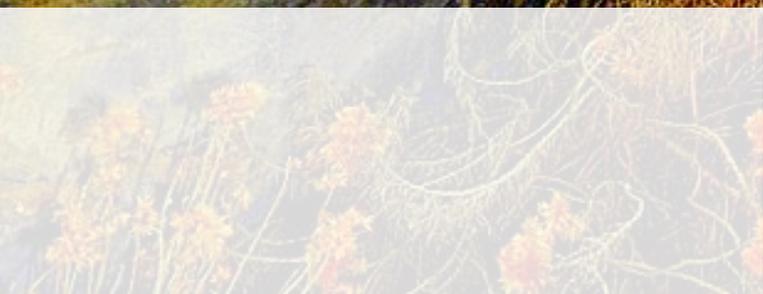




# The Advocate

Official Publication  
of the Idaho State Bar  
Volume 55, No. 10  
October 2012

<b>Ethics for the Gray</b>	<b>36</b>
<b>Cloud Computing</b>	<b>40</b>
<b>Mediation</b>	<b>44</b>
<b>Entrepreneurs</b>	<b>46</b>
<b>Benefits of Pro Bono</b>	<b>50</b>



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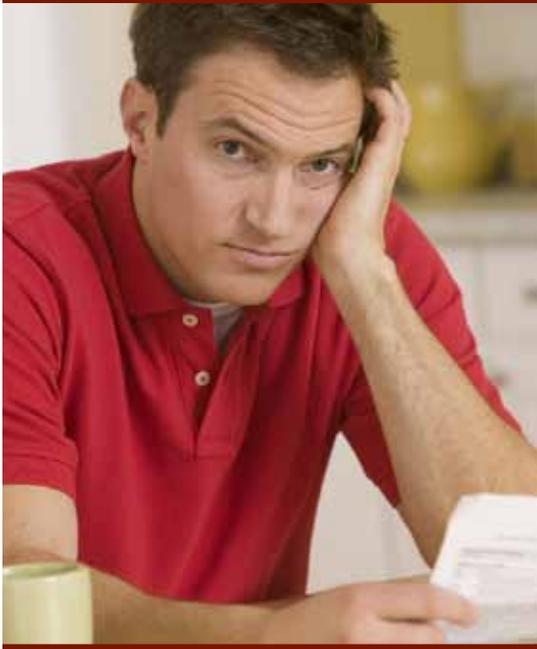
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# The Advocate

The Official Publication of the Idaho State Bar  
55 (10), October 2012

## Section Articles

- 16 Welcome From the Intellectual Property Law Section  
*Elizabeth Herbst Schierman*
- 18 Preemptive Strike: New Third Party Patent Review Procedures Via the America Invents Act  
*Jeffrey C. Parry*
- 20 IP Transactions: Questions to Ask Before Buying Patent-Related Rights  
*Elizabeth Herbst Schierman*
- 34 Capitalization Conundrums Clarified  
*Tenielle Fordyce-Ruff*
- 36 Going Gray: Risk Management for Aging Lawyers  
*Mark J. Fucile*
- 40 Decisions on Cloud Computing Must Include Ethical Concerns  
*Denise Penton*
- 43 Pro Bono Hero Michael Elia Cherishes the Responsibility
- 44 Eight Benefits of Mediation  
*Deborah A. Ferguson*
- 46 New Lawyers Blaze a Trail Through Recession  
*Dan Black*
- 50 Consider Pro Bono Work as a Great Opportunity  
*Roger S. Burdick*
- 51 Resolution of Support for National Pro Bono Week

## Columns

- 10 President's Message, *Molly O'Leary*  
14 Executive Director's Report, *Diane K. Minnich*  
30 Idaho State Law Library and UI College of Law Provide Access to HeinOnline Redux, *John Hasko*  
32 ABA Delegate Report, *Michelle R. Points*

## News and Notices

- 9 Continuing Legal Education (CLE) Information  
11 Discipline  
11 News Brief  
12 Of Interest  
13 Letter to the Editor  
13 2012 District Bar Association Resolution Meetings  
27 Idaho Court of Appeals and Idaho Supreme Court  
28 Cases Pending  
49 In Memoriam  
49 Statement of Ownership  
52 Classifieds



## On the Cover

The cover photograph was taken by Boise attorney and photographer Lisa Shultz, whose work is featured at [www.bouncelightphoto.com](http://www.bouncelightphoto.com). This photograph was taken near the Boise River, east of Boise near the Barber Dam in an area where there was once a timber mill. Most of the area has since been developed as part of the final phase of the Mill District neighborhood at Harris Ranch. A color saturation technique was used to bring out the boldness of the blues and earth-tones that were present at the gloaming of the day, when the photo was taken.

## Section Sponsor

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

## Editors

Special thanks to the September editorial team: Denise Penton, T. Hethe Clark and Brian P. Kane.

## Editors Notes:

 *The Advocate* makes occasional posts and takes comments on a LinkedIn group called "Magazine for the Idaho State Bar."



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# Upcoming CLEs

## October

### October 4

*CLE Program Video Replay*

Sponsored by the Idaho Law Foundation

8:30 – 11:15 a.m. (MDT)

Law Center, Boise

2.5 CLE Credits of which 1.5 is Ethics (RAC)

### October 5

*Idaho Practical Skills Seminar*

Sponsored by the Idaho Law Foundation

8:00 – 3:30 p.m. (MDT)

Boise Centre on the Grove, Boise

6.5 CLE Credits of which 1.25 is Ethics (RAC)

### October 12

*Family Law - Beyond Basic Custody and Divorce*

Sponsored by the ISB Family Law Section

8:30 a.m. - 4:15 p.m. (MDT)

Oxford Suites, Boise

6.5 CLE credits (RAC)

### October 19

*Family Law - Beyond Basic Custody and Divorce*

Sponsored by the ISB Family Law Section

8:30 a.m. - 4:15 p.m. (MDT)

Hilton Garden Inn, Idaho Falls

6.5 CLE credits (RAC)

### October 19

*Mastering the Art of Voir Dire: Experts in Action*

Sponsored by the ISB Litigation Section

9:00 a.m. - 4:15 p.m. (MDT)

Concordia University School of Law, Boise

5.25 CLE credits

## October (continued)

### October 24

*Internet Law: Traps, Tips and Trends*

Sponsored by the ISB Intellectual Property Law Section

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

Law Center, Boise/Statewide Webcast

1.0 CLE credit

### October 26

*Family Law - Beyond Basic Custody and Divorce*

Sponsored by the ISB Family Law Section

8:30 a.m. - 4:15 p.m. (MDT)

Hampton Inn & Suites, Coeur d'Alene

6.5 CLE credits (RAC)

## November

### November 5

*Prosecutorial Decision-Making : Politics, Ethics and the Scope of Discovery*

Sponsored by the Idaho Law Foundation

12:30 – 1:30 p.m. (MST)

Telephonic Conferencing

1.0 CLE credit of which .25 is Ethics

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

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

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

### Live Seminars

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

### Online On-demand Seminars

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

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### Recorded Program Rentals

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### THE ACCIDENTAL LAWYER ...

Molly O'Leary  
*President, Idaho State Bar  
Board of Commissioners*

A recent encounter with a young man needing legal counsel prompted me to ponder the term "accidental lawyer." So, if this column fails to resonate with you ... blame him.

The inspiration for this column dropped by our office unannounced, having noticed the sign out front identifying our mid-century, red brick building as a law office. One look at him told me that we were unlikely to be of any assistance to him – he had on a neck brace, had a couple of blackened eyes, and generally appeared to be in pretty rough shape. My practice is focused in the area of business and telecommunications law and my partner's practice is focused in the renewable energy area.

It was after-hours and the office door had been locked. Upon answering the door, I initially attempted to politely divert him by noting his condition and explaining that we do not do personal injury law, and then offering to refer him to one or more attorneys who might be able to assist him. He was not to be dissuaded, however, and made his way into the office and a nearby chair.

And, in the end, I am glad he did. He gave me an opportunity to put whatever it was I was working on aside for the moment, listen to his tale of woe and then provide him with some basic information regarding how "the law" works in practical terms. Although, as it turns out, he was already represented by what he referred to as an "accidental lawyer", it was clear he did not have even the most basic understanding about his rights as a client or how the legal system works. (Perhaps

the fact that he was apparently asked to sign a contingency fee agreement in the hospital while awaiting surgery after being hit by a car in a crosswalk should have been a red flag?)

When we parted company, the hapless fellow shook my hand and thanked me for helping him understand why his "million dollar case" may not be a million dollar-case after all and how to more effectively communicate with his "accidental lawyer".

Although I initially found his "accidental lawyer" phrase amusing, it started me thinking. What is an accidental lawyer? Taking a cue from the book, *The Accidental Tourist* by Anne Tyler, wherein the protagonist writes travel guides for reluctant business travelers that detail how best to avoid unpleasantness and difficulty while traveling, coupled with the young man's experience, I decided that an accidental lawyer might be defined as a lawyer who avoids the sometimes unpleasant and difficult (read: time-consuming) job of helping clients understand their rights as clients and the practical realities of their case. Such avoidance is a disservice to clients and, I would wager, it contributes in large part to the public's diminishing regard for our profession.

It is no "accident" that our Rules of Professional Conduct specifically address our obligation as lawyers to communicate effectively with our clients. And, it is no "accident" that failure to effectively communicate with clients is at the core of 70% of client-initiated complaints against Idaho attorneys.

Rule 1.4 of the Idaho Rules of Professional Conduct requires us to:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; including a

request for an accounting as required by Rule 1.5(f); and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

In addition, the rule requires us to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

Rule 1.0(e), referenced in Rule 1.4, defines informed consent as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." In addition, Rule 2.1 of the Idaho Rules of Professional Conduct spells out our duty to our clients as counselors at law:

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Every day we have an opportunity to avoid becoming an "accidental lawyer" and to counteract the impact of those in our profession who behave as if their license to practice law is a license to treat clients like so much grist for the mill of their personal enrichment. Not only do our Rules of Professional Conduct require that of us, the future of our profession depends on it. To paraphrase a 1960s call to consciousness, if we're not part of the solution, we're part of the problem.

#### About the Author

**Molly O'Leary** is a managing member of *Richardson & O'Leary, PLLC*, in Boise ([www.richardsonandoleary.com](http://www.richardsonandoleary.com)). In addition, she serves as a commissioner from the Fourth District on the Idaho State Bar Board of Commissioners. You can follow her on Twitter: @BizCounselor.



Molly O'Leary

## DISCIPLINE

### **RUSTY B. HANSEN (Reinstatement to Active Status)**

On August 14, 2012, the Idaho Supreme Court issued an Order Granting Petition for Reinstatement, reinstating Idaho Falls attorney Rusty B. Hansen to the practice of law in Idaho. Mr. Hansen had previously been suspended by the Idaho Supreme Court on September 14, 2011, for a period of two years, with fifteen months withheld. Upon activating his license, Mr. Hansen will serve a three year disciplinary probation.

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

## NEWS BRIEFS

### **Scams take on new look in Idaho**

Idaho attorneys continue to be targeted in a variety of email scams. Another permutation surfaced this week in which numerous emails were seemingly sent from an Idaho attorney, (but did not come from him), and asked for assistance with a case. The scam may be of the “phishing” variety, which simply begins a false relationship to be exploited at a later time.

An advisory issued by the FBI earlier this year asks individuals who suspect fraud are encouraged to file a complaint at [www.IC3.gov](http://www.IC3.gov).

### **Concordia University School of Law welcomes first class**

Concordia University School of Law welcomed its first class of students on Monday, Aug. 27. Enrolled in classes are 75 accomplished and community-focused students.

“We are thrilled with the quality of the students in our inaugural class,” Dean Cathy R. Silak said. “Their credentials and character reflect our commitment to leadership development and preparing students for lives of meaningful vocation and service. Coupled with our qualified faculty and the support of the legal community, our students will benefit from a challenging, supportive learning environment which integrates the acquisition of an exceptional legal education with practical skills and community engagement.”

Forty-eight of the students are men, while 27 are female. The majority (70%) of the inaugural class will be enrolled in the full-time program. These students will

## NEWS BRIEFS

take 30 credits during their first year. The part-time program has 23 students who will enroll in nine credits in the fall and spring semester and six credits next summer. The part-time program can be completed by attending year-round for four years.

An experienced class of professionals, including accountants, paralegals, business women, teachers, recent college graduates, a software engineer, entrepreneurs, a retired college professor and a former police officer arrive with a variety of skills that will augment their legal training. The average age is 34, with students ranging from age 21 to age 72.

With classes commencing, students participated in a comprehensive orientation program with speakers from the bar and bench. Orientation wrapped up with an address by Fourth District of Ada County Judge Michael E. Wetherell and a student oath of professional, civil, and ethical conduct administered by Chief Justice of the Idaho Supreme Court, Roger S. Burdick.

### **Federal Bench-Bar event slated**

The Idaho Federal Court Bench-Bar annual conferences are scheduled on Oct. 26 in Idaho Falls, and Nov. 30, in Boise. To see the agenda and a link for the registration form, check the website at <http://www.id.uscourts.gov/>.

For more information contact Susie Headlee, the Conference Coordinator, at (208) 334-9067 or [Susie\\_Boring-Headlee@id.uscourts.gov](mailto:Susie_Boring-Headlee@id.uscourts.gov).

### **Third District teams up with Rotary to help schools**

The Rotary Club of Nampa and 3rd District Bar Association are teaming up to ensure that students have access to basic school supplies. The Nampa School District recently released a “wish list” of school supplies that are desperately required but currently unavailable. One of the essential needs is copy paper. Their need is basic white 8 ½ x 11 copy paper. Please support our paper drive by donating a ream or box of copy paper. Donations can be dropped off at The Nampa Civic Center, located at 311 3rd Street South, Nampa, or at Scarlett Law Offices, located at 915 12th Avenue South, Nampa, on Monday – Thursday, between 9 a.m. – 5 p.m., and on Fridays from 9 a.m. – 12 p.m.

The school paper drive will run from Sept. 14 to Oct. 12. To see the school dis-

trict’s wish list online, please go to [www.nsd131.org](http://www.nsd131.org). For questions, please contact Kerry Michaelson at 463-2311, Marie Baker at 919-0382, or Danielle Scarlett at 465-5412. To learn more about the Nampa Rotary Club, please visit [www.namparotary.org](http://www.namparotary.org).

### **UI to offer business law and entrepreneurism emphasis**

Law students who wish to adorn their Juris Doctor degree with evidence of specialized study have a new opportunity at the University of Idaho. The College of Law, which already offers curricular emphases in natural resources and environmental law, Native American law, and litigation and dispute resolution — along with general Juris Doctor curriculum — now gives students a chance to pursue an emphasis in business law and entrepreneurship (BLE).

The BLE emphasis provides a structured set of courses, faculty mentorship, and practical skills opportunities for students who wish to develop substantive knowledge and practical experience in business law and entrepreneurship. Students will focus their coursework on one of the following tracks within the BLE emphasis: commercial law, enterprise organizations, or intellectual property and technology.

The BLE emphasis is available to students in Moscow and as well as to students completing their third year of law study in Boise. The emphasis reflects the increasingly important role of lawyers as enablers of economic development through the practice of transactional law and through direct involvement in starting and sustaining business enterprises.

Further information about the BLE emphasis is available from Professor Couture at [wgcouture@uidaho.edu](mailto:wgcouture@uidaho.edu).

### **New Bear Lake County Magistrate Judge announced**

The Sixth Judicial Magistrates’ Commission has selected Richard Todd Garbett as the new Bear Lake County Magistrate Judge. Mr. Garbett will fill the vacancy left by the Honorable O. Lynn Brower, who retired in 2010, who has since served in Bear Lake and will continue to serve as senior judge until Mr. Garbett takes office.

Mr. Garbett, 43, has experience in both civil and criminal law. He is currently serving as the Franklin County Prosecutor since January, 2005. He also worked at the Steven R. Fuller Law Office from

June, 2000 to January, 2010, practicing general law. He resigned in 2010, when the Franklin County Prosecutor position was designated as full-time.

He is active in his community and throughout the Sixth Judicial District serving as president of the Sixth District Bar Association, President of the Preston Area Chamber of Commerce and president of the Preston Kiwanis Club.

### Eastern Idaho attorneys chalk up pro bono hours

A friendly competition between attorneys in three of Eastern Idaho's Judicial Districts tallied more than 648 hours of public service this summer. Attorneys across Idaho regularly do a variety of pro bono service work for people who cannot afford to pay for legal services. This year, at the suggestion of area judges and the Pro Bono Commission, the Fifth, Sixth and Seventh District attorneys were asked to tally their pro bono hours and report them to the District Bar Associations. The Sixth District won the competition.

The event was concluded with a golf tournament in Pocatello, at which U.S. Ninth Circuit Court of Appeals Judge Randy Smith gave a continuing legal education seminar. Sixth District Bar Association President David Gardner said he wasn't exactly sure who won the golf tournament, but that the judges' team would likely be declared the winner.

Here are the details by District:

The Fifth District (south central Idaho) had 158 hours from nine attorneys. Judge Mick Hodges of Burley encouraged the district participation in the competition, which ran between May 1 and September 1.

The Sixth District (southeast Idaho) bested their neighbors with 245 hours. Judge Rick Carnaroli of Pocatello encouraged participation, according to Mr. Gardner. He added that one attorney, Gary Dance of Moffatt Thomas, was doing 40 hours of pro bono each week in the Ukraine and that those hours were not counted. But since they could, the Sixth District has won the competition.

The Seventh District (northeast Idaho) accumulated 245 hours with seven individual attorneys, as well as all attorneys of the Idaho Falls office of Hopkins Roden Crockett Hansen & Hoopes. The firm's attorneys did 185 hours of pro bono work on their own. Judge Michelle Mallard of Idaho Falls encouraged the pro bono participation.

### Fifth District swears in new magistrate

The Fifth Judicial District held the Oath of Office Ceremony for Calvin H. Campbell, who will serve as a Magistrate Judge for Twin Falls County. The investiture was held on Thursday, Sept. 6, in the Theron W. Ward Judicial Building, in Twin Falls. The event was covered in the Times-News. It reads: "A Gooding County native, Campbell has served as the county's prosecuting attorney since he was first elected in 2005. He has also served as the Camas County prosecutor since 1997, appointed in the lack of a candidate for the position.

"The new Gooding County prosecuting attorney is Luverne E. Shull, the county's former chief deputy prosecuting attorney. Shull said he was sworn in Wednesday by the Gooding County commissioners to fulfill the remainder of Campbell's term."

### UI College of Law applications decrease

The College of Law has enrolled an entering class of 102 students, as of the start of classes in August, 2012. The enrollment is down from 130 entering students in 2011, 132 in 2010, and 114 in 2009, although it is on par with the 102 students enrolled in 2008 and 104 in 2007. The 2012 admissions cycle saw a decrease of 14.4% in the number of applicants nationwide to American Bar Association-approved law schools, compared to 2011. Reasons include a gradually improving economy (inducing prospective students to pursue employment rather than seeking additional education) and intensive media coverage of students — largely at private law schools — incurring high debts and experiencing difficulty finding jobs that will service those debts. The University of Idaho College of Law was affected by these forces, albeit to a lesser degree. The College of Law received 595 completed applications in 2012, a decrease of 10.3% from 2011.

