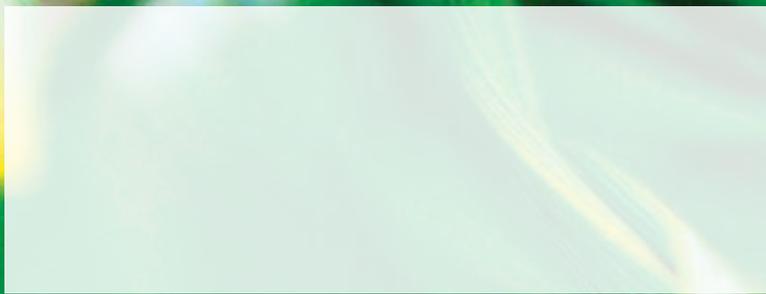




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Volume 57, No. 8
August 2014



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The cover photograph entitled "Birth of a Pinecone" was taken by attorney Lane Erickson of Racine, Olson, Nye, Budge & Bailey, Chtd. in Pocatello.

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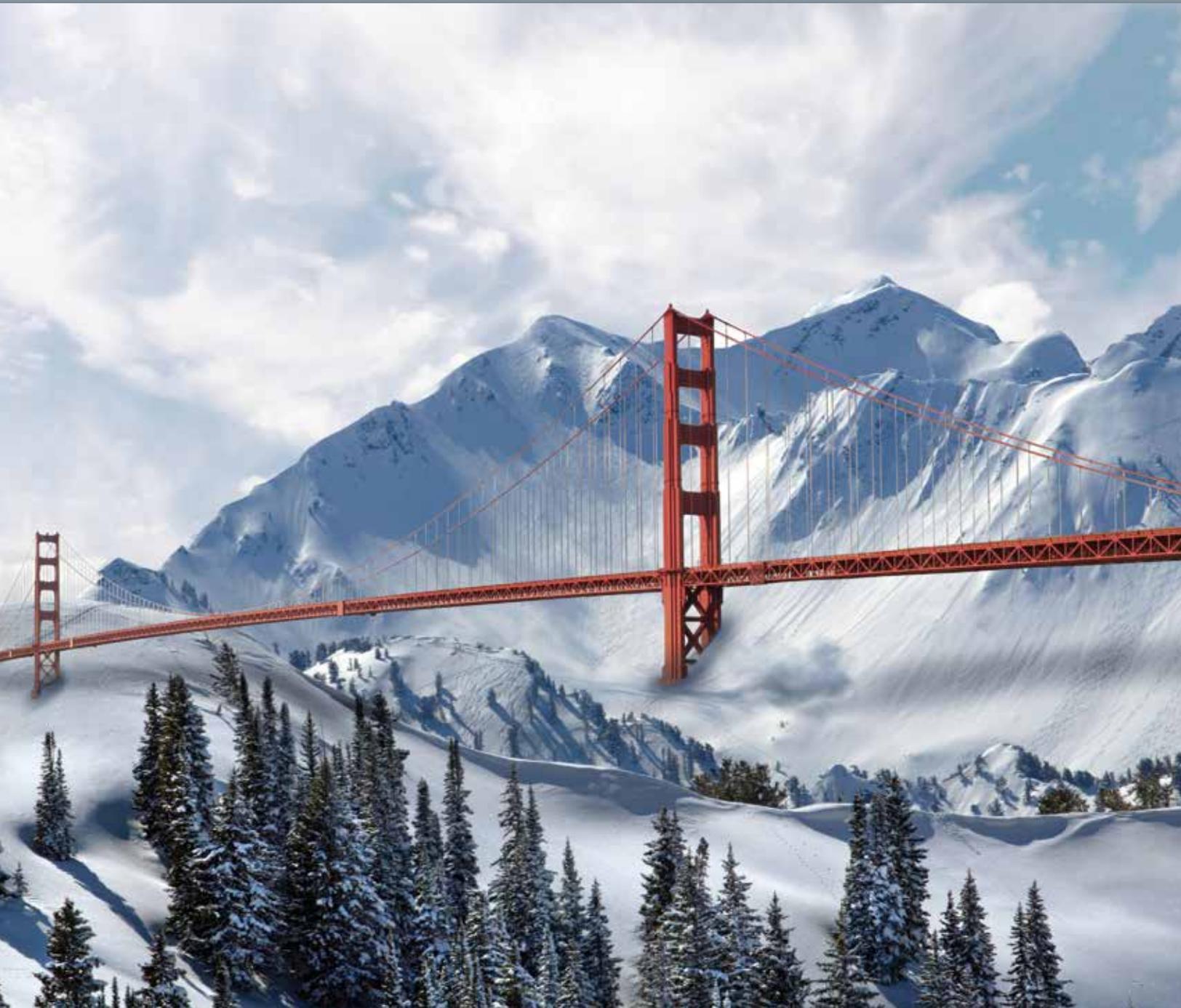
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GBSO is pleased to announce that
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Daniel has spent his nearly 20 years of practice focused on commercial, business and employment litigation matters. Daniel's litigation practice has involved a variety of issues including title insurance defense, mechanic's lien litigation and general business litigation, specifically, trade secret protection, non-compete actions and anti-trust/monopoly related matters. In addition to his litigation practice, Daniel also advises his corporate clients on the implementation and lawful compliance with various employment policies and practices.

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August 20

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9:00 a.m. (MDT)

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September

September 12 – 13

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Sponsored by the Taxation, Probate and Trust Law
Section

Sun Valley Resort, 1 Sun Valley Road – Sun Valley

10.5 CLE credits of which 1.0 is Ethics

For lodging reservation please call (800) 786-8259

September 17

*Handling Your First or Next Child Support Case –
Establishment and Enforcement*

Sponsored by the Idaho Law Foundation
The Law Center – 525 W. Jefferson, Boise /
Statewide Webcast

9:00 a.m. (MDT)

2.0 CLE credits **NAC**

September (continued)

September 19

Attorney Ethics When Starting a New Firm

Sponsored by the Idaho Law Foundation
in Partnership with Peach New Media and
WebCredenza Inc.

Audio Stream / Teleseminar

11:00 a.m. (MDT)

1.0 CLE credits

September 26

*Representing Your Child Client: Child Protection
and Child Custody*

Sponsored by the Family Law Section
Hampton Inn & Suites – 1500 Riverstone Drive,
Coeur d'Alene

8:30 a.m. (PDT)

6.0 CLE credits

October

October 2

New Attorney Program

Sponsored by the Idaho Law Foundation, Inc.
Boise Centre, 850 W. Front, Boise

8:00 a.m. (MDT)

4.0 CLE credits of which 1.5 is Ethics **NAC**

***NAC** — These programs are approved for New Admittee Credit pursuant to Idaho Bar Commission Rule 402(f).

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Career Path Changed Based on a Law Class from Art Smith

Paul B. Rippel
President, Idaho State Bar
Board of Commissioners

It seems to be a common theme for Bar Presidents in their first article to write about what brought them to the practice of law. My route was a bit circuitous. As an undergraduate at the University of Idaho I was pursuing a degree in Range Management, studying ecosystems that support grazing and browsing by tame and wild animals. I thought my future, after graduation, was going to work for the Forest Service, the Bureau of Land Management or a state public lands department.

The focus in Range Management study was largely on flora and fauna, science and natural laws. But there were aspects of human interaction with resources and within society that had to be addressed as well. Our nation was in the midst of enacting serious environmental laws and regulations on clean water, clean air and pesticides and hazardous chemicals. Additionally, cases such as *Sierra Club v. Morton* were beginning to mold our views of how resources and the groups of people wanting to use them should be managed. That would require understanding people and how our American society regulates itself, not just science.

Accordingly, future range managers were required to learn about natural resource law. My class was taught by law professor Art Smith



My main thought at that time was to avoid being a resource manager sued in one of those cases, i.e. stay out of court.

from the University of Idaho College of Law. I remember reading a lot of fine print and cases challenging the sufficiency of environmental impact statements, like the ones I expected to be writing. My main thought at that time was to avoid being a resource manager sued in one of those cases, i.e. stay out of court. That was my first taste of the law aside from traffic court.

A couple of years later as I considered various options for earning a living, I remembered my environmental law class and the challenge it presented. I also liked that saying, "every case is different," believing that if that was true, I would never be bored with a career in the law. It also helped that my favorite book and movie was (and is) Harper Lee's *To Kill a Mockingbird* with all the subtexts both good and bad. I discussed my ideas with my wife Alexis who asked a very pertinent question, "you would rather pay to go to law school in Moscow than take a paid Ph. D. fellowship in Oregon studying wild horses?" When I said yes, she supported me 110%. That was the beginning of what has been a wonderful life in the law.

People ask me when I plan to retire. I tell them I have no plan to re-

tire because I like what I do. If that changes, I'll look into doing something else. As you contemplate what brought you to the law, and though an individual day may be better or worse than another, I sincerely hope that each of you can say that you enjoy being a lawyer.

Finally, we should have a little entertainment now and then, so I am asking you who are so inclined to write a brief paragraph about the most unusual criminal sentence you have encountered. Use your own discretion on whether to keep the judge's name to yourself. Submit them to *The Advocate* (dblack@isb.idaho.gov)staff and they will select one for publication.

About the Author

Paul B. Rippel is a member of Hopkins Roden in Idaho Falls, and current President of the Idaho State Bar Board of Commissioners. Mr. Rippel received a BS from the University of Idaho in 1976, MS at NM State University in 1978, and his JD from the University of Idaho in 1981. He has practiced in Idaho Falls since clerking for the Hon. Arnold T. Beebe for a year. His wife Alexis is also a U of I graduate and they have a son and daughter living in Portland, Oregon.

DISCIPLINE

Craig R. Jorgensen

(Suspension)

On June 5, 2014, the Idaho Supreme Court issued a Disciplinary Order imposing a previously withheld suspension from a prior disciplinary case on Pocatello attorney Craig R. Jorgensen, finding that he violated Idaho Rules of Professional Conduct (“I.R.P.C.”) 5.5 [Unauthorized practice of law] and 1.15(d) [Failure to promptly deliver to client or third party funds that client or third party is entitled to receive]. On October 31, 2012, Mr. Jorgensen received a two-year suspension with all but four months withheld, which he began serving on November 14, 2012, and a three-year period of probation (see January 2013 issue of *The Advocate*). In the June 5, 2014 Disciplinary Order, in addition to imposing the withheld suspension from the prior case, the Idaho Supreme Court imposed an additional three-month suspension, thereby making Mr. Jorgensen ineligible for reinstatement until February 14, 2015. If reinstated to the practice of law, he will then serve the three-year probationary period under the terms and conditions imposed in the October 31, 2012 Disciplinary Order.

The current case involved Mr. Jorgensen’s conduct during his four-month actual suspension. Two days after his suspension began on

November 14, 2012, the Idaho Supreme Court issued an Opinion in a personal injury case in which Mr. Jorgensen had represented the plaintiff, K.A., since 2000. K.A. sustained permanent injuries as a result of a vehicular accident. The Supreme Court’s Opinion affirmed the District Court’s Judgment in favor of K.A. in the amount of \$1,126,843.01.

With respect to I.R.P.C. 5.5, Mr. Jorgensen admitted that he continued to practice law after his suspension began. Although Mr. Jorgensen informed K.A. of his suspension and K.A.’s need to find substitute counsel, and although new counsel substituted into the case, Mr. Jorgensen continued to communicate about the case with K.A., a litigation funding company, US Claims, to which K.A. owed funds after completion of the case which were advanced to him for his personal use, and Medicare. Mr. Jorgensen also admitted that when the defendant paid the \$1.2 million judgment in December 2012, those funds were deposited into his trust account rather than substitute counsel’s trust account and that he periodically disbursed case proceeds totaling \$50,000 to K.A. between December 2012 and June 2013. Mr. Jorgensen admitted that after his suspension and his receipt of the funds, he contacted Medicare and Medicaid to determine whether they had

any liens on K.A.’s case proceeds. Mr. Jorgensen further admitted that he contacted US Claims in January 2013 to inquire whether it would be willing to negotiate a compromise of the funds K.A. owed to it.

With respect to I.R.P.C. 1.15(d), Mr. Jorgensen acknowledged that although he received payment of the \$1.2 million judgment in K.A.’s case in December 2012, he did not disburse the bulk of the funds due and owing to K.A., \$548,106.62, until September 2013, eight months after receiving the check from the defendant. Mr. Jorgensen admitted that although he entered into an agreement with US Claims that he would not disburse any case proceeds to K.A. until US Claims’ interests in those proceeds had been paid in full, he made small disbursements to K.A. prior to paying US Claims and did not pay US Claims its monies due from the case proceeds for approximately five months after he received those funds.

The Idaho Supreme Court’s Disciplinary Order further ordered that Mr. Jorgensen shall reimburse the Idaho State Bar for its costs of the hearing, court reporter and hearing transcript.

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

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Justice Scalia to speak in Boise Aug. 25

BOISE – U.S. Supreme Court Justice Antonin Scalia will provide the keynote address at the Snake River Basin Adjudication celebration in Boise on August 25-26, 2014.

The conference and celebration is sponsored by the Idaho Supreme Court, the University of Idaho College of Law and the Kempthorne Institute. The conference marks the conclusion of the SRBA process.



Justice Antonin Scalia

The historic adjudication of surface and ground water rights in the Snake River Basin in Idaho is the subject of a full-day conference on August 25 and offers 7.75 hours of

CLE credit (credit approval pending). Nationally known water law experts will cover topics related to the history of the adjudication, case management challenges, role of the various constituency groups in the adjudication, and water adjudication issues throughout the western states.

Scalia will speak after a reception followed by a ceremonial signing of the final unified decree of 158,000 separate rights to use water. A panel discussion of the future of water policy is scheduled for Aug 26.

Former Interior Secretary and Idaho Gov. Dirk Kempthorne invited Scalia to attend the celebration.

“I had the pleasure of meeting him as governor and was honored to have him swear me in as Secretary of the Interior,” Kempthorne said. “The Justice’s writings, scholarship and jurisprudence have long been admired

by Idahoans, and it is an honor for us to have him help us celebrate one of this nation’s major achievements in water management.”

Idaho Supreme Court Justice Roger Burdick, who presided over the Snake River Basin Adjudication, said the celebration recognizes the importance of the largest adjudication of its kind in the nation’s history.

“Justice Scalia’s impact and intellect are well documented and bring gravitas to this celebration of cooperation among the Idaho legislature, numerous governors’ offices, and the Idaho judiciary in our effort to catalog Idaho’s water rights,” Burdick said.

Registration for the event is available at <https://secure.meetingsystems.com/SRBA/evite.htm>

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2014 Resolution Process

Diane K. Minnich
Executive Director, Idaho State Bar

Proposed resolutions — Deadline September 25

Do you, your district bar association, practice section or committee have an issue, proposed rule revision or legislative matter that you think should be voted upon by the Idaho State Bar membership. If so, the fall resolution process, or “roadshow” is the opportunity to propose issues for consideration by members of the bar.

Unlike most state bars, the Idaho State Bar cannot take positions on legislative matters, or propose changes to rules of the Court, or substantive rules governing the bar itself, by act of its bar commissioners, or at its Annual Meeting. Matters referenced above must be submitted to the membership for a vote through the resolution process.



This year, resolutions may include proposed changes to the Bar Commission rules to create more opportunity for pro bono work.

Idaho Bar Commission Rule 906 governs the resolution process. Resolutions for the 2014 resolution process must be submitted to the bar office by the close of business on September 25, 2014. If you have questions about the process or how to submit a resolution, please contact me at dminnich@isb.idaho.gov or (208)334-4500.

Resolution meetings schedule

Thursday, November 6
1st District, Coeur d'Alene, noon
2nd District, Moscow, 6:00 p.m.

Tuesday, November 18
7th District, Idaho Falls, Noon

Wednesday, November 19
5th District, Twin Falls, 6:00 p.m.
6th District, Pocatello, Noon

Thursday, November 20
4th District, Boise, Noon
3rd District, Caldwell, 6:00 p.m.

Thank you

Each summer, Commissioners retire and new Commissioners take their place. This year, William (Bill) Wellman, Nampa will be replaced by Dennis Voorhees, Twin Falls; and Boise attorney Robert (Bob) Wetherell will be replaced by Michelle Points of Boise. Paul Rippel, Idaho Falls, became the ISB President at the close of this year's Annual Meeting.

I offer my thanks to Bill and Bob for their service and commitment to the bar. They have both given of their expertise, time and talent to improve the bar and the profession.

Bill Wellman is calm and reasonable. He is willing to listen and help when and where

I offer my thanks to Bill and Bob for their service and commitment to the bar. They have both given of their expertise, time and talent to improve the bar and the profession



needed. He brought to the Board the valuable perspective of a solo practitioner from a smaller community.

Bob Wetherell is committed to serving lawyers, the profession and the public. He was available whenever needed to support the bar and its programs and activities. And, of course, he is a Vandal through and through!

Farewell

At the end of August, my dear friend and colleague, Patti Tobias will be leaving Idaho for the National Center for States Courts in Denver, Colorado. Patti has served as the Administrative Director of the Idaho Court for over 20 years. She has guided the Idaho Courts to be more efficient, innovative and accessible. She has brought together diverse groups of judges, lawyers and non-lawyers to create and establish programs to serve the public and judiciary. The Court and the Bar are losing a friend and an advocate. Working with Patti has been a pleasure — I will miss her!



William (Bill) Wellman



Robert (Bob) Wetherell



Patti Tobias

LARRY C. HUNTER

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Welcome from the Litigation Section

Joseph N. Pirtle

The Litigation Section is pleased to sponsor this issue of *The Advocate*. The Litigation Section is one of the largest and most active sections of the Idaho State Bar. This past year we have focused on presenting CLE seminars at our section meetings. Recent topics include initial disclosures in federal court, deposition strategies, asserting attorney-client and work-product privileges and recent changes to the local federal rules on electronic discovery.

Over the past two years the Litigation Section has donated more than \$20,000 to organizations promoting the law and litigation in general. Much of those funds were donated to Access to Justice Idaho, a statewide campaign to fund legal services for low-income residents and persons with disabilities. The Section also donated funds to the Love The Law! program, whose mission is to develop and maintain a pipeline program that exposes Idaho high school, college and university students with diverse, minority and low-income backgrounds and underrepresented populations to the legal profession and encourages those students to consider pursuing a career in the law.

The articles published in this issue of *The Advocate* address several



litigation issues that we hope you find of interest to your practice. Emil Berg analyzes owner liability and insurance coverage for permissive use of motor vehicles and related laws in Idaho. Josh Evett discusses the impact of the Idaho Supreme Court's recent decision in *Roundtree v. Boise Baseball, LLC* on assumption of risk as a defense in Idaho. Ted Reuter outlines how cryptocurrencies, like Bitcoin, are beginning to impact business transactions and potentially raise confidentiality concerns. Finally, Paul McFarlane provides an overview of the Idaho Small Lawsuit Resolution Act and how it is used to avoid the often expensive costs of litigation.

If your practice involves litigation, whether it be at the administrative level, trial court level or before Idaho's Appellate Courts, we encourage you to attend one of our monthly Section meetings. They are held in Boise at Noon on the third Friday of each month.

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About the Author

Joseph N. Pirtle completed his term as Chairperson of the Litigation Section in July. He is a shareholder in the law firm of *Elam & Burke, P.A.*, practicing in the areas of commercial and business litigation and insurance defense litigation.



