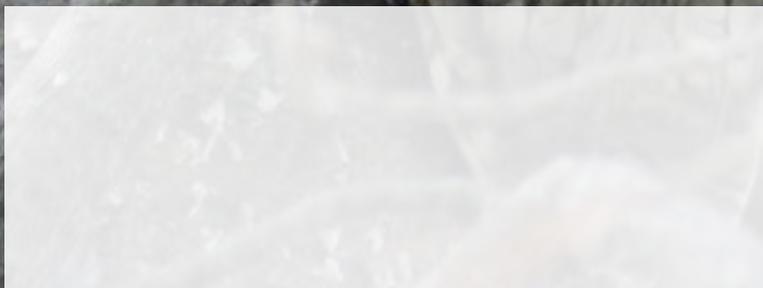


# The Advocate

Official Publication  
of the Idaho State Bar  
Volume 59, No. 3/4  
March/April 2016



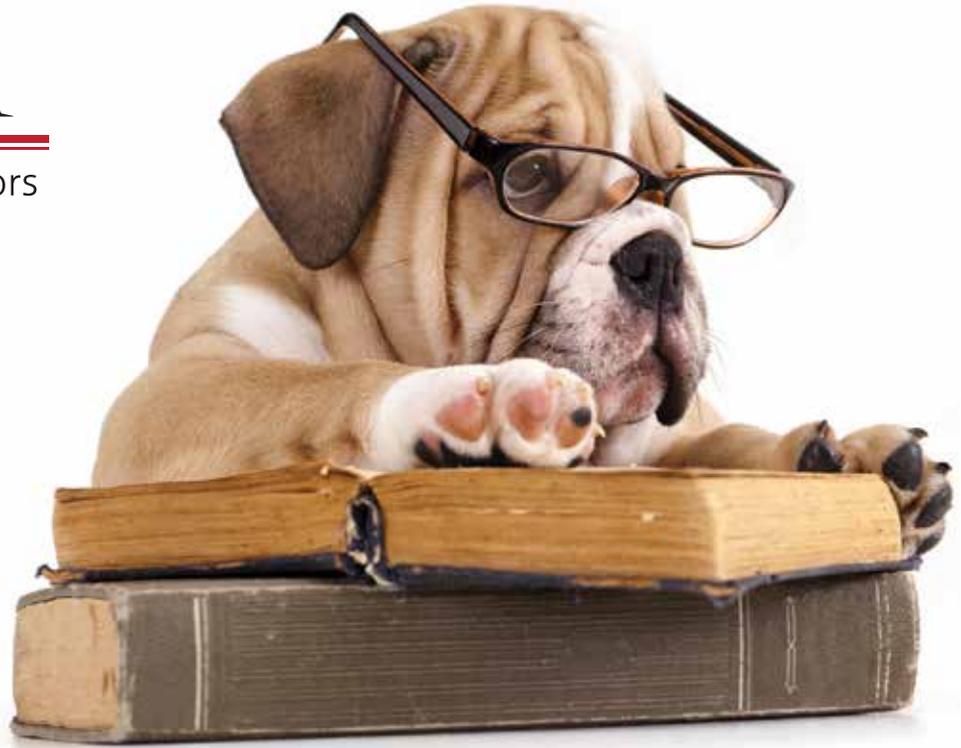
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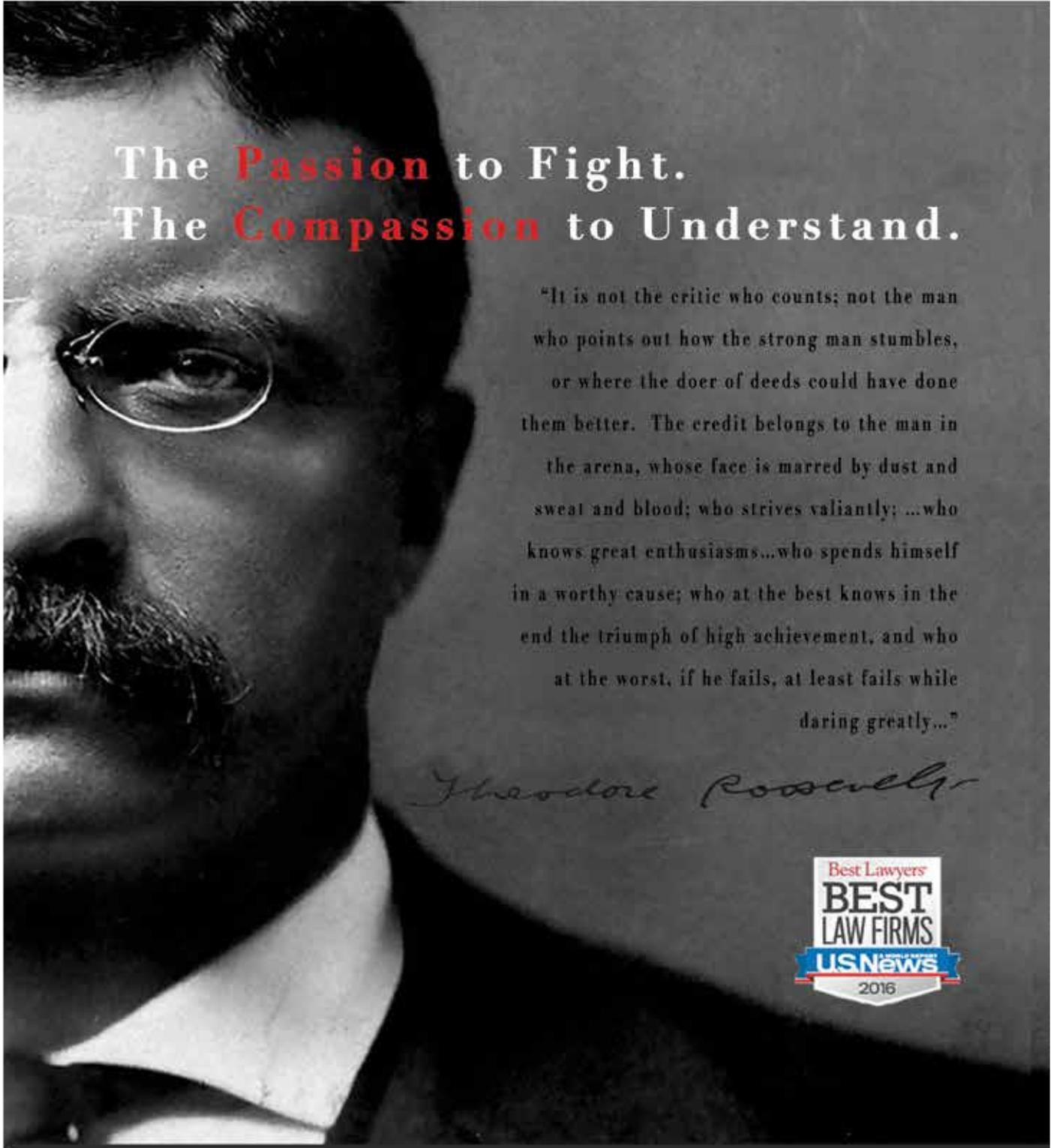
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## On the Cover:

Julie Harrison of Evans Keane LLP took this picture of an owl near the MK Nature Center in Boise. She described the scene: “In late September 2015 I was there taking pictures of finches taking a bath in one of the little creeks. An employee came up to me and asked if I would like to photograph a Screech Owl. It was just around the corner, almost as though the owl posed for me. The pine tree was covered with cotton that had blown in the wind and stuck to the branches and bark, giving it the appearance of being dusted with snow. It is one of my favorite shots.”

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Special thanks to the March/April editorial team: Tenielle Fordyce-Ruff, Kristine Moriarty, Lea L. Kear.

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Amber Myrick concentrates her practice on will and trust creation and implementation; estate and trust administration; and business succession planning. She works closely with clients to craft and implement advanced estate planning techniques including the use of multi-generational trusts (generation-skipping transfer tax planning), insurance trusts, charitable trusts, installment sales and general business succession planning to best achieve objectives to transfer assets to family and/or charitable organizations. Her practice also includes the preparation of gift and estate tax returns, as well as planning for and structuring partnerships and limited liability companies.

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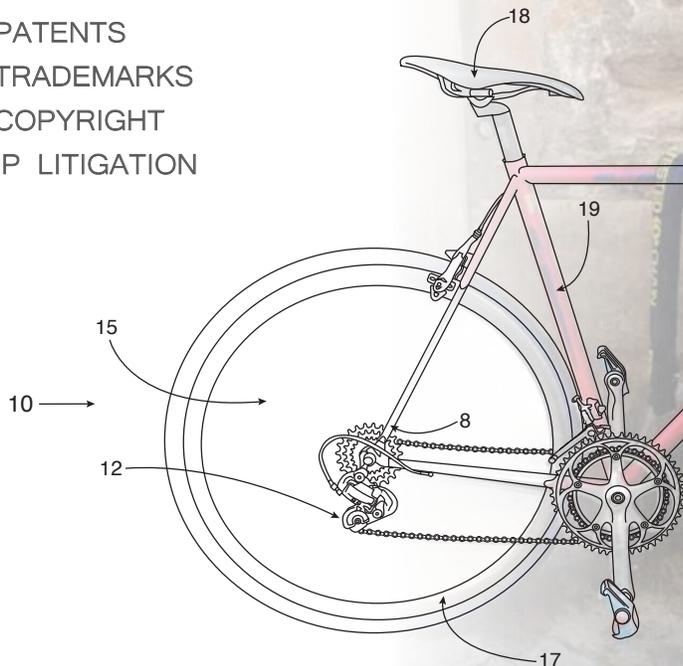
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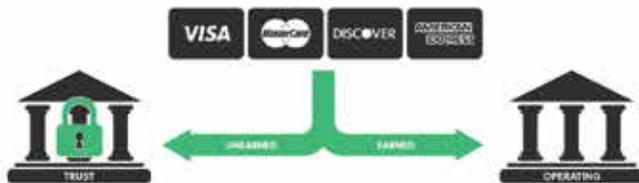


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## Upcoming CLEs

### March

#### March 9

*Ethical Issues When Changing Law Firms*  
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Audio Stream  
11:00 a.m. (MST)  
1.0 Ethics credit

#### March 11

*Annual Workers Compensation Seminar*  
Sponsored by the ISB Workers Compensation Section  
The Red Lion Downtowner,  
1800 W. Fairview Ave. – Boise, ID  
8:00 a.m. (MST)  
6.25 CLE credits

#### March 16

*Handling Your First or Next Motor Vehicle Accident Case*  
Sponsored by the Idaho Law Foundation, Inc.  
The Law Center  
525 W. Jefferson St. – Boise, ID / Statewide Webcast  
9:00 a.m. (MDT)  
2.0 CLE credits – **NAC**

### April

#### April 20

*Handling Your First or Next Medical Malpractice Case*  
Sponsored by the Idaho Law Foundation, Inc.  
The Law Center  
525 W. Jefferson St. – Boise, ID / Statewide Webcast  
9:00 a.m. (MDT)  
2.0 CLE credits – **NAC**

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

### May

#### May 4

*Ethics and Drafting Effective Conflict of Interest Waivers*  
Sponsored by the Idaho Law Foundation, Inc. in partnership with Peach New Media and WebCredenza, Inc.  
Audio Stream  
11:00 a.m. (MDT)  
1.0 CLE Credit of which 1.0 is Ethics

#### May 5

*New Attorney Program*  
Sponsored by the Idaho Law Foundation, Inc.  
The Grove Hotel, 245 S. Capitol Blvd. – Boise  
8:00 a.m. (MDT)  
4.0 CLE credits of which 1.0 is Ethics – **NAC**

#### May 6

*Mergers and Acquisitions – Structure, Terms and Considerations*  
Sponsored by the ISB Business & Corporate Law Section  
The Grove Hotel, 245 S. Capitol Blvd. – Boise, ID / Statewide Webcast  
8:15 a.m. (MDT)  
6.75 CLE credits



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

### Live Seminars

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

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### Improving the Public's Perception of Lawyers

*Trudy Hanson Fouser  
President, Idaho State Bar  
Board of Commissioners*

In my last column, I talked about the Commissioners' efforts to improve the public perception of lawyers. We can do this in many ways, but one way is to recognize all of the good works that members of the Bar are involved in every day. We can start by talking about this amongst ourselves, celebrating our accomplishments, and gathering the information we need for a more public campaign to celebrate the many contributions of bar members.