When the College determined that applications for the 2012 entering class would be down, it decided to plan on a smaller enrollment this year in order to maintain quality and selectivity. As a result, despite the application downturn and intensified competition among American law schools, Idaho's 2012 entering class,

measured at the start of fall classes, has a median LSAT of 153 (approximately the 55th national percentile), down just one point from 154 the previous year, and a median undergraduate grade point average of 3.20 compared to 3.25 in 2011. The class contains 38 women (approximately 37%, compared to 38% last year) and 13 students of color (approximately 13%, compared to 12% last year). The class contains 60 students who qualify as Idaho residents, and 42 nonresidents (many of whom also have an Idaho connection). The students hail from 14 states, including Idaho, as well as Canada. Their ages range from 20 (a student who accelerated the baccalaureate program) to 54.

### OF INTEREST

#### Concordia's Fordyce-Ruff to serve on Legal Writing Institute Committee

Concordia University School of Law Director of Legal Research and Writing Tenielle Fordyce-Ruff was selected by the Legal Writing Institute to serve on teaching resource committee.

The committee's responsibility is to work with the website and listserv committee to create a database of FAQ's for legal research and to collect and disseminate resources on teaching legal writing.

Fordyce-Ruff's background includes serving as 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 also authored Idaho Legal Research, a textbook designed to help legal professionals and students in the state. After law school, Professor 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.

A monthly columnist on legal writing for the Idaho State Bar's magazine *The Advocate*, Fordyce-Ruff earned her J.D. from the University Of Oregon School of Law and received her B.A. (with honors) in international studies from the University of Wyoming. While in law school she served as the managing editor of the Oregon Law Review (2003-04).

## OF INTEREST

## LETTER TO THE EDITOR

### Holland & Hart LLP hires Anna Eberlin

Holland & Hart LLP is pleased to announce the addition of Anna Eberlin to the firm's Real Estate and Construction practice group. Eberlin represents clients in state and federal court involving construction, real estate, lending, contract, and other disputes. She drafts construction contracts, real estate purchase and sale agreements, leases, easements, deeds, settlement agreements, operating agreements, and business formation documents.

She is a member of *The Advocate* Editorial Advisory Board, the Advisory Council for the Assistance League of Boise, Commercial Real Estate Women (CREW), the National Association for Women in Construction and Idaho Women

en Lawyers. Eberlin holds a J.D. from University of Idaho College of Law, and a B.A. from College of Idaho.



Rebecca Nickell



Rebecca A. Rainey

### Correction

Two photos were misidentified in last month's issue. The correct captions with pictures are shown above.

### Lincoln reaction drivrel

*Letter to the Editor,*

"Lincoln: Tyrant" is a recycled version of the latest drivrel making the rounds in the racist right-wing blogosphere (where it will now be forever linked to the *Advocate*). Instead of attacking the nation's first black president, the wingnuts have taken aim at the one who ended the absolute tyranny of slavery. Ironic, isn't it, that a screed devoted to labeling Lincoln a tyrant avoids mention of the Emancipation Proclamation? Notably, there is no similar campaign of vilification being waged against any one of the 12 U.S. presidents whose tyranny extended to their personal ownership of slaves.

— Robert McCarthy  
El Paso, TX

### 2012 District Bar Association Resolution Meetings

District	Date/Time	City	Location
First Judicial District	November 7 at Noon	Coeur d'Alene	TBD
Second Judicial District	November 7 at 6 p.m.	Moscow	University Inn Best Western, 1516 Pullman Road
Third Judicial District	November 1 at 6 p.m.	Nampa	TBD
Fourth Judicial District	November 2 at Noon	Boise	The Grove Hotel
Fifth Judicial District	November 13 at 6 p.m.	Twin Falls	TBD
Sixth Judicial District	November 14 at Noon	Pocatello	Juniper Hills Country Club, 6600 S. Bannock Hwy
Seventh Judicial District	November 15 at Noon	Idaho Falls	TBD

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## HELPING TO DEVELOP FUTURE LEADERS

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

**O**n July 13, the first class of the Idaho Academy of Leadership (IALL) celebrated its graduation from the program. Each participant spoke at the graduation, expressing the program's impact on them personally and professionally. The comments included "fantastic opportunity, beneficial and inspiring, transformative experience, phenomenal curriculum, increased my self-awareness, excited about future community involvement and many thanks to the steering committee."

The participants and steering committee members convened four times during the year. Program aspects included leadership skills, issues' challenges and philosophies, communication skills, fostering professional relationships, promoting professional obligations and community service, and creating new friendships and professional colleagues.

The mission of IALL is to promote diversity and inspire the development of leadership within the legal profession. The program brings together lawyers from different practice areas and backgrounds from around the state.

IALL encourages participants to engage in bar related and community leadership opportunities. As part of the program, each IALL graduate is asked to develop and implement a Legacy Project; a service project that benefits their local legal community or their community as a whole. Examples of projects that were selected by the first class are helping to reinstate an Idaho suicide prevention hotline, assisting veterans of the Iraq/Afghanistan war, and a summer law academy for high school students.



Diane K. Minnich

Before the IALL program concluded, one of the participants stepped up to assist the victims of the fires in Pocatello. Jonathan Volyn, along with Steven Herzog, quickly organized a group of Pocatello lawyers to answer legal questions and provide legal advice to the fire victims. This is an example of recognizing a need in the community and providing leadership from one of the first graduates of IALL.

The second class was recently selected; the 2012-13 class is on the following page.

I congratulate the first class of IALL graduates, welcome this year's class and thank the steering committee for its commitment to establishing this program. The steering committee consists of chair Deborah Ferguson, Hon. Mikel Williams, Hon. Mick Hodges, James Martin, Peg M. Dougherty and Deputy Executive Director Mahmood Sheikh.

Our thanks go also to the law firms, organizations and individuals that sponsored and assisted the IALL participants. The program is dependent on the generosity of not only the bar but the employers of the participants and the following sponsors: Idaho State Bar Business and Corporate Law Section, Idaho State Bar First District Bar Association, Idaho State Bar Fourth District Bar Association, Idaho State Bar Sixth District Bar Association, Moffatt, Thomas, Barrett, Rock & Fields, Chtd., Idaho Women Lawyers, Mr. Dennis E. Wheeler, and Hon. Mike Williams.

### Mentor program

Since 1995, the Idaho State Bar has had a mentor program. The program was initially developed by the ISB Litigation Section to assist new lawyers in the transition from law school to a successful law practice. The program pairs new lawyers with experienced lawyers in their local communities. The mentors are available to meet with new lawyers to provide answers to general legal questions and offer guidance about practicing law.

The issue of how new lawyers transition to the legal profession has long been

### 2011-12 IALL Graduates

Paul Arrington, *Twin Falls*  
 Javier Gabiola, *Pocatello*  
 Nicole Hancock, *Boise*  
 William Hancock, *Pocatello*  
 Paul McFarlane, *Boise*  
 Gene Petty, *Boise*  
 Joseph Pirtle, *Boise*  
 Benjamin Ritchie, *Idaho Falls*  
 Monica Salazar, *Boise*  
 Christine Salmi, *Boise*  
 Timothy Tyree, *Boise*  
 Jonathan Volyn, *Pocatello*

a concern among bar leaders. The mentor program was designed to address this issue, however, a limited number of new lawyers have taken advantage of the opportunity to have a mentor. The program is beneficial to those who participate. Both the mentor and new lawyer gain from the experience of working together. The quality of the mentors is excellent. Many of the new lawyers have obtained employment through the mentor program experience.

Several states have established mentor programs or for all new lawyers. Utah, New Mexico, Georgia and Oregon all have mentor programs requiring new lawyers' participation. At the 2012 ISB Annual Meeting, the concept of creating a similar required mentor program in Idaho was discussed by the *Lessons from the Masters* panelists. The Board of Commissioners will be discussing whether to consider this option in Idaho. Would new Idaho lawyers benefit from a required mentor program? If you have comments or questions about creating a formal mentor program, please contact me or your local Bar Commissioner.

## IDAHO ACADEMY OF LEADERSHIP FOR LAWYERS CLASS OF 2012-2013



Brett C. Anthon



M. Sean Breen



James A. Cook



Scott A. Gingras



Gabriel M. Haws



Annie N. Kerrick



Jodi A. Nafzger



Lisa D. Nordstrom



Edith L. Pacillo



S.C. Danielle Quade



Matthew J. Ryden



Lisa D. Shultz



Selim A. Star

### Idaho Academy of Leadership for Lawyers Announces 2012 - 13 Class

The Idaho Academy of Leadership for Lawyers (IALL) proudly announces the 2012-13 class. Now in its second year, IALL's mission is to promote diversity and inspire the development of leadership within the legal profession. Thirteen lawyers from different practice areas with a variety of experiences from various parts of Idaho comprise the class. Participants will enjoy an interactive leadership training program designed specifically for lawyers who have practiced law for a minimum 5 years. The Academy will include five sessions from September 14, 2012 – July 19, 2013 with a graduation ceremony following the completion of the program. For more information please contact Mahmood Sheikh, Deputy Executive Director, at (208) 334-4500.

#### The 2012 - 13 IALL class:

**Brett C. Anthon**

*Robinson, Anthon & Tribe: 5th District*

**M. Sean Breen**

*Manweiler, Breen, Ball & Davis, PLLC: 4th District*

**James A. Cook**

*Idaho Legal Aid Services: 4th District*

**Scott A. Gingras**

*Winston & Cashatt Lawyers: 1st District*

**Gabriel M. Haws**

*Belnap Stewart Taylor & Morris PLLC: 4th District*

**Annie N. Kerrick**

*Idaho Coalition Against Sexual & Domestic Violence: 4th District*

**Jodi A. Nafzger**

*Concordia University School of Law: 4th District*

**Lisa D. Nordstrom**

*Idaho Power Company: 4th District*

**Edith L. Pacillo**

*Idaho Attorney General's Office: 4th District*

**S.C. Danielle Quade**

*Hawley Troxell Ennis & Hawley LLP: 1st District*

**Matthew J. Ryden**

*Angstman Johnson: 4th District*

**Lisa D. Shultz**

*C.K. Quade Law, PLLC: 4th District*

**Selim A. Star**

*Star Law Office: 5th District*

## WELCOME FROM THE INTELLECTUAL PROPERTY LAW SECTION

Elizabeth Herbst Schierman  
*TraskBritt, P.C.*

Intellectual property (IP) law is an ever-changing area of law. This past year has seen landmark developments, and the year ahead promises to map out even more as-yet uncharted territory.

In November 2011, I'm sure many of you found yourselves, like me, without access to our most trusted online resources (e.g., Wikipedia) as opponents to the Stop Online Piracy Act (SOPA) expressed their heavy opposition by blacking out popular websites on "American Censorship Day." Though SOPA now seems to be dead in the water, online IP infringement, particularly copy-right infringement, continues to be a hot issue.

In January 2012, nearly two thousand — yes *thousand* — applications were filed by would-be domain name Registry Operators as part of the New gTLD (generic Top-Level-Domain) Program, each application seeking to acquire control over a new .whatchamakalit domain. Among the list of applied-for TLDs:



Elizabeth Herbst Schierman

.AMAZON, .APPLE, .IEEE, .JPMORGANCHASE, .MCDONALDS, .MICROSOFT, .WALMART, .WINDOWS, .XBOX, and .YOUTUBE, as well as .LEGAL (2 applications), .LAWYER (2 applications), and .LAW (6 applications). The websphere continues to wait to see who will make it through the application process and forever expand the Internet landscape.

Perhaps the most dramatic change in the IP world is still underway, as provisions of the Leahy-Smith American Invents Act (AIA), signed into law in September 2011, reach benchmarks of implementation. The AIA will, as of March 16, 2013, switch the U.S. patent system from its traditional "first-to-invent" system to a "first inventor-to-file" system. The other significant changes to the U.S. patent system stemming from the AIA are too many to list here. In this issue of *The Advocate*, Jeff Parry's article discusses some such other significant changes brought about by the AIA.

Also in recent months, the United States Patent and Trademark Office has, for the first time ever, opened a satellite office. The first satellite office opened in July 2012 in Detroit, Michigan, and the Patent Office has announced plans for additional satellite offices in San Jose, California; Dallas/Fort Worth, Texas; and Denver, Colorado. Sadly, in my humble opinion, Boise, Idaho, was not selected as one of the lucky cities to be awarded a

satellite office (despite Boise having seen nearly 200 more utility patents granted in 2010 than Denver).

Unfortunately, these recent developments in the IP world have not alleviated the concerns and common issues affecting the practice of IP law. My article in this issue of *The Advocate* completes a three-part series on one such more traditional IP law issue, IP transactions. The article discusses inquiries that should be made before engaging in a transaction to acquire patent-related rights.

The IP Law Section meets Thursdays every other month and offers its members free half-hour CLE presentations at most Section meetings. Membership in the Section is available to all members of the Idaho State Bar and also to judicial law clerks, law students, and patent agents. If you are interested in joining the IP Law Section, I invite you to stop by a Section meeting or contact me or another Section officer.

### About the Author

**Elizabeth Herbst Schierman** is serving her second term as Chair of the ISB IP Law Section, having previously served in 2009–2010. She is a registered patent attorney licensed in Idaho and Utah with degrees in Chemical Engineering and Law from the University of Idaho. Her practice is focused primarily on building valuable IP portfolios for clients in Idaho and elsewhere through high-quality patent and trademark work in industries such as the nanotechnology, agriculture, mining, consumer products, material sciences, and chemical industries.

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# PREEMPTIVE STRIKE: NEW THIRD PARTY PATENT REVIEW PROCEDURES VIA THE AMERICA INVENTS ACT

Jeffrey C. Parry  
*Jeffrey Parry IP*

With the passage of the Leahy-Smith America Invents Act (the “AIA”)<sup>1</sup> in September of 2011, America’s patenting system is undergoing a significant make-over. While many people may already know about the resulting change from a “first-to-invent” to a “first-to-file” patent regime,<sup>2</sup> there are other features of the AIA that are worthy of discussion. A prominent example: new pre- and post-grant review procedures introduced in the Act provide several mechanisms by which third parties may participate in the patent examination process both before and after a patent is granted.

This article discusses how a person may submit relevant prior art to the U.S. Patent and Trademark Office (“USPTO”) to contest a pending application or oppose a recently-granted patent under the AIA, and why your clients may want to be aware of those procedures. The article also contrasts these new procedures (and their accompanying costs) with the less expansive procedures they are replacing.

## The prior third-party review procedures

Under the prior system, a person challenging a pending patent application didn’t have many options. A third party was allowed to submit patents and published references to the U.S. Patent and Trademark Office (“USPTO”) that the third party asserted were relevant to patentability of a published patent application.<sup>3</sup> However, the third party’s participation stopped there: no arguments or explanation could be made regarding the applicability of those references.<sup>4</sup> Also, the window of time that the third party could make any submissions was quite narrow: submissions could only be made in the first two months after an application had been published and prior to the mailing of a notice of allowance.<sup>5</sup>

In practice, many patent applications are not published during pendency<sup>6</sup> so in some cases, the third party may not even

*In practice, many patent applications are not published during pendency<sup>6</sup> so in some cases, the third party may not even become aware of a potentially adverse patent until after it has been granted.*

become aware of a potentially adverse patent until after it has been granted. Under the law previously in effect, the mechanism by which a third party could dispute a granted patent was by filing a request to the USPTO for reexamination<sup>7</sup>. In an *ex parte* reexamination request (which procedure is still available), the third party requestor submits purported relevant prior art to the USPTO but has no further involvement in the reexamination proceeding.<sup>8</sup> *Inter partes* reexamination proceedings (which have been replaced by *inter partes* review proceedings, described below) allowed the third-party requestor to participate in the proceedings.<sup>9</sup>

One limitation from previous *inter partes* reexamination rules was that a third-party requestor could submit only patents and printed publications — contrast this limitation with what documents qualify as relevant prior art during a patent’s initial examination: any patent, publication or evidence of a sale, offer for sale, or public use.<sup>10</sup> An *inter partes* reexamination requestor was also limited to patent validity questions of novelty or obviousness,<sup>11</sup> compared to a patent application undergoing its initial examination that must satisfy all patentability standards, including the subject matter claimed<sup>12</sup> and what are known as the “written description,” “enablement,” and “best mode” requirements.<sup>13</sup> As a result, these references, which would not be considered during the USPTO reexamination process, instead may become the subject of expensive and drawn-out patent litigation.

## The new third-party review procedures

As mentioned, the new third-party procedures brought into existence by the AIA allow submissions for pending patent applications<sup>14</sup> and for granted patents.<sup>15</sup> These new procedures were available as of September 16, 2012 and “apply to any patent issued before, on, or after that ef-

fective date.”<sup>16</sup> The details involved in these new procedures are described below.

## Review of pending patent applications

The statutes regarding pre-grant submissions by third parties (now codified in 35 U.S.C. § 122) provide a mechanism by which persons other than the patent applicant can submit prior art in order to oppose a pending patent application.<sup>17</sup> Such submissions must be made: (a) before the USPTO mails a notice of allowance for that application and (b) within six months of publication of the patent application (or by the date of the first rejection of any claim if that first rejection occurs more than six months after publication).<sup>18</sup> In contrast to the old third-party submission rules, not only is the third party now permitted to comment on the applicability of submitted references, but there is a requirement that the third party provide “a concise description of the asserted relevance of each submitted document.”<sup>19</sup>

## Review of granted patents

New procedures to oppose granted patents include *inter partes* reviews, post-grant reviews, and “citation of prior art and written statements.”<sup>20</sup>

The new *inter partes* review procedures, which are now codified in 35 U.S.C. §§ 311–319,<sup>21</sup> define a new type of trial proceeding before the Patent Trial and Appeal Board (“PTAB”) of the USPTO that allows the third party to contest a patent under limited grounds. *Inter partes* reviews limit third-party submission to patents or printed publications (similar to the old reexamination rules).<sup>22</sup> Unlike post-grant reviews, *inter partes* reviews can only be filed after the passage of nine months from the date of patent grant.<sup>23</sup> Notably, *inter partes* review proceedings are required by statute to be completed within one year of commencement.<sup>24</sup>



Jeffrey C. Parry

The post-grant review laws, which are codified in 35 U.S.C. §§ 321–329,<sup>25</sup> allow any person to initiate a post-grant review proceeding to oppose a recently-granted patent. Similar to an *inter partes* proceeding, a post-grant review proceeding is a USPTO administrative trial before the PTAB. Unlike an *inter partes* review, a post-grant review can be based on any potentially invalidating grounds, not just patents or printed publications.<sup>26</sup> However, post-grant review petitions have a short window of opportunity: they must be submitted within nine months of the date of the grant of the patent.<sup>27</sup> Like *inter partes* proceedings, post-grant review proceedings are also required to be completed with one year of commencement.<sup>28</sup>

The new procedure for citing prior art and/or submitting written statements is codified in 35 U.S.C. § 301.<sup>29</sup> This procedure allows anyone to submit any patent or publication reference that has a “bearing on the patentability of any claim . . . .”<sup>30</sup> Moreover, any person may submit statements made by the patent owner that were “filed in a proceeding before a Federal court or the Office in which the patent owner took a position on the scope of any claim of a particular patent.” (Emphasis added.)<sup>31</sup> Thus, an adversary to a patent owner in litigation should be attentive to the patent owner’s statements—any assertion that may allow a reinterpretation of the patent claims could be submitted to the USPTO and subsequently used to limit the scope of the patent.

