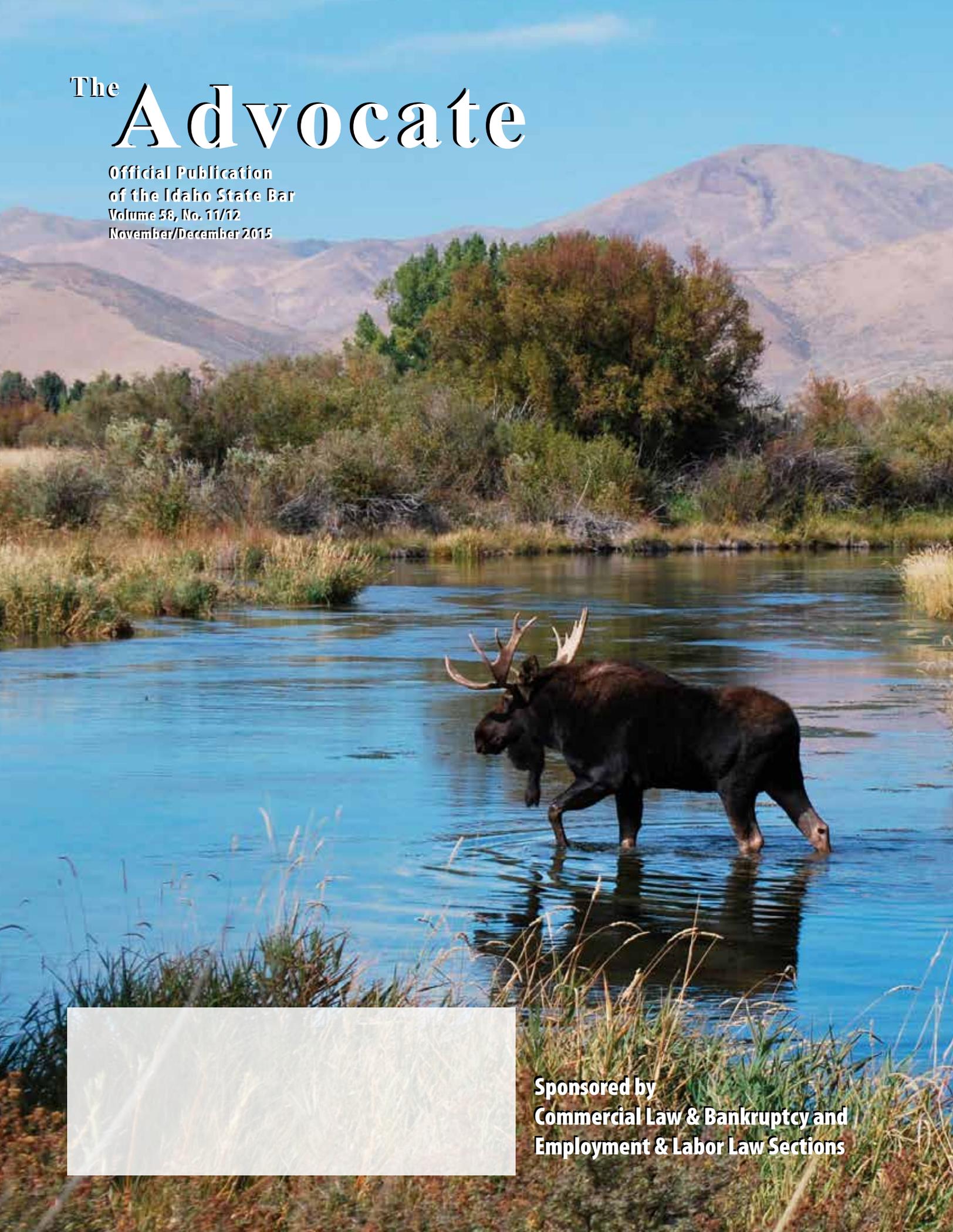


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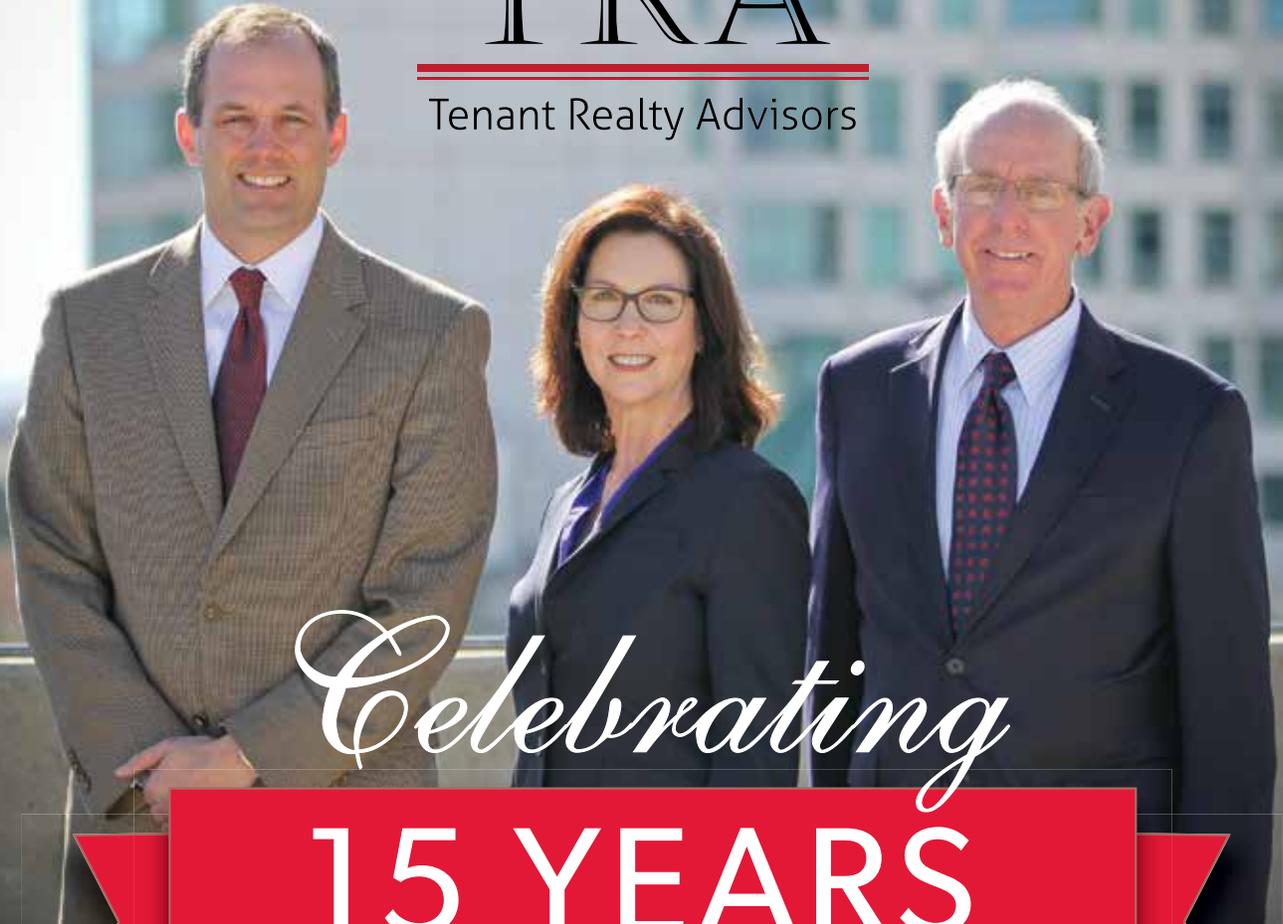
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Taylor is a civil litigation attorney who focuses his practice on insurance defense and medical malpractice defense. Prior to joining Gjording Fouser, Taylor was a staff attorney for the Honorable Patrick H. Owen, Fourth Judicial District Court. He also served as a judicial extern for the Honorable Edward J. Lodge, United States District Court for the District of Idaho. Perhaps of most interest, while an undergraduate at Boston University and a law student at University of Idaho College of Law, Taylor played on 62 different intramural teams and almost always — or at least usually — also attended class!

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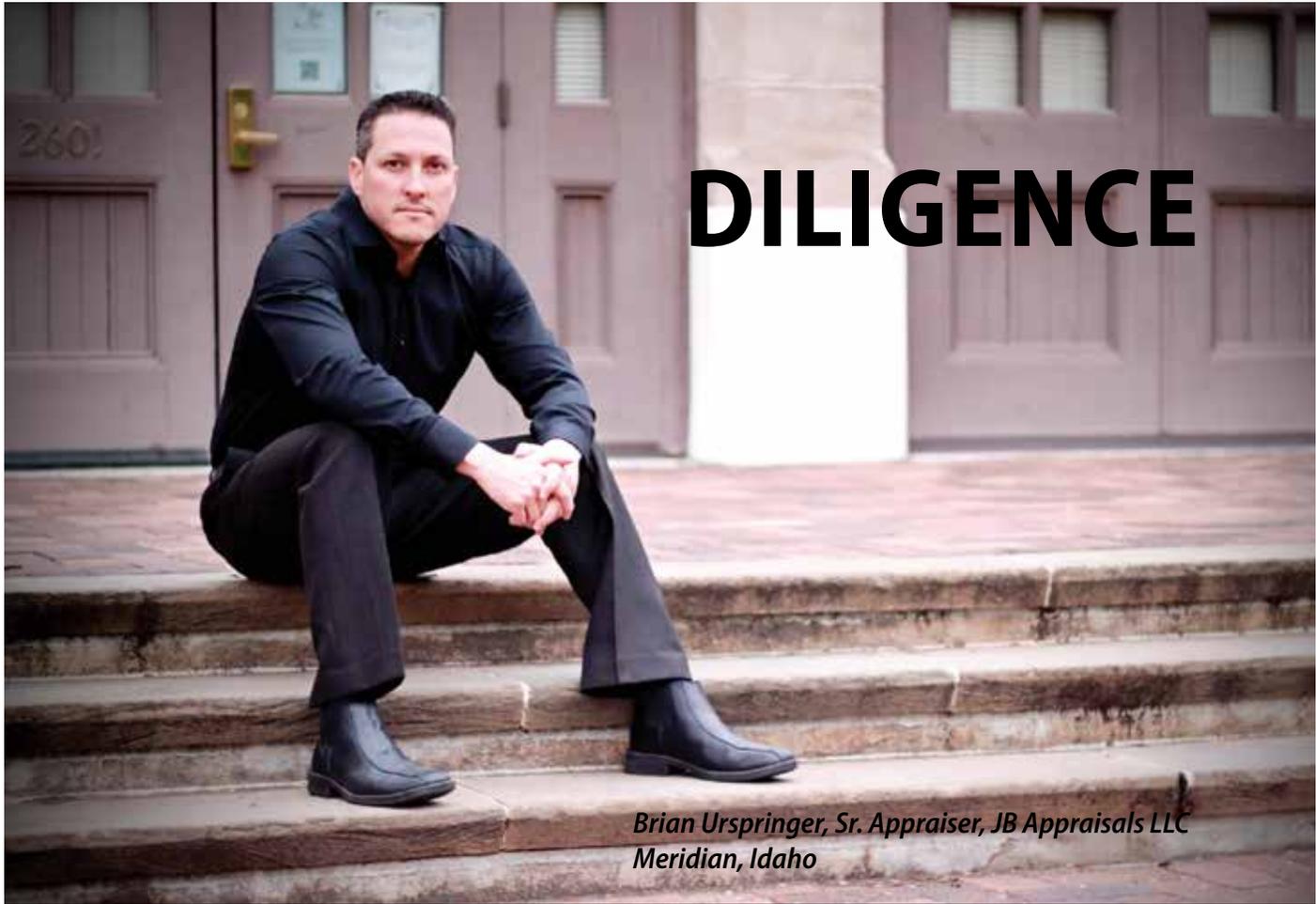
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## On the Cover:

Sharon Cuslidge, a legal secretary at Givens Pursley, took this photo at the Silver Creek Preserve in September. Sharon and her husband were walking down the trail when they heard a snuffly/snorty sound and rustling foliage. A moment later, a moose emerged from the trees and headed across the creek. He was followed by the three moose. Ms. Cuslidge stated that she wasn't using a telephoto when she shot the picture. "We were pretty darn close!" she said.

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Beard St. Clair Gaffney is pleased to announce that Kristopher D. Meek and Megan J. Hopper have joined the firm.

Kris joins the firm as a shareholder. He has practiced law here in Idaho Falls since 2006 and has a rapidly developing practice that includes both litigation and transactional work. He is experienced in estate planning, business formation and compliance, commercial litigation, and family law. He graduated *cum laude* with a bachelor's degree in political science from Brigham Young University and received his Juris Doctor from University of Idaho College of Law.



Megan graduated from the University of Idaho College of Law in 2011 and has a bachelor's degree in business administration from Idaho State University. Megan's practice includes business law, intellectual property law, debtor and creditor law, family law, and estate planning.

Kris and Megan's experience and expertise brings new depth to the firm's already-accomplished team.



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*Christy A. Kaes*

Evans Keane LLP is pleased to announce the addition of Christy A. Kaes as an Attorney with our firm. Ms. Kaes' practice emphasizes commercial and bankruptcy litigation.

Christy completed her B.S. in Business and Human Resource Management in 1990, and received her J.D. from the University of Idaho Law School in 1993. After law school, Christy worked for Idaho Legal Aid Services, Inc. in Lewiston, Idaho before entering into private practice. In 16 years of practice, she has represented clients in bankruptcy matters, wills, guardianships, and family law.

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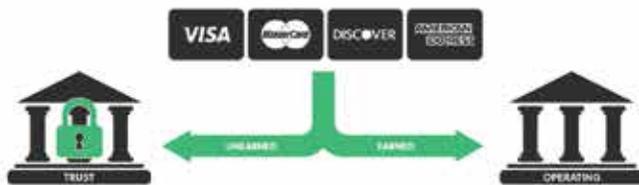


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## Upcoming CLEs

### November

#### Mobile Monday CLE Series

Sponsored by the Idaho Law Foundation, Inc.  
12:30 – 1:30 p.m. (MST) – all sessions are held telephonically  
1.0 CLE credits

**November 2:** *What Non Bankruptcy Attorneys Need to Know About Bankruptcy* – David W. Newman, U.S. Department of Justice, Office of the U.S Trustee

**November 9:** *The IRPC 4.2 Dilemma* – Bradley G. Andrews, Idaho State Bar Counsel – **NAC**

**November 16:** *The Prosecutor's Perspective* – Jan M. Bennetts, Ada County Prosecuting Attorney – **NAC**

**November 23:** *Changes to the Fair Labor Standards Act* – Mark Adams, University of Idaho College of Law Dean

#### November 3: *And Civility for All: Extending Civility to Every Participant in the Legal System*

Sponsored by the Professionalism & Ethics Section  
The Law Center, 525 W. Jefferson Street – Boise / Statewide Webcast  
8:30 a.m. (MST)  
1.5 Ethics credit – **NAC**

**November 13:** *2015 Headline News – Coeur d'Alene*  
Sponsored by the Idaho Law Foundation, Inc.  
Best Western Plus Coeur d'Alene Inn, 506 W. Appleway Avenue – Coeur d'Alene  
8:30 a.m. (PST)  
6.0 CLE credits of which 1.0 is Ethics – **NAC**

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

### November (continued)

#### November 20: *2015 Headline News – Greater Pocatello Area*

Sponsored by the Idaho Law Foundation, Inc.  
The Shoshone Bannock Hotel & Events Center, I-15, Exit 80 – Fort Hall  
8:30 a.m. (MST)  
6.0 CLE credits of which 1.0 is Ethics – **NAC**

### December

#### December 1: *Ethics in Claims & Settlements*

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

#### December 9: *Handling Your First or Next Removal Case*

Sponsored by the Idaho Law Foundation, Inc.  
The Law Center, 525 W. Jefferson Street – Boise / Statewide Webcast  
9:00 a.m. (MST)  
1.0 CLE credit – **NAC**

#### December 10: *2015 Headline News – Boise*

Sponsored by the Idaho Law Foundation, Inc.  
The Grove Hotel, 245 S. Capitol Blvd. – Boise  
8:30 a.m. (MST)  
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## Deposition Bullies, Witness Coaching and Discovery Abuse

Tim Gresback  
President, Idaho State Bar  
Board of Commissioners

**T**he deposition has been noticed up. The witness is sworn. The lawyer is making great headway:

*Q: Just before the crash you were traveling at about 35 mph?*

*A: Yes.*

*Q: The speed limit was 25 mph?*

*A: Yes.*

*Q: And when you entered the intersection, your light was red, correct?*

Just before the witness concedes this vital point and agrees, the defending lawyer interrupts the client and blurts: “If you remember.”

This scenario is played out too often. What’s the problem? It’s cheating.

Somehow it has become acceptable in some circles to interrupt a deposition just when the discovery tree is bearing juicy fruit. By interrupting, the defending lawyer is impermissibly coaching the witness. In essence the lawyer tells the witness, “Your testimony is killing us. I advise you to say that you don’t remember — try to follow my lead.” If this type of coaching does not strike you as inappropriate, imagine if a lawyer interrupted a witness in front of a jury with an “if you remember.” The judge would likely come unglued and the jury would resent the interjection. What, then, has become of our discovery process that we tolerate this improper witness coaching?

Somehow it has become acceptable in some circles to interrupt a deposition just when the discovery tree is bearing juicy fruit. By interrupting, the defending lawyer is impermissibly coaching the witness.



Coaching is often caused by insufficient witness preparation. Instead of giving the witness an idea of the likely questions prior to the deposition, the lawyer fails beforehand to prepare the witness and tries to save the day with improper coaching. Another cause for coaching is that some lawyers do not know it is wrong. Attorneys hate to sit back and be silent as their case goes down the tubes. In desperation some lawyers regress to coaching. I urge judges to impose swift and severe sanctions when this occurs. Deposition abuse, however, is not limited to witness coaching.

Idaho Rule of Civil Procedure 30(d)(1) states: “Any objection during a deposition must be stated concisely and in a non-argumentative and non-suggestive manner.” Unfortunately, this rule is routinely violated. Some bullies try to derail a deposition with a critique of the other lawyer’s method: “Your question is a bad one because it’s ambiguous and my client doesn’t know if you are

talking about the initial contact or after the third car entered the intersection. If you ask a clear question my client will give a clear answer.” An inquiring lawyer has a right to get an answer to a question — even if the question is awkwardly asked. Once the defending lawyer coaches or adds other improper comments, the deposition is at the crossroads. The inquiring lawyer must think quickly. If, in response, the inquiring lawyer loses control and ups the emotional ante, a full-blown deposition mud fight can break out. For example, the inquiring lawyer often joins the uncivil fray: “Don’t tell me what questions to ask, young lady. I’ve been at this since you were in grade school!” Now the original offender likely escapes consequence because the counterpart has answered the unprofessionalism with more unprofessionalism. How do we avoid this all too common breakdown of civility?

Fundamentally, we must know the rules for depositions. Unfortunately, many lawyers mistakenly believe depositions are minor league practice for major league evidentiary trial objections. Many lawyers do not know — or conveniently forget — the grounds for objecting are *extremely* limited at a deposition. Deposition objections are frowned upon for good reason. We want information to be efficiently gathered; a deposition too encumbered with objections becomes worthless. One valid objection at a deposition is that the question calls for privileged information. This is not very common. Privilege objections usually do not cause a problem.

A second legitimate ground for an objection, however, is a great source of deposition abuse. It is the “form of the question” objection. Our rules permit this interruption for a critical policy reason. If a deposition witness later dies or moves away and becomes unavailable, the deposition can be introduced at trial as substantive evidence. Suppose, however, the deposition witness is asked a question that would be objectionable at trial, such as a question that is compound, argumentative, or assumes facts not in evidence. At trial the Court would either have to exclude the answer or allow it notwithstanding its evidentiary flaw. To avert the harsh extremes our rules allow the lawyer at deposition to object to the form of the question so the inquiring lawyer has an opportunity to “cure” the defect, by rephrasing the question, and ask it without the flaw. If the defect in the deposition question is not “cured,” then the answer will likely be inadmissible at trial.

Other objections are routinely — but improperly — made at depositions. For example, objections such as hearsay and

relevance which go to the *admissibility* of the answer cannot be cured by rephrasing the question. No objection needs to be made at the deposition; admissibility can be taken up in court. Unfortunately, lawyers are not using the form objection for its intended purpose. Instead, form objections are being made to disrupt the flow and impact of a deposition. Like witness coaching, it’s cheating. To ameliorate this abuse, we should allow a lawyer to waive the opposition’s obligation to make the form objection. Many lawyers, like me, would rather risk trial inadmissibility to gain a deposition unencumbered by incessant objections.

The most effective way to stop deposition abuse is to gently remind your adversary at the outset that you will not, during the adversary’s depositions, interrupt legitimate questions by coaching. Once your deposition gets underway, if the other lawyer objects, look not at the lawyer but the witness and gently say, “Please answer the question.” Repeat the question if necessary, but don’t look at the other lawyer — stay locked on the witness.

Bullies not only are abusive at depositions but also in written discovery. Suppose a party seeks a copy of any written statement the plaintiff made at the scene of the crash. All too often the following type of specious response is made to a request

for production under rule 34(a). Here’s a typical response: “Objection. The question is vague and ambiguous. It also seeks work-product material and invades the attorney/client privilege. In addition, the question is overly burdensome and cumulative and violates the state and federal constitutions. Without waiving said objection, please see the attached statement given to the police officer.”

This type of discovery bully uses boilerplate gobbledegook to hedge: maybe I’m hiding evidence, maybe I’m not. I am giving you something. If I am hiding evidence and I get busted I’ll try like heck to hide my thievery of justice under my boilerplate objections. Besides, you can’t file a motion to compel on every case — you won’t be able to afford it. Judges are reluctant to intercede and I will play that to my advantage.

Discovery abuse is so rampant I sometimes don’t even request it because it isn’t worth the bother. In Oregon there are no interrogatories. Nor does Oregon have expert or lay witness disclosure. I cannot say Idaho’s level of justice is better. We sometimes have legitimate discovery disputes that require us to make objections and seek a protective order. By and large, however, discovery abuse has diminished the honor of our process: let’s restore it.

**Tim Gresback**, current ISB president, is a past president of the Idaho Trial Lawyers Association as well as the Idaho Association of Criminal Defense Lawyers. He is certified as a civil trial specialist. He serves on the Idaho Supreme Court Evidence Committee and taught trial advocacy at the University of Idaho College of Law for 10 years. He lives with his wife, Dr. Sarah Nelson, and son, Luke, in Moscow.



