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of the Idaho State Bar  
Volume 56, No. 5  
May 2013

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## On the Cover

Julie Harrison, a legal secretary with Evans Keane since 1998 took this picture of an American Avocet in mid-summer of 2009 at Blair Trail, about 8 miles north of Glenn's Ferry. From the top of the dam, she saw a beautiful bird moving in the marshes below. Julie decided to go down a steep hill for some pictures. In the blazing desert heat she took about 100 photos of the bird. In just two shots the bird looked like it was doing water ballet. This shot was taken just as the bird decided to take flight. Photography is Julie's favorite hobby and she tries to take her camera everywhere.

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

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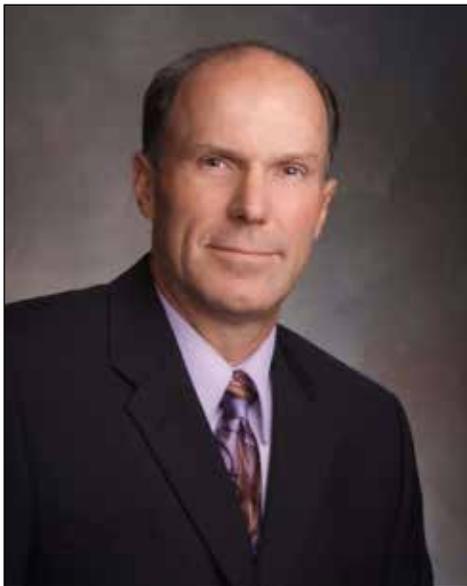
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**Mr. Johnson** is a 2007 graduate of the Washington University in St. Louis. He became a member of the Idaho Bar and the U.S. District Court, District of Idaho in 2007. Since joining White Peterson in 2007, Mr. Johnson has focused his practice in the areas of government, property, environmental and business law.

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### May 3

#### *Idaho Practical Skills Seminar*

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8:00 a.m. (MDT)

Boise Centre on the Grove, 850 W. Front Street – Boise

6.5 CLE Credits of which 2.0 is Ethics **(RAC)**

### May 15

#### *Ethical Viewpoints From the Judiciary: Inquiring Attorneys Want to Know*

Sponsored by the Idaho Law Foundation

9:00 a.m. (MDT)

Law Center, 525 W. Jefferson – Boise/Statewide Webcast

1.5 CLE credits **(RAC)**

### May 15

#### *Drafting Clearer Contracts and Other Practical Skills*

Sponsored by the ISB Business and Corporate Law Section

1:00 p.m. (PDT)

The Coeur d'Alene Resort, 115 S. 2nd St. – Coeur d'Alene

3.75 CLE credits

### May 17

#### *Drafting Clearer Contracts and Other Practical Skills*

Sponsored by the ISB Business and Corporate Law Section

8:30 a.m. (MDT)

The Grove Hotel, 245 S. Capitol Blvd. – Boise

6.25 CLE credits of which 1.0 is Ethics

### May 21

#### *Idaho Legislative Review*

Sponsored by the Idaho Law Foundation

9:00 a.m. (PDT)

Best Western Coeur d'Alene Inn,

506 W. Appleway Ave. – Coeur d'Alene

1.5 CLE credits **(RAC)**

### May 23

#### *The Practice of Law in the Computer Age: Assessing Time, Technology and Resources*

Sponsored by the ISB Litigation Section

9:00 a.m. (MDT)

Ada County Courthouse, 200 West Front Street – Boise

5.0 CLE Credits

## June

### 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

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**\*RAC** — These programs are approved for Reciprocal Admission Credit pursuant to Idaho Bar Commission Rule 206(d).

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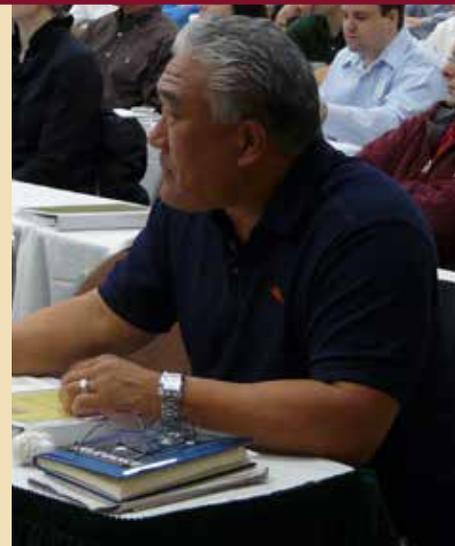
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## With Perspective, Comes a Desire to Serve

As I sit in my office on this beautiful morning writing this, my third article for *The Advocate*, I can't help but notice the sun is finally shining in Coeur d'Alene, Idaho. Perhaps spring is here. Okay, realistically it is likely just the calm before the storm that is often accompanied by April showers. I just returned from a great meeting at the Western States Bar Conference in Kauai, Hawaii.

In attendance were delegations from Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah and Wyoming. The Idaho State Bar was well represented by Executive Director Diane Minnich and Commissioners Molly O'Leary, Bill Wellman and Bob Wetherell. Past President and former Commissioner Dick Fields even made the trip.

Finding my desk at the bottom of the files stacked to the ceiling is a daunting task, but the trip was definitely worth it. After meeting with other attorneys and representatives from the various state bar associations in attendance, I left the conference knowing the Idaho State Bar is moving in the right direction.

More importantly, we are in good hands. You all would have been proud of your representatives in attendance. While some of the other states have large and sometimes cumbersome commissions or governing boards, Idaho has only five commissioners. This allows for some pretty intense discussions, but there is little room for politics or personal agendas on the commission and that is what makes it work so well.

During the conference, I learned that many of the smaller state bar associations share similar challenges. These challenges range from making sure new lawyers have the resources available to provide quality legal services to their clients to figuring out how to provide legal services to those who can't afford it.



*Idaho has only five commissioners. This allows for some pretty intense discussions, but there is little room for politics or personal agendas on the commission and that is what makes it work so well.*

Access to justice or the lack thereof, is a common challenge shared by virtually every state in attendance at the Western States Bar Conference. While some states have adopted a "fair share" approach to providing access to justice, other states have not been able to convince their membership that the problem really exists or just as importantly that they have the ability to solve it.

In Idaho, we have wrestled with this problem since before my first year on the commission. In all likelihood, it will exist long after my term expires. However, I would encourage every member of the Idaho State Bar to look at ways that you can help those unable to afford legal services. Look at ways that you can make a difference in your community.

Idaho Rule of Professional Conduct 6.1 provides in pertinent part that "every lawyer has a professional responsibility to provide legal services to those unable to pay." When we take the oath as attorneys in Idaho we affirm that we will "contribute time and resources to public service and will never reject, for any consideration personal to myself, the cause of the defenseless or oppressed."

As lawyers in Idaho we need to consider the impact we have and just as importantly the adverse impact we have on those unable to afford legal services when we fail to take these responsibilities to heart. Understandably, some of you may question the reasonableness of these requirements when you are struggling to maintain your already busy practices.

It is, however, important to remember that without providing all citizens access to justice the legal system as a whole is compromised and weakened.

As lawyers we can't let that happen and we can't just look the other way. Without our involvement the problem, and it is a very real problem, will never be solved. I encourage each of you to make the effort.

Rule 11(b)(5) of the Idaho Rules of Civil Procedure allows for limited pro bono appearances. It allows us to work together in representing the interest of the defenseless or oppressed without worrying that the scope of our representation will be unlimited. Take advantage of the opportunity provided by the Idaho Supreme Court to help those unable to afford legal services. It is a privilege to practice law in the state of Idaho. Don't take that privilege or the responsibility associated with it for granted. The stakes are too high. I think in the end you will find that the good accomplished far outweighs the risk and burden involved.

### 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.

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## LICENSING CANCELLATIONS

### Order to cancel license to practice law for non-payment of 2013 license fees

The Commissioners of the Idaho State Bar by and through their Executive Director have filed with the Clerk of this Court evidence that the following named attorneys have not paid the 2013 Idaho State Bar license fees required by Idaho Bar Commission Rule 304 and Section 3-409, Idaho Code, and have not given notice of resignation from the practice of law to the Idaho State Bar and this Court;

ORDER TO CANCEL LICENSE TO PRACTICE LAW FOR NON-PAYMENT OF 2013 LICENSE FEES NOW, THEREFORE, IT HEREBY IS ORDERED that the LICENSE TO PRACTICE LAW IN THE STATE OF IDAHO of the following named persons be, and hereby is, CANCELLED FOR FAILURE TO PAY THE 2013 IDAHO STATE BAR LICENSE FEES:

WILLIAM R. BACHAND; GREGORY SCOTT BEAN; GREGG PALMER BENSON; VALERIE BITTNER; RICHARD LEE BLISS; HEIDI BODE; HEATHER A. BRANN; JUSTIN THOMAS BREITWIESER; CHRISTOPHER WESLEY CALL; EDWYNNE WILL CARTER; PATRICIA CLARK; SCOTT R. CLEERE; JEFFREY ALAN CLIZER; STANLEY G. COLE; JENISE CORONADO; GREGORY BRIAN COXEY; HARRIET ANN ANDERSON CROSBY; ROBERT MAXWELL CURRAN; SELINA ASTRA DAVIS; BRAD MICHAEL DAYBELL; CAROL LEE ENG; JOHN MATTHEW EUSTERMANN; JAYNE BUTLER FALLON; STEPHANIE ANN FASSETT; FREDERICK JAMES FRAHM; MIKELA ALEXANDRA FRENCH; HUNT WILLIAM GARNER; LARRY BRUCE GRIMES; DAMIAN W. KIDD; ERIC TIMOTHY KRENING; DOUGLAS B. MARKS; CHASE WESLEY

MARTIN; STEPHEN RYE MAY; STANLEY ALAN MCALISTER; SANDRA ANNE MCCUNE; LARRY DEAN MOORE; SHAUNA FRANCES MORRIS; THOMAS A. NOLAN; PAIGE ALAN PARKER; PATTI POWELL; JED PRITCHETT; DAVID REX PURNELL; CHRISTINA MICHELLE RAIMONDI; PAUL EUGENE REMY; VICTOR JOHANNES ROLZITTO; KURT MICHAEL ROWLAND; BENJAMIN HUGH SCHWARTZ; MARK EDWARD STANSFIELD; D. SCOTT SUMMER; CHRISTOPHER M. TINGEY; ELIZABETH C. WALLACE; KLAUS WIEBE; and LEELAND ZELLER

IT FURTHER IS ORDERED AND NOTICE IS HEREBY GIVEN, that the persons listed above are NO LONGER LICENSED TO PRACTICE LAW IN THE STATE OF IDAHO, unless otherwise provided by an Order of this Court.

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

Dated this 4<sup>th</sup> day of March, 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:

David Rex Purnell; Active Status, March 8, 2013

Christina Michelle Raimondi; Active Status, March 22, 2013

## DISCIPLINE

### BOBBY E. PANGBURN (Disbarment)

On March 21, 2013, the Idaho Supreme Court issued its Remittitur ordering that the Court's Opinion announced February 27, 2013 was final and awarding the Idaho State Bar \$1,302.90 of costs. The Court's Opinion ordered that Eagle attorney Bobby E. Pangburn be disbarred, effective February 1, 2010.

The Idaho Supreme Court Opinion concluded the disciplinary case filed on May 20, 2010. Mr. Pangburn was suspended from the practice of law in Idaho on January 31, 2008, as a result of a reciprocal disciplinary proceeding stemming from misconduct that occurred in Oregon. That reciprocal disciplinary proceeding resulted in a five-year suspension with three years withheld. However, before Mr. Pangburn requested reinstatement from that suspension, the Idaho State Bar filed a second complaint alleging profes-

sional misconduct in connection with Mr. Pangburn's representation of two Idaho clients, Robert Hall and Robert Il-lingworth. The Opinion addressed the relevant facts regarding Mr. Pangburn's representation of those clients.

Mr. Pangburn represented Mr. Hall during Mr. Hall's prosecution for drug trafficking. Following his plea and sentence to 39 years in prison, Mr. Hall filed a pro se petition for post-conviction relief. In that petition, he advanced several claims for relief, one of which was ineffective assistance of trial counsel. Even though Mr. Hall's petition asserted that Mr. Pangburn had previously provided ineffective assistance, the district court appointed Mr. Pangburn to represent Mr. Hall in the post-conviction proceedings. Mr. Pangburn did not notify the court of the conflict. Mr. Pangburn then filed an amended petition for post-conviction relief, removing the ineffective assistance of trial counsel claim. The district

court eventually dismissed the remaining claims.

A different attorney represented Mr. Hall in his appeal from the denial of the post-conviction relief, and she requested a remand so that Mr. Hall could advance his ineffective assistance of trial counsel claim. The request was granted. On remand, the State and Mr. Hall's new attorney stipulated that Mr. Hall was entitled to limited post-conviction relief consisting of a hearing on Mr. Hall's Rule 35 motion to reduce his sentence. In the intervening four years that passed from the time Mr. Hall's first post-conviction relief petition was filed, the original sentencing judge retired. After a hearing, the new judge granted Rule 35 relief and reduced Mr. Hall's sentence from 39 years to 18 years. Based upon those circumstances, Mr. Pangburn admitted that he violated I.R.P.C. 1.3 [Failing to act with reasonable diligence], 1.7(a) [Conflict of interest] and

## DISCIPLINE

8.4(d) [Engaging in conduct prejudicial to the administration of justice].

With regard to the second case, Mr. Illingworth's mother paid Mr. Pangburn \$12,000 to represent her son in a post-conviction relief matter. The first \$2,000 was a flat fee that covered Mr. Pangburn's trip to Orofino to discuss the case with Mr. Illingworth. The remaining \$10,000 was paid as a retainer for Mr. Pangburn's representation in the post-conviction case. Shortly after payment of the retainer, Mr. Illingworth terminated Mr. Pangburn. Mr. Illingworth's mother demanded that Mr. Pangburn return the full \$12,000. Since Mr. Pangburn had performed some work on the case, he refused to return the money.

On July 31, 2006, Mr. Illingworth's mother filed a claim with the Client Assistance Fund, seeking reimbursement. The Client Assistance Fund held a hearing and on June 27, 2007, determined that Mr. Pangburn owed Ms. Illingworth \$7,280. On February 26, 2008, the Idaho Supreme Court rejected Mr. Pangburn's challenge to the Client Assistance Fund's findings. Mr. Pangburn did not return any of the money, so the Client Assistance Fund paid Ms. Illingworth \$7,280 on March 13, 2008. Mr. Pangburn has not reimbursed the Client Assistance Fund. Based upon those circumstances, Mr. Pangburn admitted that he violated I.R.P.C. 1.16(d) [Failing to return unearned fees upon termination of representation] and 1.15(d) [Failure to keep property separate until the dispute between the lawyer and client was resolved].

Given Mr. Pangburn's admissions that he violated those Idaho Rules of Professional Conduct, a Hearing Committee of the Professional Conduct Board conducted a hearing on April 4, 2011, to determine the sanction that it would recommend to the Court. On July 27, 2011, the Hearing Committee issued a decision recommending that Mr. Pangburn be disbarred. Mr. Pangburn filed a Motion to Alter or Amend that decision. On November 9, 2011, the Hearing Committee denied Mr. Pangburn's Motion to Alter or Amend, but did recommend that Mr. Pangburn's effective date of disbarment be February 1, 2010, which was the date that Mr. Pangburn would have been eligible to reinstate following his 2008 suspension.

The Court's Opinion stated that the Court had conducted an independent review of the record and carefully considered the nature of the admitted violations of the Idaho Rules of Professional Conduct and the mitigating and aggravating

circumstances. The Court concluded that the need to protect the public, the courts and the legal profession, dictated that the Court accept the Hearing Committee's recommendation that Mr. Pangburn be disbarred. The Court disbarred Mr. Pangburn effective February 1, 2010.

Mr. Pangburn cannot apply for admission to the Idaho State Bar sooner than five years from the effective date of the disbarment. If Mr. Pangburn applies for admission, he will have the burden of overcoming the rebuttable presumption of "unfitness to practice law."

This disbarment notice shall be published in the *Advocate*, the *Idaho Statesman* and the *Idaho Reports*.

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

### PHILIP K. KLEINSMITH (Public Reprimand)

On April 11, 2013, a Hearing Committee of the Professional Conduct Board issued a public reprimand to Philip K. Kleinsmith of Colorado Springs, Colorado. The Hearing Committee's Order followed a stipulated resolution of an Idaho State Bar reciprocal disciplinary proceeding which resulted in the identical sanction that was imposed in Arizona and Utah.

Mr. Kleinsmith is a member of the bar in 26 states. In 2012, the Supreme Court of Arizona and a Utah court publicly reprimanded Mr. Kleinsmith. Mr. Kleinsmith admitted violating Rules 1.1, 1.3, 1.4, 1.5, 1.16, 5.3 and 8.4(d) of the Arizona and Utah Rules of Professional Conduct. Those rules are the equivalent of the same Idaho Rules of Professional Conduct.

In two separate cases in Arizona, Mr. Kleinsmith filed complaints that were ultimately dismissed for lack of service. In nine separate cases in Arizona, Mr. Kleinsmith certified the cases for arbitration despite the amount in question exceeded the threshold for the amount allowed for arbitration. In representing the same client, he failed to appear for two hearings in Wisconsin and billed the client for filing corrective motions to remedy his failures to appear. In a Florida matter, he made errors in preparing a real estate "Notice of Sale". In withdrawing from a matter in which he represented the client, he failed to reasonably communicate with the client

prior to filing his motion to withdraw.

The public reprimand does not limit Mr. Kleinsmith's ability to practice law.

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

### DRAKE D. MESENBRINK (Suspension)

On April 11, 2013, the Idaho Supreme Court issued a Disciplinary Order relating to the suspension of Drake D. Mesenbrink. The Idaho Supreme Court's Order followed a stipulated resolution of an Idaho State Bar reciprocal disciplinary proceeding which resulted in the identical sanction that was imposed in Washington, a three-year suspension from January 18, 2013 through January 18, 2016, and specified conditions of reinstatement.

Mr. Mesenbrink was previously admitted to practice law in Washington in 1987. Mr. Mesenbrink was admitted to practice law in Idaho in 1988. Mr. Mesenbrink and the Washington State Bar Association stipulated to the Washington suspension. Mr. Mesenbrink admitted violations of Washington Rules of Professional Conduct 8.1(a), 8.4(c), 8.4(d), 8.4(l) and ELC 5.3(e). In the Washington case, Mr. Mesenbrink knowingly made false statements of material fact to the Washington State Bar Association by submitting a fabricated letter and falsified client ledger to the Association in connection with a disciplinary matter. The Washington State Bar Association recognized the following mitigating factors: that following the incidents above, Mr. Mesenbrink was diagnosed as suffering from major depression, has been taking medication, and his physician reports that with individual therapy and medication it would be unlikely that this kind of event would occur as it was out of character for Mr. Mesenbrink and that he had demonstrated clear remorse and understanding of the nature and character of his actions.

The Idaho Supreme Court's Disciplinary Order also provided that before being reinstated to the active practice of law in Idaho, Mr. Mesenbrink must demonstrate that he has the mental capacity to practice law at the time of any reinstatement.

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

## LETTER TO THE EDITOR

### Poor judgment at work

Dear Editorial Advisory Board,

After reading the article entitled *Striking the Right Balance: Local Land Use Ordinances and Proper Governance* in the February 2013 *Advocate* written by Art Macomber, I have to question the purpose of *The Advocate* and the wisdom of the editorial board in publishing the article. Perhaps I am naïve, but I have always believed it to be the responsibility of the Idaho State Bar, as a professional organization, to remain politically neutral. That neutrality should extend to the bar's official publication. Members of the bar have many other opportunities and venues to express or promote their political agenda. Mr. Macomber frequently writes guest opinions for the *Coeur d'Alene Press* for that purpose. *The Advocate* should be preserved as an educational and factually informative tool for members of the Bar.

In Dan Black's article entitled *Behind the Scenes at The Advocate, Collaboration Creates a Magazine*, he explained what the editorial board looks for in an article. Is it intelligent, does it shed new light, share helpful practice tips, or reveal some important development in the law? Mr. Black's article may have been writ-

ten as a disclaimer, but it reads more like an endorsement of Mr. Macomber's article. After all, the editorial board would not have printed the article had it not met the stringent requirements of the editorial board.

Although Mr. Macomber's article began with an analysis of the law, it digressed into a rant about the tyranny of the neighborhood and the requirement for political approval from the neighborhood. That rant was neither factually correct nor was it consistent with the principles embodied in the United States and Idaho Constitutions which we, as members of the Idaho State Bar, have sworn to uphold. The same constitutions that the members of the governing bodies charged with making land use decisions have also sworn to uphold.

The land use regulations adopted by a governing body through the public hearing process provides the criteria by which decisions are to be made. I have been present in more than one land use hearing when the "neighborhood" was opposed a particular project and attempted to shape the decision by threats of "impeachment" or withdrawal of support at the next elections, and even threats of boycotting a business owned by one of the decision

makers. Each time, the decision makers have made their decision based on the criteria in the city code and not based on the pressure from the neighborhood. It is the responsibility of the attorney for the city or county to counsel the governing body regarding their duty to make land use decisions based on the established criteria. A responsibility that should be familiar to Mr. Macomber since he has previously served as the city attorney for at least two small cities.

Rather than promote the kind of balance that is provided by giving all parties due process, Mr. Macomber advocates throwing out the constitutional protections provided through that due process. Instead, he seeks to further his personal agenda by using *The Advocate* to promote changes to the law. Is it coincidental that he submitted his article to *The Advocate* for publication while the Legislature is in session? I think not.

I am disappointed that the editorial board would allow Mr. Macomber to use our professional publication for his own political agenda. By doing so, it gives the appearance that Mr. Macomber's views are supported by the Bar.

