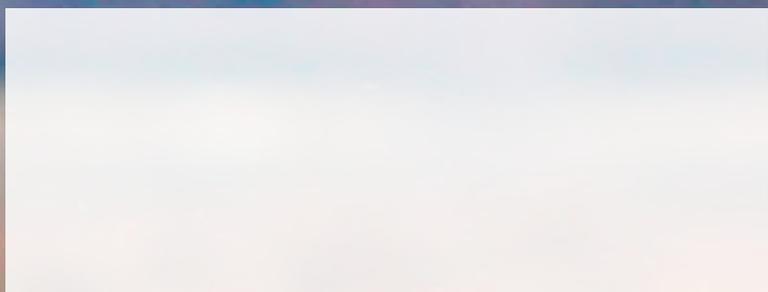


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**Official Publication  
of the Idaho State Bar  
Volume 57, No. 9  
September 2014**



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# The Advocate

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## On the Cover:

The cover photograph entitled "Light Wings" was taken Cindy Embree in March 2012 at Summer Lake in Oregon during the spring migration. There were dozens of bird species and every time Cindy would turn she would find another. Ms. Embree is a Boise native and has enjoyed bird watching and photography since she was 10 years old. Cindy hopes to return to Summer Lake next spring to again witness the spectacular migrating flocks of waterfowl and songbirds.

## Section Sponsors:

This issue of *The Advocate* is sponsored by the Young Lawyers Section.

## Editors:

Special thanks to the September editorial team: Daniel J. Gordon, Amber Champree Ellis and Brian P. Kane.

## October issue sponsor:

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George Breitsameter joins the firm after thirty years of litigation experience in the public sector with the U.S. Department of Justice and Canyon County Prosecutor's Office. George is a Certified Public Accountant, and his law practice is focused on business transactions, tax matters, estate planning and litigation.

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# ISB/ILF Upcoming CLEs

## September

### September 12 – 13

*2014 Annual Advanced Estate Planning Seminar*  
Sponsored by the Taxation, Probate and Trust Law Section  
The Sun Valley Resort, 1 Sun Valley Road – Sun Valley  
10.5 CLE credits of which 1.0 is Ethics

### September 17

*Handling Your First or Next Child Support Case – Establishment and Enforcement*  
Sponsored by the Idaho Law Foundation, Inc.  
The Law Center, 525 W. Jefferson – Boise / Statewide Webcast  
9:00 a.m. (MDT)  
2.0 CLE credits **NAC**

### September 19

*Attorney Ethics When Starting a New Firm*  
Sponsored by the Idaho Law Foundation, Inc. in Partnership with Peach New Media and WebCredenza Inc.  
Audio Stream / Teleseminar  
11:00 a.m. (MDT)  
1.0 CLE credits of which 1.0 is Ethics

### September 26

*Representing Your Child Client: Child Protection and Child Custody*  
Sponsored by the Family Law Section  
Hampton Inn & Suites, 1500 Riverstone Drive – Coeur d'Alene  
8:30 a.m. (PDT)  
6.0 CLE credits

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

## October

### October 2

*New Attorney Program*  
Sponsored by the Idaho Law Foundation, Inc.  
Boise Centre, 850 W. Front – Boise  
8:00 a.m. (MDT)  
4.0 CLE credits of which 1.5 is Ethics **NAC**

### October 17

*Representing Your Child Client: Child Protection and Child Custody*  
Sponsored by the Family Law Section  
Hilton Garden Inn, 700 Lindsay Blvd. – Idaho Falls  
8:30 a.m. (MST)  
6.0 CLE credits

### October 24

*Representing Your Child Client: Child Protection and Child Custody*  
Sponsored by the Family Law Section  
The Riverside Hotel, 2900 W. Chinden Blvd. – Boise  
8:30 a.m. (MST)  
6.0 CLE credits

## November

The Idaho Law Foundation, Inc. proudly announces their lineup for the 2014 *Mobile Monday* CLE Series. Make plans now to join the teleseminars from 12:30 – 1:30 p.m. (MST). Check next month's CLE Calendar for more information.

- November 3 – Cathy R. Silak, Concordia University School of Law
- November 10 – Hon. Roger S. Burdick, Idaho Supreme Court
- November 17 – James A. Cook, Idaho Legal Aid Services
- November 24 – William W. "Bill" Thompson, Latah County Prosecutor's Office

\*\*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.

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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](http://isb.idaho.gov). To learn more contact Dayna Ferrero at (208) 334-4500 or [dferrero@isb.idaho.gov](mailto:dferrero@isb.idaho.gov). For information around the clock visit [isb.fastcle.com](http://isb.fastcle.com).

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### Fred Hoopes: Lawyers Are Guardians of the Constitution

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

**M**y former colleague Fred Hoopes received the Distinguished Lawyer Award at this year's annual meeting. Except for additions to update a few references, the following words came from his pen and appeared in *The Advocate* when he was President of the Idaho State Bar.

**T**wenty-four of 56 signers of the Declaration of Independence were lawyers. Twenty-nine of the 40 delegates to the Constitutional Convention were lawyers. At the Idaho Constitutional Convention, as Dennis C. Colson in his book entitled *Idaho's Constitution: The Tie That Binds* observed, "[t]here were merchants, bankers, doctors, ranchers, farmers, miners and laborers. But most of all, there were lawyers. Forty percent of the delegates were trained attorneys." America was founded and formed by lawyers, more so than by any country on earth. I believe it is no coincidence that we are the most free.

Lawyers authored the Constitution and they must be the guardians. Lawyers act as the Constitution's guardians when they appear as a representative of a client in court, whether it is defending the lowest petty criminal in magistrate court

or arguing matters of great national importance before the United States Supreme Court. But there is another role when acting as guardians of the Constitution and that is the political role.

In November Idaho and American citizens exercise their sacred franchise and elect leaders to steer the ship of state. Leaders in the executive and judicial branches of the government in a democracy only earn the opportunity to serve through the political process. Everybody is qualified and has a civil responsibility to participate in the political process.

Lawyers have a special obligation to contribute to the process because of their unique education and experience. Not every lawyer should run for political office. For some, it is just not their calling. But they should participate in that political process. The political process is much like making sausage and making law. While it may seem menial and undistinguished, its dignity can best be found in the highest purposes it serves.

Lawyers supporting candidates of their choice with letters to the editor, stuffing envelopes or providing financial assistance help serve those high purposes. Lawyers who provide advice to a candidate, guidance to a legislator or warnings to an officer of the executive branch serve those high purposes in the best tradition, especially when offered for the civic good rather than the gain of it. Sadly to say, in Idaho the number of lawyers in the state legislature is currently only 8 out of 105. Since Governor Robert Smylie in 1955 only Jim Risch has had a legal education to be prepared for that high office.

At a commencement address at the George Washington Law School, former Senator George Mitchell said the following: "Real fulfillment in your life will come from striving with all of your physical and spiritual might for a worthwhile objective that helps others and is larger than your self interest. I hope that each of you is fortunate enough to find such an objective in your life."

Good lawyers have skills of communication, skills of civility and a sense of an enhanced civic duty borne of the human dramas they deal with in everyday practice. Campaigns need effective communicators. The political process needs the civility good lawyers practice even in the heat of the adversary system. The application of those skills will give the kind of fulfillment in life from striving for a worthwhile objective.

I am proud to repeat Fred's thoughts in this column because they still ring true today. The law is not an ordinary job, it is a profession, so kudos to each of you for using your lawyering skills and civility in striving to help others whether it is in your law practice, your public life or your personal life.

#### About the Author

**Paul B. Rippel** is a member of Hopkins Roden in Idaho Falls, and current President of the Idaho State Bar Board of Commissioners. Mr. Rippel received a BS from the University of Idaho in 1976, MS at NM State University in 1978, and his JD from the University of Idaho in 1981.



**P**arsons Behle & Latimer is pleased to announce that Maria O. Hart and James D. Meaders have joined the firm as associates in the Boise office. In addition, James E. Lake has relocated his intellectual property practice from Spokane, Washington to the Boise office.



Maria O. Hart focuses her practice on commercial litigation and business law. She has experience representing businesses and individuals in both Idaho and Montana. Her practice involves litigation in both federal and state courts.



James D. Meaders focuses his practice on patent procurement and proceedings before the U.S. Patent and Trademark Office. He also provides support for patent litigation matters such as the preparation of claim charts and technical analysis.



James E. Lake focuses his practice on client counseling and procurement of intellectual property rights in the U.S. and abroad for technology clients. He holds a degree in chemical engineering and has several years of experience in environmental engineering.

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## LICENSING CANCELLATIONS

**Order to cancel license to practice law for non-compliance with MCLE requirements pursuant to Idaho Bar Commission Rule 406(d)**

WHEREAS, The Commissioners of the Idaho State Bar by and through their Executive Director have filed with the Clerk of this Court evidence that the following named attorneys are not in compliance with the Mandatory Continuing Legal Education Requirements (MCLE), pursuant to Idaho Bar Commission Rule 406(d) and Rule 305;

NOW, THEREFORE, IT HEREBY IS ORDERED that the licenses to practice law in the State of Idaho of the following named attorneys shall be CANCELED for failure to comply with the Mandatory Continuing Legal Education Requirements (MCLE):

- SUSAN DIAN CENTENO
- LOIS WESTON HART
- MICHAEL CRAIG HUMPHREY
- JULIANNE MEEHAN
- WALLACE WILSON MILLS
- MATTHEW J. HOLDEN

IT FURTHER IS ORDERED AND NOTICE IS HEREBY GIVEN that the attorneys listed above shall be no longer be licensed to practice law in the State of Idaho, unless otherwise provided by an Order of this Court.

IT FURTHER IS ORDERED that Bar Counsel of the Idaho State Bar is hereby directed to distribute, serve or publish this Order as provided by the Idaho Bar Commission Rules:

Dated this 11 day of August, 2014.

By Order of the Supreme Court  
Roger S. Burdick, Chief Justice

## NEWS BRIEFS

**Holland & Hart named among “50 Best Law Firms for Women” by Working Mother & Flex-time Lawyers**

BOISE – Working Mother and Flex-Time Lawyers today announced the 2014 Working Mother and Flex-Time Lawyers “50 Best Law Firms for Women.” The list lauds firms for their family friendly policies and business development and career development initiatives that are helping to retain women

attorneys and advance them into the leadership pipeline. Holland & Hart has been selected for the prestigious list.

The survey found that 20 percent of lawyers at the winning firms use full-time flex-time work arrangements, and the percentage of lawyers who work reduced hours grew to 10 percent from 9 percent last year. The law firms are featured in the August/September issue of the magazine, and on workingmother.

com and flextimelawyers.com.

“Holland & Hart is very proud to be included once again among the 50 Best Law Firms for Women,” said Liz Sharrer, Firm Chair. “We have always taken our commitment to advancing women within the firm very seriously and have worked hard to develop policies that have allowed women here not just to survive — but to thrive — in their practices, in their lives outside of work, and as leaders in the firm.”

## 2014 RESOLUTION MEETING SCHEDULE

2014 District Bar Association Resolution Meetings		
District	Date/Time	City
First Judicial District	Thursday, November 6 at Noon	Coeur d’Alene
Second Judicial District	Thursday, November 6 at 6 p.m.	Moscow
Third Judicial District	Thursday, November 20 at 6 p.m.	Nampa
Fourth Judicial District	Thursday, November 20 at Noon	Boise
Fifth Judicial District	Wednesday, November 19 at 6 p.m.	Twin Falls
Sixth Judicial District	Wednesday, November 19 at Noon	Pocatello
Seventh Judicial District	Tuesday, November 18 at Noon	Idaho Falls

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## 2014 Idaho State Bar Service Award Recipients

Diane K. Minnich  
Executive Director, Idaho State Bar

**A**t the ISB Annual Meeting in Fort Hall, the 2014 Service Award recipients were honored. Five of the recipients were at the meeting, Erika Birch, Kari Campos, Judge Russ Comstock, Peg Dougherty, and Judge Mick Hodges. The remaining five will be honored at their local resolution meeting. As I have often noted in this column, the Idaho State Bar and Law Foundation are fortunate to have so many wonderful volunteers to serve the legal profession and the public. Following is information on the award recipients from the 2014 Award brochure.

### Erika Birch

Strindberg & Scholnick, Boise

Erika has the ambition to see what is possible, a talent she put into action with the Idaho Trial Lawyers Association in creating Street Law Clinics. She said the scarcity of free legal representation in Boise motivated her to address the problem. "I thought I might be able to model something on a clinic I had volunteered at while practicing in Utah," she said.

The Street Law Clinic was quickly adopted



Erika Birch



and supported by the leadership of ITLA, which garnered additional support from Concordia University School of Law, University of Idaho Law School, and Idaho Volunteer Lawyers Program. "We worked together for about nine months planning the clinic," Erika said. The first clinic was in October of 2012 and the City of Boise hosted it at the library.

Erika gave special thanks to the following who helped create the clinic: Barbara Jordan (ITLA Executive Director), Quinn Perry (ITLA Street Law Coordinator), Jodi Nafzger (Concordia Director of Experiential Learning), Jane Gordon (University of Idaho law student) Kira Pfisterer (ITLA Board Member), and Mary Hobson (IVLP Director).

The clinics have served 173 people in 2013 and have already served over 180 people in 2014. Sometimes a good idea can go a long ways.

### Kari M. Campos

Idaho Falls

During the past five years Kari served as president and other officer

The Street Law Clinic was quickly adopted and supported by the leadership of ITLA, which garnered additional support from Concordia University School of Law, University of Idaho Law School, and Idaho Volunteer Lawyers Program.

positions for the Seventh District Bar Association. She is also a member of the governing council of the Idaho State Bar Business and Corporate Law Section. Notably, Kari has served as a CASA pro bono attorney for many years and recently became a CASA guardian ad litem volunteer. She was also appointed to the CASA board of directors. Kari is active in other legal and community associations including service as president of the Eastern Idaho Estate Planning Council and a member of the Southeastern Idaho Big Brother Big Sisters Board of Directors.

"I have always been drawn to volunteer in my community," she said, "and since becoming an attorney, also do service work for the bar. I want to be a part of something bigger than myself and am inspired by others who graciously and tirelessly give their time and efforts to a cause that inspires them."



Kari M. Campos

Kari said she also wants to be a role model to her three daughters and instill the importance of helping others and contributing to the community.

Doing service and volunteer work “has allowed me to stay connected to my community and build relationships with my colleagues,” Kari said. “It has afforded me the opportunity to see great people do great things and to be a part of those great things. I have learned that as diverse as we all are, we all have just as much in common.”

### **Jamie R. Champion**

Veterans Affairs Medical Center,  
Boise (Non-lawyer)

Jamie has worked with the ISB Reasonable Accommodations Committee, which ensures the bar exam is administered fairly to all, including those who have disabilities.

Jamie said, “my ability to help them has been enhanced by the thoughtful comments/lessons provided by my colleagues on the committee.”



Jamie R. Champion

“This was a wonderful experience for me,” Jamie said. “It allowed me to share my expertise in neuropsychology with the committee and also helped me to have greater understanding of the law surrounding reasonable accommodations. Thank you so much for this opportunity!”

### **Hon. Russ Comstock**

Ada County Magistrate, Boise

Judge Comstock has always been willing to participate in CLE programs of interest to family law practitioners. Some of those programs

have included presentations and/or articles on family law practice, ethics, pro bono service and recent developments in Idaho law (e.g., “Headline News,” etc.).

More recently, he helped develop the Idaho Rules of Family Law Procedure in the Fourth Judicial District, which were adopted by the Idaho Supreme Court. Judge Comstock has spoken frequently lately about those rules as the state prepares for their implementation of these rules next year.

The judge also serves on the Idaho Volunteer Lawyers Policy Council and Fourth Judicial District Pro Bono Committee. Judge Comstock also mentors a law student at Concordia Law School.

“I have been inspired by many judges, lawyers and other professionals who have dedicated their careers to the improvement of the justice system in family law cases,” Judge Comstock said. While too numerous to list, he said he especially appreciated serving with those on the Children and Families in the Court Committee. “Thanks to their efforts, family law justice system in Idaho has come a long way in the last 20 years.”

Judge Comstock said his involvement in these activities has taught him humility and a bigger picture of family law.

“Although I sometimes think I know a lot about family law, I am constantly reminded each time I participate in these various CLE programs that, indeed, I do not know as much I think I do,” he said. “Family law – and child custody in particular – is constantly evolving. Questions from thoughtful



Hon. Russ Comstock

attorneys keep me rethinking and reevaluating what I do and how I do it. Hopefully, it makes me a better judge.”

“Finally, with few exceptions, I have learned that family law practitioners continue to be committed, caring and generous professionals who provide valuable services to their clients. Hourly rates have soared since I last practiced law and I think that the public and judicial system have a right to set high expectations of competence and skill from lawyers who are charging nearly \$200 per hour or more. Judges, I think, have a responsibility to participate in continuing legal education to maintain and improve that level of competence. I also see more and more attorneys donating legal services to the indigent. Overall, I am very proud of the integrity and quality of the family law bar and the services they provide.”

### **Peg Dougherty**

Office of the Attorney General,  
Boise

As Past President of Idaho Women Lawyers (IWL), and having served on its board since 2003, Peg has seen the organization’s membership grow from 80 to more than 150. There are also new chapters in the eastern and northern regions of the state. The IWL’s mission is to advance diversity through the promotion of equal rights and opportunities for women in the legal profession.

Peg chaired the IWL Judicial Recruitment Committee and worked to de-mystify the process of the judicial selec-



Peg Dougherty

tion process and encourage women to apply for open seats. “The gender inequity on the bench continues but we have seen an increase in the number of women applying for positions.”

She has also been a passionate volunteer for mentoring and leadership. Peg was a mentor through IWL’s mentorship program. And for the past three years she served on the steering committee for the Idaho State Bar Academy of Leadership for Lawyers (IALL).

“I was lucky enough to be part of the start-up of IALL and have contributed time, experience and ability to the development of the curriculum along with the other steering committee members,” she said.

Since 2012 Peg served on the University of Idaho College of Law Advisory Council, just as the law school developed plans for its Boise campus including second-year students.

Peg also served on the Idaho Supreme Court Judicial Recruitment Committee, participated as a mentor in the U of I College of Law Women’s Law Caucus program, and participated as a mentor in the U of I College of Law Orientation on Professionalism for first-year law students.

