

The
Advocate

**Official Publication
of the Idaho State Bar
Volume 57, No. 6/7
June/July 2014**

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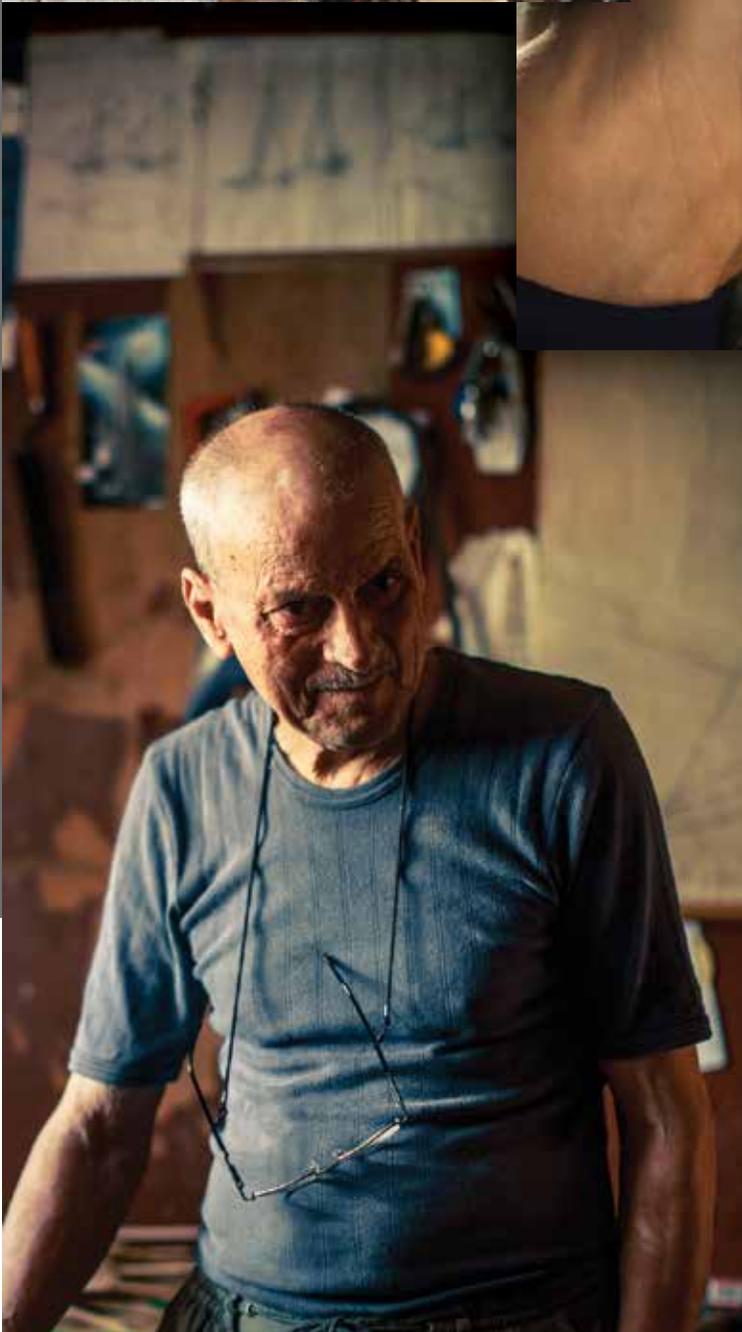
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The Advocate

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On the Cover:

Former ISB President Molly O'Leary took this photo last year in her flower garden in Boise's North End, capturing the early evening light filtered through the translucent petals of an iris, on an iPhone 4s.

Section Sponsors:

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

Editors:

Special thanks to the June/July editorial team A. Denise Penton, Tenielle Fordyce-Ruff, Anna E. Eberlin and Brian P. Kane.

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



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**For more information
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ISB/ILF Upcoming CLEs

June

June 11

Idaho Legislative Review

Sponsored by the Idaho Law Foundation

The Law Center, 525 W. Jefferson (Boise) / Statewide Webcast

9:00 a.m. (MDT)

2.0 CLE credits – **NAC**

June 26

Addressing Veteran's Legal Needs: Family and Financial

Sponsored by the Idaho Volunteer Lawyers Program

Concordia University School of Law – 501 W. Front, Boise

Noon (MDT)

1.5 CLE credits

June 27

Between a Rock and a Hard Place: Attorney Ethics and Disputes with Clients

Sponsored by the Idaho Law Foundation in partnership with Peach New Media and WebCredenza

Teleseminar / Audio Stream

11:00 a.m. (MDT)

1.0 Ethics credit

July

July 16 – 18

Idaho State Bar Annual Meeting

Shoshone Bannock Hotel and Event Center – Fort Hall, ID

Opportunity to earn 10.0 CLE credits of which more than 2.0 is Ethics

August 20

Handling Your First or Next Matter Involving the Sale or Acquisition of a Small Business

Sponsored by the Idaho Law Foundation

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

9:00 a.m. (MDT)

2.0 CLE credits **NAC**

September

September 12 – 13

Annual Advanced Estate Planning Seminar

Sun Valley Resort, 1 Sun Valley Road – Sun Valley

For lodging reservation please call (800) 786-8259

September 17

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

Sponsored by the Idaho Law Foundation

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

9:00 a.m. (MDT)

2.0 CLE credits **NAC**



August

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

**Dates, times, locations and CLE credits are subject to change. The ISB website contains current information on CLEs. If you don't have access to the Internet please call (208) 334-4500 for current information.

Attend a CLE right in your backyard

Live Seminars

Throughout the year, live seminars on a variety of legal topics are sponsored by the Idaho State Bar Practice Sections and by the Continuing Legal Education Committee of the Idaho Law Foundation. The seminars range from one hour to multi-day events. Upcoming seminar information and registration forms are posted on the ISB website at: isb.idaho.gov. To learn more contact Dayna Ferrero at (208) 334-4500 or dferrero@isb.idaho.gov. For information around the clock visit isb.fastcle.com.

Online On-Demand Seminars

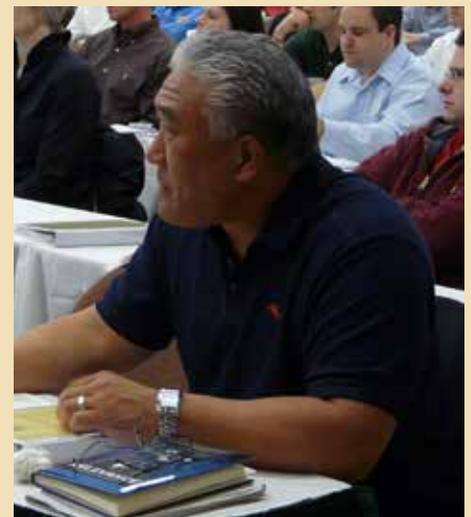
Pre-recorded seminars are available on demand through our online CLE program. You can view these seminars at your convenience. To check out the catalog or purchase a program go to isb.fastcle.com.

Webcast Seminars

Many of our one-to three-hour seminars are also available to view as a live webcast. Pre-registration is required. Watch the ISB website and other announcements for upcoming webcast seminars. To learn more contact Dayna Ferrero at (208) 334-4500 or dferrero@isb.idaho.gov. For information around the clock visit isb.fastcle.com.

Recorded Program Rentals

Pre-recorded seminars are also available for rent in DVD, VCR and audio CD formats. To visit a listing of the programs available for rent, go to isb.idaho.gov, or contact Josh Dages at (208) 334-4500 or jdages@isb.idaho.gov.





Keep Calm and Lawyer On

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

As my final President's Message to the members of the Idaho State Bar, I wanted to begin by thanking the staff at the Idaho State Bar and the fellow Commissioners with whom I served over the last three years. It has truly been an honor to serve the Bar and being a Bar Commissioner is a very rewarding experience.

I would encourage members of the Bar who have the time to run for Commissioner and serve on the Idaho State Bar Commission. While it is a commitment of time, it is well worth the effort. I should say that most months only require approximately 15 hours of your time. However, during the month of November (ISB Annual Road Show), you should plan a solid two weeks out of the office.

If such a time commitment is not available to you, I would suggest you volunteer for the various Bar committees and your local district Bar association. We, as members of the Idaho State Bar, can only be as strong as the commitment from the volunteer lawyers who assist the Bar in its governance. Applications for various Bar committees and local district Bar volunteer opportunities are now being requested. The deadline to vol-



It is the commitment to the Bar, to community service and pro-bono service that makes the experience of being a lawyer in Idaho worthwhile.

unteer for various committees of the Bar ends on July 1, 2014.

I cannot thank enough the lawyers who have assisted the Bar over the last many years for making the Idaho State Bar a quality organization and resource for the lawyers in the state of Idaho. It is through our commitment to the Idaho State Bar that the image of lawyers increases and our professionalism rises to the level that we all seek in our profession.

I recently had the opportunity to speak to the new lawyers admitted to the Idaho State Bar. I impressed upon them, as I always do when I speak to any Bar group, that this is our organization and it is only as strong as we make it. I know attending the Idaho State Bar Convention and other functions put on by the Bar is not inexpensive. There is both a time commitment and an out-of-pocket expense that must be considered any time a lawyer makes the decision to volunteer. However, for most individuals who practice law, it is the commitment to the Bar, to community service and pro-bono service that makes the experience of

being a lawyer in Idaho worthwhile. Anyone can get up in the morning, go to work and then go home. I do not believe this is what successful or satisfied lawyers do. The most successful and satisfied lawyers, of whom I am aware, are those lawyers who dedicate their time to things other than simply practicing law, as if we were a trade and not a profession.

I truly believe that as civility in our political life, and interactions between individuals continues to deteriorate in this country, it is the legal profession, more than any other, that must step up to the plate and show that people can disagree on very important and bed rock issues without accusing your opponent of being un-American, un-patriotic, a Nazi or Communist. Citizens of the United States will increasingly look to the legal profession to provide the civility and the means to resolve disputes without a total disruption and disintegration of civil life. I remember taking a course in college about the United States Supreme Court and that its primary duty was to resolve differences between citi-

zens and attempt to keep them, basically, from going at each other with torches and pitchforks. We may not agree with all of the decisions that any of our Courts make, but Courts are trying to resolve disputes in such a way that we can live together in a civil society. Whether it is abortion, civil rights, prayer in school or the Ten Commandments at the local park, the Court system does its very best to allow people to live in freedom and exercise their individual liberties without infringing on the individual liberties of others.

The fact that lawyers can resolve disputes in such a way that allows people to continue living in this country without the strife we see around the world, makes all of us very proud of our profession. I have always believed that lawyers and our legal system are the backbone of our democracy. It is interesting to read foreign commentators say the same

thing when discussing the American system of constitutional government. We can all be proud of our part in the legal process that makes our Republic possible.

Thank you for this opportunity. I look forward to seeing you at the State Bar Convention this year.

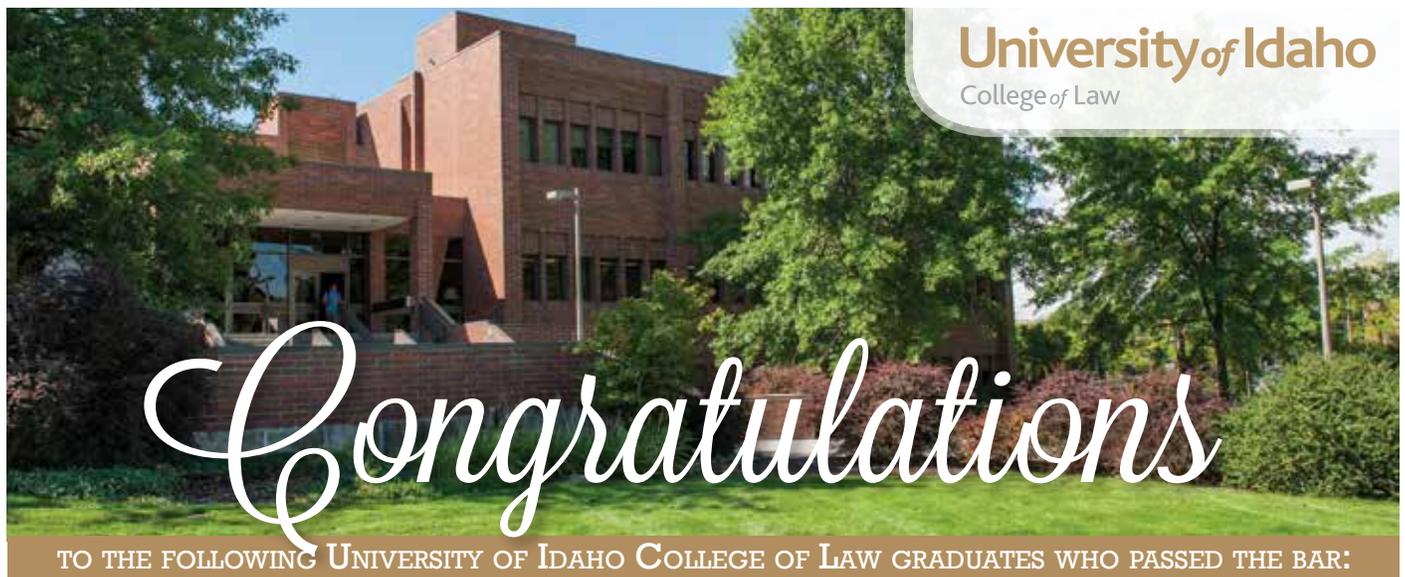
2014 Idaho State Bar Annual Meeting Community Service Project

The 2014 Idaho State Bar Annual Meeting Community Service Project has been confirmed! Annual Meeting attendees are requested to bring brand new or barely used youth sports equipment (for 5-14 years of age). The equipment will be donated to the Fort Hall Recreation Program which hosts year-long activities, tournaments and sporting events designed to promote physical fitness and wellness in the Fort Hall community. Thank you to Racine, Olson, Nye, Budge & Bailey, Chtd. for their

generous sponsorship of the project. If you are unable to attend, please send items to Shoshone-Bannock Tribes - Attn: Fort Hall Rec Center, PO Box 306, Fort Hall, ID 83203 or contact your local Bar Commissioner.

About the Author

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



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Idaho State Bar Distinguished Lawyer Award Dinner

Wednesday, July 16 at Juniper Hills Country Club – 6600 Bannock Hwy., Pocatello
President’s Reception begins at 6:00 p.m. with the dinner following at 7:00 p.m.

The Distinguished Lawyer Award is presented each year at the Idaho State Bar Annual Meeting to attorneys who have exhibited exemplary conduct, professionalism, and many years of dedicated service to the legal profession and the citizens of Idaho. In 2014 the Idaho State Bar honors three renowned Idaho lawyers:



D. Fredrick Hoopes,
Idaho Falls



John S. McGown,
Boise



**Hon. Linda Copple
Trout,** *Boise*

Idaho State Bar / Idaho Law Foundation Service Awards Luncheon

Thursday, July 17 at Shoshone-Bannock Hotel & Events Center – I-15 Exit 80 Simplot Road, Fort Hall
Service Awards Luncheon begins at Noon.

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



Erika Birch, *Boise*



Kari M. Campos,
Idaho Falls



Jamie R. Champion,*
Boise



**Hon. Russell A.
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Idaho State Bar

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Celebrating 50, 60 and 65 Years of Admission Reception begins at 5:30 p.m.

Join friends and colleagues as we honor those members of the Bar who have given decades of service to their clients and the public.

65-Year Attorneys

Admitted to the Idaho State Bar in 1949

Richard B. Eismann — Nampa
University of Oregon School of Law

60-Year Attorneys

Admitted to the Idaho State Bar in 1954

Richard J.T. Anderson — Boise
University of Idaho College of Law

William T. Goodman — Rupert
University of Idaho College of Law

Thomas J. Jones III — Boise
University of Idaho College of Law

Harry B. Turner — Twin Falls
University of Idaho College of Law

50-Year Attorneys

Admitted to the Idaho State Bar in 1964

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University of Idaho College of Law

Robert P. Brown — Lewiston
University of Idaho College of Law

Merlyn W. Clark — Boise
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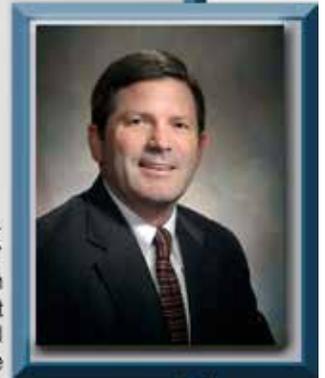
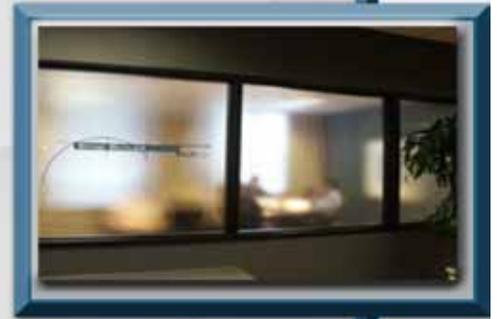
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DISCIPLINE

Jolene C. Maloney

(Withheld Suspension
and Probation)

On May 8, 2014, the Idaho Supreme Court issued a Disciplinary Order suspending Boise attorney Jolene C. Maloney from the practice of law for a period of one year with the entire one year withheld and placing her on a disciplinary probation.

The Idaho Supreme Court found that Ms. Maloney violated Idaho Rule of Professional Conduct 8.4(b) [“Commission of a criminal act that reflects adversely on a lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects”]. The Idaho Supreme Court’s Disciplinary Order followed a stipulated resolution of an Idaho State Bar disciplinary proceeding and related to the following circumstances.

In October 2012, Ms. Maloney was charged with misdemeanor driving under the influence (DUI). Ms. Maloney pled guilty to that charge and was sentenced in December 2012. In May 2013, Ms. Maloney was charged in Ada County with misdemeanor charges of DUI (excessive) and driving without privileges. In June 2013, Ms. Maloney pled guilty to the misdemeanor DUI (excessive) charge and the driving without privileges charge was dismissed. Ms. Maloney was sentenced and ordered to serve a two-year supervised proba-

tion with treatment as ordered by her probation officer. Ms. Maloney’s guilty plea to the misdemeanor DUI (excessive) charge resulted in probation violations in previous misdemeanor cases, and she was sentenced to sixty days of work release with house arrest on those charges.

In May 2013, Ms. Maloney obtained the appropriate substance abuse evaluation and began treatment. Since May 2013, Ms. Maloney has been tested for alcohol and controlled substances and has not tested positive.

The Disciplinary Order provides that Ms. Maloney’s one-year suspension is withheld subject to the terms and conditions of her probation, which runs through June 14, 2015. The terms and conditions of probation include: avoidance of any alcohol or drug-related traffic violations; a program of random urinalysis, with provision that if Ms. Maloney tests positive for alcohol or other tested substances or misses a random urinalysis test, without prior approval, the entire withheld suspension shall be immediately imposed and served; and if Ms. Maloney admits or is found to have violated any of the Idaho Rules of Professional Conduct for which a public sanction is imposed for any conduct during her period of probation, regardless whether that admission or determination occurs after the expiration of the probationary period, the entire

withheld suspension shall be imposed.

The withheld suspension does not limit Ms. Maloney’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.

Karl W. Kime
(Suspension)

On May 8, 2014, the Idaho Supreme Court issued a Disciplinary Order suspending Coeur d’Alene attorney Karl W. Kime from the practice of law for one year, retroactively to January 1, 2014.

The Idaho Supreme Court found that Mr. Kime violated the terms of his disciplinary probation, as set forth in the Court’s July 19, 2013 Disciplinary Order relating to Mr. Kime’s felony conviction for driving under the influence. Those probation terms provided that if Mr. Kime tested positive for alcohol at any time while on disciplinary probation, a one-year period of suspension would be imposed. Mr. Kime tested positive for alcohol in September and October 2013, resulting in probation violations in his underlying criminal case and the disciplinary case.

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

2014 Idaho State Bar Annual Meeting Community Service Project!

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Annual Meeting attendees are requested to bring brand new or barely used youth sports equipment (for 5-14 years of age). The equipment will be donated to the Fort Hall Recreation Program which hosts year-long activities, tournaments and sporting events designed to promote physical fitness and wellness in the Fort Hall community.



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ISB photo by Dan Black

Idaho Chief Justice Roger Burdick, left, congratulates Idaho Secretary of State Ben Ysursa, who was awarded the Fourth District's prestigious Liberty Bell Award. This year the theme is "American Democracy and the Rule of Law: Why Every Vote Matters."

4th District Law Day honors pro bono and Liberty Bell winner

BOISE - This year's 4th District Liberty Bell Award recipient is Idaho Secretary of State Ben Ysursa who accepted the award at a May 1 Law Day celebration in downtown Boise. Mr. Ysursa has worked in the Secretary of State's Office since 1974 and is currently serving his third term as the state's chief elections officer. Earlier this year he announced his retirement.

He was lauded for his impartial and fair handling of Idaho elections by Idaho Supreme Court Chief Justice Roger Burdick, who served as emcee for the Law Day Celebration. Ysursa said that the right to vote is under attack around the world and that he is proud that Idaho is one of the least restrictive states for voting, noting that residents can register and vote on Election Day.

The Law Day Celebration also included awards for the "6.1 Chal-

lenge," a friendly competition between lawyers to log the most pro bono service helping those who cannot afford an attorney. Overall, lawyers reported approximately 5,000 hours of free legal services and 2,000 hours of public service. The categories and award winners are as follows:

Large Firm: Holland & Hart, LLP, which had 100 percent participation rate from the firm's attorneys.

Corporate Law Office: Office Depot, which had both high participation and high hours.

Small Firm: Finch O'Neil Law Office, which gave tremendous amount of time especially in family law and guardianship cases.

Solo Practitioner: Kathy Railsback, an immigration attorney, trained several other volunteer attorneys and law students to assist refugees study and apply for naturalization. She also helped individuals apply for immigration benefits and disability waivers.



ISB photo by Dan Black

Kathy Railsback, winner of the Fourth District's 6.1 Challenge in the Solo Practitioner category accepts her award at the Law Day Celebration.

UI names Adams as new Dean of its College of Law

MOSCOW - The University of Idaho has appointed Mark Adams as dean of the College of Law, following a national search. Adams will begin his new role effective June 22.

"Mark Adams brings considerable administrative experience to the University of Idaho and is well prepared to lead the College of Law as it adds the second year program in Boise and continues to provide outstanding legal education opportunities on the Moscow Campus," said Katherine Aiken, interim provost and executive vice president.

Adams is thrilled to be joining the University of Idaho community and is honored to be selected as the new dean of the College of law.

"The law school is widely recognized for providing an excellent education and value to effectively

prepare students for professional careers and positions of leadership, faculty dedicated to personal teaching and influential scholarship, as well as its long-standing commitment to service," said Adams. "I look forward to working with the distinguished members of the law school and university to guide the law school in continuing to make a difference in Idaho and the lives of its students and alumni."

Adams brings a wide breadth of experience to the University of Idaho having served as vice dean at Valparaiso University Law School. His teaching and scholarship have focused on contracts, labor law and employment law.

He also served Valparaiso University Law School as associate dean for Academic Affairs, director of International Programs and a professor. During his tenure, Adams was responsible for the creation and development of programmatic initiatives including a revised curriculum, joint Juris Doctor/Masters programs and a Master of Laws for Foreign Lawyers.



Mark Adams

In addition, he developed plans that significantly increased the enrollment and academic success of under-represented minorities, established agreements with law schools in Latin America and Europe for student and faculty exchange, and implemented improved student services.

Prior to joining the faculty at Valparaiso, Adams was an attorney at the Seattle firm of Davis Wright Tremaine. Adams graduated in 1983 with a Bachelors of Arts from Williams College. He then went on to earn his Juris Doctorate in 1988 from the University of Chicago.

Adam succeeds interim dean Michael Satz who was appointed after former dean Don Burnett was named interim president of the University of Idaho in May 2013.



Access to Justice FUND run/walk

BOISE - The Access to Justice Idaho campaign is raising funds to provide support for the three main providers of free civil legal services to poor and vulnerable Idahoans: DisAbility Rights Idaho, Idaho Legal Aid Services, and Idaho Volunteer Law-

yers Program. A fun ancillary effort will get people moving on Saturday, June 14, at 10 a.m., when a FUND run/walk will benefit the Access to Justice Idaho campaign.

Run, walk, stroll, skip, jump, or crawl the 5K course. The event will start at Fort Boise park in the Military Reserve area (near the corner of Reserve Street and Mountain Cove Road). The course will be an out-and-back route along Mountain Cove Road. Prizes will be awarded to the first three finishers. Food and beverages will be available for participants at the finish line.

Bring your friends and family (small children included!) with you to participate.

Registration is \$25. Event number and t-shirt pickup will be held on Friday, June 13, 2014, from 11:00 a.m. – 2:00 p.m. at the Law Center (525 W. Jefferson).

If you have questions about the event, or if you would like to help with organization and race day logistics, please contact Maureen Ryan Braley, Director of Admissions of the Idaho State Bar, at 208-334-4500 or mryanbraley@isb.idaho.gov.



