

The Advocate

Official Publication
of the Idaho State Bar
Volume 56, No. 1
January 2013

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On the Cover

This early morning shot was taken by photographer Lance Foster in Nampa along the irrigation canals. While walking with his friend's dog he quickly noticed a fog had moved into the area providing a natural diffusion to the early morning sun. When he observed the normally excitable brown lab standing in silence as if to take measure in the start of a new day; it became clearly apparent that a confluence of all things living surrendered itself to his trusty Nikon. Foster is a freelance photographer in Boise who has documented his visits around the world.

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This issue of *The Advocate* is cosponsored by the Diversity Section and Idaho Women Lawyers.

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Special thanks to the January editorial team: Jennifer M. Schindele, Susan M. Moss and Gene A. Petty.

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

POSTMASTER: Send address changes to:

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PRESIDENT'S MESSAGE

AND, THANKS...

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

In thinking about this, my last "President's Message," I reflected over my term on the Board of Commissioners and, to a larger extent, on my career in the legal profession. "Gratitude" seems to be a recurring theme.

It started with the beginning of my private practice career, following a two-year clerkship with former Justice Gerald Schroeder on the Idaho Supreme Court. In preparation for my venture into private practice, a colleague of mine arranged a lunch date to introduce me to an acquaintance of hers who was in private practice. In discussing my pending career plans with this senior attorney, the subject of my career as a print journalist before law school came up. Coincidentally, while cleaning out a file cabinet at home the day before, I had come across a file of correspondence that I had saved over the course of my journalism career. In that file was a collection of notes, letters and Letters to the Editor from readers with whom an article or column I had written had resonated. One series of notes was from a reader who owned a shoe repair shop with her husband and often tucked handwritten notes inside my repaired shoes telling me about a recent story she had enjoyed.



Upon sharing the story of discovering that forgotten treasure trove, the senior attorney scoffed. "Well, don't plan on getting any fan mail as an attorney!" My heart sank to the pit of my stomach. "What have I gotten myself into?" I wondered in abject horror. Had I really traded a job I loved and the rewarding connection to others that it brought for a cold, heartless profession in which the human dimension was universally absent? Oh, dear...

...[O]ne quickly realizes that our bar is full of professionals who care about their clients, care about each other and care about their community.

Sixteen years later, I am happy to report that clients do care and readily express their appreciation for a job well done. No, not everyone is happy. As attorneys, we often see people at their worst. And who likes paying money to fix a problem that wouldn't exist but for a stubborn adversary's pin-headed view of the world? But a client's hug at the end of a contentious business dispute, or an invitation from clients to drop by and visit them in their new home following the resolution of a landlord-tenant matter have thankfully served to banish my worst fears embarking upon this career path. And, yes, I have saved my clients' notes, too.

Maybe the difference between the senior attorney's experience and mine is the difference between a transactional versus a litigation practice. Or, maybe it's the difference between an average-Joe client base and a large corporate client base where attorney-client interactions are, for the most part, impersonal. Or maybe it's just a reflection of inherently different personalities. Whatever the cause, I am grateful that attorney's experience has not been my own.

I would be willing to wager that particular attorney's view of our profession is not a universal one. One of the greatest experiences that comes with serving on our bar's Board of Commissioners is the opportunity to travel around the state periodically and meet with other attorneys. Whether it's part of a Resolution Roadshow, at an annual meeting, or an opportunity to meet with volunteer bar exam graders, one quickly realizes that our bar is full of professionals who care about their clients, care about each other and care about their

community. And their clients, colleagues and community care about them. Each of them, I am confident, has one or more stories to share about an opportunity to make a positive difference in a client's life and the gratitude those clients have expressed. Their stories epitomize the maxim, "Do well by doing good."

Speaking of gratitude, as a member of our Bar, I would be remiss in not expressing my gratitude for the incredible staff we have at the helm of this ship. From our Executive Director Diane Minnich and her able Deputy Mahmood Sheikh, to Bar Counsel Brad Andrews, Julia Crossland and Caralee Lambert and Admissions Director Maureen Braley, to Idaho Volunteer Lawyer Program Director Mary Hobson, and Communications Director Dan Black; to Membership, Licensing, MCLE and computer system guru Annette Strauser, not to mention all of these individuals' support staff; we are truly fortunate to have a bar that is the envy of many of our cohorts around the country.

Last, but not least, I am grateful for the opportunity to have served you as president of our bar. Thank you!

About the Author

Molly O'Leary represents business and telecommunications clients throughout Idaho, and is a managing member of Richardson & O'Leary, PLLC, in Boise (www.richardsonandoleary.com). In addition, Ms. O'Leary serves as a commissioner from the Fourth District on the Idaho State Bar Board of Commissioners, and on the statewide advisory council for the Idaho Small Business Development Center. You can follow her on Twitter: @BizCounselor.

**M. PATRICK DUFFIN
(Resignation in Lieu of Discipline)**

On September 27, 2012, the Idaho Supreme Court issued an Order accepting the resignation in lieu of discipline of Idaho Falls attorney, M. Patrick Duffin. The Idaho Supreme Court's Order followed a stipulated resolution of a disciplinary proceeding that related to the following circumstances.

On July 18, 2012, the Idaho State Bar filed a formal charge Complaint and also filed a Petition for Interim Suspension of License to Practice Law with the Idaho Supreme Court. On July 30, 2012, the Idaho Supreme Court entered an Order granting the petition and placed Mr. Duffin on interim suspension effective July 30, 2012.

The Complaint alleged three counts of professional misconduct. With respect to Count One, Mr. Duffin admitted he violated I.R.P.C. 1.2(a), relating to the scope of representation, 1.3, relating to promptness, 1.4, relating to communication with a client, 3.2, relating to expediting litigation, 3.4(d), relating to discovery responses, and 8.1(b) and I.B.C.R. 505(e), relating to the failure to correspond with Bar Counsel. Count One related to Mr. Duffin's representation of a personal injury client. In that case, Mr. Duffin failed to submit his client's response to discovery, even after being directed to do so by the Court following a motion to compel. Following that, the defendants filed a motion for sanctions based upon that failure to respond to discovery and the Court's order. Mr. Duffin did not file any response to that motion or submit any response to the discovery. He also failed to appear at the hearing on the motion for sanctions. When defense counsel then filed an affidavit for attorneys' fees and costs, Mr. Duffin did not file an objection to the requested fees and costs or respond to the affidavit. After a continued failure to respond to discovery, defendants filed a second motion for sanctions requesting the case be dismissed. Mr. Duffin did not file any response to that second motion for sanctions. The Court then entered an order dismissing the client's case with prejudice. Finally, Mr. Duffin did not respond to Bar Counsel during the investigation of that grievance.

With respect to Count Two, Mr. Duffin admitted that he violated I.R.P.C. 1.2(a), relating to the scope of representation, 1.3, relating to diligence, 1.4, relating to

communication, 1.7, relating to a conflict of interest, 3.2, relating to expediting litigation, and 3.4(d), relating to discovery, in connection with his representation of two different clients in two breach of contract cases. In the first case, Mr. Duffin did not diligently pursue the defense of the case which eventually resulted in the denial of a motion to set aside a default and award of costs and fees. In addition, Mr. Duffin failed to take diligent action on appeal, resulting in the dismissal of the appeal. In the second case, Mr. Duffin failed to diligently prosecute his client's claims which resulted in a dismissal of his client's claims and judgment being entered on behalf of the opposing party for attorneys' fees. In addition, Mr. Duffin's arrangement with these two clients, who were involved in cases against a common opponent, resulted in an impermissible conflict of interest.

With respect to Count Three, Mr. Duffin admitted that he violated I.R.P.C. 1.2(a), relating to the scope of representation, 1.3, relating to diligence and 1.4, relating to communication. In that case, the client hired Mr. Duffin to assist her with a home loan modification and paid Mr. Duffin for that representation. Mr. Duffin failed to take any material action on his client's behalf, did not diligently pursue the representation and failed to communicate with his client. Mr. Duffin did refund all fees paid to the client.

The Idaho Supreme Court entered an Order accepting Mr. Duffin's resignation effective September 27, 2012. By the terms of the Order, Mr. Duffin may not make application for admission to the Idaho State Bar sooner than five years from the date of his resignation. If he does make such application for admission, he will be required to comply with the bar admission requirements in Section II of the Idaho Bar Commission Rules and shall have the burden of overcoming the rebuttable presumption of "unfitness to practice law."

By the terms of the Idaho Supreme Court's Order, Mr. Duffin's name was stricken from the records of the Idaho Supreme Court and his right to practice law before the courts in the State of Idaho was terminated on September 27, 2012.

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

**MICHAEL J. MCDONAGH
(Resignation in Lieu of Discipline)**

On October 31, 2012, the Idaho Supreme Court entered an Order accepting the resignation in lieu of discipline of Boise attorney, Michael J. McDonagh. The Idaho Supreme Court's Order followed a stipulated resolution of a disciplinary proceeding that resulted from two grievances.

The first grievance, filed by the Idaho State Bar, related to Mr. McDonagh's criminal charges in Ada County. On May 16, 2011, Mr. McDonagh issued a \$10,000 paycheck to himself from his former employer and deposited the funds into his checking account. On February 15, 2012, he pleaded guilty to forgery. On June 20, 2012, the district court withheld judgment and placed Mr. McDonagh on a five-year probation. He has paid full restitution to the victims in that case. Mr. McDonagh admitted that his conduct in that matter violated I.R.P.C. 8.4(b) and (c) and I.B.C.R. 505(b).

The second grievance was filed by Mr. McDonagh's former client, H.C. In December 2009, H.C. retained Mr. McDonagh to collect funds owed by a third party for construction work. Mr. McDonagh sent a demand letter but did not complete any further work. Between April 2010 and June 2011, he failed to provide correct information to H.C. about the status of his case. After H.C. terminated the representation, Mr. McDonagh failed to return any portion of the \$2,500 retainer fee. Mr. McDonagh admitted that his conduct in that matter violated I.R.P.C. 1.2(a), 1.3, 1.4, 1.16(d) and 8.4(c).

The Idaho Supreme Court accepted Mr. McDonagh's resignation effective October 31, 2012. By the terms of the Order, Mr. McDonagh may not make application for admission to the Idaho State Bar sooner than five years from the date of his resignation. If he does make such application for admission, he will be required to comply with all bar admission requirements found in Section II of the Idaho Bar Commission Rules and shall have the burden of overcoming the rebuttable presumption of "unfitness to practice law."

By the terms of the Idaho Supreme Court's Order, Mr. McDonagh's name was stricken from the records of the Idaho Supreme Court and his right to practice law before the courts in the State of Idaho was terminated on October 31, 2012.

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

**BENSON BARRERA
(Withheld Suspension)**

On November 13, 2012, the Idaho Supreme Court issued a Disciplinary Order suspending Nampa attorney Benson Barrera from the practice of law for a period of one year with the entire year withheld and placing him on a two year disciplinary probation.

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

In February 2011, Mr. Barrera was charged with felony aggravated assault. The charge stemmed from an incident in which Mr. Barrera head-butted another man in a public venue. Mr. Barrera described it as a bar fight with a former girlfriend's ex-husband. In October 2011, the jury found Mr. Barrera guilty of felony aggravated assault. In December 2011, Mr. Barrera was sentenced to 60 days in jail with the possibility of early release and a five-year probation including terms that he complete a substance abuse evaluation and 200 hours of community service. Mr. Barrera was released from custody early after serving 37 days. In January 2012, Mr. Barrera appealed his conviction.

The Disciplinary Order provides that Mr. Barrera's one-year suspension is withheld subject to the terms and conditions of a two-year probation, which include: avoidance of any alcohol or drug-related criminal acts, or alcohol or drug-related traffic violations; a program of random urinalysis; that he comply with the terms of his criminal probation; and if Mr. Barrera admits or is found to have violated any of the Idaho Rules of Professional Conduct for which a public sanction is imposed for any conduct during the period of probation, regardless whether the admission or determination occurs after the expiration of the probationary period, the entire withheld suspension shall be imposed.

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

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

**CHERI K. GOCHBERG
(Resignation in Lieu of Discipline)**

On November 20, 2012, the Idaho Supreme Court entered an Order Granting Stipulation to Resign in Lieu of Disciplinary Proceedings with respect to Utah and Idaho attorney Cheri K. Gochberg.

The Idaho Supreme Court Order followed the parties' stipulation to permit a resignation in lieu of disciplinary proceedings in an Idaho State Bar reciprocal disciplinary proceeding. Ms. Gochberg was previously admitted to the practice of law in Utah. Ms. Gochberg was admitted to the practice of law in Idaho in April 2004, but had been an inactive member in Idaho since March 2008. Ms. Gochberg resigned in lieu of discipline from the practice of law in Utah following two felony convictions of driving under the influence of alcohol or drugs, one related to a September 2010 incident and one related to a February 2011 incident. She was sentenced in both cases in 2011. In the Utah proceedings, Ms. Gochberg admitted violating Utah Rules of Professional Conduct 8.4(b) (commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects) and 8.4(a) (misconduct).

The Idaho Supreme Court accepted Ms. Gochberg's resignation effective March 28, 2012. By the terms of the Order, Ms. Gochberg may not make application for admission to the Idaho State Bar sooner than five years from the date of her resignation. If she does make such application for admission, she will be required to comply with all bar admission requirements found in Section II of the Idaho Bar Commission Rules and shall have the burden of overcoming the rebuttable presumption of "unfitness to practice law."

By the terms of the Idaho Supreme Court's Order, Ms. Gochberg's name was stricken from the records of the Idaho Supreme Court and her right to practice law before the courts in the State of Idaho was terminated on March 28, 2012.

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

**CRAIG R. JORGENSEN
(Suspension)**

On October 31, 2012, the Idaho Supreme Court issued a Disciplinary Order suspending Pocatello attorney Craig R. Jorgensen from the practice of law for a period of two (2) years, with all but four (4) months of such suspension withheld. The Idaho Supreme Court found that Mr. Jorgensen violated Idaho Rules of Professional Conduct 1.2(a) (failure to abide by client objectives), 1.3 (failure to act with reasonable diligence), 1.4 (failure to reasonably communicate with client), 1.15(b) (withdrawal of fees from client trust account only as fees are earned or expenses incurred), 1.16(a) (failure to withdraw from representation upon discharge), 1.16(d) (failure to return unearned fees and client file upon termination), and 8.4(d) (conduct prejudicial to the administration of justice).

The Idaho Supreme Court's Disciplinary Order followed Findings of Fact, Conclusions of Law and Recommendation issued by a Hearing Committee of the Professional Conduct Board on September 24, 2012. A hearing before that Committee was conducted on August 28, 2012 to determine the appropriate sanction. The parties had entered into a Stipulation of Facts prior to the hearing in which Mr. Jorgensen admitted to violating the Idaho Rules of Professional Conduct referenced above.

The formal charge Complaint filed against Mr. Jorgensen by the Idaho State Bar on September 1, 2011, stemmed from his representation of A.M. in a federal court case in which A.M. sued her employer, 23 employees, and numerous other defendants for sexual harassment and discrimination, retaliation, and defamation. A.M. originally filed the lawsuit *pro se* on February 10, 2010. On June 23, 2010, certain defendants filed a Motion to Dismiss the defamation claim. A.M.'s response was due by July 19, 2010. On June 25, 2010, A.M. retained Mr. Jorgensen to represent her in the case and to respond to the motion. She paid him a \$22,500 retainer to be charged at a \$210 hourly rate. Mr. Jorgensen deposited the funds into his trust account on or about June 25, 2010. On June 30, 2010, Mr. Jorgensen filed a Notice of Appearance, but failed to ever file any other documents in the case, including A.M.'s response to the Motion to Dismiss. On July 28, 2010, the Court granted the Motion to Dismiss with prejudice based on A.M.'s failure to file a

DISCIPLINE

response to the motion. Mr. Jorgensen did not inform his client about the dismissal. Mr. Jorgensen also failed to inform A.M. about the dismissal and/or status of her case throughout the remainder of 2010.

In January 2011, A.M. notified Mr. Jorgensen that his representation was terminated and specified the attorneys she hired in substitution. Those attorneys also notified Mr. Jorgensen that they were taking over the case and requested that he return A.M.'s file and retainer. Mr. Jorgensen failed to withdraw from the representation until August 2011 and failed to return A.M.'s file or retainer.

With respect to A.M.'s \$22,500 retainer, although initially deposited into Mr. Jorgensen's trust account, he acknowledged that he did not earn the fee and did not maintain those funds in his trust account. Rather, he made draws on those funds for purposes unrelated to A.M.'s case. After A.M. filed a Client Assistance Fund claim against Mr. Jorgensen, he refunded her retainer on August 29, 2011.

In October 2012, he paid A.M. interest on the retainer from the date she paid it, June 25, 2010, to the date he refunded it, August 29, 2011.

The Disciplinary Order also provided that following the four (4) month period of imposed suspension and reinstatement, if any, Mr. Jorgensen will serve a three (3) year period of probation on specified terms and conditions that include: reporting to a supervising attorney approved by Bar Counsel on a not less than monthly basis regarding the representation of his clients to assure that he is acting with reasonable diligence in representing his clients and keeping them reasonably informed about the status of their matters; certifying to Bar Counsel under oath on a monthly basis that he is acting with reasonable diligence in representing his clients and keeping them informed about the status of their matters; entering into fee agreements which are all in writing and none of which may be on a "fixed fee/earned on receipt" basis; providing to Bar

Counsel's Office a monthly written report or summary regarding his trust account; and obtaining and maintaining during the period of probation errors and omissions legal malpractice insurance coverage in a form acceptable to Bar Counsel. The Disciplinary Order further provided that if Mr. Jorgensen is found to have violated any of these conditions of probation then the entire withheld suspension shall be automatically and immediately imposed.

The Idaho Supreme Court also ordered that as a condition of reinstatement, Mr. Jorgensen must show that he has fully complied with the requirements of I.B.C.R. 517 (a)-(d) and otherwise satisfied all requirements of I.B.C.R. 518(b), and must reimburse the Idaho State Bar for all costs associated with this disciplinary proceeding pursuant to I.B.C.R. 506(j).

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

NEWS BRIEFS

Scams still targeting attorneys

Reports of attorneys falling victim to a serious fraud continue to be reported in Idaho and across the nation. There are various methods being used to steal from attorneys, but most have to do with asking the lawyer to take a large retainer or collect some overdue compensation, (which is in the form of a bogus check). Then, the so-called client asks for the balance minus attorney's fees. Attorneys are asked to exercise care when dealing with clients they don't know or have just proposed a business arrangement through email. Before refunding money, contact your bank and make certain that the client's check has cleared.

Animal Law Section begins its work

A new practice section has taken its place among the pantheon of Idaho State Bar Sections. Late last year the ISB Board of Commissioners approved a petition to form the Animal Law Section, which met for the first time on Friday, Nov. 30, 2012 in Boise.

The Section elected officers, designated a bylaws committee, set dues levels and established a plan for membership recruitment. Twenty five other states,

including neighboring Washington and Oregon, have Animal Law Sections. The reasons for an Animal Law Section in Idaho were laid out in an article in the August issue of *The Advocate* written by Adam P. Karp. He wrote that "the old ways of thinking about animals may have served Americans well, but the changing demographics of society, in which animals become part of the family... warrants a new approach."

He teaches animal law at the University of Washington and Seattle University and has received the ABA's Excellence in the Advancement of Animal Law award.

Concordia University School of Law celebrates National Pro Bono Week

Concordia University School of Law took part in the annual national pro bono celebration Oct. 21-27, sponsored by the American Bar Association.

Typically, about 70 percent of national pro bono celebration events involve volunteer training or direct service to clients. Fundraisers, award ceremonies and other celebration activities also underscore the need for and contributions of lawyers who volunteer their services for clients in poverty. During the week, Concordia students bagged about 200 sacks of food for the Backpack Project at the Idaho Foodbank.

They also picked up trash along several miles of the Greenbelt.

The school also hosted a CLE about integrating pro bono into one's practice. The discussion was moderated by the Ada County Magistrate Judge Russell Comstock. Panelists included Joanne Kibodeaux of Kibodeaux Law Office, William Wardwell of Varin Wardwell Thomas, LLC, John Gannon of John Gannon Law Offices and Angie Levesque of Levesque Law, PLLC.

Kids' Chance scholarship

The Kids' Chance, Inc. scholarship was the brainchild of Boise attorney Jack Barrett, who is now deceased. It has been wholeheartedly adopted by the Idaho Workers' Compensation Section which is comprised of both claimant and defense counsel. The nonprofit corporation was established in March 2012 and is currently attempting to raise \$25,000 by March 2013. The Workers' Compensation Section has pledged \$1,000.

Kids' Chance, Inc. is a nonprofit corporation with a goal of raising funds to provide scholarships to college age students whose parent(s) have been declared permanently disabled by the Industrial Commission. Any contribution is tax deductible. Make checks payable to Kids' Chance, Inc. and mail to 1495 East 17th Street, Idaho Falls, Idaho 83404.



EXECUTIVE DIRECTOR'S REPORT

2012 RESOLUTIONS RESULTS

Diane K. Minnich
Executive Director, Idaho State Bar

Two resolutions were presented to the membership through the 2012 resolution process. One resolution was approved by the membership, the other was not approved. The voting totals were the highest since 2005, 24% of members eligible to vote cast their vote. Attendance at the resolution meetings was higher than the last two years but consistent with 2007 and 2008.

Resolution 12-1 *Amendments to IBCR 227 Pro Hac Vice Admission* was presented by the ISB Board of Commissioners, the Idaho Law Foundation



Board of Directors and the Idaho Volunteer Lawyers Program Policy Council. The resolution proposed that the members of the Idaho State Bar recommend to the Idaho Supreme Court that Idaho Bar Commission Rule 227 be amended to increase the pro hac vice fee and direct the increased portion of that fee to the Idaho Law Foundation to support its pro bono program. The resolution passed with 84% of the vote in favor of the resolution.

Resolution 12 -2 *Amendments to IBCR Section IV Mandatory Continuing Legal Education* was presented by the ISB Board of Commissioners. The resolution proposed that members of the Idaho State Bar recommend to the Idaho Supreme Court that IBCR Section IV MCLE be amended. The amendments included procedural changes to update the credit approval process, allow credit for legal writing, allow lawyers licensed

in Idaho but practicing in another state to only comply with MCLE requirements in their principal state and updated the standards for accrediting programs. The rule also proposed to raise the 3-year MCLE credit requirement to from 30 to 36 general credits and ethics from 2 to 4 credits. This resolution was defeated with 52% voting against the resolution.

The changes proposed to IBCR 227 will be submitted to the Idaho Supreme Court for its consideration.