One example is the selfless dedication of many lawyers to Idaho's Mock Trial Competition, which in 2015 provided 215 high school students from 18 schools with experience learning about due process and legal proceedings. The students learn about preparing and presenting an argument, public speaking, working together as a team, and regardless of the profession they eventually pursue, they come away with excellent skills that will serve them well. Idaho will also host the National Mock Trial Competition in 2016, which will draw more than 1,000 visitors to Idaho, including 400 mock trial state champions, and more than 250 volunteers. Idaho lawyers make this great learning opportunity possible.

Idaho lawyers are dedicated to public education about the legal system. In 2013, through the Idaho

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Clinics are held at regular times and locations across the state and focus on specific needs such as homelessness, immigration and citizenship, fair housing issues, military law, elder law, etc.

---

Law Foundation, 928 volunteers donated 14,682 volunteer hours to programs like continuing education, providing mock trial education for high school students, and operating the New American Law Academy for 20 refugees seeking to learn about the American legal system.

In another shining example, Idaho lawyers are involved in dramatic outreach to those who need help the most. Idaho lawyers gave one-on-one advice to 1,170 clients in 2014 through 162 free public legal clinics. This was up 52% over 2013. Clinics are held at regular times and locations across the state and focus on specific needs such as homelessness, immigration and citizenship, fair housing issues, military law, elder law, etc. Through this service, Idaho lawyers provide dedicated service to those who might not otherwise be able to receive legal consultation and advice.

In addition to these free legal clinics, 750 Idaho lawyers donated more than 14,000 hours in service to more than 2,100 low income families in need of legal assistance, through the Idaho Volunteer Lawyers Program (IVLP). In addition, Idaho Legal Aid performed 18,179 hours of free legal service last year through both staff attorneys and volunteer lawyers. Law students in Idaho also participate in pro bono service, with University of Idaho students providing 9,330 hours. Concordia University Law School, which calculates its pro bono hours differently, provided 1,152 hours of pro bono service in 2014. Idaho lawyers also gave nearly \$200,000 to the Access to Justice Campaign to raise money for Idaho Legal Aid Services, Idaho Volunteer Lawyers Program and DisAbility Idaho.

Our Bar organizations also participate in offering gifts of time

and treasure to other non-legal causes, often helping the poor, homeless, or others in great need. For example, the Young Lawyers section raises money each year for the Idaho Foodbank, and in 2014 they raised \$3,510 for the Foodbank. Idaho Women Lawyers has organized community service projects and fundraising events that have benefitted the Ronald McDonald House, Girls on the Run, CASA, and the Idaho FoodBank.

Jonathan M. Volyn, formerly of Pocatello and now of Caldwell, is another great example of an attorney who served their community. He was at the center of a pro-bono effort to help homeowners who lost their homes to the 2012 Charlotte Fire in Pocatello. About 70 homes were destroyed and he organized a town-hall meeting to connect people seeking legal help attorneys who could help them. He served as the Sixth District president and is a frequent speaker at Soundstart and Court Assistance workshops.

And up north I think of Lee James, Coeur d'Alene, who has long counseled the Idaho Legislature and local government on behalf of children's issues. He serves on the board of Lutherhaven, a church youth camp, and in the past has served as a CASA attorney, and president and board member of ICARE, an organization that helps to prevent abuse and neglect of children.

These are amazing examples of volunteer service, but many, many Idaho lawyers also offer time, talent and money for activities beyond the scope of practicing law. Idaho lawyers are good citizens, volunteering to help make the community better. Some of those serving in local government include Boise Mayor Dave Bieter and City

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Who are the lawyers in your community  
who are offering selfless gifts  
of time or treasure

---

Council member Scot Ludwig and Nampa City Council member Bruce Skaug. There are several Idaho attorneys serving in the Idaho Legislature: John Gannon, Lynn Luker, Toddd Lakey, Grant Burgoyne, Bart Davis, Kelly A. Anthon, Curt McKenzie, Jim Rice, John Gannon, Luke Malek, Mark Nye, Ilana Rubel.

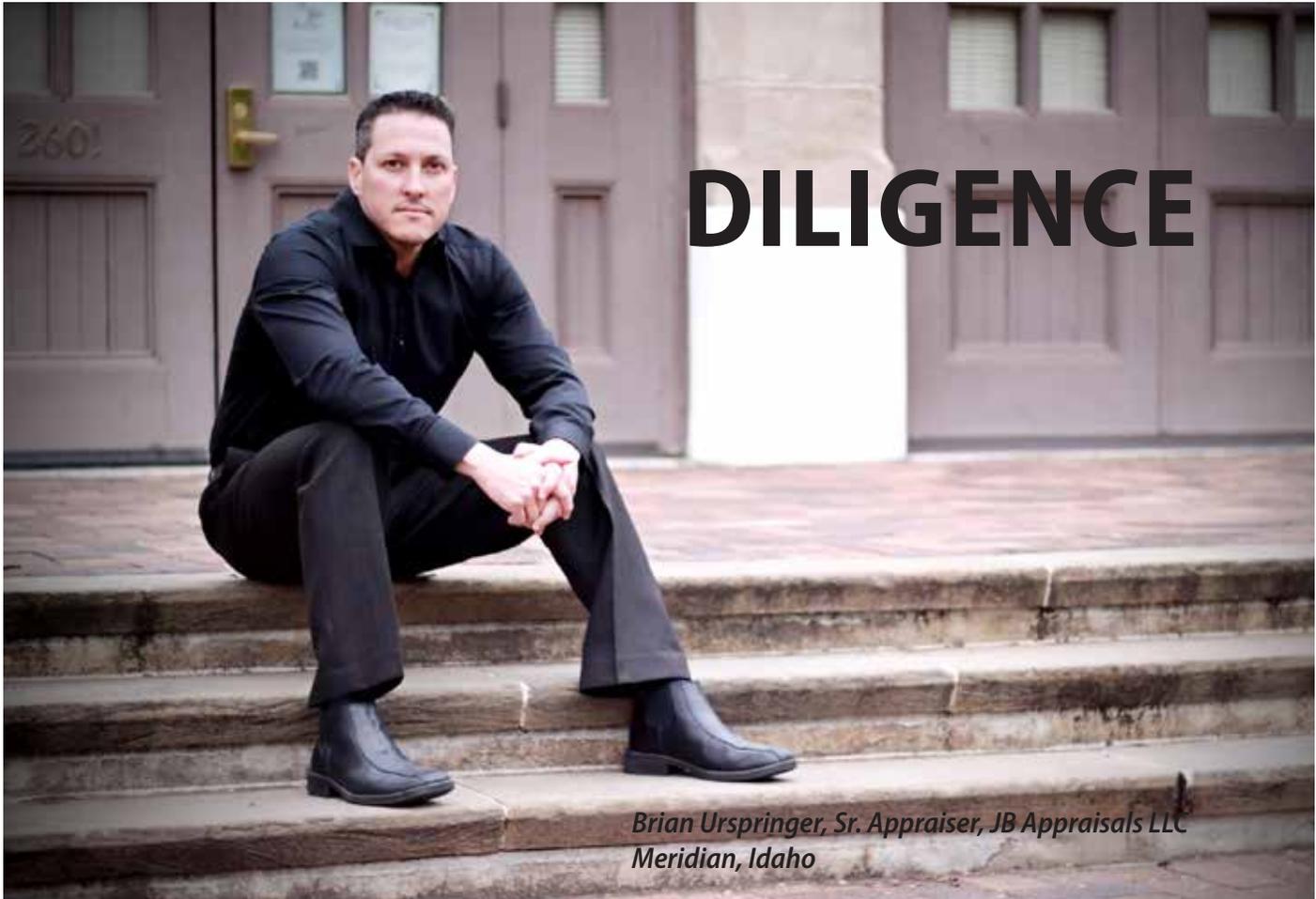
Serving on public and private school boards are Ken Howell - College of Idaho's Board; Carl Ericson - Kuna School Board. Volunteering to coach or referee children's sports teams Loren Messerly, Glenda Talbutt, Ron Shepherd. Serving on boards of local nonprofits Chip Cole, Becky Anderson and Rob Anderson serving the Boise Co-op board, and Jack Van Valkenburgh serving on Radio Boise's board. Volunteering at churches and schools, helping to

lead charitable organizations that serve the poor Monique Lillard and Alan Bosch of Catholic Charities, and the many lawyers who serve as board members of Idaho Legal Aid Services. Working directly with the poor aside from offering legal services Tom Dominick - St. Vincent DePaul outreach and working to make their communities a better place by donating time and money.

Who are the lawyers in your community who are offering selfless gifts of time or treasure to make our communities better and help those who need assistance? We are eager to hear about their stories. Please contact me at [tfouser@gfidaholaw.com](mailto:tfouser@gfidaholaw.com) if you have ideas about reshaping the perception of Idaho lawyers.

**Trudy Hanson Fouser** grew up in Malad City, Idaho, and has practiced civil litigation for over 30 years. She is a former recipient of the Idaho State Bar Professionalism Award and is currently serving as President of the Idaho State Bar. Some of her rather irrelevant "accomplishments" include being quite good at parallel parking, having a very loud whistle, running (used rather loosely) Robie Creek 10 times, finishing the NYC Marathon and finding out she had the largest head circumference in her high school graduating class.





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## DISCIPLINE

### Staci L. Anderson

(Withheld Suspension  
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On January 19, 2016, the Idaho Supreme Court issued a Disciplinary Order suspending Coeur d'Alene attorney Staci L. Anderson from the practice of law for a period of one (1) year, with the entire one year withheld and placing her on disciplinary probation.

The Idaho Supreme Court found that Ms. Anderson violated Idaho Rules of Professional Conduct 1.3 [Diligence], 1.4 [Communication], and 8.4(d) [Conduct prejudicial to the administration of justice]. The Idaho Supreme Court's Disciplinary Order followed a stipulated resolution of an Idaho State Bar disciplinary proceeding and related to the following circumstances.

In July 2013, Ms. Anderson was hired to represent a client charged with first-degree murder. The Court scheduled an October 3, 2014 discovery deadline and a three-week jury trial for October 28, 2014. On October 3, 2014, Ms. Anderson filed

a motion for extension of time to disclose expert witnesses and the Court granted that extension to October 10, 2014. On October 10, 2014, Ms. Anderson filed a motion requesting a continuance of the trial, and a 30-day extension to identify expert witnesses and file motions in limine. Ms. Anderson filed an Affidavit in support of that motion stating that she was not prepared to competently and effectively defend her client. In the Affidavit and at the hearing, Ms. Anderson specified the reasons that she was not prepared for trial. Ms. Anderson had associated with another lawyer prior to the hearing and the Court determined that Ms. Anderson could remain on the case, but was prohibited from examining witnesses and could not present any motions to the Court. The client subsequently pleaded guilty to an amended charge of voluntary manslaughter.

The Disciplinary Order provides that Ms. Anderson's one-year suspension is withheld subject to the terms and conditions of her two-year pro-

bation. The terms and conditions of probation include: a program of random urinalysis, with provision that if Ms. Anderson 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 served; participation in individual therapy; and if Ms. Anderson 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 her period of probation, regardless of whether that admission or determination occurs after the expiration of the probationary period, the entire withheld suspension shall be imposed.

The withheld suspension does not limit Ms. Anderson's eligibility to practice law.

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

## LETTER TO THE EDITOR

### Expanded knowledge does no harm

Dear Editor,

With gratitude to the editorial staff for allowing me a brief response to certain comments published in the January *Advocate* about a recent article of mine, I offer the following:

It appears the intent of the article in question has been misunderstood. Empowering Idaho attorneys to meet the unique business needs of their clients within our existing legal system is not an objective that would inspire condemnation. A closer look at the article would perhaps yield a different assessment.

It is equally important to note that an inquiry into true Islamic doctrine would establish that Islamic law mandates equality amongst men and women, imposes no prohibitions upon the profession a woman can pursue, and condemns violence toward women. Admittedly, these principles are sometimes contorted to improper ends. But just as it would be unfair to characterize all Idahoans as sexist and xenophobic because of the acts of a few, it is equally unfair to judge over one billion followers of Islam by the acts of a small percentage of those who identify as Muslim.

Finally, I offer a quote from the poet Khalil Gibran: "What shall I say of these save that they too stand in the sunlight, but with their backs to the sun? They see only their shadows, and their shadows are their laws." While we are (thankfully) as free to stand in the sunlight of understanding as we are to turn our backs toward the shadows, may we always question which of these choices leads to enlightenment and which leads to intolerance.

