



The Advocate

Official Publication
of the Idaho State Bar
Volume 56, No. 6/7
June/July 2013

“Successors and Assigns” Obsolete	30
Health Care Reform	64
Idaho’s Insurance Exchange	70
Ernesto Sanchez Retires	72

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The Advocate

The Official Publication of the Idaho State Bar
56 (6/7), June/July 2013

Section Articles

- 25** This Section Means Business
When it Comes to Practical Skills
Brent T. Wilson
- 26** Enforceability of Forum Selection
Clauses — You Might Be Surprised
Brian R. Buckham and Adam J. Richins
- 30** It's Time to Get Rid of the
"Successors and Assigns" Provision
Kenneth A. Adams
- 32** No Glossing Over Indemnification Provisions
Jarin O. Hammer and Lindsay M. Lofgran
- 36** More Notice Obligations (and Perils)
For Employers Maintaining Retirement Plans
John C. Hughes
- 48** Problems with Pronouns Part III:
Gender-Linked Pronouns
Tenielle Fordyce-Ruff
- 51** Local Flood Control: Using Idaho's
Flood Control District Statute to Enable
Place-Based Stream Restoration
Jerold A. Long and Samuel Finch
- 61** Book Review: History of a
Treaty and the Mighty Columbia
Gerald Mueller
- 64** Health Care Reform Compliance for Employers:
Hidden Perils of the Shared Responsibility
Requirements
Bret Busacker and Bret Clark
- 70** Idaho's Health Insurance
Exchange Onward and Upward
Tom Mortell and Gabe Hamilton
- 72** Devotion, Passion Drove
Sanchez at Idaho Legal Aid Services
Dan Black
- 74** 2013 Idaho Academy of
Leadership for Lawyers (IALL)
Dan Black



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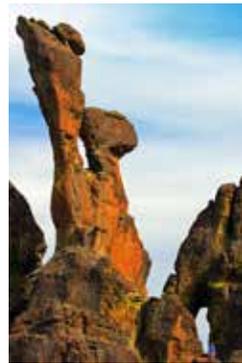
The Advocate makes occasional posts and takes comments on a LinkedIn group called "Magazine for the Idaho State Bar."

Columns

- 16 President's Message, *Paul W. Daugharty*
20 Executive Director's Report, *Diane K. Minnich*
45 Idaho Courts, *Catherine Derden*

News and Notices

- 15 Continuing Legal Education (CLE) Information
18 Discipline
18 Licensing Cancellations and Reinstatements
18 News Briefs
22 Distinguished Lawyer Award Dinner
22 ISB/ILF Service Award Luncheon
23 Celebrating 50, 60 and 65 Years of Practice
41 Idaho Court of Appeals and Idaho Supreme Court
42 Cases Pending
55 July 2013 ISB Examination Applicants
57 New Admittees
58 Of Interest
78 Idaho Law Foundation
80 Classifieds
82 2013 Idaho State Bar Annual Meeting



On the Cover:

The photographer is Chris Nye a partner at White, Peterson, Gigray, Rossman, Nye & Nichols, P.A. in Nampa. Chris took the photograph while he and his wife Vicki (lower right foreground) were camping at Little City of Rocks north of Gooding.

Hoodoos are formed when soft rock is topped by harder less easily eroded rock that protects the column from the elements. Wind, rain and freeze/thaw cycle eventually erodes away the softer rock leaving the hoodoo.

Section Sponsor:

This issue of *The Advocate* is sponsored by the Business & Corporate Law Section.

Editors:

Special thanks to the June/July editorial team: Tenielle Fordyce-Ruff, Dean Bennett, Denise Penton, Brian P. Kane.

August issue's sponsor:

Water Law Section.

Also:

We hope you like a few graphic design changes we are making, including a slightly larger font for the body text. Feel free to comment on *The Advocate's* LinkedIn page called "Magazine for the Idaho State Bar" or call Managing Editor Dan Black directly at (208) 955-8866.



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ADVOCATE STAFF

Dan Black

Managing Editor

dblack@isb.idaho.gov

Bob Strauser

Senior Production Editor

Advertising Coordinator

rstrauser@isb.idaho.gov

Kyme Graziano

Member Services Assistant

LRS Coordinator

kgraziano@isb.idaho.gov

www.idaho.gov/isb

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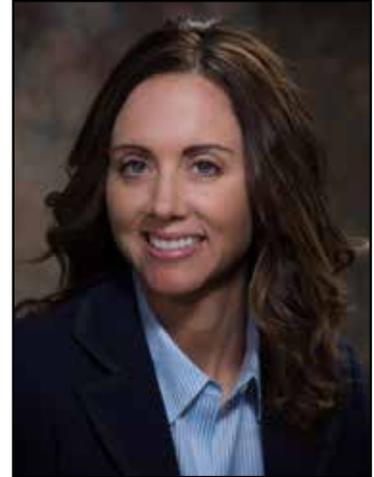
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Shelli is a native Idahoan. She received her undergraduate degree from Idaho State University and her Juris Doctorate from the University of Idaho.

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A ceremony to honor his past, present and future will be held on Wednesday, July 31, 2013, beginning at 3:00 p.m. in District Courtroom 2, with refreshments to follow, at the James A. McClure Federal Building and United States Courthouse, 550 W. Fort St., Boise.



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ISB/ILF Upcoming CLEs

June

June 12

International Arbitration: How it Works & How it Compares to Litigation in a Foreign Court
Sponsored by the ISB International Law Section
The Law Center, 525 W. Jefferson – Boise / Statewide Webcast
Noon (MDT)
2.0 CLE credits of which .5 is Ethics

June 13

Current Issues in Immigration Law
Co-Sponsored by the ISB Business and Corporate Law Section and the ISB International Law Section
Noon (MDT)
Red Lion Canyon Springs, 1357 Blue Lakes Blvd. N. – Twin Falls
2.0 CLE credits

June 14

Current Issues in Immigration Law
Co-Sponsored by the ISB Business and Corporate Law Section and the ISB International Law Section
9:00 a.m. (MDT)
Shilo Inn, 780 Lindsay Blvd. – Idaho Falls
2.0 CLE credits

July

July 17-19

Idaho State Bar Annual Meeting
The Coeur d'Alene Resort, 115 S. 2nd Street – Coeur d'Alene
Opportunity to obtain 8.5 CLE credits of which 2.0 is Ethics

August

August 21

Working on Your First or Next Real Estate Case
Sponsored by the Idaho Law Foundation
The Law Center, 525 W. Jefferson – Boise / Statewide Webcast
9:00 am (MDT)
2.0 CLE credits

August 28

CLE Idaho: Replay and Lunch – Defending Prisoners at Guantanamo: Due Process, International Law & Justice in a Time of Conflict
Sponsored by the Idaho Law Foundation
Community Campus, 1050 Fox Acres Road – Hailey
11:30 am (MDT)
2.0 CLE credits

CLE Idaho: Replay and Lunch – Defending Prisoners at Guantanamo: Due Process, International Law & Justice in a Time of Conflict
Sponsored by the Idaho Law Foundation
City Hall, 1134 F. Street - Lewiston
11:30 am (PDT)
2.0 CLE credits

September

September 6-7

Annual Advanced Estate Planning Seminar
Sponsored by the Taxation, Probate and Trust Law Section
Sun Valley Resort – Sun Valley, ID

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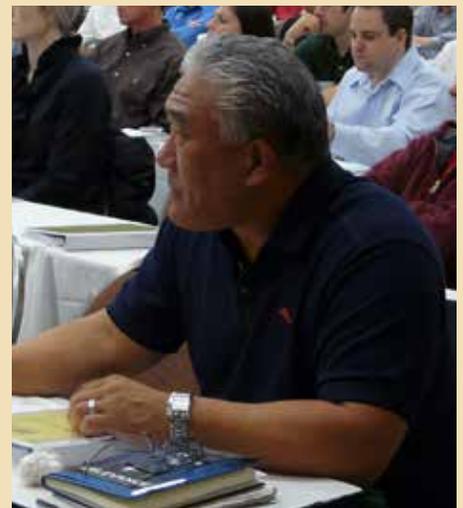
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Principles Lead the Way in a Professional Life

May 8 was my son's 15th birthday. Happy Birthday Jack. Amazing how quickly life moves. I was admitted to practice in Washington in 1991 and Idaho in 1992. Looking back over the past 20 plus years of practicing law, I can honestly say that I have enjoyed it.

Rarely have I had difficulty dealing with opposing counsel and I have been fortunate to have developed a client base that I like working with. I have strong ties to the community - both professionally and personally.



I have been privileged to work with some amazing people. Not only other lawyers but clients who never cease to amaze me with their ability to keep calm and carry on. I am constantly learning — not only how to be a better lawyer, but to be a better person.

Understandably, the practice of law can be difficult. The hours are long and oftentimes stressful. Time away from family and friends can be trying and can never be gotten back. However, in the end, what we do is both important and rewarding. Our communities benefit from our involvement and our ability to help others is limited only by our desire to serve.

The Idaho Rules of Professional Conduct, Preamble: A Lawyer's Responsibilities (6) provides in pertinent part that:

As a public citizen, a lawyers should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the

law beyond its use for clients... A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel.

When I read this I can't help but think about the obligations we have — not only the responsibility to make sure all people have access to justice, but also the responsibility to help cultivate a knowledge of the law. We are responsible to disseminate a true understanding of the law and just as importantly, an appreciation of the importance of the rule of law in our society and in our communities.

The Idaho Rules of Professional Conduct, Preamble: A Lawyer's Responsibilities (8) provides in pertinent part that:

A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen is usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communication will be private.

In previous articles I have said being a lawyer is a 24-hour job. The responsibility associated with practicing law

Our communities benefit from our involvement and our ability to help others is limited only by our desire to serve.

doesn't end at the end of a long day at the office. It continues with us as we go home to our families or interact with friends and neighbors.

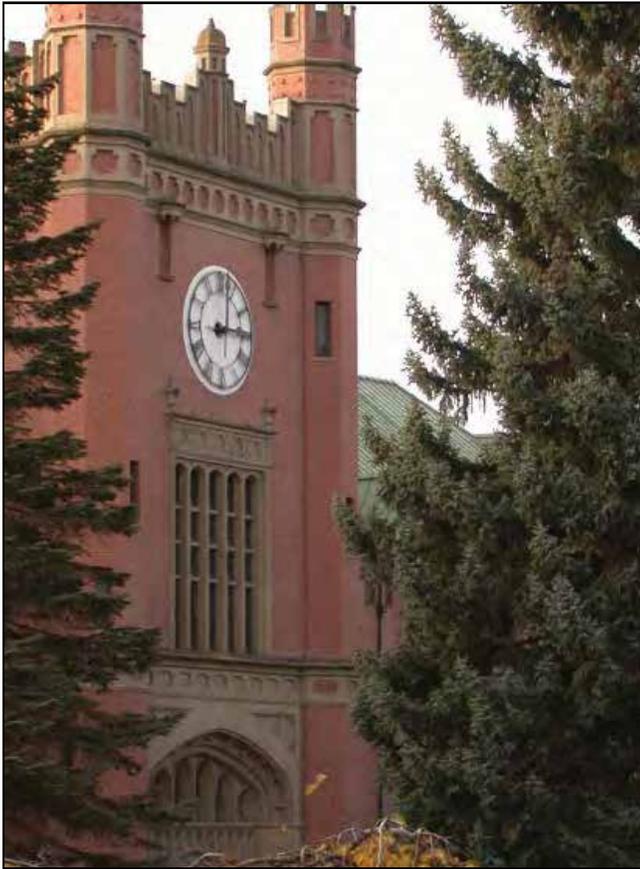
We should never lose sight of the fact that our actions will always be scrutinized by those who don't fully understand or appreciate what we really do for a living. Just as importantly, though, is the understanding that those closest to us need to understand and appreciate why we do what we do — why we can't talk about what's really on our minds after a long day at the office.

They need to understand why we spend time away or seemingly always arrive late to the recital or ballgame. It's not because we want to. It's because if we don't do our best to ensure that justice is done, who will?

The practice of law is a privilege and with privilege comes responsibility. Sometimes with that responsibility comes sacrifice and that may be the hardest part of the job.

About the Author

Paul W. Daugharty is in solo practice in Coeur d'Alene where he practices in the areas of business, corporate, real estate and civil litigation. He earned his law degree from Gonzaga University School of Law and is a member of the Idaho and Washington State Bars. Paul has three children: Katherine, a junior at University of Idaho; Emma, a Senior at Lake City High School; and Jack, a Freshman at Lake City High School.



The University of Idaho College of Law would like to congratulate our graduates who passed the February 2013 Idaho State Bar Exam:

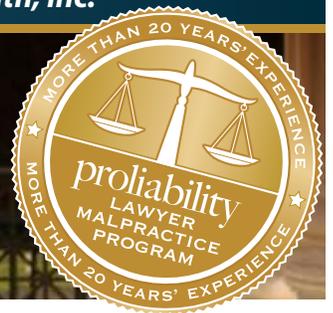
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¹"Profile of Legal Malpractice Claims: 2008–2011," American Bar Association, September 2012.

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DISCIPLINE

B. TODD BAILEY

(Interim Suspension)

On May 3 2013, the Idaho Supreme Court issued an Order Granting Stipulation for Interim Suspension of License to Practice Law of Meridian attorney B. Todd Bailey.

The parties filed a Stipulation for Interim Suspension of License to Prac-

tice Law on April 10, 2013. The Idaho Supreme Court's Order immediately suspended Mr. Bailey's license to practice law, pursuant I.B.C.R. 510(a)(1), until all disciplinary matters referred to in the Stipulation are concluded. All such disciplinary matters will be held in abeyance until pending civil cases related to the disciplinary case are

concluded at the respective trial court level. The Order also provides that the time Mr. Bailey spends on interim suspension shall be credited toward any eventual disciplinary sanction he may receive.

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

LICENSING CANCELLATIONS

Order to cancel license to practice law for non-compliance with MCLE requirements pursuant to Idaho Bar Commission Rule 406(d)

WHEREAS, The Commissioners of the Idaho State Bar by and through their Executive Director have filed with the Clerk of this Court evidence that the following named attorney(s) have not complied with the Mandatory Continuing Legal Education Requirements required by Idaho Bar Commission Rule 406(d), and have not given notice of withdrawal from the practice of law to the Idaho State Bar and this Court;

NOW, THEREFORE, IT HEREBY IS ORDERED that the license to practice law in the State of Idaho of the following named attorneys be, and hereby are, CANCELLED and said person(s)

shall be placed on INACTIVE STATUS for failure to comply with the Mandatory Continuing Legal Education Requirements:

PAUL PHILLIP BURGHARDT
MICHELLE CROSBY
DANIEL LEE HEMBREE
GARY SCOTT REEDY

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

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

Dated this 29 day of April, 2013.

By Order of the Supreme Court
Roger S. Burdick, Chief Justice

LICENSING REINSTATEMENTS

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

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

Daniel B. Marks; Active Status, April 19, 2013.

Sandra Anne McCune; Active Status, May 7, 2013.

Gary Scott Reedy; Active Status, May 7, 2013.

Stephanie Ann Fassett; Active Status, May 10, 2013.

NEWS BRIEFS

ISB Commissioner Elections

Elections for two positions on the Idaho State Bar Board of Commissioners were held in early May. The winning candidates were Trudy Hanson Fouser, for the Fourth District, and Tim Gresback for Districts 1 and 2.

Trudy Fouser has been a member attorney at Gjording Fouser PLLC in Boise since 2000. Trudy has been lead counsel in more than 50 civil trials and is a Fellow of the American College of Trial Lawyers (ACTL). She is a past president of the Idaho Chapter of the Federal Bar Association.

Tim Gresback is a Moscow attorney who concentrates on personal injury cases. Tim has served as president of the Idaho Association of Criminal Defense Lawyers and the Idaho Trial Lawyers Association. In 2012, Tim was named

ITLA Trial Lawyer of the Year.

District Bar Associations pick officers

District Bar Associations held their elections this spring. The results are as follows:

First District:

President – Mariah R. Dunham
Vice President – Tyler Steven Wirick
Sec./Treas. – Michael Trevor Howard

Second District:

President – Deborah Lynn McCormick
Vice President – Jessica Francis Moser
Sec./Treas. – Dana M. Johnson

Third District:

President – Gregory N. Swanson
Vice President – Danielle C. Scarlett
Secretary – Yecora Leaphart Daniels
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The spoken word perishes; the written word remains.





Executive Director's Report

Join Us in Coeur d'Alene for the 2013 Annual Meeting

Diane K. Minnich
Executive Director, Idaho State Bar

The 1986 Idaho State Bar Annual Meeting was scheduled to be held at the newly renovated North Shore Resort. I was a complete newbie, with no idea what happens at a state bar annual meeting, so it seemed appropriate to do a site visit of the Resort. I can still recall walking through the construction site in a hard hat only a few months before the scheduled Annual Meeting. I wasn't convinced that the resort would actually be ready in time for the ISB Annual Meeting. However, the remodeled and renamed Coeur d'Alene Resort opened in early summer of 1986, just in time for our Annual Meeting. Since that time, it has become a world class resort for visitors from around the globe.

Since 1986, the ISB Annual meeting has been held at the CDA resort 5 times, the last time in 1999.

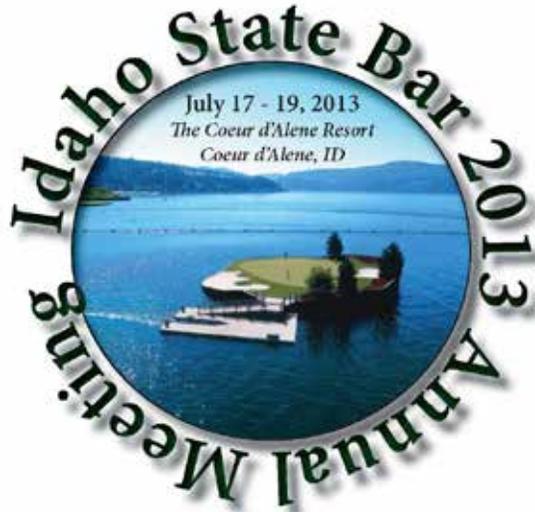
This year, for the first time in 15 years the Idaho State Bar Annual Meeting will take place July 17-19 at the Coeur d'Alene Resort.



In 2011, the Resort was remodeled and renovated. We look forward to enjoying the many activities and sights of North Idaho, while once again staying at the beautiful CDA Resort.

The Annual Meeting includes 11 CLE programs, social events, award presentations honoring lawyers and non-lawyers, and, for the first time, a community service project.

The keynote speaker is Bruce Reed, a CDA native and the son of CDA attorney Scott Reed and former legislator Mary Lou Reed. Mr. Reed currently serves as chief of staff to Vice President



Joe Biden. He was Vice President Al Gore's speechwriter, and served as past Executive Director of the National Commission on Fiscal Responsibility and Reform, also known as the Bowles-Simpson Commission.

This year's CLE program topics are:

- Asset Purchase, Stock Purchase Agreements and Indemnity
- Lawyering in the Information Age
- Planning for Portability and Other Estate Tax Issues under the 2012 Tax Act and an Overview of VA Benefits for Long Term Care
- Monkey in the Middle: What Every Idaho Lawyer Need to Know about the Law Pertaining to Animals
- New Rules Probably Coming Your Way: Perspectives on the Supreme Court Pilot Project Implementing the Family Court Rules in the 4th Judicial District
- The Affordable Healthcare Act: Resolved and Unresolved Legal Challenges
- Employment and Labor Law Update
- Land Use Regulation in Idaho: Balancing Private Use with Public Power
- Marijuana? Border Control!

- The Latest on the Bunker Hill Superfund Site

- Lessons from the Masters

Special thanks to our sponsors for their support of the Annual Meeting. Their contributions allow us to offer the conference at a reasonable cost, while maintaining the quality of the programs and events. They are:

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The Annual Meeting program brochure is posted on the ISB website and was mailed to ISB members in late May. For more information about the conference, see pages 22-23 and 82-83 of this issue of *The Advocate*, visit the ISB website; www.idaho.gov/isb or call 208-334-4500. We hope to see you in Coeur d'Alene this summer.

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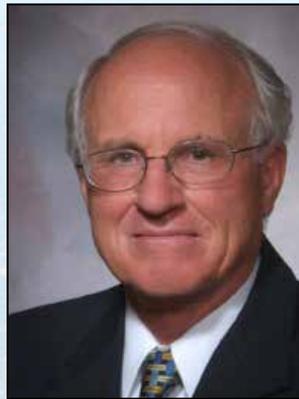
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Wednesday, July 17 at The Coeur d'Alene Resort, Lakeview Terrace
Reception begins at 6:00 p.m. with the dinner following at 7:00 p.m.

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

In 2013 the Idaho State Bar honors two renowned Idaho lawyers:



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Idaho State Bar / Idaho Law Foundation Service Awards Luncheon

Thursday, July 18 at The Coeur d'Alene Resort, Bay 4
Service Awards Luncheon begins at Noon.

The Service Awards are presented to individuals from around Idaho who have contributed their time and talent to serving the public and improving the legal profession.



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For more information about attending these events contact Dayna Ferrero at (208) 334-4500 or dferrero@isb.idaho.gov.

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5:30 p.m., Thursday, July 18, at The Coeur d'Alene Resort, Casco Room.
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This Section Means Business When it Comes to Practical Skills

Brent T. Wilson

Corporate Law Section welcomes this opportunity to sponsor this issue of *The Advocate*. The Business and Corporate Law Section strives to provide exposure to corporate and business law for all members of the Idaho State Bar. We like to believe that we offer some of the best half-hour continuing legal education opportunities at our monthly Section meetings. During the past year or so we have been honored to have local experts present on diverse business law subjects such as how health care reform will impact business operations, due diligence reviews, the EB-5 visa program, stock purchase agreements and professional rules of responsibility involving organizational clients.

In May we were honored to have Ken Adams, a leading national expert in contract drafting, travel to Idaho to present a practical skills seminar at the Section's annual CLE on preparing clear and concise contracts. We were fortunate to have Ken do presentations in both Coeur d'Alene and Boise. This was a tremendous learning opportunity with a true practical skills approach. We appreciate Ken's knowledge and expertise. A special thanks goes out to members of the Section's Annual CLE Committee, Michelle Gustavson, Betsy Oliphant, Matt Christenson, and Wendy Couture, for bringing the annual CLE together.

To continue with the practical skills theme of our annual CLE, in this issue of *The Advocate* we are excited to offer

several contract and drafting related topics to follow up with our annual CLE. Brian Buckham and Adam Richins address the topic of the enforceability of forum selection clauses. This is an article that is worth a read. The Idaho Code addresses how forum selection clauses may be enforced, which is a topic all contract drafters should understand. In case you missed the Section's annual CLE, Ken Adams provides some insight on the use of "successors and assigns" provisions. Please read the article, it is short and straightforward, but (spoiler alert) the bottom line is that this is not a necessary part of your contracts. Jarin Hammer and Lindsay Lofgren provide us with an excellent overview of indemnification clauses and what to watch for in negotiating contracts with indemnification provisions. Finally, not a contract drafting matter, but something that impacts many businesses, Section member John Hughes writes about notice requirements for business owners who maintain 401(k) and/or profit sharing plans. We all appreciate the U.S. Department of Labor for these rules.

Please dig in and enjoy this issue of *The Advocate*. We appreciate our authors and the time that they took to write these excellent articles. We hope any of you who are not members of the Business and Corporate Law Section will consider joining the Section. Please feel free to drop into one of our regular business meetings and attend one of our monthly CLEs. We meet at the ISB office in Boise at noon on the second Wednesday of every month except in June, July, and August. We have

To continue with the practical skills theme of our annual CLE, in this issue of *The Advocate* we are excited to offer several contract and drafting related topics to follow up with our annual CLE.

also established a regular meeting place in Idaho Falls that joins the meeting via video conference. We are working on re-establishing a regular meeting spot in Coeur d'Alene. If you are able to attend at one of our regular meeting locations we will gladly buy you lunch.