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## DISCIPLINE

### **Charles C. Crafts (Withheld Suspension/Probation)**

On September 23, 2015, the Idaho Supreme Court entered a Disciplinary Order imposing a withheld 90-day suspension and a six-month disciplinary probation regarding Boise attorney Charles C. Crafts.

The Idaho Supreme Court found that Mr. Crafts violated I.R.P.C. 1.2(a) [Scope of Representation] and I.R.P.C. 1.4 [Communication]. The Idaho Supreme Court's Disciplinary Order followed a stipulated resolution of an Idaho State Bar disciplinary proceeding in which Mr. Crafts admitted that he violated those Rules.

The formal charge case related to Mr. Crafts' representation of a client in a breach of contract case, for which he charged no fees. In that case, Mr. Crafts did not respond to the opposing party's discovery requests, motion for summary judgment or motion for fees and costs. He also did not appear at the hearing on the motion for summary judgment or adequately communicate with his client about the status of the case, including the entry of a default judgment against the client. As restitution in the formal charge case, Mr. Crafts paid to satisfy the judgment entered against his former client and also paid attorney fees incurred by the client subsequent to the entry of the judgment.

The Disciplinary Order provides that the 90-day suspension will be withheld and that Mr. Crafts will serve a six-month period of probation, subject to the condition that he will serve the withheld suspension if he violates the terms of his probation or admits or is found to have violated any Idaho Rules of Professional Conduct for which a public sanction is imposed for conduct that occurred during the probationary period.

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

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



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### Professionalism takes a collaborative approach

Dear Editor,

In reading the President's articles in *The Advocate* on bullying, one portion in particular resonated strongly with me — "Over the years I've seen wonderful lawyers who are effective problem-solving collaborators. I've also encountered brilliant, hard-charging, uncompromising trial attorneys. The former are often driven from the profession by the latter." So true. What a tremendous loss for our profession.

I would classify myself as one of the "problem-solving collaborators" referenced in the article. I concede that at times in the past 23 years of practicing law, I have been close to wanting to pitch this profession and everyone in it. During those times, being a bartender in Fiji seemed really, really attractive. At some point, each of us does a personal analysis and decides whether this short life we are given should be filled with the toxicity that is present in almost every day of our work.

I have chosen to stay; not because I enjoy the abuse, but because my life is enriched by helping others. I stay for my clients. Each time the Bully frustrates me, I remind myself of why I stay — when a client walks out my door relieved because they handed off their problems to me, I feel good. When a client trusts me to solve a problem, I am honored, humbled, and motivated.

When I call opposing counsel early in a case, to explore resolution, and I am met with a "brick wall," an unwillingness to consider the opposing concerns and discuss solutions, or no verbal communication at all, I admit, I become frustrated. More

and more, over the past decade, I have watched emails and letters replace telephone communication and in-person meetings. More and more, the first communication in a case is a written demand or a threat, rather than a cordial conversation to determine if a quick, cost effective, and appropriate resolution can occur. We can jump to incorrect conclusions by reading an email rather than having a phone conversation, in which inflections and context can be gauged. We need to journey back to conversations as our first line of approach.

We should not adopt a no-holds-barred, take-no-prisoners, antagonistic approach. We should work professionally and courteously to prepare the case and submit it to the fact finder for a decision. That is why we have a judicial system — for someone else to decide our issues and outcomes when we cannot do so ourselves. These proceedings are adversarial, yes — but, they do not need to be acidic or acrimonious. *Webster's Dictionary* defines "adversarial" as "involving two people or two sides who oppose each other."

As in a sporting event, "adversarial" does not mean that the competition must be hostile, nasty, or unprofessional. Good sportsmanship is a tenant that should carry from the field to the courtroom. I've walked away from trials with great affinity and respect for my opposing counsel, and I've walked away thinking opposing counsel should be barred from the profession.

It is my hope that the Bar's push for civility among our ranks gains traction in our professional community and makes a positive impact. I enjoy working collaboratively with another attorney to solve our clients'

problems. Those moments make me happy, fulfilled, and proud to be a lawyer.

*Erika Grubbs  
Winston & Cashatt  
Coeur d'Alene*

### Bullying affects subordinates and friends, too

Dear Editor,

I'm grateful that the ISB is starting a public conversation among Idaho attorneys to address bullying within our profession. The hardest parts of this job for me are the antagonism and pressure to characterize everything as a win or loss. As you discussed, the bullying between opposing counsel is an obvious issue. We can also look closer to home and see how we treat our colleagues within a firm, including junior attorneys, paralegals, and assistants. Many high performing lawyers are very good at exploiting the failures of others and hiding their own weaknesses — that's how they win cases. As a result of being very good at those things, they can become overly critical of and condescending to their subordinates, jumping on their mistakes instead of being helpful or supportive. Unfortunately, these workplace tactics often bleed into personal lives and we treat our lovers and friends to similarly toxic conversations. When examining bullying behaviors in our profession, we should look at how we communicate to people both on and off "our team."

This conversation has the potential to create some real healing in our communities. When lawyers treat each other better, will clients do the same? By increasing the amount of positive and productive interactions we create, I believe we can do a lot

to reduce the pain and confusion suffered by people in distress, experiencing shifting priorities, and coping with life changing decisions.

*Kelsey Jae Nunez*  
Kelsey Jae Nunez LLC  
Boise

### The best lawyers solve problems, not create them

Dear Editor,

The columns of ISB President Tim Gresback in the last two issues of *The Advocate* have been some of the most honest and helpful I have read. I look forward to an open dialogue among our colleagues on the ideas and suggestions discussed.

To me, the finest practitioners of the law are those who zealously represent the interests of their clients while doing so with competency, integrity, respect, and morality. They focus on resolving the problem in a way that is acceptable in the long run — many times “resolving” rather than “solving” the matter. They attend to the problem rather than the personalities and they can disagree without it becoming a competition or personal.

The practice of law can certainly be done in a disruptive way but such an approach is much less pleasant, has fewer intellectual and spiritual rewards, and distributes far less happiness for all involved. An attorney, with the great power and responsibility that comes with that, should be a healer and problem solver.

There is plenty of harshness and injustice in this world. An attorney, no matter who they serve, should not contribute to it.

*Randy Fife*  
City of Idaho Falls  
Idaho Falls

### Working with a bully takes skill

Dear Editor,

I found the article *Confessions of a Recovering Bully* to be refreshingly relevant and candid. As an attorney, I have dealt with several bullies over the years both in my dispute resolution practice and in my transactional practice. Bullies are so difficult and shattering to spirits and psyches that I have become determined to figure out how to crack their code. That is why I devote an entire segment of my dispute resolution workshops to dealing with the bully personality (something I call “Busting the Bully”).

Tricks and tools for busting bullies come from understanding them from the inside out. The bully operates from a different paradigm than most people. Their world is one of scarcity, not abundance; of fear, not security; and of suspicion, not trust. Win/lose is the operative paradigm, not win/win. The bully sees threats everywhere. It is as if they live in a war zone even though no one else wants to fight. It is impossible to change their minds on this, so part of the engagement with a bully has to be the powerful fight: not disrespectful, not abusive, but powerful. Bullies respond to power and will make concessions to powerful opponents. Stand strong and don't be too nice. Find leverage to trigger fear in the bully because bullies often back off or compromise when fearful.

I like to think of bullies as army tanks. They fire out missiles and let nothing in. That means they don't listen, they don't negotiate reasonably, they attack, they diminish, they don't take responsibility, and they fire out their one-sided, black and white view of things and call it Reality. Again, it is war for the bullies.

In war, people don't talk about gray areas and compromise. Your most powerful tool with a bully is to stress your facts and leverage points and keep it simple and strong. Stay away from the gray.

On the bright side, bullies are real people who crave connection and don't have much because they are so difficult. Connection is leverage so while fighting the fight, always be respectful and always try to find some point of connection. Then build it. Build it every day, every way you can. Talk about the connective point every time you talk to the bully. In the end, most bullies can't help but cave to connection, allowing the paradigm to soften and some peace to enter the warzone.

*Rebecca B.W. Anderson*  
Jones Gledhill Fuhrman Gourley, P.A.  
Boise

### Professionals deserve referrals; bullies do not

Dear Editor,

All attorneys swear to represent clients with “vigor and zeal.” There's nothing wrong with using the law and rules to their full extent to represent clients vigorously and zealously, but it crosses the line of professionalism when attorneys attempt to use bullying and intimidation as tactics to achieve their client's objectives. Attorneys that bully others are the reason for most negative lawyer stereotypes and jokes. They make the entire profession look bad, which is why I make it a point to never refer a potential client to such an attorney.

*Robert J. Taylor*  
Taylor Law & Mediation PLLC  
Mountain Home

### Coaches get ready for Mock Trial

BOISE — On Saturday, October 24, 2015, the Law Related Education Program held its first ever Coaches' College, which was open to both teacher sponsors and attorney coaches. Participants in the Coaches' College learned from experienced mock trial coaches and judges about the best practices for running a mock trial program and preparing students to compete in the upcoming mock trial season.

### ALPS will help with a mentor match

IDAHO — ALPS Attorney Match is a new member benefit that allows attorneys to create an online profile geared toward building a network of potential mentorships and mentees. Whether you are looking for a successor upon retirement, are seeing to become a solo practitioner or want to network in general, ALPS can assist you with potential matches in your area. Visit [www.alpsattorney-match.com](http://www.alpsattorney-match.com) for more information.

### Constitution Day celebrated with lecture

The University of Idaho College of Law hosted Constitution Day events in Moscow and Boise September 17. In Moscow, Peter Alexander, former dean of Southern Illinois University and author of *It Takes a Village*, a book about the segregated school system that existed in Hillburn, New York until 1943, spoke in the courtroom. In Boise, the College of Law hosted a CLE panel discussion about the importance of civic education in



Peter Alexander

democracy. Panelists included Justice Joel Horton '85, Judge Melissa Moody, Judge Monty Berez, and Attorney General Lawrence Wasden '85.

### Concordia helps people with advice

BOISE — Concordia Law's Housing Clinic opened its doors in September. The Housing Clinic is staffed by law students who are participating in a specialized course on tenant rights, laws, and protections. Students are responsible for intake and screening, interviewing and representing clients, as well as handling mediations and hearings in housing court. All student work is completed under the supervision of Concordia Law's Director of Clinical Education, Latonia Haney Keith.



Latonia Haney Keith

### Idaho Legal Aid Services, Inc. receives \$276,000 pro bono innovation grant

BOISE — The Legal Services Corporation has awarded ILAS a 24-month \$276,000 Pro Bono Innovation Fund grant to create a Pro Bono Opportunities website that will make pro bono services a more robust part of Idaho's low-income legal service-delivery system. Idaho Legal Aid Services will partner with the Idaho Volunteer Lawyers Program on the project.

This portal will create a searchable online space where Idaho attorneys can find statewide pro bono opportunities. The goal is to help improve services to low-income clients by increasing pro bono representation and expanding the cases

and services for which attorneys can volunteer.

"Competent legal representation is a foundation of our legal system and necessary to protect the constitutional rights of the people," said U.S. Rep. Raul Labrador (R-Idaho). "Thousands of low-income Idahoans rely on volunteer lawyers, particularly in civil matters. Providing attorneys an online portal to search for cases of interest promises to improve the quality of justice in our great state."

The Idaho Volunteer Lawyers Program currently relies on a telephone-based system for placing clients with attorneys. The web portal will allow attorneys to search case opportunities by criteria such as legal issue, geographic area, veteran's status, and other factors. If no case opportunity meets their search criteria, the system will be able to automatically notify them when cases that do meet their criteria are posted.

Idaho Legal Aid Services is one of 15 recipients of LSC's \$4 million Pro Bono Innovation Fund, a competitive grant program that invests in projects that identify and promote replicable innovations in pro bono for low-income legal aid clients. This is the second year LSC was awarded the funds.

### New Appellate Handbook Available

The Appellate Practice Section has released its new edition of the Idaho Appellate Handbook. The cost is \$100 for IAPS members and \$150 for non-members. The Handbook contains 14 chapters focused on Idaho appellate practice. It is provided as a searchable PDF with hyperlinks to statute, rule, and case law citations. It is available for purchase through the Idaho State Bar.

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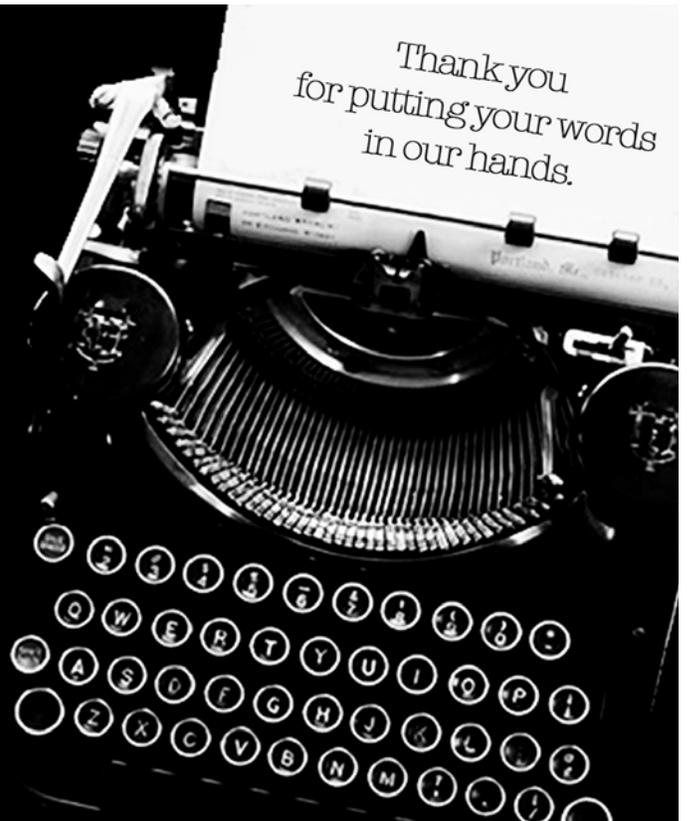
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*The spoken word perishes; the written word remains.*



### Pro Bono Heroes

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

Once again, I encourage you to attend the resolution meeting in your judicial district (schedule on page 26.)

In addition to presenting the proposed resolutions, we will present the professionalism, pro bono and retiring judge awards. The 2015 Pro Bono honorees are:

#### 2015 Pro Bono Awards

##### 1<sup>st</sup> District: David K. Robinson

David K. Robinson Jr., attorney at law, Coeur d'Alene

This pro bono award is given for Mr. Robinson's work in a guardianship that began in February 2010. Mr. Robinson represented a mother in a highly contentious and convoluted matter involving her minor child and another relative who was seeking guardianship. The case involved mountains of pleadings, numerous hearings, repeated efforts at mediation, and a great number of witnesses and counselors, teachers, medical caregivers, and special needs providers. Thanks to the amazing dedication of this volunteer, his client's objectives were ultimately achieved and mother and child are doing well. Mr. Robinson donated hundreds of hours of his time to provide access



David K. Robinson

to the judicial process for this mother. A pro bono award may seem to be very small thanks for such an extraordinary effort, but the Bar and its members must recognize the necessity of a volunteer in these kinds of matters and thank Mr. Robinson as best we can.

##### 1<sup>st</sup> District: Howard A. Funke

Howard Funke & Associates, PC,  
Coeur d'Alene

The primary reason for this nomination is the culture of pro bono that Mr. Funke fosters within his firm. This is evidenced by encouraging associates to participate in Bar activities and in choosing pro-bono cases to appear in local courts on behalf of Idahoans who are financially disadvantaged.

Attorney Mariah Dunham shared this remark, "I remember being assigned to interpret an out-of-state will when the elderly testatrix, who now resides in Idaho, had questions regarding the enforceability and recognition of her will. I know that the elderly lady was expecting to pay for the services rendered, but I also know that Howard knew her to be of limited means. After meeting with the client and answering her questions, I asked Mr. Funke on how I should bill the time spent on the matter — his answer: "pro bono."



Howard A. Funke

"Honestly, I cannot remember a single time when Mr. Funke has turned down a request from me or one of this firm's other attorneys when approached with a request to do pro-bono work. I do not know of many firms, small firms especially, where such dedication to pro-bono is fostered and encouraged."

##### 2<sup>nd</sup> District: Deborah L. McCormick

McCormick Law Office, Moscow

Family law cases often involve difficult emotional issues that take considerable time to resolve. Ms. McCormick had already represented a mother for a couple of years in an ongoing pro bono custody case when, in May 2013, she agreed to take on representation of the same client who was then seeking termination of the father's parental rights. Ultimately the termination case was dismissed and the focus reverted back to the custody proceedings. However, having a court-appointed attorney for the incarcerated father in the termination case helped him understand what were and were not reasonable expectations on his part. That work, in turn, helped Ms. McCormick's client feel comfortable with dismissing the termination case. Ms. McCormick reported 33 hours donated to this particular phase of the custody dispute but, significantly, also observed that "things have gone smoothly since."



Deborah L.  
McCormick

### 3<sup>rd</sup> District: Reese E. Verner

#### Lifetime Achievement

Solo practitioner, Nampa

The Idaho Volunteer Lawyers Program nominates Reese Verner for a “Lifetime Achievement Award” for his pro bono service. Mr. Verner claims that he retired this year. We cannot confirm that, but we do know that Mr. Verner served as pro bono counsel on 23 IVLP pro bono cases between 1995 and 2014. Most of these cases were guardianships and all were for low-income people in the Third Judicial District. Mary Hobson, who recruited attorneys for pro bono cases for the past nine years commented, “Mr. Verner was always so gracious and always said ‘yes’ when we asked him to serve as pro bono counsel. He helped many families through the years and he will be sorely missed.”



Reese E. Verner

### 3<sup>rd</sup> District: Barbra Ferre

Canyon County Public Defender, Nampa

Ms. Ferre was a relatively new member of the Idaho Bar when she took on the representation of a mother who was seeking modification of a custody order. The couple had two pre-teen children who were in the mother’s primary care but who spent most weekends with their father. Unfortunately, the abusive and irrational behavior that caused the initial breakup between the parents continued. One evening, while the children were visiting their father, Ms. Ferre’s client received a call from the police asking her to pick up the children because their father

was being arrested and his new wife (who was the victim of the father’s latest abuse) did not want the children. A short time later the father was arrested on other charges when he attacked Ms. Ferre’s client’s new husband when he attempted to pick up the children. Ms. Ferre spent 60 hours on this pro bono project while managing to negotiate a settlement that achieved her client’s objectives in the modification case and added stability to the lives of these young children.

IVLP also wishes to recognize Kerry Michaelson acted as a mentor to Ms. Ferre on this matter.

### 4<sup>th</sup> District: Scott L. Rose

Solo practitioner, Boise

In May of 2014, Mr. Rose took on three separate cases — custody, child support, and guardianship — for one pro bono client who was incarcerated. Mr. Rose donated more than 230 hours to these matters for a client whom few volunteers would consider, due to her criminal background and mental health issues. Since her legal problems concerning her children were civil in nature, without Mr. Rose she would have no ability to present her case in the administrative proceeding and in court matters. Mr. Rose was able to resolve her child support matter and her custody case. He remains attorney of record on a guardianship. Mr. Rose’s willing-



Barbra Ferre



Scott L. Rose

ness to help this client and many others through some of the most difficult matters imaginable makes him more than deserving of the award, although he would be far too modest to admit it.

### 4<sup>th</sup> District: Theodore S. “Ted” Tollefson

Office of the Attorney General, Boise

In December 2013, Mr. Tollefson agreed to assist a mother with a custody modification case concerning her daughter. The parents had been in a high-conflict custody battle over their now 12-year-old child since separating in 2003. Her own experience with the father had been emotionally and sexually abusive. Although her daughter was now complaining of similar issues with the father, the mother was not able to obtain help for her and was gradually being isolated from the daughter and pushed out of decisions concerning her mental health care. When the mother finally obtained a protection order for the child, the father responded with yet another modification petition — this time for sole legal and physical custody. He was being represented by able and tenacious counsel. It was at this point that Mr. Tollefson stepped in. He expended over 150 hours in defending the protection order for the child on appeal, appearing in court numerous times, and preparing the case for trial, including dealing with expert witnesses, home studies, and various motions. Ultimately Mr. Tollefson managed to negotiate a settlement agreement that resolved the issues to the mother’s satisfaction and in a manner that



Theodore S. “Ted” Tollefson

protected the best interests of the child. The client described her reaction as “ecstatic.”

**4<sup>th</sup> District: Kersti H. Kennedy**

Canyon County Public Defender,  
Nampa

Ms. Kennedy agreed to represent a mother in a custody case involving her two pre-teen children. The family history was a difficult one. The mother was the primary breadwinner, but the father was a poor stay-at-home dad. He often neglected to change diapers and failed to feed the children regularly. When the mother’s 14-year-old niece came to live with them, the mother was relieved that someone she could trust would be looking out for the children while she worked. Unfortunately, she misjudged the situation. At first she only noticed behavior she considered “odd,” but when she found the father and niece had been exchanging sexually explicit materials through texting, she contacted police. Eventually the father was convicted of lewd conduct with a person under age 16 and sent to prison. His prison experience did not go well. He repeatedly committed acts that prevented his parole. In January 2014, he was given another tentative parole date. It was at that point the mother decided she had to have a custody order that would protect her children, particularly the younger daughter. Ms. Kennedy agreed to help her. The father responded seeking a 50/50 arrangement that the mother found totally unacceptable. Through Ms. Kennedy’s efforts, which included the donation of 45 hours of service in litigation and negotiations,



Kersti H. Kennedy

the mother was able to obtain a custody order that achieved her objectives for protection of the children. Ms. Kennedy also agreed to continue to stay involved to help with any issues in enforcing the custody order. Ms. Kennedy reported to IVLP that “[mother] was a great pick for a client for me. I think she’s on her way to really improving her life.”

**4<sup>th</sup> District: Joe R. Larson**

Solo practitioner, Boise

Mr. Larson was new to the Idaho Bar, but not to the practice of law. In September 2013 he agreed to assist a Boise man with an eviction that followed a bank foreclosure. The client was the homeowner but he had not been able to stop the foreclosure and was now faced with having to move out of his home. Mr. Larson describes the client as “difficult” in that he had both physical and mental health issues and was “a very poor historian” (meaning he could not remember what had happened in the communications with the bank and that he had difficulty communicating with the bank and with Mr. Larson). From a legal perspective there would be no solution that offered the client the opportunity to stay in the home. What the client needed was time to figure out where he could go and obtain cash to be able to move. Mr. Larson was able to negotiate with the bank’s counsel to achieve those goals. More importantly, he was able to help the client work through the anger and frustration he had developed in the years that led up to this crisis. But it was still not an easy case. The bank’s counsel had agreed to pay



Joe R. Larson

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The client was the homeowner but he had not been able to stop the foreclosure and was now faced with having to move out of his home.

