

The Advocate

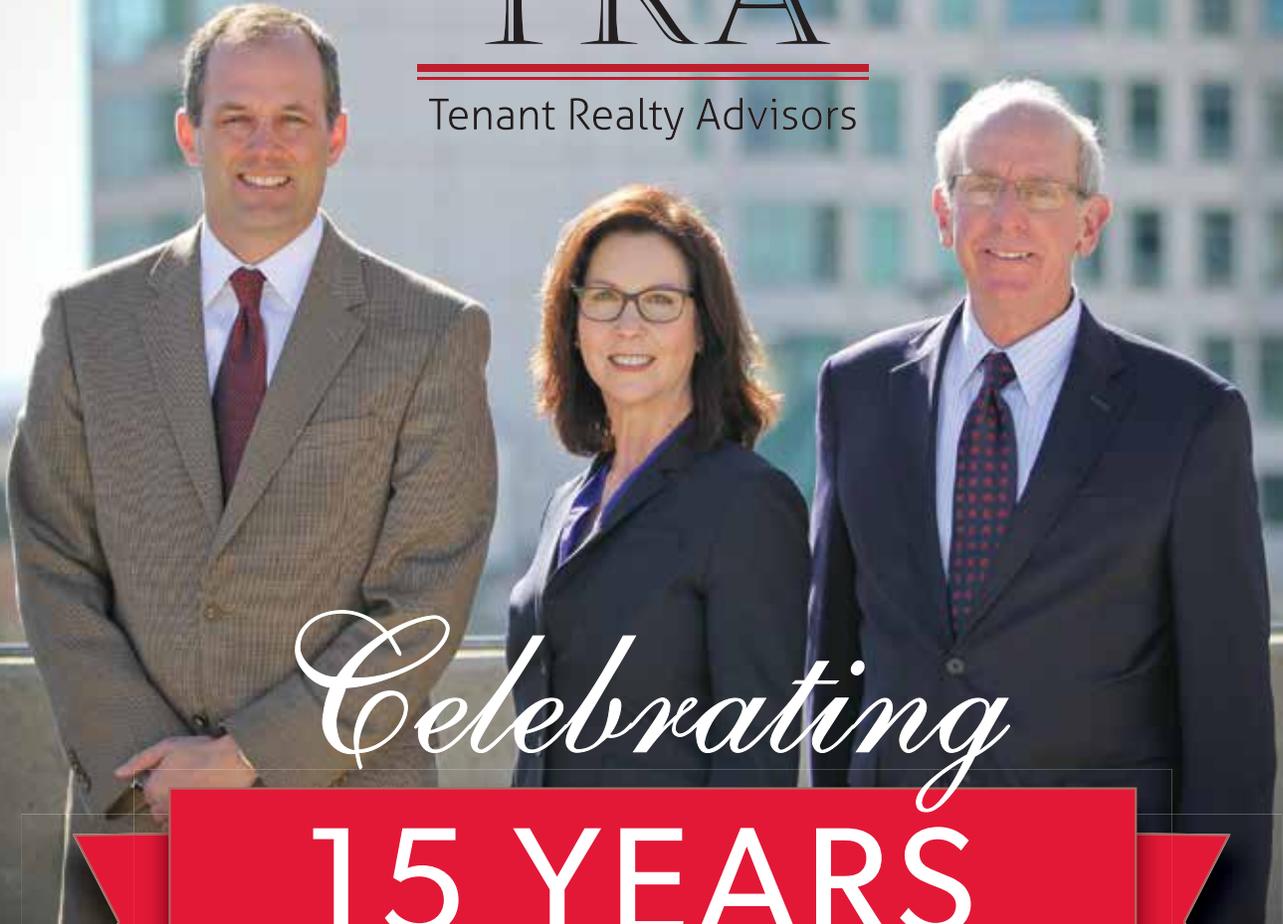
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Volume 58, No. 8
August 2015



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The Advocate

The Official Publication of the Idaho State Bar
58 (8), August 2015

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Dan Black

Managing Editor

dblack@isb.idaho.gov

Bob Strauser

Senior Production Editor

Advertising Coordinator

rstrauser@isb.idaho.gov

Kyme Graziano

Member Services Assistant

LRS Coordinator

kgraziano@isb.idaho.gov

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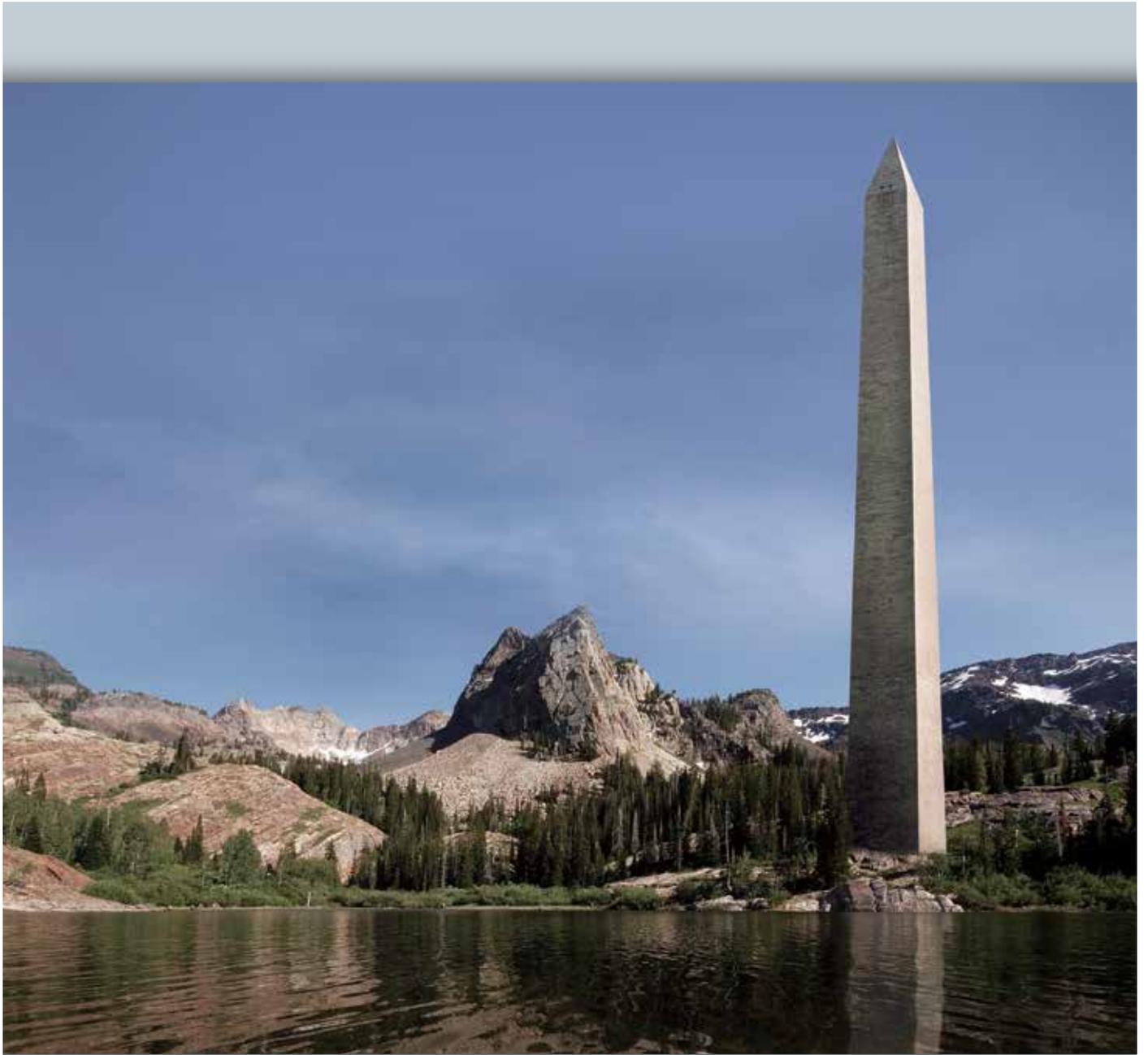
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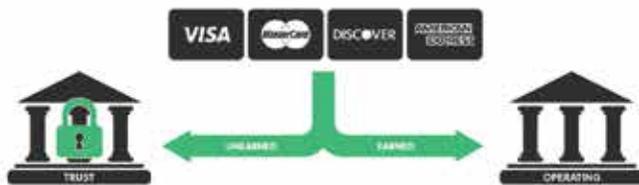


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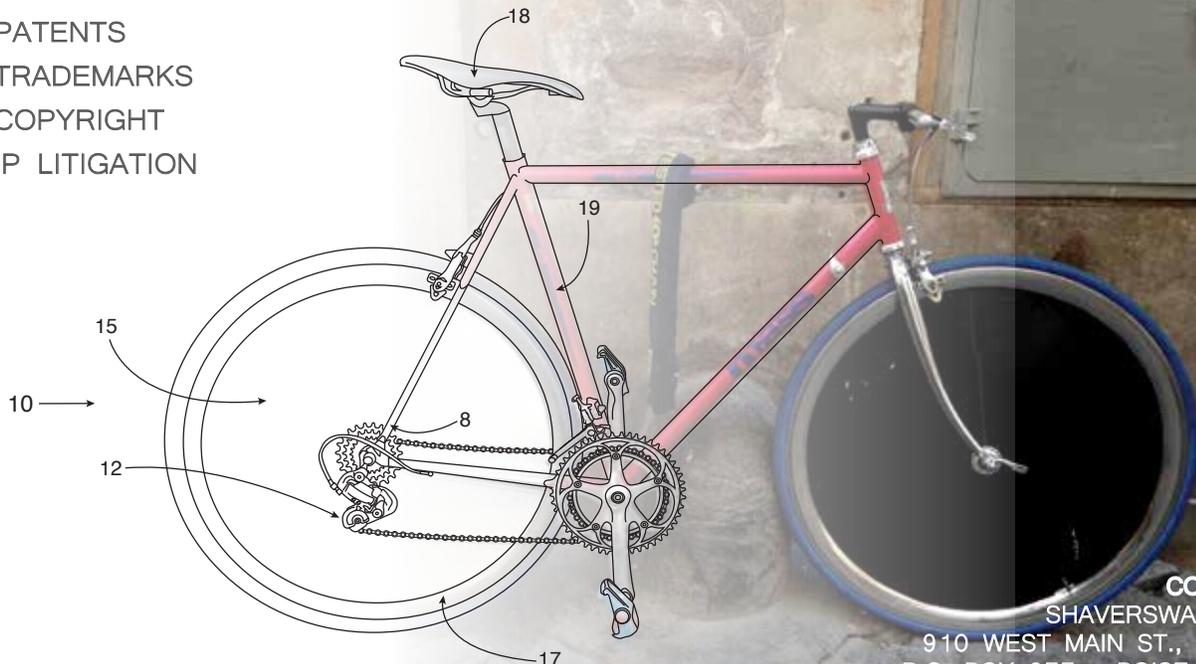
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August 14

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Teleseminar / Audio Stream

11:00 a.m. (MDT)

1.0 Ethics credit

September (Continued)

September 18 & 19

Annual Advanced Estate Planning Seminar

Sponsored by the Taxation, Probate & Trust Law Section
The Sun Valley Resort, 1 Sun Valley Road – Sun Valley

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October

September

September 8

Ethics and Pre-Trial Investigations

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October 1

New Attorney Program

Sponsored by the Idaho Law Foundation, Inc.
Boise Centre, 805 W. Front Street – Boise

8:00 a.m. (MDT)

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

September 17

Handling Your First or Next Criminal Domestic Violence Case

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**

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

****Dates, times, locations and CLE credits are subject to change. The ISB website contains current information on CLEs.**



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Confessions of a Recovering Bully

Tim Gresback
President, Idaho State Bar
Board of Commissioners

Practicing law is difficult, but bullies can make it impossible. Bullies drive good people from our profession and are a big reason many people dislike lawyers. I should know — I'm a recovering bully myself.

I have spent a lot of time thinking about bullies and why they act the way they do. I find that bullies are rigid and unwilling to compromise. It's not that they can't understand the needs of others. In fact, bullies are often keenly aware of the needs of others but will go out of their way not to meet them. Bullies run over the top of people. Bullies engage in unnecessary but exasperating power struggles over routine matters. For a bully, compromise is a sign of weakness. But why? What happens along the way to create a bully? Or, are some lawyers born bullies? Can bullies be tamed — or at least contained? To answer these questions I must first share my own story as a bully.



I started out as a criminal defense lawyer. I often felt powerless. It seemed like the law, prosecutors, police officers, and judges were biased against my client. I took this personally. I thought I was the only one who

I resented a few zealous prosecutors
so much I mirrored their despotism.
It made me miserable. I was trapped.

understood due process, freedom, and the voice of the powerless. When a prosecutor tried to unilaterally dictate a plea bargain, I concluded that this lawyer was purposefully trying to humiliate my client — and me. I reacted as a bully. For example, when I had the next opportunity, I forced that same prosecutor to put in extra effort jumping through the proof hoops for something ultimately unimportant — even though it caused a police officer to miss a shift on the beat. I justified my conduct as being tough, but it was actually abusive.

I stewed and became self-righteous. I thought my adversaries were institutionally dealt a superior litigation hand and I was impotent to do anything about it. I underestimated my own power. Occasionally I was dealt an ace in the hole. Unfortunately, I lacked the insight to play the card any way differently than the

adversaries I disliked the most. Emotionally I knew it was wrong, but I was stuck: if I was doing God's work, my opponent must be the Devil, right? I resented a few zealous prosecutors so much I mirrored their despotism. It made me miserable. I was trapped.

So, as a backdrop to my own bullying, a common thread was my own insecurity, anger and fear. I hated losing — perhaps more than I enjoyed winning. I found I had a mean streak. I was doing all the wrong things to become the lawyer I wanted to be. Fear and anger did, however, have their upsides: they motivated me to work hard. I found myself winning cases. Courtroom victories, however, did not often bring the joy I expected. They seemed shallow.

As my professional journey progressed, I concluded that sometimes the deck was indeed institutionally stacked against my clients. I slowly

let go of my anger at injustice so it would not consume me. I gradually learned to resist my first impulse to get even with those who I feel have wronged me or my client. I've concluded you can never get even. It's not worth trying. I vowed to not become what I disliked. Over time I found the practice of law with this approach infinitely more rewarding. This is why I decided to share my experience with you. I do not think my struggle with my inner bully is unique. I hope to help others find their voice for justice more quickly than I did. While age itself will often temper the zeal of youth, not all bully lawyers mellow with time. Over and over I witness (and read bar disciplinary reports about) tyrannical lawyers. They try to justify their selfishness by claiming they are just vigorously discharging legitimate obligations. Instead, they are causing people to dislike them — and all of us. We cannot allow bullies to hold our profession hostage: our work is too important.

As years went by I became a keen observer of other lawyers. The ones I respected the most — David Nevin, Pete Erbland, and Walt Bithell, for example — were, unlike me, not angry all the time. They went out of their way to treat people with respect — just like the way I wanted to be treated. I came to conclude that not only can “nice” co-exist with “effective,” but they are indispensably interconnected. It's called professionalism. For most of you, I state the obvious. For those of you who wake up and go to bed angry, I urge you to try a different path. Although my mean streak has not been fully exorcised, I sleep better now.

As I tried more cases I reevaluated what is important for litigation. For example, needless discovery disputes

exhaust me. Sure, at times we have a duty to object to discovery requests and seek protective orders, but most discovery objections are made without any legitimate basis. Discovery abuse may not seem like bullying behavior. I find no difference, however, between a leave-no-stone-unturned, scorched earth litigation strategy and someone yelling at me on the phone: neither moves the dispute towards resolution and the proponent is 100% mistaken on the efficacy of the tactic. The discovery bullies — like the phone-yelling bullies — get away with what they can and blame others when called out. The adversaries I respect and fear the most bend over backwards to get me legitimate discovery. I now try to do the same.

Over the next several months as your president I hope to explore this bullying dynamic — and what we can do about it. Please send me strategies you have developed to deal with difficult colleagues, (tim@moscowattorney.com). Your five Idaho State Bar Commissioners, along with Bar Counsel Bradley Andrews, all of whom have considerable litigation experience, are dedicated to publicly addressing the challenges bullies present. This fall at our regional roadshows we will be offering a free CLE on dealing with the difficult adversary.

I am under no illusion: there always have been, and always will be, bullies. Litigation can be contentious and exhausting; it can bring out the worst in us. Nevertheless, if we acquiesce to bullies we reward their behavior. If we emphasize the unacceptability of bullying — and then demonstrate professionalism to our new lawyers — we can make a lasting difference. Of this I am convinced. Stay tuned.

I find no difference, however, between a leave-no-stone-unturned, scorched earth litigation strategy and someone yelling at me on the phone: neither moves the dispute towards resolution and the proponent is 100% mistaken on the efficacy of the tactic.

About the Author

Tim Gresback grew up in Minnesota with 11 brothers and sisters. After he graduated from law school in Washington, D.C., he clerked for Justice Stephen Bistline. He now represents people injured in car crashes. In 2012 he was named ITLA Trial Lawyer of the Year. He is certified as both a civil and criminal trial specialist. He is a past president of the Idaho Trial Lawyers Association as well as the Idaho Association of Criminal Defense Lawyers. He serves on the Idaho Supreme Court Evidence Committee and taught trial advocacy at the University of Idaho College of Law for 10 years. He is helping to raise funds for a full-size community ice rink in Moscow, where he lives with his wife Dr. Sarah Nelson and son Luke.

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DISCIPLINE

STEPHEN J. OLSON

(Resignation in Lieu of Discipline)

On June 15, 2015, the Idaho Supreme Court entered an Order accepting the resignation in lieu of discipline of Boise lawyer Stephen J. Olson. The Idaho Supreme Court's Order followed a stipulated resolution of a disciplinary proceeding that related to the following conduct.

In response to a disciplinary grievance received from one of his clients, Mr. Olson acknowledged that he had essentially abandoned his practice. Thereafter, the District Court appointed an Attorney Receiver for Mr. Olson's practice. Mr. Olson cooperated with the Attorney Receiver. The Attorney Receiver contacted and made arrangements for the representation of twelve of Mr. Olson's current clients, including the client who had filed the grievance. Orders were then entered relieving the Attorney Receiver of her obligations.

In addition, Mr. Olson was on criminal probation relating to two DUI convictions. His criminal probation was revoked and he was sentenced to one year incarceration. Mr. Olson admitted that he intentionally did not follow or complete a number of the conditions of probation.

Mr. Olson admitted that these circumstances constituted violations of the I.R.P.C. 1.2(a) [Scope of Representation], 1.3 [Diligence], 1.4(a) [Communication], 1.16(a) and (d) [Responsibilities Upon Termination of Representation], 3.4(c) [Disobeying an Obligation Under the Rules of a Tribunal], 8.4(b) [Criminal Act] and 8.4(d) [Conduct Prejudicial to the Administration of Justice].

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

By the terms of the Idaho Supreme Court's Order, Mr. Olson's name was stricken from the records of the Idaho Supreme Court and his right to practice law before the courts in Idaho was terminated on June 15, 2015.

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

CLIENT ASSISTANCE FUND

NOTICE TO RICHARD A. HIMBERGER OF CLIENT ASSISTANCE FUND CLAIM

Pursuant to *Idaho Bar Commission Rule 614(a)*, the Idaho State Bar hereby gives notice to Richard D. Himberger that a Client Assistance Fund claim has been filed against him by former clients Miriah Struthers and Joshua Poderick, in the amount of \$2,300. Please be advised that service of this claim is deemed complete fourteen (14) days after the publication of this issue of *The Advocate*.

LICENSING REINSTATEMENTS

Order to cancel license to practice law withdrawn

On June 4, 2015, the Idaho Supreme Court withdrew its March 3, 2015 order canceling the license of attorney Scott Richard Staab for nonpayment of the 2015 license fees. Mr. Staab's license was restored to active status.

On June 8, 2015, the Idaho Supreme Court withdrew its March 3, 2015 order canceling the licenses of attorneys Don Al Asay and Jared Bryant Stubbs for nonpayment of the 2015 license fees. Mr. Asay's and Mr. Stubbs' licenses were reinstated to inactive status.

ETHICS & LAWYER DISCIPLINARY INVESTIGATION & PROCEEDINGS

Stephen C. Smith, former Chairman of the Washington State Bar Association Disciplinary Board, is now accepting referrals for attorney disciplinary investigations and proceedings in Washington, Idaho, Hawaii, and Guam.

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Submissions sought for

Gonzaga Law Review

The *Gonzaga Law Review* is seeking articles. Submissions for this edition will be due by Nov. 30. Please submit to gulr@lawschool.gonzaga.edu, or visit our submissions page at <http://www.law.gonzaga.edu/law-review/submissions/>.

2015 Citizens' Law Academy starting soon in the Fourth District

CLA is an adult education program offered free of charge to help non-attorneys appreciate the laws affecting their daily lives and understand how the judicial system works. In the Fourth District classes will be held in Boise at the Law Center on 5th and Jefferson as well as at area courthouses, and will meet one evening a week from September 15 through December 1. More detailed

information about the program as well as applications are available at the Idaho Law Foundation's website. Completed applications will be accepted through Tuesday, Sept. 1. For more information, contact Carey Shoufler at 208.334.4500 or cshoufler@isb.idaho.gov.

Lawyer Representative sought

The Judges of the United States District and Bankruptcy Court for the District of Idaho intend to appoint a Lawyer Representative to serve on the Ninth Circuit Conference of the United States Courts for a three-year term to replace Walter Sinclair. This year's lawyer representative must come from the 4th District.

Typical duties include: serving on court committees, making recommendations on the use of the Court's non-appropriated fund, developing curriculum for

the District conference, serving as the representative of the Bar to advance opinions and suggestions for improvement, and assisting the Court in the implementation of new programs or procedures. Any persons interested in such an appointment should submit a letter setting forth their experience and qualifications, no later than August 28, to Idaho State Bar Executive Director Diane K. Minnich, dminnich@isb.idaho.gov.

