



The **Advocate**

Official Publication  
of the Idaho State Bar  
Volume 59, No. 1  
January 2016

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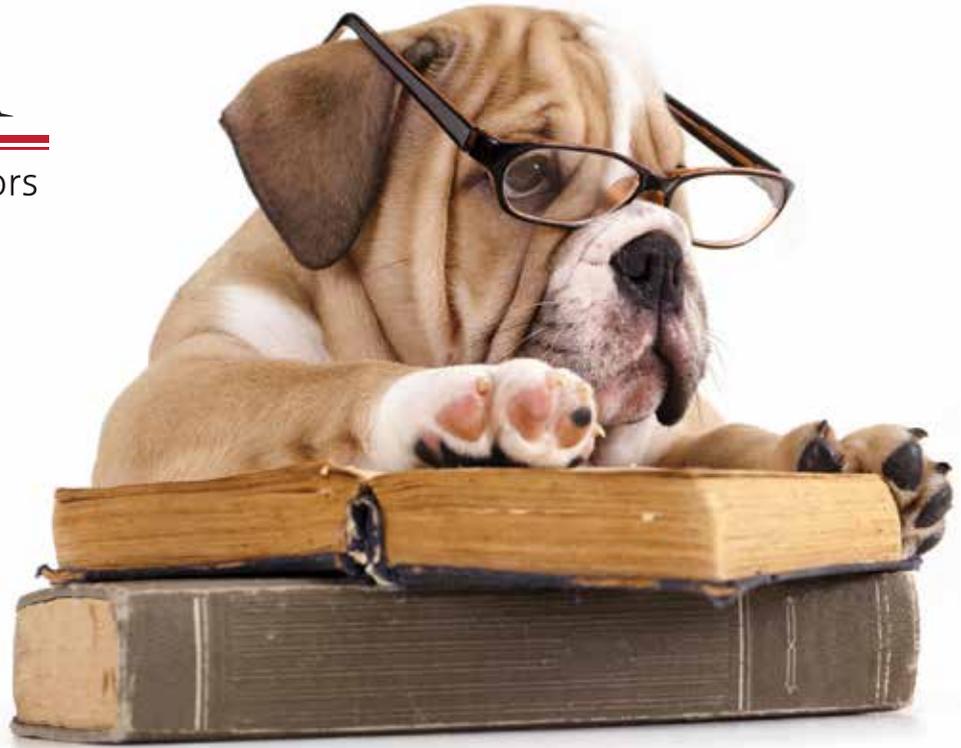
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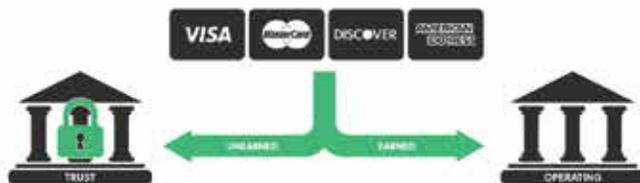


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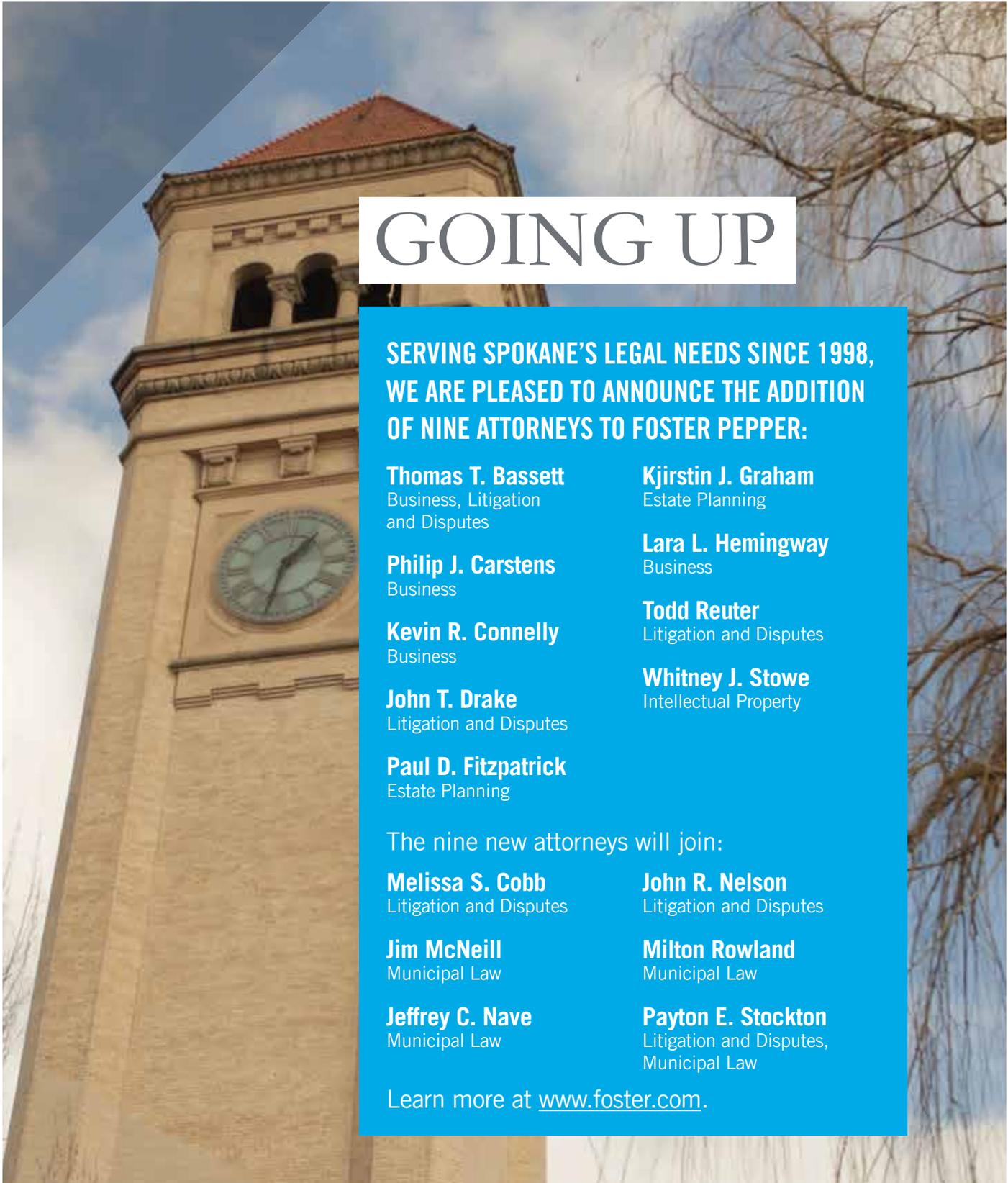
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### On the Cover:

Dan Kinghorn of Pocatello took this photo to add to his extensive collection of wildlife. He found this pheasant rooster off the old Marsh Creek Highway near McCammon Idaho on Dec. 1. Dan said the back roads during the winter months are great spots to find pheasants and many other photographic opportunities. More photos can be seen on Dan's website, [www.viewbug.com/member/Dan\\_Kinghorn](http://www.viewbug.com/member/Dan_Kinghorn)

### Section Sponsor:

Health Law Section

### Editors:

Special thanks to the January editorial team: Amber Champree Ellis, Kristine Marie Moriarty, Karen Preset Overly Sheehan.

### February issue sponsor:

Family Law Section.

### Correction:

We would like to note that the remarks provided in the November/December issue of *The Advocate* on Howard Funke's Denise O'Donnell Day Pro Bono Award were incorrectly attributed to Mariah Dunham. Kinzo Mihara provided those remarks and we would like to thank him for sharing that information, as well as for presenting the award to Mr. Funke at the Resolution Roadshow meeting in Coeur d'Alene on November 5, 2015. We apologize for the error.



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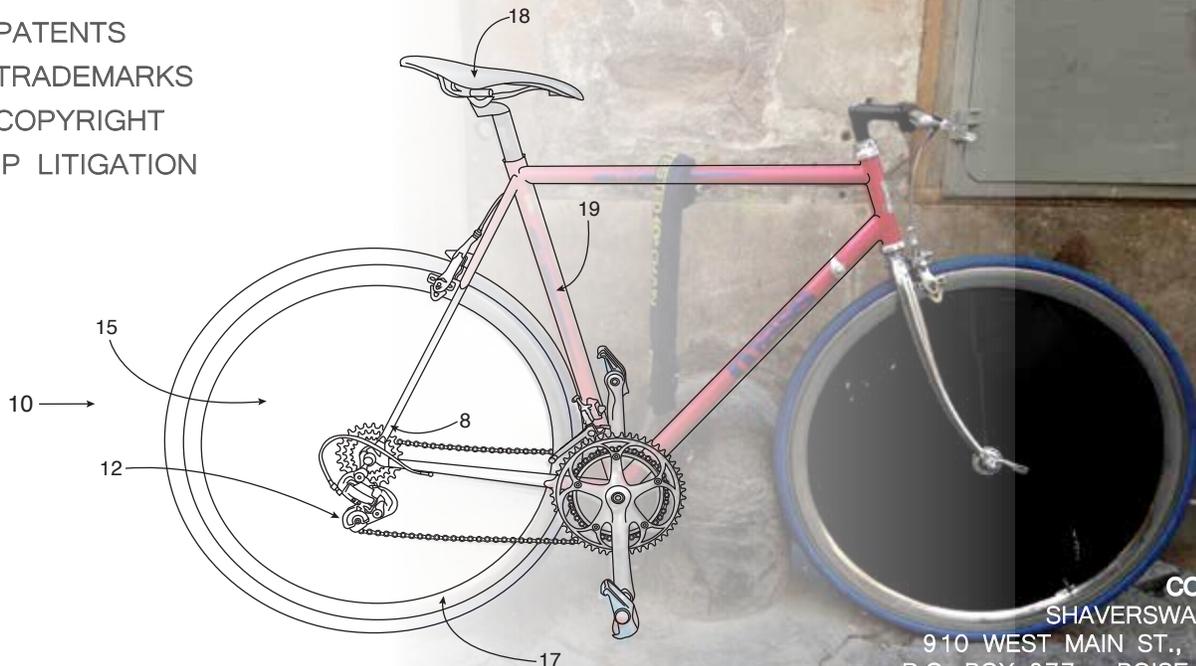
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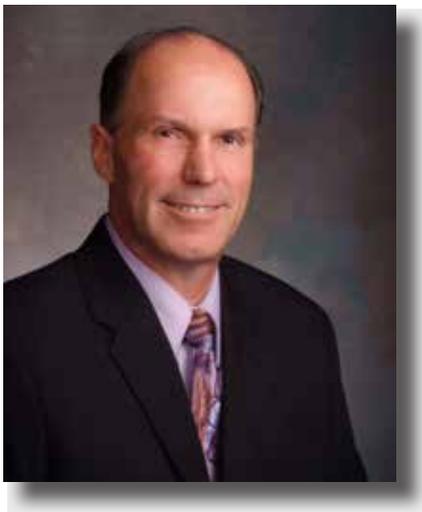
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## Upcoming CLEs

### January

#### January 8

##### *Litigation and Collaboration with Government*

Co-Sponsored by the Environment & Natural Resources Section and the University of Idaho College of Law Idaho Law and Justice Learning Center, 514 W. Jefferson Street – Boise / Statewide Webcast  
4.25 CLE credits of which 1.0 is Ethics  
11:45 a.m. (MST)

#### January 15

##### *Ethics of Preparing Witnesses*

Co-Sponsored by Idaho Law Foundation, Inc. and WebCredenza, Inc.  
Audio Stream  
1.0 Ethics credit  
11:00 a.m. (MST)

#### January 29

##### *Annual Flagship CLE: Expert Testimony: Reports, Depositions and Trial Advice*

Sponsored by the Idaho Law Foundation, Inc. The Grove Hotel, 245 S. Capitol Blvd. – Boise  
4.0 CLE credits of which .75 is Ethics – **NAC**  
8:00 a.m. (MST)

### February

#### February 5

*CLE Idaho: University of Idaho College of Law Faculty*  
Sponsored by the Idaho Law Foundation, Inc. Canyon County Administration Building, 111 North 11th Ave.- Caldwell  
1.0 CLE credit  
Noon (MST)

#### February 5

*CLE Idaho: University of Idaho College of Law Faculty*  
Sponsored by the Idaho Law Foundation, Inc. Kootenai County Administration Building, 451 N. Government Way – Coeur d'Alene  
1.0 CLE credit  
Noon (PST)

#### February 5

*CLE Idaho: University of Idaho College of Law Faculty*  
Sponsored by the Idaho Law Foundation, Inc. Latah County Courthouse, 522 S. Adams Street – Moscow  
1.0 Ethics credit  
Noon (PST)

#### February 18 – 20

*34th Annual Bankruptcy Seminar*  
Sponsored by the Commercial Law & Bankruptcy Section  
Hilton Garden Inn Idaho Falls, 700 Lindsay Blvd. – Idaho Falls  
13.5 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).

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## Eight Lessons From the Bullying Road Show

Tim Gresback  
President, Idaho State Bar  
Board of Commissioners

**F**or the last several months, our state bar has undertaken an initiative to address the detrimental effects of bullying on our profession.

The effort culminated in November when the Commissioners explored the challenges of dealing with bullies in Road Show CLEs presented in each judicial district, masterfully moderated by Bar Counsel Brad Andrews. Although each district has its own character, there were several common take-aways.

### **Bullying occurs in varying degrees and we all do it**

Because we've all been on the receiving end of a bully's wrath, it may be natural for us to initially divide the bullying world into "us" and "them." As Commissioner Dennis Voorhees pointed out, bullying is often a matter of degree and we all bully in some way — and often regret it. We may be reluctant to talk about the issue for fear of being labeled as a hypocrite.

### **Lawyers are inclined to view themselves as heroes; when we do, we can easily vilify our opponents and characterize every action as malicious**

If I'm a hero, then my opponent must be a villain. Litigators often construct this hero narrative; it may fuel bullying. However, not every

As Bar Counsel Brad Andrews observed, there is no rule protecting the names of witnesses and identification of pertinent documents as an attorney's "secret privileged thoughts."



hard-nosed opponent is a bully. When we're dealt a bad legal hand, it's tempting to resent the opposition for playing its cards. Winning a hand is not the same as showboating and taunting the other side. If we recognize this dynamic we're less likely to overreact and perpetuate a cycle of ill-will.

### **We must filter email so it does not become a weapon for snark**

President-elect Trudy Fouser shared how a simple scheduling disagreement quickly devolved into her opponent's mean email rant. In response, she crafted a lengthy, pointed and brilliant response which she proudly shared with her partner and husband, Jack Gjording. He read it and complimented Trudy on her prose. Then he advised her to delete it, which she did. Similarly, Twin Falls attorney Jarom Whitehead has a 24-hour rule: whenever he drafts an email critical of a colleague, he makes himself wait at least a day be-

fore sending it. Usually he ends up deleting it or toning it down substantially. Trudy and Jarom teach us that civility is not capitulation.

### **Financial self-interest fuels bullying**

Suppose a client delivers a hefty retainer and a compelling tale of injustice — exactly what we crave. The client expects results and the attorney wants to deliver. Unfortunately, from the outset lawyers often set an expensive litigation course without first exploring the possibility of a quick and inexpensive resolution to the dispute. Instead, the too-common first choice is to lob inflammatory and untested accusations at the other party. With such an incendiary opening volley, the other lawyer may feel trapped: either respond tit-for-tat or be perceived as weak. Although listening intently to a client is an indispensable skill, reflexively assuming that the story is factually bulletproof is foolish. Coeur d'Alene attorney Erika Grubbs sug-

gests that instead of initially sending an aggressive letter or email making immediate demands and threats to a colleague, try a phone call, introducing yourself, and exploring the possibility of resolving the dispute expeditiously. This simple technique should become our routine professional protocol.

### **Bad mentors model bullying**

New lawyers tend to mirror the conduct of the boss. We enter practice eager to impress and enthusiastically demonstrate that we're team players. Unfortunately, most new lawyers lack the experience and confidence to see that their mentors are sometimes deeply flawed. For example, Commissioner Kent Higgins explained that our rule limiting the number of interrogatories may have been instituted in part because of a mentor of his with a reputation for going overboard. Before the rule, this was not uncommon.

Bad mentoring not only sets a poor example for the enthusiastic protégé, but it can also sour the new lawyer's budding love for the law. The protégé not only witnesses abusive behavior at the courthouse, but can also be on the receiving end of the bully's wrath back at the office.

### **Bullies speciously object to routine discovery**

A consistent complaint throughout the state is the problem in getting routine discovery information. Many attorneys provide boilerplate, specious objections to legitimate written interrogatories and deposition questions. As Bar Counsel Brad Andrews observed, there is no rule protecting the names of witnesses and identification of pertinent documents as an attorney's "secret privileged thoughts."

### **Clients bully, too**

Commissioner Michelle Points observed that bullying is not limited to lawyers. She has had clients try to bully her into pursuing untenable positions. She learned that, although it's not easy to stand up to a difficult client, she feels better when the client clearly knows her boundaries. If the client refuses to respect her, Michelle declines representation. Similarly, for years Don Burnett from the U of I College of Law has implored law students not to allow future clients to "strip mine" their reputations by acquiescing to unreasonable directives. We would be wise to follow Michelle's advice and Don's admonition.

### **The end of the beginning**

In undertaking our bullying initiative, we knew the effort would not permanently solve our challenges in dealing with bullies. The effort is ongoing. Hardcore bullies will always drain our profession. As District Judge Juneal Kerrick astutely observed, "Bullies are profoundly selfish." Bullies are well-known to judges and lawyers alike. "We all know who they are," Lewiston attorney Karin Seubert noted. We must continually teach civility through example.

---

For years Don Burnett from the U of I College of Law has implored law students not to allow future clients to "strip mine" their reputations by acquiescing to unreasonable directives.

If you are interested in exploring the bullying initiative further, all of the articles and letters to the editor are posted on the ISB website, as is the following link to the video of the Boise Road Show CLE, *Managing a Bully Without Becoming One*: <https://www.youtube.com/watch?v=VP2LIIsqU4U&feature=youtu.be>.

I wish you well in responding appropriately to the challenges from bullies. I hope our initiative has shed some light on bullying and has provided you with new tools to be a fierce but fair advocate.

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



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**Karl W. Kime  
(Suspension)**

On November 12, 2015, the Idaho Supreme Court issued a Disciplinary Order suspending Coeur d'Alene attorney Karl W. Kime from the practice of law for fifteen (15) months, retroactive to January 1, 2015, the date Mr. Kime was eligible for reinstatement based on a prior suspension. The Disciplinary Order also imposed a twelve (12) month period of withheld suspension and provided that upon reinstatement, Mr. Kime shall serve a two (2) year disciplinary probation.

The Idaho Supreme Court found that Mr. Kime violated Rule 8.4(b) of the Idaho Rules of Professional Conduct, which provides that it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects. The Idaho Supreme Court's Disciplinary Order followed a stipulated resolution of an Idaho State Bar disciplinary proceeding and related to the following circumstances.

On July 19, 2013, the Idaho Supreme Court entered a Disciplinary Order suspending Mr. Kime for one year, with all one year withheld, based on Mr. Kime's felony conviction for driving under the influence of alcohol ("DUI"). The Disciplinary Order placed Mr. Kime on disciplinary probation through April 3, 2015, and required that he comply with the conditions of his criminal probation, which prohibited any consumption of alcohol. Thereafter, Mr. Kime consumed alcohol in violation of the terms of his criminal and disciplinary probations. Consequently,

on May 8, 2014, the Idaho Supreme Court entered a Disciplinary Order imposing the one-year suspension that was previously withheld.

In November 2015, while still on criminal probation, Mr. Kime was stopped by law enforcement while driving his vehicle after consuming alcohol. He was charged in Kootenai County with felony DUI. The Court subsequently determined the traffic stop was illegal and the criminal charge was dismissed. As part of the resulting disciplinary case, Mr. Kime admitted that his conduct violated I.R.P.C. 8.4(b) (commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects).

The Disciplinary Order provides that twelve (12) months of Mr. Kime's twenty-seven (27) month suspension is withheld subject to the terms of his two (2) year probation upon reinstatement, with terms including the following: avoidance of any alcohol or drug-related criminal acts or traffic violations; a program of random urinalysis, with provision that if Mr. Kime tests positive for alcohol or other tested substances or misses a random urinalysis test without prior approval, the entire withheld suspension shall be immediately imposed; and if Mr. Kime admits or is found to have violated any of the Idaho Rules of Professional Conduct for which a public sanction is imposed for any conduct during his period of probation, the twelve (12) month withheld suspension shall be imposed.

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

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(Suspension, Withheld  
Suspension and Probation)**

On October 28, 2015, the Idaho Supreme Court issued a Disciplinary Order suspending attorney Allen W. Walterscheid from the practice of law for a period of one (1) year, with four (4) months withheld and terms of probation upon any reinstatement. The Idaho Supreme Court found Mr. Walterscheid violated I.R.P.C. 8.1(b) [Failure to Respond to Bar Counsel in a Disciplinary Matter], I.B.C.R. 505(e) [Failure to Cooperate With or Respond to a Request from Bar Counsel] and I.R.P.C. 1.15(a) and 1.15(c) [Safekeeping Property]. The Idaho Supreme Court's Order followed a stipulated resolution of a disciplinary proceeding that related to the following circumstances.

On May 21, 2015, the Idaho State Bar filed a formal charge Complaint. The formal charge Complaint detailed Mr. Walterscheid's failure to respond to multiple certified letters from Bar Counsel requesting his explanation of three trust account overdraft notices the Idaho State Bar received from Respondent's bank. Respondent did not answer the Complaint and the Idaho State Bar filed a Motion to Deem Admissions (For Failure to Answer) and For Imposition of Sanction which was heard on August 4, 2015. Mr. Walterscheid appeared at that hearing where the parties agreed that the allegations in the Complaint were deemed admitted and that the parties would either stipulate to or conduct a hearing on the appropriate sanction.

Mr. Walterscheid voluntarily did not practice law in Idaho since the date his license was canceled, for

## DISCIPLINE

nonpayment of dues, March 3, 2015, and the Disciplinary Order provides that Mr. Walterscheid's eight (8) months actual suspension is retroactive to March 3, 2015 and will last until November 3, 2015 and four (4) months will be withheld. Mr. Walterscheid must reinstate his license from the disciplinary suspension and administratively reinstate his canceled license. Mr. Walterscheid will serve a one (1) year probation following his reinstatement subject to the conditions of probation specified in the Disciplinary Order. Those conditions include that Mr. Walterscheid will serve the withheld suspension if he admits or is found to have violated any of the Idaho Rules of Professional Conduct for which a public sanction is imposed for any conduct during Mr. Walterscheid's

period of probation. During his probation, Mr. Walterscheid must provide monthly reports to Bar Counsel attesting that his representation of his clients is consistent with his responsibilities under the Idaho Rules of Professional Conduct and that he is timely responding to any inquiries from Bar Counsel's Office.

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

## REINSTATEMENT

### Darren L. McKenzie (Reinstatement to Active Status)

On April 6, 2015, the Idaho Supreme Court issued an Order Granting Petition for Reinstatement, reinstating Boise attorney Darren L.

## REINSTATEMENT

McKenzie to the practice of law in Idaho. Mr. McKenzie's reinstatement became effective on October 27, 2015.

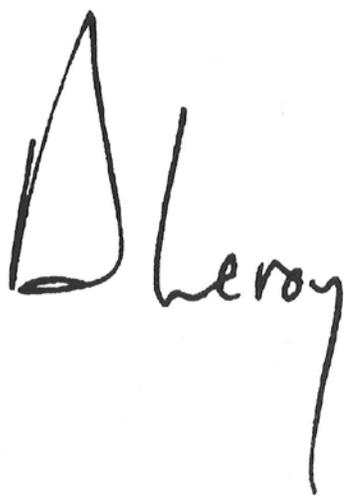
Inquiries about this matter may be directed to: Bar Counsel, Idaho State Bar, P.O. Box 895, Boise, Idaho 83701, (208) 334-4500.