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Executive Director's Report

2014 Annual Meeting — Join Us in Fort Hall/Pocatello

Diane K. Minnich
Executive Director, Idaho State Bar

Most of you probably haven't had the opportunity to visit the new Shoshone-Bannock Hotel and Event Center in Fort Hall. This summer is your chance. Several years ago we committed to rotating the Annual Meeting to more locations in Idaho. We selected Pocatello for 2014. After researching the area, we determined that the best site in the Pocatello area to accommodate the ISB Annual Meeting was the Shoshone-Bannock Hotel on the Fort Hall Indian reservation. The hotel, which opened in 2012, owned by the Shoshone-Bannock Tribes, is Southern Idaho's newest destination. It is located off Interstate 15, 10 miles North of Pocatello

This will be the first Annual Meeting in the Pocatello area. We are looking forward to the participation from the 6th and 7th District Bar members as well as lawyers from around the state.



The Annual Meeting includes 14 CLE programs, social events, award presentations honoring lawyers and non-lawyers, and, for the second year, a community service project.

The keynote speaker is Jeffrey Rosen, President and Chief Executive Officer of the National Consti-

tution Center. A professor at George Washington University Law School, Mr. Rosen is an influential legal commentator and leading expert on the United State Supreme Court.

This year's CLE program topics are:

1. *Negotiating and Litigating Over Intellectual Property: What is This Stuff Really Worth and Can We Really Place a Value on It?* sponsored by the Intellectual Property Section.
2. *Criminal Case Law Updates: Idaho Appellate Decisions from the Past 365 Days* sponsored by the Appellate Practice Section.
3. *Client Counseling: Setting the Attorney Client Relationship Up for Success* sponsored by the Government and Public Sector Lawyers.
4. *Burden of Proof: Not Just a Catch Phrase* sponsored by the Idaho Volunteer Lawyers Program.
5. *Practical and Ethical Considerations on the Use of Cloud Computing* sponsored by the Idaho Law Foundation.



A professor at George Washington University Law School, Mr. Rosen is an influential legal commentator and leading expert on the United State Supreme Court.

6. *Do We Have A Living Constitution, A Dead Constitution, or A Zombie Constitution?* sponsored by the University of Idaho College of Law.
7. *Simple is the New Black: Legal Writing's New Look and How to Make It Work For You* sponsored by Concordia University School of Law.
8. *Merchant Accounts: Managing Clients' Funds Effectively and Ethically* sponsored by the Idaho Law Foundation.

9. *Advancing Justice: Model Time Standards* sponsored by the Litigation Section.

10. *Employment and Labor Law Update* sponsored by the Employment and Labor Law Section.

11. *At the Intersection of the Indian Child Welfare Act and Idaho State Law* sponsored by the Family Law Section.

12. *A Fate Worse than Death: What Happens When a Lawyer Becomes Disabled or Dies Without a Plan* sponsored by the Diversity Section.

13. *Lessons from the Masters* sponsored by the Idaho Law Foundation.

14. *Members of the Federal Judiciary: Eastern Idaho Roots to the United States' Courts* sponsored by the Idaho Law Foundation.

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

- 6th District Bar Association
- 7th District Bar Association
- ABA Retirement Fund Program
- ALPS
- Attorney Pro
- BizPrint
- Casemaker
- Clio
- Eide Bailly LLP
- Fort Hall Casino
- Idaho Trust Bank
- LawPay
- Moreton and Company
- Racine Olson Nye Budge & Bailey
- University of Idaho College of Law

The Annual Meeting includes 14 CLE programs, social events, award presentations honoring lawyers and non-lawyers, and, for the second year, a community service project.

The Annual Meeting program brochure was posted on the ISB website and mailed to ISB members in May. For more information about the conference, see pages 84 - 85 of this issue of *The Advocate*, visit the ISB website; www.idaho.gov/isb or call (208)334-4500.

We hope you to see you in Fort Hall this summer.

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Shawna D. Peterson

Ms. Peterson started with Yturri Rose in 2004 and has rejoined the firm after a three year sabbatical during which she worked in the Saint Alphonsus Health System. Ms. Peterson's practice includes estate and business succession planning and business litigation. She is a graduate of Gonzaga University and the Northwestern School of Law at Lewis & Clark College.



Ryan H. Holden

Prior to joining Yturri Rose LLP, Mr. Holden practiced law in Boise, Idaho. He works with clients in the firm's business department, with a focus on estate planning and administration, business transactions and tax related matters. He received his JD from Gonzaga University in 2007 and his LLM in federal taxation from the University of Washington in 2008.



R. Jeremy Hindman

Mr. Hindman was born and raised in Baker City, Oregon. He graduated from Brigham Young University in 2010 and The J Ruben Clark Law School at BYU in 2013. His practice is focused on civil litigation.

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Welcome from the Business & Corporate Law Section

D. Michelle Gustavson

The Business & Corporate Law Section is pleased to sponsor this edition of *The Advocate*. Before jumping into the articles, I wanted to take this opportunity to tell you about the Section. For the second year in a row, we are the largest practice section of the Idaho State Bar. Our focus this year has been on membership outreach and adding value to our members through monthly CLEs, a drafting series, professional development training, and the Annual CLE.

During monthly meetings, local experts presented on topics identified by our members, including the proposed Idaho Uniform Business Organizations Code, current trends in early-stage financing, legal opinions, government contracts, asset purchases, and bankruptcy matters.

Based on our members' request for practical, hands-on contract drafting courses, we developed a new three-part drafting series. The inaugural series, entitled *Life of a Deal – Asset Purchases*, was held each month from January through March. The presenters walked our members through an asset purchase from inception to closing, focusing on due diligence, options for struc-

turing M&A transactions, and important provisions in an asset purchase agreement. Participants left with a comprehensive form of asset purchase agreement annotated by Brian Buckham of IDACORP and Ryan Poulson of Micron, for reference in future deals. At its height, the inaugural series brought in 84 in-person participants. The informative and engaging presentations given by James Alderman, Brian Buckham, Bret Busacker, Brian Hansen, Vid Moham-Ram, Ryan Poulson, and Claire Rossten made the series a success.

In addition, the Section launched a Professional Development Series, with the goal of assisting junior to mid-level transactional attorneys hone their practical and substantive skills in a collegial environment. The inaugural class of 14 participants consists of solo practitioners, law firm associates, and in-house attorneys, each selected through a for-

The Section launched a Professional Development Series, with the goal of assisting junior to mid-level transactional attorneys hone their practical and substantive skills in a collegial environment.

mal application process. The participants attend quarterly roundtable sessions led by local attorneys who have excelled in certain areas of professional development. The roundtable topics to date have been innovative methods in transactional practice and marketing do's and don'ts, and the remaining two roundtables will focus on substantive areas of



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law selected by the participants. The Section thanks Will Wardwell, Matt Purcell, and Brian Buckham for their presentations, and Wendy Gerwick Couture for her strong leadership in developing and organizing the Professional Development Series.

Finally, the Section was pleased to present Charles Fox, a former partner with Skadden Arps and a leading provider of practical, hands-on, interactive trainings for transactional attorneys, as the keynote speaker during its Annual CLE in May. Mr. Fox presented on complex deal drafting, best practices in drafting financial provisions, contracting war stories, and deal ethics. Mr. Fox also led a separate advanced negotiation training, which was offered to all members of the ISB. The Annual CLE once again brought in over 100 participants. A special thanks to Brian Hansen, Brittany Pfister, Denise Penton, and Ryan Poulson for their outstanding efforts in organizing the Annual CLE.

As a result of these efforts and the hard work and dedication of our officers, Governing Council, membership, and ISB staff, the Section will be presented the 2014 Practice Section of the Year Award during the ISB's Annual Meeting in July. The Section is truly honored to be only the fourth recipient of this award.

In this issue of *The Advocate*, the authors address a number of relevant topics for business and corporate law attorneys. First, Paul McFarlane provides a checklist of key issues to discuss when advising a client on starting a new business. Second, Brandon Crane discusses the benefits and traps of equity compensation. Third, Matt Christensen reviews recent bankruptcy decisions that hold the Chapter 7 Trustee can act as a new business partner (or



even the owner of the business) in certain situations when a debtor files Chapter 7 bankruptcy. Fourth, John Hughes highlights hot topics and important considerations for retirement plan fiduciaries. Fifth, Jason Prince discusses global anti-corruption compliance programs and the challenge of facilitating payments. We hope that you find this issue of *The Advocate* as interesting and informative as we do.

If business or corporate law matters are part of your practice or of interest to you, then I encourage you to attend one of our monthly Section meetings. They are held in Boise (with satellite locations in Coeur d'Alene and Idaho Falls) on the second Wednesday of each month from September through April, and we always offer at least a ½ hour CLE. The Section offers the Annual CLE each May and takes a break from June through August to enjoy the summer – we hope you enjoy yours too!

About the Author

D. Michelle Gustavson completed her term as Chair of the Busi-

If business or corporate law matters are part of your practice or of interest to you, then I encourage you to attend one of our monthly Section meetings.

ness & Corporate Law Section in May, and continues to serve on the Section's Governing Council. Michelle is Assistant General Counsel for J. R. Simplot Company, a global agribusiness corporation, and provides primary legal support to the Treasury Department. Prior to joining J. R. Simplot Company, Michelle was an associate at Hawley Troxell Ennis & Hawley LLP, where her practice was focused on banking and real estate.



Helping a New Small Business Fly

Paul D. McFarlane

How many times have you picked up the phone and listened as a prospective client proudly and excitedly bursts out “I’m starting my own small business!” Starting a new business is an exciting venture for your client, often the culmination of a lifelong dream. The decision to start a business requires many important decisions that can have lasting impact on the success or failure of the business.

Your client may need advice on a number of issues — the naming the business, assuming a certain type of business entity, clarifying the rights and responsibilities of any co-founders, complying with employment laws and policies, drafting or revising form contracts, and protecting intellectual property.

It is our job to keep the client’s feet firmly on the earth and help the client make sound decisions that ensure the business will be a success. This practical article is a checklist of some of the specific issues you should be prepared to discuss if and when your new client calls with the big news — and wants your advice on starting that new business.

Naming the business

One of the first decisions the client must make is what to name the business. While your client’s heart may be set on “Apple” or “Microsoft,” it is important that you advise the client to choose a name that will avoid trademark or domain name problems. Depending on the type of entity chosen, advise them to search business entity names with the Secretary of State.¹

Clients can perform domain name searches at GoDaddy.com or other domain name registrars. While other domain name extensions are becoming available, a .com extension that

It is our job to keep the client’s feet firmly on the earth and help the client make sound decisions that ensure the business will be a success.

is already taken could be a red flag. Also have clients conduct a trademark search at the United States Patent and Trademark Office.²

Choice of entity

Clients must also decide what type of entity to form. Each client must consider different factors when choosing a business entity, including personal liability, tax implications, needs for a particular management structure, ease of transferring ownership, ease of withdrawing investment, and ability to conduct business in more than one state or out of the country. In order to properly evaluate the tax implications of each choice, your client should also consult their accountant.

Here are highlights of the characteristics of the more common choices for business entity.

Sole Proprietorship: Sole proprietorships do not require legal documents or filings other than state or local business permits, but also do not protect your client from personal liability to creditors or adverse parties. Also, if your client needs additional capital, it may be necessary to form a partnership or an entity such as an LLC or a corporation.

Partnership: In a general partnership, each partner is liable for the debts of the business. Partnerships are taxed to the partners pro rata. Your client and her partners will need

a partnership agreement or the Idaho Uniform Partnership Act will apply.³ A Limited Partnership may have one or more general partnerships and one or more limited partners, and the limited partner’s liability is generally limited to what they have invested in the partnership.

Limited Liability Partnership: LLP’s protect general partners from personal liability. A partner will be shielded from the acts of the partnership or other partners in the absence of the partner’s own negligence, misconduct or wrongful act.⁴

Limited Liability Company: LLC’s offer the protection of personal liability but can be taxed in a variety of ways. LLC’s require an initial filing with the Secretary of State and annual reports. An Employer Identification Number is also required to organize an LLC. Certain professional service providers may form Professional Limited Liability Companies.⁵

Management can be by a manager or by members, under an operating agreement. It may be extremely important for your client to have an operating agreement, even though one is not required for organizing the LLC. An operating agreement can set forth important terms including the percentage of ownership, share of profits and losses, rules of management, and rights and responsibilities of the owners. Moreover, an operating agree-

ment for a sole owner can protect against personal liability by showing that the business was properly operated as an LLC, rather than a sole proprietorship.

Corporation: Corporations must have a board of directors, must maintain specific records, and must hold annual meetings. Corporations are subject to double taxation unless they are S Corporations, which are subject to specific IRS regulations.

Co-founders

If your client is founding the business with others, a written agreement between the founders can be important and can have lasting consequences. While many of the same issues resolved in a “co-founder agreement” may be resolved in a partnership or operating agreement, in some cases preparing a preliminary agreement before forming a business entity is warranted.

A co-founder agreement may address such issues as who gets what percentage of the company; the roles/responsibilities of the founders, including time commitment to the business; salaries; authority for day to day decisions; removal from management; eventual sale of the business; and the goal and vision of the business. Remember, though, if you represent your client in negotiating an agreement with a co-founder, you may not be able to represent the entity due to a conflict of interest.

Employment issues

If your client’s new business will employ others — either employees or independent contractors — your client will need employment advice. Your client may not intend to have employees, but independent contractors may be considered employees depending on the facts.

Misclassifying an employee as an independent contractor can expose

your client to liabilities and penalties, including penalties for unemployment taxes. Factors to consider when classifying workers include the right to control the work, the method of payment, the equipment provided, and the right to terminate the relationship.⁶

In Idaho, unless the employer and employee enter into a contract that specifies a term of employment, all employees are employees at will. As such, an employee may be terminated at any time for any reason, or no reason, as long as the discharge is not otherwise unlawful. If your client intends that any employees are to be employees at will, it is important to specify that in any written communication to the employees, such as job offers.

Your client’s business may also need employment policies and an employee manual, setting forth company policies and expectations. Unless employees are bound by employment contracts, remember to include a disclaimer that neither employment policies nor the employee manual create or are intended to create a promise or representation of continued employment that would carve out an exception to the employment at will doctrine.

Finally, your client may need initial and continuing advice concerning a myriad of employment laws, including I-9 compliance (verification of identify); the Fair Labor Standards Act (FLSA); the Family and Medical

Leave Act (FMLA); discrimination laws including Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act (ADEA), and the Americans with Disabilities Act (ADA).

While an employment lawyer may be better suited to advise your client in depth as to the effect of these laws on the new business, you should be able to recognize how these laws may impact your client.

Contracts

Your client’s new business may need basic or more complex agreements to conduct business with its customers and suppliers. You cannot always rely on simple form contracts. You will only be able to see the need (or lack of need) for the agreements and terms your client truly needs by having an understanding of your client’s business.

It cannot be overstated: In order to prepare necessary and appropriate agreements you must understand not only what your client will be doing, but how your client will be doing it.

Intellectual property

In the event your client has developed a product or service that is unique, you may need to refer your client to a patent attorney to take appropriate steps to protect your client’s intellectual property. Likewise, it is important to ensure that your client’s

If your client intends that any employees are to be employees at will, it is important to specify that in any written communication to the employees, such as job offers.

new product or service does not infringe on another party's intellectual property.

Conclusion

Starting a new business can be an exciting and stressful time for clients. As attorneys who provide legal advice to businesses, we must keep the client's feet firmly on the earth and help the client make sound decisions that ensure the business will be a success. We must listen to our client and understand not only what functions the business will perform, but how our client will accomplish those functions. Only then can we provide the best advice possible to help our new client's business soar.

Endnotes

1. <http://www.accessidaho.org/public/sos/corp/search.html?ScriptForm.startstep=crit>
2. <http://www.uspto.gov/trademarks/process/search/>

In order to prepare necessary and appropriate agreements you must understand not only what your client will be doing, but how your client will be doing it.

3. Idaho Code § 53-3-101 *et seq.*
4. Idaho Code § 53-3-1001, *et seq.*
5. Idaho Code § 30-6-Part 1, *et seq.*
6. See, e.g., Idaho Code § 72-102(17); *Excell Constr., Inc., v. Idaho Dep't of Commerce and Labor*, 145 Idaho 783, 186 P.3d 639 (2008).

About the Author

Paul D. McFarlane recently founded *McFarlane Law Offices, PLLC* in Boise, where his practice

includes businesses, employment law, and civil litigation. Paul graduated cum laude from the Tulane University School of Law where he was Editor-in-Chief of the Tulane Maritime Law Journal. He is also licensed in Oregon, Washington and Alaska. He formerly practiced with Moffatt Thomas.



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Equity Compensation: Know Your Options

Brandon P. Crane

To paraphrase the Wu-Tang Clan: cash rules everything around us.¹ This is especially true in the context of a start-up company. A start-up company will often find itself in the unenviable position of requiring a lot of money to progress to the next level and having very little money to do so. The formula for success of a start-up is simply expressed as: idea + funding + talent = success. In practice, however, this equation proves difficult to balance and requires further calculations before one can “solve for success.”

One of the biggest questions a start-up will face is how to attract talented employees and service providers when the company is cash-strapped. One potential solution: equity compensation. Most start-ups and lawyers are aware of the concept of equity compensation, but few fully understand the implications. It’s an area of corporate law that touches upon governance, tax, securities, and employment among other legal issues. The purpose of this article is to aid counsel in navigating this very common but highly complex business tool.

Equity compensation is non-cash compensation that represents an ownership stake in a company. Most early-stage companies do not have enough cash on hand to pay salaries to their employees, so equity compensation serves as a place-holder for future monetary value. Take Facebook, for example. Facebook’s earliest employees were paid in shares of stock (and six-packs of beer). As Facebook’s value increased over time, these shares became worth millions. So while at the time these em-

As with many issues facing a start-up, you’ll need to walk that fine, cost-effective line between over-lawyering and minimizing the company’s risk.



ployees could not pay their rent in shares, the value of their shares now more than covers their mortgages. Equity compensation not only saves the company money on salaries, it aligns the employees’ interests with the company’s: to grow the company and increase its value.

Setting the stage

By its very nature, equity is an abstract concept. To avoid further confusion, I will put the theories into practice using a hypothetical scenario. Your client, John, has started a company: JohnCo, an Idaho corporation with the goal of building software that will replace corporate lawyers. John wants to compensate his employees with stock and needs your help. Despite this dreadful prospect, you have agreed to doom your entire profession and help John with JohnCo’s equity compensation.

Curbing the enthusiasm - knowing the risks

Equity compensation is a mine field - you will have no idea an issue exists until you step on it, and by then it is too late. At this point, many issues cannot be fixed and those that can be are expensive and time-consuming. Thus, equity plans

require a great deal of forward thinking and educated guessing about the direction of the company.

Most founders don’t want to waste the time or the money on a lawyer to do this right, but they will thank you in the end. As with many issues facing a start-up, you’ll need to walk that fine, cost-effective line between over-lawyering and minimizing the company’s risk. Start-ups are lovingly referred to as “young companies,” and they can certainly act that way. They will test your boundaries and will hate to hear the word “no.” For many lawyers, the most difficult challenge in establishing equity compensation is getting the client to understand the formalities and the risks associated with not following the generally accepted course of conduct. But it is your duty to balance the excitement and improvisation of start-up culture with the long-term goal of creating a clean, issue-free company. Your client will love you when you sign off on their granting stock options without the “hassle” of getting board approval. But they will later question your judgment when an acquirer comes along and asks why the option grant was not properly approved.

So, John wants to know why he can’t just grant stock or stock options to people. JohnCo has 1 mil-

lion authorized shares, and John is currently the sole shareholder with 1,000 shares of JohnCo stock issued and outstanding. John also happens to be the sole director, so why can't he pass out stock like candy to these loyal early-stage employees? After all, there's enough to go around.

Too often we see founders taking this approach to equity compensation. Admittedly, it's admirable. John values loyalty and appreciates that his employees are sacrificing higher wages with other jobs because they believe in John's idea (a world without corporate lawyers). But while you may sympathize with John's intentions, this is your chance to explain to John the typical issues and risks that arise with equity compensation. Of course, in this situation, pointing out all the problems will likely further motivate John to make corporate lawyers obsolete.

Risk #1: Devaluing JohnCo stock

The economic value of a share of stock is primarily a function of (a) the total value of the company, and (b) the total number of shares of stock that are outstanding. The greater the value of JohnCo and the fewer outstanding JohnCo shares, the greater value of each individual share. So let's say JohnCo is worth \$100,000 and has 1,000 outstanding shares. Each JohnCo share is worth \$100. Now, let's say JohnCo has given out an additional 1,000 shares to its employees (so the total issued and outstanding is now 200,000 shares). Each JohnCo share is then worth \$50. This decrease in value is not necessarily a bad thing. But if JohnCo later issues stock to raise capital, the per share value will determine how many shares of JohnCo stock will need to be issued in exchange for the capital. So let's say JohnCo

has found an investor (Sam) willing to put in \$100,000.00. In scenario 1 (\$100/share), JohnCo will have to issue Sam 1,000 shares. In scenario 2 (\$50/share), JohnCo will have to issue Sam 2,000 shares. In scenario 2, Sam would now own more of JohnCo than John. So it's important to remember that share value could affect John's ownership percentage in JohnCo.

The more shares that JohnCo issues, the lower the per share value. The lower the per share value, the higher the percentage dilution for each shareholder during a financing event. Now, the risk of percentage dilution should not cause JohnCo to act miserly with its employees. You don't want to advocate a Dickensian compensation structure. Instead, the best practice is to set aside an "equity pool." An equity pool is a certain percentage of JohnCo stock that is used for employee compensation only. So, for example, if JohnCo has 1,000,000 authorized shares of common stock, JohnCo might set aside 150,000 shares as its equity pool. This means that JohnCo will not issue more than 150,000 shares to employees. Not only does this curb percentage dilution, but it is also something most venture capitalists will require during a funding round. As a general rule of thumb, roughly 15% to 20% of JohnCo com-

mon stock should be set aside for the equity pool. As explained below, this is one of the few times in which percentages should be used when discussing equity compensation.

Risk #2: The promise of a percentage

Unfortunately, many founders treat equity compensation less like salary and more like an ownership stake. To be fair, it does represent ownership. However, this should not be the driving force behind the equity grant. Each share has some inherent value that the employee or service provider is receiving in lieu of cash, and each equity grant should be treated as such.

Let's reluctantly assume that John comes to you and says, "I promised Jane 2% of the company as part of her compensation package." Prepare yourself to yet again add fire to John's crusade against corporate lawyers by asking a bunch of "annoying" questions. It is nice of John to make Jane a 2% owner of JohnCo. But what does this mean for Jane over time? If JohnCo issues more shares to raise capital, every current shareholder's ownership percentage, including Jane's, will decrease. Is JohnCo required to provide her more shares in order to maintain her 2% ownership? Must JohnCo do this upon every issuance of stock?

Equity compensation not only saves the company money on salaries, it aligns the employees' interests with the company's: to grow the company and increase its value.

Percentages are 100% uncertain. The problem is that the parties often fail to clearly state (a) when the percentage is measured, and (b) whether the parties intend for the percentage to remain fixed over time. The best way to avoid this is to always have JohnCo discuss company ownership in terms of the number of shares and not as a percentage.

If John brings you an offer letter with a percentage rather than a fixed number, you should arrange a conference between John, Jane, and yourself as soon as possible to nail down the intent of the parties. It might make for an awkward few weeks between John and Jane, but it is better than explaining to investors that Jane will be issued stock in exchange for nothing so as to keep her 2% ownership.

Practice Tips: Hooray for 409A, yippee for 83(b)

Like most non-tax lawyers, my eyes glaze over at the mention of tax law and my comprehension skills become borderline incompetent. I've learned to survive this mental lapse with the auto-generated response: "You should consult a tax attorney." However, there are two important tax issues uniquely tied to equity compensation that any lawyer representing a start-up must learn to embrace: 409A valuation and 83(b) elections. If you can explain these two issues, you are doing JohnCo a huge favor.

409A: Everything is worth something

Section 409A of the Internal Revenue Code requires all equity awards to be issued at fair market value². This does not mean each employee needs to pay for his equity, it simply requires that both parties to the

transaction recognize that the shares have an objective inherent value. In the pre-409A days, a company could make its own determination as to the fair market value of the company's stock. These days, companies are liable for excessive penalties if their fair market valuation is wrong.

Section 409A provides a safe harbor to a company by assuming its valuation is correct if the company uses a professional valuation firm to determine the fair market value. If the company does not use a professional valuation firm and the IRS

Your best practice is to make sure that each equity award notice contains a blank for the fair market value per share as of the grant date. There is always a fair market value per share, even if it's a fraction of a penny.

comes calling, the company will bear the burden of proving the accuracy of its valuation. This does not mean that every company has to shell out thousands of dollars to hire a professional valuation firm. But it is important that each company fairly and accurately value its stock.

Bear in mind that an equity grant is taxable income. It is typically taxed at ordinary income tax rates to the extent the value of the stock when received exceeds the amount paid for the stock. "But," John might reason, "when we first started I gave Jane a bunch of stock for free, so the

value was \$0." In reality, this is the equivalent of unreported income and puts both Jane and JohnCo at risk. Your best practice is to make sure that each equity award notice contains a blank for the fair market value per share as of the grant date. There is always a fair market value per share, even if it's a fraction of a penny. If "\$0" is written next to this blank, you are potentially looking at serious 409A issues.

