

The Advocate

Official Publication
of the Idaho State Bar
Volume 57, No. 1
January 2014

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On the Cover:

"Teton Flyover." The cover photograph was taken by Monte Stiles while hiking in Teton National Park. In April 2011, Monte left the U.S. Attorney's Office in order to devote his full attention to drug education efforts in Idaho and elsewhere, as well as motivational speaking and training. More information can be found at www.montestiles.com and www.montestilesphotography.com.

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This issue of *The Advocate* is co-sponsored by the Family Law Section and the Litigation Section.

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Special thanks to the January editorial team: Jennifer M. Schindele, A. Dean Bennett and Daniel J. Gordon.

February issue sponsor:

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Mr. Lamer received his law degree and Master of Urban Planning at the University of Kansas. His practice will continue to focus on land use, real estate, and construction litigation. He is a member of the American Institute of Certified Planners, a LEED accredited professional, and a former Planning Commissioner for the Lawrence-Douglas County (Kansas) Metropolitan Planning Commission.



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ISB/ILF Upcoming CLEs

January

January 22

Let's Eat Lawyers! Let's Eat, Lawyers! – Lessons in Clarity and the Impacts of Poor Writing Choices
Sponsored by the Environmental and Natural Resources Section
Law Center - 525 W. Jefferson, Boise / Statewide
Webcast
Noon (MST)
3.0 CLE credits

January 24

Annual Flagship - Idaho Rules of Evidence: Tips, Traps and Trends
Sponsored by the Idaho Law Foundation, Inc.
The Grove Hotel - 245 S. Capitol Blvd., Boise
8:00 a.m. (MST)
4.0 CLE credits of which 1.0 is Ethics - **RAC**

February

February 6-8

32nd Annual Bankruptcy Seminar
Sponsored by the Commercial Law and Bankruptcy Section
The Coeur d'Alene Resort – 115 S. 2nd 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**

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

February (continued)

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 28

A-Z of Project Development: 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

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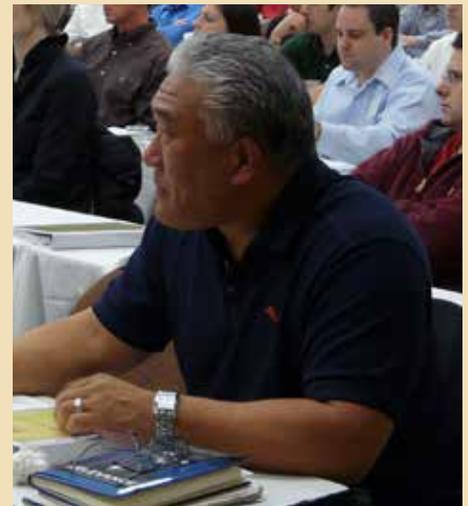
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More to Being a Lawyer

*William H. Wellman
President, Idaho State Bar
Board of Commissioners*

A few months back I wrote about a trip to Spain and the zest for living the Basque people enjoy. In my mind as I return to Ea, Bilbao, San Sebastián and Gernika with affection I think about how I want to continue to live and work in beautiful Idaho. I work and I live.

To live fully I concentrate on the task at hand which at times is competing with a golf course and my opponents. Golf offers me an outlet for reprieve from the stresses of law.

Lawyers confront crisis in varying forms. My clients' issues are personal and painful. To be at my best, I must be first and foremost objective. Still, it helps to be conscious of clients' human foibles. To understand the client I need to understand myself. I gain that when I allow myself an outlet away from the office.

For 50 years golf has been such a sanctuary. I love all there is about the game. Herbert Warren Wind's essays have taken me to the links of Dornoch in northern Scotland. Hogan's mystique has captured me with different angles on the "wee ice man." Working inside the ropes at the US Open for several years



It was a sea-day activity on a cruise ship in a room full of others who, like me, hadn't tried painting since 2nd grade. It was as if it was recess, and we were all let out to play.

— Paula Brown Sinclair

made me appreciate the best players in the toughest conditions. I play golf because I can get out with my friends who play the game with passion.

And each of us in this world of lawyering needs to have an escape from the practice. Interludes into a safe and comfortable world are refreshing and invigorating and prepare us for the next fight.

I have asked two of my respected colleagues to relate their interests.

Twin Falls attorney Paula Brown Sinclair, has a passion for music and art and had this to say:

"To be effective in our work takes a maximum effort of every part of our being. We rest our body with sleep, but what about our psyche and spirit? Failure leads to what we call "burn-out."

For over 30 years music has been my psychic rest. When my part is on the stand and the conductor

is on the podium and my horn is at my face, there are no clients or overzealous opposing counsel in my world. I still help Magic Valley Symphony make beautiful music.

With age comes a need for more rest, and by happy accident I found watercolor. It was a sea-day activity on a cruise ship in a room full of others who, like me, hadn't tried painting since 2nd grade. It was as if it was recess, and we were all let out to play. Making the mineral pigments and water behave enough to create a pleasing image will be a challenge for the rest of my life. But when the brushes are wet and the paper is waiting, time stands still. Then, when it is time to get to work for a client, all of me is ready. To my surprise, one of my watercolors took "Best of Show" for advanced amateurs in all media this year at the Twin Falls County Fair, and now more can be seen at the Full Moon Gallery."

Reed Larsen, from Pocatello

has this to say:

“Roping, like golf or skiing, gives me a chance to connect with things other than the law. I have always loved horses and believe Will Rogers was right when he said “nothing is better for the inside of a man, than the outside of a horse.”

I love my horse. It is hard to find that kind of connection and approval in the law. Plus, I still love to compete even though I am sure I am past my prime. It is fun to try to beat anyone else, especially kids younger than me. Finally, cowboys are a good break from lawyers. They see things different than lawyers: Right is right and wrong is wrong, very little pretense or alternative agendas; these help recharge the balance in my life. My motto has been to work hard and play hard. Hope I can keep it going.

There are other Idaho lawyers who can share their stories of hobbies and activities that enrich

Cowboys are a good break from lawyers. They see things different than lawyers: Right is right and wrong is wrong, very little pretense or alternative agendas; these help recharge the balance in my life.

— Reed Larsen



their lives outside of the law. Bikers, teachers, ranchers and historians come to mind. I hope you will discover and cultivate your passions.”

About the Author

William H. Wellman is a solo practice attorney in Nampa, and is also the current President of the Idaho

State Bar Board of Commissioners. Mr. Wellman has his BA from Miami University in Oxford, Ohio '74 and JD from West Virginia University College of Law '79. He has been the contract public defender in Owyhee County since 1986. His wife Debbie is a custody mediator and licensed counselor. They are parents to three adult children, all living in Boise.

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Rocky L. Wixom

(Withheld Suspension/Probation)

On October 31, 2013, the Idaho Supreme Court issued a Disciplinary Order imposing a withheld six-month suspension and placing Mr. Wixom on disciplinary probation for 18 months.

The Idaho Supreme Court found that Mr. Wixom violated I.R.P.C. 1.2(a) [A lawyer shall abide by a client's decisions concerning the objectives of representation], 1.3 [A lawyer shall act with reasonable diligence and promptness in representing a client], I.R.P.C. 1.4 [A lawyer shall keep the client reasonably informed about the status of a matter], 1.5(a) [A lawyer shall not charge or collect an unreasonable fee], and 1.16(d) [Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect the client's interests]. The Disciplinary Order followed a stipulated resolution of an Idaho disciplinary proceeding in which Mr. Wixom admitted that he violated the above Rules, relating to his failures to communicate with his client regarding multiple cases and his collection of fees for work that was not performed or that was performed by a nonlawyer assistant. Mr. Wixom also admitted that although most of the communications between his office and the client were conducted by a nonlawyer assistant, his bills to the client did not reflect who performed which services. The ISB has considered mitigation in this case, including the serious and ongoing health issues of Mr. Wixom's family members.

The Disciplinary Order provides that the six-month suspension will be withheld and that Mr. Wixom will serve an 18-month period of probation, subject to conditions of probation specified in the Order. Those conditions include: (1)

Mr. Wixom will serve the withheld suspension if he admits or is found to have violated any Idaho Rules of Professional Conduct for a which a public sanction is imposed for any formal charge case filed during the period of probation or for any conduct occurring during the period of probation; (2) Mr. Wixom shall make arrangements for a supervising attorney to supervise his law practice during the probationary period; and (3) Mr. Wixom shall pay restitution to his former client by October 2013.

The withheld suspension and probation do not limit Mr. Wixom's eligibility to practice law.

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

D. Scott Summer

(Disbarment)

On October 31, 2013, the Idaho Supreme Court entered its Disbarment Order, disbaring Nampa attorney D. Scott Summer. Following a disciplinary hearing, a Hearing Committee of the Professional Conduct Board recommended disbarment. The Idaho Supreme Court Order concluded the reciprocal disciplinary case, which was filed on April 10, 2013.

Mr. Summer was admitted to practice law in Idaho in April 1996. He was also admitted to practice law in Oregon. Mr. Summer was disbarred in Oregon pursuant to a Trial Panel Opinion on April 3, 2013. In the Oregon disciplinary case, the Oregon Trial Panel concluded that Mr. Summer violated RPC 3.1, 3.3(a)(1), 3.4(c), 8.1(a)(1) and (2), and 8.4(a)(3) and (4), which are the equivalents of I.R.P.C. 3.1, 3.3(a)(1), 3.4(c), 8.1(a)(1) and (2) and 8.4(c) and (d).

In the Oregon disciplinary case, Mr. Summer represented a plaintiff in a medical malpractice case in Or-

gon state court. Mr. Summer failed to timely respond to the defendants' motion for summary judgment. On a date set for hearing on the summary judgment motion, Mr. Summer failed to appear, but he filed an affidavit pursuant to ORCP 47E, in which he swore, under penalty of perjury, that he had consulted with and retained a qualified expert who was available and willing to testify to admissible facts and opinions necessary to establish a genuine issue of material fact. In Oregon, such an attorney's affidavit is sufficient to avoid summary judgment, and there is no requirement to include evidence from an expert supporting the attorney's representation. The defendant's motion for summary judgment was denied based upon Mr. Summer's affidavit and a trial date was scheduled.

On the date of trial, Mr. Summer appeared and advised the court that the plaintiffs were not prepared to proceed to trial because he was unable to secure the testimony at trial of any qualified experts who were willing to express opinions in favor of plaintiffs and against defendants. The trial court dismissed the case and retained jurisdiction of the case to investigate the factual basis of Mr. Summer's affidavit filed in opposition to the motion for summary judgment.

The court granted an order compelling Mr. Summer to be deposed about his affidavit. Without obtaining prior relief from the court or the agreement of defense counsel, Mr. Summer failed to appear for the deposition as commanded by a subpoena. The defendants filed a motion for sanctions and motion to show cause against Mr. Summer for his failure to obey the subpoena. Mr. Summer did not appear in court for that hearing, but faxed a letter to the court on the morning of the hearing

notifying the court of the reasons for his absence. In that letter, Mr. Summer referenced a consultation with a doctor related to his affidavit. Subsequently, that doctor executed a declaration establishing that Mr. Summer's affidavit and a letter to the court contained false and misleading statements about the doctor's willingness to testify in favor of plaintiff. The Oregon Trial Panel and the Idaho Hearing Committee concluded that Mr. Summer filed an intentionally misleading affidavit, blatantly disregarded court orders, intentionally misled the trial court judge, filed the affidavit in bad faith, and prejudiced the decision making process.

In the Idaho hearing, Mr. Summer contended that imposing disbarment in Idaho would result in grave injustice under I.B.C.R. 513. The Hearing Committee of the Professional Conduct Board and the Idaho Supreme Court concluded that Mr. Summer did not show by clear and convincing evidence that disbarment in Idaho would result in grave injustice.

The Court's Order removed Mr. Summer from the records of the Idaho Supreme Court as a member of the Idaho State Bar and his right to practice law before the Idaho courts was terminated on October 31, 2013. Mr. Summer cannot apply for admission to the Idaho State Bar sooner than five years from the date of his disbarment. If he applies for admission, he will be required to comply with the bar admission requirements in Section II of the Idaho Bar Commission Rules and will have the burden of overcoming the rebuttal presumption of "unfitness to practice law."

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

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

Christopher S. Lamont

(Withheld Suspension/Probation)

On November 14, 2013, the Idaho Supreme Court issued a Disciplinary Order imposing a withheld nine-month suspension and placing Mr. Lamont on disciplinary probation for one year.

The Idaho Supreme Court found that Mr. Lamont violated I.R.P.C. 1.4 [A lawyer shall keep the client reasonably informed about the status of the matter and promptly comply with reasonable requests for information] and I.R.P.C. 1.16(d) [Upon termination, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests]. The Disciplinary Order followed a stipulated resolution of an Idaho disciplinary proceeding in which Mr. Lamont admitted that he violated I.R.P.C. 1.4 and 1.16(d), relating to his failures to respond to client inquiries, reasonably communicate with clients about their pending cases, and respond to a former client's requests for documents.

The Disciplinary Order provides that the nine-month suspension will be withheld and that Mr. Lamont will serve a one-year period of probation, subject to conditions of probation specified in the Order. Those conditions include that Mr. Lamont will: (1) serve the withheld suspension if he admits or is found to have violated any Idaho Rules of Professional Conduct for a which a public sanction is imposed for any formal charge case filed during the period of probation or for any conduct occurring during the period of probation; (2) make arrangements for a supervising attorney to supervise his

law practice during the probationary period; and (3) maintain a valid mailing address on record with the Idaho State Bar.

The withheld suspension and probation do not limit Mr. Lamont's eligibility to practice law.

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

John C. Mitchell

(Resignation in Lieu of Discipline)

On November 15, 2013, the Idaho Supreme Court entered an Order accepting the resignation in lieu of discipline of Lewiston attorney, John C. Mitchell. The Idaho Supreme Court's Order followed a stipulated resolution of a disciplinary proceeding that resulted from Mr. Mitchell's self-report of professional misconduct.

The misconduct in question related to three matters. In the first matter, Mr. Mitchell failed to inform his law firm about his receipt of client fee payments and failed to deposit those payments into his firm's trust account. Mr. Mitchell admitted that his conduct violated I.R.P.C. 1.15(a) (failure to hold property of client or third person in connection with a representation separate from the lawyer's own property), 1.15(c) (failure to deposit legal fees and expenses into a client trust account), and 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

In the second matter, Mr. Mitchell failed to communicate with his client about the client's pending civil case and settled that case without his client's knowledge or consent. Mr. Mitchell admitted that his conduct violated I.R.P.C. 1.2(a) (failure to abide by client's decision whether to settle a matter) and 1.4 (failure to reasonably consult with client and

keep client reasonably informed about the status of a matter). In the third matter, Mr. Mitchell admitted that he paid a client's judgment in a civil case in violation of I.R.P.C. 1.8(e) (lawyer shall not provide financial assistance to a client in connection with pending litigation).

The Idaho Supreme Court accepted Mr. Mitchell's resignation effective November 15, 2013. By the terms of the Order, Mr. Mitchell may not make application for admission to the Idaho State Bar sooner than five years from the date of his resignation. If he does make such application for admission, he will be required to comply with all bar admission requirements found in Section II of the Idaho Bar Commission Rules and shall have the burden of overcoming the rebuttable presumption of "unfitness to practice law."

By the terms of the Idaho Supreme Court's Order, Mr. Mitchell's name was stricken from the records of the Idaho Supreme Court and his right to practice law before the courts in the State of Idaho was terminated on November 15, 2013.

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

Matthew R. Aylworth
(Public Reprimand)

The Professional Conduct Board has issued a Public Reprimand to Eugene Oregon lawyer, Matthew R. Aylworth, based on professional misconduct.

The Professional Conduct Board Order followed a stipulated resolution of an Idaho State Bar reciprocal disciplinary proceeding. On July 15, 2013, the Disciplinary Board of the Washington State Bar Association, pursuant to a stipulation, ordered two reprimands of Mr. Aylworth for

violating Washington Rules of Professional Conduct 1.3 ["Diligence"], 3.3(c) ["Candor to the Tribunal"], 5.3 ["Responsibilities Regarding Non-Lawyer Assistants"] and 8.4(d) ["Conduct Prejudicial to the Administration of Justice"]. Those Washington Rules of Professional Conduct correspond to those same Idaho Rules of Professional Conduct. The Washington public reprimands and this public reprimand relate to the following facts and circumstances.

In the first matter, Mr. Aylworth after receiving judgment in favor of his client, filed two affidavits for attorneys' fees and expenses for traveling to and appearing at an oral argument, which had not in fact taken place yet. When the oral argument was finally conducted, Mr. Aylworth filed another affidavit for attorneys' fees and expenses with the correct date of the oral argument and was awarded fees. The Washington disciplinary case acknowledged that Mr. Aylworth had a high volume collection practice with supervisory authority over a large number of non-lawyer assistants who prepared documents on his behalf and that he failed to supervise his non-lawyer assistants to insure that their conduct was compatible with his professional obligations in that case.

In the second matter, Mr. Aylworth was representing a plaintiff seeking to collect on a previously entered judgment. Mr. Aylworth signed an application for a writ of garnishment that stated that the judgment debtor had made no payments on the debt and had property that was not exempt from garnishment by any state or federal law, when in fact Mr. Aylworth had information showing both of those statements were false. The judgment debtor hired counsel who advised Mr. Aylworth that the judgment debtor had made payments on the judgment and in-

cluded a copy of the judgment debtor's exemption claim and a motion to quash the garnishment. Mr. Aylworth had an order pending ex parte that stated that judgment debtor's bank account held only non-exempt funds and Mr. Aylworth did not inform the court that the judgment debtor was represented by counsel or that he had filed and served him with a notice of exemption and motion to quash the garnishment a week earlier. The court then signed Mr. Aylworth's proposed judgment without the benefit of that information. Mr. Aylworth did not forward that information to the judgment debtor's counsel or inform the court that the judgment had been entered based on erroneous facts. When the judgment debtor's counsel discovered that judgment had been entered without his knowledge, he told Mr. Aylworth that if he did not agree to an order vacating the judgment, he would seek sanctions. Mr. Aylworth agreed and the judgment was vacated. The judgment debtor then filed a civil suit against Mr. Aylworth in federal court and the suit settled by payment of \$25,000 to the judgment debtor and a waiver of the balance the judgment debtor owed Mr. Aylworth's client. Mr. Aylworth also acknowledged that he failed to supervise his non-lawyer assistants to insure that their conduct was compatible with his professional obligations in this matter.

The public reprimand also provides that Mr. Aylworth will serve a period of probation up to one year. During that probation, he is required to attend Ethics School in Washington, an approximately six-hour course. Mr. Aylworth's probation will terminate upon the completion of the Ethics School.

This public reprimand does not limit Mr. Aylworth's eligibility to practice law.

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

B. Joseph Welch

(Public Reprimand
Withheld Suspension/Probation)

On November 21, 2013, the Idaho Supreme Court entered a Disciplinary Order issuing a Public Reprimand to Boise attorney B. Joseph Welch. The Disciplinary Order included a withheld nine-month suspension and a one-year disciplinary probation.

The Idaho Supreme Court found that Mr. Welch violated I.R.P.C. 1.4(a)(2) [Communication with client], 1.5(b) [Communication of rate or basis of fee] and 1.5(e) [Division of fee between lawyers not in the same firm]. The Idaho Supreme Court's Disciplinary Order followed a stipulated resolution of an Idaho State Bar disciplinary proceeding in which Mr. Welch admitted that he violated those rules.

The formal charge case related to Mr. Welch's representation of a client who had petitioned for guardianship of his stepson after the child's mother was killed in an auto accident. A wrongful death action relating to that accident was settled and payments were made to both the child and Mr. Welch's client.