Nancy Stricklin

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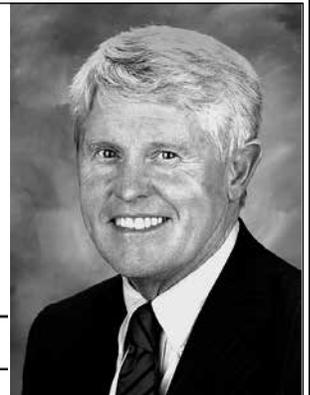
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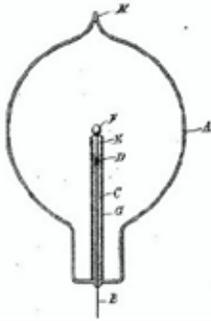
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## Annual meeting planned for Coeur d'Alene

This year's Idaho State Bar Annual Meeting will be held July 17-19 in Coeur d'Alene and will feature dynamic and interactive CLE classes, social events and awards ceremonies. "This is your chance to honor your colleagues, reconnect with friends, share stories, and earn CLE credits," said Deputy Director Mahmood Sheikh.

"In addition to the Annual Meeting, Coeur d'Alene and its surrounding areas not only offer breath-taking scenery but provide a vast array of both indoor and outdoor activities," he said.

Attendees will be given the opportunity to earn over 8.0 CLE Credits (of which 2.0 are Ethics). Programs will be offered through the Idaho Law Foundation Continuing Legal Education (CLE) Committee, Idaho State Bar Practice Sections, the University of Idaho College of Law, and Concordia University School of Law. Topics will include:

- The Affordable Healthcare Act: Resolved & Unresolved Legal Challenges
- Marijuana? Border Control!
- The Latest on the Bunker Hill Superfund Site
- Land Use Regulation in Idaho: Balancing Private Use with Public Power
- The 2012 Tax Act: Planning for Portability and Other Estate Tax Issues / VA Benefits for Long-Term Care
- Lawyering in the Information Age

## Top political strategist picked as keynote speaker

The ISB announced that Chief of Staff to U.S. Vice President Joe Biden and a former CEO of the Democratic Leadership Council (DLC), Mr. Bruce Reed, will be the keynote speaker at the Annual Meeting in Coeur d'Alene July 17-19.

Mr. Reed is a native of Coeur d'Alene, and is the son of Idaho State Bar Distinguished Lawyer Scott Reed and former Idaho State Senator Mary Lou Reed.

He attended Princeton University, graduating in 1982, and earned a master's degree in English Literature from Oxford University as a Rhodes Scholar.



Bruce Reed

Visit the Idaho State Bar website for additional facts regarding the keynote speaker, as well as suggestions for hotels and lodging for the Annual Meeting.

## 2013 Annual Meeting scholarships available

The Idaho State Bar is offering a limited number of scholarships to the 2013 Annual Meeting, July 17-19, in Coeur d'Alene. The scholarships include registration fee and a per diem of up to \$50 per day for travel and lodging. The scholarships are designed to provide assistance to those attorneys who, due to financial or professional circumstances, would not otherwise be able to attend. To apply for a scholarship, contact the ISB Commissioner who represents your judicial district, or ISB Deputy Director Mahmood Sheikh at (208) 334-4500. Deadline for a scholarship request is Friday, May 17.

## Dean Don Burnett appointed as interim president of UI

The University of Idaho Board of Regents selected Donald L. Burnett, Jr., dean of the College of Law, as the interim president upon the departure of current president M. Duane Nellis in June.

"Don has been an outstanding dean of the UI's College of Law, and we are confident he is the right person to lead the institution during this period of transition," said Ken Edmunds, president of the State Board of Education. "The board appreciates Don's willingness to take on the responsibilities of Interim President, and we look forward to working with him over the next few months."

Burnett, an Idaho native, has served as the University of Idaho College of Law dean since 2002. He also serves as the coordinating dean for interdisciplinary programs in water resources, environmental science, and professional science masters program. He had previously served as the dean of the Brandeis School of Law at the University of Louisville. He holds a bachelor's degree from Harvard and law degrees from the University of Chicago and the University of Virginia.

"I am humbled by this call to ser-



Donald L. Burnett, Jr.

vice for the whole university," said Burnett. "The University of Idaho is one of our state's great treasures. Historian Rafe Gibbs described our university as a 'beacon for mountain and plain.' I will work energetically with all members of the university community, and with all friends of the university, to assure that our beacon continues to reach far and shine brightly."

## Fourth District plans Law Day bash

The Fourth District Bar Association's Law Day Committee planned to host the May 1 Law Day events with the theme "Realizing the Dream: Equality for All." This theme provides an opportunity to explore the movement for civil and human rights in America and the impact it has had in promoting the ideal of equality under the law. It will also provide a forum for reflecting on the work that remains to be done in rectifying injustice, eliminating all forms of discrimination, and putting an end to human trafficking and other violations of basic human rights.

In conjunction with Law Day, the Fourth District plans to present the Liberty Bell Award, given to acknowledge outstanding community service by a person or persons who have: (1) promoted better understanding of the rule of law; (2) encouraged a greater respect for law and the courts; (3) stimulated a sense of civic responsibility; and (4) contributed to good government in the community.

At press time, the award winners had not been announced. The Liberty Bell Award was to be presented during the Law Day celebration reception on May 1, at the Rose Room in Boise.

## "Street law" clinic a big success

Attorneys and students from several organizations hosted a series of Street Law Clinics, an opportunity for the public to discuss and problem-solve their legal issues with a law student who is supervised by an attorney. The clinics were held at the Boise Public Library and helped dozens of people.

The Real Property Section, the Business and Corporate Law Section and the Family Law Section all donated copies of their handbook and/or forms book for this project, which was sponsored by the Idaho Trial Lawyers Association and both the University of Idaho College of Law and Concordia University School of Law.

## NEWS BRIEFS

Future clinics are planned for May 13, June 10 and July 8, from 4 - 6 p.m. at the Downtown Branch of the Boise Public Library.

### **Litigation Section makes donations**

The Litigation Section donated \$5,000 to the Idaho Campaign for Justice, \$3,000 to Idaho Legal Aid Services, \$1,000 to the Professionalism and Ethics Section in support of their Law School 1L Professionalism Orientation, \$750 to the Idaho Volunteer Lawyers Program, \$750 to the Idaho Academy of Leadership for Lawyers in support of participant scholarships, \$500 to the Idaho Partners Against Domestic Violence, and \$500 to the Diversity Section in support of their "Love the Law!" program.

### **Pro Hac Vice admission fee increased on April 1**

On March 4, 2013, the Idaho Supreme Court entered an Order amending Idaho

Bar Commission Rule 227 providing for the pro hac vice admission of non-Idaho attorneys. The amendment increases the pro hac vice fee paid to the Idaho State Bar from \$200 to \$325, with the \$125 increase to be remitted to the Idaho Law Foundation to support its pro bono legal services program. The effective date of the Amendment is April 1, 2013. If you have questions pertaining to the amendment or pro hac vice admission, please email Maureen Ryan Braley at [mryanbraley@isb.idaho.gov](mailto:mryanbraley@isb.idaho.gov) or Belinda Brown at [bbrown@isb.idaho.gov](mailto:bbrown@isb.idaho.gov).

### **ABA suggests readiness for disasters**

The American Bar Association's Young Lawyers Division (YLD) and the Federal Emergency Management Agency (FEMA) have had a formal agreement to coordinate a legal services response to qualifying national disasters. The ABA YLD has worked with FEMA under that Agreement to lead efforts to manage and

provide volunteer legal services in response to disasters. And we have seen, even in just the past few months, how serious natural disasters can give rise to a wide range of legal problems for victims.

Across the country, Lawyer Referral Programs are being notified about the current ABA-FEMA Agreement, in the event of a disaster in their area.

### **Concordia promotes community service projects**

Concordia University School of Law encourages volunteerism in the community and at the end of February two groups of students, faculty and staff prepared and served breakfast at the Ronald McDonald House. At the beginning of March, they hosted the Women's Business Center's Legal Forum, an informational dialogue and advice from local practicing attorneys. Later that March, a group of students and faculty volunteered at a Habitat for Humanity building project.

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## Volunteer Service Opportunities

Diane K. Minnich

*Executive Director, Idaho State Bar*

The Bar and Foundation rely on the volunteer efforts of bar members and non lawyers to accomplish their goals. The hundreds of hours contributed each year by volunteers allow the organizations to provide varied programs, activities and services to the public and the members. We thank those of you who continue to serve the legal profession through volunteer service. We encourage those of you who have not taken advantage of the volunteer opportunities to give it a try. As many of you already know, volunteer service can provide many rewards.



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

If you are interested in serving as a volunteer, you can submit the Volunteer Opportunities form on page 25, or on our website or email me your preferences. If you have questions about the opportunities listed, please contact me at [dminnich@isb.idaho.gov](mailto:dminnich@isb.idaho.gov).

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

### **Pro bono service:**

#### **What can you do to help?**

A few hours donated through the Idaho Volunteer Lawyers Program can help low-income people in Idaho who have critical legal needs, help you fulfill your obligation to provide pro bono services, and give you an opportunity to gain experience in various areas of the law.

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

- Representing parents or guardians of children in danger
- Representing victims of domestic violence
- Assisting nonprofit entities that serve low income groups or individuals
- Advice & Consultation Clinics for Senior Citizens
- *Soundstart* presentations for low-income parents and grandparents
- StandDown clinics for homeless veterans and other homeless legal advice clinics
- Youth court
- Court Appointed Special Advocate Programs (CASA) use volunteer attorneys to represent trained, lay Guardians ad Litem in Child Protective Act proceedings in Judicial Districts 4, 6, and 7
- US District Court, District of Idaho – to provide pro bono representation for pro se litigants in cases that have potential merit
- Representing Immigrant victims of domestic violence or crime to obtain legal status in the US through the Violence Against Women Act or U-visa petitions
- Assisting immigrants who have legal defenses to removal
- Advising emerging business on basic business law topics
- Answering questions for bankruptcy practitioners or representing debtors in bankruptcy court
- Assistance with foreclosure prevention
- Helping victims of identity theft
- Legal clinic for Veterans

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

### **ILF Law Related Education**

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

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

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

### **Sections of the Bar**

Bar members are welcome to join Practice Sections, which are involved in many projects such as CLE programs, developing publications, public service activities, and social events for section members. Volunteers are always welcome to join and help with section activities. There are currently 20 Idaho State Bar Sections. The list of sections and section contact information are available on the bar's website: [www.idaho.gov/isb](http://www.idaho.gov/isb).

### **District Bar Associations**

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

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

# ISB/ILF Committees

## *Volunteer Opportunities*

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

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



**IDAHO STATE BAR  
VOLUNTEER COMMITTEES**

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



**IDAHO LAW FOUNDATION  
VOLUNTEER COMMITTEES**

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

I would like more information about the Bar Sections.

I would like more information about the District Bar Associations.

I would like more information about participating in the Foundation's Law Related Education Programs such as Mock Trial, or Lawyer in the Classroom.

I am interested in providing pro bono service through the Foundation's Idaho Volunteer Lawyers Program.

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

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

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

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

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

**Please return this form no later than June 3, 2013**  
**ISB/ILF Committees**  
**P.O. Box 895**  
**Boise, ID 83701**  
**Or email your committee interests to [dminnich@isb.idaho.gov](mailto:dminnich@isb.idaho.gov)**

# Welcome From the Family Law Section

Joanne Kibodeaux

The Idaho State Bar's Family Law Section welcomes the opportunity to co-sponsor this issue of *The Advocate* with the Alternative Dispute Resolution Section. The use of ADR in family law has been in place in Idaho since the 1980's. Efforts to guide families through the difficult process of divorce and custody with ADR continue to evolve. Mediation is now solidly part of the practice of family law in Idaho. I.R.C.P. 16 (j) institutionalizes the issuance of mediation orders in many family law disputes and each judicial district maintains lists of court approved child custody mediators for appointment by the courts.

The Family Law Section has a long-standing interest in ADR. In recent years, the Section sponsored 20 Idaho attorneys to attend mediation training at the Northwest Dispute Resolution Center. This was designed to provide additional trained mediators in previously underserved areas of the state. The Family Law Section also co-sponsored a continuing legal education course on the topic of collaborative law which is an alternative process to litigation that incorporates mediation. These sorts of training efforts have had an impact. Mediation continues to grow and collaborative practice, while small, is also growing in various forms throughout Idaho.

Mediation is one of many important topics the Family Law Section is interested in. Pursuant to Article 1, Section 2 of our By-Laws our Section's activities "shall pertain to the field of family law and such ancillary subjects as affect the viability and security of the family, including but not limited to juvenile law, child protection law, guardianship, and elder law." In the area of child protec-

tion, the Section's council recently donated funds to the Idaho Supreme Court for efforts to train and certify attorneys in accordance with the National Association of Counsel for Children (NACC). The topics of juvenile law, guardianship, and elder law were featured in our 2012 annual October continuing legal education series.

Providing support to family law practitioners through education and communication emerged as the primary goal from our 2012 strategic planning session. This issue of *The Advocate* contains articles with that specific goal in mind. Gary L. Schreiner's article provides a primer for defining roles and responsibilities of attorney-mediators in *Hey, Can She Do That? An Ethical Dilemma*. Jill Juries' article, *Avoiding the Hollywood Drama: The Evolution of Mediation in Divorce*, highlights how ADR can assist parents in making difficult decisions for restructuring their families.

Additionally, in support of attorneys who represent low income families and victims of domestic violence, the Family Law Section has made significant financial contributions over the past year to the Idaho Volunteer Lawyers Program, Idaho Legal Aid Services, Inc., and Idaho Partners Against Domestic Violence.

We have an ambitious continuing legal education agenda for 2013. The Section just finished a free Webinar for our members on the topic of same-sex relationships. This spring will bring a CLE on the topic of tax law for the family law practitioner in conjunction with the University of Idaho College of Law's Tax Clinic. While the tax law CLE will be conducted in Boise, it will be available to all Idaho practitioners via webinar. The Section is sponsoring a CLE at the Idaho State Bar's Annual Meeting on the topic of the Fourth Judicial District's Pilot Project for the Idaho Rules of Family Law Procedure. Judge Russell A. Comstock and Judge David Epis will

be featured on that panel to discuss the implementation and progress of those rules. Also, the Section's annual October CLE series will be conducted in Boise on October 11, in Pocatello on October 18, and in Coeur d'Alene on October 25.

The Family Law Section looks forward to co-sponsoring the January 2014 issue of *The Advocate* with the Litigation Section. The Section's Form Book continues to be available for purchase and the Handbook will once again be updated this year with new articles of interest to the family law practitioner. We also have an active list serve to provide a forum for ongoing discussions amongst our members. Our page on the Idaho State Bar's website provides information on pricing for publications and how to join the list serve.

None of these efforts can be accomplished without the Section's active statewide council, interested membership, and talented staff from the Idaho State Bar. If you are not already a member, we welcome your participation. A complete listing of council members can be found on our page of the Idaho State Bar's website and you should feel free to contact any one of us for more information. We also welcome your suggestions on training topics and ways to strengthen our collegiality.

## About the Author

Joanne Kibodeaux serves as the current chair of the Family Law Section. She is a solo practitioner in Boise and practices in the area of family law. Joanne is also a Special Deputy Attorney General for the Department of Health and Welfare, Child Support Division. Joanne has been a member of the Idaho State Bar since 1989.



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# Hey, Can She Do That? An Ethical Dilemma

Gary Schreiner

Anastasia D. Advokat was an experienced family law attorney. She'd done so many cases that she could draft pleadings and decrees with her eyes closed. Being converted to the light, she also decided to become a mediator. Anastasia had mediated several cases, mostly referrals from attorneys who trusted her, and she was building a reputation as a good mediator.

One day John and Tilly contacted Anastasia looking for a mediator. They had decided to get a divorce and some friends who had been through mediation recommended they give it a try. John and Tilly thought they could be civil with each other and wanted to do what was best for the kids, but they needed a little help to work everything out. They didn't want to hire attorneys so they decided to try mediation. Neither John nor Tilly had yet filed anything with the court.

Anastasia thought it was great that the couple wanted to try to work things out for the benefit of the kids and believed the mediation would be an easy one. She was right. Everything went quickly and smoothly, and the couple soon reached an agreement. At the conclusion of the mediation, John and Tilly asked what documents they would need to file in order to get their divorce. Anastasia explained about the complaint and the documents needed to finalize the divorce by stipulation.

John then asked, "You're an attorney, right? Can you just write all that stuff up for us?" Tilly nodded in agreement.

Anastasia didn't know what to say. This was never covered in her mediation training, and no one had ever asked her that question before.

What should Anastasia do?

## The quandary

I have heard real-life variations of this scenario many times over the years, and it is a concern voiced by attorneys and non-attorneys (who are watching us) alike. Can an attorney-mediator draft any documents for the parties beyond being the "scribe" for their agreement? Chances are, if you ask your colleagues that question you will get answers on both sides of the fence.

The trouble is we have these pesky (and really quite useful) things called ethical standards. The more professional roles we play, the more standards we may have to juggle. Attorney-mediators get

## Can an attorney-mediator draft any documents for the parties beyond being the "scribe" for their agreement?

the double whammy of trying to comply with the Idaho Rules of Professional Conduct and the Model Standards of Conduct for Mediators. Attorney members of the Idaho Mediation Association (IMA) also get to balance whether the Model Standards or the IMA Standards (or both) apply.

In this article, since we will be discussing the separate roles of the neutral mediator and the attorney advocate/representative, for clarity sake I will refer to the individual who is able to provide both services (the attorney-mediator) as the "practitioner" and the separate roles by their professional titles.

We will start from the attorney side. Do the Rules of Professional Conduct permit Anastasia to accept the parties' request? At least five jurisdictions have issued formal opinions in the affirmative: Ohio,<sup>1</sup> Michigan,<sup>2</sup> Massachusetts,<sup>3</sup> Maine,<sup>4</sup> and Utah.<sup>5</sup> However, Utah attorneys found the issue so murky that they asked for specific authorization, which they received as Rule 2.4(c) of the Utah Rules of Professional Conduct.<sup>6</sup> In Arizona, the state bar ethics committee was unable to reach a consensus. A Washington opinion would seem to permit the drafting of pleadings and finalization documents if the parties are represented.<sup>7</sup> Idaho has not issued a formal opinion. So, what do the Idaho rules say?

## Separate roles

Rule 2.2 of the Idaho Rules of Professional Conduct makes it clear that the role of mediator is separate from the role of advocate. A lawyer serving as a third-party neutral "assists two or more persons *who are not clients of the lawyer*."<sup>8</sup> When a lawyer knows or should reasonably know that any of the parties do not understand the third-party neutral role, the lawyer "shall explain the difference between the lawyer's role as a third-party neutral and the lawyer's role as one who represents a client."<sup>9</sup>

If Rule 2.2 is not enough to establish two separate and distinct roles, it is reinforced by Rule 1.7. From Rule 1.7 we learn that a lawyer cannot represent multiple clients due to conflict of interest, if, among other factors:

- The representation of one client will be directly adverse to another client;<sup>10</sup>
- There is a significant risk that the representation of one or more clients will be materially limited by the responsibilities to another client, former client or third parties;<sup>11</sup>
- The representation involves the assertion of a claim by one client against another client in the same litigation or proceeding.<sup>12</sup>

At the outset of mediation, there is a strong possibility that the interests of the parties will be directly adverse. "I want primary custody!" "No, I want primary custody!" It would be quite difficult for someone trying to represent both parties to juggle these interests, materially limiting the attorney's options. However, it should be noted that these conflicts may be waived by written informed consent.<sup>13</sup>

As to the third discussion factor, Comment 17 to Rule 1.7 states that, "Whether clients are aligned directly against each other... requires examination of the context of the proceeding." Starting on its face, an Idaho divorce or custody case involves one of the parties asserting a claim directly against the other. We have "Jane Smith vs. John Smith." The parties cannot commence the case jointly, aligning themselves on the same side. The current rules and practice create an inherent conflict, aligning one party directly against the other.

In this context, it would not be possible to represent both parties. If the practitioner represents only one party then the practitioner is no longer neutral. If the practitioner is not neutral, the practitioner cannot serve as mediator. Reading togeth-

er Rules 1.7 and 2.2, the roles must therefore remain separate and distinct, with no legal representation of either party prior to or during the mediation.

Can, then, a *mediator* prepare the complaint/petition and other documents to be filed with the court? The answer is no. In the capacity of mediator, the practitioner is not representing either party, is not practicing law, and therefore cannot prepare any court documents for the parties beyond their mediated agreement.

However, this brings us to the next question. Once the role of mediator has ended, can the practitioner shift roles and prepare the documents?

### Changing hats

The foreseeable possibility that the practitioner may subsequently be asked to represent one of the parties<sup>14</sup> is addressed by Rule 1.12. For our purposes, this Rule imposes two key considerations:

1. The practitioner shall not negotiate for employment with a party or lawyer for a party in a matter where the practitioner is participating personally and substantially as a mediator.<sup>15</sup>
2. The practitioner shall not represent anyone in connection with a matter in which the practitioner participated personally and substantially as the mediator, *unless* all parties to the proceeding give informed consent in writing.<sup>16</sup>

The Rule does not completely prohibit subsequent representation, but rather permits it under certain circumstances. It seems to envision a possible changing of roles, and establishes conditions under which those might occur.

If the practitioner changes hats and moves from the role of mediator to role of attorney, part of the process of obtaining informed consent would need to be a discussion of which party to represent. Once that decision has been made, if the other party remains unrepresented – which is quite likely since the parties are ostensibly in agreement on everything at this point – Rule 4.3 duties to unrepresented parties will also kick in.

### What about Anastasia?

Back to Anastasia. What do we tell her? Based on the discussion so far, we might tell her that she *could* say ‘yes’ if she follows some rules of thumb:

1. Do not try to act as both mediator and attorney for the parties at the same time.<sup>17</sup>
2. Do not negotiate for subsequent employment while acting as mediator.<sup>18</sup>
3. Get informed consent from both parties in writing.<sup>19</sup>
4. Only represent one party.<sup>20</sup>

## Once the role of mediator has ended, can the practitioner shift roles and prepare the documents?

5. Be mindful of duties to the unrepresented party.<sup>21</sup>

Whew! So that is settled, right? Anastasia can just say ‘yes’ and...

