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**Official Publication  
of the Idaho State Bar  
Volume 58, No. 2  
February 2015**



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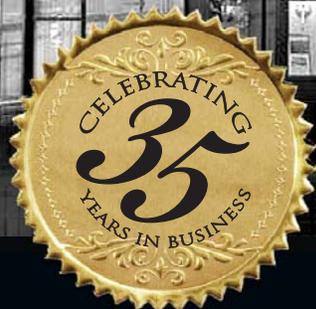
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## On the Cover:

Molly O'Leary sent in this photo named "Hoarfrost Hosanna," which was taken at Bear Basin northwest of McCall during a snowshoeing trip with her husband, Neil. This scene shows the effect of several days of accumulating snowfall followed by sunny skies. She took this photo with a iPhone 6 on December 30, 2014, when "everything was encased in glittering hoarfrost. It truly was a winter wonderland," she said.

## Section Sponsors:

This issue of *The Advocate* is sponsored by the Government and Public Sector Lawyers Section.

## Editors:

Special thanks to the February editorial team: Angela Schaeer Kaufmann, Tenielle Fordyce-Ruff, Brian P. Kane, A. Dean Bennett.

## March/April issue sponsor:

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## Have news 'Of Interest'?

*The Advocate* is pleased to present your announcement of honors, awards, career moves, etc. in the "Of Interest" column. Simply send a short announcement to the Managing Editor: [dblack@isb.idaho.gov](mailto:dblack@isb.idaho.gov) and include a digital photo.



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



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### ADVOCATE STAFF

Dan Black

Managing Editor

[dblack@isb.idaho.gov](mailto:dblack@isb.idaho.gov)

Bob Strauser

Senior Production Editor

Advertising Coordinator

[rstrauser@isb.idaho.gov](mailto:rstrauser@isb.idaho.gov)

Kyme Graziano

Member Services Assistant

LRS Coordinator

[kgraziano@isb.idaho.gov](mailto:kgraziano@isb.idaho.gov)

[www.idaho.gov/isb](http://www.idaho.gov/isb)

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[kluvai@parsonsbehle.com](mailto:kluvai@parsonsbehle.com)

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Kennedy K. Luvai is a registered patent attorney at Parsons Behle & Latimer who concentrates his practice on intellectual property litigation. In his litigation practice, Mr. Luvai draws upon his extensive experience representing local, regional, and national clients in actions involving copyrights, trademark and trade dress, patents, and right of publicity. Mr. Luvai currently serves as chair of the Intellectual Property Law Section of the National Bar Association.

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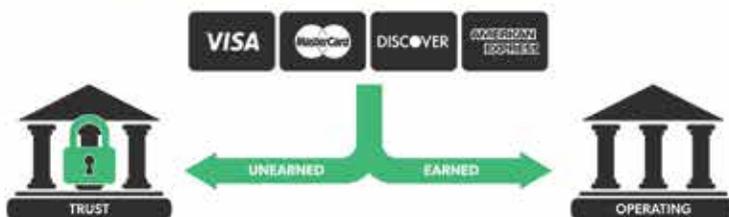


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# Upcoming CLEs



## February

### February 12-14

#### *33rd Annual Bankruptcy Seminar*

Sponsored by the ISB Commercial Law & Bankruptcy Section  
The Riverside Hotel, 2900 Chinden Blvd. – Boise  
13.75 CLE Credits of which 1.25 is Ethics

### February 20

#### *Advanced Commercial Leasing*

Sponsored by the ISB Real Property Section  
Boise Centre, 850 W. Front St. – Boise  
8:15 a.m. (MST)  
7.0 CLE Credits (Pending Approval for 2.0 CE Credits)

### February 26-27

#### *Annual Workers Compensation Seminar*

Sponsored by the ISB Workers Compensation Section  
The Sun Valley Resort, 1 Sun Valley Road – Sun Valley  
6.0 CLE Credits of which 0.5 is Ethics

## March

### March 6-7

#### *Trial Skills Academy*

Sponsored by the ISB Litigation Section  
James A. McClure Federal Building and U.S. Courthouse, 550 W.  
Fort St. – Boise

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### March 18

#### *Handling Your First or Next Mechanics Lien*

Sponsored by the Idaho Law Foundation, Inc.  
Idaho Law Center, 525 W. Jefferson Street - 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).

## March (Continued)

### March 23

#### *Ethics for Transactional Lawyers*

Sponsored by the Idaho Law Foundation, Inc. in partnership with WebCredenza, Inc.  
Teleseminar / Audio Stream  
11:00 a.m. (MDT)  
1.0 Ethics credit

## April

### April 16

#### *Handling Your First or Next Tenant / Landlord Case*

Sponsored by the Idaho Law Foundation, Inc.  
Idaho Law Center, 525 W. Jefferson Street - Boise / Statewide  
Webcast  
9:00 a.m. (MDT)  
2.0 CLE credits – **NAC**

### April 17

#### *Ethics & Digital Communications in the Law Firm*

Sponsored by the Idaho Law Foundation, Inc. in partnership with WebCredenza, Inc.  
Teleseminar / Audio Stream  
11:00 a.m. (MDT)  
1.0 Ethics credit

## Save the Date



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



## Live Seminars

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

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### How's Your Security?

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

**N**o, this is not another tech article on cybersecurity. This column sounds an alert about personal security and asks "what measures do each of us have in place to protect ourselves, staff and other clients in our offices?" Recent events in my town made me reexamine my previous lack of concern for my personal safety in practicing law. An angry party in a divorce case had threatened and stalked opposing counsel and then attempted to torch her house in the night. In my case, while representing a young man on an extension of a civil protection order, his 275 lb., 6' 5" father raised a ruckus in a narrow courthouse hallway. I found myself between them wondering where his anger might be re-directed.

Where is any particular person's breaking point, whether it is an adverse party or even your own client? We usually think of violence in litigation as something brewing in family law cases between the parties. But it doesn't have to be a family case, and it can result in lawyers being killed or injured.

An American Bar Association survey conducted in the mid-1990s



Where was that client's breaking point, and would different treatment of the client have avoided the attack?

concluded that "60 percent of family lawyers had been threatened by opposing parties, and 17 percent have been threatened by their own clients."<sup>1</sup> (The survey noted that most of the focus should be on preventing violence, but also asked, "What is the right ethical path to follow when an attorney fears he or she is representing a dangerous client?"<sup>2</sup>)

In August, 2014, a Texas Bar blog carried a post entitled, "Violence and Attorneys - Time for a Wake-up Call?" It stated that "since 2001, Utah attorney Stephen D. Kelson has closely studied the issue of violence against lawyers in multiple states. His 2006 survey of Utah lawyers revealed that 46 percent of the respondents reported being threatened or physically assaulted at least once, with 42 percent of the incidents occurring at the lawyer's office. Reports from other states point to similar levels of threats or violent acts committed against lawyers, including Idaho (41 percent), Nevada (40 percent), Wyoming (46 percent), Oregon (37

percent), New Mexico (40 percent), Kansas (41 percent), and Arizona (42 percent).<sup>3</sup> With 42 percent of the incidents occurring in the lawyer's office, we should think about the safety of staff and other clients in our offices. Are we doing enough, or do we just think of security as having to clear metal detectors at the courthouse?

Most of us don't practice enough criminal law to face the concerns present when representing a person who has allegedly engaged in extreme violence. A few years ago, an alleged felon captured in Idaho and his public defender disagreed about legal defenses to his extradition. While explaining to the judge that the client needed different counsel, the client/defendant swung his shackled hands into the side of the lawyer's head. What was that lawyer's warning, if any? All he anticipated was asking the judge to assign someone else to the case.

Other examples exist across the country and in various areas of law,

so it clearly is not just a family law or criminal law issue. As reported in the *Idaho Statesman* a number of years ago, a mining dispute between two brothers saw one brother and a mining company officer killed, and the company's lawyer wounded shortly before a deposition was to start.

In Phoenix, a lawyer and CEO were killed when an opposing party opened fire after mediation. The lawyer's practice had focused on business disputes, real estate litigation and malpractice defense - hardly areas of law thought to result in violence.

Two patent attorneys were killed in Chicago when the client thought the lawyer patented his idea for a truck toilet for someone else. The man's calls had been hung up on and he had been turned away from the office.<sup>4</sup> Where was that client's breaking point, and would different

treatment of the client have avoided the attack?

Another case featuring a person's breaking point and client treatment involved a man who gunned down a lawyer with whom he had consulted. The shooter allegedly said the lawyer told him he couldn't help him and had laughed about the issue when the man shared it.<sup>5</sup>

I have no definite answers, but I hope these examples cause us all to pause and think about preventing violence and protecting personal security.

### Endnotes

1. See "Lawyers in Harm's Way," ABA JOURNAL, March 1998 at p. 93.)
2. See [http://www.callawyer.com/clstory.cfm?eid=929081&wteid=929081\\_The\\_Dangerous\\_Client#sthash.MITQqTle.dpuf](http://www.callawyer.com/clstory.cfm?eid=929081&wteid=929081_The_Dangerous_Client#sthash.MITQqTle.dpuf)
3. Posted August 28, 2014 by John G. Browning at <http://blog.texasbar.com/2014/08/>

[articles/texas-bar-journal-1/violence-and-attorneystime-for-a-wakeup-call/](http://articles/texas-bar-journal-1/violence-and-attorneystime-for-a-wakeup-call/)

4. <http://blawgit.com/2006/12/11/two-patent-attorneys-killed-in-chicago/> and <http://www.cbsnews.com/news/shooting-may-be-over-truck-toilet-patent/>

5. <http://www.nydailynews.com/news/crime/kentucky-defense-lawyer-shot-killed-office-gunman-arrested-cops-article-1.1846708>

### About the Author

**Paul B. Rippel** is a member of Hopkins Roden in Idaho Falls, and current President of the Idaho State Bar Board of Commissioners. Mr. Rippel received a BS from the University of Idaho in 1976, MS at NM State University in 1978, and his JD from the University of Idaho in 1981. He has practiced in Idaho Falls since clerking for the Hon. Arnold T. Beebe for a year. His wife Alexis is also a U of I graduate and they have a son and daughter living in Portland, Oregon.

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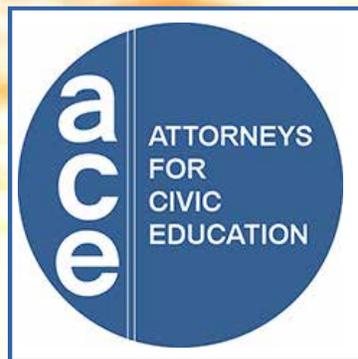
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## College of Law renovates new Idaho Law and Justice Learning Center

MOSCOW – The University of Idaho College of Law is happy to announce that renovations are expected to begin this month on the new Idaho Law and Justice Learning Center, formerly the old Ada County Courthouse, in Boise. The College plans to move its Boise-based law students to the new center in time for fall semester 2015.

The UI College of Law is based in Moscow, but offers a Boise option for second- and third-year law students. Currently, these students take classes in the UI Water Center on Front Street. The new Idaho Law and Justice Learning Center will house the College of Law, the Idaho Supreme Court Library and other Supreme Court offices, and it will provide space for civic education for the general public.

Mark L. Adams, dean of the College of Law, said, “This new building will give our students opportunities to be in the center of government and business and allow them to network with judges and lawyers in a state-of-the-art facility.”

The Center’s first floor will have two classrooms, a clinic and a student study area. The third floor will have faculty offices and two large classrooms. Classrooms in the facility will include new high-definition video communications equipment, and each room will contain multiple high-definition displays. This enhanced technology will greatly improve distance learning and inter-campus communication.

The Supreme Court Library will occupy the second floor. The College of Law manages the court’s library, which currently is located at the Water Center. The Supreme Court also will have space on the fourth floor for support staff. The new facility will enable the Supreme Court to expand its continuing education program for judges, clerks, staff and deputies. The College and Court will



Renovations on the new Idaho Law and Justice Learning Center, formerly the old Ada County Courthouse, will begin this month. The University of Idaho College of Law plans to move its Boise-based law students to the new center in time for fall semester 2015.

also start civil legal education programs for the public, especially high school and college students.

### Idaho Law Foundation launches newsletter

The Idaho Law Foundation’s inaugural newsletter was launched in December, and will be sent three times a year to inform members about the Foundation’s programs, its volunteers and events. ILF operates the Idaho Volunteer Lawyers Program, the Law Related Education Program, Mock Trial, Citizens Law Academy and CLEs. The next newsletter will be in March.

If you have any questions or comments about the newsletter, contact ILF Development Director, Carey Shoufler at [cshoufler@isb.idaho.gov](mailto:cshoufler@isb.idaho.gov)

### Darrington Lecture on Feb. 5 in Boise will feature constitutional expert

BOISE – The second annual Denton Darrington Lecture on Law and Government will be held Thursday, Feb. 5, at the Idaho Supreme Court Main Courtroom from 4 to 5 p.m. This year’s speaker is Jeffrey Rosen, President and CEO of the National

Constitution Center in Philadelphia. The program also will be live via webcast through Idaho Public Television. The lecture series began in 2013 to honor a former Idaho state senator. The annual program is sponsored by the College of Law, Idaho Supreme Court and the Idaho State Bar.

### Upcoming events coming up at U of I College of Law

- Native American Law Conference – “Tribal Stewardship of Plant and Food Sovereignty” March 30, Moscow
- Idaho Law Review Symposium – “Privacy in the Age of Pervasive Surveillance” April 3, Boise
- Sherman J. Bellwood Memorial Lecture – Judge Juan Guzman April 6, Boise, April 7–8, Moscow
- Northwest Institute for Dispute Resolution Basic Family Mediation May 18 – 22, Moscow
- Basic Civil Mediation May 18-22, Boise



# Executive Director's Report

## Idaho State Bar — 2014 Year in Review

Diane K. Minnich  
Executive Director, Idaho State Bar

### Admissions

Over the past several years, the options for admission to the bar have changed. In addition to reciprocal admission, the bar now administers the Unified Bar Exam (UBE), which allows portability of a bar exam score. At the end of 2014, 14 states had adopted the UBE. Since its adoption in Idaho in 2012, we have received 63 UBE applications.

Idaho allows reciprocal admission from 31 jurisdictions. Last year, 44% of the attorneys admitted in Idaho were reciprocal or UBE applicants.

Bar Exam/Reciprocal Admission		
Year	2013	2014
Bar exam applicants	214	190
Pass Rate	78.5%	67.8%
Reciprocal applicants admitted	63	71
UBE applicants admitted	10	34

### Licensing/Membership

ISB Membership		
12/13	12/14	Percent change
5,966	6,080	2%

As of December 2014, the breakdown of bar members is;

- 4,935 active members
- 206 judges
- 30 house counsel members
- 851 inactive members,
- 56 senior members
- 2 emeritus members

### Bar Counsel

In 2014, 16 formal charge cases were opened and 13 cases closed. Of the 13 closed cases, one attorney resigned in lieu of discipline, eight were suspended, two received public

reprimands, and two were placed on disability inactive status.

Discipline/Ethics			
	2013	2014	Percent change
Phone	1,235	1,135	-8%
Grievance opened	369	354	-4%
Grievances closed	396	392	-1%
Complaints opened	57	31	-4.5%
Complaints closed	63	44	-30%
Ethics questions	1,642	1,591	-3%

### Fee Arbitration

There was a slight decrease in fee arbitration cases in 2014, as 43 cases were opened in 2014 as compared to 47 cases opened in 2013.

### Client Assistance Fund

Year	Claims	Total Paid
2013	2	\$20,500
2014	7	\$57,800

There were 17 client assistance fund claims cases opened in 2014 and 17 claims cases closed.

### Lawyer Referral Service (LRS)

	2013	2014	Percent change
Calls	1,920	3,786	97%
Referrals	1,449	1,610	11%

The Lawyer Referral Service Committee submitted a resolution recommending changes to the LRS to improve the quality of the service for attorneys and the public. The resolution was successful. The approved changes to the program will be implemented later this year.

### Annual Meeting

The 2014 Annual Meeting was held at the Shoshone Bannock Hotel in Fort Hall. The program fea-

tured constitutional scholar Jeffrey Rosen. There were also 14 CLE programs, networking opportunities and award presentations. 2014 was the first Annual Meeting held in the Pocatello area. The venue was excellent, as was the attendance.

Annual Meeting			
	2013 CDA	2014 Fort Hall	Percent change
Total Attendees	397	398	0%
Attorneys and Judges	231	261	13%

### Member Services and Communications

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

The Appellate Practice Section was established in 2014, which brings the number of ISB practice sections to 21. Sections continue to offer many opportunities for learning, service and networking.

Each year, we are fortunate to have the time, expertise and resources of hundreds of volunteers, both lawyers and non-lawyers, to support bar programs and services. The Idaho legal community's commitment to improving the profession and serving the public is exceptional — Thank you for another successful year!

# Civility: The Fruit of Civic Education

Emily Kane

**T**he 1941 edition of *Idaho Civics*, a book by Boise High School history teacher Deborah Davis, begins with this sentence: “One of the primary objectives of the public school is the preparation for the duties of citizenship.”<sup>1</sup> Though few would disagree with the enduring relevance of the sentiment, it has lost ground, nationwide and here in Idaho. Educational systems at all levels have de-emphasized civics, and resources for extracurricular activities such as the We the People competition, the National High School Mock Trial Championship, and Project Citizen, have decreased as well.

A joint report of the Stanford University and University of Washington schools of education, released in 2014, identified three dimensions of civic education: knowledge (learning facts and concepts), skills (learning how to participate in government), and values (learning about philosophies underlying our system of governance).<sup>2</sup> The report concludes that civics curricula now tend to focus primarily on imparting knowledge, without adequate instruction in civic skills and values: how – and why – to vote, provide input on legislation, serve on a jury, pay taxes, attend public meetings, or request public documents.

One symptom of this imbalance

may be apparent in the tenor of our political discourse: “The trend in our society is for individuals to avoid controversial encounters by affiliating and interacting primarily with those who share their political perspectives. This is an unhealthy direction for our democracy, causing a decline in tolerance and civility.”<sup>3</sup> In other words, for those who lack an understanding of our rich national heritage of civil discourse and how to engage in it, the alternative is to accept a prepackaged set of political principles without critical thought or dialogue. Citizenship demands more of us.

The similarity in the words “citizenship,” “civics,” and “civility” is not a coincidence; they share a common Latin root. But these concepts are intertwined far beyond their etymology. If we are to be a civil society, we must support the return of a robust civics curriculum in our schools. Attorneys for Civic Education (ACE) is a group of dedicated volunteers who work to do just that. The Government and Public Sector Lawyers Section has designated ACE as the section’s public service focus, and we are pleased to sponsor this edition of *The Advocate*, with articles highlighting a few of the rights, duties, and facets of citizenship that the next generation is exploring through programs championed by ACE.

The Government and Public Sector Lawyers Section meets on the first Thursday of every month, at noon, at



the Law Center. We typically offer a 30-minute CLE course as part of our meeting. I invite you to join us, to learn more about ACE, and to meet those who are working throughout our state in service of Idaho citizens, both present and future.