In the guardianship case, the child's natural father moved to terminate the guardianship and his maternal grandfather sought visitation rights. During the pendency of that case, Mr. Welch and co-counsel requested and received attorney fee payments from the child's account, which had been created to hold the wrongful death settlement funds. After several years of litigation regarding the guardianship, Mr. Welch's

client terminated the representation and retained new counsel. Thereafter, the natural father discovered that attorney's fees had been paid to Mr. Welch and co-counsel from the child's account and filed a motion for recoupment of those fees. After hearing, the Court entered an order directing Mr. Welch and co-counsel to restore all fee payments to the child's account. Mr. Welch and co-counsel complied with that court order.

The Disciplinary Order provides that the nine-month suspension will be withheld and that Mr. Welch will serve a one-year period of probation subject to the condition that he will serve the withheld suspension if he admits or is found to have violated any Idaho Rules of Professional Conduct for which a public sanction is imposed for conduct that occurred during the probationary period.

The public reprimand, withheld suspension, and probation do not limit Mr. Welch's eligibility to practice law.

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

**Notice to
Larry D. Purviance
of Client Assistance Fund Claim**

Pursuant to *Idaho Bar Commission Rule 614(a)*, the Idaho State Bar hereby gives notice to Larry D. Purviance that a Client Assistance Fund claim has been filed against him by former client Douglas Brushett, in the amount of \$5,000. Please be advised that service of this claim is deemed complete fourteen (14) days after the publication of this issue of *The Advocate*.

Pursuant to *Idaho Bar Commission Rule 614(a)*, the Idaho State Bar hereby gives notice to Larry D. Purviance that a Client Assistance Fund claim has been filed against him by former client Roy Holzhauser, in the amount of \$5,000. Please be advised that service of this claim is deemed complete fourteen (14) days after the publication of this issue of *The Advocate*.

Pursuant to *Idaho Bar Commission Rule 614(a)*, the Idaho State Bar hereby gives notice to Larry D. Purviance that a Client Assistance Fund claim has been filed against him by former client Darren Krockmeyer, in the amount of \$1,000. Please be advised that service of this claim is deemed complete fourteen (14) days after the publication of this issue of *The Advocate*.

Pursuant to *Idaho Bar Commission Rule 614(a)*, the Idaho State Bar hereby gives notice to Larry D. Purviance that a Client Assistance Fund claim has been filed against him by former client John Nelson, in the amount of \$5,000. Please be advised that service of this claim is deemed complete fourteen (14) days after the publication of this issue of *The Advocate*.

Pursuant to *Idaho Bar Commission Rule 614(a)*, the Idaho State Bar hereby gives notice to Larry D. Purviance that a Client Assistance Fund claim has been filed against him by former clients Martin & Sandra Reighard, in the amount of \$1,800. Please be advised that service of this claim is deemed complete fourteen (14) days after the publication of this issue of *The Advocate*.



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IALL Legacy Project gets kudos

R. William Hancock, Jr. and Javier L. Gabiola brought support and attention to Veterans Court. Both participated in the Idaho State Bar's Idaho Academy of Leadership for Lawyers, (IALL), inaugural class 2011-2012. The program encourages its alumni to develop a service project. Hancock and Gabiola sponsored a Veterans Day spaghetti feed with the proceeds going to the Sixth District Veterans Court.



R. William Hancock, Jr.

The event drew considerable media attention and raised \$1,308, with no overhead expenses. The food, labor, facility and door prizes were all donated. There is talk of repeating the event next year.



Javier L. Gabiola

The project also brought attention to the needs of veterans and to the importance of having specialized solutions through a Veterans Court.

"I had some things happen while I was in the Gulf War and I was fortunate enough to have the support I needed at the time to get through that, and that's what we do as mentors in the court is to give them the support they need to get through their struggles," said Air Force Veteran and Mentor for the court, George "Woody" Woodman, who spoke to KPVI News 6.

Veterans' Court Judge Rick Carnaroli told the television station, "I had a veteran who I had to sentence, who was in mental health court, and

mental health court couldn't help him. That really kind of hit home that we needed to do something different."

Bannock County developed the Veterans Court, which helps connect veterans with services to address PTSD and address substance abuse problems, while honoring the veterans for their service to the country.

There are 10 veterans in the program, and they hope to double that number by this time next year.

System to help Idaho courts improve access to court information, provide e-filing

Tyler Technologies, Inc. (NYSE: TYL) today announced that the Idaho Courts have selected Tyler's Odyssey® court case management system for statewide implementation. The contract includes software licensing fees, professional services and a multi-year maintenance agreement.

The Idaho Courts submitted a request for proposal (RFP) for an integrated court case management solution to replace its decades-old system which had reached its end of life. After a comprehensive and competitive bidding process, the state's selection committee chose Odyssey to improve access to court information for internal and external stakeholders, improve integration of information with judicial partners, and maximize the efficiency of the court's business processes.

Chief Justice Roger S. Burdick, chair of Idaho's Court Technology Committee, said, "The Idaho Courts are excited to move forward from an aging computerized case management system to a modern web-based

electronic court records system, subject to appropriations. This shift will improve the efficiencies and effectiveness of our courts as we transition to an electronic court record. Tyler's proven solutions will help us streamline court operations, improve the delivery of information to judicial partners, provide enhanced services to the public and save costs."

The state chose multiple Odyssey applications to help meet its operational goals, including court case management, content management, financial management, jury management, public access, and electronic filing (e-filing). Odyssey Session-Works® Judge and Clerk editions were also selected to present data digitally to clerks and judges on the bench via touch-screen technology.

Idaho will be the 11th statewide implementation of Tyler's Odyssey software.

Lawyer Referral Service

People who don't know where to find an attorney appropriate for their legal issue find referrals through the Idaho State Bar's Lawyer Referral program.

Participating attorneys are listed on the ISB's referral page on its website according to geography and area of law. And if the public calls the ISB, the LRS program gives referrals on a rotating basis to participating attorneys.

Registration forms for the Idaho State Bar's Lawyer Referral Service were sent with licensing packets in early December. If you would like to participate in the program, please find the registration form online at http://isb.idaho.gov/member_services/lrs/join_lrs.html.



ISB photo by Kyme Graziano

President of the Idaho State Bar Board of Commissioners William H. Wellman addresses the Fourth District Bar during the Resolution Roadshow meeting in November. He explained the resolutions, as he had done in meetings around the state. Every year the commissioners travel to each district to present awards and talk about the resolutions.

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2013 Resolution Process — The Results

*Diane K. Minnich
Executive Director, Idaho State Bar*

The ISB membership considered eight resolutions during the 2013 resolution process, six of which recommended rule changes. All of the resolutions were approved by the membership. The voting results are on page 25. For the past 10 years, between 6% and 9% of the membership have attended the resolution meetings and members voting has ranged from 14% to 30% of the membership.

A brief summary of each of the proposed rule changes is below. The amendments to the Idaho Rules of Professional Conduct and Idaho Bar Commission Rules will be submitted to the Idaho Supreme Court for its consideration.

Idaho Rules of Professional Conduct

In 2009 the American Bar Association, (ABA), created the Commission on Ethics 20/20, (the Commission), to address the ethical and regulatory challenges and opportunities related to technology and globalization, which have transformed the practice of law.



The ABA House of Delegates considered the Commission's proposals and voted to adopt them.

The Model Rules of Professional Conduct, (MRPC), that were amended were: 1.0 (Terminology); 1.1 Competence); 1.4 (Communications); 1.6 (Confidentiality); 1.17 (Sale of Law Practice); 1.18 (Duties to Prospective Client); 4.4 (Respect for Rights of Third Persons); 5.3 (Responsibilities Regarding Non-lawyer Assistants); 5.5 (Unauthorized Practice of Law); 7.1 (Communications Concerning a Lawyer's Services); 7.2 (Advertising); 7.3 (Direct Contact with Prospective Clients); 8.5 (Disciplinary Authority; Choice of Law).

The changes reflect the full range of ways in which lawyers use technology to communicate with their clients and other lawyers.

The proposed rules do not include the ABA's amendments to MRPC 5.5 because MRPC 5.5 and IRPC 5.5 differ and the ABA's proposed changes address foreign lawyers practicing in Idaho, which is already addressed in Idaho Bar Commission Rule 207 – Foreign Legal Consultants.

In addition to the MRPC amendments to Rule 1.18 (Duties to Prospective Client), IRPC 1.18 amendments include adding subpart (d)(2) from the MRPC and revising the corresponding comments. That amendment will permit screening, under specified conditions, of disqualified lawyers in prospective client situations. That will be consistent with the ability of lawyers who change jobs to be screened under IRPC 1.10.

IBCR Section II Admissions - Fees for admission to the Idaho State Bar

The proposed amendments to IBCR 203 increase the student, attorney and late application fees for the Idaho bar examination, the reciprocal admission application and house counsel license application fees.

IBCR Section II Admissions – Legal intern rules

The proposed amendments focus on the scope of the legal intern's limited practice and supervising attorney's qualifications and duties.

IBCR Section IV Mandatory Continuing Legal Education/ Practical Skills Seminar

The proposed amendments to the MCLE rules retain the general 30-credit requirement for each three-year reporting period and include an increase of 1 ethics credit, to a total of 3 ethics credits every 3 years. The proposed rules allow credit for legal writing, and allow attorneys licensed in another state to only comply with the MCLE requirements in the state in which they have their principal office to practice law. The amendments also update, clarify and consolidate the procedural rules.

In addition, the proposed rules change the CLE credit requirements for new members of the bar. The Practical Skills Seminar would be replaced with the New Attorney program for new Idaho attorneys who

have practiced law for less than three years. All newly admitted attorneys would be required to obtain 10 CLE credits within one year of admission, including courses on Idaho ethics, civil and criminal procedure and community property.

IBCR Section VI Client Assistance Fund

The proposed amendments clarify the procedures followed by the Client Assistance Fund Committee in evaluating and deciding claims, add certain new procedures to assist the Committee in the administration of its duties, and update the means by which the Committee and parties communicate through the use of current technology. The pro-

posed amendments also increase the maximum dollar limit of the Client Assistance Fund, which is funded by the \$20 annual assessment of lawyers during licensing from \$750,000 to \$1,000,000, and increase the claim limit amount which a claimant may recover from the Fund for a loss caused by the dishonest conduct of a lawyer from \$20,000 to \$25,000.

IBCR Section IX General Rules

The proposed amendments clean up definitions in the rules, clarify, and update the rules; and add electronic voting as an option for Board of Commissioners elections.

The final two resolutions support the Idaho Judiciary's legislative efforts to improve recruitment

efforts of highly qualified judicial candidates by increasing judicial compensation; and obtain the necessary funding efforts to adequately fund transition to a new, more efficient and cost effective web-based electronic court records system. The bar will assist the Court's legislative efforts as needed.

We thank those of you who attended the resolution meetings. The Board of Commissioners and bar staff enjoy the opportunity to meet with lawyers from throughout the state to honor our colleagues for their service and professionalism, present the resolutions, and hear about the programs and activities of bar associations.

Happy New Year!

2013 Resolution Results											
District		1 st	2 nd	3 rd	4 th	5 th	6 th	7 th	OSA*	Totals	
Members eligible to vote <i>Percent of total membership</i>		446 9%	232 5%	258 5%	2,060 41%	312 6%	230 5%	398 8%	1,137 22%	5,073 100%	
Members voting <i>Percent of members voting</i>		97 22%	68 29%	57 22%	320 16%	58 19%	85 37%	92 23%	61 5%	838 17%	
Number in attendance <i>Percent in attendance</i>		45 10%	48 21%	32 12%	59 3%	18 6%	49 21%	47 12%	1 0%	299 6%	
13-01 Amendments to IRPC	For Against Total	81 10 91	63 3 66	42 12 54	280 31 311	49 7 56	79 5 84	73 15 88	51 6 57	718 18 807	89% 11%
13-02 Admission Fees	For Against Total	78 16 94	56 11 67	43 13 56	249 68 317	49 8 57	74 10 84	77 13 90	40 20 60	666 159 825	81% 19%
13-03 Legal Intern Rules	For Against Total	87 7 94	62 4 66	51 5 56	294 21 315	57 1 58	81 3 84	86 4 90	56 4 60	774 49 823	94% 6%
13-04 MCLE Rules	For Against Total	75 16 91	64 3 67	42 12 54	247 63 310	46 12 58	75 9 84	64 24 88	44 13 57	657 152 809	81% 19%
13-05 Client Assistance Fund	For Against Total	79 12 91	64 1 65	43 9 52	261 45 306	56 2 58	80 3 83	72 15 87	45 11 56	700 98 798	88% 12%
13-06 General Rules Electronic Voting	For Against Total	85 7 92	61 4 65	50 5 55	281 27 308	56 1 57	83 2 85	81 8 89	53 5 58	750 59 809	93% 7%
13-07 Judicial Compensation	For Against Total	82 13 95	55 12 67	37 19 56	263 56 319	48 10 58	73 12 85	80 10 90	56 5 61	694 137 831	84% 16%
13-08 Computerized Case Management	For Against Total	86 10 96	62 5 67	51 5 56	297 14 311	51 5 56	81 2 83	83 8 91	54 6 60	765 55 820	93% 7%

* Out of State Active

Litigation Chair: The Section Offers CLEs, Trial Skills

Joseph N. Pirtle

The Litigation Section is pleased to co-sponsor this issue of *the Advocate* with the Family Law Section.

The Litigation Section is one of the largest and most active sections of the Idaho State Bar. We promote education, training and professional development for attorneys whose practices involve litigation and trial work. The section meets at noon (MT) on the third Friday of each month at The Law Center in Boise. Participation in Section meetings by telephone conference is encouraged for those who are unable to attend in person.

One of the great benefits of membership in the Litigation Section is access to free CLE presentations during the Section meetings. Recent CLE topics include effective legal writing, best appellate argument practices, ethics, initial disclosures in federal court, and owner liability for permissive use of motor vehicles in Idaho.

The Trial Skills Academy is the Litigation Section's premier CLE seminar, held every other year. Many of the finest trial lawyers and

judges in Idaho generously donate their time to assist lawyers who have practiced 10 years or less to develop trial skills.

judges in Idaho generously donate their time to assist lawyers who have practiced 10 years or less to develop trial skills. The mentors provide examples of effective trial practice from start to finish, and work directly with the participants on topics including voir dire, trial motions, opening statements, witness examination (direct and cross), authenticating exhibits, making objections, and closing arguments.

We encourage anyone with an interest in any aspect of the litigation practice to consider joining the Litigation Section.

About the Author

Joseph N. Pirtle is a shareholder in the law firm of *Elam & Burke, P.A.* He practices primarily in the areas of commercial and business litigation and insurance defense litigation. Mr. Pirtle is a member of the Idaho and Oregon Associations of Defense Counsel, and is a graduate of the inaugural class of the Idaho Academy of Leadership for Lawyers. Mr. Pirtle has served on the Litigation Section's Governing Council since 2011, and currently serves as the Section's Chairperson.



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Idaho's Rule 65(e) — Lenient Standard for an Extraordinary Remedy

A. Dean Bennett
Brian C. Wonderlich

Obtaining a preliminary injunction under Idaho Rule of Civil Procedure 65(e) is much easier than it used to be under the common law — or is it?

Rule 65(e) allows a court to issue a preliminary injunction where a party shows a likelihood of success on the merits *or* that some act would produce waste, or great or irreparable injury. Although Rule 65(e) is framed in the disjunctive, courts applying the Rule regularly state the common law standard which is framed in the conjunctive, requiring both a likelihood of success on the merits *and* a showing that irreparable injury will result if the injunction is not issued. As one might expect, courts' continued reliance on the common law has created confusion and inconsistency in how Rule 65(e) is applied.

This article examines Rule 65(e) and how Idaho courts have often ignored the language of the Rule in favor of the common law. The article concludes by suggesting an amendment to the Rule to put an end to the confusion and inconsistent application.

The standard expressed in Rule 65(e)

The “one who seeks an injunction has the burden of proving a right thereto.”¹ Rule 65(e) states that a court may issue an injunction where the moving party meets *any one* of the following criteria:

1. “it appears by the complaint that the plaintiff is entitled to the relief demanded”; or
2. “it appears by the complaint or affidavit that . . . some act during the litigation would produce waste, or great or irreparable injury.”²

Although Rule 65(e) is framed in the disjunctive, courts applying the Rule regularly state the common law standard which is framed in the conjunctive, requiring both a likelihood of success on the merits *and* a showing that irreparable injury will result if the injunction is not issued.

The common law standard

The common law in Idaho has long been that an “injunction is granted only in extreme cases where the right is very clear and it appears that irreparable injury will flow from its refusal.”³ The common law in most jurisdictions, including federal common law, likewise requires a showing of a likelihood of success on the merits and a showing that if an injunction does not issue irreparable injury will result.⁴

Application of the preliminary injunction standard in Idaho

Idaho courts often require a litigant to demonstrate a likelihood of success on the merits *and* irreparable injury in order to obtain a preliminary injunction. This heightened showing regularly coincides with a court's recitation of the common law standard for obtaining a preliminary injunction.⁵ The blending of Rule 65(e) and the common law has created questions about what is actually required to obtain a preliminary injunction in Idaho. Answering the following three questions is helpful in deciphering what a litigant must actually prove under Rule 65(e) to be entitled to injunctive relief.

Do all preliminary injunctions require a showing of irreparable injury?

No. The common law clearly requires a showing of irreparable injury to obtain an injunction. In line with the common law, a number of decisions suggest or expressly state that irreparable injury is a necessary element for obtaining a preliminary injunction.⁶ The plain language of Rule 65(e), however, is not consistent with these decisions. Subsection (2) is the only subsection of the Rule that references “irreparable injury.” Thus, requiring a showing of irreparable injury under subsection (1) would graft an additional element where none exists.

Is irreparable injury ever necessary to obtain a preliminary injunction?

No. For nearly a century, Idaho courts have differed on whether the moving party must satisfy an irreparable injury element to obtain a preliminary injunction.⁷ But Rule 65(e)(2) answers the question: a preliminary injunction may issue when there is a showing that “some act during the litigation would produce waste, *or* great *or* irreparable injury to the plaintiff” (emphasis added). The only conclusion that can be

drawn from the language of the Rule is that a litigant is not required to show irreparable injury — waste or great injury will suffice.⁸

Can a preliminary injunction issue without a showing of a likelihood of success on the merits?

Yes. Rule 65(e)(1) requires a party to show it “is entitled to the relief demanded.” Courts have interpreted this to mean that a litigant must demonstrate a “substantial likelihood of success on the merits.”⁹ In contrast, Rule 65(e)(2) makes no mention of a showing of a clear right to the remedy sought. Yet, the standard refrain when considering subsection (2) is that a preliminary injunction “is granted only in extreme cases where the right is very clear.”¹⁰ Indeed, some decisions have specifically required the “very clear right” standard for obtaining a preliminary injunction under subsection (2).¹¹

If Rule 65(e)’s plain language is to be the guide, this interpretation is incorrect. The very clear right requirement is expressly limited to subsection (1) and the requirement’s exclusion from subsection (2) emphasizes that the requirement is not necessary to obtain a preliminary injunction under subsection (2).

Rule 65(e) should require both elements in a single subsection

Rule 65(e) should be modified to require both a showing of likelihood of success on the merits and irreparable injury. As pointed out above, in many instances courts in Idaho are already requiring both elements. And, this is for good reason. Common sense suggests that a court should not grant injunctive relief to a party who can show only potential for irreparable injury without a corresponding showing that

the litigant might actually prevail. A party with little chance of success on the merits should not be able to disrupt an adverse party’s business or the functioning of a government agency simply because it can show that it may suffer irreparable injury. Conversely, a showing by a litigant that it will likely prevail in an action where money damages can make it whole likewise does not call for the extraordinary relief of a preliminary injunction.

It is time to consider amending Rule 65(e) to reflect how courts are applying the Rule. Until then, as the Idaho Supreme Court consistently holds, the plain language of the Rule controls.¹² Either a likelihood of success on the merits *or* the potential for irreparable injury is the standard for this extraordinary remedy in Idaho.