We thank those of you who attended the resolution meetings. The Board of Commissioners and bar staff appreciate the opportunity to meet with bar members throughout the state, to honor colleagues for their service and professionalism, and to receive updates about the programs and activities of the District Bar Associations.

Happy New Year!

2012 Resolution Results										
District	1 st	2 nd	3 rd	4 th	5 th	6 th	7 th	OSA*	Totals	
Members eligible to vote	436	222	249	2,044	311	218	395	1,077	4,952	
Percentage of total membership	9%	4%	5%	41%	6%	4%	8%	22%	100%	
Members voting	107	79	71	533	90	99	139	56	1,174	
Percentage of members voting	25%	36%	29%	26%	29%	45%	35%	5%	24%	
Number in attendance	38	35	40	79	45	51	69	1	358	
Percentage in attendance	9%	16%	16%	4%	14%	23%	17%	0%	7%	
12-1 Pro Hac Vice Fees										
For	89	63	55	441	83	92	112	46	981	84%
Against	17	15	15	88	7	7	27	10	186	16%
Total	106	78	70	529	90	99	139	56	1,167	
12-2 MCLE Rules										
For	49	38	29	237	45	52	70	40	560	48%
Against	56	41	42	291	44	47	69	14	604	52%
Total	105	79	71	528	89	99	139	54	1,164	

*Out of State Active

DIVERSITY SECTION CHAIR'S WELCOME MESSAGE

Kinzo Mihara

Greetings from the Idaho State Bar Diversity Section. The Diversity Section is pleased to co-sponsor this issue of *The Advocate* with the Idaho Women Lawyers.

The members of both Sections have authored a number of interesting and informative articles, which I hope you have a chance to review and reflect on.

The Diversity Section was created to foster diversity within the Idaho State Bar and judiciary and to promote the Bar's professional development to serve the interests of a diverse public.

One of the ways we attempt to accomplish our mission is to dispel the common misconception that the Diversity Section is here solely to promote racial diversity in our profession. While it is important that we give people of all races, colors, and nationalities opportunities to participate in our profession, diversity is an idea that is much broader. Diversity is the collective experience that we all, as individuals, regardless of race, color, creed, religious affiliation, gender, sexual preference, etc., bring to bear to serve our clients.

The Section's mission underscores that despite the differences we may have, it is imperative we recognize the importance of allowing everyone an opportunity to express their ideas in a respectful, non-hostile manner – even if we do not necessarily agree with the message they are attempting to convey. Essentially, this can all be boiled down into the idea of the peaceful and respectful exchange of divergent viewpoints.

I was reminded of the idea of peaceful and respectful exchange of ideas while reading Mr. Bruce Skaug's recent article in *The Advocate*, "Abraham Lincoln: Tyrant?" Growing up and continuing into adulthood, I formed an idea regarding Mr. Lincoln as being a lawyer seldom equaled, a president with a stalwart resolve who personally sacrificed his own interests in order to save the Union, and a man who stood up to and destroyed the unjust institution of slavery. Mr. Skaug's article was especially interesting to me as, like Mr. Skaug, I visited many of the eastern battlefields of the Civil War and enjoy studying its history and characters. Mr. Skaug's article paints a different picture of President Lincoln and gave me food for thought. It was the well cited, articulate expression of ideas that made me reflect upon the thoughts conveyed. I want to thank Mr. Skaug for publicly sharing his personal family experience through his article.

The Diversity Section is one of, if not the smallest, section in the ISB. That being said, my time with the Diversity Section has been one of the most rewarding and satisfying experiences I have had in my professional career as a lawyer. I am constantly reminded of the rich cross-section of experiences that bring us together as a profession as well as the society we serve.

During this past year, the Diversity Section has sponsored various events and CLEs. I was proud to be present this year at the ISB Annual Meeting when the Diversity Section sponsored a breakfast and presented State Senator Nicole LeFavour with the Section's highest honor. Senator LeFavour embodies the values that the Section holds dear:

continuing to stand tall and advocate and communicate messages and ideas in the face of sometimes hostile opposition. The Section also put on several CLEs, including a recent screening of "The Color of Conscience" in conjunction with an esteemed group of discussion panelists. I want to take this opportunity to thank all of the folks whose hard work went into making that program a resounding success.

We invite all members of the Bar to join our Section membership. I hope that you find the articles as informative and interesting as we do. Even if you take issue with the ideas being expressed, take a minute to think about the issue from another point of view. Who knows: the other person just might have a point.

I want to close by also thanking the Idaho Women Lawyers for co-sponsoring this edition of *The Advocate*.

About the Author

Kinzo Mihara is an attorney practicing at the firm of Howard Funke & Associates, P.C. in Coeur d'Alene, Idaho. Mr. Mihara's practice is almost exclusively focused on federal Indian law issues, but also includes a small, active practice in the areas of insurance law and probate and estate planning matters. Mr. Mihara also serves on the boards of the Inter-mountain Fair Housing Council and the John P. Grey Bench Bar Forum. Kinzo and his wife, Hannah, are the proud parents of a healthy and active baby daughter, Lillian. In the small amount of spare time he has, Mr. Mihara enjoys participating in a wide variety of outdoor activities.



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DIVERSITY: IS IT MORE THAN JUST RACE AND GENDER?

Amy Cunningham

Over the years, we have heard a great deal about racial and gender diversity through programs like affirmative action and women's liberation. But, have you heard of disability diversity? On July 26, 1990, President Bush signed into law the world's first comprehensive civil rights law for people with disabilities – the Americans with Disabilities Act, otherwise known as the ADA.¹ On that day, the president directed: "Let the shameful walls of exclusion finally come tumbling down."² Since then, the legal community has been involved in promoting disability diversity through representation of individuals with disabilities with claims of discrimination under the ADA and policy declarations of the importance of disability diversity. Nevertheless, due to the number of individuals with disabilities, the legal community must do more.

The numbers

According to the U.S. Census Bureau, in 2010 approximately 56.7 million Americans who did not live in institutions had a disability.³ Individuals with disabilities bring "unique sets of skills to the workplace, enhancing the strength and diversity of the U.S. labor market."⁴ This group represents "more than \$200 billion in discretionary spending and spurring technological innovation and entrepreneurship."⁵ However, the number of individuals with disabilities employed in the legal profession is underrepresented compared to non-disabled individuals.⁶ A 2011 American Bar Association (ABA) member survey showed that only 4.56% of its members responded as having a disability.⁷ The Bureau of Labor Statistics reported that, "for the third quarter of 2011, 2.6% of persons employed in the legal profession . . . had a disability."⁸ As of 2009, "only 3 of 54 American jurisdictions that license attorneys collected information on lawyers with disabilities."⁹

The guidance

In 2008, the ABA adopted an association goal, entitled Goal III, with the objective to "eliminate bias and enhance diversity."¹⁰ The ABA has had a long standing concern "that a judiciary that is not representative of the diverse community it serves runs the risk of losing its legitimacy in the eyes of the very people who seek redress in the courts."¹¹ In 2011, the ABA re-named its Goal III sub-committee to the Commission on Disability Rights

As of 2009, "only 3 of 54 American jurisdictions that license attorneys collected information on lawyers with disabilities."⁹

(CDR).¹² The CDR has a two-prong mission: "to promote the ABA's commitment to justice and the rule of law for persons with mental, physical, and sensory disabilities and their full and equal participation in the legal profession."¹³

Additionally, at the 2012 Annual Meeting for the Conference of Chief Justices, the Professionalism and Competence of the Bar Committee adopted Resolution 13 in support of disability diversity in the legal profession.¹⁴ Resolution 13 reads:

WHEREAS, the courts have an important responsibility to set an example for the legal system and the public concerning (1) eradication of bias, prejudice, stereotypes, stigma, and discrimination against persons with disabilities, and (2) fostering and advancing their right to equal employment opportunities within the judicial system; and

WHEREAS, the court system should be representative of the diverse community that it serves;

NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices encourages its members to:

1. Urge the state judiciaries to work actively to foster a diverse workforce that includes qualified persons with disabilities;
2. Urge the state judiciaries and individual judges to work actively to advance the employment of qualified persons with disabilities in the judicial system; and
3. Encourage the state judiciaries to conduct educational disability awareness programs that focus on the abilities of persons with disabilities, rather than their impairments.

The action

While much has been done to provide guidance, we can do more to promote dis-

ability diversity. As members of the legal profession in Idaho, we represent clients, are officers of the legal system, and are public citizens with special responsibilities for the quality of justice.¹⁵ We are instructed that we "should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford to secure adequate legal counsel."¹⁶ The Idaho State Bar has recognized this obligation through the creation of the Diversity Section.

With a challenge to ensure justice for all and a large population with needs to be met, the question becomes, how do we accomplish disability diversity in our individual practices and for our clients? I suggest a three-fold approach: (1) commitment through policy and practice, (2) review of our facilities, services; and (3) pursuit of disability discrimination cases under the ADA and the Americans with Disabilities Amendments Act (ADAAA).

We can show a commitment to increasing disability diversity in the legal profession through the creation of Diversity Plans within our own entities. In 2010-2011, the ABA created a Diversity Plan to "ensure full and equal participation in the Association by all eligible persons (including attorneys and law students) and the elimination of bias in the ABA . . . including the provision of accommodations to persons with disabilities . . ."¹⁷ The ABA Diversity Plan includes such challenges as requiring diversity as an emphasis in all leadership nomination processes and among nomination decision-makers;¹⁸ emphasizing diversity in leadership training and development courses;¹⁹ and promoting diversity in CLE and other programming.²⁰ We can use the ABA Diversity Plan as a model in our practices.

Second, we can review our obligations under Title III of the ADA, regard-

ing our physical locations and our marketing materials to ensure equal access to our services and barrier-free facilities. The U.S. Department of Justice has created a simple and useful guide to assist in this endeavor: ADA Update: A Primer for Small Business.²¹ The Primer covers general non-discrimination requirements such as policies and procedures, communicating with customers and making the building environment accessible. For example, what are our responsibilities if an individual who is deaf comes to our door? Under the ADA, we are required to provide auxiliary aids or services necessary to ensure effective communication.²² Generally, the ADA requires attorneys to provide and pay for qualified sign language interpreters for deaf clients when necessary to provide effective communication and when the client or potential client asks for a sign language interpreter.²³ If an attorney were to refuse to serve someone solely because the individual is deaf, that would be unlawful discrimination under the ADA. Under some circumstances, the courts are required to provide and pay for sign language interpreters to parties and witnesses who are deaf during court proceedings.²⁴ In Idaho, interpreters may be appointed in civil, criminal, domestic relations, juvenile, traffic, or other in-court proceedings.²⁵

Another area of potential review is the accessibility of the law firm's website. Today, an attorney's website is often the first encounter a potential client has with his/her business. By ensuring website accessibility to persons with various disabilities, we can avoid potential complaints and prevent the loss of potential clients because of an inaccessible or unwelcoming website.²⁶ The ABA offers multiple resources, information, and Power Point presentations on making websites accessible to individuals with disabilities at its Legal Technology Resource Center.²⁷

Finally, while the ADA opened the doors for many individuals with disabilities, pursuing litigation became frustrating as courts focused on whether the plaintiff had a disability or was a qualified individual under the Act and thus never reached the question of discrimination. However, in 2008, the Americans with Disabilities Amendments Act (ADAAA)²⁸ passed specifically to reject previous Supreme Court decisions and Equal Employment Opportunity Commission (EEOC) regulations "to make it easier for people with disabilities to obtain protection under the ADA."²⁹ In the ADAAA, Congress made it clear that the focus of the law is

on the alleged discriminatory acts, not on proof of disability. The ADAAA specifically overruled the United States Supreme Court rulings in *Sutton v. United Airlines*,³⁰ and *Toyota Motor Mfg. of Kentucky v. Williams*.³¹ The decision in *Sutton* had narrowed the definition of disability and the decision in *Toyota* addressed the application of the terms "substantially limits" and "major life activities." The ADAAA became effective January 1, 2009. The EEOC issued new regulations which became effective March 25, 2011.³²

Further, the ADAAA substantially changed a discrimination claim on the basis that an individual is "regarded as" an individual with a disability. Under the ADAAA, a plaintiff only need show proof of an impairment, actual or perceived, not that the impairment is limiting in any way.³³ However, the impairment cannot be transitory and minor, i.e., a common cold.³⁴ Finally, a "regarded as" claim will support any conduct that violates the ADA except for a failure-to-accommodate claim.³⁵

In conclusion, disability diversity has come a long way; however, we can do more. More than 56.7 million Americans with disabilities is a significant number. Let's do our best to ensure that each of these Americans who are our veterans, our family, and our friends have an equal opportunity to fully access American life so the "shameful walls of exclusion" will crumble.

Endnotes

¹ AMERICANS WITH DISABILITIES ACT HANDBOOK pmb1., U.S. EEOC & U.S. DOJ, (Dec. 1991) (The ADA addresses discrimination on the basis of disability and access to programs and services in state and local governments and public entities. The Act is divided into three sections: Title I Employment; Title II State and Local Governments; and Title III Public Entities. For laws preventing discrimination on the basis of disability in the federal context, see, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C.A. § 794.)

² *Id.*

³ Matthew W. Brault, *Americans with Disabilities: 2010 Household Economic Studies*, 2012 U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS 4 available at <http://www.census.gov/prod/2012>.

⁴ *Id.* at 1.

⁵ *Id.*

⁶ *Goal III Report, an Annual Report on the Participation of Persons with Disabilities in ABA Leadership Positions*, 2011-2012 A.B.A. SEC. COMM'N ON DISABILITY RIGHTS 7 available at http://www.americanbar.org/content/dam/aba/administrative/mental_physical_disability/2012_GoalIII_Report_authcheckdam.pdf. (Only "0.03 % of employed persons with a disability were in the legal profession compared to 1.2% for [employed] non-disabled persons.")

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Goal III Report*, at 6.

¹¹ Letter from Wm. T. (Bill) Robinson III, President ABA to Kathryn Ruemmler, Counsel to the Presi-

***In the ADAAA,
Congress made it clear
that the focus of the
law is on the alleged
discriminatory acts, not on
proof of disability.***

dent (October 24, 2011) (on file with author).

¹² *Goal III Report*, at 6.

¹³ *Id.*

¹⁴ *Resolution 12-A-13 In Support of Disability Diversity in the Legal Profession, adopted as proposed*, CONFERENCE OF CHIEF JUSTICES available at <http://ccj.ncsc.dni.us/AccessJusticeResols.html>.

¹⁵ IDAHO R. PROF. CONDUCT pmb1.

¹⁶ *Id.*

¹⁷ *Diversity Plan, A.B.A. 2* available at http://www.americanbar.org/content/dam/aba_diversity_plan_may_2011_authcheckdam.pdf.

¹⁸ *Id.* at 4.

¹⁹ *Id.*

²⁰ *Id.* at 6.

²¹ See <http://www.ada.gov/smbusgd.pdf>.

²² 28 C.F.R. § 36.303(c).

²³ 28 C.F.R. § 36.301 (c). For questions, please contact the U.S. Department of Justice ADA Information Line at 1-800-514-0301.

²⁴ Idaho Code § 9-205; IDAHO CT. ADMIN. R. 52. (For federal court see 28 U.S.C. § 1827(1), FED. R. CRIM. P. 28, FED. LOCAL CRIM. R. IDAHO 28.1).

²⁵ IDAHO CT. ADMIN. R. 52(b)(5).

²⁶ David A. Bulkowski and Donald P. Lawless, *An Attorney's Obligations under Title III of the Americans with Disabilities Act*, MICH. B. J., Aug. 2010, at 40-44.

²⁷ See http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/webaccessibility.html.

²⁸ 42 U.S.C. § 12101.

²⁹ 29 C.F.R. § 1630.1(c)(4).

³⁰ *Sutton v. United Airlines*, 527 U.S. 471 (1999).

³¹ *Toyota Motor Mfg. of Kentucky v. Williams*, 534 U.S. 184 (2002).

³² See, 29 C.F.R. § 1630.

³³ 42 U.S.C. § 12102(3)(A); 29 C.F.R. §§ 1630.2(g)(1)(iii) and 1630.2(l)(1).

³⁴ 42 U.S.C. § 12102(3)(B); 29 C.F.R. §§ 1630.15(f) and 1630.2(g)(1)(iii).

³⁵ 42 U.S.C. § 12201(h); 29 C.F.R. §§ 1630.2(l)(1), (o)(4) and 1630.9(d).

About the Author

Amy Cunningham is an attorney with Disability Rights Idaho where she has provided legal services to individuals with disabilities for the past 17 years. She is also secretary/treasurer of the Diversity Section of the Idaho State Bar.



“THE JOKE’S ON US”: PAUSING TO REFLECT ON THE 50TH ANNIVERSARY OF *GIDEON V. WAINWRIGHT*

Ritchie Eppink

Shortly before lunch 50 years ago, on January 15, 1963, Chief Justice Earl Warren called up case number 155, then known as *Gideon v. Cochran*, and recognized the accomplished D.C. lawyer Abe Fortas to begin his argument at the podium.¹ The Supreme Court had appointed Fortas (who would ascend to the Supreme Court bench two years later) to represent the prisoner and convicted felon who had sent the Court a handwritten petition for a writ of certiorari.² The only question for the Court was whether to overrule long-established precedent: its 1942 holding in *Betts v. Brady*³ that state courts had no federal constitutional obligation to appoint counsel for people accused of a felony but too poor to hire an attorney. Two months after argument, on March 18, 1963, the Court announced its decision that “lawyers in criminal courts are necessities, not luxuries.”⁴ Ever since, each state has been on notice that the U.S. Constitution requires a statewide system for ensuring that all criminal defendants, even the poor ones, have a lawyer to assist them. Without a working system, our “noble ideal” of “fair trials before impartial tribunals in which every defendant stands equal before the law,” as the unanimous Supreme Court said, is instead an impossible promise.⁵

The status quo in Idaho: Underfunded, inconsistent, and unconstitutional indigent defense

Gideon himself was kept locked up in the Raiford State Prison for the whole duration of his U.S. Supreme Court appeal. It was not until two years after his 1961 conviction for breaking and entering a pool hall that he got a new trial. After the second trial on August 5, 1963, represented by an able lawyer this time,⁶ it took the jury only an hour to acquit.⁷ When a state’s indigent defense system is not working, there is more at stake than an abstract ideal, or a risk management concern about exposing the county treasury to liability. Rather, as Clarence Gideon’s plight reminds us, human dreams and liberty are on the line.

Recently, Idaho’s governor-appointed Criminal Justice Commission authorized the National Legal Aid and Defender Association (NLADA) to evaluate trial-level public defender services in our state. The results were clear and grim: the study found that the State of Idaho fails to pro-

Ever since, each state has been on notice that the U.S. Constitution requires a statewide system for ensuring that all criminal defendants, even the poor ones, have a lawyer to assist them.

vide the level of representation required by the Constitution.⁸ In excruciating detail of more than 100 pages, the report itemizes glaring deficiencies in Idaho’s system, taking in turn the excessive workloads that Idaho’s public defenders struggle under, the cattle-call proceedings in magistrate courts where defendants are pressured to “work out a deal” before getting appointed counsel, and the pervasive lack of training and supervision for public defense attorneys throughout the state. In other words, Idaho’s public defenders are not bad lawyers — they’ve simply been given the impossible task of representing too many clients with too few resources.

Although the additional cost to all of us of resulting post-conviction reversals may alone be compelling enough to demand an overhaul, the experiences of Idahoans across our state reveal the system’s devastating human consequences. One citizen wrote:

“My public defender does not like me because I’m deaf; at one point he started [to] swing his hand back and forth in front of my face (as if slapping my face) telling me to shut up because I would not take a plea deal.”⁹

His report came in a letter from Payette, Idaho. A man in Rexburg reported:

“For 10 months I have not had any preparation or actions taken on my case except continuations.”

He wrote from the Madison County jail. A prisoner in the Ada County jail gave this report:

“He told me that my witnesses were not being cooperative and that I was going to trial by myself. I weighed my options and decided to plead guilty. I called my wife and found out that my witnesses were called by my attorney and told not to come to court the following day. My public defender withheld information from me. He did not let me know that I had

witnesses in my defense, which persuaded me to plead guilty. I was basically misled into pleading guilty.”

A disturbing number of prisoner letters contain reports like these:

“[My public defender] coerced me into pleading guilty by stating that because I’m black and the alleged victim is white, I needed to plead guilty and take a deal because here in Idaho nobody would believe me.”

“At my hearing, [my public defender] made the statement to me that I was not going to win my case because I was ‘just another f[---]kin Mexican walking in Northern Idaho.’”

Unfortunately, in Idaho there is no way to comprehensively treat these symptoms. At present, aside from providing a statutory basis¹⁰ for appointment of counsel for the indigent, the State of Idaho has not taken responsibility for complying with *Gideon v. Wainwright* at the trial level. Instead, it has for decades relied entirely on the counties to develop 44 of their own systems for assuring that indigent accused are receiving meaningful assistance of counsel. This county-by-county approach has failed. As the NLADA Report explains, “[b]y delegating to each county the responsibility to provide counsel at the trial level without any state funding or oversight, Idaho has sewn a patchwork quilt of underfunded, inconsistent systems that vary greatly in defining who qualifies for services and in the level of competency of the services rendered.”¹¹

2013 is the year to fix our broken system

Providently, the three 50-year anniversaries of *Gideon* during 2013 — the January 15 oral argument, the March 18 decision, and the August 5 acquittal achieved by appointed counsel — could mark milestones for overdue reform to Idaho’s public defense system. The Idaho Crimi-

nal Justice Commission recently voted to recommend changes to Idaho's appointed counsel statutes and the creation of a committee within the Idaho legislature to develop a proposal for system-wide reform. The state's move to look seriously at reform follows our neighbors — Oregon, Washington, Nevada, Montana, and Wyoming — which have already implemented state-level oversight mechanisms.¹² If an Idaho legislative committee takes this issue up during 2013, it will be considering it at the same time that litigation aimed at ending constitutionally inadequate public defense systems proceeds ominously through the courts in other states.¹³

In addition to state-level attention to these problems, the Commissioners in Canyon County, where the NLADA Report noted a "continuing devolution" of the right to counsel in the face of "the move to place cost concerns above constitutional due process,"¹⁴ recently had the courage to candidly admit their own "grave concerns" about the indigent defense system there.¹⁵ The Canyon County Commissioners also questioned "the very constitutionality of the State of Idaho delegating its responsibility — by unfunded mandate — to the counties . . ."¹⁶ Accordingly, Canyon County has already begun exploring the development of a model system of public defense, with the goal of implementing it by 2014.

