



The **Advocate**

Official Publication  
of the Idaho State Bar  
Volume 58, No. 10  
October 2015





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# The Advocate

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## On the Cover:

Andersen Banducci paralegal Keri Rowland rides in Boise's Goldilocks event, a women-only bike ride aimed to help women of every skill level advance in the sport.

## Editors:

Special thanks to the October editorial team: A. Denise Penton and Angela Schaer Kaufmann.

## November/December issue sponsors:

Commercial Law & Bankruptcy and Employment & Labor Law Sections.

## Photographers!

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## Writing a blog?

*The Advocate* would like to know about it. We want in on the conversation and to flag notable posts through social media. Send your URL to [dblack@isb.idaho.gov](mailto:dblack@isb.idaho.gov)



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



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**Parsons Behle & Latimer is pleased to announce that Andrew V. Wake and Jordan L. Stott have joined the firm as associates in the Boise office.**



Andrew Wake is a member of the firm's Litigation, Trials & Appeals practice group and concentrates his practice on appeals, employment & labor, health law, and intellectual property litigation. Mr. Wake earned his bachelor's degree in philosophy at Boise State University. He received his J.D. with highest honors from the University of Utah, S.J. Quinney College of Law.



Jordan Stott is an associate, focusing on patent prosecution and trademark prosecution. In addition, Mr. Stott provides litigation support for intellectual property matters. He has a B.S. degree from Utah State University in mechanical engineering with a minor in mathematics. He earned his J.D. from the University of Idaho College of Law in 2015.

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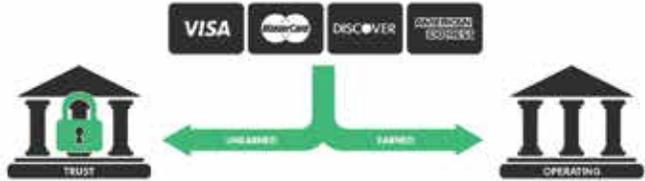


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## Upcoming CLEs

### October

#### October 9

*Divorce & Business: Experts, Appraisals/Evaluations, Determining Self-Employment Income and Dissecting Tax Returns*

Sponsored by the Family Law Section  
Red Lion Pocatello, 1555 Pocatello Road – Pocatello  
8:30 a.m. (MDT)  
6.5 CLE credits of which .5 is Ethics

#### October 9

*Appellate Practice CLE*

Sponsored by the Appellate Practice Section  
The Idaho Law and Justice Learning Center, 514 W. Jefferson Street – Boise  
9:00 a.m. (MDT)  
5.5 CLE Credits

#### October 15

*Technology and the Law: What You Need to Know in Court and in Your Practice*

Co-Sponsored by the Intellectual Property Section and the Young Lawyers Section  
James A. McClure Federal Building and United States Courthouse – 550 W. Fort, Boise / Statewide Webcast  
8:30 a.m. (MDT)  
3.0 CLE credits of which 1.0 is Ethics

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

### October (continued)

#### October 23

*Ethics & the Attorney Client Privilege*

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

#### October 30

*Divorce & Business: Experts, Appraisals/Evaluations, Determining Self-Employment Income and Dissecting Tax Returns*

Sponsored by the Family Law Section  
Hampton Inn & Suites – 1500 W. Riverstone, Coeur d'Alene  
8:30 a.m. (PDT)  
6.5 CLE credits of which .5 is Ethics

### November

*Save the Date - Mobile Monday CLE Series*

12:30 p.m. (MST), 1.0 CLE credits

**November 2** – David W. Newman, U.S. Department of Justice, Office of the U.S. Trustee

**November 9** – Bradley G. Andrews, Idaho State Bar Counsel

**November 16** – Jan M. Bennetts, Ada County Prosecuting Attorney

**November 23** – Mark Adams, University of Idaho College of Law Dean

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



### Live Seminars

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

### Online On-Demand Seminars

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

### Recorded Program Rentals

Pre-recorded seminars are also available for rent in DVD and CD formats. To visit a listing of the programs available for rent, go to [isb.idaho.gov](http://isb.idaho.gov), or contact Lindsey Egner at (208) 334-4500 or [legner@isb.idaho.gov](mailto:legner@isb.idaho.gov).



## President's Message

### Commissioners Take the Challenge of Bullies on the Road(show)

*Tim Gresback  
President, Idaho State Bar  
Board of Commissioners*

**A**s you may have noticed in the last few months, the Idaho State Bar is addressing the challenges we face in dealing with bullies in our profession. In November this year, as usual, the Commission will travel the state for the annual Roadshow, at which time we will present resolutions and awards to your local members. Before the meal your commissioners, who bring to you roughly 145 years of combined litigation experience, will present a free ethics CLE on bullying, moderated by Bar Counsel Brad Andrews. Those of you lucky enough to work with Brad know that he has a keen appreciation for the pressures under which lawyers work. He also has the benefit, during his tenure as our chief disciplinary counsel, of seeing repeated patterns of lawyer misconduct in general, and bully misconduct in particular. In addition, Brad keeps abreast of what other

Your commissioners, who bring to you roughly 145 years of combined litigation experience, will present a free ethics CLE on bullying, moderated by Bar Counsel Brad Andrews.

state bars do to promote civility and professionalism.

The Roadshow schedule is listed below.

The four Commissioners with whom I have the pleasure of serving are a remarkably talented group of lawyers. Although they live in different towns and handle an eclectic array of cases, they share a passion for a fair legal playing field. They also cherish the professionalism most Idaho lawyers routinely display. Your Commissioners have a wealth

of practical experience to add depth to our upcoming CLE conversation on handling a difficult colleague.

#### **Trudy Fouser**

Trudy Fouser is your president-elect. Trudy is a civil defense litigation attorney who for over 30 years has worked with countless talented



Trudy Fouser

#### **2015 District Bar Association Resolution Meetings**

District	Date/Time	Ethics CLE	City	Location
First Judicial District	Thursday, November 5 at Noon	10:30 -11:30 a.m.	Coeur d'Alene	North Idaho College Student Union
Second Judicial District	Thursday, November 5 at 6 p.m.	4:30 – 5:30 p.m.	Clarkston, WA	Quality Inn
Third Judicial District	Thursday, November 19 at 6 p.m.	4:30 – 5:30 p.m.	Nampa	Hampton Inn
Fourth Judicial District	Thursday, November 19 at Noon	10:30 -11:30 a.m.	Boise	Location To Be Announced
Fifth Judicial District	Wednesday, November 18 at 6 p.m.	4:30 – 5:30 p.m.	Twin Falls	Canyon Crest Event Center
Sixth Judicial District	Wednesday, November 18 at Noon	10:30 -11:30 a.m.	Pocatello	Juniper Hills
Seventh Judicial District	Tuesday, November 17 at Noon	10:30 -11:30 a.m.	Idaho Falls	Marriott Residence Inn

lawyers and judges. Her accolades, including the bar's Professionalism Award, are too numerous for much detail here, but let me summarize by stating that Trudy has tried more civil jury trials than any woman in the state and has inspired countless younger female lawyers to try cases. (She hopes!) Trudy practices with her highly respected husband Jack Gjording and recently added her son, U of I College of Law graduate Taylor Fouser, as their newest associate.

### Dennis Voorhees

Dennis Voorhees of Twin Falls is the Commissioner for the Third and Fifth Districts. This summer he received the ITLA Walt Bithell Professionalism Award. Dennis is a certified elder law specialist and serves on the Supreme Court Committee on Guardianships and Conservatorships. He is working with our Bar Counsel Brad Andrews to encourage our aging lawyers to enact succession plans. For fun Dennis regularly travels to Chicago to attend the legal technology exposition. He is very interested in the curriculum of our law schools and wants to ensure students are able to graduate with demonstrable technological skills. Dennis has been practicing for 37 years.



Dennis Voorhees

### Michelle Points

Michelle Points is now in her second year on the Commission, serving the Fourth District. Her practice includes commercial litigation, personal injury, and products liability. She is President of the Idaho Women Lawyers. Like it is for Trudy, being

a role model for younger women is important to Michelle. She considers Craig Meadows as one of her greatest mentors. Michelle, a Gonzaga Law School graduate in 2000, has 15 years of litigation experience. She has a proven track record of serving the legal profession, including as an original member of the Pro Bono Commission. Michelle also had the benefit of clerking for Justice Gerald Schroeder.



Michelle Points

### Kent Higgins

The newest Commissioner is Kent Higgins of Pocatello who serves

the Sixth and Seventh Districts. Kent brings 33 years of experience not only from his insurance defense and plaintiff practice, but also as an elected member of our Legislature. He has handled some of the largest toxic tort cases in eastern Idaho. What most impressed me with Kent is that prior to taking his seat on the Commission, he traveled to Park City, Utah, to learn from other western bar leaders how to help Idaho adapt to the rapid changes in the delivery of legal services. Kent hit the ground running.

Next month I will write about deposition bullies. See you at the Roadshow!

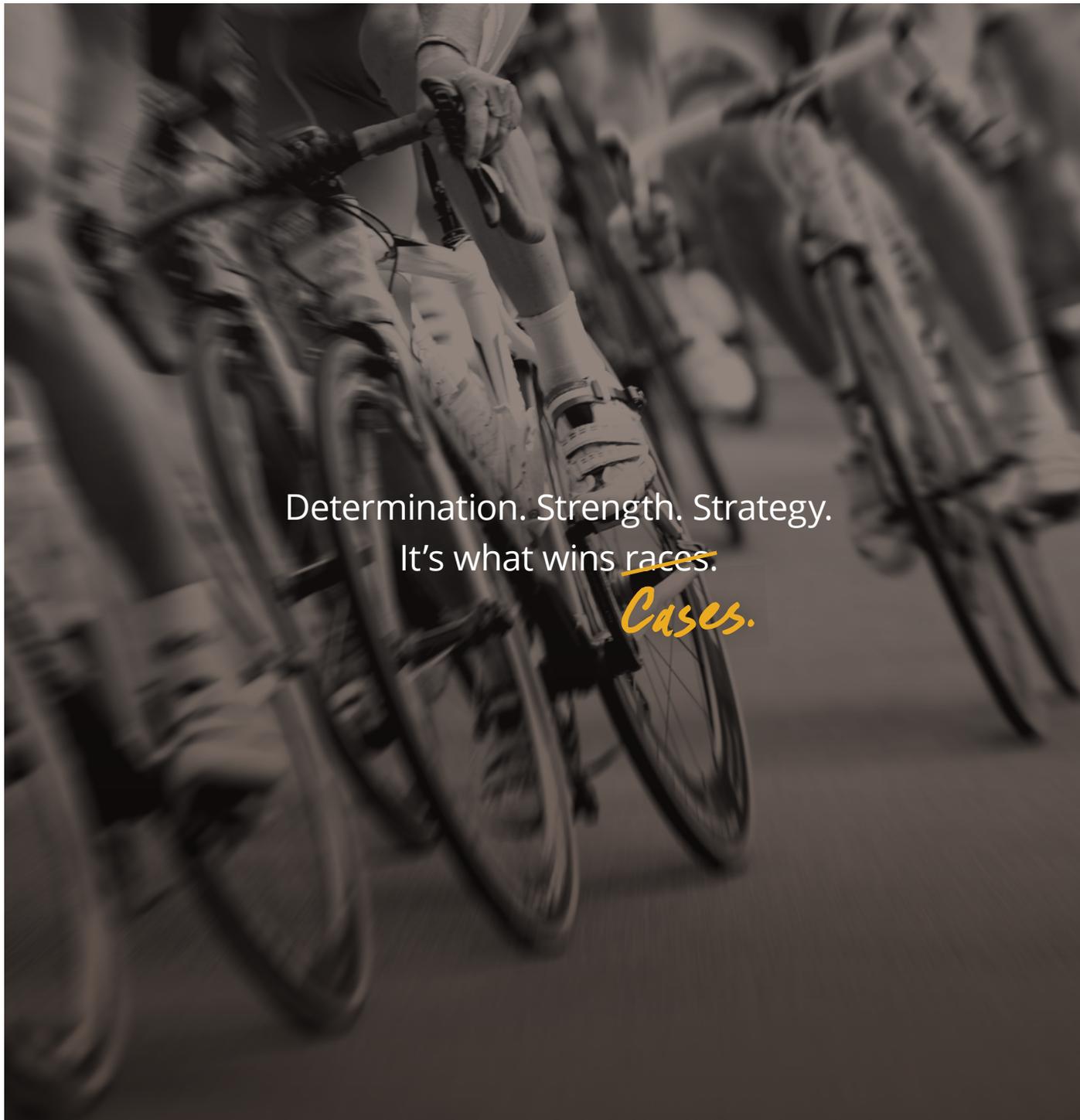


Kent Higgins

**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.



He is very interested in the curriculum of our law schools and wants to ensure students are able to graduate with demonstrable technological skills.



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## DISCIPLINE

### **David A. Goicoechea (Suspension)**

On August 10, 2015, the Idaho Supreme Court issued a Disciplinary Order suspending attorney David A. Goicoechea for one (1) year. The Idaho Supreme Court's Order followed a stipulated resolution of an Idaho State Bar reciprocal disciplinary proceeding.

Mr. Goicoechea was admitted to practice law in Washington and Idaho and practiced law in Spokane, Washington. On October 10, 2014, the Supreme Court of Washington entered an Order approving a stipulation to one (1) year suspension. The Washington suspension was effective October 17, 2014. In the Washington disciplinary case, Mr. Goicoechea stipulated to violations of the Washington Rules of Professional Conduct (RPC) 8.4(c), 3.4(c), 8.4(j) and 8.4(d). With the exception of RPC 8.4(j), those Washington rules correspond to the same Idaho Rules of Professional Conduct.

The Washington disciplinary case related to Mr. Goicoechea and his ex-wife's divorce case. Mr. Goicoechea was found in contempt numerous times of court orders in the divorce case relating to spousal maintenance payments and his reporting requirements to the court. The Washington disciplinary case acknowledged as a mitigating factor that Mr. Goicoechea lacked sufficient funds to fully comply with his financial obligations.

Other than these proceedings, Mr. Goicoechea has no disciplinary history in Idaho or Washington.

Mr. Goicoechea voluntarily did not practice law in Idaho since the date of his Washington suspension and the Stipulation provided for and the Idaho Supreme Court ordered that Mr. Goicoechea's suspension in

Idaho would be retroactive to October 17, 2014 and will last until October 17, 2015.

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

### **John T. Bujak (Resignation in Lieu of Discipline)**

On September 17, 2015, the Idaho Supreme Court entered an Order accepting the resignation in lieu of discipline of Eagle attorney, John T. Bujak. The Idaho Supreme Court's Order followed a stipulated resolution of a disciplinary proceeding that related to the following conduct.

During his tenure as the Canyon County Prosecutor in 2009-2010, by agreement of Canyon County and Nampa, funds for prosecutorial services for Nampa were received and deposited in Mr. Bujak's trust account, with an expected reimbursement from the trust account to Canyon County at the end of each fiscal year. Mr. Bujak removed funds from his trust account for personal use. At the conclusion of fiscal year 2010, there were insufficient trust account funds to reimburse Canyon County for expenses related to the Nampa prosecutorial services. Mr. Bujak admitted that these circumstances violated I.R.P.C. 1.4(b) [Communication with Client], 1.7(a)(2) [Conflict of Interest: Current Clients], and 1.15(a), (b), (c) and (e) (effective 2009-2010) [Safekeeping Property].

In addition, during the criminal prosecution of Respondent on a felony charge of preparing false evidence and a computer crime, Respondent admitted one count of contempt for willfully failing to disclose expert materials pursuant to I.C.R. 16 by the deadline ordered by the court. Mr. Bujak admitted that these circumstances violated I.R.P.C.

3.3(a) [Candor Toward the Tribunal], 3.4(c) (d) [Fairness to Opposing Party and Counsel], and 8.4(d) [Engaging in conduct prejudicial to the administration of justice].