Endnotes

1. *Harris v. Cassia County*, 106 Idaho 513, 518, 681 P.2d 988, 993 (1984).
2. Idaho R. Civ. P. 65(e). Rule 65(e) contains additional grounds for issuance of an injunction that are not discussed here as this article focuses on subsections (1) and (2).
3. *Brady v. City of Homedale*, 130 Idaho 569, 572, 944 P.2d 704, 707 (1997); *Evans v. Dist. Court*, 47 Idaho 267, ---, 275 P. 99, 100 (1929).
4. See *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20, 129 S.Ct. 365, 374

(2008); *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-32 (9th Cir. 2011).

5. See, e.g., *Idaho County Prop. Owners Ass’n, Inc. v. Syringa Gen. Hosp. Dist.*, 119 Idaho 309, 315, 805 P.2d 1233, 1239 (1990) (“Plaintiffs had shown the clear right they had for relief and the irreparable injury necessary for the issuance of an injunction.”).

6. See *id.*; *Farm Serv., Inc. v. United States Steel Corp.*, 90 Idaho 570, 414 P.2d 898 (1966) (“In addition to such a showing [of irreparable injury], it was incumbent upon plaintiff, seeking only an injunction, to show that it likely would prevail upon trial.”). See also *Planned Parenthood of Idaho, Inc. v. Kurtz*, 2011 WL 34157539, *4 (Idaho Dist. Aug. 17, 2011) (citing *Devine v. Cluff*, 110 Idaho 1, 713 P.2d 437 (Ct. App. 1985); *Unity Light & Power Co. v. Burley*, 92 Idaho 499, 445 P.2d 720 (1968)).

7. *Compare WGI Heavy Minerals, Inc. v. Gorrill*, 2006 WL 637030, *4 (Idaho Dist. Mar. 1, 2006) (citing *Meyer v. First Nat’l Bank*, 101 Idaho 175, 181, 77 P. 33d (1904), *Staples v. Rossi*, 7 Idaho 618, 626-27, 65 P. 67 (1901); *Price v. Grice*, 10 Idaho 443, 453, 79 P. 387 (1904)), and *Planned Parenthood*, 2011 WL 34157539, at *4 (citing *Idaho Gold Dredging Corp. v. Boise Payette Lumber Co.*, 60 Idaho 127, 90 P.2d 688 (1939); *Idaho Gold Dredging Corp. v. Boise Payette Lumber Co.*, 62 Idaho 683, 115 P.2d 401 (1939); *Davidson Grocery Co. v. United States Fid. & Guar. Co.*, 52 Idaho 795, 21 P.2d 75 (1933); and *Scholtz v. Am. Sur. Co.*, 35 Idaho 207, 206 P. 187 (1922)); with *Brady*, 130 Idaho at 572, 944 P.2d at 707, and *Idaho County Prop. Own-*

Rule 65(e) should be modified to require both a showing of likelihood of success on the merits and irreparable injury. As pointed out above, in many instances courts in Idaho are already requiring both elements.

ers Ass'n, Inc., 119 Idaho at 315, 805 P.2d at 1239 (citing *Farm Serv. Inc.*, supra; *Evans*, supra).

8. See *WGI Heavy Minerals, Inc.*, 2006 WL 637030, at *7 (citing Rule 65(e)(2)'s text for the proposition that a preliminary injunction may issue "to restrain temporarily an act which will result in great damage to the plaintiff, although the injury is not irreparable, and notwithstanding that other remedies lie in behalf of plaintiff").

9. *Id.*

10. *Brady*, 130 Idaho at 572, 944 P.2d at 707 (1997) (quoting *Harris*, 106 Idaho at 517, 681 P.2d at 992).

11. *WGI Heavy Minerals, Inc.*, 2006 WL 637030, *7 (Idaho Dist. Mar. 1, 2006) (relying on *Harris*, supra, for this approach to analyzing subsection (2)); *Idaho County Prop. Owners Ass'n, Inc.*, 119 Idaho at 315, 805 P.2d at 1239 ("Plaintiffs had shown the clear right they had for relief and the irreparable injury necessary for the issuance of an injunction."); *Farm Serv., Inc.*, 90 Idaho 570, 414 P.2d 898 (1966) ("In addition to such a showing [of irreparable injury], it was incumbent upon plaintiff, seeking only on injunction, to show that it likely would prevail upon trial").

12. See, e.g., *Boise Mode, LLC v. Donahoe Pace & Partners Ltd.*, 154 Idaho 99, ---, 294 P.3d 1111, 1119 (2013).

About the Authors

A. Dean Bennett is an associate with the law firm *Holland & Hart LLP* and practices in the firm's *Commercial Litigation and Labor and Employment Practice Groups*. He obtained his undergraduate degree from *Vanderbilt University* and his J.D. from the *University of Idaho*. Prior to joining *Holland & Hart*, he clerked for the Hon. *Stephen S. Trott* on the *Ninth Circuit Court of Appeals*.



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A party with little chance of success on the merits should not be able to disrupt an adverse party's business or the functioning of a government agency simply because it can show that it may suffer irreparable injury.

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Controlling Risk for Awards of Attorney's Fees

James Jacobson

One of the challenges facing litigators in Idaho is advising clients as to the risks associated with attorney's fees awards, particularly as to Idaho's statute governing attorney's fees awards in commercial transactions. This article analyzes the current state of the law governing attorney's fee awards under I.C. § 12-120(3) and suggests a practical solution to advising your clients as to the risk of an unfavorable award, including the availability of contract litigation insurance.

Idaho Code § 12-120(3)

To recover attorney's fees under I.C. § 12-120(3), a litigant must demonstrate that a commercial transaction was the gravamen of an action. The question of whether a court should award attorney's fees under this statute is one of law. Initially, the applicability of I.C. § 12-120(3) turned on whether a contract claim was alleged in the complaint.¹ However, in 2007, the Idaho Supreme Court issued the opinion of *Blimka v. MyWebWholesaler*, which broadened the analysis.² The Court extended the reach of I.C. § 12-120(3) to cases where a commercial transaction formed the basis of the claim regardless of whether it was a *tort* or contract claim.³

The Idaho Supreme Court has continued to apply *Blimka's* broad holding to award attorney's fees under I.C. § 12-120(3). Always, the existence of a commercial transaction turned on whether the parties had, in fact, entered into an agreement or purported to enter into an agreement, even if the causes of action at issue sounded in tort. However, two cases decided within the last three years have complicated the analysis of when a commercial transaction is the gravamen of an action.

The Court extended the reach of I.C. § 12-120(3) to cases where a commercial transaction formed the basis of the claim regardless of whether it was a *tort* or contract claim.³

Garner and the focus on the claims in the complaint

The first critical post-*Blimka* case is *Garner v. Povey*.⁴ There, the Idaho Supreme Court articulated a two-step process for determining whether a prevailing party was entitled to attorney's fees under I.C. § 12-120(3): "(1) there must be a commercial transaction that is integral to the claim; and (2) the commercial transaction must be the basis upon which recovery is sought."⁵

Garner involved an action to address asserted easement rights and the interference with those easement rights that arose out of the transfer of deeds to various parcels of real property. The Court repeatedly referenced the claims and allegations asserted in the complaint in discussing whether a commercial transaction was the gravamen of the lawsuit. The Court said, "the commercial transaction must be an actual basis of the complaint. . . . [T]he lawsuit and the causes of action must be based on a commercial transaction, not simply a situation that can be characterized as a commercial transaction."⁶ Ultimately, relying on the express language of the complaint that alleged that there was a "commercial transaction" (those exact words appeared in the verified complaint) the Court held that attorney's fees were recoverable under I.C. § 12-120(3). Thus,

whether a commercial transaction is the gravamen of the lawsuit must include an analysis of the causes of action asserted in the complaint, even in the post-*Blimka* era.⁷

Carrillo and a move away from Garner

The second critical post-*Blimka* case is *Carrillo v. Boise Tire Co.*⁸ Prior to going on a trip, the Carrillos had their tires rotated at Boise Tire. The tire rotation was not performed properly, which resulted in the Carrillos' vehicle crashing and the death of the partner/mother of the litigants. The Carrillos contended that the accident occurred as the result of a commercial transaction between themselves and Boise Tire, and that they were therefore entitled to attorney's fees pursuant to I.C. § 12-120(3).

The *Carrillo* Court turned to *Blimka* and said that a prevailing party is entitled to an award of attorney's fees if a "commercial transaction is integral to the claim, and constitutes the basis upon which the party is attempting to recover."⁹ The Court went on to state that a "commercial transaction ground in I.C. § 12-120(3) neither prohibits a fee award for a commercial transaction that involves tortious conduct (see *Lettunich v. Key Bank Nat'l Ass'n*, 141 Idaho 362, 369, 109 P.3d 1104, 1111

(2005)), nor does it require that there be a contract.”¹⁰ Then, the *Carrillo* Court added this statement: “as long as a commercial transaction is at the center of the lawsuit, the prevailing party may be entitled to attorney’s fees for claims that are fundamentally related to the commercial transaction yet sound in tort.”¹¹

What the *Carrillo* Court did not state is that the claims presented in that case — negligence claims — were so far removed from traditional actions for which attorney’s fees are awarded that I.C. § 12-120(3) could not possibly apply. Ignoring this point, the Court concluded that the transaction at issue was one for personal and household goods and thus I.C. § 12-120(3) was inapplicable.¹² The case should have been decided on the more fundamental point. Regardless, two buzz phrases emerged from *Carrillo* in the analysis of attorney’s fees claims under I.C. § 12-120(3): (1) claims must be “fundamentally related” to the commercial transaction; and (2) there must be “symmetry of commercial purpose.”

In the Wake of *Blimka*, *Garner*, and *Carrillo*

What has become unclear is the impact of *Garner* and its two-step, pleading-focused analysis on both of the buzz phrases articulated in *Carrillo* and the analysis that courts should be employing to determine the applicability of attorney’s fees awards under I.C. § 12-120(3). At this point, *Garner*, which was decided approximately two years ago, appears to be drifting like a boat in a becalmed ocean.

The impact of these cases reached close to home for attorneys in a case decided approximately a year ago involving legal malpractice.¹³ In *Reynolds*, in the context of a legal malpractice claim, the Idaho Supreme Court awarded fees under I.C. § 12-120(3).

Thus, the reach of *Blimka* and its progeny extends all the way into legal malpractice claims, which sound in negligence and traditionally have not been subject to attorneys fees.

Is there an end in sight? There is no cogent argument as to why these same cases could not reach into common law negligence or equitable claims where the claim was “fundamentally related” to a commercial transaction and there was “symmetry of commercial purpose” and where the transaction was not for personal or household goods or services.

Then, the *Carrillo* Court added this statement: “as long as a commercial transaction is at the center of the lawsuit, the prevailing party may be entitled to attorney’s fees for claims that are fundamentally related to the commercial transaction yet sound in tort.”¹¹

How to advise your clients

Best practice suggests that where a commercial transaction exists in the relationship of the parties, the client should be advised of the exposure for attorney’s fees under I.C. § 12-120(3). But what about the circumstance involving tort and equitable claims that arise where a commercial transaction is contemplated, but no commercial transaction is consummated, and both parties acknowledge that no actual commercial transaction exists. Such a circumstance seems beyond the “fundamentally related” test and certainly outside of the *Gar-*

ner analysis. Yet, the application of the “fundamentally related” test will have to occur on a case-by-case basis and the continued viability of *Garner* remains to be determined.

A practical solution to managing the risk associated with potential attorney’s fees awards under I.C. § 12-120(3) is the availability of coverage for such claims. For a reasonable amount, coverage can be obtained for the eventuality of an attorney’s fees award. This coverage allows the attorney to counsel his or her client as to the merits of the respective claims while simultaneously controlling the risk of an unfavorable decision regarding attorney’s fees. With the ever expanding reach of *Blimka*, practitioners would be wise to counsel their clients to employ such tools within the litigation context.

This type of insurance is known as contract litigation insurance or “CLI.” It is available for purchase in all fifty states and usually costs between six and ten percent of the policy limits. Customary policy limits ranges are between \$200,000 and \$400,000. There may be time restrictions for obtaining the coverage based on the date of filing, but the coverage is designed to be obtained after the filing of a lawsuit or counterclaim occurs. There are exclusions that can apply to the coverage for fees that arise from punitive awards and for claims that are determined to be frivolous or meritless. The availability of this coverage may also have other strategic impacts on litigation in addition to controlling risk, but every practitioner should discuss its availability when a case presents an issue of potential recovery for attorney’s fees under § I.C. 12-120(3).

Endnotes

1. *Farmers Nat. Bank v. Shirey*, 126 Idaho 63, 73, 878 P.2d 762, 772 (1994).
2. *Blimka v. My Web Wholesaler*, 143 Idaho 723, 152 P.3d 594 (2007).

3. *Id.* at 728-729, 152 P.3d at 599-600 (“The commercial transaction ground in I.C. 12-120(3) neither prohibits a fee award for a commercial transaction that involves tortious conduct (see *Let-tunich v. Key Bank Nat’l Ass’n*, 141 Idaho 362, 369, 109 P.3d 1104, 1111 (2005), nor does it require that there be a contract. Any previous holdings to the contrary are overruled.)”

4. 151 Idaho 462, 259 P.3d 608 (2011).

5. *Id.* at 469, 259 P.3d at 615 (citation omitted).

6. *Id.*

7. No citation to or mention of *Blimka* occurs in *Garner*. We are left to wonder somewhat as to why there was nothing in *Blimka*’s broad pronouncements that would inform the issue in *Garner*. Nevertheless, the Idaho Supreme Court’s heavy focus in *Garner* on the allegations contained in the complaint cannot be ignored.

8. 152 Idaho 741, 274 P.3d 1256 (2012).

9. *Blimka*, 143 Idaho at 728, 152 P.3d at 599.

10. *Id.*

11. *Carrillo*, 152 Idaho at 755-56, 274 P.3d at 1270-71.

12. *Id.* (“The transaction here at issue therefore lacked the symmetry of commercial purpose necessary to trigger I.C. § 12-120(3), and the district court properly denied the Carrillos’ request for attorney’s fees.”).

13. *Reynolds v. Trout Jones Gledhill Fuhrman, P.A.*, 154 Idaho 25, 293 P.3d 645 (2013).

A practical solution to managing the risk associated with potential attorney’s fees awards under I.C. § 12-120(3) is the availability of coverage for such claims. For a reasonable amount, coverage can be obtained for the eventuality of an attorney’s fees award.

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Punitive Damages and the Idaho Courts' 'Gatekeeper' Responsibilities

J. Walter Sinclair

The standard for amending a pleading to include a prayer for relief seeking punitive damages is outlined in Idaho Code section 6-1604. However, as the “gatekeepers” for such amendments, Idaho courts apply the standard inconsistently. This article reviews the legal standard for asserting punitive damages in Idaho, discusses the different methods for applying that standard, and finally proposes its most appropriate application in light of the legislative and judicial precedents in Idaho.

Idaho Code Section 6-1604: The legal standard

To *recover* punitive damages, a claimant “must prove, by clear and convincing evidence, oppressive, fraudulent, malicious, or outrageous conduct by the party against whom the claim for punitive damages is asserted.”¹ Yet, to *amend* a pleading to include a prayer for relief seeking punitive damages, the court, “after weighing the evidence presented,” must conclude that “the moving party has established at such hearing a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages.”²

The challenging aspect of the court’s gatekeeper responsibility is how to apply the well-developed standard on adding a prayer for relief seeking punitive damages to a party’s pleadings.³

Applying the legal standard in Idaho

The “reasonable likelihood” standard set forth for the court necessarily takes into account a claimant’s

The challenging aspect of the court’s gatekeeper responsibility is how to apply the well-developed standard on adding a prayer for relief seeking punitive damages to a party’s pleadings.³

burden to prove, by “clear and convincing evidence,” the requisite, of fending conduct supporting punitive damages. These two standards seem to be somewhat conflicting.

On one hand, in light of the legislative mandate that punitive damages be proven by clear and convincing evidence, one could argue that a motion to add punitive damages involves a high, restrictive standard. This application is reflected in significant Idaho case law.⁴ On the other hand, when considering both Idaho Rule of Civil Procedure 15(a) and Federal Rule of Civil Procedure 15(a) — encouraging the liberal granting of motions to amend pleadings — one could alternatively argue that a motion to amend the pleading to assert a claim for punitive damages should be liberally granted. As discussed below, at least one court seems to have adopted this latter approach.

Hardenbrook and Stinker Stores

Clear and convincing evidence “is generally understood to be evidence indicating that the thing to be proved is highly probable or reasonably certain.”⁵ In *both Hardenbrook v. United Parcel Service, Co.*, and *Stinker Stores, Inc. v. Nationwide Agribusiness Insurance & Order Co.*, the U.S. District Court for the District of Idaho

held that “if the moving party’s claims are reasonably disputed and there is substantial evidence that supports the non-moving party’s claims, the moving party has not met its burden under the substantial evidence standard, compelling the same conclusion under an even higher burden of clear and convincing evidence.”⁶

Under this approach, when the moving party’s claims are reasonably disputed and there is substantial evidence that supports the non-moving party’s claims, a motion to amend for punitive damages should not be allowed.⁷ As the case law properly reflects, a party would be allowed to amend the pleadings to assert a prayer for punitive damages only if, after weighing the evidence presented, the court concludes that said party established a reasonable likelihood of proving, by clear and convincing evidence, that the complained of conduct was oppressive, fraudulent, malicious, or outrageous.⁸ As the *Hardenbrook* court pointed out, “the real concern for the Court . . . is whether *Hardenbrook* has established a reasonable likelihood of proving facts at trial by clear and convincing evidence that UPS acted with an extremely harmful state of mind and extreme devia-

tion from reasonable standards of business conduct”

This approach appears to be an appropriate application of the clear and convincing evidence rule in conjunction with the reasonable likelihood proof standard.

Full Disclosure:

The author was involved as counsel in *Hansen-Rice*.

Hansen-Rice

At least one court, however, appears to have deviated from the holdings within *Hardenbrook* and *Stinker Stores*. In *Hansen-Rice Inc. v. Celotex Corp.*, the U.S. District Court for the District of Idaho originally held that “all inferences” must be made in favor of the party moving to amend its pleadings to add a punitive damages claim and, if “at least ... a reasonable inference” has been raised, a motion to amend to assert a prayer for punitive damages can proceed.¹⁰ This approach appears to follow Federal Rule of Civil Procedure 15(a)’s (as well as Idaho Rule of Civil Procedure 15(a)’s) liberal amendment standard.

However, the *Hansen-Rice* court subsequently reconsidered its ruling and pulled back from the reasonable inference standard by indicating that “all inferences should not be granted to Hansen-Rice and the truth of witnesses should not be assumed.”¹¹ The court went on to state that the party wanting to add punitive damages need “only show a reasonable likelihood of obtaining them at trial” and that, “[w]hile there is contrary evidence, [certain testimonial evidence] is favorable to [the moving party], and likely could persuade a jury.”¹²

The application of any rule allowing a party to claim punitive damag-

es if it has any evidence to support such a position (which the court determines “could” persuade a jury, even if there is contrary evidence) seems to eviscerate the clear and convincing evidence standard set forth in Idaho Code section 6-1604(1).

Appropriate application of the legal standard

As has been set forth in many Idaho cases, “[a]s a matter of substantive law, it is well established in Idaho that punitive damages are not favored and should be awarded in only the most unusual and compelling circumstances, and are to be awarded cautiously and within narrow limits.”¹³ As stated above, “[w]hen the moving party’s claims are reasonably disputed and there is substantial evidence that supports the non-moving party’s claims, a motion to amend to assert punitive damages will not be allowed.”¹⁴ That should be the correct standard; not a lesser one, endorsing a punitive damages amendment if a jury “could” be persuaded, notwithstanding reasonable evidence to the contrary.