## Endnotes

1. Deborah Davis, *Idaho Civics*, p. v (1941).
2. Heather Malin, Parissa J. Ballard, Maryam Lucia Attai, Anne Colby, and William Damon, *Youth Civic Development & Education*, Stanford University Center on Adolescence and University of Washington Center for Multicultural Education 9 (2014).
3. *Id.* at 17.

## About the Author

**Emily Kane** is the chair of the *Government and Public Sector Lawyers’ section of the Idaho State Bar and a Deputy City Attorney for the City of Meridian.*



## Government and Public Sector Lawyers

### Chairperson

Emily D. Kane  
Meridian City Attorney’s Office  
33 E. Broadway  
Meridian, ID 83642  
E: ekane@meridiacity.org

### Vice Chairperson

Elizabeth A. Koeckeritz  
Boise City Attorney’s Office  
PO Box 500  
Boise, ID 83701  
E: ekoeckeritz@cityofboise.org

### CLE Coordinator

Emily A. MacMaster  
Office of the Attorney General  
PO Box 83720  
Boise, ID 83720-0010  
E: emily.macmaster@ag.idaho.gov

### Past Chairperson

Cheri J. Ruch  
Idaho Industrial Commission  
PO Box 83720  
Boise, ID 83720-0041  
E: cheri.ruch@iic.idaho.gov

# The Law is Nothing Without Civic Education: Attorneys Can Make a Difference

Lawrence Wasden

Books and ideas are the most effective weapons against intolerance and ignorance.

— Lyndon Baines Johnson

America is at a crossroads in her history. Idaho stands right alongside that crossroads. Although our news has recently been dominated with protests arising out of Ferguson, Missouri, New York City, New York, and Cleveland, Ohio, voter turnout in our most recent election reached all-time lows. This disconnect between the obvious passion of the electorate and actual voter turnout is troubling. Unfortunately, it is not an anomaly.

As Attorney General, I have spent many hours discussing and explaining our system of government to citizens, elected officials, the press, and even attorneys. The need for civic education is most often found within my office with the mixing of law and policy. Many folks cannot separate the question: “Is this a good idea;” from “Is this legal?” Sometimes the answer to both questions is the same — for example — “Should I rob a bank?” Not a good idea, nor is it legal. But many government questions are much more subtle. As the attorney for state government, often I explain the legal ramifications to clients, but leave the policy questions for those same clients to determine. In this manner, the principle of the separation of powers is preserved.

But this crossover also demonstrates the need for civic education

This disconnect between the obvious passion of the electorate and actual voter turnout is troubling.

throughout Idaho and the nation. Currently a group of Idaho attorneys has taken on this challenge through the formation of Attorneys for Civic Education, (“ACE”), a public service project of the Idaho State Bar Government and Public Sector Section. This group has been in existence for a little over a year and acts as a “booster club” for two civic education programs. The first is *We The People*, the second is *Idaho Mock Trial*. Additionally, ACE is helping to raise funds and volunteers for the 2016 National Mock Trial Competition, being held in Boise in May 2016.

A decent and manly examination of the acts of government should not only be tolerated, but encouraged.

— William Henry Harrison

## Idaho *We The People* curriculum and competition

The *We the People* curriculum is designed to supplement upper elementary and older students’ understanding of the American system of constitutional democracy. After

the state competition, the crowning event is a national competition in Washington D.C.

Idaho has performed remarkably well at the national event. In 2014, Blackfoot High School, led by teacher Holly Kartchner, won the Best Unit award, which recognizes the best team effort among those teams not finishing within the top 10. The Blackfoot High School Team has consistently finished in the top half of the nation. Additionally, Orofino High School, led by teacher Pamela Danielson, also attended the 2014 national competition by qualifying as a wild card.

## Idaho High School Mock Trial Competition

The second program that ACE supports is the *Idaho High School Mock Trial Competition*. Through participation in the *Idaho High School Mock Trial Competition*, students from all parts of Idaho are given a hands-on opportunity to examine the legal process and current legal issues, while they develop important critical thinking, research, and presentation skills. Students prepare

a hypothetical legal case. Then, in real courtrooms, before real judges, teams try their cases — from opening statements, through direct and cross examination, to closing arguments. Each team has its own attorneys and witnesses and must be ready to present either side of the case. Teams compete in one of three regional tournaments in late February or early March. The top 12 qualifying teams compete in the state tournament in Boise in late March and the state champion qualifies to compete in the national tournament in May.

Idaho has a tremendous opportunity to capitalize on the attention given to civic education within the coming year. In May 2016, Idaho will host the National Mock Trial Competition. More than 1,000 visitors from across the nation will descend on Boise to try their cases and compete against one another. Idaho has been a participant in the National Competition for 16 years, placing 5<sup>th</sup> in 2012. This is an effort that requires your help. Please volunteer to ensure that this opportunity is a meaningful one for the students involved and represents the very best of Idaho as a host.

**Volunteers Needed for Mock Trial Event**

If you are interested in judging, please contact Mike Fica at Michael.fica@usdoj.gov.

150 non-judge volunteers are needed to make the event go smoothly. These volunteers will do a variety of

functions, and do not need to be attorneys. Please contact Celeste at ck@mcdevitt-miller.com. Please spread the word to others you may know who might be willing to help for a shift or two.

Next in importance to freedom and justice is popular education, without which neither freedom nor justice can be permanently maintained.  
— James A. Garfield

Among the most important virtues of our society is a healthy knowledge of civics. One of the most distressing circumstances for me is when basic constitutional principles such as separation of powers become partisan issues. If we are to continue to flourish as a republic, then we must be able to discuss these issues intelligently. To discuss these issues intelligently, they must find their way into the curriculum at every level of learning. One of the things I look forward to most as Attorney General is greeting classes on field trips to the capital, inviting

them into my office and helping them to understand what the Attorney General does and why it matters to them. I only wish that there were more classes and that I had more time to talk with them.

**About the Author**

**Lawrence Wasden** is Idaho's 32nd Attorney General. He was elected to his fourth term on Nov. 4, 2014, and is the longest serving attorney general in the state's history. He is the current chairman of the Conference of Western Attorneys General and past president of the National Association of Attorneys General. Lawrence Wasden and his wife, Tracey, were married in 1980 and have four children and seven grandchildren.



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# Attorneys for Civic Education: Connecting the Legal Community with Opportunities to Increase Civic Education

Merlyn Clark

In November, we as a nation enjoyed the opportunity to exercise one of the greatest privileges of being a United States citizen: the right to vote. As Americans stood in their local polling places, ballots and black pens, styluses or machines at the ready, they had already faced the usual deluge of public and private discussions and debates about issues and candidates. Voters certainly may have understood the candidates' stance on particular issues. However, what if the ballot contained the following questions:

- Which of the following are among the three branches of government?
  - ✓ Legislative
  - ✓ Law enforcement
  - ✓ Educational
  - ✓ Judicial
  - ✓ Executive
- True or false: The Bill of Rights is found in the Declaration of Independence.
- True or false: Congress may veto judicial decisions with which it disagrees.

While Americans rarely shy away from learning about and debating a candidate and his or her stance on issues of import, they might miss the essential foundation of citizenship: a solid understanding of our system of government and the rights and responsibilities that are part of being a United States citizen.

Unfortunately, with budget cuts and focus in other educational areas, civics education and related activities have received less emphasis than other subject areas. In response, a group of Idaho attorneys who recognized the importance of civics

“[L]ess than one-third of eighth-graders can identify the historical purpose of the Declaration of Independence, and it’s right there in the name.”<sup>3</sup>

— Former U. S. Supreme Court Justice Sandra Day O’Connor, in Boise, 2013

education founded the Attorneys for Civic Education (ACE). The attorneys who are members of ACE have a common vision: “to increase and sustain the opportunities for civics education in Idaho’s schools in order to ensure that Idaho’s citizens will have a solid understanding of the Constitution, the rule of law, and our form of government. Without that knowledge, democracy cannot succeed.”<sup>1</sup>

I am pleased to have the opportunity, through this article, to introduce Idaho attorneys to ACE and its fundraising endeavor, an Hour for Civics.

## Why ACE?

One need only perform a simple Google search to uncover any number of articles and glaring statistics documenting that many American citizens are simply unfamiliar with their own system of government.<sup>2</sup> As former Justice Sandra Day O’Connor said while in Boise in 2013, “[l]ess than one-third of eighth-graders can identify the historical purpose of the Declaration of Independence, and it’s right there in the name.”<sup>3</sup> More recently, a survey showed that one-third of the 1,416 adults surveyed

could not name a single branch of the U.S. government.

Twenty-one percent thought that a 5-4 decision of the United States Supreme Court is returned to Congress for reconsideration.<sup>4</sup>

The attorneys who founded ACE recognized that they have both an opportunity and a responsibility to share their knowledge about civics. Due to our education, experience, and role in society, lawyers are uniquely situated to further the cause of civics education. As attorneys, we enjoy the opportunity to experience all branches and levels of government to one degree or another. Sharing the resulting insight is rewarding.

We also have a responsibility to share their civics knowledge. We are all of aware of the pro bono obligation placed upon Idaho attorneys by the Idaho Rules of Professional Conduct. In addition to legal representation, Rule 6.1 of the Idaho Rules of Professional Conduct provides that a lawyer’s pro bono work may include “participation in activities for improving the law, the legal system or the legal profession.”<sup>5</sup> This is particularly true of government and public sector lawyers and judges – as Comment 5 to Rule 6.1 recognizes:

[c]onstitutional, statutory or regulatory restrictions may prohibit or impede government and public sector lawyers and judges from performing the pro bono services outlined in paragraphs (a)(1) and (2). Accordingly, where those restrictions apply, government and public sector lawyers and judges may fulfill their pro bono responsibility by performing services outlined in paragraph (b).<sup>6</sup>

As the comment acknowledges, government and public sector lawyers and judges face hurdles when it comes to providing “traditional” pro bono services. ACE has therefore partnered with the Idaho State Bar’s Government and Public Sector Lawyers Section, with ACE being a service project of the Section. In developing that relationship, ACE and Section members recognized that the structure and support of the Section is integral to ACE’s success. In turn, ACE will provide Section members with additional opportunities to fulfill their pro bono obligations.

That said, it is important to remember that involvement with ACE is not limited to Section members, or to attorneys who are judges or government/public sector lawyers. Anyone with a desire to ensure that Idaho’s students will have an opportunity for a robust civics education is encouraged to join ACE.

### ACE projects

To fulfill its goal of increasing civics education, ACE is supporting two critical educational programs: We the People and the Idaho Law Foundation’s Mock Trial Competition. Elsewhere in this issue, you can find articles providing greater detail on each of those programs. As you will

learn, attorneys may provide support for those programs in numerous ways: by speaking in schools, judging competitions, mentoring, and providing any other number of support services. That said, I am also pleased to announce an opportunity for attorneys to provide financial support to those programs, through a project described in the next section.

### An hour for civics

ACE’s goal is to strengthen Idaho State Bar members’ commitment to supporting civic education programs in Idaho. To that end, ACE has created a simple, quick, and easy way for attorneys to do just that, called “An Hour for Civics.”<sup>7</sup> The campaign encourages attorneys to donate at least the equivalent of a billable hour to civic education programs that benefit Idaho’s schoolchildren. Law firms and government lawyers are encouraged to pool their resources and make donations in the name of the firm or office. All donations are tax deductible, and all donors will receive recognition in an upcoming edition of *The Advocate* (donation amounts will be kept confidential). To donate, you can visit ACE’s website at <http://www.attorneysforciviceducation.org/>, and click on “Donate An Hour For Civics.”

If a monetary donation is not possible for you, consider donating at least one hour of your time to support a civic education program. More information about how to get involved is also available on the ACE website. Both your time and your money are valuable to Idaho’s schoolchildren. Funding for these programs has been drastically cut over the last several years. Let’s all follow ACE’s lead and show Idaho’s children and educators that civics matter – and that the legal community is here to help.

### Conclusion

As Justice O’Connor aptly stated “the fundamental skills and knowledge of citizenship are not handed down through the gene pool. They must be taught and learned anew by each generation.”<sup>8</sup> The ACE Committee is dedicated to being engaged in that teaching process, through their involvement and support of We The People, the Mock Trial Competition, and civics education in general.

### Endnotes

1. [www.attorneysforciviceducation.org](http://www.attorneysforciviceducation.org)
2. [Cite to September 2013 article]
3. [http://www.mccatchydc.com/2013/09/06/201376\\_retired-justice-sandra-day-oconnor.html?rh=1](http://www.mccatchydc.com/2013/09/06/201376_retired-justice-sandra-day-oconnor.html?rh=1)
4. <http://www.annenbergpublicpolicycenter.org/americans-know-surprisingly-little-about-their-government-survey-finds/>
5. I.R.P.C. 6.1.(b)(3).
6. I.R.P.C. 6.1, cmt. 5.
7. An Hour for Civics is modeled after the Indiana Bar Foundation program of the same name.
8. O’Connor, *supra* Note 1.

### About the Author

**Merlyn Clark** is a partner at Hawley Troxell in Boise. He has more than 50 years of experience managing complex civil litigation in state and federal courts, before administrative agencies and arbitration panels. Mr. Clark has mediated more than 800 disputes involving a broad range of claims and issues and has presided as the sole arbitrator or as a panel member in more than 70 arbitration proceedings. Before joining Hawley Troxell in 1979, Mr. Clark conducted a private practice in Lewiston, Idaho and served as the Nez Perce County Prosecuting Attorney from 1974-76.



# For Government Lawyers: Civic Education is an Avenue to Meaningful Pro Bono Service

Hon. Karen Lansing  
Robert M. Adelson

**G**overnment lawyers share with their counterparts in private practice and corporate offices an obligation to provide *pro bono* services. Rule 6.1 of the Idaho Rules of Professional Conduct suggests that every lawyer “should aspire to render at least fifty (50) hours of *pro bono publico* legal services per year.”<sup>1</sup> The same rule suggests that this responsibility ought to be met, at least in part, by providing *pro bono* legal services to persons of limited means or to charitable, religious, civic, community, governmental, and educational organizations.<sup>2</sup> Another way this obligation may be fulfilled is through “participation in activities for improving the law, the legal system or the legal profession.”<sup>3</sup> As explained in this article, assisting Idaho civic education programs works toward carrying out this aspiration.

Government lawyers may find it challenging to identify ways to satisfy their professional responsibility in a manner that will not conflict with their employment. Lawyers who are employed in the judicial branch, for example, may not engage in the practice of law nor do other work that might require recusal of the lawyer or that lawyer’s supervising judge from their official duties. Similarly, other government lawyers must avoid conflicts of interest between their *pro bono* activities and their official duties or those of their employing agency. They also must not create an appearance that they or the employing agency will perform official services in a biased manner or that the lawyer or agency endorses or opposes a particular viewpoint in matters upon which the agency has not taken an official position. In addition, government lawyers who have spent their careers

focusing on a very specialized and narrow area of the law may find it difficult or even imprudent to represent clients whose needs for legal services are outside the lawyers’ area of expertise. These, and other constraints, may prevent government lawyers from representing clients *pro bono* in any form of litigation, or even from providing *pro bono* legal advice to clients.

These restrictions present no obstacle, however, to government lawyers volunteering service to a civic education program. While Rule 6.1 places priority upon satisfying the *pro bono* obligation through direct legal services to appropriate persons or organizations, for government lawyers who are effectively barred from such service, volunteer assistance to civic education programs provides an alternative way to satisfy the spirit of the obligation for *pro bono publico* service.

Assisting civic education programs is especially critical now because previous funding sources have greatly diminished recently. For example, Interest on Lawyer Trust Accounts (IOLTA) grants to Idaho civic education programs have dropped significantly in recent years because account balances are down sharply.<sup>4</sup> Additionally, in 2010, the U.S. Department of Education eliminated its funding to the Center for Civic Education, which had provided textbooks and professional training to teachers nationwide for the previous 25 years.<sup>5</sup> Since then, schools have been responsible for purchasing the necessary textbooks and covering all travel expenses for statewide and national student competitions.<sup>6</sup>

Civic education programs that can benefit from the volunteer service of lawyers abound. Attorneys for Civic Education (ACE),<sup>7</sup> the committee that sponsors this issue of *The Advocate*, has focused its support

Volunteer assistance to civic education programs provides an alternative way to satisfy the spirit of the obligation for *pro bono publico* service.

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upon two programs that are dedicated to enhancing the civic education of elementary and secondary school students. These programs would be delighted to put Idaho lawyers’ knowledge and talents to use.

The first program is the *Idaho High School Mock Trial Competition*.<sup>8</sup> Students in grades 9-12 learn about the law and the legal system by participating in a simulated trial. Students from all over Idaho are given a hands-on opportunity to examine the legal process and current legal issues while they develop important critical thinking, research, and presentation skills. Students prepare a hypothetical legal case and then in real courtrooms, before real judges, try their cases—from opening statements, through direct and cross-examination, to closing arguments. Each team has its own attorneys and witnesses and must be ready to present either side of the case. There are plenty of opportunities for lawyers to volunteer with the *Idaho High School Mock Trial Competition*, and in May of 2016, the *National State Mock Trial Competition* will be held in Boise. Many volunteers are needed for both the yearly state competition and the national competition in 2016.

The second program is *We the People: The Citizen and the Constitution Program*.<sup>9</sup> In this program, upper elementary and secondary students participate by working in cooperative teams, preparing and presenting statements before a panel of community representatives acting as a congressional committee. Students then answer follow-up questions posed by the committee members. The format provides students an opportunity to demonstrate their knowledge and understanding of constitutional principles. There are also many opportunities for lawyers to volunteer time in the *We the People* program.

There are, of course, a multitude of other ways lawyers can contribute to educating the public about government, the justice system, and the rule of law. Among these are service to the Citizens Law Academies that are coordinated by the Idaho Law Foundation (ILF) in collaboration with district bar associations and the Idaho courts. Lawyers can also assist the Treasure Valley YMCA's Youth in Government program, which brings high school students from around the state to Boise for a mock legislative session and mock supreme court arguments, enabling students to learn by role-playing as elected officials, lawyers, lobbyists, and reporters.

Making presentations in schools, from elementary through high school, is another excellent way to enhance civic education. The ILF's Lawyers in the Classroom project partners lawyers with teachers for classroom presentations. Many organizations have developed curricula and classroom materials that lawyers can use for presentations, including these:

### Idaho Law Foundation

- Lawyers in the Classroom lesson plans and sign-up for lawyers to volunteer: [http://www.isb.idaho.gov/ilf/lre/lre\\_ltc.html](http://www.isb.idaho.gov/ilf/lre/lre_ltc.html).