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Automobile Owner Liability When the Driver is Negligent — A Primer on Three Doctrines

Emil R. Berg

Many automobile accident cases result from negligent driving by persons other than the vehicle owner. Under the permissive use doctrine, the owner can be liable for the driver's fault even when the driver is not the owner's employee or agent. If the driver is the owner's minor child, that doctrine creates an exception from the generally very limited parental liability for the torts of children under Idaho law.¹

A defendant owner or other person with the right to control the vehicle may also be liable under the negligent entrustment doctrine and, if the driver is the defendant's minor child, the negligent supervision doctrine. Unlike permissive use, those theories require personal negligence of the defendant in addition to the driver's fault.

This article summarizes Idaho law on those three doctrines, including the requirement that the owner's automobile liability insurance apply in permissive use cases.² This information should be useful to not only every practitioner, but to every owner of a car.

Idaho statutes on permissive use

Vehicle owner liability

Idaho Code § 49-2417(1) provides that “[e]very owner of a motor vehicle is liable and responsible for the death of or injury to a person or property resulting from negligence in the operation of his motor vehicle, in the business of the owner or otherwise, by any person using or operating the vehicle with the permission, express or implied, of the owner, and the negligence of the person shall be imputed to the own-

A defendant owner or other person with the right to control the vehicle may also be liable under the negligent entrustment doctrine and, if the driver is the defendant's minor child, the negligent supervision doctrine.

er for all purposes of civil damages.” Subsection (2) of the statute limits the owner's liability “to the amounts set forth under ‘proof of financial responsibility’ in section 49-117, Idaho Code, or the limits of the liability insurance maintained by the owner, whichever is greater,” except when the owner's liability arises from the relationship of principal and agent or master and servant.

Mandatory owner liability insurance coverage for permissive users

Idaho Code § 49-1212(1)(b) requires that an owner's motor vehicle liability insurance policies provide coverage for both permissive users and the named insureds giving express or implied permission. Subsection (12) of the statute prohibits policies with coverage above mandatory minimum limits from providing “a reduced level of coverage to any insured's family or household member or other authorized user,” except as allowed by Idaho Code § 41-2510. That statute provides, in relevant part, that “except as respects the legal liability of the named insured, the insurer shall have the right to exclude, cancel or refuse to renew coverage under an automobile insurance policy as to designated individuals. . . .”

The coverage requirement in section 49-1212(1)(b) only applies to motor vehicle liability policies and not to other types of insurance (like umbrella policies) that may provide coverage to the owner for liability arising out of the operation of a motor vehicle.³

Idaho case law on permissive use

Basic standards

Permissive user status depends upon the facts and there is no “bright line” rule. A number of Idaho precedents, however, identify the important factors and general tests. Those precedents apply a liberal standard to determine permissive user status under the above statutes and their predecessors in order to serve the public policy goal that users of Idaho highways be insured. *See, e.g., Oregon Mutual Insurance Co. v. Farm Bureau Mutual Insurance Co.*⁴ In that case, the Idaho Supreme Court affirmed a district court judgment that a driver had the insurance coverage at issue even though he had deviated from the scope of the permission granted by the vehicle owner. The Supreme Court adopted the most liberal rule for the scope of general and specific permission to use a vehicle, known as the “‘initial permission’ rule, *i.e.*, the permittee is covered although

the use is beyond the scope of the initial permission unless the use so far exceeds the initial permission that the permittee is akin to a thief or converter.”⁵ The decision also cited several Idaho precedents holding that the element of permission is a question of fact to be proved at trial and it can be either express or implied.⁶

Other leading cases supporting liability for permissive use

In *Allied Group Insurance Co. v. Allstate Insurance Co.*,⁷ the Idaho Supreme Court reversed and remanded a summary judgment that had been granted to the insurer whose coverage was at issue with respect to whether the 28-year-old driver (Robert) had implied permission to drive the insured vehicle from its owners who were his parents with whom he lived. The Supreme Court invalidated as inconsistent with Idaho Code § 49-1212(1)(b) an insurance policy provision that excluded coverage for “any person . . . [u]sing a vehicle without a reasonable belief that the person is entitled to do so.” The Court followed its prior decisions concerning implied permission that “do not focus on the driver’s state of mind, but rather on the relationship of the driver and the owner and on the owner’s conduct in relationship to the driver’s access to the vehicle.”⁸

The Court held there were genuine issues of material fact with respect to whether Robert was a permissive user, even though Robert made a sworn statement that he did not have permission and he knew his parents would not give permission; Robert was not listed on the insurance policy and did not have a valid driver’s license; and the parents stated in their depositions that Robert did not have permission. The opinion held summary judgment was precluded by evidence that Robert was living in his parents’ household; the parents kept the car keys

on a nail in the kitchen; the parents did not check the gas, oil, or mileage to see if Robert had been driving the car; the parents did not tell Robert he could not use the car; and on the day of the accident Robert’s mother noticed that he, the automobile and the keys were gone, but took no action.⁹ The precedents cited in the opinion included *Eckels v. Johnson*,¹⁰ which was to essentially the same effect.

Permissive use may be found where the owner has given permission to an initial permittee and that permittee then gives permission to another person without the owner’s knowledge or consent. In *Farm Bureau Mutual Insurance Co. v. Hmelevsky*,¹¹ a minor daughter was using an automobile with the permission of her parents, the automobile’s owners. Contrary to her parents’ instructions, she not only extremely deviated from the short authorized trip to an aunt’s house, but picked up friends and allowed one of them to drive. A 3-2 majority nevertheless held the friend’s driving was with the parents’ permission and thus within the coverage of the parents’ automobile liability insurance policies.

In *Butterfield v. Western Casualty & Surety Co.*,¹² the Court held the automobile was being used with the permission of the named insured, an automobile dealer. The dealer loaned the car to a permittee, whose

car was being repaired by the dealer. There was no special restriction on how the permittee was to use the loaned car, and the permittee and others sustained injuries while it was being operated by another person with the permittee as a passenger. *Butterfield* adopted the rule that “when a general permission is granted by the named insured to use a vehicle, and without any limitation by the named insured against a third person driving, the use of the vehicle by the first permittee is with the permission of the named insured, even though another is driving, provided the use is to serve a purpose, benefit, or advantage of the first permittee.”¹³

In *Farmer’s Insurance Co. v. Brown*¹⁴ the Court applied the *Butterfield* rule to reverse a summary judgment where the witness affidavits were in conflict regarding the permission the owner gave her relatives to use her car while she was away.

The recent decision in *Taft v. Jumbo Foods, Inc.*,¹⁵ addressed several issues where the defendant was in the process of selling a vehicle to an employee who had previously used the vehicle in his job as a sales person. He allowed his minor son to drive the vehicle, resulting in injuries to the plaintiff. Among other rulings, the decision reversed a summary judgment for the defendant on a claim of imputed liability for a permissive user under Idaho Code § 49-2417. After summarizing detailed

Permissive use may be found where the owner has given permission to an initial permittee and that permittee then gives permission to another person without the owner’s knowledge or consent.

evidence, the Court held that while the defendant “may not have had physical control of the vehicle at the time of the accident, it could well be reasonably inferred that it had the right to control the vehicle.”¹⁶ In treating “right to control” as an element for permissive use liability, the Court cited *Lopez v. Langer*,¹⁷ in which the claim was for negligent entrustment.

Permissive use doctrine as alternative to respondeat superior liability

The 2011 decision in *Nava v. Rivas-Del Toro*¹⁸ illustrates that a claim of vehicle owner liability for the negligence of a permissive user under Idaho Code § 49-2417(1) (which refers to operation of the vehicle “in the business of the owner or otherwise”) is sometimes an alternative to a claim for respondeat superior liability.

Leading precedents limiting the permissive use doctrine

In *Jennings v. Edmo*¹⁹ the Court of Appeals affirmed a summary judgment that a sub-permittee was not a permissive user. The elderly primary owner, Edmo, allowed her grandson (not an owner) to have unrestricted use of the automobile. While driving it one evening, he was arrested and charged with driving under the influence of intoxicants. He told the arresting officer that his girlfriend, who was one of his passengers, could drive the car and she was allowed to take it. She retained control of it until the next evening when, following revelry with another man, Hildreth, at a bar, she allowed the intoxicated Hildreth, who had no driver’s license and no insurance, to drive it, resulting in the collision with the plaintiff’s vehicle. The Court of Appeals upheld the dismissal of the plaintiff’s complaint against Edmo and the other owner based on a summary judgment, holding there was no evidence of implied permission to Hildreth from Edmo’s original grant of permission to her grandson.²⁰

A summary judgment against permissive user status was also affirmed in *Colborn v. Freeman*.²¹ The Court held that a car purchaser did not become a permissive user when he fraudulently obtained possession of the vehicle from the owner, a car dealer, by paying for it with bad checks.

Liability for negligent entrustment of motor vehicles

The Idaho Supreme Court explained the theory of negligent entrustment in *Ransom v. City of Garden City*,²² quoting the Restatement (Second) of Torts, § 308 (1965):

The Court held that a car purchaser did not become a permissive user when he fraudulently obtained possession of the vehicle from the owner, a car dealer, by paying for it with bad checks.

It is negligence to permit a third person to use a thing or engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.’ (Emphasis added in *Ransom* opinion.)

Ransom also noted the Restatement comments explaining that

the rule is most frequently applied “where the person is a member of a class which is notoriously likely to misuse the thing which the actor permits him to use,” and also “if the third person’s known character or the peculiar circumstances of the case are such as to give the actor good reason to believe that the third person may misuse it,” such as when the owner entrusts a car to an obviously intoxicated person.²³

In *Fuller v. Studer*²⁴ the Court further explained that the crucial element of this tort is “the legal right to ‘control’ the thing entrusted.” For example, “a plaintiff need not show that the defendant placed the instrument in ‘the hands of a child,’ but that the defendant acted ‘in a manner that it became likely a child would come into possession of it and use it in such a manner as to create an unreasonable risk of harm to others.’” “While ‘control’ usually means legal ownership, the paramount requirement is a person’s right to control, even if the person is not the legal owner.”

That explanation shows that either an owner or a nonowner, such as a permissive user who negligently allows a drunken or otherwise incompetent or reckless third person to operate the vehicle, can also be liable for negligent entrustment, or vice versa. This, however, is not always the case. For example, in *Taft v. Jumbo Foods, Inc.* (discussed above as supporting permissive use liability) the Court affirmed a summary judgment against a claim for negligent entrustment, holding there was no evidence the defendant knew or should have known that the driver was likely to use the vehicle in a way that would create an unreasonable risk of harm to others.²⁵

Negligent supervision

Parents are also liable under the doctrine of negligent supervision for

failing to properly control a minor child. The *Fuller v. Studer* opinion (discussed above under the doctrine of negligent entrustment) explains:

... [A] parent who has knowledge of a minor child's propensity for a particular type of harmful conduct is under an affirmative duty to guard against the foreseeable consequences of that specific propensity. Thus, this duty requires a two-step analysis. First, the court must look to see whether a parent has knowledge of a minor child's propensity or proclivity for a specific harmful conduct. If the first step is answered affirmatively, then it must be determined whether the parent took reasonable steps to guard against the foreseeable consequences of the minor child's propensity for the specific harmful conduct. (footnote omitted)²⁶

Conclusion

In automobile accident cases involving a car driven by someone other than the owner attorneys must be alert to whether the doctrines of permissive use or negligent entrustment apply. If the driver is a minor child, the doctrine of negligent supervision may also apply.

A case may present all three issues. Consider, for example, the following hypothetical:

Smith entrusts Smith's car to Jones, giving a specific instruction that Jones is not to allow Jones' minor child, unlicensed driver Mary, to drive it, and Smith gives this instruction in Mary's presence. Smith knows, however, that Mary is incorrigible, and has taken cars for reckless joyrides when Jones has left the keys where Mary could get them. Mary does this with Smith's car, negligently injuring Victim.

Applying the principles discussed in this article, Mary is probably not a permissive user as to Smith because of Smith's specific instruction that Mary was not to drive the car. However, Smith may be liable to Victim under the doctrine of negligent entrustment for entrusting the vehicle to Jones when Smith knew that Jones had in the past left car keys where reckless driver Mary could get them. Because of this same history, Jones may be liable to Victim under the doctrine of negligent supervision. Issues as to these three types of liability are common in automobile accident cases.

Endnotes

1. The general rule in Idaho is that a parent is not liable for the negligence of a minor child in operating an automobile, except under the doctrine of respondeat superior or a statute expressly imposing liability. See *Litalien v. Tuthill*, 75 Idaho 335, 337, 272 P.2d 311, 312 (1954).

A parent or other person can also be liable for the negligence of a child under Idaho Code § 49-2416, which provides for joint and several liability of a motor vehicle owner who furnishes it to or permits a minor under 16 to drive it.

Idaho Code § 6-210(1) provides liability up to \$2,500 for parents of minors under age 18 living with them who willfully cause economic loss to other persons.

2. There can also be insurance coverage for negligent entrustment and negligent supervision claims, but this depends upon policy terms and precedents that are beyond the scope of this article.

3. See *Farm Bureau Mutual Insurance Co. v. Schrock*, 150 Idaho 817, 822-24, 252 P.3d 98, 103-05 (2011), rehearing denied.

4. 148 Idaho 47, 54, 218 P.3d 391, 398 (2009).

5. *Id.*

6. *Id.*, at 148 Idaho 52, 218 P.3d 396.

7. 123 Idaho 733, 852 P.2d 485 (1993).

8. *Allied Group Insurance Co.*, at 123 Idaho 735-36, 852 P.2d 487-88.

9. *Id.*, at 123 Idaho 738, 852 P.2d 490.

10. 96 Idaho 264, 526 P.2d 1100 (1974).

11. 97 Idaho 46, 539 P.2d 598 (1975).

In automobile accident cases involving a car driven by someone other than the owner attorneys must be alert to whether the doctrines of permissive use or negligent entrustment apply.

12. 83 Idaho 79, 357 P.2d 944 (1960).

13. *Id.*, at 357 P.2d 947.

14. 97 Idaho 380, 544 P.2d 1150 (1976).

15. 155 Idaho 511, 314 P.3d 193 (2013).

16. *Id.*, at 314 P.3d 200.

17. 114 Idaho 873, 876-77, 761 P.2d 1225, 1228-29 (1988).

18. See *Nava v. Rivas-Del Toro*, 151 Idaho 853, 861, 264 P.3d 960, 968 (2011).

19. 115 Idaho 391, 766 P.2d 1272 (Ct. App.1988).

20. *Id.*, at 115 Idaho 394, 766 P.2d 1275.

21. 98 Idaho 427, 566 P.2d 376 (1977).

22. 113 Idaho 202, 206-07, 743 P.2d 70, 74-75 (1987).

23. *Id.*

24. 122 Idaho 251, 254, 833 P.3d 109, 112 (1992).

25. *Taft*, at 314 P.3d 201.

26. *Fuller v. Studer*, at 122 Idaho 255, 833 P.2d 113.

About the Author

Emil R. Berg, Boise, is a solo practitioner in Idaho, where he was admitted in 1994, and Oregon, where he was admitted in 1975. He received his J.D. from Lewis & Clark Law School in 1975, and an LL.M. from the University of Washington in 1980. His practice areas include appeals and insurance coverage.



Rountree v. Boise Baseball, LLC —

The End of Assumption of the Risk as a Defense in Idaho

Joshua Evett

Premises liability and sports cases often make it difficult for a defense attorney to accept the demise of assumption of the risk as a defense. This is particularly so in cases involving inherently dangerous activities, such as boxing or football (as a participant), or watching sports, such as baseball, that are inherently dangerous to spectators.

The Idaho Supreme Court recently revisited the assumption of the risk doctrine in *Rountree v. Boise Baseball, LLC*, a case in which the plaintiff was hit in the eye by a foul ball some 270 feet down the left field line.¹ The decision in *Rountree* illustrates the Idaho Supreme Court's continued adherence to the rule that only express contractual assumption of the risk can waive a tort claim in Idaho.²

It also raises some interesting practice points for litigating cases where a defendant is not protected by an express assumption of risk.

The history of assumption of the risk in Idaho

"In its most basic sense, assumption of the risk means that the plaintiff, in advance, has given his express consent to relieve the defendant of an obligation of conduct toward him, and to take his chances of injury from a known risk arising from what the defendant is to do or leave undone."³ In *Salinas v. Vierstra*, the Idaho Supreme Court abolished assumption of the risk as a defense in Idaho.⁴ The sole exception to the *Salinas* holding is where a plaintiff, "either in writing or orally, expressly assumes the risk involved."⁵ Because

Primary assumption of the risk has been used in many states to bar those who participate in, or watch, inherently dangerous sports from recovering when they are injured, regardless of whether there is an express oral or written consent.¹²

express assumption of risk sounds in contract and not tort, the *Salinas* Court noted that the "correct terminology" to use should be that of "consent" or something of a similar nature.⁶

The Idaho Supreme Court next addressed assumption of the risk in *Winn v. Frasher*.⁷ There the Court commented that *Salinas* only abolished *secondary* implied assumption of the risk and not *primary* implied assumption of the risk.⁸ Secondary implied assumption of the risk "is an affirmative defense to an established breach of duty and as such is a phase of contributory negligence."⁹ Primary implied assumption of the risk arises when "the plaintiff impliedly assumes those risks that are *inherent* in a particular activity."¹⁰ To avoid conflict with comparative negligence principles, some courts have held that primary implied assumption of the risk is "treat[ed] as part of the initial duty analysis, rather than as an affirmative defense."¹¹

Primary assumption of the risk has been used in many states to bar those who participate in, or watch, inherently dangerous sports from recovering when they are injured, regardless of whether there is an express oral or written consent.¹² Con-

sidering the *Winn* Court's conclusion that *Salinas* left primary implied assumption of risk undisturbed, there is appeal to the argument that participation in a sport with obvious inherent risks, such as football or boxing, should be enough to establish the consent required by *Salinas*.

And, for the right type of spectator sport — such as baseball — it also seemed plausible to argue that the common knowledge of the dangers posed by thrown or batted balls should be enough to support a primary implied assumption of the risk defense.

The decision in Rountree

Then came the decision in *Rountree*, the facts of which seemed to support a primary implied assumption defense. The plaintiff had been a Boise Hawks season ticket holder for 20 some years, he had handled thousands of tickets with printed waiver language on the back of each ticket (which he denied ever reading), had seen foul balls repeatedly enter the stands, and also had coaching and playing experience.¹³ Additionally, the club read the waiver language over the public address system before every game.

Nevertheless, on appeal the Idaho Supreme Court held that neither secondary implied assumption of the risk or primary implied assumption of the risk are viable defenses in Idaho with respect to spectator sport injuries, holding that “[a]llowing assumption of risk as an absolute bar is inconsistent with our comparative negligence system, whether the risks are inherent in an activity, or not.”¹⁴ The Court reiterated that liability under comparative fault is apportioned “based on the actions of the parties . . .” and that “[w]hether a party participated in something inherently dangerous will simply inform the comparison, rather than wholly preclude it.”¹⁵

Litigating assumption of the risk after *Rountree*

Despite *Rountree*'s rejection of a primary implied assumption of risk defense, on remand the case demonstrated some of the challenges plaintiffs face in these types of cases. While the primary implied assumption of risk defense cannot appear on a special verdict form, the reality is the defense is alive and well in spirit. For example, because the plaintiff had not signed an express waiver, he attempted to exclude any mention of the language on the back of his tickets, which stated “THE HOLDER ASSUMES ALL RISK AND DANGERS INCIDENTAL TO THE GAME OF BASEBALL . . .”¹⁶ His argument was, if Idaho has rejected the assumption of the risk doctrine, the assumption of risk language was not effective, and the jury should not be allowed to consider it.

