



The **Advocate**

Official Publication
of the Idaho State Bar
Volume 55, No. 3/4
March/April 2012



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The Official Publication of the Idaho State Bar
55 (3/4), March/April 2012

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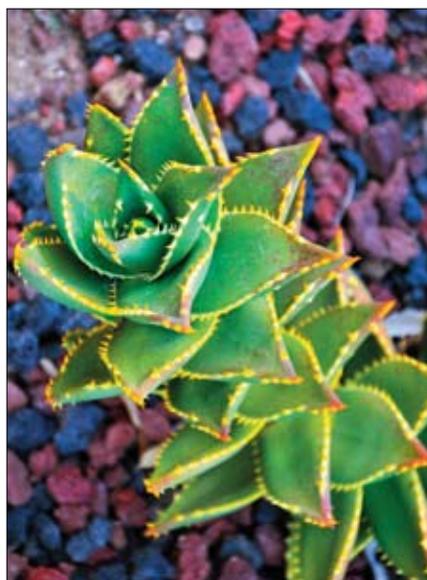
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On the Cover

This photograph was taken at Lotusland, a Public Garden in Santa Barbara, California by Lisa Shultz a Boise Attorney. This particular shot is from the "aloe garden," one of 18 gardens at the expansive botanical wonderland. Lisa works at C.K. Quade Law, PLLC. More of Lisa's photography can be viewed at: <http://bouncelightphotography.zenfolio.com/>

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Special thanks to the March/April editorial team: Judge Kathryn A. Sticklen, Daniel J. Gordon and Brent T. Wilson.

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

POSTMASTER: Send address changes to:

The Advocate

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Boise, Idaho 83701

Upcoming CLEs

March

March 9

Annual Workers Compensation Section Seminar
Sponsored by the Workers Compensation Section
Sun Valley Resort ~ Sun Valley
8:00 a.m. MST
6.0 CLE credits of which 1.0 is ethics

March 16

Day with the Idaho Supreme Court Video Replay
Sponsored by the Idaho Law Foundation
Red Lion Hotel ~ Pocatello
8:30 a.m. MDT
5.0 CLE credits of which 1.0 is ethics (RAC)

March 19

Un-Lucky Charms: When Bad Things Happen to Good Lawyers
Co-Sponsored by Idaho Law Foundation and CLE NetShows
Statewide Webcast
1:00 p.m. MDT
1.0 CLE credits of which 1.0 is ethics

April

April 11

First or Next Post Judgment Case
Sponsored by the Idaho Law Foundation
Law Center ~ Boise /Statewide Webcast
8:30 a.m. MDT
1.5 CLE credits (RAC)

April (continued)

April 20

Day with the Idaho Supreme Court Video Replay
Sponsored by the Idaho Law Foundation
Lewis Clark State College ~ Lewiston
8:30 a.m. PDT
5.0 CLE credits of which 1.0 is ethics (RAC)

May

May 3

CLE Program Video Replay
Sponsored by the Idaho Law Foundation
Law Center ~ Boise
8:30 a.m. MDT
2.5 CLE credits of which 1.0 is ethics (RAC)

May 4

Idaho Practical Skills
Sponsored by the Idaho Law Foundation
Boise Centre ~ Boise
8:00 a.m. MDT
6.5 CLE credits of which 1.25 is ethics (RAC)

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

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Webcast Seminars

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

Recorded Program Rentals

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JUDGES OR REFEREES? LET'S HEAR IT FOR THE BENCH

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

Isn't it ironic that we just finished watching the Super Bowl, with all the entertaining commercials, and there was not one mention or even a "thank you" for the judiciary that made it all possible. The NBA finals will be in June and those would not take place if not for the judiciary. Not one thanks, not even one advertisement, even if it was a public service announcement that these billionaires and millionaires are brought to you courtesy of an overworked, underpaid and vastly underappreciated branch of the government. Your judiciary.

Wouldn't that have made a great advertisement?

Can't you hear the voice of James Earl Jones filling the airwaves that the NFL lockout, the NBA lockout were all solved by those judges who serve you, the people, the fans. So let's have a Super Bowl party. Let's give them



Reed W. Larsen

thanks. Let's pay tribute to those people who dropped really busy civil and criminal calendars to solve a legal problem with enormous social implications. But no, it never happened. Not one mention or thank you.

I listened carefully and at one point Al Michaels did mention that this NFL season might not have taken place if not for the efforts of New York Giants owner John Mara and the New England Patriots owner Robert Kraft. Not one mention of the ruling of United States District Judge Susan Richard Nelson (who ruled in favor of the NFL players). Not one mention of the Eight Circuit Court of Appeals who reversed Judge Nelson. Not one mention of Judge Arthur Baylan who tried to mediate the case. And no mention of George Cohen, the lawyer who mediated both the NFL lockout and the NBA lockout to successful resolution, thus bringing you

your Super Bowl. Really this Super Bowl should have been brought to you courtesy of the third branch of the government, the judiciary, with its accompanying workers, the American lawyers.

As Paul Harvey would have said, and now "the rest of the story." At this time, the American judiciary is in a state of crisis caused by the economic effects of the nation, but also a crisis caused by a lack of understanding of important facts and values. Did you know that some NFL referees make over \$120,000 a year for officiating football games? (I got the number fresh off the internet so it must be right.) Their NBA counterparts make between \$100,000 to \$300,000 in the pre-season to officiate basketball games. Yet our courts, and I am speaking collectively as a nation and as the state of Idaho, have been in a state of financial crisis for the past three years. It has garnered a little attention from the media, but compared to the problems of life and death, wealth and poverty that courts deal with every day, very little attention.

Here in Idaho, we have communities that haven't had magistrate judge positions filled for years. Staff positions have gone empty to help balance the budget. Court schedules have been modified to save money. And it has worked. We have done more with less for more than three years and from my view the courts are prepared to continue to go down that path as long as they can — but there are limits. The purpose should not be to continue to stretch those limits, but rather look for relief. The relief will come as the economy picks up for all us. But we need to keep focused on solving the problems now and into the future. Those problems are only solved by asking some tough questions.

Why should an NFL or NBA official make more money for calling penalties and fouls than an Idaho Supreme Court Justice? And more importantly, why should these judges' retirement program receive scrutiny and criticism when they are underpaid to begin with? I am sure the judiciary would not be the one to complain about the lack of competitive pay, even though they should. I am sure the judiciary would not complain about the retirement package as it is one of the few

things that make the judiciary appealing to practicing attorneys.

Some may say that dealing with judicial pay and benefits is, without a numerical analysis, just anecdotal. Others may say that judges should not be treated differently than other state employees. To those views, I disagree. Judges should be looked at differently. To highlight the difference I continue to draw comparison to the sports arena. If you look at the highest paid state employees, they are probably all coaches. Not that successful college coaches should not be paid well, but where are values of what is really important? Is it more important to correctly run a slant pattern with a "y" receiver or perhaps adjudicate all of the water rights for the State of Idaho? Clearly, my view is that I can live without football and even basketball (although I may be grumpy). I cannot live without water. Pay and benefits always involve some review of our core values to truly determine worth. The pay and the benefits must be sufficient to attract qualified candidates to the judiciary and to maintain qualified judges. We, as lawyers, need to put that message out to all of those willing to hear.

So here is hoping you had a good Super Bowl weekend and that March Madness is everything you can scream about; that your favorite NBA team does well; and that you remind your friends, neighbors and legislators that this was brought to you courtesy of an underpaid and underappreciated judiciary of which you, as attorneys, are part.

About the Author

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

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

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Idaho Law Review goes online

For the first time, the *Idaho Law Review* will publish online. The *Review* announced that the first issue of its forty-eighth volume is available for download at <http://www.uidaho.edu/law/law-review/articles>.

This issue of the *Review* includes articles discussing the interaction between the Second Amendment rights of students and the First Amendment rights of institutions of higher education, the role of pro bono in legal education, a quantitative analysis of the influence of Seventh Circuit Judge Richard A. Posner, and the fundamental importance of the economically threatened state court system.

The edition also includes notes and comments analyzing recent developments in Idaho's prosecutorial misconduct jurisprudence, Idaho's legislative response to the sub-prime mortgage crisis, and the Ninth Circuit's treatment of the Stolen Valor Act. Authors include ABA President Wm. T. (Bill) Robinson, Prof. Shaundra K. Lewis (Texas Southern University), Prof. Margaret M. Cordray (Capital University), Christopher C. McCurdy (Law Clerk, Chief Justice Roger Burdick, Idaho Supreme Court) and Ryan P. Thompson (Cadwalader, Wickersham & Taft LLP), and current editors of the *Idaho Law Review*.

The *Idaho Law Review* is the scholarly publication of the University of Idaho College of Law. It exists to serve the bench, the practicing bar, and the legal academy as a forum for scholarly analysis of current legal issues, particularly those that are relevant to Idaho and the Pacific Northwest. For inquiries regarding subscriptions or otherwise, please contact Brian Schlect, Editor-in-Chief, at schl6701@vandals.uidaho.edu.

Symposium to examine legal issues for GMOs

Every year, the *Idaho Law Review* presents a symposium on a topic that is interesting and seminal to legal practitioners. Topics addressed in previous years have included water law, sustainable land use planning, internet and intellectual property law, and health care reform. The *Idaho Law Review* is proud to announce its upcoming 2012 symposium, *GMOs: Law and the Global Market*. The sym-

posium will address genetically modified organisms and their relevance to both domestic and international legal questions. The symposium will be held Friday, April 20 at the Owyhee Plaza Hotel in Boise. For more information, contact Katie Bilodeau at kbilodeau@vandals.uidaho.edu or for the Boise campus, contact Renee Karel at kare5903@vandals.uidaho.edu.

Ninth Circuit ADR Committee to host Resolution Roundup

Mediation/ADR has become more common in recent years as a way of resolving conflicts effectively and efficiently, and a viable alternative to trial. Cases have already been identified for mediation, and sessions will be held simultaneously throughout Idaho. Resolution Roundup is sponsored by the Ninth Circuit ADR Committee members who volunteered to serve as neutrals in ADR proceedings in district courts with heavy caseloads. Idaho is the first district to utilize the program, which includes judges, federal court mediators, and law professors from University of Idaho and Concordia College of Law who will mediate cases at no charge.

The Ninth Circuit ADR Committee's focus is to assist courts within the Ninth Circuit with their ADR programs by providing guidance and oversight using Alternative Dispute Resolution methods and techniques to assist in resolving federal court cases. Judge Valerie P. Cooke, Chair, Ninth Circuit ADR Committee, and Ninth Circuit Judge N. Randy Smith have each volunteered to participate, as well as Chief U.S. Magistrate Judge Candy Wahgahoff Dale, Idaho.

Chief Judge Winmill stated, "The District of Idaho continues to be committed to resolving its cases expeditiously, and alternative dispute resolution is an important component. Mediation is an effective way to resolve cases, and this program is a great way for members of the bar to give back to their local communities and offer alternative ways to settle difficult conflicts."

Tribal Courts to be focus of 2012 Native American Law Conference in Moscow

The annual Native American Law Conference, hosted by the University of Idaho College of Law, will focus this year on "Tribal Courts: Jurisdiction and Best Practices." The conference, to be held on March 23 in the College of Law court-

room, will feature United States Attorney Wendy Olson, Deputy United States Attorney & Tribal Liaison Traci Whelan, Christine Folsom-Smith, Director of the National Tribal Judicial College, and Nez Perce Tribal Attorney Julie Kane (UI Law '89), along with judges from tribal courts around the Northwest. The topics will include implementation of the Tribal Law & Order Act of 2010, tribal court funding strategies, the importance of tribal appellate courts, full faith and credit for tribal court orders, ethics in the courtroom, and jury trials in tribal courtrooms. A full list of speakers and topics, plus registration information, can be found on the College of Law website at <http://www.uidaho.edu/law/newsandevents/signature/native-american-law-conference/>

The annual Native American Law Conference is organized and directed by UI law professor Angelique Townsend EagleWoman (Wambdi A. WasteWin).

2012 nominations for ISB commissioners due April 3

Attorneys in the 6th and 7th districts will be electing new representatives to the Idaho State Bar Board of Commissioners this spring. The new commissioners will replace Reed Larsen of Pocatello.

Pursuant to Idaho Bar Commission Rule 900, the new commissioner representing the 6th and 7th districts must reside or maintain an office in the 7th district.

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

Nominations must be in writing and signed by at least five members of the ISB in good standing, and eligible to vote in the districts. The executive director must receive nominations no later than the close of business on April 3, 2011. The nominating petition is available on the Idaho State Bar website or a petition may be obtained by calling the office of the executive director at (208) 334-4500.

Ballots will be mailed to all members eligible to vote in the 6th and 7th districts on April 16, 2012. All ballots properly cast and returned to the executive director will be counted by a board of canvassers at the close of business on May 1, 2012.

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2011 — THE IDAHO LAW FOUNDATION YEAR IN REVIEW

Diane K. Minnich
Executive Director, Idaho State Bar

The programs and activities of the Idaho Law Foundation improve the public's access to and understanding of the legal system and enhance the competency of practicing lawyers and judges through educational programs. 2011 was a year of successes and challenges.

Law Related Education (LRE)

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



Diane K. Minnich

In 2011, nearly 100 educators participated in training programs offered by the LRE program, 216 students and 130 volunteers participated in the High School Mock Trial Competitions and 38 teaching teams of lawyers and classroom teachers worked together to teach over 2,000 students about law, government and citizenship. Again in 2011, LRE distributed more than 10,000 copies of *Turning 18 in Idaho* to high school seniors.

Idaho Volunteer Lawyers Program (IVLP)

IVLP continues to provide legal services to low-income individuals, families and groups. Through case representation by volunteer attorneys, brief services, advice and consultation, clinics and workshops, IVLP served over 1,200 individu-

als last year. The program works with Idaho Legal Aid Services, and the statewide Court Assistance Offices to assist those with legal needs and limited resources.

The Idaho Pro Bono Commission, chaired by Idaho Supreme Court Justice Jim Jones, continues to develop and implement strategies to maximize the involvement of attorneys in pro bono service and to explore the development of means and incentives to support attorneys in providing pro bono services.

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

| Idaho Volunteer Lawyers Program | | |
|--|-------------|-------------|
| | 2010 | 2011 |
| Calls received | 5,812 | 5,751 |
| Matters handled by volunteer attorneys | 849 | 832 |
| Hours donated by volunteer attorneys | 15,747 | 16,776 |
| Donated services value | \$2,362,050 | \$2,516,475 |
| Legal resource line calls | 670 | 510 |

Interest on Lawyers Trust Accounts (IOLTA)

Since the first grants were awarded in 1985, the IOLTA program has granted over \$6 million to law related programs and services throughout Idaho. The organizations funded in 2011 were: Idaho Legal Aid Services, Idaho Volunteer Lawyers Program, ILF Law Related Education, ILF Legal Resource Line, Idaho YMCA Youth Government, Idaho State 4-H Know Your Government Conference, and University of Idaho law school scholarships. Funds granted for 2011 decreased 16% from 2010. Due to the continued low interest rates, IOLTA grant funds have decreased nearly 55% in the last 3 years. The IOLTA grant recipients are struggling due to the reduced grant amounts. As the need for

services increase, the funds available to provide services continue to decrease.

Through the 2011 Idaho State Bar resolution process, changes in the IOLTA rules adopting interest rate comparability were approved by the membership and the Idaho Supreme Court. The new rules will help optimize income received for IOLTA grants. A more detailed description of the rule changes will be in a later edition of *The Advocate*.

Continuing Legal Education (CLE)

The Foundation and the Idaho State Bar Sections offer legal education programs throughout the state. Developing new and creative ways to deliver CLE programming increased 2011 attorney participation in programming by 34%.

| ISB/ILF Continuing Legal Education | | |
|------------------------------------|-------|-------|
| | 2010 | 2011 |
| Total live program attendance | 1,783 | 1,903 |
| Tape/DVD rentals | 641 | 691 |
| Online transactions | 804 | 1,046 |
| Webcast attendance/telephonic | 297 | 1,094 |

Fund Development

Funding the programs of the Foundation, specifically IVLP and LRE, has been difficult the past few years due to the decrease in IOLTA funds. We appreciate the support of our donors and funders, without the support of lawyers, judges and granting organizations, the important work of the Foundation could not be accomplished.

| Donations | | |
|-------------------------|----------|----------|
| | 2010 | 2011 |
| General Fund, IVLP, LRE | \$85,404 | \$76,179 |
| Endowment Fund | \$5,885 | \$3,300 |
| Total | \$91,289 | \$79,479 |

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



Idaho State Bar 2012 Professional Award Nominations

The Idaho State Bar Board of Commissioners is now soliciting nominations for the 2012 professional awards. These awards were initiated by the Board of Commissioners to highlight members who demonstrate exemplary leadership, direction and commitment in their profession.

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

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

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

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

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

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

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

Award nominations should include the following:

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

You can nominate a person for more than one award.

The nomination deadline is March 30, 2012. Submit nominations to: *Executive Director, Idaho State Bar, PO Box 895, Boise ID 83701, fax (208) 334-4515, dminnich@isb.idaho.gov.*

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LITIGATION AND BUSINESS AND CORPORATE LAW SECTIONS TEAM UP

Kendal A. McDevitt

Chair - Litigation Section

Brent T. Wilson

Chair - Business and Corporate Law Section

The Sixth and Seventh Amendments to the United States Constitution guarantee a jury trial in criminal cases and civil disputes of more than \$20.

The reality is however, that today there appear to be many impediments to trial. Whether these impediments are real or misperceptions, even lawyers who call themselves trial lawyers find jury trials becoming a rarity. This is troubling as the jury system was created neither for the purpose of accuracy nor efficiency, but rather to prevent tyranny.

For those who do find themselves in a jury trial or before an appellate court, this month's clever

article on improving trial skills and legal writing by referring to Sigmund Freud's teachings of psychoanalysis is a reminder of the importance of storytelling. Authors Leonard Feldman, Christopher

Pooser and Sara Berry frame the issue of persuasion through Freud's principles in a manner that gives a new vantage point to the reader. Much as science fiction can allow one to see an issue unattached to common stereotypes and perceived norms and therefore to allow for new considerations, the article shows us a fresh view of the interactions of the law, the facts and how its reception is influenced by the individual juror or jurist.

The Litigation Section further promotes preparing lawyers for jury trials by continuing its Trial Skills Academy which was held the spring of 2011 and will be held next the spring of 2013. This fall, look for our Jury Selection CLE on October 19, 2012 when a group of experienced lawyers will select a jury and then have their work reviewed by a judge, the lawyers themselves and by the audience who will be able to ask the lawyers to explain the why and how of the lawyers' individual take on jury selection.

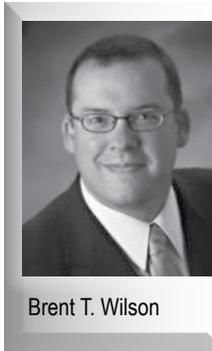


Kendal A. McDevitt



Let's avoid litigation

The Business and Corporate Law Section is pleased to co-sponsor the March 2012 issue of *The Advocate* with the Litigation Section. While the Litigation Section focuses its efforts on preparing attorneys for litigating in front of juries, the Business and Corporate Law Section hopes to provide insight and information to help attorneys avoid litigation at all.



Brent T. Wilson

To that end, Brian Buckham and Adam Richins offer an outstanding article about the fine art of drafting liability limiting provisions in contracts, and the steps transactional lawyers should consider in that process depending on the circumstances of the transaction and the client. As a continuation to her excellent series about transactions involving the transfer of intellectual property, Elizabeth Schierman writes about questions to ask before buying trademark rights. Finally, taking a turn toward transactions involving a foreign component, Joseph Wadsworth provides insight on working deals with Japanese companies, both from a cultural and legal perspective, and Steve Frinsko addresses the Foreign Corrupt Practices Act and the impact of globalization on enforcement of this law.