### American Bar Association

- Resources for presenting an 8+ hour civics and law unit with supporting lesson plans, activities, and resources: [http://www.americanbar.org/groups/civics/civics\\_and\\_law\\_academy.html](http://www.americanbar.org/groups/civics/civics_and_law_academy.html)
- A lesson plan bank for K-12 students: [http://www.americanbar.org/groups/public\\_education/resources/lesson-plans.html](http://www.americanbar.org/groups/public_education/resources/lesson-plans.html)

### Federal Courts

- Discussion starters, videos, and other resources for classroom discussions and role-playing: <http://www.uscourts.gov/education-al-resources.aspx>

### Justice Sandra Day O'Connor's civics nonprofit, iCivics

- Teaching resources including unit and lesson plans: [http://www.americanbar.org/groups/public\\_education/resources/lesson-plans.html](http://www.americanbar.org/groups/public_education/resources/lesson-plans.html)
- Games that teach civics to students as they play: <https://www.icivics.org/games>

Civic education programs increasingly need support from members of the Bar. Lawyers who are constrained from participating in more traditional *pro bono* opportunities should rush to fill the gap by donating time and money to these worthy programs.

### Endnotes

1. Idaho Rules Prof'l Conduct R. 6.1 (2004).
2. *Id.*
3. *Id.* at 6.1(b)(3).
4. <http://www.iolta.org/what-is-iolta/items-interest-rates>.
5. <http://www.edweek.org/tm/articles/2014/09/17/tm-constitution-day.html>; [http://www.huffingtonpost.com/earl-martin-phalen/earmark-ban-would-result-b\\_787354.html](http://www.huffingtonpost.com/earl-martin-phalen/earmark-ban-would-result-b_787354.html); [http://www.mercurynews.com/opinion/ci\\_17646638](http://www.mercurynews.com/opinion/ci_17646638).

6. <http://www.isb.idaho.gov/pdf/advocate/issues/adv13sept.pdf>, p. 34.

7. ACE is a public service project of the Idaho State Bar's Government and Public Lawyer Section. ACE's mission is to educate Idaho Bar members about existing K-12 civic education with volunteers and fundraising.

8. [http://isb.idaho.gov/ilf/lre/mock\\_trial.html](http://isb.idaho.gov/ilf/lre/mock_trial.html).

9. <http://www.civiced.org/donate#form>.

### About the Authors

**Judge Lansing** received a B.A. degree in Political Science from the University of Idaho in 1972 and a Juris Doctorate from the University of Washington in 1978. She served as an assistant city attorney for the City of Boise in 1978 and 1979. She joined the Boise-based law firm of Hawley Troxell Ennis & Hawley in 1979, becoming a partner in 1985. She continued to practice law in that firm until her appointment to the Idaho Court of Appeals in June 1993. She previously has served three terms as Chief Judge of the Court.



**Robert M. Adelson** is a Deputy Attorney General in the Civil Litigation and the Contract and Administrative Law Divisions of the Office of the Attorney General where he focuses on employment and healthcare law. Prior to joining the Office of the Attorney General, Rob enjoyed private practice for ten years in Boise, Idaho and Atlanta, Georgia. The opinions expressed in this article are those of the authors and do not reflect the opinions or position of the Attorney General's Office of the State of Idaho.



# Civic Education, the Rule of Law, and the Judiciary: “A Republic...If You can Keep it”

Don Burnett

**T**his story never grows old. On September 17, 1787, in Philadelphia, citizens gathered outside Independence Hall as word spread that the deliberations of the Constitutional Convention had concluded. Seeing Benjamin Franklin emerge from the building, a woman in the crowd asked him: “[W]hat have we got — a republic or a monarchy?” Without hesitation, Franklin responded, “A republic . . . if you can keep it.”<sup>1</sup>

The framers created a distinctive republic — a *constitutional* republic — in which representative government was combined with the constraint of a written charter. In a single document, the framers addressed two historical abuses of power — the tyranny of the few over the many, and the tyranny of the many over the few. To prevent concentrations of power leading to the tyranny of the few over the many, the charter dispersed power horizontally among three separate (but connected) branches of government, and vertically between the nation and the states. To protect the few from tyranny by the many, the charter, as amended during the ratification process, set forth fundamental rights that could not be infringed or extinguished by majorities of the moment. The result — the Constitution of the United States — was, and still is, a stunning achievement.

## The role of the judiciary

The framers entrusted the task of safeguarding this achievement — of maintaining the dispersion of power

The independence of judges is predicated upon their impartiality and their adherence to the rule of law.

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and preserving the enumeration of rights — to an independent and impartial judiciary. This was the most innovative and unique feature of the Constitution. Alexander Hamilton declared in the Federalist Papers that the independence of judges was “one of the most valuable of the modern improvements in the practice of government. . . . [I]n a republic it is a[n] . . . excellent barrier to the encroachments and oppressions of the representative body.”<sup>2</sup> “[T]he independence of judges,” Hamilton continued, “may be an essential safeguard against the effects of occasional ill humors in the society” and against “injury of the private rights of particular classes of citizens, by unjust and partial laws.”<sup>3</sup> Hamilton also explained that the courts would be obliged to treat as void any statutes contrary to the Constitution, thereby laying the foundation of judicial review.<sup>4</sup> To the question of whether such a judiciary would become too powerful, Hamilton replied that the judges themselves would be subject to the rule of law:

[A] voluminous code of laws is one of the inconveniences necessarily connected with the ad-

vantages of a free government. To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them . . .<sup>5</sup>

Thus, judicial independence, as envisioned by Hamilton and the framers of the Constitution, was not a privilege to decide cases according to a judge’s personal preferences. It was instead a solemnly conferred duty to decide cases impartially, to avoid an “arbitrary discretion,” and to abide by applicable “rules and precedents.” Judicial independence in this sense carried an obligation, echoed in today’s codes of judicial conduct for Idaho’s federal and state judges, to act “without fear or favor. Although judges should be independent, they must comply with the law. . . .”<sup>6</sup> The independence of judges is predicated upon their impartiality and their adherence to the rule of law. These are the anchors that enable them, in the memorable words of Justice Hugo Black, to “stand against any winds that blow. . . .”<sup>7</sup>

## Impartiality and public perception

For more than two centuries, the constitutional imperative of an impartial, independent judiciary has endured, although popular support for it has waxed and waned. After all, the concept is not intuitively grasped by the ordinary citizen who has heard since childhood that “the majority rules.” Nor is it easily accepted by the citizen who views our courts as just another political branch of government — shaped by the same political forces and making the same political decisions that characterize the work of the other two branches.

Exploiting this perception, powerful political and economic interest groups throughout American history have sought to influence the selection of federal and state judges. Today, special interests overtly seek to populate the courts with judges vetted for their viewpoints rather than for their capabilities. The acerbic partisanship of recent federal judicial appointments, coupled with the rising tide of money flowing into the judicial elections of many states, is disturbing evidence that we have entered a waning period of support for judicial impartiality as a core value of our constitutional republic.

If this circumstance were only a phase in a long historical cycle, perhaps we could simply wait for the republican ship to right itself. But there are reasons to doubt that the problem will be self-correcting. Surveys show that many Americans today are ambivalent, even skeptical, about the concept of impartiality. In one illustrative poll, conducted by Syracuse University’s Campbell Public Affairs Institute, nearly 70% of respondents said judges should be shielded from outside pressure

and allowed to make decisions on their own independent reading of the law; but this leaves a very substantial fraction of respondents who did not agree. Nor did most respondents believe our judicial system is living up to its goal of impartiality. Almost 87% said partisanship has at least some influence on judicial decisions, and 42% said it has “a lot” of influence. One commentator opined that the Syracuse survey shows “[e]veryone wants to have a neutral and fair system of dispute resolution and everyone also wants to make sure that his or her own side prevails.”<sup>8</sup>

Public perceptions matter to the health of our republic. Theodore Roosevelt famously observed that the long-term durability of a republic depends upon the “average citizenship of the nation.”<sup>9</sup> If today’s “average citizen” does not accept, or does not understand, the importance of an impartial judiciary, the perceived legitimacy of American courts — and the respect accorded to the courts’ judgments — will (continue to) erode.

Social science literature shows, unsurprisingly, that the greater a citizen’s knowledge of the judicial system (whether acquired through formal education or actual experience such as sitting on a jury), the more favorable is that citizen’s opinion of the courts and of the duty to decide

cases impartially.<sup>10</sup> Most people, however, have limited experience with the courts, and the knowledge they acquire and retain from formal education is — to use report card terminology — “in need of improvement.”

In a survey cited several years ago by the U.S. House of Representatives, more teenagers could name the Three Stooges and the three judges of the “American Idol” television program, than could name the three branches of government.<sup>11</sup> The National Assessment of Educational Progress has reported that only 27% of high school seniors — many of whom are old enough to vote — have scored at the proficiency level or better on recent national civics tests.<sup>12</sup>

A survey conducted by Xavier University’s Center for the Study of the American Dream<sup>13</sup> has revealed that more than one-third of native-born Americans would fail the basic civic literacy test taken by foreign-born persons seeking to become naturalized citizens of the United States. (97.5% of the immigrants reportedly pass the test; of course, they have studied for it!) Notably, on questions relating to the Constitution and to legal and political structures of the American constitutional republic, the native-born Americans did especially poorly:

If today’s “average citizen” does not accept, or does not understand, the importance of an impartial judiciary, the perceived legitimacy of American courts will (continue to) erode.

- 85% did not know the meaning of the “rule of law.”
- 82% could not name “two rights stated in the Declaration of Independence.”
- 77% could not identify even one power of the states under the Constitution.
- 75% could not answer correctly the question, “What does the judiciary branch do?”
- 71% were unable to identify the Constitution as the “supreme law of the land.”
- 62% could not identify “what happened at the Constitutional Convention.”

This, unfortunately, is the current knowledge base of the “average citizen” in our constitutional republic.

### **Civic education about the judiciary and the rule of law**

As lawyers and judges, we have work to do. We cannot leave law-related civic education entirely up to the public school system. Our profession has a responsibility to advance public understanding of the rule of law. As former American Bar Association President Jerome Shestack has written, “The justice system is our trust and our ministry.... [W]e bear the brunt of public dissatisfaction with the justice system’s flaws and deficiencies....” To make that limping legal structure stride upright is the obligation of every lawyer.<sup>14</sup>

Fortunately, Idaho has already taken steps in a positive direction. Our state requires high school students to take five credits of civics instruction including government (two credits), U.S. history (two credits), and economics (one credit).<sup>15</sup> School districts have authority to augment these requirements, and

some have done so. The mandated instruction provides a valuable foundation for future citizenship; it does not, however, address in depth the “average citizen’s” deficit in understanding the role of the judiciary and the rule of law.

To help address this deficit, the Idaho federal courts, the Idaho Supreme Court, and the University of Idaho College of Law are collaboratively planning an institute for Idaho secondary schoolteachers, to be con-

It may also provide a foundation for other law-related civic education programs developed and presented at the forthcoming Idaho Law & Justice Learning Center, a collaborative undertaking of the Idaho Supreme Court and the University of Idaho.

ducted at the United States Courthouse in Boise, during the first week of June, 2015. The institute, taught with a hands-on, workshop-style pedagogy, will utilize as instructors a number of judges, lawyers, and master teachers/facilitators from Idaho high schools and postsecondary institutions. The institute is expected to cover the meaning of the rule of law; distinctive features of the United States Constitution, including the independent and impartial judiciary; the judge’s role as guardian of the

national and state constitutions; the judge’s dual tasks of interpreting and following the law; federal and state appellate justice processes; methods for enhancing public understanding of the judiciary; and current challenges in the administration of justice. Participating schoolteachers will develop lesson plans and materials to take back to their classrooms.

If the institute is well received, it may be offered periodically in the future. It may also provide a foundation for other law-related civic education programs developed and presented at the forthcoming Idaho Law & Justice Learning Center, a collaborative undertaking of the Idaho Supreme Court and the University of Idaho. The Center, to be housed in the historic old Ada County Courthouse on the Capitol Mall in Boise, is expected to begin operation when renovation of the building is complete in the fall of 2015. The Center will put Idaho “on the map” along with other states where law-related civics education programs are offered.<sup>16</sup>

### **The role of the media**

The most powerful “teacher” of lessons in civics, however, is mass media. News stories — whether in print or electronic form — profoundly shape public perceptions of the justice system. Journalists have long shared, at least in spirit, the judiciary’s goals of independence and impartiality. Indeed, the vocabulary used to express these goals is remarkably similar. In 1896, Adolph S. Ochs, founder of the modern *New York Times*, published a declaration of principles including a commitment “to give the news impartially, without fear or favor, regardless of party, sect, or interests involved.”<sup>17</sup>

Today, it is widely accepted that “[t]he basic responsibility of reporters covering governmental institutions is to inform the public of what officials are doing and about official policies and goals.”<sup>18</sup> Regrettably, in reporting the work of the courts, the media generally provide sparse and selective coverage of what “officials [judges] are doing” and even more cursory coverage about “official policies and goals [i.e., court rules, sources of law, and the analytical content of judicial decisions].” The problem manifests itself in numerous ways, a few of which will be briefly mentioned here.

First, news stories typically focus on high-profile or unusual cases, leaving the ordinary administration of justice largely unreported. This may be unavoidable. Journalism is a fast-paced business, focusing on the attention-grabbing events of each day (that’s presumably why the French term “jour” is rooted in “journalism”). Accordingly, the media do not report the safe landings of airplanes, but they do report air crashes. Consumers of such news reports are well aware, however, that nearly all planes land safely, and that crashes are uncommon. Consumers of news about the courts, on the other hand, are usually not so familiar with the routine workings of justice. What they learn from the media about the justice system, in story after story, can be characterized as crash ... crash ... crash!

Second, public perception of the judiciary can be distorted if a high-profile case acquires a theme or “story line” from which the media are reluctant to retreat, even in the face of nonconforming facts. A classic example is trial in the infamous McDonald’s “hot coffee” case, *Liebeck v. McDonald’s*, widely charac-

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terized in the media as an alchemy of a frivolous claim and a runaway jury. The actual facts (third-degree burns, pelvic scarring, substantial hospital and medical costs, hundreds of prior complaints about the scalding temperature at which coffee was handed to drive-in window customers, and the judge’s reduction of the jury verdict) were under-reported;<sup>19</sup> indeed, they were submerged in a sea of sneering commentary. The case was not without genuine controversy, though. It could have provided a civics “teaching moment” on the distinction between compensatory and punitive damages; the legal standards for making each type of award, as set forth in the court’s instructions to the jury; and the scope of a judge’s authority in modifying a jury verdict. Each of these teaching points would have illustrated the rule of law. Instead, the lesson conveyed to the public by mass media was that the civil justice system resembles a lottery.

Third, the focus of media reporting can be misplaced when, as often occurs in constitutional litigation, the court’s task is not to determine who should prevail in a controversy, but rather to determine who should decide. This task illustrates the judiciary’s role in maintaining the horizontal and vertical separation of powers as set forth in the Constitu-

tion. In the well-known “medical marijuana” case, *Gonzales v. Maich*,<sup>20</sup> the Supreme Court held, pursuant to the Commerce Clause and the Supremacy Clause of the United States Constitution, that federal laws governing marijuana as a controlled substance displaced a conflicting state statute (the California Compassionate Use Act). The Court was not tasked with deciding whether “medical marijuana” ought to be compassionately allowed. That was an issue for Congress to decide — or would have been an issue for California, and any other state, to decide if Congress had not acted. Congress, however, had chosen to act. The case thus presented a “teaching moment” in federalism and the rule of law; instead, the Supreme Court was characterized in some media reports as unsympathetic to the idea of compassionate use.<sup>21</sup>

Fourth, when a court is confronted with a case involving a sensitive public issue, some constituency or advocacy group will almost invariably decry the decision as a product of “judicial activism.” The assertion ignores the fact that the judiciary is the one branch of government that usually cannot “decide not to decide.” In contrast to the legislative branch which has vast leeway to decide whether and when to address a public issue, and in contrast to the

executive branch which possesses considerable discretion in promulgating and enforcing administrative regulations, the judiciary must take cases as they are presented and usually must render a public, written decision.<sup>22</sup> A judge may wish he or she had not been handed this task, and at least one of the litigants might wish he or she had not been forced to appear and argue in court; but the case will be decided. Although activism may lurk in some judicial minds, the courts' inability to "decide not to decide" provides a more cogent reason than activism as to why courts are occasionally thrust into sensitive public issues. In such cases, it is especially important that media reports contain the rule of law identified in the judge's decision. Otherwise, the public may be forgiven for assuming that a judge reached out and took a case in order to advance a personal viewpoint.

This problem is exacerbated by "result and reaction" reporting, which describes the outcome of a case and, rather than identifying the rule of law underlying the decision, constructs a narrative of conflicting reactions by the parties or other persons interested in the case. This type of reporting is consistent with a "story model" of journalism. Unfortunately, the narrative makes it appear that the judge "favored" one litigant over another, and the rule of law is further obscured.

These issues in media coverage of the judiciary highlight the importance of law-related civic education focusing on the judiciary and the rule of law. The issues are not products of ill will by the media against the courts; as noted, the media and the courts share a common heritage of devotion to independence and impartiality. Rather, the issues

reflect structural and mission differences between these two venerable institutions, as well as time and resource constraints preventing journalists from taking time to identify and convey the rule of law in judicial decisions, and preventing judges or lawyers and court staff from assisting reporters in this constitutionally vital task.

### A shared commitment

Judges, lawyers, teachers, and journalists should search for ways to collaborate on law-related civic education. The great American innovation — the independent and impartial judiciary — is being tested. Much is at stake. The "average citizen's" understanding of the rule of law, and of the judiciary's distinctive constitutional role, ultimately will determine whether our courts remain standing "against any winds that blow."

This is how we keep our republic.

### Endnotes

1. 11 AM. HIST. REV. 618 (1906); 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, App. A, at 85 (Max Farrand ed. 1937).
2. *The Federalist No. 78*, compiled in THE FEDERALIST PAPERS (Clinton Rossiter, ed., 1961).
3. *Id.* at 469.

4. *Id.* at 465-466.

5. *Id.* at 470.

6. Commentary to Canon 1, *Code of Conduct for United States Judges*, and the *Idaho Code of Judicial Conduct*.

7. *Chambers v. Florida*, 309 U.S. 227, 241 (1940) (unanimous opinion authored by Justice Black).

8. Keith J. Bybee, *U.S. Public Perception of the Judiciary: Mixed Law and Politics*, JURIST ACADEMIC COMMENTARY (April 10, 2011), available online at <http://jurist.org/forum/2011/04/us-public-perception-of-the-judiciary-mixed-law-and-politics>.

9. Theodore Roosevelt, "Citizenship in a Republic," speech delivered at the Sorbonne, Paris, France, April 23, 1910, available online at <http://www.leadershipnow.com/tr-citizenship.html>.

10. See, e.g., Gregory A. Caldeira and Kevin T. McGuire, *What Americans Know about the Courts and Why It Matters*, INSTITUTIONS OF AMERICAN DEMOCRACY: THE JUDICIAL BRANCH 262 (Oxford University Press, 2005).

11. H. Res. 686, September 14, 2009 (calling for increased civic education in high schools). The resolution was adopted unanimously. The same resolution recited that only 46% of young adults passed a test of civic literacy and that persons over age 65 passed by the same percentage.