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## Board of Commissioners election notice

Nominations for the 2016 ISB Commissioner due April 5, 2016 – Attorneys in the 1st, 2nd and 4th districts will be electing new representatives to the Idaho State Bar Board of Commissioners this spring. The new commissioners will replace Tim Gresback of Moscow and Trudy Fouser of Boise. Pursuant to Idaho Bar Commission Rule 900, the new commissioner representing the 1st, 2nd and 4th districts must reside or maintain an office in the 1st or and 4th district. Commissioners of the Idaho State Bar – the elected governing body of the Bar – serve for three (3) years, beginning on the last day of the ISB Annual Meeting following their elections. The Board of Commissioners is charged with regulating the legal profession in Idaho, which includes the testing, admission, and licensing of attorneys, overseeing disciplinary functions and administering mandatory continuing legal education requirements.

Nominations for Commissioner shall be made in writing and signed by at least five (5) members of the Idaho State Bar in good standing and eligible to vote in that district. Nominations must be received by the Idaho State Bar office no later than the close of business on Tuesday, April 5, 2016. Nominating petitions are available on our website ([www.isb.idaho.gov](http://www.isb.idaho.gov)) or by calling our office at (208) 334-4500.

Ballots will be distributed on Monday, April 18, 2016 to all 1st, 2nd and 4th district members who are eligible to vote. A link for electronic voting will be sent to all 1st, 2nd and 4th district members who have submitted their email address to the Idaho State Bar. If a paper ballot is preferred, please contact our office at (208) 334-4500. All eligible voting members who do not have an email

address with the Bar will be sent a paper ballot.

All electronic and paper ballots received by the Idaho State Bar will be counted at the close of business on Tuesday, May 3, 2016, by a Board of Canvassers.

## 2016 Annual Meeting scholarships available

The Idaho State Bar is offering a limited number of scholarships to the 2016 Annual Meeting, July 13-15, in Boise. The scholarships include registration fee and a per diem of up to \$50 per day for travel and lodging. The scholarships are designed to provide assistance to those attorneys who, due to financial or professional circumstances, would otherwise be unable to attend. To apply for a scholarship, contact the ISB Commissioner who represents your judicial district or ISB Deputy Director Mahmood Sheikh at (208) 334-4500. Deadline for a scholarship request is Friday, May 27.

## Court at Nampa Courthouse Annex ended in January

Court at the Nampa Courthouse Annex, located at 120 Ninth Avenue ended on January 14. As of January 19, all judicial proceedings that previously took place at the Nampa Annex were now being heard at the Canyon County Courthouse at 1115 Albany Street, Caldwell.

## Externships take hold for Concordia

Ten Concordia Law students are participating in the externship program this semester. Externships allow students to gain practical skills in the professional legal setting. In its monthly online newsletter, Concordia thanked its host organizations, including the United States Attorney's Office, Boise City Attor-

ney's Office, Ada County Public Defender's Office, St. Luke's Health System, Intermountain Fair Housing Council, and three private law firms for hosting the students.

## Concordia's class presented J.D.'s

On Dec. 18, Concordia University President Charles Schlimpert, joined by Provost Mark Wahlers and Law School Dean Cathy Silak, conferred and presented the degree of Juris Doctor to nine members of Concordia Law's inaugural class. Professor Chad DeVeaux, the 2012-13 Professor of the Year, delivered the faculty address. Family, friends, faculty and staff were present to celebrate with these outstanding graduates, many of whom will sit for the February 2016 Bar Exam.

## Fourth District 6.1 Challenge deadline April 1

Based on Idaho Rule of Professional Conduct 6.1 and the responsibility of lawyers to provide pro bono service, the *6.1 Challenge* represents a friendly competition to recognize and encourage pro bono and public service from law offices within the Fourth District.

Keep track of your qualifying hours between April 1, 2015 and March 31, 2016 for the *6.1 Challenge*. The deadline to submit your (and/or your firm's) qualifying pro bono hours and public service activities is April 1. Winners in various categories will be announced during the 2016 Law Day festivities on May 1.

For more information, e-mail Anna Almerico at [aalmerico@isb.idaho.gov](mailto:aalmerico@isb.idaho.gov) or call (208) 334-4510. For ideas for pro bono service, call Idaho Volunteer Lawyer Program at (208) 334-4510. Learn more by visiting: <http://www.isb.idaho.gov/ilf/ivlp/challenge.html>



## Idaho Law Foundation — 2015 Year in Review

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

**T**he Idaho Law Foundation (ILF) is your foundation; members of the Idaho State Bar are members of the Foundation. In 2015, thousands of Idahoans, including students, lawyers, judges, individuals, families and entities that provide services to the low income population, were served by ILF programs.

### Law Related Education (LRE)

Idaho's LRE Program is part of a national civics education effort that began in 1978 when Congress passed the Law Related Education Act. Whether working with young people or adults, LRE programs offer participants an avenue to understand the law, court procedures, and our legal system and recognize the rights and responsibilities of citizenship while building positive relationships with members of Idaho's legal community. Program offerings for LRE include:



**High School Mock Trial:** Each year, participating teams from high schools all across Idaho prepare and present a hypothetical legal case in a simulated courtroom competition. In 2015, 18 teams from around the state participated in this annual event. Logos School from Moscow represented Idaho at the National Mock Trial Competition after de-



Photo by Dan Black

Judges at the 2015 State Championships give some tips and compliments to the teams after the final round. From left are: Celeste Miller, Lisa Nordstrom, U.S. Court of Appeals Judge Randy Smith, and U.S. Attorney for Idaho Wendy Olson.

feating the St. Ambrose School in the state championship round.

**National Mock Trial Competition:** Idaho will host the National Mock Trial Competition, May 12-14, in Boise. Hundreds of students, as well as coaches, judges, families and friends from around the country will come to Boise to participate in the National Competition. LRE Director Carey Shoufler and a group of dedicated volunteers, led by Celeste Miller, have spent more than two years preparing for the competition. We are still in need of volunteers, if you would like to assist with the competition, contact Carey Shoufler or visit [www.2016nationalmocktrial.org](http://www.2016nationalmocktrial.org).

**18 in Idaho:** This publication helps young people understand their rights and responsibilities as they reach the age of majority. In the past 6 years, 90,000 copies of the publication have been distributed to Idaho high schools. In 2015, we created an interactive web version and a Spanish version of the publication is almost complete.

**Citizens' Law Academy:** Citizens' Law Academy is a free adult education program that offers a glimpse into the law, our legal system, and the work of lawyers and judges. In 2015, CLA was offered in Boise in conjunction with the Fourth District Bar Association.

**Idaho Volunteer Lawyers Program (IVLP)**

IVLP provides legal services to low-income individuals, families and groups. Through case representation by volunteer attorneys, brief services, advice and consultation, clinics and workshops, IVLP served over 2,537 individuals last year. The program works with Idaho Legal Aid Services (ILAS), Idaho Military Legal Alliance, Senior Centers, CASA programs, and the statewide Court Assistance Offices to assist those with legal needs and limited resources.

2015 was the second year of the Access to Justice Idaho Campaign. The campaign raises funds for IVLP, ILAS and DisAbility Rights Idaho, the principal providers of free civil legal services for poor and vulnerable Idahoans. In 2015, the campaign raised almost \$175,000 to support the three entities.

The Idaho Pro Bono Commission, chaired by Idaho Supreme Court Chief Justice Jim Jones, develops and implements strategies to maximize attorney involvement in pro bono service and develops means and incentives to support attorneys in providing pro bono services. Local pro bono committees are active around the state, assisting attorneys in their pro bono efforts.

Idaho Volunteer Lawyers Program		
	2014	2015
Calls received	4,412	4,448
Matters handled by volunteer attorneys	1,780	2,537
Hours donated by volunteer attorneys	14,200	16,264
Donated services value	\$2,840,340	\$3,252,820

**Interest on Lawyers Trust Accounts (IOLTA)**

During the last 30 years, over \$6.5 million in IOLTA funds have been

granted to law related programs and services throughout Idaho. The organizations funded in 2015 were: Idaho Legal Aid Services, Idaho Volunteer Lawyers Program, ILF Law Related Education, Idaho YMCA Youth Government, Idaho State 4-H Know Your Government Conference, and University of Idaho and Concordia University law school scholarships. Funds granted for 2015 again decreased, 21% from 2014. Interest rates have increased slightly. We hope IOLTA income will begin to increase so the Foundation can provide additional financial support to organizations providing vital services and programs.

**Continuing Legal Education (CLE)**

The Foundation and Bar Sections offer legal education programs throughout the state, and provide programming through a variety of delivery methods designed to make programs easily available and accessible.

ISB/ILF Continuing Legal Education		
	2014	2015
Total live program attendance	1,627	1,375
Tape/DVD rentals	492	352
Online on-demand streaming	954	2,080
Webcast /telephonic	593	633

**Fund Development**

Funding for nonprofit organizations is challenging. We continue to seek ongoing and new sources of grants and funds. We appreciate the support of our donors and funders, without the support of lawyers, judges and granting organizations, the important work of the Foundation could not be accomplished.

The Idaho Law Foundation is indebted to the attorneys that volunteer their services and donate their

Local pro bono committees are active around the state, assisting attorneys in their pro bono efforts.



Donations		
	2014	2015
General Fund, IVLP, LRE	\$106,575	\$101,675
Endowment Fund	\$6,325	\$5,075
Total	\$112,900	\$106,750
Total donors	492	511

time and resources to ILF programs. The mission and goals of the organization are only realized with the help and support of our members. Thank You!

**Mission Statement**

The Idaho Law Foundation supports the right of all people to live in a peaceful community. Our mission is to educate all people about the role of law in a democratic society, to provide opportunities for people to avoid and resolve conflicts; and to enhance the education and competence of lawyers.

1. Enhance public understanding of and respect for the law and the legal system.
2. Provide and improve access to legal services.
3. Provide programs and services that enhance the competency of members of the Bar.
4. Aid in the advancement of the administration of justice.
5. Generate the necessary funding to fulfill the mission and goals of the organization.
6. Maintain effective administration and management of the Foundation's resources.

# 2016 Professional Award Nominations



The Idaho State Bar Board of Commissioners is now soliciting nominations for the 2016 professional awards. These awards were initiated by the Board of Commissioners to highlight members who demonstrate exemplary leadership, direction and commitment in their profession.

**Distinguished Lawyer** - This award is given to an attorney (or attorneys) each year who has distinguished the profession through exemplary conduct and many years of dedicated service to the profession and to Idaho citizens.

**Professionalism Awards** - These awards are given to at least one attorney in each of Idaho's seven judicial districts who has engaged in extraordinary activity in his or her community, in the state, or in the profession, which reflects the highest standards of professionalism.

**Pro Bono Awards** - Pro bono awards are presented to attorneys from each of the judicial districts that have donated extraordinary time and effort to help clients who are unable to pay for services.

**Service Awards** - Service awards are given each year to lawyers and non-lawyers for exemplary service to the Bar and/or Idaho Law Foundation.

**Outstanding Young Lawyer** - The purpose of this award is to recognize a young lawyer who has provided service to the profession, the Idaho State Bar, Idaho Law Foundation, the community and who exhibits professional excellence.

**Distinguished Jurist Award** - This award recognizes excellence, integrity and independence by a member of the judiciary. Nominees are selected for their competence, fairness, goodwill and professionalism.

**Section of the Year** - The Practice Section of the Year Award is presented in recognition of a Section's outstanding contribution to the Idaho State Bar, to their area of practice, to the legal profession, and to the community.

Recipients of the awards will be announced in May. The Distinguished Lawyer, Outstanding Young Lawyer, Section of the Year and Service Awards will be presented at the annual meeting. Professionalism and Pro Bono Awards will be presented during each district's annual resolutions meeting in the fall.

## **Award nominations should include the following:**

- Name of the award
- Name, address, phone, and email of the person(s) you are nominating
- A short description of the nominee's activity in your community or in the state, which you believe brings credit to the legal profession and qualifies him or her for the award you have indicated
- Any supporting documents or letters you want included with the nomination
- Your name, along with your address, phone, and email

You can nominate a person for more than one award. Nominations are accepted throughout the year. The deadline for the 2016 award nominations is March 25, 2016.

Submit nominations to:  
***Executive Director, Idaho State Bar, PO Box 895, Boise ID 83701***  
***or email at [dminnich@isb.idaho.gov](mailto:dminnich@isb.idaho.gov).***

# Fostering Success for Women in the Law

Michelle Points

Idaho Women Lawyers is pleased to sponsor this edition of *The Advocate*. I am now in my second year of serving as President of Idaho Women Lawyers. I have never been affiliated with a group of men and women who are as passionate, intelligent and hardworking as the members of IWL. The mission of IWL is to advance diversity through the promotion of equal rights and opportunities for women in the legal profession. Although this mission may seem a little “touchy feely” to some, the reality is that women remain underrepresented in the legal profession and in leadership positions.