83(b) Elections: Pay taxes today for equity tomorrow

As stated above, the receipt of stock is considered income and normally taxed at ordinary income tax rates. The operative word in that previous sentence is "receipt," which can be an amorphous concept when it comes to equity compensation. If an equity award is subject to a substantial risk of forfeiture and set to vest at a later date, the taxable event is delayed until the risk of forfeiture lapses (*i.e.*, when full rights over the stock are received). In these cases, the shareholder will recognize taxable income on each vesting date equal to the amount the fair market value of the stock as of the vesting date exceeds the purchase price paid.

So if JohnCo grants a restricted stock award to Jane for a purchase price of \$0 that is subject to time-based vesting over a period of four years, Jane will recognize taxable income upon each vest equal to the fair market value of the portion of fully vested shares. To further illustrate, if after 100 shares fully vest to Jane after a year, and the fair market value per share is \$1, Jane has taxable income of \$100 (Jane's purchase price was \$0). If JohnCo's value goes up each year (and with an idea like eliminating corporate lawyers, why wouldn't it?), then Jane's taxable in-

come will increase upon each vesting. Jane might find herself actually rooting for JohnCo's value to go down so as to avoid the increased tax liability.

As a way of avoiding any increased tax liability, Jane has the option of timely filing an 83(b) election with the IRS³. An 83(b) election means that Jane is electing to pay tax at the time the stock is granted in an amount equal to the amount by which fair market value of the stock at the time of the grant (rather than at the time of vesting) exceeds the purchase price. So, rather than watching her tax liability go up each year as the company grows, Jane will pay taxes on the fair market value per share at the time of grant. JohnCo will also prefer the 83(b) election, as this eliminates the risk of JohnCo owing withholding and payroll taxes in the future of an unknown amount as the shares vest.

The 83(b) election must be made within 30 days of the grant (or, in the case of an option, within 30 days of the exercise date). It is good practice to always make sure your client includes an 83(b) election form with each equity award subject to forfeiture. This way, there won't be a mad scramble a month later to file the 83(b) election.

Risk #4: Losing security over JohnCo's securities

Always, always keep in mind that equity for services is still a security, and as such it must either be registered or exempt from registration. For a start-up, anything that potentially requires the registration of its stock will effectively bankrupt the company. It's important for a start-up to not only ensure its grant of equity compensation is exempt from registration, but that the employee

When working with a client's equity compensation, formality is king.

The plan must be approved by the board and adopted by the shareholders, each award must be in writing and approved by the plan administrator (typically the board) prior to the grant date, etc., etc...

is not doing anything with the stock that could cause the company to lose out on its safe harbor exemptions.

Most start-ups rely on Rule 701 of the Code of Federal Regulations under the Securities Act of 1933 as their principal exemption when offering equity compensation. Rule 701 allows a company to offer equity to its employees under a written benefits plan if, during any consecutive 12-month period, the aggregate sales price or amount of equity sold does not exceed the greater of: (i) \$1 million; (ii) 15% of the total assets of the company measured at the most recent balance sheet; or (iii) 15% of the outstanding amount of the class of equity being offered measures at the most recent balance sheet.

While you are not required to be a securities lawyer to handle equity compensation issues, it is important that you (and your client) understand that you are dealing in securities and these securities must be treated with care. This is why most equity incentive plans include rights of first refusal and repurchase rights that restrict the employee-shareholder from transferring shares.

Equity compensation is a black tie affair

When working with a client's equity compensation, formality is king. The plan must be approved by the

board and adopted by the shareholders, each award must be in writing and approved by the plan administrator (typically the board) prior to the grant date, etc., etc... In most start-ups, no one cries foul over informally approved grants during operation of the company. Instead, any failure to abide by these formalities will rear its ugly head during a financing or acquisition event. No lawyer wants to explain to her client that the purchase price for the company has been reduced because of potential 409A issues or because a grant wasn't properly approved. And no founder wants to go back to her board to ask them to retroactively approve various stock grants or even an equity plan itself. Not only does this look unprofessional, the board may question whom you really represent: the founder of the company (spoiler: you represent the company). You reduce these risks by having a plan and sticking to it.

When I raise these equity compensation issues with start-ups, most look at me as if I'm trying to scare them into paying for unnecessary legal work. Start-ups are reluctant to pay the costs associated with creating and maintaining a solid equity compensation plan. But what you don't handle at the beginning will come back to haunt you in the end.

When Google wants to buy JohnCo for millions and Jane, the ex-employee of JohnCo, comes back 4 years after she left JohnCo seeking her 2% ownership, the company will wish they had handled these issues at the beginning. It is not uncommon for equity compensation issues to cost a company millions of dollars in a sale (and thousands in legal fees).

As the lawyer for the start-up, your best plan is to have a standard equity compensation packet complete with a plan, form board consents to award grants, form award notices, and an 83(b) election form. This will allow you to maintain the formalities that will reduce your client's risk and to be more cost-effective by reducing work associated with equity awards to simply filling out the necessary forms. Start-ups need a legal guide, not a legal yes-man. They will appreciate your professional approach

and the fact you make them conduct themselves "like a real company." And who knows, maybe your value-add to JohnCo's equity compensation plan will be enough to convince John that corporate lawyers aren't such a bad thing.

Endnotes

1. WU-TANG CLAN, *C.R.E.A.M.*, on ENTER THE WU-TANG (36 CHAMBERS) (Loud Records 1994)
2. 26 U.S.C.A. § 409A
3. See 26 U.S.C.A. § 83(b)

About the Author

Brandon P. Crane is an attorney with Perkins Coie LLP and a member of the firm's business practice focusing on emerging companies and venture capital. He has experience representing corporate clients in mergers and acquisitions, capital formation, entity selec-

As the lawyer for the start-up, your best plan is to have a standard equity compensation packet complete with a plan, form board consents to award grants, form award notices, and an 83(b) election form.

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“Is the Trustee Really my New Business Partner?!”

Chapter 7 Bankruptcy Trustees and Membership/Shareholder Interests

Matthew T. Christensen

Who has the authority to direct the activities of a company or corporation after a Chapter 7 bankruptcy estate is created? The member/debtor might believe that he retains the right to continue to operate or wind-up the business and make distributions. The Chapter 7 Trustee, however, has significant rights to “interfere.” This article examines how the bankruptcy court in Idaho is dealing with these issues by analyzing a line of court cases to determine that the Chapter 7 Trustee could act as a new business partner (or even the owner of the business) when a debtor files a Chapter 7 bankruptcy.

The history of *Gugino v. NELMAP, LLC (In re Wallace)*

Leonard Wallace wanted ownership of a cattle-product patent. He knew of a company, owned by Norman and Rodney Hayes, which owned the patent, and Wallace invested a significant sum of money in a membership interest in that company. Later, Wallace alleged that Hayes had embezzled money from the company, and Wallace decided to sue Hayes to try and recover some of the funds. Hayes counterclaimed by arguing that Wallace himself had infringed on the patent. An arbitrator awarded Hayes damages in excess of \$2.5 million.

Wallace appealed this arbitration award, and spent the next few years in various Montana and Idaho courts litigating the ownership of the patent and the arbitration award against him. While the litiga-

As a significant portion of the Wallaces’ valuable assets were transferred into this web of companies, Gugino asserted the bankruptcy estate’s interest in those companies.

tion progressed, Wallace decided to protect his other assets and created a complicated web of corporations, limited liability companies, and revocable trusts to own his other real estate and valuable assets.

Ultimately, Wallace (together with his wife) filed bankruptcy in the District of Idaho, and their case ended up in a Chapter 7 proceeding, with Jeremy J. Gugino appointed as their Chapter 7 Bankruptcy Trustee.¹ As a significant portion of the Wallaces’ valuable assets were transferred into this web of companies, Gugino asserted the bankruptcy estate’s interest in those companies. Wallace questioned, however, the actual interest that the estate held in the companies. To determine the estate’s interest in the companies, the bankruptcy court turned to a line of bankruptcy cases, largely from other districts, which had previously determined the extent of a bankruptcy estate’s interest in companies owned by debtors when they file bankruptcy petitions.

Background cases

*In re Albright*²

Ashley Albright was the sole member and manager of Western

Blue Sky, LLC, on the day she filed a Chapter 7 bankruptcy petition in the District of Colorado. Under Colorado law, a membership interest in a limited liability company is personal property, and therefore her Western Blue Sky interest became property of her bankruptcy estate.³ Western Blue Sky owned certain unencumbered real property. The Chapter 7 Trustee sought to manage Albright’s interest in Western Blue Sky by selling the real property and dissolving the company.

Albright argued that as a representative of her creditors, the Chapter 7 Trustee had only the same tools a creditor would have — a charging order against distributions made from the company but not management of the company itself. The bankruptcy court ruled, however, that, because the Western Blue Sky interest was personal property, ownership of that interest transferred to the bankruptcy estate automatically upon the filing of the bankruptcy petition.

Further, the court ruled that a charging order was to protect other members of a limited liability company from being forced to deal with new members. Because there were

no other members of Western Blue Sky, a charging order would serve no purpose. As the sole member of the company, the bankruptcy trustee was the only individual with the authority to liquidate assets and dissolve the company and had full authority to take those steps.

*In re A-Z Electronics, LLC*⁴

Ron Ryan and his wife were 100% owners of A-Z Electronics, LLC, when they filed a Chapter 7 bankruptcy petition on November 21, 2003. While their individual Chapter 7 case was still open, Ryan caused A-Z Electronics, LLC, to file its own Chapter 11 bankruptcy petition. Ryan signed all documents related to the Chapter 11 petition. The United States Trustee moved to dismiss the Chapter 11 case, arguing that the only individual with the ability to authorize the filing of the Chapter 11 petition was the Chapter 7 Trustee, Lois Murphy, and that she had not authorized the filing.⁵ Citing *Albright*, Judge Terry L. Myers, Chief Bankruptcy Judge for the District of Idaho, agreed and dismissed the Chapter 11 petition.

Fursman v. Ulrich
(*In re First Protection*)⁶

On the same day that David and Laura Fursman filed a Chapter 11 petition, they caused their 100% owned company, First Protection, Inc., to file its own Chapter 11 petition. The two cases were later consolidated. At the time of their filing, the Fursmans were also the 100% owners of Redux Development, LLC (“Redux”). Redux, in turn, owned certain real property and a 2002 Cadillac Escalade: these assets had a total asserted value of \$340,000.

During the Chapter 11 portion of the cases, the Fursmans transferred 50% of their interest in Redux

to Mrs. Fursman’s mother, Gale Thompson. In return, Thompson agreed to “loan” Redux funds as agreed upon by her and the Fursmans, so Redux could develop the real property it owned. Thompson ultimately loaned Redux approximately \$70,000, the vast bulk of which was used to pay the Fursmans’ personal expenses, not any development of the Redux property.

The cases were later converted to Chapter 7 proceedings, and a Chapter 7 Trustee was appointed. The Chapter 7 Trustee sought to recover the 50% interest in Redux that the Fursmans had transferred to Thompson.⁷ The bankruptcy court ordered that the Trustee could recover the interest. The Fursmans appealed the bankruptcy court’s decision to the Ninth Circuit Bankruptcy Appellate Panel.⁸

The Fursmans argued on appeal that the only thing of value held by the estate was the economic rights in Redux, not the management rights they had previously held. The Fursmans’ argument was based on Arizona state law and the language in Redux’s operating agreement which stated that after the transfer of the interest from the Fursmans to the bankruptcy estate, the bankruptcy estate’s interest was simply as an assignee.

Fiesta moved to dismiss the Complaint, arguing that the Trustee simply held economic rights in the company and did not have the authority to seek judicial dissolution of the company.

The Ninth Circuit BAP disagreed with the Fursmans’ position.⁹ The BAP stated that certain portions of the Bankruptcy Code made those provisions of the operating agreement and Arizona state law ineffective against the bankruptcy estate. Specifically, the BAP cited section 541(c)(1)(A)¹⁰ of the Bankruptcy Code and found that this section

overrides both contract and state law restrictions on the transfers or assignment of Debtors’ interest in Redux in order to sweep all their interests into their estate ... As a result, the trustee was not a mere assignee, but stepped into Debtors’ shoes, succeeding to all of their rights, including the right to control Redux.

As a result, the bankruptcy trustee was able to recover the entire interest, and liquidate and dissolve the company.¹¹

Movitz v. Fiesta Investments, LLC
(*In re Ehmann*)¹²

Movitz presents a new wrinkle — a multi-member limited liability company. At the time of his bankruptcy filing, Gregory Ehmann owned a minority interest in Fiesta Investments, LLC (“Fiesta”). Ehmann’s parents had created Fiesta as a tax-shelter and “to accumulate investments for the benefit of [their] children after [the parents’] deaths.”

All of the members of Fiesta were related to Ehmann. Shortly after Ehmann's bankruptcy case was filed, Fiesta received an influx of \$837,000 in cash when one of its assets was sold. Additionally, it had regular quarterly income from its other asset, a 25% interest in a different company. Fiesta would regularly "lend" the other members of the company funds (in excess of \$374,000), gifted \$42,500 to one member, and redeemed another member's interest for \$124,000.¹³

The bankruptcy trustee filed a complaint against Fiesta, seeking a declaration that the Trustee had the status of a member in Fiesta, a determination that the assets of Fiesta were being wasted, misapplied or diverted for improper purposes, and an order for dissolution and liquidation of Fiesta or the appointment of a receiver for Fiesta. Fiesta moved to dismiss the Complaint, arguing that the Trustee simply held economic rights in the company and did not have the authority to seek judicial dissolution of the company. Fiesta based its position on the argument that the Fiesta operating agreement was an "executory contract," and therefore the restrictions in the operating agreement on transferring one's interest were enforceable.¹⁴

The bankruptcy court disagreed with Fiesta's argument, stating that the operating agreement in this case was not an executory contract, and therefore the membership interest became property of the estate pursuant to Section 541.¹⁵ Because the Trustee could prove facts to support his Complaint, the motion to dismiss was denied. The court went on to recite the various remedies that would be available to the Trustee (and included all of those originally sought by the Trustee). The parties

later settled the case, which resulted in a 100% payment to Ehmann's creditors.

Idaho's decisions

*In re Hoyle*¹⁶

Richard Hoyle owned a myriad of properties, many in his own name. Two significant parcels of real property, however, were owned through limited liability companies in which he was the sole member — Brundage Inn, LLC, and Hoyle Investment, LLC. After his Chapter 11 bankrupt-

The concepts in these cases could still be used to argue that the Chapter 7 Trustee has the same rights the debtor held pre-petition (i.e., the Trustee could attend meetings and even vote on issues presented for votes).

cy was converted to Chapter 7, the Chapter 7 Trustee sought confirmation from Judge Myers that she had 100% authority over the two LLCs.

Citing the various decisions discussed herein, Judge Myers issued an oral opinion, specifically ruling that "Hoyle's 100% membership interest in the two single member LLC's ... is property of the estate and the Trustee is entitled to both the economic interest and the right to control and management of those entities."¹⁷ The Trustee then took over the entities, and liquidated the property owned by Hoyle Investment, LLC.¹⁸

Gugino v. NELMAP, LLC (*In re Wallace*)¹⁹

Reviewing each of these cases, Judge Myers ruled that Gugino had full authority to liquidate assets of the Wallace's entities and make distributions to the bankruptcy estate through winding-up the business of the entities. Gugino has done just that: he has replaced the Wallaces as managers or officers of the various entities and sold the assets of the entities. Gugino is now in the process of winding up and dissolving the entities and making distributions to the bankruptcy estate.

Conclusion

As to single-member companies or single-shareholder corporations, the Chapter 7 Trustee becomes the sole person with authority to direct the activities of those companies after a Chapter 7 bankruptcy estate is created. Of course, the Chapter 7 Trustee must still comply with all relevant state law and operating agreement²⁰ procedures for winding up the business of the company and making distributions.

What remains less clear is the Chapter 7 Trustee's authority over multi-member companies or corporations. The concepts in these cases could still be used to argue that the Chapter 7 Trustee has the same rights the debtor held pre-petition (i.e., the Trustee could attend LLC meetings and even vote on issues presented for votes). However, the executory contract or charging order analysis may hold much greater sway in a multi-member situation.

In any case, if a soon-to-be chapter 7 debtor holds any membership or shareholder interests at all, that debtor (and any attorneys involved for the debtor or the companies) should take a hard look at the com-

panies, and evaluate whether they are at risk of “interference” by their new partner and/or owner — the Chapter 7 Trustee.

Endnotes

1. When a debtor files bankruptcy, a bankruptcy estate is created. In a Chapter 7 bankruptcy case, a Trustee is appointed as the representative of the bankruptcy estate.

2. *In re Albright*, 291 B.R. 538 (Bankr. D. Col. 2003).

3. Colo. Rev. Stat. §7-80-702; 11 U.S.C. §541(a)(1).

4. *In re A-Z Electronics, LLC*, 350 B.R. 886 (Bankr. D. Idaho 2006).

5. *A-Z Electronics* also suffered from a lack of briefing from either party, and the Debtor did not even file a written response to the Motion. Additionally, neither party produced any documentary or testimonial evidence at the hearing on the Motion to Dismiss, instead simply relying on what had actually been filed in the case. A substantial issue may have arisen if Ryan had argued that he was the manager of the LLC; had never been replaced as manager; and had authority, pursuant to the company Operating Agreement and as the manager, to authorize a bankruptcy petition.

6. 440 B.R. 821 (9th Cir. BAP 2010).

7. See 11 U.S.C. §549, which allows a Chapter 7 Trustee to recover property that was transferred during the pendency of a Chapter 11 case, if it was transferred without proper authorization.

8. The Ninth Circuit Bankruptcy Appellate Panel is an alternative court for appeals from bankruptcy court decisions. In the Ninth Circuit, all appeals from bankruptcy court decisions are automatically referred to the BAP, unless a party opts out of having the BAP hear the appeal, in which case the appeal reverts back to the District Court. A large portion of bankruptcy appeals are handled by the BAP, who hear cases in panels of three judges. All six BAP judges are also sitting bankruptcy judges throughout the Ninth Circuit, and are appointed for a seven-year term as a BAP judge (subject to a three-year extension).

9. Judge Jim D. Pappas, Idaho's other bankruptcy judge, sat on the BAP panel that decided *Fursman v. Ulrich*.

10. 11 U.S.C. §541(c)(1)(A) provides that “an interest of the debtor in property becomes property of the estate ... notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law that restricts or conditions transfer of such interest by the debtor.”

11. It appears that, notwithstanding the asserted value, the real property owned by Redux was actually valued at less than \$40,000.00.

12. 319 B.R. 200 (Bankr. D. Ariz. 2005). This opinion was later withdrawn at the request of the parties. See *Movitz v. Fiesta Investments, LLC (In re Ehmann)*, 337 B.R. 228 (Bankr. D. Ariz. 2006).

13. In the original factual recitation in the opinion, after citing these various payments, the bankruptcy judge foreshadows his coming opinion: “[The] outflow of over half a million dollars does not seem to be consistent with the original goal to accumulate investments for the benefit of our children after our deaths.” 319 B.R. at 202.

14. Compare 11 U.S.C. 365(e) with 11 U.S.C. §541(c)(1)(A). In the Ninth Circuit, a contract is executory if the obligations of both parties are so far unperformed that the failure of either party to complete performance would constitute a material breach and thus excuse the performance of the other. See *Unsecured Creditors' Comm v. Southmark Corp (In re Robert Helms Constr. And Dev. Co., Inc.)*, 139 F.3d 702 (9th Cir. 1998) (citing Vern Countryman, *Executory Contracts in Bankruptcy, Part 1*, 57 MINN L. REV. 439, 460 (1973)).

15. The court's decision was largely based on a review of the operating agreement at issue, and the fact that the Debtor was not a manager of the company and had virtually no obligations under the operating agreement – just rights. See 319 B.R. at 204-05.

16. District of Idaho Bankruptcy Case No. 10-01484-TLM.

17. As Judge Myers' decision was an oral ruling, no written decision on the initial motion exists. However, Hoyle

The Ninth Circuit Bankruptcy Appellate Panel is an alternative court for appeals from bankruptcy court decisions.

later sought clarification of Judge Myers' opinion, which resulted in a written order confirming the previous oral ruling. See Case No. 10-01484-TLM, Summary Order dated April 4, 2013.

18. The Trustee later determined that the assets held by Brundage Inn, LLC, did not exceed the liabilities of the company, and she abandoned the bankruptcy estate's interest in that company.

19. 13.2 IBCR 61 (Bankr. D. Idaho 2013).

20. Although, as the sole member, the Trustee has the sole ability to amend the Operating Agreement if necessary.

About the Author

Matthew T. Christensen received his JD and LLM degrees from Duke Law School, and is presently an associate attorney at *Angstman Johnson* in Boise. Matt has practiced law in Idaho since 2005, and currently focuses on bankruptcy, real estate and business-related matters. Matt is a member of the *Governing Council of the Business and Corporate Law Section* and also teaches real estate, international law and law practice management courses as an adjunct professor.



Hot Topics and Important Considerations for Retirement Plan Fiduciaries

John C. Hughes

There is a tremendous amount of activity affecting retirement plan fiduciaries. Existing fiduciary rules and recent developments profoundly impact any company that maintains an ERISA-covered retirement plan (big or small), such as a “401(k)” plan, as well as many of the individual employees who work with those plans.¹

It is critical that plan fiduciaries recognize their fiduciary status and duties, comply with the existing and developing laws, and take appropriate action in order to avoid potentially significant liabilities. This article will define fiduciaries, discuss how fiduciaries should act, and analyze new regulations affecting fiduciaries and plans, as well as provide an overview of litigation, plan contribution deposit, and target date fund issues. Finally, the article will summarize some recent government activities and other issues affecting the retirement planning industry.

Who is a fiduciary?

A fiduciary for ERISA purposes includes anyone who:

- Exercises any discretionary authority or control with respect to the management of a plan or the disposition of plan assets;²
- Has any discretionary authority or responsibility with respect to the administration of a plan;³
- Is named as a fiduciary in the plan document;⁴ or
- Renders investment advice for a fee or other compensation, directly or indirectly, with respect to any monies or property of a plan, or who has any authority or responsibility in that regard.⁵

Most fiduciaries will not be able to satisfy the prudent expert rule without the advice and involvement of those with the requisite knowledge and experience.

Fiduciaries typically include a company’s owner(s), President, Chief Executive Officer, Chief Financial Officer, General Counsel, Human Resources Director, Controller, the company itself, and anyone serving on a plan committee.

How must fiduciaries act?

Fiduciaries must discharge their duties solely in the interest of plan participants and beneficiaries for the exclusive purpose of providing benefits, and defraying the reasonable expenses of administering a plan.⁶

Fiduciaries must follow the “prudent expert” rule. This means that they must act with the care, skill, prudence, and diligence under the circumstances that a prudent person “acting in a like capacity *and familiar with such matters* would use in the conduct of an enterprise of like character and with like aims.”⁷ Most fiduciaries will not be able to satisfy the prudent expert rule without the advice and involvement of those with the requisite knowledge and experience. Accordingly, the retention of investment, administrative, and legal experts is vital.

Fiduciaries must also act in accordance with the documents and instruments governing a plan.⁸ Finally, fiduciaries are charged with diversifying investments so as to minimize the risk of large losses.⁹

What consequences could result from fiduciary breaches? Why do I or my clients care?

Fiduciaries are *personally liable* for losses to a plan that results from breaches of their fiduciary duties.¹⁰ There is also the possibility of government imposed monetary sanctions, removal from fiduciary status, criminal charges, excise taxes, and liability for attorney fees.¹¹ Fiduciaries may be held liable for the breaches of their co-fiduciaries.¹²

Hot topics affecting plan fiduciaries

There is an unprecedented level of activity impacting fiduciaries. There are many new rules, increased civil litigation by plan participants against fiduciaries, and increased and substantial enforcement efforts being undertaken by the U.S. Department of Labor (“DOL”). Some of those topics and issues are summarized below.

Fee disclosure regulations and initiatives

Plan assets are used to pay many fees and expenses; primarily, fees and expenses related to plan administration and plan investments. Over the last several years, the DOL has

placed great emphasis on fee disclosure. The main objective is to educate and inform plan fiduciaries and plan participants about the fees and expenses that are paid by a plan. The following three initiatives fall under this topic of Fee Disclosure Regulations and Initiatives:

The New 404a-5 Regulations. In mid-2012, the “404a-5” regulations became effective. The 404a-5 regulations require *plan sponsors* (i.e., the companies maintaining retirement plans) to provide *annual and quarterly* written disclosures to plan participants.¹³ The 404a-5 disclosures generally require explanations relative to plan administration, expenses, and investments.¹⁴ The aim is to assist plan participants in making informed decisions about how they invest their plan accounts.

In order to fulfill their responsibilities, it is important that fiduciaries ensure that the regulatory mandated topics are properly covered in the written disclosures, and that those disclosures are timely distributed to participants by permissible means. In general, the disclosures must be delivered by First Class U.S. Mail or in accordance with DOL guidance regarding electronic deliveries. Delivering required communications to plan participants electronically is not as simple as posting to a website or shooting out an email. There are specified rules that must be followed.¹⁵

The 404a-5 regulations are only applicable to plans that allow participants to direct their own investments (which includes the vast majority of your common 401(k) and/or “profit sharing” plans).