To uphold the integrity of Idaho Code section 6-1604’s language, the Idaho legislature’s intent, and case law regarding punitive damages, Idaho courts should limit punitive damages to only the most egregious cases with stringent consideration and ap-

plication of the clear and convincing standard. As *Hardenbrook* instructs, the proper application of the punitive damages standard should be: “if the moving party’s claims are reasonably disputed and there is substantial evidence that supports the non-moving party’s claims, the moving party has not met its burden,” translating to the denial of any motion to amend to add punitive damages.¹⁵

Endnotes

1. Idaho Code § 6-1604(1).
2. Idaho Code § 6-1604(2).
3. Claims for punitive damages are substantive, so even if the action is pending in federal court, state law is controlling in diversity cases. See *Strong v. Unumprovident Corp.*, 393 F. Supp. 2d 1012, 1025 (D. Idaho 2005); *Doe v. Cutter Biological*, 844 F. Supp. 602, 609 (D. Idaho 1994). Therefore, both state and federal courts in Idaho apply Idaho Code section 6-1604.
4. See *Todd v. Sullivan Constr. LLC*, 146 Idaho 118, 191 P.3d 196 (2008); *Hall v. Farmers Alliance Mut. Ins. Co.*, 145 Idaho 313, 179 P.3d 276 (2008); *Vendelin v. Costco Wholesale Corp.*, 140 Idaho 416, 95 P.3d 34 (2004); *Vaught v. Dairyland Ins. Co.*, 131 Idaho 357, 956 P.2d 674 (1998); *O’Neil v. Vasseur*, 118 Idaho 257, 265, 796 P.2d 134, 142 (Ct. App. 1990).
5. *State v. Kimball*, 145 Idaho 542, 546, 181 P.3d 468, 472 (2008) (internal quotation marks, citation, and brackets omitted).
6. *Hardenbrook v. United Parcel Service, Co.*, 2009 WL 3530735, *6 n.3 (D. Idaho

“[A]s a matter of substantive law, it is well established in Idaho that punitive damages are not favored and should be awarded in only the most unusual and compelling circumstances, and are to be awarded cautiously and within narrow limits.”¹³

Octo. 26, 2009); *Stinker Stores, Inc.*, 2010 WL 1976882, *6 n.2 (D. Idaho May 17, 2010).

7. See *Hardenbrook*, 2009 WL 3530735, at *7.

8. See *Vendelin*, 140 Idaho at 423, 95 P.3d at 41; see also *Stinker*, 2010 WL 1976882, at *6 ("When the moving party's claims are reasonably disputed and there is substantial evidence that supports the non-moving party's claims, a motion to amend to assert punitive damages will not be allowed." (citing *Strong*, 393 F. Supp. 2d at 1026)).

9. *Hardenbrook*, 2009 WL 3530735, at *7.

10. See *Hansen-Rice, Inc. v. Celotex Corp.*, 414 F. Supp. 2d 970, 979-80 (D. Idaho 2006) ("Certainly a jury might conclude, as Celotex asserts, that Barrow was just letting off steam However, . . . [t]hat evidence at least raises a reasonable inference that Celotex was not acting in good faith . . ."). In the interest of full disclosure, the author was involved as counsel in *Hansen-Rice*.

11. *Hansen-Rice, Inc. v. Celotex Corp.*, No. CV-04-101-S-BLW, slip op. at 2 (D. Idaho June 22, 2006).

12. *Id.*

13. *Stinker*, 2010 WL 1976882, at *6 (citing *Manning v. Twin Falls Clinic & Hosp., Inc.*, 122 Idaho 47, 830 P.2d 1185 (1992); *Jones v. Panhandle Distributions, Inc.*, 117 Idaho 750, 792 P.2d 315 (1990); *Soria v. Sierra Pac. Airlines, Inc.*, 111 Idaho 594, 726 P.2d 706 (1986); *Cheney v. Palos Verdes Inv. Corp.*, 104 Idaho 897, 665 P.2d 661 (1983); *Linscott v. Rainier Nat'l Life Ins. Co.*, 100 Idaho 854, 606 P.2d 958 (1980)); see also *O'Neil*, 118 Idaho 257, 796 P.2d 134.

14. See *Vendelin*, 140 Idaho at 423, 95 P.3d at 41; see also *Stinker*, 2010 WL 1976882, at *6.

15. *Hardenbrook*, 2009 WL 3530735, at *6 n.3; see also *Stinker*, 2010 WL 1976882, at *6 n.2.

As Hardenbrook instructs, the proper application of the punitive damages standard should be: "if the moving party's claims are reasonably disputed and there is substantial evidence that supports the non-moving party's claims, the moving party has not met its burden,"

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Welcoming 2014 with the Family Law Section

Hon. Joanne M. Kibodeaux

It is my pleasure to prepare this message on behalf of the Idaho State Bar's Family Law Section. We are glad to start the New Year by co-sponsoring this issue of *The Advocate* with the Litigation Section. Due to Brett Anthon's coordination efforts, there are two strong articles designed to provide tools to the family law practitioner as cases develop and come to fruition.

In *Justice is More than Jail: Civil Legal Needs of Sexual Assault Victims*, Annie Kerrick addresses the basic civil needs of sexual assault victims and identifies special considerations when serving victims in rural areas of Idaho.

Ten Tips for the Accidental Family Law Lawyer written by Stephen A. Stokes and Thomas D. Smith stresses the necessity of understanding the particulars that are unique to family law cases and the available remedies in family law court. They also give some advice to lawyers who are asked to pick up a family law case on the quick.

Big news

Attorneys who handle family law cases should take note that the Idaho Supreme Court has approved amendments to the Idaho Rules of Family Law Procedure Family Procedure, (I.R.F.L.P.). These rules are currently being piloted solely in the Fourth Judicial District. The amendments to the rules are effective as of January 1, 2014. The I.R.F.L.P. are applicable to all family law cases including paternity, civil domestic violence protection orders (but specifically do not govern contempt matters). The rules do not apply to cases involving the Child



Protection Act, adoption, termination or guardianship.

Section news

I want to take this opportunity to provide an update on the other activities of the Section. The Section sponsored a CLE at the annual meeting this past July in Coeur d'Alene titled, *New Rules Probably Coming Your Way: Perspectives on the Supreme Court Pilot Project Implementing the Family Court Rules in the 4th Judicial District*. Our annual Award of Distinction was also presented to Stephen L. Beer, Esq. during the annual meeting at the Section's sponsored reception. Our annual October CLE series, *The Changing Face of Family Law Practice in Idaho* was well attended and well received. Upcoming plans include co-sponsoring CLE programs with the Animal Law Section and the Professionalism and Ethics Section. Attorneys can look forward to the annual Family Law CLE in October. We also continue to produce the Form Book and the updated Handbook which are both for sale through the Idaho State Bar.

The I.R.F.L.P. are applicable to all family law cases including paternity, civil domestic violence protection orders (but specifically do not govern contempt matters).

In consideration of strengthening the Section's future, Kristie Browning facilitated a succession planning session for the governing council on September 13, 2013. As a result, a number of changes are now being implemented that change the structure of the Governing Council. The goal is to have a Governing Council that encourages participation from a wider perspective of the Section's membership.

Our annual elections will now be conducted each April.

There is a significant change regarding the roles and responsibilities for officers and council members at large. Once an officer is elected, that person will serve a four-year term serving the first year as the Secretary/Treasurer; the second year as the Vice Chairperson; the third year as the Chairperson; and the fourth year as Past Chairperson.

In addition to their other responsibilities, Officers and Governing Council members at large will serve specific functions by coordinating "Seats" that serve the goals and objectives of the Governing Council. More information about the Governing Council and the specific roles carried out by the Seats can be found on the Family Law website, http://isb.idaho.gov/member_services/sections/fam/fam.html.

Family law is a dynamic area of the law and we encourage participation from across the state. A call for nominations will be sent out this month via e-mail and our list serve. If Section members are interested in serving on the Council, please contact our Secretary/Treasurer, Lisa Rodriguez who is responsible for coordinating elections. Our regular meetings occur on the second Friday of each month and we welcome participation from our membership, whether by telephone or at one of our four in-person meetings



each year. A complete listing of current Governing Council members can be found on our page of the Idaho State Bar's website.

About the Author

Hon. Joanne M. Kibodeaux serves as the current chair of the Family Law Section. As a member of the Idaho State Bar since 1989, she focused on the areas of family law, disability and bankruptcy. Judge Kibodeaux was recently appointed as an Ada County Magistrate and took the Bench on October 1, 2013 where she now serves as a family law judge.



The goal is to have a Governing Council that encourages participation from a wider perspective of the Section's membership. Our annual elections will now be conducted each April.

Family Law Section

Chairperson

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ELSE IS
TAKEN.

– *Oscar Wilde*

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Ten Tips for the Accidental Family Law Lawyer

Stephen A. Stokes
Thomas D. Smith

It has happened again. Your senior partner pops her head in your office and tells you she has a personal friend who needs help with a divorce and you're the man for the job — the only trouble is you only do commercial collections. You've just become an accidental family law lawyer.

This article gives ten tips to the accidental family law lawyer to help avoid the pitfalls and perils inherent in family law practice. While this article is not intended to cover every issue in detail, the accidental family law lawyer should at least be aware of the issues raised in this article and have a general idea of where to look should the issues arise.

Tip 1: Don't take the case

As much as you want to help out, the potential client may be better served if you politely pass. Family law is not for everyone. Family law practitioners are specialists who focus on the specific nuances of family law, have special training on how to deal with high maintenance family law clients, and understand how what they do and say can profoundly affect people who cannot protect themselves.

Tip 2: You are not your client's therapist, counselor or friend

If you've decided to take the case, now what? You must set appropriate boundaries with your client or your life will be overrun. You must set appropriate times and methods for communication, telling the client (in writing) how you prefer to communicate, when the best time to reach you is, what constitutes an

Under the Idaho Rules of Professional Conduct, attorneys are free to provide advice based on not only the law, but also the attorney's own moral and ethical compass.

afterhours "emergency," and how much you will charge to deal with the emergency.

You must make sure the client knows what you can and (equally important) cannot do for them.

Even if you are working pro bono, send out invoices showing, in detail, what you are doing for the client, how much time it took to get it done, and how that task plays into the overall strategy of the case. Domestic clients need to know what you are doing on the case and what the next step is.

Make sure the client understands your personal perspective on relationships, divorce, custody, and family law litigation. Under the Idaho Rules of Professional Conduct, attorneys are free to provide advice based on not only the law, but also the attorney's own moral and ethical compass.

Keep a keen eye out for genuine mental health issues both in your client and the opposing party. Some indicators to look for include changes in:

1. a parent's intellectual functioning, adaptive and/or social functioning, or personality and/or emotional functioning;
2. the parent's knowledge, attitudes, or perceptions;

3. the parent's ability to function in parent/child interactions;
4. the parent's ability to respond to the developmental needs of the children; and
5. whether the parent has had previous interventions relative to mental health issues.¹

Also be on the lookout for substance abuse, physical and sexual abuse, neglectful parenting, authoritarian parenting, emotional/psychological abuse, verbal abuse, and abuse of power in relationships as these may be indicators of a devolving or potentially devolving mental state of a parent in a family law case.²

Tip 3: Be aware of local rules that may affect your case

The rules of engagement differ in domestic cases. The best example of this is the Fourth District's Idaho Rules of Family Law Procedure (IRFLP) pilot project.³ The IRFLP apply only to domestic cases filed in the Fourth Judicial District after January 1, 2013, such as divorce, child support, child custody, paternity, modification cases, and the like. They do not apply to cases under the Child Protection Act, adoption and termination cases, or guardianship and conservatorship cases.

In addition to the IFLRP, many jurisdictions have unique local rules that drive strategy in family law cases. In particular, some jurisdictions are following the Fourth Judicial District Local Rule 8.5, which sets out the procedure used for motions for temporary custody.

It pays to contact your colleagues or the court to perform an inquiry to determine whether there are any local rules or procedures that need to be followed. Failing to follow local protocol may defeat your case before you ever step into the courtroom.

Tip 4: Know who you represent, what to file and where to file it

After laying the groundwork for successful representation, the next step is to determine who you represent (*i.e.* parent, non-parent, child, best interests of the child, petitioner, or respondent), what type of case you need to file (*i.e.* divorce, paternity/custody, guardianship/conservatorship, modification action), and where to file the case.

Family law proceedings include divorces, proceedings for legal separation, paternity/custody/support, or a modification of the same. The most common family law proceeding is a divorce where matters of property, spousal maintenance, custody, and child support may be decided.⁴

However, in proceedings for legal separation or divorce, a court may still enter a custody order when the parents have not divorced.⁵ A parent may also seek an order to establish paternity, custody, and child support when the parents were never married.⁶ Once a custody order has been established, a proceeding may be initiated to modify an existing custody, child support, or spousal support order upon a showing of a substantial and material change in circumstances.

Specifically, the petitioning parent must show that “there has been a material, permanent and substantial change in conditions and circumstances subsequent to entry of the original decree which would indicate to the court’s satisfaction that modification would be for the best interests of the child.”⁷ A court may also award custody when issuing a civil protection order.⁸ As a result, the accidental family law lawyer must be sure to initiate the proper

Jurisdiction in family law cases depends on what type of case is filed. In divorce cases, Idaho courts have jurisdiction to decide the case when the plaintiff has been an Idaho resident for at least six weeks prior to filing the complaint.

procedure to achieve the best result for the client.

After you decide what to file, you must determine where to file it. Since people frequently move between states, uniform laws govern where family law cases may be heard in specific circumstances. Even if you did not initiate the case, you must still determine whether the court is the proper venue and whether Idaho is a proper forum. Sometimes an Idaho attorney’s primary role in a family law proceeding is to seek a

dismissal so the case can be decided in the proper forum or venue.

Jurisdiction in family law cases depends on what type of case is filed. In divorce cases, Idaho courts have jurisdiction to decide the case when the plaintiff has been an Idaho resident for at least six weeks prior to filing the complaint. The proper venue is where the defendant resides, or where the plaintiff resides if the defendant resides out of state. However, it is not uncommon for parties to file a divorce in a different venue for various reasons, such as where real property is located or the closest courthouse to the filing attorney’s office.

Determining whether an Idaho court has jurisdiction to enter orders regarding custody, child support, guardianships, and conservatorships is more complicated. The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) provides the exclusive basis for making initial and subsequent child custody determinations. The Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA) provides the exclusive basis for appointing a guardian for an incapacitated adult and to enter protective orders, including conservatorships. The jurisdictional requirements under the UAGPPJA are similar to the UCCJEA, except courts in states with significant contacts may assume jurisdiction when no case has been filed in the home state at the time the final order is entered in a significant contacts state.

Tip 5: Be ready to protect your client’s short-term goals and needs

Another consideration for the accidental family law lawyer is whether temporary orders are necessary. In contrast to other types of cases that

address an act that occurred in the past that is frozen in time, family law cases typically look towards the future and attempt to address fluid situations that can change during the pendency of the action. Family law cases are dynamic and evolve over time; courts routinely enter temporary orders as necessary to protect the parties, children, and property.⁹

A thorough cost/benefit analysis must be performed before filing motions for temporary orders. Family law clients are often very emotional. As a result, many family law clients want immediate results to resolve their concerns, no matter how unreasonable they may be. The cost of pursuing temporary orders may be large, especially if faced with lengthy contested hearings. Sometimes temporary orders slow down the pace of proceedings. Look at the big picture to effectively help a family law client.

Keep Tip 3 in mind as Idaho courts utilize various procedures for obtaining temporary orders.

Tip 6: Know what your client has and know what to do with it

Know what property is involved in the proceeding and what to do with it. Generally, the first step in the analysis is to determine whether the parties have community and/or separate property.

Classifying property as community or separate can be difficult. For example, since property is classified at the time the property was acquired, property acquired in another state is classified by the law of the state where the property was acquired.¹⁰ As a result, it is important to verify where property was acquired at the outset of a divorce proceeding.

In general, the accidental family law lawyer must be on the lookout for community personal property,

Family law cases are frequently emotionally charged, involve high levels of conflict, and the parents may make extremely divergent decisions regarding the children.

community real property, and community debt. Probing questions must be asked of the client to ensure that a complete asset picture is developed early in the case. This will aid both the attorney and the client as the case progresses through mediation and ultimately trial.

After determining what the client has, determine what to do with it. Some property is relatively easy to value and divide, such as money, personal household goods, vehicles, and other tangible items. In contrast, some property is extremely difficult to value and divide such as retirement accounts, military and other civil service benefits, real estate, and business interests. Great care must be exercised in dividing these assets because they are frequently the largest assets acquired during a marriage. More importantly, they can expose you to liability if the property is not valued or divided properly.

Tip 7: Beware of additional unique property issues in your case

Keep a sharp eye out for unique property issues that may exist in the case. For example, spouses frequently commingle property during a marriage or use community funds to pay for or improve separate property, which can lead to extensive and complicated disputes.¹¹

Additionally, separate property can be transmuted to community property.¹² Unraveling commingling and transmutation problems can be very difficult when the parties have different recollections of the circumstances surrounding past events when the marriage was more harmonious.¹³

To complicate matters further, federal law may preempt state community property laws as applied to certain assets. A state court order that attempts to divide an asset in violation of federal law may be invalid and unenforceable.¹⁴

Tip 8: Beware of unique custody issues in your case

Child custody cases can present unique issues even for experienced family law attorneys. Family law lawyers represent parents and the legal interests of those parents. However, the paramount concern in a custody proceeding is the best interests of the child.¹⁵ Sometimes the client's position and a child's best interests conflict.

Family law cases are frequently emotionally charged, involve high levels of conflict, and the parents may make extremely divergent decisions regarding the children. One way to deal with this dilemma is to appoint a parenting coordinator where the

court essentially vests the parenting coordinator with decision-making authority in an appointment order that describes the specific issues that the parenting coordinator may decide to serve the best interests of the child.¹⁶ Another way of dealing with high conflict cases is to have a parenting time evaluator appointed to evaluate the best interests of the children.¹⁷ Parenting time evaluators (PTE) provide the court with information to make custody decisions.¹⁸ However, keep in mind that there has been an ongoing dispute throughout the country regarding the validity, usefulness, and admissibility of PTE opinions.¹⁹

Tip 9: Take advantage of the collaborative law model

Family law clients and their children are generally not the best served by the adversarial system. Therefore, recently, there has been a substantial shift in the practice of family law — this change is colloquially known as the “collaborative law model.” Be prepared for the court to try almost anything short of going to trial to help resolve the case.

In domestic cases where children are involved, the court may order the parties to attend an Alternative Dispute Resolution (ADR) screening to determine if mediation is appropriate and/or make recommendations to the court and the parties for additional services that may help the parents for resolving conflict.²⁰

If the court determines that mediation is appropriate, it may order the parties to attend mediation with an Idaho Supreme Court-approved custody mediator or a mediator chosen by the parties.²¹ Unlike mediation in a civil case as set out in Rule 16(k), I.R.C.P., attorneys *are not allowed* to attend unless requested

by the mediator to get the parties to start working together.²² The sooner the parents are taught how to work together, the better off they are going to be in the long run.

An alternative to mediation with a custody mediator is a judicial settlement conference. Like mediation, the parties are ordered to meet with a third-party neutral to help resolve the dispute. However, the third-party neutral is a magistrate judge. Judicial settlement conferences are an evaluative-style session where the judge helps the parties see what would likely happen if the case went to trial.