### Whoa! Not so fast!

Hold on. We cannot just stop the inquiry there; we have to throw another wrench into things. In assuming the role of mediator, the practitioner takes on another set of ethical duties, which “may impose more stringent standards of personal or imputed disqualification.”<sup>22</sup> The most relevant for the Idaho attorney-mediator is the Model Standards of Conduct for Mediators. The Idaho State Bar has adopted the Model Standards as aspirational standards. While “aspirational” may sound like “optional,” as one judge recently put it, “If we have to look for standard of care, where are we going to look?”<sup>23</sup> Right. The answer was the Model Standards.

We have already established that the mixing of roles can be problematic. The Model Standards also state this quite bluntly:

The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and thus, a mediator should distinguish between the roles. A mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these standards.

Again, wearing two hats at once is a bad idea. So what about taking off one and putting on another? Well, like the Rules of Professional Conduct, the Model Standards do not outright prohibit it, but they do give plenty of warnings.

- A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.<sup>24</sup>
- A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during *and after* a mediation.<sup>25</sup>

- A mediator shall not undertake an additional dispute resolution role in the same matter without the consent of the parties.<sup>26</sup>

- Subsequent to mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation.<sup>27</sup>

A conflict of interest can arise from any involvement or relationship that reasonably raises a question of the mediator’s impartiality.<sup>28</sup> While in general a conflict can be waived,<sup>29</sup> if the conflict of interest might reasonably be viewed as undermining the integrity of the mediation, the mediator must decline or withdraw from the mediation, regardless of whether the parties agree otherwise.<sup>30</sup>

### So, can she?

After cautioning Anastasia about engaging in any conduct or relationships that might raise questions about the integrity of the mediation, we might tell her that under the Model Standards, a mediator may change hats if she:

- Informs the parties of the implications of the change;<sup>31</sup>
- Obtains their consent to the change;<sup>32</sup>
- Follows standards governing the new role (i.e. the Rules of Professional Conduct);<sup>33</sup>

Structures the relationship so that it does not raise questions about the integrity of the mediation.<sup>34</sup>

Factors to be considered in entering into any relationship with a party post-mediation include:<sup>35</sup>

- Time elapsed following the mediation;
- The nature of the relationship established;
- Services offered.

So, assuming she obtains informed consent, the question for Anastasia is, “Would assuming the role of attorney to provide legal services to one party from the mediation, in the same matter, immedi-

ately after the mediation, raise questions about the integrity of the mediation?" If she answers 'no' and has followed all the other steps above, she is good to go, right?

Nope. She also has to avoid stepping in the mud.

### The mud

There are some other ethical considerations that can muddy this up. The duties of confidentiality,<sup>36</sup> informed decision-making<sup>37</sup> and diligent representation<sup>38</sup> are some likely culprits. Let us look at some possible scenarios. To set these up we will say John and Tilly agree that Anastasia should represent Tilly in filing the divorce.

**Caucus.** What if Anastasia caucused with the parties and that John shared some information that he asked her not to tell Tilly? At the time, Anastasia did not believe disclosure was necessary for Tilly to reach an informed decision in mediation. She cannot tell Tilly due to the duty of confidentiality, but it might be relevant to Tilly in making the decision to have Anastasia represent her. As Tilly's attorney Anastasia would also have trouble with the fact that she is in possession of information about the other party that she cannot tell her client.

**Something Better.** What if, as an attorney, Anastasia thinks she could get a "better" outcome for Tilly than was reached in the mediation agreement? Perhaps a greater share of the marital property? If she were to represent Tilly, would she not have to advise her client of that opinion? If she did that, would she be undermining the mediation and raising questions about its integrity?

**Spousal Maintenance.** Say that Tilly had a possible claim for spousal maintenance. The parties' agreement did not include spousal maintenance for Tilly. Does Anastasia include the claim for spousal maintenance in the complaint? Does she discuss with Tilly her possible claim? If so, does she do that before or after Tilly signs the mediation agreement? What does that do to the mediation?

Yes, I am just making up facts to muddy things up. However, these are realistic scenarios, and anyone thinking of switching from one role to another has to consider all the ethical factors in making the decision.

### Conclusion

The roles of attorney and mediator should be kept separate and distinct. Wearing two hats not only looks stupid, but creates undesirable and unnecessary ethical conflicts. Changing hats is permissible if the proper steps are followed,

*Changing hats is permissible if the proper steps are followed, but a practitioner must tread carefully or find oneself stepping in mud.*

but a practitioner must tread carefully or find oneself stepping in mud.

A simple way to address the issue and to avoid the ethical marsh is to refer self-represented parties to a Court Assistance Officer (CAO). Each judicial district has at least one CAO, who has standardized forms approved by the Idaho Supreme Court.<sup>39</sup> The CAO can assist the parties with completing these forms to finalize their case.

As for Anastasia, if she feels that she can juggle her different roles, conflicts of interest, duties to current and former clients, if she gets informed written consent and stays out of the mud, then she can say 'yes' to John and Tilly. She can, but I do not think I would.

The opinions in this article are solely those of the author and do not necessarily reflect those of Family Court Services or the Idaho Supreme Court.

### Endnotes

- <sup>1</sup> Ohio Bd of Commissioners on Grievances and Discipline, Op. 2009-4 (2009).
- <sup>2</sup> Michigan Bar, Op. RI 278 (1996).
- <sup>3</sup> Massachusetts Bar Assn. Op. 85-3 (1985).
- <sup>4</sup> Maine, Bd of Overseers of the Bar, Op. 137 (1993).
- <sup>5</sup> Utah State Bar, Op. 05-03 (2005).
- <sup>6</sup> Rule 2.4(c) of the Utah Rules of Professional Conduct states:

(c) A lawyer serving as a mediator in a mediation in which the parties have fully resolved all issues:

(c)(1) may prepare formal documents that memorialize and implement the agreement reached in mediation;

(c)(2) shall recommend that each party seek independent legal advice before executing the documents; and

(c)(3) with the informed consent of all parties confirmed in writing, may record or may file the documents in court, informing the court of the mediator's limited representation of the parties for the sole purpose of obtaining such legal approval as may be necessary.

The comments to the rule state, "Rule 2.4(c) is intended to permit a lawyer-mediator for parties who have successfully resolved all issues between them to draft a legally binding agreement and, to the extent necessary or appropriate, record or file related papers or pleadings with an appropriate tribunal. In so doing, the lawyer will be jointly representing the parties in their common

goal of effecting proper legal filings or obtaining judicial approval of their fully resolved issues. Because the parties in this situation have fully resolved their issues, they are not considered 'adverse' under Rule 1.7(a)(1)."

<sup>7</sup> Washington State Bar, Op. 1752 (1997).

<sup>8</sup> Idaho Rules of Professional Conduct, Rule 2.2(a) (emphasis added).

<sup>9</sup> I.R.P.C. 2.2(b).

<sup>10</sup> I.R.P.C. 1.7(a)(1).

<sup>11</sup> I.R.P.C. 1.7(a)(2).

<sup>12</sup> I.R.P.C. 1.7(b)(3).

<sup>13</sup> I.R.P.C. 1.7(b)(4).

<sup>14</sup> I.R.P.C. 2.2, Comment 4.

<sup>15</sup> I.R.P.C. 1.12(b).

<sup>16</sup> I.R.P.C. 1.12(a).

<sup>17</sup> I.R.P.C. 1.7 and 2.2.

<sup>18</sup> I.R.P.C. 1.12(b).

<sup>19</sup> I.R.P.C. 1.7(b)(4) and 1.12(a).

<sup>20</sup> I.R.P.C. 1.7 and 2.2.

<sup>21</sup> I.R.P.C. 4.3.

<sup>22</sup> I.R.P.C. 1.12, Comment 2.

<sup>23</sup> See also I.R.P.C. 2.2, Comment 2.

<sup>24</sup> Model Standards of Conduct for Mediators, Standard II.B.

<sup>25</sup> Standard III.A. (emphasis added).

<sup>26</sup> Standard VI.A.8.

<sup>27</sup> Standard III.F.

<sup>28</sup> Standard III.A.

<sup>29</sup> See Standards III.C. and III.D.

<sup>30</sup> Standard III.E.

<sup>31</sup> Standard VI.A.8.

<sup>32</sup> Standards III.C., III.D., VI.A.8.

<sup>33</sup> Standard VI.A.8.

<sup>34</sup> Standard III.F.

<sup>35</sup> Standard III.F.

<sup>36</sup> Standard V.

<sup>37</sup> Standard I.A.

<sup>38</sup> I.R.P.C. 1.3.

<sup>39</sup> Forms and the local CAO can be found by visiting <http://www.courtselfhelp.idaho.gov/>.

### About the Author

**Gary L. Schreiner** is the Family Court Services Administrator for the Sixth Judicial District, and formerly had a solo law practice. He is also the founder of Conflict Resolution Associates, a conflict management and security training and consulting firm. He has been training mediators since 2003, and frequently consults on mediator ethics issues.



# Avoiding the Hollywood Drama: The Evolution of Mediation in Divorce

Jill S. Jurries

Hollywood has entertained us for years with suspenseful courtroom dramas showcasing over-the-top attorneys and scandalous storylines. Utilized as a tool of entertainment for a public hungry for gritty stories, emotional drama, and whodun-its, this unbelievable world of the courtroom, featuring high-powered attorneys provoking emotional gore from the witness stand, thrives with popularity.

The good news is that Hollywood theatrics are generally inaccurate in capturing what real life is like in the courtroom. The bad news is that courtrooms *are* filled with emotionally distraught mothers, fathers, victims, troubled defendants, and sometimes, children. Unfortunately, the drama filling these courtrooms seldom culminates in a happy ending.

Attorneys and clients nationwide are beginning to turn more and more to mediation to resolve differences and gain closure in contested court cases. While the courtroom is sometimes the most appropriate and necessary venue for legal resolution, people are finding that mediation can be a strong alternative to the risks of litigation, as self-direction promotes satisfaction, is cost-effective, and allows for creative solutions which might otherwise be unavailable from the bench.

Because family law involves particularly personal issues, many parents wrapped up in disputes are recognizing that the battlefield of the courtroom may be an arena best avoided. Parents have repeatedly remarked that peaceable settlements encourage healthier children, stronger co-parenting, and offer a more meaningful way to end a legal partnership, which more than likely began and will end with serious implications to the human spirit.

As an attorney and divorce and child custody mediator, I am constantly reminded how painful it is for families to navigate the road of divorce or separation. Through my experience with litigation and mediation, I have noted the significant and devastating consequences that high conflict divorce has on the development of children. Divorce is one of the most difficult and painful experiences in life, marked by uncomfortable transitions and at times, chaos. The process involves all aspects of a person's life, from when or if they see their children, to where they live. It affects finances, self-esteem and identity, and it threatens the ability of people to be their

*Divorce is one of the most difficult and painful experiences in life, marked by uncomfortable transitions and at times, chaos.*

best selves. Mediation can offer parents some element of control in crafting their own personal futures without the added complications that unnecessary litigation can bring.

## **No one said mediation is easy**

Mediation is not for every family, nor is participation in it a guarantee for success. When parents are in the midst of the struggle that is divorce, they can sometimes lose sight of what they would otherwise seek to uphold at all costs: the health of their children and the protection of the family. Emotional devastation often brings to the table parents who seem to hate each other more than they love their own children. The hurt in relationships can cloud even the most rational mind, unnecessarily thwarting settlement. Still, mediation offers even these parents an opportunity to broker a deal with a trained neutral professional who, quite possibly, might de-escalate a situation or reframe an offer or issue to keep the couple focused on the business at hand: entering into mature, well-reasoned agreements that fairly address legal issues for both parents and promote the best interest of children. The "best interest of the child standard" is, after all, what governs the very essence of custodial findings.<sup>1</sup>

Sometimes just being in the same room having conversations about "the kids" can dismantle misperceptions and unravel miscommunications that would otherwise have been perpetuated indefinitely. Real decisions and actual progress are more likely to happen when people engage in direct dialogue.

Some of the most meaningful moments in mediation come when critical misunderstandings, which are secretly holding up settlement or fostering unnecessary conflict for the parents, are resolved. Unfortunately, misperceptions and untruths flourish during litigation due to the artificial and stressful nature

of communication between the parties. If parties refuse to communicate, rely on communications to go only through attorneys, or limit themselves to imperfect methods of contacting one another (such as email and texting, which can be easily misinterpreted), authentic and reliable communication can be drastically limited, paralyzing settlement.

Convoluted issues often unravel in mediation and clarity is found regarding a subject previously addressed over weeks of hostile letter-writing, stone-walling, and unnecessary cost. Having the parties together in the same room and openly tackling issues face-to-face invites unique opportunities for the exploration of common ground. The mere fact that a neutral party is navigating the discussion can foster rational discussion and diffuse emotion. Mediation offers a unique environment where business-like decisions can materialize from emotionally distraught parents.

## **How do parties become engaged with a mediator?**

Parties pursue mediation for a variety of reasons. Some seek the assistance of a mediator prior to contacting legal counsel, in the hopes of resolving the matters themselves without excessive attorney involvement. Others recognize that courts may order mediation and choose to begin the process on their own accord. Some are counseled by their attorneys to try the process, because the conflict level is low or because they prefer the process of brokering the deal in mediation. Others are routed to mediation by their attorneys because the case is particularly high conflict, the parties are nearing trial, and finances are waning.

The Idaho Rules of Civil Procedure govern "Mediation of child custody and visitation disputes."<sup>2</sup> Rule 16 describes the role of the mediator and authorizes courts to require mediation of divorcing

or unmarried parents who have custody and visitation disputes. Therefore, some couples find their way to mediation via a court order issued under this Rule.

The role of mediators in these cases is generally to assist parents in crafting a workable parenting schedule, long-term holiday schedule, and to assist with structuring financial obligations related to that schedule. In addition, mediators in divorce cases sometimes attempt to broker deals for marital property and debt division.

### **Attorney presence and participation**

Family law mediation is governed by special rules that differ from other forms of civil mediation. Unlike non-family civil cases, parents generally mediate the issues without counsel present, as attorneys are precluded from attending the mediation unless their presence is requested by the mediator or ordered by the court.<sup>3</sup>

As attorneys can both help and hinder the process of mediation, mediators must determine what level of involvement is most beneficial to the parties. An attorney who embraces self-determination in their clients can improve the mediation process by instilling confidence in a client's decision or providing an additional sense of protection for the client, especially for those clients who are experiencing emotional devastation from the separation. They can further clarify issues and untangle miscommunications, particularly if they know their clients well.

The presence of attorneys, however, can also hamper the process, as parents' senses of competition naturally increase when they appear with their advocates. Clients may have espoused uncompromising (and perhaps, unrealistic) views to their counsel and feel that negotiating anything different from their previously stated position makes them appear weak or indecisive. The parents can be less inclined to self-determine, as they often want to appear resolute and unwavering in their positions. This can delay the process while they engage in behaviors intended to intimidate or "out-lawyer" the other. As a practical matter, attorney presence can unnecessarily increase the costs to the client and the majority of discussions in divorce mediation do not necessitate the involvement of counsel.

However, attorney participation can be particularly valuable when a parent is struggling with self-advocacy or if the parents are negotiating complex financial matters, such as the buy-out of a major business, in which the client may

*However, attorney participation can be particularly valuable when a parent is struggling with self-advocacy or if the parents are negotiating complex financial matters, such as the buy-out of a major business.*

need attorney guidance in order to make a thoroughly informed decision. The parent who may be less business savvy or feel that a spouse is trying to take advantage of the situation may benefit from having counsel present who can help dissolve the paralysis of decision-making.

### **Capturing the agreement, finalizing the terms, and avoiding the mixing of roles**

No one is better equipped to capture the agreement of the parties in writing than the mediator who brokered the deal, identified and clarified the issues, and, hopefully, worked to generate creative and useful ideas to help the parties meet their needs. Across the country, rules governing these practices are still evolving as the use of mediation expands and its popularity rises. Various issues surrounding the role of the mediator are somewhat unsettled in Idaho as professionals seek to determine the appropriateness of mediators drafting agreements, assisting *pro se* litigants with legal forms preparation, drafting pleadings, or filing pleadings on behalf of the parties.

The Model Standards of Practice for Family and Divorce Mediation (2000)<sup>4</sup> which were adopted by the Association of Family and Conciliation Courts note that mediators may document the agreement of the parties, requiring that mediators counsel the parties that any prepared agreement should be reviewed by legal counsel prior to execution. Specifically, they state: "With the agreement of the participants, the mediator may document the participants' resolution of their dispute. The mediator should inform the participants that any agreement should be reviewed by an independent attorney before it is signed."<sup>5</sup>

The Model Standards of Conduct for Mediators (2005), as prepared by the American Arbitration Association, American Bar Association, and Association for Conflict Resolution, which were adopted by Idaho as aspirational guidelines for mediators, at the very least, seem to as-

sign mediators the role of "scrivener," since reducing the parties' agreement to writing assists in facilitating the mediation.<sup>6</sup> Like many other states,<sup>7</sup> Idaho vests mediators with the ability to formalize the agreement and reduce it to writing,<sup>8</sup> while some states specifically require mediators to undertake the drafting task.<sup>9</sup>

The preparation of forms by the mediator for *pro se* litigants draws differing opinions in various states and the question becomes whether this action is purely ministerial. Given Idaho's extensive use of court assistance offices and on-line packets for court filings, it would appear that this duty may be ministerial in Idaho, as long as the mediator can avoid providing legal advice in the process. Still, mediators must avoid mixing roles and should seek to determine whether this action is truly ministerial, an extension of the mediation process, or an inappropriate new role. Depending on the dynamics and facts of each case, all are possible.

The murkiest situation of all relates to the preparation of pleadings for the parties. Non-attorney mediators must follow the laws governing the unauthorized practice of law<sup>10</sup> and attorney mediators have to navigate and balance the conflict rules for attorneys<sup>11</sup> with the ethical rules for mediators.<sup>12</sup> While the Idaho Rules of Professional Conduct seem to provide some leeway for representation,<sup>13</sup> the Model Standards of Conduct for Mediators disallow relationships following mediation which would "raise questions about the integrity of mediation," perpetuate the appearance of conflict of interest, or cast doubt on the impartiality of the mediator.

While states like Florida frown upon it,<sup>14</sup> Oregon, among other states, appears to embrace the process of attorney mediators preparing the necessary legal paperwork to effectuate the agreement.<sup>15</sup> Though advisory committee opinions from Utah<sup>16</sup> originally raised concerns with attorney mediators creating pleadings to implement the mediated settlement, Utah's State Bar Board of Com-

missioners ultimately concluded that an attorney mediator could prepare all necessary court pleadings as long as they could overcome conflict rules, gain consent, guarantee firm commitment from the parties, and inform the court of the dual role.<sup>17</sup> Idaho, however, does not provide a clear mechanism with specific parameters for the filing of pleadings by a mediator following a successful mediation. Attorney mediators must weigh the ethical implications to both professions when considering serving as legal counsel for one, both, or neither of the parties.

### Conclusion

As society evolves, the use of mediation and the procedures governing it are also evolving. State by state, this mechanism for resolving legal matters is fast becoming an integral and necessary component for families in conflict, while promoting judicial efficiency. This increasing popularity of mediation is encouraging, as families embrace better ways to end their marriages and relationships and avoid the drama depicted in Hollywood.

Hopefully, with the passage of time and the evolution of the legal system,

more and more families can benefit from mediation and avoid the financial and emotional devastation that can come with litigation. Our families are the fiber of society and it benefits us all to promote healthy children and parents. Given that failed marriages and the dissolution of relationships among the unmarried are certain, it is critical that the legal community seeks to promote methods of settlement that not only protect individuals and their legal rights, but, as a result, protect the family units of our communities.

### Endnotes

- <sup>1</sup> Idaho Code § 32-717(1)(a)-(g).
- <sup>2</sup> Idaho Rule of Civil Procedure 16(j)(5).
- <sup>3</sup> I.R.C.P. 16(j)(9)(b).
- <sup>4</sup> The Model Standards of Practice for Family and Divorce Mediation (2000).
- <sup>5</sup> The Model Standards for Conduct of Mediators (2005), Standard IV.
- <sup>6</sup> ABA Section of Dispute Resolution Committee on Mediator Ethical Guidance SODR-2010-1, pages 5, 8; indicating that “simply memorializing the parties’ agreement without adding terms of operative language” implicates no ethical impediment to the mediator performing a drafting function.
- <sup>7</sup> *Id.*; listing specifically, Maine, Michigan, Florida and Georgia.
- <sup>8</sup> I.R.C.P. 16(j)(7)(B)(i) and (ii) and 8(A)(i), stating that resulting agreements shall be reviewed by

counsel prior to submission to court and further that agreements shall be reduced to writing.

- <sup>9</sup> SODR-2010-1 listing Virginia and Florida.
- <sup>10</sup> Idaho Code § 3-420.
- <sup>11</sup> Idaho Rule of Professional Conduct 1.7(b)(3).
- <sup>12</sup> The Model Standards for Conduct of Mediators (2005), Standard III(A) and (F).
- <sup>13</sup> I.R.P.C. 2.2, Commentary 4 and I.R.P.C. 1.12.
- <sup>14</sup> Mediator Ethic Advisory Committee 2005-004, Florida.
- <sup>15</sup> See [http://www.osbar.org/public/legalinfo/128\\_MediationFamLaw.htm](http://www.osbar.org/public/legalinfo/128_MediationFamLaw.htm); see also [http://www.osbar.org/\\_docs/rulesregs/cpr.pdf](http://www.osbar.org/_docs/rulesregs/cpr.pdf); Oregon Code of Professional Responsibility DR 5106.
- <sup>16</sup> Utah State Board of Bar Commissioners: Opinion No. 05-03.
- <sup>17</sup> *Id.*

### About the Author

**Jill S. Jurries** is a family law mediator and sole practitioner of family and criminal law. Jill, an Idaho native from Weiser, received her education at Seattle Pacific University, Pepperdine School of Law, and the University of Idaho’s Northwest Institute for Dispute Resolution. Jill formed her own practice in 2003.