### David A. Goicoechea (Reinstatement to Active Status)

On November 12, 2015, the Idaho Supreme Court entered an Order Granting Request for Readmission to Practice Law in Idaho reinstating David A. Goicoechea to practice law in Idaho.

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

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### Legal clinics on statewide calendar

Legal clinics have become increasingly important in Idaho as a great way to deliver pro bono legal services. The Idaho Law Foundation hosts a comprehensive calendar of pro bono law clinics across Idaho. This has become a resource for low income people and attorneys looking for a limited pro bono commitment. The calendar is at [http://isb.idaho.gov/ilf/ivlp/clinic\\_calendar.html](http://isb.idaho.gov/ilf/ivlp/clinic_calendar.html).

“Law clinics are a great way to offer service,” said IVLP Director Anna Almerico, and they are offered by several entities such as law schools, sections, Idaho Trial Lawyers Association or nonprofit agencies. Some clinics will target underserved groups such as refugees, veterans, tenants or senior citizens. Other clinics are more general. Some are recurring and others are unique. Ms. Almerico said attorneys can more easily regulate their time commitment by volunteering at law clinics.

The Idaho Volunteer Lawyers Program (IVLP) provides a safety net for low-income individuals and families in Idaho who require civil legal services and cannot afford to pay for

them. IVLP recruits attorneys from local communities who volunteer their time and expertise to assist those in need. IVLP placed 615 attorneys with clients in dire need. And in 2014, 1,170 clients were helped through 162 legal clinics. It was a 52% increase from 2013.

### Darrington lecture scheduled for Boise on February 8

The Annual Denton Darrington Lecture will feature former Colorado Supreme Court Justice Rebecca Love Kourlis, the current Executive Director of the Institute for the Advancement of the American Legal System. Her lecture is entitled, “Building the Just, Speedy and Inexpensive Civil Courts of Tomorrow: Why We Cannot Afford to Fail.” The free lecture will be at 5 p.m. at the Idaho Law and Justice Learning Center on February 8.

Justice Kourlis served in the Colorado judiciary for nearly two decades as a trial judge and then as a justice of the Supreme Court. She established the Institute for the Advancement of the American Legal System in 2006 and serves as its executive director. The Institute is a national, independent

research center dedicated to facilitating continuous improvement and advancing excellence in the American legal system.

The Denton Darrington Annual Lecture on Law and Government is sponsored by the University of Idaho College of Law, the Idaho Supreme Court and the Idaho State Bar and Law Foundation. The lecture series is designed to address a wide range of topics related to the improved administration of justice and features national state, and regional speakers.

### Lawyer referral service registration goes online in 2016

In a departure from previous years, the Annual ISB Licensing Packet did not include a registration form to join the Lawyer Referral Service (LRS). Instead, LRS registration will be online and available in early 2016. The start of that registration period will be announced in the E-Bulletin and [www.isb.idaho.gov](http://www.isb.idaho.gov).

The ISB operates a referral service to match people looking for legal services with an attorney in their location, and who practices the appropriate area of law.

### LETTER TO THE EDITOR

#### No need to learn Shari'a law

Dear Editor,

Mr. Angelo Rosa's article in the November/December *Advocate* arguing for “the evolution of Idaho's body of business law and legal community for the application of Shari'a” law gave me a headache. The concept that American attorneys should give special deference to the religious dictates of a seventh century moral code

is not only alien to the long and honored tradition of anglo-saxon jurisprudence but violates the basic concept of stare decisis, not to mention the Constitution.

It should have been noted by Mr. Rosa that under the dictates of Shari'a women are not allowed to engage in contract negotiations, much less, be attorneys at all. I suppose this fact might reduce the need

to consider Shari'a law by 50% of U.S. attorneys (and population) but unfortunately it is just another reason why this antiquated fantasy of a proposed legal “system” should be ignored by Idaho attorneys and its courts regardless of the risk of political incorrectness.

*Jim C. Harris*  
Law Office of Jim C. Harris  
Boise



## Executive Director's Report

Resolution	For	Against	Percent For
<b>15-01 Idaho Bar Commission Rule 217 (k). Reevaluation</b> <i>Proposes to eliminate the bar exam reevaluation process and change the passing score.</i>	545	196	74%
<b>15-02 Idaho Bar Commission Rule 228. Emeritus Attorney License</b> <i>Proposes to amend the rules for obtaining an emeritus license.</i>	634	104	86%
<b>15-03 Idaho Bar Commission Rule 302. Licensing Requirements and 304 Annual License</b> <i>Fee Proposes to change the age requirement for senior status from 72 to 65.</i>	687	60	92%
<b>15-04 Idaho Bar Commission Rule 402</b> <i>Changes the eligibility requirements for MCLE exemptions, eliminating the ability for attorneys over the age of 72 to request exemption, but maintaining the ability for attorneys to request exemptions due to hardship or disability.</i>	611	146	81%
<b>15-05 Idaho Bar Commission Rule 521. Access to Information</b> <i>Proposes to limit the scope of disciplinary confidentiality in Rule 521.</i>	613	128	83%
<b>15-06 Idaho Bar Commission Rules Section IV Mandatory Continuing Legal Education</b> <i>Proposes several clarifications to the MCLE rules.</i>	693	45	94%

## Results From the 2015 Resolution Process

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

**T**he bar membership considered six resolutions during the 2015 resolution process. All six resolutions recommended changes to the Idaho Bar Commission Rules. The membership voted in favor of all of the resolutions. The proposed rule changes will be submitted to the Idaho Supreme Court for its consideration. The vote totals are listed in the chart above.



Thanks to those attorneys who attended the resolution meetings and to all who took the time to vote. Your participation and support is appreciated.



Photo by Dan Black

Members of the Fourth District Bar Association listen to a presentation about this year's Resolutions at the Roadshow meeting in late November.

# Welcome From the Health Law Section

Thomas J. Mortell

**T**he Health Law Section is pleased to sponsor this edition of *The Advocate*. As we begin a new year and set our sights on 2016, the members of our Section appreciate the opportunity to share with you some insights from our practice area. It is our goal to provide *The Advocate's* readers with a strong mix of articles that provide practical insight into health law issues and the application of those issues in Idaho.

Health law attorneys across the nation have seen rapid change in our health care system in recent years. The Affordable Care Act, and what seems to be daily federal regulations promulgated thereunder, has provided a constant learning curve of new material. From establishing a health insurance exchange to revamping Idaho's Medicaid program, our state and its regulators have seen dramatic change. As a result our Section members have certainly seen their practice area grow and evolve.

We take this opportunity to share some of that change with our colleagues. Our articles in this edition include the following:

Kim Stanger describes many of the federal and state laws which affect how a health care transaction is structured. From the Stark law and the Anti-Kickback Statute on the fed-

eral level to state common law principles, this article covers the wide gamut of potential pitfalls that can be associated with business transactions between health care providers.

Marvin M. Smith and Austin Strobel describe recent changes to the definition of "community" in medical malpractice actions in Idaho. In defining "community" as an area "ordinarily served" by the health care provider, recent Idaho Supreme case law has caused unpredictability and inefficiency in many cases. This article proposes a legislative solution to this issue of statutory construction.

Laura Perkovic of the Attorney General's Medicaid Fraud Control Unit and Wendy Olson, Kevin Maloney and Bill Humphries of the Office of the U.S. Attorney co-author an article about health care fraud in Idaho. The available enforcement tools, including both civil and criminal penalties, are well described in this jointly-written article.

Patrick Miller addresses the implications for medical professionals brought about by Idaho's adoption of a new comprehensive Uniform Business Organizations Code. Mr. Miller also addresses the related issue of the corporate practice of medicine.

Brent Wilson provides practical lessons for all attorneys in comply-

ing with the Health Insurance Portability and Accountability Act, otherwise known as HIPAA. As described in this article, for those attorneys and law firms who act as "business associates" for clients who are "Covered Entities" under HIPAA, the need for a business associate agreement is especially important.

Finally, my article on Idaho's recently-enacted Telehealth Access Act provides background on the use of telemedicine in Idaho and summarizes how it is currently regulated. Also included are some practical issues for counsel to consider when helping health care providers use telemedicine for purposes of patient care.

For those who provide legal services in the health care area, please consider membership in the Health Law Section. We meet every other month on the first Thursday for lunch, with participants often joining by telephone from around the state. We earn CLE credit for most of our meetings based on presentations by speakers who are often distinguished practitioners or regulators in many health care-related areas. We welcome any interested members of the Bar to join with us for these CLE opportunities.

On behalf of the Health Law Section, we hope you find these articles interesting and useful in your practice.

## Health Law Section

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# Traps for the Unwary: Federal and State Laws Affecting Healthcare Business Transactions

Kim C. Stanger

**A**nytime you structure a transaction involving healthcare providers, you must beware federal and state statutes unique to the healthcare industry, including laws prohibiting illegal kickbacks or referrals. Those laws may affect any transactions between health care providers, including employment or service contracts, group compensation structures, joint ventures, leases for space or equipment, professional courtesies, free or discounted items or services, and virtually any other exchange of remuneration. Violations may result in significant administrative, civil and criminal penalties. The Affordable Care Act (ACA) dramatically increased exposure for violations by expanding the statutory prohibitions, increasing penalties, and imposing an affirmative obligation to repay amounts received in violation of the laws.<sup>1</sup> The following are some of the more relevant traps for the unwary.

## Anti-kickback statute (AKS)

The federal AKS prohibits anyone from knowingly and willfully soliciting, offering, receiving, or paying any form of remuneration to induce referrals for any items or services for which payment may be made by any federal health care program unless the transaction is structured to fit within a regulatory exception.<sup>2</sup> An AKS violation is a felony punishable by a \$25,000 fine and up to five years in prison.<sup>3</sup> Thanks to the ACA, violation of the AKS is also an automatic violation of the federal False Claims Act,<sup>4</sup> which exposes defendants to additional civil penal-

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The Affordable Care Act (ACA) dramatically increased exposure for violations by expanding the statutory prohibitions, increasing penalties, and imposing an affirmative obligation to repay amounts received in violation of the laws.<sup>1</sup>

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ties of \$5,500 to \$11,000 per claim, treble damages, and private *qui tam* lawsuits.<sup>5</sup> The AKS is very broad: it applies to any form of remuneration, including kickbacks, items or services for which fair market value is not paid, business opportunities, perks, or anything else of value offered in exchange for referrals. The statute applies if “one purpose” of the transaction is to generate improper referrals.<sup>6</sup> It applies to any persons who make or solicit referrals, including health care providers, managers, program beneficiaries, vendors, and even attorneys.<sup>7</sup>

Despite its breadth, the AKS does have limitations. First, it only applies to referrals for items or services payable by government health care programs such as Medicare or Medicaid.<sup>8</sup> If the parties to the arrangement do not participate in government programs or are not in a position to make referrals relating to government programs, then the statute should not apply. Second, the statute does not apply if the transaction fits within certain regulatory exceptions.<sup>9</sup> For example, exceptions apply to employment or personal services contracts, space or equipment leases, investment interests, and cer-

tain other relationships, so long as those transactions satisfy specified regulatory requirements.<sup>10</sup> Third, interested persons who are concerned about a transaction may obtain an Advisory Opinion from the Office of Inspector General (OIG) concerning the proposed transaction. Past Advisory Opinions are published on the OIG’s website, [www.hhh.oig.hhs.gov/fraud](http://www.hhh.oig.hhs.gov/fraud). Although the Advisory Opinions are binding only on the parties to the specific opinion, they do provide guidance for others seeking to structure a similar transaction.

## Ethics in patient referrals act (Stark)

The federal Stark law prohibits physicians from referring patients for certain designated health services to entities with which the physician (or a member of the physician’s family) has a financial relationship unless the transaction fits within a regulatory safe harbor.<sup>11</sup> Stark also prohibits the entity that receives an improper referral from billing for the items or services rendered per the improper referral.<sup>12</sup> Unlike the AKS, Stark is a civil statute: violations may result in civil fines ranging up to \$15,000 per violation and up to

\$100,000 per scheme in addition to repayment of amounts received for services rendered per improper referrals.<sup>13</sup> Repayments can easily run into thousands or millions of dollars. Stark is a strict liability statute; it does not require intent, and there is no “good faith” compliance.<sup>14</sup>

Unlike the AKS, Stark only applies to financial relationships with physicians, *i.e.*, M.D.s, D.O.s, podiatrists, dentists, chiropractors, and optometrists,<sup>15</sup> or with members of such physicians’ families; it does not apply to transactions with other health care providers. Also, unlike the AKS, Stark only applies to referrals for certain designated health services (DHS), payable by Medicare and perhaps Medicaid;<sup>16</sup> it does not apply to referrals for other items or services. If triggered, Stark applies to any type of direct or indirect financial relationship between physicians or their family members and a potential provider of DHS, including any ownership, investment, or compensation relationship.<sup>17</sup> Thus, the statute applies to everything from ownership or investment interests to compensation among group members to contracts, leases, joint ventures, waivers, discounts, professional courtesies, medical staff benefits, or any other transaction in which anything of value is shared between the parties. If Stark applies to a financial relationship, then the parties must either structure the arrangement to fit squarely within one of the regulatory safe harbors<sup>18</sup> or not refer patients to each other for DHS covered by the statute and regulations.

### **Civil Monetary Penalties law (CMP)**

The federal CMP prohibits certain transactions that have the effect of increasing utilization or costs to federally funded health care pro-

grams or improperly minimizing services to beneficiaries.<sup>19</sup> For example, the CMP prohibits offering or providing inducements to a Medicare or Medicaid beneficiary that are likely to influence the beneficiary to order or receive items or services payable by federal health care programs, including free or discounted items or services, waivers of copays or deductibles, etc.<sup>20</sup> This law may affect health care provider marketing programs as well as contracts or payment terms with program beneficiaries.<sup>21</sup> The CMP also prohibits

Idaho Code § 41-348 prohibits paying or accepting payment from others to refer claimants to healthcare providers, or to provide services to a person knowing that the person has been referred in exchange for payment of a fee.



hospitals from making payments to physicians to induce the physicians to reduce or limit services covered by Medicare.<sup>22</sup> Thus, the CMP usually prohibits so-called “gainsharing” programs in which hospitals split cost-savings with physicians.<sup>23</sup> Finally, the CMP prohibits submitting claims for federal health care programs based on items or services provided by persons excluded from health care programs.<sup>24</sup> As a practical matter, the statute prohibits health care providers from employing or contracting with persons or entities who have

been excluded from participating in federal health care programs.<sup>25</sup> Violations of the CMP may result in administrative penalties ranging from \$2,000 to \$50,000 per violation.<sup>26</sup>

### **State anti-kickback, self-referral, or fee splitting statutes**

Many states have their own versions of anti-kickback or self-referral laws that must also be considered. State versions vary widely; they may or may not parallel federal versions. For example, Idaho Code § 41-348 prohibits paying or accepting payment from others to refer claimants to healthcare providers, or to provide services to a person knowing that the person has been referred in exchange for payment of a fee. Violations may result in fines of \$5,000.<sup>27</sup> In addition to anti-kickback statutes, most states also prohibit fee splitting or giving rebates for referrals, which might also apply to some transactions between referral sources. Idaho Code § 54-1814(8) prohibits physicians and certain other providers from dividing fees or gifts received for professional services with any person, institution, or corporation in exchange for a referral. Violations may result in adverse administrative penalties under Idaho’s Medical Practices Act.

### **HIPAA<sup>28</sup> privacy and security rules**

The HIPAA privacy rules prohibit most health care providers, health plans (including employee group health plans that are administered by third parties or have more than 50 participants), and their “business associates”<sup>29</sup> from using, disclosing, or selling protected health information (PHI) without the patient’s authorization unless certain exceptions apply.<sup>30</sup> The HIPAA security rule

requires covered entities and business associates to implement certain administrative, technical and physical safeguards to protect electronic PHI.<sup>31</sup> HIPAA violations may result in fines of \$100 to \$50,000 per violation; violations involving “willful neglect” are subject to a mandatory fine of \$10,000 to \$50,000 per violation.<sup>32</sup> To make matters worse, covered entities and business associates must voluntarily self-report breaches of unsecured PHI to affected individuals and the government, thereby increasing the potential for HIPAA sanctions.<sup>33</sup>

If you are handling a transaction involving covered entities and/or their business associates (e.g., services contracts, sales contracts, practice acquisitions, etc.), chances are you will need to consider and address HIPAA requirements in your transaction. Among other things, covered entities must execute business associate agreements (BAAs) with their business associates that require the business associate to comply with HIPAA conditions; the BAAs themselves must contain required terms.<sup>34</sup> Similarly, business associates must execute BAAs with their subcontractors.<sup>35</sup> Accordingly, BAAs have become ubiquitous in the healthcare industry. They even apply to lawyers who receive PHI in the course of providing services for clients. Failure to properly structure BAAs or other PHI-related transactions expose your clients — and you — to unanticipated HIPAA liability.

### **Corporate Practice of Medicine Doctrine (CPOM)**

Some states impose the so-called “corporate practice of medicine” doctrine by statute or case law, i.e., only certain licensed health care professionals (e.g., physicians) may

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Although the rationale of *Worlton* seems to have been undermined by the changing healthcare industry and intervening legislation,<sup>37</sup> the Idaho Board of Medicine has periodically used *Worlton* as a basis for threatening physicians who are employed by certain corporations.

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practice medicine; corporations may not employ physicians to practice medicine due to the risk that such an arrangement would improperly influence medical judgment. The Idaho Supreme Court recognized the CPOM in *Worlton v. Davis*, a case from 1952.<sup>36</sup> Although the rationale of *Worlton* seems to have been undermined by the changing healthcare industry and intervening legislation,<sup>37</sup> the Idaho Board of Medicine has periodically used *Worlton* as a basis for threatening physicians who are employed by certain corporations. Fortunately, however, there are statutory exceptions for the CPOM, e.g., professional corporations or employment by hospitals or managed care organizations. In Idaho, other entities may circumvent the CPOM by structuring transactions as independent contractor arrangements rather than employment contracts. In those states that apply or enforce the CPOM, transactions may need to be structured around the CPOM, including services contracts with physicians or other healthcare providers.

### **Medicare reimbursement rules**

The Centers for Medicare & Medicaid Services (CMS) has promulgated volumes of rules and manuals governing reimbursement for services provided under federal health care

programs. The rules govern such items as when a health care provider may bill for services provided by another entity, supervision required for such services, and the location in which such services may be performed to be reimbursable. In addition, the amount of government reimbursement may differ depending on how the transaction is structured, e.g., whether it is provided through an arrangement with a hospital or by a separate clinic or physician practice. The rules concerning reimbursement and reassignment should be considered in structuring health care transactions if the entities intend to bill government programs for services or maximize their reimbursement under such programs.

### **Conclusion**

The foregoing is only a brief summary of some of the more significant laws and regulations that may affect common health care transactions. As in all cases, the devil is in the details (as well as the Code of Federal Regulations and CMS Medicare Manuals). Attorneys who represent healthcare providers should review the relevant laws and regulations whenever structuring a health care transaction, especially if that transaction involves potential referral sources or implicates federal health care programs.

## Endnotes

1. 42 U.S.C. § 1320a-7k.
2. 42 U.S.C. § 1320a-7b(b).
3. 42 U.S.C. § 1320a-7b(b)(2)(B).
4. Patient Protection and Affordable Care Act Pub L. No. 111-148 § 6402(f)(1), 124 Stat. 119 (2010); see 31 U.S.C. § 3729 *et seq.*
5. See, e.g., 42 U.S.C. § 1320a-7a(5); 42 U.S.C. § 1320a-7(b)(7); 31.
6. *United States v. Kats*, 871 F.2d 105 (9th Cir. 1989); *United States v. Greber*, 760 F.2d 68 (3d Cir.), *cert. denied* 474 U.S. 988 (1985).
7. *United States v. Anderson*, Case No. 98-20030-01/07 (D. Kan. 1998).
8. See 42 U.S.C. § 1320a-7b(b)(2)(B).
9. 42 U.S.C. § 1320a-7b(3); 42 C.F.R. § 1001.952.
10. 42 U.S.C. § 1320a-7b(3); 42 C.F.R. § 1001.952.
11. 42 U.S.C. § 1395nn; 42 C.F.R. § 411.351 *et seq.*
12. 42 C.F.R. § 411.353(b).
13. 42 U.S.C. § 1395nn.
14. See 42 C.F.R. § 411.353(a)-(b).
15. *Id.* at § 411.351.
16. The “designated health services” covered by Stark include clinical laboratory services; physical therapy, occupational therapy and speech-language pathology services; radiology and other imaging services; radiation therapy; durable medical equipment and supplies; prosthetics, orthotics, prosthetic devices and supplies; home health services; outpatient prescription drugs; inpatient and outpatient hospital services; and parenteral and enteral nutrients. *Id.* at § 411.351.
17. *Id.* at § 411.351.
18. *Id.* at § 411.355 to 411.357.
19. 42 U.S.C. § 1320a-7a.
20. 42 U.S.C. § 1320a-7a(a)(5).
21. See OIG Special Advisory Bulletin, “Offering Gifts and Other Inducements to Beneficiaries” (August 2002); OIG Special Fraud Alert, “Routine Waiver of Part B Co-Payments/Deductibles” (May 1991).
22. 42 U.S.C. § 1320a-7a(b).
23. See, e.g., OIG Special Fraud Alert, “Gainsharing Arrangements and CMPs for Hospital Payments to Physicians to Reduce or Limit Services to Beneficiaries” (July 1999).
24. 42 U.S.C. § 1320a-7a(a)(1)(C) and (2).
25. OIG Special Advisory Bulletin, “The Effect of Exclusion from Participation in Federal Health Care Programs (Sept. 1999).
26. See *id.* at § 1320a-7a(a) and (b).
27. I.C. § 41-327(1).
28. Health Insurance Portability and Accountability Act of 1996.
29. “Business associates” are generally those entities who create, maintain, use, access or transmit protected health information on behalf of a covered entity. 45 C.F.R. 160.103.
30. 45 C.F.R. 164.500 *et seq.*
31. 45 C.F.R. 164.300 *et seq.*
32. 45 C.F.R. 160.400 *et seq.*
33. 45 C.F.R. 164.400 *et seq.*
34. 45 C.F.R. 164.502(e) and 164.504(e).
35. *Id.*
36. 73 Idaho 217, 221, 249 P.2d 810, 814 (1952).
37. See M. Gustavson and N. Taylor, “At Death’s Door—Idaho’s Corporate Practice of Medicine Doctrine”, 47 Idaho L. Rev. 479 (2011).

As in all cases, the devil is in the details (as well as the Code of Federal Regulations and CMS Medicare Manuals).



Kim C. Stanger is the chair of Holland & Hart's health care practice group. He represents health care clients in regulatory, transactional and administrative matters, and is a frequent speaker and writer on health law-related topics. Mr. Stanger's additional articles concerning health-law related issues may be accessed at <https://www.hollandhart.com/healthcare>.



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# Idaho's Telehealth Access Act

Thomas J. Mortell

**M**any in the health care community believe that the increased use of telemedicine services is an important component of health care reform. Building upon that concept, the 2015 Legislature passed, and Governor Otter signed, the Idaho Telehealth Access Act (Act) which clarified how telemedicine services would be used and, significantly, regulated in Idaho.<sup>1</sup> Briefly defined, telemedicine is the use of technology to assist a health care provider in treating the patient.

## Background

The Patient Protection and Affordable Care Act (ACA) has had a major impact on Idaho's health care providers and health insurance industries. Driven by years of rising health care costs and the corresponding increases in insurance premiums, the ACA has certainly caused change for Idaho businesses. Those businesses would argue that the hoped-for relief from ever-increasing insurance premiums is long overdue.

To accomplish the goal of reducing health care costs, a primary objective of the ACA is to significantly decrease the number of individuals without health insurance. Across the nation, that process is underway. Most of Idaho's businesses are now required to provide health insurance for their full-time employees or face significant penalties. Many individuals have enrolled for insurance on Idaho's health insurance exchange established under the ACA and Idaho law.

