit to their states, to their schools, to their families, and to themselves. If even a few of them end up making their way to law school, I have no doubt that our profession will be enriched by their participation."

## Foundation conceived in Idaho helps veterans

An organization assisting severely wounded, disabled and injured veterans has been created by retired Navy Captain Jeff Bacon, a military cartoonist now living in the Treasure Valley. He and Representative Marv Hagedorn and other trusted friends created an educational program that includes mentoring, networking and career counseling for struggling veterans. The program is called the Wyakin Warrior Foundation and in 2012 was awarded "Best in Class" by the USO. The organi-

zation has two paid employees and more than 100 volunteers. Lawyers can help with various legal needs. More information can be found at [www.wyakin.org](http://www.wyakin.org).

## Concordia honored with building award

Concordia University School of Law's building project was selected as a recipient of the 2012 City of Boise Building Excellence Award in the Best Green Building Project in the commercial category.

"Concordia University School of Law is honored to receive a 2012 City of Boise Building Excellence Award," Dean Cathy Silak said. Completed in fall 2011, the Concordia Law building was designed with sustainability in mind. The 54,000-square-foot law school and the George R. White Law Library provide technologically-equipped spaces, contemporary architecture with natural lighting, and geothermal heating. Concordia Law's building brings innovation and relevance to the learning environment.

## New Licensing/Trust Account Rules

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

Revisions to the rules that govern licensing and trust accounts were approved through the 2011 resolution process. The revised rules were adopted by the Idaho Supreme Court, effective 7-1-12.

The text of the revised IBCR Section III and new Section XIII can be found in your 2012-2013 Desk Book Directory; pages 252-254 and pages 294-296 or on the ISB website. Following are the major changes to the rules.

### IBCR Section III Licensing

#### Rule 301. Definitions and Rule 302. Licensing Requirements

The rules change affiliate status to inactive status, which is consistent with most other states' definitions.

The current inactive status is eliminated. If an attorney chooses not to meet the licensing requirements their license will be resigned. The rule provides that current members on inactive status have until March 2013 to transfer to active or the new inactive status.

The rules now include and define a senior member and judicial member status. Judicial member status is defined in Idaho Code Section 3-409, but was not previously included in the bar commission rules.

The definitions in Rule 301 are clarified and consistent with the definitions in other sections of the bar commission rules.

Good Standing – Rule 301 (i) establishes a definition of good standing.

The yearly licensing requirements have not changed; they have been reorganized to create more clarity.



Diane K. Minnich

*The requirements to transfer status have changed. If you are considering a change in your membership status, review the rules.*

#### Rule 303. Membership Information

This rule defines the membership information required to be submitted to the bar by members and states what information is public information.

#### Rule 304. Annual License Fees

The annual license fees did not change. The late fee for submitting annual licensing fees after the February 1 deadline increased for active and house counsel members from \$50 to \$100.

The late fee for requesting additional time after December 31 to complete the MCLE requirements increased from \$50 to \$100.

#### Rule 305. Failure to Comply with Licensing Requirements

This section is revised to specify the consequences of failure to comply with the licensing requirements and delineates the process and requirements for reinstating a license that is canceled for noncompliance with the licensing requirements. If an attorney does not meet the requirements for reinstatement within a year, the attorney's license will be considered resigned. An attorney whose license is resigned, either voluntarily or deemed resigned, is required to apply for admission under IBCR Section II.

#### Rule 306. Transfer

This section explains the process for changing membership status. The rule defines the requirements, standards, and time frames for transferring status. For a transfer to active status, the requirements increase based on the number of years that an attorney has not been an active member.

For example, the CLE requirements for an attorney that has not been active for 3 to 5 years increased to 30 hours, including 2 ethics credits. An attorney that has not been active for 5 to 7 years is required to successfully complete a character and fitness evaluation in addition to the increased CLE hour requirement.

An attorney who has not been active for more than 7 years may be required to apply for admission under IBCR Section II.

We plan to notify current affiliate and inactive members informing them of the new rules and requirements for transferring to active status.

**Note: If you are currently an affiliate member who is considering transfer to active status, review the rules to determine what the requirements are to change status.**

#### Section XIII Trust Accounts (new section) and I.R.P.C. 1.15: Safekeeping Property

The new Section XIII of the bar commission rules incorporates the rules and requirements for trust accounts into one section. The rules related to IOLTA accounts have been removed from IRPC 1.15, revised, and included in the new section. The rules governing trust account maintenance and automatic reporting of trust account overdrafts have been removed from IBCR Section III and included in the new rule.

#### IOLTA Rules

The rules governing IOLTA accounts are amended to implement "rate comparability." Rate comparability requires at-

torneys to place IOLTA accounts at banks that agree to pay the highest rate of interest on similar non IOLTA accounts or at least 70% of the federal fund rate. Currently, more than 30 states have adopted rate comparability.

The rule standardizes the means of determining the rates of interest paid and, thereby, provides future revenue predictability. Currently, interest rates on IOLTA accounts fluctuate considerably between banks and sometimes at the same bank. The rules place uniformity on the rates banks pay.

The majority of the revenue from IOLTA supports legal services for the disadvantaged, traditionally to Idaho Legal Aid Services and Idaho Volunteer Lawyers Program. The funds also support law related education programs, programs that advance the administration of justice and law school scholarships. As the economy faltered, interest rates and IOLTA income declined and the need for the essential services provided by IOLTA grantees increased. The increased interest earned from rate comparability will help bridge the gap between the growing needs and available revenue.

*The majority of the revenue from IOLTA supports legal services for the disadvantaged, traditionally to Idaho Legal Aid Services and Idaho Volunteer Lawyers Program.*

The Idaho Law Foundation is working with Idaho banks to explain the new rules so banks continue to be eligible repositories for the IOLTA trust account funds of Idaho attorneys.

**Rule 1304. Establishment of IOLTA Accounts**

This rule outlines the exceptions under which a lawyer can maintain a non IOLTA trust account. This rule also allows for an exemption if compliance with the rule creates an undue hardship on the lawyer and would be extremely impractical, based on geographic distance between the lawyer's principal office and the closest

financial institution participating in the IOLTA program.

The rule also requires more standardized reporting by banks to facilitate monitoring of the rates paid and interest earned on accounts.

**I.R.P.C. 1.15 Safekeeping Property**

The addition of 1.15(b) allows attorneys to place a nominal amount of money in the trust account for the sole purpose of paying bank service charges on the account.

If you have questions about the new rules, please contact me at (208) 334-4500 or [dminnich@isb.idaho.gov](mailto:dminnich@isb.idaho.gov).

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## WELCOME FROM THE HEALTH LAW SECTION

Mark C. Peterson  
*Moffatt, Thomas, Barrett, Rock & Fields, Chtd.*

The Health Law Section is pleased to sponsor this issue of *The Advocate*. The Section's aim was to provide the Bar with a strong mix of articles that provide practical insight into the areas covered and are current to the practice of law in Idaho. I hope the reader will agree that each of the articles submitted is consistent with this goal.

Julian Gabiola addresses statutory limitations in the medical malpractice context. The article focuses on the development of law relating to the accrual of a medical malpractice claim, focusing on a 2011 Idaho Supreme Court decision. The article co-authored by Matt Gordon and Joseph McCollum, Jr. focuses on two recent decisions issued by the Idaho Supreme Court pertaining to the discoverability of peer review records. The article outlines how the holdings in these two decisions strengthen the peer review privilege. Kim Stanger provides a detailed explanation of the new HIPAA privacy and security rules. The article addresses the scope of the new regulations, circumstances in which self-reporting is required, and the mandatory penalties for violations. In the article by Kevin West, he provides an outline of the Medicare Secondary Payer Act and guidance to practitioners for the best practices for compliance. Thomas Mortell outlines the potential exposure to officers and managers for health care entities based upon the responsible corporate officer doctrine.



Mark C. Peterson

Mr. Mortell provides suggestions for strategies to avoid liability under this doctrine. The Health Law Section's mission is to provide a venue for the exchange of expertise among health law practitioners. In this vein, the Section sponsors free CLEs throughout the year in connection with its business meetings. Over the course of the last several months, the Section has had many distinguished attorneys provide presentations to the Section, including Wendy Olson, Tom Donovan, Stephanie Westermeier, Joseph McCollum, Jr., Christine Neuhoff, Matt Gordon, and Shane Bengoechea. The Section is grateful for the willingness of these attorneys to share their time with the Section in this way. We welcome all members of the Bar to join us as we continue to provide these CLE opportunities.



On behalf of the Health Law Section, I hope you enjoy the articles in this issue of *The Advocate* and find them both relevant and helpful.

### About the Author

**Mark C. Peterson** is a partner with *Moffatt, Thomas, Barrett, Rock and Fields, Chtd.*, where his practice includes health law, worker's compensation, and general business litigation. His health law practice focuses upon the representation of hospitals pertaining to medical indigency claims, medical liens, mental health commitments, and a variety of litigated matters. In his spare time, Mark is a baseball fanatic and loves participating in a variety of outdoor activities with his wife and children.

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# WHEN A CAUSE OF ACTION FOR MEDICAL MALPRACTICE ACCRUES — THE OBJECTIVELY ASCERTAINABLE DAMAGE STANDARD FOLLOWING *STUARD V. JORGENSON*

Julian E. Gabiola  
*Moffatt Thomas Barrett Rock & Fields, Chtd.*

Imagine a man suffers a work-related injury and sees his physician who tells him that he needs a discectomy and fusion at T6-7. However, instead of performing surgery at that level, the physician mistakenly operates at the T5-6 level, where he removes the disc and soft tissue, drills holes into the spine, and installs a plate and other hardware to stabilize and support the spine. The patient has postoperative visits with his physician and he takes x-rays to determine if any material has shifted or come loose, to see if any spinal fractures have developed, and to see if any screws have come out. The patient's pain resolved following the surgery, even though surgery was performed at the wrong level.

More than two years after the surgery, the patient suffers a second work-related injury and his back pain returns. He returns to his physician, who orders radiographic studies and discovered that he had operated on the wrong level of the patient's spine. He informs the patient that he inadvertently operated on the T5-6 level, he has the same pathology and herniation at the T6-7 level as previously, and this pathology is causing his current symptoms. The patient sees a second physician who removes the plate and some of the hardware from the T5-6 level and performs surgery on the T6-7 level. The patient then files a medical malpractice action against the first physician, who raises a statute of limitations defense under Idaho Code § 5-219(4) because the action was brought more than two years after he performed the surgery. Should the statute of limitations defense prevail?

You might expect the answer to be "No" because the action should not accrue until the time the mistake could have been discovered or because the patient had not suffered any damage until his second work-related injury. You might also think

*His action was barred because he had not filed a prelitigation claim within two years of the first surgery.<sup>2</sup>*

that the negligent placement of the plate and hardware would constitute a foreign object under Section 5-219(4).

However, in *Stuard v. Jorgenson*, the Idaho Supreme Court determined, under nearly identical facts, Section 5-219(4) barred the patient's cause of action.<sup>1</sup> The Court held that the medical malpractice action had accrued at the time of the first surgery because the patient had suffered objectively ascertainable damage at the time of the first surgery and his action was barred because he had not filed a prelitigation claim within two years of the first surgery.<sup>2</sup> The Court also concluded that the foreign object exception under Section 5-219(4) did not apply because the plate and hardware used in the first surgery had been intentionally placed and not inadvertently left in the patient's body.

## **Section 5-219(4) and the Idaho legislature's limitation of the discovery rule**

The Idaho legislature amended Section 5-219(4) in 1971, following the Idaho Supreme Court's decision in *Renner v. Edwards*,<sup>3</sup> in which the Court allowed a discovery rule to apply to cases of misdiagnosis and held that the statute of limitations did not begin to run until the patient knew or should have known of the physician's misdiagnosis. Section 5-219(4) now provides that a cause of action for professional malpractice accrues "as of the time of the occurrence, act or omission complained of" unless it is based upon leaving a foreign object in a patient's body or there is fraudulent concealment of damage.<sup>4</sup>

Thus, following the 1971 amendment, a cause of action for professional malpractice does not accrue when the plaintiff discovered or should have discovered his cause of action, unless the cause of action involves the leaving of a foreign object or fraudulent concealment. Moreover, Idaho

courts have "an established history of deference to the Legislature's abrogation of the discovery rule."<sup>5</sup>

## **Medical malpractice cases and objectively ascertainable damage**

The gist of a malpractice action is negligence.<sup>6</sup> In order to recover under a theory of negligence, the plaintiff must prove actual damage, and as a general rule the statute of limitations does not begin to run until some damage has occurred.<sup>7</sup> In medical malpractice cases, the statute of limitations "begins to run when damages are objectively ascertainable."<sup>8</sup> By "objectively ascertainable," the Idaho Supreme Court means "objective medical proof [that] would support the existence of an actual injury."<sup>9</sup> In addition, Section 5-219(4) specifies that the limitation period is not extended by reason of any continuing consequences or damages resulting from the malpractice or any continuing professional or commercial relationship between the patient and the alleged wrongdoer.<sup>10</sup> And, where there is no dispute as to when the cause of action accrues, the question of whether the statute of limitations bars an action is one of law.<sup>11</sup>

## **Why the *Stuard* Court held that the patient's cause of action accrued at the time of the surgery**

In *Stuard*, the Court determined that Stuard's cause of action accrued at the time of the surgery because there was no genuine issue of material fact that (1) the negligent act was Dr. Jorgenson's performance of the surgery at the wrong level of Stuard's spine and (2) an objectively ascertainable injury had occurred at the time of the first surgery because there was removal of healthy tissue and installation of medical hardware at the wrong level.<sup>12</sup>

Stuard argued that he did not suffer any damage until the date of his sec-



Julian E. Gabiola

ond work-related injury because he did not have any symptoms or knowledge of the physician's negligence until that time. However, the Court explained that "[w]hether there was some damage, or whether that damage was objectively ascertainable, does not depend upon the knowledge of the injured party because such dependence would effectively create a discovery rule, which the legislature has expressly rejected."<sup>13</sup> A patient's subjective knowledge of injury "is not relevant to the determination of when 'some damage' occurred under Idaho's clear legislative direction and the case law following it."<sup>14</sup> Moreover, the Court determined that symptoms are not damage but "by nature subjective, and therefore are not determinative in an 'objective' analysis as the one this Court has stated is the standard for evaluating the accrual of a professional malpractice claim."<sup>15</sup>

The Court also rejected Stuard's argument that the lack of medical records showing that the surgery was performed at the wrong level indicated there was not any damage that was objectively ascertainable. Again, the Court explained that "[t]o allow for accrual to begin only once the parties have been put on notice of the damage, or in other words, once the damage is actually 'ascertained' would effectively create a discovery rule, which the legislature has rejected."<sup>16</sup>

The Court noted further that Dr. Jorgenson had supplied an affidavit and sworn deposition testimony that the injury was objectively ascertainable at the time of the surgery because it was performed at the wrong level and Stuard had the same pathology and herniation at the T6-7 level as he had before. However, Stuard had not provided any expert testimony to dispute the physician's opinions. Accordingly, the injury was objectively ascertainable at the time of the surgery "because had objective medical proof in the form of an MRI been ordered, it would have shown the surgery was performed at the wrong level and that Stuard had suffered damages as a result of its performance at the wrong level."<sup>17</sup>

The Court also noted that Stuard had suffered some objectively ascertainable damage from the surgery itself because Dr. Jorgenson cut into his back, negligently removed healthy tissue, and negligently placed a locking plate, screws, and other hardware at the wrong spinal level. According to the Court, had Stuard's claim survived Dr. Jorgenson's summary judg-

*The Stuard Court adopted the Ogle court's holding that a medical device that is placed in the body intentionally for the purpose of medical treatment is not a foreign object under Section 5-219(4).<sup>23</sup>*

ment motion and gone to trial, he would have asked for compensation for these damages from the negligent surgery.<sup>18</sup> "Thus, these damages satisfy the 'some damage' standard."<sup>19</sup>

### **The negligently placed hardware did not constitute a foreign object under Section 5-219(4)**

Stuard also argued that because Dr. Jorgenson negligently installed the plate and other hardware, the plate was inadvertently left in his body and, therefore, constituted a foreign object under Section 5-219(4). If a medical device is a foreign object under Section 5-219(4), then the patient's cause of action does not accrue until he "knows or in the exercise of reasonable care should have been put on inquiry regarding the condition or matter complained of . . ."<sup>20</sup>

The Court rejected this argument because the plate and other hardware were intentionally left in Stuard's body for the purpose of medical treatment with his consent.<sup>21</sup> In reaching its holding, the Court relied upon the Idaho Court of Appeals' decision in *Ogle v. De Sano*, where the Court of Appeals found that an IUD was not a foreign object because it was "intentionally placed in a woman's body with her consent, . . . has continuing medical function, and . . . will be removed when its function is no longer needed."<sup>22</sup>

The *Stuard* Court adopted the *Ogle* court's holding that a medical device that is placed in the body intentionally for the purpose of medical treatment is not a foreign object under Section 5-219(4).<sup>23</sup> This section, by its very language, contemplates that the leaving of an object in the body must be "inadvertent, accidental or unintentional."<sup>24</sup> The Court explained that both Section 5-219(4) and precedent require that the inadvertence be in the leaving of the foreign object (e.g. a sponge, needle, fragment from a drain inadvertently left in the body), not in the performance of the surgery.<sup>25</sup>

Thus, even though Dr. Jorgenson had mistakenly placed the plate and other hardware at the wrong level of Stuard's spine, the doctor did so intentionally. These facts did not, therefore, trigger the foreign object exception under the plain language of Section 5-219(4).<sup>26</sup> The Court also concluded that there was no issue of fact that Dr. Jorgenson placed the plate and hardware in Stuard's body with his consent and for a medical purpose—fusing the spine together.<sup>27</sup>

### **Conclusion**

The *Stuard* Court acknowledged that Stuard's situation was unique, particularly because his pain resolved even though Dr. Jorgenson performed the first surgery at the wrong level, and that the result the Court reached was harsh. However, the Court took the position that the patient's arguments needed to be taken up with the legislature because Section 5-219(4) and Idaho case law are clear: The statute of limitations accrues once some damage that is objectively ascertainable occurs. Because Stuard had incurred some objectively ascertainable damage at the time of the first surgery and he failed to bring his claim within two years of the first surgery, his claim was barred under Section 5-219(4). The lesson to take from *Stuard* is that when analyzing when the statute of limitations begins in a medical malpractice action, you need to determine whether there is objective medical evidence of damage and at what point in time that damage occurred.

### **About the Author**

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of Idaho College of Law and his B.A. in Political Science from the University of Idaho.

### Endnotes

<sup>1</sup> *Stuard v. Jorgenson*, 150 Idaho 701, 249 P.3d 1156 (2011). In *Stuard*, the district court concluded that the patient's action was barred under Section 5-219(4) because the action accrued at the time of the physician's performance of the first surgery because there was objectively ascertainable damage at that time. The court also concluded the foreign object exception in Section 5-219(4) did not apply because the plate and hardware had been intentionally left in the patient. The court granted the physician's summary judgment motion. The patient appealed, and in a 3-2 decision, the Idaho Supreme Court affirmed the district court.