To further enhance the skills and knowledge of business and corporate lawyers throughout Idaho, the Section's annual CLE is scheduled for Friday, May

For those who do find themselves in a jury trial or before an appellate court, this month's clever article on improving trial skills and legal writing by referring to Sigmund Freud's teachings of psychoanalysis is a reminder of the importance of storytelling.

11, at the Riverside Hotel in Boise. Our annual CLE will focus on Practicing Business Law In A Down Economy, and will feature a keynote presentation by M&A attorneys Bryan Davis and Adam Schaeffer from the international law firm Jones Day. We will also have an opportunity to hear from a number of local authorities regarding in-house counsel concerns, commercial real estate, civil litigation, and ethics matters, and how the current and ongoing economic climate has, and will continue, to impact the practice of business law.

We invite all members of the Bar to join our Section, and encourage all of our members, new and old, to participate in our monthly meetings and CLE presentations. Please enjoy the articles offered by the Business and Corporate Law Section. We hope you find them informative.

CAN SIGMUND FREUD HELP US IMPROVE OUR TRIAL SKILLS AND LEGAL WRITING?

Leonard J. Feldman
W. Christopher Pooser
Sara M. Berry
Stoel Rives LLP

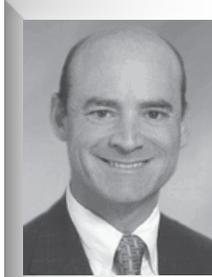
Sigmund Freud, the father of modern psychoanalysis, divided human thoughts and behavior into three categories or responses: (1) the id, (2) the ego, and (3) the super-ego.¹ Freud was a neurologist, not a lawyer. He never wrote on legal theory and, other than perhaps treating psychotic and neurotic lawyers, he never materially contributed to the practice of law. So what, then, can we learn from Freud about legal writing and analysis? The answer, albeit with a healthy dose of creativity, is plenty. Start with the nature of the id, ego, and super-ego.

According to Freudian theory, the id is the “Tasmanian Devil” of the human psyche, the uncontrolled drive to seek pleasure.² The id knows no logic and is not influenced by external reality.³ The ego saves humanity from id-driven destruction.⁴ The ego adapts the drive of the id to conform to reality.⁵ The super-ego assists the ego in controlling the id.⁶ The super-ego represents the influences of family, society, and culture and provides moral and legal guidelines so that humans act in a socially responsible manner.⁷

Now think about how these Freudian concepts have parallels in litigation. In litigation, the facts of a case are like the human id. They are the subconscious, pre-existing drives and actions that we as attorneys cannot change. They are not influenced by trial or legal writing, even though they drive all or nearly all of what we as litigators do. When talking with a client at the beginning of litigation, we can almost always point to several things he *should* have done, but did not do. Good or bad, the facts are set and must be dealt with as they are, not as we wish they were.

Legal principles, in turn, are the ego. They help lawyers control – and give structure to – the facts. Like the ego, legal principles adapt the pre-existing drive and force of the facts so that they can be controlled and understood. The law lets you know which facts are relevant and necessary to your case, and which facts – though fascinating, scintillating, or downright absurd – serve no purpose. Just as the ego controls the id, the law helps lawyers sift through conflicting facts and shape them into theories that can win or lose the case.

Like the ego, legal principles adapt the pre-existing drive and force of the facts so that they can be controlled and understood.



Leonard J. Feldman



W. Christopher Pooser



Sara M. Berry

Finally, the super-ego is the judge or jury – incorporating values and imposing guidelines on human conduct. The judge and jury tell you whether your client’s actions were right or wrong and hopefully provide a benchmark for future interactions and rules that future litigators can fight about. Lawyers who understand the role of the judge, jury, and super-ego can craft a presentation that will not only win the case (or the appeal) but will also make the world a better place.

As this article explores, knowing how the facts, laws, and decision-maker – the id, ego, and super-ego – function together in litigation can improve our skills in the courtroom and in legal briefing and analysis. After all, at the end of the day, Freud’s goal is not that different from ours. He wants the super-ego to control the id, with help from the ego, so that humans act in a socially responsible manner. Similarly, we as litigators want judges and juries, with help from applicable legal principles, to control the underlying facts – again, so that humans act responsibly. As such, we as lawyers can use Freudian theory to more effectively persuade judges and juries to rule in our favor.

The id: The uncontrolled facts

Freud’s structural model of the psyche begins with the id. The id is the “dark inaccessible part of our personality.”⁸ Freud said, “call it a chaos, a cauldron of seething excitement.”⁹ The id is responsible for our instinctual needs, our basic drives.¹⁰

It knows no judgment, has no organization or unified will, and acts only to obtain satisfaction according to the “pleasure principle.”¹¹ The id does not correspond to or recognize the idea of time, and thus “no alteration in its

mental processes is produced by the passage of time.”¹² Simply put, the id consists of the many disorganized and sometimes erratic impulses and drives that affect who we are and how we behave.

Just as Freud’s model of the psyche begins with the id, legal advocacy begins with the facts. Like the impulses that make up the id, the facts are uncontrollable, unchanging, and unchangeable. Litigators typically become involved in a dispute well after the fact. Certainly there are times when the facts continue to develop after a lawsuit is filed, but the underlying facts – like the id – are largely predetermined before litigation ensues. Once those facts exist, like the impulses that make up the id, such facts are difficult, if not impossible, to change. Like a psychoanalyst working with a patient’s drives and desires, litigators must deal with the facts whether they are good or bad.

What this means for the litigator

Even though the facts are largely outside of our control, it is critical to bring order to chaos. As an initial matter, an advocate can only develop and advance a legal position through a thorough understanding of the facts of the case. That process begins with fact-gathering, which focuses on understanding *all* of the facts (and impulses) that could be legally (psychologically) significant. Attorneys, like psychoanalysts, should craft a theme so that the facts can be easily explained to,

and understood by, the audience (judge or jury).¹³ Your job is to “carefully shape[] the facts without distorting them.”¹⁴ Credibility is key – you must address facts that both support and undermine your legal positions.¹⁵ A lawyer who does not understand and accept all the facts, just like a psychoanalyst who ignores important impulses, is unlikely to be effective.

Telling a story at trial is an excellent tool to orient the jurors to your theme; it helps organize the facts while increasing juror comprehension and recall.¹⁶ Trial also plays another important function, creating the “record” that drives everything that occurs in the case, including opening statements, closing arguments, post-trial motions, and the legal arguments that can be raised on appeal.¹⁷ As Judge Alex Kozinski states in his article *The Wrong Stuff*, “[t]he law doesn’t matter a bit, except as it applies to a particular set of facts.”¹⁸ Confirming the importance of those facts, Judge Kozinski further notes that “where the lawyer can really help the judges – and his client – is by knowing the record and explaining how it dovetails with the various precedents. Familiarity with the record is probably the most important aspect of appellate advocacy.”¹⁹ Thus, just as a psychoanalyst must understand a patient’s id, an effective litigator must understand and master the facts.²⁰ Those facts can then be controlled and shaped by the law.

The ego: Controlling the facts with the law

The job of the ego is to control the id, to restrain it from acting on every impulsive desire and passion. Freud said the ego’s “relation to the id . . . is like a man on horseback, who has to hold in check the superior strength of the horse.”²¹ The ego must rein in the powerful nature of the id. Freud explains that as the ego “attempts to mediate between id and reality, it is often obliged to cloak the [unconscious] commands of the id with its own [pre-conscious] rationalizations, to conceal the id’s conflicts with reality, to profess, with diplomatic disingenuousness, to be taking notice of reality even when the id has remained rigid and unyielding.”²² The ego has the sometimes difficult task of representing reason and sanity.²³ The ego must weigh the conflicting choices before it, sometimes giving up one impulse or desire in favor of another.²⁴ As with the law, the ego encompasses judgment, tolerance, reality testing, control, synthesis of information, and intellectual functioning.²⁵

The comparison between the law and the ego is clear (again, with a touch of

“Keep in mind that simple arguments are winning arguments; convoluted arguments are sleeping pills on paper.”

— Judge Alex Kozinski

creativity). Like the ego, the law imposes order on the facts of a case and prevents them from being a meaningless jumble of impulses. The law has many forms, including statutes, case law, common law, rules of procedure and evidence, and jury instructions, to name a few. In these various forms, the law imposes order on the facts; it does so through discovery rules, pre-trial motions, and rules of evidence – all of which control if, how, and when facts are presented to a decision-maker (judge or jury). The law – whether in the form of jury instructions, statutes, or common law principles – also sifts through sometimes conflicting facts, shaping those facts into theories that can ultimately persuade a judge or jury to resolve disputes in your client’s favor.

What this means for the litigator

Recognizing how the law works can naturally help lawyers shape their arguments. At the outset, it is important to allow the law to shape the facts – just as the ego shapes the id. Effective litigators carefully develop a theory of a case based on the elements that must be proven, the defenses that can be asserted, and the defenses the other side will likely use.²⁶ These theories and defenses are developed by organizing the facts according to the experiences of the law and rejecting the weaker, conflicting theories that will not lead to success. The same is true, perhaps even more so, on appeal, where the standard of review – in addition to substantive legal principles – plays a critical role in shaping the facts into coherent arguments. As one commentator has aptly noted, “[t]he standard of review is the keystone of appellate decision making.”²⁷

Whether at trial or on appeal, several useful lessons can be learned by comparing the ego to the law. First, simpler is better. As Judge Kozinski put it, “Keep in mind that simple arguments are winning arguments; convoluted arguments are sleeping pills on paper.”²⁸ The easier it is for the ego (law) to be understood and applied, the more likely it is to control the id

(facts).²⁹ Second, the theories of the case and supporting arguments should be carefully organized and focused. Self-preservation dictates that only the strongest arguments should be presented to the court; a shotgun approach rarely works.³⁰ Third, carefully cite and quote controlling legal principles. Just as the id and ego are often in conflict, the law and the facts do not always line up. But if you manipulate the meaning of the law to create the impression that it controls the facts in a specific manner when it does not, the result will be legal psychosis.³¹

The super-ego: Creating socially responsible decision-makers

Like the ego, the super-ego works to control the id.³² The super-ego consists of two parts: the ego ideal and the conscience.³³ The ego ideal is the “expectations, value and ideals for which we strive.”³⁴ The conscience is the “angel” in our psyche” that provides moral and legal guidelines so that humans act in a socially responsible manner.³⁵ Thus, the super-ego acts as a parental figure, assisting the ego in controlling the id.³⁶ As Freud explained, “As the child was once under a compulsion to obey its parents, so the ego submits to the categorical imperative of its super-ego.”³⁷

The judge and jury function like the super-ego, striving to maintain order, ensuring that humans act in socially appropriate ways, and judging right and wrong. Just as the super-ego governs the ego to control the id, the judge and jury oversee the law to control the facts of the case in the pursuit of justice. To be completely effective, litigators should appeal to the super-ego drive of the judge and jury to dictate the societal good. It is not enough to tell the judge and jury that they can rule in your favor; you should tell them why the world would be a better place if they did so.

What this means for the litigator

Given the relationship of the super-ego to the id and the ego, a number of lessons can be gained from the relation-

ship between the judge or jury and the facts and law. Of particular importance is knowing your audience and how to gain their attention. At trial, the audience is typically a jury. As noted, giving the jury the relevant facts as part of a story – complete with a theme – is an excellent way to organize the events in question, humanize the people involved, and hold the jury’s attention.³⁸ People learn better through stories and can relate to them.³⁹ Research also shows that jurors’ retention of factual information fades and, thus, emotional evidence should be presented first and factual evidence last.⁴⁰

On appeal, your audience is appellate judges and their law clerks. Both will read your brief, and neither is as familiar with your case as you are. As a result, it is your job to convince the law clerks that your legal authority is stronger than your opponent’s and to give the judge “the necessary information that he or she needs to know to affirm or reverse your case.”⁴¹ To do that, many of the lessons above will apply: recite the facts in a compelling story, strive for simplicity and brevity, state and argue only what is necessary, know and apply the standard of review, pick your strongest arguments, and focus on controlling legal principles.⁴²

Oral argument is equally important.⁴³ Because the panel will likely ask you questions, your introduction is significant and may be your only chance to succinctly present your issues and explain why you should prevail.⁴⁴ When a question is posed, listen to it carefully and answer it directly.⁴⁵ And again, focus on your best arguments and keep it simple. In those ways you craft a presentation that focuses, the panel on the key points of your case, addresses any remaining questions or concerns that the panel may have, and ultimately allows you to tell the panel not only that they could rule in your favor but that the world would be a better place if they did so. Like the super-ego, the panel’s ruling not only will control the facts and shape the law, it also provides moral and legal guidelines so that humans act in a socially responsible manner in the future.

As this article shows, Freud’s teachings go well beyond psychoanalysis. Applied liberally to the practice of law (admittedly, perhaps too liberally), Freudian theory can also make us better litigators. By accepting that facts are beyond our control, using the law to shape our story of the facts, and focusing the decision-makers on the key issues that need to be resolved, we have a better chance of

Like the super-ego, the panel’s ruling not only will control the facts and shape the law, it also provides moral and legal guidelines so that humans act in a socially responsible manner in the future.

obtaining a decision in our client’s favor – thereby avoiding personal and professional psychoses. Not only would Freud be pleased with the result, so will your client.

About the Authors

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The authors wish to thank Michael Wampold for his Freudian inspiration. The views expressed in this article are those of the authors, and do not reflect the views of Sigmund Freud or any other reputable professional.

Endnotes

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THE FINAL HOUR: DRAFTING AWAY LIABILITY

Brian R. Buckham
Adam J. Richins
Idaho Power Company

Lawyers rarely encounter two transactions that are exactly alike. Most commercial transactions involve different timeframes, different conditions, and, most importantly for purposes of this article, different parties. A provision that is essential in one transaction may be secondary (or even absent) in another, or market conditions may justify inclusion or exclusion of certain provisions.¹ Likewise, contractual terms that may be acceptable to one party may not align with the risk tolerance or contracting policies or standards of another party. A transactional lawyer, therefore, must be willing to adapt to an amalgam of circumstances in order to provide his or her client with the best deal possible. It is pivotal in such circumstance to understand the client's business and industry (including what terms are standard or commercially reasonable in that industry and in the particular circumstances) and the client's specific interests, access to alternatives, and risk tolerance.

While the foregoing issues are relevant to most contract terms, they are particularly relevant to provisions of the contract pertaining to limitations of liability. A limitation of liability clause, stated generally, limits the amount of damages a party may recover from the counter-party.² At some point — usually at the end of the contract negotiations — the contract parties, often buyers and sellers of a good or service, will argue over the seller's potential liability under the contract. The arguments will not be novel. The seller will argue that its liability must be limited in proportion to the revenue generated by the deal. The buyer will respond that there is no reason the seller's liability should be capped when the seller controls the product (or service) and the risk. The dialogue will typically proceed as follows:

Seller: "This deal is only worth \$2 million. Yet, if we accept unlimited liability, the project could put us out of business. My executives are not willing to accept that risk. I am authorized to accept liability up to \$2 million for all claims."



Brian R. Buckham



Adam J. Richins

Buyer: "Under the old law of *Hadley v. Baxendale*,³ you will only be liable for the foreseeable damages your product causes my company. If your product causes my company to incur \$5 million in damages, you should be required to pay us \$5 million. You manufacture the product; you control the risk and liability. Neither common law nor statutory law establishes limits of liability for foreseeable damages.⁴ I am only asking for what is allowed under the law."

Both arguments are perfectly logical, and neither one is invalid. After all, why should a buyer pay for damages caused by the seller, especially when the buyer is paying the seller \$2 million for the product? On the other hand, why would a seller risk the entire business on one deal? Indeed, the seller cannot reasonably be expected to control or assume all risk.

Notwithstanding this conflict, contracts with limitation of liability provisions do get signed, so either the parties compromise, one party caves, or, more worrisome, one or both of the parties fail to notice or understand the significance of the issue. The key to resolving the conflict is not to stubbornly debate the big picture. Rather, there are a number of provisions the buyer and seller may each request that may help the parties reach a mutually agreeable position.

This can be illustrated through a simple hypothetical. Assume the initial draft of a purchase contract, as drafted and presented by the seller, contains the following limitation of liability provision:

The key to resolving the conflict is not to stubbornly debate the big picture. Rather, there are a number of provisions the buyer and seller may each request that may help the parties reach a mutually agreeable position.

LIMITATION OF LIABILITY. ANYTHING TO THE CONTRARY HEREIN NOTWITHSTANDING, UNDER NO CIRCUMSTANCE SHALL SELLER BE LIABLE TO BUYER FOR AN AMOUNT OF DAMAGES IN EXCESS OF THE FEES PAID BY BUYER TO SELLER PURSUANT TO THIS AGREEMENT, OR BE LIABLE IN ANY AMOUNT FOR SPECIAL, INCIDENTAL, CONSEQUENTIAL, OR INDIRECT DAMAGES, INCLUDING, WITHOUT LIMITATION, LOSS OF GOODWILL, LOSS OF BUSINESS PROFITS, INTEREST AND FINANCE CHARGES, WORK STOPPAGE, DATA LOSS, OR EXEMPLARY OR PUNITIVE DAMAGES.

Clearly, this provision is seller-favorable, as it ensures (subject to limited possible exceptions) that the seller is not exposed to any liability beyond the purchase price for the product. This limitation of liability applies to damages incurred by the buyer as a result of the seller's negligence (including a third-party claim against the buyer), breach of warranty, and breach of contract.⁵ From the buyer's perspective, at least the provision does not seek to waive direct damages,⁶ which in almost all circumstances would be outlandish,⁷ so perhaps there is opportunity for the buyer and seller to reach a common ground. Our hypothetical buyer, after discussing the provision with his attorney, is unlikely amused by the proposed broad limitation on the seller's liability and the attendant risk-shifting and, unless desperate, is unlikely to execute the agreement. But, the deal must go on.

In order to establish common ground, the buyer's attorney should, first, ensure that the buyer understands what constitutes "special, incidental, consequential, and indirect damages." Second, the buyer should analyze whether excluding such damages (or capping them) is appropriate under the circumstances.

The first step is not easy. Indeed, courts have long struggled to differentiate between direct damages on the one hand, and special, incidental, consequential, or indirect damages on the other. Generally speaking, special, incidental, consequential, and indirect damages (which we refer to collectively in this article as “consequential damages”) are losses or injuries that do not flow directly or immediately from an injurious act or omission, but that result as a consequence of that act or omission. Such damages commonly include, among other things, damage to reputation, loss of product, loss of revenue, interest or finance charges, loss of efficiency, loss of rents, depreciation, material escalation charges, downtime costs, and additional overhead costs. Beware, however, that there is no readily accepted laundry list as to what constitutes consequential damages. Therefore, rather than leaving that determination to a court, the best practice is to expressly state in the agreement whether a particular damage is consequential.

The second step — i.e., deciding whether a waiver or limitation of such consequential damages is appropriate — can be equally difficult to determine. In many contexts, buyers should be reluctant to limit a seller’s liability for certain forms of consequential damages, most specifically, lost profits. For instance, if the buyer is purchasing services related to the construction of a commercial building, the buyer should generally reject a broad limitation of consequential damages. Such action is appropriate because many sellers in the industry will accept unlimited liability based on the improbable nature of the consequential damages, the low amount of such damages, and the large number of service providers in the industry.

