



# The Advocate

**Official Publication  
of the Idaho State Bar  
Volume 57, No. 2  
February 2014**

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# The Advocate

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

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## On the Cover:

Boise attorney John Thiel captured this image of a geothermal pool in Yellowstone National Park on a crisp October day. He is a solo practitioner at Thiel Law Offices, PLLC and handles matters of business law, litigation, personal injury, and bad faith. Practicing law, he said, helps feed his photography habit.

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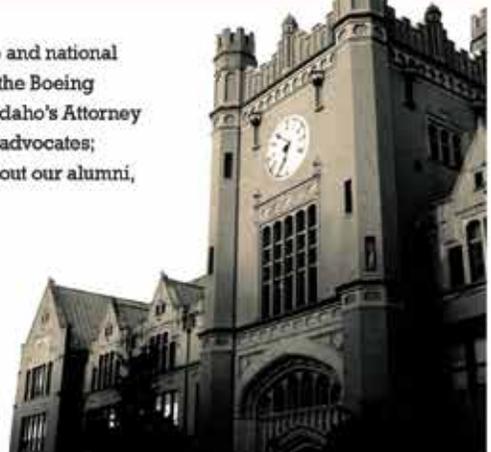
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### February 6-8

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The Coeur d'Alene Resort – 115 S. 2<sup>nd</sup> Street, Coeur d'Alene

13.5 CLE credits of which 1.0 is Ethics

### February 14

#### *CLE Idaho: Lunch with the Judiciary*

Sponsored by the Idaho Law Foundation

Canyon County Courthouse - 115 Albany Street, Caldwell

Noon (MST)

1.0 CLE credit – **RAC**

### February 14

#### *CLE Idaho: Lunch with the Judiciary*

Sponsored by the Idaho Law Foundation

Kootenai County Courthouse – 501 Government Way, Coeur d'Alene

Noon (PST)

1.0 CLE credit – **RAC**

### February 14

#### *CLE Idaho: Lunch with the Judiciary*

Sponsored by the Idaho Law Foundation

Nez Perce County Courthouse – 1109 F Street, Lewiston

Noon (PST)

1.0 CLE credit – **RAC**

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

## February (continued)

### February 28

#### *Real Estate Development Fundamentals: How to Build Rome, Described in One Day*

Sponsored by the Real Property Section

The Riverside Hotel – 2900 Chinden Blvd., Boise

8:30 a.m. (MST)

6.5 CLE credits of which .5 is Ethics

## March

### March 7

#### *Annual Workers Compensation Seminar*

Sponsored by the Workers Compensation Section

The Sun Valley Resort – 1 Sun Valley Road, Sun Valley

8:30 a.m. (MST)

6.0 CLE credits of which 1.0 is Ethics

### March 14

#### *Annual Flagship CLE Replay: Idaho Rules of Evidence – Tips, Traps and Trends*

Sponsored by the Idaho Law Foundation

Holden Kidwell Hahn & Crapo PLLC – 1000 Riverwalk, Idaho Falls

8:15 a.m. (MST)

4.0 CLE credits of which 1.0 is Ethics – **RAC**

### March 14

#### *Annual Flagship CLE Replay: Idaho Rules of Evidence – Tips, Traps and Trends*

Sponsored by the Idaho Law Foundation

Best Western Plus Coeur d'Alene Inn – 506 Appleway Avenue, Coeur d'Alene

8:15 a.m. (PST)

4.0 CLE credits of which 1.0 is Ethics – **RAC**

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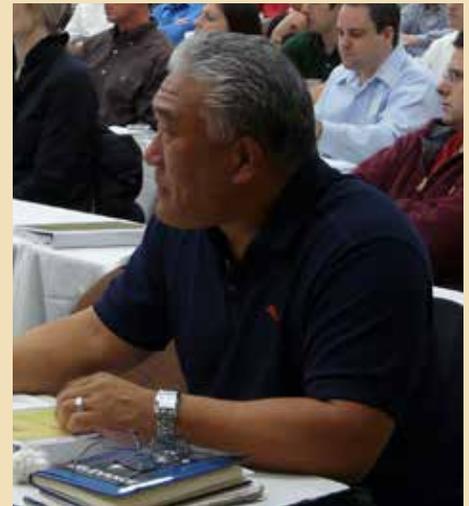
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### An Introduction from Robert T. Wetherell

*Robert T. Wetherell  
President, Idaho State Bar  
Board of Commissioners*

If the President's first message is to be a rambling introduction, this should do.

I am one of those individuals who always wanted to be a lawyer. I remember in grade school seeing a program about John Adams and his defense of the British soldiers at the Boston Massacre. In addition, "To Kill a Mockingbird" had been recently released with Gregory Peck standing to defend the rule of law in a small town in the South. The law seemed to attract people of integrity and courage.

I was born in Mountain Home in 1958. It was a wonderful community while I was growing up and still is today. With approximately 8,000 people in town and 8,000 people at the air base, it was a much larger community than people realized. In addition, it was by far the most diverse community in the state of Idaho. With retired military in the community, it was not uncommon to hear foreign accents from Germany, France and other European countries. In addition, with the Air Force base kids attending school in Mountain Home, you were able to interact with people from all over the United States and students who had traveled the world.



The schools in Mountain Home were first rate. Because of federal impact funds and money the school district received from Idaho Power

I was able to see a true cross section of life. One thing that impressed me most about living in Mountain Home in my formative years, was the way the lawyers in town were treated.

for Anderson Ranch Dam, teachers in Mountain Home were paid more than teachers in the rest of the Treasure Valley. We had excellent teachers and leadership, and I never recall a bond election that failed.

My father was a state senator in the 1950's-60's and my mother was a state senator in the 1980's-90's. Law and politics were always a topic of conversation. You never knew who was going to be at the house on a particular occasion. I was able to see a true cross section of life. One thing that impressed me most about living in Mountain Home in my formative years, was the way the lawyers in town were treated. In particular, Frank Hicks, Fred Kennedy and Perce Hall were very well respected. You saw them wear suits every day and it seemed as if the town revolved around their counsel and advice.

More than just practicing law, Frank Hicks especially, was everything a small town attorney should be. He didn't simply practice law and go home. He volunteered his time to various organizations and you

would often see him on week nights and weekends working to make the city of Mountain Home better for everyone. He offered me advice as I continued to tell him how I wanted to be a lawyer.

Frank Hicks gave me one quote from Abraham Lincoln I will never forget. It's a partial quote, but it says volumes about what lawyers should be, even in this day and age:

"Discourage litigation. Persuade your neighbors to compromise wherever you can. Point out to them how the nominal winner is often a real loser – in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough. Never stir up litigation. A worse man can scarcely be found than one who does this . . . A moral tone ought to be infused into the profession which should drive such men out of it."

After I graduated from the University of Idaho College of Law in

1982, I was fortunate enough to obtain a clerkship with United States District Judge Taylor and United States District Judge McNichols. I did well enough in law school that I was asked to interview for the position. Interestingly enough, I didn't get the job but did receive a call stating I had come in second during the interviewing process. As luck would have it, the graduate who was actually offered the job turned it down to be an associate at a bankruptcy firm in Spokane. Apparently it paid more, but I can guarantee with all the money he probably has now, he couldn't buy the 2½ year experience I had at federal court working for Judge Taylor and Judge McNichols. I would encourage any new lawyer to clerk for a judge, regardless of pay.

In those days, you could only clerk for the United States District Court for two years. The reasoning was that a federal judge is appointed for life and therefore that judge should not turn around and appoint two additional lawyers for life. Those days have changed.

My first controversial statement is as follows. I would encourage state and federal judges to rotate their clerkships in order to provide opportunities for new graduates from law school. This would provide a better understanding of the court system by giving young lawyers the experience of seeing how the system operates from the inside. I don't believe it is a good practice to have longtime law clerks. It only serves to separate the bench from the bar. Change is hard, but change is good. Change gives new energy to you and the people around you.

After my clerkship, I entered private practice and have engaged in private practice for approximately 30 years now. It has been very rewarding. Fred Kennedy worked me 50 hours a week my first two years and taught me the importance of preparation in the practice of law. I think the most important experiences have been practicing with and against other lawyers. They have been exceptional professionals and become lifelong friends.

I look forward to serving you as President of the Idaho State Bar in 2014. I hope to write articles for *The Advocate* that will be thought-provoking on topics we should be discussing, but at times are reluctant to mention.

#### About the Authors

**Robert T. Wetherell** is a 1982 graduate of the University of Idaho Law School and clerked for the United States District Court for the District of Idaho immediately upon his graduation. Since that time he has been in private practice in the city of Boise and is currently a principal and partner at Capitol Law Group. Mr. Wetherell began serving as Bar President in January of 2014. He has been married to his wife, Deborah, for 29 years and they have two adult children; Marie Ellen, a third-year law student at the University of Idaho College of Law and R. John, a senior at the University of Idaho. GO VANDALS!



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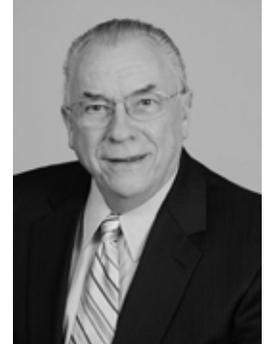
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**Darren L. McKenzie**

(Suspension, Withheld Suspension and Probation)

On December 9, 2013, the Idaho Supreme Court issued a Disciplinary Order suspending Nampa attorney Darren L. McKenzie from the practice of law for a period of five years, with 19 months withheld and recommending terms of probation upon any reinstatement. Mr. McKenzie's non-withheld suspension runs from June 2, 2010 through November 2, 2013, representing credit for time he served on interim suspension. The Idaho Supreme Court's Order followed a stipulated resolution of a disciplinary proceeding that related to the following circumstances.

On May 20, 2010, the Idaho State Bar filed a formal charge Complaint and a Petition for Interim Suspension of License to Practice Law with the Idaho Supreme Court. On June 2, 2010, the Idaho Supreme Court entered an Order placing Mr. McKenzie on interim suspension effective June 2, 2010.

The Complaint alleged four counts of professional misconduct. With respect to Count One, Mr. McKenzie admitted he violated I.R.P.C. 1.3, relating to diligence, 1.4 relating to lack of communication with his client, 1.15(c) relating to the failure to promptly notify and deliver property to his client, 1.15(d) relating to failure to distribute property to his client, and 1.16(d) relating to the failure to return unearned fees and the file upon termination of representation. Count One related to Mr. McKenzie's representation of a client in a criminal case. The client pled guilty pursuant to a negotiated plea

and was sentenced. In anticipation of his incarceration, the client signed a durable power of attorney appointing Mr. McKenzie as his agent to sell his house. Mr. McKenzie agreed to deduct his attorney's fees from the proceeds from the sale. The house was sold, Mr. McKenzie's attorney's fees were paid, he made a deposit to his client's inmate account and the remainder of the proceeds was placed in a certificate of deposit for the client's benefit. However, despite requests, Mr. McKenzie did not communicate with his client nor provide him with an itemized accounting of the funds. After the Complaint was filed, Mr. McKenzie cooperated with Bar Counsel's Office and they were jointly able to obtain a release of the funds held in the matured certificate of deposit. Those funds were then transferred to Mr. McKenzie's client's inmate account. Mr. McKenzie also then provided an accounting of fees and costs relating to that client.

With respect to Count Three, Mr. McKenzie admitted that he violated I.R.P.C. 1.2 relating to the scope of representation, 1.3 relating to diligence, 1.4 relating to communication, and 1.1.6(d) relating to the failure to protect his client's interest upon termination. That count related to Mr. McKenzie's representation of a client in a divorce modification case. Mr. McKenzie handled the case and the court took the matter under advisement, pending the submission of separate proposed orders from counsel. No proposed orders were filed with the court by either counsel. Mr. McKenzie's client filed a complaint alleging that Mr. McKenzie failed to expedite his litigation and could not be reached despite sev-

eral attempts to communicate with him. Opposing counsel eventually filed an affidavit with the Court to retain the case, Mr. McKenzie's client eventually retained substitute counsel, and the case was completed.

With respect to Counts Two and Four, Mr. McKenzie admitted that he violated I.R.P.C. 8.1(b) and I.B.C.R. 504(e) relating to his failure to respond to requests from Bar Counsel about those client's grievances.

The Disciplinary Order provides that 41 months of suspension will be served by Mr. McKenzie and 19 months of the suspension will be withheld. Mr. McKenzie's 41 month suspension runs from June 2, 2010 through November 2, 2013, representing credit for the time he served on interim suspension. Mr. McKenzie will serve a two-year probation following any reinstatement subject to conditions of probation specified in the Disciplinary Order. Those conditions include that Mr. McKenzie will serve an additional 19 month suspension if he admits or is found to have violated any of the Idaho Rules of Professional Conduct for a which a public sanction is imposed for any conduct during Mr. McKenzie's period of probation. During his probation, Mr. McKenzie must practice under a supervising attorney and provide monthly reports to Bar Counsel attesting that his representations of his clients is consistent with his responsibilities under the Idaho Rules of Professional Conduct.

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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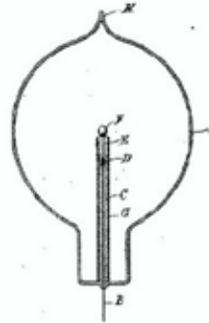
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## NEWS BRIEFS

### Committee considers Fourth District Family Law Procedure

The Children and Families in the Courts Committee will soon consider a recommendation to the Idaho Supreme Court on whether to adopt for statewide use the Idaho Rules of Family Law Procedure that are currently being piloted in the Fourth District. A copy of these rules can be found on the court's website at <http://www.isc.idaho.gov/irflp>. The Committee sought comments on whether the rules should be implemented statewide.

### Lincoln gala to benefit Idaho Legal History Society

On Wednesday, February 12, Abraham Lincoln's birthday, the Idaho Legal History Society will host a gala event from 5:30 to 8:30 p.m. at the Idaho History Center, 2205 Old Penitentiary Road in Boise.

Attendees will have exclusive, after-hours access to the brand new Lincoln Legacy Exhibition, the most significant grouping of contemporary artifacts ever assembled relating to the relationship of Abraham Lincoln and the Rocky Mountain West. The event will featuring the Honor-

able Stephen Trott, Senior Circuit Judge for the United States Court of Appeals for the Ninth Circuit.

To reserve your ticket online, go to <http://goo.gl/eS2018>. You may also mail your payment to the Idaho Legal History Society, c/o Walt Sinclair, Holland and Hart, LLP, 101 S. Capitol Boulevard, Suite 1400, Boise, ID 83702. Checks should be made payable to "Idaho Legal History Society." All proceeds of this event benefit the Idaho Legal History Society and its mission to preserve and promote public knowledge of Idaho's legal history. The cost is \$75 per person.

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# Executive Director's Report

## Idaho State Bar — 2013 Year in Review

Diane K. Minnich  
Executive Director, Idaho State Bar

**A**s we begin a new year, I offer highlights of the bar's programs and operations for the past year.

### Admissions

The Bar administered the Unified Bar Exam, which allows portability of a bar exam score, in 2012. At the end of 2013, 14 states had adopted the UBE.

Idaho allows reciprocal applicants from 31 jurisdictions. Last year, 32% of the attorneys admitted in Idaho were reciprocal or UBE applicants.

The bar also administers the legal intern process. In 2013, 97 legal intern licenses were issued.

Bar Exam/Reciprocal Admission		
Year	2012	2013
Bar exam applicants	215	214
Pass Rate	80%	78.5%
Reciprocal applicants admitted	94	63
UBE applicants admitted		10

### Licensing/Membership

ISB Membership		
12/12	12/13	Percent change
5,812	5,966	2.6%

As of December 2013, of the 5,966 lawyers licensed in Idaho, 4,839 were active members, 205 judges, 30 house counsel, 839 inactive (previously affiliate) members, 2 emeritus and 51 senior members.

### Bar Counsel

In 2013, 17 formal charge cases were opened and 19 cases closed. Of the 19 closed cases, 3 attorneys were disbarred, 2 resigned in lieu of disci-

pline, 10 were suspended, 2 received public reprimands, and 2 cases were dismissed.

Discipline/Ethics			
	2012	2013	Percent change
Phone	1,435	1,235	-14%
Grievance opened	431	369	-14%
Grievances closed	367	396	8%
Complaints opened	57	57	0%
Complaints closed	59	63	7%
Ethics questions	1,565	1,642	5%

### Fee Arbitration

There was a slight decrease in fee arbitration cases in 2013, 47 cases were opened in 2013 as compared to 54 cases opened in 2012.

### Client Assistance Fund

Year	Claims	Total Paid
2012	14	\$33,520
2013	2	\$20,500

There were 19 client assistance fund claims opened in 2013 and 13 claims closed.

### Lawyer Referral Service (LRS)

	2012	2013	Percent change
Calls	2,091	1,920	-8%
Referrals	1,650	1,449	-12%

The Lawyer Referral Service Committee has been studying other options to improve the quality of the service for attorneys and the public. The Committee is currently developing criteria for certain areas of practice.

### Annual Meeting

The 2013 Annual Meeting was held at the Coeur d'Alene Resort.

The program featured Bruce Reed, a CDA native who served as chief of staff to Vice President Biden. There were also 11 CLE programs, networking opportunities and award presentations. Although the attendance was lower than Boise it was consistent with 2010 in Idaho Falls and slightly higher than 2011 in Sun Valley.

	2012 Boise	2013 CDA	Percent change
Total Attendees	533	397	-25%
Attorneys and Judges	302	231	-23%

### Member Services and Communications

In addition to our regulatory responsibilities, we are committed to providing quality services to bar members. The services are offered to enhance your practice and professional growth. The current list of services offered to bar members can be found on our website: [www.isb.idaho.gov](http://www.isb.idaho.gov). Services include Case-maker legal research library, *The Advocate*, the CLE programming, mentor program, job announcements, publications, weekly E-bulletin, discounts on services, and section programs and activities.

There are currently 20 ISB practice sections that offer many opportunities for learning, service and networking.

Hundreds of volunteers, both lawyers and non-lawyers, volunteer their time, expertise and resources each year to support bar programs and services. The Idaho legal community's commitment to improving the profession and serving the public is exceptional. Thank you!

# Welcome from the Employment and Labor Law Section

Leslie M. Hayes

**T**his issue of *The Advocate* is sponsored by the Employment and Labor Law Section of the Idaho State Bar. In this issue we seek to provide all readers with a glimpse of exciting changes in the employment context.

Our Section has provided seven authors presenting on five different employment topics: Theodore Reuter engages us with the Equal Employment Opportunity Commission's stances on criminal background checks; Dean Bennett and Scott Randolph take a look at recent rulings from the Idaho Supreme Court and when the *McDonnell Douglas* burden shifting standard applies in Idaho; John Ashby discusses issues with non-compete agreements that could arise with newly hired employees; Thadeus O'Sullivan examines changes to the Family Medical Leave Act regulation; and Lucy Juarez and myself delineate the recent challenges presented in the employment realm due to changes in federal law, the partial repeal of the Defense of Marriage Act, and individual city ordinances that protect LGBT individuals. In addition to these employment topics from our membership, this issue also features



Lisa Shultz with her perspective on the partial repeal of the Defense of Marriage Act and issues that arise in family law.

I encourage all who are interested to join the Employment and Labor Law Section. We are an education-focused Section that meets on the fourth Wednesday of the month at the ISB offices in Boise and also offers a telephonic option. Each meeting we aim to provide a half-hour CLE on topics that are trending in the employment arena. Our Section also annually sends members to present an employment CLE at the Idaho State Bar Annual Meeting.

On behalf of our Section, I would like to thank all our authors and

the editorial board for their help in bringing this issue together and I hope you enjoy the articles in this issue of *The Advocate*.

## About the Authors

**Leslie M. Hayes** is a deputy attorney general for the State of Idaho and this article is a presentation of her views only and not the views of the Office of Attorney General. Leslie has practiced employment law since 2009 and has represented employers in both the private and public sector. She currently she serves as the Chair for the Employment and Labor Law Section.



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# Equal Employment Opportunity Commission's War on Background Checks

Theodore W. Reuter

In January 2012, Pepsi Beverages agreed to pay \$3.13 million and provide job offers and training to resolve claims that Pepsi's background check policy had a disparate impact on African Americans. In April 2012, the Equal Employment Opportunity Commission (EEOC) released new enforcement guidance with the purpose of updating and consolidating guidelines "regarding the use of arrest or conviction records in employment decisions."<sup>1</sup> The guidelines tighten restrictions on criminal background checks and signaled the EEOC's intent to pursue litigation in this area more aggressively.<sup>2</sup>

In 2013 the EEOC filed two more high profile suits, one against Dollar General and another against BMW Manufacturing Co. LLC.<sup>3</sup> These suits appear to be part of what prompted a letter from nine attorneys general to the EEOC. In its response to the letter, the EEOC affirmed that "[a]pplying disparate impact analysis to criminal background checks is squarely within [its] mission." However, despite the EEOC's apparent dedication to curtailing the use of criminal background checks in hiring decisions, so far, results at the trial court level have been mixed, as described in more detail in the "Recent Developments" section below.