The Idaho Supreme Court accepted Mr. Bujak's resignation in lieu of discipline. By the terms of the Order, Mr. Bujak may not make application for admission to the Idaho State Bar sooner than 4 years, 4 months and 11 days from the date of his resignation, reflecting previously ordered credit related to his voluntary interim suspension. If he does make such application for admission, he will be required to comply with all bar admission requirements in Section II of the Idaho Bar Commission Rules and shall have the burden of overcoming the rebuttal presumption of the "unfitness to practice law".

By the terms of the Idaho Supreme Court's Order, Mr. Bujak's name was stricken from the records of the Idaho Supreme Court and his right to practice law before the courts in Idaho was terminated on September 17, 2015.

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

## CLIENT ASSISTANCE FUND CLAIM

### **Notice to M. Patrick Duffin of Client Assistance Fund Claim**

Pursuant to Idaho Bar Commission Rule 614(a), the Idaho State Bar hereby gives notice to M. Patrick Duffin that a Client Assistance Fund claim has been filed against him by former client Todd Johnson, in the amount of \$3,479. Please be advised that service of this claim is deemed complete fourteen (14) days after the publication of this issue of The Advocate.

**Young Lawyers event addresses hunger**

BOISE - The 2015 Attorneys Against Hunger event was a success again this year. The campaign, sponsored by the Young Lawyers Section, raises funds for the Idaho Food Bank. Attorneys Against Hunger raised \$3,510. In addition, the host of this year's event, Boise Brewing donated 25 percent of their beer sales, or \$367. The Young Lawyers Section thanks all who participated and hopes for another successful event next year.

**Bankruptcy and evidence rules published for comment**

WASHINGTON., D.C. - In August the Judicial Conference Advisory Committees on Bankruptcy and Evidence Rules published proposed amendments to their respective rules, and requested that the proposals be circulated to the bench, bar, and public for comment. The proposed amendments, rules committee reports explaining the proposed changes, and instructions on how to submit comments are posted on [uscourts.gov](http://uscourts.gov). The public comment period ends February 16, 2016.

**College of Law expects to add first year in Boise by Fall, 2017**

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Photo by Greg LeDonne

Catie Freeman, left, and Meghan Carter have some fun during the Young Lawyers Section's annual Attorneys Against Hunger fundraising event.

ho announced that the College of Law plans to offer first-year classes to law students in Boise in the fall 2017. Classes will be taught at the new Idaho Law and Justice Learning Center (ILJLC), which opened this fall.

Currently, all UI law students attend their first year of law school in Moscow. Second- and third-year students have the option of completing their educations in either Moscow or Boise. The addition of first-year classes in Boise will make a Juris Doctor degree fully available on either campus.

“We are thrilled to offer what we believe will be a world-class legal education at the ILJLC,” said Mark L. Adams, dean of the College of Law. “The first-year option in Boise has been part of our strategic vision all along, and the planning processes to make it a reality are officially beginning. It’s a lengthy process involving conversations and input from many important players, including our faculty, and the approvals of the Idaho State Board of Education and the American Bar Association.”




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### 2015 District Resolution Meetings, Award Presentations

Diane K. Minnich  
Executive Director, Idaho State Bar

**T**he resolution packets, which include the resolution meeting schedule and proposed resolutions will be mailed to bar members the week of October 19. It will also be posted on the Idaho State Bar website.

We hope to see you at the resolution meeting in your district. In addition to presenting the proposed resolutions, at each meeting we will present the professionalism, pro bono and retiring judge awards. The 2015 Professionalism Award recipients are:

#### Professionalism Awards

##### 1<sup>st</sup> District: Joel P. Hazel

Witherspoon Kelley, Coeur d'Alene

Joel Hazel served on the Idaho State Bar Character and Fitness Committee from 2002-08, and then later the Professional Conduct Board from 2008-14. He also earned the Service Award in 2010. He currently serves as an ISB appointed Judicial Council Member.

#### Ideals

"It has always been modeled to me that you should extend professional courtesies so long as it does not prejudice your client. You will eventually need an extension or stipulation from opposing counsel. I endeavor to return phone calls, emails and



Joel P. Hazel

respond to letters in a timely manner. There is no substitute for preparation and staying organized."

#### Inspirations

"My grandfather, Harry Hazel, was a lawyer and court commissioner in Yakima, Washington, for many years and was a true gentleman and role model. I have been fortunate to have excellent mentors and role models in civility at both the Kootenai County Prosecutor's office and at Witherspoon Kelley."

#### Lessons and tips

"Don't accept every invitation to be contentious. Chest-thumping letters about whether to set a deposition on Tuesday or Wednesday or accusing opposing counsel of improper motives are almost never productive to the process or your client."

##### 2<sup>nd</sup> District: Anthony C. Anegon

Aherin, Rice & Anegon, Lewiston

Tony Anegon's practice areas are worker's compensation, personal injury and criminal law.

#### Ideals

"I believe treating clients with respect and honesty is most important as it makes it easier to be an effective advocate for them. This attribute obviously applies to colleagues, judges, court staff and others involved in this profession, but it starts with your clients. Every other good professional attribute one should have (including commitment, civility and fairness) flows from this."



Anthony C. Anegon

#### Inspirations

"There was no particular one thing that was influential. Starting the practice of law in the Second Judicial District was certainly a major benefit to me early on as the local bench and bar were, and are a welcoming, respectful and conscientious group making the practice much more enjoyable. I am not saying it isn't the same in other districts, but it has been a pleasure working here."

#### Lessons and tips

"Be committed to your clients. If you cannot be committed to clients in your representation of them, you will have problems. Be nice. You do not have to be a jerk to be an aggressive lawyer. You can be nice to all involved in our profession and still be a very effective advocate. Keep business and personal separate. This is sometimes hard to do, but taking things personally or making even implied personal attacks on colleagues is a bad way to be an advocate. Do not write and send letters or emails while angry. Reflect on what you have written before sending so you do not send something you will later regret."

##### 3<sup>rd</sup> District: William H. Wellman

Solo practitioner, Nampa

Bill Wellman practices criminal defense, tort and family law in the solo practice he has built since 1980. He received the ISB Pro Bono Award in 1987 and he served as an ISB Commissioner including time as President.

#### Ideals

"History in the practice has taught me that competence, trustworthiness

and dependability are critical to an attitude and reputation as a professional. I liken my practice to a first responder and in that sense, being able to correctly assess the matter at hand is imperative. I touch lots of files in my work as a defending attorney and child support attorney. I learned about being punctual from my dad. He had a regular routine each day. He was always up very early and on the job by 8 am. He also was a selfless person. He sacrificed much to raise his younger siblings in the depression and even late in life took time for my grandmother almost every Sunday. By examples he set, I seem to get to court on time and expect that I will be prepared. Nothing less would be acceptable in our household."

*Inspirations*

"I was the youngest in the family and my two brothers were natural role models. With very different personalities, they are now retired physicians. Jim was the one who taught me that adversity was only a minor bump in the road to success. He went through about 10 major surgeries before he was 15 in order to arrest a rare disease, scleroderma. Despite all of the long hospital stays he managed to be a stellar athlete and a college scholar at Marshall University and West Virginia University Medical School. He never gave up on his goal set at a very early age to be a doctor.



William H. Wellman

"Dave, on the other hand, is a brilliant thinker and communicator. He has opened my mind to consider changing my attitude towards doing things the way they have always been done."

*Lessons and tips*

"Do not make promises about cases that you cannot deliver. Call

clients back. It is a lot better to tell someone the work is not done rather than to leave them wondering what is going on. Court clerks are your best friends, especially in small counties. As many lawyers have said before my time, 'It takes years to build a good reputation and about five minutes or less to destroy one.' Think carefully about the long term consequences of your conduct every day."

**4<sup>th</sup> District: James J. Davis**

Solo practitioner, Boise

Jim Davis practices in areas of law associated with defense of local Idaho governments and their elected officials and employees in civil rights, employment, and tort litigation.

*Ideals*

"Integrity, compassion and humility. Integrity is pivotal. Our reputations are built on it. For me, integrity embodies most of the other attributes generally regarded as professional, e.g., hard work, competence, diligence, and good judgment. Also critical to a meaningful practice is compassion for others. Treating others with respect has its own personal rewards, while also fostering a constructive environment in which to practice. Likewise important is humility. Understanding that each of us has worth provides balance in what can otherwise be a very self-serving, competitive profession."

*Inspirations*

"The foundation for what inspired me to practice the way I do is the values my parents provided. They were innately good and decent people who instilled personal integrity, respect for others and social consciousness in their children."

"In high school, I started running errands for the Boise law firm, then



James J. Davis

known as Eberle, Berlin, Kading, Turnbow & Gillespie, Chtd., where I eventually practiced law for over a decade. The many excellent lawyers in that firm were, and many remain, my role models and mentors. From them I learned how law should be practiced. In particular, I am grateful to Jim Gillespie for stressing the importance of character. I have also been very fortunate to observe the character and practice habits of so many other lawyers and judges for whom I have the utmost respect. I have attempted to emulate each of them."

*Lessons and tips*

"To newer attorneys, observe and mirror the character and attributes of attorneys and judges you admire. To all of us, this is trite, simple, but true: We reap what we sow. Integrity promotes trust; compassion promotes empathy; and humility promotes respect. Finally, since the nature of the work we do can be stressful, it has to be balanced with humor and fun. Find balance!"

**4<sup>th</sup> District: Hugh V. Mossman**

Mossman Law Office, LLP, Boise

Hugh Mossman practices in the worker's compensation and Social Security disability areas. He served on the Professional Conduct Board from 1991-97.

*Ideals*

"Most important are integrity, honesty, common sense, and the ability to organize."

*Inspirations*

"My father, also an attorney, was a wonderful inspiration both professionally and personally."

*Lessons and tips*

"Try to maintain a proper balance with your profession, family and personal life."



Hugh V. Mossman

## 5<sup>th</sup> District: Michael F. McCarthy

Idaho Legal Aid Services, Twin Falls

Michael McCarthy's practice focuses on advocating for low income persons, primarily in the areas of housing, social security disability, Medicaid, elder law and guardianship. He was recognized with the Idaho State Bar Service Award in 2009.



Michael F. McCarthy

### *Ideals*

"I try to focus on the interest of the client and judge every action I take in terms of whether it advances that cause. Being civil tends to advance that cause more than being a jerk."

### *Inspirations*

"Atticus Finch in *To Kill A Mockingbird*. And a fear of living in my car."

### *Lessons and tips*

"Remember what got you into the practice of law in the first place and if it's no longer enjoyable go for a long bike ride."

## 6<sup>th</sup> District: Reed W. Larsen

Cooper & Larsen, Pocatello

Reed Larsen practices general litigation, defense, injury and liability law. He was recognized in 2009 with an ISB Service Award, he served on the Access to Justice Idaho Committee and the Judicial Fairness Committee. He has also served a three-year term as an ISB Commissioner for the Idaho State Bar, including time as President.

### *Ideals*

"I believe patience, perseverance and preparation are all important. I have done more with hard



Reed W. Larsen

work than talent or intelligence. I enjoy helping people as a lawyer and feel we should always remember we are there to help people in difficult times."

### *Inspirations*

"The people I have worked with as a lawyer have inspired me to practice the way I do. My partner Gary Cooper is always a great example of how a lawyer should practice law. I received great training as a young lawyer from Bill Olson and others. I remember times when lawyers like Ken Lyon, Buck Hiller, and Ted Pike gave me help and advice that has lasted throughout my career. I will always be grateful for their advice and counsel."

### *Lessons and tips*

"I hope that other attorneys view me as being accessible and a resource for mentoring. I also hope that other attorneys view me in a way that is approachable and helpful. In the end I enjoy being a lawyer and a service to my profession and community."

## 7<sup>th</sup> District: Royce B. Lee

Royce B. Lee, PA, Idaho Falls

A solo practitioner whose practice areas are as diverse as family law, real estate, business, estate planning and personal injury cases, Royce Lee earned the Pro Bono Award in 2000.

### *Ideals*

"To properly understand and serve clients, we need to actively listen, not only to their words, but to the emotions behind the words, and then to the ultimate message about the client's needs. Imagine yourself in the client's chair, with the client's problems and circumstances, and then focus on how to help that unique client. Always show respect to the opposing attorney and



Royce B. Lee

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Hon. Charles L. Roos, Challis

Hon. Benjamin R. Simpson,

(Coeur d'Alene)

judge. It is the facts and the law of the case that will be the enemy or the friend for your client. Honesty with others is not just the best policy; it is the only policy for a professional."

### *Inspirations*

"Since the first day of law school I have been impressed with the ability and opportunity the law has to protect individuals and improve our world. I try to do that one client at a time. My inspiration has come from watching other professional attorneys pour their heart and soul into serving clients, serving the legal system, and serving as leaders and volunteers in their communities."

### *Lessons and tips*

"I have learned to keep learning about law and about life every day. Have a positive attitude about law practice and decide to enjoy each day that you have the opportunity to be a lawyer. Remember to reach out to the new generation of lawyers to give them the inspiration they will need. Focus on serving your clients' needs, not whether the client can, or is, paying your bill. Good service will always provide a proper income in the long run, better than good bill collecting."

2015 Pro Bono Award Recipients will be highlighted in the November/December issue of *The Advocate*.

# Are Cognitive Biases Impeding Your Legal Advice Under Rule 2.1?

Brian P. Kane

**A**s attorneys, we exercise independent judgement and deliver advice that our clients may not receive elsewhere. Ideally, we serve our clients best by providing a sharp dose of reality to wild-eyed ideas. But often, clients resist candid assessments of their legal positions and options. The cause may lie in one of several well-known cognitive biases.

A cognitive bias<sup>1</sup> is an individual's perception of reality from a subjective point of view often shaped by the individual's personal knowledge and experiences. For example, if you have ever thought, "I always pick the slowest line at the checkout counter," then you are showing a cognitive bias called negativity bias.<sup>2</sup> As humans, we have a tendency to remember negative events more often than positive events. Thus, we rarely, if ever, recall when we are the first in line, or when the line moves quickly to our benefit. In reality, we are not horrible line selectors; we only remember our negative line experiences.

With this example, you can see how prone we are to the tricks our mind can play. This represents a two-fold challenge for attorneys. First, we must recognize these biases as we evaluate legal issues. Second, we must recognize these biases in our clients and assist those clients in overcoming them as they evaluate their legal positions and options. This article will introduce a few biases as well as strategies for helping yourself and your clients in addressing them.

## Rule 2.1

Idaho Rule of Professional Conduct 2.1 directs:

First, we must recognize these biases as we evaluate legal issues. Second, we must recognize these biases in our clients and assist those clients in overcoming them as they evaluate their legal positions and options.

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation.

Importantly, a lawyer has two duties under 2.1:

1. Exercise independent judgment; and
2. Render candid advice.

Those two elements may be the most difficult. Clients don't like to spend a lot of money just to hear the word "no." And those attorneys working for an organization may have expectations thrust upon their "independent judgment" and "candid assessment." Add to this challenge the fact that we are all preconditioned for certain ways of thinking, making independence much more difficult. Fortunately, these pre-conditions or cognitive biases are recognizable, and can be addressed.

## Anchoring blocks new information

Attorneys often rely on the first piece of information received to

color our interpretation of events and the law. Relying too heavily on this initial information is known as anchoring because the initial information forms the anchor from which subsequent judgments are made.<sup>3</sup> Writers use our tendency towards anchoring to great effect. An excellent example is Harry Potter's initial conclusion that Snape was in league with Voldemort. Harry maintained this point of view in spite of numerous characters including Dumbledore telling him that he was wrong. It was not until Harry saw Snape's memories that he realized his error. Ms. Rowling, the author of the series, undoubtedly knew our tendency towards anchoring bias

### Presented at NAAG Meeting

The subject matter of this article reflects a recent presentation by the author at the National Association of Attorneys General Summer Meeting on June 17, 2015. That presentation can be viewed here: <http://www.naag.org/meetings-trainings/video-and-other-av-archive/2015-naag-summer-meeting.php>

and capitalized on that for nearly seven volumes.