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a sum in cash to the client, but then retained half of the sum until the home was inspected and deemed to be in good shape. Mr. Larson received word that the house had not passed inspection. He was forced to round up the client and take him to the home to determine what was to be done. Then he tracked down helpers for the client to get the home in shape (he says he drew the line at actually doing the cleaning). The client ultimately received all the promised cash. At times the client was angry with Mr. Larson that he had not saved his home but, after the matter was concluded, he realized he had been relieved of a burden that had been holding him back and he was most appreciative of Mr. Larson’s service.

IVLP would also like to acknowledge Sunrise Ayers of Idaho Legal Aid Services who acted as Mr. Larson’s mentor since post-foreclosure evictions were not a part of his prior experience.

### 5<sup>th</sup> District: Kirstin K. Dutcher

Lawson Laski Clark & Pogue, PLLC,  
Ketchum

Ms. Dutcher volunteered to represent a low-income mother in a custody and paternity action. Her client was the defendant who was impregnated by a neighbor — a married man with several sets of children born out of wedlock. Ms. Dutcher found the background of the relationship very disturbing, to the point that she concluded that the neighbor was physically and verbally assaulting the client at the time she became pregnant. He was upset that the mother had put his name on the birth certificate and was asking for support, so he retaliated by filing a custody action seeking a 50/50 shared custody arrangement under which the child would spend 6 months with father and 6 with the mother. The baby was only three weeks old at the time this action was filed. Ms. Dutcher reported to IVLP:

“[A]s a mother, I was shocked that he would request separating a child from his mother during this very important time of attachment. The father was calling the police to take the baby away from her. The father and mother lived in government subsidized housing and his harassment made her feel very insecure and unsafe. I took the case knowing that the plaintiff was a litigious individual representing himself in many civil cases and taking a criminal case of statutory rape to trial.”

It was a hotly contested matter that involved questions of support, custody, and child safety and well-being. The child’s father was zealously represented by retained legal counsel who argued that a father can raise an infant and that there would be no emotional damage to the infant if it was taken away from his mother

for long periods of time. The parties had a child evaluation conducted and several motions were heard in front of the court. Ultimately, Ms. Dutcher was able to negotiate a settlement agreement that accorded her client primary physical and residential custody and allowed supervised visits for the father following a graduated schedule. The planned schedule provided for father’s time with the child to increase in stages, assuming that he complied with the requirements of each successive stage of the plan. This arrangement served the best interest of the child without hindering his ability to attach to the primary parent. Ms. Dutcher also succeeded in negotiating a satisfactory child support arrangement on behalf of the mother. This kind of matter can be difficult and time-consuming, but is terribly important to the clients. Those who cannot afford to pay legal counsel often suffer, especially where the other parent is represented. Ms. Dutcher reported donating 84 hours on this case.

### 6<sup>th</sup> District: Kenneth E. Lyon Lifetime Achievement

Solo practitioner, Pocatello

In November 2014, Mr. Lyon closed a bankruptcy case for a Pocatello man who had filed Chapter 7 bankruptcy. He spent 12.75 hours on that project. Mr. Lyon also closed a bankruptcy for another Pocatello man in October 2014; he donated 10 hours on that case. Earlier in October 2014, he closed a bankruptcy file for a woman who lived in Pocatello. She had decided not



Kirstin K. Dutcher



Kenneth E. Lyon

to pursue her case, so Mr. Lyon reported only 4 hours in connection with that matter. Handling three pro bono matters in a single year would easily qualify Mr. Lyon for a pro bono award. Although debtors often attempt to file without representation, many debtors (and not a few attorneys) find the federal bankruptcy court’s terminology, procedures, and rules overwhelming. Having an experienced attorney like Mr. Lyon determines whether a person will achieve the benefits of a bankruptcy discharge in many cases. Ken Lyon deserves a pro bono award for his work in 2014. However, if we step back a bigger picture emerges. Since 1993, Mr. Lyon has worked with IVLP on 51 pro bono cases. He has one open now. His extraordinary generosity has made a huge difference in the lives of many people in his community.

### 6<sup>th</sup> District: Shane Reichert

Kumm & Reichert, PLLC, Pocatello

Mr. Reichert joined Kelly Kumm as a partner in 2013. Mr. Reichert is extremely busy, but is always prepared and willing to fight hard for the volunteer and the children as a Court Appointed Special Advocate (CASA) volunteer. Mr. Reichert has taken more than one case at a time and volunteers ask to have Mr. Reichert represent them as he has the reputation of being a wonderful pro bono attorney.



Shane Reichert

**6<sup>th</sup> District: Stratton Laggis**

Kumm & Reichert, PLLC, Pocatello

Mr. Laggis recently became an Idaho licensed attorney and is an associate attorney at Kumm & Reichert, PLLC, which houses the only actively practicing three-generation attorney family in Idaho. Upon graduation from University of Idaho College of Law in December of 2013, Mr. Laggis jumped right into his commitment to volunteer. Individuals who he has represented through the Court Appointment Special Advocate (CASA) program have commented that he is very hands on and offers his expertise on how the volunteer approaches their investigation and writing their reports. Mr. Laggis took two cases right away and the volunteers really enjoy working with him.



Stratton Laggis

**7<sup>th</sup> District: Bryce C. Lloyd**

Blaser, Olesen & Lloyd, Chartered, Blackfoot

Mr. Lloyd agreed to represent a father who had been his daughter's primary caregiver since the girl was removed from her mother's home

by Child Protection Service five years previously. He had also been granted full custody by the court. However, the mother had recently filed for modification and Mr. Lloyd's client felt he was simply not able to effectively litigate the case without help. He was probably right. The case was a difficult and complex one that involved allegations of sexual abuse of the minor child and criminal charges against the mother, who had retained her own attorney. Mr. Lloyd generously donated considerable time as well as travel to see the matter through a contested proceeding that resulted in a court order in favor of his client, enabling him to retain custody and protect the child.



Bryce C. Lloyd

**7<sup>th</sup> District: Charles E. Cather III and Benjamin C. Ritchie**

Moffatt Thomas, Idaho Falls

Guardianships for minor children can often be straight-forward matters where everyone agrees a guardian is needed and that the right person has agreed to take on the responsibility. The case that Mr. Cather and Mr. Ritchie undertook was not such a matter. Their case involved a 14-year-old boy whose mother had passed

away 7 months previously. The boy's adult half-brother had moved back to Idaho to care for him and get him into counseling to cope with the loss of his mother. The boy had little relationship with his father (seeing him rarely prior to his mother's death). Suddenly the father reappeared and pulled the child out of counseling and took him on a "road trip" for roughly a month. When they returned to Idaho, the boy was able to escape and reunite with his half-brother. The father called the police, who were not convinced the boy should return to his father. Police urged the half-brother to file for guardianship. He was able to do so with the help of Mr. Cather and Mr. Ritchie. The boy's father arduously opposed the guardianship, which involved two contested hearings and numerous witnesses. Eventually these generous volunteers prevailed and the brothers were united in a permanent guardianship under which the boy felt comfortable and secure.



Charles E. Cather III



Benjamin C. Ritchie

2015 District Bar Association Resolution Meetings					
District	Date	Ethics CLE	Resolution Mtg.	City	Location
First Judicial District	Thurs., Nov. 5	10:30 -11:30 a.m.	Noon	Coeur d'Alene	North Idaho College Student Union
Second Judicial District	Thurs., Nov. 5	4:30 - 5:30 p.m.	6:00 p.m.	Clarkston, WA	Quality Inn
Third Judicial District	Thurs., Nov. 19	4:30 - 5:30 p.m.	6:00 p.m.	Nampa	Hampton Inn
Fourth Judicial District	Thurs., Nov. 19	10:30 -11:30 a.m.	Noon	Boise	Owyhee Hotel
Fifth Judicial District	Wed., Nov. 18	4:30 - 5:30 p.m.	6:00 p.m.	Twin Falls	Canyon Crest Event Center
Sixth Judicial District	Wed., Nov. 18	10:30 -11:30 a.m.	Noon	Pocatello	Juniper Hills Country Club
Seventh Judicial District	Tues., Nov. 17	10:30 -11:30 a.m.	Noon	Idaho Falls	Marriott Residence Inn

# Commercial Law and Bankruptcy Issues Affect Us All

Alexandra Caval

**B**ankruptcy is the legal labyrinth that impacts every other field of law yet remains an enigma to non-bankruptcy attorneys. Bankruptcy halts the division of property in divorce proceedings. It can mean that business partners may wake up and find themselves with a new business partner who goes by the name of “bankruptcy trustee.” Bankruptcy can even halt a personal injury lawsuit from proceeding if the asset was not properly disclosed in the plaintiff’s bankruptcy case. In short, bankruptcy has serious implications.

As a bankruptcy attorney, I enjoy making order out of financial chaos and crafting the most painless path possible toward debt relief for my clients. Each client also presents new challenges and an opportunity to learn. While practicing bankruptcy can be described as challenging at times, it cannot be described as boring.

As this year is drawing to a close, the Commercial Law and Bankruptcy Section is preparing for its upcoming 34<sup>th</sup> Annual Seminar in Idaho Falls on February 18 - 20 2016. We also continue to support teams from the University of Idaho College of Law and Concordia as they participate in bankruptcy moot court competitions. Lastly, we help

our members stay abreast current developments in the law.

In this issue of *The Advocate*, we have partnered with the Employment Law Section to explore employment law issues that arise both within bankruptcy and outside of it. Look inside this issue to learn how to utilize various expert witnesses in employment cases to prove damage, establish the element of causation and how to comply with the new requirements for disclosing expert witnesses in light of the recent rule changes.

Explore the potential pitfalls that employers face when drafting severance agreements.

Discover whether pension plans are insulated in bankruptcy or whether those plans can be modified under the supervision of a bankruptcy judge.

Lastly, learn about the tools available to employment law litigators

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As a bankruptcy attorney,  
I enjoy making order out  
of financial chaos and crafting  
the most painless path possible  
toward debt relief.

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when the other side seeks bankruptcy relief. I hope that the information in this issue sheds some light on the obscure nexus between bankruptcy and employment law.

*Alexandra Caval is a bankruptcy attorney in Twin Falls, Idaho. She represents consumer and business clients in bankruptcy proceedings under various chapters of the Bankruptcy Code. She is a graduate of the University of Idaho College of Law and is a member of the Commercial Law & Bankruptcy Section.*



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# What Happened to My Pension Plan?!?

## Pension Fund Claims, Contracts, and Bankruptcy

Matt Christensen

Imagine the following scenario: You are a 72-year-old man. The 40 years prior to your retirement at age 65 you worked for a small Idaho town in eastern Idaho<sup>1</sup>. At the time you retired, you had earned a pension, which was to pay 75% of your last salary for the rest of your life, with a 2% cost of living increase every two years. For the past five years, however, the town has suffered from a severe loss of funds, caused in large part by budget decreases from the state of Idaho and a general exodus of residents from the small town you worked and grew up in (with significant decreases in tax revenue). Based on this loss of funds, the town has been unable to pay your full pension payments for the past three years — averaging only a 50% payment per month. Luckily, you also qualify for social security, so you're able to just scrape by each month. The town, however, is now severely in debt, owing millions of dollars on bonds and other credit arrangements. The town recently filed a Chapter 9 bankruptcy petition (with the permission of the State of Idaho) to reorganize and restructure its debts, including the pension claims and pension contracts. Are you ever going to see the past three-years of unpaid amounts?

This article first addresses Idaho's legal restrictions on changes to retirement plans, followed by a discussion of approaches taken by other states. Two recent bankruptcy cases are then discussed, involving the City of Detroit and City of Stockton, and specifically the bankruptcy court's orders allowing changes to seemingly protected retirement plan benefits. The lessons from Detroit and Stockton are then applied to potential situations in Idaho, including the hypothetical outlined above.

Alterations of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation, and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages."<sup>6</sup>

— Idaho Supreme Court in  
*Nash v. Boise City Fire Department* (1982)

### Idaho restrictions on contracts and pension plan modifications

Both the U.S. and Idaho constitutions protect contract rights. Article 1, Section 10 of the federal constitution prohibits states from passing any laws "impairing the Obligation of Contracts"<sup>2</sup> Article 1, Section 16 of the Idaho constitution also prohibits the same.<sup>3</sup> The Idaho Supreme Court long ago ruled that impairing a contract means taking from a party a right to which he is entitled by its terms" or "depriving [a party] of the means of enforcing such a right."<sup>4</sup> In applying this statute to public-employee pension plans, the Idaho Supreme Court stated that "the rights of employees in pension plans such as Idaho's Retirement Fund Act are vested, subject only to reasonable modification for the purpose of keeping the pension system flexible and maintaining its integrity."<sup>5</sup> The Idaho Supreme Court further explained that "[to] be sustained as reasonable, alterations of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation, and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages."<sup>6</sup>

Consequently, while current Idaho Supreme Court authority appears to allow modifications to pension plan benefits, those modifications must be related to the "theory of a pension system" and provide for offsetting additional benefits if benefits are removed.

### Other states' pension plan protections

On the other hand, several other states provide more robust protection for pension plan benefits. For instance, the Michigan constitution provides that "[the] accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby."<sup>7</sup> Similarly, California enacted legislation specific to its California Public Employees' Retirement System ("CalPERS"). California's statute specifically protects the CalPERS pension plans from a Chapter 9 bankruptcy filing:

Notwithstanding any other provision of law, no contracting agency or public agency that becomes the subject of a case under the bankruptcy provisions of Chapter 9 ... of Title 11 of the United States

Code shall reject any contract or agreement between that agency and [CalPERS] pursuant to Section 365 of Title 11 of the United States Code or any similar provision of law ...”

Notwithstanding these very specific provisions, and the safeties provided by the Michigan constitution, both protections were recently tested by the bankruptcy filings of the City of Detroit and the City of Stockton.

### Stockton and Detroit bankruptcies

The City of Stockton filed a Chapter 9 bankruptcy petition on June 28, 2012. Shortly thereafter, the City resolved to reduce the funding for certain retirement benefits. A class action lawsuit was subsequently filed, seeking an injunction from the bankruptcy court requiring the City of Stockton to continue funding the retirement benefits.<sup>8</sup> The court denied the injunction, citing Section 904(2) of the Bankruptcy Code, which prohibits the bankruptcy court (unless its part of a proposed plan of adjustment in the Chapter 9 case) from “interfering with any of the property or revenues of the debtor.”<sup>9</sup> Later, after the court allowed the bankruptcy case to proceed, it confirmed a Chapter 9 plan. In confirming the negotiated Chapter 9 plan, however, the bankruptcy court noted that the pension plans (as “collective bargaining agreements”) could be adjusted, modified or even rejected through the bankruptcy plan.<sup>10</sup>

The City of Detroit suffered from well-documented dwindling in population, employment and revenues. As the bankruptcy court later put it:

The City no longer has the resources to provide its residents with the basic police, fire and emergency medical services that its residents need for their basic health and safety. Moreover, the City’s governmental operations are wasteful and

inefficient. Its equipment, especially its streetlights and its technology, and much of its fire and police equipment, is obsolete. To reverse this decline in basic services, to attract new residents and businesses, and to revitalize and reinvigorate itself, the City needs help.<sup>11</sup>

The bankruptcy court found that the City of Detroit’s debt exceeded \$18 billion. Of this amount, over \$10 billion was related to pension obligations, whether unpaid health and insurance benefits, or unpaid pension obligations.<sup>12</sup>

While bankruptcy law endeavors to provide a system of orderly, predictable rules for treatment of parties whose contracts are impaired, that does not change the starring role of contract impairment in bankruptcy.

— In re City Detroit,  
504 B.R. at 244



An initial challenge to the City of Detroit bankruptcy was made by a class of pension holders, who argued that the City did not qualify for bankruptcy relief and alternatively, that the bankruptcy court could not restructure the pension obligations. This later argument was premised on the Tenth Amendment to the U.S. Constitution and the protections against state amendments of contracts provided by the U.S. and Michigan constitutions. The pensioners essentially argued that because the state of Michigan was prohibited from modifying their pension rights, the federal Bank-

ruptcy Code could not otherwise do what the state could not. The court decided otherwise:

[W]hile a state cannot make a law impairing the obligation of contract, Congress can do so. The goal of the Bankruptcy Code is adjusting the debtor-creditor relationship. Every discharge impairs contracts. While bankruptcy law endeavors to provide a system of orderly, predictable rules for treatment of parties whose contracts are impaired, that does not change the starring role of contract impairment in bankruptcy.

It follows, then, that contracts may be impaired in this chapter 9 case without offending the Constitution. The Bankruptcy Clause<sup>13</sup> gives Congress express power to legislate uniform laws of bankruptcy that result in impairment of contract; and Congress is not subject to the restriction that the Contracts Clause places on states.<sup>14</sup>

The court then concluded that the pension rights were subject to impairment in the Detroit bankruptcy proceeding, and allowed the case to proceed.<sup>15</sup>

Reactions to this ruling were immediate and apocalyptic. For instance, a spokesman for the Detroit Police and Fire Retirement System (one of the pensions affected by the ruling) stated that the Detroit pension obligations were “one of the strongest protected pension obligations in the country ... If this ruling is upheld, this is the canary in a coal mine for protected pension benefits across the country. They’re gone.”<sup>16</sup>

Less than a year later, however, a compromise had been crafted that largely saved the pension obligations and avoided further litigation and appeals over whether the pension obligations really could be modified in the bankruptcy case.<sup>17</sup> Referred

to as the “Grand Bargain,” the settlement involved a myriad of parties and was made possible due to Detroit’s ownership of the Detroit Institute of Arts (and the vast artwork collection housed there). By way of the compromise, certain foundations, the state of Michigan, the Detroit Institute of Arts and the city’s water and sewer system pledged hundreds of millions of dollars to fund payments on the pension plans. In return, the artwork held by the Detroit Institute of Arts was transferred to a perpetual trust, and the pension claimants agreed to reductions in monthly checks and other specific cutbacks on their benefits.<sup>18</sup> Each of these settlements was later heralded by the bankruptcy court in its approval of Detroit’s plan of adjustment.<sup>19</sup> While the pension claimants retained their pension claims, critics argued that the underlying problems (lack of adequate funding for ongoing obligations) remained, and Detroit may simply be back in bankruptcy again sometime in the future.<sup>20</sup>

### Lessons from Stockton and Detroit<sup>21</sup>

Most instructive for future municipality bankruptcies is the decision by both the *Stockton* and *Detroit* bankruptcy courts that pension plans that held specific statutory and/or constitutional protections from impairment or modification remained subject to impairment and modification in a Chapter 9 bankruptcy case. These same principles have since been applied to a Chapter 11 bankruptcy proceeding involving a private company.<sup>22</sup> Whether the pension benefits qualify as “executory contracts”<sup>23</sup> or not, they may be impaired and modified in a bankruptcy case.<sup>24</sup>

Applying these courts’ reasoning to the Idaho Supreme Court’s protection of pension benefits in Idaho, one is left with the conclusion that the restrictions on modification

Because pension benefits may be modified in a bankruptcy case, employee and retiree clients must be advised that their pension benefits are not as inviolate as they may think.

outlined by our Supreme Court are ephemeral. Outside the bankruptcy context, those restrictions may still apply. However, because pension benefits may be modified in a bankruptcy case, employee and retiree clients must be advised that their pension benefits are not as inviolate as they may think. Further, even clients holding pension benefits from other states with more robust pension protections (such as those in California and Michigan) should be advised that their pension benefits are not as protected as the client may have thought.

Lastly, as happened in the Detroit bankruptcy, the spectre of wholesale changes to a pension plan may lead to negotiated resolutions. However, the resolution outlined in the *Detroit* case may have just been a band-aid, requiring further bankruptcy reorganization in the future. Negotiated resolutions to pension plan issues in a bankruptcy case may require much more movement by the pension holders in order to avoid later bankruptcy court involvement. Recognizably, though, it will be difficult for pension holders to agree to a reduction of their pension benefits especially when they likely rely on them for day-to-day living. However, as the *Stockton* and *Detroit* cases show us, failure to agree to voluntary reductions or reforms may lead to bankruptcy court approval of even further reductions.

### Endnotes

1. For purposes of this hypothetical, we are assuming the “small eastern Idaho town” did not elect to join Idaho’s PERSI retirement system. Nevertheless, as demonstrated by the *City of Stockton* decisions (discussed below), even if the small town had joined the PERSI system, with the right set of facts even rights under that retirement plan may not be completely protected.
2. U.S. Constitution, Article 1, Section 10.
3. See Idaho Constitution, Article 1, Section 16.
4. *In re Fidelity State Bank*, 35 Idaho 797, 810 (1922).
5. *Hanson v. Idaho Falls*, 92 Idaho 512, 514 (1968).
6. *Nash v. Boise City Fire Dep’t*, 104 Idaho 803, 806 (1982) (citing *Abbott v. City of Los Angeles*, 332 P.2d 324, 328 (Cal. App. 1958)).
7. Michigan constitution, Article IX, Section 24.
8. See *Assoc. of Retired Employees v. City of Stockton (In re City of Stockton)*, Adversary Case No. 12-2302 (Bankr. E.D. Cal.).
9. 11 U.S.C. §904(2); see *Assoc. of Retired Employees v. City of Stockton (In re City of Stockton)*, 478 B.R. 8 (Bankr. E.D. Cal., 2012) (hereinafter “*Stockton I*”).
10. See, e.g., *In re City of Stockton*, 526 B.R. 35 (Bankr. E.D. Cal., 2015).
11. *In re City of Detroit*, 504 B.R. 191, 206 (Bankr. E.D. Mich., 2013) (hereinafter “*Detroit I*”).
12. *Id.*, at 207.
13. U.S. Constitution, Article I, Section 8(4) (“Congress shall have Power ... to establish ... uniform Laws on the subject of Bankruptcies throughout the United States.”).
14. *Detroit I*, 504 B.R. at 244 (citing *Stockton I*, 478 B.R. at 16).
15. See *Detroit I*, 504 B.R. at 247-48.
16. Cited in Monica Davey, Bill Vlasic and Mary Williams Walsh, “Detroit Ruling on

Bankruptcy Lifts Pension Protections," N.Y. TIMES, Dec 3, 2013.