About the Author

Brent Wilson is serving his second term as the Chair of the Business and Corporate Law Section. Brent works in-house for the Elks Rehab System in Boise. Prior to that he had a corporate and nonprofit/tax exempt organizations practice with the Boise firm Evans Keane.



Business and Corporate Law Section

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Brent T. Wilson
Elks Rehab System
600 N. Robbins Road
Boise, ID 83702
Telephone: (208) 489-4761
Email: bwilson@elksrehab.org

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Enforceability of Forum Selection Clauses — You Might Be Surprised

Brian R. Buckham
Adam J. Richins

Like many provisions considered to be “boilerplate” in contracts, the forum selection clause is commonly included but probably receives little thought or attention. These provisions, however, deserve scrutiny because properly drafted and enforceable forum selection clauses significantly impact how and where a dispute will be resolved.

Drafters might skim, at best, the standard provision, which often states as follows:

This Agreement shall be governed and construed in accordance with the laws of the state of [INSERT YOUR FAVORITE] without regard to conflicts of laws principles thereof, and all questions concerning the validity and construction of this Agreement shall be determined in accordance with the laws of such state. Each party hereby irrevocably submits to the exclusive jurisdiction of any state or federal court of competent jurisdiction located in the state of [INSERT YOUR FAVORITE] in any action or proceeding arising out of or relating to this Agreement and hereby irrevocably agrees, on behalf of itself and on behalf of such party’s successors and assigns, that all claims in respect of such action or proceeding may be heard and determined in any such court and irrevocably waives any objection such person may now or hereafter have as to the venue of any such suit, action, or proceeding brought in such court or that such court is an inconvenient forum.

Often, the parties debate the appropriate state to include in the clause, with each party seeking a home-court advantage. A party might choose a particular forum for a number of reasons, including the existence of favorable procedural laws, the convenient proximity to the company’s headquarters (or to the offices of its usual law firm),

The basic federal principles governing the enforceability of forum selection clauses were articulated by the U.S. Supreme Court in *M/S Bremen v. Zapata Off-Shore Co.*¹

favorable jury outcomes in that forum, or familiarity with the forum’s courts. In any event, once the parties select a state, the victor is confident in the bullet-proof nature of the clause and breathes a sigh of relief. The provision is then forgotten, dusted off only when a dispute arises and the parties need to know where to file suit, where to hire local counsel, and where to make hotel reservations for the ensuing dispute.

What happens, then, when a party wants to litigate the claim in an Idaho federal district court, but the contract expressly states that New York law will govern the agreement and that the exclusive forum for any such matter will be in the state of New York (perhaps even specifying the county, for added effect)? You might be surprised.

The Basic Premise

The basic federal principles governing the enforceability of forum selection clauses were articulated by the U.S. Supreme Court in *M/S Bremen v. Zapata Off-Shore Co.*¹ The Court found that a forum selection clause is prima facie valid and is only set aside if it is unreasonable under the circumstances.² The Ninth Circuit has held that a forum selection clause is “unreasonable if (1) its incorporation into the contract was the result of fraud, undue influence, or overweening bargaining power; (2) the selected forum is so ‘gravely difficult and inconvenient’ that the complaining party will ‘for all practical purposes be deprived of its day in court;’ or (3)

enforcement of the clause would contravene the strong public policy of the forum in which the suit is brought.”³

The *Bremen* analysis is not difficult in some cases. For example, in a fine-print contract of adhesion between a commercial party and a consumer counterparty — particularly in the context where a consumer enters into a shrink-wrapped agreement selecting a forum with no nexus to the dispute — a court will probably strike down the provision if challenged. But what about a dispute between two sophisticated commercial parties, represented by competent counsel, where the forum selection clause was specifically negotiated and carefully crafted? Certainly the forum selection clause is always valid in that circumstance, right? Should not the defendant in this example be confident that it will easily prevail with its motion to dismiss for improper venue under Federal Rule of Civil Procedure 12(b)(3), or, in the alternative, its motion to transfer venue pursuant to 28 U.S.C. § 1404(a)? Read on.

Improper Venue?

As an initial matter, federal law, not state law, governs the enforceability of forum selection clauses in diversity cases in federal courts.⁴ For those who take pride in their understanding of the *Erie* doctrine, you will be pleased to know that the doctrine is alive and well. Indeed, based on *Erie* and its progeny, the Ninth Circuit has consistently held that federal law governs in determining

whether a forum selection clause is enforceable, even where the parties' agreement contains a choice of law clause that selects the law of a specific state.⁵

The analysis does not stop there, however. Even though federal law governs as to the enforceability of forum selection clauses, *Bremen* requires courts to apply the state law of the forum court in determining the scope and effect of forum selection clauses. As noted earlier, the court in *Bremen* held that “[a] contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision.”⁶ State law, therefore, controls whether the court can uphold the negotiated terms of a forum selection clause.

By example, in *Jones v. GNC Franchising, Inc.*,⁷ the Ninth Circuit applied *Bremen* to strike down a Pennsylvania forum selection clause. The case involved a franchisee's dispute with its franchisor under a franchise agreement. The franchisee's claims involved breach of contract, breach of the covenant of good faith and fair dealing, and various tort claims. Notwithstanding the existence of both a Pennsylvania forum selection clause and a Pennsylvania choice of law clause, the franchisee sued the franchisor in California.⁸ Ultimately, the Ninth Circuit concluded that enforcing the exclusive forum selection clause would violate California's strong public policy against such clauses in franchise agreements.⁹

Idaho courts have reached the same conclusion. Idaho has a strong public policy against the enforcement of forum selection clauses, even as between sophisticated commercial parties. The support for this policy gets its genesis from Idaho Code § 29-110, which provides in relevant part that “every stipulation or condition in a contract, by which any party thereto is restricted from enforcing his rights under the contract in Idaho tribunals . . . is void as it is against the public policy of Idaho.”¹⁰

The Idaho Supreme Court initially broadened the application of § 29-110 in *Cerami-Kote*.¹¹ There, the Court ap-

State law, therefore, controls whether the court can uphold the negotiated terms of a forum selection clause.

plied § 29-110 to a dispute involving a promissory note despite the statute's title — “Limitations on right to sue — Franchise agreements” — which appeared to apply solely to franchise agreements. Since then, Idaho courts have routinely embraced § 29-110 to invalidate forum selection clauses in all types of contracts, from insurance contracts to disputes between shareholders of a corporation.¹² In 2012, the Idaho state legislature amended Idaho Code § 29-110 to reflect Idaho Supreme Court case law.¹³

Equally important, courts have not limited § 29-110 to the context of adhesion contracts or those involving unsophisticated consumers. Instead, courts have applied it to contracts executed between complex commercial parties in sophisticated transactions.¹⁴ This application is consistent with the plain language of § 29-110, which states that the statute applies to “any party” to a transaction, not just small businesses or unsophisticated parties.

Take for example *Brandt v. Com-Trust, Inc.*,¹⁵ where the federal district court of Idaho applied *Bremen* when a plaintiff entered into an agreement with a Florida corporation containing a Florida forum selection clause. The Florida corporation moved to enforce the Florida forum selection clause under Rule 12(b)(3). The court responded in three parts. First, it recited the basic public policy principles of *Bremen* and determined that because the case had been filed in Idaho, Idaho's public policy (not Florida's) applied to determine whether enforcement of the clause would be unreasonable. Second, the court cited Idaho Code § 29-110(1)

and found that Idaho had a strong public policy against the enforcement of forum selection clauses under both statute and judicial decision.¹⁶ Third, based on Idaho's strong public policy, the court concluded that it would not enforce the Florida forum selection clause in the parties' agreement.

There is an important practice point here. The court in *Bremen* referred to application of the public policy of the “forum in which suit is brought.”¹⁷ Thus, counsel desiring to litigate a claim in an Idaho federal court, but who are confronted with a forum selection clause seeking to require that the claim be filed in another state, may wish to consider being the first to file a complaint in the federal district of Idaho.

Transfer the Case?

A party seeking to litigate outside of Idaho may also seek to enforce the forum selection clause by filing a motion to transfer the case to another forum pursuant to 28 U.S.C. § 1404(a), which provides, “For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.” Courts have broad discretion in their application of the transfer statute.¹⁸ To prevail on a § 1404(a) motion to transfer, a party must make a very strong showing of inconvenience to warrant upsetting the plaintiff's choice of forum.

Apparently, even the inclusion of an express provision waiving any objection to a specific forum, as is frequently

done and is included in the example early in this article, is not dispositive. Although the presence of a forum selection clause is a significant factor in the § 1404(a) analysis, the Ninth Circuit has held that a forum state's strong public policy against the enforcement of forum selection clauses (e.g., Idaho Code § 29-110(1)) is at least as significant a factor.¹⁹ If they are to be given equal weight, then presumably a court in Idaho will find that they negate one another. But, there is no reason for a plaintiff seeking to retain the case in Idaho to admit defeat. Notwithstanding the forum selection clause versus public policy negation, the Ninth Circuit outlined eight factors to consider in determining whether, in the context of an agreement containing a forum selection clause, transfer is appropriate:²⁰

- (1) the location where the relevant agreements were negotiated and executed;
- (2) the state that is most familiar with the governing law;
- (3) the plaintiff's choice of forum;
- (4) the respective parties' contacts with the forum;
- (5) the contacts relating to the plaintiff's cause of action in the chosen forum;
- (6) the differences in the cost of litigation in the two forums;
- (7) the availability of compulsory process to compel attendance of unwilling non-party witnesses; and
- (8) the ease of access to sources of proof.

Importantly, courts have held that a party seeking to transfer a case from Idaho to another forum must not only show that another forum is more convenient, but also that Idaho is an inconvenient forum.²¹ These factors equip a plaintiff seeking to litigate in Idaho, but facing a forum selection clause, with a few important practice tools.

Practical Tips

So, what can we learn from the Ninth Circuit's and Idaho's jurisprudence? Assuming a party would like

The Ninth Circuit outlined eight factors to consider in determining whether, in the context of an agreement containing a forum selection clause, transfer is appropriate:²⁰

a shot at a home-court advantage if a dispute materializes, the party should consider the following:

- Include a strong forum selection clause in the agreement, perhaps incorporating some or all of the elements from the sample clause included earlier in this article. While the clause could be invalidated under Idaho law, its inclusion is nonetheless a factor to be considered, and the strength of the provision and its degree of negotiation could factor into the analysis.
- While apparently not required, list the laws of the state of Idaho as the governing law, even where the venue may be listed as another state. This is probably an uncommon approach, and perhaps not agreeable to the parties. Nevertheless, it is a helpful factor in the Ninth Circuit's analysis. If the parties select New York as the forum, all hope is not lost, as federal courts are commonly tasked with applying the law of other states and do so readily.²² An exception may apply where the substantive law applicable to the claims is complex or significantly different from Idaho law; however, in the commercial contracts context this is somewhat unlikely.
- Negotiate and execute the agreement in Idaho, preferably with both parties physically present in Idaho during at least a portion of the negotiations. In-person closings — where the parties are physically present — are becoming increasingly rare. Similarly, with the relative low costs and convenience of data rooms, documentary due diligence is increasingly being conducted electronically. However, if the parties desire a physical closing, then site the

closing at an Idaho location. Likewise, if there will be physical documentary due diligence conducted, require parties to travel to Idaho to review the documents.

- If third-party advisors will assist with the transactions, consider the use of advisors located in or near Idaho, who will eventually be the witnesses for which the court is evaluating the convenience of the forum.
- Most importantly, be the plaintiff — be the first party to the contract to file a complaint, and file it in an Idaho court (per the Ninth Circuit's third factor).

Bottom line: do not assume a forum selection clause is valid in Idaho federal courts. And, if you prefer the case be litigated in Idaho, consider the Ninth Circuit's analysis when negotiating, drafting, and closing the transaction.

Endnotes

1 407 U.S. 1 (1972).

2 See *Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 325 (9th Cir. 1996) (citing *Bremen*, 407 U.S. at 10).

3 See *id.*

4 *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 512 (9th Cir. 1988). There, the Ninth Circuit noted that the question of whether state or federal law governs the enforceability of forum selection clauses in diversity actions is "dictated by the doctrine of *Erie Railroad v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed 1188 (1938), and its progeny." The Ninth Circuit began its analysis by stating that "in diversity suits . . . , federal district courts should apply state law to substantive issues, and federal laws to procedural issues." *Id.* Ultimately, the court concluded that the enforceability of a forum

selection clause is a procedural issue, requiring application of federal law.

5 Id.

6 Bremen, 407 U.S. 1, at 15. Although Bremen was an admiralty case, its standard has been widely applied to forum selection clauses in general.

7 Jones v. GNC Franchising, 211 F.3d 495, 498 (9th Cir. 2000).

8 Id. at 496.

9 Id. at 498.

10 Idaho Code § 29-110.

11 See Cerami-Kote v. Energywave Corp., 116 Idaho 56, 60, 773 P.2d 1143, 1147 (1989).

12 See, e.g., id.; see, e.g., Brandt v. ComTrust, Inc., Case No. CV06-166-S-EJL, 2006 WL 2136145, at *3 (D. Idaho July 28, 2006); Sunshine Min. Co. v. Allendalre Mut. Ins. Co., 107 Idaho 25, 26, 684 P.2d 1002, 1003 (1984); Oneida v. Oneida, 95 Idaho 105, 106-07, 503 P.2d 305, 306-07, n.1 (1972).

13 H.R. 639, 61st Leg., 2nd Reg. Sess. (Idaho 2012).

14 For instance, the transaction in question in Brandt was a commodity futures transaction.

15 2006 WL 2136145, at *3 (D. Idaho July 28, 2006).

16 Id. at *2.

17 Bremen, 407 U.S. at 15.

18 Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 31 (1988).

19 Jones, 211 F.3d at 498-99.

20 Id.

21 Decker Coal Co. v. Commonwealth Edison Co., 805 F.2d 834, 843 (9th Cir. 1986).

22 Whether a court would honor the choice of law provision is a separate matter, outside of the scope of this article.

About the Authors

Brian R. Buckham is senior counsel at IDACORP, Inc., where his practice is focused on securities, corporate finance, corporate governance, and transactional matters. Formerly, he was an attorney at Greenberg Traurig LLP and Davis Wright Tremaine, LLP, where his practice focused on securities, domestic and cross-border

mergers and acquisitions, venture capital, and corporate finance. An Idaho native, he obtained a degree in mining engineering from the University of Idaho, an MBA from Gonzaga University, and a J.D. from the University of Idaho.

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



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It's Time to Get Rid of the "Successors and Assigns" Provision

Kenneth A. Adams

Because a new transaction will generally resemble previous transactions, lawyers don't draft contracts from scratch. Instead, they copy, making whatever adjustments are required to reflect the new transaction. And generally they're willing to rely on the verbiage they find in precedent contracts, the assumption being that if it worked in previous transactions, it must be acceptable.

But if you take a closer look at the words and phrases that make up traditional contract language, you'll find much dysfunction. That's also the case when it comes to some of the standard components of contract boilerplate.

A good example is the "successors and assigns" provision. Here's a representative example:

This agreement is binding upon, and inures to the benefit of, the parties and their respective permitted successors and assigns.

Although the "successors and assigns" provision is utterly standard, the fusty language — use of "inures," meaning "to take effect, to come into use," and use of "assigns" rather than "assignees" — suggests that it's something of a fossil. In fact, close scrutiny shows that it performs no useful function; you should delete it from your contracts.

Consider the following seven functions that the "successors and assigns" provision could conceivably perform. The first five are suggested in *Negotiating and Drafting Contract Boilerplate* (Tina L. Stark ed. 2003), referred throughout this article as simply "*Boilerplate*."

(For purposes of the following discussion, bear in mind that an assignment occurs when one party transfers to a nonparty its right to receive the other party's performance. The transferring party is the assignor; the nonparty to whom the right is assigned is the assignee; and the party who must perform in favor of the assignee is the nonassigning party.)

1. To Bind an Assignee to Perform. According to *Boilerplate*, some courts

If you don't address assignment directly, it would be best to dispense with the "successors and assigns" provision, lest a court look to it for guidance on assignment.

have held that a "successors and assigns" provision in a contract binds the assignee of any rights under that contract to perform the assignor's obligations under that contract. But that's contrary to accepted law, which holds that the assignee assumes the assignor's obligations only if the assignee agrees to do so.

2. To Bind a Nonassigning Party. *Boilerplate* says that a second purpose of the "successors and assigns" provision is to restate common law to the effect that after an assignment, the nonassigning party is under an obligation to perform in favor of the assignee. But why restate the common law? If a party may assign its rights under a contract, it follows that the nonassigning party must perform in favor of the assignee — otherwise, the right to assign would be worthless. Sometimes it's useful to state in a contract what would apply anyway — particularly when the parties might otherwise be unaware — but doing so in this case seems excessive.

3. To Determine Whether Rights Are Assignable. According to *Boilerplate*, some courts have relied on a "successors and assigns" provision to determine whether a party may assign its rights under a contract. It's standard practice to address that issue directly; if you do so, you certainly wouldn't need the inscrutable "successors and assigns" provision, too. And if you don't address assignment directly, it would be best to dispense with the "successors and assigns" provision, lest a court look to it for guidance on assignment.

4. To Determine Whether Performance Is Delegable. And according to

Boilerplate, some courts have relied on the "successors and assigns" provision to determine whether a party may delegate its obligations under a contract. The same considerations apply in this context as apply to whether rights are assignable.

5. To Bind the Parties to the Contract. The "successors and assigns" provision could be read as indicating that the parties intend to be legally bound. Such a statement would be ineffective, as it isn't a condition to enforceability of a contract that the parties have, or explicitly express, an intention to be legally bound.

6. To Ensure That If a Party Sells Its Assets, the Buyer Will Perform Under the Contract. If online commentary is any guide, some lawyers are of the view that the "successors and assigns" provision could help a contract party if the other party sells its assets and excludes from that deal its contract with the first party. But that's not so. The general rule is that if one company sells or transfers assets to another, the second entity isn't responsible for the debts and liabilities of the transferor. That rule has developed exceptions under which a predecessor's liabilities could be imposed upon a successor. See Byron F. Egan, *Asset Acquisitions: Assuming and Avoiding Liabilities*, 116 Penn. St. L. Rev. 913, 931–48 (2012). But none of those theories relies on the "successors and assigns" provision.

7. To Establish That a Contract Is Supported by Consideration. Generally, a contract promise isn't enforceable unless the promisor receives con-

sideration — in other words, receives something of value in exchange. It's a basic principle of contract law that a false recital of consideration cannot create consideration where there was none, but not all judges are aware of that. In particular, the Illinois Appellate Court has suggested that presence of a recital of consideration is all that's required to establish that a contract is supported by consideration. See *Urban Sites of Chicago, LLC v. Crown Castle USA*, 979 N.E.2d 480, 493 (2012). Just as bizarrely, the court also pointed to "successors and assigns" language in the contract to support its conclusion. Nothing in contract law suggests that the "successors and assigns" provision has any bearing on consideration.

So, to summarize, here's the effect of the "successors and assigns" provision with respect to its seven ostensible functions: (1) ineffective; (2) needlessly states the obvious; (3) is the wrong place to address this issue; (4) is the wrong place to address this is-

It's a basic principle of contract law that a false recital of consideration cannot create consideration where there was none, but not all judges are aware of that.

sue; (5) ineffective; (6) ineffective; and (7) ineffective.

Boilerplate suggests that the traditional "successors and assigns" provision is "so truncated that its objectives are veiled." But a simpler explanation is that it's a useless provision that survives because drafters are unsure what function it serves and so are loath to get rid of it. And it's sufficiently obscure that one can project onto it all sorts of unlikely meanings.

It's high time that drafters stop giving "successors and assigns" provision the benefit of the doubt. Purge it from your contracts.

About the Author

Kenneth A. Adams is a speaker and consultant on contract drafting. He's author of *A Manual of Style for Contract Drafting* (ABA 3d ed. 2013) and a lecturer at the University of Pennsylvania Law School. He can be contacted at kadams@adamsdrafting.com.



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No Glossing Over Indemnification Provisions

Jarin O. Hammer
Lindsay M. Lofgran

When was the last time you seriously reviewed an indemnification provision in a contract? We recently had clients who were leasing a commercial building. Among other language, the lease agreement's indemnification provision provided that our clients would be responsible for any damage that would occur on the leased property, even if our clients were not responsible for causing the damage. We wrestled with what to do — our clients did not want to be liable for any damage they did not cause. In the end, we were able to negotiate an agreement that our clients would only indemnify the landlord for damages caused by our clients. In addition, we had our clients' insurance company review and agree to pay out on any claims relating to the indemnification provision.

Unfortunately, not all indemnification negotiations are that easy. Instead, as attorneys, we need to take time to understand the risks, duties, and strategies that are involved in drafting and reviewing indemnification provisions. This article highlights some of those risks, duties, and strategies attorneys need to be aware of when negotiating and drafting an indemnification provision.

Purpose of indemnification

Indemnification stems from “the concept that a party should be held responsible for his own wrongs, and if another is compelled to pay damages caused by the wrongdoer, that party is entitled to recover from the wrongdoer.”¹ Indemnification is at once both a risk-shifting mechanism and a deterrent to injurious behavior on the part of the indemnifying party that could otherwise harm the indemnified party.²

The obligation to indemnify can arise from an explicit contractual provision or from an implied duty based on the relationship between parties. Numerous types of agreements, including

We need to take time to understand the risks, duties, and strategies that are involved in drafting and reviewing indemnification provisions.

purchase agreements, business entity formation documents, construction agreements, and use agreements, have explicit contractual indemnification provisions. A contractual indemnification provision can be advantageous for both parties. For the indemnifying party, it can spell out and limit the indemnifying party's potential liability. For the indemnified party, it may be ideal because it can provide for recovery of fees and costs associated with enforcing the indemnification.

As for common law indemnification in Idaho, “[i]t is well established that under the common law, a person who without fault on his part is compelled to pay damages occasioned by the negligence of another is entitled to indemnity.”³ However, there are potential problems for both parties in depending on common law indemnification. By relying on common law indemnification, the indemnifying party runs the risk that it might be obligated to provide broad indemnification for a wide range of situations.

Conversely, by relying on common law indemnity, the indemnified party risks the possibility that the indemnifying party may not be financially able to indemnify by the time of indemnification, as well as the possibility that the common law indemnification obligation may not cover all of the situations for which the indemnified party wishes to be covered. This innate uncertainty in common law indemnity for both parties can be resolved through care-

fully drafting a contractual indemnification provision.

Indemnification triggers

As a preliminary matter to drafting and agreeing to an indemnification provision, both parties must understand what events will trigger indemnification. Indemnification triggers may include misrepresentation, whether negligent or contractual, such as breach of warranty; breach of contract or damages arising from work performed under a contract; tax related losses; and infringement of intellectual property. Depending on the parties' specific contractual relationship, both parties will want to carefully consider what events elicit a claim for indemnification.

Drafting indemnity clauses

Because of the potential pitfalls associated with indemnity clauses for both parties, careful drafting is crucial to avoid unnecessary problems and conflict. A typical indemnity clause covers numerous topics, including the scope of indemnification, the duty to “hold harmless,” exculpation, defense costs, the duty to defend, procedures, exclusions, and the right of subrogation. With such a vast array of topics to be addressed, clarity in drafting is essential to ensure that both parties have similar understanding of potential indemnification.

Buried within these topics is the inherent conflict of interest between the

parties: the indemnified party wants broad coverage for as many potential liabilities as possible, while the indemnifying party wants to limit its obligation to indemnify the other party. The parties' attorneys can address these competing interests through careful drafting.

Drafting concerns for the indemnifying party

The indemnifying party has particular concern in drafting a narrow indemnification clause to limit its potential future obligation. To address this concern, counsel should carefully define what situations require indemnification, as well as the scope and extent of the party's obligation to indemnify.

Articulating the scope of its obligation to indemnify is always a major concern. Indemnification provisions often include language requiring the indemnifying party to "indemnify and hold harmless" the indemnified party.

