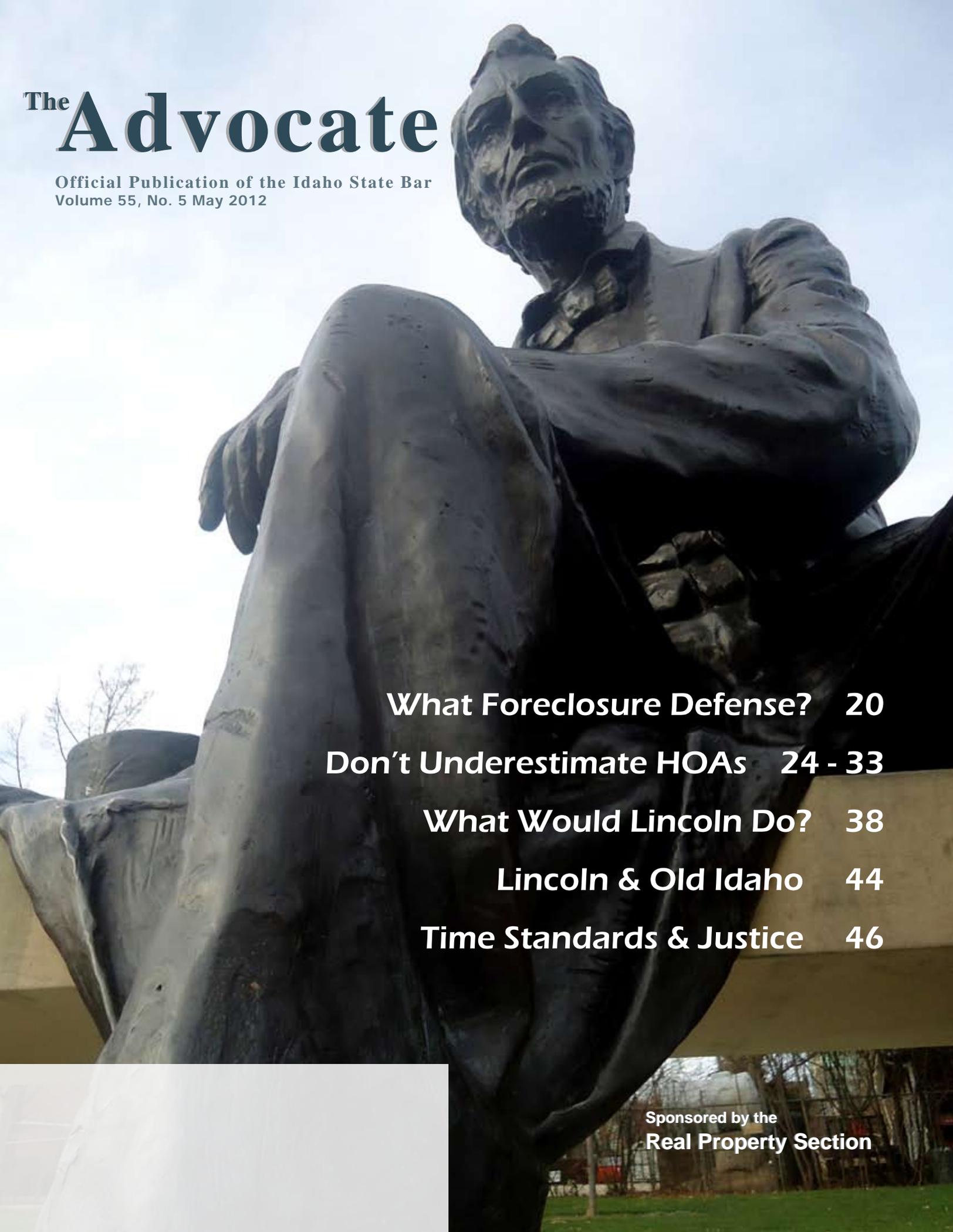


# **The Advocate**

Official Publication of the Idaho State Bar  
Volume 55, No. 5 May 2012

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# The Advocate

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## On the Cover

This photo was taken by Stephanie Stoddard, age 10, of the Abraham Lincoln statue placed in Ann Morrison Park in Boise. The original artist is Gutzon Borglum, known as the sculptor of Mount Rushmore. Borglum was born in St. Charles, Idaho, in 1867. A 1912 quote from him explains his motive with this piece, “I have tried to give to posterity, in a true, unstudied picture, a glimpse of possibly the best-loved man in our national history, as he might sit alone, unposed ...” This copy was executed by Irene Deely of Boise. The cover photo was preferred over two other excellent photos by more than a dozen staff members who were unaware of the photographers’ identity. Stephanie is the daughter of Diane Minnich and Michael Stoddard.

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

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# Upcoming CLEs

## May

## June

### May 9

*International Family Law: International Dimensions of Custody, Adoptions and Surrogacy*

Co-Sponsored by the International Law Section and the Family Law Section

9:00 – 11:30 a.m. (MDT)

Law Center, Boise/Statewide Webcast

2.5 CLE credits

### May 10

*Idaho Legislative Review*

Sponsored by the Idaho Law Foundation

9:00 – 11:00 a.m. (MDT)

Hilton Garden Inn, Idaho Falls

2.0 CLE credits

### May 11

*Practicing Business Law in a Down Economy*

Sponsored by the Business and Corporate Law Section

8:30 a.m. (MDT)

The Riverside Hotel, Boise

5.5 CLE credits of which 1.25 is ethics

### May 16

*Malpractice Trends in Idaho: Ways to Avoid Becoming a Stat*

Sponsored by the Idaho Law Foundation

Noon – 1:30 p.m. (PDT)

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1.5 CLE credits of which 1.5 is ethics

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

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

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

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**E-Bulletin** — The ISB E-Bulletin is emailed weekly to ISB members. It includes upcoming CLE programs, Section and District Bar activities and more.

**District Bar Associations** — The District Bar Associations offer a great way to get involved and meet other attorneys practicing in your geographical area. The District Bar Associations provide social events, CLE programs, and host the annual Idaho State Bar Resolutions Roadshow in the fall.

**The Advocate** — The Advocate is mailed 9 times a year and features articles written by lawyers for lawyers and notices of upcoming Bar and law-related events.

**Annual Meeting** — Held in July, the Annual Meeting alternates locations around the state. Activities surrounding the conference include CLE seminars, networking opportunities, social gatherings and awards recognition.

**Desk Book Directory** — The Idaho State Bar Desk Book Directory is published every April and provides members with an attorney roster, state and federal court contact information, the Idaho Bar Commission Rules (IBCR) and the Idaho Rules of Professional Conduct (IRPC).

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**Citizens' Law Academy** — The Citizens' Law Academy is a multi-week adult public information program designed to help the public understand the laws affecting their daily lives, their rights under the law, what lawyers do, and how the judicial system works.

**Idaho Volunteer Lawyers Program (IVLP)** — The Idaho Volunteer Lawyers Program provides volunteer legal assistance to low-income citizens across the state. IVLP staff screens applicants for income and case eligibility and supports volunteer attorneys as they prepare cases.

## Leadership Opportunities

**Committees** — There are 18 committees of the Idaho State Bar and Law Foundation which provide vision and oversight to various programs and functions of the Bar and Law Foundations.

**Practice Sections and District Bar Associations** — Provide an avenue to participate in meaningful projects and educational opportunities along with an opportunity to become better acquainted with other bar members.

**Idaho Academy of Leadership for Lawyers (IALL)** — The Idaho Academy of Leadership for Lawyers (IALL) is an interactive leadership training program designed specifically for lawyers who have practiced law for a minimum 5 years.

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## PRESIDENT'S MESSAGE

### PROFESSIONALISM AND CIVILITY, THANK GOODNESS WE LIVE IN IDAHO

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

I recently attended the Western States Bar Conference, which was held in Las Vegas. The Western States Bar Conference rotates between a site on the mainland and Hawaii every other year. So you would think that with a three-year term as a Bar Commissioner, I would have made it to Hawaii at least once. Well, the answer is no. I didn't make it there. As usual my poor planning prevented that trip last year, so I was rewarded with a trip to Vegas. Still, it is not bad duty for farm boy/ lawyer from Southern Idaho. Thank you for letting me go to learn what is going with our Western neighbors' bar associations. It was really an enlightening experience.

The topic for the seminar was professionalism and civility. This topic was both timely and instructive. I wanted to share some of the thoughts with you while it was fresh on my mind. Every time I am in one of these settings, I scratch my head at some of the things that I hear and say a silent "thank you" prayer that I live in Idaho. We may have tough weather, sparse population, and less opportunity to earn "big bucks," but our quality of life and practice appears to be better. I hope we can keep it that way.

A message that encompasses all generations is that civility matters and it affects our job satisfaction. Interestingly, while civility matters to all generations, we define civility differently from generation to generation. That thought had never struck me. I just assumed that civility was uniformly accepted as what I perceived it to be. I also thought that all civility centered on the "Golden Rule." Well as it turns out, the "Golden Rule" applies well to The Greatest Generation and to The Baby Boomer, but some in Generation X and Generation Y don't even know what the Golden Rule is, let alone have a feel-



Reed W. Larsen

ing that it should somehow govern their acts of civility in the professional work place. That does not mean that those two generations think that civility is unimportant or that they don't abide by the Golden Rule.

I believe that *we are civil to one another when another's claim to comfort and happiness is as important as our own.* While that summarizes the Golden Rule, it is through our relationships that the rule has meaning. That is why professionalism and civility go hand-in-hand with job satisfaction. This is something I have to repeat to myself every day and throughout the day. If I want to have a professional and civil practice, I have to try to be a professional and civil lawyer. Wow, is that hard.

As I write this on a Saturday morning, my partner, Gary Cooper, is where he is most every Saturday morning, at his desk working to serve his clients. Gary is the hardest working lawyer I have ever met. He is the most prepared lawyer I know. He has received the Bar's award for Professionalism in our district. And I could never have been a Bar Commissioner without his support. I can't tell him thanks enough for his sacrifice and example. I have known and practiced with Gary for 27 years now; I know he is predictable and absolutely dependable. He is professional beyond question. (He is not perfect, none of us are. That is not the point). A lawyer could never have a better partner and I am so grateful for his help and influence.

Let me tell you one story that exemplifies Gary Cooper's professionalism. As many of you may know, Gary Cooper is one of the best trial lawyers in this state. Some time back on a Saturday he was pre-

*Interestingly, while civility matters to all generations, we define civility differently from generation to generation.*

paring for trial. I looked at the printer at our office and I saw the Plaintiff's jury instruction, and exhibit list being printed off. Gary was representing the Defendant in this car accident. I took them off the printer, back to Gary's office and said, "Here are the jury instructions and exhibits for the plaintiff's case. Why are we printing them out and who prepared them?"

Gary just grabbed them and said that Plaintiffs' counsel, who was inexperienced and understaffed, could not really figure out how to do them so he did them. As you might guess, my jaw hit the floor. He said it was just easier to do it that way. I had never heard of opposing counsel completing such a task for the opposition. I was truly amazed that he would do such a thing. Until this article, I doubt that anyone else beside Gary, opposing counsel and myself knew that he had done so much work for trial preparation for the opposing side. That is professionalism.

Did Gary's story have a happy ending? It depends. The young inexperienced lawyer got a verdict that was greater than Gary's offer of judgment, which rarely happens to Gary. Gary never said a word. That fact impressed me more than anything else. I believe that is a definition of professionalism at work.

How does this apply to us? The Bar is made up of the last of the Greatest Generation, (those who fought in World War II). Those numbers are dwindling every day. They set great examples for us. They accomplished so much. The Baby Boomers, which right now are the majority of the Bar, have turned out much better than anyone would have thought in the 1960s and the 1970s when our hair was too long; our music too loud; and our views

too radical. So what will the practice of law be for professionalism and civility for Generation X and Generation Y? It will be OK.

The membership survey this fall and other national surveys show that our youngest lawyers are passionate about pro bono service, helping their community and pursuing a balanced life. All these add up to a new definition of civility that gets awfully close to the Golden Rule.

To sum up, David Bossart, a lawyer from North Dakota, who I have met a number of times over the years at various bar leadership and CLE activities shared a poem at the Western State Bar Conference that was so powerful I thought it would provide a great closing. The author of the poem is Kent Keith:

**ANYWAY**

People are unreasonable, illogical  
and self-centered,  
**LOVE THEM ANYWAY**

If you do good people will accuse  
of selfish, ulterior motives,  
**DO GOOD ANYWAY**

If you are successful, you win false  
friends and true enemies,  
**SUCCEED ANYWAY**

The good you do will be forgotten  
tomorrow.

*Gary just grabbed them and said  
that Plaintiffs' counsel, who was inexperienced  
and understaffed, could not  
really figure out how to do them  
so he did them.*

**DO GOOD ANYWAY**

Honesty and frankness make you  
vulnerable.

**BE HONEST AND FRANK ANYWAY.**

What you spent years building may be  
destroyed overnight.  
**BUILD ANYWAY**

People really need help, but may attack  
you if you help them.  
**HELP PEOPLE ANYWAY**

Give the World the best you have, and  
you'll get kicked in the teeth.  
**GIVE THE WORLD THE BEST  
YOU'VE GOT ANYWAY.**

**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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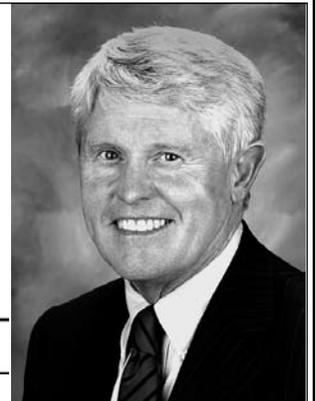
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**MICHAEL J. TRULL  
(Suspension)**

On February 9, 2012, the Idaho Supreme Court issued a Disciplinary Order suspending Michael J. Trull from the practice of law for six-months, retroactive to March 5, 2009. Mr. Trull was admitted to the Idaho Bar in 1983. He became an affiliate member in 1988 and an inactive member in 2005 and thus has not been engaged in the practice of law in Idaho since 1988.

The Idaho Supreme Court's Order followed a stipulated resolution of a formal charge disciplinary proceeding requesting entry of a reciprocal sanction under I.B.C.R. 513. Mr. Trull was previously admitted to practice law in Arizona and on August 18, 2009, the Supreme Court of Arizona issued a Judgment and Order, suspending Mr. Trull from the practice of law in Arizona for a period of six-months, retroactive to March 5, 2009.

Mr. Trull consented to the disciplinary sanctions in Arizona. The Arizona proceeding related to Mr. Trull's administrative suspension on June 18, 1998, for failure to comply with Arizona Rule 45, regarding mandatory continuing legal education requirements and non-payment of dues. Following that administrative suspension, Mr. Trull was not legally permitted to practice law in any jurisdiction and did not inform his employer of that fact. Between June 1, 2004 and May 7, 2007, Mr. Trull practiced law as director of legal services for an Arizona corporation.

In the Idaho reciprocal case the Idaho Supreme Court imposed the identical sanction as Mr. Trull received in Arizona.

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

**STEPHEN K. STARK  
(Public Reprimand)**

The Professional Conduct Board of the Idaho State Bar has issued a Public Reprimand to Nampa lawyer Stephen K. Stark, based on professional misconduct.

The Professional Conduct Board Order followed a stipulated resolution of an Idaho State Bar disciplinary proceeding, in which Mr. Stark admitted that he violated Idaho Rules of Professional Conduct 1.3 [Failure to act with reasonable diligence in representing a client]; 1.7(a) (2) [Representation of a client where there is a significant risk that the representation will be materially limited by the lawyer's personal interests, including family and

domestic relationships]; and 3.3 [Knowingly making a false statement of fact or law to a tribunal or failing to correct a false statement of material fact or law previously made to the tribunal by the lawyer].

The Complaint related to Mr. Stark's representation of his son, G.S., in 2005. In June 2005, G.S. was charged in Ada County with attempted strangulation, misdemeanor domestic assault and destruction of a telecommunication line. The charges stemmed from an incident in which G.S. allegedly assaulted his then-wife, A.S., in front of their children. A public defender was appointed to represent G.S. in the criminal case. In July 2005, the attempted strangulation charge was dismissed and jury trial was scheduled for November 2005.

In September 2005, Mr. Stark filed a divorce Complaint on G.S.'s behalf in Canyon County requesting that G.S. be awarded sole custody of the children. Mr. Stark did not disclose the pending domestic violence case and instead stated that G.S. knew of no proceeding that could affect the divorce proceeding, including proceedings related to domestic violence. Mr. Stark also filed a Motion for Order to Show Cause, which the Court granted. A.S. did not appear or file any responsive pleadings. In mid-October 2005, Mr. Stark filed an Application for Default but again did not advise the Court about G.S.'s pending domestic violence case in Ada County. The Court entered a Default Decree of Divorce granting G.S. sole custody of the children.

In late October 2005, a pretrial conference was held in the domestic violence case, one charge was amended and trial was continued to January 2006. G.S. subsequently relocated to Missouri to live with A.S. and the criminal charges against him were dismissed.

A.S.'s father filed a grievance against Mr. Stark in October 2009. In the resulting disciplinary proceeding, Mr. Stark acknowledged that he knew G.S. had been criminally charged at the time he filed the divorce Complaint but stated he believed those charges had been, or would be, dismissed based on statements by G.S. and the public defender. He acknowledged that he did not diligently review the divorce documents filed with the Court, investigate the status of G.S.'s criminal charges or correct statements made to the Court regarding the domestic violence proceeding.

The public reprimand does not limit Mr. Stark's eligibility to practice law.

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

**MARK JENKINS MILLER  
(Suspension)**

On February 28, 2012, the Idaho Supreme Court issued a Disciplinary Order suspending Idaho Falls attorney, Mark J. Miller, from the practice of law for a period of five years.

The Idaho Supreme Court found that Mr. Miller violated the following Idaho Rules of Professional Conduct: (1) 1.2(a) [Failure to abide by client objectives], 1.3 [Lack of diligence], 1.4 [Lack of communication] and 1.16(d) [Failure to refund unearned fees or costs] with respect to three client matters; (2) 1.5(a) [Charge or collect of an unreasonable fee], 1.16(a) [Failure to withdraw when physical or mental condition materially impairs ability to represent client], 8.4(c) [Conduct involving dishonesty, fraud, deceit or misrepresentation], 8.1(b) [Failure to respond to Bar Counsel in connection with a disciplinary matter], and I.B.C.R. 505(e) [Failure to cooperate with or respond to a request from Bar Counsel] with respect to two client matters; and (3) 3.4(d) [Failure to comply with discovery requests] and 1.15(b) [Failure to deposit fees and expenses into client trust account or withdrawal of unearned fees] with respect to one client matter.

The Idaho Supreme Court's Disciplinary Order concluded a disciplinary proceeding that was initiated with a Complaint filed on June 7, 2011. On September 19, 2011, a Hearing Committee of the Professional Conduct Board conducted a hearing on the Idaho State Bar's Motion to Deem Admissions for Failure to Answer and for Imposition of Sanction. Following that hearing, the Hearing Committee entered findings of fact, conclusions of law and a recommendation.

With respect to the first client matter, Mr. Miller represented plaintiffs, townhouse purchasers, whose units were subject to a building moratorium. The plaintiffs claimed that an engineer negligently prepared a plat that failed to indicate the units were located within a floodway. Mr. Miller falsely represented to his clients that he had sent a demand upon a title insurance company. In the case against the engineer, plaintiffs agreed to hire an expert and paid Mr. Miller money for the expert's retainer fee. Mr. Miller contracted to pay the expert directly but thereafter did not pay the expert's fees.

## DISCIPLINE

Mr. Miller also failed to timely disclose any experts and the defendant filed a motion for summary judgment arguing plaintiffs were unable to establish a *prima facie* case for professional negligence because they did not timely offer a qualified expert to testify about the standard of care. Mr. Miller did not advise his clients about the summary judgment motion, timely file a responsive brief, or submit any evidence by affidavit or depositions to contradict the factual assertions in the motion. The Court permitted plaintiffs an extension to file a responsive brief to the summary judgment motion, but denied plaintiffs from disclosing any expert witnesses, initiating formal discovery or filing affidavits or expert opinions in response to the motion. Eventually, the Court entered summary judgment against plaintiffs on all counts stating that, as a result of plaintiffs' own failure to provide affidavits from experts or any other witnesses, there was simply no viable cause of action available to plaintiffs.

Mr. Miller then misrepresented to his clients that the lack of expert witnesses had no bearing on the outcome of their case. Plaintiffs retained substitute counsel, who demanded that Mr. Miller immediately return over \$5,000 in payments made by plaintiffs to Mr. Miller for expert costs. Mr. Miller did not respond or return any of the requested payments for expert costs. In post-judgment motions, defendant was awarded over \$80,300 in attorney's fees and costs, jointly against plaintiffs and Mr. Miller. Substitute counsel filed a Motion for Reconsideration and was able to eventually settle the case in exchange for plaintiffs' payment of \$15,000 to defendant. The Disciplinary Order requires that before being eligible to be reinstated, Mr. Miller must pay the three plaintiffs in that case \$9,859.45, plus interest.

With respect to the second client matter, plaintiffs filed a complaint seeking an injunction and declaratory judgment regarding a roadway easement used to access property adjacent to defendants' property. Mr. Miller did not file an answer, even after obtaining an extension to file an answer from plaintiff's counsel, and default judgment was entered. Mr. Miller then filed a motion to set aside the default judgment, arguing that his family or health problems prevented him from filing responsive documents. At hearing, Mr. Miller indicated he was competent to continue in the case and agreed with the judge's suggestion that he provide his clients with a letter from his doctor confirm-

ing his capacity to proceed, and the default judgment was set aside. Mr. Miller then filed an answer and counterclaim. After that, an individual not named as a plaintiff ("LO") caused property damage to Mr. Miller's clients and he and his clients discussed naming LO individually as a defendant and seeking leave to amend the pleadings to allege punitive damages. Mr. Miller did not pursue either action.

Plaintiffs filed a motion for partial summary judgment. Mr. Miller did respond to the motion, but requested that the hearing and trial be continued because defendants wanted to depose LO. The Court denied the motion for continuance, took the motion for partial summary judgment under advisement, continued the trial and ordered Mr. Miller to comply with the pretrial orders by a date certain. Despite multiple assurances to his clients, Mr. Miller did not schedule depositions, name LO as a defendant or comply with the pretrial orders by the date required. His clients then retained substitute counsel.

Substitute counsel filed a motion for leave to file a responsive memorandum and objection to the partial summary judgment motion and plaintiffs filed a motion for sanctions. The judge granted both motions and imposed sanctions against Mr. Miller and his clients for attorney's fees and costs relating to two hearings. Substitute counsel requested his clients' file and return of funds they had paid for deposition and court reporter costs, which Mr. Miller never paid. Mr. Miller provided the file, but did not return any funds to his clients.

The judge eventually denied Mr. Miller's former clients' motion to amend the pleadings to include LO. The judge granted plaintiffs' summary judgment motion and found that an easement existed over Mr. Miller's former clients' property in favor of plaintiffs. Eventually substitute counsel was able to settle the case and settlement included plaintiffs' agreement to waive all payments of attorney's fees and costs that were ordered. The Disciplinary Order requires that before being eligible to be reinstated, Mr. Miller must pay those clients \$13,245.40, plus interest.

In the third client matter, the client retained Mr. Miller and paid him a \$500 fee to file and perfect mechanic's liens. Mr. Miller repeatedly assured his client that he would complete the lien work, however, no liens were filed and he stopped returning his client's telephone calls. Mr. Miller did not return original documents or any unearned fees to his client. The Disciplinary Order requires that before being eli-

gible to be reinstated, Mr. Miller must pay this client \$500, plus interest.

Based upon the violations of the Idaho Rules of Professional Conduct discussed above, the Idaho Supreme Court suspended Mr. Miller from the practice of law in Idaho for five years. Before being eligible to be reinstated, Mr. Miller must also comply with I.B.C.R. 516 and 517, reimburse the Idaho State Bar for the costs associated with the proceedings, \$361.17, plus interest, pay the restitution to his clients referenced above, totaling \$23,604.85, plus interest, and reimburse the Client Assistance Fund for any monies paid by the Fund as a result of Mr. Miller's representation of any of his clients.

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

### **KELLY CHRISTINA LOTZ (Termination of Conditional License)**

On March 2, 2012, the Idaho Supreme Court issued an Order of Disbarment permanently terminating the conditional license of Kelly C. Lotz. The Idaho Supreme Court's Order followed a proceeding requiring Ms. Lotz to show cause why her conditional license should not be permanently terminated.

In October 2011, the Idaho State Bar filed a Petition for Order to Show Cause, pursuant to I.B.C.R. 212, alleging that Ms. Lotz breached a number of the conditions of her conditional license. On November 7, 2011, the Idaho Supreme court entered an Order, ordering that Ms. Lotz be suspended from the practice of law and issued an order to show cause to her why her revocation from the practice of law should not be permanent. Senior Justice Jesse R. Walters, Jr. was appointed as the Hearing Officer in that show cause proceeding. The show cause hearing was held on January 31, 2012. On February 21, 2012, Justice Walters recommended to the Idaho Supreme court that it terminate Ms. Lotz's conditional admission license.

The Idaho Supreme court's Order permanently terminates Ms. Lotz's conditional license, she is no longer licensed to practice law in Idaho and her admission to practice law is revoked and her name has been stricken from the records of the Idaho Supreme Court as a member of the Idaho State Bar.

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

## DISCIPLINE

### SHAWN C. NUNLEY (Suspension)

On March 22, 2012, the Idaho Supreme Court issued a Disciplinary Order suspending former Coeur d'Alene attorney, Shawn C. Nunley, from the practice of law for a period of three years.

The Idaho Supreme Court found that Mr. Nunley violated I.R.P.C. 3.4(c) [Knowingly disobeying rules of a tribunal], 8.4(b) [Commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer], 8.4(d) [Conduct prejudicial to the administration of justice] and I.B.C.R. 505(b) [Conviction of a serious crime].

The Idaho Supreme Court's Disciplinary Order followed a stipulated resolution of an Idaho State Bar disciplinary proceeding in which Mr. Nunley admitted that he violated the Idaho Rules of Professional Conduct set forth in the preceding paragraph.

The Complaint filed in this proceeding related to Mr. Nunley's violation of the terms of his criminal probation. In

October 2010, Mr. Nunley was convicted of felony possession of a controlled substance. Following a period of retained jurisdiction, he was placed on supervised probation for four years. Mr. Nunley's felony conviction resulted in a disciplinary action and the suspension of his license to practice law for a period of three years, with two years withheld, followed by four-year probation upon reinstatement. Mr. Nunley did not seek reinstatement and remains suspended. In May 2011, Mr. Nunley violated his criminal probation by consuming alcoholic beverages and leaving Idaho without written permission from his probation officer. In August 2011, his criminal sentence was imposed. The three-year suspension imposed in this matter is in addition to Mr. Nunley's previous suspension and requires that he serve a four-year probation upon reinstatement, if any. Inquiries about this matter may be directed to: Bar Counsel, Idaho State Bar, P.O. Box 895, Boise, Idaho 83701, (208) 334-4500.

### NOTICE TO TOM HALE OF CLIENT ASSISTANCE FUND CLAIM

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

### NOTICE TO MARK J. MILLER OF CLIENT ASSISTANCE FUND CLAIM

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

## LICENSING CANCELLATIONS

### Order to cancel license to practice law for non-payment of 2012 license fees

The Commissioners of the Idaho State Bar by and through their Executive Director have filed with the Clerk of this Court evidence that the following named attorneys have not paid the 2012 Idaho State Bar license fees required by Section 3-409, Idaho Code, and have not given notice of withdrawal from the practice of law to the Idaho State Bar and this Court;

NOW, THEREFORE, IT HEREBY IS ORDERED that the LICENSE TO PRACTICE LAW IN THE STATE OF IDAHO of the following named persons be, and hereby is, CANCELLED, and said persons are placed on *INACTIVE STATUS FOR FAILURE TO PAY THE 2012 IDAHO STATE BAR LICENSE FEES*:

DONALD KRIS ANTON; JOSEPH H. BAIRD; MATTHEW ROGERS BEAUCHAMP; RICHARD SAMUEL BOWER; WAYNE ROBERT BRYDON; ROBERT DANIEL BURNS III; TAMAR JERGENSEN CERAFICI; WARREN LEE CHRISTIANSEN; BENJAMIN SANFORD COLEMAN; JOHN FRANKLIN CRONER; JUNIPER L. DAVIS; GREGORY JAMES EHARDT; SHARON LOUISE FIELDS; STEPHEN ANTHONY GRATTON; LEILA HALE HANSEN; HUBERT JAMES JOHNSON SR.; L. SANDERS JOINER; MICHAEL DAVID KINKLEY; GARY A. KITTLESAN; DAN L. LARSON; KELLY CHRISTINA LOTZ; STEPHEN KENT MADSEN; CHRISTINA INGE MILLER; MANUEL PEREZ; TROY

DARWIN PETERSON; DANIEL C. PICARD; EMILY SHARP RAINS; DANA HOFFELT ROSE; LEE HOWARD ROUSSO; STEPHEN J. STURGIL; THOMAS N. TESTA; PAUL R. TRUEBENBACH\*; DENNIS C. WEIGHT; and ELIZABETH DIANE WRIGHT.

IT FURTHER IS ORDERED AND NOTICE IS HEREBY GIVEN, that the above named persons are no longer licensed to practice law in the State of Idaho unless otherwise provided by an Order of this Court.

IT FURTHER IS ORDERED that Bar Counsel of the Idaho State Bar is directed to distribute, serve or publish this Order as provided in the Idaho State Bar Commission Rules.

DATED this 2nd day of March 2012.

Roger S. Burdick, Chief Justice

\*It has been consequently learned that Mr. Truebenbach is deceased.