17. Of interest to those who regularly litigate cases, the bankruptcy court in the Detroit case took the unusual step of touring the City of Detroit as part of the plan confirmation process. After doing the tour, the court commented in its decision confirming the plan that viewing the living conditions of city residents was "heartbreaking, maddening and sad. No one should have to endure, day in and day out, the damage to the human spirit that can result from living in those surroundings. City residents who live, work and play in these neighborhoods deserve better. Detroit deserves better." See *In re City of Detroit*, 524 B.R. 147, 167, (Bankr. E.D. Mich., 2014 (hereinafter "Detroit II").

18. See, generally, *Detroit II*, 524 B.R. 147.

19. *Detroit II*, 524 B.R. at 181 ("It is therefore a vast understatement to say that the pension settlement is reasonable. It borders on the miraculous. No one could have foreseen this result for the pension creditors when the City filed this case.").

20. See, e.g., David Skeel, "Detroit's clever and likely illegal art-for-pensions deal," WASHINGTON POST, May 9, 2014; Mary Williams Walsh, "Detroit Emerges from Bankruptcy, Yet Pension Risks Linger," N.Y. TIMES, November 11, 2014.

21. While not strictly bankruptcy cases, the states of Illinois and New Jersey also recently reformed their existing public employee pension plans. Challenges were made to each reform, arguing that either constitutional or statutory provisions protected the vested rights of pensioners. In both cases, the state supreme court ruled that the constitutional or statutory provisions created contractual rights for the pensioners (similar to the bankruptcy courts' rulings in Detroit and Stockton). See, e.g., *Heaton v. Quinn (In re Pension Reform Litig.)*, 32 N.E. 3d 1 (Ill. 2015) (construing a constitutional provision) and *Burgos v. State*, 118 A.3d 270 (N.J. 2015) (construing a statutory provision). Because the pension rights were

construed as contractual, those pension rights would be subject to the same *Detroit* and *Stockton* bankruptcy analysis regarding changes to those rights in a Chapter 9 bankruptcy case.

22. See, e.g., *Ky. Emples. Ret. Sys. v. Seven Counties Servs. (In re Seven Counties Servs.)*, 511 B.R. 431 (Bankr. W.D. Ky., 2014).

23. See 11 U.S.C. §365 (dealing with rejection or assumption of executory contracts).

24. The *Stockton* court specifically found that the health plan benefits at issue were not executory contracts. See *Stockton I*, 478 B.R. at 22.

Matt Christensen is a partner at Angstman Johnson whose practice focuses on commercial transactions and litigation, including bankruptcy. Matt frequently represents Chapter 7 Bankruptcy Trustees and bankruptcy debtors in all kinds of bankruptcy cases. Matt is a graduate of Duke Law School.



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# Tools for Collecting Debts From High-Income Low-Asset Bankruptcy Debtors

Loren K. Messerly

**W**hen asked to write an article about the nexus between employment and bankruptcy law, my thoughts took me to a recent, frustrating experience I had chasing collection on a judgment into bankruptcy. I have found that the only thing worse than getting a big judgment and not being able to collect it, is getting a big judgment against someone you were confident you would be able to collect against, only to later find out you were wrong. Mine was such a case: successful litigation that resulted in a large judgment for my client, but then mostly thwarted in bankruptcy by a debtor (1) with no assets to execute on (he had lots of assets but they were all exempt) and (2) who had a high income but did not have to use that income to pay the judgment due to a Chapter 7 bankruptcy discharge. I call this type of debtor the notorious “High-Income Low-Asset Bankruptcy debtor” or “HILA debtor.”

Employment litigators face similar challenges. Borrowing a baseball analogy, after hitting a triple during litigation, they want to make sure their client gets to home plate, not stranded on third base by the HILA debtor. Clients expect their lawyers to be omniscient, predicting how the client will “circle the bases” and, ultimately, score. Thus, it behooves the employment litigator — like any litigator — to understand how bankruptcy can affect collectability.

This article discusses how an employment litigator can navigate around the challenge of collecting judgments from HILA debtors, using the following bankruptcy tools: (1) a nondischargeability judgment

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It behooves the employment litigator — like any litigator — to understand how bankruptcy can affect collectability.

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under Section 523, (2) a dismissal or conversion for abuse under revised Section 707(b), and (3) a conversion to Chapter 11 under Section 706(b).<sup>1</sup>

## **HILA debtors: Stiffing creditors while remaining wealthy after bankruptcy**

Debtors in bankruptcy come in all different shapes and sizes. One of the most notorious types is the Chapter 7 debtor, with a lot of debt, a high-paying job, and no significant non-exempt assets (or, perhaps, like the debtor in my case, significant exempt assets). This describes the HILA debtor — famed for obtaining a bankruptcy discharge of all debt, while avoiding the liquidation of any significant assets or the garnishment of high future wages. Often times, the HILA debtor is the loser of protracted, high-stakes litigation, having had the time and foresight to do pre-bankruptcy asset planning and the ability to account for impressive litigation costs.

## **Tool for collecting No. 1: Nondischargeability judgments**

Naturally, the best collection tool against the HILA debtor is a non-

dischargeability judgment wherein the bankruptcy court determines that your client’s debt is not discharged by the debtor’s bankruptcy discharge. The nondischargeability judgment turns the potential negative impact of bankruptcy into a positive one for your creditor client — let the HILA debtor discharge payments to *other* creditors, resulting in fewer debts and fewer creditors to compete against for the limited funds that can be used to satisfy *your* client’s nondischarged judgment. All debts, however, are dischargeable, unless excepted under Section 523. In other words, in addition to obtaining your employment litigation judgment, you must be prepared to subsequently prove that the judgment is nondischargeable under Section 523.

As it turns out, many employment litigation judgments *are* nondischargeable; typically under Section 523(a)(6) because they are the product of a “willful and malicious injury” that resulted in damages — for example, sexual harassment, retaliation, disparate treatment discrimination, violation of a non-compete agreement, tortious interference with contract, and trade secret act violation.<sup>2</sup> The two elements of willful

and malicious injury are similar, but nonetheless distinct, and must each be proven.

A “willful” injury is a “deliberate or intentional *injury*, not merely a deliberate or intentional act that leads to injury;” willfulness can be established when “the debtor has a subjective motive to inflict injury or when the debtor believes that injury is substantially certain to result from his own conduct,” with the debtor being presumed to know the natural consequences of his or her actions.<sup>3</sup> A malicious injury involves “(1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse” and does not require a plaintiff to establish “personal hatred, spite, or ill-will.”<sup>4</sup>

In some cases, a bankruptcy is filed at the start of litigation and the bankruptcy court will handle the underlying employment litigation and the nondischargeability action as one. In many situations, however, the bankruptcy is filed only as a result of the judgment issued in the underlying litigation, so the nondischargeability action will be a completely separate litigation in bankruptcy court. In that latter, more common situation, issue preclusion (sometimes referred to as collateral estoppel) becomes a crucial principal in avoiding/minimizing the costs of re-litigation. That is, a good lawyer in a non-bankruptcy setting will anticipate possibly needing to prove a discharge exception (*e.g.*, willful and malicious injury) later on in bankruptcy. Any findings of fact in the non-bankruptcy proceeding can be the key to avoiding a new dischargeability trial in bankruptcy court, allowing you to win a summary or stipulated judgment based on issue preclusion.

Of course, there are many employment-related debts/judgments

that are nondischargeable — for example, the sole proprietor who loses litigation over a noncompetition agreement and must pay attorney fees to the prevailing party or the employee who violated the agreement but on advice of counsel.<sup>5</sup> Fortunately, there are at least two other tools that an employment litigator can use to combat the HILA debtor who is seeking to avoid any significant payment on your judgment. These tools are quite different in their approach: rather than preventing a debt from being dischargeable, these two additional tools prevent the debtor from

The Means Test and related “abuse” provisions in Section 707(b), however, may not be particularly helpful for employment litigation judgment creditors because they only apply to HILA debtors with “primarily consumer debts.”

getting a discharge of any debts without first using their high (sometimes obscene) income to make significant payments towards those debts. These tools can work both independently or jointly with the nondischargeability judgment to exert leverage against the HILA debtor.

**Tool for collecting No. 2: Dismissal or conversion for abuse under revised Section 707(b)**

A recently revamped tool to deal with the HILA debtor is the “Means Test” and related “abuse” provisions

under revised Section 707(b). Revised in 2005, Section 707(b) now contains a Means Test calculation that can create a presumption of abuse that can ultimately (after consideration of other related abuse provisions like rebuttal of the presumption, bad faith, and a totality of the circumstances of the debtor’s financial situation) force certain HILA debtors out of Chapter 7, giving them the option of Chapter 13 (if they are eligible), Chapter 11, or no bankruptcy.<sup>6</sup> If “pushed” into either Chapters 11 or 13, the HILA debtor would typically be required to pay all “disposable income” to creditors during a 3-5 year bankruptcy payment plan, thus meeting the objective of forcing the HILA debtor to pay the debt out of their high income for an extended period.

The Means Test and related “abuse” provisions in Section 707(b), however, may not be particularly helpful for employment litigation judgment creditors because they only apply to HILA debtors with “primarily consumer debts.” The Ninth Circuit instructs that any debtor’s debts are primarily consumer debts if more than half (by dollar amount, not number of debts) of the total debt is consumer debt, with each individual debt being evaluated based on that “debt’s primary purpose” (either consumer or non-consumer; any one debt cannot be split).<sup>7</sup>

Most employment litigation judgments fall within the category of non-consumer debts (and within the frequently-mentioned subset of “business debts” that are often defined as “profit driven”) — for example, the small business owner hit with a sexual harassment or racial discrimination judgment or the ex-employee saddled with a judgment for violation of the Idaho Trade Secrets Act. Thus if the HILA debtor

has more than 50% of his debt related to an employment litigation judgment (the high-stakes litigation that pushed the HILA debtor into bankruptcy in the first place), dismissal for abuse under Section 707(b) is inapplicable. The irony may be that the larger the judgment obtained by a creditor, the greater the chance that judgment will be more than 50% of the HILA debtor's debts, allowing the HILA debtor to avoid the Section 707(b) abuse provisions.

### **Tool for collecting No. 3: Conversion under Section 706(b)**

Another new and developing tool, specifically helpful against the HILA debtor with debts that are not primarily consumer debts, is Section 706(b). This is a tool that became much more useful when the 2005 BAPCPA<sup>8</sup> amendments made a debtor's post-bankruptcy petition earnings property of the Chapter 11 bankruptcy estate. The implications of the BAPCPA amendments on Section 706(b) took some time to be recognized, but seven recent decisions (all issued since 2011) address Section 706(b) as a new possible tool in the context of HILA debtors with primarily non-consumer debts (though none from Idaho and only one from a bankruptcy court within the Ninth Circuit - (Alaska).

Section 706(b) is simply-stated: "On request of a party in interest and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 11 of this title at any time." Section 706(b) has minimal legislative history and the cases have uniformly agreed that "conversion under § 706(b) is not conditioned upon any specific factors, or limited to any subset of debtors," but is "committed to the sound discretion of the court, based on what will most inure to the benefit of all parties in interest."<sup>9</sup>

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The implications of the BAPCPA amendments on Section 706(b) took some time to be recognized, but seven recent decisions (all issued since 2011) address Section 706(b) as a new possible tool in the context of HILA debtors with primarily non-consumer debts.

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Increasingly, creditors and the U.S. Trustee are bringing motions to convert from Chapter 7 to Chapter 11 for HILA debtors with primarily non-consumer debts (as discussed above, a similar motion under Section 707(b) would be proper when dealing with a HILA debtor with primarily consumer debt).<sup>10</sup> Courts from Alaska, Florida, Nebraska and the Eighth Circuit Bankruptcy Appellate Panel, and Georgia have recently granted such motions.<sup>11</sup> The only jurisdiction to reject Section 706(b)'s application for HILA debtors with primarily non-consumer debts, post-BAPCPA amendments, is New Mexico.<sup>12</sup> In granting the motions to convert, courts do not appear to require a showing of abuse or bad faith by the HILA debtor in filing Chapter 7; rather, courts have merely determined that the HILA debtor can pay significant amounts to creditors by using post-petition income as part of a Chapter 11 plan (as opposed to paying creditors minimal amounts in Chapter 7) and that, on balance, the conversion benefits "all parties in interest."

*In re Gordon*<sup>13</sup> represents an interesting example of Section 706(b)'s utility in an employment litigation context. There, the debtor was an operational consultant who went to a competitor in alleged violation of "a written employment agreement

which contained several restrictive covenants."<sup>14</sup> After several years of litigation, judgment was entered against him for \$1,659,000 in damages and \$335,050 in attorneys' fees.<sup>15</sup> The debtor and his judgment creditor stipulated to extend the deadline for determining dischargeability of the debt, and the judgment creditor filed a motion to convert from Chapter 7 to Chapter 11, pursuant to Section 706(b).<sup>16</sup> The bankruptcy court determined the debtor's monthly income was at least approximately \$14,000 (and likely more and that) and his monthly disposable income was "at least \$3,400, and perhaps as much as \$10,000."<sup>17</sup> The court found that conversion was therefore in the best interest of creditors.<sup>18</sup> The court also found that conversion was in the debtor's interest (despite the debtor's arguments to the contrary), reasoning: "Debtor has become a pawn between two companies . . . . Dismissal of this case will only result in further efforts by the two companies to thwart each other. . . . A final resolution of this matter is needed, so that Mr. Gordon can resume his normal life. Conversion is also beneficial to Mr. Gordon, because it avoids litigation over Section 727 issues of discharge and instead focuses litigation only on the potential non-dischargeability of the debt of [Creditor] under Section 523. If, as

[Creditor] argues, its debt is non-dischargeable, a Chapter 11 plan will be a preferred method for dealing with payment of the debt.”<sup>19</sup>

Ultimately, the court took a wait-and-see approach regarding the debtor’s predictions that no workable Chapter 11 payment plan could be reached and that Chapter 11 would be a wasted effort — that was the same approach employed in each of the above-referenced cases where conversion was granted under Section 706(b), with several courts noting that it was ultimately the debtor’s choice whether to propose a confirmable Chapter 11 plan, make the plan payments, and thereby obtain a bankruptcy discharge. To date, however, none of the four debtors in these cases has chosen to propose a Chapter 11 plan.<sup>20</sup>

It does not appear that Section 706(b) has been used against a HILA debtor in Idaho post-BAPCA, but its application appears likely to be successful against the right HILA debtor. Of note, Idaho has a pre-BAPCA case, *In re Lenartz*,<sup>21</sup> suggesting that at least one of its judges would interpret Section 706(b) to allow the forced conversion from Chapter 7 to Chapter 11 of certain HILA debtors with primarily non-consumer debts. There, the court initially ruled that the plain language of Section 706(b) allowed for forced conversion (similar to involuntary Chapter 11 proceedings brought against individual debtors); however, in a subsequent opinion, the court noted that “debtors’ post-bankruptcy earnings are therefore not property of the bankruptcy estate” and denied the motion to convert because “absent debtors’ cooperation, it would be impractical, if not plainly infeasible, to attempt to force debtors to pay their debts through Chapter 11 if they were not inclined to do so.”<sup>22</sup> As noted above, the BAPCA amendments changed

the treatment of post-petition earnings for individuals in Chapter 11, suggesting that the court may have granted the motion to convert if *Lenartz’s merits* were considered today.<sup>23</sup>

### Bottom line

In sum, a HILA debtor is not uncollectible.<sup>24</sup> Employment law litigators have three important bankruptcy tools — Section 523 nondischargeability, Section 707(b) abuse, and Section 706(b) conversion — to employ when attempting to collect judgments against the post-petition

Employment law litigators have three important bankruptcy tools — Section 523 nondischargeability, Section 707(b) abuse, and Section 706(b) conversion.

earnings of a HILA debtor. The development of new case law regarding Section 706(b) will be interesting to watch and Idaho appears to be fertile territory for pursuing Section 706(b) application to HILA debtors with primarily non-consumer debts.

### Endnotes

1. All references herein to Section 523, Section 706, and Section 707 are references to those Sections within Title 11 of the United States Code, commonly referred to as the Bankruptcy Code.
2. See, e.g., *In re Goldberg*, 487 B.R. 112 (Bankr. E.D.N.Y. 2013) (pregnancy dis-

crimination and retaliation judgment found nondischargeable); *Beard Research, Inc. v. Kates (In re Kates)*, 485 B.R. 86 (Bankr. E.D. Pa. 2012) (trade secret violation damages found nondischargeable); *In re Spagnola*, 473 B.R. 518, 524 (Bankr. S.D.N.Y. 2012) (“The Court is persuaded by the many bankruptcy courts that have found that sexual harassment discrimination is inherently an intentional tort and allowed it to be excepted from discharge as a willful and malicious injury.”); *Hughes v. Arnold*, 393 B.R. 712 (E.D. Cal. 2008) (attorney fee judgment from defending against sexual harassment claim was nondischargeable where plaintiff brought the claim in “bad faith”); *Traditional Indus. v. Ketaner (In re Ketaner)*, 149 B.R. 395 (Bankr.E.D.Va.1992) (intentional breach of non-compete clause constitutes willful and malicious injury).

3. See, e.g., *Burks v. Bailey (In re Bailey)*, 499 B.R. 873, 892-94 (Bankr. D. Idaho 2013), affirmed in relevant part in *Burks v. Bailey (In re Bailey)*, 518 B.R. 594, 600 (D. Idaho 2014).

4. *Id.*

5. See, e.g., *JB Construction v. King*, Case No. 07-02042-JDP, Adv. Pro. No. 08-6031 (Bankr. D. Idaho January 22, 2009) (breach of covenant not to compete found to not be a tort and therefore discharged because does not fit within willful and malicious injury); *In re Busch*, 311 B.R. 657, 671 (Bankr. N.D.N.Y. 2004) (finding judgment from hostile work environment case was dischargeable); *In re Tompkins*, 290 B.R. 194, 202 (Bankr. W.D.N.Y. 2003) (debt from settlement of sexual harassment suit did not allow for issue preclusion and analysis of underlying facts did not support finding of willful and malicious injury).

6. Compare *In re Littman*, 370 B.R. 820, 832-33 (Bankr. D. Idaho 2007) with *In re Soto*, 2012 Bankr. LEXIS 2632, \*12-13, 2012 WL 2087446 (Bankr. D. Idaho June 8, 2012) and *In re Scott Michael Smith*, Case No. 09-00416 (Bankr. D. Idaho June 8, 2012). A detailed discussion of the Means Test calculation and of the related abuse provisions (*i.e.* how the Means Test presumption of abuse can be rebutted or how the “totality of the circumstances . . . of the debtor’s financial situation” provision might apply) is beyond the scope of this article.

7. See *Zolog v. Kelly III, et al. (In re Kelly)*, 841 F.2d 908, 913 (9th Cir. 1988) (finding that mortgage debt was consumer

debt); *Hopkins v. Marble (In re Kempkers)*, 2012 WL 4953076 (Bankr. D. Idaho Oct. 16, 2012) (“Put another way, dividing a single debt into both consumer debt and non-consumer debt is inappropriate; the total amount of a debt will be counted as consumer debt, even if a portion of it was incurred by the debtor for a business purpose.”).

8. The Bankruptcy Abuse Prevention and Consumer Protection Act.

9. See *Matter of Johnson*, 116 B.R. 224, 225-26 (Bankr. D. Idaho 1990).

10. See *In re Hardigan*, 490 B.R. 437, 446 (Bankr. S.D. Ga. 2013) (“Thus, for non-consumer debtors such as *Gordon*, § 706 is the only avenue to convert a Chapter 7 case. For consumer debtors, however, both sections apply. Because § 707(b) is the more comprehensive of the two, § 707(b) should be used exclusively for deciding conversion issues when the issue is bad faith or abuse. All that remains under § 706 for a consumer debtor is whether a discretionary conversion is warranted for reasons other than those that fit into the body of law interpreting bad faith and abuse under § 707(b).”). *But see Suntrust Bank v. Hardigan (In re Hardigan)*, 2014 U.S. Dist. LEXIS 153008, \*9 (S.D. Ga. Oct. 29, 2014) (District Court affirming decision not to convert based on facts and “highly deferential standard” and stating, “The Court does not address the Bankruptcy Court’s discussion of the interplay between sections 706(b) and 707(b) because there is sufficient evidence in the record to determine that the Bankruptcy Court did not err in refusing to convert the case under section 706(b) alone.”).

11. See *In re Decker*, No. A14-00065-GS, 2015 WL 5027558 (Bankr. D. Alaska Mar. 31, 2015); *In re Baker*, 503 B.R. 751, 754 (Bankr. M.D. Fla. 2013); *In re Schlehuber*,

489 B.R. 570 (B.A.P. 8th Cir. 2013) *aff’d*, 558 F. App’x 715 (8th Cir. 2014); *In re Gordon*, 465 B.R. 683 (Bankr. N.D. Ga. 2012).

12. See *In re Snyder*, 509 B.R. 945 (Bankr. D.N.M. 2014); *In re Quinn*, 490 B.R. 607 (Bankr. D.N.M. 2012); *In re Lobera*, 454 B.R. 824 (Bankr. D.N.M. 2011).

13. 465 B.R. 683 (Bankr. N.D. Ga. 2012)

14. *Id.*, 465 B.R. at 687-88.

15. *Id.*

16. *Id.* at 690.

17. *Id.* at 688-89 & 693.

18. *Id.* at 692-93.

19. *Id.* at 694.

20. In *Decker*, the debtor appealed the conversion order and the case remains a Chapter 7 with the appeal pending. In *Baker*, the debtor has not proposed a plan, the creditors have brought motions to appoint a trustee or dismiss the case, and the debtor has brought a motion to reconvert to Chapter 7. In *Schlehuber*, the debtor pursued all appeals through the BAP and Eighth Circuit and never filed a plan and the case was dismissed. In *Gordon*, the debtor appealed and the main creditor then settled with

the debtor and the case was reconverted to Chapter 7.

21. No. 01-40268, 2001 WL 35814401, at \*1-3 (Bankr. D. Idaho May 3, 2001).

22. *In re Lenartz*, 263 B.R. 331, 335 (Bankr. D. Idaho 2001).

23. Another tool, potentially helpful against the HILA debtor with debts that are not primarily consumer debts, is Section 707(a) of the Bankruptcy Code. This Section provides for dismissal of bankruptcy cases for “cause.” Some jurisdictions have considered dismissal of a HILA debtor’s bankruptcy under this provision. The Ninth Circuit, however, has severely limited the reach of Section 707(a) such that it has become a worthless tool in an Idaho bankruptcy. See *In re Padilla*, 222 F.3d 1184, 1194 (9th Cir. 2000) (rejecting a definition of “cause” that included bad faith)

24. Had my own case against a HILA debtor with primarily non-consumer debts occurred in 2015, rather than several years before when the new case law regarding 706(b) was not yet developed, I anticipate my client may have had much more success recovering from the debtor’s high income.