12. "Most Students Lack Civics Proficiency on NAEP," *Education Week*, May 4, 2011 (updated March 24, 2012), available online at <http://www.edweek.org/ew/articles/2011/05/04/30naep.h30.html>.

13. News release, "Civic Illiteracy: A Threat to the American Dream," Xavier University Center for the Study of the

The issues are not products of ill will by the media against the courts; as noted, the media and the courts share a common heritage of devotion to independence and impartiality.

American Dream, April 26, 2012, available online at <http://xuamericandream.blogspot.com/2012/04/civic-illiteracy-threat-to-American.html>.

14. Jerome Shestack, "President's Message: Defining Our Calling," 83 *American Bar Association Journal* 8 (September, 1997).

15. IDAPA 08.02.03 107.06; see generally, Education Commission of the States, "State Notes: High School Graduation Requirements – Citizenship," available online at <http://mb2.ecs.org/reports/Report.aspx?id=115>.

16. See "Civics Education Resource Guide," National Center for State Courts, available online at <http://ncsc.org/Education-and-Careers/civics-education/Resource-Guide.aspx>

17. *New York Times* Archives, "Without Fear or Favor," published August 19, 1996 (the 100<sup>th</sup> anniversary of Ochs' declaration of principles), available online at <http://www.nytimes.com/1996/08/19/opinion/without-fear-or-favor.html>

18. Martha Joynt Kumar and Alex Jones, *Government and the Press: Issues and Trends*, AMERICAN INSTITUTIONS OF DEMOCRACY: THE PRESS 226, 231 (Oxford

University Press, 2005).

19. See Gerald N. Rosenberg, *The Impact of Courts on American Life*, INSTITUTIONS OF DEMOCRACY: THE JUDICIAL BRANCH 280, 295-296 (Oxford University Press, 2005).

20. 545 U.S. 1 (2005).

21. *E.g.*, "Court Snuffs Medicinal Pot," headline story on Page 1 of the *Arizona Republic*, June 7, 2005.

22. There are of course, exceptions to the duty of a court to decide every case presented. Some cases involve issues that are neither ripe nor justiciable, or that involve parties who lack standing. These exceptions are narrow, however, and they provide the judiciary nothing resembling the wide exits available to the other branches of government.

#### About the Author

**Don Burnett** is Professor of Law and past Interim President at the University of Idaho, where he also served



The great American innovation  
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impartial judiciary —  
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as the law dean. He previously served as a judge of the Idaho Court of Appeals and as president of the Idaho State Bar.

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# In Year 25, Idaho's Public Records Law Gets a Checkup

## By Idaho's Public Records Ombudsman

Cally Younger

**T**he Idaho Public Records Act celebrates its 25<sup>th</sup> birthday this legislative session! You may be surprised that the Idaho Public Records Act did not exist until 1990. Though the Act was amended a few times over the years, it seems serendipitous that Governor Otter would task me with surveying and auditing the public records law and request process this year, with the hopes of significantly improving these laws during this legislative session. This article will briefly discuss the history of the Public Records Act, some suggested improvements, and steps designed to increase transparency under the Act.

### Born from litigation

Following my appointment as Public Records Ombudsman by Governor Otter's Executive Order<sup>1</sup>, one of my first tasks was to research the history and development of the Idaho Public Records Act over the last two-and-a-half decades. According to the interim committee tasked with creating the law in 1989, the 1984 decision in *Dalton v. Idaho Dairy Commission*<sup>2</sup> prompted the need to tackle public records and open government. The Idaho Supreme Court held that public records of a state or local unit of government are open for inspection and copying absent any statutory closure or provision of confidentiality to the contrary. At the time, Idaho's exemptions from disclosure were spread throughout the Idaho Code.

The interim committee met from June through November in

The committee also discussed the idea of creating a public records commission that would act as an arbiter between a requester and an agency when disagreements arose about production of records.

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1989. Back then, there were at least 129 separate sections of Idaho Code providing for confidentiality of records held by state or local units of government. The committee heard testimony from a wide variety of sources, including state and local government representatives, reporters, and private businesses. The committee then drafted an 82-page bill, which was introduced in the 1990 legislative session. The bill outlined what we now consider to be the basics of Idaho Public Records law — the definition of a public record, the procedure for requesting and responding to a public records request, and the creation of a civil penalty if a court determined that records were unlawfully denied to a requester.

The committee also discussed the idea of creating a public records commission that would act as an arbiter between a requester and an agency when disagreements arose about production of records. However, the committee ultimately decided against a commission because they felt it would slow down the process of creating the Idaho Public Records Act. They also were concerned about the difficulty

for people from all around the state driving to one location for a hearing.

A seemingly “no-brainer” type of law today, the Idaho Public Records Act did not get through the 1990 session without controversy. The original bill was amended countless times, at one point even getting split into two separate bills. Some opponents were nervous about the loss of certain confidentiality provisions in then-existing Idaho law.

However, other opponents didn't think the proposed bills went far enough, arguing that the number of exemptions in the bill would render the public records act meaningless. Ultimately, the bill passed both houses and the Idaho Public Records Act was born. The legislature amended the Public Records Act in 1997, 2000, 2004, and 2011. Notably, in 2011, the Idaho Legislature passed an amendment that balanced the ability of agencies to charge reasonable fees for copies and employee time to produce responses with access to the first 100 pages and first two hours of labor for free. Amendments such as this reflect a trend toward more openness within Idaho's Public Records Act.

## Evaluating the effectiveness of the current public records act

Earlier this year, Governor Otter recognized a major flaw in the Idaho Public Records Act. The sole remedy for a requester to contest an agency's decision to deny access to records is to sue the agency. The requester must then take the chance that certain records actually exist and that they do not fall under the exemption cited by the agency. In many cases, the cost and risk outweigh the necessity of the records. Unfortunately, this remedy is effectively a bar to accessing public records and an obstacle to increased government transparency. Governing units can deny records with very little fear of recourse. However, looking closely at the statutes, the Governor determined that an alternative remedy could not be created through an executive order. The statute clearly states, "The *sole* remedy for a person aggrieved by the denial of public records request for disclosure is to institute proceedings in the district court..." (Emphasis added.) So, he decided to take a step back and use the ombudsman position to take a broader look at the Idaho Public Records Act.

The Governor first tasked me with surveying all the executive agency's public records request processes. I developed a questionnaire to send to each agency that would help me understand the issues each agency faces when responding to public records requests. I gave the agencies several months to complete the survey. I was hoping to determine several things from the survey results: the volume of public records requests made in Idaho, which agency received the most and the least, whether agencies

had difficulty responding to requests, whether the same information was frequently requested, and whether an agency had frequent requesters. I wanted to get a full picture of the state of Idaho's public records request process. I also wanted to know how the agencies with the most requests dealt with a large volume of requests and why some agencies received few to no requests.

By September 30, I received responses from every agency. The results were not altogether surprising. Some agencies received thousands of requests per year, while some agencies hadn't received a single request in two years. However, every agency had one thing in common: none of them had been sued over a denial in 2013 or 2014.

The survey responses also showed that there are a lot of differences in each agency's public records procedure, which creates confusion for requesters. Some agencies have clear policies that are easy to access, while some agencies don't have a formal public records request procedure at all. While I was generally pleased with how well all the state agencies handled public records requests, I could see there were a couple small areas that could improve statewide. First, the public records request process needs to be modernized at all levels

of state government. This includes relatively simple updates such as allowing requests to be made through agency websites. Second, agencies should develop clear policies and fee schedules that are easy to find and understand. At the very least, the public should be able to determine how to make a public records request simply by visiting an agency's website.

## A committee to propose amendments

I next assembled a group, modeled after the original effort in 1989, to begin discussing other areas in which we could improve this law during the 2015 legislative session. At the time of completing this article, the group is still determining what our focus will be this session. However, the group agrees that after a series of piecemeal revisions over the last 25 years, the Idaho Public Records Act needs to be tackled head on. Some changes will require legislation.

One of the first changes to be tackled is the assignment of Idaho's Public Records Act and Open Meetings law within their own title and chapter of the Idaho Code. If you have ever used either of these acts, you recall that they are wedged into other sections of the Code. For example, the Public Records Act is placed within the Evidentiary Title

At the very least, the public should be able to determine how to make a public records request simply by visiting an agency's website.

of the Code. In order to assist users and make the law more accessible, the Committee has proposed the creation of a new title of Idaho Code called "Open and Transparent Government," with standalone chapters for the Public Records and Open Meetings laws.

More substantive changes under discussion include clarifying statutes and updating language to reflect changes in technology and adding an alternative remedy prior to filing suit. Despite a thoroughly developed Public Records Manual, many public record statutes are unclear. Further, it is not clear what agencies can charge for electronic records. Currently, agencies can charge for copies even if the response is provided on a disc, thumb drive or email. This practice likely does not reflect actual agency cost. One of our primary goals is to make sure these statutes are as clear as possible so agencies and the public can fully understand the policies, procedures, and cost of making and responding to public records requests.

Other changes can be made by each agency. These include modernizing the request and response process. Agencies are encouraged to create online requests forms that are easy to find on agency websites. I would also like to see

agencies provide more responses electronically. This would cut down the printing and labor costs required to produce public record responses. Agencies should clearly post their policies and fee schedules on their websites. These fee schedules must reflect actual costs which include the use of modern technology.

### Increasing transparency statewide

The responses to the survey helped the group realize that if our goal is transparency, we need to figure out a way to make more information accessible without prompting a formal public records request. For example, if an agency's board or commission meeting minutes are almost always requested, agencies should preemptively make those minutes available to the public on their website.

### Looking to the future

This process started with a singular goal of creating an alternative remedy to contest public record requests denials. However, under Governor Otter's leadership, it has evolved into a more comprehensive undertaking. Taking a step back to review state agency policy allowed the committee to

uncover other areas within Idaho Public Records law that need improvement. I am optimistic that we will meet our goal of increasing transparency in Idaho during this legislative session. Creating the Idaho Public Records Act 25 years ago was an important milestone in Idaho history. This legislative session I hope we can continue to build that legacy by ensuring the Idaho Public Records Act continues to be a useful tool for the public to hold its government accountable.

### Endnotes

1. Executive Order No. 2014-04, issued April 23, 2014.
2. 107 Idaho 6, 684 P.2d 983 (1984).

### About the Author

**Cally Younger** works as the Associate Legal Counsel to Governor C.L. "Butch" Otter. In April 2014, Governor Otter appointed her the Public Records Ombudsman. He tasked her with surveying Idaho's public records request process and developing solutions for increasing transparency in Idaho. She is a 2012 graduate of the University of Idaho College of Law.



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# Idaho's Sunshine Laws and the *Citizen's United* Case: Promoting an Informed Electorate Through Election Campaign Disclosure

Ben Ysursa

One of the most important duties of the Idaho Secretary of State is to serve as chief election officer of the State of Idaho and to ensure that elections and political campaigns are run correctly and fairly.<sup>1</sup> Another safeguard for fair elections is for the Secretary of State to create an informed electorate.

Accurate reporting of both expenditures and contributions by those who participate in campaigns helps the electorate stay informed. Some groups who participate in elections may be misinformed, however, as to their duties under Idaho's campaign disclosure laws, thinking that Idaho's laws don't apply to nonprofit organizations or so-called 501(c)(4) "social welfare" organizations. This article will explain a little about federal disclosure laws, as well as Idaho's "Sunshine" laws.

## What *Citizens United* is, and what it is not

*Citizens United*<sup>2</sup> has been extensively covered in the media since the Supreme Court of the United States issued its decision in 2010. Unfortunately, the case's legal significance has been frequently mischaracterized in the media. As a result, there are many misperceptions about the case and its holdings. Because of the widespread misunderstanding of the case, it is important to review here what this seminal case stands for — and what it doesn't stand for.

In *Citizens United*, the majority of the Supreme Court held three main things:

In the wake of *Citizens United*, outside groups were free to spend unlimited amounts of money to influence elections through independent communications.

(1) the government violates the First Amendment when it restricts political speech on the basis of the type of corporation who is doing the speech;

(2) the federal statute which prohibited corporations from using their treasury funds to endorse or call to vote for or against specific candidates in elections was improper; but

(3) the parts of the federal statute relating to disclaimer and disclosure of contributions and expenditures did not violate the First Amendment.<sup>3</sup>

The Court held that laws that prohibited corporations from spending money to support or oppose political candidates through independent communications are unconstitutional. But it explicitly let stand the provisions of federal law that required political committees who received certain amounts of contributions to file a disclosure statement identifying "who made the expenditure, the amount of the expenditure, the election to which the communication was directed, and the names of certain contributors."<sup>4</sup>

The Supreme Court upheld this disclosure requirement on principled grounds. "The First Amend-

ment protects political speech and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."<sup>5</sup>

In the wake of *Citizens United*, outside groups were free to spend unlimited amounts of money to influence elections through independent communications. This was a way for interested groups to spend more money to influence elections than they had in the past. Although the holding of the case prohibited spending limits, *Citizens United* held that the groups still had to disclose the identity of their contributors.

## Enter 501(c)(4) "social welfare" organizations, stage right

The Internal Revenue Code — under section 501(c)(4) — contains a provision creating a tax-exemption status for nonprofit organizations that operate "exclusively for the promotion of social welfare."<sup>6</sup> These are the so-called "social welfare organizations."

Under the Federal Election Commission, such organizations do not

meet the definition of “political committees” and thus are not required to report the identities of their donors in their FEC filings. For contributors who wish to remain anonymous, this arrangement is very attractive. Unfortunately for the electorate, donor anonymity results in a diminished ability of the people to know who seeks their vote for a candidate or an issue.

In order to keep from having to disclose their donors, the social welfare organizations must operate “exclusively” for the promotion of social welfare, as the U.S. Code says. However, although the Code states that social welfare organizations must operate “exclusively” for the promotion of social welfare, the IRS’s rules are not so limiting.

Treasury Regulation § 1.501(c)(4)–1 states: “An organization is operated *exclusively* for the promotion of social welfare if it is *primarily* engaged in promoting in some way the common good and general welfare of the people of the community.”<sup>7</sup> In other words, the IRS construes the word “exclusively” to mean “primarily.” Thus, many social welfare organizations interpret this to mean that they can spend up to 49% of their money on activities related to campaigns, all the while maintaining anonymity for their donors.

After *Citizens United*, there has been an increase of applications for 501(c)(4) organizations, and the subsequent influx of anonymous campaign donations and expenditures has been widely covered in the media. It seems, then, that many inaccurately conflate the holding in *Citizens United* with the anonymity allowed 501(c)(4) organizations under federal campaign laws.

## Standing in the background — The bright light of Idaho’s “Sunshine” Laws

Forty years ago, the voters of Idaho enacted a series of laws known as the Sunshine Initiative.<sup>8</sup> “The purpose of this act is: . . . (b) to promote openness in government and avoiding secrecy by those giving financial support to state election campaigns and those promoting or opposing legislation . . .” The Sunshine laws provide that “[n]o contribution shall be made and no expenditure shall be incurred, directly or indirectly, in a fictitious name, anonymously, or by one (1) person through an agent, relative or other person in such a manner as to conceal the identity of the source of the contribution.”<sup>10</sup> Idaho law abhors anonymity when it comes to campaign contributions.

To effectively avoid secrecy by those giving financial support to legislation, either by act of the Legislature or by initiative or referendum of the people, the Sunshine Initiative’s definitional section includes “measures,” which are defined as “any proposal, to be voted statewide, submitted to the people for their approval or rejection at an election, including any initiative, referendum, . . . or revision of or amendment to the state constitution.”<sup>11</sup>

Additionally, “political committee” is defined to take into account measures. It means: “(1) Any person specifically designated to support or oppose any candidate or measure; or (2) Any person who receives contributions and makes expenditures in an amount exceeding five hundred dollars (\$500) in any calendar year for the purpose of supporting or opposing one (1) or more candidates or measures.”<sup>12</sup>

Importantly, the term “person” is defined to cover almost any individual or association of individual. “Person” includes individuals, corporations, associations, firms, partnerships, committees, political parties, clubs and other organizations or groups of persons.<sup>13</sup> There is one exception in the definition of political committee for entities that are registered with the Federal Election Commission; such entities “shall not be considered a political committee for purposes of this chapter.”<sup>14</sup>

Otherwise, the ambit of the Idaho law is broad and covers almost every individual or group of individuals.

Finally, a political committee is required to appoint a political treasurer who must keep detailed accounts and within strict deadlines relative to contributions and expenditures.<sup>15</sup> The contributions that must be reported include all contri-

The Sunshine laws prohibit gamesmanship by which nested political committees string together a daisy chain of contributions and expenditures that hide the true contributors.

butions from a person that exceed in aggregate \$50 in a calendar year.<sup>16</sup> Political treasurers must make additional reports in timeframes relative to any election.<sup>17</sup>

The Sunshine laws prohibit gamesmanship by which nested political committees string together a daisy chain of contributions and expenditures that hide the true contributors. It requires the identification of the source of contributions and expenditures: “No contribution shall be made and no expenditure shall be incurred, directly or indirectly, in a fictitious name, anonymously, or by one (1) person through an agent, relative or other person in such a manner as to conceal the identity of the source of the contribution.”<sup>18</sup>

Political committees that comply with the reporting requirements the Sunshine laws vindicate the act’s promotion of openness in government and avoidance of “secrecy by those giving financial support to state election campaigns and those promoting or opposing legislation.”<sup>19</sup>

Political committees that refuse to report as required do just the opposite. They promote secrecy by those giving financial support to state election campaigns and those promoting or opposing legislation and avoid openness in government.

When political committees flout the Sunshine laws, the statute is not toothless. The Secretary of State is charged with enforcement of the Sunshine laws. Among other things, the Secretary of State is to “make investigations with respect to statements filed . . . , and with respect to alleged failures to file any statement . . . , and upon complaint by any person with respect to alleged violations of any part of this act” and to “report suspected violations of law to the appropriate law enforcement

authorities.”<sup>20</sup> Moreover, any citizen of Idaho and the Secretary of State has the right to sue for injunctive relief to enforce the provisions of the Sunshine laws.<sup>21</sup>

**Stage left: *Ysursa v. Education Voters of Idaho, Inc.***

Some in Idaho may think that their 501(c)(4) social welfare organization is exempt from the requirements of Idaho’s campaign disclosure laws. Not true.

Moreover, any citizen of Idaho and the Secretary of State has the right to sue for injunctive relief to enforce the provisions of the Sunshine laws.<sup>21</sup>



The loophole that 501(c)(4) organizations take advantage of in relation to disclosure of their donors in their federal election filings is simply unavailable in Idaho. Idaho’s Sunshine laws do *not* exempt from its definition of “political committee” those groups who are primarily engaged in promoting the common good and general welfare of the people of the community, like the FEC does.

Under Idaho’s Sunshine laws, a “political committee” can be any person specifically designated to support or oppose any candidate or measure, or any person who receives contributions and makes expendi-

tures over \$500 for the purpose of supporting or opposing a candidate or measure.<sup>22</sup> And “person” is broadly defined to include individuals and groups of individuals, including corporations and partnerships.<sup>23</sup> In other words, in Idaho, when it comes to campaign disclosure, there is no blanket exception for nonprofit or eleemosynary organizations.