The district court disagreed, finding that the language was in effect a “super warning” that should have made the plaintiff more vigilant than he normally would have been, as he was told that any injuries would be

his responsibility.¹⁷ And, despite the plaintiff's testimony that he never read the disclaimer language on the tickets, the court concluded that whether the plaintiff actually read the tickets was a credibility determination for the jury to decide.

The district court's ruling makes sense in light of what *Rountree* ultimately instructs, which is that the inherently dangerous nature of an activity will “simply inform the comparison” of fault, rather than “wholly preclude it.”¹⁸ Arguably, any evidence that has any bearing on the plaintiff's knowledge of the inherently dangerous nature of a sport is relevant to a comparative fault analysis. This would seem to include any type of warning or assumption of risk language communicated to a plaintiff, even in the absence of a signed waiver.

Get a signed waiver if you can

A “best practice” is to get a signed waiver. This is probably the only way to achieve the potential for a summary judgment in these types of cases. While this may present challenges in the sporting event context (for example, having general admission patrons sign waivers may be logistically impossible or too time consuming), electronic signatures or check boxes during electronic payment might suffice. And, certainly, season ticket holders could be requested to sign a waiver upon purchase of their tickets.

However, even in the absence of an express written waiver, it is probably fair to say that assumption of the risk, though no longer an accepted defense in Idaho, still exerts a strong influence on how courts and juries consider cases involving inherently dangerous activities.

Endnotes

1. 154 Idaho 167, 296 P.3d 373 (2013)
2. Cases in which, effectively, assumption of risk is asserted as a defense continue to make their way to the Idaho Supreme Court. See, e.g., *Ball v. City of Blackfoot*, 152 Idaho 673, 273 P.3d 1266 (2012) (application of “natural accumulation rule” by district court overruled on appeal). In that case the Court held that the Legislature's enactment of comparative fault in 1971 effectively abolished the “open and obvious danger doctrine,” and similar defenses, such as the natural accumulation rule, which barred suit where a plaintiff injured herself due to natural accumulations of ice or snow. *Id.* at 676, 273 P.3d at 1269.
3. BLACK'S LAW DICTIONARY 134 (8th ed. 2004) (quoting W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 68, at 480-81 (5th ed. 1984)).
4. 107 Idaho 984, 695 P.2d 369 (1985).
5. *Id.*, 107 Idaho at 990.
6. *Id.*
7. 116 Idaho 500, 777 P.2d 722 (1989).
8. *Id.* at 503, 777 P.2d at 725.
9. *Rountree*, 154 Idaho at 174 (citation omitted)
10. *Id.* (citation omitted).
11. *Id.* (citations omitted).
12. *Davenport v. Cotton Hope Plantation*, 333 S.C. 71, 508 S.E.2d 565, 569-71 (1998).
13. 154 Idaho at 169, 296 P.3d at 375.
14. *Id.* at 175, 296 P.3d at 381.
15. *Id.*
16. *Id.* at 169, 296 P.3d at 375.
17. The author was defense counsel in *Rountree* and argued the motions in limine.
18. *Rountree*, 154 Idaho at 175, 296 P.3d at 381.

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The Small Lawsuit Resolution Act — A Thumbnail Sketch

Paul D. McFarlane

In 2002, the Idaho Legislature passed the Small Lawsuit Resolution Act (SLRA) with the twin goals of reducing “the cost and expense of litigation” and encouraging civil litigants to “resolve their disputes through alternative dispute resolution.” The statutes and rules governing the SLRA are found in Title 7, Chapter 15 of the Idaho Code, and Rule 85 of the Idaho Rules of Civil Procedure.¹ The procedures under the SLRA are somewhat informal in order to comport with the objectives of alternative dispute resolution.

Cases subject to the SLRA have a jurisdictional limit of \$25,000 and are decided by a third-party evaluator. While the SLRA can streamline litigation of smaller cases, the fact that the parties can request a trial de novo removes some of the statute’s effectiveness. This article will acquaint (or re-acquaint) practitioners with the SLRA and provide a useful guide to the procedures contained in the statute and rules.

Scope of the SLRA

The SLRA is often used to resolve smaller cases where the damages are easily ascertainable and do not exceed the jurisdictional limit. The SLRA does not apply to appeals from the magistrates division, disputes relating to arbitration under the Uniform Arbitration Act,² small claims, cases seeking a punitive damages award, or cases in which the SLRA was invoked previously.³ Most importantly, both parties must agree that the total claims for all damages sought by a party do not exceed \$25,000.⁴ The dollar limitation applies separately to each party, and excludes requests

Within seven days of filing the notice initiating the provisions of the SLRA, the parties must confer to decide whether they wish to undertake mediation or an evaluation.

for costs and attorney’s fees.⁵ If the jurisdictional amount is contested, however, the matter cannot remain under the SLRA.

Notice of the initiation of the SLRA

Any party may file a notice with the court initiating the provisions of the SLRA, and the notice must be entitled: “Notice of Initiation of Proceedings Under the Small Lawsuit Resolution Act.” The party filing the notice must also file a case information sheet. The opposing party will be deemed to have agreed to the initiation of the SLRA, unless written objection is filed within seven days.⁶

Absent agreement of the parties, the notice cannot be filed within 45 days of the service of the complaint (30 days for actions pending in the magistrate division). The notice must be filed with the court at least 150 days before trial (100 days for actions pending in the magistrate division). The trial court retains jurisdiction over SLRA matters, which remain on the trial court’s calendar.⁷ Additionally, the complaint must contain a statement that the amount of the claim does not exceed the jurisdictional limit.⁸

Mediation or evaluation

Within seven days of filing the notice initiating the provisions of

the SLRA, the parties must confer to decide whether they wish to undertake mediation or an evaluation. If the parties cannot agree on mediation or an evaluation, a party can file a motion with the court within this seven-day period seeking an order specifying which form of alternative dispute resolution should occur. In making its decision, the court must consider a number of factors, including the nature of claims and defenses, the parties’ and/or counsels’ ADR experience, and the complexity of the case. The court may determine that the case should be mediated or be evaluated, or that neither mediation or evaluation is appropriate and the case should proceed to trial.⁹

If the parties agree to pursue mediation, they can agree on a mediator or use as a mediator an individual selected with the evaluator selection provisions, discussed further below. If mediation is pursued and is unsuccessful, within 14 days the parties must file a notice with the court specifying which claims remain for evaluation.¹⁰

Any party can move the court at any time for removal from evaluation, as long as good cause is shown. Good cause could include a change in circumstances, as well as a likelihood that a party may wish to amend its complaint to assert punitive damages.¹¹

Selecting the evaluator

There is a great deal of flexibility in selecting an evaluator, but time limits must be observed. A list of approved private civil litigation evaluators is kept by the Supreme Court for each district.¹² All magistrate, district court and appellate judges are automatically approved as evaluators. Unless the parties agree in advance on an approved evaluator, upon receiving the notice initiating the SLRA the clerk of the court provides the parties with a list of 5 randomly selected evaluators (10 if there are more than two parties). Within three days of receipt of the list, any party may request a replacement list.¹³

The party initiating the SLRA must contact the other party or parties in order to select the evaluator within seven days of receiving the list. Beginning with the initiating party, each party strikes one name off the list. After each party exercises two alternating strikes, the last name remaining will be the evaluator. If there are more than two parties, the strikes occur in the order of the parties' names on the caption, beginning with the initiating party. The initiating party must notify the clerk of the selected evaluator within 10 days of the receipt of the list.¹⁴

Parties may stipulate to an evaluator, but if the proposed evaluator is not on the list, the parties must file a joint statement to that effect with the court. Upon application of a party, the clerk may assign by random lot an evaluator from the list within 14 days of the filing of the notice invoking the SLRA if there is no notice of selection or motion for assistance in selecting an evaluator.¹⁵

A party may move the court for assistance in the event of a dispute between the parties as to the procedure for selecting an evaluator, or a failure to select an evaluator, in which case the court may appoint an evaluator.¹⁶

Authority of the evaluator

The evaluator has the authority to decide procedural issues (including discovery); request pre-hearing briefs; examine any relevant site or object, administer oaths to witnesses, rule on admissibility of evidence, rule on the facts, decide the law and issue a written evaluation decision; and take other actions as necessary for the fair, swift and cost effective disposition of the case. Evaluators cannot decide, however, motions for summary judgment, motions to dismiss, or motions to add or dismiss parties.¹⁷

The discovery process

There are significant differences in the discovery process under the SLRA. Barring exceptional circumstances discovery is specifically limited to the following:

Depositions of Parties and Requests for Admissions: As in any civil case, depositions of parties and Requests for Admissions under Idaho Rule of Civil Procedure 36 are specifically allowed.¹⁸

Statement of Damages: The defendant may demand a written statement of damages from a claimant setting forth separately special, general or other damages, and the answer must be served within 21 days of the request.¹⁹

Medical Reports and Examination: If the physical or mental condition of a claimant is at issue, the defendant may obtain "the relevant medical reports of the claimant" and may obtain one (1) medical examination of the claimant. The evaluator will decide upon any limitations to be placed on the examination. The claimant has an absolute right to all documents created by the examiner, and any documents must be provided within 14 days of the examination and no later than 21 days before the evaluation hearing.²⁰

Expert Opinions and Depositions: The conclusions and foundations of any expert opinion — specifically including medical records — intended to be offered at the evaluation hearing must be submitted to the opposing party no later than 21 days prior to the evaluation. If the opposing party determines that it needs to take the expert's deposition and the parties are unable to agree, the expert opinion is submitted to the evaluator who makes a decision on whether the deposition will go forward, based upon whether it is necessary for a fair resolution of the case.²¹ If a party intends to offer at the evaluation hearing the live testimony of an expert, the offering party must provide 21 days notice prior to the hearing, and the opposing party has

If a party intends to offer at the evaluation hearing the live testimony of an expert, the offering party must provide 21 days notice prior to the hearing, and the opposing party has the right to depose the expert.

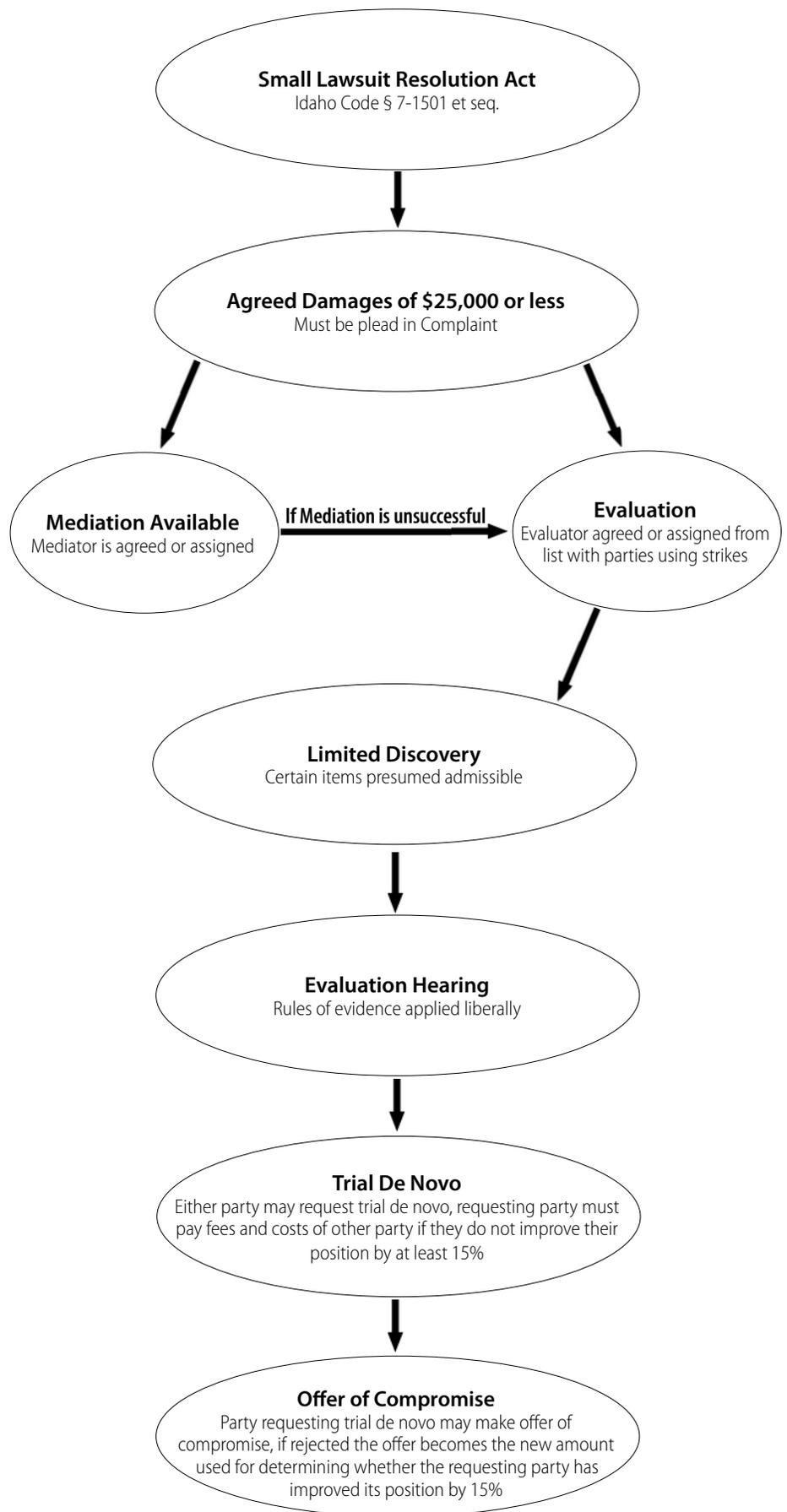
the right to depose the expert. Costs of depositions and examinations are paid by the requesting party.²²

The evaluation hearing

Unless the parties otherwise agree, the evaluator must schedule the evaluation hearing no earlier than 28 days and no later than 70 days after the case is assigned to the evaluator. The evaluation hearing can be by telephone if agreed by the parties. Counsel and the evaluator may issue subpoenas. At least seven days before the hearing, the parties must file with the evaluator and serve other parties a prehearing statement containing a witness list, list of exhibits, and documentary evidence the party intends to use at the hearing. The prehearing statement shall specify whether witnesses will testify live, by telephone, or by a sworn writing.²³

At the hearing, the evaluator controls the mode and order of proof to ensure the hearing proceeds efficiently, and administers oaths. A stenographic or electronic recording is allowed but the cost is paid by the requesting party. Each party is limited to no more than three hours to present its case. Parties have the right of cross examination. The SLRA specifically provides that the rules of evidence may be applied liberally: “The extent to which the formal rules of evidence will be applied shall rest in the discretion of the evaluator.”²⁴

A wide range of documents are presumed admissible, provided they were appropriately disclosed and, where appropriate, the identity of the author is set forth on the document. The full list of these “automatically admissible” documents is set forth in the statute, but includes written contracts and correspondence between



the parties, numerous types of billing statements, numerous types of health care records, police reports, written statements, and documents not listed but having “equivalent circumstantial guarantees of trustworthiness.”²⁵

The evaluator is required to issue a written opinion within 14 days of the evaluation hearing, determining all the issues raised by the pleadings and determining any damages. Findings of fact and conclusions of law are not required. The evaluator files a notice of issuance of opinion with the court, but does not file the opinion itself. The evaluator may not award more than \$25,000 in total damages to any party, and may not award punitive damages. However, the evaluator may award costs and attorneys fees over the dollar limit if provided by contract. Any other fees or costs must be awarded by the court.²⁶

If no request for a trial de novo (discussed further below) is requested within 21 days of the evaluator’s notice of decision, any party may present a judgment to the court along with a copy of the evaluator’s opinion.

Trial de novo and offer of compromise

Within 21 days of the evaluator’s notice of issuance of opinion, any party may file a request for a trial de novo. In that case, the trial occurs in the district court as though no evaluation had occurred, and no reference to the evaluation can be made in court or to the jury. If a party has admitted that its damages did not exceed \$25,000 for the evaluation, any award by the district court cannot exceed that amount, unless the party establishes the applicability of factors enumerated in Rule 60.²⁷

If the party who requests a trial de novo fails to improve their position by at least 15% at the trial de novo, the district court shall award

costs, reasonable attorneys’ fees, and the entire evaluator’s fee against that party. Costs and reasonable attorney’s fees are defined as “all attorney’s fees and costs as provided for by statute or court rule incurred after the filing of a request for a trial de novo.” Also, the court shall award expert witness fees and expenses in excess of that allowed by statute if reasonably incurred.²⁸

A party, within 21 days of a filing of the request for a trial de novo, may serve on the opposing party an offer of compromise. If not accepted within 14 days, “the amount used for determining whether the party requesting the trial de novo has improved its position shall be the amount of the offer of compromise.”²⁹

Conclusion

The SLRA can be a valuable tool for practitioners when dealing with smaller cases. The downside of SLRA cases is that the evaluator’s opinion is not binding, and any party can request a trial de novo. On the upside, it is a way to litigate smaller value cases while avoiding the often extensive costs of litigation.

Endnotes

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2. Idaho Code § 7-901 *et seq.*
3. Idaho Code § 7-1503.
4. Idaho Code § 7-1503(1).
5. Idaho Rule of Civil Procedure 85(b).
6. Idaho Rule of Civil Procedure 85(c); Idaho Code § 7-1503(2).
7. Idaho Code § 7-1503(2).
8. Idaho Rule of Civil Procedure 85(b).
9. Idaho Code § 7-1503(3-4).
10. Idaho Code § 7-1503(4).
11. Idaho Code § 7-1503(5).
12. The list of SLRA evaluators is maintained on the Idaho Supreme website: <http://www.isc.idaho.gov/problem-solving/civil-litigation-evaluators/search#>
13. Idaho Code § 7-1504(3-4).

Findings of fact and conclusions of law are not required. The evaluator files a notice of issuance of opinion with the court, but does not file the opinion itself.

14. Idaho Code § 7-1504(5).
15. Idaho Code § 7-1504(7).
16. Idaho Code § 7-1504(6).
17. Idaho Code § 7-1506(1).
18. Idaho Code § 7-1507(1)(b).
19. Idaho Code § 7-1507(1)(a).
20. Idaho Code § 7-1507(1)(c).
21. Idaho Code § 7-1507(2).
22. *Id.*
23. Idaho Code § 7-1508(1), (3-4).
24. Idaho Code § 7-1508(5-7).
25. Idaho Code § 7-1508(8).
26. Idaho Code § 7-1509(1).
27. Idaho Code § 7-1509(2-4).
28. Idaho Code § 7-1509(5).
29. Idaho Code § 7-1509(6).

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Bitcoin's Digital Enterprise Creates Alternative Business Transactions

Theodore W. Reuter

Money has been around a long time. Early on, “money” often included items that had some sort of use value. For example, coco beans, cattle, and salt have served as mediums of exchange.¹ In fact, our word, “salary” is thought to have come from a Latin word meaning “of salt.”² Over time, in western culture, the mediums of exchange became more and more symbolic, moving from items with immediate value to coins. Coins then gave way to paper money, backed by a promise of precious metal available to the bearer. In the last century, any vestiges of use value were wiped away from our currency as the world’s developed economies left the gold standard.³ Much of our money as we know it is now kept in the form of numbers in ledgers, in a bank, or with a credit card company. But where do recent innovations in how value is transferred — digital “cryptocurrencies” — fit in?