In Idaho, 49% of the population are females, but only make up 27% of members of the Idaho Bar.<sup>1</sup> The disparity increases significantly when you look at the number of women in leadership positions. Which is why our mission to promote equal rights and opportunities for women in the legal profession is the crux of what drives IWL.

This year, IWL is focusing on fostering success for women in the law to address the underrepresentation of Idaho women in leadership positions, whether those positions are judges, board members, legislators or managing members of law firms. Currently, women in Idaho comprise 17% of the judiciary, 30%

of board members and 28% of our legislature. And in law firms, the majority of female attorneys have lower billing rates than their male counterparts, only 7% of large matters are assigned to a team made up of more than one female, while 81% of small matters are assigned to a team staffed by a majority of women and among law firm partners only 22% are women. IWL is making every effort to change this picture. How? Well, we aren’t burning bras.

IWL has chapters all across Idaho, including Canyon County, Pocatello, Idaho Falls, Twin Falls, Whitewater (includes Idaho, Clearwater and Lewis counties), Valley (includes Nez Perce and Latah counties) and IWL North (includes Couer d’Alene and Sandpoint), all of which have very active committees. These committees include judicial recruitment, mentoring, community service, health and wellness, positions and pipeline, education and networking. IWL also actively coordinates activities and networking opportunities with both the University of Idaho College of Law and Concordia School of Law.

IWL holds monthly lunch and breakfast meetings that are geared toward assisting members and non-members in improving their practice and creating and exploring opportunities, most of which



## Idaho Women Lawyers Retreat

### Retreat:

Idaho Women Lawyers IWL Membership Retreat: *Fostering Success for Women in the Law*

### Date:

April 28th – 30th, 2016

\*CLE program on Friday, April 29<sup>th</sup>

### Location:

Shore Lodge in McCall, ID

### How to register:

Register now at:

<http://idahowomenlawyers.com/>

are telecast for members statewide. IWL’s mentoring committee pairs new lawyers with experienced lawyers. The positions and pipeline (P&P) committee has collected substantial information regarding various state and federal bar positions, judicial positions, and other leadership positions, including when and how to apply. P&P publishes these positions on the IWL website and via email to IWL members. A com-

## Idaho Women Lawyers

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pilation of leadership positions in Idaho can also be found on the IWL website.

IWL's judicial recruitment committee enlists potential judicial candidates, and if these candidates are members of IWL, the committee assists them (men and women) in their application process, including conducting mock interviews. This committee also sits in on nearly every judicial interview in the state to observe the interviews and keep a record of questions posed to the different candidates.

In 2013, IWL put on its first "Gala" event. The IWL Gala is the "legacy" project of former IWL President Nicole Hancock that she created while in the Idaho Academy of Leadership for Lawyers, which began in part with help from IWL members Peg Dougherty and Deborah Ferguson.

The funds generated from the Gala gave IWL the opportunity to increase the scope and number of activities to reach more and potential members. For example, in April IWL will hold its inaugural IWL Membership Retreat in McCall. The theme of this year's retreat will be "Fostering Success for Women." It includes a panel of accomplished speakers and will offer great professional and networking opportunities, as well as CLE credits.

IWL is a great organization which provides a number of benefits and opportunities to its

members. However, when it comes to leadership positions in Idaho, women simply aren't applying, and this includes judicial positions. The reasons for the hesitation of women "putting their hat in the ring" are many, and are valid, as discussed in several articles contained in this issue. The message that IWL would like to convey to these "would be" applicants to a board, the judiciary or any other leadership position, is that IWL is here to assist you.

IWL has the resources, the knowledge base and the network to promote women in the legal profession. And to the men we work alongside every day, IWL would encourage you to sponsor a female who has consistently delivered by offering her (or recommending her for) stretch assignments that can advance her career and providing her with guidance and critical feedback. It is only through working together that we can create a level

In April IWL will hold its inaugural IWL Membership Retreat in McCall.

playing field for all members of the legal profession. I invite you to take a look at our website and to become a member of IWL.

#### Endnotes

1. Although the number of female members increases to 46% for attorneys 29 years of age and younger, that age group makes up only 3% of total membership.

*Michelle Points is the President of Idaho Women Lawyers and a solo practitioner at Points Law, PLLC. Michelle is also on the Board of Commissioners for the Idaho State Bar. Following her graduation from Gonzaga University School of Law, Michelle clerked for the honorable Gerald F. Schroeder of the Idaho Supreme Court. Michelle is a former partner at Hawley Troxell Ennis & Hawley. As a trial attorney, Michelle represents both corporate and individual clients in business and tort matters.*



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# Negotiating Your Worth as a Professional Woman: Wage Disparity Causes and Solutions

Debra Groberg

**W**hen I graduated from law school last spring, I spent considerable time contemplating what I wanted my future to look like, what type of law I wanted to practice, what type of firm I wanted to work for, and how I was going to pay off my student loans. Surprisingly then, I never considered negotiating my starting salary. Salary negotiation is a private topic people don't often openly discuss. Perhaps that is because discussing money is taboo, or it's uncomfortable because we associate our salary with our worth as a professional.

However, we should discuss our negotiating experiences because we learn from our own and others' experiences whether good or bad. Negotiating is something that women attorneys, whether new or experienced in practice, should seriously consider because it is important to our future. This article addresses three issues: (1) why women should negotiate their salary (2) why women do not negotiate their salary, and (3) how women can effectively negotiate their salary.

## Part 1: The gender wage gap

Two common answers for gender pay disparity are (1) institutional sexism, and (2) women take more time removed from the labor force when they have children, which puts them at a disadvantage when being considered for raises and promotions.<sup>1</sup> While these theories certainly have merit, there may be a third contributing factor that, if addressed, could play a large role in equaling the play-

---

In Idaho a typical full-time working woman makes approximately 76% of what a typical full-time working man makes.<sup>3</sup>



ing field: women don't negotiate their salary as often as men.

Although the wage gap between men and women has been slowly decreasing, it still registered at 21% in 2014, the most recent year for which there is comprehensive data.<sup>2</sup> That means that in 2014 a typical full-time working woman made approximately 79% of what a typical full-time working man made. The numbers are slightly worse in Idaho where a typical full-time working woman makes approximately 76% of what a typical full-time working man makes.<sup>3</sup> As for attorneys, the American Bar Association reported in July 2014 that women attorneys also made approximately 21% less than their male counterparts.<sup>4</sup>

A recent study conducted on pay disparities between men and women attorneys provides insight about the extent of the problem. The study found that women attorneys are paid less than their male counterparts even if they put in more hours and have more years of experience. The study analyzed \$3.4 billion in legal invoices, accounting for three years of billing data from over 3,000 law firms and found that women were

billed at significantly lower hourly rates than men — approximately 10% less.<sup>5</sup>

The research found that men saw an increase in their hourly rate that corresponded with their experience, but women who stayed with their firm did not see a similar change.<sup>6</sup> One identified contributing factor is that women were given different work than their male colleagues.<sup>7</sup> Only 7% of “large matters” were staffed with teams that were more than 50% female, while 81% of “small matters” were staffed by a majority of women.<sup>8</sup> The study also found that women made up about 75% of paralegals, 46% of associates, and only 22% of partners.<sup>9</sup> As for billable hours, female partners at firms billed approximately 24 more minutes a day than their male partners, but still made less.<sup>10</sup>

While conducting studies for their book *Women Don't Ask*, authors Linda Babcock and Sara Lashever found that there was a 7.6% salary difference between women and men MBAs.<sup>11</sup> Interestingly, only about 7% of those women attempted to negotiate their salary, and 57% of men did.<sup>12</sup> On average, those who

negotiated increased their salary by over 7%.<sup>13</sup> It follows that the salary difference would be significantly less if women and men negotiated in similar proportions.<sup>14</sup> Stanford University's negotiation guru, Margaret A. Neale, explained the actual cost of not negotiating:

One of the things I ask my students is: If you think of a \$100,000 salary, and one person negotiates and gets \$107,000, and the other doesn't — what's the cost of that? In a simple-minded way, some people say, "Is \$7,000 really worth risking my reputation over?" And I agree, \$7,000 may not be worth your reputation.

But that's not the correct analysis, because that \$7,000 is compounded. If you and your counterpart who negotiated are treated identically by the company — you are given the same raises and promotions — 35 years later, you will have to work eight more years to be as wealthy as your counterpart at retirement. Now, the question is: \$7,000 may not be worth the risk, but how about eight years of your life?<sup>15</sup>

In other words, not negotiating typically costs women more than half a million dollars in earnings over the course of their respective careers.<sup>16</sup> Consequently, it is important to start the negotiation process as early as possible because the benefits of negotiating are compounded throughout your career.

## Part 2: Why women do not negotiate

So why don't women negotiate?<sup>17</sup> The answer is easy; women do not like to ask. While both men and woman may not like to ask for more, there are additional legitimate concerns that prevent women from

asking. For starters, women may be concerned about the reputational risk of negotiating for a higher salary, and they have good cause to be concerned. A recent study found that women are likely to be penalized for attempting to negotiate their salary and men are not.<sup>18</sup>

The study focused on 184 managers who were given a hypothetical scenario where they had to explain the raises they awarded. The managers gave men raises that were two-and-a-half times larger than the raises they gave to women with equal

Not negotiating typically costs women more than half a million dollars in earnings over the course of their respective careers.<sup>16</sup>



skills and experience.<sup>19</sup> Yet, when the same managers were given a scenario where they awarded raises without explanation, men and women received equal raises.<sup>20</sup> This gender blow-back is a "subtle but powerful punishment for stepping outside our cultural gender role" and has taught women to not be self-serving.<sup>21</sup>

Another theory explaining why women don't negotiate is that they have systematically lower expectations.<sup>22</sup> It follows that if women have systematically lower expectations, they will get systematically lower

outcomes. Harvard Business School conducted a study on men and women with MBAs and found that when women had the same knowledge as men about the typical salary for the job they desired, the wage difference between men and women disappeared because both genders had the same pay expectation.<sup>23</sup> The theory is that expectations drive behavior, so women are paid less not only because they are women, but because their expectations are lower.

These two theories help to explain why there is a stark difference in the number of men and women who negotiate their salary.<sup>24</sup> The remaining question is "how can women overcome the negotiation barrier?"

## Part 3: How women can effectively negotiate

First, prepare, prepare, prepare. As attorneys our job is to advocate for our clients, and showing your employer that you can advocate well for yourself is a good indication of your potential, so do the necessary preparation to set yourself up for success. Women typically know and even acknowledge that they should negotiate, but they don't know how much they want and why, so they fail to persuasively explain why they should get what they want.<sup>25</sup>

To prepare for negotiation:

- (1) learn your true market value by researching what people similar to you are earning and what companies or firms like yours are paying;
- (2) review your job description and consider how it has expanded and what new challenges you have taken on;
- (3) write out the benefits your employer is receiving due to your employment and any additional benefits you believe you will offer in the future;

(4) write out possible scenarios, such as the compensation you would like, what you would be willing to settle for, and what your bottom line is;

(5) actually practice by mock negotiating with a friend or spouse; and

(6) consider the pros and cons before you negotiate.

It is a personal decision that can affect your future, so considering your management and the firm's culture is extremely important. That is not to dissuade anyone from negotiating, but you are your own best resource because you likely know those you are going to negotiate with. Along those lines, if you are telling yourself, "none of this applies to me because I work for a government agency," I respectfully dissent and encourage you to check out the article listed in this endnote.<sup>26</sup>

Second, focus on how you want to package and present your proposal. Try to have a communal motivation for asking for more.<sup>27</sup> Women outperform men when negotiating for someone else, but are not as skilled at negotiating for themselves.<sup>28</sup> The explanation for this strange discrepancy is that it is contrary to social norms for women to be greedy on their own behalf, but it is more than acceptable for women to advocate for someone else since it demonstrates good caretaking skills, a skill that society values in women.

The moral is to explain how your unique abilities can help solve a common problem. This collaborative form of dialogue is beneficial because both parties can feel as though they benefited from the negotiation. Although, this may not always be possible, sometimes a direct approach can be the best choice for your particular situation. Finally, don't be afraid to get creative. You can negotiate more than your salary.

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Unequal pay sends a message  
to women that they are not  
valued as professionals.