In *Ysursa v. Education Voters of Idaho, Inc.*, Ada County Case No. CV-OC-2012-19280, an Idaho district court recognized the duty of disclosure in Idaho’s Sunshine laws. In late 2012, a non-profit corporation by the name of “Education Voters of Idaho, Inc.” (Education Voters) filed its Articles of Incorporation with the Office of the Idaho Secretary of State. Its registered office’s post office box and street address was identical to that of another group called “Parents for Education Reform/Debbie Field” (Parents for Education), which both supported and opposed elements in the well-known education reform propositions (commonly known as Propositions 1, 2, and 3) that were on the ballot for the November 2012 election.

Education Voters accepted contributions and made expenditures in excess of \$200,000 (well beyond the statutory limit of \$500) from donors supporting or opposing the ballot measures. It did this by its donation to Parents for Education, who in turn paid nearly the entirety of the contribution to an out-of-state firm to produce campaign materials in the run-up to the election.

The statute requires disclosure of contributions and expenditures made “directly or indirectly.”<sup>24</sup> But Education Voters never filed any campaign finance disclosure forms as a political committee as required by Idaho law, nor did it appoint a political treasurer as required by the law.

After extensive discussions with Education Voters regarding the applicability of Idaho's Sunshine law to 501(c)(4) entities, the Office of the Idaho Secretary of State sued Education Voters in district court seeking injunctive relief to mandate pre-election disclosure.

Education Voters asserted that it was not a "political committee" required to disclose the names and contributions made by its contributors. It contended that it was protected by provisions of both the Idaho and United States Constitutions. Education Voters also specifically requested that the district court declare that it had no duty to disclose under Idaho's Sunshine laws because of its status as a 501(c)(4) social welfare organization.

In an Order Granting Injunctive Relief, Fourth District Judge Mike Wetherell determined that Idaho's Sunshine laws passed constitutional scrutiny. The court determined that the Sunshine laws were not void for vagueness. Also, it determined that Education Voters has constitutional free speech and assembly rights, but that those rights have never been held to be absolute.

Moreover, the court noted that *Citizens United* "did not hold reporting requirements as to disclosure of contributions and spending were unconstitutional. The Supreme Court has specifically held that reporting requirements and disclosure of contributions and expenditures by political organization do not violate the First Amendment."<sup>25</sup>

Quoting *Citizens United*, the district court noted that "[d]isclaimer and disclosure requirements may burden the ability to speak, but they impose no ceiling on campaign-related activities, . . . and do not prevent anyone from speaking, . . ."<sup>26</sup> In

Fourth District Judge Mike Wetherell determined that Idaho's Sunshine laws passed constitutional scrutiny. The court determined that the Sunshine laws were not void for vagueness.

short, *Citizens United* may have invalidated statutory language related to campaign contributions, but it clearly upheld the long line of cases that hold that corporate speech could be regulated through disclosure and disclosure requirements.<sup>27</sup>

Finally, the court noted those Idaho cases where the Idaho Supreme Court held that Article 1, Section 9 of the Idaho Constitution does not create an absolute right of free speech — certain speech is not constitutionally protected.<sup>28</sup> As Judge Wetherell concluded, "the interest in free, fair and honest elections free of fraud and deception and the right of the people to know who seeks their vote for a candidate or an issue is at the heart of the electoral process."<sup>29</sup>

The court issued its order granting the injunctive relief requested and required Education Voters to comply with Idaho's reporting requirements, including appointing a political treasurer and certifying the group to the Office of the Idaho Secretary of State, as well as filing all campaign finance disclosure reports required by Idaho's Sunshine laws.

**Curtain call: The Secretary of State vindicated the citizens' interests in an informed electorate**

In the end, when the Office of the Secretary of State sued for injunctive relief under the Sunshine

laws, it was vindicating not only this Office's interest that the law be followed, but also the interests of every citizen of the State. After all, it was the citizenry itself that created the Sunshine laws and gave the powers of injunctive relief to both citizens and the Secretary of State. The purpose of pre-election disclosure requirements was met, in that the people were informed — before they voted — of the sources of the money being spent for and against the measures. The public interest of "avoiding secrecy by those giving financial support to state election campaigns and those promoting or opposing legislation" under Idaho Code § 67-6601(b) was met.

The lesson learned from both *Citizens United* and *Education Voters* as it pertains to 501(c)(4) organizations in Idaho is perhaps best stated by Judge Wetherell:

The fact that the federal disclosure laws, apparently by omission, create a "loophole" as to reporting requirements for 501(c)(4) entities through which it appears truckloads of millions of dollars drive through, does not bind either the voters of Idaho or their legislature. . . . Clearly under *Citizens United*, no bar under the United States Constitution to reasonable reporting and disclaimer requirements exists as to the Idaho law.<sup>30</sup>

**Endnotes**

1. I.C. § 34-201. To help meet these duties, the website for the Office of the Secretary of State, for example, provides extensive information relating to elections, lobbyists, campaign disclosure, as well as student and teacher civic resources.
2. *Citizens United v. Federal Election Commission*, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010).
3. See generally *Citizens United*, 558 U.S. 310.
4. *Citizens United*, 558 U.S. at 366.
5. *Citizens United*, 558 U.S. at 371.
6. 26 U.S.C. § 501(c)(4).
7. 26 C.F.R. § 1.501(c)(4)-1 (emphasis added).
8. I.C. §§ 67-6601 through 67-6630.
9. I.C. § 67-6601.
10. I.C. § 67-6614.
11. I.C. § 67-6602(m).
12. I.C. § 67-6602(p).
13. I.C. § 67-6602(o).
14. I.C. § 67-6002(p).
15. I.C. § 67-6603(a); § 67-6604(a).

16. I.C. § 67-6610 and § 67-6612.
17. I.C. § 67-6607.
18. I.C. § 67-6614.
19. I.C. § 67-6601.
20. I.C. § 67-6623.
21. I.C. § 67-6626.
22. I.C. § 67-6602(p).
23. I.C. § 67-6602(o).
24. I.C. § 67-6614.
25. Order Granting Injunctive Relief (October 29, 2012), in *Ysursa v. Education Voters of Idaho, Inc., et al*, Ada County Case No. CV-OC-2012-19280, at 9.
26. Order at 13 (internal quotations and citations omitted).
27. Order at 10-11.
28. Order at 13-15.
29. Order at 15.
30. Order at 12.

**About the Author**

*Ben Ysursa served as Idaho 26th Secretary of State from 2003 - 2015. He has been a member of the Idaho*

It was the citizenry itself that created the Sunshine laws and gave the powers of injunctive relief to both citizens and the Secretary of State.

*State Bar since 1974, and has been the recipient of many awards, including most recently the 2014 Dottie & Ed Stimpson Award for Civic Engagement from the City Club of Boise.*



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Joel D. Horton

**Regular Spring Term for 2015**  
*2nd Amendment – 01/09/15*

Boise ..... January 12, 14, 16 and 20  
Boise ..... February 13, 17 and 18  
Boise (Concordia University School of Law--501 W. Front Street) .....  
..... February 20  
Boise ..... March 2  
Boise ..... April 1 and 14  
Coeur d'Alene ..... April 7 and 8  
Lewiston ..... April 9  
Boise ..... May 4, 6 and 8  
Idaho Falls ..... May 12  
Pocatello ..... May 13  
Boise ..... June 1, 3 and 5  
Twin Falls ..... June 9 and 10

By Order of the Court  
Stephen W. Kenyon, Clerk

**NOTE:** The above is the official notice of the 2015 Spring Term for the Supreme Court of the State of Idaho, and should be preserved. A formal notice of the setting of oral argument in each case will be sent to counsel prior to each term.

**Idaho Court of Appeals  
Oral Argument for February 2015**

**Thursday, February 19, 2015 – BOISE**

9:00 a.m. .... Open  
10:30 a.m. *State v. Umphenour* ..... #41497  
1:30 p.m. *Lytle v. Lytle* ..... #42128

**Tuesday, February 24, 2015 – BOISE**

9:00 a.m. *State v. McClure* ..... #41571  
10:30 a.m. *State v. Hopkins* ..... #41824  
1:30 p.m. *Peterson v. State* ..... #41415

**Thursday, February 26, 2015 – BOISE**

9:00 a.m. *Boncz v. State* ..... #41597  
10:30 a.m. *Boswell v. Steele* ..... #41684  
1:30 p.m. *Nelson v. Dept. of Health & Welfare* (Via Telephone) .. #41282

**OFFICIAL NOTICE  
COURT OF APPEALS OF IDAHO**

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**Regular Spring Term for 2015**  
*3rd Amendment – 01/20/15*

Boise ..... January 13, 15 and 22  
Boise ..... February 19, 24 and 26  
Boise ..... March 3 and 5  
Moscow ..... March 16 thru 20  
Boise ..... April 9, 16, 21 and 23  
Boise ..... May 12, 14, 19 and 21  
Boise ..... June 9, 11, 16 and 18

By Order of the Court  
Stephen W. Kenyon, Clerk

**NOTE:** The above is the official notice of the 2015 Spring Term for the Court of Appeals of the State of Idaho, and should be preserved. A formal notice of the setting of oral argument in each case will be sent to counsel prior to each term.

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

**Friday, February 13, 2015 – BOISE**

8:50 a.m. *State v. Eliassen* (Petition for Review) ..... #42486  
10:00 a.m. *Idaho Trans Dept. v. ASCORP* ..... #42018  
11:10 a.m. *Arnold v. City of Stanley* ..... #41600

**Tuesday, February 17, 2015 – BOISE**

8:50 a.m. *Pfenniger v. City of Nampa* ..... #41797  
10:00 a.m. *Mullinix v. Killgore's* ..... #41583  
11:10 a.m. *City of Challis v. Consent Governed Caucus* ..... #41956

**Wednesday, February 18, 2015 – BOISE**

8:50 a.m. *State v. Struhs* (Petition for Review) ..... #42357  
10:00 a.m. .... Open  
11:10 a.m. .... Open

**Friday, February 20, 2015 – BOISE  
(Concordia University)**

8:50 a.m. *Nampa Ed. v. Nampa S.D.* ..... #41454  
10:00 a.m. *Ellmaker v. Tabor* ..... #41846  
11:10 a.m. *Dunlap v. State* ..... #41105

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

**CIVIL APPEALS**

**Arbitration**

1. Whether the district court erred in ruling as a matter of law that Jackson Hop was not entitled to an award of prejudgment interest on its arbitration award on its insurance claim.

*Jackson Hop, LLC v.  
Farm Bureau Mutual Insurance Co.*  
S.Ct. No. 42384  
Supreme Court

**Divorce, custody, and support**

1. Did the district court err in affirming the order requiring Father to pay child support to the children's guardians calculated on Father's gross annual income and the Social Security Survivors benefits the children receive as a consequence of their mother's death?

*Doe I v. Doe (2014-05)*  
S.Ct. No. 41817  
Supreme Court

**Immunity**

1. Under section 9-604(a) of the Idaho Tort Claims Act, does discretionary function immunity shield operational decision makers from liability for negligently or recklessly failing to follow policies and procedures that were developed in response to budget cuts to mental health services?

*Mitchell v. State*  
S.Ct. No. 41882  
Supreme Court

**Insurance**

1. Did the Department err in reducing the insurance reimbursement payment to Cazier?

*Cazier v.  
Idaho Department of Health & Welfare*  
S.Ct. No. 42184  
Court of Appeals

**Medical indigency**

1. Whether the application was untimely filed under the Medical Indigency Act when it was filed 32 days after the date of hospitalization for emergency medical services, including the date of admission to the hospital.

*St. Alphonsus Regional Medical Ctr. v.  
Gooding County*  
S.Ct. No. 42243  
Supreme Court

**New trial**

1. Whether the trial court erred in denying Stibal's motion for directed verdict, JNOV and new trial because there was insufficient evidence to prove a valid, enforceable contract.

*Alexander v. Stibal*  
S.Ct. No. 41604  
Supreme Court

**Post-conviction relief**

1. Whether the court erred in summarily dismissing Quedraogo's petition for post-conviction relief when he provided undisputed evidence that his trial counsel affirmatively misadvised him as to the immigration consequences of his guilty plea.

*Quedraogo v. State*  
S.Ct. No. 41547  
Court of Appeals

**Summary judgment**

1. Did the district court improperly weigh the evidence and assess the credibility of the witnesses?

*Hilliard v. Murphy Land Company, LLC*  
S.Ct. No. 42093  
Supreme Court

**Termination of parental rights**

1. Whether the trial court erred in finding it had jurisdiction to hear this case in light of 25 U.S.C.A. § 1911 and I.C. § 67-5101, pertaining to state jurisdiction in Indian Country.

*Idaho Dept. of Health & Welfare v. John Doe*  
(2014-25)  
S.Ct. No. 42675  
Supreme Court

**CRIMINAL APPEALS**

**Evidence**

1. Whether Williams' conviction was supported by sufficient evidence.

*State v. Williams*  
S.Ct. No. 42102  
Court of Appeals

2. Did the court abuse its discretion in admitting the State's I.R.E. 404(b) evidence by concluding its probative value was not substantially outweighed by the danger of unfair prejudice?

*State v. Patrick Rodriguez*  
S.Ct. No. 41303  
Court of Appeals

3. Did the district court err in affirming the denial of Morin's motion to exclude evidence of the presence of Carboxy-THC, a simple metabolite of THC?

*State v. Morin*  
S.Ct. No. 41832  
Court of Appeals

**Search and seizure –  
suppression of evidence**

1. Whether the district court erred by denying Cabrera's motion to suppress the evidence found during the search incident to arrest and in finding his arrest for obstructing an officer was lawful.

*State v. Cabrera*  
S.Ct. No. 41510  
Court of Appeals

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

**Mediator/Arbitrator  
W. Anthony (Tony) Park**

·36 years, civil litigator  
·Former Idaho Attorney General  
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# Following the Recipe: A Rules Reminder for Motion Practice

Stephen Adams

**W**hen you look at a menu, it often tells you what is in the meal you are ordering, but rarely does it tell you how it is being made. This omission is understandable, as what you are eating often is more important to you than what the chef had to do to make it. However, you can't make a pound cake only knowing what the ingredients are — you also have to know how to properly cream the butter with the sugar. You have to follow the recipe.

The same is true with civil motions. Not only do you have to be able to effectively communicate the substance of the information, you also have to properly file and serve the motion, or you can end up with a motion that fails for not following a basic procedural rule. This article will remind you of some of the most basic rules related to civil motion practice, including timing and what to put in affidavits, in Idaho state courts.

## Timelines for motion practice

Motion timeline rules are important because getting the timing rules wrong can potentially be fatal to your motion. That being said, motion timing rules are easy to overlook or confuse as they are not uniform for every motion. The attached chart outlines three different timelines for fairly common motions:<sup>1</sup>

Note that each of these timelines contains deadlines based on the date of hearing.<sup>5</sup> Those familiar with federal practice are aware that the federal filing timelines are based on the date of filing<sup>6</sup> and that it is the Court who determines whether to set a hearing.<sup>7</sup>

Filing and Service Timelines <sup>2</sup>	General Motions (I.R.C.P. 7(b)(3))	Summary Judgment (I.R.C.P. 56(c))	Fees and Costs (I.R.C.P. 54(d) & (e))
Preliminary issues	None	None	Memo of Costs filed no later than 14 days after entry of judgment I.R.C.P. 54(d)(5) Requests for fees filed at same time I.R.C.P. 54(e)(5)
Motion	<ul style="list-style-type: none"> <li>Filed and served at least 14 days before hearing<sup>4</sup> I.R.C.P.7(b)(3)(A)</li> <li>If no brief is filed with motion, party must give notice (in motion) of intent to submit brief or present oral argument within 14 days of filing motion I.R.C.P. 7(b)(3)(C &amp; D)</li> </ul>	Filed and served at least 28 days before hearing I.R.C.P. 56(c)	<ul style="list-style-type: none"> <li>Objection/Motion to Disallow filed within 14 days of service of memorandum of fees/costs<sup>3</sup> I.R.C.P. 54(b)(6)</li> <li>Motion for Fees either filed at same time as memo of costs or included in memo of costs I.R.C.P. 54(e)(5)</li> </ul>
Supporting Affidavits	Served with motion I.R.C.P. 7(b)(3)(B)	Filed and served at least 28 days before hearing I.R.C.P. 56(c)	Filed at the same time as the motion or included in the memoranda of costs I.R.C.P. 54(d)(5) & 54(e)(5). See also I.R.C.P. 7(b)(3)
Responsive/Objection Memoranda	Filed and served at least 7 days before hearing I.R.C.P. 7(b)(3)(E)	Filed and served at least 14 days before hearing I.R.C.P. 56(c)	Follow general motion timeline
Responsive/Objection Affidavits	Filed and served at least 7 days before hearing I.R.C.P. 7(b)(3)(B)	Filed and served at least 14 days before hearing I.R.C.P. 56(c)	Follow general motion timeline
Reply Briefs	Filed and served at least 2 days before hearing I.R.C.P. 7(b)(3)(E)	Filed and served at least 7 days before hearing I.R.C.P. 56(c)	Follow general motion timeline

In Idaho State Court, either the parties or the Court may set a hearing.<sup>8</sup> Thus, the briefing schedule is not usually set until a hearing is scheduled. Remember, the timelines for fees and costs are a bit different, as the initial steps are based on the date of the judgment. However, once the motion to disallow costs/fees is filed and a hearing is set, the general motion timelines apply to responsive and reply briefs. In particular regard to fees and costs, failure to timely file an objection constitutes a waiver of the objection; thus the timeline for objecting is essential.<sup>9</sup>

Following these rules will solve a majority of the problems attorneys have when it comes to civil motion timing. However, these rules are not the end, as there are other general rules that overlay the specific timelines. The attached chart outlines some of these issues:

Another overlay to timing issue involves service. Rule 5 discusses all the methods of allowed service, including hand delivery, mailing, “facsimile machine process” (i.e. faxing), etc.<sup>13</sup> If a party is represented, serving their attorney is sufficient. Hand de-

livery is effective upon delivery, as is serving by fax.<sup>14</sup>

Serving motion documents by mail, however, involves a confused set of timing rules. Rule 5(b)(C) says that service of motions can be made by, “mailing it to the person’s last known address in which event service is complete upon mailing.” This language indicates that service of a motion document by mail is effective upon service. Rule 6(e)(1) provides:

Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, three (3) days shall be added to the prescribed period.

Based on a reasonable interpretation of these rules, if you have to do something after notice of an event (such as responding to discovery<sup>15</sup> or objecting to a memorandum of costs) the recipient may add three extra days to the response deadline calculation if the notice was mailed. It would not seem to apply to motion deadlines, which are not based on notice, but instead based on hearings dates.