<sup>2</sup> Medical malpractice plaintiffs are required to file a prelitigation screening request with the Idaho Board of Medicine. IDAHO CODE § 6-1001 (West 2006). The statute of limitations is tolled upon the filing of a request for a prelitigation screening panel. IDAHO CODE § 6-1005 (West 2006). A thirty (30) day stay period commences from the date that the Idaho Board of Medicine receives the prelitigation screening panel's report and recommendation. IDAHO CODE § 6-1006 (West 2006); *James v. Buck*, 111 Idaho 708, 712, 727 P.2d 1136, 1140 (1986). The tolling of the limitations period ends after the 30-day stay period. *James*, 111 Idaho at 712, 727 P.2d at 1140.

<sup>3</sup> *Renner v. Edwards*, 93 Idaho 836, 475 P.2d 530 (1969).

<sup>4</sup> IDAHO CODE § 5-219(4) (West 2006).

<sup>5</sup> *Knudsen v. Agee*, 128 Idaho 776, 778, 918 P.2d 1221, 1223 (1996); see also *Therriault v. A.H. Robins Co., Inc.*, 108 Idaho 303, 308, 698 P.2d 365, 370

(1985) ("Since the 1971 amendment [to Section 5-219(4)], in deference to the legislative policy expressed therein, this Court has consistently refused to create additional discovery exceptions.").

<sup>6</sup> *Blake v. Cruz*, 108 Idaho 253, 260, 698 P.2d 315, 322 (1984).

<sup>7</sup> *Id.* at 260, 698 P.2d at 322 (quoting *Stephens v. Stearns*, 106 Idaho 249, 254, 678 P.2d 41, 46 (1984)); see also *Laphram v. Stewart*, 137 Idaho 582, 585-86, 51 P.3d 396, 399-400 (2002).

<sup>8</sup> *Hawley v. Green*, 117 Idaho 498, 502, 788 P.2d 1321, 1325 (1990).

<sup>9</sup> *Id.* (quoting *Davis v. Moran*, 112 Idaho 703, 709, 735 P.2d 1014, 1020 (1987)).

<sup>10</sup> *Laphram*, 137 Idaho at 586, 51 P.3d at 400 (citing § 5-219); see also *Holmes v. Iwasa*, 104 Idaho 179, 657 P.2d 476 (1983) ("The question, however, is not one of continuing treatment, because I.C. § 5-219(4), as amended, expressly states that any continuing professional relationship between the injured party and the alleged wrongdoer shall not extend the limitation period").

<sup>11</sup> See *Reis v. Cox*, 104 Idaho 434, 438, 660 P.2d 46, 50 (1982).

<sup>12</sup> *Stuard*, 150 Idaho at 706, 249 P.3d at 1161.

<sup>13</sup> *Stuard*, 150 Idaho at 705, 249 P.3d at 1160 (quoting *Laphram*, 137 Idaho at 587, 51 P.3d at 401).

<sup>14</sup> *Id.*

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

<sup>16</sup> *Stuard*, 150 Idaho at 706, 249 P.3d at 1161.

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

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

<sup>19</sup> *Id.* (citing *City of McCall v. Buxton*, 146 Idaho 656, 659, 201 P.3d 629, 632 (2009)).

<sup>20</sup> IDAHO CODE § 5-219(4) (West 2006).

<sup>21</sup> *Stuard*, 150 Idaho at 707-08, 249 P.3d at 1162-63.

<sup>22</sup> *Ogle v. De Sano*, 107 Idaho 872, 875 693 P.3d 1074, 1077 (Ct. App. 1984).

<sup>23</sup> *Stuard*, 150 Idaho at 708, 249 P.3d at 1163.

<sup>24</sup> *Id.* (quoting § 5-219(4)).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

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

**A thirty (30) day stay period commences from the date that the Idaho Board of Medicine receives the prelitigation screening panel's report and recommendation.**

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# IDAHO'S PEER REVIEW PRIVILEGE — LESSONS LEARNED

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In two opinions issued late last year, the Idaho Supreme Court clarified and strengthened the protections afforded by Idaho's statutory peer review privilege. In *Verska v. St. Alphonsus Regional Medical Center (SARMC)*<sup>1</sup> and *Montalbano v. SARMC*,<sup>2</sup> the Court held that the peer review privilege applies to lawsuits initiated by physicians challenging adverse credentialing decisions and that it contains no exceptions for credentialing decisions motivated by bad faith or economic considerations. The Court made clear that the privilege applies broadly, beyond the medical malpractice context. And by refusing to find exceptions for bad faith credentialing, the Court deepened the peer review protections and signaled that the only exceptions to the privilege are those expressly stated in the statute itself.

## Why peer review is protected

Hospital peer review is the process by which a hospital's organized medical staff evaluates, critiques, and sometimes disciplines other staff physicians. Peer review includes, among other things, the peer evaluation of a physician's application for initial appointment to the medical staff, evaluation of a physician's application for reappointment, and, if warranted, the suspension or termination of a physician's privileges to practice at the hospital (sometimes referred to as "adverse credentialing decisions"). Peer review also includes physician review of bad patient outcomes undertaken with an eye toward reducing similar outcomes in the future.

Regular peer review has become so entrenched in this country that it is required in every state.<sup>3</sup> Protections from discovery for peer review proceedings are similarly widespread. In fact, just as all fifty states require hospital peer review, so too has each state created an evidentiary privilege for peer review materials, in recognition of the need for frank and candid discussion and the potential chilling effect on peer review posed by the threat



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that such materials might be discovered during litigation.<sup>4</sup> The United States Congress has also recognized an "overriding national need to provide incentive and protection for physicians engaging in effective professional peer review."<sup>5</sup>

Idaho's peer review statute, Idaho Code § 39-1392 et seq., was passed to:

[E]ncourage research, discipline and medical study by certain health care organizations for the purposes of reducing morbidity and mortality, enforcing and improving the standards of medical practice in the

state of Idaho, certain records of such health care organizations shall be confidential and privileged as set forth in this chapter.<sup>6</sup>

The statute provides two different but related protections for peer review participants: it includes provisions for both peer review privilege and peer review immunity. The peer review privilege protects peer review materials from discovery in legal proceedings. Peer review immunity, in contrast, protects the peer review participants from lawsuits based on their peer review activities.<sup>7</sup>

The language of the privilege portion of the peer review statute is particularly broad. Idaho Code § 39-1392b protects "all peer review records" from subpoena or discovery "in any action of any kind in any court or before any administrative body, agency or person for any purpose whatsoever[.]" The statute broadly defines "peer review records" as "all evidence of interviews, reports, statements, minutes, memoranda, notes, investigative graphs and compilations and the contents

*Peer review immunity, in contrast, protects the peer review participants from lawsuits based on their peer review activities.<sup>7</sup>*

thereof, and all physical materials relating to peer review of any health care organization."<sup>8</sup> The statute also broadly defines "peer review" to include, among other things, "credentialing, privileging or affiliation of health care providers," quality assurance and improvement, and any "professional review action."<sup>9</sup> As a result, the scope of what "relates to" peer review – and thus, what constitutes "peer review records" under the statute – is expansive.

## The physicians' challenge to the peer review statute

Drs. Montalbano and Verska were each spine surgeons with privileges at SARMC. After concerns arose about Dr. Montalbano and Dr. Verska, the Medical Executive Committee at SARMC took adverse action against the credentials of each doctor, suspending Montalbano's privileges and revoking Verska's.<sup>10</sup>

Each doctor filed his own lawsuit against SARMC and various individuals; both alleged, among other things, conspiracy, defamation, and violation of due process.<sup>11</sup> In essence, each doctor claimed that SARMC's decisions to take adverse action against his credentials were motivated by economic considerations rather than patient care. In particular, the physicians alleged that SARMC acted as it did because it wanted to reduce competition for spinal care.<sup>12</sup>

During discovery, each doctor sought documents related to the processes and activities in connection with SARMC's adverse credentialing decisions – documents that constituted peer review records. After SARMC objected, the district court, relying on I.C. § 39-1392b, held that records were protected from discovery.<sup>13</sup>

The Idaho Supreme Court granted interlocutory appeals to both physicians on grounds that the application of the peer review statute to physician disciplinary proceedings was a matter of first impression.<sup>14</sup>

## The court rejects the challenges

On appeal, the physicians argued that section 39-1392b was meant to apply in medical malpractice cases, not where a physician challenges a credentialing decision. In support, the physicians relied upon the legislative statement of purpose. Both physicians also argued that section 39-1392b does not – or should not – operate to shield credentialing decisions made for economic reasons or otherwise made in bad faith, and that allowing health care organizations to shield credentialing decisions would eviscerate the ability of health care providers to mount a meaningful court challenge to an adverse decision and would, therefore, effectively deprive them of their day in court.<sup>15</sup>

The Court held otherwise. Although the issues in each case were essentially identical, the Court kept the two cases separate and issued two opinions, neither of which acknowledged the other. And although the two opinions took different paths, both arrived at the same result, essentially based on the same rationale: the plain language of the statute and the lack of any exception therein for bad faith or economic credentialing.<sup>16</sup>

In *Montalbano*, Chief Justice Burdick, writing for the majority, disposed of the issue quickly:

As I.C. § 39-1392b states clearly that “all peer review records shall be confidential and privileged” and provides that the records are not subject to subpoena or discovery in proceedings such as the one in this case, the statute applies to the questions before this Court.<sup>17</sup>

And the lack of any language in the statute limiting its protections to medical malpractice actions or providing for an exception for credentialing decisions motivated by economic considerations or otherwise taken in bad faith doomed the plaintiffs’ public policy arguments. As Justice Eismann wrote for the majority in *Verska*,

[t]he statute does not create an exception for this type of litigation, and we cannot create such an exception under the rubric of public policy. The creation of such an exception is an issue within the province of the legislature.... There is no wording in section 39-1392b that limits its scope to peer review records sought in a medical malpractice action. In that respect, the legislation is unambiguous.<sup>18</sup>

Justice Jim Jones concurred in both decisions because he took issue with the majority’s conclusion that the statutory privilege shields credentialing decisions

made in bad faith. In particular, in Justice Jones’s view, the privilege does not apply where plaintiff makes a “credible showing that the Hospital was using the peer review proceedings for an improper purpose.”<sup>19</sup> Nevertheless, Justice Jones agreed with the result in each case because he felt that the physicians had failed to make such a showing. In his view, the evidence in both cases demonstrated that the relevant peer review proceeding “was initiated and pursued in ‘furtherance of quality health care.’”<sup>20</sup>

## Impact of the decisions

The direct impact of the Court’s decisions in *Verska* and *Montalbano* is obvious: physicians who challenge adverse credentialing decisions will be unable to access peer review records, even if they can make a credible showing that such decisions were motivated by considerations other than the best interest of the patients. The decisions also have, potentially, a much broader impact: given the Court’s unwillingness to read into the statute any exceptions or limitations not expressly stated therein, plaintiffs who seek to invoke policy or equity considerations in support of efforts to obtain peer review records in other situations are unlikely to meet with success.

As a result, the affirmation of the breadth and strength of the statutory peer review privilege may apply beyond the particular circumstances of the cases and the general setting of physician credentialing actions. Nevertheless, health care organizations that wish to use the privilege to shield peer review records must still take care to ensure that the privilege will apply if challenged. For no matter how broad and strong the privilege, it remains applicable only to peer review materials, so organizations must ensure that the documents they wish to protect are appropriately created and maintained as such.

Moreover, like any other privilege, the protections for peer review materials can be waived if not strictly monitored. The contours of waiver are not well defined, however. In particular, the *Montalbano* and *Verska* opinions appear to point in different directions regarding whether a hospital may use privileged information in its defense without waiving the privilege. In *Montalbano*, the Court stated that hospital waives peer review protection if it chooses to disclose that information as part of its defense.<sup>21</sup> But in *Verska*, the Court stated that a hospital does not waive peer review protection by “rely[ing] upon privileged information in defense of the lawsuit.”<sup>22</sup> Moreover, in his concurring opinion in *Montalbano*, Justice Jim Jones raised the possibility that SARMC’s privilege might

be waived pursuant to I.R.E. 510 because information was allegedly improperly disclosed by at least one individual involved in the peer review proceedings.<sup>23</sup>

As a result, it remains advisable for health care organizations to carefully follow statutes as well as the procedures set forth in their applicable bylaws to help ensure that they preserve the viability of their peer review privilege.

## About the Authors

**Matthew Gordon** is an associate at *Hawley Troxell Ennis & Hawley LLP* and a member of the firm’s Health Law Group. Mr. Gordon represents health care providers in a broad range of health care matters, including peer review matters. Mr. Gordon represented the *Idaho Hospital Association*, *amicus curiae*, in the cases of *Verska* and *Montalbano*.

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## Endnotes

<sup>1</sup> 151 Idaho 889, 265 P.3d 502 (2011).

<sup>2</sup> 151 Idaho 837, 264 P.3d 944 (2011).

<sup>3</sup> See George E. Newton II, *Maintaining the Balance: Reconciling the Social and Judicial Costs of Medical Peer Review Protection*, 52 Ala. L. Rev. 723, 726 (2001).

<sup>4</sup> See *KD v. United States*, 715 F. Supp. 2d 587, 594 (D. Del. 2010).

<sup>5</sup> 42 U.S.C. § 11101(5).

<sup>6</sup> Idaho Code § 39-1392 et seq.

<sup>7</sup> Although SARMC raised peer review immunity under Idaho Code § 39-1932c as a defense in the district court in both *Montalbano* and *Verska*, that court did not issue a ruling as to immunity, and, as a result, the Idaho Supreme Court did not address section 39-1392c. *Montalbano*, 264 P.3d at 950; *Verska*, 265 P.3d at 510-11.

<sup>8</sup> Idaho Code § 39-1392a(12).

<sup>9</sup> Idaho Code § 39-1392a(11).

<sup>10</sup> *Montalbano*, 264 P.3d at 946; *Verska*, 265 P.3d at 504.

<sup>11</sup> *Montalbano*, 264 P.3d at 946; *Verska*, 265 P.3d at 504.

<sup>12</sup> *Montalbano*, 264 P.3d at 949; *Verska*, 265 P.3d at 505.

<sup>13</sup> *Montalbano*, 264 P.3d at 947; *Verska*, 265 P.3d at 504.

<sup>14</sup> *Montalbano*, 264 P.3d at 947; *Verska*, 265 P.3d at 505.

<sup>15</sup> *Montalbano*, 264 P.3d at 949; *Verska*, 265 P.3d at 505.

<sup>16</sup> *Montalbano*, 264 P.3d at 949; *Verska*, 265 P.3d at 505-06.

<sup>17</sup> *Montalbano*, 264 P.3d at 949.

<sup>18</sup> *Verska*, 265 P.3d at 505.

<sup>19</sup> *Montalbano*, 264 P.3d at 951-52 (Jones, J., concurring); *Verska*, 265 P.3d at 512-13 (Jones, J., concurring).

<sup>20</sup> *Verska*, 265 P.3d at 513 (Jones, J. concurring).

<sup>21</sup> *Montalbano*, 264 P.3d at 950.

<sup>22</sup> *Verska*, 265 P.3d at 510.

<sup>23</sup> *Montalbano*, 264 P.3d at 953 (Jones, J., concurring).

# BEWARE HIPAA'S NEW PENALTIES: WHAT YOU AND YOUR CLIENTS SHOULD KNOW

Kim C. Stanger  
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Recent changes to the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA) privacy and security rules dramatically increase attorneys' and their clients' potential liability for HIPAA violations.

## HIPAA now applies directly to some attorneys

The HIPAA privacy and security rules apply to "covered entities," which includes most health care providers, health care clearinghouses, health insurers, and employee group plans that have 50 or more participants or that are administered by a third party. Effective February 2010, HIPAA also applies directly to "business associates" of covered entities, which includes attorneys who (1) represent a covered entity or a covered entity's business associate, and (2) receive protected health information from the client or the client's business associate in the course of representing the client. "Protected health information" is individually identifiable information about a person's health, health care, or payment for his or her health care. The net result is that attorneys who are business associates of covered entities and larger law firms' group health plans, must comply with most HIPAA requirements or face increased HIPAA penalties.



Kim C. Stanger

## Must self-report HIPAA breaches

Effective February 2010, covered entities and business associates must self-report HIPAA violations that pose a significant risk of financial, reputational or other harm to the individual whose information was breached. If the business associate learns of such a breach, it must report the breach to the covered entity without unreasonable delay. The covered entity must report a breach to the affected individual or his or her personal representatives and the federal Department of Health and Human Services (HHS). If the breach involves more than 500 per-

sons, the covered entity must also report information about the breach through local media. Needless to say, the self-reporting requirement increases the potential for HIPAA penalties.

## HIPAA civil penalties are now mandatory

In 2009, the penalties for HIPAA violations were increased 500 times the prior amount. To make matters worse, effective February 2011, the Office of Civil Rights ("OCR") is required to impose HIPAA penalties if the covered entity or business associate acted with willful neglect, i.e., "the conscious, intentional failure or reckless indifference to the obligation to comply" with HIPAA requirements. The new penalty structure is as follows:

Conduct of Covered Entity or Business Associate	Penalty
Did not know and, by exercising reasonable diligence, would not have known of the violation.	\$100 to \$50,000 per violation; Up to \$1,500,000 per identical violation per year.
Violation due to reasonable cause and not willful neglect.	\$1,000 to \$50,000 per violation; Up to \$1,500,000 per identical violation per year.
Violation due to willful neglect but the violation is corrected within 30 days after the covered entity knew or should have known of the violation.	Mandatory fine of \$10,000 to \$50,000 per violation; Up to \$1,500,000 per identical violation per year.
Violation due to willful neglect and the violation was not corrected within 30 days after the covered entity knew or should have known of the violation.	Mandatory fine of not less than \$50,000 per violation; Up to \$1,500,000 per identical violation per year.

*In 2009, the penalties for HIPAA violations were increased 500 times the prior amount.*

The government is serious about the new penalties: the OCR has imposed millions of dollars in penalties or settlements since the mandatory penalties took effect. Recent HIPAA amendments also authorize state attorneys general to sue individuals for HIPAA violations and recover penalties in the amount of \$25,000 per violation plus fees. The amendments also permit affected individuals to recover a portion of any settlement or penalties related to a HIPAA violation, thereby increasing their incentive to report HIPAA violations. Regulations implementing the amendments are pending.

The good news is that if the covered entity or business associate does not act with willful neglect, the OCR may waive or reduce the penalties, depending on the circumstances of the violation. More importantly, if the covered entity or business associate does not act with willful neglect and corrects the violation within 30 days, the OCR may not impose any penalty; timely correction constitutes an affirmative defense.

## HIPAA violations may be a crime

Even if not a business associate, attorneys and any other individuals may be liable under HIPAA's criminal statute for improperly obtaining or disclosing protected health information from a covered entity without authorization:

Prohibited Conduct	Penalty
Knowingly obtaining or disclosing protected health information without authorization.	Up to \$50,000 fine and one year in prison.
If done under false pretenses.	Up to \$100,000 fine and five years in prison.
If done with intent to sell, transfer, or use the information for commercial advantage, personal gain or malicious harm.	Up to \$250,000 fine and ten years in prison.

## What your clients (and you) need to do to avoid penalties.

Given this increased exposure, covered entities and their attorneys need to do the following to avoid HIPAA penalties:

**1. Read the rules.** There is no substitute for actually knowing the rules, which are found at 45 C.F.R. part 164. The OCR maintains a very helpful website to facilitate HIPAA compliance: [www.hhs.gov/ocr/privacy](http://www.hhs.gov/ocr/privacy). Among other things, the website contains copies and summaries of the rules, guides, forms, and frequently asked questions.