### Cost comparisons

One downside of the new third-party review procedures is their cost. When the USPTO’s proposed rules come into effect,<sup>32</sup> the cost to file a petition for *inter partes* review will start at \$27,200 and sharply rise based on the number of claims in the patent.<sup>33</sup> The cost to file a post-grant review will start at \$35,800 and also rise sharply based on the number of claims.<sup>34</sup> Compare this to the prior procedures: under prior rules, an *inter partes* reexamination proceeding cost \$8,800 in USPTO fees.<sup>35</sup> Further increasing the parties’ costs, these large filing fees will most likely be overshadowed by attorneys’ fees incurred during those proceedings because the parties are permitted to conduct (albeit limited) discovery.<sup>36</sup>

That said, the prior procedures gave limited opportunity for third parties to contest granted patents through any means other than a lawsuit and practically no means to contest pending applications. Although expensive, the cost of these new third-party review procedures will, in most cases, be less costly to the parties in-

volved than a typical patent infringement lawsuit.<sup>37</sup> Even if a post-grant review procedure does not prevent a subsequent patent infringement lawsuit, it could preclude or at least reduce certain arguments with respect to invalidity of that patent.

### Conclusion

The America Invents Act is bringing about significant changes to the U.S. patent system. Included in those changes are several new or modified types of third-party review. Under the old third-party review procedures, third parties were limited in what they could submit and when they could submit it. New procedures allow third parties to submit references and comments for pending patent applications, which was not previously allowed. New and expanded review procedures provide increased opportunities to challenge granted patents, and now let third parties submit more types of prior art references. It remains to be seen how many parties will take advantage of these new proceedings, but judicial efficiency could be served by their utilization.

### About the Author

**Jeffrey C. Parry** is a solo practice patent attorney in Boise, where he focuses his practice on patent and trademark procurement. He was born and raised in Idaho Falls and graduated from the J. Reuben Clark (BYU) Law School in 2006 after receiving a degree in Chemical Engineering from BYU. Jeff currently serves as the Treasurer of the Intellectual Property Law Section of the Idaho State Bar. He is happily married and the proud father of three daughters. You may contact him at [parry@parryip.com](mailto:parry@parryip.com).

### Endnotes

- 1 Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011) (codified in scattered sections of 35 U.S.C.), available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr1249enr/pdf/BILLS-112hr1249enr.pdf> (last visited August 14, 2012).
- 2 See, e.g., Dana M. Herberholz, *America Invents Act: How Landmark Patent Reform Legislation Will Impact Idaho Inventors and Companies*, THE ADVOCATE, June/July 2011, at 28–31 for an excellent discussion of the ramifications of the first-to-file regime, which will come into effect on March 16, 2013.
- 3 37 CFR § 1.99.
- 4 37 CFR § 1.99(d).
- 5 37 CFR § 1.99(e).
- 6 Under 35 U.S.C. § 122(b)(2)(B)(i), the patent applicant may request that the patent application not be published; such a request is valid only when the applicant certifies that she does not intend to file any foreign patent applications claiming the same subject matter. *Id.*
- 7 35 U.S.C. § 302.
- 8 See USPTO, MANUAL OF PATENT EXAMINING PROCEDURE (“MPEP”), 8th ed. (2010) at § 2201.
- 9 See MPEP § 2601.
- 10 See 35 U.S.C. § 102(b).
- 11 37 C.F.R. § 1.552(a).

**New procedures allow third parties to submit references and comments for pending patent applications, which was not previously allowed.**

- 12 35 U.S.C. § 101.
- 13 35 U.S.C. § 112, First Paragraph.
- 14 AIA sec. 8.
- 15 AIA secs. 6(a) and 6(g).
- 16 AIA sec. 6(c)(2)(A); sec. 6(g)(3); sec. 8(b). One exception to this effective date is post-grant reviews, which will be available principally for patents having a priority date on or after March 16, 2013. AIA, sec. 6(f)(2)(A).
- 17 AIA 35 U.S.C. § 122.
- 18 AIA 35 U.S.C. § 122(e)(1).
- 19 AIA 35 U.S.C. § 122(e)(2)(A).
- 20 AIA sec. 6(a), 6(d), and 6(g).
- 21 AIA sec. 6(a).
- 22 AIA 35 U.S.C. § 311(b).
- 23 AIA 35 U.S.C. § 311(c)(1).
- 24 AIA 35 U.S.C. § 316(a)(11).
- 25 AIA sec. 6(d).
- 26 AIA 35 U.S.C. § 321(b).
- 27 AIA 35 U.S.C. § 321(c).
- 28 AIA 35 U.S.C. § 326(11).
- 29 AIA, sec. 6(g).
- 30 AIA 35 U.S.C. § 301(a)(1).
- 31 AIA 35 U.S.C. § 301(a)(2).
- 32 The AIA gives the USPTO fee-setting authority. AIA sec. 10. On February 7, 2012, the USPTO published its proposed fee schedule. See USPTO website, *Fees and Budgetary Issues*, [http://www.uspto.gov/aia\\_implementation/fees.jsp#heading-1](http://www.uspto.gov/aia_implementation/fees.jsp#heading-1) (last visited August 14, 2012).
- 33 *Id.*
- 34 *Id.*
- 35 USPTO, UNITED STATES PATENT AND TRADEMARK OFFICE FEE SCHEDULE, effective September 26, 2011, <http://www.uspto.gov/web/offices/ac/qs/ope/fee092611.htm> (last visited September 6, 2012).
- 36 See AIA 35 U.S.C. § 316(a)(5); see also AIA 35 U.S.C. § 326(a)(5).
- 37 See, e.g., USPTO, *Changes to Implement Inter Partes Review Proceedings*, FEDERAL REGISTER, February 10, 2012, at 7055 (“The AIPLA Report of the Economic Survey 2011 reports that the total cost of patent litigation where the damages at risk are less than \$1,000,000 average \$916,000, where the damages at risk are between \$1,000,000 and \$25,000,000 average \$2,769,000, and where the damages at risk exceed \$25,000,000 average \$6,018,000. There may be a significant reduction in overall burden if, as intended, the Leahy-Smith America Invents Act and the proposed rules reduce the overlap between review at the USPTO of issued patents and validity determination during patent infringement actions.”).

# IP TRANSACTIONS: QUESTIONS TO ASK BEFORE BUYING PATENT-RELATED RIGHTS

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The patenting process is complex, expensive, and time-consuming. It can take years and tens of thousands of dollars to acquire a patent, with no guarantee that a patent application will successfully make it to patent issuance. Yet, more than half a million patent applications were filed with the United States Patent and Trademark Office in 2011. (Only about a quarter of a million patents were granted, though.) Despite the costs, the uncertainty of success, and the wait, innovators continue to invest in the patenting process. It is, after all, the only means by which to create the valuable rights of a patent owner.

The rights of an owner of an issued patent may be transferred to another. Even before a patent issues, an inventor or other owner of a patent application may have valuable rights in an invention. Inventor or applicant rights may also be transferable. Any transfer of patent-related rights (i.e., of an inventor, a patent applicant, or patent owner) should be approached with care and caution. Thus, there are certain inquiries that should be made prior to acquiring, by assignment or license, any IP rights, including patent-related rights. These include the following all-important questions: (1) what are the circumstances of the creation of the IP rights; (2) do the rights still exist; and (3) are the rights transferable?

This article, which is part three of a three-part series, examines these questions in the context of a contemplated assignment or license of patent-related rights. In this context, an “assignment” is essentially a complete transfer of the ownership of an exclusive right by an assignor to an assignee. A “license,” on the other hand, is not a transfer of ownership, but is a grant of permission, allowing the licensee to engage in some act that would otherwise be an act of patent infringement. In essence, then, an assignment transfers the assignor’s rights to the assignee, and

a license gives up, in some respect, the licensor’s ability to sue the licensee for infringement based on a licensed activity.

Before we delve into the pre-transaction inquiries, consider this hypothetical: A project manager at an engineering company, N-O-V8, Inc., gets word from the higher-ups that “we need to make our widgets smaller so they are easier to install in the Big Machine and cheaper to ship.” Project manager turns to his research engineering team with the command “design a more compact widget.” Research engineers Able, Baker, and Charlie start checking and tinkering. Charlie, one day, exclaims “Eureka! I’ve got it!” Charlie shows a design for a new widget with thinner sidewalls made out of a new polymer material he created, which he has named SDPoly (short for super-duper polymer) to Able and Baker. Baker says, “Ooh! We could also make the mid-portion of the sidewalls collapsible to make it even more compact.” Able agrees wholeheartedly. He also comes up with a fast way to manufacture the product. The amazingly-small Widget 2.0 becomes an instant hit at the company and in the marketplace. MegaCompany, Inc., wants to buy, outright, the patent rights. From whom does MegaCompany, Inc., acquire an assignment of the patent-related?

## Patent-related rights: An introduction

Patent-related rights are associated with inventions. An “invention” is “any art or process (way of doing or making things), machine, manufacture, design, or composition of matter, or any new and useful improvement thereof, or any vari-

ety of plant, which is or may be patentable under the patent laws of the United States.” In our hypothetical, Widget 2.0, the method by which Widget 2.0 is manufactured, and the chemical composition of the SDPoly may each be separately patentable inventions. Even the ornamental design of Widget 2.0 may be patentable.

An inventor may seek patent protection by filing a patent application with the United States Patent and Trademark Office, the ultimate goal of which filing is, usually, to acquire a U.S. patent. The patent application describes the invention, sets forth detailed claims as to what elements of the process, machine, etc., the inventor claims as his exclusive invention, and often includes black-and-white figures illustrating the invention. Therefore, what we see in a music video as Michael Jackson leaning an extraordinarily long way toward the stage without falling, is patented as “[a] system for engaging shoes with a hitch means to permit a person standing on a stage surface to lean forward beyond his or her center of gravity.”

## Question 1: What were the circumstances of the creation of the patent-related rights?

As soon as an inventor has invented an invention, certain patent-related rights come into being. These “inventor rights” are owned by the individual who invented the invention. Once a patent application is filed, the patent applicant holds what will be referred to in this article as “applicant rights.” If, and only if, a patent issues will “patent rights” come into being. Each of these three categories of patent-related rights involves different rights:

Inventor Rights	Applicant Rights	Patent Rights
<ul style="list-style-type: none"> <li>• File a patent application</li> <li>• Transfer right, title, and interest in invention to another</li> </ul>	<ul style="list-style-type: none"> <li>• Act on the patent application (i.e., correspond with the Patent Office while the patent application is being considered)</li> <li>• Transfer right, title, and interest in application to another</li> <li>• Be granted a patent, if invention found patentable and applicant owns rights in the application at time of patent issuance</li> <li>• Mark invention as “Patent Pending”</li> </ul>	<ul style="list-style-type: none"> <li>• Exclude others from making, using, selling, offering for sale, and importing the claimed invention in the United States</li> <li>• Sue for patent infringement</li> <li>• Mark invention as “Patented”</li> </ul>



Elizabeth Herbst Schierman

Notably, only a patent owner has the right to exclude others from practicing the invention. Therefore, an inventor may file a patent application on a new invention and have to wait years for a patent to issue before the inventor can sue a competitor for making a copy-cat product.

The patent-related rights associated with an invention are originally held by the inventors, i.e., the individual or individuals who invented the invention. Those who contributed to the conception of the invention that has been or will be claimed in the patent application are the inventors of the concerned invention. An individual who merely suggested an idea of a result to accomplish, but not the means to accomplish it, is not an inventor. Therefore, before acquiring rights to an invention, it is important to identify the inventors, which requires identifying the individuals involved in the conception of the invention to be claimed in an associated patent or patent application. In our hypothetical, for example, the project manager is not an inventor because he did not contribute to the actual invention. Charlie is an inventor of a widget with thinner sidewalls, but, if the “invention” to be claimed in the patent application is a widget with both thinner and collapsible sidewalls, Charlie and Baker are the inventors. Able is an inventor of the manufacturing method, and Charlie is the inventor of the composition for the SD-Poly. A patent application claiming the product, the manufacturing process, and the composition, would therefore need to name each of Able, Baker, and Charlie as inventors, but not the project manager. An assignment of all patent rights related to Widget 2.0 would need to include all rights from each of Able, Baker, and Charlie.

Notably, an inventor must be an individual person, not a business or other legal entity. Therefore, even if an invention is created in the context of an employment, it is the employee, not the employer, who is the inventor. In the hypothetical, then, N-O-V8, Inc., is not an inventor even though Able, Baker, and Charlie came up with Widget 2.0 in the scope of their employment. Nonetheless, it is common for inventors working for companies or working with federal funding to be under a legal obligation, such as an employee agreement or other contract, to transfer (e.g., assign or license) their rights to the employing company or funding agency. Therefore, after identifying who the inventors are, it is also important to determine whether the inventors were operating under a pre-existing contract or

*Even if an invention is created  
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it is the employee, not the employer,  
who is the inventor.*

other legal obligation to transfer some or all of their rights to a third party.

To add to our hypothetical, N-O-V8, Inc., was wise enough to have each of Able, Baker, and Charlie sign an employment agreement when first hired, and, under the terms of their employment agreements, Able, Baker, and Charlie must assign all rights in inventions created as part of their employment to N-O-V8, Inc. N-O-V8’s patent counsel will wisely have Able, Baker, and Charlie sign a patent assignment to N-O-V8 at the same time a patent application regarding Widget 2.0, the method of manufacturing, and the composition of SDPoly is filed with the Patent Office. Therefore, when MegaCompany, Inc., seeks to later buy the patent rights, MegaCompany, Inc., will need to acquire the assignment from N-O-V8.

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

Patent-related rights, whether of an inventor, a patent applicant, or a patent owner, will expire at some point in time. When the rights expire depends on whether the rights to be transferred are those of an inventor, a patent applicant, or a patent owner. Therefore, to determine whether the rights have expired or, contrarily, whether they are still in existence and available for transfer, an initial determination should be made as to at what the stage in the patenting process the rights are to be transferred.

#### **Pre-application stage**

If looking to acquire rights from an inventor before a patent application has been filed and before a patent has issued, consider when the invention was invented and what the inventor has done with the invention since. If the inventor “abandoned” the invention since the invention date, he or she is barred from seeking patent protection. If the inventor has already disclosed the invention to others and more than one year has passed since that disclosure, the inventor is barred from obtaining a patent. Such disclosures that start the

one-year clock toward the statutory bar may include describing the invention in a printed publication, allowing others to use the invention without an obligation of confidentiality, and selling or offering to sell the invention. In our hypothetical, for example, if more than one year has passed since N-O-V8 started selling Widget 2.0 without a patent application having been filed, Widget 2.0, its manufacturing process, and the SDPoly composition may be forever barred from patent protection.

#### **Pending application stage**

Suppose a patent application has been filed in time. In our hypothetical, for example, we suppose that N-O-V8 wisely filed a patent application before so much as a peep about Widget 2.0 was shared outside of the company. The patent application claims the device that is the Widget 2.0, the method of manufacturing the device, and the composition of the SDPoly. Able, Baker, and Charlie are named as inventors. The patent application has been assigned by all three inventors to N-O-V8, and the assignment has been recorded with the Patent Office. N-O-V8 is now a patent applicant.

When looking to acquire rights from a patent applicant, consider where in the patent prosecution process the patent application stands. Patent applications go through several stages. A newly-filed patent application may wait years before receive a first “Office Action,” i.e., a communication from the Patent Examiner, to whom the application has been signed, as to whether the invention is patentable. Applicants have opportunities to respond to such Office Actions, and several such back-and-forth communications may be made during the prosecution of the patent application. Eventually either a patent application is “allowed,” such that the invention is deemed patentable and a patent may issue for the invention, or the patent applicant gives up trying to acquire a patent and the application becomes abandoned.

All patent applications, therefore, eventually expire, become abandoned, or mature into an issued patent. At some point, then, patent-related rights may become worthless. For example, a provisional application expires one year after filing without any opportunity for extension, while a nonprovisional application does not expire, but remains pending until abandonment or maturity to issuance. A nonprovisional application will become abandoned if, during the back-and-forth communications with the Patent Office, the patent applicant fails to meet the response deadlines instituted by the Patent Office or if the patent applicant expressly abandons the application. Even once the Patent Office has “allowed” a patent application, i.e., found the claimed invention to be patentable, certain deadlines must be met and fees paid in order for the patent application to mature to an issued patent. Therefore, before buying the rights of a patent applicant, determine whether the patent application is still pending and, if so, when it will expire, if it is the type of application e.g., a provisional application) that can expire by operation of law. It may also be beneficial, for valuation purposes, to determine whether the application still awaits a first patentability determination from the Patent Office (i.e., a first “Office Action”), whether it has already been rejected, or whether it has already been allowed.

In our hypothetical, N-O-V8 filed a provisional application before it took Widget 2.0 to a trade show. Before the one-year anniversary of the provisional application filing, it filed a nonprovisional patent application claiming priority to the provisional. The application has been pending for three years and, after a couple rounds of Patent Office Actions and Responses, a Patent Examiner has now found the patent application allowable. A little over \$1,000 is due to the Patent Office to acquire the patent. Learning of this status, MegaCompany, Inc., is willing to pay quite a bit for the patent rights, because a patent should be in hand within a matter of weeks. On the other hand, if the application for Widget 2.0 was only recently filed, MegaCompany, Inc.’s buy price may not be as high, because there would be still a great deal of uncertainty as to whether a patent could be successfully acquired.

### **Post patent issuance stage**

If all goes well, a patent issues and, in our hypothetical, N-O-V8 becomes a patent owner, having not yet assigned the patent rights to another. If looking to ac-

*The rights of an inventor,  
a patent applicant, or patent owner  
may be wholly transferred  
by assignment.*

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quire rights from a patent owner, i.e., after a patent has already issued for the invention, it is important to determine when the patent is expected to expire. All U.S. patents eventually expire. For example, utility patents expire, according to the most recent U.S. patent term laws, 20 years from the earlier of (a) the filing date of the patent application from which the patent matured and, (b) if the application claimed priority to an earlier-filed patent application, the earliest filing date to which priority was claimed, which certain exceptions. Design patents, on the other hand, expire 14 years from the design patent’s issue date, and no maintenance fees are required. A patent’s term can also be affected by the lack of payment of mandatory maintenance fees, by terminal disclaimer having been filed during prosecution, and by patent term adjustments due to delays during patent pendency by an applicant or the Patent Office.

Understandably, one may want to determine the remaining life of a patent before buying rights associated with the patent and may want to determine what, if any, maintenance fees would need to be paid to keep the patent alive as long as possible. For our hypothetical, immediately after issuance of the patent for the highly-successful Widget 2.0, the method of manufacturing, and the SDPoly composition, the value of the patent rights may be at their highest. On the other hand, ten years down the road, with only half the life of the patent remaining, the value of the patent rights may be significantly decreased.