Canyon County has a wealth of national research and standards to guide it. In particular, the Commissioners have expressed interest in building the framework of their model system from the *Ten Principles of a Public Defense Delivery System*, the widely recognized indigent defense fundamentals developed by the American Bar Association.¹⁷ Those principles identify the practical necessities for a constitutional delivery system: workload limits, prompt assignment of counsel, adequate confidential client meeting space, continuous representation by the same attorney throughout each case, minimum attorney qualifications, adequate training and supervision, regular quality audits, independence from politics, and parity between prosecution and defense counsel resources. The NLADA Report found grave failures in these areas, and in 2013 we will hopefully see those failures corrected at a system-wide level, whether through legislation, litigation, or county-based reform.

"The joke's on us"

Among the sometimes apocryphal tales that make up the territorial history of Idaho is the report of a gravestone epitaph

left for an innocent man accused of stealing horses: "LYNCHEd BY MISTAKE: THE JOKE'S ON US."¹⁸ The likelihood that there are innocent men and women separated from their families and locked up in Idaho's prisons is gruesomely high. The probability that some of the innocent were too poor to afford their own attorney is almost a certainty. The occasion of the 50th year since a prisoner's handwritten petition resulted in the landmark *Gideon* decision is a solemn opportunity to reflect on whether what the Supreme Court called an "obvious truth" — that "any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him" — has been honored in Idaho.¹⁹ Although effective mechanisms for fulfilling *Gideon*'s command may not always be so obvious, all members of our bar should work this year to ensure that the joke is not on us.

Endnotes

¹ Accounts of the oral argument—remembered by Bruce Jacob, who argued the case for the State of Florida and later became dean of the law schools at both Mercer and Stetson—are published as Bruce R. Jacob, *Memories of and Reflections about Gideon v. Wainwright*, 33 STETSON L. REV. 181 (2003), as part of the *Conference on the 30th Anniversary of the United States Supreme Court's Decision in Gideon v. Wainwright*, 43 AM. U. L. REV. 1, 33 (1993), and in the transcript of an oral history recorded by the National Equal Justice Library, available online at <http://www.law.georgetown.edu/library/collections/nejl/upload/jacob.pdf>. An audio recording and transcript of the oral argument is available at http://www.oyez.org/cases/1960-1969/1962/1962_155.

² Images of *Gideon*'s petition and his handwritten briefing that followed are now easily found on the web. High-quality photos of documents from the case that are in the archives of the State of Florida are compiled together at <http://www.floridamemory.com/exhibits/floridahighlights/gideon/index.php>.

³ 316 U.S. 455 (1942).

⁴ *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

⁵ *Id.*

⁶ At his second trial, *Gideon* was represented by W. Fred Turner, who would later be appointed to a trial court judgeship. Louis S. Rulli, *On the Road to Civil Gideon: Five Lessons from the Enactment of a Right to Counsel for Indigent Homeowners in Federal Civil Forfeiture Proceedings*, 19 J.L. & POL'Y 683, 750 n. 243 (2011).

⁷ *Gideon Gets Acquittal in Landmark Law Case*, ST. PETERSBURG TIMES, Aug. 6, 1963, at 2-B.

⁸ NAT'L LEGAL AID & DEFENDER ASS'N., THE GUARANTEE OF COUNSEL: ADVOCACY AND DUE PROCESS IN IDAHO'S TRIAL COURTS iii (2010) [hereinafter NLADA REPORT], available at http://www.nlada.net/sites/default/files/id_guaranteeofcounseljseri01-2010_report.pdf.

⁹ This report and the following four are excerpted from correspondence on file with the ACLU of Idaho.

¹⁰ I.C. §§ 19-851 – 19-856.

¹¹ NLADA REPORT at iii.

¹² NLADA REPORT at 4. The Washington Supreme Court also recently adopted statewide standards for indigent defense. *In the Matter of the Adoption of New Standards for Indigent Defense and Certification of Compliance*, No. 25700-A-1004 (Wash. June

**Accordingly,
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15, 2012), available at <http://www.courts.wa.gov/content/publicUpload/Press%20Releases/25700-A-1004.pdf>.

¹³ Indigent defense reform litigation continues to be successful. The Missouri Supreme Court held, in July 2012, that, "[s]imply put, a judge may not appoint counsel when the judge is aware that, for whatever reason, counsel is unable to provide effective representation to a defendant. Effective, not just pro forma, representation is required by the Missouri and federal constitutions." *State ex rel. Mo. Pub. Defender Comm'n v. Waters*, 370 S.W.3d 592, 607 (Mo. 2012). New York's highest court reinstated a dismissed challenge to that state's unfunded county-based system, holding that the resources available to public defenders may be so limited that the appointment of counsel results in "merely nominal attorney-client pairings" that "could convert the appointment of counsel into a sham . . ." *Hurrell-Harring v. New York*, 15 N.Y.3d 8, 22 (2010). That case was recently certified as a class action. Similar litigation is ongoing in Louisiana and Michigan.

¹⁴ NLADA REPORT at 24.

¹⁵ Letter from Board of Canyon County Commissioners to Canyon County Criminal Justice Committee (July 23, 2012) (on file with author).

¹⁶ *Id.*

¹⁷ The blackletter principles and official comments are available online at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf.

¹⁸ ROBERT H. BLANK, INDIVIDUALISM IN IDAHO: THE TERRITORIAL FOUNDATIONS 22 (1988).

¹⁹ *Gideon*, 372 U.S. at 344.

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No FAITH, No CREDIT, No UNION

Lisa Shultz

Courts examine the harm caused by limiting same-sex couples' rights

When a married couple moves to Idaho from another state, Idaho recognizes the marriage because of the Full Faith and Credit Clause of the United States Constitution, which states:

Full Faith and Credit shall be given in each State to the Public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.¹

Pursuant to this provision, states must extend "full faith and credit" to other states' public acts, records and court proceedings, including marriages.

So why is it that Wendy and Wilma's legal marriage from the state of Iowa is not honored in Idaho? The answer to this question goes back to March of 1996, when, with the stroke of Governor Phil Batt's pen, Idaho put into place a law allowing Idaho to refuse to recognize marriages performed in other states if the marriage "violate[s] the public policy of this state."² The statute specifically lists same-sex marriages as violating Idaho's public policy.³

Ten years later, Idaho's Constitution was amended to include a provision on marriage that states, "Marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state."⁴ The amendment goes further than the 1996 law, by eliminating any effort by an Idaho municipality to pass its own ordinance allowing same-sex marriage. Idaho's legislature was not alone in taking the dramatic step of amending its constitution over this issue: by 2006, 24 states had done the same.⁵

Full faith and credit clause and the federal defense of marriage act

These enactments appear to improperly circumvent the Full Faith and Credit Clause. However, the Defense of Marriage Act or "DOMA"⁶ provides at least superficial justification for them. DOMA was enacted in September 1996 (six months after Idaho's parallel statute or "mini-DOMA" was passed). In Section 3, it defines marriage for purposes of federal laws and regulations as being "only a le-

Wendy and Wilma who married in Iowa but then move to Idaho lose the marriage benefits they were receiving in Iowa.

gal union between one man and one woman as husband and wife."⁷ Moreover, it allows states to do just what Idaho has done: deny recognition to marriages it does not like. Section 2 of the law states, "No State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . or a right or claim arising from such relationship."⁸

Thus, DOMA purports to permit states to simply ignore the Full Faith and Credit requirement, albeit only for decrees, acts, or records that relate to same-sex marriage. The result is that such marriages end at state borders. Consequently, the United States now has a messy patchwork of laws surrounding same-sex marriage. Some states, such as Idaho, have laws prohibiting recognition of same-sex marriage. Others, such as Washington, not only do not forbid recognition of same-sex marriages from other states, but recognize same-sex marriage on equal footing with opposite-sex marriage.⁹

There are harsh effects on same-sex couples as a result of DOMA and the states' mini-DOMAs. First, marriage benefits are not portable between states. Therefore, Wendy and Wilma who married in Iowa but then move to Idaho lose the marriage benefits they were receiving in Iowa. This makes it necessary for them to do such things as revise wills and create medical powers of attorney. Further, even if a state recognizes a marriage, the federal government does not. This means, for example, that Wendy and Wilma are able to file state tax returns in Iowa but would have to file their federal returns as unmarried individuals. In fact, according to the Government Accountability Office, there are 1,138 discrete benefits, rights, and privileges that flow to individuals as a result of being married under federal

law, including the protection against being compelled to testify against each other in court and the right to the spouse's social security benefits.¹⁰

Challenges to DOMA

Courts around the country have begun to hold that DOMA violates the Constitutional rights of people in same-sex relationships. The increased litigation over DOMA derives in large part from a February 2011 announcement by Attorney General Eric Holder that the Obama administration would no longer defend the constitutionality of the section of DOMA that defines marriage, for purposes of federal law, to exclude same-sex couples.¹¹ As a result, the Attorney General's office is not participating in challenges to DOMA brought in federal court. Other organizations have had to step in to defend the statute.

On December 7, 2012, in a conference wherein the Supreme Court considered ten petitions that have been filed regarding same-sex marriage, the court granted the writs of certiorari for two cases.¹³ The court elected to review one case relating to Section 3 of DOMA¹⁴ (allows the federal government to refuse to recognize same-sex marriages) and another pertaining to the constitutionality of California's Proposition 8, a 2008 ballot initiative that stripped away the right of same-sex couples to legally marry, by an amendment to California's state constitution. The court is expected to hear arguments as soon as March, with decisions expected by the end of June. Neither case challenges Section 2 of DOMA, which is the section relevant to the full faith and credit inquiry

The California case, or *Hollingsworth v. Perry* (formerly known as *Perry v. Schwarzenegger*, then *Perry v. Brown*), has been one of the most high-profile legal battles pertaining to same-sex marriage. Proposition 8, a 2008 voter-approved measure added a new provision

to the California Constitution, providing that “only marriage between a man and a woman is valid or recognized in California.”¹⁵ A federal judge found the provision discriminatory and struck it down, and the Ninth Circuit Court of Appeals upheld the District Court’s ruling.¹⁶

Windsor, the other case the Supreme Court has elected to hear, stems from a Second Circuit Court of Appeals decision that upheld a ruling finding DOMA unconstitutional, which, significantly, applied a heightened scrutiny standard in its equal protection analysis.¹⁷ In that case, one of the women in a same-sex marriage passed away in 2009 after a long struggle with multiple sclerosis. She left her estate to her surviving spouse. Though their marriage is recognized by the state of New York, it is not recognized by the federal government because of DOMA. Therefore, the surviving spouse was forced to pay the federal government over \$300,000 in inheritance tax. On October 18, 2012, the Second Circuit issued its opinion, stating, “It is easy to conclude that homosexuals have suffered a history of discrimination. Thus they are part of what the law refers to as a ‘quasi-suspect’ class that deserves any law restricting its rights to be subjected to a ‘heightened scrutiny.’”¹⁸

Most of other petitions that were considered during the December 7th conference involve federal benefits for surviving spouses of same-sex marriages.¹⁹ These surviving spouses have sought a range of federal benefits, including Social Security, private pension survivor payments, access to federal employee health insurance, and the right to file a joint federal income tax return. Another case concerns a federal court employee who was allowed, under a court order, to add her wife to her health insurance coverage.²⁰ These cases will also be affected, depending on how the court rules in Windsor.

In both the Proposition 8 case, and Windsor, essentially the same issue will be front and center: whether legally married gay Americans can be denied the range of benefits that are otherwise extended to married couples. If Section 3 of DOMA is indeed repealed or invalidated, federal law will no longer define marriage as being between one man and one woman, and marriage will be determined by each state.

Depending on the scope of a United States Supreme Court ruling on same-sex marriage, state laws in Idaho and dozens of other states denying same-sex couples the right to marry could be subject to legal

“It is easy to conclude that homosexuals have suffered a history of discrimination. Thus they are part of what the law refers to as a ‘quasi-suspect’ class that deserves any law restricting its rights to be subjected to a ‘heightened scrutiny.’”

— Second Circuit Court of Appeals

challenges. States’ refusals to recognize marriage — and often even benefits that are related to marriage — have drastic effects on these families.

A particularly harsh consequence has been suffered by the children of same-sex parents. Idaho’s prohibition on same-sex marriage has been used by at least one district court to forbid a non-biological parent to adopt her same-sex partner’s child. The rationale is that because the legislature forbids same-sex marriage, the legislature, if it ruled on this, would use that same public policy to prohibit adoption of Wilma’s biological daughter by Wendy.²¹ The logic is apparently that adoption by a same-sex partner is a “gateway” to same-sex marriage or to an impermissible recognition of its validity.

Additionally, many employers offer healthcare benefits for spouses; however, the marriage must be legal in the state where the couple resides. Wendy therefore cannot be on Wilma’s benefits in Idaho even though she was when they lived in Iowa.

An objective application of the law requires that those opposed to same-sex marriage set aside their personal beliefs in favor of the very principle upon which our nation was formed, that everyone is created equal. Courts are now finding that there is no basis, whether rational basis review or heightened scrutiny review, to limit the rights to the basic fundamental freedom to marry. A right enjoyed exclusively by one class of citizens, to the exclusion of another, for no rational reason, cannot stand. This analysis was applied to the fight for women to vote and for blacks to have the same rights as whites. Bestowing upon same-sex relationships the rights and responsibilities of marriage is not only required by the Constitution, but it will also solve the problems created by different treatment of marriage by differ-

ent states, and remove this divisive and distracting issue from the national debate. The sooner we can resolve this issue, the closer we come to a more perfect union.

Endnotes

¹ U.S. Const. art. IV, § 1.

² Idaho Code § 32-209 (1996).

³ *Id.* Also, Idaho defines marriage as “a personal relation arising out of a civil contract between a man and a woman.” Idaho Code § 32-201 (1996).

⁴ IDAHO CONST. art. III, § 28. The State Senate voted 26 to 9 to ratify this amendment, which had been approved by the House of Representatives.

⁵ *List of U.S. state constitutional amendments banning same-sex unions by type*, WIKIPEDIA, NOV. 18, 2012, http://en.wikipedia.org/wiki/List_of_U.S._state_constitutional_amendments_banning_same-sex_unions_by_type.

⁶ Defense of Marriage Act, 1 U.S.C. § 7 & 28 U.S.C. § 1738C (1996).

⁷ 1 U.S.C. § 7 (1996) (“Section 3”).

⁸ 28 USC § 1738C (1996).

⁹ Referendum 74 was passed by Washington voters on November 6, 2012. *See November 06, 2012 General Election Results: Referendum Measure No. 74 Concerns marriage for same-sex couples*, NOV. 27, 2012, WASHINGTON SECRETARY OF STATE, <http://vote.wa.gov/results/current/Referendum-Measure-No-74-Concerns-marriage-for-same-sex-couples.html>.

¹⁰ Letter to Bill Frist, Majority Leader United States Senate, from Dayna K. Shah, Associate General Counsel, United States General Accounting Office, *GAO-04-353R Defense of Marriage Act Subject: Defense of Marriage Act: Update to Prior Report* (January 23, 2004), available at <http://www.gao.gov/assets/100/92442.html>.

¹¹ Letter from Eric H. Holder, Jr., U.S. Attorney Gen., to John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011) (“DOMA Letter”), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>. The letter was required by 28 U.S.C. § 530D(a)(1)(B)(ii) (2006) (“The Attorney General shall submit to the Congress a report of any instance in which the Attorney General or any officer of the Department of Justice . . . determines . . . to refrain (on the grounds that the provision is unconstitutional) from defending or asserting, in any judicial, administrative, or other proceeding, the constitutionality of any provision of any Federal statute . . .”). Holder noted, however, that the administration would continue enforcing DOMA. *Id.*

¹² The Bipartisan Legal Advisory Group of the House of Representatives (“BLAG”) has been actively defending DOMA in legal challenges since Attorney General Eric Holder’s pronouncement.

¹³ *ORDER LIST: 568 U.S., December 7, 2012*, available at http://www.supremecourt.gov/orders/courtorders/120712zr_3f14.pdf.

¹⁴ *Windsor v. U.S.*, 699 F.3d 169 (2d Cir. 2012).

¹⁵ *Proposition 8 Official Voter Information Guide*, CALIFORNIA GENERAL ELECTION, July 28, 2008, available at <http://voterguide.sos.ca.gov/past/2008/general/title-sum/prop8-title-sum.htm>.

¹⁶ *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012).

¹⁷ *Windsor v. U.S.*, 699 F.3d 169 (2d Cir. 2012).

¹⁸ *Id.* Judge Jacobs' opinion went on to say, "[T]he court's legal analysis sidesteps the fair point that same-sex marriage is unknown to history and tradition, but those are questions concerning 'holy matrimony,' not the 'civil status' recognized under the laws a state may enforce and dissolve." *Id.*

¹⁹ One is *Pedersen v. Off. of Personnel Mgt.*, No. 3:10-CV-1750 VLB, 2012 WL 3113883 (D. Conn. July 31, 2012) (holding that Section 3 of DOMA is unconstitutional). Another is *Massachusetts v. U.S. Dept. of Health and Human Services*, 682 F.3d 1, 16 (1st Cir. 2012) (same).

²⁰ *Golinski v. U.S. Office of Personnel Management*, 824 F. Supp. 2d 968 (N.D. Cal. 2012).

²¹ Ada County District Court redacted opinion, available from author. ("I.C. 32-209 explicitly states that same-sex marriages violate the public policy of this state. I.C. 32-201 and 32-202 only allow marriage between a man and a woman. The court concludes that the legislature either did not anticipate or did not intend that one same sex partner could adopt his or her partner's biological child. Since public policy in each state is determined by elected legislators, not courts, the court is constrained to dismiss this petition.")

About the Author

Lisa Shultz is an attorney at *C.K.Quade Law, PLLC*. In addition to family law, estate planning, guardianships, probate, education law, and em-

ployment law, her practice includes a concerted effort to reach out to the LGBT (Lesbian, Gay, Bisexual & Transgender) community, providing legal as well as educational resources with regard to rights of couples, families with children, employees, and employers. A member of the Idaho Bar since 1997, Ms. Shultz is also a participant in the Idaho State Bar's Idaho Academy of Leadership for Lawyers, class of 2013.



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IDAHO WOMEN LAWYERS WELCOME MESSAGE

Nicole Hancock

Idaho Women Lawyers is proud to co-sponsor this edition with the Diversity Section of the Bar. Idaho Women Lawyers is a dynamic organization with a mission of advancing diversity in Idaho through the promotion of equal rights and opportunities for women in the legal profession. As you can see from the articles in this edition, women are far from achieving equality with our professional white male counterparts. We hope that by raising awareness and by providing focused efforts toward improving our profession we can make significant strides toward improving the opportunities available to women in our Bar and to shrink the inequalities between the incomes of men and women.

IWL's members enjoy opportunities to gather once a month for educational and professional networking lunches, and our members can tap into IWL's support and assistance when applying for judicial positions. IWL has created a mentorship program, whereby 3rd year law students and newer lawyers are partnered up with more senior attorneys in our Bar. There is also a social component, as IWL hosts various events for our members to network with one another and members can be added to our 200+ referral directory. IWL recently rolled out its "Positions

and Pipelines," an elaborate tracking mechanism to see where leadership or new professional opportunities will be opening in the future and we help identify avenues for our members to achieve their professional goals. In sum, IWL is a comprehensive support network for our members that culminates this year with our inaugural "Celebrating Women in the Law: Making History" dinner on March 14, 2013. For more information about Idaho Women Lawyers and what is happening, please visit our website at www.idahowomenlawyers.com.

About the Author

Nicole Hancock is a trial partner in the Boise office of Stoel Rives and President of the Idaho Women Lawyers. Nicole works with Agribusiness companies, serving as outside general counsel for their day to day legal needs as well as litigating their corporate disputes. She is Chair of Stoel Rives' Agribusiness Initiative, providing strategic direction and management for Stoel Rives' Agribusiness practices that span across Stoel Rives' seven offices in the Pacific Northwest and in Minnesota. Nicole also serves on the Advisory Board for the 2013 Women in Agribusiness Summit.



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50 YEARS OUT FROM *MAD MEN* ARE THINGS REALLY THAT DIFFERENT?

Erika Birch

With small kids at home we don't watch a lot of television. But my husband finally convinced me to sign up for Netflix streaming, which led to our addiction to the TV series *Mad Men*. For those of you who have not seen an episode, it depicts a New York City advertising agency in the 1960s and reflects the social mores of that era. I had a hard time sitting through the first couple of episodes. Male chauvinism was rampant and sexism explicit. However, by the third or fourth episode, I found myself enough intrigued by the story line and the characters to continue watching. It got me thinking — was the workplace really like that back then? It turns out, sadly, that in many cases it was.

As someone who practices in the area of employment law, I often represent women in sex discrimination and sexual harassment claims, so I get frequent opportunities to gauge whether things are really that different today. By way of this article I offer up my opinion, informed by years of handling sex discrimination cases, that workplace sex discrimination like that depicted in *Mad Men* still exists today.

The history of Title VII & protection for women in the workplace

In June of 1963, President Kennedy called for a bill to give all Americans equal access to public places and voting rights — a clear response to the protests against racial segregation and discrimination in our country at that time. The House Judiciary Committee strengthened the bill by adding protections against racial discrimination in the workplace. It wasn't until after Kennedy's assassination that the bill actually had a glimmer of a chance of passage. With President Johnson in the White House pushing for passage of a civil rights bill and public opinion building in favor, the House passed the bill in early 1964 and was sent to the Senate. After some political and procedural finagling, the bill came before the full Senate in March. There was strong opposition from some senators (such as Strom Thurmond), which led to a 57-day filibuster that resulted in a substitute bill.

Notably, the bills did not protect women from discrimination in the workplace. The prohibition against sex discrimination was added as a last-minute amendment on the floor of the House and quickly passed without discussion. Historians have de-

The prohibition against sex discrimination was added as a last-minute amendment on the floor of the House and quickly passed without discussion.

bated whether including protections for women was a well-intentioned amendment or an attempt to kill the bill, because there were many men in Congress who did not favor prohibiting sex discrimination even though they were in favor of prohibiting race discrimination. In fact, the Congressional Record reflects that the amendment was greeted by laughter.¹ Nonetheless, the bill passed through both houses and was signed into law by President Johnson on July 2, 1964. Title VII of the Civil Rights Act of 1964 is still in effect today and has been strengthened by amendments, most notably those enacted in 1991.

50 years later . . .