However, such interpretation has been specifically rejected by the Idaho Courts. In *Ponderosa Paint Mfg., Inc. v. Yack*, the Idaho Court of Appeals stated

The Rule 56(c) time frames for service are supplemented by the provision of Rule 6(e)(1) that a party who is served by mail must be allowed an additional three days within which to respond. Thus, when a motion for summary judgment and supporting documenta-

I.C. § 73-109	General timing rule for acts provided by law (exclude first day, include last day unless a holiday, in which case exclude the holiday) <sup>10</sup>
I.C. § 73-108	Holidays enumerated
I.C. § 73-110	Computation of time for obligations maturing on holidays
I.C. § 1-1607	Days on which court may be held
I.R.C.P. 6(a)	Time computation under the rules: <ul style="list-style-type: none"> <li>• Do not count the day the time period starts running.</li> <li>• Do count the last day, unless it is a Saturday, Sunday or holiday. If last day is a Saturday, Sunday, or holiday, the period runs until the end of the next day which is not a Saturday, Sunday, or holiday.<sup>11</sup></li> <li>• If the time period is less than 7 days, Saturdays, Sundays, holidays are excluded from the time calculation.<sup>12</sup></li> </ul>

tion are served by mail, they must be mailed at least 31 days in advance of the hearing.<sup>16</sup>

*Ponderosa Paint* specifically holds that if a motion is served by mail, Rule 6(e)(1) requires that the serving party add three extra days to the time by which the motion must be served. Other cases have upheld this interpretation of Rule 6(e)(1) with regard to both motions for summary judgment and other motions.<sup>17</sup>

These rules are significant because trial courts may strike or disregard any untimely document.<sup>18</sup> As an example, in *Arregui v. Gallegos-Main* (a medical malpractice case), the defendant filed a motion for summary judgment on October 26, 2010, and set the motion for hearing on November 23, 2010.<sup>19</sup> The plaintiff filed and served a responsive brief and affidavit on November 12, 2010, only 11 days before the hearing.<sup>20</sup> The trial court rejected the affidavit as untimely<sup>21</sup> and the Idaho Supreme Court agreed.<sup>22</sup> In part because the affidavit was untimely, the plaintiff lost her case.<sup>23</sup>

Does this mean that any late motion or brief is doomed to be disregarded or stricken by the Court? Not necessarily.

There are competing interests in addressing untimely motions. The purpose of the timing rules, “is to give the opposing party an adequate

and fair opportunity to support its case.”<sup>24</sup> In contrast, courts generally are unwilling to strike an untimely document if it does not create prejudice to the other party.<sup>25</sup> Rule 61 specifically instructs courts to, “disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.” This language is cited in a number of cases related to refusing to strike late motion documents.<sup>26</sup> Further, the rules regarding timing contain clauses allowing them to be modified by the Court, which indicates that timing rules are not set in stone.<sup>27</sup>

What should an attorney take from these rules? Timing rules are of significant importance. First, as *Arregui* showed, cases can be lost if the timing rules are ignored. Second, the rules are not always clear. When in doubt, pick the longest applicable time line to work from. Third, timing rules are not located in one place. It is important to become familiar with the civil rules (and statutes) as a whole in order to ensure all rules are followed. Fourth, failure to abide by the rules, while not wise, is not always fatal. If an emergency happens, the parties should ask for the Court to utilize its discretion to alter motion timelines, or (in a worst case scenario), argue that an untimely document is not prejudicial and is at worst harmless error under Rule 61.<sup>28</sup>

## What should and should not be included in an affidavit

When an affidavit is filed, attorneys should endeavor to follow the applicable civil and evidentiary rules. Both Rule 7(b)(3) and 56 discuss affidavits accompanying motions. However, Rule 56(e) contains special standards for affidavits supporting or opposing summary judgment. Such affidavits, “shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.”<sup>29</sup> Arguably, this mandate could be seen as repeating various rules of evidence.<sup>30</sup> However, there is no similar mandate in Rule 7(b)(3). Does this mean that affidavits supporting non-summary judgment motions may ignore evidentiary rules? Probably not.

Generally, courts have broad discretion in determining whether to consider evidence presented through affidavits.<sup>31</sup> The evidentiary rules, “govern all actions, cases and proceedings in the courts of the State of Idaho and all actions, cases and proceedings to which rules of evidence are applicable.”<sup>32</sup> Therefore affidavits should comply with the rules of evidence even if they do not support a motion for summary judgment. So what does this mean for an attorney preparing an affidavit?

First, make sure that the person for whom the affidavit is prepared has personal knowledge about the subject matter of the affidavit. Second, if documents are attached to the affidavit, make sure there is sufficient foundation and authentication for the documents.

Authentication or identification of documentary evidence is a condition precedent to its admissibility. Pursuant to

First, make sure that the person for whom the affidavit is prepared has personal knowledge about the subject matter of the affidavit.

I.R.E. 901(a), authentication or identification is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. One example of authentication or identification conforming with the requirements of this rule is testimony of a witness with knowledge that a matter is what it is claimed to be.<sup>33</sup>

Third, ensure that all statements of fact in an affidavit are either not hearsay or are subject to a hearsay exception. While an affidavit should strive to follow all evidentiary rules, these three basic rules will save most affidavits.

Under these rules it will rarely be necessary for attorneys to prepare an affidavit for themselves. Attorneys should never take discovery documents from their file and use them as exhibits in their own affidavit. An attorney is not the proper person to testify to the authenticity of documents or facts from the case. Any information that an attorney has about documents or facts usually comes from their client or other parties, and is likely inadmissible hearsay.

Often, the only time the attorney is the right person to make an affidavit to support a motion is when the affidavit has exhibits which were created by or for the attorney (such as

letters to or from opposing counsel, discovery requests and responses, depositions, etc.).

Finally, if an affidavit violates a rule of evidence (or Rule 56(e)), does that mean the affidavit is dead in the water? Not necessarily. Though evidence is important in motions (and particularly in motions for summary judgment<sup>34</sup>), evidentiary issues can be waived.<sup>35</sup> Thus, if an affidavit is riddled with hearsay, the trial Court is fully within its discretion to review the hearsay (even on summary judgment) if the other party does not object.

I personally experienced this in a private injury case I was defending. When searching through the plaintiff’s voluminous medical records, I found a document which indicated that the plaintiff had assigned her claims to another entity. Ignoring my own rules about affidavits, I promptly attached the document to an affidavit and filed a motion for summary judgment to argue that the defendant was not a real party in interest. The case settled shortly thereafter. Even though I wasn’t trying to get away with anything, my summary judgment motion could have gone down in flames because the affidavit was based on a hearsay and unauthenticated document.

So should an attorney move to strike an objectionable affidavit?

That is based on a number of considerations.

For example, if the affidavit contains an evidentiary issue that can easily be corrected, it might not be worth the effort and expense of objecting now just to redo the motion at a later date. However, if an applicable scheduling deadline has passed, moving to strike might have a tactical advantage.

Also, some judges will accept any objection as a basis for reviewing admissibility of evidence, whether written or oral, while other judges require a formal motion to strike be filed in advance.<sup>36</sup> The Supreme Court has stated, “There is no authority in this state that requires a motion to strike or an objection before a trial court may exclude or not consider evidence offered by a party.”<sup>37</sup> Be that as it may, prudence would indicate that best practice would be to submit a written motion objecting to the affidavit, in whatever form the attorney deems best.<sup>38</sup>

### Following all the rules

When preparing a motion, attorneys should make sure to not only follow the civil rules and applicable statutes (including the basic formatting requirements of Rule 10), but also to follow all local rules. Rule 1(c) allows judicial districts to set their own local rules. These local rules must be consistent with the Idaho Rules of Civil Procedure,<sup>39</sup> but otherwise the districts are free to include whatever procedural rules they desire.

Local rules vary from location to location, and include things such as hearing requirements,<sup>40</sup> page limits,<sup>41</sup> location requirements,<sup>42</sup> and format requirements.<sup>43</sup> The local rules may be found at the judicial district websites, or at <http://www.isc.idaho.gov/district-courts>.<sup>44</sup>

### Conclusion

Learning the rules of civil procedure is a career-long process. Rarely does any attorney get everything right the first time around. Hopefully this article will help ensure that fewer deadlines are missed and affidavits are stricken. Remember that ingredients are important, but how you put them together to make the meal is equally, if not more, essential.

### Endnotes

1. This chart is not comprehensive. Other timelines apply to specialized motions.
2. As discussed below, add three days to each of these deadlines if service is done by mail.
3. Note that the rule specifically indicates objections to proposed costs are filed as motions to disallow part or all of the requested costs. This indicates that once an objection/motion to disallow is filed, it follows general motion timeline rules.
4. Note that I.R.C.P. 7(b)(3)(C–D) and (E) could be read to conflict. Rule 7(b)(3)(C–D) require a party, when filing a motion, to request oral argument, or file a memorandum within 14 days. 7(b)(3)(E) requires any brief in support to be filed and served at least 14 days prior to the hearing. If the motion is filed more than 28 days before the hearing, a brief filed 14 days before the hearing could be timely under 7(b)(3)(E), but untimely under 7(b)(3)(C – D).
5. As mentioned above, the general motion timelines only come into play on fees and costs if the parties set it for hearing. However, the preliminary steps are based on the date of the judgment.

Idaho R. Civ. P. 54(d) and (e).

6. See Dist. Idaho Loc. Civ. R. 7.1(b)(3) and (c)(1).

7. See Dist. Idaho Loc. Civ. R. 7.1(d)(1)(A).

8. Idaho R. Civ. P. 6(e)(2) (Court may notice any motion for hearing); Idaho R. Civ. P. 7(b) (discussing that parties file the notice of hearing). Also, local rules affect how hearings are handled. See, e.g. Fourth Jud. Dist. Loc. R. 2.1 (discussing that parties must contact the judge’s clerk to schedule a hearing). Note that it is fairly uncommon for the Court to set a hearing if the parties do not do so.

9. Idaho R. Civ. P. 54(d)(6).

10. Idaho Code § 73-109 and Idaho R. Civ. P. 6(a) are often read together, and usually are not deemed in conflict. See, e.g., *Cather v. Kelso*, 103 Idaho 684, 687-88, 652 P.2d 188, 191-92 (1982); *Young v. Idaho Dept’t of Law Enforcement (Alcohol Beverage Control Div.)*, 123 Idaho 870, 873-74, 853 P.2d 615, 618-19 (Ct. App. 1993). However, when the rules of civil procedure do not apply, Idaho Code § 73-109 controls. See *Page v. McCain Foods, Inc.*, 145 Idaho 302, 311, 179 P.3d 265, 274 (2008).

11. This rule is clear when counting forward to a deadline. However, it is less clear about what to do when counting backward. For example, if a response to a motion (whose deadline is established by counting backward from a hearing date) falls on a Court holiday, is the response due the day before or the day after the holiday? Idaho law does not specifically say what to do under these circumstances. However, prudence dictates that filing earlier would be the best course of action.

12. As an example, if a reply is due two days before a hearing and two days before a hearing is Saturday or Sunday, the reply must be filed and served so that it is received on Thursday or Friday, respec-

Some judges will accept any objection as a basis for reviewing admissibility of evidence, whether written or oral, while other judges require a formal motion to strike be filed in advance.<sup>36</sup>

tively. This rule can result in unexpected consequences. As a second example, if a hearing is on Wednesday, but Tuesday is a Court holiday, then a reply brief is not due on the Monday the week of the hearing, but is instead due the Friday before.

13. Idaho R. Civ. P. 5(b). Note that any other electronic means of service (such as e-mail) is not allowed unless the receiving party has consented to such service in writing. Idaho R. Civ. P. 5(b)(E).

14. Idaho R. Civ. P. 5(b).

15. Discovery deadlines are generally based on service of the discovery requests. See Idaho R. Civ. P. 33(a)(2) (answers to interrogatories due 30 days after service); Idaho R. Civ. P. 34(b)(2) (responses to requests for production due 30 days after service); Idaho R. Civ. P. 36(a) (requests for admission deemed admitted unless denied within 30 days of service).

16. *Ponderosa Paint Mfg., Inc. v. Yack*, 125 Idaho 310, 316, 870 P.2d 663, 669 (Ct. App. 1994) (citations omitted).

17. *Jarman v. Hale*, 112 Idaho 270, 271, 731 P.2d 813, 814 (Ct. App. 1986) (adding extra days when mailing a motion for summary judgment); *Matter of Estate of Keeven*, 126 Idaho 290, 296, 882 P.2d 457, 463 (Ct. App. 1994) (adding extra days when serving a motion by mail); *McClure Eng'g, Inc., v. Channel 5 KIDA*, 143 Idaho 950, 955, 155 P.3d 1189, 1194 (Ct. App. 2006) (affirming the ruling in *Ponderosa Paint Mfg.*).

18. See *Cumis Ins. Soc'y, Inc. v. Massey*, 155 Idaho 942, 946, 318 P.3d 932, 936 (2014) ("This Court reviews a district court's decision to accept an untimely filed affidavit in connection with summary judgment, and a court's decision to relieve a party from a stipulation, for an abuse of discretion."); *Arregui v. Gallegos-Main*, 153 Idaho 801, 805, 291 P.3d 1000, 1004 (2012), reh'g denied (June 7, 2012) (holding that a decision on a motion to strike an untimely document is made in the trial court's discretion).

19. *Arregui* at 803, 291 P.3d at 1002.

20. *Id.*

21. *Id.*

22. *Id.* at 805, 291 P.3d at 1004.

23. In addition to finding that the affidavit was untimely, the Supreme Court found that the affidavit was inadmissible. *Id.* at 806, 291 P.3d at 1005 (2012).

24. *Sun Valley Potatoes, Inc. v. Rosholt*,

*Robertson & Tucker*, 133 Idaho 1, 5, 981 P.2d 236, 240 (1999). *Arregui* cited this rule, but its application in that case is ambiguous – the stricken affidavit was the responsive affidavit, after which no further affidavits are typically allowed by rule. Therefore, it is unclear how the moving party needed additional time to support its case, when it was not allowed to file any further affidavits.

25. See *Ponderosa Paint Mfg., Inc.*, 125 Idaho at 317, 870 P.2d at 670 (late mailed summary judgment motion did not cause prejudice); *McClure Eng'g, Inc., v. Channel 5 KIDA*, 143 Idaho 950, 955, 155 P.3d 1189, 1194 (Ct. App. 2006) (late mailed motion to withdraw did not cause prejudice); *Matter of Estate*

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*of Keeven*, 126 Idaho at 296, 882 P.2d at 463 (motion mailed less than eight days before the hearing did not cause prejudice).

26. See, e.g., *Ponderosa Paint Mfg., Inc.*, 125 Idaho at 317, 870 P.2d at 670; *Matter of Estate of Keeven*, 126 Idaho at 296, 882 P.2d at 463.

27. Idaho R. Civ. P. 6(b) (allowing for enlargement of time on motions based upon excusable neglect); 56(c) (allowing for modifications of the summary judgment timeline by the Court for good cause).

28. It is not recommended that attorneys rely on Idaho R. Civ. P. 61 to file late documents. This is akin to putting your head in an alligator's mouth on the reliance that it won't find you tasty.

29. Idaho R. Civ. P. 56(e).

30. See, e.g. Idaho R. Evid. 602 (witnesses must have personal knowledge), 402 (only relevant evidence is admissible), 702 (expert witness qualifications), and other evidentiary rules such as hearsay.

31. *Foster v. Traul*, 145 Idaho 24, 27, 175 P.3d 186, 189 (2007) (fn. 1) (discretion to strike an affidavit); *Harris, Inc. v. Foxhollow Const. & Trucking, Inc.*, 151 Idaho 761, 770, 264 P.3d 400, 409 (2011) (discretion to admit or exclude evidence).

32. Idaho R. Evid. 101(b). However, there are proceedings where the Rules of Evidence do not apply. See Idaho R. Evid. 101(d – e) and 104

33. *Shea v. Kevic Corp.*, 156 Idaho 540, 328 P.3d 520, 526 (2014) (citations and quotation marks omitted).

34. With motions for summary judgment, courts have an extra role. "Summary judgment proceedings are decided on the basis of admissible evidence." *Shea*, 156 Idaho at 328 P.3d at 524. "The question of admissibility is a threshold question to be answered before applying the liberal construction and reasonable inferences rule to the admissible evidence." *Hecla Min. Co. v. Star-Morning Min. Co.*, 122 Idaho 778, 784, 839 P.2d 1192, 1198 (1992) (citations omitted). In other words, the court is supposed to look at whether affidavits are admissible before it even starts applying the inferences available to the non-moving party.

35. *Camp v. Jiminez*, 107 Idaho 878, 881, 693 P.2d 1080, 1083 (Ct. App. 1984); *Naccarato v. Vill. of Priest River*, 68 Idaho 368, 372, 195 P.2d 370, 373 (1948) ("A party who fails to object to the admission of evidence waives an objection to the subsequent admission of the same or similar evidence."). *Tolmie Farms, Inc. v. J.R. Simplot Co.*, 124 Idaho 613, 617, 862 P.2d 305, 309 (Ct. App. 1992) aff'd in part, rev'd in part, 124 Idaho 607, 862 P.2d 299 (1993) ("[U]nless noncompliance of an affidavit with Rule 56(e) is brought to the lower court's attention by a proper objection and motion to strike, it is waived.").

36. Often, attorneys want a motion to strike to be heard at the same time as the underlying motion. If the motion to strike is filed within the 14 day time limit for general motions, attorneys often file a "Motion to Shorten Time" when they attempt to have Motion to Strike heard the same day as the underlying motion. There is no rule allowing for a "Motion to Shorten Time" specifically. However, the

Court has discretion under Idaho R. Civ. P. 6(b) to alter time limits, even if such rule does not specifically identify such motions as "Motions to Shorten Time."

37. *Hecla Min. Co.*, 122 Idaho at 782-83, 839 P.2d at 1196-97 (stating that "some form of objection is ordinarily necessary," but such objection does not necessarily need to be in the form of a motion to strike).

38. If such motion is filed, it is encouraged that the moving party follow all applicable rules, including local rules. For example, if a party files a Motion to Strike and Motion to Shorten in the Fourth Judicial District, the party also must file a notice of hearing on such motions, or the Court could refrain from hearing the motions. See Fourth Judicial Dist. Loc. R. 2.2.

39. Idaho R. Civ. P. 1(c).

40. See, e.g., Fourth Judicial Dist. Loc. R. 2 (on setting hearings); First Judicial Dist. Loc. R. 2 and 3 (on scheduling); Second Judicial Dist. Loc. R. 9 (hearings over 30 minutes must be set for a time certain).

41. See, e.g., Fourth Judicial Dist. Loc. R. 8.1 (setting page limits on motions, responses, and replies); Sixth Judicial Dist.

Loc. R. 3 (setting page limits on civil and criminal motions).