Idaho gets new Chief Justice

Justice Jim Jones has been elected by his colleagues to serve as Chief Justice of the Idaho Supreme Court. Justice Jones will begin his four-year term as Chief Justice on August 1, 2015. He succeeds Justice Roger Burdick, who will continue to serve on the Court. The new Chief Justice will be formally sworn in at a ceremony in August.

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AMY K. HOLM

Elam & Burke welcomes Amy K. Holm as an Associate Attorney.

Ms. Holm joined the firm as an associate in April 2015. Ms. Holm practices labor and employment law, medical and professional malpractice defense, and general civil litigation. Ms. Holm's labor and employment specialty includes experience in claims involving breach of contract, wrongful termination, sexual harassment, disability discrimination, age discrimination, pregnancy discrimination, whistleblower cases, and wage claims.

Before joining Elam & Burke, Ms. Holm practiced litigation in private practice at a firm in Boise and served as a staff attorney for the Honorable Thomas J. Ryan in the Third Judicial District. She is also a 2014 recipient of the Idaho Business Review's 40 under 40 award.

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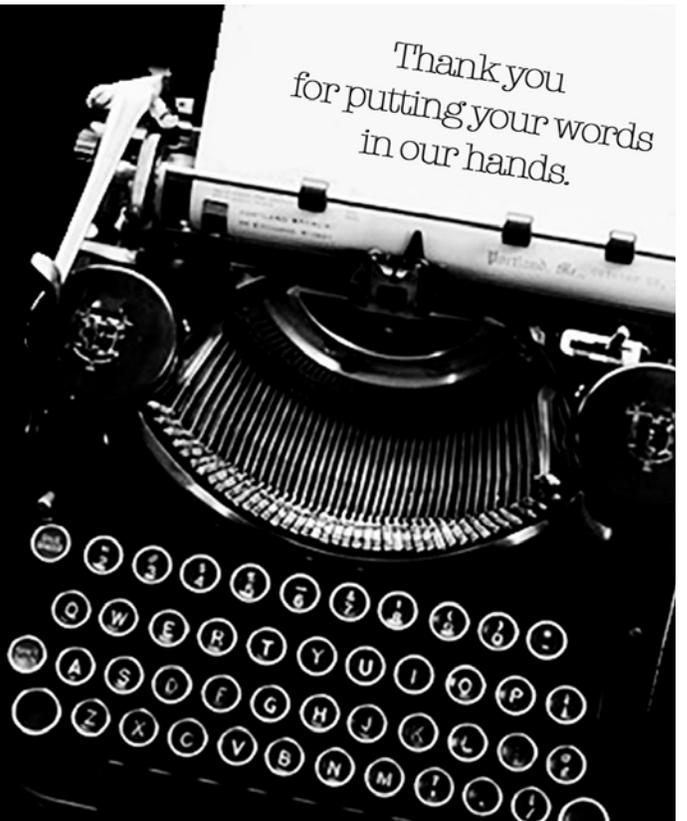


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The spoken word perishes; the written word remains.





Executive Director's Report

2015 Resolution Process

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

Proposed resolutions – Deadline September 25

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

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

This year, resolutions may include proposed changes to the Bar Commission rules, generally to clarify and update sections of the rules.

Idaho Bar Commission Rule 906 governs the resolution process. Resolutions for the 2015 resolution process must be submitted to the

bar office by the close of business on September 25, 2015. If you have questions about the process or how to submit a resolution, please contact me at dminnich@isb.idaho.gov or (208) 334-4500.

Thank you

At the close of the Annual Meeting each year, Commissioners retire and new Commissioners take their place. This year Commissioner, Paul Rippel, Idaho Falls, left the Commission. Pocatello attorney Kent Higgins joined the Commission, representing the 6th and 7th Districts.

For the coming year, Tim Gresback, Moscow, and Trudy Fouser, Boise, will share the year as President. Tim became the ISB President at the close of this year's Annual Meeting. Trudy will begin her time as President in January 2016.

I offer my thanks to Paul for his service and commitment to the bar. The eastern Idaho Commissioner is the only Commissioner that serves a full year as President, which requires many trips back and forth across the state.

Paul is committed to service; prior to serving as a Commissioner he graded bar exams 25 times and served as the chair of the Reasonable Accommodations Committee for several years. During his tenure, Paul kept the ship on course, which is not always easy. I appreciate Paul's time, expertise and leadership.

Changing of the guard

At the end of July, Justice Burdick steps down as the Idaho Supreme Court Chief Justice. Justice Jim Jones will serve as the new Chief Justice.

Chief Justice Burdick is one of a kind. He is a pleasure to work with, always approachable, helpful, willing to listen. He regularly provided guidance and assistance to me. His perspective and expertise are valuable and I appreciate the many times he was there to help me and the bar.

Justice Burdick works with the Court, the bar and lawyers to create a better legal profession. We'll continue to work with him as a member of the Idaho Supreme Court. I'll miss his leadership as the “Chief.”

2015 District Bar Association Resolution Meetings

District	Date/Time	City
First Judicial District	Thursday, November 5 at Noon	Coeur d'Alene
Second Judicial District	Thursday, November 5 at 6 p.m.	Lewiston
Third Judicial District	Thursday, November 19 at 6 p.m.	Nampa
Fourth Judicial District	Thursday, November 19 at Noon	Boise
Fifth Judicial District	Wednesday, November 18 at 6 p.m.	Twin Falls
Sixth Judicial District	Wednesday, November 18 at Noon	Pocatello
Seventh Judicial District	Tuesday, November 17 at Noon	Idaho Falls

The Idaho Appellate Practice Section: Advancing Good Appellate Practice and Professionalism Before Idaho and Federal Appellate Courts

Christopher Pooser

The Idaho Appellate Practice Section (“IAPS”) was created in April 2014 and is the Idaho State Bar’s newest practice section.

IAPS’s purpose, as stated in its by-laws, is “to advance good appellate practice and professionalism before the state and federal appellate courts, to increase awareness of appellate practice in Idaho, and to enhance the skills of its members.”

Over the past year, IAPS has worked to further those goals. In addition to sponsoring this edition of *The Advocate*, IAPS will publish a new edition of the *Idaho Appellate Handbook* this fall.

The *Idaho Appellate Handbook* was last published in 1996. The new edition deals exclusively with practice before the Idaho appellate courts and will contain practice tips from Idaho appellate justices, judges, and staff. It will also sport a new format that we hope is both easy to read and use as a guide to appellate practice in Idaho.

The *Idaho Appellate Handbook* will include the following chapters:

- I. Introduction to the Idaho Appellate Courts
- II. Framing and Preserving Issues for Appeal

In conjunction with the release of the *Idaho Appellate Handbook*, IAPS will host a full-day CLE on appellate practice on Friday, October 9, 2015.

- III. Appealing from the Magistrate Court to District Court
- IV. Appealing from the District Court and Settling the Record
- V. Administrative and Regulatory Agency Appeals
- VI. Appellate Settlement Conferences
- VII. Pre-Decision Motions
- VIII. Standards of Appellate Review
- IX. Writing Effective Appellate Briefs
- X. Effective Oral Argument
- XI. Post-Decision Motions
- XII. Attorney Fees on Appeal
- XIII. Extraordinary Proceedings and Writs Before the Supreme Court
- XIV. Petition for Certiorari with the U.S. Supreme Court

A preview of the *Idaho Appellate Handbook* is included in this edition of the *Advocate*. An excerpt from the chapter on Pre-Decision Motions starts at page 39.

IAPS members can purchase the *Idaho Appellate Handbook* at the discounted price of \$100, while the cost to non-members is \$150. The price of the *Idaho Appellate Handbook* includes a subscription to any changes for the next two years. IAPS expects to update the handbook periodically to address rule amendments, new case law, and other changes.

In conjunction with the release of the *Idaho Appellate Handbook*, IAPS will host a full-day CLE on appellate practice on Friday, October 9, 2015. The CLE will be held at the new Idaho Law and Justice Learning Center in Boise and also may be streamed

Appellate Practice Section

Chairperson

Christopher Pooser
Stoel Rives, LLP
101 S. Capitol Blvd., Ste. 1900
Boise, ID 83702-7705
T: (208) 387-4289
E: christopher.pooser@stoel.com

Vice Chairperson

Christine M. Salmi
Perkins Coie, LLP
PO Box 737
Boise, ID 83701-0737
T: (208) 343-3434
E: csalmi@perkinscoie.com

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101 S. Capitol Blvd., Ste. 1600
Boise, ID 83702
T: (208) 342-4411
E: ram@andersenbanducci.com

live to the University of Idaho College of Law in Moscow. IAPS members will receive discounted pricing. IAPS will release details on the CLE in the coming months.

We hope you enjoy this edition of *The Advocate* and take advantage of the new edition of the *Idaho Appellate Handbook* and the October 9 appellate practice CLE.

And if you have not already joined IAPS, we encourage you to do so. Our members also benefit from a weekly email alert of recent opinions issued by Idaho state and federal appellate courts and quarterly lunch CLEs devoted to appellate practice topics.

Membership in IAPS is a bargain at \$10 for attorneys admitted to the Idaho State Bar less than three years and \$25 for attorneys admitted for

more than three years. It is free for law students. Even those who do not specialize in appellate practice can benefit from membership in IAPS. A Section Membership Registration form is available from the Idaho State Bar website: <http://isb.idaho.gov/pdf/sections/secreg.pdf>.

About the Author

Christopher Pooser is an attorney in the Boise office of *Stoel Rives LLP*, where he represents clients in state and federal courts in appellate matters and complex commercial litigation. He serves as the *Chair of the Idaho Appellate Practice Section*.



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To Appeal or Not Appeal: That is the Question

Christine M. Salmi

Your three-week jury trial is finally over and, although you are emotionally and mentally drained from the pressures of trial, you must decide quickly whether to appeal the jury verdict entered against your client. For some lawyers, filing an appeal in this situation will seem the only next logical step to take.

However, filing an appeal is not always the best strategy for attempting to minimize the impact an adverse decision can have on your client. The filing of an appeal can bring many hidden risks, in addition to the obvious risk of not knowing how the appeal will turn out and the mounting costs associated with an appeal.

This article highlights some key factors every attorney should consider in order to avoid being blindsided by these hidden risks. These factors can be categorized into three main groups: (1) procedural factors, (2) substantive factors, and (3) practical factors.

Procedural factors

Although every appellate venue has a host of unique procedural factors, some universal procedural factors include: (1) is there a final appealable judgment, when filing an appeal as a matter of right, or is the criteria for filing a permissive appeal present; (2) has the deadline for filing an appeal expired; and (3) have the appellate issues been properly preserved below? Depending on how these questions are answered, filing an appeal may not be an option. For example, factors (1) and (2) are jurisdictional prerequisites to filing an appeal. Thus, if there is no final appealable judgment, the unique criteria for filing a permissive appeal

A good appellate lawyer knows that the applicable standard of review is a strong indicator of the likelihood of obtaining a successful result on appeal.

is not present, or the deadline for filing an appeal has expired, the appellate court will not be able to hear the appeal and the appeal will be dismissed.¹ Indeed, factors (1) and (2) are two of the first few factors the appellate court, or a member of its staff, will analyze to determine if an appeal is properly before the appellate court.

Rule 54(a) of the Idaho and Federal Rules of Civil Procedure defines a final appealable judgment or order. Both judges and practitioners find the final judgment rule challenging to apply, so attorneys should pay close attention to this factor. Likewise, the time to file an appeal is relatively short, so attorneys should pay close attention to this important factor as well.²

Even if it's determined that a final appealable judgment does exist and the time to file an appeal has not yet expired, before filing an appeal, an attorney should consider whether the issues he intends to raise on appeal have been properly preserved in the record below. Except for a few limited exceptions, the general rule is that issues cannot be raised for the first time on appeal.³ For a more in-depth discussion on the issue of preservation, see on page 34 the article in this edition of the *Advocate* addressing how to properly preserve issues for appeal.

Substantive factors

One of the most important substantive questions an attorney should ask when evaluating whether to appeal is, what is the applicable standard of review? A good appellate lawyer knows that the applicable standard of review is a strong indicator of the likelihood of obtaining a successful result on appeal. Each issue raised on appeal will have its own applicable standard of review. Pure fact issues or findings will be reviewed for clear error, or affirmed if supported by substantial evidence.⁴ Pure questions of law will be reviewed *de novo*.⁵ Questions reserved for the trial court's discretion will be reviewed for abuse of discretion.⁶ And, with regard to mixed questions of law and fact, appellate courts will give deferential review to the factual findings, but freely review the trial court's statement of the law and application of the law to the facts.⁷

The procedural stance of the case just prior to filing an appeal will also dictate the applicable standard of review. For example, a party is less likely to succeed on appeal after a full trial on the merits of the claims, unless the sole or primary issues on appeal involve legal questions of serious debate. This is true because significant deference is given to the fact finder at trial; whereas less deference may be given to the trial court's

decision if the case was subject to an early dismissal as a result of a Rule 12(b)(6) motion or motion for summary judgment.⁸

When evaluating whether to file an appeal, it's also important to consider how attractive the facts and law of the case will be to the appellate court. In other words, ask yourself whether the facts and applicable law allow you to tell a sympathetic story that will help persuade the appellate court to rule in your client's favor. If there are a lot of bad facts for your client that are undisputed, or facts that make your client appear unsympathetic, or there is a long, ingrained history of law that works against the result your client intends to seek on appeal, filing an appeal may not be a good idea.

Similarly, if the appeal involves legal questions of first impression, the attorney should consider whether good policy arguments exist for urging the appellate court to rule in the client's favor. If, on the other hand, the legal issues involved in the appeal are well-settled in the applicable jurisdiction, and a fair argument can be made that the factual findings made below are supported by sufficient evidence, filing an appeal under such circumstances poses the risk that your client may lose the appeal and be required to pay both his and the prevailing party's attorney's fees and costs incurred on appeal.

Practical factors

Numerous practical factors should also be considered when evaluating whether to file an appeal. The two most important of these factors are the time and costs associated with filing an appeal. Appeals can be very time-consuming and expensive.

A civil appeal pending in Idaho's appellate courts, for example, can take anywhere from nine months to several years to be resolved, except

for the rare circumstances reserved for expedited appeals.⁹ The lifespan of an appeal will vary depending upon, among other things, how complex the appellate issues are, the number of appellate issues raised, whether a cross appeal is filed, whether any post-decision petitions for review or for rehearing are filed and the court's workload. Due to the significant amount of time involved in prosecuting an appeal, the cost of an appeal, primarily consisting of attorney's fees incurred for the appellate representation, can be sig-

Should a client lose on appeal, the client may be required to pay the prevailing party's attorney's fees and costs incurred on appeal, in addition to his own.

nificant, and in some rare cases can even surpass the cost of litigation at the trial level. This is particularly true if, when considering appellate costs, you include the fees and costs that could be incurred if the client prevails on appeal and the relief obtained is a directive from the appellate court that the case be re-tried or that a first trial on the merits be conducted by the trial court below.

Attorney's fees on appeal can also be multiplied if the legal representation on appeal is handled by both trial counsel and an attorney with appellate expertise. However,

as Christopher Pooser explains in another article in this edition of *The Advocate*, which discusses the benefits of engaging an appellate lawyer, (page 27), it's generally a good idea to seek the opinion of an objective third party to help assess the likelihood of prevailing on appeal. Preferably, this third party should be an attorney with appellate expertise who can offer a fresh perspective on the legal arguments that are likely to succeed on appeal and who is trained to spot the weaknesses in the case that a trial lawyer, who may be too close to the case, may not be able to see.

As Mr. Pooser points out in his article, appellate practice is very different from trial practice. Therefore, hiring an attorney as sole or primary counsel for appeal, who has specialized training and experience navigating the appellate rules and who is familiar with the local appellate practice and appellate judges, can be very beneficial, both in terms of cost-savings to the client and in obtaining a favorable result on appeal.

Other appellate costs attorneys should consider when deciding whether to appeal include the costs associated with posting an appellate bond if appealing a money judgment, and the statutory post-judgment interest on a money judgment that will accrue during the pendency of the appeal.¹⁰ Additionally, should a client lose on appeal, the client may be required to pay the prevailing party's attorney's fees and costs incurred on appeal, in addition to his own. On the other hand, if the client prevails on appeal, the client may be entitled to an award of their appellate attorney's fees and costs.

In addition to the cost concerns, there's the unknown factor of how the appellate court will decide the issues on appeal. When assessing whether to file an appeal, an attorney should discuss with the client the possibility that, even if the client prevails on appeal by convincing the

appellate court to overturn or vacate the decision below, the client could obtain a worse outcome on remand. Filing an appeal could also cause the opposing party to file a cross appeal when the opposing may not otherwise have considered filing an appeal.

Another practical factor to consider is what impact a lengthy appeal may have on the client's personal or professional life. Having to hold everything in abeyance until a client's liability is determined on appeal can take an emotional and financial toll on the client and even the client's family members. Employee morale and business productivity can also be negatively affected by on-going litigation. The stigma of being in litigation can also negatively affect a business's reputation or goodwill, as well as a business's ability to obtain insurance coverage or financial backing. Ultimately, the attorney and client will need to decide if there is a strong likelihood of prevailing on appeal and, if so, whether that prospect outweighs the negative consequences that can come with pursuing an appeal.

Alternatives to filing an appeal

Due to the significant risks and costs associated with filing an appeal, a good attorney will consider and weigh the alternatives to appeal. Some questions to ask in this regard include, what does a judgment entered against the client at the trial level mean for the client's future, if not challenged on appeal? Can the client satisfy the judgment immediately or under a negotiated payment plan, or will the judgment force the client into bankruptcy? If the latter is true, filing an appeal may carry greater risks should the client lose on appeal and be unable to pay not only the judgment, but also his appellate attorney's fees and costs and, in some cases, those of his opponent.

The stigma of being in litigation can also negatively affect a business's reputation or goodwill, as well as a business's ability to obtain insurance coverage or financial backing.



Another question to ask is, how does an adverse decision affect the client's future business endeavors? A court decision declaring that the client's non-compete clauses in its employment agreements with its employees is unenforceable as a matter of law, for example, could have significant business and financial ramifications for the client, such that the client may feel that filing an appeal is worth taking on the added risks and costs of challenging the decision.

In considering the alternatives to an appeal, it is also important to keep in mind that the percentage of reversals following an appeal is low. For this reason, and the many others outlined here, the client and attorney should think hard about whether it may be better to satisfy the judgment outright, or at least attempt to make a post-trial settlement offer to reduce the amount of the judgment in exchange for offering some other favorable terms to the judgment debtor in lieu of filing an appeal.

A good appellate lawyer, in consultation with the trial lawyer, will be best equipped to help weigh all of these factors when evaluating whether to file an appeal. Therefore, consider consulting with an appellate lawyer the next time you and your client are confronted with the daunting question of: To appeal or not to appeal.

Endnotes

1. See I.A.R. 11 (governing appeals as a matter of right); I.A.R. 12 (governing permissive appeals); *State v. Tucker*, 103 Idaho 885, 888, 655 P.2d 92, 95 (Ct. App. 1982) (requirement of perfecting appeal within time period allowed by Idaho Appellate Rules is jurisdictional; appeal taken after expiration of filing period will be dismissed). While this article focuses on the factors an attorney should consider when evaluating whether to file an appeal primarily in a *civil* case pending in Idaho *state* court, many of the factors discussed in this article equally apply in state criminal cases and federal civil and criminal cases, with the exception that a different set of procedural rules and statutes apply in those cases. In federal court, for example, appeals from final judgments are governed by 28 U.S.C. § 1291, and permissive appeals are governed by 28 U.S.C. § 1292.

2. In Idaho state court, a party has 42 days following entry of a final judgment or order to file an appeal as a matter of right, I.A.R. 14, and 14 days from entry of an order or judgment appealed from to file a motion for permissive appeal. I.A.R. 12(b). In federal court, a civil litigant has 30 days following entry of the final judgment or order to file an appeal as a matter of right, Fed. R. App. P. 4(a)(1)(A), unless one of the parties is the United States or a governmental agency or officer sued in certain capacities, in which case the party has 60 days to file the appeal following entry of the final judgment or order. Fed. R. App. P. 4(a)(1)(B). A criminal defendant in federal court has only 14 days following entry of the appealable judgment or order to file an appeal. Fed. R. App. P. 4(b)(1)(A).

But if the government seeks to appeal in a federal criminal case, the government has 30 days following entry of the final judgment or order to file its appeal. Fed. R. App. P. 4(b)(1)(B).

3. See *McLean v. Cheyovich Family Trust*, 153 Idaho 425, 430, 283 P.3d 742, 747 (2012) (recognizing general rule that appellate court will not consider arguments raised for first time on appeal); *Dodd v. Hood River Cnty.*, 59 F.3d 852, 863 (9th Cir. 1995) (same).

4. *Stibal v. Fano*, 157 Idaho 428, 432, 337 P.3d 587, 591 (2014); *Husain v. Olympic Airways*, 316 F.3d 829, 835 (9th Cir. 2002).

5. *Guzman v. Piercy*, 155 Idaho 928, 934, 318 P.3d 918, 924 (2013); *Husain*, 316 F.3d at 835.

6. *Hurtado v. Land O'Lakes, Inc.*, 153 Idaho 13, 16-17, 278 P.3d 415, 418-19 (2012). See *Chappel v. Laboratory Corp.*, 232 F.3d 719, 725-26 (9th Cir. 2000) (decision whether to allow amendment of pleadings rests in trial court's discretion, which is reviewed on appeal for abuse of discretion).

7. *Booth v. State*, 151 Idaho 612, 617, 262 P.3d 255, 260 (2011); *Lim v. City of*

Long Beach, 217 F.3d 1050, 1054 (9th Cir. 2000).