This article sets out the standard for disparate impact under Title VII, and the usual test using criminal background checks in hiring and retention determination. It next reviews the guidelines issued by the EEOC, a recent decision at the federal level, and two suits filed in 2013 by the EEOC. The article concludes by offering some suggestions for how plaintiffs can avoid the pitfalls which sidelined the EEOC's case, as well as steps employers can take to place themselves

The guidelines tighten restrictions on criminal background checks and signaled the EEOC's intent to pursue litigation in this area more aggressively.<sup>2</sup>

on firmer ground if their use of background checks is questioned.

## Background checks and disparate impact analysis

A hiring policy that is neutral on its face may be challenged as having a "disparate impact" where the policy disproportionately excludes a protected class and is not justified by business necessity.<sup>4</sup> In the case of criminal background checks, one often cited standard is the one set out in *Green v. Missouri P.R. Co.* In that case, a group of African American workers sued a potential employer alleging that the employer's absolute ban on hiring persons with criminal convictions had a discriminatory impact on African American workers. The trial court agreed, an injunction was entered and it was upheld on appeal.<sup>5</sup> In response to the injunction, the employer modified its hiring practices. The employer still took into account felony convictions of applicants, but it was no longer necessarily sufficient to automatically disqualify an applicant.

The plaintiffs challenged the new hiring policies. On appeal, the Eighth Circuit Court of Appeals affirmed an injunction from the District Court which allowed the company to con-

tinue to consider criminal background as a factor in hiring so long as it took into account "the nature and gravity of the offense or offenses, the time that has passed since the conviction and/or completion of sentence, and the nature of the job for which the applicant applied."<sup>6</sup>

## EEOC enforcement guidelines

The EEOC has expanded on the legal requirements with guidelines that set out the sorts of procedures that it considers compliant with the *Green* standard.<sup>7</sup> The guidelines provide that an arrest, in and of itself, is not sufficient to show criminal conduct. Therefore, an arrest alone will not be sufficient to show that an adverse employment or hiring decision was in line with business necessity, although the conduct underlying the arrest may be sufficient.<sup>8</sup> As an example of conduct underlying an arrest sufficient for discharge, the EEOC uses the example of a school janitor who is arrested for allegedly having inappropriate conduct with underage students. If the school investigates these allegations, has a policy that requires suspension or termination of employees who endanger students and determines that inappropriate touching occurred, then it may terminate the janitor. This is true even the arrest from the conduct does not lead to a conviction.<sup>9</sup>

Assuming that a company treats all individuals with criminal histories in the same manner, the guidelines offer two legitimate ways in which a business may take into account criminal convictions. Firstly, a criminal background check may be allowed even if it disproportionately disadvantages a protected class if “[t]he employer validates the criminal conduct screen for the position in question per the Uniform Guidelines on Employee Selection Procedure (Uniform Guidelines) standards...”<sup>10</sup> These guidelines require that a study have been done which shows the connection between certain criminal behavior and job performance.<sup>11</sup>

In the alternative, the EEOC has conceded that criminal background may be taken into account so long as any conviction is not an automatic bar to employment. The guidelines propose a two step process where “[t]he employer develops a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job (the three *Green* factors), and then provides an opportunity for an individualized assessment for people excluded by the screen to determine whether the policy as applied is job related and consistent with business necessity.”<sup>12</sup>

The EEOC also states that in certain cases a narrowly tailored policy of refusing to hire persons with specific crimes that clearly relate to the job may be acceptable.<sup>13</sup> The EEOC does not give specific examples of what sorts of fit is needed between particular crimes and business necessity. One imagines that this would include situations like refusing to hire a person with a history of embezzlement for a position as a bookkeeper, or refusing to hire a person with a history of child abuse as a pre-school teacher.

### Recent developments case law

Given the speed at which cases move through our legal system, it should come as no surprise that these

new standards are relatively untested at this time. However, recent cases (litigated before the recent guidelines were implemented) dealing with criminal background checks have revealed that the EEOC faces significant hurdles in enforcing these guidelines.

As demonstrated in a recent case, one major hurdle has been gathering sufficient information in discovery to demonstrate that a company’s policy has a disparate impact on a protected class. In *EEOC v. Peoplemark*<sup>14</sup>, the EEOC filed suit against Peoplemark, alleging that it had a blanket policy of refusing to hire or place applicants with felony convictions across all of its offices, and that this policy had a discriminatory impact on African Americans, Latinos and men. For complicated reasons, explored in more detail below, the EEOC found itself unable to gather and present the necessary information within the time allowed for discovery, and ultimately agreed to dismiss the case against Peoplemark. Following dismissal, the district court awarded costs, attorney fees and expert fees to Peoplemark.

On appeal, the 6<sup>th</sup> Circuit Court of Appeals upheld the award of attorney’s and expert’s fees of just over three-quarters of a million dollars against the EEOC, after the EEOC conceded that it could not prove that Peoplemark had a blanket policy of refusing employment to felons.<sup>15</sup> However, that brief statement only scratches the surface of *Peoplemark*.

A review of the decision shows that the major hurdle that the EEOC faced in this case was gathering accurate information about the practices Peoplemark employed, organizing the information it did collect and measuring the impact of Peoplemark’s policies on the named protected classes.

Resolution of the case centered on the Court’s perspective on the specific employment practice that the EEOC alleged, and how well the EEOC managed its time. In determining liability for costs and fees the majority opinion focused on the fact that the EEOC pled a particular employment practice in its complaint, and learned over the course of discovery that practice did not exist. The EEOC had not alleged any other practice, or attempted to amend its complaint within the deadlines set by the Court.<sup>16</sup> The dissent argued that it appeared there likely was a viable disparate impact claim against the defendant, but the contentious discovery process prevented it from coming to light in the period allowed by the trial court for discovery.

The dissent sets out the case’s course in some detail. It appears that, early in the EEOC’s investigation, the Chief Counsel for Peoplemark stated that it was the policy of the company not to place persons with felony convictions. This statement was made in three letters and his deposition.<sup>17</sup> However, statements from the operators of particular Peoplemark offices were significantly less definite.<sup>18</sup>

Firstly, a criminal background check may be allowed even if it disproportionately disadvantages a protected class if “[t]he employer validates the criminal conduct screen for the position in question per the Uniform Guidelines on Employee Selection Procedure (Uniform Guidelines) standards...”<sup>10</sup>

Those conflicting statements were a minor issue compared to the sheer number of documents produced by Peplemark. The majority and the dissent agree that Peplemark provided approximately 178,000 pages of discovery to the EEOC.<sup>19</sup> Ultimately, cataloguing, classifying and mining data from those documents prevented the EEOC from timely hiring an expert and producing an expert opinion to support its claim.

The majority believe that the EEOC's failure to properly manage its resources within the time provided caused it to fail meet the Court's deadlines. The dissent argued that the volume of discovery, and the necessity of entering that information into a database coupled with the additional discovery disputes, created a situation where EEOC could not accomplish necessary tasks within the time allowed.<sup>20</sup>

Whether that amount of time was insufficient or the EEOC was inefficient, this case illustrates an important issue in the litigation of disparate impact claims. The present rules around pleading required the EEOC to name a specific employment practice which had a discriminatory impact.<sup>21</sup> When its initial theory turned out to be untenable, the EEOC moved to an argument based on a more subtle policy. That argument required analysis of how employment decisions were influenced by background checks, and may have required different theories for different offices, an unappealing prospect.

This case shows that, despite the relatively aggressive stance taken by the EEOC with respect to use of criminal background checks in employment decisions, the courts are not necessarily sympathetic to these claims. If other courts follow the rationale in *Peplemark*, disparate impact claims based on use of criminal background as a factor in hiring may be difficult to prove. Recent case law at the District Court level shows that Courts

are still trying to determine exactly what constitutes a sufficient allegation of discrimination under the disparate impact theory. For example, the Northern District of California federal district court held that allegations that two companies had policies of discharging or not hiring persons who had been arrested for or convicted of a crime and that persons who had been arrested for or convicted of a crime were disproportionately people of color was not sufficient to allege that the policy had a disparate impact.<sup>22</sup> Compare that case with one from the Western District Court for the District

This case shows that, despite the relatively aggressive stance taken by the EEOC with respect to use of criminal background checks in employment decisions, the courts are not necessarily sympathetic to these claims.



of Louisiana, in which the court held that an allegation that an organization has a policy that excludes persons with criminal backgrounds from employment and that African Americans are more likely to have a criminal records is sufficient to assert a claim for disparate impact.<sup>23</sup>

*Peplemark* was filed, and largely tried, well before the new guidelines on background checks had been adopted by the EEOC. Since the issuance of the new guidelines, the EEOC has filed two high profile cases. These cases, against Dollar General and a BMW plant, are still in the early stages.

The case against the BMW plant involves the termination of approximately 70 African American employees based on the alleged implementation of a policy which excluded all persons with any criminal conviction, without regard for how long ago the conviction had occurred, or the gravity of the underlying offense.<sup>24</sup>

The Dollar General case involves a lawsuit against the nationwide chain based on the rejection of two applicants. The first disclosed a conviction from six years prior. Dollar General initially offered her the job, but then revoked the offer, citing a policy that prevented them from hiring persons with that sort of conviction within the past 10 years. The second applicant was denied employment based on the company's mistaken belief that she had been convicted of a crime.<sup>25</sup>

The theory of the first case looks very similar to the theory in *Peplemark*, but the fact that it is centered on a particular plant rather than a whole company should make the amount of information being collected much more manageable. In contrast, the case against Dollar General appears to be attempting a novel theory, including what looks like a theory of discrimination based on a company believing that a conviction existed where none did.

## Conclusion

Presently, there appears to be a large degree of disagreement among the courts as to the proper standard for identifying a particular employment practice when it comes to the use of criminal records. For the time being, if the employer creates and follows a policy which takes into account the nature of the crime, the time elapsed since the crime, and the nature of the job, it may be even more difficult for a disgruntled employee or a government agency to identify a particular practice that is not justified by business necessity.

Plaintiffs also have something to learn from the present state of the case law. While a large class action is appealing because of the economies of scale, it may be advisable to allege different policies in the alternative as part of your case in chief in a disparate impact case. It certainly makes sense to take one small segment of a company so that you can be reasonably certain the policy you are attacking is consistently enforced there. These measures should allow for a faster gathering, review and analysis of company specific data and help avoid the outcome seen in *Peplemark*.

Overall, the outcome of EEOC's litigation against employers who use criminal background checks is still uncertain. Even the *Green* standard only has actual precedential effect in the 8<sup>th</sup> Circuit. Given the prevalence of the use of background checks by employers and the legitimate business purposes they serve, this is an area of law that bears watching. It will be interesting to see what standards the courts eventually settle on.

## Endnotes

1. U.S. Equal Emp't Opportunity Comm'n, "Pepsi to Pay 3.13 Million and Made Major Policy Changes to Resolve EEOC Finding of Nationwide Hiring Discrimination Against African Americans" EEOC Website Press Release, January 1, 2012, <http://www.eeoc.gov/eeoc/newsroom/release/1-11-12a.cfm> (Accessed December 11, 2013).
2. U.S. Equal Emp't Opportunity Comm'n, "EEOC FILES SUIT Against Two Employers for Use of Criminal Background Checks" EEOC Website Press Release, June 11, 2013, <http://www.eeoc.gov/eeoc/newsroom/release/6-11-13.cfm> (Accessed December 11, 2013).
3. U.S. Equal Emp't Opportunity Comm'n, "What You Should Know: EEOC's Response to Letter from State Attorneys General on Use of Criminal Background Checks in Employment," EEOC Website, August 29, 2013 [http://www.eeoc.gov/eeoc/newsroom/wysk/criminal\\_back-](http://www.eeoc.gov/eeoc/newsroom/wysk/criminal_back-)

While a large class action is appealing because of the economies of scale, it may be advisable to allege different policies in the alternative as part of your case in chief in a disparate impact case.

ground\_checks.cfm (Accessed December 11, 2013)

4. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).
5. *Green v. Missouri Pacific Railroad Company*, 523 F.2d 1290 (8<sup>th</sup> Cir. 1975).
6. *Green v. Missouri P.R. Co.*, 549 F.2d 1158, 1160 (8<sup>th</sup> Cir. 1977).
7. *Id.*
8. U.S. Equal Emp't Opportunity Comm'n, *Enforcement Guidance on the Consideration of Arrests and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act*, April 25, 2012. [http://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm) (Accessed December 11, 2013.)
9. *Id.* Example 4: Employer's Inquiry into Conduct Underlying Arrest.
10. *Id.*
11. The guidelines for what sorts of studies are acceptable can be found at 29 CFR 1607.5.
12. U.S. Equal Emp't Opportunity Comm'n, *Enforcement Guidance on the Consideration of Arrests and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act*, April 25, 2012.
13. *Id.*
14. 732 F.3d 584 (6<sup>th</sup> Cir. 2013)
15. *Id.* at 587.
16. *Id.* at 592.
17. *Id.* at 597. (Dissent).
18. *Id.* at 610. (Dissent) *Peplemark, Inc* supplies other companies with temporary employees. Depositions of *Peplemark's* managers showed that each office dealt with hiring felons differently.

Some made the decision based on whether their clients would accept felons, others simply did not. The managers that the dissent discusses which did not accept felons as employees stated that they had no clients who would accept felons as temporary employees.

19. *Id.* at 593 and 606, respectively.
20. *Id.* at 627.
21. *Id.* at 593, fn. 5.
22. *Adams v. Vivo, Inc.*, 2012 U.S. Dist. LEXIS 109199; 2012 WL 3156812 (N. Dist. Cal. 2012).
23. *Wallace v. Magnolia Family Servs.*, 2013 U.S. Dist. LEXIS 168798 (W. Dist. La. 2013).
24. Hananel, Sam "Dollar General, BMW Plant's Use of Criminal Background Checks Led to Discrimination, EEOC Claims," HUFFINGTON POST, June 11, 2013. [http://www.huffingtonpost.com/2013/06/12/background-check-discriminate-eeoc-criminal\\_n\\_3428484.html](http://www.huffingtonpost.com/2013/06/12/background-check-discriminate-eeoc-criminal_n_3428484.html) (Accessed January 2, 2014)
25. *Id.*

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# Idaho Supreme Court Reverses Course in Applying the *McDonnell Douglas* Burden-Shifting Framework to Summary Judgment Motion

A. Dean Bennett  
Scott E. Randolph

**W**hen the Idaho Supreme Court refused to apply the familiar *McDonnell Douglas* burden-shifting analysis at the summary stage of a retaliatory discharge case in 2008, Idaho employers were left without an important means of defending meritless employment law claims short of trial.<sup>1</sup> This September, the Court changed course, readily applying the *McDonnell Douglas* burden-shifting framework at the summary judgment stage in *Hatheway v. University of Idaho*, an age discrimination case under the Idaho Human Rights Act (IHRA).<sup>2</sup>

Post *Hatheway*, the issue of whether to apply the traditional burden-shifting framework at the summary judgment stage should be clear, right? Not necessarily. The *Hatheway* Court did not overrule its 2008 decision in *Curlee v. Kootenai County Fire & Rescue*. Nor did it discuss why the *McDonnell Douglas* analysis applied at the summary judgment in one case but only at trial in other. In fact, the *Hatheway* Court did not even mention *Curlee*.

The result is conflicting precedent, inconsistent procedural rules, and uncertainty for litigants in employment cases. The employment bar, and the clients it represents, is in dire need of further clarification.

## ***McDonnell Douglas* framework is widely applied to federal and state employment discrimination claims**

In the 1973 case of *McDonnell Douglas Corp. v. Green*, the United States Supreme Court established the order and allocation of proof for employment discrimination cases under Title VII of the Civil Rights

If the employer provides a legitimate reason, the burden of production then swings back to the plaintiff to show that the proffered reason is merely a pretext for unlawful discrimination.<sup>6</sup>

Act of 1964.<sup>3</sup> This order of proof is designed to allow a plaintiff to establish a discrimination claim based on circumstantial evidence when no direct evidence of the employer's discriminatory intent exists.<sup>4</sup>

The burden-shifting framework first requires a plaintiff to establish a *prima facie* case of discrimination, typically a variation of the following elements: the plaintiff (1) belongs to a protected group; (2) is qualified to do a particular job; (3) suffered an adverse employment action, such as denial of employment, termination, demotion, etc.; and (4) was replaced by an individual not in the protected group.<sup>5</sup>

The burden then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employer's actions. If the employer provides a legitimate reason, the burden of production then swings back to the plaintiff to show that the proffered reason is merely a pretext for unlawful discrimination.<sup>6</sup> At all times, the plaintiff bears the burden of persuasion, meaning the plaintiff must convince the judge or jury that the employer engaged in unlawful discrimination.<sup>7</sup>

Although the *McDonnell Douglas* burden-shifting framework was first applied to discrimination claims under Title VII, it has since been used to analyze discrimination claims under numerous other federal employ-

ment statutes, including the Americans with Disabilities Act (ADA) and the Age Discrimination in Employment Act (ADEA), as well as to various types of retaliation claims.<sup>8</sup> Many state courts, including Idaho, adopted the *McDonnell Douglas* burden-shifting framework when adjudicating employment discrimination and retaliation claims brought under analogous state laws.<sup>9</sup>

## **Does the *McDonnell Douglas* burden-shifting analysis apply to Idaho employment cases at the summary judgment stage?**

It depends. In its recent *Hatheway* decision, the Idaho Supreme Court wrote "in cases where the plaintiff puts forward indirect evidence of age discrimination, the *McDonnell Douglas* burden-shifting analysis applies at the summary judgment stage."<sup>10</sup> Because the plaintiff, Lillian Hatheway, had not put forth any direct evidence of age discrimination, the Court proceeded to analyze her IHRA claim under the *McDonnell Douglas* burden-shifting framework.<sup>11</sup>

Under the first prong of the burden-shifting analysis, the Court found that Hatheway succeeded in establishing a *prima facie* case for age discrimination, based on the University issuing her a negative employment evaluation that precluded

her from receiving an automatic pay raise.<sup>12</sup> In order to overcome the inference of discrimination established by Hatheway's *prima facie* case, the University then had to articulate a legitimate non-discriminatory reason for giving her the negative employment evaluation.<sup>13</sup>

The University met its burden by offering evidence that she received "needs improvement" ratings on her evaluation because of continued unprofessional conduct.<sup>14</sup> The burden then shifted back to Hatheway for "the final stage of the *McDonnell Douglas* analysis: whether Hatheway demonstrated that the University's proffered reasons are merely pretext for discrimination."<sup>15</sup>

The Court stated that to survive summary judgment, Hatheway needed to provide sufficient evidence from which a jury could reasonably find that, but for her age, she would not have received a negative performance evaluation.<sup>16</sup> Hatheway failed to meet that burden, resulting in the Court affirming the district court's grant of summary judgment in favor of the University.<sup>17</sup>

The *Hatheway* decision would not seem novel or particularly noteworthy were it not for the Court's 2008 decision in *Curlee*. In *Curlee*, the Idaho Supreme Court concluded that the *McDonnell Douglas* analysis should be applied to retaliatory discharge actions arising under Idaho's whistleblower act, Idaho Code § 6-2101 *et seq.*<sup>18</sup> However, the Court went on to rule that the analysis applied only at trial and did not apply at the summary judgment stage.<sup>19</sup> It wrote: "we conclude that the district court erroneously held *Curlee* to a higher burden of proof than is permissible at summary judgment by requiring her to 'poke holes' in [her employer's] proffered rationale for discharging her and to demonstrate that the grounds advanced as justification for her termination were a pretext for retaliatory conduct."<sup>20</sup>

In rejecting the use of the *McDonnell Douglas* framework at the summary judgment stage, the *Curlee* Court relied on a whistleblower case from North Dakota.<sup>21</sup> As explained in a previous article in *The Advocate*, North Dakota's evidence rule regarding presumptions is vastly different from both the Federal and Idaho rules.<sup>22</sup> Consequently, North Dakota's departure from using the traditional *McDonnell Douglas* framework is likely appropriate given that state's evidence rule, but is inapplicable under Idaho's rules that mirror the federal rules.