## LICENSING REINSTATEMENTS

### Order granting petition for reinstatement as active member in the Idaho State Bar

As of the dates indicated, the following attorneys' licenses were reinstated:

Joseph H. Baird; Active Status, March 15, 2012.

Matthew R. Beauchamp; Affiliate Status, March 15, 2012.

Gregory J. Ehardt; Active Status, March 20, 2012.

Michael D. Kinkley; Active Status, March 22, 2012.

Donald Kris Anton; Affiliate Status, April 4, 2012.

## Workers Comp seminar held in Sun Valley

The Workers' Compensation Section held its annual seminar and business meeting in Sun Valley on March 9. The highlight of the business meeting was bestowing the Section's inaugural Distinguished Service Award in memory of two prominent members of the Bar who recently passed, Boise lawyer John W. "Jack" Barrett and Lewiston attorney John Reid Tait.

Memories of the distinguished lawyers were shared during the lunch meeting with colleagues of the Bar and their special guests, the friends and family members who were able to attend. Plaques were given to each family and a perpetual plaque will be displayed in the offices of the Idaho Industrial Commission memorializing this year's honorees and all future recipients of the Section's Distinguished Service Award.

## Idaho Law Foundation seeks pro-bono volunteers

The Idaho Volunteer Lawyers Program is recruiting attorneys to take cases on behalf of clients who have a pressing need for legal services but insufficient resources to pay. The Program is especially in need of attorneys who can take Family Law cases. All cases have been screened for financial eligibility and priority. The Idaho Law Foundation provides liability insurance for its pro bono lawyers. For more information, contact IVLP Director Mary Hobson at 334-4510 or check the IVLP website at <http://isb.idaho.gov/ilf/ivlp/beahero.html>

## Headliner selected for ISB Annual Meeting

Mr. Dewey Bozella, a boxing phenomena, will serve as the keynote speaker at this year's ISB Annual Meeting Plenary Session. Mr. Bozella will discuss the importance of mentoring, leadership and community engagement during a 45-minute presentation and 10 minute Q/A session.



Dewey Bozella

Mr. Bozella's past was featured last March at the ESPY's award program. Plans are in the works as early as this summer to announce a movie and a book deal about his life and his message.



Workers Compensation Section Chair Brad Eidam, left, presents attorney Mark Peterson, right with the Section's Distinguished Service Award, named in honor of the late Jack Barrett, during the Section's annual meeting in Sun Valley.

Photo by Stephanie Butler

## Med-Mal panel members sought

The Idaho State Bar seeks attorneys interested in serving as a panelist for medical malpractice hearing panels. Pursuant to Idaho Code Section 6-1002, the Board of Commissioners appoints attorney panelists to the medical malpractice prelitigation hearing panels. Preferably, candidates should not practice in the area of medical malpractice. If you would like information about the time commitment, duties, etc., contact the Board of Medicine at (208) 327-7000. If you are interested in serving as a panelist, please contact Diane Minnich by June 15, at [dminnich@isb.idaho.gov](mailto:dminnich@isb.idaho.gov).

## First District hosts Bench-Bar Forum

The Bench-Bar Forum and the First District Bar Association welcomed the Justices of the Idaho Supreme Court to north Idaho at the Bench-Bar Forum's monthly meeting on Tuesday, April 3. The Justices presented a CLE entitled "The Idaho Supreme Court Justices' Views on Current Appellate Practices."

## Desk Book Directory published

The 2012 Desk Book Directory was mailed to members of the Idaho State Bar during the first week in April. Those members who responded to an ISB email offer in March received the digital version via email. Both versions are identical. Additional hard-copy books are available for \$20 for members and \$40 for non-members. For a free digital version, or for more information, please contact ISB Communications Director Dan Black at (208) 955-8866 or by email at [dblack@isb.idaho.gov](mailto:dblack@isb.idaho.gov).

## LETTER TO THE EDITOR

### Tait was a model of justice

Dear Editor:

After reading your fine obituary of John Reid Tait in the March/April issue of *The Advocate*, I realized all over again how much the profession and I personally had lost with his premature passing, shedding yet another tear or two. We have lost a giant who supported the rule of law every day of his professional life and all that is best about being a lawyer.

John was a tireless supporter of the Bill of Rights and of women's rights. He put family first. I personally remember his devotion to his daughter who came down with leukemia as a child when he dropped everything to be with her as long as necessary until the condition was resolved.

He was a stalwart supporter of Idaho Legal Aid. He could be depended on to step up and represent the indigent, the forgotten, the marginal. His career did not result in fabulous wealth but must have been fabulously rewarding in a thousand ways. I only wish that the political winds that prevented him from taking the position on the Federal Bench had been defeated, allowing him to serve in another venue.

John Tait was a supreme advocate, someone law students now can look to as a model of public service to be emulated.

God speed, John Tait.

Linda Pall, J.D., Ph.D.  
Moscow, Idaho



John R. Tait

## VOLUNTEER OPPORTUNITIES OFFER GRATIFYING EXPERIENCES

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

The Bar and Foundation rely on the volunteer efforts of Bar members and non lawyers to accomplish their goals. The hundreds of hours contributed each year by volunteers allow the organizations to provide varied programs, activities and services to the public and the members. We thank those of you who continue to serve the legal profession through volunteer service. We encourage those of you who have not taken advantage of the volunteer opportunities to give it a try. As with most volunteer efforts, you may find that the return on your investment of time and resources can be immeasurable.

Each year, the Bar Commissioners and Idaho Law Foundation (ILF) Directors recruit attorneys interested in serving on a committee or volunteering their time to assist with ISB and ILF programs and activities.



Diane K. Minnich

If you are interested in serving as a volunteer, please complete the Volunteer Opportunities form on the next page (also available on our website) or email me your preferences. If you have questions about the opportunities listed, please contact me at [dminnich@isb.idaho.gov](mailto:dminnich@isb.idaho.gov).

Committee appointments are made in July. Board members consider geographic diversity, areas of practice and previous or current committee assignments when selecting committee members. Many of the volunteer activities are available year round or on a limited basis throughout the year. A few of these activities are highlighted here.

### Pro bono service: What can you do to help?

A few hours donated through the Idaho Volunteer Lawyers Program can help low-income people in Idaho who have critical

legal needs, help you fulfill your obligation to provide pro bono services, and give you an opportunity to gain experience in various areas of the law.

Attorneys have a variety of opportunities to provide pro bono assistance including direct representation of clients, as well as clinics, and advice and consultation. Some of the critical needs are:

- Representing parents or guardians of children in danger
- Representing victims of domestic violence
- Representing nonprofit entities that serve low income groups or individuals in certain civil cases
- Advice & Consultation Clinics for Senior Citizens
- **Soundstart** presentations for low-income parents and grandparents
- StandDown clinics for homeless veterans and other homeless legal advice clinics
- Youth court
- Court Appointed Special Advocate Programs (CASA) use volunteer attorneys to represent trained, lay Guardians ad Litem in Child Protective Act proceedings in Judicial Districts 4, 6, and 7
- United States District Court, District of Idaho – to provide pro bono representation for pro se litigants in cases that have potential merit
- Immigrant victims of domestic violence or crime to obtain legal status in the United States through the Violence Against Women Act or U-visa petitions
- Assistance with foreclosure prevention
- Helping victims of identity theft

If you see a need or have a passion, IVLP can work with you to put together a project that works for you. Find a pledge form at [www.isb.idaho.gov/pdf/ivlp/ivlp\\_pledge.pdf](http://www.isb.idaho.gov/pdf/ivlp/ivlp_pledge.pdf)

### ILF Law Related Education

Idaho's young people are its most valuable resource. As an attorney, you can help Idaho teachers reinforce learning while building positive relationships between students and members of Idaho's legal community.

Law Related Education (LRE) programs focus on topics that translate into real world experiences. Students exposed to LRE programs learn constructive ways to resolve conflicts and increase critical, analytical, and problem-solving skills.

LRE offerings include the annual Mock Trial Competition, and the Lawyers in the Classroom project, which gives students the opportunity to learn about the law from actual practitioners. Please consider volunteering to help with either of these programs. Contact Carey Shoufler, Law Related Education Director, at 334-4500 or [cshoufler@isb.idaho.gov](mailto:cshoufler@isb.idaho.gov) for more information.

### Sections of the Bar

Bar members are welcome to join Practice Sections, which are involved in many projects such as CLE programs, developing publications, public service activities, and social events for section members. Volunteers are always welcome to join and help with section activities. There are currently 19 Idaho State Bar Sections. The list of sections and section contact information are available on the Bar's website: [www.isb.idaho.gov](http://www.isb.idaho.gov).

### District Bar Associations

The seven District Bar Associations provide an opportunity for you to get involved and meet other attorneys practicing in your geographical area. Each association provides social events, public service projects, CLE programs, and hosts the annual fall resolution meetings. Contact your local DBA officers for more information about how to get involved in the local bar.

Again, we offer our sincere thanks to those of you who give of your time, talents and expertise to provide service to your colleagues and the public.

# ISB/ILF Committees Volunteer Opportunities



Committees capture the volunteer spirit of the Bar and elevate the profession. Here, a group of attorneys are honored by the Fourth District Bar's 6.1 Challenge in 2011. Committees have been involved from the beginning of the 6.1 Challenge. From left are Kira Pfisterer, Brandon Karpen, Craig Durham, Janis Dotson, Daphne Huang, Lisa Brownson and Daniel Gordon.

Member participation is vital to the success of the Idaho State Bar and Idaho Law Foundation. Lawyers can and do make a difference by participating on one of the many committees or activities listed below. Committee assignments are three-year terms, and each year there are generally one to three openings available on each committee. Time commitments vary with each committee depending upon its function and meeting schedule. In the appointment process, consideration is given to geographic distribution, areas of practice, and other committee assignments or ISB/ILF involvement.

Please let us know if you are interested in contributing to the activities of the Idaho State Bar and the Idaho Law Foundation by serving on one of the committees, or participating in one of the programs listed below. Please indicate your 1st, 2nd, or 3rd choice.

## IDAHO STATE BAR VOLUNTEER COMMITTEES

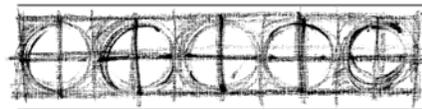
- The Advocate Editorial Advisory Board (Meets monthly)
- Bar Exam Grading (Meets twice a year)
- Lawyer Assistance Program (Meets quarterly)
- Disciplinary Committees (Meet as needed)
  - Professional Conduct Board
  - Client Assistance Fund
  - Unauthorized Practice of Law
- Admissions Committees (Meet as needed)
  - Character and Fitness
  - Reasonable Accommodations



## IDAHO LAW FOUNDATION VOLUNTEER COMMITTEES

- Continuing Legal Education (Meets three times a year)
- Law Related Education (Meets three times a year)
- Idaho Volunteer Lawyers Program Policy Council (Meets quarterly)
- IOLTA Fund Committee (Meets once a year)

## IDAHO LAW FOUNDATION



*Helping the profession serve the public*

- I would like more information about the Bar Sections.
- I would like more information about the District Bar Associations.

- I would like more information about participating in the Foundation's Law Related Education Programs such as Mock Trial, or Lawyer in the Classroom.
- I am interested in providing pro bono service through the Foundation's Idaho Volunteer Lawyers Program.

Name: \_\_\_\_\_ Firm: \_\_\_\_\_

Address: \_\_\_\_\_ City: \_\_\_\_\_ Zip: \_\_\_\_\_

Phone: \_\_\_\_\_ Email: \_\_\_\_\_

Have you previously participated as a member of an ISB and/or ILF Committee?

- No  Yes – Most recent committee assignment(s) \_\_\_\_\_

**Please return this form no later than June 1, 2012**

**ISB/ILF Committees**

**P.O. Box 895**

**Boise, ID 83701**

**Or email your committee interests to [dminnich@isb.idaho.gov](mailto:dminnich@isb.idaho.gov)**



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#### ETHICS & LAWYER DISCIPLINARY INVESTIGATION & PROCEEDINGS

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

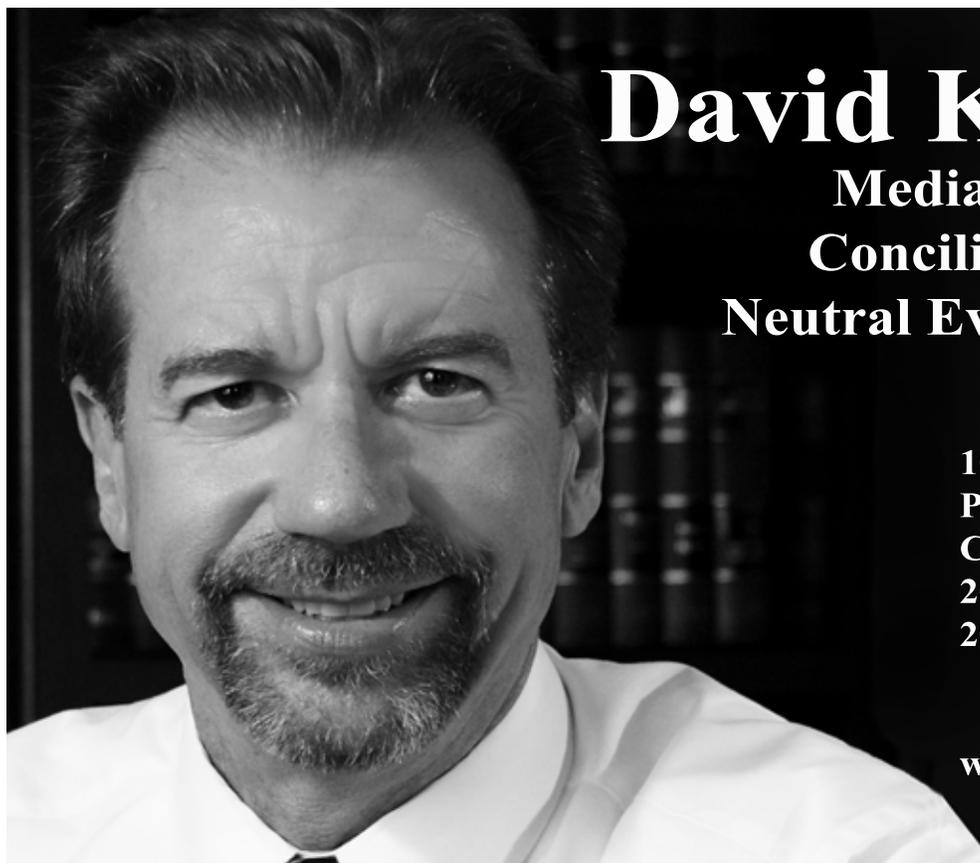
208.388.4990  
ssmith@hawleytroxell.com



# STOATDOCS

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Photo courtesy of Alan D. Coogan

## WELCOME FROM THE REAL PROPERTY SECTION

Jeremy O. Evans  
*Vial Fotheringham, LLP*

**T**he members of the Real Property Section have authored a number of property-related articles this month. As the legal community is still facing challenges arising from Idaho's troubled real estate markets, a couple of the articles are focused on mortgage foreclosures and other challenges facing property owners and homeowner associations. We have tried to continue our section's tradition of focusing on the interests of small property owners and home owners in Idaho.

We have three homeowner association articles, from a suggestion for new common interest property ownership legislation, to a description of the challenges arising from dealing with sex offenders in a community setting, to a suggestion for an assessment collection approach to foreclosed properties. Another timely article describes the challenges facing private property owners affected by changed

access restrictions. To kick off, we have a response to an article in the January 2012 Advocate regarding the Idaho Supreme Court's *Trotter* decision. We hope you enjoy both the practical advice and legal commentary that they contain.

### About the Author

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# IDAHO SUPREME COURT ELIMINATES FORECLOSURE DEFENSE OPTION

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As foreclosure rates have increased in Idaho and across the country over the past three years, so too have the number of defenses dreamed up by creative lawyers and self-proclaimed foreclosure defense experts. Now, as foreclosure rates in Idaho finally begin to fall, so too have the defenses available to mortgagors thanks to a recent Idaho Supreme Court decision.<sup>1</sup>

In the January 2012 edition of *The Advocate*, the article, “No Free Houses: Few Mortgages Have Fatal Flaws,”<sup>2</sup> discussed some of those defenses and the potential impact of *Trotter v. Bank of New York Mellon*.<sup>3</sup> That case, which addressed the issue of standing in a nonjudicial foreclosure, was recently decided by the Idaho Supreme Court.

## Court decides standing issue in *Trotter*

The Idaho Supreme Court has held that the nonjudicial foreclosure process is “the express-lane alternative” to a judicial foreclosure; but to balance that speed, the Idaho Deed of Trust Act must be followed to the letter.<sup>4</sup> The Court then went on to determine who was eligible to carry out a nonjudicial foreclosure.

In the fall of 2011, the Court was asked in *Trotter* to decide the issue of whether Mortgage Electronic Registrations Systems, Inc. (MERS) or its trustee has standing to initiate a nonjudicial foreclosure in Idaho. On January 25, 2012, the Court found in favor of the foreclosing parties and held that a trustee could initiate nonjudicial foreclosure proceedings under Idaho Code § 45-1506 without first proving ownership of the underlying note or showing that the deed of trust beneficiary gave authorization to the trustee to initiate foreclosure.<sup>5</sup>

In that case, Vermont Trotter, the *pro se* appellant, bought a house in Coeur d’Alene in 2005 and executed a Note and Deed of Trust with MERS as nominee for the lender, Countrywide Home Loans, Inc.<sup>6</sup> MERS is a private electronic database that keeps track of which company owns a loan as it is sold and re-sold, but

*Other courts have frowned on MERS’s sloppy record keeping and failure to follow the letter of the law before, during, and after the foreclosure process.*<sup>13</sup>

does not keep the paper record of the deed of trust or promissory note.<sup>7</sup> In 2009, MERS assigned the Deed of Trust to Bank of New York, which then appointed ReconTrust as the successor trustee on August 24, 2009. ReconTrust immediately recorded a Notice of Default. On September 2, 2009, ReconTrust executed a Notice of Trustee’s sale.

Mr. Trotter was able to get a temporary injunction to prevent the trustee’s sale. The district court held that, “MERS was the beneficiary under the deed of trust and that MERS had properly assigned its rights as beneficiary to Bank of New York, pursuant to I.C. § 45-1502(1).”<sup>8</sup> The lower court also upheld the validity of Bank of New York’s appointment of ReconTrust as successor trustee.

Mr. Trotter appealed on the grounds that MERS had no authority to assign the deed of trust to the Bank of New York, which then could not name ReconTrust as successor trustee and, therefore, neither party had standing to begin foreclosure proceedings. The Idaho Supreme Court rejected this argument. Instead, the Court emphasized that Bank of New York had followed the statutory requirements of Idaho Code § 45-1502, *et seq.* (the Idaho Deed of Trust Act).<sup>9</sup> The Court reasoned that in reading the plain meaning of the statute there was simply no standing requirement.<sup>10</sup> In fact, the Court seemed to read the statute as not even requiring a clear succession of title: “[A] trustee may initiate nonjudicial foreclosure proceedings on a deed of trust without first proving ownership of the underlying note or demonstrating that the deed of trust beneficiary has requested or authorized the trustee to initiate those proceedings.”<sup>11</sup>

The article “No Free Houses: Few Mortgages Have Fatal Flaws,” provided insight that may explain the Court’s reasoning. If the Court had disagreed with the longstanding precedent of lower courts that MERS could appoint a trustee and initiate a foreclosure, “the bar could

be gainfully employed for years with the messy aftermath from the thousands of Idaho foreclosure sales conducted in this manner.”<sup>12</sup> Bank attorneys can relax a little now that the Supreme Court upheld current foreclosure practices in Idaho.

The underlying message in *Trotter* is that strict compliance with the statute is required. It would be interesting to see how *Trotter* would have been decided if, for example, the acquisition of the note by MERS, or its assignment to Bank of New York, had not been properly recorded. Other courts have frowned on MERS’s sloppy record keeping and failure to follow the letter of the law before, during, and after the foreclosure process.<sup>13</sup>

## Recent attempts at legislation

The *Trotter* decision has already affected pending cases raising similar questions on standing and will save bank attorneys the hassle of dealing with a flood of cases raising the issue.<sup>14</sup> What it will not do, however, is clarify exactly who may use the Idaho Deed of Trust Act. Nor will it resolve every defense raised by homeowners fighting to beat nonjudicial foreclosure. These homeowners may have seen some relief from the Idaho Legislature.

This year Bill 434 was introduced in the Idaho House, which would have virtually eliminated deficiency judgments against people who lose a house to foreclosure. Idaho Code § 45-1512 allows a lender to sue the former homeowner for the difference between the value of the loan and what the bank was able to recover by selling the property. In the present market, this is usually a considerable amount. The lender currently has 90 days after the foreclosure sale to initiate a deficiency judgment action.

A recent news story about a couple in Meridian highlights the problem with deficiency judgments.<sup>15</sup> The couple lost their house, which is devastating enough, but then they received notice the bank was suing them for \$140,000 – the difference



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between what they owed and what the bank had sold the house for. For Idaho families who have lost their homes and had their credit destroyed, it is an extra bit of sand kicked in their eyes to then have to pay a deficiency judgment. It raises questions about who should bear the burden of risk for a failing housing market in Idaho.

Bill 434, which appears to have been tabled as it never made it out of committee, would have reduced the time a bank had to seek a deficiency judgment in Idaho from 90 to 30 days after the foreclosure sale, and precluded deficiency judgments for single homes and duplexes on 2.5 acres or less.

This legislation came on the heels of 2011's changes to Idaho Code § 45-1506(8), which requires lenders who reschedule a foreclosure sale to give 14 days' notice of the new date to the homeowner. Even more importantly, Idaho Code § 45-1506C was added which requires the lender to provide information with the notice of default about the long-term consequences of foreclosure and how to contact the lender about loan modification programs. The lender has 45 days to respond to a request for modification and must respond to the request before the house can go to foreclosure sale. These changes are an encouraging sign that Idaho is not resigned to becoming a banker's paradise at the expense of everyone else.

### Need for loan modification

The *Trotter* decision, along with prior state decisions, strikes a blow to many homeowner defenses to foreclosure in Idaho. It is no surprise that many of these cases are fought by homeowners *pro se*; people losing their homes have little money to retain counsel. However, lawyers may be more likely to be involved in the loan modification process. Fortunately, this is becoming more common. Until recently, banks seemed loathe to work with homeowners. This ignores some basic facts.

- Loan modifications are cheaper than foreclosure. A foreclosure generally costs the bank \$50,000, while a loan modification costs less than \$2,000.<sup>16</sup>

- The business model of banks is not to own homes. After a foreclosure, the bank is left trying to sell an often dilapidated home in an oversupplied market. At the same time, banks are having to pay property taxes and minimal upkeep. In some states, lenders have found the going so difficult that they have started allowing homeowners to stay in the home because it is better to have someone living there mortgage free but defraying at least utility costs, than it is to have the home vacant.<sup>17</sup>

*The point is not to give free houses to undeserving homeowners, but to make sure the lenders strictly comply with the foreclosure statutes and other Idaho law.*

- Loan modifications are better for society and neighborhoods. The problems cities face with half-completed subdivisions and neighborhoods of boarded up homes include crime, a decline in surrounding property values, and health risks.

The catch is that loan modification is complicated and confusing for the average homeowner. Research has shown most of the private companies offering to help with loan modification are scam artists.<sup>18</sup> This is where attorneys on both sides of the negotiating table can help clients navigate the difficult waters of loan modification.

### Conclusion

To some attorneys, especially those who believe homeowners who challenge MERS' authority are hoping for a ticket in the free house lottery, foreclosure defense may seem like a fool's errand.

Nonjudicial foreclosure is a fast process, a legal advantage that the government has handed to lenders in Idaho. In return, the government needs to make sure the rules are being followed so lenders do not steamroll homeowners with no judicial oversight. The point is not to give free houses to undeserving homeowners, but to make sure the lenders strictly comply with the foreclosure statutes and other Idaho law. Idaho Code § 45-1506 provides a tremendous benefit to banks by streamlining and speeding up the foreclosure process; the very least they can do is bear the burden of ensuring they follow the letter of the law, avoid mistakes, and act in an informed and reasoned manner by considering the advantages of loan modification.

### About the Author

**Ryan Ballard** is graduating this month from Rutgers School of Law-Newark. He hopes to practice law near his home in eastern Idaho after he takes the Bar Exam in July. He previously studied journalism at California Polytechnic State University-San Luis Obispo and has a B.S. in Business from Keystone College in Pennsylvania. He can be contacted at [ryanaballard@live.com](mailto:ryanaballard@live.com).

### Endnotes

<sup>1</sup> Molly Messick, *Idaho's Foreclosure Rate Posts Dramatic Drop Over Last Year*, STATE IMPACT IDAHO, Feb. 16, 2012, available at <http://tinyurl.com/7wx8uab> (last visited Feb. 24, 2012).

<sup>2</sup> Kelly Green McConnell, *No Free Houses: Few Mortgages Have Fatal Flaws*, THE ADVOCATE, January 2012, p. 30.

<sup>3</sup> *Trotter v. Bank of New York Mellon*, -- P.3d --, 2012 WL 975493 (Idaho March 23, 2012). The Idaho Supreme Court's original decision was issued on January 25, 2012. A substitute opinion was released on March 23, 2012.

<sup>4</sup> *Fed. Home Loan Mortg. Corp. v. Appel*, 143 Idaho 42, 46 n. 1, 137 P.3d 429, 433 n. 1 (2006).

<sup>5</sup> *Trotter*, --P.3d--, 2012 WL 975493.

<sup>6</sup> *Id.*

<sup>7</sup> Ariana Eunjung Cha and Steven Mufson, *How the mortgage clearinghouse MERS became a villain in the foreclosure mess*, Washington Post, Dec. 30, 2010, available at <http://tinyurl.com/6qld5yq> (last visited March 6, 2012).

<sup>8</sup> *Trotter v. Bank of New York Mellon*, -- P.3d --, 2012 WL 206004 (Idaho March 23, 2012).

<sup>9</sup> The procedure for a trustee to foreclose on a deed of trust is set out in Idaho Code § 45-1505.

<sup>10</sup> *Trotter*, -- P.3d --, 2012 WL 975493.

<sup>11</sup> *Id.*

<sup>12</sup> *McConnell*, at 31. Ms. McConnell also gives a terrifically thorough summary of the primary defenses to foreclosure that homeowners have used around the country and how courts in Idaho have handled them. In summary, the Idaho courts have declined to stop foreclosures under the "produce the note" theory, the "split the note" theory, or the "who owns the note" theory.

<sup>13</sup> See, e.g., *U.S. Bank Nat. Ass'n v. Ibanez*, 941 N.E.2d 40 (Mass. 2011)(court invalidated pair of foreclosure sales because the banks were unable to demonstrate the assignment of the mortgages was properly recorded); *Landmark Nat. Bank v. Kesler*, 216 P.3d 158 (Kan. 2009)(court held mortgage was unenforceable because MERS failed to follow state statute which requires publicly recording the chain of title with the county register of deeds); *Bank of New York v. Silverberg*, 86 A.D.3d 274 (N.Y. App. Div. 2011)(court held MERS never had authority to assign mortgage, so subsequent assignment was null. Recognizing the reported 60 million mortgages MERS is a part of and the possible impact of its decision, the court said, "... the law must not yield to expediency and the convenience of lending institutions. Proper procedures must be followed to ensure the reliability of the chain of ownership, to secure the dependable transfer of property, and to assure the enforcement of the rules that govern real property.").

<sup>14</sup> See, e.g., *Hobson v. Wells Fargo Bank, N.A.*, 2012 WL 505917 (D. Idaho Feb. 15, 2012); *Russell v. OneWest Bank FSB*, 2012 WL 442903 (D. Idaho Feb. 10, 2012); *Bacon v. Countrywide Bank*, 2012 WL 639521 (D. Idaho Feb. 8, 2012).

<sup>15</sup> Molly Messick, *In the Wake of Foreclosure, a Debt That Won't Die*, STATE IMPACT IDAHO, Oct. 25, 2011, available at <http://tinyurl.com/7n7rvv4> (last visited Feb. 15, 2012).

<sup>16</sup> Jon Duval, *Foreclosure bill dies in committee*, IDAHO MOUNTAIN EXPRESS, Feb. 24, 2010, available at <http://tinyurl.com/767gfmf> (last visited Feb. 15, 2012).

<sup>17</sup> Susan Saulny, *When Living in Limbo Avoids Living on the Street*, NEW YORK TIMES, March 3, 2012, available at <http://tinyurl.com/8xrpjyz> (last visited March 3, 2012).

<sup>18</sup> Lawrence Wasden, *Foreclosure Prevention and Foreclosure Scams: How to Tell the Difference*, REPORT FROM THE OFFICE OF THE ATTORNEY GENERAL FOR IDAHO, August 2011.

# ACCESS TO HIGHWAYS AND ROADWAYS – IMPORTANT CONSIDERATIONS DURING CONDEMNATION PROCEEDINGS

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As Idaho's population grows, new and expanding roadway systems are required. Governments must inevitably acquire privately owned property to accommodate these expansion projects. More often, the property's access right and the impact of access on the "just compensation" to be paid by the government have become an increasingly important consideration during condemnation proceedings.

As highway authorities have recently expanded their roadway systems, they have also become reluctant to grant property owners direct access to public right-of-ways, causing the affected property to be devalued and its usefulness diminished. As a result, access questions have become increasingly confrontational and simultaneously central to determining "just compensation" in eminent domain proceedings.

Access to a public road is an incident of owning land that abuts the road, is appurtenant to the land, and is a vested right of the owner.<sup>1</sup> Meanwhile, the Idaho Transportation Department ("ITD") and local governing bodies have been granted the authority to establish standards for the location, design, construction, alteration, repair and maintenance of state highways and local roads.<sup>2</sup> This authority has been interpreted to include the power to determine when and how a property owner may build an encroachment onto a public road.<sup>3</sup> This article provides insight into the conflicts that arise in these situations and offers suggestions to practitioners and property owners involved access disputes.