8. When reviewing a trial court's grant of summary judgment, for example, the appellate court "exercises free review in determining whether a genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law." *Robinson v. Mueller*, 156 Idaho 237, 238, 322 P.3d 319, 320 (Ct. App. 2014); *Szajer v. City of Los Angeles*, 632 F.3d 607, 610 (9th Cir. 2011). Compare *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 398, 987 P.2d 300, 310 (1999) (recognizing standard for reviewing dismissal for failure to state a cause of action pursuant to Rule 12(b)(6) is same as standard for reviewing grant of summary judgment); *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005) (same).

9. See, e.g., I.A.R. 12.2, which provides that an appeal from an order terminating parental rights or denying an adoption bypasses the district court and goes directly to the Idaho Supreme Court, where the appeal will be processed on an expedited basis with oral argument occurring within 120 days from when the notice of appeal is filed with the dis-

trict court.

10. See I.A.R. 13(b)(15) (providing for stay of execution or enforcement of money judgment on appeal upon posting of cash deposit or supersedeas bond); I.C. § 28-22-104(2) (governing post-judgment interest).

About the Author

Christine M. Salmi, *Senior Counsel in Perkins Coie, LLP's Boise office, is a commercial litigator specializing in appellate, employment, and commercial construction law. She is Vice-Chair of the ISB's Appellate Practice Section, chair of her firm's Boise diversity committee, and a Board member for Jannus, a local nonprofit helping citizens in the areas of community health, education, public policy and economic opportunity.*



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The Benefits of Engaging an Experienced and Skilled Appellate Lawyer

Christopher Pooser

As specialization of the law grows in Idaho, there is a greater emphasis on appellate advocacy as a distinct and unique practice area. That is evident from the formation of the Idaho Appellate Practice Section in April 2014. There also is a growing number of Idaho attorneys who label themselves “appellate lawyers.”

Many Idaho trial lawyers nevertheless continue to handle their own appeals alone without involving a lawyer experienced and skilled in appellate practice. This article explores the risks of cradle-to-grave lawyering and the benefits of engaging an experienced appellate attorney.

Certainly many trial lawyers are also excellent appellate lawyers, but there is no question that a trial and an appeal are fundamentally different and require different perspectives and strategies for success. Consider the findings from a recent study that examined civil appeals in the United States Court of Appeals for the Ninth Circuit.¹ One of the questions the authors asked was whether there is a connection between a lawyer’s appellate experience and success on appeal.

To find the answer, the authors randomly selected and analyzed Ninth Circuit civil decisions issued between 2010 and 2013.² They also considered the appellate experience of lead attorneys by measuring the number of their appearances in federal appeals in the prior 10 years.³ The study found a direct connection: greater experience in appellate work correlated to greater success on appeal.⁴

An appeal is not a trial

Why is that? Simply put, [a]ppellate advocacy *is* a different area of the

While proceedings before the trial court are meant to determine the case on the merits, an appeal examines the trial court record for prejudicial error.

law.⁵ While proceedings before the trial court are meant to determine the case on the merits, an appeal examines the trial court record for prejudicial error. In other words, the trial level is an opportunity to develop the facts and convince a judge or jury who should prevail based on the controlling law. The focus on appeal is narrower: were there mistakes in the trial court that changed the outcome of the case?

Because appellate advocacy is far different than advocacy at the trial level, there are advantages to involving an experienced appellate lawyer. Working with the trial lawyer — whether to consult or prepare the appeal — an appellate lawyer will best position the client’s case for success on appeal.

The benefit of understanding the standard of review

The benefits of working with an experienced appellate lawyer start with understanding the limited role of the appellate courts and the nature of appellate decision-making. The change in orientation from trial to appeal means the appellate court, in searching for error, can only view the case through the lens and guidelines of the standard of review.

The standard of review determines how much deference the ap-

pellate court will give the trial court. A trial court’s exercise of discretion must be upheld unless that discretion was abused. Its findings of fact must be accepted if supported by substantial evidence. Only on questions of law can the appellate court exercise independent (or *de novo*) review.

Given the vital importance of the standard of review, an experienced appellate lawyer will focus on how the standard of review impacts the appellate court’s review and decision as to each issue. More often than not, the standard of review is decisive to the issues on appeal.

An experienced appellate lawyer also knows that an error, even if egregious, will not result in reversal unless the appellate court finds the error was prejudicial — the error must have changed the outcome of the case such that it caused substantial harm to the appellant. At times, prejudice is so inherent that it is easily identified. More often, prejudice is not so clear and requires a thorough review of the entire trial record.

The benefit of objectivity

There also is value in a second, unbiased opinion. Trial lawyers often live with a case for years. They may review the case from the per-

spective (and with the personal attachment) of having lived it with the client. Trial lawyers may also become convinced of their client's position and unwittingly review the case with "tunnel vision."⁶

Involving an experienced appellate lawyer helps eliminate that risk. An appellate lawyer has the advantage of reviewing the case just as the appellate court will — by reading and studying the filings and transcripts that make up the trial record. Looking at the case in that way allows an appellate lawyer to review the proceedings before the trial court objectively, without preconceived notions or bias.

The ability to view the case from the same position as the appellate court is a benefit that extends throughout the appellate process — one that ideally begins well before a notice of appeal is filed. Once the trial court enters the judgment, whether the client was successful or not, the question must be asked: how strong is the client's position considering the standard of review? An appeal can be time consuming and lengthy and inflates an already costly process. Working with the trial lawyer, the appellate lawyer can fully and objectively advise the client about the merits of appealing or cross-appealing.

A client who lost at trial must decide whether to appeal and evaluate the merits of the underlying judgment, the practical and financial burdens of an appeal, and the chances of success on appeal. Conversely, if successful at trial, the client must ask the same questions and decide whether to stand fast and defend the appeal or seek a settlement. And once a notice of appeal is filed, as a respondent, the client must quickly consider the consequences of filing or not filing a cross-appeal.⁷

The benefit of knowing the technicalities of appellate procedure

An experienced appellate lawyer will also have a detailed understanding of the rules that govern appellate procedure. The rules vary by appellate court, and many courts have adopted internal guides or have unwritten rules and customs that

The ability to view the case from the same position as the appellate court is a benefit that extends throughout the appellate process — one that ideally begins well before a notice of appeal is filed.



are known only to experienced attorneys, former law clerks, and court staff.

Ensuring compliance with the technicalities of appellate procedure is important because preserving the right to appeal does not end with trial. Key issues — and perhaps even the right to appeal — can be lost if the record before the trial court is not properly prepared or the legal arguments in the briefs are not properly presented.⁸

The benefit of a thorough and focused review of the case

Because the trial record tells the story on appeal, an experienced appellate lawyer will thoroughly review the record — often a laborious

task. Nevertheless, it is critical to understand the basis of the trial court's or jury's decisions and the impact of those decisions.

Understanding the trial record is also necessary to select and shape the strongest arguments on appeal in light of the standards of review. The parties have limited opportunities to present those arguments and convince the appellate court that prejudicial error did or did not occur during briefing and oral argument.⁹

The briefs are the appellate court's first impression (and sometimes only impression) of the case and carry most of the load on appeal. An appellate lawyer appreciates that appellate briefs "receive greater judicial scrutiny than trial level points and authority."¹⁰ The audience is a panel of justices or judges, supported by a team of law clerks and sometimes staff attorneys. Each person will study the briefs closely and without the time pressure imposed on the trial judge.

The close scrutiny means the appellate court will uncover mischaracterizations of the facts, misstatements of law, and errors in reasoning.¹¹ The appellate court's research could also reveal legal authority that counsel missed or dangerously chose not to bring to the court's attention.

The benefit of framing and arguing the issues in a persuasive and compelling way

It is also important to note what appellate briefing and oral argument should and should not be. An appellate brief is not a trial brief and cannot simply rehash the same arguments presented to the trial court. And what may be effective oral advocacy before a jury may be off-putting, if not counterproductive, to an appellate court.

An experienced appellate lawyer will focus on showing the pres-

ence or absence of prejudicial error. The appellate brief must accurately describe the trial record, frame the issues based on the standards of review, and organize and structure the argument in a persuasive and compelling way — and do so in writing that is clear, succinct, and readable. Because the appellate courts not only apply the law but interpret it, there is also an expectation on appeal that counsel will perform additional research to fully develop the controlling law.¹² The briefs give the parties that opportunity.

The legal analysis required is necessarily broader and must consider the implications of the parties' legal positions, the interrelationship between different legal concepts, and how the ruling the party seeks fits with existing case precedent.¹³ It is also important to recognize the limitations of your case and to play the devil's advocate and assume the position of the other side. In doing so, an experienced appellate lawyer will closely analyze and anticipate the hard questions the appellate court may ask — all while understanding the inclinations of the appellate court who will decide the appeal. That familiarity is useful, whether preparing the appellate brief or presenting oral argument.

The benefits of an appellate perspective at the trial level

The benefits of engaging an experienced appellate lawyer are not limited to the appeal itself. Actions taken (or not taken) at the trial level can make or break a later appeal.

Involving an appellate lawyer early on in a trial helps ensure the relevant facts and legal issues are carefully developed and presented and a complete trial record is preserved for appeal. Working closely with trial lawyers, appellate lawyers consult on litigation strategy and prepare pre-

A respondent's chances of successfully defending an appeal are far greater than an appellant's chances of showing prejudicial error.

trial motions, jury instructions, and post-trial motions — all with an eye on the trial record and applicable standards of review to successfully develop or defend an appeal.

But an appellate lawyer's goal at the trial level is not just preserving issues for appeal. Equally important is prevailing on key issues before the trial court and ultimately obtaining a favorable judgment. A respondent's chances of successfully defending an appeal are far greater than an appellant's chances of showing prejudicial error. Experience indicates that an appellate perspective at the trial level increases the chance of success before the trial court and on appeal and, in some cases, positions the case in such a way that no appeal is filed.

All in all, it is not surprising that trial and appeal require different perspectives and strategies for success. As the United States Supreme Court has recognized, “[t]here can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review.”¹⁴

Engaging an experienced and skilled appellate lawyer — simply to consult with or to prepare the appeal — can improve the chances of success on appeal or perhaps prevent a client from throwing good money after bad where the odds of success are long.

Endnotes

1. Gregory C. Sisk & Michael Heise, “Too Many Notes”? An Empirical Study of Advocacy in Federal Appeals, 12:3 J. of Empirical Legal Studies (2015 (forthcoming)), Cornell Legal Studies Research Paper, Univ. of St. Thomas (Minn.) Legal Studies Research Paper No. 15-2 (Mar. 23, 2015), available at <http://ssrn.com/abstract=2564870>.

2. *Id.* at 4-5.

3. *Id.* at 7. The authors did not study all types of civil decisions. They did not analyze prisoner claims, bankruptcy cases, habeas corpus petitions, agency appeals, or tax court cases. *Id.* at 5.

4. See *id.* at 4, 24, 26. At the risk of oversimplifying the study's findings, the authors found that appellee lawyer experience was statistically significant — that is, appellees with a more experienced appellate lawyer appeared to have an advantage in preserving the trial court's judgment. *Id.* at 24. The authors also acknowledged other studies that found a relationship between a lawyer's appellate experience and success on appeal. *Id.* at 23-24 (citing Kevin T. McGuire, *Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success*, 57 J. of Pol. 187, 188 (1995); Laura P. Moyer, Todd A. Collins & Susan B. Haire, *The Value of Precedent: Appellate Briefs and Judicial Opinions in the U.S. Courts of Appeals*, 34 Just. Sys. J. 62 (2013)). Based on their findings and the prior studies, the authors concluded that “the evidence grows that attorney experience matters in general and attorney experience in appellate work matters in particular.” *Id.* at 26.

5. David Cardone, *The Art of Cathedral Building: Why Appellate Advocacy is Different*, Pa. Law. 25 (Mar.-Apr. 2006).

6. *Estate of Gilkison*, 77 Cal. Rptr. 2d 463, 467 (Cal. Ct. App. 1998).

7. Idaho Appellate Rule 15(b) requires a

cross-appeal to be filed within 42 days of the appealable judgment or order or 21 days after the filing of the original notice of appeal, whichever is later.

8. See, e.g., *Bolen v. Baker*, 69 Idaho 93, 99, 203 P.2d 376, 379 (1949) ("This Court . . . will not review the actions of a District Court which have not been specifically assigned as error[.] [e]specially where there are no authorities cited nor argument contained in the briefs upon the question." (citations omitted)); *Cummings v. Stephens*, 157 Idaho 348, 362, 336 P.3d 281, 295 (2014), *reh'g denied* (Nov. 5, 2014) ("Merely referring this Court to the party's brief filed in the trial court does not comply with [I.A.R.] 35(a) (6).").

9. The Idaho Supreme Court and Court of Appeals allow 50 pages per brief, I.A.R. 34(b), while the federal circuit courts allow 14,000 words for a principal brief, F.R.A.P. 32(a)(7)(B). As for oral argument, the Idaho Supreme Court and Court of Appeals typically allow each side 30 minutes, I.A.R. 37(b), but the Court of Appeals may order an appeal be submitted on the briefs, I.A.R. 109. In the Ninth Circuit Court of Appeals, most cases are not set for oral argument. See generally F.R.A.P. 34(a)(2) (case will be submitted without argument if panel agrees that

oral argument will not aid decisional process). If argument is allowed, each side will be assigned 10, 15, or 20 minutes, and occasionally 30 minutes.

10. See *In re Marriage of Shaban*, 105 Cal. Rptr. 2d 863, 870 (Cal. Ct. App. 2001) (explaining differences between trial courts and appellate courts).

11. Counsel on appeal should assume that the appellate court will uncover mischaracterizations and other errors in the briefs. That is particularly true today considering the growing acceptance of electronic briefs, which provide hyperlinks directly to the appeal record and legal authority.

12. *Alameda Cnty. Mgmt. Emp'ees Ass'n v. Superior Court*, 125 Cal. Rptr. 3d 556, 565 n.9 (Cal. Ct. App. 2011) ("[A]ppellate counsel is generally expected to perform 'additional research that trial counsel simply will not have had the time to do.' As this appellate district explained over 50 years ago, '[c]ounsel's duty to assist the court includes a duty to study and to discuss the available authorities.' Careful research by counsel allows us to 'have more confidence in the completeness and sufficiency of our own research.'" (citations omitted)).

13. *Marriage of Shaban*, 105 Cal. Rptr. 2d at 870-71 ("Appellate work is most assur-

edly not the recycling of trial level points and authorities [A]ppellate counsel must necessarily be more acutely aware of how a given case fits within the overall framework of a given area of law.... [T]he appellate practitioner is on occasion likely to stumble into areas implicating some of the great ideas of jurisprudence, with the concomitant need for additional research and analysis that takes a broader view of the relevant legal authorities [A]ppellate practice entails rigorous original work in its own right").

14. *Jones v. Barnes*, 463 U.S. 745, 753 (1983).

About the Author

Christopher Pooser is an attorney in the Boise office of *Stoel Rives LLP*, where he represents clients in state and federal courts in appellate matters and complex commercial litigation. He serves as the Chair of the Idaho Appellate Practice Section.



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What to Bring to an Appellate Oral Argument, and Why

Syrena C. Hargrove

Judges schedule oral argument because they have questions. Difficult questions. And they want our help answering those questions before they decide the case. It sounds simple, doesn't it? And in some ways, it is simple. As an observer of the Ninth Circuit for the last 18 years, however, I've seen a good many very intelligent people make it very complicated, and sometimes painful. Here are my suggestions about what to bring to oral argument. As I discuss what to bring and why, I will offer some suggestions on how to prepare and how to keep the focus on the difficult and interesting questions at hand. Although I focus on what I know – the Ninth Circuit – many of these suggestions should apply more broadly.

What to bring:

1. The record on appeal (the Excerpts and Supplemental Excerpts in the Ninth Circuit), in a readily accessible form, and the briefs. Judges often want help finding important facts in the record, either because they want those facts themselves or because they want to highlight certain facts for their colleagues. Thus, you need the record on appeal available to you, either in electronic or paper form, during argument. You also want to have a good sense of where things are in the record. I have seen judges excuse people from continuing to search for a certain fact in a record after a search has gone on for some time. But I have never seen judges excuse someone who did not bring the record or who did not begin to look for a cite when asked. I also always bring the briefs, though I seldom refer to them during argument. I place both the briefs and the record on counsel table, so I can retrieve them

I begin developing the most difficult questions and answers by reviewing my notes from the brief-writing process.

if necessary. I also make a point of memorizing particularly important record citations.

2. A bench book. Many of the judges will have their own bench books with all the important authority in them. I thus come prepared with my own. It includes the major cases, rules, statutes, and regulations that control the arguments in the case. If a judge wants to discuss a certain section or quotation, I find that I am able to have a more engaging conversation if I can read the section myself. I have moved from a paper format to an electronic one, using my iPad, recently. I find that I must practice using the electronic bench book a bit more in order to feel comfortable.

Note that you only need to concern yourself with authorities that you or the opposing party cited in the briefs or, in the federal system, in a Federal Rule of Appellate Procedure 28(j) letter. You may not discuss previously un-raised authority at oral argument. If you find new relevant authority before argument, you must let the court and the opposing party know in advance of the argument, and ideally well in advance.

3. Three or four points to make before you sit down. I write three or four points randomly around the one piece of paper I bring up to the

podium with me. I purposefully do not list the points in any particular order. This reminds me that they can come up at any time and that I am not giving a linear presentation; I am answering questions and working in my points as I can. I also use my points as transitions. If there is a break in the conversation, I get things going again by making one of my points. (Note that these points may overlap with the best answers to the most difficult questions, listed below).

4. Any conceptual tools or visual aids included in the brief or that you want for your own reference. If a chart, graph, map, or timeline helped you understand the case, you may have included it in your brief. If you did, you will want it at your fingertips to help you answer questions. Sometimes, I also make notes for myself in a graph or timeline form. This helps me recall facts and arguments without lengthy written explanations.

5. A good idea of how to answer the most difficult questions in your case. I begin developing the most difficult questions and answers by reviewing my notes from the brief-writing process. I particularly look at what concerned me the very first time I read my opponent's brief – initial impressions I made a point of recording at the time, with

oral argument in mind. I write down the concerns I had, try to extrapolate upon them, and then come up with short, written answers, using my brief. Then, I plan a moot court.

A moot court does two primary things for me. First, it spurs me to prepare my thoughts and my materials, and to practice with what I have prepared. A bench book is only useful during a real argument, for example, if you know how to find things in it quickly. And that requires practice. Second, a moot court makes me get out of my own head and engage. I have found no better aid to preparation.

I ask three people to act as judges, to read the briefs critically, to try and be convinced by the other side's brief, and to ask me as many tough questions as they can for as long as they are willing (or at least 30 minutes). I try to recruit one or two people who are not familiar with the case or the area of law, as well as one who is. I have found that it's easier for someone who is not involved to start fresh, to see anything that is not clear from the briefs, and to play the role of devil's advocate. I like having someone who is familiar with the area of law as well, however, so I have a partner in formulating the best answers to the difficult questions when I get feedback at the end.

Finding or convincing people to challenge the way you are thinking and to put you on the spot is sometimes difficult, particularly for those who are very senior and for those in an office in which everyone practices within a specialized area of law. I have seen brilliant, very senior attorneys who seemed unprepared for — and unused to — real challenges to their reasoning when confronted by such challenges at oral argument. And I have participated in moot courts where everyone in my office is, no surprise, thinking

like a prosecutor. People need some prodding to step out of their usual ways of thinking. So it is worth taking the time to explain to colleagues what you need from them: real challenges to your thinking. It's even worth explaining why you need this from them: You do not want to be the emperor with no clothes.

6. An understanding of what you can concede. As you identify the most difficult questions in your case and figure out the best way to phrase your answers to them, you

It is worth taking the time to explain to colleagues what you need from them: real challenges to your thinking. You do not want to be the emperor with no clothes.



will naturally identify what facts and legal propositions are vital to your argument. If you go one step further and identify what is *not* vital to your argument, you will be in an excellent position to concede points that do not matter. If you can do this, you will gain credibility and save precious time for what does matter.

7. The right attitude. You are present at an oral argument in order to be supremely helpful to the judges and to your client, by answering the most difficult questions about your case as well as you can, and by

answering any other questions the judges may have, including cordial “softballs.” Convention requires that you begin as though you are making a linear presentation, but make no mistake: You are not making a linear presentation. When you begin, you are merely helping to remind the judges what the case is about so they may ask the questions they need answered. Thus, when a judge asks a question, you need to be quiet, listen closely, and do your very best to answer. Likewise, if a judge asks a question that calls for a “yes” or “no” response, provide one. You can explain your answer afterwards. And, if you have practiced your points enough, you can easily link from an answer to a point you want to make. After you have made your three or four points and answered all the questions, you have done your job and it is time to sit down.

I remind myself of the two things that are most difficult for me with two notes on the top of the page I bring up to the podium with me. I write “zip it” to remind myself to be quiet, to go with whatever the judge is asking, and not to overlap my words with a judge's. And I write YES/NO in large letters at the top of the paper. It confounds me how difficult it is to this day to answer a “yes” or “no” question with a “yes” or a “no.” I like having a reminder.

8. Knowledge of the standards of review, especially if they are deferential. The standard by which the appellate court reviews the district court's decisions may well determine the outcome of an appeal. And regardless, the standard frames the court's inquiry. Thus, standards of review are a common subject of questions. Indeed, if you are arguing against a deferential standard, the question of how you overcome it will likely be one of your most difficult to answer. You'll need to ac-

knowledge the deference due, and then explain why your argument nonetheless overcomes that deference and satisfies the standard.

When there are four or more issues, I generally bring a list of all the issues, their accompanying standards of review, the most important record citations, and the best case in support of my argument for each issue. Among the most common questions at oral argument, after standards of review, are where record support may be found for a point and which case best supports an argument. I like having those things at my fingertips.

9. The beginning and end of the argument, and some stock answers for tricky questions in the middle. I find it helpful to know how I will begin and end, and to have some responses for awkward situations.