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Consider negotiating job title, vacation time, flexibility, benefits, time off, and work assignments. The possibilities are endless.

Lastly, practice makes perfect. Every situation is different, and things may not go as you planned, so try to be flexible and adapt to the situation. Remember that you may not get everything you expect or want the first time you negotiate, but don't be discouraged. Maybe you had a small amount of success while negotiating. Celebrate that win. If you weren't successful, remember that by practicing your negotiation skills you have gained invaluable experience that will help you the next time you negotiate. In addition, you will have gained a better understanding of what your future holds, so you can adjust expectations, or maybe even employment, accordingly.

In the end, the answer is easy. Women need to be adequately compensated for their work. Unequal pay sends a message to women that they are not valued as professionals. Women have made substantial contributions to the legal field. Their skill, experience, and dedication to the law warrants equal pay to the men they work alongside.

Idaho has a great legal community. I have met many practitioners

in Idaho, men and women, who love the law and are dedicated to their careers. They have provided me with legal experience and mentorship, and have inspired me through their passion for the work they do. My experience in Idaho so far has been extremely positive, and that makes me believe that as a state and a bar, we can do better. So let's do better.

As managers, be aware of unequal pay and promotions. Take notice of who is asking for more, and who isn't. Provide mentorship to women about negotiating. It will probably help your retention.<sup>29</sup> And men, take notice and be aware of the disparities that exist and be an advocate for equal pay. This will only make the legal community better for everyone.

Negotiation is not the end-all-be-all solution to wage disparities between men and women, but it is a starting point worth considering. Negotiating just might make your future a whole lot brighter and help pave the way for future generations of professional women.

### Endnotes

1. Derek Thompson, *Why the Gender-Pay Gap is Largest for the Highest Paying Jobs*, THE ATLANTIC (Dec. 17, 2014), <http://www.theatlantic.com/business/archive/2014/12/the-sticky-floor-why/>

the-gender-wage-gap-is-lowest-for-the-worst-paying-jobs/383863/.

2. Catherine Hill, *Economic Justice: The Simple Truth About the Gender Pay Gap*, AMERICAN ASSOCIATE OF UNIVERSITY WOMEN (Fall 2015), <http://www.aauw.org/research/the-simple-truth-about-the-gender-pay-gap/> (registering the gender wage gap median at 21%); see also *Pay Equity and Discrimination*, INSTITUTE FOR WOMEN'S POLICY RESEARCH (2014), <http://www.iwpr.org/initiatives/pay-equity-and-discrimination> (also registering the gender wage gap median at 21%); U.S. Bureau of Labor Statistics, *Highlights of Women's Earnings in 2014*, BLS REPORTS 1, 1 (Nov. 2015), <http://www.bls.gov/opub/reports/cps/highlights-of-womens-earnings-in-2014.pdf> (registering the gender wage mean at 17%).

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4. Commission on Women in the Profession, *A Current Glance at Women in the Law*, AMERICAN BAR ASSOCIATION 1, 6 (July 2014), [http://www.americanbar.org/dam/aba/marketing/women/current\\_glance\\_statistics\\_july2014.authcheckdam.pdf](http://www.americanbar.org/dam/aba/marketing/women/current_glance_statistics_july2014.authcheckdam.pdf); see generally Lauren Stiller Rikleen, *Women Lawyers Continue to Lag Behind Male Colleagues*, NATIONAL ASSOCIATION OF WOMEN LAWYERS 1 (2015), [http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2015\\_wotsol/written\\_materials/2\\_nawl\\_2015%20survey.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2015_wotsol/written_materials/2_nawl_2015%20survey.authcheckdam.pdf) (providing a comprehensive analysis of gender disparity in the legal field).

5. Jennifer Smith, *Female Lawyers Still Battle Gender Bias*, WALL STREET JOURNAL (May 4, 2014), <http://www.wsj.com/articles/SB10001424052702303948104579537814028747376>.

6. Silvia Hodges Silverstein, *White Paper, Gender Study*, SKY ANALYTICS 1, 3 (March 2014), <http://www.silviahodges.com/wp-content/uploads/2010/07/Sky-Analytics-Gender-study-WP.pdf>.

7. *Id.* at 5.

8. *Id.*

9. *Id.* at 6.

10. *Id.* at 4.

11. Vicki Slavina, *Why Women Must Ask (The Right Way): Negotiation Advice From Stanford's Margaret A. Neal*, FORBES, LEADERSHIP (June 17, 2013), <http://www.forbes.com/sites/dailymuse/2013/06/17/why-women-must-ask-the-right-way-negotiation-advice-from-stanfords-margaret-a-neale/>.

And men, take notice and be aware of the disparities that exist and be an advocate for equal pay. This will only make the legal community better for everyone.

women-must-ask-the-right-way-negotiation-advice-from-stanfords-margaret-a-neale/.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. LINDA BABCOCK & SARA LASHEVER, WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE 5 (2003).

17. It is important to note that while some women do negotiate, this article speaks in generalities so the language in this article is largely unqualified.

18. Maura A. Velliveau, *Engendering Inequity? How Social Accounts Create vs. Merely Explain Unfavorable Pay Outcomes for Women*, 23(4) ORGANIZATIONAL SCIENCE 1154 (Sept. 28, 2011), available at <http://pubsonline.informs.org/doi/pdf/10.1287/orsc.1110.0691>.

19. *Id.* at 1158-64.

20. *Id.*

21. Victoria Pyncheon, *Why Women Don't Negotiate (and What We Can Do About It)*, FORBES, WOMAN (Feb. 26, 2012),

<http://www.forbes.com/sites/dailymuse/2012/02/26/why-women-dont-negotiate-and-what-we-can-do-about-it/#6d89511b340e>.

22. Slavina, note 11.

23. Dina W. Pradel et al., *When Gender Changes the Negotiation*, HARVARD BUSINESS SCHOOL (Feb. 13, 2006), <http://hbswk.hbs.edu/item/when-gender-changes-the-negotiation>.

24. While readers may not agree with either theory, it is important to know what research is being conducted and analyze answers for the existing disparities so we can find solutions.

25. Slavina, note 11.

26. Hannah Moss, *3 Tips to Negotiate A Government Salary*, GOVLOOP (April 1, 2015), <https://www.govloop.com/3-tips-to-negotiate-a-government-salary/>.

27. Slavina, note 11.

28. Pradel, note 23.

29. See BABCOCK, note 16, at 14-16.

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# Women on State Boards and Commissions: Is Idaho Where it Wants to Be?

Alexandra S. Grande  
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Brenda Bauges

**D**ocumenting diversity statistics has become relatively commonplace in various levels of government. If a person wants to know how many women are currently serving in the United States Senate, a quick internet search can provide the answer.<sup>1</sup> The same is true of statistics regarding the composition of the Idaho State Senate.<sup>2</sup> These kinds of statistics are vital to people who are committed to having our government representatives proportionately reflect the constituency that they serve. Such statistics, however, are not as easy to come by in all levels of government.

Recognizing how little work had been done to document whether or not women are proportionately represented in less visible governmental bodies, Professors Jaclyn Kettler and Justin Vaughn at Boise State University created the Idaho Boards Project.<sup>3</sup> They describe the project as “an initiative that seeks to document and analyze the gender balance on public boards and commissions throughout the state of Idaho from cities and counties to state organizations.”<sup>4</sup>

Through that effort the professors did just that, publishing the first comprehensive study of gender balance on Idaho’s public boards and commissions in mid-September of last year. The study shows that the percentage of female appointees who serve on Idaho’s boards and commissions is approximately 30%.<sup>5</sup> The study also identified evidence of gender sorting as women are dis-

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proportionately appointed to those boards the professors identified as having “stereotypically feminine missions.”<sup>6</sup> By comparison, where a state board has “stereotypically masculine core functions” the gender imbalance is even steeper — the percentage of women appointed drops to roughly 15%.<sup>7</sup>

Recent discussions and studies on gender imbalance on state boards and commissions is not just a concern in Idaho. In North Carolina, which, like Idaho, has no legislation encouraging gender diversity on boards and commissions, gender imbalances on so called “power boards” has been studied since 1999.<sup>8</sup> There are 14 boards that are considered “power boards” due to prestige, size of their budgets, and influence in the state.<sup>9</sup> Much like the characterization of masculine boards in Idaho, examples of power boards in North Carolina include: Banking Commission, Board of Transportation, and the Economic Development Board.<sup>10</sup>

In 2009, and again in 2013, the Women’s Forum of North Carolina studied the 14 power boards to determine membership and gender balance over time.<sup>11</sup> In 2009, women

made up a minimum of 30% membership — the number determined to be the tipping point for women to significantly affect the appointed body — on only five of the 14 boards.<sup>12</sup>

However, by 2013, women made up a minimum of 30% membership on only two of the 14 boards.<sup>13</sup> The Lottery Commission, for example, had an approximate drop in membership of 30% from 2009 to 2013, while the second largest decrease was the Utilities Commission, which had an approximate drop in membership of 10%.<sup>14</sup>

From these figures, it is clear that underrepresentation of women on these power boards persists over time, and unless a significant number of women are appointed over the next few years, the gender imbalance will remain.

In Alaska, Governor Bill Walker recently came under fire for the underrepresentation of women on state boards and commissions.<sup>15</sup> A study completed over this past summer concluded that of the 104 people Governor Walker has appointed during his tenure, only 34 have been women.<sup>16</sup> After taking into account

that some public officials serve on multiple boards, the result was that more than half of Alaska's boards are still strongly occupied by men.<sup>17</sup> Like the masculine boards characterized in Idaho, and the "power boards" in North Carolina, women in Alaska are either underrepresented, or not at all, on the state's boards and commissions.

For example, the following boards have no female members: Alaska Commercial Fishing and Agriculture Bank Board of Directors, Occupational Safety, and the Worker's Compensation Appeals Commission.<sup>18</sup> Women make up a majority of the membership on only 24 of the 134 state boards and commissions, including boards such as the Board of Certified Direct-Entry Midwives and the Advisory Council on Libraries.<sup>19</sup> Like Idaho, Alaska has no gender diversity legislation, and struggles to proportionately represent women on some of its more powerful boards.

### **Action is underway**

Prior to the publication of the Idaho Boards Project's study, Idaho Senator Cherie Buckner-Webb, had already begun drafting legislation to encourage gender balance in state board appointments.<sup>20</sup> Senator Buckner-Webb, who has the distinction of being both Idaho's first elected African-American state legislator and first African-American woman legislator, is one of the 29 women who hold one of Idaho's 105 total seats in the legislature.<sup>21</sup> Senator Buckner-Webb was gracious enough to be interviewed for this article. The senator hopes to add Idaho to the growing number of states with codified requirements to consider gender when making appointments to state boards and commissions.<sup>22</sup>

A passionate advocate of the proposition that government "needs to be representative of our population," Buckner-Webb believes her proposed legislation recognizes what she identifies as the "unique vitality, different sensibilities and intelligence, and valuable contributions" that women can bring to all levels of governance. "Women should be represented in every endeavor in American life, and need a seat at the table." Noting that her bill is "simplistic by design," Buckner-Webb believes that increasing the number of women on

A recent Thomson Reuters study showed that companies with greater board gender diversity outperformed those without gender diversity.

state boards and commissions "just makes sense." "Study after study has shown that the more diversity, the better the product is."

Indeed, studies do support the proposition that diversity on boards increases the quality of work done by the board at issue. There is no doubt that all candidates should be independently qualified, regardless of gender, to serve on any board. These studies indicate, however, compelling reasons to pare down the pool of qualified candidates with an eye towards gender diversity. A

2006 study of corporate governance found that women in the boardroom brought "a collaborative leadership style that benefits boardroom dynamics by increasing the amount of listening, social support, and win-win problem-solving."<sup>23</sup> A 2015 publication found that gender diversity in the boardroom increases dialogue and decision-making, making the quality of conversations better, more professional, and more effective.<sup>24</sup>

Yet another article found that "[w]omen are particularly good at defining responsibilities clearly as well as being strong on mentoring and coaching employees" indicating that gender diversity in boards would "foster a better balance in leadership skills."<sup>25</sup> Indeed, a recent Thomson Reuters study showed that companies with greater board gender diversity outperformed those without gender diversity in that they had lower volatility in stock market price, while having similar or better gains in stock price overall.<sup>26</sup>

Additionally, in the judicial context, diversity is considered to improve decision-making and add insights that otherwise would be absent.<sup>27</sup> Though these sources do not study state government boards specifically, the principles they espouse relating to women's strengths and skills are easily translatable into that context.