On the other hand, a limitation of consequential damages may be acceptable to a buyer if, for example, the seller is constructing a power plant. In that case, the buyer may be hard-pressed to find a seller that will accept unlimited liability as it relates to consequential damages. Indeed, the lost profits related to significant downtime of a power plant or damages resulting from interruption of the power grid caused by the seller’s act or omission could put a seller out of business.

Regardless of the industry, the buyer should generally attempt to exclude delay damages (and liquidated damages, if ap-

One common mistake is that buyers agree to waive “consequential damages” not knowing that they have also arguably waived their right to collect damages caused by the seller’s inability to meet critical completion dates.

plicable) from any provision that purports to limit consequential damages. Many courts have ruled that damages caused by a seller’s delay are, by definition, consequential damages.⁸ One common mistake is that buyers agree to waive “consequential damages” not knowing that they have also arguably waived their right to collect damages caused by the seller’s inability to meet critical completion dates, carved-out by wary parties often as “delay damages.” This mistake can be grave if a project is delayed due the seller’s acts or omissions.

Aside from making the determination as to whether excluding liability for each of the above items is acceptable, the buyer may employ a few additional mechanisms. First, it can make the limitation of liability provision mutual. After all, if the seller is limiting its liability under the contract, why should the buyer not receive the same benefit? After that, the buyer can consider where there may be particularly heightened risks, such as the seller’s product’s infringement on third-party intellectual property rights, other forms of third-party claims (including those for which the agreement requires the seller to indemnify the buyer), the potential for personal injury or property damage (consider also potential strict liability), the need for injunctive relief, delay damages (as explained above), and risks related to the seller’s breach of a particular contractual provision (e.g., confidentiality and non-disparagement provisions). The buyer can either fully exclude such areas of heightened risk from the limitation of liability provision, or exclude an amount of liability above a specified cap.

Having considered the various risks under the circumstances and available options, the buyer in our hypothetical may redraft the limitation of liability provision as follows (bracketed provisions are authors’ commentary):

LIMITATION OF LIABILITY

(A) EXCEPT AS SET FORTH IN SUBSECTION (B) BELOW, UNDER NO CIRCUMSTANCES SHALL EITHER PARTY: (i) BE LIABLE TO THE OTHER FOR AN AMOUNT OF DAMAGES IN EXCESS OF THE PRODUCT OF (a) THREE TIMES (b) THE FEES PAID BY BUYER TO SELLER PURSUANT TO THIS AGREEMENT, OR (ii) BE LIABLE IN ANY AMOUNT FOR SPECIAL, INCIDENTAL, CONSEQUENTIAL, OR INDIRECT DAMAGES, INCLUDING WITHOUT LIMITATION, LOSS OF GOODWILL, LOSS OF BUSINESS PROFITS, INTEREST AND FINANCE CHARGES, WORK STOPPAGE, DATA LOSS, OR EXEMPLARY OR PUNITIVE DAMAGES.

(B) THE LIMITATIONS AND EXCLUSIONS IN SUBSECTION (A) SHALL NOT APPLY TO:

(i) SELLER’S INDEMNITY OBLIGATIONS PURSUANT TO THIS AGREEMENT, WHICH SHALL BE LIMITED TO THE COSTS INCURRED BY SELLER IN THE DEFENSE OF ITS OBLIGATION TO PAY THE FULL AMOUNT AWARDED IN A FINAL JUDGMENT BY A COURT HAVING JURISDICTION OVER THE CLAIM OR THE AMOUNT AGREED UPON BY SELLER IN A SIGNED SETTLEMENT AGREEMENT, IN EACH CASE NOT TO EXCEED A TOTAL OF \$10,000,000.

(ii) SELLER’S BREACH OF ITS OBLIGATIONS WITH RESPECT TO SECTION “X” (“_____”) OF THIS AGREEMENT, IF SELLER’S BREACH OF SECTION X IS AS A RESULT OF SELLER’S GROSS NEGLIGENCE OR INTENTIONAL MISCONDUCT. [Any number of sections could be inserted, depending on the particular circumstances; however,

the gross negligence or intentional misconduct carve-out may not be appropriate in all contexts.]

(iii) DAMAGES CAUSED BY SELLER'S FAILURE TO ACHIEVE FINAL COMPLETION OF THE WORK BY THE GUARANTEED COMPLETION DATE, WHICH SHALL NOT BE LIMITED IN AMOUNT. [In the case of delay damages, consider whether a liquidated damages provision in the agreement is desirable, and if so, whether it should be appropriate as a carve-out from the limitation of liability provision.]

(iv) PERSONAL INJURY OR DEATH OR DAMAGE TO TANGIBLE PROPERTY CAUSED BY THE NEGLIGENCE OR WILLFUL MISCONDUCT OF SELLER,⁹ SUCH DAMAGE TO TANGIBLE PROPERTY SHALL NOT EXCEED \$10,000,000 PER OCCURRENCE. [The parties could also agree to limit liability to the amount of insurance required to be maintained by seller under a separate provision of the agreement. See endnote v.]

(v) EITHER PARTY SHALL HAVE THE RIGHT TO SEEK INJUNCTIVE RELIEF TO PREVENT IRREPARABLE HARM IN THE EVENT OF THE OTHER PARTY'S BREACH OF ITS OBLIGATIONS OF NON-DISCLOSURE OR USE OF PROPRIETARY INFORMATION, EVEN IF NO MONEY DAMAGES HAVE BEEN PROVEN.

The seller, after initially scoffing at the extent of the changes shown in the redlined version of the agreement returned by the buyer, evaluates these carve-outs and determines that they are reasonable under the circumstances. However, being wily, the seller recognizes that if the provision is to be mutual, it desires to include two additional carve-outs in subsection (B) of the provision, as follows:

(vi) BUYER'S BREACH OF SECTION "Y" ("_____") WITH RESPECT TO BUYER'S USE OR GRANTING UNAUTHORIZED USE OF SELLER'S PROPRIETARY INFORMATION TO A THIRD PARTY, IN WHICH CASE DAMAGES SHALL BE LIMITED TO AN AMOUNT EQUAL TO SELLER'S LOST REVENUE LESS ANY AMOUNTS AWARDED FOR BUYER'S BREACH OF ITS OBLIGATIONS UNDER SECTION Y, IF ANY, ARISING FROM THE SAME SET OF FACTS.

(vii) BUYER'S OBLIGATION TO PAY FEES DUE AND OWING UNDER THE AGREEMENT.

The seller recognized the need for these provisions given the sensitivity of its intellectual property and proprietary information and the damage that may result if the buyer fails to implement information security measures agreed upon by the buyer in hypothetical Section Y of the agreement. The seller also recognized that if the buyer had not yet paid for the product or service, then technically, the buyer's liability would be limited to \$0.00 under the terms of the agreement, and thus added subsection (vii) above.¹⁰

At the end of perhaps a few spirited discussions, coupled with several drafts of the above contract provision and a few modifications of the dollar figures based on the parties' respective risk profiles and policies, the buyer is comfortable that she has not permitted the seller to limit her liability for areas to which the buyer is most sensitive, and the seller has been given an itemized list of areas where it must exercise particular caution to avoid additional exposure. Barring disaster, the deal is done.

About the Authors

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Adam J. Richins is in-house counsel at IDACORP, Inc., where his practice is focused on litigation, commercial transactions, and environmental matters. Formerly, he was an attorney at Stoel Rives LLP, where his practice focused on litigation, dispute resolution, and commercial transactions, and had previously been a project manager on construction projects. He obtained a degree in civil engineering from Columbia University, a degree in mathematics from the University of Puget Sound, and a J.D. from the University of Washington.

Endnotes

¹ Consider, for example, the extent of representations and warranties of the selling entity in an asset or stock purchase transaction during 2005 relative to the extent of representations and warranties in those agreements during 2011. Changes in risk tolerance, transaction leverage shifting toward the buyer, and tight credit and capital markets resulted in a general increase in the number and strength (in favor of the buyer) of representations and warranties made by the seller, as well as whether some or all of the representations and warranties survived the closing of the acquisition.

² The clause is generally not intended to limit a contract party's liability to third parties. In those situations, a party should consider indemnification provisions. That said, parties can and do limit liability as it relates to indemnification obligations.

³ Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Rep. 145 (1854) ("Where two parties have made a contract which one of them has broken, the damage which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contracts, as the probable result of the breach of it.")

⁴ Article 2, Section 2-719 of the Idaho Uniform Commercial Code addresses limitation of liability only in the sense that it authorizes as enforceable such a provision, providing as follows:

(1) ... [T]he agreement may ... limit or alter the measure of damages recoverable under this chapter, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts[.]

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

⁵ In many commercial agreements, the seller is required to carry certain insurance, such as commercial general liability insurance. The buyer should be aware that limitations of liability provisions can also limit the buyer's ability to rely on those insurance provisions in the agreement. For example, if an agreement includes a limitation of liability of \$1,000,000, and if the commercial general liability insurance limits in the contract equal \$2,000,000, the buyer may not be able to recover \$2,000,000 in the event the seller's actions cause an individual to get injured on the site. The more likely scenario is that the seller's insurer would step into the shoes of the seller and point to the limitation of liability clause to limit its liability to the \$1,000,000 stated in the agreement.

⁶ Generally speaking, direct damages are damages that "follow from the type of wrong complained of." Black's Law Dictionary 394 (7th ed. 1999). Direct damages, for example, are costs incurred by the buyer to complete a project following the seller's default.

⁷ The authors have seen this attempted on more than one occasion. Their mutual position on the issue is obvious from the context.

⁸ See, e.g., Performance Abatement Servs. v. Lansing Bd. Of Water and Light, 168 F. Supp. 2d 720, 740-41 (W.D. Mich. 2001) (holding, as a matter of law, that "delay damages" were excluded by a provision waiving "special, incidental, or consequential damages"); Otis Elevator Co. v. Standard Const. Co., 92 F.Supp. 603, 607 (D. Minn. 1950) (holding, as a matter of law, that "alleged loss of rent from hospital rooms during the period of delayed installation of the elevators . . . are consequential damages..."); C.f. Borah v. McCandless, 147 Idaho 73, 82, 205 P.3d 1209, 1218 (2009) ("[I]ncidental damages resulting from the seller's breach included 'any reasonable expense incident to the delay or other breach.'" (citing I.C. § 28-2-715)).

⁹ The term "Seller" should be defined broadly to include the seller and its subcontractors and suppliers, at all tiers. If the term "Seller" is not defined in that broad manner, the buyer should ensure that the limitation of liability clause refers to both the seller and all other entities performing work for the seller under the agreement.

¹⁰ In a circumstance where a purchase order is used, this could also have been remedied by revising subsection (i) of Section (A) of the agreement to read as follows: "(i) BE LIABLE TO THE OTHER FOR AN AMOUNT OF DAMAGES IN EXCESS OF THE FEES PAYABLE BY BUYER TO SELLER PURSUANT TO THIS AGREEMENT, AS EVIDENCED BY THE PURCHASE PRICE LISTED ON THE PURCHASE ORDER FOR THE APPLICABLE GOOD OR SERVICE...."

IP TRANSACTIONS: QUESTIONS TO ASK BEFORE BUYING TRADEMARK RIGHTS

Elizabeth Herbst Schierman
TraskBritt, P.C.

Have you heard of Binney & Smith Inc.? No? Well, have you heard of Binney & Smith's CRAYOLA® products? Yes? I thought so. I imagine the mere mention of CRAYOLA® brings to mind a pleasant little yellow and green box of oh-so-loved crayons.¹ Clearly, a trademark can embody a company's identity to the consuming public, making trademarks a highly valuable asset to any business. Given their high value, trademarks and their rights should be handled with care. Any transaction of trademark rights should likewise be approached with care and caution.

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

This article, which is part two of a three-part series,³ examines these questions in the context of an expected assignment or license of trademark rights.⁴ In this context, an "assignment" is essentially a complete transfer of the ownership of an exclusive right by an assignor to an assignee. A "license," on the other hand, is not a transfer of ownership, but is essentially a waiver by a licensor of the right to sue a licensee for infringement based on a licensed activity.

Trademark rights: An introduction

Trademarks, as discussed in this article, are symbols, words, phrases, shapes, and even, sometimes, sounds, smells, colors, and tastes, provided these indicate a particular source, origin, endorsement, or

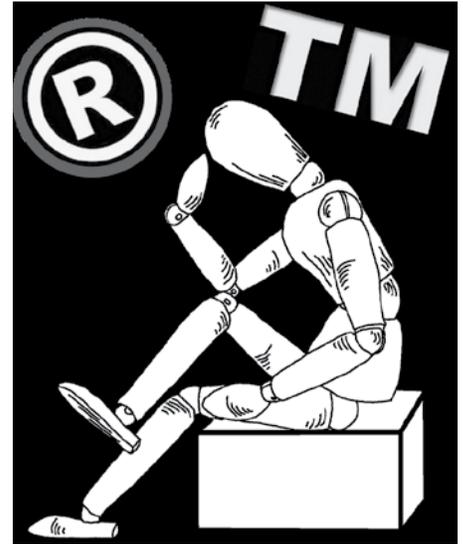
sponsorship of associated goods or services. A trademark rights holder generally has the right to exclude another from adopting or using a confusingly-similar mark. That is, the trademark holder can stop a junior user (i.e., a later adopter/user) from adopting or using a mark that is likely to confuse, cause mistake, or deceive a potential customer as to the affiliation, connection, or association of the junior user with the trademark rights holder, or as to the source, origin, endorsement, or sponsorship of the junior user's goods or services with those of the trademark rights holder.⁵

Trademark rights are recognized in both federal law and state law, and trademarks may be registered at either or both the federal level and the state level.⁶ For purposes of this article, however, the discussion is limited to a transaction involving federal trademark rights.

Trademark rights are based on use of the trademark in commerce; therefore, registration of a trademark is not a prerequisite to establishment of enforceable or transferable trademark rights. Registration is also not necessarily required before instituting a lawsuit to stop an infringement. Though registration is not mandatory for establishing or enforcing trademark rights, whether and where a trademark is registered can greatly impact the scope of any associated enforceable trademark rights. This is because registration provides a constructive area of use and a presumption of (exclusive) ownership of the mark in an area equal to the geographic territory in which the trademark is registered. Therefore, a federally-registered trademark enjoys the benefit of the owner's legal presumptive ownership of the mark and exclusive right to use the mark nationwide on, or in connection with, the goods/services listed in the registration.⁷ On the other hand, unregistered marks enjoy protection only in their area of actual use, which can often be much more limited, geographically, and much more difficult to prove.

What were the circumstances of the creation of the trademark rights?⁸

Because a trademark owner's rights are effective to prevent infringement by junior users, the priority date of a trademark can be highly important. For example, a trademark with rights dating back to the late 1800s will likely have more value



Knowing when a logo was designed or when a brain-storming session churned out a new product name is not sufficient to determine when trademark rights came into being.

to a potential trademark rights purchaser than a trademark with rights dating back only to the late 1900s. A recently-adopted trademark may leave open a not-insignificant risk of an as-yet-unknown third-party claiming senior rights in a confusingly similar mark, in which case the later adopter may be stopped from continuing or expanding use of its mark.

Trademark rights may be created when a symbol is used in commerce to distinguish the goods or services of one entity from those of another entity.⁹ It is the use of the trademark, and particularly the use of the trademark in commerce, that is important. Therefore, knowing when a logo was designed or when a brain-storming session churned out a new product name is not sufficient to determine when trademark rights came into being.

It is often difficult to pinpoint a particular date upon which trademark rights became enforceable, particularly if the trademark rights involved are not associated with a registered trademark. After all, not every word, picture, or sound used in a commercial has associated with it enforceable trademark rights. Therefore, in investigating the origins of trademark rights, it may be important to consider not only when the trademark in question was first used, but how it was used, where it was used, and with what goods or services it was used.

Do the rights still exist?

Trademark rights, technically speaking, have no expiration date; they may be enforceable unless and until the trademark becomes abandoned. A trademark is considered abandoned, and therefore no longer enforceable against others, when either of two circumstances occurs. First, a mark is considered abandoned if the owner discontinues use of the mark with no intent to resume use.¹⁰ (This may just be why, every once in a while, a trip through the grocery store will bring you face to face with “throw-back” labels.) Second, a mark is considered abandoned if the mark loses its distinctiveness such that it no longer functions as a symbol of a particular source, origin, or sponsorship, etc., of the associated goods/services.¹¹ (This may be why Johnson & Johnson advertises “BAND-AID® Brand Adhesive Bandages,” rather than simply “Band-Aids”; why Xerox may prefer you to make “copies,” not “xeroxes”; and why a Kimberly-Clark Worldwide, Inc., exec may be happy to offer a friend a “KLEENEX Tissue,” not just a “kleenex.”)

Trademark registrations, on the other hand, do have expiration dates; however, registrations are generally renewable indefinitely with proof of continued use of the trademark in question.¹² (For example, the trademark registration for Coca-Cola has been alive since 1893.)¹³ Even so, trademark registrations are also subject to termination due to discontinued use or to the trademark becoming generic.

Accordingly, before purchasing trademark rights, it is important to determine not only whether there is a presently-live trademark registration, but also whether there have been any significant periods of time in which the trademark concerned has not been used in commerce and, depending on the trademark, whether competing products/services have been or are being described using the trademark in question.

A mark is considered abandoned if the mark loses its distinctiveness such that it no longer functions as a symbol of a particular source, origin, or sponsorship, etc., of the associated goods/services.

Are the rights transferable?

Ownership of trademark rights, like other types of IP rights, may generally be transferred by assignment or license. However, there are certain limitations on such conveyances that are unique to trademark rights transactions.

With regard to assignments, it is generally advisable to make any assignment of trademark rights in writing, and an assignment of a trademark registration must be in writing.¹⁴ Trademark rights cannot be assigned apart from the good will associated with the trademark.¹⁵ An assignment purporting to transfer ownership of trademark rights without the associated good will can result in the trademark being considered abandoned.¹⁶

With respect to licenses, it is also generally advisable to make any license in writing. However, regardless of the form in any license of trademark rights, the trademark owner should retain control over the nature and quality of the goods/services. Licenses that do not provide for this quality control by the licensor are known as “naked” licenses.¹⁷ Such “naked” licenses leave the licensor and licensee exposed to a potential finding of abandonment.¹⁸

It should also go without saying that rights not owned by the would-be assignor or licensor cannot be transferred by the would-be assignor or licensor. Therefore, it is important to ensure that the would-be assignor or licensor is indeed the entity presently in control of the quality of the goods/services associated with the trademark(s) in question.

Given the limitations on trademark assignments and licenses, an entity looking to buy, via assignment, the trademark rights of another may want to trace all previous transactions to determine whether all transfers since creation of the trademark rights have been assignments with associated good will. Further, an entity looking to license the trademark rights of another may want to ensure that the would-be licensor is the true present overseer of the quality of goods/services and that the would-be licensor will continue

to maintain that control over the potential licensee’s goods/services after the license is executed.

Conclusion

Trademarks are much more than colorfully-designed logos, catchy phrases, or jingles. They can be a business’s identity to its customers and the world at large. Therefore, in a transaction involving the sale of a business, the seller’s trademarks should not be an afterthought. Moreover, any potential transaction of trademark rights, whether an all-rights acquisition through an assignment or only a license to use the trademark, should be approached with care, mindful of the potential value the trademark has to the seller and the buyer, the good will tied to the trademark, and the responsibilities of the trademark owner to oversee the quality of the associated goods and services. Finally, while the buyer may be wise to start the pre-transaction investigation with the questions above, the inquiries should not end there.