When the presiding judge indicates that you may begin, say: “May it please the Court,” introduce yourself, and identify the party you represent. This is simply what’s expected.

If you can’t find something in the record, and you’ve tried, or if you just don’t know an answer to a question, you may say: “I do not know, your honor, but I can find out and submit the answer to the Court.”

If the record does not contain an answer to a question, you may say: “The record is silent on that ques-

tion, your honor.” (And then, if you know the extra-record answer and wish to share it: “I do know the answer, however, and am happy to share it if the Court wishes. . .”)

When there are no more questions from the bench and you have made the three or four points you want to make, sit down and submit! I generally say: “If there are no further questions, I will rest my case and request affirmance [or whatever relief we’re seeking].”

Appellate argument is one of my favorite parts of practicing law. I prepare for it as I would an oral examination — by identifying the most important and difficult questions, developing and vetting answers to those questions, brushing up on the record and memorizing the most important record citations, understanding the authority that supports my arguments, and by preparing and bringing materials that will help me engage with the court and provide responsive answers. Once present in the courtroom, however, I think of oral argument as a special kind of conversation. There are some odd — and one-sided — rules: for example, the court may interrupt at any time; the attorney, in contrast, should strive not even to overlap a word with the court. But the goal of the argument is to participate in a give and take that is conversational, guided both by the judges’ questions

The goal of the argument is to participate in a give and take that is conversational, guided both by the judges’ questions and the advocate’s ability to respond.

and the advocate’s ability to respond to them in a way that places the most important points squarely before the court. By coming to argument prepared with the things described above, you should be ready to engage the judges in an interesting, focused, and productive conversation.

About the Author

Syrena C. Hargrove is an Assistant U.S. Attorney for the District of Idaho. She has overseen appeals in that office since 2008. She clerked for two appellate judges: the Honorable Stephen S. Trott and the Honorable T.G. Nelson.



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Ferguson Durham, PLLC

223 N. 6th St., Ste. 325
Boise, ID 83702

fergusonlawmediation.com
daf@fergusondurham.com
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Preserving Issues for Appeal: Leaving Breadcrumbs for the Way Home

Stephen Adams

Brian Dickson

Some of the most horrifying words an attorney can read are that an issue “will not be considered on appeal.” These words can appear in both civil and criminal appellate opinions, and can result from failing to comply with appellate rules or to adequately preserve an issue for appellate review. This article provides guidance on how attorneys can avoid those words and, instead, properly preserve appellate issues in both the civil and criminal contexts, primarily in Idaho state courts.¹

Rules applicable to both civil and criminal cases

Following the rules to bring an appeal. The simplest method for bringing an issue to the attention of an appellate court is also the most common: follow the path outlined in the rules. This starts with the pleadings. Idaho Rule of Civil Procedure 8 does not require much from parties in the way of pleading, but it does at least require, “a short and plain statement of the claim showing that the pleader is entitled to relief;” or a statement “in short and plain terms [of] the defenses to each claim asserted.”² As the Idaho Supreme Court stated, “we will only consider the causes of action alleged in the complaint, not causes of action that could have been alleged under the facts presented, but were not.”³ Thus, if you want a claim or defense considered on appeal, put it in the pleadings.

The next step to preserve an issue is to at least present it to the lower court.⁴ As the Idaho Supreme Court has said repeatedly, it “will not consider arguments raised for the first time on appeal.”⁵ Some issues, such as the correctness of an evidentiary

If an objection or discussion of an issue occurs off the record, in chambers, or is otherwise not adequately recorded, the appellate court cannot properly review any potential errors in the ruling.

objection, require not just mere presentation to the lower court but an actual adverse ruling before the appellate courts will address them.⁶

Trial counsel should also strive to make an adequate appellate record. The appellate courts can only review the cold record, and so if an objection or discussion of an issue occurs off the record, in chambers, or is otherwise not adequately recorded, the appellate court cannot properly review any potential errors in the ruling. For example, in *Bach v. Miller*, the Idaho Supreme Court refused to address issues because the appellant had failed to include those issues in the record.⁷ “On appeal, the party challenging the decision below has the burden of showing error in the record.”⁸ The best way to ensure this is to make sure the relevant documents get into the trial court’s file.⁹ If a document is not in the file, it is difficult (if not impossible) to get it in front of the appellate court later.¹⁰

Likewise, in *W. Cmty. Ins. Co. v. Kickers, Inc.*, the relevant documents were not included in the appellate record, and the Court noted specifically it would not consider the documents unless they were part of the record, or later added in by motion.¹¹ When the appellant tried to get the documents in front of the Supreme Court’s eyes by attaching the documents to the appellate brief,¹²

the Supreme Court refused to consider the documents.¹³ Trial counsel should also make a record when the trial court refuses to admit evidence at trial. Failure to make a record of what that evidence would have been will negatively impact the client’s chances on appeal.¹⁴

After the issues have been presented to the lower court, the next step is to obtain an appealable order or judgment. Idaho Appellate Rule 11(a) sets forth the types of appealable orders. The primary method of appeal is to obtain a final judgment. “Only final judgments are appealable as a matter of right.”¹⁵ Other methods of obtaining an appeal include obtaining a Rule 54(b) certificate from the district court,¹⁶ or obtaining a permissive appeal under Idaho Appellate Rule 12.

Once a party has an appealable judgment, or is otherwise permitted to appeal, the party must file a notice of appeal or cross appeal.¹⁷ Although the notice of appeal must contain a preliminary statement of issues on appeal, “any such list of issues on appeal shall not prevent the appellant from asserting other issues on appeal.”¹⁸

Finally, a party should ensure the record contains everything upon which the party will rely. Idaho Appellate Rule 28 specifies what is automatically included in the record.

Parties can, however, request the inclusion of additional documents, either in their notice of appeal¹⁹ or by filing a subsequent request or motion.²⁰ Appellate courts may not consider issues for which there are no supporting documents in the record. It is worth noting that the rules for creating a record in the 9th Circuit are significantly different from Idaho state rules, and those rules should be examined before practice in the 9th Circuit.²¹

Other methods to obtain appellate review

Although the best practice is to first raise an issue in the lower court, certain issues, such as mootness, standing, or subject matter jurisdiction, can be raised for the first time on appeal.²²

Additionally, a respondent may be able to raise its own issues without filing a cross appeal by requesting affirmance on different grounds or asking the appellate court to address issues not decided by the lower court.²³ When attempting to raise issues without filing a cross appeal, however, the respondent should take care to properly brief the issue, as outlined below. “Merely referring this Court to the party’s brief filed in the trial court does not comply with Rule 35(a)(6).”²⁴ That being said, not filing a cross appeal may result in an issue not being addressed.²⁵ A party should thus analyze whether a cross-appeal is necessary to preserve an issue. Even if it seems excessive for a respondent to file a notice of appeal (or cross-appeal) on minor issues, discretion is the better part of valor; taking that step could ensure preservation of the issue and save you from those words you don’t want to hear.

Rules for briefing

To adequately preserve an issue, parties also must carefully follow

the briefing rules addressing length, content, and arrangement of briefs, among other things, set forth in Idaho Appellate Rules 34 and 35. Failure to comply with the rules contained therein can be disastrous. For example, in a string of cases brought by the same pro se litigant, the Supreme Court repeatedly knocked out issues on appeal purely because of failure to comply with Rule 35.²⁶ However, it’s not just pro se litigants who suffer the effects of this rule; it can happen to represented parties just as easily.²⁷

It is worth noting that the rules for creating a record in the 9th Circuit are significantly different from Idaho state rules, and those rules should be examined before practice in the 9th Circuit.²¹

All appellate opening briefs, of whatever nature:

- must contain certain headings and subsections;
- cannot exceed 50 pages; and
- must cite “to the authorities, statutes and parts of the transcript and record relied upon” or risk the Court choosing not to consider the argument.²⁸

Similarly, parties must raise issues on appeal at the proper time. “A reviewing court looks to the initial brief on appeal for the issues presented on appeal,”²⁹ and, “will not

address an issue raised only in the reply brief.”³⁰ Thus, if you want the Supreme Court to consider an issue, put it in the opening brief and support your position with citations to the record and authority. Raising it in a reply brief or at oral argument will be too late.³¹

Preservation issues unique to the criminal appeal

The fundamental error standard. In the criminal context, preserving error in the lower court is critical because if an error is unreserved, it may only be reviewed on appeal under the plain error standard in federal courts or the fundamental error standard in Idaho state courts. The federal plain error standard requires the appellant to show that there was “(1) error, (2) that is plain, and (3) that affects substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of the judicial proceedings.”³²

Idaho’s fundamental error test is similar to the federal plain error test, but it is distinct because, as the Idaho Supreme Court has pointed out, Idaho’s criminal rules do not have an equivalent to Fed. R. Crim. Pro. 52(b), which is the basis for the plain error review.³³ This portion of the article is going to focus on Idaho’s fundamental error test under *State v. Perry*.³⁴

Under *Perry*, the appellant must show three things: (1) that one or more of his unwaived constitutional rights was violated; (2) that the error is clear or obvious from the face of the record; and (3) that the error affected the outcome of the proceedings.³⁵

The first prong of the *Perry* test has two elements. First, the error has to impact a *constitutional* right. This

means that violations of statutes or other rules, such as the rules of evidence, will not be reviewed unless they are preserved, no matter how clear the violation might be.³⁶ Second, the constitutional right has to be *unwaived*. Thus, an invited error argument can derail a claim of fundamental error.³⁷ However, it may still be possible to raise the violation of a right that was “forfeited” (*i.e.*, the right was not timely invoked) as fundamental error.³⁸

Under the second prong of the *Perry* test, the appellant must be able to show that the error is “clear and obvious” from the record. This means that the appellant cannot base his claim of error on evidence that is not in the appellate record.³⁹ There also cannot be an open question of whether the decision not to pursue the issue was a strategic decision by trial counsel, or an open question of law on the issue.⁴⁰

Although the first two prongs are challenging to establish, the third prong of the *Perry* test is, perhaps, the most difficult hurdle for an appellant to overcome. Ordinarily, for a preserved issue, when the defendant shows error, the State bears the burden of proving that the error is harmless beyond a reasonable doubt.⁴¹ For an unpreserved error raised under *Perry*, however, that burden shifts. The appellant must show there was a reasonable possibility that the error contributed to the verdict in the case.⁴²

The impact *Perry* can have

Two recent decisions from the Idaho Court of Appeals demonstrate the enormous impact this shift in the burden of proof can have: *State v. Moffat*⁴³ and *State v. Moad*.⁴⁴ In both cases, the defendant alleged a violation of his right to be free from double jeopardy because he had been convicted for two separate offenses arising from the same course

The two contrasting results in *Moffat* and *Moad* show that obtaining relief on a claim of fundamental error under the *Perry* test is extremely difficult.



of criminal conduct. In *Moffat*, the appellant had preserved the issue with a motion to dismiss, and the Court of Appeals ultimately found a double jeopardy violation. In *Moad*, however, the defendant raised his claim for the first time on appeal through fundamental error. The Court of Appeals held, “Even if we assume that this claim of error satisfies the first two prongs of the *Perry* test in that *Moad* alleges a violation of an unwaived constitutional right and that error is clear or obvious from the record, he has not met his burden to show that the error affected the outcome of the trial proceedings.” As such, the Court of Appeals affirmed both of his convictions.

Perry by the numbers

The two contrasting results in *Moffat* and *Moad* show that obtaining relief on a claim of fundamental error under the *Perry* test is extremely difficult. Since *Perry* was issued in 2010, there have been 130 cases in which 231 claims of fundamental error have been addressed under the *Perry* test.⁴⁵ The appellate courts have found error or assumed error existed in only 65 of those claims. There were also six claims where error was conceded. These statistics mean that appellants only surmounted the first prong of the *Perry* analysis in 30.7% of fundamental error claims.⁴⁶ Relief was only granted on 11 of the 65

claims where error was found, and relief was granted in only one of the six cases where error was conceded. This means that, in 84.5% of claims where error was found, the courts found that the appellant had not shown the error was clear from the record or had not shown that the error prejudiced him. The bottom line is this: only 4.8% of claims of unpreserved error have actually satisfied all three prongs of the *Perry* analysis.

Therefore, trial attorneys in the criminal arena should be aware that, by not preserving claims of error, their clients are unlikely to get relief for errors that occurred during the trial process. To protect their clients’ interests, trial attorneys should be looking for ways to preserve issues.

Methods to preserve issues

One of the best ways to preserve an issue for appeal is by engaging in pretrial motion practice. By filing motions in limine to address potential issues that may arise, attorneys can fully argue, and thus, preserve, an issue.

Unfortunately, not all issues can be effectively addressed in a pretrial motion. In some cases, the district court defers a ruling to see how the evidence develops at trial. Trial attorneys should be alert to such rulings because if the attorney does not renew her objection at trial, the appellate court may hold that there

was no adverse ruling, and therefore, decide that the issue was not preserved.⁴⁷ In such cases, even though the issue was partially addressed by the trial court, the appellate court still will require the defendant-appellant to show fundamental error under *Perry*.⁴⁸

In other instances, the issue will not arise until trial. In those cases, the trial attorney needs to make a contemporaneous objection to the error. Such objections should be specific as to the basis for the claim; broad “continuing objections” are disfavored.⁴⁹

There may be times, such as when the issue is an allegation of misconduct in closing argument, when trial counsel might be loath to make a contemporaneous objection because of the effect the objection may have on the jury. Even in those scenarios, a contemporaneous objection is still the best course. If trial counsel decides not to make that contemporaneous objection, he/she should consider making the objection at the end of the closing arguments. While there appears to be an open question as to whether this is sufficiently contemporaneous to preserve the issue for appeal, such an objection at least makes the argument to the district court and gives the client an opportunity to raise the issue without having to satisfy *Perry*’s stringent standards.

Finally, trial counsel should not shy away from post-trial motion practice. Motions for mistrial or judgments notwithstanding a verdict allow trial counsel to present issues to the district court. Such motions also allow trial counsel the opportunity to explain that there was no strategic reason for not objecting to a particular issue, but rather, for example, the objection was missed amid dealing with all the other aspects of trial. Such admissions ultimately benefit the client because,

even if he/she has to raise the issue as fundamental error, that admission removes one potential roadblock under the *Perry* analysis. And, because trial counsel and appellate counsel both are trying to serve the best interests of the client, having this sort of discussion in the record allows for a better, more appropriate resolution of potential errors.

Arguing *Perry* on appeal

Even with best efforts, however, there still will be issues that have to be raised via fundamental error. In those cases, it will be appellate coun-

Such an objection at least makes the argument to the district court and gives the client an opportunity to raise the issue without having to satisfy *Perry*’s stringent standards.

sel’s responsibility to properly present the claim under the *Perry* analysis. Appellate attorneys should look for evidence that the error contributed to the verdict. Such evidence is crucial because the burden of proof that the error was prejudicial is a high hurdle; a cursory assertion that the error affected the outcome is unlikely to satisfy the requirements of *Perry*. Similarly, appellate attorneys representing respondents should be ready with arguments on all three prongs of the *Perry* test. Although

most claims are not likely to get past the first prong of the test, because the standards on all three prongs favor respondents, it is worth making quality arguments on all three prongs.

Ultimately, the best course is to preserve the issue below because appellate courts prefer to resolve issues on their merits.⁵⁰ *Perry* makes it clear that, in the criminal law context, the district court should be given the first opportunity to resolve those issues, and when that does not happen, the appellate courts will not review the issue except in the most stringent circumstances.

Conclusion

In conclusion, preserving an issue on appeal starts long before the appeal begins and continues until the last brief is filed. In other words, preserve early and often! Although this may seem like a daunting task, we hope this article will serve as a useful roadmap when you begin your next case so you never have to read those dreaded words again.

Endnotes

1. Where appropriate, citations to federal authority are also provided.
2. Idaho R. Civ. P. 8(a)(1) and (b). *See also* Fed. R. Civ. P. 8.
3. *Telford v. Smith Cnty., Texas*, 155 Idaho 497, 501, 314 P.3d 179, 183 (2013).
4. A corollary to this principle is that the party must actually identify the issue to the lower court, and show where in the record support for the argument lies. “The trial court is not required to search the record looking for evidence that may create a genuine issue of material fact; the party opposing the summary judgment is required to bring that evidence to the court’s attention.” *Esser Elec. v. Lost River Ballistics Technologies, Inc.*, 145 Idaho 912, 919, 188 P.3d 854, 861 (2008). *See also Venable v. Internet Auto Rent & Sales, Inc.*, 156 Idaho 574, 582, 329 P.3d 356, 364 (2014), review denied (July 31, 2014); *Carmen v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026, 1030-31 (9th Cir.

2001).

5. See, e.g., *McLean v. Cheyovich Family Trust*, 153 Idaho 425, 430, 283 P.3d 742, 747 (2012). See also *In re Am. W. Airlines, Inc.*, 217 F.3d 1161, 1165 (9th Cir. 2000) (“Absent exceptional circumstances, we generally will not consider arguments raised for the first time on appeal, although we have discretion to do so.”).

6. See, e.g., *Slack v. Kelleher*, 140 Idaho 916, 922, 104 P.3d 958, 964 (2004) (“Where no motion to strike was made and no ruling was requested or made by the trial court, such alleged error was not preserved for consideration on appeal. Objections to evidence cannot be raised for the first time on appeal.”). See also *Saint Alphonsus Diversified Care, Inc. v. MRI Associates, LLP*, 148 Idaho 479, 494, 224 P.3d 1068, 1083 (2009) (“If the trial court unqualifiedly rules on the admissibility of evidence prior to trial, no further objection is necessary in order to preserve the issue for appeal. If the trial court does not do so, however, then the party opposing the evidence must continue to object as the evidence is presented. By failing to object when the memorandum was offered into evidence during the trial, St. Alphonsus waived any objection.”). See also *Maryland Cas. Co. v. Jones*, 35 F.2d 791, 792 (9th Cir. 1929).

7. 144 Idaho 142, 145, 158 P.3d 305, 308 (2007).

8. *Id.*

9. See *W. Cmty. Ins. Co. v. Kickers, Inc.*, 137 Idaho 305, 306, 48 P.3d 634, 635 (2002).

10. Idaho App. R. 28 discusses the standard record, and does not indicate any provision for a party to request items not previously filed with the lower court. Instead, it specifically states, “Any party may request any written document filed or lodged with the district court or agency to be included in the clerk’s or agency’s record.” Idaho App. R. 28(c) (emphasis added).

11. 1137 Idaho at 306, 48 P.3d at 635.

12. Idaho App. R. 34(b) specifically allows for addenda or exhibits to be attached to an appellate brief. The addenda or exhibits may not, however, be used to expand the appellate record beyond what is allowed by the rules. Motions to expand the record are instead done under Idaho App. R. 19 and 30.

13. *W. Cmty. Ins. Co.*, 137 Idaho at 305, 48 P.3d at 635.

14. See, e.g., *Thomas v. State*, 145 Idaho 765, 770, 185 P.3d 921, 926 (Ct. App. 2008).

2008).

15. *Walker v. Shoshone Cnty.*, 112 Idaho 991, 993, 739 P.2d 290, 292 (1987).

16. Idaho App. R. 11(a)(2).

17. See Idaho App. R.17 and 18.

18. Idaho App. R.17(f).

19. Idaho App. R. 17(i).

20. Idaho App. R. 19, 30; *Bach*, 144 Idaho at 145, 158 P.3d at 308.

21. A fantastic resource for dealing with appeals in the 9th Circuit is The Appellate Lawyer Representatives’ Guide (available at http://cdn.ca9.uscourts.gov/datas-tore/general/2015/05/06/Final_2014_ALR_Practice_Guide_82514.pdf, last checked Jun. 26, 2015).

22. *McLean v. Cheyovich Family Trust*, 153 Idaho 425, 431, 283 P.3d 742, 748 (2012); *Dunlap v. State*, 146 Idaho 197, 199, 192 P.3d 1021, 1023 (2008); *Council of Ins. Agents & Brokers v. Molasky-Arman*, 522 F.3d 925, 933 (9th Cir. 2008).

23. See, e.g., *Campbell v. Kvamme*, 155 Idaho 692, 697, 316 P.3d 104, 109 (2013); *Stapleton v. Jack Cushman Drilling & Pump Co. Inc.*, 153 Idaho 735, 742, 291 P.3d 418, 425 (2012).

24. *Cummings v. Stephens*, 157 Idaho 348, 362, 336 P.3d 281, 295 (2014), reh’g denied (Nov. 5, 2014).

25. See, e.g., *Frogley v. Meridian Joint Sch. Dist. No. 2*, 155 Idaho 558, 564, 314 P.3d 613, 619 (2013).

26. See *Liponis v. Bach*, 149 Idaho 372, 374, 234 P.3d 696, 698 (2010); *Bach v. Bagley*, 148 Idaho 784, 790, 229 P.3d 1146, 1152 (2010); *Bach v. Miller*, 148 Idaho 549, 553, 224 P.3d 1138, 1142 (2010).

27. See *City of Meridian v. Petra Inc.*, 154 Idaho 425, 450, 299 P.3d 232, 257 (2013).

28. See Idaho App. R. 34(b), 35(a)-(b); *Liponis*, 149 Idaho at 374-75, 234 P.3d at 698-99.

29. *Myers v. Workmen’s Auto Ins. Co.*, 140 Idaho 495, 508, 95 P.3d 977, 990 (2004).

30. See, e.g., *Telford v. Smith Cnty., Texas*, 155 Idaho 497, 502, 314 P.3d 179, 184 (2013). See also *Nunes v. Ashcroft*, 375 F.3d 805, 810 (9th Cir. 2004).

31. *Paloukos v. Intermountain Chevrolet Co.*, 99 Idaho 740, 744, 588 P.2d 939, 943 (1978).

32. *United States v. Cotton*, 535 U.S. 625, 631-32 (2002) (internal quotations omitted).