**2. Assign HIPAA responsibility.** Covered entities must designate persons to serve as HIPAA privacy and security officers and document the designation in writing. The privacy and security officers are responsible for ensuring HIPAA compliance.

**3. Comply with use and disclosure rules.** The basic privacy rules are simple. In general, covered entities and business associates may not use, access or disclose protected health information without the patient's valid, HIPAA-compliant authorization unless the use or disclosure fits within an exception. Covered entities and business associates may use or disclose protected health information for purposes of treatment, payment or certain health care operations without the patient's consent. However, they may not use or disclose more than is minimally necessary for the permitted purpose.

**4. Comply with patient rights. HIPAA grants patients certain rights concerning their health information.** Among others, patients generally have a right to obtain copies of their protected health information, request amendment to their information, and obtain an accounting of impermissible disclosures. Covered entities and business associates must allow patients to exercise their rights. Cignet Health was fined \$4.3 million for, among other things, failing to timely respond to patient requests to access their health information.

**5. Maintain written policies.** HIPAA requires covered entities and business associates to develop and maintain written policies that implement the privacy and security rule requirements. Having the required policies is a key to avoiding penalties: it may be difficult to avoid a finding of willful neglect if you failed to implement the policies required by HIPAA. HHS has indicated that maintaining the

*If the breach involves less than 500 persons, the covered entity must notify HHS by filing an electronic report no later than 60 days after the end of the calendar year.*

required written policies is a significant factor in avoiding penalties imposed for "willful neglect." In contrast, Rite Aid paid \$1 million to settle HIPAA violations based on its failure to maintain required HIPAA policies.

**6. Develop compliant forms.** HIPAA requires that certain documents used by covered entities and business associates satisfy regulatory requirements. For example, HIPAA authorizations must contain certain elements to be valid. Covered entities must provide patients with a notice of privacy practices that contains certain statements. Other forms may be developed to ensure compliance with patient rights. Ensure your HIPAA forms satisfy the regulatory requirements.

**7. Execute business associate agreements.** Although HIPAA now applies directly to business associates, HIPAA still requires covered entities to execute "business associate agreements" with their business associates before disclosing protected health information to the business associate. Under proposed rules, attorneys and other business associates must execute similar agreements with subcontractors to whom the business associate discloses protected health information. The business associate agreements must contain certain elements. Breach of the business associate agreement exposes the business associate to contract claims by the covered entity in addition to the civil or criminal penalties that may follow HIPAA violations.

**8. Train employees and agents.** Having the policies and forms is only the first step. Covered entities and business associates must train their agents to comply with the policies and agreements. HIPAA requires that new employees be trained within a reasonable period of time upon hire, and as needed thereafter. Documented training is a second most important step to avoid HIPAA compliance. In commentary to HIPAA's new penalties, HHS indicated that covered entities may

avoid HIPAA penalties based on the misconduct of a rogue employee so long as the covered entity implemented appropriate policies and adequately trained the employee.

**9. Use appropriate safeguards.** The government recognizes that patient information cannot be absolutely protected; accordingly, HIPAA does not impose liability for "incidental disclosures" so long as the covered entity or business associate implemented reasonable administrative, technical, and physical safeguards designed to protect against improper disclosures. The security rule contains detailed regulations concerning safeguards that must be implemented to protect electronic health information. The privacy rule is less specific. Reasonable safeguards may include, e.g., not leaving protected health information where it may be lost or improperly accessed; checking e-mail addresses and fax numbers before sending using fax cover sheets; etc.

**10. Respond immediately to any breach.** This is critical for several reasons. First, HIPAA requires covered entities and business associates to investigate any privacy complaints, mitigate any breach, and impose appropriate sanctions against any agent who violates HIPAA. It may also require covered entities to terminate an agreement with a business associate due to the business associate's noncompliance. Second, an entity may be able to ameliorate or negate any risk of harm to the affected individual by taking swift action, thereby avoiding the obligation to self-report HIPAA violations to the individual and the government. Third, a covered entity or business associate can avoid HIPAA penalties altogether if it corrects the violation within 30 days.

**11. Timely report breaches.** If a breach of unsecured protected health information poses a risk of significant financial, reputational or other harm to the individual, business associates must promptly report the breach to covered entities, and cov-

ered entities must notify the individual within 60 days. If the breach involves less than 500 persons, the covered entity must notify HHS by filing an electronic report no later than 60 days after the end of the calendar year. If the breach involves 500 or more persons, the covered entity must file the electronic report at the same time it gives notice to the individual. The written notice to the individual must satisfy certain regulatory requirements.

**12. Document your actions.** Documentation of proper action is essential to defend yourself against HIPAA claims. In addition, covered entities and business associates are generally required to maintain documentation required by HIPAA for six years.

**13. Watch for new rules.** As I write this article, the Office of Management and Budget is considering new HIPAA regulations, including those affecting business associate responsibilities. Attorneys and their health care clients should watch for the new regulations and implement any additional changes as necessary.

**About the Author**

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**Endnotes**

- <sup>1</sup> "HIPAA" is the Health Insurance Portability and Accountability Act. The HIPAA privacy and security rules are found at 45 C.F.R. part 164.
- <sup>2</sup> 45 C.F.R. § 160.103 (definition of *covered entity*).
- <sup>3</sup> *Id.* (definition of *business associate*).
- <sup>4</sup> *Id.* (definition of *protected health information*).
- <sup>5</sup> 45 C.F.R. § 164.400 *et seq.*
- <sup>6</sup> 45 C.F.R. § 164.410.
- <sup>7</sup> 45 C.F.R. §§ 164.404 and .408.
- <sup>8</sup> 45 C.F.R. §§ 164.406.
- <sup>9</sup> 45 C.F.R. §§ 160.404.
- <sup>10</sup> 45 C.F.R. §§ 160.401 and .404; *see* 75 F.R. 40876.
- <sup>11</sup> *See, e.g.*, reported enforcement actions listed at <http://www.hhs.gov/ocr/privacy> (last visited April 26, 2012).
- <sup>12</sup> 42 U.S.C. § 1320d-5(d).
- <sup>13</sup> 45 C.F.R. § 160.408.
- <sup>14</sup> 45 C.F.R. § 160.410.
- <sup>15</sup> 42 U.S.C. § 1320d-6.
- <sup>16</sup> 45 C.F.R. § 164.530(a).
- <sup>17</sup> 45 C.F.R. § 164.502(a).
- <sup>18</sup> 45 C.F.R. § 164.502(b).

- <sup>19</sup> 45 C.F.R. § 164.524.
- <sup>20</sup> 45 C.F.R. § 164.526.
- <sup>21</sup> 45 C.F.R. § 164.528.
- <sup>22</sup> *See* <http://www.hhs.gov/news/press/2011pres/02/20110222a.html> (last visited April 26 2012).
- <sup>23</sup> 45 C.F.R. § 164.316(a) and .530(f).
- <sup>24</sup> *See* 75 F.R. 48078-79.
- <sup>25</sup> *See* <http://www.hhs.gov/news/press/2010pres/07/20100727a.html> (last visited April 26, 2012).
- <sup>26</sup> 45 C.F.R. § 164.508.
- <sup>27</sup> 45 C.F.R. § 164.520.
- <sup>28</sup> 45 C.F.R. § 164.308(b) and .502(e).
- <sup>29</sup> 75 F.R. 40873.
- <sup>30</sup> 45 C.F.R. § 164.314(a) and .504(e).
- <sup>31</sup> 45 C.F.R. § 164.530(b).
- <sup>32</sup> 75 F.R. 40879.
- <sup>33</sup> 45 C.F.R. § 164.502(a)(1)(iii); *see* OCR Guidance on Significant Aspects of the Privacy Rule: Incidental Uses and Disclosures, available at: <http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/incidentalsusesanddisclosures.html> (last visited April 26, 2012).
- <sup>34</sup> 45 C.F.R. § 164.308-.316, and Appendix A to 45 C.F.R. subpart C of part 164.
- <sup>35</sup> 45 C.F.R. § 164.530(c).
- <sup>36</sup> 45 C.F.R. § 164.530(d)-(f).
- <sup>37</sup> *See* 45 C.F.R. § 164.314(a)(2)(i)(D) and .504(e)(2)(iii).
- <sup>38</sup> *See* 74 F.R. 42744-45.
- <sup>39</sup> 45 C.F.R. § 160.410.
- <sup>40</sup> 45 C.F.R. §§ 164.404-.410.
- <sup>41</sup> 45 C.F.R. § 164.408(c).
- <sup>42</sup> 45 C.F.R. § 164.408(b).
- <sup>43</sup> 45 C.F.R. § 164.404.
- <sup>44</sup> 45 C.F.R. § 164.530(j).

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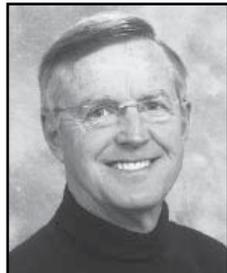
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# THE MEDICARE SECONDARY PAYER ACT: A NEW PARADIGM FOR LITIGATORS

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The federal government's new enforcement effort with respect to the Medicare Second Payer Act (MSPA) will fundamentally change the way attorneys practice in litigation involving the personal injury of a Medicare beneficiary. The old model of waiting until settlement to address "settlement issues," such as medical liens, etc., must now be replaced with a pattern of proactive behavior by attorneys. The MSPA has truly created a new paradigm for counsel in handling and settling cases involving Medicare beneficiaries.

When a Medicare beneficiary is injured by another's actions and as a result incurs medical expenses paid by Medicare, a "super lien" arises in favor of Medicare. Later, when the matter is in litigation, the Medicare lien becomes a serious issue that the parties must address



J. Kevin West

or they can be subject to a recovery action by Medicare that may include double damages ( i.e. twice the amount of the medical expense lien) and attorney fees. Recent changes in the MSPA have made it a much greater risk not only to ignore the Medicare lien, but also to continue to address the liens as litigators traditionally have done for years.

The following illustrates this new paradigm for handling cases with Medicare beneficiaries:

*Litigators must recognize that they cannot contract around Medicare reimbursement obligations, as was often done in the past.*

A thoughtful perusal should cause litigators some anxiety, or better yet, it should prompt counsel to begin to proactively take steps to properly address Medicare issues prior to the settlement of such cases.

## Settling cases with Medicare beneficiaries: A new paradigm

### A. Settlement Strategies

Cases with Medicare beneficiaries must be handled differently than other cases, and this is most true when settling. Litigators must recognize that they cannot contract around Medicare reimbursement obligations, as was often done in the past. Counsel must also realize that if there is a settlement, Medicare will assume that the settling party is 100% responsible for all the Medicare payments, unless there is a court order stating differently. Medicare does not recognize and is not bound by allocations of fault or damages entered into by the parties as a matter of settlement documentation. Such allocations will be recognized only where there is a court order on the merits. Medicare does not take into account whether the defendant disputes liability, or that the claimant has a preexisting condition.

In settling a case involving the Medicare beneficiary, there are essentially four options:

1. Put Medicare as a joint payee on the settlement check;
2. Hold the settlement proceeds until the final demand letter from Medicare, then issue separate checks to the plaintiff and Medicare;
3. Settle for "new money" with the plaintiff and have the primary plan directly reimburse Medicare;
4. Go to trial or arbitration and get a court-ordered or jury-determined allocation of past and future medical expenses.

### Option 1: Putting Medicare as a joint payee on the settlement check

With this option, Medicare is made the joint payee on the lump sum settlement check, placing the burden on the plaintiff and Medicare to have the proper amount deducted from the settlement before proceeds are released to the plaintiff. This option offers great protection to the defendant. In addition, for the defendant, this is a potentially easy and quick solution to the problem of Medicare's conditional payments. On the other hand, there is a risk that the settlement check can become stale if it is not quickly endorsed by the parties. Counsel must recognize that Medicare will demand to be the last signatory on the settlement check. Additionally, the plaintiff will not have access to the money for weeks or even potentially months during the process of endorsing the check and releasing funds. Also, plaintiff's counsel may not agree to this and the court may not uphold this practice. Finally, if the payee fails to endorse the settlement check in a timely fashion, the deadline to reimburse Medicare may pass, causing a potential for enforcement action and double damages to Medicare.

Old Way	New Way
Wait until mediation to worry about settlement details.	Settlement issues must be addressed early in the case, before mediation.
The court is not involved in settlement matters.	Court involvement may be needed in order to approve settlement allocations.
Responsibility for medical liens is contractually placed on plaintiff and plaintiff's counsel.	Counsel cannot contract around Medicare reimbursement obligations and resolution of Medicare liens.
Settlements close immediately.	Settlements may be left open for months.
Little cooperation is needed with plaintiff's counsel regarding most settlement issues.	Cooperation is needed among counsel or settlements may unravel.
Defense counsel could let plaintiff/plaintiff's counsel worry about medical liens.	All counsel must be vigilant to ensure satisfaction of Medicare liens.
Little risk of double indemnity for insureds and insurers.	A significant risk of double indemnity exists as to insurers and their insureds unless claims are resolved appropriately.

## **Option 2: Holding the settlement proceeds until the final demand letter from Medicare, then issuing separate checks to the plaintiff and Medicare**

With this option, the defendant holds all the settlement proceeds until it receives a final demand from Medicare and then issues separate checks — one for the medical expenses to Medicare and one for the difference to the plaintiff. The advantage of this option is that it will give plaintiff quicker access to settlement money. Further, it will ensure accurate and reasonably certain full payment of Medicare obligations. In proceeding with this option, counsel should consider a “hold-back” of some funds to avoid uncertainties as to the final lien amount. On the con side, this option may place the defendant and its counsel in the role of bailee of the settlement funds. This could cause defense counsel to become a target (as a “primary payee”) for any recovery action by Medicare. Finally, the ultimate conditional payment amount may be different than expected, causing a dispute as to who, defendant or plaintiff, is responsible for the difference.

## **Option 3: Settling for “new money” with the plaintiff and having the primary plan directly reimburse Medicare**

Under this option, the defendant settles for “new money” with the plaintiff and agrees to pay all Medicare claims directly to Medicare. New money means that what is paid to the claimant is over and above whatever the Medicare lien may be. This option is used primarily in cases with unrepresented claimants; it is generally not appropriate for claimants who have counsel. For example, in a case involving minor injuries with a pro se claimant, counsel may be aware that the claims by Medicare are small in size, e.g., less than \$5,000. Assuming the claimant agrees, a settlement amount can be paid directly to the claimant, with the defendant and its insurer agreeing to satisfy whatever amount of the medical lien held by Medicare. In a situation with minor injuries, the exposure here can generally be quantified and controlled.

## **Option 4: Going to trial or arbitration and getting a court-ordered or jury-determined allocation of past and future medical expenses**

In this option, the case goes to trial or arbitration, and the court or jury allocates past and future medical expenses. The advantage of this option is finality and certainty as to the amounts of the medical expenses. Medicare is bound by the court or jury’s allocation of fault and damages.

The disadvantage of this approach is that it requires ultimate completion of the litigation process.

### **B. Settlement Documentation: Best Practices**

The planning and preparation by counsel for settlement and mediation should begin well before the event itself. In addition, the actual documentation of the settlement is critical. The settlement documents should:

1. Clearly spell out who will reimburse Medicare, how reimbursement will be done, and when;
2. Include a waiver of the plaintiff’s private cause of action under the MSPA;
3. Spell out who, if anyone, will contest (through the administrative appeals process) relatedness issues in the final settlement demand;
4. Carefully identify the injuries (by ICD-9 code if possible) and should avoid “kitchen sink” language;
5. Disclose the plaintiff’s rights of waiver, compromise appeal, and procurement costs and the disposition of such;
6. Include a cooperation clause requiring the plaintiff to provide post-settlement updates and documentation showing satisfaction of Medicare reimbursement obligations;
7. State that liability is disputed and that all benefits are exhausted under the liability insurance plan or policy;
8. Specify who gets any “salvage,” i.e. if there is an unexpected shortfall or overage as to the Medicare expenses;
9. Include a waiver of any violation of state unfair claims settlement practices laws (i.e. regarding timeliness of settlement payments);
10. Include as attachments any set-aside documentation, spreadsheets or analyses, and any court-determined allocations as to damages or fault;
11. State that the parties have taken into account Medicare’s interests and that they do not intend to shift responsibility to Medicare; and
12. Include the age-old indemnification clause stating that if plaintiff fails to reimburse Medicare that plaintiff will be liable for any monies that must be paid by the defendant.

Additionally, if appropriate, counsel should consider using a procedure akin to a minor’s compromise or special needs trust hearing to get approval for any “Medicare Set Aside” (MSA). An MSA is a means of designating or setting aside settlement monies to pay for future medi-

cal expenses that are expected to be paid by Medicare. The MSPA requires that the parties consider Medicare’s interests not only as to past medical expenses, but also those to be incurred in the future. Determining how much must be designated for the MSA will generally require the assistance of medical experts and life care planners.

### **C. Miscellaneous Issues**

It may be a wise practice to ask the court to include MSPA compliance issues in litigation scheduling/management orders. In addition, settlement documentation, and all supporting papers, should now be retained for a minimum of six years because the statute of limitations for Medicare recovery actions is either three or six years, depending on interpretation by the courts. Litigation firms should check their document retention practices in order to prevent premature purging or destruction of files.

### **Conclusion**

Litigators should consider designating an attorney or committee within their firms to police MSPA issues, particularly settlements. This designee should obtain a copy of the MSP Manual issued by The Centers for Medicare and Medicaid Services and become thoroughly familiar with it. Firms that fail to organize themselves in this manner could be subject to malpractice liability if a settlement goes awry or if the client is subjected to double liability or attorney fees.

### **About the Author**

**J. Kevin West’s** is an attorney at *Parsons Behle & Latimer*. His practice emphasizes healthcare and employment law. Mr. West also does trial work, particularly in the areas of employment law, commercial litigation, professional malpractice, personal injury and insurance litigation. Mr. West also advises and represents companies regarding business and employment matters.

### **Endnotes**

1. Medicare Secondary Payer Manual, ch. 7 § 50.4.4.
2. 42 U.S.C. § 1395y(b)(2)(B)(ii-iii).
3. Medicare Secondary Payer Manual, ch. 7, § 50.4.5.
4. R. Franco and J. Signor, Medicare Secondary Payer Compliance, Juris Publishing (2010).
5. See, e.g., *Tomlinson v. Landers*, 2009 WL 1117399 (M.D. Fla. 2009) (refusing to require plaintiff to accept a joint-payee settlement check and enforcing settlement without such).
6. See 42 C.F.R. § 411.24(e)-(g).
7. 42 U.S.C. § 1395y(b)(3)(A).
8. The issue of relatedness refers to whether some or all of the medical expenses claimed in the Medicare lien actually resulted from the accident or injury in question, as opposed to some other, unrelated health condition of the claimant.
9. The manual is available at <http://www.cms.gov/manuals/downloads/msp105c07.pdf>.