About the Author

Elizabeth Herbst Schierman is a registered patent attorney licensed in Idaho with degrees in Chemical Engineering and Law from the University of Idaho. She represents established businesses, as well as individuals, seeking patent protection for inventions in the chemical, nanotechnology, and other high-tech and consumer arts both in the United States and abroad, and represents trademark applicants and registrants before the U.S. Patent and Trademark Office. She is a past Chair of the ISB Intellectual Property Law Section and is a member of the Advisory Board for the University of Idaho’s Department of Chemical & Materials Engineering.

Endnotes

¹ The black and white line drawing of the thinking figure is included for the convenience and amusement of those readers having handy such said aforementioned box of CRAYOLA® crayons. The author welcomes receipt of a copy of any such colored-in figures said readers care to provide. (However, no prize is being offered for best completed, colored-in figure.)

²This article is focused on IP transactions involving a transfer of rights by assignment or license. IP rights may be transferable by other types of transactions, such as by inheritance or bequeathal, by operation of law, or in bankruptcy. The discussion in this article does not necessarily apply to these other types of transfers.

³ The first part of this series is "IP Transactions: Questions to Ask Before Buying Copyrights Rights," published by The Advocate in September 2011, an electronic copy of which is available online at <http://isb.idaho.gov/pdf/advocate/issues/adv11sep.pdf>. The third part, to follow at a later date, will be directed toward transactions involving patent rights.

⁴ For more information regarding these questions, particularly as they also apply to copyright and patent transactions, please refer to "Intellectual Property Transactions: Identifying and Transferring Ownership," a Continuing Legal Education program recorded April 6, 2011, which is available online from the Idaho State Bar and Idaho Law Foundation online CLE catalog at <http://www.legalspan.com/isb/catalog.asp>, under the "Intellectual Property" category.

⁵ 15 U.S.C. § 1125(a)(1)(A).

⁶ See, e.g., United States Patent and Trademark Office, at <http://www.uspto.gov>; Idaho Secretary of State – Trademarks and Service Marks, at <http://www.sos.idaho.gov/tmarks/tmindex.htm>.

⁷ United States Patent and Trademark Office, Trademark FAQs, at <http://www.uspto.gov/faq/trademarks.jsp> (last visited Feb. 2, 2012).

⁸ In part one of this series—addressed to potential transfers of copyright rights—the most pertinent question regarding the circumstances of creation of the IP rights was "who" created the work. With trademarks, on the other hand, the most pertinent question is "when" were the rights created.

⁹ As used in this article, "entity" refers to an indi-

With trademarks, on the other hand, the most pertinent question is "when" were the rights created.

vidual, a group of associated individuals, and to a business entity.

¹⁰ "Intent not to resume may be inferred from circumstances. Nonuse for three consecutive years shall be prima facie evidence of abandonment. "Use" of a mark means the bona fide use of such mark made in the ordinary course of trade, and not made merely to reserve a right in a mark." 15 U.S.C. § 1127.

¹¹ "A mark shall be deemed to be 'abandoned' . . . [w]hen any course of conduct of the owner, including acts of omission as well as commission, causes the mark to become the generic name for the goods or services on or in connection with which it is used or otherwise to lose its significance as a mark. Purchaser motivation shall not be a test for determining abandonment under this paragraph." 15 U.S.C. § 1127.

¹² United States Patent and Trademark Office, Basic Facts About Trademarks, at http://www.uspto.gov/trademarks/basics/BasicFacts_with_correct_links.pdf (last visited Feb. 2, 2012).

¹³ U.S. Trademark Reg. No. 22,406, registered January 31, 1893.

¹⁴ 15 U.S.C. § 1060.

¹⁵ "The law is well settled that there are no rights in a

trademark alone and that no rights can be transferred apart from the business with which the mark has been associated." *Mister Donut of Am., Inc. v. Mr. Donut, Inc.*, 418 F.2d 838, 842 (9th Cir. 1969).

¹⁶ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 34 (1995).

¹⁷ "An uncontrolled or 'naked' license allows use of the trademark on goods or services for which the trademark owner cannot offer a meaningful assurance of quality." *Id.* at § 33 cmt.b (1995).

¹⁸ When a trademark owner fails to exercise reasonable control over the use of the mark by a licensee, the presence of the mark on the licensee's goods or services misrepresents their connection with the trademark owner since the mark no longer identifies goods or services that are under the control of the owner of the mark. Although prospective purchasers may continue to perceive the designation as a trademark, the courts have traditionally treated an erosion of the designation's capacity for accurate identification resulting from uncontrolled licensing as a loss of trademark significance, thus subjecting the owner of the mark to a claim of abandonment *Id.*

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SOME JAPANESE CULTURAL AND LEGAL BASICS FOR IDAHO ATTORNEYS

B. Joseph Wadsworth
Asia Pacific, Corp

On March 16, 2011, the Japanese yen reached an all-time high of 76 yen to the United States dollar. What this means for us is that the dollar-base buying power of Japanese companies and individuals has increased over 25% in the past several years. In other words, our exports and our domestic assets (real estate, etc.) are a bargain right now, and your clients have excellent opportunities to do business with the people of Japan.

Whether you have an Idaho client who wishes to access the Japanese market, or a Japanese client who comes to Idaho, here are some basics about Japanese culture and law that will help you succeed:

Cultural considerations: Farmers vs. hunter-gatherers

A close Japanese friend once described the difference between Japanese and United States culture as the difference between farmers and hunter-gatherers. Living and working in Japan has given me many opportunities to observe the validity of my friend's description. I had the good fortune to spend more than half my growing up years in Japan, experiencing the culture, learning the language and ultimately developing a deep appreciation and respect for a remarkable people. Since graduating from law school in 1998, I have made many business trips per year to Japan and have learned to function very well within the Japanese business culture.

Japan's cultural history extends back thousands of years. For most of that history, Japan was a basically homogenous, agrarian nation, and in keeping with Confucian ideals, farmers or peasants held a position of respect in society (below the Samurai, but above artisans and merchants) because they produced the food that other classes depended on. In contrast, under the Japanese feudal caste system, merchants were despised because it was thought that they profited from the labors of the "productive" farmer and artisan classes (it is interesting to note the difference between respect for farmers under



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the Confucian system and the "uneducated country bumpkin" view of farmers in our culture). Today, Japan's 126 million-plus residents (98.5% Japanese) live in a land area roughly the size of Montana. It is one of the most highly industrialized nations in the world and is respected for its successful manufacturing, banking and international trade industries. Only 5% or so of its people are currently farmers, nevertheless, I believe the farmers' "law of the harvest" provides a good metaphor for understanding Japanese cultural perspectives.

Law of the harvest: The long term perspective

Japan's deep, relatively homogenous cultural roots have given its people a long-term perspective on individual and corporate behavior (seeds planted now, bear fruit in the future):

Social Responsibility. Individuals and corporations place a very high value on "social responsibility." Selfishness or too much independence are considered very negative traits. A Japanese proverb: 釘は打たれる, or "the nail that sticks up gets hammered," is a good example of the negative connotation associated with being too "independent." Acting selfishly at the expense of others, and society as a whole is not acceptable.

Cleanliness and Aesthetic Beauty. Individuals and corporations recognize their obligation to leave a clean, orderly world for future generations. Each is expected to consider the long-term "harvest" of its present actions. Japan's clean streets are only partly a result of efficient city work crews. In my early morning walks or jogs, I often see shopkeepers sweeping and scrubbing the streets and sidewalks before they open their doors for the day. It is also common to see business men and women in suits and ties don company t-shirts and spend an hour sweeping up trash around their office building a couple of times a month.

Longevity. Corporate longevity is a key factor in consumer trust, and "respect for elders" is a key component of Japanese society's rules of engagement. If you're not in it for the long-haul you aren't viewed as trustworthy.

Customer Service. In spite of Japan's large population, the world of business is remarkably small and tight knit. What goes around definitely comes around, so every customer expects to be treated like a repeat, long-term customer. Quality control, excellent customer service, beautiful packaging, and perfect politeness are considered "normal."

Order. Because of its high population density, Japan has evolved into a society where "order" is among the highest priorities. Jaywalking is not only a technical violation of the law, it is also considered socially unacceptable behavior. As a general rule, those climbing the stairs are expected to do so on the left, those descending also stay to their left. I work in Tokyo near Shinjuku train station, the busiest station in Japan (and in the world as of 2007). Over 3.6 million people per day go through Shinjuku station. The crowds are incredible, but people move on and off trains in a remarkably smooth manner.

No Forgiveness. When a Japanese person or corporation breaches protocol or violates the law, the punishment can seem harsh by Western standards, and the effects can seem almost permanent — forgiveness is tough to obtain. A juvenile who goes on a vandalism spree may never recover his social standing — he probably won't be able to get into the right high school, which would allow him to get into the right university, which would allow him access to jobs at the most prestigious companies, or in government service. If an employee voluntarily leaves his or her job to work for a competing company, even if he or she is extremely talented, it is unlikely that he or she would ever be welcomed back. From the perspective of the employees who stayed behind and

were loyal to the organization, the former employee was “selfish” in seeking greener pastures, and therefore is no longer trustworthy. The same principle holds true with corporations to a certain degree. If a corporation once loses societal trust, or the trust of regulators, it is very difficult to recover.

Politeness and Harmony. Politeness is a way of life. Rudeness is generally not tolerated (although it often happens when someone of superior or elder status is addressing an inferior). 平和, or harmony, is highly valued, so frequently blunt or confrontational truth takes a back seat to “maintaining harmony.”

Punctuality. Timeliness is expected. Chronic tardiness results in loss of societal trust and respect.

Hard, efficient work. Japan has few natural resources, so it places a very high value on its “human resources.” Its people and companies rely on working harder and being more efficient than the competition.

Long working hours. Although the statutory work week is 40 hours, employees expect each other to work much longer than the required minimum. A general rule of the societal hierarchy is that a lower level employee may not leave work until his boss leaves. He is also expected to arrive before his boss. If an employee leaves promptly at the end of the official workday on a consistent basis, he may be viewed as lazy and will probably be passed over for advancement.

Precision and Efficiency. The Japanese train system is a great example of the precision and efficiency that Japanese society values. If the train schedule says a train will arrive at 1:12 p.m., all of the passengers expect it will be precisely on time. If it is off by even a little bit, the conductor will apologize for inconveniencing passengers by his inexcusable error. Many of the cutting edge manufacturing processes, inventory management theories, etc. were developed in Japan where efficient use of resources is the formula for success.

The Hunter-gatherer

In contrast, from the Japanese viewpoint, we Americans sometimes act like hunter-gatherers with short-term view:

Short-term efficiency and quantity over quality. From the Japanese perspective, we tend to emphasize speed and cost-savings over quality. We love our discount stores and don’t have very “discerning” tastes.

Newest is best. As a nation of inventors and innovators, we sometimes empha-

Americans are also viewed as innovative, entrepreneurial, big-hearted, generous, and quick to forgive.

size the value of being the first to market, over having a long-term market presence. We accept fast-paced change.

Cold hard facts. Our business models tend to emphasize data and numbers over business relationships. We talk about “facing the brutal facts” more than we emphasize societal harmony.

Excellent Marketing, but Poor Customer Experience. We talk about superior customer experience but we often fail to deliver. Our business schools are starting to emphasize customer service indicators such as “Net Promoter Score,” but our natural orientation towards short-term profitability usually wins out.

Just Fight it Out. We run to the courts to litigate our differences rather than settling them through good-faith discussions.

What this means is that when the average Japanese company or individual considers doing business in the United States, or with a United States company in Japan, its context is often news images painting Americans as litigious and combative (spilled coffee at McDonalds, street protests, etc). On the other hand, Americans are also viewed as innovative, entrepreneurial, big-hearted, generous, and quick to forgive. The more we understand the Japanese viewpoint, the better we can create common ground for shared success.

Points to remember

When we work with Japanese clients or counterparts, we need to remember to:

- Cultivate a long-term viewpoint and plan to be in it for the long haul.
- Plan to build relationships that last for many years.
- Be as polite as you possibly can.
- Prepare to answer many detailed and precise questions about plans, processes, timelines, etc.
- Be punctual.
- Under promise and over deliver—you probably won’t get a second chance.
- Expect the negotiation process to take a while, and plan to ask your own detailed

questions in order to make sure you understand what’s going on — “we’ll think about it” often means “no” in Japan.

- Be ready to overcome concerns about how to settle differences.
- If the plan is to open a business in Japan, be ready to strictly follow the laws/regulations and be a good corporate citizen.

Quick survey of Japanese business laws

Should one of your clients desire to establish a business in Japan — whether by setting up a subsidiary, or entering a strategic alliance with a Japanese company — it may be helpful to know a little about the Japanese legal system. Please consult with competent local counsel before proceeding with the establishment of any business operation or relationship but the following samples might be of interest to Idaho business and corporate law attorneys:

Establishing a Company in Japan.

It is relatively simple and inexpensive to set up a new company in Japan.

Entity Types. There are four basic types of legal entities in Japan: The Kabushiki Kaisha (Joint Stock-Stock Corporation: similar to a U.S. C Corporation), the Goudou Kaisha (similar to a limited liability company), the Goshi Kaisha (similar to a limited partnership), and the Gomei Kaisha (similar to a general partnership). As could be expected, the Kabushiki Kaisha, with its long track record in Japan, is often considered to be the most reliable and trustworthy entity type by Japanese consumers. Other entity types are more recent imports from western society and although they are very popular with business owners and professionals in the financial sector, they are sometimes viewed as less reputable by society.

Capitalization and Selection of Representative.

In 2005, Japan’s corporations law was revised so that a new legal entity can be set up with zero capital at the time of incorporation. Each type of legal entity requires a representative who is a resident of Japan (the same is true of a “branch office” of a foreign company).

Generally, the representative in Japan has statutorily granted authority to act for the entity, so selection of a trustworthy representative is a very key consideration. Additionally, should the entity be involved in any serious violation of Japanese law, the representative in Japan can in some cases be held criminally liable, and in almost all cases he will be considered by society to be responsible for the entity's actions, so the position of "entity representative" is one of great responsibility.

Employment Law. Companies are viewed as having an obligation to provide stable employment to their employees. "At-will" employment does not exist. Japanese employment law creates an implied employment contract between employers and employees. Termination for cause is very rare. Termination for convenience almost always involves a negotiated separation. Minimum wage laws and anti-discrimination laws are strictly enforced.

Gender-based discrimination, sexual harassment, and power harassment have been hot topics in Japan in recent years. Americans doing business in Japan can easily run into trouble without intending any harm. For example, a hug can be very disturbing to a Japanese person. Also, direct criticism by top-level leadership to an employee several layers lower in the hierarchy can be considered power harassment. Although an employee might expect to receive harsh criticism from her direct superior, the impact of a member of top management reaching down through the corporate hierarchy to single her out for criticism can be devastating.

Intellectual Property. Intellectual property is respected and well-protected by Japanese laws.

Trademarks. Japan is a party to the Madrid Protocol covering international trademark application and registration. Unlike the United States, there are no "common law" trademark rights in Japan. Japan is a "first to file" jurisdiction, rather than a "first to use" jurisdiction. Thus, it is very important to file trademarks early in the business strategy.

Patents. Japan is a party to the Patent Cooperation Treaty, so patents filed in the United States according to treaty procedures may be localized in Japan. In some cases, the examination standards are more rigorous in Japan than in the United States.

Contracts. When your client enters a contract in Japan or with a Japanese counterpart, you will see a striking reflection of our cultural differences. Japanese contracts are typically very short (two to



three pages is very common) and to the point. Almost every Japanese contract I have reviewed or negotiated over the past thirteen plus years included a clause like the following:

Good faith discussion

The Parties shall discuss in good faith and resolve any matters which are not provided for in this Agreement or for which doubt arises as to the interpretation thereof.

Most Japanese individuals and companies are very litigation averse. Although my clients have done in excess of a combined one billion dollars worth of business in Japan, I have never had a client actually litigate a contract dispute related to a domestic Japanese transaction.

Product Liability. Japan implemented a comprehensive product liability law in 1995, which defines product defects, specifies who may be held liable for damage caused by product defects, (the manufacturer, importer, seller, etc.), provides limited exemptions, and imposes statutes of limitations for taking action once damage has occurred. Product liability is serious business in Japan, and companies who are viewed as having ignored complaints or failed to take steps to avoid further damage or injury to consumers risk not only losing their societal trust (fatal to a business in Japan), but may face severe regulatory fines and penalties in addition to their liability for the damage caused.

Conclusion

With a little bit of cultural context, Idaho attorneys can assist clients with developing successful and meaningful relationships with Japanese companies and individuals. Success requires a desire to patiently work on developing strong business relationships and a commitment to understanding and complying with Japanese cultural and legal expectations. With

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this as the foundation, you and your clients can take advantage of tremendous Japanese business opportunities.

About the Author

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Endnotes

¹ Wayne Cole, Yen Surges to All-Time High in Chaotic Trade, Reuters News Service, March 16, 2011.

² Wikipedia, Demographics of Japan, available at http://en.wikipedia.org/wiki/Demographics_of_Japan (last visited January 28, 2012).

³ Wikipedia, Shinjuku, available at http://en.wikipedia.org/wiki/Shinjuku_Station#Daily_entries.2Fexits (last visited January 28, 2012).

RECENT TRENDS IN FOREIGN CORRUPT PRACTICES ACT ENFORCEMENT

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Corruption — both at home and abroad — is nothing new. What is new is the rapid increase in business globalization and the ease with which even small companies can enter foreign markets. And, in an increasingly competitive marketplace companies sometimes resort to corruption — often simply because that’s the way business is done there — to gain entry into those markets.

In an effort to curb foreign corruption and level the field for U.S. companies, Congress enacted the Foreign Corrupt Practices Act (FCPA) in 1977.¹ Until recently, however, enforcement has been limited. For example, the Department of Justice (DOJ) did not file any FCPA actions in 2000² but filed 10 in 2011.³ FCPA-related fines imposed in fiscal 2010 totaled \$1 billion⁴ compared with none in 2000.

With this recent aggressive FCPA enforcement by the government have come greater challenges to companies doing business outside the U.S., in part because the FCPA covers a wide range of activities and the government has lately been arguing for the widest interpretation possible. This new and aggressive enforcement push has also created some uncertainty about what activities are prohibited by the FCPA. Thus, companies doing business outside the U.S. should carefully consider their extra-territorial activities to ensure they comply with the FCPA.

FCPA overview

When it enacted the FCPA, Congress took a two-pronged approach to curtailing foreign corruption: first, by making it a crime to bribe foreign officials,⁵ and second, by increasing the record-keeping and reporting requirements for public companies.