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# Expert Witnesses to Consider in Your Next Employment Case

April M. Linscott

**A**n expert may testify if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.<sup>1</sup> This article will address how experts can be used effectively in a plaintiff's employment case.

## The damages expert

In an employment case, as in most cases, experts fall into a minimum of two categories: damage experts and causation experts. Frequently, a plaintiff will retain an economist or CPA to help prove economic loss such as lost wages (past and future) and lost benefits (health, pension and social security). A plaintiff may also use a vocational rehabilitation expert to prove damages. This type of expert can opine as to your client's ability or inability to perform certain job functions in relation to injury or illness, and the expert can opine as to the sufficiency of your client's mitigation efforts.

Another commonly used expert is a psychologist or other medical expert. When an employment claim hinges on proof of a physical limitation, illness, and/or emotional distress element, relying exclusively on your client's testimony to establish the injury, pain, or emotional distress is a risky proposition. Direct examination of your client regarding his or her pain may come at the expense of alienating the jury. The jury will either dislike you for putting him or her through the examination, which in and of itself is traumatizing, or they will think it is a ploy to garner sympathies.<sup>2</sup> By allowing an expert to opine on your client's physical and emotional damage, you will be free to portray your client in a more

The expert can help a jury understand what a person with one of these conditions experiences day-to-day, what your client can do to help themselves, and how your client may be affected in the future.

favorable light and can focus on the positive steps he or she has taken to deal with the pain. You can then portray your client as a survivor instead of a victim.<sup>3</sup>

A psychologist can also offer damage opinions. This can effectively supplement the testimony of your client and is useful in presenting the picture of emotional damages to the jury.<sup>4</sup> Further, your client may not be able to testify as to some of his or her emotional damages, if it falls outside of lay opinion. Your client may be suffering from post-traumatic stress disorder, major depressive disorder, anxiety disorder, or other similar conditions. The expert can help a jury understand what a person with one of these conditions experiences day-to-day, what your client can do to help themselves, and how your client may be affected in the future.

A less often used damage expert is an expert close to the industry in which a plaintiff worked or works. This expert can be your client's co-worker or someone who once held the same or similar position as your client. The industry expert may even be someone who works for a competitor. This type of expert can assist the jury in understanding your client's challenges in continuing to pursue his or her chosen profession when the challenge results from the

employer's actions. For example, a teacher who has been wrongfully accused of sexual harassment may be unemployable in the future as a teacher. A financial planner who has been wrongfully discharged for embezzlement may be unemployable in the future as a financial planner.

I have utilized this type of expert to provide an opinion that because a professor was wrongfully terminated for sexual harassment, it would be unlikely that he would be considered for any compatible employment positions, should such position become available at another university. This expert was further able to explain how knowledge of the termination and its reason would become known throughout the industry. In another case, involving age discrimination, I utilized an expert to provide an opinion that because of the plaintiff's age, it was unlikely that he would be able to find employment similar to the employment he lost.

Other plaintiff's counsel have successfully used this type of industry expert. For example in *Dixon v. City of Coeur d'Alene*, No. 2:10-00078-LMB, U.S. District Court for the District of Idaho, an industry expert was used in a case involving a 42 U.S.C. § 1983 claim, resulting in a jury verdict of \$3,763,541. The industry ex-

pert opined that “if Dixon is honest with prospective employers regarding the reasons he was disciplined and ultimately discharged, it will be virtually impossible for him to find employment.”<sup>5</sup> In assessing damages, it is important for the jury to understand whether your client has been effectively barred from pursuing his or her chosen profession because of the employer’s actions. A jury may award significantly less in damages, if it believes that your client can easily mitigate his or her damage by finding comparable employment.

### Causation experts

Assisting the jury in understanding your client’s damages may not be enough. You must also establish that the employer’s actions caused the damage. To do this, causation experts may be necessary. The most common causation expert is a human resources expert. Don’t overlook psychological and medical experts, as causation experts, as well.

Most people can relate to the highs and lows of employment. Many people have experienced the highs of being recognized and rewarded for a job well done, or the low of a conflict with a co-worker or in making a mistake. However, how many of us are personally familiar with the daily functions of human resource specialists? For example, what are the proper techniques for investigating a sexual harassment charge? Or, how should an employer endeavor to determine whether an accommodation is reasonable under the Americans with Disabilities Act? Further, a lay person is not familiar with what processes constitute constitutional due process in terminating public employees for cause. At least one district court within the Ninth Circuit has recognized that, “the average juror is unlikely to be familiar with human resources management policies and practices.”<sup>6</sup> A

human resource expert may assist the jury in understanding what actions constitute harassment or create a hostile work environment, including a discussion of the specific occurrences which are the bases of the case.<sup>7</sup> The expert can also testify “as to the effect upon a person who complains about harassment and how the person is not considered a ‘team player.’”<sup>8</sup> Further, an expert may testify regarding the corrective measures that other employers have taken as compared to the actions taken by the defendant employer or other general policies and practices that an employer typically undertakes.<sup>9</sup>

A human resource expert can be used in a host of other ways to assist the jury in understanding whether an employer’s actions are reasonable.



A human resource expert can be used in a host of other ways to assist the jury in understanding whether an employer’s actions are reasonable. One Circuit decision has recognized that an expert can help establish facts required to link specific actions to punitive damages.<sup>10</sup> In another case, the court explained that the right experience in human resources can qualify an expert to explain how employers typically engage in the process of accommodating disabled employees and the types of reasonable accommodations available.<sup>11</sup>

The expert can explain the human resources process in general terms and help to make sense of certain concepts that may be foreign to a jury.

I have utilized a human resources expert to opine as to the appropriate type, frequency, and content of training used to prevent harassment, discrimination, and hostile work environments. In another case I used a human resources expert to describe the best practices for conducting an investigation. That expert explained that if an employer goes to great lengths to solicit negative information about the complainant during the investigation it may be evidence of retaliatory conduct. Even if there are some negative feelings toward the complainant in the workforce, it does not grant an employer a license to harass the complainant.

A psychological or medical expert can also assist the jury on issues of causation. The expert can relate the pain and the injury to the actions of the employer. While some physical manifestations of distress or injury do not require expert testimony, the Idaho Supreme Court has repeatedly recognized that expert testimony is usually required to establish causation involving many medical conditions. Physical manifestations which are readily recognized by a lay person, such as loss of sleep, irritability, anxiety and being shaky-voiced may not require expert testimony.<sup>12</sup> A lay person may also be able to testify that medical care obtained to treat some symptoms is causally related.<sup>13</sup> The court stated in that case:

For example, if a person fell down some steps, landing on a knee, and immediately thereafter felt pain in the knee, saw an open wound on the knee, and within minutes or hours observed that the knee was swelling, that lay person could provide reliable testimony that the pain, wound and swelling were caused by the fall.

A layperson could also testify that medical care obtained to treat those immediate symptoms was causally related to the fall.<sup>14</sup>

However, for all medical conditions lacking an easily followed chain of causation, such as ulcers or headaches, you may need to use a medical expert in order to establish causation. Whether lay testimony is excluded regarding particular symptoms is a decision committed to the discretion of the trial court based upon the facts and circumstances of the particular case. Lay opinions may be foreclosed if the Court determines that the causation question is not a matter within the common knowledge and experience of the average person. Therefore, don't forget to use a psychological or other medical expert for causation, when necessary.

### Disclosing your experts

Once you have determined which experts you will need for your employment case and have obtained their opinions, you will need to pay particular attention to the expert disclosure requirements, because an inadequate disclosure can result in your expert being barred from testifying.

Idaho Rule of Civil Procedure 26(b)(4)(A)(i) almost mirrors Federal Rule of Civil Procedure 26(a)(2)(A) & (B).<sup>15</sup> Idaho's most recent rule change related to expert disclosures became effective July 1, 2014. Prior to that time, Idaho's rule on expert disclosure was less rigid; instead of requiring disclosure, the rule stated that discovery of the expert opinion "may be obtained by interrogatory and/or deposition."<sup>16</sup> The mandatory disclosure requirement means that opposing counsel is no longer required to inquire about the expert opinion in deposition or written discovery. An attorney that fails to disclose all opinions voluntarily, and

the basis or reasons therefore, does so at his client's potential peril.

Err on the side of over disclosure, if you want your experts to be heard. Be sure to state everything you want your expert to say in the disclosure. If your expert is a causation expert, be certain to connect the chain of causation in your disclosure. If your expert is a damage expert, be sure to list all damages and how the expert arrived at the opinion of damages. Don't forget to list all information the expert relied on in reaching the opinion. Experts can be a powerful tool in assisting a fact finder to better understand your client and your client's case. Protect this benefit by providing an adequate and timely expert disclosure.

### Endnotes

1. *Idaho R. Evid. 702; Fed. R. Civ. P. 702.*
2. Rob Ammons and David A. Kirby, *Benefits of a Grief Counselor's Testimony*, TRIAL, Oct. 2011, at 40.
3. *Id.*
4. *Id.*
5. *Dixon v. City of Coeur d'Alene*, No. 2:10-00078-LMB, U.S. District Court for the District of Idaho, *Document 101 filed 10-3-11.*
6. *Hernandez v. City of Vancouver*, No. C04-5539 FDB, 2009 WL 279038, at 5 (W.D. Wash. Feb. 5, 2009).
7. *Fowler v. Kootenai County*, 128 Idaho 740, 743, 918 P.2d 1185, 1188 (1996).
8. *Id.*
9. *Freitag v. Ayers*, 468 F.3d 528, 540-541

You will need to pay particular attention to the expert disclosure requirements, because an inadequate disclosure can result in your expert being barred from testifying.

(9<sup>th</sup> Cir. 2006); *Peone v. Mary Walker Sch. Dist. No. 207*, No. CS-02-135-RHW, 2003 WL 25685232, at 2 (E.D. Wash. May 6, 2003).

10. *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 864 (9<sup>th</sup> Cir. 2002).

11. *Hollen v. Chu*, No. CV-11-5045-EFS, 2013 WL 5306594 at 5 (E.D. Wash. 2013).

12. *Cook v. Skyline Corp.*, 135 Idaho 26, 35, 13P.3d 857, 866 (2000).

13. *Dadge-Farrar v. Am. Cleaning Servs. Co.*, 137 Idaho 838, 842-43, 54 P.3d 954, 958-59 (Ct. App. 2002).

14. *Id.*

15. The most notable difference between the two rules is the federal rule requirement that the expert prepares and signs a separate written report.

16. *Idaho R. Civ. P. 26(b)(4)(A)(pre-2014 changes).*

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# Recurring Issues in the Prosecution of Employment Claims in a Bankruptcy

Robert Faucher

**E**mployees who lose their jobs often find themselves in strained financial circumstances. They may believe they have a claim against their employer in connection with their termination. Because of this, issues relating to employment claims arise frequently in bankruptcies. Does an employment claim need to be disclosed in a bankruptcy filing? Does the automatic stay apply? Who has standing to prosecute the claim or the authority to settle the claim? This article addresses these and several other frequently-encountered issues.

## **The debtor must list the employment claim in her schedule of assets**

The Bankruptcy Code<sup>1</sup> provides that the bankruptcy estate consists, with very narrow exceptions, of “all legal or equitable interests of the debtor in property as of the commencement of the case.”<sup>2</sup> Accordingly, any employment-related claim that exists as of the bankruptcy petition date would almost certainly be part of a debtor’s bankruptcy case.<sup>3</sup>

The debtor must file, at or shortly after the beginning of the bankruptcy case, a schedule of assets. There is an official form for this purpose, which makes clear that debtors must disclose “contingent and unliquidated claims of every nature . . .”<sup>4</sup> “The integrity of the bankruptcy system relies on full disclosure of all assets, including potential but unlitigated claims.”<sup>5</sup> Thus, employment-related claims must be scheduled. All debtors must amend their schedules to add a prepetition claim which they previously failed to list. And for chapter 11 bankruptcies (“Reorga-

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There is an official form for this purpose,  
which makes clear that debtors must disclose  
“contingent and unliquidated claims of every nature . . .”<sup>4</sup>

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nization”) and chapter 13 bankruptcies (“Adjustment of Debts of an Individual with Regular Income”) the bankruptcy estate includes post-petition assets, arguably obligating the debtor to schedule these post-petition assets.

Notwithstanding these straightforward and fundamental requirements, there is a surprisingly large volume of case law involving debtors who have failed to disclose employment-related causes of action in their schedule of assets.

## **The automatic stay will not generally apply if the claim belongs to the bankruptcy estate**

Generally speaking, the automatic stay of Bankruptcy Code section 362 only applies to actions *against* the debtor, not to actions initiated by the debtor. Therefore, if the debtor’s bankruptcy estate owns an employment claim, the automatic stay will not prevent the bankruptcy trustee or debtor in possession from continuing to prosecute that claim. Nor does the stay prevent a defendant from protecting its interest in claims brought by the debtor, even if defendant’s successful defense will result in the loss of an allegedly valu-

able employment claim asserted by the estate.<sup>6</sup> In other words, an employer can seemingly obtain a dismissal of the claim belonging to the employee’s bankruptcy estate without violating the stay.<sup>7</sup>

## **Who has standing to prosecute the employment claim?**

In a chapter 7 case, only the chapter 7 trustee has standing to prosecute the debtor’s prepetition employment claims.<sup>8</sup>

In a chapter 11 case, the debtor-in-possession has standing to prosecute the debtor’s prepetition and post-petition employment claims. If a chapter 11 trustee is appointed, then the “debtor in possession” becomes a mere “debtor,” and control of the estate passes to the trustee. The chapter 11 trustee would thereafter have standing to prosecute any such claims.

With respect to a chapter 13 case, while the law in the Ninth Circuit is not entirely clear, the extant law suggests that a chapter 13 debtor retains standing to prosecute her prepetition and post-petition employment claims.<sup>9</sup>

## Judicial estoppel may bar a debtor's attempt to prosecute an unsecured claim

There is much case law involving a debtor suing on a prepetition employment claim that she failed to disclose in her schedule of assets. Defendants who find themselves subject to an employment claim brought by a debtor, but which was not disclosed in the debtor's schedule of assets, invariably assert a judicial estoppel defense. The essence of such a defense is that the debtor is precluded from prosecuting a claim in a non-bankruptcy forum that he did not disclose to the bankruptcy court. If a defendant finds himself in federal court, the leading statement of the bankruptcy judicial estoppel defense in the Ninth Circuit is *Hamilton v. State Farm Fire & Cas. Co.*<sup>10</sup> If the defendant finds himself in Idaho state court, the leading bankruptcy judicial estoppel case appears to be *McCallister v. Dixon*.<sup>11</sup>

Four factors typically seem to control the analysis. A court will examine whether the claimant's later position (that she possesses an employment claim) is "clearly inconsistent" with her earlier position (the position taken in her bankruptcy schedules that no claim exists). A second factor is whether the party has succeeded in persuading a court to adopt the claimant's earlier position, so that a judicial acceptance of an inconsistent position in the later proceeding would create the perception that one of the courts was misled. Third, courts will often look at whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.<sup>12</sup> Fourth, the court might consider whether the omission was mistaken or inadvertent.<sup>13</sup>

The most sensible result would be to permit the prosecution of the claim with conditions to ensure that the claim is pursued in a way that ensures that the bankruptcy estate, and not the debtor herself, realizes the benefits of recovery. The bankruptcy trustee would argue that an employer who has committed an actionable wrong should not be relieved of responsibility merely because the debtor tried to hide the claim from his creditors. And indeed, it appears that this may be what most often happens.

The essence of a such a defense is that the debtor is precluded from prosecuting a claim in a non-bankruptcy forum that he did not disclose to the bankruptcy court.

The Idaho Supreme Court recently affirmed a trial court's forced substitution of a chapter 13 trustee for the debtor in a state court (non-employment) tort lawsuit when it came to light, quite late in the litigation, that the claim at issue should have been scheduled but was not.<sup>14</sup> The bankruptcy case was reopened so that the trustee could prosecute the claim. This same result occurred with respect to an employment claim in *In re Hall*, a bankruptcy case.<sup>15</sup> Another route to the same result occurred in *Donato v. Metropolitan Life*.<sup>16</sup>

## The debtor faces other penalties for failing to disclose an employment claim

Judicial estoppel is not the only potential defense available when a previously undisclosed employment claim comes to light.

Dishonesty in a bankruptcy proceeding is a federal criminal offense. Section 152 of title 18 of the U.S. Code prohibits a debtor from "knowingly and fraudulently" concealing assets of the bankruptcy estate or making a false oath in a bankruptcy case, among other things. Section 157 of title 18 of the U.S. Code criminalizes, among other things, fraudulent conduct in a bankruptcy case. Both statutes provide for fines and imprisonment not to exceed five years for each prohibited offense.

Debtors can also face civil sanctions in the bankruptcy case. Section 727 of the Bankruptcy Code provides that the debtor shall be denied his discharge if he engages in certain wrongful conduct, such as transferring or concealing his property in the year prior to the filing of the petition, or concealing property of the bankruptcy estate, in an attempt to defraud creditors.

*In re Couch-Russell*<sup>xvi</sup> concerned a debtor's apparently-purposeful failure to disclose a prepetition employment claim. The chapter 13 debtor prosecuted a prepetition sexual harassment claim against her ex-employer during her bankruptcy case but failed to disclose the existence of the claim in her schedule of assets. The defendant ultimately discovered the failure to disclose. The debtor ended up dismissing her chapter 13 bankruptcy case, without obtaining a discharge, as a means to avoid sharing the employment claim's settlement value with her creditors. She settled the employment claim for

\$30,000 almost contemporaneously with the dismissal of her bankruptcy case. She then promptly spent the settlement funds, and filed a second bankruptcy case seven months later.

The bankruptcy court denied the debtor a discharge in her second bankruptcy on the grounds that debtor had transferred her property — the settlement proceeds — within a year of the second petition date in an attempt to defraud her creditors. In finding fraudulent intent, the bankruptcy court relied in part on the debtor's culpable conduct in the first bankruptcy case.

A second Idaho debtor who failed to disclose his claim in his chapter 13 case nonetheless did manage to escape with discharge intact. Jerry Doherty was the non-disclosing debtor in the Idaho Supreme Court case *McCallister v. Dixon*.<sup>17</sup> Further research in the bankruptcy docket in Mr. Doherty's bankruptcy case reveals that the bankruptcy trustee agreed not to prosecute her motion to vacate the debtor's already-granted discharge in his bankruptcy case in exchange for Mr. Doherty's agreement to cooperate with the trustee's prosecution of his claim.<sup>18</sup>

### **The claim is likely not exempt**

Exempt assets are the assets that the debtor need not make available to his creditors even though they are assets of the bankruptcy estate. In Idaho, a debtor in bankruptcy can utilize only those exemptions provided for by Idaho non-bankruptcy law.<sup>19</sup> Generally speaking, Idaho law contains no exemptions for employment-related claims, except to the extent certain claims may be exempt under ERISA. Although claims for wrongs such as sexual harassment or discrimination would seem to be "personal" in nature, such claims do not appear to be exempt.

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The court must determine whether the settlement is "fair and equitable" and "reasonable" by applying these criteria:

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Debtors, unsurprisingly, do on occasion try to claim an exemption in their employment claims so they can keep the proceeds for themselves. In *In re Lee*,<sup>20</sup> for example, the debtor claimed an exemption in the proceeds of her lawsuit against her employer for wrongful discharge and sexual harassment. The debtor claimed that the proceeds were exempt under I.C. § 11-604(1)(c) as "proceeds of . . . a settlement . . . accruing as a result of bodily injury . . ."

The bankruptcy court in *Lee*, however, held that the wrongful discharge claim was akin to a breach of contract claim, and section 11-604(1)(c) did not apply. The court likewise rejected the contention that the sexual harassment claim involved "bodily injury," in light of the absence of evidence of an actual physical injury. The court concluded that the debtor's contention that she suffered emotional distress from the harassment was not sufficient.

### **Settlements involving the bankruptcy estate must be approved by the bankruptcy court**

Regardless of whether the bankruptcy case is pending under chapter 7, chapter 11, or chapter 13, settlements involving the bankruptcy es-

tate must almost always be approved by the bankruptcy court.<sup>21</sup>

In the Ninth Circuit, the bankruptcy court must evaluate the settlement under a test widely called the "A & C Properties" test.<sup>22</sup> The court must determine whether the settlement is "fair and equitable" and "reasonable" by applying these criteria:

- the probability of success in the litigation.
- the difficulties to be encountered in the matter of collection;
- the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and
- the paramount interest of the creditors and a proper deference to their reasonable views in the premises.<sup>23</sup>

The trustee (or the debtor in possession) bears the burden of proving that the settlement is reasonable, but he need not prove the estate has reached the best possible deal. Instead, he needs only to prove that the settlement falls above the lowest point in the range of reasonableness.<sup>24</sup>

### **Settlements with the trustee probably cannot be kept confidential**

Employers who pay to settle em-

ployment-related claims typically prefer to keep the terms of settlement confidential. Employers do not want their current litigation adversaries, their current employees, or the plaintiffs' bar to know what the employer is paying to settle claims.

However, it seems improbable that an employer could successfully shield the terms of its settlement with a bankruptcy estate from public disclosure. The Bankruptcy Code<sup>25</sup> and the Bankruptcy Rules<sup>26</sup> do contain provisions permitting the sealing of court filings where necessary. But, public disclosure and notice in bankruptcy cases are highly valued. Creditors would not be able to evaluate a proposed settlement if key details were not disclosed. Indeed, recent case law from our district suggests that an employer who wishes to withhold the details of a proposed settlement from the public record faces a nearly-impossible task.<sup>27</sup>

## Endnotes

1. The Bankruptcy Code is found at title 11 of the United States Code, section 541(a)(1).
2. 11 U.S.C. § 541(a)(1).
3. 11 U.S.C. §§ 1115, 1306.
4. Official Bankruptcy Form 6B, ¶ 21.
5. *Arruda v. C & H Sugar Co.*, 2007 WL 754627, at \*7 (E.D. Cal. Mar. 8, 2007).
6. *Linares v. CitiMortgage, Inc.*, 2015 WL 2088705 at \*4 (N.D. Cal. May 5, 2015) (citing *Palmdale Hills Prop., LLC v. Lehman Commercial Paper, Inc. (In re Palmdale Hills Prop., LLC)*, 654 F.3d 868, 875 (9th Cir. 2011)).
7. *White v. City of Santee (In re White)*, 186 B.R. 700 (9th Cir. BAP 1995). See also *Gordon v. Whitmore (In re Merrick)*, 175 B.R. 333 (9th Cir. BAP 1994). But see *In re Gregg*, 00.1 IBCR 42 (Bankr. D. Idaho 2000) (Bankruptcy court suggests in dicta that section 362(a)(3) might prevent a non-bankruptcy court from entering a judgment that "exercise[s] control over property of the estate" by, for example, dismissing the claim.)