So here we are, nearly 50 years later. There have been a tremendous number of decisions in the area of sex discrimination in employment. United States Supreme Court cases include the following:

- In 1971, the first U.S. Supreme Court sex discrimination case under Title VII held that sex-plus discrimination, discrimination based on a combination of sex plus another characteristic (in this case having preschool-aged children), was illegal. In that case, the employer had a hiring policy which refused to hire women with preschool-aged children (on the theory that they would be less reliable) but hired men with preschool-aged children and women without children in preschool.²
- In 1986, the Court held that sexual harassment was a form of illegal sex discrimination. The case involved a bank employee that was pressured into having a sexual relationship with her boss.³
- In 1989, the Court held that sex stereotyping was prohibited under Title VII. In that case, Price Waterhouse refused to promote a woman and indicated that she could have improved her chances of making partner if she had “walk[ed] more

femininely, talk[ed] more femininely, dress[ed] more femininely, [had] her hair styled, and [worn] jewelry.”⁴

- In 1991, the Court held that even well-intentioned protections of women in the workplace constituted a form of illegal discrimination. In that case, the employer's policy barred the participation of women in occupations that could be detrimental to their reproductive capacities.⁵
 - In 1998, the Supreme Court held that same-sex harassment, to the extent it is based on sex, is also actionable. The case involved a male employee who was sexually harassed and assaulted (even threatened with rape) by his male coworkers.⁶
 - Also in 1998, the Court ruled that employers could be vicariously liable for sexual harassment by their supervisors.⁷
- Congress has also contributed to changes to Title VII, typically in response to Supreme Court decisions.

- Most significant were the 1991 amendments which provided that emotional distress and punitive damages could be awarded for discrimination (with varying caps depending on the size of the employer). The amendments also allowed a plaintiff to recover attorneys' fees even if an employer had successfully proved its mixed motive defense (that despite discriminating against the plaintiff, it would have made the same employment decision anyway).
- The Lilly Ledbetter Fair Pay Act of 2009 amended Title VII by providing that the statute of limitations for filing an equal pay lawsuit resets with each new paycheck affected by that discriminatory action.
- And, nearly every year since 1994, Congress has sought to explicitly prohibit discrimination on the basis of sexual orientation and gender identity. While un-

successful thus far, the EEOC ruled just this year that Title VII prohibits discrimination on the basis of gender identity, and several circuits have held the same.⁸

In my own practice

I have practiced employment law in Colorado, Utah, and Idaho over the last 12 years, and I always seem to have a steady stream of sex discrimination cases, including sexual harassment issues and the more traditional sex discrimination claims. In my practice, I see sex discrimination continuing to manifest itself in the following ways: 1) holding women to higher performance standards than their male counterparts; 2) discounting women for being too aggressive or too emotional; 3) assuming women won't take their career seriously because they have family obligations; or 4) failing to provide the networking or social opportunities that can be so critical to upward mobility in one's career because they don't golf, fish, or play ball. These cases, though only anecdotal evidence, suggest that discrimination against women in the workplace is still a real problem even with the strong legislation and case law described above.

For example, I recently had a case in Idaho that involved an older professional woman whose younger, married male boss grabbed her buttocks in a crowded room during a business meeting. The more egregious harassment cases I have seen involve women raped by coworkers or supervisors with a pattern of such behavior.

However, in many cases, the discrimination is more subtle, covert, and perhaps even subconscious or unconscious. We represent a woman who worked for the federal government and was passed over for a promotion to a job that she had already been unofficially performing successfully for years. While the agency admitted she had superior technical abilities, it selected a male candidate, claiming he had better "leadership" qualities. The agency could point to nothing concrete or objective in support of his superior leadership qualities and it seemed clear to us (for a variety of additional reasons) that this was gender preference. The lower court found in favor of the agency, however. The case is now on appeal pending decision from the Tenth Circuit.

Likewise, we recently represented the former Director of the Idaho Transportation Department, Pamela Lowe, the first and only woman to hold that rank in Idaho. Ms. Lowe's allegations included

While the agency admitted she had superior technical abilities, it selected a male candidate, claiming he had better "leadership" qualities.

direct discriminatory comments ("no little girl will be able to run this department") as well as allegations of more subtle forms of discrimination (being judged more harshly or treated less favorably than her male counterparts). Ms. Lowe also had an equal pay claim based on the fact that her male successor was paid \$22,000 more per year than she had been. (It is significant that Idaho ranks 42nd in the nation for our gender pay gap. Idaho women make only 75.2% of what men make.⁹ The same is true in Idaho's top executive positions: the *Idaho Statesman* reported in March of this year that the median salary for the 11 women in Governor Otter's cabinet is \$85,445 compared to the \$103,002 median salary for the 33 Cabinet-level men.¹⁰)

Proving sex discrimination in many of these cases is difficult — and sometimes impossible — yet it is real and has lasting impacts. Without being able to hold companies accountable for this type of discrimination, it persists unabated. Thus, while I seldom encounter the kind of sexism that was as prevalent and obvious as portrayed in *Mad Men* (although shockingly, it does still occur on occasion), this engrained, subtle discrimination still permeates the workplace. Combating this type of discrimination may require different legal tools, but obviously starts with first recognizing and admitting that sex discrimination still exists despite 50 years of prohibition.

Endnotes

¹ Another amendment was added by Senator Bennett from my home state of Utah that allowed employers to differentiate on the basis of sex in determining the amount of the wages so long as it was lawful under the Equal Pay Act. See 42 U.S.C. § 2000e-2(h). This provision still stands today.

² *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971).

³ *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

⁴ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235

(1989).

⁵ *United Automobile Workers v. Johnson Controls, Inc.*, 499 U.S. 187 (1991).

⁶ *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998).

⁷ *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

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ARE WE THERE YET?!? A STATISTICAL VIEW OF EQUALITY FOR WOMEN IN IDAHO

Nicole Hancock

One recent Saturday morning, I sat at my dining room table next to my fourth-grade son, Joshua. He was working on his Idaho history project and learning about our great state. Joshua was listing the symbols represented in Idaho's state seal, along with an explanation for each one. The grain and plow represent agriculture, the miner represents the key role that mining plays in our state, and the woman represents justice and liberty. But what struck me was the next thing he read from his Idaho State Historical Society's flyer on state symbols: "*the fact that the woman is the same size as the man shows us that in Idaho, men and women are considered equal.*"¹ It just so happens that I was in the process of planning the inaugural "Celebrating Women in the Law: Making History" event to highlight women who have overcome the professional hurdles facing female attorneys in Idaho. I leaned over Joshua's shoulder to read a little further. Idaho's very first legislature adopted this state seal on March 14, 1891, the exact day (although not year) that Idaho Women Lawyers had set for our Celebrating Women in the Law Dinner!

Exactly 122 years later, on March 14, 2013, Idaho Women Lawyers will host its "Celebrating Women in the Law: Making History" event. My heart raced at the coincidental (or perhaps serendipitous) scheduling of the celebratory dinner on the same date that the seal representing equality between men and women was adopted in Idaho. To top it off, Idaho's seal is the only one in the country that was designed by a woman, Emma Edwards Green, perhaps revealing a foresight of the work Idaho would have to undertake to achieve equality between men and women.²

Despite the 122 years that have passed since the seal was adopted, women and minorities are still working toward equality in position, pay and representative status in Idaho's legal system. Here is how it all breaks down.

Women's wages in all professions

Women are paid less than men in every state and in Washington D.C.³ Comparing the states' lack of parity, Idaho ranks 42nd for women's wages, according to a U.S. Census study released in September 2012.⁴ For every dollar earned by a man in Idaho, a woman earns on average approximately \$0.75, which is less than



The first women lawyer in Idaho, Helen Louise Nichols Young.

the national average of \$0.77.⁵ According to the National Women's Law Center, the wage gap is even larger for Hispanic women, who earn \$0.54 for every dollar earned by a white, non-Hispanic man.⁶ Our neighbor, Utah, ranked 49th, with women's wages at 69% of men's, and Wyoming ranked last in the nation at 67%.⁷ The smallest pay gap was in Washington D.C., where women earned 90% of what men earned.

Women's wages in the legal profession

National wages for women within the legal profession showed great improvement between 2010 and 2011. According to the American Bar Association, a female lawyer's salary equaled \$0.77 for every dollar earned by a male lawyer in 2010.⁸ In 2011, that number increased to \$0.86.⁹ But before you start claiming victory for women lawyers, it is important to note that the number has fluctuated, reaching \$0.80 in 2008 but then dropping to \$0.74 in 2009.¹⁰ There have not been any studies to explain why the amounts have fluctuated so much over the past few years, but the dates correspond directly to rises and falls in the economy, suggesting that when the profession is flush there is less disparity in wages. But the question remains whether we can stay on the current trajectory for shrinking the disparity in the legal profession and equalizing the pay between female and male lawyers.

Number of women in the legal profession

There is a drastic difference between the number of men and women at the highest levels of the legal profession, which is not commensurate with the number of

Despite the 122 years that have passed since the seal was adopted, women and minorities are still working toward equality in position, pay and representative status in Idaho's legal system.

women who have been graduating from law school over the past quarter of a century. Approximately 45% of law students have been women over the last 25 years. According to a September 2012 survey by the American Bar Association, women make up approximately one-third of the total legal profession,¹¹ and the numbers are growing each year as the retiring generation, which mostly male, moves into inactive status. Despite incoming lawyers approaching a 50% representative status, the percentage of women steadily drops at each stage of progression through a legal career.

Summer associates are approximately 48% women, but associate hires drop to 45% women.¹² By the time women reach

partnership in private practice, they fill only 19.5% of non-equity partner positions, and that number drops to 15% for equity partners.¹³ Of the 200 largest law firms in the United States, only 5% have women as managing partners.¹⁴

Some of these statistics are likely attributed to the fact that attorneys from the older generation, who have the most experience and are thus promoted into the highest positions, are still mostly male. Also, some women attorneys may have made personal choices to stay home with children or work a reduced schedule, which would impact their promotional track. Yet women have represented approximately 45% of graduating law students for the past 25 years, and even accounting for those who have left the profession or reduced their schedules, there is still a drastically disproportionate number of men at the highest levels of the legal profession. And the disparity begins within just one year of graduation, before justifications based on experience or family choices would apply in most cases.¹⁵ It is clear that women are not progressing through the ranks proportionately to their male counterparts. And the same is reflected in the statistics for women in the judiciary.

Nationwide judiciary

As with the rest of the legal profession, women are not proportionately represented in the judiciary. The United States Supreme Court has three of its nine seats filled by women (Justice Ruth Bader Ginsburg, Justice Sonia Sotomayor and Justice Elena Kagan). In its history, of the 112 Justices ever to serve on the highest court in the land, only four have been women. Of course, Justice Sandra Day O'Connor is the fourth Justice, who served on the Supreme Court from 1981 to 2006.

The U.S. Courts of Appeals, with a total of 165 active judges, have a slightly lower percentage of women than the Supreme Court at 31.1%.¹⁶ And 24.1% of the 1,874 federal court judges in the United States are women.¹⁷ There are only 11 women of color on the United States Courts of Appeals.¹⁸ Five of those 11 women sit on the Ninth Circuit Court of Appeals, and there are seven federal Courts of Appeals without a single active minority woman judge.¹⁹

United States district courts have approximately 30% women on their bench.²⁰ For women of color, the numbers are even smaller. Sixty-five women of color serve as active federal judges across the country,



U.S. Supreme Court Justices Sonia Sotomayor, Ruth Bader Ginsburg and Elena Kagan.

including 33 African-American women, 24 Hispanic women, seven Asian-American women, and one woman of Hispanic and Asian descent.²¹ There are no Native-American women among the over 750 active federal district court judges in the country.²² All in all, the federal judiciary has hovered at or near approximately one-third of its bench as women.

State courts statistically sit near the 30% mark as well. Both final appellate jurisdiction courts (comparable to Idaho's Supreme Court) and intermediate appellate courts have 32% women on the bench.²³ General jurisdiction courts (trial courts) nationally have 25% women on the bench, while limited and special jurisdiction courts have approximately 31% women judges.²⁴ In total, all of the federal and state court judge positions combined are 27.1% women.²⁵ That number is up from 26.6% in 2011 and 26% in 2010.²⁶ So how does Idaho stack up against the country? Poorly to say the least.

Idaho's judiciary

Idaho's legal system clearly lacks parity between men and women, but even more markedly so when compared to the national statistics. Idaho ranks **LAST** in the nation concerning the number of women who sit on the bench in state courts, with 11.3%.²⁷ By way of comparison, Montana ranked first in the nation with 40.3%, and the next-in-line to Idaho is South Dakota at 13.6%.²⁸ Utah has 21.4% of its state bench filled by women,

The disparity begins within just one year of graduation, before justifications based on experience or family choices would apply in most cases.¹⁵

whereas Washington has 33.6% and Oregon has 37.7%.²⁹

Idaho is one of only two states without a woman on its Supreme Court (Iowa is the only other state supreme court with an all male bench). No women have been appointed to the Idaho Supreme Court since 1992 when Justice Linda Copple Trout was appointed by governor Cecil Andrus. Justice Trout was the first woman justice on the Idaho Supreme Court and served until 2007 when she stepped down from her position.³⁰

The Idaho Judicial Council, empowered to nominate to the governor candidates to fill vacancies in the Idaho Supreme

Court, Idaho Court of Appeals and Idaho district courts, is composed of six white men and one woman (Elizabeth Chavez was appointed in October 2012). Between 2003 and 2008, the Idaho Judicial Council was tasked with filling 21 vacancies on the bench.³¹ None of those positions was filled with a woman. By 2008 Governor Otter had appointed 34 men in a row to fill judicial positions in Idaho.³² There is a chilling effect to 34 successive appointments of men to the bench in Idaho. In fact, the number of women applicants was incredibly low during this time period, ranging from zero to 8% of the applicants.³³ Yet there is a silver lining: when female applicants total 25-30%, there is a direct correlation to an increase in the appointments of women to the bench in Idaho. In 2011, 26% of the applicants for the two judicial openings were women, and 30% of the applicants were women for the sole judicial vacancy in 2012.³⁴ All three of these judicial vacancies in 2011 and 2012 were filled with women, breaking a 34-straight male-appointment streak in Idaho.³⁵ However, due to retiring or departing women judges, Idaho did not net an increase in the number of women on the bench even with three successive appointments.

Idaho's federal bench received its first and as yet only female judge with the appointment of the Honorable Chief Magistrate Judge Candy Wagahoff Dale on March 31, 2008. Because she is one of eight federal judges in Idaho (not counting the Ninth Circuit judges or the Administrative Law judges), Judge Dale's solo appointment resulted in a higher percentage of women on the federal bench in Idaho (12.5%) than on the state bench in Idaho (11.6%). The American Bar Association reports that Idaho has zero women on the federal bench, but this is because it only counted district court positions, meaning there might be an even greater disparity between Idaho and other states if one were to take into account the magistrate positions.

Idaho's legal system

So it is clear that the Idaho bench has failed to make adequate progress regarding gender diversity, but what about the rest of the Bar? Currently, more than half of the Idaho State Bar district associations have women presidents. While only five out of 20 Idaho State Bar section chairs are women, that number has more than doubled since 2011. The current president of the Idaho State Bar Board of Commissioners is Molly O'Leary, but she is

Women Lawyers, I frequently ask myself, "What can we in Idaho do to improve the disparity between men and women, and between the majority and minorities, that puts us last in the nation?"

only the fifth female president out of 106 in our Bar's history (and all of the women came from the Fourth Judicial District). The other four commissioners are all men, which means that all successor presidents in line to rotate in for their term as President of the Idaho State Bar Board of Commissioners are men.

Why does it matter?

At this point, your mind must be swimming with numbers and you could be left asking yourself why it really matters anyway. The simple, if not obvious, answer is *balanced and proportional representation*. Having attorneys representing the population, whether it be in civil or criminal matters, and having a bench that is representative of the people it serves (in characteristics such as gender and race), is critical because it inspires trust and confidence in the legal system.

Judicial statistics reveal that balanced representation in a legal system makes a difference in whether people who historically have been marginalized feel encouraged to access its protections, and in overall perceptions of the system. One study demonstrated that male federal appellate court judges are less likely to rule against plaintiffs bringing claims of sex discrimination if a female judge is on the panel.³⁶ Balanced and proportional representation neutralizes this statistic and improves the quality of justice in our legal system.

Proportional representation is also cyclical: if women are not appointed to judicial positions, there is less visibility of the paths leading women into these positions, fewer applicants, and a smaller pool from which to select candidates. Certainly there are fewer mentors and role models when the benches are filled with men. How do we encourage our new female lawyers to seek a path toward the judiciary when there are so few role models and the percentages suggest that there is little likelihood that a woman will be se-

lected for a vacant position? By increasing women appointments to the bench, perhaps we can provide women attorneys with new role models and encourage more applicants for future vacancies.

Perhaps most importantly, balanced and proportional representation matters because a diverse perspective strengthens the entire judicial system simply by virtue of providing different viewpoints, different backgrounds, and different ways to interpret and apply the laws that govern our society. Certainly if 50% of the population is women, half of those interpreting and applying the laws should also be women.

Future of Idaho

So why, 122 years after Idaho recognized the goal of equality between men and women, is Idaho so far behind other states? As President of Idaho Women Lawyers, I frequently ask myself, "What can we in Idaho do to improve the disparity between men and women, and between the majority and minorities, that puts us last in the nation?"

We have to raise awareness of the issue, especially here in Idaho, where we are so far behind other states. Say it loudly and often: "We are not there yet! And we have to keep working to get there!" Educate those who make hiring decisions and those women who consider applying for these positions on the objective statistics so everyone is on the same page. Encourage *everyone* to find opportunities to promote and recognize women who have the skills and achievements for the promotion. Attend the inaugural "Celebrating Women in the Law: Making History" dinner on March 14, 2013, the 122nd anniversary of the adoption of Idaho's great seal. We are lucky that our Bar is small enough to allow us the opportunity to know one another and celebrate our colleagues' successes!

Endnotes

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- ⁵ *Id.*
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¹⁸ Women in the Federal Judiciary: Still a Long Way to Go, *supra* note xvi.

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²⁰ *Id.*

²¹ *Id.*

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²⁵ Refki et al., *supra* note xvii, at 1.

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³⁰ Nat'l Women's History Museum, *Women Wielding Power: Pioneer Female State Legislators*, <http://www.nwhm.org/online-exhibits/legislators/Idaho.html>.

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³⁴ *Id.*

³⁵ Slow Gains for Parity on the Bench, *supra* note xxxii.

³⁶ Women in the Federal Judiciary: Still a Long Way to Go, *supra* note xvi.

About the Author

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THE IMPACT OF MARRIAGE STRUCTURES ON WOMEN'S ADVANCEMENT

Lauren Stiller Rikleen

Editor's Note: Portions of this article originally appeared in the May 16, 2012 Harvard Business Review Blog Network.

Slow gains and a clogged pipeline

For decades, the media coverage and related research focusing on professional women in the workplace has followed a remarkably similar narrative. In all professions, women are not rising to leadership positions in parity with men, and still battle a gender gap in compensation. For women lawyers, the numbers have barely budged in more than a decade: the number of women equity partners hover around 13% to 15%, the compensation gap continues, particularly at the higher levels where there is greater discretion in bonus amounts, and the number of women who serve on the highest governing committees remains stagnant.

Clearly, the new millennium has not brought much progress for women seeking high level leadership positions in the workplace. The data shows surprisingly low and stagnant numbers with respect to women in top leadership roles: women represent 3% of Fortune 500 CEOs, less than 20% of the chief executives of large charities, and only 14% of executive officer positions.¹ Despite decades of women pouring out of colleges, graduate, and professional schools into the workforce, women are not being promoted to the highest levels of leadership in numbers commensurate with the size of the pipeline.

The glass ceiling at home

Notwithstanding decades of analysis focused on the institutional and individual challenges that affect women's advancement, the data remains troubling. A recent study, however, brings some new thinking to this vexing topic.² This research suggests that the reason for the stalled progress of women in the workplace may be due to the unlikeliest of reasons: the marriage structure of their male colleagues.

A collaboration of researchers from multiple universities looked at whether the home life of men in the workplace could be impacting the way in which they view women at work.³ This collaboration resulted in a study of attitudes and beliefs of employed men from homes where their wives: (a) did not engage in paid work; (b) worked part-time; or (c) were employed full-time. The findings raise critical issues about the unseen barriers that can affect

A collaboration of researchers from multiple universities looked at whether the home life of men in the workplace could be impacting the way in which they view women at work.³

women in the workplace. The data revealed that the employed husbands whose wives did not work outside the home or who worked part-time were more likely to:

1. Have an unfavorable view about the presence of women in the workplace;
2. Perceive their workplace was running less smoothly if there were higher percentages of women, compared to their perceptions of their workplace if there were less women;
3. Find workplaces that have female leaders as less desirable places to work; and
4. Evaluate female candidates for promotion as less qualified than comparable male colleagues.⁴

The researchers' conclusion that "marriage structures play an important role in economic life beyond the four walls of the house" raises profound questions about the opportunities for women to advance. As the study points out, the men who exhibited the resistance to women's advancement "are more likely to populate the upper echelons of organizations and thus, occupy more powerful positions."

So after years of struggling to advance, women in the workplace now learn that the glass ceilings they have been trying to penetrate may be located in the homes of their male colleagues. If men with wives at home taking care of their family's domestic needs are more likely to thwart the careers of women at work, what does it mean for the myriad efforts that have been underway to level the playing field?

The authors also reviewed decades of other data measuring attitudes and beliefs that demonstrate resistance to women's success outside the home. What they found corroborated that individual experiences are important to how individuals view gender roles and how they categorize others. Critically, this can be expressed unconsciously, which means that a male in the workplace may explicitly

state that he is supportive of women, even as his implicit/unconscious beliefs result in behaviors which contradict his conscious expressions.

Unconscious bias, conscious choices

These implicit reactions to one's individual experiences have significant repercussions for women seeking to advance. In a Harvard Business Review Research Report⁵, the Center for Work-Life Policy reported that men are much less likely to recognize ongoing gender bias, noting that only 28% of men, compared with 49% of women, see gender bias as still prevalent in the workplace. A white paper issued by the Center for Women in Law at the University of Texas School of Law reported that women who seek increased power may be co-opted in their efforts through the development of committees that marginalize the underlying objectives, or by being provided too few resources to be successful.⁶ And Harvard Professor Mahzarin Banaji has repeatedly documented, particularly through the Implicit Association Test, ways in which unconscious beliefs can be expressed in our everyday behaviors.⁷

I saw anecdotal examples of the study's findings in some of my own research for *Ending the Gauntlet: Removing Barriers to Women's Success in the Law*.⁸ Many of the women partners I interviewed described a lack of support and sponsorship from key men in their law firms. Several spoke of conversations with male colleagues who admitted that if married women succeed as equity partners in their firm, it would invalidate the choices that their own wives had made to leave their careers and be the primary caregiver at home while they climbed the path to partnership. These men viewed the decision to raise their children with a mom at home much or all of the time as

necessary for their own family unit. By extension, if a working mother colleague is highly successful in her career, it calls into question that choice and their spouses' career sacrifice.