So how did the *Hatheway* Court explain its change of heart from its earlier *Curlee* opinion on the issue of the application of the *McDonnell Douglas* framework at the summary judgment stage? It didn't — the Court did not mention *Curlee*.

#### **Another level of complexity: The District of Idaho distinguishes *Curlee* on procedural grounds**

In 2012 (prior to the recent *Hatheway* decision), the U.S. District Court for the District of Idaho ruled on an employer's motion for summary judgment in *Brown v. City of Caldwell*.<sup>23</sup> The motion sought summary judgment on numerous state employment claims, including wrongful discharge under Idaho's whistleblower act and First Amendment retaliation under 42 U.S.C. § 1983 for exercising free speech and associational rights.<sup>24</sup>

The federal court relied on *Curlee* for the three substantive elements of a claim for wrongful discharge under Idaho's whistleblower act, Idaho Code § 6-2104.<sup>25</sup> The plaintiff argued, however, that under *Curlee*, once he established a *prima facie* case on his whistleblower claim, the court must deny the defendant's summary judgment motion without further inquiry into the defendant's allegedly legitimate reasons for firing him.<sup>26</sup>

Currently, the bar lacks guidance to explain why *McDonnell Douglas* applies to some summary judgment motions in employment cases and not to others.

In response to plaintiff's argument, the federal court recognized that in *Curlee*, "the Idaho Supreme Court opted not to apply the traditional *McDonnell Douglas* burden-shifting framework that federal courts use in employment cases at the summary judgment stage."<sup>27</sup> However, despite *Curlee*, the federal court determined that it must follow *McDonnell Douglas* on procedural grounds.<sup>28</sup> It stated that state claims removed to federal court are governed by state substantive law and federal procedural law.<sup>29</sup> Because the Ninth Circuit has held that *McDonnell Douglas* burden-shifting is a federal procedural rule, the *Brown* court applied the *McDonnell Douglas* framework to the Idaho whistleblower retaliatory discharge claim at the summary judgment stage.<sup>30</sup>

#### **More clarification needed to resolve conflicting precedent**

Under *Curlee*, employer-defendants face the denial of summary judgment motions simply upon a plaintiff's establishment of a *prima facie* case without the opportunity to offer legitimate non-discriminatory reasons for taking adverse actions. This leads to prolonged litigation with increased time, money, and resources expended by both the

litigants and the courts, even when a plaintiff's claim is meritless. *Hatheway*, on the other hand, allows the parties to anticipate the required order and allocation of proof under the familiar *McDonnell Douglas* burden-shifting framework at the summary judgment stage so that cases without the requisite amount of circumstantial evidence of discriminatory intent can be disposed of prior to trial.

How are the parties to know which of these two precedents applies? Is the *Curlee* holding applicable only to retaliatory discharge claims brought under the Idaho whistleblower act? Does *Hatheway* apply to all claims alleging a violation of the IHRA, including retaliatory discharge claims? Currently, the bar lacks guidance to explain why *McDonnell Douglas* applies to some summary judgment motions in employment cases and not to others. The result is that litigants will be forced to argue over which precedent applies to their particular employment case, adding one more layer of argument to the summary judgment process.

In addition, even claims under the Idaho whistleblower act face procedural uncertainty. If a retaliatory discharge case is litigated in state court, the *Curlee* decision will preclude use of the *McDonnell Douglas* analysis at the summary judgment stage. But, if the case can be removed to federal court, the *McDonnell Douglas* framework will likely apply as a federal procedural rule, as occurred in *Brown*. The dichotomy between the *Curlee* and *Hatheway* decisions creates uncertainty for litigants in employment cases depending not only on the type of claims at issue but also on whether the case is litigated in Idaho state court or federal court.

The bottom line is that the Idaho Supreme Court needs to provide further explanation. As it will likely take years for this issue to percolate up to the Supreme Court again, employment lawyers on both sides of

the argument should prepare to address the proper order and allocation of proof at the summary judgment stage of their Idaho employment law cases.

### Endnotes

1. See *Curlee v. Kootenai Cnty. Fire & Rescue*, 148 Idaho 391, 224 P.3d 458 (2008).
2. *Hatheway v. Univ. of Idaho*, 155 Idaho 255, 310 P.3d 315 (2013).
3. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).
4. *Stone v. City of Indianapolis Pub. Util. Div.*, 281 F.3d 640, 643 (7th Cir. 2002); see also *Hazle v. Ford Motor Co.*, 628 N.W.2d 515, 520 (Mich. 2001) (where there is no direct evidence of impermissible bias, plaintiff proceeds under familiar *McDonnell Douglas* framework).
5. See e.g., *McDonnell Douglas*, 411 U.S. at 802.
6. *Id.* at 802-804.
7. *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 855 (9th Cir. 2002), *aff'd* *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).
8. See, e.g., *Budnick v. Town of Carefree*, 518 F.3d 1109 (9th Cir. 2008) (ADA); *Wallis v. J.R. Simplot Co.*, 26 F.3d 885 (9th Cir. 1994) (ADEA); *Conner v. Schnuck Mkts., Inc.*, 121 F.3d 1390 (10th Cir. 1997) (FLSA retaliation); *EEOC v. Kohler Co.*, 335 F.3d 766, 772 (8th Cir. 2003) (Title VII retaliation); *Stone*, 281 F.3d 640 (ADA and Title VII retaliation).
9. See, e.g., *Bowles v. Keating*, 100 Idaho 808, 812-14, 606 P.2d 458, 462-54 (1979); *Hoppe v. McDonald*, 103 Idaho 33, 36, 644 P.2d 355, 358 (1982); *White v. Tomasic*, 69 P.3d 208, 211 (Kan. Ct. App. 2003); *Hazle*, 628 N.W.2d at 521.
10. *Hatheway*, 310 P.3d at 323 (citing *Onyiah v. St. Cloud State Univ.*, 684 F.3d 711, 716 (8th Cir. 2012)).
11. *Id.*
12. *Id.* at 326.
13. *Id.*
14. *Id.*
15. *Id.* at 327.
16. *Id.*
17. *Id.* at 328.
18. *Curlee*, 224 P.3d at 463.
19. *Id.*
20. *Id.*

21. *Id.*

22. See A. Dean Bennett, *Further Review of Idaho's Version of McDonnell Douglas Is Necessary*, *The Advocate*, Aug. 2010, at 17-19.

23. *Brown v. City of Caldwell*, No. 1:10-cv-536-BLW, 2012 WL 892232 (D. Idaho Mar. 14, 2012).

24. *Id.*

25. *Id.* at \*12.

26. *Id.* at \*15-16.

27. *Id.* at \*16.

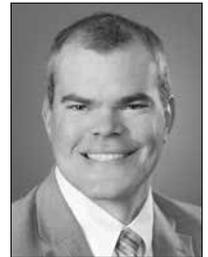
28. *Id.* at \*17.

29. *Id.* (citing *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 426-428 (1996)).

30. *Id.* (citing *Dawson v. Entek Intern.*, 630 F.3d 928, 934-35 (9th Cir. 2011)).

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# Employers Should Assess Risks Before Hiring a Competitor's Employees

John Ashby

**G**ood employees are the backbone of any strong business and businesses strive to hire the best and most qualified applicants. Often times, the best applicants are employees of a competing business. These employees come with industry knowledge and experience that allow them to hit the ground running. They may even come with customer or other valuable relationships.

While it is perfectly legal to recruit and hire a competitor's employee, doing so comes with significant legal risk because such an employee may be bound by restrictive covenants with a current or former employer. Moreover, the employee may have access to trade secrets or other confidential business information that the competitor will fight aggressively to protect.

This article describes some of the most common legal issues that arise in the context of hiring a competitor's employees. It also offers practical advice on how employers can minimize the risk of liability and costly litigation when hiring a competitor's employees.

## **Tortious interference with contract**

The most common legal issue arising out of hiring a competitor's employee is a claim for tortious interference with contract. Many employees are subject to restrictive covenants with their current or former employer. Those restrictive covenants come in several forms.

Most commonly, employees are subject to a covenant not to compete with their current employer for a specified period of time after the termination of their employment.

Moreover, the new employer may be held liable for tortious interference with contract if it hires employees whom it knows are subject to restrictive covenants.<sup>7</sup>

Other employees are subject to a less restrictive non-solicitation agreement — an agreement not to solicit a company's customers and/or employees either during or after the termination of employment. Contrary to many employees' beliefs, these restrictive covenants are often enforceable, as long as the covenant satisfies certain requirements.

Until recently, covenants not to compete in employment contracts were governed by common law. Under that common law, restrictive covenants were "disfavored" and strictly construed against the employer.<sup>1</sup> Nevertheless, a covenant not to compete would be enforced if the covenant:

1. was not greater than necessary to protect the employer in some legitimate business interest;
2. was not unduly harsh and oppressive to the employee; and
3. was not injurious to the public.<sup>2</sup>

To determine whether a covenant not to compete was enforceable, courts would generally look to whether the covenant contained a reasonable geographic and duration-al scope and whether it was no more restrictive than necessary to protect the employer's legitimate business interests.

In 2008, the Idaho Legislature enacted Idaho Code § 44-2701, *et seq.* (the "Non-Compete Statute"). The Non-Compete Statute provides that a "key employee" may enter into a covenant not to compete "if the agreement or covenant is reasonable as to its duration, geographical area, type of employment or line of business, and does not impose a greater restraint than is reasonably necessary to protect the employer's legitimate business interests..."<sup>3</sup>

For the most part, the Non-Compete Statute codifies the common law rules and does not drastically alter the enforceability of covenants not to compete. Instead, the Non-Compete Statute creates several presumptions, including:

1. A presumption the duration is reasonable if it is for a period of 18 months or less after the termination of employment.<sup>4</sup>
2. A presumption of geographic reasonableness if the covenant "is restricted to the geographic areas in which the key employee or key independent contractor provided services or had a significant presence or influence."<sup>5</sup>

Finally, the Non-Compete Statute expressly authorizes (and, in fact, purports to instruct) courts to "blue-pencil" covenants not to compete to the extent that they are overbroad:

To the extent any such agreement or covenant is found to be unreasonable in any respect, a court shall limit or modify the agreement or covenant as it shall determine necessary to reflect the intent of the parties and render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement or covenant as limited or modified.<sup>6</sup>

Covenants not to compete and other restrictive covenants limit an employee's ability to work for a new employer. Moreover, the new employer may be held liable for tortious interference with contract if it hires employees whom it knows are subject to restrictive covenants.<sup>7</sup> Notably, the act of "luring" a competitor's employee is not a required element of an intentional interference cause of action. In other words, it does not matter whether a company actively solicits the competitor's employee or whether the competitor's employee applies without solicitation. Knowingly employing an individual in violation of a restrictive covenant is enough to create potential liability.<sup>8</sup>

### **Misappropriation of trade secrets**

Employers face potential liability under the Idaho Trade Secrets Act<sup>9</sup> when they hire an employee with access to a competitor's trade secrets. Trade secret misappropriation occurs when there is an "[a]cquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means."<sup>10</sup> Alternatively, misappropriation occurs where there has been a "[d]isclosure or use of a trade secret of another without express or implied consent by a person who . . . [a]t the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was . . . [d]erived from or

through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use."<sup>11</sup>

The Idaho Supreme Court has held that the mere hiring of a competitor's employee, absent other facts, does not constitute misappropriation of trade secrets. "An employee will naturally take with her to a new company the skills, training, and knowledge she has acquired from her time with her previous employer."<sup>12</sup> This basic transfer of information does not violate the Idaho Trade Secrets Act. However, misappropriation occurs where an employee takes a former employer's real trade secrets to a new employer. Idaho Courts have recognized that customer lists and other customer data may be protected as trade secrets.<sup>13</sup> Marketing data, strategic plans, pricing models and other proprietary information may also be protected as trade secrets.<sup>14</sup>

It is easy to see how hiring a competitor's employees may result in liability for trade secret misappropriation. If an employee leaves a former employer with customer lists, pricing information or other trade secret information and then uses that information on behalf of a new employer, both the employee and the new employer run a serious risk of liability for misappropriation of trade secrets.

### **Computer Fraud and Abuse Act**

The Computer Fraud and Abuse Act (the CFAA)<sup>15</sup> is a criminal statute that provides a civil cause of action for anyone whose computer system or network has been accessed "without authorization" or "exceeding authorized access." Although traditionally thought of as a form of relief for those who fall victim to computer "hackers," the CFAA has been increasingly used in litigation between employers and employees. As one court explained, "[e]mployees . . . are increasingly taking advantage of the CFAA's civil remedies to sue former employees and their new companies who seek a competitive edge through wrongful use of information from the former employer's computer system."<sup>16</sup>

The typical fact pattern involves a departing employee who, just prior to the termination of employment, copies confidential business information from an employer's computer systems. This copying is often done by using a portable USB device, by emailing the electronic information to a personal email account, or by logging into a password protected computer system.

The CFAA is a relatively new statute and the case law interpreting it is still developing. Several courts have held, however, that employees who access their employer's computers to copy business information for their

The key to a breach of fiduciary duty claim is timing.  
An employee owes a fiduciary duty of loyalty  
only to a current employer.

own personal benefit or the benefit of a competitor act without authorization or exceed authorization within the meaning of the CFAA.<sup>17</sup> If a hiring employer encourages prospective employees to access another employer's computer system for the benefit of the hiring employer, both the employee and the hiring employer face potential liability under the CFAA.

### Inducing breach of fiduciary duties

All employees owe a fiduciary duty of loyalty to their current employer. This duty of loyalty includes a duty not to compete with the employer during the employment relationship, even in the absence of a covenant not to compete. The employee must act solely for the benefit of the employer in matters within the scope of his employment. In general, the employee must not engage in conduct that is adverse to the interests of the employer.<sup>18</sup>

For example, an employee breaches the duty of loyalty by soliciting customers for a competing business.<sup>19</sup> An employee similarly breaches the duty of loyalty by negotiating with co-workers for the purpose of hiring them away to a competitor with whom the employee has arranged for his own employment.<sup>20</sup>

The key to a breach of fiduciary duty claim is timing. An employee owes a fiduciary duty of loyalty only to a current employer. The law distinguishes between solicitation by a current employee during the employment relationship and solicitation after the employment has been terminated. Absent a covenant not to compete or violation of some other statute or duty, an employee can compete with a former employer once the employment relationship has ended.<sup>21</sup>

Liability for breach of fiduciary duty may also extend to the hiring

employer. If a hiring employer encourages or assists an employee in soliciting the customers or co-workers of the employee's current employer, that hiring employer may potentially be liable under a theory of inducing breach of fiduciary duties.

### Tips for minimizing risk when hiring a competitor's employees

As set forth above, hiring a competitor's employees comes with considerable risk. But, companies hiring a competitor's employees can reduce that risk by following a few basic steps:

Under Idaho's new Non-Compete Statute, a court may enforce a modified version of a covenant not to compete even if it would be unenforceable as written.

*Ask about restrictive covenants.* Prior to hiring a competitor's employee, an employer should know whether that employee is subject to a restrictive covenant. What is the best way to find out that information? Just ask the applicant! If an applicant is unsure, ask the applicant to check any offer letters or other employment contracts.

*Document the absence of restrictive covenants.* If an applicant states that he is not subject to a restrictive covenant, put that representation in writing. If the company uses employment contracts, include in the

contract a representation that the new employee is not aware of any restrictive covenant inconsistent with his new employment.

*Carefully review restrictive covenants.* If an applicant is subject to a restrictive covenant, that restrictive covenant should be carefully reviewed for enforceability. While the enforceability of a restrictive covenant is often not a black and white issue, an experienced employment lawyer should be able to help an employer assess the likelihood that the covenant would be enforced. Keep in mind that, under Idaho's new Non-Compete Statute, a court may enforce a modified version of a covenant not to compete even if it would be unenforceable as written. After analyzing the scope and enforceability of a covenant not to compete, the company should be able to make a good business decision as to whether hiring the applicant is worth the risk.

*Instruct new hires to take nothing with them.* Employers are most likely to resort to litigation when they believe an employee has taken trade secrets or other confidential information to a competing employer. Accordingly, a new hire should be instructed not to take anything with him when he leaves a prior employer. Specifically, the new hire should be instructed

1. to take no paper documents;
2. to return all company property, including laptops, cell phones and electronic storage devices before leaving;
3. not to retain or forward company e-mails or other electronically stored information.

*Instruct new hires to leave on good terms.* Litigation is often driven by emotion. Accordingly, a new hire should be instructed not to say or do anything that would increase a competitor's motivation to litigate.

The new hire should be instructed to give appropriate notice, to refrain from bad-mouthing the former employer and to refrain from announcing any intention to compete. The new hire should be instructed not to solicit co-workers or contact customers while still employed by the competitor.

There will always be some risk associated with hiring a competitor's employees. However, following these proactive steps will minimize an employer's risk of liability. At the very least, a company that follows these steps will be able to make educated hiring decisions and will be in the best position possible to defend itself against legal claims by a competitor.

**Endnotes**

1. *Intermountain Eye & Laser Ctrs., P.L.L.C. v. Miller*, 142 Idaho 218, 224, 127 P.3d 121, 127 (2005).

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- 3. I.C. § 44-2701.
- 4. I.C. § 44-2704(2).
- 5. I.C. § 44-2704(3).
- 6. I.C. § 44-2703.
- 7. *Bybee v. Isaac*, 145 Idaho 251, 259, 178 P.3d 616, 624 (2008).
- 8. *Id.*
- 9. Idaho Code § 48-801, *et seq.*
- 10. I.C. § 48-801(2)(a).
- 11. I.C. § 48-801(2)(b).
- 12. *Northwest Bec-Corp v. Home Living Serv.*, 136 Idaho 835, 841, 41 P.3d 263, 269 (2002).
- 13. *Id.*
- 14. *See Cardinal Freight Carriers, Inc. v. J.B. Hunt Transp. Serv., Inc.*, 987 S.W.2d 642, 150-151 (Ark. 1999); *PepsiCo v. Redmond*, 54 F.3d 1262, 1265 (7th Cir. 1995).
- 15. 18 U.S.C. 1030.
- 16. *P.C. Yonkers, Inc. v. Celebrations the Party & Seasonal Superstore, LLC*, 428 F.3d 504, 510 (3d Cir. 2005)
- 17. *See, e.g., Hanger Prosthetics & Orthotics, Inc. v. Capstone Orthopedic, Inc.*, 556 F.

Supp. 2d 1122, 1131 (E.D. Cal. 2008); *Int'l Airport Ctrs., L.L.C. v. Citrin*, 440 F.3d 418, 420-21 (7th Cir. 2006).

18. *R Homes Corp. v. Herr*, 142 Idaho 87, 90-91, 123 P.3d 720, 725-725 (Ct. App. 2005).

19. *Id.*

20. *Twin Falls Farm & City Distrib. v. D & B Supply Co.*, 96 Idaho 351, 358, 528 P.2d 1286, 1293 (1974).

21. RESTATEMENT (SECOND) OF AGENCY § 393, cmt. e.

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# FMLA Amendments to Affect Military Families and Airline Flight Crews

Thaddeus J. O'Sullivan

In March 2013, the Department of Labor (DOL) issued new administrative rules in response to recent statutory changes to the Family and Medical Leave Act of 1993 (FMLA) affecting FMLA leave for military families and airline flight crews. The FMLA seeks to balance employers' needs with the needs of their employees to take reasonable time away from work for family and medical reasons without risking their jobs.<sup>1</sup>

In particular, the FMLA requires covered employers to provide eligible employees with up to 12 weeks off work during any 12-month period for (1) the birth, adoption, or foster care placement of a child; (2) the care of a spouse, child, or parent with a serious health condition; (3) the employee's own serious health condition affecting the employee's ability to do their job; and (4) a "qualifying exigency" relating to the covered active duty in the Armed Forces of the employee's spouse, child, or parent.<sup>2</sup> The FMLA provides eligible family members an additional 14 weeks of leave (26 weeks total during a 12-month period) to care for a covered member of the Armed Forces with a serious injury or illness.<sup>3</sup> The FMLA's enforcement provisions encourage compliance and discourage retaliation against employees exercising their FMLA rights.<sup>4</sup>

DOL issues regulations regarding the administration, application, and enforcement of the rights established by the FMLA.<sup>5</sup> On February 6, 2013, DOL published a Final Rule to implement amendments to the FMLA made by the National Defense Authorization Act for Fiscal Year 2010 and the Airline Flight Crew Techni-

For military members and their families, the 2013 Amendments affect both "qualifying exigency" leave relating to a military member's active duty or impending call to duty, and leave to care for a covered military member with a serious injury or illness.

cal Corrections Act.<sup>6</sup> The February 6, 2013 Final Rule included several amendments to the existing FMLA regulations that became effective March 8, 2013 (2013 Amendments).<sup>7</sup>

The 2013 amendments reflect the unique challenges faced by members of the military and their families, and create a new method to determine eligibility and calculate leave for airline flight crew employees.<sup>8</sup> For military members and their families, the 2013 Amendments affect both "qualifying exigency" leave relating to a military member's active duty or impending call to duty, and leave to care for a covered military member with a serious injury or illness. This article is intended to summarize the 2013 Amendments and provide citation to the primary source.