42. See, e.g., Seventh Judicial Dist. Loc. R. 3 (discussing serving documents on non-resident judges).

43. See, e.g., Third Judicial Dist. Loc. R. 2 (discussing format for requests for trial settings).

44. Last checked Oct. 2, 2014.

### About the Author

*Stephen Adams is a staff attorney in Ada County. He spent eight years as a civil litigator and was an adjunct professor in the Legal Studies Program at Utah Valley University. He considers his greatest achievement (besides getting married and having three daughters) to be the creation of the ideal cheesecake. Seriously, ask anyone who has tried one of his cheesecakes.*



"The question of admissibility is a threshold question to be answered before applying the liberal construction and reasonable inferences rule to the admissible evidence." *Hecla Min. Co. v. Star-Morning Min. Co.*



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# The Motion in Limine: Probing the Potential of this Powerful Tool

Kent A. Higgins

**T**he Latin phrase “*in limine*” suggests the motion in limine may have more uses, perhaps even more appropriate uses, than how it is typically used in most Idaho courts. The motion is familiar to practitioners as a tool to keep a trial from going awry with inappropriate evidence. It calms the advocate’s and the court’s fears of having to “unring” the bell in front of the jurors. But the motion, by its terms, suggests it may have better uses to resolve disputes, reduce litigation costs, and engage the court’s assistance before trial. This article will address these other ways in which the motion may economize litigation, particularly with pretrial rulings on the law. The article also highlights the history of the growing use of the motion in limine.

## Eliminating uncertainty

In limine literally means “at the threshold.” But just before trial, when most motions in limine are filed, is nowhere near the “threshold” of litigation. Perhaps in the days of Abraham Lincoln, when litigants would be in trial within weeks of first retaining counsel, such a motion would still be at the threshold. But in these days, when it sometimes takes years to discovery a case to death, an evidentiary motion just weeks before trial is hardly a motion at the threshold.

Cases go to trial either because litigants disagree about what they can prove or they disagree about what they need to prove. While the motion in limine is used frequently to address what litigants will be allowed to prove, it can be just as valuable to resolve, in the early stages of litigation, what litigants need to prove. As often as not, the conun-

As any good litigator has been taught, or has learned the hard way, a worthy advocate will outline jury instructions at the earliest stages of litigation, to avoid wasting resources.

drum of the case is a disagreement about what law applies or how it applies.

In the appropriate case, a preliminary ruling on how the jury will be instructed on the law could curtail an enormous waste of time and expense.

Just like the evidentiary motions in limine, a pretrial decision on the law:

- makes the trial more predictable;
- allows both sides the chance to brief the important legal issues;
- allow for more careful analysis by the court;
- reduces occasions for error;
- can flush out the opponent’s strategy;
- can eliminate substantive, but misconceived claims; and,
- alerts the court to the key issues, particularly those that may be obstructing out-of-court resolution.

In certain cases, decision of a key legal question can eliminate the need for trial altogether.<sup>11</sup>

## Focusing jury instructions

As any good litigator has been taught, or has learned the hard way, a worthy advocate will outline jury instructions at the earliest stages of litigation, to avoid wasting resources on matters that he or she will not

have to prove. But what if there is uncertainty as to what those jury instructions are likely to be? For example, the Idaho precedent might be, at best, inconclusive, but a *Restatement of the Law* directly on point. The determinative question is whether the court will allow the particular *Restatement* to be embodied in a jury instruction.

Under typical IRCP Rule 51 practice, the court would not decide on the proposed jury instructions until after the evidence is already before the jury. Consider, if instead, a motion in limine was presented to the court, “at the threshold” for a ruling as to whether the *Restatement* would be embodied in a jury instruction. The parties and their attorneys could avoid the needless preparation and assemblage of evidence that may end up as irrelevant, or would only convolute the trial process. The early motion in limine, could resolve, early on, whether the evidence will fit the jury instruction, thus avoiding the potential fracas in the late night jury instruction conference that occurs after the evidence is in. The wisdom to affirm, early-on, which jury instructions will be given is self-evident.

## Suggested by the Supreme Court

One Justice of the Idaho Supreme Court has suggested this approach.

In *Ramco v. H-K Contractors, Inc.*<sup>22</sup>, the Idaho Supreme Court reviewed a contract dispute. The issue at hand was whether or not the agreement of the parties was contained within the four corners of the written contract. In his dissent, Justice Bistline explained that the first matter that should have been addressed was the threshold issue of whether or not the contract was ambiguous. He further suggested that a party should have filed a motion in limine requesting the court to determine whether the contract was ambiguous. Without a preliminary ruling of whether the contract was ambiguous, the parties could spend an inordinate amount of time preparing the case, gathering evidence, exchanging demands, when all might be irrelevant and inadmissible if the four corners of the contract were the sum and substance of all the parties could turn to in supporting their respective positions.

### Federal precedent for in limine motions on the law

The use of the motion in limine in this fashion is not without precedent. Although it is still somewhat infrequent, its use as a preliminary resolution of jury instructions is gaining traction in the federal courts.<sup>33</sup> In the case of *United States v. Adair*<sup>44</sup>, a notable case involving a threat to kill the President of the United States, the government filed two motions in limine. The first affirmatively sought the admission of evidence to show “willfulness,” and the second sought a jury instruction concerning the required showing of willfulness in a threat to assassinate the President.

The court’s decision is not only refreshing because of the court’s appreciation of the “at the threshold” approach to get to the heart of the case, but it is also instructive in how to handle the motion. The court realized that it did not want to be

bound to any particular wording of the proposed jury instruction until it had heard the evidence. But, astutely, the court recognized that the pivotal issue of the case was the appropriate definition of “willfully” under 18 U.S.C. § 87(a). The court said:

The government also asks the court to determine the proper instruction for the charge of threatening the President or Vice-President in violation of 18 U.S.C. § 871(a). However, the court cannot predict what particular jury instruction will be appropriate until the parties have presented their cases at trial. Still, the court is mindful that the issues raised in the government’s motion will affect all phases of the trial from opening statements to closing arguments. Therefore, the court will address the legal issues raised in the government’s motion without deciding on the specific language to be contained in the jury instructions. This opinion does not violate the prohibition against advisory opinions because the definition of an element of a criminal offense is a crucial issue for the parties in preparing for trial. Accordingly, the court grants the government’s motion in limine as to the legal issues raised and outlines the appropriate definition

of “willfully” under 18 U.S.C. § 871(a).<sup>55</sup>

The court’s willingness to give the parties a straight-up ruling on the court’s position on the law is a boon to judicial economy that ought to be heralded by all litigants.

Recently, the Honorable B. Lynn Winmill, Chief Judge of the United States District Court for Idaho addressed a motion in limine for certain jury instructions.<sup>66</sup> Although the court deferred ruling conclusively on any particular jury instructions, the court perceived the crux of the case was a disagreement by the litigants on a fundamental legal issue. The court stated its position on the legal issue, thus providing welcome direction and focus for counsel in preparing for trial.

Several secondary sources propose or endorse a more expansive use of the motion in limine. In 75 Am Jur. 2d. Trial § 43 the author comments:

Because the motion in limine may be utilized not only to preclude prejudicial evidence from being introduced at the trial, but also in other ways to narrow the issues, shorten the trial, and save costs for the litigants, many courts will encourage the use of motions in limine whenever appropriate.

In 3 Pattern Discovery Motor Vehicles § 27:6 the author explains:

1. The **motion in limine** is another tool to be used creatively by counsel:

Without a preliminary ruling of whether the contract was ambiguous, the parties could spend an inordinate amount of time preparing the case, gathering evidence, exchanging demands, when all might be irrelevant and inadmissible...

- (a) the potential subjects are limitless;
- (d) common subject of the motion include:
- (5) establishment of trial procedures for, for example, jury views, courtroom demonstrations, or **preliminary jury instructions**. (emphasis added).

The other alternatives we litigants often use to address the same objectives are usually poor alternatives. We may formulate a creative motion for summary judgment in an attempt to get at the ultimate legal issue. But likely as not, an equally adroit legal opinion will dispose of the summary judgment motion on other grounds, and avoid addressing the legal issue altogether. The litigants remain at a loss to know what law the court will apply. And the costs continue to rise.

### The winds of change are often stormy

The first litigants who attempt motions in limine on jury instruction in the state courts should brace themselves for resistance to change. The same voices that remonstrate for lowering the costs of litigation might be the voices most resistant to embracing unfamiliar methods such as the motion in limine on jury instructions. Historically, instead of embracing the motion in limine's utility, many courts saw only perceived problems. The following quote from an Alabama Supreme Court is typical of the disdain against such novelty when first attempted by pioneering advocates:

[A] trial court [will not] assume the right, in advance of the offering of any evidence, to "instruct" an attorney what evidence he may introduce on the trial of a cause. Such a procedure, in this jurisdiction, finds no support in any of our

adjudged cases. To give judicial sanction to the procedure attempted to be engrafted upon our well understood and long established practice in the trial of cases would be wholly unjustified by, and in violation of, all precedent, and an unwarranted usurpation of judicial power and authority.<sup>77</sup>

The motion in limine on jury instructions is likely to face similar rough sledding in its inaugural attempts. Fortunately, we have moved beyond the reluctance to embrace the motion in limine as to evidentiary issues, and someday a motion in limine to resolve the legal issues through proposed jury instructions may well be adopted as standard. Judges who get the jitters at accepting a motion in limine in this fashion should keep in mind that a ruling on a motion in limine is not the final word. As with evidentiary motions in limine, the court can always change its mind at trial and change jury instructions at the jury instruction conference based on how the trial proceeds.

### Conclusion

The motion in limine to help litigants decide how the law will apply could serve an immeasurable service to our current, expensive, and overcrowded litigation process. Litigation is costly. Unnecessary litigation is foolish. Controlling issues, whether they be evidentiary or legal, should be afforded a means of early resolution. The best time to thwart protracted litigation over a disagreement on the law is — at the threshold.

### Endnotes

1. Montgomery & Nahrstadt (2007). *Beyond the Threshold, For the Defense*, April, p. 10-13, 71.

2. 118 Idaho 108, 794 P.2d 1381 (1990).

3. For example, in *United States v. Rutherford*, 104 F. Supp. 2d 1190 (Neb. 2000), the court reviewed a motion in limine to exclude expert testimony altogether, or, in the alternative, for jury instructions limiting the scope of a handwriting expert's testimony to exclude an opinion on authorship. The court declined to exclude the testimony but granted the motion in limine as to the jury instruction. See also, *United States v. Higdon*, 638 F.3d 233 (3d Cir. 2011) (Motion to have jury instructed on all elements of 18 U.S.C.A. § 922(g)(1), possession of a firearm by a felon); *United States v. Slocum*, 486 F. Supp. 2d 1104 (C.D. Cal, 2007) *aff'd sub nom. United States v. Houston*, 648 F.3d 806 (9th Cir. 2011). (Motions in limine by both gov't and defendant on jury instructions re. duress and self-defense); *United States v. Stapleton*, (Motion to preclude instruction on duress defense); *United States v. Flood*, 2007 WL 1228058 (W.D. Pa. Apr. 25, 2007). (Proposal for instruction regarding a defendant's request for immunity); *United States v. Passaro*, 2006 WL 2349606 (D. Conn. July 26, 2006) (Jury instruction on defendant's intent to repay).

4. 227 F. Supp. 2d 586 (W.D. Va. 2002).

5. *Id.* at 590-1.

6. *Michael T. Hayes v. Correction Corporations of America*, United States District Court for the District of Idaho, case number 1:09-CV-00122-BLW.

7. *Bradford v. Birmingham Electric Co*, 227 Ala. 285 at 287, 149 So. 729 at 730 (1933). Montgomery & Nahrstadt (2007). *Beyond the Threshold, For the Defense*, April, p. 10-13, 71.

### About the Author

**Kent A. Higgins** is a partner of Merrill & Merrill, Chtd. of Pocatello. He is the current President of the Sixth District Bar Association. He served in the Idaho State Legislature. He has practiced in the 9th, 10th and Federal Circuits and United States Supreme Court. He is a graduate of the Brigham Young University Law School.



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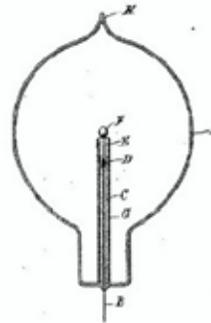
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# Beyond the Basics: Transitive, Intransitive, Ditransitive and Ambitransitive Verbs

Tenielle Fordyce-Ruff

**H**ere's a good laugh: Lori walks into the kitchen and says to Greg, "Make me a sandwich." Greg waives his hands wildly and replies, "Poof! You're a sandwich."

I know you all love a good grammar joke as much as I do. That one's worth at least a chuckle, right?

But, don't you wonder what makes that funny? And don't you wonder if the correct phrasing should be "Please make a sandwich for me"?

The answer lies, of course, in grammar. To understand whether "Make me a sandwich" is a correct way to ask someone to prepare a sandwich, you need to understand a little more about verbs, objects, and object complements.

## Transitive and intransitive verbs

Transitive verbs are verbs that have a thing to receive the action — they take a direct object.

*I wrote a grammar article.*

*I baked a cake.*

*I told a joke.*

Intransitive verbs take only a subject and lack a direct object.

*The grammar guide fell.*

*I cried.*

*You laughed.*

This seems simple enough. So think about this sentence: *I baked for Valentine's Day yesterday.* Is *baked* transitive or intransitive?

If you answered intransitive, you're correct. This sentence lacks direct object; in other words *for Val-*



*entine's Day* aren't receiving the action of *baked*. In grammatical terms, *for Valentine's Day* is a prepositional phrase and *yesterday* is an adverb.

So, what about the sandwich joke? Is *me* a direct object? Is *please make a sandwich for me* the only correct phrasing?

Wait — to answer that one you need to know a little more about verbs.

## Ditransitive verbs

Like transitive verbs, ditransitive verbs take a direct object, but they also take an indirect object. This indirect object always comes before the direct object, and it usually refers to someone who benefits from the action

*Lori gave Greg a break.*

*Send your wife a card.*

*My husband brought me some flowers.*

*Get your assistant to help.*

*Show grammar nerds some love!*

Most English verbs are neither purely transitive/ditransitive or in-

transitive. Instead, they are ambitransitive. They can act as any of these types of verbs depending on context.

*The little boy broke the lamp.*  
(transitive)

*My oven broke yesterday.*  
(intransitive)

*She opened a new shoe store.*  
(transitive)

*The store opened early today.*  
(intransitive)

*I paid the mechanic.*  
(transitive)

*We already paid.*  
(intransitive)

Still, wondering if *make me a sandwich* is correct? The answer is coming, after a little more grammar. . . .

## Resultative verbs

Resultative verbs (sometimes called attributive ditransitive verbs) take a direct object and an object complement — a word or phrase

that describes how the direct object ends up.

*He painted the barn red.*

*The jury found the defendant guilty.*

*Grammar jokes drive me crazy.*

Okay, so here's where it gets interesting. *Make* can be a resultative verb.

*Bad writing makes me mad.*

*My students make me proud.*

But what does that do about the joke? Let's take a moment to switch from verbs to adjectives and nouns — then we will get to the answer.

### Noun phrases as adjectives

So far, the examples of resultative verbs have all used an adjective as the object complement: *red, guilty, crazy, mad, and proud.*

But some resultative verbs can take noun phrases or adjectives as object complements.

*Grammar jokes make me the happiest girl in the world.*

So, what does that do to our question? If *make* can take *me* as an object complement, did Lori, grammatically speaking, ask Greg to turn her into a sandwich?

Now you're ready to learn the answer.

### The answer

Yes — *make me a sandwich* is a grammatically correct way to ask someone to prepare you a meal. It is perfectly correct to use *make* as a ditransitive verb.

The humor in the jokes comes because *make* can function as a ditransitive or a resultative verb.

In the serious version, *make* functions as a ditransitive verb, *sandwich* functions as a direct object, and *me* functions as an indirect object.

In the funny version, *make* functions as a resultative verb, *sandwich* functions as an object complement, and *me* functions as a direct object.

### Conclusion

While *make me a sandwich* is as grammatically correct as *make a sandwich for me*, it still highlights a potential problem. Because many verbs have different functions, they can create ambiguity in our writing.

Thus, check your sentence structure and word choices to make sure your meaning is clear.

All this grammar has made me really hungry. I'm off to make myself a sandwich.

### Sources

- <http://www.linguisticsgirl.com/eng->

The humor in the jokes comes because *make* can function as a ditransitive or a resultative verb.

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### About the Author

**Tenielle Fordyce-Ruff** is an Assistant Professor of Law and the Director of the Legal Research and Writing Program at Concordia University School of Law in Boise. She is also Of Counsel at Fisher Rainey Hudson. You can reach her at [tfordyce@cu-portland.edu](mailto:tfordyce@cu-portland.edu) or <http://cu-portland.edu>



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## Ben Ysursa Looks Back Over his Years as Secretary of State

Dan Black

**A**s 2014 drew to a close, Ben Ysursa pulled a large plastic trash bin alongside his desk to discard files and notes accumulated over his 40 years in state government. Be assured - Idaho's official records, laws and amendments remain secure. Their new caretaker, Lawrence Denney, assumed the position in January. The Secretary of State oversees elections, voting district boundaries, legislative and agency record keeping, and has a vote on the powerful Land Board.

"Looking back, it's bittersweet," Mr. Ysursa said in late December as he prepared to leave the stately second-floor office in the Capitol Building. Having served 12 years in the position, Mr. Ysursa leaves a legacy of open government, easy voter registration and an agency known for its customer service. The office also kept pace with technology and aggressively made public records more accessible online. That might have done more for open government than any other accommodation. "The Internet has been a god-send," Mr. Ysursa said. Residents and the press can access an enormous amount of information without asking staff to locate and duplicate documents.

With his record of public service, a long list of influential friends and his seemingly boundless good humor, Mr. Ysursa could be expected to stay at least partially involved in public life. But before leaving the job, he wouldn't give any hints.

A week after the interview, the Idaho Statesman reported Mr. Ysursa would join its editorial



Photo by Dan Black

Former Secretary of State Ben Ysursa talks about his 40-year-career at the Secretary of State's office. He went straight from law school to a job under former Secretary Pete Cenarrusa.

board. And Gallatin Public Affairs announced in mid-January he had joined the lobbying and communications group.

His status as elder statesman belies the fact that Mr. Ysursa has had only one employer since he graduated from law school - the State of Idaho. He grew up in Boise, attended Bishop Kelly High School, went to Gonzaga University for undergraduate work and received his J.D. from St. Louis University Law School in 1974. Then, straight out of law school he took a position as

in-house legal counsel to longtime Idaho political fixture and Secretary of State Pete Cenarrusa, a man who served for a half century in elected office.

"Pete was great mentor," Mr. Ysursa said. "He boiled down the job into two basic rules. One, never forget who you work for - the public. Two, the Golden Rule really works. No matter what walk of life or background, people deserve respect. Be reasonable and fair."

Mr. Cenarrusa, who died in 2013, was elected Secretary of State seven

times, and instead of running in 2002, he backed chief deputy Ysursa for the job. The office was already well-run as Ysursa made the transition from Chief Deputy to Secretary of State. “We have a blueprint,” he said. “It’s called the law.”

Mr. Ysursa likes talking about taking the high road: “It’s not rocket science. Our guiding principle is to be reasonable and fair. You have to play it right down the middle. Being fair doesn’t happen by chance.”