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# Chairman's Welcome From the Alternative Dispute Resolution Section

David Kerrick

In the short span of my law practice, I have witnessed remarkable change in litigation due to the advent of alternative dispute resolution. Historically, we always managed to settle our cases, but most of the time, settlement did not occur until the morning of the trial, or after the first witness had testified. My first experience with ADR was when I received a court order-invitation in one of my cases directing mediation at a settlement week in Ada County, which was held at the State Capitol Building. A number of lawyer volunteers had taken a crash course to serve as mediators. When I arrived with my client, I never believed the case could have been settled, but amazingly, after a couple of hours, it did. When the lawyers and the parties all came together for the exclusive focused purpose of discussing and understanding their respective cases with the uninterrupted objective of settlement, an amazing thing happened.

In 9 out of 10 lawsuits, everyone involved wants the same result, to end the time, expense, frustration, and uncertainty, that is litigation. Today mediation and other forms of ADR have become so standard that it has essentially become institutionalized in the judicial process, both at the state and federal level.

The Alternative Dispute Resolution Section of the Bar is happy to co-sponsor this edition of *The Advocate* with the Family Law Section. I would especially like to thank John McGown for heading up the ADR's committee and Britt Ide, Tony Park, and Maureen Laflin for also submitting articles.

It is so fitting that we are sharing this issue of *The Advocate* with our friends

*Today mediation and other forms of ADR have become so standard that it has essentially become institutionalized in the judicial process, both at the state and federal level.*

at the Family Law Section. Domestic matters really lend themselves well to alternative forms of dispute resolution whereas the adversary approach often does not. The subjects even enjoy a close proximity in the Idaho Rules of Civil Procedure. Rule 16(j) deals with the mediation of child custody and visitation, and Rule 16(k) deals with the mediation of civil lawsuits.

I would be remiss if I did not take this opportunity to brag on the ADR Section. We meet four times a year, January, April, August, and October, at noon on the third Wednesday of the month at the Idaho State Bar office. Folks outside the Boise area join the meetings via teleconferencing. The meetings are an hour and a half long consisting of one hour of CLE and a half hour of business. Four hours of CLE per year with lunches included is a great bargain for the price of the dues.

In the recent past, the ADR Section has enjoyed esteemed presentations from some of the Gem State's great gurus, e.g. Hon. Ron Schilling, Jim Gillespie, Hon. Mike McLaughlin, Taunya Jones, Hon. Duff McKee, Maureen Laflin, Hon. Ron Bush, Merlyn Clark, Pierce Murphy, Jill Jurries, Hon. Linda Copple-Trout, Britt

Ide, Bob Wetherell, John McGown, and Michelle Michaud.

I would like to extend an invitation to the entire Bar to join us. ADR touches all areas of the law and should be a topic of interest to all practitioners, whether they are mediators, arbitrators, advocates, or just want to expand their knowledge. If you have any interest in attending one of our meetings, or joining the Section, please do not hesitate to give me a call.

#### **About the Author**

**David Kerrick** has been engaged in the private practice of law since 1980 and lives in Caldwell, Idaho, a few blocks from where he was born. He is a graduate of the University of Idaho, College of Law. He is past president of the Third District Bar Association and the Canyon County Lawyers and he has received the Idaho State Bar Outstanding Service Award and the Idaho State Bar Professionalism Award. He also served three terms in the Idaho State Senate, including a term as Majority Caucus Chairman and a term as Majority Leader.



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# Upstream Mediation: How You Can Use Mediation Tools Before Litigation to Grow Your Practice

Britt Ide

What comes to mind when you hear “mediation?” You may think of court-ordered mediation when parties, well into litigation, settle near the courthouse door. Or you may picture mediation used in divorce and in employment disputes. However, mediation concepts have broad, beneficial application for lawyers and their clients. This article aims to expand your definition of “mediation” by introducing concepts. Integrating these concepts into your practice will hopefully help efficiently resolve your clients’ disputes.

The graphic above demonstrates a continuum of mediation types on the X-axis. Moving to the right, they increase in time and cost of the resolution as shown on the Y-axis. Mediation can be used “upstream” of litigation to resolve disputes even before they are recognized as disputes and at a lower cost. Various terms follow this continuum ranging from issue identification, conflict resolution, dispute resolution, mediation, arbitration to litigation resolution. Understanding the various terms for and types of resolutions helps describe options to clients.

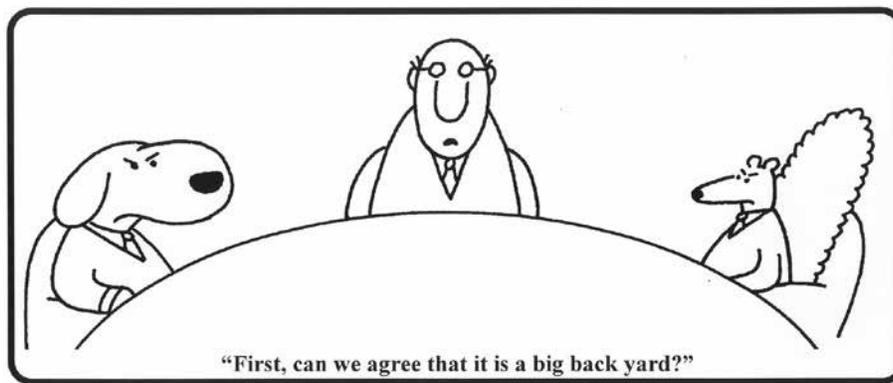
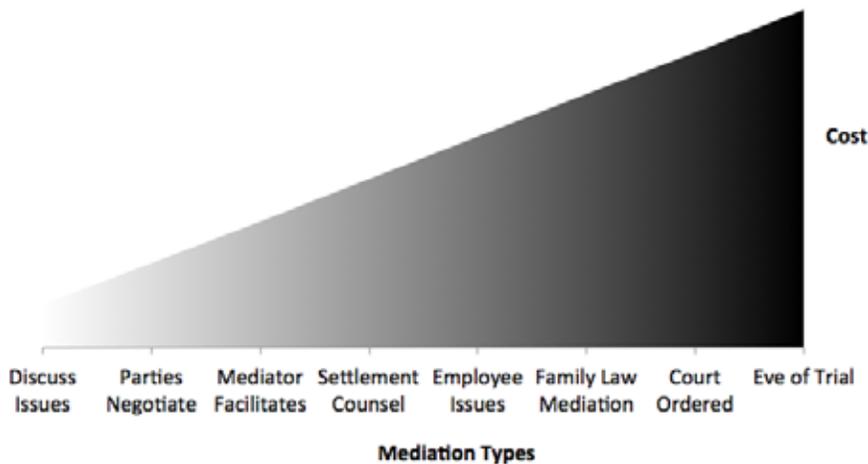
## Business lawyers are mediators

After more than a decade working as in-house counsel for small and large corporations, and then attending intensive mediation training, I recognize that business lawyers are mediators. Clients frequently come to business lawyers with a problem such as a vendor not performing under the contract. Business lawyers review the facts and issues and counsel on a solution. Their solution is rarely to jump to litigation. Business lawyers are trained to find business solutions to maintain important relationships between business partners, vendors, customers, and so on. Helping business lawyers and business clients understand the broad continuum of mediation tools available helps your practice by increasing client satisfaction and helps your clients by getting them improved outcomes at lower costs.

## Helping clients understand and use mediation tools<sup>2</sup>

While some disputes require a court resolution, most do not. In fact, some disputes should not be litigated because a court cannot provide the best resolution. Courts are limited to legal remedies. For example, a business contract dispute can be settled through the court or through

## Mediation Continuum



mediation options. Your client might be seeking improved contract terms. But the court usually can only grant money damages. Therefore, even if your client “wins” at court, a negotiated settlement would have been better.

Mediation also helps relationships continue. It can resolve disputes with the public, customers, vendors, suppliers, and partners. Litigation is, by definition, an adversarial process. Many disputes benefit from a collaborative resolution to preserve a relationship.

Mediation principles can save time and trouble. Picture this: Executives are sitting around a conference table bemoaning a vendor dispute. Instead of focusing on how to resolve the issue, they talk about why their side is right and the other is wrong. This approach can lead to posturing, animosity, and expensive litigation. Your client may feel that the vendor breached the contract and overbilled. Your

client wants money back but is too far into the project to switch vendors. The vendor may feel that they did their best but your client did not explain what was required. Your client’s contract is important to the vendor’s business. Instead of expensive litigation that would almost certainly delay your client’s project and irreparably damage its relationship with the vendor, your client could benefit from informal mediation to understand these consequences and to reach a mutually beneficial resolution. In similar situations, parties have been able to agree to restate the contract to better explain expectations – an outcome likely unavailable through litigation. Helping clients use tools along the mediation continuum gives them, and you, choices.

## Grow your practice

There are many ways for you to assist clients with business or other disputes. You can act as a:

- A. **Strategic advisor** to coach clients through evaluating issues and options;
- B. **Legal advisor** on legal issues early, even as you help the client focus on business solutions;
- C. **Facilitator** to help clients meet with and constructively engage the other side;
- D. **Pre-Litigation Mediator** to mediate between the two sides when they cannot effectively engage each other;
- E. **Settlement counselor** to advise your client who is already involved in litigation; and/or
- F. **Mediator** to facilitate resolution in a matter already embroiled in litigation.

You may find a niche among these roles and find others who practice in the other niches to encourage referrals. Transactional attorneys are especially well suited to serving as Strategic and Legal Advisors (A and B). Transactional lawyers are trained to recognize different and constructive ways to create a deal.<sup>3</sup> They are familiar with various business structures that can be used to achieve objectives. Litigators also can be helpful as Legal Advisors (B) because they can give advice as to how to avoid litigation and how to anticipate issues that may arise in litigation. Trained mediators have the skills to help at all levels of mediation (B, C, D, E and F and often A). While it is difficult to quickly create a mediation practice, thinking broadly about using mediation skills along the continuum can help you incorporate mediation tools into your current practice to benefit your clients.

### **Settlement counsel: An innovative service offering**

The Settlement Counsel service deserves a more detailed discussion given its potential to help your clients. So what is Settlement Counsel?

Settlement counsel is an attorney engaged for the express and limited purpose of assisting a client to resolve a current dispute. Settlement counsel is not a member of the litigation team. . . . Settlement counsel is a specialist who has developed skills and techniques in negotiation and mediation advocacy. Settlement counsel is conversant with all dispute resolution processes, the theory and practice of interest-based negotiations, effective mediation advocacy, risk analysis, and current developments in social psychology and other related disciplines.<sup>4</sup>

You may want to find your niche among these service offerings and find others who practice in the other niches to encourage referrals. Too often, I find that lawyers think exclusively: “If I help another lawyer, that lawyer will take business away from me.” In today’s business environment collaboration is

crucial. Building a reputation as someone who helps others benefits your practice. Referrals will come to you from those who value your help and expertise. While lawyers may be trained to be adversarial, as business owners we need to remember the value of collaboration.

Clients should engage Settlement Counsel early to assist in resolution and to keep litigation costs down. Payment models for Settlement Counsel range from hourly charges, to a flat fee for a fixed amount of time, to a “double or nothing” concept (attorney tracks hours: if the case settles, the attorney is paid; if not, no fee).<sup>5</sup> While the settlement counselor concept has been primarily used by large companies and large firms (see “Big Dogs” below),<sup>6</sup> I have found that the principles work well in Idaho and with smaller business disputes. Clients have engaged me to help resolve disputes in unwinding a business, in trademark disputes, between executives and investors, and between private entities and government organizations. A settlement counselor service has been a positive addition to my practice and benefits other members of the Idaho Bar. Jim McGuire built a successful settlement counselor practice on the East Coast before he became a full-time neutral mediator. His articles provide practical details about the concept and benefits of Settlement Counsel.<sup>7</sup> Mr. McGuire also wrote a helpful article on *why litigators should engage Settlement Counsel*, noting that business solutions provided by Settlement Counsel “have a much broader range of alternatives” than litigation solutions.<sup>8</sup> Settlement Counsel can also act as the “good

cop” to reach resolution while the litigator can be the “bad cop” to keep pushing litigation options.

### **Proactive planning in your practice**

As lawyers, we can promote dispute resolution concepts by proactive and preemptive planning in our practices. I include a dispute resolution clause in my retention agreements and in contracts drafted for clients and have provided sample language in the sidebars.<sup>9</sup> You may benefit someday from one of these clauses when you have a cordial, facilitated solution with a formerly disgruntled client instead of an expensive, time-consuming litigation and public relations nightmare.

### **Endnotes**

<sup>1</sup> Clyde Willis, <http://mtweb.mtsu.edu/cewillis/my-activities.htm>.

<sup>2</sup> For an article on this subject, geared towards business people, see Britt Ide, *Mediation saves time & money*, *Id. BUS. REV.*, Aug. 2, 2012, available at <http://idahobusinessreview.com/2012/08/02/mediation-saves-time-and-money/>

<sup>3</sup> Lisa Pomerantz, *Do Transactional Attorneys Make Better Commercial Mediators*, *NEWSLETTER*, January 2013, available at [http://www.lisapom.com/mtc.aspx?goback=%2Egde\\_2889678\\_member\\_201951393](http://www.lisapom.com/mtc.aspx?goback=%2Egde_2889678_member_201951393).

<sup>4</sup> James E. McGuire, *Settlement Counsel: Answers to the FAQs*, *N.Y. DISPUTE RES. LAWYER*, Fall 2010, Vol. 3, No. 2, at 23-25.

<sup>5</sup> *Id.* at 25.

<sup>6</sup> Int’l Inst. for Conflict Prevention & Resolution,

### **“Big Dogs” are Onboard**

On January 22, 2013, the International Institute for Conflict Prevention & Resolution (CPR) publically announced the 21st Century Corporate ADR Pledge. The Pledge provides for signatories “to commit its resources to manage and resolve disputes through negotiation, mediation and other ADR processes when appropriate, with a view to establishing and practicing global, sustainable dispute management and resolution processes.” The

“Founding Signatories”— the first 25 companies to sign the Pledge – include AEGIS Insurance Services, Inc.; Akzo Nobel N.V.; Amgen Inc.; BP; ConocoPhillips; Danaher Corporation; DuPont; Fluor Corporation; FMC Technologies; General Electric; Glaxo-SmithKline; IBM Corporation; Johnson & Johnson; Microsoft Corporation; Northeast Utilities; PepsiCo, Inc; Pfizer Inc; Royal Dutch Shell plc; Teradata Corporation; and Walgreen Company.

## Sample Informal dispute resolution provisions to include in contracts:

If there is a dispute under this Agreement, the Parties will meet in person and attempt to resolve the dispute. If the dispute cannot be settled through negotiation, the Parties agree to attempt to settle the dispute by nonbinding mediation administered by a neutral mediator agreed to by the Parties prior to resorting to litigation. The Parties will cooperate to select a mediator but if unable to do so will use JAMS for the mediation process and selection from JAMS' panel of neutrals. The Parties will participate in the mediation in good faith, and will share its costs equally, other than the respective Parties' individual out-of-pocket costs. This agreement to negotiate and mediate shall not preclude either Party from seeking injunctive relief to preserve the status quo or prevent irreparable harm. This Agreement shall be governed in all respects solely and exclusively by the laws

of the State of Idaho, without regard to conflicts of laws principles. The Parties hereto expressly consent to and submit themselves to the exclusive jurisdiction of the courts of Idaho, and stipulate that venue shall be courts in Ada County, Idaho for the adjudication or disposition of any claim, action or dispute arising out of this Agreement. The prevailing Party in any dispute shall be entitled to recover reasonable costs and attorney fees at trial and on appeal.

*OR (for the time when you need something REALLY simple)*

If we have a dispute, we agree to work informally to resolve the dispute. If we cannot resolve the dispute after we engage a mutually-agreed-upon third-party facilitator, then any litigation would be filed in [ ] under [ ] law. The prevailing party would pay the other party's legal fees.

(CPR), <http://www.cpradr.org/Resources/ALL-CPRArticles/tabid/265/ID/775/CPR-Launches-21st-Century-Corporate-ADR-Pledge-at-Annual-CPR-Meeting-in-San-Diego-Press.aspx>.

<sup>7</sup> McGuire, *supra* note 5, at 25..

<sup>8</sup> James E. McGuire, *Why Litigators Should Use Settlement Counsel*, CPR INST. FOR DISPUTE RESOLUTION, June 2000, Vol. 18, No. 6.

<sup>9</sup> Formal clauses from Int'l Inst. for Conflict Prevention & Resolution (CPR): CPR MODEL MULTI-STEP DISPUTE RESOLUTION CLAUSE, available at: [www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ArticleType/ArticleView/ArticleID/635/Default.aspx](http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ArticleType/ArticleView/ArticleID/635/Default.aspx).

### About the Author

**Britt E. Ide, J.D.**, *President of Ide Law & Strategy, PLLC is formally trained in mediation at Harvard and practically trained by 20 years of finding solutions in engineering, law, business, legislatures, courts, nonprofits, and boards. She serves as general counsel to a number of Idaho companies and advises on negotiation, mediation and strategy. Her expertise includes contracting, energy, sustainability, and intellectual property. Britt serves on the Board of the Idaho Nonprofit Center. For more information, please visit her website at [www.idelawstrategy.com](http://www.idelawstrategy.com)*



## Sample formal dispute resolution provisions to include in contracts:

**Negotiation Between Executives (A)** The parties shall attempt in good faith to resolve any dispute arising out of or relating to this [Agreement] [Contract] promptly by negotiation between executives who have authority to settle the controversy and who are at a higher level of management than the persons with direct responsibility for administration of this contract. Any person may give the other party written notice of any dispute not resolved in the normal course of business. Within [15] days after delivery of the notice, the receiving party shall submit to the other a written response. The notice and response shall include (a) a statement of that party's position and a summary of arguments supporting that position, and (b) the name and title of the executive who will represent that party and of any other person who will accompany the executive. Within [30]

days after delivery of the initial notice, the executives of both parties shall meet at a mutually acceptable time and place, and thereafter as often as they reasonably deem necessary, to attempt to resolve the dispute. All reasonable requests for information made by one party to the other will be honored. All negotiations pursuant to this clause are confidential and shall be treated as compromise and settlement negotiations for purposes of applicable rules of evidence.

**Mediation (B)** If the dispute has not been resolved by negotiation as provided herein within [45] days after delivery of the initial notice of negotiation, [or if the parties failed to meet within ]20[ days,] the parties shall endeavor to settle the dispute by mediation under the [International Institute for Conflict Prevention & Resolution ("CPR") Mediation Procedure or JAMS or other] [currently in effect OR in effect on the date of this Agree-

ment], [provided, however, that if one party fails to participate in the negotiation as provided herein, the other party can initiate mediation prior to the expiration of the [45] days.] Unless otherwise agreed, the parties will select a mediator from the CPR Panels of Distinguished Neutrals.

**Litigation (C)** If the dispute has not been resolved by mediation as provided herein [within ]45[ days after initiation of the mediation procedure] [within 30 days after appointment of a mediator], this Agreement does not preclude either party from initiating litigation [upon 00 days written notice to the other party]; [provided, however, that if one party fails to participate in either the negotiation or mediation as agreed herein, the other party can initiate litigation prior to the expiration of the time periods set forth above.]

# Criminal Mediation Has Taken Root in Idaho's Courts

Maureen E. Laflin

With the growth of criminal mediation comes controversy, questions, and uncertainty. The Idaho Supreme Court's 2011 criminal mediation rules, Idaho Rule Criminal Procedure 18.1 ("Rule 18.1") and Idaho Juvenile Rule 12.1 ("Rule 12.1") provide some guidance. Rule 18.1 and Rule 12.1 are nearly identical, only differing as to the age of the defendant. To enhance readability, this article will cite primarily to Rule 18.1. This article provides an overview of the Rules, a brief history of how we got here, and then touches upon some of the thornier issues.

We are on the cusp of real change in the criminal system and criminal mediation has begun to take hold for minor and serious crimes alike as well as at all stages – pre-arraignment, pre-trial, presentencing, and post-trial. Criminal mediation runs the gamut and manifests itself in a variety of different ways. The criminal mediation spectrum encompasses restorative and retributive justice. Rule 18.1 covers all criminal mediations, however, it was enacted in response to long trials and overcrowded dockets. As such, the Rule focuses primarily on case management mediation or facilitated plea bargaining, which are settlement driven in order to save counties money and reduce burgeoning dockets. Criminal mediations provide closure for the participants and reduce risks for the defendant.<sup>1</sup>

## How we got to the present

The path to where we are now began with the initial meetings of the Idaho Supreme Court's ADR Committee in 1994.<sup>2</sup> The late Monte Carlson was a pioneer of criminal mediation in Idaho. He served as a district court judge in the Fifth Judicial District from 1998 to 2007. During his tenure on the bench, he mediated a broad spectrum of criminal cases ranging from murder and rape to malicious destruction of property.<sup>3</sup> By spring 2001, he had mediated seven homicides, six of which resulted in a plea agreement. In fact, the use of criminal mediation started spreading so quickly that lawyers reported that some judges "in the early part of this century strongly encouraged mediation, treating it as a 'prerequisite to trial' for many cases on their criminal calendars."<sup>4</sup>

In May 2001, the Idaho Supreme Court created an ad hoc Criminal Mediation Committee and requested that it draft a rule for criminal mediations in felony, misdemeanor and juvenile matters. Af-

*Criminal mediations provide closure for the participants and reduce risks for the defendant.<sup>1</sup>*

ter several drafts, the Court decided to maintain the status quo and not promulgate a rule.<sup>5</sup> The criminal bar had raised concerns about whether a court should be allowed to order the parties into a criminal mediation, the role of the victim, and confidentiality and privilege. These same issues confronted the Idaho Supreme Court's reconstituted Criminal Mediation Committee in 2010. However, by this time, the bench and the bar were ready to confront the issues and the Court adopted Rule 18.1 and Rule 12.1.