The natural consequence of reducing the number of uninsured in Idaho is that more Idahoans will

Telemedicine services are typically available after normal business hours and to patients located even in the most remote locations.

seek the services of primary care physicians and other health care providers. That increased demand for health care services will exacerbate the problems created by Idaho's well-documented shortage of physicians.<sup>2</sup> Physician shortages typically cause patients to endure longer wait times for appointments, increased travel distances to get care, shorter physician visit times, more care provided by non-physicians, and higher prices. In some remote areas of Idaho, patients have very limited access to physician and other health care services.

## Telemedicine services

One option for alleviating physician shortage issues is the use of telemedicine or telehealth services. The Centers for Medicare and Medicaid Services (CMS) defines telehealth as the "use of telecommunications and information technology to provide access to health assessment, diagnosis, intervention, consultation, supervision and information across distance."<sup>3</sup> In other words, the physician and the patient are not in the same location and communicate through some means other than a face-to-face, in-person encounter. In order to be eligible for reimburse-

ment under Medicare, the services must be provided by "audio and video equipment permitting two-way, real-time interactive communication between the patient and distant site physician or practitioner."<sup>4</sup> Some of the leading telemedicine companies use a business model where the telemedicine service is a part of the patient's benefits package provided by the patient's employer. Employers sometimes provide access to telemedicine services as a way to decrease health insurance costs.

Telemedicine services are typically available after normal business hours and to patients located even in the most remote locations. In theory, telemedicine allows Idaho-licensed physicians, who may live in other states, to provide services to patients in Idaho. Advocates for telemedicine point out that telemedicine services can be provided at a much lower cost than traditional medical services. Those advocates also note increased employee productivity based on the decreased time employees spend waiting in a physician's waiting room.<sup>3</sup> On the other hand, critics of telemedicine point to the fact that an in-person examination is an important component to understanding the patient's problems and diagnosing the patient's condition.

## Telemedicine in Idaho

The use of telemedicine services in Idaho has not always been easy. Recently, there has been extensive debate, in Idaho and nationwide, about the appropriate standards for the use of telemedicine. Last year, it was widely-reported in the media that the Idaho State Board of Medicine (Board) sanctioned an Idaho-licensed physician for prescribing medication based on a telephone consultation with the patient without first conducting a face-to-face evaluation of the patient.<sup>5</sup> In part, the Board relied on an Idaho statute that prohibits a physician from prescribing medication without first establishing a physician-patient relationship “which includes a documented patient evaluation adequate to establish diagnoses and identify underlying conditions and/or contraindications to the treatment.”<sup>6</sup> The Board also stated that the sanctioned physician failed to meet the applicable standard of care because the physician should have conducted an “objective examination” of the patient’s “ears, nasal mucosa, throat, lymph nodes, listening to her heart and lungs as well as taking her temperature, respiratory rate, pulse and blood pressure.”<sup>7</sup> An objective reading of the Board’s position in this case clearly indicated reluctance by the Board to accept anything short of an in-person patient examination. Naturally, the Board’s position created significant anxiety among providers of telemedicine services.

The Act addressed many of these and other issues.<sup>8</sup> The Act was the result of legislation proposed by the Idaho Telehealth Council which included a broad stakeholder base, representing physicians, hospitals, health insurance companies, industry associations, as well as represen-

tatives from governmental agencies charged with regulating health care and health insurance in Idaho.<sup>9</sup>

In passing the Act, the Legislature concluded that telehealth services “enhance access to health care,” make health care services “more cost-effective” and “distribute limited health care provider resources more efficiently.”<sup>10</sup> The Legislature also recognized that patient outcomes could be improved through telehealth services because patients could be treated and diagnosed sooner, leading to less costly treatments.<sup>11</sup> In addition,

The Legislature found it important that telehealth services result in improved patient outcomes “by expanding health care access for the people of Idaho.”<sup>13</sup>

the Legislature found that telehealth services address an “unmet need for health care by persons who have limited access to such care due to provider shortages or geographic barriers.”<sup>12</sup> Finally, the Legislature found it important that telehealth services result in improved patient outcomes “by expanding health care access for the people of Idaho.”<sup>13</sup>

The Act provided much needed clarity to health care providers and the governmental agencies charged with regulating health care and health insurance in Idaho. Specifical-

ly, the Act clarified the requirements a health care provider must meet to evaluate and treat a patient through telehealth services. Under the Act, “telehealth services” are health care services provided through the means of electronic communications or information technology.<sup>14</sup> In order to provide guidance to Idaho’s health care providers and regulators, the Act requires that, with certain exceptions,

[i]f a provider offering telehealth services in his or her practice does not have an established provider-patient relationship with a person seeking such services, the provider shall take appropriate steps to establish a provider-patient relationship by use of two-way audio and visual interaction; provided however, that the applicable Idaho community standard of care must be satisfied.<sup>15</sup>

In other words, the initial interaction with the provider must be through something more than a telephone call — the consultation must include a visual component. In addition, the evaluation of the patient through telehealth services requires that the provider obtain and document the patient’s clinical history, current symptoms, underlying conditions, as well as documentation of the provider’s diagnosis and treatment recommendations.<sup>16</sup> Further, the Act allows the telehealth provider to prescribe medications based on an evaluation performed through telehealth services.<sup>17</sup>

The Act also includes important protections for patients. As is required in other health care settings, the Act reaffirms the obligation of the provider to obtain the patient’s informed consent and to maintain appropriate medical records.<sup>18</sup> Telehealth providers must be appropriately licensed and perform services

within the scope of those licenses.<sup>19</sup> The telehealth provider must be available for follow up care or in a position to provide information to the patient on where follow up care may be obtained.<sup>20</sup> The telehealth provider must have access to available medical resources to provide referrals to other providers, if necessary.<sup>21</sup> Finally, and importantly, all health care services provided through telehealth services must meet the community standard of care for those services, meaning that the telehealth provider must provide the same quality of care as the patient would receive in an in-person setting.<sup>22</sup>

Idaho patients potentially benefit from the Act in three ways. First, telehealth services can often be provided at a lower cost than traditional medical services. Second, by expanding access to primary care services, more Idaho residents will be in a position to see a physician or other provider sooner rather than later. Treating disease before it becomes a crisis lowers the overall cost of that patient's health care. Third, as is available in other markets, telehealth companies may make their services available in Idaho as a component of the employee benefit plans offered by Idaho's employers.

### Practical considerations

In advising health care providers on the use of telehealth services, Idaho attorneys should carefully consider the requirements of the Act. A potential pitfall is that it is not entirely clear that the Idaho State Board of Medicine will view the provision of all telehealth services, even if provided through the means permitted under the Act, as meeting the applicable standard of care. The Act has left room for interpretation

by the Board of Medicine regarding what does or does not meet the applicable standard of care. Further, the Act has not clarified which community's standard of care applies; that of the location of the provider-physician or that of the location of the patient. The Act contemplates rulemaking by the Board of Medicine and the expectation is that rules will be forthcoming soon.<sup>23</sup> And, although adopted by the Board of Medicine prior to the Act becoming law, counsel should also consider the guidelines of the Board which describe the Board's approach to regulating telemedicine services.<sup>24</sup>

### Endnotes

1. Idaho Code § 54-5701 *et seq.*
2. In its workforce overview report, the Idaho Department of Labor pointed out that "Idaho ranked at the bottom of the 50 states and the District of Columbia for the number of primary care physicians per capita." *IDAHO DEP'T OF LABOR, WORKFORCE OVERVIEW, IDAHO PRIMARY CARE PHYSICIANS 5* (Winter 2012-2013), available at [https://labor.idaho.gov/publications/physicians\\_whitepaper.pdf](https://labor.idaho.gov/publications/physicians_whitepaper.pdf).
3. *Telemedicine*, Medicaid.gov, [www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Delivery-Systems/Telemedicine.html](http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Delivery-Systems/Telemedicine.html).
4. 42 C.F.R § 410.78(3).
5. *In the Matter of Ann De Jong, M.D.*, No. 2012-BOM-582 (Idaho Bd. of Med. Jan. 6, 2014), available at [http://isb.idaho.gov/pdf/temp/150402\\_hear\\_materials2.pdf](http://isb.idaho.gov/pdf/temp/150402_hear_materials2.pdf).
6. Idaho Code § 54-1733.
7. See *supra* note 4.
8. Idaho Code § 54-5701 *et seq.*
9. The Idaho Telehealth Council was established by the Idaho Legislature in 2014. See H.R. Con. Res. 46, 62d Leg., 2nd Reg. Sess. (Idaho 2014) ("HCR 46"), available at <http://www.legislature.idaho.gov/legislation/2014/HCR046.pdf>. HCR 46 required that the Idaho Department of Health and Welfare convene a Council to establish "a comprehensive set of standards, policies, rules and procedures for the use of telehealth and telemedicine in Idaho."
10. Idaho Code § 54-5702(1).
11. § 54-5702(2).
12. § 54-5702(3).
13. § 54-5702(5).
14. § 54-5703(6).
15. § 54-5705(1) (emphasis added).
16. § 54-5706.
17. § 54-5707.
18. § 54-5708.
19. § 54-5704.
20. § 54-5709.
21. § 54-5710.
22. § 54-5706.
23. § 54-5713.
24. See *Idaho Board of Medicine, Guidelines for Appropriate Regulation of Telemedicine*, available at <http://bom.idaho.gov/BOMPortal/BOM/PDF%20FORMS/Idaho%20Board%20of%20Medicine%20Telemedicine%20Policy.pdf>.

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# Forming Professional Entities for Medical Professionals Under the Idaho Uniform Business Organizations Code

Patrick Miller

**T**he 2015 Idaho Legislature adopted a new comprehensive Uniform Business Organizations Code (the “New Code”).<sup>1</sup> The New Code was an entire re-codification of the existing chapters of the Idaho Code addressing business organizations, including general partnerships,<sup>2</sup> limited partnerships,<sup>3</sup> limited liability companies,<sup>4</sup> general business corporations,<sup>5</sup> and nonprofit corporations.<sup>6</sup> Additionally, the New Code added a new Chapter 21 to Title 30 containing definitions, filing requirements, naming conventions and other administrative provisions common to all business entities. The principal purpose of the New Code was to harmonize Idaho’s unincorporated and incorporated entity statutes so they can be integrated in a single code of entity laws.<sup>7</sup> The legislation purported to make only “technical revisions necessary to create a code of statutes that is simpler to use.”<sup>8</sup>

As a part of the harmonization effort, the New Code provides for a set of common rules for forming “professional entities” which apply across nearly all organization types.<sup>9</sup> This article describes how the reorganization of the business entities into a single title of the Idaho Code and creating a common set of rules for all professional entities affects the formation of professional entities in Idaho. This article begins with an explanation of why professionals, and specifically medical professionals, are required to organize as professional entities rather than as general business entities. This article also provides insight into the types of medical professionals that can join in the same entity and whether the New Code intentionally or un-

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This article describes how the reorganization of the business entities into a single title of the Idaho Code and creating a common set of rules for all professional entities affects the formation of professional entities in Idaho.

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intentionally changes existing Idaho corporate law relative to professional organizations. Finally, the New Code may have some unintended consequences that are discussed below.

## **Requirement for medical professionals to organize as professional entities**

The prohibition against physicians or other professionals forming a general business corporation (or other professional organization) derives principally in the codes dealing with particular professions and within the common law.<sup>10</sup> At common law, the principle is generally known as the prohibition against the corporate practice of medicine. The common law prohibition against the corporate practice of medicine is based on the idea that only physicians can be licensed to practice medicine. Corporations and other business entities cannot. Many states have a specific statutory prohibition against the corporate practice of medicine.<sup>11</sup> While Idaho does not have a specific statutory prohibition, the prohibition likely exists at common law and is inferentially recognized by Idaho statutes. The most specific statement of the common law prohibition is

found in the Idaho Supreme Court’s decision in *Worlton v. Davis*.<sup>12</sup> The *Worlton* case involved a noncompetition covenant signed by a physician with a general partnership that had as one of its members a business manager not licensed to practice medicine. The Court stated:

It is well-established that no unlicensed person<sup>13</sup> or entity may engage in the practice of the medical profession through licensed employees; nor may a licensed physician practice as an employee of an unlicensed person or entity. Such practices are contrary to public policy.<sup>14</sup>

The Supreme Court found that the noncompete contract between the departing physician and the general partnership that could not be licensed to practice medicine was, therefore, contrary to public policy and could not be enforced.

The prohibition against the corporate practice of medicine also finds its roots in the principle that physicians (like other professionals) owe a direct professional duty (and corresponding liability) to that physician’s patients. The physician cannot shield himself or herself from personal liability by organizing as a business entity. More importantly,

the physician cannot enter a relationship in which the physician's duty of loyalty to the patient is compromised by a duty of loyalty to the physician's partnerships, shareholders or employer.<sup>15</sup> A physician's direct and personal obligations to a patient are not limited by, but certainly include those obligations listed in Idaho Code § 54-1814.<sup>16</sup>

In recognition that physicians and other professionals could not (either by their ethical codes or by common law) adopt the entity form, states across the nation adopted "professional codes" which allow professionals to incorporate<sup>17</sup> and enjoy protections of the corporate forum so long as the physician would remain individually responsible for that professional's own professional negligence and maintain the direct duty to the patient. In 1963, the Idaho legislature enacted an entire chapter of the Idaho Code specially providing for Professional Service Corporations.<sup>18</sup>

The professional corporate code was a standalone chapter that allowed individuals or groups of individuals duly licensed or otherwise legally authorized to render the same professional service to be organized as a corporation and become a shareholder in such corporation.<sup>19</sup> The express language of the Professional Service Code did not preclude professionals from organizing as a corporation, but rather allowed for incorporation. The absence of an express prohibition was likely the result that the common law prohibition was well understood.

### **How does the Idaho uniform business organizations code affect professional entities?**

The New Code was not intended to change Idaho entity law but rather was intended to provide harmony and consistency amongst the various entity codes.<sup>20</sup> The New Code likely

achieves this goal by becoming directly applicable to all forms of business entities. At the same time, the New Code does create a few ambiguities concerning who can join together in professional entities. The rest of this article is devoted to these topics.

### **The new code applies to all entity types**

Prior to the adoption of the New Code, the requirements for professional entities were described in only two places in the Idaho Code:

The New Code was not intended to change Idaho entity law but rather was intended to provide harmony and consistency amongst the various entity codes.<sup>20</sup>



(1) in a separate chapter addressing only professional corporations<sup>21</sup> and (2) built into the Limited Liability Company Act. The New Code more clearly establishes that all business entities that are formed to provide the services of one or more of the specifically defined professions, are "professional entities." Once meeting the definition of a professional entity, the same requirements for professional entities expressly apply.

This uniformity is principally accomplished through Title 30, Chapter 21, Idaho Code which provides

common definitions and rules applicable to all professional entities. It defines a "Professional entity" as an entity formed for the sole and specific purpose of rendering professional services, allied professional services, and services ancillary to the professional services.<sup>22</sup> By definition, therefore, any entity<sup>23</sup> that is organized to provide one of the identified professional services is a professional entity and is subject to the rules described in Title 30, Chapter 21, part 9.

### **The new code addresses who can join in ownership of a professional entity**

One of the most difficult questions under both versions of the law is who can be an owner of a professional entity. The prior law provided that the listed professions and "allied professions"<sup>24</sup> could join in ownership of the professional corporation or professional limited liability company. The New Code is less clear. Under the New Code, a professional entity by definition may have as its interest holders only natural persons who are licensed to render one or more of the same professional services as the professional entity. The New Code also provides that a professional entity may not offer an interest or accept as interest holders anyone "other than an individual who is duly licensed or otherwise legally authorized to render the same specific professional services as those for which the entity was formed."<sup>25</sup> The combination of these provisions suggests that only natural persons who practice the same profession can join in ownership of a professional entity.

As noted above, the New Code still provides that a professional entity can perform "allied professional services."<sup>26</sup> The New Code's statement of who can be an owner, however, does not (as did the old Code) list allied professional services

as a permissible owner. Arguably, therefore, a professional entity can be formed to provide both professional services and allied professional services, but the provider of allied services cannot be an owner. This raises a question whether the New Code effected a potential significant change in law.

The most logical answer may be that a professional entity under the New Code may be organized to provide both professional and allied professional services. Once formed to provide a professional service and an allied service, any such professional or allied service can be an owner. In other words, a professional entity can be organized to provide a professional service and an allied professional service, and the allied professional can be an owner if such service meets the definition of an allied service and the profession is one of the other specifically listed professions.

In addition, the prior law was quite clear that allied professionals could be owners. In light of the fact that the New Code was not intended to change the rules applicable to business entities, we can take some assurance that allied professional services can be owners, but the type of professional who can be an owner is still limited by the exclusive list stated in Idaho Code § 30-21-901(b).

### **Voting power, officers and directors**

Under the old Professional Service Corporations Code, no person other than the specifically listed professionals could be an owner of a professional corporation and no person who was not a shareholder could serve as a director or general officer of a professional corporation. The only exception was when a professional corporation had only one shareholder in which case a non-shareholder could serve as the corporate secretary.<sup>27</sup> In addition,

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Under the captive PC model, owners of a professional corporation concede control over the company while still remaining the technical owners of the company.

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the former code provided that no shareholder of a corporation could enter into a voting trust agreement or other type of agreement vesting another person with the authority to exercise the voting power of any or all of his stock.

These provisions combined to provide a strong statement that an owner of a professional entity could not put any restrictions upon his or her duties to his or her patient or client and that the control of the organization had to be left with the professionals who were qualified owners.

The New Code retains the restriction stating that no member of a professional entity shall enter into a voting trust agreement or any other type of agreement vesting another person with the authority to exercise the voting power of his or her interest.<sup>28</sup> The New Code does not, however, appear to address who can be officers or directors of a general business corporation that would otherwise meet the definition of a professional entity. The plain words of the statute no longer appear to require that only shareholders could be directors and only shareholders can be general officers of the corporation.

The fact that the New Code does not contain all of the limitations of the former Code could be material in situations where the non-professional entity desires to stretch the bounds of the prohibition against

the corporate practice of medicine. In states with strong prohibitions against the corporate practice of medicine (such as California) general business organizations have created a model known as the “captive PC.” Under the captive PC model, owners of a professional corporation concede control over the company while still remaining the technical owners of the company. In Idaho, this model has had limited applicability because of the prohibition against voting trust agreements and the requirement that officers and directors be shareholders of the company. There may now be an increased window for creating captive PCs in Idaho under the New Code in light of the fact that officers and directors of a professional corporation no longer have to be shareholders of the company.

### **Application to general partnerships**

A question has arisen in the past whether persons who are not defined as a professional in the former Professional Service Corporations Code (or the corresponding provisions of the former Limited Liability Company Act) could join in ownership of a partnership. The Uniform Partnership Law did not contain a specific restriction on ownership by professionals and non-professionals.<sup>29</sup> Under the New Code, any entity formed for the sole and specific

purpose of rendering professional services, allied professional services, and services ancillary is a professional entity and would be subject to the requirements of the New Code for professional entities. As a consequence of this broad definition of professional entity general partnerships, limited liability partnerships, and other entities not formerly governed by professional entity codes are now defined as professional entities, subject to the New Code.

### Naming requirements

Idaho Code section 30-21-302 addresses naming requirements, and states that business entities that are professional entities may include the word professional in such entities name and the letter “P” at the beginning of entity abbreviation. Because the word “may” is used, it does not appear that a professional entity is required to use the professional designation as provided for in the prior codes for such entities.

### Conclusion

The new Uniform Business Organizations Code provides some uniformity by developing common rules and definitions for all professional entities. Variations in the language of the New Code from the former Professional Service Corporations Code, however, create some ambiguities that could be addressed through future amendments.

As applied to the medical professions, the New Code reinforces the existing prohibition against the corporate practice of medicine by reiterating that the New Code does not supersede the licensing and ethical codes of the individual professions. Instead the New Code retains, and perhaps further limits, the restrictions on who can be owners of professional entities.

### Endnotes

1. See Idaho Code § 30-21-101, *et seq.*
2. Re-codified from Title 53, Chapter 3 to Title 30, Chapter 23, Idaho Code.
3. Re-codified from Title 53, Chapter 2 to Title 30, Chapter 24, Idaho Code.
4. Re-codified from Title 30, Chapter 6 to Title 30, Chapter 25, Idaho Code.
5. Re-codified from Title 30, Chapter 1 to Title 30, Chapter 29, Idaho Code.
6. Re-codified from Title 30, Chapter 3 to Title 30, Chapter 30, Idaho Code.
7. See State of Purpose, RS23192, <https://www.legislature.idaho.gov/legislation/2015/S1025SOP.pdf>
8. *Id.*
9. See Title 30, Chapter 21, Part 9, Idaho Code.
10. See e.g. the Medical Practice Act, Title 54, Chapter 8, Idaho Code.
11. See e.g. Colo. Rev. Statute § 12-36-134(1)(g)(7) (2005) and Colo. Rev. Statute § 12-36-117 (m) (2005).
12. 73 Idaho 217, 249 P.2d 810 (1952).
13. The Medical Practice Act defines a “person” as a natural person. Idaho Code § 54-1803(7).
14. 73 Idaho 217, 249 P.2d at 813.
15. See e.g. *Colo. Med. Ass’n v. Regents of University of Cal.*, 94 Cal. Rptr. 2d 194, 199 (Colo. App. 2000).
16. The fact that entities cannot practice medicine is further supported by Idaho Code § 39-1353a (relating to hospital districts) provides that nothing in the establishment of hospital districts shall be construed to authorize a hospital district to engage in the practice of medicine “which right is reserved exclusively to persons licensed for that purpose..”
17. When professional corporate codes were first adopted, many of the current entity forms did not exist. Professionals could form general partnerships, which of course did not insulate the partners from direct liability.
18. Idaho Session Laws, Ch. 282 (1963).
19. The professional corporate code was subsequently amended to allow “allied professional services” to join in the ownership. “Allied professional service was defined as professional services which are so related in substance that are frequently offered in conjunction with one another as parts of the same service package to the consumer.” This definition carried through to the New Code. Idaho Code § 30-21-901(a).
20. See endnote vii, *supra*.
21. See Title 30, Chapter 13, Idaho Code.
22. Idaho Code § 30-21-102 (39).
23. E.g. corporations, partnerships, LLPs, LLCs, and LLLPs.
24. Please recite the appropriate section
25. Idaho Code § 30-21-901(g). The New Code, as did the old law, specifically limits the professions to which the Code applies to the practices of architecture, chiropractic, dentistry, engineering, landscape architecture, law, medicine, nursing, occupational therapy, optometry, physical therapy, podiatry, professional geology, psychologies, certified or licensed public accountancy, social work, surveying and veterinary medicine and no others.
26. Idaho Code § 30-21-901(a).
27. See Idaho Code § 30-1315 (repealed 7-1-15).
28. Idaho Code § 30-21-901(g).
29. See the discussion of *Worlton v. Davis*, 73 Idaho 217, 249 P.2d 810 (1952).

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# Moving Towards a Workable Definition of 'Community' After *Bybee v. Gorman*

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**F**or nearly 40 years, Idaho, like other sparsely populated states, has adhered to a statutorily created community standard of health care practice for purposes of determining medical negligence in medical malpractice actions.<sup>1</sup> This began in 1976, when the Idaho Legislature, due to: (1) the disparity between urban and rural areas in terms of availability of medical facilities, education programs, and other specialists, (2) policy concerns about rising malpractice insurance premiums, and (3) concerns about attracting quality doctors to the state, codified Idaho Code §§ 6-1012 and 6-1013.<sup>2</sup> In legal academia, Idaho's statutorily created community standard of care as codified in these sections is generally referred to as a variant of the "strict locality rule" - requiring that medical experts familiarize themselves with the community standard of health care practice with strict specificity as to time, place, and specialty of the provider.<sup>3</sup>

Over the last decade, commentators have criticized Idaho Code §§ 6-1012 and 6-1013, with calls for legislative reform ranging from revision within the current framework to wholesale adoption of a uniform, national standard of care in Idaho.<sup>4</sup> While commentators calling for the adoption of a national standard of care make valid points about the standardization of medical education and board certification, they largely ignore the continued disparity between similarly situated Idaho physicians and hospitals in terms of facilities and the availability of cutting-edge medical equipment.<sup>5</sup> Put another way, even assuming a similar level of competence, skill, and

Even assuming a similar level of competence, skill, and training, there is still no level playing field between a physician practicing at a small community hospital in a remote, rural Idaho town, and a similarly situated practitioner at a large hospital in an urban setting.

training, there is still no level playing field between a physician practicing at a small community hospital in a remote, rural Idaho town, and a similarly situated practitioner at a large hospital in an urban setting. Further, commentators also underemphasize the importance of the inherent flexibility in utilizing a community standard of care in a sparsely populated state like Idaho. For example, at Idaho's larger hospitals in urban settings, where hospitals and physicians remain at or near the cutting edge, the community standard of health care practice may mirror the national standard of care, with the possibility of slight variation where appropriate.<sup>6</sup> On the other hand, smaller regional hospitals and practitioners that still do not have the most up-to-date facilities, specialized and highly trained staff, and equipment will be held to a standard commensurate with the hand they have been dealt. In light of these continued disparities, the community standard of health care practice still has a place in Idaho.