“My primary motivation is to do all I can to make it easier for women who enter the legal profession after me,” Peg said.

The newly admitted are enthusiastic about learning and participating in Idaho’s legal system, Peg said. “There is also a growing enthusiasm on the part of women and men alike in Idaho’s legal profession to address the inequities and stereotypes that tend to hold women back,” she said. “Diligence and vigilance are required to implement changes aimed at retaining and promoting women into leadership roles.”

### Hon. Mick Hodges

Cassia County Magistrate, Burley

In his community, Judge Hodges serves as a lay minister and volunteers as a chaplain at the hospital. He also volunteers with a pet therapy group that visits nursing homes and the local hospital. He is a member of Kiwanis, serves on the District Health and Welfare Behavior Health Board and on the Fifth District Pro Bono Committee.



Hon. Mick Hodges

For the Bar, he helped the initial organization of the Idaho Academy of Leadership for Lawyers as a member of the original Steering Committee. He serves on the Child Protection Advisory Committee, the Access to Language Committee and on Idaho’s Pro Bono Commission.

“Volunteer service seems to have been a family tradition,” Judge Hodges said, adding, “My mom and dad always were involved in community service and the kids tagged along - mine too.”

“I feel better when I am able to help someone,” Judge Hodges said. “I am also regularly reminded what a wonderful place the state of Idaho is to live and to practice law.”

### Deb McCormick

McCormick Law Offices, Moscow

Deb is well known for her longtime involvement in the Second District Bar Association — having served as an officer for the past 5 years (3 terms as President, 2 terms



Deb McCormick

## Committee Service Thanks

Special thanks to the following attorneys and non-lawyers who recently concluded their committee service:

### Idaho State Bar

Hethe Clark  
*Advocate Editorial Advisory Board*

Shannon Harris\*  
*Client Assistance Fund*

Janell Burke,  
Hon. Robert Caldwell,  
Sue Flammia, Kathleen Simko\*  
*Professional Conduct Board*

Peg Dougherty,  
Hon. Mick Hodges  
*Idaho Academy of Leadership for Lawyers*

Hon. Daniel Eismann,  
Angela Schaer Kaufmann,  
Thomas Lopez  
*Lawyer Assistance Program*

### Idaho Law Foundation

Fonda Jovick, Viki Howard\*  
*Idaho Volunteer Lawyers Program Policy Council*

Glenda Talbutt, Russ Heller\*  
*Law Related Education Committee*

\*non-lawyers

as Vice President). She is currently the Second District representative to the State Pro Bono Commission and serves on her local pro bono committee. She helped organize the Citizens’ Law Academy and served on the Palouse Ice Rink Board of directors (having stepped down earlier this year).

She said of her current role, “As a public defender, I am often in the position of providing additional, non-contracted, legal services to my clients who have no other means of obtaining legal advice.”

At the University of Idaho College of Law she has judged mediation competition, sat with a panel of attorneys at new admittee day, and spoken to law clinic classes. She has also volunteered to grade bar exams.

"I've always had a soft spot for the underdog and those struggling with difficult circumstances in their lives," Deb said. "The most rewarding parts of my job are the social work aspects. In addition to providing good legal counsel, my goal is for each of my clients to know that someone does care about what happens to them. I love practicing criminal defense, and I especially love being a public defender."

Deb said her experiences helped her not judge others too harshly. "I've been very fortunate and am very thankful that I did not end up where my clients have," she said. "Some of that is due to good judgment, but some is also due to luck."

### **Kerry Michaelson**

Michaelson Mediation and Law, PLLC, Nampa

Most Canyon County attorneys know Kerry from her work with the Third District Bar Association. But she also serves on the Idaho State Bar Pro Bono Commission and is a current member of Access to Justice Idaho Campaign Committee. She is a member of Nampa Rotary and the Women's Business Center Advisory Council.

Kerry credits the example of other attorneys who donate their skills and time to help people who need it, including her father, Nampa attorney Terry Michaelson.

Kerry put it succinctly: "The need for pro bono legal services can seem overwhelming here in Idaho, where



Kerry Michaelson

so many people live in poverty and cannot afford access to attorneys. It seems like such an uphill battle at times. What I admire about so many members of the State Bar is that, when asked, they step up to address the problem."

### **Susan Moss**

Lukins & Annis, Coeur d'Alene

Since 2012 Susan has served as a member of *The Advocate's* Editorial Advisory Board, whose members are tasked with working with authors on revisions. Earlier this year Susan dedicated many hours to a series of complex articles about the Affordable Care Act that the Idaho State Bar made available on its website. The requirements of the ACA were changing almost daily, which posed a special challenge. "I ended up learning a lot about the Act," Susan said, and subsequently has taken a strong interest in increasing the number of Idaho residents who are insured.

"When I learned of the existence of the Editorial Advisory Board a few years ago, I eagerly applied and have very much enjoyed serving on the Board since then," she said.

"The members of the Idaho State Bar have such varied interests and expertise," Susan said. "In working closely with many Idaho attorneys through my work on the Editorial Advisory Board, I have also come to appreciate their collegiality and dedication to advancing the understanding of the practice of law in Idaho."



Susan Moss

### **Tonya Westenskow**

Bank of the Cascades, Meridian (non-lawyer)

Giving back to the community is important to Tonya, and she found

several volunteer opportunities to do just that. She works with the Boise Public Library Foundation and the Library Board as a trustee. A non-lawyer award recipient, Tonya works with the Idaho Law Foundation's Law Related Education Committee and the Interest Rate Comparability Committee. "While I have worked with IOLTA accounts in my banking career," she said, "I have enjoyed seeing where the funds are distributed and how they impact our community for the better."

Tonya served as a loaned executive for the United Way of Treasure Valley, and volunteers in several capacities at the Idaho Botanical Garden. Most recently she served as the Co-Ambassador Chair at the Meridian Chamber.

"I believe strongly that we should give back more to our community than we take, and I am proud to say my employer, Bank of the Cascades, supports this philosophy," Tonya said.

The bank hosts a nonprofit education breakfast event twice a year for the nonprofit community, and Tonya said, "I am always touched by the amazing and truly unselfish work that occurs within these organizations. I am continuously inspired by the people and the services provided by the nonprofit organizations. It is important to me to support their inspirational work."

Tonya said her work with nonprofit organizations taught her that for a vibrant community, "we each have to realize that we are the stewards that are tasked with propelling our community and strengthening our vision. It begins and ends with each and every one of us."



Tonya Westenskow

# Welcome From the Young Lawyers Section

Jeremiah Hudson

**T**he Young Lawyers Section is pleased to be sponsoring the September edition of *The Advocate*. The Young Lawyers Section acts as a platform for introducing newer attorneys to the legal community and helping them successfully transition into the practice of law. With such mission, the Young Lawyers Section's membership consists of attorneys that practice in a variety of areas of law. We put on a variety of CLEs throughout the year that reflect our mission, as well as educating our members about a variety of practice areas and issues.

Over the past years, the Young Lawyers Section has maintained an active presence in Idaho's legal community. We have seen success in our annual Attorneys' Against Hunger events, which have raised thousands of dollars for the Idaho Food Bank and, this year, will be held at Boise Brewing, located at 521 West Broad Street in Boise on September 4 at 4:00 p.m.

Twice a year we welcome all of Idaho's newly admitted attorneys to the profession by having our New Admittees' Reception sponsored by Idaho Trust Bank. And we frequently gather with fellow attorneys and judges to socialize over beverages and appetizers at our regularly held Barristers and Beers event.

We have seen success in our annual Attorneys' Against Hunger events, which have raised thousands of dollars for the Idaho Food Bank and, this year, will be located at Boise Brewing on September 4 at 4:00 p.m.

The articles published in this edition of *The Advocate* represent a cross-section of the variety of areas of law that our members practice. Michael Ferrigno's article discusses the basics of Eminent Domain and why it is an increasingly important issue for attorneys and citizens alike. Jessica Harrison's article discusses the rules for Attorney Advertising, and some of the ethical concerns that have arisen in the age of the internet and advancing technology. Nicholas Warden, along with myself, co-wrote an article analyzing the constitutionality of Idaho's newest drone legislation. Finally, Ben McGreevy discusses Idaho's Criminal Rule 12.2 and the rule's benefits and burdens for indigent defendants seeking additional resources for their defense.

We'd like to welcome you all to participate in our events, including our Attorneys' Against Hunger event at Boise Brewing on September 4 at 4:00 p.m. We'd also encourage you to attend our monthly section meetings which are held at the Idaho State Bar at Noon on the third Tuesday of every month.

## About the Authors

**Jeremiah Hudson** is a partner at Fisher Rainey Hudson, in Boise, Idaho. His legal practice is focused on representing plaintiffs in complex employment and personal injury litigation, as well as civil rights litigation. In 2013, Jeremiah was recognized by Idaho Business Review's "Leaders In Law" program.



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# Narrowing the Drone Zone: The Constitutionality of Idaho Code § 21-213

Jeremiah Hudson  
Nicholas Warden

**D**rones are beginning to occupy the skies across the United States by both citizens and federal, state, and local governments. The concept of drone law is even more novel than the technology itself.

While we have all heard about the United States using drones as part of its foreign policy, attention over the past few years has started to focus on the use of drones by citizens and governmental entities alike. Drones are not only becoming increasingly affordable, but are becoming highly popularized both domestically and abroad. While the potential beneficial uses of drones are numerous, their technological capabilities — including the ease and clarity by which they can produce audio and visual recordings — have increasingly given rise to public concern regarding their unfettered use by both governments and private citizens.

State legislatures are now being confronted with how to adequately protect the privacy rights of citizens in an age where virtually anyone with little more than \$300 and a smart phone can purchase a drone that can, with stealth-like ability, observe and record unsuspecting people as they go about their daily routine. Additionally, there is growing concern over the interplay between the Fourth Amendment's prohibition against unlawful searches by the government and its ability to use drones to get up close and personal when it comes to observing and recording people and their property. This concern is amplified by a lack of interpretive case law regarding small-flying objects that can

There is growing concern over the interplay between the Fourth Amendment's prohibition against unlawful searches by the government and its ability to use drones to get up close and personal.

go places and record things in ways unimaginable to the Founding Fathers when they drafted the Fourth Amendment,<sup>1</sup> and only minimally analyzed by the U.S. Supreme Court when considering issues involving the government's use of helicopters and vision-amplifying equipment to search for contraband.

While much of the public debate involves the *government* using drones to invade the privacy of citizens, the Idaho Legislature recently addressed the ability of *citizens* to invade the privacy of others. This brings up tough questions about what role government should play in controlling the actions of its drone-owning citizens, and how much protection citizens (non-drone-owning or otherwise) and certain industries should be afforded from this evolving technology.

This article discusses some of the constitutional principles and potential pitfalls implicated by Idaho's new drone law, while analyzing the basis for potential constitutional challenges under First Amendment jurisprudence.

## Idaho's new drone law

The Idaho state Legislature addressed privacy issues related to drones during the last legislative session when it approved passage of

SB 1134 which, after being signed by Governor Otter, amended Chapter 2, Title 21 of the Idaho Code, to include section 21-213, imposing restrictions on the use of drones. A review of the legislative history reveals that the law's stated purpose is to ensure the safety and privacy of Idaho citizens. However, a closer examination of the language and prohibitions contained therein reveals that its listed prohibitions are overbroad relative to its intended purpose.

Idaho Code § 21-213 states, in relevant part:

(2)(a) Absent a warrant . . . no person, entity or state agency shall use an unmanned aircraft system to intentionally conduct surveillance of, gather evidence or collect information about, or photographically or electronically record specifically targeted persons or specifically targeted private property including, but not limited to:

(i) An individual or a dwelling owned by an individual and such dwelling's curtilage, without such individual's written consent;

(ii) A farm, dairy, ranch or other agricultural industry without the written consent of the owner of such farm, dairy, ranch or other agricultural industry.

(b) No person, entity or state agency shall use an unmanned aircraft system to photograph or otherwise record an individual, without such individual's written consent, for the purpose of publishing or otherwise publicly disseminating such photograph or recording.

Further, Idaho Code § 21-213 imposes a civil penalty for using a drone to photograph, record, gather evidence or gather information about any person, private property, farm, dairy, ranch or other agricultural facility even when the individual controlling the drone is in a place where they are unquestionably permitted to be.

The imposition of civil penalties for using drones to record constitutionally-protected speech activities implicates First Amendment concerns, as much as a law imposing a civil penalty for engaging in the protected speech itself. Moreover, Idaho Code § 21-213 may be subject to constitutional challenge for being content-discriminatory, based on the specific prohibition it contains against using drones to record the "agricultural industry." Even if the law is found to be content-neutral, the scope of its prohibition is so broad that it is susceptible to a First Amendment challenge on that basis alone. Simply put, Idaho Code § 21-213 is poorly designed to achieve its stated purpose and implicates numerous core constitutional concerns that should render it invalid.

### The First Amendment and drones

The First Amendment of the United States Constitution, being incorporated to the states by the Due Process clause of the Fourteenth Amendment, provides that neither Congress nor the states shall make any law "... abridging the freedom

of speech, or of the press ... ." The First Amendment has never been interpreted as an absolute prohibition. The U.S. Supreme Court has permitted different types of speech regulations (including content-based regulations and content-neutral regulations affecting the time, place, and manner of protected speech), setting forth different standards depending on the type of speech being regulated.<sup>2</sup>

The U.S. Supreme Court has held that the First Amendment extends to conduct that is necessary for developing and communicating protected speech.<sup>3</sup> This protection prohibits the passage of laws suppressing otherwise protected speech simply by discouraging the activities early in the speech process necessary to achieve the end result of the speech itself. For example, a state could not discourage political speech by passing a law prohibiting the use of cameras, video recorders, or phones to record a political demonstration; nor could a state discourage media coverage of a particular event or issue by passing a law prohibiting the use of printing presses for a period of time. The bottom line is a law prohibiting audiovisual capture of public speech is regulating a predicate of speech that is otherwise afforded constitutional protection. Arguably, this is precisely what Idaho Code § 21-213 does and it is just as problematic as

a law prohibiting protected speech itself — it prohibits the act of using a drone to create an audiovisual recording in a variety of contexts where such a recording might be made preparatory to constitutionally-protected speech.

### Content-based vs. content-neutral regulation?

When the government overtly attempts to restrict speech based upon the content of the speech, the statute or regulation "must ... be subjected to 'the most exacting scrutiny'" ("strict scrutiny").<sup>4</sup> Strict scrutiny also applies when a statute burdens speech because of its content, *even if* the statute appears to be content-neutral on its face.<sup>5</sup> Consistent with the application of the strict scrutiny standard, a statute regulating speech based on content "must be narrowly tailored to promote a compelling Government interest."<sup>6</sup> If there is a less restrictive alternative measure, the legislature must use it.<sup>7</sup>

However, where a statute does not attempt to restrict the content of speech, but rather restricts speech based upon the reasonable, time, place, or manner of the speech, the statute is subjected to a lower standard. In such cases, the statute must be "justified without reference to the content of the regulated speech, ... narrowly tailored

This brings up tough questions about what role government should play in controlling the actions of its drone-owning citizens, and how much protection citizens (non-drone-owning or otherwise) and certain industries should be afforded from this evolving technology.

to serve a significant governmental interest, and ... leave open ample alternative channels for communication of the information.”<sup>8</sup> The Supreme Court focuses on the government’s justification for the statute to determine whether a statute is content-neutral.<sup>9</sup>

While, on its face, Idaho Code § 21-213 appears to regulate the manner and place of the speech, thus appearing to be content-neutral, one does not need to dig too deeply to determine that the Idaho Legislature afforded questionable,<sup>10</sup> yet very similar protections for the agricultural industry via the enactment of Idaho Code § 18-7042 (“Interference With Agricultural Production,” ubiquitously referred to as the “Ag-Gag Law”) in February of 2014. Among other things, Idaho Code § 18-7042 criminalizes the act of making “audio or video recordings of the conduct of an agricultural production facility’s operations” without the facility owner’s consent.<sup>11</sup> As indicated above, Idaho Code § 21-213 imposes a comparable civil penalty for “gather[ing] evidence or collect[ing] information about, or photographically or electronically record[ing] specifically targeted persons or specifically targeted private property including, but not limited to . . . [a] farm, dairy, ranch or other agricultural industry without the written consent of the owner . . .”

The similarity of protections afforded to the agricultural industry in Idaho Code §§ 21-213 and 18-7042 creates a basis for the inference that the rationale for protections in both laws is the same. Both statutes impose a penalty to prevent the recording and/or publishing of activities that occur at agricultural facilities. Therefore, both laws are potentially subject to challenge for being content-discriminatory, to the

extent they treat speech containing agricultural content differently from speech *not* containing agricultural content.

The official legislative Statement of Purpose for the Idaho Code § 18-7042 is “to protect agricultural production facilities from interference by wrongful conduct by providing penalties for such conduct and restitution to an injured agricultural producer.”<sup>12</sup> Although Idaho Code § 21-213 appears to be content-neutral when considered in isolation, given its striking similarities to Idaho Code § 18-7042, it begins to ap-

(The law) . . . is targeted  
at preventing people  
or organizations from publishing  
recordings of animal abuse  
at Idaho’s agricultural facilities.  
That same prohibition  
is currently being challenged  
on First Amendment grounds  
in federal District Court  
for the District of Idaho.

pear that its intent, at least in part, is targeted at preventing people or organizations from publishing recordings of animal abuse at Idaho’s agricultural facilities. That same prohibition is currently being challenged on First Amendment grounds in federal District Court for the District of Idaho.

If the Statement of Purpose of the Ag-Gag Law is used to defend special protections afforded the agricultural industry under Idaho Code § 21-213, it seems unlikely that courts would find that the state’s interest in “protecting agricultural production

facilities from wrongful conduct . . .” is compelling enough to restrict the First Amendment rights of people using drones to record animal abuse at agricultural facilities. Further, even if courts found the state’s intent behind Idaho Code § 21-213 compelling enough, it seems unlikely that the broad prohibitions against recording any specifically-targeted person or private property without the required consent is narrowly tailored enough to survive strict scrutiny.