### **3Xs the time off for rest and recuperation and a new parental care qualifying exigency**

The FMLA entitles an eligible employee who is the spouse, son, daughter, or parent of a military member on "covered active duty" to take leave required by a "qualifying exigency" arising out of the military member's "covered active duty (or [notification] of an impending call or order to covered active duty) in the Armed Forces."<sup>9</sup> The FMLA does

not define "qualifying exigency," but tasks the Secretary of Labor to define what constitutes a "qualifying exigency."<sup>10</sup>

Prior to March 8, 2013, the regulations defined "qualifying exigencies" as the following: (1) issues arising when the military member receives seven or less days' notice prior to deployment; (2) attendance at defined military events and related activities; (3) time needed to make arrangements for alternative childcare; (4) time needed to make pre- and post-active duty financial and legal arrangements; (5) attendance at counseling necessitated by the active duty; (6) up to five days off to spend with a military member on "short-term, temporary, rest and recuperation leave during the period of deployment"; (7) to attend to post-deployment activities; and (8) other active-duty-related activities that the employee and employer agree qualify as exigencies.<sup>11</sup>

The 2013 Amendments include an additional "qualifying exigency" for parental care leave and two changes related to the "rest and recuperation" exigency.<sup>12</sup> The leave time allowed for the "rest and recuperation" exigency is increased from five to 15 days;<sup>13</sup> and the allowable certification for exigency leave now includes "Rest and Recuperation

orders” and other documentation indicating the dates of the Rest and Recuperation leave.<sup>14</sup>

The new parental care “qualifying exigency” allows eligible employees to take leave to provide immediate care, arrange for alternative care, and attend to other issues related to care for a military member’s parent who is incapable of self-care.<sup>15</sup> The need for leave must be necessitated by the military member’s “covered active duty or call to covered active duty status” and the person requesting leave must be the parent, spouse, or child of the military member.<sup>16</sup>

**For qualifying exigency leave, “covered military member” is now “military member” on “covered active duty”**

The 2013 Amendments include changes related to eligibility to take “qualifying exigency” leave. The prior “covered military member” distinction is replaced with “military member” or “covered active duty.”<sup>17</sup> Members of the National Guard and Reserves “on covered active duty or call to covered active duty status” are now included as “covered servicemembers” for qualifying exigency leave eligibility purposes.<sup>18</sup> However, qualifying exigency leave eligibility now requires deployment in a foreign country for all military members.<sup>19</sup>

**Military caregiver leave is now available to care for “covered veterans”**

The FMLA also allows eligible employees to take up to 26 weeks of leave during a 12-month period “to care for a covered service member with a serious injury or illness.”<sup>20</sup> Unlike qualifying exigency leave, the “covered servicemember” with a serious injury or illness need not be on

“covered active duty” for the employee to be eligible for FMLA leave.<sup>21</sup>

Military caregiver leave was previously limited to care for a current member of the “Armed Forces, the National Guard or Reserves.”<sup>22</sup> As of March 8, 2013, “covered servicemember” now includes “covered veterans.”<sup>23</sup> A “covered veteran” is “an individual discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date the eligible employee takes leave to care for the covered veteran.”<sup>24</sup> The leave must commence, but need not conclude, during the five-year period.<sup>25</sup> If the veteran was discharged or released prior to March 8, 2013, then the period of October 28, 2009 through March 8, 2013 does not count towards the five-year calculation.<sup>26</sup>

**“Serious injury or illness” in relation to military caregiver leave now includes aggravation of pre-active duty injuries and illnesses**

The 2013 Amendments expand the definition of “serious injury or illness” for current servicemembers and include a separate “serious injury or illness” definition for covered veterans.<sup>27</sup> For current servicemembers, “serious injury or illness,” now includes pre-active duty injuries and illnesses that are “aggravated in the line of duty on active duty” and “may

render the member medically unfit to perform the duties of the member’s office, grade, rank or rating.”<sup>28</sup>

For covered veterans, “serious injury and illness” includes injuries and illnesses incurred “in the line of duty on active duty” and pre-active duty injuries and illnesses aggravated “in the line of active duty on active duty.” The serious injury and illness is covered whether it manifested itself during or after the period of active duty,<sup>29</sup> but must:

- Render the covered veteran unable to perform the duties of their military position; or
- Resulted in a U.S. Department of Veterans Affairs Service-Related Disability Rating of 50% or greater; or
- Substantially impair the covered veteran’s ability to obtain or maintain a “substantially gainful occupation”; or
- The basis for the covered veteran’s enrollment in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers.<sup>30</sup>

**Changes to certification requirements for leave taken to care for a covered servicemember**

Prior to the 2013 Amendments, the health care providers authorized to complete certifications for leave

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taken to care for a covered servicemember were limited to providers affiliated with the Department of Defense (DOD), the Department of Veterans Affairs (VA), and TRICARE.<sup>31</sup> The 2013 Amendments expand the list of authorized health care providers meeting the “health care provider” definition in 29 U.S.C. Section 825.125.<sup>32</sup> However, if the employee relies on a certification from a provider who is not affiliated with the DOD, VA, or TRICARE, the employer may request a second or third opinion.<sup>33</sup>

The addition of covered veterans in the “covered servicemember” definition necessitated changes to detail the certification required when the employee seeks leave to care for a covered veteran. For employees seeking leave to care for servicemembers enrolled in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers (VAPCAFC), documentation demonstrating enrollment is sufficient certification of the servicemember’s serious injury or illness.<sup>34</sup> That is the case even if the employee is not the caregiver named in the documentation.<sup>35</sup> However, the employer may request additional information regarding the servicemember’s discharge date and status; and confirmation of the employee’s familial relationship to the servicemember.<sup>36</sup>

With regard to health care provider certifications for leave taken to care for a covered veteran, the certification must include medical facts establishing that the injury or illness:

- Renders the covered veteran unable to perform the duties of their military position; or
- Resulted in a U.S. Department of Veterans Affairs Service-Related Disability Rating of 50% or greater; or
- Substantially impairs the covered veteran’s ability to obtain or main-

tain a “substantially gainful occupation”; or

- Is the basis for the covered veteran’s enrollment in VAPCAFC.<sup>37</sup>

Furthermore, for all employees seeking leave to care for a covered veteran, the employer may request information regarding when the servicemember was separated from the military, whether the discharge was dishonorable, and related military-issued documentation.<sup>38</sup>

### **New rules relating to airline flight crew employees**

On December 21, 2009, the Airline Flight Crew Technical Correc-

The growing complexity and changes place a significant administrative burden on employers. However, the March 8, 2013 Amendments promote the FMLA’s attempt to balance the needs of employers and employees.

tions Act amended FLMA’s “eligible employee” definition (§ 101(2)) to include special provisions for Airline Flight Crews.<sup>39</sup> In response, the Department of Labor replaced the prior Subpart H, “Definitions,” with “Definitions Special Rules Applicable to Airline Flight Crew Employees,” § 825.800 - .803.<sup>40</sup> The new Subpart H includes rules: (1) for determining the flight crew employee’s hours of service; (2) setting the amount of leave available to flight crew employees; (3) for calculating

leave taken; and (4) establishing special record keeping requirements.<sup>41</sup>

### **2013 clarifications**

The 2013 Amendments included clarifications to the existing regulations:

- For purposes of determining whether an employee has been employed for the requisite twelve months, all military members, whether active duty or reserve, who miss work due to Uniformed Services Employment and Reemployment Rights Act (“USERRA”) covered military service, are entitled credit for the period of employment preceding the USERRA break.<sup>42</sup>
- For tracking intermittent FMLA leave, leave must be tracked by the shortest period used to track other leave (and no greater than an hour); an employer cannot require an employee to take more leave than necessary; and an employer may only reduce the employee’s leave entitlement by the amount of leave actually taken.<sup>43</sup>
- The 2013 Amendments emphasize the limitations of the physical impossibility exception to intermittent leave entitlement and the employer’s obligation to return the employee to the same or similar position after the FMLA leave concludes.<sup>44</sup>
- The confidentiality requirements of the Genetic Information Nondiscrimination Act of 2008 apply to the employer’s FMLA-leave related records.<sup>45</sup>

### **Conclusion**

The employer’s FMLA obligations continue to evolve. The growing complexity and changes place a significant administrative burden on employers. However, the March 8,

2013 Amendments promote the FMLA's attempt to balance the needs of employers and employees. Members of the National Guard and the Reserves called to active duty in a foreign country, and their families, face particular challenges as they juggle their "civilian" obligations with their military obligations.

The 2013 Amendments recognize these challenges by expanding the availability of qualifying exigency leave generally and increasing the number of days available to family members while the military member is home for rest and recuperation leave. The expansion of military caregiver leave to veterans and inclusion of injuries and illnesses aggravated during active duty reflect the sacrifices made by active duty members and veterans and the family members that care for them.

Finally, the amendments relating to flight crew members seek to ensure those individuals enjoy the FMLA's protections. While these amendments potentially place additional burdens on employers, they also provide some clarification. In addition, the amendments regarding leave documentation and the limitation of exigency leave to active duty in a foreign country acknowledge the needs of employers.

## Endnotes

1. 29 C.F.R. § 825.101; 29 U.S.C. § 2614
2. 29 U.S.C. § 2612(a)(1)
3. 29 U.S.C. § 2612(a)(3); 29 C.F.R. § 825.127
4. 29 U.S.C. §§ 2615, 2617; 29 C.F.R. § 825.400
5. 29 U.S.C. § 2654; 29 C.F.R. § 825.100 *et seq.*
6. 78 Fed. Reg. 8834 (Feb. 6, 2013); Pub. L. 111-119 (Dec. 21, 2009)
7. 78 Fed. Reg. 8834 (Feb. 6, 2013) (to be codified at 29 C.F.R. pt. 825)

The 2013 Amendments recognize these challenges by expanding the availability of qualifying exigency leave generally and increasing the number of days available to family members while the military member is home for rest and recuperation leave.

8. <http://www.dol.gov/WHD/fmla/2013rule/> (last visited December 11, 2013)
9. 29 U.S.C. § 2612(a)(1)(E)
10. *Id.*
11. 29 C.F.R. § 825.126(a)(1)-(8) (eff. Jan. 16, 2009 - Mar. 7, 2013) (Unless otherwise noted, citations are to the current version of the regulation)
12. 29 C.F.R. § 825.126(b)(8); 29 C.F.R. § 825.126(b)(6)(ii); 29 C.F.R. § 825.309(b)(6)
13. 29 C.F.R. § 825.126(b)(6)(ii)
14. 29 C.F.R. § 825.309(b)(6)
15. 29 C.F.R. § 825.126(b)(8)
16. *Id.*
17. 29 C.F.R. § 825.126(b) (eff. Jan. 16, 2009 - Mar. 7, 2013); 29 C.F.R. § 825.126(a); 29 U.S.C. § 2611(14)-(15)
18. 29 C.F.R. § 825.126(a)(2); 29 U.S.C. § 2611(14)-(15)
19. 29 C.F.R. § 825.126(a)(1)-(2)
20. 29 C.F.R. § 825.127(a); § 825.127(e) (see § 825.127(e) for additional details and limits regarding entitlement to Military Caregiver Leave)
21. 29 C.F.R. § 825.127(b)
22. 29 C.F.R. § 825.127(a)(eff. Jan. 16, 2009 - Mar. 7, 2013)
23. 29 C.F.R. § 825.127(b)(2)
24. *Id.*
25. *Id.*
26. 29 C.F.R. § 825.127(b)(2)(i)
27. 29 C.F.R. § 825.127(c)
28. 29 C.F.R. § 825.127(c)(1)

29. 29 C.F.R. § 825.127(c)(2)
30. 29 C.F.R. § 825.127(c)(2)(i)-(iv)
31. 29 C.F.R. § 825.310(a)(eff. Jan. 16, 2009 - Mar. 7, 2013)
32. 29 C.F.R. § 825.310(a)(5)
33. 29 C.F.R. § 825.310(d)
34. 29 C.F.R. § 825.310(f)
35. *Id.*
36. 29 C.F.R. § 825.310(f)(1)-(2)
37. 29 C.F.R. § 825.310(b)(4)(ii)(A)-(D)
38. 29 C.F.R. § 825.310(c)(6)
39. Pub. L. 111-119 (Dec. 21, 2009)
40. 29 C.F.R. § 825.800 (eff. Jan. 16, 2009 - Mar. 7, 2013); 29 C.F.R. §§ 825.800 - .803.
41. 29 C.F.R. § 825.800 - .803
42. 29 C.F.R. § 825.110(2)(i)
43. 29 C.F.R. § 825.205(a)(1)
44. 29 C.F.R. § 825.205(a)(2)
45. 29 C.F.R. § 825.500(g)

## About the Author

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# Idaho's Inconsistent System of Employment Protections for Lesbian, Gay, Bisexual and Transgender Individuals

Leslie M. Hayes  
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**T**here is no comprehensive legislation in Idaho to protect an individual from employment-related discrimination based on the individual's sexual orientation or gender identity. In the wake of Idaho's failure to enact such protections, individual cities in Idaho have undertaken the task of providing these protections. Paired with recent federal decisions from the United States Supreme Court and the Equal Employment Opportunity Commission (EEOC), employers and employees are left in the dark as to what is protected, when it is protected, and where it is protected. Idaho's current system creates a patchwork of laws that leaves employees vulnerable to discrimination and employers vulnerable to conflicting and constantly changing standards.

This article will discuss developments in federal laws that employers and employees should be aware of, the nuances of the individual city ordinances that provide protections for lesbian, gay, bisexual, and transgender (LGBT) individuals, and pending legislation and lawsuits that could change the face of any future analysis.

## Federal employment laws affecting LGBT individuals

Two major developments have occurred recently on the federal landscape that affects LGBT individuals as employees and their employers. These developments include the EEOC's decision to expand sex discrimination claims under Title VII to include discrimination based on gender identity and the United States Supreme Court's partial re-

Idaho's current system creates a patchwork of laws that leaves employees vulnerable to discrimination and employers vulnerable to conflicting and constantly changing standards.

peal of the Defense of Marriage Act (DOMA).

## Title VII protections for transgender individuals

The first big federal employment law development for transgender individuals was handed down by the EEOC in April 2012 in *Macy v. Holder*.<sup>1</sup> For the first time, the EEOC clearly decided that discrimination against a transgender individual was a form of discrimination on the basis of sex and constituted "gender stereotyping" under Title VII.

In 2010, Mia Macy, a transgender woman, was working as a police detective and still presenting as a man when she applied for a position at the Bureau of Alcohol, Tobacco, Firearms and Explosives Walnut Creek laboratory. Ms. Macy was indisputably well qualified for the position. At the beginning of 2011, Ms. Macy had two telephone conversations with the director. In both conversations Macy presented herself as a man (she had not transitioned to a woman yet) and the director indicated to Ms. Macy that the position was hers as long as she passed her background check. During her background check, Ms. Macy informed the company performing the check that she was transitioning from male

to female and would start living as a woman by the time she began her new position. About a week later, Ms. Macy was informed that the position at Walnut Creek was no longer available due to budget cuts.<sup>2</sup> Ms. Macy later discovered the position was not cut but instead was given to a man.

Thereafter, Ms. Macy filed an EEO complaint with the Bureau. The Bureau informed her that it would not process her claim of discrimination based on gender identity or transgender status under Title VII, and thus those claims could not be adjudicated before the EEOC.<sup>3</sup> Ms. Macy appealed this decision to the EEOC and the EEOC accepted the appeal to address confusion with a "recurring legal issue."<sup>4</sup>

The EEOC's decision in *Macy* clarified that, at least for the EEOC, "claims of discrimination based on transgender status, also referred to as claims of discrimination based on gender identity, are cognizable under Title VII's sex discrimination prohibition."<sup>5</sup> Through *Macy*, the EEOC has made it clear that it does not matter if a claim is brought as gender stereotyping or as sex discrimination because discrimination against a transgender individual because of his/her status/identity is protected by Title VII.<sup>6</sup> Through *Macy*, the

EEOC clarified that it is irrelevant whether the discrimination claim is based on gender stereotyping or sex discrimination because it is the individual's gender identity/status that is protected by Title VII.

The *Macy* decision has a meaningful impact on Idaho employers and employees. Although, there is no indication yet whether the federal courts will uphold the EEOC's determination, the decision is binding on all Idaho employers as it relates to the EEOC's investigation of claims within its jurisdiction. *Macy* also indicates the EEOC's intent to investigate charges of sex discrimination based on transgender status or gender identity under Title VII. Therefore, it would be unwise for Idaho employers to ignore the *Macy* analysis, even absent Idaho law. Idaho employers should not engage in any discriminatory acts because of an employee's gender identity.

### Partial repeal of DOMA

On June 26, 2013, the Supreme Court handed down a historic decision in *United States v. Windsor*.<sup>7</sup> In the 5-4 decision, the Court declared that the DOMA definition of "marriage" and "spouse" was unconstitutional as a deprivation of liberty under the Fifth Amendment.<sup>8</sup>

Edith Windsor and Thea Spyer, both New York residents, were together for 40 years before they legally married as a same-sex couple in 2007.<sup>9</sup> Ms. Spyer died in 2009 and left her entire estate to her wife, Edith. Ms. Windsor was unable to claim the estate tax exemption for surviving spouses because of DOMA's definitions of "marriage" and "spouse."<sup>10</sup>

Congress enacted DOMA in 1996 in anticipation of some states moving to legalize marriage for same-sex couples.<sup>11</sup> DOMA had two operative sections: (1) Section 2, not addressed in *Windsor*, which permits states to refuse to recognize same-sex

marriages performed in other jurisdictions; and (2) Section 3, which defined "marriage" as between one man and one woman, and "spouse" as "a person of the opposite sex who is a husband or wife."<sup>12</sup> The Section 3 definitions apply to "over 1,000 federal laws in which marital or spousal status is addressed as a matter of federal law[.]"<sup>13</sup>

In its opinion, the Supreme Court held that there is no rational basis for the federal government to deny benefits to lawfully married same-sex couples. A majority of the Court concluded that Section 3 of DOMA violated the equal protection clause and was unconstitutional, leaving only Section 2 of the Act in affect.<sup>14</sup>

### Windsor's effect on federal benefits programs

The *Windsor* decision affects the application of some of the "over 1,000 federal laws" referenced in the decision. In the wake of the *Windsor* decision, federal agencies have issued guidance on how they will apply the decision and extend federal benefits to same-sex couples. Two approaches have emerged so far for federal agencies to determine if spousal/marital benefits or protections apply to a same-sex couple: (1) the "place of residence" rule; and (2) the "place of celebration rule." The "place of residence rule" recognizes same-sex marriages and spouses only in states where the marriage is legally recog-

nized. The "place of celebration" rule recognizes legal same-sex marriages if the marriage was performed legally in any state even if the couple resides in a state that does not recognize same-sex marriage.<sup>15</sup>

Idaho employees and employers must be familiar with any agency that applies the "place of celebration rule" because it means that any same-sex marriage legally performed in any jurisdiction will now be considered a marriage for purposes of that agency's benefit program. For example, if a lesbian couple residing in Idaho marries legally in Washington under Washington law, their employers will need to treat their marriage the same as an opposite sex marriage under federal laws using the "place of celebration" rule. The "place of residence" rule does not apply to Idaho employers because, as discussed below, Idaho does not recognize same-sex marriage.

In August 2013, the IRS announced it will be applying the "place of celebration rule" for federal tax purposes.<sup>16</sup> In September, the Department of Labor's Employee Benefits Security Administration (EBSA) announced that it will also apply the "place of celebration" rule to provisions of the Employee Retirement Income Security Act of 1974 (ERISA).<sup>17</sup> This means that for federal tax and ERISA purposes, legally married same-sex couples will be treated the same as legally married opposite sex couples.

In the wake of the *Windsor* decision, federal agencies have issued guidance on how they will apply the decision and extend federal benefits to same-sex couples.