However, as commentators suggest, legislative steps can and should be taken to modernize Idaho Code §§ 6-1012 and 6-1013 and make Idaho's medical expert familiarization requirements more predictable

and more efficient for plaintiffs, defendants, patients, and practitioners. This article briefly discusses the process of familiarization of non-local expert witnesses under current law, discusses recent interpretations of the law in *Bybee v. Gorman*, and finally, suggests a change to § 6-1012 to enhance efficiency and predictability in the process of familiarization of expert witnesses.

## **Familiarization of expert witnesses under Idaho Code §§ 6-1012 and 6-1013**

For medical malpractice plaintiffs to survive summary judgment, plaintiffs must submit testimony in affidavit form from at least one expert witness that has actual knowledge of the local standard of health care practice that indicates "that the defendant health care provider negligently failed to meet the applicable standard of health care practice."<sup>7</sup> Further, the affidavit must demonstrate that the expert meets the three foundational requirements of Idaho Code § 6-1013, namely:

"(a) that such an opinion is actually held by the expert witness,

(b) that the said opinion can be testified to with reasonable medical certainty, and

(c) that such expert witness possesses professional knowledge and expertise coupled with actual knowledge of the applicable said community standard to which his or her expert opinion testimony is addressed[.]”<sup>8</sup>

In order to demonstrate actual knowledge of the community standard of health care practice, the medical expert must show that he or she is “familiar with the standard of health care practice for the relevant medical specialty, during the relevant timeframe, and in the community where the care was provided.”<sup>9</sup> Additionally, the medical expert must explain “*how* he or she became familiar with that standard of care.”<sup>10</sup> Local experts can show familiarity directly by showing actual knowledge of the community standard of care through their practice in the relevant community for the relevant time period. For non-local experts, the most common method to obtain knowledge of the community standard of care is by inquiring of a local practitioner within the relevant community and for the relevant time period.<sup>11</sup>

### **Bybee v. Gorman: A Summary**

Recently, a major issue in this area of law has been the scope of the statutory definition of community. Idaho Code § 6-1012 defines the relevant community as: “that geographical area *ordinarily served* by the licensed general hospital at or nearest to which such care was or allegedly should have been provided.”<sup>12</sup> This definition is crucial, as the community sets the outer geographic boundaries of the pool of physicians from which plaintiffs can draw an expert or a consulting physician to familiarize a non-local expert.

The most recent Idaho Supreme Court case interpreting Idaho’s statutory familiarization requirements for experts came near the end of 2014 in *Bybee v. Gorman*.<sup>13</sup> In *Bybee*,

the plaintiffs alleged that a defendant physician from Idaho Falls “was negligent...due to...failure to monitor and periodically test...for adverse side effects attributable to amiodarone.”<sup>14</sup> While the outcome of this particular case actually hinged on the adequacy of plaintiff’s expert’s consultation with an anonymous Idaho Falls consulting physician, the other issue raised by the defendant on summary judgment — the scope of community under § 6-1012 — highlights a potential area for improvement to Idaho’s community standard of care framework.

The Idaho Supreme Court’s recognition of the possibility of overlapping communities raises questions about the continued usefulness of § 6-1012’s definition of community in its current form.

As noted above, § 6-1012 defines community as “that geographical area *ordinarily served* by the licensed general hospital at or nearest to which such care was or allegedly should have been provided.”<sup>15</sup> Plaintiffs argued that Pocatello was an area ordinarily served by Eastern Idaho Regional Medical Center (EIRMC), the general hospital in Idaho Falls, and therefore, that their Pocatello expert had direct knowledge of the standard of care at EIRMC because he practiced in the same community.<sup>16</sup> In short, plaintiffs functionally

argued that Idaho Falls and Pocatello were, or at least could be, part of the same community for purposes of § 6-1012.

The district court disagreed, holding that there was no possibility of overlapping communities in Idaho under § 6-1012’s definition of community.<sup>17</sup> Idaho Falls was its own distinct community, served only by one general hospital, EIRMC. Pocatello was its own distinct community, served only by one general hospital, Portneuf Medical Center. Therefore, under the district court’s interpretation of § 6-1012, Pocatello physicians would, as a matter of law, be non-local experts and would need to familiarize themselves with the Idaho Falls/EIRMC community standard of care in order to give an expert opinion in an Idaho Falls medical malpractice case.

The Idaho Supreme Court disagreed with the district court, holding that § 6-1012 at least left open the possibility for overlapping communities.<sup>18</sup> Unlike the district court, which held as a matter of law that Pocatello was not the same community as Idaho Falls for purposes of § 6-1012, the Idaho Supreme Court held that the question of whether an Idaho city is in the same geographic area ordinarily served by a general hospital in another Idaho city is a factual issue to be decided by a judge.<sup>19</sup> Thus, under the Supreme Court’s interpretation of § 6-1012, Pocatello could be part of the area ordinarily served by Idaho Falls’ licensed general hospital, EIRMC, and Idaho Falls could be part of the area ordinarily served by Pocatello’s general hospital. Portneuf Medical Center plaintiffs would just need to prove it. The Idaho Supreme Court’s recognition of the possibility of overlapping communities raises questions about the continued usefulness of § 6-1012’s definition of community in its current form.

## Overlapping communities with uncertain boundaries: The problems

The two major problems associated with statutory language that defines the relevant community by tethering it to the area ordinarily served by the general hospital at or closest to where the care at issue took place are: (1) unpredictability; and (2) inefficiency. As noted by the Supreme Court in *Bybee*, “[t]he imprecision of this definition of community lies in the word ‘ordinarily.’”<sup>20</sup> Using this metric to determine the scope of the community, “judges viewing the same evidence may reach differing conclusions as to whether patients from a particular location use a hospital’s services on a regular or common basis.”<sup>21</sup> This imprecision creates unpredictability and inefficiency for all involved.

For plaintiffs and plaintiffs’ counsel, much time and effort goes into finding a local expert or local physician willing to consult and familiarize a non-local expert with the relevant community standard of care. Under the current definition of community in § 6-1012, plaintiffs are left to make an educated guess about the scope of the relevant community, and therefore, a guess about whether a certain expert or consulting physician will satisfy the requirements of § 6-1012. The outcome of plaintiffs’ guessing game will ultimately be decided in a second game of “judge roulette.”

For example, imagine a hypothetical Pocatello medical malpractice case where the alleged negligent medical treatment occurred at Portneuf Medical Center. In this case, the only expert willing to testify or consult with plaintiffs is from and practices in American Falls. Based on the facts presented, Judge “A” determines that American Falls is not part of the area ordinarily served by Portneuf in Pocatello, and thus, is not part of the same community

for purposes of § 6-1012. Therefore, the plaintiffs’ American Falls physician cannot be used as an expert or consulting physician for a non-local expert. Plaintiffs’ case is dismissed on summary judgment for failure to meet the requirements of §§ 6-1012 and 6-1013.

Imagine a second hypothetical case with the same substantive facts, but a new wrinkle with the expert. This time, the only expert plaintiffs can find to testify or consult practices in Rexburg. Upon hearing the evidence, Judge “B” is persuaded that Rexburg is part of the area ordinarily served by Portneuf in Pocatello. Judge “B” further finds that the Rexburg expert has direct knowledge of the community standard of care in Pocatello by virtue of his practice in the relevant community. Plaintiffs’ case survives summary judgment and proceeds to trial.

On top of being unpredictable, requiring each side to marshal facts to prove that a certain area is or is not part of the area ordinarily served by a given area is inefficient and a needless waste of client, attorney, and judicial resources. Under the current definition of community in § 6-1012, both plaintiffs and defendants must spend time marshaling facts, briefing the issue, and arguing the issue in court. Judges and law clerks must spend time evaluating the parties’ briefing and ultimately determine the issue of whether a certain area is ordinarily served by a given hospital within the meaning of § 6-1012. Most importantly, clients and taxpayers pay for all of this. This unpredictability and inefficiency baked into the current statute’s definition of community is unjustifiable given the existence of a simple solution.

## Fixed geographic boundaries: The solution

In its opinion in *Bybee*, the Supreme Court alluded to a solution to the problems of unpredictability

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Under the current definition of community in § 6-1012, plaintiffs are left to make an educated guess about the scope of the relevant community, and therefore, a guess about whether a certain expert or consulting physician will satisfy the requirements of § 6-1012.

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and inefficiency created by overlapping “communities” with uncertain boundaries. The Idaho Supreme Court called the “uncertainty” created by the statute a “consequence of the legislature’s choice of language defining ‘community.’”<sup>22</sup> In the words of the Court: “[r]ather than choosing to define community *by means of distance from the nearest licensed general hospital*, the legislature chose to define community by reference to the locations from which the patient base of the hospital is derived.”<sup>23</sup> In short, the Supreme Court drew a roadmap to the solution - which is to give “communities” fixed geographic boundaries.

A fixed geographic community boundary is created by pegging the geographic boundary of the community to a fixed mile radius from the licensed general hospital nearest to where the alleged negligent care was provided. This would allow plaintiffs to select their expert or consulting expert with little to no guesswork involved, and would leave little room, if any, for different outcomes given cases with similar facts but different judges. A fixed geographic boundary for the relevant community would also drastically reduce conflict about whether a certain expert or consulting physician practiced within the relevant community.

Instead of marshaling facts, briefing the issue, and arguing about whether a certain area is ordinarily served by a certain general hospital, plaintiffs and defendants could simply refer to a map and easily determine whether or not the expert or consulting physician practices in the relevant community. While there may still be some room for argument about an expert that practices at or near the periphery of the fixed boundary, tethering the statutory definition of community to a fixed boundary should greatly reduce the possibility of needless litigation in most cases.

## Conclusion

Idaho's statutory framework for establishing an expert witness' familiarization with the community standard of care could use a little work to bring it into the Twenty-First Century. One painless way the legislature could improve § 6-1012 would be tethering the definition of community to a fixed, geographic boundary, rather than the current amorphous and unpredictable area ordinarily served language. Determining the geographic scope of the relevant community through a fixed geographic boundary would make the familiarization process more predictable and more efficient for everyone involved.

## Endnotes

1. Idaho Code §§ 6-1012 and 6-1013; Monique C. Lillard, *The Standard of Care for Health Care Providers in Idaho*, 44 IDAHO L. REV. 295, 300-02 (2008).
2. See *McDaniel v. Inland Nw. Renal Care Grp.-Idaho, LLC*, 144 Idaho 219, 223-24, 159 P.3d 856, 860-61 (2007) (citing *Buck v. St. Clair*, 108 Idaho 743, 746, 702 P.2d 781, 784 (Idaho 1985)); see also Lillard, *supra* note 1, at 301-02.
3. Idaho Code §§ 6-1012 and 6-1013; Marc D. Ginsberg, *The Locality Rule Lives! Why? Using Modern Medicine to Eradicate an Unhealthy Law*, 61 DRAKE L. REV. 321, 333 (2013); E. Lee Schlender, *Malpractice*

*and the Idaho Locality Rule: Stuck in the Nineteenth Century*, 44 IDAHO L. REV. 361, 361-62 (2008); see also Kelley Ann Porter, Note, *Dulaney v. Saint Alphonsus Regional Medical Center: Reconstructive Surgery for Plaintiffs' Medical Nightmare--A Call for Reform of the Local Standard of Care*, 38 IDAHO L. REV. 597, 620-25 (2002).

4. Ginsberg, *supra* note 3 (advocating a national standard of care); Porter, *supra* note 3, at 630; Lillard, *supra* note 2, at 356.
5. See generally *McDaniel*, 144 Idaho at 224, 159 P.3d at 861 (noting in 2007 that the legislature's election of a community standard of health care practice is understandable given that "the practice of medicine in Idaho has historically involved a good number of doctors practicing in small communities with limited resources, limited access to the flow of medical information, and limited support from like providers. Such doctors, if held to the same standard of practice as those in urban communities, would face inequities stemming from the geographical location of their practice.");
6. See *McDaniel*, 144 Idaho at 224, 159 P.3d at 861 (noting that "in the present medical care environment, there are a variety of ways that a medical malpractice plaintiff may be able to establish a local standard of care as being synonymous with a regional or national standard.");

7. *Bybee v. Gorman*, 157 Idaho 169, 174, 335 P.3d 14, 19 (2014); Idaho Code § 6-1013.

8. Idaho Code § 6-1013.

9. *Bybee*, 157 Idaho at 174, 335 P.3d at 19 (citing *Suhadolnik v. Pressman*, 151 Idaho 110, 116, 254 P.3d 11, 17 (2011)); Idaho Code § 6-1012.

10. *Bybee*, 157 Idaho at 174, 335 P.3d at 19 (quoting *Dulaney v. St. Alphonsus Reg'l Med. Ctr.*, 137 Idaho 160, 164, 45 P.3d at 820

11. *Dulaney v. St. Alphonsus Reg'l Med. Ctr.*, 137 Idaho 160, 164, 45 P.3d 816, 820 (2002) (citing *Perry v. Magic Valley Reg'l Med. Ctr.*, 134 Idaho 46, 995 P.2d 816 (2000)).

12. Idaho Code § 6-1012.

13. 157 Idaho 169, 335 P.3d 14 (2014).

14. *Id.* at 172.

15. Idaho Code § 6-1012.

16. *Bybee*, 157 Idaho at 175, 335 P.3d at 20.

17. *Id.*

18. *Id.* at 176.

19. *Id.*

20. *Id.*

21. *Id.* at 176-77.

22. *Id.*

23. *Id.* at 176 (emphasis added).

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# Health Care Fraud Investigations and Prosecutions in Idaho

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**P**ublic health care fraud is a significant threat. It diverts scarce resources away from our publicly funded health benefit programs, from health plan beneficiaries, and from health care consumers. Many schemes involve sacrificing patient safety in order to maximize profits, causing injury or death from neglect, unnecessary prescribing and procedures, and the diversion of controlled substances for recreational abuse. In 2010, then-U.S. Attorney General Eric Holder estimated the cost of health care fraud at \$60 billion a year.

Auditors, investigators, and prosecutors at all levels have a responsibility to protect our health care fraud dollars. The State of Idaho, Office of the Attorney General, U.S. Attorney's Office for the District of Idaho, and our law enforcement partners cooperate to aggressively pursue health care fraud throughout the state. This article sets out the enforcement tools available at the state and federal level, identifies the federal and state statutory framework for investigating and prosecuting public program health care fraud in both criminal and civil cases, and identifies the agencies that practitioners will interact with in a health care fraud case.

## **The United States attorney's office – federal health care fraud enforcement**

The federal government has prioritized investigating and prosecuting health care provider fraud and

From 2012-14, for every dollar the federal government spent on health care-related fraud investigations, it recovered \$7.70.



abuse for the last 20 years. In 1997, following passage of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the U.S. Department of Justice and the Department of Health and Human Services established the Health Care Fraud and Abuse Control Program to coordinate federal, state and local health care fraud law enforcement activities. HIPAA further provided federal prosecutors with new statutes and administrative subpoena powers to pursue criminal health care fraud cases. Through the 2010 Patient Protection and Affordable Care Act, Congress provided \$350 million to combat health care fraud and abuse over a 10-year period, directed the United States Sentencing Commission to increase federal sentencing guidelines for health care fraud offenses, and provided the Centers for Medicare and Medicaid Services with the ability to conduct background checks, site visits and other enhanced oversight to weed out problem providers before they start billing.

These measures have worked. Through the end of fiscal year 2014, more than \$27.8 billion has been returned to the Medicare Trust Fund.

From 2012-14, for every dollar the federal government spent on health care-related fraud investigations, it recovered \$7.70.

## **Federal prosecution of health care fraud**

The U.S. Attorney's Office focuses its health care fraud prosecution resources in three areas: (1) fraud involving federal taxpayer funds – fraud against Medicare and Medicaid; (2) fraud directed at a health care benefit plan affecting commerce<sup>1</sup>; and (3) diversion of prescription drugs. Most investigations and prosecutions involve a provider knowingly billing Medicare, Medicaid or a private carrier for services not provided, for services not covered, for services that were not medically necessary or for services that were provided contrary to health care benefit plan rules. The most commonly charged criminal statutes in Idaho federal health care fraud prosecutions are 18 U.S.C. § 1035, false statements relating to health care matters, and 18 U.S.C. § 1347, health care fraud. Both statutes require proof that a defendant knowingly and willfully made a materially false statement in connection with the delivery of or payment

for health care benefits, items or services. Section 1347 further prohibits the execution of a scheme to defraud a health care benefit program. The execution of the scheme typically involves submission of a bill to an insurance carrier for payment. For example, in *United States v. Card*, a Caldwell optometrist pleaded guilty to executing a scheme to defraud Medicare and others by falsely billing for colorblindness tests when, in fact, he had not conducted the test. The defendant also admitted that he falsely diagnosed some patients with glaucoma, which allowed him to then bill for various services and additional visits covered only for patients who had glaucoma.<sup>2</sup>

In federal criminal health care fraud cases, the most critical inquiry is whether the defendant acted knowingly, willfully and (for prosecutions under § 1347) with the intent to defraud. The intent to defraud is the intent to deceive or cheat.<sup>3</sup> In federal criminal statutes, the term “willfully” typically requires proof that the defendant acted with a “bad purpose” and with knowledge that his conduct was unlawful.<sup>4</sup> However, in 2010, the Affordable Care Act amended § 1347 to make clear that a defendant need not have actual knowledge of the statute or a specific intent to violate the statute.<sup>5</sup> The federal criminal health care fraud statutes do not reach accidental, mistaken or negligent conduct. In most cases, willfulness and intent to defraud are proven through evidence of knowing, repeated conduct over a long period of time – through the existence of the scheme itself.<sup>6</sup> Intent to defraud may be proved through falsified or altered documents, including treatment records or billing. In some cases, health care auditors have told providers that a billing

practice is contrary to the rules but the provider continues the billing practice anyway.

Penalties for federal health care fraud violations include both prison sentences and exclusion of the provider from the federal health care programs. For cases not involving bodily injury, the statutory maximums are five years in prison for violations of 18 U.S.C. § 1035 and 10 years for violations of 18 U.S.C. § 1347. However, application of the United States Sentencing Guidelines

Federal criminal cases are often investigated using the federal grand jury, which has the authority to issue subpoenas requiring the live testimony of witnesses and the production of documents.



and consideration of the sentencing factors set out in 18 U.S.C. § 3553(a), typically results in a sentence below the statutory maximum. The most significant fact in application of the guidelines is the amount of loss resulting from or intended by the fraud.<sup>7</sup> In addition, providers convicted of health care crimes face exclusion from federal health care programs.<sup>8</sup> Under 42 C.F.R. § 1001.101, the Department of Health and Human Services, Office of Inspector General (HHS-OIG) must exclude

providers convicted of criminal offenses related to the delivery of an item or service under Medicare or a state health care program for at least five years, which period may be increased if certain aggravating factors are present.<sup>9</sup> In addition to HHS-OIG exclusion, states impose separate exclusionary periods.

The United States uses many tools to investigate federal criminal health care violations. Federal criminal cases are often investigated using the federal grand jury, which has the authority to issue subpoenas requiring the live testimony of witnesses and the production of documents. The United States also may use administrative subpoenas, which are specifically authorized for federal health care offenses, pursuant to 18 U.S.C. § 3486.

Many health care providers and their lawyers, when contacted by law enforcement, express concerns that their cooperation might violate HIPAA. However, HIPAA provides a number of law-enforcement-related exceptions under 45 CFR § 164.512(f)(1), including, most commonly, exceptions for court orders, warrants, subpoenas or summonses issued by a judicial officer, grand jury subpoenas and special health care fraud administrative subpoenas.<sup>10</sup>

### **Federal civil enforcement of health care fraud**

The False Claims Act (FCA), 31 U.S.C. §§ 3729-3733, prohibits false claims to the government. Congress enacted the FCA in 1863 to address the concerns that Union Army suppliers during the Civil War were defrauding the government. The FCA is now frequently used against those defrauding federal health care programs such as Medicare and Medicaid.

The FCA provides the United States with a cause of action against those who: (1) knowingly present, or cause to be presented, a false claim to the government; or (2) knowingly make, use, or cause to be made or used, a false record or statement material to a false claim.<sup>11</sup> The FCA sets out five other types of prohibited conduct, including conspiring to violate the FCA and acting improperly to avoid paying money to the government.<sup>12</sup> In addition, violating 42 U.S.C. § 1320a-7b, commonly known as the Anti-Kickback Statute, constitutes a false claim for purposes of the FCA.<sup>13</sup> The Anti-Kickback Statute prohibits offering, paying, soliciting, or receiving remuneration in return for referring a person for services that will be paid by a federal health care program.<sup>14</sup>

Violating the FCA can create substantial liability. Liability includes three times the damages sustained by the government and a civil penalty between \$5,500 to \$11,000 per false claim.<sup>15</sup>

The FCA requires knowledge, which can be proved either through actual knowledge or through deliberate ignorance of the truth or falsity of the information or reckless disregard of the truth or falsity of the information.<sup>16</sup> Unlike for the federal criminal health care fraud statutes, specific intent to defraud is not required.

### **Qui Tam lawsuits under the FCA**

The FCA allows private individuals to file suit for violations of the FCA in the name of the United States. This is known as a *qui tam* action, and the person is known as a relator. 31 U.S.C. § 3730(b). A *qui tam* action is filed under seal. The complaint and all written disclosures must be provided to the U.S.

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The State of Idaho enforces health care fraud primarily through the Medicaid Fraud Control Unit (MFCU), a unit within the Criminal Division of the Idaho Attorney General.

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Attorney for the applicable federal judicial district and the United States Attorney General. The United States then has time to investigate the allegations before the seal is lifted. If the United States intervenes, it takes over the case, and if successful, the relator is entitled to 15 to 25 percent of the recovery. But if the United States does not intervene, then the private party can proceed with the action, and the relator is entitled to 25 to 30 percent of the recovery.

### **State of Idaho health care fraud enforcement**

The State of Idaho enforces health care fraud primarily through the Medicaid Fraud Control Unit (MFCU), a unit within the Criminal Division of the Idaho Attorney General. The MFCU has the authority<sup>17</sup> to investigate and prosecute health care providers that contract with the Idaho Medicaid program in the following categories of cases:

1. Medicaid provider fraud;
2. Abuse or neglect of Medicaid recipients in health care facilities;
3. Misappropriation of patients' private funds in such facilities;
4. Provider fraud under other federal health care programs if the suspected crime is substantially related to Idaho Medicaid; and

5. fraud in the administration of the Medicaid program.

The MFCU does not investigate and prosecute recipient fraud, unless the recipients conspire with providers to commit provider fraud. The MFCU is separate and distinct from the Idaho Department of Health & Welfare (IDHW) and no IDHW official has authority to review or override the MFCU's prosecutorial decisions. The MFCU is housed in Boise, but operates statewide and has concurrent authority with county prosecutors to prosecute its cases.<sup>18</sup>

### **MFCU criminal prosecutions**

The MFCU may charge any state criminal statute where the conduct is directly related to the use of Medicaid program funds or services.<sup>19</sup> In addition, three Idaho criminal statutes are unique to Medicaid fraud prosecutions — I.C. §56-226, Provider Fraud; I.C. §56-209o, Failure to Retain Records; and I.C. §56-227E, Obstruction of Investigation.