### **Question 3: Are the rights transferable?**

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

### **Patent-related assignments**

The rights of an inventor, a patent applicant, or patent owner may be wholly

transferred by assignment. The transfer must include the entirety of the bundle of rights that is associated with the ownership interest. The assignment may be of the assignor’s entire ownership interest or a percentage of the assignor’s ownership interest. Accordingly, MegaCompany, Inc., could not acquire an “assignment” of only N-O-V8’s right to import the invention into the United States, without also acquiring an assignment of N-O-V8’s right to make, use, and sell the invention. However, N-O-V8 could assign a 50 percent interest in the patent-related rights to MegaCompany, Inc., making both N-O-V8 and MegaCompany joint owners of the entire bundle of patent rights. Thereafter, both could practice the invention as joint patent-rights owners.

An assignment must be in writing, and it may be recorded with the Patent Office. A recorded assignment provides legal notice to the public of the assignment. An assignment may also be made of record in a patent application file or patent file at the Patent Office. Making an assignment of record allows the assignee to take action before the Patent Office, e.g., communicate with the Patent Office during the prosecution of the patent application. Accordingly, after the assignment from Able, Baker, and Charlie to N-O-V8 was recorded with the Patent Office, N-O-V8 could oversee the dealings with the Patent Office as the patent application for Widget 2.0, the method, and the composition was prosecuted.

### **Patent-related licenses**

Patent-related rights may also be licensed, rather than wholly assigned. A license transfers a bundle of rights that is less than the licensor’s entire ownership interest. At least after a patent has issued, a patent license may be crafted to be exclusive or non-exclusive and may be limited as to geographic area, field of use, and time. For example, a licensor may license the right to use a patented invention only in Idaho, only for the production of processed potato products, and only for a

period of five years. An assignment could not be likewise limited. Therefore, in our hypothetical, N-O-V8 could have exclusively licensed to MegaCompany, Inc., the right to import Widget 2.0 into the United States, while retaining the right to make, use, or sell Widget 2.0 in the U.S.

Because a license is essentially a promise by the licensor not to sue the licensee for an otherwise infringing act, the licensing of pre-patent rights is somewhat tricky. After all, before a patent issues, an inventor or patent applicant possesses no legal standing to sue for patent infringement. Nonetheless, licenses by inventors and patent applicants are very common. The “patent pending” status of the invention should be kept in mind, to ensure that the patent license has sufficient consideration for enforceability. For example, if MegaCompany, Inc., wanted a license of patent-related rights while the Widget 2.0 patent application was pending, N-O-V8 may have, as a term of the license, provided additional information about Widget 2.0 or how to implement the invention with Big Machine, may have provided consulting work to MegaCompany, or may have promised an exclusive license

*Because a license is essentially a promise by the licensor not to sue the licensee for an otherwise infringing act, the licensing of pre-patent rights is somewhat tricky.*

to MegaCompany of any patent rights once a patent issued.

**Patent-related transactions are unique**

Patent-related rights are often incredibly valuable assets of a business or individual inventor. Just as the patenting process should be approached carefully because it is complicated, expensive, and fraught with traps for the unwary, patent-related licenses and assignments should likewise be approached carefully.

Many clients new to the world of patents may have previously been a party to a real property transaction, but an intellectual property transaction is unique. Even clients familiar with copyright and trademark transactions should be specifically counseled for a patent transaction. To highlight just a few significant differences between the world of copyright, trademark, and patent-related transactions, consider the following:

	<b>Copyright ©</b>	<b>Trademark TM/®</b>	<b>Inventor/Applicant</b>	<b>Patent Owner</b>
<b>Rights</b>	Right to reproduce; make derivative works; distribute copies by sale, rental, lease, lending; perform or display publicly	Right to exclude, within the area of seniority, junior users from adopting or using marks likely to cause confusion	Right to file application for patent  No right to exclude others from practicing the invention	Right to exclude others from making, using, selling, offering for sale, and importing the patented invention, as claimed, in the United States
<b>Law</b>	Federal	State or Federal	Federal	Federal
<b>Creation</b>	Fixation of the original work of authorship in tangible form (Registration does not create the rights)	Use of the trademark, in a distinctive way, in commerce  (Registration does not create the rights)	Conception and reduction to practice of an invention (Application does not create the rights)	Issuance of patent from the U.S. Patent and Trademark Office  (Only issuance of patent creates the rights)
<b>Original Owner</b>	Author of the work (may be the creative individual(s) or may be an entity employing the creative individual(s))	Source of the associated goods/services (often not the individual(s) who thought up the trademark)	The individual(s) who actually invented the invention (never an entity)	Owner of the patent rights at the time of patent issuance
<b>Term (generally)</b>	Life of last surviving author + 70 years or, for work made for hire, earlier of 120 years after creation or 95 years after publication	Indefinite – as long as trademark continues to be used in commerce in a distinctive way	Until earliest of abandonment, statutory bar, transfer of rights, or patent issuance	For utility patent – 20 years from first filing date, with payment of maintenance fees For design patent – 14 years from issuance, no maintenance fees
<b>Transferring Rights</b>	Rights transferrable by assignment or license, in whole or in part	Rights transferrable by assignment only with good will or by license provided mark owner controls quality	Rights transferrable by assignment, no separation of the bundle of rights; Licensing rights tricky	Rights transferrable by assignment, no separation of bundle of rights, or by license

In light of the differences between copyright, trademark, and patent-related transactions, each should be approached with due care and in recognition that handling one type of IP transaction is not necessarily the right way to handle another type of IP transaction. For example, a copyright or trademark may, generally speaking, be registered at any point during their rather-long lifetimes, while patent rights may be easily lost early on. Therefore, pre-transaction inquiries to ensure that a copyright or trademark right still “exists” for license or assignment may not be as complex as the same inquiry for a patent-related right. Also, for transactions involving an already-filed patent application or patent issuance, the inquiry regarding the circumstances of the creation of the patent-related rights may not be as complicated as the same inquiry regarding the circumstances of the creation of copyright or trademark rights.

It is also important to keep in mind that more than one area of intellectual property law may be implicated when trying to acquire rights from another. Therefore, acquiring rights within only one of the patent, trademark, and copyright categories may not be sufficient. For example, though MegaCompany, Inc., wanted the patent rights for Widget 2.0, they may have considered whether they also wanted any associated trademark rights in the Widget 2.0 name or logo or copyright rights in the software code used to program Widget 2.0 to work in Big Machine.

In any regard, for patent-related rights, where high values and complex laws are involved, the above-discussed pre-transaction questions are good starting points for those interested in acquiring patent-related rights, but the above questions are certainly not the only ones to consider. It is always a good idea to consult with someone very familiar with patent licensing, specifically, and to keep in mind that all inventions are different and all patent-related transactions should be tailored for the specific circumstances involved. Most importantly, if the transaction involves rights in an invention for which a patent application has not yet been filed, do not delay in consulting with a registered patent agent or attorney to ensure that the needed steps are taken to protect the patent-related rights before they are irrevocably lost.

#### About The Author

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*It is also important to keep in mind that more than one area of intellectual property law may be implicated when trying to acquire rights from another.*

*Idaho and Utah with degrees in Chemical Engineering and Law from the University of Idaho. Her practice is focused primarily on building valuable IP portfolios for clients in Idaho and elsewhere through high-quality patent and trademark work in industries such as the nanotechnology, material science, mining, consumer products, and chemical industries. She is serving her second term as Chair of the ISB Intellectual Property Law Section and is a member of the Advisory Board for the University of Idaho's Department of Chemical & Materials Engineering.*

#### Endnotes

<sup>1</sup> In FY 2011, the average pendency of a patent application, between initial filing and either final rejection or issuance as a patent, was 33.7 months. *Performance and Accountability Report Fiscal Year 2011*, United States Patent and Trademark Office, p. 2, available at <http://www.uspto.gov/about/strat-plan/ar/2011/USPTOFY2011PAR.pdf>.

<sup>2</sup> The cost of filing and prosecuting a patent application to issuance and of maintaining the issued patent in the United States may easily reach \$25,000.00 or more. Samson Helfgott, *PCT Filing and International Prosecution, AIPLA Practical Patent Prosecution Training for New Lawyers 2007 Road Show*, pp. 2–3 (2007); available at <http://www.aipla.org/learningcenter/library/papers/bootcamps/07patentbootcamp/Documents/Helfgott-paper.pdf>.

<sup>3</sup> *U.S. Patent Statistics Chart Calendar Years 1963 – 2011*, U.S. Patent and Trademark Office Patent Technology Monitoring Team (PTMT), at [http://www.uspto.gov/web/offices/ac/ido/oeip/taf/us\\_stat.htm](http://www.uspto.gov/web/offices/ac/ido/oeip/taf/us_stat.htm) (last visited Aug. 6, 2012).

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

<sup>5</sup> This article is focused on IP transactions involving a transfer of rights by assignment or license. IP rights may be transferable by other types of transactions, such as by inheritance or bequeathal, by operation of law, or in bankruptcy. The discussion in this article does not necessarily apply to these other types of transfers.

<sup>6</sup> The first part of this series is “IP Transactions: Questions to Ask Before Buying Copyrights Rights,” published by The Advocate in September 2011, an electronic copy of which is available online at <http://isb.idaho.gov/pdf/advocate/issues/adv11sep.pdf>. The second part is “IP Transactions: Questions to Ask Before Buying Trademark Rights,” published by The Advocate in March/April 2012, an electronic copy of which is

available online at <http://isb.idaho.gov/pdf/advocate/issues/adv12MarApr.pdf>.

<sup>7</sup> For more information regarding these questions, particularly as they also apply to copyright and trademark transactions, please refer to “Intellectual Property Transactions: Identifying and Transferring Ownership,” a Continuing Legal Education program recorded April 6, 2011, which is available online from the Idaho State Bar and Idaho Law Foundation online CLE catalog at <http://isb.fastcle.com/store/provider/custompage.php?seminar=11422>.

<sup>8</sup> Though “a patent license agreement is in essence nothing more than a promise by the licensor not to sue the licensee,” *Spindelfabrik Suessen-Schurr Stahlecker & Grill GmbH v. Schubert & Salzer Maschinenfabrik Aktiengesellschaft*, 829 F.2d 1075, 1081 (Fed. Cir. 1987), this is not to imply that a patent license is equivalent to a covenant not to sue. For more information in this regard, see March Maloley, *Patent Licenses Versus Covenants Not to Sue: What Are the Consequences?*, available at <http://www.brookskushman.com/Portals/0/NewsPDFs/131.pdf> (last visited Aug. 24, 2012).

<sup>9</sup> *Glossary*, United States Patent and Trademark Office, at <http://www.uspto.gov/main/glossary/index.html#i>.

<sup>10</sup> The inventor may also seek patent protection in another jurisdiction by filing a patent application in the other jurisdiction. This article, however, is focused on the transfer of U.S. patent-related rights only.

<sup>11</sup> U.S. Patent No. 5,255,452 (filed June 29, 1992) (issued Oct. 26, 1993).

<sup>12</sup> In part one of this series—addressed to potential transfers of copyright rights—the most pertinent question regarding the circumstances of creation of the IP rights was “who” created the work. In part two of this series—addressed to potential transfers of trademark rights—the most pertinent question regarding the circumstances of creation of the IP rights was “when” were the rights created. With patent rights, on the other hand, the most pertinent question regarding the circumstances of creation of the IP rights is “what” was created. Determining “what” the invention is vital to determining who invented it and what rights may be transferred by assignment or license.

<sup>13</sup> An invention is made when there is a conception and a reduction to practice. MPEP § 2138.02 (citing *Dunn v. Ragin*, 50 U.S.P.Q. 472, 474 (B.P.A.I. 1941)).

<sup>14</sup> “Rights” as used in the term “inventor rights” is used very loosely.

<sup>15</sup> “Rights” as used in the term “applicant rights” is also used very loosely.

<sup>16</sup> “Patentees, and persons making, offering for sale,

or selling within the United States any patented article for or under them, or importing any patented article into the United States, may give notice to the public that the same is patented, either by fixing thereon the word "patent" or the abbreviation "pat.," together with the number of the patent, or when, from the character of the article, this cannot be done, by fixing to it, or to the package wherein one or more of them is contained, a label containing a like notice." 35 U.S.C. § 287(a). Virtual marking, which involves posting patent information on the Internet, may also be permissible. Leahy-Smith America Invents Act, Pub. L. No. 112-29, § 16, 125 Stat. 284, 328-29 (2011), available at [http://www.uspto.gov/aia\\_implementation/20110916-pub-112-29.pdf](http://www.uspto.gov/aia_implementation/20110916-pub-112-29.pdf).

<sup>17</sup> M.P.E.P. § 300 (citing *Beech Aircraft Corp. v. EDO Corp.*, 990 F.2d 1237, 1248 (Fed. Cir. 1993)).

<sup>18</sup> M.P.E.P. § 2137.01 (quoting *In re Hardee*, 223 U.S.P.Q. 1122, 1123 (Comm'r Pat. 1984)).

<sup>19</sup> *Levin v. Septodont, Inc.*, 34 Fed. Appx. 65, 73 (4th Cir. 2001).

<sup>20</sup> 35 U.S.C. § 102(c) "A person shall be entitled to a patent unless . . . (c) he has abandoned the invention."

<sup>21</sup> M.P.E.P. § 2133.02 (citing *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 148 (1989) ("Once an inventor has decided to lift the veil of secrecy from his [or her] work, he [or she] must choose between the protection of a federal patent, or the dedication of his [or her] idea to the public at large.")).

<sup>22</sup> M.P.E.P. § 2133.02.

<sup>23</sup> M.P.E.P. § 2133.03(a).

<sup>24</sup> M.P.E.P. § 2133.03(b).

<sup>25</sup> A nonprovisional patent application may be filed within the one-year life of the provisional applica-

*A utility patent protects a new, useful,  
and nonobvious process, machine,  
article of manufacture, or composition of matter,  
or any new and useful improvement thereof.*

tion, however, to continue the pursuit of a patent for a concerned invention. See 35 U.S.C. § 119(e). Therefore, though a provisional application will expire, an inventor's or patent applicant's rights associated with the invention may not necessarily expire when the provisional application expires.

<sup>26</sup> A "utility patent" is what comes to mind when most people think of a "patent." A utility patent protects a new, useful, and nonobvious process, machine, article of manufacture, or composition of matter, or any new and useful improvement thereof. *Glossary*, United States Patent and Trademark Office, at <http://www.uspto.gov/main/glossary/index.html#u>. Inventors wanting to protect the way an invention is made or the way the invention functions would likely want to seek a utility patent.

<sup>27</sup> 35 U.S.C. § 154.

<sup>28</sup> A "design patent," is different than a utility patent. A design patent protects a new, original, and orna-

mental design for an article of manufacture. *Glossary*, United States Patent and Trademark Office, at <http://www.uspto.gov/main/glossary/index.html#d>. Inventors wanting to protect the way an invention looks would likely want to seek a design patent.

<sup>29</sup> M.P.E.P. § 1502.01.

<sup>30</sup> M.P.E.P. §§ 2501, 2701, 2710.

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

<sup>32</sup> M.P.E.P. § 301.

<sup>33</sup> *Id.* (citing 35 U.S.C. § 261).

<sup>34</sup> M.P.E.P. § 301.

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

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

<sup>37</sup> *Id.*

<sup>38</sup> *Spindelfabrik Suessen-Schurr Stahlecker & Grill GmbH*, 829 F.2d at 1081. Again, however, this is not to imply that a patent license is equivalent to a covenant not to sue.

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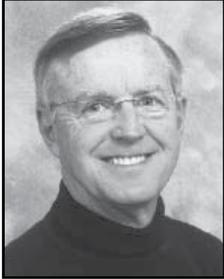
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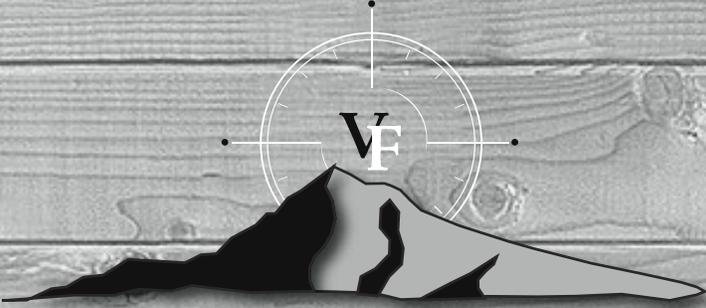
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## COURT INFORMATION

### OFFICIAL NOTICE SUPREME COURT OF IDAHO

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

#### 3rd AMENDED - Regular Fall Terms for 2012

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

By Order of the Court  
Stephen W. Kenyon, Clerk

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

### OFFICIAL NOTICE COURT OF APPEALS OF IDAHO

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

#### 2nd AMENDED - Regular Fall Terms for 2012

Boise ..... August 9, 21 and 23  
Boise ..... September 18 and 20  
**Boise Eastern Idaho** ..... October **15, 16, 17, and 18 19**  
Boise ..... October **23 and 25**  
Boise ..... November 13, 15 and 20  
Boise ..... December 11 and 13

By Order of the Court  
Stephen W. Kenyon, Clerk

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

### Idaho Supreme Court Oral Argument for November 2012

#### **Thursday, November 1, 2012 – BOISE**

8:50 a.m. State v. Phillip James Morgan ..... #38305-2010  
10:00 a.m. Two Jinn, Inc. v. Dept. of Insurance #38759-2011  
11:10 a.m. Jack L. Garrett v. Thelma V. Garrett #38971-2011

#### **Friday, November 2, 2012 – BOISE**

8:50 a.m. State v. Dunlap (Death Penalty Review) .....  
..... #32773-2006/37270-2010  
10:00 a.m. State v. Abraham Scraggins, Jr. ....  
..... #38212/38213-2010  
11:10 a.m. Joseph Henry v. Dept. of Correction  
(Industrial Commission)..... #39039-2011

#### **Wednesday, November 7, 2012 – ISU (Pocatello)**

8:50 a.m. Allen F. Grazer v. Gordon A. Jones ... #38852-2011  
10:00 a.m. State v. Joan Michelle Anderson  
(Permissive Appeal) ..... #38950-2011  
11:10 a.m. Habib Sadid v. Idaho State University  
(Industrial Commission)..... #38549-2011

#### **Thursday, November 8, 2012 – BYU-Idaho (Rexburg)**

8:50 a.m. Robert Day v. Wal-Mart Stores, Inc. ...#38730-2011  
10:00 a.m. Michael Stapleton v. Jack Cushman Drilling &  
Pump ..... #39198-2011  
11:10 a.m. Buku Properties, LLC v. Rael H. Clark .....  
..... #38561-2011

#### **Friday, November 9, 2012 – IDAHO FALLS**

8:50 a.m. Judy Nield v. Pocatello Health Services .....  
..... #38823-2011  
10:00 a.m. Craig E. Peterson v. Wesley J. Gentillon .....  
..... #38878-2011  
11:10 a.m. Ida-Therm, LLC v. Bedrock Geothermal, LLC ...  
..... #39108-201

**The Idaho Supreme Court will have NO oral  
arguments during the month of October.**

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

#### **Tuesday, October 16, 2012 - BOISE**

9:00 a.m. Williams v. State ..... #38349-2010  
10:30 a.m. Schultz v. State ..... #39065-2011

#### **Thursday, October 18, 2012 – BOISE**

10:30 a.m. Kafader v. Baumann ..... #39195-2011  
1:30 p.m. State v. Risdon ..... #39095-2011

#### **Thursday, October 25, 2012 – BOISE**

10:30 a.m. State v. Ciccone ..... #38817-2011  
1:30 p.m. State v. Cox ..... #39040-2011

**Idaho Supreme Court and Court of Appeals**  
**NEW CASES ON APPEAL PENDING DECISION**  
(Updated 9/1/12 )

## CIVIL APPEALS

### Divorce, custody, and support

1. Whether the court abused its discretion by awarding spousal maintenance.

*Pelayo v. Pelayo*  
S.Ct. No. 39789  
Supreme Court

### Evidence

1. Whether the district court erred in finding Dr. Bowman's affidavit did not sufficiently address the local standard of care and was therefore inadmissible.