# THE RESURGENCE OF THE RESPONSIBLE CORPORATE OFFICER DOCTRINE

Thomas Mortell  
Michelle Gustavson  
*Hawley Troxell Ennis & Hawley  
LLP*

Hospitals and healthcare systems and their attorneys should take note of the recent resurgence of the responsible corporate officer (RCO) doctrine. Aptly referred to as the crime of doing nothing, the RCO doctrine is a strict-liability theory used by the government to bring misdemeanor charges against officers and directors who fail to prevent or correct a corporation's misconduct. Traditionally used in Federal Drug Administration (FDA) cases, prosecutors have successfully expanded RCO doctrine-type liability to public welfare statutes, including The Sherman Antitrust Act, federal securities laws, and state and federal environmental laws.<sup>1</sup> Notably, the Office of the Inspector General of the Health and Human Services Department (OIG) has recently applied elements of the RCO doctrine to exclude certain individuals from participating in federal healthcare programs such as Medicare and Medicaid, meaning that no program payment may be made for any items or services furnished, ordered, or prescribed by these excluded individuals.<sup>2</sup> This growing enforcement trend leaves officers, directors, certain managers, administrators and even general counsel of hospitals and healthcare systems vulnerable to exclusion. These individuals should stay well-informed of the risks associated with the RCO doctrine, and should adopt and enforce comprehensive compliance programs to help avoid potentially career-ending exclusion.



Thomas Mortell



Michelle Gustavson

## The history of the RCO Doctrine

The United States Supreme Court first analyzed the RCO doctrine in *United States v. Dotterweich*.<sup>3</sup> In *Dotterweich*, the federal government prosecuted Buffalo Pharmacal Company, Inc., a wholesaler of drugs, and Joseph Dotterweich, its president and general manager, for violations of the federal Food, Drug and Cosmetic Act (FDCA).<sup>4</sup> Section 331(a) of the FDCA prohibits in pertinent part “[t]he introduction or delivery for intro-

duction into interstate commerce of any . . . drug . . . that is adulterated or misbranded.” Section 333 goes on to make “any person” who violates Section 331(a) “guilty of a misdemeanor,” thus making Section 333 one of the few strict liability crimes under federal law.

The jury found Dotterweich guilty on three counts – two for shipping misbranded drugs in interstate commerce and one for shipping an adulterated drug. All three counts were based on a single shipment for which Dotterweich had no personal connection. Nevertheless, Dotterweich was “in general charge of the corporation’s business and had given general instructions to its employees to fill orders received by physicians.”<sup>5</sup> Notably, the jury found Buffalo not guilty on all charges.

On appeal, the Second Circuit Court of Appeals reversed Dotterweich’s conviction on the ground that the corporation was the only “person” subject to prosecution unless Buffalo was merely Dotterweich’s alter ego.<sup>6</sup> The Supreme Court reversed, holding that the term “any person” may include any corporate officer or employee standing in “responsible relation” to a condition or transaction forbidden by the FDCA.<sup>7</sup> Moreover, the Supreme Court observed that the FDCA “dispenses with the conventional requirement for criminal conduct-awareness of some wrongdoing” and “[i]n the interest of the larger good . . . puts the burden of action at hazard upon a person otherwise innocent but standing in responsible relation to a public danger.”<sup>8</sup>

Over thirty years later, in *United States v. Park*,<sup>9</sup> the Supreme Court reaffirmed

*This growing enforcement trend leaves officers, directors, certain managers, administrators and even general counsel of hospitals and healthcare systems vulnerable to exclusion.*

*Dotterweich* and upheld an executive’s conviction under the FDCA. In that case, the federal government prosecuted Acme Markets, Inc., a national retail food chain, and John Park, its president and chief executive officer, for shipping adulterated food (i.e., contaminated by rodents) in interstate commerce. The Food and Drug Administration (FDA) had repeatedly notified Acme of insanitary conditions in its warehouses, and Park, personally, had received notice of a failed violation in 1970. Acme pleaded guilty but Park pleaded not guilty.

During the trial, the government introduced Acme’s bylaws, which prescribed the duties of the CEO.<sup>10</sup> The government also called Acme’s vice president to testify that Park delegated “normal operating duties” such as “sanitation,” but ultimately retained “certain things, which are the big, broad, principles of the operation of the company” and had “the responsibility of seeing that they all worked together.”<sup>11</sup> On cross-examination, Park conceded that providing sanitary conditions for food offered for public sale fell under the ambit of his responsibilities for “the entire operation of the company.”<sup>12</sup> The trial court instructed the jury that in order to find Park guilty, Park was required to have a responsible relation to the adulterated food, even if he did not consciously do wrong. The jury found Park guilty on all counts and he was subsequently sentenced to a fine of \$50 on each count.

The Fourth Circuit Court of Appeals reversed Park’s conviction, reasoning that the trial court’s instruction left the jury with the erroneous impression that Park could be found guilty in the absence of “wrongful action” on his part, and that proof of this element was required by due process.<sup>13</sup> The Fourth Circuit directed that on retrial the jury be instructed as to “wrongful action,” which might be “gross negligence and inattention to discharging . . . corporate duties and obligations or any

of a host of other acts of commission or omission which would 'cause' the contamination of food."<sup>14</sup>

The United States Supreme Court disagreed and upheld the trial court's instruction. The Supreme Court noted that "Dotterweich and the cases which have followed reveal that in providing sanctions which reach and touch the individuals who exercise the corporate mission. . . the [FDCA] imposes not only a positive duty to seek out and remedy violations when they occur but also, and primarily, a duty to implement measures that will insure that violations will not occur."<sup>15</sup>

### **The resurgence of the RCO Doctrine**

The resurgence of the RCO doctrine is evidenced by two recent high-profile cases. First, in 2007, the federal Department of Justice (DOJ) brought charges against Purdue Frederick Company, Inc. and three of its officers (the president and chief executive officer, chief legal officer, and former chief medical officer) for violations of the FDCA associated with the misbranding of OxyContin. Purdue's supervisors and employees fraudulently marketed the drug by falsely claiming that OxyContin was less addictive, less subject to abuse, and less likely to cause withdrawal symptoms than other pain medications. There was neither the research to support the off label marketing, nor had the FDA approved such claims.

The DOJ alleged that the three executives were responsible corporate officers at the time the misbranding occurred and, therefore, guilty of misdemeanors. Notably, the executives were not charged with personal knowledge of the misbranding or with any personal intent to defraud. Purdue and the executives pled guilty and agreed to pay \$634,515,475 in fines. In their plea agreements, the three executives agreed to pay a total of \$34,500,000 to the Virginia Medicaid Fraud Unit's Program Income Fund in exchange for no jail time.<sup>16</sup>

Almost immediately, the OIG used its permissive exclusion authority to debar the three Purdue executives from participation in federal healthcare programs for 12 years, effectively excluding them from the health care industry all together. Under Section 1128(b) of the Social Security Act,<sup>17</sup> the OIG has 16 bases for permissive exclusion, which include certain misdemeanor convictions. Further, pursuant to the Balanced Budget Act of 1997,<sup>18</sup> the OIG is authorized to impose civil monetary penalties against health

*Even more troubling is that Howard Udell, one of the three executives, is Purdue's former general counsel, making him the first known general counsel to be debarred under the RCO doctrine.<sup>21</sup>*

care providers or entities that employ or enter into contracts with excluded individuals for the provision of services or items to federal program beneficiaries. "Thus, a provider or entity that receives [f]ederal health care funding may only employ an excluded individual in limited situations," such as where the provider can pay the individual exclusively with private funds or from other non-federal funding sources, or where the services furnished by the excluded individual relate solely to non-federal program beneficiaries.<sup>19</sup>

The three Purdue executives appealed their exclusions, arguing that the RCO doctrine misdemeanor convictions did not relate to fraud or the unlawful distribution of a controlled substance. The United States District Court of the District of Columbia affirmed their exclusion,<sup>20</sup> and an appeal before the United States Court of Appeals for the District of Columbia Circuit is currently pending. The ban, if upheld, will effectively end the executives' careers.

Even more troubling is that Howard Udell, one of the three executives, is Purdue's former general counsel, making him the first known general counsel to be debarred under the RCO doctrine.<sup>21</sup> The Association of Corporate Counsel ("ACC") filed an amicus brief in support of the executives' appeal, arguing, among other things, the OIG's exclusionary power as applied to general counsel "inappropriately shifts liability and punishment that the government cannot pin on the corporate entity to those who are obliged to provide legal counsel and advocate for their clients' positions."<sup>22</sup>

In the second case filed in 2009, the DOJ brought charges against Synthes Inc., a medical device manufacturer, and four of its executives (the chief operating officer, former president of the Spine Division, former director of regulatory and clinical affairs of the Spine Division, and former vice president of operations) related to the unauthorized use of bone cements, Norian SRS and Norian XR, in spinal surgery clinical trials.<sup>23</sup> The ce-

ments, which were produced by Norian, a wholly-owned subsidiary of Synthes, were injected into patients' spines without FDA approval. Of the 200 patients operated on, three died. The four executives each pled guilty to one misdemeanor count of shipping adulterated and misbranded Norian XR in interstate commerce under the RCO doctrine. They were each sentenced to prison terms ranging from five to nine months and ordered to pay \$100,000 in fines. It is expected that the OIG will seek to exclude the four executives from participation in federal healthcare programs.

The OIG has also recently invoked its permissive exclusion authority against officers and managing employees in non-FDCA cases. In 2009, the OIG permanently excluded Emmanuel Bernabe, the president and chairman of Pleasant Care Corporation, from further participation in federal healthcare programs following an investigation of allegations regarding substandard care nursing homes managed by Pleasant Care.<sup>24</sup> The ban stemmed from the OIG's permissive authority to exclude an individual that fails to meet professional recognized standards of health care to be furnished to patients.<sup>25</sup> In a press release, Inspector General Daniel Levinson stated: "It is critical that boards and management make compliance with professionally recognized standards of care a priority at all levels of their organizations."<sup>26</sup>

In addition, the OIG has made efforts to ban executives of pharmaceutical companies. In 2010, Marc Hermelin, the former chief executive officer and substantial owner of KV Pharmaceutical, was banned from participating in federal healthcare programs after a KV subsidiary pled guilty to two counts of criminal fraud for failing to report to the FDA that it was making oversize tablets that could be harmful to patients.<sup>27</sup> And although in 2011 the OIG sought to exclude Howard Solomon, chairman of Forest Laboratories, the agency elected to drop the action later that year.<sup>28</sup>

## OIG guidance

On October 20, 2010, the OIG released guidance regarding what factors it will consider when determining whether to implement its permissive exclusionary authority.<sup>29</sup> Individuals with an ownership or controlling interest in a sanctioned entity may be excluded if they knew or should have known of the conduct that led to sanctions, whereas officers and managing employees, which includes a general manager, business manager, administrator or director,<sup>30</sup> may be excluded based solely on their position within the entity.<sup>31</sup> Thus, there is no knowledge element with respect to officers and managing employees.

Although the OIG has announced that it does not intend to exclude all officers and managing employees, the agency will operate with a presumption in favor of exclusion when there is evidence that the officer or managing employee knew or should have known of the conduct.<sup>32</sup> The presumption may be overcome if the OIG finds significant factors that weigh against exclusion.<sup>33</sup>

In the absence of evidence that the individual knew or should have known of the conduct, the OIG will consider the following factors:

- Circumstances of the misconduct and seriousness of the offense;
- Individual's role in the sanctioned entity;
- Individual's actions in response to the misconduct; and
- Information about the entity.<sup>34</sup>

In regards to the second factor, the OIG will focus on (i) the individual's position during the time of the misconduct, (ii) the individual's degree of managerial control or authority in the position, (iii) the relation of the individual's position to the misconduct, and (iv) whether the conduct occurred within the individual's chain of command. For the third factor, the OIG will consider (i) whether the individual took steps to stop the underlying misconduct or mitigate the ill effects of the misconduct, (ii) whether such actions took place before the individual had reason to know of an investigation, (iii) whether the individual disclosed the misconduct to the appropriate federal or state authorities, and (iv) whether the individual cooperated with investigators and prosecutors and responded in a timely manner to lawful requests for documents and evidence.<sup>35</sup> If the individual can demonstrate that it was impossible to prevent

*According to the Inspector General, a board's "commitment to and promotion of ongoing [compliance] efforts greatly enhances their opportunity for success."<sup>44</sup>*

the misconduct or that the individual exercised extraordinary care but still could not prevent the misconduct, the OIG may weigh this evidence against exclusion.<sup>36</sup>

### Defense to the RCO Doctrine

The only defense to the RCO doctrine is objective impossibility. In *Park*, the Supreme Court indicated that a defendant can present evidence that he was "powerless to prevent or correct the violation."<sup>37</sup> In cases after *Park*, defendants have argued that despite having exercised "extraordinary care," it was impossible for them to prevent the violations.<sup>38</sup> As set forth above, the OIG similarly recognizes the impossibility defense in exclusion actions. It should be noted, however, that courts have been hostile to delegation arguments made by executives in support of the impossibility defense.<sup>39</sup>

Because the impossibility defense offers scarce protection, commentators suggest that the best defense against RCO liability is implementing a comprehensive compliance program.<sup>40</sup> According to compliance guidance from the OIG, at a minimum, an effective compliance program should include the following seven elements:

- The development and distribution of written standards of conduct, as well as written policies and procedures that promote the entity's commitment to compliance;
- The designation of a chief compliance officer and compliance committee charged with the responsibility of operating and monitoring the compliance program;
- The development and implementation of regular, effective education and training for all pertinent employees;
- The maintenance of a hotline or other process to receive complaints, and the adoption of procedures to protect the anonymity of complainants and whistleblowers from retaliation;
- The development of a system to respond to allegations of improper/il-

legal activities and the enforcement of appropriate disciplinary action against employees who have violated internal policies, statutes, regulations or other requirements of federal health care programs;

- Regular audits or evaluations to monitor compliance; and
- Investigation and remediation of compliance issues.<sup>41</sup>

In fact, Inspector General Daniel Levinson recently recommended that every hospital have an effective compliance program, which "promote[s] the prevention, detection and resolution of actions that do not conform to federal and state law."<sup>42</sup> The Inspector General has made it clear that a successful compliance plan "establishes a culture of ethical and legal standards of behavior" and that the OIG expects hospital and hospital system boards to take "active roles" in areas such as compliance.<sup>43</sup> According to the Inspector General, a board's "commitment to and promotion of ongoing [compliance] efforts greatly enhances their opportunity for success."<sup>44</sup>

Given the heightened risk of RCO doctrine prosecutions, insurance providers have recently unveiled policies to cover the costs associated with RCO investigations and related enforcement actions and administrative debarment/exclusion proceedings.<sup>45</sup> Executives can even recover a portion of their annual salary under the policy.<sup>46</sup> However, rather than relying on insurance policies, the best line of defense for executives is corporate compliance.

### Conclusion

Although the OIG has not yet aggressively applied its permissive exclusion authority to hospitals and health systems, the agency's recent exclusion efforts subject officers, managing employees and general counsel of hospitals and health systems to RCO-type exposure.<sup>47</sup> As such, these individuals should stay educated about the risks associated with the RCO doctrine and, as explained above, implement effec-

tive compliance programs to deter liability. The risks are too great to overlook the importance of compliance. Attorneys for hospitals and health systems will certainly find no measure of added comfort in the knowledge that the OIG has yet another enforcement tool that it appears willing to utilize.

#### About the Authors

**Thomas J. Mortell** is the Chair of the Health Law Group at Hawley Troxell Ennis & Hawley LLP. Mr. Mortell represents health care providers in joint ventures and business transactions, as well as a broad range of health care matters. Mr. Mortell also serves as the Vice Chair of the Health Law Section of the Idaho State Bar.

**Michelle Gustavson** is an associate at Hawley Troxell Ennis & Hawley LLP and a member of the firm's Health Law Group. Ms. Gustavson advises health care providers on federal and state compliance issues and licensing requirements.

#### Endnotes

- <sup>1</sup> Michael Peregrine et al., *Coming on Strong: The Responsible Corporate Officer Doctrine*, AM. HEALTH LAWYERS ASS'N, IN-HOUSE COUNSEL & BUS. L. & GOVERNANCE PRACTICE GROUPS, Feb. 2011, at 1, available at [http://www.mwe.com/info/pubs/AHLA\\_0211.pdf](http://www.mwe.com/info/pubs/AHLA_0211.pdf) [hereinafter Peregrine, *Coming on Strong*].
- <sup>2</sup> See *id.* at 1–2.
- <sup>3</sup> 320 U.S. 277 (1943).
- <sup>4</sup> 21 U.S.C. § 301 *et seq.*
- <sup>5</sup> *United States v. Buffalo Pharmacal Co.*, 131 F.2d 500, 501 (2d Cir. 1942), *rev'd*, 320 U.S. 277, 285 (1943).
- <sup>6</sup> *United States v. Dotterweich*, 320 U.S. 277, 279 (1943).
- <sup>7</sup> See *id.* at 285.
- <sup>8</sup> *Id.* at 280–81.
- <sup>9</sup> 421 U.S. 658 (1975).
- <sup>10</sup> *Id.* at 662–63.
- <sup>11</sup> *Id.*
- <sup>12</sup> *Id.* at 664.
- <sup>13</sup> *United States v. Park*, 499 F.2d 839, 841–42 (4th Cir. 1979), *rev'd*, 421 U.S. 658, 678 (1975).
- <sup>14</sup> *Id.* at 842.
- <sup>15</sup> *United States v. Park*, 421 U.S. 658, 672 (1975).
- <sup>16</sup> *United States v. Purdue Frederick Co., Inc.*, 495 F.Supp.2d 569, 573 (W.D. Va. 2007).

## The agency's recent exclusion efforts subject officers, managing employees and general counsel of hospitals and health systems to RCO-type exposure.<sup>47</sup>

<sup>17</sup> 42 U.S.C. § 1320a-7(b).

<sup>18</sup> Pub. L. No. 105-33, 111 Stat. 324.

<sup>19</sup> *The Effect of Exclusion from Participation in Federal Health Care Programs*, SPECIAL ADVISORY BULL. (Office of the Inspector Gen. for the Dep't of Health and Human Servs.), September 1999, available at <http://oig.hhs.gov/fraud/docs/alertsandbulletins/affected.htm>.

<sup>20</sup> *Friedman v. Sebelius*, 755 F. Supp. 2d 98 (D.D.C. 2010).

<sup>21</sup> Michael Clark, *The Responsible Corporate Officer Doctrine*, J. OF HEALTH CARE COMPLIANCE, Jan.–Feb. 2012, at 8.

<sup>22</sup> Brief for Ass'n of Corporate Counsel as Amicus Curiae Supporting Appellants, *Friedman v. Sebelius* (No. 11-5028), available at <http://www.acc.com/vl/public/AmicusBrief/upload/ACCAmicusFriedmanvSebelius.pdf>.

<sup>23</sup> Press Release, United States Department of Justice, International Medical Device Maker and Four Executives Charged in Connection with Unlawful Clinical Trials (Jun. 16, 2009), available at <http://www.justice.gov/usao/pae/News/2009/jun/synthes-release.pdf>.