The provider fraud statute criminalizes the acts of:

1. Submission of fraudulent claims for services or supplies;
2. Fraudulently obtaining or attempting to obtain authorization for furnishing services or supplies; and

3. Fraudulently obtaining or attempting to obtain compensation in an amount greater than which one is legally entitled. The means of commission are:

1. By making a false statement or representation;
2. By deliberate concealment of material fact; or
3. By any other fraudulent scheme or device.

The government must prove that the defendant acted knowingly, with intent to defraud. Provider fraud is a felony, regardless of the dollar amount involved.

The failure to obtain records statute mandates the five-year retention of records required by IDHW rules, though the rules themselves may require a longer retention period. It criminalizes both the failure to retain and the destruction of those records prior to the five-year mark. To prove a violation, the government must show the defendant's intent to evade the provisions of public assistance laws found in chapter 2, title 56 of the Idaho Code. If the value of the treatment, services or goods relevant to the records is \$1,000 or less, the offense is a misdemeanor; if more than \$1,000, the offense is a felony.

Obstruction of investigation under I.C. § 56-227E takes the failure to retain records statute one step further. It criminalizes the alteration of any document required to be maintained under public assistance laws or IDHW rules. Violation of the obstruction statute is always a felony. The alteration must be intended to mislead an investigation, and concern information material to an investigation. Further, it is a violation either to knowingly provide false information to, or knowingly with-

hold information from, a person authorized to investigate or enforce violations of the Idaho public assistance laws.

As with the federal criminal statutes, the critical inquiry for the state health care fraud statutes is proof of criminal intent. Overpayments absent proof of criminal intent are referred to the IDHW Medicaid Program Integrity Unit for possible administrative action and recoupment.<sup>20</sup> If criminal charges are filed under any of the aforementioned statutes, punishment does not dif-

As with the federal criminal statutes, the critical inquiry for the state health care fraud statutes is proof of criminal intent.



fer from the general statutory criteria outlined for other Idaho felonies and misdemeanors.<sup>21</sup> In Idaho, there is a presumption toward the imposition of probation over prison, unless the factors in I.C. § 19-2521 are met. Thereafter, Idaho courts have wide discretion for the imposition of fine and period of incarceration. After conviction, the MFCU reports to the National Provider Database as well as the HHS-OIG and IDHW for purposes of state and federal exclusions.

### Idaho civil false claims lawsuits

Idaho has its own false claims statute, I.C. § 56-227B, which has notable differences from the federal FCA.<sup>22</sup> Like its federal counterpart, the state statute contains a provision for treble damages. However, unlike its federal counterpart, the state false claims statute has no provision for additional per-claim penalties, and no *qui tam* provision. Additionally, the Idaho false claims statute requires proof of specific intent to defraud, whereas the federal FCA does not.<sup>23</sup> As a practical matter but not as a rule, the State of Idaho has pursued false claims cases against Medicaid providers by filing civil actions in federal court as co-plaintiff with the United States, with each sovereign pleading its own false claims statute.

### MFCU investigations and tools

The Idaho MFCU currently employs a team of two Deputy Attorneys General, four peace officer investigators and one investigative auditor. The MFCU may request and receive assistance of local prosecutors or law enforcement agencies,<sup>24</sup> and cooperates with federal agencies, including the U.S. Attorney's Office, in the investigation and prosecution of health care fraud.

The MFCU may enter upon premises of Medicaid providers, and upon written request, have full access to all records held by Medicaid providers, that are relevant to its investigations.<sup>25</sup> Contractually, many provider agreements specifically allow for the MFCU to have "immediate" access to provider records. In such situation, an MFCU investigator will present a provider with an access letter on Idaho Attorney General Letterhead.

Additionally, the MFCU may issue administrative subpoenas<sup>26</sup> to an enrolled or formerly enrolled provider of services, to compel the production of any records or documents that are required to be maintained under the Medicaid provider agreement,<sup>27</sup> or, materials relevant to an investigation of fraud or other crime directly related to the use of Medicaid program funds or services. The MFCU may also compel testimony by the custodian of the items subpoenaed, but only concerning the production and authenticity of those items.

Prior to charging, the MFCU may also use a search warrant<sup>28</sup>, a special inquiry judge proceeding,<sup>29</sup> or grand jury subpoena,<sup>30</sup> to access records and information from providers and witnesses. As a health oversight agency under HIPAA, and pursuant to Idaho Code, the MFCU may access otherwise protected health information of Medicaid recipients.<sup>31</sup>

### **Idaho Department of Health & Welfare, bureau of audits & investigations, medicaid program integrity unit**

The Idaho Department of Health & Welfare (IDHW) maintains an administrative fraud control program called the Medicaid Program Integrity Unit to enforce the provisions of provider agreements, rules, and violations of public assistance laws, which are outside the scope of the duties of the Idaho Attorney General's criminal MFCU.<sup>32</sup> The Program Integrity Unit must refer all cases of suspected Medicaid provider fraud to the MFCU.<sup>33</sup> The Program Integrity Unit may obtain immediate access to provider documentation for services upon written request, and may: suspend or withhold payments

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This agency is permitted broad access by subpoena or request for information or assistance to materials held by not only providers, but "all information" necessary for the agency to carry out its investigative responsibilities under the Inspector General Act.<sup>36</sup>

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if it identifies fraud or abuse (subject to administrative appeal process); recover overpayments or improperly paid claims; terminate, exclude, or deny provider status; and assess civil monetary penalties for each item or service improperly claimed.<sup>34</sup> Exclusions in Idaho for program-related crimes are imposed for not less than 10 years.<sup>35</sup>

### **Federal health care fraud investigative agencies**

In Idaho, special agents of the HHS-OIG Office of Investigations investigate health care fraud against Medicare and Medicaid. These agents conduct criminal, civil and administrative investigations of fraud and misconduct related to U.S. Department of Health and Human Services programs, operations, and beneficiaries. They work closely with criminal as well as affirmative civil Assistant U.S. Attorneys, in criminal prosecutions and False Claims Act cases. This agency is permitted broad access by subpoena or request for information or assistance to materials held by not only providers, but "all information" necessary for the agency to carry out its investigative responsibilities under the Inspector General Act.<sup>36</sup> This authority is limited to documentary requests. Such

subpoenas must, 1) be issued for a lawful purpose within the statutory authority of the Inspector General Act, 2) be reasonably relevant to that purpose, and 3) not be unduly burdensome.<sup>37</sup>

The Federal Bureau of Investigation (FBI) also pursues a robust health care fraud investigation program. Whereas HHS-OIG investigates primarily fraud against federal government insurance, the FBI may investigate any type of fraud, including health care fraud affecting private insurance companies. In Idaho, the FBI tends to focus on high dollar billing fraud perpetrated over long time periods. Most commonly, these federal investigative agencies work closely with the Idaho Attorney General's MFCU, the State of Idaho Department of Insurance and private carrier fraud investigators to ensure that the full scope of billing fraud is investigated and, where evidence is sufficient, prosecuted in the most appropriate forum.

### **The special problem of prescription drug diversion**

While this article focuses primarily on fraud, prescription drug diversion has risen as a significant challenge confronting communities and law enforcement. Providers and their

attorneys should be aware of this risk and its consequences. Both nationally, and in Idaho, prescription drug addiction has escalated, especially regarding opioid narcotics such as oxycodone. This has led to a resurgence of heroin. Resulting problems range from addiction and job loss to driving under the influence and even to

overdoses and deaths. Providers prescribing controlled substances, especially Schedule IIs, should educate themselves on the problem and the Board of Medicine's policy on prescribing opioids.<sup>38</sup> Recently, the U.S. Attorney's Office, in conjunction with several hospitals, regulatory boards, private law firms, and others,

sponsored a Drug Diversion Summit to open a dialogue between law enforcement and providers. Materials from that summit are available from the U.S. Attorney's Office, the Board of Medicine, and other sources.

Crimes associated with drug diversion, primarily illegal distribution of controlled substances, may

<b>Key Statutes Unique To Public Program Health Care Fraud</b>	
<b>FEDERAL</b>	<b>STATE</b>
<b>Health Care Fraud</b>	
Criminal Health Care Fraud 18 U.S.C. § 1347 False Statements Relating to Health Care Matters 18 U.S.C. § 1035	Provider Fraud I.C. § 56-227A
<b>Identity Theft</b>	
Identity Theft 18 U.S.C. § 1028 Aggravated Identity Theft 18 U.S.C. § 1028A	False Personation I.C. § 18-3001, 3002
<b>Means of Commission of the Offense</b>	
Fraud by Wire, Radio, or Television 18 U.S.C. § 1343 Frauds and Swindles (Mail Fraud) 18 U.S.C. § 1341	Computer Crime I.C. § 18-2202
<b>Obstruction</b>	
Obstruction of Criminal Investigations of Health Care Offenses 18 U.S.C. § 1518	Obstruction of Investigation I.C. § 56-227E Failure to Retain Records I.C. § 56-209o
<b>Kickbacks and Self-Referral</b>	
Anti-Kickback 42 U.S.C. § 1320a-7b(b) The Stark Law 42 USC § 1395nn	n/a
<b>Civil False Claims</b>	
The False Claims Act 31 U.S.C. §§ 3729-3733; 31 U.S.C. § 3730	Provider Fraud- Damages I.C. § 56-227B
<b>Exclusions</b>	
Mandatory Exclusions 42 U.S.C. §1320a-7(a), 42 C.F.R. § 1001.101 Permissive Exclusions 42 U.S.C. §1320a-7(b), 42 C.F.R. § 1001.201	Administrative Remedies I.C. § 56-209h
<b>Penalties &amp; Sentencing</b>	
Max. penalties written into criminal statutes. Discretionary range below max. guided by 18 U.S.C. § 3553(a); USSC §2B1.1	Max. penalties written into criminal statutes, or subject to general penalties in I.C. §§ 18-112, 113. Discretionary range below max. guided by I.C. § 19-2521.

be investigated by the Drug Enforcement Administration and various state and local agencies, often working together on task forces. A practitioner who intentionally distributes a controlled substance outside the normal course of medical practice and not for a legitimate medical purpose can face criminal penalties, not to mention the associated license suspension or revocation.

## Endnotes

1. See 18 U.S.C. § 24(b).
2. *United States v. Card*, CR 12-6-EJL, Dkt. \_\_\_, 1-3.
3. Ninth Circuit Model Jury Instruction 3.17; see *United States v. Dearing*, 504 F.3d 897, 902 (9th Cir. 2007).
4. *Bryan v. United States*, 524 U.S. 184, 191-92 (1998) (footnote omitted); *United States v. Dearing*, 504 F.3d 897 (9th Cir. 2007).
5. 18 U.S.C. § 1347(2)(b).
6. See *Dearing*, 504 F.3d at 901; *United States v. Ciccone*, 219 F.3d 1078, 1083 (9th Cir. 2000).
7. See United States Sentencing Guidelines, § 2B1.1(b)(1).
8. 42 C.F.R. §§ 1001, et seq.
9. 42 C.F.R. § 1001.102(a),(b).
10. 45 CFR §§ 164.512(f)(1)(ii)(A)-(C).
11. 31 U.S.C. § 3729(a)(1)(A) & (B); see also 31 U.S.C. § 3730(a).
12. 31 U.S.C. § 3729(a)(1)(C)-(G).
13. 42 U.S.C. § 1320a-7b(g).
14. 42 U.S.C. § 1320a-7b(b).
15. 31 U.S.C. § 3729(a)(1); 28 C.F.R. § 85.3(a)(9).
16. 31 U.S.C. § 3729(b)(1).
17. 42 C.F.R. §1007, I.C. § 56-226.
18. I.C. § 67-1401(14).
19. *Id.*
20. I.C. § 56-226(4).
21. I.C. §§ 18-112, 113.
22. 31 U.S.C. §§ 3729 – 3733.
23. 31 U.S.C. § 3729(b)
24. I.C. § 56-226(7)(a).
25. I.C. § 56-226(7).
26. I.C. § 56-227C(2). The statute reads, “attorney general or any prosecuting

Recently, the U.S. Attorney’s Office, in conjunction with several hospitals, regulatory boards, private law firms, and others, sponsored a Drug Diversion Summit to open a dialogue between law enforcement and providers.

- attorney or the designated agent of either...”
27. Provider agreements require the documentation of each item or service at the time it is provided.
  28. I.C.R. 41; I.C. § 19-4401 et. seq.
  29. I.C. § 19-1116 et. seq.
  30. I.C.R. 6.5; I.C. § 19-1101 et. seq.
  31. I.C. 56-226(7)(c); 45 C.F.R. 164.501 and 512(d).
  32. I.C. § 56-209h(2).
  33. 42 C.F.R. §455.21; I.C. § 56-209h(7).

34. I.C. §§ 56-209h (3)-(6) and (8)-(10).
35. I.C. § 56-209h(9).
36. Inspector General Act of 1978, § 1; 5 U.S.C. app. 3 et. seq.; See also, 42 U.S.C. § 1320a-7c(a) (HIPAA)
37. See *Burlington Northern RR v. Office of Inspector General, R.R. Retirement Board*, 983 F.2d 631, 637 (5th Cir. 1993).
38. <http://bom.idaho.gov/BOMPortal/BoardAdditional.aspx?Board=BOM&BureauLinkID=320>.

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# HIPPA for Lawyers — Taking Care With Patient Information

Brent T. Wilson

**A**ttorneys regularly access and use medical records in their work. Litigators use medical records as evidence in cases; health care lawyers rely on medical records to establish the validity of claims when consulting on claims audits; and mergers and acquisition attorneys access medical records to assess valuation. Notwithstanding our familiarity as a profession with medical records as evidence or information, many attorneys may not appreciate duties to maintain the confidentiality of medical information or the requirements for obtaining these records from medical providers. A breach of these duties under federal law can lead to substantial monetary penalties. This article addresses requirements for lawyers representing health care clients, and requirements for lawyers seeking to obtain health care information from health care providers under federal law.

## HIPAA – The basics

Federal lawmakers passed the Health Insurance Portability and Accountability Act (HIPAA) in recognition of the need for confidentiality of medical records, which contain highly sensitive personal information and data used for identity theft. HIPAA requires entities that use and access medical records to implement effective security and privacy standards to protect those records. The Department of Health and Human Services (HHS) issued implementing regulations after passage of HIPAA. This discussion focuses on the “Privacy Rule” (45 CFR § 164.500 *et. seq.*) and the “Security Rule” (45 CFR § 164.300 *et. seq.*) of the HIPAA regulations.<sup>1</sup>

Many attorneys may not appreciate duties to maintain the confidentiality of medical information or the requirements for obtaining these records from medical providers.

The Privacy Rule regulates the use, access, and disclosure of Protected Health Information (PHI) by Covered Entities. PHI is any information about a patient’s health care, medical condition, or payment for health care and that individually identifies the patient.<sup>2</sup> Covered Entities include health care providers and health plans that transmit any health information electronically.<sup>3</sup> Under the Privacy Rule, Covered Entities must implement appropriate safeguards to protect PHI and

appropriately limit use, access, and disclosure of PHI.

The Security Rule sets national standards to protect electronic PHI (“ePHI”) that is used, received, created, or maintained by a Covered Entity. Under this rule Covered Entities must implement appropriate administrative (e.g. designate a security officer), physical (e.g. mandate use of passwords), and technical (e.g. encrypt electronic transmissions of PHI) safeguards to ensure the confidentiality and security of ePHI.

### Who is a ‘Business Associate?’

Law firms may rely on the definition of Business Associate (BA) under 45 CFR § 160.103 to determine whether a Business Associate Agreement is required:

1. Will the firm provide legal or consulting services to a Covered Entity (CE) client? If no, not a BA, if yes:
2. Will the CE client disclose PHI to the firm as part of the firm’s services provided to the CE client? If no, not a BA, if yes:
3. The firm is a BA and must enter into a BAA with the CE client before accessing or using any PHI.

Example: A law firm retained by a hospital to defend a medical malpractice lawsuit is a BA because it is providing legal services to a CE and the CE will disclose PHI to the firm to defend against the medical malpractice claim. A law firm retained by a property owner in a slip and fall lawsuit is not a BA even though it may subpoena the plaintiff’s medical records because the firm is not providing services to a CE, but instead is receiving PHI for its own use in defense of the slip and fall claim.

## **Business associate relationships under HIPAA**

Covered Entities like health care providers rarely have the resources to perform all necessary health care functions. Providers often contract with vendors that use or access PHI to provide services such as claims processing and billing, data analysis, management and administration, legal, accounting, consulting, and other services. Vendors who use or access PHI in the work they perform for or on behalf of Covered Entities are Business Associates.<sup>4</sup> Covered Entities may permit a Business Associate to access and use PHI only after the Business Associate enters into a written Business Associate Agreement that assures the Business Associate will appropriately safeguard PHI as required by the Privacy and Security Rules, and use PHI only for purposes of the contracted services.<sup>5</sup>

Many Business Associates in turn subcontract with other vendors to provide a service for the Covered Entity. Subcontractors who use, access, or maintain PHI are considered downstream Business Associates under HIPAA.<sup>6</sup> The first tier Business Associate is required to enter into a Business Associate Agreement with subcontractors.<sup>7</sup> The Business Associate Agreement between Business Associates and subcontractors must, at a minimum, meet the same standards established in the Business Associate Agreement between the Covered Entity and the Business Associate.<sup>8</sup>

### **The general rule**

With all of this in mind, the general rule under HIPAA is that Covered Entities and their Business Associates are prohibited from using or disclosing PHI without the patient's

written authorization unless the use or disclosure is expressly permitted by the Privacy Rule.<sup>9</sup> The most common permitted uses or disclosures of PHI are for payment for services, patient treatment, or health care operations.<sup>10</sup>

### **Impact of HIPAA on legal professionals**

Attorneys and law firms may access or use medical records to provide services to health care providers, and may be Business Associates. Likewise, attorneys routinely request

Covered Entities and their Business Associates are prohibited from using or disclosing PHI without the patient's written authorization unless the use or disclosure is expressly permitted by the Privacy Rule.<sup>9</sup>

production of medical records as third parties from health care providers. Thus, it is important for lawyers to understand their obligations under HIPAA when using or accessing PHI and the limits on disclosures when requesting production of medical records from providers.

### **Lawyers and law firms as HIPAA business associates**

Lawyers and law firms that access, use, or maintain medical records to consult with or to provide legal ser-

vices to Covered Entity clients are Business Associates under HIPAA.<sup>11</sup> For example, when a health care provider retains a lawyer to advise on a fraud and abuse investigation, to conduct a claims audit, to provide an opinion on a peer review matter, or to defend a medical malpractice claim the law firm is a Business Associate because it will access and use medical records to provide legal advice to the client. Business Associate law firms must comply with the Privacy and Security Rule.<sup>12</sup>

Attorneys retained for these purposes should not access or use any PHI until a valid Business Associate Agreement (BAA) is in place with the Covered Entity client (a sample BAA is available at HHS's website).<sup>13</sup> The BAA must include all necessary assurances that the Business Associate will safeguard PHI.<sup>14</sup> If the firm engages subcontractors who will use, access, or maintain PHI (e.g. document processing, expert witnesses, ediscovery, data analysis, document destruction), the firm must enter into a BAA with those subcontractors. This additional agreement must satisfy HIPAA requirements and include the same limitations on the use of or access to PHI as in the original agreement between the Covered Entity and the Business Associate.<sup>15</sup> One word of caution – lawyers should carefully analyze the purpose of its retention to ensure they are Business Associates for HIPAA purposes. Avoid assuming HIPAA liabilities if the services provided do not require it.

In addition to making sure a BAA is in place, law firms must take affirmative steps to comply with other Privacy and Security Rule provisions. For Privacy Rule compliance, Business Associate law firms need to develop and implement privacy poli-

cies governing the use and disclosure of PHI.<sup>16</sup> These policies should include a method of accounting for disclosures and individual rights related to access to PHI. Law firms should also designate a person responsible for HIPAA compliance, maintain a log of all subcontractor relationships and copies of the Business Associate Agreement with subcontractors, train firm staff and document all education and training efforts, and log and document any instances of noncompliance and the resulting investigation and corrective actions.<sup>17</sup>

For Security Rule compliance, Business Associate law firms need to design and implement a risk analysis to assess potential exposures to the confidentiality of the ePHI it accesses, uses, or maintains, and to identify the type of physical, administrative, and technical safeguards necessary to protect ePHI.<sup>18</sup> Law firms should also develop and implement security policies and appoint a security officer to document and oversee ongoing risk analyses, audit HIPAA security functions, educate the firm's staff, and document investigations of any security incident.<sup>19</sup>

This is not the end of the fun for Business Associate lawyers. Law firms must also comply with the Breach Notification requirements under HIPAA and timely notify their Covered Entity clients of any incidents involving a breach of PHI.<sup>20</sup> A breach is any acquisition, access, use, or disclosure of PHI that compromises the privacy or security of the PHI.<sup>21</sup> Covered Entities, in turn, must notify the patient(s) and HHS (and if more than 500 patients are involved, the local media) of the breach incident.<sup>22</sup>

All of this matters because violations of HIPAA will result in sig-

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Law firms should also develop and implement security policies and appoint a security officer to document and oversee ongoing risk analyses, audit HIPAA security functions, educate the firm's staff, and document investigations of any security incident.<sup>19</sup>

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nificant civil penalties and possibly criminal sanctions under certain circumstances.<sup>23</sup> A violation resulting from willful neglect will result in mandatory fines of \$10,000 to \$50,000 per violation if corrected within 30 days or mandatory fines of not less than \$50,000 per violation if not corrected within 30 days.<sup>24</sup> Penalties add up quickly and can easily reach into the millions of dollars. Although the BAA will outline many of these requirements, familiarity with the affirmative duties under the Privacy and Security Rule will help a Business Associate law firm maintain compliance and avoid penalties.

### **Subpoenas seeking medical records**

Attorneys who need medical records for a case often subpoena healthcare providers. This most often occurs in cases where the provider is not a party to the litigation. An example may be when a law firm defends a property owner against a slip and fall claim where the plaintiff's injuries may be in dispute. The subpoena, by itself, is usually insufficient under HIPAA to force production of the requested records.<sup>25</sup> A provider may produce medical records in response to a subpoena duces tecum signed by an attorney or clerk of the court only if the issuer provides *satisfactory assurances* that either: (1)

the patient has been notified of the request or (2) a qualified protective order has been sought.<sup>26</sup> Attorneys issuing subpoenas duces tecum to providers for medical records often fail to include these satisfactory assurances.

Satisfactory assurances require the issuer to provide a written statement and documentation establishing: (1) the patient was provided written notice of the subpoena (or there was a good faith effort to provide written notice); (2) the notice provided enough information about the litigation so the patient may object; and (3) the time for objections has passed and either no objections were raised or the court has satisfactorily resolved all objections and the disclosure of records under subpoena is consistent with that resolution.<sup>27</sup>

So what are satisfactory assurances? HHS recommends issuing attorneys send a notice to the patient with instructions for how to raise objections and the deadline for raising objections.<sup>28</sup> Include a copy of the notice with the subpoena and add a written statement that either the deadline to object has passed or objections were resolved. If objections were raised and resolved, the request for documents must be consistent with that resolution. If the subpoena

itself includes this type of information when sent to the healthcare provider, additional documentation is not required.

If the issuer fails to provide the reasonable assurances required by HIPAA the provider should not produce the documents. To avoid contempt or other sanctions providers cannot simply ignore the subpoena, however. They may appear and object based on the HIPAA Privacy Rule or they may provide notice to the patient and advise the patient they will produce the medical record if the patient does not object.<sup>29</sup>

### **Release of information requests and fees**

HIPAA grants patients a right to access and request a copy of their medical records.<sup>30</sup> The patient's personal representative has the same right to access and obtain copies of medical records.<sup>31</sup> "Personal representative" is a term of art under HIPAA – anyone who has authority to make health care decisions on behalf of the patient is a personal representative.<sup>32</sup> Providers may charge patients or their personal representative a reasonable cost-based fee for producing the medical record.<sup>33</sup> Third parties, however, are not entitled to the patient copying fee. Providers may charge third parties fees allowed under state law for document production.