### Overbreadth of Idaho code § 21-213

An overbreadth challenge to the constitutionality of a statute “is an exception to the traditional rule that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court.”<sup>13</sup>

The scope of the prohibition contained in Idaho Code § 21-213 is vast, to the extent that it is susceptible to challenge for being unconstitutionally overbroad in violation of the First Amendment. Even though Idaho Code § 21-213 may have some constitutional applications, its broad sweep includes protected speech activities and has the effect of chilling speech.<sup>14</sup> The law imposes a civil penalty for using a drone to photograph, record, gather evidence or gather information about any person, any privately-owned property, or any farm, dairy, ranch or other agricultural facility absent consent, even when the drone or the individual controlling the drone is otherwise lawfully permitted to be there. By virtue of its scope, the law prohibits the audiovisual capture of a significant amount of what could be constitutionally-protected speech activity, such as protests, speeches, or rallies, just to name a few.

Idaho Code § 21-213 is broad to the extent that its practical effect could be to burden otherwise protected speech activities in a variety of circumstances. A ban on audiovisual recordings using drones is not substantially different than the use of any other mediums that can be used to create audio or visual recordings such as cameras, microphones, smart phones, or even a pencil and paper for hand-drawn sketches. As stated above, the legislature has articulated some legitimate interests in regulating drone-based speech activity when it comes to protecting the privacy of the citizens of Idaho, and the widespread use of this technology does have significant implications for individual privacy, i.e. preventing people from flying drones outside, say, a tenth floor hotel room window, or preventing potential burglars from using drones to determine the daily routine of a homeowner.

However, Idaho Code § 21-213, as drafted, is inadequately tailored to those legitimate concerns and it unjustifiably engulfs a significant amount of speech-related activity that is otherwise protected by the First Amendment.<sup>15</sup> The current language of Idaho Code § 21-213 chills the ability of people to use drones to record or observe “specifically targeted” persons or property in public spaces by anyone. This includes members of the media who may fly their drones to record the next big groundbreaking story rather than risk running into traffic delays. It also includes anyone else who may use his or her drone to publish videos of various events or activities that they intend to publish via various social media outlets or otherwise.

As stated above, in what appears to be an interesting extension of the legislative protections for the agricultural industry, Idaho Code § 21-213 also prohibits an individual or

Idaho Code § 21-213 as drafted unjustifiably engulfs a significant amount of speech-related activity that is otherwise protected by the First Amendment.<sup>15</sup>

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a state entity from using a drone to observe agricultural facilities and/or activities occurring on private property from a public space. This law goes well beyond protecting individual privacy by prohibiting recordings by law enforcement without a warrant. It extends the prohibition to all individual persons (absent express permission of the individual, private property owner, or agricultural facility being recorded) in a manner that needlessly and impermissibly burdens constitutionally-protected speech activities.

### Conclusion

The timing of the Idaho Code § 21-213’s passage, combined with the singling out of the agricultural industry for additional protection, suggests that the legislature had a content-based objective when passing this law and contradicts the notion that the primary legislative objective is the protection of individual privacy and safety. As stated above, even assuming this law produces merely incidental, content-neutral burdens on expressive conduct, the government will bear the burden of establishing that the law “furthers an important or substantial governmental interest . . . unrelated to the suppression of free expression, and . . . [imposes a burden] no greater than is essential to the furtherance of that interest.”<sup>16</sup> The stated rationale of

promoting privacy and safety of Idaho’s citizens is simply not consistent with the list of entities afforded protection under this law. It is possible to envision a much narrower, revised version of this law, better designed to achieve the stated legislative purpose and less likely to run afoul of constitutional protections. However, as written, Idaho Code § 21-213 represents a poor attempt at doing so.

### Endnotes

1. It should be noted that while the First and Fourth Amendments of the United States Constitution were safeguards for citizens from the federal government, the U.S Supreme Court has concluded that “...certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process of law clause of the Fourteenth Amendment...” Grosjean v. Am. Press Co., 297 U.S. 233, 243-44, 56 S. Ct. 444, 446, 80 L. Ed. 660 (1936)
2. See Consol. Edison Co. of New York, Inc. v. Pub. Serv. Comm’n of New York, 447 U.S. 530, 535, 100 S. Ct. 2326, 2332, 65 L. Ed. 2d 319 (1980); See also Linmark Associates, Inc. v. Willingboro, 431 U.S. 85, 93, 97 S.Ct. 1614, 1618, 50 L.Ed.2d 155 (1977); Virginia Pharmacy Board v. Virginia Citizens Consumer Council, 425 U.S. 748, 771, 96 S.Ct. 1817, 1830, 48 L.Ed.2d 346 (1976).
3. See, United States v. Eichman, 496 U.S. 310 (1990).
4. United States v. Eichman, 496 U.S. 310, 311, 110 S. Ct. 2404, 2406, 110 L. Ed. 2d 287 (1990); See also Boos v. Barry, 485

U.S. 321, 108 S.Ct. 1157, 1164 (1988).

5. Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2664, 180 L. Ed. 2d 544 (2011)

6. United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813, 120 S. Ct. 1878, 1886, 146 L. Ed. 2d 865 (2000)

7. Id.

8. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293, 104 S. Ct. 3065, 3069, 82 L. Ed. 2d 221 (1984); *See also* Consol. Edison Co. of New York, Inc. v. Pub. Serv. Comm'n of New York, 447 U.S. 530, 535, 100 S. Ct. 2326, 2332, 65 L. Ed. 2d 319 (1980).

9. United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 814, 120 S. Ct. 1878, 1886-87, 146 L. Ed. 2d 865 (2000). "So long as the justifications for regulation have nothing to do with content, *i.e.*, the desire to suppress crime has nothing to do with the actual films being shown inside adult movie theaters, we concluded that the regulation was properly analyzed as content neutral." Boos v. Barry, 485 U.S. 312, 320, 108 S. Ct. 1157, 1163, 99 L. Ed. 2d 333 (1988)

10. See [http://www.huffingtonpost.com/2014/02/28/idaho-ag-gag-law\\_n\\_4877042.html](http://www.huffingtonpost.com/2014/02/28/idaho-ag-gag-law_n_4877042.html)

[com/2014/02/28/idaho-ag-gag-law\\_n\\_4877042.html](http://www.huffingtonpost.com/2014/02/28/idaho-ag-gag-law_n_4877042.html)

11. This industry has been a hot political topic in light of the disturbing animal abuse videos recorded at Idaho agricultural facilities that have been circulating throughout the national media and the subsequent "Ag-Gag" legislation criminalizing such video recordings.

12. <http://www.legislature.idaho.gov/legislation/2014/S1337SOP.pdf>

13. Los Angeles Police Dep't v. United Reporting Pub. Corp., 528 U.S. 32, 120 S. Ct. 483, 485, 145 L. Ed. 2d 451 (1999)(internal quotations omitted)

14. Id.

15. Virginia v. Hicks, 539 U.S. 113, 124 (2003).

16. United States v. O'Brien, 391 U.S. 267, 377 (1968).

### About the Authors

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# How to Ask For Expert Testimony: Idaho Criminal Rule 12.2 and Requesting Assistance for Indigent Defendants

Ben Patrick McGreevy

**W**e are all familiar with a criminal defendant's right to counsel. But the right to counsel may also include the right to investigative, expert and other defense services guaranteed by the United States Constitution and Idaho statute. However, Idaho has never had a procedure to request those additional defense services, evaluate requests, or appoint service providers. As a result, additional defense services may be underutilized by indigent defendants. A recent assessment of Idaho's public defender system indicated that indigent defendants have limited access to investigators, experts, and other defense services, even though such additional defense services may be crucial to an adequate defense.<sup>1</sup>

The Idaho Supreme Court has now clarified how indigent defendants may request additional defense services in new Idaho Criminal Rule 12.2, effective as of August 1, 2014.<sup>2</sup> This article discusses the provision of investigative, expert, and other defense services to indigent defendants, Rule 12.2, the rule's benefits and burdens for indigent defendants seeking to present their defense with the help of additional defense services, and some practical recommendations to improve Rule 12.2.

## A meaningful opportunity to present a complete defense

All criminal defendants must be given "a meaningful opportunity to present a complete defense."<sup>3</sup> In 1923, the Idaho Supreme Court held, "It is the public policy of this

While "[t]he constitution does not require a state to provide expert or investigative assistance merely because a defendant requests it . . . a defendant's request for expert or investigative services should be . . . measured against the standard of 'fundamental fairness' embodied in the due process clause."<sup>10</sup>

— Idaho Supreme Court *State v. Olin*

state, disclosed by constitutional guarantees as well as by numerous provisions of the statutes, to accord to every person accused of crime, not only a fair and impartial trial, but every reasonable opportunity to prepare his defense and to vindicate his innocence upon a trial."<sup>4</sup>

In the following decades, the United States Supreme Court "recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense."<sup>5</sup> "This elementary principle, grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake."<sup>6</sup> In recognition of this right, the United States Supreme Court has held that indigent defendants are entitled to the assistance of counsel at trial and on their first appeal as of right, to the effective assistance of counsel, and to trial transcripts if they are necessary to a decision on the merits of their

appeal.<sup>7</sup> The United States Supreme Court also held that States may not require indigent defendants to pay a fee before filing a notice of appeal of their conviction.<sup>8</sup>

## Providing additional defense services to indigent defendants: *Olin* and *Ake*

As Justice (then Chief Judge) Benjamin Cardozo once observed, a defendant is "at an unfair disadvantage if he is unable because of poverty to parry by his own witnesses the thrusts of those against him."<sup>9</sup> Thus, the guarantee of a meaningful opportunity to present a complete defense may extend to providing investigative, expert, and other defense services to indigent defendants.

The Idaho Supreme Court held in *State v. Olin* that, while "[t]he constitution does not require a state to provide expert or investigative assistance merely because a defendant requests it . . . a defendant's request for expert or investigative services should be reviewed in light of all the circumstances and be measured against the standard of 'fundamental fairness' embodied in the due process clause."<sup>10</sup> A trial court, exercising its sound discretion, must "inquire into the needs of the defendant and the

circumstances of the case, and then make a determination of whether an adequate defense will be available to the defendant without the requested expert or investigative aid. If the answer is in the negative, then the services are necessary and must be provided by the state.”<sup>11</sup>

Three years after *Olin*, the United States Supreme Court reached a similar holding in *Ake v. Oklahoma*.<sup>12</sup> In *Ake*, the Court held that “when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist’s assistance on this issue if the defendant cannot otherwise afford one.”<sup>13</sup> Applying a procedural due process analysis, the *Ake* Court concluded that both individual defendants and the State have a compelling interest in the accuracy of criminal dispositions, while the interest of the State in denying access to a psychiatrist is not substantial.<sup>14</sup>

As for the probable value of the requested psychiatric assistance, the Court recognized that “when the State has made the defendant’s mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant’s ability to marshal his defense.”<sup>15</sup> However, the United States Supreme Court did not hold that defendants have a constitutional right to choose a psychiatrist of their personal liking or receive funds to hire their own.<sup>16</sup> Further, the *Ake* decision on its face only governed requests for psychiatric assistance, not other types of defense services.

Like courts in other jurisdictions,<sup>17</sup> the Idaho Court of Appeals has interpreted *Ake* as also permitting indigent defendants to request

assistance from non-psychiatric experts or other defense services. In *State v. Martin*, the Court of Appeals saw “little to no substantive difference between the *Ake* standards and the Idaho Supreme Court’s statements in *Olin*.”<sup>18</sup> Those cases all required “the provision of assistance at public expense where it is necessary for a fair trial and a meaningful opportunity to present a defense, while sifting out requests for services that are not shown to be reasonably necessary for those purposes.”<sup>19</sup>

If anything, expert assistance and other defense services have become more important since *Olin* and *Ake* were decided in the 1980s, considering the proliferation of DNA analysis and the increased reliance on social science research and modus operandi testimony.<sup>20</sup> As Justice Cardozo warned, without additional defense services to parry the use of those and other types of investigative and expert evidence by the prosecution, indigent defendants may be left without a meaningful opportunity to present a complete defense.

### **Requesting additional defense services**

Before Rule 12.2, the way to request additional defense services was to file a motion under the Idaho Constitution and Idaho Code § 19-

852.<sup>21</sup> Section 19-852 provides that an indigent defendant in Idaho is entitled “[t]o be provided with the necessary services and facilities of representation including investigation and other preparation. The attorney, services, and facilities and the court costs shall be provided at public expense to the extent that the person is, at the time the court determines indigency pursuant to section 19-854, Idaho Code, unable to provide for their payment.”<sup>22</sup> However, Idaho law provided no process by which a request for additional defense services could be made or conducted, or how those services would be administered.

### **Idaho Criminal Rule 12.2**

Rule 12.2 establishes the process for requesting additional defense services. Under the rule, defendants may submit a motion for public funds to pay for defense services they believe are necessary for their defense, provided they submit the motion before the costs are incurred and the court grants prior approval.<sup>23</sup> The motion must include the following:

1. The scope and details of the services requested.
2. The reasons the requested services are relevant and necessary to the defense based upon the specific facts of the case.

If the court grants the motion requesting additional defense services, the court may order additional conditions to control costs and expenses.

3. The name and location of the proposed providers of the services.
4. The qualifications of the proposed providers of the services.
5. An estimate of the total cost of the services being requested, including the hourly rate or other charges of the providers of the services, and any additional expense, such as travel costs, that will be incurred.
6. If the proposed providers of the services are located outside of the judicial district or the state of Idaho, an explanation of why the proposed providers should be utilized and what efforts have been made to locate providers of the requested services in the judicial district or in the state of Idaho.<sup>24</sup>

The court will decide each motion based on the record in the case and the information submitted by the defendant.<sup>25</sup> A court may not grant a request for public funds to obtain additional defense services without finding the defendant is indigent under Idaho Code § 19-854. A defendant having retained private counsel or having not been found to be indigent for purposes of appointing a public defender will not necessarily preclude the court from finding that the defendant is indigent for purposes of the request for additional defense services.<sup>26</sup> The court may request that the Administrative District Judge appoint another judge to decide the motion.<sup>27</sup>

Motions for additional defense services will generally be submitted to the court *ex parte*, but if private counsel files the motion and the additional defense services are to be paid for with funds allocated to the public defender, the public defender will be served with copies of the motion, notice of any hearing on the motion, and the order granting the motion.<sup>28</sup>

If the court grants the motion requesting additional defense services, the court may order additional conditions to control costs and expenses. The order granting the motion must specifically state the amount authorized. If expenditures go beyond that amount, they will not be approved for payment unless the court gives prior authorization under the rule. Payment will only happen if the defendant submits a detailed billing outlining each of the services provided and their costs.<sup>29</sup>

Rule 12.2 in most instances provides for *ex parte* submission of motions for additional services.

This is important because it protects defense counsel's thought process and strategy from disclosure.



### **Rule 12.2: benefits and burdens**

Rule 12.2 offers some new benefits to indigent defendants. While the Idaho Supreme Court held that Idaho Code § 19-852 did not guarantee an *ex parte* procedure for requesting assistance without notice to the prosecution,<sup>30</sup> Rule 12.2 in most instances provides for *ex parte* submission of motions for additional services. This is important because it protects defense counsel's thought process and strategy from disclosure. Additionally, the court may request that another judge decide

the motion, allowing for a disinterested "money judge" to determine if the requested assistance is necessary. The money judge option helps ensure fairness. The rule also clearly lists what information must be included in a motion for additional defense services, which should be helpful to practitioners and may foster consistency.

But those information requirements also place extra burdens on indigent defendants seeking expert or other defense services. The American Bar Association (ABA) standards for professional independence recommend that lawyers for indigent defendants "be subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice."<sup>31</sup> Further, the ABA has recommended "parity between defense counsel and the prosecution with respect to resources," including "access to forensic services and experts."<sup>32</sup> By imposing extra burdens, Rule 12.2 subjects lawyers for indigent defendants to additional judicial supervision and contributes to a lack of parity between defense counsel and the prosecution.

One of Rule 12.2's extra burdens is the requirement that a motion requesting additional defense services must include, "[i]f the proposed providers of the services are located outside of the judicial district or the State of Idaho, an explanation of why the proposed providers should be utilized and what efforts have been made to locate providers of the requested services in the judicial district or in Idaho."<sup>33</sup> The fact that a service provider comes from outside the district or state does not help answer the key question from *Olin* and *Ake*: whether the requested assistance is necessary for a fair trial and a meaningful opportunity to present a complete defense.

Additionally, individual judicial districts (or the State itself) may not harbor experts capable of addressing the significant factors in a given case. The prosecution would still be able to bring in out-of-state experts,<sup>34</sup> but this requirement might have a chilling effect on defense counsel who would otherwise seek out-of-district or out-of-state experts to assist indigent defendants.

The rule also requires defendants to include “[t]he qualifications of the proposed providers of the services.”<sup>35</sup> It is true that *Ake* requires that when defendants make the threshold showing that their sanity at the time of the offense is to be a significant factor at trial, the State must assure access to a “competent” psychiatrist.<sup>36</sup> However, experts for the prosecution, before they are hired, are not subject to such vetting by the court to determine their qualifications or competency.

### Recommendations:

#### A return to *Olin* and *Ake*

The Idaho Supreme Court should consider amending Rule 12.2 to return to the standard from *Olin* and *Ake*, by removing the extra burdens imposed on indigent defendants. Approving a request for additional defense services should hinge solely on whether the requested services are necessary for a meaningful opportunity to present a complete defense, not on whether the proposed service providers are from out-of-state. Thus, defense counsel should not have to automatically provide argument to justify requests for out-of-state or out-of-district service providers as opposed to local ones. Those other parts of the rule that also place extra burdens on indigent defendants should likewise be removed.

Another fix would tweak Rule 12.2’s requirement of prior approval

By amending Rule 12.2 to remove the extra burdens imposed on indigent defendants, the Idaho Supreme Court could return the process for requesting additional defense services to the standard set in *Olin* and *Ake*.

by the court before the defense may incur the costs of additional defense services. There may be situations where assistance is necessary for an adequate defense and the defendant is unable to secure prior approval. For example, Minnesota provides that courts may, “in the interests of justice, and upon a finding that timely procurement of necessary services could not await prior authorization, ratify” necessary investigative, expert or other services for indigent defendants “after they have been obtained, but such ratification shall be given only in unusual situations.”<sup>37</sup> The Idaho Supreme Court should consider adding a similar provision allowing trial courts to ratify defense services in the rare instances where it would serve the interests of justice.