8. In *In re Clark*, 2012 WL 12261414 (Bankr. D. Ariz. Apr. 24, 2012), the bankruptcy court seemed unconcerned that the trustee's settlement with the debtor's former employer might be a "death knell" for the debtor's career in the securities industry, in light of the fact that the settlement was financially beneficial to the estate.

9. See *In re DiSalvo*, 219 F.3d 1035, 1039 (9th Cir. 2000); *Linares v. CitiMortgage, Inc.*, 2015 WL 2088705, at \*5, 6; *Donato v. Metro. Life Ins. Co.*, 230 B.R. 418 (N.D. Cal. 1999).

10. 270 F.3d 778 (9th Cir. 2001). See also Pamela Foohey, *Recent Developments in Judicial Estoppel and Dismissal of Employment Discrimination Suits*, 29-10 ABIJ 20, 74-75 (2010).

11. 154 Idaho 891, 303 P.2d 578 (2013).

12. *Hamilton v. State Farm*, 270 F.3d at 782-83.

13. *Ah Quin v. County of Kauai Dep't of Transp.*, 733 F.3d 267, 279 (9th Cir. 2013).

14. *McCallister v. Dixon*, 154 Idaho 891, 303 P.3d 578.

15. 02.4 IBCR 181 (Bankr. D. Idaho 2002). "IBCR" is the Idaho Bankruptcy Court Reporter, published by Goller Publishing.

16. 230 B.R. 418.

17. 154 Idaho 891, 303 P.2d 578

18. "Order," docket no. 64, *In re Doherty*, Case No. 05-41630, United States Bankruptcy Court, District of Idaho, April 26, 2012. Mr. Doherty's claim was a tort claim, but the same rationale would have applied to an employment claim.

19. Idaho Code § 11-609.

20. 96.2 IBCR 84 (Bankr. D. Idaho 1996).

21. *Woodson v. Fireman's Fund Ins. Co. (In*

The Bankruptcy Code<sup>25</sup> and the Bankruptcy Rules<sup>26</sup> do contain provisions permitting the sealing of court filings where necessary.

*re Woodson*), 839 F.2d 610, 619 (9th Cir. 1988).

22. *Martin v. Kane (In re A & C Props.)*, 784 F.2d 1377, 1380 (9th Cir. 1986).

23. *Id.* at 1381

24. *In re Clark*, 2012 WL 12261414, at \*4.

25. 11 U.S.C. § 107.

26. Fed. R. Bankr. Pro. 9018.

27. *In re Apply 2 Save, Inc.*, 11.2 IBCR 67 (Bankr. D. Idaho 2011). This case does not involve an employment claim, but its rationale would apply equally to employment claims.

**Robert Faucher** is a partner in Holland & Hart LLP's Boise office, where he has practiced since 1992. Bob specializes in bankruptcy, creditors' rights, and commercial litigation. He is presently a board member of the Commercial Law & Bankruptcy Section of the Idaho State Bar. He can be reached at [rfaucher@hollandhart.com](mailto:rfaucher@hollandhart.com).



# Protecting Employers: Common Pitfalls When Drafting Severance Agreements

Shelly H. Cozakos

**S**everance agreements are a very useful tool for employers. If drafted properly, they provide the employer with security against wrongful termination lawsuits and the employee with added wages they otherwise would not be paid. Many employers have adopted mandatory severance pay policies contingent on the employee signing a general release or have existing employment agreements in place that require severance pay at the end of employment.

However, several different laws need to be considered when preparing or reviewing a severance agreement for a client. Additionally, some severance agreements which contain payments over time may have tax consequences to take into consideration.

## **When should an employer offer a severance pay?**

Idaho is an at-will state, meaning employers can terminate employees at any time, for any reason that is not unlawful. However, employment litigation is common, and employees often bring claims for wrongful termination. Even the “cleanest” of terminations can pose a risk. If an employer offers a severance package, the employer can pay a set or negotiated sum in exchange for a full release of all Idaho and federal claims and reduce or eliminate potential lawsuits. Therefore, anytime an employer wants to pay an employee additional wages upon termination the employee should sign a release or severance agreement.

Also, whenever an employee falls into a “risk” category, meaning they fall within a protected category un-

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Whenever an employee falls into a “risk” category, meaning they fall within a protected category under a discrimination law (such as race, gender, age), it’s a good idea to consider paying severance.

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der a discrimination law (such as race, gender, age), it’s a good idea to consider paying severance. Risk categories include employees who fall into a protected category because of their age (40+), race, gender or sexual orientation. Employees who are disabled under the Americans with Disabilities Act are also protected from discrimination. Also, if an employee has recently taken leave under the Family and Medical Leave Act (FMLA), filed a worker’s compensation claim, organized employees for a union, or blown the whistle on her employer, severance pay should be considered.

## **What should I be aware of when drafting a severance agreement?**

A severance agreement should always advise an unrepresented employee to seek the advice of legal counsel and provide them a reasonable amount of time to do so if they choose. It can be prepared like a settlement agreement – a sum of money is paid in exchange for a general release and waiver of all claims. The general release should specifically reference all Idaho and federal employment laws the employee is waiving so the employee is clear on what claims he or she is giving up. Also,

severance payments are considered wages. The agreement should therefore make clear that the severance payment is subject to regular payroll tax withholdings so the employee is not surprised when they receive the check.

An employer can pay the severance payments over time, and may want to pay them in the future on the employee’s regularly scheduled pay dates. This may make it more affordable for the employer. Just be wary of tax consequences discussed below.

## **Special consideration for “older” employees**

In order to release and waive age discrimination claims under the Age Discrimination in Employment Act (ADEA), which protects employees age 40 or older, certain waiting and revocation periods must be given to the employee.<sup>1</sup> In general, employees age 40 or over must be given 21 days to consider the agreement and 7 days to revoke the agreement. The employee need not use the full 21 days before signing, but the employer should not pay the severance benefits until after the full revocation period has expired. If an employer

is laying off or terminating a group of employees, the waiting period can increase to 45 days. The waiting and revocation periods must be in writing, in the severance agreement, and the ADEA should be specifically referenced. Also, a group incentive program offered to employees as part of a reduction in force can require that certain age disclosures be provided to employees in this protected class.

### Release of EEOC complaints and other thorny claims

When preparing a severance agreement, keep in mind that not all employee claims can be waived. The most controversial of these as of late is an employee's right to file a complaint with the Equal Employment Opportunity Commission (EEOC), which is also a prerequisite to filing a lawsuit in many instances. Recent opinions from federal circuit courts have held that filing a complaint with the EEOC is protected activity and requiring an employee to waive her right to file an EEOC complaint or dismiss a pending complaint as a prerequisite to payment of severance benefits constitutes retaliatory conduct and the entire agreement can be invalidated. The employer can also be subjected to penalties. An employer *can* require the employee to waive any monetary recovery from the EEOC, as long as the agreement is clear that the employee is only waiving his right to monetary damages but not his ability to file the EEOC complaint.

There are other types of claims that, similarly, can't be waived. These include wage and hour claims with the Fair Labor Standards Act and worker's compensation claims. If these claims are of concern, an employer should consider obtaining statements from the employee that

she has been fully compensated, or similarly that she has not suffered an injury.

Also, while not common in the at will employment arena, a severance agreement requiring non-disclosure of funds paid is not applicable to government employees. Their salaries are a matter of public record and any payments which are made which fall under this category are open to public review.

### Section 409A: Be wary of severe tax consequences

In general, Section 409A of the Internal Revenue Code applies when workers earn income or compensation in one year, but the income is paid in a future year. This is referred to as nonqualified deferred compensation. Section 409A is implicated when severance payments are made more than 2 ½ months into the calendar year following the employee's termination of employment. If the agreement violates Section 409A, then regardless of when actually paid, the severance payments will be immediately included in the employee's gross income for the year of termination. The employee will also be subject to a 20% tax penalty plus interest charges.

To ensure Section 409A is not implicated, the payments must be made on pre-set dates, which can-

not be changed, and for set amounts which also cannot be changed. Whenever payments are spread out over time a specialist should be consulted. When an employer has already agreed to pay severance as part of an employment agreement, or has adopted a severance pay plan, these plans should be reviewed to ensure they comply with Section 409A.

### In conclusion . . .

Employment claims have been on the rise for many years, especially with the downturn in the economy. If done properly, a severance agreement is an excellent way for an employer to protect themselves from being sued for wrongful termination. Whenever a client contacts you about terminating or laying off an employee, your discussion should include whether severance pay is feasible and even advisable. If the employer already wants to pay severance make sure they require the employee to sign a release in exchange for the additional wages. If done right, a well drafted severance agreement can draft around many of the pitfalls employers face in terminating or laying off employees.

### Endnotes

1. This is a requirement of the Older Worker's Benefit Protection Act (OWBPA) of 1990, which is part of the ADEA.

*Shelly H. Cozakos is a partner with Pickens Cozakos, P.A., and has practiced law in Idaho since 1996. For many years, she focused her practice in the areas of employment law and general litigation. Her love of children lead her to also develop a small adoption practice and she enjoys assisting parents through the adoption process and bringing families together. Ms. Cozakos obtained both her undergraduate and law degree from the University of Idaho.*



**COURT INFORMATION**

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SUPREME COURT OF IDAHO**

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Justices  
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Warren E. Jones  
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**Regular Fall Term for 2015**

*5<sup>th</sup> Amended – 09/23/15*

Boise .....	August 11
Coeur d'Alene .....	August 26 and 27
Moscow .....	August 28
Boise (Boise State University) .....	September 2
Boise .....	September 3
Boise .....	September 18
Boise .....	November 2 and 10
Twin Falls .....	November 4, 5 and 6
Boise .....	December 2, 4, 7, 9 and 11

By Order of the Court  
Stephen W. Kenyon, Clerk

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

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David W. Gratton  
Molly J. Huskey

**Regular Fall Term for 2015**

*5<sup>th</sup> Amended - 09/23/15*

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

By Order of the Court  
Stephen W. Kenyon, Clerk

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

**Idaho Supreme Court  
Oral Arguments for November and December  
2015**

*1<sup>st</sup> Amended – 10/06/15*

**November 2, 4, 5, 6 and 10**

**Monday, November 2, 2015 – BOISE**

8:50 a.m. <i>Chadwick v. Multi-State Electric</i> .....	#42473
10:00 a.m. <i>Severson v. State</i> .....	#42830
11:10 a.m. <i>Easterling v. Kendall, M.D.</i> .....	#42158

**Wednesday, November 4, 2015 – TWIN FALLS  
(Twin Falls County Courthouse)**

8:50 a.m. <i>Humphries v. Becker</i> .....	#41897
10:00 a.m. <i>Lepper v. Eastern Idaho Health Services</i> .....	#42004
11:10 a.m. <i>Mitchell v. State</i> .....	#41882

**Thursday, November 5, 2015 – TWIN FALLS  
(Twin Falls County Courthouse)**

8:50 a.m. <i>Samples v. Hanson</i> .....	#41869
10:00 a.m. <i>Bank of NY Mellon v. Evans</i> .....	#42633
11:10 a.m. <i>Haupt v. Wells Fargo Bank</i> .....	#41990

**Friday, November 6, 2015 – TWIN FALLS  
(Twin Falls County Courthouse)**

8:50 a.m. <i>State v. Razo-Chavez</i> .....	#42398
10:00 a.m. <i>State v. McIntosh</i> .....	#41910
11:10 a.m. ....	OPEN

**Tuesday, November 10, 2015 – BOISE**

8:50 a.m. <i>Countrywide Home Loans v. Sheets</i> .....	#42063
10:00 a.m. <i>Rich v. State</i> .....	#42515
11:10 a.m. <i>Huber v. Lightforce USA</i> .....	#41887

**December 2, 4, 7, 9 and 11**

**Wednesday, December 2, 2015 – BOISE**

8:50 a.m. <i>Green v. Industrial Special Indemnity Fund</i> .....	#42782
10:00 a.m. <i>Erickson v. Erickson</i> .....	#41587
11:10 a.m. <i>State v. Pachosa</i> .....	#42950

**Friday, December 4, 2015 – BOISE**

8:50 a.m. ....	OPEN
10:00 a.m. <i>McKay v. Walker</i> .....	#42434
11:10 a.m. <i>Aikele v. City of Blackfoot</i> .....	#42742

**Monday, December 7, 2015 – BOISE**

8:50 a.m. <i>Idaho Ground Water v. IDWR</i> .....	#42775
10:00 a.m. <i>City of Pocatello v. Rangen</i> .....	#42836
11:10 a.m. <i>Rangen v. IDWR</i> .....	#42772

**Wednesday, December 9, 2015 – BOISE**

8:50 a.m. <i>Morgan v. New Sweden Irrigation District</i> .....	#42575
10:00 a.m. <i>PHH Mortgage v. Nickerson</i> .....	#42163
11:10 a.m. <i>State v. Rawlings</i> .....	#42697

**Friday, December 11, 2015 – BOISE**

8:50 a.m. <i>Cornell v. Johnson</i> .....	#42822
10:00 a.m. <i>Pandrea v. Barrett</i> .....	#42333
11:10 a.m. <i>Brown v. State</i> .....	#42511

## COURT INFORMATION

### Idaho Court of Appeals Oral Arguments for November 2015

#### **Thursday, November 12, 2015 – BOISE**

9:00 a.m. *State v. Harbison* ..... #42689

#### **Thursday, November 19, 2015 – BOISE**

10:30 a.m. *State v. Ostler* ..... #42335

#### **Tuesday, November 24, 2015 – BOISE**

9:00 a.m. *State v. Bischoff* ..... #42574

10:30 a.m. *State v. Mercado* ..... #42436

1:30 p.m. *Hern v. Idaho Transp. Dept.* ..... #42287

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**Idaho Supreme Court and Court of Appeals  
NEW CASES ON APPEAL PENDING DECISION  
(Updated 9/1/15)**

**CIVIL APPEALS**

**Attorney fees and costs**

1. Did the district court err by awarding attorney fees to respondents pursuant to I.C. §12-120(3) after Agstar was not successful in obtaining a deficiency judgment in post foreclosure proceedings?

*Agstar Financial v.  
Northwest Sand & Gravel*  
S.Ct. No. 42932  
Supreme Court

**Family law**

1. Whether the district court erred in reversing the magistrate court's Judgment of Qualified Domestic Relations Order and in finding it was not in compliance with ERISA.

*Kesting v. Kesting*  
S.Ct. No. 42875  
Supreme Court

**Post-conviction relief**

1. Did the court err in summarily dismissing Gonzalez's petition for post-conviction relief in which he argued his trial counsel coerced his guilty plea?

*State v. Gonzalez*  
S.Ct. No. 42463  
Court of Appeals

2. Did the court err when it dismissed Morrison's petition for post-conviction relief as untimely?

*Morrison v. State*  
S.Ct. No. 42918  
Court of Appeals

3. Whether the court used the wrong standard when it summarily dismissed all of Bias's post-conviction claims.

*Bias v. State*  
S.Ct. No. 42498  
Court of Appeals

**Procedure**

1. Did the court err by dismissing the action for declaratory judgment and in finding there was no case or controversy?

*Western Community Insurance v.  
Pahrump Courtyard*  
S.Ct. No. 42871  
Supreme Court

**CRIMINAL APPEALS**

**Evidence**

1. Was there sufficient evidence to support Roberts' conviction for first degree arson?

*State v. Roberts*  
S.Ct. No. 42534  
Court of Appeals

2. Did the court abuse its discretion by allowing evidence of involvement in prison gangs pursuant to I.R.E. 404(b)?

*State v. Wilson*  
S.Ct. No. 42532  
Court of Appeals

3. Did the district court err when it affirmed the magistrate court's ruling excluding evidence on the credibility of BAC testing in general?

*State v. Nichols*  
S.Ct. No. 42641  
Court of Appeals

**Other**

1. Did the court err in concluding the prosecutions' decision to exclude juror 24 was not substantially motivated by gender?

*State v. Ornelas*  
S.Ct. No. 42799  
Court of Appeals

**Search and seizure –  
suppression of evidence**

1. Did the district court err when it concluded that the independent source and inevitable discovery doctrines apply only to remove the taint of illegal searches and not illegal seizures?

*State v. Davis*  
S.Ct. No. 42749  
Court of Appeals

2. Did the court err in denying Case's motion to suppress and in finding Case's traffic stop was supported by reasonable suspicion he was committing a traffic violation?

*State v. Case*  
S.Ct. No. 42363  
Court of Appeals

3. Did the court err in denying Floyd's motion to suppress and in finding consent for police to enter his home was not the product of coercion?

*State v. Floyd*  
S.Ct. No. 42636  
Court of Appeals

**Statutory interpretation**

1. Whether the district court erred by allowing, pursuant to I.C. §19-3023, the victim witness coordinator to sit with the eleven year old victim on the witness stand while the victim testified.

*State v. Mercado*  
S.Ct. No. 42436  
Court of Appeals

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

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## Federal Court Corner

### Changes in Store for U.S. District Courts

*Libby Smith, Clerk of Court*

#### **U.S. District Court news:**

#### **Change in Chief Magistrate Judge**

The Chief Magistrate Judge for the District of Idaho serves a seven-year term. On October 1, 2015, Judge Ronald E. Bush became Chief Magistrate Judge for the U.S. District Court. Judge Bush succeeds Judge Candy Wagahoff Dale, who has served as Chief Magistrate Judge since October 1, 2008. Among other matters, the Chief Magistrate Judge is responsible for appointments of private counsel under the federal Criminal Justice Act for indigent defendants in criminal appeals and habeas corpus cases; works closely with Probation and Pretrial Services regarding bail reports, pretrial release conditions, presentence reports for misdemeanors and other procedures and forms; and interacts with the U.S. Attorney's Office regarding preliminary criminal proceedings, search warrant procedures, and petty offenses on federal lands. Although the responsibilities of Chief Magistrate Judge have changed, both Judges Dale and Bush continue to carry out a host of other administrative responsibilities for the District Court. I think I can safely say on behalf of all Clerk's Office employees that it was a delight working closely with Judge Dale as Chief Magistrate Judge and we all look forward to working with Judge Bush in his new capacity as Chief Magistrate Judge.



#### **Prisoner electronic filing pilot program**

On September 1, 2015, the District Court implemented a prisoner e-filing pilot project to determine the feasibility and cost-effectiveness of having state prisoners file court documents electronically into the Court's Electronic Case Filing (ECF) system, through prison legal resource center staff. The Idaho State Correctional Institute (ISCI) was selected to participate in the pilot project. Kudos to Chief Magistrate Judge Ronald Bush, who led this effort, along with Pro Se Law Clerk Janis Dotson and Clerk's Office employees Kirsten Wilkinson, Carrie Smith, Kelly Montgomery and David McDonald. We also appreciate the efforts of ISCI paralegal Alan Stewart and Idaho Department of Corrections (IDOC) Access to Courts Coordinator and Chief

of Division of Prisons Jeff Zmuda and Idaho Deputy Attorney General Mark Kubinski. Similar programs have been implemented by partnerships between federal district courts and state prisons throughout the country and have resulted in time savings on behalf of court staff and prison staff, as a result of the electronically filed documents.

#### **Judicial emergency declared**

The U.S. District Court for the District of Idaho is among 19 federal district courts and four federal appellate courts to have been declared to be under a judicial emergency. Our Court's judicial emergency is due to the fact that we have more than one (two) authorized judgeship(s) and only one active judge. We are hopeful that the vacancy created by District Judge Edward Lodge will be filled very soon.



## Federal Court Corner

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### Upcoming Bankruptcy Rules and Forms Changes

Kirsten Wilkinson,  
Chief Deputy of Operations

#### U.S. Bankruptcy Court news

As the close to 2015 rapidly approaches, it is time to remind ourselves of those important annual fall events we look forward to each year — pumpkin spice everything lining grocery store shelves, setting clocks back the first Sunday in November, and preparing for rules and forms updates. The Clerk's office would like to share a few highlights of the upcoming changes (sans pumpkin spice) practitioners can expect to see before the end of the year.

#### National rules/forms

The Supreme Court adopted only one national rule amendment as it has direct correlation to the form updates. Rule 1007 is updated to reflect references to Schedules E and F that, on December 1, will come to exist as a combined form.

The Official National forms, on the other hand, are substantially revised, reformatted and renumbered for use on and after December 1. The bulk of the forms that had yet to undergo the forms modernization process are now brought into that format, making them easier to read and likely to generate more complete and accurate responses from filers. Forms have also been remunerated to distinguish between individual and non-individual debtors; forms for individual debtors are now

Rule 1007 is updated to reflect references to Schedules E and F that, on December 1, will come to exist as a combined form.

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in a 100 series numeration while forms for non-individual debtors will reside in a 200 series. If you prepare documents via bankruptcy form software, you are strongly encouraged to contact your vendor for information regarding upgrades to address these changes.

Other key forms, including the Notice of Commencement of Case, Proof of Claim and Discharge of Debtor will also receive face lifts through the modernization formatting.

The Commercial Law and Bankruptcy Section will be sponsoring a CLE training event, to be hosted by the Clerk's office, at the Boise courthouse on Friday, November 6<sup>th</sup> from 9:30 a.m. - 10:30 a.m. to provide an overview of the national forms changes. The event will also be broadcast district wide via webcast, courtesy of the Idaho State Bar.

For a complete list of the pending official forms and forms

number conversion chart, or details regarding the CLE, please visit the Bankruptcy Court News section of our website at [www.idb.uscourts.gov](http://www.idb.uscourts.gov).

#### Local rules/forms

The Bankruptcy Local Rules Committee will be posting proposed updates to local rules and forms for comment on the court's website in mid-November, with a January 1, 2016 implementation date for approved items. Please watch your emails for a message from the Clerk regarding the opening of the comment period. Redline/strikeout versions of the proposed changes will be available under the Forms, Fees & Rules section of our website. A public notice will also be posted to the Bankruptcy Court News section at [www.idb.uscourts.gov](http://www.idb.uscourts.gov) at the commencement of the comment period.