A call for training and communicating

This new research on marriage structures, combined with years of data on unconscious bias, should encourage workplaces to rethink their past approach and programs devoted to women's advancement. In particular, there is clearly a need for training that focuses more on the unconscious impacts of our life choices. For example, if one's marriage structure unconsciously influences the evaluation of, and opportunities available to, those in the workplace who made different family choices, then training in unconscious bias and its full implications may help to develop awareness of these influences and lead to changes that can ameliorate their impacts.

Although researchers have been analyzing the effects of unconscious bias for decades, and social science literature is replete with fascinating examples of ways in which our implicit beliefs impact our explicit actions, training on these issues is not routinely conducted. Yet the research also provides reason for optimism that,

by understanding how our brain works in unconscious mode, we can develop strategies – both within our organizations and personally – that can override our implicit biases and result in more inclusive behaviors. Such training also has the opportunity to bring about open and honest conversations in the workplace, which can minimize barriers between work colleagues who have made different choices in their personal lives.

It is understandable that people want to see their choices – and, even more, their sacrifices – validated. But when that validation expresses itself in behaviors which make it difficult for talented individuals who have made different choices to advance, it is critical for workplace leaders to intervene. This study provides an important opportunity to bring new thinking to an old challenge.⁹ The sooner we can do that, the more likely it is that we can create a better work environment for both our sons and our daughters.

Endnotes

- ¹ Jennifer B. McKim, "Narrowing the Gap", Diversity Boston, The Boston Globe (Winter 2012).
- ² Sreedhari Desai, Dolly Chugh, and Arthur Brief, "Marriage Structure and Resistance to the Gender Revolution in the Workplace," Social Science Research Network, (March 12, 2012).
- ³ Id.
- ⁴ Id.

⁵ Sylvia Ann Hewlett, Kerrie Peraino, Laura Sherbin, Karen Sumberg, "The Sponsor Effect: Breaking Through the Last Glass Ceiling", Harvard Business Review, (January 12, 2011).

⁶ Linda Bray Chanow and Lauren Stiller Rikleen, "Power in Law: Lessons from the 2011 Women's Power Summit on Law and Leadership," Center for Women in Law, University of Texas School of Law, (January, 2011), http://www.utexas.edu/law/wp/wp-content/uploads/centers/cwil/Summit_White_Paper-FINAL.pdf.

⁷ See, Project Implicit: <https://implicit.harvard.edu/implicit/>.

⁸ Lauren Stiller Rikleen, *Ending the Gauntlet: Removing Barriers to Women's Success in the Law*, Thomson Legalworks, (March, 2006).

⁹ Supra, note 3.

About the Author

Lauren Stiller Rikleen is president of the Rikleen Institute for Strategic Leadership and the Executive-in-Residence at the Boston College Center for Work & Family in the Carroll School of Management. The author of *Ending the Gauntlet: Removing Barriers to Women's Success in the Law and Success Strategies for Women Lawyers*, Lauren is writing a book on the Millennial generation in the workplace.



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COURT INFORMATION

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Jim Jones
Warren E. Jones
Joel D. Horton

Regular Spring Term for 2013

Boise. January 9, 11, 14, 16, and 18
Boise. February 11, 13, 15, 20, and 22
North Idaho. April 2, 3, 4, and 5
Boise. April 10
Eastern Idaho. May 1, 2, and 3
Boise. May 8 and 10
Twin Falls. June 4 and 5
Boise. June 3, 10, and 12

By Order of the Court
Stephen W. Kenyon, Clerk

NOTE: The above is the official notice of the 2013 Spring Terms of the Supreme Court of the State of Idaho, and should be preserved. A formal notice of the setting of oral argument in each case will be sent to counsel prior to each term.

OFFICIAL NOTICE COURT OF APPEALS OF IDAHO

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

1st Amended Regular Spring Terms for 2013

Boise. January 8, 10, 15, and 17
Boise. February 12, ~~14~~, 19, and 21
Boise. March 12 and 14
Moscow. March 19 and 20
Boise. April 9, 11, 23, and 25
Boise. May 14, 16, 21, and 23
Boise. June 11, 13, 18, and 20

By Order of the Court
Stephen W. Kenyon, Clerk

NOTE: The above is the official notice of the 2013 Spring Terms of the Court of Appeals of the State of Idaho, and should be preserved. A formal notice of the setting of oral argument in each case will be sent to counsel prior to each term.

Idaho Supreme Court Oral Argument for January 2013

Wednesday, January 9, 2013 – BOISE

8:50 a.m. State v. Robert Lyle Barton, Jr. #38405-2011
11:10 a.m. Gary Duspiva v. Clyde Fillmore #38480-2011

Friday, January 11, 2013 – BOISE

8:50 a.m. Bud Rountree v. Boise Baseball, LLC
. #38966-2011 (Permissive Appeal)
10:00 a.m. State v. Woodrow John Grant
. #38325/38326/38327-2010
11:10 a.m. Larry Hansen v. Matthew Roberts
. #38904-2011

Monday, January 14, 2013 – BOISE

8:50 a.m. Mosell Equities v. Berryhill & Co.
. #38338-2010
10:00 a.m. State v. Russell G. Jones (Petition for Review)
. #39519-2012

Wednesday, January 16, 2013 – BOISE

8:50 a.m. Idaho State Bar v. Bobby E. Pangburn
. #38215-2010
10:00 a.m. Horst Muttscheller v. Klaus Greger . #38025-2010
11:10 a.m. Rita Hoagland v. Ada County #38775-2011

Friday, January 18, 2013 – BOISE

8:50 a.m. Martin Bettwieser v. New York Irrigation Dist.
. #37396-2010
10:00 a.m. Seiniger Law Offices v. Nampa Lodging
Investors #38037-2010 (Industrial Commission)
11:10 a.m. State v. Faron Raymond Hawkins . . . #38532-2011
(Permissive Appeal)

Idaho Court of Appeals Oral Argument for January 2013

Tuesday, January 8, 2013 – BOISE

10:30 a.m. State v. McLellan #39102-2011

Thursday, January 10, 2013 – BOISE

10:30 a.m. State v. Elias #39139-2011
1:30 p.m. Davidson v. Soelberg #39595-2012

Tuesday, January 15, 2013 – BOISE

9:00 a.m. State v. Russo #38404-2011
10:30 a.m. State v. Fifer #39591-2012

Thursday, January 17, 2013 – BOISE

9:00 a.m. Barcella v. State #39520-2012
10:30 a.m. State v. Wolfe #38896-2011



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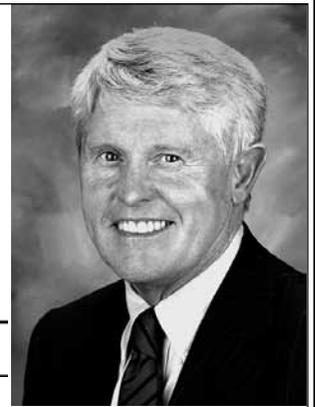
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Mr. Burke is the Northwest Region Director for DRI, serves as the Board Liaison to the DRI Medical Liability and Health Care Law Committee, and is the State Liaison for the DRI Drug and Device Committee.

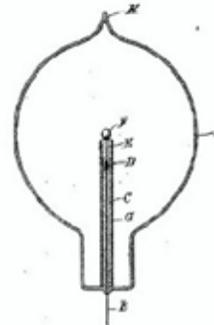
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Idaho Supreme Court and Court of Appeals
NEW CASES ON APPEAL PENDING DECISION
(Updated 12/1/12)

CIVIL APPEALS

Attorney fees and costs

1. Whether the defendant/counter-claimant, ICI, can be designated the prevailing party for purposes of attorney fees in view of its abandonment of its contract claim, and the aspects of the jury verdict finding that ICI was in breach of the contract, that ICI failed to prove that AMD committed fraud as a defense to ICI's breach of contract and that ICI was not entitled to any damages?

*Advanced Medical Diagnostics v.
Imaging Center of Idaho*
S.Ct. No. 39753
Supreme Court

Clerical error

1. Whether the magistrate erred when it denied Edward's Rule 60(a) motion to correct a clerical error because no affidavit or live testimony was presented, without examining the court record for error.

DeGues v. DeGues
S.Ct. No. 39931
Court of Appeals

Contract

1. Whether the district court erred in granting summary judgment to the defendants on the basis that no contract of insurance existed.

*Shapley v.
Centurion Life Insurance Co.*
S.Ct. No. 39784
Supreme Court

Liens

1. Did the court err by not considering the priority of American Bank's mortgage over Wadsworth's claim of lien and thereby allowing Wadsworth to recover \$2.4 million from the lien release bond when Wadsworth would have recovered nothing by foreclosing its claim of lien against the property?

*American Bank v.
Wadsworth Golf Const.*
S.Ct. No. 39415
Supreme Court

Post-conviction relief

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

Perez v. State
S.Ct. No. 38892/38893
Court of Appeals

Procedure

1. Whether the appellants' failure to timely answer the complaint was the product of mistake, inadvertence, surprise or excusable neglect such that the motion to set aside default should have been granted.

Mickey v. Halinga
Docket No. 39973
Court of Appeals

CRIMINAL APPEALS

Credit for time served

1. Did the court err in denying a motion to amend judgment to include credit for time served as a condition of probation that the court had previously credited?

State v. Hoid
S.Ct. No. 39304
Court of Appeals

Evidence

1. Did the court err in allowing an emergency room physician to present expert testimony as to whether pictures of the victim's neck showed bruising consistent with strangulation injuries?

State v. Schulz
S.Ct. No. 3900
Court of Appeals

2. Was there substantial evidence of Stark's guilt to sustain his conviction for DUI?

State v. Stark
S.Ct. No. 39885
Court of Appeals

Motion to dismiss

1. Did the court err in denying Cordingley's motion to dismiss and in finding he did not establish that smoking marijuana is an exercise of his religious beliefs?

State v. Cordingley
S.Ct. No. 39518
Court of Appeals

Pleas

1. Did the court err in denying Thomas' motion to withdraw his guilty plea after sentencing?

State v. Thomas
S.Ct. No. 39374
Court of Appeals

2. Did the State breach the plea agreement when it submitted a restitution claim on behalf of the State Insurance Fund?

State v. Acuna
S.Ct. No. 39678
Court of Appeals

Probation revocation

1. Did the court abuse its discretion when it revoked Day's probation?

State v. Day
S.Ct. No. 39165
Court of Appeals

Prosecutorial misconduct

1. Did the court err by denying Maynard's motion for mistrial based on prosecutorial misconduct for violating a stipulation not to mention certain information?

State v. Maynard
S.Ct. No. 38695
Court of Appeals

Search and seizure – suppression of evidence

1. Did the court err in denying Cargile's motion to suppress evidence found in a search of her car and in finding the stop was not unreasonably extended?

State v. Cargile
S.Ct. No. 38855/38867/38868
Court of Appeals

2. Did the district court err when it concluded that consent to search one room of the house did not grant consent to enter the house?

State v. Greco
S.Ct. No. 39618
Court of Appeals

Statutory interpretation

1. Was the act of accessing the engine compartment of a truck an unlawful entry into the truck under the burglary statute?

State v. Sexton-Gwin
S.Ct. No. 39352
Court of Appeals

Summarized by:
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Supreme Court Staff Attorney
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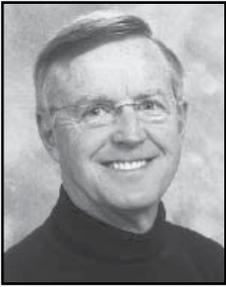
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IDAHO'S NEW JUDICIARY IN 2012

Hon. Michael McLaughlin

As of October 19, 2012 there have been 11 new Idaho judges appointed: two new District Judges and nine new Judges of the Magistrate Division.

In the Third Judicial District

Hon. Molly Huskey was appointed as a District Judge for the Third Judicial District, effective January 16, 2012, filling the vacancy created by the retirement of Judge Gregory Culet.

Molly Huskey earned her law degree from the University of Idaho. Prior to her appointment to the bench, she served as State Appellate Public Defender beginning in 2002, when she was appointed by then-Governor Dirk Kempthorne. She was reappointed to that position by Governor Otter in 2008 and again in 2011. Prior to her service as State Appellate Public Defender, she was a deputy prosecutor and a deputy public defender in Bonneville County.



Hon. Molly Huskey

Hon. Jayme Beaber Sullivan was appointed as a Magistrate Judge for the Third Judicial District, effective July 9, 2012, filling the vacancy created by the retirement of Judge Robert Taisey.

Judge Sullivan received her undergraduate and law degree from the University of New Mexico. She began her law practice in Boise, at Herrington Law Offices. She was associated with Wiebe & Fouser, P.A. law firm for six years practicing criminal defense law as a public defender in addition to practicing in the areas of divorce, adoption, immigration and administrative law. For the five years prior to her appointment, Ms. Sullivan had been in general practice with the law office of Cofel & Beaber, P.C. in Nampa. Ms. Sullivan was involved as a core team member of Canyon County's first problem solv-



Hon. Jayme Beaber Sullivan

Ms. Sullivan was involved as a core team member of Canyon County's first problem solving court, the felony drug court, and she served on the committee that drafted the guidelines and regulations for the Canyon County Mental Health Court.

ing court, the felony drug court, and she served on the committee that drafted the guidelines and regulations for the Canyon County Mental Health Court.

In the Fourth Judicial District

Hon. Lamont Berez was appointed as a Magistrate Judge for Valley County in the Fourth Judicial District, effective April 2, 2012, filling the vacancy created by the retirement of Judge Henry Boomer.

Judge Berez has served as a magistrate judge assigned to the juvenile court in Ada County, since 2008. From 2001-2008, he was employed with the Ada County Prosecutor's Office. From 2000-2001, Judge Berez worked as an associate attorney for the Stoel Rives law firm in Boise. Judge Berez holds a Bachelor's of Art degree in Biology from Andrews University in Berrien Springs, Michigan and a J.D. from the University of Virginia School of Law.



Hon. Lamont Berez

Hon. Lynnette McHenry was appointed as a Magistrate Judge for Ada County in the Fourth Judicial District, effective July 2, 2012, filling the vacancy created by Judge Berez's appointment to the bench in Valley County.

Prior to her appointment, Judge McHenry was employed as Senior Counsel at Naylor and Hales law firm in Boise. She also served as a Hearing Officer for the Idaho Department of Education, Special Education Division and as the Loss Control Officer for the Idaho Counties Risk Management Program (ICRMP),

where she provided loss control legal advice and training to over 750 ICRMP members.

From 1995-2000, Judge McHenry served as Chief Deputy Prosecutor for the Nez Perce County Prosecutor's Office, where she handled all civil matters for the county, including juvenile and child protection, as well as misdemeanor and mental commitment hearings. Judge McHenry holds a Bachelor's of Science degree from Lewis-Clark State College and a J.D. from the University of Idaho, School of Law.



Hon. Lynnette McHenry

Hon. Melissa Moody was appointed as a District Judge for the Fourth Judicial District, effective July 30, 2012, filling the vacancy created by the retirement of Judge Michael McLaughlin.

Judge Moody is an Illinois native with degrees from the University of Illinois, Penn State University and the Cornell University law school in central New York. Prior to her appointment, Judge Moody served as a law clerk to former Idaho Supreme Court Justice Gerald Schroeder, as an Ada County deputy prosecutor, a deputy attorney general in the Criminal Appellate Division, a city prosecutor in Nampa, and a deputy attorney general in the Civil Liti-



Hon. Melissa Moody

gation Division before becoming head of Special Prosecutions. She also worked as a criminal law specialist for the American Bar Association in Tbilisi in the former Soviet republic of Georgia.

In the Fifth Judicial District

Hon. Rick Bollar was appointed as a Magistrate Judge for Minidoka County in the Fifth Judicial District, effective July 2, 2012, filling the vacancy created by the retirement of Judge Larry Duff.

Judge Bollar had been serving as the Cassia County Magistrate Judge since his appointment to the bench in November of 2003. While serving in that capacity, he also presided over a regular caseload of criminal proceedings in Minidoka County and was the presiding judge of the Mini/Cassia Domestic Violence Court. He currently serves as the president of the Statewide Magistrates Association. Prior to his appointment to the bench in 2003, he served as the Minidoka County Prosecutor and in a partner with Goodman & Bollar Law. He also worked with the law firms of Benoit, Alexander & Sinclair; Ling, Nielsen & Robinson; and Creason & Bollar. In addition, he served as city attorney for City of Rupert for 12 years; the City of Acequia for 11 years; the City of Minidoka for 10 years and had represented the cities of Heyburn and Paul in criminal prosecutions. Judge Bollar earned his J.D. degree from the University of Idaho College of Law.



Hon. Rick Bollar

Hon. Calvin Campbell was appointed as a Magistrate Judge for Twin Falls County in the Fifth Judicial District, effective September 10, 2012, filling the vacancy created by the resignation of Judge Nicole Cannon.

Judge Campbell has an extensive prosecutorial background and before his appointment to the bench, served as elected Prosecutor for Gooding County beginning in 2005. He also served as the Camas County Prosecutor and as deputy prosecuting attorney for the Twin Falls County Prosecutor's Office. He also previously served as city



Hon. Calvin Campbell

attorney for the cities of Wendell, Fairfield, Gooding, Hagerman and Boise. He was an associate attorney with the Greg Fuller Law Office prior to becoming a sole practitioner in Jerome until 2005. He received his BA in political science from Boise State University and his J.D. in 1992 from the University of Idaho.

Hon. Blaine Cannon was appointed as a Magistrate Judge for Cassia County in the Fifth Judicial District, effective September 17, 2012, filling the vacancy created by the vacancy created by Judge Rick Bollar who was appointed to the bench in Minidoka County, created by the retirement of Judge Larry Duff.

Judge Cannon has an extensive criminal law background and before his appointment to the bench, served as deputy prosecutor for Cassia County where he served beginning in 2001. Prior to that, he worked with the Minidoka County Public Defender's Office as well as the firm of Byington, Holloway, Whipple and Jones. He also served as Law Clerk to the Honorable Gregory Anderson from 1997-1998. He received his BA in economics from Brigham Young University and his J.D. in 1996 from J. Reuben Clark (BYU) Law School in Utah.



Hon. Blaine Cannon

In the Sixth Judicial District

Hon. R. Todd Garbett was appointed as a Magistrate Judge for Bear Lake County in the Sixth Judicial District, effective November 2, 2012, filling the vacancy created by the retirement of Judge O. Lynn Brower, who retired in 2010. Since his retirement, Judge Brower has continued to serve Bear Lake County.

Judge Garbett has experience in both civil and criminal law. He served as Franklin County prosecutor from January, 2005 until his appointment to the bench. He also worked at the Steven R. Fuller Law office from June, 2000 to January, 2010, practicing general law. He is active in his community and throughout the Sixth Judicial District serving as president of the Sixth District Bar Association, Presi-



Hon. R. Todd Garbett

dent of the Area Chamber of Commerce and president of the Preston Kiwanis Club. He received his BA in Political Science from Weber State University and his J.D. in 199 from the School of Law, University of Montana. He is married and has six children.

In the Seventh Judicial District

Hon. Michelle Mallard was appointed as a Magistrate Judge for Bonneville County in the Seventh Judicial District, effective January 3, 2012, filling the vacancy created by the retirement of Judge Earl Blower.

Judge Mallard grew up in Idaho Falls and attended the University of Idaho receiving her Bachelor's in 1993 and her Law Degree in 1996. Prior to her appointment to the bench, she served as a law clerk in Latah County and as an associate attorney with the law firm of Moffatt Thomas. In 1997, she joined the Bonneville County Prosecutor's Office as a Deputy Prosecutor and in 2003, she joined the U.S. Attorney's Office for Idaho as an Assistant U.S. Attorney.



Hon. Michelle Mallard

Hon. Gilman Gardner was appointed as a Magistrate Judge for Fremont County in the Seventh Judicial District, effective January 2, 2013, filling the vacancy created by the retirement of Judge Keith Walker, who retired in 2010. Since his retirement, Judge Walker has continued to serve Fremont County.

Judge Gardner received his Bachelor's degree from BYU in 1977 and completed his law degree from the University of Idaho in 1981. From 2000-2002 he was part of the initial Drug Court Team. He trained at various locations around the country with funding provided to the County by a federal grant. From February 2009 until his appointment to the bench, Judge Gardner has been the Chief Criminal Deputy Prosecutor in Fremont County. His experience includes finance and budgeting, supervising attorneys and staff members, and criminal prosecution of crimes, supervised and assigned caseloads.



Hon. Gilman Gardner

THE IDAHO RULES OF FAMILY LAW PROCEDURE: A PILOT PROJECT IN THE FOURTH JUDICIAL DISTRICT

Hon. Russell A. Comstock
Hon. David E. Day

Returning refreshed and inspired from the 2008 Idaho Judicial Conference in Sun Valley, the two of us hatched the idea to form a set of procedural rules specific to the practice of law and administration of justice in domestic relations cases. The Idaho Rules of Civil Procedure (“IRCP”), in our opinion, failed to address certain recurring issues that are unique to family law including (i) how to obtain children’s wishes regarding custody, (ii) how and when children should participate in these cases, (iii) a lack of disclosure of basic financial information by one party or both of them, and (iv) case management issues caused by the vagaries of notice pleading, particularly in modification cases.

In addition, we groused from time to time about the organizational structure of the IRCP, particularly the scattered nature of the rules that applied to family law. Only the experienced lawyer would know to look under Rule 16 – a rule originally dedicated to pre-trial conferences – to find rules applicable to mediation, supervised visitation and parenting coordinators. Without specific direction, a self-represented litigant would not likely find the rule applicable to filing and serving a motion to modify a custody order under the same set of rules that applies to relief from judgments, and yet there it is in Rule 60(c).

In the last 17 years we have seen the innovative development of institutions throughout the state, such as Court Assistance Offices and Family Court Services, that (i) assist children and families with gaining access to the court, (ii) provide parties with education, skills and opportunities to resolve their issues in a non-adversarial manner, and (iii) help the court make better custody decisions by providing investigation and analysis in cases where the parties are indigent and unskilled. We felt it was time for Idaho to explore the efficacy of having a self-contained set of rules to complement the specialty into which family law cases have evolved.

Four years later, in November 2012, the Idaho Supreme Court approved the Idaho Rules of Family Law Procedure (“IRFLP”) as a pilot project in the Fourth

Our final product includes all the new rules, as well as all rules from the IRCP that remain applicable to family law cases.

Judicial District. The IRFLP will go into effect January 1, 2013 in Ada, Elmore, Boise and Valley Counties.