## Background

ITD is charged with governing direct access to state highways.<sup>4</sup> Local highway districts, counties and municipalities often use ITD's access rules (which deal mostly with the location and design standards for approaches onto public highways<sup>5</sup>) as a basis for their own public way encroachment regulations. As a result, ITD and

many local governments rely heavily on ITD's self-published *Access Management: Standards and Procedures for Highway Right-of-Way Encroachments* (the "Access Manual") to interpret and implement Idaho Administrative Code ("IDAPA") regulations.

The location, design standards, and variance guidelines contained in the Access Manual and IDAPA are important for any applicant for an encroachment permit to know and understand. These standards are the basis for the highway authority's decision to grant or deny an encroachment permit, and could result in the loss of an owner's right of access to their property. In certain instances, a permit may be denied even though there exists no reasonable or comparable alternative access to the property, or a roadway expansion project may require the blocking or removal of an existing access.

As mentioned, ITD and highway authorities have, in recent years, strictly construed these standards to prohibit real property owners from gaining direct access to public right-of-ways that abut their real property.<sup>6</sup> A critical issue in this discussion is the spacing requirements between approaches. IDAPA's encroachment spacing guidelines state the "minimum recommended distances between approaches...,"<sup>7</sup> which makes the spacing regulations more of a guideline than a requirement. Indeed, IDAPA and the Access Manual allow for variances to the standards under certain conditions. For example, the Access Manual states in relevant part:

A request for a variance **MAY** receive favorable consideration under the following conditions:... If the variance offers the opportunity to accommodate a joint-use access serving two or more properties abutting the state highway.

- If the variance would improve traffic safety or operations.
- If the variance allows access to a parcel landlocked created prior to April 1, 2001 that has no reasonable alternative access and would not impose significant impacts to safety or traffic operations by allowing the change in access....

A request for a variance **MAY NOT** receive favorable consideration under the following conditions:...

- If reasonable alternative access is available, which may include: joint-use, cross access agreement or access to local roads. (Direct access to the State highway system is not guaranteed).

• If the proposed access does not meet the design standards of the ITD Design Manual and there are no reasonable grounds for a design exception.

- If the variance would adversely affect traffic safety or operations....<sup>8</sup>

As shown above, whether ITD or a local highway district grants a variance to the spacing guidelines will depend on a variety of factors. Most notably and most relevant to this discussion will be whether the parcel requesting an encroachment already possesses reasonable alternative access. In addition to the practical fear of losing direct access from the highway to their property, such as the taking of an encroachment onto a public roadway, owners of such property should be concerned about the impact on property value after access has been removed or denied.

## Condemned access rights are compensable

Where an owner's property value has been diminished due to the denial of an encroachment permit, the property owner's recourse may be to bring a condemnation or regulatory takings action.

It is well settled in Idaho that a granted encroachment, possessed by an owner of land abutting on a street or highway, constitutes property of which he cannot be deprived without compensation.<sup>9</sup> In other words, the owner of land abutting a street or highway has a private right of access to such street or highway, distinct from that of the public, which cannot be taken nor materially interfered with without just compensation.<sup>10</sup> As a result, elimination of access is a compensable taking of a property for purposes of eminent domain proceedings.<sup>11</sup>

A highway authority may also eliminate an encroachment outside of eminent domain proceedings. For example, the highway authority may not physically take the property, but the conditions of the development project may nonetheless result in loss of access from the property to the abutting roadway. In such cases, the property owner may initiate an inverse condemnation suit and request compensation.<sup>12</sup> The governing agency removing or destroying the direct access to the public roadway could be found to owe just compensation for the taking of the property right.



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## Land locking property through denial of an encroachment is a taking

Recently, ITD and other highway agencies have argued that a denial of direct access is not a taking when there was no prior approved encroachment onto the public right-of-way.<sup>13</sup> Although ITD and local highway authorities have been granted the power to control and determine access to public right-of-ways for public safety, this authority does not allow the government agencies to sustain a regulation that wholly eliminates the value of the owner's real property by depriving access to the property.<sup>14</sup>

Denial of existing access rights has been so prevalent in recent years that the 2012 Idaho Legislature determined that denial of a "deeded access" must be a compensable taking.<sup>15</sup> The new law is intended to remedy instances where property owners' application is denied for right-of-way access in locations where an access easement has been previously granted. In such scenarios, property owners will now be compensated with the fair market value for their easements.

Nevertheless, the new law does not address cases where a highway authority denies an encroachment application to property where no access exists. It is possible that such a denial could leave the property owner with no lawful access to their property. Where a government entity seeks to sustain a regulation that strips the property owner of all economic value, such a regulation requires compensation.<sup>16</sup>

A denial of access, where no alternative access exists, deprives the owner of all use of the property for whatever economic purpose. Consequently, the real property is left without any economically viable use. Although the government agency has not actually taken the property, the government has effectively denied the owner of use of and access to the property. Therefore, a denial of an encroachment application without alternative access, even if denied on health and safety concerns, is a taking and the owner should be compensated.

## Denial or removal of access should not affect condemnation valuations

Trial courts confronted with the task of determining just compensation in condemnation proceedings must consider the overall value of the property, which can be significantly affected by access rights.<sup>17</sup> When the government's use of property constitutes a fundamental change in the character of use of the property, the

government's conduct amounts to a taking requiring compensation.<sup>18</sup> The Idaho Supreme Court has stated that the impairment, destruction, or deprivation of access and the use of property is a taking and may be compensable.<sup>19</sup>

ITD and highway districts have the authority to regulate access to public ways, and these bodies regularly deny encroachment applications. In certain instances, denial of an encroachment permit can compound the injury to a property owner by reducing the usefulness and, therefore, the value of property. There is also a perverse benefit to the highway authority: by denying the encroachment permit, the highway authority has arguably reduced the value of the property and, therefore, the "just compensation" due to the property owner.

Real property owners denied encroachment permits should not be hit with this compounded consequence. In fact, a viable argument can be made that just compensation should not be lowered as a result of a denial of an encroachment permit. Idaho law dictates that real property will be valued at its "highest and best use," not its actual use, during all condemnation proceeding following a government taking of the property.<sup>20</sup> If this is the case, condemning authorities should not benefit by arguing the "highest and best use" of the property has been diminished due to the denial of an encroachment application. If said argument is viable, compensation during the subsequent condemnation proceedings could be reduced dramatically.

In sum, the same government agency that controls access permits to public roadways may later be the condemning authority seeking to acquire some or all of the roadside land to expand roads to accommodate the same growth property owners are trying to capitalize on. By removing value from the condemned property, the agency or department has, in many cases, reduced the value of the property. Arguably, the denial of an encroachment permit, if done unreasonably and with only concerns to valuation, may constitute a taking requiring compensation.<sup>21</sup> In such cases, the property owner should assert that the highest and best use of their property must be considered as if the property had been granted the encroachment permit. Without this parameter, highway authorities could potentially deny encroachment applications and later benefit by a decrease in the owner's "just compensation" in future condemnation proceedings.

## Conclusion

Real property that abuts a public right-of-way has a vested right in at least some private access to that roadway. Property owners are often unaware of this right when dealing with ITD and local highway authorities. However, the right of access is a right to be protected. If such a right is removed, either through condemnation proceedings or through other government actions, such a removal is a compensable taking.

Further, the act of denying access from a public right-of-way onto property abutting the roadway can be compensable as a component of an actual condemnation award or through a regulatory takings action. As state and local highway authorities continue to remove or deny property owners' rights to access public roadways, property owners need to be aware of their rights of access that are appurtenant to their land.

## About the Author

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## Endnotes

<sup>1</sup> A.A. Johnston v. Boise City, 87 Idaho 44, 51, 390 P.2d 291, 294 (1964); See also Killinger v. Twin Falls Highway District, 135 Idaho 322, 17 P.3d 236 (2000).

<sup>2</sup> Idaho Code § 40-310(5); Idaho Code § 604(1); Idaho Code § 50-313.

<sup>3</sup> Vickers v. Lowe, 150 Idaho 439, 443, 247 P.3d 666, 670 (2011).

<sup>4</sup> IDAPA 39.03.42.

<sup>5</sup> IDAPA 39.03.42.400.

<sup>6</sup> See, e.g. Wylie v. Idaho Transportation Board, 151 Idaho 26, 253 P.3d 700 (2011).

<sup>7</sup> IDAPA 39.03.42.400.03.c (Emphasis added).

<sup>8</sup> Access Management: Standards and Procedures for Highway Right-of-Way Encroachments, § 3.16 (March 2011) (emphasis in original).

<sup>9</sup> See, e.g. Hughes v. State, 80 Idaho 286, 295, 328 P.2d 397, 402 (1958).

<sup>10</sup> Id.

<sup>11</sup> See Killinger, 135 Idaho at 325.

<sup>12</sup> See Reisenauer v. State, 120 Idaho 36, 39, 813 P.2d 375, 378 (Ct. App. 1991)

<sup>13</sup> See, e.g. Wylie, 151 Idaho at 30.

<sup>14</sup> See Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1026 (1992).

<sup>15</sup> House Bill 583, amending Idaho Code § 40-102(1) (a), (b) (adopted April 5, 2012).

<sup>16</sup> Id. at 1027.

<sup>17</sup> See Ada County Highway Dist. v. Sharp, 135 Idaho 888, 892, 26 P.3d 1225, 1229 (Ct. App. 2001).

<sup>18</sup> Killinger, 135 Idaho at 326.

<sup>19</sup> Moon v. North Idaho Farmers Assoc., 140 Idaho 536, 542, 96 P.3d 637, 643 (2004) (dictum).

<sup>20</sup> See, e.g. Ada County Highway Dist. v. Magwire, 104 Idaho 656, 658, 662 P.2d 237, 239 (1983).

<sup>21</sup> See Killinger, 135 Idaho at 325; See also Johnston v. City of Boise, 87 Idaho 44, 52, 390 P.2d 291, 295 (1964).

# ANARCHY AND TYRANNY IN IDAHO'S HOMEOWNER ASSOCIATIONS: WHY WE NEED NEW COMMON INTEREST OWNERSHIP REGULATION

Jeremy O. Evans  
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## Introduction

Idahoans prize their freedom. Nowhere is that more clear than when private property rights conflict with the various forms of common interest property ownership known as the homeowners association (HOA), condominium, planned urban development, or town home. In these common interest communities, each landowner has entered into a covenant and undertaken equitable obligations for the maintenance of common property, be it a road, swimming pool, shared roof, or narrow patch of grass.<sup>1</sup> Conflicts between traditional property ownership and these more recent versions of common interest property ownership run along a fault line that lies directly between Idaho's rural past and its fastest-growing suburban centers, where HOAs are most common.

Covenants are usually outlined in a

document known as the declaration of covenants, conditions and restrictions, commonly called the "CC&Rs" or simply the "declaration." The owner may, by buying property subject to the declaration, agree to certain limitations on his

or her use of the property. In exchange, the owner obtains the right to require similar support and compliance from his or her neighbors.

This form of common property ownership is becoming more common in Idaho and throughout the country. While new building has slowed in the last couple of years, the trend towards some kind of common interest property ownership in new development is still clear.<sup>2</sup> In a common property ownership setting, while the landowner retains many sticks in the bundle of rights appurtenant to private property ownership, some of those rights have been exchanged or were not assumed at purchase, by virtue of restrictive covenants.<sup>3</sup> These covenants are usually enforced by an elected board of volunteers. Sometimes board conflicts with owners result in litigation.



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*Perhaps the judiciary should not be required to undertake this legal wrangling without guidance from the legislature.*

When interpreting covenants, Idaho courts hold to the maxim that as "restrictive covenants are in derogation of the common law right of a person to use land for all lawful purposes" they should be interpreted and enforced narrowly.<sup>4</sup> However, this does not always go as expected for property owners. Idaho courts have not always construed ambiguous covenant clauses against HOAs, despite this overarching rule. Even though the HOA is the successor-in-interest, in many respects, to the declarant and could therefore be considered the "drafter" of the covenants, many covenant clauses are found to not be ambiguous.<sup>5</sup> Furthermore, to the extent that a covenant restriction is found to exist, Idaho courts have strictly enforced the language of the restrictive covenants.<sup>6</sup> The resulting consequences for individual property owners can be dramatic.

A common law approach based on a narrow reading of covenants requires Idaho's courts to dig deeply into each individual set of covenants presented and decide each case by application of the rules of contract construction to the nuances of the particular declaration language.<sup>7</sup> This seems somewhat nonsensical in a setting where homeowners accept covenant language only on a take-it-or-leave-it basis. As a result, Idaho has a relatively large body of case law interpreting covenants without any legislative guidance on common property ownership.<sup>8</sup> But many HOA legal questions remain unsettled, and perhaps the judiciary should not be required to undertake this legal wrangling without guidance from the legislature.

## Current HOA law and the *Beaver Springs* opinion

An example of Idaho's common-law approach to restrictive covenants was on display this March when the Idaho Supreme Court parsed the governing documents of the Beaver Springs Owners

Association in Ketchum.<sup>9</sup> The *Weisel v. Beaver Springs* opinion affirms many of the principles laid down over the years by Idaho courts regarding the interpretation of covenants, and illustrates some of the latent problems in Idaho's common law approach. Both sides were represented by counsel, and the arguments well developed for both parties.<sup>10</sup>

The facts in the *Beaver Springs* case are not unusual. In 1983, Mr. Weisel, the owner of two adjacent lots in the upscale Beaver Springs development, sought to build a single building on both lots, and to have the two lots thereafter treated as a single lot by the association for setback, voting, and assessment purposes. He entered into an agreement with the association board to that effect. However, after gaining the association's agreement and approval of his building plans, he did not build in what had previously been the setback zone dividing the two lots, and instead built on just one lot.

Decades later, Weisel sought to unwind his 1983 agreement with the association and subdivide his two lots so he could develop the empty lot. In the intervening decades, despite the terms of the agreement, Weisel had paid assessments for each lot and exercised a vote for each lot. Also during the prior years, the association had not uniformly enforced the setback requirements against other owners. No doubt the association's directors elected in the intervening years had lost track of the agreement and been uninformed of its terms. However, when Weisel applied for building approval for his second lot, the agreement resurfaced.

The association refused to grant Weisel permission to build, holding to the terms of the 1983 agreement and insisting that he stop development. Furthermore, the association began holding Weisel to the single vote he had stipulated to in 1983.

In 2009, Weisel brought a legal challenge to these board decisions, and sought a refund of assessments he had paid on his second lot over the years.

After awarding Weisel his overpaid assessments, the district court granted summary judgment for the association on Weisel's remaining challenges to the 1983 agreement. The Idaho Supreme Court upheld the district court's decision on appeal. Consistent with prior Idaho cases, both courts looked specifically and in detail at the language of the 1983 agreement as well as at the particular language of Beaver Springs' declaration.<sup>11</sup>

On appeal, Weisel asserted that the 1983 agreement failed for lack of consideration. Weisel argued that in 1983 the association lacked authority to deny his development plans because his plans ultimately did not violate the setback and otherwise conformed to the covenants. As such, Weisel argued that the association's approval did not constitute consideration. The Court disagreed, holding that, due to the explicit language of the declaration, the association had "complete discretion to approve or disapprove construction."<sup>12</sup> In other words, the association's grant of its discretionary approval was sufficient consideration.

In a contract setting, it would be unusual for a court to honor a clause giving one party unlimited discretion to approve or deny the other party's activities, especially when the form "contract" at issue shares many characteristics of a contract of adhesion.<sup>13</sup> However, in the context of restrictive covenants, this is not unusual, and Idaho courts have routinely upheld the discretion and authority of volunteer boards granted in a declaration. In *Berezowski v. Schuman*, for instance, the decision of an association architectural control committee (or "ACC") was challenged by the owners.<sup>14</sup> Not only did the Court uphold the ACC's authority and discretion to make architectural determinations, the Court held that the internal ACC appeal process outlined in the community's declaration was mandatory, so that "[h]aving failed to avail themselves to that remedy, [the owners] are precluded from challenging the ACC's decision now."<sup>15</sup> The Court effectively deferred to the discretion of these elected neighbors in the same way it would defer to a governmental administrative agency.<sup>16</sup>

Likewise, in an unpublished 2009 opinion, District Court Judge Mitchell read existing Idaho case law to mean that, in cases where violations of a restrictive covenant are shown, injunctive relief may issue merely on a showing of a violated

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covenant.<sup>17</sup> The law requires no showing of "irreparable harm" as is usually the case when injunctive relief is sought.<sup>18</sup> This is a soundly reasoned rule and certainly facilitates the enforcement of covenants; however, the result of this abbreviated review is again to defer to the authority and discretion of an elected board of volunteers.

A second argument raised by Weisel on appeal in *Beaver Springs* shines the spotlight on a legal theory that the Idaho Supreme Court has considered as a limit to the power of restrictive covenants in Idaho. Weisel raised a theory articulated in *Ada County Highway District v. Magwire*<sup>19</sup>. In *Magwire*, the Idaho Supreme Court stated in *dicta* that "restrictive covenants can only be declared unenforceable because of a change within the restricted area itself."<sup>20</sup> However, it does not appear that Court has ever applied this doctrine to invalidate a restrictive covenant in Idaho.

Weisel argued that the Court's statement in *Magwire* was an implicit adoption of the "change of neighborhood" test, and that on those grounds the Court should invalidate the 1983 agreement (but not the declaration).<sup>21</sup> Weisel's attorney argued that the Beaver Springs neighborhood had changed dramatically since 1983, from a neighborhood where backyard chicken coops were anticipated, to one containing only large recreational cabins, guesthouses, and swimming pools. The Court did not outright reject Weisel's claim that this doctrine has been adopted in Idaho, but rather found the doctrine inapplicable to the 1983 agreement as it is "not part of a neighborhood development scheme" and it affects "only a relatively small number of lots."<sup>22</sup> In other words, in the future the Court may choose to apply the change of neighborhood test to invalidate restrictive covenants, but it will not apply the doctrine to invalidate an agreement between one owner and an association board affecting only one or two lots.

In a decision that will come as a relief to volunteer association boards everywhere, the Idaho Supreme Court next held

that Beaver Springs' inconsistency over the years in enforcing the terms of the 1983 agreement (and the covenants) did not estop the association from finally, over 20 years after the agreement was made, rescinding Mr. Weisel's second vote. The Court came to this conclusion based on the statement of the declaration that a single lot gets a single vote.<sup>23</sup> The important principle reinforced by this ruling is simply that mistakes made by a board in enforcing the covenants or in undertaking the business of the association will not be read to overturn the clear provisions of the declaration.<sup>24</sup>

Finally, the Court awarded attorney fees to the association, relying solely on Beaver Springs' declaration for its authority. The declaration provides for fees to the successful party "[i]n any action to enforce any ... covenant, restriction or condition." However, the case on appeal was an action that Weisel himself brought to void the 1983 agreement, and in which he had already successfully collected past assessments. It was not what most would consider an enforcement action; nor was it based solely on the declaration. So it appears that the Court interprets this fairly common declaration clause broadly to grant fees to the prevailing party in litigation between associations and owners.

### **The need for uniform common interest property ownership law in Idaho**

The *Beaver Springs* decision only illustrates a few of the problems that may arise from Idaho's approach to common interest property ownership law. The real problem is that most disputes are not litigated. Those that are, seem to lead to draconian results that do not encourage compromise by association boards.

Idaho homeowners need the legislature to set certain minimum standards for all forms of common property ownership. On the one hand, residents purchase property in HOAs or condominiums with an expectation of ground rules, uniformly

maintained neighborhoods, and accompanying assessments. When these expectations are not met, potential liabilities arise for the associations. Out-of-state transplants and investors are bemused and puzzled when they find that the state law ground rules they expect to be in place simply do not exist in the “wild west” of Idaho HOA law. As a result, they are often willing to litigate. On the other hand, in a few cases a small clique of directors may selectively ignore Idaho corporate law and vague common law principles to go too far in the other direction, creating their own police state of assessments and fines with little accountability or control. Neither problem is easily challenged without resorting to the courts.

Idaho could spell out much more clearly some general principles of fair play and transparency in all common interest property ownership regimes. For instance, most associations are currently non-profit corporations subject to the Idaho Nonprofit Corporation Act.<sup>25</sup> This is a start. However, the Act does not anticipate title-based assessments, requires consent for admission, and also allows a member to voluntarily leave the corporation.<sup>26</sup> It is simply inapplicable in many ways to ownership-based membership. Solely clarifying situations when the Non-profit Corporation Act does not apply to an HOA or condo association would be a worthwhile effort.

Moreover, an HOA and a condominium, both based on real property ownership, with elected homeowner boards, fines, and common maintenance expenses, share much more in common than an association shares with other types of nonprofit corporations. Despite this, two neighboring associations may have completely different ground rules if one incorporated as a limited liability partnership, or failed to incorporate at all, and the other followed standard procedure to set up as a non-profit corporation. The federal mortgage financing regime has already imposed some standardization on Idaho’s condominium associations by tightening the requirements for condominium associations to receive approval for federally-backed loans.<sup>27</sup> However, this only adds to the unnecessary distinctions in Idaho between the rules governing condominiums and those governing other forms of common interest property ownership. Certain basic “rules of the road” could easily be outlined in statute and provide basic guidance and assurances to all types of common-interest property owners, both condominiums and HOAs of all stripes.

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There are still many important questions that have not been resolved by Idaho’s judiciary. For instance, Idaho courts have not yet defined the rights of minority property homeowners to not have the nature and character of their property rights fundamentally altered by amendments to a declaration of restrictive covenants. As mentioned earlier, Idaho courts have not spelled out the standards a declaration-imposed dispute-resolution process or enforcement process must follow before an Idaho court will defer to it and require an owner to exhaust all association remedies before litigating. There is no case law outlining transparency requirements for associations where association documents may differ from corporate documentation.

This is by no means an area where other states have been shy to impose their own laws on local associations. Of Idaho’s six neighboring states, only Montana and Wyoming<sup>28</sup> lack comprehensive association legislation. Montana and Wyoming have bare-bones condominium legislation comparable to Idaho’s Condominium Property Act.<sup>29</sup> On the other hand, Washington<sup>30</sup> has a comprehensive battery of statutes addressing this topic. Oregon’s condominiums and associations are also heavily regulated,<sup>31</sup> as are Nevada’s.<sup>32</sup>

There is no uniform data for accurately comparing the number of associations in each state, but it appears that the number of associations in Idaho is much closer<sup>33</sup> to the number in Utah<sup>34</sup> or Oregon<sup>35</sup> or even to Nevada<sup>36</sup> than to the handful that exist in lightly-regulated Montana and Wyoming. For this reason, the recent history of common interest property ownership legislation in Utah is instructive.

Utah has had a condominium act in place since 1968.<sup>37</sup> In 2004, Utah also adopted a Community Association Act that addressed non-condominium HOAs.<sup>38</sup> In recent years, a legislative action committee in Utah has attempted to introduce uniform common interest ownership laws that would unify condominium and hom-

owner association law. This has resulted in the adoption of a number of measures that greatly enhance Utah’s Community Association Act, although no uniform act has been adopted to date.

During these same years, a number of bills have been introduced in the Idaho legislature that are comparable to Utah’s early attempts at common interest property ownership law, or are at least a step in that direction.<sup>39</sup> However, there has been no central driving force to these efforts, and for the most part even minor bills have not passed.<sup>40</sup> According to parties involved in those efforts, there is a fundamental disagreement about whether Idaho should quickly adopt small laws that address the largest common interest ownership problems, or whether Idaho should take advantage of its clean slate and adopt some version of a comprehensive law, modeled perhaps on the Uniform Common Interest Ownership Act (UCIOA).<sup>41</sup> This disagreement is compounded by the usual conflicting interests of various stakeholders. Contractors, Realtors, associations and homeowners all have a valid interest in legislation of this type.

In this lawyer’s opinion, if Idaho took a broad approach and adopted a version of UCIOA to fit Idaho’s needs, all stakeholders would have more room to negotiate and compromise. The stakeholders with organized lobbies could finalize rules they long have been pushing for, and less-organized homeowners could be protected from injustice. Quick fixes have not met with success in Idaho. Furthermore, multiple rounds of short-term fixes may lead to further confusion, conflicting provisions, and ultimately more litigation. A bill can and should be crafted that helps all of Idaho’s stakeholders and sets clear and uniform guidelines for all common interest ownership associations.<sup>42</sup>

#### **About the Author**

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stitute, and represents many homeowner and condo associations. Jeremy has practiced in Boise for the last five years after practicing in Washington, DC, and Salt Lake City. He loves skiing and camping with his family. Jeremy is a graduate of Harvard Law School and Brigham Young University.

## Endnotes

<sup>1</sup> For more information about Idaho HOA law, consult the May 2010 *ADVOCATE* for a number of good articles, in particular, a superb analysis of I.C. § 45-810 and association assessment collections and lien powers by Jill Mazirou Eshman.

<sup>2</sup> In 2008, Senate Bill 1399 attempted to regulate homeowner association meetings in Idaho. It contained an estimate that “nearly 2,500 homeowners’ associations” had been created in Idaho and that “[s]ome 40 states have enacted or are considering legislation to clarify the relationship between the HOA and its members.” SB1399 *Statement of Purpose*, [www.legislature.idaho.gov/legislation/2008/S1399.html#billtext](http://www.legislature.idaho.gov/legislation/2008/S1399.html#billtext) (accessed March 6, 2012). There is no detailed Idaho-specific research published, however, a survey of homeowner association registrations at the Idaho Secretary of State’s Office shows that in the 1990s, an average of about 90 new HOAs registered each year. After 2000, that number mushroomed to nearly 300 per year in the boom years of 2004, 2005 and 2006. In recent years, registrations have again dropped, consistent with decreasing construction and development. Nationally, Community Associations Institute, an HOA industry non-profit, estimates that from 2000 to 2011, association-governed communities in the United States grew from 222,500 to 314,200, with the number of total association residents growing from 45.2 million to 62.3 million during the same period. [www.caionline.org/info/research/Pages/default.aspx](http://www.caionline.org/info/research/Pages/default.aspx) (accessed March 6, 2012).

<sup>3</sup> *Meyer v. first National Bank of Coeur D’alene*, 77 P. 334, 10 Idaho 175 (1904) (appellants cite POMEROY’S EQUITY JURISPRUDENCE for the proposition that “restrictive covenants in deeds, leases and agreements limiting the use of land . . . will be specifically enforced in equity. . . .”); see also *Payette Lakes Protective Ass’n v. Lake Reservoir Co.*, 68 Idaho 111, 121, 189 P.2d 1009, 1014 (1948) (holding that restrictive contracts limiting the use of property are enforceable).

<sup>4</sup> *Brown v. Perkins*, 129 Idaho 189, 923 P.2d 434 (1996); *Smith v. Shinn*, 82 Idaho 141, 147, 350 P.2d 348, 351, (1960) (citing with approval 14 AM. JUR. 619 that “such contracts are strictly construed in favor of the free use of property.”)

<sup>5</sup> Compare *Poe v. Little Blacktail Ranch Park Home Owners’ Association, Inc.*, Idaho Court App. 2008 (unpub’d Op. No. 433) (upholding the lower court’s determination that the association’s interpretation of an admittedly ambiguous declaration clause was correct); with *Investors Ltd. Of Sun Valley v. Sun Mountain Condos., Phase I, Inc. Homeowners Assn.*, 106 Idaho 855, 683 P.2d 891 (Ct. App. 1984) (finding that the particular language of the declaration, construed strictly against declarant as drafter, meant that declarant’s successor-in-interest had no voting rights for unimproved lot).

<sup>6</sup> *Thomas Weisel v. Beaver Springs Owners Ass’n, Inc.*, 2012 Opinion No. 37, (March 1, 2012) (finding HOA has unlimited authority to approve or deny

***<sup>16</sup> Unlike well-developed administrative law principles, Idaho HOA case law still lacks a clear explanation that the courts will defer to a covenant-based association only when the association follows a process that allows adequate due process rights to all parties.***

building permits); *Island Woods Homeowners Ass’n v. McGimpsey*, 2010 Unpub’d Op. No. 392, (March 24, 2010) (finding declaration requirement to build within 30 days of occupancy was not modified or excused by a construction and sale period exception); *Thompson v. Ebbert*, 144 Idaho 315, 160 P.3d 754 (2007) (holding that a lease entered into in violation of a restrictive covenant is void *ab initio*).

<sup>7</sup> *Weisel* (2012) (holding that “when a court interprets a restrictive covenant, it is to apply generally the same rules of construction as are applied to any contract or covenant”).

<sup>8</sup> See, e.g. *Island Woods Homeowners Ass’n v. McGimpsey*, 2010 Unpub’d Op. No. 392, (March 24, 2010) (affirming declaration’s validity and summarizing law); *Jacklin Land Co. v. Blue Dog RV, Inc.*, 2009 WL 3287578 (Idaho Dist. Sept. 14, 2009) (finding injunctive relief is available “if breach of a restrictive covenant is shown.”); *Birdwood Subdiv. Homeowners’ Assn. Inc. v. Bulotti Construction, Inc.*, 145 Idaho 17, 175 P.3d 179 (2007) (holding that a declaration is required to prevent further subdivision); *West Wood Investments, Inc. v. Acord*, 141 Idaho 75, 106 P.3d 401 (2005) (holding that an association can enforce equitable servitudes as against original promisor); *Berezowski v. Schuman*, 141 Idaho 532, 112 P.3d 820 (2005) (upholding an association’s enforcement decision); *Shawver v. Huckleberry Ests. LLC*, 140 Idaho 354, 93 P.3d 685 (2004) (finding that a declaration may be amended following purchase of the land, if the declaration provides for amendment); *Ponderosa Home Site Lot Owners v. Garfield Bay Resort, Inc.*, 139 Idaho 699, 85 P.3d 675 (2004) (The association, and other owners, have an equitable servitude against the other condominium units); *Sun Valley Land & Minerals, Inc. v. Hawkes*, 138 Idaho 543, 66 P.3d 798 (2003) (holding that a formal association was required to give owners rights to common areas granted to the association); *D & M Country Ests. Homeowners Assn. v. Romriell*, 138 Idaho 160, 59 P.3d 965 (2002) (holding that I.C. §§ 67-6530 and 6531 do not nullify a declaration’s restriction of elderly or group homes); and *Nordstrom v. Guindon*, 135 Idaho 343, 17 P.3d 287 (2000) (holding that in absence of specific declaration language to the contrary, each owner gets one association vote, regardless of the number of lots owned).