33. *State v. Perry*, 150 Idaho 209, 225-26, 245 P.3d 961, 977-78 (2010).

34. *Id.*

35. *Id.* at 225, 245 P.3d at 977.

36. *State v. Parker*, 157 Idaho 132, 149, 334 P.3d 806, 823 (2014).

37. See, e.g., *State v. Norton*, 151 Idaho 176, 187, 254 P.3d 77, 88 (Ct. App. 2011).

38. See *United States v. Olano*, 507 U.S. 725, 733 (1993).

39. *Perry*, 150 Idaho at 226, 245 P.3d at 978.

40. *State v. Hadden*, 152 Idaho 371, 375, 271 P.3d 1227, 1231 (Ct. App. 2012).

41. *Chapman v. California*, 386 U.S. 18, 24 (1967).

42. *Perry*, 150 Idaho at 226, 245 P.3d at 978.

43. 154 Idaho 529, 530-34, 300 P.3d 61, 62-66 (2013).

44. 156 Idaho 654, 659, 330 P.3d 400, 405 (2014).

45. These statistics were compiled by the author and account for only those cases which actually cite to *Perry* and which actually address a claim under the fundamental error framework through May 4, 2015.

46. In assessing 21 other claims, the Court analyzed the second or third prong of the *Perry* test without providing analysis on the first prong.

47. See, e.g., *State v. Manzanares*, 152 Idaho 410, 419-21, 272 P.3d 382, 391-93 (2012).

48. See, e.g., *State v. Everhart*, No. 41180, 2015 WL 161901, at *5 (Ct. App. Jan. 14, 2015).

49. *Hansen v. Roberts*, 154 Idaho 469, 474, 299 P.3d 781, 786 (2013).

50. See, e.g., *Golay v. Loomis*, 118 Idaho 387, 397, 797 P.2d 95, 105 (1990).

About the Authors

Stephen Adams is an attorney, father, husband, and is working on his black belt in baking.

Brian Dickson is an attorney practicing in Boise.



Excerpts From *Idaho Appellate Handbook* Show its Usefulness

Stephen Adams
Christopher Pooser

This fall, the Idaho Appellate Practice Section will publish a new edition of the *Idaho Appellate Handbook*. In 14 chapters, the new edition outlines the basics of practice before Idaho's appellate courts. Authored by a mix of appellate practitioners, law professors, appellate court staff, and appellate and district court judges, the *Handbook* speaks to the practical, everyday issues confronting Idaho's appellate attorneys. Below is a preview of the *Handbook's* content, introduced by some of these very issues.

Have you ever wondered how Idaho appellate courts set their hearing schedule? Chapter 1 of the *Handbook* (authored by Judge David W. Gratton of the Idaho Court of Appeals) is an introduction to the Idaho Supreme Court and Idaho Court of Appeals, and it discusses, among other things, the courts' structure and decision-making process, as well as how cases are set for and prepared for hearing. The following selection discusses how hearings are set:

* * *

Hearings

1. Setting cases for hearing

a. Supreme Court. Cases are ordinarily set for argument in the order of the dates they came at issue, unless the Court for either good cause shown or on its own motion, expedites the hearing. Approximately four months before a term of Court, the Clerk's office prepares a proposed calendar of cases then at issue and ready for argument. After the schedule is determined and cases selected, the Clerk's office notifies counsel of the date and time set.

It discusses, among other things, the courts' structure and decision-making process, as well as how cases are set for and prepared for hearing.

b. Court of Appeals. Approximately two months before a term of Court, the Court will choose the number of cases necessary to fill the hearing calendar for that term and will notify counsel, by telephone or email, of the available dates and times. Each case scheduled for oral argument is assigned to a three-judge panel based on a pre-set rotation schedule, taking into account cases upon which individual judges must be recused.

c. Accommodation. In scheduling arguments before both Courts, an effort is made to accommodate counsels' schedules if practicable. If the Courts are traveling to a particular geographical area of the state, they will hear the cases from that region.

* * *

Though they do not occur in every case, occasionally a party will need to know how to file a pre-decision motion. These can include anything from a request to augment the record to a petition for leave to file an amicus curiae brief. Chapter 7 (authored by Cathy Derden, Staff Attorney for the Idaho Supreme Court) addresses the most common pre-decision motions filed with the Idaho Supreme Court and addressed by the Idaho Appellate Rules ("I.A.R."). The chapter also addresses the most common motions that are filed with a trial court or administrative agency after the notice of appeal has been

filed, but before any decision has been made by the appellate court. Here are selections from the chapter discussing filing amicus briefs, motions to stay, and motions to consolidate:

* * *

Amicus curiae – I.A.R. 8

Any attorney may apply for leave of the Supreme Court to appear as an amicus curiae in a proceeding, generally on behalf of a specific interested client.

PRACTICE TIP:

This application should be made as soon as possible after the filing of the notice of appeal so any brief can be scheduled in the briefing process. If the application is not filed until after the normal briefing has been completed, it is more likely to be denied because it will delay the appeal.

The application must set forth the particular employment of the attorney making the application, the specific interest of the applicant in the proceeding, the name of the party in whose support the amicus curiae would appear, and whether leave is sought to appear for the purpose of filing an amicus curiae brief only or to participate in oral argument as well. No filing fee is required. The application is processed as a motion, so all of the provisions for the filing

of briefs, statements, and affidavits and the standard fourteen-day period for the filing of opposition apply. The rule does not appear to permit the filing of a pro se application to appear as amicus curiae. The ruling of the Supreme Court on an application to appear as amicus curiae is in the form of an order that specifies the time limit for the filing of any amicus curiae brief and also states whether leave is granted to participate in oral argument.

PRACTICE TIP:

There are no specific criteria set forth in the rule, but the applicant should state how the applicant will be indirectly affected or have an interest in the outcome of the appeal or proceeding. In particular, the Court is looking for a demonstration that the applicant has a different or unique perspective or will present the Court with information that otherwise is not likely to be presented by the parties. If a brief is permitted, it should not simply reiterate the same arguments made by the parties.

Stay by Supreme Court during an appeal – I.A.R. 13(g)

The Supreme Court has broad authority to determine whether there should be a stay of a proposed act, a pending action or proceeding, or the enforcement of any judgment, order, or decree during an appeal, but I.A.R. 13(g) contains an absolute requirement that the party first apply to the district court or administrative agency for a stay before making application to the Supreme Court. If the district court or administrative agency denies the application for stay, or fails to rule upon it for fourteen days, the party may then make application to the Supreme Court. The application to the Supreme Court may be in the form of a request for stay during appeal after a stay has been denied by the district court or agency, or it may be

in the form of a request to dissolve a stay that was granted by the district court or administrative agency. The standard procedure for processing a motion, including the fourteen-day period for objection, applies to this application.

PRACTICE TIP:

If the motion is urgent—for example, a motion to stay a sale—advise the Clerk when the motion is filed so that the motion is not held for fourteen days waiting for a possible objection.

Motion to consolidate

Consolidation of cases can be done by the Court on its own initiative or upon a motion of any party. A party may request by motion the consolidation of various appeals involving the same proceeding below, or occasionally separate appeals will be consolidated because they involve the same legal issue. A party filing a motion for consolidation should specify the purposes for which the cases are requested to be consolidated. Separate appeals regarding the same proceeding below can be consolidated for the purpose of preparing the transcript and record, as well as for the filing of briefs and oral argument. If separate cases are consolidated, generally they are consolidated only for the purpose of presenting oral argument. A similar motion can be made asking that similar cases involving common questions of law be set for consecutive oral argument on the same day before the Court.

* * *

Sometimes it seems that mysterious and magical things happen behind the Idaho Supreme Court's closed doors. Most often, it is a very simple process that appears strange only because the procedure is not widely understood. For example, how appellate judges are assigned

cases may seem mysterious because the public is not invited to watch. But a display case in the lobby of the Supreme Court building shows how the process works: cases are assigned numbers which are written on slips of paper, the papers are placed in a hopper, and the slips are then drawn out of the hopper by law clerks. In other words, case assignment is done almost literally by pulling numbers from a hat. This process is mentioned in Chapter 1 of the *Handbook*.

But what about another seemingly-mysterious protocol: which court will hear the appeal? The following selections from Chapter 10 (written by Justice Daniel Eismann) address this question, in addition to providing explanations related to oral arguments and post-argument issues.

* * *

Logistics

- 1. Which court will hear my appeal?** All appeals from the district court and from the magistrate court pursuant to Idaho Appellate Rules 11.1 and 12.1 go initially to the Supreme Court. The majority of those appeals are then assigned to the Court of Appeals. The basis for determining which court will hear the appeal is set forth in Idaho Appellate Rule 108. Once the assignment is made, the Clerk of the Supreme Court will notify you of which court will hear your appeal. If your appeal is assigned to the Court of Appeals, you can request retransfer to the Supreme Court pursuant to Idaho Appellate Rule 114. Appeals to the Supreme Court from the imposition of a sentence in a capital case and from the Industrial Commission or the Public Utilities Commission will not be assigned to the Court of Appeals.
- 2. Will my case be set for oral argument?** All appeals retained by the

Supreme Court will be set for oral argument unless: (1) all parties stipulate to submission on the briefs and the Court approves the stipulation, or (2) the Court orders submission on the briefs without oral argument. If the Court orders that the appeal will be submitted on the briefs, any party may file a written objection within twenty-one days of the order, setting forth the reasons why the party desires oral argument. That motion will be decided without oral argument. I.A.R. 37(a).

The Court of Appeals may, in its discretion, likewise order submission on the briefs without oral argument. If it does so, any party may file a written objection within twenty-one days of the order, setting forth the reasons why the party desires oral argument. That motion will be decided without oral argument. I.A.R. 109.

The day of oral argument

1. Before argument

a. Be in the courtroom before your hearing will start. Be in the courtroom at least ten minutes before oral argument in your case is scheduled to begin. If argument on another case is ongoing when you arrive, you can enter the courtroom and sit down. There will be a break of about ten minutes between arguments.

b. Allocate your time. Before your argument begins, tell the court Clerk in the courtroom who you are and, if applicable, the party you represent. If you are co-counsel, tell the Clerk who will be presenting the argument. Each side will have 30 minutes for oral argument. The appellant may divide that time between the opening argument and the rebuttal argument. Before the argument

begins, the appellant must tell the Clerk how that time should be divided.

Make sure that your cell phone or other electronic device is silenced.

2. After argument

a. What if I misstated something during my argument? You should file a letter with the court correcting your misstatement as soon as possible.

If a party does not request attorney fees in its first appellate brief or does not brief or provide support for a claim to attorney fees, it will be deemed to have waived any attorney fee claims.

b. What if I discover additional authority or want to present additional argument? At any time before the issuance of the opinion, you may supplement your brief with additional authority in accordance with Idaho Appellate Rule 34(f)(1). You do not need leave of court to do so. At any time before the issuance of the opinion, you may also augment the authority and argument presented in your brief in accordance with Idaho Appellate Rule 34(f)(2). However, such augmentation requires permission from the court, which will only be granted upon a motion showing good cause why the material was not included in your brief.

Often, one of the most important issues in a case is attorney fees. The following is a selection from Chapter 12 (edited by Brett DeLange of the Idaho Attorney General's Office)¹ discussing how attorney fees must be raised on appeal.

Procedure for claiming attorney fees

1. A claim for attorney fees on appeal must be made in the first appellate brief. Idaho Appellate Rule 41 establishes the procedure for requesting attorney fees on appeal. It does not create a right to attorney fees. Any party claiming attorney fees on appeal must assert the claim for attorney fees as an issue on appeal in the first appellate brief filed and state the legal basis for that claim in the argument section of the brief, although the appellate court may allow a later claim for attorney fees under conditions it deems appropriate. I.A.R. 35(a)(5), (b)(5). At oral argument, the parties may argue the legal entitlement to attorney fees.

2. The failure to timely claim attorney fees constitutes waiver.

If a party does not request attorney fees in its first appellate brief or does not brief or provide support for a claim to attorney fees, it will be deemed to have waived any attorney fee claims. *Ball v. City of Blackfoot*, 152 Idaho 673, 678, 273 P.3d 1266, 1271 (2012) (prevailing party waived any claim to attorney fees as a result of failing to present any argument in support of its request); *Bingham v. Montane Res. Assocs.*, 133 Idaho 420, 427, 987 P.2d 1035, 1042 (1999) (because party did not raise the issue of attorney fees in first appellate brief as required by I.A.R. 41, the request would not be considered on appeal). Where an incorrect statutory basis

for an attorney fee claim is cited initially, but attorney fees are later requested on correct statutory grounds and the opposing party has adequate notice of the claim to defend against it, it is not error to award fees. *BECO Constr. Co. v. J-U-B Eng'rs, Inc.*, 145 Idaho 719, 725-26, 184 P.3d 844, 850-51 (2008).

Statutory authority for awards of attorney fees

1. Various statutes authorize attorney fees. There are various statutes authorizing the award of attorney fees for specific causes of action, such as Idaho Code § 6-918A (the Idaho Tort Claims Act), Idaho Code § 12-117 (awards for and against certain state or local government agencies), and Idaho Code § 12-120 (civil actions for open accounts, certain commercial actions and cases where damages of less than \$35,000

are pled). In those cases where more than one statute authorizes or mandates the award of attorney fees, the more specific statute applies. *Tomich v. City of Pocatello*, 127 Idaho 394, 400, 901 P.2d 501, 507 (1995). However, where no specific statute applies, the statute most often relied on by litigants for authorizing an award is Idaho Code § 12-121, because it allows the court to award attorney fees to the prevailing party in any civil action.

* * *

The *Handbook* represents many hours of hard work by authors, editors, and various subcommittees of the Appellate Practice Section. We hope the *Handbook* will be a useful resource to the Idaho legal community. Available in the fall of this year, it may be purchased through the Idaho State Bar.

Endnotes

1. The views and analysis expressed in this chapter are solely the authors' and should not be considered an expression of a legal position, either formal or informal, of the Office of Attorney General or the Attorney General.

About the Authors

Stephen Adams is an attorney, father, husband, and is working on his black belt in baking.



Christopher Pooser is an attorney in the Boise office of Stoel Rives LLP, where he represents clients in state and federal courts in appellate matters and complex commercial litigation. He serves as the Chair of the Idaho Appellate Practice Section.



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Regular Fall Term for 2015

3rd Amended – 06/22/15

Boise August 11
Coeur d'Alene August ~~25~~, 26, and 27
Moscow August 28
Boise (Boise State University) September 2
Boise September 3
Boise November 2, ~~4~~, 9 and 10
Twin Falls November 4, 5 and 6
Boise December 2, 4, 7, 9 and 11

By Order of the Court
Stephen W. Kenyon, Clerk

NOTE: The above is the official notice of the 2015 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.

**Idaho Supreme Court
Oral Argument for August 2015**

2nd Amended – 07/16/15

Tuesday, August 11, 2015 – BOISE

8:50 a.m. *OPEN*
10:00 a.m. *CDA Tribe v. Denney* #43169
11:10 a.m. *OPEN*

Wednesday, August 26, 2015 – COEUR d'ALENE

8:50 a.m. *Sky Canyon Prop v. The Club at Black Rock* #42216
10:00 a.m. *Hayes v. Plummer* #42125
11:10 a.m. *Federal Home Mrtg. Corp v. Anderson* #42598
2:00 p.m. *Kelly v. Blue Ribbon* #42658

Thursday, August 27, 2015 – COEUR d'ALENE

8:50 a.m. *Fairchild v. KFC* #42237
10:00 a.m. *Kennedy v. Hagadone Hospitality* #41951
11:10 a.m. *Liberty Bankers Life v. Witherspoon* #41993

Friday, August 28, 2015 – MOSCOW

8:50 a.m. *Walco, Inc. v. Idaho County* #42296
10:00 a.m. *Krinit v. Dept of Fish & Game* #42417
11:10 a.m. *Skinner v. USB Home Mrtg.* #42065

**OFFICIAL NOTICE
COURT OF APPEALS OF IDAHO**

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

Regular Fall Term for 2015

4th Amended 07/13/15

Boise August 11, ~~13~~, 18, 20
Boise September ~~10~~, ~~15~~, ~~17~~, 24
Boise October 15, 20, 22, 27
Boise November 12, 17, 19, 24
Boise December 15, 17

By Order of the Court
Stephen W. Kenyon, Clerk

NOTE: The above is the official notice of the 2015 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 Court of Appeals
Oral Argument for August 2015**

2nd Amended 06/29/15

Tuesday, August 11, 2015 – BOISE

9:00 a.m. *Vacated*
10:30 a.m. *Vacated*
1:30 p.m. *State v. Rozajewski* #42447

Tuesday, August 18, 2015 – BOISE

9:00 a.m. *Pentico v. State* #42242
10:30 a.m. *State v. Villavicencio* #42198
1:30 p.m. *Sweet v. Foreman* #42226

Thursday, August 20, 2015 – BOISE

9:00 a.m. *Vacated*
10:30 a.m. *State v. Anderson* #42027
1:30 p.m. *Vacated*

Mediator/Arbitrator

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Idaho Supreme Court and Court of Appeals
NEW CASES ON APPEAL PENDING DECISION
(Updated 6/1/15)

CIVIL APPEALS

Attorney discipline, sanctions, and malpractice

1. Whether the court erred in granting summary judgment to the defendant and in finding the alleged tort of legal malpractice failed due to an absence of a breach of duty as a matter of law.

McKay v. Walker
S.Ct. No. 42434
Supreme Court

Attorney fees and costs

1. Did the court err by ruling that Lightforce USA, Inc., was the prevailing party in the litigation and awarding it attorneys' fees under Idaho Code Section 12-120(3) and I.R.C.P. 54(d)(1)(C)?

Huber v. Lightforce USA
S.Ct. No. 41887
Supreme Court

License suspension

1. Whether the hearing officer erred by finding there was legal cause to arrest Bezdicek and to request him to submit to evidentiary testing.

Bezdicek v. Idaho Dept. of Transportation
S.Ct. No. 42608
Court of Appeals

2. Whether the district court erred in finding there was substantial evidence to support the hearing officer's determination that Bobeck was informed of the consequences of submitting to evidentiary testing.

Bobeck v. Idaho Transportation Department
S.Ct. No. 42682
Court of Appeals
Post-conviction relief

3. Whether Brown may raise for the first time on appeal from the dismissal of his petition for post-conviction relief that the district court in the underlying criminal case did not have subject matter jurisdiction over the charge to which Brown pled guilty?

Brown v. State
S.Ct. No. 42511
Supreme Court

4. Did the court err by summarily dismissing Sims' claim that his trial attorney failed to consult with him and file a motion to suppress his warrantless nonconsensual blood draw?

Sims v. State
S.Ct. No. 41942
Court of Appeals

Procedure

1. Did the court err in granting the defendant's I.R.C.P. 12(b)(2) and 12(b)(5) motions to dismiss?

Salamina v. Estate of Jacquelyn Mauzey
S.Ct. No. 42670
Court of Appeals

Summary judgment

1. Did the court err by dismissing Houpt's claims for declaratory relief and wrongful non-judicial foreclosure on summary judgment?

Houpt v. Wells Fargo Bank, N.A.
S.Ct. No. 41990
Supreme Court

2. Did the court err in granting summary judgment to St. Luke's Regional Medical Center on the basis the statute of limitation had expired for Baker's claim?

Baker v. St. Luke's Regional Medical Center
S.Ct. No. 42519
Court of Appeals

Trusts

1. Did the court err in its legal and factual treatment of Althea's deed as a trust?

Erickson v. Erickson
S.Ct. No. 41587
Supreme Court

CRIMINAL APPEALS

Evidence

1. Was there substantial and competent evidence admitted at trial from which the jury could conclude beyond a reasonable doubt that Smith was guilty of forcible sexual penetration?

State v. Smith
S.Ct. No. 40767
Court of Appeals

2. Did the district court err when it allowed the State to introduce on cross-examination Burgess's inculpatory un-Mirandized statements made to police?

State v. Burgess
S.Ct. No. 41902
Court of Appeals

3. Did the district court abuse its discretion when it admitted testimony from the officer regarding the likelihood of intoxication based on HGN results?

State v. Duff
S.Ct. No. 42230
Court of Appeals

4. Did the State present sufficient evidence from which the jury could conclude beyond a reasonable doubt that Smith was guilty of aiding and abetting the delivery of a controlled substance?

State v. Smith
S.Ct. No. 42090
Court of Appeals

Instructions

1. Did the court err when it failed to instruct the jury on the law of justifiable homicide pursuant to Idaho Code Section 18-4009(1)?

State v. Hall
S.Ct. No. 40916
Court of Appeals

Pleas

1. Did the court abuse its discretion when it denied Williston's motion to withdraw his guilty plea?

State v. Williston
S.Ct. No. 42115
Court of Appeals

Search and seizure – suppression of evidence

1. Did the court err by concluding the observation of an open container of alcohol in plain view did not provide probable cause to search the vehicle under the automobile exception?

State v. Fridley
S.Ct. No. 42468
Court of Appeals

2. Did the court err in denying Bowman's motion to suppress evidence found in his car and in finding his detention was not unlawfully prolonged to allow for a drug dog to sniff his car?

State v. Bowman
S.Ct. No. 41813
Court of Appeals

3. Did the district court err when it held that Christensen's statements were not obtained in violation of his *Miranda* rights and denied his motion to suppress his statements?

State v. Christensen
S.Ct. No. 41671
Court of Appeals

4. Did the court err in concluding that police had probable cause to arrest Knight for frequenting a house where drugs are sold?

State v. Knight
S.Ct. No. 42377
Court of Appeals

5. Did the court err by finding the traffic stop was justified by reasonable suspicion that Meyer's exhaust system was not in good working order because it was emitting excessive noise?

State v. Meyer
S.Ct. No. 42699
Court of Appeals

6. Did the court err when it denied Rozajewski's motion to suppress and found that the search warrant was supported by probable cause?