## Privilege/confidentiality and Idaho Rule of Evidence 507

In order to encourage full participation, parties to a mediation must have assurance that mediation communications are both confidential and privileged. The need for this assurance, however, came at a cost. In 2008, Idaho adopted the Uniform Mediation Act, which is found at Idaho Rule Evidence 507 ("Rule 507"). Under Rule 507, the parties, the mediator, and the non-party participants all hold the privilege.<sup>6</sup> Two issues came to the forefront: (1) the scope of the mediator's privilege; and (2) the admissibility of mediation communications in subsequent criminal proceedings.

## Scope of mediator privilege

The criminal defense bar raised the concern that if a defendant claimed ineffective assistance of counsel after the mediation, the mediator could not be forced to testify in that action. Rule 507(3)(b) (2) provides that "A mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator." Thus, neither the court nor defense counsel can require the mediator to testify about what happened in a mediation.<sup>7</sup> Nonetheless, the mediator may testify if he or she wishes. Truth be told, most mediators will not remember the details of a mediation three or four years lat-

er; unless something egregious occurred, at which point the mediator probably terminated the mediation.

## Admissibility of mediation communications

The 2008 version of Rule 507 provided a balancing test to determine whether mediation communications were admissible in subsequent criminal cases.<sup>8</sup> This simply left too much uncertainty.<sup>9</sup> Rule 507 had to be amended to restrict the balancing test to civil mediations. In 2012, Rule 507(5)(b) was amended to provide that the balancing test "does not apply to any statement made in the course of a criminal mediation under Rule 18.1 of the Idaho Rules of Criminal Procedure or Rule 12.1 of the Idaho Juvenile Rules." This addition removes all uncertainty — mediation communications from a criminal mediation in Idaho are privileged in subsequent criminal proceedings unless waived.

## Who are the mediators in criminal mediations?

Most of the cases mediated under Rule 18.1 and Rule 12.1 are judicial settlement conferences or assisted plea bargaining sessions. The mediators are senior or sitting judges or justices who conduct these mediations without cost to the parties. The judicial mediators have completed twelve hours of criminal mediation training and their names are maintained on a roster kept by the Administrative Office of the Courts. To date over thirty members of the judiciary have been trained in criminal mediation.<sup>10</sup>

Although the Rules establish who can be on the court's roster, nothing requires the parties to select someone from the roster. The Idaho Supreme Court and the Criminal Mediation Committee wanted to offer the parties the ability to participate in a criminal mediation without costs. Thus, the Rules provide a compromise position — the parties can use a mediator from the roster without costs or pay for someone else if they choose.

## Who may initiate a criminal mediation?

The Rules are very clear — mediation cannot be imposed on the parties. Under Rule 18.1, “any party or the court may initiate a request for the parties to participate in mediation to resolve some or all of the issues presented in the case.” U.S. Magistrate Judge Kelley Arnold of the Western District of Washington has said at each of the criminal mediation trainings in Idaho, it is important to give either or both parties the option of asking the court to initiate the process, thus not making it appear that one side is overly eager to resolve the case.<sup>11</sup> The Rule goes on to clarify that participation in criminal mediations is voluntary and that the mediation will not occur unless the parties agree. As Judge Arnold stated at the May 2012 training, there is “no reason to mediate unless both sides are agreeable to mediation. If either side is ambivalent or reluctant, don’t push it.”<sup>12</sup> The Rule also states, that decision-making rests with “parties not the mediator.”<sup>13</sup> Thus, while the court can initiate or propose the idea, it cannot order parties into criminal mediation. It is very important that there be a record supporting the defendant’s voluntary participation.

## Guidelines for communications between the mediator and court

Communications between the court and the mediator is a hot button issue that touches on Idaho Criminal Rule 11 (“Rule 11”), past practices, and issues of expediency. As such, the issue consumed countless hours of deliberation and debate to finally arrive at the current rule. Rule 11 differs from Federal Rule of Criminal Procedure 11 in one significant way: Idaho allows the court to participate in plea discussions (Rule 11(f)), whereas the federal rule expressly precludes the court from participating in plea discussions (Fed. R. Crim. P. 11(c)(1)). In both state and federal courts, the judicial mediator is not the trial judge and cannot take the plea.<sup>14</sup>

Rule 18.1, however, does not allow the mediator to serve as the ambassador for the parties or to defend the proposed plea with the court.<sup>15</sup> This is noteworthy because prior to the Rule, in some judicial districts in Idaho, when the parties were close to a deal, the judicial mediator would share the proposed resolution with the trial judge to test the waters. Idaho’s criminal mediation rule now expressly precludes such discussions. Now, if the parties are concerned about whether the trial judge will accept the proposed mediated plea, the attorneys can talk with the trial judge. This is consistent with the

*While some have argued that victims have a right to participate in criminal mediations, no Idaho court has ruled on this issue.*

current practice of attorneys floating potential pleas by the trial judge outside of mediation.

## Role of the victim

Another controversial topic involves the role of the victim in the criminal mediation process. Neither Rule 18.1 nor the Idaho’s Victim Rights Statute, Idaho Code § 19-5306, definitively answers this question. Rule 18.1(5) states that the attorneys and the mediator decide who can be present during mediations.<sup>16</sup> The Victim Rights Statute provides that victims may be present at “all criminal proceedings;”<sup>17</sup> will be allowed to be heard “at all justice proceedings considering a plea of guilty;”<sup>18</sup> and in certain types of crimes, will “be advised of any proposed plea agreement by the prosecuting attorney prior to entering a plea agreement.”<sup>19</sup> While some have argued that victims have a right to participate in criminal mediations, no Idaho court has ruled on this issue. The Rules do make it clear that the victim does not have veto power over a plea agreement.

What is important is that victims are heard if they wish to be, their concerns are understood, they fully understand the process, the risks, and other considerations, and they understand that they can address the court at sentencing. Yet, victims often need closure and allowing them to participate in the mediation process allows this to happen.<sup>20</sup> A judicial mediator from Kentucky, discussing victims’ involvement, stated:

By being directly involved with the negotiations, the victims obtain ownership over the plea agreement, and come out not feeling like they have been co-opted. This is a win-win for everyone, and it allows prosecutors and judges to avoid the criticism they often receive in plea agreements where victims do not feel like they have had meaningful input into the process.<sup>21</sup>

Some prosecutors want the victims to be present so that they better understand how the parties came to a particular agreement. Others fear that they will lose too much control if the victim is in the room and want to maintain the maximum flexibility.<sup>22</sup> Some defense attorneys echo this concern and worry that the presence of the victim may make the prosecutor reluctant to make a reasonable offer.<sup>23</sup> Others worry that the presence of the victim will lengthen the process as the prosecutor will have to negotiate with both defense counsel and the victim.<sup>24</sup>

Some prosecutors and mediators regulate the role of victims by controlling their location. Some victims are present during the mediation — either in the room with the prosecutor or in his or her own room. Some victims are available by phone. Other victims’ desires are communicated to the prosecutor or the victim advocate before the process begins.

Whether the victim is present at the mediation, by phone, or through prior conversations with staff at the prosecutor’s office, the mediator and the prosecutor need to ensure the victim’s voice and desires are heard. In the end, the role the victim plays must be determined on a case by case basis recognizing the personalities of the parties and the mediator, the facts of the case, and the particular victim.

Although there may be a desire to insert “restorative justice” into a case-management criminal mediation, Judge Arnold maintains that it would be unwise to allow the defendant and the victim to sit together with the mediator during the proceeding. The potential for an outburst, loss of confidentiality, and/or loss of control of the proceeding are potential consequences too great to risk.

## Constitutional issues

Civil mediations often involve money and the distribution of assets. In contrast, criminal mediations concern a defendant’s liberty interest and the other protections provided under both state and federal constitutions. For this reason, criminal

mediations must be completely voluntary. The judicial mediator must safeguard the voluntariness of the process by paying special attention not to exert undue influence or pressure.

**Conclusion and takeaway**

Case management mediation provides an opportunity for both sides to engage in “risk assessment” with a neutral third party — a sitting or senior judge other than the assigned judge. A mediated agreement provides closure, certainty, and efficiency, and is more cost effective. At the same time, the process only works if the players stay mindful of defendants’ constitutional rights.

**Endnotes**

- <sup>1</sup> See generally Maureen E. Laflin, *Remarks on Case-Management Criminal Mediation*, 40 IDAHO L. REV. 571 (2004).
- <sup>2</sup> Maureen E. Laflin, *Dreamers and Visionaries: The History of ADR in Idaho*, 46 IDAHO L. REV. 177, 213 (2009).
- <sup>3</sup> *Id.* at 213.
- <sup>4</sup> *Id.*
- <sup>5</sup> *Id.* at 214.
- <sup>6</sup> I.R.E. 507(3)(b).
- <sup>7</sup> I.R.E. 507(5)(c).
- <sup>8</sup> I.R.E. 507(5)(b)(1) provides in part:

There is no privilege under subpart 3 if a court, administrative agency, or arbitrator finds, af-

ter a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered in: (1) a court proceeding involving a felony or misdemeanor . . . ;

<sup>9</sup> See Maureen E. Laflin, *The Mediator as Fugu Chef: Preserving Protections Without Poisoning the Process*, 49 S. TEX. L. REV. 943 (2008) (addressing the mediator’s need to allow parties to reap the benefits of mediation without harming them in subsequent criminal litigation).

<sup>10</sup> U.S. Magistrate Judge Kelley Arnold, Western District of Washington, and Professor Laflin taught the two judicially sponsored criminal mediations trainings.

<sup>11</sup> Notes from the Oct. 6-7, 2011 and May 24-25, 2012 trainings are on file with author.

<sup>12</sup> Notes from the May 24-25, 2012 training are on file with the author.

<sup>13</sup> I.C.R. 18.1.

<sup>14</sup> On January 4, 2013, the United States Supreme Court agreed to hear *United States v. Davila*, 664 F.3d 1355 (11th Cir. 2011), *cert. granted* (U.S. Jan. 4, 2013) (No. 12-167). The Court’s decision in that case may preclude criminal mediations in federal cases. The issue before the Court is “Whether the court of appeals erred in holding that any degree of judicial participation in plea negotiations, in violation of Federal Rule of Criminal Procedure 11(c) (1), automatically requires vacatur of a defendant’s guilty plea, irrespective of whether the error prejudiced the defendant.” See <http://www.scotusblog.com/case-files/cases/united-states-v-davila/>.

[com/case-files/cases/united-states-v-davila/](http://www.scotusblog.com/case-files/cases/united-states-v-davila/).

<sup>15</sup> I.C.R. 18.1(8).

<sup>16</sup> I.R.C. 18.1(5).

<sup>17</sup> I.C. §19-5306(b).

<sup>18</sup> I.C. §19-5306(e).

<sup>19</sup> I.C. §19-5306(f).

<sup>20</sup> Maureen E. Laflin, *Remarks on Case-Management Criminal Mediation*, *supra* note 1 at, 573.

<sup>21</sup> Bill Mains, *Observations of Senior Judge and Mediator, Hon. Bill Mains, Kentucky’s Year End Report 2010*, Court Services Strategies Plan (a copy on file with author).

<sup>22</sup> Maureen E. Laflin, *Remarks on Case-Management Criminal Mediation*, *supra* note 1 at, 573, 595.

<sup>23</sup> *Id.* at 593.

<sup>24</sup> *Id.* at 597.

**About the Author**

**Maureen E. Laflin**, *Professor of Law and Director of Clinical Programs at the University of Idaho College of Law*, has been on the faculty since 1991. She has written extensively on criminal mediation, mediation privilege, and mediation ethics. She has served on three Idaho Supreme Court Committees exploring criminal mediation and helped draft the mediation privilege rule in Idaho.



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# Mediation and Probate Disputes

John McGown, Jr.

People die, often leaving behind surviving children. What the decedent hoped would be an easy process following his or her death has the potential to become anything but that. The property accumulated during a lifetime needs to be distributed in a relatively short time according to the terms of a will, trust or beneficiary designation (or according to the applicable state statute for those who die without a will). Probate is often a necessary step in accomplishing the disposition of the deceased's property. It is nearly impossible for anyone to cover the disposition of each and every item on their death because many items are not easily divided. This is especially true for household items such as furniture and pictures. Occasionally, items that were in the house before death are no longer there after death, which can lead to awkward conversations. This is where mediation can become a useful tool.

There are two aspects of human nature that can exacerbate the potential for conflict. First, it is easier to tell someone what they want to hear than to be forthright. Second, we tend to hear what we want to hear. As a result, there may have been conversations between the decedent and one of the children that are contrary to the wording in the will. Even worse, a mother may have had separate conversations with different children in which she "promised" the same thing to both. Adding to the emotional trauma of death is the short time in which funeral and burial decisions must be made. The decedent's wishes may have changed over time, and the children may have heard different wishes from the deceased parent. Unfortunately, the one person who could set the record straight is no longer available to talk to. In short, it is easy to see why disputes often arise during the administration of an estate.

## **Perfect storm**

The likelihood for probate disputes is encountering a "perfect storm" due to the confluence of three recent factors. First, more wealth is being transferred from the older generation to the younger generation than at any point in history. Second, we are encountering new family dynamics because the decedent's children are often spread out around the country rather than remaining at home. Finally, the inheritance from one's parents is now viewed less as a windfall and more as part of the child's retirement plan.

*A mother may have had separate conversations with different children in which she "promised" the same thing to both.*

Mediating a probate dispute, however, has unique challenges. There is the grief factor due to the passing of the parent(s). There are family issues not usually present in a business dispute. And, tax issues can arise and be very important. These unique challenges are discussed below.

## **Grief factor**

It usually takes several months after the decedent's passing (and often longer) before probate disputes become ripe for mediation. This is because it takes some time for a Personal Representative to be appointed to administer the estate and then an additional period for the Personal Representative to start exercising his or her authority. Even so, the loss of what typically is the last surviving parent is an emotionally painful event that does not quickly dissipate.

The real dispute often does not happen when one of the parents is living, largely out of respect for the surviving spouse. The more common situation for disputes to arise is after the death of both parents. This can be an especially trying time because all of a sudden the child is now in the oldest generation with no one to look up to. This may cause both a lonely feeling and an intimidating feeling. In addition, there may have been traumatic events that occurred at the hospital or hospice, in the person's home, or shortly after the death of the surviving parent that exacerbate the situation. These events may have occurred just prior to death, at the moment of death, at the funeral, or in dividing up the household goods.

## **Involvement of family (Often from birth)**

Many business and personal injury disputes revolve around financial issues among parties that have no social relationship. Probate disputes are often just the opposite. Not only do the parties know

each other, but they usually have known each other since birth. I have found it common among beneficiaries that there are unresolved issues relating from childhood. Those unresolved issues may be unstated but often need to be uncovered to make progress toward a mediation settlement. For example, a common issue is perceived favoritism toward one child by a now deceased parent.

I vividly recall a mediation involving two children from the husband's prior marriage, two children from the wife's prior marriage, and two children of the marriage. When the father's daughter of the first marriage was getting married, the father drove out of state to attend. After arrival, he was told by the daughter that he was unwelcome at the wedding. The other four children naturally carried a grudge toward their stepsister.

With some probing during the mediation, I learned that the daughter would have loved to have had her father attend the wedding, but her mother told her in no uncertain terms that her father was not to attend. It turned out that the father had begun his relationship with his second wife while still married to the first wife. The first wife was extremely bitter and never wanted to see her ex-husband again. The daughter was closer to her mother and was put in the untenable situation of having to choose between her mother and father as to who would attend the wedding. As the mediator, I was allowed to share this with the other children and I believe this softened some of the animosity that existed between them.

## **Multitude of tax issues**

Many probates have significant tax issues lurking in the background. There may be income tax issues, step up (or down) in income tax basis issues, and estate tax issues. In certain circumstances, the parties can structure their mediation

settlement in such a way as to reduce some of these taxes. In essence, it may be possible to reduce the tax burden and have that "additional money" be enough to bridge the financial differences between the parties.

### Benefits of mediation

The probate court or other relevant forum needs to apply the law to the facts to reach a correct legal decision on the case. For example, there may be three roughly equal parcels of real estate to be divided among three children who do not get along, or between other beneficiaries named in the decedent's will. The correct legal result might be that each beneficiary becomes a one-third owner of each of the three properties. This could lead to continuing friction as they disagree over the management and use of the properties. By using mediation, it may be possible to have each child or beneficiary become the full owner of one of three properties, reducing the chance for conflict and letting each one move forward independent of the others. Similarly, the court may be constrained in some property distributions that result in higher taxes than might apply if the parties were able to structure their own settlement. There is no free path to avoid taxes that normally apply,

but if there is a legal basis for the settlement, significant tax savings may result.

### Repairing relationships

While each case is unique, in mediating probate disputes, the practitioner may try to find out if the parties are interested in repairing strained relationships. If they are, it is prudent to build in extra time so the mediator can learn more about the family issues as necessary background to help with possible healing. It is rewarding to see the parties shed a few tears while exchanging hugs at the end of the mediation.

### Conclusion

A mediator can help guide parties to reach their own settlement. The parties in a disputed probate often carry extra baggage because of grief, longstanding inter-

personal relationships, and the absence of the one party who often could resolve the dispute. In addition, tax issues often permeate the dispute. The mediator who can successfully meet these challenges may be able to achieve a rewarding experience for all included.

### About the Author

**John McGown, Jr.** has been associated with Hawley Troxell Ennis & Hawley LLP during most of his professional career; where he currently serves as Of Counsel. John has particularly enjoyed the opportunity to mediate probate disputes.



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shed a few tears while exchanging  
hugs at the end of  
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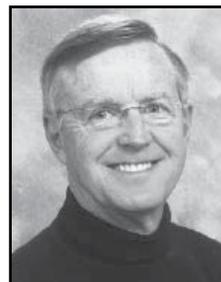
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# Mediation Practice From a Veteran

W. Anthony Park

Over the past 13 years, I have limited my law practice exclusively to Alternative Dispute Resolution (ADR) work. During that time I have conducted several hundred mediations. Through this experience I have identified strategies and practices that work and do not work in the mediation process. Attorneys may find the following suggestions for participating in the mediation process useful.

## Pre-mediation position statements

**DO:** Set forth your client's position in the mediation in a succinct and sequential narrative. If there are legal and factual issues, treat them fully but objectively. No more than three to four pages are necessary.

**DON'T:** Submit piles of pleadings and discovery responses to the mediator. Remember that the mediator is not a judge deciding a dispositive motion. The mediator just needs to know the essence of the dispute and where the fault lines are for respective litigants.

**DO:** Be candid. Let the mediator know your problem areas. That does not mean you should not fully address your strengths and what you believe are your adversary's weaknesses. But if both sides are realistic about soft spots, that allows the mediator to narrow the issues and hone in on the areas that will bring ultimate agreement.

## During the mediation

**DON'T:** Be a chest-pounder. The mediator (and, indeed, the client) should not have to listen to a jury summation from counsel during the caucus sessions. You and your client are there, presumably, to reach that middle ground, not to achieve total victory. A constant barrage of derision and contempt for the other side's position has a chilling effect on the process. It also tends to enhance the always difficult hazard of unrealistic expectations by the client listening to it. The biggest barrier to a successful mediation is a litigant who fails to recognize any merit in the opponent's position in the case.

**DO:** Listen to the mediator. A good mediator will make sure that you and your client are hearing the things you need to know vis-à-vis the strengths and weaknesses of your case, as the mediator is getting it from the other room. I prefer to speak directly to the litigant, especially when I am trying to lower expectations. Of course, if you do not agree with what the mediator is reporting to you and your



client, you should express your view. But my experience has been that the most successful attorneys at mediations are those who listen to what the mediator is telling them, pro and con, and encourage their clients to do the same.

**DON'T:** Be afraid to share your settlement range with the mediator well in advance of the final stages of the negotiations. Having that knowledge early allows the mediator to discreetly sound out the other side and assess the chances for success in that identified range. If it is definitely not going to fly, you should know that sooner rather than later.

**DO:** Make the mediator aware of any non-monetary needs or issues that your client may have. The most common non-monetary need I encounter (always from the claimant) is for an apology from the defendant. When such a need is identified, it can be used to mitigate the monetary difference and reach mutual agreement.

**DON'T:** Allow your out-of-town client to schedule their flight home for a time that is likely to cut into the mediation work time. This usually happens with insurance company representatives, and I can tell you that it drives plaintiff's counsel crazy. Also, have the out-of-town representative present in person at the mediation unless counsel for the other side has specifically consented well in advance that the representative may participate by telephone. Having all the decision makers physically present at the mediation is a vitally important element for a successful mediation.

**DO:** Be willing to discuss any sensitive situation that may arise during the mediation privately with the mediator. I am quite willing to have side-bar conferences with counsel and, indeed, have asked for them myself from time to time. Similarly, I have had private sessions with both (or

*The most common non-monetary need I encounter (always from the claimant) is for an apology from the defendant.*

all) attorneys together. With experienced and capable attorneys, these conferences can result in candid discussions and get the parties to "yes."

## Conclusion

These are a few of the most frequently recurring examples of both good and bad practices in mediation. Since mediations have become an almost indispensable part of the civil litigation process, it is very important for litigators and their clients to make the best possible use of what will probably be their last best chance at a successful resolution of their case prior to trial.

## About the Author

**W. Anthony Park** is of counsel with the Boise law firm of Thomas, Williams & Park, LLP, where he limits his practice exclusively to mediation/arbitration work. Prior to his focus on mediation/arbitration, Mr. Park practiced as a civil litigator in Idaho for over 35 years, including as the Attorney General of the State of Idaho.