*Hall v. Rocky Mountain ER Physicians*  
S.Ct. No. 39473  
Supreme Court

### Property

1. Whether the district court erred when it concluded the Christensens' use of their property constituted a private nuisance and that the Right to Farm Act and the clean hands doctrine did not apply.

*McVicars v. Christensen*  
S.Ct. No. 38705  
Supreme Court

### Quiet title

1. Whether the district court erred in its determination that the dedication of the common areas located in Section 7 was ineffective.

*Seigwarth v. Opportunity Management Co.*  
S.Ct. No. 39445  
Supreme Court

### Substantive law

1. Does I.C. § 73-101 bar application of the 2009 amendments to the Sex Offender Registration Act to appellant's petition to be released from the sex offender registration requirements?

*Bottum v. Idaho State Police*  
S.Ct. No. 39772  
Supreme Court

### Summary judgment

1. Did the district court err in granting summary judgment on the Beers' negligence claim in favor of the Corporation of the President of the Church by finding that no special relationship existed between COP and Beers as a matter of law?

*Beers v. The Corporation of the President of the Church of Jesus Christ Latter Day Saints*  
S.Ct. No. 39319  
Supreme Court

2. Did the district court err by reversing the magistrate's judgment in favor of BBC and granting MRS summary judgment on its claim for conversion?

*Medical Recovery Serv. v. Bonneville Billing & Collections*  
S.Ct. No. 39408  
Court of Appeals

3. Did the district court err in granting summary judgment in favor of Monsanto on SIO's claims for breach of contract and breach of the implied covenant of good faith and fair dealing?

*Silicon International Ore v. Monsanto Co.*  
S.Ct. No. 39409  
Supreme Court

4. Did the district court err by granting summary judgment in favor of the Homeowner's association on the fraudulent transfer claim?

*Island Woods Homeowner's Assoc. v. McGimpsey*  
S.Ct. No. 39698  
Court of Appeals

5. Did the district court err in granting the defendants' motion for summary judgment and in concluding the finding of O-Kel-ly's guilt in prison disciplinary actions did not result in an atypical and significant deprivation compared to what might be expected in ordinary prison life?

*O-Kel-ly v. Jones*  
S.Ct. No. 39048  
Court of Appeals

6. Whether the parties' mediated agreement in its entirety was merged into the decree and thus subject to the court's review and modification for changed circumstances.

*Davidson v. Soelberg*  
S.Ct. No. 39595  
Court of Appeals

7. Did the court err by granting summary judgment to Highway 101 allowing it to place a large sign within the area of an express recorded right of way?

*Johnson v. Highway 101 Investments, LLC*  
S.Ct. No. 39160  
Supreme Court

8. Did the trial court err in granting summary judgment to SEC when genuine issues of material fact existed as to whether SEC knew or should have known at the time of the sale that its SABRE Red products pose a risk of respiratory injury?

*Major v. Security Equipment Corp.*  
S.Ct. No. 39414  
Supreme Court

9. Did the court err in granting summary judgment to Brady Law on Sykes' claim of professional negligence?

*Sykes v. Schepp*  
S.Ct. No. 39687  
Court of Appeals

### Termination of parental rights

1. Whether the court erred in terminating Mother's parental rights under the best interest analysis.

*Idaho Dept. of Health and Welfare v. Doe*  
S.Ct. No. 40122  
Supreme Court

## CRIMINAL APPEALS

### Due process

1. Did the prosecutor commit misconduct, rising to the level of fundamental error, during closing argument by mischaracterizing Corwin's arguments and appealing to the prejudice and passion of the jury?

*State v. Corwin*  
S.Ct. No. 38479  
Court of Appeals

### Evidence

1. Did the court abuse its discretion by admitting the portion of Goyenko's testimony regarding whether he had made statements to an officer that Agafonov had previously told him about Agafonov's prior use of opiates?

*State v. Agafonov*  
S.Ct. No. 38764  
Court of Appeals

2. Did the State present sufficient evidence to support the jury's finding that McClain was a persistent violator?

*State v. McClain*  
S.Ct. No. 38576/38577  
Court of Appeals

3. Did the court err when it permitted Brad Johnson to testify as to the effects of Hill's crime on another individual?

*State v. Hill*  
S.Ct. No. 38808  
Court of Appeals

4. Did the court abuse its discretion by excluding the testimony of Rothwell's proposed character witnesses on the basis their testimony regarding his trustworthiness was not relevant to the elements of the offense?

*State v. Rothwell*  
S.Ct. No. 38437  
Court of Appeals

5. Did the court err when it denied Padilla's motion in limine and allowed the State to present evidence about his possession of broken pieces of a spark plug and a flashlight at the time of his arrest because the evidence was irrelevant and prejudicial?

*State v. Padilla*  
S.Ct. No. 38899/38900  
Court of Appeals

**Instructions**

1. Did the district court err in refusing to instruct the jury on the lesser included offenses of false imprisonment and domestic battery?

*State v. Joy*  
S.Ct. No. 38190  
Supreme Court

**Search and seizure – suppression of evidence**

1. Did the district court err in denying Round's motion to suppress and in finding the stop of her vehicle was lawful and the length of her detention was reasonable?

*State v. Round*  
S.Ct. No. 38963  
Court of Appeals

1. Did the court err in denying Pfeiffer's motion to suppress and in finding the officers acted reasonably based on their community caretaking function?

*State v. Pfeiffer*  
S.Ct. No. 39022  
Court of Appeals

**Sentence review**

1. Did the court abuse its discretion by denying Hall's Rule 35 motion after revoking his probation?

*State v. Hall*  
S.Ct. No. 38681  
Court of Appeals

2. Did the court abuse its sentencing discretion by imposing an excessive sentence?

*State v. Reece*  
S.Ct. No. 38661  
Court of Appeals

3. Did the court abuse its discretion when it revoked Costin's probation and executed the underlying sentence?

*State v. Costin*  
S.Ct. No. 38856  
Court of Appeals

**Summarized by:**  
**Cathy Derden**  
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John Hasko

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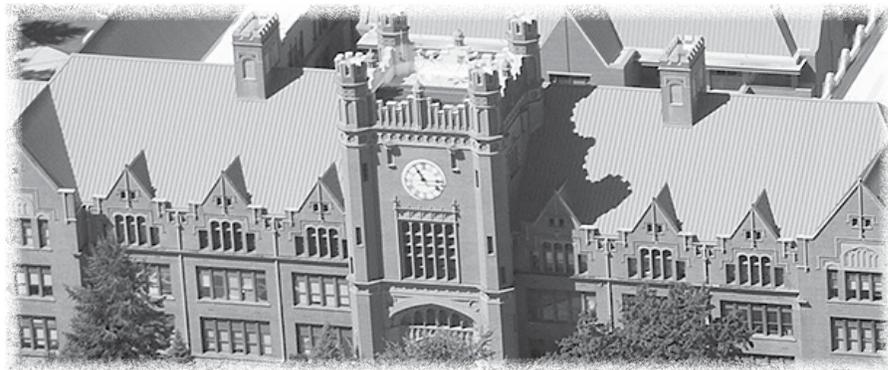
It's been a while since I've written on the newest additions to the HeinOnline electronic database, which is available at the University of Idaho College of Law Library in Moscow, and at the Idaho State Law Library in the Idaho Water Center in Boise. Our license agreement with HeinOnline restricts access to the physical environs of those two buildings, but, once logged on to the database at either of those locations, users can access, at no cost to them, not only the core law review library, but another three dozen add-on libraries. The current year has been a particularly busy one, with close to ten million pages of new content being added, including some very interesting add-ons to the a la carte menu of libraries. Summarized below are the contents of a handful of these newest libraries.

Earlier in the year, the *American Indian Law Collection* was added. Included in the more than 800 titles and 800,000 pages in the collection are decisions of the Interior Board of Indian Affairs, Indian Claims Commission

Decisions, legislative histories of several Federal Public Laws involving American Indians, over 300 constitutions, by-laws, and acts of various tribes, and the full text of hundreds of law review articles dealing with American Indians.

Included in the *Congress and the Courts* library are full text Federal Judicial Center publications, complete runs of periodicals, such as *Federal Probation*, *Federal Sentencing Reporter*, *Litigation*, and *The Judges' Journal*, legislative histories of Federal Public Laws dealing with the judiciary, and a collection of law review articles addressing the Federal court system.

The newest library in the HeinOnline database is *History of Supreme Court Nominations*. The major piece in this collection is the entire print series of



*Supreme Court of the U. S. Hearings and Reports on Successful and Unsuccessful Nominations of Supreme Court Justices by the Senate Judiciary Committee.*

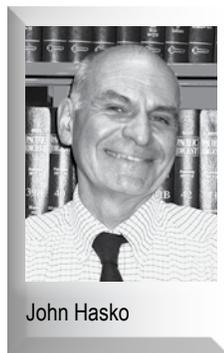
Biographies of individual justices and books about the Supreme Court are also included. Users can browse the library by individual justice to locate biographical information and scholarly articles about him or her.

As the practice of Law has become more international in scope, HeinOnline has kept pace with this development. Added this year was the *Index to Foreign Legal Periodicals (IFLP)*, which indexes articles and book reviews in over 500 legal journals throughout the world, excluding those from the United States, the UK, Canada, and Australia. Articles dealing with those countries are in the core HeinOnline library. A number of the publications covered in *IFLP* are available in HeinOnline, accessible by links from the *Index*.

The *U. S. International Trade Library: A Current and Historical Archive*, covers the exchange of goods and services between the United States and other nations. Included is an archive of United States International Trade Commission publications, over 4,000 in number, dating back to 1966. There are U. S. Government documents and commercially produced publications, collections of documents dealing with agreements like GATT and the Uruguay Round, and a complete collection of scholarly articles dealing with the topic of International Trade.

HeinOnline continues to be one of the premier legal databases, especially for archival material. The HeinOnline database, including the libraries discussed here, is as noted above, accessible at the University of Idaho

*As the practice of Law has become more international in scope, HeinOnline has kept pace with this development. Added this year was the Index to Foreign Legal Periodicals (IFLP), which indexes articles and book reviews in over 500 legal journals throughout the world.*



John Hasko

College of Law Library in Moscow, and at the Idaho State Law Library in the Idaho Water Center in Boise. Individuals and firms wishing to get personal subscriptions to HeinOnline should contact Steve Roses at [sroses@wshein.com](mailto:sroses@wshein.com), or (800) 828-7571, ext. 107. Steve can also set you up with a trial subscription, if you'd like to try out the database beforehand. Just contact him at his email address or via his phone number.

### About the Author

John Hasko received his J.D. from St. Mary's University in San Antonio, Texas and his M.S. in Library Science from the University of Illinois/Urbana-Champaign. He has been the Director of the University of Idaho College of Law Library since 1997.

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

The 2012 ABA Annual Meeting for the House of Delegates took place in Chicago on August 6 and 7. I attended the meeting as representative for the Idaho State Bar, along with Larry Hunter, the Idaho State Delegate, and Tim Hopkins, a member of the ABA Board of Governors.

This annual meeting was different. There was a lot of heated debate on several issues. It was emotional, reaffirming and inspirational. I cannot approach to tell you what this organization is about. Yes, it is political. But its goal, at all times, is to promote the vital role of lawyers and the sanctity of the practice of law, in every aspect of our society and our profession. To be a part of this organization particularly the House of Delegates, is an extraordinary experience as a lawyer.

During the meeting, Bill Robinson passed the Presidential “baton” to Laurel Bellows to serve as ABA President. In her speech to the House of Delegates, Bellows outlined the priorities of her presidency to include addressing the “horrors” of human trafficking, improving cybersecurity, promoting diversity, and continuing the ABA’s ongoing efforts to address adequate funding for the courts. Past presidents Bill Robinson and Steve Zack will continue to lead the committee charged with improving court funding.



Michelle R. Points

**Delegates pass resolutions**

Several resolutions were passed by the House, which I will not review here, but which can be found on the ABA’s website. The “highlights” included the House passing Resolution 105F, which amends Rule 1.6 of the ABA Model Rules of Professional Conduct regarding confidentiality of client information. The ABA Commission on Ethics 20/20 recommended the change in the rule as part of its examination of how technology and globalization



are spurring lawyer mobility and creates a model for examining potential client conflicts.

The House passed the new ABA Model Rule on Practice Pending Admission, Resolution 105D, which allows lawyers to practice in a “new” jurisdiction under certain circumstances while their admissions application is pending.

The House passed Resolution 102, which contains standards to assist the Department of Homeland Security as it transitions to a system that does not primarily rely on jail-like facilities, but rather, civil detention facilities that are more akin to “secure” nursing homes or residential treatment facilities.

The House passed Resolution 107A, which calls on government agencies to extend the statute of limitation for child sexual abuse cases, given special factors such as the age of the victim, the inability to report, and the abuse of trust.

The House passed Resolution 107C which urges funding for training for criminal defense organizations and criminal defense lawyers to address clients’ inter-related criminal, civil and non-legal problems so that they can adequately inform clients of all collateral consequences related to a plea or conviction.

The State of South Dakota, of the Jackrabbit Bar, introduced Resolution 10B, which urges federal, state, territorial, tribal and local governments to sup-

***Resolution 10B urges federal, state, territorial, tribal and local governments to support efforts to address the decline in the number of lawyers practicing in dual areas and to address access to justice issues for residents in rural America.***

port efforts to address the decline in the number of lawyers practicing in dual areas and to address access to justice issues for residents in rural America. This Resolution is uniquely relevant to rural Idaho communities. The House unanimously passed Resolution 10B.

Finally, the House passed Resolution 301, which urges congress to strengthen tribal jurisdiction to address crimes of domestic violence, sexual assault, stalking

and sex trafficking committed on tribal lands in the reauthorization of the Violence Against Women Act to grant the U.S. government jurisdiction to prosecute these crimes against non-tribal individuals.

**Tim Hopkins caps ABA tenure**

I realized at the beginning of the meeting it was Tim’s last ABA meeting, as his term on the ABA Board of Governors was completed. Tim has been an integral member of the ABA for decades. Tim served in the House of Delegates from 1992 through 2005. Tim most recently served on the ABA Board of Governors. Tim “exited” ABA with no pomp and circumstance. At our last session, a good friend of Tim’s was standing with him - Charlie English of Kentucky - who was also attending his last meeting with the ABA. Charlie and Tim have served the ABA together in several capacities over the years and are good friends. I was at Tim’s side, and overheard Charlie say, “well, it was a good hunt ... it is time to put the dogs away and piss on the fire.” Tim concurred and laughed. Tim later confirmed to me that this was a quote he often used.

**Morris Dees honored,**

**stresses pro bono**

Near the end of the meeting, Morris Dees, co-founder of the Southern Poverty Law Center, received the ABA Medal. Dees received the ABA’s highest honor for his efforts to ensure access to justice for society’s most vulnerable members. I have heard Mr. Dees give a presentation before, but not like this one. His acceptance speech drew tears from many in the audience. We often forget the impact lawyers have in defending and protecting the most fundamental rights of those in our society. I know I do. Perhaps it is because we think we live in a different time, or face different issues. But we don’t. At the close of Mr. Dees speech, Larry turned to me and said “that was worth the whole trip.” He was right. Following the adjournment of the house, the emails amongst the delegates started flying. The first one said, to the effect of “I felt guilty after Mr. Dees speech for the type of law I practiced.” She is a business lawyer. So she donated to the Southern Poverty Law Center. Several emails followed indicating that other delegates had done the same. The message, I believe, was that it doesn’t matter what kind of practice that you choose as a lawyer, it matters that you recognize the potential you have, and that

you respect what members of your profession have and continue to accomplish. Be proud.

If you don’t already, think about providing pro bono service. You can do it. Even if you are uncomfortable, even if you think “I don’t think that is something I am qualified or experienced to do,” you can. You are a lawyer. You have the tools. There is more to do than representing someone in court. People can, and are willing to help you. Being an advocate for someone who cannot speak or act for themselves, or don’t know what to do in a given circumstance, can have a profound impact. If you are not sure what pro bono opportunities are out there for you, contact IVLP.

I am looking forward to the several issues to be discussed and voted on by the House of Delegates at the ABA Midyear in Dallas in February, and appreciate the opportunity to represent the ISB.

**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.

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## CAPITALIZATION CONUNDRUMS CLARIFIED

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Sometimes, the stars just align. I follow Grammar Girl's blog, and she recently posted an enlightening explanation of the difference in capitalization for nicknames and terms of endearment (hint: capitalize nicknames, but not terms of endearment).<sup>1</sup> Not particularly useful in the legal writing context, but then a colleague asked me whether to capitalize the names of seasons (hint: don't capitalize). Thus, the idea for this essay was born.

The trend in writing in general is to capitalize less, even though as legal writers we tend to capitalize more. This can lead to tension when writing: When should I capitalize certain words? And, many of us learned capitalization rules as children, only to see them thrown out the window when reading opinions. What, then, are we to do when faced with a capitalization conundrum?

Follow these simple tips to eliminate many of those pesky capitalization questions.

### Capitalization and quotations

The first conundrum pops up all the time: When to capitalize the first word in a quotation. The first word is capitalized only if the quotation is a full sentence and is formally introduced.



Tenielle Fordyce-Ruff

When discussing law practice, Elihu Root explained, "About half the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop."

Grant Gilmore explained, "In Hell there will be nothing but law, and the Bluebook will be meticulously observed."

If you split the quotation with an attribution, don't capitalize the second part of the quoted sentence.

"About half the practice of a decent lawyer," Elihu Root explained, "consists in telling would-be clients that they are damned fools and should stop."



"In Hell there will be nothing but law," Grant Gilmore observed, "and the Bluebook will be meticulously observed."

In all other instances, the first word of a quotation is lower-case. For instance, if you quote only a partial sentence, don't capitalize the first word.

Elihu Root spent "about half" of his practice telling clients they "should stop."

In Gilmore's particular Hell, "the Bluebook will be meticulously observed."

Likewise, if you are using only parts of the quotation within your sentence, use a lower-case letter to begin the quotation.

A good portion of practice consists of telling clients they are "damned fools."

For some, Hell would be "nothing but law."

And, if you introduce your quotation with *that*, use a lower case letter.