Some courts may look to this phrase as merely redundant, for "[w]hen a person promises to hold another harmless, he does not promise to prevent harm from occurring. That would be an impossible promise to keep."⁴ This line of reasoning instead finds that by agreeing to "hold harmless," the indemnifying party "promise[s] in the traditional and accepted parlance of the commercial world ... to make things right if harm [does] occur,"⁵ or essentially, indemnification.

However, other courts, including the Idaho Supreme Court, have looked at indemnification provisions with "hold harmless" language as indicating the indemnifying party is also obligated to indemnify for loss caused by its negligence: "[T]he indemnification provision contains the 'hold harmless' language which, although not talismanic, is nonetheless indicative of a specific intent to encompass indemnification for the indemnitee's negligence."⁶ Carefully consider inclusion of "hold harmless" language in an indemnification provision to safeguard against additional and unwanted future obligations.

Another related concern is to determine exactly what expenses the indem-

An indemnifying party interested in limiting its potential exposure should define exactly what constitutes a loss under the agreement.

nifying party must cover. A contractual indemnification provision provides for the indemnifying party to compensate the indemnified party for "loss." Consequently, an indemnifying party interested in limiting its potential exposure should define exactly what constitutes a loss under the agreement. Always draft the obligation to limit losses to general damages while excluding punitive and consequential damages under the indemnification provision.

Next, establish whether the indemnification provision provides for indemnification of first-party and third-party claims. A first-party indemnification claim is a claim by the indemnified party for a loss suffered directly. A third-party indemnification claim is a claim by the indemnified party for a loss resulting from a claim by a third party. If both first-party and third-party indemnification scenarios are to be addressed, do so in separate clauses of the indemnification provision. By failing to separate these claims, an indemnifying party could unintentionally expand its obligation to indemnify against third-party claims.

Address how the indemnified party is to provide notice of an indemnification claim. The provision should define at what point the time period for providing notice begins to run, whether it begins when the triggering event occurs or when the indemnified party discovers the triggering event. Include the deadline for notice of an indemnification claim, whether it is immediately following knowledge of the triggering event, with reasonable promptness after discovering the triggering event, or

within some other defined timeframe. Also limit the length of time when an indemnified party can formally bring a claim for indemnification. Make sure the time period is not longer than any applicable statutes of limitations.

Finally, check with the indemnifying party's insurance provider to make sure its potential obligations to indemnify are covered under its commercial general liability policy. Broad blanket coverage for indemnification obligations is often available under these policies, but may result in higher premiums. However, for the indemnifying party, higher premiums may be worth the peace of mind in knowing it has coverage for potential indemnification obligations.

Drafting concerns for the indemnified party

Given the nature and underlying conflict of their positions, an indemnified party has different objectives and concerns regarding indemnification than those of the indemnifying party. It looks to shift risk to the indemnifying party, and therefore wants an all-inclusive indemnification obligation. Because of this inherent conflict, many of the concerns facing the indemnifying party are also of concern to the indemnified party, but framed differently — while the indemnifying party will wish to limit its obligation, the indemnified party will seek to increase its coverage.

While the indemnified party may not feel the same impetus to narrowly draft terms defining the scope and range of indemnification, it should take

special care in drafting an indemnification provision to avoid unfavorable strict judicial construction. In Idaho, courts strictly construe indemnification provisions against the indemnified party, particularly in cases where it drafted the provision.⁷ This is due to the “hazardous” and “extraordinary” character of the indemnification relationship.⁸ With this warning in mind, an indemnified party must ensure that in its desire for broad indemnification, the provision is still drafted in a way that provides precise direction to any future courts interpreting the provision.

During the drafting process, define the indemnifying party’s duty to defend the indemnified party against third-party claims to address the indemnified party’s potential vulnerabilities in turning over its defense to the indemnifying party. The indemnified party must decide if it wants the indemnifying party to be the sole defender of any third-party claims against it, or if the defense approach will be collaborative. Also articulate at what point in the litigation the indemnified party will take over its own defense.

This is an especially important consideration because of the very real possibilities of the indemnifying party lacking the finances to conduct a strong defense, a breakdown in cooperation between the parties regarding handling of the defense, and unsatisfactory counsel hired by the indemnifying party. The indemnified party may determine that it will take over its defense against third-party claims if there is a “reasonable possibility” or “reasonable basis” that any of the above concerns impede the indemnifying party’s defense.

Finally, address the indemnifying party’s ability to bind the indemnified party to a settlement agreement. Because of the parties’ conflicting interests, the indemnified party will want to limit the indemnifying party’s ability to agree to a settlement without the indemnified party’s consent. Include language prohibiting the indemnifying party from entering into a settlement agreement unless the indemnified party is fully indemnified for all losses, the indemnified party receives an unconditional release for all relat-

For basic reciprocal indemnification provisions, one paragraph may be sufficient to address the mutual indemnification obligations.



ed claims, the indemnified party does not admit wrongdoing, and there are no material effects for the indemnified party beyond the relief granted by the settlement agreement. By inserting this or similar language into a duty to defend clause, the indemnified party can protect itself from otherwise being bound to an undesirable settlement agreement.

Special indemnification considerations

Beyond the individual concerns of the parties, additional considerations face both parties to an indemnification agreement. One important issue is drafting reciprocity indemnification clauses. The parties may wish to include language in which each agrees to indemnify the other. For basic reciprocal indemnification provisions, one paragraph may be sufficient to address the mutual indemnification obligations. If, however, the triggering events requiring indemnification are markedly different for each party, the better approach is to draft two separate clauses, one in which the first party is the indemnifying party and the other in which the second party is the indemnifying party. Breaking a reciprocal indemnification provision into two separate clauses permits the parties to be more specific as to what triggers each party’s indemnification obligation.

Another special consideration is how to handle indemnification for known loss. This concern can arise in real estate transactions when land contaminants are discovered as the parties are drafting the sales agreement.⁹ If the parties wish to proceed with the

sale, they may choose to address the indemnifying party’s obligation by adjusting the purchase price to reflect the estimated cost in cleaning up contamination. Another approach is for the indemnifying party to agree to cover any additional cleanup costs beyond an initial agreed-upon amount. Finally, the parties may agree to require the indemnifying party to purchase insurance to cover any contamination costs. Regardless of which approach is taken, both parties will want to incorporate the drafting tips discussed above to ensure their competing interests are protected.

Conclusion

Because of underlying competing interests, indemnification can be a potential minefield for both parties to an indemnification agreement. Address possible questions regarding the scope of the indemnification provision while drafting, rather than when future conflicts arise. By carefully drafting a clear-cut and precise indemnification provision, counsel for both parties can ensure the parties are better protected against the uncertainties inherent in indemnification.

Endnotes

1 *Chenery v. Agri-Lines Corp.*, 115 Idaho 281, 284, 766 P.2d 751, 754 (1988).

2 Throughout this article, the terms “indemnifying party” and “indemnified party” will be used to represent the indemnitor and indemnitee, respectively.

3 *Beitzel v. City of Coeur d’Alene*, 121 Idaho 709, 717, 827 P.2d 1160, 1168 (1992) (quoting *Industrial Indem. Co. v. Columbia Basin Steel & Iron Inc.*, 93 Idaho 719, 723, 471 P.2d 574,

578 (1970)). See also *Williams v. Johnson*, 92 Idaho 292, 294, 442 P.2d 178, 180 (1968).

4 *Majkowski v. Am. Imaging Mgmt. Servs., LLC*, 913 A.2d 572, 591 (Del. Ch. 2006).

5 *Id.*

6 *Bonner County v. Panhandle Rodeo Ass'n., Inc.*, 101 Idaho 772, 775, 620 P.2d 1102, 1105 (1980) (citing *United States v. Seckinger*, 397 U.S. 203, 213 (1970)).

7 *R.W. Beck v. Job Line Constr., Inc.*, 122 Idaho 92, 96, 831 P.2d 560, 564 (Ct. App. 1992) (internal citations omitted).

8 See *Perry v. Payne*, 66 A. 553, 557 (Pa. 1907).

9 See *Jones v. Sun Carriers, Inc.*, 856 F.2d 1090 (8th Cir. 1988).

About the Authors

Jarin O. Hammer joined *Beard St. Clair Gaffney Thomson PA* in 1997. His practice focuses on business, tax, and real estate. Jarin received his juris doctorate from the University of Idaho and his LL.M. in taxation from the University of Florida.

He advises business owners on a wide array of legal issues including the formation of entities, taxation of business transactions, contract negotiations, land use and planning issues, and mergers and acquisitions.



Lindsay M. Lofgran recently joined *Beard St. Clair Gaffney Thomson PA* as an associate attorney. Her practice focuses primarily on litigation and education law. Lindsay attended *BYU Law School* where she appeared multiple times on the *Dean's List* and served as both an executive editor for the *BYU Journal of Public Law* and a submissions editor for the *BYU Education and Law Journal*.



Both parties will want to incorporate the drafting tips discussed above to ensure their competing interests are protected.

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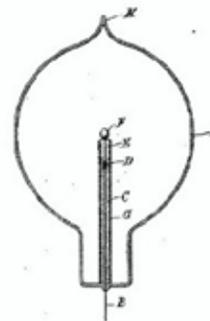
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More Notice Obligations (and Perils) For Employers Maintaining Retirement Plans

John C. Hughes

New federal regulations recently became effective that impose even more notice requirements on employers maintaining 401(k) and/or profit sharing plans.¹ This will impact the vast majority of all businesses that maintain these kinds of plans.

The new rules/regulations were issued by the Department of Labor under the Employer Retirement Income Security Act (“ERISA”). The rules are commonly referred to as the “participant level fee disclosure” rules or the “404a-5” rules (Section 2550.404a-5 being the section of Title 29 of the Code of Federal Regulations where the regulations are located).

The 404a-5 rules are part of a larger Department of Labor (“DOL”) initiative aimed at ensuring that plan participants and employer plan sponsors are made aware of, and understand, the fees and expenses associated with plan administration. There is particular focus on the fees and expenses associated with the investment of plan assets. The amount of such fees and how they are paid amongst the various involved parties has long been a mystery to plan participants, employers, the government, and even most benefit professionals. Associated components of the initiative, not discussed in this article, include revisions to Schedule C of Internal Revenue Service Form 5500 and the “service provider fee disclosure” regulations under Section 408(b)(2) of ERISA.²

The 404a-5 rules apply to any retirement plan that allows the plan participants to self-direct their investments under the plan.³ This includes all “401(k)” and/or “profit sharing” plans under which the participants are permitted to direct their own investments, which of course, is most of those plans. There are two separate disclosures required under the new 404a-5 rules, each with different timing and content requirements. There are annual disclosures that must be made to plan participants and quarterly disclosures that must be made to plan participants.

The 404a-5 rules apply to any retirement plan that allows the plan participants to self-direct their investments under the plan.³

The basics of the annual notice

The annual notice to participants must include several general explanations about plan operations and expenses.⁴

General Information. The explanations that an employer must provide are many, beginning with explanations relating to how the plan operates. This requires a recitation of the circumstances under which participants may provide investment instructions under the plan and an explanation of any limitations on such instructions (including identification of any restrictions on transferring to or from investment alternatives). The employer must also provide a description of, or reference to, plan provisions regarding the right to exercise voting, tender, and similar rights relative to investment alternatives offered under a plan.

The notice must provide substantial detail relative to the Plan’s investment options themselves. As such, the employer must identify any designated investment alternatives (“DIAs”) offered under the plan. DIAs are those investments designated by the employer plan sponsor as investment options for the plan participants. For example, employers frequently create a “menu” of the ten, twenty, thirty, or more investment funds (typi-

cally, mutual funds) that the plan participants may choose among in investing their plan accounts. DIAs are in contrast to self-directed brokerage accounts.

Self-directed brokerage accounts (sometimes referred to as “brokerage windows”) consist of an arrangement where instead of choosing from a limited menu, a participant works directly with an investment broker, often of their own choosing, and is able to invest their plan accounts in a very broad universe of investments far beyond DIAs. Typically, this means individual stocks and bonds; however, the options are not actually so limited. Self-directed brokerage accounts are very popular in Idaho, and particularly so with smaller plans.

Sometimes, brokerage accounts are offered along with DIAs, but more often it seems that plans set up their investments so as to utilize either brokerage accounts or DIAs. There are many concerns relating to brokerage accounts, some of which emanate from the new rules and some of which already existed. More on these concerns below.

Plan-Wide Administrative Expenses. The annual notice to participants must also provide detailed information regarding expenses associated with operating the plan.⁵ This requires an explanation of the fees and expenses

for general plan administrative services which may be charged to the plan (and not otherwise reflected in annual operating expenses of DIAs). Administrative expenses include those for legal, accounting, and recordkeeping/third party administrator services. An example might be a plan that charges \$3 per month against participant accounts and then uses those funds to pay the foregoing administrative expenses (or portions thereof). Administrative expenses need not be separately disclosed if the employer plan sponsor pays those expenses directly (which happens in many instances). The employer must also explain how the plan administrative expenses are allocated among the participant accounts. For example, an explanation as to whether the charges are allocated on a pro rata or per capita basis.

Individual Expenses. The employer must also provide an explanation in the annual notice of any fees and expenses that may be charged against the account of a plan participant on an individual (as opposed to a plan-wide) basis. For example, a charge associated with processing a loan or a qualified domestic relations order (i.e., a “QDRO”) for a particular participant. Such charges are common and often are not charged to the plan as a whole, but rather, are charged to the particular individual participant that is seeking the loan, presenting a QDRO, or requesting a distribution.

Detail Regarding Particular DIAs. The annual notice must list the name of each DIA. That is, for example, the name of the particular mutual funds that participants may choose among, such as the “Investment Company XYZ Large Cap Growth Fund.” The type or category of each DIA must also be identified. For example, a description of whether the DIA is a large cap value fund, small cap growth fund, money market fund, etc.

Statistical data on the DIAs must be provided including historical performance data for one, five, and ten year periods relative to each DIA including a statement that past performance is not necessarily an indication of future performance. Appropriate benchmarks for

This disclosure requirement provides information to a participant to assist him or her in making investment choices.

each DIA must also be identified. The benchmarks allow a comparison of the plan chosen DIAs versus an analogous market index, such as the S&P 500.

The notice must disclose the annual operating expenses associated with each DIA (and any shareholder type fees). The annual operating expenses are those charged by the investment company as a fee for a participant investing in the particular DIA. This will typically be a percentage applied on an annual basis. For example, one DIA might charge 0.5% per year while another might charge 1.2% per year. This disclosure requirement provides information to a participant to assist him or her in making investment choices in consideration of the expenses that will apply. The disclosure must also include a statement that fees and expenses are only one of several factors to consider when making investment decisions, as well as a statement regarding the cumulative effect of fees and expenses and a reference to the Employee Benefit Security Administration’s website.

The notice must illustrate the annual operating expenses for each DIA that would be applied to a hypothetical \$1,000 investment. This will allow participants to put matters in perspective.

Miscellaneous Investment Information. The annual notice must identify a website address providing participants access to specified information regarding the DIAs. This will frequently be a website established and maintained by the plan’s investment provider. The participants must be provided with a glossary of investment terms. The DOL initially hinted at preparing such a glossary that employers could use for this

purpose, but then backed off. The disclosure must also include information such as dates, contact information, and references to other locations where information (including paper copies of certain materials) may be obtained.

Certain of the above information must be furnished in a chart or similar format “designed to facilitate a comparison of such information for each” of a plan’s DIAs.⁶ The appendix to the regulations provides a model that is deemed to satisfy the comparative format requirement. Some of the above requirements are not presently applicable to brokerage account arrangements.⁷

The basics of the quarterly notice

The quarterly notice must include the actual dollar amount of administrative expenses charged against a participant’s account during the preceding quarter, as well as a description of the services to which the administrative charges related.⁸ For example, an explanation of whether the fees related to administrative, accounting, and/or legal services. The quarterly notice must also include the actual dollar amount of any individual expenses charged against the participant’s account during the preceding quarter, as well as a description of the services to which those individual expenses related. For example, if a participant was levied a charge for taking a loan from the plan, such must be explained. Finally, if applicable, the quarterly notice must include an explanation that in addition to the administrative and individual expenses mentioned above, some of the plan’s administrative expenses were paid from

the total annual operating expenses charged against the DIAs.

As is evident, the quarterly statement contains much less explanation than the annual statement, and instead provides actual dollar amounts charged against a participant's account for the preceding quarter, if any.

Quarterly statements for participant directed accounts have been required under ERISA since the passage of the Pension Protection Act of 2006 ("PPA").⁹ The PPA requirements are different than those in response to 404a-5; that is, PPA requires a quarterly notice to disclose certain items, while 404a-5 requires disclosure of other items. Frequently, an employer (or a service provider on the employer's behalf) will include the above-discussed new 404a-5 disclosures on the PPA statements. There is no requirement to combine the PPA and 404a-5 disclosures on one statement, but it certainly makes sense.

Delivery of the new notices

The new disclosures must be delivered within specified timeframes and formats.

For most plans, the first annual notices were due by August 30, 2012, and the first quarterly notices were due by November 14, 2012 (with subsequent notices due annually and quarterly thereafter, respectively).¹⁰

The notices may be delivered by First Class U.S. Mail or hand delivery. The notices may also be delivered electronically under specified circumstances. Notwithstanding, and to the chagrin of many, there is no option to simply email the annual or quarterly disclosures. There are specified rules that must be followed if electronic delivery is utilized.

There are generally three choices relative to electronic delivery: (1) compliance with the DOL "safe harbor" regulations regarding electronic delivery, (2) compliance with the rules described in DOL Field Assistance Bulletin 2006-03, or (3) compliance with Treasury Regulations regarding electronic delivery.¹¹ Further details regarding the electronic delivery rules are beyond the scope of this article. All or some of these rules also apply to the delivery of other plan-

The most noticeable and concerning aspect of the new regulations is that many employers were not aware of the new requirements.

related documents that are provided to participants such as summary plan descriptions, safe harbor notices, "QDIA" notices, summary annual reports, etc.

The new 404a-5 annual and quarterly notices must be provided to all plan participants. This includes anyone with a plan account (even if they are no longer employed) and anyone who is eligible to make 401(k) contributions (even if they do not presently take advantage of that opportunity and never have in the past).

Practical observations and subsequent guidance

The foregoing obviously places great burdens on employers maintaining retirement plans. Some observations and subsequent regulatory developments are as follows.

Logistical Confusion. The most noticeable and concerning aspect of the new regulations is that many employers were not aware of the new requirements or, more importantly, that it is their responsibility to ensure compliance with the regulations. In many situations, employers believed that their service providers were going to handle the matter for them. Notwithstanding, many service providers were not willing to undertake this task on behalf of the employer plan sponsor, and the service provider may or may not have communicated that clearly to their employer clients. This confusion and lack of coordination undoubtedly has resulted in noncompliance; particularly, with regard to plans utilizing brokerage account arrangements. Employers should contact their plan service pro-

viders immediately to ensure these new detailed requirements are being met.

Failed Compliance. Many annual and quarterly notices prepared by plan services providers (e.g., the plan's third party administrator or investment manager) fell short of satisfying the regulations and were thus deficient. The importance and necessity of a close review of the notices actually in use against the new regulations cannot be overstated. Some of the more common areas of deficiency included failures to: explain the circumstances under which participants may provide investment instructions, identify the types of investments, identify the plan provisions regarding voting, and identify appropriate benchmarks. In reviewing the quarterly statements, it often became apparent that there were also existing shortcomings associated with the PPA notice requirements.

There appeared to be noncompliance and vast confusion with regard to some of the notice requirements applicable to brokerage accounts. Some service providers seemed to be unaware of the electronic delivery rules and/or were unable to identify which of the three electronic delivery options referenced above they were attempting to satisfy on behalf of their employer clients.

Failure to comply with the regulations will result in fiduciary breaches and associated liabilities. Plan fiduciaries generally include the employer and those who have discretion over plan assets. Breaching fiduciaries will incur personal liability for associated losses to a plan.

The new rules greatly increase the threat of litigation because they provide a roadmap that can easily be used to demonstrate noncompliance. In recent years, there has been a wave of class action lawsuits brought against employer plan sponsors generally alleging plan fiduciaries' overpayment of fees and expenses. These new 404a-5 rules will likely continue that wave. The DOL has also greatly stepped up its overall enforcement efforts which could result in the application of penalties, the filing of litigation, and increased administrative burdens and expenses associated with an audit. Employers should anticipate audits and must be ready, on very short notice, to demonstrate their compliance with the new regulations.

Subsequent "Soft" Guidance. Subsequent to issuance of the 404a-5 regulations, the DOL issued guidance in the form of Field Assistance Bulletin ("FAB") No. 2012-02 (which was thereafter superseded by FAB No. 2012-02R). FAB No. 2012-02R contains 39 questions and answers relating to various aspects of the regulations. Most notably, FAB No. 2012-02R calls into question the overall use of brokerage accounts and states the DOL's intention to look closer at those arrangements and possibly issue associated regulations. Pre-existing concerns regarding the use of brokerage accounts in retirement plans, as opposed to DIAs generally include: a lack of plan oversight related to plan investments resulting in participants making inappropriate investment (inappropriate in terms of legal constraints and also in terms of providing them with an appropriate balance

of risk and return), inappropriate (or failed) titling of accounts (in the name of an individual instead of in the name of the plan's trust as is required), distributions in conflict with a plan's terms given confusion about who controls/owns the account, complications associated with reporting and disclosure obligations, and issues arising in connection with the case where brokerage accounts are offered to some, but not all, participants.

Conclusion

The new participant level fee disclosure regulations impose new and substantial burdens on employers maintaining the most common sort of qualified retirement plans. Compliance with the regulations is of paramount importance and will require that employers coordinate with their service providers and benefits counsel to ensure the bases are covered.

Endnotes

- 1 29 CFR § 2550.404a-5.
- 2 29 CFR § 2550.408b-2.
- 3 29 CFR § 2550.404a-5(b)(2).
- 4 29 CFR § 2550.404a-5(c) and (d).
- 5 29 CFR § 2550.404a-5(d).
- 6 29 CFR § 2550.404a-5(d)(2).
- 7 U.S. Department of Labor Field Assistance Bulletin No. 2012-02R.
- 8 29 CFR § 2550.404a-5(c).
- 9 ERISA Section 105.
- 10 U.S. Department of Labor Field Assistance Bulletin No. 2012-02R, Q&A 35 and 36.
- 11 U.S. Department of Labor Technical Release 2011-03.

The new rules greatly increase the threat of litigation because they provide a roadmap that can easily be used to demonstrate noncompliance.

About the Author

John C. Hughes is a Shareholder in The ERISA Law Group, P.A. in Boise, Idaho. He practices exclusively in the area of employee benefits/ERISA, primarily counseling and assisting employers with compliance issues relative to all types of benefit plans. John is a Board Member and the Past President of the Boise Chapter of the Western Pension & Benefits Council. He is the Coeditor-In-Chief of the 401(k) Advisor, a nationally circulated monthly newsletter on issues relating to 401(k) plans.