### Conclusion

By amending Rule 12.2 to remove the extra burdens imposed on indigent defendants, the Idaho Supreme Court could return the process for requesting additional defense services to the standard set in *Olin* and *Ake*. In the meantime, defense counsel representing indigent defendants should familiarize themselves with Rule 12.2, especially its requirements for what must be included in a motion for additional defense services. As Idaho works to improve its public defense system,

continued improvement of Rule 12.2 will ensure indigent defendants a meaningful opportunity to defend themselves.

### Endnotes

1. See generally Nat. Legal Aid & Defender Ass’n, *The Guarantee of Counsel: Advocacy & Due Process in Idaho’s Trial Courts* (2010), available at [www.nlada.net/sites/default/files/id\\_guaranteeof-counseljseri01-2010\\_report.pdf](http://www.nlada.net/sites/default/files/id_guaranteeof-counseljseri01-2010_report.pdf).
2. Order In Re: Adoption of Idaho Criminal Rule (I.C.R.) 12.2, June 26, 2014, available at [www.isc.idaho.gov/orders/ICR\\_Order\\_12.2\\_08.14.pdf](http://www.isc.idaho.gov/orders/ICR_Order_12.2_08.14.pdf).
3. *E.g.*, *Crane v. Kentucky*, 476 U.S. 683, 690 (1986).
4. *State v. Montroy*, 37 Idaho 684, 690, 217 P. 611, 614 (1923).
5. *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985).
6. *Id.*
7. *Id.* (citing *Evitts v. Lucey*, 469 U.S. 387 (1985); *Strickland v. Washington*, 466 U.S. 668 (1984); *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970); *Douglas v. California*, 372 U.S. 353 (1963); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956)).
8. *Burns v. Ohio*, 360 U.S. 252 (1959).
9. *Reilly v. Berry*, 166 N.E. 165, 167 (N.Y. 1929).
10. 103 Idaho 391, 394, 648 P.2d 203, 206 (1982).
11. *Id.* at 395, 648 P.2d at 207.
12. 470 U.S. 68.
13. *Ake*, 470 U.S. at 74.
14. *Id.* at 78-79.
15. *Id.* at 79-80.

16. *Id.* at 83.
17. See generally Carlton Bailey, Ake v. Oklahoma and an Indigent Defendant's 'Right' to an Expert Witness: A Promise Denied or Imagined?, 10 WM. & MARY BILL RTS. J. 401 (2002).
18. 146 Idaho 357, 363, 195 P.3d 716, 722 (Ct. App. 2008)
19. *Id.*, 195 P.3d at 722. The Martin Court also stated that, "to the extent that any conflict exists, the Ake decision of the United States Supreme Court controls." *Id.*, 195 P.3d at 722.
20. See Paul C. Giannelli, Ake v. Oklahoma: The Right to Expert Assistance in a Post-Daubert, Post-DNA World, 89 CORNELL L. REV. 1305, 1318-26 (2004).
21. See *State v. Wood*, 132 Idaho 88, 967 P.2d 702 (1998)
22. I.C. § 19-852(1)(b).
23. Idaho R. Crim. P. 12.2(a).
24. Rule 12.2(b).
25. Rule 12.2(d).
26. Rule 12.2(c).
27. Rule 12.2(e).
28. Rule 12.2(d) & (g).
29. Rule 12.2(f).
30. *Wood*, 132 Idaho at 99-100, 967 P.2d at 713-14.
31. Am. Bar Ass'n, *ABA Standards for Criminal Justice: Providing Defense Services*, Standard 5.1-3(a) (3d ed. 1992).
32. Am. Bar Ass'n, *Ten Principles of a Public Defense System*, Principle 8 (2002).
33. Rule 12.2(b)(6).
34. For example, in a recent murder trial in Boise, the prosecution brought in a torture expert "from the east coast." Jamie Grey, *Expert in Human Torture Testifies in Daniel Ehrlick Murder Trial*, KTVB.COM, June 17, 2011, www.ktvb.com/news/Expert-in-human-torture-testifies-in-Daniel-Ehrlick-murder-trial-124066764.
35. Rule 12.2(b)(4).
36. *Ake*, 470 U.S. at 83.
37. MINN. STAT. 611.21(a) (2013). title/47781.

Those other parts of the rule that also place extra burdens on indigent defendants should likewise be removed.

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# Attorney Advertising Rules: Ethical Guidelines to Remember

Jessica Harrison

**A**ttorneys must always take their ethical obligations seriously. While advertising rule violations may not seem like the most harmful violations of professional conduct, state bar authorities enforce advertising rules through disciplinary actions. The State Bar of Texas disciplined an attorney who advertised his legal services by falsely indicating he was certified in civil trial law.<sup>1</sup> Additionally, in 1995, a professional responsibility committee publicly admonished a Minnesota attorney for failing to include the word “advertising” on solicitation letters he mailed out.<sup>2</sup> And in 2004, Florida publically reprimanded a firm for featuring the image of a pit bull in a spiked collar on the firm’s logo because it degraded the reputation of the legal profession.<sup>3</sup> More recently, in 2013, a Virginia court publicly admonished an attorney for failing to include disclaimers on his advertisements.<sup>4</sup> The Virginia court found that the attorney, under Virginia’s rules of professional conduct, was required to disclaim the fact that he could not guarantee results similar to those of the successful cases he advertised.<sup>5</sup> Given such disciplinary actions, it is important to keep up to date on Idaho’s attorney advertising rules.<sup>6</sup>

For most of the 1900’s, attorneys could not advertise their services.<sup>7</sup> The American Bar Association banned attorney advertising in 1908 because it was thought to undermine the dignity of the legal profession.<sup>8</sup> But in 1977, in the case of *Bates v. State Bar of Arizona*, the United States Supreme Court found that the First Amendment protects commercial speech, which encompasses



Photo provided by Jessica Harrison

Playing close to the edge: In Florida this 2004 pit bull ad brought a state bar public reprimand, which was appealed, and the attorneys prevailed. The ad was ultimately found to not violate the rules of professional conduct in Florida.

advertising, and thus struck down the prohibition on attorney advertising.<sup>9</sup> In that case, the Court determined that “public access to the legal system outweighed the state’s interest” in safeguarding the dignity and reputation of the legal profession.<sup>10</sup> However, the Court maintained that attorney advertising was still subject to restraint.<sup>11</sup> For instance, while attorney advertising rules vary by state, most states prohibit false or misleading advertising.<sup>12</sup>

## Brief overview of Idaho’s advertising rules

Generally speaking, the advertising rules embodied in the Idaho Rules of Professional Conduct (IRPC) apply to most forms of communication – written, recorded, and electronic.<sup>13</sup> The advertising rules, listed under IRPC 7.1–7.5, were recently amended effective July 1, 2014.<sup>14</sup> This article summarizes the advertising rules and discusses how they apply to the internet and other electronic communication.

## Copies and recordings

Unlike the American Bar Association (ABA) model rules, the IRPC 7.2 requires attorneys to keep either copies or recordings of all advertisements for at least two years after circulation.<sup>15</sup> Further, attorneys must keep a record of where and when each advertisement was used.<sup>16</sup> To comply with Rule 7.2, attorneys and

The Court determined that “public access to the legal system outweighed the state’s interest” in safeguarding the dignity and reputation of the legal profession.<sup>10</sup>

law firms should carefully track and store copies and recordings of each and every advertisement. Compliance with this rule is made efficient and affordable through online databases.

## Referrals through reciprocal agreements

One way for attorneys to save money on advertising is to rely on referrals for new clients. Referrals essentially serve as face-to-face advertising. In conformity with the ABA model rule, IRPC 7.2 was recently amended to require that attorneys meet two conditions before entering into reciprocal agreements relating to client referrals.<sup>17</sup> First, the reciprocal referral agreement must not be

exclusive.<sup>18</sup> Second, the client must be informed of the existence and nature of the agreement.<sup>19</sup> Thus, while attorneys typically may not pay for someone to recommend services, an attorney may enter into a reciprocal agreement for referrals if the reciprocal agreement is not exclusive and so long as the client knows of the reciprocal agreement.

### Pay-per-lead advertising

On a related note, amended Rule 7.2 contains a “pay-per-lead” provision in Comment 6 that is also embodied in the ABA Model Rules.<sup>20</sup> Pay-per-lead advertising refers to the payment for generating client leads, such as advertising on Internet search engines that leads to a new client.<sup>21</sup> In an Internet dominated world, pay-per-lead advertising is a highly effective method of reeling in new clients.<sup>22</sup> It saves money because attorneys are only charged a fee by the generator when a potential client clicks on the advertisement, whereas billboards and newspaper clippings cost regardless of results. Such advertising is permissible so long as the lead generator does not recommend the attorney, but merely lists the attorney’s website when certain searches are run.<sup>23</sup>

A lead generator makes an impermissible recommendation if it endorses or vouches for an attorney’s credentials, abilities, competence, character, or other professional qualities.<sup>24</sup> Linking a potential client to an attorney’s website upon a general search, such as “employment attorneys in Boise,” is permissible. But if the potential client typed in “the best employment attorney in Boise” and Attorney Bob’s website popped up, the Internet search engine would essentially be recommending Attorney Bob because displaying Attorney

Bob as the best employment attorney in Boise constitutes an endorsement of Attorney Bob’s credentials and abilities. In such an instance, Attorney Bob could not pay for the recommendation because under Rule 7.2 the lead generator may not recommend the attorney who is paying for generating client leads.<sup>25</sup>

### Blog posts

Attorney blogs are also growing in popularity because the Internet creates exposure to a broad audience. Attorneys should be cautious of posting blogs, however, because they may inadvertently violate the IRPC. In 2011, Virginia became the first state to discipline an attorney for advertising through a blog.<sup>26</sup> The attorney posted a blog about his criminal defense success stories, and the Virginia Bar disciplined him because he failed to include a disclaimer indicating that his blog was an advertisement.<sup>27</sup> Such a broad reading of “advertisement” is unfavorable to attorneys, but it is unclear whether other states will follow Virginia’s lead on the issue.

Idaho attorneys are not currently required to label all advertisements as “advertisements,” but are required to label “solicitation” as “advertising material.”<sup>28</sup> Blog posts may constitute solicitation, which is defined as “a targeted communication initi-

ated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services.”<sup>29</sup> Advertising, on the other hand, targets the general public.<sup>30</sup> If a blog post has the potential to serve as a form of solicitation, attorneys are well advised to include a disclaimer on the bottom or top of the blog that reads “advertising material.”

Additionally, under IRPC 7.1, blog posts, and other forms of communication, cannot create an unjustified expectation about results an attorney can achieve.<sup>31</sup> Rule 7.1 applies to all forms of communication about an attorney or an attorney’s services.<sup>32</sup> So if a blog post contains information about an attorney’s success stories, it constitutes a form of communication about an attorney’s services and thus falls under the scope of Rule 7.1. To avoid being misleading or creating an unjustified expectation about results, a simple disclaimer on the bottom of a blog that reads “similar results not guaranteed” would suffice to comply with Rule 7.1.

Lastly, under IRPC 7.2, when an attorney advertises through written, recorded, or electronic communication, including blogs, the communication must include the name and office address of at least one attorney or law firm responsible for its con-

... IRPC 7.2 was recently amended to require that attorneys meet two conditions before entering into reciprocal agreements relating to client referrals.<sup>17</sup> First, the reciprocal referral agreement must not be exclusive.<sup>18</sup> Second, the client must be informed of the existence and nature of the agreement.<sup>19</sup>

tent.<sup>33</sup> This could be as simple as including the author attorney's name on the blog post and, if applicable, attaching the firm's name and address next to or underneath the attorney's name.

### Fields of practice and specialization

In an effort to attract new clients, an attorney may be tempted to boast successful experience in a particular field of law and claim to be a certified specialist in that field. Such boasting may be a line in an e-mail signature or a letterhead that reads "certified specialist in bankruptcy law" or "certified family law specialist." However, it is not enough to be experienced or even certified.<sup>34</sup> Rule 7.4 prohibits an attorney from stating, or even implying, that he or she is certified as a specialist unless two conditions are first met: (1) the attorney is certified by an Idaho State Bar approved organization, and (2) the attorney clearly identifies the name of the certifying organization.<sup>35</sup>

The Idaho State Bar website includes a list of certifying organizations which encompass a variety of legal fields – bankruptcy, estate planning, workers' compensation, and more.<sup>36</sup> These organizations review attorney applicants to determine whether the applicants meet the organization's certification requirements.<sup>37</sup> If an attorney meets the requirements, the organization will certify the applicant as a specialist within the organization's area of law.<sup>38</sup> The Idaho State Bar website also includes the contact information for each certifying organization, along with instructions for organizations who wish to apply to become certifying organizations.<sup>39</sup>

Although most Idaho attorneys are not certified as specialists in any particular area of law,<sup>40</sup> a client

may be more prone to hiring an attorney who is certified as a specialist. In fact, an ABA survey revealed that 93.5% of people believed that a specialist would better handle matters than a non-specialist.<sup>41</sup> Specialist attorneys may be seen as the "experts" in a field of law. Additionally, obtaining a specialist certification sets attorneys apart from their peers because the certifying organization has recognized that the attorney is more skilled and experienced in an area of law than the average attorney. Whether this perception is valid, it

Some states that have suffered an onslaught of such violations have created and required pre-approval processes through which advertisements are reviewed prior to dissemination.<sup>42</sup>

likely induces some clients into hiring a specialist attorney over a non-specialist attorney.

### Pre-approval process

In order to prevent attorney advertising violations, some states that have suffered an onslaught of such violations have created and required pre-approval processes through which advertisements are reviewed prior to dissemination.<sup>42</sup> While attorney advertising is not a particularly big problem in Idaho, according to Idaho State Bar Counsel, advanced

technology and the transition from paper to electronic advertising will likely pose future dilemmas. Idaho does not have a pre-approval process, so attorneys must analyze their own advertisements to ensure conformity with the IRPC. But such a process may be helpful for Idaho attorneys sometime down the road as the world of attorney advertising expands and grows more complex.

A pre-approval process may include the issuance of advisory opinions or the requirement that attorneys submit proposed advertisements to a committee that undertakes pre-screening procedures. Pre-approval would decrease the number of attorney advertising violations. Moreover, a pre-screening process would relieve the stress that tends to arise from individually ensuring compliance with the IRPC.

### Conclusion

Before creating and paying for advertisements, attorneys in Idaho are well advised to review the IRPC to confirm their compliance with those standards. Additionally, internet advertisements should be carefully reviewed under the amended rules.

For any questions regarding attorney advertising rules or any other rules of professional conduct, please contact the Idaho State Bar at (208) 334-4500.

### Endnotes

1. *State Bar of Texas v. Faubion*, 821 S.W.2d 203 (Tex. App. 1991).
2. *In re MDK*, 534 N.W.2d 271 (Minn. 1995).
3. *The Florida Bar v. Pape*, 918 So.2d 240 (Fla. 2005).
4. *Virginia State Bar v. Horace Frazier Hunter*, Consent Order, Case No. CL12-335-7 (Va. Cir. Ct. 2013), available at <http://www.vsb.org/docs/Hunter-071813.pdf>.

5. *Id.*
6. See *Idaho Rules of Professional Conduct (IRPC)*, IDAHO STATE BAR, <http://isb.idaho.gov/general/rules/irpc.html>.
7. See *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). See also Louise L. Hill, *Lawyer Communication on the Internet: Beginning the Millennium with Disparate Standards*, 75 WASH. L. REV. 785, 791 (2000).
8. Christopher R. Lavoie, *Have You Been Injured in an Accident? The Problem of Lawyer Advertising and Solicitation*, 30 SUFFOLK U. L. REV. 413, 414-416 (1997).
9. *Id.* at 384.
10. Hill, *supra* note 1, at 795.
11. *Id.* at 383.
12. *Id.*
13. IDAHO RULES OF PROF'L CONDUCT R. 7.2(a) (2014).
14. See *Idaho Rules of Professional Conduct (IRPC)*, IDAHO STATE BAR, <http://isb.idaho.gov/general/rules/irpc.html>.
15. IDAHO RULES OF PROF'L CONDUCT R. 7.2(b).
16. IDAHO RULES OF PROF'L CONDUCT R. 7.2(b).
17. IDAHO RULES OF PROF'L CONDUCT R. 7.2(c) (4); MODEL RULE OF PROF'L CONDUCT R. 7.2(b) (4) (2014).
18. IDAHO RULES OF PROF'L CONDUCT R. 7.2(c) (4).
19. IDAHO RULES OF PROF'L CONDUCT R. 7.2(c) (4).
20. IDAHO RULES OF PROF'L CONDUCT R. 7.2, Comment 6; MODEL RULE OF PROF'L CONDUCT R. 7.2, Comment 5.
21. *Pay Per Lead*, MARKETING TERMS, [http://www.marketingterms.com/dictionary/pay\\_per\\_lead/](http://www.marketingterms.com/dictionary/pay_per_lead/).
22. See, e.g., Lawrence M. Friedman, *Marketing With a Click*, 20 CBA RECORD 62 (Mar. 2006).
23. IDAHO RULES OF PROF'L CONDUCT R. 7.2, Comment 6.
24. IDAHO RULES OF PROF'L CONDUCT R. 7.2, Comment 6.
25. IDAHO RULES OF PROF'L CONDUCT R. 7.2, Comment 6.
26. Catherine Ho, *Virginia State Bar's Crackdown on Lawyer's Blog Raises Questions*, WASH. POST (Oct. 9, 2011), [http://www.washingtonpost.com/business/capitalbusiness/virginia-state-bars-crackdown-on-lawyers-blog-raises-questions/2011/10/03/gIQAysufYL\\_story.html](http://www.washingtonpost.com/business/capitalbusiness/virginia-state-bars-crackdown-on-lawyers-blog-raises-questions/2011/10/03/gIQAysufYL_story.html).
27. *Id.*
28. IDAHO RULES OF PROF'L CONDUCT R. 7.3(c).
29. IDAHO RULES OF PROF'L CONDUCT R. 7.3, Comment 1.
30. See IDAHO RULES OF PROF'L CONDUCT R. 7.2, Comment 1.
31. IDAHO RULES OF PROF'L CONDUCT R. 7.1.
32. IDAHO RULES OF PROF'L CONDUCT R. 7.1.
33. IDAHO RULES OF PROF'L CONDUCT R. 7.2(d).
34. IDAHO RULES OF PROF'L CONDUCT R. 7.4(d).
35. IDAHO RULES OF PROF'L CONDUCT R. 7.4(d).
36. *Specialization*, IDAHO STATE BAR, (last visited June 23, 2014), <http://www.isb.idaho.gov/licensing/specialization.html>.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*

41. Johannes P. Burlin, *Lawyer Certification and Model Rule 7.4: Why We Should Permit Advertising of Specialty Certifications*, 5 GEO. J. LEGAL ETHICS 939, 947 (1992).
42. See, e.g., Dave Stafford, *Lawyers Fret Over Enforcement of Advertising Rules*, IBJ.COM, (May 21, 2014), <http://www.ibj.com/lawyers-fret-over-enforcement-of-advertising-rules/PARAMS/article/47781>. See also Diane Karpman, *Outdated Rules for 21st Century Advertising*, CAL. BAR J. (Sept. 2009), available at <http://www.ibj.com/lawyers-fret-over-enforcement-of-advertising-rules/PARAMS/article/47781>.