FCPA anti-bribery provisions

The FCPA’s anti-bribery provisions make it unlawful to make or offer to make any payment to a foreign government or political official (even through an intermediary) for the purposes of influencing

The FCPA does not simply prohibit delivering the proverbial bag of cash to a foreign dictator; rather, it prohibits giving “anything of value” to a foreign official.

the official or gaining any improper advantage.⁶

All U.S. companies, citizens, and residents of the United States are subject to the FCPA.⁷ Further, even non-U.S. citizens and non-U.S. entities are subject to the FCPA if they attempt to bribe a foreign official while in U.S. territory.⁸ Similarly, U.S. citizens and U.S. entities remain subject to FCPA jurisdiction even if their bribery or attempted bribery takes place entirely outside the United States.⁹ And, paying bribes through an intermediary invokes the FCPA just as does paying them directly.¹⁰

The FCPA does not simply prohibit delivering the proverbial bag of cash to a foreign dictator; rather, it prohibits giving “anything of value” to a foreign official.¹¹ The phrase “anything of value” is broadly interpreted. For example, “overseas holidays to places such as Disneyland and Las Vegas,” “extravagant vacations,” “lavish sales events, . . . hotel costs, meals, greens fees for golf, and travel expenses,” as well as “expensive gifts”¹² all qualify as things of value under the FCPA. Importantly, there is no “floor” on the value of the thing; instead, the recipient’s perception of the value of the thing received determines if there was value given.¹³

A payment is illegal if the purpose is to persuade the foreign official to misuse his or her position in order to benefit the company, regardless of whether the official actually carries out the requested action.¹⁴ That is, if the intended end-result of the payment is either to make or save money for the company, regardless of how much, that gain or savings can be considered an improper advantage that violates the FCPA.¹⁵ Thus, the FCPA prohibits not only payments to win a contract but also payments to obtain better tax treatment, to keep a contract, or to obtain permits to do business. Moreover, it doesn’t matter whether the intended recipient ever receives the payment — an *attempt* to make

a payment intending to influence a foreign official is sufficient.¹⁶

One element of an FCPA violation that is currently the subject of great debate is the scope of the term “foreign official.” The FCPA defines “foreign official” as:

...any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.¹⁷

Thus, a violation may occur with payment to nearly any individual related to the government, including low-level or part-time government employees and even “honorary” officials. Likewise, payments to employees of state-owned or state-controlled entities (SOE) such as hospitals or electric companies are prohibited.¹⁸ And, if the SOE is a government instrumentality, *all* of its employees are foreign officials.¹⁹

FCPA books and records provisions

Publicly-traded companies have additional duties under the FCPA’s reporting requirements.²⁰ Public companies must keep records that “accurately and fairly” reflect how they spend their money.²¹ They must also have internal control systems to “provide reasonable assurances” that the transactions conform to management’s direction, the transactions are properly recorded and account for the company’s assets, only authorized people have access to the company assets, and there are procedures in place to compare actual with recorded assets.²²

Penalties

The FCPA provides for both criminal and civil penalties, including up to 5 years in prison and \$100,000 in fines per violation.²³ Willful violations carry potential



Steve Frinsko

penalties of up to 20 years in prison and fines of up to \$5 million for individuals and fines of up to \$25 million for entities.²⁴ Alternatively, if a person “derives pecuniary gain” from an FCPA violation, that person may be fined up to twice his gross gain or twice the loss suffered by his victim,²⁵ for example the losing bidder on a public project where the bid was obtained through a violation.

Recent trends in FCPA enforcement

In the last several years, the government has increased its focus on finding and prosecuting FCPA violations. As part of that increased enforcement, several trends have emerged. First is the ongoing debate about the scope of the term “foreign official,” in particular the scope of the term “instrumentality” within that definition. The second is the record penalties that have been handed down for FCPA violations.

Foreign officials

One of the most heavily litigated areas of the FCPA in recent years is the meaning of the term “foreign official.” More specifically, as a foreign official is “any officer or employee of a foreign government or any department, agency, or *instrumentality* thereof”²⁶ the litigation has focused largely on the meaning of the undefined term “instrumentality” in the definition of foreign official.

In the typical case, the defendants were accused of FCPA violations based on payments allegedly made to employees of state-owned corporations, creating an opportunity for the defendants to argue that FCPA did not apply.²⁷ For example, in the most well-known case, *United States v. Aguilar*, (better known as the Lindsey case), the entity at issue was the Comisión Federal de Electricidad (CFE), which is an electric utility owned by the Mexican government.²⁸ In another case, the *United States v. Esquenazi*, the defendants were convicted of FCPA violations based on bribes paid to Telecommunications D’Haiti S.A.M., a telecommunications company owned in part by the Haitian government.²⁹ In both cases the alleged bribe recipients were employees of those entities.

The main argument put forward by the defendants in these cases was that the term “instrumentality” must be narrowly construed and does not encompass state-owned companies.³⁰ That is, a state-owned company cannot be an instrumentality because it does not have the characteristics of a government department or agency.³¹ Instead, “instrumentality” should mean

The defendants were accused of FCPA violations based on payments allegedly made to employees of state-owned corporations, creating an opportunity for the defendants to argue that FCPA did not apply.

only those “governmental units and subdivisions that are akin to departments and agencies.”³²

The government, by contrast, argued for a broader definition. It argued that a state-owned corporation can be an instrumentality under the FCPA if it has similar characteristics and carries out similar functions to a government department or agency.³³ Likewise, a state-owned corporation can be an instrumentality if it “is an entity through which a government achieves an end or purpose or carries out the functions or policies of the government.”³⁴

The courts in these cases have agreed with the government and held that a state-owned corporation could be a government instrumentality under the FCPA.³⁵ In doing so, they set out a number of factors to consider when deciding whether a particular foreign entity qualifies as an instrumentality under the FCPA. Some of those factors are:

- The foreign state’s characterization of the entity and its employees;
- The foreign state’s degree of control over the entity;
- The purpose of the entity’s activities;
- The entity’s obligations and privileges under the foreign state’s law, including whether the entity exercises exclusive or controlling power to administer its designated functions;
- The circumstances surrounding the entity’s creation; and
- The foreign state’s extent of ownership of the entity, including the level of financial support by the state (e.g., subsidies, special tax treatment, and loans).³⁶

Other factors include whether the entity provides a service to all citizens of the country, whether the key officers (or some of them) are appointed by the government, whether the entity is financed with state funds, and whether the public widely perceives that the entity is performing governmental functions.³⁷ These lists of factors are not exclusive³⁸ but

they should provide guidance to help determine whether a particular relationship might raise FCPA issues.

To date, none of the decisions examining the meaning of instrumentality and its effect on the meaning of foreign official has come from a circuit court. That may change, however, as the co-defendant in the *Esquenazi* case recently filed an appeal to the Eleventh Circuit.³⁹ In his appeal, Mr. Rodriguez argued that his conviction should be overturned because the district court’s instruction as to the meaning of instrumentality and foreign official was too broad and that there was insufficient evidence to find that the entity in question was an instrumentality of a foreign government.⁴⁰ As such, the Eleventh Circuit may shortly weigh in on the meaning of the term instrumentality under the FCPA and provide greater clarity about which types of SOEs are properly considered instrumentalities under the FCPA.

Record penalties

The second hot topic in FCPA enforcement is the number of record penalties that have been handed down in the last several years.

In the *Esquenazi* case described above, the president of the company was sentenced to 15 years in prison for his role in the bribery scheme — the longest prison sentence ever imposed for an FCPA violation.⁴¹ An executive vice president of the company was sentenced to 7 years in prison for his role in the same scheme.⁴² The two officials were also ordered to forfeit \$3.09 million they received as part of the scheme.⁴³

On the corporate front, Siemens, in 2008, agreed to pay \$800 million to settle charges of FCPA violations leveled by both the DOJ and SEC.⁴⁴ That \$800 million is the largest FCPA monetary penalty ever imposed.⁴⁵ In addition, Siemens paid \$800 million in fines and penalties to German authorities to settle anti-bribery charges brought by the German government.⁴⁶ More recently, a consortium of 6 companies agreed to pay over \$150 million in

criminal penalties to settle FCPA charges brought by the DOJ based on a scheme to pay bribes to avoid import regulations for oilfield equipment in a number of foreign countries.⁴⁷ The companies also agreed to disgorge about \$80 million in illicit profits as part of a related SEC books and records proceeding.⁴⁸

The SEC has also recently handed down other significant fines for books and records violations. In January 2011, Watts Water Technologies agreed to disgorge about \$3 million in illicit profits gained through improperly recorded bribes.⁴⁹ Likewise, Maxwell Technologies, Inc. agreed to pay more than \$6.3 million to settle SEC charges based in part on FCPA books and records violations.⁵⁰ In both cases, the violations stemmed from disguised bribes shown on a foreign subsidiary's books, which, when rolled into the U.S. parent's books, caused them to be inaccurate.⁵¹

In its recent prosecutorial zeal, however, the DOJ may have been sloppy in some of its investigations. In the *Lindsey* case the court recently threw out the jury convictions of the company and its two key executives.⁵² Key to its ruling were the court's findings that the DOJ allowed an FBI agent to provide untruthful testimony to the jury, that the DOJ "inserted material falsehoods" into affidavits in support of search warrants, and generally "engaged in questionable behavior during closing argument and even made misrepresentations to the Court."⁵³ What, if any, effect this ruling will have on the DOJ's future FCPA enforcement efforts remains to be seen.

What to do?

Companies that believe they may have FCPA exposure — which can be any company doing business outside the U.S. — can take steps to minimize the risk of FCPA violations. The first step is to conduct an assessment of the level of risk the company faces for FCPA violations.⁵⁴ Factors to consider in assessing the risk level should include "geographical organization, interaction with governments, and industrial sector of operation."⁵⁵

If the assessment suggests the company's business might implicate the FCPA, the next step is to implement a compliance program designed to encourage compliance with the FCPA.⁵⁶ The program should include, among other things, a code of conduct, employee training, a message from the top that corruption will not be tolerated, and a mandate to regularly re-assess the corruption risks facing the company.⁵⁷ Of course, the complexity

*Factors to consider in assessing the risk level should include "geographical organization, interaction with governments, and industrial sector of operation."*⁵⁵

of the compliance program should be balanced against the risk the company faces. Moreover, many companies may already have similar compliance programs in place, such as anti-trust programs, that can be adapted to work for FCPA compliance.

Conclusion

Business — even small business — is becoming increasingly global. This globalization may bring companies into contact with business practices that, even if "the norm" outside the U.S., are illegal under the FCPA. And, with potentially large profits at stake, it may be tempting to follow the local customs, especially when there is uncertainty about whether the FCPA applies. Given, however, the increased focus on FCPA enforcement of late and the success with which the government has had at broadening the FCPA's scope, companies doing business overseas would be well advised to compete on the strength of their products and services rather than on their ability to pay bribes and secure corrupt influence.

About the Author

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- ¹ Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977).
- ² U.S. Dep't of Justice, FCPA and Related Enforcement Actions: Chronological List, 2000, <http://www.justice.gov/criminal/fraud/fcpa/cases/2000.html> (last visited Jan. 15, 2012).
- ³ U.S. Dep't of Justice, FCPA and Related Enforcement Actions: Chronological List, 2011, <http://www.justice.gov/criminal/fraud/fcpa/cases/2011.html> (last visited Jan. 15, 2012).
- ⁴ Press Release, U.S. Dep't of Justice, Department of Justice Secures More Than \$2 Billion in Judgments and Settlements as a Result of Enforcement Actions

Led by the Criminal Division (Jan. 21, 2011).

⁵ See S. Rep. No. 95-114, at 3-4, reprinted in 1977 U.S.C.C.A.N. 4098, 4100.

⁶ See 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), and 78dd-3(a) (2010). As the three Code sections are largely the same, for simplicity's sake I will cite only to § 78dd-1 when the language is the same.

⁷ *Id.* §§ 78dd-1(a) and 78dd-2(h)(1).

⁸ *Id.* § 78dd-3(a) and (f)(1).

⁹ *Id.* § 78dd-1(g)(1).

¹⁰ *Id.* § 78dd-1(a)(3).

¹¹ *Id.* § 78dd-1(a).

¹² Information at ¶¶ 19, 20, and 21, *United States vs. Control Components, Inc.*, No. SA CR 09-00162 (C.D. Cal. July 31, 2009).

¹³ See Complaint at ¶¶ 6-10, *SEC v. Schering-Plough Corp.*, No. 04-CV-00945 (D.D.C. June 16, 2004) (asserting that charitable donations were things of value even though the charity's director received no personal benefit).

¹⁴ See, e.g. 15 U.S.C. § 78dd-1(a) (making illegal an "offer, payment, promise to pay, or authorization of the payment of any money" (emphasis added)).

¹⁵ See, e.g. *United States v. Kay*, 359 F.3d 738, 756 (5th Cir. 2004) ("[W]e conclude that bribes paid to foreign officials in consideration for unlawful evasion of customs duties and sales taxes could fall within the purview of the FCPA's proscription . . . [provided] that the bribery was intended to produce an effect—here, through tax savings—that would 'assist in obtaining or retaining business.'").

¹⁶ S. Rep. No. 95-114, at 10, reprinted in 1977 U.S.C.C.A.N. 4098, 4108.

¹⁷ 15 U.S.C. § 78dd-1(f)(1)(A).

¹⁸ See, e.g., *United States v. Aguilar*, 783 F. Supp. 2d 1108, 1115, 1117 (C.D. Cal. 2011) (holding that a state-owned electric utility company was an instrumentality of the government).

¹⁹ 15 U.S.C. §§ 78dd-1(f)(1)(A).

²⁰ 15 U.S.C. § 78m(b)(2)-(7).

²¹ *Id.* § 78m(b)(2)(A).

²² *Id.* § 78m(b)(2)(B).

²³ 15 U.S.C. § 78dd-2(g)(2).

²⁴ *Id.* § 78ff(a).

²⁵ 18 U.S.C. § 3571(d) (2010).

²⁶ 15 U.S.C. § 78dd-1(f)(1)(A) (emphasis added).

²⁷ Interestingly, none of the defendants apparently contested that they made the payments.

²⁸ *United States v. Aguilar*, 783 F. Supp. 2d 1108, 1110 (C.D. Cal. 2011).

²⁹ Press Release, U.S. Dep't of Justice, Executive Sentenced to 15 Years in Prison for Scheme to Bribe Officials at State-Owned Telecommunications Company in Haiti, Oct. 25, 2011; *United States v. Esquenazi*, No. -09-cr-21010-JEM es. D. Fla. Oct 14, 2011).

³⁰ *Aguilar*, 783 F. Supp. 2d at 1112.

³¹ *Id.* at 1114.

³² *United States v. Carson*, No. SACR 09-00077-JVS, 2011 WL 5101701, at *4 (C.D. Cal. May 18, 2011).

³³ *Aguilar*, 783 F. Supp. 2d at 1114.

³⁴ *Carson*, 2011 WL 5101701, at *4.

³⁵ *Id.* at *9; *see Aguilar*, 783 F. Supp. 2d at 1115 (stating that the court would examine the entity's characteristics to determine whether it resembled a government department or agency).

³⁶ *Carson*, 2011 WL 5101701, at *3-4.

³⁷ *Aguilar*, 783 F. Supp. 2d at 1115; *see also* Order Denying Defendants' Motion for Judgment of Acquittal or New Trial at 5-7, *United States v. Esquenazi*, No. 09-cr-21010-JEM (S.D. Fla. Oct. 14, 2011) (setting out evidence the court found supportive of the government's claim that the entity was an instrumentality of a foreign government).

³⁸ *Aguilar*, 783 F. Supp. 2d at 1115.

³⁹ Appellant's Motion for Release Pending Appeal, *United States v. Rodriguez*, No. 11-15331-C, at 1 (11th Cir. Dec. 29, 2011).

⁴⁰ *Id.* at 7-11 and 12-14.

⁴¹ Press Release, U.S. Dep't of Justice, Executive Sentenced to 15 Years in Prison for Scheme to Bribe Officials at State-Owned Telecommunications Company in Haiti, Oct. 25, 2011.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Press Release, U.S. Dep't of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Fines; Coordinated Enforcement Actions by DOJ, SEC and German Authorities Result in Penalties of \$1.6 Billion, Dec. 15, 2008.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Press Release, U.S. Dep't of Justice, Oil Services Companies and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigations and to Pay More Than \$156 Million in Criminal Penalties, Nov. 4, 2010.

⁴⁸ *Id.*

⁴⁹ Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing Cease-and-Desist Orders and Civil Penalties, Watts Water Tech., Inc., Exchange Act Release No. 65,555 (Oct. 13, 2011), *available at* <http://www.sec.gov/litigation/admin/2011/34-65555.pdf> (Watts Order).

⁵⁰ SEC Charges Maxwell Technologies Inc. for Bribery Scheme in China, Litigation Release No. 21,832

(January 31, 2011), *available at* <http://www.sec.gov/litigation/litreleases/2011/lr21832.htm>.

⁵¹ *Id.*; Watts Order.

⁵² *United States v. Aguilar*, --- F. Supp. 2d ---, No. 10-01031(A)-AHM, 2011 WL 6097144, at *1 (C.D. Cal. Dec. 1, 2011).

⁵³ *Id.*

⁵⁴ *See* Deferred Prosecution Agreement, *United States v. Tyson Foods, Inc.*, No. 11-cr-00037-RWR, at 21 (D.D.C. Feb. 10, 2011).

⁵⁵ *Id.*

⁵⁶ *See id.* at 20-21; *see also* Deferred Prosecution Agreement, *United States v. Panalpina World Transport (Holding) Ltd.*, No. 10-cr-00769, at C-1 (S.D. Tex. Nov. 4, 2010).

⁵⁷ *Panalpina* at C-1-C-7.

Many companies may already have similar compliance programs in place, such as anti-trust programs, that can be adapted to work for FCPA compliance.

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El-Ada, Inc.
Idaho Coalition Against Sexual & Domestic
Violence
Idaho Community Foundation/WGA
Idaho Council Against Domestic
Violence and Victim Assistance
Idaho Law Foundation IOLTA Program
Idaho Partners Against Domestic Violence
Idaho Partners for Homebuyers Education
Idaho State Police
Native American Rights Fund
Parents Reaching Out to Parents
Sage Community Resources Southwest
Idaho Area Agency on Aging
Seagraves Foundation
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Twin County United Way
United States District Court
United Way of Idaho Falls and Bonneville County
United Way of Kootenai County
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Chief Justice Roger S. Burdick
Idaho Supreme Court

State of the Judiciary Address

January 25, 2012

I would first like to thank the Supreme Court Justices for electing me Chief Justice and giving me an opportunity to address this body. Don't worry, I'll get even with them later.

The last time I stood at the podium in these chambers was in 1965 when I was in Boys State – I ran for governor and lost. It took me a change to the judicial branch and 45 years, until 2010, to win a hotly contested election and here I am.

Since becoming Chief Justice I have traveled to each of the judicial districts and met with judges, county clerks, commissioners as well as sheriffs and others throughout the state. I would like to share my observations with you about the state of the judiciary.

Partnerships are being established to implement efficiencies and meet citizens' changing needs at every level. This creativity has led to remarkable success in meeting the judiciary's mission of equal access to the timely, impartial and fair resolution of cases. I am struck by the commitment, compassion and competence of Idaho's trial judges and county officials in developing local solutions to unique problems despite severe fiscal restraints.

Let me share some of these accomplishments, emphasizing that without the cooperation of all three branches of state government and the counties' support and resources; it doesn't get done.

Idaho's judiciary has been working with the Legislature and the counties to craft a county-based statewide misdemeanor probation system. We now have 32 officers who have graduated from POST Academy with 21 now enrolled. The court's goal is that all officers will



Chief Justice Roger S. Burdick

Idaho's judiciary has been working with the Legislature and the counties to craft a county-based statewide misdemeanor probation system.

be certified by January, 2014. By monitoring misdemeanor offenders, we protect our citizens as well as save incarceration costs.

Kootenai County has opened their Juvenile Justice Center, with one courtroom dedicated to juvenile justice cases and child protection matters and another for felonies. A child-friendly waiting room has been opened to give a safe and peaceful waiting area for the children involved in child protection cases. Canyon County has also built a children's room for the same purpose.

We thank Justice Dan Eismann for his many accomplishments while Chief Justice, but his most beloved legacy came to fruition last year.

Idaho's first Veteran's Court was started in Ada County in March, 2011.