The New 408(b)(2) Regulations. Also in mid-2012, the “408(b)(2)” regulations became effective. The

408(b)(2) regulations require certain entities hired to provide services to a plan to provide specified written disclosures and explanations to plan fiduciaries.¹⁶

The 408(b)(2) disclosures must generally explain the services that providers furnish to a plan and the compensation they receive from all sources relative to those services.¹⁷ This might seem odd; however, the arrangements entered into by fiduciaries and those entities and persons providing services to a plan are often very complicated and are not understood by the fiduciaries, thus prompting the need for these regulations.

Plan fiduciaries are charged with analyzing and understanding the 408(b)(2) disclosures and explanations so they may make an assessment that the arrangement is reasonable. Failure to do so will constitute a fiduciary breach (and also give rise to a “prohibited transaction”).

The types of service providers that must make 408(b)(2) disclosures are generally investment providers, recordkeepers, consultants, and third party administrators. The service providers are required to advise of all sources of compensation, directly from the plan or indirectly from others.¹⁸ Indirect compensation is common and is perhaps the

crux of these regulations because the relationships and amounts at issue are often not apparent.

In March 2014, the DOL issued proposed changes to the 408(b)(2) regulations in an effort to further simplify the information that the service providers are furnishing to plan fiduciaries.¹⁹ This was prompted in part by the perception that many service providers were continuing to hide the ball relative to the actual services they are providing and the compensation they are receiving, which in turn prevented plan fiduciaries from understanding the arrangements and fulfilling their responsibilities.

The DOL has been requesting the 408(b)(2) disclosures during audits and investigations. Accordingly, fiduciaries should be sure to keep copies of the disclosures on hand, and should be ready to assert that they have reviewed and understand the disclosures.

Revisions to Schedule C of Form 5500. Most ERISA-covered plans are required to complete and file an IRS form every year known as the Form 5500. It is like an annual tax return for a benefit plan. The filing is reviewed by the IRS and the DOL.

In the past few years, there have been substantial revisions to Schedule C of Form 5500. The revisions

Delivering required communications to plan participants electronically is not as simple as posting to a website or shooting out an email.

require plan sponsors to report to the DOL and IRS much information about the fees and expenses paid with plan assets.

Caution should be exercised in completing Schedule C. Often, employers are under the mistaken impression that it is their service providers attesting to the accuracy of this information when in fact it is the plan sponsor who signs the Form 5500 under penalty of perjury and submits it to the government. Consequently, it is critical that the information on Schedule C, and the rest of the Form 5500, be reviewed and understood by plan fiduciaries prior to signature and filing.

Civil litigation relative to plan expenses

Over approximately the past decade, many class action lawsuits have been filed against plan fiduciaries on behalf of plan participants alleging losses to a plan in the form of excessive fees. There have been varying results in favor of both sides, and many questions remain.

Suffice it to say that these cases (and new filings) are ongoing and could result in substantial liabilities to plan fiduciaries. Most notably, the Eighth Circuit Court of Appeals recently affirmed a multi-million dollar award against plan fiduciaries for breaches relating to the failure to monitor service fees (specifically, a type of administrative fee/service commonly referred to as “record-keeping”).²⁰ Several cases have also recently settled for significant amounts.

It seems likely that future lawsuits will use a failure to comply with the new fee disclosure regulations discussed above as a roadmap in attempting to establish liability against fiduciaries.

Late deposit of employee contributions

DOL regulations require that employee contributions; for example, 401(k) contributions, be deposited with the plan as soon as reasonably practicable following the applicable pay date.²¹ This is a subjective rule that will vary from employer to employer depending on their established processes and abilities. In general, it will be difficult for most employers to justify deposits taking more than a few business days.

Properly correcting the matter and reporting such correction on the required separate statement to the Form 5500 that must accompany a “yes” response (which separate statement is often overlooked by employers and their providers) will often avert governmental inquiry.

The issue of late deposits is typically an issue of focus in every investigation conducted by the DOL. Additionally, there is a question on Form 5500 that asks whether contributions were not timely transmitted during the applicable year. When an employer answers that question with a “yes,” there is a very good chance of follow up by the DOL. Properly correcting the matter and reporting such correction on the required separate statement to the Form 5500 that must accompany a “yes” response (which separate statement is often overlooked by employers and their providers) will often avert governmental inquiry.

The correction relative to late deposits generally involves the deposit of lost earnings. The correction also requires preparing and filing Form 5330 and paying an excise tax. It is important to understand the rule and avoid violations in the first place, but it is equally important to identify violations and take appropriate corrective action sooner rather than later because correcting discrete instances of late deposits will involve much less work (and cost much less) than correcting several years of late deposits.

The rule is often misunderstood as providing a “safe harbor” allowing deposits anytime before the 15th day of the month following the pay date. There is no such safe harbor; the funds must simply be deposited as soon as reasonably practicable under the circumstances. There is a 7-day safe harbor rule for plans with fewer than 100 participants.²²

Target Date Funds (and Default Funds)

Target Date Funds (“TDFs”), also sometimes referred to as “lifecycle funds,” are investment products that generally contain a mix of fixed income and equity investments. The mix in a given TDF will change over time, becoming more conservative as time goes on; specifically, as the participants invested in the particular fund get closer to a targeted retirement age, such as age 65.

The use of TDFs by defined contribution retirement plans, like 401(k) plans, has become very popular. In February 2013, the DOL issued “Target Date Retirement Funds — Tips for ERISA Plan Fiduciaries.”²³ Fiduciaries would be well advised to review this guidance. In general, fiduciaries choosing to utilize TDFs should ensure they understand the characteristics of the par-

ticular TDFs (including the attendant fees and expenses) and establish a process for ongoing review.

Contributions to a plan must sometimes be invested in a “default fund” when a participant has the opportunity to direct the investment of the contributions made on their behalf, but fails to do so. TDFs are often used as a plan’s default fund.

Use of TDFs for this purpose is on the rise given the increased popularity of automatic enrollment and also the DOL’s issues of “QDIA” regulations. The QDIA regulations provide optional protection to fiduciaries when they must invest a participant’s contributions in a default fund.²⁴ In designating a TDF as a plan’s default fund, fiduciaries should be careful to ensure that the TDF is in fact a “qualified default investment alternative” as defined under the regulations, and that the other conditions of the QDIA regulations are satisfied. If the regulatory conditions are not fulfilled (which consist of more than designating a TDF as the QDIA), the protections may not be attained.

With regard to plan investments overall, there is discussion about how to treat nonstandardized investments under plans, and the DOL is considering the overall propriety of “brokerage windows” as an investment option under plans.

Increased government enforcement initiatives and focus on process

It is important for plan fiduciaries to engage in a “process” in carrying out their duties, and to appropriately document that process. The particular decisions made by fiduciaries will be more defensible if the fiduciaries engage in a process (and document such process). This can be accomplished by conducting

The increased incidence of investigations has been very noticeable. In conducting examinations, the DOL routinely requests copies of meeting minutes.

regular meetings where issues such as those discussed in this article are addressed, decisions made, and the deliberation, compliance efforts, and decisions documented in an understandable written form (e.g., in meeting minutes).

In addition to increased litigation by plan participants, the DOL has increased its enforcement activities and also its outreach efforts. The increased incidence of investigations has been very noticeable. In conducting examinations, the DOL routinely requests copies of meeting minutes. While it is not a violation of law or fiduciary breach to not keep meeting minutes, it is the type of item that will demonstrate to an agent that an appropriate level of attention is afforded to plan maintenance. The DOL has also recently requested information about fiduciary training and education.

The current Assistant Secretary for the Employee Benefits Security Administration of the DOL, Phyllis Borzi, has been very proactive in her outreach efforts in terms of frequent newsletters, blogs, webinars (and other speaking engagements), and even social media aimed at the benefits community including employers, fiduciaries, and participants.²⁵

Similarly, while focused more on the favorable tax status afforded to

qualified plans under Section 401(a) of the Internal Revenue Code, as opposed to fiduciary breaches and compliance with ERISA, there has been a noticeable increase in IRS outreach and enforcement efforts, as is evident by its newsletters,²⁶ “phone forums,” and several recent initiatives including its 401(k) questionnaire project, other “compliance check” programs, and the “EPTA” program. In these regards, the IRS refers frequently to the concept of “internal controls.” Internal controls are similar to engaging in process. It generally involves an affirmative and ongoing reviewing and assessment of a plan’s compliance with the law. This will include ensuring that plan documents are timely updated to comply with the law, that appropriate policies are in place (and followed), and that plan operations are consistent with the plan documents and the law.

Conclusion

There have long existed complicated laws and regulations governing plan fiduciaries. It is more important than ever to recognize those responsibilities in order to ensure compliance with the law and avoid participant lawsuits, government penalties, and other unwanted government involvement. The issues affecting plan fiduciaries and retire-

ment plans overall are too numerous to include in this article, but carefully reviewing the issues addressed in this article will provide practitioners with a good starting point from which to advise their clients.

Endnotes

1. "ERISA" is the Employee Retirement Income Security Act of 1974, as amended. Various fiduciary rules may also affect other types of plans including ERISA-covered welfare plans and non-ERISA governmental plans. This article focuses on the rules applicable to ERISA-covered retirement plans.
2. ERISA Section 3(21).
3. *Id.*
4. ERISA Section 405(c)(1)(B).
5. ERISA Section 3(21).
6. ERISA Section 404(a)(1)(A).
7. ERISA Section 404(a)(1)(B) (emphasis added).
8. ERISA Section 404(a)(1)(D).

9. ERISA Section 404(a)(1)(C).
10. ERISA Section 409(a).
11. See generally, ERISA Sections 501 and 502.
12. ERISA Section 405(a).
13. 29 CFR § 2550.404a-5(b)(1).
14. 29 CFR § 2550.404a-5(c) and (d).
15. See, e.g., DOL Technical Release 2011-03R.
16. 29 CFR § 2550.408b-2(c).
17. *Id.*
18. *Id.*
19. See 79 Federal Register 13949 (March 12, 2014).
20. *Tussy v. ABB, Inc.*, No. 12-2056 (8th Cir. Mar. 19, 2014).
21. See 29 CFR § 2510.102(a)(1).
22. See 29 CFR § 2510.102(a)(2).
23. The publication may be found here -- <http://www.dol.gov/ebsa/pdf/fsTDF.pdf>.
24. See 29 CFR § 2550.404c-5.
25. See, e.g., <http://social.dol.gov/blog/getting-it-right/> (a March 21, 2014 blog

discussing a program to assist employers with their compliance efforts).

26. See, e.g., *Retirement News for Employers*, which may be accessed here - <http://www.irs.gov/Retirement-Plans/Retirement-News-for-Employers>.

About the Author

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



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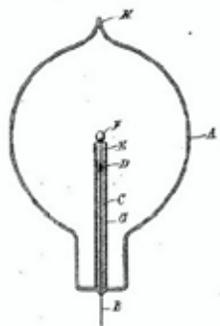
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Global Anti-Corruption Compliance Programs and the Challenge of Facilitating Payments

Jason E. Prince

Although the U.S. Foreign Corrupt Practices Act (“FCPA”) prohibits companies and individuals from paying bribes to foreign officials to obtain or retain a business advantage, it also expressly allows payments intended to facilitate or expedite a foreign official’s performance of such “routine governmental actions” as issuing permits and providing police protection. This article explores the treatment of “facilitating payments” under U.S. and foreign law, and suggests best practices for addressing these payments in a company’s global anti-corruption compliance program.

As U.S.-based Universal Export Co.’s (UnivEx) trade compliance officer, you have become accustomed to receiving phone calls from anxious co-workers in search of guidance on various compliance issues. But this particular call has thrown you for a loop. Setting down your phone, you look back over the notes you scribbled while a sales manager relayed to you the details of UnivEx’s most recent dilemma.

Apparently, UnivEx contracted to ship \$1.3 million worth of widgets to a new customer in the Republic of Zubrowka by no later than July 28. The shipping containers arrived at a Zubrowkan port without incident on July 12, but the goods have now been stuck in customs for two weeks. When UnivEx’s third-party customs broker in Zubrowka visited the customs office to inquire about the delay, the lower-level customs official on duty yawned and responded that he still needed to inspect the goods for compliance with Zubrowka’s customs regulations. Asked how

soon this inspection would occur, the customs official stated: “That depends. Right now, I estimate at least another two weeks. But if you slip me 10,000 klübecks, I could be persuaded to conduct the inspection today.” Following this conversation, the broker immediately contacted the sales manager, who in turn called you to ask the following question: Can UnivEx legally authorize its broker to make the 10,000 klübeck (i.e., \$200 U.S. dollars) payment to the Zubrowkan official and, if so, should it do so?

The answer to this question is complicated. On the one hand, the U.S. Foreign Corrupt Practices Act (“FCPA”) prohibits companies like UnivEx from directly or indirectly paying bribes to foreign officials to obtain or retain a business advantage.¹ At first blush, the 10,000 klübeck payment sounds like a bribe. On the other hand, the FCPA contains an express exception for “facilitating,” “facilitation,” “expediting” or “grease” payments made to facilitate or expedite a foreign official’s performance of such “routine

governmental actions” as scheduling inspections related to the transit of goods.² This exclusion seems to cover the Zubrowkan official’s demanded payment. To further complicate matters, however, many foreign countries have laws that prohibit government officials from receiving, and private parties from offering, payments to government officials to secure their performance of official duties. Thus, the requested payment might run afoul of Zubrowkan law. Even setting aside these legal concerns, UnivEx must still address the issue of whether, as a matter of company policy, it wants to oblige the Zubrowkan official’s extortionate demand.

Companies that engage in global business — even those that steer clear of the infamous Zubrowkan market — are bound to encounter similar issues related to facilitating payments. Indeed, especially in developing markets, some low- to mid-level officials automatically expect such payments in exchange for performing their non-discretionary jobs. Accordingly, this article seeks

to provide a brief overview of the key U.S. and foreign laws that govern facilitating payments, as well as best practices for companies that, like UnivEx, need to develop an anti-corruption compliance program that reduces the risk of running afoul of those laws.

Overview of the FCPA's anti-bribery provisions

Enacted in 1977, the FCPA contains two distinct sets of provisions: (1) the anti-bribery provisions,³ which prohibit companies and individuals from bribing foreign officials; and (2) the accounting provisions,⁴ which require publicly traded companies to keep accurate books and records and to establish and maintain internal accounting controls aimed at preventing and detecting bribery. The Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) share responsibility for enforcing the FCPA.

The anti-bribery provisions, which contain the facilitating payment exception, sweepingly prohibit companies (both public and private) and individuals⁵ from paying, offering or promising — either directly or through a third-party intermediary — anything of value to a foreign official with the corrupt intent of obtaining or retaining an improper business advantage.⁶ To place facilitating payments in their proper context, I will address in more detail three key aspects of the anti-bribery provisions' prohibition.

First, the anti-bribery provisions do not make an exception for *de minimis* payments to a foreign official. Even a payment of seemingly minimal value can qualify as a bribe under the FCPA. For example, in its 2013 enforcement action against Helmerich & Payne, Inc. (“H&P”),

the SEC alleged that H&P made improper payments to Venezuelan customs officials in the total amount of only \$7,000 over a five-year period. Yet, the SEC determined those payments were illegal bribes because they were allegedly made to avoid customs inspections and compliance with Venezuelan import/export regulations.⁷

Second, the term “foreign official” includes not only actual government officials, but also the employees of government instrumentalities (e.g., state-owned or state-controlled companies), public international organizations (e.g., the United Nations), political parties, political party officials, and candidates for political office.⁸ The term “foreign official” also is not limited to high-ranking officials; rather, a bribe paid to a low- to mid-level foreign bureaucrat constitutes a violation of the anti-bribery provisions to the same extent as a bribe paid to a foreign head of state.

Third, the FCPA's bribery prohibition is *not* limited to bribes paid to foreign officials to obtain or renew a contract. The U.S. Court of Appeals for the Fifth Circuit's 2004 decision in *United States v. Kay* rejected such a limited application of the FCPA, holding that the FCPA also prohibits bribes paid to a foreign official to secure such improper business advantages as avoiding the payment of lawful duties and taxes.⁹

With these three concepts in mind, I will now turn to explaining how the facilitating payments exception came into existence and why it has posed a challenge for compliance-minded companies ever since.

The FCPA's facilitating payments exception

When Congress enacted the FCPA in 1977, the FCPA's anti-bribery provisions did not expressly exclude any category of payments to foreign officials. The FCPA's legislative history, however, reflected Congress's intent to exempt “so-called grease or facilitating payments,”¹⁰ such as “a gratuity paid to a customs official to speed the processing of a customs document” or other payments made to secure “the expeditious performance of similar duties of an essentially ministerial or clerical nature.”¹¹

In *United States v. Kay*, the Fifth Circuit summarized this legislative history, explaining that “[i]nstead of making an express textual exception for these types of non-covered payments, the respective committees of the two chambers sought to distinguish permissible grease payments from prohibited bribery by only prohibiting payments that induce an official to act ‘corruptly.’”¹² In other words, Congress intended to *prohibit* payments made to influence

Congress intended to prohibit payments made to influence a foreign official “to misuse his official position’ and his discretionary authority,”¹³ but to permit payments that “merely move a particular matter toward an eventual act or decision or which do not involve any discretionary action.”¹⁴

a foreign official “to misuse his official position” and his discretionary authority,”¹³ but to *permit* payments that “merely move a particular matter toward an eventual act or decision or which do not involve any discretionary action.”¹⁴

During the next decade or so, companies and individuals who were subject to the FCPA “experienced difficulty in discerning a clear line between prohibited bribes and permissible facilitating payments.”¹⁵ Consequently, Congress amended the FCPA in 1988 to “reflect current law and Congressional intent more clearly,”¹⁶ especially with regard to facilitating payments.

As a result of these 1988 amendments, the FCPA’s anti-bribery provisions expressly “shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or secure the performance of a routine governmental action by a foreign official, political party, or party official.”¹⁷ The term “routine governmental action” includes only actions ordinarily and commonly performed by foreign officials in connection with: (i) obtaining permits, licenses, or other official documents to qualify to do business in a foreign country; (ii) processing governmental papers, such as visas or work orders; (iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country; (iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or (v) actions of a similar nature.¹⁸ Moreover, the term “routine governmental action” expressly does *not* include any decision by a foreign official to award new business or to continue business.¹⁹

Treatment of facilitating payments by other countries

On November 21, 1997, the members of the Organisation of Economic Co-operation and Development (OECD) and five non-members adopted the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention).²⁰ To date, the OECD’s 34 member countries, as well as six non-member countries, have adopted the OECD Convention and implemented leg-

The OECD Convention does not include an exception for facilitating payments or, as referred to in many other OECD signatory countries, “facilitation payments.”

islation prohibiting the bribery of foreign officials.²¹

The United States played a central role in negotiating the OECD Convention, ensuring that the convention’s prohibitions are fundamentally in accord with the FCPA’s anti-bribery provisions. That said, the OECD Convention does *not* include an exception for facilitating payments or, as referred to in many other OECD signatory countries, “facilitation payments.” Although the OECD Convention’s official commentary states that “small ‘facilitation’ payments do not constitute

payments made to ‘maintain or retain business or other improper advantage’ within the meaning of the OECD Convention,” signatory states are free to choose whether to permit or prohibit facilitating payments.

Following the OECD Convention’s adoption, only ten signatory states have joined the United States in enacting anti-bribery legislation that expressly permits facilitating payments: Australia, Austria, Canada, Greece, Korea, New Zealand, Slovak Republic, South Africa, Spain, and Switzerland.²² Twenty-nine signatory states have declined to adopt such an exception.²³

On November 26, 2009, the OECD issued a report that decried the “corrosive effect of small facilitation payments” and called on the OECD Convention’s signatories to “encourage companies to prohibit or discourage the use of small facilitation payments.”²⁴ Subsequently, the United Kingdom rejected the facilitating payments exception when it enacted the U.K. Bribery Act of 2010,²⁵ Australia called for public comment in November 2011 on whether or not to abolish facilitating payments as a defense to foreign bribery under the Criminal Code of 1995,²⁶ and Canada amended its Corruption of Foreign Public Officials Act in June 2013 to repeal the facilitating payments exception.²⁷

The challenge of facilitating payments

Despite the global debate about the permissibility of facilitating payments, such payments remain legal under the FCPA. Nevertheless, facilitating payments still pose a significant challenge for U.S. companies and individuals for at least three reasons.

First, despite Congress’s attempt in 1988 to clarify the FCPA’s distinction between prohibited bribes and

permissible facilitating payments, this distinction generally remains murky. Depending on the circumstances, a low- to mid-level foreign official might be merely performing a routine governmental action or she might be exercising discretionary decision-making authority. For example, there is often a fine line between paying a foreign customs official to expedite an inspection of permissible goods (which is likely a facilitating payment), and paying a foreign official to determine that the goods are permissible for customs clearance purposes in the first place (which is likely a bribe). Furthermore, unlike DOJ and SEC prosecutors who have the benefit of analyzing the situation after the fact, a company's on-the-ground employees and third-party intermediaries often must respond to a foreign official's request for a facilitating payment on the spot and without the ability to make a fully informed decision.

Second, even if a company's payment to a foreign official indisputably qualifies as a facilitating payment under the FCPA, that payment still might violate the anti-bribery laws of other jurisdictions to which the company is subject, including the laws of the foreign official's home country. Thus, a payment to a foreign official that is perfectly legal under U.S. law could still lead to criminal or civil penalties for the company, its employees, and its third-party intermediaries under foreign law. And the only way truly to get to the bottom of this issue is to engage foreign country counsel to opine on whether or not the payments in question are permissible under the applicable foreign country's law.

Third, the DOJ and the SEC strongly discourage facilitating payments. In their November 2012

Even if a company's payment to a foreign official indisputably qualifies as a facilitating payment under the FCPA, that payment still might violate the anti-bribery laws of other jurisdictions to which the company is subject, including the laws of the foreign official's home country.

publication *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (the "FCPA Resource Guide"), the DOJ and the SEC stress the perils of making facilitating payments and expressly refer to the OECD's 2009 report, which urged companies to prohibit or discourage the use of facilitating payments.²⁸ Additionally, in *United States v. Westinghouse Air Brake Technologies*, the defendant's non-prosecution agreement with the DOJ characterized as illegal certain payments that arguably qualified as facilitating payments under the FCPA — i.e., payments to Indian government officials to schedule pre-shipping inspections of products.²⁹ In short, the DOJ and the SEC appear to be attempting to narrow the facilitating payment exception's scope and will likely afford less prosecutorial leniency to companies that fail to prohibit or discourage such payments.

Anti-corruption compliance program best practices

In the *FCPA Resource Guide*, the DOJ and the SEC state that a company's "code of conduct is often the foundation upon which an effective compliance program is built," and that "effective policies and procedures require an in-depth understanding of the company's business model, including its products and

services, third-party agents, customers, government interactions, and industry and geographic risks."³⁰ Facilitating payments are among the risks that the DOJ and the SEC expressly advise companies to address when drafting their anti-corruption compliance policies and procedures.³¹ Thus, companies like UnivEx should adopt, implement, and adhere to an anti-corruption policy and related procedures (including training of appropriate employees and third-party intermediaries) that address facilitating payments.

Given the risks associated with facilitating payments, a company would be extremely ill-advised to adopt an anti-corruption compliance policy that provides employees and third-party intermediaries with unfettered discretion over whether and when to make facilitating payments. Instead, companies should consider adopting one of the following two options:

Option #1: Prohibit facilitating payments under any and all circumstances. According to a survey conducted by Trace International in 2009, 34.7% of the companies surveyed had outright banned facilitating payments,³² and anecdotal reports suggest that this percentage has likely grown during the past five years. This approach has the benefits of simplicity and ease of administration. Rather than trying to educate employees

and third-party intermediaries about the subtle distinctions between permissible facilitating payments and prohibited bribes, companies that select this option can simply ban any and all payments to foreign officials that could reasonably be regarded as bribes. Additionally, this approach eliminates the need to engage local counsel in multiple foreign jurisdictions to confirm that each facilitating payment complies with applicable foreign country laws.

Option #2: Strongly discourage facilitating payments, permitting them only under narrow and clearly articulated circumstances. This approach takes into account the facts that the FCPA expressly permits companies and individuals to make facilitating payments, and that, in certain situations, a company's refusal to make a small facilitating payment can have significant negative financial consequences. If a company selects this second option, it should generally impose at least the following conditions: (1) the company's compliance officer must provide advance written approval of the facilitating payment based on as much relevant information as reasonably possible under the circumstances; (2) the facilitating payment must be lawful for the company, its employees, and its third-party intermediaries to make under all applicable anti-corruption laws, including those of the foreign country in which the facilitating payment is made; and (3) the company must promptly and accurately record the payment in its books and records.

Depending on the company's anti-corruption risk profile, some companies may opt for additional limitations on facilitating payments (e.g., strict dollar limits), while others may adopt a more flexible, case-by-case approach with appropriate checks and balances. The key is that

each company must develop policies and procedures that it can effectively administer in a real-world setting and confidently defend if a U.S. or foreign government enforcement agency inquires into the company's business practices abroad. If companies like UnivEx put such policies and procedures in place, they should be ready and able to respond decisively the next time a foreign official in Zubrowka or some other far-flung place asks to have his or her palms greased.