State v. Rozajewski
S.Ct. No. 42447
Court of Appeals

**Idaho Supreme Court and Court of Appeals
NEW CASES ON APPEAL PENDING DECISION
(Updated 6/1/15)**

7. Did the court err in denying Coulston's motion to suppress his statements in a police interview and in finding that he did not make an unequivocal request for an attorney?

State v. Coulston
S.Ct. No. 41396
Court of Appeals

8. Did the court err in denying Howell's motion to suppress and in finding his detention was not illegal?

State v. Howell
S.Ct. No. 42277
Court of Appeals

9. Did the court err in finding Huffaker was in custody for purposes of *Miranda* when he was taken to the county jail for an interview by an officer?

State v. Huffaker
S.Ct. No. 42691
Court of Appeals

Sentence review

1. Did the court abuse its discretion when it considered Bird's refusal to participate in the psychosexual examination as an aggravating factor at sentencing?

State v. Bird
S.Ct. No. 41111
Court of Appeals

2. Did the district court err by using Jimenez's decision to exercise his right not to participate in the psychosexual evaluation against him at sentencing?

State v. Jimenez
S.Ct. No. 42098
Court of Appeals

3. By considering Komen's refusal to take a polygraph test, did the court violate Komen's Fifth Amendment rights when it relinquished jurisdiction?

State v. Komen
S.Ct. No. 41916
Court of Appeals

4. Whether Hall's claims of unconstitutional conditions of pre-sentencing confinement should have been addressed and considered as a factor at his sentencing hearing on his burglary conviction.

State v. Hall
S.Ct. No. 42847
Court of Appeals

**Summarized by:
Cathy Derden
Supreme Court Staff Attorney
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Legal Community Embraces Civics Education with Program, New Space

A workshop for secondary school teachers held recently at the James A. McClure Federal Courthouse in Boise is an example of the kind of event that will typically be held at the new Idaho Law and Justice Learning Center (ILJLC), which will open this fall.

The workshop for secondary school teachers was held at the United States Courthouse in Boise on June 4-5, 2015. The workshop, titled “The Rule of Law and the Role of an Independent, Impartial Judiciary,” was a collaborative effort of the United States Courts for the District of Idaho, Idaho Supreme Court and the College of Law, and was designed to enhance knowledge of the judicial process by teachers of government, history and social studies in Idaho secondary schools. Funding for the Institute was provided by the District of Idaho.

The workshop featured presentations by 16 federal and state judges, lawyers, academics and journalists, together with sessions in which teachers, master teachers and facilitators shared strategies for elevating student understanding of the distinctive role of the judiciary in America’s constitutional system. Evaluating the workshop, teachers remarked on the “amazing expertise” of “top-notch speakers” as well as the “competing perspectives presented.” The teachers praised the speakers’ “openness to questions,” the teachers’ “access to working experts in the field,” and the judges’ “stellar character.” One teacher summed up the workshop as “truly a collaboration of genius.”

Speakers included past Chief Justices Linda Copple Trout and Daniel Eismann of the Idaho Supreme Court; Chief U.S. District Judge B. Lynn Winmill, Chief U.S. Magistrate Judge Candy W. Dale, U.S. Bankruptcy Judge Jim D. Pappas, and U.S. Magistrate Judge Ronald



Civics teachers listen to the presentation at “The Rule of Law and the Role of an Independent, Impartial Judiciary,” event, which was sponsored by the United States Courts for the District of Idaho, Idaho Supreme Court and the College of Law.

E. Bush; Judge Karen Lansing from the Idaho Court of Appeals; Idaho State District Judges John Stegner and Jon Shindurling; United States Attorney Wendy Olson; Idaho Federal Public Defender Richard Rubin; Boise attorney Walt Sinclair (Holland & Hart); Kenton Bird, head of the School of Journalism and Mass Media at the University of Idaho; journalist Betsy Russell and historian, blogger and retired journalist Marc Johnson; and University of Idaho law professor Don Burnett. Outreach to Idaho schoolteachers was provided by Russ Heller, retired Educational Services Supervisor for the Boise School District.

Such an enthusiastic showing reflects strong support for civics education. Similar programs will take place in a new venue for legal education, the Idaho Law and Justice Learning Center. The University of Idaho College of Law in Boise will soon open the ILJLC in the historic and newly renovated Ada County Courthouse, adjacent to the Idaho State Capitol and Idaho Supreme Court.

In addition to a second- and third-year option for law students,

the fully renovated space will house the Idaho State Law Library and offer law-related civic education programs to students, educators and the public. The ILJLC is a collaborative undertaking between the University of Idaho and Idaho Supreme Court.

“With the ILJLC being in the center of Boise, the College of Law can build collaborations like never before,” said Mark L. Adams, dean of the College of Law. “Our students gain access to a state-of-the-art facility and network with experienced professionals.”

Construction continues at the facility this summer. The State Law Library, operated by University of Idaho, is in the process of moving into its new home in the historic building. Students will begin taking classes in the new space on Aug. 24, 2015. A grand opening celebration is planned for Sept. 24. Other upcoming programming at the center includes Constitution Day activities and a meeting of the Idaho Business Review Leaders in Law.

Sources: U.S. Courts District of Idaho and Don Burnett, University of Idaho.

Lawyer Representatives of the District of Idaho — Your Access to the Federal Bench

Idaho attorneys should be aware that they have a very useful (yet sometimes overlooked) resource readily at hand — namely, the three federal lawyer representatives of the District of Idaho.

Appointed by the members of Idaho's federal bench to serve staggered three-year terms, the lawyer representatives hail from various geographical areas of Idaho and represent a variety of federal court practices. They serve as liaisons to foster open communications between Idaho's attorneys and our resident federal judges. The lawyer representatives serve as a conduit for advancing opinions and suggestions for the improvement of the administration of justice in our federal courts. The three currently-serving lawyer representatives for the District of Idaho are J. Walter Sinclair of Boise (3rd year — civil litigation practice), Howard D. Burnett of Pocatello (2nd year — civil litigation practice), and Lori A. Nakaoka of Ketchum (1st year — criminal defense practice).

Throughout each calendar year, the lawyer representatives attend meetings of the Board of Judges of the District of Idaho, participate extensively with U.S. Magistrate Judge Ronald E. Bush in the planning and presentation of Idaho's annual federal Bench Bar Conferences, serve as members of various federal

court committees (including the Local Rules Committee), and, starting with its recent successful debut in 2015, participate in the planning and presentation of the Idaho Teachers' Institute (a civic education program for Idaho's secondary schoolteachers of government, history and social studies focusing on the rule of law and the role of an independent, impartial judiciary).

The lawyer representatives also make recommendations for the use of, and participate with the Board of Judges in the review and approval of requested expenditures from the Non-Appropriated Fund (generated by the District of Idaho's receipt of attorney admission fees and *pro hac vice* admission fees) for the benefit of the bench and the bar in the administration of justice.

In addition, the lawyer representatives participate with their counterparts in all of the districts throughout the Ninth Circuit in the planning and related activities of the Ninth Circuit's lawyer representative Coordinating Committee. Finally, the lawyer representatives have the privilege of serving as delegates from the District of Idaho to the annual Conference of Chief District Judges and the annual Ninth Circuit Judicial Conference.

Service as a lawyer representative provides a unique opportunity to

The lawyer representatives serve as a conduit for advancing opinions and suggestions for the improvement of the administration of justice in our federal courts.

observe the inner workings of the federal court system and to work closely with federal judges, court personnel and other lawyers to promote the efficient administration of justice. It's a challenging role, and it can be time-consuming — but it's always very rewarding.

Idaho attorneys are invited and strongly encouraged to contact the lawyer representatives with inquiries, concerns and suggestions: J. Walter Sinclair, jwsinclair@hollandhart.com, (208) 383-3928; Howard D. Burnett, hburnett@hawleytroxell.com, (208) 233-0845; Lori A. Nakaoka, lnak@mindspring.com, (208) 726-1010.

Sources: Current Lawyer Representatives J. Walter Sinclair, Howard D. Burnett and Lori A. Nakaoka.

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Concordia University School of Law Earns ABA Provisional Status

Everyone knew that ABA approval was going to be a multi-year process for Concordia University School of Law, which had been planning a Boise campus for many years. Concordia Law opened its doors to students in the fall of 2012. Concordia Law followed the ABA's required two-year waiting period before it applied for provisional approval.

Concordia University School of Law earned provisional approval this spring from the American Bar Association (ABA), making Concordia graduates eligible to take the Idaho State Bar exam. The ABA is the national accrediting agency authorized by the U.S. Department of Education.

"I'm delighted the ABA has recognized Concordia Law's commitment to offering the highest quality legal education," said Concordia Law's Dean Cathy Silak. "In our third year of operation, we continue to achieve the key milestones we set out to accomplish for our students and for the greater community."

"We are very excited about Concordia's success and what it means for higher education in Boise," said Boise Mayor David H. Bieter. "Boise's role as our state's legal focal point becomes even stronger with Concordia's accreditation and the school is a fantastic presence in our central district. Congratulations to Dean Silak



and everyone at the School of Law on this milestone accomplishment."

"Congratulations to Concordia on receiving its provisional accreditation," said Attorney General Lawrence Wasden. "I appreciate the positive impact Concordia has made in Idaho's legal community thus far and look forward to great things from its faculty and graduates in the future."

Several elements distinguish Concordia Law's program.

- Concordia Law is the only three-year law program to be offered entirely in Boise, Idaho, in close proximity to the State Capitol, Ada County Courthouse, and the Idaho State Supreme Court.

- The school emphasizes first-hand legal experiences, in which students are paired with practicing attorney mentors and take practicum courses taught by members of the legal community.

- Another important cornerstone of the program is community service. For example, Concordia Law's collaboration with Idaho Legal Aid helps students provide legal support for underserved populations, while gaining valuable skills.

Concordia Law's inaugural graduates will take the state bar exam in July and will celebrate Commencement Ceremonies on Aug. 8.

Source: Concordia University



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ISB Lawyer Referral Service Gets a Tune-up to Improve Quality

The Idaho State Bar Lawyer Referral Service, (LRS), will provide improved service next year for both attorneys and the public.

For those attorneys who enroll in the program, cloud-based software will streamline registration, make record-keeping easier, and will improve referrals over time.

“These and other changes will also improve the quality of our program, both in creating more referrals, and improving the quality of referrals with a higher likelihood of generating cases,” said Dan Black, the Idaho State Bar Lawyer Communications Director and Lawyer Referral Service Supervisor.

The ISB LRS Advisory Committee explored best practices for LRS programs in other states and consulted with a committee of advisors from the American Bar Association. The LRS committee also asked LRS members what they thought would benefit the program. In the fall of 2014 the ISB committee suggested changes to the Board of Commissioners, who put those changes on the ballot during the Resolution Roadshow. The LRS ballot passed overwhelmingly.

Perhaps the most notable change involves timing and collection of the \$35 consultation fee. Instead of paying the LRS attorney after an initial half-hour consultation, a \$35 fee will be collected by the ISB before the referral. The committee’s research showed that callers who have already paid for the referral are more likely to go through with the consultation. Too often, callers get a referral and make an appointment, only to change their minds, leaving the attorney waiting. “We expect that callers willing to pay \$35 up front



are more serious about seeking legal services,” Black said. The ISB will use the revenue to defray its costs of running the LRS program. Many other states operate their programs in a similar way.

The ISB referral fee will also apply to those who get a referral online. It goes into effect on Feb. 1, 2016.

Another change in rules asks that participating attorneys attest they are qualified to take cases in the areas of law for which they are registered. Specifically, the rules ask for minimum qualifications for those accepting referrals in felony criminal, bankruptcy, and high-conflict family law cases.

For those who don’t know about the Idaho LRS program, it essentially offers the public a telephone service that directs them to either local agencies or an attorney in the appropriate location and area of law for their issue. Referrals don’t go to just any attorneys. They must be “panel members” or participants in the LRS program. An attorney can register as a panel member in the late fall during licensing.

These and other changes will also improve the quality of our program, both in creating more referrals, and improving the quality of referrals,”

— Dan Black

The program takes hundreds of phone calls each month from people who don’t know what kind of attorney they need. It is not a reduced rate or pro bono program. Rather, it matches those who can afford a regular-price attorney with one who practices in the correct area of law in the right location.

Questions about the Idaho LRS program can be directed to LRS Coordinator Kyme Graziano at kgraziano@isb.idaho.gov, or calling (208) 334-4500.

Fairness, Clarity, Precision, and Reaction: Gender-free and Bias-free Word Choice

Tenielle Fordyce-Ruff

Every legal problem involves people. You cannot practice law without writing about people. But writing about people in a way that is clear and won't cause a negative reaction by the reader takes some effort. The language of the law is moving toward gender- and bias-free word choices, but not as fast as other disciplines. Yet, a few simple and easy changes can help move your writing toward being more precise, fair and clear, and help you avoid any negative reaction from the reader.



Gender-neutral word choice

The use of language in this arena has shifted rather quickly. Many terms previously meant to be inclusive are now recognized as exclusive.

Think about it — the last time you flew did you have a female flight attendant? Not so long ago she would have been called a stewardess. And many terms that include the root *man* to refer to all of humanity are also going the way of stewardess. Simply replacing terms can help make your writing gender neutral. It can also help your writing be more precise by not using a male expression to refer to a female. Here is a handy list to help when you're writing or editing.¹

- Businessman → Business Executive
- Chairman → Presiding Officer, Chair, Head, Manager
- Coed → Student
- Common Man/Average Man → Common Individual, Average Citizen, Ordinary Person
- Congressman → Representative, Member of Congress
- Councilman → Council Member

- Fireman → Firefighter
- Forefathers → Ancestors, Fore-runners, Forebears
- Foreman (head of a group of workers) → Supervisor, Head Worker, Section Chief
- Foreman (of a jury) → Foreperson
- Man/Mankind → People, Humanity, Human Race, Human Beings, Human Population
- Man (as a verb) → Staff, Operate, Run, Work
- Man-Made → Hand-crafted, Handmade
- Manpower → Human Energy, Human Resources, Workforce, Personnel, Staff
- Man and Wife → Man and Woman, Husband and Wife
- Middleman → Negotiator, Liaison, Intermediary
- Old Wives' Tale → Superstitious belief

Pronouns can present a similar problem — creating confusion. Last year Sweden added a gender-free pronoun, *hen*, to its language. We English speakers don't yet have that option.² Instead, we must avoid us-

Last year Sweden added a gender-free pronoun, *hen*, to its language. We English speakers don't yet have that option.²

ing the pronoun *he* as a generic pronoun. While it used to be standard practice to use *he* to refer to an antecedent that could be either male or female, we must now use some creativity to avoid doing so.³

First, consider revising the sentence so that both the antecedent and the pronoun are plural.

A *defendant's* tortious conduct can serve as a source of specific personal ju-

isdiction when *he* (1) committed an intentional act, (2) the act was expressly aimed at the forum state, and (3) *he* knew that *his* actions were causing harm.

Defendants' tortious conduct can serve as a source of specific personal jurisdiction when they (1) committed an intentional act, (2) the act was expressly aimed at the forum state, and (3) *they* knew that *their* actions were causing harm.

Next, consider revising the sentence so that you don't need a pronoun.

The defendant's intent refers to his intent to perform an actual, physical act in the real world, rather than intent to accomplish a result or consequence of that act.

The defendant's intent refers to the intent to perform an actual, physical act in the real world, rather than intent to accomplish a result or consequence of that act.

Third, try replacing *he* with another pronoun.

Every man has the right to defend his home.

One has the right to defend one's home.

You have the right to defend your home.

*Everyone has the right to defend his or her home.*⁴

Finally, you can repeat the noun rather than use an inappropriate *he*.

The defendant asserted that the officer violated his right to be free from unreasonable searches.

The defendant asserted that the officer violated the defendant's right to be free from unreasonable searches.

Using a combination of these approaches can help make your writing gender-neutral and still flow well.⁵

Bias-free word choice

Naming and labeling has power and can create an almost instant reaction in the reader. Write with care when describing people.

First, unless a person's race is legally necessary — such as racially motivated crimes — avoid referring to that person's race at all. Use a description of a person's race only if it is necessary to the legal analysis.

This advice applies as well to other descriptions of people. Using language to describe a person's religion, sexual orientation, age, socioeconomic status, or differing abilities can shape the reader's perception of both the writer and the issue at hand.

Generally, use the term that a group of people prefers for their description. This bit of advice can be difficult to follow, however, because language shifts over time. To use the preferred term for a group of people requires that you stay abreast of current trends and preferences in language. Below is a list of older terms with the newer, preferred terms.

- Colored person, Negro, Black, Black American → African American
- Elderly → Senior Citizen
- Handicapped, Disabled → Physically Challenged, Person with Differing Abilities
- Homosexual → Gay/Lesbian
- Indian, American Indian → Native American
- Mexican American, Chicano/Chicana, Hispanic → Latino/Latina
- Oriental → Asian American

Additionally, if you know of a specific person's preferred term, use that if you are describing that person. If your client describes herself as a gay woman instead of a lesbian, honor that choice if you must describe her sexual orientation in writing.

Likewise, be careful with words that describe ethnicity, race, and religion; terms are not interchangeable. For instance, *Arab* and *Muslim* are not synonyms. Neither are *Spanish* and *Latina*. If you are going to use a description for a person, make sure to pick one that is accurate and precise.

Finally, use the most specific term possible. For instance, if you must describe a person with Japanese ancestry, choose to write Japanese American rather than Asian American.

Conclusion

Language has power, and the word-choices we make in writing can serve to avoid negative reactions in our readers. It can also serve to avoid insidious forms of prejudice. Taking the extra time to make thoughtful word choices can help your writing be credible and help avoid a negative reaction in the reader.

Endnotes

1. Anne Enquist & Laurel Currie Oates, *Just Writing: Grammar, Punctuation, and Style for the Legal Writer*, 137-40 (3d ed. Aspen 2009).
2. Using *they* as a singular pronoun is becoming commonplace and accepted. Many legal readers, however, are still jarred by its usage. Bryan Garner, *Garner on Language and Writing*, 244 (ABA 2009).
3. You can find additional tips on avoiding gender-linked pronouns in my previous article: Tenielle Fordyce-Ruff, *Problems with Pronouns III: Gender-Linked Pronouns*, June/July, 2013 56-JUL Advocate (Idaho) 48.
4. *Just Writing* at 138.
5. In some less formal contexts, writers are substituting the plural pronoun for the singular pronoun. This substitution, however, creates grammar errors.

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 or <http://cu-portland.fice.com>.



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IN MEMORIAM

Richard “Dick” John Whittemore 1956 - 2015

Richard “Dick” John Whittemore passed away unexpectedly Sunday, July 5, 2015. He was 59 years old. Dick had just completed a weekend of racing his BMW 325 in Auburn, Wash., when he developed breathing problems at the conclusion of the race. He later suffered cardiac arrest. Dick was born and raised in Portland. He was the son of Dr. James P. and Mary Margaret Whittemore, both of whom preceded him in death.



Richard “Dick” John
Whittemore

He graduated cum laude with a B.A. in Philosophy from Colorado College in 1978. He attended Northwestern School of Law and Lewis & Clark College, working nights at Abernethy’s restaurant so he could serve a clerkship for the Honorable Charles Crookham in Multnomah County Circuit Court. He remained close to Judge Crookham until the judge’s death in 2004.

Dick joined the firm of Bullivant Houser Bailey in 1984 and was a senior shareholder. He was a member of the Oregon, Washington and Idaho bar associations and practiced law for more than 30 years litigating cases in both state and federal court. He was an expert in product liability defense, clergy malpractice, medical malpractice and commercial litigation.

Loren Podwill, president of Bullivant Houser Bailey said, “Dick was the consummate professional and partner and a tremendous legal advocate equally respected by his clients, adversaries and judges hearing his cases. He was a devoted teacher,

spending endless hours working with newer lawyers teaching them the tools of the trade and professionalism, and volunteering his time to judge local and national legal competitions. Dick carried himself through the world with confidence, grace and dignity, and will forever be remembered and honored by his friends and colleagues.”

Dick had a deep respect for the law but his personal passion was motor racing. He traveled the Pacific Northwest participating in SCCA (Sports Car Club of America) races. For all who knew him, he stood tall, spoke softly, listened intently and thought logically.

Dick was a member of numerous professional organizations including the American Board of Trial Advocates where he served as national board representative president elect among other board positions. He was a member of the Oregon Association of Defense Counsel and served as a regional judge for the 2015 National Trial Competition of the Texas Young Lawyers Association. He was also serving on the board of trustees of the Leukemia & Lymphoma Society.

Dick is survived by his loving wife of 10 years, Carolyn; sisters, Kathy (Kirk) Johnson and Susan (Craig) Honeyman; brother, James (Laurie) Whittemore.

Mack Andy Redford 1937 - 2015

Mack A. Redford died on June 30, 2015 surrounded by his family. His life was a cinematic adventure full of rich experiences and accomplishments. He grew up in Weiser, Caldwell, Portland and Malad, Idaho where he worked on the family’s Big Bend Ranch. His work ethic was

fostered early on in life by his hard working parents and his grandfather who ran the ranch with stern, but loving guidance. He broke horses in high school and his love for the ranch continued into his 70’s when he looked forward to helping his beloved cousin Tom Palmer with the round-up every year.

A die-hard Vandal, Mack spoke of his time at the University of Idaho often and with great fondness. He obtained both his B.S. in Agriculture Economics and his Juris Doctorate Degree in Law from UI. During his senior year of Law School he served as the Police Judge for the City of Moscow. After undergraduate school, he was drafted into the U.S. Army and served his country honorably.

On June 25, 1966, Mack married Nancy Tefft Redford. They met on a blind date in 1964, set up by a Pi Beta Phi sorority sister.