From the buyer’s perspective, transactions using cryptocurrency feel very similar to transactions involving traditional currency. But there is a crucial difference in the way each transaction is processed. Whereas a traditional currency transaction over the internet requires a facilitating third party (generally a bank that transfers money to the seller and either debits the buyer’s funds or bills the buyer at a later date), a cryptocurrency transaction involves no such third party — the transaction itself moves funds from one ledger to another, without any intervening action.

So, when purchasing a book over the internet using *traditional* currency, buyers go to the seller’s website, enter in their credit card infor-



mation, and place the order. This process is regulated and comes with certain safeguards. Having a known third party involved gives the seller some assurance that it will be paid for its product; the buyer also knows that if a problem arises, he can dispute the charge. In contrast, when a buyer makes payment to the seller using *cryptocurrency* (e.g., Bitcoin) and there is a problem, no third party is available to handle any corresponding disputes — either the buyer resolves things with the seller, or remains unsatisfied.

In a world where buyers and sellers can be anywhere on the planet, using Bitcoin can present challenges and, likewise, fertile ground for disputes in possible need of attorney involvement. But what exactly is Bitcoin, and what applications does it have in the practice of law?

What is Bitcoin?

Of the cryptocurrencies out there, Bitcoin is the most widely known. Bitcoin’s fame is largely due to its meteoric jump in value, followed by its more recent, gradual descent back down. Its volatility and the role that

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speculation plays in its price may well have contributed to the Internal Revenue Service’s decision to treat Bitcoin as a security rather than as a currency.⁴

On a superficial level, Bitcoin works in much the same way as traditional currencies — individuals store their Bitcoin in digital wallets and, when they find someone who is offering something for sale (and is

willing to accept Bitcoin in exchange for that sale), they send an appropriate amount of Bitcoin to the seller and receive the item or service purchased. A number of individuals and companies are doing just this, embracing Bitcoin in their personal and business lives. Last November, CNN Money ran an article listing a few businesses throughout the US that were accepting Bitcoin.⁵ They included a sandwich shop in Pennsylvania and a law office in Arizona.⁶

So far, using Bitcoin probably doesn't look much different from walking into a store and swiping your credit card. However, when you swipe your credit card, the debiting of your account and the crediting of the shop's account is all handled by intermediaries. It has to be. The entities involved have to make sure that their books balance or else they would end up with inconsistent obligations. The role that US banks play in creating money only complicates that issue further.⁷

Bitcoin works differently. There is no separate third party controller verifying each transaction. Instead, the "Bitcoin protocol" works as a decentralized ledger known as a "Blockchain". When someone initiates a transaction using Bitcoin, that transaction is broadcast throughout the network and bundled with thousands of others into a "block". That block is then linked with previous blocks of bundled transactions into a "chain." The end result is a system that is checked and rechecked multiple times by multiple entities.⁸

This is the key innovation of the Bitcoin protocol. It allows for trustworthy verification and agreement regarding asset ownership and the state of a transaction across multiple platforms without the need for centralized enforcement.⁹ The key thing to remember about Bitcoin and other cryptocurrencies is that

they are not pieces of code that are traded like money; they are ledgers of transactions that keep track of the trades that people are making. Furthermore, these ledgers allow for self-executing transactions, with no need for a specific middleman to regulate those transactions, but with a high degree of trustworthiness and anonymity. The Bitcoin protocol can be used as a kind of digital cash, to be sure, but it potentially has much broader applications.

Bitcoin protocol applications

Some people in the Bitcoin community have suggested that digital currencies like Bitcoin create the possibility of autonomous software entering into transactions and managing their own funds.¹⁰ At this time, however, no bank would consider opening an account in the name of a computer program. Even so, with Bitcoin, no Bank is necessary.

It is apparently relatively simple to open a digital wallet; all that is necessary is the generation of a sufficiently large, identifying account number. As such, there is no reason, in theory, that a program providing a useful service could not have a Bitcoin account, charge customers, and operate independent of human oversight.

Mike Hearn, a former Google employee who left to "work on Bit-

coin" full time, imagines a world where people could be picked up by an autonomous, driverless taxi, or packages could be delivered by autonomous drones.¹¹ If this vision becomes a reality, that book ordered online could be held in a warehouse, owned and operated by an autonomous computer program. These possibilities are merely theoretical today, but if Bitcoin continues to hold value it is not clear why some of the applications below could not be realized in the not too distant future.

Because Bitcoin is a ledger rather than an exchange of digital objects, the possibility exists for writing additional information into that ledger to expand its application to different types of transactions. For example, the coding that underlies Bitcoin is already built to support escrow transactions, and shared financial management. In turn, a digital wallet could be set to dole out Bitcoin slowly over time or pay out a lump sum when, in searching the internet, it learns that a certain event has occurred.¹² Much of this functionality is available through protocols that are being built on top of Bitcoin. One such protocol, called "Mastercoin," is already able to handle escrow transactions and pay out dividends, at least insofar as the exchange of digital property is concerned.¹³ Other organizations are stepping up to take advantage of the "blockchain" technology that underpins Bitcoin too.

One such protocol, called "Mastercoin," is already able to handle escrow transactions and pay out dividends, at least insofar as the exchange of digital property is concerned.¹³

These companies impact areas of corporate control and corporate governance. Stock could be issued in a protocol built on the blockchain technology. The same protections that ensure that a Bitcoin is only spent once would also protect stockholders' control over their holdings. Corporate decisions could be made by stockholders casting digital votes, and dividends could be distributed digitally. Bitcoin also allows for wallets that require multiple keys to open, in the same way that some bank accounts require multiple signatures to validate a check.¹⁴ Furthermore, Bitcoin allows these kinds of transactions across any distance, without regard for national borders or languages — the only requirement is an internet connection.

Bitcoin is also making inroads in the sale of consumer goods. In Colorado, some marijuana distributors are setting up vending machines to hock their wares and those vending machines will take Bitcoin.¹⁵ Furthermore, the interface between electronic devices and Bitcoin offers other possibilities as well. In an interview, well-known Bitcoin Entrepreneur, Andrea Antonopolous, suggested that an organization could set up a system of lockers opened by a Bitcoin payment that contained keys to an apartment.¹⁶ It would allow for seamless payment, and even the acceptance and return of a deposit, all without human interaction. The same basic principle could potentially apply to the sale or rental of nearly any personal property.

Bitcoin and enhancing your legal practice

At this point in the article, a number of you may be saying, "so what?" Yes, Bitcoin and other blockchain technologies allow for a new way to manage transactions, but they have

not actually allowed us to do anything truly new that we could not do before. Even so, from a lawyer's perspective, Bitcoin offers a new tool for structuring agreements, given its unique set of traits.

Confidentiality. On the one hand, the volume of Bitcoin traded, the lack of personally-identifying information, and the absence of third party verification, mean that it is very difficult for a person uninvolved in a transaction to know what any given person is up to. Using a credit card marks me as the guy who bought the *Kama Sutra*. If I would rather people

Because Bitcoin is an open source system, if someone does know a digital wallet number, it is possible, in theory, for him to uncover the details of a Bitcoin user's previous transactions.

not know, Bitcoin puts in an added layer of confidentiality. However, this advantage can be overstated. Because Bitcoin is an open source system, if someone does know a digital wallet number, it is possible, in theory, for him to uncover the details of a Bitcoin user's previous transactions.

Lower Transactions Costs. The present system requires middlemen to complete transactions. In addition to infringing upon confidentiality, it also has a cost. Banks, credit card companies, and brokers all take some portion of the funds in their care from their customers in order to

sustain their business. Peer-to-peer systems have the potential to virtually eliminate those costs and free up capital for productive use. Note: this aspect of the system is somewhat impaired by the IRS rule requiring users of Bitcoin to track the price at the time of purchase. While this is cumbersome, it does not seem to be beyond the reach of tracking software to remedy.

Versatility. Cutting out the middle man means that you no longer have to worry about his requirements for particular kinds of transactions. For example, in our present system, it is often cost-prohibitive to set up certain sorts of transactions unless large enough sums of money are involved. Indeed, some professional trustees will require a minimum amount of assets before they will agree to manage a trust. However, once you have a set of code that will serve a particular function, the amount of assets that you entrust to it should have a negligible effect on the administrative cost. In addition, structuring deals in Bitcoin means you no longer have to worry about a third party's hours of operation. A transaction can occur at the convenience of the parties, whenever that may be.

Multi-Signature Transactions. Bitcoin has the ability to require multiple keys to access a particular set of funds. This can be set up such that all keys are needed to access the funds, or so that some portion of the keys are needed. Let's go back to that book purchased online. It is possible to structure that transaction so that the Bitcoin used to purchase the book goes into a wallet that has three keys, one which the buyer holds, one which the seller holds, and one which a neutral arbitrator holds. It can be set so that any two keys can decide where the Bitcoin held in that digital wallet goes. So, if

the buyer gets the book, he and the seller can agree that the seller should get the Bitcoin; but, if they disagree, the arbitrator can step in, assess the situation, and determine where the Bitcoin should end up. Because this system has a relatively low barrier to entry, it is likely that a number of different organizations would spring up, offering this arbitration service. The reasons for the decisions of the arbitrators could be coded into the release of funds, helping the market determine which arbitrators they prefer to use, further mitigating the risks of dealing with unknown parties.¹⁷



The dark side of Bitcoin activity

Bitcoin's features unquestionably come with real risks. Bitcoin is largely without effective regulation and transactions in Bitcoin are relatively anonymous. This makes it attractive to people who prefer to operate in the shadows.

Most of us have probably heard about *Silk Road*, a website designed to allow its users to anonymously buy and sell drugs or other illicit goods. The currency of choice for many of these transactions was Bitcoin.¹⁸ The FBI's investigation eventually led to the shutdown of the site and the initial seizure of some 30,000 bitcoin.¹⁹ In June 2014, the FBI began to auction off some of the 144,321 Bitcoin ultimately seized during its investigation — at that time, valued at about 86 million dollars.²⁰ It also allows people without any particular financial expertise to effectively enter into the banking business, sometimes with disastrous consequences.

One such company was MTGOX.com. Last February, MTGOX (often referred to as Mt. Gox) admitted that it had lost approximately 744,000 bitcoin (valued at over 400 million

dollars).²¹ That revelation caused a serious drop in the price of Bitcoin. At this time, it is not clear whether the issue was embezzling employees or an outside attack. However, MTGOX's CEO admitted that poor management practices played a role.²² The fact that approximately 200,000 bitcoin (at the time, worth approximately 127 million dollars) were later found in an old digital wallet underlines the incompetence of the organization.²³

These sorts of issues are not likely to go away in the Bitcoin marketplace. Because the existence of traditional currency allows all sorts of people to engage in unrecorded transactions, it is not surprising that crime and mismanagement exist in the world of cryptocurrency as well. However, some companies are beginning to accept that regulation is necessary. That move should help new entrants into the market find service providers they can trust.

Conclusion

Bitcoin has opened the door to a new way of engaging in business transactions. It opens the door to a lower cost, a more versatile way of

These sorts of issues are not likely to go away in the Bitcoin marketplace.

doing business, and ultimately will allow us to transfer more responsibility to automated systems. Moving forward, the legal community should be aware of Bitcoin generally, and, even, to specifically assist in the structuring of certain transactions. It is also likely that new applications will continue to emerge, offering new efficiencies for our own practice, and for our clients.

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10. Id.
11. Id.
12. Morris, David, *Fortune*, *Bitcoin is not Just Digital Currency. It's Napster for Finance*, <http://fortune.com/2014/01/21/>

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23. Knight, Sophia, *Mt. Gox says it Found 200,000 Bitcoins in 'Forgotten' Wallet*, Reuter News, March 21, 2014, <http://uk.reuters.com/article/2014/03/21/uk-bitcoin-mtgox-wallet-idUK-BREA2K06220140321> (accessed June 27, 2014).

About the Author

Theodore W. Reuter is the Managing Attorney for the Ontario Regional Office of the Oregon Law Center. He graduated from Willamette College of Law's joint degree program with a J.D. and a M.B.A. Mr. Reuter has particular interest in the areas of litigation and employment law.



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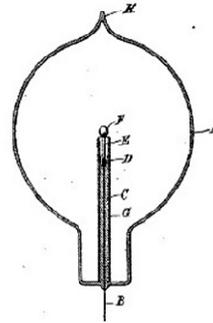
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Joel D. Horton

1st AMENDED - Regular Fall Term for 2014

Boise July 29
Boise August 20, 22, ~~25~~, 27, 28 and 29
Boise September 26
Coeur d'Alene September 29 and 30
Moscow October 1
Boise October 3
Boise November 3
Twin Falls November 6 and 7
Boise November 10 and 12
Boise December 1, 3, 5, 8 and 10

By Order of the Court
Stephen W. Kenyon, Clerk

NOTE: The above is the official notice of the 2014 Fall Term for the Supreme Court of the State of Idaho, and should be preserved. A formal notice of the setting of oral argument in each case will be sent to counsel prior to each term.

OFFICIAL NOTICE COURT OF APPEALS OF IDAHO

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Judges
Karen L. Lansing
David W. Gratton
John M. Melanson

1st AMENDED - Regular Fall Term for 2014

Boise July 22 and 24
Boise August ~~11~~, 12, 19 and 29
Boise September 9, 11, 16 and 18
Boise October 14, 16, 21 and 23
Boise November 13, 14, 24 and 25

By Order of the Court
Stephen W. Kenyon, Clerk

NOTE: The above is the official notice of the 2014 Fall Term for the Court of Appeals of the State of Idaho, and should be preserved. A formal notice of the setting of oral argument in each case will be sent to counsel prior to each term.

Idaho Supreme Court Scheduled for August 2014

Wednesday, August 20, 2014 – BOISE

8:50 a.m. *Richard J. Braese, Jr. v. Stinker Stores* #41296-2013
10:00 a.m. *State v. Micha Abraham Wulff* #41179-2013
11:10 a.m. *State v. Gary L. Schall* (Petition for Review) #41645-2013

Friday, August 22, 2014 – BOISE

8:50 a.m. *Jay Brown v. Augusta Sayoko Mimoto Greenheart*
..... #41189-2013
10:00 a.m. *Tracy Sales v. Stacie Peabody* #41446-2013
11:10 a.m. *Stanley Consultants v. Integrated Financial Assoc.*
..... #40514-2012

Wednesday, August 27, 2014 – BOISE

8:50 a.m. *Roger L. Stevens v. Steven B. Cummings* #40793-2013
10:00 a.m. *Christian Westby v. Gregory Schaefer, M.D.* #40587-2012
11:10 a.m. *State v. Katherine Lea Stanfield* #40301-2012

Thursday, August 28, 2014 – BOISE

8:50 a.m. *Timothy Williams v. Board of Real Estate Appraisers*
(Judicial Review) #41193-2013
10:00 a.m. *Renee L. Baird-Sallaz v. Dennis J. Sallaz* #41301-2013
11:10 a.m. *Idaho Youth Ranch, Inc. v. Board of Equalization*
..... #41256-2013

Friday, August 29, 2014 – BOISE

8:50 a.m. *State v. Moses Olivas, Jr.* (Petition for Review) .. #41644-2013
10:00 a.m. *International Real Estate Solutions v. Gordon Arave*
..... #41297-2013
11:10 a.m. *Cable One, Inc. v. Tax Commission* #41305-2013

Idaho Court of Appeals Oral Argument for August 2014

Tuesday, August 12, 2014 – BOISE

9:00 a.m. *Dixon v. State* #39745-2012/40761-2013
1:30 p.m. *Cook v. State* #41449-2013

Tuesday, August 19, 2014 – BOISE

9:00 a.m. *Moen v. State* #40600-2013
10:30 a.m. *State v. Vantassel* #41210-2013
1:30 p.m. *State v. Ortega* #40682-2013

Friday, August 29, 2014 – BOISE

1:45 p.m. *State v. Estep* #40646-2013

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Idaho Supreme Court and Court of Appeals
NEW CASES ON APPEAL PENDING DECISION
(Updated 7/1/14)

CIVIL APPEALS

Liens

1. Are the lenders entitled to foreclose on the Sunshine Mine and other property subject to the mortgage and the lenders' liens, rather than be subject to the 2003 Stock Purchase Agreement?

Silver Opportunity Partners v. Stonehill Capital Management
S.Ct. No. 40938
Supreme Court

New trial

1. Whether the trial court acted outside its discretion by granting a new trial based on a theory plaintiff failed to plead or pursue, and affirmatively disclaimed.

Mosell Equities v. Berryhill & Co.
S.Ct. No. 41338
Supreme Court

2. Whether the district court erred in granting defendant's summary judgment motion, *sua sponte*, on issues and bases not raised or argued by defendant in his briefs or affidavits.

Noble Manor v. Shousharain
S.Ct. No. 41350
Supreme Court

Other

1. Was there substantial and competent evidence to support the court's decision to grant the defendant's motion for involuntary dismissal pursuant to I.R.C.P. 41(b)?

Kugler v. Nelson
S.Ct. No. 41039
Court of Appeals

Post-conviction relief

1. Did the court err in failing to grant Nelson's motion for appointment of counsel?

Nelson v. State
S.Ct. No. 40661/40828
Court of Appeals

2. Did Severson raise a genuine issue of material fact as to whether he was denied effective assistance of counsel by counsel's failure to object to prosecutorial misconduct in the State's closing argument?

Severson v. State
S.Ct. No. 40769
Court of Appeals

3. Did the court err in dismissing Salinas' petition for post-conviction relief without conducting an evidentiary hearing?

Salinas v. State
S.Ct. No. 40902
Court of Appeals

4. Did the court err by failing to rule on Reber's motion to appoint conflict counsel?

Reber v. State
S.Ct. No. 41022
Court of Appeals

CRIMINAL APPEALS

Evidence

1. Whether the evidence against Bennett was sufficient to support the convictions and whether the court erred in denying Bennett's motions for judgment of acquittal.

State v. Bennett
S.Ct. No. 40770
Court of Appeals

2. Did the court err when it allowed the State to present evidence pursuant to I.R.E. 609 that Garza was a convicted felon as his prior felony was a crime of violence and thus did not weigh on credibility?

State v. Garza
S.Ct. No. 40920
Court of Appeals

Instructions

1. Was there a fatal variance between the State's charging document and the court's jury instructions that amounted to fundamental error?

State v. Pressley
S.Ct. No. 40868
Court of Appeals

No contact orders

1. Did the court err in finding non-compliance with the expiration date requirement of I.C.R. 46.2 did not render the no-contact order void?

State v. Hillbroom
S.Ct. No. 41533
Court of Appeals

Other

1. Did the court abuse its discretion by denying Bias' motion for appointment of new counsel to pursue his post-judgment motions?

State v. Bias
S.Ct. No. 40930
Court of Appeals

2. Did the court abuse its discretion when it denied Collins' motion to seal his record pursuant to I.C.A.R. 32(i)?

State v. Collins
S.Ct. No. 41462
Court of Appeals

Pleas

1. Did the court abuse its discretion by denying Bates' motion to withdraw her guilty plea and in concluding she had not demonstrated manifest injustice?

State v. Bates
S.Ct. No. 40082
Court of Appeals

**Search and seizure –
suppression of evidence**

1. Did the court correctly determine that Beck did not have a legitimate expectation of privacy in the public land surrounding his tent and campsite?