Endnotes

1. See 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).
2. See *id.* §§ 78dd-1(b), 78dd-1(f)(3), 78dd-2(b), 78dd-2(h)(4), 78dd-3(b), 78dd-3(f)(4).
3. *Id.* §§ 78dd-1, 78dd-2, 78dd-3.
4. *Id.* § 78m(b).
5. The FCPA applies to (a) "issuers," which are entities required under the U.S. Securities Exchange Act to register under Section 12 or to file reports under Section 15(d), *id.* §§ 78dd-1, 78m; (b) "domestic concerns," which includes individuals who are U.S. citizens, nationals or residents, as well as business entities (public or private) with their principal place of business in the United States, or which are organized under the laws of a U.S. state, territory, possession or commonwealth, *id.* §§ 78dd-2, 78dd-2(h)(1); and any individual or entity other than issuers or domestic concerns who uses the mails or instrumentalities of interstate commerce, while within U.S. territory, to carry out an act prohibited under the FCPA, *id.* § 78dd-3.

6. See *id.* §§ 78dd-1, 78dd-2, 78dd-3. The penalties for running afoul of the anti-bribery provisions are severe. Entities face criminal fines of up to \$2,000,000 per violation and civil penalties of up to \$10,000 per violation, and individuals face criminal fines of up to \$100,000 and/or imprisonment of not more than five years per violation, and civil penalties of up to \$10,000 per violation. *Id.* §§ 78dd-2(g)(1)(A), 78ff(c)(1)(A), 78ff(c)(2)(A).

7. Helmerich & Payne, Inc., Exchange Act Release No. 60400, 2009 WL 2341649 (July 30, 2009), available at www.sec.gov/litigation/admin/2009/34-60400.pdf.

8. 15 U.S.C. § 78dd-1(f)(1).

9. 359 F.3d 738, 755 (5th Cir. 2004).

10. H.R. Rep. No. 95-640, at 4 (1977).

11. H.R. Rep. No. 95-640, at 4; S. Rep. No. 95-114 (1977).

12. 359 F.3d at 747 (citing H.R. Rep. No. 95-640, at 7-8; S. Rep. No. 95-114, at 10).

13. *Id.* (citing H.R. Rep. No. 95-640, at 7-8; S. Rep. No. 95-114, at 10).

14. *Id.* (citing H.R. Rep. No. 95-640, at 8).

15. *Id.* at 750 (citing S. Rep. No. 100-85, at 53 (1987) (stating that "the method chosen by Congress in 1977 to accomplish [the task of distinguishing grease payments from bribery] has been difficult to apply in practice").

16. S. Rep. No. 100-85, at 54; H.R. Rep. No. 100-40, pt. 2, at 77 (1987).

17. 15 U.S.C. § 78dd-1(b).

18. *Id.* §§ 78dd-1(b), 78dd-1(f)(3)(A), 78dd-2(b), 78dd-2(h)(4)(A), 78dd-3(b), 78dd-3(f)(4)(A).

19. *Id.* §§ 78dd-1(f)(3)(B), 78dd-2(h)(4)(B), 78dd-3(f)(4)(B).

20. OECD Doc. DAFE/IME/BR(97)20, reprinted in 37 I.L.M. 1 (1998).

21. Org. of Econ. Co-operation and Dev., *OECD Convention on Combating Bribery*

The key is that each company must develop policies and procedures that it can effectively administer in a real-world setting and confidently defend if a U.S. or foreign government enforcement agency inquires into the company's business practices abroad.

of Foreign Public Officials in International Business Transactions: Ratification Status as of 8 April 2014, at http://www.oecd.org/daf/anti-bribery/WGBRatification-Status_April2014.pdf. Latvia will officially become the OECD Anti-Bribery Convention's forty-first party on May 30, 2014.

22. Andy Spaulding, "Facilitating Payments (De)mystified (Conclusion)," THE FCPA BLOG (June 28, 2012), at <http://www.fcpablog.com/blog/2012/6/28/facilitating-payments-demystified-conclusion.html>.

23. *Id.*

24. OECD Working Grp. on Bribery of Foreign Pub. Officials in Int'l Bus. Transactions, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, at 4 (Nov. 26, 2009) (amended Feb. 18, 2010), available at <http://www.oecd.org/daf/anti-bribery/44176910.pdf>.

25. See Bribery Act, 2010, c. 23 §§ 1-9 (U.K.). According to the U.K. Ministry of Justice, the United Kingdom has rejected facilitating payments because they "create artificial distinctions that are difficult to enforce, undermine corporate anti-bribery procedures, confuse anti-bribery communication with employees and other associated persons, perpetuate an existing 'culture' of bribery and have the potential to be abused." U.K. MINISTRY OF JUSTICE, THE BRIBERY ACT 2010 18 (2011), available at <http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>.

26. See Australian Gov't, Dep't of Foreign Affairs & Trade, *Recent Developments: Assessing the "Facilitation Payments" Defense Under Australian Foreign Bribery Law*, <http://www.dfat.gov.au/issues/measures-against-corruption.html>. Al-

though the public comment period has since closed, the Australian Government has yet to indicate how it intends to proceed on the issue. See *id.*

27. See Fighting Foreign Corruption Act, R.S.C., ch. 26 (Can. 2013). Recognizing that Canadian companies will require some time to change their policies and procedures to ban facilitating payments, the new legislation will not take effect until a future yet-to-be-determined date. See *id.*

28. U.S. DEP'T OF JUSTICE & U.S. SEC. & EXCH. COMM., A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT [hereinafter "FCPA RESOURCE GUIDE"] 25-26 (2012), available at <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>.

29. Letter from Steven A. Tyrrell, Chief, Fraud Section, Criminal Div. Dep't of Justice, to Eric A. Dubelier, Reed Smith LLP, app. A at 3-4 (Feb. 8, 2008), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/westinghouse-corp/02-08-08wabtec-agree.pdf>.

30. FCPA RESOURCE GUIDE, *supra* note 28, at 57-58.

31. *Id.* at 58.

32. TRACE INT'L, INC., TRACE FACILITATION PAYMENTS BENCHMARKING SURVEY 8 (2009), available at <https://secure.traceinternational.org/data/public/documents/FacilitationPaymentsSurveyResults-64622-1.pdf>.

About the Author

Jason E. Prince is a Partner with *Holland & Hart LLP*, a full-service U.S. business law firm, where he is a member of the firm's Commercial Litigation and Foreign Corrupt Practices Act & Anti-Corruption Practice Groups. His

Option #2: Strongly discourage facilitating payments, permitting them only under narrow and clearly articulated circumstances.



practice emphasizes litigation, dispute resolution, and compliance counseling involving the domestic and international sale of goods and services, including compliance with U.S. anti-corruption, export control, and trade sanctions laws. Prior to joining Holland & Hart, he served as a Law Clerk to Judge Susan H. Black of the U.S. Court of Appeals for the Eleventh Circuit and as a Deputy Press Secretary to Nobuteru Ishihara of the Japanese House of Representatives.





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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

4th AMENDED - Regular Spring Term for 2014

Boise January 13, 15, 17, 22 and 24
Boise February 12, 14, 18 and 19
Boise (Concordia University School of Law - 501 W. Front Street) February 21
Boise April 4 and 14
Coeur d'Alene April 8 and 9
Lewiston April 10
Boise May 2
Idaho Falls May 13, 14 and 15
Pocatello May 16
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

7th AMENDED - Regular Spring Term for 2014

Boise January 9, 14, 16 and 21
Boise February 6, 11, 13 and 20
Coeur d'Alene March 4 and 5*
*United States Federal Courthouse - Coeur d'Alene, located at 6450 N. Mineral Drive
Boise March 18 and 20
Boise April 8, 10, 15, 17 and 24
Boise May 1 (Law Day)*
*Oral Argument held at Capital High School, 8055 W. Goddard Road in Boise
Boise May 5, 6 and 8
Boise June 10, 12
Boise July 22 and 24

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 Scheduled for June 2014

Monday, June 2, 2014 - BOISE

10:00 a.m. *Reed J. Taylor v. Richard A. Riley* #40595-2012
11:10 a.m. *Reed J. Taylor v. Sharon Cummings* #40599-2013

Wednesday, June 4, 2014 - BOISE

8:50 a.m. *State v. Charlynda Lynn Goggin* #40554-2012
11:10 a.m. *U.S. Bank National Assoc. v. CitiMortgage, Inc.* #41252-2013
..... #41395-2013
1:30 p.m. *State v. Michael Rowe Russo* (Petition for Review) #41395-2013

Friday, June 6, 2014 - BOISE

8:50 a.m. *State v. Matthew Steven Taylor* #40553-2012
10:00 a.m. *State v. Jesse Elias* (Petition for Review) #41477-2013
11:10 a.m. *917 Lusk, LLC v. City of Boise* (Judicial Review) #41214-2013

Tuesday, June 10, 2014 - TWIN FALLS

8:50 a.m. *Gregory Hull v. Richard B. Giesler* #41306-2013
10:30 a.m. *Lynn Urrutia v. Ty (Cliff) Harrison* #41100-2013
11:10 a.m. *J & M Cattle Co. v. Farmers National Bank* #41023-2013

Wednesday, June 11, 2014 - TWIN FALLS

8:50 a.m. *ABC Agra, LLC v. Critical Access Group* #40573-2012
10:00 a.m. *Mark Van v. Portneuf Medical Center* #38793-2011
11:10 a.m. *Gary R. Corgatelli v. Steel West, Inc.* (Industrial Commission) #41012-2013

Idaho Court of Appeals Oral Argument for June 2014

Tuesday, June 10, 2014 - BOISE

10:30 a.m. *Klein v. State* #40924-2013
1:30 p.m. *State v. Swenson* #41325-2013

Thursday, June 12, 2014 - BOISE

10:30 a.m. *Hymas v. Meridian Police Dept.* #41156-2013
1:30 p.m. *Reece v. State* #41369-2013

Idaho Court of Appeals Oral Argument for July 2014

Tuesday, July 22, 2014 - BOISE

10:30 a.m. *IDHW v. Jane Doe* (EXPEDITED) #41978-2014
1:30 p.m. *State v. Spies* #41147-2013

Thursday, June 24, 2014 - BOISE

10:30 a.m. *State v. Larson* #40091-2012
1:30 p.m. *State v. Frietas* #41378-2013

**Idaho Supreme Court and Court of Appeals
NEW CASES ON APPEAL PENDING DECISION
(Updated 5/1/14)**

CIVIL APPEALS

Damages

1. Did the trial court err in refusing to apply the special relationship exception to the economic loss rule where a professional engineering firm held itself out as an expert in the specialized field of land use planning and negligently provided personal services related to land use planning and entitlements that resulted in substantial economic harm?

BRN Development v. Taylor Engineering
S.Ct. No. 40625
Supreme Court

Eviction

1. Whether Freddie Mac's claim of possession fails as a matter of law because it did not comply with I.C. § 45-1505(1) prior to the foreclosure sale.

Federal Home Loan Mortgage Corp. v. Butcher
S.Ct. No. 41188
Supreme Court

Post-conviction relief

1. Did the court err in denying Parvin post-conviction relief after an evidentiary hearing?

Parvin v. State
S.Ct. No. 40824
Court of Appeals

2. Did the court err in summarily dismissing Green's petition for post-conviction relief as untimely?

Green v. State
S.Ct. No. 41235
Court of Appeals

3. Did the court err in denying, after an evidentiary hearing, Dixon's claim that trial counsel was ineffective for failing to object to the location of the jury trial in a courtroom at the Kootenai County Public Safety Building, in which there is also a county jail?

Dixon v. State
S.Ct. No. 39745
Court of Appeals

4. Did the court err by summarily dismissing Cadue's successive petition for post-conviction relief?

Cadue v. State
S.Ct. No. 41001
Court of Appeals

5. Did the court err by summarily dismissing Mahler's petition as untimely?

Mahler v. State
S.Ct. No. 40963
Court of Appeals

Quiet title

1. Is the court's finding that the Clarks intended to convey to Coleman the property up to the fence line clearly erroneous where the court also concluded that the fence line did not exist at the time of the conveyance?

Boyd-Davis v. Baker
S.Ct. No. 40438
Supreme Court

Summary judgment

1. Did the court err in granting summary judgment to Franklin Building Supply based on the affidavit offered in support of the motion?

Franklin Building Supply v. Hymas
S.Ct. No. 41041
Supreme Court

2. Did the court err in granting summary judgment to Micron to enforce Goldman's personal guaranty in the principal amount of \$1 million?

Micron Semiconductor Products v. Goldman
S.Ct. No. 41554
Court of Appeals

CRIMINAL APPEALS

Double jeopardy

1. Under the plain language of § 37-2732B and principles of double jeopardy, can a defendant be convicted and sentenced for both a conspiracy under subsection (b) and the completed act under subsection (a) when both charges arise out of the same course of conduct?

State v. Sanchez-Castro
S.Ct. No. 40603
Supreme Court

Evidence

1. Did the court abuse its discretion in allowing the opinion testimony of Detective Johnston as an expert witness in the science of ballistics?

State v. Larson
S.Ct. No. 40091
Court of Appeals

2. Did the district court err in allowing the State to present evidence of prior bad acts pursuant to I.R.E. 404(b)?

State v. Ortega
S.Ct. No. 40682
Court of Appeals

3. Did the court abuse its discretion when it admitted Trujillo's recorded admission of guilt made in a recorded jail telephone call?

State v. Trujillo
S.Ct. No. 41135
Court of Appeals

4. Whether the conclusion that Van Tassel refused to submit to evidentiary testing by conduct was supported by substantial and competent evidence.

State v. Van Tassel
S.Ct. No. 41210
Court of Appeals

Other

1. Did the court err when it denied Orellana-Castro's motion to sever and motion for relief from prejudicial joinder because the charges were not properly joined?

State v. Orellana-Castro
S.Ct. No. 41358
Court of Appeals

Restitution

1. Did the court abuse its discretion by ordering Struhs to pay as restitution the cost of medical insurance premiums purchased by the victim's wife between the date of the offense and date of sentencing?

State v. Struhs
S.Ct. No. 40941
Court of Appeals

**Idaho Supreme Court and Court of Appeals
NEW CASES ON APPEAL PENDING DECISION
(Updated 5/1/14)**

Search and seizure –
suppression of evidence

1. Did the district court err in reversing the magistrate court’s order suppressing evidence and in finding the traffic stop of Spies’ car was objectively reasonable?

State v. Spies
S.Ct. No. 41147
Court of Appeals

2. Did the court err in denying Perez-Jungo’s motion to suppress because his detention was unduly prolonged and therefore the subsequent search of his person and vehicle violated the Fourth Amendment?

State v. Perez-Jungo
S.Ct. No. 41158
Court of Appeals

3. Did the district court err in concluding that under Idaho’s implied consent law an officer may not request a blood test if the suspect is apparently willing to take a breath test?

State v. Burrill
S.Ct. No. 41151
Court of Appeals

4. Did the court err in denying Tracy’s motion to suppress and in finding the warrantless entry into his apartment was justified by exigent circumstances?

State v. Tracy
S.Ct. No. 40783
Court of Appeals

5. Did the court err by finding the stop of McPeak’s vehicle was justified by reasonable suspicion and by denying his motion to suppress evidence found in his vehicle?

State v. McPeak
S.Ct. No. 40892
Court of Appeals

Sentence review

1. Did the court err in denying Owens’ motion for credit for time served or in its application of *State v. Hoch*, 102 Idaho 351 (1981)?

State v. Owens
S.Ct. No. 41174
Supreme Court
Summarized by:
Cathy Derden
Supreme Court Staff Attorney
(208) 334-3868

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Idaho Courts

Highlights of Rule Amendments Effective July 1, 2014

Catherine Derden

The following is a list of rule amendments that will go into effect on July 1, 2014, unless otherwise noted. The orders amending these rules can be found on the Idaho Judiciary's home page at <http://www.isc.idaho.gov/recent-amendments>. Please note that several other proposed amendments were not yet finalized as of the date this article was prepared. Orders amending the rules can always be found on the Supreme Court website. Be sure to check the Idaho State Bar e-bulletin for your chance to comment on proposed amendments before adoption.

Idaho Appellate Rules

The Idaho Appellate Rules Advisory Committee is chaired by Chief Justice Roger Burdick.

Rule 30. Augmentation or deletions from transcript or record. This rule has been amended to allow the Supreme Court Clerk to collect a \$2 per page fee for preparation of the augmentation of the record. The fee is set out in the order granting the motion to augment, and failure to pay within 14 days results in denial of the motion.

Rule 35. Content and arrangement of briefs. A new subsection has been added that states in cases involving easements or other types of boundary or real property disputes, the brief shall include a map,



diagram, illustrative drawing, or other document depicting (i) the lay of the land, (ii) the location of the parcels or pieces of property in dispute, and (iii) the location of any features of or on the land that are pertinent to identify the matters in dispute, including but not limited to easements, roads, trails, boundaries, markers, fences, and structures. The parcels, pieces and features depicted shall be labeled so as to adequately identify them. The document shall be based upon testimony or evidence in the record with citations to such supporting evidence.

Idaho Criminal Rules

The Criminal Rules Advisory Committee is chaired by Justice Daniel Eismann. The Bail Bonds Guidelines Committee is chaired by Senior Judge Barry Wood.

Rule 16. Discovery and inspection. On January 1, 2014, a new rule took effect that is similar to 18 U.S.C. § 3509 and addresses sexually exploitative material. The rule provides that any property or material that constitutes or is alleged to constitute sexually exploitative material as defined in I.C. § 18-1505B or I.C. § 18-1507 shall remain in the care, custody, and control of either the court or a law enforcement agency, and the court is to deny any request by the defendant to duplicate it so long as the State makes the property or material reasonably available to the defendant.

Rule 46. Bail or release on own recognizance. The amendment addresses an inconsistency between the bail statutes and Rule 46. A provision has been added to the rule concerning notice when a bond is forfeited or a forfeiture is set aside, stating that, if the bail consists of

a surety bond, such notice shall be sent to the surety, or to the agent designated by the surety to receive such notice as reflected in the records of the Department of Insurance, and shall constitute notice to both the surety and the person posting bond, if they are different persons. This new provision enables clerks to send a single notice of forfeiture or the setting aside of forfeiture in cases of a surety bond.

Idaho Rules of Family Law Procedure

The Children and Families in the Courts Committee is chaired by Judge Russell Comstock.

In January 2013, at the recommendation of the CFCC, a pilot project was started in the Fourth Judicial District implementing this new set of family law rules. The rules have now been adopted statewide but implementation has been delayed until July 1, 2015. However, any Judicial District may implement the rules sooner by Administrative Order. These rules govern the procedure in all family law cases, including divorce, child support, child custody, paternity, proceedings related to the Domestic Violence Crime Prevention Act and all proceedings, judgments or decrees related to the establishment, modification or enforcement of such orders, excepting contempt. The rules do not apply to cases involving the Child Protection Act, Adoption, Termination or Guardianship.

Idaho Rules of Civil Procedure

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

Rule 3(a). Commencement of action. When a family law case is commenced, this rule requires that a family case information sheet be

filed. Effective January 1, 2014, this rule was amended to require that an information cover sheet also be filed in all guardianship and conservatorship cases, as well as involuntary commitment cases. The sheet is used as an administrative tool to coordinate cases involving the same individual.

Rule 11(b)(3). Leave to withdraw - Notice to client. The amendment places the responsibility on the clerk to serve the order of withdrawal on the client in accord with Rule 77(d) in the same manner that other orders are served, and clarifies that the 20 day period for the client to respond begins after service of the order.

Rule 16(a). Scheduling conferences and scheduling orders. New Rules 16(a) and (b) replace the former Rules 16(a) though (g) and were proposed by the Advancing Justice Committee, chaired by Senior Judge Barry Wood. The current rules were reorganized and multiple sections combined to eliminate duplication. Scheduling conferences are to be held within 30 days after an answer or notice of appearance is filed. When one or more defendants have been served, but no appearance has been made, a scheduling conference or status conference shall be set no later than three months after a complaint is filed and a scheduling order entered that addresses dates for discovery, other pre-trial conferences and a trial date.

Rule 16(b). Final pre-trial procedure. A final pre-trial conference is to be held at least 30 days before trial and a list of subjects to be discussed is set out. No later than three (3) days prior to the date set for the final pre-trial conference all parties to an action may file a written stipulation regarding any matter to be discussed

at the conference. The court shall enter a written pre-trial order which recites the action taken at the conference. Written objections to a pre-trial order may be filed within 14 days from date of service, and shall be heard prior to trial in the same manner as a motion.

Rule 26(b)(4)(A). Trial Preparation – Experts. The amendments create two categories of expert witnesses: (1) those retained or specially employed to provide expert testimony in the case or who are employees of the party and (2) individuals with knowledge of relevant facts not acquired in preparation for trial and who have not been retained or specially employed to provide expert testimony in the case. There is no change in the current rule as to what must be disclosed upon interrogatory or court order as to witnesses that fall in the first category as specifically retained experts or employees. However, if an expert witness falls into the second category, then what must be disclosed is a statement of the subject matter on which the witness is expected to present evidence under Idaho Rule of Evidence 702, 703 or 705, and a summary of the facts and opinions to which the witness is expected to testify. The rule makes it clear that a party may depose any person who has been disclosed pursuant to this rule. In addition, a new provision similar to the federal rule has been added, which provides that any draft disclosure or draft report prepared in anticipation of litigation by any witness disclosed under this 26(b)(4)(A)(1)(i) as a retained expert or expert employee of a party is protected from disclosure.

Rule 33(a). Interrogatories to parties - Availability - Procedures for use. The amendment is in response to difficulty finding a person to sign

answers to interrogatories when the answers come from an agency or company and not just one person.

Rule 40(e). Change of venue. The amendment provides that a change of venue may only be made upon motion of a party.

Rule 54(a). Judgments - Definition - Form. The rule, as amended, provides specific language for a final judgment. A judgment shall begin with the words “JUDGMENT IS ENTERED AS FOLLOWS: . . .” and it shall not contain any other wording between those words and the caption.

Rule 56(a) and (b). Summary judgment- For claimant; Summary judgment-For defending party. The time for filing a motion for summary judgment has been changed so that it must be filed at least 90 days before trial date or filed within 7 days from the date of the order setting the case for trial, whichever is later, unless otherwise ordered by the court. The primary purpose of this rule change is to ensure efficient use of court time and parties’ time and costs in preparing for trial and is in line with the goal of I.R.C.P. 1 to secure an inexpensive determination of every action and proceeding. Under the current rule, if motions for summary judgment are filed 60 days before trial, it is likely that the court will be unable to make a ruling in advance of the trial and/or the pre-trial deadlines. Thus, the parties and the court will be preparing for trial unnecessarily should summary judgment be granted thereby increasing the time and costs incurred by the parties. By moving the deadline to 90 days prior to trial, a ruling is likely to be made 30 days prior to trial, giving the parties, in most cases, sufficient time to prepare for trial and comply with pretrial deadlines.

Rule 57. Declaratory judgment. The amendment provides that a party having a claim against the insured subject to a declaratory judgment be given notice of the action rather than be joined in the action.

Rule 59(c). Form and time for serving affidavits on motion for new trial. The amendment requires that affidavits in support of a new trial comply with the form for affidavits provided in Rule 56 (e).

Rule 77(d). Notice of orders or judgments. The word “proposed” has been inserted in front of the word “order” to clarify that a party who drafts an order should serve a copy of the proposed order on the other party.

New filing fee schedule

At the 2014 legislative session HB509 was passed and signed into law effective July 1, 2014. This law increases civil filing fees to provide necessary support for the implementation of the new Odyssey system that will replace the current “ISTARS” and will modernize case management and improve access to the courts and court records through the use of electronic filing, electronic storage of records, and video-conferencing. For cases filed in the district court, there is an increase of \$125; for cases filed in the magistrate division, an increase of \$70; and for appearances filed by defendants in either the district court or the magistrate division, an increase of \$70. A \$20 fee was also added for a few types of filings for which no technology fee is currently charged. Thus, most cases that are filed in district court will have a total filing fee of \$221.00, while most cases filed in the magistrate division will have a total filing fee of \$166.00.

Idaho Misdemeanor Criminal Rules

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

Rule 2.2. Declarations. This new rule was adopted effective January 1, 2014, similar to a rule found in the Criminal Rules and Civil Rules of Procedure noting that whenever the rules require or permit a written statement to be made under oath or affirmation, such statement may be made as provided in Idaho Code Section 9-1406. An affidavit includes a written certification or declaration made as provided in Idaho Code Section 9-1406.

Rule 5. Uniform citation. A line has been added to the uniform citation advising that payments may be made over the Internet by going to <http://courtpay.idaho.gov>.

Rule 10(d). Form of withheld judgment. This subsection was deleted as the form was outdated and was not being used.

Idaho Court Administrative Rules

Rule 32. Records of the judicial department - Examination and copying- Exemptions from and limitations on disclosure. Effective January 1, 2014, subsection (d), Access to Court Records, Examination and Copying, was amended and some restrictions placed on access to exhibits. Before final disposition of the action, access to any exhibit shall be allowed only with permission of the custodian judge subject to any conditions set by the custodian judge and shall take place under the supervision of the office of the court clerk. It also adds a provision that the public shall not have access at any time to items of contraband or items that pose a health or safety hazard; for example, drugs, weapons,

child pornography, toxic substances, bodily fluids, without permission of the custodian judge.