He was employed by the Attorney General’s Office in Boise. As a young attorney at the age of 29, he was asked by Governor Samuelson to replace the Warden of the Old Idaho State Penitentiary. A job most would happily refuse, Mack accepted the job and loved it. He was a man who saw people for who they were, regardless of social status, profession or if they had made mistakes and ended up in his care. His time as Warden positively influenced him for the rest of his life. He always gave people the benefit of the doubt.

After spending years in private practice, Mack began his global adventures that went on for over 30 years. In 1977, he became the Deputy



Mack Andy Redford

IN MEMORIAM

Attorney General for the Trust Territory of the Pacific Islands. The Territory consisted of 2,000 islands from Hawaii to the Philippines. Mack, Nancy and daughter Holly moved from Boise to Saipan. The time spent in Saipan was very memorable for Mack and Nancy. They had their second child Andy, learned to sail and fell in love with scuba diving.

In early December of 1978, Mack flew to Taiwan to crew the maiden voyage of a 42-foot sailboat "Lematau." After a storm destroyed their sails, radios and other equipment, the crew finally arrived at their destination.

The next Journey of Mack's life began in 1981 with Boise based international construction company Morrison Knudsen as General Counsel. Most notably he was an integral part of the building of King Khalid Military City in Saudi Arabia. After leaving MK, he worked as Legal Counsel for The Channel Tunnel Contractors who built the 31-mile Channel Tunnel connecting England to France. In 1992, he joined the Boise Firm Park & Burkett. Later he was hired by the World Bank of the Government of Nepal as contract and claims counsel for a hydroelectric project. In 1996, he became General Counsel for Micron Construction, which later turned into Kaiser Engineers. He joined Elam & Burke in 2001.

In 2007, he was appointed by Governor Butch Otter to Public Utilities Commissioner where he served and was reappointed in 2013. He was still in office at the time of his death. Mack loved his job greatly and enjoyed his co-workers. He was able to travel many times stateside to regulatory meetings and internationally for good will missions to help underdeveloped countries.

He is survived by his wife, Nancy; daughter, Holly; sons, Andy, Chris Murphy; and grandson, Jordan.

Kenneth L. Anderson

1938 - 2015

Ken Anderson was born to Homer and Ethel Anderson on May 14, 1938, in Borger, Texas. He joined the United States Air Force in June 1956. During his four-year military tenure, he became a fluent speaker of the Russian language and was stationed for one year in Turkey.

He then began to pursue his education and ultimately graduated from the University of Texas with a Bachelor of Arts in history in 1963 and then obtained his Master of Arts in history in 1965. After passing doctoral exams at University of California Los Angeles in 1968, he became an assistant professor of history (Ancient, medieval and Byzantine) at Washington State University in Pullman.

He later decided to embark on his next educational endeavor, where he would discover his passion for helping people. He enrolled in the University of Idaho College of Law in 1975, and was admitted to the Idaho State Bar in 1978.

Ken was the prosecuting attorney for Nez Perce County for a short time and then decided to open his own practice in 1978. Helping others has always been the cornerstone of Ken's essence, which is why in 1990 he restricted his practice to bankruptcy. He maintained offices in Lewiston and Grangeville, and helped countless families and businesses in reorganizing their lives to-



Kenneth L. Anderson

ward a debt-free future. Ken was very proud of that.

He was a member of the Commercial Law and Bankruptcy Section of the Idaho State Bar as well as president of North Idaho Debtors' Counsel in Coeur d'Alene. He was an accomplished classical pianist, played classical guitar and participated in Summer Palace Theater at WSU. He also belonged to the Outlook Club for more than 30 years and was an active member of the Lewis-Clark Valley Train Club.

Ken was also an enthusiastic ham radio operator, with call sign KB7I-AW. Ken was instrumental in establishing the first repeater tower above Grangeville. Ken not only utilized ham radio for communications with his family and people all over the world, but used his skills to set up and become the area's Skywarn coordinator for the National Weather Service offices in Spokane and Missoula. He and his fellow amateur radio operators were very proud to provide storm spotting and early warning of severe weather.

Ken leaves behind his wife, Janet Anderson, who is a retired Grangeville Elementary School teacher; two daughters, Stephanie Lathrop (Earl) and Wendy Anderson; two stepsons, David Swisher (Sara Stolz) and Gary Yamamoto (Patty Harris); and seven grandchildren and nine great-grandchildren.

Larry Francis Weeks

1943 - 2015

Larry Francis Weeks, 72, of Boise, Idaho, passed away on Saturday, June 6, 2015. Arrangements are under the direction of the Cremation Society of Idaho.

Attorneys Philip McKay and Stephen C. Smith promoted

BOISE - Hawley Troxell is pleased to announce attorneys Philip McKay and Stephen C. Smith have been elected to the firm's partnership. McKay is chair of the firm's patent and intellectual property and internet groups. Smith is a member of the firm's litigation group



Philip McKay

Prior to joining Hawley Troxell, McKay was a founding member of McKay & Hodgson, LLP, a patent firm in Monterey, California (2000 to 2013) and was senior patent counsel for a Fortune 100 Corporation.

He has developed and maintained some of the largest patent portfolios and patent programs in Silicon Valley, and has personally prepared and prosecuted hundreds of domestic and foreign patent applications. As corporate counsel, McKay helped establish the patent program, policies, and procedures used by a Fortune 100 Corporation to create one of the largest patent portfolios in the Silicon Valley. McKay is licensed to practice law in California, The District of Columbia, and before the USPTO.

Smith is an experienced trial lawyer and third-generation native of Boise. He has substantial trial experience, including cases involving natural resources disasters, wildland fire litigation, and other resource issues. His trial experience in the



Stephen C. Smith

courts of Idaho, Washington, Alaska, Hawaii, the territories of American Samoa and Guam, and the Federated States of Micronesia include complex casualty, construction, aviation, maritime, professional and medical malpractice, products liability, and general commercial cases. In addition to commercial interests, Smith has represented ship owners, airline pilots, airlines, lawyers, doctors, and other professionals in a wide variety of cases.

Prior to joining Hawley Troxell, he was a trial specialist with the Oceania's largest law firm, Carlsmith Ball LLP in Honolulu and practiced with and was chairman of the Transportation Litigation Group of a large Seattle law firm.

"Phil and Steve are a great addition to our partnership. Their expertise and vast wealth of knowledge are an invaluable asset to the firm and to our clients," said managing partner Nick Miller.

ITLA honors Dennis Voorhees, Timothy C. Walton

KETCHUM - Timothy C. Walton and Dennis Voorhees received top honors at the Idaho Trial Lawyers Association's annual convention May 5 in Sun Valley. Walton, from Boise, was named James J. May Trial Lawyer of the Year, while Voorhees, from Twin Falls, received the association's Professionalism Award.

Walton was honored for his dedication to the practice of law, his active community involvement, and his commitment to the preservation of the civil justice system. In recent years Walton has primarily focused on obtaining justice for victims of childhood sexual abuse. He and his longtime law partner, Andrew Chasan, have represented 130 such

survivors in a case against a Roman Catholic religious order in the Northwest.

Walton has also served as a mediator in over 700 personal injury cases and is a past president of the Idaho Trial Lawyers Association. The award is named after ITLA's founding member and first president, retired 5th District Judge James J. May.



Timothy C. Walton

The Professionalism Award given to Voorhees is named after renowned Idaho plaintiff's lawyer Walter H. Bithell of Boise. It recognizes commitment to integrity, excellence and professionalism as a lawyer for all clients, colleagues, judges and legal staff members.

Voorhees, a New Jersey native, has been practicing law in Idaho since 1978 and is a sole practitioner. He is certified as an elder law attorney and as a certified estate law planning specialist. He also serves as the Idaho representative for the Special Needs Alliance, a group of attorneys who specialize in the establishment of trusts for people with disabilities.

He also serves on the Idaho Supreme Court Committee on Guardianships and Conservatorship and is a currently serving as a commissioner of the Idaho State Bar. He and his wife, LeNee, have seven children.



Dennis Voorhees

Linda Pike appointed for another term

COEUR d'ALENE - Linda Pike, based in North Idaho, was first appointed to the Board of Tax Appeals in 1996 and has served since with the exception of a four-year hiatus. Ms. Pike has a varied background in agriculture and business, earning her law degree from the University of Idaho in 1990. Ms. Pike and her husband maintained a law practice focusing on estate planning, probate, taxes, property, and business until their retirement. Ms. Pike remains a member of the Idaho Bar on inactive status.



Linda Pike

James Dale elected a Fellow of the College of Labor and Employment Lawyers

BOISE - Stoel Rives LLP is pleased to announce that partner James C. Dale has been elected a Fellow of The College of Labor and Employment Lawyers. The College views election as a Fellow as the "highest recognition by ones' colleagues of sustained outstanding performance in the profession, exemplifying integrity, dedication and excellence." Installation of this year's newly elected Fellows will be held on November 7 in Philadelphia, PA.

The College of Labor and Employment Lawyers was established in 1995 through an initiative of the Council of The Section of Labor and Employment



James C. Dale

Law of the American Bar Association. Mr. Dale will be the only Idaho-based attorney in the College. Dale, a member of Stoel Rives' litigation practice group, has served as lead defense counsel on class and collective actions seeking recovery of unpaid wages, represented management in traditional labor disputes and provided counsel on union avoidance.

Moffatt Thomas welcomes new attorneys and paralegal in all three Idaho offices

Idaho law firm Moffatt Thomas welcomes new members to each of its three Idaho offices. Cynthia A. Melillo joins the firm's Boise office as a partner in the firm's business and real estate practice; attorney Jerry Stenquist provides a broad array of legal services from the firm's Idaho Falls office; and the Pocatello office welcomes paralegal Kayleen Shaw.

Cynthia A. Melillo, who has more than 15 years of experience practicing law in Idaho, joins Moffatt Thomas from private practice in which she provided legal assistance to real estate developers, businesses, and telecommunication providers. The addition of an experienced business/corporate and real estate transaction attorney underlines Moffatt Thomas's continuing commitment to expand its presence throughout Idaho.

Cynthia attended the University of Arizona School of Law, the University of Kent at Canterbury, England, and the



Cynthia A. Melillo

University of Southern California. Cynthia was a 2013 Leaders in Law award recipient, a 2010 *Idaho Business Review* Idaho Women of the Year honoree, and a 2007 recipient of the Tribute to Women in Industry Award by the Women's & Children's Alliance.

Jerry T. Stenquist has a broad practice that includes banking and creditors' rights, commercial litigation, property law, and health law. He has experience in Congressional internships, student leadership, and leading domestic and international volunteer groups. Jerry graduated from George Washington University Law School and earned his undergraduate degree at Utah Valley University. He is licensed to practice law in Idaho, Montana, and Utah.



Jerry T. Stenquist

Kayleen Shaw joins the Pocatello office as a paralegal assisting with family law matters, insurance defense, general litigation, and workers' compensation matters. Kayleen attended Lewis-Clark State College in Lewiston, Idaho, and received her associate's and bachelor's degrees in paralegal studies, minoring in pre-law. She was a member of the Ambassador Honor Society and was Co-President of the Legal Support Student Association.



Kayleen Shaw

OF INTEREST

Amy Holm joins Elam & Burke

BOISE - Elam & Burke welcomes Amy Holm as an associate attorney. Ms. Holm practices labor and employment law, medical and professional malpractice defense, and general civil litigation. Ms. Holm's labor and employment specialty includes experience in claims involving breach of contract, wrongful termination, sexual harassment, disability discrimination, age discrimination, pregnancy discrimination, whistleblower cases, and wage claims. Before joining Elam & Burke, Ms. Holm practiced litigation in private practice at a firm in Boise and



Amy Holm

served as a staff attorney for the Honorable Thomas J. Ryan in the Third Judicial District. While in law school, Ms. Holm participated in Elam & Burke's summer clerkship program. Ms. Holm is a University of Idaho alumna and was born and raised in Idaho. Her interests include skiing, hiking, and spending time with her husband and young daughter.

INL attorney gains recognition in *National Law Journal*

IDAHO FALLS - Linda Guinn Montgomery, the General Counsel for the Idaho National Laboratory, was recently named one of 50 national Trailblazers in Energy and Environment. A profile of her and her work appears in the April Supplement to the *National Law Journal*. The article highlights Ms. Montgomery's in-

volvement in the legal issues surrounding the nuclear industry over recent decades. She works for the Battelle Energy Alliance, LLC, a contractor for the U.S. Department of Energy and the INL.



Linda Guinn

Dotters-Katz joins Boise firm

BOISE - Jones Gledhill Fuhrman Gourley, P.A. in Boise is pleased to announce Samuel Dotters-Katz has joined the firm as an Associate.



Samuel Dotters-Katz

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Kenneth L. Pedersen Thrives on Challenging the Powerful

Dan Black

After 42 years practicing law, Ken said numerous influences have led to a satisfying career. Of course, no simple list can sum up his decades of work. What remains for Ken are high points, low points and a general feeling of appreciation for the profession and those who have helped along the way. “I met some of the greatest lawyers, and the greatest clients,” he said, “real salt of the earth people.”

Ken’s law partner Jerom A. Whitehead wrote in his nomination that Ken “truly epitomizes the great strength of character that all attorneys should aspire to. I have never seen him waiver in the slightest on an issue of honesty, loyalty or trust. He has been an amazing mentor.”

Ken distinguished his practice by helping people who have suffered at the hands of carelessness. And he made a good living at it, securing several large settlements. But how did Ken find his niche doing general negligence, medical malpractice, product liability, and insurance bad faith?

In 1979 Ken decided to represent a Burley family after their child became paralyzed after receiving the Pertussis vaccine. Ken challenged the drug company, which was a huge gamble.

“I had a theory,” he said, that came from an enormous stack of company documents. Along the evidentiary trail he found



Kenneth L. Pedersen,
Twin Falls

“something of a hot document,” he said, showing that the company’s doctor pointed out that while there had been persistent complaints about the vaccine’s serious side effects, the company continued to produce and distribute the inferior product, despite the fact that there was a safer alternative. He won the case at trial in 1984 and pressed on through appeals. Finally, after eight years total, the Ninth Circuit affirmed and the U.S. Supreme Court passed on the defendant’s cert. “It was my first large verdict,” Ken said. It led to other similar cases. “An important part of that verdict,” he said, was that the company made the vaccine safer. “That was truly satisfying.”

He has represented several plaintiffs in mass tort cases that took him all over the country, which was a strain. He learned that the verdict “is only half way there.” Of course the defendants have little to lose with an appeal. Persistence and patience have been helpful allies along the way.

Ken admits he’s made a good income. “Your economic interests are perfectly aligned with your clients,” he said. His litigation skills, Ken said, were influenced by luminaries in the profession such as Gerry Spence and Harry Philo, especially those he’s worked with in the Idaho Trial Lawyers Association. He serves on its board of governors and served as president in 1983-84. He also served on the American Association for Justice, formerly known as the ATLA, where he was on its board of governors. “ITLA has been very helpful to my practice,” Ken said.

There have been many other influences that have made him the attorney he wanted to be. “My Mormon upbringing gave me respect for the truth,” he said. And even though he doesn’t

His litigation skills, Ken said, were influenced by luminaries in the profession such as Gerry Spence and Harry Philo, especially those he’s worked with in the Idaho Trial Lawyers Association.

now follow the faith, he said he respects its guiding values. As a new lawyer he developed his own guiding principles at the Firm of Parsons, Smith in Burley: Never misrepresent a case, respect legal reasoning and precedent.

Nothing has been terribly easy. He recalled ITLA’s efforts to guide the Idaho Legislature, which has been working to impose restrictions on personal injury damages since before 2000. “We put up a fight, year after year, but eventually Idaho has adopted almost every limitation imaginable,” he said. “I know this is political, but that is where I live,” he said. His advocacy successfully expanded workers’ compensation protections for injured workers in the agricultural area. “We successfully had the ag exemption removed,” because of a case in which an Idaho worker lost both arms and a leg in a farming accident.

Ken credits those around him for his successes. He and his partner, Jerom, have practiced together for 15 years. “He’s like a son to me,”

2015 Distinguished Lawyer Awards

The Idaho State Bar presented the Distinguished Lawyer Awards at its Annual Meeting, July 22-24 in Sun Valley.

adding that another longtime associate, Lloyd Web, Ken said, taught him a great deal about the law and how to try a case. He also said that William Parsons and Richard Smith of Burley gave him “the best start any lawyer could have.”

Ken has other interests. A big fan of travel, for many years he kept a sailboat in Hawaii. Now he has a tug boat in Anacortes, Wash. He’s a musician and played for many years with the Eddie Haskell Band. He reads a great deal, especially literature and philosophy. And, of course, he likes spending time with family. He has been married for 47 years to Trudy, who he met on a blind date when he was 19. She was 18 and they were married nine months later. Now they have three adult children and eight grandchildren.

Jerom added in his nomination: “He is unwavering in his dedication to the best principles of lawyering.”

Fast Facts - Kenneth L. Pedersen

Firm

- Partner, Pedersen & Whitehead, Twin Falls

Practice Areas:

- General negligence
- Medical malpractice
- Product liability
- Insurance bad faith

Mass tort experience:

- L-Tryptophan
- Breast Implant
- Fen-Phen
- DTP
- Sulzer Hip

Education:

- Bachelor of Arts, Brigham Young University, 1969
- Juris Doctorate, University of Idaho, 1972

Professional Activities:

- Fifth District Bar Association (President 1977-78)
- Idaho Trial Lawyers Association (Member, Board of Governors 1979 – present; President 1982-83)
- ITLA Seminar Planning, 1980-81; ITLA Certification of Specialization
- Committee (member 1995-97, ITLA Lawyer of the Year 2007)
- Association of Trial Lawyers of America (Sustaining Member; Board of Governors 1986-93 and 2008-2012)

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David Lombardi

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- Privileging and Peer Review Disputes
- Personal Injury
- Environmental Liability

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Mr. Lombardi’s resumé is available at: www.givenspursley.com

GIVENS PURSLEY LLP
Attorneys and Counselors at Law

John Rumel, Legal Scholar with Courtroom Experience

Dan Black

John Rumel, Associate Professor at the University of Idaho College of Law, always knew he wanted to be an educator. But the route took him through part-time teaching jobs, complex civil and commercial litigation and about 16 years traveling the back roads of Idaho, where he represented the Idaho Education Association and its members.

From that work he collected a wealth of experience he can now pass on to Idaho law students. John joined the U of I College of Law full time in 2011 and now teaches at the Boise campus, which this summer is being moved from the Water Center on Front Street to the Old Ada County Courthouse across the street from the Law Center (Idaho State Bar offices), and sandwiched between the Capitol Building and the Supreme Court Building.

“Teaching really gets me up in the morning,” John enthused during an interview in his downtown Boise office. “It’s like I was always meant to do this. You work with ideas, bright students. There is no ‘us and them.’” John’s students apparently agree, twice selecting him as their Inspirational Mentor, thereby causing him to receive the University of Idaho’s Alumni Award for Excellence in 2012 and 2014.

Raised in California, John attended the University of

California at Santa Cruz and earned a BA double major in History and Politics. While considering graduate school, he saw few prospects for a career as a historian, and no scholarship assistance. However, for aspiring lawyers both were plentiful. He decided a career in law naturally involves three of his most passionate interests — history, politics and Constitutional law. “I wanted to tap into those interests.”

While attending Hastings College of Law in the Bay Area, John distinguished himself as Note Editor of the Constitutional Law Quarterly, and served as a judicial extern to Justice Jerome Smith, of the California Court of Appeals. After law school, he served for two years as a law clerk for Judges William T. Sweigert and Robert P. Aguilar, at the United States District Court for the Northern District of California.

In the 1980s, John worked in private practice doing civil litigation in San Jose and San Francisco. And, in the early 1990s, he spent three years as a visiting professor at Santa Clara University School of Law. He noted that even 30 years ago, the cost of living was high in the Bay

Area, his salary didn’t go far. So he and his wife, Kathe Alters, decided to return to their roots in Idaho. He met Kathe while working in California, but she and her family were from Boise.

John’s paternal grandfather was born in Ketchum and his maternal grandmother was born in Pocatello. John spent his childhood vacations in the Wood River Valley, where he liked to fish and hike. The couple decided on Boise, and soon John was working at what was then Stoel Rives Boley Jones & Grey. His emphasis was on education, employment, professional liability and product liability.

“Legal practice and education are both oriented toward service,” John says, and he easily saw how assisting students and assisting clients “comes out of the same ethos.” But whether helping a student or client, John passionately does his best.

“I’ve always been inclined to represent clients with the greatest need – the underdog,” he said. With the downturn in union strength through Idaho’s Right to Work laws, John said the public sector unions were the last vestiges for protecting the legal rights of Idaho workers. In

— John Rumel



John Rumel,
Boise

1995, he became general counsel for the Idaho Education Association, representing teachers and other educators throughout Idaho.

John especially liked dealing with all the important issues facing the teachers' union and workplace issues such as job security and the ability to practice one's livelihood. Those things are priorities for people everywhere, but especially in an education setting. He said while that work was interesting and important, it occasionally became highly emotional and very contentious. "It takes a toll."

"I loved representing the IEA," he said, adding that in rural Idaho school districts are often the largest employer in town. "A town has much of its identity wrapped up around the school," he said, making some issues a little more volatile. Hot topics in recent years have included the four-day school week, the Luna Laws, their repeal, and some of their return.

He said much of his work for the IEA involved establishing due process for employment actions. "Both sides need to suspend judgement until we get the facts and review the law," he said. His IEA cases helped to develop case law that ensures the rights of individual teachers to get a fair hearing before discipline or termination. But it wasn't just the lawyer's job at the IEA. "We had some very dedicated people who were good at marshalling a team. We'd all work together," including mobilizing local leaders and bargaining unit members.

John's predecessors were the late Byron Johnson and Kathy Brooks, who helped establish the requirements of good faith bargaining, and other teacher rights.

Experience from those 17 years helped John to teach workplace law issues with vivid examples. And it helped his scholarly research, as well, he said.