If the parties insist on going to trial, a useful, lower-conflict approach is to conduct an informal custody trial under Rule 16(p), I.R.C.P. There, the rules of evidence are relaxed, the judge conducts most of the questioning, the attorneys take a back seat, and the parties are allowed to tell their story to the court without the formal trappings of a court trial.²³

Cross-examination is very limited. Advantages include empowering the parties to take ownership of their case and allowing the parties to tell their story in a more comfortable manner.²⁴ If parties are represented, informal custody trials are generally more cost effective too. Disadvantages

include a certain loss of control that sometimes makes attorneys uncomfortable.

Tip 10: Ask for help

“Asking for help does not mean that [you] are weak or incompetent. It usually indicates an advanced level of honesty and intelligence.”²⁵ Family law cases are not easy. As demonstrated herein, they are complicated, multi-faceted cases, which are made exponentially difficult because of the human factor. Not only is the law difficult, the people are, at times, difficult. There is no shame in asking for help.

Resources for the accidental family law lawyer abound. If the case is one that was received through the Idaho Volunteer Lawyers Program, (I.V.L.P.), there are many lawyers who have agreed to act as mentors to non-family law attorneys. The governing council of the ISB Family Law Section has many resources for non-family law lawyers. Some judicial districts around the state have family law sections, family law bench/bar committees and “brown bag” groups that meet to discuss family law issues and mentor attorneys. More importantly, most family law lawyers in Idaho will willingly take the time to discuss issues in a case, matters of strategy, and generally provide guid-

Recently, there has been a substantial shift in the practice of family law — this change is colloquially known as the “collaborative law model.” Be prepared for the court to try almost anything short of going to trial to help resolve the case.

ance to the accidental family law attorney.

Ask for help, find a family law mentor, read about family law, take a CLE, but after all is said and done, as Napoleon Bonaparte said, “take time to deliberate, but when the time for action comes, stop thinking and go in.”²⁶

Family law cases are not easy. As demonstrated herein, they are complicated, multi-faceted cases, which are made exponentially difficult because of the human factor.

Endnotes

1. Tim Collias, *Parental Mental Health in Custody Litigation*, pp. 2-3, IDAHO FAMILY LAW HANDBOOK (4th Ed. 2013).
2. See *Id.* at pp. 2-3.
3. http://fourthjudicialcourt.idaho.gov/pdf/Family_Law_Rules-pilot_version.pdf
4. Idaho Code §§ 32-705, 32-706, 32-712, and 32-717.
5. Idaho Code § 32-1005.
6. Idaho Code §§ 7-1102 and 32-706.
7. Idaho Code §§ 32-709, 32-717; *Evans v. Saylor*, 151 Idaho 223, 225-26, 254 P.3d 1219, 1221-22 (2011) (internal citations omitted).
8. Idaho Code § 29-630.
9. See Idaho Code §§ 32-704 and 32-717; Rules 16(l) and 65(g), I.R.C.P.
10. *Matter of Estate of Ashe*, 114 Idaho 70, 74, 753 P.2d 281, 285 (Idaho App. 1988); *Berle v. Berle*, 97 Idaho 452, 454-55, 546 P.2d 407, 409-10 (1976).
11. See, e.g., *Baruch v. Clark*, 154 Idaho at 302 P.3d at 357.
12. *Barrett v. Barrett*, 149 Idaho 21, 23, 232 P.3d 799, 801 (2010); Idaho Code § 32-902(2); see also Stephen A. Stokes, *Don't Look a Gift Horse in the Mouth: Transmutation and the Problem of the Joint Title Gift Presumption in Light of Dunagan v. Dunagan*, 147 Idaho 599 (2009) and *Barrett v. Barrett*, Docket No. 35763, April 23, 2010, IDAHO FAMILY LAW HANDBOOK (4th Ed. 2013).
13. See *Barrett v. Barrett*, 149 Idaho 21, 232 P.3d 799.

14. See *Bowlden v. Bowlden*, 118 Idaho 89, 90, 794 P.2d 1145, 1146 (Idaho App. 1989) (citing *Philpott v. Essex Count Welfare Board*, 409 U.S. at 415).
15. *Evans v. Saylor*, 151 Idaho at 227, 254 P.3d at 1223.
16. Idaho Code § 32-717D.
17. Rule 16(q), I.R.C.P..
18. *Id.*
19. See Timothy M. Tippins & Jeffrey P. Wittman, *Empirical and Ethical Problems with Custody Recommendations: A Call for Clinical Humility and Judicial Vigilance*, 43 Fam. Ct. Rev. 2, April 2005 193-222; see also Mary Shea Huneycutt, *Trying to Fit a Square Peg Into a Round Hole? Applying Idaho Rules of Evidence & Procedure to Child Custody Evaluations*, IDAHO FAMILY LAW HANDBOOK (4th Ed. 2013).
20. See Rule 16(m), I.R.C.P.; Stephen L. Beer, *Alternative Dispute Resolution in Domestic Relationships*, IDAHO FAMILY LAW HANDBOOK (4th Ed. 2013).
21. *Id.*; Rule 16(j), I.R.C.P.
22. *Id.*
23. Rule 16(p), I.R.C.P.; Stephen L. Beer, *Alternative Dispute Resolution in Domestic Relationships*, IDAHO FAMILY LAW HANDBOOK (4th Ed. 2013).
24. *Id.*
25. Anne Wilson Schaeff, 1990.
26. Napoleon Bonaparte.

About the Authors

Stephen A. Stokes is a partner in the Pocatello law firm of Huneycutt, Smith & Stokes, PLLC. He practices family law as well as criminal law, commercial litigation and general litigation. He is a member of the governing council of the Family Law Section, secretary of the Sixth District Bar Association and past chair of the District Family Law Section. He is also in the Idaho Academy of Leadership for Lawyers and is a member of the Idaho Trial Lawyers Association.



Thomas D. Smith received his J.D. from the University of Utah in 2009. Thomas is a member of Huneycutt, Smith & Stokes, PLLC in Pocatello, Idaho, where his practice involves family law, probate, estate planning, appeals, criminal defense, and administrative law. Thomas is also on the Idaho Supreme Court rosters for custody mediators and parenting coordinators. Thomas is the chair of the Sixth District Bar Association Family Law Section and has served on the Professional Conduct Board for the Idaho State Bar since 2010.



COURT INFORMATION

OFFICIAL NOTICE SUPREME COURT OF IDAHO

Chief Justice
Roger S. Burdick

Justices
Daniel T. Eismann
Jim Jones
Warren E. Jones
Joel D. Horton

Regular Spring Term for 2014

Boise January 13, 15, 17, 22 and 24
Boise February 12, 14, 18, 19 and 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
Sergio A. Gutierrez

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

Regular Spring Term for 2014

Boise January 9, 14, 16 and 21
Boise February 6, 11, 13 and 20
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

By Order of the Court
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 January 2014

Monday, January 13, 2014 – BOISE

8:50 a.m. *Fonseca v. Corral Agriculture, Inc.* (Industrial Commission) ... #40578-2012
10:00 a.m. *Local 4758, International Assoc. of Fire Fighters v. City of Ketchum* #39558-2012
11:10 a.m. *Terrie H. Rowley v. ACHD* #40672-2013

Wednesday, January 15, 2014 – BOISE

8:50 a.m. *Cuevas v. Barraza* #40516-2013
10:00 a.m. *State v. Herren* (Petition for Review) #40619-2013
11:10 a.m. *White v. Valley County* #40262-2012

Friday, January 17, 2014 – BOISE

8:50 a.m. *Ada County v. City of Garden City* #40084/40106-2012
10:00 a.m. *DeGroot v. Standley Trenching, Inc.* #39406-2011
11:10 a.m. *Western Home Transport v. Dept. of Labor* (Industrial Commission) #40462-2012

Wednesday, January 22, 2014 – BOISE

8:50 a.m. *Tobin Restoration, Inc. v. Laird* #40260-2012
10:00 a.m. *Murray v. State* #39400-2011
11:10 a.m. *Credit Suisse AG v. Teufel Nursery, Inc.* #40234-2012

Friday, January 24, 2014 – BOISE

8:50 a.m. *State v. Stark* (Petition for Review) #41159-2013
10:00 a.m. *A&B Irrigation District v. State* (Snake River Basin Adjudication) #40974-2013
11:10 a.m. *Boise Project Board of Control v. State* (Snake River Basin Adjudication) #40975-2013

Idaho Court of Appeals Oral Argument for January 2014

Thursday, January 9, 2014 – BOISE

9:00 a.m. *State v. Scott* #40789-2013
10:30 a.m. *State v. Eddins* #39933-2012
1:30 p.m. *State v. Ruggiero* #40175-2012
3:00 p.m. *John Doe v. Jane (2013-24) Doe (EXPEDITED)* #41416-2013

Tuesday, January 14, 2014 – BOISE

9:00 a.m. *State v. Anderson* #39510-2012
10:30 a.m. *State v. Ghormley* #40490-2012
1:30 p.m. *IDHW v. John (2013-21) Doe (EXPEDITED)* #41382-2013

Thursday, January 16, 2014 – BOISE

9:00 a.m. *State v. Trusdall* #40241-2012
10:30 a.m. *State v. Fair* #39255-2011/40628-2013
1:30 p.m. *Atwood v. Idaho Transportation Dept.* #40441-2012

Tuesday, January 21, 2014 – BOISE

9:00 a.m. *State v. Cardoza* #39811-2012
10:30 a.m. *John Doe I v. John (2013-20) Doe (EXPEDITED)* #41380-2013
1:30 p.m. *IDHW v. Jane (2013-22) Doe (EXPEDITED)* #41383-2013

**Idaho Supreme Court and Court of Appeals
NEW CASES ON APPEAL PENDING DECISION
(Updated 11/1/13)**

CIVIL APPEALS

Post-conviction relief

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

Beighley v. State
S.Ct. No. 40319
Court of Appeals

2. Did the court err in denying Navarro's petition for post-conviction relief because he established that the prosecutor's failure to disclose the case against the victim's father violated his right to due process?

Navarro v. State
S.Ct. No. 40469
Court of Appeals

3. Whether the court erred when it denied post-conviction relief on the failure to appeal issue because it erroneously ruled that it had no jurisdiction to grant the requested relief.

Huntsman v. State
S.Ct. No. 40549
Court of Appeals

4. Did the court err by summarily dismissing Lonn's petition as untimely?

Lonn v. State
S.Ct. No. 40548
Court of Appeals

5. Did the court err by summarily dismissing Lyneis' petition for post-conviction relief?

State v. Lyneis
S.Ct. No. 40919
Court of Appeals

Procedure

1. Whether the trial court abused its discretion by denying leave to amend on the ground that the claims asserted lacked merit.

DAFCO, LLC v. Stewart Title Guaranty Co.
S.Ct. No. 40738
Supreme Court

Summary judgment

1. Did the court err in finding that the relevant community for purposes of I.C. § 6-1012 was limited to Idaho Falls?

Bybee v. Gorman, M.D.
S.Ct. No. 40887
Supreme Court

CRIMINAL APPEALS

Evidence

1. Is Garcia's conviction for aiding and abetting delivery of methamphetamine supported by substantial evidence?

State v. Garcia
S.Ct. No. 40544
Court of Appeals

2. Did the court err by taking judicial notice over certain documents on the day of the evidentiary hearing?

State v. Giovanelli
S.Ct. No. 40884
Court of Appeals

**Search and seizure –
suppression of evidence**

1. Did the court err when it denied Tena's motion to suppress, finding Tena's mother had apparent authority to consent to a search of his bedroom?

State v. Tena
S.Ct. No. 40423
Court of Appeals

2. Did the court err when it denied Buck's motion to suppress evidence found in a search of his car?

State v. Buck
S.Ct. No. 40634
Court of Appeals

3. Did the court err in finding that Moore voluntarily consented to the search of her home and purse while officers were in the home to conduct a probation search?

State v. Moore
S.Ct. No. 40210
Court of Appeals

4. Whether the court erred when it found Hamlin was not in custody equivalent to formal arrest and therefore the dictates of Miranda did not apply.

State v. Hamlin
S.Ct. No. 40026
Court of Appeals

Sentence review

1. Did the court err in failing to order a mental health evaluation pursuant to I.C. § 19-2522, as the court had reason to believe the defendant's White's mental health condition would be a significant factor at sentencing?

State v. White
S.C. No. 38473
Court of Appeals

State v. Morrissey
S.Ct. No. 38799
Court of Appeals

State v. Standley
S.Ct. No. 38944
Court of Appeals

2. Did the court abuse its discretion by denying Allen's request to dismiss or reduce his felony conviction pursuant to I.C. § 19-2604?

State v. Allen
S.Ct. No. 40696
Court of Appeals

3. Did the court err in ordering a civil judgment under I.C. § 19-5307 based on a conviction for attempted murder?

State v. Crow
S.Ct. No. 40073
Court of Appeals

Statutory interpretation

1. Whether I.C. § 54-1732(3)(c), part of the Idaho Pharmacy Act, violates substantive due process on its face or as applied to Sherman.

State v. Sherman
S.Ct. No. 40995
Court of Appeals

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



Introducing Idaho's New Judiciary

Hon. Michael McLaughlin

As of Nov. 21, there have been 16 new Idaho judges appointed this year: six new district judges and 10 new judges of the magistrate division.

In the First Judicial District

Hon. Barbara Buchanan was appointed district judge effective February 1, 2013, filling the vacancy created by the retirement of Judge Steve Verby.

Judge Buchanan, Sandpoint, served 18 years as a magistrate judge before being appointed as a district judge. She is a Moscow native who received her bachelor's and law degrees at the University of Idaho. Judge Buchanan and her husband have two daughters and a foster daughter. She looks forward to serving as the only district judge for Bonner and Boundary counties.



Hon. Barbara Buchanan

Hon. Richard S. Christensen was appointed district judge effective May 1, 2013, filling the vacancy created by the retirement of Judge John Luster.

Judge Christensen, St. Maries, is a New Jersey native who received his bachelor's degree from Colorado State Univer-



Hon. Richard S. Christensen

sity and his law degree from the University of Idaho. He was a prosecutor in Boise County, practiced law in Grangeville and Boise, was a deputy Idaho Attorney General, a Benewah County prosecutor, and worked in private practice in St. Maries. Judge Christensen and his wife, Katherine have three children.

Hon. Lori Meulenberg was appointed as a magistrate judge for Bonner County effective April 15, 2013, filling the vacancy created by Judge Buchanan's appointment to the District Bench.

Judge Meulenberg was born and raised in the small farming community of Prinsburg, Minnesota and attended Calvin College in Michigan, where she received her Bachelor of Arts in both Criminal Justice and Sociology. She earned



Hon. Lori Meulenberg

her JD with honors, on the same day her husband, Dan, earned his MD degree, from the University of North Carolina, where they became lifetime fans of the Tarheels.

They moved to Idaho, where Lori worked as a deputy prosecutor, legal researcher, city attorney and as a Social Security disability attorney.

Judge Meulenberg and Dan have two daughters, Sophia and Jennie. They live in Sandpoint.

In the Third Judicial District

Hon. George Southworth was appointed district judge effective January 16, 2013, filling the vacancy created by the retirement of Judge Renae Hoff.

Judge Southworth, Nampa, is a Navy veteran, a graduate of Idaho State University and received his law degree from



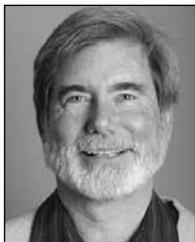
Hon. George Southworth



the University of Utah. He worked as an attorney in Las Vegas and as a deputy Bannock County Prosecutor in Pocatello before working in private practice in Pocatello from 1983 until he was named a magistrate judge in 2006. Judge Southworth and his wife Kamila, have one son.

Hon. Robert L. Jackson was appointed magistrate judge for Payette County effective August 1, 2013, filling the vacancy created by the retirement of Judge A. Lynne Krogh.

Judge Jackson received an undergraduate degree from Idaho State University and a law degree from the University of Idaho. Judge Jackson has over 20 years of varied legal experience in the private sector. Judge Jackson started his own general law practice in Nampa in 1992 where he remained until joining the Pedersen & Jackson law firm in Twin Falls as a litigation attorney in 2000. He left his Twin Falls practice in 2008 to join the Lister and Frost law office in Boise as that firm's attorney in charge of the litigation division. In 2010, he became a contract litigation attorney for the Saetrum Law Office in Boise after establishing his own general practice in Parma in 2009.



Hon. Robert L. Jackson

Hon. F. Randall Kline was appointed as a magistrate judge for Canyon County in the Third Judicial District, effective April 30, 2013, filling the vacancy created by Judge George Southworth's appointment to the district bench.

Judge Kline received his undergraduate degree from Idaho State University and his law degree from



Hon. F. Randall Kline

the University of Idaho College of Law. He was in general practice with Ward, Maguire, Bybee and Kline in Pocatello from 1982 to 1988, and opened his own general law practice there in 1988. Judge Kline also was the City Attorney for American Falls and Rockland. He was appointed as the Power County Prosecuting Attorney in 2008 and later elected to that position where he served until January, 2013.

Hon. John Meienhofer was appointed as a magistrate judge for Adams County effective July 1, 2013, filling the vacancy created by the retirement of Judge James Peart.

Judge Meienhofer received his undergraduate degree from Bowdoin College in Brunswick, Maine and his law degree from the University of Oregon. He comes to the bench with 20 years of experience both in the public and private sectors. In 1994, Judge Meienhofer spent two years as deputy prosecuting attorney in Jerome County followed by a year of practice as a deputy prosecuting attorney in Blaine County. In 1997, Judge Meienhofer joined the Finch, Cosho law firm in Boise where he practiced in the areas of criminal defense, domestic relations and personal injury law. He opened his own criminal defense, domestic relations and personal injury.



Hon. John Meienhofer

Hon. Christopher Nye was appointed district judge, filling the new district judge position created by the Legislature.

Prior to his appointment, he was a partner with the Nampa



Hon. Christopher S. Nye

law firm of White, Peterson, Gigray, Rossman, Nye & Nichols, PA. He received his law degree from the University of Kansas. He previously worked as a deputy prosecutor in Canyon County and a public defender in Nampa before entering private practice in 1990.

In the Fourth Judicial District

Hon. Andrew Ellis was appointed as a magistrate judge for Ada County effective October 1, 2013 filling the new magistrate position.

From 2002 until his appointment, Judge Ellis was a deputy prosecuting attorney with Ada County, where he prosecuted child protection cases. In 2013, Mr. Ellis served as an Adjunct Professor with the University of Idaho College of Law teaching "Children in the Law" coursework.

In 2008, Judge Ellis received the Prosecutor's Award of Excellence from the Governor's Task Force on Children at Risk and, from 2001-2002, Judge Ellis served as a law clerk at the Idaho Court of Appeals to judges Alan Schwartzman and Sergio Gutierrez. He served on the Idaho Supreme Court's Child Protection Committee.



Hon. Andrew Ellis

Hon. Laurie Fortier was appointed magistrate judge for Ada County effective October 1, 2013, filling the new magistrate position. Judge Fortier holds a Bachelor's Degree in business and accounting from the Univer-



Hon. Laurie Fortier

sity of Idaho and a law degree from the University of Idaho.

From 2005 until her appointment, Judge Fortier was employed as an Assistant City Attorney with the Boise City Attorney's Office, where she prosecuted infractions and misdemeanors. From 2003-2005, Ms. Fortier worked as an Associate Attorney for the Boise law firm of Naylor and Hales, where she handled civil litigation in both the state and federal courts. Before that she served as a law clerk to Idaho Supreme Court Justices Roger Burdick and Jesse Walters and, in 2000 - 2001, for judge Joel Horton in district court.

Hon. Joanne Kibodeaux was appointed magistrate judge for Ada County effective October 1, 2013, filling the vacancy created by the retirement of Judge David Day. Judge Kibodeaux holds a Bachelor's Degree in English from the University of Michigan - Deerpark, and a law degree from the University of Wyoming College of Law.



Hon. Joanne Kibodeaux

From 2001 until her appointment, Judge Kibodeaux was a family law attorney in private practice handling matters of divorce, child custody, child support, property and debt division, retirement division, as well as domestic violence protection orders.