Attorneys representing patients often request their medical records. The amount providers or Release of Information (ROI) vendors may charge attorneys for copying medical records is an ongoing point of contention. Patient attorneys often argue they are the patient's representative and entitled to the patient's copy fee rate, but ROI vendors usually charge patient attorneys the docu-

ment production rate allowed under state law.<sup>34</sup> In response to these higher ROI vendor fees, some plaintiffs' attorneys have sued and many have submitted complaints to the Office for Civil Rights (OCR).<sup>35</sup>

The OCR recently issued a response to an attorney's complaint about copying fees denying the attorney's complaint and closing the matter without further action.<sup>36</sup> The OCR explains that in cases where the attorney requests medical records HIPAA's restrictions on copying fees do not apply and providers

Unless a patient also appoints their attorney as a personal representative, for example as a health care power of attorney, requesting attorneys must pay the state-based fee schedule for production of documents.<sup>38</sup>

or their ROI vendors may charge copying fees based on fee schedules set out under state law.<sup>37</sup> Simply representing a patient does not make the attorney the patient's personal representative for HIPAA purposes.

There is no reason to believe the OCR will respond differently to such complaints going forward. Unless a patient also appoints their attorney as a personal representative, for example as a health care power of attorney, requesting attorneys must pay the state-based fee schedule for production of documents.<sup>38</sup>

Of course, patients may request their records directly and authorize the release of documents to a designated third party such as their attorney.<sup>39</sup>

### **Conclusions**

Law firms that access and use medical records and PHI in representing health care clients should thoroughly review and implement HIPAA compliant practices. Solid privacy and security practices are a must to ensure compliance. Likewise, understanding the basic requirements to obtain medical records from providers will make the process more efficient. It is in the best interests of lawyers to ensure they understand their own duties and roles under HIPAA as they work with patient medical records.

### **Endnotes**

1. The Privacy Rule and the Security Rule went into effect in the early and mid-2000's when laptop computers were barely commonplace and thumb drives and the "cloud" did not exist. HIPAA was updated in 2009 with The Health Information Technology for Economic and Clinical Health ("HITECH") Act, which was part of the American Recovery and Reinvestment Act of 2009. HITECH brought HIPAA up to speed with the increasing use of technology in health care by addressing privacy and security concerns related to electronic transmission of health information. HITECH also added significantly stronger civil and criminal penalties for violations of patient privacy. HHS issued updated implementing regulations for HITECH, known as the HIPAA Omnibus Rule, on January 17, 2013, with a March 26, 2013 effective date.

2. See 45 CFR § 160.103 for the definitions of Protected Health Information and Individually Identifiable Health Information.

3. 45 CFR § 160.103. Health care clearinghouses are another type of Covered Entity. Clearing houses most often play an intermediate role in the claims and billing process between a provider and an insurer.

4. See 45 CFR § 160.103.
5. See 45 CFR §§ 164.502(a)(3) (e) & 164.504(e).
6. See 45 CFR § 160.103 (subpart (3)(iii) of the definition of "Business Associate").
7. 45 CFR §§ 164.314(a)(2) & 164.504(e) (1).
8. 45 CFR § 164.504(e)(5).
9. 45 CFR § 164.502(a).
10. 45 CFR § 164.502(a)(1). HIPAA actually permits a number of other uses or disclosures of PHI beyond payment, treatment, or operations. Some permitted uses require giving the patient an opportunity to object. For example a hospital may list a patient's name in a patient directory, but patients must have an opportunity to opt out of the directory. See 45 CFR § 164.510. Other permitted uses or disclosures do not require giving the patient an opportunity to object. For example a provider may disclose PHI for public health reasons (such as reporting sexually transmitted diseases), to report domestic or other abuse, to prevent an imminent and serious threat to the patient, to respond to a government investigation, and so forth. See 45 CFR § 164.512.
11. 45 CFR § 160.103.
12. Technically, not all provisions in the Privacy Rule directly apply to Business Associates. See 78 FR 5591 (January 25, 2013). Business Associates, however, are subject to the same limits on use and disclosure of PHI as Covered Entities. 45 CFR § 164.504(d)(2). The Security Rule, on the other hand, applies directly to Business Associates. 45 CFR § 164.314(s)(2).
13. 45 CFR § 164.308(b), 164.502(e). HHS has developed a template Business Associate Agreement. Available at: <http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/contractprov.html>. Last visited on November 11, 2015.
14. *Id.*
15. 45 CFR §§ 164.314(a)(2) & 164.504(e) (1), (5)
16. 45 CFR §§ 164.502 & 164.524-528.
17. 45 CFR § 164.530. Note that these administrative provisions under the Privacy Rule apply to Covered Entities, but because Business Associates are essentially bound by the same limitations on the use and disclosure of PHI as Covered Entities, Business Associates should implement the required policies and procedures.
18. See 45 CFR §§ 164.306, 164.308, 164.310 & 164.312.
19. *Id.*
20. 45 CFR § 164.410. The Business Associate Agreement will also require the Business Associate to provide notification. See 45 CFR § 164.502(e). See 45 CFR § 164.400 *et. seq.* for breach notification requirements.
21. 45 CFR § 164.402.
22. 45 CFR § 164.410.
23. 45 CFR § 160.404. Criminal offenses involve any knowing use or disclosure of PHI without authorization. 42 U.S.C. § 1320d-6. Penalties include fines up to \$50,000 and up to a year in prison. If done under false pretenses, the penalties increase to fines up to \$100,000 and up to 5 years in prison. If done with intent to sell or use the PHI for a commercial advantage, personal gain, or malicious intent, the penalties increase to fines up to \$250,000 and up to 10 years in prison.
24. See 45 CFR § 160.404. Violations due to something less than willful neglect are also subject to civil penalties that may range from \$100 to \$50,000 per violation, depending on the circumstances.
25. The scope of this discussion is limited to attorneys issuing subpoenas as officers of the court in civil matters. It also assumes that the provider is subject to the jurisdiction of the issuing court and is not a named party in the litigation. If a court or administrative body issues a subpoena or order for medical records the provider should comply. See 45 CFR §§ 164.512(e)(1)(i) & (f)(1)(ii)(A)-(C). If a subpoena is sought for law enforcement purposes or for criminal proceedings, providers should contact legal counsel to ensure compliance with the appropriate rules. See generally 45 CFR § 164.512(f)(1).
26. 45 CFR §§ 164.512(e)(1)(ii)(A) & (B).
27. 45 CFR §§ 164.512(e)(1)(iii)(A)-(C).
28. See [http://www.hhs.gov/ocr/privacy/hipaa/faq/judicial and administrative proceedings/706.html](http://www.hhs.gov/ocr/privacy/hipaa/faq/judicial%20and%20administrative%20proceedings/706.html). Last visited November 11, 2015.
29. Providers may shift the burden to patients to quash a subpoena by providing notice to the patient of the request for documents and the deadline for objecting. 45 CFR § 164.512(e)(1)(vi). Issuing attorneys should not assume providers will take on this burden, however.
30. 45 CFR § 164.524(a)(1).
31. 45 CFR § 164.502(g)(1).
32. 45 CFR § 164.502(g)(2).
33. 45 CFR § 164.524(c)(4).
34. Adam Green, *Confusion Leading to Litigation: Health Care Providers May Continue to Charge State Fee Schedules for Third-Party Medical Record Requests*, PRIVACY AND SECURITY LAW BLOG, DAVIS WRIGHT TREMAINE, (February 5, 2015) <http://www.dwt.com/HIPAA-Confusion-Leading-to-Litigation-Health-Care-Providers-May-Continue-to-Charge-State-Fee-Schedules-for-Third-Party-Medical-Record-Requests-02-05-2015/>. Last visited November 11, 2015. Hereinafter: "*HIPAA Confusion Leading to Litigation.*"
35. Adam Green, *Are Attorneys Entitled to "HIPAA RATE"?*, PRIVACY AND SECURITY LAW BLOG, DAVIS WRIGHT TREMAINE; (November 5, 2015); <http://www.privsecblog.com/2015/11/articles/healthcare/are-attorneys-entitled-to-hipaa-rate/>. Last visited November 11, 2015.
36. *Id.*
37. *Id.*
38. Green, *HIPAA Confusion Leading to Litigation.*
- 39 45 CFR § 164.524(c)(3)(ii).

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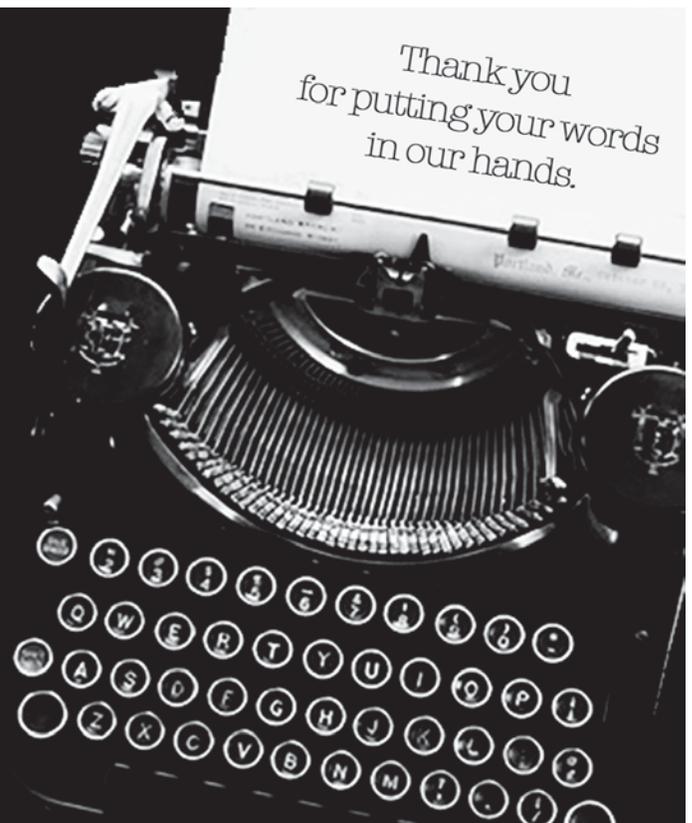


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*The spoken word perishes; the written word remains.*



**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 Spring Term for 2016**

Boise ..... January 11, 13, 15, 19<sup>1</sup> and 22  
Boise ..... February 8, 10, 12 and 17  
Boise (Concordia University School of Law--501 W. Front Street) .....  
..... February 19  
Boise ..... April 1 and 4  
Coeur d'Alene ..... April 6 and 7  
Lewiston ..... April 8  
Boise ..... May 9 and 11  
Idaho Falls ..... May 4  
Pocatello ..... May 5 and 6  
Boise ..... June 1, 3 and 6  
Twin Falls ..... June 8 and 9

By Order of the Court

Stephen W. Kenyon, Clerk

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

1. State of the Judiciary on January 20<sup>th</sup>.

**Idaho Supreme Court  
Oral Arguments for January 2016**

*3<sup>rd</sup> Amended 11/12/15*

**Monday, January 11, 2016 – BOISE**

8:50 a.m. *Intermountain Anesthesia v. Strong* ..... #42514  
10:00 a.m. *Unifund v. Lowe* ..... #42876  
11:10 a.m. *Gearhart v. Mutual of Enumclaw* ..... #42859

**Wednesday, January 13, 2016 – BOISE**

8:50 a.m. *State v. Dabney* ..... #42650  
10:00 a.m. *Navo v. Bingham Memorial Hospital* ..... #42540  
11:10 a.m. *Sweet v. Foreman* ..... #43501

**Friday, January 15, 2016 – BOISE**

8:50 a.m. *Fagen v. Lava Beds Wind Park* ..... #42592  
10:00 a.m. *State v. Schmierer* ..... #43140  
11:10 a.m. *Wagner v. Wagner* ..... #42707

**Tuesday, January 19, 2016 – BOISE**

8:50 a.m. *H-D Transport v. Pogue* ..... #42921  
10:00 a.m. *State v. McClure* ..... #43131  
11:10 a.m. *State v. Rodriguez* ..... #42219  
1:30 p.m. .... \*OPEN\*

**Friday, January 22, 2016 – BOISE**

8:50 a.m. *State v. Eversole* ..... #43277  
10:00 a.m. *Crawford v. State* ..... #43141  
11:10 a.m. *Kugler v. Nelson* ..... #42690

**OFFICIAL NOTICE  
COURT OF APPEALS OF IDAHO**

Chief Judge  
John M. Melanson  
Judges  
Sergio A. Gutierrez  
David W. Gratton  
Molly J. Huskey

**Regular Spring Term for 2016**

*11/02/15*

Boise ..... January 7, 12, 14 and 28  
Boise ..... February 9, 11, 16 and 18  
Boise ..... March 8, 10, 15, and 17  
Boise ..... April 5, 12, 19 and 21  
Boise ..... May 10, 17, 19 and 24  
Boise ..... June 7, 9, 14 and 16

By Order of the Court  
Stephen W. Kenyon, Clerk

**NOTE:** The above is the official notice of the 2016 Spring Term for the Court of Appeals of the State of Idaho, and should be preserved. A formal notice of the setting of oral argument in each case will be sent to counsel prior to each term.

**Idaho Court of Appeals  
Oral Arguments for January 2016**

*1<sup>st</sup> Amended 11/20/15*

**Thursday, January 7, 2016 – BOISE**

9:00 a.m. .... \*OPEN\*  
10:30 a.m. *State v. Linze* ..... #42321  
1:30 p.m. .... \*OPEN\*

**Thursday, January 14, 2016 – BOISE**

9:00 a.m. *McGiboney v. State* ..... #42506  
10:30 a.m. *State v. Clark* ..... #43077  
1:30 p.m. *Lanham v. Lanham* ..... #43105

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**Idaho Supreme Court and Court of Appeals**  
**NEW CASES ON APPEAL PENDING DECISION**  
**(Updated 11/1/15)**

**CIVIL APPEALS**

**Attorney fees and costs**

Whether the court erred in awarding attorney fees on the basis the claims were brought frivolously, unreasonably or without foundation.

*Doble v. Interstate Amusements*  
S.Ct. No. 42744  
Supreme Court

**Due process**

Whether the order cancelling Senor Iguana's alcohol license should be set aside because the ABC violated constitutional provisions regarding notice and an opportunity to be heard.

*Senor Iguana's v. Idaho State Police*  
S.Ct. No. 43158  
Supreme Court

**Post-conviction relief**

Whether the district court erred in summarily dismissing Shackelford's amended successive petition.

*Shackelford v. State*  
S.Ct. No. 42182  
Supreme Court

**Procedure**

Did the district court err in determining that personal jurisdiction over King did not exist for the purposes of considering Wilson's motion to determine the amount due under the parties' decree of divorce?

*Wilson v. King*  
S.Ct. No. 43086  
Supreme Court

**Summary judgment**

Did the district court err in finding there was no genuine issue of material fact regarding whether Ada County violated the Family Medical Leave Act?

*Wright v. Ada County*  
S.Ct. No. 42999  
Supreme Court

**CRIMINAL APPEALS**

**Due process**

Did the district court err when it denied Svelmoe's motion to dismiss the refiled felony complaint?

*State v. Svelmoe*  
S.Ct. No. 43181  
Supreme Court

**Evidence**

Whether the district court erred when it denied Ruiz's motion for new trial because the State's expert rebuttal witness was not sufficiently disclosed under the discovery rules.

*State v. Ruiz*  
S.Ct. No. 42199  
Court of Appeals

**Instructions**

Did the court err in vacating Pierce's conviction for violating a domestic violence protection order based on an erroneous conclusion that the State was also required to prove the elements of disturbing the peace?

*State v. Pierce*  
S.Ct. No. 42848  
Court of Appeals

Did the district court err in refusing to instruct the jury on the "threats and menaces" defense as requested by Boat?

*State v. Boat*  
S.Ct. No. 42651  
Court of Appeals

**Mistrial**

Did the district court abuse its discretion when it denied Ruiz's motion for a mistrial and held a curative instruction would preserve his right to a fair trial?

*State v. Ruiz*  
S.Ct. No. 42362  
Court of Appeals

**No contact orders**

Did the court abuse its discretion by denying Hansen's motion to modify the no-contact order to allow unsupervised contact with his son?

*State v. Hansen*  
S.Ct. No. 42768  
Court of Appeals

**Pleas**

Did the court abuse its discretion in denying Farmer's motion to withdraw his guilty plea?

*State v. Farmer*  
S.Ct. No. 42316  
Court of Appeals

**Restitution**

Did the district court abuse its discretion when it awarded the State restitution for prosecution costs based upon a written statement of costs?

*State v. Cunningham*  
S.Ct. No. 42585  
Court of Appeals

**Search and seizure –  
suppression of evidence**

Did the district court err in affirming the magistrate's denial of Rowley's motion to suppress on the basis the traffic stop was supported by reasonable suspicion of a traffic infraction?

*State v. Rowley*  
S.Ct. No. 43207  
Court of Appeals

Did the court err in denying Crotto's motion to suppress and in finding Crotto's consent to search was voluntary?

*State v. Crotto*  
S.Ct. No. 42993  
Court of Appeals

**Statutes**

Did the court err in its calculation of credit for time served by not retroactively applying the 2015 amendments to the statutes regarding credit for time served as a condition of probation?

*State v. Leary*  
S.Ct. No. 43097  
Supreme Court

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



## Idaho Courts

# Comments Sought on Proposed New Idaho Rules of Civil Procedure

Catherine Derden

In 2014, the Idaho Supreme Court appointed an ad hoc committee to review the Idaho Rules of Civil Procedure. The committee consisted of Senior Magistrate David Day (Chair), Cathy Derden (Idaho Supreme Court staff attorney), Fourth District Judge Steven Hippler, Canyon County Magistrate Jayme Sullivan, William Gigray (White, Peterson, Gigray & Nichols, PA), and Jennifer Brizee (Powers Tolman Farley, PLLC).

The objectives of this committee, as stated by the Idaho Supreme Court, were to: simplify, clarify and modernize the language in the rules; reorganize the rules into a sequence based on the timeline of a civil case; limit each rule to a single topic; create a consistent format for the rules; create a useful table of contents; identify obsolete rules for deletion; and forward to the Civil Rules Advisory Committee any recommendations for substantive changes in the rules. Additional goals of the committee were to use a numbering system that allowed for insertion of new rules in the appropriate location and to keep rule numbers of significant rules the same as in the current rules to the extent possible.

In doing its work, the ad hoc committee made considerable use of the current Federal Rules of Civil Procedure. Those rules were amended in 2007 and the amendments addressed many of the same concerns facing this committee.



Since the Idaho rules were modeled after and currently track the earlier version of the FRCP in large part, the committee used the federal rules and titles as a guide. Where the Idaho rules differed significantly from the federal rules, or where the Idaho rules addressed issues not in the federal rules, the committee attempted to use similar construction and grammatical standards.

The proposed new Idaho Rules of Civil Procedure are divided into 10 titles:

- I. General Administration
- II. Commencement of Action; Service
- III. Pleadings; Motions; Scheduling
- IV. Parties
- V. Discovery
- VI. Alternative Dispute Resolution and Trial
- VII. Judgment
- VIII. Post- Judgment Procedure

Since the Idaho rules were modeled after and currently track the earlier version of the FRCP in large part, the committee used the federal rules and titles as a guide.

- IX. Provisional and Final Remedies
- X. Special Proceedings

An example of the new formatting is Rule 7(a). Currently, Rule 7(a) reads as follows:

**Pleadings allowed -  
Form of motions - pleadings**

There shall be a complaint and an answer; and there shall be a reply to a counterclaim denominated as such; an answer to a cross-claim,

if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under Rule 14 and there shall be a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

Modeled after F.R.C.P. 7(a), the new proposed Rule 7(a) reads as follows:

**Rule 7. Pleadings allowed; Form of motions and other papers**

(a) **Pleadings.** Only these pleadings are allowed:

- (1) a complaint;
- (2) an answer to a complaint;
- (3) an answer to a counterclaim designated as a counterclaim;
- (4) an answer to a cross claim;
- (5) a third party complaint;
- (6) an answer to a third party complaint; and
- (7) if the court orders one, a reply to an answer.

Some rules that apply to all civil cases have been moved to the initial section on general administration. To keep the numbering of key rules the same, and to allow for insertion of new rules in the future, the proposed rules use a numbering system in which a number with a decimal point indicates a different rule; for example, 6.1 is a different rule from 6, not a subpart. There will be a cross-reference table but only a few of the rules have a completely different number. Rather than treating each subsection of a rule as a separate rule, all subsections of a rule will be kept together so that the entire rule is seen in context and then the annotations will follow.

The committee is also making a recommendation that a few rules that have to do with the administra-

The committee's work is now done and everyone who has worked on this project is excited about having a new set of rules that is simpler to read and easier to understand than the current rules.



tion of the courts rather than the conduct of a case be moved to the Court Administrative Rules. In addition, it is recommending that the rules governing small claims be set out in a separate set of rules, as none of the other civil rules apply to small claims.

Lastly, the committee identified and recommended for consideration by the Civil Rules Advisory Committee some rules that were included in the federal rules but not in Idaho's. These were reviewed and approved by the Civil Rules Advisory Committee, previously circulated for comment through the E-bulletin and have already been approved by the Supreme Court.

The committee's work is now done and everyone who has worked on this project is excited about having a new set of rules that is simpler

to read and easier to understand than the current rules. The Idaho Supreme Court sees this as a much needed improvement for the courts, attorneys and self-represented litigants and is now asking that you comment about any concerns you may have before final approval of the rewritten Idaho Rules of Civil Procedure. To view the new rules check the Idaho Supreme Court website at [www.isc.idaho.gov/main/rules-for-public-comment](http://www.isc.idaho.gov/main/rules-for-public-comment).

To view the orders deleting rules, moving rules to the Idaho Court Administrative Rules and adopting substantive changes go to [www.isc.idaho.gov/recent-amendments](http://www.isc.idaho.gov/recent-amendments). All comments will be carefully considered before the changes are adopted. Please send your comments by email to Cathy Derden at [cderden@id-courts.net](mailto:cderden@id-courts.net) by February 12, 2016.

*Catherine Derden is a graduate of the University of Arkansas at Little Rock, where she received her Juris Doctorate Degree in 1979. In 1992, she became an Assistant Attorney General for the State of Arkansas. She moved from Arkansas to Idaho in 1994 and continued to handle criminal appeals as a Deputy Attorney General for Idaho. She has been the Staff Attorney for the Idaho Supreme Court since September 1998.*





## Idaho Courts

### Judicial Retirements and Those New to the Bench

Listed below is a comprehensive list provided by the state courts of those judges who have retired in 2015, and those who have been newly appointed or elected to serve on the bench.