Effective July 1, 2014, subsection (b) of Rule 32, Definitions, was amended to expand the definition of court record from those relating to judicial proceedings to other types of records, such as records of the Administrative Office of the Courts, the Judicial Council, the Idaho State Bar, the Idaho Bar Commission, and the District Magistrates Commissions. In addition subsection (c) (6) of Rule 32 was amended to provide access to court information sheets by guardian ad litem and court visitors unless restricted by the court.

Rule 54.2. Guardianship Reports. This new rule is the result of the 2014 legislative sessions and deletions that were made from various statutes. The rule requires all guardians to file a report within 30

days following the anniversary of the appointment and at least annually thereafter. It also specifies the information that must be set out in the report.

Rule 54.3. Conservator Reports. This new rule is also the result of the 2014 legislative sessions and deletions that were made from various statutes. The rule requires all conservators to file an inventory within 90 days of appointment and an accounting within 30 days of the anniversary date of the appointment and at least annually thereafter. It also states with information should be in an inventory and in an accounting.

Rule 71. Exhibits. Effective January 1, 2014, this rule was repealed and replaced with a new rule addressing the handling and storing of exhibits to ensure all exhibits are properly accounted for both during and after trial.

About the Author

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

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Decades of Research Shows Adolescents Do Better With Community Service Rather than Incarceration

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The purpose of this article is to share with the legal community some of what we as social science researchers have learned from our research and the research of others, regarding the health and education benefits of community service among adolescents. In other words, we will attempt to answer the question of whether there are benefits of performing community service to the individuals performing the service, and to describe what these benefits are.

Sentencing individuals to community service in the modern legal environment began in 1966 in Alameda County, California. Judges there began imposing work assignments as an alternative to jail for offenders who could not pay traffic fines.¹

Eventually courts extended use of the sanction to other low-level non-violent offenders.¹ The work assignments grew increasingly diverse.

Sentencing offenders to unpaid labor inspired some judges' creativity as they combined community service with jail or a fine or both. Offenders did low-level maintenance work for public agencies—clearing litter from playgrounds, sweeping up around public buildings or housing projects, cutting grass and raking leaves in parks, washing cars in an agency motor pool. Others did clerical work or answered phones. Thousands more were sent off



to help out at hospitals, nursing homes, social service centers, and other nonprofit organizations.¹

The practice spread across the United States by the late 1970s, as the federal Law Enforcement Assistance Administration (LEAA) provided funding to encourage it. LEAA concluded that incarceration for many non-violent offenders may increase recidivism by placing low-level offenders in prisons with violent career criminals, and further, that formal conviction and incarceration severely limited future economic activities.² Experimental studies have shown that community service as a part of a restitution approach rather than an incarceration approach relates to lower rates of recidivism.³

Organized community service in the primary and secondary educational system began in the early 1970s with the introduction of what is referred to today as *service-learning*. Much earlier, in around 1900⁴, educator Arthur Dunn promoted service in the community as a part of his civ-

LEAA concluded that incarceration for many non-violent offenders may increase recidivism by placing low-level offenders in prisons with violent career criminals, and further, that formal conviction and incarceration severely limited future economic activities.²

ics class in Indianapolis and eventually the act of service was combined with a curriculum to form “service-learning.”

Service-learning “is a process of involving students in community service activities combined with facilitated means for applying the experience to their academic and personal development. It is a form

of experiential education aimed at enhancing and enriching student learning in course material. When compared to other forms of experiential learning like internships and cooperative education, it is similar in that it is student-centered, hands-on, and directly applicable to the curriculum.⁵ An example of service-learning is taking grade school students to a nursing home to visit elderly people. During the visit, students might find that residents of the nursing home were born in the 1920s. In order to make this a service-learning experience and not simply community service (which in itself is valuable), the student would go back to school and learn who the United States Presidents were in the 1920s and what cars looked like in the 1920s in order to link the visitation experience with the elderly to their school curriculum.

Social scientists have also learned over the past two decades that engagement in community service among adolescents often yields valuable outcomes for the adolescents' health. In other words, the persons being served are not the only ones benefiting from the experience—the providers of the service benefit as well.

Benefits of community service to the provider of the service

Community Service Reduces Risky Sexual Behavior and Teen Pregnancy

Researchers have exhaustively evaluated teen pregnancy programs and reported what they refer to as “best practices.” Comparing individual researcher’s “best practices” often reveals very similar findings. One item repeatedly emerges: youngsters who engage in service-learning or community service are less likely to be involved in a teen pregnancy.⁶

“Service-learning connects meaningful community service with academic learning, civic responsibility, and personal growth. It enables young people to study community issues in-depth, plan and initiate community action, and make a difference in their community.”⁶

The issues related to sexual behavior among the young are extensive. Risky sexual behaviors primarily include unprotected sex, multiple partners, and unfamiliarity with partners.⁷ The United States has one of the highest rates of teen pregnancy among developed countries.⁸ There are 41.5 births per 1,000 women in the 15- to 19-year-old age group, according to a Centers for Disease Control and Prevention (CDC) report from 2009.⁹ It has been estimated that the cost of teen pregnancy is \$9 billion per year in the United States.⁹ In addition to the huge societal cost of teen pregnancy, teen pregnancy may also be a marker of sexual behavior that increases the risk of contracting sexually transmitted infections, such as human immunodeficiency virus (HIV).¹⁰ The CDC reported that the total number of new HIV cases reported each year decreased from 2001 to 2005; however, there was an increase in those years of new cases of HIV in people aged 15 to 29 years.¹¹

In 1997, an article was published which described the impact of the Teen Outreach program, which focused on reducing both teen pregnancy and academic failure.¹⁰ The study investigated the impact of the program on 342 students in grades 9 to 12 and compared the participants to a control group who did not participate in the program. Teen Outreach consisted of three elements: 20 hours of supervised community service, classroom-based discussions of the students' service experiences, and classroom-based discussions and activities that were related to the social-developmental tasks of adolescents.¹⁰ The community service component allowed for the students to select their own supervised site within the community, and the students worked in hospitals and nursing homes, worked as tutors, participated in walk-a-thons, and participated in many other types of activities. The classroom component included discussions, role-plays and guest speakers, and engaged the students regarding their experiences. Topics and themes were self-confidence, social skills, and self-discipline, values, how to deal with family stress, development, and the transition from adolescence to adulthood.

In the Teen Outreach study, participants in the program had less than half the risk (42%) of school

Social scientists have also learned over the past two decades that engagement in community service among adolescents often yields valuable outcomes for the adolescents' health.

suspension compared to the control group, and course failure was only 39% as large as the control group.¹⁰ Teen pregnancy was only 41% as large in the Teen Outreach group. Each of these results was statistically significant, even after adjusting for sociodemographics, baseline levels of these behaviors, and potential biases in self-reporting.¹⁰

Another important study regarding service-learning as a preventive method for risky sexual behavior was a retrospective study of over 9,000 adult women in the San Diego area that was conducted in the early 1990s.¹² This study analyzed the Adverse Childhood Experiences (ACE) score (emotional, physical, or sexual abuse; exposure to domestic violence, substance abusing, mentally ill or criminal household member; or separated/divorced parent) among patients and sought to explain characteristics in individuals who were once pregnant as teens. The study suggested that engagement in early, unprotected sex leading to adolescent pregnancy may be indicative of an attempt for interpersonal connectedness and support that may have been missing in childhood among these women.¹² The investigators suggested that youth development programs focused on building competence and confidence through relationships with peers and mentors, promoting education, enhancing decision-making and autonomy, and offering community service opportunities for at-risk youth who may be exposed to these “ACE” characteristics.¹²

Doug Kirby¹³⁻¹⁶ (who, until his sudden death in 2012, was a Ph.D. and scholar at ETR and Associates, an organization whose work focuses on improving the lives of young people) produced work that remains at

the forefront of reviewing programs for effectiveness in delaying the initiation of sexual activity and identifying features related to successful and unsuccessful interventions. He reported that service-learning programs among young people are effective in reducing adolescent unprotected sex, pregnancy, and child-bearing.

Other researchers confirm Kirby’s findings. Melchior evaluated the Learn and Serve programs throughout the United States.¹⁷ Students in these programs spent an average of

Scales and Benson, in their manuscript on social capital and pro-social orientation among youth, reported that pro-social orientation was inversely correlated with all risk behavior patterns.

77 hours providing various community services. Pregnancy rates among participants during the year in which they participated were lower than among non-participants.

O’Donnell and colleagues evaluated the Reach for Health community youth service-learning program. Student participants in this service-learning program delayed initiation of sexual intercourse, reduced the frequency of sexual intercourse, and increased condom use. Additionally, those with suicidal thoughts were more likely to talk to an adult than were nonparticipants.¹⁸

Although it is not clear why service-learning has such positive effects, Kirby speculates that it may be because participants develop sustained relationships with program facilitators, which may encourage resilience or enhanced feelings of competency and greater autonomy, along with the positive feeling that they are making a difference in the lives of others. Participating in service activities also reduces the opportunity to engage in problem behavior, especially during after-school hours.¹⁵

Preventing teen pregnancy is an important part of delinquency and crime prevention. In summing a wide variety of research, Sigle-Rush-ton and McLanahan¹⁹ noted that the children of teen mothers and absent fathers had significant higher odds of using illicit drugs, engaging in delinquent and criminal activity, and being in prison. Anything that strengthens the family and reduces teen pregnancy is important for the criminal justice system.

Community service reduces criminal behavior, substance abuse, and other health risk behaviors

Scales and Benson, in their manuscript on social capital and pro-social orientation among youth, reported that pro-social orientation was inversely correlated with all risk behavior patterns measured in their research, including delinquency (that is, as the adolescents performed more pro-social behaviors, their engagement in at-risk behaviors decrease).²⁰ Coefficients ranged from low to moderate (-.14 to -.25) between helping others and problem alcohol use, use of illicit drugs, use of tobacco, gambling, anti-social behavior, violence, school problems, and sexual behavior risk.

Eccles and colleagues²¹ reported similar findings describing that pro-social activities in their study consisted of community service involvement, school clubs and programs, performing arts, and team sports. Their results indicated that participation in community service in particular was associated with lower rates of underage drinking and illicit drug use. Another study by Klein and colleagues concluded that adolescents involved in community service are likely to show an increase in basic social and decision-making skills and a decrease in violent criminal behavior and risky sexual behavior.²²

In our analysis of data from Alaska high school students between the ages of 12 and 18 from the CDC's 2009 Youth Risk Behavior Survey (YRBS), we found that students who engaged in volunteer activities for at least one hour per week were less likely to have had sexual experiences, to have been involved in binge drinking, to have ever used marijuana, or to have ever used prescription drugs that were not prescribed for them by a physician.²³

Community Service Improves Academic Performance

One of the benefits of engaging in service by youth is improved academic performance. Children and teens who engage in community service tend to earn better grades, have better cognitive skills, and have better decision-making and problem-solving skills.²⁴ There appears to be a reciprocal relationship between academic performance and service in that those with better grades tend to also be more involved in service activities.

In a nationally representative study involving more than 4,000 high school students, Schmidt and colleagues found that those participat-

Another study by Klein and colleagues concluded that adolescents involved in community service are likely to show an increase in basic social and decision-making skills and a decrease in violent criminal behavior and risky sexual behavior.²²

ing in any type of service improved their academic performance.²⁴ Students' grades increased by 12% and their civic knowledge increased by 16%. Although 27% of the students performed service as a requirement and the number of hours spent in service varied, the results remained significant. Furthermore, students working directly with individuals in need had higher grades compared to those who performed other types of services.

A report from the National Service Knowledge Network cites many examples of how service engagement by youth has been related to benefits including higher grades in school.²⁵ Two of these examples include reports from alternative schools. In Michigan, Laird and Black reported that students who participated in Literacy Corps, a service-learning option in one alternative school, scored higher than their nonparticipating peers on the Michigan state assessment.²⁶ In Kansas, Kraft and Wheeler found that alternative school students who participated in service-learning showed strong gains over time on measures of attitude toward school, writing scores on a six-trait writing assessment, and grade point averages.²⁷ In our analysis of the previously noted YRBS Alaska data, we found that those who engaged in one hour or more of community ser-

vice per week were 50% less likely to earn D's and F's in school.

Academic performance is of high interest to the justice system. In a classic meta-analysis, Maguin and Loeber found consistent inverse relationships across studies between academic performance and delinquent behavior.²⁸ That is, the higher the academic performance, the lower the delinquent behavior. These relationships were stronger for males and whites, but they tended to hold in all groups regardless of socio-economic status. Academic performance is strongly related to future opportunities and a stake in conformity that reduces decisions to violate the law. To the extent they improve academic performance, community service programs may reduce community criminal behavior.

Discussion and recommendations

The information presented here demonstrates that the benefits of serving others accrue not only to those being served, but also to those providing the service. Research data shows that community service can be an effective part of recidivism prevention and a part of broader community delinquency prevention programs. Importantly, Doug Kirby recommends that adults who perform these service activities with youth

provide structured time for preparation and reflection before, during, and after the service.²³

We suggest that when the courts impose community service activities on young people, that they engage high quality, caring adults to work with the courts and to be involved in the service with the youth. The literature on adolescent and high-risk behaviors is clear that there are potential benefits of engaging youngsters with adults, even with non-family adults. Although parents are clearly among the most important and influential adults in the lives of young people, adolescents do develop relationships with adults besides their parents. These relationships may include teachers, coaches, friends' parents, neighbors, counselors, and religious leaders. The relationships may develop through existing social networks or as part of formal mentoring programs. Research clearly shows that relationships with pro-social non-parental adults can have a strong positive effect on adolescent development.²⁹ We would urge the courts to consider engaging well-screened adults to work with adolescents in providing helpful services to others.

In the process of designing these community service projects for youth, we suggest a three-step process. First, meet with the youth and talk about the planned activity. Second, accompany them to perform the service. Third, reflect with them and talk about what they did and their feelings about these activities.

We would discourage the courts from sending young people out to do service without the engagement of an adult. We suggest that the courts order that the community service be performed between the hours of 3 and 6 p.m., which are the



hours when the highest rates of drug use, sexual behavior and delinquency occur.³⁰

Endnotes

1. Anderson DC. Community Service: A Productive Way to Punish. In: *Sensible Justice: Alternatives to Prison*. New York: The New Press. 1998. Chapter available at <http://www.nytimes.com/books/first/a/anderson-justice.html>. Accessed March 24, 2014.
2. McBride DC, Dalton SG. Criminal justice diversion for whom? In: Cohn A, Ed., *Criminal Justice Planning and Development*. Sage Research Progress in Criminology; 1977:103-116.
3. Schneider AL. Restitution and recidivism rates of juvenile offenders: results from four experimental studies. *Criminology*. 1986;24:533-552.
4. The History of Service Learning. Los Angeles County Office of Education. http://www.lacoe.edu/Portals/0/Curriculum-Instruction/SLHistory_doc.pdf. Accessed March 24, 2014.
5. Definition of Service Learning. Fayetteville State University, Office of Civic Engagement & Service Learning. <http://www.uncfsu.edu/civic-engagement/service-learning/definition-of-service-learning>. Accessed March 24, 2014.
6. Best Practices in Teen Pregnancy Prevention Practitioner Handbook [Published 2003]: Abstract. *Journal of Extension*. 2003;41(2). <http://www.joe.org/joe/2003april/tt1.php>. Accessed March 24, 2014.

We would discourage the courts from sending young people out to do service without the engagement of an adult.

7. Grossman M, Markowitz S. I did what last night? Adolescent risky sexual behavior and substance abuse. *Eastern Economic Journal*. 2005;31:383-405.
8. Singh S, Darroch J. Adolescent pregnancy and childbearing: levels and trends in developed countries. *Family Planning Perspectives*. 2000;31:14-23.
9. HIV, Other STD and Teen Pregnancy Prevention and San Bernardino Students [Fact Sheet]. Centers for Disease Control and Prevention. http://www.cdc.gov/healthyyouth/yrbs/pdf/hiv/sanbernardino_hiv_combo.pdf. Published 2009. Accessed March 24, 2014.

10. Allen J, Philliber S, Herrling S, Kuperminc GP. Preventing teen pregnancy and academic failure: experimental evaluation of a developmentally based approach. *Child Development*. 1997;64:729-742.

11. HIV-AIDS Surveillance Report. Centers for Disease Control and Prevention. http://www.cdc.gov/hiv/pdf/statistics_2005_HIV_Surveillance_Report_vol_17.pdf. 2005. Vol. 17. Atlanta: U.S. Department of Health and Human Services. Published 2005. Revised June 2007. Accessed March 29, 2014.

12. Hillis SD, Anda RF, Dube SR, Felitti VJ, Marchbanks PA, Marks JS. The association between adverse childhood experiences and adolescent pregnancy, long-term psychosocial consequences and fetal death. *Pediatrics*. 2004;113:320-327.

13. Kirby D. Understanding what works and what doesn't in reducing adolescent sexual risk-taking. *Family Planning Perspectives*. 2001;33:276-281

14. Kirby D. Antecedents of adolescent initiation of sex, contraceptive use and pregnancy. *American Journal of Health Behavior*. 2002;26:473-485

15. Kirby D. Emerging Answers 2007: research finding on programs to reduce teen pregnancy and sexually transmitted diseases. Washington, DC: The National Campaign to Prevent Teen and Unplanned Pregnancy. <http://www.urban.org/events/thursdayschild/upload/Sarah-Brown-Handout.pdf>. Accessed March 24, 2014

16. Kirby D. The impact of abstinence and comprehensive sex and STD/HIV education programs on adolescent sexual behavior. *Sexuality Research and Social Policy*. 2008;5:6-17.

17. Melchior A. Summary Report: National Evaluation of Learn and Serve America. Waltham, Mass: Brandeis University, Center for Human Resources; 1999. Available at: http://www.cpn.org/topics/youth/k12/pdfs/Learn_and_Serve1999.pdf. Accessed March 29, 2014.

18. O'Donnell L, Stueve A, Wardlaw D, O'Donnell C. Adolescent suicidality and adult support: the reach for health study of urban youth. *American Journal of Health Behavior*. 2003;27:633-644.

19. Sigle-Rushton W, McLanahan S. Father absence and child well-being: a critical review. In: Moynihan DP, Smeeding TM, & Rainwater L, eds. *The Future of the Family*. New York, NY: Russell Sage Foundation; 2004:116-154.

Research data show that community service can be an effective part of recidivism prevention and a part of broader community delinquency prevention programs.

20. Scales PS, Benson PL. Indicators of Positive Youth Development: Prosocial Orientation and Community Service (Draft Paper). Prepared for Indicators of Positive Youth Development Conference, convened by Child Trends, Washington, DC. http://childtrends.org/wp-content/uploads/2013/05/Child_Trends-2003_03_12_PD_PD-ConfScaBen.pdf. Published March 2003. Accessed March 24, 2014.

21. Eccles JS, Barber BL, Stone M, Hunt J. Extracurricular activities and adolescent development. *Journal of Social Issues*. 2003;59:865-889.

22. Klein JD, Sabaratnam P, Auerbach M, Smith S, Kodjo C, Lewis K, Ryan, Dandino C. Development and factor structure of a brief instrument to assess the impact of community programs on positive youth development: the Rochester Evaluation of Asset Development for Youth (READY) tool. *Journal of Adolescent Health*. 2006;45:252-260.

23. Hopkins GL, McBride DC, VanDerwaal C, Fayard C, Gleason PC, Kannenberg W, Moreno J & Roberts J. The power of serving others in preventing risk behaviors among adolescents. 2014. Manuscript in preparation for submission.

24. Schmidt JA, Shumow L, Kackar H. Adolescents' participation in service activities and its impact on academic, behavioral, and civic outcomes. *Journal of Youth and Adolescence*. 2007;36:127-140.

25. Impacts of service-learning on participating K-12 students. National Service Knowledge Network. <https://www.nationalservicelearningresources.gov/impacts-service-learning-participating-k-12-students>. Published December 2002. Revised May 2007. Accessed March 24, 2014.

26. Laird M, Black S. *Service-learning evaluation project: Program effects for*

at risk students. Presentation at 2nd International Service-Learning Research Conference, October 2002, Nashville, TN. Available at <http://www.lions-quest.org/pdfs/ServiceLearningSFCEvaluation.pdf>. Accessed March 24, 2014.

27. Kraft N, Wheeler J. Service-learning and resilience in disaffected youth: A research study. In: Billig SH, Eyler J, eds. *Advances in service-learning research: Vol. 3. Deconstructing service-learning: Research exploring context, participation, and impacts*. Greenwich, CT: Information Age; 2003:213-238.

28. Maguin E, Loeber R. Academic performance and delinquency. *Crime and Delinquency*. 1996;20:145-204

29. Bernat DH, Resnick M. Connectedness in the lives of adolescents. In: DiClemente RJ, Hansen WB, Ponton LE, eds. *Handbook of Adolescent Health Risk Behavior*. New York, NY: Plenum Press; 2009:375-390.

30. VanderWaal C, Powell LM, Terry-McElrath YM, Yanjum B, Flay B. Community and school drug prevention strategy prevalence: differential effects by setting and substance. *The Journal of Primary Prevention*, 2005;26:299-320.

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Time Savings: E-editing Tricks and Tips

Tenielle Fordyce-Ruff

Tomorrow I'll teach this batch of 1L's their final proofing and editing class of the year. (I'm writing this in April, admiring the lovely blossoming trees around Boise.)

This final editing class fills me with excitement and it gave me the idea for this month's column. My students have tired of paper editing tricks like reading backwards (so you can concentrate on the words instead of the flow) or out loud. This time, I'm going to work with them on e-editing.

I thought many of *The Advocate's* readers might also enjoy these tips. So here goes. This month, we will cover ways to prevent mistakes, ways to fix mistakes, and why e-edit isn't a cure-all.

Fix citation mistakes before they happen

Yes, this is possible. Word-processing programs come with default settings that create chaotic legal citations.¹ But you can set your word processing program to avoid pesky citation errors.



First, change the default setting to eliminate the single or double space after a period. This will prevent citing to *P. 2d* instead of *P.2d* or *U. S.* instead of *U.S.* While this may seem like a simple trick, it saves space as well as time.

Next, get rid of the auto-formatting that puts ordinals in superscript. You may remember from pre-Algebra that an ordinal number denotes a series: first, second, third. Reporter abbreviations are done in "legal ordinals" like 2d and 3d, and



word processing programs don't recognize these as ordinals. Circuit abbreviations, however, can create problems. Instead of having to fix every citation to the 9th Circuit, you can simply type 9th correctly.

Finally, turn off auto-replacement for symbols. This will save you from citing to subsection © or ® of a statute.

Taking the time now to change a few settings can save you time and effort when cite checking every document.

Finding errors: Grammar and spell check

How many times have you seen those pesky squiggly lines under words as you are typing, but just ignored them? Time to stop. Those lines indicate that your word processing program has picked up on a spelling or grammar error. Running each and every document through both spell and grammar check can help you find and correct errors.²

To make this process even more efficient, take some time to add common legal words to your dictionary. This will prevent your computer from identifying common legal words, like *tortious*, as errors.

Adding clients' names to the dictionary can also help you avoid the embarrassment of misspelling their names. For instance, if your client is named *Kukuchka*, your spell check will flag it every time. If you put the correct spelling in the dictionary, it will flag only the misspellings: *Kukuckha*.

Spell-Czech: Some notes of caution

Of *coarse*, spell check can't replace an old-fashioned proof read. Spell check won't identify words that are spelled correctly, but used incorrectly. (Like my use of *coarse* two sentences ago.)

Remember back to your elementary school days when you learned about homophones? Words that sound the same but are spelled differently? Well, when we are working away furiously, we sometimes use a homophone for the word we *here* in our heads.

Taxi drivers charge a different *fair* depending on whether it is *peek* season.

It's more likely the writer meant Taxi drivers charge a different *fare* depending on whether it is *peak* season.

Here is a list of common homophones.

aisle—isle
brake—break
cell—sell
cent—scent
cereal—serial
coarse—course
for—four
hair—hare
heal—heel
hole—whole
idle—idol
know—no
made—maid
meat—meet
pair—pear
peace—piece
plain—plane
real—reel
sight—site
seam—seem
stair—stare
steal—steel
tail—tale
waist—waste
weak—week³

Of course, my favorite set of homophones involves a grammar nerd joke!

How do you comfort a grammar nerd?

By saying *there, their, they're!*

Spell check won't pick up on the use of a homophone instead of the word you intended, but my next tip can help you find and fix them quickly.

Finding errors: The find function

You can use the find function⁴ to help you edit and proof read. Picture this: It's late, you're tired, and you're proofing a wonderful work of advocacy. The titillating topic? The legislative history of a statue.

Did you catch the error? That's right. It should be *statute* not *statue*. Here are a few other common mistakes that spell check *wont* catch.

anew instead of a new
defiant instead of definite
desperate instead of disparate
fro instead of for
pubic instead of public
tot he instead of to the
tortuous instead of tortious
wonton instead of wanton
wont instead of won't

Keep a list of your common mistakes handy, and pretty soon this editing step will be second nature.

Conclusion

No single editing method is foolproof. But using these tips should make your job of editing go more quickly.