The IRFLP represent the collective effort of the dedicated members of the Ada County Family Law Working Group (“the Group”) that we formed in the fall of 2008. We wanted the Group to be a cross-section of attorneys who possessed diverse experience in domestic relations cases; we wanted input from the point of view of law firms large and small, and from the solo practitioner. The members who accepted our invitation to the Group were Stanley W. Welsh, James Bevis, Joanne Kibodeaux and Matthew Gustavel. Mr. Bevis’ paralegal, Karen Hall, attended all of the meetings in the first few years and donated extensive hours recording the Group’s activities and decisions as the project developed.

The concept of specialized family law rules is not a new one; many other states have them either as stand-alone rules, or as rules that merely supplement the civil rules of procedure for that state. The Group reviewed examples of each from Florida, Arizona, Minnesota, West Virginia and Delaware. We decided to draft our rules as a stand-alone set representing an amalgam of the Arizona Rules of Family Procedure, the IRCP and, in a few cases, rules we drafted. We divided up responsibility for drafting each section of the rules among the members and met at least quarterly (monthly, by the end of the project) over many lunch hours to discuss, argue and settle the language of each rule. Judge Day and Ms. Kibodeaux spent countless hours reformatting the rules and cross-referencing them to the IRCP. Our final product includes all the new rules, as well as all rules from the IRCP that remain applicable to family law cases.

Whenever possible, we kept rules from the IRCP intact; however, many of them were modified to remove references that apply only to juries or jury trials because all procedures to which these Rules apply are tried to the court without a jury. At this time, most rules incorporated from the IRCP have not been changed except insofar as necessary to match the format and structure of the IRFLP. Therefore, most practitioners will recognize the majority of these rules as essentially identical to the IRCP. In the future, we anticipate that some of these rules will be further modified to reflect current practices and to better suit family litigation.

Intended advantages of the IRFLP

Although new rules will likely create unforeseen issues, it is our hope and belief that the IRFLP will resolve more issues than it causes and that it will improve the administration of justice in family law cases. In this regard, there are some significant differences between the IRFLP and the IRCP which are:

1. The Applicability of the Idaho Rules of Evidence. Similar to Arizona’s rules, the Group crafted a rule that requires strict application of the Idaho Rules of Evidence (“IRE”) only if a party gives notice within 30 days of the filing of a responsive pleading. Otherwise, all relevant and material evidence is admissible subject to a limitation on evidence (i) the probative value of which is outweighed by the danger of unfair prejudice, (ii) that is cumulative, (iii) that confuses the issues, (iv) that is unreliable or (v) that has not been timely disclosed. The advantages of this rule are:

a. It incorporates existing practices regarding the foundation of evidence that have been informally followed in most

family law cases for some time. Most attorneys dispense with calling the foundational witnesses who might otherwise be required to admit many documents in family law cases;

b. The admissibility of hearsay, which arises in nearly every custody trial, is governed by a simpler standard that is still tempered by a showing of reliability.

c. Evidence of character, which is a statutory factor in child custody cases, is no longer subject to the narrow restrictions of the IRE;

d. For those parties who wish to follow the relaxed approach, it saves them time and money;

e. It is a standard that is easier to understand for the significantly increasing number of self-represented litigants in family law cases; and

f. A strict application of the IRE is still available if one party gives notice early in the case so both parties can prepare accordingly.

2. Participation of Children and Protection of Their Interests. Currently, there is no rule in the IRCP regarding the participation of children in custody cases. There is a statute, Idaho Code Section 32-704, that authorizes the court to appoint an attorney for the child without any regard to the attorney's qualifications. As a result of the above, some children may be represented by counsel with no experience though, in most cases, children are not represented in court. Under current practice, children usually participate in custody cases in one of three ways: (i) directly as a witness at trial, (ii) directly through an "in camera interview" by the court, and (iii) indirectly through the parties or third parties (i.e., by hearsay). Under the first two methods, it is not uncommon for a child to be brought to court with little or no advance notice, causing significant stress to the parties and, especially, the child. If the child is interviewed by the court, the methodology of that interview can vary widely depending on the particular judge (e.g., on the record, off

In family law cases, however, there is certain basic information that is discoverable and relevant in nearly every type of case.

the record, sworn, unsworn, parties present, no parties present, etc.). The IRFLP adopt a modified approach to the Arizona rules that establish (a) qualifications for attorneys who are appointed by the court to represent children and (b) notice and other procedural requirements for parties who intend to call a child as a witness. The advantages of this approach are:

a. Children, when represented by an attorney, have one who possesses experience and skill at doing so;

b. Children can prepare for being heard in court;

c. Parties have time to consider and prepare for how their child will participate in court; and

d. The court, counsel, parties and children are protected by the requirement that any "in camera" interview be recorded, while preserving some flexibility regarding other aspects of the manner of the interview.

3. Automatic, Mandatory Disclosure of Information. Under the IRCP, once an answer is filed and the case is at issue it is then incumbent upon a party to initiate discovery by propounding discovery requests. In many cases, there is no discovery conducted at all for a variety of reasons that include (i) lack of money, (ii) lack of knowledge regarding how to propound discovery, (iii) lack of motivation, and/or (iv) laziness. At trial, this approach often translates to a lack of preparation, a lack of information, surprise and conflict. The IRFLP require that certain information common to all divorce and custody cases be disclosed by each party no later than 35 days after the filing of a responsive pleading. As an appendix to the IRFLP, the Group developed a form to help parties comply with these disclosure requirements. The advantages of automatic disclosure requirements are:

a. Relevant information is disclosed early;

b. Early disclosure means early identification of issues and earlier preparation;

c. Better preparation means timely resolution of cases; and

d. Better preparation and timely resolution of cases means costs savings to the parties and the court system.

4. Standardized Discovery. The IRCP does not standardize discovery because the rules apply to every different kind of civil case. In family law cases, however, there is certain basic information that is discoverable and relevant in nearly every type of case. There is no reason to leave the discovery of this information to the creative semantic talents of individual parties and attorneys. The IRFLP offer uniform, standardized interrogatories, the use of which is not mandatory but which may be used in conjunction with non-standard interrogatories. The advantages are:

a. Cost savings from the preparation of the same interrogatories; and

b. Fewer discovery issues that arise from interrogatories that are less artfully drafted.

5. Time Increments. For consistency, whenever possible, time increments were used that are multiples of seven.

6. Reorganization. The existing IRCP follows a loose organization that has become increasingly disorganized as time has progressed. Rules have been expanded and, within some of them, there is little room to grow in a way that makes sense. For example, as discussed above, Rule 16 of the IRCP is denominated as a rule about pre-trial procedure, yet it has been expanded over the years to cover alternative trial techniques, like the Informal Custody Trial, and service providers who are specific to family law cases such as mediators, visitation supervisors and parenting coordinators. In another

*Rules of
Family Law Procedure
are at
www.isc.idaho.gov/irflp_home*

example, IRCP 11 covers such disparate issues as the signing of pleadings to the withdrawal of attorneys. The IRFLP are organized in separate numerical categories. The advantages are:

a. They are easier to use and logically follow the progression of civil litigation. Pleadings are in the 200 series; Judgments are in the 800's. No longer are discovery rules spilling over the mid-twenties into the thirties; rather, all discovery rules are contained in the 400 series;

b. Each numbered rule covers only one specific topic; and

c. There is considerable room to expand and/or modify the rules within each category while keeping the integrity of the overall organization of the rules.

7. Reformating. As the IRCP has expanded and changed over time, there has been little attention paid to formatting them consistently. Thus, the formatting of paragraphs and subparagraphs varies from rule to rule. The IRFLP have been formatted so that the structure is uniform throughout. The advantages of this are:

a. Citation to the rules can be consistent;

b. Changes and additions to the rules can be easily made to match the format of existing rules;

c. A useful and accurate Table of Contents and/or Index can be created automatically; and

d. The rules have a more uniform and professional appearance.

How to access the IRFLP

The IRFLP are accessible now both electronically and by hard copy. Electronically, any attorney or party can access and print the rules through:

(i) the Fourth Judicial District website <http://www.fourthjudicialcourt.idaho.gov/>, and

(ii) the Idaho Supreme Court website <http://www.isc.idaho.gov>.

There will also be hard copies available at the offices of (a) every county clerk in the Fourth Judicial District, (b) Family Court Services on the Fourth Floor of the Ada County Courthouse, and (c) the Court Assistance Office at the Ada County Courthouse. The IRFLP are extensive, and if one intends to print them one will need approximately 180 pages (the rules are 143 pages and the forms are about 35 pages).

Scope and duration of the pilot project

The IRFLP will apply to all family law cases including divorce, paternity,

The IRFLP will be piloted only in the Fourth Judicial District and until further order of the Idaho Supreme Court.

child custody, child support, civil domestic violence protection orders and all proceedings related to the establishment, modification and enforcement of such decrees or judgments, excluding contempt. They will NOT apply to cases involving adoption, termination of parental rights, guardianship, conservatorship or petitions arising under the Child Protection Act.

The IRFLP will be piloted only in the Fourth Judicial District and until further order of the Idaho Supreme Court. The project will be evaluated after approximately one year during which participants will be encouraged to offer input through a survey. We anticipate the survey will be available on-line by early February 2013 and will allow participants to comment on the IRFLP by rating their ease of use and overall participant satisfaction. In addition, the survey will hopefully identify issues created by specific rules that need to be addressed.

Conclusion

Whether the IRFLP is a success or an IRF-L-O-P, the process of developing them has been a humbling one. As watertight as we would like to believe these rules are, every re-read reveals a new issue or two that we overlooked. As we were developing them, we tried to keep pace with on-going changes in the IRCP with mixed results. We just recently discovered that at least one rule (i.e., IRCP Rule 60(c)) was modified and became effective last July was accidentally omitted from the IRFLP, causing us to tweak the latest draft to make them as current as we could. They are not perfect and, like any set of rules, the IRFLP will require periodic amendments and modifications. Like the mythological Dutch boy, we just hope we have enough fingers to plug the inevitable leaks.

We expect that the IRFLP will cause certain cultural changes in the way fam-

ily law cases are handled by the bench and bar, and there will be some pain in that process. Divorces are emotional and stressful; for some of your clients, it is very difficult to focus on organizing information that is needed to prepare for the issues in his or her case. We have seen many cases, particularly involving self-represented parties, where there is literally no useful information presented to the court with which to make an equitable decision about the division of property and debt, or very little evidence with which to form a judgment about the best interests of a particular child – all because there has been no effort made by the parties during the case to garner relevant information. As difficult as it may be to force parties to organize facts early in the case, we hope and believe it will ultimately improve the quality and efficiency of justice we can deliver to them.

About the Authors

Russell A. Comstock and David E. Day are magistrate judges in Ada County whose dockets are specialized in domestic relations cases including divorce, paternity, child custody, child support, and domestic violence protection orders. Both were appointed as magistrates in 1995 and both are graduates of the University of Idaho College of Law - Judge Day in 1983 and Judge Comstock in 1984. They have been members of the Idaho State Bar since then.



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Elam & Burke, P.A. is pleased to announce that **Robert A. Berry** has joined the firm as a senior associate. Mr. Berry received his J.D. degree from the University of Idaho College of Law in 2007, and has a defense litigation practice focused on health care, professional liability, and civil rights (Section 1983) claims.

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HIGHLIGHTS OF RULE AMENDMENTS EFFECTIVE JANUARY 1, 2013

Catherine Derden

The following is a list of rule amendments that will go into effect on January 1, 2013. The orders amending these rules can be found on the Internet on the Idaho Judiciary's home page at <http://www.isc.idaho.gov/recent-amendments>.

Idaho Appellate Rules

The Appellate Rules Advisory Committee is chaired by Chief Justice Roger Burdick.

Rule 5. Special writs and original proceedings. A new subsection has been added entitled "challenge to a final redistricting plan." A challenge to a congressional or legislative redistricting plan adopted by the Commission on Reapportionment is brought as an original proceeding and the rule provides that any such challenge shall be filed within 35 days of the filing of the final report with the office of the Secretary of State by the Commission. This time limit is jurisdictional.

Rule 6. Title of appeal and designation of parties and size of paper. A new subsection has been added providing that once a Supreme Court case number is assigned, all motions, briefs and other documents filed shall specify both the Supreme Court case number and the district court docket number, including county, or agency docket number from which the case originated. The original case number should appear below the Supreme Court case number.

Rule 9. Appearance of attorneys not licensed in Idaho. The amendment provides that if an attorney is granted pro hac vice admission pursuant to Idaho Bar Commission Rule to appear in any case, then the attorney may continue to appear in that case before the Supreme Court without obtaining an order pursuant to this rule.

Rule 11. Appealable judgments and orders. The appellate rule is now consistent with Idaho Court Administrative Rule 59, by providing that an order designating a person a vexatious litigant is appealable to the Supreme Court. It also provides that the notice of appeal may be filed with the

I.C. § 13-302 addresses appeals to the Supreme Court and allows for a supersedeas bond or cash deposit to be waived for good cause.

Supreme Court since it may be confusing as to whether the person has permission to make a filing in the district court.

Rule 11.2. Signing of notice of appeals, petitions, motions, briefs and other papers; sanctions. The amendment in Rule 11.2 advises of the vexatious litigant rule.

Rule 12. Appeal by permission. Due to the nature of the questions in these appeals, they are routinely retained by the Supreme Court and do not go through the case assignment process. The amendment clarifies this.

Rule 12.2. Expedited review for appeals in custody cases brought pursuant to Rule 11.1 or Rule 12.1. Consistent with the expediting of these appeals, a new subsection has been added that any petition for rehearing or review shall be accompanied by the brief in support of the petition or the petition shall be summarily dismissed. Rule 42, petitions for rehearing, and Rule 118, petitions for review, were also amended to reflect this requirement.

Rule 13 (b). Stay Upon Appeal - Powers of District Court - Civil Actions. I.C. § 13-302 addresses appeals to the Supreme Court and allows for a supersedeas bond or cash deposit to be waived for good cause. It also modifies the appeal bond requirements for large awards for punitive damages by allowing the appellant to bond for compensatory damages and the first million dollars of punitive

damages. Because this is a procedural issue, the Idaho Appellate Rules prevail and Rule 13 does not include either of these provisions. The rule has now been amended to incorporate both of these provisions.

Rule 17. Notice of appeal - Contents. The amendment states that, except in capital cases, an amended notice of appeal may not be filed after the record has been filed with the Supreme Court. The amendment would ensure that an amended notice of appeal is not used to augment the record after the record is settled.

Rule 21. Effect of failure to comply with time limits. A challenge to a final redistricting plan is included in the time limits that are jurisdictional. Rule 46, on extensions of time, was also amended to provide that the time for filing may not be enlarged.

Rule 23. Filing fees and clerk's certificate of appeal - Waiver of appellate filing fee. The judges' retirement fund for filings was raised by \$8.00 effective July 1, 2012. The civil filing fee was previously amended to reflect this change but now the rule on filing appeals and original petitions also reflects the increased fee.

Rule 25. Reporter's transcript - Contents. The amendment seeks to clarify that there is no standard transcript in civil cases and that all requests for transcripts must include the name of the court reporter along with the specific date and title of the proceeding.

Rule 31. Exhibits, recordings and documents. Currently photocopies of exhibits are sent to the Court, though occasionally a party may request that an original be sent. Originals are returned, but this has raised a question as to retention of the copies. The amendment requires that all exhibits be scanned and retained as part of the file so it is clear what exhibits were actually sent to the court as part of the appeal.

Idaho Criminal Rules

The Criminal Rules Advisory Committee is chaired by Justice Daniel Eismann.

Rule 5.1. Preliminary hearing- Probable cause finding- Discharge or commitment of defendant- Procedure. The amendment provides that affidavits under this rule may have the signature of the affiant and the person who administered the oath in electronic form, as well as the notary seal. This amendment was prompted by a request from the Idaho State Police Forensic Services Laboratory. As part of their system of creating and sending reports electronically, the lab wanted to be able to electronically notarize affidavits. The Criminal Rules Advisory Committee recognized that Idaho is moving in the direction of electronic filings and was in favor of allowing for e-signatures on affidavits as well as eNotarization.

Family Law Pilot Project

The Children and Families in the Court Committee developed a new set of Rules of Family Law Procedure and on November 20, 2102, the Idaho Supreme Court entered an order for a pilot project in the Fourth Judicial District beginning January 1, 2013. The order states the: Rules of Family Law Procedure as published on the Idaho Supreme Court website shall apply to all family law cases in

the Magistrate's Division of the Fourth Judicial District, including divorce, child support, child custody, paternity, proceedings related to the Domestic Violence Crime Prevention Act, and all proceedings, judgments or decrees related to the modification or enforcement of such orders, except contempt. These pilot project rules shall not apply to cases involving the Child Protection Act, Adoption, or Termination and Guardianship. These rules shall apply to all cases filed on or after January 1, 2013, and shall continue until further order of the court. The Rules of Family Law Procedure shall be reviewed at the end of one year.

The Rules of Family Law Procedure are currently on the Supreme Court website in a .pdf version found at http://www.isc.idaho.gov/irflp_home, and will be on the website as separate rules by January 2, 2013.

Idaho Code of Judicial Conduct

A new provision has been added to Canon 3(B)(7) providing that "if a judge receives an unauthorized ex parte or other prohibited communication bearing upon the substance of the matter, the judge shall promptly notify the parties of the sub-

stance of the communication and provide the parties with an opportunity to respond. If the communication was in writing, the judge shall promptly provide a copy to the parties."

About the Author

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



The Criminal Rules Advisory Committee recognized that Idaho is moving in the direction of electronic filings and was in favor of allowing for e-signatures on affidavits as well as eNotarization.



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EXEMPTIONS FROM PUBLIC DISCLOSURE RELIEVE LAWYERS OF THE TASK OF REDACTING PERSONAL IDENTIFYING INFORMATION

Michael Henderson

Lawyers should take note of two new provisions regarding public records, and the effect they have on how to file documents in certain cases.

Rule 32 of the Idaho Court Administrative Rules (ICAR 32) governs the availability of public records in the judicial branch. Subsection (g) lists the categories of records that are exempt from public disclosure. One of the two new sections that went into effect on July 1, 2012, is ICAR 32(g)(19). This section, proposed by the Trust and Estate Professionals of Idaho (TEPI), was prompted by the recognition that guardianship and conservatorship cases often involve intimate information concerning the persons whose interests are being protected, who are generally children, the elderly, or persons with mental illnesses or developmental disabilities. The files in these cases may also include a good deal of information involving the financial resources of these persons and their families. Consequently, this rule now provides that “all court filings” in these cases are exempt from public disclosure.

However, there are two important exceptions. First, several persons may have a legitimate interest in reviewing the records in these cases to determine whether guardian conservators are performing their duties properly. So the persons who may review the records in these cases include “interested persons as defined in section 15-1-201, Idaho Code, guardians ad litem, court visitors, or any monitoring entity as defined by Idaho law,” or any attorney representing any of these persons.

Second, it may be necessary for members of the public to ascertain that



someone is, in fact, a guardian or conservator and is authorized to act on behalf of the ward or protected person. So the general public does have access to the register of actions, letters of guardianship and conservatorship and orders addressing the rights and duties of the guardian or conservator, the conservator’s bond and court orders regarding that bond, and orders or judgments disposing of a case.

Of course, it will be challenging for deputy court clerks to determine whether a person falls within the categories of persons who may view the entire file, or whether a particular document in these cases is one that may be viewed by any member of the public. Our advice to court clerks has been that where there is any doubt, a request to view records in these cases should be made in writing and submitted to the presiding judge in the case for a ruling, as provided in ICAR 32(j)(5).

Our advice to court clerks has been that where there is any doubt, a request to view records in these cases should be made in writing and submitted to the presiding judge in the case for a ruling, as provided in ICAR 32(j)(5).

Electronic Notices in Appellate Cases

Attorneys who are practicing before the Idaho appellate courts have begun to receive some notices via electronic mail. Some questions have arisen from our efforts to automate the notice process for the appellate courts.

Electronic notices

Most routine notices of filings and court action are now being sent by the Supreme Court Clerk's office to the attorneys of record via electronic mail. Attorneys practicing before the Idaho Supreme Court or the Court of Appeals need to understand that their email address of record with the Idaho State Bar is the address used by courts for electronic service of documents. Electronic notices sent from the Supreme Court and Court of Appeals Clerk's office will come from the following address: supremecourtdocuments@idcourts.net

If attorneys are participating in an appeal and have not received an email from the Court, it could be that these email notices have mistakenly been labeled as junk mail by your spam folder or junk mail folder. Please open your spam folder, find the email, open it and identify the address as safe.

Only attorneys of record will receive notice of court action emails. If attorneys wish to have their staff or others receive notices of filings in addition to the attorney of record, they can email their request to supremecourtdocuments@idcourts.net and ask to have others added to the email notice list for that particular appeal. You must include the Supreme Court docket number in the request.

Any orders issued by the Court will be attached to the notice emails in PDF form. If you have questions regarding the notice, please feel free to email supremecourtdocuments@idcourts.net or call the office of the Clerk of the Courts at 334-2210.

ecourtdocuments@idcourts.net or call the office of the Clerk of the Courts at 334-2210.

An update on electronic records

On July 1, 2011 the Court started offering the possibility of electronic records on appeal. This service is optional, as the party paying for the records and transcripts can make this request. Approximately 50% of appellate records filed today are being filed in an electronic format. As a reminder, the fee for a hard copy record is \$1.25 per page, while the fee for an electronic record is 65 cents per page (to have the entire district court record scanned) or the appellant can pay a flat \$100 fee plus 65 cents per page if the party wants less than the entire electronic record.

— Michael Henderson

The second provision is ICAR(g)(20), which makes records in cases involving child custody, child support, and paternity exempt from disclosure. It was felt that the records in these cases frequently involve the types of intimate information regarding children that are exempt from disclosure in Child Protective Act, adoption, and parental termination cases. Officers and employees of the Department of Health and Welfare may examine the records in these cases in the exercise of their duties. Members of the public still have access to the register of actions and to any order, judgment or decree issued by the court.

The adoption of these new provisions means that personal identifying information generally will not have to be redacted from documents filed in guardianship, conservatorship, child custody, child support and paternity cases, as would otherwise be required by Rule 3(c) of the Idaho Rules of Civil Procedure. That rule requires that documents filed in civil cases should not include Social Security numbers (if the number has to be included, only the last three digits may be used), names of minor children (only the initials should be used), dates of birth (only the year of birth may be used), or financial account numbers (only the last four digits may be used). If any of this personal identifying information must be

provided in the filing, then a redacted document must be filed that omits the personal identifying information, along with either a reference list that includes the identifying information, or an unredacted copy of the document. The reference list or unredacted copy would be sealed and unavailable to the public.