<sup>9</sup> *Thomas Weisel v. Beaver Springs Owners Ass’n, Inc.*, 2012 Opinion No. 37, (March 1, 2012). Plaintiff’s counsel in the case pointed out that Weisel won his claims for assessments in the lower court, but that his arguments about the association’s inconsistent enforcement of the setback rule over the years had little impact. Telephone Interview with Fritz Haemmerle, March 6, 2012.

<sup>10</sup> Lawson Laski Clark & Pogue, PLLC, of Ketchum represented Beaver Springs, and Haemmerle & Haemmerle, P.L.L.C. of Hailey represented Weisel before the Supreme Court.

<sup>11</sup> See, e.g. *Investors Ltd. Of Sun Valley v. Sun Mountain Condos., Phase I, Inc. Homeowners Assn.*, 106 Idaho 855, 683 P.2d 891 (Ct. App. 1984) (finding that the particular language of the Declaration, construed strictly against declarant as drafter, meant that declarant’s successor-in-interest had no voting rights for unimproved lot).

<sup>12</sup> *Weisel* (2012).

<sup>13</sup> See, e.g. *Lovey v. Regence BlueShield of Idaho*, 139 Idaho 37, 42, 72 P.3d 877, 882 (2003) (holding that “[w]hile a court of equity will not relieve a party from a bargain merely because of hardship, yet he [or she] may claim the interposition of the court if an unconscionable advantage has been taken of his or her necessity or weakness.”) (internal citations omitted).

<sup>14</sup> *Berezowski v. Schuman*, 141 Idaho 532, 112 P.3d 820 (2005).

<sup>15</sup> *Id.* at 535, 112 P.3d at 823.

<sup>16</sup> *Service Employees Int’l Union, Local 6, et al v. Idaho Dept. of Health & Welfare*, 106 Idaho 756, 683 P.2d 404, 408 (1984) (upholding motion to dismiss under doctrine of primary jurisdiction, and listing cases); *State v. Concrete Processors, Inc.*, 85 Idaho 277, 379 P.2d 89 (1963) (outlining when judiciary will require a party to exhaust administrative remedies before turning to the courts). Unlike well-developed administrative law principles, Idaho HOA case law still lacks a clear explanation that the courts will defer to a covenant-based association only when the association follows a process that allows adequate due process rights to all parties.

<sup>17</sup> *Jacklin Land Co. v. Blue Dog RV, Inc.*, 2009 WL 3287578 (Idaho Dist. Sept. 14, 2009).

<sup>18</sup> *Id.* at \*8 (denying challenge based on plain language of I.R.C.P. 65(e)).

<sup>19</sup> *Ada Co. Hwy. Dist. v. Magwire*, 104 Idaho 656, 662 P.2d 237 (1983)

<sup>20</sup> *Id.* at 659, 662 P.2d at 240 (citing nonbinding authorities, and concluding that “[t]he fact that a particular piece of property would increase in value if used for a different purpose than that allowed in the covenant is not enough to invalidate the covenant.”)

<sup>21</sup> *Weisel v. Beaver Springs* (2012).

<sup>22</sup> *Id.*

<sup>23</sup> The language of the declaration is not as clearly “unambiguous” as the Idaho Supreme Court’s decision lets on. The opinion makes no explanation of the distinction between the term “Lot” that is defined in the declaration and the term “parcel” that is not defined, but that is used extensively in portions of the declaration relied on by the Court. In the Court’s

analysis, the statement “the combined parcels shall be deemed one parcel...” is read to mean the “[combined] Lots become one Lot.” As declarations often contain gaps in formal language like this that are seized upon by one party or another, it is encouraging that the Court is inclined to use common sense to find what the “plain language” of a declaration was intended to mean. *But see Brown v. Perkins*, 129 Idaho 189, 923 P.2d 434 (1996)(holding that restrictive covenants should be read to best permit the free alienation of property).

<sup>24</sup> An interesting contrast is found here to the situation the Idaho Supreme Court faced in *Leppaluoto v. Warm Springs Hollow Homeowners Assn.*, 114 Idaho 3, 752 P.2d 605 (1988). In Warm Springs Hollow, the declaration clearly states that each owner must be assessed the same amount per lot. However, the condo association found itself in litigation with a bank over past assessments owed on foreclosed units. The board decided to accept a smaller assessment amount from the bank to settle the litigation. In a situation not uncommon for associations, another owner then challenged the board’s decision in court, demanding a similar discount of past assessments. The Court found that the elected board of the condominium association could exercise its “honest business judgment” to settle pending litigation. Justice Bistline’s eye-opening dissent is also worth reading.

<sup>25</sup> I.C. 30-3-1 *et seq.*

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

<sup>27</sup> *See, e.g.* <https://entp.hud.gov/idapp/html/condlook.cfm> (accessed March 12, 2012) for view of condominium pre-approval in action.

<sup>28</sup> Keyword searches of Wyoming corporate records for “owners association” located 877 active or dissolved entities. <https://wyobiz.wy.gov> (accessed March 12, 2012).

<sup>29</sup> I.C. 55-1501 *et seq.*

<sup>30</sup> Washington does not track homeowners associations at a state level. Real estate professionals have publically estimated Washington to have close to 12,000 associations. In one rough measure, a key word search of the Washington Secretary of States’ listing of corporations finds 9,953 that include the words “owners association.” [http://www.sos.wa.gov/corps/corps\\_search.aspx](http://www.sos.wa.gov/corps/corps_search.aspx) (accessed April 5, 2012).

<sup>31</sup> *See, e.g.* Oregon’s Planned Community Development Act, ORS 94.550-94.758; and Condominium Act, ORS 100.

<sup>32</sup> Nevada has adopted the Uniform Common Ownership Interest Act as NRS Ch. 116 and a Condominium Act as NRS Ch. 117.

<sup>33</sup> Idaho’s associations were estimated to number about 2,500 in 2008. *See n. 2, supra.* A 2012 key

***<sup>39</sup> In 2008, Senator Andreason and Representative Killen co-sponsored a measure with Senator Burkett that was intended to add to existing provisions governing HOAs and HOA board meetings. S1399aa(2008). None of these bills were adopted.***

word search for “owners association” on the Idaho Secretary of State business entity site resulted in 3,423 hits for active and inactive entities. <http://www.accessidaho.org/public/sos/corp/search.html?ScriptForm.startstep=crit> (accessed April 5, 2012).

<sup>34</sup> CAI, the nonprofit Community Association Institute, has compiled county information in its Utah chapter and as of 2010 believed there were some 2,550 active associations in Utah. A key word search of the Utah Department of Commerce’s Business Entity for active or inactive entities registered with the phrase “owners association” in their title resulted in 3,587 hits. [www.utah.gov/serv/bes](http://www.utah.gov/serv/bes) (accessed April 5, 2012).

<sup>35</sup> Oregon’s Business Division of the Secretary of State includes approximately 3,650 homeowners associations in its database, according to a 2010 search. Unfortunately, Oregon’s online entity search capacity is limited to 1,000 results, so this rough methodology is even less reliable in Oregon than in other states.

<sup>36</sup> Nevada is unique in this group of states. No doubt the concentration of development in only one or two areas in Nevada has resulted in a higher level of regulation than would be expected in a state of Nevada’s size. For instance, Nevada requires each HOA to register with the Nevada state Ombudsman pursuant to NRS 116.31034(9). The December 2011 Executive Summary of data collected by Nevada’s Department of Business and Industry Real Estate Division can be seen at [http://red.state.nv.us/cic/stats/cic\\_stats\\_fy2012.htm](http://red.state.nv.us/cic/stats/cic_stats_fy2012.htm) (last accessed March 7, 2012), and indicates that there were exactly 2,978 active associations in the State of Nevada as of December, 2011.

<sup>37</sup> U.C.A. §§ 57-8-1, *et seq.*

<sup>38</sup> U.C.A. §§ 57-08a, *et seq.*

<sup>39</sup> In 2004 and 2005, bills were introduced by Representative Jaquet to facilitate the fair enforcement of covenants and collection of assessments. H0137 (2005) and H0758(2004). In supporting this legislation, Representative Jaquet stated that 20% of Idaho’s residents now live in housing regulated by a homeowner’s association. Minutes, House Business Committee, February 7, 2005. In 2006, Representative Jaquet proposed a law facilitating the establishment of HOA capital reserve funds for long-term capital projects. H0642(2006). In 2008, Senator Andreason and Representative Killen co-sponsored a measure with Senator Burkett that was intended to add to existing provisions governing HOAs and HOA board meetings. S1399aa(2008). None of these bills were adopted.

<sup>40</sup> In 2010, Senator Killen and Representative Corder successfully amended I.C. § 45-810, the homeowner association lien statute, to standardize HOA lien mailing times with deadlines for other lien holders.

<sup>41</sup> When asked to explain the failure of Idaho to adopt past proposed HOA laws, one legislator involved in the effort replied simply: “Most legislators shy away from regulation.”

<sup>42</sup> For instance, association boards could receive some assistance enforcing covenants and collecting dues in exchange for a few guarantees that boards give owners adequate due process rights while exercising their duties. Real estate professionals could be given more information to pass on to their clients before purchasing in an association that could insulate them from claims of misrepresentation. Developers, rather than litigating about the rules after the fact and hiring attorneys to create declarations from scratch, could be given clear guidelines about how to set up associations in Idaho.

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# HOW HOAs CAN CONTROL WHERE CONVICTED SEX OFFENDERS LIVE WITHIN ITS BOUNDARIES

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“Sex offenders are a serious threat in this Nation.”<sup>1</sup> “When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault.”<sup>2</sup> Through the passage of federal laws, Congress encouraged states to adopt comprehensive and uniform sex offender registration laws.<sup>3</sup> In 2006, Congress enacted the Sex Offender Registration and Notification Act (“SORNA”).<sup>4</sup> SORNA requires sex offenders to register their whereabouts within three business days after their release from imprisonment, and to keep their registrations current by updating their registrations within three business days of moving to a new residence, gaining new employment, or entering a new school.<sup>5</sup>

By 1996, every state and the District of Columbia had enacted a sex offender registration law.<sup>6</sup> Idaho has two such registration laws.<sup>7</sup> In Idaho, “an offender shall keep the registration current for the full registration period[, which] is for life,” barring a successful terminating petition.<sup>8</sup> Both federal and state enactments in this area confirm the public policy that convicted sex offender registration requirements are both necessary and valid for the public safety especially around schools, in parks, and in neighborhoods.

On the other hand, even though there is a lifetime registration requirement, in most cases convicted sex offenders remain citizens and may, 10 years following either release from prison or the end of a probationary or parole period, file a petition with their local district court to be released from the registration requirement.<sup>9</sup> A right to relocate one’s residence is protected by the Fourteenth Amendment of the U.S. Constitution, because citizens have a right to travel in the United States<sup>10</sup> and have the freedom to choose their own domicile as a part of that right.<sup>11</sup> If the



Arthur B. Macomber

government or arguably even a private actor such as a HOA wants to place limits on that freedom, it must have a compelling justification.<sup>12</sup> This author found no case law on point, but private homeowners’ association rules impacting the freedom to choose one’s residence should be carefully weighed and a compelling interest parallel to a governmental actor’s should be considered, both to preserve citizens’ freedom and to avoid unnecessary legal expenditures.

## Application to homeowner associations

In Idaho, it is a misdemeanor for a convicted sex offender to “[r]eside within five hundred (500) feet of the property on which a school is located” unless the person’s residence was established prior to July 1, 2006.<sup>13</sup> This law applies even when a residence is located within a homeowner association governed geographic area. A “school district [may adopt] more stringent safety and security requirements.”<sup>14</sup> There is no similar subsection regarding a registered sex offender’s residence in relationship to a park or other location where children may be at play. However, these statutory provisions evidence that distance requirements regarding convicted sex offender residence locations are proper and lawful.

Similar to the Idaho laws, and as a condition of probation, the federal criminal code allows a court to require a sex offender to “reside in a specified place or area, or refrain from residing in a specified place or area.”<sup>15</sup> Also, that code allows as a probationary condition that the offender “refrain from frequenting specified kinds of places or from associating unnecessarily with specified persons.”<sup>16</sup>

Thus, there are both federal and Idaho sex offender residence and registration restrictions, regardless of whether the convicted offender resides in a homeowners’ association.

*A group of homeowners may contractually bind themselves to greater restrictions than may apply in the law.<sup>29</sup>*

## Private association restrictions

In Idaho, homeowners’ covenants should be of record and a buyer, thus, takes a conveyance with constructive notice of them.<sup>17</sup> A declaration of covenants, conditions, and restrictions (CC&Rs) is construed as a contract in Idaho.<sup>18</sup> The objective in interpreting contracts is to ascertain and give effect to the intent of the parties.<sup>19</sup> The intent of the parties should, if possible, be ascertained from the language of the documents.<sup>20</sup> If a covenant is unambiguous, the court must apply its plain meaning as a matter of law.<sup>21</sup> Restrictions that are found to be clearly expressed in the restrictive covenants can be applied *against* the free use of land, but restrictions not clearly expressed therein will be resolved by Idaho courts in *favor* of the free use of land.<sup>22</sup>

Zoning has been compared to the law of equitable servitudes, which are individual use restrictions that can be organized into CC&Rs.<sup>23</sup> “Zoning [by public entities is] a legitimate exercise of police power.”<sup>24</sup> Private CC&Rs may restrict a property owner’s right to rezone land, if the express restriction is unambiguous.<sup>25</sup> Since zoning ordinances and CC&Rs are both restrictions on the free use of land, interpretations of ambiguous CC&Rs may be assisted by local zoning rules or definitions.<sup>26</sup>

One commentator noted “[m]any land use activities now constrained by zoning ordinances raise only localized threats that would be better handled through private nuisance remedies supplemented by covenants and good manners.”<sup>27</sup> In Idaho, the still optional rule is that private land use controls using covenants may supplement government zoning.<sup>28</sup>

Public zoning and subdivision ordinances set minimum land use standards. A group of homeowners may contractually bind themselves to greater restrictions than may apply in the law.<sup>29</sup>

## HOA restrictions on sex offender residence locations

There is no known Idaho case law interpreting a private governing association's CC&Rs, Bylaws, or Rules and Regulations on the validity of sex offender residence location restrictions. A homeowners association may be a collection of single family detached residences or a condominium association. Usually, condominiums are located within a single building, like apartments, and so the governing board should consider whether sex offender residence restrictions will be reasonable or practical in condominiums. Conversely, in single family detached housing neighborhoods, restrictions may be practical and enforceable. Further, due to the health and safety aspects of such restrictions, a seniors-only community or one with a large number of young families may find such restrictions very desirable as a component of CC&Rs designed to elevate and maintain property values. A governing board should consider several components to such restrictions.

**Practice** Components of an HOA's rule  
 **Tip** should include a policy justification, a list of applicable definitions that blend with definitions used in the other governing documents such as landlord-tenant provisions, distance requirements, and notice and approval processing requirements. Generally, as in all such enactments, the new rules must work with the old rules.

Minimum distance requirements should be considered, because the law recognizes that when several convicted sex offenders live together or near places where children are found, such as schools, restrictions are proper.<sup>30</sup> Idaho cities and counties may restrict sex offender group residence location by mandating "permissible distances between such houses."<sup>31</sup> These distance restrictions should be arranged such that a grid is created, "to minimize [sex] offender clustering within a community."<sup>32</sup>

**Practice** Whether an HOA is responsible for facilities maintenance  
 **Tip** or not, identification of either member or publicly used facilities within HOA territory should be mapped, including school bus stop locations, parks, clubhouses, pools, exercise areas, etc., because high use areas usually mean higher HOA expenditures for maintenance of HOA-adjacent areas.

Such a planned grid is used in some Idaho cities for specifying the location of

*Local private covenants may be preferred over zoning rules, because a homeowners association can accomplish this task with nothing but a good map.*

sex-oriented businesses, and there is no reason such zoned use criteria cannot be contractually used in privately governed associations.<sup>33</sup> Governing boards should include how a distance restriction is to be calculated, whether it be air miles (as the crow flies), or other measure, so that owners and prospective tenants may do their own calculations before applying to a board for occupancy.

**Practice** Distance restrictions should be  
 **Tip** calculated and applied equally, whether the convicted sex offender lives within or outside the development. The fact of a convicted sex offender living one block outside the subdivision will impact homes in the subdivision, if the planning grid radius is more than one block long.

Associations contemplating such restrictions should also consider homeowners and renters. Usually, CC&Rs require landlords to give prospective tenants a copy of the governing documents, and tenants are required to adhere to them. In every case, the potential landlord subject to such restrictions would be responsible for determining whether prospective tenants could be allowed at a particular residence location. The association restrictions need to either allow for a time delay during implementation for existing owners and leasehold tenants with vested rights to move, or allow temporary waivers where hardship may result. Also, tenants need to know whether and where they may move into an association's territory, so the governing board should track sex offender residential locations within its area of governance, and be prepared to share the most current knowledge it has related to convicted sex offender residential locations, or direct owners to the Idaho Sex Offender Registration (ISOR) website.<sup>34</sup>

**Practice** HOA legal counsel should  
 **Tip** recommend identification of all non-owner occupied hous-

ing and make sure the HOA has copies of leases that mandate tenants abide by HOA governing documents. They should additionally recommend a newsletter or website to keep landlords apprised of HOA requirements regarding leased properties, including any required process and time frames related to restrictions on convicted sex offender residence locations. Good planning and communication can help avoid or mitigate most complaints about HOA policies.

### Potential issues

The criteria cited above require an active association governing board, because "not only are offenders required to maintain an awareness of what housing stock is available outside the [restricted zone], they must also be cognizant of where other offenders have established a permanent residence in an effort to adhere to the hybrid restrictions that may be in place . . . [thus,] without advanced analytical and modeling approaches combined with detailed spatial information, the contingencies of these hybrid strategies are difficult to identify, especially for offenders, landlords, law enforcement agencies, and correction officials."<sup>35</sup> This is a good example of where local private covenants may be preferred over zoning rules, because a homeowners association can accomplish this task with nothing but a good map.

An active governing board may have little trouble with these criteria. However, even with accurate records, a private association board may draw unnecessary lawsuits from tenants denied housing, or from the landlord or owner who may not live in their own home, even where civil liability is barred based on public registration records, (see below). These claims will likely fail if the board made a good faith effort to create the rules and if the board has a solid process to determine

whether restrictions should apply to a given tenant or owner. Maintaining accurate records is possible, because Idaho law mandates information be available to the public on the internet, such as the offender's date of birth, the address of each residence at which the offender resides or will reside, or information about where the offender has his or her home or habitually lives; and the address of any place where the offender is a student or will be a student.<sup>36</sup> Therefore, it is simply the governing board covenant or rule and the board implementation process that may be at issue. Mirroring due process requirements of public entities should allay tenant and owner fears, while being legally defensible as reasonable regulations.

**Practice** Even though a HOA is not subject to Idaho's open meetings law,<sup>37</sup> maintaining strong communication for notice of meetings, changes in rules, and community events helps bind the common interests of the community together. This is supportive of activities such as Neighborhood Watch, Scouting, local church events, July Fourth picnics, or community litter abatement events. Weaving the HOA into the community fabric assists in rules compliance.

### Immunity from civil liability

Idaho Code provides that no "person," including non-profit homeowner associations, has "a duty to collect information [regarding registered sexual offenders], . . . a duty to inquire, investigate or disclose any information . . . an affirmative duty to provide public access to information, . . . [and cannot] be held liable for any failure to disclose any information . . . to any other person or entity."<sup>38</sup> Further, a homeowners governing board "acting without malice or criminal intent, [that] obtains or disseminates information under this chapter shall be immune from civil liability for any damages claimed as a result of such disclosures made or received."<sup>39</sup> The requirement in Idaho is that a governing board of a non-profit association act "in good faith [and] with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and [ ] in a manner the director reasonably believes to be in the best interests of the corporation."<sup>40</sup> Thus, if board members act reasonably and in good faith, sex offender residence location restrictions can join the other CC&Rs to raise and maintain property values.

**Practice** HOA board members and their agents or contractors should avoid disclosing or discussing

*Such restrictions may be more narrowly tailored and restrictive than a public entity's.*

their personal opinions about convicted sex offenders, because they are irrelevant. The board should create a policy statement anchored by HOA goals as stated in the governing documents, such as upholding neighborhood property values, contributing to neighborhood safety, or other iteration of policy supported by contractual goals of the HOA.

### Conclusion

Federal and Idaho law require convicted sex offenders register. Idaho law allows school districts, cities, and counties to restrict residence locations for such offenders. Therefore, it is reasonable for the governing boards of homeowner associations to have the power to initiate such restrictions in their private contractual CC&Rs, Bylaws, or Rules and Regulations. Such restrictions may be more narrowly tailored and restrictive than a public entity's. With care and prudent management, a governing board can protect resident safety and property values by creating reasonable restrictions, and implementing them with proper notice and hearing requirements.

**Practice** A HOA board and members at a duly noticed meeting should be given instruction in the new rules to emphasize the purpose and process for implementation. A board may want to consider having a one to two-year delay in enforcement, so that adjustments in a person's residence location may be made by those with a present interest as lessor or lessee, so the new policy is minimally disruptive to existing contracts.

### About the Author

**Arthur B. Macomber's undergraduate degree in business was accomplished at George Fox University. Prior to attending the University of California Hastings College of the Law, he enjoyed 25 years in business, real estate and construction. Mr. Macomber teaches a contracts drafting lab at Gonzaga University School of Law. The Law Office of Arthur B. Macomber is a solo practice in Coeur d'Alene focusing**

*on real property, land use, water and construction law.*

### Endnotes

<sup>1</sup> *McKune v. Lile*, 536 U.S. 24, 32, 122 S.Ct. 2017, 2025 (2002).

<sup>2</sup> *Id.*; citing U.S. Dept. of Justice, Bureau of Justice Statistics, Sex Offenses and Offenders 27 (1997); U.S. Dept. of Justice, Bureau of Justice Statistics, Recidivism of Prisoners Released in 1983, p. 6 (1997).

<sup>3</sup> In 1994, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act. See *Smith v. Doe*, 538 U.S. 84, 89-90 (2003).

<sup>4</sup> *Carr v. United States*, 560 U. S. \_\_\_, 130 S.Ct. 2229, 2233 (2010).

<sup>5</sup> *United States v. Clements*, 09-10034 (9th Cir. Aug. 22, 2011); citing 42 U.S.C. §§ 16911, 16913.

<sup>6</sup> *Smith v. Doe*, 538 U.S. 84, 90, 123 S.Ct. 1140, 1146 (2003).

<sup>7</sup> The Sexual Offender Registration Notification and Community Right-to-Know Act at Title 18, Chapter 83, Idaho Code, see I.C. § 18-8301, et seq., and the Juvenile Sex Offender Registration Notification and Community Right-to-Know Act at Title 18, Chapter 84, see I.C. § 18-8401, et seq.

<sup>8</sup> I.C. § 18-8307(7).

<sup>9</sup> I.C. § 18-8310.

<sup>10</sup> *Saenz v. Roe*, 526 U.S. 489 (1999) ("The word 'travel' is not found in the text of the Constitution. Yet the 'constitutional right to travel from one State to another' is firmly embedded in our jurisprudence. *United States v. Guest*, 383 U.S. 745, 757 (1966). Indeed, [referencing *Shapiro v. Thompson*, 394 U.S. 618 (1969),] the right is so important that it is 'assertable against private interference as well as governmental action . . . a virtually unconditional personal right, guaranteed by the Constitution to us all.'" *Id.*, at 643 (concurring opinion)).

<sup>11</sup> *Id.* at 503; citing *Slaughterhouse Cases*, 16 Wall 36, 80 (1873) ("a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a bonafide residence therein, with the same rights as other citizens of that State.").

<sup>12</sup> *Id.*; citing *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) ("the effect of imposing a penalty on the exercise of the right to travel [may] violate[] the Equal Protection Clause 'unless shown to be necessary to promote a compelling governmental interest.'")

<sup>13</sup> I.C. § 18-8329(1)(d).

<sup>14</sup> I.C. § 18-8329(3).

<sup>15</sup> 18 U.S.C. §§ 3563(b)(13), 18 U.S.C. § 3583.

<sup>16</sup> 18 U.S.C. § 3563(b)(13).

<sup>17</sup> *West Wood Investments, Inc. v. Acord*, 141 Idaho 75, 106 P.3d 401 (2005); see *Matheson v. Harris*, 98 Idaho 758, 761, 572 P.2d 861, 864 (1977) (discussion of purpose of recording statutes).

<sup>18</sup> *Pinehaven Planning Bd. v. Brooks*, 138 Idaho 826, 829, 70 P.3d 664, 667 (2003); *Best Hill Coalition v. Halko, LLC*, 144 Idaho 813, 817, 172 P.3d 1088, 1092 (2007).

<sup>19</sup> *Twin Lakes Village Property Assn., Inc. v. Crowley*, 124 Idaho 132, 135 (1993).

<sup>20</sup> *Id.*

<sup>21</sup> *City of Chubbuck v. City of Pocatello*, 127 Idaho 198, 201 (1995); *Best Hill Coalition*, 144 Idaho at 817.

<sup>22</sup> *Thomas v. Campbell*, 107 Idaho 398 (1984).

<sup>23</sup> *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 442, 109 S.Ct. 2994, 3027 (1989) (Stevens, J. concurring); *Michigan Protection and Advocacy Service, Inc. v. Babin*, 18 F.3d 337, 345 (6th Cir. 1994).

<sup>24</sup> *Giltner Dairy, LLC v. Jerome County*, 181 P.3d 1238, 1241 (Idaho 2008); *City Of Idaho Falls v. Grimmett*, 63 Idaho 90, 96, 117 P.2d 461, 467 (Idaho 1941) (proper and legitimate exercise of the police power).

<sup>25</sup> *Lane Ranch Partnership v. City of Sun Valley*, 144 Idaho 584, 589, 166 P.3d 374, 379 (2007).

<sup>26</sup> *Brown v. Perkins*, 129 Idaho 189, 193, 923 P.2d 434, 438 (1996).

<sup>27</sup> Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U.Chi.L.Rev. 681, 762 (1973).

<sup>28</sup> I.C. § 67-6511A; Hauser City Code §§ 8-1-4(C);

8-3C-6(C) (Any application for a subdivision that does not provide a master plan for development of the entire contiguous holdings of the developer/owner shall be rejected); Ada Co. Code § 8-6-3(C)(3) (covenants and restrictions optional for new subdivisions); but see Ada Co. Code § 8-3H-5 (maintenance requirements shall be incorporated into the protective covenants for a subdivision and the conditions of approval for development applications).

<sup>29</sup> Post Falls City Code § 17.04.090 (where city codes are more restrictive or impose higher standards or regulation, the requirements of these regulations shall govern irrespective of private contractual provision).

<sup>30</sup> I.C. § 18-8329; 18 U.S.C. §§ 3563(b)(13), 18 U.S.C. § 3583.

<sup>31</sup> I.C. § 18-8331(4)(b).

<sup>32</sup> *Cityscape Magazine*, U.S. Dept. of Housing and

Urban Dev., Vol. 13, No. 3, 2011, p. 15.

<sup>33</sup> Post Falls City Code § 5.08.130 (sexually oriented business cannot operate within 1,000' of [schools, parks, churches, etc.]); Ada Co. Code § 8-5-3-2(A) (1000' separation from schools, churches, and other adult entertainment establishments); see *World Wide Video of Washington, Inc. v. City of Spokane*, 368 F.3d 1186 (9th Cir. 2004) (Spokane ordinance upheld re zoning of sexually oriented businesses).

<sup>34</sup> [http://isp.idaho.gov/sor\\_id/](http://isp.idaho.gov/sor_id/).

<sup>35</sup> *Cityscape*, Vol. 13, p. 16.

<sup>36</sup> I.C. § 18-8323(2)(a-d).

<sup>37</sup> I.C. §§ 67-2341(4) and (5) (defining "public agency" and "governing body"); and 67-2342 (requires open meetings).

<sup>38</sup> I.C. §§ 18-8325(1) and (2).

<sup>39</sup> I.C. § 18-8325(3).

<sup>40</sup> I.C. § 30-3-80(1)(a-c).

*Thus, if board members act reasonably and in good faith, sex offender residence location restrictions can join the other CC&Rs to raise and maintain property values.*

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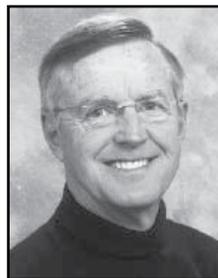
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## CASE STUDY: COLLECT PAST DUE HOA DUES ON FORECLOSED PROPERTIES

Jim Goldmann  
Mimura Law Offices, PLLC

It is not uncommon for a foreclosed homeowner to be delinquent in the payment of his/her assessment dues owed to their homeowner's association (HOA). Following a foreclosure, it is difficult for an HOA to collect the delinquent assessment dues (dues). Having recently dealt with this issue, I was able to employ a simple strategy that resulted in my client, the HOA, receiving payment.

I was contacted last year by an HOA that had recently changed its board members; the new board found the accounts in a state of disarray. Since no clear and precise collection policies had been established, no action to collect unpaid dues had occurred. If this continued, the HOA potentially would be unable to meet its obligations. Knowing they had a fiduciary duty to keep the HOA funded, the Board was required to take action. They could either pursue collection efforts for the unpaid assessments or charge a special assessment on all homeowners to make up for the deficit.