The legal system leans heavily toward anchoring. Consider the first pleading or briefing's advantage in framing issues for a court. However, as attorneys trained to think critically, and as judges trained to weigh and evaluate conflicting evidence, the legal profession is expected to overcome anchoring bias. Asking questions such as "why is this fact so important?" or "what happens when I remove this fact?" or "how this conclusion can be attacked?" will assist you and your client in overcoming anchoring bias.

### 'That's what I thought'

Anyone who practices in a government or organizational setting regularly sees confirmation bias. This bias reveals itself within our social circles as well. We do not want a night out to turn into a confrontation among friends. As attorneys, it is important to recognize the strong likelihood that this bias is present in virtually every organizational client (and even within your own workplace). If you have ever used the phrase "we want to find a good fit" when making a hiring decision, that is a latent nod towards confirmation bias.

Confirmation bias can be particularly challenging for attorneys. Oftentimes, we are brought in near the end of the decision making process and asked to opine on the legality of a course of action. At other times a decision has already been made and the attorney is asked to defend or authorize the decision as legally viable. Unfortunately, he or she may be the first person to challenge the wisdom of the decision. In other words, the attorney is the thundercloud in a room of sunshine and rainbows.

The organization may interpret the attorney's advice as an obstacle or accuse the attorney of not being a team player. Even worse, an organization in this situation may make a bad decision worse by cutting the attorney out of the discussion to avoid hearing bad news.

This bias can be overcome. First, an attorney should validate the goals of the client. Acknowledge that you understand those goals. Explain the value of your advice. For example: "I understand that you want to accomplish this, but the current path

Unfortunately, he or she may be the first person to challenge the wisdom of the decision. In other words, the attorney is the thundercloud in a room of sunshine and rainbows.



looks like it will lead to litigation and delay. Perhaps I can help you find another way to reach the same endpoint." Such a statement accomplishes three things:

1. It shows that you understand the issues;
2. It makes clear you are not disapproving of the goal or accusing the client of poor conduct; and
3. It connects you to the client and their ultimate goal.

Another approach is to ask the client questions to help the client reach their own conclusion. For example,

if you think a course of action will lead to litigation or significantly delay the project, ask questions about other interested parties and the likelihood of a challenge; ask about the timeline; whether there is a strategy for delay; or ask about the impact of a delay on the organization. In this way, the client reaches the conclusion then looks to the attorney for advice.

### Too much, or too little, information

If you've ever said or heard, "Don't let perfection become the enemy of progress," you are likely dealing with information bias.<sup>4</sup> But, how can too little or too much information be a bias? Additional information may be irrelevant or unnecessary. Attorneys are prone to informational bias because we are trained to identify worst case scenarios. But this may disrupt our ability to provide candid advice because we may overlook or over-emphasize the likelihood of a worst case scenario.

Typically, we see information bias when a leader or organization is confronted with a difficult or controversial decision. Nobody wants to make a decision because some information is missing. We can recognize this happening by understanding the information that has been presented along with the risk assessments. We should fill the information gap, thus enabling a decision.

One of the most direct ways to avoid the pitfalls of information bias is to inform the decision maker that he or she (or a group) has all of the necessary information. Potential outcomes can be quantified for the decision maker to more fully understand that more information does not equal a better decision. The likelihoods are already known. But in

the provision of counsel, an attorney may want to privately ask the client if there are other reasons why he or she is reluctant to make a decision. To overcome this bias, allow the client to identify his or her own questions during the process and then tailor your advice accordingly.

### Recipe for addressing biases

Most situations where bias is present can be overcome. You may find the following steps helpful:

1. Validate the issue that must be resolved: “I understand the problem is \_\_\_\_\_.”
2. Recognize there are alternative solutions: “Although this solution poses some legal problems, what if we came at this from this direction?”
3. Sometimes humor can defuse a tense situation: “I know that legal always messes up the really good ideas, but I am trying to put you into the most legally defensible posture.”
4. Understand which battles are worth fighting — not every legal hill has to be taken and an 80% solution might be just what the client needs.
5. Remember, good attorneys identify problems — great attorneys solve them. Be a problem solver not a problem causer for your client.

### Across the board

Cognitive biases interfere with our ability to think and can lead us to incorrect conclusions. In many ways, they reveal that no matter how confident we are in our abilities, our minds play tricks on us. Recognizing these biases can help you to critically think through dilemmas and address prevalent biases.

Cognitive biases surface everywhere in our daily lives. From the grocery store line, workplace, and

If you fall into the cognitive bias trap, it may prevent you from being able to render a candid assessment.



social situations, these biases alter our thinking. And these are not the only biases we encounter — if you have ever heard the phrase “that’s the way we’ve always done it,” then you are encountering status quo bias. If you dismiss information based on the source, then you have reactive devaluation bias. If you ever utter the words, “well, we really had no choice,” welcome to post-decision rationalization.

As you can see, each of these is a thinking trap for attorneys and clients alike. If you fall into the cognitive bias trap, it may prevent you from being able to render a candid assessment. But if you can recognize these biases, and address them through your legal advice, you will be known for providing accurate, objective and effective legal advice — so that even if the news you deliv-

er is bad, it will be correct. One final note of caution: people generally do not like to have these biases pointed out to them when they surface. So be sure to simply observe and note them for later. Then, when the time is right, use your skill to overcome them.

### Endnotes

1. For purposes of this article, Wikipedia provides workable definitions of Cognitive Bias. See [https://en.wikipedia.org/wiki/Cognitive\\_bias](https://en.wikipedia.org/wiki/Cognitive_bias) (Last accessed August 31, 2015).
2. [https://en.wikipedia.org/wiki/Negativity\\_bias](https://en.wikipedia.org/wiki/Negativity_bias) (Last accessed August 31, 2015).
3. <https://en.wikipedia.org/wiki/Anchoring> (Last accessed on August 31, 2015).
4. [https://en.wikipedia.org/wiki/Information\\_bias\\_\(psychology\)](https://en.wikipedia.org/wiki/Information_bias_(psychology)) (Last accessed on August 31, 2015).

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# The 1031 Exchange in Forward or Reverse: Critical Components and Common Pitfalls

Anna E. Eberlin

**A** 1031 Exchange is the short-hand nickname used to refer to a tax-deferred, like-kind exchange pursuant to Section 1031 of the Internal Revenue Code and Section 1.1031 of the Department of the Treasury Regulations. A typical forward 1031 Exchange allows you to sell investment property (the “relinquished property”) and purchase more productive or profitable investment property (the “like-kind replacement property”) while deferring federal (and in Idaho and most other states) capital gain and depreciation recapture tax liabilities. There are times, however, where it may be advantageous to engage in a Reverse 1031 Exchange: acquire the replacement property first and then sell the relinquished property. Both types of 1031 Exchanges will be discussed in greater detail below.

## The 1031 exchange

The following is a short synopsis of the basic rules and requirements of a 1031 Exchange.

## Qualified intermediary

The first step in a 1031 Exchange is to identify a qualified intermediary, also called a 1031 accommodator or facilitator. The qualified intermediary provides the 1031 Exchange agreements to properly structure the 1031 Exchange transaction, which incorporates both the first sale and the subsequent purchase, all wrapped up into one transaction. The purchase and sale agreement is assigned to the qualified intermediary, and the escrow instructions and any other transactional documents

The relinquished property and the replacement property must be like-kind to qualify for tax-deferred treatment

must also incorporate the qualified intermediary. This is true for both the sale of the relinquished property and the purchase of each like-kind replacement property. The qualified intermediary holds the 1031 Exchange funds during the process — and in fact, this is a vital requirement, as the taxpayer is not allowed to have any actual or constructive receipt of the funds. If the taxpayer receives the funds, he or she will not qualify for recognition under Section 1031.

## Qualified use property

The relinquished property must be held for rental, investment or use in a business. The requisite intent must be to hold the like-kind replacement property for rental, investment or use in business. Non-qualifying property on either the relinquished or replacement side will cause the entire exchange to not qualify for the tax deferral. For example, buying a fixer-upper with the intent to repair and remodel the property and then sell it — essentially flipping the property — is considered by the IRS to be property held for sale (like inventory) and not for investment. Flipping properties will not qualify for any tax deferral and will instead be taxed as ordinary income.

## Like-kind property

The relinquished property and the replacement property must be like-kind to qualify for tax-deferred treatment. “Like-kind” does not mean an apartment complex for an apartment complex; rather, it refers to real property held for investment. An apartment complex may be exchanged for industrial property, for example, or vacant land held for investment may be exchanged for a single family residence used as a rental property. Per Section 1.1031 of the Department of Treasury Regulations, non-like-kind property includes things like stock, bonds, notes, or securities.

## Same tax-paying entity

The like-kind replacement property must be acquired by the same tax-paying entity that sold the relinquished property. The IRS, however, has recognized that a taxpayer may form a single-member limited liability company to acquire the replacement property so long as the sole member of the LLC is the taxpayer.

## Less than 100% ownership

Multiple properties may be exchanged for one property, or one property may be exchanged for a

fractional interest in the replacement property. In other words, 100% of the property does not have to be sold or acquired on either end of the 1031 Exchange, as long as the value requirements are met (see *Tax Ramifications*, below).

### Identification requirements

To qualify for a 1031 Exchange, one of the following three rules must be met:

1. **The Three Property Rule.** The most common rule allows a taxpayer to identify up to three potential like-kind properties so that there is flexibility in the replacement property — in case the taxpayer's first choice falls through. There is no market value limitation under this rule, which is the easiest framework to work within.
2. **The 200% of Fair Market Value Rule.** This rule allows a taxpayer to identify as many properties as he or she likes, so long as the aggregate value does not exceed 200% of the sales price of the relinquished property.
3. **The 95% Exception Rule.** If the identified properties exceed the three property rule and the 200% rule, the identification will still be considered valid for 1031 Exchange treatment if the acquisition is at least 95% of the fair market value of the replacement properties that were identified.

### Time restrictions

A 1031 Exchange involves very strict time restrictions that cannot be extended or waived. The like-kind replacement properties must be identified within 45 calendar days from the date of sale of the relinquished property. Properties may be revoked and re-identified as many times as necessary during that 45 day period. The acquisition of the like-kind property or properties must be completed on the earlier of (1) 180 calendar days from the close of the

relinquished property or (2) the due date (including extensions) of the federal income tax return for the year in which the relinquished property was sold.

### Reverse 1031 exchange

In a Reverse 1031 Exchange, the replacement property is purchased before the relinquished property is sold. The replacement property is acquired in the name of the “exchange accommodation titleholder” on the taxpayer's behalf. An exchange accommodation titleholder is a single-member limited liability company formed by a qualified intermediary for use in a single specific reverse exchange.

Certain requirements must be met in order to defer 100% of the capital gain and depreciation recapture tax liabilities that would otherwise be an obligation upon a sale of investment property.

### Safe harbor in a reverse 1031 exchange

The IRS has published requirements that provide for a “safe harbor” in a Reverse 1031 Exchange. A safe harbor is satisfied if there is an “accommodation arrangement” where the following requirements are met:

1. Title to both the replacement property and the relinquished property are held by a qualified accommodator.

2. The taxpayer has a bona fide intent that the property held by the qualified accommodator is property that is intended to qualify for tax deferral.

3. No later than five days after the qualified accommodator takes title to the replacement property, the accommodator and the taxpayer enter into a written agreement providing that the accommodator is holding title to the replacement property for the benefit of the taxpayer in furtherance of a Reverse 1031 Exchange.

4. No later than 45 days after title to the replacement property is transferred to the qualified accommodator, the taxpayer identifies the property to be relinquished.

5. No later than 180 days after title to the replacement property is transferred to the accommodator, the title is transferred to the taxpayer.

6. The relinquished property must actually be transferred to the taxpayer's buyer.

### Reasons to use a reverse 1031 exchange

(1) The taxpayer has not yet found a purchaser for the property that will be relinquished; (2) the replacement property transaction must close by a certain date to obtain favorable financing or avoid forfeiting a deposit or the like; or (3) improvements need to be made on the replacement property.

### Tax ramifications for either type of exchange

Certain requirements must be met in order to defer 100% of the capital gain and depreciation recapture tax liabilities that would otherwise be an obligation upon a sale of investment property.

First, the person must acquire like-kind replacement property that is equal to or greater in value than the relinquished property. Keep in

mind that the value is based on the net sales price, not on the equity in a property. Second, the taxpayer must reinvest all of the net proceeds from the sale of the relinquished property. Third, the taxpayer must replace the amount of old debt that was paid off on the relinquished property with new debt of an equal amount on the like-kind replacement property.

Of course, there are ways to still pull cash out of an investment property without incurring tax liability. Refinancing the debt is one way, although this should be done well ahead of the exchange. Also, the taxpayer may use the 1031 Exchange to defer only a portion of expected tax liability, receiving a portion of the sale proceeds as a “gain” that would be offset by other losses.

If the transaction results in a trade down in value, the 1031 Exchange

will result in only partial deferral of tax liabilities. The amount that is not exchanged for qualified replacement property is called “cash boot” or “mortgage boot” and will generate recognition of capital gains or depreciation recapture tax liabilities.

### Conclusion

Because a 1031 Exchange can be

complex, it is important that a taxpayer consult with an attorney or a qualified intermediary or exchange accommodator when first contemplating an exchange to ensure that the 1031 Exchange or Reverse 1031 Exchange transaction results in the tax deferral you are seeking. Competent tax and financial advisors are equally important.

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# Corporate Sponsored Private Foundations – Do’s and Don’ts

John McGown, Jr.  
Dustin Liddle

**P**ivate foundations are charitable organizations formed and sponsored by individuals or business entities to achieve charitable endeavors. The focus of this article is on the risks and restrictions that apply to private foundations formed and sponsored by for-profit corporations.

Like many wealthy families, successful corporations may create a private foundation to (i) give back to the public, (ii) generate goodwill, and (iii) take advantage of income tax deductions. Private foundations are tax exempt under Internal Revenue Code Section 501(c)(3), but unlike public charities, private foundations generally rely on a limited number of donors for funding. Moreover, these donors often retain some control as to how their donations are used. For example, a sponsoring corporation may retain such control by ensuring overlap between the officers and board of directors of the private foundation and those of the corporate sponsor (i.e., ensuring that key offices and director seats of the private foundation are filled with officers and directors of the sponsoring corporation). Such corporate sponsors may be tempted to use this control to get the most and best publicity from their sponsorships, but these goals must be approached with an understanding and appreciation of the many restrictions and requirements that must be obeyed or satisfied.

Because both public charities and private foundations are income tax exempt under Internal Revenue Code § 501(c)(3), people are often

unaware of the significant difference between them. The distinction between public charities and private foundations is a matter of federal tax law.

Public charities, unlike private foundations, are heavily supported by the public. For this reason, public charities are subject to more public scrutiny, which can help ensure adherence to appropriate standards of conduct in the absence of the more strict rules and regulations governing private foundations.

Private foundations are subject to stricter and more extensive federal rules than public charities, including strict prohibitions on self-dealing, and limits on the amount of stock they can hold in any one company. Examples of the various regulated private foundation activities include:

- financial transactions between the foundation and its largest contributors, officers and other insiders,
- amounts paid out toward operating costs, grants, and charitable programs,
- reasonableness of the types and amounts of expenses incurred to operate the foundation,
- compensation of foundation staff and board members,
- business holdings of the foundation,

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Private foundations are subject to stricter and more extensive federal rules than public charities, including strict prohibitions on self-dealing, and limits on the amount of stock they can hold in any one company.

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- engaging in overly risky investments with charitable assets, and
- grants or other payments to individuals, other private foundations, certain kinds of charities, and organizations that are not charities.