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# Eminent Domain: The Essentials

Michael J. Ferrigno

Idaho is growing. According to recent reports, the Treasure Valley along with other regions throughout Idaho will nearly double in population in the next 40 years.<sup>1</sup> In fact, another 400,000 residents are projected to move into Ada and Canyon County alone.<sup>2</sup> This projected growth is not limited to just population, but Idaho is projected to be one of the top 10 states for job growth in 2014.<sup>3</sup> Therefore, as more people move to Idaho for jobs and begin to call the Gem State home, the need for more local infrastructure (i.e., roads, schools, hospitals, emergency response, etc.) to support this growth is inevitable. One of the tools for government to respond to rapid growth is the right of eminent domain. As Idaho continues to grow, local attorneys should have a basic understanding of eminent domain and the process by which the state acquires property through condemnation.

This article looks to provide the basics one should remember when talking to a prospective client who has a condemnation matter. First, it examines the legal authority provided to the state or local municipalities to condemn. Next, it provides a brief overview of the phases and proceedings in a condemnation acquisition. Lastly, it discusses emerging areas as well as some helpful tips to have when representing a party in a condemnation matter.

## Foundation for the right of eminent domain

The right of eminent domain is granted by Idaho's Constitution.<sup>4</sup> The Idaho Constitution states, in relevant part, that "[p]rivate property

Attorneys should have a basic understanding of eminent domain and the process by which the state acquires property through condemnation.

may be taken for public use, but not until a just compensation, to be ascertained in the manner prescribed by law, shall be paid therefor."<sup>5</sup> The Idaho Constitution also enumerates certain spheres that are deemed "public use," including, but not limited to, irrigation and the conveyance of water, mining and its "complete development," the complete development of other material resources of the state, as well as for the general preservation of health.<sup>6</sup> The Idaho Constitution also makes clear that the right of eminent domain "shall never be abridged, nor so construed as to prevent the legislature from taking the property and franchises of incorporated companies, and subjecting them to public use, the same as the property of individuals."<sup>7</sup> Thus, as the Idaho Supreme Court has long held, the Idaho Constitution grants much broader powers than most states, since it allows private interest such as irrigation and mining business the ability to benefit from this power.<sup>8</sup>

However, even with these broad enumerated powers, the Due Process provision within the Idaho and U.S. Constitutions tempers the reach of the state's power. It is a deprivation of one's constitutional rights if the state takes property unless the taking is for public use and the property

owner receives his or her just compensation.<sup>9</sup> While the concept of public use may seem clear-cut, defining exactly what public use entails is at the center of many condemnation controversies that have brought national attention and even public outrage in some cases.<sup>10</sup> However, for the purpose of this article, the categories of public use subject to the right of eminent domain are listed in Section 7-701 of the Idaho Code.

Just compensation is an essential component that requires the condemnor to fully indemnify the property owner for the loss of his or her property interest. Although this may seem relatively straightforward, what "fully indemnify" actually means is a case-by-case inquiry. For instance, if the condemning authority takes a temporary easement from a property owner to allow heavy equipment access to the project, the just compensation would be substantially different than if the condemnor acquired a permanent easement to build a 20-foot-high sound wall. As most attorneys learned in law school, property rights are a bundle of sticks, so, in the context just compensation, determining what fully indemnifies a property owner is a fact intensive question about how much the "stick" is worth.<sup>11</sup> And some sticks are worth more than others.

Therefore, before discussing the process of acquisition, it is important to remember that the right of eminent domain is an age old necessity of government but the breadth and reach are constantly shifting. With this quick refresher complete, we can now move to brief summary of how property rights are acquired.

### **Basic overview of phases and proceedings**

Condemnation acquisitions can be separated into three distinct phases: Planning, Negotiation, and the Condemnation Proceeding. A majority of these phases are codified in Chapter 7 of Title 7 of the Idaho Code, §§ 7-701, *et seq.* Before discussing each phase, there are four requirements that the condemning authority must complete before it may proceed to the Condemnation Proceeding: use, necessity, survey, and good faith negotiations. Each of the four requirements should be satisfied in the Planning and Negotiation phases. And as you go through each phase you can see how the Legislature is trying to bridle the overwhelming power of eminent domain in order to protect property owners.

### **Planning phase**

In the planning phase, the condemning authority determines whether or not a certain project is for the public use, whether the property right to be acquired is necessary, and surveying land to determine that the proposed take is “compatible with the greatest good and the least private injury.” The statutory authority for this phase is found in Idaho Code, §§ 7-701, 7-704, and 7-705.

### **Public use requirement (I.C. § 7-701)**

The State may not condemn property unless the use is a public

use.<sup>12</sup> However, a closer review of the list of public uses reveals a broad list, including, but not limited to, construction and maintenance of public buildings, telephone lines, mining and irrigation, and even snow fences to protect highways or floating logs and lumber on streams. According to some experts, Idaho law provides poor protections to landowners because Idaho’s definition of public use is so expansive.<sup>13</sup> Regardless, the public use, however vague, must be present. Thus, while it is a prerequisite, the condemning authority generally can clear this low hurdle in the Planning phase.

### **Necessity prerequisites (I.C. § 7-704)**

Prior to a taking, certain facts must be present including that the public use is authorized by law and that the acquisition is either necessary for the intended use or a need for a more necessary public use if the use is already appropriated. The current necessity requirement is a restraint, but the legislature seeks to amend § 7-704 to require even more factual prerequisites.<sup>14</sup> The necessity requirement, like the public use requirement, is generally a low bar to clear, but as with all cases, it is a case-by-case inquiry. For example, demonstrating the necessity requirement could be challenging if the condemning authority took land for

a library or some other public building. Conversely, demonstrating the necessity for acquiring land adjacent to a road widening project would likely be less difficult than for a library. That being said, the necessity requirement is a prerequisite and a vital component of the Planning phase.

### **Survey/location requirement (I.C. § 7-705)**

For all acquisitions of land, the land must be “compatible with the greatest good and the least private injury.” To effect this task, section 7-705 grants an authority the right to enter private property for the purpose of surveying and locating suitable property. Thus, unless proper planning finds an acquisition that is both for the greatest good and also the least private injury, this requirement is not achieved and negotiations to acquire the land cannot progress.

While the Planning phase may seem tedious, it is absolutely essential to ensure that the right of eminent domain is not used capriciously.

### **Restrictions effecting the planning phase**

In the wake of the landmark U.S. Supreme Court decision in *Kelo, et al. v. City of New London*, 545 U.S.

As you go through each phase you can see how the Legislature is trying to bridle the overwhelming power of eminent domain in order to protect property owners.

469 (2005), Idaho enacted § 7-701A to limit takings for certain types of economic development.<sup>15</sup> Idaho was one of eight states that reformed its laws to “couple a ban on economic development condemnations with restrictions on the definition of blight that . . . restrict[s] blight condemnations to areas that fit the intuitive definition of the term.”<sup>16</sup> Section 7-701A curbs the taking of private property for “public use” that is actually a pre-textual transfer of private property from one private party to a different private party. This restriction likely only applies to the planning of economic development of blighted areas, not a myriad of other uses such as roads or power lines. However, despite the Legislatures’ best efforts, scholars opine that § 7-701A provides sufficient wiggle room to navigate around its purposes as the law allows “the possibility that property could be condemned merely for posing an “actual risk of harm” to public “morals” or “welfare,” which are concepts that could be defined broadly enough to include most economic development takings.<sup>17</sup>

### The Negotiation phase

After the condemning authority has completed its due diligence in the Planning phase, which included surveying the land, determining that a certain property acquisition was necessary for a public use through utilizing various design professionals, engineers and appraisers, the condemning authority must conduct good faith negotiations. Idaho Code § 7-707(7) expressly requires that the authority undertake good faith negotiations before proceeding to condemnation. However, to clarify and assist the authority in negotiating in good faith, the Legislature

encourages the condemning authority to provide an Advice of Rights Form to the property owner.<sup>18</sup>

### Advice of Rights Form and other rights (I.C. §7-711A)

The Advice of Rights Form supplies the property owner with the vital information concerning the declared public use, why the taking is necessary, and how the property owner’s parcel allows for the greatest good and the least private injury (survey/local requirement), all of which are prerequisites to condemn-

It is in the condemning authority’s best interest to settle with the landowner rather than proceed to condemnation.

ing the property.<sup>19</sup> The Code also gives the property owner notice of a right to a jury trial and attempts to explain the difficult concepts associated with condemnation appraisals, including the highest and best use and severance damages.<sup>20</sup>

The means by which the condemning authority can deliver the Advice of Rights Form has slightly expanded, effective July 1, 2014. Now the Code allows the condemnor to deliver the form to the property owner by hand.<sup>21</sup> Before this change, the form was required to be sent by certified mail, which could

be impractical for the negotiator since merely handing the form to the property owner was insufficient delivery.

One of the hallmarks of good faith negotiations is providing sufficient information to allow a party with less bargaining power the opportunity to consult an appraiser and an attorney to make an informed decision.<sup>22</sup> The Code also requires that the property owner is provided a copy of the acquisition appraisal upon request to allow the property owner to comprehend not only what the project entails, but what the condemning authority asserts is just compensation.<sup>23</sup> Lastly, the Code requires that the authority provide at least a 30-day deadline to allow the property owner time to review and consider the initial offer.<sup>24</sup> Therefore, any deadline to respond to the initial offer cannot be less than 30 days or the acquisition is deemed “null and void.”<sup>25</sup>

Although the Advice of Rights Form is not required *per se*, the condemning authority could expose itself to unnecessary risks since if it neglects to supply the form, there is a presumption that any sale or contract between the property owner and the condemning authority was not voluntary.<sup>26</sup> Therefore, it seems highly unlikely the condemning authority would elect to withhold this form since it provides three of the four prerequisites and may negate the presumption that the acquisition was involuntary.

Generally the Negotiation phase is a back and forth between the landowner and the negotiator. It is in the condemning authority’s best interest to settle with the landowner rather than proceed to condemnation, but sometimes, despite good faith negotiations, the property owner and the authority cannot settle and the prop-

erty is acquired by condemnation, not settlement.

### Condemnation phases

The condemnation phases only occur once negotiations between the property owner and condemnor fall apart. After negotiations break down, the condemning authority must commence an action through filing a complaint and summons.<sup>27</sup> Only the District Court in the county where the property is located has jurisdiction to adjudicate a condemnation proceeding.<sup>28</sup>

After the correct parties are sued by the condemning authority a condemnation trial commences. Trials quickly turn into a battle of experts as they usually involve appraisers, zoning experts, engineers and construction experts. Once the evidence is received, the trial court determines whether all the procedural and constitutional protections discussed in Part I and II are present, and if so, the court allows the jury to determine the just compensation owed to the property owner.

To underscore the peculiarity of condemnation actions, at the end of the trial, one judgment is entered against the condemning authority and another judgment is entered against the property owner.<sup>29</sup> The condemning authority is liable for the just compensation award, which must be paid within 30 days and the property owners lose his or her property interest.<sup>30</sup>

### Quick-take

One important procedure tool of the condemnor is the quick-take. The quick-take allows the state to take possession and use of desired property prior to trial. However, the quick-take is only available if the condemning authority deposits

Trials quickly turn into a battle of experts  
as they usually involve  
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engineers and construction experts.



the initial offer into the Court registry and the Court holds a hearing concerning whether the plaintiff has the right of eminent domain, and whether the use, necessity and good faith negotiation requirements were fulfilled.<sup>31</sup> Once, the initial offer is deposited and the Court finds that the necessary requirements were fulfilled, the quick-take is granted. The quick-take greatly assists the condemning authority as it allows project construction to commence without being delayed by protracted litigation.

### S.B. No. 1309 - A new wrinkle

On occasion, a project may need to amend the project, but as of July 1, 2014, if the condemning authority amends the project after filing the condemnation complaint and serving the summons, the condemning authority may need to reimburse the property owner.<sup>32</sup> On March 26, 2014, Governor Otter signed S.B. No. 1309 into law, which allows a defendant property owner the ability to seek reimbursement for certain costs that are “rendered moot by such amendment.” As with just compensation awards, the Code requires prompt payment for costs (i.e., 60 days) upon the court’s determination.<sup>33</sup> Although it is unclear how S.B. 1309 will be applied by the courts, this new law did garner

national attention, and will certainly give the condemning authority pause before filing a condemnation complaint if any plans to amend the project are likely.<sup>34</sup>

### Emerging areas

In the ever changing energy renaissance that Western States are currently enjoying, a strong argument can be made that the Idaho Constitution bestows the state the right of eminent domain for the “complete development” of natural gas or any other “material resources of the state.”<sup>35</sup> As was said in *McKenney v. Anselmo*,

“The timber of this state is a material resource and where that resource cannot be completely developed without the exercise of the power of eminent domain that power may be lawfully exercised. The fact that the use may be for private benefit is immaterial since the controlling question is whether the use is for the complete development of the material resources of the state.”<sup>36</sup>

Therefore, as innovation drives to new untapped material resources, Idaho’s broad allowance of the right of eminent domain for the complete development of resources will allow the State more avenues to condemn

property for the benefit of developing more resources for Idaho.

### Helpful tips

First, before you can assist a property owner or condemning authority, you must identify what phase your client is in. If you treat a condemnation case as simple litigation and forget either the planning or negotiation aspect, you could forget the necessary requirements to properly condemn if you are representing the state or cost your client money by forcing the parties into litigation instead of settling.

Second, most property owners do not hire an attorney until negotiations break down so a lawyer's role is generally limited to the third phase. However, a wealth of knowledge is available to counsel early on in the Advice of Rights Form (if provided), so a lawyer can get up to speed quickly.

Third, encourage your client to be creative during the negotiation phase and even while trial is pending. As we all know, settling parties can make deals that courts are not equipped to do. For example, if the property owner is willing to sell if the condemnor builds a new retaining wall or different type of sign or sidewalk, encourage such dialogue. At trial, courts can only award damages and creative solutions are off the table.

Fourth, remind your clients that condemnation acquisitions are much different than most typical real estate transactions. It is advisable to heed the Idaho Supreme Court's advice because the condemnor "must fairly and openly deal with the landowner. In that manner most condemnation actions should not be thrown into litigation."<sup>37</sup> Thus, the typical low offers and haggling are not present since the Constitution commands that just compensation be offered.<sup>38</sup> To prove the State wrong, your client

will likely need to hire experts and these costs/risks should be explained early on.<sup>39</sup>

### Conclusion

Given the expected growth in Idaho, the use of eminent domain may be on the rise. It is important that practitioners are aware of the power of eminent domain and how due process tries to bridle it as well as the basic phases of how a property is acquired. With some important proposed and enacted changes in the Code and the potential for new energy resources emerging in our State, lawyers need to refresh the basic procedures involved in eminent domain so that both the constitutional right to condemn and the private right of due process are upheld.

### Endnotes

1. See Torrie Cope, *Planning Committee Prepares For Robust Growth*, Idaho Press-Tribune, (Aug. 25, 2013), available at [http://www.idahopress.com/by-the-numbers/pdf\\_02ebf83a-0d47-11e3-af84-001a4bc-f887a.html](http://www.idahopress.com/by-the-numbers/pdf_02ebf83a-0d47-11e3-af84-001a4bc-f887a.html).
2. *Id.*
3. <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2014/01/07/which-states-will-generate-jobs-in-2014>
4. IDAHO CONST., ART. I, §14
5. *Id.*
6. *Id.*
7. IDAHO CONST. ART. XI, § 8
8. *Boise Redevelopment Agency v. Yick Kong Corp.*, 94 Idaho 876, 880 (1972) ("We

note that the Constitution of the State of Idaho, Article I, Section 13, supra, grants a right of eminent domain much broader than grants in most other state constitutions. For example, completely private interests in the irrigation and mining businesses can utilize eminent domain.")

9. IDAHO CONST. ART. I, §§ 13, 14.

10. See *Kelo, et al. v. City of New London*, 545 U.S. 469 (2005).

11. *E.g. United States v. Craft*, 535 U.S. 274, 278 (2002) ("A common idiom describes property as a "bundle of sticks"—a collection of individual rights which, in certain combinations, constitute property.")

12. See IDAHO CONST. ART. I, §§ 13, 14.

13. See Castle Coalition, *50 State Report Card — Tracking Eminent Domain Reform Legislation since Kelo*, (August 2007), available at [http://www.castlecoalition.org/pdf/publications/report\\_card/50\\_State\\_Report.pdf](http://www.castlecoalition.org/pdf/publications/report_card/50_State_Report.pdf).

14. See I.C. § 7-704; S.B. 1411, Idaho 62<sup>nd</sup> Legislature, (March 17, 2014).

15. See I.C. § 7-701A

16. Ilya Somin, *The Limits of Backlash: Assessing The Political Response to Kelo*, 93 Minn. L. Rev. 2100, 2140 (June 2009).

17. *Id.*

18. I.C. § 7-711A

19. *Id.*

20. *Id.* at (3)-(5)

21. See S.B. 1303, as amended, 62<sup>nd</sup> Idaho Legislature, (Idaho 2014) available at <http://legislature.idaho.gov/legislation/2014/S1303E1.pdf>

22. I.C. §7-711(6) and (8).

23. See I.C. § 7-711(7)

24. I.C. § 7-711A(10)

25. *Id.*

26. *Id.*

If you treat a condemnation case as simple litigation and forget either the planning or negotiation aspect, you could forget the necessary requirements to properly condemn.