The board opted to pursue the collection strategy and contacted me to assist them. In devising a collection strategy for a property, we had to consider the type of ownership interest held in that property. The state of the ownership interests in this subdivision varied and included owner-occupied properties, rental properties, bank-owned properties and/or vacant properties. While each type of property presented its own unique collection challenges, the bank owned and/or vacant properties were the most problematic. Not only had the prior owner not provided payment, but the bank that foreclosed upon the property would not provide payment in a timely manner either. Furthermore, in the case of one property, the previous owner could not be located.

The HOA was presented with the following options in order to collect the dues on these properties: (1) turn the debts over to a traditional collection agency; (2) effectuate a judicial foreclosure of an assessment lien ("lien"); (3) effectuate a non-judicial foreclosure; or (4) pursue a civil action. It seemed more economical and efficient to turn the debt over to a traditional collection agency. In so do-

*This HOA needed a low-cost method of collection that would ensure they received the full outstanding debt owed.*

ing, there would be little, if any, up front out-of-pocket expense for the collection costs. The HOA decided against doing this, however, because they would likely have to forfeit one-third or so of the debt collected to the collection agency.

The HOA decided against any sort of foreclosure action, judicial or non-judicial. Such action would be costly to the HOA in terms of attorney's fees and the later management of the foreclosure process. Additionally, the board members are volunteers and have full-time jobs and families; their limited time precluded them from managing the foreclosure process.

Lastly, the HOA decided against pursuing a claim in civil court against the owner. The likelihood of enforcing a judgment against a foreclosed owner is low. If the prior owner was unable to save their home from foreclosure, it is not likely that they would be able to satisfy any court judgment.

This HOA needed a low-cost method of collection that would ensure they received the full outstanding debt owed. After review of the Covenants Conditions and Restrictions (CC&Rs), we did the following: (1) suspend the voting rights of delinquent homeowners; (2) served notices of delinquent dues and intent to file liens; (3) filed liens; and (4) amended the CC&R provision regarding the initiation assessment paid by a future purchaser of a property.

One, the existing CC&Rs allowed the HOA to suspend the voting rights of members who have failed to timely pay dues. By suspending their voting rights, it was easier to meet the voting requirements required for amendments to the CC&Rs. The bank owners objected to this change. However, since the policies and procedures of the CC&Rs were followed, nothing ever became of this objection.

Two, as required under the CC&Rs, notice was provided to the owners of the delinquent dues and the intent to file a lien. In this notice, the owners were informed that failure to pay would result in a special assessment to that homeowner equal to the cost of collection. This collection

cost would be a flat fee amount payable if a lien was filed.

Three, liens were filed. The liens, as written, were required to be renewed every six (6) months. Typically, per Idaho Code, these liens are renewed at one year intervals. In order to prompt action, the HOA opted to set a six-month time requirement. If the owner failed to pay, there would be continuing collection charges for each renewal. In response, the bank offered to pay a pro-rated amount of the dues; the HOA notified the bank that the CC&Rs of this association did not allow for the proration of dues. The bank remitted a pro-rated amount of the unpaid dues anyway and refused to remit further payment. Upon receipt of the partial payment, the HOA rescinded the outstanding lien and filed a new notice and lien upon the property including additional collection costs. Faced with continuing additional collection costs, the bank remitted the remaining balance owed.

Lastly, the HOA amended the CC&Rs in order to collect the pre-foreclosure dues owed on the property. The existing CC&Rs required a nominal initiation assessment (or "set up fee") of \$100. This section was amended to set the initiation assessment equal to the previous unpaid dues owed by any previous owner, plus \$100. When the property sold, any purchaser would have to pay any dues owing and outstanding in the form of the initiation assessment. In this case, the HOA collected the previous outstanding balance as an initiation assessment upon the sale of the property.

The HOA successfully collected the full outstanding balance of the dues owed on all properties. Some of the steps taken may not be appropriate in all circumstances. The CC&Rs of each association are unique. Before making a plan for collection, review an association's CC&Rs closely. In most circumstances, it will be appropriate to apply many of the same procedures taken with this case.

### About the Author

**Jim Goldmann** is employed as a public defender in Canyon County with Mimura Law, PLLC.

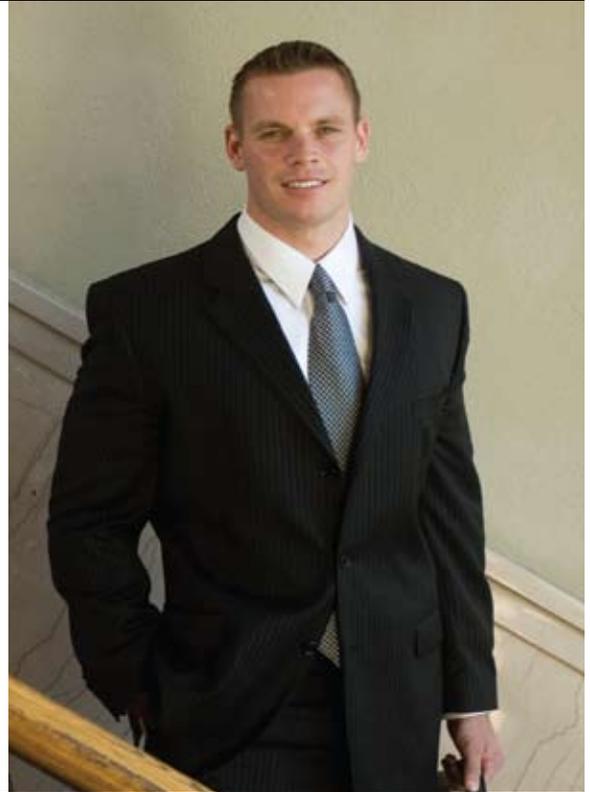


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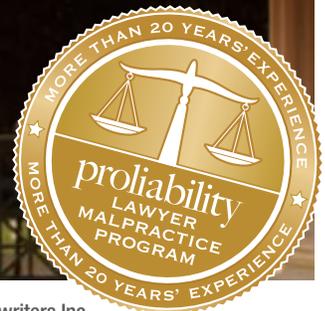
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Joel D. Horton

#### 3rd 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  
**Boise.....March 22**  
Coeur d'Alene.....April 2, 3, 4, 5, and 6  
**Coeur d'Alene.....April 30 and May 1**  
**Lewiston.....May 2**  
Boise.....May 9 and 11  
Boise.....June 4, 6, 8, 11, and 13

By Order of the Court  
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**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.

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#### 2nd AMENDED Regular Spring Terms for 2012

Boise.....January 10, 12, 19, and 24  
Boise.....March 13  
Moscow.....March 20 and 21  
Boise.....April 10, 19, 24, and 26  
Boise.....May 8\*, 10, 17, and 22  
\*Oral Argument will be held at Middleton High School (LAW DAY)  
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 May 2012

#### Monday, April 30, 2012 – COEUR D'ALENE

8:50 a.m. Fragnella v. Petrovich .....#37783-2010  
10:00 a.m. Berry v. McFarland .....#37951-2010  
11:10 a.m. Mickelsen v. Broadway Ford, Inc. ....#38111-2010

#### Tuesday, May 1, 2012 – COEUR D'ALENE

8:50 a.m. Berkshire Investments v. Taylor .....#38599-2011  
10:00 a.m. Estate of Benjamin Holland v. Metropolitan Property  
.....#38157-2010  
11:10 a.m. Bowman v. Washington Trust Bank .....#38426-2011

#### Wednesday, May 2, 2012 - LEWISTON

8:50 a.m. Marek v. Lawrence .....#38827-2011  
10:00 a.m. Paddison Scenic Properties v. Idaho County  
.....#38154-2010  
11:10 a.m. Dept. of Transportation v. HJ Grathol .....#38511-2011

#### Wednesday, May 9, 2012 - BOISE

8:50 a.m. State v. David Leroy Lee (Petition for Review)  
.....#39107-2011  
10:00 a.m. Markel International v. Ereksen .....#38336-2010  
11:10 a.m. New Phase Investment, LLC v. DAFCO, LLC  
.....#38447-2011

#### Friday, May 11, 2012 - BOISE

8:50 a.m. Daniel S. Fuchs v. Alcohol Beverage Control  
.....#38714-2011  
10:00 a.m. Gaylen Clayson v. Don Zebe .....#38471-2011  
11:10 a.m. Krystal M. Kinghorn v. Kelly N. Clay .....#38109-2010

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

#### Tuesday, May 8, 2012 – LAW DAY (at Middleton High School)

10:00 a.m. State v. Kaiser .....#37889-2010

#### Thursday, May 10, 2012 – BOISE

9:00 a.m. State v. Schwab .....#38797-2011  
10:30 a.m. Dorion v. Keane .....#38519-2011  
1:30 p.m. Johnson v. Dept. of Transportation .....#38090-2010

#### Thursday, May 17, 2012 – BOISE

9:00 a.m. State v. Clinton .....#38755-2011

#### Tuesday, May 22, 2012 – BOISE

9:00 a.m. State v. Stocks .....#39041-2011

**Idaho Supreme Court and Court of Appeals**  
**NEW CASES ON APPEAL PENDING DECISION**  
(Updated 3/1/12)

**CIVIL APPEALS**

**Instructions**

1. Did the district court commit reversible error in its jury instruction with regard to premises liability law in Idaho and in eliminating notice as an element of the claim?

*Day v. Wal-Mart Stores, Inc.*  
S.Ct. No. 38730  
Supreme Court

**Liens**

1. Whether the district court erred in finding Riedesel's lien on the property had priority over First Federal's lien.

*First Federal Savings Bank v. Riedesel Engineering*  
S.Ct. No. 38407  
Supreme Court

**Post-conviction relief**

1. Did the court err when it summarily dismissed Farnsworth's petition for post-conviction relief?

*Farnsworth v. State*  
S.Ct. No. 38934  
Court of Appeals

2. Did the district court err in summarily dismissing Foldesi's sixth claim because it presented a genuine issue of material fact?

*Foldesi v. State*  
S.Ct. No. 38120  
Court of Appeals

3. Did the court err by dismissing Colon's petition for post-conviction relief?

*Colon v. State*  
S.Ct. No. 38746  
Court of Appeals

**Substantive law**

1. Did the district court err in interpreting the plain and ordinary meaning of the language set forth in the Bell Deed and expanding the intent of the mineral reservation?

*Ida-Therm, LLC v. Bedrock Geothermal, LLC*  
S.Ct. No. 39108  
Supreme Court

**Summary judgment**

1. Did the court err in granting summary judgment in favor of Nelson?

*Kugler v. Nelson*  
S.Ct. No. 39060  
Court of Appeals

2. Whether there are genuine issues of material fact as to when Cushman Drilling breached its oral agreement with Stapleton.

*Stapleton v. Jack Cushman Drilling and Pump Co.*  
S.Ct. No. 39198  
Supreme Court

**Tax cases**

1. Was the Target property actively devoted to agriculture and therefore entitled to the agricultural exemption under I.C. § § 63-603K and 63-604 for tax years 2009 and 2010?

*Thompson Development v. Latah County Board of Equal.*  
S.Ct. No. 39265  
Supreme Court

**Termination of parental rights**

1. Whether the magistrate court erred when it found termination was in the best interests of the child.

*Dept. of H & W v. Jane (2011-17) Doe*  
S.Ct. No. 39285  
Court of Appeals

**CRIMINAL APPEALS**

**Evidence**

1. Was there substantial, competent evidence presented at trial from which the jury could have found beyond a reasonable doubt that Curry was guilty of burglary and aggravated assault?

*State v. Curry*  
S.Ct. No. 38127  
Court of Appeals

2. Was there substantial, competent evidence admitted at trial from which the magistrate could find beyond a reasonable doubt that Pepper was guilty of harboring a vicious dog?

*State v. Pepper*  
S.Ct. No. 39145  
Court of Appeals

3. Did the district court abuse its discretion when it admitted, as an excited utterance, a statement made by the victim to the police?

*State v. Parton*  
S.Ct. No. 37940  
Supreme Court

**Search and seizure – suppression of evidence**

1. Did the district court err in suppressing Valero's statements as involuntary and in finding the police tactics employed by the officer were coercive?

*State v. Valero*  
S.Ct. No. 38923  
Court of Appeals

**Sentence review**

1. Does the question of whether McKinney's sentences are allegedly "illegal" under the double jeopardy clause and I.C. § 18-301 involve questions of fact such that the district court was without jurisdiction to grant his Rule 35 motion?

*State v. McKinney*  
S.Ct. No. 38527  
Supreme Court

2. Did the court err when it determined that Caldwell's request for counsel in regard to his Rule 35 motion was frivolous?

*State v. Caldwell*  
S.Ct. No. 38515  
Court of Appeals

3. Did the court err in denying Ferrier's Rule 35 motion to correct an illegal sentence?

*State v. Ferrier*  
S.Ct. No. 39109  
Court of Appeals

**Summarized by:**  
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# Mediate, Arbitrate or Litigate: What Would Lincoln Do?

Hon. Larry M. Boyle  
*United States District Court*

Several months ago I accepted an invitation to speak at the 2012 Texas State Bar annual meeting. One of the topics is the vanishing trial and the role ADR has played in that decline. My assigned topic is *Mediate, Arbitrate or Litigate: What would Lincoln do?*

Abraham Lincoln wasn't perfect, either as a man or as a lawyer. In fact, Lincoln had many critics, some calling him overrated and others arguing his larger than life legacy as a lawyer is a myth. Other critics claim that "Honest Abe" really wasn't more honest than many of his contemporaries, did not have a good knowledge of the law, and lost cases he should have won. A former law partner

said Lincoln was deficient as a lawyer, described him as being a case lawyer and nothing more, and objected to him being called a great lawyer.<sup>1</sup>

However, those notions are soundly rejected by the vast majority of Lincoln scholars. The overwhelming consensus is that Lincoln was a premier attorney, and one of the most creative, intelligent and exceptional advocates ever to address a court or jury.

Lincoln has been called "our most admired and least understood president."<sup>2</sup> Assuming that to be true, how well do we understand Lincoln *as a lawyer*? If we can understand how he practiced law and counseled people involved in a dispute we will have an answer to the question: "What would Lincoln do - mediate, arbitrate or take it to a jury?"

## Lincoln the man

Most of the material in this article has been gleaned from Lincoln biographies. In that regard, Lincoln warns,

Biographies as written are false and misleading. The author of the life of his hero paints him as

the perfect man - magnifies his perfections and suppresses his imperfections - describes the success of his hero in glowing terms, never once hinting at his failures and blunders.<sup>3</sup>

But, Leo Tolstoy, a Lincoln admirer, places the passage of time into perspective,

We are still too near his greatness. But after a few centuries more of our posterity will find him considerably bigger than we do. His genius is still too strong and too powerful for common understanding....<sup>4</sup>

Although Lincoln may have been skeptical of biographies in general, Tolstoy's prediction has proved accurate and the abundance of source material describing Lincoln's life is staggering. In fact, historians have suggested that more has been written about Abraham Lincoln than anyone in the history of the world, with the exception of perhaps Jesus of Nazareth and possibly Napoleon.<sup>5</sup>

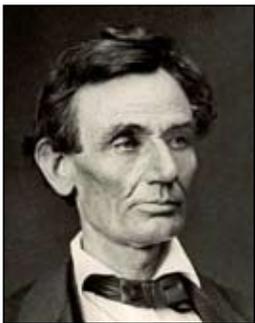
From the multitude of sources, a good place to begin is Lincoln's character, which prompted Justice Anthony Kennedy's admonishment that we should adopt "*the simple honesty of Lincoln.*"<sup>6</sup>

It is well known that Lincoln was born into wretched poverty, had incredibly limited formal education, was self-taught in the law, had a woefully unhappy marriage, was of a melancholy personality, and suffered migraines and depression. Yet despite all these obstacles and even after the passage of 150 years, most of us are still moved, as if reading holy writ, by his Second Inaugural Address, which promised there would be "*malice toward none, with charity for all.*"<sup>7</sup>

Writing of Lincoln at Gettysburg, a major American city newspaper observed:

The year was 1863. The nation was torn by a civil war that had claimed more than 100,000 lives, and the president was struggling against virulent political forces eager to abandon the fight against a rebellion that had split the country in two.

Yet, in a three-minute speech, Abraham Lincoln rallied a war-weary people around the cause of freedom through union and refined the purpose and identity of the nation. It was, perhaps, *the*



*greatest use in American history of the sheer weight of one man's character and the authority of the office he holds.*<sup>8</sup>

Lincoln cultivated humility, and carefully avoided the development of vain, egotistical pretension and affectations. This may have been, at least in part, an attempt to hide his feelings of social inferiority due to his lack of formal education.<sup>9</sup> This sentiment also caused Lincoln to avoid judging others. Historian Carl Sandburg noted that Lincoln wasn't judgmental of other people. "In his own mind he did not divide people into good people and bad people."<sup>10</sup> Likewise, he "was certainly a very poor hater. He never judged men by his like or dislike for them."<sup>11</sup>

Truth was central to Lincoln's entire perspective. Lincoln himself gives us a window into this element of his character:

I determined to be so clear that no honest man could misunderstand me, and no dishonest man could successfully misrepresent me.<sup>12</sup>

Many in Lincoln's time said he had a "special quality," about him, and it was common for people to use words such as "truthfulness," "honesty," and "integrity" when speaking of him. Although awkward and ungainly in appearance, there was an "indefinable something" about Lincoln that "commanded respect."<sup>13</sup> A friend said Lincoln was "... true to himself, he was true to everybody and everything about and around him ... his whole aim in life was to be true to himself & being true to himself he could be false to no one."<sup>14</sup>

Beyond these basic moralities, learning, skills and sophistication came as he studied the law and was tutored by mentors. The law not only provided Lincoln a path out of poverty, but it also helped him gain confidence. However, through the years, Lincoln's focus on truth remained. It was in the setting of his private practice and appearing in the state and federal courts of Illinois that "*Honest*" became a lasting part of his name and legacy.

### Lincoln the lawyer

Lincoln's decision to study law "stunned his friends and neighbors" because he had no means to obtain even a common school education and they believed "that people born in humble life should be content with their lot."<sup>15</sup> These observers underestimated Lincoln's desire for education. In fact, even after he was admitted to the bar, Lincoln continued this quest, studying astronomy, political economics and philosophy — subjects many of his fellow

circuit riders had learned in college, causing one fellow circuit rider to observe, "Life was to him a school, . . . and he was always studying and mastering every subject which came before him."<sup>16</sup>

He was also a master storyteller, a skill he learned sitting around the fireplace listening to the adults tell stories. As a six year-old, young Abraham repeatedly retold the stories in his mind determined to tell a story in "language plain enough... for any boy I knew to comprehend."<sup>17</sup> Lincoln's natural gift of storytelling was perfected on the Illinois circuit and "would eventually constitute his stock-in-trade throughout his legal and political careers," remaining with him his entire life.<sup>18</sup> He possessed an extraordinary ability to convey practical wisdom in stories that his listeners would remember.<sup>19</sup>

These natural skills were aided by the guidance of excellent mentors. Lincoln was fortunate to become associated with Stephen T. Logan, a former Illinois state circuit court judge. When they began working together it became obvious there were considerable differences in the two men; Judge Logan was well-read, studious, highly organized and meticulous. According to Sandburg, Logan was:

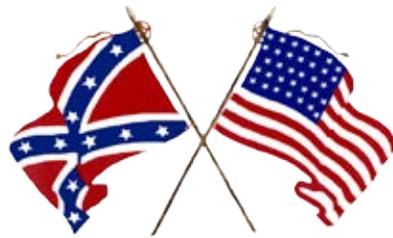
one of the most neat, scrupulous, particular and exact lawyers in Illinois when it came to preparing cases, writing letters, and filing documents. In law practice Logan knew how to be thorough, how to make results come from being thorough. From him Lincoln learned; the word "thorough" became important among his words.<sup>20</sup>

Initially, Lincoln was the opposite, even disorganized. Logan being "methodical, industrious, particular, painstaking, and precise," he could not tolerate Lincoln's "disorderly" ways.<sup>21</sup>

Logan is viewed by historians as perhaps the most constructive influence in Lincoln's life.<sup>22</sup> Through this development, Lincoln continued to stress the virtues of truth and honesty.

Even in petty and trivial cases, otherwise dull and uninteresting, can be found touches of his characteristic love of justice, honesty, humility and forbearance. They are replete with his moral courage, humaneness, modesty, sympathy, tact and adroitness, wit, humor, and power of satire. Here can be found his human weaknesses as well as the elements of his greatness.<sup>23</sup>

A two-time Pulitzer Prize winner explains how Lincoln got his nickname,



In handling hundreds of cases in the circuit courts, Lincoln firmly reestablished his reputation as a lawyer. It was a reputation that rested, first, on the universal belief in his absolute honesty. He became known as ‘Honest Abe’ . . . the lawyer who was never known to lie. He held himself to the highest standards of truthfulness.<sup>24</sup>

Lincoln wrote, “. . . [i]f, in your own judgment, you cannot be an honest lawyer, resolve to be honest without being a lawyer. Choose some other occupation.”<sup>25</sup>

Lincoln’s success as a lawyer was not hampered by his unwillingness to compromise his core principles. According to legal scholars, Lincoln was not in any sense of the word a simple “country lawyer.”<sup>26</sup> Lincoln was a prolific rainmaker, making his living handling a prodigious number of cases, and became a “lawyer’s lawyer.”<sup>27</sup> Lincoln scholar John A. Lupton observes,

He was not a folksy, down-home kind of guy. Instead he was a shrewd, sophisticated, tough and aggressive litigator with a staggering case load who cared about making money . . .<sup>28</sup>

Despite the pressures of a successful practice, Lincoln eventually became a mentor to younger, less experienced lawyers and many were the beneficiaries of his advice and assistance. In one interesting circumstance, Lincoln was in a courtroom waiting for his case to be called when he observed a young lawyer make a weak argument. After stating his case in a “bewildered, feeble” manner, the young lawyer recounted he was,

. . . about to sit down, and let the case go by default, as it were, when a tall, homely, loose-jointed man sitting in the bar, whom I had noticed as giving close attention to the case, arose and addressed the court in behalf of the position I had assumed in my feeble argument, making the points so clear that when he closed the Court at once sustained my demurrer. This act of kindness prompted the opposing counsel, Isaac N. Arnold, to rebuke his friend for meddling. Lincoln replied, “that he claimed the privilege of giving a young lawyer a boost when struggling with his first case, especially if he was pitted against an experienced practitioner.”<sup>29</sup>

Presidential historian Doris Kearns Goodwin confirms Lincoln “arrogated to himself no superiority over anyone — not even the most obscure member of the bar. . . He was remarkably gentle with young lawyers.”<sup>30</sup>

*Lincoln was a prolific rainmaker, making his living handling a prodigious number of cases, and became a “lawyer’s lawyer.”<sup>27</sup>*

Lincoln also could not tolerate injustice. William H. Herndon, a former law partner, said, “As he was grand in his good nature, so he was grand in his rage.”<sup>31</sup> Another colleague said:

Personal abuse, injustice, and indignity offered to himself did not disturb him, but gross injustice and bad faith towards others so enraged him that his eyes would blaze with indignation, and his denunciation few could endure.<sup>32</sup>

Lincoln added a remarkable intellect to these remarkable virtues. When appearing before an appellate court, Lincoln would seize the strong points of a case and present them with clearness and great compactness. His mind was logical and direct, did not indulge in extraneous discussion and his power of comparison was large.<sup>33</sup>

Lawyers in the 1850s tried even the pettiest cases before a jury and Lincoln grew to possess the important quality of diligent preparation. Former law partner Herndon quipped, “He was always calculating and planning ahead. His ambition was a little engine that knew no rest.”<sup>34</sup> In a day long before discovery, by studying the opposite side of every case Lincoln was rarely surprised by the testimony of the opposition and thus showed great confidence before the jury. “[C]lients and other lawyers also respected Lincoln’s incredible capacity for hard work. . . . Lincoln’s clients rarely lost a suit because of carelessness or inattention on the part of their attorney.”<sup>35</sup>

Lincoln’s sharp mind and diligent preparation helped him acquire a gift for presenting the essential facts to the jury in the simplest, clearest fashion. Using common words, he was direct and concise, using words understandable by the common person, always showing perfect calm when before a jury.<sup>36</sup>

In the courtroom Lincoln had his own unique style.

With Lincoln, the emphasis was on casual, friendly questioning of the wit-

nesses, far from technical matters. He would good-naturedly concede nine points of the ten to the opposing counsel, until it seemed he had given his case away. But on the tenth point, he would insist, and it was the nub of the action.<sup>37</sup>

Lincoln’s style allowed him to adapt to the circumstances. This was true of his approach to examination of witnesses:

He only asked necessary questions of a witness and refrained from brow-beating, confusing, distracting or alarming them. If he found a witness to be honest and truthful he questioned them in a gentle and friendly manner, but if he believed a witness was lying or evasive he became severe and merciless.<sup>38</sup>

Lincoln was also known to be fair to opposing counsel and rarely raised objections to their introduction of evidence, but this does not mean he yielded essentials.

What he was so blandly giving away was simply what he couldn’t get and keep. . . [M]any a rival lawyer was lulled into complacency as Lincoln conceded, say six out of seven points in argument, only to discover that the whole case turned on the seventh point. “Any man who took Lincoln for a simple-minded man. . . would very soon wake up with his back in a ditch.”<sup>39</sup>

Lincoln’s skill in making closing argument caused one Illinois journalist to place him “at the head of the profession in this state. . . though he may have had his equal, it would be no easy task to find his superior.”<sup>40</sup> Woldman concludes, “All his colleagues agree that for lucidity of statement, clear reasoning power, and analogy Lincoln had no superior at the bar of Illinois.”<sup>41</sup>

In addition to his courtroom skills, Lincoln had the ability to “think outside the box.” For example, in defending a medical malpractice case, rather than using formal medical jargon he used a brittle chicken bone to illustrate the effects of ag-

ing.<sup>42</sup> He was lead counsel in a nationally prominent test case between a railroad and a shipping line disputing the right of a railroad to construct bridges over navigable rivers. In that case a steamship ran into a bridge, was destroyed and its cargo lost. The case involved mechanical engineering, bridge construction, river current velocity and other highly technical issues. Representing the railroad, Lincoln used a scale model of the ship to illustrate the fault lay with operation of the vessel, not the presence of the bridge.<sup>43</sup>

As president, Lincoln was also ahead of his time by utilizing that era's high tech. Giving the Union army an advantage during his presidency, Lincoln received up to the minute reports from the battle field and exchanged thousands of telegrams with his generals.<sup>44</sup>

Lincoln became "a star courtroom attraction" and "a formidable adversary not only pleading to the jury but in the presentation of legal argument as well," eventually monopolizing the sessions of the Illinois Supreme Court.<sup>45</sup> He was soon making regular appearances in the United States courts in Chicago as well as the courts in Springfield.<sup>46</sup>

Lincoln faced and matched wits with witnesses and attorneys in thousands of trials, and he was "a great deal more than just a competent, successful lawyer."<sup>47</sup> A Lincoln scholar observed, "[E]very once in a while a lawyer comes along who attains that sure mark of greatness — the unstinted praise of his co-workers. Lincoln was supremely that kind of lawyer."<sup>48</sup> Initially described as a "raw novice," Woldman says of Lincoln as a mature lawyer,

Pitted against lawyers of unusual ability and power, he had come to be regarded as a dangerous adversary in every type of case and in every court. Before a jury he had grown to have but few peers... and had learned the value of study, thoroughness, painstaking attention to details, and exactitude.<sup>49</sup>

Of course, as with any prominent practitioner, some opinions of Lincoln were not so complimentary. Sandburg wrote,

It was natural that Abraham Lincoln was many things to many people; some believed him a cunning, designing lawyer and politician who coldly figured all his moves in advance; some believed him a sad, odd, awkward man trying to find a niche in life where his hacked-out frame could have peace and comfort; some believed him a superb human struggler...<sup>50</sup>

*It is well known  
that Lincoln met  
with disputants and  
counseled them  
to reconcile  
disputes and  
preserve  
relationships.*

As Lincoln's reputation spread, his practice prospered and his clients increasingly involved larger landowners, banks, railroads, ranchers, professionals, the wealthy and the growing middle class. Lincoln's cases increasingly involved disputes with railroads, and he was good at his job, both for and against the railroads.<sup>51</sup> Humble individuals and great corporations placed their affairs in his hands.<sup>52</sup>

Lincoln was acknowledged by his peers, judges and jurists before whom he practiced as "the best all-around jury lawyer" of his day in Illinois,<sup>53</sup> possessing the rare combination of moral and intellectual qualities that are essential to the making of a good lawyer.<sup>54</sup> He was considered to be the finest lawyer the Chief Justice of the Illinois Supreme Court ever knew because he possessed a professional bearing that was high-toned and honorable, and proceeded justly and without derogating the claims of others, a model well worthy of the closest imitation.<sup>55</sup>

Lincoln had the most uncommon of possessions — common sense — and "logic" was always his "constant companion."<sup>56</sup> Lincoln created an atmosphere of "honesty, candor, and fair dealing,"<sup>57</sup> and that one of his strengths was seeing the kernel of the case and never let the court or jury forget that "*This is the real point.*"<sup>58</sup> Lincoln, the master of understatement, was a "courtroom strategist who fought his legal battles with a light brigade... calling upon his heavy artillery only when absolutely necessary."<sup>59</sup>

Woldman declared "*Lincoln is the law profession's noblest contribution to American civilization,*" and states as a lawyer-President, that his constitutional inter-

pretations, his understanding of broad principles of law and justice, and his fine legal conscience and reasoning power are "causing the most respected jurists to rank Lincoln among the greatest lawyers of history."<sup>60</sup> Perhaps the greatest testament to Lincoln is "... even more conclusive of his high regard and recognition of his qualification as a lawyer is the fact that so many other members of the bar — competitors if you please — employed him, of all the thousand or more barristers then practicing in Illinois."<sup>61</sup>

### Advice from Lincoln

Many of Lincoln's early trials were over trivial matters, misdemeanors, property disputes, bankruptcies, assaults, battery, neighborhood quarrels, divorce, collections and mortgage foreclosures.<sup>62</sup> Certainly not landmark cases for a future president, but it appears then, as it is today, young lawyers started with small, seemingly insignificant cases.