There are, however, exceptions to the redaction requirement. IRCP 3(c)(2)(b) provides that the "redaction requirement does not apply to documents that are exempt from disclosure pursuant to Idaho Court Administrative Rule 32." So documents filed in the cases covered by ICAR 32(g)(19) and (20), unless they are in the narrow categories available to the public, do not have to be redacted to exclude personal identifying information.

Also, in civil cases generally, when a court order is prepared, personal identifying information need not be redacted from the order at the time it is drafted, signed, or filed. Under IRCP 3(c)(4)(a), if the order contains personal identifying information if is placed in a sealed envelope. If a member of the public requests the document, a redacted copy of the order is prepared and provided at that time.

About the Author

Michael Henderson is Legal Counsel for the Idaho Supreme Court. He provides legal guidance on issues relating

So documents filed in the cases covered by ICAR 32(g)(19) and (20), unless they are in the narrow categories available to the public, do not have to be redacted to exclude personal identifying information.

to the operation of the trial courts. He previously served for 19 years as Deputy Attorney General, and before that was a deputy prosecuting attorney in Twin Falls, Blaine and Ada Counties.

FIVE TIPS TO COMBAT VERBOSITY

Tenielle Fordyce-Ruff

Another member of The Advocate Editorial Board recently sent me a trial court's order directing the movant to file a new motion that concentrated on eliminating verbosity.¹ While I'm sure the attorney who received this order (which included the judge's redlined suggestions!) was humiliated, we shouldn't wait for a judge's invitation (or humiliation) to combat verbosity in our writing.

Instead, we should take every opportunity to write better sentences. Wordy sentences tend to be filled with poor constructions that break the readers' concentration, forcing them to stop and decipher our meanings. Yet, we all know that we don't communicate effectively if our sentences need translation.

The principle to writing better sentences is simple: Legal writing is often about characters doing actions. So it makes sense to use a subject-verb-object construction instead of burying the actors and actions. To help you write better sentences that narrate the action, we will examine five tips for writing shorter sentences: active voice, concrete subjects, active predicates, parallel structure, and cleaning out clutter.

Active voice

We have all heard that active voice is preferable to passive voice, but have you ever wondered why? First, passive voice can make sentences longer.² For instance:



A duty of care to the plaintiff was breached by the defendant when the slippery floor was left unmopped by the defendant.

This exact same idea can be expressed in many fewer words.

When the defendant failed to mop the slippery floor, he breached his duty of care to the plaintiff.

And, not only is this sentence shorter, it's easier to understand. That's because using passive voice also obscures the actor in the sentence, which can lead to confusion. Take this next example:

In balancing the interests, full factual development is needed in order to ensure the fair administration of justice.



So, who is doing what here? Because the writer has used passive voice, the reader can't understand this sentence. This confusion and obscurity can be cleared up, however, by using active voice — naming who is doing the action in the sentence.

In order for courts to balance the interests, the parties should fully develop the facts.

This fix helps the reader better understand the writer's meaning, and it's shorter.

Concrete subjects

Not only should we expressly state who is doing what, we should be concrete when drafting the subjects in our sentences.

The awarding of damages will be left to judicial discretion.

Here, the real action in the sentence is buried in the subject, and the real actor is hidden. But, putting the actor first makes for a shorter and better sentence.

The judge will decide whether to award damages.

Removing almost meaningless abstractions from our subjects also makes our sentences better. Abstractions like "nature of," "kind of," "type of," and "area of," add virtually nothing to a sentence and obscure the real actor and ac-

Confusion and obscurity can be cleared up, however, by using active voice — naming who is doing the action in the sentence.

tion. Notice how this sentence improves when a real person is used as the subject instead of an abstraction.

The nature of the defendant's argument was that he was temporarily insane.

The defendant argued that he was temporarily insane.

Active predicates

Enough about subjects! Let's cover the rest of the sentence. Shorter, better sentences use active predicates. (Gram-

mar refresher: Predicates are the part of a sentence that tells the reader about what the subject is or is doing.)

Sentences are better and more concise when we use short active verbs. They are more forceful, and more dynamic. This is because readers prefer to focus on the verb—the action. So, shorter, punchier verbs help advance the story and help the reader understand which facts are legally significant.

Yet, we legal writers tend to turn the action in our sentences into the subjects by using nominalizations.³ This deadens our writing. It shifts the reader's focus from the story and the facts to trying to discern your meaning. Take for instance: *The actions of the transit authority in firing appellants for criticizing fare increases were a violation of the appellants' first and fourteenth amendment rights.*

This sentence becomes more interesting and shorter when it uses an active verb:

The transit authority violated the appellants' first and fourteenth amendment rights when it fired them for criticizing fare increases.

(This fix has the added bonus of using an active verb and a concrete subject: transit authority.)

Parallel structure

An active verb isn't the end of the sentence, though. Sometimes we need to express a list of ideas after the verb. The actors in our sentences will have to do more than one active verb. When that's the case, we need to put the list into parallel structure. This coordinates the ideas for the reader, promotes clarity and continuity in your ideas, and helps the reader see the relationship of the items in the list.

Parallel structure is the use of similar grammatical form for coordinate elements. In practice, this means when we write a pair or a list, match nouns with nouns, verbs with verb, prepositional phrases with prepositional phrases.

Sentences that fail to use parallel structure tend to be long and difficult to follow.

An agency defense depends on whether the agent was acting as an extension of the buyer and not for himself, if the agent was motivated by compensation, and finally, was salesman-like behavior exhibited.

But, putting the three requirements into the same grammatical form (matching the verbs) makes this a much better, shorter sentence.

Finally, we can look for other places to tighten your sentences. We sometimes add words to our writing without adding any meaning. We throw in extra propositional phrases or use needless repetition.

An agency defense depends on whether the agent was acting as an extension of the buyer and not for himself, was motivated by compensation, and acted like a salesman.

Clear the clutter

Finally, we can look for other places to tighten your sentences. We sometimes add words to our writing without adding any meaning. We throw in extra propositional phrases or use needless repetition.

Let's start with this sequence:

At this point in time, we are in the process of filing a motion for summary judgment with the court.

At this point in time, we are in the process of filing a motion for summary judgment.

We are in the process of filing a motion for summary judgment.

We are filing a motion for summary judgment.

By cutting out the extraneous prepositional phrases, we took this sentence from 20 words to eight — without a loss in meaning.

We can also cut out needless repetition.

Ferguson described the car as an older model sedan that was green (in color).

For (a period of) three years, Bowman worked as a grocery store checker; but during (the year of) 2003 she was promoted to store manager.

Jones parked her car at 10:00 p.m. (at night) and did not return for it until 7:00 a.m. (in the morning).

None of these sentences needs the words in parenthesis. Our readers understand that green is a color, 2003 is a year, and 10:00 p.m. is at night. We shouldn't

waste words by explaining to them what they already know.

Conclusion

We can all combat verbosity by focusing on telling our readers a good story. Using real people as subjects and having them do real actions. This narrative structure not only makes our writing shorter, it helps our readers focus on our meaning. And because writing is often our best chance of telling our clients' stories, combating verbosity by focusing on the people involved in the case helps the reader better understand the story behind the case.

Sources

Helene S. Shapo et al., *Writing and Analysis in the Law*, 229-237 (5th ed. 2008).
Anne Enquist & Laurel Currie Oates, *Just Writing: Grammar, Punctuation, and Style for the Legal Writer*, 69-76 (3d ed. 2009).

Endnotes

¹ A copy of this order can be found at <http://cdn.abovethelaw.com/uploads/2012/11/Merryday-Order.pdf>.

² For a refresher on finding and fixing passive voice, see my article, *Adding People to Your Writing: Eliminating Passive Voice and Vague "ing" Words*, in the November/December 2010 edition of *The Advocate*.

³ For a refresher on finding and fixing nominalizations, see my article, *Cutting the Clutter: Three Steps to More Concise Legal Writing*, in the January 2011 edition of *The Advocate*.

About the Author

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

HOW TO PREPARE YOUR CLIENT FOR MEDIATION

Deborah A. Ferguson

Editor's Note: This is the second of a three-part series.

Our role as lawyers continues to evolve as more legal disputes are resolved through mediation. Less than five percent of civil cases go to trial. Consequently, your pretrial strategy should reflect the strong likelihood that the case will be settled. You must prepare for the near certainty that you will sit at the table with a mediator, and perhaps the opposing side, to negotiate a settlement. Civil trial lawyers need to be proficient in representing clients in a mediated settlement process. Part of that preparation means preparing your client, which should begin long before the actual mediation. While Part I of this series examined the benefits of a mediated resolution, Part II suggests how you can best prepare your client for a mediation. Part III will address practice tips for attorneys participating in a mediation.

Explain to your client how mediation works

The mediation process focuses on solving problems and on the future. It is fundamentally different from an attempt to find fault, which is what is at the core of a legal adjudication. Many of our clients, if not most, have never gone through mediation. In order to be fully prepared, your client must understand the basic difference between an agreement and a judgment. While most clients understand that mediation does not directly involve the court, they may still expect some form of adjudication of the facts, which will not happen. You may want to remind them that while a judge (or arbitrator) looks at the past and decides who is right and who is wrong, in mediation, the parties work with a mediator to resolve the conflict by way of a voluntary agreement.

It is also important to discuss with your client what it means to be successful in mediation. You should point out that a successful outcome in a mediation will not look like a favorable court judgment, where one side prevails, and the other side does not. Instead, in mediation there are no clear winners and losers. A successful mediation allows your client to choose between either continuing with litigation or ending the matter by way of the most favorable settlement option available. Your job as counsel is to get the best proposal on the table from the

A successful mediation allows your client to choose between either continuing with litigation or ending the matter by way of the most favorable settlement option available.

other side. Then your clients can weigh the offer and the finality it brings against the cost, effort, and uncertainty of pursuing potential recovery pursuant to the decision of a court.

Take the time to discuss with your client a range of acceptable outcomes. Fixating on a bottom line dollar amount may come back to haunt you. Once your client hears an amount that must be paid or received, it may be difficult to move them from that anchor. Mediation often reveals new facts, or puts other important variables in a new light, requiring reassessment of the value of the case. Do not get locked into an absolute position that may no longer be viable to pursue or defend.

Because a mediated settlement often involves something other than money, brainstorm with your client about what a customized resolution of the conflict might look like. For example, would an apology, future business contracts, or a structured annuity be alternative means to a compromise? Fleshing out these options and doing research on their feasibility in advance greatly increases their potential usefulness in reaching an agreement during the course of a mediation.

Emphasize to your client that compromise will be necessary

Make sure your client understands and accepts that mediation will involve compromise from both sides. If your client is unwilling to yield on any given issue, then litigation might be the only path ahead despite the fact that it might not bring your client to his or her desired destination. Let clients know that if they terminate the mediation process, litigation will, in fact, proceed. If you reach this juncture, ask them to weigh the inherent uncertainty of litigation, along with the relative strength of their case and an assessment as to the range of

outcomes. Mediation allows deals to get done because one side is not the winner and one side is not the loser. Both parties walk away with something they can live with.

At a recent advanced mediation training, a retired judge told the tale of a mediation he conducted in a complicated intellectual property case. Late in the day during a caucus session, tempers flared and negotiations reached an impasse. The mediator suggested to one of the parties that a trip to Wal-Mart would be useful. The bewildered party inquired, "Why?" "To take a look at your jury pool," he replied. While much of the world emulates our jury system as the gold standard of justice, it presents considerable challenges in a complicated civil case. This judge's point was that it is difficult to effectively present complex litigation even to the most experienced jurist, let alone to a random jury of citizens. Your client should consider this reality.

In these discussions, ask your client to consider the drain that litigation will impose on his or her time, budget, and energy and to carefully weigh this against the resources that a mediated resolution could potentially save. Point out that even for the victorious, a judgment may do little to either address the underlying problem that created the dispute in the first place or to stop it from reoccurring.

Discuss the objectives of the mediation

Manage your client's expectations so that they are realistic and avoid an "all or nothing" perspective. The ideal result of the mediation is the full settlement of the case. However, even if the mediation does not resolve all the claims between the parties, encourage your client to be prepared to take an incremental approach. Mediation can narrow the issues and get some claims off the table. In the

event the case proceeds to trial, this will allow the court to focus on the primary dispute and avoid having to resolve expensive and distracting ancillary issues.

In multifaceted disputes, an initial mediation might be only one of several sessions, as part of a longer negotiation process. You should prepare your client to take the long view and to not get discouraged or frustrated if a single mediation session does not resolve the case. At times, negotiations reveal that crucial pieces of information are missing, and more facts must be gathered before the parties can enter an informed settlement. Likewise, a core disagreement on a fundamental issue of law may crystallize.

Instead of reverting back to a litigation mode, explain to your client that this can present an opportunity to work with the mediator to carve a path forward and avoid the impasse. After defining the issue that is blocking settlement, a game plan might be developed to continue the process and shed more light on the issue without returning immediately to a full litigation track. This could entail an agreement between the parties to engage in focused discovery on the disputed facts, to hire a third party expert to weigh in, or to proceed with the joint testing of a product or an accident reconstruction. Rather than abandon the negotiation process, an unsuccessful attempt at resolution can create a plan to move settlement forward.

Even if the mediation does not resolve the litigation or streamline discovery, it can allow you and your client to learn more about the other side of the case. Mediation often results in new insights into the conflict, which did not come to light through the traditional discovery process because the right questions were not asked. Ask your client to listen carefully throughout the mediation because it presents a unique opportunity to hear both parties' perspectives. Revealing information is often unearthed in the separate caucus sessions or opening statements. Fully participating in the mediation may also increase clients' objectivity because they will be put in a position to have to consider the soundness of their claims or the defenses.

Explain the structure of mediation and inevitable downtime

Although there is no set formula, a mediation may begin with a joint introduction by the mediator, to both parties and counsel. The mediator will typically explain the process and the confidential nature of the proceedings. Then the par-

ties go into separate caucus sessions, with the mediator working as an intermediary between them.

However, sometimes a mediation takes the following regrettable course. Counsel and client are ushered into a windowless conference room in the morning by a receptionist only to sit and wait for hours for the mediator to emerge from an initial caucus session with the other party. Frustration mounts as the hours drag on. This time is unproductive, as you have not yet even seen, let alone been heard, by the mediator. Hopefully this scenario can be avoided by a pre-mediation discussion with the mediator and a request for introductions before caucus sessions begin. But address the inevitable downtime inherent in caucus sessions with your client in advance, so they know what to expect and come prepared to use the time productively.

Consider the pros and cons of a joint session

You should also discuss with your client whether you will request that the mediator conduct a joint session with the opposing parties, or if you prefer the entire mediation take place in separate caucuses. If a joint session is planned, make sure you are clear as to who will make opening statements: counsel or the parties themselves. Although one size does not fit all, the parties' attorney typically should do the talking. Counsel is in a better position to succinctly relay the merits of their client's story and avoid the emotions the client might bring to the situation. As counsel, minimize argument in your opening statement, so that the joint session does not disintegrate into grandstanding. The mediator should also be prepared to take firm control of the joint session, and promptly end it, if that should occur.

In some jurisdictions, joint sessions are routinely conducted. They are not as common in Idaho, but Idaho attorneys may, on occasion, want to consider participating in a joint session, given the right case and the right mediator. Despite the likely initial discomfort of the situation, it can provide you and your client an invaluable opportunity to hear the best arguments of the other side. If the case does go to trial, the joint session might prove to be an important trial preparation step for your client.

Despite its potential risks and awkwardness (namely that the mediation gets off to a poor, hostile, and polarizing start), a joint session can also provide for the basic human need to be heard and acknowledged, even if it is through counsel. This can help the parties look

beyond the positions advanced in the litigation to the true interests of both sides. Do not underestimate how a showing of dignity and respect, or even simply recognition, can change the dynamics of a case. This is especially true when a plaintiff is challenging the decision of a large business, institution or government agency they perceive as more powerful. Addressing the parties' need to be heard and to be treated respectfully can create a more reasonable and flexible negotiation process. With the consent of counsel and after the right preparation, joint sessions can be a powerful mediation tool and merit your consideration.

Involve your client in the preparation process

Lastly, involve your client in the mediation preparation process. A successful and positive experience is far more likely if they understand the process, as well as the goals and possibilities of mediation. Even if mediation does not result in a resolution of all of the claims, it can go a long way in refining the issues between the parties. Preparation will help clients assess the risks and merits of their claims. It may also provide a reality check and adjust their expectations as to outcome.

In summary

In most of your civil cases, you will represent your clients in a settlement process, usually mediation. Advance preparation is crucial to a successful mediation, and preparing your client is an essential part of that process. Don't skip this step. You have a sizable advantage in securing a good result if you and your client arrive well-prepared to mediate.

About the Author

Deborah A. Ferguson specializes in civil mediation and litigation. She has 26 years of complex civil litigation and trial experience. Formerly an Assistant United States Attorney, she has litigated 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 cases in litigation. She is on the roster of certified mediators for the United States District Court for the District of Idaho and for all Idaho State Courts. Deborah A. Ferguson served as the President of the Idaho State Bar in 2011.



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IN MEMORIAM

Thomas Logan Smith 1927 - 2012

Thomas Logan Smith, 85, died Oct. 14, 2012, at his home. Born in Boise, Tom served in the Navy at Great Lakes Naval Training Station, and at Del Monte, CA. After being discharged from the Navy, Tom enrolled at the University of Idaho, and became a member of Beta Theta Pi fraternity.

Tom was married to Shirley Johnson in 1951 and finished his final year of University of Idaho College of Law the following year. He practiced law in Boise for 50 years. Tom was proud to be a fourth generation Idahoan. His maternal great grandfather, Thomas E. Logan, was Boise's first post-master in 1869, and was elected Mayor of Boise four times. His adobe house now stands in Pioneer Village next to the Idaho Historical Museum. His paternal grandfather, Thomas O. Smith, was the candy maker who started Idaho Candy Company in 1901. His recipes for the Idaho Spud, Old Faithful, and Cherry Cordial candy bars are still being used.

He is survived by his wife Shirley, his son Geoffrey (Elizabeth), his daughter Jennifer, all of Boise, ID; his sister Marilyn (Jack) of Seattle, WA, and several nieces and nephews.



Thomas Logan Smith

Samuel Hess Crossland III 1929 - 2012

Samuel Hess Crossland III, 83, died of natural causes on Oct. 22, 2012, in Boise.

He was born in Tulsa, Oklahoma, to Samuel Hess Crossland, Jr. and Louise Weaver. He grew up in Tulsa and became an accomplished musician playing both the piano and drums. His mother, Louise, was a concert pianist in her youth in Dallas and a piano teacher later.

After high school, Sam enlisted in the U.S. Navy and was stationed in Pearl Harbor, Hawaii, serving on a submarine as a radio operator during the Korean War. When Sam returned from the war he entered the University of Oklahoma on the GI Bill and graduated with a degree in History.

He then entered the Oklahoma University Law School, where he met the love of

his life, Yolonda Phillips McMahon. After Sam finished his law degree in 1957, and Yo finished her degree in Education and Art History in 1958, the two married.

Sam loved the law, which may be explained by the fact that he was a fourth generation lawyer. His father, Samuel H. Crossland, Jr., had moved to Tulsa from Paducah, Kentucky, and became a judge on the Tulsa County Court of Common Pleas until his death when Sam was three years old.

Sam's first job out of law school was with the Tulsa County Prosecutor's Office, having been hired by the elected prosecutor, J. Howard Edmondson. Sam tried numerous DUI cases, but was not as successful at obtaining convictions as he would have liked, often noting that the juries back in those days had the mindset of "there but for the grace of God go I!"

While Sam worked in the prosecutor's office he and Howard Edmondson forged a long and lasting friendship. When Mr. Edmondson decided to run for governor of Oklahoma, Sam was his campaign manager. Mr. Edmondson won the race and Sam and Yo moved from Tulsa to Oklahoma City where Sam served as legal counsel to Governor Edmondson. Sam and Yo's daughter, Julia Allison was born while they lived there.

In 1962, the Crosslands moved to Washington, D.C., where Sam practiced law and studied Government Contracts at night at George Washington University Law School.

Sam later worked as associate counsel for Morrison Knudsen Company, Inc., and he eventually was transferred to Boise. He was promoted to general counsel and later became Senior Vice President and Secretary in addition to General Counsel until he retired in 1989.

Sam served on the Boise State University Foundation Board, the St. Alphonsus Foundation Board and the Learning Lab, Inc. Board for many years. In 1992, he was awarded the Distinguished Citizen Award by St. Alphonsus. In 1989, he received an Outstanding Service Award by the Idaho State Bar, and in 2003 was awarded the Professionalism Award, again by the Ida-



Samuel Hess
Crossland III

ho State Bar. Sam and Yo were also members of the Boise Philharmonic Founders Club.

Sam is survived by his daughter Julia, son-in-law Bill Ward, grandson Walker Ward, brother Dan Crossland and nephew Christopher Crossland, both of Santa Rosa, California.

Robert Earl Rayborn 1931 - 2012

Robert Earl (Bob) Rayborn died October 8, 2012, with his wife Judi, stepson Matt, and friend Candy at his side. Bob was born on Dec. 1, 1931 in Twin Falls, Idaho to Adah (Jackson) and E. L. (Doc) Rayborn. He has one sister, Margie.

Bob grew up and attended schools in Filer, Idaho, where his father Doc, was city attorney for 55 years. Bob excelled in school, and loved fishing, boating, football, and golf. After graduation, he moved to Moscow, Idaho and attended the University of Idaho for two years, and then went on to Stanford University to pursue the family tradition of law. He married Sarah Warberg and started a family. They were later divorced. Bob graduated from Stanford University in 1954 and Stanford Law School in 1956. Bob and family returned to Twin Falls to enter the family law firm of Rayborn and Rayborn. The law firm was started by his father E.L. Rayborn and his uncle E.M. Rayborn in 1928, and is still going today. Bob's family had grown to six wonderful children: David, Vickie, Steve, Meg, Zoe and Liz.

Bob married Rozelle Lekey, who later died in a car accident. Bob and Judi Gibson Campbell married on November 26, 1985 and a new chapter in Bob's life began. They shared a mutual love of hunting, collecting and refurbishing antiques. Bob loved showing off his home and relating the history and discovery of each piece in this collection. Wednesday golf with friends was a tradition. In 1995 Bob was voted "Boss of the Year" by the Legal Secretaries Association, and was past Fifth Judicial District Bar Association President. Bob was also very proud of his 30 year AV



Robert Earl Rayborn

IN MEMORIAM

Rating Award with Martindale Hubbell. It is the highest possible peer review rating. With 57 years of practice, Bob was still working until the end. His longtime secretary/Para-Legal and friend Karen Mattice, has been with him for 32 of those years. Surviving Bob are his wife – Judi, his children – David, Vickie, Meg, Zoe and Liz. Stepson – Matthew Campbell, stepdaughter Dani Campbell and many grandchildren and great grandchildren. At Bob's request he was cremated and there will be no service.