State v. Beck
S.Ct. No. 41241
Court of Appeals

2. Did the court err in determining Hergesheimer's statements were not obtained in violation of his *Miranda* rights?

State v. Hergesheimer
S.Ct. No. 41284
Court of Appeals

3. Did the court err when it granted Hays' motion to suppress on the basis her detention was illegally extended?

State v. Hays
S.Ct. No. 40999
Court of Appeals

4. Was Brooks' traffic stop in violation of his Fourth Amendment rights such that the court erred in denying his motion to suppress?

State v. Brooks
S.Ct. No. 41046
Court of Appeals

5. Did the court err in denying Cunningham's motion to suppress and in finding there was probable cause for the issuance of the search warrant for his home?

State v. Cunningham
S.Ct. No. 41167
Court of Appeals

Summarized by:
Cathy Derden
Supreme Court Staff Attorney
(208) 334-3868



Federal Courts

Bench - Bar Conference Features Sept. 26 & Oct. 3 Features Big Names, Current Issues in Federal Law

Speakers include U.S. Representative Mike Simpson, Hon. Sidney Thomas, Chief District Judge B. Lynn Winmill, Bankruptcy Judge Jim D. Pappas and others.

Hon. Ronald E. Bush

The 2014 Idaho Federal Court Bench-Bar Conference will be held in Eastern Idaho and in Boise. The Conference in Eastern Idaho is scheduled for Friday, September 26, at the Shoshone-Bannock Hotel & Event Center located nine miles north of Pocatello at the Fort Hall interchange on I-15. The Conference in Boise will be held on Friday, October 3, at the Boise Centre.

U.S. Congressman Mike Simpson from Idaho's Second Congressional District will be the luncheon keynote speaker at the Eastern Idaho Conference. Congressman Simpson will speak upon "A Congressional Perspective on Issues Facing the Federal Judiciary in Idaho," which will include a report regarding efforts to obtain a third district court judgeship.

The luncheon keynote speaker at the Boise Conference will be the Honorable Sidney R. Thomas, the incoming Chief Judge of the United States Court of Appeals for the Ninth Circuit. Judge Thomas was nominated to the Court of Appeals in 1996 by President Bill Clinton. He maintains his chambers in his home state of Montana. Highly regarded by his peers for his judicial acumen and ability to forge consensus, Judge



Thomas was widely reported to be on President Obama's short list in 2010 as a possible candidate to replace John Paul Stevens on the United States Supreme Court.

Chief District Judge B. Lynn Winmill and Bankruptcy Judge Jim D. Pappas will start each Conference with a "State of the Federal Judiciary" report for each Court.

A morning plenary program entitled "*Bellingham Revisited*" will be presented by Bankruptcy Judge Jim D. Pappas, U.S. Magistrate Judge Ronald E. Bush, Chief U.S. Magistrate Judge Candy W. Dale, and Professor Richard Seamon (Associate Dean for Faculty Affairs and Professor of Law at the University of Idaho College of Law). This panel, moderated by Joseph Meier, Esq. of Cosho Humphrey, LLP, will address the history, status, constitutional issues and potentially wide-ranging implications to the work of the federal bank-

Congressman Simpson will speak upon "A Congressional Perspective on Issues Facing the Federal Judiciary in Idaho," which will include a report regarding efforts to obtain a third district court judgeship.

ruptcy courts and the federal magistrate judge system surrounding the U.S. Supreme Court's recent decision in *Executive Benefits Insurance Agency v. Arkison* (*In re Bellingham Insurance Agency*), 573 U.S. ____ (2014).

The Supreme Court addressed two questions about which lower courts have disagreed: (i) whether Article III of the United States Constitution allows Bankruptcy Judges, with the parties' consent, to enter final judgments on *Stern* claims, meaning claims that the Bankruptcy Code designates for final adjudication in the bankruptcy court but that Article III — at least in the absence of consent — prohibits non-Article III judges from finally adjudicating, and, if not, (ii) whether Bankruptcy Judges may submit proposed findings of fact and conclusions of law, for de novo review by a District Court, on *Stern* claims.

Conference attendees will then choose between two morning breakout sessions: (i) “The Use of Social Media in *Voir Dire* and Potential Juror Investigation” presented by Chief District Judge B. Lynn Winmill, Chief U.S. Magistrate Judge Candy Dale and Idaho Deputy Attorney General Brian Kane (addressing *voir dire* practices and procedures in the state and federal courts in Idaho, and including a discussion of the appropriate use of social media in jury selection and investigation); or (ii) “The Craft of Legal Writing in Modern Times — New and Old Intersections of Mind and Technology” presented by Marci Smith (Law Clerk for Judge Winmill) and Katie Ball (Adjunct Professor, University of Idaho College of Law and Law Clerk for Judge Bush), local practitioners, and Judge Bush (educating attendees on the best practices used by the best writers in combining modern law practice technology and software in combination with the best writing practices, to create persuasive written arguments).

After the luncheon program, the Eastern Idaho Conference will continue with a plenary session entitled “Memories and Minds — the Malleability of Memories and the Fallibilities of Cognitive Function,” presented by Professor Jason Watson

Professor Watson will discuss the findings of ongoing research into the reliability and unreliability of memory, including eyewitness identification.

of The Brain Institute at the University of Utah. Professor Watson will discuss the findings of ongoing research into the reliability and unreliability of memory, including eyewitness identification. Professor Watson will also discuss the limitations of the brain to retain information in the world of multi-tasking, and will educate attendees about the realities of cognitive decline and how it can affect all of us. The information presented in this program has real-life implications for all aspects of litigation, will provide insights into how best to present your case to a jury for maximum retention during deliberations, and will raise fascinating questions about just how efficient you really are in the modern world of lawyer multi-tasking.

The afternoon portion of the Boise Conference will include a plenary session titled “New Research on the Reliability of Eyewitness Evidence: Challenges and Revisions to Long-held Views,” presented by Professor Steven E. Clark. Professor Clark is the Director of the Robert Presley Center for Crime and Justice Studies at the University of California, Riverside. He will discuss new research that challenges and revises long-held views about eyewitness evidence and points to new ways of assessing its reliability. Professor Clark will also discuss the foundations of eyewitness accuracy, interviewing techniques, eyewitness identification, and the assessment of eyewitness accuracy by researchers, legal actors, and juries,

with applications to both criminal and civil litigation.

During the afternoon session of both Conferences, the federal court Lawyer Representatives (Bruce Anderson, Walt Sinclair, and Howard Burnett) will provide an update on federal and local rule changes, and discuss the duties and responsibilities of the lawyer representative positions. Keely Duke, current president of the Idaho chapter of the Federal Bar Association, will report upon FBA initiatives and ongoing activities of the Idaho chapter.

The afternoon sessions of both Conferences will conclude with the traditional and often lively question-and-answer judges' panel discussion. Attendees will gain valuable insights into the workings of the Idaho federal courts from the perspectives of Idaho federal judges.

Always a grand bargain when considering the enlightening and interesting content of the conference program, the conference cost is \$75 for attorneys, and \$35 for law students, clerks and paralegals. The cost includes the CLE credits, a continental breakfast, and a full lunch. CLE credit approvals are pending. A registration form will be available soon on the United States District/Bankruptcy Court website at www.id.uscourts.gov. If you have questions, please contact Susie Headlee at (208) 334-9067 or via email at Susie_Boring-Headlee@id.uscourts.gov.

The Americans with Disabilities Act: Our Responsibilities as Lawyers

Amy Schipper Howe

For more than 15 years, U.S. Attorneys have played a critical role working with the Department of Justice's Civil Rights Division in enforcing the Americans with Disabilities Act (ADA), which was passed on July 26, 1990. Approximately 84 U.S. Attorney's offices across the nation currently participate in this critical and unique partnership effort and have resolved hundreds of matters. An early example of this unique partnership was the nationwide U.S. Attorney 9-1-1 ADA Initiative under Attorney General Janet Reno. As a result of this initiative, more individuals who were deaf, hard of hearing, or who had speech impairments gained greater access to 9-1-1 services than ever before. Other achievements have provided access to places of public accommodation and state and local government programs, access to voting, and elimination of discriminatory policies, practices and procedures.

Disability-based discrimination in legal and other professional services is in violation of the ADA.¹ Yet, many attorneys remain unsure about their obligations under the ADA. This article will address two standards of particular interest to attorneys — accessibility standards and effective communication — and how attorneys can make sure they are meeting their obligations under the ADA.

Accessibility standards

The ADA Standards for Accessible Design (the "Standards") and the revised ADA regulations implement-

This article will address two standards of particular interest to attorneys — accessibility standards and effective communication — and how attorneys can make sure they are meeting their obligations under the ADA.

ing Title II and III can be found at www.ada.gov.² The Standards, published by the Department of Justice, are comprehensive and establish technical criteria and dimensions for accessible elements. Such elements include everything from the width of parking spaces to the usability of door hardware. The Standards also include requirements that specify how many of each accessible feature must be provided and where it shall be located. In addition to providing access for mobility-impaired individuals, the Standards establish criteria for elements such as tactile signage and assistive listening systems to provide for access by people who are blind or deaf or have limited vision or hearing.³

For buildings that are covered by Title III but were built prior to the ADA's effective date, there is a requirement that the owner, operator, lessor or lessee of the facility or building remove barriers to access in such public accommodations.⁴ Removing barriers includes actions such as installing ramps, removing protruding objects not detectable by individuals who are blind or have low vision, and creating accessible parking spaces. Additionally, accessible routes should coincide with

or be located in the same area as general circulation paths, and ramp slopes and handrails must ensure a safe entrance and exit that complies with the Standards.

The Department of Justice, along with other federal agencies, provides technical assistance to individuals and institutions that have rights or duties under the ADA.⁵

Effective communication

The ADA requires that places of public accommodation and public entities provide effective communication for people who are deaf or have hearing loss. To meet this obligation, public accommodations must provide auxiliary aids and services unless doing so would cause an undue burden or fundamentally alter the service being provided. Although handwritten notes or typed text can be appropriate auxiliary aids for simple communications, in many situations such as legal proceedings or complex health care-related communications, a qualified sign language interpreter may be required.

"Effective communication" in public facilities means "communication with persons who are deaf or hard of hearing that is as effective

as communication with others.”⁶ Public accommodations must also take those steps necessary to ensure that no individual with a disability is excluded, denied service, segregated or otherwise treated differently from other individuals because of the absence of auxiliary aids.⁷ Effective communication is achieved by furnishing appropriate auxiliary aids and services where necessary to afford qualified individuals with disabilities an equal opportunity to participate in or benefit from the services, programs, or activities of a public accommodation or public entity.⁸

Some forms of communication may be ineffective for certain deaf individuals. For example, an individual who has learned American Sign Language as a first language may have difficulty understanding written notes. While the service provider may initially choose the type of communication to be used, if the recipient does not understand, the provider must offer a more effective form of communication.⁹ “Auxiliary aids and services” include qualified interpreters provided on-site or through video remote interpreting (VRI) services. Other services include notetakers, computer-aided real-time transcription services (CART), written materials or exchange of written notes.

These services, however, may not be considered effective for every individual or in every situation. Some individuals who have hearing loss may benefit from telephone handset amplifiers, assistive listening devices, assistive listening systems or telephones compatible with hearing aids. There are a host of other options of auxiliary aids that may be used in appropriate situations.¹⁰

The Act prohibits discrimination; mandates access and accommodation

The ADA broadly defines a “disability” as a “physical or mental impairment that substantially limits one or more major life activities.” 42 U.S.C. § 12102 (1)(2008). The ADA protects individuals who have a history or record of such an impairment, or who are perceived by others as having such impairment. Title II of the ADA (42 U.S.C. § 12131-12134) prohibits discrimination on the basis of disability in state and local government services. A primary example of disability-based discrimination is when a public entity provides programs or activities at facilities that are inaccessible to individuals with disabilities and does not otherwise make its programs accessible. 28

C.F.R. 35.149 (1994). Title III of the ADA (42 U.S.C. § 12181-12189) applies to public accommodations—facilities operated by a private entity whose operations affect commerce. The definition of “public accommodation” is also very broad. It includes just about any establishment that serves the public: hotels, restaurants, bars, theatres, auditoriums, shops, accountants’ and lawyers’ offices, doctors’ offices, hospitals, and other service establishments. Private clubs and religious organizations are excluded from the ADA. 42 U.S.C. 2000-a(e). However, some private clubs that also have open access to the public may be covered by Title III. 42 U.S.C. § 12181.

“Qualified interpreter” means an interpreter who, via a video remote interpreting service or an on-site appearance, is able, under the circumstances, to interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary, given the deaf or hard of hearing individual’s language, skills, and education.¹¹ Family members are never considered qualified interpreters because they may not know or understand the technical nature of the conversation.

VRI is an interpreting service that uses video conference technology over dedicated lines or wireless technology offering high-speed, wide-bandwidth video connection that delivers high-quality video images. 28 C.F.R. §§ 35.160(d) and 36.303. The interpreter appears on the screen, hears the conversation and translates to the deaf individual through signs on the screen. This technology requires a very high-quality image in order for the deaf individual to understand the signs. Many courthouses in Idaho have these installed and activated.

Family members are never considered qualified interpreters because they may not know or understand the technical nature of the conversation.

Our responsibilities as lawyers

The ADA requires attorneys and other individuals to provide equal physical access to their services. The features of every office may be different. Buildings built in 1991 or later must provide accessible entrances and restrooms. Barriers that can

reasonably be removed from older buildings should be altered. However, the list of requirements does not stop there. Law offices should be prepared to accommodate service or assistance dogs. These dogs may perform various services including but not limited to guiding, stabilizing and retrieving.

While comfort animals are not “assistance” or “service” dogs, in some cases if an individual has a well-founded disability, usually psychological, and exhibits symptoms that a dog can sense and relieve, that dog may be considered a service animal. A service animal is any dog individually trained to do work or perform tasks for the benefit of an individual with a disability, including a psychiatric disability.¹² The “work or tasks performed by a service animal must be directly related to the individual’s disability.” Such tasks can include “helping persons with psychiatric . . . disabilities by preventing or interrupting impulsive or destructive behaviors. . . .” The provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of this definition. Service dogs may be removed if they are not under the owner’s control, if they bite someone, or if they are not house trained. A proprietor may ask whether the individual has a disability and what service the dog performs, but may not ask for written verification or medical information.¹³

For guidance on accessible standards and architectural issues, small business owners including attorneys can refer to the small business primer at ada.gov or call the ADA information line at 800 - 514 - 0301 (voice) or 800 - 514 - 0383 (TTY). If the issue is architectural, the call will be referred to a DOJ architect.

The ADA also requires lawyers to provide services in a manner that does not discriminate against individuals with disabilities.¹⁴ An attorney who is asked by a deaf individual to provide a sign language interpreter would typically be required to provide a sign language interpreter for a complex or initial meeting unless it was an “undue burden.” There is a tax credit for eligible small businesses who may incur expenses in providing access or accommodations for customers or employees with disabilities. The credit is called the Disabled Access Credit.¹⁵

The ADA also requires lawyers to provide services in a manner that does not discriminate against individuals with disabilities.¹⁴

If a client can type on a computer, emails may be considered to be “effective communication” used for communications once an attorney-client relationship is established if that is the procedure with other clients. Courts usually provide sign language interpreters or VRI systems for most in-court appearances just as they provide language interpreters for non English-speaking parties. It follows that a party taking a deposition should ensure effective communication for that deposition. Refusing to see a client or refusing to pur-

sue a client’s case on the basis of the client’s disability and the accommodations that a client might require is a violation of the ADA.

Consent judgments and settlements DOJ has entered into are located at ada.gov under the enforcement section. By analogy, these cases demonstrate the responsibilities of service providers when serving disabled clients or potential clients. DOJ also provides a variety of technical assistant publications at ada.gov.

Conclusion

Law offices are basic “places of public accommodation” so it is up to the proprietors of these establishments to familiarize themselves with the ADA. To find out more about meeting your obligations under the ADA, visit ada.gov.

Additionally, the United States Attorney’s Office for the District of Idaho protects the rights of our citizens and visitors with disabilities. In most cases, the U.S. Attorney’s Office can resolve compliance issues cooperatively with employers, public accommodations, and local government officials through training, consent decrees, settlement agreements and alternate dispute resolution.¹⁶

Endnotes

1. See 42 U.S.C. § 12181(7)(f).
2. The Standards should be distinguished from the minimum guidelines in the Americans with Disabilities Act and Architectural Barriers Act Accessibility Guidelines (July 2004) promulgated by the Federal Access Board. The Department of Justice has adopted the ADAAG as its Standards for Accessible Design, published as appendix A to 28 CFR, part 36.
3. The 2010 Standards apply to new construction and alterations made after March 15, 2012, the compliance date.

The original 1991 Standards apply to all construction built after the ADA's effective date of July 26, 1991 and modified prior to March 15, 2012. However, if a facility subject to the 1991 Standards did not comply with those Standards when built or modified, any further remediation must meet the current, 2010 Standards.

4. 28 C.F.R. 36.304.

5. Technical assistance and design standards are located at: http://www.ada.gov/ada_req_ta.htm.

6. 28 C.F.R. § 35.160.

7. 28 C.F.R. § 36.303.

8. Regulations can be found on-line at: http://www.ada.gov/regs2010/titleIII_2010/titleIII_2010_regulations.htm#a303.

9. More information on effective communication can be found at <http://www.ada.gov/effective-comm.htm> and http://libraries.idaho.gov/files/effective-communicationdraft_copy.pdf.

10. See 28 C.F.R. § 35.104.

11. 28 C.F.R. §§ 35.104 and 36.303.

12. The ADA also includes miniature

horses as protected service animals, although these are not as widely used as dogs. 28 CFR 36.104.

13. See consent decrees in *United States v. Patric Lehouillier* (3/29/10) and *United States v. Larkin, Axelrod, Ingrassia & Tetenbaum, LLP* (6/28/12) regarding denial of access to law offices because an individual with a disability was accompanied by a service animal. <http://www.ada.gov/lehouillier.htm> and <http://www.ada.gov/larkin-cd.htm>

14. See 42 U.S.C. § 12181(7)(f).

15. The Northwest ADA Center provides information about this credit on its website. http://dbtacnorthwest.org/_public/site/files/fact_sheets/Tax_Incentives_10-2012.pdf.

16. An Idaho settlement can be found on-line at: http://www.ada.gov/budget_motel_settle.htm.

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This article is provided for information purposes only, is not legal advice, and should not be relied upon in making determinations as to whether one is in compliance with the ADA.



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Dealing with Sham Affidavits in Idaho Courts

Stephen Adams

The sham affidavit rule allows courts to strike contradictory affidavits presented by a party seeking to avoid summary judgment. The concept behind the sham affidavit rule is fairly straightforward. On a motion for summary judgment, the moving party has the burden to show, through affidavits or other admissible evidence, that there are no genuine issues of material fact and that summary judgment would be appropriate as a matter of law.¹

The party opposing summary judgment may then present evidence showing that there is a material issue of fact.² However, it would be unjust for a party to attempt to avoid summary judgment by presenting an affidavit that contradicts the party's previous sworn testimony.³ For example, if a party testifies during a deposition that, "the northbound light was red," he or she may not later provide an affidavit that states that, "the northbound light was green." This is the sort of clear conflict that the sham affidavit rule protects against.

As discussed below, the Ninth Circuit and the Idaho Federal District Courts allow contradictory affidavits to be stricken under the sham affidavit rule. However, under what circumstances a sham affidavit can be stricken in Idaho state courts is more uncertain.