Hon. Steven Hippler was appointed district judge, effective October 1, 2013, filling a new position.



Hon. Steven Hippler

Steven J. Hippler was a partner since 2002 in the Boise law firm

Givens Pursley LLC. The Boise native received his bachelor's degree from Boise State University and his law degree from the University of Utah.

In the Fifth Judicial District

Hon. Daniel Dolan was appointed magistrate judge for Camas County, effective January, 2014. He replaces Judge Jason Walker who was appointed to the bench in Teton County. Judge Dolan received his bachelors of science in forestry from Iowa State University and his law degree from Gonzaga University.

Judge Dolan is a long-time Blaine County resident and has been a sole practitioner in Ketchum for the past 23 years. He contracted with Blaine County to provide public defender services and provided public defenders services in Camas County for the last 17 years.



Hon. Daniel Dolan

In the Sixth Judicial District

Hon. Scott Axline was appointed magistrate judge for Bannock County, effective January 4, 2013, filling the vacancy created by the retirement of Judge Gaylen Box.

Judge Axline received his bachelor of arts from Idaho State University in 1981 and his law degree from the University of Idaho in 1984. Prior to his appointment, he lived in Blackfoot where he owned his own domestic relations, personal injury, probate, child protection and other civil-related and criminal defense practice since 1986.



Hon. Scott Axline

He is very active in his community and is an active member of the Seventh District Bar Association, serving as President in 2009. He has received the Idaho State Bar Service Award and its Pro Bono Award. Judge Axline and his wife, Jackie, have four children.

In the Seventh Judicial District

Hon. Jason Walker was appointed magistrate judge for Teton County effective January 2, 2014, filling the vacancy created by the retirement of Judge Colin Luke.

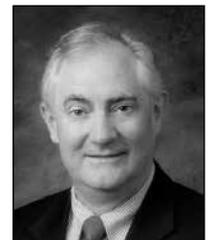
Judge Walker attended Brigham Young University and received his bachelor's degree in 1995, and law degree in 1998 at the University of Idaho. He was a law clerk in Minidoka County for the Honorable J. William Hart. After clerking for Judge J. William Hart, Judge Walker was a practicing attorney and became a partner in the Law Firm of Ling and Robinson. Then he was elected Prosecutor for Minidoka County until 2007. Judge Walker has served as the Magistrate Judge for Camas County.



Hon. Jason Walker

Hon. Alan Stephens was appointed district judge, effective October 31, 2013, filling a new District Judge position.

Judge Stephens received his bachelor's degree from Brigham Young University and his law degree from the University of Idaho. Prior to his appointment, he served for many years as an attorney in Idaho Falls, notably as a partner with Thomsen Stephens Law Offices.

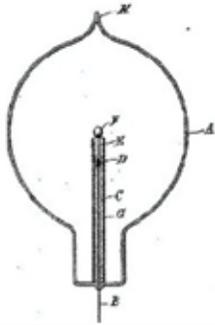


Hon. Alan Stephens

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The U.S. Supreme Court Sidetracks Idaho Implied Consent Law

Richard Seamon

When the Idaho police stop a driver reasonably suspected of driving under the influence of alcohol or drugs (DUI), Idaho's "implied consent" law authorizes them to have the driver's blood drawn (typically at a hospital) for testing.¹ Idaho case law lets these blood draws occur without the warrants that the Fourth Amendment usually requires for such "search[es]" of "person[s]."² The Idaho case law holds that these blood draws may occur without warrants because the blood draws invariably fall within the warrant exceptions for "exigent circumstances" and "consent searches."

This article explains that neither exception validates all warrantless blood draws under Idaho's implied consent law. In *Missouri v. McNeely*, the U.S. Supreme Court recently overruled Idaho case law holding that the natural dissipation of alcohol in the blood, per se, establishes exigent circumstances.³ And U.S. Supreme Court case law on consent searches undermines the Idaho case law upholding warrantless, nonconsensual blood draws under an "implied consent" theory.

Idaho's implied consent law and related case law

You can understand Idaho's implied consent law by envisioning the typical situation in which an Idaho police officer pulls over a driver reasonably suspected of DUI. First, the officer observes the driver for signs of DUI, including the driver's performance of field sobriety tests like standing on one leg. The officer may then decide to have the driver tested with a breathalyzer or a blood draw. To focus on the situation presented in *Missouri v. McNeely*, this article



assumes our Idaho police officer decides on a blood draw.

Before testing, Idaho's implied consent law requires the officer to give the driver information. The driver learns: By driving on Idaho's roads, she is "deemed to have given . . . consent" to testing for alcohol or drugs if there are reasonable grounds to believe she is driving under the influence of one or both.⁴ If she refuses to take the test or doesn't complete it, she may be fined \$250 and have her license suspended for at least one year; she can avoid those penalties only if she shows good cause at a court hearing.⁵ If — instead of refusing to take or not completing the test — she takes the test and fails it, her license will be suspended for at least 90 days, unless she shows good cause at an administrative hearing before the Department of Transportation.⁶ Having heard this advice, the driver decides whether or not to take the blood test.

Readers will notice that the driver who refuses to submit to a blood test faces stiffer administrative penalties — a \$250 civil fine and a driver's license suspension of at least one year — than the driver

U.S. Supreme Court case law on consent searches undermines the Idaho case law upholding warrantless, nonconsensual blood draws under an "implied consent" theory.

who takes the test and fails it, who faces no civil penalty and may suffer an administrative suspension that can be as short as 90 days. The stiffer administrative penalties for refusal to submit to a test reflect the legislature's intent "to discourage and civilly penalize such a refusal."⁷ The legislature wants drivers suspected of DUI to submit to blood tests so that, if they are in fact DUI, the tests yield objective evidence to prosecute them.

By administratively penalizing the refusal to submit to a blood test, Idaho's implied consent law does not create a statutory right of refusal.⁸ Indeed, once a driver has — by operation of the law — impliedly consented to a blood test by using Idaho's roads, the driver cannot revoke that consent by refusing to submit to the test if the police have reasonable grounds to believe the driver is DUI.⁹ Thus, if the driver refuses to submit to a blood test, the police can subject the driver to what is commonly called a "forced" blood draw.¹⁰

The Idaho Supreme Court has held that the police do not need a warrant for a forced blood draw. The court has held that forced blood draws fall within either of two exceptions to the warrant requirement.

First, the court held in *State v. Woolery* that forced blood draws fall within the exigent circumstances exception. The *Woolery* court reasoned that "the destruction of the evidence by metabolism of alcohol in the blood provides an inherent exigency which justifies the warrantless search."¹¹ This "inherent exigency" theory treats the metabolization of blood as enough, standing alone, to establish exigent circumstances.

Second, the court held in *State v. Diaz* that forced blood draws are valid as consent searches. The *Diaz* court recognized that the "forced" drawing of Benito Diaz's blood was "involuntary," because it occurred despite his "continued . . . protest."¹² Still, the blood draw qualified as a consensual search because the police had reasonable grounds to believe that Mr. Diaz was DUI. In that situation, Mr. Diaz "had already given his implied consent" to the blood draw "by driving on an Idaho road."¹³ According to the court, his protests immediately before the forced blood draw did not revoke his prior (implied) consent, because under Idaho

precedent he had no right to revoke that consent.¹⁴

Thus, Idaho case law uses a belt-and-suspenders approach to reject Fourth Amendment challenges to forced, warrantless blood draws from drivers reasonably suspected of DUI: The metabolization of alcohol in the blood, per se, establishes exigent circumstances; alternatively, forced blood draws occur with the statutorily implied consent of the driver, and are thus sustainable as consent searches, even when the driver actually refuses to submit to the test.

As discussed next, the U.S. Supreme Court's decision in *McNeely v. Missouri* makes clear that the exigent circumstances belt is not large enough to uphold all forced, warrantless blood draws. And when the exigent circumstances belt does not fit, the implied consent suspenders snap under the pressure of U.S. Supreme Court precedent on consent searches. Metaphors and case law aside, warrantless, forced blood draws violate the Fourth Amendment in the absence of exigent circumstances.

McNeely v. Missouri's rejection of the per se exigent circumstances theory

The U.S. Supreme Court held in *Missouri v. McNeely* that "the natural metabolization of alcohol in the bloodstream" does *not* "presen[t] a

per se exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases."¹⁵ Instead, courts must use a "totality of the circumstances" approach to determine exigent circumstances. The natural dissipation of alcohol in blood is just one circumstance, and it must be considered with other factors, such as the ease and speed with which the police could get a warrant in the particular case.¹⁶

McNeely rejects the state-court decisions that upheld warrantless blood draws under the "per se exigency" theory. Among the rejected state-court cases that the *McNeely* Court cited was the Idaho Supreme Court's decision in *Woolery*.¹⁷ Because of *McNeely's* rejection of the per se exigency theory, the exigent circumstances exception cannot justify all warrantless, forced blood draws authorized by Idaho's implied consent law. The question thus arises: Can the warrantless, forced blood draws that aren't justified by exigent circumstances be justified, instead, by the implied-consent theory upon which the Idaho Supreme Court relied in *Diaz*?

McNeely does not directly address that question. Justice Sotomayor did, however, address implied consent laws in a portion of her *McNeely* opinion that did not have the support of the majority of the Court.

The U.S. Supreme Court's decision in *McNeely v. Missouri* makes clear that the exigent circumstances belt is not large enough to uphold all forced, warrantless blood draws.

She wrote that implied consent laws provide an effective alternative to warrantless, nonconsensual blood draws:

States have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC [Blood Alcohol Content] evidence without undertaking warrantless non-consensual blood draws. For example, all 50 states have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense. Such laws impose significant consequences when a motorist withdraws consent; typically the motorist's driver's license is immediately suspended or revoked, and most States allow the motorist's refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution.¹⁸

This statement clearly suggests that a state may encourage drivers to consent to blood draws by penalizing their refusal to consent. On the other hand, it does not address whether, if the driver refuses to give actual consent, the state can rely on their implied consent to justify a forced blood draw. The next section argues the answer is no.

The invalidity of the irrevocable-implied-consent theory

As discussed above, the Idaho Supreme Court in *Diaz* held that a warrantless, forced blood draw is a valid consent search. This author respectfully suggests that *Diaz* conflicts with U.S. Supreme Court case law holding that consent to a search must be voluntary and that the scope of consent can be restricted. This case law implies that consent, once given, can be revoked. Implied consent under Idaho's implied con-



sent law, however, is neither voluntary nor revocable. It therefore cannot justify warrantless, forced blood draws.

The leading U.S. Supreme Court case on consent searches is *Schnecko v. Bustamonte*.¹⁹ There, the Court upheld the police's warrantless search of Robert Bustamonte's car because he consented to the search. His consent was valid because it was *voluntary*. The Court explained that voluntariness is judged under the "totality of the circumstances," and that consent is not voluntary if it is "the product of duress or coercion, express or implied."²⁰

Implied consent under Idaho's implied consent law is not voluntary. Its involuntariness becomes clear if you imagine an Idaho official telling an Idaho resident applying for an Idaho driver's license: "To drive on Idaho's roads, you must consent to having your blood tested if the police stop you with reasonable grounds to believe you are DUI. Do you consent?" How many Idaho residents would say no, if they knew

Implied consent under Idaho's implied consent law, however, is neither voluntary nor revocable. It therefore cannot justify warrantless, forced blood draws.

that doing so would bar them from driving in Idaho? For most Idaho residents, driving in Idaho is a daily necessity. The implied consent law makes them an offer they can't refuse. In turn, their acceptance of that offer is not voluntary.

But even if a driver's initial consent were voluntary, it would not

justify a forced blood draw when the driver later refuses to submit to it. Just as a person can *restrict* the scope of his or her consent to a search,²¹ a person should be able to *revoke* consent previously given.²² In a sense, voluntariness and revocability go together. The Idaho Supreme Court unwittingly proved this point when it used the implied-consent theory in *Diaz* to uphold what the Court itself characterized as an “involuntary” blood draw. A consensual, “involuntary” blood draw is an oxymoron.

In sum, a warrantless, forced blood draw from a driver suspected of DUI satisfies the Fourth Amendment if exigent circumstances exist in the particular case. But if they do not, the irrevocable-implied-consent theory cannot provide an alternative justification.

The permissibility of administratively penalizing drivers who refuse to submit to blood tests

The last section focused on drivers who, despite “implied consent,” actually refuse to submit to a blood test when stopped by police for DUI. Many drivers in this situation, however, will actually consent to a blood test, to avoid the \$250 fine and one-year suspension of their license. It is unsettled whether states can constitutionally use such administrative penalties to encourage people to consent. Justice Sotomayor suggested in *McNeely* that such administrative schemes are constitutional, a suggestion to which three other Justices subscribed. This author predicts that a majority of the Court would agree, on one of two grounds.

First, the Court might conclude that consent to a blood test can be voluntary even if given to avoid administrative penalties. The prospect of penalties arguably exerts less pressure than circumstances that, the Court has found, did not render consent to a search involuntary.²³

In *McNeely*, the Court refused to rule that the metabolization of alcohol, per se, establishes exigent circumstances, because the per se approach conflicted with the totality of circumstances analysis used to analyze exigent circumstances.

Furthermore, many drivers would rather have their licenses administratively suspended for a year (and pay a fine) than submit to a test that ensures their conviction for criminal DUI.

Even so, this author suspects the Court would not rely on a consent theory to uphold the administrative penalty schemes in implied consent laws like Idaho’s. That is because voluntariness analysis, like exigent-circumstances analysis, examines the “totality of the circumstances,” which would include, in this context, the characteristics of the individual driver and other circumstances of the traffic stop. In *McNeely*, the Court refused to rule that the metabolization of alcohol, per se, establishes exigent circumstances, because the per se approach conflicted with the totality of circumstances analysis used to analyze exigent circumstances. Likewise, the Court will probably refuse to rule as a categorical matter that the prospect of administrative penalties will never make a driver’s consent to a blood search involuntary; such a categorical ruling conflicts with the totality of circumstances analysis used to analyze voluntariness. In sum, the Court cannot easily use its case law on consent searches to give a blanket blessing to the administrative penalty schemes in implied consent laws.

A more promising approach uses Fourth Amendment reasonableness

analysis to uphold these administrative penalty schemes. The Court has said that “the ultimate measure of the constitutionality of a governmental search is ‘reasonableness,’” and that “where there was no clear practice, either approving or disapproving the type of search at issue, at the time [the Fourth Amendment] was enacted, whether a particular search meets the reasonableness standard is judged by balancing its intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate governmental interests.”²⁴ Furthermore, a leading treatise endorses reasonableness analysis for blood tests of drivers under implied consent laws.²⁵ Finally, two of the Court’s cases support using a reasonableness analysis.

In those cases, the Court used a reasonableness analysis to uphold warrantless searches of probationers and parolees. In each case, the subject of the search “consented” to them as a condition of probation or parole. But the Court expressly refused to rely on consent, and relied instead on a reasonableness analysis.²⁶ The Court might have eschewed the consent rationale so it could issue decisions generally upholding searches of probationers and parolees.

Strong arguments support the reasonableness of administrative penalties encouraging drivers suspected of DUI to submit to blood tests. The state has a huge interest in

taking impaired drivers off the roads. True, drivers have a weighty interest in avoiding the bodily intrusion of blood testing. But the intrusion is mitigated by the information that officers must give drivers before testing. It could be further mitigated by state efforts to give drivers actual, advance notice — when issuing drivers' licenses, for example — of the implied consent law.

Conclusion

U.S. Supreme Court case law sidetracks Idaho's implied consent law but does not run it entirely off the road. Exigent circumstances will often justify warrantless blood draws from drivers suspected of DUI. Alternatively, many drivers will submit to warrantless blood draws to avoid administrative penalties that the U.S. Supreme Court would likely uphold as reasonable, especially if Idaho strives to give Idaho drivers actual notice of the implied consent law. But if exigent circumstances don't exist and the driver refuses to submit, a warrantless, forced blood draw violates the Fourth Amendment.

Endnotes

1. Idaho Code §§ 18-8002 – 18-8004.
2. See *State v. Diaz*, 144 Idaho 300, 302, 160 P.3d 739, 741 (2007) ("The administration of a blood alcohol test constitutes a seizure of a person and a search for evidence under both the Fourth Amendment and Article I, § 17 of the Idaho Constitution.") (citing *Schmerber v. California*, 384 U.S. 757, 767 (1966)).
3. 133 S.Ct. 1552 (2013).
4. Idaho Code § 18-8002(1).
5. *Id.* § 18-8002(3).
6. *Id.* § 18-8002A(2).
7. *State v. DeWitt*, 145 Idaho 709, 713, 184 P.3d 215, 219 (Ct. App. 2008).
8. *State v. Woolery*, 116 Idaho 368, 378, 775 P.2d 1210, 1215 (1989).
9. *State v. LeClercq*, 149 Idaho 905, 909, 243 P.3d 1093, 1097 (Ct. App. 2010).
10. *Diaz*, 144 Idaho at 301, 160 P.3d at 740.



11. *Woolery*, 116 Idaho at 370, 775 P.2d at 1212.
12. *Diaz*, 144 Idaho at 302, 160 P.3d at 741.
13. *Id.* at 303, 160 P.3d at 742.
14. *Woolery*, 116 Idaho at 372-373, 775 P.2d at 1214-1215; *LeClercq*, 149 Idaho at 909, 243 P.3d at 1097.
15. 133 S.Ct. at 1556.
16. *Id.* at 1562-1563.
17. *Id.* at 1558 n.2.
18. *McNeely*, 133 S. Ct. at 1566 (opinion of Sotomayor, joined by Scalia, Ginsburg, and Kagan, JJ.) (citations omitted).
19. 412 U.S. 218 (1973).
20. *Id.* at 227.
21. See, e.g., *Florida v. Jimeno*, 500 U.S. 248, 251-252 (1991).
22. See *State v. Thorpe*, 141 Idaho 151, 106 P.3d 477 (Ct. App. 2004); *State v. Rusho*, 110 Idaho 556, 560, 716 P.2d 1328, 1332 (Ct. App. 1986); see also 4 Wayne R. LaFare, *Search and Seizure* § 8.1(c), at 58 (5th ed. 2012) (stating that the "better view" is that "a consent usually may be withdrawn or limited at any time prior to the completion of the search") (footnote omitted).
23. E.g., *United States v. Mendenhall*, 446 U.S. 544 (1980).
24. *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 652-653 (1995) (footnote and citations omitted).
25. LaFare, *supra* note ___, § 8.3(l), at 165.
26. *Samson v. California*, 547 U.S. 843,

Strong arguments support the reasonableness of administrative penalties encouraging drivers suspected of DUI to submit to blood tests.

852 n.3 (2006); *United States v. Knights*, 534 U.S. 112, 118 (2001).

About the Author

Richard Seamon is a professor at the University of Idaho College of Law, where he teaches and writes on issues of constitutional law. He is currently editing a book on Idaho administrative law. He can be reached at richard@uidaho.edu.



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The 50th Anniversary of the Idaho Association of Defense Counsel

Mark S. Prusynski

This year the Idaho Association of Defense Counsel celebrates its 50th birthday. The 50th annual meeting will be held September 12-13, 2014, at the Sun Valley Lodge and we would like to celebrate our history with members and all past presidents.

Unfortunately, historical records are sparse and we have not been able to complete the first step in recording our history and identifying all the past presidents. This article introduces *The Advocate* readers to the IADC, explains our research efforts and possibly will prompt someone to help fill in gaps in IADC history.

The genesis of “the history project”

Just prior to the September, 2010, annual meeting, the board of the IADC asked for assistance constructing a list of all the past presidents. There was an initial flurry of emails, mostly about vague memories and lack of records. The next day I learned of Gene Thomas’ passing and notified the board, suggesting that someone should try to interview the remaining original members of the IADC to document our history before it was lost.