Alonzo "Lon" F. Davis 1935 - 2012

Lon Davis, 77 of Eagle, died at a local care center. Lon obtained a Bachelor's degree and a law degree from the University of Idaho. He decided to become an attorney after his father's suggestion.

After graduating from law school he practiced with Richard Weeks. Lon said he focused on the research side of the practice and left the trial work up to Weeks. Lon loved to study the law. He served as chairman of the Continuing Legal Education Committee and worked for the Idaho Supreme Court as Staff Attor-



Alonzo "Lon" F. Davis

ney from 1973 until 1998. He was one of the Masters of the three-person committee to review 1974 bar exam results and ultimately drafted the standards for grading bar exams and the standards for preparing the examinations.

Over the years, Lon drafted chapters on appellate rules, civil rules, criminal rules, misdemeanor rules and often presented these materials at CLE seminars. He was also very involved with the Bar's disciplinary matters and amendments to the Bar Commission rules.

He was awarded the Idaho State Bar Service Award in 1990 and honored as a 50-year bar member in 2009.

Lon and his wife, Mary Alice, have four sons – Mark, David, Matt and Shawn.

Justice Byron S. Johnson 1937 - 2012

Justice Byron S. Johnson, died at his home in Boise on Dec. 9, 2012 from cancer of the jaw.

A Harvard graduate, Johnson served on the Idaho Supreme Court for 11 years before retiring in 1999. He made headlines earlier this year with his autobiographical book, "Poetic Justice," which earned high praise from those in literary circles.

Before entering the judiciary, he did criminal defense work and also represented the Idaho Education Association. Johnson lost three races for office as a Democrat, twice for the Legislature and, in 1972, for U.S. Senate.

In 2007, the Idaho Legal History Society created the Byron S. Johnson award to recognize those individuals who have made significant efforts to help the mission of the ILHS. The award is named in recognition of Justice Johnson's years of effort to collect, preserve and disseminate Idaho's rich legal history.

His official obituary, which he drafted, describes him as a poet first, then a retired justice. Johnson asked that donations in his name be made to the Boise-based literary center, The Cabin, an organization for which he served as a board member. He was a leading figure in preserving the history of Idaho's legal community and of Idaho City, where he lived for 20 years with his wife, Boise County Magistrate Patricia Young.

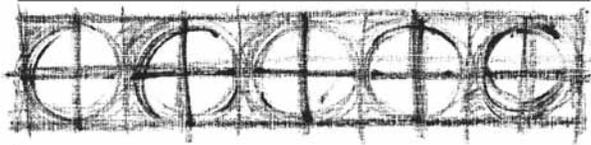
Johnson will be remembered on the Twelfth Day of Christmas, Jan. 6, at the Barber Events Center in Barber Park. The time has yet to be firmly set, but it will be in the afternoon, Young said.

"He didn't want a memorial service, but he did want a wake," Young said. "He wanted a really good party. We're going to have good whiskey there, and good food."



Hon. Byron S. Johnson

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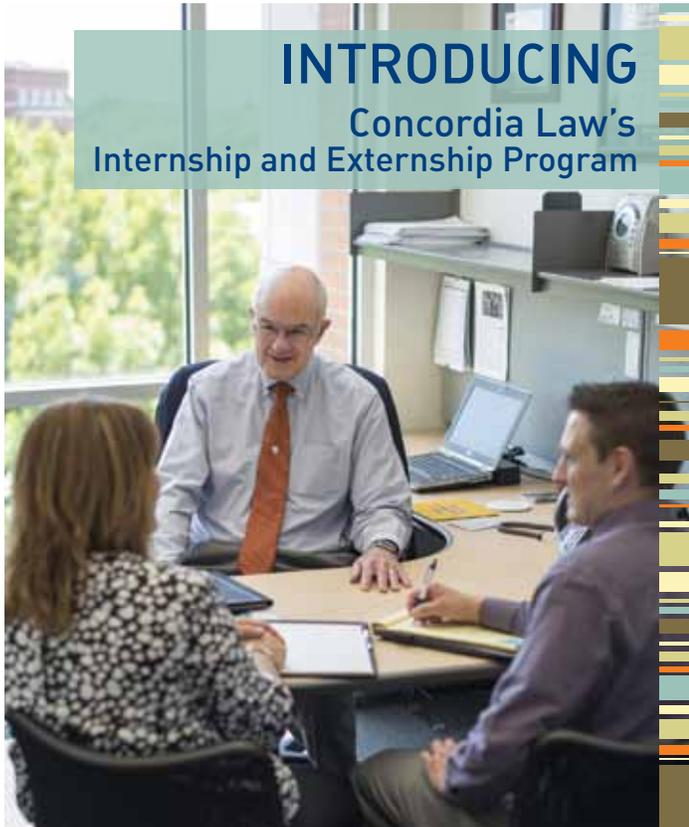
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Laird Stone to serve on CSI board

TWIN FALLS - Laird Stone of the law firm Stephan, Kvanvig, Stone & Trainor in Twin Falls was elected to serve a four-year term as a trustee for the College of Southern Idaho.

Laird has been a member of the Idaho State Bar since 1979. He and his partners, Russell G. Kvanvig and Kevin F. Trainor, have been an active practice in family law, estate planning, commercial law and litigation in Twin Falls and the surrounding area.



Laird Stone

Stoel Rives names Nicole Hancock as firm's agribusiness leader

BOISE — Stoel Rives LLP, a U.S. business law firm, has appointed Nicole Hancock as chair of the firm's Agribusiness Initiative. As leader, Nicole is responsible for providing strategic direction and management for the initiative, which includes attorneys practicing in a variety of agribusiness sectors across seven Stoel Rives' offices.

"I am excited to start my new role working with the strong Agribusiness attorneys in our firm," said Nicole, "and look forward to working closely with our agribusiness group to grow our practice."

Nicole is a trial partner in the Boise office of Stoel Rives. Drawing upon her previous experience as corporate counsel for Syngenta Seeds, Inc. she also serves as general counsel for a variety of Agribusiness companies, advising clients on agricultural-related matters including contracting, seed laws, trade secrets, trademark protections, product liability lawsuits, Department of Agriculture investigations and appeals, and PACA claims.

Nicole is also the president of the Idaho Women Lawyers organization that



Nicole Hancock

promotes opportunities for women and minorities in the legal profession.

Hargraves to join Ruchti & Beck, PLLC

POCATELLO - The law firm of Ruchti & Beck, PLLC, welcomes attorney David B. Hargraves to the firm where his practice will focus on estate planning, probate, business formation, workers' compensation, and injury law. David received his B.S. from the University of Utah in 1995, at which time he was commissioned an officer in the U.S. Navy. After four years of active duty, he attended the University of Idaho College of Law. After law school, he clerked two years for the Honorable Judge Darrel R. Perry of the Idaho Court of Appeals. From 2004 to 2012, he was a deputy in the Gem County Prosecutor's Office handling both civil and criminal matters.



David B. Hargraves

Borton Lakey welcomes two attorneys

MERIDIAN - Victor Villegas has joined Borton Lakey as a partner. His practice emphasizes land use and zoning, real estate transactions, corporate governance, and real estate brokerage and licensee practices. His litigation practice includes matters in employment litigation, contract litigation, construction defect litigation, boundary disputes, and inverse condemnation. Victor also represents clients in administrative proceedings before state agencies and serves as chairman for the City of Eagle's Planning & Zoning Commission and as Chairman for the State of Idaho's Board of Drinking Water and Wastewater Professionals. He also volunteers time as a coach for youth soccer with Meridian's Police Activities League.



Victor Villegas

Robert K. Banks now serves of-counsel with the firm Borton-Lakey practicing

in its real estate development group concentrated in commercial development emphasizing supermarket and retail anchored multi-tenant developments. Mr. Banks has extensive experience in all aspects of site selection, financing and acquisition; property entitlement and development; and design, construction and management of grocery-based retail developments throughout the United States.

From 2008 to 2010 he served as the Vice President of Real Estate for Albertson LLC responsible for building new stores, remodeling existing stores, managing real estate properties, and disposing of surplus properties. Robert's community service includes United Way, Detox Steering Committee Member - Boise & Ada County from 2005 to present; George Fox University MBA/MAOL Guest Instructor from 2004 to present.

Borton-Lakey is located in downtown Meridian, Idaho and can be reached at (208) 908-4415 or www.borton-lakey.com.

Idaho attorney among those named to help farm workers

BOISE - Farmworker Justice seated four new representatives to its 16 member board of directors. Natalie Camacho Mendoza of Boise, Idaho, Marco Cesar Lizárraga, Executive Director of La Cooperativa Campesina de California, Lupe Martinez, President and CEO of UMOs, Milwaukee, Wisconsin and Cyrus Mehri founding partner of the law firm Mehri & Skalet, PLLC in Washington, D.C. have been appointed.

Natalie Camacho Mendoza is managing partner of Camacho Mendoza Coulter Law Group with offices in Idaho and Maryland; practice areas include employment law, OFCCP compliance, worker's compensation defense, American Indian law, civil rights litigation, government relations, political law and business law.



Robert K. Banks



Natalie Camacho Mendoza

OF INTEREST

She is licensed to practice law in Idaho, Texas, Shoshone-Pauite Tribal Court, and Coeur d'Alene Tribal Court. Natalie began her practice with Idaho Legal Aid Services, Inc. where she served as staff attorney then managing attorney, and director of the Migrant Law Units. She currently serves as Chair of the Trustee to the Louis W. Hill Trust and Director for the Northwest Area Foundation, Minneapolis, MN where she serves as the Program Committee Chair and is a member of the Executive Committee. She sits on the Dean's Advisory Committee for Concordia University School of Law and has been appointed by Gov. Butch Otter to serve on the Idaho Criminal Justice Commission.

Farmworker Justice is a nonprofit organization that seeks to empower farmworkers to improve their living and working conditions, immigration status, health, occupational safety and access to justice. Farmworker Justice is located in Washington D.C. but works with farmworkers, their advocates and organizations throughout the United States.

Karen Sheehan joins Boise firm Gjording Fouser

BOISE - Gjording Fouser PLLC is pleased to announce that Karen Sheehan has joined the firm as an associate. She is an experienced civil litigation attorney who focuses her practice on employment law, insurance defense, bankruptcy, and tort. She also has extensive business and corporate law experience.

Karen earned a B.A. in economics from Bucknell University, and her J.D. degree from George Washington University Law School. After law school, she held a senior attorney position with the law firm of Lee & McShane, PC in downtown Washington, D.C. where she specialized in employment and business law along with civil litigation. She relocated to Boise in 2005.

Most recently, Karen was an attorney at the Law Offices of Jeffrey T. Sheehan, PLLC where she developed a legal practice in the areas of civil litigation, bankruptcy, and employment law. She has also worked for Hall, Farley, Oberrecht and



Karen Sheehan

Blanton, PC and the Ada County Prosecutor's Office. Karen can be reached at 208-336-9777 or ksheelan@gfidaholaw.com.

Jamal Lyksett takes position with Idaho Legal Aid

LEWISTON - Idaho Legal Aid is pleased to announce the addition of Jamal Lyksett to its Lewiston office. Jamal will focus on criminal defense work in the Nez Perce Tribal Court, family law, consumer law, and Social Security.

Jamal graduated from the University of Idaho, College of Law in May, 2012, with an emphasis in Native American Law and Natural Resource and Environmental Law. During law school he interned for the Nez Perce Tribal Court, the Bingham County Prosecutor's Office, and for Senator Bart Davis at the Idaho State Senate. Jamal received his BA, summa cum laude, in history and philosophy in 2005, and MA in philosophy in 2007 from the University of Idaho. He was born and raised in Blackfoot.



Jamal Lyksett

Waddell joins Streich Law Offices, P.C.

BROOKINGS, OR - Streich Law Offices, P.C. is pleased to announce that Perry Waddell has joined the firm as an associate attorney. Streich Law was founded by Alexandria Chris Streich, a graduate of the University of Idaho College of Law. Streich Law has offices at 913 W. River Street, Suite 420, in Boise, and in Brookings, Oregon. Prior to joining the firm, Waddell served as a New York City attorney in Brooklyn, New York, prosecuting child abuse and neglect cases. Waddell has been a member of the Idaho Bar since 1993 and is focusing his practice on all aspects of asset protection: estate planning, veteran's benefit planning, non-profit corporations, firearms law, elder law, real property, probate and trust administration.



Perry Waddell

Mr. Waddell received his J.D. from the University of Idaho College of Law in 1993. He received his B.A. in Political Science/International Relations with a minor in Canadian studies from Boise State University in 1988.

Mr. Waddell can be reached at (541) 469-0901 or perry.waddell@assetprotectionfirm.com

Tracy Greene named first SDSU university counsel

BROOKINGS, S.D. - Tracy Greene was appointed as South Dakota State University's first university counsel. Greene came to SDSU from Emporia State University in Kansas, where she served as general counsel since 2005. Prior to that, she was a staff attorney at the University of Idaho. Her professional background includes work and training in the areas of discrimination and harassment awareness, public records and public meetings, immigration and employment law, and other issues relevant to higher education.

The position was created to support the university's growth in research activity, contracts and agreements, and licensing. As university counsel, Greene also will interact with several departments and units on employment matters, public records and risk management, among other areas. She reports directly to President David Chicoine.

Greene, originally from Washington, earned her bachelor's degree in business, finance at the University of Idaho and her law degree at the University of Idaho College of Law. She also is licensed to practice law in Kansas and Idaho. Greene is an institutional representative member of the National Association of College and University Attorneys, and serves on that organization's Committee on Membership and Membership Services.

"I look forward to joining the SDSU team, and to the opportunity to address the diverse and dynamic legal needs of this premiere and progressive teaching and research university," said Greene.



Tracy Greene

Williams joins Rossman Law Group

BOISE - Rossman Law Group, PLLC is pleased to announce the addition of Kimberly L. Williams to the firm. Ms. Williams graduated magna cum laude from Creighton University School of Law. Prior to joining Rossman Law Group, Ms. Williams was practicing with Domina Law Group in Omaha, Nebraska. Ms. Williams will be representing clients in the areas of medical malpractice, severe personal injury and employment law. Ms. Williams can be reached at 208-331-2030 or kwilliams@rossmanlaw.com.



Kimberly L. Williams

domestic relations. Family law became a focus.

Idaho did not have a Family Law Section though a few years earlier Paul Buser of Boise had tried to get something off the ground. In 1986, I undertook the re-suscitation, and with the talented, committed lawyers like Sue Flammia, Stan Welsh, Lou Cosho and others, our family Law Section was reborn. With the leadership of Judge Patricia Young and the Idaho Supreme Courts' Justice Linda Trout and Patti Tobias and Carl Bianchi of court administrators, we undertook a project to remove rancor from high-conflict divorces to protect children.

Four years ago I became chair again of the Section, after an initial three-year stint from 1986-90. Thanks to Kent Fletcher, Burley, Rove Beale Gwartney, Boise; and others too numerous to mention, we began a new path, the projects identified by leaders and members through strategic planning. Tom Dial accepted the editorship of the Family Law Handbook, Lois Fletcher agreed to secretarial service and Debbie Alsaker-Burke challenged us to look more carefully at children's needs, making the Family Law Section truly reflect Idaho families.

All of this was going well. I was ready to pass the baton of leadership this summer. The terminal disease I was diagnosed with in 2003, pulmonary hypertension, was progressing and last spring, my crazy schedule caught up with me. Serious heart

and lung issues, never mind cancer, had developed.

May 5 began a spring, summer and lately fall slide toward death and debilitation that tested poor Zach, holder of my durable power of attorney for health care. I was intubated and for 2 ½ months I could not speak. What a condition for an attorney control freak!

It is a real triumph to be here today, considering the past six months.

I will return to teaching and administrative duties in January. Unfortunately, I will be an inactive member of the Bar. The good news is that I will not be paying malpractice premiums. The bad news is that I will not be seeing clients and addressing their needs in family law, employment law and civil rights.

I leave you with thriving, new, young leadership... I will continue to write, speak and agitate for better treatment of children by parents and the court system as they are the pawns in a division of their stability, their parents and family. ...

I wish you the very best and thank you for calling me colleague and some, a friend, for nearly 30 years. Thank you for your energy and support for children and families in their darkest hours. Tell those in law school and who may be looking at what to do as a lawyer that there is no more important, nor satisfying role than that of family lawyer.

Judge Sergio Gutierrez to serve as COA Chief Judge

The Honorable Sergio Gutierrez has been appointed to serve as the Chief Judge of the Idaho Court of Appeals, effective January 1, 2013 through December 31, 2014, or until further order of the Court.

Linda Pall bids farewell to the Bar

Editor's note: *The following are excerpted remarks made by Linda Pall to the Idaho State Bar Family Law Section on Oct. 26 in Coeur d'Alene. Despite chronic illness, Linda has long been involved in Sections, having served as president of Family Law and Diversity Sections. She also belongs to the Business & Corporate Law, Employment & Labor Law, and Indian Law Sections. She won the ISB's Service Award in 1997 and served on the Continuing Legal and Education Committee from 1995-97.*

I entered the law school in September, 1982, and never looked back. My original desire to pursue public defense quickly evaporated. I was good at civil law and



Linda Pall

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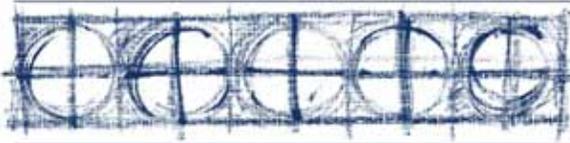
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A CLE about immigration law drew a packed house on Dec. 7 in Boise. The class addressed critical differences between Immigration court and other courts and included expert tips from an immigration judge. From the left is the Immigration CLE's principal organizer attorney Maria Andrade, U.S. Chief Immigration Judge Andrea Sloan from Portland, and immigration attorneys Patrick Taurel and Chris Christensen. Below are attendees at the Law Center classroom in Boise.



Photos by Dan Black

Special free CLE to address foreclosure issues

The Idaho Volunteer Lawyers Program, Foreclosure Aid Project is offering a CLE about what to look out for when working with clients facing foreclosure. It will be offered from 8:45 a.m. - 3 p.m. on Jan. 8 at the Law Center in Boise for 5 CLE credits.

This CLE will help you advise clients about their options when facing foreclosure. It will also teach how to identify issues that may stop a pending foreclosure and how to allow enough time to develop workable solutions for clients.

The CLE will include this core information from seasoned practitioners:

- The procedure and timeline used in a non-judicial foreclosure
- Practical techniques for protecting your client's interests
- Basic file evaluation techniques to identify problem loans
- Overview of predatory lending and scams targeting homeowners
- Understanding when to pursue fore-

closure alternatives such as modifications or deeds in lieu

- Best practices when dealing with lenders
- Information about where to refer clients for various kinds of assistance related to their situation

This course is intended for attorneys who plan to volunteer through IVLP's Foreclosure Aid Project. There is no charge for the training. Participants agree to accept at least one pro bono referral for a foreclosure or other matter from the IVLP in 2013.

Lawyers asked to consider taking the 6.1 Challenge

The Fourth District Bar once again invites lawyers to take the 6.1 Challenge, a competition to celebrate pro bono and public service activities by members of the Fourth District Bar Association. Firms and individuals in various categories have an opportunity at light-hearted competition, logging their volunteer and pro bono work with the Idaho Volunteer Lawyers Program, (IVLP). The winners for each

category of law will be presented with awards at the Law Day reception in the spring. The winning offices will receive a plaque. To participate, simply download the 6.1 Challenge form found on the Idaho State Bar website under IVLP. Then fill out the form and turn it in to the IVLP before April 5, 2013. For more information, contact IVLP Director Mary Hobson at 334-4510.



IVLP earns \$2,500 grant from OfficeMax

The Idaho Volunteer Lawyers Program has been awarded \$2,500 from the OfficeMax Boise Community Fund. The grant will help the Idaho Volunteer Lawyers Program continue providing volunteer lawyers for members of our community who cannot afford to pay for representation. IVLP staff would like to express sincere gratitude for the sustained support of Office Max Boise Community Fund.

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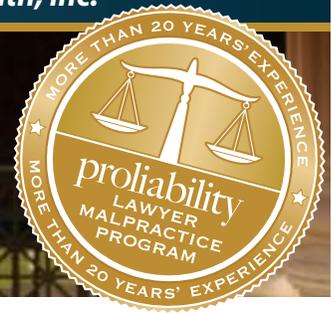
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2. "Human hacking." A low-tech skillset utilized by hackers that exploits human trust, often part of email scams.

4. The "free space" on a hard drive where deleted files can be found.

6. A type of "virus-network" that utilizes infected victims for combined computing, DDOS attacks, and more.

7. Format of cell-phone picture messages.

8. On Android devices, databases of evidentiary value are stored in this format.

9. Extra space at the end of a file where deleted data can exist.

10. Algorithm used to ensure evidence integrity; the "data fingerprint."

11. Type of container used to shield seized mobile devices from radio waves.

13. Verb: to gain administrative access on an iOS device.

DOWN

1. Hardware device used to ensure that evidence drives are not contaminated during acquisition.

2. A common web vulnerability where a hacker executes malicious code to alter a database.

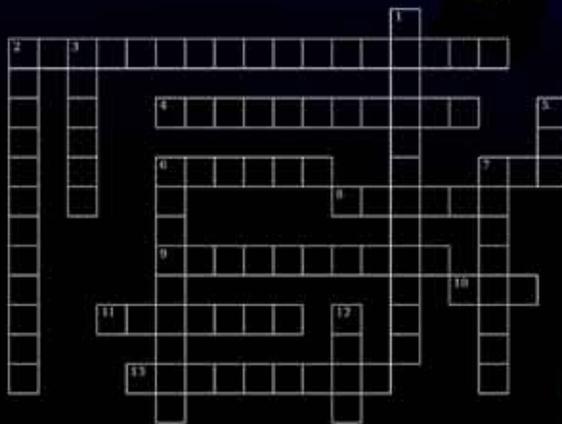
3. The first piece of hardware a forensic examiner reaches for when responding to a computer-crime.

5. Text message format, limited to 160 characters.

6. Term for forensic disk images containing every bit of an evidence drive.

7. "Hidden" data such as date-time stamps and GPS coordinates, often part of picture files.

12. Newer type of cryptographic hash, also used to verify evidence integrity.



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