### **The practical realities of the appointment process**

Armed with studies supporting legislative action, the question arises, what part of the appointment process should the legislation target? In order to answer that question, one must have a grasp of how a person gets appointed to a board or commission in Idaho. The authors had the opportunity to sit down with

Anne Beebe, the Governor's Special Assistant for Boards and Commissions, to learn about the process.

When there is an opening on a board or commission, Ms. Beebe considers who she is aware of that would be qualified and she also checks with the respective board or commission for their suggestions of candidates as well. With 250 boards and commissions, Ms. Beebe indicated that the State does not currently advertise every position that comes open. However, though not all open positions are advertised, any member of the public can keep track of upcoming vacancies online, and obtain an application in anticipation of the vacancy.<sup>28</sup> Ms. Beebe will accept applications at any time, even if there is not a current open position on the relevant board. She will keep these applications on file until the next vacancy and may consider the application at that time.

Ms. Beebe is single-handedly responsible for recommending candidates to the Governor for appointment to all of Idaho's 250 boards and commissions. Under her tenure, multiple boards and commissions have their first female member in state history. Recalling a relatively recent instance where she had to "lobby hard" to the Idaho Potato Commission for a woman to receive an appointment to that commission, Ms. Beebe notes that the Governor's Office has received occasional "push-back" to female applicants. She recalls that when she first started her job, Governor Otter made it clear that bringing diversity to Idaho's boards and commissions, both in terms of gender and geography, was a priority.

On the topic of gender diversity Ms. Beebe relates that she is "looking for good women to be on Idaho's

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Under her tenure, multiple boards and commissions have their first female member in state history.

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boards" although she is "limited by who applies." She may be further limited by specific statutory requirements of certain boards that govern board composition, including party affiliation, occupation, geographic location, and licensure. Regardless, Ms. Beebe encourages all Idahoans, regardless of gender or party affiliation to get involved and welcomes any interested party to call her for further information about applying for a state board or commission appointment.

### Legislation in other states

Another consideration that might affect the form any proposed legislation might take is how other states have crafted their gender diversity statutes. In its introductory section, this article outlined the situation in states without gender diversity legislation. To see the improvement gender diversity legislation can make, Connecticut and North Dakota provide guiding examples.

Since 1993, Connecticut law has required appointing authorities — including the governor, agency heads, and other non-legislative appointing authorities — to "make a good faith effort" to ensure that appointments reflect the "gender and racial diversity of the state."<sup>29</sup> The law also requires state boards, commissions,

committees, and councils to biennially submit reports to the Secretary of State that document gender and racial composition of their membership, for maintenance as public record.

In a 2011 report issued by the Secretary of State assessing the reported information of 175 state boards and commissions, Connecticut saw a 4.2% increase over a two-year span in appointed membership of women.<sup>30</sup> As a result of this increase, women comprised 40.1% of the aggregate appointed membership of the reporting boards and commissions.<sup>31</sup> Despite this advance, 13.7% of reporting boards and commissions reported having no female appointed membership.<sup>32</sup>

The boards and commissions that reported no female membership included, among others: Board of Mediation and Arbitration, Connecticut Maritime Commission, and the State Properties Review Board.<sup>33</sup> The result of these figures show that although great strides have been made, there is still room for improvement for gender diversity on specific types of boards. This concern also arises in North Dakota.

Like Connecticut, North Dakota law requires appointments to state boards, commissions, committees, and councils to be "gender balanced

to the extent possible and to the extent that appointees are qualified to serve on those boards, commissions, committees, and councils.”<sup>34</sup> As of 2013, Governor Jack Dalrymple had made approximately 390 appointments to state boards and commissions, 41% of which were women.<sup>35</sup>

That is a slight increase from the appointments of previous governors, in which appointments of women made up approximately 37%.<sup>36</sup> Although progress has been made, there are still masculine boards — such as the Game and Fish Advisory Board and the Natural Resources Trust Board of Directors — that do not have a single female member.<sup>37</sup> And, where masculine boards do have female members, they are often the minority.<sup>38</sup>

Complicating the efficacy of gender diversity legislation, is how it works in conjunction with legislation relating to individual board requirements. Directly on this point is a concern from Gov. Dalrymple. Although North Dakota law requires gender diversity, for many boards state law requires certain elected officials to serve, or the governor to appoint from an industry group’s shortlist.<sup>39</sup> If there are few women in the legislature or in the industry, these restrictions often limit the opportunity for women to serve on boards and commissions.

Like Gov. Dalrymple, Ms. Beebe expressed frustration with certain statutes mandating who the Governor is to appoint for certain boards and commissions. Statutes inhibiting the Governor’s discretion — requiring mandatory appointment from an industry short list or from the pool of elected officials — narrow the opportunities for women to be appointed to serve on boards and commissions.

The various enabling acts for each state board or commission necessarily limit the eligible pool of applicants by specifically designating who may serve. By example, of the nine “practical potato persons” who are to comprise the Potato Commission, five members shall be growers, two shall be shippers, and two shall be processors.<sup>40</sup> All members must be residents of Idaho for at least three years, and must be currently engaged in their respective occupations.<sup>41</sup> The growers and shippers must be nominated from different “districts” as defined by the statute.<sup>42</sup>

Although progress has been made, there are still masculine boards — such as the Game and Fish Advisory Board and the Natural Resources Trust Board of Directors — that do not have a single female member.<sup>37</sup>



Nevertheless, Connecticut and North Dakota have seen an increase in female membership on boards and commissions. Additionally, the difference in membership compared to North Carolina and Alaska, states that do not have diversity legislation, is about 10%.<sup>43</sup>

While gender diversity legislation does make a difference, and an important one, it is only a first step. A 10% difference, though significant, indicates that it is unlikely legislation alone can cure the absence of women on boards and commissions.

## **Legislation – The first step but not the only option**

Assuming Idaho passes legislation regarding gender diversity on boards, the next question becomes what else can it do to increase diversity beyond the mere 10%? Although in the context of diversity in the judiciary, a publication by the Brennan Center for Justice at the New York University School of Law has described ten “best practices” to increase diversity.<sup>44</sup> Many of these suggestions could be adapted to the context of Idaho boards and commissions. The first suggestion is to “grapple fully with implicit bias.”<sup>45</sup>

Because implicit bias is not something a person is consciously aware of doing, it is important to acknowledge its probable existence.<sup>46</sup> In Idaho, implicit bias would certainly appear to be an issue by the data that women are being categorized into “gender appropriate” boards and commissions, when they are being appointed at all. The first step to increasing diversity is to identify at what point in the process implicit bias might be an issue and acknowledge its existence.

The second suggestion is to increase strategic recruitment.<sup>47</sup> This can be done by widely advertising open positions and actively reaching out to diverse candidates.<sup>48</sup> A third suggestion is to be clear about the role of diversity in the nominating process through state statutes.<sup>49</sup> This suggestion, of course, has already been addressed above.

Other suggestions include keeping the application, appointment, and interview process transparent, training those involved in the process to be effective recruiters and nominators, appointing a diversity compliance authority, creating diverse commissions by statute to

oversee the process, and improving record keeping of the gender make-up of the applicant pool, interview pool, and successful candidates pool for any given opening.<sup>50</sup>

All of these suggestions, however, should operate within the framework of maintaining high standards and quality.<sup>51</sup> These suggestions operate under the theory that qualified candidates with diverse backgrounds, such as women, exist as a resource that can be cultivated if an attempt is made to search out and recruit these candidates when openings occur. These suggestions are not intended to sacrifice quality for diversity. Rather, the premise is that quality and diversity should not be viewed as mutually exclusive; with a little effort they can exist simultaneously.<sup>52</sup> And, as the sources discussed above indicate, Idaho would be better served by such boards and commissions.

## Endnotes

1. There are twenty. *Women in the Senate*, SENATE.GOV, [www.senate.gov/reference/Index/Women.htm](http://www.senate.gov/reference/Index/Women.htm) (last visited December 17, 2015).
2. There are ten. *Senate Membership*, IDAHO.GOV, <http://legislature.idaho.gov/senate/membership.cfm> (last visited December 17, 2015).
3. Jaclyn Kettler & Justin S. Vaughn, *Gender representation on Idaho state and local appointed boards*, THE BLUE REVIEW Sept. 15, 2015, available at <https://thebluereview.org/gender-balance-idaho-boards/>.
4. *Id.*
5. *Id.*
6. *Id.* "Stereotypically feminine" was defined as "those concerning stereotypically feminine roles, such as areas related to children and family, education, health, culture and community affairs."
7. *Id.* "Stereotypically masculine" functions were defined as those "consistent with masculine stereotypes" such as "commerce, environment, energy, natural resources, and science & technology."
8. Women's Forum of North Carolina, Inc., *Boardroom or Boy's Room? Gender Composition on North Carolina's Power Boards*

The premise is that quality and diversity should not be viewed as mutually exclusive.

1 (Nov. 7, 2009), available at <http://womensforumnc.org/wp-content/uploads/2009/11/2009BoardsandCommissionsWF-NC.pdf>.

9. *Id.* at 2.

10. *Id.* The full list of the fourteen power boards includes: Banking Commission, Board of Education, Board of Transportation, Economic Development Board, Employment Security Commission, Environmental Management Commission, Golden Leaf Foundation Board of Directors, Governor's Crime Commission, Health and Wellness Trust, Lottery Commission, State Board of Community Colleges, Social Services Commission, UNC Board of Directors, and Utilities Commission.

11. Compare note xxvi with Dana Jennings, *Closing the Leadership Gap: Achieving Gender Equity on North Carolina Boards and Commissions* (December 8, 2013), <http://www.womenadvancenc.org/2013/12/08/closing-the-leadership-gap-achieving-gender-equity-on-north-carolina-boards-and-commissions/> (last visited Dec. 14, 2015).

12. Jennings, note xi.

13. *Id.*

14. *Id.*

15. Lisa Phu, *Alaska boards, commissions skew male 2 to 1*, ALASKA PUBLIC MEDIA (Nov. 5, 2015), <http://www.alaskapublic.org/2015/11/05/alaska-boards-commissions-skew-male-2-to-1/> (last visited Dec. 10, 2015).

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. Betsy Russell, *Idaho boards, commissions lack women, study says*, THE SPOKESMAN-REVIEW September 18, 2015, available at <http://www.spokesman.com/stories/2015/sep/18/idaho-boards-commissions-lack-women-study-says/>.

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21. *Women in State Legislatures for 2015*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Sept. 4, 2015), <http://www.ncsl.org/legislators-staff/legislators/womens-legislative-network/women-in-state-legislatures-for-2015.aspx> (last visited December 17, 2015).

22. These states include Missouri, Connecticut, Florida, Kentucky, North Carolina, Oregon, Rhode Island, and Tennessee, among others.

23. Vicki W. Kramer, Alison M. Konrad, & Sumru Erkut, *Critical Mass on Corporate Boards: Why Three or More Women Enhance Governance*, WELLESLEY CENTERS FOR WOMEN, 2006, at 2 (Special Report).

24. Diane Lerner and Christine Oberholzer Skizas, *Where Women Are on Board: Perspectives from Gender Diverse Boardrooms*, Harvard Law School Forum on Corporate Governance and Financial Regulation 2015, available at <http://corpgov.law.harvard.edu/2015/07/31/>.

25. Credit Suisse, *Does Gender Diversity Improve Performance?*, July 31, 2012, available at <https://www.credit-suisse.com/us/en/about-us/responsibility/news-stories/articles/news-and-expertise/2012/07/en/does-gender-diversity-improve-performance.html>.

26. Andre Chanavat and Katharine Ramsden, *Mining the Metrics of Board Diversity*, Thomson Reuters (2013), available at [https://risk.thomsonreuters.com/sites/default/files/mining\\_the\\_metrics\\_of\\_board\\_diversity.pdf](https://risk.thomsonreuters.com/sites/default/files/mining_the_metrics_of_board_diversity.pdf).

27. Ciara Torres-Spelliscy, Monique Chase, & Emma Greenman, *Improving Judicial Diversity*, Brennan Center for Justice at New York University School of Law, 2nd ed. 2010, at 5.

28. <http://www.gov.idaho.gov/boards/boards.cfm> (last visited December 17, 2015).

29. Conn. Gen. Stat. § 4-9b (Rev. 2011).

30. Denise W. Merrill, *Gender and Racial*

*Composition of Connecticut State Boards and Commissions 2011 Report*, May 14, 2012, at 6, available at <http://www.ct.gov/sots/lib/sots/capitol/bdscomms/bdscomms/gr2011report.pdf> (last visited on Dec. 14, 2015).