27. I.C. §§ 7-706, 7-707, and 7-708
28. I.C. § 7-06.
29. See I.C. §§ 7-706 to 7-710; *Renninger v. State*, 70 Idaho 170 (1950)
30. I.C. §§ 7-714, 7-716
31. I.C. § 7-721(2)
32. SB 1309, 62<sup>nd</sup> Idaho Legislature, (Idaho 2014) available at <http://www.legislature.idaho.gov/legislation/2014/S1309E1.pdf>
33. Unlike just compensation, which is determined by a jury, this award could be determined by stipulation between the parties or the court by affidavits. See I.C. § 58-1104(b).
34. Katie Terhune, *Eminent Domain Bill May Make State Pay Court Costs*, Associated Press, (July 8, 2014, available at <http://www.washingtontimes.com/news/2014/mar/4/eminent-domain-bill-may-make-state-pay-court-costs/>)
35. See IDAHO CONST. ART. I, § 14
36. 91 Idaho 118, 123 (1966)
37. *State ex rel. Ohman v. Ivan H. Talbot Family Trust*, 120 Idaho 825, 833 (1991)
38. *Id.*
39. If the matter is a commercial property, the client will likely need an MAI

As we all know, settling parties can make deals that courts are not equipped to do. For example, if the property owner is willing to sell if the condemnor builds a new retaining wall or different type of sign or sidewalk, encourage such dialogue.

appraiser as well as zoning, construction and possibly engineering experts. Every case is different so every case may need different experts.

**About the Author**

**Michael J. Ferrigno**, of the Law Office of Michael J. Ferrigno, PLLC in Boise, practices in business and commercial litigation, bankruptcy, and eminent domain. He has extensive experience representing the condemning authorities, including the acquisition

of over 100 parcels, mostly through condemnation proceedings. He currently holds the position of Secretary/Treasurer for the Young Lawyers Section of the Idaho State Bar. Mr. Ferrigno received a Juris Doctorate and Certificate of Public Policy from The Catholic University of America, Columbus School of Law in Washington, D.C.



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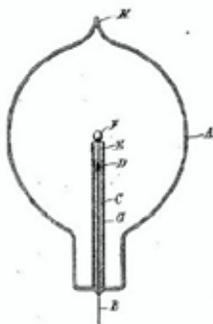
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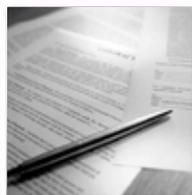
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**1<sup>st</sup> AMENDED - Regular Fall Term for 2014**

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

By Order of the Court  
Stephen W. Kenyon, Clerk

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

**OFFICIAL NOTICE  
COURT OF APPEALS OF IDAHO**

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

**1<sup>st</sup> AMENDED - Regular Fall Term for 2014**

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

By Order of the Court  
Stephen W. Kenyon, Clerk

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

**Idaho Supreme Court  
Scheduled for September 2014**

**Friday, September 26, 2014 – BOISE**

8:50 a.m. *State v. Dameniel Preston Owens* ..... #41174-2013  
10:00 a.m. *State v. Dennis John Halseth* ..... #41169-2013  
11:10 a.m. *Newman K. Giles v. Eagle Farms, Inc.* (Industrial Commission) ..... #41469-2013  
1:30 p.m. *Firmage v. Snow* (EXPEDITED) ..... #42141-2014

**Monday, September 29, 2014 – COEUR D'ALENE**

8:50 a.m. *Terri L. Boyd-Davis v. Macomber Law* (Industrial Commission) ..... #41523-2013  
10:00 a.m. *Mountain West Bank v. James D. Durham* ..... #41030-2013  
11:10 a.m. *State v. Jonathan Wade Ellington* ..... #39838-2012

**Tuesday, September 30, 2014 – COEUR D'ALENE**

8:50 a.m. *Stephanie K. Reed v. Scott Avery Reed* ..... #41013-2013  
10:00 a.m. *Gene L. Mattox v. Life Care Centers* ..... #40762-2013  
11:10 a.m. *Keith A. Sims v. Dan S. Jacobsen* ..... #40474-2012

**Wednesday, October 1, 2014 – MOSCOW**

8:50 a.m. *Silver Opportunity Partners v. Stonehill Capital Management* ..... #40938-2013  
10:00 a.m. *Su Warren v. Williams & Parsons* (Industrial Commission) ... #41209-2013  
11:10 a.m. *Terri L. Boyd-Davis v. Timothy Baker* ..... #40438-2012

**Friday, October 3, 2014 - BOISE**

8:50 a.m. *Samuel J. Zylstra v. State of Idaho & Boise State University* ..... #41421-2013  
10:00 a.m. *Federal Home Loan Mortgage Corp. v. Margaret A. Butcher* .. #41188-2013  
11:10 a.m. *HFLP, LLC v. City of Twin Falls* ..... #41277-2013

**Idaho Court of Appeals  
Oral Argument for September 2014**

**Tuesday, September 9, 2014 - BOISE**

9:00 a.m. *Severson v. State* ..... #40769-2013  
10:30 a.m. *State v. Brooks* ..... #41046-2013  
1:30 p.m. *State v. Lemmons* ..... #41278/41279-2013

**Thursday, September 11, 2014 – BOISE**

9:00 a.m. *State v. Bennett* ..... #40770-2013  
10:30 a.m. *State v. Big Dawg Bail Bonds* ..... #41489-2013  
1:30 p.m. *State v. Young* ..... #41541-2013

**Tuesday, September 16, 2014 – BOISE**

10:30 a.m. *State v. Howell* ..... #41417-2013  
1:30 p.m. *State v. Beck* ..... #41241-2013

**Thursday, September 18, 2014 – BOISE**

10:30 a.m. *State v. Rocha* ..... #41535-2013  
1:30 p.m. *State v. Cunningham, Jr.* ..... #41167-2013

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**Idaho Supreme Court and Court of Appeals**  
**NEW CASES ON APPEAL PENDING DECISION**  
**(Updated 8/1/14)**

**CIVIL APPEALS**

**Arbitration**

1. Whether the district court erred in denying the motion to modify and/or correct the arbitration award due to an evident miscalculation of prejudgment interest.

*Cedillo v. Farmers Insurance Co.*  
S.Ct. No. 41683  
Supreme Court

**Eviction**

1. Whether the district court erred in affirming the magistrate court's grant of summary judgment in favor of Deutsche Bank in its eviction action against Breinholt.

*Deutsche Bank National Trust Co. v. Breinholt*  
S.Ct. No. 40748  
Court of Appeals

**Fees**

1. Did the court err in ruling the Idaho Revenue Bond Act, I.C. § 50-1207 et seq., authorizes municipalities to collect sewer system "connection fees", which are to be solely used to pay for future expansion?

*North Idaho Building Contractors v. City of Hayden*  
S.Ct. No. 41316  
Supreme Court

2. Whether the court correctly found the charging of user fees related to commissary purchases, telephone use and other services does not invade the province of the legislature.

*Searcy v. Idaho State Board of Corrections*  
S.Ct. No. 41216  
Court of Appeals

**Liens**

1. Did the district court err in requiring that a trustee be named in a lien or in a suit to foreclose a lien under the Trust Deed statute, I.C. § 45-1502, et. seq.?

*ACI Northwest, Inc. v. Jacobson*  
S.Ct. No. 41269  
Supreme Court

**Other**

1. Did Global establish by clear and convincing evidence that each element of the doctrine of boundary by agreement applied to the lease agreement?

*Sherman Storage v. Global Signal Acquisitions*  
S.Ct. No. 41077  
Supreme Court

**Post-conviction relief**

1. Did the trial court err in finding trial and appellate counsels' performances were not deficient because there was sufficient evidence in the trial record to support the conviction?

*Crawford v. State*  
S.Ct. No. 41669  
Court of Appeals

**Statute of limitation**

1. Whether plaintiffs' legal malpractice suit accrued within two years of when it was filed on June 7, 2012, or is barred by I.C. § 5-219(4).

*Minnick v. Hawley Troxell Ennis & Hawley, LLP*  
S.Ct. No. 41663  
Supreme Court

**Summary judgment**

1. Did the district court err in granting Portneuf Medical Center's motion for summary judgment?

*Pocatello Hospital v. Quail Ridge Medical Investors*  
S.Ct. No. 41589  
Supreme Court

**Tax**

1. Whether Jayo Development, Inc., qualified for the "site improvement" property tax exemption as based upon the unambiguous language of I.C. § 63-604W(2).

*Jayo Development v. Board of Equalization*  
S.Ct. No. 41668  
Supreme Court

**Termination of parental rights**

1. Was the finding that the children were neglected supported by clear and convincing evidence?

*Dept. of Health & Welfare v. Doe (2014-15)*  
S.Ct. No. 42234  
Supreme Court

2. Whether the court erred in terminating Doe's parental rights by failing to consider Doe's disabilities and DHW's failure to provide meaningful supportive services

*Dept. of Health & Welfare v. Doe (2014-17)*  
S.Ct. No. 42291  
Supreme Court

**CRIMINAL APPEALS**

**Evidence**

1. Whether the court erred in ruling that Houser's drug use before the incident was relevant as to whether he committed battery and more probative than prejudicial.

*State v. Houser*  
S.Ct. No. 41540  
Court of Appeals

2. Did the court err in excluding expert testimony concerning the reliability of breath testing devices in Roach's trial for DUI?

*State v. Roach*  
S.Ct. No. 41221  
Court of Appeals

3. Did the court err in the admission of expert testimony on the subject of domestic violence, including the reasons domestic violence victims recant?

*State v. Ibarra*  
S.Ct. No. 41120  
Court of Appeals

4. Did the court abuse its discretion when it allowed a police officer, over Barber's foundation objection, to testify as to the weight of the marijuana he obtained by using a digital scale?

*State v. Barber*  
S.Ct. No. 41015  
Court of Appeals

5. Did the district court err by concluding that AM-2201 was a controlled substance as a matter of law?

*State v. McKean*  
S.Ct. No. 41004  
Supreme Court

6. Was there sufficient evidence from which a jury could find beyond a reasonable doubt that Hildreth was guilty of unlawfully killing a black bear?

*State v. Hildreth*  
S.Ct. No. 40936  
Court of Appeals

**Pleas**

1. Did the court abuse its discretion by denying McCabe's post-sentencing motion to withdraw his guilty plea?

*State v. McCabe*  
S.Ct. No. 41357  
Court of Appeals

**Search and seizure – suppression of evidence**

1. Whether the district court erred in reversing the magistrate's ruling on Neal's motion to suppress and in finding his traffic stop was justified by reasonable suspicion Neal had violated traffic laws.

*State v. Neal*  
S.Ct. No. 41534  
Court of Appeals

**Substantive law**

1. Is Idaho's sexual abuse of a vulnerable adult statute unconstitutional because it is overbroad?

*State v. Knutsen*  
S.Ct. No. 40803  
Supreme Court

**Summarized by:**  
**Cathy Derden**  
**Supreme Court Staff Attorney**  
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# Speaker at Women's Conference Breaks Down the Generation Gap

Nicole Pantera

One of the primary issues facing attorneys today is the generational differences between senior decision makers and younger attorneys entering the workforce — “millennials.” How do we resolve the differences in workplace behaviors and philosophies to create a viable business model for the future?

When I look around my peers, I see a number of two income households, two people with demanding jobs, children, and many other obligations. Women and men alike value life outside of work, and a balanced lifestyle is a priority to the millennial

generation — and that means work competes with, and can be subordinate to other priorities. To senior generations, this is often perceived as lack of commitment to a particular job and treated as a weakness, and may even be viewed as a sense of entitlement. However, perhaps being a good lawyer and having a balanced lifestyle do not have to be mutually exclusive.

Lauren Stiller Rikleen came to Boise July 2012 to speak about gender in the workplace, and specifically about unconscious bias. These issues are closely entwined with generational barriers in the workplace and are often indistinguishable. In fact, what piqued the most interest in July 2012 was the intergenerational aspect of her presentation.

Ms. Rikleen has responded in a new book, *You Raised Us – Now Work With Us: Millennials, Career Success, and Building Strong Workplace Teams*. Her book has received widespread praise and is a must-read for millennials, but even more so for managers. By exploring these issues together with open minds, senior generations, together with millennials, can try to create a sustainable business model for future generations.

What follows is an article that preceded publication of Ms. Rikleen's new book. I hope this will draw your interest enough to pick up a copy of the book and consider applying Ms. Rikleen's practical advice to your workplace. Happy reading.

## Millennials Bring Their Own Special Skills to the Workplace

Lauren Stiller Rikleen

Today's multi-generational workplace poses many interesting communication and technology challenges. For senior generations, key among these challenges is the way Millennials use technology. What Baby Boomers and Gen Xers generally do not see, however, is the set of unique challenges Millennials encounter as they bring their exceptional technology skills into the workplace.

Millennials have been exposed to technology of various sorts since birth and have grown up within the digital world, adapting constantly to change. They do not view advances in technology as something they would choose not to learn, as their more senior colleagues sometimes do.



No prior generation has had to face the odd assortment of communication and technology transitions that Millennials confront daily. At home, social networking and text messages are their preferred forms of communication. At work, however, they are expected to communicate via email, telephone, and face-to-face interactions. This means that Millennials continually adapt to the communication styles of those with whom they work, even though they communicate more efficiently and effectively on a personal level. This is not an adjustment that prior generations had to make as their communication options at home and work were the same.

As a result of this significant variance, Millennials demonstrate a quiet sophistication and ability to adapt that often goes unnoticed. In assessing technology capabilities of their colleagues, they determine whether they must adapt to a less efficient style of communicating, whether

they will be expected to assume the role of teacher, or whether they will face co-workers whose unwillingness to learn to use technology or maximize its efficiency impedes workplace effectiveness.

As technology has guided how Millennials communicate with one another, it has also shaped their social norms. The internet provides a forum for lives to be lived publicly and for every experience to be recorded and distributed widely. Privacy boundaries, compared to those of previous generations, have crumbled. Prior generations chronicled their lives but shared the tangible aspects of those experiences selectively within a close geographical circle of friends and family.

Today's opportunities for the public display of every aspect of one's life may profoundly affect how Millennials view privacy considerations. Privacy and confidentiality issues that Boomers and Gen Xers take for granted seem very different

to people whose daily life experiences are shared online. Moreover, Millennials' comfort with sharing information about themselves and each other has profound implications for how they will manage privacy in the workplace.

A 2013 study of Millennials' use of technology in the workplace found that:

The majority of Millennials say they carry out personal tasks during work hours. Though keen to perform well at work, it is virtually impossible for them to leave their personal lives behind, as they typically check Facebook, conduct IM chats and send and receive text messages on their devices throughout the day. This is seen as a right rather than a benefit.<sup>1</sup>

While some might read this statement as fueling the "entitlement" reputation, it also reflects an expectation of their ability to communicate with friends the way they have for much of their lives.

Of particular significance to employers, the study identified how vast the divide can be with respect to the effort to maintain workplace norms and policies in a vastly changing technology climate. A stunning 66% of Millennials reported that they do not abide by IT policies generally, and "45% of employed Millennials globally use social networking sites at work, whether prohibited or not." Nearly 30% said they do not even know if their company has a corporate IT policy.<sup>2</sup>

Millennials' comfort with and recognition of the speed and ease of technology was evident in the survey of Millennials I conducted while researching my new book, *You Raised us- Now Work with Us: Millennials, Career Success, and Building Strong Workplace Teams*,<sup>3</sup> which separates the myths from reality about the newest

generation in the workplace. Survey respondents generally indicated that they have an expectation that they can interact freely with others during the day, including communicating with friends via text and social media. The question we haven't yet answered, however, is whether these interactions hinder their ability to do the job or serve as only momentary distractions.

Responses to my survey also demonstrated the differences between how Millennials communicate personally and how they communicate professionally. Respondents communicated with their friends most frequently via text (more than 86%) and social networks (more than 75%). In the workplace, however, respondents were more likely to face restrictions on their use of text messaging and social networks.

Respondents expressed frustration with having limitations imposed on their ability to use technology to its optimum benefits. They described having to adapt to the inefficient expectations of others, even where the failure to take advantage of simple technologies resulted in a lower quality work product. Some respondents were similarly puzzled by missed opportunities to use technology to make tasks easier. They recognized that it is harder for older generations to learn technology, but they resented the missed opportuni-

ties for greater efficiency and were frustrated when their suggestions for improving efficiencies were ignored.

At the same time, the expectation that Millennials will serve as unpaid tech support can have negative effects for both the Millennials and their senior colleagues. Respondents repeatedly described being diverted from assigned legal tasks to troubleshooting their own technology problems or to help others solve theirs. Many reported feeling like they had two jobs: the one for which they were hired and that of unpaid technology teacher.

When Millennials spend their time assisting more senior colleagues on tech issues, their own job responsibilities suffer and their colleagues can continue to ignore even the easiest paths to self-sufficiency. Millennials noted a particular inequity in the reluctance of older generations to learn a new technology that could significantly improve workplace functions, knowing that they themselves lack the luxury of ever refusing to do a task they find difficult or unnecessary.

### Thinking differently about millennials and technology

Senior generations in the workplace need to think differently about how younger workers are trained on issues of technology, privacy, and confidentiality. The data demonstrat-

A stunning 66% of Millennials reported that they do not abide by IT policies generally, and "45% of employed Millennials globally use social networking sites at work, whether prohibited or not."

ing that IT restrictions in the workplace are widely ignored pose daunting challenges for employers. At the same time, it is important to pay greater attention to the dynamics that occur around technology issues. The following are tips that should help individuals responsible for professional development and other senior leaders as they seek to meet these challenges.

**1. Expertise can come in all age groups; consider establishing procedures to encourage employees to share ideas and suggestions.** Workplaces that ignore ideas offered by younger employees about ways to use technology to take advantage of marketing trends or to improve workplace efficiencies do so at their peril. Millennials have a tremendous vantage point, and their observations and suggestions can provide an important perspective often missed by senior workers less facile with social media's role in marketing and branding or with ways technology can benefit clients more efficiently. Such steps can include the development of a forum to discuss the pros and cons of ideas presented, the appointment of a task force to further investigate suggested technological improvements, or other programs that demonstrate attention to and an interest in new ideas. These interactive discussions offer an additional opportunity for more experienced workers to provide communication advice to their younger colleagues.