When asked what practice was like, Elihu Root explained *that* "[a]bout half the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop."<sup>2</sup>

When describing his Hell, Gilmore explained *that* "there will be nothing but law, and the Bluebook will be meticulously observed."

### Capitalization and questions

The next conundrum is also tricky because the correct capitalization looks wrong at times. But, the first word of a direct question is always capitalized because the question is a sentence apart from the main sentence that contains it. You should also set off the question by using a comma, en-dash, or colon.

*The first word of an indirect question, however, is lower case because an indirect question is a declaratory statement. You can tell the difference between a direct and indirect question because an indirect question doesn't call for a question mark.*

My partner asked, Have you read both depositions?

She asked the defendant—Have you been anywhere near the scene of the crime?

I asked his assistant: Why is he always in a meeting or at a conference when I call?

The first word of an indirect question, however, is lower case because an indirect question is a declaratory statement. You can tell the difference between a direct and indirect question because an indirect question doesn't call for a question mark.

My partner asked if I had read both depositions.

The prosecutor asked the defendant whether he had been near the scene of the crime.

### Capitalization and adjectives

We all learned as children to capitalize proper nouns, but do you remember learning the rule about capitalizing certain adjectives based on those proper nouns? Some adjectives are derived from words that exist only as proper nouns. These types of adjectives are always capitalized.

That jurisdiction follows the American rule.

Other adjectives are derived from words that don't exist exclusively as proper nouns: presidential, constitutional. These types of adjectives are not capitalized.

Obama exercised his presidential veto.

The Court avoided a constitutional crisis.

### Capitalization and short-form proper nouns

Likewise, we all know that full names of corporate entities and government entities, officers, and acts are capitalized.

Micron Technology Inc. recently purchased Elpida Memory Inc.

Middleton High School hosted oral arguments on law day.

Chief Justice Roger Burdick's term as chief began on August 1, 2011.

The Fourteenth Amendment was one of the Reconstruction Amendments.

And, when you subsequently refer to nouns with a short form, you should also capitalize that short form.

Micron's purchase of Elpida cost a reported \$750 million.

The School's auditorium was at capacity for the event.

The Chief's duties include delivering an annual address to the legislature.

This Amendment's due process clause applies most of the Bill of Rights to the states.

This capitalization rule does not apply, however, to the word *rule*. You capitalize rule when referring to a particular number.

Rule 1.2 of the Bluebook defines introductory signals.

But, when you don't use a number, don't capitalize rule.

This is one of the rules followed meticulously in Gilmore's Hell!

### Conclusion

Hopefully these tips helped clear up a few capitalization questions you had.

Use them to buck the trend of capitalizing more!

### About the Author

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### Endnotes

- <sup>1</sup> I highly recommend Grammar Girl. This hand article can be found at: <http://grammar.quickanddirtytips.com/are-nicknames-capitalized.aspx>
- <sup>2</sup> For more on how to correctly alter quotations, see *Using Quotation Marks Correctly*, The Advocate 44-45 (October 2011) available at <http://www.isb.idaho.gov/pdf/advocate/issues/adv11oct.pdf>.

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# GOING GRAY: RISK MANAGEMENT FOR AGING LAWYERS

Mark J. Fucile  
*Fucile & Reising LLP*

Much has been written in the past few years about the demographic bulge as the baby boomers in the legal profession move toward and into retirement.<sup>1</sup> As a baby boomer myself (with gray hair, no less), many of my contemporaries have chosen three general paths. First, some have continued practicing full-time. Second, others have closed their practices and retired. Third, still others have tried to blend work and retirement by practicing part-time.

Each of these approaches presents unique issues from the perspective of law firm risk management. In this article, we'll examine both the issues involved and practical steps for addressing them.

## Continued full-time practice

Justices Oliver Wendell Holmes and John Paul Stevens are ready examples of lawyers working into their 90s. As a learned profession, the skills and intellect that lawyers bring to a case or transaction do not necessarily diminish with age. At the same time, lawyers are not immune to change. Moreover, change in this context doesn't have to mean declining health with age. An important facet of change is our ability to adapt to developments in the practice of law fostered by broader technological, economic, and social trends.

When I was a black-haired associate, for example, my large firm had no desktop computers (let alone laptops and tablets), no cell phones (let alone smart devices), and no email (let alone social media).

Continued practice beyond a normal retirement age can present challenges for both the lawyers involved and their firms.

For lawyers, our duty of competent representation is neither age-adjusted nor static. On the former, we all have a basic duty of competent representation under Idaho RPC 1.1 (which is patterned on its ABA Model Rule counterpart): "A



Mark J. Fucile

*Our duty of competent representation is neither age-adjusted nor static. On the former, we all have a basic duty of competent representation under Idaho RPC 1.1.*

*In short, the RPCs and the standard of care don't cut an older lawyer any slack.*

lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." The Idaho Supreme Court noted in *Stephen v. Sallaz & Gatewood, Chtd.*, 248 P.3d 1256 (Idaho 2011), that this duty is also reflected in the standard of care.<sup>2</sup> On the latter, a recent Oregon State Bar ethics opinion made this point in discussing the need to protect client confidentiality in metadata when exchanging documents in electronic form. The opinion, 2011-187, observed that competency today includes a basic understanding of the evolving technology that is reshaping the practice of law.<sup>3</sup> Similarly, the ABA's 20/20 Commission recommended that the comments to ABA Model Rule 1.1 include specific mention of the need to stay current with technology relevant to a lawyer's practice.<sup>4</sup> In short, the RPCs and the standard of care don't cut an older lawyer any slack.

For firms, aging lawyers can present delicate issues if a lawyer develops health problems (physical or mental) that affect the lawyer's ability to practice law.

The ABA, in Formal Ethics Opinion 03-429 (2003), addresses this issue at considerable length. The nub of its advice is twofold. First, it stresses, as noted above, that all lawyers have an obligation to provide competent representation under ABA Model Rule 1.1 and state counterparts (such as Idaho RPC 1.1). Second, under ABA Model Rule 5.1(a) (upon which the corresponding Idaho rule is based), firm management has a general duty to make "reasonable efforts" to have internal measures in place that give "reasonable assurance" that all lawyers in the firm comply with the RPCs. Therefore, the ABA opinion counsels that firm management has an ethical obligation (as well as a practical risk management incentive) to address lawyer health problems that may affect the lawyer's ability to practice.<sup>5</sup> The opinion notes that issues of this kind are very fact-specific, as are the solutions. It emphasizes, however, that simply ignoring the situation is not an acceptable approach.

## Retirement

For lawyers retiring from a large firm, the mechanics of winding down their practices often consist largely of transitioning work to others at their firm. For lawyers with solo or small firm practices, however, the logistics can be more complicated. Solo practitioners are essentially closing an entire business. Small firm lawyers, in turn, may be closing their individual practices without necessarily transitioning work to others at their firm (who may have different practice areas). RPC 1.17 also permits the sale of law practices (including good will), but this avenue remains comparatively rare and clients are not obliged to move their work to the purchaser. Closing a practice may also trigger more general but long-ignored issues such as what to do with an original will or a small trust account balance for a client the lawyer has lost contact with.

For lawyers who are either closing their firms or their practices, insurers and bar associations have developed very useful checklists and forms.<sup>6</sup> The ABA's Law Practice Management Section also has helpful materials on its web site.<sup>7</sup> The spectrum of topics covered typically ranges from areas where we have specific professional obligations — such as notifying clients, returning original documents to clients, and closing out



trust accounts — to other areas that are generic to any business closure — such as terminating leases and discontinuing office phone service. Beyond the specific tasks the checklists and forms address, they also effectively provide a systematic and comprehensive plan for closing down both the professional and business sides of a law practice.

Coordinating a firm or practice closure with your malpractice carrier can be especially important in two areas — file storage and “tail” coverage. Carriers typically have specific file retention guidelines that can vary by state (depending on statutes of limitation and ultimate repose) and practice area (especially for lawyers involved in estate planning or other issues involving minors). Tail or extended reporting coverage, in turn, can provide continuing coverage for matters you handled while in practice but the potential claims don’t arise until after you’ve retired. The availability and specifics will vary by carrier. But this can be an extremely important piece of a secure retirement both in terms of financial risk and peace of mind.

### **Part-time**

Part-time practice can take a variety of forms. Some lawyers, whether at firms or solo practitioners, go part-time as a way to wind down their practices toward eventual retirement. For others, part-time is a form of career change to, for example, working as legal counsel to a non-profit, teaching, or supplementing

retirement income from a government agency or a corporation with a limited private practice.

Regardless of the form of part-time, the duty of competent representation discussed earlier remains the touchstone. However, the particular path that a lawyer chooses may present different nuances to this fundamental duty.

For lawyers who are trying to combine practicing law at a less frenetic pace with travel or other outside interests, client calls still need to be returned promptly and court papers still need to be filed on time. In other words, the lawyer can be part-time but the work on any particular client’s matter must still meet the full-time standard. On this point, a lawyer who is adept at using today’s technology has the tools available to maintain a virtual presence even if the lawyer is out of the office (whether near or far). As the Oregon ethics opinion mentioned earlier reflects, however, lawyers also need to understand how to use the technology in ways consistent with their core duties to clients, such as the obligation to protect confidentiality.

For lawyers exploring second acts that are outside the areas in which they spent the bulk their careers, the guidance offered to young lawyers by the comments to RPC 1.1 — the competence rule — is equally apt: if you are entering an unfamiliar substantive area, you need to undertake the requisite study to learn it or associate with a more experienced lawyer

*Regardless of the form of part-time, the duty of competent representation discussed earlier remains the touchstone. However, the particular path that a lawyer chooses may present different nuances to this fundamental duty.*

in that particular field. Further, lawyers who are experienced in one area need to be attuned to how narrow many of our practices have become over time and be prepared to ask themselves the honest question of how applicable their deep, but narrow, knowledge may be to a completely different substantive area.

### **Summing up**

Although the baby boom generation may present aging issues more starkly due to the numbers involved, lawyers

have been getting old for a long time. Lawyers have also been taking divergent paths to eventual retirement for a long time. Aside from the sheer numbers, however, perhaps the biggest change today is the pace of technological change. For lawyers who want to continue practicing, technology can often make that a realistic possibility. But, those same lawyers need to maintain their proficiency with practice technology in the same way they are expected to remain current with the law in their practice areas.

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**Mark Fucile** of *Fucile & Reising LLP* handles professional responsibility, regulatory and attorney-client privilege matters and law firm related litigation for lawyers, law firms and legal departments throughout the Northwest. He is a past chair of the Washington State Bar Rules of Professional Conduct Committee, is a past member of the Oregon State Bar's Legal Ethics Committee and is a member of the Idaho State Bar Litigation and Professionalism & Ethics Sections and is a co-editor of the WSBA's Legal

*Ethics Deskbook and the OSB's Ethical Oregon Lawyer.* He can be reached at 503.224.4895 and [Mark@frllp.com](mailto:Mark@frllp.com).

**Endnotes**

- <sup>1</sup> See, e.g., National Organization of Bar Counsel-Association of Professional Responsibility Lawyers Joint Committee on Aging Lawyers Final Report (May 2007). Their web sites are at, respectively, [www.nobc.org](http://www.nobc.org) and [www.aprl.net](http://www.aprl.net).
- <sup>2</sup> See also *Bishop v. Owens*, 272 P.3d 1247 (Idaho 2012) (discussing generally the overlap between RPCs and standard of care).
- <sup>3</sup> Available on the Oregon State Bar's web site at [www.osbar.org](http://www.osbar.org).

- <sup>4</sup> ABA materials cited in this article are available on the ABA's web site at [www.americanbar.org](http://www.americanbar.org).
- <sup>5</sup> ABA Formal Ethics Opinion 03-431 (2003) addresses the related issue of the duty of a lawyer who is not a firm member to report another lawyer whose ability to practice may be impaired to the appropriate professional authority.
- <sup>6</sup> See, e.g., the Oregon State Bar Professional Liability Fund's "Closing Your Law Practice" forms at [www.osbplf.org](http://www.osbplf.org) and the Washington State Bar Association's "Closing a Practice" page on its web site at [www.wsba.org](http://www.wsba.org). The advice and forms provided are largely generic and are not tied to particular jurisdictions.
- <sup>7</sup> See, e.g., "Closing a Solo Practice: An Exit To-Do List," ABA Law Practice Magazine (May/June 2011), available on the ABA's web site.

*For lawyers who want to continue practicing, technology can often make that a realistic possibility. But, those same lawyers need to maintain their proficiency.*

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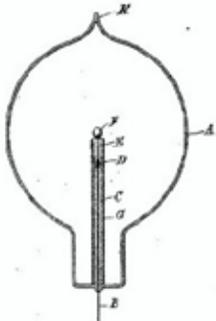
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# DECISIONS ON CLOUD COMPUTING MUST INCLUDE ETHICAL CONCERNS

Denise Penton  
*Solo Practitioner*

In the latest chapter of computer innovations, law firms now have the option of purchasing computing services over the internet that are easier to use and more cost effective. Many of the activities performed on a computer can be outsourced to third party vendors who offer a range of services under the guise of cloud computing. These services can include time, billing and invoice management, document storage, calendaring and searchable client files and organization, access to these products and files from anywhere, secure electronic signatures, encrypted email and document exchanges.<sup>1</sup>

Cloud computing means using a series of machines owned by someone else in remote locations that could run everything from word processing and email services to complex data analysis.<sup>2</sup> They include services like Gmail, Google docs, Dropbox and Hotmail.<sup>3</sup>

Cloud computing comes with many benefits. The cost of hardware and software can be greatly reduced. Someone else is managing the servers, updating the software and upgrading the hardware.<sup>4</sup> Your IT personnel costs could be reduced.<sup>5</sup> Some cloud services can be as easy to implement as setting up an online account. It provides scalable options for business storage and IT data needs as business grows.<sup>6</sup> File sharing between attorneys can be easier, especially if there are multiple firms associating on a case. And remote access<sup>7</sup> to your files and programs means the attorney on the go can access files and data while in court or, heaven forbid, while on vacation. In fact, technology has become so easy to use that attorneys may now maintain virtual law practices, where all of the services and interaction they provide to clients are on line.

While outsourcing computing services can make running a business smoother, it also comes with another layer of responsibility, especially for attorneys.

## Legal issues in cloud technology

There are several issues that use of the cloud raises. For example, jurisdictional

*Technology has become so easy to use that attorneys may now maintain virtual law practices, where all of the services and interaction they provide to clients are on line.*

issues may arise due to location of the servers. Some cloud storage servers replicate data and may keep that data in different locations. The data may not even be stored here in the United States. For example, Google Cloud Storage states on its Frequently Asked Questions page that the data storage location is not disclosed for security purposes. However, it is located in the United States and Europe.<sup>8</sup> While Google Cloud Storage does give the option to keep your data storage here in the States,<sup>9</sup> that may not be the case with other cloud resources.

Jurisdictional issues could also arise when you use technology to maintain a virtual practice in another state. With the advent of technology attorneys may now be physically present in one jurisdiction and virtually present in another.<sup>10</sup> At some point, reliance on cloud computing may be so great that a law firm may be considered practicing law in another jurisdiction, requiring licensing in that jurisdiction.<sup>11</sup> Attorneys must also know how businesses use technology to effectively conduct discovery in a lawsuit.

Perhaps the biggest issue that attorneys face and the focus of this article is how to protect client confidentiality and limit third party access to important confidential information. Third party access can encompass a wide range of activities from benign to malignant. For example, IT professionals who are fixing or upgrading servers may access and view your data, police may issue a warrant to search your data without your knowledge,<sup>12</sup> access through subpoenas may occur and, of course, the data could be hacked.<sup>13</sup>

## Ethical rules in the use of cloud technology

Passing the responsibility of maintaining IT systems off to third party vendors does not abrogate the responsibility to ethically practice law. The Idaho Rules of Professional Conduct require an attorney to maintain the confidentiality of client information<sup>14</sup> and to supervise nonlawyer

assistants.<sup>15</sup> Just as technology evolves, so must our response to maintain an ethical practice. The rules do give some guidance.

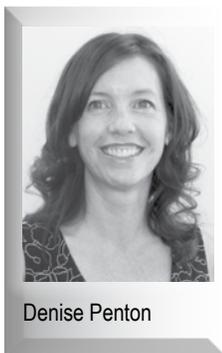
Comments to the Idaho Rules of Professional Conduct state “a lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer’s supervision.”<sup>16</sup>

These comments also provide some guidance about transmitting confidential information. They state,

“The lawyer *must take reasonable precautions* (emphasis added) to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer’s expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule<sup>17</sup> or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.”<sup>18</sup>

Regarding the duty to supervise non-lawyer assistants, the attorney “must make reasonable efforts to ensure that there are measures in place giving reasonable assurances that the nonlawyers conduct is compatible with the responsibilities of the attorney.”<sup>19</sup>

Legal and privacy issues surrounding cloud computing are still evolving and a majority of states have yet to issue



Denise Penton

opinions regarding its use. The California State Bar issued Formal Opinion No. 2012-184 regarding the use of cloud computing to maintain a virtual law office practice, where all legal services and communications were conducted solely through the internet using third party vendors.<sup>20</sup> While many practitioners may not use cloud computing to the extent that a virtual law office might, the issues with cloud computing remain the same.

The opinion indicates an attorney must assess the technology to determine if it is adequate to comply with the ethical obligations of maintaining client confidentiality.<sup>21</sup> This may require some reasonable due diligence as well as some specific due diligence.<sup>22</sup> The obligation of reasonable due diligence should be used in selecting a third party vendor, as well as continuing to use the vendor.<sup>23</sup> Vendor policies should also employ the same policies and procedures that an attorney would use to comply with the attorney's duty of confidentiality.<sup>24</sup>

While an attorney does not have to be an expert in technology, he or she should at least have an understanding of what protections are afforded by the technology.<sup>25</sup> If an attorney does not have enough knowledge to assess the security of the technology, then seek the help of an information technology professional.<sup>26</sup>

Other considerations may include a disclosure to the client about how and where his or her confidential information is being kept and whether the attorney should seek consent regarding the receipt and storage of the information.<sup>27</sup>

### Practical considerations

Now that we know what some of the ethical issues are, here are some recommendations to meet these obligations. Many of the best practice tips require you to become informed about the technology, how it works, and who has access to it. Then you can make decision about how to maintain your ethical duties. As a bonus, it may also help streamline your own practice.

The Elawyering Task Force, ABA Law Practice Management Section and ABA Standing Committee on the Delivery of Legal Services provided several recommendations on some minimum requirements for attorneys with "virtual practices."<sup>28</sup>

While the scope of this article is not on virtual practices, many of the following suggestions apply to the issues that attorneys face when dealing with third party vendors. They recommend:

- Check the privacy policy of the cloud service provider. Some are more stringent than others about who they will

*The opinion indicates an attorney must assess the technology to determine if it is adequate to comply with the ethical obligations of maintaining client confidentiality.<sup>21</sup>*

release information to and under what circumstances. For example, if your information is searched via a search warrant or a request under a subpoena, will you be informed?