I'm off to enjoy a lovely April afternoon by working on my lesson plans at the park. Maybe using these tricks will give you enough extra time to enjoy a lovely June day!

Sources

- Darby Dickerson, *ALWD Citation Manual: A Professional System of Citation*, 9-13 (4th ed., Wolters Kluwer 2010).
- Megan McAlpin, *Beyond the First Draft: Editing Strategies for Powerful Legal Writing*, 118-119 (Carolina Academic Press 2014).
- Suzanne E. Rowe, *Spell Czech: Amazing Mistakes Your Computer Won't Catch*, available at: <https://www.osbar.org/publications/bulletin/11nov/legalwriter.html>.
- Suzanne E. Rowe, *Perfect Proofing: 10 Steps Towards Error-free Documents*, available at: <https://www.osbar.org/publications/bulletin/06dec/writer.html>.

Endnotes

1. For specific directions on how to change these settings, see Darby Dickerson, *ALWD Citation Manual: A Professional System of Citation*, 9-13 (4th ed., Wolters Kluwer 2010).

No single editing method is foolproof. But using these tips should make your job of editing go more quickly.

2. Grammar check can be very helpful for identifying minor points like subject-verb agreement errors. Be cautious, though. Grammar check isn't perfect and will often identify perfectly good sentences as needing revision. Instead of blindly accepting every suggested change, use grammar check as a way to identify sentences you might want to revise after considering the grammar rules.
3. Megan McAlpin, *Beyond the First Draft: Editing Strategies for Powerful Legal Writing*, 118 (Carolina Academic Press 2014). This book contains many wonderful editing tips, including a much more inclusive list of homophones.
4. You can simply hit "Ctrl+F" or "Apple+F" to quickly access the find feature in Word.

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.

I Know You're Out There; I Hear Your Pleadings

Fourth District Pro Bono Committee

Take care not to perform righteous deeds in order that people see them;... When you give alms, do not blow a trumpet before you as the hypocrites do in the synagogues and in the streets to win the praise of others. ... When you give alms, do not let your left hand know what your right hand is doing, so that your almsgiving may be secret...

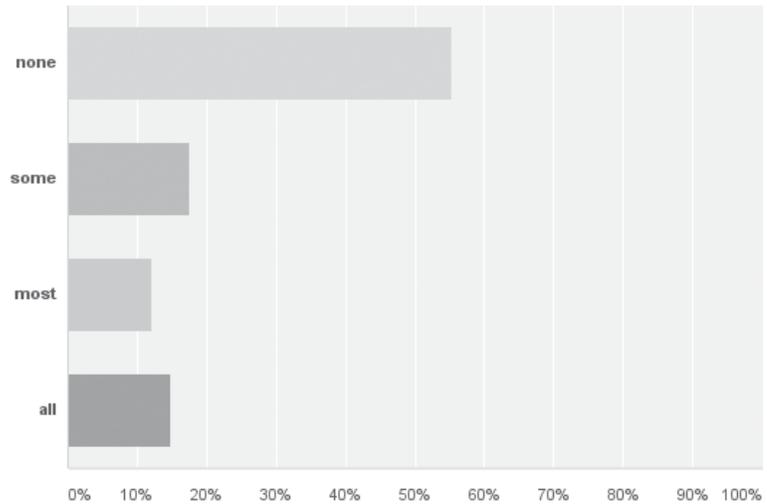
— Matthew 6 1-6, 16-18

Modesty, religious beliefs laziness — whatever the cause, a majority of 4th district lawyers do not want a record of their generosity. In December, 2013, the 4th District Bar Commission conducted a survey of attorneys to learn how much *pro bono* work lawyers were performing and to investigate issues regarding the reporting of those hours. In answering this question: **Do you want to report your *pro bono* hours?** 52.4% of those responding (63 total responses) answered that they did not want to report their hours.

The December survey was part of the 4th District *Pro Bono* Committee's effort to help a growing population for whom legal service has become all but impossible to afford. The Committee's goals include encouraging solo practitioners and small law firms to report their *pro bono* hours and coordinating the reporting with Idaho State Bar. While the Idaho Volunteer Lawyers Program provides an excellent means to connect lawyers with those in need of service, there has been a sense that many lawyers were reluctant to participate in the program. The survey confirmed that impression and provided other information that all of us in the legal profession should

Q2 How many of those pro bono hours did you report to any entity that keeps track of them, such as the Idaho Volunteer Lawyers Program?

Answered: 74 Skipped: 4



consider in fulfilling our professional and moral obligation to our community.

The survey propounded these basic questions:

1. How many pro bono hours have you provided in the last 12 months?
2. How many of those pro bono hours did you report to any entity that keeps track of them, such as the Idaho Volunteer Lawyers Program?
3. Do you feel that there are barriers to reporting your pro bono hours to the Idaho Volunteer Lawyers Program or other entities? And
4. Do you want to report your pro bono hours and, if so, how would you prefer to do so?

The survey defined *pro bono* as professional legal services provided at no charge for low-income people and for organizations in matters that primarily help low-income people or that protect or secure civil rights, civil liberties, or public rights. The survey asked participants to exclude

52.4% of those responding (63 total responses) answered that they did not want to report their hours.

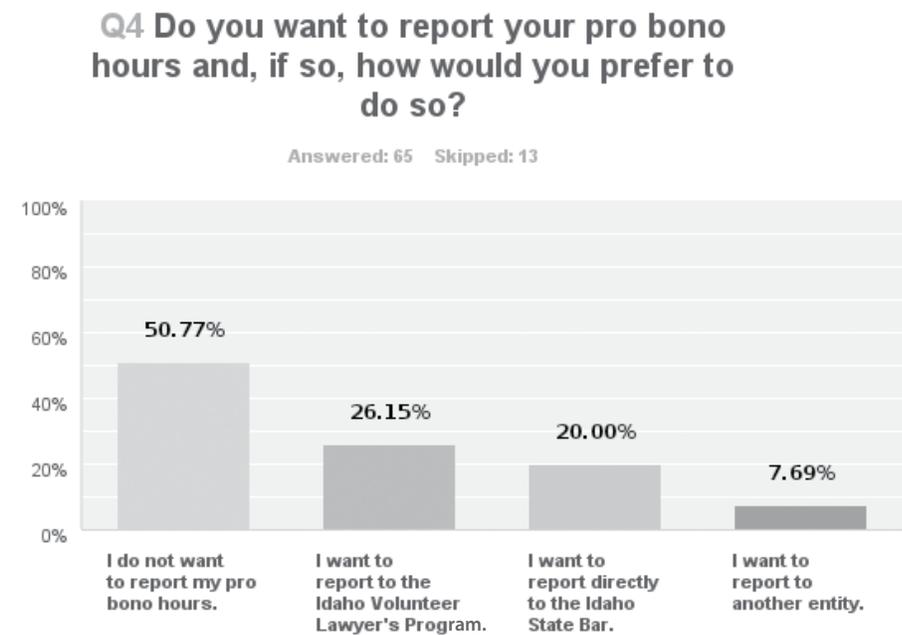
from *pro bono* hours non-legal volunteer service for charitable, nonprofit, religious, and other organizations; writing off debt owed by paying clients who did not pay; and legal services for relatives or friends who could afford to pay if they had to.

Participants reported performing between zero and 150 hours of *pro bono* work during 2013. Fifty percent of the respondents did not think there are any barriers to reporting *pro bono* hours, but another 39% felt no need or desire to report *pro bono* hours or receive any recognition for their work. The remaining respondents felt that it is either too complicated to report *pro bono* hours or there is little to no incentive to report those hours. As the following charts demonstrate, most of the respondents have not, and do not want to, report *pro bono* hours, and those who do want to report hours suggest more than one method for doing so.

In addition to the raw responses, many lawyers provided detailed comments.

- “My reward is my own satisfaction at helping someone in need. The amount of my *pro bono* work will not be affected by public disclosure. If a lawyer thinks it is a ‘neat’ thing to get credit for *pro bono* work, he needs to consult a mirror. The last time I checked, one definition of ‘character’ is undertaking a good deed when no one is looking. What is the drill here? Are we seeking to shame attorneys into *pro bono* work by requiring annual disclosure of hours?”

- “I personally think it is important for all attorneys to report their *pro bono* hours so that we have an accurate picture of how much we do as a profession to help low income people. I think it would be good if the bar required us to report because then more would take the time to do it. We are all very busy and it does take time but I imagine if we all reported we would be astonished at how many hours of *pro bono* work actually happens.”



- “I don’t know if it matters to whom it is reported or how. I like to report just because I want lawyers who don’t volunteer to know and see that other lawyers with equally busy schedules are devoting time to *pro bono* and there is really no excuse to decline to volunteer to help people who need lawyers but have no money. We are privileged to be lawyers and part of this profession but we are not entitled. We are obligated to return to those less fortunate the benefits we have reaped as lawyers, even those of us working in the government sector for less pay than 95% of our similarly situated and qualified colleagues.”

- “I represent young women seeking judicial bypass for abortion. I do not report these hours as abortion is a rather emotional topic. I don’t want crazy people picketing my law firm or publicly identifying me. This is unfortunately a security issue.”

The conclusions to be drawn from the survey results are as elusive and diverse as the answers themselves. We may say with some confidence, however, that the typical 4th

“I personally think it is important for all attorneys to report their *pro bono* hours so that we have an accurate picture of how much we do as a profession to help low income people.”

district lawyer is generous, modest and conscientious. During a discussion of the survey with an Ada County magistrate, he suggested that the state bar have a method of anonymous reporting so that there is some, overall account of *pro bono* service. Such a blind reporting process may accomplish the goal of assessing the amount of volunteer le-

gal work being performed and provide a subtle challenge to our sisters and brothers who need motivation to do their part.

The creation of a clearinghouse where all *pro bono* hours may be reported would also provide a public counterweight to the cynical dismissal of lawyers as greedy mercenaries. Encouraging, if not requiring, reporting of hours would remind us lawyers that we are part of a system of societal justice larger than the cases for which we are paid.

Helping the public obtain the benefits and protections of the law is one the fundamental missions of our profession. As the survey results make clear, the bar and bench must continue to be creative in providing opportunity, motivation, recognition (or anonymity) and administration to get legal service to those in need. Life will provide the caseload.

Encouraging, if not requiring, reporting of hours would remind us lawyers that we are part of a system of societal justice larger than the cases for which we are paid.

It ain't the heat, it's the humility.

—Yogi Berra

About the Authors

The 4th District *Pro Bono* Committee members are: Ritchie Eppink, American Civil Liberties Union of Idaho, Chair, Hon. Melissa Moody, Hon. Lynn Norton, Hon. Russell Comstock, Hon. Carolyn Minder, Hon. Christopher Bieter, Sunrise Ayers, Idaho Legal Aid Services,

Jody Nafzger, Concordia University School of Law, Katie Ball, University of Idaho College of Law, and Mary Hobson, Idaho Volunteer Lawyers Program.

The Committee's essential goal is to increase *pro bono* service to deserving people of the 4th district. Here is a link to the many opportunities to help: http://www.isb.idaho.gov/pdf/ivlp/ppo_bono_commission_menu.pdf

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			Caitlin D. Kling Boise, ID <i>University of Idaho College of Law</i>

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**Richard “Dick” Fields
1931 - 2014**

Richard “Dick” C. Fields, 83, passed away unexpectedly on April 23, 2014 while recovering from a fall suffered on March 19. Dick was born in Waterloo, Iowa on January 10, 1931, the son of George and Emily Fields. When he was 9, his family moved to Boise and in 1948 he was graduated from Boise High School, where his father was the principal and later became the superintendent of Boise schools.



Richard “Dick” Fields

Dick and his two best friends (the “Three Musketeers”) ventured outside of Idaho for college, with Dick going to Harvard, and the other two attending Columbia and Yale. Dick was graduated from Harvard University (magna cum laude) in 1952 with an Economics degree. After college, he served in the Air Force as a First Lieutenant at the Miho Air Force Base in Japan.

Dick fell in love with the beautiful country and a Japanese woman (Taiko Izawa, later baptized Shirley Fields) who worked as a translator and interpreter in the communications office of the headquarters building where he was the adjutant. When he completed his service, Dick became a reporter and editor for the Associated Press in Helena, Montana.

He surprised his co-workers one day and announced that he was returning to Japan to marry Shirley. On November 25, 1957, they embarked upon their 57-year marriage

with a wedding ceremony at the Lutheran Church in Tokyo, and a day later, a Japanese ceremony at the Japanese consulate, followed by receptions at the renowned Meguro Gajyoen in Tokyo and later in Boise. They returned to Helena, and Dick often recalled fondly the warm welcome he and Shirley received there, including when their first daughter (Stephanie) was born in 1959.

Because he wanted to stay in the West, Dick moved to Denver to attend University of Denver College of Law where he was graduated with a doctorate of jurisprudence (Order of St. Ives) in 1964, while working full time as a supervisor of the editorial department at the Martin Company. He began his legal career working in Denver as a staff attorney for the National Labor Relations Board. In 1965, Dick and Shirley moved with two daughters born in Denver (Diana and Debbie) to Boise to be closer to his parents, and there they had their only son (Steve).

In Boise, Dick joined his childhood friend and fellow “Musketeer,” Eugene Thomas, at the law firm of Moffatt Thomas Barrett Rock & Fields, where for nearly 50 years he counseled clients in the areas of labor and employment and litigation, trying over 150 cases in state and federal courts throughout the Mountain States and Pacific Northwest. For the last 15 years, although he was no longer a shareholder or salaried member of the firm, Dick went to the office every day he was in town, voluntarily serving the firm’s Boise, Pocatello, and Idaho Falls offices nearly full time as a mentor, in-house counsel, and general troubleshooter.

Throughout his lifetime, Dick gave his time, knowledge, and financial resources to a wide array of

professional and community causes. Almost every lawyer and judge who knew him would say that he epitomized what it meant to be a lawyer. He was recognized for his leadership and ethics by many legal organizations, including the Idaho State Bar (receiving awards for Outstanding Service [1990], Professionalism [1992], and its highest honor, Distinguished Lawyer [2000]), the Federal Bar Association (Exemplary Service Award in 2008), the American College of Trial Lawyers, and the Boise chapter of the American Inns of Court, which he founded.

He served as commissioner and president of the Idaho State Bar, chaired several Bar sections, and led many other legal organizations, such as the state’s chapter of the American College of Trial Lawyers, the American Board of Trial Advocates, the Idaho Association of Defense Counsel, the Jackrabbit States Bar, the Western States Bar, and the Federal Bar Association. He also served as the representative to the U.S. Ninth Circuit Judicial Conference.

He was known in the legal community as an advocate for professionalism and civility in the practice of law and for legal education (teaching classes at Boise State University, Idaho State Bar programs, the Citizens Law Academy, and grading bar examinations for 30 years). Believing lawyers should give back to their communities and that there should be access to the justice system for all, he helped to establish and served on the board of the Idaho Volunteer Lawyers Program, which provides pro bono legal services, and recently had volunteered legal counsel for pregnant teens and single mothers.

IN MEMORIAM

Dick lived the motto of Rotary International: “Service Above Self.” He was committed to creating positive and lasting change in his community and the world. He was an active Rotarian since 1973, and following in his father’s footsteps, became president of The Boise Rotary Club, and then District Governor, exactly 30 years after his father served in that role.

He was awarded a Citation for Meritorious Service by the Rotary Foundation in 2005, was a district delegate to Rotary International’s Council on Legislation in Chicago, and chaired the Permanent Fund Committee (raising \$1 million for its endowment fund). Dick and Shirley’s philanthropy was recognized through multiple Paul Harris Fellow awards, a Rotary International Major Donor and Bequest Society membership, as well as a Greater Boise Rotary Foundation Robert S. Gibb Fellow award. Both Dick and Shirley recently were honored as the first recipients of an award that will continue in their names, “The Dick and Shirley Fields Award for Substantial Financial Contributions to Rotary,” which will be awarded annually. Without seeking the limelight, Dick quietly led many other charitable institutions in Boise. Since the early 1970s, he also was a member of the Advisory Board of the Salvation Army, and was given the organization’s William Booth Award (its highest award) in 1999. As long-term patrons of the Boise Philharmonic Association (Dick and Shirley tried never to miss a concert), Dick served as a board member and two years as its president, helping, among other things, with formation of the highly successful Langroise Trio, in collabo-

ration with the College of Idaho. He also represented the orchestra on the board of the Esther Simplot Performing Arts Academy. In 1993, in recognition of some of these accomplishments, the Idaho Statesman painted Dick as a “Portrait of a Distinguished Citizen,” an honor also bestowed on his father in the 1970s.

Dick came from a family of educators and was passionate about education. He volunteered for the Learning Lab, Inc. (an adult and family literacy program), first as a tutor, later as its president, and then as a member of the advisory board, which spear-headed efforts to develop a state-of-the-art facility in Garden City. In February, 2014, Dick was awarded the second, annual Anna Margaret Jones Legacy Award for demonstrating extraordinary leadership and philanthropy in his dedication and passion for Learning Lab. For years, Dick also helped many local high school graduates obtain admission and financial aid scholarships by interviewing student applicants to Harvard.

During the last several years, Dick’s main endeavor was helping to bring a law school to the Boise community. He was the initial chair for the Dean’s Advisory Council for the Concordia University School of Law and was instrumental in locating, developing, and promoting Boise’s first law school. He also served ex officio to the Council of Trustees of Concordia University, in Portland, Oregon. The law school honored Dick’s contributions by presenting to him the inaugural “Leaders in Action Award” in April, 2013.

Dick and Shirley traveled to over 35 countries on 5 different continents, attending 17 Rotary Inter-

national conventions. Despite his worldly travels, Dick loved Idaho best. When he wasn’t watching BSU Broncos football or basketball (or the multitude of other sports he followed), his favorite past-time was sitting on his back porch taking in the views of the Boise foothills or on the deck of his mountain cabin watching the sun set on Payette Lake in McCall.

Dick was a devoted family man who never missed his children’s school and extra-curricular activities, serving as the PTO president at their schools, and coaching YMCA basketball. When his daughter, Debbie Fields Rowan, was killed in 1998, the dignity and compassion he and Shirley showed in the face of tragedy was an inspiration to all. Perhaps Dick’s most lasting legacy is his role as “Oji” (a nickname derived from grandpa in Japanese) to his four grandchildren, Diana’s daughters (Anika and Allison), and Steve’s sons (Oscar and Koji).

Dick will always be remembered as a gentleman and for his kind-hearted nature, great humility, decency of character and affect that inspired those around him to make the world a better place.

Dick is survived by his loving wife of 57 years, Shirley Fields, his daughter, Stephanie Bentley (Boise), his daughter, Diana Fields and her husband, Todd Fisher (Boulder, CO), and their children, Anika and Allison, his son, Steve Fields and his wife, Mary Jane Fields (Boise), and their children, Oscar and Koji, his sister, Ann Kaufman (Vancouver, WA). He was preceded in death by his parents, George and Emily Fields, his brother-in-law, John Kaufman, and his daughter, Debbie Fields Rowan.

IN MEMORIAM

Bob Melton Brown 1937 - 2014

Bob Melton Brown died peacefully on May 1, 2014, in Coeur d'Alene, Idaho, after a long illness.

Bob was born February 24, 1937, in Hereford, Texas, to Fred and Erle Marie Brown. Bob was a graduate of Lubbock High School, class of 1955. In 1960, he graduated from Texas Tech University with a bachelor's degree in political science, and a minor in Spanish.

Through ROTC, Bob entered the U.S. Air Force as a lieutenant and was stationed in Portland, Ore., from 1960 -1963.

He married Judith

Hyatt Kimber in 1965 and became stepfather to her son, Eliot. Their daughter, Catherine, was born in 1970. The family moved to Coeur d'Alene, Idaho, in 1971.

Bob began working at North Idaho College as an administrator in vocational programs. The following year in 1972, daughter Rebecca was born. Bob and Judy divorced in 1981.

In 1983, Bob married Anne Salisbury. He earned his Juris Doctorate from Gonzaga University in 1988 and began practicing law in Coeur d'Alene, first at the firm of Cox, Davis & Stoddard, and later establishing his own practice, specializing in labor law. Bob and Anne divorced in 1997, but remained good friends.

Bob's life reflects his consistent commitment to the arts, public service, and social justice. Some of the memories that were particularly im-



Bob Melton Brown

portant to him include his service on the following: Coeur d'Alene City Council from 1982-1985; Idaho Commission on the Arts; Western States Arts Federation; boards of both the Coeur d'Alene Community Theater and the Carousel Players; civil rights actions in the 1960s; Kootenai County Task Force on Human Relations; staff to Texas Democratic Senator Ralph Yarborough; John F. Kennedy's statewide campaign in Texas in 1960; board of Opera Coeur d'Alene; hosting weekly program on KVNI called "Sunday at the Symphony;" volunteer at St. Pius Soup Kitchen in the 1990s; and membership in the North Idaho Unitarian Universalist church.

Family and friends will remember Bob's quick wit, generous hospitality, and unshakable beliefs. He loved to organize and plan events, and his eye for detail was legendary — whether setting up a conference, cooking a meal, directing a play, reviewing a legal document, or facilitating a meeting, Bob thought deeply about how each small part built to a whole.

Bob loved nothing better than to be of use; to be doing work that mattered to others. Bob is survived by his two daughters, Catherine and Rebecca, and three grandchildren.

Charles Arthur "C. A." Daw 1953 - 2014

C. A. Daw, formerly from Boise, Idaho, passed away on May 1 after a short battle with cancer. He had served as Chief Legal Counsel for the Montana Department of Revenue from January 2007 until his death.

C. A. received both his undergraduate degree in chemical engineering and his Juris Doctorate from

the University of Idaho, with honors. He began his legal career with the Idaho Tax Commission, and was in private practice from 1988 until 2007 with the Boise firm of Bosch, Daw and Ballard. His practice primarily involved defending state tax agencies, especially in centrally assessed property cases and 4-R Act litigation.

C. A. was a nationally recognized expert in state and local taxation. He contributed to the work of national organizations, including the International Association of Assessing Officers (IAAO) and the National Conference of Unit Valuation States (NCUVS). He also consulted with numerous counties and states on issues related to complex tax valuation and equalization. The IAAO recently recognized C. A. for 25 years of contributions to standards of assessment, major textbooks on appraisal methods, and other work.

C. A. was a strong advocate for justice and equity in taxation, and for protecting the rights of individual taxpayers. One Montana DOR colleague noted, "In just seven years as chief legal counsel for the department, C. A. made a lasting impact on tax administration in Montana, with equity, fairness, and ethics the hallmarks of his legacy. These principles, C. A.'s legacy, are reflected in Montana tax law, administrative rules, and in many department practices."

He was also a gentle and kind person. He treated people with dignity, respect, and friendship. He genuinely cared for people around him.



Charles Arthur "C.A." Daw

IN MEMORIAM

C. A. was a great friend who will be missed by those closest to him — his family, friends and colleagues. He is survived by his wife, Mari Victory-Daw of Helena, Montana, son Alex, and daughter Kelli and her husband Jeff.

Kirk B. Hadley 1960 - 2014

Kirk B. Hadley, 54, of Pocatello, Idaho, was born on January 17, 1960 to Kent and Mary Catherine Hadley. He passed away peacefully at his home on Saturday, May 3, 2014.

Kirk began his schooling in Kobe, Japan in the 1st grade and continued at Indian Hills Elementary, Irving Junior High, Pocatello High School (1978). He then attended the University of Idaho and earned his Juris Doctorate from the University of Idaho School of Law.

Kirk celebrated his twenty-fifth year of practicing law in May. He specialized in Estate Planning. He will be greatly missed by his friends, relatives and the many clients he served through the years. A popular attorney, Kirk was named the Pocatello area's "Favorite Lawyer" in 2013 Idaho State Journal Readers' Choice Awards. He was also listed as one of the "Best Lawyers in America," and emphasized Elder Law. He drafted over 3,000 wills and helped several hundred families with nursing home and medic-aid planning for the elderly. Kirk was devoted to his partners and to his clients.

Kirk's greatest pride and joy were his two sons Connor and



Kirk B. Hadley

Sander. He loved and cherished his family and friends. He was a man of Christian Faith. He enjoyed listening to contemporary jazz and classic rock along with many other genres of music. He loved skiing Pebble Creek, mountain climbing and biking. One of his favorite past times was reading.

His is survived by his two amazing sons, Connor (23), and Sander (21), his mother Mary Catherine and sister Lynn Hadley (Boise), nephews Nick Ingram (24) and Alec Ingram (21), along with the mother of his children, Debbie Akers. He is preceded in death by his father, Kent Hadley.

In lieu of flowers donations can be made to the Pebble Creek Ski Patrol in care of Mike Mickelsen, 1855 S. Fairway Dr., Pocatello, ID 83201.

Diane Marie Tappen 1959 - 2014

Diane Marie Tappen, age 55, of Boise, ID, passed away after a long battle with metastatic breast cancer.

She was born in Los Angeles, CA on April 6, 1959 to Dr. Thomas and Georgia Tappen. Diane graduated from Buhl High School, received a Bachelor of Arts degree in history from the University of Idaho and went on to receive a Juris Doctor degree from the University of Idaho in 1984. Diane worked in Idaho and Oregon before deciding to continue her education at Portland State University where she received a Masters degree.