By being proactive, you are sending an important signal that new ways of solving problems are always welcome. People who offer suggestions are invested in the organization. Accordingly, all ideas should be encouraged. Having been encouraged to speak up throughout their lives, Millennials expect their ideas to be taken seriously when

they speak up at work. This does not mean that every recommendation warrants implementation. It does, however, warrant a response. Failure to do so can result in lost opportunities to implement improvements and can harm moral.

**2. Understand the challenges in your own workplace.** To begin the process of traversing the technology divide, employers should assess the capacities of both senior and junior professionals and identify areas where the divide is impeding efficiency. It is important to understand

Workplaces should consider implementing ways to provide Millennials with some form of internal credit for their role as technology teacher.

and bridge these differences to avoid unnecessary inefficiencies and the impacts of conflicting messages.

For Millennials, often impatient with the pace of change at their workplace, it is important that the assessment be transparent and provides information explaining any constraints on progress. For example, does the workplace have limited financial resources, impacting the purchase of newer technology and training programs? Are fellow workers uncomfortable with or resistant to learning new technologies? If the latter is the case, are there opportu-

nities for enterprising Millennials to make useful suggestions and assist with a more constructive role in implementing change?

**3. Bridge the technology divide in ways that provide an opportunity for Millennials to shine and for senior workers to learn and grow.** Millennials may be uniquely situated to translate technological complexities and to help demonstrate how pushing past discomfort can result in greater ease and efficiency. Reverse mentoring programs are a growing trend in the corporate sector and offer great opportunities in professional services as well. Such programs can be implemented and structured to help Millennials develop stronger relationships with the more senior colleagues they mentor. An effective reverse mentoring program will also recognize Millennials for their specific contributions and help them benefit from the efficiencies they can create.

When workplaces do not monitor the extra time spent by Millennials in providing additional tech support responsibilities, the result can be unfinished assignments and increased attribution. The older generations' discomfort with technology; overreliance on technical support of younger workers; and, in some cases, outright refusal to incorporate available efficiencies into workplace interactions can drive Millennials to distraction (literally). Effective strategies can facilitate stronger intergenerational communications and more effective use of technology. Workplaces should consider implementing ways to provide Millennials with some form of internal credit for their role as technology teacher. The assumption that younger workers will be available throughout the day to teach their less proficient colleagues imposes an unfair burden

and impedes workplace productivity. If technology tutoring is more than an incidental part of younger professional's day greater structure needs to be created around the role.

**4. Do not make assumptions that privacy and confidentiality means the same thing to a millennial as to other generations.** Recently, an in-house lawyer told me about seeing a younger colleague happily recounting on Facebook the company's excellent result in a recent negotiation. The senior lawyer was horrified. To the younger lawyer, it was the logical extension of what one always does with good news — share it with friends. Boomers and Gen Xers need to be more explicit in developing and communicating the boundaries around what can and cannot be shared. And, even if the answer is a

blanket prohibition, that needs to be clarified — and not in a way that calls into question that judgment of a younger colleague. All generations in the workplace are traversing new ground when it comes to communicating on-line. We need well-crafted policies that everyone can understand as essential to their effective job performance and responsibilities.

Both Millennials and senior generations have a role to play in addressing the challenges posed when technology allows for continuing intrusions in the workplace. The opportunities for distraction will only increase. Determining where and how to erect boundaries are questions for all generations. Moreover, finding those opportunities to help Millennials channel their significant technological expertise in a way that

improves workplace effectiveness can result in improved relationships and added value. Meeting each of these challenges and opportunities openly and creatively is in everyone's best interest.

#### Endnotes

1. Consumerlab, "Young Professionals at Work," Ericson Consumer Insight, April 2013, 5. [www.slideshare.net/Ericsson-Slides/young-professionals-at-work](http://www.slideshare.net/Ericsson-Slides/young-professionals-at-work).
2. Accenture Management Consulting, Technology and Outsourcing, Jumping the boundaries of Corporate IT: Accenture Global Research on Millennials' Use of technology (Web: Accenture,2010) 6-7. [nstore.accenture.com/technology/millennials/global\\_millennial\\_generations\\_research.pdf](http://nstore.accenture.com/technology/millennials/global_millennial_generations_research.pdf).
3. Forthcoming from the American Bar Association. [apps.americanbar.org/abastore/index.cfm?pid=1620615&section=main&fm+Product.AddToCart](http://apps.americanbar.org/abastore/index.cfm?pid=1620615&section=main&fm+Product.AddToCart)

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# Back to the Basics III: Subordinate Word Groups

Tenielle Fordyce-Ruff

I've spent a lot of time writing about how to create better sentences. I've covered everything from parts of a sentence, to cutting clutter from sentences, to adding eloquence to sentences.

But I've never covered those word groups that simply cannot function as a sentence. These groups of words, instead, function as other parts of speech, usually as adjectives, adverbs, or nouns.<sup>1</sup> This time, we will cover prepositional phrases, verbal phrases, and absolute phrases. And I'll give you some handy advice on using these word groups correctly.

## Prepositional phrases

A prepositional phrase begins with a preposition and ends with a noun (or a noun equivalent). The noun, or noun equivalent, is the object of the preposition. Prepositional phrases may also contain words that modify the noun.



*The road to hell is paved with good intentions.*

In this example, *to* and *with* are the prepositions. *Good* modifies *intentions* and is part of the prepositional phrase.

Okay — that was grammar heavy, so let's unpack things a little before we get to some more examples.

Prepositions are the words we place before nouns to turn those nouns into modifiers. There aren't many prepositions in English. Here are the most common ones:

## Preposition words

about	between	near	than
above	beyond	next	through
across	but	of	throughout
after	by	off	till
against	concerning	on	to
along	considering	onto	toward
among	despite	opposite	under
around	down	out	underneath
as	during	outside	unlike
at	except	over	until
before	for	past	unto
behind	from	plus	up
below	in	regarding	upon
beneath	inside	respecting	with
beside	into	round	within
besides	like	since	without

Some prepositions, though, are multiple words: *along with*, *as well as*, *in addition to*, *instead of*, *next to*, and *up to*.

Prepositional phrases can function as nouns:

*For the judge to change his mind would be a miracle.*

or adverbs:

*The shoplifter strolled through the store.*

or adjectives:

*Variety is the spice of life.*

When using a prepositional phrase as an adjective or an adverb, place it as close as possible to the word it modifies to avoid ambiguity, awkwardness, or unintentional humor.

*One morning I shot an elephant in my pajamas.<sup>2</sup>*

That is either a very small elephant or I wear really large pajamas!  
*Is the man with black hair named Thom here?*

Which is named Thom, the man or the hair?

*Two sisters were reunited after eighteen years in a checkout line.<sup>3</sup>*

Whew! I get annoyed after waiting for five minutes in a checkout line!

## Verbal phrases

A verbal is a verb form that doesn't function as the main verb in a clause or sentence. Verbals include infinitives (*to* plus the base form of a verb: *to write*), present participles (the *-ing* form of a verb: *writing*), and past participles (the form of a verb that usually ends in *-d*, *-ed*, *-n*, *-en*, or *-t*: *written*).

Verbals can take objects, complements, and modifiers to form verbal phrases. We classify these phrases into three types: participial phrases, gerund phrases, and infinitive phrases.

## Participial phrases

Participial phrases always function as adjectives in a sentence. These verbals include either present participles or past participles. They can also include nouns, pronouns, and prepositions. Participial phrases modify the noun in the sentence.

*Beating you over the head with examples, I hope to make identifying subordinate word groups easier.*

*He sometimes felt like writing was an enigma wrapped in a conundrum.*

Participial phrases can dangle, creating illogical, ambiguous, or even incoherent sentences.

*Wishing she could write, comma rules always gave her fits.*

Here, *comma rules* is the subject of the sentence. Thus this sentence means that the comma rules wish she could write.

To fix a dangler, give the sentence a clear subject.

*Wishing she could write, she felt taunted by the comma rules.*

### Gerund phrases

Gerund phrases always function as nouns — usually as subject complements, direct objects, or objects of a preposition. A gerund's verbal is always a present participle.

*Complaining about writing poorly won't help.*

*Beating you over the head with examples might help!*

To distinguish between a participial phrase and a gerund, you will need to figure out how the verbal is functioning in the sentence. If it is modifying a noun, you have a participial phrase; if it is acting as a noun, you have a gerund.

Like participial phrases, gerunds can also dangle.

*While driving to Paul, my map was lost.*

How, exactly, was my map driving?

*After finishing the research, writing the brief was easy.*

Who did the research, and who wrote the brief? To fix a dangling gerund, give the sentence a proper noun.

*While driving to Paul, I lost my map.*

Infinitive phrases can function as adjectives, adverbs, or nouns. Infinitive phrases are always formed with *to* and the base form of a verb.

*After finishing her research, the associate found writing the brief was easy.*

### Infinitive phrases

Infinitive phrases can function as adjectives, adverbs, or nouns. Infinitive phrases are always formed with *to* and the base form of a verb.

*To write well is a lofty goal.*

Like other verbal phrases, infinitive phrases can create confusion when they dangle.

*To edit your writing properly, it must be sent to another writer.*

Here, *to edit* doesn't have a logical subject, so it is left dangling. Rewrite sentences with dangling infinitive phrases to include a logical subject.

*To edit your writing properly, you must send it to another writer.*

### Absolute phrases

Unlike prepositional phrases and verbal phrases, absolute phrases don't modify a single word. Instead, these phrases modify the whole sentence. Absolute phrases are made up of a noun or pronoun, a participle, and their modifiers.

*His words dipped in honey, the attorney mesmerized the jury.*

### Conclusion

Using subordinate word groups can add spice and variety to your writing. Just be careful to use them correctly.

### Sources

- Diana Hacker, *A Writer's Reference*, 348-350 (3d ed. Bedford 1995).
- *The Chicago Manual of Style*, 232-34, 247-48 (16th ed. The University of Chicago Press 2010).
- Anne Enquist & Laurel Currie Oates, *Just Writing: Grammar, Punctuation, and Style for the Legal Writer*, 169-71 (3d ed. Aspen 2009).

### Endnotes

1. For a refresher on the parts of speech, see *Back to the Basics II: Parts of Speech*, The Advocate (August 2013).
2. This is the beginning of a joke by Groucho Marx: "One day I shot an elephant in my pajamas. How he got in my pajamas I'll never know." John Bartlett and Justin Kaplan, ed., *Bartlett's Familiar Quotations*, 693 (16th ed. Little, Brown & Company 1992).
3. Modified from a headline quoted in Barbara Walraff, *Word Court*, 291-94 (Harcourt, 2000).

### 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 Fisher Rainey Hudson. You can reach her at [tfordyce@cu-portland.edu](mailto:tfordyce@cu-portland.edu) or <http://cu-portland.edu>

# The Basics of File Retention and Destruction

Mark Bassingthwaight

**T**he question most frequently asked of ALPS risk managers is, “What do I need to do with all these old files?” This article shares a little advice to help those with similar questions or concerns regarding the destruction of client files.

The first step in file destruction is in determining which files can be destroyed. While we recommend that you keep your files for a minimum of seven to 10 years, you should check to see if your jurisdiction has specific file retention rules or guidelines as jurisdictions do differ on this point. If the recommended storage time has not passed, keep the file.

Even if the recommended storage time has passed, you cannot simply get rid of all the files that fall into that category because there are going to be exceptions that would call for an additional amount of storage time. The exceptions should include but are not necessarily limited to the following:

- Files on which the malpractice statute of limitation has not yet run (and don’t forget about the doctrine of continuous representation which can toll these statutes);
- Files involving a client who was and still will be a minor when the end of recommended file retention period is reached;
- Estate plans for clients who still are alive;
- Files that contain agreements that have yet to be executed or have not been fully paid off when the end of the recommended retention period has been reached;

When you originally closed any given file, you should have separated out all of the original documents that belonged to the client and saw that they were returned.

- Files that establish the tax basis of one or more client assets;
- Adoption files;
- Support or custody files with continuing support obligations;
- Files with renewable judgments
- Corporate books and records of active client entities;
- Files of clients convicted of a capital crime; and
- Files of certain “problem clients.”

Because there are so many exceptions, every file should be reviewed before being okayed for destruction.

When you originally closed any given file, you should have separated out all of the original documents that belonged to the client and saw that they were returned. If this was never done, be certain to do so prior to having the file destroyed. As files are reviewed one final time keep in mind the following list of documents, which are the documents that should never be destroyed or discarded. They are documents that clearly or probably belong to the client; original documents; any other documents that the client may need or reasonably might expect his lawyer to preserve, and every file’s letter of closure. The letter of closure is an important document to retain because it can help clarify

whether or not a conflict of interest is in play later on. If closure letters are destroyed, you take away your ability to provide documentation that an inactive client is actually a past client. The ramification of this is you now may be prevented from benefiting from Rule 1.9 of the Rules of Professional Conduct, also known as the “Former Client” Rule.

To varying degrees, in most jurisdictions the file is viewed as client property. This means that you should follow any client’s given instructions as to the final disposition of their file. If you did not obtain those instructions when their file was closed, you should try to do so prior to having their file destroyed. You could simply try sending a letter to the client’s last known address although on older files this may prove problematic. Due to the problem of locating clients on files closed years ago, more and more firms place in their engagement and/or closure letters a short paragraph that discusses the firm’s file retention policy so as to avoid this problem on a going forward basis.

Sample file retention language might read as follows.

This matter now is closed. We are returning your original [*records, documents*] related to your case and we are closing our file. As we discussed dur-

ing our initial interview with you, your file will be kept for a period of [number of] years. The file will then be destroyed unless you request that we store it longer or return it to you at that time. If you wish to have us to store the file for a longer period or return it to you when our normal retention period expires, you must give us written notice of that desire within seven days after receiving this letter. Please note that if it is your wish to not have your file destroyed, you will need to be responsible for keeping us informed as to how to reach you should your contact information ever change.

If you need to send the client such a letter years after closing the file, you might consider designing a letter based upon this sample language.

Our law firm destroys files [number of] years after they are closed. We have retained your file for that period of time and are now preparing to have it destroyed. If your desire is to have us continue to store it or see that it is returned to you, you must send us a letter telling us of your desire and this must be done no later than seven days after the date you receive this letter.

Once you learn your client's wishes, carry them out. If you are going to destroy a file, make sure you follow through with the notion of destruction. "Destruction" does not mean tossing all the old files in a dumpster out back and, yes, this does need to be said. Take the necessary steps to have old files incinerated or shredded. You cannot compro-

mise your client's confidences, even during the file destruction process.

Finally, keep an inventory of the final disposition of all files. Make sure that you track the client name, file matter, method of disposition (destroyed, returned), and date of disposition.

#### About the Author

**Mark Bassingthwaighte** is the Risk Manager with Attorneys Liability Protection Society, Inc., a Risk Retention Group, in Missoula, Montana. ALPS has conducted over 1,000 law firm risk management assessment visits, presented numerous continuing legal education seminars throughout the United States, and written extensively on risk management and technology.



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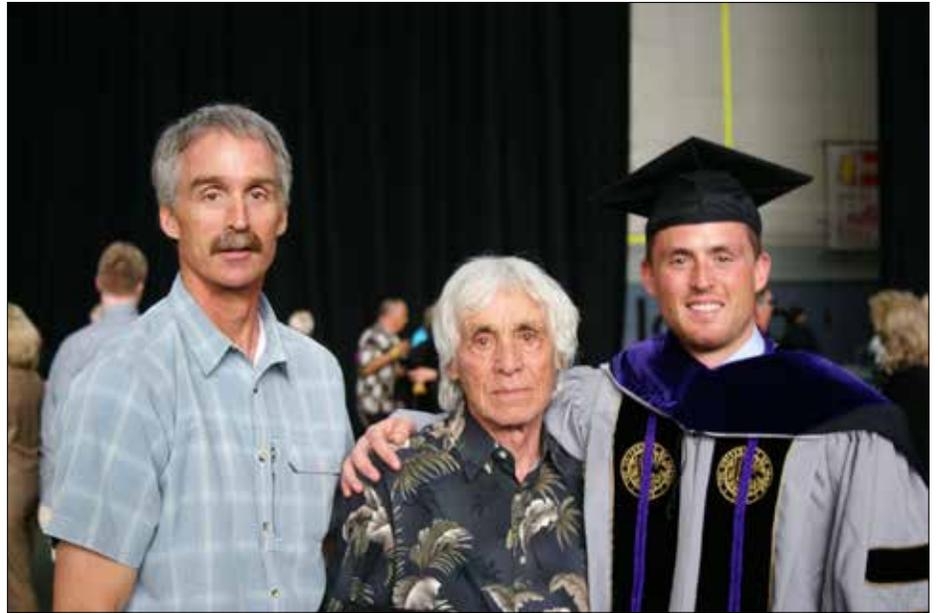
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# Three Generations of Practicing Attorneys — A Rare Occasion

Hon. Paul Laggis

**M**ay 1, 2014, I was sitting in the Boise Centre. About 50 new attorneys were waiting to be sworn in by the Idaho Supreme Court and the delegation of 9<sup>th</sup> Circuit Judges. I sat there with my dad, Stratton, who reflected on his memory of going through the same ceremony in 1968 with the likes of Judge Peter D. McDermott, Tom Dial, Walt Bithell, Jim Risch, Lyle Eliassen and others. That was 46 years ago. I, too, remember the ceremony, as I was sworn in 22 years ago. Now my son, Stratton Paul, sat amongst the roughly 50 new admittees. The Laggis family has three generations of *actively practicing* attorneys. To some, it may not seem all that interesting until you consider what it takes to become an attorney and readers of *The Advocate* will surely have an immediate recognition of the rarity of this occurrence.

In today's world of technology the third generation of anything takes about six months. In the world of lawyers it takes much, much more. While it is clearly mathematically possible, the random nature of life and the paths we choose to walk makes this fact pretty remarkable. My dad has practiced in Ketchum, Idaho since 1968 when he was the second attorney. Flash forward 46 years and there are now 96 attorneys in the greater Ketchum area. That's more attorneys than there are ski runs on world famous Bald Mountain. My dad's arrival in Ketchum was not by chance but by a long set plan originating from his days of



From left are Paul Laggis, Stratton Laggis and Stratton Paul Laggis.

travel and work while serving in the United States Marine Corps. Ketchum was just too perfect of a place to work and raise a family and so it became home to dad and my mother Marilyn, and their four children.