It is significant that the first case Lincoln handled, *Hawthorne v. Wooldridge*, was settled before going to trial.<sup>63</sup> In all probability Lincoln and the other lawyer *self-mediated* by negotiating and reaching a mutually agreeable resolution of the dispute.

As the years passed, Lincoln won and lost cases in the state and federal courts. Beginning in the 1980s, thousands of yellowed handwritten documents were discovered in courthouse basements relating to more than 5,000 cases Lincoln handled, including more than 400 appeals before the Illinois Supreme Court.<sup>64</sup> In addition, the majority agreed with Lincoln in two of the three cases he presented to the United States Supreme Court.<sup>65</sup>

Despite this success, Lincoln urged clients and neighbors to avoid litigation.

... disputing neighbors had learned to leave their differences for settlement to him as an arbitrator. Lawyer Lincoln's office early became a court of conciliation. . . . Lincoln discouraged litigation, turned away business, and tried to keep people out of court. He persuaded his clients to compromise their difference with their adversaries when they could do so with honor.<sup>66</sup>

Lincoln counseled,

Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a loser - in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.<sup>67</sup>

He was indeed a peacemaker.

In a case that resulted in a hung jury and had to be retried, Lincoln's approach is instructive,

The bitter feelings would have to be intensified, the slander repeated, the old hurts reopened. Lincoln abhorred this type of litigation. He (successfully) urged the litigants to drop their charges and to make peace with each other.<sup>68</sup>

Lincoln condemned lawyers for aggressively pursuing clients to file lawsuits, saying, "Never stir up litigation. A worse man can scarcely be found than one who does this," and referred to that type of lawyer as a "fiend."<sup>69</sup>

Lincoln relied on his wealth of experience when deciding to litigate or seek other options. As mentioned, Lincoln was involved in "at least" 5,000 cases and knew the alternatives.<sup>70</sup> Would Lincoln litigate? Of course he would. Lincoln was a master trial lawyer who tried 2,000 or more cases.<sup>71</sup> In the right case and given time to prepare, Lincoln was more than prepared to litigate forcefully. Yet, Lincoln urged his clients to settle their differences with adversaries "when they could do so with honor,"<sup>72</sup> and "discouraged litigation, turned away business, and tried to keep people out of court."<sup>73</sup>

Assuming the scholars are correct that Lincoln was "involved in" 5,000 cases and "tried" 2,000 cases, what happened in the remaining 3,000 cases? It is well known that Lincoln met with disputants and counseled them to reconcile disputes and preserve relationships. Reason tells us he counseled them to dismiss pending cases or settled cases by negotiating with opposing counsel. He even arbitrated cases. If none of these efforts were successful he would file a lawsuit if the claim had merit, but that wouldn't necessarily bring an end to negotiations. Lincoln was known to prepare thoroughly, bring "masterly ingenuity . . . and legendary skill,"<sup>74</sup> and be a formidable, even dangerous, advocate for his client. That likely gave other lawyers incentive to settle lawsuits they had with Lincoln, accounting for some of the 3,000 cases.

Even after the battles were over, Lincoln treated other members of the bar with dignity and courtesy. As a prevailing lawyer in litigation, and later as a victorious war-time president, Lincoln became a peacemaker who treated defeated opponents with respect. When that terrible war ended, Lincoln the peacemaker emerged. He directed Grant to preserve Lee's dignity at Appomattox, but also to offer him a

generous peace.<sup>75</sup> Abraham Lincoln, as a lawyer or a president, burnt no bridges—even with a former adversary.

### Conclusion: What would Lincoln do if he were practicing today?

Inasmuch as Lincoln's office was known to be a court of conciliation, if he were practicing law with us today, at the beginning stages of a dispute I am confident Lincoln would be a peacemaker and negotiate with the other lawyer to reach real common ground. I am confident he would practice law in much the same manner as fine lawyers practice today. David H. Leroy, former Idaho Attorney General, Lieutenant Governor and now practicing lawyer, explains the importance of this ability, stating: "The ability to ride into town, make friends, win a client, analyze facts, cross-examine and win a jury over were the skills that saved the Union!"<sup>76</sup>

In addition to pointing out Lincoln's peacemaking and reconciliation efforts at the end of the Civil War, my colleague Judge Stephen S. Trott wrote,

Just think, it took a lawyer to save our nation, a man who by training and experience in private practice and our courts knew there can be no rights, life, liberty, or pursuit of happiness without the rule of law. Without Abraham Lincoln, the dreams of our ancestors would have been lost.<sup>77</sup>

Regardless of whether Lincoln would choose to mediate, arbitrate or litigate, depending on the circumstances I believe he

would do what was right, honest and best for his client. This great man left us a rich professional legacy and a roadmap to follow. That's what lawyer's lawyers do.

Yes, Abraham Lincoln was an honest, premier lawyer, but in my well-formed view he does not stand alone on that high ground. In my mind's eye, I see Thurgood Marshall at his side. Does it end there? I think not. Rather, I am convinced we have lawyer's lawyers among us today—not likely Lincoln's superior, but certainly his equal.

### About the Author

**Judge Larry M. Boyle** has served the state and federal judiciaries since 1986 as a State District Judge, a United States Magistrate Judge and an Associate Justice of the Idaho Supreme Court.

### Endnotes

<sup>1</sup> DAVID HERBERT DONALD, WE ARE LINCOLN'S MEN 75 (2003).

<sup>2</sup> Geoffrey C. Ward, N.Y. TIMES BOOK REVIEW (noted in DONALD, *supra* note 1).

<sup>3</sup> RICHARD H. LUTHIN, THE REAL ABRAHAM LINCOLN 113 (1960); Sandra K. Lueckenhoff, Comment, *A. Lincoln, A Corporate Attorney and the Illinois Central Railroad*, 61 MISSOURI LAW REV. 393 (1996).

<sup>4</sup> DAVID H. LEROY, MR. LINCOLN'S BOOK, ix (2009).

<sup>5</sup> ALBERT A. WOLDMAN, LAWYER LINCOLN, Preface (Reprint 1994 Preface; original printing 1936).

<sup>6</sup> *Legal Order*, THE LOS ANGELES DAILY JOURNAL (Aug. 19, 1997).

<sup>7</sup> CARL SANDBURG, 6 ABRAHAM LINCOLN 92-94 (1936).

<sup>8</sup> *Commanding Moral Authority*, ATLANTA CONSTITUTION (Sept. 27, 1998) (emphasis added).

<sup>9</sup> EDWARD J. KEMPF, ABRAHAM LINCOLN'S PHILOSOPHY OF COMMON SENSE, AN ANALYTICAL BIOGRAPHY OF A GREAT MIND, PART I, 158 (1965).

## Lincoln Taught Importance of Listening

During Lincoln's Presidency, it was difficult to find him in the White House. He visited troops in the field and in hospitals, toured naval facilities, inspected fortifications, and visited members of Congress and members of his Cabinet in their homes. Lincoln's personal secretaries stated that he spent nearly 75% of his time meeting with people. Upon removing General John C. Fremont from the command of the Department of the West, Lincoln noted "His cardinal mistake is that he isolates himself, and allows nobody to see him; and by which he does not know what is going on in the very matter he is dealing with."

Lincoln utilized this behavior during his days as a lawyer also. He literally rode the circuit of the court and was diligent in seeking out the

individuals with knowledge and facts of each matter he handled.

This is an attribute that I am trying to incorporate more in my legal practice. Although email and text messages can be a good way to keep in touch with current and prospective clients, I have found that clients, especially business clients, appreciate a personal visit. Taking the time to gain an understanding and appreciation of a current or prospective client's operation shows them that you are invested in what they are doing. It also assists in the representation of the client as it is easier to understand a client's need or problem if the attorney takes the time to gain an understanding of the client's business.

- Benjamin Ritchie

<sup>10</sup> CARL SANDBURG, I ABRAHAM LINCOLN, THE PRAIRIE YEARS 307 (1926).  
<sup>11</sup> WILLIAM H. HERNDON, HERNDON'S LINCOLN 321 (2006).  
<sup>12</sup> G. GRIESSMAN, THE WORDS LINCOLN LIVED BY (1997).  
<sup>13</sup> MICHAEL BURLINGAME, THE INNER WORLD OF ABRAHAM LINCOLN 10 (1994).  
<sup>14</sup> *Id.* (The symbol "&" in original).  
<sup>15</sup> DORIS KEARNS GOODWIN, TEAM OF RIVALS 130 (2005).  
<sup>16</sup> *Id.* at 153.  
<sup>17</sup> *Id.* at 50.  
<sup>18</sup> *Id.* at 8, 50.  
<sup>19</sup> *Id.* at 151.  
<sup>20</sup> SANDBURG, THE PRAIRIE YEARS, *supra*, at 286.  
<sup>21</sup> WOLDMAN, *supra* note 5, at 40-41.  
<sup>22</sup> *Id.*  
<sup>23</sup> *Id.* at 5.  
<sup>24</sup> DONALD, *supra* note 1, at 149.  
<sup>25</sup> *Id.* STEPHEN B. OATES, ABRAHAM LINCOLN, THE MAN BEHIND THE MYTH 53 (1984).  
<sup>26</sup> ALLEN D. SPIEGEL, A. LINCOLN, ESQUIRE viii (2002).  
<sup>27</sup> *Id.* at 95.  
<sup>28</sup> John A. Lupton, *A. Lincoln Esquire: The Evolution of a Lawyer* (contained in SPIEGEL, *supra*, at 18).  
<sup>29</sup> BURLINGAME, *supra* note 13, at 76.  
<sup>30</sup> GOODWIN, *supra* note 15, at 150.  
<sup>31</sup> BURLINGAME, *supra* note 13, at 148.  
<sup>32</sup> *Id.*  
<sup>33</sup> HERNDON, *supra* note 11, at 209.  
<sup>34</sup> ORGANIZATION OF AMERICAN HISTORIANS, THE BEST AMERICAN HISTORY ESSAYS ON LINCOLN 8 (Richard Hofstadter ed.) (2009).  
<sup>35</sup> DONALD, *supra* note 1, at 149.  
<sup>36</sup> See Lueckenhoff, *supra* note 3, at 401.  
<sup>37</sup> *Id.* at 401 (citing WILLIAM H. HERNDON, HERNDON'S LINCOLN: THE TRUE STORY OF A GREAT LIFE 37, 40 (reprint 1970)).  
<sup>38</sup> *Id.*  
<sup>39</sup> DONALD, *supra* note 1, at 149.  
<sup>40</sup> *Id.* at 151.  
<sup>41</sup> WOLDMAN, *supra* note 5, at 248.  
<sup>42</sup> SPIEGEL, *supra* note 26, at 128.  
<sup>43</sup> WOLDMAN, *supra* note 5, at 183-84.  
<sup>44</sup> TOM WHEELER, MR. LINCOLN'S T-MAILS: HOW ABRAHAM LINCOLN USED THE TELEGRAPH TO WIN THE CIVIL WAR (2006).  
<sup>45</sup> WOLDMAN, *supra* note 5, at 32, 41-42.  
<sup>46</sup> DONALD, *supra* note 1, at 144.  
<sup>47</sup> JOHN J. DUFF, LINCOLN, PRAIRIE LAWYER 367-68 (1960).  
<sup>48</sup> *Id.* at 366 (1960).  
<sup>49</sup> WOLDMAN, *supra* note 5, at 46-47.  
<sup>50</sup> SANDBURG, THE PRAIRIE YEARS, *supra*, at 307.  
<sup>51</sup> ORVILLE VERNON BURTON, THE AGE OF LINCOLN 110 (2007).  
<sup>52</sup> WOLDMAN, *supra* note 5, at 126.  
<sup>53</sup> *Id.* at 241.  
<sup>54</sup> *Id.*  
<sup>55</sup> *Id.* at 243.  
<sup>56</sup> *Id.* at 248.  
<sup>57</sup> *Id.* at 249.  
<sup>58</sup> *Id.* at 250.  
<sup>59</sup> *Id.* at 250.  
<sup>60</sup> *Id.* at preface.  
<sup>61</sup> *Id.* at 252.  
<sup>62</sup> *Id.* at 30; SPIEGEL, *supra* note 26, at 22.  
<sup>63</sup> WOLDMAN, *supra* note 5, at 30.  
<sup>64</sup> SPIEGEL, *supra* note 26, at viii. The *Lincoln Legal Papers* were gathered in the 1980-90s by the Illinois Historical Preservation Agency and presented to the Library of Congress on February 9, 2000.  
<sup>65</sup> WOLDMAN, *supra* note 5, at 245.  
<sup>66</sup> *Id.* at 30.  
<sup>67</sup> AMERICAN BAR ASSOCIATION, CODE OF PROFESSIONAL RESPONSIBILITY AND CANONS OF JUDICIAL ETHICS 48 (1949) (cited in *Clarion Corp. v. American Home Products Corp.*, 494 F.2d 860, 863 (7th Cir. 1974)).  
<sup>68</sup> WOLDMAN, *supra* note 5, at 105.



Photo by Dan Black

The Idaho Academy of Leadership for Lawyers (IALL) stopped during Lawyers as Leaders session to view the Lincoln statue in front of the Idaho Capitol this winter. This group includes those from the steering committee, and the IALL class. From left are Ben Ritchie, Hon. Mike Williams, Paul McFarlane, Paul Arrington, Tim Tyree, Bill Hancock, Jonathan Volyn, Deborah Ferguson, Christine Salmi, Peg Dougherty, Hon. Mick Hodges, Joe Pirtle, Nicole Hancock, Jim Martin, Monica Salazar, Gene Petty, Mahmood Sheikh. Not pictured are Javier Gabiola and Diane Minnich.

## Idaho Academy of Leadership for Lawyers Study Lincoln

Over the last year, I have had the pleasure of serving on the seven-member Steering Committee for the newly formed Idaho Academy of Leadership for Lawyers. The idea was that the committee would arrange several days of instruction and the young lawyers would learn a lot.

The day titled "Lawyers as Leaders," which had a focus on Abraham Lincoln's skills, had to be my favorite so far. Included in that day was a discussion of the book, *Lincoln on Leadership, Executive Strategies for Tough Times* (Donald T. Phillips, Hatchette Book Group, 1993)

Lincoln on Leadership can be quick read, focusing on concrete examples of leadership accomplished by the 16<sup>th</sup> President. I was fascinated to learn that Abraham Lincoln's principles were

his original work, i.e., "Never try, you will never succeed," or "Remember that compromise does not constitute weakness". Repeatedly, I told myself, "I thought that was from the Bible... Jimmy Buffett... Dale Carnegie", etc.

In my work as a Magistrate Judge, I hope to remember two poignant principles from this great man:

1. When you extinguish hope, you create desperation;
2. Remember, the best leaders never stop learning.

I agree there is greatness in our profession in Idaho. I would go so far to say as this next great attorney may currently be enrolled in the Idaho Leadership Academy for Lawyers.

- Hon. Mick Hodges

<sup>69</sup> FREDERICK TREVOR HILL, LINCOLN THE LAWYER 102-03 (1996).

<sup>70</sup> Spiegel, *supra* note 26, at 22.

<sup>71</sup> WOLDMAN, *supra* note 5, at 246.

<sup>72</sup> *Id.* at 30.

<sup>73</sup> *Id.*

<sup>74</sup> DONALD, *supra* note 1, at 150.

<sup>75</sup> RONALD C. WHITE, A. LINCOLN 670 (2009).

<sup>76</sup> Handwritten note from David H. Leroy to the author (March 5, 2012) (on file with author).

<sup>77</sup> E-mail from Hon. Stephen S. Trott to the author (March 8, 2012) (on file with author).

# Former AG Rekindles Lincoln's Light

Dan Black  
Editor, *The Advocate*

“One of my missions in life is to spread the word that Lincoln is closely connected to us in Idaho.”

— David Leroy

Lincoln's connection to the West is well-known among Civil War historians. Before the war, Southern states wanted slavery extended west along the Mason-Dixon Line, where, according to Boise attorney David Leroy, “there was little enthusiasm for slavery.” Lincoln's connections out West were both friendly and strategic. His legal and political friends were given posts out West, and when the time came for cannon shot and tourniquets, the Western territories flew a Union flag.

Lincoln's specific connections to Idaho were almost lost to time but for Mr. Leroy, who served as Idaho's Attorney General and Lieutenant Governor, and who now runs a solo practice in Boise. He recalled that as a young prosecutor looking to make his way into an elected state office, he stumbled onto President Lincoln's legacy to Idaho almost by accident. Mr. Leroy honed a stump speech for countless Lincoln Day dinners, known across rural Idaho as a must-do meet-and-greet for Republicans seeking statewide office. So he turned to the Idaho State Historical Society, “which had a few things here or there.” In 1978 he fashioned a talk and then kept digging, pulling from old newspapers, books, magazines and official records.

Aside from winning elections, all that research resulted in an 18-page article published in 1998 by the Idaho State Historical Society's journal, *Idaho Yesterdays*.<sup>1</sup> It documents the numerous connections between our 16<sup>th</sup> President and the state of Idaho. That article and another article by Mr. Leroy in *The Advocate* in 2007 documented the following connections:<sup>2</sup>

- Lincoln, as a lawyer, represented the DuBois family of New York. Fred DuBois later would become a U.S. Senator for the state of Idaho.
- Lincoln was offered the governorship of the Oregon Territory by President Zachary Taylor, which at that time included ground now considered Idaho. Lincoln denied the offer and went on to run for president.
- As president, Lincoln lobbied hard for, and signed, the bill that created the Idaho Territory on March 4, 1863.
- After becoming president, Lincoln quickly appointed close friends from his legal practice

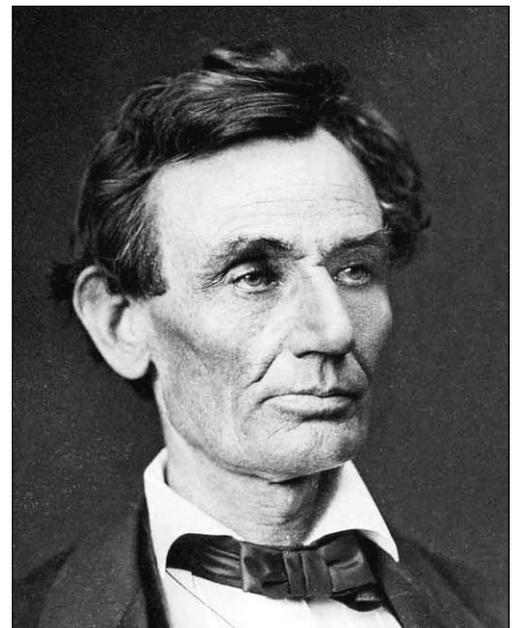
and political allies as officers over the territories, including Indiana state politician William Wallace as governor. Shortly after Lincoln's election, Wallace asked Lincoln to purge Washington Territory of disloyal officers, which helped secure the West for the Union side.

- Lincoln appointed men to various judicial, military and political positions in Idaho, one of whom may have contributed to the slight-of-hand that moved Idaho's capitol from Lewiston to Boise.

“In researching, I came across Lincoln memorabilia merchants,” he said. “When I left public service, and earned a higher income, I purchased items connected to Lincoln and the West.”

The objects are important, Mr. Leroy said, because they remind us that Idaho has these connections. He began to collect general Lincoln memorabilia and then precious rare items, a hobby that falls just short of a personal obsession.

Lincoln forged a strong connection to Idaho, Mr. Leroy found it easy to reinforce that connection. The amount of Lincoln “stuff” in his office, hallway, waiting room and stairway is overwhelming. He has original posters, photos, documents, busts, paintings, carvings, books, imprints, drawings, engravings, giant pennies, bookends, silverware and even original book titles key to Lincoln's worldview. Mr. Leroy practices as a trial lawyer, but he could easily turn his artifact hobby into a thriving museum. Rather, he and his wife, Nancy, quietly announced this year they will give numerous artifacts worth “several



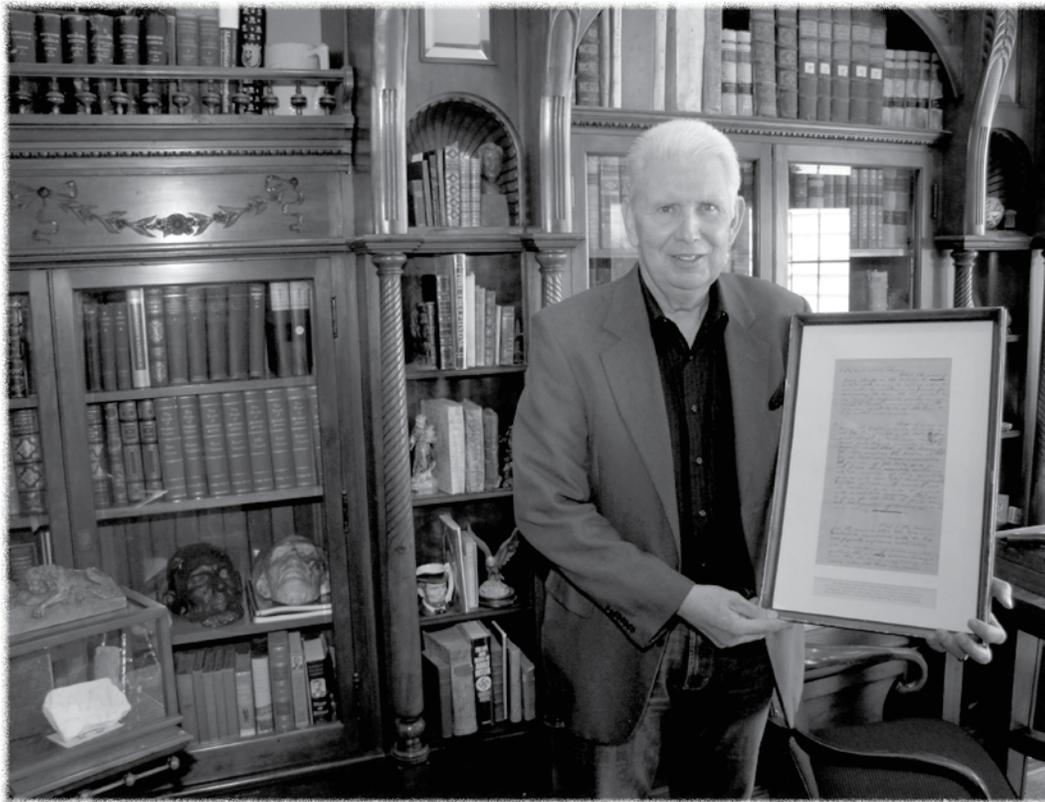


Photo by Dan Black

David Leroy holds one of his favorite pieces of Lincoln memorabilia, a pleading written by the hand of Abraham Lincoln himself. The proposed “instructions to jurors,” submitted with revisions, was rejected three times when Lincoln lost the same case thrice, though he won twice on appeal for remands. Dave said the piece is a favorite because it “shows his cogitation, his thinking, in an attempt to make his communication more precise, with words struck and some added. It’s as inspiring to me as anything,” he said. Dave and his wife plan to donate a large part of their collection to the Idaho Historical Society.

hundred thousand dollars” to the Idaho Historical Society for display at its archive in Boise.

“It’s my opinion that the traits that made him a good lawyer on the trial circuit in the 1830s to 1850s are the same skills that enabled him to assess people and become an effective communicator as president at a critical time,” Mr. Leroy said. “These are the traits that make good lawyers today.”

Mr. Leroy’s enthusiasm caught on around the Capitol city. He was appointed by Gov. Dirk Kempthorne in 2006 to serve on a commission to prepare for Lincoln’s 200<sup>th</sup> Birthday Celebration, which involved several educational events and the erection of a statue in Julia Davis Park. Another statue was restored and moved to perhaps the

state’s most prominent place, in front of the Capitol Building. The standing statue, called “Lincoln the Emancipator” looks westward and is a favorite site for schoolkids and scholars. Mr. Leroy explains the statue faces west because “Lincoln was a Western man.” It had previously been on State Street at the Old Soldier’s Home. In the 1970s it was moved to Fort Boise where there was high traffic, but it seemed overlooked there.

Mr. Leroy elaborates that, “It’s the oldest Lincoln statue in the west.”

#### Endnotes

<sup>1</sup> Idaho Yesterdays, Summer, 1998

<sup>2</sup> “Lawyers, Lincoln, and Idaho,” by David Leroy, *The Advocate*, March, 2007, p. 20, 21

### Mr. Leroy owns various Lincoln objects including:

- An 1824 edition of *Laws of Indiana*, the first law book Lincoln ever read.
- A photograph of Lincoln, before the beard, made from an original plate.
- An advertisement from his original law practice: in partnership on the circuit with W.H. Lamon in Danville, Illinois from 1852
- Several legal briefs written by Lincoln in the 1840’s and 1850’s
- A copy of the New York Herald newspaper from 1863, when Idaho was made a territory.
- Mourning ribbons that were used in Lincoln’s Springfield funeral ceremonies.
- Playbill from Ford’s Theatre announcing the play which Lincoln attended the night of his death.
- Plaster casts of Lincoln’s face and hands made while he was alive so sculptors could use them as reference for works of art.

# IDAHO COURTS BEGIN A REVIEW OF CASE PROCESSING TIME STANDARDS

Hon. Barry Wood  
Senior District Judge

**T**ime standards create expectations for how long, on average, it should take to resolve a case. They also provide judges and court administrators with a means of actively managing cases to prevent unnecessary delay. However, time standards do not create legal rights or obligations.

The Idaho Courts are currently evaluating current time standards for the purposes of meeting public expectations, assisting judges with calendar management, and assessing the need for judicial resources. In addition to considering whether current time standards are appropriate, the Idaho Supreme Court will adopt performance benchmarks and will also determine whether there should be time standards for the various stages of a given case type. For example, with respect to felony cases,

rather than simply measuring the time between the initial appearance and disposition, it might be useful to measure time to initial appearance, time to indictment or information, time to plea accepted or trial initiated, and time to sentencing. The examination

of cases in stages helps to facilitate active case management and provides more meaningful information, allowing judges and court administrators to more easily identify causes of unnecessary delay.

We expect recommendations for modifying Idaho's time standards to be finalized in the fall of 2012, at which point proposed amendments to I.C.A.R. 57 will be forwarded to the Supreme Court for consideration.

As part of the review, the judiciary is soliciting input from Idaho Supreme Court committees, judges, court staff, and attorneys. By this article, the Courts are requesting participation from the Idaho Bar. This summer, in partnership with the Idaho State Bar, the Idaho Supreme Court will administer an online survey to all attorneys in Idaho to gain further insight into a variety of factors that impact case processing, including time standards. In the interim, the judiciary welcomes ques-



Hon. Barry Wood

tions, comments, and suggestions, which can be directed to Senior District Judge Barry Wood at [bwood@idcourts.net](mailto:bwood@idcourts.net) or Taunya Jones at [tjones@idcourts.net](mailto:tjones@idcourts.net).

## The larger effort

This evaluation of time standards is part of a larger effort on the part of the Idaho Courts that has been branded "Advancing Justice." The judiciary has initiated an open-ended, top to bottom systems review to identify and eliminate sources of unnecessary delay in case processing, that is, delay that contributes nothing to due process or procedural fairness. From family law cases to problem solving courts, complex multi-party civil litigation to small claims, and felonies to infractions, all aspects of case processing are under close review.

The Idaho Bar can expect to hear a great deal more about Advancing Justice in the coming months and years and will have multiple opportunities to participate in Advancing Justice efforts. Presentations will be made to several Bar Sections over the next few months as well as at the Idaho State Bar's Annual Meeting in July. Attorneys will be invited to participate in workgroups tasked with such things as reviewing Idaho court rules and statutes to identify additional opportunities for delay reduction and developing plans to improve Bench-Bar communications on both a district and statewide level. The Idaho judiciary places great value on the

## Idaho time standards

Idaho time standards for case processing are outlined in Idaho Administrative Court Rule 57 (I.A.C.R. 57). The rule includes standards for ten case types: District Court civil, Magistrate Division civil, District Court felony, Magistrate Division felony, small claims, domestic relations and child support, juvenile corrections act, child protection act, misdemeanor, and infraction.

thinking and recommendation of Idaho attorneys and recognizes that they have a considerable stake in the outcome of the current review, particularly because any changes resulting from the current initiative may well impact the way Idaho courts conduct business for years to come.

## About the Author

**Judge Barry Wood** is currently serving as a Senior Judge. Prior to his retirement from the bench in 2009, Judge Wood served 10 ½ years as the 5th District Administrative Judge, and served on several Supreme Court Committees, including the Supreme Court Clerk's Manual and Training Committee. Judge Wood and his wife, Karen, spend as much time as possible outdoors enjoying hunting, fishing and gardening.



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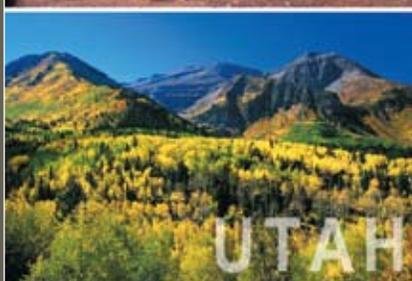


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Michelle R. Points  
*Idaho Delegate  
to ABA House of Delegates*

The 2012 Midyear meeting of the American Bar Association (the ABA) House of Delegates was held February 6 in New Orleans, Louisiana. This was the fourth meeting I have attended as the State Bar Delegate for Idaho. Attending the meeting with me representing Idaho were Tim Hopkins, who is on the ABA Board of Governors, and Larry Hunter, the Idaho State Delegate. As I have described in previous articles, and for those of you who are not familiar with the structure of the ABA, the House of Delegates is the policy-making body of the ABA. The House of Delegates meets twice a year at the ABA Annual and Midyear meetings. The actions taken and resolutions passed by the House of Delegates become official ABA policy, allowing the ABA to thereafter lobby before Congress and the Executive branch for implementation of that policy.