<sup>24</sup> Press Release, Office of the Inspector General for the Department of Health and Human Services, Nursing Home Executive Agrees to Permanent Exclusion In Settlement with OIG (Jul. 13, 2009), available at [http://oig.hhs.gov/publications/docs/press/2009/hhs\\_oig\\_bernabe\\_exclusion\\_release.pdf](http://oig.hhs.gov/publications/docs/press/2009/hhs_oig_bernabe_exclusion_release.pdf).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Tom Herrmann, *The New OIG "Responsible Corporate Officer Doctrine,"* J. OF HEALTH CARE COMPLIANCE, Jan.–Feb. 2011, at 50, available at [http://www.compliance.com/wp-content/files\\_mf/jhcc\\_0111\\_herrmann.pdf](http://www.compliance.com/wp-content/files_mf/jhcc_0111_herrmann.pdf).

<sup>28</sup> Press Release, Office of the Inspector General for the Department of Health and Human Services, OIG Fact Sheet on Forest Laboratories, Inc., and the Inspector General's Exclusion Authorities (May 10,

2011), available at [http://oig.hhs.gov/publications/docs/press/2011/factsheet\\_051011.asp](http://oig.hhs.gov/publications/docs/press/2011/factsheet_051011.asp).

<sup>29</sup> Press Release, Office of the Inspector General for the Department of Health and Human Services, Guidance for Implementing Permissive Exclusion Authority Under Section 1128(b)(15) of the Social Security Act (Oct. 20, 2010), available at [http://oig.hhs.gov/fraud/exclusions/files/permissive\\_excl\\_under\\_1128b15\\_10192010.pdf](http://oig.hhs.gov/fraud/exclusions/files/permissive_excl_under_1128b15_10192010.pdf).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

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

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

<sup>35</sup> *Id.*

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

<sup>37</sup> *United States v. Park*, 421 U.S. 658, 673 (1975).

<sup>38</sup> See, e.g., *United States v. New England Grocers Supply Co.*, 488 F. Supp. 230, 235 (D. Mass. 1980).

<sup>39</sup> See, e.g., *State v. Rollfink*, 475 N.W.2d 575, 580 (Wis. 1991). <sup>40</sup> See, e.g., Peregrine, *Coming on Strong*, at 8–9; Lisa Krigsten, *Criminalizing Management Decisions: Prosecuting the Responsible Corporate Officer*, 11 ABA CRIM. LITIG. 7, 8–9 (Fall 2010), available at [http://www.huschblackwell.com/files/Publication/3f25e3ce-7f03-408a-aa21-1252fcf5ead7/Presentation/PublicationAttachment/d9897859-eeec5-4a90-ba03-143f1b57d08f/Krigsten\\_CriminalLitigation2010.pdf](http://www.huschblackwell.com/files/Publication/3f25e3ce-7f03-408a-aa21-1252fcf5ead7/Presentation/PublicationAttachment/d9897859-eeec5-4a90-ba03-143f1b57d08f/Krigsten_CriminalLitigation2010.pdf).

<sup>41</sup> Compliance Program Guidance for Hospitals, 63 Fed. Reg. 8987, 8989 (Feb. 23, 1998).

<sup>42</sup> Daniel Levinson, *Trustee Engagement and Hospital Success*, TRUSTEE MAG., July 2010.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Gregory Schwab, *Insuring Against Responsible Corporate Officer Liability*, martindale.com (Mar. 26, 2012), [http://www.martindale.com/corporate-law/article\\_Saul-Ewing-LLP\\_1484722.htm](http://www.martindale.com/corporate-law/article_Saul-Ewing-LLP_1484722.htm).

<sup>46</sup> See *id.*

<sup>47</sup> Peregrine, *Coming on Strong*, at 1.

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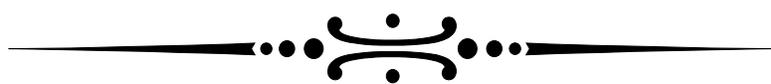
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Joel D. Horton

#### Regular Fall Terms for 2012

Boise ..... August 20, 22, and 24  
Twin Falls ..... August 28 and 29  
Boise ..... September 17  
Coeur d'Alene, Moscow, and Lewiston .....  
..... September 19, 20, and 21  
Boise ..... September 28  
Boise ..... November 1, 2, and 5  
Rexburg (Brigham Young University - Idaho) .....  
..... November 8  
Pocatello (Idaho State University) ..... November 9  
Boise ..... December 3, 5, 7, 10, and 12

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**Judges**  
Karen L. Lansing  
Sergio A. Gutierrez  
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Boise ..... August 9, 16, 21 and 23  
Boise ..... September 11, 13, 18 and 20  
Eastern Idaho ..... October 15, 16, 17, 18 and 19  
Boise (as needed) ..... October 23 and 25  
Boise ..... November 13, 15 and 20  
Boise ..... December 11 and 13

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### Idaho Supreme Court Oral Argument for June 2012

#### Monday, June 4, 2012 - BOISE

8:50 a.m. State v. Daniel Ryan Straub ..... #38139-2010  
10:00 a.m. Idaho State Bar v. Clark ..... #38792-2011  
11:10 a.m. IDHW v. McCormick ..... #38694-2011

#### Wednesday, June 6, 2012 - BOISE

10:00 a.m. Joseph A. Gerdon v. Joshua R. Rydalch .....  
..... #38419-2011  
11:10 a.m. Ron Markin v. Thomas Wolff Grohmann  
..... #37981-2010

#### Friday, June 8, 2012 - BOISE

8:50 a.m. Tapadeera, LLC v. Jay F. Knowlton .. #38498-2011  
10:00 a.m. Idaho Transportation Board v. HI Boise, LLC .....  
..... #38344-2010  
11:10 a.m. Security Financial Fund, LLC v. Thomason .....  
..... #37203-2009

#### Monday, June 11, 2012 – BOISE

8:50 a.m. Peterson v. Peterson (*EXPEDITED*) . #39178-2011  
10:00 a.m. Farm Bureau Mutual Insurance v. Eisenman .....  
..... #38703-2011  
11:10 a.m. Alma A. Elias-Cruz v. Idaho Dept. of  
Transportation (*EXPEDITED*) ..... #39425-2011

#### Wednesday, June 13, 2012 – BOISE

8:50 a.m. Mickelsen Construction v. Horrocks . #38634-2011  
10:00 a.m. Clair v. Clair (*EXPEDITED*) ..... #39188-2011  
11:10 a.m. A&B Irrigation District v. Idaho Ground Water  
Appropriators ..... #38191/38192/38193-2010

### Idaho Court of Appeals Oral Argument for June 2012

#### Tuesday, June 5, 2012 – BOISE

9:00 a.m. State v. Curry ..... #38127-2010  
10:30 a.m. State v. Caldwell ..... #38515-2011  
1:30 p.m. Kugler v. Nelson ..... #39060-2011

#### Thursday, June 7, 2012 – BOISE

9:00 a.m. State v. Valero ..... #38923-2011  
10:30 a.m. Murphy v. State ..... #37254-2010



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## CIVIL APPEALS

### Attorney fees and costs

1. Whether the district court abused its discretion in finding Martin is entitled to attorney fees pursuant to I.C. § 12-117.

*Martin v. Smith*  
S.C. No. 36055  
Supreme Court

2. Did the district court err in denying the Ferrells an award of attorney fees pursuant to I.C. § 41-1839?

*Ferrell v. United Financial Casualty Co.*  
S.C. No. 39221  
Supreme Court

### Evidence

1. Whether the trial court erred in allowing Roberts to introduce expert opinion testimony from an accident reconstructionist and biochemical engineer when the disclosures were untimely and insufficient.

*Hansen v. Roberts*  
S.Ct. No. 38904  
Supreme Court

### Post-conviction relief

1. Did the court err in finding Anderson's successive petition was procedurally barred and that he had failed to present a sufficient reason to allow a successive petition?

*Anderson v. State*  
S.C. No. 37147  
Court of Appeals

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

*Allsop v. State*  
S.C. No. 38812  
Court of Appeals

3. Did the district court err in summarily dismissing Melton's second successive petition for post-conviction relief?

*Melton v. State*  
S.C. No. 38992  
Court of Appeals

4. Did the court err in summarily dismissing Heredia-Juarez's petition for post-conviction relief, in which he alleged claims of ineffective assistance of counsel?

*Heredia-Juarez v. State*  
S.C. No. 38543  
Court of Appeals

5. Did the court err in denying Gerardo's petition for post-conviction relief, in which he alleged claims of ineffective assistance of trial and appellate counsel?

*Gerardo v. State*  
S.C. No. 38592  
Court of Appeals

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

*Cobler v. State*  
S.C. No. 38625  
Court of Appeals

7. Did the court err in summarily dismissing Block's petition for post-conviction relief as untimely?

*Block v. State*  
S.Ct. No. 38962  
Court of Appeals

8. Did Moore present a viable *prima facie* claim for post-conviction relief such that he was entitled to an evidentiary hearing?

*Moore v. State*  
S.Ct. No. 38591  
Court of Appeals

9. Did the court err in denying Gosch's petition for post-conviction relief entered after an evidentiary hearing?

*Gosch v. State*  
S.Ct. No. 38791  
Court of Appeals

### Procedure

1. Whether an exercise of personal jurisdiction over defendant Greger, a resident of the Federal Republic of Germany, would violate due process.

*Muttscheller v. Greger*  
S.Ct. No. 38025  
Supreme Court

### Substantive law

1. Whether I.C. § 58-310A conflicts with the requirement in Article IX, Section 8 of the Idaho Constitution that school trust lands be subject to disposal at public auction and therefore is unconstitutional in its entirety.

*Wasden v.*  
*Idaho Board of Land Commissioners*  
S.C. No. 39084  
Supreme Court

2. Did the court err in dismissing Matthews' complaint for failure to comply with the statute of limitation, I.C. § 5-219?

*Matthews v. Van Idour*  
S.C. No. 39665  
Court of Appeals

### Summary judgment

1. Did the court err in granting summary judgment in favor of Boise Mode, LLC, on all claims in its verified complaint?

*Boise Mode, LLC v. Donahoe Pace & Partners, LTD*  
S.Ct. No. 39229  
Supreme Court

## CRIMINAL APPEALS

### Due process

1. Did the court abuse its discretion in denying DeWitt's motion to continue the trial so he could retain new counsel that was made on the first day of trial?

*State v. DeWitt*  
S.C. No. 38556  
Court of Appeals

1. Was Risdon's statutory right to speedy trial denied when the trial was extended beyond the six month time frame due to the unavailability of a witness?

*State v. Risdon*  
S.C. No. 39095  
Court of Appeals

### Evidence

1. Was there substantial, competent evidence presented at trial to support the jury finding of guilt on the charge of grand theft?

*State v. Maxwell*  
S.C. No. 34662  
Court of Appeals

2. Did the court err in admitting expert testimony regarding the dynamics of why domestic violence victims recant and minimize?

*State v. Guel*  
S.C. No. 38149  
Court of Appeals

3. Did the court err in denying Ramsey's motion to sever the counts related to victim LN from the counts related to victim SP?

*State v. Ramsey*  
S.C. No. 38228  
Court of Appeals

4. Did the court abuse its discretion by admitting into evidence portions of a recorded conversation between Phillips and a confidential informant, regarding a future sale of methamphetamine?

*State v. Phillips*  
S.C. No. 38614  
Court of Appeals

5. Did the court err in finding that Herren violated a no contact order when he did not touch or communicate with the other person?

*State v. Herren*  
S.Ct. No. 38783  
Court of Appeals

**Instructions**

1. Did the court err in refusing Barton's requested instruction on the defense of entrapment?

*State v. Barton*  
S.C. No. 38405  
Supreme Court

2. Did the court err by directing the jury to re-read the instructions in response to a question by the jury?

*State v. Crawford*  
S.C. No. 38587  
Court of Appeals

**Pleas**

1. Did the court abuse its discretion in denying Crist's pre-sentencing motion to withdraw her *Alford* plea?

*State v. Crist*  
S.C. No. 38205  
Court of Appeals

**Search and seizure – suppression of evidence**

1. Did the court err when it denied Ligon-Bruno's motion to suppress evidence discovered under three warrantless searches of his apartment?

*State v. Ligon-Bruno*  
S.Ct. No. 38691  
Court of Appeals

2. Did the court err when it denied Whitman's motion to suppress evidence found during a warrantless search of his vehicle?

*State v. Whitman*  
S.Ct. No. 38446  
Court of Appeals

**Sentence review**

1. Did the court abuse its discretion by failing to strike the entire presentence report when it contained inappropriate conjecture and speculation?

*State v. Cox*  
S.C. No. 39040  
Court of Appeals

2. Did the court err when it admitted the victim impact statement?

*State v. Grant*  
S.C. No. 38325/38326/38327  
Supreme Court

**Substantive law**

1. Did the court lack jurisdiction over the subject matter of the charge of sexual abuse of a minor because the law and facts alleged in count I failed to allege a valid charge under the version of the statute that applied to Olin's case?

*State v. Olin*  
S.C. No. 38056  
Court of Appeals

2. Did the court abuse its discretion in denying Park's motion to seal his underlying criminal case filed pursuant to I.C.A.R. 32 because the district court failed to recognize that it had the actual discretion to do so?

*Park v. State*  
S.Ct. No. 38672/38784  
Court of Appeals

**Summarized by:**  
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## HIGHLIGHTS OF THE 2012 RULE AMENDMENTS

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

### Supreme court rules advisory committees

The following is a list of rule amendments that will go into effect on July 1, 2012, unless otherwise indicated. The orders amending these rules can be found on the Internet on the Idaho Judiciary's home page at <http://www.isc.idaho.gov/rulesamd.htm>.

### Idaho rules of civil procedure

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

**Rule 4(b). Summons - Form.** The form of summons has been amended to include the address and phone number of the district court clerk's office where an answer is to be filed.

**Rule 6(c)(6). Child Support Guidelines.** The Child Support Guidelines Committee is chaired by Judge David Day. Several minor errors identified in the tax tables have been corrected. In addition an amendment clarifies adjustments to basic child support related to health insurance premiums and uncovered medical expenses.

**Rule 11(b)(5). Limited Pro Bono Appearance.** This

new rule took effect on January 1, 2012, and allows an attorney to appear to provide *pro bono* assistance to an otherwise *pro se* party in one or more individual proceedings in an action. The attorney must file and serve a notice of limited appearance on the opposing party and has no authority to act on any matter not specified in the notice. Upon conclusion of the matters specified in the notice, the attorney shall file a notice of completion with the court, which terminates the attorney's role without the necessity of leave of the court. The purpose of the rule is to make it easier for attorneys to do *pro bono* work by allowing



Catherine Derden

*This new rule allows an attorney to appear to provide pro bono assistance to an otherwise pro se party in one or more individual proceedings in an action.*

them to assist with one dispositive motion or one aspect of a case without then being obligated on the entire case.

**Rule 16(j). Child Custody Mediation.** This amendment and the amendment to Rule 16(l) were recommended by the Children and Families in the Court Committee chaired by Judge Russell Comstock. The training requirements prior to placement on the child custody mediation roster have been amended by deleting the restriction regarding on-line training courses and adding a requirement that the initial training be acquired through a single training course. The amendment also clarifies who may participate in the mediation.

**Rule 16(k). Mediation of civil lawsuits.** Currently this rule requires mediators to have twenty hours of additional training every two years but there is no requirement that the training be in the area of mediation; therefore, any approved CLE course meets the requirement. The new requirement is that mediators obtain five hours of additional training on mediation every three years, and this could certainly be part of the mediator's thirty hours of continuing legal education required for the Idaho State Bar. In addition, the sponsoring organizations listed have been greatly expanded. The requirement that continuing education for mediators include at least five (5) hours of training in mediation takes effect for renewals due on or after July 1, 2013.

**Rule 16(l). Parenting Coordinators.** The provision which prohibits a parenting coordinator from charging a retainer has been deleted consistent with the statutory amendment to I.C. § 32-717(D) that goes into effect July 1, 2012. The rule provides that any disputes regarding fees are sub-

ject to review by the court. It also further clarifies who is entitled to receive a copy of any report prepared by a parenting coordinator.

**Rule 40(d)(1). Disqualification without cause.** A new exception has been added to the right to disqualification without cause for a judge hearing petitions to modify child custody orders or child support orders entered by that same judge in an earlier proceeding. Rule 60(c) on proceedings to modify child custody or child support orders provides that these motions shall be served and adjudicated in substantially the same manner as an original proceeding. The amendment clarifies that it is not a new proceeding for purposes of disqualification without cause. The same judge who entered the original decree or support order should preside over any modification.

In addition, a new provision on misuse of disqualification without cause has been added. This same provision is in the corresponding Criminal Rule so the rules will now read the same. If it appears that an attorney or law firm is using disqualifications without cause to hinder, delay or obstruct justice, or with such frequency as to impede the administration of justice, the Trial Court Administrator shall notify the Administrative Director of the Courts and request a review of the possible misuse of disqualifications without cause and possible remedial measures as set out in the rule.

**Rule 45(b)(2). Subpoenas.** The rule currently provides that the party serving a subpoena to command a person who is not a party to produce or to permit inspection and copying of documents or premises must serve a copy of the subpoena on the opposing party at least seven (7)

days prior to service on the third party. The purpose of the seven day provision is to allow counsel for the opposing party a chance to review and object. However, the rule provides that the subpoena may be served on the non-party "at any time after commencement of the action", and Rule 3(a) provides that an action "commences" once the complaint is filed. Thus, a plaintiff can serve a subpoena before even serving the complaint since the complaint only has to be "filed" and the action is deemed to have commenced. The problem is that the summons and complaint rarely get to defense counsel within seven days and thus the chance for a meaningful review and objection by counsel is still lost. The amendment strikes "after commencement of the action" and substitutes "after all parties have either appeared or have been defaulted, unless otherwise ordered". The party serving the subpoena still must serve a copy of the subpoena on the opposing party at least seven (7) days prior to service on the third party, but additional language has been added that states "unless otherwise specified by the court".

**Rule 45(e)(2). Service of subpoena.** New language has been added to this rule to allow service of a subpoena on a party to a legal action for attendance at a trial or hearing to be made by service on that party's attorney.

**Rule 60(c). Proceedings to modify child custody or child support orders.** This rule has been amended to clarify that a proceeding to modify child custody or support shall not be deemed the commencement of an action for purposes of venue under I.C. § 5-404.

**Filing Fee Schedule.** Some of the filing fees have been raised \$8.00 due to the statutory increase in fees collected for the district judge's retirement fund. In addition, the schedule now has a distinction for divorces with minor children and divorces without minor children. The same distinctions have been added to motions to modify a decree. Cases involving minor children will be exempt from disclosure beginning July 1, 2012, and the separate filing fee categories will help the clerks identify these cases.

### **Idaho criminal rules**

The Criminal Rules Advisory Committee is chaired by Justice Daniel Eismann. The Criminal Mediation Committee is chaired by Senior Judge Barry Wood.

**Rule 6.6. Indictment.** Once a charge has been ignored by a grand jury, the prosecutor may not file an information. The amendment to this rule adds a new subsection, entitled "Return of no bill", that

## *The amendments also make it clear that the mediator privilege is governed by Idaho Rule of Evidence 507.*

requires the grand jury's finding of no probable cause to be recorded and kept as part of the record of that proceeding.