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Jim Jones  
Warren E. Jones  
Joel D. Horton

#### 3rd AMENDED - Regular Spring Term for 2013

Boise..... January 9, 11, 14, 16, and 18  
Boise..... February 11, 13, 15, 20, and 22  
Coeur d'Alene..... April 2, 3, and 4  
Lewiston..... April 5  
**Boise..... May 2**  
Boise..... May 3  
Idaho Falls..... May 6 and 7  
Pocatello..... May 8 and 9  
Twin Falls..... June 5 and 6  
**Boise..... June 3, 5, 7, 10, and 12**

By Order of the Court  
Stephen W. Kenyon, Clerk

**NOTE:** The above is the official notice of the 2013 Spring 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

#### 1st AMENDED - Regular Spring Term for 2013

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

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**NOTE:** The above is the official notice of the 2013 Spring 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 May 2013

#### Thursday, May 2, 2013 – BOISE

10:00 a.m. John Doe v. IDHW (*EXPEDITED*) ..... #40670-2013

#### Friday, May 3, 2013 – BOISE

8:50 a.m. Richard I. Hehr and Greystone Village LLC v. City of McCall ..... #39535-2012

10:00 a.m. Idaho Trust Bank v. Michael R. Christian .. #39781-2012

11:10 a.m. Alpine Village Company v. City of McCall #39580-2012

#### Monday, May 6, 2013 – IDAHO FALLS

8:50 a.m. Pedro A. Pelayo v. Bertha Alicia Pelayo ..... #39789-2012

10:00 a.m. Bagley, etal. v. Thomason, etal. .... #39069-2011

11:10 a.m. Silicon International Ore v. Monsanto Company ..... #39409-2011

#### Tuesday, May 7, 2013 – IDAHO FALLS

8:50 a.m. Goodspeed v. Shippen ..... #38829-2011

10:00 a.m. Thomas R. Taylor v. Chamberlain ..... #39378-2011

11:10 a.m. Thomas H. Ullrich, etal. v. John N. Bach ... #39318-2011

#### Wednesday, May 8, 2013 - POCATELLO

8:50 a.m. Sam Ferrell v. United Financial Casualty Company ..... #39221-2011

10:00 a.m. Telford Lands, LLC v. Donald William Cain ..... #39466-2011

11:10 a.m. Bank of Commerce v. Jefferson Enterprises ..... #40034-2012

#### Thursday, May 9, 2013 - POCATELLO

8:50 a.m. Campbell, etal. v. Kvamme, etal. .... #39650-2012

10:00 a.m. William J. Waters v. All Phase Construction ..... (Industrial Commission) #39556-2012

11:10 a.m. Heather Hall v. Rocky Mountain Emergency Physicians ..... #39473-2011

### Idaho Court of Appeals Oral Argument for May 2013

#### Friday, May 3, 2013 – LAW DAY

(Renaissance High School – Meridian)

10:00 a.m. State v. John Doe ..... #39272-2011

#### Thursday, May 16, 2013 – BOISE

10:30 a.m. John Doe v. Jane Doe (*EXPEDITED*) ..... #40666-2013

1:30 p.m. State v. Hartzell ..... #39866-2012

#### Tuesday, May 21, 2013 – BOISE

9:00 a.m. Leonard, Jr. v. State ..... #39067-2011

10:30 a.m. Stevens v. State ..... #39218-2011

1:30 p.m. State v. Bosh ..... #39472-2011

#### Thursday, May 23, 2013 – BOISE

1:30 p.m. Hoffman v. State ..... #39553-2012



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**Idaho Supreme Court and Court of Appeals**  
**NEW CASES ON APPEAL PENDING DECISION**  
(Updated 4/1/13 )

**CIVIL APPEALS**

**Liens**

1. Did the court err in interpreting I.C. § 45-1802 as providing that an agricultural commodity dealer lien on an agricultural product extends to the livestock that consumes the product and the proceeds of the sale of the livestock?

*Farmers National Bank v.  
Green River Dairy, LLC*  
S.Ct. No. 40101  
Supreme Court

**Post-conviction relief**

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

*Atwell v. State*  
S.Ct. No. 39996  
Court of Appeals

2. Whether the district court erred when it summarily denied Stakey's post-conviction relief petition.

*Stakey v. State*  
S.Ct. No. 40085  
Court of Appeals

3. Did the court err when it summarily dismissed Begley's claim regarding the voluntariness of his *Alford* plea?

*Begley v. State*  
S.Ct. No. 39892  
Court of Appeals

4. Whether the court erred in summarily dismissing Smith's untimely successive petition for post-conviction relief.

*Smith v. State*  
S.Ct. No. 39705  
Court of Appeals

5. Did the court apply an incorrect legal standard in denying Gould's petition for post-conviction relief?

*Gould v. State*  
S.Ct. No. 39738  
Court of Appeals

6. Did the court err in finding Adams failed to raise a genuine issue of material fact as to whether counsel was ineffective for failing to call his accident reconstruction expert to testify and in summarily dismissing Adams' post-conviction petition?

*Adams v. State*  
S.Ct. No. 39842  
Court of Appeals

7. Did the court err in failing to conduct an evidentiary hearing on Olson's claim of relief?

*Olson v. State*  
S.Ct. No. 40140  
Court of Appeal

**Property**

1. Did the trial court use the wrong burden of proof standard for demonstrating the assessed value of Wurzburg's property was incorrect?

*Wurzburg v. Kootenai County*  
S.Ct. No. 40150  
Court of Appeals

**Summary judgment**

1. Was there sufficient evidence to support the granting of Sterling Savings Bank's motion for summary judgment as to the deficiency judgment?

*Sterling Savings Bank v. Fairfield*  
S.Ct. No. 39907  
Court of Appeals

2. Did the district court err in finding the City did not owe Block a duty of care and that no special relationship existed between the City and Block and/or that the City did not assume a duty of care through its actions?

*Block v. City of Lewiston*  
S.Ct. No. 39685  
Supreme Court

**Tax cases**

1. Is the Ashton Renewal Agency a "person aggrieved" pursuant to I.C. § 63-511 and thus entitled to appeal the Board of Equalization's decision granting Ashton Memorial tax exempt status?

*Ashton Urban Renewal Agency v.  
Ashton Memorial Inc.*  
S.Ct. No. 40348  
Supreme Court

**Termination of parental rights**

1. Whether the court erred in failing to find that DHW had violated the court's order requiring reasonable efforts to move toward reunification.

*Dept. of Health and Welfare v.  
Jane (2013-05) Doe*  
S.Ct. No. 40727  
Court of Appeals

2. Whether the court erred in entering an order of non-establishment of paternity.

*John (2013-02) Doe v.  
Dept. of Health and Welfare*  
S.Ct. No. 40670  
Supreme Court

3. Whether the court erred in terminating the parent's rights under the best interest of the child analysis.

*Dept. of Health and Welfare v.  
John (2013-07) Doe II*  
S.Ct. No. 40786  
Court of Appeals

**CRIMINAL APPEALS**

**Evidence**

1. Did the court err by admitting evidence regarding all the text messages in this case because it failed to first conduct an analysis under I.R.E. 404(b)?

*State v. Branigh, III*  
S.Ct. No. 36427  
Court of Appeals

2. Did the court err in denying Nichols' Rule 29 motion for judgment of acquittal?

*State v. Nichols*  
S.Ct. No. 38123  
Court of Appeals

3. Did the court err by allowing evidence and testimony regarding the symbolism of the tattoos worn by Tankovich's co-defendants?

*State v. Tankovich*  
S.Ct. No. 38813  
Court of Appeals

4. Was the guilty verdict supported by substantial and competent evidence?

*State v. Sigler*  
S.Ct. No. 39313  
Court of Appeals

5. Did the court err in refusing to allow two electronic trial exhibits to be taken into the jury room for the jury to review during its deliberations?

*State v. Adams*  
S.Ct. No. 38910  
Court of Appeals

6. Did the State fail to provide evidence of manual-genital contact such that Wilson's conviction for lewd conduct was not supported by substantial and competent evidence?

*State v. Wilson*  
S.Ct. No. 39073  
Court of Appeals

7. Was there substantial and competent evidence to support the jury's verdict?

*State v. Alfaro*  
S.Ct. No. 38500  
Court of Appeals

8. Was the evidence sufficient to establish Ritchie's guilt on the charge of driving without a license and the persistent violator enhancement?

*State v. Ritchie*  
S.Ct. No. 39920  
Court of Appeals

**Idaho Supreme Court and Court of Appeals**  
**NEW CASES ON APPEAL PENDING DECISION**  
(Updated 4/1/13)

**Instructions**

1. Did the court deprive Carver of due process and a jury trial when it failed to instruct the jury that, before it could find him guilty of felony murder by aggravated battery of a child, it was required to find that he had the specific intent to commit the crime of aggravated battery and cause great bodily harm to the child?

*State v. Carver*  
S.Ct. No. 39467  
Supreme Court

2. Did the court err when it denied Johnson's request for a unanimity instruction?

*State v. Johnson*  
S.Ct. No. 39870  
Court of Appeals

**Jurisdiction**

1. Did the magistrate lack jurisdiction to reconsider its oral ruling on Small's motion to dismiss?

*State v. Small*  
S.Ct. No. 39969  
Court of Appeals

**Procedure**

1. Did the district court properly dismiss Bettwieser's appeal based on his failure to pay for a transcript of the proceedings in the magistrate court?

*State v. Bettwieser*  
S.Ct. No. 39106  
Court of Appeals

**Restitution**

1. Whether the district court erred by allowing the State to include the fringe benefits of employment in the calculation of regular salaries at the restitution hearing.

*State v. Chongphaisane*  
S.Ct. No. 39577  
Court of Appeals

**Search and seizure –  
suppression of evidence**

1. Did the court err in granting Silver's motion to suppress statements given to officers during a traffic stop?

*State v. Silver*  
S.Ct. No. 40017  
Court of Appeals

2. Did the district court err in refusing to suppress evidence discovered through a warrantless search of McBride's vehicle?

*State v. McBride*  
S.Ct. No. 38667  
Court of Appeals

3. Did the court err in denying Ellis' motion to suppress evidence and in finding he had no reasonable expectation of privacy in the maintenance room outside his apartment?

*State v. Ellis*  
S.Ct. No. 39226  
Court of Appeals

4. Did the district court err in denying Gaytan's motion to suppress and in finding the officer had reasonable suspicion to detain Gaytan and to investigate?

*State v. Gaytan*  
S.Ct. No. 40001  
Court of Appeals

5. Did the court err in denying Rhall's motion to suppress evidence found in a search of his truck?

*State v. Rhall*  
S.Ct. No. 39950  
Court of Appeals

**Sentence review**

1. Whether *State v. Reed*, 149 Idaho 901 (Ct. App. 2010) should be overruled such that it was error to allow the State to enhance Glenn's sentence for DUI because he had pled guilty or been found guilty of felony DUI, notwithstanding the fact that the prior guilty plea had been withdrawn and the case dismissed.

*State v. Glenn*  
S.Ct. No. 39567  
Supreme Court

2. Did the court abuse its discretion when it revoked Weathers' probation and failed to reduce his sentence?

*State v. Weathers*  
S.Ct. No. 39645  
Court of Appeals

3. Did the district court abuse its discretion when it relinquished its retained jurisdiction over Horn?

*State v. Horn*  
S.Ct. No. 39728/39729  
Court of Appeals

**Substantive law**

1. Did the court err by granting Nicholas' motion to reduce his felony to a misdemeanor where it previously found, and Nicholas admitted, that Nicholas had violated probation?

*State v. Nicholas*  
S.Ct. No. 39859  
Court of Appeals

**Summarized by:**  
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# Adding Eloquence to Your Legal Writing with Figures of Speech

Tenielle Fordyce-Ruff

**L**awyers write a lot, and write a lot under time constraints. But, at times the legal writer still wants to write eloquently. You may not want to take the time to add eloquence to every piece of writing. While it would be great if the email to a client could be more eloquent, it might not be worth the time. But other types of writing benefit from added eloquence.

Indeed, an eloquent brief is more persuasive. Yes, writing must first be clear, correct, and readable. And yes, the arguments themselves must be persuasive and supported by the law. But presentation matters.

Using rhetorical devices can convey your meaning in a more vivid and meaningful way. Using certain figures of speech can also motivate the decision maker to see the outcome your way. So, this essay will cover simile, metaphor, anaphora, antithesis, chiasmus, isocolon, metonymy, and synecdoche—figures of speech you can use to create a more clear, energetic, memorable, and striking written work.

## Simile and metaphor

Similes and metaphors are likely the figures of speech you are most familiar with. They create comparisons. Similes are direct comparisons.

*Writing is unfortunately like painting; . . . paintings have the attitude of life but if you ask them a question they preserve a solemn silence.<sup>1</sup>*



Metaphors are indirect comparisons. *[S]imple arguments are winning arguments; convoluted arguments are sleeping pills on paper.<sup>2</sup>*

Fresh and insightful similes and metaphors are more effective than stale, cliché-ridden, timeworn ones. Writing that something is *woven into the fabric of society* or that someone acted like *a wolf in sheep's clothing* suggests that your writing is on autopilot. Unfortunately, that means the reader can read it on autopilot.

A fresh simile or metaphor, however, grabs the reader's attention and makes him create new associations.



*Legal contentions, like the currency, depreciate through over issue.<sup>3</sup>*

## Anaphora

You likely recognize anaphora. You likely have read famous works that employ anaphora. You likely have even used anaphora.

Anaphora is starting two or more sentences with the same word or words. Using anaphora — repeated words — joins phrases and ideas together. It will make your writing sound repetitive, but that's the point. It creates an impression. It's also very effective and powerful.

You can create anaphora in your writing by going back through a draft and determining what you would like to emphasize. Then add (or repeat) key words to create a link.

For instance, you have written:

*Since Mr. Smith's departure, overall sales were down 5%. Specifically, red widget sales decreased by 3% and blue widget sales decreased 6%.*

But, you want to emphasize that Mr. Smith's departure created the decline. You could re-write this with anaphora:

*Since Mr. Smith's departure, overall sales dropped 5%. Since Mr. Smith's departure, red widget sales dropped 3%. Since Mr. Smith's departure, blue widget sales dropped 6%.*

Repeating the first clause to begin all three sentences makes this idea much stronger.

*Like anaphora, antithesis repeats a familiar structure. Antithesis, though, juxtaposes contrasting ideas, words, phrases, or sentences to create balance.*

## Antithesis and chiasmus

Like anaphora, antithesis repeats a familiar structure. Antithesis, though, juxtaposes contrasting ideas, words, phrases, or sentences to create balance.

*Bad arguments infect the good.<sup>4</sup>*

To use antithesis effectively, you need to make sure the opposing parts of the sentence are in parallel structure. (Parallel structure is when parts of a sentence or sentences are in the same grammatical form.) Then, you simply need to create contrast within the parallel structure.

*The touchstone of the First Amendment is not secularism, but pluralism.*

Write simply and clearly; avoid jargon and legalese.

The court must refrain from basing its decision on its subjective view of the article: whether the article was good or poor, necessary or superfluous.

Chiasmus is a special form of antithesis. It puts parallel phrases in reverse order to make a point.

Ask not what your country can do for you — ask what you can do for your country.<sup>5</sup>

The careless lawyer betrays the language; and careless language betrays the lawyer.<sup>6</sup>

To create the balance and structure of antithesis or chiasmus, simply find an idea that you want to emphasize, but haven't expressed as well as you want. Then counter the language with balanced language to create the emphasis you want.

### Isocolon

Isocolon can be used to make sentences with anaphora, antithesis, or chiasmus even more emphatic. Isocolon emphasizes parallel structure by using equal parts for the parallel elements.

*Veni, vidi, vici*

*Let each man search his conscience and search his speeches.<sup>7</sup>*

To create isocolon, look for parallel constructions in your writing, then revise to create the rhythm of isocolon.

### Metonymy and synecdoche

These figures of speech use replacement to invoke an image. Metonymy replaces a word or phrase with a similar word that represents it. In some instances, the metonymy is more common than the actual term.

To create isocolon, look for parallel constructions in your writing, then revise to create the rhythm of isocolon.

For instance, the press frequently discusses *The White House* when it actually means the President and his staff. We sometimes use *Hollywood* to refer to professional actors and celebrities. Metonymy can be used to shorten your writing, and to create implicit assumptions.

In a suit against a bank, for instance, you could talk about *Wall Street* instead of the bank or the banking industry to create a negative impression.

*Mr. Jones is an unfortunate victim of Wall Street's greed.*

Synecdoche is a special form of metonymy. Synecdoche uses a piece of the whole as a replacement for the whole. *All hands on deck* is a replacement for as many people as possible. When we talk about our *new set of wheels*, we are really discussing our new car.

### Conclusion

Now when you find yourself faced with a brief that needs a little emphasis, you can add a few figures of speech to help convey your meaning vividly.

### Sources

- <http://grammar.quickanddirtytips.com/Figures-Of-Speech.aspx>
- <http://publicspeaker.quickanddirtytips.com/how-to-create-and-use-figures-of-speech.aspx>

### Endnotes

<sup>1</sup>Plato, *The Phaedrus* — a dialogue between Socrates and Phaedrus written down by the pupil of Socrates, Plato, in approximately 370 BC, from <http://www.units.muohio.edu/technologyandhumanities/plato.htm>.

<sup>2</sup>Alex Kosinski, *The Wrong Stuff*, 1992 BYU L. Rev. 325, 326 from <http://lawreview.byu.edu/archives/1992/2/koz.pdf>.

<sup>3</sup>Robert H. Jackson, *Advocacy Before the United States Supreme Court*, 37 Cornell L. Q. 1, 5 (1951).

<sup>4</sup>Ruggero J. Aldisert, *Perspective from the Bench on the Value of Clinical Appellate Training of Law Students*, 75 Miss. L.J. 646, 653 (2006), <http://www.olemiss.edu/depts/ncjrl/pdf/Aldisert75-3.pdf>.

<sup>5</sup>John F. Kennedy's Inaugural Address, January 20, 1961.

<sup>6</sup>Ethel Grodzins Romm, *Chiasmus and Contrast Can Help You Winn*, ABA Journal, Aug. 84, Vol. 70, Issue 8, p. 158.

<sup>7</sup>Winston Churchill Speech to the House of Commons, June 18, 1940.

### About the Author

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# “Making Money Talk - How to Mediate Insured Claims and Other Monetary Disputes” — A Book Summary

John McGown, Jr.

Many attorneys have an interest in learning more about mediation, but do not know where to start. Since this issue of *The Advocate* is co-sponsored by the ADR Section of the Idaho State Bar, it makes sense to describe a low cost practical tool for those who want an introduction to mediation.

I chose this book to summarize because it looked like an excellent resource for attorneys interested in learning more about mediation. I saw it advertised by the ABA Section of Dispute Resolution and the topic piqued my interest. While this summary can itself be a learning tool, the book itself is an excellent resource for those who want to know more about mediating in the legal arena.

Mediation can cover a variety of disputes. But when attorneys are involved, whether as client representatives or as the mediator, the dispute very likely involves money. As such, the book aims for the monetary sweet spot for attorneys involved in mediations.

This summary starts with the parameters, then reviews each of the nine chapters. Then it concludes with why you should, or should not, buy the book (hint: you should).

## Parameters

*Making Money Talk* consists of nine chapters and totals 269 pages. Many, but not all, chapters conclude with a summary of key points. And there are hundreds of observations provided throughout the book in gray boxes. Many, many practical examples are provided throughout the book.

### “Making Money Talk”

ISBN-13 is 978-1-59031-825-6.  
It costs \$42 (\$35 for Section of Dispute Resolution members). More information is available through [www.ababooks.org](http://www.ababooks.org).

The author is J. Anderson Little. He is a mediator and mediator trainer in North Carolina who is credited with leading North Carolina’s efforts to incorporate mediation into its courts.

He soon learned that the training he received to reframe positional bargaining into joint problem solving rarely works when money is the primary issue. Bargaining over money rarely results in

*Bargaining over money rarely results in an elegant solution for mutual gain. The author primarily addresses mediators who feel they have become mere messengers carrying proposals and counterproposals back and forth.*

an elegant solution for mutual gain. The author primarily addresses mediators who feel they have become mere messengers carrying proposals and counterproposals back and forth. He uses the book to provide new tools and to describe how they can assist the parties involved with traditional bargaining in a facilitative, rather than directive, way.

## The rear ender

The book begins with a “typical” civil mediation he calls “the rear ender.” After almost five hours and twelve complete rounds of proposals, the parties settled at \$27,500 and executed a memorandum of settlement. Although an agreement was reached at the mediation, no one was particularly happy with the settlement or the difficulty with which it was reached. For the plaintiff, it was a once in a lifetime experience. He never saw his attorney again. The members of the defense team were professionals. For them, this was just one more automobile accident, one more claim, and one more negotiation. The author ends this scenario with “Welcome to the world of civil trial court mediation.”

## Chapter 1 — The realities of negotiations about money

Chapter One gives ten perceptions followed by the author’s vision of the reality of those perceptions. As one example, he says the perception is that case analysis will dominate settlement discussions. He then says the reality is that case analysis gives way to multiple rounds of monetary proposals. He then spends a few pages providing examples of how this dynamic works and why it cannot be changed. However, it is important to recognize it and the emotions it raises in the parties (especially the plaintiff who often wants his trauma, especially the impact on his life, considered). In the end, the mediator should help the parties make thoughtful, rather than reactive, proposals.

## Chapter 2 — Making a place for traditional bargaining among the models of the mediation process

The traditional model of solving mediation through problem solving has limited use in civil trial court mediation where money usually is the only currency of settlement. The model for the book describes three ways that mediators can make traditional bargaining more productive for the parties. They are: (1) facilitate the flow of information, (2) facilitate case or risk analysis, and (3) facilitate movement. As to the second item, the author makes a couple of points. One, mediators need to approach the subject of case analysis with a great deal of care, because the risk of deeply offending the lawyers is great. Two, case/risk analysis is fundamentally important for both parties. Without it, the negotiator has no compass with which to navigate the process; he or she is lost. The third item of facilitating movement is the heart of the book and Chapters 3-7 are devoted to it.