Mediator/Arbitrator

W. Anthony (Tony) Park

- 36 years, civil litigator
- Former Idaho Attorney General
- Practice limited exclusively to ADR

P.O. Box 1776 Phone: (208) 345-7800
Boise, ID 83701 Fax: (208) 345-7894
E-Mail: tpark@thomaswilliamslaw.com



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COURT INFORMATION

**OFFICIAL NOTICE
SUPREME COURT OF IDAHO**

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Justices
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Jim Jones
Warren E. Jones
Joel D. Horton

Regular Fall Term for 2013

Idaho Falls August 21
Pocatello August 22 and 23
Boise August 27 and 28
Coeur d'Alene September 11 and 12
Moscow September 13
Boise September 27 and 30
Boise November 1, 4 and 6
Twin Falls November 7 and 8
Boise December 2, 4, 5, 9 and 11

By Order of the Court
Stephen W. Kenyon, Clerk

NOTE: The above is the official notice of the 2013 Fall Term for 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

Regular Fall Term for 2013

Boise August 13, 15, 20, and 22
Boise September 10, 12, 17, and 19
Eastern Idaho October 7, 8, 9, 10, and 11
Boise October 15, 17, 22, and 24
Boise November 12, 14, 19, and 21
Boise December 10 and 12

By Order of the Court
Stephen W. Kenyon, Clerk

NOTE: The above is the official notice of the 2013 Fall Term for 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 June 2013**

Monday, June 3, 2013 - BOISE

8:50 a.m. Billie Jo Major v. Security Equipment Corporation#39414-2011
10:00 a.m. Alan G. Ross v. Tommy A. Dorsey (EXPEDITED)#39152-2011
11:10 a.m. Karl L. Roesch v. Daniel L. Klemann#39836-2012

Wednesday, June 5, 2013 - BOISE

8:50 a.m. Kenton D. Johnson v. Highway 101 Investments#39160-2011
10:00 a.m. Echo T. Vanderwal v. Albar, Inc. ****VACATED****#38085-2012
11:10 a.m. William S. Shapely v. Centurion Life Insurance#39784-2012
1:30 p.m. James W. Clark v. State Insurance Fund#40016-2012 (Industrial Commission)

Friday, June 7, 2013 - BOISE

8:50 a.m. Sarah M. Johnson v. State#38769-2011
10:00 a.m. Rubio Izaguirre v. R&L Carriers Shared Services#39750-2012 (Industrial Commission)
11:10 a.m. BV Beverage Company v. Alcohol Beverage Control#39690-2012

Monday, June 10, 2013 - BOISE

8:50 a.m. Dept. of H & W v. Lynn Wiggins#39129-2011
10:00 a.m. Advanced Medical Diagnostics v. Imaging Center of Idaho#39753-2012
11:10 a.m. State v. Dale Carter Shackelford#39398-2011

Wednesday, June 12, 2013 - BOISE

8:50 a.m. Gregory Beers v. Church of Jesus Christ of Latter-Day Saints#39319-2011
10:00 a.m. Richard Alan Keane v. Bald, Fat & Ugly, LLC ..#39451-2011
11:10 a.m. State v. Tyler Ray Carter (Petition for Review)#39927-2012

**Idaho Court of Appeals
Oral Argument for June 2013**

Tuesday, June 11, 2013 - BOISE

9:00 a.m. Wurzburg v. Kootenai County#40150-2012
10:30 a.m. State v. Branigh#36427-2009
1:30 p.m. Transportation Department v. Kalani-Keegan#40149-2012

Tuesday, June 18, 2013 - BOISE

9:00 a.m. State v. Sigler#39313-2011
10:30 a.m. State v. Tankovich#38813-2011
1:30 p.m. Dept. of Health & Welfare v. Doe (EXPEDITED)#40727-2013

Thursday, June 20, 2013 - BOISE

9:00 a.m. State v. Nicholas#39859-2012
1:30 p.m. State v. Chongphaisane#39577-2012

Idaho Supreme Court and Court of Appeals
NEW CASES ON APPEAL PENDING DECISION
(Updated 5/1/13)

CIVIL APPEALS

Attorney fees and costs

1. Whether the trial court erred in finding that the Idaho Military Historical Society was the prevailing party.

Idaho Military Historical Society v. Maslen
S.Ct. No. 39909
Supreme Court

Default

1. Whether the court erred as a matter of law in failing to apply a standard of liberally granting relief in doubtful cases when it made its discretionary ruling to deny Ball's motion to set aside default and default judgment.

U.S. Air Conditioning Dist., LLC v. Ball
S.Ct. No. 40281
Court of Appeals

Divorce, spousal maintenance

1. Whether the trial court erred as a matter of law and abused its discretion in the amount and duration of spousal support awarded because it failed to follow I.C. § 32-705 and consider respondent's resources.

Undesser v. Undesser
S.Ct. No. 40385
Supreme Court

Immunity

1. Whether the trial court erred as a matter of law when it found I.C. § 6-904(4) granted Martinez immunity from liability when the alleged tort occurred on Martinez's commute home from Idaho National Guard duty.

Teurlings v. Larson
S.Ct. No. 40502
Supreme Court

Jurisdiction

1. Whether the court erred in concluding there was no personal jurisdiction over the respondents.

Telford v. Copeland
S.Ct. No. 39878
Supreme Court

Post-conviction relief

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

Earl v. State
S.Ct. No. 39751
Court of Appeals

2. Did the court err by summarily dismissing Gillard's petition for post-conviction relief in which she challenged the entry of her guilty plea?

Gillard v. State
S.Ct. No. 39814
Court of Appeals

3. Did the court err in summarily dismissing the claim that trial counsel was constitutionally ineffective in failing to have a police interview admitted into evidence for the non-hearsay purpose of rebutting a claim of recent fabrication?

Parmer v. State
S.Ct. No. 39613
Court of Appeals

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

Lopez v. State
S.Ct. No. 39739
Court of Appeals

5. Should post-conviction relief have been granted because Martin established, by a preponderance of the evidence, that the waiver of right to counsel was not valid?

Martin v. State
S.Ct. No. 39419
Court of Appeals

6. Did the district court err when it denied Perkins' motion for appointment of post-conviction counsel?

Perkins v. State
S.Ct. No. 39700
Court of Appeals

7. Whether the court abused its discretion in denying Nunez's request to modify the scope of appointed counsel's representation from limited assistance to full assistance on the basis the request was untimely.

Nunez v. State
S.Ct. No. 39966
Court of Appeals

8. Did the court err in summarily dismissing the ineffective assistance of counsel claim because the court dismissed on grounds not stated in the state's motion for summary dismissal without giving a twenty day notice and allowing Schultz to respond?

Schultz v. State
S.Ct. No. 40391
Court of Appeals

Statute of limitation

1. Whether the court erred in ruling that I.C. § 5-224 and the amended I.C. § 31-857 prevent Piercy from challenging a 1982 ordinance.

Piercy v. Canyon County
S.Ct. No. 39708
Supreme Court

Summary judgment

1. Whether the district court misconstrued federal and Idaho law governing the standards of professional conduct for appraisers in reaching its decision to grant summary judgment in favor of Massey.

Cumis Insurance Society v. Massey
S.Ct. No. 40002
Supreme Court

2. Whether the district court erred when it granted summary judgment finding that privity of contract is required to recover for economic loss for breach of an implied warranty.

American West Enterprises, Inc. v. Case New Holland, Inc.
S.Ct. No. 40230
Supreme Court

Termination of parental rights

1. Whether the court erred in finding the minor child is abandoned without sufficient competent evidence to meet the standard of clear and convincing evidence.

Dept. of Health & Welfare v. John (2013-08)
Doe
S.Ct. No. 40864
Court of Appeals

CRIMINAL APPEALS

Due process

1. Whether Anderson's conviction should be vacated because of prosecutorial misconduct by vouching for evidence, misstating the law, disparaging the defense and commenting on the veracity of Anderson's testimony.

State v. Anderson
S.Ct. No. 39227
Court of Appeals

Evidence

1. Did the court abuse its discretion by refusing to permit the Bergeruds to inquire into a state's witness character for truthfulness or untruthfulness?

State v. Bergerud
S.Ct. No. 39284/39286
Court of Appeals

**Idaho Supreme Court and Court of Appeals
NEW CASES ON APPEAL PENDING DECISION
(Updated 5/1/13)**

2. Did the court err in its evidentiary rulings regarding the admission of State's Exhibit 53, the arrest photo of Ortiz-Perez, and the victim's testimony about his suspected drug use?

State v. Ortiz-Perez
S.Ct. No. 39487
Court of Appeals

3. Did the court err in denying suppression of Knott's breath test refusal and in finding it was relevant and that its probative value was not outweighed by any prejudicial effect?

State v. Knott
S.Ct. No. 40074
Court of Appeals

Instructions

1. Did the court violate Mobley's right to due process when the court provided the jury with a "dynamite instruction" upon being informed the jurors were deadlocked on one count?

State v. Mobley
S.Ct. No. 39074
Court of Appeals

2. Did the court correctly instruct the jury on the elements of aggravated assault?

State v. Coe
S.Ct. No. 39460
Court of Appeals

Pleas

1. Did the court abuse its discretion in denying Crump's motion to withdraw his guilty plea made prior to sentencing?

State v. Crump
S.Ct. No. 39818
Court of Appeals

Probation revocation

1. Whether there was substantial and competent evidence to support a finding that Gandenberger willfully violated the terms of his probation.

State v. Gandenberger
S.Ct. No. 39557
Court of Appeals

2. Did the district court abuse its discretion when it revoked Hotchkiss' probation and failed to reduce his sentences sua sponte upon revoking probation?

State v. Hotchkiss
S.Ct. No. 39617
Court of Appeals

3. Did the court abuse its discretion when it revoked probation in his first case and failed to place Dusenbery on probation in the second?

State v. Dusenbery
S.Ct. No. 40156/40157
Court of Appeals

4. Did the court err in revoking Kalashnikov's probation and imposing an excessive sentence?

State v. Kalashnikov
S.Ct. No. 40127
Court of Appeals

5. Did the court err in revoking probation and denying Casey's Rule 35 motion?

State v. Casey
S.Ct. No. 39702
Court of Appeals

6. Did the court err in revoking probation and denying Pablo's Rule 35 motion?

State v. Pablo
S.Ct. No. 40035
Court of Appeals

7. Did the court err in revoking probation and failing to reduce Caves' sentence?

State v. Caves
S.Ct. No. 40050
Court of Appeals

Prosecutorial misconduct

1. Did the prosecutor commit misconduct in rebuttal closing argument such that the court erred by overruling Dobbs' objection?

State v. Dobbs
S.Ct. No. 39267
Court of Appeals

**Search and seizure –
suppression of evidence**

1. Whether the district court erred when it denied Freidrich's motion to suppress because the officer did not have reasonable suspicion to justify the warrantless detention of Freidrich.

State v. Friedrich
S.Ct. No. 39462/39463
Court of Appeals

2. Did the court err in denying McDonald's motion to suppress and in finding that the search of McDonald's bedroom was based on reasonable suspicion that he was violating the terms of his probation?

State v. McDonald
S.Ct. No. 39559
Court of Appeals

Sentence review

1. Did the court violate I.C. § 18-8311 when it reinstated Olivas on probation in the underlying criminal case after Olivas committed a sex offender registration act violation while on probation?

State v. Olivas
S.Ct. No. 39682/39683
Court of Appeals

2. Did the court abuse its discretion when it denied Mumme's Rule 35 motion requesting leniency in light of the mitigating factors present in this matter?

State v. Mumme
S.Ct. No. 39889/39890
Court of Appeals

3. Did the court abuse its discretion in denying Vaughn's motion to modify the no contact order?

State v. Vaughn
S.Ct. No. 39526/40237
Court of Appeals

Separation of powers

1. Did the prosecutorial veto power permitted under the Idaho Drug Court and Mental Health Court Act violate the separation of powers doctrine?

State v. Easley
S.Ct. No. 39710/39711
Supreme Court

Substantive law

1. Did the court err in finding that images of sexually exploitative material housed on a thumb drive were encompassed within the definition of I.C. § 18-1507(2)(k)?

State v. Gillespie
S.Ct. No. 39426/39427
Court of Appeals

2. Did the district court err in concluding the prosecution of Baker in Kootenai County was barred by a plea agreement executed in Ada County?

State v. Baker
S.Ct. No. 39877
Supreme Court
Summarized by:

Cathy Derden
Supreme Court Staff Attorney
(208) 334-3867

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Idaho Courts

Highlights of Rule Amendments Effective July 1, 2013

Catherine Derden

The following is a list of rule amendments that will go into effect on July 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 28(f). Preparation of the clerk's or agency's record. This subsection on arrangement and numbering was amended to provide that the numbering shall include every page included in the record even if it was not a filed document, such as the title page, the table of contents, the index, and the register of actions.

Idaho Civil Rules of Procedure

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

Rule 7(b)(5). Video teleconferencing for mental commitment hearings. This is a new permissive rule that allows for hearings concerning an initial involuntary mental commitment or a continuing involuntary commitment to be conducted by video teleconference via simultaneous electronic transmission under certain conditions. These include that the proposed patient be visible and audible to the court and others physically present in the courtroom, that a proposed patient who is represented by counsel be able to consult privately with counsel during the proceeding, and that the court, proposed patient, counsel from both sides, and any witness while testifying, be visible and audible with each other simultaneously and have the ability to communicate with each other during

the proceeding. In addition, the audio of the video teleconference shall be recorded by the court and the court shall cause minutes of the hearing to be prepared and filed in the action.

Rule 7(d). Declarations. The Idaho Legislature recently amended Title 9, Chapter 14, by adopting a new section, I.C. § 9-1406, that allows for declarations under penalty of perjury in place of sworn statements, with a few exceptions, and sets out the form for such declarations. A new rule, I.R.C.P. 7(d), has also been adopted providing that whenever these rules require or permit a written statement to be made under oath or affirmation, such statement may be made as provided in Idaho Code Section 9-1406.

Rule 11(a)(1). Signing of pleadings, motions, and other papers; sanctions. Language was added to this rule to alert parties that if pleadings are signed in violation of the rule, the court may refer to the Administrative District Judge the question of whether to declare a party a vexatious litigant pursuant to Idaho Court Administrative Rule 59.

Rule 16(q). Parenting Time Evaluation. This new rule was recommended by the Children and Families in the Courts Committee, chaired by Judge Russell Comstock. A "parenting time evaluation" is an expert investigation and analysis of the best interest of children with regard to disputed parenting time issues. The rule addresses a number of related issues, including the qualifications of a parenting time evaluator, what information should be included in motions, stipulations and orders for an evaluation, the scope of the evaluation and the form of the report.

Rule 28(e). Unsworn Foreign Declarations. Since September 11, 2001, access to U.S. consular offices has become more restricted and the process of getting in to visit a notary public has

become difficult. Even greater problems exist for those seeking statements from individuals that do not reside near a U.S. consular office. The ABA raised these concerns to the Uniform Law Commission, which resulted in the Uniform Unsworn Foreign Declarations Act. Under this act, if an unsworn declaration is made subject to penalties for perjury and contains the information in the model form provided in the act, then the statement may be used as an equivalent of a sworn affidavit, with certain exceptions. Rule 28(e) constitutes Idaho's implementation of the Uniform Unsworn Foreign Declarations Act, with slight modification. Comments from the Uniform Act are included.

Rule 69. Execution. The amendment to this rule clarifies that the discovery process can be used post-judgment when attempting to execute on a judgment.

Idaho Criminal Rules

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

New Rule 2.1. Declarations. Similar to the addition to the Civil Rules of Procedure, a new rule has been added to the Criminal Rules providing that whenever these rules require or permit a written statement to be made under oath or affirmation, such statement may be made as provided in Idaho Code Section 9-1406.

Rule 18.1. Mediation in criminal cases. Subsection (8) on communications between the mediator and the court was amended to provide that any agreement reached "may" be reduced to writing and submitted to the court rather than "shall" be reduced to writing. The change reflects the recognition that these agreements are not consis-

tently put in writing as sometimes the agreements are immediately placed on the record before the presiding judge.

Rule 32. Standards and procedures governing presentence investigations and reports. The amendments to this rule were proposed by the Felony Sentencing Committee, chaired by Justice Joel Horton. The content of the report is to include the result of any substance abuse evaluation, mental health evaluation, or psychosexual evaluation, including any report prepared pursuant to I.C. § 19-2522 or I.C. § 19-2524, but excluding the content of any evaluation or report prepared pursuant to I.C. § 18-211 or I.C. § 18-212. The PSI may recommend programs or treatment for the defendant and comment as to the length of time required to complete those, and may also include a report generated from use of the Sentencing Tool of the Idaho Sentencing Information Database and may contain a narrative description of the database results. In addition, once any PSI is prepared for the purpose of assisting a sentencing court, it may be released to any district judge for that purpose. There are also new subsections addressing the availability of the report to evaluators and to problem-solving courts.

Idaho Infraction Rules

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

Rule 5. Uniform citation - Issuance - Service - Form - Number - Distribution. A new subsection (g), Service of Citations for Parking Violations, has been added to this rule to resolve a conflict in this rule on personal service with I.C. § 67-4237 and parking violations in state parks. The new subsection allows officers to cite cars that are illegally parked in state parks by affixing the citation to the vehicle in the same manner as municipal parking tickets.

Idaho Juvenile Rules

The Juvenile Rules Advisory Committee is chaired by Judge John Varin.

Rule 33. Summons CPA. The amendment updates language in the summons to mirror legislative changes

to I.C. § 16-1622 (7) regarding out-of-home care for fifteen of the last twenty-two months.

Rule 39. Shelter Care hearing. The old definition of aggravated circumstances has been deleted based on changes to the definition in I.C. § 16-1602.

Rule 41. Adjudicatory hearing. The rule clarifies that aggravated circumstances can be raised at any time during a child protection act proceeding. The rule also clarifies the definition of protective supervision consistent with changes made in I.C. § 16-1602.

Rule 44. Case plan hearing; Permanency hearing. The majority of the text of this rule was moved to the corresponding statute, I.C. § 16-1621, as part of the changes in H256 so the details of what must occur during these hearings are in one consolidated location. In addition, the rule clarifies the time lines consistent with Advancing Justice for reunification; guardianship; termination and adoption.

Rule 45. Review hearings. References to fifteen out of twenty-two months have been deleted consistent with H256 changes to I.C. § 16-1622 (7). The amendment also clarifies the definition of protective supervision consistent with changes to I.C. § 16-1602.

Rule 46 Annual permanency hearings. The amendment clarifies time-lines consistent with statutory changes and Advancing Justice. Certain descriptions of findings and other requirements of the hearing were moved to the statute to consolidate and make clearer the roles and responsibilities at the permanency hearing.

Rule 51. Application of Idaho Rules of Evidence. The rule clarifies when the rules of evidence apply in regards to aggravated circumstances findings.

New Rule 56. Declarations. Similar to the addition to the Civil and Criminal Rules of Procedure, a new rule has been added to the Juvenile Rules providing that whenever these rules require or permit a written statement to be made under oath or affirmation, such statement may be made as provided in Idaho Code Section 9-1406.

Idaho Misdemeanor Rules

The Misdemeanor Rules Advisory Committee is chaired by Judge Michael Oths. The Misdemeanor Sentencing Advisory Team is chaired by Judge James Cawthon.

Rule 9.4 Alcohol-Drug Evaluation report. At the recommendation of the DUI Evaluation Redesign Work Group, the Misdemeanor Sentencing Advisory Team recommended a number of amendments to Rule 9.4. The rule has been expanded to include drug evaluations as well as alcohol evaluations. The rule now requires that the evaluation be presented in a standardized format approved by the Supreme Court and the format is included in the rule. There are some changes to the content of the evaluation report. At least three screening tools must be used and they shall include a Gain SS, a criminogenic risk needs screening tool, and any other approved alcohol-drug screening tool. A new subsection has been added that provides in the event an evaluator submits an evaluation that is not in compliance with this rule, the court may return the evaluation to prepare one in compliance with the rule at no charge to the defendant.

A few additional rule amendments are under consideration for July 1 at the time of this writing. Be sure to check the court's website for any additional orders before that date.

About the Author

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

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Problems with Pronouns Part III: Gender-Linked Pronouns

Tenielle Fordyce-Ruff

As a law professor, I love this time of year. I'm busy grading my students' appellate briefs, and they have stopped making silly pronoun errors. They no longer refer to a court as *they* and no longer use reflexive pronouns for emphasis in their writing.

Of course, they still have questions. Recently, a student stopped me in the hall to ask about what to do because English doesn't have a gender-neutral singular pronoun to refer to people. That reminded me that I hadn't yet covered all of the pesky pronoun problems in this column.¹

So this month we will continue to discuss problems with pronouns, looking at gender-linked pronouns.

Pronoun Refresher

Pronouns replace nouns, and the nouns they replace are called antecedents. Pronouns must agree with the antecedents they replace in gender, person, and number. First person pronouns refer to the speaker or writer (I, me, we, us, my, mine, our, ours, myself, ourselves). Second person pronouns refer to the person being spoken or written to (you, your, yours, yourself, yourselves). Third person pronouns refer to someone or something else (he, him, she, her, it, they, them, his, hers, its, their, theirs, himself, herself, itself, themselves).



Writers run into gender-linked pronoun problems when using third person pronouns to refer to a category or profession rather than a specific person. For instance, always referring to an attorney using a masculine pronoun is objectionable because it suggests that only men are attorneys.

An attorney must follow the rules of professional conduct, including competently representing his clients.



Of course, using *he*, *him*, or *his* when referring to man is perfectly appropriate and grammatically correct. But, using *he*, *him*, or *his* in other situations should be avoided.²

What Not to Do: The Singular *They*

We all, even the noodgiest of grammar noodges like me — use *they* as a singular pronoun in speech. How many times have you asked your assistant to call the clerk and see if *they* can . . . ? Or, if you were explaining the rules of professional conduct to someone, you might say: An attorney must follow the rules of professional conduct, including competently representing *their* clients.

While this is perfectly acceptable in casual speech, it is not yet acceptable in formal writing. I suspect this is changing,³ but for now, do not use *they* as a singular pronoun in your writing.

What Not to Do: His or Her

Avoid the desire to institute a quick fix. Some writers simply use awkward phrases to avoid the problem of gender-linked personal pronouns.

If a man or woman dies without a will, his or her property will be disposed of under the intestacy laws.

Using *he/she* or *s/he* is another quick fix that just makes the appearance of a document worse.



This sentence is unnecessarily wordy and sounds stilted. While it might be fine if it is the only instance in a document, the repeated use of *he or she*, *him or her*, and *his or hers* can become clumsy or obnoxious.

Using *he/she* or *s/he* is another quick fix that just makes the appearance of a document worse. So, rather than creating grammatically incorrect or awkward sentences, use a few simple techniques to avoid the problems created by gender-linked pronouns.

Change Singular Nouns to Plural Nouns

We can't fix this problem in English by using a gender-neutral singular pronoun.

A judge must give its instructions to the jury.

We all know that judges must be a person, so this sentence is grammatically incorrect.

But, while singular pronouns can have a gender, plural nouns are gender neutral. Thus, while we can't use an *it* to refer to a judge, we can craftily rewrite the sentence.

Judges must give their instructions to the jury.

Replacing the singular *judge* with the plural *judges* allows us to avoid assuming all judges are men and to write a grammatically correct sentence.

Rewrite to Avoid Personal Pronouns

Another option is to rework the sentence to avoid the need for a personal pronoun altogether. Spend a few moments thinking about the meaning of the sentence to see if you can convey the same meaning without a personal pronoun.

A judge must give its instructions to the jury can become

A judge must give instructions to the jury.

Likewise, an awkward sentence like:

If a man or woman dies without a will, his or her property will be disposed of under the intestacy laws.

Can be rewritten as

If a person dies without a will, the decedent's property will be disposed of under the intestacy laws.

Use an Article Instead of a Pronoun

Sometimes, we don't need to have a third-person pronoun in the sentence at all. An article will work just as well and the replacement won't change the meaning.

The accused must waive his right to speak to his lawyer.

The accused must waive the right to speak to a lawyer.

Spend a few moments thinking about the meaning of the sentence to see if you can convey the same meaning without a personal pronoun.

Use an Indefinite Pronoun Instead of a Personal Pronoun

Of course, sometimes we can't replace the third-person pronoun with an article.

An indigent defendant without an attorney can ask the court to appoint one for her.

An indigent defendant without an attorney can ask the court to appoint one for the.

The *the* in the last sentence doesn't make any sense. But, rewriting the sentence to include an indefinite pronoun instead of a personal pronoun can create a gender-neutral sentence.

An indigent defendant who needs an attorney can ask the court to appoint one.

Alternate Gendered Pronouns

If none of these tips work, and you simply must use a gendered pronoun, consider alternating the pronouns. So, the attorney could be a man in the first sentence and a woman in the second.

An attorney cannot represent a client if the representation would be adverse to his other client. An attorney also cannot represent a client if the representation would be materially limited by her representation of another client.

Conclusion

Now that you know a few tricks to help you avoid the inappropriate use of gender-linked pronouns, I'm off to write a final exam for my students. Don't worry, correct grammar and usage counts!