Later, I was asked if I would agree to be that “someone.”

I willingly agreed and began informal interviews of some of the earliest IADC members. My easiest source of information was founding member, Jack Barrett, with whom I



Eugene C. Thomas

regularly swapped lunchtime war stories. Jack recalled the first meeting in 1964 and some of the people who were present, although he was uncertain of the location.

He said someone called together the most active insurance defense lawyers in the state to discuss forming a group to promote the defense of civil cases. Carl Burke was elected first president and Jack was the first secretary-treasurer.

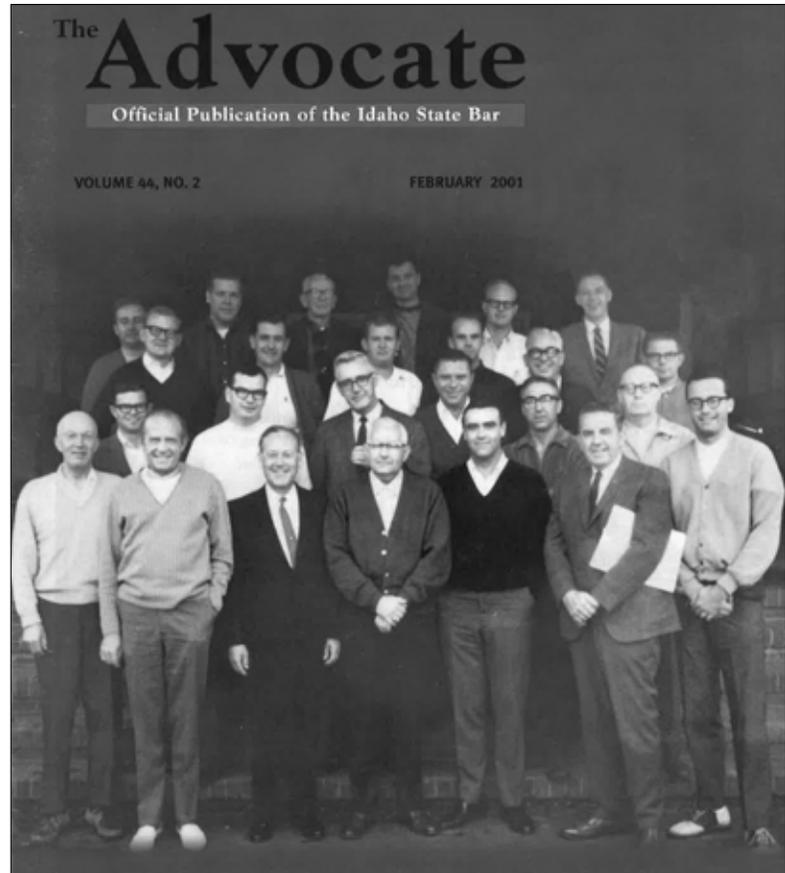
An obvious source for more information was Carl Burke, but Carl was ill. Chris Burke and John



Jack Barrett

Someone called together the most active insurance defense lawyers in the state to discuss forming a group to promote the defense of civil cases. Carl Burke was elected first president and Jack Barrett was the first secretary-treasurer.

Magel volunteered to arrange for a meeting over lunch or coffee when Carl’s health improved. I was sure Carl could fill my head full of



The cover of *The Advocate* from February of 2001 shows attendees at the 1968 Idaho Association of Defense Council meeting at Shore Lodge. Association members identified all the people in the photograph, but have not been able to identify who was elected president in 1968. Anyone with specific information is encouraged to contact the author.

IADC history. But after a flurry of activity, I placed the project on the back burner.

In June of 2011, Jack suddenly succumbed to cancer. I notified several friends in the Idaho Bar including Chris Burke. Chris told me that Carl was fading fast and, indeed, Carl passed away within 24 hours of Jack. At a reception in Jack's honor, some of us speculated that Jack and Carl may have been the last living members of the original group that met in 1964.



Carl Burke

Searching for records of the early years

Many of us did not keep records from our earliest years with the IADC. By 2010 I had accumulated a huge file of miscellaneous IADC papers, but decided to clean out all the old records just months before this project started.

John Burke was President of the IADC in 2011 and arranged an "interview" with his then-partner J. Charles (Chuck) Blanton. Chuck was able to recall some detailed memories of the early years of the organization and, after searching some old records, found copies of the minutes of the 1972 annual meeting and a flyer for the first annual meeting at Shore Lodge in 1965.

The IADC was not incorporated until 1988. The only records that I received dating from before 1988



John J. Burke

are the copies I received from Chuck Blanton and a 1968 photograph. By 1988 the IADC had adopted a fairly systematic succession process. New directors were nominated from the same geographic area as the immediate past president and served a year in each office until the president's term was complete. That process was not formalized initially, which makes the process of identifying all of our past presidents more difficult.

The first presidents were elected from open nominations of the



J. Charles Blanton

Past Presidents of the Idaho Association of Defense Counsel

Year Elected	Name	Year Elected	Name
1964	Carl Burke	1989	Curt R. Thomsen
1965	John H. Daly	1990	Edwin Apel
1966	Eugene C. Thomas	1991	Thomas B. High
1967	Wesley F. Merrill	1992	N. Randy Smith
1968		1993	James D. LaRue
1969	Joseph Imoff	1994	Theodore O. Creason
1970	Jack Hawley	1995	Richard T. St. Clair
1971	Robert J. Koontz	1996	Mark S. Prusynski
1972	J. Charles Blanton	1997	Steven K. Tolman
1973	Thomas B. Nelson	1998	John A. Bailey
1974	R. Vern Kidwell ?	1999	Candy Wagahoff Dale
1975	Richard C. Fields	2000	Blake G. Hall
1976	Daniel W. O'Connell	2001	James A. Ford
1977	M. Allyn Dingel, Jr.	2002	John K. Butler
1978		2003	Patrick E. Miller
1979	Richard E. Hall	2004	Stephen S. Dunn
1980	J. Robert Alexander	2005	J. Kevin West
1981	Michael E. McNichols	2006	J. Michael Wheeler
1982	John A. Doerr	2007	Thomas P. Baskin
1983	W. Marcus W. Nye	2008	Jennifer K. Brizee
1984	Gary T. Dance	2009	David E. Dokken
1985	Sam Eismann	2010	John J. Burke
1986	David H. Maguire	2011	Scott R. Hall
1987	Donald J. Farley	2012	Patrick N. George
1988	Robert P. Brown	2013	Sonyalee R. Nutsch

members. Jack Barrett did not recall ever serving as president, although he told me someone nominated him at the initial meeting, but Carl Burke was chosen instead. I have not located any information showing that John Peacock or Arthur Smith served as president, although they, like Jack, were on the initial Executive Committee.

From bits and pieces of information supplied by other members and many Google searches, we have compiled the following list of the IADC Presidents.

We have a few gaps and some uncertainties in our records of past presidents. Occasionally, internet biographies of the past-presidents might be inaccurate, either because

the biographies were inconsistent with other information we had or because they did not account for the presidents' terms extending from September of one year until the September of the next year.

For example, Rich Hall is certain that he succeeded Allyn Dingel as president. Allyn's biography from the *Advocate's* June 2006 issue states that he was elected president in 1977, but Rich's internet biography says that he was elected in 1979. As far as we know, no one ever served more than one year, so one of those sources of information must be incorrect. Although we appeared to have adopted a succession plan by 1980, the system was occasionally interrupted when one of our directors or officers took the bench.

For example, Harold L. (Hal) Ryan was a charter member of the organization, but I have been unable to find any evidence that he served as president before he became a federal judge in 1981. Chuck Hosack also took the bench while he was a director of the association, but before he became president. Judges Tom Nelson, Randy Smith, Dick St. Clair, Candy Dale, John Butler, and Steve Dunn all served as president of the association before becoming judges.

The IADC annual meetings

The IADC always mixed business with pleasure. Although the association occasionally funded lobbying efforts, most of the lobbying work was voluntarily performed by members. By the time Idaho adopted mandatory CLE requirements, the group had combined its annual business meetings with seminars on significant Idaho Supreme Court Cases and a wide range of other educational topics.

A golf tournament and tennis tournaments were regular staples.

Of course, with Allyn Dingel acting as official or unofficial master of ceremonies, the serious business of the annual meetings was interrupted by jokes. From the early years, Allyn started the meeting with the "vinous salute" that led into a rousing rendition of the Vandal Fight Song.

Of course, with Allyn Dingel acting as official or unofficial master of ceremonies, the serious business of the annual meetings was interrupted by jokes. From the early years, Allyn started the meeting with the "vinous salute" that led into a rousing rendition of the Vandal Fight Song. The McCall residents seemed to enjoy having the group at Shore Lodge, especially when Allyn kept the bar open. The group often unintentionally paid for rounds of drinks for members and non-members alike.



M. Allyn Dingel, Jr.

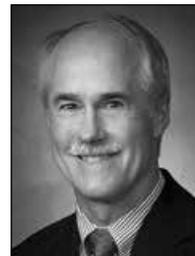
Shore Lodge hosted the annual event for over 30 years, with the possible exception of one meeting at Salishan Resort in Oregon, until new ownership and remodeling shifted the location to Sun Valley. For the past several years the association has rotated the annual meetings between the Shore Lodge in McCall and the Sun Valley Lodge. We continue to combine legal education, the annual business meeting and social opportunities.

A call for help

We hope this article spreads awareness of the Idaho Association of Defense Counsel. And we encourage other Idaho lawyers to search their memories and records for information that completes the list of past presidents. We would also love to see photographs of the meetings, or any other information that helps us document the history of this wonderful organization. If you have any information that you believe might be helpful, please call or email me at MSP@moffatt.com.

About the Author

Mark S. Prusynski is a partner in *Moffatt, Thomas, Barrett, Rock & Fields, Chartered*, where he has practiced since graduating from the University of Iowa Law School in 1978. Most of his career has been devoted to the defense of civil cases of almost every conceivable variety in almost all of the state district courts, federal court, the Idaho appellate courts and the Ninth Circuit. He was elected President of the Idaho Association of Defense Counsel in 1996. He can be reached at 208-385-5305 or msp@moffatt.com.



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Back to the Basics III: Noun-Sense

Tenielle Fordyce-Ruff

Over the last few months, I've delved into broad writing tips. I've focused on big picture ideas like better briefs or even better sentences. I've received some very nice feedback and helpful comments on those columns.

But, I've also received some very nice feedback on my more basic columns. Since January is the time of year to settle in and, at least in my house, simplify after the holidays, I thought I would turn again to the basics.

Last summer, I wrote about the eight parts of speech and each part's general characteristics. I've already covered the basics of verb tense last spring. So, this month, I bring you noun-sense. Let this column help you better understand both the basics and a little beyond the basics of how nouns function.



The basics

At the simplest level, nouns are names. They can be generic or proper:

Go up the *street*.

Turn left onto *Main Street*.

They can be people:

The *judge* wore a blue robe.

Chief Justice Burdick authored the Court's opinion.

Or places:

The *courtroom* was full the first day of the trial.

The *Idaho Supreme Court* has original jurisdiction to hear certain claims.



Or things:

Reporters contain cases.

Idaho Reports contains cases from the Idaho Supreme Court.

As things, they can be tangible or intangible:

The *Idaho Code* is the official codification of Idaho statutes.

Courts aim to protect the *public good*.

Nouns also have properties: number, gender, and person. A noun's spelling usually changes for number. For instance, *office* changes spelling depending on whether it is singular or plural:

Come to my *office*.

This floor has fifteen *offices*.

Nouns rarely change spelling for gender:

I met with a female *student* and a male *student* yesterday.

Although, some nouns still have a gender differentiation:

I saw both a *goose* and a *gander* waddling down the road.

Nouns, however, never change spelling for person.¹

Jessica arrived last weekend.

How can you stand working with *Tenielle*?

Beyond the basics: Cases

Case is the feature that shows a noun's function in a sentence. English nouns come in three cases: nominative, objective, and possessive. Nominative case indicates the noun is the subject or complement of a sentence. Objective case indicates the noun is the object or complement in a sentence. Present-day English nouns don't change form in the nominative or objective case.²

Possessive case is the only case where the noun might change spelling. If you think back to elementary school, you probably remember learning to indicate possession by adding an 's or s' to the end of the noun.

Possessive nouns can indicate possession. When only the final

noun in the series changes spelling, the thing being possessed is owned collectively by each of the nouns named in the series.

The dinner party was at Ryan and Jenny's house.

(Ryan and Jenny both own the house, even though *Ryan* did not change spelling.)

When each noun in the series changes spelling, however, the sentence indicates that each noun owns a separate thing.

The judge read the *plaintiff's* and *defendant's* briefs before the hearing.

(I would certainly hope that the plaintiff and defendant have separate briefs.)

But don't think that possessives indicate only ownership. Possessive nouns can also indicate relationships.

She is going to teach *Tenielle's* students today.

(I don't actually own my students; I'm very opposed to slavery.)

We also use the possessive case in some very specific instances. First, use the possessive case to indicate a sense of measurement of time or value.

Landlords must give tenants three *days'* notice to perform the actions necessary to save the lease.

This gives the sense of measurement — notice of three days — so the possessive is correct.

Likewise, we use double possessives to shift the focus of a sentence to the object. A double possessive is a sentence with both an *of* indicating possession and a noun in the possessive case.

Chad was a friend *of Abby's*.

This sentence focuses on Abby's attitude, not Chad's. We also use double possessives to avoid ambiguity.

This is a picture *of Rebecca's*.

This lets the reader know the picture belongs to Rebecca. Without the double possessive, the picture might be a snapshot showing Rebecca in all her glory (This is a picture of Rebecca). Of course, while this use is technically correct, the sentence could be rewritten to avoid the ambiguity and the double possessive.

This is Rebecca's picture.

This picture belongs to Rebecca.

Beyond the basics: Participles, phrases, and clauses (Oh my!)

Finally, nouns can be more than a single word and can be something other than a basic name. Grammar is completely functional, so usage in the sentence determines matters. Participles, phrases, and clauses can all function as nouns.

You may remember from last month's column that a participle is a verb in the present tense.

Writing is fun.

A phrase is a group of related words that lacks a subject and a predicate, that doesn't express a complete thought, and that acts as a single part of speech. Thus, phrases can function as nouns.

Walking alone at night can be dangerous.

Clauses, unlike phrases, contain both a subject and a predicate. Some express a complete thought and are sentences. Others don't express complete thoughts. These clauses can act as nouns.

That the criminal acted stupidly should surprise no one.

Just because a word is ordinarily classified as a noun doesn't mean that's how it's functioning in the sentence. For instance, nouns can function as adjectives.

The *litigation* department needs another attorney.

And finally, a noun in the possessive case always functions as an adjective.

The *judge's* robe included a lace collar.

(Judge's modifies the robe in this sentence.)

Conclusion

So, remember both the basics of nouns, and a few tidbits that are beyond the basics. Both can help you understand how the words in a sentence are functioning.

Sources

- Neal Whitman, Blog, *Possessives*, (posted Mar. 29, 2012) (available at <http://www.quickanddirtytips.com/education/grammar/possessives>).
- Bryan A. Garner, *The Redbook: A Manual on Legal Style*, 143-45 (2d ed. 2006).

Endnotes

1. In contrast, pronouns do change depending on person. *She* arrived last weekend. (First person) How can you stand working with *her*? (Third person)
2. Present-day English retains changed forms for pronouns, however. For instance, we use *we* for the subject of a sentence, but *us* for the object of a sentence.

About the Author

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

Kristin Bjorkman elected as Idaho Shakespeare Festival trustee

Hawley Troxell is pleased to announce that partner Kristin Bjorkman has been elected to the Idaho Shakespeare Festival's board of trustees. She will serve a three-year term, which began October 1, 2013. The board is comprised of volunteer community members who govern the award-winning Idaho Shakespeare Festival, which produces five theatrical performances each summer. Hawley Troxell partner Nick Miller has also served with the board in varying capacities since 2000.

Bjorkman's practice entails commercial and real estate financing, including documenting loan originations and due diligence, while representing banks, financial institutions, and other institutional lenders.

She was a graduate of the Boise Metro Chamber of Commerce Leadership Boise in 2013 and has been a member of the Chamber's Boise Young Professionals since 2009. Bjorkman received the Idaho Business Review Accomplished Under 40 award in 2012 and the Women's and Children's Alliance Tribute to Women and Industry (TWIN) award in 2011.



Kristin Bjorkman

Rosston joins Holland & Hart LLP

Holland & Hart LLP is pleased to announce the addition of Claire Rosston to the firm's Business, Corporate and Finance and Real Estate and Construction



Claire Rosston

practices. Rosston is based out of the firm's Boise office.

Rosston advises clients on complex financings, asset and equity purchases and real estate transactions. She assists clients with due diligence, transaction documents, legal opinions and closings. She is admitted to practice in Alaska and Idaho.

Rosston holds a J.D. from the University of Texas School of Law and a B.A. from Dartmouth College.

Andrade Legal welcomes Nathaniel Damren and Benjamin Stein

Andrade Legal is pleased to welcome Nathaniel Damren to the firm as an associate attorney to work on the firm's deportation defense, naturalization, family-based immigration, and asylum docket. Admitted in Illinois and Idaho, Nathaniel holds a J.D. from the DePaul University College of Law and a B.A. from the University of Michigan. Nathaniel's areas of expertise include removal defense, immigration consequences of criminal convictions, and asylum.



Nathaniel Damren

Andrade Legal is also pleased to welcome Benjamin Stein to the firm as an associate attorney to work on the firm's deportation defense, naturalization, family-based immigration, and asylum docket. Benjamin's areas of expertise include family-based immigration, immigration options for crime victims



Benjamin Stein

(U Visa/VAWA), and consular processing and removal defense. Admitted in Minnesota and Idaho, Benjamin holds a J.D. from the University of St. Thomas School of Law and a B.A. from the University of Minnesota.

Hawley Troxell introduces new patent practice and attorneys

Hawley Troxell is pleased to announce the addition of a new full-service domestic and international patent practice to the firm. Patent attorneys Philip McKay and Sean Lewis have joined the firm from Silicon Valley where they practiced patent law in-house and as outside counsel for a combined 35 years.

They currently maintain some of the largest patent portfolios in the Silicon Valley for major technology companies. The patent group strengthens the firm's existing intellectual property group chaired by partner Brad Frazer, which includes trademark, copyright, licensing, trade secrets, and internet law.

"We are extremely excited to welcome Phil and Sean to the firm. Their patent practice is highly regarded and not only an excellent addition to our IP group, but also a great asset to clients served by our transactional and litigation departments as a whole," said Managing Partner Steve Berenter.

Mr. McKay has prepared and prosecuted hundreds of domestic and foreign patent applications. He helps clients achieve strategic business objectives, prepares non-infringement and validity opinions, and provides strategic technology licensing and portfolio manage-



Philip McKay

ment counseling to numerous companies throughout the technology sector.

Mr. McKay is a member of the U.S. Patent and Trademark Office and is licensed to practice law in California. Prior to joining Hawley Troxell, he founded McKay & Hodgson, LLP, a patent firm in Monterey, California, and was senior patent counsel for a Fortune 100 Corporation.

Mr. Lewis has assisted companies of all sizes nationally and internationally. His practice includes the preparation and prosecution of U.S. and international patent and trademark applications, technology and patent licensing, authoring opinion letters, managing invention review committees, and assisting with mergers and acquisitions. He received his J.D. from Western State University College of Law in 1994 and his B.S. in physics from the University of California San Diego in 1987. Lewis is a member of the Fresno County Bar Association and the American Bar Association Military Pro Bono Project.