These courts have a special camaraderie based upon the "Warrior Ethos." It is embodied in the Soldier's Creed which reads in part:

*I will always place the mission first.
I will never accept defeat.
I will never quit.
I will never leave a fallen comrade.*

Words for all to live by; but they carry a special meaning to our veterans. By hearing from their own, and relying on shared experiences, the rehabilitation message gains credibility and helps to turn lives around. Two additional veterans courts will be starting in Canyon and Bannock counties. We owe it to our veterans to help them lead productive lives, as part of our national debt of gratitude.

Domestic Violence courts now exist in seven counties and supervised almost 1600 offenders in 2011. The Domestic Violence court could be our most complex problem-solving court. The model starts

with a judge who is cross-trained to handle all matters relating to a single family. A Domestic Violence Court team provides treatment which teaches positive, responsible behavior. The mix of court monitoring, counseling, treatment, and education focuses on improving behavioral skills free of violence and promoting healthy relationships.

Although new to these courts, Idaho's judiciary is already a national leader. After a presentation by Idaho judges to a national conference, representatives from New York and Minnesota will be arriving shortly to observe our system.

Last year, Idaho's 59 problem-solving courts supervised almost 2,250 felony, misdemeanor and juvenile offenders. 594 offenders graduated from our drug and mental health courts. Thank you for entrusting us with last year's substance abuse treatment appropriation for use in our problem-solving courts. Research continues to show recidivism rates for graduates are lower than other alternatives for rehabilitation and sentencing.

Idaho's Child Protection Drug courts are another innovative approach to keep families together and to nurture and protect children. These courts address the parent's drug use while marshaling services to change family dynamics, thus saving the family unit. Because parenting skills are taught to us by our parents, these courts will influence not only the participating parents, but generations to come.

I would like to recognize the retirement of our statewide Drug Court coordinator, Norma Jaeger. She is a moving force not only in Child Protection Drug Courts but problem-solving courts throughout the state. We will miss her non-stop energy, her warming smile, and her ability

to move people in the right direction. She starts a new chapter in her life and we thank her.

Speaking of new starts — Idaho's drug and mental health courts helped 20 babies — to be born to clean and sober mothers, bringing the total to 248 drug-free births since the beginning of Idaho's problem-solving courts. There can be no greater legacy than having these kids start out in a sober, safe home with parents who will teach them the rewards of sobriety and accountability.

We are not just focused on youth; we are energizing the entire system of guardianships and conservatorships to help our aged and disabled citizens achieve their potential. Working with judges and county clerks statewide, over \$212 million is being managed by conservators and reviewed by existing trained court staff.

I know it goes without saying, but all of the district and magistrate judges who preside over problem-solving courts do so in addition to a full case load and without further benefit; other than the life-changing expressions of hope on the faces of the participants.

The Snake River Basin Adjudication started in 1987 has progressed at unprecedented speed for an adjudication and as a result spread its procedural model throughout the nation. I can happily report that fewer than 1900 claims are left to be adjudicated, having already completed over 150,000 claims. Under the leadership of District Judge Eric Wildman we are now starting to draft the final decree for the Snake River Basin's water resources. We thank past presiding District Judges Hurlbutt, Wood, Melanson and now Wildman for shepherding Idaho's most complex civil case to its end.

All judges in Idaho's courts have seen a substantial increase in certain types of cases. Since 2006, there has been a 30% increase in district court civil cases — including complex civil, medical, and business disputes that often take years to resolve. Divorce and child custody cases have risen by 10%. With the decline in availability of mental health treatment, we have seen an astounding 151% increase in mental health commitment proceedings. These trends — likely the direct result of the economic decline — are a reflection of the heightened stress levels that Idahoans, businesses and families are experiencing in this economy.

The challenge then is how to meet this upward trend with static resources.

“Courts of justice shall be open to every person and a speedy remedy afforded to every injury . . .”

These are not my words, but those of Article I, Section 18 in Idaho's Constitution. They are unchanged from 1889 and we are re-pledging ourselves to their spirit by our Advancing Justice Initiative. Senior Judge Barry Wood, working with national and local groups, is making a critical examination of all court case types to find unnecessary delay, developing new procedures, and creating new expectations to minimize that delay. This is not speed for speed's sake. It is a search for efficiencies while preserving quality.

On the technology front we continue our march to “e-everything”; e-citations by law enforcement, e-payment of fines, fees, and court costs by the public, and now plans for e-filing of court documents and paperless courthouses. These efforts meld seamlessly into our Advancing Justice Initiative.

An increasing part of Idaho's judicial caseload involves persons representing themselves. Our court assistance offices responded to over 60,000 requests in 2011; an 11% increase over 2010, an increase of 64% in five years. In addition to our “on the ground” court assistance offices, we will be launching a new revised self-help center website.

For many years Justice Jim Jones has provided exemplary leadership to the cause of unrepresented litigants in Idaho. Through his efforts and the Idaho Pro Bono Commission, lawyers are now encouraged to provide a minimum of 50 hours of pro bono legal service annually. He has fostered changes to the Idaho Civil Rules to make it easier for lawyers to provide pro bono assistance on a limited issue. He has worked tirelessly with Idaho Legal Aid and the State Bar to help explore funding alternatives. Some of these proposals will come to you in this session.

Even with the work of this Court, the State Bar and Idaho Law Foundation, we know there is further need. We support and encourage the Idaho Legislature to continue to explore funding for legal representation in civil cases for the many Idahoans who cannot afford legal services.

We also commend the work of the Criminal Justice Commission, which in addition to other important work, is developing recommendations to improve criminal public defender services throughout the state.

Idaho's judiciary decides our citizens' most important personal and business problems, ranging from the care and custody of our children to the most byzantine of business relationships. For this constitutional requirement, we need our most

experienced and scholarly lawyers to become judges.

Since July 2000, Governors Kempthorne, Risch, and Otter have been given the full slate of four candidates to fill district judge positions only 26% of the time. Our magistrate judge openings during the same time period have had an ample list of qualified applicants. A more competitive compensation package is required to insure the third branch of government attracts highly qualified individuals for district judge and other positions. Idaho's trial judges have not had an increase in their compensation since July, 2008; we rank 47th lowest in the nation.

The Judge's Retirement Fund is the other significant part of the overall compensation package. By any estimation this fund is at or above the national performance standard for governmental pension funds. The Court has conferred with legislators, state pension experts, and PERSI's actuary to explore ways to strengthen the fund for the future. We hope reasonable consensus will be reached this session on ways to do so.

I will conclude my remarks by saying the state of the Judiciary is straining under increased caseloads, expanded duties, scarce resources, and stagnant compensation. We must begin a conversation with the Legislature, the Governor, and county clerks and commissioners about how best to address the pent-up demand for judges, court facilities, and new resources needed to conduct safe, timely hearings on the vital issues facing everyday Idaho citizens.

These conversations will present new challenges for the future, but I'm convinced with the continued support of the Idaho Legislature, the Governor, and county officials we will solve them and present an even stronger judiciary to you next year, and the years thereafter.

Thank you and God Bless.

About the Author

Chief Justice Roger S. Burdick received his Bachelors of Science degree in Finance from the University of Colorado in 1970 and graduated from the University of Idaho School of Law in 1974.

In January 2001, he was appointed the Administrative Judge for the Fifth Judicial District. In August, 2003 he was appointed to be the fifty-third Justice of the Idaho Supreme Court by Governor Dirk Kempthorne. He served as Vice Chief Justice of the Idaho Supreme Court from August 1, 2007 until July 31, 2011. On August 1, 2011, he began serving a four-year term as Chief Justice of the Idaho Supreme Court.

COURT INFORMATION

OFFICIAL NOTICE SUPREME COURT OF IDAHO

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

2nd AMENDED - Regular Spring Terms for 2012

Boise..... January 5
Boise..... January 11, 13, 17, 18, and 20
Boise..... February 8, 10, ~~14*~~, 15, and 17
***Oral Argument will be held at
Boise State University, Special Events Center**
Coeur d'Alene..... April 2, 3, 4, 5, and 6
Moscow..... April 5
Lewiston..... April 6
Coeur d'Alene..... May 2 and 3
Lewiston..... May 4
Boise..... May 9 and 11
Twin Falls (Boise)..... June 4, 6, 8, 11, and 13

By Order of the Court
Stephen W. Kenyon, Clerk

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

OFFICIAL NOTICE COURT OF APPEALS OF IDAHO

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

1st AMENDED Regular Spring Terms for 2012

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

By Order of the Court
Stephen W. Kenyon, Clerk

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

Idaho Supreme Court Oral Argument for April 2012

Monday, April 2, 2012 – COEUR D'ALENE
8:50 a.m. Erickson v. Mc Kee#38130-2010
10:00 a.m. Abolafia v. Adler#38189-2010
11:10 a.m. Hart v. State Tax Commission#38756-2011
Tuesday, April 3, 2012 – COEUR D'ALENE
8:50 a.m. Capstar Radio v. Lawrence#38300-2010
10:00 a.m. Lakeland True Value Hardware v. Hartford Fire Ins.
.....#37987-2010
11:10 a.m. Trunnell v. Fergel#37984-2010
Wednesday, April 4, 2012 – COEUR D'ALENE
8:50 a.m. James v. Mercea#38135-2010
10:00 a.m. City of Osburn v. Randel#37965-2010
11:10 a.m. State v. Ray (Petition for Review)#38692-2011
Thursday, April 5, 2012 – COEUR D'ALENE
8:50 a.m. Silver Eagle Mining Co. v. State#38059-2010
10:00 a.m. Johnson v. North Idaho College#38605-2011
11:10 a.m. Grant v. Griggs#38341-2010
Friday, April 6, 2012 – COEUR D'ALENE
8:50 a.m. Wooden v. Martin#38430-2011
10:00 a.m. Machado v. Ryan#37888-2010

Idaho Court of Appeals Oral Argument for March 2012

Tuesday, March 13, 2012 – BOISE
9:00 a.m. State v. Watkins#37906-2010
10:30 a.m. Hansen v. Dept. of Transportation#38435-2011
1:30 p.m. Mecham v. Dept. of Transportation#38502-2011
Tuesday, March 20, 2012 – MOSCOW
9:00 a.m. Beckvold v. Barnes#38231-2010
10:30 a.m. Arthur v. Dept. of Health & Welfare#38399-2011
1:30 p.m. Peck v. Dept. of Transportation#38542-2011
Wednesday, March 21, 2012 – MOSCOW
9:00 a.m. State v. Giovanelli#38134-2010
10:30 a.m. State v. Kramer#38786-2011
1:30 p.m. State v. Long#38578-2011
Oral Argument for April 2012
Tuesday, April 10, 2012 – BOISE
9:00 a.m. Hoffman v. State#37938-2010
10:30 a.m. Parvin v. State#38295-2010
1:30 p.m. State v. Robinson#38816/38839-2011
Thursday, April 19, 2012 – BOISE
10:30 a.m. State v. Wright#38017-2010
Tuesday, April 24, 2012 – BOISE
9:00 a.m. Harper v. Drzayich#38521-2011
10:30 a.m. State v. Moskios#38241-2010
1:30 p.m. State v. Davidson#38266-2010
Thursday, April 26, 2012 – BOISE
10:30 a.m. State v. Nienburg#38656-2011



MEMORIAL CEREMONY

For deceased Idaho Judges and Attorneys

Thursday, March 22, 2012 - 10:00 a.m.

Idaho Supreme Court Building

| Judges | Residence City | Deceased |
|--------------------------------------|-------------------|----------|
| Hon. Robert W. Whiteman ¹ | Mountain Home, ID | 2/3/11 |
| Hon. Thomas George Nelson | Boise, ID | 5/4/11 |
| Hon. Earl L. McGeoghegan | Lewiston, ID | 12/22/11 |

| U.S. Senator | Residence City | Deceased |
|-----------------------|----------------|----------|
| Sen. James A. McClure | Boise, ID | 2/26/11 |

| Attorneys | Residence City | Deceased |
|--------------------------|-------------------|----------|
| Michael Forrest Barron | Craig, AK | 1/10/11 |
| Philip Edwin Dolan | Coeur d'Alene, ID | 1/11/11 |
| John Richard Hathaway | Orofino, ID | 1/19/11 |
| Francis Hubert Hicks | Mountain Home, ID | 2/5/11 |
| Paul Edward Levy | Boise, ID | 2/17/11 |
| Emmett Michael Corrigan | Meridian, ID | 3/11/11 |
| Robert Marion Kerr, Jr. | Mapleton, UT | 4/28/11 |
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| Eugene L. Miller | Coeur d'Alene, ID | 7/9/11 |
| John Clifford Hepworth | Twin Falls, ID | 7/10/11 |
| Amil Norman Myshin, Jr. | Boise, ID | 8/6/11 |
| Jay Leon Webb | Boise, ID | 8/21/11 |
| Robert "Mickey" Turnbow | Boise, ID | 8/27/11 |
| Andrew E. "Andy" Schepp | Boise, ID | 10/15/11 |
| Mark Stephen Moorer | Moscow, ID | 10/18/11 |
| Edwin V. "Win" Apel, Jr. | Winston-Salem, NC | 11/28/11 |
| William E. Anderson | Moscow, ID | 12/2/11 |
| Patrick James Inglis | Boise, ID | 12/23/11 |

¹ Lay Magistrate in Adams County

Idaho Supreme Court and Court of Appeals
NEW CASES ON APPEAL PENDING DECISION
(Updated 2/1/12)

CIVIL APPEALS

Attorney fees and costs

1. Whether the court erred in determining that time records for work performed are required to establish whether attorney's fees are reasonable.

Bailey v. Bailey
S.Ct. No. 38760
Supreme Court

Condemnation proceedings

1. Did the Board properly initiate an action for condemnation in accordance with I.C. § 7.707 prior to moving for early possession of the HJ Grathol property?

Idaho Dept. of Transportation v. HJ Grathol
S.Ct. No. 38511
Supreme Court

Election

1. Whether it was error to hold that the city could contractually delegate all of its election duties to the county.

Brannon v. City of Coeur d'Alene
S.Ct. No. 38417
Supreme Court

Insurance

1. Did the district court err in determining that, under a policy of general liability insurance, the insurer had a duty to pay attorney fees and court costs taxed against the insured in a suit brought by the policy claimant for which defense was provided by the insurer, but where no part of the damages awarded to the policy claimant were subject to policy coverage?

Employers Mutual Casualty Co. v. Donnelly
S.Ct. No. 38623
Supreme Court

2. Did the district court err in affirming the Department of Insurance declaration that I.C. § 41-1042 precludes Aladdin Bail Bonds from entering into an indemnity agreement at the time of the bail transaction that would permit collection of apprehension costs later incurred should a defendant fail to appear?

Two Jinn, Inc. v. Idaho Department of Insurance
S.Ct. No. 38759
Supreme Court

Post-conviction relief

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

Glass v. State
S.Ct. No. 38079
Court of Appeals

2. Did the court err in declining to equitably toll the statute of limitations on Woodley's claim of ineffective assistance of counsel?

Woodley v. State
S.Ct. No. 38195
Court of Appeals

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

Whitcomb v. State
S.Ct. No. 38778
Court of Appeals

4. Whether the court erred when it denied Clark's petition for post-conviction relief in which he alleged ineffective assistance of counsel.

Clark v. State
S.Ct. No. 38107
Court of Appeals

5. Whether the court erred when it summarily dismissed Newman's petition for post-conviction relief in which he raised claims of ineffective assistance of counsel.

Newman v. State
S.Ct. No. 38281
Court of Appeals

6. Whether the court erred when it denied Ogburn's petition for post-conviction relief after an evidentiary hearing.

Ogburn v. State
S.Ct. No. 38293
Court of Appeals

7. Whether the district court erred by summarily dismissing Mubita's successive petition for post-conviction relief.

Mubita v. State
S.Ct. No. 38629
Court of Appeals

Summary judgment

1. Did the district court err in ruling the lis pendens and Barson judgment that ParkWest recorded against the property failed to give Residential constructive notice of this civil action and ParkWest's lien on the property?

ParkWest Homes LLC v. Residential Funding
S.Ct. No. 38919
Supreme Court

Termination of parental rights

1. Whether there is substantial and competent evidence to support the finding that John Doe neglected his child within the meaning of I.C. § 16-2002(3)(a).

Dept. of Health & Welfare v. John (2011-18) Doe
S.Ct. No. 39392
Supreme Court

CRIMINAL APPEALS

Due process

1. Did the district court err when it denied Navarette's motion for mistrial?

State v. Navarette
S.Ct. No. 38040
Court of Appeals

2. Did the court violate Wright's due process right to a fair trial when it placed him in restraints and informed the jury that he was so restrained?

State v. Wright
S.Ct. No. 38017
Court of Appeals

Evidence

1. Was there substantial evidence presented at trial to support the jury verdict that Dixey was guilty of the burglary alleged in Count I?

State v. Dixey
S.Ct. No. 38482
Court of Appeals

2. Was there sufficient evidence to support the allegation of grand theft of lost property in the form of a financial transaction card?

State v. Satcher
S.Ct. No. 38278
Court of Appeals

Probation revocation

1. Does the due process clause of the Fourteenth Amendment permit a district court to revoke probation for past violations that were previously punished through the intermediate sanction of discretionary jail time?

State v. Scraggins, Jr.
S.Ct. No. 38212/38213
Supreme Court

2. Did the district court abuse its discretion pursuant to I.C. § 19-2522 when it failed to order a mental health evaluation of Deluca prior to her probation violation disposition?

State v. Deluca
S.Ct. No. 38485
Court of Appeals

Restitution

1. Did the district court exceed its authority when it ordered Nienburg to pay for damage to a police cruiser that was not the result of his criminal conduct?

State v. Nienburg
S.Ct. No. 38656
Court of Appeals

**Idaho Supreme Court and Court of Appeals
NEW CASES ON APPEAL PENDING DECISION
(Updated 2/1/12)**

**Search and seizure –
suppression of evidence**

1. Did the court err when it denied Morgan’s motion to suppress as there existed no objectively reasonable, articulable suspicion that his vehicle was being operated in violation of the law?

State v. Morgan
S.Ct. No. 38305
Supreme Court

2. Did the district court err when it found there was reasonable, articulable suspicion to stop Lewis’ vehicle and denied Lewis’ motion to suppress?

State v. Lewis
S.Ct. No. 38611
Court of Appeals

3. Did the court err when if found Olsen was not in custody equivalent to formal arrest and therefore *Miranda* warnings were not required during the administration of field sobriety tests?

State v. Olsen
S.Ct. No. 38328
Court of Appeals

4. Did the court err in denying Burgess’ motion to suppress and in finding his arrest was not illegal?

State v. Burgess
S.Ct. No. 38702
Court of Appeals

Substantive law

1. Was it error to hold that a “no hunting sign” is of like meaning to a “no trespassing” sign under I.C. § 36-1603(a), recreational trespass?

State v. Long
S.Ct. No. 38578
Court of Appeals

2. Did the court err in denying Schwab’s motion in limine to exclude a prior Montana DUI conviction for enhancement purposes?

State v. Schwab
S.Ct. No. 38797
Court of Appeals

**Summarized by:
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PRONOUN PROBLEMS, PART 1

Tenielle Fordyce-Ruff
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For some reason, lawyers are unable to resist the urge to write long, complex, meandering sentences. Only the most astute of sentence diagrammers can accomplish this feat without interjecting an errant pronoun that creates confusion for the reader. Because most of us have better things to do with our time than diagram every sentence we write, writing shorter sentences and paying a little attention to pronoun usage can help avoid confusion.