#### Court of Appeals

##### *New Appointment*

Hon. Molly J. Huskey, September 8, 2015

##### *Retirement*

Hon. Karen Lansing, June 30, 2015

#### First District

##### *New Appointments*

Hon. Anna Eckhart, Magistrate Judge, Kootenai County, September 1, 2014

Hon. James Combo, Magistrate Judge, Kootenai County, January 1, 2015

Hon. Cynthia Meyer, District Judge, June 1, 2015

##### *Retirements*

Hon. Penny Friedlander, Magistrate Judge, Kootenai County, August 31, 2014

Hon. Barry Watson, Magistrate Judge, Kootenai County, December 31, 2014

Hon. Benjamin Simpson, District Judge, April 30, 2015

#### Second District

##### *New Appointment*

Hon. Gregory Fitzmaurice, District Judge, February 23, 2015



##### *Retirement*

Hon. Michael Griffin, District Judge, January 6, 2015

#### Third District

No changes

#### Fourth District

##### *New Appointments*

Hon. Diane Walker, Magistrate Judge, Ada County, July 1, 2014

Hon. Samuel Hoagland, District Judge, January 5, 2015 (contested election)

Hon. Jonathan Medema, District Judge, June 22, 2015

##### *Retirements*

Hon. Terry McDaniel, Magistrate Judge, Ada County, June 30, 2014

Hon. Michael Wetherell, District Judge, January 2, 2015

Hon. Thomas Neville, District Judge, February 28, 2015

#### Fifth District

##### *New Appointment*

Hon. Jennifer Haemmerle, Magistrate Judge, Blaine County, January 1, 2015

##### *Retirement*

Hon. R. Ted Israel, Magistrate Judge, Blaine County, December 31, 2014

#### Sixth District

##### *New Appointment*

Hon. David Hooste, Magistrate Judge, Oneida County, July 1, 2015

##### *Retirement*

Hon. David Evans, Magistrate Judge, Oneida County, June 30, 2015

#### Seventh District

##### *New Appointment*

Hon. Bruce L. Pickett, District Judge, January 5, 2015 (contested election)

##### *Retirement*

Hon. Jon Shindurling, District Judge, January 2, 2015

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## Idaho Courts

### E-Filing Launches in Twin Falls County as Test Case

Natalie Pigorski

**A**ttorneys from all over Idaho can now file most cases in Twin Falls County without leaving their office and heading to the courthouse. Electronic case filing first started in October in Twin Falls County. Currently, it is voluntary but on January 11, 2016, all attorneys filing cases in the Twin Falls County will be required to file electronically.

"To be able to immediately communicate with the courts and our clients is huge," said Sheri Mitchell, office administrator for May, Browning & May, LLP, one of the pilot firms to test e-filing in Idaho. "You are eliminating a three- to five-day process."

Mitchell says e-filing is already saving the firm time and it gives attorneys additional flexibility because now they can file cases any time of day, even when the courts are closed. While e-filing is working smoothly for May, Browning & May now, Mitchell admits it took time and lots of testing to get to that point.

"There were hiccups at the beginning. There are always going to be hiccups when you are dealing with a new program," said Mitchell. "I appreciate the fact that the Idaho Supreme Court didn't just give us one person to call. They gave us several."

Worst, Fitzgerald & Stover, PLLC, the other law firm to test out the e-filing system, had a similar experience. Office manager April O'Berg says they've worked closely with the courts to identify ways to improve the system for attorneys all over the state. Changes have already been

made including turning off certain options that were confusing for users and adding additional filing codes.

O'Berg says it took the firm a few weeks to feel confident using the new system. While e-filing is still optional until January 11, she recommends attorneys start using it now.

"Get on early and practice early," said O'Berg. "The process to set up an account takes time. Do it now so you are not on a deadline left wondering how to get it done."

#### Help available

Tyler Technologies, the Idaho Supreme Court's partner in modernizing the state's judicial system, will help any attorney set up their e-filing account for free. For assistance call 1-800-297-5377 during normal business hours.

The Idaho Supreme Court is holding in-person trainings on how to e-file January 7 and 8 at the Twin Falls County West Administration Building. Attorneys who are unable to attend one of those trainings can take a free online seminar anytime through Tyler Technologies. For more details on those trainings, or to register, attorneys should visit <http://icourt.idaho.gov/efileoverview>

#### Way of the future

The Court believes e-filing and the new case management system will allow for improved information delivery and help increase Idahoan's access to fair and efficient justice. E-filing also gives attorneys the freedom to file a case any hour of the day from any location and it will signifi-

The Idaho Supreme Court is holding in-person trainings on how to e-file January 7 and 8 at the Twin Falls County West Administration Building.

cantly decrease the amount of time it takes to file with the court and serve other parties – benefits May, Browning & May and Worst, Fitzgerald & Stover say they are enjoying.

"The Idaho Judiciary has reached a pivotal moment in our transition to electronic court records with the implementation of electronic filing, allowing documents to be digitally filed, served, distributed and delivered at any time from any place," said Justice Linda Copple Trout, Interim Administrative Director of the Courts. "This transition further supports the efficiencies gained by moving to an electronic court record by creating time savings for attorneys, clerks, and judges."

Twin Falls County is just the beginning. As the Idaho courts continue to deploy the new court case management system, e-filing will be implemented in every county and over the next few years it will be mandatory across the state.

# Good Old-Fashioned Editing

Jason Dykstra

In the law, first impressions often transpire in writing. Given this opportunity, don't risk losing credibility from Judges, clerks, or clients by submitting documents rife with typos and errors.

Certainly, no attorney wants to stand up at an oral argument and commence with an apology for a brief riddled with typos and errors. In the digital age, no attorney wants to risk blowback from their bad briefing going viral, in places such as "Above the Law" accompanied by an overheated caption like *Bad Briefing Begets Brutal Benchslap*.<sup>1</sup> So, to make the best written impression, invest time in both drafting and editing work product.

A year and a half ago, this column discussed electronic editing.<sup>2</sup> While not perfect, the spelling and grammar review features of word processing software can prove good editing tools. Similarly, find and replace features can help ferret out any lurking malapropisms. These searches can avert the potential embarrassment of quoting a "statue" in the Idaho Code in a brief filed in "Canon County." However, electronic editing does not supplant the good old-fashioned printing-a-fresh-draft-and-reading-keenly style of editing. This article focuses on a few tips to optimize the effectiveness of editing text in print.

## Separate drafting and editing

First, strive to separate the drafting process from the editing process.<sup>3</sup> As you may notice while following a distracted driver attempting to text, humans are not particularly skilled at multitasking. In general, you can optimize the



effectiveness of both drafting and editing by focusing separately on each task. Amongst perfectionists, separating drafting from editing facilitates efficiency by quashing the urge to linger and revise word choices and sentence structure. So, try drafting first and then turn your full attention to editing.

While younger practitioners may mock their older colleagues' habit of whispering into Dictaphones, dictation encourages separating drafting from editing. But there are alternatives other than dictation. Last year, one of my students found her efficiency improved dramatically by typing drafts in a white font that only became visible when she later changed the font to black for editing.

Another writer explained his lower tech solution: covering the screen on his laptop with a pillowcase while drafting. And yes, there is even a free Web App called "Blind Write" that lets you type away on a blackened screen before revealing your text.<sup>4</sup> So, find a technique that works for you, draft and then turn your attention to editing.

---

However, electronic editing does not supplant the good old-fashioned printing-a-fresh-draft-and-reading-keenly style of editing.

---

## Take a break before editing

Before editing, walk away from your draft. Of course, this can prove a challenge for procrastinators. But schedule a little break after you finish your initial draft: go out to lunch, take a walk around the office, or, even better, sleep on it. This

break separates drafting from editing.

Moreover, given a little idle down time, your mind will consciously begin to problem solve and edit. As the essayist Tim Krieder explained, an idle break provides “a necessary condition for standing back from life and seeing it whole, for making unexpected connections and waiting for the wild summer lightning strikes of inspiration — it is, paradoxically, necessary to getting any work done.”<sup>5</sup> For example, a well-known Idaho attorney once claimed that his best trial strategies emerged not in court or at the office, but while drying dishes after dinner. Like the proverbial “epiphany in the shower,” your best ideas may require a little time to percolate.

### Find the editing techniques that work for you

Once you sit down to edit, try a number of editing techniques. Over time, you will hone the best techniques that work for you. Many writers are the most effective when editing from a printed copy. With this in mind, print a fresh copy of your draft.

Also, consider a change of venue from your office. The distractions of e-mails popping up, phone calls rolling in, and other neglected files piled on your desk are not conducive to effective editing. So grab your draft and wander into an empty conference room, head over to a coffee shop, or take your draft home.

Many writers find their editing skills are the most effective when they read aloud. You know what you meant to type. So, while reading you tend to skip over minor errors and typos. When reading aloud,

small typos often become readily apparent.

For my first edit, I skip reading legal citations altogether and focus exclusively on reading the text of the document aloud. During round two of my editing, I return to check every citation. Usually, I quickly pass through my draft to highlight each cite and return for a thorough citation review.

Some legal writers find it more effective to edit by focusing on each line of their draft. Moving a ruler or blank sheet of paper along to isolate each line of text can facilitate this technique. Other writers print drafts on a different colored paper for editing. For these writers, errors and typos stand out in drafts printed on pink or yellow copy paper.

Some legal writers prefer to perform their final edit by reading the entire document backwards, focusing discretely on each sentence in reverse order. Absent the accompanying context of how each sentence fits into the draft, these writers notice more typos and errors. Other writers listen to music during the editing process. Preferably nothing distracting with lyrics, but a favorite classical or jazz piece can facilitate focused editing. Ultimately, try a bunch of editing techniques to find the techniques that work the best for you.<sup>6</sup>

### Conclusion

A bit of effort at the editing stage will ensure that the documents you produce put your best foot forward, whether in pleadings or in correspondence. One final note for private practitioners, don't neglect to edit and proof your billing statements. In particular, don't neglect to check for the correct spelling of your client's name in every time entry. While it may not be a first impression, don't let misspelling your client's name on an invoice make IT your last impression.

### Endnotes

1. <http://abovethelaw.com/2015/06/maybe-this-is-the-greatest-or-at-least-the-snarkiest-concurrence-ever> (last visited September 23, 2015).
2. Tanielle Fordyce-Ruff, *Time Savings: E-Editing Tips & Tricks*, 57-JUL Advocate (Idaho) 62 (2014).
3. Stephen V. Armstrong & Timothy P. Terrell, *Editing: Overcoming the Dr. Strangelove Syndrome*, 5 No. 2 Persp: Teaching Legal Res. & Writing 77 (1997).
4. <http://blindwrite.herokuapp.com/>
5. Tim Krieder, *The 'Busy' Trap*, The New York Times (June 30, 2012), [http://opinionator.blogs.nytimes.com/2012/06/30/the-busy-trap/?\\_r=0](http://opinionator.blogs.nytimes.com/2012/06/30/the-busy-trap/?_r=0).
6. Stephen V. Armstrong, *How to Edit Effectively and Efficiently*, 37 No. 2 Prac. Law. 45, 53 (1991).

Jason Dykstra is an Assistant Professor of Law and the Assistant Director of the Legal Research and Writing Program at Concordia University School of Law. You can reach him at [jdykstra@cu-portland.edu](mailto:jdykstra@cu-portland.edu).



## Procrastination's Dark Side

Mark Bassingthwaight

**A**ll right, I'll admit it. I am a procrastinator. If there is a Procrastinator's Anonymous, I should probably be a member. In fact, I wonder if an organization such as this actually exists. I've always thought about checking into that, but somehow I never got around to it. Now, my excuse for never checking has been that I tend to perform well under the gun. In fact, some of my best work often occurs when I'm working under a time crunch. I am able to produce when I must. Even better, I like the feeling of satisfaction that I get when it's all over having met the deadline with a job well done. It feels good. I have earned my place.

What's the problem then?

A false sense of security is the problem and this is the dark side of procrastination. I've pulled it off at the last minute so many times before that I'm certain I can do it again and often this is true. Of course this can only happen if no unforeseen circumstances arise; and note that I have not shared the stories of when I didn't make the deadline. I assure you that I have had them. That said, while my missing a deadline from time to time might mean that I will need to ask for an extension, for an attorney in practice, a missed deadline can be disastrous.

Consider Rule 1.3 (a) of the ABA Model Rules of Professional Conduct and commentary. The rule states: "A lawyer shall act with reasonable diligence and promptness in representing a client." Comment [3] to this rule reads "Perhaps no professional shortcoming is more widely

resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness."

Procrastination can be a dangerous choice in the practice of law and it is so easy to do. The reasons behind procrastination are many. An attorney may assume that someone else is taking care of the matter, may not have a complete understanding as to how to best handle a matter, or may simply have too many matters open. Being afraid of imparting bad news, not wanting to deal with a "problem



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An attorney may be depressed or burned out, thus unable to find the energy to finish a matter, or perhaps is impaired and not thinking clearly.

---

client," or hoping that with enough time the problem will go away are other reasons that attorneys procrastinate.

Sometimes the problem is an inability to organize work and a matter has been overlooked or forgotten about. Sometimes there is an inability to appropriately

prioritize work coupled with a failure to appreciate the importance of completing the work on a given matter in a timely fashion. At other times procrastination arises for reasons that are more personal. An attorney may be depressed or burned out, thus unable to find the energy to finish a matter, or perhaps is impaired and not thinking clearly.

These examples all point to the dark side of procrastination. Anyone could easily rationalize his or her way through them in order to reach a false sense of security. Who among us has never had at least one of the following thoughts now and again?

“I don’t need to worry about it because someone else will eventually take care of it.”

“Next week I will have the time to do the research or I can call in a favor then if necessary.”

“I can handle all this work now because I was able to do it before.”

“The client doesn’t really want to hear this bad news.”

“The client wouldn’t be able to handle the bad news.”

“The client isn’t going to be able to understand this and so doesn’t need to know.”

“If I wait long enough, this problem will eventually go away.”

“I’m pretty sure I’m on top of everything so why worry?”

“I can get to this anytime.”

“I just don’t have the energy today, but I’ll make sure to do it tomorrow.”

“This really isn’t that important so it doesn’t matter if I don’t get to it for a while.”

“I need to spend my time on this important matter so these other matters can wait.”

“I don’t have anything going on next week so I’ll get to it then.”

“I’ll deal with this after I hear from them.”

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The point is simply to remind you that we as attorneys have an ethical obligation to be diligent in the handling of all client matters.

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Statements such as these are rationalizations that bring a false sense of security and nothing else. Admittedly, many times things work out just fine. The problem did go away, the difficult conversation with the client eventually occurred, someone else took care of it, or you benefited from having an extremely competent staff person make certain that you finished the work on time. But what if it doesn’t? Unfortunately at ALPS, we deal with those times when things didn’t work out as planned. Something unexpected happened and time ran out.

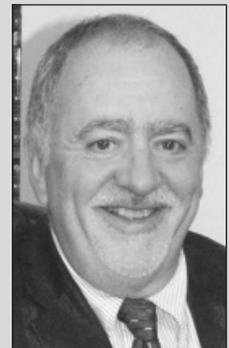
My intent here is not to share all the various systems that could be put in place to help you complete all matters in a timely fashion; and truth be told, no system can force you to do the work anyway. They can only remind you of what

needs to be done. For example, a number of malpractice claims are classified as “failure to respond to the calendar.”

With these types of claims the system apparently worked. It was the attorney who dropped the ball. The point is simply to remind you that we as attorneys have an ethical obligation to be diligent in the handling of all client matters. Recognize procrastination for what it is, an excuse. There is real value in remembering that and, more importantly, in learning how responsibly address whatever is behind the need to create the excuse because, sooner or later, the unexpected will happen and the fallout can get ugly. The bottom line is this. Never put off until tomorrow what can and should be done today.

*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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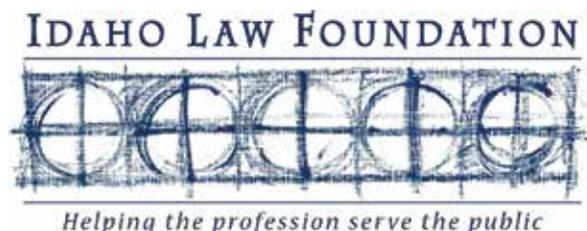
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## IN MEMORIAM

### Patricia “Pat” Urquhart 1946 - 2015

Patricia “Pat” Urquhart passed away on Sept. 18, 2015, after a brief but devastating battle with metastatic melanoma. She was a fifth-generation Oregonian, descended from the Tichenor family, settlers of Port Orford. Pat was the daughter of Robert and Anna Tichenor Bridge and grew up with her brother Chuck in Parkrose. She received a degree in philosophy at Portland State and her law degree from Lewis & Clark Law School.



Patricia “Pat”  
Urquhart

Pat and John were married in 1977 and practiced law together for three years in Portland before moving to Northern California where her husband attempted to reopen an underground gold mine. They moved to Idaho and began a criminal defense and civil rights practice.

Memorable moments of her Idaho law career included: suing the department of corrections for the wrongful death of an inmate resulting from medical malpractice; seeking the reversal in the US Supreme Court of a client’s conviction of trading in eagle feathers; and battling with a New York law firm representing a CBS talk show in a federal libel and slander case.

In 1988, Pat and her family returned to the Portland area. She spent the next 17 years as a senior assistant attorney general with the Oregon Department of Justice specializing in employment and civil rights litigation. During her time with the

DOJ, she had more civil jury trials—with more wins — than all but a few litigators in the state.

She spent the last six years of her life seeking vindication for a firefighter wrongly accused of gross misconduct. Her work resulted in winning a \$1 million federal jury verdict that was set aside by the trial judge. A week prior to her death, she was actively pursuing review by the United States Supreme Court of the unfounded nullification of the jury’s decision in favor of her client.

Pat loved to travel. She and her family traveled to many countries in Latin America, taking almost annual vacations to the Yucatán coast of Mexico.

She was a member of the World Affairs Council, and a member and past president of the Portland Committee on Foreign Relations. As a lifelong student of history and literature, she was drawn to the controversy around Shakespearean authorship. She was a proud member of the Shakespeare Oxford Society in which she met many intellectually stimulating friends.

At an early age, Pat became interested in comparative religion and was ultimately drawn spiritually to the basic tenants of Buddhism, particularly the belief in the interconnectedness of everything and everyone.

### William E. Little 1948 - 2015

William E. “Bill” Little Bill Little of Caldwell, was born Nov. 9, 1948 to Walter and Evelyn Little and passed away suddenly from a heart attack on Oct. 15, 2015.

Bill went to the University of Idaho for both his undergraduate

degree and his law degree, where he was a proud member of the Sigma Chi fraternity. Bill spent his career as an attorney in a variety of capacities. Two of his private practice law offices were with two of his best friends. First, David Wishney, who was also one of Bill’s life-long fishing buddies. Later, Bill and Don Lassaw partnered for many years as Lassaw and Little Law Offices. Bill also spent many years as a city attorney for Boise. Bill had



William E. Little

many other business interests from farming to car lots. He loved to play cards, and poker and gin were two of his favorites. Bill also loved to golf and spent many hours on golf courses around the valley. Bill is survived by his older brother, Rob Little (Mary) and their three daughters (Erica, Andrea and Robin) and younger sister Anne Roberts (Doug) and their son (Nick). Bill is survived by many dear friends - too numerous to name.

### John A. Church 1941 - 2015

John A. Church passed away Nov. 11, 2015, at Life Care Center in Lewiston, due to complications from pneumonia. He was 74. He was Nez Perce Tractor Co. president from 1967-1986 and attorney at law from 1987-2008.

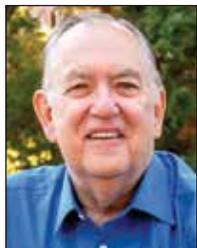
John was born to John Junior and Gwen Grover Church on Feb. 3, 1941, in Lewiston. After high school graduation, John attended the University of Oregon, where

## IN MEMORIAM

he completed his bachelor's degree in business administration, class of 1963. He went on to complete his law degree at the University of Idaho in 1966, passing the bar shortly after. But he didn't practice law until 23 years later.

After graduation, John turned down an offer to work with the Federal Bureau of Investigation and put his legal career on hold to do his family duty as a third-generation owner/operator of Nez Perce Tractor Co., the Lewiston-based Caterpillar and John Deere dealership that served eastern Washington and north central Idaho.

After the company sold in 1987, John finally began his career as a lawyer, working in the Lewiston-Clarkston Valley for 21 years. Practicing mostly family law, John took



John A. Church

an estimated 2,300 cases during that time. He was also instrumental in launching the pro bono program at his alma mater, the University of Idaho. He accepted many pro bono cases in his own practice and was the 2006 recipient of the Idaho State Bar's Denise O'Donnel Day Pro Bono Award.

John served with the Idaho National Guard, 148th Field Artillery and 116th Engineers, from 1966 to 1974. John was very community-minded and was actively involved in various organizations, including: Lewiston Chamber of Commerce (president), Port of Lewiston (commissioner, vice president), Twin County United Way (board of directors), KUID Public Television (board of directors), Episcopal Church of the Nativity (treasurer), Episcopal Diocese of Spokane (board of trustees), North Idaho Children's Home (secretary), Nez Perce County Historical Society (board of directors), Idaho Community Foundation (board of directors), Lewis-Clark

State College (campaign for athletic facility), Idaho Association of Commerce and Industry, The Idaho Company, University of Idaho campaign for the Kibbie Dome and Lewiston Library campaign for the new Lewiston Library.

As a boy, John spent his summers in Lowell with his family. They enjoyed horseback riding, hunting and fishing in the Clearwater National Forest, which were some of his fondest memories. He enjoyed travel and made trips to all 50 states during his lifetime. He also enjoyed traveling overseas and made trips to Mexico, Latin America and Europe.

He married Susan Lee Jeans (Church) Dec. 22, 1963, in Springfield, Ore. They later divorced in 1981. John then married Cyndee C. Bourne (Church) July 15, 2000, in Lewiston.

He is survived by his wife, Cyndee C. Church, of Lewiston; sons Jay (Rachael) Church of Boise and Dan Church of Denver; one grandson and one granddaughter.

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**Idaho's first young lawyer delegate appointed to the ABA House of Delegates**

BOISE – The Idaho State Bar Board of Commissioners recently appointed Holland and Hart's Boise associate Jennifer Jensen as Idaho's first Young Lawyer Delegate to the American Bar Association House of Delegates. Her term is effective until the ISB Annual Meeting in 2017.

The control and administration of the ABA is vested in the House of Delegates, the policy-making body of the association. At the 2015 Annual Meeting, the House of Delegates of the ABA adopted a proposal to provide for additional young lawyer delegates for delegations that do not currently have a young lawyer delegate to the ABA House of Delegates.



Jennifer Jensen

“The Idaho State Bar Board made the right choice by selecting Jennifer for this prestigious position. Congratulations from all of us in Boise and the firm,” said Holland & Hart partner Walter Bithell.

As a Young Lawyer Delegate, Ms. Jensen will be a delegate of the House which considers and adopts new policy resolutions on a broad range of issues related to the legal profession. Once resolutions are adopted as official ABA policy, the Governmental Affairs Office coordinates implementation of the policies and serves as the focal point for the Association's advocacy efforts before Congress, the Executive Branch and other governmental entities.

Ms. Jensen is a member of the firm's Commercial Litigation team. Prior to joining Holland & Hart, Ms. Jensen served as law clerk to the Honorable N. Randy Smith of the U.S. Court of Appeals for the Ninth Circuit.

**Stephanie Taylor selected Fellow in College of Trust & Estate Counsel**

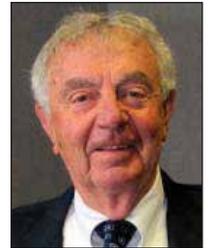
SPOKANE – Randall | Danskin, P.S. is pleased to announce that one of its principals, Stephanie R. Taylor, has been selected as a Fellow of the American College of Trust & Estate Counsel (ACTEC). ACTEC is an international organization comprised of lawyers skilled and experienced in the preparation of wills and trusts; estate planning; probate procedure and administration of trusts and estates of decedents. ACTEC Fellows work on a state and national level to improve and reform probate, trust and tax laws, procedures, and professional responsibility. Lawyers and law professors are elected to be Fellows based on their outstanding reputation, exceptional skill, and substantial contributions to the field by lecturing, writing, teaching and participating in bar activities. Ms. Taylor is licensed to practice in Idaho, Washington, and Florida. A graduate of Gonzaga University School of Law, with an LL.M in Taxation from the University of Florida, she can be reached at 509.747.2052 or srt@randalldanskin.com.



Stephanie R. Taylor

**New Judicial Council director**

BOISE – David W. (Tony) Cantrill has been appointed executive director of the Idaho Judicial Council.



David W. (Tony) Cantrill

The council interviews and recommends candidates to the governor to fill district and appellate court vacancies, advises judges on ethical questions, and receives, investigates and makes recommendations to the Supreme Court regarding complaints made against judges. Cantrill started in the position Dec. 1.

Cantrill has practiced law in Boise since 1970, and established his own firm in 1980. He is with Cantrill, Skinner, Lewis, Casey and Sorensen. Cantrill received a BA in government from Idaho State University in 1966 and his law degree from the University of Idaho College of Law in 1970.