Further, private foundations are required to pay a 2% federal income tax (1% in certain situations) on net investment income. This is reported annually on Form 990-PF, a copy of which should be provided to the Idaho attorney general. In addition, the federal income tax deduction for donations to private foundations is more restrictive than for donations to public charities, as illustrated by the following chart:

	Private Foundation	Public Charity
Total limit for all annual contributions combined	30% AGI (adjusted gross income)	50% AGI
Tax deduction for contributions of long-term appreciated securities	Fair market value up to 20% AGI	Fair market value up to 30% AGI
Tax deductions for long-term appreciated assets and closely-held securities	Cost basis up to 20% AGI	Fair market value up to 30% AGI
Tax deduction for cash contribution	Up to 30% AGI	Up to 50% AGI

The rules regarding the deductibility of contributions to private foundations by corporations are different and can be summarized as follows:

1. Any cash plus the fair market value of property given to a recognized charity by a corporation is generally deductible. Such deductions are subject to a 10% of taxable income limitation, as explained below.
2. In addition, a corporation that accrues a contribution authorized by the Board of Directors at the end of the year may deduct the contribution if it is paid by the due date of the return 2 ½ months later.
3. Any amount not deducted in the current year may be carried forward a maximum of 5 years. In the carryover year, the deduction is once again subject to the 10% limitation (along with any current-year contributions).
4. Carryovers are utilized only after deducting any current-year contributions. If carryovers from several years are present, the oldest carryovers are used first.  
For example, Able Corporation has charitable contribution carryovers of \$12,000 from 2007 and \$8,000 from 2008. During 2009, Able has taxable income of \$400,000 before considering charitable contributions of \$26,000. In determining its taxable income for 2009, Able will first deduct the \$26,000 current-year contributions, then the \$12,000 carryover from 2007, and then \$2,000 from 2008 (to total \$40,000, the 10% of taxable income limit, as explained below). Thus, the contributions carryover to 2010 will be \$6,000, all from the year 2008).
5. A charitable carryover may not be deducted if it increases a net operating loss carried over from a prior year.

There are a few different kinds of private foundations: independent, family, and corporate. These categories are not legally defined. Rather, they are commonly used in the field of philanthropy to distinguish the different kinds of private foundations. Private foundations must pay out at least 5 percent of their assets each year in the form of grants and operating charitable activities. A private operating foundation is a kind of private foundation, and must operate under similar rules. However, it does not have to pay out 5 percent

Under the Internal Revenue Code, a charity is presumed to be a private foundation unless it can prove that it is a public charity.

or more of its assets each year in grants. Instead, it must carry out its own charitable purposes. All private foundations are 501(c)(3) organizations. Under the Internal Revenue Code, a charity is presumed to be a private foundation unless it can prove that it is a public charity.

Private foundations may and often do generate goodwill for the corporations that sponsor them as the general public usually has little trouble identifying such private foundations with their corporate sponsors. However, private foundations must

maintain separate identities and cannot operate for a substantial non-charitable purpose. This means, among other things, that: (i) all gifts coming from a private foundation should be clearly identified as such; (ii) corporate sponsors cannot take (or appear to take) credit for gifts made by a private foundation; (iii) a private foundation should maintain its own website and e-mail addresses; (iv) any decisions regarding use of a private foundation's resources should be made at the private foundation level; (v) a private foundation must not advertise or promote the goods or services of its corporate sponsor; and (vi) a private foundation must not otherwise operate with a substantial non-charitable purpose. While private foundations occasionally fail to adhere to these practices, repeated or substantial deviation could result in significant penalties and the loss of tax exempt status.

Additionally, private foundations are prohibited from engaging in self-dealing, which basically includes any transaction between a private foundation and a disqualified person. Disqualified persons include, among others, corporate sponsors, affiliates of such sponsors, and shareholders owning 35% or more of the stock of such sponsors. Self-dealing includes the following activities: (i) sale or exchange of property between a private foundation and a disqualified person; (ii) lending of money or any other extension of credit between a private foundation and a disqualified person; (iii) furnishing of goods or services between a private foundation and a disqualified person; (iv) payment of compensation by a private foundation to a disqualified person; (v) the transfer to or use by a disqualified person of a private found-

dation's income or assets; and (vi) the satisfaction of the debt or other obligation of a disqualified person by a private foundation.

Exceptions to self-dealing include: (i) a private foundation furnishing goods or services to a disqualified person at a price and on terms that are no more favor than what is available to the general public; (ii) a private foundation's payment of reasonable compensation to a disqualified person for services in furtherance of the private foundation's exempt purpose; (iii) the furnishing of goods or services by a disqualified person to the private foundations at no cost; and (iv) where the benefits derived from a disqualified person are merely incidental and tenuous. Treasury regulations set forth examples of benefits deemed to be incidental and tenuous. For example, a corporate sponsor may condition a gift to a private foundation for a specific project on the project being named after the corporate sponsor. Additionally, a private foundation may make contributions to a public charity or government program that serves to improve the communities in which a corporate sponsor is located. As an example of the breadth of the self-dealing rules, the sale of an asset by a disqualified person to a private foundation, even for a bargain price, is self-dealing.

One particular scenario where self-dealing occurs is where a corporate sponsor makes a charitable pledge that is ultimately satisfied by a private foundation. This occurs when a corporate sponsor enters into a pledge agreement with a charitable organization, but then actually satisfies such pledge through a private foundation sponsored by the corporation. Under these circumstances, the private foundation is deemed to

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Once a corporate sponsor has made a pledge, the corporate sponsor must satisfy such pledge directly or risk committing an act of self-dealing.

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be satisfying the obligation of a disqualified person (i.e., the corporate sponsor). This is so even if the corporate sponsor contributes money to the private foundation specifically to satisfy such pledge. Accordingly, it is imperative that pledges that are intended to be satisfied by a private foundation be in the name of that private foundation. Once a corporate sponsor has made a pledge, the corporate sponsor must satisfy such pledge directly or risk committing an act of self-dealing.

Self-dealing can result in severe penalties. Specifically, any disqualified person benefiting from the self-dealing faces a penalty of 10% of the amount involved (i.e., the benefit received), while those managers of a private foundation who knowingly participated in the self-dealing face a penalty of 5% of the amount involved. To correct the self-dealing, the disqualified person must repay the private foundation for any improper benefit received (plus interest if applicable). If the self-dealing goes uncorrected for a period of 90 days or more after the receipt of a notice of deficiency from the IRS regarding the amount involved, the penalty skyrockets to 200% and 50% for the disqualified person(s) and participating manager(s), respectively.

By way of example, assume a corporate sponsor makes a \$1 mil-

lion pledge to a charitable entity. Further assume the manager or executive director of a private foundation sponsored by the corporation approves payment of this pledge by the private foundation. As discussed above, these facts suggest self-dealing between the private foundation and the corporate sponsor. Under these facts, the corporate sponsor may face an initial penalty of \$100,000 and the manager or executive director who authorized the payment may be personally liable for a penalty of \$50,000. Moreover, if the corporate sponsor fails to repay the private foundation the \$1 million within 90 days after the receipt of notice from the IRS, such corporate sponsor could face a penalty of \$2 million while the manager or executive director could face a penalty of \$500,000.

Note that self-dealing may also constitute private inurement, which can result in the loss of a private foundation's tax exempt status.

In sum, private foundations can be a source of goodwill and income tax deductions for corporate sponsors, but such sponsors must understand and appreciate the applicable restrictions and requirements. As outlined above, failure to do so can result in potentially disastrous consequences for all parties involved.

## Endnotes

1. The term "tax exempt" is a misnomer. There is a 2 percent (reducible in certain cases to 1 percent) excise tax on net investment income. See Internal Revenue Code § 4940.
2. Treas. Reg. 1.501(c)(3)-1(c)(1).
3. For a case study involving these rules, please see Steven J. Willis, *People in Glass House*, Tax Notes, Vol. 113, No. 5, October 30, 2006.
4. Internal Revenue Code § 4941.
5. Internal Revenue Code § 4946(a).
6. Internal Revenue Code § 4941(d)(1).
7. Internal Revenue Code § 4941(d)(2)
8. Treas. Reg. § 53.4941(d)-2(f)(9), at Example 1.
9. *Id.* at example 2.
10. Internal Revenue Code § 4941(d)(1)(A).
11. Treas. Reg. § 53.4941(d)-2(f)(1).
12. See P.L.R. 9703020 (Jan. 17, 1997).
13. Internal Revenue Code § 4941(a).
14. Internal Revenue Code § 4941(e)(3).
15. Internal Revenue Code §§ 4941(b)&(e)(1).

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# Protecting Inherited IRA's after the *Clark v. Rameker* Decision

Michael W. McGraham

In a landmark decision handed down on June 12, 2014, Justice Sonia Sotomayor delivered the opinion of a unanimous Supreme Court in the case of *Clark v. Rameker* to answer the question of whether assets held under an inherited IRA, by a non-spouse beneficiary (and likely other types of qualified retirement plans, such as 401(k)'s would qualify as "retirement funds" under the applicable bankruptcy exemption. The Supreme Court held that inherited IRA's are not "retirement funds" within the meaning of the bankruptcy law. This means that they are therefore available to satisfy creditor's claims. (See *Clark, et us v. Rameker*, 573 U.S. 2014).

The case of *Clark V. Rameker* involved a Wisconsin couple (Heidi Hefforn-Clark and her husband Brandon Clark) who declared bankruptcy in 2010, and in their bankruptcy filing claimed that the remaining balance of an inherited IRA (approximately \$300,000 of the original \$450,000 IRA, which Heidi inherited from her mother Ruth in 2001) should be protected under 11 USC 522(b)(3)(C) of the Bankruptcy code, which protects retirement accounts of various types (as of changes implemented under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005).

The bankruptcy court ruled in favor of the creditors, stating that the inherited IRA's are not "retirement funds, because the funds are not set aside for retirement needs, nor are they distributed upon retirement." The decision was then appealed to a federal district court. The district court reversed the decision of the bankruptcy court, holding that inherited IRA's do qualify as retirement funds and are exempt from the bankruptcy estate. The decision

Ultimately the Supreme Court agreed with the Appeals Court, and in its unanimous decision declared that an inherited IRA will not be treated as "retirement funds" for the purposes of bankruptcy protection, and thus the assets will be available to creditors.

was appealed again to the Seventh Circuit, which agreed with the bankruptcy court that inherited IRA's do not qualify for the Section 522(b)(3)(C) exemption. This ruling was in conflict with *In re Chilton*, 674 F.3d 486 (5th Cir. 2012) which held that inherited IRA's were exempt because "the defining characteristic of 'retirement funds' is the purpose they are 'set apart' for, not what happens after they are 'set apart'."

The Supreme Court agreed to hear the case in order to resolve the split in the circuit courts. Throughout the case, the core issue remained whether an inherited IRA retains its character as a "retirement account" for the purposes of bankruptcy protection. The original bankruptcy court ruling held that the account was no longer a true "retirement" account after the death of the original IRA owner, (who, by definition, no longer needed retirement funds). The District Court that overturned the decision held that since the account was originally accumulated for retirement purposes and the funds were still in the account, that they should still be treated as retirement funds for bankruptcy purposes as well. The Appeals Court insisted that since the inherited IRA can be consumed immediately, and does not need to be held for future use

as a retirement fund, as there is no early withdrawal penalty for inherited IRA's as there is for the original owner of the IRA, it is no longer a retirement account. In other words, if the owner of the inherited IRA is allowed to consume the account freely, it should be available to that person's creditors as well.

Ultimately the Supreme Court agreed with the Appeals Court, and in its unanimous decision declared that an inherited IRA will not be treated as "retirement funds" for the purposes of bankruptcy protection, and thus the assets will be available to creditors. In writing for the court, Justice Sotomayor noted three key distinguishing factors for why inherited IRA's should not receive protection as retirement accounts:

- 1) the beneficiary of an inherited IRA cannot make additional contributions to the account, which an IRA owner can;
- 2) the beneficiary of an inherited IRA must take required minimum distributions from the account regardless of how far away the beneficiary is from actually retiring, while an IRA owner can defer distributions at least until age 70 1/2;
- 3) the beneficiary of an inherited IRA can withdraw all of the funds at any time and for any purpose with-

out penalty, while an IRA owner must generally wait until age 59 ½ to take penalty-free distributions.

These factors characterize an inherited IRA as money that was set aside for the original owner's retirement and not for the designated beneficiary's retirement. This simple analysis has sent shock waves through the estate planning and financial advisory worlds, because its logic can also be applied to all inherited defined contribution retirement plans, so inherited 401(K) and 403(b) accounts may also be affected.

*What can be done to protect inherited IRA's from creditors?*

The biggest implication of the inherited IRA ruling is that, for those who are concerned about asset protection, more careful thought should be given to how retirement assets are bequeathed in the first place. To some extent, this may make inherited employer retirement plans more appealing, as the inheritor may still be able to claim ERISA protection for the inherited 401(k)/profit-sharing plan.

However, it remains to be seen whether ERISA protection for retirement accounts might someday also be challenged (on the same grounds that an inherited account should no longer benefit from protection for retirement accounts). From a practical perspective many inherited employer retirement plans do not allow beneficiaries to stretch out the benefit in the first place and instead force funds out under the 5-year rule (which means even if inherited employer retirement plans are protected, they won't stay that way for long). While all inherited employer retirement plans are required to allow a trustee-to-trustee transfer to an inherited IRA to permit a stretch out for a designated beneficiary, doing so for stretch purposes will then revert the account to inherited IRA status and lose the asset protection.

*Can you rely on state exemptions to protect an Inherited IRA?* A handful of states including Alaska, Arizona, Florida, Idaho, Missouri, North Carolina, Ohio and Texas have passed laws or have favorable court decisions that specifically protect inherited IRA's under state bankruptcy exemptions for federal bankruptcy proposes. If the IRA beneficiary is fortunate enough to live in one of these states, then the beneficiary may well be able to protect their inherited IRA.

The trust can receive the IRA of the decedent and the required minimum distributions can be "accumulated" by the trustee for distribution to the beneficiary only if and when the trustee deems it to be appropriate.



*What about Idaho?* To determine what types of assets are excluded, either the Federal Bankruptcy Code or state law applies. In Idaho, state law determines what can be excluded (Idaho Code 11-609). Idaho law also provides that inherited IRA's are exempt from all creditor claims arising from claims of judgment creditors of the beneficiary arising out of a negligent or otherwise wrongful act of omission of the beneficiary resulting in monetary damages to the judgment creditor (Idaho Code 55-1011). Does that mean that you can simply disregard the Clark decision?

Caution should be used in relying on the state exemptions to protect a

beneficiary's inherited IRA. Can you be sure that your client's beneficiaries all reside in Idaho? People are more mobile than ever and move from state to state to find work, pursue education or be closer to family. Aside from this, federal bankruptcy laws now require a debtor to reside in a state for at least 730 days prior to filing a petition for bankruptcy in order to take advantage of the state's bankruptcy exemptions. Prudent long term planning should not simply rely on a specific state's laws but instead should take a broad approach.

The best option for protecting an inherited IRA is to create a Stand-alone IRA Retirement Trust for the benefit of all the intended IRA beneficiaries. These trusts can provide for beneficiaries without being subject to the beneficiaries creditors' claims, and stretch out the required minimum distributions from the IRA over the life expectancy of the oldest beneficiary of the trust.

The Treasury Regulations and a number of Private Letter Rulings have approved the use of discretionary or ascertainable standard trusts as beneficiaries of the IRA's in order to avoid the 5-year minimum distribution rule. A trust can therefore be structured so that the beneficiaries can only receive distributions as determined by an independent trustee, and can have a spendthrift provision that would prevent the creditors of a beneficiary from reaching the assets of the trust. The trust can receive the IRA of the decedent and the required minimum distributions can be "accumulated" by the trustee for distribution to the beneficiary only if and when the trustee deems it to be appropriate. The life expectancy of the oldest beneficiary of the trust will be used to determine the amount of the required minimum distributions that must be made each year so that, for federal income

tax purposes, it is treated similar to the oldest beneficiary having been directly named as the retirement account or IRA beneficiary.