Although these two agencies have provided clarity, there are several other federal agencies that have not determined how they will apply benefits post-*Windsor*. Importantly for employment attorneys, the DOL has not provided guidance as it relates to the Family and Medical Leave Act (FMLA). By default, the “place of residence” rule, which was the pre-*Windsor* rule, still applies to the FMLA.<sup>18</sup> For Idaho employers this means that currently there is no change in the application of the FMLA post-*Windsor*; however if the DOL issues updated guidance and changes the application to the “place of celebration” rule, then Idaho employers will need to change their internal policies accordingly. Given that the DOL has chosen the “place of celebration” rule for ERISA purposes, it is likely that the DOL will provide similar guidance for the FMLA and employers should be prepared.

The post-*Windsor* changes in federal law have not fully taken form and more changes are likely on the horizon. For this reason, Idaho employers need to remain cognizant of any changes that will affect their employees and respond accordingly.

### **Seven Idaho cities take a proactive approach to eliminate “legal” discrimination**

To further complicate the patchwork of LGBT employment laws in Idaho, seven Idaho cities have added protections for LGBT individuals to protect against discrimination and retaliation and to provide those individuals with equal opportunity in various areas ranging from housing to use of public accommodations.<sup>19</sup> Each of these cities has taken a different approach to each aspect of these protections from the breadth of the protection, the exceptions where the code does not apply, the process for filing and investigating a complaint,

and the consequences for violating the city’s code. A brief overview of the codes shows that there is no consensus between these seven cities as to how these claims should be handled, investigated, penalized, or even what precisely should be protected.

Boise<sup>20</sup> was the second city in Idaho to enact legislation protecting sexual orientation and gender identity/expression and has provided a framework for the most popular model among other cities with similar codes.<sup>21</sup> Moscow<sup>22</sup> and Coeur d’Alene<sup>23</sup> followed a format similar to Boise’s code. These codes provide

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equal opportunity for employment, housing, commercial property, and the use of public accommodations; and prohibit discrimination based on sexual orientation and gender identity/expression. They do not apply to religious organizations, an organization’s rights of expressive association,<sup>24</sup> the state or federal government, or the rental of a home in some instances. A violation of the code is a misdemeanor, punishable by up to six months in jail and a \$1000 fine, which is subject to reduction if the person engages in corrective action.<sup>25</sup> A complaint for violation of the code is filed with the city

prosecutor and must be filed within 180 days of the alleged violation.

Both Ketchum and Sandpoint offer similar protections to Boise, but have different “exceptions” provisions. Ketchum’s code has additional language stating that the code will be construed in a manner consistent with the First Amendment whereas Sandpoint has a narrower “exception provision,” which limits the application of the code to religious organizations, corporations, associations, or groups. The most remarkable difference with these city codes compared to Boise’s is that they both take an approach similar to the investigative structure of the Idaho Human Rights Commission. Sandpoint<sup>26</sup> and Ketchum<sup>27</sup> have each created a “Human Relations Review Board” to investigate, review complaints, encourage mediation, and render findings as to whether a misdemeanor prosecution should be sought. The complaint must be filed with the city clerk’s office within 90 days of the alleged discrimination or retaliation. The three-member Human Relations Review Board will then review the complaint and request a response from the alleged violating party within 30 days. The Board then invites the parties to mediate the claims. The claim is only investigated if mediation fails; after the investigation, the Board issues findings and, if “cause” is found, refers the matter to the prosecutor to pursue “civil, equitable, or criminal remedies.”

Idaho Falls<sup>28</sup>, provides for equal opportunity and prohibits acts of discrimination and retaliation only in employment and housing. Notably absent from the protections provided in Idaho Falls are the areas of public accommodation and commercial property. The exceptions to the code are similar to the City of Boise, with the addition that it does not apply to businesses with fewer than five employees. A complaint

must be filed with an unspecified agency within 180 days. The first offense is considered an infraction and the second offense within five years is punishable as a misdemeanor. Any fine may be reduced if the person engages in corrective action.

Finally, Pocatello<sup>29</sup> is also similar to Boise's, but provides an expansive list of exceptions for various religious organizations. These include exempting religious organizations from the provisions of the code applicable to the restriction of membership, attendance at service, or use of facilities. It also expressly states that the segregation of bathrooms or locker rooms by gender is not a violation of the code. Its penalty and reporting provisions are similar to the City of Boise; however, filing a false report in Pocatello is listed as a separate prosecutable misdemeanor. If an alleged violation occurs, the city prosecutor will encourage mediation prior to prosecution and the city will pay the first \$250 of mediation fees.

These seven different codes, providing different protections, different exceptions, different reporting and investigatory processes and consequences ranging from civil, criminal, or equitable remedies, leave both employers and employees without concrete guidance. Employers are vulnerable because they are subject to differing requirements depending on where facilities are geographically located. Employees are vulnerable because the protections are neither uniform nor statewide.

### **Protections for LGBT individuals are a moving target — cases and legislation that may change the analysis**

In addition to this assortment of recent federal and city developments as it relates to LGBT individuals, there are even more changes that could come.

Employers are vulnerable because they are subject to differing requirements depending on where facilities are geographically located.

Employees are vulnerable because the protections are neither uniform nor statewide.

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### **Federal legislation to watch: The Employment Non-Discrimination Act**

The Employment Non-Discrimination Act (ENDA) is federal legislation to protect against acts of discrimination on the basis of sexual orientation or gender identity by employers.<sup>30</sup> ENDA, or versions of it, have been introduced on a regular basis since 1994. Although it is not anticipated that ENDA will be enacted this session due to the Republican-controlled House of Representatives, which generally takes a more conservative view on issues like same-sex marriage and protections for LGBT individuals, ENDA did pass the Senate in November, which is the first time it has been voted on in the Senate since 1996. Even though passage is not likely this year ENDA is on the horizon and has gained momentum in the wake of DOMA's partial repeal.

### **Campaign to "add the words" to the Idaho Human Rights Act**

For the past eight years, different groups have actively been working to amend the Idaho Human Rights Act to include "sexual orientation" and "gender identity" in its list of protections. More recently, "Add the Words," a group of community volunteers campaigning for the amendment, has garnered more momentum and support for the amendment than previously seen. Even though the amendment has gained support

among Idaho residents, businesses, and dignitaries over the years, it is not likely to pass in the Idaho legislature this year due to the historical lack of support the legislation has received from lawmakers. However, if it does pass, the amendment will protect employees in Idaho from discrimination in the workplace due to sexual orientation or gender identity under the Idaho Human Rights Act.

### **Latta v. Otter – An Idaho civil lawsuit seeking to recognize same-sex marriages in Idaho**

"Marriage" in Idaho is defined as a civil contract between a man and a woman,<sup>31</sup> which means that same-sex marriages are not recognized in Idaho, even if legally performed in another state.<sup>32</sup> In a lawsuit filed in federal court in November, four same-sex couples seek to have Idaho's ban on same-sex marriage overturned.<sup>33</sup> The suit seeks the recognition of same-sex marriages valid in other states and for the issuance of marriage licenses to same-sex couples here in Idaho.<sup>34</sup> Although this suit addresses the right to marry, it also alleges that laws creating a class of discrimination on the basis of sexual orientation violate the United States Constitution. Therefore, the judicial decisions in this case should be closely watched for any potential applicability to the employment context.

## Conclusion

This complicated patchwork of laws has created a confusing landscape for employers, employees and attorneys alike. As it stands now, it is conceivable that an Idaho employer could have offices in Boise and Nampa, which are two cities close in proximity that do not uniformly provide protection for LGBT individuals. If a transgender employee, working in both the Boise and Nampa locations, feels discriminated against in the Nampa office, the employee may file an EEOC complaint, but has no recourse with the city of Nampa or the state. However, if that individual feels discriminated against in Boise, the employee may, in addition to the EEOC complaint, file a complaint with the Boise City Prosecutor's office. This situation leaves the employee vulnerable to potentially illegal discrimination and the employer vulnerable because of conflicting standards between city, state, and federal law.

It's clear that federal, local and state laws are changing and expanding to provide protections for LGBT employees nationwide. Many states are tackling the complicated piecemeal approach by passing employment protections for LGBT residents through statewide legislation. Given that these changes are happening, and more changes are likely to come, Idaho should undertake the task of enacting comprehensive legislation to provide LGBT protections. With statewide legislation, employers will have clarification as to the state of the law, not be subjected to several jurisdictional standards within Idaho, and have a uniform investigative body. With statewide legislation, employees will be fully informed of their rights within the workplace, have a unified reporting system for claims of discrimination, and not be subjected to discrimination based on his/her sexual orientation or gender

identity without recourse. A proactive approach gives Idaho the opportunity to shape its future rather than being told through federal law and court and administrative decisions how that future will look. If any lesson can be gleaned through the last few years of legal changes, it is that the haphazard makeup of laws does not work for anybody.

## Endnotes

1. 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012).
2. *Id.* at 2.
3. *Id.* at 4-5.
4. *Id.* at 5.
5. *Id.* at 5-6.
6. The EEOC analyzed a line of cases using gender stereotype protections under Title VII provided by the Supreme Court's decision in *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989). The EEOC also analyzed cases which took a plain language/*per se* approach, such as *Schwenk v. Hartford*, which held that the important factor in analyzing these claims is whether the "discrimination is related to the sex of the victim." 204 F.3d 1187, 1201-02 (9th Cir. 2000).
7. See *United States v. Windsor*, 570 U.S. \_\_\_, 133 S. Ct. 2675, 186 L. Ed. 2d 808 (2013).
8. *Id.* at 2696.
9. *Id.* at 2682.
10. 1 U.S.C. § 7.
11. *Id.* at 2682.
12. *Id.* at 2682-83.

13. *Id.* at 2683.

14. *Windsor*, 133 S. Ct. at 2693-95.

15. Throughout this section, we will refer to "legal same-sex marriages" to denote marriages that were legally performed in any jurisdiction in the United States.

16. Official IRS website announcement, <http://www.irs.gov/uac/Newsroom/Treasury-and-IRS-Announce-That-All-Legal-Same-Sex-Marriages-Will-Be-Recognized-For-Federal-Tax-Purposes;-Ruling-Provides-Certainty,-Benefits-and-Protections-Under-Federal-Tax-Law-for-Same-Sex-Married-Couples> (last visited Dec. 12, 2013); see also <http://www.hrc.org/blog/entry/irs-issues-new-guidance-for-same-sex-couples>

17. United States Department of Labor Technical Release, <http://www.dol.gov/ebsa/newsroom/tr13-04.html> (last visited Dec. 12, 2013).

18. However, it should be noted that Federal employees residing in Idaho with same-sex spouses are provided the same FMLA entitlements as those with opposite-sex spouses. See Elaine Kaplan, *Memorandum for Heads of Executive Departments and Agencies*, Oct. 21, 2013, <http://www.chcoc.gov/transmittals/TransmittalDetails.aspx?TransmittalID=5834> (last visiting Dec. 12, 2013).

19. Not all cities provide for the same equal opportunities. Those differences will be outlined in more detail in the body of the article.

20. Codified at Boise City Code, Title 6, Chapter 2.

21. Throughout the article, we have used the phrase "LGBT," however, the city codes all refer to "sexual orientation and/or gender identity/expression" and

With statewide legislation, employers will have clarification as to the state of the law, not be subjected to several jurisdictional standards within Idaho, and have a uniform investigative body.

for that reason we use that terminology here.

22. Codified at Moscow City Code, Title 10, Chapter 19.

23. Codified at Coeur d'Alene City Code Chapter 9.56.

24. See *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

25. "Corrective action" is described as sensitivity training, policies and practices to prevent discrimination, or an agreement not to engage in discriminatory practices in the future.

26. Codified at Sandpoint City Code, Title 5, Chapter 2, Section 10.

27. Codified at Ketchum City Code Chapter 9.24.

28. Codified at Idaho Falls City Code, Title 5, Chapter 33.

29. Codified at Pocatello City Code Chapter 9.36.

30. <http://www.npr.org/blogs/itsallpolitics/2013/11/04/243023548/senate-poised-to-pass-employment-non-discrimination-act>

31. I.C. § 32-201.

32. Idaho Constitution, Art. III, § 28 ("A

marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state."); see also I.C. § 32-209.

33. <http://nwpr.org/post/idaho-couples-sue-state-over-same-sex-marriage-ban>; see also <http://www.nclrights.org/wp-content/uploads/2013/11/Latta-v.-Otter-Idaho-Complaint.pdf>

34. *Latta v. Otter*, Case No. 1:13-CV-00482-CWD, Dkt. 1, p. 2 (D. Idaho, 2013).

### About the Authors

**Leslie M. Hayes** is a deputy attorney general for the State of Idaho and this article is a presentation of her views only and not the views of the Office of Attorney General. Leslie has practiced employment law since 2009 and has represented employees in both the private and public sector. She currently she serves as the Chair for the Employment and Labor Law Section.



It should be noted that Federal employees residing in Idaho with same-sex spouses are provided the same FMLA entitlements as those with opposite-sex spouses.

**Lucy R. Juarez** obtained her law degree from the University of Utah. She lives in Boise, Idaho where she is an associate at Strindberg & Scholnick, LLC. Lucy is an employment attorney with a strong interest in protecting employees' rights and fighting discrimination in the workplace and within our communities. She is licensed to practice in Idaho and Utah.



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# Family Law in a Post - Windsor Landscape

Lisa Shultz

The US Supreme Court decision in *WINDSOR vs. US*,<sup>1</sup> issued in June of 2013, ushered in a dynamic new phase of family law. The decision repealed Section 3 of the Defense of Marriage Act (DOMA),<sup>2</sup> which had excluded married same-sex couples from over 1100 federal protections available to opposite-sex couples. Instantly regarded as a landmark decision and a victory for the gay rights movement, this decision has resulted in sudden and unprecedented rapid expansion in benefits to legally married gay couples. In addition, numerous pending cases both at the state and federal level promise to keep this issue front and center both in the mainstream media and on the legal front.

## **U.S. v. Windsor and the lay of the land**

Prior to the recent Supreme Court decisions in *Windsor*, 12 states and Washington, DC recognized same-sex marriages. Those 12 states include: Massachusetts, Connecticut, Iowa, Vermont, New Hampshire, Washington, Maine, Maryland, Delaware, Minnesota, Rhode Island, and New York. Although afforded the same rights as opposite-sex married couples for state purposes, those living in “pre-*Windsor*” marriage equality states were not treated as married under federal law.

As emphasized throughout the majority opinion of *US v. Windsor*, this exclusion had far-reaching impact with regard to over 1,100 areas of federal law. It meant that same-sex couples were treated differently than married heterosexuals in areas of the law, including but not limited to: tax, trusts and estates, immigration law, employee benefits, social security benefits including Medicare



Image, courtesy of The National Conference of State Legislatures

and Medicaid allocations, property law, immigration and even federally funded education loans and grants.

As of this writing, there are now 16 states and the District of Columbia that have adopted marriage equality. The most recent additions include New Mexico, Utah and Hawaii. Notably, Hawaii began an independent state challenge over two decades ago. *Baehr v. Miike*<sup>3</sup> was initiated in 1990. As the case crept its way through the state courts, the conservative legislature passed an amendment to the state constitution in 1998, which led to the dismissal of the case in 1999. Between the time of the filing of *Baehr* in 1990, to its dismissal in 1999, numerous states, including Idaho, passed amendments to their constitutions to avoid being required to recognize same-sex marriages from other states. Additionally, in 1996 President Clinton signed DOMA into law.

If the 1990's could be referred to as the decade of limiting LGBT (lesbian, gay, bisexual and transgender)

rights, the new century, and particularly the last four or five years culminating in *Windsor* and *Hollingsworth*<sup>4</sup> in 2013, can be referred to as the decade of rights expansion. This being said, as of the writing of this article, there are still 32 states that do not recognize marriage equality,<sup>5</sup> and 28 have constitutional provisions that require popular votes, usually alongside legislative action. These are known as non-recognition states.

## **The post-*Windsor* landscape**

Couples in states that recognize same-sex marriages became eligible for federal benefits immediately after the decision was handed down. However, it should be noted that, some of these benefits, depending on the agency, were conferred in a manner that was at times challenging. In states such as Idaho, where marriage equality is not yet recognized, it's not at all clear-cut as to who is eligible for what.<sup>6</sup>

In the wake of the Supreme Court decision in *Windsor*, a melee of litigation has ensued. There have been numerous lawsuits filed by same-sex couples across the country seeking clarification on the ruling, from Ohio to Arkansas to Louisiana, and recently in Idaho,<sup>7</sup> to list a few jurisdictions. Add to this the reaction of many states that had already been considering marriage-equality laws, to expedite the enactment of similar laws, in New Mexico, New Jersey and Hawaii, for instance. This has led many couples, some who had been waiting decades to legally marry, whether in their own state, or if they live in a non-recognition state, to travel to the nearest or most desirable “equality” state.

In order to legally solemnize their union, couples from non-recognition states have traveled in droves to states where marriage equality is now the law of the land. However, once they cross the border on their way home from the honeymoon, they are no longer legal, for state law purposes.

### Issues in family law

Here’s where the dynamic new phase of family law begins to take shape. Say you have a prospective client who comes to you to discuss the end of her marriage. As she describes her situation, you learn that her marriage is not to a person of the opposite sex, the ceremony took place in California in 2008 (pre-Prop 8) and there are three children, two legally adopted by both and one, the eldest, is the biological child of your prospective client’s spouse.

If your head isn’t spinning at this point, you are in the minority. Many questions arise in this hypothetical. First, can they legally divorce in Idaho, where they have always lived, or must they travel back to California?<sup>8</sup>

Second, assuming a District Court Magistrate decides they have jurisdiction, how will they deal with the issue of custody, as to the child born to the one spouse, who has also always known your prospective client as their other parent, and also has always considered him or herself as the sibling of the two subsequently legally adopted children?

As you continue your consultation, you discover that the home they live in is only in the name of the other spouse. What rights does your prospective client have in the way of property division? In addition, your client has spent years and thousands of dollars from an inheritance, improving the family home. Your prospective client does not work outside the home; she is a freelance writer and the primary caregiver for the children, ages 8, 6 and 4. Now remember, the eldest has no legally recognized relationship to your prospective client.

And to top it all off, your prospective client’s spouse is a federal employee and has a pension and other benefits that now extended to your prospective client after the *Windsor* decision in which section 3 of DOMA was repealed. The other spouse also has a Thrift Savings Plan (TSP) that has grown by over \$6,000, since DOMA was repealed and by over \$60,000, since their marriage in 2008.

As you continue your consultation, you discover that the home they live in is only in the name of the other spouse. What rights does your prospective client have in the way of property division?

### Resources for additional guidance

- The National LGBT Bar Association should be your first stop, find their website at: <http://www.lgbtbar.org/>
- Lambda Legal has compiled several fact-sheets, find their website at: <http://www.lambdalegal.org/publications/after-doma>
- The Human Rights Campaign is an excellent source of up-to-date resources, find their website at: <http://www.hrc.org/>
- The Family Equality Council has an excellent resource on advocacy, their website can be found at: [http://www.familyequality.org/get\\_informed/advocacy/](http://www.familyequality.org/get_informed/advocacy/)
- The ACLU, who represented Eddie Windsor in her landmark case, must not be overlooked, the link for their marriage equality resources can be found at: <https://www.aclu.org/lgbt-rights/lgbt-relationships>.

This hypothetical is offered to illustrate the quagmire that awaits family law practitioners as marriage equality law evolves. Conventional wisdom and historical insight leads this author to believe that it is only a matter of time before all 50 states adopt marriage equality. For if our nation is known for anything with regard to civil rights it is that such

rights are far more likely to be expanded than they are to be restricted.

Some will agree with this assessment, others won't. But even if nothing on the "marriage equality front" changes and everything just freezes in place, the decision in *Windsor* has forever changed the family law landscape in our nation.

## Endnotes

1. *U.S. v. Windsor*, S. Ct. 265 (2013) (involving a same-sex marriage recognized in New York but not by the IRS for purposes of an estate tax exemption).

2. *The Defense of Marriage Act (DOMA)* is a United States federal law that allows states to refuse to recognize same-sex marriages granted under the laws of other states. Section 3 of the Act was ruled unconstitutional by the U.S. Supreme Court in June of 2013, as a result of a case brought on behalf of Edith Windsor, *Windsor vs. U.S. id.* (Pub.L. 104-199, 110 Stat. 2419, enacted September 21, 1996, 1 U.S.C. § 7 and 28 U.S.C. § 1738C)

3. In *Baehr v. Miike*, (originally *Baehr v. Lewin*) three same-sex couples argued

that Hawaii's prohibition of same-sex marriage violated the state constitution. No. 20371, Hawaii Supreme Court (Haw. DEC. 9, 1999)

4. *Hollingsworth v. Perry* 130 S. Ct 705 (2103) (involving a constitutional challenge to California's Proposition 8 legislation, which banned same-sex marriage in that state).