- Some suggestions to protect client confidences could include ensuring that all data transferred between a law firm's website and the server is encrypted.<sup>29</sup> There should be policies and procedures in place that address such things as security breaches, data theft and privacy of information.<sup>30</sup>
- A contract with the third party vendor should make clear under what circumstances the provider's staff has access to client files and also make clear that if the vendor's staff is accessing client data for technical reasons, they are functioning as agents of the law firm as if they were the law firm's internal staff.<sup>31</sup>
- Ensure there are procedures that can guarantee the security of client data, backup files and provide for redundancy of the backup files and a procedure for exporting data on behalf of the firm when so requested.<sup>32</sup>
- A procedure should be in place that guarantees the security of the firm's client data, provides for redundant backups, and offers a procedure for exporting the data on behalf of the law firm at the request of the law firm.<sup>33</sup>

The Washington State Bar has also issued an ethics opinion on cloud computing. The opinion suggests several practice tips for lawyers who do not have an advanced technical knowledge.<sup>34</sup> It says:

- Become familiar with the potential risks of online data storage. This can be done by reviewing general audience literature and literature directed at the legal profession, on cloud computing industry standards and desirable features.<sup>35</sup>
- Evaluate the third party provider's practices, reputation and history.<sup>36</sup> If you conduct an internet search on their name, do they appear in Snopes.com?<sup>37</sup> Ask

your coworkers, colleagues and business associates for their recommendations.

- Compare provisions of service provider agreements to determine if and the extent that the service provider recognizes the lawyer's duty of confidentiality and agrees to handle the information accordingly.<sup>38</sup>
- Compare provisions of service provider agreements to determine the extent that the agreement gives the lawyer methods for retrieving the data if the agreement is terminated or the service provider goes out of business.<sup>39</sup>
- Confirm provisions in the agreement that give the lawyer prompt notice of any nonauthorized access to the lawyer's stored data.<sup>40</sup>
- Ensure that access to the storage system is secure and tightly controlled by the service provider.<sup>41</sup>
- Ensure there are reasonable measures to secure backup of the data that is maintained by the service provider.<sup>42</sup>

There is no easy solution to how attorneys can maintain an ethical practice in the technological world of the cloud. The American Bar Association has a summary of opinions from other jurisdictions that can provide additional guidance on what attorneys may be required to do to comply with ethical rules.<sup>43</sup> And for those who are not tech savvy, using cloud service providers who specifically target their services to attorneys can make the job of due diligence easier.<sup>44</sup> They may already be aware of the professional issues unique to the practice of law and may have taken steps to address these issues. Additionally, the American Bar Association has a Legal Technology Resource Center which is designed to help lawyers "leverage technology to make their practices and organizations more successful."<sup>45</sup>

Because technology is so varied and creative, there is no roadmap that will tell us how to use technology for our greatest advantage while still protecting the clients. Cloud technology has so

many benefits that it can certainly make running a business easier, faster and more cost effective. Attorneys can be more responsive to clients and practice from anywhere in the world. But the latest and greatest can also make meeting ethical obligations trickier. There are more variables to control than just who in your office is looking at your client files. Now, instead of making sure the office door is locked, attorneys must ensure that the keys to the technology are locked up as well. For this reason, our response to how we use technology must evolve along the technology itself. The guidelines and tips set forth above can help make that journey easier, faster and a bit less complex.

### About the Author

**A. Denise Penton** works with Rainey Law Office whose practice includes civil litigation, consulting and appellate practice. Ms. Penton's background includes contract law, small business issues, employment law issues, consumer rights related issues, general bankruptcy principle, and wills and probate issues. She is a native Idahoan who received her J.D. from the University of Idaho.

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## PRO BONO HERO MICHAEL ELIA CHERISHES THE RESPONSIBILITY

Michael Elia considers donating time to charitable causes to be one of the most important aspects of a lawyer's professional obligations. This philosophy explains why he has been accepting pro bono appointments for the Court Appointed Special Advocate Program (CASA) since 1994. Mike frequently represents volunteer Guardian ad Litem (GALs) in child protection cases, providing legal advocacy for abused and neglected children, pursuant to state statute.

In 1997 he began serving as General Counsel to the Fourth Judicial District CASA Program and has continued as program counsel ever since. He considers it a privilege and a great responsibility to represent a program dedicated to the well-being of children.

Mike's early childhood memories are of his mom and dad volunteering at DeSales High School in Walla Walla, Washington, where he grew up. He recalled that his parents always went out of their way to help others. He said that to this day, their legacy sets a very high bar. He was also influenced by many of Walla Walla's community leaders, who were also lawyers that were generous with their time and talent, especially causes for youths. Their example is part of what drew him to become a lawyer.



Michael Elia

*He was also influenced by many of Walla Walla's community leaders, who were also lawyers that were generous with their time and talent, especially causes for youths. Their example is part of what drew him to become a lawyer.*

Mike is a partner at the law firm of Moore & Elia, LLP, where their practice is mostly civil defense, litigation, including aviation, product liability, governmental entity, insurance disputes and insurance cases. When asked how he fits in his volunteering, Mike said he receives a tremendous amount of support from his wife Maureen and their three sons: Noah, Daniel, and Joseph. Along with his paralegal Wendy Chindlund, who keeps him on task, and a culture in his firm that supports the court and provides legal services to organizations like CASA, he takes great pride in the fact that every member of his law firm has volunteered to represent GALs in CASA cases.

In 2011, Mike joined the Federal Court Mediation Panel and initially volunteered to participate as a mediator in Resolution Roundup (the Federal Court ADR Settlement Week hosted by the Ninth Circuit ADR Committee). He volunteered to travel away from Boise if mediators were needed in other parts of the state.

Later, he was asked to consider accepting an appointment as pro bono counsel for a Plaintiff in a North Idaho

diversity action. The lawsuit involved a gentleman with multiple health issues who had been injured and was suing the performer of a show at the North Idaho Fair. The Plaintiff's previous lawyer had withdrawn from the case, and the Plaintiff was attempting to represent himself pro se.

The gentleman was genuinely thankful that the Court had appointed an attorney to help guide him through the federal court process; and with the assistance of the Court and opposing counsel, the matter was successfully mediated. Mediation allowed the Court to remove one more case off its docket, and spared significant litigation expense to the defendant. Mike hopes that resolution of the lawsuit will allow his client to now fully focus on treatment for some of his underlying health conditions.

Mike enjoyed working on the federal court pro bono case, but he said his heart is and will always remain with CASA. If you would like information regarding CASA or serving as a Guardian ad Litem attorney, please contact Nanci Thaumert, Statewide GAL Coordinator at (208) 947-7458



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## EIGHT BENEFITS OF MEDIATION

Deborah A. Ferguson  
The Law Office  
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Editor's note:

*This is the first in a three-part series*

In 1926, long before the explosion of litigation in our society, Justice Learned Hand remarked in a lecture to the New York Bar, "As a litigant, I should dread a lawsuit beyond almost anything else short of sickness and death."<sup>1</sup> His comments echo Abraham Lincoln who famously stated: "Discourage litigation. Persuade your clients to compromise whenever you can. Point out to them how the nominal winner is often the real loser — in fees, expenses, and waste of time." In short, litigation is costly, intrusive and time consuming. Most attorneys and judges agree that it is an inefficient and taxing method to resolve the majority of disputes.

That said, in some circumstances, litigation has its advantages, and there are times when cases should be litigated. Litigation, and not settlement, can establish a legal precedent. This very public process also brings a measure of accountability for parties that violate the law and the rights of others. Sometimes it offers a trial by jury. And, at least in theory, the blindfold over the eyes of Lady Justice serves to remind us the judicial system is supposed to treat people fairly, without regard to their position in society, and equalize the power between parties. However, an unequal distribution of resources between the parties — even with a fair, impartial court — works against this noble ideal.

Mediation in Idaho, outside the family law arena, can be traced to its nascent beginnings in 1992, when Governor Cecil D. Andrus formed a task force "to coordinate and foster the development and use of alternative dispute resolution..."<sup>2</sup> While progress has been made over the course of those 20 years, commentators describe the current alternative dispute resolution process in Idaho as in a state of



Deborah A. Ferguson

*Because of the shortcomings of litigation, Idaho lawyers should commit to resolve more Idaho lawsuits through an alternative dispute resolution process.*

stasis, which needs an infusion of energy and resources.<sup>3</sup> Because of the shortcomings of litigation, Idaho lawyers should commit to resolve more Idaho lawsuits through an alternative dispute resolution process. Of course, as attorneys, our first response is informed by our training, and we instinctually frame a dispute for court adjudication. To temper that instinct, it is helpful to review eight benefits of a mediated process.<sup>4</sup>

### **Mediation gives the parties more control over the outcome and who decides their dispute**

A judgment creates a winner and a loser, as opposed to a voluntary compromise between the parties. The parties retain control to make the decisions that affect them when they chose mediation. They have the power to change the procedural ground rules, and customize the process to make it work under the circumstances their unique dispute presents.

Mediation can also lessen the risk of unexpected outcomes. This can be especially important when a jury is asked to decide complex and technical matters. Further, the parties can select a mediator who has the disposition and approach that they believe will bring the parties to a settlement. It also allows the parties to hire a mediator with subject matter expertise that the court may not process.

### **Mediation creates an opportunity for a creative solution**

A real benefit of a mediated settlement is the opportunity to engage in creative problem solving. Outside the courtroom, where the parties control the result, they have a far wider array of options to resolve their differing interests and issues. It often cannot address the parties' underlying concerns. A court must look to the past, apply the law to the evidence, and deter-

mine who was at fault. A court judgment can order money damages or injunctive relief. Yet there are many things beyond money that can resolve a lawsuit. These might involve an apology, a future business contract, a referral, or any number of possibilities besides a money settlement.

One of the most creative mediations I participated in arose in the context of a wrongful death medical malpractice case against a veteran's hospital. The patient lost his life from an overdose of anesthesia. As part of the settlement, the defendant agreed to construct and dedicate a memorial in the hospital garden courtyard, as a tribute to the man that lost his life. The patient's family took great solace in that they were able to create a daily reminder for the physicians of the hospital to vigilantly exercise great care in their work. This result could not have been obtained from a court judgment.

### **A mediated settlement brings certainty**

Even if a party is successful in obtaining the judgment it seeks, it still must be enforced to obtain the relief ordered. This can result in another round of litigation. Parties tend to honor their agreements when they explicitly negotiate and agree to the outcome. This is why a negotiated agreement is often more lasting than a litigated result.

The possibility that the losing party may appeal the judgment brings further uncertainty into the equation. When the parties enter into a voluntarily settlement, they have decided to resolve the matter and move forward with their life or business. While the mediated outcome will be a compromise, it becomes a "knowable fact," upon which other decisions can reasonably be made. There is also less chance that the settlement will generate more litigation, which an adjudicated result often does.

## A mediated settlement can be confidential

Litigation is a very public process. The parties' dispute is an open book often concerning private matters and highly charged issues. In a business context, trade secrets or other confidential proprietary information may be revealed, might harm a businesses' reputation. A mediated process offers the parties privacy. Idaho adopted the Uniform Mediation Act in 2008, which provides strong protection to ensure that matters discussed in mediation are confidential and protected from disclosure.

## Mediation can reduce collateral damage to the parties

Litigation is not for the faint of heart. A "scorch the earth, take no prisoners" approach might win a lawsuit, but it certainly will not lessen the damage, or rebuild the impaired relationship between the parties. Litigation can result in winning the battle, but not the war, when viewed from the higher perspective or context. Parties often have to deal with one another after the ink on the judgment is dry, and interact as businesses, colleagues and families. This may seem near impossible, after the parties have fought publically, and drawn a line in the sand. As Justice Learned Hand aptly noted, only death and sickness can cause more dread than a lawsuit. The emotional costs are high, even for the winners.

## Mediation will save the parties time and money

A primary reason that less than five percent of cases go to trial is the sheer expense of the process. The pretrial attorney fees and costs arising from discovery, depositions, transcripts, motions, briefs, research, experts and witnesses can be staggering, even before the case arrives on the courthouse steps. On a practical level, few parties can afford to crank up the liti-

gation machine and keep it running. Mediation is far less expensive, and the cost of a mediator is typically shared between the parties.

Likewise, litigation can be very slow and time consuming. This has a direct impact on increasing the cost to adjudicate a dispute. Court dockets are crowded, in Idaho and across our country, as courts are instructed to handle more cases with fewer resources. In many situations, the slowness of the litigation process, which may take years to conclude even in the absence of an appeal, makes little sense for the parties. Individuals and commercial entities are often better served by a mediated resolution, which allows them to move on, past the dispute.

## Mediation can provide a fresh assessment of the case

Mediation also allows each party to better understand the strengths, and especially the weaknesses, of their case. If an evaluative mediator is selected (as opposed to a mediator who is facilitative in style), the mediator can be asked to provide each side their opinion of the value of their case, and the likelihood of the success on the merits. The mediator offers an invaluable, neutral perspective. They bring to the table their own trial and litigation experience and perspective on how the court might respond to the witnesses and evidence of the parties. This reality check can also be a real benefit to counsel, and bring an objective voice to the process.

## Mediation can narrow the issues

In the event the parties feel the dispute needs to be litigated, and they can afford to do so, then mediation can also be worthwhile in narrowing the issues between the parties. When mediation is used in this fashion, the parties can then present the court with a more fully developed case. Reducing ancillary issues

through mediation, rather than motions, can help the court focus on the real issues of the case.

In sum, mediation can be used to increase the efficiency of the dispute resolution process. It also has the potential to result in more innovative outcomes, with a greater likelihood that the parties will find some measure of satisfaction in the process.

The rest of this series will give more practical how-to pointers. Part II will address Preparing Your Client for Mediation and Part III focuses on Participating in a Mediation — a Guide for Idaho Attorneys.

## About the Author

**Deborah A. Ferguson** specializes in civil mediation, outside the family law arena. She has 26 years of complex civil litigation and trial experience, and was an Assistant United States Attorney litigating hundreds of civil cases for the Department of Justice over the past 20 years. She recently attended the Straus Institute for Dispute Resolution, at Pepperdine University School of Law and completed advanced training in mediating the litigated case. She is on the roster of certified mediators for the United States District Court of Idaho and all Idaho State Courts. Deborah A. Ferguson served as the President of the Idaho State Bar in 2011.

## Endnotes

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<sup>4</sup> For purposes of this article, the focus will be on mediation, and not other forms of alternative dispute resolution, such as arbitration, or early neural evaluation.

<sup>5</sup> Idaho Code 9-801, et seq.

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Photo by Dan Black

Matthew Taylor talks about the importance of good marketing for a new firm, no matter what size. His solo practice has antique furnishings provided by his family, which has several lawyers among their ranks. The desk, bookcases and law books were all “hand-me-downs” that help give the office an established feel, Matthew said.

## New Lawyers Blaze a Trail Through Recession

A new lawyer praises private practice and the importance of choosing your goldfish.

**T**he Great Recession has left a confused wasteland for the legal services market. Innovations and creative solutions would naturally come from those most distressed – young lawyers.

Fresh out of law school, Matthew Taylor wears a crisp dark suit. But he believes his most important first impression comes from his home page, which features a colorful snapshot of goldfish.

“It’s my calling card,” he said in his office in downtown Boise. The sole practitioner is drawing on his undergraduate training in marketing. “And there,” he points to the computer screen image of his web site, “a blue fish is going the other direction. That’s me. I’m the blue fish!”

He explained that after looking at dozens of lawyers’ websites, there were clichés he wanted to avoid – rows of books, a formal office, confident smiles. “There’s nothing wrong with all that,” he said. But he knew from his business education and from his entrepreneurial temperament that to

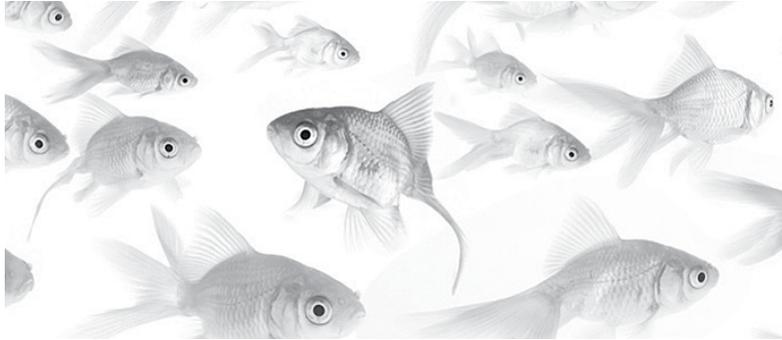
survive in a highly competitive field, one must stand out. If a big firm looks expensive, it might be passed over. “A small one might be more concentrated on what the client needs,” Matthew said. “That’s turning a weakness into a strength and building on it.”

### Starting out at a difficult time

There are plenty of weaknesses in the legal services industry market right now. New law school graduates such as Matthew have been the topic of numerous mainstream articles that explore weakening demand for legal services. New reports have not been encouraging.

According to an August article in *American Law Daily*, a new report from Citi Private Bank shows that the modest recovery in the legal industry in 2011 has softened in the first half of 2012.<sup>1</sup> The report, which sampled 176 firms of various sizes, combined data with discussions from law firm management and said, “we’re now concerned that this year the legal industry may be unable to match 2011’s low single-digit profit growth.”

The report noted that tepid demand in the first quarter had further softened during the second quarter. While revenue increased, it was outpaced by growth in expenses. Attorney



## Unique Legal Solutions.

“head count” lost ground in the second quarter, but “it was not enough to counter the impact of slowed demand.”

The report said conditions were, “driving billable hours down even further than the historically low numbers we’ve seen post-recession.”

In Idaho, there is no similar market survey to measure supply, demand or aggregate dollars spent on legal services. An American Bar Association survey of attorney population shows no remarkable changes in the past two years. In recent years, the Idaho State Bar licensed about 200 to 230 lawyers per year. That hasn’t changed much, “but we are seeing more reciprocal admissions,” said ISB Admissions Administrator Maureen Ryan Braley, based on mid-career attorneys in other states looking to enhance their credentials and more and more jurisdictions offering reciprocal admission.

It seems everyone has anecdotal evidence that the legal services industry is changing. Perhaps no one feels these changes more than new lawyers and the schools that train them. Concordia University School of Law and the University of Idaho have emphasized successful transition from academia to the marketplace shoring up their mentoring/networking opportunities with externships and internships.

The University of Idaho integrates a discussion of main street economics into several courses. “[W]e prepare students by discussing law office economics in the professional responsibility course, by offering a course on law office management, and by inviting guest presentations by visiting members of the profession,” said UI College of Law Dean Don Burnett.

He added that “I started my own practice by going solo and never regretted it. In those days, going solo was a preferred avenue into the profession and it still can be the first choice for today’s graduates.”

A similar commitment has been made at Concordia University School of Law.

“The experiential learning curriculum at Concordia Law is designed with an emphasis on professional development, practical skills, and pro bono service,” said Jodi Nafzger, Director of Experiential Learning and Career Services.

“By design, law faculty integrate coursework and practical skills to make students ‘practice ready’ at graduation. Through the mentorship program, students observe the practice of law and meet regularly with a respected member of the Bar. Externships, internships, and the on-site Legal Services Clinic provide opportunities for hands-on legal work.”

The law schools, as well as the ISB, help match mentors and mentees, which is especially important for solo practitioners.