Naming an Accumulation Trust with a spendthrift provision as the beneficiary of an IRA will enable the protection of the beneficiaries and their descendants from potential divorce claims, poor self-management, and/or spendthrift tendencies. Further, using an Accumulation Trust as a receptacle to receive an IRA on the death of the participant/owner can provide creditor protection for those beneficiaries who live outside states that have exemptions for inherited IRA's. Do not make the mistake of assuming that all beneficiaries will be protected if the law of the state where the IRA participant/owner resides provides protection. The creditor exemption status of an inherited IRA will be determined by the law of the state where the beneficiary resides, which cannot be definitively known before the death of the retirement account or IRA participant/owner.

Moreover, an IRA that is inherited directly by an individual will be subject to federal estate tax in such individual's estate, which will not be the case if inherited under an Accumulation Trust that is generation-skipping tax exempt. A beneficiary of an inherited IRA typically cannot name his or her own beneficiaries that would inherit such account in the event of the beneficiary's death before the account is exhausted. However, a beneficiary of an Accumulation Trust can have a power of appointment over the assets of the Trust that will, in effect, allow the beneficiary to control the disposition of the retirement account or IRA after his or her death.

What are the downsides of such trusts? There are compressed tax brackets which max out at \$12,300 of income, ongoing accounting and

trustee fees and the complexity of administering the trust year after year. In addition, a well-drafted trust can be derailed by uncoordinated IRA beneficiary designations. However, given this latest Supreme Court ruling the benefits of such a trust would seem to outweigh the detriments.

To summarize, the benefits of a properly drafted IRA Inheritors Trust:

Protects the inherited IRA from each beneficiary's creditors as well as predators and lawsuits;

Insures that the inherited IRA remains in the family bloodlines and out of the hands of a beneficiary's spouse, or soon-to-be ex-spouse;

Allows for experienced investment management and oversight of the IRA assets by a professional trustee;

Prevents the beneficiary from gambling away the IRA or blowing it all on exotic vacations, jewelry, cars, etc.;

Enables proper planning for a special needs beneficiary;

Permits minor beneficiaries, such as grandchildren, to be immediate beneficiaries of the inherited IRA without the need for a court-supervised guardianship;

Facilitates generation-skipping transfer tax planning to insure that estate taxes are minimized or even eliminated in each generation and;

You can in essence set up a retire-

---

A well-drafted trust can be derailed by uncoordinated IRA beneficiary designations. However, given this latest Supreme Court ruling the benefits of such a trust would seem to outweigh the detriments.

---

ment/pension plan for your children and grandchildren.

Notwithstanding the negative results for the debtor, this Supreme Court decision may do more good than harm to the extent it encourages practitioners to communicate with clients about the advantages and disadvantages (both tax and non-tax) applicable to the various methods of structuring beneficiary designations for IRA's.

*Michael W. McGreaham is a partner at Parsons Behle & Latimer. His practice focuses on estate planning, asset protection planning and probate. He obtained his undergraduate degree from Brigham Young University and his law degree from Gonzaga University (in an attempt to cover all his bases). He is licensed in Washington, Idaho and Utah (pending).*



**COURT INFORMATION**

**OFFICIAL NOTICE  
SUPREME COURT OF IDAHO**

Chief Justice  
Jim Jones  
Justices  
Daniel T. Eismann  
Roger S. Burdick  
Warren E. Jones  
Joel D. Horton

**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.

**OFFICIAL NOTICE  
COURT OF APPEALS OF IDAHO**

Chief Judge  
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Judges  
Sergio A. Gutierrez  
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 Argument for October, 2015**

There are no oral arguments scheduled at this time in October for the Idaho Supreme Court.

**Idaho Supreme Court  
Oral Argument for November, 2015**

**Monday, November 2, 2015 – BOISE**

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

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

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

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

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

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

8:50 a.m. *State v. Razo-Chavez* ..... #42398  
10:00 a.m. *State v. McIntosh* ..... #41910

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

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

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

**Tuesday, October 27, 2015 – BOISE**

9:00 a.m. *Hymas v. Meridian Police Department* ..... #42626  
10:30 a.m. *State v. Van Komen* ..... #41916  
1:30 p.m. *State v. Jimenez* ..... #42098

**Idaho Court of Appeals  
Oral Argument 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

**Idaho Supreme Court and Court of Appeals**  
**NEW CASES ON APPEAL PENDING DECISION**  
**(Updated 8/1/15)**

**CIVIL APPEALS**

**Attorney fees and costs**

1. Did the court err by disallowing attorney fees for Ruiz for time her counsel spent on an unsuccessful motion for summary judgment?

*Portfolio Recovery v. Ruiz*  
S.Ct. No. 42982  
Court of Appeals

**Contracts**

1. Did the district court err in holding the credit card accounts were founded upon an instrument in writing and thus subject to a five year statute of limitations?

*Unifund v. Lowe*  
S.Ct. No. 42876  
Supreme Court

**Corporations**

1. Whether the district court's determination that the "fair value" of share of Wannoka Farms is \$3,344.00 is supported by substantial and competent evidence.

*Wagner v. Wanooka Farms, Inc.*  
S.Ct. No. 42707  
Supreme Court

2. Did Nelson breach the stockholder agreement regarding his H&M Distributing, Inc., stock and did defendants Powers and Armstrong aid and abet Nelson in the breach such that they also breached the stockholder agreement?

*Kugler v. Nelson*  
S.Ct. No. 42690  
Supreme Court

**Insurance**

1. Whether the court erred in granting Gearhart's motion for summary judgment, finding that Enumclaw was required to pay the full \$300,000 of UIM benefits under both policies issued separately to Gearhart's parents.

*Gearhart v. Mutual of Enumclaw*  
S.Ct. No. 42859  
Supreme Court

**Post-conviction relief**

1. Whether the court erred in denying Hayes' petition for post-conviction relief after an evidentiary hearing.

*Hayes v. State*  
S.Ct. No. 41952  
Court of Appeals

**Procedure**

1. Did the district court err in denying Pandrea the right to amend her complaint under I.R.C.P. 15(a) and (b) to include all claims and all parties of interest not included in the original complaint?

*Pandrea v. Barrett*  
S.Ct. No. 42333  
Supreme Court

2. Whether the district court abused its discretion by granting Rule 41(b) dismissal based on conclusory facts of prejudice where there were no facts that plaintiffs' conduct caused any actual prejudice.

*Strong v. Intermountain Anesthesia*  
S.Ct. No. 42514  
Supreme Court

**Summary judgment**

1. Did the court err in determining on summary judgment that there was insufficient support for Navos' claim that Sayre was acting as BMH's agent while performing anesthesia services on Ellery Navo under the theory of apparent authority?

*Navo v. Bingham Memorial Hospital*  
S.Ct. No. 42540  
Supreme Court

2. Did the district court err in finding there was no genuine issue of material fact about the existence of an attorney-client relationship between Hughes and Pogue at some point between October 21, 2011, through December 3, 2011, as counsel drafting a partnership agreement for H-D Transport and Hughes and Diges?

*H-D Transport v. Pogue*  
S.Ct. No. 42921  
Supreme Court

3. Whether the district court abused its discretion by refusing to permit reconsideration of its summary judgment ruling on the basis of late-acquired evidence.

*Fagen, Inc. v. Lava Beds Wind Park, LLC*  
S.Ct. No. 42592  
Supreme Court

**Water law cases**

1. Whether there is substantial evidence to support the determination the junior-priority ground water users are using water efficiently and without waste.

*Rangen, Inc. v. Idaho Dept. of Water Resources*  
S.Ct. No. 42772  
Supreme Court

**CRIMINAL APPEALS**

**Due process**

1. Whether the prosecutor committed misconduct by misstating the State's burden of proof and by appealing to the prejudices and passions of the jury.

*State v. Wisdom*  
S.Ct. No. 42134  
Court of Appeals

**Evidence**

1. Did the district court err when it denied Yarber's I.C.R. 29 motion for judgment of acquittal because the evidence presented to the jury was insufficient to convict him of the video voyeurism charges?

*State v. Yarber*  
S.Ct. No. 42418  
Court of Appeals

2. Did the district court abuse its discretion by admitting evidence of Dunn's prior abuse of the victim pursuant to I.R.E. 404(b)?

*State v. Dunn*  
S.Ct. No. 42196  
Court of Appeals

3. Did the court abuse its discretion by excluding Joy's proposed surrebuttal testimony?

*State v. Joy*  
S.Ct. No. 42166  
Court of Appeals

4. Did the court err by excluding as irrelevant expert testimony on the effects of elevated blood sugar levels and GERD on breath alcohol content?

*State v. Fernandez*  
S.Ct. No. 42370  
Court of Appeals

**Instructions**

1. Did the court lower the State's burden of proof by erroneously instructing the jury that, in order for the battery to be justified as self-defense, Jimenez must have acted only in response to the danger presented, and not for any other motivation?

*State v. Jimenez*  
S.Ct. No. 42155  
Court of Appeals

**Lesser included offense**

1. Whether the Court should vacate McIntosh's conviction for possession of a controlled substance with the intent to deliver, as the district court did not have subject matter jurisdiction over that charge.

*State v. McIntosh*  
S.Ct. No. 41910  
Supreme Court

**Idaho Supreme Court and Court of Appeals  
NEW CASES ON APPEAL PENDING DECISION  
(Updated 8/1/15)**

2. Whether the Court should vacate Rodriguez's conviction for possession of a controlled substance with the intent to deliver, as the district court did not have subject matter jurisdiction over that charge.

*State v. Rodriguez*  
S.Ct. No. 42219  
Supreme Court

**Pleas**

1. Did the district court abuse its discretion by denying Cosner's motion to withdraw his plea made prior to sentencing?

*State v. Cosner*  
S.Ct. No. 42771  
Court of Appeals

**Search and seizure –  
suppression of evidence**

1. Did the court err in finding that Bischoff voluntarily consented to a search of his residence?

*State v. Bischoff*  
S.Ct. No. 42574  
Court of Appeals

2. Did the court err in denying Anderson's motion to suppress and in finding the officer had probable cause to search his car under the automobile exception?

*State v. Anderson*  
S.Ct. No. 41730  
Court of Appeals

3. Did the district court err in affirming the magistrate court's denial of Harbison's motion to suppress in which he argued he was unlawfully seized?

*State v. Harbison*  
S.Ct. No. 42689  
Court of Appeals

**Sentence review**

1. Did the court violate Dabney's rights to equal protection and due process when it relinquished jurisdiction, despite finding probation would serve the goals of sentencing, simply because Idaho has no suitable housing for mentally disabled sex offenders?

*State v. Dabney*  
S.Ct. No. 42650  
Supreme Court

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

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ABA Delegates to Examine Courtroom Bias

Deborah A. Ferguson
Idaho Delegate
to ABA House of Delegates

I attended the 2015 Annual Meeting of the American Bar Association House of Delegates on August 3-4, in Chicago, as your Idaho State Bar Delegate.

The ABA House passed the presidential gavel to Paulette Brown, the first African American woman to lead the ABA. President Brown is especially interested in the role of implicit bias in the criminal justice system, a concept that has become part of the national conversation on criminal justice. She has established a Diversity and Inclusion 360 Commission to closely examine equal justice and rule of law issues, including implicit bias – the subtle and sometimes not-so-subtle prejudices we may unconsciously hold.

In a recent interview she stated: "Statistical data demonstrates that too often people of different races and backgrounds who commit the same offense and go before the same judge get disparate sentences. A part of our initiative will address implicit bias, from which none of us are exempt. Implicit bias plays a role everywhere, including in the delivery of justice. We have been in discussions with the U.S. Department of Justice and the National Center for State Courts on how to best build upon some of the very good work that has already been

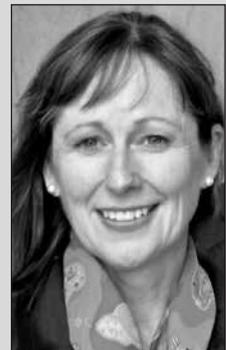
"Statistical data demonstrates that too often people of different races and backgrounds who commit the same offense and go before the same judge get disparate sentences."

done and to develop implicit bias training materials to assist judges, prosecutors and public defenders whose decisions are critical in how justice plays out."

The two-day agenda for the House of Delegates was especially interesting this year because it included a decennial review of the governance of the association. There was intense and passionate debate about proposed changes to the ABA's constitution, and some very close votes were called about the fundamental structure of the organization.

A positive change for the Idaho State Bar as a result of the decennial review is the addition of a Young Lawyer Delegate from Idaho in 2016. In an effort to increase participation of younger lawyers, states such as ours with lower attorney population levels were given new delegate positions. I look forward to working with the new Idaho young lawyer delegate at the 2016 Midyear meeting. It will take place in San Diego on Feb. 3-9, 2016. I will report back to the Bar on the events of that meeting.

Deborah A. Ferguson is a partner at Ferguson Durham, PLLC, which specializes in civil and criminal litigation, as detailed at www.fergusondurham.com. With 29 years of complex civil litigation experience, she had litigated hundreds of federal civil cases. She also has an active mediation practice. Ms. Ferguson was President of the Idaho State Bar in 2011. She can be contacted at (208) 345-5183 or at daf@fergusondurham.com.





## Federal Court Corner

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### Are You Ready? 2015 Amendments to the Federal Rules of Civil Procedure

Hon. Candy Wagahoff Dale

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**T**he process to amend the Federal Rules of Civil Procedure began back in June of 2013, when the Judicial Conference of the United States' Standing Committee on Rules of Practice and Procedure voted to approve for public comment the full slate of proposed amendments to the Federal Rules of Civil Procedure. Over 2,000 public comments were received by February of 2014, most of them objecting to the proposed changes to the rules governing the discovery process, which would have reduced the presumptive limits to interrogatories and depositions, as well as to other changes affecting discovery. The Advisory Committee reconsidered the proposed amendments, and submitted a revised version of the rule changes to the Committee on Rules and Practice in May of 2014.

On September 16, 2014, the proposed rule changes were submitted to the United States Judicial Conference Committee for consideration. The Committee then forwarded the recommended changes to the United States Supreme Court, which considered the proposals, and officially promulgated the revised rules by order on April 29, 2015, to take effect on December 1, 2015, unless Congress enacts legislation to reject, modify, or defer the pending rules. So, barring any action by Congress, the rule changes discussed below will be effective December 1, 2015. The District Court Local Rules

One of the primary goals of the rule amendments is to obtain earlier and more active case management by the presiding judge(s).

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Committee has been monitoring the proposed changes, and will be issuing corresponding updates to the District of Idaho's Local Rules in January of 2016.

#### Cooperation

Rule 1 will be amended to add that the Rules "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."

The Rule now will include a reference to not only the Court, but to the parties, to remind all participants in the litigation that the rules should be construed to achieve the goals of justice, swiftness of legal proceedings, and resolution of disputes in a cost effective manner.

#### Getting the case moving faster

Rule 4(m) period to serve is shortened from 120 to 90 days.

Rule 16(b) period to issue a scheduling/case management order is shortened from 120 to 90 days.

The Local Rules Committee has drafted a new rule and the judges are discussing how best to comply with the compressed time frame for issuance of a scheduling order, while providing the attorneys sufficient time to discuss their litigation plans. The result may be more frequent status conferences with the Court. As discussed below, one of the primary goals of the rule amendments is to obtain earlier and more active case management by the presiding judge(s).

#### Early, active case management

Rule 16(b)(1) language is changed to encourage "live" case management conferences with the court.

Rule 16(b)(3) is amended to:

- i. add preservation and Rule 502 orders to the topics judges should consider addressing in their case management orders; and
- ii. encourage pre-motion conferences for discovery disputes.

Our Court already is on board with these amendments, to the ex-

tent that Local Rule 16.1(b) was amended last year to reference Rule 502 orders and most of our judges require the parties to call chambers before filing a discovery motion. Also, Local Rule 37.1 was amended last year to provide a definition of meet and “confer” for resolving discovery disputes.