5. <http://www.ncsl.org/research/human-services/same-sex-marriage-overview.aspx>

6. Refer to U.S.A.G. directive as to the place of ceremony.

7. *Latta v. Otter*, filed November 8, 2013 in U.S. District Court for the District of Idaho, case 1:13-cv-00482-CWD.

8. If they cannot divorce in Idaho and are not inclined to travel back to California, and they simply, slowly, grow apart and eventually meet new partners, and marry again...are they subject to Bigamy Laws?

## About the Author

*Lisa Shultz is an attorney at SHULTZ LAW, PLLC. In addition to family law, civil rights, simple estates, guardianships, and employment law,*

*her practice includes a concerted effort to reach out to the LGBT (Lesbian, Gay, Bisexual & Transgender) community, providing legal as well as educational resources with regard to rights of couples, families with children, employees, and employers. Lisa also serves as a Guardian Ad Litem for the Ada County District Court.*

*A member of the Idaho Bar since 1997, Ms. Shultz is also a recent graduate of Academy of Leadership for Lawyers, class of 2013. She is also a member of the Family Law Institute - a project of the NLGBT Bar Association, The National Coalition for a Civil Right to Counsel, The American Association for Justice, The Federal Bar Association, Idaho Women Lawyers, Idaho Trial Lawyers Association, and is on the founding board of directors for the Equal Justice Fund.*



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## COURT INFORMATION

### OFFICIAL NOTICE SUPREME COURT OF IDAHO

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Jim Jones  
Warren E. Jones  
Joel D. Horton

#### 1<sup>st</sup> AMENDED - Regular Spring Term for 2014

Boise ..... January 13, 15, 17, 22 and 24  
Boise ..... February 12, 14, 18 and 19  
**Boise (Concordia University School of Law located at 501 W. Front Street) ..... February 21**  
Boise ..... April 4 and 14  
Northern Idaho ..... April 8, 9 and 10  
Boise ..... May 2 and 5  
Eastern Idaho ..... May 13, 14 and 15  
Boise ..... June 2, 4 and 6  
Twin Falls ..... June 10 and 11

By Order of the Court  
Stephen W. Kenyon, Clerk

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

### OFFICIAL NOTICE COURT OF APPEALS OF IDAHO

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

#### 1<sup>st</sup> AMENDED - Regular Spring Term for 2014

Boise ..... January 9, 14, 16 and 21  
Boise ..... February 6, 11, 13 and 20  
**Coeur d'Alene ..... March 4 and 5**  
**(United States Federal Courthouse - Coeur d'Alene, located at 6450 N. Mineral Drive)**  
**Moscow ..... March 10, 11, 12, 13 and 14**  
Boise ..... March 18 and 20  
Boise ..... April 8, 10, 15 and 17  
Boise ..... May 6, 8, 13 and 15  
Boise ..... June 10, 12, 17 and 19

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Stephen W. Kenyon, Clerk

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

### Idaho Supreme Court Oral Argument for February 2014

#### **Wednesday, February 12, 2014 – BOISE**

8:50 a.m. *Wandering Trails v. Big Bite Excavation* ..... #40124-2012  
10:00 a.m. *State v. Moses* (Petition for Review) ..... #41275-2013  
11:10 a.m. *Pocatello Hospital v. Quail Ridge Medical* ..... #40566-2012

#### **Friday, February 14, 2014 – BOISE**

8:50 a.m. *Stephen R. Syson v. Ford Motor Co.* ..... #40075-2012  
10:00 a.m. *Medical Recovery Services v. Bonneville Billing* .....  
..... (Petition for Review) #40966-2013  
11:10 a.m. *Profits Plus v. Podesta* ..... #39964-2012

#### **Tuesday, February 18, 2014 – BOISE**

8:50 a.m. *Peterson v. Child Support Services* ..... #41017-2013  
10:00 a.m. *Medical Recovery Services v. Strawn* ..... #40827-2013  
11:10 a.m. *Sanders v. Mountain Home School District No. 193* .....  
..... #40013-2012

#### **Wednesday, February 19, 2014 – BOISE**

8:50 a.m. *St. Alphonsus v. MRI Associates* ..... #40012-2012  
10:00 a.m. *Talbot v. Desert View Care Center* (Industrial Commission) ...  
..... #41208-2013  
11:10 a.m. *Brad C. Carr v. Crystal Pridgen* ..... #40883-2013

#### **Friday, February 21, 2014 – BOISE (Concordia University School of Law located at 501 W. Front Street)**

8:50 a.m. *Edged in Stone, Inc. v. Northwest Power* ..... #40463-2012  
10:00 a.m. *State v. Russell James Parker* ..... #38956-2011  
11:10 a.m. *Marvin F. Morgan v. Michael Alexander Demos, M.D.* .....  
..... #40170-2012

### Idaho Court of Appeals Oral Argument for February 2014

#### **Thursday, February 6, 2014 – BOISE**

9:00 a.m. *State v. Thomas* ..... #39776-2012  
10:30 a.m. *Jimenez v. State* ..... #40109-2012

#### **Tuesday, February 11, 2014 – BOISE**

9:00 a.m. *State v. Rhoads* ..... #39989-2012  
10:30 a.m. *State v. Moad* ..... #40289-2012

#### **Thursday, February 13, 2014 – BOISE**

9:00 a.m. *Dixey v. State* ..... #40323-2012

#### **Thursday, February 20, 2014 – BOISE**

9:00 a.m. *State v. Torrez* ..... #40506-2012  
10:30 a.m. *State v. Moon* ..... #40538-2012

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

**CIVIL APPEALS**

**Attorney fees and costs**

1. Whether the district court erred in determining the gravamen of the claim was a commercial transaction and awarding Lynn Urrutia attorney fees under I.C. § 12-120.

*Urrutia v. Harrison*  
S.Ct. No. 41100  
Supreme Court

**Contract**

1. Did the court err when it determined that April Fano breached the contract between the parties when all evidence of breach predated the contract?

*Stibal v. Fano*  
S.Ct. No. 40427  
Supreme Court

**Divorce, custody, and support**

1. Did the magistrate court err by addressing the issue of joint legal custody when the magistrate was not expressly asked to do so?

*Mahnami v. Mahnami*  
S.Ct. No. 40888  
Court of Appeals

**Evidence**

1. Whether the district court erred in denying defendants' motion for directed verdict and JNOV as there was insufficient evidence to support an award of damages.

*April Beguesse, Inc. v. Rammell*  
S.Ct. No. 40212  
Supreme Court

2. Did the district court commit clear error in finding the mortgaged property was valuable only as agricultural land and that the property's reasonable value was no more than \$4,500 per acre?

*Northwest Farm Credit Serv. v. Lake Cascade Airpark*  
S.Ct. No. 40992  
Supreme Court

**Legal malpractice**

1. Whether the district court erred in holding that attorneys for AIA Insurance owed Taylor, a non-client, a legal duty even though no attorney-client relationship existed between them and whether the district court further erred in creating an opinion letter exception to the prerequisite requirement that an attorney client relationship must exist to assert a professional malpractice claim.

*Taylor v. Riley*  
S.Ct. No. 40595  
Court of Appeals

**Planning & zoning**

1. Did the council err in upholding the P&Z Commission's decision when the P&Z Commission refused to follow the conditional use procedure as set forth in the Boise City Code?

*917 Lusk, LLC v. City of Boise*  
S.Ct. No. 41214  
Supreme Court

**Post-conviction relief**

1. Did the district court err by refusing to consider attachments to the petition for post-conviction relief?

*Valadez-Pacheco v. State*  
S.Ct. No. 40386  
Court of Appeals

2. Did the court err in summarily dismissing Haas' third petition for post-conviction relief in which he claimed ineffective assistance of trial counsel?

*Haas v. State*  
S.Ct. No. 40998  
Court of Appeals

3. Did the court err in summarily dismissing Chippewa's petition for post-conviction relief and his claim that he was represented by conflicted counsel?

*Chippewa v. State*  
S.Ct. No. 40527  
Court of Appeals

**Summary judgment**

1. Did the district court err in concluding that Bank of Idaho's full credit bid at the trustee's sale constituted a "voluntary satisfaction or release of the insured mortgage" which terminated First American Title Insurance Company's liability pursuant to Section 9(c) of the policy conditions and stipulations?

*Bank of Idaho v. American Title Insurance Co.*  
S.Ct. No. 41157  
Supreme Court

2. Did the district court err in granting summary judgment and allowing deed reformation?

*Regan v. Owen*  
S.Ct. No. 40848  
Supreme Court

3. Whether the district court erred by granting summary judgment in favor of Internet Auto Rent and Sales on Venable's claim of wrongful discharge in violation of public policy.

*Venable v. Internet Auto Rent and Sales, Inc.*  
S.Ct. No. 40939  
Supreme Court

**CRIMINAL APPEALS**

**Evidence**

1. Were prior convictions improperly admitted under I.R.E. 404(b) when the only probative value of the convictions was as propensity evidence?

*State v. Folk*  
S.Ct. No. 39622  
Court of Appeals

2. Did the district court err in determining that testimony from a fourth daughter that she also had been sexually abused by Marks was permissible under I.R.E. 404(b)?

*State v. Marks*  
S.Ct. No. 39684  
Court of Appeals

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

3. Did the court abuse its discretion in finding there was adequate foundation laid for the admission of several text and email messages?

*State v. Koch*  
S.Ct. No. 40294  
Supreme Court

4. Did the court err in allowing admission of evidence showing prior sadistic acts of Ehrlick, pursuant to I.R.E. 404(b), to show intent, motivation, and lack of mistake or accident?

*State v. Ehrlick*  
S.Ct. No. 39249  
Supreme Court

5. Did the court abuse its discretion by precluding Dr. Ofshe from testifying specifically as to his expert opinion about the procedures associated with Meister's confession?

*State v. Meister*  
S.Ct. No. 39807  
Court of Appeals

**No contact orders**

1. Did the court err in finding the clerical error in the original no contact order did not deprive the court of jurisdiction over the charge that Vaughn violated the no contact order?

*State v. Vaughn*  
S.Ct. No. 40616  
Court of Appeals

**Search and seizure –  
suppression of evidence**

1. Did the district court err in reversing the magistrate's order that had suppressed the results of Hunter's breath test and in finding that Hunter's arrest was supported by probable cause?

*State v. Hunter*  
S.Ct. No. 40950  
Court of Appeals

2. Did the district court err when it denied Nelson's motion to suppress statements made in response to questioning by officers while she was detained during a parole search of her house?

*State v. Nelson*  
S.Ct. No. 40493  
Court of Appeals

3. Did the court err in denying Foote's motion to suppress and in finding entry into his apartment was justified by exigent circumstances?

*State v. Foote*  
S.Ct. No. 40500  
Court of Appeals

4. Did the court err in concluding that exigent circumstances justified a warrantless entry into Tracy's home and in denying her motion to suppress?

*State v. Tracy*  
S.Ct. No. 40739  
Court of Appeals

5. Did the court err in finding that the officer had reasonable articulable suspicion to stop Pendergrass' vehicle?

*State v. Pendergrass*  
S.Ct. No. 40914  
Court of Appeals

6. Did the district court err in reversing the magistrate's decision that had suppressed results of Nicolescu's breath test and in finding the officer had reasonable suspicion to conduct the test?

*State v. Nicolescu*  
S.Ct. No. 40985  
Court of Appeals

7. Did the district court err by affirming the magistrate's conclusion that the search of the trunk of a car requires separate probable cause from the probable cause that justifies the search of the passenger compartment?

*State v. John (2013-16) Doe*  
S.Ct. No. 41220  
Court of Appeals

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# Why You Need to Update Your Social Media Policy

Lisa McGrath

In April 2012, Nordstrom Rack hosted a Tweetup, providing Boise's influencers on Twitter with \$50 gift cards in exchange for tweets about the store in advance of its opening. In such a situation, the Federal Trade Commission (FTC) Guides Concerning the Use of Endorsements and Testimonials in Advertising (Guides) require advertisers to do two things: (1) inform social media users that they must disclose that they are being given cash or payment in-kind to tweet endorsements; and (2) implement a reasonable monitoring program to make sure that the users are disclosing such connections.<sup>1</sup>

Despite these requirements, Nordstrom Rack did not ask event attendees to disclose these connections, and when asked by a local news station about the requirements of the Guides, Nordstrom Rack said it wasn't responsible for making sure social media users disclosed such connections.<sup>2</sup> The FTC investigated the Tweetup shortly thereafter, and in exchange for not pursuing enforcement against Nordstrom Rack for violations of the Guides, the Fortune 500 company agreed to amend its social media policy to comply with the Guides.<sup>3</sup>

And Nordstrom Rack isn't the only company that has been slow to integrate its legal department with its social media strategy. Take Hewlett Packard and its public relations firm, Porter Novelli's, 2012 Inkology campaign.

During the campaign, Hewlett Packard provided \$50 gift certificates to bloggers and asked them to blog about Hewlett Packard printer ink and other printer products.<sup>4</sup> The majority of bloggers failed to disclose that they received a gift certificate in

In a 2013 survey by Deloitte, business executives from 300 major companies said social media posed the greatest risk to their businesses in the upcoming year.<sup>10</sup>

exchange for positive blog posts, and neither Hewlett Packard nor Porter Novelli monitored the bloggers to ensure that they disclosed the connections.<sup>5</sup> The FTC investigated the Inkology campaign, and in exchange for not pursuing enforcement against Hewlett Packard and Porter Novelli, both companies agreed to revise their social media policies and "take reasonable steps to monitor bloggers' compliance with the obligation to disclose the gifts they receive."<sup>6</sup>

In addition to the requirements of the Guides, the FTC released the updated .com Disclosures: How to Make Effective Disclosures in Digital Advertising (Dot Com Disclosures), in March 2013, providing additional guidance on the form of disclosure for social media and blogs.<sup>7</sup> Using the example of Nordstrom Rack's Tweetup, the Dot Com Disclosures would have required the store to advise attendees that all event-related tweets be prefaced with the words, "Ad" or "Sponsored."<sup>8</sup> In the case of the Inkology campaign, Hewlett Packard and Porter Novelli would have had to ensure that bloggers make clear and conspicuous disclosure at the top of their blog posts.<sup>9</sup>

In a 2013 survey by Deloitte, business executives from 300 major companies said social media posed the

greatest risk to their businesses in the upcoming year.<sup>10</sup> In addition to social media advertising disclosures, let's take a look at two other legal risks associated with social media use and how to minimize such risks.

## Social media account ownership

One risk is the unsettled issue of who owns a company's social media accounts — the employer or employee?

Take, for example, the Black Entertainment Channel's (BET) Facebook fan page for the show, "The Game." In 2008, BET hired social media freelancer, Stacey Mattocks, to run a Facebook fan page for the popular show.<sup>11</sup> Mattocks created and managed the page, amassing 6.2 million "likes" by 2012. When BET asked Mattocks to transfer ownership of the Facebook page to BET, Mattocks refused. BET had the page suspended, Mattocks sued, and The Game's millions of Facebook fans were left in the dark.<sup>12</sup>

Perhaps more than the risk of litigation associated with the issue of social media account ownership is that of brand damage.

Consider former *New York Times* Assistant Managing Editor, Jim Roberts. In January 2013, Roberts accepted a buyout, agreeing to leave the *New York Times*.<sup>13</sup> Known for trail-

blazing social media at the newspaper, when Roberts was asked about the future of his Twitter account, he tweeted, “My feed is my own.” Upon his departure, Roberts changed his Twitter handle from @nytjim to @nycjim and walked out the door with over 77,000 followers.<sup>14</sup>

*The New York Times’* response to the question of social media account ownership captures most companies’ problematic approach to the issue: “there is no specific policy in place that covers this kind of situation.”<sup>15</sup>

While attorneys parse complicated legal arguments in expensive lawsuits over social media accounts, the solution is simple — draft employee agreements and social media policies specifying social media account ownership. In fact, employee agreements are the only thing courts have definitively upheld regarding the issue. In 2012, in *Ardis Health, LLC v. Nankivell*, a federal court granted a preliminary injunction on the basis of an employee agreement, requiring the employee to provide the employer with access to social media accounts and passwords.<sup>16</sup>

Avoid litigation and brand damage — obtain signed employee agreements and social media policies with the following provisions regarding social media account ownership:

- Ownership of social media accounts and content;
- Access, passwords, and logins in compliance with state “password laws” that prohibit employers from requiring employees to provide access to social media accounts;
- Confidentiality and trade secrets that comply with Section 7 of the National Labor Relations Act which protects employees’ right to concerted activity;<sup>17</sup> and
- Privacy.

## National Labor Relations Act

In recent years, the National Labor Relations Board (NLRB) has struck down the social media policies of dozens of companies, including Costco, Walmart, Echostar, and others, for violations related to Section 7 of the National Labor Relations Act (NLRA).<sup>18</sup> Section 7 of the NLRA protects private employees’ right to “concerted activity,” or the right to discuss wages, working conditions, and terms of employment on social media platforms.<sup>19</sup> And the NLRB’s interpretation of “concerted activity” has been expansive.

In the recent case of *Echostar Inc.*, an administrative law judge issued a decision striking down provisions in Echostar’s social media policy that prohibited employees from making disparaging comments about Echostar; undermining the company through insubordination; disclosing information to the media and government agencies; and disclosing company investigations.<sup>20</sup> The decision also went so far as to strike down the provision in Echostar’s policy that prohibited social media activities “with Echostar resources and/or on Company time.”<sup>21</sup>

And the trend continues as the General Counsel of the NLRB releases opinions and advisory memoranda regarding what private employers legally can fire and/or discipline employees for posting on social media. To date, private employers cannot:

- Prohibit employees from releasing confidential guest, team member, or company information;
- Prohibit offensive, demeaning, abusive, or inappropriate remarks;
- Prohibit disparaging or defamatory comments;
- Prohibit employees from sharing confidential information with another team member unless they have a need to know the information to do their job;
- Prohibit objectionable or inflammatory social media posts;
- Prohibit employees from having conversations regarding confidential information in the break room or in any other open area;
- Prohibit employees from discussing confidential information at home or in public areas;
- Prohibit employees from commenting on legal matters;
- Prohibit employees from revealing non-public company information on any public site;
- Prohibit employees from posting photos, music, and video, including those containing the employer’s logos or trademarks;
- Prohibit employees from posting to social media sites without receiving prior authorization from the employer first;
- Prohibit employees from sharing material non-public information or

And the trend continues as the General Counsel of the NLRB releases opinions and advisory memoranda regarding what private employers legally can fire and/or discipline employees for posting on social media.

confidential or proprietary information;

- Require employees to avoid harming the integrity of image and integrity of the company;
- Require employees to make sure that their social media posts are completely accurate and not misleading;
- Require employees to think carefully about ‘friending’ co-workers; and
- Require employees to report any unusual or inappropriate internal social media activity.<sup>22</sup>

Further, an organization’s social media policy must reflect these complex legal requirements under the NLRA.

## Conclusion

Advertising disclosures, social media account ownership, and the NLRA scratch the surface of the risks organizations face in the competitive social media marketplace. Add privacy and industry-based laws and regulations such as Financial Industry Regulatory Authority (FINRA) social media regulations, Health Insurance Portability and Accountability Act (HIPAA), Health Information Technology Act (HITECH), public record laws, open meeting laws, and First Amendment to the list.

Embracing a social media policy that addresses these issues – and training employees on it – is the first step to maximizing the effectiveness of strategic social media use while minimizing the risk.

## Endnotes

1. See 16 C.F.R. § 255.5 (2009).
2. Justin Corr, KTVB.com, *Nordstrom Rack Event Could Be Violation Of Federal Guidelines*, <http://www.ktvb.com/news/business/Did-Nordstrom-Rack->

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4. FTC.gov, [http://www.ftc.gov/sites/default/files/documents/closing\\_letters/hp-inkology/120927hpinkologyltr.pdf](http://www.ftc.gov/sites/default/files/documents/closing_letters/hp-inkology/120927hpinkologyltr.pdf) (last visited Dec. 29, 2013).

5. See *id.*

6. See *id.*

Private employers cannot:  
Require employees to avoid  
harming the integrity of image  
and integrity of the company

7. See Federal Trade Commission, (2013), available at <http://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosure.pdf>.

8. See *id.*

9. See *id.*

10. See Deloitte, EXPLORING STRATEGIC RISK (2013), available at [http://www.deloitte.com/view/en\\_US/us/Services/additional-services/governance-risk-compliance/explore-strategic-risk/index.htm?id=gx:sm:fb:srsurv:awa:grc:101013](http://www.deloitte.com/view/en_US/us/Services/additional-services/governance-risk-compliance/explore-strategic-risk/index.htm?id=gx:sm:fb:srsurv:awa:grc:101013) (last visited December 12, 2013).