Writers use pronouns to keep their writing from becoming boring and repetitive. Consider this example: *The lawyer had to get photographs of the accident admitted into evidence before using the photographs of the accident to cross-examine the witness.* Ouch! It's much easier to read this sentence with pronouns: *The lawyer had to get the photographs of the accident admitted into evidence before using them to cross-examine the witness.*

Here's your bit of grammar refresher for this month. Pronouns replace nouns, and the nouns they replace are called antecedents. Readers must be able to logically connect antecedents to their pronoun. And, pronouns need to agree with their antecedent in number, gender, and person. Most legal writers don't have problems making pronouns agree with their antecedents in gender. Number and person can be a little trickier. If your sentence is confusing, there may be a problem with the antecedent and there may be a problem with the pronoun – so I'll talk about each.



Tenielle Fordyce-Ruff

Problems with antecedents

Pronouns must clearly and specifically relate to their antecedents. As the writer, you understand perfectly well who or what a pronoun refers to because you wrote the sentence. The relationship might not be so clear to the reader; this is called an ambiguous antecedent. Problems with ambiguous antecedents arise when a writer uses multiple antecedents or implied antecedents.



Multiple Antecedents: Technically, an antecedent is the noun that precedes the pronoun most closely. Readers are likely to become confused when two possible antecedents agree in gender and number with a single pronoun.

The attorney handed the exhibit to the clerk; she then asked the judge to enter it into evidence.

Technically, *she* refers to the clerk in this sentence, because *clerk* is the noun closest to the pronoun *she*. Putting technicalities aside, *she* could logically refer to the attorney. Because a reader is not likely to diagram your sentence, it is up to you to clarify this for the reader. One easy solution is to remove the pronoun entirely and rearrange the sentence.

After handing the exhibit to the clerk, the attorney asked the judge to enter it into evidence.

Pay special attention whenever you use the pronouns *it*, *this*, *that*, and *which* because it's very easy to use them in a vague way.

After comparing the witness's testimony with the exhibit, the jury disregarded it.

What does *it* refer to? The testimony or the exhibit? To fix this ambiguity, restate the antecedent rather than using a pronoun.

After comparing the witness's testimony to the exhibit, the jury disregarded the witness's testimony.

Implied Antecedents: Pronouns must have an antecedent. To make things in-

Problems with ambiguous antecedents arise when a writer uses multiple antecedents or implied antecedents.

teresting, the antecedent can appear in the same sentence or the previous sentence; however, the antecedent cannot be implied. (Unless, of course, the pronoun is one that is so obvious it doesn't actually require an antecedent: you, I, everyone, no one).

After the verdict was returned, the attorney thanked them.

Them is not so obvious that it does not require an antecedent. In this example, the writer incorrectly created an implied antecedent so the reader must make a mental leap, guessing from a world of possibilities what the pronoun might logically refer to: the lawyer's clients, her family, the media, the jury, or courtroom personnel. The fix for this is having an actual antecedent in your sentence:

After the jurors returned a verdict, the attorney thanked them.

Even worse than having an implied antecedent is combining an implied antecedent with a pronoun that technically matches the existing antecedent, but produces a nonsensical result. I know, it's getting confusing – this example should help:

Travis had always been intrigued by lawyers and judges. After sitting on a jury, he decided he wanted to become one himself.

Here, the pronoun *one* technically refers to a jury, but it does not make sense that Travis wants to become a jury. Rather, Travis wants to become something else based on his experience on the jury: a judge or a lawyer? The reader has no way of knowing and, in order to make sense of the sentence, the reader must realize that the result is nonsensical, disregard that result, and then search for the correct antecedent. While your readers might be able to glean the antecedent from the context, they shouldn't have to work that hard. The best solution is to omit the pronoun and just be clear:

Travis had always been intrigued by lawyers and judges. After sitting on a jury, he decided he wanted to become a judge.

Problems with pronouns

Even if your sentence contains a clear antecedent, the reader can still be confused if you use the wrong pronoun. Most mistakes come when pronouns don't agree with their antecedents in number, using a plural pronoun when a singular is called for or a singular pronoun when a plural is called for. Watch out for ambiguous pronouns when you use collective nouns or indefinite pronouns.

Collective nouns: These nouns are groups of people that function as one unit — association, business, crowd, corporation, jury. These nouns are singular and must take on a singular pronoun.

The jury is returning their verdict.

Who is *their*? The only noun in this sentence is *jury*. A jury is one thing, even if it's made up of many people. The sentence should read: *The jury is returning its verdict.*

Indefinite Pronouns: Problems with number can also come when we use indefinite pronouns as antecedents. Indefinite pronouns don't refer to any specific person or thing: *anybody, both, each, everyone, few, much, neither, one, others, several*. Even though these pronouns are indefinite, the rule doesn't change: Use a singular pronoun to refer back to a singular indefinite pronoun and use a plural

pronoun to refer back to a plural indefinite pronoun.

Something about our witness seemed to bother the jury; I'm not sure what it was.

Something is an indefinite pronoun that serves as the antecedent in the sentence. Because it is singular, use the singular pronoun *it* to refer back to the *something*.

Few of the jurors kept notes; instead they relied on their memory.

Few is an indefinite pronoun that serves as the antecedent in this sentence. Because it is plural, use the plural pronoun *they* to refer back to *few*.

Now to get really advanced, there are some indefinite pronouns can be either singular or plural: *all, any, more, most, none*, for example. When these indefinite pronouns are used as antecedents, you determine the proper pronoun to use based on whether the indefinite pronoun is replacing a mass noun or a counting noun.¹

When indefinite pronouns are used to replace counting nouns, then a plural pronoun should be used:

All of the witnesses were credible, and they told a convincing story.

Any of the litigants could refuse an interview; it's their right.

More of the jurors were inclined to acquit, and they persuaded the rest.

Most of the law students agreed; they needed more sleep.

None of the defendants commented; they were all tight-lipped.

But, when indefinite pronouns are used to replace mass nouns, then a singular pronoun should be used:

All of the argument was confusing; I could not understand it.

Any empathy can be overcome if you address it properly.

While your readers might be able to glean the antecedent from the context, they shouldn't have to work that hard.

Most of her presentation was flawless; I enjoyed it.

More of the offer was appealing than not, so I accepted it.

None of the tension left the room; you could feel it.

Conclusion

Pronouns don't have to create headaches or keep us from writing clear, concise sentences. Just remember these few simple rules, and your meaning will shine through for the readers.

About the Author

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

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Endnotes

¹ I addressed mass and counting nouns in "Confusing Word Pairs." This article is available in the January 2012 edition of *The Advocate*, and you can find it online at <https://isb.idaho.gov/pdf/advocate/issues/adv12jan.pdf>

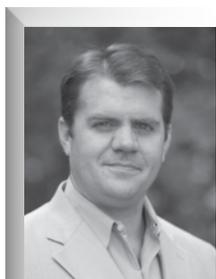
DARWINISM IN LAW PRACTICE: TECHNOLOGY DRIVING COMPETITIVENESS OF THE MODERN LAWYER

Aaron S. Bartholomew
Utah Valley University

Many in the Establishment thought he was a crackpot. When Charles Darwin published *Origin of Species* in 1859, arguing in part that individuals

who are less suited and less prone to adapt to changing environmental conditions are less likely to survive, he was met with palpable resistance. However, a century and a half later these ideas are considered axiomatic.

Modern law practice is facing a similar resistance and struggle against changing times and changing technology. As a profession, we have experienced unprecedented change in the last several years. The American Bar Association's weekly newsfeed is rife with the doomsday-ish news of thousands of attorney-level positions cut at law firms across the country, mass layoffs in Big Law, and the lowest 3L hiring rate in a generation. Darwinism has come to law practice and we, as lawyers, are compelled to either adapt or risk the very possibility of failing to survive.



Aaron S.
Bartholomew

Adaptation and survival

Adaptation and change are hard, and often painful. Our profession is one based upon the value of precedent and *stare decisis*, revering tradition and “the way things have always been done.” But the evolution of modern law practice, particularly with regard to the assimilation of cutting-edge technologies, have left many practitioners behind and struggling for survival. While an increasingly technologically-savvy client base expects and demands the utilization of current technologies to improve the accuracy, efficiency, and cost-effectiveness in the creation and delivery of legal services, lawyers and law firms have generally lagged in the implementation of those very technologies that would ensure more robust survival of the profession.

Emerging technologies have been, and continue to be, a primary catalyst and accelerant for change in our profession.

In his book, *The End of Lawyers?*, Dr. Richard Susskind argues that emerging technologies pressure the standard law firm economic model that has historically meant prosperity for the profession.¹ Dr. Susskind's book reads like a dense research treatise on the economics of law practice from a scholarly perspective. Although highly relevant to attorneys, the book's intended audience was not the in-the-trenches law practitioner. This article seeks to critically tease out the most relevant material from *The End of Lawyers?*, and recommends vital technology adaptations for the profession that every lawyer should consider.

The pressure to commoditize legal services

Although some lawyers continue to succeed in the profession, there are an ever-increasing number of lawyers that are without work or leaving the profession entirely, sometimes before a legal career substantively begins, finding that jobs that were waiting for them when law school began are now filled with a more cost-competitive and efficient method of creating and delivering those services. Emerging technologies have been, and continue to be, a primary catalyst and accelerant for change in our profession.

Where are these pressures to change coming from? As we get into how technology can catalyze the innovation and adaptation necessary to maintain robust survival, a careful examination of economic modeling utilized and discussed by Dr. Susskind may be helpful.

In Dr. Susskind's view, the different methods legal services are generated and delivered for a client can be placed on a continuum starting with tailor-made, or “bespoke” services, and ending with commoditized services, with various stages in between, each having a specific identity in how the service is created.

Bespoke, standardized, systematized, packaged, commoditized

Bespoke: This English term refers to goods or services that are custom-made to a buyer's specifications. Bespoke services are highly customized and unique to a specific client. They are the kinds of services that are now becoming increasingly rare: the “bespoke” legal service begins, as it were, with an absolutely blank sheet of paper (or a blank monitor) — with no model, example or other starting place that gives a lawyer a head start in producing the service — and ends with a finished product, created entirely “from scratch.”

Standardized: Moving right on the scale, standardized products develop when legal tasks become recurrent and quasi-formulaic. By standardizing the generation of work product, the lawyer seeks to avoid “re-inventing the wheel.” Standardization occurs in two identifiable ways, in process or in substance. Process standardization occurs where lawyers rely on checklists or procedure manuals that dictate good practice principles for a specific type of matter or document. Substance standardization involves lawyers using work product or pre-templates that have been used in the past. A significant amount of legal work that would have been “bespoke” 20 or 30 years ago is now done this way. Very few legal services are rendered anymore without a fair amount of this kind of figurative and literal “cutting and pasting.”

Systematized: Legal services become systematized when law firms develop internal systems for producing legal work. Systemization goes beyond storage of standard procedures and documents to a truly internal interactive checklist or electronic workflow management method. This allows document preparation and production to move beyond cutting

and pasting standardized text towards automatic document assembly where the practitioner obtains a polished, finished document after responding to a series of questions without any appreciable word processing. It is this area that has advanced the most in recent years: many practice specialties, including bankruptcy, debt collection, and corporate compliance, are almost entirely driven by these systematized services, wherein raw data and information is “fed” into a system, and a finished and accurate work product is immediately produced with little additional interface from the user.

Packaged: It is a simple move from systematized to packaged services. The internal systems of a law firm need only be made accessible to its clients. This is increasingly done over the internet. Law firms could allow their clients direct access to their internal systems to generate their own products. The law firm’s systems and the knowledge contained therein become “packaged” for the client’s convenience. Of course, law firms can also place their packaged services directly into the marketplace without moving through the three previous phases. An example of this is by packaging a law firm’s research on issues and making it available as an on-line legal reference service, which many practitioners have already done in the name of advertising. While having clients generate “their own” legal work product may be a scary proposition to some, market pressures are pushing this into the realm of reality. Sites like LegalZoom.com, while not well received now, have a certain future as consumers look for instant access to some legal services. Governmental entities are in many respects leading the way in packaged legal services. Bordering on a commoditized service explained hereafter, Utah on its Utah.gov website, allows anyone to form Utah business entities using a question-and-answer data interface to ask the relevant questions to form the entity. No lawyer needed — and no paperwork either.

Commoditized: Like bespoke services, legal services that are commoditized are, at least presently, very narrow and exceedingly rare. Commoditized legal services are similar or identical products available from a variety of sources at prices generated by competition. As legal services become commoditized, or move toward the right side of this scale, the price of those services drops from the cost to produce to the cost to reproduce and ultimately to zero. The most notable examples of quasi-legal services that fall into this category are internet legal research

Law firms can also place their packaged services directly into the marketplace. An example of this is by packaging a law firm’s research on issues and making it available as an on-line legal reference service, which many practitioners have already done in the name of advertising.

providers, including Westlaw and Lexis. While they have been the top-tier competitors for years, many small and solo firms looking to cut overhead costs are resorting to lower-priced products like Loislaw, or entirely free services like Google Scholar. This competitiveness in the legal research front has driven down costs substantially in the last 10 years and dramatically improved product offerings.

Disruptive technologies

In essence, while the legal services lawyers provide have not measurably changed, technology has drastically changed the means of creation and delivery of those services. Emerging technologies improve the speed, accuracy, efficiency and cost-effectiveness of legal services. Many advances in technology have been embraced by lawyers, such as email and virtual officing, which have helped lawyers become more efficient as service providers. However, many more developing technologies are creating increased competition among lawyers, driving consumers/clients from the current legal marketplace, and drastically reducing revenues to law firms.

As noted by Dr. Susskind, there are a number of disruptive legal technologies to which lawyers and law firms must adapt to remain cost-competitive and relevant.² So while it may seem paradoxical, there are very real economic pressures to decrease the costs of legal services, but at the same time increase accuracy, efficiency and speed in the creation and delivery legal services. Keeping this in mind, our profession — and lawyers individually — must adapt to several technology-driven advances to promote our own survival in the legal marketplace:

1. *The Electronic Legal Marketplace:* While it has readily been accepted by lawyers as a means of advertising, the internet is also emerging as an outlet for

an electronic legal marketplace, where clients and prospective clients can “window-shop” for legal services, and even buy legal services directly. The internet creates that connectivity between clients to price and quality compare. Through consumer demand and initiative, the internet will inevitably become a means of quality-control and price comparison for legal services consumers. Our profession should preempt that inevitability by the creation of our own, lawyer controlled forum for consumers.

2. *E-Learning:* Multi-media applications allow us to transfer knowledge in more than a two-dimensional way. As the technology improves, e-learning will, in all likelihood, transform how lawyers are taught, trained, and educated. Moreover, this kind of learning by trainees or younger attorneys from senior attorneys can provide a richer and more stimulating range of experiences and will also avoid the drudgery and repetition of a traditional young associate’s work. E-Learning will become a disruptor by changing the way lawyers keep up to date on changes and the face to face training or consultations provided to clients. Rather than paying his lawyer for a consultation, the client will be able to watch online training on a topic and then determine exactly what services are necessary from the lawyer prior to discussing the issue with a lawyer.

3. *Online Legal Guidance:* Increasingly, current and prospective clients are turning to the internet — rather than a lawyer — for legal advice. From the client’s perspective, the information is readily available night or day, helpful, and free. From a lawyer’s perspective this information may undermine the attorney-client relationship, may not be reliable or accurate, likely comes from a non-lawyer, and may mislead clients into an erroneous course of action without any recourse (i.e. professional liability). Nevertheless, online legal guid-

ance is here to stay and will only increase with time to include commercial and business clients as well. Lawyers may never be able to adapt to this concern as it is a malpractice minefield, but lawyers must be aware of the competition from online legal guidance.

4. *Closed Legal Communities*: The interconnectivity of the internet has created closed communities of legal service consumers. These consumers share documents, work product, knowledge and experience with each other in lieu of consulting with an attorney. Additionally, these closed communities function as clearinghouses for clients to share their good and bad experiences, provide attorney recommendations, and the like. These interactions substantially drive down costs for commercial clients. Law firms need to confront the reality of these interactions by facilitating their own voluntary client communities that can be controlled.

These technologies are indisputably disruptive, but they primarily affect traditional, and increasingly anachronistic, forms of law practice. Attorneys and firms who harness these technologies, rather than fight against or ignore them, will yet have a bright future ahead.

Conclusion

Adapting to these emerging technologies will not only be good business, but

These technologies are indisputably disruptive, but they primarily affect traditional, and increasingly anachronistic, forms of law practice.

a practical imperative for the robust survival of our profession.

As Dr. Susskind aptly summarized:

The future for lawyers could be prosperous or disastrous. ... I predict that lawyers who are unwilling to change their working practices and extend their range of services will, in the coming decade, struggle to survive. Meanwhile, those who embrace new technologies and novel ways of sourcing legal work are likely to trade successfully for many years yet, even if they are not occupied with the law jobs that most law schools currently anticipate for their graduates.

I believe that lawyers, in order to survive and prosper, must respond creatively and forcefully to the shifting demands of what is a rapidly evolving legal marketplace.³

This is indeed a circumstance in which Darwin's theory of natural selection is measurably and significantly affecting the growth and survival of the legal profession, and it will be the practitioners and firms who carefully and strategically integrate current and emerging technologies who are most likely to survive and thrive in our ever-changing legal marketplace.

About the Author

Aaron S. Bartholomew is an assistant professor and Chair of Legal Studies at Utah Valley University, teaching courses in business law, legal research and law practice technologies. He actively practices law in Utah and Idaho, working primarily in commercial litigation and contract disputes.

Endnotes

¹ Richard E. Susskind, *The End of Lawyers?: Rethinking the Nature of Legal Services* (2010).

² *Id.* at 100-145.

³ *Id.* at 269.

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GARNER'S DICTIONARY OF LEGAL USAGE, THIRD EDITION

I recently acquired a copy of the third edition of *Garner's Dictionary of Legal Usage*. It has already become a frequently used addition to my library.

As he did with his original, Garner seeks to provide writers with a tool that allows them to easily "resolve at a glance the many grammatical and stylistic questions that arise in legal writing." This new edition does so beautifully while providing readers with many useful new tools. It is truly a style guide and a usage dictionary in one.

Garner has provided users with over 800 new terms and included examples and citations throughout. He provides detail, citation, and examples, but his entries are far from the dry entries one might expect in a dictionary. For instance, he provides 62 derogatory names for lawyers — everything from *shyster* to *lake lawyer*.

He has also updated this edition by defining vexing synonyms, providing useful guidance and examples to help the writer achieve the right style and tone. He includes precise distinctions between words to help every attorney improve the use of words. For instance, for "exculpate" he notes that exoner-

ate, acquit, absolve, and vindicate may share a common general meaning, but do not mean exactly the same thing.

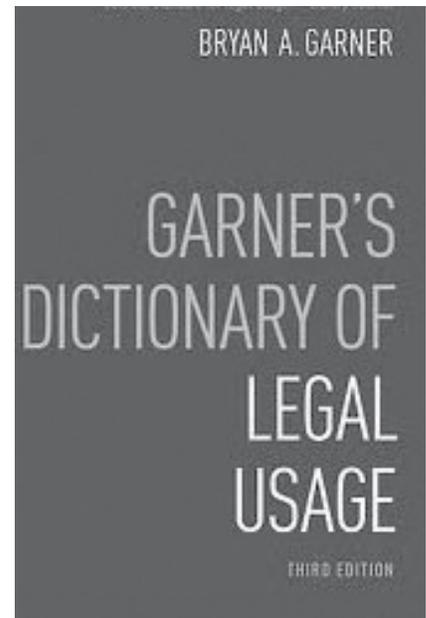
In addition to colorful detail, Garner has included helpful advice on when to italicize Latin words (it depends on if the word has been "naturalized"—a "fuzzy line.") And, he provides useful guidance on avoiding superstitions by providing a number of false rules in the entry on "superstition." These useful additions are interspersed throughout the alphabetical listings.