**Rule 16. Discovery and inspection.** Two new subsections have been added regarding redacting personal information from responses to discovery. The amendment allows the prosecution to keep contact information and personal identifying information for victims out of the hands of the defendant by redacting this information so that only defense counsel has access to it. The prosecutor must serve the redacted copy for the defendant and the unredacted copy for defense counsel at the same time. The unredacted copy is to be printed on paper of a color clearly distinguishable from white. As for a *pro se* defendant, should the state choose to redact identifying information, it must then seek a protective order within seven days. The same option of redaction is available to the defendant so that personal information of the defendant may be withheld from the victim or witnesses. Similarly, if the defendant chooses to redact, then an unredacted copy must be provided to the prosecutor at the same time. The rule does not mandate that personal information must be redacted from discovery responses, but only sets out the procedure for doing so.

**Rule 18.1. Mediation in criminal cases.** Criminal cases may include numerous defendants, and the rule now clarifies that not all defendants have to join in the request or in the mediation. Mediation may proceed with those participants that wish to join in the process. The rule also emphasizes the need for the government attorney to have settlement authority. The subsection on confidentiality has been shortened and provides an exception for the statutory duty to report child abuse, abandonment and neglect pursuant to I.C. § 16-1605. The amendments also make it clear that the mediator privilege is governed by Idaho Rule of Evidence 507. Subsection 8 of the rule was deleted as unnecessary.

**Rule 25(a). Disqualification without cause.** The amendment to this rule pro-

vides that a list of alternate judges may be provided for hearings other than trials.

**Rule 33(e). Revocation of probation.** The new language simply reiterates the law that a court shall not revoke probation unless there is an admission by the defendant or a finding by the court, following a hearing, that the defendant willfully violated a condition of probation.

**Rule 41(a). Authority to issue warrant.** Many people conduct business or socialize via the Internet such that information flows through and is stored on computer servers owned by service providers and housed outside Idaho. Many large Internet based companies recognize the burdens of law enforcement and are cooperative and willing to send the information but still want an official piece of paper giving them permission to release the information as a way of protecting themselves. However, investigators investigating crimes, such as child sexual exploitation, are not able to get out of state search warrants for Internet companies that do not have an actual physical location within the borders of Idaho because of the wording of I.C.R. 41(a). Thus, the rule has been amended to delete the requirement that the warrant be issued in the judicial district where the property or person is located. The warrant must be sought in the county of proper venue, but the rule specifically states a warrant may be issued for property or persons outside the state. While an Idaho law enforcement officer does not have authority to execute the warrant outside of Idaho, the amendment allowing the issuance of the warrant still accomplishes the stated purpose as it allows the obtaining of records where the holder of those records is willing to bring them to the state. It also allows prosecutors to seek federal or sister-state warrants based on the Idaho finding of probable cause.

**Rule 43. Presence of the defendant.** This rule provides that further progress of a trial to and including the return of the verdict shall not be prevented when a defendant, who is initially present, is voluntarily absent after the trial begins or has

been removed from court due to disruptive behavior. The amendment expands this provision so that it is not limited to trial but rather applies to any proceeding.

**Rule 54.1. Appeals from magistrate court to district court.** The purpose of the amendment to this rule is to clarify that an order granting or denying a motion to set aside the forfeiture of bail or to exonerate bail may be appealed.

### Idaho rules of evidence

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

**Rule 101. Title and Scope.** The amendment is a new subsection (d)(7). The purpose of the amendment is to clarify that the rules of evidence do apply to restitution hearings subject to the exception set out in I.C. § 19-5304(6) that provides “the court may consider such hearsay as may be contained in the presentence report, victim impact statement or otherwise provided to the court.”

**Rule 507. Mediator Privilege.** I.R.E. 507(5)(b) creates a balancing test to determine whether mediation communications are admissible in felony or misdemeanor proceedings. As written, the rule is inconsistent with the express language in the criminal mediation rules, I.C.R. 18.1 and I.J.R. 12.1, that “except as provided in I.C. § 16-1605, mediation proceedings shall in all respects be confidential and not reported or recorded.” The amendment makes I.R.E. 507 consistent with I.C.R. 18.1 and I.J.R. 12.1.

### Idaho infraction rules

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

Changes have been made to the infraction schedule to reflect the statutory amendment raising POST fees by \$5.00. Every infraction that includes a POST fee has been raised by \$5.00.

One new infraction was added to the schedule and that is texting while driving. The fixed penalty is \$25.00 and, with court costs, the total penalty will be \$81.50.

### Idaho juvenile rules

The Child Protection Committee is chaired by Judge Bryan Murray.

**Rule 12.1. Criminal Mediation.** This rule mirrors Criminal Rule 18.1 and the same amendments were made.

**Rules 35 and 36. Guardian Ad Litem Programs. (CPA).** The court has amended Rules 35 and 36 to clarify that the information and records maintained by a Guardian ad litem and the Guardian Ad Litem Program in a Child Protection Act case are confidential and such infor-

mation remains confidential after a case has been dismissed or the GAL resigns or is removed.

**Rule 39. Shelter Care Hearing (CPA).** Part (4) under subsection (1) on the burden of proof at a shelter care hearing has been amended to delete subsection (4) as it creates confusion regarding the relevant burden of proof and could be interpreted as inconsistent with the standard provided under I.C. § 16-1615, which requires a “reasonable cause to believe”.

**Rule 40. Notice of Proceedings (CPA).** Subsection (b) now clarifies that when a youth over eight seeks to participate in a proceeding by way of a writing, the writing shall be filed with and considered by the court and copies provided to the Department of Health and Welfare, whether or not a party, and all parties to the case.

### Idaho misdemeanor rules

By statute, there is a \$5.00 increase in POST fees for misdemeanors. In addition, the legislature added a new \$10.00 fee to misdemeanors for VINE, the Victims Information and Notification System. Thus, all payable misdemeanors were raised by \$15.00. A few other misdemeanors were raised in a similar fashion so that they would not become payable.

### Idaho court administrative rules

**Rule 32. Records of the Judicial Department.** Rule 32 addresses access to court records, including records that are exempt from disclosure. Guardianships and conservatorships have been added to the list of proceedings that are exempt from disclosure except as to certain interested persons specified in the rule. While the majority of the record is exempt from disclosure, the rule does provide that certain records are still open. The public may access the register of actions, letters of guardianship or conservatorship, any order of the court regarding a bond by a conservator and the bond, as well as any order, decree or judgment dismissing, concluding or otherwise disposing of the case.

In addition, subsection (j), request for records, has been amended to provide that the custodian of the record may request contact information as provided in I.C. § 9-338(4) and that a request for public records and delivery of the public records may be made by electronic mail.

Rule 32 has also been amended to add records in cases involving child custody, child support and paternity to the list of records that are exempt from disclosure. The purpose of the amendment is to exempt from automatic disclosure the intimate information regarding children that is frequently present in the records filed

in these cases. Such information can include the types of reports and allegations that are often seen in Child Protective Act and parental termination cases, in which the records are exempt from disclosure under the current provisions of I.C.A.R. 32. The register of actions (ROA) is still available to the public, as is any order, decree or judgment, though the order is subject to the redaction requirements of I.R.C.P. 3(c)(4), as far as certain personal identifying information. Parties to the cases and their attorneys would of course still have access to the records in these cases under I.C.A.R. 32(c), and the rule specifies that it does not apply to officers and employees of the Department of Health and Welfare examining and copying these records in the exercise of their official duties. Other persons with a legitimate interest in the information contained in these files may still file motions seeking access to the records under I.C.A.R. 32(i).

**Rule 43A. Administrative Conference.** This new rule addresses the membership and role of the Administrative Conference. The members of the Administrative Conference include the Chief Justice of the Supreme Court, the Administrative District Judge of each judicial district, the Trial Court Administrators of each judicial district, the President of the District Judges’ Association, the current president, immediate past president, and President-Elect of the Magistrate Judges’ Association, the Administrative Director of the Courts and various designated court personnel. The Conference meets four times a year and its responsibilities include formulating policies for the judiciary and developing standards for the trial court to improve court operations, among others. The rule was effective April 1, 2012.

### About the Author

**Catherine Derden** is a graduate of the University of Arkansas at Little Rock, and of the University of Arkansas at Little Rock School of Law, where she received her Juris Doctorate Degree in 1979. From 1984 to 1992, she was on the faculty at the UALR School of Law, where she taught Research, Writing and Appellate Advocacy, Advanced Appellate Advocacy, and ran an intramural moot court program. In 1992, she became an Assistant Attorney General for the State of Arkansas, working in the Criminal Appeals Division. She moved from Arkansas to Idaho in 1994 and continued to handle criminal appeals as a Deputy Attorney General for Idaho. She has been the Staff Attorney for the Idaho Supreme Court since September 1998.

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## PROBLEMS WITH PRONOUNS PART II: PERSONAL, REFLEXIVE, AND POSSESSIVE PRONOUNS

Tenielle Fordyce-Ruff  
Concordia University  
School of Law

Pronouns do a lot of heavy lifting in English. They appear in most sentences and in virtually every paragraph. We throw them around casually in speech. But, when we write for a living, as we lawyers do, we need to be more careful about our pronoun usage.

In the March/April 2012 edition of *The Advocate*, I addressed the problems created when pronouns and their antecedents don't match. There are other pesky pronoun problems lurking out there. This round, I will address specific types of pronouns — personal, reflexive, and possessive and how to use them correctly.

### Personal pronouns

Personal pronouns replace people.

English is tricky because it has two sets of personal pronouns: nominative and objective. Nominative pronouns function as the subject of verbs (these pronouns do the action of the sentence): *I, you, she, he, it, we, and they*. Objective



Tenielle Fordyce-Ruff

pronouns function as the objects of verbs or prepositions (these pronouns are acted upon): *me, you, her, him, it, us, and them*.

Writers tend to get into trouble when they use objective pronouns to do the work of subjective pronouns. Interestingly, this happens often when using two pronouns joined by an “and.”

*Him and me are going to court.*

This sentence makes my eyes bleed. The writer is using two objective pronouns as the subject of the verb. Fortunately, there is no fancy rule you need to memorize that applies in this situation. You just need to see if the individual pronouns sound ok by themselves.

*Him is going to court.* (doesn't sound right)

*Me is going to court.* (doesn't sound right)

*He is going to court.* (sounds right)

*I am going to court.* (sounds right)

Now, avoid the pain-inducing example above by just combining the two pronouns that actually sound right, and make



sure the verb reflects that more than one person is involved:

*He and I are going to court.*

This same trick works to fix mistakes from two subjective pronouns trying to do the work of an objective pronoun.

*The lawyer asked she and I several questions.*

You wouldn't say

*The lawyer asked she several questions.*

*The lawyer asked I several questions.*

So, instead write:

*The lawyer asked her and me several questions.*

This last example seems to be particularly tricky for some. We all learned that to be polite, always refer to ourselves last. This “rule,” however, doesn't change the function of subjective and objective pronouns. You would never say, *Please send the schedule to I*, so don't say, *Please send the schedule to my partner and I*. Rather, *Please send the schedule to my partner and me*.

### Reflexive pronouns

I slipped another type of pronoun at you in the last paragraph: *always refer to ourselves last*. Reflexive pronouns are the “self” pronouns: *myself, yourself, himself, herself, ourselves, yourselves, and themselves*.

We can correctly use reflexive pronouns when we want to repeat a subject for emphasis. (For my fellow grammar noodges — this is sometimes called a reflexive-intensive pronoun.)

*All we have to fear is fear itself.*

*The senator herself answered the phone.*

*The most common spelling error in the English language is including an apostrophe in “it’s” when you mean “belonging to it” rather than “it is.”*

We also correctly use reflexive pronouns when the subject and the object of a sentence are the same (the doer and the receiver of the action are the same).

*You must keep it to yourself.*

*She cut herself while filing papers.*

*I've really outdone myself.*

*They had to see it for themselves.*

We cannot, however, correctly use a reflexive pronoun as a substitute for a personal pronoun. This is both incorrect and stuffy.

Incorrect: *Please send the schedule to myself.*

Correct: *Please send the schedule to me.*

Incorrect: *My partner and myself wrote a very persuasive brief.*

Correct: *My partner and I wrote a very persuasive brief.*

### Possessive pronouns

Possessive pronouns are used to show ownership or attribution:

You must make your citations correct.

The possessive pronouns are *my*, *mine*, *your*, *yours*, *his*, *her*, *hers*, *its*, *our*, *ours*, *their*, and *theirs*. Notice that none of these pronouns have an apostrophe — the most common spelling error in the English language is including an apostrophe in “it’s” when you mean “belonging to it” rather than “it is.”

*It’s important that the business receive its license.*

Notice, too, that certain possessive pronouns have two forms: *my* and *mine*, *your* and *yours*, *her* and *hers*, *our* and *ours*, *their* and *theirs*. We have multiple forms to indicate the type of possessive: simple or absolute.

Simple possessive pronouns function as adjectives and are sometimes called possessive adjectives:

*Have you seen her briefcase?*

*This is his response.*

*Give me my phone.*

Absolute possessive pronouns, on the other hand, can stand alone and don’t need a noun following them:

*That briefcase is hers.*

*That response was his.*

*This phone is mine.*

Possessive pronouns can get tricky when we use gerunds (a gerund is an “-ing” verb that functions as a noun). Using an objective pronoun instead of a possessive pronoun can change the meaning of your sentence.

*There is no use in your testifying.* (Here, the testifying is useless, not you!)

*There is no use in you testifying.* (Here, you are useless.)

Possessive pronouns also get tricky when using a double genitive. This is when you use “of” plus a pronoun to indicate the pronoun is one of many in its class. Logically, you would use an objective pronoun in this instance. However, English is idiomatic and we use possessive pronouns instead of personal pronouns. So, to simplify: If you are using an “of” plus a pronoun, use an absolute possessive pronoun.

*He was a client of mine.* (Using “me” instead of “mine” would be a glaring error here.)

*This questioning of yours is tiresome.*

And that last example leads to my final word on possessive pronouns. When you use the double genitive, particularly with a *this*, *that*, *these*, or *those*, your construction will be intensifying and frequently take on a negative connotation.

*Who could ever forget that riveting article on pronouns of hers?*

## Conclusion

Using pronouns — personal, reflexive, and possessive — can help your meaning shine through. Remember these few tricks and rules, and you will be well on your way to correct, concise legal writing.

## About the Author

**Tenielle Fordyce-Ruff** is an Assistant Professor of Law and the Director of the Legal Research and Writing Program at Concordia University School of Law in Boise. She is also Of Counsel at Rainey Law Office, a boutique firm focusing on civil appeals. You can reach her at [tfordyce@cu-portland.edu](mailto:tfordyce@cu-portland.edu) or [tfr@rainey-lawoffice.com](mailto:tfr@rainey-lawoffice.com).

## Sources

- Deborah E. Bouchoux, *Aspen Handbook for Legal Writers: A Practical Reference* at 14-18 (2005).
- Bryan A. Garner, *The Redbook: A Manual on Legal Style* at 149-158 (2d ed. 2006).
- Suzanne E. Rowe, *Problems with Pronouns: Replacing Rufus Xavier Sarsaparilla*, Oregon Bar Bulletin (Feb./Mar. 2008), available at <http://www.osbar.org/publications/bulletin/08febmar/legalwriter.html> (last visited April 26, 2012).

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## **Rogers v. Household Life Ins. Co.**

On March 8, 2011, the Idaho Supreme Court issued a decision holding that the appointment of a guardian with full powers represents a finding that the ward lacks the capacity to contract.<sup>1</sup> The Court's holding creates problems for practitioners in this area and raises ethical concerns.

In *Rogers*, the ward, Alan, had been diagnosed with Alzheimer's disease and dementia. In 2004, a lower court granted Alan's son, Jason, a full guardianship and conservatorship. In 2007, Alan filed an on-line application, with Jason's help, for life insurance from Household Life Insurance Company (Household). Jason was named the sole beneficiary.<sup>2</sup> The conservatorship-guardianship was not disclosed in the application. Three weeks after the application was filed, Alan died. Jason made a claim to the insurance proceeds. Household denied the life insurance claim and litigation resulted.

Household argued that Alan's life insurance contract was void because Alan lacked the capacity to enter into a contract. Jason asserted that the contract was merely voidable and that as Alan's guardian, he had the authority to ratify the contract — and he did. The district court granted summary judgment in favor of Household. The Supreme Court affirmed the district court based primarily on two areas of law.

First, the Court considered three statutes from Title 32, Domestic Relations, of the Idaho Code. Idaho Code § 32-106, entitled "Contracts of persons without understanding" says that "[a] person entirely without understanding has no power to make a contract of any kind . . ." The following statute, Idaho Code § 32-107 states, "[a] conveyance or other contract of a person of unsound mind, but not entirely without understanding, made before his incapacity has been judicially determined, is subject to rescission." Finally, Idaho Code § 32-108, relating to contracts of "insane persons after adjudication of



Robert L. Aldridge

*Given Rogers and your duty to protect your client, what is your duty to attempt to keep the appointment limited if possible?  
How do you effectively do that?*

incapacity," states that such a person "can make no conveyance or other contract, nor delegate any power or waive any right until his restoration to capacity." Section 32-108 also provides that a certificate from the proper person at the insane asylum to which such person had been committed showing discharge from the asylum as "cured and restored to reason," creates a presumption of legal capacity thereafter.<sup>3</sup>

Second, the Court considered several statutes from Title 15 of the Idaho Code. For example, Idaho Code § 15-5-101 defines "Incapacitated person" as a person who "lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person . . ." The Court also looked to part 3 of Title 15 requiring that a court create the "least restrictive form of guardianship," create maximum self-reliance and independence, and so forth.

Although the Court examined some statutes from Titles 32 and 15 of the Idaho Code, it failed to take other statutes into consideration. One provision of law found only in the conservatorship provisions, but not mentioned in the *Rogers* decision, is Idaho Code § 15-5-408(b)(5) which states, "[a]n order made pursuant to this section determining that a basis for appointment of a conservator or other protective order exists, has no effect on the capacity of the protected person."<sup>4</sup>

Moreover, the Title 32 domestic relations statutes cited by the Court have not been amended since their enactment well over a century ago, other than one title amendment. Obviously, these statutes relate to a far different treatment of capacity determinations and of the mentally disabled. There are only a few cases discussing the statutes and they were issued in the 1907 to 1937 time period.

The Court relied heavily on the definition of incapacitated person and the ability of a court in guardianships to make more

limited appointments "to encourage the development of maximum self-reliance and independence," to hold:

[A] finding that one is incapacitated and a grant of unrestricted guardianship powers represents a finding that the ward lacks all capacity to make decisions and take actions that protect his or her well being. Thus, we conclude that the appointment of a guardian with full powers represents a finding that the ward lacks the capacity to contract as a matter of law.<sup>5</sup>

Based upon this conclusion, the Court held that the contract was void *ab initio*, not voidable as argued by Jason.

## **The aftermath of *Rogers***

While the provisions of Title 15 encourage limited guardianships and conservatorships, or even the use of trusts and powers or other means to avoid an appointment, in practice the number of limited guardianships and conservatorships in Idaho is quite small. The vast majority of Idaho appointments are general and unlimited. However, guardians and conservators generally tailor their powers to allow the ward/protected person to have independence and self-reliance to the extent possible, in effect creating more limited appointments. This system had worked fairly well in a practical sense, but the *Rogers* case raises serious doubts about that method.

*Rogers* engenders a number of issues, some directly and some by implication. For example, does the *Rogers* case apply to a temporary appointment (often *ex parte*)? If so, can the ward hire his or her own attorney to fight the permanent appointment? The Idaho Code provides for that right but it would be a contractual agreement, and based upon the holding in *Rogers*, it would be considered void.