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12. See *id.*

13. Amy McIlwain, financialsocialmedia.com, *Social Media Ownership: Is It A Business Account Or Personal Account?* (2013), <http://financialsocialmedia.com/social-media-ownership-business-account-personal-account/> (last visited Dec. 29, 2013).

14. *Id.*

15. *Id.*

16. *Ardis Health, LLC v. Nankivell*, 2011 WL 4965172 (S.D.N.Y. 2011).

17. See 29 U.S.C. § 157 (2011).

18. See NLRB, <http://www.nlr.gov/news-outreach/fact-sheets/nlr-and-social-media> (last visited Dec. 29, 2013).

19. 29 U.S.C. § 157 (2011).

20. Administrative Law Judges Decision, *Echostar Inc.*, Case No. 27-CA-066726 (Sept. 20, 2012).

21. *Id.*

22. NLRB, (2012), <http://www.nlr.gov/news-outreach/fact-sheets/nlr-and-social-media> (last visited Dec. 29, 2013).

## About the Author

**Lisa McGrath’s practice focuses on solving legal problems related to social media, the Internet, advertising, apps, and technology. McGrath began her career as a Counsel in the U.S. Senate and later returned to her home state to clerk at the Idaho Supreme Court. McGrath is a Member of Harvard’s Berkman Center Online Media Legal Network, and the Idaho Business Review recently named her a 2013 Leader in Law. [www.lisamcgrathllc.com](http://www.lisamcgrathllc.com)**



# Succession Planning Really Isn't Optional, Particularly for Solos

Mark Bassingthwaighte

**A** significant number of solo practitioners have not taken the step of creating a succession plan. Working with attorneys at ALPS, be it from visits, on applications for insurance, or at CLE events, we talk about succession.

Our message is always the same, if no plan is in place, now is the time. You really don't want to leave stacks of closed files to an unsuspecting non-lawyer spouse and yes, such calls continue to come in. Remember, someone paid for the production of the file you have in your possession and that someone has an interest in that file.

We all know that client property cannot be destroyed whenever an attorney feels like doing so; but of course, non-lawyer spouses aren't bound by our rules and it happens. Heaven forbid that post attorney death and post file destruction by a grieving spouse a certain file is needed to properly defend against a claim of malpractice.

Making matters worse, there is no insurance in place to cover the fallout of the claim because no one knew they had to timely contact the malpractice carrier in order to purchase a "tail" once the attorney passed. The deceased attorney's estate may now not be what everyone was counting on it being. The failure to plan can end badly; but wait, there's even more.

Rule 1.3 of the ABA Model Rules of Professional Conduct addresses diligence. The Rule reads, "A lawyer shall act with reasonable diligence and promptness in representing a client." Most attorneys, if not all, are well aware of this rule.

We are all to strive to deliver our services in a professional, competent and timely fashion. Yet our obligations do not end here. There is an obligation to prevent neglect of a client matter after attorney death or disability.

As lawyers, we are to act with commitment, dedication, and where appropriate even zealous advocacy. Our workloads are to be reasonable so that all matters can be resolved competently.

Procrastination is an enemy to be avoided at all costs; for it has and will continue to lead to malpractice claims if and when clients are ever harmed as a result. In the end we are all to strive to deliver our services in a professional, competent and timely fashion. Yet our obligations do not end here. There is an obligation to prevent neglect of a client matter after attorney death or disability.

In 2002 the comments to ABA Model Rule 1.3 were amended with the following language. Comment 5 now states, "To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine if there is a need for immediate protective action."

Given all that I have seen and experienced over my years with ALPS, I personally have trouble coming up

with a set of circumstances where I would feel comfortable saying no such plan would be required for a solo. The only question for me is how to get there.

## **Designate person or persons for transition**

The most important aspect of planning for your death or disability is in the designation of an attorney who will be responsible for administering the winding down of your practice. This attorney should be competent, experienced, and someone who displays the utmost professionalism. This person should have the time, or the ability to make the time, to come into the practice. She must be able to make rapid decisions and assume, at least for a period of time, something of an additional practice.

Now remember that the purpose of the designated attorney is not to come in and take over the practice but rather to take the lead in winding down the practice. It's about being expeditious with file review, client notification, protective action, and transitioning files to other attorneys. Perhaps these responsibilities could even be shared among a select group if time constraints are a concern.

Obviously, the designated attorney ought to be someone quite familiar with your practice areas and also not likely to have a significant number of conflict concerns arise as a result of having to step in. Finally, don't overlook the importance of making certain that appropriate employees are aware of who the designated attorney is and how to contact this individual in an emergency. One added benefit of choosing a designated attorney (and often this is a reciprocal designation) is that this individual can also act as your backup attorney, thereby allowing you to take extended absences from your office for work, pleasure, or health reasons.

### Write an office procedure plan

Beyond designating an attorney, there are a number of other things that should be done with your practice if not already taken care of. Consider providing notice of the existence of and reason for a designated attorney in your fee agreements so that clients are aware of the steps you have taken to protect their interests in the event of an emergency.

Maintain a current office procedure manual that discusses the calendaring system, conflict system, active file list, open and closed file systems, accounting system, and any other key system as this can be valuable in expeditiously bringing the designated attorney up to speed on how your practice is run.

It is imperative that critical systems such as the calendar and conflict systems be kept current at all times and make certain that all files are thoroughly documented. The designated attorney will need to review all client files as quickly

as possible in order to make a determination as to whether any immediate protective action is necessary. Mistakes can and will be made with poorly documented files.

### Don't forget about employees

Finally, write a letter for the designated attorney that details duties for all employees; includes instructions on use of and passwords for the computer system; provides financial details such as location and account numbers for all bank

One added benefit of choosing a designated attorney (and often this is a reciprocal designation) is that this individual can also act as your backup attorney, thereby allowing you to take extended absences from your office for work, pleasure, or health reasons.

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accounts, particularly client trust accounts; and contact information for all staff and principal vendors such as banks, insurance companies, utility companies, and the landlord. In short, think about what you would need to know if you were the person coming in to wind down your practice and capture that intellectual capital in a way that can be left for the designated attorney.

If you feel that you need assistance in developing a plan for your death or disability, the Oregon State Bar Professional Liability Fund has published a handbook with related

forms that can be of real help. This handbook, available to out-of-state lawyers at a reasonable price, will also provide significant help to the designated attorney should his or her services ever be needed. In this book entitled *Planning Ahead: A Guide to Protecting Your Clients' Interests in the Event of Your Disability or Death*, you will find items such as a checklist for closing another attorney's office, a sample notice of designated assisting attorney, sample letters to clients, a sample authorization for the transfer of a client file, and much more.

Also be aware that a few useful resources based upon the materials in this Oregon guide are available on the websites of a number of state bars. Finally, the ABA has published a similar resource entitled *Being Prepared: A Lawyer's Guide for Dealing with Disability or Unexpected Events* that might be of use as well.

### About the Author

**Mark Bassingthwaight** is the Risk Manager with Attorneys Liability Protection Society, Inc., a Risk Retention Group, in Missoula, Montana. Currently Mark's responsibilities include developing and delivering new risk management and CLE products and services, risk management consulting, law firm risk evaluations, maintaining the ALPS 411 blog and publishing the company's e-newsletter, the ALPS Risk Management Report. In his tenure with the company, Mark has conducted over 950 law firm risk management assessment visits, presented numerous continuing legal education seminars throughout the United States and written extensively on risk management and technology.



# Some February Fun: F Words

Tenielle Fordyce-Ruff

I've wanted to write another column on word pairs for a while.<sup>1</sup> I decided that this month is it. Let's celebrate the shortest month of the year by looking at "F" words.

## First/firstly

The first "F" word comes from my students wondering whether using *firstly* was correct, or whether they should simply use *first*. Turns out, either is correct. When creating lists, however, be careful not to mix the two. So if you begin your list with a *first*, use *second*, *third*, and so on.

## Farther/further

Traditionally, *farther* is used to indicate literal distance, space, and time, and *further* is used to indicate distance, space, and time, but in a figurative sense.<sup>2</sup> Thus, use *farther* literally.

*The court traveled farther this year than last, racking up hundreds of miles in travel.*



And use *further* figuratively.

*The court refused to extend the doctrine any further.*

While using *further* to indicate literal distance, space, or time has become common, in more formal writing it's best to stick with the traditional differentiation.

## Feign/feint

These similar words have similar meanings. *Feign* means to fake or pretend to be affected by something. *Feint* is a pretend blow or attack designed to mislead an opponent: The boxer *feinted* a jab then threw an uppercut.



*Feign* could be a great, emotive word choice to show a reader how insincere someone is.

*The defendant feigned remorse over his actions.*

## Fictional/fictitious

Both of these adjectives indicate that something is made up. *Fictional* has a more neutral connotation.

*Mary Poppins is a fictional character.*

*Fictitious*, however, has a more negative connotation, indicating that something is a sham or nonexistent.

*She pleaded guilty to embezzling thousands of dollars by having fictitious accounts payable.*

## Flair/flare

*Flair* is a knack or style for something, an outstanding skill.

*Megan had a flair for writing about grammar.*

*Flare* is a sudden burst of emotion or bright flames used to provide light.

*The students felt a flare of happiness at the end of the exam period.*

*The driver used flares to warn other motorists of his disabled truck.*

## Flammable/inflammable

Both *flammable* and *inflammable* mean easily set on fire. Many writers believe that *inflammable* has the opposite meaning. This confusion is caused by the little known meaning for the Latin prefix *in-*: into or intensifying the meaning of the root.

To avoid confusion use the more common *flammable*.

*The pajamas were flammable.*

The opposite of both words is *nonflammable*. So if you mean to write that something is not easily set on fire, use that.

*The wet wood was nonflammable.*

## Flaunt/flout

Perhaps it's that these words sound so similar, but many writers confuse them. *Flaunt* is an ostentatious display.

*If you've got grammar skills, flaunt them!*

*Flout* is to ignore rules or conventions.

*Flouting the rules of grammar can lead to confusion.*

### Forbear/forebear

These two words are mistakenly used interchangeably, even though *forbear* is a verb and *forebear* is a noun, and they aren't related. To *forbear* is to refrain from doing something. A *forebear* is an ancestor. That little "e" in the middle drastically changes the meaning.

*As part of the settlement, the plaintiff agreed to forbear future claims.*

*Like my forebears, I grew up on a ranch.*

### Founder/flounder

These similar verbs get many writers. *Flounder* means to struggle or flail about. *Founder* means to fail. While they describe similar aspects of a bad situation, they should not be used interchangeably.

*The professor waited while the unprepared student floundered.*

*Students who fail to study founder their exams.*

Use this simple trick to keep yourself from floundering for the correct usage and possibly founder-ing. Think of a fish flopping around, like a flounder!

### Forgo/forego

Here is another set of words with a pesky "e" that creates confusion.

Indeed, the misuse of *forego* for *for-go* is widespread. *Forgo* means to go without. *Forego* means to go before.

*The parties agreed to forgo having a jury.*

*In light of the foregoing discussion, I recommend that you consult a dictionary to ensure correct usage.*

To help keep these words straight, remember this trick: Before and *forego* both have the "e" in *fore*.

### Fortuitous/fortunate

*Fortuitous*, unfortunately, is often misused for *fortunate*. Perhaps a spirit of optimism creates this confusion: *fortuitous* means to happen by chance, and *fortunate* means auspicious or lucky. Maybe optimistic writers think that every chance happening will turn out to be lucky. They would have a better chance at correct usage, however, if they recognized the difference.

*A fortuitous turn of events made the student late for class.*

*You are fortunate to be near the end of a great column.*

### Conclusion

First, I hope that the foregoing discussion of F words didn't make you feign delight. Second, I hope it led to a flare of understanding. Finally, I hope that you won't flounder too much trying to use these words

correctly. Remember, you can always forgo using an F word.

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- Suzanne E. Rowe, *F-Words: The First Flames of Fall*, Oregon State Bar Bulletin (October 2012), available at <http://www.osbar.org/publications/bulletin/12oct/legalwriter.html>.

### Endnotes

1. I first wrote about confusing word pairs in the January 2012 edition of *The Advocate*.
2. These are the traditional definitions. It's now commonplace to use further to indicate both literal and figurative distance, and even dictionaries will cross-reference these words.

### About the Author

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



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**B**

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Clark, T. Hethe  
Coats, Jim  
Cooper, Gary  
Copple Trout, Honorable Linda  
Crawford, Jerad  
Cunningham, Heather

**D**

Dale, Honorable Candy  
Daniel, Larry  
Daniel, Lars  
Davis, Senator Bart  
Davis, Shelley  
Dryden, William  
Dunn, Honorable Stephen

**E**

Epis, Honorable David  
Erbland, Peter  
Ewers, Jennifer

**F**

Fields, Richard  
Fitzgerald, William  
Fonnesbeck, Marc  
Fouser, Trudy  
Friedman, Dr. Robert

**G**

Gardner, P. David (Coeur d'Alene)  
Gardner, P. David (Pocatello)  
Gardunia, Honorable Theresa  
Gary, Donald  
Geile, Patrick  
Gerwick Couture, Wendy  
Geston, Mark  
Gilmore, Michael  
Gjording, Jack  
Gowland, Karen  
Gratton, Honorable David  
Graziano, Kyme  
Greenwood, Honorable Richard  
Gugino, Jeremy  
Gutierrez, Honorable Sergio

**H**

Haan, Sarah  
Hall, Richard  
Harbart, Traci  
Hardesty, Stephen  
Harris, Donald  
Healow, Terry  
Hickok, Suzanne  
Higer, Sarah  
High, Thomas  
Hoidal, Ernest  
Howe, Tom  
Howell, Ken  
Huneycutt, Mary  
Hunter, Larry  
Huskey, Honorable Molly

**J**

Jovick, Fonda

**K**

Karp, Adam  
King, Scott  
Kirscher, Honorable Ralph  
Knoebel, Dr. Richard  
Kolts, Kathlene  
Kovar, Shirley

**L**

Lee, Honorable Jerold  
Lindstrom, C. Timothy  
Lucoff, Aaron

**M**

Mac Master, Emily  
Magel, John  
Malek, Representative Luke  
Manwaring, Kipp  
Martens Miller, Tara  
McCallister, Kathleen  
McDaniel, Honorable Terry

**M**

McDevitt, Annie  
McDougall, Scott  
McGown, John  
McHenry, Honorable Lynnette  
McKee, Honorable D. Duff  
McLaughlin, Honorable Michael  
Meadows, Craig  
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Myers, Honorable Terry

**N**

Norris, Jason  
Nye, Honorable David

**O**

Olson, Wendy  
Oths, Honorable Michael  
Owens, Richard

**P**

Pappas, Honorable Jim  
Patricco, Ray  
Pauloski, Thomas  
Peters, Mark  
Peterson, Chuck  
Petrich, Christian  
Pierce, Douglas  
Points, Michelle

**R**

Rice, Robert  
Richins, Adam  
Robison Doug  
Robnett, Aubsey  
Root, Skye  
Rubin, S. Richard  
Rutter, Andrea

**S**

Salladay, Lance  
Sanders, Shaakirrah  
Satz, Dean Michael A.  
Scanlan, Terry  
Schiller, Edwin  
Schwager, Sheila  
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Shultz, Lisa  
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Sicard-Mirabal, Josefa  
Simon, Lindsey  
Sims, John  
Sisson, Peter  
Slavin, Chace  
Smith, Honorable N. Randy

**S**

Smith, Nick  
Smith, Thomas  
Spinner, Jim  
Stegner, Honorable John  
Stephens, Alan  
Stern, Frances

**T**

Taggart, Steven  
Telford, Stephen

**W**

Walker, Dr. Gary  
Whatcott, Mackenzie  
Wilson, Brent  
Wilson, David B.  
Wood, S. Douglas  
Wreggelsworth, Robert

**Y**

Young Irish, Debra

**Z**

Zahn, Colleen  
Zarian, John  
Zundel, Frederick

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Alexander, J. Robert  
Boyd, Jerry  
Callahan, Kimmer  
Cerner, Phillip  
Cobb, Jerry  
Comstock, Honorable Russell  
Dennard, Honorable Michael  
Derden, Terry  
Epis, Honorable David  
Fransen, Curt  
Gingras, Scott  
Harwood, Terry  
Heikkila, Kara  
Karp, Adam  
Kibodeaux, Joanne  
Macomber, Art  
McGown, John  
McHugh, Barry  
McNichols, Mike  
Meadows, Craig  
Numbers, Audrey  
Seamon, Richard  
Sergienko, Greg  
Street, Paul  
Vieth, Nick  
Weeks, Susan  
Yackulic, Ted  
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2013

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**Kris Ormseth elected as chair-elect of Boise Metro Chamber Board**

Stoel Rives LLP, is pleased to announce that Kris Ormseth has been elected by the Boise Metro Chamber of Commerce as Chair-Elect of its Board of Directors. Ormseth will assume the Chair position in 2015. He has served on the Board of Directors and Executive Committee for the Chamber since 2007.



Kris Ormseth

Ormseth represents significant public and private businesses in manufacturing, energy, technology, health care, financial services, real estate development and other industries. He also devotes a portion of his practice to representing promising emerging businesses.

**Racine firm welcomes five attorneys**

The law firm of Racine Olson Nye Budge & Bailey, with offices in Pocatello, Idaho Falls and Boise, welcomes Steve Carr and Bruce Larson and three new associates.

Steve Carr, a resident of Idaho Falls, will join the firm of counsel. In addition to his decades of legal practice, he brings extensive international experience, including being the first elected representative from the United States for the International Red Cross, which takes him to Switzerland on a regular basis.



Steve Carr

“We are pleased to have Steve join us,” said Managing Partner Mark Nye. “His knowledge, experience and counsel will be invaluable to us and to clients.”

Bruce Larson has also joined the firm of counsel. Larson has been engaged in practice in Soda Springs and Pocatello for a number of years, focusing primarily on business, estate work and litigation. Larson is located in the firm’s Pocatello office. He brings significant experience to the firm. “We’re excited to have Bruce in our ranks,” said Managing Partner Mark Nye.



Bruce Larson

The firm has added three new associates in the Pocatello office in the last year. “All three of these young attorneys have demonstrated abundant ability and intelligence and are welcome additions to our growing firm,” said Mark Nye.

Nolan Wittrock joined the firm immediately after receiving his J.D. from the University of Idaho in 2012. Wittrock was raised in Pocatello and returns here to work in the home office, where he interned during law school. Wittrock received his B.A. in political science from Boise State in 2009, graduating magna cum laude. His practice is focused primarily on litigation, with emphasis on personal injury claims.



Nolan Wittrock

Rachel Miller is a 2012 graduate, *cum laude*, of the J. Reuben Clark Law School at Brigham Young University. She also received a B.S. in social studies from BYU. A native of Idaho Falls, Miller clerked for District Judge Mitchell W. Brown and for District Judge Steven S. Dunn in the Sixth Judicial District prior to joining the firm in June 2013. Her practice in the Pocatello office focuses on general civil litigation, family law and personal injury.



Rachel Miller

Matt Stucki is a Pocatello native and graduate of Idaho State University, where he was a standout on the men’s basketball team prior to playing professionally in Weisenfels, Germany. He is a 2013 graduate of the University of Idaho College of Law. Stucki received a degree in business management at ISU, and was named the College of Business’ Management Student of the Year. Stucki’s practice in the Pocatello office centers on worker’s compensation, sports law, estates, business, and family law.



Matt Stucki

**Women honored by business newspaper**

For the ninth year, the Idaho Business Review will salute 50 successful women in business across public, private and charitable sectors.

A panel consisting of past honorees and Idaho women business leaders selected the 50 from more than 150 nominees.

The women of the year were chosen for their leadership skills, achievements, community involvement and for reaching their goals. Of the 50, five were from the legal field.

The women include:

- D. Michelle Gustavson, J.R. Simplot Company, Boise
- Erica M. Kallin, Canyon County Prosecuting Attorney's Office, Caldwell
- Sheila Schwager, Hawley Troxell, Boise
- Emily Kane, City of Meridian, Meridian
- Diane K. Minnich, Idaho State Bar and Idaho Law Foundation Inc., Boise

On Feb. 18, the 50 will be lauded at an awards event gala. At the evening's end, one will be recognized as outstanding honoree and "Woman of the Year." New to the program this year is the daylong Working Women's Business Symposium at the Boise Centre.

"Once again, we applaud 50 women for exemplifying what it takes to be a leader," said IBR Vice President and Publisher Sean Evans. "It is exciting that Idaho has these women in its midst. They are making their businesses and organizations – and our state – more successful and profitable."