### **Traditional strategy: Persistence and networking**

The path to success hasn’t changed entirely. Persistence and patience have paid off for Mark Coonts, the current President of the ISB Young Lawyers Section. When he entered the workforce about five years ago, “it was pretty terrifying at the time.”

In the fall of 2007 he was hired to do a clerkship for Judge Deborah Bail. He then landed a job at a mid-sized firm, which after 10 weeks, laid him off along with another attorney and two support staff. “I was only unemployed for a month but it felt like a long time.” He routinely checked the Idaho State Bar’s website for job postings, but there were thin pickings.



Mark Coonts

### **Law schools respond to ABA survey**

- Over 85% of responding law schools regularly offered in-house live-client clinical opportunities and 30% of respondents offered off-site, live-client clinical opportunities. Law schools with in-house clinical opportunities averaged three clinics. Nearly all respondents provided at least one externship opportunity, and without exception, placement opportunities have increased in each externship category since 2002.
- Eighty-seven percent of all ABA-approved law schools offered joint degrees in 2010. The most popular joint degree continued to be the J.D./M.B.A. (masters in business administration) but the J.D./M.S.W. (masters in social work) experienced the most growth. An increasing number of law schools offered post-J.D. and non-J.D. degree programs in 2010

— American Bar Association

With the help of Judges Bail and Darla Williamson, he took another clerkship, this time for Judge Richard Greenwood. That lasted for one and one-half years. “I applied at the public defenders’ office, but there wasn’t any movement. He continued to apply at corporations and firms, “but it was just crickets.”

He said he felt grateful to be working in his field at all because for every job opening, numerous mid-career lawyers were lined up. When his rotation ended for the judge clerkship, Mark did some work for Davidson, Copple, Copple & Copple on a contract basis. “They had some extra work, but didn’t want to make

a commitment with a new hire,” he said. “I have to let this go where it takes me.”

All the uncertainty forced Mark to focus on the positive. He kept on putting out resumes and getting interviews, but things didn’t line up. He tried to keep his spirits up, and thought: “Here I am working during the whole downturn. Instead of complaining, things have worked out.”

With his courthouse contacts he was able to get a job at the public defender’s office, which he said has been a blast. “I’m really happy here,” he said, adding that “it wasn’t a lesser path for me.”

“You just have to be flexible. Nothing’s certain and that’s OK,” he said.

A few days after being interviewed for this article, Mark sent an email saying he had been hired at a local firm “out of the blue.”

### Emphasizing entrepreneurial opportunities

Mark took the more traditional route. In contrast, entrepreneurs like Matthew integrate lessons from the culture of start-up business.

Matthew laments missing some of the traditional networking opportunities enjoyed by those attending the University of Idaho College of Law. Missing a cohort, Matthew has no classmates to help meet the right people for an inside track on job opportunities. Matthew has tried to shore up his networking by joining ISB Practice Sections, The Boise Young Professionals and the Plantation Country Club. He also sought a good office location in downtown Boise to lend some credibility.

Matthew comes from the “lost generation” — those who graduated during the Great Recession carrying college debt and who face the worst job prospects in several generations. Raised in Eastern Idaho, Matthew wanted a broad educational experience. He left home and got a degree in business management from Linfield College in Oregon and his J.D. from Albany Law School in New York. He said these experiences influenced his business training, and encouraged him to look at his career through an entrepreneurial lens.

He took a business concentration in law school, which taught him that as a business lawyer, “I need to be a counselor to business, not just on the law, but everything about business.” Part of his own continuing education, he said, must include operating his practice as a business.

### Why the goldfish?

How did Matthew Taylor come to decide the picture on his website? Matthew hired a firm he felt was in sync with his ideas on marketing and entrepreneurship, Dox Marketing of Meridian. Founder Brodie Tyler said it’s vitally important to stick with a branding scheme so with Matthew, as a new business entity, the decision was a big one.

“With his, I wanted to do something outside the box that says, ‘I’m kind of a non-conformist,’” he said.

Brodie sent Matthew a link to photo services and they looked at hundreds of images. “It became an obsession with both of us,” Matthew said, that took many hours.

“So eventually we would be on the phone and talk about different pictures we were looking at, at the same time. We would look at hundreds of other lawyer websites and discuss the pros and cons of each look. All in all, regardless of if people “got it” or not, I wanted my website to reflect who I am.



Brodie Tyler

When people spend time around me they understand why it works.”

Brodie said he wanted to create a page that Matthew could log on to and make changes. Above all else, the site needs to be recognized and suggested by Google searches. Brodie and Matthew worked together to create something that is easily understood, memorable and will create a connection with the visitor.

“I like free content,” Brodie said, in describing the calculus of start-up culture. “It attracts eyeballs. Anytime you do that, you add value. If you can attract business, you offer more value, you can charge more.”

“We eventually found that the sites that promoted anything BUT a lawyer were favorites,” Matthew said.

“A girlfriend of mine once told me that I was more comfortable in a button down shirt and dress slacks than I was in sweatpants. When I was little, my family said I was an old man in a boy’s body because I would play golf on the weekends with doctors and lawyers.”

And about the goldfish? “When people spend time around me they understand why it works,” he said. “Matthew Taylor is a blue goldfish!”

When he prepared to leave college he looked at opportunities in New York. “The market was horrific,” he said, adding that entry level government jobs have become career positions. “There is no turnover and competition is brutal” for both jobs and for clients. Firms continued to lay off lawyers, which convinced Matthew that “in this economy you have to rely on yourself.”

His return to Idaho was partly driven by the fact he could open his own firm with a much lower overhead costs. A website was an important part of the plan and he found a like-minded entrepreneur at BOX Marketing in Eagle. In addition to the featured goldfish, the website design has a short video of Matthew introducing himself and his services. It also features a couple of articles he’s written and some self-help answers to simple legal questions and some testimonials. “It says something about you,” Matt said of his web page. “I am organized, methodical.” A good website, he said, “gives you a lot of credibility.”

Part of his web design, he said, is based on criteria that search engines such

as Google use to direct people who are looking for a lawyer. Matthew knew he had to use dynamic, updated web content for search engines to take notice. Using free software tools, he can track how many computer users visit his site, where they are from, how long they stay on his site and if they return. These details help Matthew measure his site’s effectiveness.

Even though the Boise area has plenty of lawyers, Matthew feels confident he will attract the right kind of clients. He’s done work for a local hospital, and finds himself getting established since he hung his shingle in January, 2012. “I build relationships. That’s how our industry survives,” he said.

And what do the goldfish do? “People see that and we build a rapport instantly,” Matthew said.

### Endnote

<sup>1</sup> <http://www.americanlawyer.com/PubArticleTAL.jspx?id=1202567706544&slreturn=20120814125424> as of Sept. 14, 2012

— Dan Black

## IN MEMORIAM

### Hon. J. Wesley Crowther 1929 -2012

J. Wesley Crowther died suddenly on September 10, in Malad, Idaho, after a courageous battle with cancer.

He was born in Salt Lake City on Dec. 2, 1929, to Norman Weston and Gwenfred Jones Crowther.

Other than time away at college, serving in the Air Force and serving two missions, he was a lifelong resident of Malad, graduating from Malad High School in 1947.



Hon. J. Wesley Crowther

He continued his education at Utah State University, receiving his bachelor's degree in 1952, before moving on to George Washington University Law School on an academic scholarship.

He married Laura Mae Emery in 1955, in Windsor, Maine. Their marriage was later solemnized in the LDS Salt Lake Temple in 1957. After graduating in 1955 with his law degree, he and Laura moved to Mather Air Force Base, where he served as a member of Judge Advocate General (JAG). He then returned to Malad, where he practiced law for over 30 years in both Malad and Preston. In 1985, he was appointed as a magistrate judge for Oneida County, where he served until 1997.

Following the death of his wife, Laura, to whom he had been married 44 years,

Wesley married Barbara Shipp Waldron on July 6, 2001, and was grateful for her companionship the remaining years of his life.

He was a very accomplished musician with expertise playing both the piano and the organ. He was an active member of the Church of Jesus Christ of Latter-day Saints serving in numerous church callings including bishop, missionary and most recently as a host at the LDS Conference Center.

He is survived by his wife, Barbara; two sons, Jim Crowther (Gloria), Pocatello, and Randy Crowther (Debbie), Hyde Park, Utah; and two daughters, Diane Roylance (Thom), Lindon, Utah, and Carol Ann Rasmussen (Chris), Centerville, Utah.

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*Dan Black* Date: September 12, 2012

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PS Form 3526, September 2007 (Page 2 of 3)

## CONSIDER PRO BONO WORK AS A GREAT OPPORTUNITY

Hon. Roger S. Burdick  
*Idaho Supreme Court*

**T**he Idaho Supreme Court and the other constituent members of the Idaho Pro Bono Commission have issued a proclamation celebrating National Pro Bono Week, October 21–27. I urge members of the Idaho legal community to consider what each of us can do to improve the delivery of legal services to those who can't afford them and then to take action to get it done.

When I started practicing law in Jerome in the 1970's, it was an article of faith among the local practitioners that lawyers would step forward to help people with legal problems, even if they knew the people could not pay. It was just what we did. I'm pleased to say that in the ensuing years, Idaho lawyers have kept faith with that tradition and have continued to step forward to help.

The pro bono effort undertaken by the University of Idaho School of Law under the leadership of Dean Burnett has strengthened that effort among the annual crop of new lawyers. Concordia University School of Law is establishing a strong pro bono effort to imbue its students with the ethic of helping those with legal needs and no resources.

Despite all of the ongoing efforts to provide pro bono services, we can do better. In the membership survey conducted by the State Bar last year, lawyers were asked how many hours of pro bono service they had performed in the past year. Only 18.5% of 1,597 lawyers who responded to the question had met or exceeded the aspirational goal of 50 hours a year contained in I.R.P.C. 6.1. About one-fourth of the 1,597 lawyers (27.2%) had performed no pro bono service. Two-thirds of the respondents (66%) performed less than half of the 50-hour goal. While nobody will be censured for failing to provide 50 hours of pro bono service during the course of a year, such failure simply does not meet a lawyer's commitment to the profession, nor reflect well upon the legal community. With the approach of National Pro Bono



Hon. Roger S.  
Burdick



Week, let's think of how we can fulfill our obligation to help those with serious legal problems who simply don't have the resources to pay. With the continuing economic difficulties facing our State and the country as a whole, the need is greater than ever.

Please consider what you, personally, or your local legal organizations, can do to facilitate the delivery of pro bono services. One way would be to assist pro se litigants in getting their documents prepared and to help prepare them to present their cases in court. The Court Assistance Offices do a tremendous job in helping people get their documents prepared on forms made available by the offices. However, on occasion people need additional help when their situation is particularly complicated. Further, once a self-represented person gets a complaint or petition filed, there is a great need to inform them of what steps need to be taken to gather evidence, to collect witnesses, and to present their case in court. When they don't have that information, they often appear for trial not having a case ready to present. That causes difficulty for the pro se litigants, as well as for the scheduling of other cases. Contact your Court Assistance Office to see whether you can help these individuals or perhaps conduct a training session to advise pro se litigants how to get their case prepared.

Many young lawyers have indicated that they would take a pro bono case in a field of law that they are not familiar with, if they had an experienced practitioner who would mentor them. The

*Despite all of  
the ongoing efforts to  
provide pro bono services,  
we can do better.*

Idaho Volunteer Lawyer program would love to have experienced volunteers who would be willing to act as mentors. As with any task for which a person registers with IVLP, you are not committing to handle every matter that gets referred. You can evaluate each request from IVLP on its own merits and accept or decline. Many seasoned lawyers do not wish to go to court, but, with their great deal of knowledge and experience, they can be great mentors.

There are many other things that people can do to provide pro bono service. When the disastrous fire hit Pocatello earlier this year, a number of lawyers in the area spontaneously stepped forward to offer free legal help to those who lost their house or other belongings in the fire. That is the kind of can-and-will-do attitude that fulfills our responsibility to help others. Think of what you can do in your community and then do it. If you get a bright idea, contact IVLP or the Advocate and share your thoughts. Whatever you do, make every effort to keep the pro bono tradition alive in Idaho.

## RESOLUTION OF SUPPORT FOR NATIONAL PRO BONO WEEK

**W**HEREAS, we are a nation dedicated to “liberty and justice for all,” and equal justice and the fair administration of justice are fundamental to our system of government; and

**WHEREAS**, the promise of equal justice under the law is not realized for individuals and families who have no meaningful access to the justice system because they are unable to pay for legal services; and

**WHEREAS**, this de facto denial of equal justice has an adverse impact on these individuals, families, and society as a whole, and works to erode public trust and confidence in our system of justice; and

**WHEREAS**, as a consequence of the ongoing economic downturn and the consequent erosion of their financial resources, more and more individuals and families are experiencing critical civil legal problems they cannot afford to address; and

**WHEREAS**, the timely provision of civil legal aid can help alleviate some of the harshest effects of the economic downturn and prevent a costly spiral of social problems; and

**WHEREAS**, Idaho’s lawyers and judges strongly support the provision of free-of-charge legal services to those who can’t afford them and have joined together in a collaborative effort to support pro bono services through

the establishment of the Idaho Pro Bono Commission; and

**WHEREAS**, in 2011, more than 716 public and private attorneys, working in association with the Idaho Volunteer Lawyers Program, provided more than 16,000 hours of volunteer attorney assistance to more than 1,224 low-income individuals and family members, including providing legal representation in more than 555 state and federal court cases, amounting to free legal services valued at over \$2,516,475; and

**WHEREAS**, many Idaho lawyers, through state and federal court programs, provided pro bono mediation services to litigants in our State, including 358 hours volunteered by attorney mediators during Settlement Week sponsored by the U.S. District Court of Idaho in April, 2012;

**WHEREAS**, many Idaho lawyers, acting upon their own volition, generously provide many untallied hours of pro bono service to the citizens of our State without receiving recognition for their unpaid services; and

**WHEREAS**, the graduating class of 2012 at the University of Idaho College of Law compiled approximately 9,749 hours of pro bono services, under the supervision of lawyers and judges, as part of the College’s distinctive pro bono program in which every student participates; and

**WHEREAS**, Concordia University School of Law is committed to expanding access to justice for underserved populations through a pro bono

service requirement, pro bono training programs for Idaho lawyers, and the law school’s on-site legal clinic; and

**WHEREAS**, the Idaho Pro Bono Commission, consisting of the state courts of Idaho, the United States District and Bankruptcy Courts for the District of Idaho, the Idaho State Bar, the Idaho Law Foundation, the University of Idaho College of Law, and Concordia University School of Law, recognizes the need to expand the delivery of legal services to economically disadvantaged persons and families;

**NOW, THEREFORE**, the Idaho Pro Bono Commission and its constituent members recognize National Pro Bono Week, October 21-27, 2012, as a time to honor the work of those who provide volunteer legal services, to address the growing need for civil legal assistance on matters of profound urgency, and to remind all attorneys of their responsibility to assist in meeting the legal profession’s sacred commitment to equal justice under the law.

DATED this 4th day of September, 2012, by the IDAHO PRO BONO COMMISSION, and its constituent members: SUPREME COURT OF IDAHO, UNITED STATES DISTRICT AND BANKRUPTCY COURTS FOR THE DISTRICT OF IDAHO, IDAHO STATE BAR, IDAHO LAW FOUNDATION, UNIVERSITY OF IDAHO COLLEGE OF LAW, AND CONCORDIA UNIVERSITY COLLEGE OF LAW.

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**Standard Registration: (Includes 6.50 CLE credits RAC approved and lunch.)**

- \$175 - Family Law Section Members
- \$210 - Non Family Law Section Members

**Register on the ISB website: [www.isb.idaho.gov](http://www.isb.idaho.gov)**

### Program Agenda

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

**8:20 – 8:30 a.m. Welcome & Introductions**

**8:30 – 9:30 a.m. Adoption Primer: ABC's of Adoptions**

- Boise: Jeffrey T. Sheehan, *Law Offices of Jeffrey T. Sheehan, PLLC*
- Idaho Falls: Wiley R. Dennert, *Nelson Hall Parry Tucker, PA*
- Coeur d'Alene: Anne Solomon, *Flammia & Solomon, PC*

**9:30 – 10:30 a.m. Post Divorce - Refinancing Real Estate in Today's Economic Climate**

- Boise: Tami E. Springer, *Pickens Law, PA*
- Boise: Sarah Jorgensen, *Sterling Bank*
- Idaho Falls: Jeffery W. Banks, *Smith & Banks, PLLC*
- Coeur d'Alene: Jeannine Ferguson, *Idaho Legal Aid Services, Inc.*

**10:30 – 10:45 a.m. Break**

**10:45 a.m. – 12:00 p.m. Intersection of Juvenile Court and Divorce/Custody Matters**

- Boise: Jolene C. Maloney, *Maloney Law Office, PLLC*
- Idaho Falls: Hon. Bryan K. Murray, *Bannock County Magistrate*
- Coeur d'Alene: Hon. Clark A. Peterson, *Kootenai County Magistrate Court*

**12:00–12:45 p.m. Lunch (Included with registration.)**

**12:45 – 1:45 p.m. Family Court Rules of Procedure**

*A pilot project of the Rules Subcommittee of the Idaho Supreme Court's Children and Families in the Courts Committee.*

- Hon. David E. Day, *Ada County Magistrate*

**1:45 – 2:30 p.m. Case Law Update**

- Boise: Mackenzie E. Whatcott, *Cosho Humphrey, LLP*
- Idaho Falls: Thomas D. Smith, *Meyers Law Office, PLLC*
- Coeur d'Alene: Karin R. Seubert, *Jones, Brower & Callery, PLLC*

**2:30 – 2:45 p.m. Break**

**2:45 – 4:15 p.m. The Spectrum of Guardianships: Differences & Similarities for Cases Involving Minors, the Elderly, and Disabled People**

- Boise: Charlene K. Quade, *C.K. Quade Law, PLLC*
- Boise: Lois K. Fletcher, *Fletcher & West, LLP*
- Boise: Julie Adams Deford, *DeFord Law, PC*
- Idaho Falls: Angela Jensen, *Idaho Legal Aid Services, Inc.*
- Coeur d'Alene: Melanie E. Baillee, *James Vernon & Weeks*
- Coeur d'Alene: Katherine M. Coyle, *Wytychak Elder Law*
- Coeur d'Alene: P.J. Miller, *LCSW, Court Visitor*
- Coeur d'Alene: Tommy Labombard, *LCSW, Court Visitor*

**4:15 p.m. Program Adjourns**

The Family Law Section





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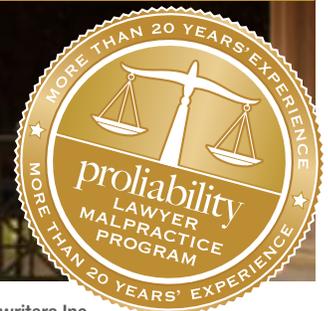
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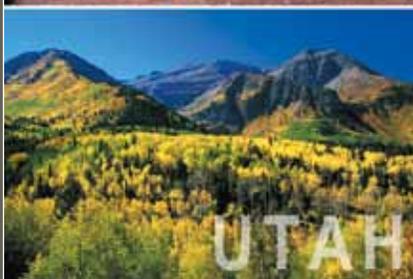
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