The Ninth Circuit allows sham affidavits to be stricken

Almost every federal circuit has adopted some form of the sham affidavit rule.⁴ The Ninth Circuit has had a form of the sham affidavit rule since at least 1975⁵ to assist the court in securing the just, speedy and in-

The Eighth Circuit applies the sham affidavit rule to evidence from non-party witnesses which contradicts sworn testimony from a party.⁸ The Ninth Circuit does not apply the sham affidavit rule in such situations.⁹

expensive determination of every action.⁶ Nonetheless, there are variations in the rule's application.⁷ For example, the Eighth Circuit applies the sham affidavit rule to evidence from non-party witnesses which contradicts sworn testimony from a party.⁸ The Ninth Circuit does not apply the sham affidavit rule in such situations.⁹

The rule utilized by the Ninth Circuit is stated in *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262 (9th Cir. 1991):

The general rule in the Ninth Circuit is that a party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony. [I]f a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact.¹⁰

The Court explained this rule, stating that the rule only applied to "sham" testimony "that flatly contradicts earlier testimony in an attempt to 'create' an issue of fact and avoid summary judgment."¹¹ Under this rule, the district court "must make a

factual determination that the contradiction was actually a 'sham'" before it can strike the evidence from the record.¹²

The Ninth Circuit clarified that the sham affidavit rule does not preclude the non-moving party "from elaborating upon, explaining or clarifying prior testimony elicited by opposing counsel on deposition and that minor inconsistencies that result from an honest discrepancy, a mistake, or newly discovered evidence afford no basis for excluding an opposition affidavit."¹³

Further, as discussed above, the Ninth Circuit has indicated that the rule is limited to situations where a party is trying to contradict his/her own testimony. "The rationale underlying the sham affidavit rule is that a party ought not be allowed to manufacture a bogus dispute with *himself* to defeat summary judgment. That concern does not necessarily apply when the dispute comes from the sworn deposition testimony of another witness."¹⁴ Thus, if the evidence presented to avoid summary judgment is from a non-party, the affidavit should not be stricken under the sham affidavit rule.¹⁵

While the Ninth Circuit has adopted the sham affidavit rule, it is rather difficult to find a situation

where the rule resulted in an affidavit being stricken. In *Kennedy*, the affidavit at issue was remanded for a factual determination as to whether it was a sham.¹⁶ In other cases, the Ninth Circuit has found that the sham affidavit rule did not apply because the affidavits were not sufficiently contradictory or for some other reason.¹⁷ Therefore, even though the rule is available to strike contradictory affidavits, absent a complete contradiction, a party should not be surprised to find his/her motion to strike a sham affidavit denied.

Idaho Courts have not clearly adopted the sham affidavit rule

While the Ninth Circuit has adopted the sham affidavit rule, the situation in the Idaho state courts is less clear in light of a 2013 Idaho Supreme Court Case.¹⁸

In 1993, the Idaho Supreme Court held the sham affidavit rule did not apply when the evidence presented was not contradictory. In *Tolmie Farms, Inc. v. J.R. Simplot Co., Inc.*, Tolmie submitted an affidavit claiming that a Simplot employee told Tolmie that a particular chemical would improve crop yield.¹⁹

Simplot objected to the affidavit on the grounds that it was completely contradicted by Tolmie's prior deposition testimony, where Tolmie stated he could not remember what statements were made by the Simplot employee.²⁰ While relying on *Kennedy*, the Idaho Supreme Court stated that "While we may agree that the purpose of summary judgment is served by a rule that prevents a party from creating sham issues by offering contradictory testimony," the rule in that case did not apply because the Court found that the affidavit and deposition testimony were not contradictory.²¹

A year later in *Matter of Estate of Keeven*, the Idaho Court of Appeals decided a similar issue. When it was argued that an affidavit directly contradicted prior deposition testimony, the Court of Appeals stated "a sham affidavit which directly contradicts prior testimony may be disregarded on a summary judgment motion."²² Despite this, the Court found that while the affidavit at issue was unclear and vague, because it was not directly contradictory to the deposition testimony, the sham affidavit rule did not apply.²³

These two cases seem to indicate that the Idaho Courts could apply the sham affidavit rule in an appropriate situation. However, the Idaho Supreme Court sidestepped the question of adopting the rule in several ensuing cases. In *Frazier v. J.R. Simplot Co.*, 136 Idaho 100, 103-04, 29 P.3d 936, 939-40 (2001), the Idaho Supreme Court declined to adopt the rule because the affidavit at issue was not contradictory.²⁴ The Court reiterated that *Tolmie Farms* did not adopt the logic of *Kennedy* because the affidavit at issue in *Tolmie Farms* was not deemed contradictory.²⁵ In *Mains v. Cach*, the Idaho Supreme Court allowed an allegedly contradictory affidavit of an expert witness to be admitted because Rule 26(e)(1)(B) specifically allows experts to supplement their testimony.²⁶ In *Arregui*

v. Gallegos-Main, the Idaho Supreme Court declined to address the sham affidavit rule because the affidavit in question was deemed untimely, and therefore inadmissible.²⁷

Most recently in the 2013 case, *Major v. Sec. Equip. Corp.*, the Idaho Supreme Court reversed a trial court's decision to strike an allegedly sham affidavit on a rather ambiguous basis.²⁸ The Court noted that the sham affidavit doctrine had never been adopted, then stated:

However, the Court of Appeals has previously stated that an affidavit which directly contradicts prior testimony may be disregarded as a sham affidavit on a summary judgment motion. *See In re Estate of Keeven*, 126 Idaho 290, 298, 882 P.2d 457, 465 (Ct.App.1994). "[A]ll tribunals inferior to the Court of Appeals are obligated to abide by decisions issued by the Court of Appeals." *State v. Guzman*, 122 Idaho 981, 986, 842 P.2d 660, 665 (1992). Therefore, to the extent that the district court was following precedent from the Court of Appeals, the district court did not err in striking the affidavit.²⁹

The Supreme Court went on to find that the affidavit at issue was not sufficiently contradictory for the sham affidavit rule to apply.³⁰ The

In *Mains v. Cach*, the Idaho Supreme Court allowed an allegedly contradictory affidavit of an expert witness to be admitted because Rule 26(e)(1)(B) specifically allows experts to supplement their testimony.²⁶

Supreme Court then made this ambiguous statement:

This Court has never adopted the sham affidavit doctrine. We roundly criticized the doctrine in *Mains* because a sham affidavit finding necessarily turns on a credibility finding as well as a finding of bad faith. That is beyond the power of the trial courts at the summary judgment phase.

Although the trial court followed Court of Appeals precedent, it is however an abuse of discretion to misinterpret an affidavit or deposition. That is what has happened here.³¹

This statement seems to indicate that the trial court erred in striking the affidavit at issue, not because the sham affidavit rule has been rejected by Idaho courts, but because the affidavit was misinterpreted and was not sufficiently contradictory. While it could alternately be viewed as rejecting or limiting the sham affidavit rule, the Supreme Court did not explicitly overrule *In re Estate of Keeven* or *Tolmie Farms*, nor did it state that the sham affidavit rule was rejected outright. Thus, there may still be room for the sham affidavit rule in Idaho state courts.³²

The sham affidavit rule seems to be accepted though not readily applicable

Based on the foregoing, both federal and state courts in Idaho are willing to accept the concept of a sham affidavit rule, even though it may be difficult to get an affidavit stricken under it. In federal courts, it is unlikely that an affidavit will be deemed a sham unless it flatly and directly contradicts a prior statement from a party themselves.

In Idaho state courts, the situation seems more precarious. Under *Frazier*, *Mains*, and *Major*, the Idaho Supreme Court — while not rejecting the rule — has repeated that they have not adopted the sham affidavit rule. In contrast, under *Tolmie Farms*

Based on the foregoing, both federal and state courts in Idaho are willing to accept the concept of a sham affidavit rule, even though it may be difficult to get an affidavit stricken under it.

and *Matter of Estate of Keeven*, both the Idaho Supreme Court and the Idaho Court of Appeals indicate that there may be a benefit from having such a rule, even though the situation to adopt it has not yet arrived. Therefore, it seems that until the Idaho Supreme Court specifically rejects the sham affidavit rule, it may be available to litigants, but may best be used when the testimony is directly contradictory.

Endnotes

1. See F.R.C.P. 56(a); Idaho R. Civ. Proc. 56(c).
2. See F.R.C.P. 56(c); Idaho R. Civ. Proc. 56(e).
3. *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir. 1991) (quoting *Foster v. Arcata Associates*, 772 F.2d 1453, 1462 (9th Cir.1985), cert. denied, 475 U.S. 1048, 106 S.Ct. 1267, 89 L.Ed.2d 576 (1986)).
4. See *Cleveland v. Policy Mgmt. Sys. Corp.*,

526 U.S. 795, 806-07, 119 S. Ct. 1597, 1604, 143 L. Ed. 2d 966 (1999) (listing cases discussing contradictory testimony).

5. See *Radobenko v. Automated Equip. Corp.*, 520 F.2d 540, 543-44 (9th Cir. 1975).

6. *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 998 (9th Cir. 2009) (“The Supreme Court has explained that [s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action. Some form of the sham affidavit rule is necessary to maintain this principle.”).

7. See *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266-67 (9th Cir. 1991) (discussing different applications of the rule in the Fifth, Seventh, Eighth, Ninth and Tenth Circuits).

8. *Prosser v. Ross*, 70 F.3d 1005, 1008-09 (8th Cir. 1995).

9. See *Nelson v. City of Davis*, 571 F.3d 924, 929 (9th Cir. 2009); *DelJack, Inc. v. U.S. Bank Nat. Ass'n*, 1:11-CV-00065-EJL, 2012 WL 4482049 at *11 (D. Idaho Sept. 26, 2012).

10. *Kennedy*, 952 F.2d at 266 (internal citations and quotation marks omitted).

11. *Id.* at 267.

12. *Id.* Another district court has stated that “A contradictory affidavit, however, is not necessarily a sham affidavit. Rather, the court must make a factual determination that the contradiction was actually a ‘sham,’ as opposed to an attempt to explain certain aspects of confused deposition testimony, for example.” *Zurich Am. Ins. Co. v. Coeur Rochester, Inc.*, 720 F. Supp. 2d 1223, 1229 (D. Nev. 2010)

13. *Nelson v. City of Davis*, 571 F.3d 924, 928 (9th Cir. 2009) (internal quotation marks omitted) (citing *Scamihorn v. Gen. Truck Drivers*, 282 F.3d 1078, 1086 n. 7 (9th Cir.2002)).

14. *Nelson v. City of Davis*, 571 F.3d 924, 928 (9th Cir. 2009) (emphasis in the original)

15. See *DelJack, Inc. v. U.S. Bank Nat. Ass'n*, 1:11-CV-00065-EJL, 2012 WL 4482049 at *11 (D. Idaho Sept. 26, 2012).

16. *Kennedy*, 952 F.2d at 267.

17. See *Nelson v. City of Davis*, 571 F.3d 924, 929 (9th Cir. 2009) (sham affidavit rule didn’t apply to evidence from third parties); *Van Asdale v. Int'l Game Tech.*,

577 F.3d 989, 999 (9th Cir. 2009) (district court's ruling striking the affidavit as a sham was improper because no factual finding was made); *Pappas v. J.S.B. Holdings, Inc.*, 392 F. Supp. 2d 1095, 1103-04 (D. Ariz. 2005) (affidavits not a sham because they are not "sufficiently contradictory"); *Messick v. Horizon Indus. Inc.*, 62 F.3d 1227, 1231 (9th Cir. 1995) (affidavits are not sufficiently contradictory).

18. *Major v. Sec. Equip. Corp.*, 155 Idaho 199, 307 P.3d 1225, 1231 (2013).

19. *Tolmie Farms, Inc. v. J.R. Simplot Co., Inc.*, 124 Idaho 607, 609, 862 P.2d 299, 301 (1993)

20. *Id.* at 609 – 10, 862 P.2d, 301 – 02.

21. *Id.* at 610 – 11, 862 P.2d 299, 302 – 03.

22. *Matter of Estate of Keeven*, 126 Idaho 290, 298, 882 P.2d 457, 465 (Ct. App. 1994).

23. *Id.* at 297 – 98, 882 P.2d 457, 464 – 65.

24. *Id.*

25. 136 Idaho 100, 103-04, 29 P.3d 936, 939-40 (2001).

26. 143 Idaho 221, 225-26, 141 P.3d 1090, 1094-95 (2006).

27. 153 Idaho 801, 805, 291 P.3d 1000, 1004 (2012), reh'g denied (June 7, 2012)

(stating that "Idaho has not recognized the sham affidavit doctrine and because the affidavit was untimely, it was properly stricken and this Court need not address the issue here. The Court will not use this appeal as an opportunity to create a new doctrine when it is unnecessary to do so.")

28. 155 Idaho 199, 307 P.3d 1225, 1231 (2013).

29. *Id.*

30. *Id.* at 1232.

31. *Id.*

32. The Supreme Court has, as recently as June, 2014, held that Idaho has not adopted the sham affidavit doctrine. See *Shea v. Kevic Corp.*, 40563, 2014 WL 2854710 (Idaho June 24, 2014). However, in *Shea*, the Supreme Court ruled that the affidavit at issue was vague and contradictory, and therefore subject to cross-examination. *Id.*

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The Supreme Court has, as recently as June, 2014, held that Idaho has not adopted the sham affidavit doctrine. See *Shea v. Kevic Corp.*

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Confusing Word Pairs: Part II

Tenielle Fordyce-Ruff

Way back in the January 2012 edition of *The Advocate* I introduced you to my inner grammar noodle by discussing confusing word pairs. Several readers gave me suggestions for pairs that had confused them, and since then I've fielded more than a few questions from both students and readers about the difference between certain words.

I recently realized that I had enough material to have a Confusing Word Pairs: Part II. Here are more confusing word pairs explained and some tips to help you use the correct word when writing or editing.

Imply/Infer

These words particularly trip up new legal writers. *Imply* and *infer* are both verbs, but they carry different meanings and should not be used as synonyms for each other.



Imply means to suggest, indicate, or express indirectly.

The expert used jargon to imply her superior knowledge.

Infer means to deduce, conclude, or gather.

The jury may infer the defendant's guilt if it hears of his prior convictions.

Here's a quick tip for telling *imply* and *infer* apart: Use a nominalization (implication/inference) to determine what action the actor in the sentence took. Only one nominalization will make sense in context.

The expert suggested her superior knowledge by implication.



The jury determined his guilt based on an inference from the admission of his prior convictions.

Then/Than

The confusion in this pair comes from the single letter difference and similarity in sound when spoken. In writing, however, an incorrect usage will stand out to the reader.

Then is an adverb. It is used to discuss time.

Prices were lower then. (at that time)

The protests stopped briefly, then started again. (immediately, or soon after)

We ate, then started the deposition again. (next in order of time)

At first the suspect seemed angry, then contrite. (at the same time)

Then can also refer to next in order of place.

Standing beside Charlie is my uncle, then my cousin, then my brother.

Than, a conjunction, is used to construct a comparison. It is used to introduce the second member of a comparison.

Juries are more representative institutions than the judiciary.

It is also used to introduce a choice or explain a rejected choice.

I'd rather write than appear in court.

Now that you understand the difference, be sure to carefully proof your writing.

Principal/Principle

This can be an especially confusing pair in writing because the pronunciation of *principal* and *principle* is exactly the same.

Principal is almost always an adjective meaning main or chief.¹

The principal question before the jury is the credibility of the witness.

Principle is virtually always a noun meaning a rule, truth, or doctrine.

The bill preserves two important principles.

How to remember this distinction? Here's a handy trick: *Principal* with an "a" is an adjective (with an "a"). Use it when describing something or someone.

Disinterested/Uninterested

The difference in this pair is eroding in general usage, but not in legal writing.

Disinterested means neutral or unbiased. A *disinterested* person has no financial or legal interest in the outcome of a case.

As a matter of principle we insist that judges be disinterested.

Uninterested means bored. An *uninterested* person has no intellectual interest in the people or controversy. *We, however, do not want judges to be uninterested.*

If/Whether

This is another pair whose differences are disappearing, especially in speech. But legal writing should be precise and correct.²

If is a conjunction used to introduce a conditional clause. Use *if* when you need to let the reader know that something must happen prior to an action.

If you have a complaint, please write to the director.

Whether is a conjunction indicating a choice between alternatives.

The only remaining issue is whether the publication was defamatory.

In addition to mistakenly using *if* to introduce a choice, writers sometimes use the redundant *whether or not* construction.

Affect/Effect

This is a tricky pair. Both *affect* and *effect* can be nouns and verbs.³ No wonder many writers are confused. Good news though: The majority of the time you will use *affect* as a verb and *effect* as a noun.

Generally, *affect* is a verb that means to influence, impress, or sway. *He attempted to affect the jury through his emotional testimony.*

Affect is also less commonly used to mean to pretend or feign.

The witness affected shock when confronted.

The least common usage of *affect* is as a noun meaning emotion.

His expression lacked affect.

Generally, *effect* is a noun meaning result.⁴

The witness' displays of emotion had no effect on the jury.

But legal writers will still sometimes want to use *effect* as a verb meaning to bring about or produce.

He hoped to effect change through his lobbying efforts.

Awhile/A While

Awhile is an adverb meaning for a short period of time. It can be used only when modifying a verb.

The witness waited awhile before answering the prosecutor's questions.

A while is an article and a noun and is used as a prepositional phrase. *It takes quite a while to become a better writer.*

To remember which to use: *awhile* is one word, just like *adverb*. So if you're modifying a verb use one word: *awhile*.

Sometime/Some Time

The difference between these two is subtle. *Sometime* means at an indefinite or unspecified time.

The break-in occurred sometime last night.

Some time means quite a while. *The new associates will take some time getting used to the pace of practice.*

The difference is best understood by contrast:

Kate quit sometime later. (We don't know exactly when Kate quit.)

Kate quit some time later. (Kate waited a while to quit)

Conclusion

I hope these explanations will help you in your future writing. If

you have a suggestion for a confusing word pair send it my way. I'd love to do a Confusing Word Pairs: Part III!

Sources

- Anne Enquist & Laurel Currie Oats, *Just Writing: Grammar, Punctuation and Style for the Legal Writer*, 307-13 (3d ed. Aspen 2009).
- Bryan A. Garner, *The Redbook: A Manual on Legal Style*, § 12.3 (2d ed. West 2006).
- Bryan A. Garner, *Garner's Modern American Usage* (3d ed. Oxford 2009).

Endnotes

1. *Principal* is also a noun when referring to funds: principal and interest. It can also serve as a noun when referring to a main person — an elliptical form of principal official.
2. *Mea Culpa*: This pair has long plagued me and after one of my early columns an alert reader pointed out that I had used *if* when *whether* was correct. Nothing like having an error in your publication to help cement the difference in your mind!
3. For a refresher on parts of speech, see Back to the Basics II: Parts of Speech in the August 2013 edition of *The Advocate*.
4. *Effect* as a noun can also mean goods. *She left her personal effects to her niece.*

About the Author

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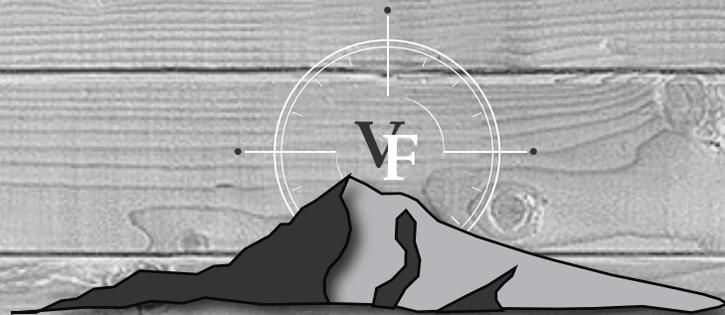
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One large office available for rent on the first floor of Beautiful Old Victorian House within existing law firm in Coeur d'Alene, with secretarial desk available. Access to reception area, conference room, copier and fax. Cost is \$525.00 per month which includes telephone and internet. Courthouse is located one block south from office. Call Robert at (208) 664-2191 or E-Mail brownjusth@cdaattorneys.com.