The overriding message in meetings and discussions at the Midyear meeting, including speeches by ABA President Bill Robinson and others, was the pending crisis of lack of funding to the courts and its implications on access to justice; that the fundamental right to justice is diminishing and that we as members of the bar each have a personal responsibility to assure that this right is preserved, no matter what your practice or position.

There were several resolutions presented to the House of Delegates for consideration. Of interest to state bar associations, a resolution sponsored by the Bar Association of Puerto Rico was passed to urge courts and legislative bodies to respect the organized bar's ability and right to function independently and express its views freely.



Michelle R. Points



Of interest to the criminal bar, several important resolutions were passed. For example, a resolution was passed to adopt the ABA Criminal Justice Standards on Law Enforcement Access to Third Party Records to provide a framework for the legislature, courts acting in their supervisory capacity, and administrative agents to balance the needs of law enforcement and the interests of privacy, freedom of expression and social participation. A resolution was passed to urge governments to adopt pretrial discovery procedures requiring laboratories to produce comprehensive and comprehensible laboratory and forensic science reports for use in criminal trials that include a number of identified criteria. A resolution was passed to urge judges and lawyers to consider a number of factors in determining the manner in which expert testimony should be presented to a jury and in instructing the jury in its evaluation of expert scientific testimony in criminal and delinquency proceedings. A resolution was passed to urge judges and lawyers to consider potential jurors' understanding of general scientific principles, scientific principles relevant to forensic science, and preconceptions or bias with respect to forensic scientific principles in formulating jury voir dire questions. A resolution

*The fundamental right  
to justice is diminishing  
and we as members  
of the bar each  
have a personal  
responsibility to  
assure that this  
right is preserved.*

was passed to urge the federal government to encourage public housing authorities to reevaluate their current rules regarding admission, termination, and additions to households to ensure that, while resident safety is protected, those rules do not unfairly punish persons with criminal records. A resolution was passed to support legislation, policies and practices that allow equal and uniform access to therapeutic courts and problem-solving sentencing alternatives, such as drug treatment and anger management counseling, regard-

less of the custody or detention status of the individual. Finally, a resolution was passed to urge federal, state and territorial courts to adopt jury instructions which are in language understandable to jurors untrained in law and legal terms, in the penalty phase of trials in which the death penalty may be imposed and that such instructions should be provided to jurors in written form.

A resolution sponsored by several divisions and spearheaded by the Commission on Women in the Profession was passed to urge state and territorial bar admission authorities to adopt rules, regulations and procedures that accommodate the unique needs of military spouse attorneys who move frequently in support of the nation's defense.

Of interest to the intellectual property bar, a resolution was passed to support the long-established precedent that patent infringement must be proven by a preponderance of the evidence, and the fact that a product or process accused of infringing a patent-in-suit is itself separately patented does not alter the burden of proof, or create a presumption of non-infringement.

Based on a motion submitted by the Commission of Disability Rights (and sponsored by several other divisions), a resolution was passed to urge entities that administer a law school admission test to provide appropriate accommodations for a test taker with a disability to best ensure that the exam results reflect what the exam is designed to measure and not the test taker's disability.

The State and Local Government Law division sponsored a resolution, which passed, to support the principle that "private" lawyers representing governmental entities should be entitled to qualified immunity from 42 USC Section 1983 claims when they are acting "under color of state law."

If you are not a member of the ABA, think about becoming one. There are a number of member benefits including alerts, notifications, publications, discounted products and services, and several resources for attorneys in all areas of practice. The ABA is now offering to all new members a free monthly CLE series. Also see the ABA website for information about pending legislation and other important news impacting our profession.

On a personal note, I had never visited New Orleans. Wow. Our headquarters were a short walk from Bourbon Street. Our meeting was held shortly before Mardi Gras, so everything was getting "tuned up" for the big event. I soaked in the diversity and the frequent experiences that I thought likely were only orchestrated on television. Dozens of oysters and local specialties were devoured, several libations were sampled, and the heartburn lasted for nearly a week. It was a great experience, I am looking forward to productive annual meeting in Chicago in August.

#### About the Author

**Michelle R. Points** is the principal of *Points Law, PLLC*. She has over a decade of experience as a litigator and has practiced in both state and federal court with civil and criminal cases.

Her practice encompasses a wide range of general and complex litigation, with an emphasis on personal injury, product liability, medical negligence, commercial litigation, commercial transactions, employment claims and natural resources.

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Tenielle Fordyce-Ruff  
Rainey Law Office

Remember this great song from Schoolhouse Rock?

*Conjunction Junction, what's your function?  
Hooking up words and phrases and clauses.  
Conjunction Junction, how's that function?  
I got three favorite cars  
That get most of my job done.  
Conjunction Junction, what's their function?  
I got "and," "but," and "or,"  
They'll get you pretty far.*

While these three conjunctions would get most school children pretty far, as legal writers, we need a more nuanced repertoire to help readers understand our meaning and how the words, phrases, and clauses we use relate to each other.

So, to help you better understand how to make conjunctions function, let's take a look at coordinating conjunctions, correlative conjunctions, and subordinating conjunctions to connect ideas.

## Coordinating conjunctions

These conjunctions are used to join grammatically equal elements. The main coordinating conjunctions are *for*, *and*, *nor*, *but*, *or*, *yet*, *so*.<sup>1</sup> They coordinate because they draw equal attention to two or more ideas. You can use them to draw attention to equal words:

*The speech was not vulgar, lewd, obscene, or plainly offensive.*

Or equal phrases (a group of related words):

*The government's actions violate the establishment clause unless, the government's action (i) has a secular legislative purpose, (ii) does not have the primary effect of either advancing or inhibiting religion, and (iii) does not result in an "excessive government entanglement" with religion.*

Or equal clauses (a group of related words with both a subject and a verb):

*The Federal Constitution limits the government's ability to abridge free*



*speech, but the Idaho Constitution grants to every person the right to speak freely.*

In addition to creating equal emphasis on ideas in your sentence, coordinating conjunctions can be used to add variety to the length of sentences in a paragraph. Longer sentences are always useful if you want to avoid having the reader hear machine gun fire as he reads your writing. For instance,

*The first ten amendments are the Bill of Rights. The First Congress proposed them to the several states on September 25, 1789. New Jersey ratified them on November 20, 1789. Virginia ratified them on November 3, 1791. Connecticut ratified them on April 19, 1939.*

That paragraph is much more pleasant to read if you add coordinating conjunctions to vary the length:

*The first ten amendments are the Bill of Rights. The First Congress proposed them to the several states on September 25, 1789. New Jersey ratified them on November 20, 1789, **and** Virginia ratified them on December 15, 1791. **But**, Connecticut didn't ratify them until April 19, 1939.*

Don't go too far in the direction of combining every sentence. Remember, the occasional short sentence has punch and demands the reader's attention.

*The first Congress proposed the Bill of Rights to the several states on September 25, 1789. Between November 20, 1789, and December 15, 1791, eleven of the states ratified the Bill of Rights. One hundred forty-eight years later, the last of the several states ratified the Bill of Rights. Connecticut takes its time!*

*Don't go too far in the direction of combining every sentence. Remember, the occasional short sentence has punch and demands the reader's attention.*

## Correlative conjunctions

Correlative conjunctions are also used to connect grammatically equal elements, but these conjunctions come in pairs: *either/or*, *neither/nor*, *not only/but also*, *whether/or*, *both/and*.

When using correlative conjunctions, make sure the phrases or clauses you are connecting are both grammatically equal (don't mix and match phrases and clauses). For example, don't say:

**Wrong:** *Her speech was either protected as political speech, or she could have been making a religious statement.*

**Correct:** *She was making either a political statement or a religious statement.*

The first sentence is incorrect because "protected as political speech" does not have a subject and a verb, so it's a phrase.



Tenielle Fordyce-Ruff

“She could have been making a religious statement” has both a subject and a verb and is an independent clause.

Also, make sure the phrases and clause you’re joining are in parallel structure. Parallelism is the use of similar grammatical form for coordinated elements. In non-grammarians terms, this means you match nouns with other nouns, verbs with other verbs, prepositional phrases with prepositional phrase, and so on . . . .

**Wrong:** *Under the Open Meetings Law, the public is not only entitled to attend governmental meetings, but also to be given notice of the time, place, and subject matter of those meetings.*

**Correct:** *Under the Open Meetings Law, the public is entitled not only to attend governmental meetings, but also to be given notice of the time, place, and subject matter of those meetings.*

The first example is incorrect because the verbs are not in the same tense; in the second example the verbs are.

The use of parallelism is especially important when presenting long or complicated ideas to the reader.

**Wrong:** *The author claim that it was not only wrong to tell just one side of the story, but also people had the right to hear the other side of the story and that he could write what he wanted.*

**Correct:** *The author claimed not only that it was wrong to tell just one side of the story, but also that people had the right to hear the other side of the story and that he had the right to write what he wanted.*

The first example is more difficult to understand because the writer’s three ideas are in a mish-mash of grammatical forms. In the second example the writer has helped the reader follow her three ideas by using “that” to begin each idea and by using grammatically parallel clauses.

### Subordinating conjunctions

Subordinating conjunctions are used when the elements of a sentence are not equal. These conjunctions introduce subordinate clauses and explain the clause’s relationship to the rest of the sentence. Common subordinating conjunctions include *after, although, as, as if, as long as, because, before, even though, if, in order that, now that, rather than, since, so that, than, that, though, unless, until, when, whenever, where, whereas, whether, while*.

Subordinate clauses are patterned like sentences; they have subjects and verbs. But, because these clauses include a sub-

ordinating conjunction, they cannot stand alone as sentences:

*Although he yelled fire in the crowded theater.*

Instead, we use subordinating conjunctions to create clauses that help the reader better understand the main clause of the sentence by explaining the when, where, or why.

*Although he yelled fire in the crowded theater, the patrons exited in an orderly fashion.*

Use subordinating conjunctions to let the reader know the sentence elements are not equal and to help you emphasize the more important idea. (Determining which is the more important idea is up to you.)

*The speech was vulgar, lewd, obscene, and plainly offensive, but the court ruled it was protected.*

*Even though the speech was vulgar, lewd, obscene, and plainly offensive, the court ruled it was protected.*

### Conclusion

Using coordinating conjunctions, correlative conjunctions, and subordinating conjunctions can help your readers better understand your writing and your thoughts. They can also add nuance and balance to our writing.

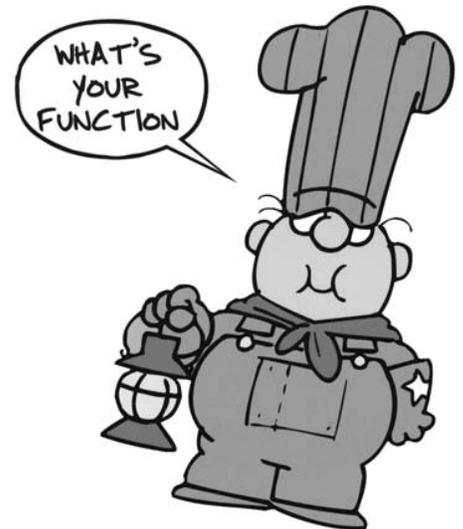
And, just in case the tune for Conjunction Junction has left your mind after this grammar lesson, I leave you with this verse:

*In the mornings, when I’m usually wide awake, I love to take a walk through the gardens and down by the lake, where I often see a duck and a drake, and I wonder, as I walk by, just what they’d say if they could speak, although I know that’s an absurd thought.*

### 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,

*The use of parallelism is especially important when presenting long or complicated ideas to the reader.*



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](mailto:tfr@raineylawoffice.com).

### Sources

- The lyrics for Conjunction Junction can be found at <http://www.school-houserock.tv/Conjunction.html>. You can also view the original Conjunction Junction at <http://www.youtube.com/watch?v=ODGA7ssl-6g>.
- Anne Enquist & Laurel Currie Oates, *Just Writing: Grammar, Punctuation, and Style for the Legal Writer* at 202-204 (3d ed. 2009).
- Bryan A. Garner, *The Redbook: A Manual on Legal Style* at 178-181 (2d ed. 2006).

### Endnotes

<sup>1</sup> For a refresher on how to correctly punctuate independent clauses joined with these seven coordinating conjunctions, see “Six Simple Steps to Correct Commas,” *The Advocate* 49-50 (September 2011), available at <https://isb.idaho.gov/pdf/advocate/issues/adv11sep.pdf>.

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# NONTRADITIONAL LAW STUDENTS: A 21<sup>ST</sup> CENTURY RESOURCE

Donna Emert  
University of Idaho  
College of Law

**G**rowing ranks of nontraditional law students present new opportunities and new challenges for law schools nationwide. The first challenge is defining them.

“The way we think of the traditional student is one who attends school from kindergarten through juris doctorate, is unmarried, has no children, is attending law school full time, and probably is not doing much work outside of academia,” said Lee Dillion, University of Idaho College of Law associate dean for Boise programs.

Nontraditional students include all who do not fit neatly within those parameters, including students who are older, married, have children, are entering law school from the workforce or are full time students who simultaneously hold a job up to 20 hours per week, the maximum allowed by the American Bar Association for students taking 12 or more credit hours per semester.

Dillion, like several University of Idaho College of Law faculty and staff, was a nontraditional student himself.

“When I took my daughter to campus in the late 1970s, it was kind of like a petting zoo:

the reaction was ‘look at the strange creature you’ve brought!’” Dillion recalls with a laugh.

“There were not many married students or students with children. Since then law schools generally, and ours particularly, have done a good job addressing the needs of non-traditional students.”

A significant number of University of Idaho law students are married, have children, or are nontraditional in other ways.

“Every Monday morning I come in to the law school and see little hand prints and face prints on our glass door,” said Dillion, citing one smudgy barometer of change for law students raising families. “The spouses often come down here and



Photo by Donna Emert

University of Idaho Law Associate Dean Lee Dillion talks with third-year law student Jeff Butler about juggling school and family.

interact. We’ve created a pretty friendly atmosphere that I certainly didn’t feel when I went to law school.”

For both traditional and nontraditional students, time management remains one of the greatest obstacles in law school. Non-traditional students may have an edge over K-through-JD students there, Dillion suggests: “Non-traditional students often treat law school like a job: they’re working eight to five. They have more time pressures, but they’re experienced, and often better, time managers.”

On the down-side, nontraditional students’ fuller schedules can mean less time to get involved in the University’s diverse clinical programs, externships, internships, assistantships, publications and competitions. These experiences are designed to wed theory and application.

The vast majority of nontraditional students do take advantage of these on-the-ground experiences. A third-year law student in Moscow, Erin Hodgins-Tomlin, has engaged in extra-curricular activities that have included co-chairing the Native American Law Students Association, participating in the D. Craig Lewis Trial Team, and serving as the law school’s volunteer representative on the Latah County Youth Accountability Board — a diversion program for first-time juvenile offenders. In addition she has volun-

*“Non-traditional students often treat law school like a job: they’re working eight to five. They have more time pressures, but they’re experienced, and often better, time managers.”*

— Lee Dillion

teered at Latah County’s Small Claims Court as a mediator, and has logged more than 150 hours in pro-bono service as a law student.

Hodgins-Tomlin also has worked part-time as a research assistant for a law professor, and part-time for a local public defender, handling misdemeanors and representing clients in court, within the parameters of her limited license.

In between and throughout, she and



Donna Emert

her husband Josh are raising three sons, currently age 12, 7 and 3. She expects to graduate with dual emphasis in Native American Law and Litigation/Appropriate Dispute Resolution in May, 2012.

"A typical day is mapped out," she said. "By that I mean all my classes and work duties, my husband's work schedule, kids' after school activities, even what's for dinner, are planned in advance. It's a juggling act, really. With time management and enough flexibility to stay sane, it works."

Jeff Butler, a third-year student in Idaho's law program at Boise, is a husband and a father of four. His extracurricular commitments have included service as president of the Nontraditional Law students group, editor of the law school critical legal studies journal (*the crit*), contributing editor of [www.Business-LawGems.com](http://www.Business-LawGems.com) (an on-line publication of the law school for business law practitioners), and a research assistant.

Butler is on track to earn his J.D. in May. Simultaneously, his wife, Angel, is pursuing a degree in Communications through Boise State University.

While Butler says he wishes he had the leisure of uninterrupted focus, and 20-somethings' super powers of memorization, he confesses that students like him also have some advantages.

"One of the perks of being an older, married student is experience," said Butler. "I started law school when I was 35. I've worked a lot, and experienced a lot of what our professors discuss in class. These aren't intangible concepts to me."

The result of experience is often insight. "Experience allows us to get more out of the discussion, and add more to the discussion," Butler said.

Traditional students are more likely to have the advantage of a quiet apartment to go home to, or at minimum, one that houses only adults. But the College attempts to equalize opportunity for quiet study. "One of the unique resources we provide on both the Moscow and Boise campuses are dedicated study carrels for students, which gives them a quiet space, without interruptions, in which to study," said Dillion.

To provide all students membership in the law school community, the College also offers 28 diverse law student organizations, including the Nontraditional Student Group. In addition, every student has an assigned faculty mentor, a relationship most often facilitated by an open door policy.



Photo by Donna Emert

The Butler family goes trick- or-treating at a nontraditional student Halloween event at the University of Idaho College of Law.

### Empathy is also an asset

"Our faculty who were nontraditional students themselves bring those values and concerns forward," said Dillion.

"We are aware of scheduling issues, and we work with the students. We're small enough that we can adapt in ways that maybe a larger law school can't."

For the past 20 years, says Dillion, one objective of law schools across the nation has been to bridge the gap between theory and practice with the introduction of clinical programs, externships and internships. Work experience before law school also bridges the divide.

"A nontraditional student who enters law school after working, for example, in mitigating personnel disputes in an HR position, or negotiating contract language for an employer, has already applied the law in real-life situations," said Dillion. "Nontraditional students bring insights borne of experience to their law education. That experience can be an asset in to everyone in the law school classroom."

### About the Author

**Donna Emert** is a writer with *University of Idaho Communications*, where she has worked for several years. She also has worked as a freelance writer for more than 20 years. She is based in Coeur d'Alene.

*While Butler says he wishes he had the leisure of uninterrupted focus, and 20-somethings' super powers of memorization, he confesses that students like him also have some advantages.*

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## IN MEMORIAM

### Judge Dan McDougall 1942 - 2012

Born in Pocatello, Dan moved to Texas and later joined the Peace Corps. He was sent to India in 1965 for a two-year teaching assignment. His next service was an invitation from LBJ to join the Army. Dan arrived in Vietnam in 1967 for a one-year tour of duty. On Valentine's Day, 1970 he married his wife Jan and recently celebrated his 42nd wedding anniversary. He attended the University of Tulsa Law School and returned to military service as a Captain in the JAG branch, achieving the rank of Lt. Colonel. Dan returned to Pocatello to serve Bannock County as the Chief Deputy Prosecutor. In 1981, Dan served the city of Pocatello as the City Attorney and in 1983 was selected to serve the state as a Magistrate Judge for the Sixth District.



Hon. Dan McDougall

Judge McDougall was the Juvenile Judge for 10 years and helped create the Juvenile Justice facility for Bannock County, and implemented the Drug Court program. The CASA program was established under Judge McDougall's leadership and he was honored by the Idaho Supreme Court in 1994 with the prestigious Kramer Award. After 10 years he decided to leave the Juvenile Court and return to the responsibilities of a magistrate judge. In 2004 Judge McDougall retired after 21 years of service. He is survived by his wife, Jan, son Eddy and daughter Cathy.

### Lawrence G. Smith 1955 - 2012

Lawrence G. Smith died at his home in Boise on March 9. Larry was born in Asheville, NC. After high school he enlisted in the U.S. Army. After his discharge, he attended Boise State University, earning a B.A. in English. He chose Duke Law School to complete his education with a J.D. degree.



Lawrence G. Smith

In 1988, Larry and his family moved to Boise. After a brief employment with Holland and Hart, Larry worked for the Ada County Public Defender's Office until the time of his death.

Larry is survived by his son Tyler T. Smith, daughter Rebecca Joan Smith Briery, mother Loyce Smith, close cousins Sara Jones Montgomery and Russell Jones, half brother John Smith and family, three ex-wives, many girlfriends and many who loved him.

### Christopher Davis Bray 1946 - 2012

Christopher Davis Bray passed on unexpectedly, but free of pain on March 28.

In high school, he was named Texas All-State Center in 1964 and attended the University of Texas at Austin on a football scholarship.

He graduated with a BA in History and a J.D. from the University of Texas Law School. After moving to Idaho Chris

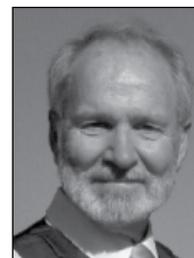
served in the Attorney General's office from 1974-1978 as Deputy A.G. to the Secretary of State and Department of Health and Welfare.

After he finished his work there, he practiced family law, including cases to the 9th Circuit Court of Appeals and the Idaho Supreme Court. Known for his compassion, clarity, guidance, and integrity, Chris practiced law out of an abiding commitment to "making the impossible possible" for those in great need with the least amount of acrimony and contention.

Chris was also a gentle, strong, and selfless father. His children, Bonnar and Tessa, were never far from his thought, and the family is a loving unit involved together in church, theater, music, politics, traveling the world and working actively on Gail's successful campaigns for state senate and for the Democratic Party locally and nationally.

Chris loved singing with the Boise Philharmonic Master Chorale, being a member of First Church of Christ, Scientist in Boise, and being the #1 fan of anything and everything his children and wife did. The Brays spent many wonderful times at their log cabin on the North Fork of the Boise River, and more recently in McCall, Idaho, where Chris and Gail were always at their most relaxed and joyful.

He, Gail, Bonnar, and Tessa welcomed his mother, Christine, into their home in 1994 and cared for her until her passing this past September.



Christopher Davis Bray

#### IDAHO LAW FOUNDATION



The Idaho Law Foundation gratefully acknowledges the following tribute donations:

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In memory of **Rose Silak** from **Cathy R. Silak** and **Nicholas G. Miller**

In memory of **Jay Webb** from **Tim Hopkins**

In memory of **John Barrett, Carl Burke, M. Allyn Dingel, John Hepworth** and **Jay Webb** from an anonymous donor

## Parsons Behle & Latimer hires senior paralegal

Parsons Behle & Latimer hired Josh Sweet as a senior paralegal for the firm's Boise office (formerly Zarian Midgley and Johnson). Sweet, who joined the firm in January, will support the firm's litigation practice group. He has an extensive background in general, civil and business litigation.

Sweet's work at Parsons Behle & Latimer will focus primarily on document management, discovery, pre-trial preparation and trial support. He previously worked as a litigation paralegal at Boise-based firms Naylor & Hales and Greener Burke Shoemaker, and Los Angeles-based McCutchen Doyle Brown & Enersen (now Bingham McCutchen). Sweet earned a Bachelor of Arts in Political Science from University of California, Irvine.

Parsons Behle & Latimer's Boise office features the largest intellectual property legal team in Idaho.



Josh Sweet

## Attorneys Gingras, Grubbs join Winston & Cashatt

Attorneys Scott Gingras and Erika Grubbs have joined Winston & Cashatt as associates who will work out of the firm's Coeur d'Alene office.

Gingras focuses on civil litigation involving employment and labor law, personal injury, products liability, medical negligence, insurance law, and insurance defense. A Gonzaga Law School graduate, Gingras joins Winston & Cashatt from a Coeur d'Alene firm. He is the current chair of the Employment and Labor Law Section of the Idaho State Bar, and a regular presenter on employment and labor law



Scott Gingras



Erika Grubbs

topics. He is admitted to practice in Idaho, Washington and Montana.

Grubbs has two decades of trial experience, and will focus on construction law, land use and development, planning and zoning, real estate, contracts, business law, civil litigation, government law, and estate planning and probate. She is a frequent presenter on employment law, risk management, government law, and contracts. She is admitted to practice in Idaho, Washington and Georgia.

Winston & Cashatt is a regional, independent law firm that has been practicing law for more than 60 years.

## Ninth Circuit Advisory Board welcomes Debora Kristensen

Boise attorney Debora K. Kristensen has been appointed to the Ninth Circuit Advisory Board, a group of prominent attorneys that advises on the effective administration of the federal courts in the western states.

Ms. Kristensen, 46, a partner at Givens Pursley LLP, is a general business litigator in state and federal courts, with a particular emphasis on employment and media law. She is considered one of Idaho's prominent lawyers and previously served for six years as an Idaho Lawyer Representative to the Ninth Circuit Judicial Conference.

"It's an honor to have been selected to serve in this new role. I'm thrilled to be able to continue working with the fine judges, lawyers and staff of the Ninth Circuit," Ms. Kristensen said.

The Advisory Board acts as an advisor to the chief judge and the Judicial Council of the Ninth Circuit, which sets policy for federal courts in Idaho, eight other western states and two Pacific Island jurisdictions. The board formulates recommendations for improvement of judicial administration, comments on proposed changes in practice and procedure, and participates in the annual Ninth Circuit Judicial Conference. More recently, the board has sought to educate lawmakers about the judicial vacancy crisis in the courts.

Appointments to the Advisory Board are made by Chief Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit, who chairs the Judicial



Debora K. Kristensen

Council. Selection is based on an outstanding record of contributions to the administration of the federal courts of the circuit, demonstrated leadership, and past service to the Judicial Conference.

## Fourth Judicial District Magistrate Judge appointed

The Magistrate Commission for the Fourth Judicial District has appointed Lamont (Monty) Berez, 37, of Boise as a new magistrate judge in Valley County. Since 2008, Mr. Berez has been employed as a magistrate judge assigned to the juvenile court in Ada County. From 2001-2008, Mr. Berez was employed with the Ada County Prosecutor's office where he was a felony trial attorney focusing on domestic violence cases and served as an on-call drug prosecutor.

Mr. Berez holds Bachelor's of Art degree in Biology from Andrews University in Berrien Springs, Michigan and a J.D. from the University of Virginia School of Law.

He and his wife, Sophie, and their four daughters currently live in Boise and will relocate to Valley County in the near future.

## Camacho Mendoza Coulter Law Group opens new office, hires Remington Johnson

Camacho Mendoza Coulter Law Group announces the addition of a new attorney and opening of a new office. The firm provides counsel to businesses, employees, employers, Native American Tribes and Tribal members, insurers, political candidates and parties.

Remington J. Johnson joined the firm in January. He graduated with a degree in Political Science and a minor in History from the University of Utah, before graduating with honors from the George Washington University Law School, Washington, D.C. where he was a member of the Black Law Student Association and served as senior member of the Federal Circuit Bar Journal.



Hon. Lamont Monty Berez



Remington J. Johnson

## OF INTEREST

Remington is licensed in the state courts of Maryland and the U.S. District Court of Maryland. His practice will focus primarily on compliance with campaign finance laws. Camacho Mendoza Coulter Law Group is located at 776 E. Riverside Dr., Ste 240, Eagle, ID 83616, and at 7272 Wisconsin Ave., Ste 300, Bethesda, MD 20814.

### Haemmerle elected mayor in Hailey

Fritz Haemmerle, an attorney with a long history of volunteerism with the Bar, was elected mayor of Hailey in November. Mr. Haemmerle had to forfeit his role as City Council president to run for the office. He won almost twice the number of votes (668) as incumbent Rick Davis (350), who stepped down after 20 years in public service.



Fritz Haemmerle

Mr. Haemmerle served on the Conditional Admission Committee from 1998 to 2003 and currently serves on the Character and Fitness Committee. He is a member of Litigation, Real Property and Water Law Sections.

### Points opens firm

Michelle Points of Boise announced the formation of her own law firm, Points Law PLLC. Her practice as attorney and counselor includes civil litigation, products liability, personal malpractice, and personal injury. Her office is located at 420 W. Main Street in Boise. She can be reached at (208) 287-3216 or by email at [mpoints@pointslaw.com](mailto:mpoints@pointslaw.com).



Michelle Points

### Kim Stanger joins Holland & Hart's Boise office

Holland & Hart is pleased to announce the addition of partner Kim Stanger to the firm's Boise office. Mr. Stanger has more than 20 years of experience in the healthcare industry on a wide range of legal matters, from simple contracts to complicated transactions and regulatory concerns.

As a member of the firm's healthcare and corporate groups, Mr. Stanger ad-

vises clients on matters such as practitioner agreements; joint ventures; practice formation, acquisitions and mergers; and physician integration. He helps clients comply with complex regulations governing the healthcare industry, including Stark, HIPAA, HITECH, EMTALA, and other rules. He represents individual and institutional providers in internal, administrative and judicial proceedings, including those relating to licensing, credentialing, peer review, and government investigations.

He is a member of the American Health Lawyers Association; the Healthcare Financial Management Association; the Health Law Sections of state and national bar associations; the Idaho Medical Group Management Association; and Idaho Association of Healthcare Risk Managers. He is a popular speaker at industry organizations, and a frequent author on health law-related topics. He graduated magna cum laude from Brigham Young University.



Kim Stanger

### Lewiston City Council appoints Shropshire as City Attorney

Jamie C. Shropshire was appointed City Attorney for the City of Lewiston by the Lewiston City Council in March. Ms. Shropshire had been the acting City Attorney since longtime City Attorney, Don L. Roberts, retired in November. She served as Assistant City Attorney for Lewiston from July 2004 to November of 2011.