### **Litigation planning and communication**

Rule 26(d) is amended to allow parties to deliver Rule 34 requests before the Rule 26(f) discovery planning conference.

i. Conforming changes also made to Rule 34.

Rule 26(f) is amended to add preservation and Rule 502 orders to the topics parties should address at the discovery planning conference.

Rule 34 is amended to require responding parties to:

- i. state objections “with specificity”;
- ii. state specifically when materials will be made available; and
- iii. state clearly if materials are being withheld on the basis of an objection.

Although these rule changes may lead to more litigation of discovery disputes, compliance with the amendments should resolve some of the issues that otherwise all too frequently arise from vague discovery responses and blanket objections.

### **Discovery scope, limits, and protections**

Rule 26(b)(1) is amended in four ways:

i. The “proportionality” factors that were in Rule 26(b)(2)(C)(iii) are altered slightly and moved to Rule 26(b)(1) to become part of the scope of discovery.

ii. The provision allowing the court to order “subject matter” discovery for good cause is deleted.

iii. The language explaining the relationship between admissibility and discoverability is rephrased to address a persistent misinterpretation.

iv. The language explicitly stating that the scope of discovery includes information about the existence and details of sources of relevant information is deleted as unnecessary.

Rule 26(b)(2) is amended to reflect the relocation of the proportionality factors.

Rule 26(c) is amended to explicitly reference cost-sharing (allocation of expenses) as a permissible protection against undue burden or expense.

These amendments to Rule 26 may lead to more discovery motions, at least initially.

### **Sanctions for failure to preserve electronically stored information**

Rule 37(e) is rewritten to place limits on spoliation sanctions:

i. Courts must first find the party breached a duty to preserve, but the rule leaves those questions to the evolving common law.

ii. Courts are instructed to first consider whether the information can be replaced through further discovery.

iii. Courts may order “curative measures” upon a finding of prejudice.

iv. Courts may order adverse inference instruction, dismissal, or default only upon a finding that the party who failed to preserve did so “with the intent to deprive another party of the information’s use in the litigation.”

The amendment to Rule 37(e) appears to make it more difficult to prove entitlement to sanctions for spoliation of ESI.

### **Other changes**

Rule 55 is amended to make clear that the court can revisit entry of a partial default judgment until final judgment is entered (Rule 60 does not apply yet).

Rule 84 and Official Forms are abrogated.

i. Forms 4 and 5 are appended to Rule 4.

ii. A project is underway to expand AO forms.

For more information, you may download the full text of the rule changes submitted on April 29, 2015, by the United States Supreme Court to Congress at <http://www.uscourts.gov/file/document/congress-materials>. The proposed Rule amendments also will be discussed at the Federal Bench/Bar conference in Boise on October 30, 2015.

Hon. Candy Wagahoff Dale is United States Chief Magistrate Judge for the District of Idaho. A native of Boise, Judge Dale obtained a Bachelor of Science degree, with honors and as a Gipson Scholar, from the College of Idaho in 1979, and a Juris Doctorate from the University of Idaho College of Law in 1982, where she served as Editor-in-Chief of the Idaho Law Review.



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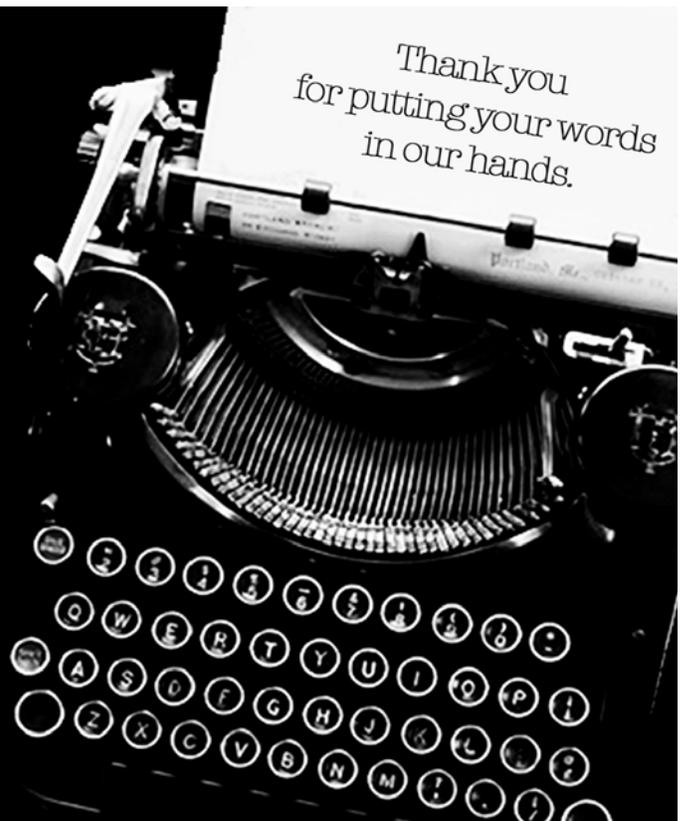


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*The spoken word perishes; the written word remains.*



# Know Your Audience: Writing to Non-Lawyers

Tenielle Fordyce-Ruff

I spend a lot of time in my classroom teaching my students about audience traits and expectations. We learn about how legal readers read and use documents and how we can better prepare our writing to meet the purpose and expectation. This is the norm in the legal academy.

Practically, however, that means many attorneys leave law school with great training for writing to judges and attorneys, but not necessarily great training on writing to clients or non-lawyers.

So this month we will focus on a few tips to help you better craft your writing to meet the non-lawyer's expectations.

## Organization

Legal writing has a specific organizational paradigm (remember IRAC from law school?). But waiting until the end of a letter or email can be immensely frustrating to a reader who isn't used to this type of organization.

Instead, non-law-trained readers want the important information stated clearly at the beginning. Imagine the frustration of receiving a three- or four-page letter that begins with this issue statement when what you really want is to know the answer to your problem.

*Dear Client,*  
*I am writing today in response to your inquiry as to whether an irrevocable trust with a spendthrift clause could be liable to the IRS when the primary beneficiary fails to pay his taxes. Below is my analysis.*

Setting up our writing this way simply frustrates the reader and fails to give them any context to understand how we reached our conclusion. Because non-lawyers expect to

understand the big picture at the start, make sure to include your big picture answer in the first paragraph.

*Dear Client,*  
*You asked me to determine whether an irrevocable trust with a spendthrift clause could be liable to the IRS when the primary beneficiary fails to pay his taxes. My research reveals that the IRS could reach the principle of the trust, so the trust would be liable.*

## Word choice

This tip is harder than it sounds: Try not to sound like a lawyer.

Legal training is, in some ways, learning a new language and using new meanings for familiar words. That's why the cover of my *Black's* was torn by the end of my 1L year. Non-lawyers, however, don't have the benefit of three years of legal language training. It can read like Greek to them.

So, to help them understand, and to help you not sound like a lawyer, avoid legalese, use simple words, and pair down phrases. Below are some helpful charts you can use when editing to get you thinking about your word choice.

So, to help them understand, and to help you not sound like a lawyer, avoid legalese, use simple words, and pair down phrases.

## Omit or minimize citations

Not only was my *Black's* torn by the end of my 1L year, my citation guide was tattered. But remember, non-lawyers don't understand citation. To them, including citations in sentences or after sentences creates visual "bumps" that make it much harder for them to read and understand the information.

So it might not be important for the reader to have an exact citation. When deciding whether to include a citation, ask yourself if it is absolutely necessary for your reader to have the exact citation to the case or tax code provision that answers his question?

Legalese	
Instead of this	Use this
Same (as a pronoun)	It; the
Pursuant to	As we discussed; as we agreed
Common law	Court cases; judicial decisions
Cannon of construction	Rule; method of interpreting statutes
Said (as pronoun)	It; the
Herein	Here; in this letter
Aforementioned	This; that; named earlier
Forthwith	Immediately
Pray	Request
To wit	Namely
Such (as an adjective)	The; this; that
Negative (as a verb)	Negate
Gravamen	Crux; gist; burden

If the reader doesn't need the exact citation, you can be more general or omit citations entirely.

*According to the Blankenship case, only beneficiaries of the trust can sue the trustee for his actions.*

*The IRS has said that it will not consider student loan forgiveness as income.*

While these sentences would need citation when writing to a law-trained reader, a non-lawyer can better grasp their meanings without the citations. And if you determine that citations would be necessary, consider putting them in footnotes so that they don't interrupt the flow of your writing.

### Tone, tone, tone

Using the best tone can be a balancing act. You want to be conversational, but not too informal. You want to be colloquial, but not slangy. Strive to make your writing sound natural. At the heart of this tip is simple advice: Be less formal.

Of course, you still need to sound competent and professional. While the right tone is a matter of personal style, strive to sound a little more like you're talking to your client and a little less like you're writing to a court.

### Conclusion

"A lawyer should keep in mind that the purpose of communication is to communicate, and this can't be done if the reader or listener doesn't understand the words used."<sup>4</sup>

### Endnotes

1. Wayne Schiess, *Writing for the Legal Audience*, 40 (2d ed.); Bryan A. Garner, *The Redbook: A Manual on Legal Style*, 190-91 (2d ed.).
2. Bryan A. Garner, *The Redbook: A Manual on Legal Style*, 183-87 (2d ed.).
3. Bryan A. Garner, *The Redbook: A Manual on Legal Style*, 187-89 (2d ed.).
4. Bryan A. Garner, *The Redbook: A Manual on Legal Style*, 183 (2d ed.).

Simple Words	
Instead of this	Use this
Administer	Run; operate; manage; handle
Advert to	Refer to
Cognizant	Aware
Conjecture	Guess
Demonstrate	Show
Elapse	Pass; go by
Gainsay	Deny
Inception	Start; beginning
Indicate	Say; mention
Notwithstanding	Despite
Precede	Go before; come before
Supposition	Belief; idea; thought
Transmit	Send

Pair Down Phrases	
Instead of this	Use this
Am in receipt of	Have
At that point in time	Then
Enclosed please find	Here is; enclosed is
In reference to	About
In the course of	While
Commensurate with	Equal to; appropriate for
Have knowledge of	Know
Make a decision	Decide
Prior to	Before
Undertake an effort	Try
Pertaining to	About; on
With respect to; with reference to; with regard to	About; regarding
Take into consideration	Consider

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



# Who's Steering the Ship? Managing the Business Side of Your Firm

Mark Bassingthwaight

I have always felt that my law school education missed one key component. A comprehensive course on how to manage the business side of a law practice was never offered. Trust me, I had my fair share of missteps early on in my career and a course like that would have helped. Yes, I do know that now-a-days a number of law schools have developed a basic business class. In fact, I've actually been a guest lecturer in such classes at a few different law schools over the years. I just don't think that the limited number of hours typically devoted to a broad range of topics suffices.

As I see it, there should be a serious year long course that delves into the ins and outs of managing a solo or small firm. Why? Because the success of any small professional services business, let alone a law firm, depends upon the business's continuing ability to deliver a quality product or service in a timely fashion and at a fair price. The more any business misses that goal, the greater the likelihood the business will eventually fail.

Here are three common examples that demonstrate the kinds of things I'm concerned about. In the first we have a solo attorney or a small firm's principal attorney who believes you can't make any money if you're not practicing law. She may eventually step in or tell someone else to address any fires, but only after it becomes absolutely necessary. In short there is a complete failure to recognize or appreciate the value of having the business side of the practice properly managed. No one is steering the ship.

In the second we have a firm in which the partners decide to manage by consensus. No one is tasked



with the responsibility of making any necessary business decisions because the group must first meet and try to reach consensus. The end result is that substantive decisions rarely occur and any decision that does get made often occurs long after it was needed.

Finally we have a firm where the attorneys have decided to hire an office manager intending to delegate many, if not all, managerial tasks to this individual. Unfortunately, while delegating responsibility, they refuse to pass along the necessary authority and this person simply goes through the motions with little progress ever really made.

While a magazine column is not an appropriate place to delve into a thorough discussion of business management best practices; it is a place where I can highlight the principle areas that any successful small business does effectively manage. If your firm isn't adequately addressing one or more of the following managerial areas I would encourage you to remedy the situation as one way to further ensure the long-term success of your firm.

## **Practice management** *(Think quality control)*

This area focuses primarily on the effective and efficient delivery of legal services. Managerial responsibilities should include things like determining the types of matters the firm will handle; setting appropriate caseloads; developing a client screening/intake process; establish-

As I see it, there should be a serious year long course that delves into the ins and outs of managing a solo or small firm.

ing effective systems such as conflict checking and calendaring systems (which should include the ability to monitor compliance with said systems); developing calendaring guidelines; and creating file organization standards for both paper and computer files. This position might also be tasked with recommending and deploying new technologies such as mobile devices or the utilization of cloud-based services. Ignoring this area can easily result in malpractice claims, ethical missteps, lost clients, and a poor reputation in the legal community.

## **Administrative management** *(Think leadership)*

These responsibilities here are more organizational in nature. Duties would typically include assigning staff; staff training; developing policies (e.g. Internet Use Policy); and most importantly, providing

firm leadership. As firm leader, this person is responsible for establishing the firm's vision, direction, and culture. Attorney and staff achievement and motivation will be impacted as a direct result of this person's efforts. Ignoring this area can result in higher than normal attorney and staff turnover, low morale, and even create a situation where the firm is forced to downsize or eventually fold.

### **Financial management** *(Think accountability)*

This area is all about being responsible for the firm's financial health. Duties would include preparing budgets; managing cash flow to cover payroll, taxes and other expenses; issuing invoices; purchasing necessary goods and services; bank account oversight, maintaining financial records to include trust account and tax records; setting fee schedules; and preparing financial statements. Ignoring this area can have catastrophic consequences not the least of which could be cash flow problems, an excessive number of accounts in arrears, and unintentionally creating a situation where someone in your firm could steal client funds.

### **Human resource management** *(Think culture)*

Responsibilities in this area are all about recruiting, hiring, evaluating, maintaining, and directing the personnel – including lateral hires, associates, secretaries, file clerks, bookkeepers, paralegals, etc. The person serving in this role is going to be on the front line and responsible for many of the day-to-day decisions that concern personnel. Ignore this area and you basically

find yourself a camper at Camp Run-A-Muck. Some of the most troubled firms I have worked with found themselves in trouble directly and solely as a result of not effectively managing personnel. I will also share that several of these firms no longer exist as a result of this misstep.

### **Marketing management** *(Think presence)*

A marketing manager is often responsible for developing and maintaining the firm's visibility and presence both within the legal community and the legal marketplace. The goal is to let those with legal needs know what services your firm provides and why your firm is best suited to meet their legal needs. Optimally this manager's efforts will generate a steady stream of business that can grow with the firm as its ability to handle additional work also grows.

Not only should this person seek new business, he should also work to increase business with the firm's existing clients. This individual must also stay abreast of applicable law firm advertising rules in all jurisdictions where the firm does legal work. Ignore this area and income streams will stagnate and often decline. Ignore it long enough and

the firm will eventually be forced to shut its doors for want of clients.

This list is not exhaustive by any stretch of the imagination and responsibilities certainly overlap in places. That said, I hope it begins to demonstrate the need for and value of effective firm management. Depending upon the size of your firm, there is no reason why any of the above areas of responsibility couldn't be handled by several different individuals.

The trick with any of this will be in how successful you are in prioritizing the work, clarifying responsibilities, delegating sufficient authority to allow the manager/s to effectively manage, and most importantly trusting them to make decisions that are in the firm's best interests. In my experience I have found that it's either the refusal to make the managerial work a priority or the failure to delegate enough authority (often due to lack of trust) that undermines the entire effort. If your firm is doing a decent job of managing the above areas, that's great! If not, do all that you can to avoid the three examples shared above. Because in my opinion, failing to effectively manage a firm is the equivalent of having no one at the helm and I don't see that ever turning out well. How about you?