# Building Bridges: Understanding Islamic Legal Principles for Idaho's Transactional Attorneys

Angelo L. Rosa

Changes in Idaho's ethnic landscape have been embraced by some, resented by some, and ignored by others. Regardless, Idaho's Muslim population has grown considerably in the past five years. Given recent asylum placements and a growing diversity in Idaho's university system, the Muslim population not only contributes to Idaho's diversity, but is a diverse demography within itself. As Idaho's own Muslim population grows and puts down roots, so too must Idaho's legal community grow to competently meet the needs of clients wishing to conform their economic activity to the requirements of their faith.

This article is not intended to serve as a comprehensive practice guide for Idaho attorneys wishing to expand their practice to serve the Muslim community, but is instead an introduction to certain economic principles of Islamic law, an illustration of their practical application in transactions commonly encountered by Idaho attorneys, and an identification of practical issues that will likely arise in the course of advising on such transactions.

## What is *Shari'a*?

In broad terms, Muslims and non-Muslims living under the same legal system have been bound by their respective standards, guidelines, beliefs, and ethics. Reconciling these differences — shown by history to be distinct and complicated further by portrayals in the media and by prejudice — requires an answer to the question: how can there be cooperation, growth or mutual benefit between these groups in spite of such distinctions? The answer lies in

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While the concept of profit is not prohibited, the prohibition on *riba* is more accurately analogized as a prohibition on usury.

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reaching a genuine and mutual understanding, one party to the other.

Islamic law, or *Shari'a* (pronounced: *shah-ree-ah*), governs how Muslims conduct personal and business affairs, adhering to a strict set of rules governing commerce and finance. Therefore, from a business perspective, the answer to the question posed above is aided by an attorney's understanding that *Shari'a*-compliant transactions are intended to situate its participants in the same legal position (risk, return, control, and recourse) as more "conventional" transactions. This isn't a novel concept. In the international finance sector, *Shari'a*-compliant finance methods have been successfully deployed by major banks and finance groups in a variety of scenarios commonly occurring in Idaho, from asset finance to real estate development. Moreover, Islamic finance methods have increased in use over the past two decades.<sup>1</sup>

As such, attorneys advising on such transactions must create an understanding of the standards unique to a *Shari'a*-compliant transaction. In building agreements in such ways, advising parties to transactions that comply with Islamic law also becomes an exercise in building bridges.

## Understanding the basics of *Shari'a*-compliant transactions

Understanding the fundamentals of Islamic finance requires an acknowledgement of three core principles. First, the *Shari'a* dictates that all property is within the exclusive ownership of God. Human beings are considered, from a doctrinal perspective, mere trustees of God's property.<sup>2</sup> Accordingly, 'money' lacks intrinsic value and is neither appreciable nor depreciable in its own right.

Second, because money has no intrinsic value, concepts of inflation and time value have no legitimacy under an Islamic economic model.<sup>3</sup> Accordingly, interest (*riba*) is prohibited.<sup>4</sup> While the concept of profit is not prohibited, the prohibition on *riba* is more accurately analogized as a prohibition on usury, whether charged in relation to the use of money, or the exacting of excessive profit in relation to the value of an asset.<sup>5</sup>

Third, excessive speculation or risk is considered gambling (or "*gharar*") and is likewise prohibited.<sup>6</sup> Modern interpretations of this prohibition are more accommodating of the speculative nature of business.

Even so, the application of the *Shari'a* imposes far greater limitations than under Western economic principles.

While spiritually derived, the application of the *Shari'a* to commerce is not an academic exercise. The United States Treasury Department has provided a body of guidance approving the use of Islamic finance models.<sup>7</sup> Larger financial institutions (including Citibank, HSBC, and others) offer large-scale transaction financing tailored to the demands of high net-worth individuals or investment groups seeking to conform their investment activities to the *Shari'a*.<sup>8</sup> Certain banks provide *Shari'a*-compliant financial products in certain markets.<sup>9</sup> In the United States, smaller boutique finance houses provide Muslims with *Shari'a*-compliant products (notably home mortgages and car loans).<sup>10</sup> However, the number of parties with access to such products and services is a function of their availability and access to professionals with competence to advise and structure transactions accordingly. The largest sector in which *Shari'a*-compliant transactions are deployed is, and is likely to remain, in private transactions involving the sale, lease and/or optioning directly connected with an asset. It is in this sector that legal counsel to Muslim investors, business owners, and consumers can provide practical assistance.

### ***Shari'a*-compliant variants on conventional transactions**

The following concepts reflect a sample of economic relationships that are most easily analogized to conventional business transactions:

#### **1. Mark-up contracts**

A mark-up contract (*murabaha*) involves a bank or other financial intermediary purchasing an asset on the buyer's behalf before selling it to the buyer at a profit.<sup>11</sup> This is

the most straightforward and easily structured transaction where customary contract law principles will govern. The 'Islamic' components of such a transaction are reflected in the terms relating to the flow of money under the contract terms. *Murababah* requires that the total price of the property being purchased is known at the outset of the transaction.

**EXAMPLE:** Party A wishes to purchase an automobile for \$20,000. Party B acquires the automobile on behalf of Party A and then sells it to Party A at an agreed-upon fixed

The 'Islamic' components of such a transaction are reflected in the terms relating to the flow of money under the contract terms.

profit of \$5,000, with the total purchase price of \$25,000 payable over a period of five years. The markup of \$5,000 is fixed and Party B will retain a security interest in the automobile (i.e., a lender's lien) until Party A completes the purchase.

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A *murabaha* contract is, in economic substance, most similar to a loan with interest, with the 'interest' substituted by the replacement of a defined amount of 'mark-up' which is fixed (to avoid the prohibition on *gharar*) and reasonable (to avoid the prohibition on *riba*).<sup>12</sup> Accordingly,

to borrow the language of the Office of the Comptroller of the Currency when commenting on the use of *murabaha* in the context of providing mortgages to adherent Muslims (otherwise prohibited from obtaining mortgages and remain compliant with the *Shari'a*): "when the economic characteristics of a lease are substantially similar to a loan, the lease may be considered to be functionally equivalent to the loan. Therefore, the substance of the transaction, rather than its form, should guide our analysis."<sup>13</sup>

#### **2. Finance leases**

In a finance lease (*ijara*), a financing party agrees to purchase an asset and then lease it, either to a third-party (common in equipment finance) or back to the seller (a "sale + leaseback" model) with the financier charging a fee for the rental of that asset.<sup>14</sup> An *ijara* can be combined with a purchase facility (analogous to a "buy-out provision") at the end of the lease terms that will allow the underlying asset to be transferred in a manner similar to a conventional leveraged lease (known as *ijara wa-*iqatina**).

**EXAMPLE:** Party A agrees to purchase a piece of industrial equipment having a price of \$1,000,000. Party B agrees to lease the equipment from Party A for a period of five years at a rate of \$200,000 per year along with a fixed fee for the rental of \$20,000 per year. Party B pays Party A \$220,000 per year for the use of the equipment. The parties also agree that Party B shall have the option of purchasing the equipment at the end of the five-year lease term for a nominal buy out of \$1. At the end of the transaction, Party A has recouped the cost of its purchase, plus a profit of 10 percent (unadjusted for inflation) and both parties have reaped the benefit of a fixed set of terms giving Party A a return on its capital outlay of \$1,000,000 and giving Party B the benefit of both the use

of the equipment and a means of acquiring the equipment at the end of the lease term.

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Again, customary principles of contract law apply to an *ijara* lease. The definition of the 'rental fee' is analogous to the concept of a fixed-rate lease. However, the fee for the 'rental' of the asset must be fixed to avoid the prohibitions on *riba* and *gharar*. The parties to an *ijara* transaction, as with any other contract governed by Idaho law, have wide latitude to determine appropriate variations of consequences of delayed performance. A lessor may charge a higher price if payment is delayed. The limitation imposed by the *Shari'a* requires that any variation on the 'rental fee' be fixed and ascertained at the time the agreement is entered into. As with *murabaha* contracts, the *ijara* economic form has been permitted as an acceptable form of finance methodology.<sup>15</sup>

### 3. Conditional sales contracts

In conditional sales contracts (*'arbutun*), an option is paid out of the overall purchase price as consideration for holding the right to purchase open to only the option-holder for a certain period of time.<sup>16</sup> The distinction from a more conventional model of a purchase option lies in the fact that an *'arbutun* contract is predicated on an option being deducted from the purchase price of an asset rather than paid independently of that purchase price. This is most easily analogized as an earnest money deposit that may be forfeit in the event of non-performance.

**EXAMPLE:** Party A wishes to obtain an exclusive right to purchase real estate from Party B for a period of one year. The Parties agree that the purchase price of the property will be \$110,000, allocated \$100,000 to the property and \$10,000 to the strike price of the option. The parties further agree that the obligation

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The limitation imposed by the *Shari'a* requires that any variation on the 'rental fee' be fixed and ascertained at the time the agreement is entered into.



to purchase the property is abrogated in the event the option is not exercised within the option period and the \$10,000 option price is the exclusive remedy for Party B keeping the property off the market. Party A pays Party B the \$10,000 as an earnest money deposit. At the end of the one year option period, Party A has paid a fixed price and has a fixed downside in the event the property is not purchased, and Party B has a non-refundable sum to compensate for any loss of marketability during the option period.

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While the distinction may appear to be only a matter of integrating the value of the option to the purchase price and increasing the price accordingly, the distinction lies in fixing the remedy for not exercising the option instead of leaving open the potential for other remedies which reflect prohibited risk and speculative loss(es). By limiting the remedy to an ascertainable and (crucially) fixed amount and excluding other potential remedies available at law (specific performance, claims for consequential damages arising from lost economic opportunity, etc.), the aforementioned prohibitions of the *Shari'a* are satisfied. This concept is among the most similar to conventional western finance notions, but the deeper implications of limiting

remedies (or limiting risk) is where potential distinctions lie.

The foregoing concepts are not intended to be an exhaustive list of Islamic finance models. Rather, the transaction types discussed are selected for their conceptual similarity to conventional forms and, as such, provide a basis for understanding the similarities and the distinctions between them.

### Practice pointers & ethical considerations

Any attorney wishing to undertake such a task requires careful study of these principles, conferring with professionals who possess expertise regarding their application, and the cautious communication of that knowledge in both advising clients and dealing with counterparties. The following points are intended to illustrate important practice points when advising on transactions structured around *Shari'a* principles. While not exhaustive, the examples described below will provide the reader with examples that can provide further insight into the relevant ethics concerns.

1. For transactional attorneys, modulating conventional terms to conform to the *Shari'a* requires a comprehensive understanding of how the *Shari'a* works. The relevant ethical considerations begin with the

first Rule of Professional Conduct, which mandates that “a lawyer shall provide competent representation to a client.”<sup>17</sup> Rule 1.1 continues, elaborating that: “Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”<sup>18</sup> It therefore follows that practitioners familiarize themselves with the theory underlying the various economic models under the *Shari’a*. This is as much for the sake of understanding the motivations to comply with its requirement as it is to take informed positions, explain them, and intelligently draft agreement language that accurately reflects them.

2. Owing to the increasing likelihood of advising on a transaction where one or more parties (and/or their counsel) is unfamiliar with the *Shari’a*, handling this ‘imbalance’ in knowledge creates special considerations. Convincing a counterparty that the risks and remedies are consistent with traditional contract principles is an exercise requiring caution. In this regard, Rule of Professional Conduct 1.6(a), which prohibits (among other scenarios) acting in a manner contrary to the interests of a client in the context of that representation, merits careful review.<sup>19</sup> Counsel advising clients wishing to conform a transaction to the *Shari’a* will be in a position where familiar transaction principles must be reinterpreted in unique terms. Rendering informal advice or comment to a counterparty therefore requires — in addition to the customary requirements of (a) disclosure and (b) informed consent under I.R.C.P. 1.6(b)<sup>20</sup>— careful qualification that (a) counsel represents one (not both) parties to the transaction<sup>21</sup>, (b) descriptions and commentary on the applicability of *Shari’a* principles is intended to be

mutually advantageous and given upon the informed consent of the client<sup>22</sup>, and (c) the commentary is not, and shall not be construed as, common representation.<sup>23</sup>

3. On a less solemn note, it is critical that the architecture of a *Shari’a*-compliant transaction be understood and communicated as a means of accomplishing the unique objectives of the Muslim party(ies) while, at the same time, providing mutual assurances of accountability and recourse through agreed-upon process(es) of dispute resolution. It is through the identification of common ground

It is through the identification of common ground that rights and remedies can be fashioned to comply with the rule of law and be in harmony with the requirements of the *Shari’a*.



that rights and remedies can be fashioned to comply with the rule of law and be in harmony with the requirements of the *Shari’a*.

### Closing thoughts

If common understanding is possible, there is a space in the evolution of Idaho’s body of business law and legal community for the application of the *Shari’a* to business transactions between Muslims and non-Muslim parties. Structuring transaction that comply with the *Shari’a* requires a revision of familiar concepts

with unconventional rationales and structuring, thereby tasking counsel to build confidence through demonstrating that a *Shari’a*-compliant transaction is enforceable as a matter of law and accomplishes the same objectives as one that is more conventionally drawn. For counsel possessing the correct balance of competence, creativity and respect for distinct cultural and spiritual objectives, the rewards of advising clients on *Shari’a*-compliant transactions can be unique and satisfying.

### Endnotes

1. See, e.g., Mohammed El Qorchi, *International Monetary Fund Report: Islamic Finance is Gearing Up* (2005) (discussing the increasing growth in Islamic finance transactions), Interview with Mohammed Kateeb, *Technologies and Trends for Islamic Finance in 2015* (January 20, 2015), available at <http://www.globalbankingandfinance.com/technologies-and-trends-for-islamic-finance-in-2015/> (discussing current and anticipated trends in the global Islamic finance community).
2. See THE QUR’AN, Sûrah 57:5 (M. Picthall trans., 3d ed., The Folio Society 2010) (stating “His is the Sovereignty of the heavens and the earth, and unto Allah (all) things are brought back.”).
3. See FRANK E. VOGEL AND SAMUEL L. HAYES, III, *ISLAMIC LAW AND FINANCE: RELIGION, RISK, AND RETURN* 2, 56 (1998) (discussion the rejection of time value of money by Islamic doctrine and interpretive texts).
4. *Id.* at pp. 77-82.
5. *Id.*
6. See *id.* at pp. 87-93 (discussing the *hadith* (interpretations upon canonical revelations as contained in the Qur’an) concerning *gharar* and recognized forms on forbidden risk).
7. See, e.g., Office of the Comptroller of the Currency (“OCC”), “Activities Permissible for a National Bank, Cumulative” 28 (2011) available at <http://www OCC.gov/publications/publications-by-type/other-publications-reports/bankact.pdf>.
8. See, e.g., Angelo Luigi Rosa, *Harmonizing Risk and Religion: The Utility of Shari’a-Compliant Transaction Structuring in Commercial Aircraft Finance*, 13 MINNESOTA

JOURNAL OF GLOBAL TRADE 35 (2004) (discussing Islamic finance methodologies applied to the sale and lease of commercial aircraft).

9. See, e.g., HSBC Amanah, available at <http://www.hsbcamanah.com/> (offering Shari'a finance products in certain international markets).

10. See, e.g., LARIBA American Finance House, available at <https://www.lariba.com/site/index.html> (providing Shari'a-compliant lending services in the United States).

11. See Angelo L. Rosa, *Keeping the Faith*, LOS ANGELES LAWYER February 2005, at 24, available at <http://www.lacba.org/show-page.cfm?pageid=5050>.

12. VOGEL AND HAYES, *supra* at note 2.

13. OCC Interpretive Letter No. 806, FED. BANKING L. REP. (CCH) ¶ 81,253 (October 17, 1997). See also OCC Interpretive Letter No. 867 (November 1999), available at <http://www.occ.gov/static/interpretations-and-precedents/nov99/int867.pdf>.

14. See Rosa, *supra* at note 11 (illustrating the basic mechanics of *ijara* leases). See also VOGEL AND HAYES, *supra* at note 2 at 143-145 (providing an academic overview of the *ijara* lease model).

15. See OCC Interpretive Letter No. 867, *supra* at note 13.

16. See VOGEL AND HAYES, *supra* at note 3 at 156-158 (providing an overview of 'arbun). See also Angelo L. Rosa, *From Mecca to San Francisco: Harmonizing Shari'a Compliant Contractual Remedies with California Law*, 6 U.C. DAVIS BUS. L.J. 5 (2005) (discussing and contrasting liquidated damages remedies for breaches of purchase option agreements).

17. Idaho R. Prof. Conduct 1.1 (eff. July 1, 2014)

18. *Id.*

19. Idaho R. Prof. Conduct 1.6(a)(1)-(a)(2).

20. Idaho R. Prof. Conduct 1.6(b).

21. See, e.g., Comment 27 to Idaho R. Prof. Conduct 1.6 (illustrating the necessity for clear disclosure of which party the attorney represents).

22. See, e.g., Comment 28 to Idaho R. Prof. Conduct 1.6 (describing the potential for rendering legal advice in connection with a transaction where one or more parties are involved).

23. See, e.g., Comments 29 and 32 to Idaho R. Prof. Conduct 1.6 (identifying the limits of common representation).

Angelo L. Rosa is a partner with Marsh Rosa LLP, a boutique international law firm with offices in the United States, Europe and Asia. Raised in the United States and the Middle East and licensed to practice law in California and Idaho, his practice emphasizes corporate counsel, transaction advising, and select commercial litigation. The author is a cited authority on Islamic finance topics. He resides in Boise. Special thanks go to Dr. H. Peter Doble II.



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## Lawyers in Small Firms Need to Verify Client's Property and General Finances

Mark Bassingthwaight

I continue to be surprised at the number of times during a firm visit, be it with a solo attorney or in a small firm setting, I learn that complete oversight of client property has been turned over to an employee. More often than not, this individual has been employed at the firm for years and is always viewed as someone worthy of a high level of trust.

While I do believe the development of trusting work relationships is a good thing, there can be a downside if the trust is left unchecked for an extended period of time. One problem is that excessive trust can easily lead to the deterioration, if not complete abandonment, of accountability mechanisms and sometimes trouble follows.

One story that has stayed with me for years involved a trusted firm administrator who eventually came to be treated by her boss, a solo attorney, as a member of his family. This individual even played a role in helping to raise the attorney's children. Everything came crashing down when the attorney eventually discovered this trusted employee had been embezzling him for years managing to take well in excess of \$100,000. Suffice it to say the attorney never saw it coming and was crushed by this individual's deceit.

Before going further, allow me to say that I do value the professional and personal relationships that can and do arise in a work setting. I believe that placing trust in employees is not only appropriate but a necessary practice. My purpose here is not to advocate a modicum of distrust. Rather it is to encourage and underscore the importance of creating and maintaining appropriate mechanisms of accountability for client property. Why? Because, unfortunately, even long-term



trusted employees sometimes make really bad decisions. To add insult to injury, should such an unfortunate event ever occur in your firm and adequate safeguards were not in place, you might end up on the wrong side of a disciplinary action and/or malpractice claim. You cannot and should not delegate total and complete responsibility for all accounting functions to non-lawyer staff. Simply put, as an attorney you have an ethical duty to oversee the safekeeping of client property.

With all this in mind, here are a few ideas to help you avoid such problems and, if followed, can help demonstrate that an appropriate level of attorney oversight of client property was in place should a theft ever occur.

- Promptly identify items of value received on a short-term or long-term basis. Label them as client property and place them in a secure place as soon as possible. For example, immediately deposit client funds into the trust account. Place valuable papers or other small tangible items in a safety deposit box or a fireproof safe. Large items may require safekeeping in secure commercial storage space. When maintaining client property long-term keep an inventory of the property, catalogue the property as onsite or off-site, and update this inventory as called for. Diamond rings have disappeared and client x-rays unintentionally destroyed for want of this kind of basic safekeeping practice.
- When hiring administrative, accounting, or bookkeeping staff

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You cannot and should not delegate total and complete responsibility for all accounting functions to non-lawyer staff. Simply put, as an attorney you have an ethical duty to oversee the safekeeping of client property.

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- verify reported employment history and personally speak with references. You might also review the publically available social media presence of any prospective hire.
- Have your books reviewed by an outside auditor once a year. Typically this audit would occur during a mandatory two week vacation you should require any long-term employee who is in a position of trust, such as a bookkeeper, to take.
- Require two signatures on all checks written in excess of \$500 or \$1000. This can help assure an attorney personally sees and reviews all checks being written for a significant amount.
- Make certain that all checks and cash received are kept in a locked

drawer, cabinet, or safe until it's time to take them to the bank. In addition, all checks should be restrictively endorsed upon receipt and either copied or recorded in a log of checks received in order to make identification and replacement easier if a check is ever lost or stolen.

- Separate check preparation responsibilities from account reconciliation responsibilities. Allowing one person to sit in both roles is asking for trouble. In a perfect world, the account reconciler would also never have access to the trust account check stock as those checks should be kept in a locked drawer or safe.
- Trust account checks should be physically different from the operating account checks to lessen the likelihood that a check will be written on the wrong account. Consider different sizes or colors or perhaps even maintaining the accounts at different banks. Periodically take a look at both check stocks to make certain that the checks at the back are still there. Sometimes forged checks turn out to be checks taken from the back of the check stock done with the hope that the stolen checks will not be missed.
- The use of signature stamps should be forbidden as these things have been misused too many times. If you have any signature stamps lying around in your office, destroy them. For similar reasons, never leave signed blank checks lying around.
- An attorney should regularly review the bank statement for the trust account and the corresponding reconciliation report so that any discrepancies can be addressed immediately. Require the bank statement to be delivered to the reviewing attorney unopened or consider having them sent directly to the attorney's home. Not only



does this attorney need to see and understand all activity in the trust account but he will also want the opportunity to make certain no forged checks were written. In part, this is about trying to catch small thefts before they become something more.

Watch for the warning signs and never ignore them once present. Although not foolproof, there are certain warning signs that should warrant careful attention. These would include your becoming aware that the trusted staff person is having financial problems, you witness the demonstration of addictive behaviors, realize this person is living beyond their apparent means, or learn that the individual never takes any extended amount of time off.

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The use of signature stamps should be forbidden as these things have been misused too many times. If you have any signature stamps lying around in your office, destroy them. For similar reasons, never leave signed blank checks lying around.