## Chapter 3 — Facilitating movement: Understanding the problems of movement in traditional bargaining

The problem in mediating monetary disputes is that the parties react negatively to each other’s proposals and stall or quit the negotiations before they reach their bottom lines. They do this by packing up, refusing to counter, responding with low-ball or high-ball proposals, or putting the other side of bidding against itself.

The greatest motivation of the parties to settle is the perception that the case will settle (and vice versa that the greatest detriment is the perception that the case will not settle). Mediators should concentrate not on settlement but on eliciting well-thought-out proposals that encourage movement. Most cases will settle if the parties reach their best numbers during the negotiation. Get the

parties to their best numbers and find out what the real gap is.

#### **Chapter 4 — Facilitating movement: Helping negotiators overcome their negative reactions to the other side's proposals**

The focus of this chapter (which in part is an extension of the prior chapter) is on the negative reaction to a proposal by the other party. The first step is to understand the source of the parties' negative reactions, using summary and reframing statements. Then help the parties construct thoughtful proposals by employing the insights of control theory: (1) identifying communication goals for the proposal, (2) invent an array of proposals, and (3) evaluate and choose the proposal that sends a well-formed communication. There should be a thoughtful message sent with the proposal that is broader than the amount of dollars.

#### **Chapter 5 — Tools of the trade: The skills of a mediator**

The discussion here is on the tools the mediator can use to move the parties toward settlement. The first is to use open-ended questions and summary statements. This is followed by brainstorming to aid in the development of new ideas. If appropriate, the mediator can make observations about the negotiation process to open up new avenues for understanding and movement. If the parties cannot create new avenues on their own, then the mediator can make suggestions.

#### **Chapter 6 — Responding to recurring problems of movement in traditional bargaining: 25 settlement conference clichés**

This is a very practical chapter. It covers 25 "settlement conference clichés." For example, the plaintiff may decline to make the first offer and the defense may react by saying "I'm not going to bid against myself." Later in the mediation, one party might say "Tell them we're not going any higher/lower." Or "I'll go to \$X, but only if it'll settle the case." For many of these, the author gives a useful transcript of a helpful conversation between the mediator and the party (with occasional comments on the techniques being used by the mediator) on how to address the cliché.

#### **Chapter 7 — Closing the gap: From best numbers to settlement**

The author begins by expressing his view that he doesn't inquire about the parties' bottom lines and his belief that it is totally unnecessary to know those numbers to work as a facilitator of money negotiations. He believes it is private information, that the response

often is not truthful and even if it is, the number changes. If it is provided, the party becomes more reluctant to move from it. And the difference in the two parties' numbers can be a discouraging factor, especially if divulged only in the negotiations. So why ask for a bottom line number?

If there is an impasse between each parties' (supposedly) best numbers, try to get the parties to come up with their own ideas for movement. If that is not successful, then, in limited circumstances, the mediator might choose to intervene with his/her final number. This "intervention" carries risk and the situation must be carefully analyzed before choosing this option. The process of doing this final number intervention is described on pages 193-195.

#### **Chapter 8 — Other models of the mediation process: Their uses and limitations in civil trial court mediation**

The book goes a new direction in Chapter 8, with the focus changing to the problem solving method. It can be especially helpful in business disputes where the parties need to maintain a working relationship. It generally is less helpful in the typical civil mediation case, largely because the insurance adjuster usually has limited needs which are to settle the case expeditiously (i.e., to close the file) at an amount that can be easily justified. The plaintiff's needs usually are more complex, including a need to be "listened to." By closely examining the situation, the mediator can determine the appropriateness of the problem solving method.

#### **Chapter 9 — Do you have an opinion? Standards of conduct in the mediation of civil litigation**

In the concluding chapter, the author states that lawyers tend to be too directive in conducting mediations. While it may be a blurry line, he draws the distinction between "offering a suggestion" and "giving an opinion," strongly preferring the former, especially when it gives the parties an idea they have not thought of on their own. While being facilitative is more challenging in monetary disputes, the author believes it is the preferred approach.

#### **Appendix: A record of movement: Charting settlement conference proposals**

The author has kept bid sheets on various court-ordered mediations he has conducted over the years. They showed the amounts "bid" by each party, the counter and so on until the case either

*The author begins by expressing his view that he doesn't inquire about the parties' bottom lines and his belief that it is totally unnecessary to know those numbers to work as a facilitator of money negotiations.*

settled, recessed or reached an impasse. Looking at the evolution of the dollars from beginning to end provides helpful insight, although the numbers illustrate that there is no magical formula. Further, the numbers fail to take into account the dynamics that happened during the exchanges.

#### **Conclusion**

Mediators have a variety of styles. Perhaps because of their background, attorneys tend to be more directive and try to direct the parties to a settlement. This approach differs from a "pure" mediation, where the mediator facilitates the parties in better understanding their needs and interests, as well as the needs and interests of the other party, so that these underlying needs and interests can be accommodated in resolving the dispute.

Where the dispute primarily involves money, there is less opportunity to address any needs or interests that are nonfinancial. The book does a nice job of providing tools to the mediator to be more facilitative and less directive. I view this as a worthwhile endeavor and am pleased that our law firm purchased the book. You should as well!

#### **About the Author**

**John McGown, Jr.** has been associated with Hawley Troxell Ennis & Hawley LLP during most of his professional career; where he currently serves as Of Counsel. John has particularly enjoyed the opportunity to mediate probate disputes.



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Mr. Donesley is available for referrals and consultation.

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## IN MEMORIAM

### **James Slavens 1957 - 2012**

James Kenneth Slavens, 54, passed away on December 12, 2012, in a car accident in Fillmore, UT. He was born in Monticello, UT to James Keith and Karen Alexander Slavens. He graduated from Brigham Young University and earned a J. D. from the University of Idaho, where he was the editor and chief of the Idaho Law Review.



James Slavens

As an attorney, Jim represented thousands, many for free. His passion for the Constitution and argued a case at the U.S. Supreme Court in 2009. Most of all, he loved and cherished his family. He is survived by his wife Melanie Ann Slavens, Fillmore, UT; children, James Adam (Chrissy) Slavens, Idaho Falls, ID; Alexa Slavens; Orem, UT; Tanner Slavens, Gracie Slavens, Grant Slavens, all of Fillmore, UT; Kelton Stewart, Orem, UT; Jaycee (Taylor) Stewart, Fillmore, UT; Devin Stewart, St. George, UT; Cortney Stewart, St. George, UT; parents, James Keith and Karen Alexander Slavens, Blanding, UT.

### **Roger Lee Brown 1962 - 2013**

Roger Lee Brown, 50, of Boise, died February 17, 2013. He was born in Redwood City, California to C.Z. and Doris (Boehms) Brown.



Roger L. Brown

Roger started working in the legal field in 1983 and graduated from Chico State in 1985 with a bachelor's degree in Political Science. He continued his education at Thomas Jefferson School of Law and received his J. D. in 1991. He was admitted to practice law in California in 1992 and admitted in Idaho in 1996. Roger practiced in the areas of criminal defense, business litigation, family law, workers' compensation, and personal injury.

In 2004, Roger and Errin Eagan were married at Eagle Christian Church. Roger

was so excited to welcome his son, Austin, in 2006. He adored his son, Austin. He was looking forward to coaching Austin's North Boise Little League T-Ball Team.

Roger is survived by his wife, Errin and his son, Austin, of Boise; his brother, Garry Brown and sister-in-law, Renee of Dallas, TX and Los Angeles, CA. He was preceded in death by his parents, C.Z. & Doris Brown in 2010.

### **Hon. John Ray Durtschi 1922 - 2013**

John Ray Durtschi died on March 2, 2013. He lived a full life of service to family, church, community, and profession. Ray was born to John and Luella Durtschi on March 3, 1922 near Driggs, Idaho, where he grew up working on the family dairy.

He served in the US Army Signal Corps during WWII, stationed on the Aleutian Islands. On June 16, 1948, Ray married Josephine Bauman. Ray earned his undergraduate degree from the University of Idaho and then attended the University of Idaho College of Law, graduating first in his class.

Ray worked as an attorney in Twin Falls and Boise until Governor Robert Smiley appointed him as a district judge in 1959.

He loved being a judge and served on the bench for 28 years. After he retired from the judiciary, he worked with the law firm Elam, Burke and Boyd. Ray loved Idaho and enjoyed exploring the Tetons with his family, working in his garden, ham radio, astronomy, and eating Josephine's huckleberry pies.

During his lifetime Ray was active in the Church of Jesus Christ of Latter-Day Saints and served in many leadership and teaching callings. Ray is preceded in death by his son David B. Durtschi (Jeri) and his grandson John Luke Roberts.

He is survived by his wife Josephine; his brothers Reed (Jean) and Don (Ann); his children, Stephen (Brenda), Don (Bonnie), Kathryn (Hal Roberts), John, and Susan (Randy Rymer).



Hon. John Ray Durtschi

### **L. Lamont Jones 1929 - 2013**

L. Lamont Jones passed away peacefully, March 10, 2013. He was born in Malad, Idaho to Leland D. Jones and Melba Thomas. At the time of his death he was a practicing attorney with Jack Robison and Tom Holmes at Jones Chartered.



L. Lamont Jones

Lamont graduated from Idaho State University in 1953 with a B.S. in accounting. He was inducted into the sports Hall of Fame at I.S.U. in 1980 for his football career. Pocatello is where he met the love of his life, Ilene, and they made their life in Pocatello together for 62 years. In June 1958, he graduated with a J. D. from the University of Idaho College of Law. Lamont had a long career in law, receiving the Distinguished Lawyer Award from the Idaho State Bar and serving on its Board of Commissioners. Lamont was also past chairman of the Idaho Housing Association. Lamont is survived by: his wife, Ilene; daughter, Lisa Jones; son, Lance (Shelley) Jones. A memorial has been established in the name of: Lamont Jones Scholarship Endowment, at the I.S.U. Foundation, Campus Box 8050, Pocatello, Idaho, 83209 or online at [www.isu.edu/pledges](http://www.isu.edu/pledges).

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Keely Duke



Wendy Gerwick



Natasha Hazlett



Lisa Nordstrom



Christine M. Salmi



Amanda Keating Schaus

## Idaho Business Review honors top 50 women

Six attorneys were recognized as among the “Women of the Year” by the Idaho Business Review in a recent special section of the weekly publication. The section’s editor, Jeanne Huff, explained that 50 women were selected from 150 nominations by a panel of previous honorees. The panel rated each nominee from one to five, in four categories: leadership, professional achievements, community support and long-term goals. Of the 50 women chosen, six are members of the Idaho State Bar, all from Boise. They include:

Wendy Gerwick Couture, 36, is a University of Idaho College of Law teacher in Boise. Wendy distinguished herself doing complex securities litigation in Texas and later joined the University of Idaho College of Law faculty as associate professor of law. She actively mentors young attorneys through the Idaho Women Lawyers.

Keely Duke, 38, is founder and managing member of Duke Scanlon & Hall in Boise. She earned the Denise O’Donnell Day Pro Bono Award, has published in legal publications and teaches a trial advocate program at the University of Idaho College of Law.

Natasha Hazlett, 33, is Of Counsel with Angstman Johnson in Boise where

she does wills, estates and trusts. She also puts her marketing skills to work for the firm, as well as for projects she believes in such as the “Bear Hugs with Love” project that distributed 10,000 stuffed animals for children affected by Hurricane Katrina. In 2009 she started an on-line multi-level marketing business called Fast Forward Marketing.

Lisa Nordstrom, 40, is Lead Counsel for Idaho Power Company in Boise. She worked as deputy attorney general for the Public Utilities Commission, which

was a good introduction to utility issues. Before Idaho Power, she worked for PacifiCorp in Portland representing the company in regulatory issues. She also makes time for pro bono service to Court Appointed Special Advocate program. She is in the 2013 class of Idaho Academy of Leadership for Lawyers, is a recipient of the Denise O’Donnell Day Pro Bono Award and the Women’s and Children’s Alliance Tribute to Women and Industry Award.

Christine M. Salmi, 45, is Of Counsel at Perkins Coie in Boise. She does pro bono work helping abused and neglected children as they go through the foster care system. She also supports Go Lead Idaho, a group dedicated to encouraging, educating and supporting women take on leadership roles.

Amanda Keating Schaus, 40, is General Counsel for the Brighton Corporation in Boise. The company does real property development including commercial and residential projects. She played a key role mitigating harm during the housing market collapse and the company has rebounded with greater market share and profitability. Recently, she played an instrumental role in developing the Marianne Williams Park in cooperation with the City of Boise.

## Concordia delivers Leaders in Action Awards

Concordia University School of Law is honoring Dr. Linda Clark and Richard C. Fields as Leaders in Action, having opened doors for others in the community through their innovative leadership in either the education or legal profession.

Richard C. Fields is chairman of the Law School’s Dean’s Advisory Council. Mr. Fields, senior partner at Mofatt Thomas Barrett Rock & Fields, is a fellow of the American College of Trial Lawyers, and was ACTL’s state chairman from 1993-1995. He is past president of the Idaho State Bar, the Idaho Association of Defense Counsel, the Idaho chapter of the American Board of Trial Advocates and the Western States Bar Conference, past chancellor of the Jackrabbit States Bar, and initial membership chairman for the Idaho Chapter of the Federal Bar Association.

While State Bar president, he helped develop the Idaho Volunteer Lawyers Program, which provides pro bono legal services throughout the state.

He served a three-year term as lawyer representative to the Ninth Circuit Judicial Conference. As chair of the Idaho State Bar Professionalism & Ethics Section, helped establish the courts’ Standards for Civility in Professional Conduct.

Mr. Fields is past president of the Learning Lab, an adult and family literacy program, and of the Boise Philharmonic Association, as well as a long-time member of the Salvation Army Advisory Board and continuing participant in United Way and Idaho Community Foundation activities.

Mr. Fields is the recipient of many professional awards, including the Idaho State Bar’s Outstanding Service Award (1990), Professionalism Award (1992), and Distinguished Lawyer Award (2000), as well as an Exemplary Service Award from the Federal Bar Association (2008).

Dr. Linda Clark, Superintendent of Meridian School District, the largest district in the state, will be honored as well.



Richard C. Fields

## OF INTEREST

She has long been recognized as a leader in education, curriculum and professional advancement for the district's 35,000 students in 49 schools. She received the National Center for Education and the Economy's Technology Leader of the Year Award. She has also earned the Professional -Technical Education's Distinguished Service Award.



Dr. Linda Clark

### Tracy Crane joins 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

### Betty Richardson receives the first annual Dave Judy Civil Rights Award

Named after long-time ACLU volunteer Dave Judy, who recently passed away, this award "honors those whose passion, genuine concern for others, and devotion to civil rights help preserve liberty, justice, and equality for all Idahoans," according to an announcement by the ACLU of Idaho.



Betty Richardson

### Second District welcomes Hon. Bruce E. Plackowski

The Hon. Bruce E. Plackowski has been appointed the Nez Perce Tribe's new Chief Judge. Judge Plackowski is a graduate from Alma College (1974) and

the University of Detroit School of Law (1977). He has been employed at Oakland County Legal Aid Society, Schoolcraft County (Prosecuting Attorney), and was a partner in Davis, Olsen, Filoramo, Plackowski and Jarvi Law Firm. He has also served as a Michigan District Court Judge, Saginaw Chippewa Chief Tribal Court Judge, and State of Michigan Unemployment Law Judge.

### Andrew Kim selected as Assistant Professor at Concordia School of Law

Concordia University School of Law Associate Dean of Academics Greg Sergienko announced that Andrew Kim will join Concordia Law as a full-time faculty member beginning in the early summer of 2013. In this position, Kim will teach first- and second-year courses and electives.

"Students, faculty and staff appreciated Professor Kim's scholarly work and his teaching ability when he visited earlier this year," Sergienko said. "He will increase our school's existing strengths in quantitative and economic research. Applying economic methods to analyze legal choices has shown great success in the area of criminal law, and Kim's work will provide new achievements in that area."

Kim has spent the past two years as a visiting assistant professor at the School of Law at Washington University in St. Louis, Mo.

Prior to becoming a law professor, Kim served as a judicial clerk for Justice Richard N. Palmer of the Supreme Court of Connecticut in Hartford, Conn. His role included conducting legal research, preparing memoranda, and drafting opinions and dissents for Justice Palmer.

He is an experienced researcher, with several works in progress examining the United States' criminal justice system, using tools from economics, social psychology and statistics to identify and explore inefficiencies in the rules and structures that define the judicial system.

Kim received his B.A. in economics, anthropology and physics from University of Chicago in 2000. He was awarded his J.D., cum laude, from Harvard Law

School in 2010. During law school, Kim served as the general editor for the Harvard Civil Rights-Civil Liberties Law Review.

### Ada Prosecutor hires Jan Bennetts as Chief of Staff

With the assistance of the of Ada County Board of Commissioners, Ada County Prosecuting Attorney Greg Bower has created a Chief of Staff position. During Greg Bower's 30-year tenure as prosecuting attorney, his staff has grown to 140 employees. Despite the growth, the top-level of leadership has remained the same, including Chief Deputy of the Criminal Division Roger Bourne, and Chief Deputy of the Civil Division Ted Argyle.

Bower appointed Jan M. Bennetts as Chief of Staff and began her duties in January. Jan reports directly to Prosecutor Bower.

Jan began her career in 1992 as a Judicial Law Clerk to the Honorable Thomas G. Nelson of the Ninth Circuit Court of Appeals. In 1994, at the conclusion of her clerkship, Prosecutor Bower hired Jan as a Deputy Ada County Prosecuting Attorney.

During the course of her career as a deputy prosecutor, Jan handled a wide variety of criminal cases, including murder and capital cases. She has also held various leadership positions within the Criminal Division.

Jan is a native Idahoan who grew up on a ranch in Challis. She received her undergraduate degree from the University of Idaho and her Juris Doctorate degree from Willamette University College of Law in Salem, Oregon.

### Hawley Troxell promotes Busacker, adds Cranney

Hawley Troxell is pleased to announce attorney Bret Busacker has been elected to the firm's partnership. Busacker returned home to the Treasure Valley in 2011 to join Hawley Troxell after practicing law in Ohio for 10 years. He is a member of the employee benefits and executive compensation practice group, as well as the employment, tax, and corporate groups.

Busacker's practice focuses on employee benefits and executive compensation matters with privately owned and



Jan M. Bennetts



Andrew Kim

## OF INTEREST

publicly traded clients in Idaho and nationally. He is a frequent speaker on various employee benefits topics, including health care reform and the fiduciary and governance requirements applicable to employer-sponsored benefit plans. He advises clients on the tax and benefits issues in mergers and acquisitions, negotiating employment and severance agreements, managing DOL and IRS audits, and complying with the various tax and securities laws that impact employee benefit arrangements and incentive plans.



Bret Busacker

Hawley Troxell is also pleased to welcome Justin Cranney to the firm as an associate attorney in the real estate group. His practice includes commercial and real estate litigation, real estate development, drafting contracts, leases, and purchase agreements.

Cranney received his J.D., cum laude, from Case Western Reserve University School of Law in 2008, and his B.A. from Weber State University in psychology in 2004. During his time at Case Western, he was the president of the Hispanic Law Student Association, a member of the Student Body Budget Committee, involved with the J. Reuben Clark Law Society, and selected to work with the Federal Trade Commission. Cranney currently volunteers as a Court Appointed Special Advocate (CASA) Attorney where he represents guardian ad litem for children in state custody pursuant to the Child Protective Act, and also works with Boy Scouts as a merit badge counselor.



Justin Cranney

Hawley Troxell announced that it has been recognized by Populus as one of the Best Places to Work in Idaho. This distinction was awarded to the firm as the result of surveys completed by Hawley Troxell employees who were asked to provide feedback in areas of work environment, flexibility, and quality of management. The compiled scores gathered from these

surveys exceeded the threshold needed to be considered a best place to work, resulting in the firm being ranked among the top scoring medium-sized businesses in the state of Idaho. Hawley Troxell will be recognized, along with the other ranked businesses, at an awards banquet on April 18, 2013, at the Linen Building in Boise.

### **Alan Gardner, Richard Owen active in national organization**

On March 16, 2013, the Annual Meeting of the College of Workers' Compensation Lawyers was held in Coral Gables, Florida, during the American Bar Association, Section of Labor and Employment Law and Tort, Trial and Insurance Practice Section Workers' Compensation Seminar.

At that meeting, Richard Owen of Owen & Farney Law Office, Nampa, Idaho, was inducted as a Fellow in the College.

Also at that meeting, Fellow Alan Gardner of Gardner Law Office, Boise, Idaho, was elected to the Board of Governors of the College.

The College of Workers' Compensation Lawyers honors those attorneys who have 20 years of practice in the Workers' Compensation field and who have demonstrated a distinguished career in Workers' Compensation.



Richard Owen



Alan Gardner

### **Patti Tobias presented with national honor**

The National Center for State Courts has awarded Patricia Tobias, the administrative director of Idaho's court system, its Warren E. Burger Award.

The award is given annually to an individual who has made significant contributions to the administration of the nation's state courts. Award winners demonstrate professional expertise, leadership, creativity, innovation and sound judgment. The award honors administrators whose steps to improve court operation at the

state or local level may apply to courts nationwide.

Ms. Tobias has been the administrator of Idaho's court system since 1993. She has helped introduce improvements including creative use of technology, enhanced training for court personnel, courts focusing on families and children, drug courts, and services designed to help citizens understand and navigate the judicial system. She previously worked in court administrative positions in Missouri.

Tobias was awarded the Idaho Court's Kramer Award in 2001, the Idaho State Bar's Award of Distinction in 2003, the Public Policy Leadership Award in 2003 and the Justice Management Institute's Ernest C. Friesen Award of Excellence in 2008. She earned her Bachelor of Science from the University of Illinois, and her master's in judicial administration from the University of Denver College of Law.