*ALPS Risk Manager Mark Bassingthwaighe, 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).*

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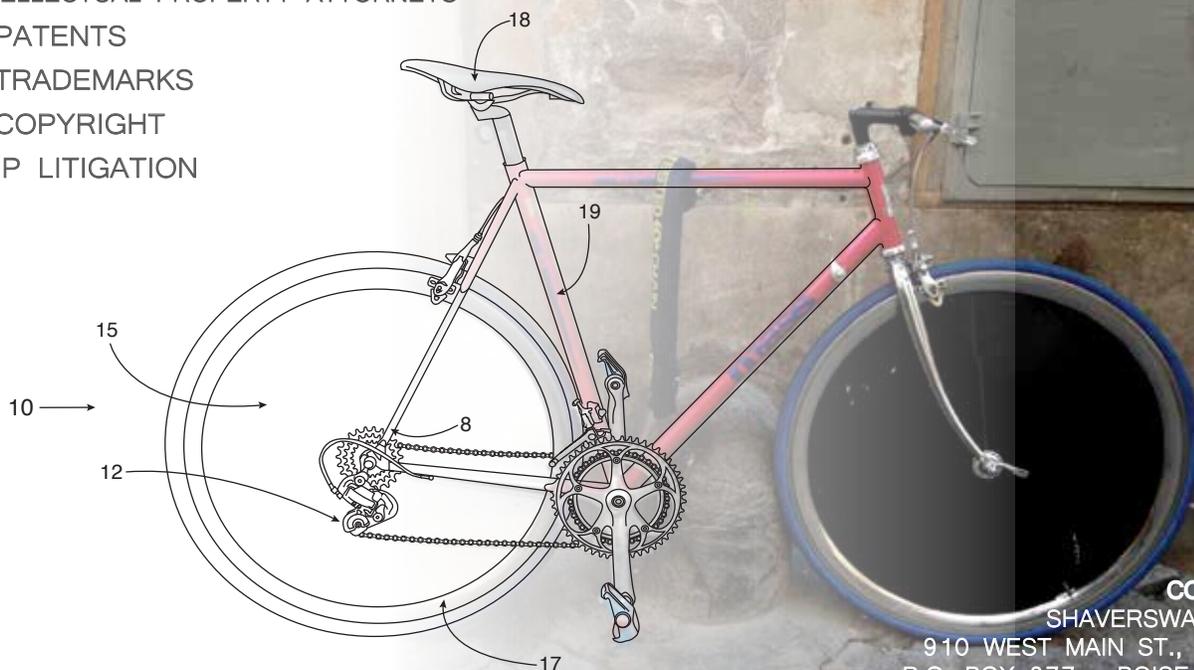
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Mr. Lombardi's resumé is available at: [www.givenspursley.com](http://www.givenspursley.com)

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## IN MEMORIAM

### John M. Curney, Jr., 1960 - 2015

John M. Curney, Jr., beloved husband, father, and faithful friend, passed away unexpectedly May 1, 2015, at the age of 54.

John received his B.S. from Texas Christian University in 1982, and in 1985, his Juris Doctorate from St. Mary's University School of Law. He began practicing law in 1985 in San Antonio, and was also licensed to practice in Idaho. He was one of the principal founders of the firm of Curney, Farmer, House & Osuna. A longtime resident of Fair Oaks Ranch, John was passionate about his family, community, fly-fishing, youth athletics, and TCU.

He is survived by wife, Patty Curney; sons Will and Zeke Curney, Boerne, TX; parents Barbara and John Curney Sr.; sisters, Bekki Curney, Cindy Cancienne, and Cecelia Neathery, San Antonio.



John M. Curney, Jr.

Fruitland surrounded by his family who loved him dearly.

Glenn was born in 1945, in Salt Lake City, to Cal and Mary (McQuiston) Lee. He was raised in Ontario, Ore., on the Lee family farm and attended school in Vale, Ore. Glenn was the baby of the family and was doted on by his big brother and sisters. Glenn grew up working on the farm with his family and was active in church, school and community programs and activities.

After high school, Glenn served a mission for the LDS church in Southern California. While on his mission, he was introduced to Mary Rost, whom he later married.

Glenn graduated from Boise State University in 1972 and earned his JD from the University of Idaho College of Law.

He began his law practice in Malad. The family moved to Fruitland in 1977 and Glenn opened his law office with LaMarr Kofoed. He loved being an attorney and was especially skilled in helping families with estate planning and complex probate issues. He cared deeply for his clients and many became close



Glenn McQuiston Lee

family friends over the years.

He served as counsel for the Fruitland School District, Farmers Mutual Telephone Company, and many other organizations. Glenn was active in his community and was a member of the Fruitland Lions Club.

He was also active in his church. He served as a member of the bishopric and also as youth leader for the young men in his ward for several years. He especially enjoyed designing and building the annual haunted house fundraiser for the young men's organization activities.

Glenn underwent kidney transplant surgery in 2004. He received a kidney donation from Justin Perry, whom he considered to be a son. That gift enabled him to enjoy more than a decade of love and laughter with his family.

Glenn was preceded in death by his parents; sister, Dixie Griffin; and sister-in-law Betty Lee.

Glenn is survived by his wife Mary; daughter, Marne (Paul) Marshall; sons Brian (Abby) Lee; Trevor (Julie) Lee; and Justin Perry; grandchildren: Kennedy and McCall Marshall; Payton and Chance Lee; and Tanner and Challis Lee. He is also survived by his brother Gordon Lee, of Ontario; and sister Linda (Ralph) Ashby of Ogden, UT.

### Glenn McQuiston Lee 1945 - 2015

Glenn McQuiston Lee passed away on Sept. 5, 2015, at his home in

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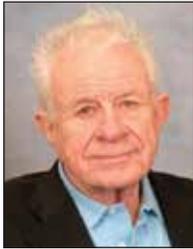
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**John Southworth honored with national prize**

The Promises Foundation has honored John Southworth, executive director at Southworth Associates, for his exceptional work in the field of substance abuse recovery. He has been honored with the The Promises Foundation Lifetime Achievement Award for more than three decades of outstanding service in the field of chemical dependency treatment. John is the program coordinator for the Idaho Lawyers Assistance Program and also works with Idaho State Board of Medicine, Dentistry and Pharmacy. He consults for several treatment centers, facilitates interventions worldwide, and provides post-treatment case management services.



John Southworth

**Judge Huskey appointed to Court of Appeals**

BOISE - Hon. Molly J. Huskey was formally sworn in as a judge on the Idaho Court of Appeals on Sept. 14 in the courtroom of the Idaho Supreme Court in Boise. A reception was held immediately afterward. Judge Huskey is a graduate of the University of Idaho College of Law and has practiced since 1993.



Hon. Molly J. Huskey

**Judge Van Valin takes place on federal bench**

COEUR d' ALENE – Hon. Timothy L. Van Valin was formally sworn in

as a federal Magistrate Judge, First Judicial District of the State of Idaho on Sept. 29 at the Kootenai County Administration Building. A reception sponsored by the First District Bar Association followed at The Greebriar Inn in Coeur d'Alene.

Judge Van Valin is a graduate of the University of Idaho College of Law and has practiced law since 1988. He earned the Idaho State Bar Pro Bono Award in 1998. He and his wife Deborah Ann live in Rathdrum.



Hon. Timothy L. Van Valin

**Grant Burgoyne establishes solo ADR practice**

BOISE – Grant Burgoyne is pleased to announce that he has established a solo alternative dispute resolution practice. He has practiced law for 27 years representing clients in a wide variety of employment, civil rights, commercial, personal injury and other matters. Grant's experience includes conducting mediations, arbitrations and administrative hearings. He is a certified mediator, and on the state and federal court mediator rosters.

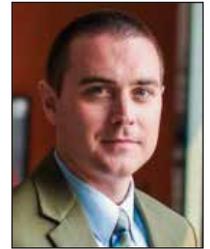


Grant Burgoyne

**New attorney joins Andersen Banducci team**

BOISE - Andersen Banducci PLLC, a Boise-based litigation firm specializing in civil trial practice and commercial dispute litigation, recently welcomed attorney Daniel Mortensen to its team.

At Andersen Banducci, Mortensen will represent and counsel clients on a variety of complex civil litigation issues. Before joining the firm, he served as a law clerk for Justice Warren E. Jones of the Idaho Supreme Court and to a federal magistrate judge in U.S. District Court for the Southern District of California. Prior to Mortensen's judicial clerkships, he worked at the San Diego, California law firm of Procopio, Cory, Hargreaves & Savitch LLP.



Daniel Mortensen

"I was drawn to Andersen Banducci because of its high-stakes, bet-the-company litigation practice," Mortensen said. "The firm has some of the region's finest trial attorneys who are known for being sharp, hard-working, and compassionate. I have no doubt this team can hold its own against any firm, in any dispute, anywhere."

Mortensen received his J.D. from Pepperdine University School of Law and a Bachelor of Arts degree in politics from Pomona College. He is admitted in Idaho, Colorado, the District of Columbia, and California, as well as the U.S. District Court for the Central District of California.

**Attorney to provide police oversight**

BOISE - Natalie Camacho Mendoza was selected by Boise Mayor David Bieter to serve as the director of Boise's Office of Police Oversight. Besides 26 years of legal practice, Camacho Mendoza brings extensive background in civ-



Natalie Camacho Mendoza

## OF INTEREST

il rights. She will investigate civilian complaints about the Boise Police Department, filling the role that was previously known as the ombudsman. She will continue her private practice while working 20 hours per week for the City.

### Attorney Brent R. Wilson joins Hawley Troxell

BOISE - Hawley Troxell is pleased to announce that attorney Brent R. Wilson has joined the firm. Wilson is a litigation attorney, specializing in creditor rights and bankruptcy and banking.

“The addition to our banking practice group will enable us to continue to provide our high level of service to our growing client base,” said Managing Partner Nick Miller.

Wilson’s prior experience includes a three-year clerkship with the

Honorable Jim D. Pappas in the U.S. Bankruptcy Court for the District of Idaho and the Bankruptcy Appellate Panel of the Ninth Circuit. Before moving to Idaho, he practiced law for a small bankruptcy firm in Chicago.

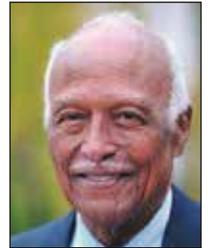
Wilson is licensed to practice in Illinois and Idaho. He received his J.D. cum laude from The John Marshall Law School in Chicago, Illinois and his B.A. from Indiana University in Bloomington, Indiana. While in law school, he was a member of the Editorial Board and the Student Publications Editor for *The John Marshall Law Review*.



Brent R. Wilson

### Idaho lawyers recognize Reginald R. Reeves

BOISE – Reginald R. Reeves, a longtime humanitarian and community benefactor, has earned the Richard C. Fields Award. It was presented in August by the Idaho State Bar Professionalism and Ethics Section and Concordia University College of Law at the college’s professionalism and ethics orientation on Aug. 22. This award is given for attorneys who demonstrate a commitment to professionalism and civility in the profession. It is given to recognize civility in the practice of law. Reeves received the ISB Service Award in 2012.



Reginald R. Reeves

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  - ABA Section of Dispute Resolution Arbitration Training Institute 2009
  - Northwest Institute for Dispute Resolution 2010
  - Arbitration Law and Practice Training 2012 Presented by U.S. Courts and Northwest Institute
  - University of Idaho – Advancing Mediation Practice 2014

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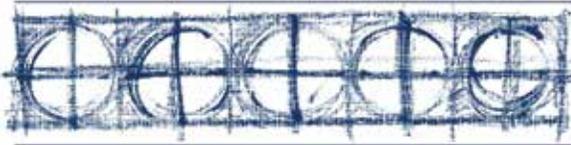
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## IVLP Special Thanks to Sharla Ng

Anna Almerico  
Idaho Volunteer Lawyers Program,  
Program Director

**S**harla Ng began an adventurous volunteer experience with IVLP this spring. Sharla came to IVLP with a strong background in employment law having previously worked at the Idaho Industrial Commission. Sharla was interested in learning more about family law and dove right in without hesitation. Eager to volunteer and fulfill the aspirational goal of 50 pro bono hours, Sharla accomplished this in her first several months with IVLP. She has more than 125 hours to date. She helped fill a need for case review and preparation on meritorious civil legal cases; preparing them for recruitment and placement with pro bono attorneys. She takes challenges head on and shows enthusiasm for each new project, presentation or situation she faces. Each day IVLP helps address serious legal matters; talking with people undergoing trauma and in the middle of life changing experiences. Sharla's compassion and genuine interest in each person's unique circumstances are felt by everyone she encounters. Her professionalism manifests in clear communication with staff and clients. Sharla has helped to secure legal services for many people who



Sharla Ng



otherwise would have faced their battle without representation due to inability to pay. Sharla is also a volunteer speaker for the *Soundstart* program through IVLP, presenting basic legal information to young parents in the Treasure Valley on family law topics.

Sharla also has a passion for the written word with an emphasis in English and writing in her undergraduate studies. In addition to helping at IVLP she is volunteering to help revise the Law Related Education publication, *Turning 18 in Idaho*.

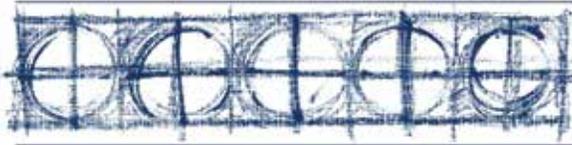
Sharla has been priceless to IVLP and we whole-heartedly thank her for her service.

Volunteers are not paid — not because they are worthless, but because they are priceless.

— Unknown

Anna Almerico is the Program Director for the Idaho Volunteer Lawyers Program and has a degree from the University of St. Thomas in Criminal Justice and Peace and Justice Studies. Prior to IVLP, Anna began the Immigration Legal Services Program for Catholic Charities of Idaho.





## Introducing Family Advocates' Guardian Ad Litem, Merritt Dublin

Desiree Ward  
AmeriCorps VISTA

**M**erritt Dublin is a mom, a former foster parent and an attorney with 20 years of experience. She has experience in child protection, representing the Arizona child protection services department as the Chief Counsel for the Protective Services Section of the Arizona Attorney General. Merritt shared, "I became involved with Family Advocates when I was a stay at home mom temporarily, looking for some volunteer work. I became more involved joining the Board of Directors for Family Advocates as the Attorney Advisory liaison. Since my tenure on the Board, I have continued to volunteer as an attorney for Guardian ad Litem,(GALs)."

When asked why Merritt believes in the importance of a Guardian ad Litem, she responded, "The CASA programs statewide are important because they are the entities fulfilling the State's obligation to give representation in court of the children's best interests. Often times, this is the only representation and voice the children in foster care have at all. Why does this matter? Under federal and state laws, the best interests of a child are critical factors at nearly every juncture of decision-making in the child protection process. Because the other parties in child protection cases (the State or the parents) may have conflicting



interests and serious challenges due to funding constraints that sometimes unknowingly lead to recommendations or decision-making, or a lack of action, that is not in the best interests of children. The GAL's role is critical as the only person whose role is to advocate solely for the best interest of the children. Without the GAL's attorney, children — particularly those under 12 — have no legal representation to make sure that a child's best interests are represented as required."

Merritt's experience has been rewarding because she knows that being a Guardian is so important and meaningful in the life of a child. Most of the time, the cases are not particularly adversarial and everyone is working toward the same goals, and the little things matter — like when the GAL realizes that a child recently removed from his home hasn't had his glasses and could not see for

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Merritt's experience has been rewarding because she knows that being a Guardian is so important and meaningful in the life of a child.

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a week and was able to solve the problem.

But sometimes the stakes are higher, and everyone loses sleep at night. But those are the cases where the children really need the GAL. It's worth it. We can really make a difference.

Merritt's experience has been rewarding because she knows that being a Guardian is so important and meaningful in the life of a child.