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*ALPS Risk Manager Mark Bassingthwaight, Esq. has conducted over 1,000 law firm risk management assessment visits, presented numerous continuing legal education seminars throughout the United States, and written extensively on risk management and technology. Check out Mark's recent seminars to assist you with your solo practice by visiting ALP's on-demand CLE library at [alps.inreachce.com](http://alps.inreachce.com).*

*Mark can be contacted at: [mbass@alpsnet.com](mailto:mbass@alpsnet.com).*



# Odds and Ends: My Inbox Part II

Tenielle Fordyce-Ruff

One of the joys of writing this column is hearing from my readers. Every month a loyal *Advocate* reader contacts me.

Some just let me know about a topic they particularly enjoyed. Others, though, ask for advice or answers to specific questions.

This month, I've decided to share some of the tips, tricks, and answers that have gone out to individuals. We will look at when e-editing isn't particularly helpful, combating verbosity, using numbers correctly, and how to correctly identify a nickname.

## E-editing isn't foolproof

In July 2014 I gave you all advice about saving time by using your word processor to help proof and edit your writing.<sup>1</sup> I also provided a word of caution about common homonyms that the spell-check function of a word processor wouldn't catch. Today, I'm going to cover another time when your word processor won't be helpful.

Most grammar checks won't correctly identify subject-verb agreement errors if there is a phrase or clause between the subject and the verb. Take a look at this example.

*Custom-made towels imprinted with the hotel's logo satisfies the requirement that the goods be specifically manufactured.*

Looking at this as I type it, Word hasn't identified the error in this sentence. Yet, the subject (towels) and the verb (satisfies) don't agree in number. This is a basic grammar error that has made it past grammar check.<sup>2</sup>

So what to do? First, try to avoid writing sentences with a long clause



or phrase between the subject and the verb. Second, make note of these sentences when you're writing them and double or triple check the subject verb agreement.

## Minimizing prepositional phrases

Many readers want quick tips to help them shorten their writing. There are a few quick ways to minimize prepositional phrases: use shorter replacements and use active voice.

As a reminder, a preposition is a word that relates its object to another word in the sentence. The relationships are commonly ones of space (in, on, under), possession (of, for, by), or circumstance (about, against).

Prepositions can be simple (in, of, for) or complex (in accordance with, on behalf of). Much wordiness comes from the use of complex prepositions, so replacing a complex preposition with a simple one or a shorter word can cut down on verbosity.

Compare the following sentences:

---

Most grammar checks won't correctly identify subject-verb agreement errors if there is a phrase or clause between the subject and the verb.

---

*She asked that her attorney file the complaint with all diligence.*

*She asked that her attorney file the complaint quickly.*

*The CEO of the company expects to end the year with only minimal losses.*

*The company's CEO expects to end the year with only minimal losses.*

Likewise, using active voice will help cut down on wordy sentences clogged with *by* phrases.<sup>3</sup>

Compare these examples:

*A duty of care to the plaintiff was breached by the defendant when the slippery floor was left unmopped by the defendant.*

*When the defendant failed to mop the slippery floor, he breached his duty of care to the plaintiff.*

Notice how switching to active voice eliminated the wordy prepositional phrase “by the defendant.” Not only is the second sentence much shorter, it is also easier to read and understand. Never bad traits for legal writing!

### Using numbers correctly

Numbers seem to be a source of consternation for both my students and readers. To help clear up how to use numbers correctly, here are a few tips.

First, it is best to spell out numbers between zero and one hundred.<sup>4</sup> It is also best to spell out even hundreds, thousands, hundred thousands, etc., if using those numbers as approximations.

*Stanley, Idaho, has only sixty-nine residents.*

*Idaho Falls, Idaho, has a population of 58,292.*

*Idaho has over one million people.*

Second, if the number begins a sentence, it should always be spelled out.

*Two hundred fourteen thousand two hundred thirty-seven people live in Boise.*

However, because that can make the sentence awkward, it is best to rewrite the sentence.

*Boise has a population of 214,237.*

When the sentence begins with a year, you should also write the year out.

*Eighteen eighty-nine saw the creation of the Idaho Constitution.*

But, that can also make the sentence awkward, so it’s best to rewrite it.

*The people of Idaho ratified the state constitution in 1889.*

*In 1889, the people of Idaho ratified the state constitution.*

Third, if your sentence has two numbers of the same category, spell out the first number and use numerals for the second.

*Two hundred fourteen thousand two hundred thirty-seven of Idaho’s 1,634,464 residents live in Boise.*

Or rewrite the sentence.

*Of Idaho’s 1,634,464 residents, 214,236 live in Boise and 86,518 live in Nampa.*

Finally, when spelling out numbers, use a hyphen for numbers twenty-one through ninety-nine. The rest are left open.

### Identifying nicknames correctly

I have to admit, this was a reader’s question and I didn’t know the answer. I’ve never had a nickname! But I know that many people go by names other than their given names and need to use both for professional purposes or refer appropriately to a client or other party.

If you are using the nickname in addition to a person’s proper name, put the nickname in quotation marks, not parentheses. Capitalize it

as you would a proper name. Do not, however, capitalize *the* if it is part of the nickname (unless *the* is the beginning of a sentence).

Abraham Lincoln “the Great Emancipator”

George Herman “Babe” Ruth

C.L. “Butch” Otter

### Conclusion

I hope you enjoyed this month’s hodgepodge of advice. Keep the questions and suggestions coming!

### Sources

- Bryan A. Garner, *The Redbook: A Manual on Legal Style*, 176-177 (2d ed. West 2006).
- *The Chicago Manual of Style*, 376, 464-466 (16th ed. 2010).

### Endnotes

1. Tienielle Fordyce-Ruff, *Time Savings: E-Editing Tips & Tricks*, 57-JUL Advocate (Idaho) 62 (2014).
2. For a reminder on subject-verb agreement, see Tienielle Fordyce-Ruff, *Back to the Basics: Subject and Verb Agreement*, 55-DEC Advocate (Idaho) 52 (2012).
3. For a refresher on finding and fixing passive voice, see my article, *Attaching People to Your Writing: Eliminating Passive Voice and Vague “ing” Words*, 53-DEC Advocate (Idaho) 68 (2010).
4. The Chicago Manual of Style, the ALWD Guide to Legal Citation, and the Bluebook all give this advice. In technical contexts, however, it can be appropriate to use numerals for all numbers over ten.

Tienielle 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.lice.com>.



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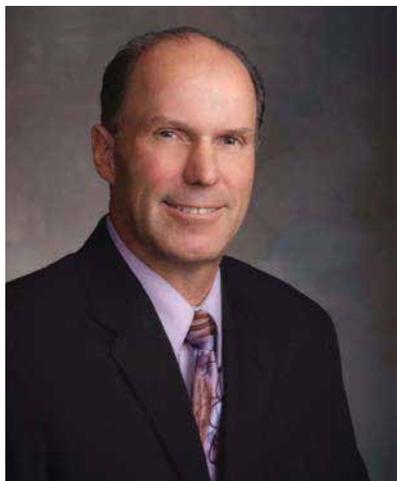
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## IN MEMORIAM

### Barbara Jean 'Bobbi' Richart

1949-2015

Barbara Jean "Bobbi" Richart passed away Sept. 23, at her home after a year-long battle with cancer. She was 66.

Bobbi was born July 29, 1949 in Berkley, Calif. Being in a military family Bobbi was educated in many states. She studied and became a piano concert pianist before she graduated from Aqua Clara High School in 1967.

Bobbi went on to college in Texas. She graduated "Magna Cum Laude" with a degree in the Bachelor of Arts, and continued on to the University of Houston where she got her Doctor of Jurisprudence.

She continued practicing law in Texas as a private practice attorney and a judge. She moved to Idaho and continued her career. In 1988 she was elected Elmore County prosecutor and stayed there for eight years.

Bobbi went on to finish the rest of her career as the Payette County deputy prosecutor. Bobbi found her "nitch" in working as the prosecutor and deputy prosecutor where she was able to help people. She became the "pitbull" advocate to protect children and other victims.

One of her greatest loves came from when the Drug Court Program started; where people could and did change their lives for the better. Seeing the people graduate that program made her want to help others that came into the program do the same.

Her love and care continued on while she worked as an EMT for a few years.

Bobbi loved to travel, listen to music, and spend time with her family and friends.

Bobbi is survived by her mother, Merna Jean Richart; a son, Kevin

Warren (Michelle Warren) of Texas; a daughter, Brittany Layher; two step children, Joei (Layher) Beaman and John Layher; a half-sister, Jo Anne Dunn (Bob Dunn); two step sisters, Rhonda Coonse (Wade Coonse) and Terri Smith (Don Smith); numerous grandchildren and several nieces and nephews.



Barbara Jean 'Bobbi' Richart

### Hon. Craig Charles Kosonen

1936 - 2015

Craig passed away peacefully from natural causes while surrounded by close family and friends on October 1, at Kootenai Medical Center.

Craig was born in Wallace, Idaho on October 5, 1936; the only child of Unto "Whitey" and Edith (Torkelson) Kosonen. He attended schools in Wallace, Spokane and Coeur d'Alene, where he graduated from High School in 1954 as student body president.

Although he excelled in baseball, he decided to pursue music and went on to play the trumpet professionally. Craig attended North Idaho Junior College and continued at the University of Idaho; where he received a B.A. in Political Science in 1959 and on to receive his Law degree in 1961.

He was a proud member of the Phi Gamma Delta (Fiji) fraternity and treasured the lifelong friendships he made there. Craig started his private practice in Coeur d'Alene and was appointed as Justice of the Peace in 1966 until Idaho's court reform in 1971, when he was appointed as a District Court Magistrate and

served for 15 years until he retired in 1986.

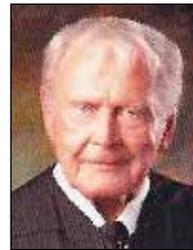
He then spent the next four years in private practice until 1990, when he served as First District Court Judge from Shoshone County

until he retired in 2001. Craig was known for his brilliant legal mind; combined with a sense of fairness and compassion for all persons who came into his courtroom.

He authored landmark decisions, as a District Judge and while serving as a pro tem Idaho Supreme Court Justice. In 2000, he received the Distinguished Jurist Award from the Idaho Association of Criminal Defense Lawyers. Even after retirement he helped people in need of his legal representation.

Craig loved to laugh with friends and family and his hilarious wit was known to all who knew him. He was a long-time member of the Gyros club in Wallace. He was a passionate man and knowledgeable on most subjects, and yet enjoyed learning from others.

In recent years he was able to vacation in Mexico and Hawaii with his wife and closest friends. Craig is survived by his loving wife of 38 years, Nancy, at home in Osburn, Idaho; his son, Brian Kosonen of Osburn; daughter, Tiffany (Peter) Erbland of Coeur d'Alene; granddaughters Kayla (Matt) Womeldorff of Salt Lake City, and Lauren Leitzke of Moscow, Idaho and grandson, Mitchell Leitzke of Moscow, Idaho. He also leaves a twin daughter and son: Karen Ylitalo Gill and her children in Hillsboro, Ore. and Cameron Ylitalo and his children of Colorado Springs, Colo.



Hon. Craig Charles Kosonen

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# Idaho Law and Justice Learning Center Holds Grand Opening

Dan Black

**P**ressed into service once again, the former Ada County Courthouse Building has a new name and a new life. Its marble floors, wood panels and mural-covered plaster halls echo the crashing sounds of those eager to practice law. Personal greetings bounce off the walls frescoed with 1930s images of the West. Natural light creates vivid shadows and highlights virtually unseen to generations of lawyers who trained under florescent tubes.

The Idaho Law and Justice Learning Center held its Grand Opening September 24 in high style. Guests invaded every niche and cranny of monumental Deco-style building, inspecting the murals, polished brass and deco symmetry. At least 200 people came to look the place over and to celebrate the building's new purpose.

The building now supports the legal profession with the University of Idaho's branch College of Law, the Idaho State Legal Library, and the Idaho Supreme Court's Institute for Advanced Judicial Education. The celebration created a reunion of sorts for UI supporters, alumni, the broader legal community, elected officials, faculty members and students.

The building was finished in 1939 as a Public Works Administration project as part of President Roosevelt's New Deal in response to the Great Depression. It functioned as a courthouse until 1999. It was sold to the state for extra room for the legislature, but was left vacant in 2002. Later it served as a temporary Capitol Building during the Statehouse renovation. The original wood paneled walls cast a warm glow throughout the interior. Windows to the ultra high ceilings in what were House



Photos by Dan Black

Alumni, supporters, students, dignitaries, professors, lawyers, judges, politicians, elected officials, and educators packed into the newly opened Idaho Land and Justice Learning Center Grand Opening Celebration in September. The building's thorough renovation carved another chapter in the iconic downtown building.

and Senate Chambers now light up class rooms, which serve double duty for both UI College of Law and the Institute for Advanced Judicial Education.

Many of those attending the Grand Opening had their own personal connection to the building, including judges who had their chambers there, attorneys who practiced there, members of the Idaho Legislature who were housed in the building during the Idaho State Capitol renovation, or members of the public who have experienced the building as part of the downtown Boise landscape.

Special recognition was given to Don Burnett for his vision and leadership to the ILJLC and to Lee Dillion for overseeing the construction project.

The celebration featured welcoming remarks from Lieutenant Governor Brad Little, Chief Justice Jim Jones, UI President Chuck Staben, and Professor Don Burnett. College of Law Dean Mark Adams provided remarks, especially thanking the Idaho Supreme Court and Idaho State Archives, which brought a traveling exhibit of the Magna Carta, which was on display during the event.

*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. Dan oversees the Lawyer Referral Service and general announcements from the ISB. He has been Managing Editor of The Advocate since 2009.*





Festive Vandal colors welcome the legal community to the grand opening.



Notable key officials in repurposing the old Ada County Courthouse into its new life include, from left UI President Chuck Staben, UI College of Law Dean Mark Adams and former UI Intern President and former College of Law Dean Don Burnett, who initiated the project by pulling together state, university and alumni in a shared vision for the building.

## OF INTEREST

### Ryan Hunter joins Naylor & Hales, P.C.

Naylor & Hales, P.C. announces the addition of Associate Ryan S. Hunter to the firm. Mr. Hunter's practice includes all aspects of general litigation, with a focus on municipality and public entity defense; civil rights defense; governmental liability; administrative law; and employment law. Ryan graduated from Idaho State University in 2008 with Bachelor of Arts degrees in Political Science and International Studies. He received his Juris Doctorate, summa cum laude, from the University of Idaho College of Law in 2013. While in law school, Ryan interned with Idaho Legal Aid and a Spokane general litigation firm.

After graduating from law school, Ryan completed a two year



Ryan S. Hunter

clerkship for the Honorable John M. Melanson, Chief Judge of the Idaho Court of Appeals.

### Winston & Cashatt hires new associate attorney

Megan E. Marshall received her undergraduate degree in English in 2008 and her law degree in 2011, both from the University of Idaho. She joins Winston & Cashatt after working at the Kootenai County Public Defender's Office for more than three years. While attending law school, Megan worked at the Whitman County Prosecutor's office and at the ACLU of Idaho. Megan's practice primarily focuses on criminal defense, civil litigation and employment law. In her personal time, she enjoys skiing, rafting, mountain



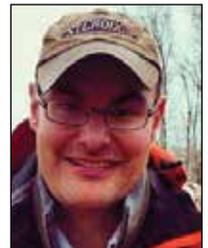
Megan E. Marshall

biking and camping.

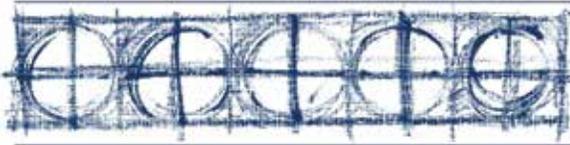
Winston & Cashatt is a multidisciplinary, regional law firm that has been serving clients for more than 40 years. An experienced litigation firm, it represents a roster of local and national clients through its offices in Spokane and Coeur d'Alene.

### Idaho Falls law firm welcomes new partner

Aaron J. Tolson is pleased to announce that Andrew M. Wayment has joined the firm, Tolson Law Offices, as a partner. Attorney Andrew M. Wayment provides a broad array of legal services including family law, business, and real estate practices. The firm will now be known as Tolson & Wayment Law Offices.



Andrew M. Wayment



## Legal Clinics Help Idahoans Access Justice

Kelli Ketlinski

Idaho Volunteer Lawyers Program,  
Legal Director

**S**ometimes as attorneys we forget how intimidating the process of contacting an attorney can be. To the layperson, the process and world of lawyers can be mysterious and entry into it can seem insurmountable. Many discover they will need to pay hundreds or thousands of dollars in retainer to talk to a lawyer. What if someone doesn't have \$100? Free legal clinics can be an ideal solution.

Sometimes as attorneys we struggle with wanting to provide *pro bono publico* service, but are intimidated by the thought of taking on full representation. Naturally, we share the concern that the case will take more hours than expected. For the lawyer who has a couple of free hours each month or quarter, volunteering for a legal clinic can be an ideal solution.

The Idaho Volunteer Lawyers Program coordinates legal clinics throughout the state of Idaho every month in conjunction with the Idaho Military Legal Alliance, senior centers, and Court Assistance Offices. Several other organizations hold free legal clinics in a variety of locations as well. To support attorneys' service at the clinics coordinated by IVLP, attorneys are offered professional liability coverage and continuing legal education opportunities. This allows attorneys to come up to speed in areas of law outside their usual practice. Clinic participants are required to sign an acknowledgment of the attorney's limited service in order to define the attorney's role to that participant.



Below is a non-exhaustive list of walk-in clinics currently held in Idaho. If you have friends, family, clients or other acquaintances that could benefit from help at a clinic, please send them to one. If you are interested in helping at any of the clinics, please contact IVLP or your local contact person listed below. A current Statewide Legal Clinics Calendar can always be found on the IVLP website at [http://isb.idaho.gov/ilf/ivlp/clinic\\_calendar.html](http://isb.idaho.gov/ilf/ivlp/clinic_calendar.html).

### 1<sup>st</sup> District:

- St. Vincent DePaul North Idaho's Legal Link – Coeur d'Alene: Held on Thursdays twice monthly, with pre-registration required, addressing primarily landlord/tenant and family law. Contact Keri Stark (208) 416-4778.

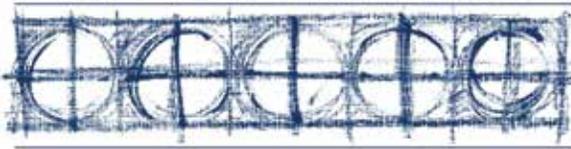
- The law firm of Flammia & Solomon, PC holds a monthly class and workshop for veterans in family law matters. To help, please contact Anne Solomon at (208) 667-3561.

### 2<sup>nd</sup> District:

- Veteran's Legal Clinic – Lewiston: A walk-in clinic for veterans on a variety of legal issues, held the first Wednesday of every month (6-8 p.m.) Contact Robert Wakefield at (208) 882-5939.

### 3<sup>rd</sup> District:

- College of Western Idaho Legal Clinic for Students: 2<sup>nd</sup> Thursday of each month (4-7 p.m.) Contact IVLP.



- Nampa Senior Clinic: 4<sup>th</sup> Thursday of each month at the Nampa Senior Center (10 a.m.-noon). Contact IVLP.
- Canyon County Legal Clinic – Held in conjunction with the Court Assistance Office and Idaho Military Legal Alliance on the 4<sup>th</sup> Thursday of each month (1:30-4 p.m.) addressing veterans and other participants from Canyon County in family law, wills, benefits, consumer protection, housing and other matters. Contact IVLP.

**4<sup>th</sup> District:**

- Boise Senior Clinic: 1<sup>st</sup> Monday and 3<sup>rd</sup> Tuesday of each month (10 a.m.-noon). Contact IVLP.
- Veteran’s Legal Clinic – Boise: 2<sup>nd</sup> Friday of each month (2-4 p.m.) Contact IVLP.
- Idaho Trial Lawyers Association’s Boise Street Law Clinic: Held at the Library! on the 2<sup>nd</sup> and 4<sup>th</sup> Monday of each month (4-6 p.m.) Concordia law students screen and talk to participants. Non-ITLA members are welcome and encouraged to volunteer! Contact Quinn Perry (208) 345-1890.
- Mountain Home Senior Clinic – 3<sup>rd</sup> Wednesday of each month (10 a.m.-noon). Contact IVLP.
- Community Legal Services at Corpus Christi – Boise: Addressing legal questions of primarily homeless participants on the last Saturday of each month (10:30 a.m.-noon). Contact IVLP.
- Women’s Business Center – Boise: Pre-registration style clinic for new and continuing small businesses addressing a variety of legal questions (business formation, employment, IP, risk management). Held the 4<sup>th</sup> Wednesday of each month (11:30 a.m.-1 p.m.) Contact IVLP.

**5<sup>th</sup> District:**

- Twin Falls Senior Clinic: 2<sup>nd</sup> Wednesday of each month (12:45-2 p.m.) Contact IVLP.
- College of Southern Idaho: 2<sup>nd</sup> and 4<sup>th</sup> Thursdays of each month. Contact Laird Stone (208) 733-2721

**6<sup>th</sup> District:**

- Pocatello Senior Clinic: 3<sup>rd</sup> Tuesday of each month (10 a.m.-noon). Contact IVLP.
- Veteran’s Legal Clinic – Pocatello: 3<sup>rd</sup> Wednesday of each month at ISU (5:30-7 p.m.) Contact Katre Nye, Court Assistance Officer (208) 236-7067.

**7<sup>th</sup> District:**

- Idaho Falls Senior Clinic: Pre-registration style clinic held on the 4<sup>th</sup> Tuesday of each month. Contact (208) 522-4357.

The University of Idaho School of Law, and Concordia University School of Law both hold legal clinics for members of the public on specific legal needs. Please contact those universities directly for information on opportunities to volunteer. If veterans issues are of particular interest to you, please contact Captain Stephen A. Stokes of the

IVLP would like to acknowledge and express gratitude to the dozens of attorneys who volunteer at these clinics throughout the state.

Idaho Military Legal Alliance. He can be reached at (208) 272-3573.

Do you organize or know of another clinic to be featured in an upcoming issue, please contact IVLP at (208) 955-8872.

Finally, IVLP would like to acknowledge and express gratitude to the dozens of attorneys who volunteer at these clinics throughout the state. Some are able to help once per year and others nearly every month. These attorneys are the reason for the clinics’ success! We would love to see you join them.

*Kelli Ketlinski is the Idaho Volunteer Lawyers Program Legal Director. Previously she worked in the Civil Division of the Ada County Prosecutor's Office. She also worked on a contract basis for Bar Counsel. A graduate from the University of Idaho with a B.A. in Political Science, she earned her law degree from the UI College of Law.*



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