Diane Marie Tappen

In 1995 she settled in Boise and found her niche practicing education law as a partner at Eberharther-Maki and Tappen P.A. Diane enjoyed her work and was fortunate to be in business with her good friend and former classmate Elaine Eberharther-Maki. Her coworkers were important to her and over the years she grew to love many of them. Diane's social spirit allowed her to create and enjoy a great community of close friends; she relished the opportunity to banter and joke with them.

Diane had an adventurous spirit and loved history and traveling. She was daring and not afraid of the unknown. Born with a keen internal compass, she always had her bearings in a new place. She could venture anywhere in the world whether by train, bus, car or on foot with ease. Diane enjoyed great discussions sharing her knowledge of far away places or local historic sites. Her curious nature and sense of adventure led her to backpack through Europe, explore Greece and eventually travel to China on two separate occasions. The latter trips forever changed her life.

Diane's dream of being a mother came true in 2002 when she adopted her daughter Adelaide from China and again in 2005 when Augusta joined the family. They were truly the love of Diane's life.

Diane believed in family and had a generous heart. She was quick to forgive and would freely lend an ear to listen or a shoulder to cry on. Diane offered sage advice and could make you laugh with her wit and dry sense of humor. She opened her home and her heart unconditionally to those in need. Diane was the cog

IN MEMORIAM

of the family wheel and took charge whether it was the Christmas family dinner or a Tappen family camping trip.

In addition to traveling and history she enjoyed sewing, weaving, cooking and was an avid reader. Most of all, she delighted in nurturing her two girls and supporting their busy school and social activities. They were truly gifts from God treasured by Diane.

Diane is survived by her two daughters, Addie and Gussie; her mother, Georgia Tappen of Buhl, brothers, Mark Tappen (Maria) of Louisville, CO and Mitchell Tappen (Susan) of Socorro, NM; and her sisters, Sharon Parnell (Bill) of Eugene, OR, Donna Tappen of Boise, Cammie Jayo (Joe) of Twin Falls, and Rachel Brasil (Joe Little) of Boise. She was preceded in death by her father, Dr. Thomas Tappen and her brother, James Tappen.

The family would like to thank Dr. Dan Zuckerman, Harrison Hope Hospice, Sacred Heart Parish and especially our Sacred Heart School family for their love and support. In lieu of flowers, memorial contributions may be made to Sacred Heart School.

Condolences and memories may be shared with the family on Diane's memorial webpage at www.summersfuneral.com

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The spoken word perishes; the written word remains.





ISB photo by Dan Black

The 2014 IALL class and committee members gather at the Lincoln statue outside the state Capitol in February while exploring President Lincoln's leadership style.

Bar Program Enhances Leadership Development

Mahmood U. Sheikh

The Center for Creative Leadership recently asked corporate executives in 53 countries, "Are leaders born or made?"¹

This remains an important question in the fields of personal and professional development and for attorneys hoping to make the most of their profession. The Idaho Academy of Leadership for Lawyers, (IALL), which capped off its five-session course in April, has answered this question through its dynamic programming.

After the April 25 graduation ceremony for the 2013-14 (IALL) class, Idaho State Bar President Bob Wetherell reflected that "leadership is a skill that indeed can be taught."



His conclusion echoes those of people like the late Vince Lombardi of the Green Bay Packers who stated "Leaders are made, they are not born. They are made by hard effort, which is the price which all of us must pay to achieve any goal that is worthwhile."²

In the Center for Creative Leadership survey, slightly more than half (52.4 percent) of the top executives said leaders are made. Approximately one fifth (19.1 percent), think that individuals come into this world with an understanding to lead and have that "it" factor. Just over a quarter (28.5 percent) think leaders are both made and born. Author Erika Andersen writes in *Forbes* magazine, "the single most powerful way to grow as a leader [is to] become truly self-aware." Andersen relates that "Becoming truly self-aware means to cultivate, on a daily basis, an accurate sense of how you show up in the world and what motivates you."³

After the April 25 graduation ceremony for the 2013-14 (IALL) class, Idaho State Bar President Bob Wetherell reflected that "leadership is a skill that indeed can be taught."

Deborah L. Rhode, Director for the Center on Legal Profession and Stanford University Professor of Law, quotes that lawyers are "leaders of leaders."⁴ However, Rhode contends that most lawyers do not receive formal training or adequate education on leadership skills.⁵

An Idaho solution

Oftentimes lawyers must learn leadership skills “on the job” while serving on community and charitable boards, in elected office or within their respective firm. Such happenstance training left room for improvement. So to address the issue, the Idaho State Bar Board of Commissioners unanimously adopted the creation of the IALL in November of 2010, making Idaho the 18th state bar to create a leadership program designed specifically for lawyers.

In late 2007, then-ISB Deputy Executive Director Terri Muse began extensive research for a program that would bring together some of the best and brightest attorneys in Idaho and teach them leadership skills that they could use to enhance the legal profession and transform their local communities. Her study, alongside the vision of then-Bar Commissioner and now the IALL Committee

Concluding the evening of April 25, the IALL now proudly claims three graduating classes with a total of 37 graduates from all across Idaho, representing a variety of backgrounds and different practice areas.

Chairperson Deborah Ferguson, determined the program would serve as a highly regarded, selective leadership training program.

Concluding the evening of April 25, the IALL now proudly claims three graduating classes with a total of 37 graduates from all across Idaho, representing a variety of backgrounds and different practice areas. Each graduate has been asked to develop, implement and evaluate a legacy project that benefits their local community and/or community as a whole.

Open enrollment coming soon

Due to the continued success of this program we are pleased to announce the opportunity for attorneys to be a part of the 2014-15 IALL class. Applications will be made available on the bar’s website beginning June 20, 2014 and are due on August 1, 2014. This five-session Academy will provide another layer of lawyers with the necessary skills set to continue their role of being “leaders of leaders” as we truly believe “leaders can be made.”

Quotes from the IALL graduates

“What a fantastic opportunity! IALL has been an invaluable experience for me in my career. From team building to discussions with great leaders (in law as well as other fields), this academy has given me tools to be a better person – both as an attorney and in my personal life. As an added benefit, we get to associate with judges and attorneys [from] across the state of Idaho!! I would highly recommend IALL to any attorney looking to gain leadership skills and advance their career.”



— Paul Arrington,
Barker, Rosholt & Simpson, LLP

“Little did I appreciate when I was accepted into the IALL program how truly inspiring and beneficial this experience would be to me both professionally and

personally. Through the IALL, I have been introduced to and developed lasting friendships with some of the finest attorneys and individuals I have ever met. The IALL seminars and assignments have inspired me to raise the bar in my professional practice and in my personal involvement in the community. I now look for opportunities to be involved in the community and to share the wonderful things I have learned through the IALL. I doubt that I would have had the confidence to take these steps without the wonderful program developed and presented by the IALL committee.”



— Bill Hancock,
Merrill & Merrill, Chtd.

“Participation in the IALL has been a transformative experience, personally and as an attorney, which has left me with a

new-found sense of possibility and optimism. The IALL created a great environment in which to increase self-awareness and identify my strengths and unique characteristics. This self-awareness, I consider to be the cornerstone towards my continued development as a servant lawyer. The IALL has increased my arsenal of tools with which I can better serve clients, the Bar and my community at large. Through the IALL, I have benefitted from the countless years of experience, knowledge and wisdom of numerous outstanding speakers and I have built lasting relationships with other great lawyers.”



— Monica Salazar,
Salazar Law, PLLC

2013 – 2014 IALL graduates

- Ricky Bower, *Belnap Stewart Taylor & Morris, PLLC*
- Maureen Braley, *Idaho State Bar*
- Amanda Breen, *Amanda Breen Law*
- Paul Clark, *Kirsch & Clark, PLLC*
- Lynette Davis, *Hawley Troxell Ennis & Hawley, LLP*
- Mischelle Fulgham, *Lukins & Annis, PS*
- D. Michelle Gustavson, *J.R. Simplot Company*
- Taylor Mossman, *Mossman Law Office, LLP*
- Ali Nelson, *Husch Blackwell LLP*
- Brooke O'Neil, *Finch O'Neil Law Office, PA*
- Tyler Rounds, *Lovan Roker & Rounds, PC*
- Steve Stokes, *Idaho National Guard*

Sample of Legacy Projects

- *Access to Justice FUND Run/Walk* – Maureen Braley (Idaho State Bar)
- *Attorneys for Civic Education* – Jodi Nafzger (Concordia University School of Law), Edith Pacillo (Office of the Attorney General) and Danielle Quade (Hawley Troxell Ennis and Hawley, LLP)
- *Idaho Incarcerated Females Know Your Rights Campaign* – Annie Kerrick (Boise State University)
- *Legal Counsel for the Idaho Suicide Prevention Hotline* – Joe Pirtle (Elam and Burke) and Ben Ritchie (Moffatt, Thomas, Barrett, Rocks & Fields, Chtd).
- *Mediation in the Middleton School District* – Tyler Rounds (Lovan Roker & Rounds, PC)

Endnotes

1. William Gentry, Ph.D., Jennifer J. Deal, Ph.D., Sarah Stawiski, Ph.D., and Marian Ruderman, Ph.D., *Are Leaders Born or Made? Perspectives from the Executive Suite* (2012), <http://www.ccl.org/leadership/pdf/research/areleadersbornormade.pdf>



ISB photo by Dan Black

Conversation at an IALL seminar engages presenters and participants in asking questions about the nature of fulfilling one's highest, best duty to self and community.

2. ©2010 www.vincelombardi.com/quotes
3. Erika Anderson, *Are Leaders Born Or Made?* Forbes.com (11/21/2012), <http://www.forbes.com/sites/erikaanderson/2012/11/21/are-leaders-born-or-made/>
4. Herb Rubenstein, *Leadership for Lawyers* 9 (2000)
5. Deborah L. Rhode, *Lawyers and Leadership*, *The Professional Lawyer*, American Bar Association Center for Professional Responsibility, 2010, Vol. 20, No. 3

About the Author

Mahmood U. Sheikh is the Deputy Executive Director for the Idaho State Bar and the Idaho Law Foundation. Sheikh has served in this capacity since July 2010 and oversees the Member Services Department of the Bar and Foundation.

Sheikh is President-Elect of the Boise Vista Lions Club and he previously served on the Alumni Board of Trustees for the Idaho Chapter of the Delta Chi Fraternity. In 2007, he earned the Idaho Business Review's "Top 40 Under 40" Award. Sheikh graduated from the

This five-session Academy will provide another layer of lawyers with the necessary skills set to continue their role of being "leaders of leaders" as we truly believe "leaders can be made."

University of Idaho with a Bachelor of Science in Business Marketing and a Masters degree in Education, Educational Leadership. In 1999, he served as Associated Students University of Idaho (ASUI) President.

A native of Moscow, Idaho, he is married to the former Amity Vacura of Winchester, Idaho. The two have one son, Zain and a daughter Ara.



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ISB Annual Meeting 2014 Schedule of Events

Wednesday, July 16th

8:30 a.m. - 3:00 p.m. **Idaho State Bar Board of Commissioners**
 4:00 p.m. - 5:00 p.m. **Registration /Exhibition Hall**
 6:00 p.m. - 7:00 p.m. **President's Reception** - *Sponsored by Idaho Trust Bank* (Juniper Hills Country Club - Pocatello)
 7:00 p.m. - 9:00 p.m. **Distinguished Lawyer Awards Dinner** - *Sponsored by ALPS* (Juniper Hills Country Club - Pocatello)
 9:00 p.m. - 11:00 p.m. **Annual Meeting Hospitality HQ** - *Sponsored by Clio*

Thursday, July 17th

7:30 a.m. - 5:00 p.m. **Registration / Exhibition Hall**
 7:30 a.m. - 8:30 a.m. **Continental Breakfast** - *Sponsored by BizPrint*
 7:30 a.m. - 8:15 a.m. **Litigation Section Annual Meeting**
 7:30 a.m. - 8:15 a.m. **Taxation, Probate & Trust Law Section Meeting**
 8:30 a.m. - 10:00 a.m. **Conference Plenary Session - .5 CLE credits** - *Sponsored by LawPay Credit Card Processing*

- Welcome from ISB President Bob Wetherell
- State of the Court by Idaho Supreme Court Justice Jim Jones
- Greeting from the Shoshone Bannock Tribal Chairman Nathan Small
- Keynote Presenter Jeff Rosen

10:15 a.m. - 3:15 p.m. **Idaho Law Foundation Board of Directors**
 10:15 a.m. - 11:45 a.m. **CLE Session #1**

- **Client Counseling: Setting the Attorney Client Relationship Up for Success**
Sponsored by the Government & Public Sector Lawyers Section - 1.5 CLE credits of which .5 is Ethics
- **Criminal Case Law Updates: Idaho Appellate Decisions from the Past 365 Days**
Sponsored by the Appellate Practice Section - 1.5 CLE credits (NAC)
- **Negotiating and Litigating Over Intellectual Property: What is This Stuff Really Worth and Can We Really Place a Value on It?** - *Sponsored by the Intellectual Property Section - 1.5 CLE credits*

Noon - 1:15 p.m. **ISB/ILF Service Awards Luncheon & ILF Annual Meeting** - *Co-Sponsored by Moreton & Co. and Attorney Pro*
 1:30 - 3:00 p.m. **CLE Session #2**

- **Burden of Proof: Not Just a Catch Phrase** *Sponsored by the Idaho Volunteer Lawyers Program - 1.5 CLE credits (NAC)*
- **Do We Have A Living Constitution, A Dead Constitution, or A Zombie Constitution?**
Sponsored by the University of Idaho College of Law - 1.5 CLE credits
- **Practical and Ethical Considerations on the Use of Cloud Computing**
Sponsored by the Idaho Law Foundation - 1.5 CLE credits of which .5 is Ethics

3:15 - 4:45 p.m. **CLE Session #3**

- **Advancing Justice: Model Time Standards** - *Sponsored by the Litigation Section - 1.5 CLE credits (NAC)*
- **Merchant Accounts: Managing Clients' Funds Effectively and Ethically**
Sponsored by the Idaho Law Foundation - 1.5 CLE credits of which .25 is Ethics
- **Simple is the New Black: Legal Writing's New Look and How to Make It Work For You**
Sponsored by Concordia University School of Law - 1.5 CLE credits

5:30 p.m. - 6:30 p.m. **50/60/65 Years of Admission Reception** - *Sponsored by the Sixth District Bar Associatio*
 6:45 p.m. - 8:30 p.m. **Family Law Section Award of Distinction Reception** (Rosewood Event Center, 1499 Bannock Hwy - Pocatello)
 7:00 p.m. - 9:00 p.m. **Bingo Pizza Party** - *Sponsored by Fort Hall Casino*
 7:30 p.m. - 9:30 p.m. **Taxation, Probate & Trust Law Section - Social** (Simisu Fusion Restaurant, 309 E. Center St., Pocatello, ID)
OR Golf, Mountain Bike Ride or Road Bike Ride (Call Eric Olsen at (208) 232-6101 or email elo@racinelaw.net)
 9:00 p.m. - 11:00 p.m. **Annual Meeting Hospitality HQ** - *Sponsored by Clio*

Friday, July 18th

7:15 a.m. - 8:00 a.m. **ILF Donor Appreciation Breakfast** *Sponsored by Eide Bailly, LLP*
 7:30 a.m. - 1:30 p.m. **Registration / Exhibition Hall**
 7:30 a.m. - 8:00 a.m. **Continental Breakfast** - *Sponsored by the Seventh District Bar Association*
 8:00 a.m. - 10:00 a.m. **CLE Session #4**

- **A Fate Worse than Death: What Happens When a Lawyer Becomes Disabled or Dies Without a Plan**
Sponsored by the Diversity Section - 2.0 CLE credits of which .5 is Ethics
- **At the Intersection of the Indian Child Welfare Act and Idaho State Law**
Sponsored by the Family Law Section - 2.0 CLE credits (NAC)
- **Employment and Labor Law Update** - *Sponsored by the Employment & Labor Law Section - 2.0 CLE credits*

10:15 a.m. - 11:45 a.m. **CLE Session #5**

- **Lessons from the Masters**
Sponsored by the Idaho Law Foundation - 1.5 CLE credits of which .5 is Ethics (NAC)

Noon - 1:15 p.m. **Social Networking BBQ** - *Sponsored by the University of Idaho College of Law*
 1:30 p.m. - 3:30 p.m. **CLE Session #6**

- **Members of the Federal Judiciary: Eastern Idaho Roots to the United States' Courts**
Sponsored by the Idaho Law Foundation - 2.0 CLE credits of which .5 is Ethics (NAC)

3:30 p.m. **Conclusion of the 2014 Idaho State Bar Annual Meeting**



Idaho State Bar 2014 Annual Meeting
• Registration Form •
 Shoshone-Bannock Hotel & Event Center
 Pocatello • Fort Hall
 July 16-18

Name: _____

Attorney #: _____ Firm _____

Mailing Address: _____ City, State, Zip: _____

Phone: _____ Email: _____

Choose *Registration Option* from the left column ↓ - Then *Meal Events* you/guests will attend from the right column ↓

Full Registration
Includes all meals, CLEs & Plenary Session

Early Bird (by June 16) <input type="checkbox"/> \$260	Standard (after June 16) <input type="checkbox"/> \$310	First Time Attendee <input type="checkbox"/> \$230
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Special Registration
Includes CLEs & Plenary Session ONLY
 • Meal Events Require Additional Payment •

Attorneys residing <i>within</i> the 6th and 7th Districts or Utah, Wyoming or Montana who have been practicing 3 years or less and/ or are unemployed <input type="checkbox"/> \$125	Attorneys residing <i>outside</i> of the 6th and 7th Districts or Utah, Wyoming or Montana who have been practicing 3 years or less and/or are unemployed <input type="checkbox"/> FREE	Law Students <input type="checkbox"/> FREE
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Day Pass Registration
Includes CLEs & Plenary Session ONLY
 • Meal Events Require Additional Payment •

Thursday Full Day <input type="checkbox"/> \$130	Thursday Morning Session <input type="checkbox"/> \$65	Thursday Afternoon Session <input type="checkbox"/> \$95
Friday Full Day <input type="checkbox"/> \$155	Friday Morning Session <input type="checkbox"/> \$110	Friday Afternoon Session <input type="checkbox"/> \$75

Meal Events

- Distinguished Lawyer Awards Dinner**
 Registrant* + Guest (\$45 each) = \$____
- Service Awards Luncheon**
 Registrant* + Guest (\$30 each) = \$____
- 50/60/65 Years of Admission Reception**
 Registrant* + Guest (\$15 each) = \$____
- Social Networking BBQ Lunch**
 Registrant* + Guest (\$25 each) = \$____

Total Meal Event Fees = \$ _____

Guest Name(s):

1. _____

2. _____

3. _____

4. _____

***No Charge with Full Registration**

PAYMENT INFORMATION

Make checks payable to and send completed form to:
Idaho State Bar, PO Box 895, Boise, ID 83701
 Fax: (208) 334-4515

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Exp. Date _____ Amt. _____

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Tax Problem Resolution

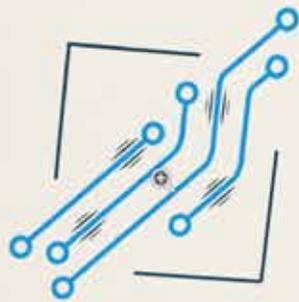
Offers in Compromise – Installment Plans – Tax Court Representation – Innocent Spouse Relief
Penalty Abatement – Tax Return Preparation

Bankruptcy

Bankruptcy/Tax Discharge – Chapter 13 Bankruptcy
Chapter 7 Bankruptcy – Chapter 11 Bankruptcy

Mortgage Loan Modification

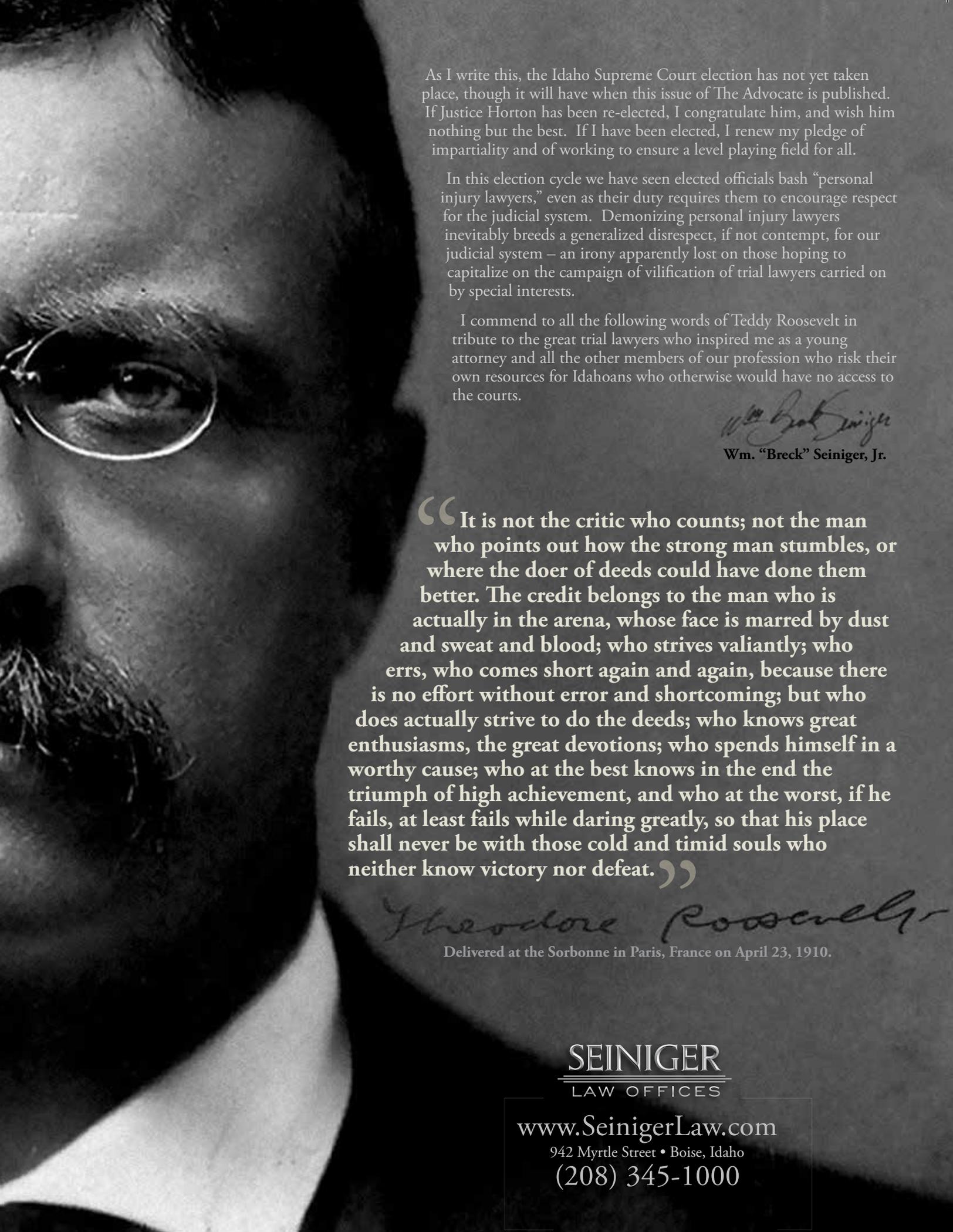
Foreclosure Alternatives – Mortgage Modifications
Forbearance Agreements – HAMP Modifications



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As I write this, the Idaho Supreme Court election has not yet taken place, though it will have when this issue of *The Advocate* is published. If Justice Horton has been re-elected, I congratulate him, and wish him nothing but the best. If I have been elected, I renew my pledge of impartiality and of working to ensure a level playing field for all.

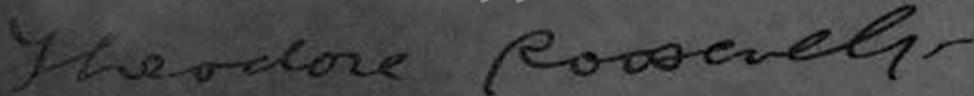
In this election cycle we have seen elected officials bash “personal injury lawyers,” even as their duty requires them to encourage respect for the judicial system. Demonizing personal injury lawyers inevitably breeds a generalized disrespect, if not contempt, for our judicial system – an irony apparently lost on those hoping to capitalize on the campaign of vilification of trial lawyers carried on by special interests.

I commend to all the following words of Teddy Roosevelt in tribute to the great trial lawyers who inspired me as a young attorney and all the other members of our profession who risk their own resources for Idahoans who otherwise would have no access to the courts.



Wm. “Breck” Seiniger, Jr.

“It is not the critic who counts; not the man who points out how the strong man stumbles, or where the doer of deeds could have done them better. The credit belongs to the man who is actually in the arena, whose face is marred by dust and sweat and blood; who strives valiantly; who errs, who comes short again and again, because there is no effort without error and shortcoming; but who does actually strive to do the deeds; who knows great enthusiasms, the great devotions; who spends himself in a worthy cause; who at the best knows in the end the triumph of high achievement, and who at the worst, if he fails, at least fails while daring greatly, so that his place shall never be with those cold and timid souls who neither know victory nor defeat.”



Delivered at the Sorbonne in Paris, France on April 23, 1910.

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