# Idaho Pro Bono Week: Where Are We Now?

Hon. Jim Jones

Chairman Idaho Pro Bono Commission

Idaho celebrates Pro Bono Week on October 25–31. Constituent members of the Idaho Pro Bono Commission — Idaho’s State and Federal Courts, the Idaho State Bar, the Idaho Law Foundation, the University of Idaho College of Law, and Concordia University School of Law — have joined in a resolution recognizing those who have honored their responsibility under Bar Commission Rule 6.1 to perform at least 50 hours of pro bono service. Those who have fulfilled their commitment are thanked and those who have not are urged to do so. As a whole, the Bar has done well in helping people who cannot afford to pay for legal advice and assistance, but we can certainly do better.

Don’t get me wrong. Many lawyers step forward to help low-income people with serious legal problems without going through the Idaho Volunteer Lawyers Program and without seeking recognition for their work. And I don’t mean people who do legal work expecting to be paid but end up being disappointed in that regard. Pro bono is where you know you are not going to be paid at the outset.

On September 1, the Pro Bono Commission issued a resolution designating Idaho Pro Bono Week. The resolution recognized that 750 public and private attorneys working through the Idaho Volunteer Lawyers Program performed more than 14,000 hours of service for more than 2,100 low-income persons last year; that volunteer

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**National Pro Bono Celebration**

*October 25 - 31, 2015*

lawyers provided 658 hours of pro bono work in federal court cases in 2014; that Idaho Legal Aid Services performed 18,179 hours of free legal service last year through staff attorneys and volunteer lawyers; that the University of Idaho 2014 graduating class performed 9,330 hours of pro bono service; and that Concordia staff and students contributed 1,152 hours of pro bono work last year.

While most of the pro bono work is done in the trenches, it has also made its way to the appellate level. In the last two years, the Supreme Court has commended two individuals who have handled meaningful appellate cases — Jim Runsvold of Caldwell and Bud Yost of Nampa. Christopher Pooser currently has two pro bono cases before the Court (the attorney on the other side of one case, Ellen Smith, is also acting in a pro bono capacity) and is working to establish an appellate pro bono program.

In the Bar membership survey conducted in 2011, 42 percent of the responding attorneys said that they would be inclined to perform more pro bono service if there were a wide range of pro bono opportunities available. Opportunities to do pro bono abound. One can go on the State Bar/Law Foundation website’s IVLP page and fill out a pro bono pledge to be available to consider handling pro bono work in discreet categories. Among other things, an attorney filling out a pledge can offer to mentor younger lawyers who may need assistance in handling a pro bono case. By filing a pledge form one is not obligated

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The resolution recognized that 750 public and private attorneys working through the Idaho Volunteer Lawyers Program performed more than 14,000 hours of service for more than 2,100 low-income

to take a case when it will not fit into one’s schedule.

Pro bono opportunities are also available through Idaho Legal Aid Services — just give them a call at their local office. One can also check with the local court assistance office to see if some deserving person is in need of help with a pro se case or if it would be helpful to conduct a training session, either for pro se individuals or for attorneys assisting with their cases.

The Idaho Trial Lawyer Association conducts a street law clinic in Boise that has helped many people. Check them out online and offer to help.

What appears to be a wonderful way to perform pro bono is for a law firm to establish a program in a discreet area of practice. For instance, Holland & Hart has a project to help individuals with UVisa cases. The UVisa process enables certain crime victims to seek non-immigrant legal status in the United States by showing that the victim was helpful, or is likely to be helpful, to a Federal, State, or local authority investigating or prosecuting a crime. Holland & Hart began handling UVisa cases at the request of IVLP and currently has five attorneys working on separate UVisa cases. The firm has found the project to be a great fit.

By taking on a group pro bono project, people in a firm can help one another, which meets one of the concerns of people who are reluctant to perform pro bono on an individual basis — having someone with knowledge of the subject readily at hand to help out. And, an element of peer pressure helps to keep such a project going.

Parsons Behle & Latimer, working through that indefatigable person, Susie Boring-Headlee, is interested in establishing a program to assist veterans with their legal problems through the Idaho Military Legal Alliance. This is an area of substantial need and Captain Steve Stokes and the rest of the members of the Idaho Military Legal Alliance are doing some great work on behalf of veterans. Anyone interested in volunteering can contact him directly at (208) 272-3573.

The Intermountain Fair Housing Council needs pro bono volunteers to assist individuals, including veterans, with eviction problems, damage claims against unfair land-

lords, and a variety of other types of problems that the organization is not funded to handle. Contact the executive director, Zoe Ann Olson, to offer your help. She can also use

The Intermountain Fair Housing Council needs pro bono volunteers to assist individuals, including veterans, with eviction problems, damage claims against unfair landlords, and a variety of other types of problems that the organization is not funded to handle.



help on her core area of practice, fair housing issues, as the Council's federal funding is inadequate to fill the need. Fisher Rainey Hudson

and Neal Colborn have generously provided assistance for her referrals but additional help is needed.

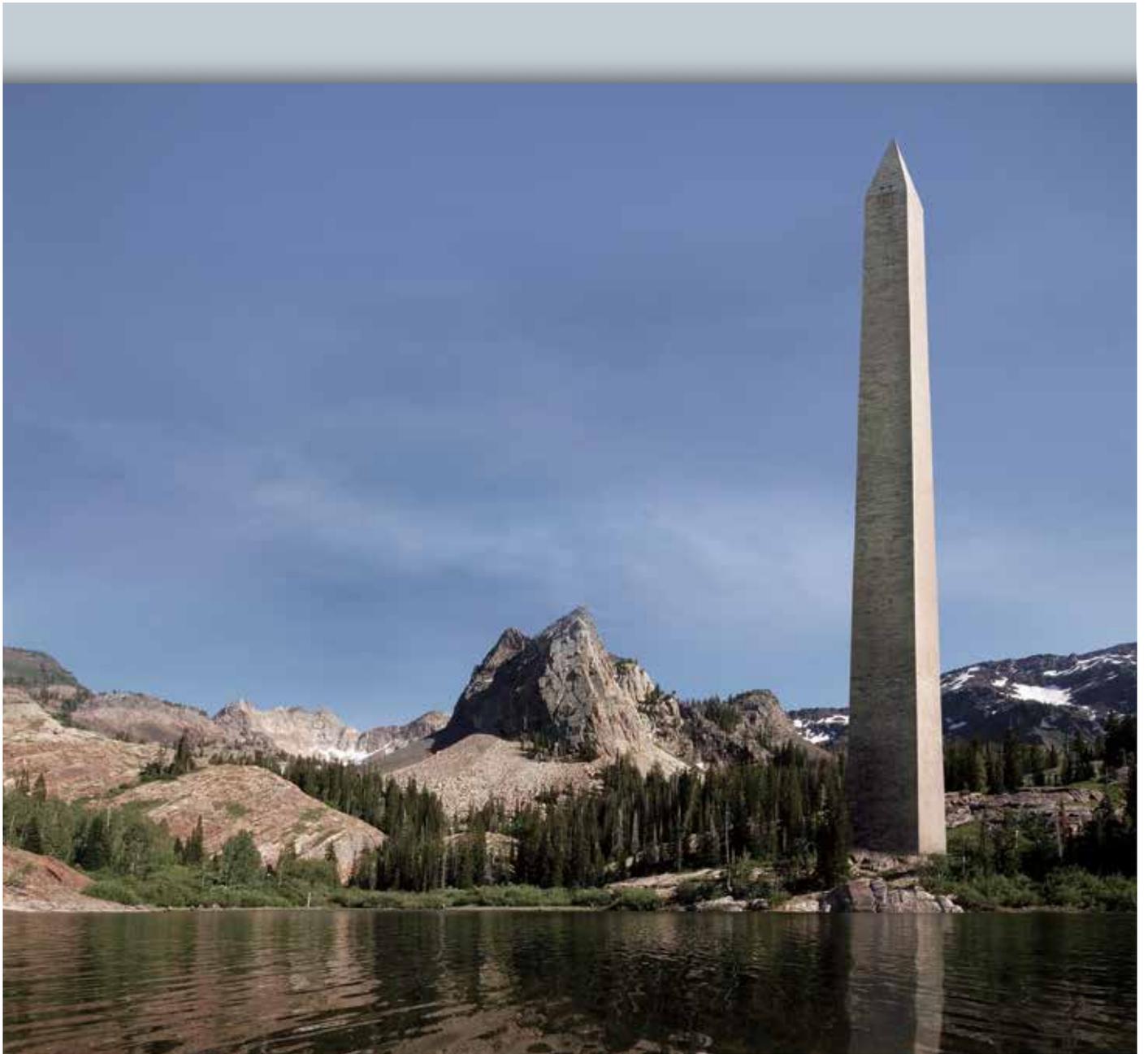
These are just a few examples of the opportunities available for lawyers interested in performing pro bono work. A call to Kelli Ketlinski or Anna Almerico at IVLP will likely produce many more opportunities.

In addition to commending those in the legal community who directly provide free legal assistance to the economically disadvantaged, the Commission's resolution recognizes the Idaho Law Foundation for sponsoring a statewide Access to Justice campaign to fund legal services for low-income residents and persons with disabilities. Contributions received by ILF are shared among the Idaho Volunteer Lawyers Program, Idaho Legal Aid Services, and Disability Rights Idaho.

Equal justice and the fair administration of justice are fundamental to our system of government. Rule 6.1, which ensures access to the legal system for those who cannot pay, is a proud part of the heritage of the legal profession in Idaho. Let's do our best to carry on that proud tradition.

**Chief Justice Jim Jones** *grew up on a farm near Eden. He received a BA from the University of Oregon in 1964 and a JD in 1967 from Northwestern University. He was elected as Attorney General in 1982, serving eight years in that office. He maintained a law practice in Boise until being elected to the Supreme Court in 2004. He began serving as Chief Justice in August 2015. He has served as Chairman of the Idaho Pro Bono Commission since its founding in 2008.*





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## Resolution Designating Idaho Pro Bono Week – 2015

**W**HEREAS, we are a nation dedicated to “liberty and justice for all;” and equal justice and the fair administration of justice are fundamental to our system of government; and

**WHEREAS**, the promise of equal justice under the law is not realized for individuals and families who have no meaningful access to the justice system because they are unable to pay for legal services; and

**WHEREAS**, this de facto denial of equal justice has an adverse impact on these individuals, families, and society as a whole, and works to erode public trust and confidence in our system of justice; and

**WHEREAS**, Idaho’s lawyers and judges strongly support the provision of free-of-charge legal services to those can’t afford them and have joined together in a collaborative effort to support pro bono services through the establishment of the Idaho Pro Bono Commission; and

**WHEREAS**, in 2014, more than 750 public and private attorneys, working in association with the Idaho Volunteer Lawyers Program, provided more than 14,000 hours of volunteer attorney assistance to more than 2,100 low-income individuals and family members, including the provision of legal representation in more than 600 state cases, while in 2014 volunteer lawyers provided 658 hours of pro bono service in federal court cases; and

**WHEREAS**, Idaho Legal Aid Services is a statewide non-profit law firm dedicated to serving the civil legal needs of low income Idahoans through its seven regional offices and in 2014 its staff attorneys and attorney volunteers provided 18,179 hours of free legal services to thousands of Idahoans with legal problems such as domestic violence, wrongful evictions, illegal foreclosure, guardianships for abused or neglected children, Medicaid and Social Security problems of seniors, and unlawful discrimination; and

**WHEREAS**, the Idaho Law Foundation is sponsoring a statewide Access to Justice campaign to fund legal services for low-income residents and persons with disabilities, with the funding to be shared among the Idaho Volunteer Lawyers Program, Idaho Legal Aid Services, and Disability Rights Idaho; and

**WHEREAS**, many Idaho lawyers, acting upon their volition, generously provide many untallied hours of pro bono service to the citizens of our State without receiving recognition for their unpaid services; and

**WHEREAS**, the graduating class of 2014 at the University of Idaho College of Law compiled approximately 9,330 hours of pro bono services, under the supervision of lawyers and judges, as part of the College’s distinctive pro bono program in which every student participates; and

**WHEREAS**, students and faculty at Concordia University School of Law contributed 1,152 hours of pro bono service in 2014, and are committed to expanding access to justice through their pro bono service

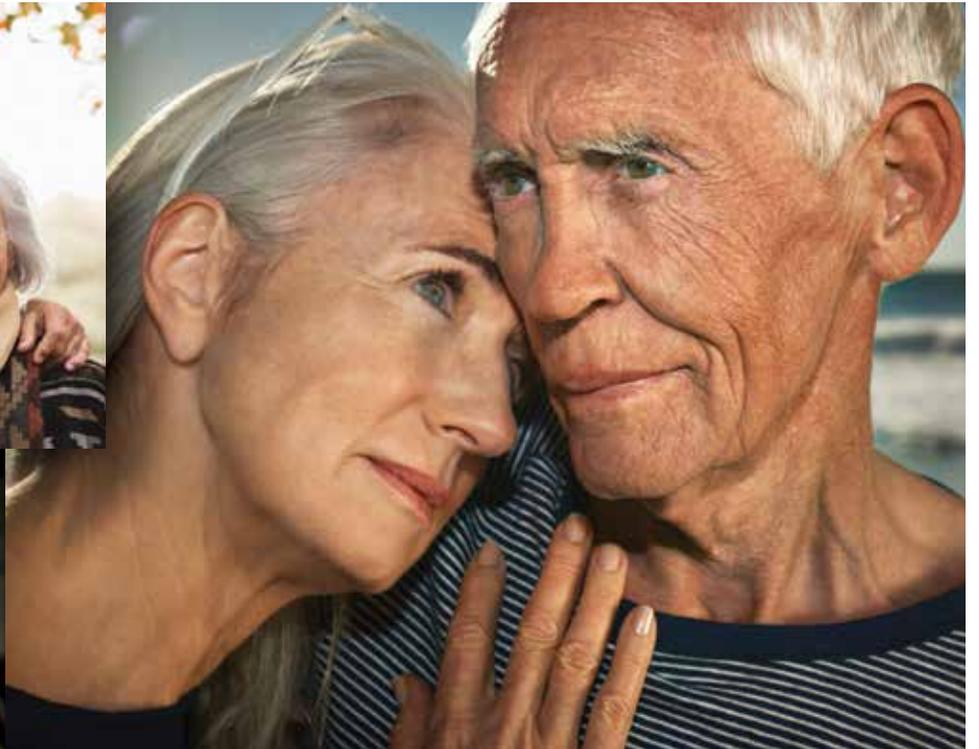
requirement, their on-site legal clinic, and providing pro bono training for Idaho lawyers; and

**WHEREAS**, October 25-31 has been designated as National Pro Bono Week; and

**WHEREAS**, the Idaho Pro Bono Commission, consisting of the state courts of Idaho, the United States Courts for the District and Bankruptcy Courts for the District of Idaho, the Idaho State Bar, the Idaho Law Foundation, and the University of Idaho College of Law, and Concordia University School of Law, recognizes the need to expand the delivery of legal services to economically disadvantaged persons and families;

**NOW, THEREFORE**, the Idaho Pro Bono Commission and its constituent members recognize Pro Bono Week, October 25-31, 2015, as a time for Idaho, along with the rest of the Nation, to honor the work of those who provide volunteer legal services, to address the need for civil legal assistance on matters of profound urgency, and to remind all attorneys of their responsibility to assist in meeting the legal profession’s sacred commitment to equal justice under the law.

**DATED** this 1st day of September, 2015, by the IDAHO PRO BONO COMMISSION, and its constituent members: SUPREME COURT OF IDAHO, UNITED STATES DISTRICT AND BANKRUPTCY COURTS FOR THE DISTRICT OF IDAHO, IDAHO STATE BAR, IDAHO LAW FOUNDATION, UNIVERSITY OF IDAHO COLLEGE OF LAW, AND CONCORDIA UNIVERSITY COLLEGE OF LAW.



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