**Stoel Rives elects Christopher Pooser as Partner**

Stoel Rives LLP, a U.S. business law firm, is pleased to announce that it has elected Christopher Pooser as a partner in the firm. Christopher

represents clients in state and federal courts in appellate matters and complex commercial litigation. His appellate practice focuses on all phases of civil appeals, including trial preservation and jury instruction issues, case management, and drafting appellate motions and briefs. He has represented clients before the Ninth Circuit Court of Appeals, the Idaho Supreme Court, the Idaho Court of Appeals and the Idaho Board of Environmental Quality. He is a member of the Idaho Appellate Rules Advisory Committee.

"We are pleased to welcome Christopher to our partnership. He consistently exhibits a high level of professionalism and commitment that our clients expect from our partners," said Stoel Rives Managing Partner Bob Van Brocklin.

**Hawley Troxell expands Coeur d'Alene office with three new attorneys**

Hawley Troxell is pleased to announce the expansion of its Coeur d'Alene office with the addition of three attorneys: Jerry Mason, Nancy Stricklin, and John Cafferty. All three have practiced law in Coeur d'Alene for several years, and will be members of the firm's municipal law group. They join partner Danielle Quade who has been practicing finance and municipal law in the Coeur d'Alene office for eight years. The new office



Christopher Pooser

will be located at 250 NW Boulevard, Suite 204 in Coeur d'Alene.

"We are very pleased to expand our Coeur d'Alene location to better serve our clients and are excited to welcome Jerry, Nancy, and John to the firm," said Managing Partner Steve Berenter.

Mason and Stricklin were previously partners at Mason & Stricklin, LLP. Mason has worked in Idaho for 40 years as a local government administrator and legal counsel to government officials. He served as counsel to the Association of Idaho Cities and the board of trustees of the Idaho Counties Risk Management Program, a 750-member local government liability and property insuring pool. Stricklin has more than 23 years' experience in local government legal practice. She served as deputy city attorney, acting city attorney, and interim city attorney for the city of Coeur d'Alene before entering private practice in 2001. Both Mason and Stricklin have extensive experience in land use, planning and zoning, property rights, municipal contracting, intergovernmental agreements, election procedures, and general governmental powers.



Nancy Stricklin

Cafferty, an Idaho native and previous Deputy Civil Prosecutor for Kootenai County, has more than 15 years of legal experience. He has significant knowledge in governmental pro-



Jerry Mason



John Cafferty

## OF INTEREST

curement procedures (both real and personal property as well as professional and personal services), public works construction, public records requests, open public meeting compliance, election law, land use, risk management, and human resources.

### Concordia Law School expands Career Services Office

Concordia University School of Law is pleased to welcome attorneys Jennifer Brown and Benjamin Cramer to its Career Services Office. Ms. Brown joins the law school as the Assistant Director of Career Services, following seven years working as a staff attorney for Canyon County District Judges Renae Hoff and George Southworth. A native of Kennewick, Washington, she is an active member of the Washington State Bar. In addition to her pro-

fessional experience in Idaho, Ms. Brown also served as the Executive Director of the ACLU's student chapter at South Texas College of Law and interned for both the Native American Program for Oregon Legal Services and Fluor Hanford, Inc., in Richland, Washington.

Mr. Cramer is a graduate of the University of Georgia School of Law and joins Concordia as a Career Services Advisor. Most recently, Mr. Cramer worked for Daniel L. Cronin, P.C.,



Jennifer Brown

a rural practitioner based in Grant County, Oregon. Prior to that, he interned with the Ada County Prosecutor's Office, as well as the Oregon Court of Appeals. A native of Burns, Oregon, Mr. Cramer is a member of the Oregon State Bar and will sit for the upcoming February 2014 Idaho Bar exam.

### Clark joins Gardner Law Office

Susan M. Clark has joined the firm of Gardner Law Office and will practice workers' compensation defense. The office is at 1410 W. Washington Street

In Boise. She can be reached at (208) 387-0881, ext. 13, or [sclark@gardnerlaw.net](mailto:sclark@gardnerlaw.net).



Susan M. Clark

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## IN MEMORIAM

### Judge Mary Durham Adams 1923 - 2013

Judge Mary Durham Adams, 90, of Fort Smith, Arkansas, and long-time judge in Bonneville County, has died. Mary was the daughter of Frank and Grace Durham and had one brother, Robert, who preceded her in death.

She was born in Hartshorne, OK; grew up in Fort Smith, was a beauty queen and attended college at the University of Arkansas and Sophie Newcomb, in New Orleans. She later obtained a degree in economics from Hunter College in New York City. While a young adventurous woman, she took flying lessons. She met her husband Maurice at Fort Chaffee. Maurice served in World War II and was a highly decorated Lt. Colonel. Maurice's brothers and sisters lured them to Idaho. They settled in Idaho Falls where they raised their three boys.

Mary practiced law; served as an assistant prosecuting attorney in Idaho Falls and four terms as the probate and juvenile judge of Bonneville County, Idaho.

After Maurice died from cancer in 1967, Mary ran for, and lost a very narrow primary race for U.S. House of Representatives.

She moved to Jackson Hole, Wyoming and helped establish Jackson Hole Cable as a public stock company.

Later she ventured to New York City and worked for a Fortune 500 company. When her mother was failing she moved back to Fort Smith and worked as a trust officer for Fort Smith National Bank. Mary was a woman of character (very strong as her sons would say); a woman of deep and abiding faith, full of kindness and charity; a woman of



Mary Durham Adams

substance; compassionate, resolute, strong, smart, accomplished, forthright and honest.

She is survived by her three sons, Maurice, (Haddam, CT) Donald (West Jordan, UT), and Douglas (Midlothian, VA); 7 grandchildren and 8 great grandchildren.

### William M. "Bill" Smith 1922 - 2013

William M. (Bill) Smith age 91, passed away on December 5, 2013 at St. Luke's Hospital in Meridian, after a short illness. Bill was born October 17, 1922 in Moscow, Idaho. His parents were Earl B. and Pearl M. Smith.

Early in his childhood the family moved to Boise. During his elementary school years he was to meet his future wife, Joyce E. Shroyer. In school, Bill excelled in music, both trumpet and vocals. In addition to music, Bill developed a keen interest amateur radio. These interests would remain throughout his life. His first FCC amateur radio license (W7GHT) was issued in 1937 and signed by President Herbert Hoover - a fact in which Bill took great pride.

Bill graduated from Boise High School in 1940 and entered the College of Idaho. During World War II, Bill received a commission into the U.S. Army OSS. Because of his proficiency with the Morse code, he was stationed in England and France to provide communications between Allied forces and the Free French.

After the war, Bill returned to U of I College of Law, earning his degree in 1952. Bill then returned to Boise to practice law and work for the Idaho Tax Commission. Bill



William M. "Bill" Smith

married Joyce Shroyer in 1959. Bill was active in civic activities in Boise including singing with the Boise Gleeman and playing with the Boise City band. Bill was also active in Boise's Masonic Lodge and the Miss Idaho Pageants.

One of his most outstanding achievements was the formation of the National Traffic System, to move messages during times of disaster. He received numerous Ham Radio achievement awards, not the least of which was having "Worked All U.S. Counties" by Morse code. The Ham Radio community will long recognize the callsign - W7GHT.

In 1972 Bill was appointed as Magistrate Trial Court Administrator for Idaho's 2nd Judicial District. During his 15 years on the bench, Bill and Joyce made their home in Craigmont, Idaho. He retired in 1987 and returned to Boise in 1997 to be closer to family.

### William "Bill" Harvey Mulberry 1940 - 2013

William "Bill" Harvey Mulberry, 73, of Ririe, Idaho, passed away December 25, 2013, at Teton Post Acute Care & Rehabilitation in Idaho Falls. Bill was born April 27, 1940, in Idaho Falls to Donald Wilber and Genevieve Bowman Mulberry. He grew up and attended schools in Ririe and graduated from Ririe High School. He also attended Utah State University and University of Idaho College of Law. Bill had been an attorney since 1971. He spent four years in the Navy. He was also a member of the Scottish Rite and was a Shriner.



William "Bill" Harvey Mulberry

## IN MEMORIAM

On March 22, 1996, he married Sherry Lee Cromwell at Rigby, Idaho. Bill and Sherry made their home in Ririe.

Bill is survived by his loving wife, Sherry Mulberry of Ririe; daughter, Robin Murphy of Coeur D'Alene; daughter, Stephanie McAlister of Coeur D'Alene; son, Klair Creer of Tualatin, OR; stepson, Clinton Sermon of Idaho Falls. 10 grandchildren. He was preceded in death by his parents and siblings.

### Gary Lane Meikle 1950 - 2013

Gary Lane Meikle, 63, of Idaho Falls, passed away on Sunday, Dec. 22, 2013, from cancer at his home.

Gary was born Feb. 1, 1950, in Driggs to Doral "J" Meikle and Doris Fullmer Meikle. He grew up and attended school in Idaho Falls, where he excelled at wrestling, winning a state championship his senior year.

After graduating from Idaho Falls High School in 1968, he served a full-time mission for The Church of Jesus Christ of Latter-day Saints in the Northern Italy Mission.

On Jan. 27, 1972, he married Jean Bennett Meikle in the Idaho Falls LDS Temple. To this union they added seven children and 25 grandchildren. In 1978, Gary graduated from Brigham Young University with his Juris Doctor degree. Following his graduation, the family moved to Idaho Falls, where Gary began his life-long association with the law firm Holden, Kidwell, Hahn and Crapo.

Gary was dedicated to his family, faith and work. His hobbies revolved around his children and grandchildren, and he rarely missed a ballgame or other activity in which they participated. He also enjoyed golfing with his children and was an avid reader.

Gary served as bishop of the former 36th Ward, as stake president of

the Idaho Falls East Stake, and as director of the Public Affairs Council for the greater Idaho Falls area. Gary also enjoyed a deep association with his law partners and enjoyed serving his clients.

Gary is survived by his loving wife of 41 years, Jean; children, Julie Miskin of Filer, Lisa Burtenshaw of Idaho Falls, Kathi Woodall of Fort Mill, S.C., Ryan Meikle of Idaho Falls, Angela Pearson of Vacaville, Calif., Nathan Meikle of Salt Lake City and Rebecca Webb of Idaho Falls; mother, Doris Meikle of Idaho Falls; brother, Kent Meikle of Idaho Falls; and sisters, Shauna Payne of Chanhassen, Minn., and Debbie Burton and Lori Birch, both of Idaho Falls.



Gary Lane Meikle

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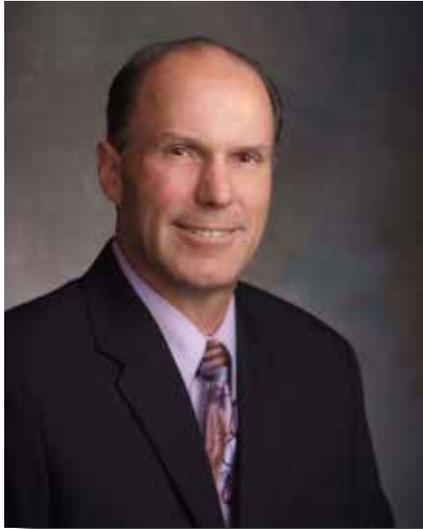
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## National Mock Trial Champions Will Face Off in Boise

Celeste Miller

In May 2016 about 400 high school students will appear in the Ada County Courthouse as lawyers and witnesses competing in the National High School Mock Trial Championship event that will be hosted by the Idaho Law Foundation.

Each year approximately 20,000 high school students participate in mock trial programs around the country and in territories such as Guam, the Northern Mariana Islands and even South Korea. Idaho's Law Related Education Committee has long run a stellar mock trial program that began participating in National Mock Trial 18 years ago. In 2012 the Idaho team from Logos High School in Moscow finished 5<sup>th</sup> at Nationals.

### From the schoolhouse to the Courthouse

The Idaho Law Foundation will host the national event from May 11 – 14, 2016, in Boise. This is a first call to all Idaho lawyers to save those dates and consider participating on one or more levels in this exciting law related, civic education event. We expect at least 1,000 visitors to attend as family members, teachers and lawyer coaches accompany the state championship participants on their quest for a national title.

A Host Committee has formed to organize and carry out the event.

We expect at least 1,000 visitors to attend as family members, teachers and lawyer coaches accompany the state championship participants on their quest for a national title.

Pledges of volunteer and financial support as well as cash donations are streaming in from lawyer associations and grants from your colleagues and organizations.

We make this general announcement so that every Idaho lawyer is aware of the project and has an opportunity to support the endeavor. You will hear more about the Idaho event throughout the planning, volunteer recruitment and funding phases in the coming years.

Those of you who have participated in high school mock trial have experienced its impact on teens who learn practical aspects of our legal system and our democracy; gain respect for the rule of law and the importance of civility in advocacy; and improve their communication and critical thinking skills.

Save the dates and stay tuned: You will hear more about National Mock Trial in the coming months and years leading up to the 2016 event. In the meantime consider volunteering for Idaho's own high school mock trial program. It

could well be the most rewarding experience you will have in your legal career.

### About the Author

**Celeste Miller** is a 1980 graduate of the University of Idaho College of Law. As an Assistant U.S. Attorney Ms. Miller litigated matters on behalf of the United States for over 24 years in both the civil and criminal divisions of the office. Ms. Miller has been involved in numerous aspects of Idaho's Mock Trial program. She has often judged competition rounds (including at a National competition), served on and chaired the Idaho Law Foundation's Law Related Education Committee, and she coached the three-time state championship mock trial team from Bishop Kelly High School for nine years.

Ms. Miller now practices at the firm of McDevitt & Miller LLP in Boise, and she is a member of the Host Committee that is facilitating the National High School Mock Trial Championship ("From the Schoolhouse to the Courthouse") to be held in Boise in May 2016.





## Interest on Lawyers Trust Accounts Program Announces the 2014 Grant Recipients

### **ILAS - The Domestic Violence Project: \$37,700**

For civil legal assistance to low-income survivors of domestic violence, sexual assault, and stalking. Funds will be allocated among ILAS offices for client representation, including protection orders, divorce, custody, modifications, wrongful evictions, and other legal actions.

### **Idaho Law Foundation, Inc.**

### **Idaho Volunteer Lawyers Program: \$25,400**

For general support of Idaho Volunteer Lawyers Program, which provides legal services to Idaho's poor through referral of appropriate civil cases to volunteer attorneys statewide.

### **Idaho Law Foundation, Inc.**

### **Law Related Education Program: \$17,200**

For support of democracy education for young people. Program components include a statewide mock trial competition for high school students, teacher training, resource materials, Lawyers in the Classroom, and Citizens' Law Academy.

### **Treasure Valley Family YMCA**

### **The Youth Government Program: \$300**

For scholarship funds for youth who otherwise would not be able to attend the annual statewide model legislative and judicial session for high school students.

### **Idaho State 4-H Office The Know Your Own Government Project: \$300**

For general support of the Idaho State 4-H Know Your Government Conference which provides 8<sup>th</sup> and 9<sup>th</sup> grade Idaho 4-H members an opportunity to participate in a mock legislative session and learn about the Idaho judicial system.

### **U of I College of Law Scholarship Program: \$1,600**

To award Public Interest Fellowships to encourage students to, and reward them for, taking unpaid summer positions that serve the public interest.

## 4th District Bar Association 6.1 Challenge on Law Day 2014

Include all Volunteer Hours from 5/1/2013 to 4/4/2014  
Submit your (and/or your firm's) qualifying pro bono hours and public service activities to the Idaho State Bar by April 4th!

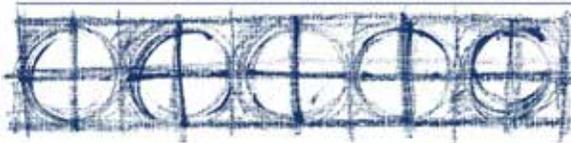


Find more information at:

<http://www.isb.idaho.gov/ilf/ivlp/challenge.html>

[http://www.isb.idaho.gov/pdf/ivlp/6.1\\_challenge\\_volunteer\\_hours\\_form.pdf](http://www.isb.idaho.gov/pdf/ivlp/6.1_challenge_volunteer_hours_form.pdf)





## Legal Volunteers Touch Many Lives Across Idaho

**P**lease join us in saying a special thanks to the **750** Idaho attorneys who accepted or completed pro bono assignments in family law, immigration, consumer protection, wills, benefits, foreclosure matters, non-profit corporation issues and other special needs for IVLP applicants in 2013.

Andrew A. Adams, *Idaho Falls*  
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 Jared W. Allen, *Idaho Falls*  
 Elizabeth K. Allen, *Nampa*  
 Debra J. Alsaker-Burke, *Boise*  
 Kenneth L. Anderson, *Lewiston*  
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 Maria E. Andrade, *Boise*  
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 Thomas J. Angstman, *Boise*  
 Paul L. Arrington, *Twin Falls*  
 Larry C. Ashcraft, *Mountain Home*  
 John M. Avondet, *Idaho Falls*  
 Sunrise A. Ayers, *Boise*  
 Durward (Dave) K. Bagley II, *Pocatello*  
 Kent W. Bailey, *Meridian*  
 Melanie E. Baillie, *Coeur d'Alene*  
 Dwight E. Baker, *Blackfoot*  
 Eric F. Baldwin, *Meridian*  
 Robert R. Ball, *Boise*  
 James K. Ball, *Boise*  
 Ryan A. Ballard, *Rexburg*  
 Thomas A. Banducci, *Boise*  
 Jeffery W. Banks, *Idaho Falls*  
 Lisa A. Barini-Garcia, *Twin Falls*  
 Donald R. Barker, *Moscow*

Some of the volunteers helped represent individuals facing foreclosure, stepped in to represent Court Appointed Special Advocates in a child protection cases, or helped a grandparent rescue an innocent grandchild from a dysfunctional home by establishing guardianship.

The **IVLP Wall of Fame** also includes the names of attorneys or judges

Randall S. Barnum, *Boise*  
 John C. Barrera, *Nampa*  
 Alfred E. Barrus, *Burley*  
 Charles B. Bauer, *Boise*  
 Jeanne C. Baughman, *Boise*  
 Jon M. Bauman, *Boise*  
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 Kevin J. Beaton, *Boise*  
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 Barbara A. Beehner-Kane, *Boise*  
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 Matthew R. Bever, *Caldwell*  
 James A. Bevis, *Boise*  
 Philip M. Bevis, *Boise*  
 Loren D. Bingham, *Twin Falls*  
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 Barton J. Birch, *Driggs*  
 Erika Birch, *Boise*  
 Bruce S. Bistline, *Boise*  
 Eric R. Bjorkman Jr., *Boise*  
 Betsy B. Black, *Coeur d'Alene*  
 Nikeela R. Black, *Boise*

who participated in other IVLP activities including: Advice and Counsel sessions given at the Veterans Administration, Senior Centers, at the St. Vincent DePaul Center in Coeur d'Alene, various Community Legal Services or on the Bankruptcy Helpline.

Volunteers also participated in the Pro Bono Immigration Law Network's "Charla" (education pre-

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 Jeffrey D. Brunson, *Rexburg*

sentation and case screening) & Case Review Panel, **Soundstart** (proactive education and motivation sessions for low-income parents) and Volunteer Lawyers for Emerging Businesses (assisting small business owners with their legal needs). Attorney members of the Idaho Pro Bono Commission and the IVLP Policy Council are also listed.

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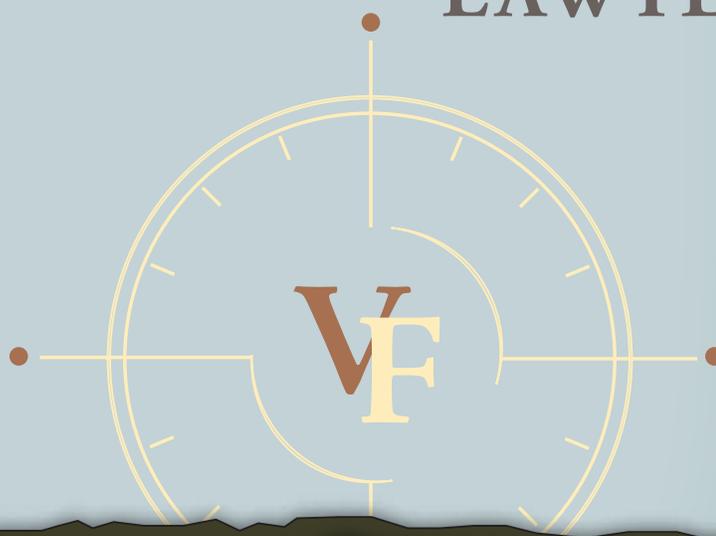
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