I landed in law school in 1989 after a five-year stint in Alaska following my graduation from undergraduate at the University of Idaho. My wife, Paula, and I spent our every waking hour hiking, hunting, fishing and living in the vast lands of Alaska. I had applied to law school in 1985 but was denied admission so it was off to the north where the real accomplishment for me was growing up, finally. In 1988, our first son, Stratton Paul was born in Anchorage. After a summer of him hanging over my shoulder in my backpack while drooling a thick mixture of graham crackers, gummy bears and fruit juice down my neck and his constant chatter of "fishy dada" while I fished for salmon in rivers such as the Kenai, the Kasilof, and Peter's Creek, we packed up

There are now 96 attorneys in the greater Ketchum area. That's more attorneys than there are ski runs on world famous Bald Mountain.

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our worldly belongings and headed back to Idaho to attend law school at the University of Idaho.

Time went on with me serving the community of American Falls as their prosecuting attorney and in the fall of 2007 my son,

Stratton, enrolled at Idaho State University with plans of becoming a pharmacist. That didn't last long and by spring he announced to my wife and me that he was going to Moscow to attend school. Three short years later he graduated from the University of Idaho with a B.S. in Environmental Science and applied to law school where he was accepted. He graduated from law school at the University of Idaho in December of 2013 and with his successful completion of the Bar Exam and swearing-in in May, the rest as they say, is history.

As proud as my dad felt watching his grandson take the Oath, I have to say it was equaled by my own appreciation for that moment as I sat next to him, in his 46<sup>th</sup> year of active practice, while he waved and talked to the justices

He graduated from law school at the University of Idaho in December of 2013 and with his successful completion of the Bar Exam and swearing in May, the rest as they say, is history.



of our Supreme Court and judges from the 9<sup>th</sup> Circuit, many of whom he had encountered at some time in his 46 years of practice.

My family probably isn't the first and won't be the last to accomplish this feat but that doesn't make it any less remarkable. I hope this article sparks some interest amongst my peers who might report to the

State Bar any others out there with the same accomplishment. For me, it has been an honor to be a lawyer and to serve the people of our state. I hope that my son is able to look back in 20 years and have the same thought. I know that my dad feels the same way as he continues doing the job he started almost a half century ago.

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*The spoken word perishes; the written word remains.*



**Bower joins Givens Pursley LLP**

BOISE – Givens Pursley LLP is pleased to announce the addition of Jeff W. Bower as an associate attorney with the firm. He received his J.D. magna cum laude from the University of Idaho College of Law in 2012 and his B.A. in Biological Science magna cum laude from the University of Idaho in 2009. Prior to joining the firm, he clerked for the Honorable Justices Joel D. Horton and Jim Jones of the Idaho Supreme Court.



Jeff W. Bower

**Clive J. Strong receives the ABA Environment, Energy, and Resources Government Attorney of the Year Award**

WASHINGTON – The American Bar Association Section of Environment, Energy, and Resources honored Clive J. Strong, deputy attorney general of Idaho, with its 2014 Environment, Energy, and Resources Government Attorney of the Year Award on Aug. 10 at the ABA Annual Meeting in Boston.



Clive J. Strong

As section chief in the Natural Resources Division of the Idaho Attorney General’s Office, Strong is one of the leading experts in water rights, state endowment lands, the Endangered Species Act and nuclear waste storage issues in the nation. He has resolved numerous seemingly intractable environmental and natural

resources disputes affecting Idaho, other states and the federal government.

Strong, with more than 30 years of experience, has numerous achievements in the fields of environmental, energy, and natural resources law. Among other accomplishments, Strong has been recognized with numerous awards including the National Association of Attorneys General Marvin Award, the Western Conference of Attorneys General Jim Jones Public Service award and the National Association of Attorneys General Best Brief Award for his work before the U.S. Supreme Court.

The Idaho State Bar awarded Strong with its Professionalism Award in 2010. He also has been recognized with the Idaho Water Users Distinguished Service Award and the Idaho Statesman’s Distinguished Citizen recognition.

**Hammerquist opens solo firm**

BOISE – David Hammerquist proudly announces that he has formed his own law firm, David Hammerquist Law Chartered, emphasizing business law, criminal defense and personal injury. Hammer formerly was Vice President with Ringert Law Chartered and is a former prosecutor. He has over 30 years of experience. He received his law degree from University of Idaho.



David Hammerquist

David Hammerquist Law Chartered is located at 401 West Front Street, Suite 302, Boise, Idaho 83702; phone: (208) 322-9090; email: hammer@davidhammerquist.com. The firm’s website is www.DavidHammerquist.com.

**Busacker joins Red Cross Board of Directors**

BOISE – Dane Watkins, chairman of the Board of Directors for the American Red Cross of Greater Idaho, announced a new board member - Bret Busacker of Holland & Hart. Busacker is an experienced employee benefits attorney whose clients include public and private businesses, governmental entities, non-profit organizations, human resources executives and compensation and benefits committees.



Bret Busacker

**Knox McMillan joins Perkins Coie as Senior Counsel**

BOISE – Perkins Coie is pleased to announce the addition of Knox McMillan to the firm’s Boise office as a Senior Counsel working with the Labor & Employment practice.



Knox McMillan

Knox’s background in handling labor and employment disputes as well as managing compliance and business ethics issues at global corporations will enhance the firm’s practice. His focus areas include arbitration, administrative agency proceedings, internal investigations, and guiding retail, manufacturing/industrial, distribution and e-commerce clients through employment law compliance issues. Prior to joining Perkins Coie, he worked as vice president and associate general counsel for OfficeMax Incorporated.

**Amanda Breen Law, PLLC  
opens new Ketchum office**

KETCHUM – Amanda Breen announced the new Ketchum location of Amanda Breen Law, PLLC. The office is located at 371 Walnut Avenue North in Ketchum. After working from home over the past two years while her son was a baby, Amanda is now welcoming clients and colleagues to visit her at her new office location in the center of Ketchum. Amanda has practiced law in Idaho since 2005. She received her B.A. from Stanford University, her J.D. from the University of Utah, and her LL.M. in Inter-



Amanda Breen

national Law from University College London. Her general practice will continue to include immigration, family law, employment, real estate, and civil litigation. Visit the firm’s website at [www.amandabreen-law.com](http://www.amandabreen-law.com) for more details.

**Trudy Fouser recognized as a  
top female trial lawyer in the U.S.**

BOISE – Trudy Hanson Fouser, a trial lawyer at the Boise law firm Gjording Fouser PLLC, and a current Idaho State Bar Commissioner, was recognized as one of the Top 250 Women in Litigation in the U.S. by the national legal directory Benchmark Litigation. Fouser is the only lawyer in Idaho included on this list. Benchmark Litigation reported that “she [Trudy] is hailed by peers as

‘the leading female litigator in Idaho.’ Clients echo this praise, offering that Fouser’s 20 years of experience in defense litigation makes her the top choice for ‘very difficult and technical matters’ particularly in catastrophic injury claims.” Top 250 Women in Litigation is dedicated to honoring the accomplishments of America’s leading female trial lawyers and features female litigators from all 50 states. Inclusion on this list is based on interviews of clients, lawyers, and a review of the lawyer’s cases and overall depth of their litigation career.



Trudy Hanson Fouser



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## IN MEMORIAM

### **Stanley Gordon Cole** 1944 - 2014

Stanley Gordon Cole, 70, passed away on Thursday, Aug. 7, 2014, from complications of Alzheimer's disease at his home in Paul, Idaho, surrounded by his loving wife and daughters who were his caregivers.



Stanley Gordon Cole

Stanley was born on July 3, 1944, in Rupert, Idaho, to Noble and Pauline Wageman Cole. He was the third oldest of six children to be raised on the family farm west of Paul. Stanley learned to work hard planting, irrigating, and milking cows.

Stanley graduated from Minico High School in 1962. He then at-

tended electronic school for two years before enlisting in the United States Army. He was assigned to the renowned 101st Airborne Division, became a platoon leader and served in South Vietnam.

He earned his bachelor's degree at the University of Central Florida in 1975 and his law degree from Ole Miss in 1978.

Stan moved back to Idaho and set up his practice in Rupert. His passion continued for the military as he was affiliated with the Idaho National Guard, flew helicopters, completed Army Fixed Wing Flight School, flew multi-fixed wing aircraft, and eventually retired from the National Guard as a Lieutenant Colonel after 30 years of service.

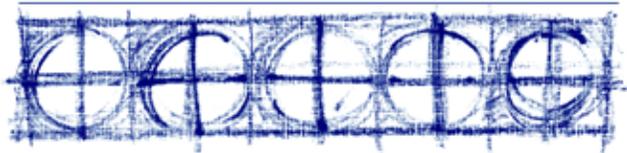
Living in Paul, Stanley married Carol Lynn Schmidt in 1994, and they raised three daughters. He was a

member of the Cassia County Sheriff's Posse for many years and an active member of the Central Church of Christ in Rupert.

Stanley is survived by his wife, Carol Cole; his daughters, Staci Cole (Preston Arthur), Amber (Jeremy) Smith, and Stephanie Eads all of Paul, Brandi (Dustin) Moore of Boise, and Sheila Franks of Twin Falls; one son, Rick (Kim) Cole of Kimberly as well as two sisters, two brothers, 22 grandchildren; and six great-grandchildren.

Stanley was preceded in death by his parents, Noble and Pauline Cole; his brother, Ronald Cole; his daughter, Constance Noel Lynn Cole; a niece, Christy Ann Catmull; his father-in-law, Bill G. Schmidt; as well as many aunts and uncles.

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has received generous gifts in memory of:  
**Thomas Allen Miller**  
from **Hawley Troxell Ennis & Hawley,**  
**Ernie Hoidal and John and Karen Rosholt.**



Thomas Allen Miller

## Thanks to All Those Who Made 4<sup>th</sup> District 2014 Law Day a Great Success

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  - Arbitration Law and Practice Training 2012 Presented by U.S. Courts and Northwest Institute

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Photo by John Glen Hall

Joined by Idaho State Bar Board of Commissioners, staff and students from the Fort Hall Recreation Program accept youth sports equipment from Idaho State Bar Annual Meeting attendees, who donated a huge box full of new or slightly used items.

## Stars Shine in Annual Meeting Held at Fort Hall

**S**timulating CLEs, awards for good works and warm-hearted camaraderie dominated the Idaho State Bar Annual Meeting July 16 – 18 at the Shoshone-Bannock Hotel & Events Center near Pocatello. With 261 attorneys and judges attending, this was the fifth most attended Annual Meeting since 1986. Attendees repeated their praise for the first-class facility, its amenities and for the event’s programming.

The keynote presentation was given by legal journalist and scholar Jeffrey Rosen, President and CEO of the National Constitution Center. Rosen spoke about the Roberts Court and its commitment to reach unanimous decisions and to be mindful of how the High Court’s rulings compare with public sentiment.

Aside from the Distinguished Lawyer Award Dinner, various awards were given at the luncheons and receptions. During an afternoon break, representatives from the Fort Hall Recreation Program were on hand to

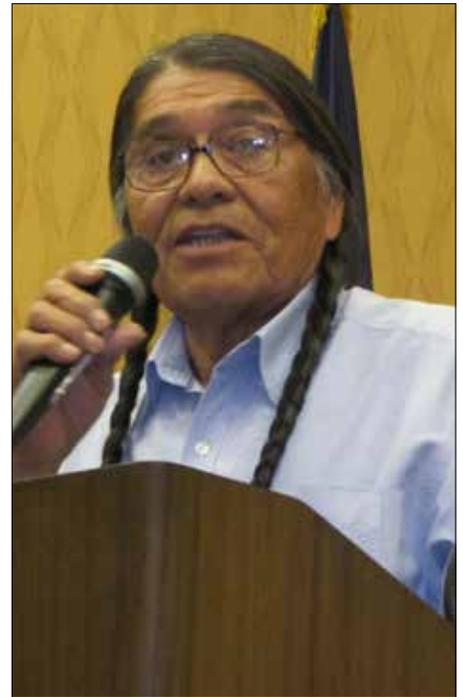
thank attendees for donating youth sports equipment.

A bingo pizza party and hospitality headquarters were offered in the evening hours. The flagship CLE “Members of the Federal Judiciary: Eastern Idaho Roots to the United States’ Courts” was presented Friday afternoon and featured Judges N. Randy Smith, B. Lynn Winmill, Larry M. Boyle, Ron E. Bush and Jim D. Pappas and was moderated by former University of Idaho President Don L. Burnett.



A packed room during the Annual Meeting listened as “Lessons from the Masters” were presented by Dwight E. Baker of Blackfoot, Tom McCabe of Boise and William A. Parsons of Burley.

ISB photo by Dan Black



The Chairman of the Shoshone – Bannock Tribes, Nathan Small, welcomes Idaho’s lawyers to Indian Country, and briefly explained that the Tribes are always looking for commerce and understanding that help native and non-native residents of Idaho.

ISB photo by Dan Black



Noting the end of their three-year terms on the Board of Commissioners, William H. Wellman (center, left) and Robert T. Wetherell (center, right) pose with their spouses Debbie and Debbie along with their plaques honoring them for their service.

ISB photo by Dan Black



Lawyers listen closely during a CLE at the Annual Meeting.

ISB photo by Dan Black



ISB photo by Dan Black  
Randy El Teton, the marketing director for the Shoshone-Bannock Tribes speaks briefly to welcome attendees. She was the model for the Sacajawea Dollar, which has been minted every year since 2000.



Attorneys and spouses visit at the President's Reception prior to the Distinguished Lawyer Awards dinner.

ISB photo by Dan Black



ISB photo by Dan Black

Sidney Hoopes looks on as her husband, Fred, accepts the 2014 Distinguished Lawyer Award.

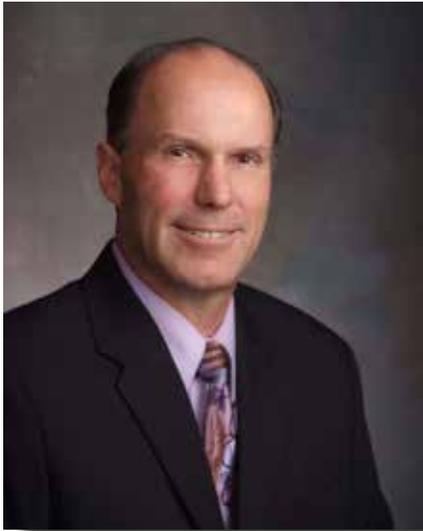
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- Celebrating 50/60/65 Years of Admission Reception - Sixth District Bar Association
- Bingo and Pizza Party - Fort Hall Casino
- ILF Donor Appreciation Breakfast - Eide Bailly, LLP
- Friday Continental Breakfast - Seventh District Bar Association
- Social Networking BBQ - University of Idaho College of Law
- Course Materials - Casemaker
- Trinket Giveaway - ABA Retirement Fund Program



ISB photo by Dan Black

Relaxing before the final afternoon of classes are, from left: Ernie Hoidal, Carol Hoidal, David Kerrick, Annie Kerrick and Judge Juneal Kerrick.



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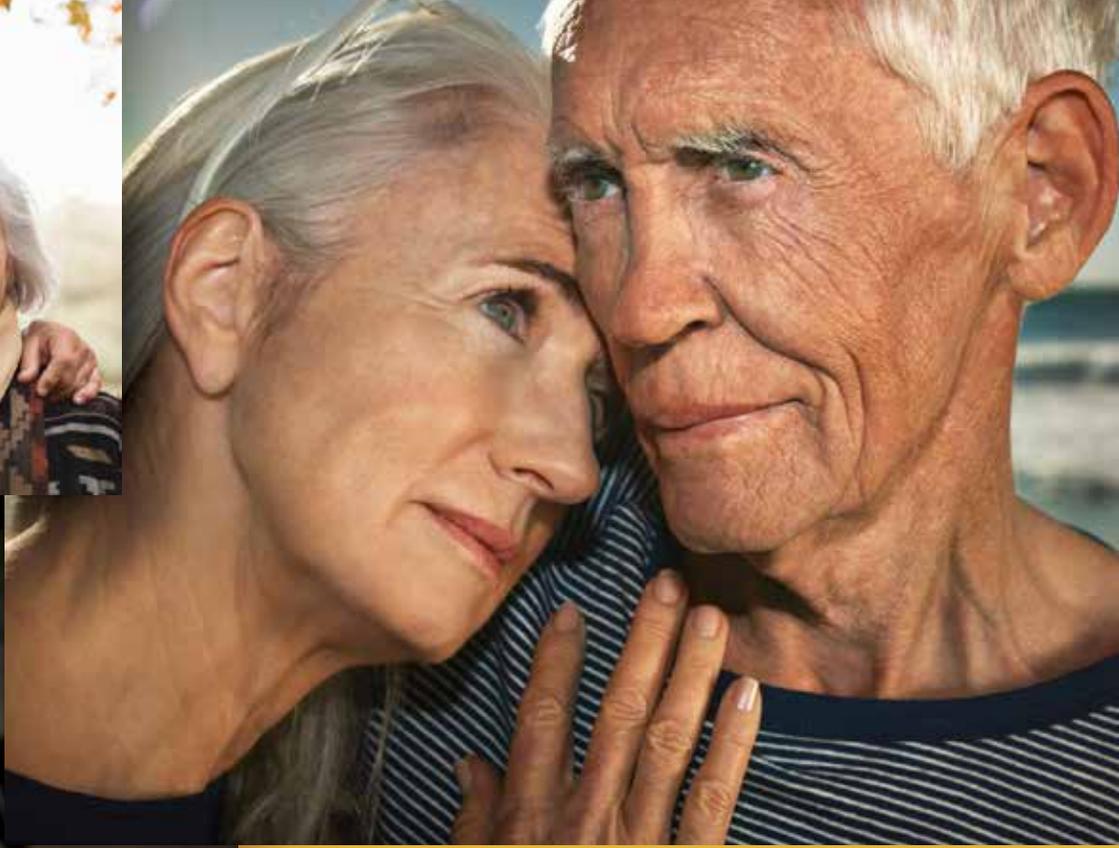
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