Deputy Attorney General Brian Kane, who has served Mr. Ysursa as legal counsel for the last decade knows a lot about Mr. Ysursa’s style of leadership. “He IS public service,” Mr. Kane said, “a true keeper of the Republic.”

Kane easily ticks off the numerous attributes that have made Mr. Ysursa’s term so successful. He said the staff has longevity and under the Chief Deputy Tim Hearst, “they have the competence and intelligence” to stay above the fray. He said Mr. Ysursa goes beyond lip service for open government. “We have a saying around here that the best disinfectant is sunshine,” Mr. Kane said. And, “when in doubt - disclose.”

Things weren’t always so sanguine in that office. Mr. Ysursa began his career during the Watergate era, when people demanded more accountability and transparency in state and federal government. Idaho voters passed its “Sunshine Law” as an Initiative in 1970 and after unsuccessful attempts by the Legislature to reverse the law, it went into effect the same year Mr. Ysursa started, 1974.

“Looking back,” Mr. Ysursa said, “it’s been a privilege to be a part of that legacy of fairness. I’m proud of that.”

However, there remains one major disappointment – low voter turnout. “People are not participating,” he said. “No matter how easy we make it, voter participation is not what we would like.”

Mr. Ysursa believes Idaho should do a better job teaching civics to young people. Beyond that, there is little more that state officials can do. “Ultimately, issues and candidates drive turnout,” he said.

No longer in state office, Mr. Ysursa no longer carries those responsibilities on his shoulders. “Unlucky things aren’t run right,” he said.

“It’s been a privilege to be a part of that legacy of fairness. I’m proud of that.”

— Ben Ysursa

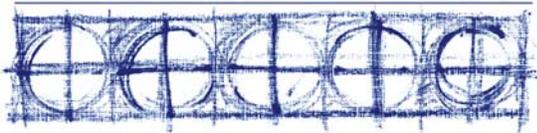
“Then you will be hearing from me.”

#### About the Author

**Dan Black** is the Communications Director for the Idaho State Bar and Managing Editor of *The Advocate*. He is a former newspaper reporter, copy editor and managing editor.



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**Firm celebrates 100 years**

TWIN FALLS – The firm of Stephan, Kvanvig, Stone & Trainor celebrated its 100 years in the Magic Valley last fall with an ice cream social. Pictured at left is Russell G. Kvanig and Jeremy C. Vaughn. The firm has had 15 different names, but for most of the 1900s included a member of the Stephan family. The firm was started in 1914 by Frank L. Stephan, who was the Prosecuting Attorney for Twin Falls County. In the early 1920s Frank prosecuted the “Black Widow,” Lydia Sweet Trueblood. He was later the Idaho Attorney General. Frank Stephan was the father of Robert Stephan, who was practiced there from 1958-1991.

Photo courtesy of Stephan, Kvanvig, Stone & Trainor

**Brian Hansen appointed administrative partner of Holland & Hart’s Boise office**

BOISE – Brian Hansen has been appointed as the administrative partner for Holland & Hart LLP’s Boise office. In that role, he assumes responsibility for overseeing the management and strategic development of the office. The Boise office is one of 15 regional office locations within the Denver-based law firm, has 45 attorneys who provide legal counsel to businesses of all sizes on a full range of legal services.

“I’m honored to take on this role to further the relationships and connections we have developed in this community and beyond, and I look forward to building on the growth and success the Boise office has experienced under Nicole Snyder’s leadership.”

Hansen replaces Nicole Snyder, who has managed the Boise office for the past two years. Snyder has been elected to the firm’s Management Committee and will continue

her corporate law practice in Boise.

“During her tenure in the Boise office, Nicole completed and moved into new office space, grew the office from 37 to 45 attorneys, and made huge strides towards the goal of increasing the firm’s prominence in the Boise market. Her leadership was crucial to each of those results,” said Liz Sharrer, the firm’s Chair.



Brian Hansen

**Professor selected for research in Australia**

MOSCOW – University of Idaho College of Law Professor Barbara Cosens has been selected as a visiting professor with the ANZSOG—Goyder Institute Visiting Professors Program in association with Flinders University in Adelaide, South Australia, for part of the 2015 spring semester.

The competitive selection process required Cosens’ proposal for research in Australia to focus on “addressing the public policy challenges of how finite resource use can effectively be managed through cooperation, with a priority focus on water policy and management.”



Prof. Barbara Cosens

University of Idaho Vice President of Research, Jack McIver, says “Since it is rare for legal scholars to achieve funding through a National Science Foundation synthesis center, this award signifies both the stature of the investigator and the importance of her work.”

Cosens’ proposal to the ANZSOG-Goyder Institute built on a project she co-chairs with Lance Gunderson of Emory University, Social-Ecological System Resilience, Climate Change and Adaptive Water Governance, part of a series of

workshops from the National Socio-Environmental Synthesis Center at the University of Maryland—an NSF-funded synthesis center.

Follow Professor Cosens' adventures down under on her blog at the Law Community Blog: "Water Down Under" posts.

**Moffatt Thomas welcomes its newest partners, David K. Penrod and Blake G. Swenson**

POCATELLO – Idaho law firm Moffatt Thomas welcomes its newest partners David K. Penrod and Blake G. Swenson, to the firm's Pocatello office.

Mr. Penrod and Mr. Swenson, who each have more than a decade of experience practicing law in Idaho, join Moffatt Thomas from their Pocatello litigation and family law firm, Penrod Swenson PLLC. They will be working with the existing Moffatt Thomas team on all aspects of business law and litigation, including bankruptcy and creditors' rights, healthcare law, insurance defense, real estate and land use, construction law, water law and estate planning.

David Penrod graduated from Boise State University in 1999 and earned his J.D. degree from the University of Idaho in 2001. He clerked for the Honorable William H. Woodland, District Judge, Pocatello. Mr. Penrod has been a resident of Pocatello, Idaho, for the majority of his life. He takes great pride in his community and has made it his duty to serve beyond his role as a practicing attorney.



David Penrod

Blake Swenson graduated from Utah State University earning degrees in both Political Science and Philosophy in 1999. In 2002, he earned his J. D. degree from the University of Idaho. Upon graduation from law school, he clerked for the Honorable Charles Hosack of Idaho's First Judicial District in Coeur d'Alene. Blake is a member of numerous professional organizations, including the Idaho State Bar Litigation and Family law sections, Utah State Bar Association, the Portneuf Inns of Court and Sixth District Bar Association.



Blake Swenson

**Pro bono work inspires donation**

BOISE – John Sincky and Abbie Thomson have made a donation to the Idaho Volunteer Lawyers Program to benefit special education and disabled children. They wrote that the donation was in appreciation of some pro bono work done by Char Quade, C.K. Quade Law. Char helped a relative of the donors who is disabled.



Char Quade

**Migliuri honored in list**

TWIN FALLS – Patricia Migliuri, of Nicholson Migliuri Rodriguez, PLLC in Twin Falls was recently honored as one of "Idaho's 40 Under 40," a list of influential young professionals compiled by the Idaho Business Review. Aside from her law

practice, Patricia is a member of the board of directors for the local Inns of Court, and presently serves as its President. Patricia is also a member of the Jerome Chapter of Optimist International.



Patricia Migliuri

**University of Idaho hires law professor**

MOSCOW – The University of Idaho College of Law welcomes Law Professor Katherine A. MacFarlane who will start in the next academic year. MacFarlane comes from the Louisiana State University Paul M. Hebert School of Law in Baton Rouge, Louisiana.

MacFarlane earned her J.D. from Loyola Law School Los Angeles and her BA from Northwestern University. During law school, she served as Chief Articles Editor of the Loyola Law Review and received a Dean's Service Award for her community service. She will teach Civil Procedure and Constitutional Law I.

MacFarlane clerked for the Honorable Frederick J. Martone of the U.S. District Court for the District of Arizona and for the Honorable Arthur Alarcón of the United States Court of Appeals for the Ninth Circuit. Professor MacFarlane practiced commercial litigation with Quinn Emanuel Urquhart & Sullivan. Immediately preceding her appointment at LSU Law, MacFarlane was an Assistant Corporation Counsel in the New York City Law Department's Special Federal Litigation Division.



Prof. Katherine A. MacFarlane

## OF INTEREST



Damaris G. Fisher



Cece Gassner



S.C. Danielle Quade



Nicole Snyder



Erin J. Wynne

### Attorneys honored as Women of the Year

BOISE – Five Idaho attorneys were recently named by the Idaho Business Review as its 2015 Women of the Year. The entire list of 50 women will be honored at a dinner and awards gala 5:30 to 9 p.m. on Feb. 26 at the Riverside Hotel and their stories will be told in a dedicated magazine published with the Idaho Business Review Feb. 27. For tickets go to the IBR website: <https://www.regonline.com/WOY2015>.

The attorneys are:

- Damaris G. Fisher, senior assistant general counsel, Micron Technology Inc., Boise
- Cece Gassner, counsel, Perkins Coie LLP, Boise
- S.C. Danielle Quade, partner, Hawley Troxell, Coeur d'Alene
- Nicole Snyder, attorney, administrative partner, Holland & Hart LLP, Boise
- Erin J. Wynne, attorney, Wynne Law PLLC, Boise.

### University of Idaho students honored

MOSCOW – The University of Idaho recently recognized four students with the 2014 Alumni Award for Excellence. This award is presented to students who have achieved outstanding academic success, demonstrated high levels of career and professional preparation, as well as campus and community leadership and involvement. The honorees included KC Harding, Shea Line, Jack Relf and Alayne Randall.

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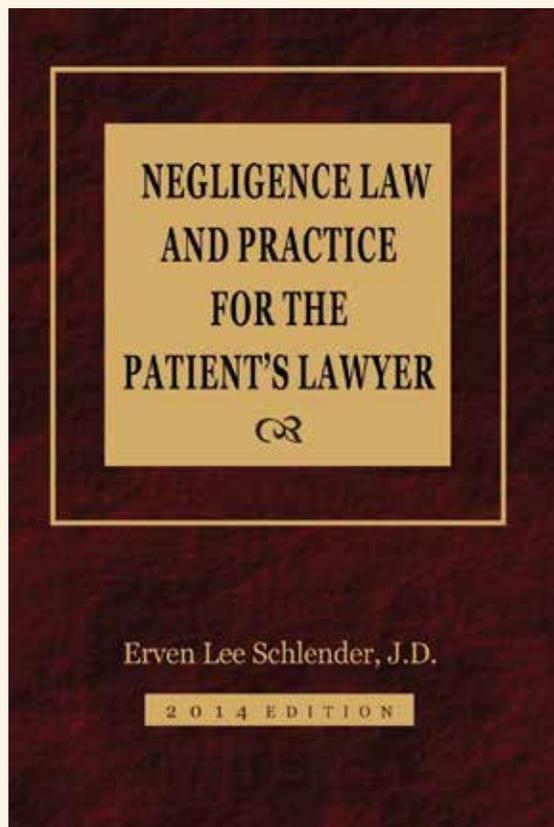
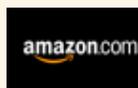
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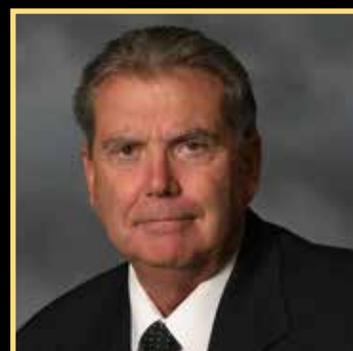
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Idaho Supreme Court Justice (Ret.)  
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*E. Lee Schlender is a member of the Idaho and Washington Bars; certified as a specialist in medical malpractice law by the American Board of Professional Liability Attorneys and in civil law ; National Board of Trial Advocacy. Publications include “ Medical Negligence for the Plaintiff’s Lawyer” isbn 0-9711450-0-8, 228 pages 2001. He presently serves on the CLE board of the Washington State Bar Association.”*



## IN MEMORIAM

### Hon. Watt Edmund Prather 1928 - 2014

Judge Prather died on Dec. 19, 2014 in Meridian. He was born Oct. 12, 1925, in Gooding to Frances Fern and Van Benton Prather. He grew up on a farm and in 1941 was named Idaho 4H State Champion in livestock production.

He graduated from Gooding High School at age 16 and enrolled at the University of Idaho. In February of 1943 he enlisted in the United States Navy Air Corp.

He was sent to Shanghai and China and was made a Communications Officer. His unit transported Army vehicles for Generalissimo Chiang Kai-Shek down river as he retreated before the forces of Mao Zedong.

After he returned to the United States from World War II Watt enrolled at the University of Idaho College of Law, graduating in 1949 fulfilling a lifelong dream to become a lawyer. In December 1948 he married Margaret McNamara of Great Falls Montana and had four children: Van, Ryan, Cory, and Marla. After graduation he entered practice with Hardy Lyons and later with Peter B. Wilson in Bonners Ferry. That partnership lasted until he was appointed to District Judge in Coeur d'Alene, Idaho. He also served as City Attorney for Bonners Ferry and County Attorney for Boundary County.

In 1950 he purchased the controlling interest in Boundary Abstract Company LTD which he honed and managed until June of 1966. In addition, he operated a cattle ranch near the Canadian Border. In 1960 Governor Robert E. Smylie appointed him State Senator of Boundary County. He was thereafter elected to serve terms in 1961 and 1963.

In December of 1965 Governor Smylie appointed him as District Judge for the First Judicial District. He served as Judge until he retired in 1986. In many of those years he served as Administrative Judge. He was an active member of court reform and co-authored Civil Rules of Procedures, Idaho Jury Instructions, Idaho Trial Judges Manual and Sentencing Manual for Idaho Judges. After retirement he became an arbitrator, helping parties come to mutual decisions outside of the court. He also enjoyed teaching law classes at North Idaho College. He loved giving back and helping the new students discover their passion for law and politics. Watt is survived by his wife Jeannie and his constant companion Beau, three sons; Van of California, Ryan of Oregon and Cory of Washington, and two daughters Marla (Stan) Slutz of Nevada, and Leslie (Brad) Thorne of Kuna, Idaho and his two grandsons of which he was very proud.

### James B. Green 1926 - 2014

James B. Green, 88, of Pingree, Idaho died on December 26, 2014 at Portneuf Medical Center in Pocatello. Jim was born on October 22, 1926 in Ogden, Utah to Margaret and George Norman Green. He grew up in Pocatello during the Great Depression, graduated from Pocatello High School in 1944, and immediately enlisted in the U.S. Army.

Jim served in the infantry in a heavy fire-power platoon. After receiving an Honorable Discharge from the Army, he enrolled at Idaho State University. He graduated from I.S.U. in 1949 with a B.S. degree in Sociology, after just three years of study. He attended the University of Utah, S. J. Quinney College of Law,

graduated in 1952 and was admitted to the Idaho State Bar that same year.

Jim practiced law for over 60 years. He and life-long friend Archie Service began in private practice, eventually growing their firm to include nearly a dozen lawyers. In the 1980s Jim obtained one of the first million-dollar personal injury verdicts in the state of Idaho. Later in his law practice he was of counsel to his son, Bart, of J. Bart Green, PLLC, dba Green & Green Law Firm.

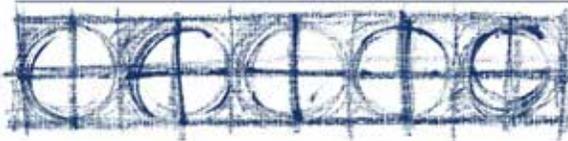
Jim served as Deputy Bannock County Prosecutor for many years in the 1960s, successfully handling many serious felony prosecutions and one murder.

When he was younger, Jim enjoyed fishing and bird hunting in spring-fed creeks, wetlands and ponds on the Shoshone-Bannock Indian Reservation. Jim was also an accomplished wildlife and nature photographer and loved to tell of the time he came across Ansel Adams as they were both photographing spring flowers in the Idaho desert.

In 1991 he and his wife, Hilary, fulfilled his life-long dream of building a house on the banks of the Snake River across from the pristine and preserved land of the Shoshone-Bannock Indian Reservation. Jim is survived by his devoted and loving wife of 34 years, Hilary H. Green. He is also survived by his daughter from a previous marriage, Nancy Green Alford (Stewart) of Gulph Mills, PA; his son from a previous marriage, J. Bart Green (Mary Helen) of Meridian, his grand son, Nicholas Ned Green of Boise, and his grand daughters, Diana Marie Green and Sierra Ashley Bush, both of Meridian.



James B. Green



## Special Thanks to Freshly-Minted Lawyer Nicholas Warden

Andrew Jenkins

**J**ust after being sworn in as a new lawyer, Nicholas Warden made a decision that had an extraordinary impact on someone's life. After passing the bar exam, he immediately took a pro bono case for the Idaho Volunteer Lawyers Program (IVLP). It was a divorce for a mother of two who experienced domestic violence.

Nick previously volunteered with IVLP where he saw many different kinds of civil cases being worked on. However, his new case was a more intense, high-stakes situation than Nick had ever encountered. His previous pro bono experience helped Nick see the positive impact he could make by giving legal assistance. With dedication and



Nicholas Warden

many pro bono hours, he was able to help achieve the client's goal.

New law license in hand, Nick took this case head on. "Practicing in a new area of law is a little intimidating" Nick said, but this didn't hold him back. Along with other resources, IVLP was able to provide a mentor attorney to assist him, which, Nick said, "made the case more approachable."

When asked why he originally took the case, Nick said, "There is a severe need for these services in our community and attorneys have skills they can utilize to have a positive impact."

He felt that he could make a difference even though he had only been in Idaho a short period of time.

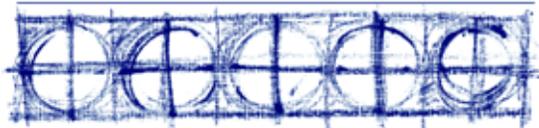
Nick says that people who are considering pro bono work should not worry about getting in too deep. Young attorneys have the opportunity to work with mentors who have experience in the specific

His previous pro bono experience helped Nick see the positive impact he could make by giving legal assistance.

area of law, Nick said that these cases can feel more rewarding than those that are not pro bono. The warm feeling of helping others is something Nick believes all attorneys would enjoy.

If you want to get involved with IVLP call (208) 334-4510 and ask for Mary Hobson.

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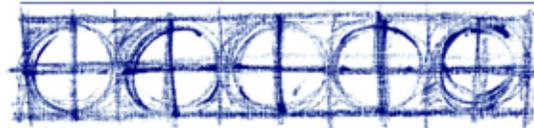


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#### **Vasconcellos Investment Consulting**

William L. Vasconcellos, CIMA®, CRPC®

Senior Vice President-Wealth Management

1161 West River Street, Suite 340, Boise, ID 83702

208-947-2006 888-844-7452 [william.vasconcellos@ubs.com](mailto:william.vasconcellos@ubs.com)

[www.ubs.com/fa/williamvasconcellos](http://www.ubs.com/fa/williamvasconcellos)

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Salt Lake City, UT 84111-2323