Sean Lewis

Howard Burnett appointed lawyer representative by U.S. District Court

Hawley Troxell is pleased to announce partner Howard Burnett has been appointed as the newest Lawyer Representative for the United States District and Bankruptcy Court, District of Idaho. He was selected from applicants from the 6th and 7th Judicial Districts and will serve a three-year term. His duties will include serving as the representative of the bar to advance opinions and suggestions for improvement,

assisting the Court in the implementation of new programs and procedures, serving on court committees, and developing curriculum for training programs.

When announcing the selection of Mr. Burnett, Chief Judge B. Lynn Winmill said, "I have known Howard for many, many years, and am well aware of his sterling reputation as one of the very best lawyers in the state. I am certain he will make a lasting contribution to the District of Idaho and the Ninth Circuit Court of Appeals."

Mr. Burnett is the resident partner in the firm's Pocatello office. His practice focuses on transactional matters, commercial litigation, and general business counsel and advice, with particular experience in the semiconductor industry. He received the Idaho State Journal's Professional of the Year award in 2011. Burnett has participated in many different community organizations, including the Rotary Club of Pocatello since 1986.



Howard Burnett

Worst, Fitzgerald & Stover, P.L.L.C. welcomes Kirk A. Melton

Worst, Fitzgerald & Stover, P.L.L.C., is pleased to announce that Kirk A. Melton recently joined the firm's Twin Falls office as an associate attorney. Mr. Melton graduated *magna cum laude* from the Brigham Young University Law School in 2011. While in law school, Kirk served on the BYU Law Review as a



Kirk A. Melton

senior editor. He earned his undergraduate degree *magna cum laude* in Sociology with a minor in Spanish from Brigham Young University. Before joining Worst, Fitzgerald & Stover, Kirk served a judicial clerkship with the Honorable G. Richard Bevan in Twin Falls.

Joan E. Callahan joins Naylor & Hales, P.C.

Naylor & Hales, P.C., is pleased to announce the addition of associate Joan E. Callahan to the firm. Ms. Callahan's practice concentrates on municipality and public entity defense; Section 1983 prison litigation; and administrative law. Joan received her J.D. from University of Idaho College of Law in 2013. In 2004, she graduated from Stanford University with a degree in Classical Studies and Psychology. While in law school, Joan externed in the Chambers of the Honorable B. Lynn Winmill of the U.S. District Court for the District of Idaho and worked in the Idaho College of Law Economic Development Clinic.



Joan E. Callahan

Federal Bar Association Honors Two

Deborah A. Ferguson and J. Walter Sinclair have received the Exemplary Service Award from the Idaho Chapter of the Federal Bar Association. The award honors attorneys who have improved the quality of practice in Idaho's federal courts. They were recognized as demonstrating professionalism, collegiality, mentoring, and providing quality legal representation and presented awards at the FBA annual holiday party in Boise.

OF INTEREST

Business newspaper honors legal professionals

The Idaho Business Review recently presented its "Leaders In Law" awards to those who have demonstrated superior skills in the field, and whose leadership, both in the legal profession and in the community, has had a positive impact on Idaho.

Of the nearly 100 legal professionals nominated, dozens returned completed applications, which were then reviewed by a selection committee of their peers. The result: 21 honorees, chosen based on professional achievements, leadership, community work, and the ability to set, reach, and, in many cases, go far beyond their goals.

The honorees and their awards are:

- Erik Bolinder, *Givens Pursley LLP*, Firm Associated Partner, Boise
- Donald L. Burnett Jr., *University of Idaho*, Lifetime Achievement Award, Moscow
- James R. Dalton, *Riverbend Group*, In-House Counsel, Idaho Falls
- Matthew Gordon, *Hawley Troxell Ennis & Hawley LLP*, Up and Coming Lawyer, Boise
- Jeremiah M. Hudson, *Fisher & Hudson PLLC*, Up and Coming Lawyer, Boise
- Wyatt B. Johnson, *Angstman Johnson*, Firm Associated Partner, Boise
- Lisa McGrath, *Lisa McGrath LLC*, New Media Law Firm, Sole Practitioner, Boise
- Cynthia A. Melillo, *Cynthia A. Melillo PLLC*, Sole Practitioner, Boise
- Kerry Ellen Michaelson, *Michaelson Mediation & Law PLLC*, Up and Coming Lawyer
- Kinzo H. Mahara, *Howard Funke & Associates P.C.*, Firm Associated Associate, Coeur d'Alene
- Richard W. Mollerup, *Meuleman Mollerup LLP*, Firm Associated Partner, Boise
- Christine Neuhoff, *St. Luke's Health System*, In-House Counsel, Boise
- Kris Ormseth, *Stoel Rives LLP*, Firm Associated Partner, Boise
- Nicole Trammel Pantera, *Hawley Troxell Ennis Hawley LLP*, Firm Associated Associate, Boise
- Alison Perry, *Hawley Troxell Ennis & Hawley LLP*, Unsung Hero, Boise
- Adam J. Richins, *Idaho Power Company*, In-House Counsel, Boise
- Michael Satz, *University of Idaho College of Law*, Educator, Moscow
- Richard H. Seamon, *University of Idaho College of Law*, Educator, Moscow
- B. Newal Squyres, *Holland & Hart LLP*, Firm Associated Partner, Boise
- Cheryl Thompson, *Holland & Hart LLP*, Firm Associated Associate, Boise
- Joy M. Vega, *Jones & Swartz PLLC*, Up and Coming Lawyers, Boise



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Rexurg, ID
Brigham Young University

Monica Jean Anderson
Boise, ID
Hamline University

Jedediah Abram Bigelow
Rigby, ID
Brigham Young University

Joseph Robert Bowen
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aka P. Alexandria Lewis
aka Penny Lynn Lewis
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Boise, ID
*University of Oregon School of
Law*

**James Stewart Neal
McCubbins**
Glendale, CA
*University of Illinois College of
Law*

Sarah Katherine McKim
Coeur d'Alene, ID
*The George Washington
University Law School*

Melodie Annalise McQuade
aka Melodie Annalise Bales
Boise, ID
*Catholic University of America,
Columbus School of Law*

Barry Michael Meyers
Athol, ID
Whittier Law School

Terry A. Nelson
Huntington Beach, CA
*Western State University-College
of Law*

Jay Edward Northam
Moscow, ID
University of Idaho College of Law

Kelly Susan Marie O'Neill
Salt Lake City, UT
University of Idaho College of Law

True Pearce
New Plymouth, ID
University of Idaho College of Law

February 2014 Idaho State Bar Examination Applicants (as of December 1, 2013)

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

Nichole Rapier Rocha
Sacramento, CA
*University of California-Davis
School of Law (King Hall)*

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

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

William James Pigott
Boise, ID
*University of Washington School
of Law*

Gary L. Romel II
Lakewood, CO
*Loyola Law School, Loyola
Marymount University*

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

Anna Rose Sullivan
Missoula, MT
*University of Montana School of
Law*

Nathan Robert Pittman
Richmond, VA
William & Mary Law School

Brian Michael Rothschild
Kaysville, UT
*University of Southern California,
Gould School of Law*

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

Donald Garrett Terry
Moscow, ID
University of Idaho College of Law

Tonya Marie Potter
Boise, ID
Gonzaga University

Jason Joe Rudd
Meridian, ID
*The University of Michigan Law
School*

Nancy Somers
aka Nancy Somers Beck
Spokane, WA
*University of Detroit Mercy School
of Law*

Michelle Vos
Boise, ID
*St. Thomas University School of
Law*

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

Scott Allen Schlack
Felton, CA
Seattle University School of Law

Jessica Genevieve Sosa
Portage, IN
*Indiana University School of Law-
Bloomington*

Lyle Kenneth Weden
Jacksonville, FL
Florida Coastal School of Law

Cruz Rocha
Sacramento, CA
*University of California-Davis
School of Law (King Hall)*

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

Travis Daniel Spears
Moscow, ID
University of Idaho College of Law

William James Young
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IN MEMORIAM

Franklin H. Powell 1934 - 2013

Franklin H. Powell, Boise, passed away on September 26, 2013. Mr. Powell, a graduate of Gonzaga Law School, worked with the Idaho Attorney General's office and as a law clerk to the Idaho Supreme Court before going into private practice. One of his most notable cases was a worker's compensation case against a mining company in Kellogg which he won in the Supreme Court. Franklin was honored in 2004 with the Pro Bono Award from the Idaho Law Foundation and in 2012 with the 50 years in practice award from the Idaho State Bar.

Ismael Chavez 1938 - 2013

Ismael Chavez, 75, of Caldwell, died in December at a local care center. Services are under the care of Bowman Funeral Parlor of Garden City. No other information was available.

Robert Kenneth Reynard 1974 - 2013

Robert Kenneth Reynard of Beaumont, Texas passed away on March 13, 2013, leaving behind a loving wife and four adoring children. Rob was a tireless advocate, father, and citizen, whose good humor and integrity earned him hundreds of friends and clients. He lived for his children Payton, Ryan, Lincoln, and Sara, and his favorite activity was any activity with them.

Rob attended Southern Utah University in Cedar City, Utah, grad-



Robert Kenneth
Reynard

uating with honors and serving in numerous academic and civic leadership roles, including Student Regent for the State of Utah's State Board of Regents.

While at SUU, Rob met and fell in love with Nicole Reynard. Rob and Nicole have been married for 16 years. Rob attended law school at the University of Utah. Following graduation, he established a successful legal practice in Salt Lake City.

In 2010, along with some trusted colleagues, Rob co-founded a law firm, PADRM. Rob approached this new venture with his trademark vigor, assisting the firm as its administrative partner; unsurprisingly, the firm thrived, along with Rob's own practice.

Conley Earl Ward, Jr. 1947 - 2013

"A measure of a life is not how you live, but how you die." - Montaigne (quoted by Conley two days before he died).

Conley Ward died on October 28, 2013, from leukemia. He died in the company of his beloved wife, children, and grandchildren. He was opinionated, driven, and very bright, but more importantly honest, compassionate, and modest.

Though his accomplishments were vast and monumental his family always came first. Conley was born in Nampa, mostly raised on a farm in the Opaline area of Owyhee County and went to school in Notus, Marsing, and Vallivue.

He went to Columbia University and, according to Chris Jensen, a fellow Columbia student, he was "Idaho to the core but welcomed ev-



Conley Earl Ward, Jr.

ery challenge that New York threw at him." Pat Ford, another Idahoan at Columbia, said, "He was a great friend, the central one around whom many of the Idaho boys orbited."

He earned his law degree at the University of Colorado. There he met Gail Fleischer, his wife of 42 years. He returned to Idaho and became an attorney for the Public Utilities Commission. He was instrumental in preventing a coal-fired power plant from being built near Boise.

He became, at age 29, the youngest public utilities commissioner in the country and sought to keep hydropower strong and rates low with, in Jeff Fereday's words, "a calm intelligent use of facts that the region's political power brokers did not want to hear."

Though a staunch Democrat, Conley was not dismissive of the Republicans he opposed. He admired many Republicans who had honesty and integrity. Jerry Piper of Cambridge Telephone said, "He could step on your shoes while he straightened your tie."

Conley is survived by his wife Gail, sons Ian (Dorota) and Tyler (Dina), three grandchildren, mother Eloise Ward, brothers Dudley, Cotton, Clay, and sister Janie Ward-Engelking, plus many nephews, nieces, and cousins. He was preceded in death by his father Conley Ward, Sr. Conley's ashes, per his wishes, will be scattered at an unspecified date near Opaline.

Tim Gass 1955 - 2013

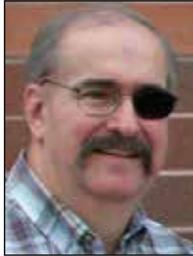
Tim Gass passed away November 30, 2013 after a battle with brain tumors. Tim was born in 1955 in Boise and attended Creighton University in Omaha, NE receiving B.S., B.A. and J.D.

Tim was an accomplished guitarist and vocalist and performed with

IN MEMORIAM

Capital Singers and Cathedral of the Rockies while in high school; and in clubs in Omaha as well as for weddings and funerals.

Tim returned to Boise and initially was employed as a prosecuting attorney for Ada County, before joining his father in private practice. Tim's law career was cut short by the effects of an earlier brain tumor and radiation therapy.



Tim Gass

He was active in Kiwanis, and church choirs. Tim was preceded in death by his father, Elbert E. Gass and is survived by his mother Mildred, his sister Mary Beth Carson, his brother Thomas, nephews Thomas and Alec Carson, and family members Chester McLemore and Greg Carson.

Orin Leroy Squire 1937 - 2012

Orin Leroy (Lee) Squire was born in 1937 in Billings, Montana. Lee grew up in Euclid, Ohio, where he graduated from Euclid High School, and then joined the U.S. Marine Corps. After completing his term with the Marines, Lee joined the U.S.

Navy, from which he retired after 22 years, as a chief warrant officer 4.

Lee met Phyllis Coon in a high school math class, and in 1958 they were married. Together they had three beautiful daughters. Lee and Phyllis were a powerful force working together through the years, in their family and their many contributions to their community, no matter where the military or life sent them. They maintained decades-long relationships with many people who remained dear to them throughout their lives together.

While he was in the military, Lee pursued a college education between deployments, and in 1980, he earned a bachelor of arts degree in history from Old Dominion University in Virginia. This degree opened the path to achieve his lifetime goal to be an attorney. After retirement from the Navy, Lee was off to law school and his next career.

Utilizing one last move provided by the military, Lee, Phyllis, and their youngest daughter, Jackye, moved to Moscow, where he was accepted to the University of Idaho College of

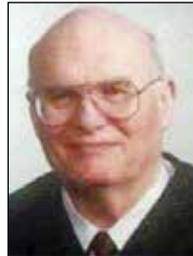
Law. He and Jackye attended college together for two years.

After obtaining his J.D. in 1985, Lee was given the opportunity to share office space with attorneys John Swayne and Steve Calhoun in Orofino, where he and Phyllis put down deep roots. Lee was an active member of the local Kiwanis Club, as well as the Marine Corps League and the VFW.

Over the course of his legal career, Lee was the deputy prosecuting attorney of Clearwater County, and served as the city attorney for Orofino, Pierce, Weippe and Kamiah. In 1999, he was selected to be the magistrate for Clearwater County in the 2nd Judicial District of Idaho. This appointment was a great honor to him, and he took being a judge very seriously.

In 2004, Lee retired due to the declining health of his beloved Phyllis. He cared for her through the years of her illness, until her death, after 50 years of marriage, in July 2008. In 2010, Lee began corresponding with Shirley Van Kirk, with whom he had attended the same high school, she being a year behind him. After a brief courtship, they were married in July 2012.

Lee is survived by his loving wife, Shirley; and his three daughters.



Orin Leroy Squire

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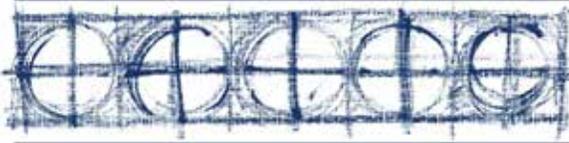
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6.1 Challenge Deadline is April 4

The 6.1 Challenge is very near and the 4th District Bar Association President, Joe Borton had this to say:

“We all know setting priorities is important. One priority that I and each one of you pledged to maintain when we began practicing law in Idaho was to give back and share our legal abilities with those of limited means. While many of you already donate your time



Joe Borton

without tracking it, please help us share your efforts by participating in the 6.1 Challenge. This friendly competition recognizes and encourages pro bono and public service in our District. By tracking and sharing your pro bono efforts you will serve as a motivator to our colleagues to follow your leadership and kindness. Please make 2014 the year that you commit to participate in the 4th District Bar’s 6.1 Challenge - you will be glad you did!”

Submit your (and/or your firm’s) qualifying pro bono hours and public service activities to the Idaho State Bar by April 4!

By tracking and sharing your pro bono efforts you will serve as a motivator to our colleagues to follow your leadership and kindness.

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



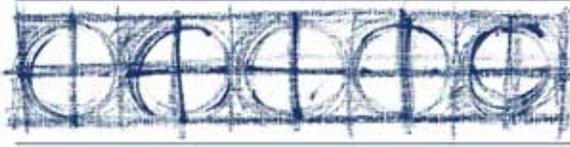
Courtroom Artist Sketch by Sierra Lile, Coeur d’ Alene High School

SAVE THE DATE

2014 Mock Trial Competition Volunteer Judges Needed

- ★ Regional Competitions: March 8 in Blackfoot, Coeur d’ Alene, or Caldwell
- ★ State Competition: March 19 to 21 in Boise

To find out more about volunteering to judge, visit the **Mock Trial Page** on the Idaho Law Foundation website at www.idaholawfoundation.org or contact Carey Shoufler at cshoufler@isb.idaho.gov or (208) 334-4500.



Statewide Legal Clinics Help Bridge the Gap in Legal Services for Those in Need

Anna Almerico, Idaho Volunteer Lawyers Program Coordinator

Sir Francis Bacon is credited with the oft-quoted adage, “knowledge is power.” Assuming Sir Francis is correct, then the term for those who face the legal system without a lawyer or knowledge of the law and its procedures must certainly be “powerless.”

Over 200,000 people live below the poverty levels in Idaho. These people are largely powerless when faced with legal issues and unable to obtain legal aid. The Idaho Volunteer Lawyers Program (IVLP) seeks to bridge this gap in legal services by offering free legal clinics through the *Community Legal Services* project in public venues across the state.

With support from the Idaho Commission on Aging, the Greater Boise Rotary Foundation and the Veterans Administration, IVLP has forged partnerships with community senior centers, homeless shelters and veterans service providers to make volunteer attorneys available to answer questions and provide legal advice. In 2013, IVLP provided over 500 hours of free legal advice and consultation through these clinics, which are making the legal system more accessible to those without resources.



In 2013, IVLP provided over 500 hours of free legal advice and consultation through these clinics, which are making the legal system more accessible to those without resources.

Feedback from clinic participants has been overwhelmingly positive. Individuals express gratitude and appreciation for the legal insights and timely suggestions for addressing their stressful legal concerns. At the same time, attorney volunteers also find the clinics fulfilling.

Anne Pieroni is a regular volunteer at the clinic for veterans. She said, “It has truly been a privilege and rewarding experience assisting the men and women of Idaho who have served in the U.S. armed forces. I highly encourage other attorneys to volunteer their time at the monthly Boise Veterans Administration clinic, so we can expand the legal services we provide and reach out to more local veterans.”

A Nampa attorney who asked to remain anonymous spoke of what he felt was “an honor” in being able to assist homeless people at the *Community Legal Services* clinic held each month at the Corpus Christi day shelter. Partner agencies also express gratitude for the clinics. The Education Director at Corpus Christi said, “Our guests are so often

marginalized by the legal system. This makes the generous offer of free legal expertise all the more appreciated.”

Clinics are typically held monthly for about two hours. Volunteer attorneys with various areas of expertise are recruited to help answer legal questions pertaining to many different areas including family and criminal law, wills, public benefits, landlord/tenant issues and many others.

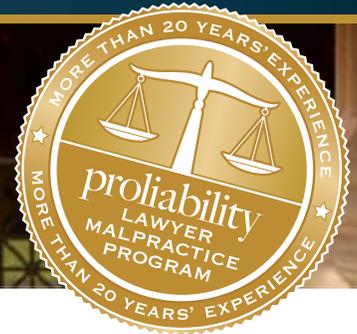
In some situations volunteers provide additional limited services or even take on full pro bono representation. The differences made by having an attorney may mean someone is able to leave an abusive relationship and maintain custody of their children or avoid an unnecessary eviction or foreclosure.

A volunteer may be able to help a person resolve an outstanding legal issue and thereby help that individual gain employment or obtain housing.

For lawyers, these results demonstrate the enormous impact the profession can have in our communities.

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Drug or alcohol abuse

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Trouble concentrating or remembering things

Loss of interest or pleasure, dropping hobbies

Guilt, feelings of hopelessness, helplessness, worthlessness, or low self-esteem

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