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Spacious office for rent in downtown Boise on 5th and Bannock. Onsite free parking, large conference room, kitchen area and other amenities available. Rent is \$900 per month with possible receptionist services (amount negotiable). Available immediately. Please contact Larry D. Scott or Tina Burke at scottlaw@qwest-office.net or call (208) 342-7600.

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Two office suites with client waiting areas and secretarial space. Great Bench Location with ample parking, Receptionist-phones and Equipment available. Client & Case Referral Possible, Terms are Negotiable Depending on needs, with rent reduction for handling overflow cases. Contact: Sallaz & Gatewood, Law Offices, PLLC. (208) 336-1145, 1000 S. Roosevelt, Boise, ID 83705 or email: sallaz@sallazlaw.com

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JOB OPPORTUNITY

ASSOCIATE ATTORNEY OPENING

The Coeur d'Alene office of Witherspoon Kelley, a full-service regional law firm with offices in Spokane and Coeur d'Alene, has an immediate opening for an associate attorney with general litigation and medical malpractice defense experience. He/she should possess strong academic credentials, excellent drafting skills, and preferably one to two years' experience. Qualified candidates should submit a cover letter with salary expectations, a resumé and a writing sample to: Hiring Partner, Witherspoon Kelley, 608 Northwest Blvd., Suite 300, Coeur d'Alene, ID 83814 or email jph@witherspoonkelley.com.

Procrastination, file stagnation & neglect, inability to meet professional or personal obligations or deadlines

Inability to open mail or answer phones, "emotional paralysis"

Feelings of bafflement, confusion, loneliness, isolation, desolation and being overwhelmed

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Drug or alcohol abuse

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Trouble concentrating or remembering things

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Michael G. McPeck inducted to College of Worker's Compensation Lawyers

BOISE – At the Annual Meeting of the College of Worker's Compensation Lawyers this spring in Chicago, Michael G. McPeck of Gardner Law Office, in Boise, was inducted as a Fellow in the College. Also at that meeting, Fellow Alan Gardner of Gardner Law Office, Boise, Idaho, was re-elected to the Board of Governors of the College. The College of Worker's Compensation Lawyers honors those attorneys who have 20 years of practice and who have demonstrated a distinguished career.



Michael G. McPeck

Landon S. Brown joins Naylor & Hales, P.C.

BOISE – Naylor & Hales, P.C. is pleased to announce the addition of associate Landon S. Brown to the firm. Mr. Brown's practice concentrates on municipality and public entity defense, Section 1983 litigation, and administrative law. Landon graduated from Brigham Young University-Idaho with a degree in Political Science in 2009. He received his Juris Doctorate, cum laude, from University of Idaho College of Law in 2012. After graduating from law school, Landon clerked for the Honorable David W. Gratton of the Idaho Court of Appeals.



Landon S. Brown

Paul McFarlane opens firm

BOISE – Paul McFarlane proudly announces that he has formed his own firm, McFarlane Law Offices, PLLC. His general practice will emphasize civil litigation, employment, and workers compensation. Paul formerly practiced with Moffatt Thomas in Boise and has over 18 years of litigation experience. He received his law degree from Tulane University School of Law and is admitted to practice in Idaho, Oregon, Washington and Alaska, the Ninth Circuit, and the United States Supreme Court.



Paul McFarlane

McFarlane Law Offices, PLLC is located at 1004 W. Fort Street; Boise, 83702; phone: (208) 342-1948; email: paul@mcfarlanelawoffices.com. The firm's website is mcfarlanelawoffices.com.

Perkins Coie strengthens emerging companies & venture capital practice in Boise

BOISE – Perkins Coie is pleased to announce that Eric Bjorkman has rejoined the firm's Boise office as a partner in the Emerging Companies & Venture Capital practice. Prior to spending two years as general counsel and director of legal affairs at a health care consulting firm, Bjorkman was a partner at Perkins Coie.



Eric Bjorkman

Bjorkman focuses his practice on emerging com-

panies and business counseling. He has extensive experience representing start-up clients with respect to entity formation, governance, seed funding, working capital requirements and mergers and acquisitions. His healthcare experience includes both regulatory and transactional counsel involving independent physician practices, ambulatory surgical centers, hospitals, and health systems.

Bjorkman earned his J.D. from the University of Idaho College of Law and his undergraduate degree from Dartmouth College. He was honored by the Idaho Business Review as a recipient of the "Accomplished Under 40" award (2010) and has received the Idaho State Bar Denise O'Donnell-Day Pro Bono Award (2003).

Baker appointed Senior Vice President for United Heritage Financial Group

MERIDIAN – United Heritage Insurance has announced the promotion of Geoffrey M. Baker to Senior Vice President, General Counsel and Chief Compliance Officer for United Heritage Financial Group. Baker has held similar positions previously as Vice President and General Counsel for United Heritage Life Insurance Company and United Heritage Property & Casualty Company.

"With this position, Geoff will add new General Counsel and CCO responsibilities for providing shared corporate services to four operating insurance companies based in Idaho, Oregon, and California," stated Dennis Johnson, President and CEO, in announcing the appoint-



Geoffrey M. Baker

ment. Baker joined United Heritage in 2000 as General Counsel and has been instrumental in licensure of the companies throughout 38 states and the District of Columbia.

A 1992 graduate of the College of William & Mary, Baker earned a Juris Doctor degree from University of Idaho College of Law in 1996. He is a Fellow, Life Management Institute, and an Associate, Insurance Regulatory Compliance.

Thomas B. High admitted to American College of Trial Lawyers

TWIN FALLS – Thomas B. High has become a Fellow of the American College of Trial Lawyers, before an audience of approximately 465 persons during the recent 2014 Spring Meeting of the College in La Quinta, California.

Founded in 1950, the College is comprised of the best of the trial bar from the United States and Canada. Fellowship in the College is extended by invitation only. Membership in the College cannot exceed one percent of the total lawyer population of any state or province.



Thomas B. High

Mr. High is a partner in the firm of Benoit, Alexander, Harwood & High LLP and has been practicing in Twin Falls for 35 years.

Emily M. Klick to join Perkins Coie

BOISE – Perkins Coie is pleased to announce the addition of Emily M. Klick to the firm’s Boise office. Emily joins the firm as an associate in the business practice group with a focus on corporate, commercial and tax law matters. Klick graduated from

University of Puget Sound with a bachelor’s degree in Politics and Government. She earned her law degree from Vanderbilt University Law School in 2012.

Prior to joining Perkins Coie, Emily worked as a business attorney for a Boise law firm and as a corporate paralegal at Micron Technology, Inc.



Emily M. Klick

Diane M. Walker appointed to bench

MERIDIAN – Diane M. Walker of Meridian has been appointed as magistrate judge in Ada County. She replaces magistrate judge Terry McDaniel who is retired June 30. For the past nine years Ms. Walker has worked as a Deputy State Appellate Public Defender, where she represented indigent clients in felony criminal appeals. From 2003-05 she clerked for Idaho Supreme Court Chief Justice Roger Burdick, where she researched and analyzed legal issues, drafted legal opinions and made recommendations to the court. She has practiced family law and criminal law in private practice. She is now assigned to the Family Law Docket in Ada County.



Hon. Diane M. Walker

New attorney joins Andersen Banducci PLLC

BOISE – Andersen Banducci PLLC, a Boise-based litigation firm specializing in civil trial practice and commercial dispute litigation, recently welcomed attorney Alyson Foster to their team.

At Andersen Banducci, Foster will represent businesses, organizations and individuals in commercial litigation in federal and state courts. Over the course of her career, she has successfully pursued relief for her clients in a variety of areas, including commercial contracts, insurance recovery, class actions, business disputes, personal injury, construction defect, voting rights, affirmative action, employment and labor law, and consumer protection. Foster also advises small business owners on contract and employment issues.



Alyson Foster

Before joining Andersen Banducci, Foster worked at litigation boutiques in Washington, D.C. and Salt Lake City, Utah. She also served as a law clerk for the Honorable Sidney R. Thomas of the U.S. Court of Appeals of the Ninth Circuit.

Foster received her J.D. from the University of Michigan and bachelor of art degrees in mathematics and German from the University of California, Berkeley. She is admitted in Washington, Utah, and the District of Columbia, as well as the U.S. District Court for the District of Columbia.

Holland & Hart Associate Aaron Kraft moves to firm’s Boise office

BOISE – Holland & Hart LLP Associate Aaron Kraft has moved from the firm’s Boulder, Colo., office to the firm’s Boise office. He joined the firm at its Boulder office in 2013.

Kraft is a licensed professional engineer and, before becoming a patent attorney, practiced electrical engineering for several years. He

provides strategic patent counsel, and he prepares and prosecutes sophisticated patent applications. He works closely with in-house legal teams to manage a number of international patent portfolios.



Aaron Kraft

He is well versed in standards-related patents, claim charting, and infringement analysis. He also has substantial experience working with emerging companies in the mobile and information technology fields — identifying protectable IP, harvesting inventions, developing patent strategy, and managing patent portfolios.

In addition to his technical experience, Kraft served as a law clerk to the Hon. Jim Jones of the Idaho Supreme Court. He also served in the chambers of the Hon. Edward J. Lodge of the U.S. District Court for the District of Idaho.

Concordia welcomes new full-time faculty

BOISE – Concordia Law is pleased to welcome new full-time faculty members joining the faculty next month. Professor Victoria Haneman was a professor at the University of LaVerne School of Law and recently visited at the University of Nevada William S. Boyd School of Law. Associate Professor McKay Cunningham arrives from Arizona Summit School of Law in Phoenix, and Associate Professor Jessica Berch was at Southwestern School of Law



Victoria Haneman

in Los Angeles. Assistant Professor Jason Dykstra joins the full-time faculty as Assistant Director of Legal Research and Writing, after his service as a part-time LRW instructor and law practice in private firms in Boise.



Jason Dykstra

Patti Tobias moves to National Center for State Courts

BOISE – Idaho Courts Administrator Patti Tobias has accepted a position at the National Center for State Courts (NCSC) in their Denver office. The NCSC is the premier national organization in providing leadership, services, and solutions to the state courts.



Patti Tobias

She shared the news with friends and colleagues in late June. In that announcement, she said, “In my new position, I will continue to work with the Idaho courts, as well as all other state courts. I will have the best of all worlds! Thank you all for the countless kindnesses and support you have shown me. I will always cherish my time working with all of you.”

Marten Law attracts Terry Uhling as partner

SUN VALLEY – Terry Uhling, a veteran agribusiness and natural resources attorney with a career spanning more than three decades, joined environmental and energy law firm Marten Law PLLC as a partner in Sun Valley.

Uhling is formerly senior vice president, general counsel and secretary of the Boise, Idaho-headquartered J.R. Simplot Company, one of the largest privately held agribusiness companies in the country. Uhling will work closely with the firm – in all offices, including a new Sun Valley outpost – and its clients on strategic and complex matters across the spectrum of issues that affect agribusiness, mining, water and other natural resources rights, permitting, legal and business strategies.

“Terry brings to Marten Law a long-standing reputation and industry leadership in food, mining and agribusiness operations,” said Brad Marten, chairman of Marten Law.

Uhling has dedicated the greater part of his career to the strategic oversight of J.R. Simplot’s legal and regulatory affairs departments, including environmental, health and safety, natural resources, public lands and corporate governance matters on behalf of the company’s interests. During his tenure, he developed and implemented Sustainable Simplot, an innovative business sustainability program.

Uhling remains on the board of directors for J.R. Simplot Company and has served on boards for myriad public and industry-focused groups, such as the Idaho Water Resource Board, where he was formerly chairman, American Mining Association, where he was a member of the board of trustees, National Cattlemen’s Beef Association and Washington State Climate Change Task Force. Uhling earned his J.D. from the University of Nebraska, Lincoln College of Law and his B.A. in Business from Washington State University.



Terry Uhling

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IN MEMORIAM

Thomas Allen Miller 1930 - 2014

Thomas A. Miller died peacefully on July 7, 2014, in Boise, surrounded by his family.

Born in Pocatello, he was the third son of Allen Newell Miller and Mary Casper Miller. Along with his brothers, Newell and Don, he was introduced to hunting and fishing by his father at an early age and this was something that he passed on and enjoyed with his children and grandchildren throughout his entire life.

Tom's love of learning began at the early age of 11 when he became interested in foreign affairs after WWII. He enjoyed studying history, politics, law, and many other topics and was truly a life-long learner. His excellent memory helped him recall detailed facts and figures that could range from a certain golf shot on a course he played 30 years ago to a citation for a legal issue from the same year.

Tom had a variety of occupations during his formative years including: selling magazines, having a pa-



Thomas Allen Miller

per route, working on his aunt's and uncle's farm for three summers in Vacaville, California, and working at McMahon's Drugstore downtown. Caddying at the Plantation and ground-maintenance work at Hillcrest Golf Course sealed Tom's love affair with golf. He played for the University of Idaho, in Bar Association and firm tournaments, and with friends for many years, and had scores below his age into March of this year. Semi-retirement allowed much more time for golf and for five hole-in-ones between 2001 and 2011. Fate even allowed him to meet his future wife, Jo Lecona, at Hillcrest Country Club in 1955.

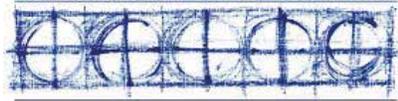
Tom joined the Naval Reserve in 1948 and by 1950 was assigned to the Commander Naval Forces, Far East in Tokyo during the Korean War. He had fond memories of his service days and looked back on his active duty as one of the most satisfying times of his life.

Admitted to the American Bar Association in 1956, Tom was still practicing law at the time of his death. He served as Secretary of the Idaho State Bar (1959-1963) while working as a law clerk in the office of Anderson, Kaufman and Anderson. In 1964 he became an associate with Hawley Troxell Ennis & Hawley and

a partner in 1968, specializing in real estate, water law, and financial transactions. When the firm celebrated its 50th anniversary earlier this year, Tom was pleased to be recognized as the oldest representative of its original members.

Tom served on the Court Reorganization Committee from 1963-1967, the Idaho Judicial Council from 1967-1973, and advocated increases judicial salaries. He considered these professional achievements among the finest of his career. Tom was the recipient of the Idaho State Bar Award of Merit (1969), and the American Judicature Society Herbert Lincoln Harley Award (1973). He served on the Board of Directors of Junior Achievement of Idaho for 35 years (1963-1998) and helped the Basque Museum & Cultural Center, Inc. and the Idaho Association of Museums in recent years with legal and legislative issues. Tom's marriage to a Basque woman made him Basque by association. Together, Tom and Jo had three children. Tom was truly a gentle man and a man of great integrity, honesty, humor, wit and intelligence. Tom is survived by his wife of 57 years, Jo Lecona Miller; children, Ted, Patty, and Tim, and daughter-in-law, Ann; and five grandchildren.

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has received a generous gift in memory of:

Richard C. (Dick) Fields

from **James F. Judd, Linda Judd, John and Karen Rosholt.**



Richard C. (Dick)
Fields

Introducing the Idaho Chapter of the American Immigration Lawyers Association

Nicole Derden

Idaho's local immigration attorneys are proud to announce the commencement of the first ever Idaho Chapter of the American Immigration Lawyers Association (AILA). While immigration attorneys have been practicing in Idaho's jurisdiction for decades, the increased difficulty in navigating modern U.S. immigration law, coupled with the ever-expanding number of foreign-born individuals living in Idaho have created an increased demand for knowledgeable practitioners to represent people in deportation proceedings, seeking lawful permanent



Nicole Derden



Angela Levesque

residence through family or employment-based petitions, seeking refuge or asylum from foreign perils as well as violence in the home, and advising on the adverse consequences of certain Idaho-specific criminal convictions.

By creating an AILA Chapter, immigration attorneys now have joint access to AILA's national association consisting of more than 13,000 attorneys and law professors who practice and teach immigration law. Founded in 1946, AILA is a nonpartisan, not-for-profit organization that provides continuing legal education, information, professional services, and expertise through its 39 chapters and over 50 national committees.

This year in June, during AILA's 2014 Annual Conference in Boston, Meridian attorney Angela Levesque was able to successfully petition AILA for an Idaho Chapter by presenting twenty signatures from Idaho attorneys indicating their intent to create, organize, and fund



this new AILA chapter. If you are interested in learning more about AILA and joining our Idaho chapter please contact either Angela Levesque, Chapter Chair at angela@levesquelaw.us or Nicole Derden, Chapter Secretary/Treasurer at nicole@idahoimmigrationlawyer.net.

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has job postings on its web site.
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D. Fredrick Hoopes – A Remarkable Litigator, Friend and Defender

Dan Black

Born into a prominent farming and ranching family in Eastern Idaho, Fred Hoopes had an early passion for justice. Before he became a lawyer, Fred worked as an aide to U.S. Senator Frank Church, (D –Idaho), a thrill for a ranch kid, he said. He took classes at American University in Washington, D.C. and got a sense of how the law worked. After graduating with his J.D. from Texas Tech University School of Law, Fred returned home to Idaho Falls to hang up his shingle.

He and his wife Sidney have raised two daughters, Sarah and Rachel.

In his practice, Fred said he “took anything that walked in the door, and by the luck of the draw I became a general practitioner.” Soon, he became known for criminal defense and personal injury litigation. He also gained a reputation for winning difficult cases.

In Idaho Falls, Fred quickly joined ranks with his good friend, Tim Hopkins, another Idaho Falls native, to form what would later become Hopkins Roden Crockett Hansen & Hoopes, PLLC, one of the largest and most influential firms in southern Idaho.



D. Fredrick Hoopes,
Idaho Falls

Tim said Fred was known as “a cowboy character,” who peppered his language with common-sense country wisdom. But contrary to the leanings of his mostly rural and conservative community, Fred proudly championed many liberal causes.

“Fred is first and foremost an exceptionally fine attorney,” Tim said. “Fred has a strong sense of justice and of what’s right.” Tim’s admiration was reciprocated – Fred mentioning Tim as his trusted invaluable friend.

“I believe lawyers are the best friends you can have,” Fred said. “I admire other lawyers, their thought process, even in their adversarial roles.”

Tim has known Fred for many years, and the two have spent considerable time together hunting, fishing, riding and anything outdoors, Tim said.

Looking back at their many years together, Tim recalled that Fred had a well-deserved reputation for “remarkable success serving clients.” Fred often took difficult cases and defended people from all walks of life. Naturally, he was a lawyer that many of his extended family and their friends trusted implicitly. Fred laughed about the extended family, calling them “his following.”

Tim said Fred was known as “a cowboy character,” who peppered his language with common-sense country wisdom. But contrary to

the leanings of his mostly rural and conservative community, Fred proudly championed many liberal causes.