Sources

- Deborah E. Bouchoux, *Aspen Handbook for Legal Writers: A Practical Reference*, 22-23 (2005).
- Bryan A. Garner, *The Redbook: A Manual on Legal Style*, 151, 315-16 (2d ed. 2006).
- The New Oxford American Dictionary (2001).

Endnotes

1 I covered problems with multiple antecedents, implied antecedents, collective nouns, and indefinite pronouns in the March/April 2012 edition of *The Advocate*. I then covered personal, reflexive, and possessive pronouns in the June/July edition.

2 A caveat to this: Using the masculine singular pronoun in transactional documents and including a statement that the use of masculine gender is deemed to include the feminine is acceptable practice. Such use should be avoided in other types of legal writing, however.

3 The New Oxford American Dictionary notes that using *they* as a singular pronoun is becoming more acceptable and even prefers *they* to *he* in some instances.

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@concordia.edu or tfr@raineylawoffice.com.

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Local Flood Control: Using Idaho's Flood Control District Statute to Enable Place-Based Stream Restoration

Jerold A. Long
Samuel Finch

During the 1980s and 1990s, a Teton County developer slowly converted a one mile stretch of Teton Creek's wide floodplain and riparian area, which was historically comprised of three distinct stream channels, into a single, straight, deep, un-vegetated sluice. This alteration of the natural stream channels caused floodwater to pick up both speed and sediment, leading to recurring damage to the surrounding property. If this sounds inappropriate, it is. The developer's activities violated Section 404 of the Clean Water Act, which requires a federal permit before discharging any dredged or fill material into "waters of the United States." While he did not go willingly, the developer ultimately served time in federal prison for criminal violations of the Clean Water Act.¹

But what of the stream? Prior to the stream's channelization, and dewatering by the Grand Teton Canal Company, Teton Creek provided important habitat for Idaho's native Yellowstone Cutthroat Trout. Now, with an eroding headcut migrating upstream, and increased sediment loads depositing downstream, parts of the stream serve more as an erosive force and sediment transport system than a stream. With its damaged aesthetics and compromised ecological health and function, Teton Creek begs for attention. Although local government and community organizations have begun to restore part of the degraded stream corridor, much of the damage still remains, and local land and homeowners and the city of Driggs face an increased risk of harm from flooding.

While the developer's brazen disregard for legal requirements might make Teton Creek somewhat unique, the resulting stream-channel alterations unfortunately are not. In Idaho alone over 7,000 miles of stream channels are impaired by the physical conditions of the stream, either through

Although local government and community organizations have begun to restore part of the degraded stream corridor, much of the damage still remains.

flow or physical-habitat alterations.² In other words, due to dewatering, stream channelization, erosion, or other degradation of the stream channel and floodplain, these 7,000 miles of streams cannot serve the beneficial uses designated by the people of Idaho. An additional 7,364 miles of streams are impaired due to increased temperatures, and 4,780 miles are impaired by sediment or siltation. Idaho is not alone in this. Across the Intermountain West, silt, sediment, temperature, low flows, and other morphological alterations impair thousands of stream miles.³ These streams are compromised not only ecologically and aesthetically, they also lack natural flood control properties. This leads to increased frequency and severity of flood events.

Idaho communities do have the capacity to remedy these failings and restore their degraded streams. Idaho's Flood Control District Statute⁴ allows for grassroots, place-based, locally-managed efforts to restore degraded stream systems and allow for the natural control and mitigation of floodwaters, while simultaneously providing for the conservation of Idaho's water resources. Historically, flood control districts have mitigated floods by implementing stream-channel-altering flood control methods such as dikes, levees, dams, and canals. But more recently, local communities are exploring creating flood control districts that take advantage of a stream's natural flood control properties through stream res-

toration. Place-based stream restoration has the benefit of improving locally-desired aesthetic, health, ecological, and economic resources, in addition to flood control. The Idaho Department of Water Resources ("IDWR") should encourage the use of flood control districts to achieve locally-identified stream restoration — and flood control — goals.

Flood control districts in Idaho

In Idaho local communities can petition the Director of the IDWR to create flood control districts.⁵ Flood control districts are local taxing districts authorized to levy a small property tax to fund and implement flood control operations.⁶ The powers granted to flood control districts are broad, allowing for a wide range of actions, but arguably limited by the general policy statement of the enabling statute: "to provide for the prevention of flood damage in a manner consistent with the conservation and wise development of our water resources."⁷

While it appears that all Idaho flood control districts have historically limited their efforts to traditional physical stream-channel-altering flood control methods, the statute does not require that approach. The statute does not specify any required methods of flood control. Rather it only requires that the petition explain the "method or system of flood control" to be used by the proposed district, and demonstrate that such flood control methods are "a

proper and advantageous method of accomplishing the relief sought or the benefits to be secured.”⁸ The statute’s general purpose is clear, but it leaves the specific means of achieving that purpose in the hands of the local community.

In articulating the numerous powers granted to flood control district commissioners, the statute specifically recognizes that natural stream systems can serve a flood control purpose. The statute grants commissioners the power “to use natural streams and to improve the same for use as a flood control structure.”⁹ The statute further provides that “in the event that use of the natural stream involves alteration of the stream channel,” such alteration requires approval by the IDWR Director.¹⁰ This provision indicates that the use of natural streams as contemplated by the statute does not necessarily include stream channel alteration — it may include it, but may instead involve preservation or restoration of the natural system.

These elements of the flood control district statute — broad authority to act in the public interest, a preference for local control, and the specific authorization of the use of natural streams for flood control purposes — suggest several flood control alternatives. A community may use a flood control district to fund stream restoration activities that both reduce the potential for flood damage and achieve locally-desired ecological, aesthetic, and economic development goals. In other words, the historical use of flood control districts in Idaho for constructing physical flood control methods is not mandated by the statute. In many cases, preservation or restoration of the natural stream may be a better flood control approach.

Using nature to control floods

Of course, using stream restoration or preservation as a flood control tool requires that natural stream conditions actually serve flood control purposes. The evidence for this is overwhelming. As demonstrated tragically by Hurricanes Katrina in 2005 and Sandy in

The statute grants commissioners the power
“to use natural streams and to improve
the same for use as a flood control structure.”⁹

2012,¹¹ and through hundreds of on-the-ground research projects over several decades,¹² natural riparian systems play a vital role in absorbing flood waters and reducing the harm to land and structures built near flood plains. This role cannot be replicated fully by artificial flood control approaches. Natural stream systems contain many mechanisms to control floodwaters, and restoring an altered stream to its natural state can improve the flood control capacity of that stream.

Because stream restoration achieves both flood control and local ecological or aesthetic goals, several western states already use restoration as part of the tools available to flood control districts. In Washington, the Donald Wapato Levee Removal Project in Yakima County — funded and implemented by the Yakima County Flood Control Zone District¹³ — restored 100 acres of floodplain. This has reduced flood overflows, and improved riparian habitat, native plant communities, and fish populations. Similarly, Arizona’s flood control district statute specifically advocates for flood control solutions that use stream restoration practices.¹⁴ In the Arlington Valley Flood Plain Acquisition Project,¹⁵ the Maricopa County Flood Control District purchased an elementary school in a flood prone area, demolished the building and restored the floodplain’s natural conditions. While this might seem a drastic measure, relocating the school was more cost effective than leaving it in place and attempting to protect it from the flooding Gila River. In both cases, local communities implemented stream restoration under flood control

authority enabled by legislation very similar to Idaho’s flood control district statute.

Resolving uncertainty and enabling real local control

While Idaho’s flood control district statute should allow for the use of place-based stream restoration efforts, two uncertainties exist in the statute. First, although natural streams can be used for flood control purposes under the statute’s broad purpose and delegated powers, apparently no Idaho flood control district has implemented stream restoration as a flood control tool. Further, neither the statute nor the IDWR explicitly support that particular tool. Second, and perhaps more troubling, the statute’s broad grant of authority to district commissioners — with few explicit restrictions on how that authority is used — leaves flood control districts prone to capture by interests that might favor traditional, stream-channel-altering flood control approaches, even where the local community may prefer otherwise. Legislative attention to these two issues is unnecessary. When a petition contemplates the use of stream restoration as the method of flood control, the IDWR Director should clarify when granting the petition that the authority of the flood control district is limited by “proposed method or system of flood control” described in the petition. The proposed method or system may specifically include and be limited to stream restoration.

The statute requires that the petition to establish a district contain two elements that suggest that the legisla-

ture intended a district's power be determined and limited by the petition that created it. First, all petitions must specify the "object of the organization of the district."¹⁶ As demonstrated by the petition requirements that follow, the word "object" in this sentence means "purpose" or "goal." Because the entire statute requires that all districts achieve flood control in some form, this requirement that the petition describe the purpose of a particular flood control district indicates that an individual flood control district may have a purpose that is more specific than that statute's general goal. For example, the petition might describe as its purpose the mitigation or controlling of floods by restoring the stream's natural condition. Similarly, a specific flood control district might provide that its purpose is to restore a floodplain by purchasing private lands that might otherwise be developed and exacerbate stormwater runoff. Both purposes achieve the statute's general goal, but in a specific, locally-appropriate way.

The petition must also describe how establishment of the district, and use of the proposed method or system of flood control, "is a proper and advantageous method of accomplishing the relief sought or benefits to be secured."¹⁷ As noted above, the reference to "relief sought or benefits to be secured" only makes sense if a district can have a purpose that is more specific than simply "flood control." More important, the requirement that a petition describe both the proposed method and system of flood control and how it will achieve the proposed district's specific goals demonstrates that the method or system described is an integral part of the district itself. This requirement would be meaningless if the district could ignore both the purpose and method or system described in the petition. The only reasonable interpretation of this requirement is that the petition itself — as approved by the registered voters in the proposed district — describes and limits the range of actions that might be undertaken by the district. Any other interpretation renders the petition requirements a mere formality, to be ignored once the district is approved.

In approving flood control districts, the IDWR Director should clarify that the district created is limited to the purposes and tools described in the petition, which can include stream restoration.

The procedure by which a petition is approved also indicates that the authority granted a specific district can and should be constrained as described in the petition itself. After considering a petition, the Director has three options. The Director may approve the petition as submitted, may deny the petition, or may recommend a district different from that described in the petition.¹⁸ When the alternative district recommended is "materially different" from that described in the petition, the registered voters in the proposed district must approve the revised district in the same manner required for the original petition.¹⁹ Because the original petition need only describe the "temporary boundaries of the proposed district," and because the materially different provision refers to the petition in its entirety, the materially different language must refer to more than simply the proposed district's geographic boundaries. A materially different flood control district would be a district with a different purpose, or with a different proposed system or method of flood control. If the statute did not limit the authority of flood control districts to the purpose, and system or methods, described in the petition, this "materially different" language would be irrelevant.

A plain reading of the statute indicates that it both authorizes the use of stream restoration and limits the acceptable tools and powers of a specific district to those that carry out the specific purpose, and use the specific system or methods, described in the petition. Any other interpretation renders significant aspects of the statute largely meaningless and would invali-

date the goals and desires of the taxpayers who approved and fund the district. In approving flood control districts, the IDWR Director should clarify that the district created is limited to the purposes and tools described in the petition, which can include stream restoration.

Conclusion

Idaho is home to more miles of streams and rivers than any other western state. And those streams, and the communities that surround and love them — from the Bruneau Canyon to the deep forests of North Idaho or the high alpine streams flowing out of the Tetons — are incredibly diverse. What might work to control floods and achieve locally-desired aesthetic, ecological, or economic development goals in Weiser might not work in Driggs. Each community should have the flexibility to design and use the flood control tools that best fit its condition, economy, and culture. This includes stream restoration and preservation. Idaho law authorizes and supports local control and funding of flood control efforts. The Idaho Department of Water Resources should promote the use of locally-designed programs to achieve local goals that are consistent with the state-wide interest in conserving our water resources. Stream restoration and related flood management approaches provide local communities more options to manage floodwaters and water resources, while strengthening those local communities and cultures, preserving and conserving the state's water resources, and improving degraded streams in our great state.

Endnotes

1 See *United States v. Moses*, 2006 WL 1459836 (D. Idaho 2006), affirmed by *United States v. Moses*, 496 F.3d 984 (9th Cir. 2007), certiorari denied by *Moses v. United States*, 554 U.S. 918 (2008), and post-conviction relief dismissed by *United States v. Moses*, 642 F.Supp.2d 1216 (D. Idaho 2009).

2 See Idaho's 2010 Integrated Report (August 2011), available at <http://www.deq.idaho.gov/water-quality/surface-water/monitoring-assessment/integrated-report.aspx>.

3 See, e.g., *United States Environmental Protection Agency, National Rivers and Stream Assessment, 2008-2009 (Draft)*, (Feb. 28, 2013).

4 Idaho Code Ann. §§42-3101 to 3128.

5 See Idaho Code Ann. §42-3105.

6 The property tax assessed by a flood control district may be no more than 0.06% of a property's assessed value, unless a higher amount is approved by voters. See Idaho Code Ann. §42-42-3115(1).

7 Idaho Code Ann. §42-3102.

8 Idaho Code Ann. §42-3105(3).

9 Idaho Code Ann. §42-3115(14).

10 *Id.*

11 In Louisiana, the use of dikes and channelization to control the Mississippi River has caused the loss of more than 5,000 square kilometers of wetlands in the Mississippi River Delta since 1900. These wetlands formerly served as a buffer that reduced the storm surges and flooding associated with hurricanes or other significant storms. See John W. Day, Jr., et al., *Restoration of the Mississippi Delta: Lessons from Hurricanes Katrina and Rita*, 315 *SCIENCE* 1679 (2007); *Some of Hurricane Sandy's effects were exacerbated by coastal development, which eliminates the buffering capacity of coastal wetlands and dunes and can increase severity of storm surges.* See, e.g., John Rudof, et al., "Hurricane Sandy Damage Amplified by Breakneck Development of Coast," Nov. 11, 2012, available at [http://www.huffingtonpost.com/2012/11/12/hurricane-sandy-](http://www.huffingtonpost.com/2012/11/12/hurricane-sandy-damage_n_2114525.html)

[damage_n_2114525.html](http://www.huffingtonpost.com/2012/11/12/hurricane-sandy-damage_n_2114525.html) (last accessed Apr. 1, 2013); see also Robert A. Monton, *Factors Controlling Storm Impacts on Coastal Barriers and Beaches: A preliminary basis for near real-time forecasting*, 2002 *J. COASTAL RES.* 486.

12 See, e.g., Cynthia Berlin & James Handley, *Wetlands as Flood Control: The case of the La Crosse River marsh*, 50(2) *FOCUS ON GEOG.* 7 (2007); Ted Sommer, et al., *California's Yolo Bypass: Evidence that flood control can be compatible with fisheries, wetlands, wildlife, and agriculture*, 26(8) *FISHERIES* 6 (2001); Donald L. Hey & Nancy S. Philippi, *Flood Reduction through Wetland Restoration: The Upper Mississippi River basin as a case history*, 3(1) *RESTORATION ECOLOGY* 4 (1995); Taylor A. Delaney, *Benefits to Downstream Flood Attenuation and Water Quality as a Result of Constructed Wetlands in Agricultural Landscapes*, 50(6) *J. SOIL & WATER CONSERVATION* 620 (1995).

13 See <http://www.yakimacounty.us/surface-water/FCZD.htm>.

14 See *Ariz. Rev. Stat.* §48-3603(C)(20)(b).

15 See <http://www.fcd.maricopa.gov/Projects/PPM/projStructDetails.aspx?ProjectID=5>.

16 Idaho Code Ann. §42-3105(1).

17 Idaho Code Ann. §42-3105(3).

18 See Idaho Code Ann. §42-3108.

19 *Id.*

Each community should have the flexibility to design and use the flood control tools that best fit its condition, economy, and culture.

About the Authors

Jerrold A. Long is an associate professor at the University of Idaho College of Law in Moscow. Professor Long grew up in Rexburg, Idaho. He received a B.S. in Biology from Utah State University and a J.D. from the University of Colorado-Boulder. After practicing law for several years, Professor Long returned to graduate school and earned a Ph.D. in Environment and Resources from the University of Wisconsin-Madison.



Samuel Finch is a second year law student and Environmental Science graduate student at the University of Idaho in Moscow.



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Christopher W. Bayuk San Diego, CA <i>California Western School of Law</i>	Regan Charlton Boise, ID <i>University of Idaho College of Law</i>	David Anthony Eisele Moscow, ID <i>University of Idaho College of Law</i>	Aaron B. Goldman Coral Gables, FL <i>University of Florida, Frederic G. Levin College of Law</i>
Joshua Andrew Bishop Boise, ID <i>University of Idaho College of Law</i>	Douglas Taylor Christensen Shelley, ID <i>Ave Maria School of Law</i>	Piper Ashton Elmer Coeur d'Alene, ID <i>University of Idaho College of Law</i>	Jane Catherine Gordon Boise, ID <i>University of Idaho College of Law</i>
Christopher D. Boyd Moscow, ID <i>University of Idaho College of Law</i>	Bertha Joann Clayton aka Bertha Joann Poirier Moscow, ID <i>University of Idaho College of Law</i>	Katherine Alexander Elsaesser Priest River, ID <i>University of Idaho College of Law</i>	Joshua Paul Goyden Boise, ID <i>Catholic University of America, Columbus School of Law</i>
Matthew V. Bradshaw Williamsburg, VA <i>William & Mary Law School</i>	Anna Elizabeth Courtney Spokane, WA <i>Gonzaga University</i>	Nicholas Jeffrey Erikson Boise, ID <i>University of Idaho College of Law</i>	Natalie Greaves aka Natalie Ann Johnson Litchfield Park, AZ <i>Arizona State University</i>
Dale Francis Braunger Colfax, WA <i>University of Idaho College of Law</i>	David Wayne Cousin Idaho Falls, ID <i>University of Utah S.J. Quinney College of Law</i>	Maren Caroline Ericson Nampa, ID <i>University of Idaho College of Law</i>	Bryson Keith Gregory Lincoln, NE <i>University of Nebraska College of Law</i>
Christopher Fraser Brown Boise, ID <i>University of Idaho College of Law</i>	Benjamin Thomas Cramer Athens, GA <i>University of Georgia School of Law</i>	Barbra Ferre Nampa, ID <i>Golden Gate University School of Law</i>	Luke Andrew Hagelberg San Jose, CA <i>Santa Clara University School of Law</i>
Erica E. Bullo aka Erica E. Davenport Moscow, ID <i>University of Idaho College of Law</i>	Nathan John Cuoio Boise, ID <i>University of Idaho College of Law</i>	Tanya May Finigan Moscow, ID <i>University of Idaho College of Law</i>	Clayton Michael Hansen Boise, ID <i>Drake University Law School</i>
Dennison Alexander Butler Virginia Beach, VA <i>Regent University School of Law</i>	Nathaniel James Damren Boise, ID <i>DePaul University College of Law</i>	Tracey Renee Fouche' aka Tracey Renee Brown Coeur d'Alene, ID <i>Pepperdine University School of Law</i>	Eric Scott Hanson Naples, FL <i>Ave Maria School of Law</i>
Marc Jason Bybee Boise, ID <i>University of Idaho College of Law</i>	Patrick James Davis Boise, ID <i>University of Idaho College of Law</i>	Catherine Ann Freeman Eagle, ID <i>University of Idaho College of Law</i>	James Eldon Harmer Caldwell, ID <i>University of Idaho College of Law</i>
August Heil Cahill III Boise, ID <i>University of Idaho College of Law</i>			

**July 2013 Idaho State Bar Examination Applicants
(as of May 9, 2012)**

Katherine Anne Hawkins
aka Katherine Anne Paulsen
Moscow, ID
University of Idaho College of Law

John Matthew Haynes
Spokane Valley, WA
Gonzaga University

Joshua G. Hillyard
Meridian, ID
*University of Denver Sturm
College of Law*

Denise Marlena Hippach
aka Denise Marlena Culver
Valencia, CA
*University of Southern California,
Gould School of Law*

Arthur Robert Hoksbergen
Blackfoot, ID
*University of South Dakota School
of Law*

KayDee Holmes
Moscow, ID
University of Idaho College of Law

D. Aaron Hooper
Boise, ID
University of Idaho College of Law

Jaelyn Terese Hovda
Boise, ID
University of Idaho College of Law

Lucas M. Howarth
Eagle, ID
University of Idaho College of Law

Jason Lee Hudson
Boise, ID
*University of Colorado School of
Law*

Ryan Scott Hunter
Moscow, ID
University of Idaho College of Law

Melissa Annette Jacobs
Moscow, ID
University of Idaho College of Law

**William Paul Joseph Jacobson
III**
Citrus Heights, CA
*University of the Pacific,
McGeorge School of Law*

Jayde Christine James
Moscow, ID
University of Idaho College of Law

Matthew Thomas Janz
Moscow, ID
University of Idaho College of Law

Jennifer Meling-Aiko Jensen
aka Jennifer Meling-Aiko Pon
Moscow, ID
University of Idaho College of Law

Jerald Von Johnson
Topeka, KS
Washburn University

Paul Kelly Johnson
Moscow, ID
University of Idaho College of Law

Kimball Joseph Jones
Rexburg, ID
Brigham Young University

Cynthia Forbes Knight
aka Cynthia Forbes Olney
Sun Valley, ID
*Golden Gate University School
of Law*

Shanna C. Knight
aka Shanna Colleen Hood
Moscow, ID
University of Idaho College of Law

Lindsey C. Kofoed
aka Lindsey Coe Mattee
Palm Harbor, FL
Stetson University College of Law

Neal Andrew Koskella
Boise, ID
University of Idaho College of Law

Otto Woelke Leithart
Durham, NC
Duke University School of Law

Dustin Arthur Liddle
Chicago, IL
*The University of Chicago Law
School*

Wendy Marie Lierman
Spokane, WA
University of Idaho College of Law

J. Kelso Lindsay
aka Kelly Lindsay
Coeur d'Alene, ID
*Loyola Law School, Loyola
Marymount University*

Samuel Vannasin Lityouvang
aka Vannasin Lityouvang
Boise, ID
University of Idaho College of Law

Shawn Patrick McMurray
Boise, ID
*Golden Gate University School
of Law*

C. Harrison Meerdink
Lake Oswego, OR
*Florida State University College
of Law*

Cassandra Nicole Mix
Jerome, ID
Brigham Young University

Dana Clifford Mohr
Denver, CO
*University of Denver Sturm
College of Law*

Sharon Elizabeth Mohr
aka Sharon Elizabeth Ilgenfritz
Denver, CO
*University of Denver Sturm
College of Law*

Christina Moreno
Moscow, ID
University of Idaho College of Law

Nicholas Robert Morgan
Boise, ID
University of Idaho College of Law

Jacob K. Munk
Idaho Falls, ID
Florida Coastal School of Law

Cory Wayne Nielsen
Moscow, ID
University of Idaho College of Law

Nathan Henrie Nielson
Sandy, UT
University of Idaho College of Law

Jeffery D. Nye
Washington, DC
*Georgetown University Law
Center*

John David Oborn
St. Paul, MN
Hamline University

Kelly Susan Marie O'Neill
Moscow, ID
University of Idaho College of Law

Jennifer Lynn Ouellette
Moscow, ID
University of Idaho College of Law

Nathan Ross Palmer
Sandy, UT
*University of Nevada, Las Vegas,
Wm S Boyd School of Law*

Allison Cass Parker
Boise, ID
University of Idaho College of Law

Lindsey Michael Parker
Boston, MA
Boston University

Kristen Claire Pearson
Idaho Falls, ID
University of Idaho College of Law

Austin Ross Phillips
Moscow, ID
University of Idaho College of Law

Brindee Lee Probst
Salt Lake City, UT
*University of Utah S.J. Quinney
College of Law*

Matthew Aaron Rakes
Coeur d'Alene, ID
Gonzaga University

Lacey Bree Rammell-O'Brien
Meridian, ID
University of Idaho College of Law

Richard Waters Roberts Jr.
Hailey, ID
*George Mason University School
of Law*

Jaron Andrew Robinson
Moscow, ID
University of Idaho College of Law

Terry Rodino Jr.
Rexburg, ID
Washburn University

Gary L. Romel II
Lava Hot Springs, ID
*Loyola Law School, Loyola
Marymount University*

Claire Chandler Rosston
aka Claire Brassey Chandler
Anchorage, AK
University of Texas School of Law

Jonathan David Sater
Meridian, ID
Liberty University School of Law

Cassandra C. Scheihing
aka Cassandra Cayleen Mundell
Boise, ID
University of Idaho College of Law

Tessa Ann Scholl
aka Tessa Ann Chenney
Moscow, ID
University of Idaho College of Law

Kurt Herzog Schwab
Moscow, ID
University of Idaho College of Law

**July 2013 Idaho State Bar Examination Applicants
(as of May 9, 2012)**

Kiera Louise Sears
Meridian, ID
*University of Nevada, Las Vegas,
Wm S Boyd School of Law*

Michael Foster Sexton III
Rexburg, ID
New York University School of Law

Jenya Shanayeva
aka Yevgenia Igorevua
Shanayeva
Boise, ID
Syracuse University College of Law

Brian Douglas Sheldon
Moscow, ID
University of Idaho College of Law

John Christopher Shirts
Weiser, ID
*University of Colorado School of
Law*

Allen James Shoff
Moscow, ID
University of Idaho College of Law

Sara Catherine Simmers
Eagle, ID
University of Idaho College of Law

Michael Peter Sinks
Kalispell, MT
University of Idaho College of Law

Whitney Parker Skinner
Moscow, ID
University of Idaho College of Law

Kresten Thomas Snow
Meridian, ID
University of Idaho College of Law

Matthew Christopher Starr
Moscow, ID
University of Idaho College of Law

Benjamin Edward Stein
Boise, ID
*St. Thomas University School of
Law*

Ashlen Michelle Strong
aka Ashlen Michelle Anderson
Portland, OR
*The George Washington
University Law School*

Matthew Paul Stucki
Pocatello, ID
University of Idaho College of Law

Blake D. Surerus
Carey, ID
*University of the Pacific,
McGeorge School of Law*

Andrew Lloyd Swanson
Pocatello, ID
University of Idaho College of Law

Jenevieve Clair Swinford
aka Jenevieve Clair Mandell
Portland, OR
Lewis and Clark College

Robert James Taylor
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University of Idaho College of Law

Mark William Thompson
Boise, ID
University of Idaho College of Law

Taylor Wayne Tibbitts
Salmon, ID
*University of Virginia School of
Law*

Robert Douglas Todeschi
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George Joseph Tomlinson
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Brian David Trammell
Moscow, ID
University of Idaho College of Law

Michelle Ann Volkema
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University of Idaho College of Law

Michelle Vos
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*St. Thomas University School of
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Dane C. Whipple
Las Vegas, NV
*University of Nevada, Las Vegas,
Wm S Boyd School of Law*

Nichole Hannah Wilk
Phoenix, AZ
Gonzaga University

Mark T. Wilson
Missoula, MT
*University of Montana School of
Law*

Michael F. Winchester
Idaho Falls, ID
University of Idaho College of Law

Zachary S. Zollinger
Ann Arbor, MI
*The University of Michigan Law
School*

**NEW ADMITTEES
DIRECTORY UPDATES
Admitted 5/2/13 and 5/3/13**

Cheryl Anne Allaire
Christopher Richard Ambruso
April Lynn Anderson
Jeremy J. Andrew
Tyler James Black
Ryan Ronald Bolander
James Browitt
Thomas A. Bushnell
Michael David Bybee
Wm. Hunter Campbell
Stephen Paul Carpenter
S. Bret Clark
Jeffrey Lee Cotton II
Jennifer Rose DeHaan
Kent Neil Doll Jr.