Fast Facts - John Rumel

Employer:

Professor, University of Idaho, College of Law - Boise

New digs:

- John will be teaching in the very same rooms where he argued cases early in his career, in the remodeled building which served as the Ada County Courthouse, but is now the Idaho Law and Justice Learning Center.

Family:

- Two children: Daughter Ellen, 24, Seattle; Son, Sam, 23, Denver.
- John's wife, Kathe, works as the business development director for Idaho Public Television.

Well traveled:

- His work for IEA included travel to every one of Idaho's 44 counties. The IEA was able to mobilize Idahoans to quickly repeal the Luna Laws by referendum.

Education:

- University of California Hastings College of Law

"All of my papers have some genesis in my own law practice," he said. "I have written about cases I have won and that I have lost," he said, "only now I have time to really hash out the issues by probing deeper and more broadly into them."

He joined the UI College of Law in Moscow as a full-time faculty member in fall 2011 after teaching on a part-time basis in Boise. Now he teaches courses in Civil Procedure, Evidence, Workplace Law, Education Law, Remedies, and Lawyering Process.

Once moved into the newly remodeled Idaho Law Education Center, "I will continue doing what I do: provide both the theoretical knowledge; and, with Idaho-specific examples, I want to illustrate how students will be able to go out and practice with practical legal skills."

Professor Rumel has served the legal community as a member of the Idaho Supreme Court's Evidence Rules Advisory Committee and on the Idaho State Bar CLE advisory committee, which made recommendations concerning State Bar rules pertaining to

Experience from those 17 years helped John to teach workplace law issues with vivid examples.

And it helped his scholarly research, as well, he said.

continuing legal education compliance. He also served on the Idaho Volunteer Lawyers Program Policy Council in the 1990s. He has served on a variety of committees at the College of Law and as coach for the Jerome Prince Evidence Moot Court team.

Beyond the rewards from teaching and from his fruitful career with the IEA, John is especially grateful to the Idaho State Bar this summer. "To be honored with this award; it just seemed to come so out of the blue," he said. "The people who have gotten this award – these are the people I have always respected; like Don Burnett, Linda Copple Trout and others. These are the luminaries. I'm truly flattered."

Newal Squyres — Great Expectations Turned into Hard Work

Dan Black

Newal Squyres knows his job. “You take care of your client. You do what’s right,” he said. “And what’s right is the law. Your responsibility is to be a problem solver.”

“Sometimes the only way to solve a problem is to actually go to trial, which is always the best part of practicing law for a trial lawyer. But going to trial is not necessarily in the best interest of solving a client’s problem,” he said.

Interviewed at Holland & Hart’s new offices on the 17th Floor of Eighth & Main, Newal speaks humbly about his accomplishments, influences, work schedule, his community involvement, and his time with the Department of Justice implementing the Foreign Intelligence and Surveillance Act (FISA).



Newal Squyres,
Boise

In his home state of Texas, Newal’s family had high expectations for all the children. Newal’s father was a small town family practitioner and leader in the medical community, selected as the Texas Family Practice Physician of the Year in 1983, and who helped establish the Family Practice Department at the Texas Tech Medical School. Newal said his family might have been slightly disappointed he didn’t go into medicine. But he was not very good with math and science and law was his first choice.

Newal was part of a small team dealing almost exclusively with national security and counterintelligence matters.

“I did as well as you could in law school,” Newal said, having graduated at the top of his class and served as editor of the Law Review. “I was shocked because all I wanted to do was not flunk out,” he said. “I just worked really hard.”

His parents led by example, “living hard-working, tolerant and non-judgmental lives,” Newal said. And the value system they passed on was simply to “do unto others as you would have them do unto you.”

After law school, Newal clerked for Judge Joe Ingraham on the U.S. Court of Appeals for the Fifth Circuit, which handled major racial discrimination cases in the South. In 1974, after the clerkship, Newal, his wife Linda, and four-month-old son, Isaac, moved to Boise “to be a real lawyer,” Newal said. They wanted to live where they could ski, and in those days Texans weren’t all that welcome in Colorado, much like Californians to Idaho.

His time in Boise was interrupted by a stint in Washington, D.C., at the Department of Justice. One of his early mentors was Fifth Cir-

cuit Judge Griffin B. Bell, who was appointed U.S. Attorney General by President Jimmy Carter. From 1977 to late ’79, Newal worked for Judge Bell in the Office of Legal Counsel and was among a group of six to eight lawyers from across the Department that met every morning for breakfast with the Attorney General.

Newal was part of a small team dealing almost exclusively with national security and counterintelligence matters. “As Judge Bell put it, our job was to bring the intelligence community under the rule of law.” We helped implement the recommendations of the “Church Committee” (the Senate Select Committee on Intelligence chaired by U.S. Senator Frank Church), including the Foreign Intelligence Security Court, (also known as FISA), which was a main focus of his responsibilities.

“Judge Bell had a great sense of humor, did not take himself too seriously, worked very hard, and loved the practice of law and being a lawyer. He taught us and made

the tough daily decisions by being a problem solver with the rule of law as the bedrock principle from which to act.” Newal says not only were these years a great experience, but they provided a wonderful foundation to try and be a good lawyer and member of society. “We always planned to come back to Idaho and reality.”

So Newal and his family returned to Idaho, and he resumed a general litigation practice. He also put down roots, getting involved with the Idaho State Bar as a speaker, teacher, mentor, and lecturer for the Citizens’ Law Academy, and as a founding member of the Idaho Pro Bono Commission. Newal was an Idaho State Bar Commissioner in 2007-10. He has been a Trainer in the Trial Advocacy Clinic at the U of I Law School for many years. He also served on the executive committee of the Idaho Partners Against Domestic Violence. Aside from the law, Newal delved into the world of soccer and coached for the Boise Nationals Soccer Club for 20 years.

Newal has represented individuals and businesses large and small. He has been a plaintiff’s lawyer (doing contingent fee work for individuals who have been harmed or injured) and defense counsel, defending companies against all sorts of allegations of wrongful conduct. “I take all types of cases. That means I get to learn about new areas of the law, but also learn about the client’s or opponent’s business. Sometimes you have to learn a whole new industry. You want to view things with an open mind, to work with judgment without being judgmental. You try to respect other people, particularly the lawyers on the other side.”

Of all the work, he said, some of the most meaningful and satisfying

Fast Facts - Newal Squyres

Firm

- Partner, Holland and Hart LLP, Boise office

Practice areas:

- Commercial Litigation/Business Torts
- Labor and Employment
- Appellate
- Products Liability
- False Claims Act

Awards & Honors

- Fellow, American College of Trial Lawyers
- ACLU of Idaho Liberty Award (1994)
- Plaque of Appreciation, Intelligence Division of the Federal Bureau of Investigations, October 1979.

Memberships/Affiliations

- Idaho State Bar Board of Commissioners (2007-2010), President (2009)
- Faculty, University of Idaho School of Law, Trial Advocacy Clinic
- Idaho Bar Foundation, Citizens’ Law Academy
- Idaho Pro Bono Commission Founder, Executive Committee (2008-2014)
- Member, Executive Committee, Idaho Partners Against Domestic Violence (2008-2014)
- Board Member, John William Jackson Fund (2012-present)
- Board Member, Boise Nationals Soccer Club (2006-2008), and Coach (1986-2008)

Education:

- Texas Tech University School of Law, with High Honors (J.D. 1972)
 - Order of the Coif, Editor-in-Chief, Law Review
- Texas Tech University (B.A. 1968)

cases have been on a pro bono basis for the ACLU and Planned Parenthood. He continues to take pro bono cases and said he’s proud his law firm, Holland & Hart, supports pro bono work.

Newal said that after seeing so many disputes over the years he still believes people to be genuinely good. “I’m not a cynic,” he said, adding that “I believe that most of the time people are trying to do the right thing as they see it. Still, they can have honest disputes. That’s what the law is for.”

And before trial or going to court, does he still get butterflies? Newal laughs answering in the affirmative. “The older you get, the

more you realize how things can go wrong. So rather than a level of comfort, you better not be complacent or take things for granted.”

Newal said he’s been lucky to have had important mentors and role models, like R.B. Kading, Jr., John Hepworth, Mike McNichols, Jess Hawley, Bob Alexander, Lou Racine, Bill Olson, Fred Hoopes, Chuck McDevitt, Lou Cosho, Ailyn Dingel, Allen Derr, Walt Bithell, Craig Meadows, Dick Greener, and others.

When asked about the downside of modern legal practice, Newal responded about how litigation has become an increasingly expensive option and process. Access to justice

for normal people and many businesses continues to be a problem. “I believe that the judicial system is a pretty good way to resolve a dispute,” he said. “But for cases involving under \$50K - \$100K, the cost of trying that case can be prohibitively expensive.”

One of the problems driving the cost of litigation is the sheer number of emails lawyers have to sift through in discovery. “We used to read all the documents. Now we need a system just to manage, sort, and scan all the emails for the important information,” he said.

But scan, sift, sort or problem-solve, Newal still loves litigation and is happy to be a lawyer. “At this stage in my career,” he said, “things are no different. I still work hard. The last 9 or 10 months I’ve been working at a pace almost as intense as any time in my career.” “I will

“We used to read all the documents. Now we need a system just to manage, sort, and scan all the emails for the important information.”

— *Newal Squyres*

keep doing this as long as someone will hire me.”

The most positive influence in Newal’s life has been his wife of 47 years, Linda, and his children Isaac and Ruby. Isaac was adventuresome enough not to become a lawyer, entering the world of strategic communications and public relations. Ruby practices law in Salt Lake City

where her husband, Jeff Redshaw, is completing a residency in urology at the University of Utah. Granddaughter Sophie Squyres (10 and a half) is amazing and, along with her cousin Elise, Ruby and Jeff’s daughter born a month ago, reminds Newal daily of what’s really important in life.

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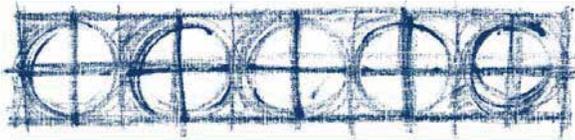
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Access to Justice Idaho Holds Kick-Off Event and Fund Run to Support Crucial Legal Services for Vulnerable Idahoans

Anna Almerico, IVLP Director

The Access to Justice Idaho Campaign has combined the separate fundraising efforts of DisAbility Rights Idaho (DRI), Idaho Legal Aid Services (ILAS), and the Idaho Volunteer Lawyers Program (IVLP) to raise money to serve the critical legal needs of low income Idahoans and persons with disabilities.

The need for the Access to Justice campaign is great. More than 255,000 Idahoans live in poverty. Idaho Supreme Court data indicate that approximately three out of five civil law cases proceeded pro se in 2012. According to the Justice Index, Idaho has .71 legal aid attorneys per 10,000 people in poverty, the 38th worst ratio among the 50 states.¹ In 2013, after 15 years, the Department of Justice discontinued a statewide grant to ILAS and IVLP, resulting in a cut of over \$137,000 to serve victims of domestic violence and sexual assault. Prolonged reductions in interest rates have caused IOLTA grants to drop by over 85% over the last 8 years, constituting a loss of over \$306,430 in legal services.

To celebrate the launch of the second year of the Access to Justice Idaho Campaign, a Kick Off celebration was held on April 29 at the Basque Center in Boise. Many distinguished members of Idaho's legal community attended. Walter Sinclair, Chair of



"The legal profession has been very good to many of us, and this is an opportunity for each of us to give back to our profession by donating to this campaign."

— J. Walter Sinclair

the campaign's Leadership Committee, announced that fundraising was off to a tremendous start, with lead gifts totaling approximately \$80,000. Sinclair addressed the attendees, highlighting the importance of giving back: "The legal profession has been very good to many of us, and this is an opportunity for each of us to give back to our profession by donating to this campaign. Your support helps ensure that the justice system is available and working for everyone in Idaho, and a well-functioning justice system benefits us all."

Sinclair encouraged all Idaho attorneys to do their part to help the campaign reach its \$300,000 fundraising goal.

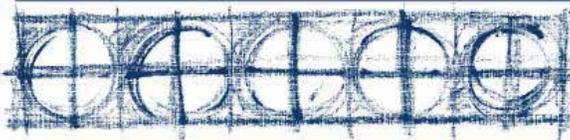
Top lead gift donors were honored at the event. Donors giving at the \$5,000 "Visionaries" level included the American Board of Trial Advocates, the Fourth District Bar Association, Gjording Fouser, Hawley Troxell, Holland & Hart, Parsons Behle & Latimer, and Stoel Rives. These lead gifts are invaluable for providing the momentum the Access to Justice campaign needs as we

move into our second fundraising year.

We also want to thank all of the participants in Access to Justice Idaho's second annual FUND Run/Walk, which was held on May 16. Approximately 120 runners participated and over \$3,500 was raised. The top runners were Michael Bowers, Ian Ashby, John Ashby, Esther Ceja, Jackie Elo, and Julia LaMar. Special thank you to Maureen Bralley for coordinating this event, if you would like to help coordinate the Fund Run in 2016, please contact Maureen at mryanbralley@isb.idaho.gov.

The Access to Justice Idaho campaign's goal is to provide civil legal services by raising funds from Idaho's legal community, businesses, and others who understand the essential role of the judicial system in the lives of so many. Beneficiaries will be the low income and vulnerable Idahoans who would otherwise have no access to legal help. Contributions will enable these organizations to serve Idahoans in domestic violence, custody and divorce cases, guardianships for incapacitated adults and abused/ne-

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glected children, foreclosure prevention, protection of seniors who have been financially exploited, and other critical legal needs.

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

Finally, we would like to thank all of the donors, especially the lead donors for this year's campaign, listed below."

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Walt and Kristen Sinclair
Mary and Don Hobson
Williams Meservy & Lothspeich
ISB Litigation Section

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Bank of Commerce
The Cook-Scholnick Fund
ISB Young Lawyers Section

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Erika Birch
Powers Tolman Farley

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Jeffery Neumyer
Mike McBride
Larry Larson

Each Idaho attorney is invited to support this critical and rewarding campaign.

Michael Hinman
Royce Lee
Terrel Transtrum
ISB Appellate Practice Section

Endnotes

1. www.justiceindex.org

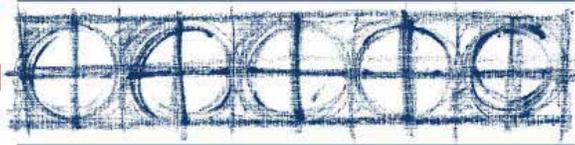
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IVLP Thanks to Kent Gauchay

Molly Mitchell

Kent Gauchay exemplifies what a meaningful and positive impact an attorney can have on his or her community. He has practiced law in Southeast Idaho since 1981 and has given back to his community by consistently providing pro bono services to those in need. IVLP records show that Kent has volunteered to help with 23 guardianship cases since 1992.

Kent's most recent pro bono case involved serving as guardian ad litem for three children who came from a particularly unfortunate living situation. Their father abandoned them and their mother was addicted to drugs. The children were living in Texas with their mother until CPS removed them. Kent described their living situation in Texas as deplorable. The children were severely neglected. For example, one of the children told Kent that



Kent Gauchay

he received a can of peas as a birthday present one year. Kent said the children were also exposed to things that children should not be exposed to and they had essentially been deprived of their childhood.

The children's living situation improved dramatically once CPS removed them from their mother's home and sent them to Idaho to live with their aunt and uncle. With Kent's help, the aunt and uncle were able to establish guardianships over the three children through an uncontested court decision. Kent felt that the aunt and uncle were able to provide them with a good home and were committed to giving the children a better life. The children were excited to have meals on a regular basis. The aunt told Kent that one of the children did not understand that he could ask for seconds at meals be-

Kent felt that the aunt and uncle were able to provide them with a good home and were committed to giving the children a better life.

cause that had never been an option for the children. Kent said it was very rewarding for him to see the children have stability in their life.

Kent said that he would encourage other attorneys to volunteer with guardianship cases because it is a great opportunity to make a positive impact and the experience is very rewarding.

If you are encouraged by Kent's choice to help with the Idaho Volunteer Lawyer's Program, please call (208)334-4510 to contact Kelli Ketlinski.

About the Author

Molly Mitchell is an intern at IVLP and Bar Counsel's Office this summer. She is a third-year law student at the University of Idaho College of Law.

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IDAHO *Access to Justice* ...AND JUSTICE FOR ALL

The Access to Justice FUND Run/Walk: Creating a Legacy to Benefit the *Access to Justice Idaho* Campaign

Maureen Ryan Braley

On a chilly and breezy Saturday in May of this year, over 100 people met at Fort Boise Park to participate in the *Access to Justice* FUND Run/Walk, supporting the *Access to Justice Idaho* Campaign. The Access to Justice FUND Run/Walk is the legacy project I created while participating in the Idaho Academy of Leadership for Lawyers (IALL). IALL is a great program teaching valuable leadership skills and giving lawyers the opportunity to develop positive relationships with future leaders of the Idaho Bar.

IALL tasked us to use those freshly honed leadership skills to create a legacy project benefitting our local community. The Access to Justice FUND Run/Walk idea evolved throughout my 8-month participation in IALL. In one of the first IALL sessions, during an exercise on reciprocity, we were asked to present the other IALL participants with two requests for assistance, one business and one personal. My business request related to my desire to keep up my lawyering skills. I have worked as the Director of Admissions at the Idaho State Bar for over four years and no longer practice law in the traditional sense. I want to keep the legal skills I developed in law school and 7 years of private



Photos by Kyme Graziano

Everyone gets into the spirit during the second annual Fund Run in Boise this spring. The event publicizes efforts to raise money through the Access for Justice Idaho Campaign.

practice fresh. Initially, I asked the IALL participants for input on starting a contract legal work business. Molly O'Leary, one of the IALL steering committee members at the time, suggested I do pro bono work. Her suggestion was like a light bulb being lit in my head and struck me as the perfect balance of keeping up my lawyering skills, working towards meeting my professional pro bono obligations (which, admittedly, had not been met for a number of years), and doing something good for a person in need.

I contacted Mary Hobson, then Director of the Idaho Volunteer Lawyers Program and volunteered to take a family law case. I had never worked on a family law case in my life. But with Mary's help and guidance, the advice I received from Sean Breen, a family law attorney I knew through his volunteer work with the

I contacted Mary Hobson, then Director of the Idaho Volunteer Lawyers Program and volunteered to take a family law case.



ISB (thank you, Sean), and a smart, talented, respectful and patient opposing counsel (thank you, Patrick Geile), I managed to negotiate a settlement of a custody dispute that satisfied my client.

In talking with Mary about my pro bono work, I learned more about the Idaho Volunteer Lawyers Program and the *Access to Justice Idaho* Campaign. That Campaign was organized in 2013 to raise funds to sup-

port the three main providers of free civil legal services for poor and vulnerable Idahoans: DisAbility Rights Idaho, Idaho Legal Aid Services, and the Idaho Volunteer Lawyers Program. These organizations have seen cuts to their funding in recent years, all while the demand for their services has increased. The fact that these organizations banded together to jointly raise funds appealed to my sense of fairness and being a team player, and to my renewed commitment to using my legal skills to help people who cannot afford to hire a lawyer.

At another IALL session, we were asked to draw a picture (lawyers drawing!) of something that inspired us. I immediately envisioned mountains, and drew a picture of mountains with a stream running below. The outdoors is my escape, my refuge, my peaceful place. It is why I live in Idaho. I posted that drawing in my office and looked at it for inspiration. I knew that my IALL legacy project had to be something that got people outside.

The *Access to Justice Idaho* Steering Committee planned a kickoff event for spring 2014 to formally announce the Campaign and acknowledge the major donors up to that point. I had been toying with the idea of planning a 5K as my legacy project. The *Access to Justice Idaho* Campaign seemed like a great cause, and the timing of the kickoff event worked perfectly to announce an early summer outdoors event. I approached the *Access to Justice* Steering Committee with my idea – the *Access to Justice* FUND Run/Walk 5K. Thankfully, they were supportive and enthusiastic about the event.

In 2014, over 100 people registered for the event and we raised over \$2,500. With generous donations from our sponsors to cover the costs, 100% of everyone's \$25 entry fee went directly to the *Access to Justice Idaho* Campaign. People got out-



Runners pull out all the stops in the finishing stretch. The event raised money for agencies that provide legal services.

side, got in some good exercise, met great people, and supported a great cause. I achieved my goals for my legacy project.

This year, 119 people registered for the event and we raised over \$3,700 for the *Access to Justice Idaho* Campaign. I am thrilled about the success of the event in its second year. Thank you to Concordia University School of Law, the ISB Real Property Section, the 4th District Bar Association, the ISB Young Lawyers Section, the ISB Environment and Natural Resource Law Section, M&M Court Reporting and the University of Idaho College of Law for your generous sponsorships. Thank you to the amazing volunteers, without whom the event would not be possible: Stephanie Stoddard, Kyme Graziano, Cassandra Cooper, Nelda Adolf, Kayla Adolf, Mimi Faller, Kelli Ketlinski, Clay Gill, Olivia Gill, Jim Cook, Anna Almerico, Iris Almerico, Opal Almerico, Belinda Brown and Lindsey Peterson.

I am excited about the potential for the *Access to Justice* FUND Run/Walk in years to come. Food trucks, live bands, giant checks for big donations, just like on *The Price is Right*. . . But I cannot do it alone. Another

People got outside, got in some good exercise, met great people, and supported a great cause.

I achieved my goals for my legacy project.



goal of the IALL legacy project was to leave a legacy beyond the person who created it. In other words, one should be able to hand off their legacy project to someone else or some other group. The Campaign is so critically important, and it affects all of us – both as lawyers with a professional obligation to help the less fortunate, and as members of this community. So consider this a call for help! Contact me at mryanbraley@isb.idaho.gov or 208-334-4500 if you want to leave your own legacy by making the 2016 *Access to Justice* FUND Run/Walk event great. Together, we can raise *even more money* and *even more awareness* for the *Access to Justice Idaho* Campaign.

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