One case that drew national attention and gained for him the ACLU’s Thurgood Marshall Liberty Award, was Fred’s work defending Charles Fain, a death row inmate who had been convicted of murder. Fain had spent 18 years on death row and Fred was successful at re-opening the case and having the conviction overturned. Tim said technology for DNA testing had just been developed and this case was the first DNA case in Idaho and one of the first in the country. Fred said those difficult cases “were the best part of it,” and he and Mr. Fain loosely kept in touch. “He was so grateful,” Fred said, for representation that saved him from the executioner.

Outside of the courtroom, Fred has been well-liked and very involved in his community and the bar. That involvement took him all over the state.

Aside from his work for the bar, Tim said “Fred was, and is, an absolutely committed Democrat.” Fred also loved to aid

Snapshot

- Judicial Fairness Committee (2000-2010)
- ISB Professionalism Award (2005)
- Denise O'Donnell Day Pro Bono Award (2008)
- ISB Board of Commissioners and President (2000-2003)
- ISB CLE Committee (1990s)
- Idaho Trial Lawyers Association President
- ACLU Thurgood Marshall Liberty Award
- American College of Trial Lawyers
- American Bar Foundation Fellow

Fred said those difficult cases “were the best part of it,” and he and Mr. Fain loosely kept in touch. “He was so grateful,” Fred said, for representation that saved him from the executioner.

environmental and conservation issues.

Fred found his work developing the Citizens Law Academy, teaching at University of Idaho and serving as

an Idaho State Bar Commissioner, and president of the Bar as well as ITLA, all part of a rewarding career. He struggles to remember all the volunteer efforts, he said, because he recently suffered a stroke and has

been diagnosed with Parkinson’s disease. Still, he speaks clearly and his demeanor is upbeat and cheerful.

“He has had a unique, full and rewarding life,” Tim said.

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Foreclosure Alternatives – Mortgage Modifications
Forbearance Agreements – HAMP Modifications

John McGown – Even-Tempered and Loyal to Firm and Clients

Lindsey Hanks

Through his 39-year career in law John McGown lost his temper only once. That single detail tells volumes about his fastidious temperament. From the start, John looked at what he wanted to overcome and through years of methodical self-improvement, accomplished that rare level of elder statesman in his practice. Looking back at his career, John recalls what he loves most, helping people. But he didn't know from the start what roads he would take.

After receiving his undergraduate degree in accounting from the University of Kentucky, John found a lot of tax disputes are settled in court. So, he decided to go to law school.

Wanting to live near mountains, John moved to Denver to attend the University of Colorado. John found he couldn't

find an area of law that grabbed his attention. In law school the classes failed to show how the law is applied. Setting a goal to be able to feel comfortable in a court room, he served three years as a deputy district attorney, which involved a lot of trial work. It wasn't John's favorite, but at the end of the three years he accomplished his goal.

A few months after John and his wife were married they decided to take a year and travel around the country in a fifth-wheel trailer. For work he used his C.P.A. to do tax



John S. McGown,
Boise

His professor, Mark Vogel, taught most of his classes and John said he was a great teacher and mentor, piquing his interest in tax law.

filings. He found he really enjoyed doing tax work. After the trip he decided to get his LL.M.

It wasn't until John received his LL.M. in taxation that he found his niche in the law. He had always been interested in taxes having worked as a C.P.A. His professor, Mark Vogel, taught most of his classes and John said he was a great teacher and mentor, piquing his interest in tax law. John had the opportunity to apply what he was learning while he was in the LL.M. program at the University of Colorado. While getting his LL.M., he worked for the IRS. Finding his niche in the law allowed him to build a career he really enjoys and is passionate about. He worked on some high-profile cases that allowed him to develop a good relationship with appeal officers. This experience allowed him to make the connection between academia and real world.

One of the most important aspects of helping clients is communicating with clients. John set out to improve his speaking ability and joined Toast Masters, allowing him to become more articulate. Consequently John enjoys giving seminars on tax law, taking his time to articulate his words. He has been in Toast Masters for 20 years.

John believes there are “three major life decisions you make, who you marry, whether or not you have kids, and where you live.” So, when it came down to deciding where to live, John and his wife wanted a place with access to outdoor recreation, college, and big enough to have a need for a tax practice. That led him to Idaho looking specifically in Moscow and Boise. Luckily Hawley Troxell in Boise had an opening for a tax lawyer.

A career at Hawley Troxell is a bit of a family affair. John said he had the privilege of working closely with three of the founding members, Jesse Hawley, Bob Troxell, and Jack Hawley. Although he didn't have the opportunity to meet Paul Ennis he was able to meet and get to know Paul's wife and children. He had the opportunity to help Paul's wife with some estate planning. Through this experience John feels like he was able to get to know Paul through his family. Loyalty is an important aspect of John's career at Hawley Troxell. In any firm there can be a lot of friction between the employee and employer. John said a person can either whine, quit or be constructive. John said he tries to make the work environment better. During his career there has been

only one instance when he lost his patience with the other side, (and never a client). John and a long term client were on the phone with the adverse party, who was making threats, which John was sick of hearing, and briefly blew up at him. While the client was shocked by never having seen John lose his temper, it actually turned out to be effective in eventually resolving the case.

Even though John was busy as a tax attorney, he never missed one of his children's events because of work. He actively made his family a priority, always making sure he was able to support them in various activities. When thinking back on the times when his girls were young and he would sometimes bring them with him into the office on the weekends. John would put a movie on for them while he finished up some work. It is a good thing John values humor, because

Snapshot

- Certified Estate Planning Specialist (2010 to present)
- Volunteer Mediator- ISB Fee Arbitration (2003 to present)
- Member of Pioneer Toastmasters (1990-2011); President (1991)
- Received Certified Public Accountant designation (1975)
- Frequent CLE Presenter - locally, statewide, and nationally
- Former Chairperson of the ISB Taxation, Probate, & Trust Law Section
- Visiting Faculty - University of Idaho College of Law

he recalls one Sunday afternoon in particular when the youngest got a little bored and decided it would be a good idea to pull the fire alarm. Quickly John called the fire department and told them what had happened, but they still had to come and check out the building. John smiles and says, "She got a lecture for that."

John is very pleased someone in the tax profession was able to get this award. He says, "There are so many great tax lawyers in the state this award could have gone to." Tax attorneys are a great group and they have the opportunity to share and mentor each other. He is pleased the tax lawyers are being recognized.

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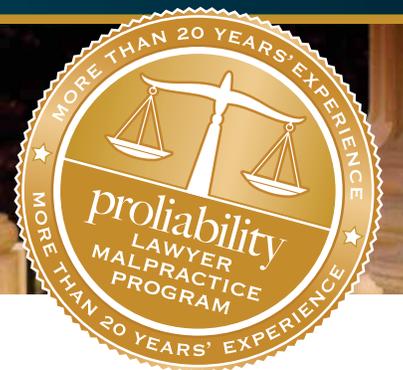
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¹"Profile of Legal Malpractice Claims: 2008-2011," American Bar Association, September 2012.

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2014 Idaho State Bar Distinguished Lawyer

Hon. Linda Copple Trout – Her Journey Includes Making History as First Female Justice

Dan Black

Hon. Linda Copple Trout didn't set out to make history as the first woman on the Idaho Supreme Court.

"That wasn't why I did it," she said. "It was the honor of serving on the state's highest court."

Receiving the Distinguished Lawyer Award is only the latest in a career loaded with accomplishment, honors and distinction. Those achievements belie Justice Trout's relaxed and humble demeanor.

These days she is content to work as a senior judge on the Idaho Supreme Court, doing mediations and chairing the Design and Implementation Team, which has the herculean task of standardizing and upgrading all the state's courts into one computer system. "Right now it's the perfect mix," she said, "I have time to do the things I like to do."

But the legal scene didn't always look like this. When Linda entered the University of Idaho College of Law in 1974, there were about 20 women in her class. "Of course, there were a few law students who were not accepting of women," but that was rare, she said. The country was struggling with the challenge of women's rights, but that was not

Justice Trout found more than mere camaraderie. She was elected by her fellow Justices to serve as Chief Justice for two consecutive terms from 1997 to 2004. She said she especially enjoyed the collaboration between the Justices, sharing opinions in an open and rigorous intellectual environment.

Linda's main concern in choosing law as a profession. Coming from a family where education was stressed, but not imposed, she knew she wanted a career as a professional.

After law school she worked in private practice for Clark Feeny and Trout in Lewiston. At the time, she was one of only two female lawyers in Lewiston. "It would have been nice if there were even five or 10," she said, but "I felt well accepted in the legal community. Again there were a few, but not many who were not accepting."

While still in Lewiston Linda became a Magistrate Judge and also worked as Trial Court Administrator. In 1990 she was elected as a District Court Judge. After a little more than a year later, she was appointed by Gov. Cecil Andrus to the Idaho Supreme Court. "I loved being a trial judge," she said, "But what are the chances that this opportunity to be on the Supreme Court will come around again?"

"Governor Andrus said 'it is high time we had a woman on the court,'" Justice Trout recalled, so she took the plunge and applied to the judicial selection committee. Once

on the court, the other Justices were cordial and pleasant. "I can't say enough about how comfortable they made me feel. I was one of the Justices."

One month after her appointment the Justices took an annual trip to Eastern Idaho to hold court in Idaho Falls and Pocatello. They made a ritual stop at the Eastern Idaho Fair, and "that sounded odd to me," she said. "Here we were, five men and one woman, all over-dressed, me in heels, walking through the fair. I was the newest justice and I got to pick the food. It gives you an opportunity to get to know each other, talk about your family. This is what they always did."

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Looking back on her time on the state's highest court, Justice Trout said dealing with the first appeals from the Snake River Water Adjudication process was one of



Hon. Linda Copple Trout, Boise

Snapshot

- University of Idaho Alumni Hall of Fame (2014)
- Sheldon A. Vincenti Award for Exemplary Service to the University of Idaho College of Law (2011)
- Distinguished Service Award, National Center for State Courts (2005)
- Idaho State Bar Family Law Section Award of Distinction (2001)
- Girl Scouts Women of Today and Tomorrow (2000)
- Honorary Recipient of Doctor of Laws from the College of Idaho (1999)
- Boise High School Hall of Fame (1997)

She retired from the court in 2007 and continues to serve as a senior judge for the Supreme Court, trial courts, pro tem judge and as a settlement judge.

the big challenges. Also challenging were death penalty cases and others where she simply had to rule on the law and put her personal views aside. “You always have to do that as a judge,” she said.

Then there were a series of lawsuits asking the court to enforce a constitutional provision that says the state must provide equal educational opportunities across the state. Justice Trout said, “we really struggled with the issue. It was so impor-

tant to Idaho children but it was a moving target” because the Legislature had continued to address parts of the issue while the lawsuits were working their way through the appeals process.

She said while only a few of the cases will gain a lot of public attention, all are important. She retired from the court in 2007 and continues to serve as a senior judge for the Supreme Court, trial courts, pro tem judge and as a settlement judge.

Looking at her past influences Justice Trout credits her father, who was a doctor, and emphasized the importance of getting an education. She was also inspired by Justice Sandra Day O’Connor, whom she met while already on the bench. “It was so wonderful. She has helped so many. To the extent I can have an impact on women lawyers, I would like to do so.” Linda regularly speaks to women law students and shares her story to hopefully inspire the next generation of women lawyers.

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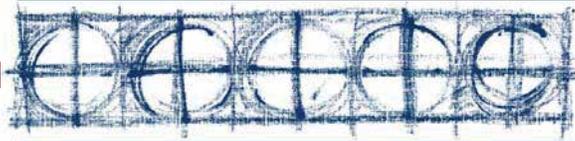
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Kathy Railsback Goes all out for Refugees

Dan Black

As a solo immigration attorney in Boise, Kathy Railsback sees plenty of unmet legal needs. In her pro bono efforts she assisted Catholic Charities with refugees who, after they enter the United States, have seven years to successfully pass an exam to become United States citizens.

Among the people needing lawyers the most are those who have little ability to learn English and go on to navigate the legal complexities of the citizenship process. Imagine trying to understand the complex path to citizenship from the perspective of a completely different language and culture. The challenge intrigued her.

Kathy found that advocacy on her part created a life-changing event for the refugees. Immigrants who fail to attain citizenship within seven years will lose the subsistence aid from the Social Security Administration.

“For many that’s their only income,” Kathy said.

Kathy found that among the several hundred refugees in Boise, many needed help with the citizenship process. Some of the refugees’ home countries are mired in wars and human rights atrocities and the

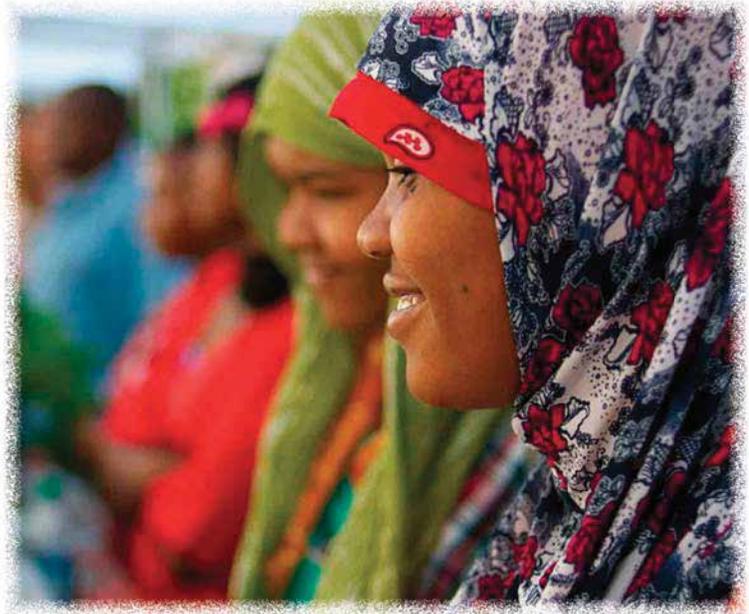


Kathy Railsback

refugees themselves carry deep emotional scars. Some suffer from Post Traumatic Stress Disorder and won’t likely pass the test for citizenship. Kathy found that her legal assistance was sorely needed attaining waivers for these people.

She and a team of law school students from Concordia University have helped file for disability waivers. “We just filed about 30 cases,” Kathy said, and “there is still a lot to do.”

There are about 50 people who need this particular kind of legal assistance and she is grateful to have Concordia student Nick Weeks as a coordinator and assistance from Boise attorney Heather Condor. She also credited her success with Idaho Volunteer Lawyers Program, World Relief, Agency for New Americans,



International Rescue Committee and the Idaho Office for Refugees.

Kathy was recently recognized by earning the Fourth District’s 6.1 Challenge, which is a friendly competition between attorneys doing pro bono work.

“It’s very gratifying,” Kathy said. “You are right there with them. It gives them such confidence and it’s very empowering to know they have a home.”

“I accompanied a woman who was blind in one eye, she had been shot in 25 places, lost three children and suffers from PTSD and depression,” Kathy said. “She was originally told she would not qualify for a waiver.”

Kathy won’t give up and continues to serve as a key organizer and inspiration for others fighting for refugees’ rights under the law.

Access to Justice Going Strong — More Help Needed

This spring the Access to Justice Idaho Campaign combined efforts of DisAbility Rights Idaho, Idaho Legal Aid Services (ILAS), and the Idaho Volunteer Lawyers Program (IVLP) to raise money to make it possible for low income Idahoans and persons with disabilities to receive critical legal services.

On June 6, Access to Justice Idaho held its kickoff event at the new Zion's Bank Eighth and Main Building in downtown Boise. The festive affair was well-attended by the legal community's luminaries and judges. Walt Sinclair, Chair of the campaign's Leadership Committee, announced that fundraising is off to a tremendous start, with lead gifts totaling \$150,000. Sinclair noted, "what has always made Idaho such a great place to live and work is that when we learn about a need, we take action and we rise to meet that need. Now we need to reach out across Idaho to reach our \$300,000 goal."

Lead gift donors who gave at the top tier received special recognition at the event, which comes at a pivotal time for those who need legal services. More than 220,000 Idahoans live in poverty, and according to the Justice Index (released in 2014), more than 62% of Idaho litigants appear without lawyers.¹

The Department of Justice discontinued a domestic violence assistance grant to ILAS and IVLP, resulting in the elimination of a 15-year grant and a cut of over



Staff photos by Kyme Graziano

The Fund Run was held to promote the Access to Justice walk-run, which attracted more than 100 people. There were many families who came out for a beautiful, clear Saturday morning on June 14 in Boise. The event raised over \$2,500 and provided a fun way to spread the word about the Access to Justice Campaign. In front is Walter Sinclair, who serves as Chair of the Campaign's Leadership Committee.

\$137,000. Prolonged reductions in interest rates have caused IOLTA grants to drop by nearly 80% over the last 5 years. Idaho Supreme Court data indicate that 57.7% of civil law cases proceeded pro se in 2012. According to the Justice Index, Idaho has .71 legal aid attorneys per 10,000 people in poverty, the 38th worst ratio among the 50 states.²

The goal of the Access to Justice Idaho Campaign is to provide civil legal services by raising funds from Idaho's legal community, businesses, and others who understand the essential role of our judicial system in the lives of so many.

The campaign has so far raised \$96,376 from 59 personal and corporate donations. There was one

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Early Donors

The Access to Justice Committee would like to thank everyone who made a lead gift, by making a donation prior to May 30th to help us kick off our fundraising efforts:

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grant for \$11,340 and 60 individuals have pledged an additional \$40,000. The Fund Run/Walk in Boise raised another \$2,500.

Contributions will enable these organizations to serve Idahoans in domestic violence custody and divorce cases, guardianships for incapacitated adults and abused/neglected children, foreclosure prevention, protection of seniors who have been financially exploited, and other critical legal needs.

Each Idaho attorney is invited to support this critical and rewarding campaign. For more information or to make a donation, please visit Access to Justice Idaho's website: http://www.isb.idaho.gov/ilf/aji_campaign/aji.html

Endnotes

1. www.justiceindex.org
2. www.justiceindex.org



Staff photo by Dan Black

Attorneys swap cheerful greetings at the Access to Justice Kickoff Celebration in Boise. The charitable nature of the gathering was naturally joyful. The committee recognized all the major donors with oversize checks. Photos of those donors can be found on the Idaho State Bar's Facebook page.



Lauren Scholnick visits with friends and colleagues at the fundraising campaign kickoff in Boise. She has advised the Idaho Access for Justice Committee to develop its plan based on a similar program in Utah where Scholnick has been involved. The cooperative approach to fundraising is a more efficient, synergistic approach.



Organized by Idaho State Bar Admissions Director Maureen Braley, the Access to Justice Fund Run/Walk was her leadership "legacy project" for participating in the Idaho Academy of Leadership for Lawyers. She said, "It was a ton of fun and we will definitely be doing it again next year." Donors can be found on the Idaho State Bar's Facebook page.



The fastest runner was Christian Williams, a 15-year-old who runs in a local 5K almost every weekend. He ran the 5K course in just 19 minutes.



Fun was the name of the game as participants from the Boise legal community, join family, friends and some folks who simply love getting out on a Saturday morning. At right is Idaho State Bar Executive Director Diane Minnich and Deputy Bar Counsel Julia Crossland.



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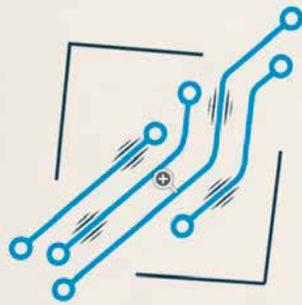
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