Bryce Erick Downer
Amie J. Dryden
Eleanor A. DuBay
Aaron Eddington
Catherine Elizabeth Enright
Jonathon Frantz
Chip Giles
Isaiah Lee Govia
Max A. Hansen
Nancy Ann Hurd
Trevor Elliott Jack
Ryan D. Jenks
Joelle Sarah Kesler
Brady Ward King
Gary Mitchell Kirkham

Steven A. Langford
Benjamin Oliver Layman
Robert Henry McQuade Jr.
Brian McTague
Daniel Richard Charles
Mortensen
Adam Thompson Mow
Michael Louis Myers
Joshua Mark Lawless Nelson
Garrett James Oliverson
Danielle Therese Pare
Florence J. Phillips
Andrakay J. Pluid
Jillian Hana Potts
Devin William Quackenbush
Sarah Maureen Reed

Christine Lynn Reinert
Stephanie Riley
David Aaron Roscheck
Mark Rees Scoville
Jody Elizabeth Smith
John Thomas Spalding
David L. Spoede
Jeremiah Trent Stoddard
Joel Dee Tague
Matthew Robert Thompson
Erin Emily Tomlin
Lauren Eileen Vane
Nicholas Alexander Warden
Bryan J. Wheat
David Jay Wilson

Durham begins Durham Law Office PLLC

Craig Durham announces that he has formed his own firm, Durham Law Office, PLLC. His general practice will have an emphasis on criminal trial defense, criminal and civil appeals, state and federal post-conviction relief, and civil rights litigation. Mr. Durham welcomes referrals.



Craig Durham

For nearly 10 years, Mr. Durham was a staff attorney for the United States District Court in Boise, where he assisted federal judges in managing capital and non-capital habeas corpus cases and prisoner civil rights cases. Before working at the Court, Mr. Durham served as a trial and appellate public defender. He received his law degree from University of Kansas School of Law and is admitted to practice in Idaho, Kansas, and the Ninth Circuit Court of Appeals.

The Durham Law Office is located in the 8th Street Marketplace at 405 S. 8th Street, Suite 372, in Boise. Mr. Durham can be reached at (208)-345-5183 or at craig@chdlawoffice.com.

Idaho attorneys spoke at Litigation Counsel of America Conference

The Litigation Counsel of America invited Wade L. Woodard and Thomas A. Banducci of Andersen Banducci PLLC spoke at its 2013 Spring Conference & Induction of Fellows, which took place May 2-4, in Newport Beach, Calif.



Wade L. Woodard

As trial lawyers with more than 45 years of combined experience, Mr. Woodard and Mr. Banducci spoke about how Andersen Banducci approaches jury trials, and specifically how they

develop themes that resonate and connect with juries. Their presentation was made to Fellows of the LCA, an honorary trial lawyer society that represents less than one-half of one percent of one percent of American lawyers. Fellowship in the Litigation Counsel of America is highly selective and by invitation only. Fellows are carefully selected based on evaluations.

Also Fellows in the LCA, Mr. Woodard and Mr. Banducci are partners in the newly formed litigation firm of Andersen Banducci PLLC.

Attorney Michelle Gustavson Earns Junior League Community Service Award

Hawley Troxell announced attorney Michelle Gustavson received the Junior League of Boise Community Service Award during the League's 85th Anniversary Gala on May 3. The community service award is granted to one member for her volunteer work within the League and throughout the community.

Gustavson received this award based on her work within the League as the 2012-2013 program chair for an effort to help pre-teen girls called "Especially Me! (EM)." It was developed to help girls ages 9-12 navigate the upcoming changes in their lives through building and maintaining positive self-esteem and good decision making skills to promote happy, healthy futures. Since taking over as chair in May of 2012, Gustavson



Thomas A. Banducci

has dedicated over 400 volunteer hours to restructure the program, update the curriculum, teach classes, lead training sessions, form community partnerships, and apply for grant funds. Under

her leadership, the program has almost doubled in size from the prior year reaching 86 girls and has expanded to more local elementary schools.

Gustavson is an attorney in the firm's business and finance, banking, real estate, and social media groups. She assists clients with complex commercial real estate financing, loan documentation, legal opinions, and various employment matters, including social media policies. Gustavson's additional community involvement includes serving on the Idaho Women Lawyers (IWL) Board of Directors, Chair of the IWL Community Service Subcommittee, Vice Chair of the Idaho State Bar Business and Corporate Law Section and Chair of the Section's Annual CLE Committee, and serving on the American Heart Association Go Red for Women Logistics Committee.

Tracy Crane joins Anderson Julian & Hull LLP

The law office of Anderson, Julian & Hull LLP, announced that Tracy J. Crane joined the firm as a senior associate in February. Mr. Crane received his B.S. and M.S degrees in Geology at Idaho State University in 1996 and 2000. He received his J.D. degree from University of Idaho College of Law, summa cum laude in 2003. Mr. Crane has extensive experience in commercial and complex litigation.



Tracy J. Crane

Publication honors 10 attorneys as "Accomplished Under 40"

The *Idaho Business Review* has recognized 10 attorneys among those selected for the publication's "Accomplished Under 40" recognition listing.

"These are talented young professionals. They are shaping our state, our image and our expectations," said IBR President and Publisher Sean Evans.

This year, 129 were nominated, and 65 completed the application process.



Michelle Gustavson

OF INTEREST

A six-member selection panel of past "Accomplished Under 40" recipients scored the applicants in four categories: professional accomplishments, leadership skills, community involvement and long-term goals.

University of Idaho College of Law Professor Wendy Couture, a member of the 2012 class of "Accomplished Under 40," said in her profile, "I used to think 40 sounded old. Now, I think it sounds young. I'm happy to have my accomplishments recognized at this stage in my life, and I hope I have a long career ahead of me."

The 2013 Accomplished Under 40 magazine will be published with the June 14 issue of Idaho Business Review. The event – networking reception, dinner and awards ceremony – will be held at the Knitting Factory June 13. For tickets, visit idahobusinessreview.com/events/au40/.

2013 Accomplished Under 40 includes the following attorneys:

- D. John Ashby, Hawley, Troxell, Ennis & Hawley LLP
- Allison Blackman, Stoel Rives LLP
- Matt Darrington, Robinson, Anthon & Tribe Attorneys at Law
- Michelle Gustavson, Hawley, Troxell, Ennis & Hawley LLP
- Erika Malmen, Perkins Coie LLP
- Joe Meuleman, Meuleman Mollerup LLP
- Scott Randolph, Holland & Hart LLP
- Sarah Q. Simmons, The Erica Law Group PA
- Hilary Soltman, First American Tile Company
- Josh Taylor, Pickens Law PA

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Book Review: History of a Treaty and the Mighty Columbia

Gerald Mueller

In 1941, under contract to the Bonneville Power Administration, America's greatest folk singer/song writer Woody Guthrie wrote these words:

“And on up the river is Grand Coulee Dam

The mightiest thing ever built by a man

To run the great factories and water the land

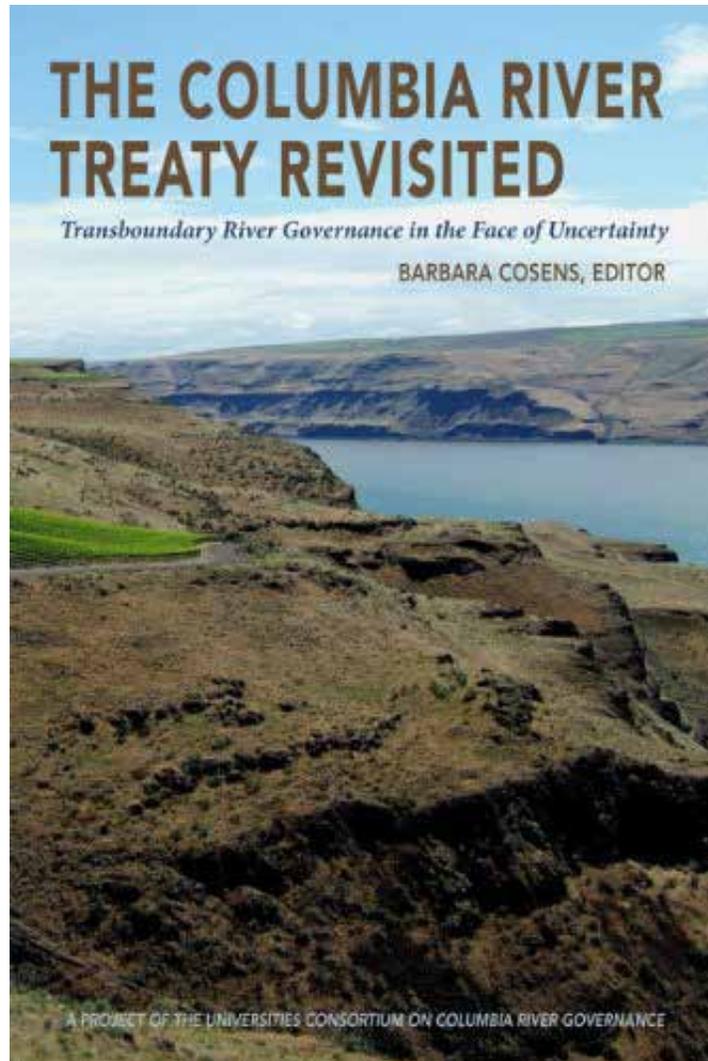
So roll on, Columbia, roll on.”

This perspective is in stark contrast to the anguish expressed by Mary Pearson, a judge on the Court of Appeals for the Shoshone-Bannock Tribes of Idaho:

The devastating impact of Coulee Dam can only be explained in terms of genocide, as the dam's destruction of the salmon runs directly ended the ability of the Columbia River People to fish for salmon, which in turn damaged their cultural existence and diminished their source of sustenance.

Judge Person's words are found in “The River People and the Importance of Salmon,” a chapter of *The Columbia River Treaty Revisited, Transboundary River Governance in the Face of Uncertainty* edited by Barbara Cosens.

These quotations encapsulate the significance of the system of hydropower dams on the Columbia River and its tributaries which form the Columbia Basin in the US and Canada. The dams generate the electricity that provides the foundation for the basin's economy and prevent a repeat of the 1948 flood that destroyed Vanport, Oregon. Unfortunately, they also devastated the salmon fishery and the people that depended on it. Since 1964, management and operation of the this system has been subject to the Columbia River Treaty enacted to allow the United States and Canada to realize joint hydropower and flood control benefits which neither country acting alone could achieve. This Treaty is under active review by entities and interests on both sides of the international border.



Cosens' book is an excellent primer of Columbia Treaty history, current operation, and future possibilities. Its chapters survey a wide range of topics from the political context in the US and Canada for development of the Treaty to the impacts of its implementation and system operation on the people and natural resources of the Columbia Basin to an academic analysis of transboundary governance of water resources and the role uncertainty plays in it. A chapter entitled “When Courts Run Regulated Rivers: The Effect of Scientific Uncertainty” chronicles the litigation over river operation and salmon recovery under the Endangered Species Act.

Several of the chapter authors focus needed attention on interests and

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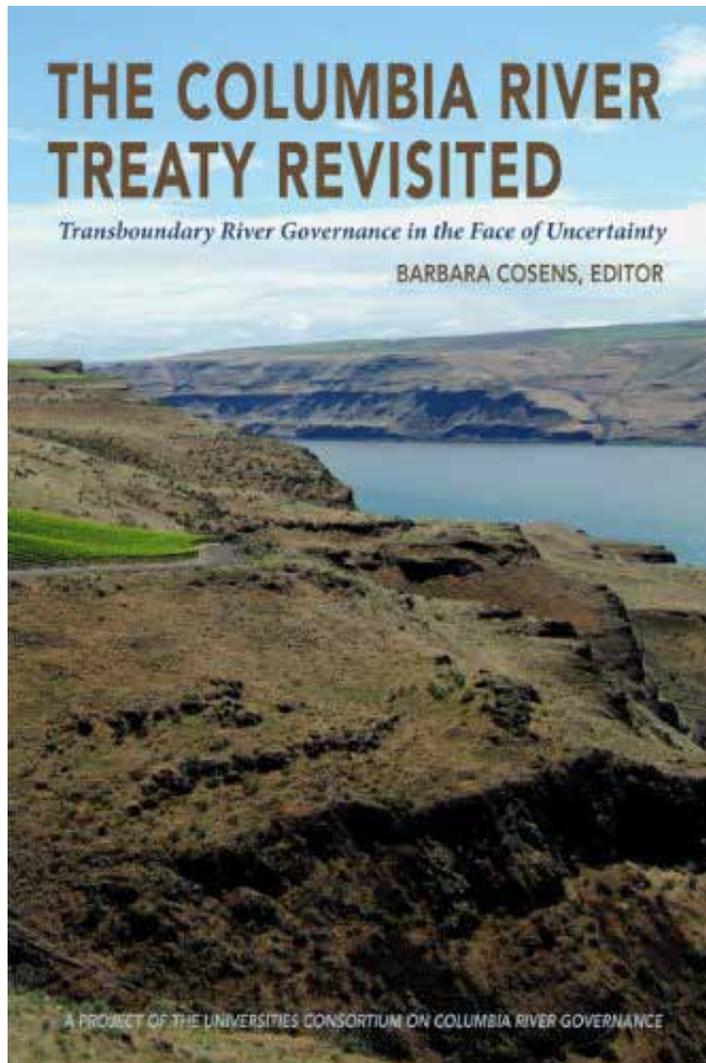
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Health Care Reform Compliance for Employers: Hidden Perils of the Shared Responsibility Requirements

Bret Busacker
Bret Clark

On January 1, 2014, the most significant provisions of the Patient Protection and Affordable Care Act¹, as amended by the Health Care and Education Reconciliation Act², (Health Care Reform) become effective. As this deadline fast approaches, federal regulators, states, insurance companies, health care providers, and many other interested parties scramble to prepare for and implement the sweeping changes to the insurance and health care industries included in Health Care Reform. Among these changes are significant new requirements for employers.

This article identifies several issues affecting employers that have not been in the Health Care Reform headlines, but could cause significant penalties for unwary employers. As explained below, in order to comply with the shared responsibility requirements, employers should analyze their workforce to identify all common law employees and union employees of the employer, and related employers, and develop comprehensive procedures for determining the full-time status of employees.

Shared responsibility penalties

Health Care Reform imposes significant penalties, called the shared responsibility penalties, on large Idaho employers that do not provide qualified health coverage to their full-time employees.³ Employers with 50 or more full-time equivalent employees are considered large employers for purposes of the shared responsibility penalties. Small employers with less than 50 full-time equivalent employees are not subject to the shared responsibility penalties.⁴

No coverage penalty

One of these penalties, the no coverage penalty, applies if a large employer does not provide major medical cov-

Small employers with less than 50 full-time equivalent employees are not subject to the shared responsibility penalties.⁴

erage to at least 95% of its full-time employees and one or more full-time employee(s) obtains subsidized health coverage on a health insurance exchange, such as the Idaho health insurance exchange (subsidized health care coverage will generally be available to individuals with household income of 100% to 400% of the federal poverty level). This all or nothing penalty starts at \$40,000 per year for an employer with 50 full-time employees and increases by \$2,000 for each additional full-time employee of the employer.⁵ For example, if an employer with 100 full-time employees fails to cover as few as 6 full-time employees, it will be subject to a penalty of \$140,000.

Insufficient coverage penalty

If an employer does provide major medical coverage to at least 95% of its full-time employees, it still may be subject to the second shared responsibility penalty, if the coverage is not affordable or does not provide minimum value (as defined by IRS regulations). This penalty is \$3,000 for each full-time employee who obtains subsidized coverage on a health insurance exchange.⁶ For example, if an employer with 100 full-time employees covers all of its full-time employees but the coverage is not affordable to 10 full-time employees and 6 of those full-time employees obtain subsidized exchange coverage, the employer will be subject to a penalty of \$18,000 (6 x \$3,000).

The perils of the shared responsibility rules

Under the shared responsibility requirements, an employer must identify its common law employee workforce (which, as explained more fully below, includes all workers who the employer has power to direct and control) in order to (i) determine whether an employer is a large employer, (ii) determine whether coverage is provided to 95% of the employer's full-time employees, and (iii) calculate the amount of any shared responsibility penalties.⁷ For these purposes, an employee is considered full-time if the employee works 30 or more hours per week. Rather than rely on an employer's classification of an employee's full-time status, employees' full-time status must be based on actual hours worked.⁸

Because the shared responsibility penalties are tied to the number of an employer's common law employees, each Idaho employer must look closely at the nature of its workforce and its business structure to ensure that it has identified all full-time common law employees. In particular, employers should carefully examine non-traditional workers and the employer's corporate structure to confirm that all common law employees are identified. They should also confirm that union employees have sufficient coverage to satisfy the shared responsibility requirements. Finally, employers should establish administrative procedures for

identifying which common law employees are full-time employees.

Common Law Employees v. Non-Traditional Workers

For many years the IRS has actively audited employers that, inadvertently or intentionally, misclassify common law employees as agency workers, independent contractors, and/or leased employees and, as a result, avoid payroll tax and benefit obligations for these workers.⁹ The IRS has the power, for example, to reclassify an independent contractor as a common law employee if that is the reality of the relationship.¹⁰

In the past, many employers have not been diligent in correctly classifying workers because penalties for misclassification and enforcement by state and federal regulators has been minimal. However, Health Care Reform significantly raises the stakes of misclassifying workers because it is possible that the addition of a few common law employees due to reclassification could cause an employer to become subject to significant shared responsibility penalties. For example, an employer that provides no medical coverage to its employees because it believes it has 49 full-time employees (and, as a result, is not subject to the shared responsibility penalties) could be subject to a shared responsibility penalty of \$40,000 if one of its independent contractors is reclassified as a common law employee.

Determining independent contractor status

Under IRS rules, a worker is a common law employee if, based on all the facts and circumstances, the business has the right to direct and control the worker.¹¹ This analysis is especially difficult because the IRS considers a wide variety of factors in determining control, including factors relating to whether the employer has behavioral control over the worker, the financial arrangement between the worker and the business, and the relationship between the parties.¹²

In the past, many employers have not been diligent in correctly classifying workers because penalties for misclassification were insignificant.

Some of the most important factors considered by the IRS include the following:

- Does the business require a worker to perform a job in a certain way, impose detailed instructions on the worker, and/or train the worker extensively on how the job must be performed?

- Is the worker free to seek out independent business opportunities?

Under the financial arrangement, may the worker realize a profit or incur a loss?

- Is the worker's compensation structure different from how an employee is compensated?

- Is the work performed by the worker a key aspect of the regular business of the company?¹³

Accordingly, employers should carefully review their staffing, leasing, and independent contractor arrangements to confirm that they are not common law employee relationships, and properly monitor and document the non-employee status of these workers. In addition, employers that hire agency workers or leased employees should review their staffing agency agreements and confirm that the staffing agency will take proper steps to ensure that the employer will not be subject to shared responsibility penalties with respect to the agency or leased employees and indemnify the employer if shared responsibility penalties are imposed.

Complex Business Structures

In addition to the challenge of properly identifying common law employees, some businesses may find it

difficult to properly determine whether related entities must consider their employees together for the purpose of the shared responsibility requirements. This problem often arises when a business consists of complex ownership structures and business ventures.

Identify controlled groups

The IRS has rules for treating all related business entities (including corporations, s-corporations, limited liability companies, partnerships, etc.) as a single employer for tax purposes. Previously these rules applied for several purposes, including the administration of retirement plans. These rules now also apply for the purpose of the shared responsibility requirements.¹⁴

The rules for determining whether related businesses are treated as a single employer are complicated but, in general, the following apply:

- Parent-subsidiary controlled group. An entity and any entity it substantially owns are treated as a single employer.

- Brother-sister controlled group. If five or fewer individuals together substantially own multiple entities, the entities are treated as a single employer.

- Affiliated service group. Multiple professional organizations that work together to provide services to clients may be treated as a single employer.¹⁵

For example, a business owner who owns two companies with 30 employees each may mistakenly believe that neither business is subject to the shared responsibility penalties because neither company has 50 employees. However, under IRS rules, the businesses are

treated as a single employer with 60 employees and subject to the shared responsibility penalty.

These rules present a significant area of risk for employers in the retail, hospitality, medical, and construction industries because complex ownership structures are common.

All employers should examine their corporate structure to confirm that all related entities with employees have been identified. Employers should also closely monitor changes in corporate structures and ensure that the shared responsibility implications of any such changes are carefully considered.