Additionally, after appointment of a permanent guardian, can a ward make a last will and testament? This author

has historically said yes since the capacity determinations are different. But, the language in *Rogers* seems very broad and Idaho Code § 15-2-501 limits the ability to make a will to those “of sound mind.” The decision in *Rogers* and the definition of incapacitated person both point to the well-being of the person and the conservatorship statutes clearly state that capacity is not affected by appointment of a conservator. A will would seem to be a different situation. But does the lack of ability to “make decisions” as stated in *Rogers* include the decisions inherent in executing a will? If a will can be made, can the ward retain an attorney to do the will? No, if the relationship with the attorney is contractual or represents the capacity to “make decisions.” Can the ward change life insurance or other beneficiary designations or change payable on death or transfer on death designations? Probably not. Is a trust based on contract or testamentary capacity?

The Idaho Supreme Court may have provided some insight into these questions in its recent decision, *In Re Estate of Conway*.<sup>6</sup> In that case, the Idaho Supreme Court affirmed the lower court’s decision that the testatrix had testamentary capacity to execute a will even though the testatrix was the ward of a limited guardianship and conservatorship. The Court acknowledged a distinction between the “tests for incapacity for guardianship purposes and testamentary capacity.”<sup>7</sup> The Court appeared to rely on the limited nature of the guardianship although it did not mention *Rogers* nor did it even raise the question of whether the ward had the ability to retain an attorney to prepare the will.<sup>8</sup>

Finally, if the ward had an ongoing attorney-client relationship entered into prior to the appointment, does the appointment automatically sever the relationship or is it only subject to rescission under Idaho Code § 31-107?

### **Ethical considerations and the Idaho Rules of Professional Conduct**

Described above is just a sampling of the potential issues raised by the decision in *Rogers*. However, those issues are significant enough to elevate a number of ethical concerns that attorneys must consider in context with the Idaho Rules of Professional Conduct.<sup>9</sup>

**1. Rule 1.1 Competence.** Any attorney dealing with incapacity had better fully understand the ramifications of *Rogers*

and of conservatorship and guardianship generally, including the alternatives available. Further, given the severe consequences of a general guardianship after *Rogers*, the attorney should be equipped and ready to analyze whether a limited or general guardianship should be sought, and what are appropriate limitations.

### **2. Rule 1.2 Scope of Representation.**

When can you “abide by a client’s decisions” and consult with the client about pursuing those decisions? When does your attorney-client relationship cease? Can you enter an appearance as attorney of record for the client in the appointment procedures and does that depend on the nature of your prior representation and fee agreements?

**3. Rule 1.4 Communication.** You must consult with the client about any relevant limitation on the lawyer’s conduct not permitted by the Rules of Professional Conduct or by “other law.” Further you must “keep the client reasonably informed about the status of the matter.” What happens upon temporary or permanent appointment of a guardian or conservator? Do you have a duty to inform the client that you cannot proceed or that you cannot consult with him or her? Can you inform the client or consult with the client about the effect of changing a general appointment to a limited appointment? Can you continue with estate planning and so inform the client?

### **4. Rule 1.14 Client with Diminished Capacity.**

You can, under this Rule, essentially trigger the appointment of a conservator or guardian for your client. Given *Rogers* and your duty to protect your client, what is your duty to attempt to keep the appointment limited if possible? How do you effectively do that? Does that mandate attempting to appear as attorney of record for the client in the appointment proceedings even if a Guardian ad Litem is appointed? Or should you be the Guardian ad Litem? Should you attempt to create trusts, powers, and so forth to avoid having an appointment made to the extent the client still has capacity to do so? Commentary 8 to this Rule talks about disclosure that could “adversely affect the client’s interests.” A general appointment certainly could be described as potentially adversely affecting the client’s interests, and the Rule may require that the attorney, pursuant to Commentary 8, “at the very least,” determine whether the outside person or entity will act adversely to the client’s interests.

## **Conclusion**

In sum, attorneys involved in guardianships are going to have to be very diligent and knowledgeable. They almost certainly must be prepared to expand the expert testimony, especially medical, used in a case so that limited guardianships or other alternatives are used whenever possible. Crafting limitations in cases where the ward is changing capacity levels over time will be difficult and may require complex and expensive periodic adjustments of court orders and the powers of the guardian and/or conservator.

The *Rogers* case should trigger a re-examination of the whole concept of guardianship and conservatorship as it relates to capacity, limitations on appointments, and similar issues. That process has started amongst practitioners in this area, but the issues are complex and solutions are neither easy or clear.

## **About the Author**

**Robert L. Aldridge** has been a volunteer legislative lobbyist for 25 years, writing and promoting bills that protect the elderly and improve probate and estate planning laws. He received his J.D. from Washington University School of Law, St. Louis, Missouri and graduated from the University of Idaho with an irrelevant B.A. He was admitted to the Idaho State Bar and the 9<sup>th</sup> Federal Circuit in 1970 and is also admitted to practice in the U.S. Court of Claims. Mr. Aldridge’s specialties include Estate Planning, Probate, Trusts, Tax, Elder Law, and First Amendment and Church law. He has an extensive background in historic preservation, is an organist/pianist for his church, plays ice hockey, reads extensively, collects rare books, and lectures on and appraises oriental rugs.

## **Endnotes**

<sup>1</sup> *Rogers v. Household Life Ins. Co.*, 150 Idaho 735, 250 P.3d 786 (2011).

<sup>2</sup> This article will not examine the ethical or legal aspects of having the son named as sole beneficiary.

<sup>3</sup> See I.C. § 32-108.

<sup>4</sup> No similar provision exists in the guardianship statutes.

<sup>5</sup> *Rogers*, 150 Idaho at 739, 250 P.3d at 790.

<sup>6</sup> *In Re Estate of Conway*, Docket No. 38430 (Idaho S.Ct. April 26, 2012).

<sup>7</sup> *Id.* at 12.

<sup>8</sup> *Id.* The order granting the limited guardianship stated, “[t]his shall be a limited guardianship . . .” It further provided that the testatrix “shall be allowed to participate in making said decisions to the extent of her ability with due consideration being given to her wishes . . .”

<sup>9</sup> Ethical issues of a Guardian ad Litem have been previously examined in THE ADVOCATE and, thus, are not covered here.

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**Parsons Behle & Latimer**, home to Idaho's largest intellectual property law team, is pleased to announce the addition of two new practice areas in the firm's Boise office – Employment law and Health Care law.

This month, the firm welcomes **J. Kevin West** as a Shareholder, **Sarah A. Arnett** and **Dylan A. Eaton** as Associates, and **Brenda A. Veloz** as a Paralegal, to the firm's Boise office. Their practices will continue to focus on employment law, health care law, and general litigation.

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J. KEVIN WEST



SARAH A. ARNETT



DYLAN A. EATON



BRENDA A. VELOZ

## IN MEMORIAM

### John E. Clute 1934 - 2012

John E. Clute longtime house counsel for Boise Cascade, and a former dean of Gonzaga University School of Law died in his sleep at his home in Phoenix, Arizona, on May 1, 2012. John grew up in Kooskia, Idaho, where he graduated valedictorian of his high school class at the age of 16. He worked several years in the family grocery store before joining the U.S. Army. He saw military service in South Korea. After completing his military service John



John E. Clute

held several jobs while he worked his way through college.

John received his B.S. degree in law from Gonzaga University in 1960 and his J.D. degree from the Gonzaga University School of Law in 1963. John worked as a staff attorney for the Atomic Energy Commission in Richland, Washington. In 1965 he joined the legal department of Boise Cascade Corporation in Boise, Idaho and in 1968 he was named general counsel of Boise Cascade, a position he held for 23 years.

In 1991 John was appointed dean and professor of law at the Gonzaga University School of Law. His deanship was characterized by an abiding commitment to academic excellence, education of the entire person, diversity, and social justice. His decade-long efforts as dean culminated in the 2000 dedication of a new law school building built on the north bank of

the Spokane River on Gonzaga University's lower campus. John was awarded the DeSmet Medal, Gonzaga University's highest honor in 2008. He will be awarded the Law Medal, Gonzaga University School of Law's highest honor posthumously at the 2012 graduation ceremony. Following his retirement from Gonzaga University in 2001, John divided his time between the family cabin in Kooskia, Idaho, and the state of Arizona where his children and grandchildren reside.

John is survived by his wife Nancy; his three daughters Jody Clute, Molly De-Castro, and Shelley East; and his three grandchildren. Services will be held at 11 a.m., Saturday, June 9, 2012, at Saint Catherine's Church in Kamiah, Idaho, followed by a reception at the family cabin in Kooskia. A remembrance event in Spokane will be scheduled for a later date.

## OF INTEREST

### Parsons Behle & Latimer adds six to Boise team

Parsons Behle & Latimer has added six legal professionals to its Boise office, increasing local resources in the practice areas of Health Care and Employment Law as well as Commercial Litigation. Joining the firm are shareholder Kevin West (formerly a partner with Hall Farley Oberrecht & Blanton); associates Sarah Arnett and Dylan Eaton; paralegal Brenda Veloz; paralegal support assistant Sara Cousineau; and administrative assistant Jodi Paulson.

"In an environment of emerging health care legislation and new workforce technologies, health care and labor and employment law are two of the fastest growing practice areas in the country, and Idaho is no exception," said John Zarian, managing shareholder of Parsons Behle & Latimer's Boise office. "The addition of this outstanding team of professionals is a very positive development for the Boise office of our firm, and we are delighted to welcome them and offer increased services to our local clients."

**Kevin West** will lead the firm's healthcare and employment law practice in Boise. His practice also includes trial work, particularly in the areas of employment law, commercial litigation and

general litigation. West graduated with honors from Brigham Young University in 1981 with a B.A. in English, and from Brigham Young University Law School with honors in 1984. He is a member of the Idaho, Utah and Washington State Bar Associations.

**Sarah Arnett** received a B.A. Joint Honors degree from the University of Kings College in Halifax, Nova Scotia in 1995, and her J.D. from the University of Idaho College of Law in 2002. Prior to joining the Hall Farley firm in 2007, she served as law clerk to Judge Renee Hoff, Third Judicial District of Idaho, and spent three years practicing as an associate with another local firm.

**Dylan Eaton** received his B.A. degree from the University of Washington in 1999 with a double major in Economics and Political Science, and his J.D. from Seattle University School of Law in 2003. Prior to joining the Hall Farley firm in 2007, he worked as a civil litigation attorney for a Seattle law firm and gained practical experience as a criminal prosecutor.

The firm's Boise office is now home to Idaho's largest Intellectual Property Law team. Parsons Behle & Latimer's 130 attorneys serve clients in the natural resources, manufacturing, technology, real estate, banking, retail, utility and health

care industries, as well as practicing mass torts and personal injury law. Founded in 1882, Parsons Behle & Latimer has offices in Salt Lake City, Boise, Las Vegas and Reno.

### Patent attorney Robert Matson joins Parsons Behle & Latimer

Registered Patent Attorney Robert Matson this month joined Parsons Behle & Latimer's Boise-based Intellectual Property Law practice group. Matson, an Idaho native, returns to the state after practicing law in Arizona and Tennessee. His employment at Parsons Behle & Latimer brings the firm's total number of registered patent attorneys to 14.

Matson's work focuses primarily on the procurement, maintenance and enforcement of intellectual property rights. Additionally, he has experience handling intellectual property litigation involving patent, trademark and unfair competition claims.

John Zarian, managing shareholder of Parsons Behle & Latimer's Boise office, said, "Rob's experience, both as an attorney and as a process design engineer in the petroleum and nuclear industries, will be a great asset to the firm and our clients."

Matson earned his law degree from the University of Arizona (Rogers) School of

Law and received a B.S. in Mechanical Engineering from Brigham Young University. He is a member of the Arizona and Tennessee state bars and is also admitted to practice before the U.S. Patent and Trademark Office. Prior to joining Parsons Behle & Latimer, Matson worked as a patent attorney for Hayes Soloway PC, a highly-regarded intellectual property law firm. Before earning his law degree, he was also previously employed as an engineer for Bechtel Corporation and Esys Company.



Robert Matson

**Owens & Crandall, PLLC welcomes new attorneys**

The law firm of Owens & Crandall, PLLC, is pleased to announce the addition of two associate attorneys, April M. Linscott and Ryan J. Crandall.

April M. Linscott has practiced before the U.S. District Court of Idaho, the U.S. Court of Appeals for the Ninth Circuit, the Idaho Supreme Court and the District and Magistrate Court Divisions for the State of Idaho. Ms. Linscott is an experienced trial lawyer who has provided comprehensive representation to both plaintiffs and defendants, individuals and organizations in court, alternative dispute resolution, mediation and administrative hearings with various state agencies.

April M. Linscott worked for a national retailer in a broad spectrum of positions including real estate development, management, human resource management and trainer focused on the development of front-line and mid-level managers' best practices to minimize the risk of legal exposure.



April M. Linscott

Ms. Linscott's areas of practice include civil litigation and appeals, landlord tenant, employment law, probate, real estate law, foreclosure assistance, insurance litigation, construction law, equine law, and bankruptcy. She earned her J. D. from Gonzaga University School of Law and

her B. S. in Accounting from University of Idaho College of Business.

Ryan J. Crandall is a North Idaho native and a graduate of Coeur d'Alene High School. Ryan attended Brigham Young University in Provo, Utah, where he was the recipient of the Clyn D. Barrus scholarship for jazz bass. After serving a two-year mission in Lithuania, he returned to BYU where he met his wife, Jennifer, and where, in 2008, he received his B.A. in Music.



Ryan J. Crandall

At the University of Idaho College of Law in Moscow, Idaho. At law school, Ryan served as associate editor and managing editor of the Idaho Law Review. Ryan spent two years as a teaching assistant for Legal Research and Writing helping new law students hone their legal writing skills.

In 2011, Ryan received his juris doctorate and was admitted to the Idaho State Bar. As a new associate at Owens & Crandall, Ryan is involved in a variety of cases including personal injuries, contract disputes, medical malpractice claims, wrongful foreclosures, and class actions.

**Stoel Rives appoints Kris Ormseth as new Boise office managing partner**

Robert Van Brocklin, firm managing partner of Stoel Rives LLP, a U.S. business law firm, announced that he has appointed Kris Ormseth to be the new office managing partner of the firm's Boise office. In his new assignment, Ormseth will be responsible for the day-to-day administrative management of the Boise office, which includes nearly 40 attorneys and staff. Practices in Boise include corporate, environmental and natural resources, labor and employment, real estate, project development, and food and beverage law, as well as all aspects of business litigation.

"We're very pleased to welcome Kris to the Boise OMP role," Van Brocklin said. "Kris has been an important partner in putting our Idaho practice on the map as a client service leader in Idaho. He is the perfect fit to take the reins in our ongoing efforts to improve our relationships

with Boise area businesses, and help us attract and retain additional high-quality lawyers and staff."

A former co-chair of the firm-sponsored Idaho Innovation Awards, Ormseth advises clients on a wide range of legal and business issues, including structuring joint ventures and strategic alliances, negotiating and documenting commercial transactions, developing equity compensation plans, and advising boards of directors and assisting distressed companies in workout and restructuring transactions.



Kris Ormseth

Ormseth received a B.A. from Stanford University in 1983, and a J.D. from the University of California at Berkeley (Boalt Hall) in 1991. Ormseth succeeds Quentin Knipe, who is returning to full-time practice, concentrating on real estate transactions, land use entitlements and construction contracts. In thanking Knipe for his service, Van Brocklin said, "Quentin has been a conscientious leader of our Boise operation and has helped us increase our market visibility and success in Idaho."

**Eiguren named to partner at Capitol Law Group**

Idaho attorney and lobbyist Roy Eiguren has been named a partner at Capitol Law Group.

Eiguren has been Of Counsel at Capitol Law Group since 2010. Capitol, which has offices in Boise, Emmett and Gooding, has a wide-ranging practice that includes 12 attorneys.

"Roy has decades of experience and stellar credentials and will make a great addition to Capitol Law Group as a partner," said Capitol Law attorney and managing partner C. Tom Arkoosh.

"His experience in natural resources and public policy will allow us to expand our expertise and client services in those areas."



Roy Eiguren

## OF INTEREST

“Capitol Law Group helps clients that have demanding, specialized needs,” said Eiguren. “It is a good fit for someone with my background.”

Eiguren is a graduate of the University of Idaho College of Law and has 30 years of experience in governmental relations as well as regulatory issue management with a focus on energy and environmental concerns.

### Perkins Coie Named to ‘Top Ten Family Friendly Firms’ by Yale Law Women

Perkins Coie has been named one of the 2012 Top Ten Family Friendly Firms by Yale Law Women, a student organization devoted to promoting the interests of women in law school and the legal profession. This is the fourth time in the past five years that Perkins Coie has been included

on this list, and is the only firm to achieve four out of five category honors.

Yale Law Women conducts an annual survey of law firms on the 2012 Vault Top 100 Law Firms list and produces its annual Top Ten Family Firms report to raise awareness of gender disparities within the legal profession as well as to highlight progress and innovative solutions.

“Perkins Coie makes work-life balance a top priority for its attorneys,” says Iveth Durbin, Chair of the Women’s Forum’s Work/Life Balance Subgroup. “Firm management understands that a quality personal life means a quality work life.”

Theresa Cropper, Chief Diversity Officer, says, “We are continually looking for ways to improve the lives of our attorneys through policies, benefits and a culture that allows for successful integration of career, family and other outside obligations and interests. This creates an

environment that gives our attorneys the chance to continue their professional development and manage their family lives without penalty.”

Perkins Coie is recognized for its accomplishments in the legal profession, its commitment to diversity and its excellent client service. For 10 consecutive years, Perkins Coie has been on FORTUNE magazine’s list of “100 Best Companies to Work For.” The firm has been named to the “Best Law Firms for Women” by the National Association for Female Executives (NAFE) and Flex-Time Lawyers LLC each survey year since 2008. In 2011, the firm received a Gold Standard Certification from the Women in Law Empowerment Forum. The firm has also earned the Human Rights Campaign Foundation’s top rating of 100 percent in the Corporate Equality Index for four years in a row.

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Parsons Behle & Latimer, home to Idaho’s largest intellectual property legal team, is pleased to announce that **Robert A.**

**Matson** has joined the firm as an associate and will be part of the firm’s Intellectual Property Law practice group.

Rob is a registered patent attorney specializing in the procurement, maintenance, and enforcement of intellectual property rights. Prior to joining **Parsons Behle & Latimer**, he was associated with Hayes Soloway PC in Tucson, Arizona. Rob holds a bachelor’s degree in Mechanical Engineering and received his Juris Doctor from the University of Arizona.

Rob can be reached at rmatson@parsonsbehle.com or 208-562-4900

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Introducing our  
**NEW PARTNERS**  
Jennifer Schrack Dempsey  
and Brent Bastian

BWS is proud to announce that Jennifer Schrack Dempsey and Brent Bastian have become partners in our firm. Licensed in Idaho and California, Jennifer joined BWS in 2009 and focuses her practice on agribusiness as well as complex commercial litigation involving employment, unfair business practices and partnership disputes. In her spare time, she performs pro bono work for Family Advocates' CASA program and serves as Vice President of Idaho Women Lawyers. She is a graduate of Loyola Law School.