31. *Id.*

32. *Id.* at 10.

33. *Id.* at App. B.

34. N.D. Cent. Code § 54-06-19 (2015).

35. Kyle Potter, *4-in-10 governor appointments are women*, DICKINSON PRESS (Dec. 15, 2013), <http://www.thedickinsonpress.com/content/4-10-governor-appointments-are-women> (last visited Dec. 14, 2015).

36. *Id.*

37. *Id.*

38. North Dakota Office of Governor, *Boards and Commissions*, <http://governor.nd.gov/boards> (last visited Dec. 10, 2015). For example, the Agricultural Products Utilization Commission has eleven members, only one of which is female; the Energy Policy Commission has seventeen members, only three of which are females; and the North Dakota State Investment Board has eleven members, only two of which are appointed females (the third is the State Treasurer and she is statutorily required to be on the Board).

39. Potter, note xxi.

40. See Idaho Code § 22-1202 (2015).

41. *Id.*

42. *Id.*

43. This figure is arrived at by considering the roughly 30-33% representations of women found in both North Carolina and Alaska, compared with the 40% representation of women from Connecticut and North Dakota.

44. Torres-Spelliscy, note xxvi at 36-42.

45. *Id.* at 36.

46. *Id.*

47. *Id.* at 37.

48. *Id.*

49. *Id.*

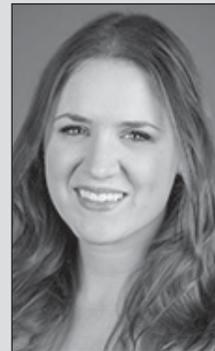
50. *Id.* at 38-42.

51. *Id.* at 41.

52. These suggestions presume, of course, sufficient resources can be committed to the goal of increasing gender diversity. Part of the problem in Idaho could be a resources issue. According to Ms. Beebe, her Kansas counterpart who deals with approximately 150 boards, has seven people working to handle the work that Ms. Beebe does on her own for 250 boards and commissions.



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# Litigators Beware: Implicit Bias

Sarah Q. Simmons

**W**e have no prejudices. We are fair evaluators of “just the facts.” We can separate our personal judgments from our professional assessments. Right? Wrong.

Lawyers are just human and our nature dictates that subconscious bias permeates our analyses and decisionmaking — unless we acknowledge the bias and bring it into the light. Although the majority of Americans today likely believe themselves to operate free of race, gender, disability, or other forms of bias, research in neurology and social and cognitive psychology reveals that we are all subject to unconscious biases that tend to favor those socially similar (*e.g.*, race, ethnicity, gender, socioeconomic status) to ourselves. Unaware that we hold these implicit biases, our decisionmaking in many instances is subconsciously influenced by them. In fact, study after study has shown that much of our daily conduct is driven by our minds’ subconscious reliance upon associations rather than conscious discernment.

## Hard to argue with the research

Implicit bias research reveals that we draw associations that unconsciously shape our cognition and subsequent action, in some cases to the detriment of truth. For example, one study<sup>1</sup> revealed that less than 30% of over 250 trial court judges in attendance at a judicial conference correctly answered the question: “A bat and a ball cost \$1.10 in total. The bat costs \$1.00 more than the ball. How much does the bat cost?” Correct answer? \$1.05. Certainly, every

Some subconscious associations are so strong in our minds that even the brightest amongst us are prone to unwittingly rely upon them.

judge (and every attorney) engages in complex reasoning, and yet this exceptionally well-educated group of deliberate thinkers overwhelmingly failed to resist the response that first came to their minds.

Another study showed that people recalled that an individual they met only briefly was taller when that individual was introduced as someone with a higher status occupation. Some subconscious associations are so strong in our minds that even the brightest amongst us are prone to unwittingly rely upon them.

Studies of greater import with similar results are concerning. In one oft-repeated study, participants played a video game where photographs of white or black individuals holding an object — such as a soda, phone, or weapon — momentarily flashed on the screen. The participants were directed to decide as quickly as possible whether to shoot based on whether that individual was armed or not. The results? With greater frequency, the participants mistakenly shot unarmed black individuals, while they failed to shoot armed white individuals. This was true even where the participant herself was black.

In another study regarding race, hundreds of duplicate resumes were sent in response to advertised job openings. Half were headed with a white-sounding name (*i.e.*, Emily, Greg, Sarah, Todd), while the other half with an African American-sounding name (*i.e.*, Lakisha, Jamal, Latoya, Tyrone). Those with names that sounded white were called back 50% more frequently than were their African American counterparts. In these two instances, the precognitive association between race and negativity was so immediate that even participants who denied any racial animosity acted on racial stimuli when there was no rational justification for doing so.

Implicit bias concerning gender, like those with race, can dictate thoughtless outcomes. In yet another study, participants reviewed narratives of a highly successful entrepreneur. Some participants were told that the entrepreneur was named “Howard” and others were told the entrepreneur was named “Heidi.” Otherwise the narratives were identical. The participants rated Heidi and Howard as equally competent. Yet the students found that Howard came across as a more appealing colleague, while they viewed Heidi as

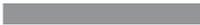
selfish and not “the type of person you would want to hire or work for.” The same data with a single difference — gender — created vastly different impressions.

While this study reveals a bias both men and women have in evaluating how women must act in the workplace, the next revealed bias when women are allegedly evaluated purely on their proficiency. Specifically, the simple change from viewed to blind orchestra auditions resulted in the hiring of 30% more women than when the judges could see the musician’s gender. Gender biases also account for unconscious adjustments in our assessment criteria. For instance, screeners hiring for traditionally male jobs (*e.g.*, police chief or construction manager), placed more importance on whatever quality a male candidate possessed. If the male was better educated, that was the important factor, but if the female was better educated, experience became the deciding factor. Without any intention of discriminating against women, the decisionmakers unwittingly rationalized their unconscious biases.

These and other studies reveal that, notwithstanding our best intentions, bias subconsciously shapes the lens through which we view others and governs our decisions about them. While these studies are limited to black versus white and male versus female, they represent just a handful of the many studies that have been performed over the course of the past three decades with regard to implicit bias. Studies have also confirmed unconscious bias with regard to disability, age, skin color, obesity, and more. If you want to test your own implicit biases, the Harvard Implicit Association Test is available free of charge online at

<https://implicit.harvard.edu/implicit/takeatest.html>, and offers over a dozen tests based on various social subsets. The test directs you to assign persons of a certain subset positive or negative attributes, and then measures your response time in connecting those attributes to images of individuals from the group. More often than not, participants quickly associate positive attributes to dominant social subsets, while they more slowly associate positive characteristics to minority subsets.

Studies have also confirmed unconscious bias with regard to disability, age, skin color, obesity, and more.



### Overcoming implicit bias

Although the research overwhelmingly supports the existence of implicit bias, it also indicates that implicit bias is malleable. We can construct new mental associations to override those in our subconscious. We do this by:

- heightening our awareness of our own implicit biases;
- exposing ourselves to individuals who, and situations that, do not align with our subconscious associations;
- engaging in deliberative rather than off-the-cuff decisionmaking; and

- providing reasoned explanations for decisions that acknowledge the initial impetus of implicit bias.

### Implicit bias in litigation

As attorneys, there are countless instances where we may need to subvert the process of unconscious bias in ourselves, our clients, or the justice system.

First, during initial meetings with potential clients, we assess their credibility, their jury appeal, and the viability of their legal claims. Moving forward, we can apply our knowledge of implicit bias in at least two ways. Question whether your assessment of clients and their claims is driven by your own unconscious biases, unwittingly causing you to reach improper conclusions to the client’s detriment.

Also consider whether and to what extent implicit bias may have contributed to the events that caused the client to seek out your services, and further will continue to shape the human components of the litigation moving forward. Perhaps the event or decision to be litigated in fact originated due to the impulse of your client’s or his opponent’s implicit bias, such as a belief that a claim is worth less due to the social position of the claimant, or an unwillingness to make accommodations that unwittingly arose from unconscious bias about the social group to which the person seeking the accommodation belongs. Further, your assessment of your client’s jury appeal should alert you to common biases that you will need to confront at deposition or during voir dire.

Especially in the employment law context, you should utilize discovery to uncover, explore, and later address the implicit biases at work

in the case. Whether you represent the employer or the employee, you should evaluate how comparators of the plaintiff were treated in similar situations. Decision-makers must be challenged to push beyond basic justifications for their decisions, and beyond the surface-level reasoning they applied (e.g., education versus experience) at the time decisions were made so that you understand whether unconscious bias played a role.

Finally, at trial, beware of and probe for implicit bias during voir dire, cross examination, closing argument, and jury instructions. Judge Mark Bennett of the Northern District of Iowa is convinced that, due to the existence of implicit bias, voir dire should be performed by attorneys rather than judges. He argues that jurors are less likely to be candid in their responses to judges, and that attorneys have access to experts who will assist them in artfully crafting a voir dire individualized to the unique implicit biases at play in the case. He also routinely provides a jury instruction that cautions jurors about the existence and influence that implicit bias may play as it works toward verdict. Other judges throughout the country have admitted expert testimony regarding implicit bias. Attorneys should consider these and other tools to address unconscious bias as they prepare for and litigate at jury trial.

## Conclusion

Implicit bias shapes the decisions that lead up to and occur throughout the litigation process. We should tune into our own implicit biases, and sensitize ourselves to the biases of witnesses, jurors, opposing counsel, and judges. The American Bar Association's Implicit Bias Initiative

Judges throughout the country have admitted expert testimony regarding implicit bias.

is intended to serve as a repository of information regarding the subject. Visit the ABA website to learn more.

## Endnotes

1. See below for a list of sources relied upon by the author.

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# UPS Delivered New Workplace Protections for Pregnant Employees

Anne B. Wilde

**A**s demographics of the workforce have changed, workplace protections for pregnant workers and new mothers have increased over recent decades. Due to these evolving workplace protections, employers and employees should consider multiple federal laws when a pregnant employee requests any change in the employee's terms and conditions of employment from the employer due to her pregnancy. Such a change can range from a schedule change due to morning sickness to a position re-assignment due to an employee's physical inability to perform her current position.

This article will discuss recent developments in the law relating to pregnancy in the workplace. It will further offer recommendations for employers to comply with new legal standards and to promote a culture of workplace acceptance for pregnant employees.

## **The workplace for pregnant employees before the UPS delivery**

Title VII of the Civil Rights Act of 1964 protects individuals who work for an employer with at least 15 employees against employment discrimination on the bases of race and color, as well as national origin, sex, and religion.<sup>1</sup> In 1978, the Pregnancy Discrimination Act (PDA) amended Title VII, making Title VII applicable to pregnancy and prohibiting workplace discrimination based on pregnancy. In other words, an employer cannot treat an employee differently *because of pregnancy*. The Americans with Disabilities Act Amendments Act of 2008 (ADA) requires employers with 15 or more employees to accommodate disabilities, including pregnancy-related



disabilities. For employers with 50 or more employees, the Family and Medical Leave Act (FMLA) entitles eligible employees to 12 weeks of unpaid leave for pregnancy-related conditions and/or to care for a newborn child.

In addition to these traditional statutory sources of workplace protections, Section 4207 of the Patient Protection and Affordable Care Act provides that employers with 50 or more employees must provide breastfeeding new mothers with reasonable break time and a private space (other than a bathroom) at work to express breast milk for the first year of a newborn's life.<sup>2</sup> The break time provided for this activity does not need to be paid by the employer.

Given this patchwork of legal requirements impacting how employers treat employees, employers have been challenged to create clear workplace standards for pregnant employees that effectively balance legitimate business needs, particularly in positions that require significant physical work, with the physical limitations of pregnant employees. This year, the U.S. Supreme Court provided guidance.

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This article will offer recommendations for employers to comply with new legal standards and to promote a culture of workplace acceptance for pregnant employees.

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## **The EEOC's position**

Historically, the Equal Employment Opportunity Commission (EEOC), the federal body charged with enforcing this patchwork of federal laws, has taken positions that are not aligned with the general interests of the employer community. On July 14, 2014 and in anticipation of a Supreme Court decision, the EEOC published Enforcement Guidance on Pregnancy Discrimination and related publications. The preemptive nature of the EEOC guidance was evidenced by the fact that the guidance was published by the agency without public comment.

## Young v. United Parcel Service

On March 25, 2015, the United States Supreme Court issued *Young v. United Parcel Service, Inc.* overturning a Fourth Circuit decision that affirmed a grant of summary judgment to United Parcel Service, Inc. (UPS) in a Pregnancy Discrimination Act lawsuit.<sup>3</sup> The Supreme Court remanded the case to the Fourth Circuit to determine whether Peggy Young, a female part-time delivery driver, had created a genuine issue of material fact as to whether UPS's reasons for having treated Young less favorably than it treated other non-pregnant employees were pre-textual.