Ms. Shropshire was elected Nez Perce County Prosecutor from 1996 to 2001, and before that was a deputy in Nez Perce County and Prosecuting Attorney for Valley County. Currently she chairs the Lawyer's Assistance Program Committee for the Idaho State Bar and is a member of the Statewide Drug Court and Mental Health Court Coordinating Committee.



Jamie C. Shropshire

Ms. Shropshire is a native of Idaho. She graduated from Santa Clara University Law School, Santa Clara, California and practiced in California before returning to Idaho.

### Idaho Association of Paralegals has new board

The Idaho Association of Paralegals is pleased to announce the seating of its Board of Officers for 2012.

Incoming officers include BryonAnn Green, Lesa Thomas and Sara Gronberg, who will serve their first terms as officers in the capacity of treasurer, vice president of membership and vice president of education, respectively. Colleen Kohler continues for a second term as vice president of policy and public affairs, and IAP Board veteran Maryann Duncan is currently serving a second term as secretary. Kimberle English is the National Affairs Representative. Greg Bradford returns to the board as president, having served two years as vice president of education. Bernice Myles is board advisor.

The contact information for the current Board Officers is:

- Greg Bradford, Idaho Paralegal, LLC - [president@idahoparalegals.org](mailto:president@idahoparalegals.org)
- Colleen Kohler, Advocates for the Disabled - [publicaffairs@idahoparalegals.org](mailto:publicaffairs@idahoparalegals.org)
- Lesa Thomas, BMHC - [membership@idahoparalegals.org](mailto:membership@idahoparalegals.org)
- Sara Gronberg, Parsons Behle & Latimer - [education@idahoparalegals.org](mailto:education@idahoparalegals.org)
- BryonAnn Green, Stern Law Office - [treasurer@idahoparalegals.org](mailto:treasurer@idahoparalegals.org)
- Maryann Duncan, URS Corp - [secretary@idahoparalegals.org](mailto:secretary@idahoparalegals.org)
- Kimberle English, Holland & Hart - [nationalaffairs@idahoparalegals.org](mailto:nationalaffairs@idahoparalegals.org)
- Bernice Myles, Office of the Attorney General

Board officers are organizing speakers for upcoming seminars and continuing legal education events. Past speakers have included a variety of attorneys, judges, and other legal professionals from the local community, and have covered numerous topics. For questions regarding the association, including support to the Association in the form of a presentation at one of its continuing legal education events, contact Bradford.



Photo by Chad case Photography

Concordia University School of Law inaugural faculty. Front row (l to r): Jodi Nafzger, Dean Cathy Silak, Chad DeVeaux. Back row (l to r): Phillip Gragg, Tenielle Fordyce-Ruff, Associate Dean Greg Sergienko.

## CONCORDIA UNIVERSITY NAMES INAUGURAL FACULTY

Kimberley Hoidal  
*Concordia University  
 School of Law*

Concordia University School of Law Dean Cathy Silak announced the selection of the founding team of full-time law faculty in preparation for the enrollment of the inaugural class in August 2012. The faculty will teach first-year law courses while taking all necessary steps to present a program of legal education that will qualify for approval by the American Bar Association.

“We’re delighted about the quality of our incoming first-year faculty. Together, with Dean Silak, they bring teaching expertise, experience as practicing attorneys, and a commitment to Concordia’s tradition of community service and engagement,” said Concordia University President Chuck Schlimpert.

“Our law faculty will contribute a wealth of resources and talent to Boise’s legal community and prepare students with a rigorous academic curriculum, a range of practical skill-building experiences, and the ethical foundation to contribute to the state and region.”

Greg Sergienko has been named Associate Dean of Academics, Chad DeVeaux as Associate Professor of Law and will teach two first-year law classes. Boise attorney Tenielle Fordyce-Ruff will direct the law school’s Legal Research and Writing Program. Jodi Nafzger joined the law school in January as the

Director of Experiential Learning and Career Services. The law school recently hired Phillip Gragg as the Director of the Law Library. Faculty was introduced to students admitted to the inaugural class at a dinner in April.

The law school is currently enrolling the inaugural class of 75 to 95 students in the fall 2012.

Concordia University School of Law is a private, Lutheran, liberal arts university based in Portland with a mission of preparing leaders for the transformation of society.

In 2007, Concordia University announced plans to open a law school in downtown Boise. The expansion was completed in 2010 as the law school was designed for sustainability and multifaceted learning. Features include the George R. White Law Library and the latest advancements in classroom technology.

**Greg Sergienko** will join Concordia University, School of Law as the Associate Dean of Academics in June. An experienced legal educator, Mr. Sergienko comes to Concordia Law after serving as the associate dean of academics (2003-2004, 2007-2009) and professor of law (1999-present) at Western State University, College of Law, in Fullerton, Calif. During his tenure at Western State, Mr. Sergienko was instrumental in helping guide the school through the process of gaining full ABA approval. In his second term as

*The law school is  
 currently enrolling  
 the inaugural class of  
 75 to 95 students  
 in the fall 2012.*

dean, he helped increase the bar-passage rate from 17% to 73% (February 2007 to July 2008).

Mr. Sergienko also has served as visiting faculty to several law schools including the University of Chicago, the University of Richmond, the College of William & Mary, the University of Maryland, Wayne State University, Southern Illinois University, and Albany Law School.

Prior to teaching, Mr. Sergienko clerked for the Honorable Alfred T. Goodwin, United States Court of Appeals for the Ninth Circuit from 1985-1986, before becoming an associate at Barrett, Hale & Gilman in Seattle, Wash.

Mr. Sergienko received his Bachelors of Arts, magna cum laude, from Harvard College in 1980. Awarded his Juris Doctor, magna cum laude, from Harvard Law School in 1985, Mr. Sergienko

contributed to the Harvard Civil Rights-Civil Liberties Law Review.

**Chad DeVeaux** joins Concordia University, School of Law as a full time Associate Professor of law in July. He will teach two of the first-year courses. Mr. DeVeaux comes to Concordia Law after spending the past three years as an assistant professor at Western State University, College of Law, in Fullerton, Calif. At Western State, Mr. DeVeaux taught Civil Procedure, Criminal Procedure and Contracts.

Prior to being a law professor, Mr. DeVeaux practiced law for seven years, most recently at the San Francisco office of the international firm DLA Piper. At DLA, he worked on both civil and criminal litigation and appellate work. Mr. DeVeaux was on the winning side of published decisions in cases involving the First Amendment, the dormant Commerce Clause, procedural and substantive due process, administrative law, housing rights, the separation of powers and federal-enclave law. Mr. DeVeaux also specialized in Federal Indian law and military law.

Mr. DeVeaux received his Bachelors of Arts, cum laude, in political science from Bowling Green State University in 1997. He was awarded his Juris Doctor, summa cum laude, from Notre Dame Law School in 2001. Mr. DeVeaux served as the articles editor of the Notre Dame Law Review and was the recipient of the Dean Joseph O'Meara Award, given to the graduate with the second highest cumulative grade point average. Mr. DeVeaux furthered his education in 2008, earning a Masters of Laws degree from Harvard.

**Tenielle Fordyce-Ruff** has joined Concordia University, School of Law as a member of the faculty and the director the law school's Legal Research and Writing Program in April. Professor Fordyce-Ruff will create, direct, and teach the first-year legal writing course in partnership with other faculty, as well as develop upper level electives. Prof. Fordyce-Ruff brings prior teaching experience to her new position. She served as a visiting professor of Legal Research and Writing at the University of Oregon, School of Law. In this position she taught legal research and writing, advanced legal research and intensive legal writing. She wrote *Idaho Legal Research*, a textbook designed to help legal professionals and students. Prof. Fordyce-Ruff is also a monthly contributor to *The Advocate*, the Idaho

*In 2007, Concordia University announced plans to open a law school in downtown Boise. The expansion was completed in 2010 as the law school was designed for sustainability and multifaceted learning. Features include the George R. White Law Library and the latest advancements in classroom technology.*

State Bar's monthly publication and serves on the magazine's Editorial Advisory Board.

After law school, Prof. Fordyce-Ruff clerked for the Honorable Joel D. Horton in the Fourth Judicial District, Ada County, in Boise, Idaho. Following her clerkship in Ada County, she clerked for Justice Roger S. Burdick of the Idaho Supreme Court. Prof. Fordyce-Ruff also served as a partner in two law firms in Boise.

Prof. Fordyce-Ruff received a Bachelors of Arts, with honors, in international studies from the University of Wyoming in 1999. She received her Juris Doctor from University of Oregon, School of Law in 2004. Prof. Fordyce-Ruff served as the managing editor of the *Oregon Law Review* (2003-04). She lives in Boise with her husband and their two dogs.

**Jodi Nafzger** joined the Concordia University School of Law faculty as the Director of Experiential Learning and Career Services in January. In this position, Ms. Nafzger directs the mentorship program, the externship program, the pro bono service requirement, and career services. Ms. Nafzger comes to Concordia Law after serving as an Assistant City Attorney for nine years with the Boise City Attorney's Office. In this capacity, she handled misdemeanor criminal prosecution and provided police advice and training for both the Boise and Meridian Police Departments.

Ms. Nafzger served on committees assigned to downtown livability issues for the City of Boise and drafted proposed legislation for the Mayor and City Council. Ms. Nafzger has also taught at the Idaho Peace Officer Standards and Training (POST) Academy. Ms. Nafzger's professional experience also includes private-sector public relations and marketing

work. Ms. Nafzger is a member of the Professionalism and Ethics Section, Government and Public Sector Section, and Litigation Section of the Idaho State Bar.

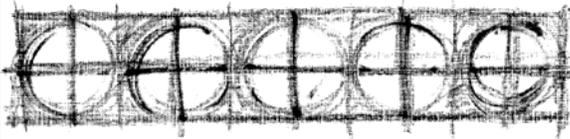
Ms. Nafzger received a Bachelor of Arts in Journalism in 1996 from the University of Missouri-Columbia, School of Journalism. She earned her Juris Doctor in 1999 from the University of Missouri-Columbia, School of Law.

**Phillip Gragg** will join Concordia University, School of Law as Director of the Law Library in June. In this position, Mr. Gragg will provide leadership in designing, implementing, assessing, and managing The George R. White Law Library. Mr. Gragg comes to Concordia Law from Louisiana State University's Paul M. Hebert Law Center in Baton Rouge, La., where he served as the Associate Director for Public Services and as an adjunct professor of Legal Research. He previously served as Reference and Faculty Services Librarian and Reference Librarian at Louisiana State.

While in law school, Mr. Gragg served as a judicial clerk for Iowa's 8th District. During his clerkship he researched and drafted memos, orders and judgments in civil and criminal cases. He also garnered experience working in the Office of Student Legal Services, representing university students.

Mr. Gragg received his Bachelor of Science in Anthropology from the University of California, Riverside in 2001. He was awarded his Juris Doctor in 2004 from the University of Iowa, College of Law. In 2006, Mr. Gragg furthered his education, receiving a Masters of Information and Library Science from the University of Arizona. While pursuing his Masters, Gragg served as a Law Library Fellow at the University of Arizona, College of Law.

## IDAHO LAW FOUNDATION



*Helping the profession serve the public*



Logos High School won the state competition. Pictured are McKenzie Evans, Rebekka Hoeft, Gavin Meyer, Jacqueline Nance, Kira Langworthy, Will Isenberg, Morgan Schlect, Madeline Schlect, Chris Schlect, Lydia Ryan, and Sam Creason.

Photo courtesy of Logos High School

## HIGH SCHOOL STUDENTS CLOSE OUT THE 2012 MOCK TRIAL SEASON

On Friday, March 23, in one of the closest final mock trial rounds ever, Logos School from Moscow won Idaho's Annual High School Mock Trial Competition, defeating The Ambrose School of Meridian, in a split ballot by a total of only five points. This year, mock trial teams had the opportunity to try a civil case in which a celebrity sues a fictitious long term care facility in Hailey, Idaho for the death of the celebrity's spouse, tragically killed in a particularly vicious bingo match, after being hit over the head with a bingo cage. The season included 142 students and 88 volunteers.

There were 16 teams from 10 schools participating in regional tournaments held in Blackfoot, Caldwell, and Coeur d'Alene in early March. Of those teams

14 chose to go on to participate in the state tournament held in Boise on March 21 to 23. Participating schools included:

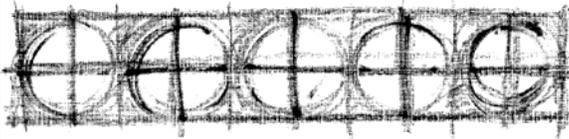
- The Ambrose School, Meridian
- Blackfoot High School, Blackfoot
- Bonneville High School, Idaho Falls
- Centennial High School, Meridian
- Coeur d'Alene High School, Coeur d'Alene
- Idaho Distance Education Academy, Statewide Online High School
- Lewiston High School, Lewiston
- Logos School, Moscow
- Mountain Home High School, Mountain Home
- Vallivue High School, Caldwell

This is the second year of the expanded state competition. Teams had the opportunity to participate in four rounds of competition over two evenings at the Ada County Courthouse in Boise. Four teams advanced to the semi-final rounds held at the Federal Courthouse, including:

- The Ambrose School
- Centennial High School
- Coeur d'Alene High School
- Logos School

Logos and Ambrose moved on to the finals held at the Idaho Supreme Court. Logos will now advance to the National High School Mock Trial Championship in Albuquerque, New Mexico, to be held on May 3 to 6.

# IDAHO LAW FOUNDATION



*Helping the profession serve the public*

The Law Related Education staff would like to thank the many volunteers who ensured a successful mock trial season. They would especially like to thank the Mock Trial Committee who put together a wonderful case, the coaches who spent countless hours preparing their teams to participate, the donors who help underwrite mock trial expenses, and the mock trial judges who took time out of their busy schedules to help make the mock trial experience successful for the young people who participate.

For information about volunteering for or making a contribution to the Idaho High School Mock Trial Program, contact Carey Shoufler, Law Related Education Director, at (208)334-4500 or [cshoufler@isb.idaho.gov](mailto:cshoufler@isb.idaho.gov).

## Mock Trial Committee

Laura Chess  
Greg Dickison  
Mike Fica  
Katherine Georger  
Jessica Lorello  
Russ Johnson

## Mock Trial Donors and Sponsors

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Mager Empowerment  
Sixth District Bar Association  
Seventh District Bar Association  
Glenda Talbutt  
University of Idaho College of Law  
Hon. Ronald Wilper

## Eastern Idaho Regional Competition

Lori Jorgensen  
Mayor Mike Virtue  
Hon. Dane Watkins

## Northern Idaho Regional Competition

Erin Agidius  
Kerwin Bennett  
Hon. Barbara Buchanan  
Greg Dickison  
Marsha Dornquast  
Jonathon Hallin  
Tevis Hull  
Becky Mares

Kinzo Mihara  
Hon. Clark Peterson  
Jay Q. Sturgell  
Lauren Vane  
Kacey Wall

## Treasure Valley Regional Competition

Ritchie Eppink  
Brent Gunnell  
Dave Lloyd  
Dan Kessler  
Laura Mattern  
Melissa Moody  
Hon. Patrick Owen  
Leon Samuels  
Rhea Safford  
Hon. Susan Wiebe

## State Competition

Alpha Kappa Lambda Fraternity,  
Boise State University  
Shane Bengoechea  
A. Dean Bennett  
Hon. Lamont Berecz  
Emil Berg  
Hon. Christopher Bieter  
Kevin Borger  
Terri Broome  
Hon. James Cawthon  
Laura Chess  
Tonya Clark  
Greg Dickison  
Jeremy Evans  
Mike Fica

Kierstin Fiscus  
Mikela French  
Kitty Fleischman  
Katie Garcia  
Jana Gomez  
Rafael Gonzalez  
Jason Gray  
Kenley Grover  
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Jessica Lorello  
Patrick McNulty  
Jonathan Medema  
Celeste Miller  
Joseph Miller  
Chris Moore  
Lisa Nordstrom  
Edith Pacillo  
Kira Pfisterer  
Tyler Robinson  
Randy Schmitz  
Yvette Sedlewicz  
Shelly Shannahan  
Erin Simnitt  
Dean Cathy Silak  
David Stanish  
Joanne Station  
Glenda Talbutt  
Ted Tollefson  
Hon. Stephen Trott  
Tonya Westenskow



Photo by Dan Black

Megan Wilford of the Ambrose School gets congratulatory hugs after being chosen as the Outstanding Attorney during the Championship Round of the State Mock Trial Competition in Boise, held at the Idaho Supreme Court.

Jeff White  
Dan Williams  
Cynthia Yee-Wallace

## Attorney and Teacher Coaches

Victoria Armstrong  
Patti Boliou  
George Breitsameter  
Gayle Brown  
Sam Creason  
Brian Douglas  
David Goodwin  
Darren Guthrie  
Jared Harris  
Blaine Horrocks  
Erica Kallin

David Koch  
Stephanie Lauritzen  
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Jim Nance  
Steve Nipper  
Hailey Ogden  
John Petti  
Ty Rallens  
Chris Schlect  
Steve Sherer  
Jim Silvestri  
Randy Smith  
Shannon Van Buren  
Bob Vanldour  
Erin Walkowiak  
Valerie Wilson

## Expenses not covered

In times like now when educational budgets have become tighter, the Law Related Education Program depends even more on donors and sponsors to help defray the rising expenses associated with the competition. ILF still needs to raise \$3,000 to cover expenses for this year's mock trial program. To help the Law Related Education Program keep mock trial participation strong, please consider a donation to the program. You can donate online at [www.idaholawfoundation.org](http://www.idaholawfoundation.org) or contact Carey Shoufler at 208-334-4500 or [cshoufler@isb.idaho.gov](mailto:cshoufler@isb.idaho.gov) for more information.



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# MYTHS ABOUT PRO BONO SERVICES

Justice Jim Jones  
*Idaho Supreme Court*

The preamble to the Idaho Rules of Professional Conduct affirmatively states:

A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel.

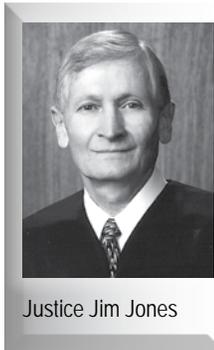
Rule 6.1 goes on to say, “A lawyer should aspire to render at least 50 hours of pro bono publico legal services per year.”

Many lawyers take their pro bono responsibility seriously and fulfill their aspirational target. However, according to the recent membership survey conducted by the Bar, a large majority of those who responded to the survey simply are not doing their part. According to the survey, 27.2% of the 1,597 respondents performed no pro bono service in 2010. The results indicate that 10.5% performed 1-5 hours of pro bono work, 10.7% did 6-10 hours, 17.5% did 11-25 hours, 15.7% performed 26-49 hours and 18.5% did 50 hours or more.

We need to do better. We can do better. The survey asked respondents to indicate what measures might cause lawyers to be more inclined to do pro bono work. The responses from 1,380 participants indicated a lack of knowledge of resources available through the Idaho Volunteer Lawyer Program (“IVLP”) and other entities committed to the pro bono effort.

## Myth #1: No malpractice coverage

Almost half of the respondents (48.8%) indicated that more pro bono work might be done if lawyers received free malpractice coverage for work on pro bono cases. The fact is that lawyers performing pro bono work through IVLP are covered by



Justice Jim Jones



malpractice insurance for that work. The malpractice carrier is ALPS and the policy limits are \$1,000,000.00. It is probably also worth noting that in the roughly 30 years IVLP and its predecessor program have been in existence, no pro bono client has made a malpractice claim.

## Myth #2: “Stuck” in a lengthy case

Half of the respondents (48.1%) indicated that more pro bono work would be performed if lawyers were able to work on a particular task rather than accept total representation of a client. This can now be done. The Supreme Court recently adopted a new rule — I.R.C.P. 11(b)(5), Limited Pro Bono Appearance — just for this purpose. The rule, which went into effect on January 1, 2012, reads:

### 11(b)(5). Limited Pro Bono Appearance.

In accordance with Idaho Rule of Professional Conduct 1.2(c), an attorney may appear to provide pro bono assistance to an otherwise pro se party in one or more individual proceedings in an action. An attorney making a limited pro bono appearance must file and serve on the opposing party a notice of limited appearance prior to or simultaneous with the proceeding or proceedings, specifying all matters that are to be undertaken on behalf of the party. The attorney shall have no authority to act on behalf of the party on any matter not specified in the notice or any properly filed and served amendment thereto. Service on an attorney who has made a

*The responses from 1,380 participants indicated a lack of knowledge of resources available through the Idaho Volunteer Lawyer Program (“IVLP”) and other entities committed to the pro bono effort.*

limited appearance for a party shall be valid only in connection with the specific proceedings for which the attorney has appeared, including any hearing or trial at which the attorney appeared and any subsequent motions for presentation of orders. Upon the conclusion of the matters specified for the attorney’s limited appearance, the attorney shall file a notice of completion of limited appearance with the court. Upon such filing, the attorney’s role terminates without the necessity of leave of the court.

### Myth #3: Pro bono services are needed only in a narrow range

Four out of ten respondents (41.8%) thought that more pro bono work may be done if lawyers had a wide range of opportunities from which to choose. In fact, a wide range of opportunities is available — from bankruptcy, to family law, to immigration, to wills and probate, to guardianships for seniors, children and developmentally delayed adults, to advice and counsel sessions with seniors or the homeless, to working with emerging businesses and non-profits, to civil rights actions in Federal Court, to assisting homeowners seeking to avoid foreclosure, to aiding victims of crimes such as sexual assault and identity theft, to working with the CASA program, to making presentations on legal topics to low income people. You can also serve by being a mentor to a less experienced attorney or by assisting in relevant training sessions. The truth is, so long as you are providing pro bono legal services to persons of limited means, or to organizations that address the needs of persons of limited means, the range of pro bono projects is limited only by your willingness to contribute your time. Just

check out the pro bono pledge form on the IVLP link from the Idaho State Bar website at [http://www.isb.idaho.gov/pdf/ivlp/ivlp\\_pledge.pdf](http://www.isb.idaho.gov/pdf/ivlp/ivlp_pledge.pdf) (also available in the Desk Book). There is something for everyone.

### Myth #4: No training, no support

Nearly 49% of the respondents thought that more pro bono would be done if free CLE training were available. It is available. Training is offered through IVLP, various Bar sections, Idaho Legal Aid, and other organizations. We need to do a better job of advertising those free CLE opportunities on the Bar's website and we will do so.

Mentoring is also available through IVLP, an incentive suggested by 33.8% of the respondents. If IVLP does not have a volunteer mentor available in a particular subject area, many lawyers simply call a local attorney who handles the type of case in question. Many lawyers use this informal procedure to find out what they need to do on a particular type of case and very few lawyers will hesitate to provide the information needed, if no conflict is involved.

The point is that many of the things lawyers perceived to be roadblocks to the performance of pro bono service simply do not exist. There are no further excuses to hold one back from helping indigent individuals. Fill out a pro bono pledge form and send it to IVLP. Urge others to do likewise. There is a great need for help and I know we can step up to the task.

### About the Author

**Justice Jim Jones** served as legislative assistant to former U.S. Senator Len B. Jordan for three years, commencing in 1970. He started a law practice in Jerome in 1973 and maintained it until he was elected as Idaho Attorney General in 1982. Justice Jones served two elected terms as Attorney General. Following the completion of his second term, he established a private law practice in Boise, which he maintained until being elected to the Idaho Supreme Court in 2004. He was re-elected in 2010. During his tenure as Idaho Attorney General, he argued three cases before the United States Supreme Court.

Justice Jones is married to Boise author, Kelly Jones. They have three children, Kathy, Jon, and Kristi, as well as seven grandchildren.

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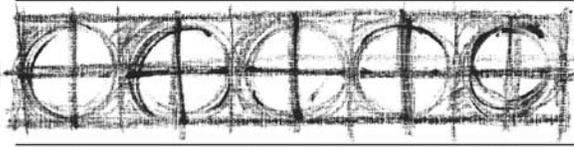
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## 2011 IDAHO VOLUNTEER LAWYERS PROGRAM WALL OF FAME

Please join us in saying a special thanks to the **716** Idaho attorneys who accepted or completed pro bono assignments in family law, immigration, consumer protection, wills, benefits, nonprofit corporation issues and other special needs for IVLP applicants in 2011. Some attorneys named below represent(ed) victims of domestic violence in family law cases, thereby helping traumatized parents and their children get on with their lives free from physical and psychological abuse. Others took up

the challenge to represent or assist prisoners in federal court litigation, stepped in to represent Court Appointed Special Advocates in a child protection cases, or helped a grandparent rescue an innocent grandchild from a dysfunctional home by establishing guardianship. The **IVLP Wall of Fame** also includes the names of attorneys or judges who participated in other IVLP activities including: Advice and Counsel sessions given at Senior Centers, at the St. Vincent DePaul Center

in Coeur d'Alene, or on the Bankruptcy Helpline. Volunteers also participated in the Pro Bono Immigration Law Network's "Charla" (education presentation and case screening) & Case Review Panel, **Soundstart** (proactive education and motivation sessions for low-income parents) and Youth Court (mentoring for high school students participating in an alternative sentencing court). Attorney members of the Idaho Pro Bono Commission and the IVLP Policy Council are also listed.

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**The Idaho Pro Bono Commission honors the many contributions of our member and colleague, John Tait, to pro bono and the rule of law.**



John R. Tait

**“John Tait was a mentor and friend to many, including me. His clients came from all parts of the greater Lewiston community, from well respected local leaders to disadvantaged citizens in need of an advocate to champion their cause. His dedication to providing excellent and vigorous representation to all of his clients was inspiring. He is deeply missed by all who knew him.”**

— Karin Seubert  
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**“John Tait was committed to providing legal help to those who could not pay and he inspired other attorneys to do likewise. The unrepresented have lost a great friend.”**

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# Dewey Bozella

2011 ESPN Arthur Ashe Courage Award Winner and Boxer

*“Dewey Bozella represents the power that courage can bring to an individual despite seemingly insurmountable circumstances that could destroy many a man,”*  
- John Skipper, ESPN executive vice president

There are times in life when it is easier, or even more sensible, to just give up. This isn't a belief held by 2011 Arthur Ashe Courage Award winner Dewey Bozella. The 2011 ESPY Awards celebrated the courage and conviction that led Bozella to the ultimate path of freedom after 26 years of wrongful imprisonment.

Bozella's early life was one of hardship and turmoil, having witnessed his father beat his pregnant mother to death as a young boy. Foster care and life on the streets defined his youth until he found his calling in the sport of boxing. He showed promise training at Floyd Patterson's camp and moved from Brooklyn to make a life for himself in upstate New York. He was a talented young fighter and determined to be a good man.

In 1983, Bozella's life took a dramatic turn when he was convicted of a murder he did not commit. Sentenced to 20 years to life in Sing Sing prison, Bozella maintained his innocence and exhausted every appeal. He was offered more than four separate chances for an early release if he would only admit guilt and show remorse, but Bozella consistently refused to accept freedom under such conditions. Anger at his imprisonment gave way to determination and instead of becoming embittered, he became a model prisoner, earning his GED, bachelors and masters degrees, working as a counselor for other prisoners, and falling in love and getting married. Through it all, Bozella found strength and purpose through boxing, becoming the light heavyweight champion of Sing Sing Prison.

Unyielding in his principles, Bozella never gave up fighting in or out of the ring. He wrote to the Innocence Project weekly in his quest for a ray of hope. Powerful New York law firm, WilmerHale, eventually took on Bozella's case and uncovered new evidence that exonerated him. After being in prison for more than 26

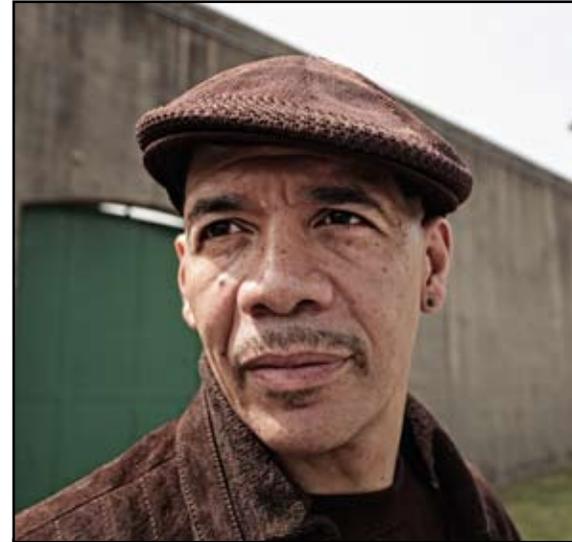
years, he was finally released in October 2009. Today, Bozella devotes his life to helping others, working with a non-profit that helps recently released prisoners rehabilitate back into the world. He has also returned to boxing as a trainer to kids and aspiring fighters.

Less than two years after a judge overturned his murder conviction and freed him from prison, Bozella was honored by athletes from around the world for his courage and perseverance for the Arthur Ashe Courage Award. Past recipients of the award include South African President Nelson Mandela, Muhammad Ali and Billie Jean King. “Although many lessons in my life have been difficult to learn, I am now in a position to help others based on my experiences and that is worth the world to me,” Bozella said upon receiving his award.

At the podium, Bozella candidly discusses his tragic story of injustice and the perseverance, courage and faith that led to his long overdue exoneration. His inspiring story takes audiences on an emotional rollercoaster as they struggle with the flawed US justice system that sent an innocent man to prison for most of his life, while warming their hearts with Bozella's unyielding determination and forgiveness.

Bozella, 53 years of age, dreamed to have just one professional fight. He met former heavyweight champion Lennox Lewis during some the pre-ESPY festivities and told him about his goal. In October 2011, Bozella's dream became a reality as he won his professional boxing debut on the undercard of the Bernard Hopkins vs. Chad Dawson match-up at the Staples Center in Los Angeles, against Larry Hopkins by a 4-round unanimous decision. President Barack Obama telephoned Bozella prior to the fight wishing him luck.

Bozella lives in Fishkill, NY with his wife of 17 years, Trena.



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