Of course, this is a legal dictionary, and it shows. In addition to general usage advice, Garner provides guidance on the usage of legal terms. For instance, in the entry for collateral estoppel Garner explains that this term is the same as issue preclusion, but not the same as *res judicata*, which is the same as claim preclusion.

Garner's Diction of Legal Usage is not merely an alternative to *Black's Law Dictionary* or to a general usage dictionary; it is a reference that will help any legal writer add clarity and accuracy to her work.

— Tenielle Fordyce-Ruff, Boise

BOOK REVIEW



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Myers Law Office is pleased to announce the return of Mr. Stokes from his year-long deployment with the 116th Cavalry Brigade, Idaho National Guard.

Mr. Stokes is past chair of the Sixth District Bar Association Family Law Section, a past board member of the Idaho Trial Lawyers Association and a current board member of the ITLA Amicus Foundation. Mr. Stokes is also an Idaho Supreme Court approved child custody mediator.

Please contact Mr. Stokes at (208)233-4121 or at stokes@pocatellolaw.net for more information or to schedule a consultation.

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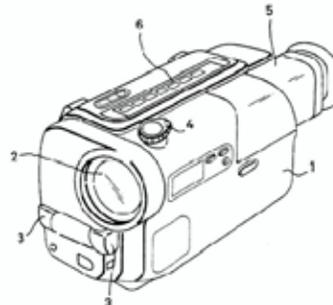
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IN MEMORIAM

John R. Tait 1946 -2012

John Reid Tait died of causes related to a brain tumor on Feb. 1, in Lewiston. He was 65.

Born in Toledo, Ohio, John won a full scholarship to Columbia College, New York City (1964-1968). During a freshman mixer between his university and Vassar College in 1964, John met his future bride, Christina Bjornstad of Ann Arbor, Mich. They were married in 1972.

After graduating from Columbia, John enlisted in the U.S. Army where he received a Top Secret Security Clearance and served as a Counterintelligence Special Agent.

Following his honorable discharge from the Army, John attended Vanderbilt University Law School, Nashville, Tenn. Upon graduating in 1974, John and Christina moved to Lewiston, where she set up a medical practice as one of the first women doctors in Idaho and John began his 35-year partnership with Paul Keeton in the law firm of Keeton and Tait.

An expert in worker's compensation law, John was an enthusiastic and dedicated advocate for working people. His practice included personal injury, insurance, discrimination, real property, condemnation, business, contract and family law cases. He made it a point to represent people instead of big corporations. He was also a Special Deputy Attorney General for the Bureau of Child Support.

John served as Clearwater Bar president, member and chairman of the Idaho State Bar Ethics Committee, and board member of the Worker's Compensation Section of the Idaho State Bar, serving as chair for 2004 and 2005. He served for many years on the Board of the Idaho Trial Lawyers and for 25 years on the State Board of Idaho Legal Aid Services.

John recently served on the Leadership Committees of the Idaho Partners Against Domestic Violence and the Idaho Pro Bono Commission. He also served on the Board of the Workers Injury Law and Advocacy Group. In 1998 he received the Pro Bono Award from the Idaho State Bar.



John R. Tait

Over the course of his career, John argued a number of cases before the Idaho Supreme Court. He successfully established the case law assuring that health care providers are paid their usual and customary charges, in full, under the Industrial Commission regulations.

In 1994, John was nominated by President Bill Clinton and found qualified by the American Bar Association to serve as United States District Judge for Idaho, one of only 141 nominations sent to the U.S. Senate that year. His nomination was one of many that was blocked for political reasons.

John was a fixture in Idaho State Democratic politics and served as treasurer for John Evans' United States Senate campaign and for U.S. Congressman Larry LaRocco's campaigns. He served on the Democratic Party's state Central Committee.

John served on numerous regional, state and local boards, including the Northern Rockies Action Group from 1981-88, serving as its chair from 1984-86. He also served on the Lewiston Historic Preservation Commission, St. Joseph Regional Medical Center Foundation, the Idaho Housing Agency, and most recently the Board of the Lewiston Independent Foundation for Education (LIFE). He was also an active member of the Episcopal Church of the Nativity.

He is survived by his wife, Christina Bjornstad; his brother, Paul Tait of Perrysburg, Ohio; his daughters and sons-in-law, Gretchen Bjornstad and Alastair Gemmell of London, England, and Mary Tait and Nathan Abraham of Silver Spring, Md.

Roger B. Wright 1931 -2012

Roger B. Wright passed away at his home on Feb. 5, at the age of 71, from complications of post polio syndrome. He was born in Idaho Falls, the sixth of seven children. At the age of 7, he contracted polio, causing paralysis in his right arm. For him this was not a disability but a challenge. He did not allow it to define his life. Before leaving for college, Roger married Connie Revon Porter, his high school sweetheart. He graduated from the University of Idaho in 1965 with a Juris Doctorate. After graduation, he worked for five years in Boise as a Deputy Attorney General for the State of Idaho. Returning to Idaho Falls, he went into private prac-

tice and spent the next 40 years in dedicated service to the community.

He was appointed Deputy Prosecuting Attorney for Bonneville County and Prosecuting Attorney for Clark County. He was elected President of the Seventh Judicial District Bar Association, and enjoyed serving as Chairman of the Board of Directors of Development Workshop.

As a member of the Church of Jesus Christ of Latter Day Saints, he served for 17 years in the Idaho Falls South Stake Presidency. After his family, Roger's greatest love was missionary work.

He is survived by his wife Connie, his children Brad and Sheri Wright of Grand Junction, Colo.; Steve and Julie Wright of Idaho Falls; Jill and Steve Ross of Philadelphia; LynAnne and Gary Blatter of Idaho Falls; and Tyler and Jennifer Wright of Homewood, AL; and by 24 grandchildren, 4 great-grandchildren and one brother, Kenneth L. Wright of Fresno, CA.



Roger B. Wright

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Administrative District Judge elected

Judge Thomas J. Ryan has been elected as the Administrative District Judge for the Third Judicial District. He assumed those duties on Feb. 1, starting a three-year term. As administrator, Judge Ryan will apportion the workload for the district judges, assign cases and make policies and procedures. He was selected by a majority vote of district judges in the Third District and he replaces Judge Juneal Kerrick in the position.



Hon. Thomas Ryan

Judge Ryan was appointed Magistrate Judge of Owyhee County in 1995 and was appointed as Third District Judge in 2007 by Governor Butch Otter.

In 1997 Judge Ryan established the Third District Youth Court program and continues to preside over it. He has also presided over the Canyon County Felony Drug Court and serves on the Juvenile Justice Commission. He has been a mediator of more than 250 civil cases and serves on the statewide Supreme Court Committee for Drug Courts and Mental Health Courts. He earned the 2004 John Schuler Award for Outstanding Contribution in Juvenile Corrections, and the 2004 Idaho State Bar Service Award. He has also served on ISB/ILF committees for the Idaho Volunteer Lawyers Program and the Lawyers Assistance Program.

Statewide Court Assistance Services Officer

Imelda Ramirez is the new Statewide Court Assistance Services Officer, taking over Judge Michael Dennard's former responsibilities. Ms. Ramirez is originally from Roberts, Idaho. She graduated from law school at Michigan State University. In December 2007, she returned to Idaho to be the Seventh Judicial District's Court Assistance Officer. Please feel free to contact her (208) 947-7449 with any questions about Court Assistance Services.



Imelda Ramirez

Boise firm welcomes Celeste Miller

Celeste Miller has become a member of the Boise firm, McDevitt & Miller LLP. Ms. Miller, a 1980 graduate of the University of Idaho School of Law, recently left her federal government practice after serving for 24 years as an Assistant United States Attorney and a Special Assistant United States Attorney. In 1981 Celeste began private practice in Boise with the firm now known as Givens Pursley as a civil litigation associate where she handled a range of federal court matters. Six years later Ms. Miller joined the civil division of Idaho U. S. Attorney's office before moving to the criminal division to prosecute white collar offenses, emphasizing bankruptcy crimes. Ms. Miller's government service expanded in 2003 to prosecution of bankruptcy crimes throughout the Northwest.



Celeste Miller

Ms. Miller recently taught Federal Courts as an Adjunct Professor of Law for the University of Idaho School of Law. Her practice at McDevitt & Miller LLP will focus on creditors rights, bankruptcy, and federal court litigation, criminal defense and consultation.

Paine Hamblen welcomes Brandie J. Rouse

Brandie J. Rouse has joined Paine Hamblen LLP as an associate attorney in the firm's Coeur d'Alene office. Ms. Rouse's practice emphasis includes criminal and family law. She earned her J.D. from Gonzaga University School of Law and her B.A. from New Mexico State University. Ms. Rouse is on the Idaho Supreme Court roster of parenting coordinators; the Idaho Supreme Court roster of parenting coordinators; the Idaho Supreme Court roster for civil mediators; and child custody mediators. Ms. Rouse is admitted to practice in the state of Idaho and Washington.



Brandie J. Rouse

Perkins Coie adds two business attorneys in Boise

Perkins Coie announced that Stephen Hardesty has joined the firm as partner and Nicholas Taylor has joined as associate in the business practice. They join the firm in Boise where they previously worked at Hawley Troxell Ennis & Hawley LLP.



Stephen Hardesty

"Steve and Nick are very welcome additions to our Boise office," said Robert Maynard, Boise Office Managing Partner.

"Steve has tremendous experience and knowledge handling corporate finance matters and Nick is a bright and capable young talent. Both add significant value to their practice and our office and firm."

Both domestically and in China, Hardesty counsels clients on fund formations, venture investments, mergers and acquisitions, private placement offerings and real estate acquisitions, among other related corporate transactions. He has led numerous venture capital financings and has recently served as counsel for a structured finance lender issuing nearly \$1 billion in rated asset-backed bonds.

Hardesty earned his J.D. from University of California, Davis, School of Law where he also served as editor for the *U.C. Davis Law Review*. He has served on the governing council for the Business and Corporate Section of the Idaho State Bar since 2000. Since 2009 he has served as a board member on the Boise Public Schools Education Foundation.

Taylor represents a variety of corporate entities, private equity firms, and venture capitalists regarding equity and debt financing transactions, securities and company governance issues. He received his J.D., Order of the Coif, from the University of Oregon School of Law, where he also served as editor for the *Oregon Law Review*. He is a member of the Boise Young Professionals.



Nicholas Taylor

OF INTEREST

New firm opens in Twin Falls

J.O. Nicholson III, Patricia Migliuri and Lisa B. Rodriguez announced their new law firm Nicholson Migliuri Rodriguez PLLC in Twin Falls. Their practice will focus primarily on family law matters including divorces, child custody, guardianships and adoptions. Additionally, they will handle general civil matters, such as estate planning and landlord/tenant matters, and criminal defense.

J.O. Nicholson III graduated from the University of Idaho College of Law in 1990. He has been in private prac-



J.O. Nicholson III

tice for the past five years after serving as a Jerome County Prosecutor for many years. He is the current president of the Fifth District's Theron Ward Inns of Court and is a member of the Family Law Section of the Idaho State Bar.

Patricia Migliuri graduated from Willamette University College of Law in Salem, Oregon before clerking for District Court Judge John Butler in Jerome County. She has been in private practice since that time focusing on family law matters. She serves on the Board of Directors for the Theron Ward Inns of Court and currently is the program chair.



Patricia Migliuri

Lisa B. Rodriguez earned her Juris Doctorate from the University of Idaho in 2004. She started her legal career as a law clerk for Twin Falls County District Judge G. Richard Bevan and entered private practice thereafter. Her practice has mainly been in the area of family law, which has included handling complex divorce and child custody matters. She is currently the Secretary/Treasurer for the Family Law Section of the Idaho State Bar. The firm's website is twinfallslegal.com and they can be reached in Twin Falls at (208) 734-5663 or at nmr@twinfallslegal.com.



Lisa B. Rodriguez

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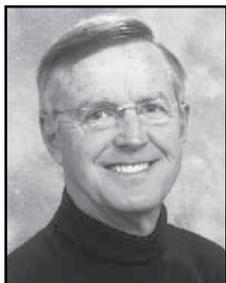
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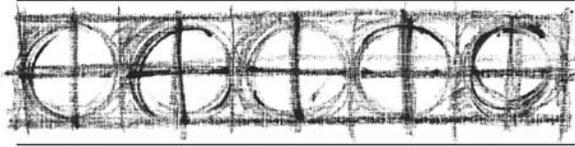


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- ❖ 400 donors gave a total of \$35,300 to the Idaho Law Foundation. Gifts to the Foundation allow us to increase access to legal services and enhance public understanding of the legal system.
- ❖ 157 donors gave a total of \$9,500 to the Access to Civil Justice Fund. Gifts to ACJF support programs that help provide legal solutions to Idahoans who do not have the resources to hire an attorney for their civil legal issues.

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The staff of the Idaho Law Foundation has taken great care to ensure the accuracy of the names listed. Should you find an error or an omission, please accept our apologies and let us know so we can correct it.

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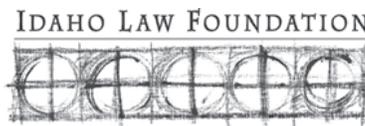
Lawyers in the Classroom pairs lawyers and teachers to instruct students about the role of law in a democratic society. One attorney/teacher pair held a mock election in which students in Hannah's kindergarten class voted for their class mascot, helping her and the other students understand how elections work.

Thanks to an IOLTA grant, the Idaho Law Foundation is able to provide **law related education for the public** in schools across Idaho. All students should understand the foundation of the U.S. government and legal system and IOLTA ensures that many more will.



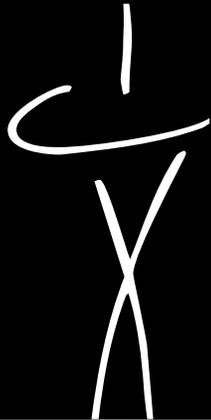
Where attorneys place their IOLTA funds impacts how much money the IOLTA grant program can offer. Banks that partner with the Idaho Law Foundation to pay higher interest rates on IOLTA accounts determine whether the Foundation is able to help students like Hannah and her classmates.

To find out more about IOLTA, visit www.idaholawfoundation.org or call Carey Shoufler, ILF Development Director, at (208) 334-4500.



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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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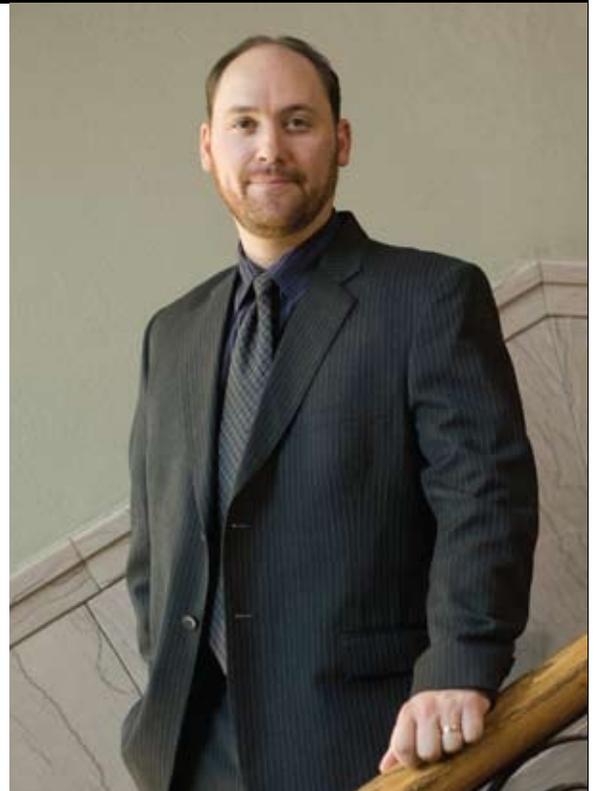
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Genetically Modified Organisms

LAW & THE GLOBAL MARKET

The Idaho Law Review is proud to announce its upcoming 2012 symposium, GMOs: Law and the Global Market. The symposium will address the legal, scientific, and policy issues that genetically modified organisms present.

CLE Credits Available



Friday, April 20th, 2012
Owyhee Plaza Hotel, Boise, ID

8:00 a.m. **Registration**

8:30 a.m. **Introductory Remarks**

8:45 a.m. **Keynote**

9:30 a.m. **Panel I:**
Issues with Genetically Modified Organisms: science and law

11:00 a.m. **Panel II:**
Barriers and Channels for GMO Trade

12:30 p.m. **Lunch**

1:15 p.m. **Panel III:**
Issues with Genetic Drift: liability and biotechnology

2:45 p.m. **Panel IV:**
Social Dimensions of GMO Law: producers and consumers

4:15 p.m. **Closing Remarks**

Register or find more information at:

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Katie Bilodeau (kbilodeau@vandals.uidaho.edu) / Renee Karel (kare5903@vandals.uidaho.edu)



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During the first week of April, 2012, our Court is hosting a "Resolution Roundup" in the District of Idaho, as the first court to participate in a settlement week program offered by the Ninth Circuit Alternative Dispute Resolution (ADR) Committee.

Please join the Idaho Chapter of the Federal Bar as they host a reception on Monday, April 2 from 5:30 - 6:30 p.m. at the law firm of Duke, Scanlan and Hall located at 1087 W. River Street Suite 300 in Boise, ID. We'll see you there!

FOR MORE INFORMATION

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Members of our Court's mediation roster, members of the Ninth Circuit ADR Committee, and federal and state court judges will conduct mediations in cases pending in the District of Idaho at no charge to the parties. We are grateful to these mediators and judges for their willingness to travel to assist our District in settling federal cases. The District of Idaho is pleased to be able to offer this program in Boise, Pocatello, Moscow and Coeur d'Alene.





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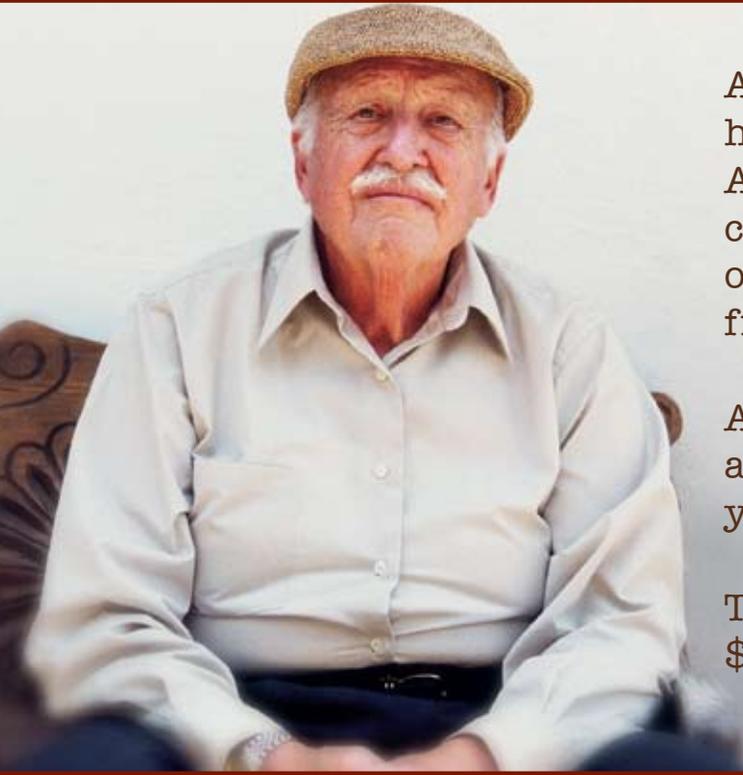
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Idaho Industrial Commission, *Kulm v. Mercy Medical Center*
I.I.C. No. 2006-012770, 5/20/2010

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