Patti Tobias

### **Molly O'Leary chosen for leadership position**

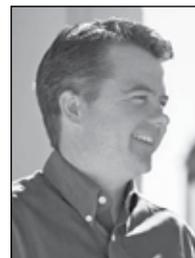
Idaho State Bar Commissioner Molly O'Leary was selected at this year's Western States Bar Conference in March as President Elect for conference. Her duties as president will begin at the end of the 2015 conference. The Western States Bar Conference assists the leadership of bar organizations in the West to better serve the membership and profession.



Molly O'Leary

## CORRECTION

An "Of Interest" announcement in last month's magazine inadvertently omitted a picture of principal Wade Woodard, of the new civil litigation law firm, Andersen Banducci, LLC.



Wade Woodard

# REFLECTION.

*Bob Minto, CEO, Executive Chair, and Founder,  
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CAO officer Sharee Sprague made several innovations to improve service to people in the Sixth Judicial District.

## Innovations Help Court Assistance Office Serve the Public

Dan Black

**T**he crush of clients at the Court Assistance Office, (CAO), posed a serious dilemma for the Sixth District's Assistance Officer — how to meet an ever-growing demand and still offer thorough, timely service. Although individuals are encouraged and advised to seek counsel from an attorney, more people want to do the work themselves. It's a pressing issue across Idaho.

When Sharee Sprague started as the lone officer in the Sixth Judicial District's Pocatello office in 2006 the office made about 3,000 contacts a year. Last year that rose to nearly 7,000. Appointments were being made for six or seven weeks out. So Sharee looked for ways to improve both timeliness and quality of forms reaching the judge.

Quite often people seeking a divorce or other simple legal matters do not un-

derstand the particulars or appreciate the importance of details. "They just want a final order and think they can work it out without details," Sharee said. Custody arrangements, division of property and child support need to be explicit before filings get to the court. A pre-filing review helps reduce errors. But getting to that point was daunting, especially with increasing numbers of clients.

### **Group workshops**

To accommodate the demand, Sharee changed how clients receive assistance. She used to hand out forms to those who wanted to file for divorce, custody or modifications during the office's limited walk-in hours. They would return the forms riddled with errors or omissions, which took more appointments and lots of time to explain things on a one-on-one basis. Now Sharee only gives out the forms for custody issues to those who attend a workshop offered each Wednesday at which she explains the forms and the process to a group. The clients ask good

### **More than one way to scratch that pro bono itch**

The Idaho Pro Bono Commission has a suggested "menu" of options for local Pro Bono Committees. The document suggests projects coordinated with local CAO offices as well as creating brochures, training for pro-bono lawyers, a hotline, "street" law clinics in libraries, combined legal and medical issue clinics, and other ideas. The full menu is available online at the Idaho Law Foundation's web page at: <http://isb.idaho.gov/ilf/ivlp/ivlp.html>

questions the others had not previously considered. And, unexpectedly, “the clients help each other,” she said, adding “there is power when individuals with common experiences meet together.”

“Now they understand the same information that was already written,” she said, because of the workshops. They can set an appointment to have child support calculated and to have copies made, forms notarized, etc. The litigants now return with much more complete forms. “The process has especially helped empower people from all levels of education and financial situations — and that’s important,” she said. Most clients no longer need a separate appointment to review their forms.

### **Attorney workshops**

Having been Judge Mark Allen Beebe’s clerk for 14 years in Power County, and having familiarity with the Idaho Volunteer Lawyers Program, (IVLP), Sharee took initiative to divert the more complex matters to pro bono lawyers in her district. She used her contacts and also “talked it up” at family law CLEs to recruit volunteers.

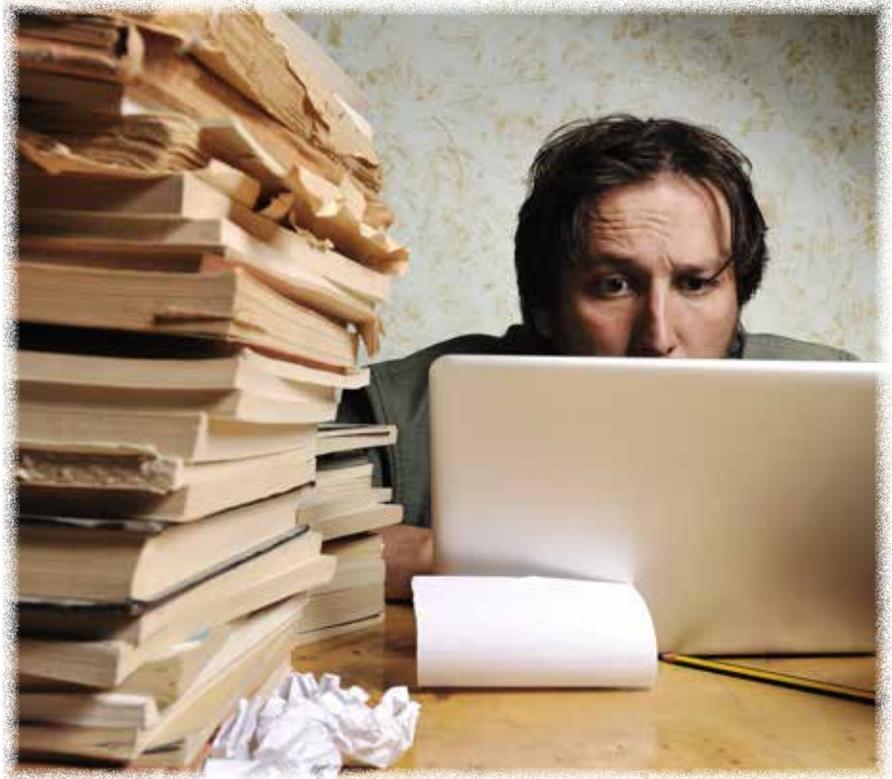
“Our bar here in the Sixth District has been wonderful,” she said. The second Wednesday of every month is reserved for people to meet with pro bono attorneys in a courtroom in Pocatello. The volunteer attorneys provide legal information in a group format for any party that appears.

Some volunteer attorneys have followed up with people from the workshops and assisted in critical situations — changing venue for custody matters, getting orders set aside nunc pro tunc, and defending their cases in contested settings.

Those pro bono contributions are documented, which helps the legal profession monitor and improve access to that essential obligation. Currently, the Pocatello office has 15 volunteer attorneys providing pro bono service, with another five or six willing to join their ranks, if needed. Because they work through the statewide IVLP, clients are screened, verified as low-income and the attorneys receive malpractice coverage.

Before attorney workshops, Sharee gathers an intake form which helps the attorney determine if there might be a conflict of interest with that particular attorney or firm. That form states that the CAO and attorney are not creating an attorney-client relationship through the workshop and that anything sensitive or confidential should be discussed outside of the workshop.

According to Gary Schreiner, Sixth District Family Court Services Director,



since the inception of the workshops, the number of contested cases between self-represented litigants has declined.

Sharee apprises Judge Rick Carnaroli of the Pro Bono Commission of any updates and/or changes in local Court Assistance Office and attorney services being provided in the Sixth District. The workshops are gaining momentum as Judge Mick Hodges, also a member of the Pro Bono Commission, worked with Twin Falls County Court Assistance Officer Jerry Wooley and local attorneys to get similar workshops launched in the Fifth District. Burt Butler, District Trial Court Administrator, and Brad Rigby, District Court Assistance Officer, in the Seventh District have begun using workshops to assist patrons as well.

### **A tradition of volunteerism**

The Sixth District has a long tradition of volunteerism and community-based solutions. Last summer Sharee coordinated a workshop with the local bar for victims of the Charlotte Fire that burned 100 homes and left 95 families homeless. “That may not have happened if not for the collaborative relationship established between the office and our local bar,” she said.

“I am proud of the services that we are providing locally. I couldn’t provide any of that without the support of the trial court administrator, our judges and our local bar,” she said.

*Currently, the Pocatello office has 15 volunteer attorneys providing pro bono service, with another five or six willing to join their ranks, if needed.*

What’s next? Sharee recently met with the volunteer attorneys to discuss “taking it to the next level” to improve clients’ understanding of their legal rights and to help peaceably resolve family conflicts. The group is currently working to connect volunteer attorneys with clients by offering unbundled services and handling complex matters like obtaining temporary orders, mediation, or finessing high-conflict cases.

A pervasive spirit of cooperation empowered Sharee to develop these innovations, something that is not lost on Sharee. “Nobody told me no,” she said.

# Idaho Women Lawyers Honors its Luminaries

Left: United States Attorney for Idaho Wendy Olson addresses the Idaho Women Lawyers after receiving the 2013 Kate Feltham Award at the IWL Annual Award Banquet on March 14, which featured a keynote address by Chief United States Magistrate Judge Candy Wagahoff Dale.

Below: Nicole Snyder accepts flowers from IWL board member Peg Dougherty in appreciation for organizing the awards dinner.

Photos by Chris Thometz Photography



The legal community from around the state gathered at the Boise Centre on March 14 to honor winners of Idaho Women Lawyers awards, given to distinguished professionals in the legal field. The Kate Feltham Award was given to United States Attorney Wendy Olson. It is awarded to an individual who has made extraordinary efforts to promote equal rights and opportunities for women within the legal community in Idaho.

Hawley Troxell partner Paula L. Kluksdal was the first woman to receive the IWL Setting the Bar Award. The award is intended to honor a female lawyer who is well respected in the legal field for exemplary service and championing and mentoring others. She received the award because of her work with the Fourth District Bar Association, Idaho Partners Against Domestic Violence, and for serving as a role model for women in leadership.

She has served on the executive committee of Idaho Partners Against Domestic Violence since 2005, and was a recipient of the Idaho State Bar Outstanding Service Award in 2011, Idaho Business Review Women of the Year Award in 2008, and Women's & Children's Alliance TWIN Award in 2007.

WEforce, a company that utilizes a holistic approach to a mediated divorce won the 2013 Innovator Award from the IWL. Michelle Crosby of the company accepted the award. The award is given to entities or individuals who have promoted creative change in the legal community.

Laura E. Burri of Ringert Law won the Notable Achievement of the Year Award, which goes to entities or individuals who have made a significant contribution in the legal community.

The 2013 Bertha Stull Green Award was given to Anne Z. Dwelle. She prac-

tices in Moscow. This award is given to a woman in the legal community who has demonstrated a commitment to her community and public service. She practices law at Wakefield and Dwelle.

Keisha L. Oxendine of Wallace won the 2013 Rising Star Award, which is given to a woman within the first 7 years of practice for her contributions to the legal community and who appears to be on a path toward even greater accomplishment. She works as the Shoshone County Prosecutor.





Photo by UI Photographic Services

Trainer Peter Kaiser explains to UI College of Law students some of the functionality of Bloomberg Law, a legal research web tool.

## Bloomberg Law Makes a Debut at UI College of Law

John Hasko

**F**or the past few decades, the electronic legal field has been dominated by LEXIS and WESTLAW when it comes to databases that endeavor to collect a variety of different types of materials in one package. In the past couple of years, Bloomberg Law has attempted to broaden its range of offerings to compete with LEXIS and WESTLAW, not only for the law school market, but also for the practicing bar.

Idaho attorneys are given access to CASEMAKER as part of the membership benefit for belonging to the Bar. And members can purchase add-ons to enhance its functionality. But for those who want more, there are options.

Originally designed to provide news and business information, the database has grown to include a formidable amount of legal information, as Bloomberg has attempted to make the database not just informational, but useful, for attorneys. In addition to a full range of court opinions, statutes, and administrative and regulatory materials from the federal government and the states, and BCite, a citator similar to Shepard's and KeyCite, Bloomberg Law has added a variety of secondary materials to allow searchers to delve deeper

into their practice areas. Discussed below are samplings of some of those tools.

Especially useful among these materials is a collection of Bureau of National Affairs (BNA) looseleaf services in electronic format. These can be accessed to locate news, analysis, and practical guidance to support the primary legal research, and provide a measure of currency. As an example, if using the Practice Center for Intellectual Property, court opinions, statutes, and regulations are available, along with the ability to consult secondary materials on subsets of IP Law, such as Trade Secret Law, International IP Law, Technology and Internet Law, and Privacy & Information Law, from BNA publications.

In addition to the BNA library, there are collections of books and treatises produced by the American Bankruptcy Institute (ABI), the American Bar Association (ABA), the Practising Law Institute (PLI), and Wiley Press.

For attorneys involved in litigation, Bloomberg Law offers a Litigation and Dockets collection. Here dockets from federal, state, and international courts can be accessed, with the ability to set up a docket tracking service to retrieve updates to the dockets via email.

There is a section of the database dealing with Transactional Law, containing

deal news, expert commentary, practice notes, and a fully searchable EDGAR database. Forms from the American Law Institute-American Bar Association (ALI-ABA) are available, along with a unique database called "DealMaker Documents & Clauses," a collection of over one million clauses that constitute tried and true language for creating legal documents.

Bloomberg Law also allows access to the Bloomberg news service, an award-winning collection of proprietary stories produced by journalists in 72 countries, major newswire services, newspapers, and magazines. And, there is a Companies and Markets database, with detailed company profiles for every publicly traded company anywhere in the world, along with profiles of over 100,000 private companies.

Bloomberg Law allows a researcher to retrieve a broad collection of primary and secondary legal materials in a very seamless operation. It was designated the American Association of Law Libraries (AALL) 2012 New Product of the Year, and is well worth your consideration.

Free trial subscriptions to Bloomberg Law are available by connecting to Bloomberg Law at [www.bloomberglaw.com](http://www.bloomberglaw.com), and clicking on the link, "Request a Trial," or by calling 1(888)560-2529.



Photo by Kyrme Graziano

Guardian Mentorship Program volunteers Mary Auschel, Leon Rothstein and Marge Cleverdon talk about their volunteer work at the Ada County Courthouse.

## Volunteers Bolster Ada County Guardian Mentorship Program

Leon Rothstein

**I**daho Code Section 15-5-419 requires annual status reports from court appointed guardians and conservators. The purpose is to help assure the ward's well-being and protection of his or her assets.

Wards include children, incapacitated adults, and seniors unable to care for themselves. Many have permanent impairments making them unlikely to ever be self-sufficient.

Concordia University School of Law provides volunteer manpower for this program. Participation by students brings pro bono credit toward the 50 hour requirement for graduation. This is but one of Concordia's community outreach initiatives. This effort brings valuable experience and learning opportunity to Concordia's law students.

The Ada County Guardianship Monitoring Program (GMP) oversees guardians and conservators on behalf of the court. Established in 1995, and patterned after an AARP design, the program was the first of its kind in the state. To help protect this vulnerable segment of our population, the program acts as the eyes and ears of the court. GMP uses a cadre of volunteers to carry out this mission. Volunteers are trained in a variety of skills – communication, interviewing, detecting signs of abuse, cultural aware-

ness, physical and mental health issues, and available resources. Together, volunteers and GMP's professional staff help loved ones meet a fundamental human urge – to care for other loved ones who are not fully able to look after themselves.

The Program prepares written annual reports for the court – one for guardians and one for conservators. To prepare the guardian reports, volunteers conduct home visits at which they interview wards, caregivers, and guardians. The purpose is not to supervise or manage the guardian, but to assure that the ward's needs are being met. The volunteer observes and reports on living environment, currency of medical treatment, activities, and overall health and happiness of the ward. The focus is not on providing expert analysis, at which he is not qualified, but on common sense questioning and observation. Volunteers then prepare a detailed report focusing on these needs – day to day living as well as longer term objectives.

Conservators complete an initial report which includes detailed balance sheet and income statements. Detailed annual reports include income, expenditures, change in assets, and change in liabilities. Court volunteers then review these reports. As with guardianship

monitoring, the purpose is not so much to supervise conservators as to check that wards' needs and finances are properly minded.

All reports are reviewed by GMP staff, and most are routinely filed with the court. If staff detects a possible problem, members may start discussion with guardians or conservators as appropriate. Staff can recommend judicial conferences and even hearings if needed.

Most guardians and conservators view this program positively. They view their task not as babysitting, but as nurturing and loving. Monitoring is not mere paperwork, but an opportunity to review progress, consider updating their plans, and indeed show that the System works to the benefit of the ward.

For more information about Concordia, community outreach, and experiential learning contact Professor Jodi Nafzger, Director of Experiential Learning, at [jnafzger@cu-portland.edu](mailto:jnafzger@cu-portland.edu), (208) 639-5403.

### About the Author

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# Mock Trial season objections, cross-

Every member of the Idaho State Bar is also a member of its charitable arm, the Idaho Law Foundation, which is partially funded through a check-off donation during annual licensing. Part of the Foundation's work involves designing, organizing and conducting the statewide Mock Trial program annually. By organizing

Starting above and in clockwise order: ILF Development Director Carey Shoufler gives some practical direction to teams gathered for state competition in Boise.

- A student plays the role of witness, answering questions within the scope of the mock trial materials.
- After a briefing to all the schools, two 'attorneys' head to a courtroom at the Ada County Courthouse to argue their case. Teams are told at the last minute whether they are the plaintiff or defense.
- The plaintiff's argument is a "nail in search of a hammer," a student attorney says in his closing argument.
- Teams from Ambrose and Logos Schools pose in the courtroom after their duel for state champion, as parents, relatives and volunteer coaches take photos.
- Student attorneys glance at notes during a short recess. The final round was held in the Idaho Supreme Court Courtroom.



Photos by Dan Black





# ends with explosive tests of examination and keeping focused

dozens of volunteers, teams across the state engage hundreds of students to prepare, practice and compete. The program helps develop analytical skills, speaking in public and serves to introduce young people to the legal system. The 2013 Mock Trial Season closed with a showdown between powerhouse schools; Ambrose losing in the final round by a razor-thin 4 points to Lo-

gos School of Moscow. Congratulations to Logos School and their coach Chris Schlect, as well as the entire cadre of aspiring litigators from across Idaho. The final round was held, as usual, in the Idaho Supreme Court Courtroom in Boise. Numerous attorneys were involved all season as coaches and advisors. More volunteers served as judges and scorers during the competition.





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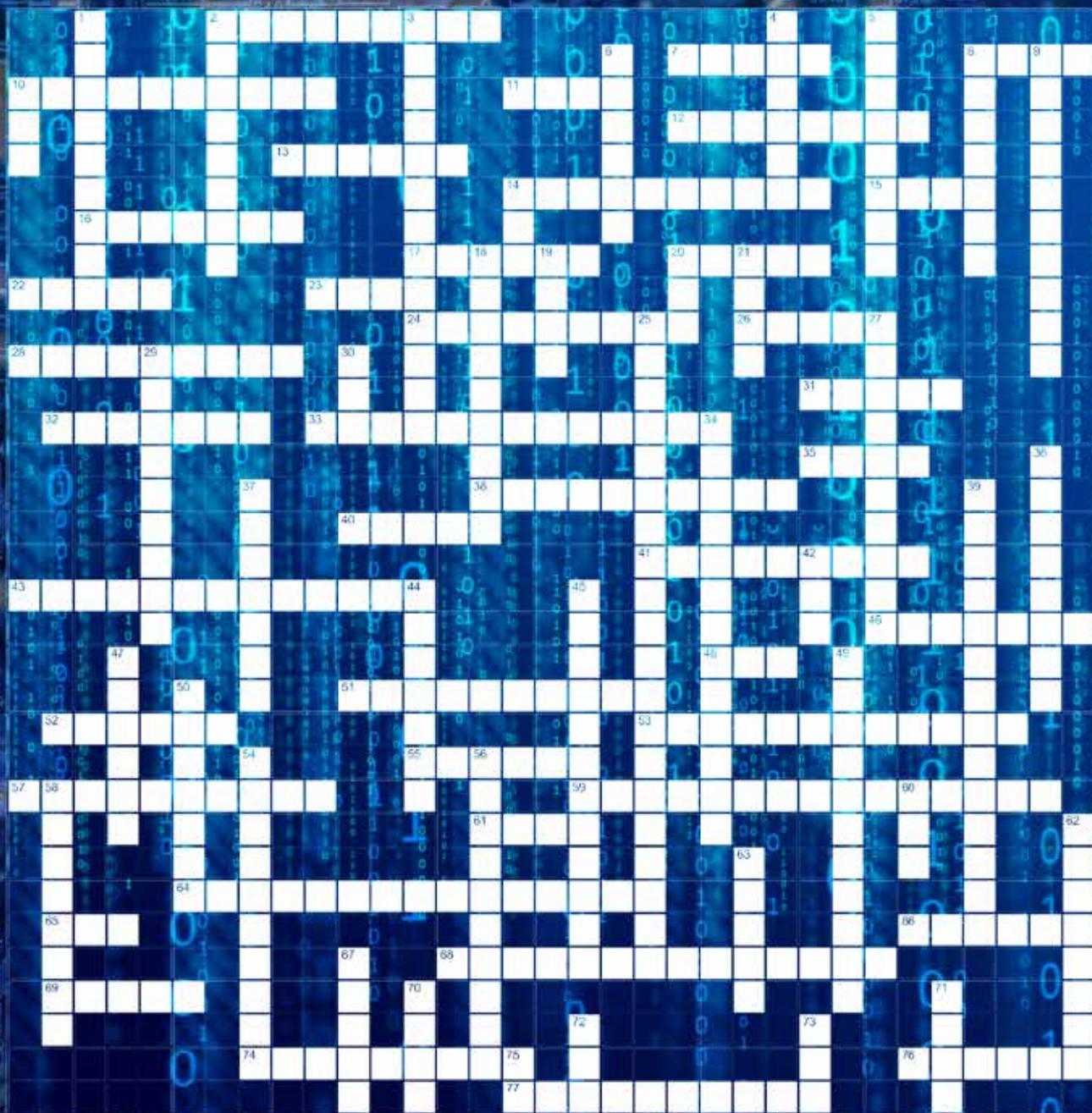
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<sup>1</sup>"Profile of Legal Malpractice Claims: 2008–2011," American Bar Association, September 2012.

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