Brent has litigated in the areas of contract, business tort, governmental malfeasance, breach of fiduciary duty, crop destruction, securities fraud and oil and gas. He joined BWS PLLC in 2008 and, most recently, was on the trial team responsible for a \$52 million jury verdict against Saint Alphonsus Regional Medical Center. He is a graduate of Tulane University School of Law.



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**NEW ADMITTEES  
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Photo by Dan Black

New admittees applaud a speaker at the May 3 ceremony at the Idaho Capitol.

Abblitt, Carmel A.  
 Allen, Jessica Corinne  
 Asher, Amy Elizabeth  
 Asher, Stephanie Claire  
 Bartholick, Sean Patrick  
 Beckett, Kristian Scott  
 Bergman, Aaron K.  
 Best, Ryan Matthew  
 Bezu, Alex  
 Black, Nikeela Renae  
 Blank, Theodore Braden  
 Boehme, Alan Joseph  
 Bottomly, Raymond Victor  
 Broadbent, Phillip Elijah  
 Burch, Keith Reiferd  
 Callister, Jonathan Charles  
 Chamberlain, Felicity Abigail  
 Miranda  
 Clark, Lee Wayne  
 Clark, Shannon Marie  
 Claus, Johannes Stephanus  
 Adrianus III  
 Coose, Ruth

Cramer, Thomas Dale  
 Crane, Brandon Paul  
 Crapo, David J.  
 Diviney, Seth Hayden  
 Dodge, Laura Ladd  
 Fiore, Dijon Michelle  
 Ford, Michael L.  
 Freeman, Fredrick William  
 Ghandour, Rima I.  
 Hedden-Nicely, Dylan Reyher  
 Johnson, Patricia Lee  
 Juarez, Lucy R.  
 Kurtz, Timothy Ryan  
 Laird, Brian A.  
 Lang, Braden John  
 Larsen, F. Scott  
 Leavitt, Tristan L.  
 Lether, Thomas  
 Levinson, Barry Paul  
 Lively, Leah C.  
 Livsey, Charles H.  
 McClinton, Laura Beth

McCord, Laurel Vivian  
 McCune, Sandra Anne  
 McDevitt, John Reilly  
 Merritt, Kurt V.  
 Miller, Shawn G.  
 Morris, Jeremy Ray  
 Norris, Daniel Oren  
 Oman, Lisa James  
 O'Sullivan, Thaddeus James  
 Partridge, Jessica Laraine  
 Partridge, William Lindsay  
 Pearson, Kristen Ann  
 Pierson, Susan Roche  
 Pincock, Trevor R.  
 Poole, Ryan D.  
 Pugrud, Scott N.  
 Purcell, Matthew David  
 Ramsey, Georgianna Elizabeth  
 Gaines  
 Rasmussen, Chad Craig  
 Rice, Tyler James  
 Rogers, Steven M.

Rosholt, Andrea Jo  
 Shrum, Jennifer Lynn  
 Stamper, Connie LaRae  
 Starry, Melissa M.  
 Stoddard, Jason Gardner  
 Stoker, Brandon J.  
 Stottler, Courtney Rose  
 Strawhun, Lincoln  
 Taylor, Mark Rogers  
 Utz, Diane Carol  
 Verhage, Rachel Erin  
 von Reis, Charles A.C.  
 Vook, Matthew Joseph  
 Ward, Darci Noelle  
 Warr, Adam Christopher  
 Watts, Daniel Benjamin  
 Weight, Ian Christopher  
 Wheable, Michael Adam  
 Willenbrock, Frederick Colin  
 Williams, Kimberly Lynette  
 Wolf, Ann V.

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## Get to Know Concordia Law A Community-Focused Law School



A defining aspect of Concordia University School of Law is the integration of traditional learning with practical experience and public service. Former Boise Assistant City Attorney, Jodi Nafzger, joined the school in January to spearhead Concordia Law's experiential learning programs.

Jodi Nafzger,  
Director of Experiential  
Learning and Career Services

"As the law school integrates meaningful experiential learning and Concordia University's core values into the curriculum (Christian, Community, Excellence, and Service), students will immediately be empowered to make a positive impact on their communities through internships, externships, and pro bono opportunities," said Nafzger.

In addition, Concordia's Legacy Mentor Program will provide students with mentors to foster professionalism, service, and ethical responsibility. All incoming students will be paired with a local attorney or judge. Mentors will guide students' professional development and show them how to apply their skills to effect change, serve others, and become active citizens.

"Students will benefit from a trusted guide through law school and the mentors will have the personal satisfaction of sharing their experience to help a future lawyer," Nafzger said. "The mentor program also offers students the opportunity to network during law school which improves their employment options at graduation. We hope it also results in lasting friendships."

### Q&A with Professor Nafzger

**Q. What opportunities does the law school provide for the legal community?**

A. Our experiential learning programs are designed as a partnership between Concordia Law and the lawyers, judges, and social service providers in our community. In addition to the Legacy Mentor Program, law students will participate in year-long externships and provide pro bono service for underserved populations from our accessible, downtown location.

**Q. How will the law school help in the continuing education of the legal community?**

A. The law school is already serving as a hub for Continuing Legal Education (CLE) programs. We will continue to draw on the expertise of members of our faculty and our Dean's Advisory Council, while also partnering with members of the Bar, to offer a variety of CLE programs.

**Q. How many members of the Bar have volunteered?**

A. Over 100 members of the local legal community have already volunteered to be mentors to members of the inaugural class. These lawyers will have the same effect on the students as mentors have had on my own career. I am a better attorney because of those relationships.

**Q. Who are the mentors? Do you anticipate adding more?**

A. We have selected mentors who reflect the diversity of the profession in terms of age, gender, ethnicity, and practice area. The mentors frequently relate how much they would have benefitted from having a program like this during their law school experience. We will always be recruiting mentors who model the highest level of professionalism and work habits, and who demonstrate a commitment to the program. We are very fortunate to have the support of the local Bench and Bar.

### GETTING TO KNOW JODI NAFZGER

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Children: Henry and William;  
Pets: Chocolate lab named  
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## FOURTH DISTRICT VOLUNTEERS PULL TOGETHER LAW DAY TRIUMPH

Members of the Fourth District Bar celebrated Law Day by taking legal questions from the public and recognizing outstanding contributions by members of the legal community. Awards were given at a reception at the Rose Room in downtown Boise and included the prestigious Liberty Bell Award and the 6.1 Challenge, which is a friendly competition to encourage pro bono service. This year's Law Day theme was "No Courts, No Justice, No Freedom," underscoring the importance of the courts.

Law Day, which is typically recognized across the country on May 1, was celebrated by the Fourth District Bar on the preceding Friday. This year the work began for volunteers taking phone calls from the public starting at 5 a.m. As in previous years, the "Ask-A-Lawyer" project began with KTVB meteorologist and community celebrity Larry Gebert broadcasting from the Ada County Courthouse, where 33 attorney volunteers took 175 requests for legal advice. By the end of the day, about 60 calls were still to be answered, and volunteers were still whittling away at them.

In conjunction with Law Day, the Liberty Bell Award is given by the Fourth District to acknowledge outstanding community service by a person or persons who have:

- Promoted better understanding of the rule of law,
- Encouraged a greater respect for law and the courts,
- Stimulated a sense of civic responsibility, and
- Contributed to good government in the community.

This year's Liberty Bell Award winner was Susie Boring-Headlee, the ADR/Pro Bono Coordinator for the United States District Court. She worked for the federal judiciary for more than 20 years. She spent 10 years at the Ninth Circuit Court of Appeals where she completed a two-year capital case management plan for Ninth Circuit Judge Arthur L. Alarcón. She then



Susie Boring-Headlee and her husband, Paul, pose at the Fourth District's annual Law Day reception in Boise. Susie was honored for her contributions to the legal community with the Liberty Bell award.

supported Chief Judge B. Lynn Winmill at the U.S. District Court for 10 years. In January, 2009, Ms. Headlee accepted the position of full-time ADR/Pro Bono Coordinator where her contributions have been felt not only district-wide but nationally. Her duties have included designing and implementing the ADR/pro bono program.

One of Ms. Headlee's recent accomplishments was the organization and coordination of the first Ninth Circuit ADR Settlement Week entitled "Resolution Round-up," which was held April 2-6, and resolved 52% of the cases selected for possible resolution.

### 6.1 Challenge honors pro bono work in six categories

Idaho Supreme Court Chief Justice Roger Burdick presented the 6.1 Challenge awards at the Law Day Reception, where about 150 people gathered. Awards were given in the categories of small firms, large firms, solo practitioners and

government lawyers. For the first time, an award was designated for a corporate law department. The winners are as follows:

**Solo Practitioner** — Wes Wilhite took a difficult custody modification case with the Idaho Volunteer Lawyers Program which exemplified the spirit of Rule 6.1.

**Small Firm** — Moore & Elia, LLP was recognized for the large number of hours contributed through the CASA program.

**Large Firm** — Stoel Rives LLP had a very high percentage of its legal staff involved in pro bono, and an extraordinary number of hours donated to the Balla Prison litigation, immigration matters, and an adult guardianship referred by the Idaho Volunteer Lawyers Program.

**Government Law Office** — Idaho State Appellate Public Defender demonstrated how government attorneys can creatively perform pro bono service. They staffed a legal clinic for homeless people, provided legal services to a nonprofit, and represented an individual in a criminal case. The office also provided service to

the Bar and profession through outreach to schools.

**Corporate Law Office** — The first-ever award in this category goes to the attorneys at Idaho Power. The participating lawyers worked with CASA, and provided legal service to a nonprofit. One lawyer contributed 200 hours to the Uniform Law Commission and another served as a volunteer judge for the Idaho Law Foundation's state mock trial competition.

The 6.1 Challenge judges included Chief Federal Magistrate Candy Dale, Fourth District Magistrates Russell Comstock and Christopher Bieter, Past President of the Idaho Law Foundation Linda Judd, and Director of the YMCA Jim Everett.

### Law Day School Outreach

Volunteer attorneys gave presentations at more than nine schools, with multiple classroom presentations at each school. Classrooms ranged from 1<sup>st</sup> grade through 12<sup>th</sup> grade.

— Dan Black and Laurie Fortier

### School outreach volunteers

Katherine L. Georger  
*Holland & Hart LLP*

Kristin F. Ruether  
*Advocates for the West, Inc.*

Robert Swartz

Jessica M. Lorello  
*Office of the Attorney General*

Taylor L. Mossman  
*Mossman Law Office, LLP*

Claire S. Tardiff  
*Ada County Prosecutor's Office*

Gabriel J. McCarthy  
*McCarthy Law*

Jeffery E. Brownson  
*Nevin, Benjamin, McKay & Bartlett, LLP*

Rob G. Dickinson  
*Hawkins Companies, LLC*

### Law Day committee

Sean C. Beaver  
*Powers Tolman PLLC*

Christian C. Christensen II  
*Andrade Law Office, Inc.*

Laurie A. Fortier  
*Boise City Attorney's Office*

Daniel J. Gordon  
*U.S. Courts, District of Idaho*

Mary S. Hobson  
*Idaho Volunteer Lawyers Program*

Heather M. McCarthy  
*Ada County Prosecutor's Office*

Jason E. Prince  
*Stoel Rives LLP*



Photo by Dan Black

Idaho Supreme Court Chief Justice Roger S. Burdick, right, gives an award during the Law Day reception. Representing Stoel Rives, LLP are, from left, Allison Blackman, Teresa Hill, Jason Prince and Sara Berry. The firm won the 6.1 Challenge in the Large Firm category. Judges noted that Stoel Rives attorneys had a very high percentage of its legal staff involved in pro bono activities.

### Ask-A-Lawyer Volunteers

Jessica M. Lorello  
*Office of the Attorney General*

M. Sean Breen  
*Manweiler, Breen, Ball & Davis, PLLC*

Mark S. Geston  
*Stoel Rives, LLP*

Joseph W. Borton  
*Borton-Lakey Law Offices*

Sally J. Reynolds  
*Farley Oberrecht West Harwood & Burke, PA*

A. Denise Penton  
*Penton Law Office*

Tessa J. Bennett  
*Legacy Law Group, PLLC*

Jennifer M. Schindele  
*Bevis, Thiry & Schindele, PA*

Mark S. Freeman  
*Foley Freeman, PLLC*

Alec T. Pechota  
*Howell & Vail, LLP*

Robert W. Vail  
*Howell & Vail, LLP*

Michael J. Crawford  
*Law Offices of Michael J. Crawford*

Trudy H. Fouser  
*Gjording & Fouser, PLLC*

Elaine A. Nichenko  
*Blue Cross of Idaho*

Shannon N. Romero  
*Idaho State Appellate Public Defender's Office*

Tony J. Steenkolk  
*Boise, Inc.*

Audrey L. Numbers  
*Numbers Law Office*

Ann L. Coshon  
*Ada County Public Defender's Office*

Laurie A. Fortier  
*Boise City Attorney's Office*

Heather M. McCarthy  
*Ada County Prosecutor's Office*

Daniel J. Gordon  
*U.S. Courts, District of Idaho*

Christian C. Christensen II  
*Andrade Law Office, Inc.*

Kira D. Pfisterer  
*Hepworth Janis & Kluksdal*

Kip J. Reisinger  
*Idaho Supreme Court*

Mary R. Grant  
*Idaho Court of Appeals*

Andrew S. Jorgensen  
*Fourth District Court*

Lorna K. Jorgensen  
*Ada County Prosecutor's Office*

Amber C. Ellis  
*Ada County Prosecutor's Office*

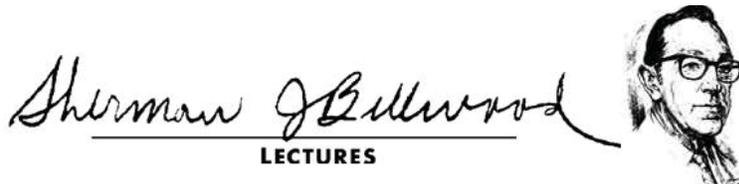
Alison S. Graham  
*Idaho Court of Appeals*

Marisa S. Crecelius  
*Carey Perkins, LLP*

Katherine C. Ball  
*U.S. Courts, District of Idaho*

Elizabeth A. Mahn  
*Ada County Prosecutor's Office*

J. Patrick Denton  
*Ada County Court*



## Unconventional Responses to Unique Catastrophes: Tailoring the Law to Meet the Challenges Kenneth R. Feinberg

**Wednesday, October 3, 2012**

**Reception and Presentation  
Featuring Mr. Feinberg**

5:30 p.m. (MDT)  
Boise Centre  
Boise, Idaho

**Thursday, October 4, 2012**

**Bellwood Memorial Lecture**

3:30 p.m. (PDT)  
Administration Auditorium  
Moscow, Idaho



Named the "Lawyer of the Year" in 2004 by the National Law Journal, and listed repeatedly in the Journal's "Profiles in Power: The 100 Most Influential Lawyers in America," Kenneth Feinberg is the nation's leading authority on mediating disputes and administering compensatory awards in mass injury cases. Mr. Feinberg has served as Special Master of the September 11th Victim Compensation Fund and Administrator of the memorial fund following the shootings at Virginia Tech and the BP Deepwater Horizon Compensation Fund.



**FOLEY FREEMAN** announces the opening of a branch office in Nampa, formerly Alban Law, located at 1224 1st Street South, Nampa, Idaho. This new location will allow Foley Freeman to expand its bankruptcy, estate planning, family law, business support, and general civil litigation services into Canyon County and surrounding areas.

**FOLEY FREEMAN** is also pleased to announce that attorneys Leah F. Shotwell and Richard L. "Dick" Alban have joined the firm.

- Leah graduated magna cum laude from Gonzaga University with a degree in organizational leadership, and is a 2010 graduate of the University of Idaho College of Law. Leah will work with the firm's family law and civil litigation teams.
- Dick has a bachelor's degree from Northwest Nazarene College and is a 1975 graduate of the University of Idaho College of Law. Dick has practiced bankruptcy law in Nampa for over 32 years, and in 2008 was awarded the Professionalism Award by the Commercial Law & Bankruptcy Section of the Idaho State Bar. Dick, who joins the firm of counsel, will work with the firm's bankruptcy team in Nampa.



Leah F. Shotwell



Richard L. Alban

**Foley Freeman, PLLC**  
77 E. Idaho, Suite 100, Meridian, ID 83642  
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CONCORDIA UNIVERSITY  
SCHOOL OF LAW

-BOISE, IDAHO-

## Get to Know Concordia Law Enrolling our Inaugural Class in Fall 2012



Tamara Martinez-Anderson,  
Assistant Dean of Admission &  
Marketing

Tamara Martinez-Anderson joined Concordia University in June 2010. Her experience as an admission dean at three law schools throughout the country provides her with a broad perspective on how law schools operate and best practices in the recruitment and admission of law students. Family connections in Southern Idaho, combined with an entrepreneurial spirit, inspired her to join Concordia Law. Tamara is committed to the success of the law school, its students, and graduates.

### 2012 Inaugural Class Demographics\*

Males: 66.0%  
Females: 34.0%

Full Time: 77.4%  
Part Time: 22.6%

Under 30: 34.0%  
30 to 45: 56.6%  
Over 45: 9.4%

Idaho: 87%  
Oregon: 4%  
Utah: 4%  
Nevada: 2%  
Washington: 2%  
Montana: 2%

\*As of May 1, 2012

### Q. How important is having a law school in Boise?

A. Concordia Law is providing an exceptional educational opportunity to Boise residents who have long aspired to attend law school, but were not in a position to relocate. Having a law school in Boise helps to keep and attract talent to the city and region. The entire Treasure Valley will benefit from having law students in the community who can provide legal services through pro bono projects, legal clinics, and as legal externs and interns.

### Q. What has attracted students to Concordia Law?

A. Students are very excited about how our Legacy Mentor Program will pair them with a local attorney or judge. They are also attracted to the community and civic engagement focus of the law school and to the unique opportunity of being part of an inaugural class. In addition, they appreciate the proximity of our building to the legal community and our easy access to all of the great amenities of downtown Boise.

### Q. Has cost been an issue for the students who are attending?

A. Financing a legal education is a challenge for many law students. However, Concordia has strived to keep the costs manageable by creating a community of supporters — a Scholars Society — to assist students. Generous scholarship contributions by individuals, law firms, bar associations, and foundations have been matched by the university, enabling the law school to offer every member of

the inaugural class a scholarship and a grant. We are working to expand this program to provide a similar level of support to future classes.

### Q. Where is the law school at in the accreditation process?

A. The law school has acquired the regional accreditation required to award financial aid and we have approval from the Idaho State Board of Education to award the Juris Doctor. Our intent is to acquire full accreditation from the American Bar Association\* as quickly as the process allows.

### Q. What are students most excited about?

A. Our incoming students are incredibly motivated and committed to contributing to the creation of a premier law school. They realize that not only will their hard work and dedication allow them to reach personal and professional goals, but will forever tie them to the ongoing success of Boise's first comprehensive law school.

\*The Dean is fully informed as to the Standards and Rules of Procedure for the Approval of Law Schools by the American Bar Association. The Administration and the Dean are determined to devote all necessary resources and take all necessary steps to present a program of legal education that will qualify for approval by the American Bar Association. The Law School makes no representation to any applicant that it will be approved by the American Bar Association prior to the graduation of any matriculating student. ABA Standard 102. Interpretation 102-7.

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