Analyze union coverage

Employers that contribute to a union health plan, also known as a multiemployer health plan, for their union employees should carefully review the union coverage to confirm it will satisfy the employer's shared responsibility obligation with respect to its union employees.

The IRS has not yet determined how union health coverage will be treated under the shared responsibility rules, but it has provided transition relief for 2014. Under the transition relief, an employer will not be subject to shared responsibility penalties for a union employee as long as:

- The employer is obligated to contribute to the multiemployer plan pursuant to a collective bargaining agreement.
- The union coverage is offered to the employee (and dependents).
- The union coverage is affordable and provides minimum value.¹⁶

Employers should confirm that union coverage is affordable, provides minimum value, and is available to all union employees that are full-time employees under the shared responsibility rules. If not, the employer may be treated, for the purposes of the shared responsibility requirements, as if it were not providing coverage at all to its union employees. Employers should explore the possibility of limiting a union's ability to make unilateral coverage changes that could affect the employer's shared responsibility obli-

Employers will have to establish new procedures in accordance with IRS rules to determine full-time employees.

gations. For example, an employer may want to seek, through the collective bargaining process, to limit the union's ability to increase employee premiums and, as a result, cause the union coverage to be unaffordable.

Identifying full-time employees

Once an employer has identified its common law employees, it must identify which employees are full-time for the purpose of the shared responsibility requirements. In the past, an employer limiting coverage to full-time employees could exclude part-time employees based on the number of hours the employee was expected to work and disregard the actual number of hours worked. However, for the purpose of the shared responsibility penalties, full-time employees must be determined based on actual hours worked.¹⁷

Consequently, employers will have to establish new procedures in accordance with IRS rules to determine full-time employees. Under these procedures, the employer must be able to identify the full-time status of employees from year to year, including employees with variable hours that may work 30 or more hours per week during some periods and less than 30 hours per week during other periods. The procedures must also allow an employer to determine when new variable hour employees become full-time employees (required to be offered coverage). The rules and challenges for identifying these employees are described below.

Employees reasonably expected to work 30 or more hours per week

Initially, an employer should identify all the employees that it reasonably expects to work 30 or more hours per week. These employees are full-time employees under the shared responsibility requirements and should be covered in order to avoid the shared responsibility penalties.¹⁸

Ongoing variable hour employees

For employees that are not reasonably expected to work 30 or more hours per week, the IRS allows an employer to establish standard measurement periods during which the employer determines whether variable hour employees will be treated as full-time employees.¹⁹ The employer tracks employee hours during the measurement periods, which may be from 3 to 12 months. At the end of each measurement period, the employer determines whether employees averaged at least 30 hours per week.

Employees that average 30 or more hours per week during a measurement period must be treated as full-time employees for a period that is at least as long as the measurement period (the IRS refers to this period as a stability period). If an employer does not offer coverage to employees who average at least 30 hours per week during the measurement period, the employer may be subject to a shared responsibility penalty for that period.²⁰

Most employers will make their standard stability periods the same as their plan years. As a result, employees determined to be full-time during the

immediately preceding measurement period will be offered coverage during the open enrollment period preceding the plan year/stability period and will be covered during the plan year/stability period. For each plan year, an employer must review the hours worked by each variable hour employee during the previous measurement period to determine which employees worked sufficient hours to be classified as full-time and eligible for coverage during the plan year.

New variable hour employees

When an employer is unable to reasonably determine whether a new hire will work at least 30 hours per week, the employer may exclude the employee from the plan for up to 12 months without incurring a shared responsibility penalty while the employer determines the full-time status of the employee. Following this initial measurement period the employee will have a stability period at least as long as the measurement period.²¹ After this initial measurement period and stability period, the employee's full-time status will be determined based on the employer's standard measurement periods and stability periods (as described above for ongoing variable hour employees).²²

Transition relief for 2014 administrative periods

Under transition relief provided by the IRS, employers may begin measurement periods for 2014 stability periods as late as July 1, 2013.²³ Employers should begin tracking hours now for any variable hour employees whose hours are not currently tracked. Generally, no administrative change will be required for hourly employees because their hours are already tracked. However, employers may have to implement procedures for tracking part-time salaried employees who are excluded from coverage. Generally, the only way to confirm that part-time salaried employees are not full-time employees for the purpose of the shared responsibility requirements will be to count their hours.²⁴

Even employers that decide to pay the shared responsibility penalty instead of covering employees will need to establish procedures for determining full-time employees

New administrative burden

Although employers have significant flexibility in establishing procedures under the IRS rules for determining full-time employees, these procedures will be a significant and ongoing administrative requirement for health plans. The procedures are similar in many respects to the comprehensive eligibility rules that currently apply to retirement plans. Even employers that decide to pay the shared responsibility penalty instead of covering employees will need to establish procedures for determining full-time employees because the number of full-time employees is required in order to calculate the shared responsibility penalty.

In order to ensure compliance with the shared responsibility requirements, employers should take a close look at their employee population and develop comprehensive procedures for determining the full-time status of all common law employees in compliance with IRS rules. These procedures should be put in writing. Written procedures are important for consistent administration from year to year and to be able to confirm the non-full-time status of any employee in the event the IRS questions the employer's determination. Once the procedures are established, they must be carefully implemented so that all full-time employees are properly identified each year.

Analyze the risk

Employers who fail to properly identify their full-time common law employees may unexpectedly become subject to the shared responsibility penalties.

This problem is particularly acute for large employers that believe they have complied with the shared responsibility requirements by offering major medical coverage, but fail to provide coverage to misclassified employees or full-time employees that were improperly identified as non-full-time employees. In such a case, shared responsibility penalties may apply, even though many employees were provided coverage.

For example, an employer could provide coverage to all 60 of its full-time employees but not to its 7 independent contractors who each work more than 35 hours per week for the employer. If the IRS audits the employer and determines that the 7 independent contractors are actually common law employees of the employer, the employer will be subject to the shared responsibility penalty because it failed to cover 7 full-time employees. Even though the employer made significant contributions to its health plan and intended to cover all of its full-time employees, the employer will be subject to a penalty of \$74,000 because it misclassified the independent contractors.

Action items

Employers need to begin planning now for compliance (or noncompliance) with the shared responsibility requirements and other Health Care Reform requirements that become effective from now until the end of 2014. In determining compliance with the shared responsibility requirements, employers should closely examine their employment and contractor agreements, evaluate their ownership structures, review union coverage, and

identify full-time employees. Employers should consider taking the following actions:

- Develop an initial list of potential areas of risk.
- Address risks with the board of directors and/or benefits committee.
- Prepare a comprehensive shared responsibility action plan to address risk and compliance:
 - Review corporate ownership structure and identify all related entities.
 - Determine whether related entities must be aggregated under IRS rules.
 - Identify all non-traditional workers, including agency employees, independent contractors, and leased employees.
 - Review each agency employee, independent contractor, and leased employee and determine whether the worker is a common law employee of the employer.
 - Analyze the risk of misclassification and potential shared responsibility penalties.
 - Revise contracts relating to agency employees, independent contractors, and leased employees based on risk analysis and add appropriate indemnification language.
 - Confirm whether union coverage is affordable and provides minimum value.
 - Analyze workforce and develop procedures for determining full-time status of employees.
 - Evaluate minimum essential coverage, minimum value, and affordability.
- Implement any plan changes during open enrollment for 2014.
- Prepare employee communications (revised summary of benefits and coverage (SBCs), notice of exchanges).
- Prepare plan amendments, policies, notices to document compliance.
- Report compliance efforts to board of directors and/or benefits committee.

Revise contracts relating to agency employees, independent contractors, and leased employees based on risk analysis and add appropriate indemnification language.

Conclusion

At a minimum, in order to ensure compliance with the shared responsibility requirements, employers should carefully review their workforce to identify all common law employees of the employer and related entities, confirm that union employees have sufficient coverage, and establish procedures for identifying full-time employees.

Endnotes

- 1 Pub. L. No. 111-148, 124 Stat. 119-1025 (2010).
- 2 Pub. L. No. 111-152, 124 Stat. 1029-1084 (2010).
- 3 I.R.C. § 4980H.
- 4 I.R.C. § 4980H(c)(2).
- 5 I.R.C. § 4980H(a); Prop. Treas. Reg. § 54.4980H-4. Although the IRS has not finalized the shared responsibility regulations, it has indicated that employers may rely on the proposed regulations. Prop. Treas. Reg. § 54.4980H-0, Preamble § X.
- 6 I.R.C. § 4980H(b); Prop. Treas. Reg. § 54.4980H-5.
- 7 Prop. Treas. Reg. § 4980H-1(a)(13).
- 8 I.R.C. § 4980H(c)(4); Prop. Treas. Reg. § 4980H-1(a)(18), -3.
- 9 See Treas. Reg. § 31.3121(d)-1(c).
- 10 E.g., *James v. Commissioner*, 25 T.C. 1296 (1956).
- 11 Treas. Reg. § 31.3121(d)-1(c); Treas. Reg. § 31.3306(i)-1; Treas. Reg. § 31.3401(c)-1; Rev. Rul. 87-41.
- 12 Independent Contractor or Employee? Training Materials, IRS Training Course 3320-102, TPDS 842381 (October 30, 1996); Rev. Rul. 87-41.

13 Id.

14 Prop. Treas. Reg. § 4980H-1(a)(14); I.R.C. §§ 414(b) (aggregating related corporations), 414(c) (aggregating other related business entities), 414(m) & (o) (aggregating business entities of professionals under certain circumstances).

15 I.R.C. § 414(b), (c), (m) and (o).

16 Prop. Treas. Reg. § 54.4980H-0, Preamble § IX.D.

17 I.R.C. § 4980H(c)(4); Prop. Treas. Reg. § 4980H-1(a)(18), -3.

18 Prop. Treas. Reg. § 4980H-3(c)(2).

19 Prop. Treas. Reg. § 4980H-3(c)(1).

20 Prop. Treas. Reg. § 4980H-3(c)(1)(iii).

21 Prop. Treas. Reg. § 4980H-3(c)(3).

22 Prop. Treas. Reg. § 4980H-3(c)(1); Prop. Treas. Reg. § 4980H-1(a)(27).

23 Prop. Treas. Reg. § 54.4980H-0, Preamble § IX.C.

24 Prop. Treas. Reg. § 4980H-3(b)(2).

About the Authors

Mr. Busacker is a partner in Hawley Troxell's tax and employee benefits practice.

Bret Clark, also at Hawley Troxell, provides legal services to the firm's employee benefits and executive compensation clients. They can be reached at bbusacker@hawleytroxell.com and bclark@hawleytroxell.com.



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Idaho's Health Insurance Exchange Onward and Upward

Tom Mortell
Gabe Hamilton

It is not news to Idaho's business community that the state legislature recently passed the Idaho Health Insurance Exchange Act.¹ Few, however, are aware of exactly what the Act does and what steps are next for the implementation of a state-based health insurance exchange.

The recent, and often heated, debate over an Idaho health insurance exchange arises because the Patient Protection and Affordable Care Act of 2010,² (hereinafter referred to collectively as the "ACA") requires the establishment of health insurance exchanges to serve the individual and small-employer-group markets. A health insurance exchange is an Internet-based marketplace where qualified health insurance plans will be sold, similar to the way travel websites typically sell airline tickets.³ In other words, the exchanges will offer standardized plans and information so customers can make "apples to apples" comparisons between competing health plans. Exchanges are intended to provide one-stop shopping for qualified health plans and make purchasing health insurance easier and more understandable. Exchanges will interactively assist individuals and small businesses by providing pricing and other information necessary to purchase health insurance.

In addition, an important function of the exchange is to direct eligible individuals into a state's Medicaid system. The exchange will verify an individual or family's income and direct that individual or family to Medicaid if eligibility requirements are met. For those not eligible for Medicaid, the ACA provides sliding-scale premium subsidies for individuals and families who earn up to 400 percent of the poverty level (\$94,200 for a family of four) — a significant portion of Idaho's residents.⁴ But to receive premium subsidies, the private insurance must be purchased on a qualified exchange. As a result, most, if not all, individual insurance will likely eventually be purchased on

A health insurance exchange is an Internet-based marketplace where qualified health insurance plans will be sold, similar to the way travel websites typically sell airline tickets.³

an exchange.

The Act passed with the strong support of Governor C.L. "Butch" Otter and the business community. Idaho's business community recognized that an Idaho-based Exchange was a better choice than an exchange established and operated by the federal government.⁵ Beginning with the recommendations of the Governor's 2012 Idaho Health Insurance Exchange Working Group (appointed by Governor Otter after the U.S. Supreme Court refused to strike down the insurance market reforms in the ACA)⁶, the primary arguments advanced in favor of a state-based exchange were local control and flexibility.⁷ As the Working Group pointed out, a state-based exchange allows local stakeholders, rather than the federal government, to determine the exchange's direction in key areas of structure, governance, financing, and operations.⁸ The Exchange's recently-appointed board of directors has the daunting task of determining the Exchange's direction in these areas.

How it will work

The Act sets many of the ground rules for the Exchange's structure and governance. For structure, the Exchange is an independent body corporate and politic, created by Idaho statute and similar to other entities such as the Idaho Housing and Finance Association.⁹ But the Exchange is not a state agency.¹⁰ Exchange employees will not be state employees,¹¹ and Ex-

change debts are not state debts.¹² The Exchange has no power to raise taxes and it is not entitled to funding from the state.¹³

For governance, the Exchange is governed by a 19-person board. The board includes stakeholders who represent all areas of healthcare, insurance and government. The board is comprised of three legislators, three consumer representatives, four representatives of small employers, two representatives of the healthcare provider community, three insurance company representatives, two representatives of insurance agents and brokers, the director of the Idaho Department of Insurance, and the director of the Idaho Department of Health and Welfare.¹⁴ All meetings of the board will be streamed over the Internet and will be subject to Idaho's Open Meetings Act.¹⁵ In addition, the Exchange will make an annual report to the legislature,¹⁶ and undergo annual audits.¹⁷

The Act is less detailed regarding Exchange financing and operations. Although the establishment of the Exchange is funded by the federal government, under the ACA, the Exchange must be self-sufficient by 2015.¹⁸ Under the Act, the Exchange will not receive funding from the state.¹⁹ In addition, the Act provides that the Exchange must develop procurement policies and that vendor contracts be procured through open bidding.²⁰ The Act also provides that the Exchange should favor Idaho vendors.²¹ For the most

part, though, the operation of the Exchange is left to the discretion of the Exchange's board, which must draft and adopt a written plan of operations that is consistent with the Act. Idaho Code § 41-6105. Accordingly, the board will determine Idaho's direction on several key matters:

- What operations will the Exchange perform and what operations will be outsourced? For outsourced functions, who will provide these functions to the Exchange? Possible outsourced functions include processing applications, call center operations, and website creation and hosting.

- How will the Exchange be financed? Will the Exchange rely solely on participant fees, or will the board secure other sources of revenue?

- How will the Exchange provide customer education, outreach, and support, as required by the ACA to increase availability of health insurance to certain groups? What will be the role of licensed brokers and agents?

- What will be the requirements for insurance plans offered on the Exchange? Who will certify that the plans meet the requirements? How will the board exercise its discretion to determine what plans are in the best interest of Idahoans?

- What will be the rules for obtaining and terminating individual and small employer group coverage?

Under the ACA, the board's task is to ensure that the Exchange can accept applications for health insurance coverage no later than October 1, 2013. This leaves only a few months to address the operational issues identified above, negotiate vendor contracts, adopt policies and procedures, and actually implement an exchange.

Fortunately, the legislature has placed the task in the hands of a state-established body that is directed by a board that represents a broad group of stakeholders, including consumers, the small business community and health care providers. By October of this year, individuals and small employers will have the opportunity to purchase

By October of this year, individuals and small employers will have the opportunity to purchase health insurance from a marketplace that has been designed by Idahoans for Idahoans.



health insurance from a marketplace that has been designed by Idahoans for Idahoans. By purchasing insurance on the exchange, those individuals and businesses will be in a position to benefit from the federal premium tax credits available to many purchasers of insurance under the ACA.

- 9 Idaho Code § 41-6104.
- 10 Id.
- 11 Id.
- 12 Idaho Code § 41-6105.
- 13 Id.
- 14 Idaho Code § 41-6104.
- 15 Id.
- 16 Idaho Code § 41-6106
- 17 Idaho Code § 41-6105.
- 18 45 C.F.R. § 155.160.
- 19 Idaho Code § 41-6105.
- 20 Idaho Code § 41-6104 to 6105.
- 21 Idaho Code § 41-6108.

Endnotes

- 1 Idaho Code § 41-6101 to -6109 ("Act")
- 2 Pub. L. No. 111-148, 124 Stat. 119 § 1311 (2010) as amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029
- 3 See generally, id.
- 4 Treas. Reg. 1.36B(3); Dep't of Health and Human Serv., Annual Update of the HHS Poverty Guidelines, 78 Fed. Reg. 5182-83 (Jan. 24, 2013).
- 5 Under ACA, states were given the option to establish and operate their own exchanges. If states declined to do so, the state's exchange would be provided by the federal government. 45 C.F.R. § 155.105(f).
- 6 Nat'l Federation of Independent Business v. Sebelius, 132 S. Ct. 2566. (2012)
- 7 See C.L. "Butch" Otter, Opinion: An Idaho Health Insurance Exchange Makes Sense, But How It's Done Makes a Big Difference (Dec. 29, 2011) available at http://gov.idaho.gov/mediacenter/press/pr2011/prdec11/pr_064.html.
- 8 Health Insurance Exchange Working Group Findings (Oct. 30, 2012) available at http://www.doi.idaho.gov/HealthExchange/Final_report.pdf.

About the Authors

Mr. Mortell is a partner at Hawley Troxell and chairs the firm's health law practice group. He can be reached at tmortell@hawleytroxell.com.

Mr. Hamilton is an attorney in Hawley Troxell's corporate group and his practice focuses on insurance, health care law, and corporate transactions. He can be reached at ghamilton@hawleytroxell.com.



Devotion, Passion Drove Sanchez at Idaho Legal Aid Services

Dan Black

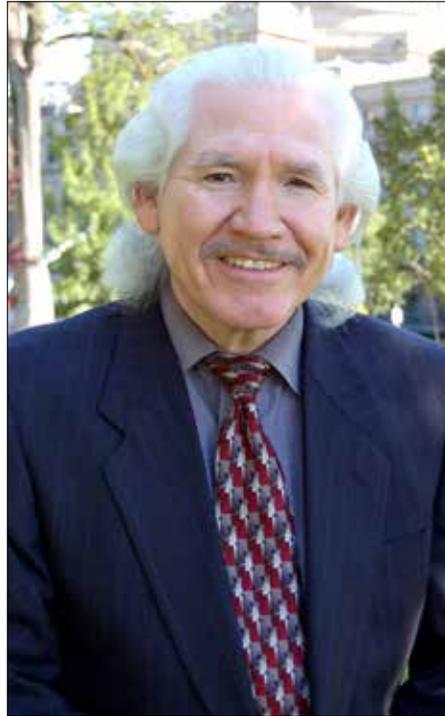
During his 35 years as Executive Director of Idaho Legal Aid Services Inc. (ILAS) Ernesto G. Sanchez built a reputation as an unwavering advocate for the disenfranchised. The first Hispanic admitted to practice law in Idaho and the first Hispanic to graduate from the University of Idaho College of Law, he blazed a trail working for equal access to justice.

Ernie retired from ILAS at the end of April, leaving an essential statewide organization that provides legal services to the poor. With Ernie at the helm of Idaho Legal Aid Services Inc. for 35 years, there is no part of the operation that he hasn't influenced.

Ernie joined Idaho Legal Aid Services in 1972 and became its Executive Director in 1978. When he joined the organization, it only had two offices; one in Lewiston and one in Caldwell. Ernie guided its transition into a statewide program with seven regional offices, satellite offices at the Nampa Family Justice Center and FACES justice center in Boise, Migrant Farmworker and Indian Law Units, as well as three toll free attorney-staffed legal advice lines.

ILAS Board of Directors President Mary Huneycutt said Ernie has continued a tradition of "commitment to provide legal services to those who need them in the best and most efficient way."

She said he has impressed the board and employees with "a mastery of being aware of what's going on" and he has been widely respected in that role.



As executive director his management style has been open, respectful and conscientious, Mary said. And "although he is fairly reserved and rarely blows his own horn," he has a deep dedication to the mission, which during the last few years has been essential as ILAS has faced an existential crisis. The organization's funding has become increasingly scarce with federal LSC grants becoming smaller. Mary praised his understanding and response to these threats.

"Ernie has advanced the ball and gotten the word out," she said.

To address the dire situation for ILAS funding, Mary said, ISB Executive

Snapshot

Former farmworker
Idaho Supreme Court Committee to Increase Access to the Courts
National Legal Aid & Defender Association Civil Policy Council
Lifetime Achievement Award from United Vision of Idaho, 2004
National Legal Aid & Defender Association Board of Directors
2002 President's Medallion, University of Idaho
Past President, Idaho Hispanic Caucus
Institute for Research and Education Board of Directors
National Equal Justice Library Board of Directors
1991 University of Idaho College of Law Award of Legal Merit
Idaho Law Foundation Board of Directors
Past Member of University of Idaho College of Law Advisory Council

Director Diane Minnich, former ISB president Reed Larsen and Idaho Court Administrative Director Patty Tobias and Idaho Supreme Court Justice Jim Jones met regularly over the last year with Ernie, ILAS staff and the Idaho Supreme Court to find a more stable funding source.

"He weathered some big financial challenges with grace, commitment and dedication to his staff," she said.

A reception commemorating Idaho Legal Aid's 45th anniversary and honoring Sanchez is scheduled for June 7 at the Riverside Hotel from 5:30 to 8:00 pm. Please RSVP to Bev Allen, 208-336-8980 x 1113 or bevallen@idaholegalaid.org.

Idaho Legal Aid names new executive director

Jim Cook, Idaho Legal Aid Services Deputy Director, has been named as the new executive director by the ILAS Board of Directors.

Idaho Legal Aid is the single largest provider of civil legal services to low income Idahoans. Representation is free of charge. Case areas include family law in domestic violence situations, housing, elder, guardianships, public

benefits, consumer, and other types of civil cases.

Cook joined Idaho Legal Aid Services as a staff attorney in 1999. He worked on two of the firm's legal advice lines and managed a domestic



Jim Cook

violence and then a senior law practice. In 2005, he assumed the position of Deputy Director where he has been responsible for fundraising, project management, public relations, and other administrative responsibilities. He looks forward to the challenges of the future knowing that Idaho Legal Aid Services has dedicated staff and a motivated board of directors.



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Front row, left to right are: Sean Breen, Hon. Mike Williams*, Molly O'Leary*, Jodi Nafzger, Deborah Ferguson*, Annie Kerrick, Diane Minnich*, Edith Pacillo, Scott Gingras, Brett Anthon, Gabe Haws. Back row, left to right are: Matt Ryden, Jim Cook, Peg Dougherty*, Jim Martin*, Mahmood Sheikh*, Lisa Shultz, Hon. Mick Hodges*, Lisa Nordstrom. Not pictured are Danielle Quade and Gene Petty*. (*denotes Steering Committee member)

2013 Idaho Academy of Leadership for Lawyers (IALL)

The 2013 Class of Idaho Academy of Leadership for Lawyers wrapped up its series of seminars with a graduation ceremony April 12 at the Hillcrest Country Club in Boise. The 13-member class explored various aspects of leadership for attorneys over the course of eight monthly gatherings.

Participants are chosen from across the state and the 2013-14 class will be chosen this summer, with sessions beginning in September. Asked to describe the class in one word, respondents used the following adjectives: beneficial, awesome, positive, enjoyable, excellent, inspiring, valuable, interesting and welcoming.

In a year-end evaluation of the program, one participant wrote: "IALL was incredibly valuable to me in that it allowed me the time and environment to meet other attorneys on a professional and personal level. IALL also provided me with the information I need to develop as a leader as my career progresses."

Another said, "The IALL provided me with the opportunity to participate in activities and meet people that I would not have absent the academy. From the interactions with the steering committee and class participants, to exploring what my specific leadership strengths are, IALL has been a great experience."