**CDA attorney receives certification in elder law**

COUER d' ALENE – The National Elder Law Foundation (NELF), the only organization approved by the American Bar Association to offer certification in the area of elder law, has announced that Katherine Monroe Coyle of Coeur D' Alene, Idaho has successfully completed its examination leading to such certification.

Certification in elder law, one of the fastest growing fields in the legal profession, will provide a measure of assurance to the public that the attorney has an in-depth working knowledge of the legal issues that

impact the elderly, the disabled, and their families.

Ms. Coyle of the Wytychak Elder Law, PLLC firm in Coeur d'Alene, Idaho is now a Certified Elder Law Attorney (CELA). She has practiced elder law for seven years. Ms. Coyle is a graduate of Gonzaga University School of Law in Spokane, Washington and the University of Montana in Missoula, Montana. She has been a resident of Coeur d'Alene, Idaho for eight years.



Katherine Monroe Coyle

For more information, please contact Wytychak Elder Law, PLLC at (208) 765-3595 or visit the website at [www.wytychakelderlaw.com](http://www.wytychakelderlaw.com).

**Miner & Pope, PLLC opens in Middleton**

MIDDLETON – Clinton Miner and Michael Pope are pleased to announce that they have opened Miner & Pope, PLLC, a full service law firm including personal injury and workers' compensation litigation.



Clinton Miner

Prior to co-founding Miner & Pope, Clinton Miner was a partner and member of Storer & Miner, PLLC, and has worked in personal injury and



Michael Pope

workers' compensation law for over 27 years serving both English and Spanish speaking Clients.

Michael Pope was previously with Allstate Insurance Company's Staff Counsel Office based in the Seattle and Portland offices handling civil litigation matters for its insureds in eastern and western Idaho. He has been in insurance defense litigation for over 14 years.



**Evans Keane LLP earns recertification in Meritas, a global alliance of independent business law firms**

BOISE – Evans Keane, LLP, a Boise-based law firm, announced that it has been awarded recertification in Meritas, a global alliance of business law firms. Evans Keane, LLP joined Meritas in 1993, and as a condition of its membership, is required to successfully complete recertification every three years.

Meritas is the only law firm alliance with an established and comprehensive means of monitoring and enhancing the quality of its member firms — a process that saves clients time in validating law firm credentials and experience.

“We are proud of our firm's achievements, and look forward to continuing our relationship with Meritas,” said Jim Hovren, Partner at Evans Keane, LLP. “Meritas' Quality Assurance Program is not just valuable for our clients seeking legal expertise around the world, it also provides us with a framework to consistently monitor and address the quality of our services.”

**Margie R. Cleverdon joins Garner law office**

BOISE – Recent graduate of Concordia University School of Law and new member of the Idaho State Bar Margie R. Cleverdon has joined the firm of Gardner Law Office for the practice of Workers' Compensation Defense. The firm is at 1410 W. Washington Street, Boise, and Ms. Cleverdon can be reached at [mcleverdon@gardnerlaw.net](mailto:mcleverdon@gardnerlaw.net).



Margie R. Cleverdon

**Stott, Wake join Parsons Behle & Latimer's Idaho legal team**

BOISE – Parsons Behle & Latimer is pleased to announce Jordan Stott and Andrew V. Wake have joined the firm's Idaho office as associates.

Stott, a patent attorney who focuses on patent and trademark prosecution, has broad experience working with a variety of technologies, including firearms, aerospace, medical devices, and mechanical systems. He has also assisted in patent prosecution in foreign jurisdictions such as Europe, Japan, China, Israel and Canada. Stott earned a B.S. degree in mechanical engineering and minored in



Jordan Stott



Andrew V. Wake

## OF INTEREST

mathematics at Utah State University. He holds a J.D. from the University of Idaho College of Law, and previously interned at the U.S. Patent and Trademark Office where he examined patent applications and participated in proceedings before the Patent Trial and Appeal Board.

Wake joined Parsons Behle & Latimer's Litigation, Trials and Appeals practice group, and specifically works with appeals, employment and labor, health law, and intellectual property litigation. Wake graduated magna cum laude from Boise State University where he earned his bachelor's degree in Philosophy. He later went on to earn master's and doctoral degrees in philosophy from University of Rochester, and graduated with highest honors from University of Utah's S.J. Quinney College of Law. Prior to his employment at Parsons Behle & Latimer, Wake served as a judicial clerk to the Honorable Jim Jones, Idaho Supreme Court.

Both Stott and Wake are licensed to practice law in Idaho.

### IBR 2015 leaders in law

For the third time, Idaho Business Review is recognizing Leaders

in Law, chosen from the state's top law professionals.

About 100 law professionals were nominated and about 50 sent back applications. A dozen selection committee members, including past awardees, a representative from the University of Idaho, and Idaho Business Review editors winnowed the list to 24.

The Leaders in Law program "provides an opportunity to recognize those who have excelled not only in their professional lives but who are also leaders in terms of their community and civic engagement. The nominees are all exceptional candidates and are deserving of recognition," said Terri Muse, assistant dean of external relations for the University of Idaho College of Law.

An awards reception was held in Boise on Nov. 17.

Associate: Steve Frinsko, Hawley Troxell Ennis & Hawley LLP

Educator: Lee Dillion, University of Idaho College of Law; Tenielle Fordyce-Ruff, Concordia University School of Law

In-house Counsel: Brian Buckingham, Idaho Power Company; In-

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Sole Practitioner: Bob Aldridge, Robert L. Aldridge, Chartered

Unsung Hero: Dana Olson Reid, Hawley Troxell Ennis & Hawley LLP

Up & Coming Lawyer: Sunrise Ayers, Idaho Legal Aid Services Inc.; Anna Eberlin, Holland & Hart LLP; Matthew Gunn, Barnum Howell PLLC; Sarah Reed, Hawley Troxell Ennis & Hawley LLP

Lifetime Achievement Award: Scott D. Hess, Holland & Hart LLP.

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# Improving Effectiveness and Efficiency Through Physical Fitness

Dan Stone

**F**or attorneys, exercise offers more benefits than just weight loss or staying in shape. It can also help improve performance at work.

And who doesn't want to get their job done more creatively and skillfully?

Many Idaho firms encourage team members to stay healthy through incentives such as free memberships to the YMCA, extended lunch breaks for long bike rides or workouts, and flexible schedules that permit employees to bike to work.

"Physical training boosts my focus at work and helps me make the most of my time," said John Kormanik, founding partner of the Meridian law firm Kormanik Hallam & Sneed. "Whether I'm participating in a race or just exercising, I always feel accomplished after completing a workout on my calendar. When I wake at 5 a.m. and finish a session, the 'plate' for my day is set."

## Fitness fosters teamwork

Thomas Banducci, partner and co-founder of Boise law firm Andersen Banducci, has learned that a fit team is a happier, more effective team. "When we're healthy we tend to be sick less often and miss fewer work days," he said. "All of which is critical to foster a team environment in which collaboration and mental sharpness are key."

Banducci says that because the contributions of every team member at a firm are important, keeping everyone healthy is vital. "When we founded Andersen Banducci, we set out to reinvent what a law firm could be," he said. "We put an emphasis on personal and focused attention for all our clients. And that



Photo courtesy of Eric Vehlow

Eric Vehlow, a partner at Boise-based Holland & Hart, likes exercise to rejuvenate his attitude. He prefers the outdoors, but will make sure to get a workout, even if it is at the gym.

means everyone's input matters, from the receptionist to the partners. We need everyone at the top of their game."

Banducci, however, doesn't just advocate healthy living to his colleagues — he's also a fitness fanatic himself. He's been a member of the Y since 1979 and goes four or five times a week, lifting or attending TRX (a suspension training workout) and spin classes. Though he used to compete in triathlons, he now opts for more traditional workouts and cycling on his road bike.

## Exercise begets balance and energy

Balancing a busy schedule is challenging for many in the le-

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"When we're healthy we tend to be sick less often and miss fewer work days," he said. "All of which is critical to foster a team environment in which collaboration and mental sharpness are key."

— Thomas Banducci

gal profession, which is why Eric Vehlow, a partner at Boise-based Holland & Hart, blends convenience into his regiment. He uses the gym in his building at work and tries to make the most of Boise's natural landscape.

"The hardest part is making myself get to the gym and be active," Vehlow said. "Taking time from sitting behind my desk to exercise almost always improves my mood. I'll be physically tired and sore, but mentally rejuvenated."

Kormanik, a triathlete and open water swimmer, also appreciates the benefits of physical activity. He competes in Ironman triathlons and said the endurance-testing training carries over into his everyday work as a litigator.

"Exercise is a wonderful stress-management technique and helps me bring a renewed focus to my practice," he said. "Training for an Ironman triathlon — a 2.4 mile swim, 112 mile bike ride and 26.2 mile run that has to be completed in less than 17 hours — helps me as a litigator. It teaches me how to focus and make the most of my time."

### **Cycling clears the mind**

One of Banducci's partners, Wade Woodard, also knows the benefits of staying in shape. An avid recreational cyclist, Woodard rides his bike 13 to 20 miles four or five times a week — either by commuting to work or mountain biking during lunch. He keeps a bike at work and does a 30-minute Cross-Fit workout most mornings before heading to the office.

"Cycling is my escape from law, and I usually try not to think about work while I'm on a bike," Woodard said. "Riding helps me reduce stress and clears my head. Although once in a while I do have an epiphany concerning a case while on a trail."



Photo by Wade Woodard

Boise attorney Aaron Chandler mountain bikes with colleague Wade Woodard during a business trip to Arizona.

Not long ago, Woodard encouraged paralegal Keri Rowland to pick up cycling. Today she rides in a local women's cycling group, Spinderella, and enjoys an occasional 40-mile weekend ride. Rowland records her distance with My Fitness Pal, a mobile app that also tracks nutrition and ultimately helped her lose 30 pounds.

"Cycling helps me eliminate stress and have more energy," Rowland said. "By staying active and eating right I just feel better overall." Along with riding, Rowland also stays in shape with weight training and regular golf outings.

### **Eating right makes all the difference**

Clinton Miner, partner and co-founder of Miner & Pope LLC in

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"Cycling is my escape from law, and I usually try not to think about work while I'm on a bike." Riding helps me reduce stress and clears my head."

— Wade Woodard



Photo courtesy of Keri Rowland

Boise paralegals Keri Rowland and Chantel Elkins at the end of Boise's Goldilocks event, a women-only bike ride aimed to help women of every skill level advance in the sport.

Middleton, says what he eats can affect job performance. "A proper diet has had a huge impact on my life and career," he said. "I've lost 70 pounds in the last six months through a physician-led diet program. I feel less stressed, I have more energy — and physical activity is so much more enjoyable now."

Miner says being more trim and fit makes working as an attorney easier. "My mind is clearer and I can concentrate more on our clients," he said. "My blood pressure has significantly dropped, and I just feel better overall."

### **Yoga offers new perspectives**

Many attorneys choose yoga to improve physical fitness. Five times a week, Andersen Banducci partner Benjamin Schwartzman does Ashtanga yoga — a vigorous, athletic style of yoga that includes

a set series of poses and breathing exercises. He says he likes yoga because it's self-contained and he can do it anywhere. Schwartzman is so committed to yoga, his colleagues say that on work trips he'll often turn down offers to go out after a long day because he hasn't done his yoga yet.

Schwartzman, who has led yoga classes in his firm's building for colleagues, says yoga helps him focus more at work. "Yoga teaches me how to be present while ignoring extraneous elements around me," he said. "At the same time, there's a purifying aspect to it. Yoga helps strip away things like aggression, pride and ego that can come with our profession, and replace them with characteristics like neutrality and humility. It's an interesting paradox — yoga gives me confidence but also reminds me that I can't do everything."

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"My blood pressure has significantly dropped, and I just feel better overall."

— *Clinton Miner*

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### **Walking and running reduce stress**

Miner's partner and Miner & Pope co-founder, Mike Pope, likes to walk everywhere. "I always have more energy and feel less stressed after I walk and exercise," he said. "Having the energy to work long days when necessary helps me focus on what counts — the client and the case — rather than being too tired to do anything."

Andersen Banducci attorney Jennifer Schrack Dempsey prefers running over walking. She runs three days a week and loves the social side of it. “I have a close knit group of girlfriends that run,” she said. “And even though our mileage has dropped over the years, the frequency of our runs has not.”

When she’s not running or walking, Schrack Dempsey likes to keep her family active when they’re together. “We love to ski, bike, hike, camp and swim,” Schrack Dempsey said. “Because I do so much sitting at work, I like to move as much as possible when I’m not at the office.”

### Keeping the communities strong and active

Some firms like Andersen Banducci are also trying to do their part to promote physical fitness in the community. In 2013, Andersen Banducci made a long-term commitment to be title sponsor of Boise’s Twilight Criterium, a bike race that draws more than 15,000 spectators each year and helps get Boiseans interested in cycling. The event is on the USA Cycling National Criterium Calendar and the USA Crit Championship Series for both men and women’s teams.

After the Criterium’s previous sponsor went in a different direction a few years ago, the city was in danger of losing the race, which had been a Boise tradition for 26 years. Andersen Banducci felt the race was vital to the city’s cycling culture and wanted to help keep the tradition alive.

“The Twilight Criterium helps put Boise on the map,” Woodard said. “The whole city comes out for the event, which has had numerous Tour de France veterans who raced here first before they went to the tour. The race is good for the

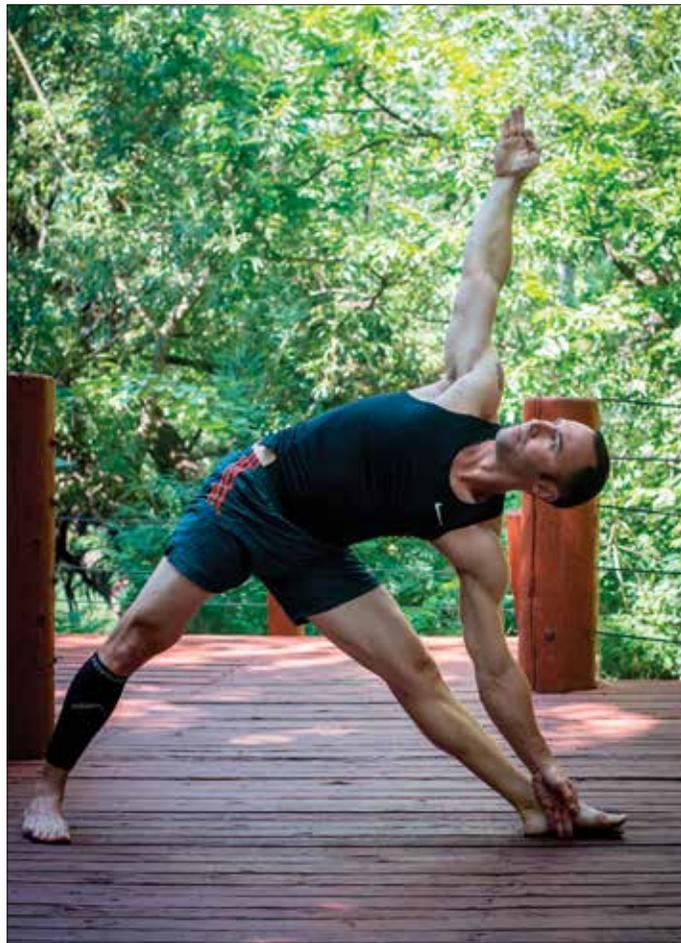


Photo by Dan Stone

Boise attorney Benjamin Schwartzman does yoga five times a week to help him decrease aggression, pride and ego – common workplace maladies in the legal profession.

cyclists — and good for the city. We couldn’t bear to see it go away.”

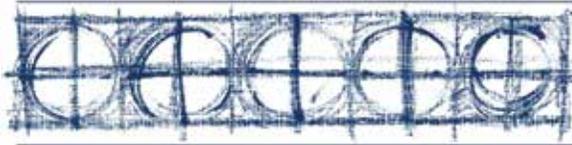
### You can make healthy changes

Whether by picking up running, adding yoga to daily routines, or biking in the mountains, there are

many ways attorneys can make fitness part of their day and become more effective at work. “We all know life in the legal field can bring stress and long hours,” Schwartzman said. “Fortunately, exercise can help us deal with stress in a positive way.”

*Dan Stone is a freelance writer and has been an editor and journalist at a variety of magazines and newspapers. Throughout his career, he’s written about everything from the complicated digestion of sloths to the street photography of Garry Winogrand.*





## Attorney Helps Refugees Gain Citizenship After Taking Pro Bono Case

Dan Black

**S**teve Ormiston practices patent law part time from his home in Boise. Last spring he saw an email from the Idaho Volunteer

Lawyers Program to help refugees with the naturalization process to gain U.S. Citizenship. The proposition was simple – come to a free CLE about immigration and sign up to take a pro bono case. Steve’s daughter Kate, who volunteers at the International Rescue Committee as part of her work toward a degree in multi-ethnic studies at Boise State University, agreed to assist. “So, we attended the CLE,” Steve said.

“I was looking for pro bono where the learning curve was not too steep,” he said, adding that “the CLE was very focused” and tailored to the cases already lined up for volunteers. “The seminar did not attempt to teach me how to practice immigration law,” just a step-by-step description for the naturalization process and the guiding applicable law. “I thought ‘Even an old patent lawyer could do this,’” Mr. Ormiston said.

“It was a manageable amount of information to learn to participate effectively,” he said, giving credit to presenters Kathy Railsback and Denise Penton, both Boise immigration lawyers who led the half-day CLE at the Law Center in Boise.

“I asked for and was assigned two cases. Both clients were older and both with demonstrated challenges learning English and civics,” he said, which are typically required for the naturalization



Photo by Dan Black

At the naturalization ceremony are, from left, Sentore Elia, Steve Ormiston, Yves Ndayishimiye, Nahimana Emilienne and Kate Ormiston. Steve and his daughter Kate, worked together on a pro bono case that helped two refugees from Africa complete the naturalization process for U.S. citizenship.

test. Ormiston’s clients spoke very limited English and both qualified for the naturalization test waiver.

Catholic Charities, who had helped settle Nahimana Emilienne and Sentore Elia in Boise, arranged for a case worker and interpreter, Yves Ndayishimiye, to help with the process. Sentore and Nahimana had fled a brutal civil war and ethnic unrest in their native Burundi, living for many years in refugee camps before finally coming to the U.S. in 2008.

“You cannot imagine how they have suffered,” Steve said, adding that he was caught up in their excitement at having finally become U.S. citizens. “This is a big deal,” he said, “for both the refugees and the United States.”

He said that the initial meeting with Nahimana and Sentore was a little stressful. “Later, my daughter gently suggested that I was a little loud,” he said. “So next time I was aware of that, and I realized how stressful this is for them, too.”

In the end, the refugees and attorneys, family and friends gathered at the Office of Homeland Security for the naturalization ceremony. There were hugs all around. Ormiston said, “they were so appreciative.” The ceremony was standing room only as people from 17 countries gathered to take an oath to the United States of America.

For Mr. Ormiston, a little pro bono challenge turned into a successful and rewarding case.

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## Access to Justice Idaho Thanks Donors and Leadership Committee

Gina Whitney

Idaho Legal Aid Services, Inc.

In 2015, *Idaho Legal Aid Services*, *Idaho Volunteer Lawyers Program*, and *DisAbility Rights Idaho* launched the second annual *Access to Justice Idaho* fundraising campaign with a goal to continue raising funds to provide essential legal services to vulnerable Idahoans in need.

The 2015 campaign was a huge success, bringing in over \$170,000. This funding will help family members secure guardianship of minor children and vulnerable adults, assist victims of domestic violence and their children with divorce and custody proceedings, and provide representation for people with chronic mental illness and developmental disabilities.

The success of this campaign would not have been possible without our Leadership Committee, led by Walt Sinclair and composed of volunteers from across the state who are committed to making Idaho an even better place — J. Ford Elsaesser and Mike Ramsden in the First District; Eric Peterson in the Second District; Kerry Michaelson and Yecora Daniels in the Third District; Aaron Kraft, Adam Boyd, Bill Mauk, Christine Salmi, Craig Meadows, Jim Dale, John Zarian, Josh Evett, Keely Duke, and Susie Boring-Headlee in the Fourth District; Kent Fletcher and Tom High in the Fifth District; Dave Bagley and David Gardner in the Sixth District; and Chuck Homer and Curt Thomsen in the Seventh District. Thanks

to all of you for your hard work, time, and energy. And a very special thanks to Walt for his dedicated leadership of the campaign during its first two years!

With the generous sponsorship of our donors, *Idaho Legal Aid Services*, *Idaho Volunteer Lawyers Program*, and *DisAbility Rights Idaho* will be able to help more disadvantaged Idahoans navigate the legal steps necessary to make their lives safer, healthier, and happier. We would like to express our sincere gratitude to each and every one of you who donated.

To our 2015 *Access to Justice Idaho* contributors, once again, from the bottom of our hearts, thank you!

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 M. Sean & Lora R. Breen  
 Robyn M. Brody  
 Charles A. Brown  
 Robert P. Brown  
 Hon. Roger S. Burdick  
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 Mary York & Jim Cook  
 Patrick D. Costello  
 Mary W. Cusack  
 James C. Dale  
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 James J. Davis  
 J.T. Diehl  
 William G. Dryden  
 Keely E. Duke  
 Billy G. Dupree  
 Summer A. Emmert  
 John M. Fedders  
 Nancy A. Ferris  
 William Kent Fletcher



Photo by Kyme Graziano

Pictured at the kick-off at the Basque Center in Boise are four members of the Access to Justice Steering Committee. From left is IVLP Legal Director Kelli Ketlinski, DisAbility Rights Idaho Director James Baugh, Access to Justice Idaho Campaign Chairman Walt Sinclair, and former IVLP Director Mary S. Hobson.

William A. Fuhrman  
 Roderick D. Gere  
 Mary R. Giannini  
 Tracy W. Gorman  
 Jon S. Gorski  
 Tim Gresback  
 Jenny C. Grunke  
 Mark J. Guerry  
 John Glenn Hall  
 Robin L. Haynes  
 Susie & Paul Headlee  
 Hon. Debra A. Heise  
 Scott D. Hess  
 Michael H. Hinman  
 Mary & Don Hobson  
 Hon. Mick Hodges  
 Romney J. Hogaboam  
 Ernest A. Hoidal  
 C. Timothy Hopkins  
 Forrest Hunter  
 Hon. Jim & Kelly Jones  
 Hon. James & Linda Judd  
 Julie Sobotta Kane  
 Kelli B. & Ty A. Ketlinski  
 Jennifer G. King  
 Aaron J. Kraft  
 Charles R. Kroll  
 Hon. Karen Lansing

Lary S. Larson  
 Yecora Leaphart-Daniels  
 Royce B. Lee  
 Edwin L. Litteneker  
 David R. Lombardi  
 Nancy C. Luebbert  
 Arthur B. Macomber  
 Pamela B. Massey  
 Michael R. McBride  
 William V. McCann, Jr.  
 Michael F. McCarthy  
 Craig L. Meadows  
 Hon. Daniel B. Meehl  
 Diane K. Minnich  
 Pamela Myers  
 Kirtlan G. Naylor  
 Jeffrey D. Neumeyer  
 Phillip S. Oberrecht  
 Edith L. Pacillo  
 Boyd J. Peterson  
 Lisa Peterson  
 Cameron L. Phillips  
 Jeremy L. Pittard  
 Seth C. Platts  
 John R. "Jack" Porter  
 Hon. Richard M. Redman  
 Stephen C. Rice  
 Eugene A. Ritti

Hon. Randy Robinson  
 John A. Rosholt  
 Claire C. Rosston  
 Susan Roy  
 Christine M. Salmi  
 Elizabeth H. Schierman  
 John S. Simko  
 J. Walter & Kristin H. Sinclair  
 Leon E. Smith  
 Tricia K. Soper  
 Gayle A. Sorenson  
 Jane E. Spencer  
 Michael M. Stoddard  
 Scott D. Swanson  
 Bruce L. Thomas  
 Francis H. Thompson  
 Terrel F. Transtrum  
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