Getting into the program

Applications for the 2013-14 IALL class will be made available June 24 at www.isb.idaho.gov or the Law Center, 525 W. Jefferson, Boise. Deadline to apply is Aug. 9. Eligibility requirements are:

- Be a member in good standing of the Idaho State Bar
- Have been admitted to practice law in the U.S. jurisdiction for at least five years (based on original date of admission)
- Make a two-year commitment – participants are expected to carry out a legacy project in year two.
- 100 % attendance. Participation is required at each of the sessions.

Leadership Class of 2012 Makes a Lasting Impact

Dan Black

Among the many topics explored in the 2012 Idaho Academy of Leadership for Lawyers, (IALL), participants delved into questions about character, personal fulfillment and community. But the discussions, presenters and class exercises are only part of the learning experience. Class members are challenged to consider an activity or “Legacy Project” that applies their leadership training, even after the one-year program ends.

The inaugural class of 2012 took the assignment to heart, and the class managed to perform some extraordinary public service. For those whose projects took a different direction than originally planned, the legacy projects provided continued personal growth. Here is a sampling of projects by members of the IALL class of 2012.

Jonathan M. Volyn, Pocatello

When the Charlotte Fire burned more than 100 homes in Pocatello last summer, Jon jumped right into the middle of the aftermath. He organized and ran a town hall meeting where the victims of the fire could ask a panel of local volunteer attorneys about legal matters such as insurance, liability, and claims.

Jon used his numerous contacts in the legal community and drew from a strong feeling of empathy for those who lost their homes, possessions, and sense of security. Due to the event, fire victims not only got their questions answered. They also discovered the community where they live was a caring place.

Taking the event’s success one step further, Jon wrote and distributed protocols for disaster response that could be helpful if something similar happened in other communities. He sent them to all the District Bar Presidents, encouraging them to hold similar style events in their community when local issues arise, or on popular topics just to foster positive relations between local lawyers and the citizenry.

“IALL helped me identify the challenges of leadership and the skills needed to effectively lead a team.”

— Tim Tyree

Tim Tyree, Boise

Taking lessons about leadership development, Tim put together a program to identify potential leaders, train them and improve the skills of existing leaders for Camp Rainbow Gold, a summer camp for Idaho’s children with cancer.

The camp runs four weeks of summer camp, a winter retreat and numerous year-round programs. The need for volunteers to run the programs is significant. And so is the need for volunteer training.

All programs provided by Camp Rainbow Gold are free to the children and their families. Each year, Camp Rainbow Gold impacts the lives of about 300 children and their families from all areas of the state. He provided this example to explain the vision behind the camp program:

“The core service provided by Camp is emotional support. Imagine the life of a child diagnosed with cancer. She will be in and out of school during the course of her treatment. When she is in school, she’s likely to be sick, tired, bald and her classmates won’t understand. They’ll be afraid to get to know her; they’ll be afraid they’ll catch her disease. Her parents may not get her the professional counseling help she needs because they are in and out of doctor offices all too frequently. Adding another doctor visit may be too much both emotionally and financially. But through Camp Rainbow Gold, this child can interact with children her own age who know the struggles she is enduring. This child can let her worries go while at camp and return to her

treatment energized with the understanding that she is not alone and that she is strong enough to get through her treatment.”

He added, “IALL helped me identify the challenges of leadership and the skills needed to effectively lead a team. I was able to utilize my experience to help Camp Rainbow Gold identify, train and improve their leadership teams.”

Nicole Hancock, Boise

Nicole’s project was organizing the inaugural “Celebrating Women in the Law: Making History” gala, held in Boise in February. She summarized the Herculean task:

“As President of the Idaho Women Lawyers, I planned this event (with my IWL planning committee) to celebrate the success and accomplishments of the women in our Idaho State Bar. Women have been historically underrepresented on the bench and in leadership positions within our bar and IWL hopes that by raising awareness of the successes of women lawyers and those individuals and entities who promote and provide opportunities to improve the gender equalities with our bar, that collectively we will improve our bar by motivating other women to take a chance an apply for these positions and to raise awareness of those women who would be great candidates if and when they do apply for these positions. In the end, more than 250 people attended our sold-out event and it was a huge success. IWL was able to raise money for its operating budget, allowing it to

provide more leadership training scholarships and fund several of its projects that “advance diversity through the promotion of equal rights and opportunities for women in the legal profession.”

Planning the IWL gala required a committee that included IWL board of directors, IWL members, and support marketing and staff. Nicole had to stay organized and watch the budget because the event had to be profitable. IWL did not have anything to cover any deficits.

As the inaugural event, the committee had to start from scratch and plan for every detail down to the lanyards, seating and program.

She elaborated, “As you can imagine, everyone has their own ideas about how to ensure the success of our event and we had to give and take throughout the planning session. In the end, it is clear that the success was attributed to the dedication and detailed work of the team.”

She said the leadership skills used included:

- Gathering the most driven and talented individuals she could find
- Getting all of those ideas and energies aimed at the same goal;
- Creating a comprehensive checklist to ensure we did not miss any details.
- Once the team was in place, corralling the energy was the primary goal. From there, everything else just fell into place.

Joe Pirtle, Boise and Ben Ritchie, Idaho Falls

Joe and Ben provided pro bono counsel to the Idaho Suicide Prevention Hotline, a critical service in Idaho. They provided legal research and guidance on several legal issues including the duties of volunteer hotline workers. They studied legal issues such as disclosures, confidentiality and privacy set by statute that limit how the volunteers work.

Joe and Ben also helped develop internal guidelines and policies for the hotline. And the two plan to continue working with the organization as it seeks accreditation.

Joe said this behind-the-scenes work is important because Idaho has one of the highest suicide rates per capita in the United States. Until recently, Idaho was the only state without its own suicide prevention hotline.

Various national studies confirm that hotlines help reduce incidents of death among callers, Joe said. The Idaho Suicide Prevention Hotline has the potential to reduce the numbers of tragic suicides by having trained local volunteers available to respond to callers and to arrange for emergency services if necessary.

Ben and Joe said they try to be as accessible as possible to the hotline personnel. “We provide timely and decisive responses to their requests for advice,” Joe said, “and encourage working as a team.”



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

— Vince Lombardi

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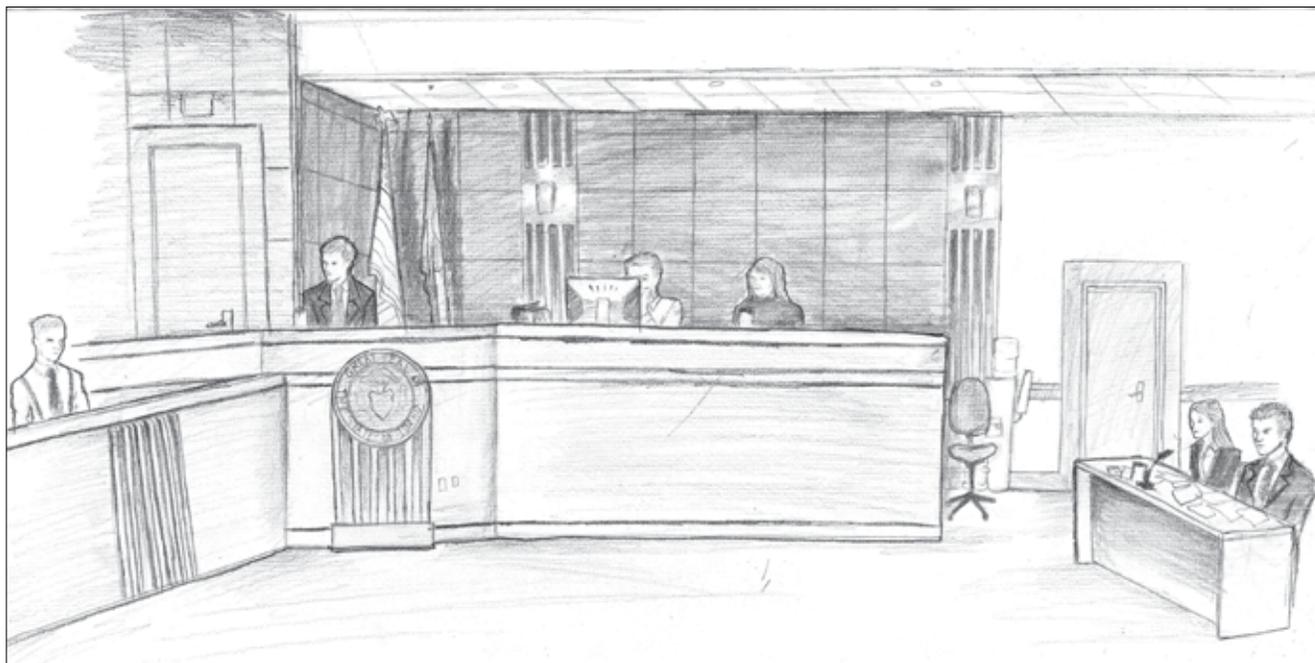
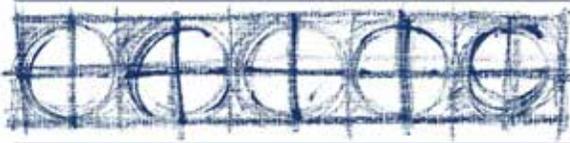
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Mock Trial Makes Room for the Courtroom Artist

For the first time, the Idaho High School Mock Trial Competition included a courtroom artist contest. The contest was open to students in grades 9 to 12, to allow artistically talented students the opportunity to participate in the mock trial program. Artists observe trials and submit sketches that depict actual courtroom scenes.

Seven artists participated in the inaugural Contest: four from Northern Idaho and three from Eastern Idaho. In regional competitions, students could place either first or second. In the state competition, the first four places were ranked.

Eastern Idaho Contest

- First Place: Elysa Martin, Firth High School
- Second Place: Chandler Clark, Blackfoot High School

North Idaho Contest

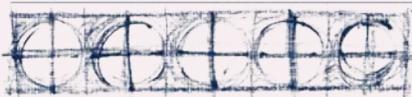
- First Place: Sierra Lile, Coeur d'Alene High School

- Second Place: Teresa Geidl, Lewiston High School
- State Contest**
- First Place: Elysa Martin: Firth High School
 - Second Place: Sarah Gussenhaen,

Lewiston High School

- Third Place: Sierra Lile: Coeur d'Alene High School
- Fourth Place: Chandler Clark, Blackfoot High School

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Thanks to the support of Idaho attorneys and others in our communities, the Idaho Law Foundation exceeded its Idaho Gives fundraising goal by nearly 50%. Because of these donations, the Law Related Education Program has more resources to dedicate to important programs like mock trial and Citizens' Law Academy.

Thank you for your support! We here at the Idaho Law Foundation are humbled by the generosity of our attorney community.



Fourth District Celebrates Law Day with Awards, Public Service

Dan Black

In celebrating the rule of law, the Fourth District Bar Association honored several of its elite on May 1 in the Rose Room in Boise. Under the theme “Realizing the Dream: Equality for All” the event is an ABA-sponsored, national event celebrating the rule of law and the legal process. The Fourth District Bar Association’s Law Day Committee promotes the goals of Law Day by organizing volunteer opportunities for local attorneys, educating area students, encouraging and rewarding pro bono civic and legal service, and honoring members of the community who embody the Law Day mission.

The prestigious Liberty Bell Award went to non-attorneys Greg Hampikian and Marilyn Shuler. They were recognized at the Law Day Reception for their work in human rights and for advancing justice to those who have barriers to the legal system.

Greg has been the longtime director of The Innocence Project at Boise State University, which takes on cases of wrongful imprisonment. Marilyn was the longtime director of the Idaho Human Rights Commission.

Chief Justice Roger Burdick presented the winners of the 6.1 Challenge, a reference to the rule asking all Idaho attorneys to commit to pro bono work. The winners in the different categories are:

- Solo Practitioner - The Law Office of Andrew T. Schoppe
- Government Law Office - Idaho State Appellate Public Defender’s Office
- Corporate Law Firm - Office Max Incorporated
- Small Firm - Ahrens DeAngeli Law Group LLP
- Large Firm - Holland & Hart LLP

The judging panel for the 6.1 Challenge consisted of:

- Dave Bieter – Mayor, City of Boise
- Roger Burdick – Chief Justice, Idaho Supreme Court
- Russ Comstock – Fourth District Magistrate Judge
- Candy Dale – U.S. Chief Magistrate Judge
- Betty Richardson – Former U.S. Attorney, District of Idaho; Of Counsel, Richardson & O’Leary, PLLC

Law Day 2013 Committee: Sean Beaver (Attorney), Justin Cafferty (Ada County Prosecutor’s Office), Amber Ellis (Ada County Prosecutor’s Office), Laurie Fortier (Boise City Attorney’s Office), Catherine Freeman (Ada County Prosecutor’s Office), Katie Garcia (Boise City Attorney’s Office), Dan Gordon (U.S. Courts), Mary Hobson (Idaho Law Foundation), Heather McCarthy (Ada County Prosecutor’s Office), Jason Prince (Stoel Rives LLP).

The annual Ask-A-Lawyer event was a big success, with more than 100 callers served.



Photo by Joe Borton

Sean Beaver, right, and Supreme Court Chief Justice Roger Burdick present the Liberty Bell Award to non-attorneys Greg Hampikian left and Marilyn Shuler, for their tireless work on behalf of those who face significant struggles to attain justice.

Law Day in the 7th District

The 7th District Bar Association once again celebrated Law Day with a ceremony giving the Liberty Bell Award.

The noon event was held at the Hotel on the Falls Convention Center in Idaho Falls and the keynote speaker was Michael Hinman, Managing Attorney of Idaho Legal Aid Services, Inc.

The 7th District also presented the Liberty Bell Award, which is given to acknowledge outstanding community service by someone who has:

- (1) promoted better understanding of the rule of law,
- (2) encouraged a greater respect for the law and the courts,
- (3) stimulated a sense of civic responsibility, and
- (4) contributed to a good government in the community. This year’s recipient is Anne Johnson, Administrator at The Haven, a shelter for women and homeless families.

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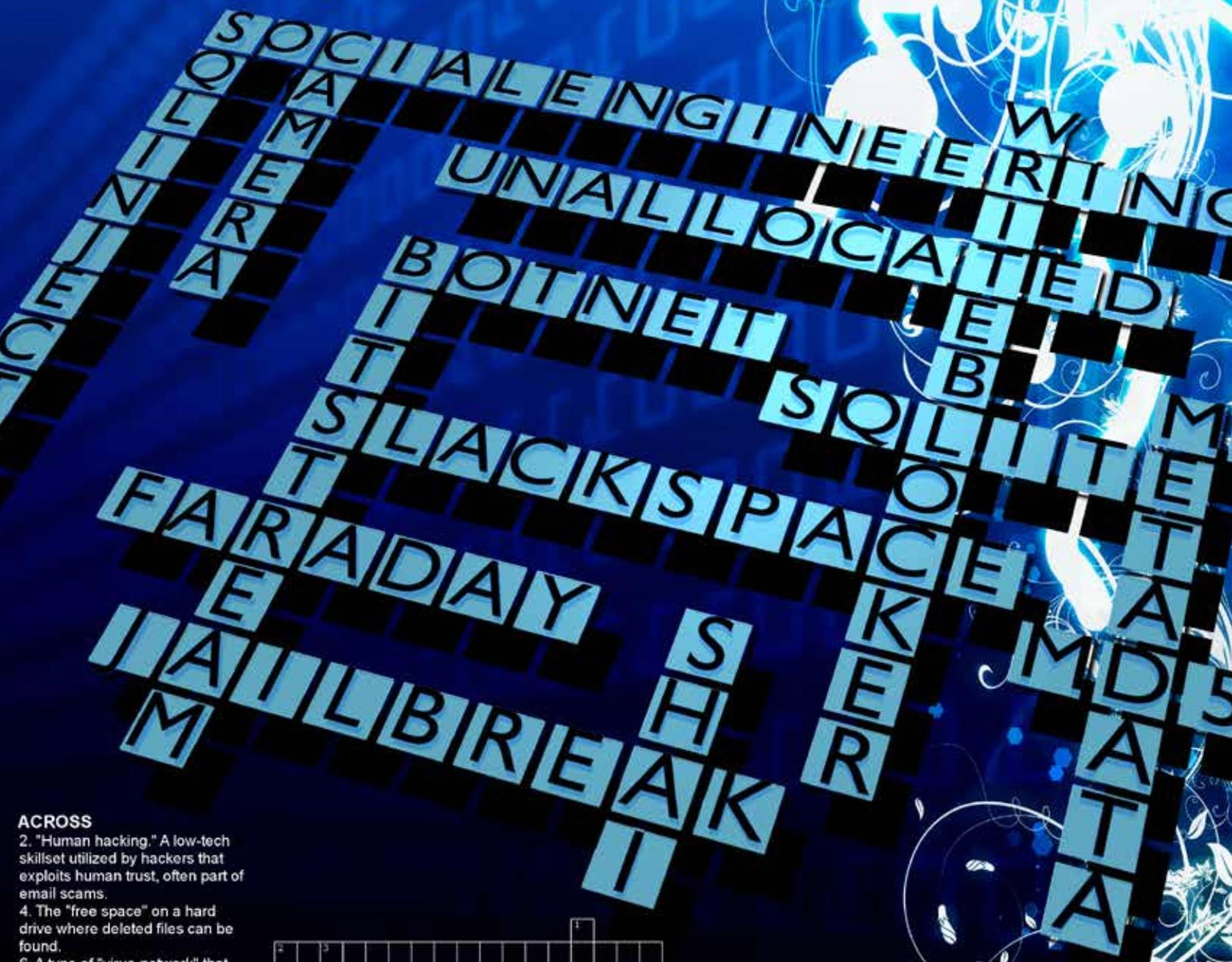
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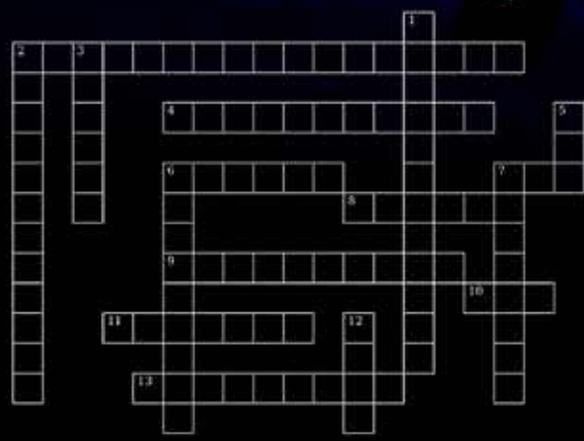


ACROSS

- 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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ISB Annual Meeting • 2013 Schedule of Events

July 17-19 • The Coeur d'Alene Resort - Coeur d'Alene, ID

Wednesday - July 17, 2013

- 8:30 a.m. - 3:00 p.m. Idaho State Bar Board of Commissioners Meeting (*Boardroom 6*)
4:00 - 5:30 p.m. Registration / Exhibitor Hall (*Bay 2*)
6:00 - 7:00 p.m. President's Reception ~ Sponsored by Paine Hamblen LLP (*Lakeview Terrace*)
7:00 - 9:00 p.m. Distinguished Lawyer Awards Dinner ~ Sponsored by ALPS (*Lakeview Terrace*)

Thursday - July 18, 2013

- 7:30 a.m. - 5:00 p.m. Registration / Exhibitor Hall (*Bay 2*)
7:30 - 8:30 a.m. Continental Breakfast ~ Sponsored by BizPrint (*Bay 2*)
7:30 - 8:30 a.m. District Bar Association Officers Breakfast (*North Cape Bay*)
7:30 - 8:30 a.m. ISB Diversity Section "Justice for All" Award Breakfast (*Iron Horse Bar & Grill, 407 E. Sherman Ave*)
7:30 - 8:30 a.m. ISB Taxation, Probate & Trust Law Section Breakfast / Meeting (*Kidd Island Bay*)
8:30 - 10:00 a.m. Plenary Session ~ Sponsored by LawPay (*Bay 4*)
~ Welcome from Idaho State Bar President Paul W. Daugharty
~ State of the Court by Idaho Supreme Court Chief Justice Roger S. Burdick
~ Keynote Presentation - Mr. Bruce Reed, Chief of Staff to U.S. Vice President Joe Biden
10:15 a.m. - 3:30 p.m. Idaho Law Foundation Board of Directors Meeting (*Boardroom 6*)
10:15 - 11:45 a.m. CLE Session #1 (1.5 CLE Credits)
~ Asset Purchase, Stock Purchase Agreements and Indemnity
Sponsored by ISB Business & Corporate Law Section (*Bay 5*)
~ Lawyering in the Information Age (Includes 0.5 Ethics credit / RAC)
Sponsored by Concordia University School of Law (*Bay 6*)
~ Planning for Portability & Other Estate Tax Issues Under the 2012 Tax Act AND An Overview of VA Benefits for Long-Term Care
Sponsored by ISB Taxation, Probate & Trust Law Section (*Bay 3*)
12:00 - 1:15 p.m. ISB/ILF Service Awards Luncheon & ILF Annual Meeting ~ Sponsored by Moreton & Company (*Bay 4*)
1:30 - 3:30 p.m. CLE Session #2 (2.0 CLE Credits)
~ Monkey in the Middle: What Every Idaho Lawyer Needs to Know about the Law Pertaining to Animals
Sponsored by ISB Animal Law Section (*Bay 6*)
~ New Rules Probably Coming Your Way: Perspectives on the Idaho Supreme Court Pilot Project Implementing the Family Court Rules in the Fourth Judicial District (Includes 0.5 Ethics credit / RAC)
Sponsored by ISB Family Law Section (*Bay 3*)
~ The Affordable Healthcare Act: Resolved & Unresolved Legal Challenges
Sponsored by the University of Idaho College of Law (*Bay 5*)
3:45 - 5:00 p.m. Community Service Project: Care Packages for North Idaho Violence Prevention Center
~ Sponsored by Clio (*Bay 4*)
5:30 - 6:30 p.m. Celebrating 50/60/65 Years of Admission Reception
~ Sponsored by First District Bar Association (*Casco/Kidd Island Bay/North Cape Bay*)
7:00 - 8:30 p.m. ISB Business & Corporate Law Section AND ISB Real Property Section Receptions (*Boardroom 5AB*)
7:00 - 8:30 p.m. ISB Family Law Section Award of Distinction Reception (*Seasons of Coeur d'Alene, 209 Lakeside Ave*)

Friday - July 19, 2013

- 7:30 a.m. - 1:30 p.m. Registration / Exhibitor Hall (*Bay 2*)
7:30 - 8:30 a.m. Continental Breakfast ~ Sponsored by Gorilla Capital (*Bay 2*)
7:30 - 8:30 a.m. Idaho Law Foundation Donor Appreciation Breakfast ~ Sponsored by Eide Bailly, LLP (*Kidd Island Bay*)
8:30 - 10:00 a.m. CLE Session #3 (1.5 CLE Credits)
~ Employment & Labor Law Update
Sponsored by ISB Employment & Labor Law Section (*Bay 3*)
~ Land Use Regulation in Idaho: Balancing Private Use with Public Power (RAC)
Sponsored by ISB Government & Public Lawyers Sector Section (*Bay 6*)
~ Marijuana? Border Control! (Includes 0.25 Ethics credit / RAC)
Sponsored by Idaho Law Foundation, Inc. (*Bay 5*)
10:15 - 11:45 a.m. CLE Session #4 (1.5 CLE Credits)
~ Lessons from the Masters (Includes 1.0 Ethics credit / RAC)
Sponsored by Idaho Law Foundation, Inc. (*Bay 5*)
12:00 - 1:15 p.m. Social Networking BBQ Lunch ~ Sponsored by University of Idaho College of Law (*Lakeview Terrace*)
1:30 - 3:30 p.m. CLE Session #5 (2.0 CLE Credits)
~ The Latest on the Bunker Hill Superfund Site (RAC)
Sponsored by the ISB Environment & Natural Resources Section (*Bay 5*)
3:30 p.m. Conclusion of Idaho State Bar Annual Meeting 2013

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