When Young became pregnant, her doctor advised her that she could not lift more than 20 pounds. By job description, UPS required delivery drivers to be able to lift up to 70 pounds and up to 150 pounds with assistance. UPS advised Young that she could not work while under a lifting restriction, as she could not perform the essential functions of the delivery driver position.

Young then filed a federal lawsuit claiming that UPS acted unlawfully in refusing to accommodate her pregnancy-related lifting restriction. In response to UPS's motion for summary judgment, Young pointed to a collective bargaining agreement in which UPS had agreed to make accommodations for (1) workers who were injured on the job, (2) drivers who had lost Department of Transportation certifications, and (3) employees who had disabilities covered by the ADA.

Young asserted that UPS violated the PDA's second clause, which mandates "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes. . . as other persons not so affected but similar in their ability or inability to work..."<sup>4</sup> Young provided favorable facts in support of her claim,

including (1) evidence that her co-workers were willing to help her by lifting heavy packages, (2) instances in which UPS accommodated other drivers with similar restrictions with non-pregnancy conditions, and (3) evidence that when she requested an accommodation from a UPS manager he responded that while she was pregnant she was "too much of a liability" and "could not come back" until she was "no longer pregnant."<sup>5</sup>

In a 6-3 decision, the Supreme Court applied a burden-shifting framework to pregnancy discrimination claims:

A pregnant worker who seeks to show disparate treatment through indirect evidence may do so through application of the *McDonnell Douglas* burden-shifting framework.

• A pregnant worker who seeks to show disparate treatment through indirect evidence may do so through application of the *McDonnell Douglas* burden-shifting framework. Thus, a pregnant worker must first establish a prima facie case of pregnancy discrimination, which requires her to establish that she belongs to the protected class, she sought an accommodation, the employer did not accommodate her, and the employer did accommodate others who were "similar in their ability or inability to work."

• If the pregnant worker establishes a prima facie case, then the burden shifts to the employer to articulate

a legitimate, nondiscriminatory reason for denying the plaintiff the accommodation. The reasons cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those whom the employer accommodates.

• If the employer articulates a legitimate, nondiscriminatory reason, then the burden shifts back to the pregnant worker to show that the employer's reason is a pretext for unlawful discrimination.

A pregnant worker can show pretext by providing evidence that the employer's policies impose a "significant burden" on pregnant workers and the employer's legitimate, nondiscriminatory reasons are "not sufficiently strong" to justify the burden. She may do so by providing evidence that the employer accommodates a large percentage of non-pregnant workers while failing to accommodate a large percentage of pregnant workers.

The Supreme Court then held that Young had created a genuine dispute as to whether UPS provided more favorable treatment to at least some employees whose situation could not reasonably be distinguished from hers. The Court remanded the case to the Fourth Circuit to determine whether Young had created a genuine issue of material fact as to whether UPS's reasons for treating her less favorably than other non-pregnant employees was a pretext for discrimination.

The Supreme Court, however, rejected Young's assertion that if an employer provides a small group of other workers with an accommodation, then it must provide similar accommodations to pregnant workers with comparable physical limitations, irrespective of the nature of their jobs, the employer's need to keep them working, or any other criteria.

While the decision was split, the Court unanimously rejected the EEOC's contention that pregnant employees should be granted "an unconditional most-favored-nation status." Accepting the EEOC's position would mean that pregnant women would receive more favorable treatment than other employees due to their pregnancy. The Supreme Court recognized the preemptive nature of the published guidance from the EEOC, but disregarded it because of its timing, inconsistency with the agency's past positions and the lack of "thoroughness of consideration" of the issue.

### The workplace for pregnant employees after the UPS delivery

Regardless of the prevailing party in the *UPS* case, both employers and employees will have difficulty applying the Court's new standard, which Justice Scalia pointed out as "splendidly unconnected" to the text of Title VII. Without a doubt, and as alluded to by the majority opinion, many more pregnancy-related impairments now likely rise to the level of an ADA-covered disability (e.g., pregnancy-related sciatica, pre-eclampsia, anemia, gestational diabetes, etc.) given the broad expansion of covered disabilities under the 2008 amendments to the ADA. In these situations, a pregnant employee would be afforded the same right to reasonable accommodation under the ADA as any other individual with a disability, regardless of whether the impairment was related to pregnancy.

Based on the questionable status of the EEOC Guidance after the *UPS* decision, the EEOC published updated guidance on June 25, 2015.<sup>6</sup> Although not dispositive, the guidance is useful for employers to evaluate and consider as it reflects the position the EEOC is likely to take in administrative proceedings and litigation involving pregnancy-related claims. This guidance is particularly relevant considering that in the 2014 fiscal year, the EEOC received 3,400

pregnancy-related charges. Those charges resulted in \$14.4M in monetary settlements and payments made by employers (excluding awards or settlements made in conjunction with litigation).<sup>7</sup>

Litigation in coming years will likely provide clarity for employers and employees on the workplace protections available to pregnant workers. Even in the absence of further clarity, employers should consider adopting practices that consider accommodation of women with "normal" pregnancies by determining whether the individual can perform the essential functions of the job and evaluating the accommodation request accordingly.

### Human resources best practices for employers

Given these various workplace protections for pregnant employees and new mothers, employers should consider:

- Reviewing their ADA policies, procedures and internal practices, including the interactive dialog process for workplace accommodations.
- Reviewing their FMLA policies and procedures to ensure that they are up-to-date and auditing internal leave administration practices.
- Reviewing discrimination and harassment policies to ensure that they include pregnancy, childbirth, and pregnancy-related conditions.
- Reviewing light duty policies and processes. These policies can be incorporated in an employer's risk



management program or worker's compensation policies and processes.

- Training managers on the legal obligations of an employer regarding pregnant employees and new mothers and related company policies.
- Taking complaints from pregnant employees and new mothers about workplace treatment seriously.
- Updating job descriptions to accurately reflect physical requirements for all positions, in advance of someone in a position requesting an accommodation.

### Endnotes

1. 42 U.S.C. § 2000(e), et. seq.
2. 29 U.S.C. § 207.
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# To Behave or Not to Behave: How Behavioral Science Can Inform Policy and the Law

April Lea Pope

**B**ehavioral science has captured the attention of the United States government, as well as other countries' governing bodies, and increasingly is being used to inform policy making. Scholars are also using behavioral science to understand how culture affects the way in which people perceive adjudicatory facts. This article explores two behavioral science concepts: (1) the popular "nudge theory" in policy making; and (2) the lesser-known Cultural Cognition of Law Project at Yale Law School.

Behavioral science is the study of human and animal behavior. More specifically, it "is the systematic analysis and investigation of human and animal behaviour through controlled and naturalistic observation, and disciplined scientific experimentation. It attempts to accomplish legitimate, objective conclusions through rigorous formulations and observation."<sup>1</sup> Psychology, social neuroscience, behavioral economics, and cognitive science are all fields of behavioral science.

It is important to note that Social science is the scientific study of human society and social relationships. The distinction between social science and behavioral science can be difficult to make. The two areas often overlap. For purposes of this article, the focus is on behavioral science, but there are elements of social science in the topics discussed.

## How governments are nudging their people

In April of 2008, Richard Thaler, a behavioral economist, and Cass Sunstein, a legal scholar, published a book called, "Nudge: Improving

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Following its publication, policy makers in both the United Kingdom and the United States have sought to employ nudge theory to effectuate national priorities.

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Decisions about Health Wealth and Happiness." The book introduces "nudge theory," which is a behavioral science concept that asserts that people make decisions contrary to their own interests as a result of psychological and neurological biases, and that it is possible to guide people toward better decisions by deliberately structuring the choices in particular ways. The reviews of the book were largely positive, and it made the New York Times bestsellers list.<sup>2</sup> It was also named one of the best books of 2008 by *The Economist*.<sup>3</sup>

Following its publication, policy makers in both the United Kingdom and the United States have sought to employ nudge theory to effectuate national priorities. In 2010, the United Kingdom (UK) formed the Behavioral Insights Team, informally known as "the Nudge Unit" to use nudge theory to better government programs and change the behaviors of its people. The work of the UK's Nudge Unit resulted in, among other findings, an additional 100,000 organ donors a year after encouraging people to register as organ donors by using a reciprocity-based message on the registration website: "If you needed an organ transplant, would you have one? If so please help oth-

ers."<sup>4</sup> Alternatively, the Nudge Unit found that using a social norm-based message with a picture of a group of individuals resulted in fewer registrants.<sup>5</sup>

The Nudge Unit also looked into why a large number of people who initially expressed interest in joining the Army Reserve later dropped out during the recruitment process. To encourage people to remain throughout the recruitment process, the Nudge Unit had the program send e-mails from an actual officer detailing his personal experiences.<sup>6</sup> Thereafter, the number of army applicants nearly doubled.<sup>7</sup>

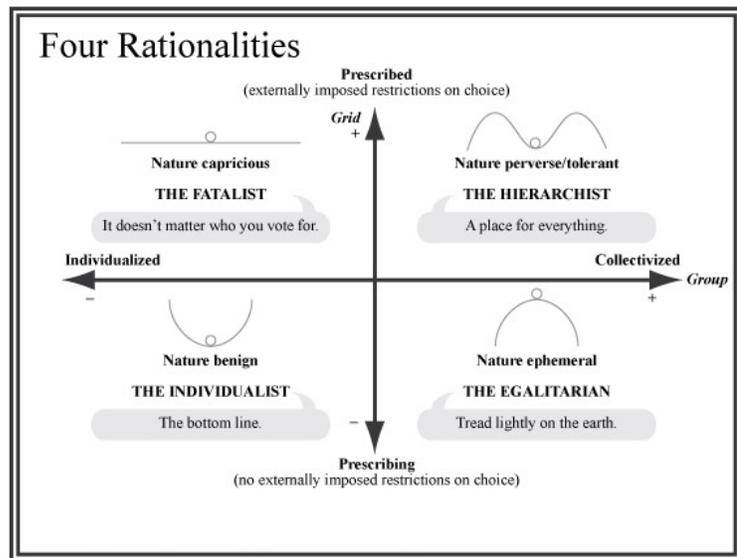
In the United States in 2009, President Obama appointed Cass Sunstein to be the Administrator of the Office of Information and Regulatory Affairs for the Office of Management and Budget.<sup>8</sup> On September 15, 2015, President Obama issued an Executive Order directing executive offices and agencies to use behavioral science insights to inform policies, programs, and operations.<sup>9</sup> The Order officially established the Social and Behavioral Sciences Team (SBST) under the National Science and Technology Council to provide agencies with advice and policy guidance.<sup>10</sup>

The SBST was unofficially established in 2014, and in 2015 the SBST released its first annual report.<sup>11</sup> The SBST focused on two core areas: streamlining access to programs and improving governmental efficiency by looking at how behavioral barriers affected the way in which people engaged with those programs.<sup>12</sup> For example, the SBST redesigned a General Services Administration (GSA) form for self-reported sales by vendors selling goods and services to the government to include, at the top of the page, a signature box certifying accuracy of information. This change resulted in an additional \$1.59 million in fees collected within a single quarter.<sup>13</sup>

Additionally, the SBST and the Department of Defense (DOD) used behavioral insights to increase the number of Service members enrolled in the Thrift Savings Plan.<sup>14</sup> To promote participation in the Plan, DOD and SBST launched an email campaign that sent around 720,000 unenrolled employees one of nine e-mail messages.<sup>15</sup>

The messages were designed using behavioral insights and notified recipients of the opportunity to participate in the Plan.<sup>16</sup> “Compared to no message, the most effective message nearly doubled the rate at which Service members signed up for TSP. Emails informed by behavioral insights led to roughly 4,930 new enrollments and \$1.3 million in savings in just the first month after the emails were sent.”<sup>17</sup>

Critics of nudge theory assert that it is paternalistic and propagates governmental manipulation. Critics also contend that nudge units are simply a temporary policy fad and that the changes effectuated by nudge theory are only superficial and do not actually change people’s beliefs. Regardless of the criticisms, it is clear that the nudge units of both the United Kingdom and the United States have been relatively successful.



The prevalence of behavioral science in United States policy making led me to ask some questions about behavioral science and the law: what kind of research has been done? How can behavioral science inform the practice of law? One particular body of work immediately stood out: the Cultural Cognition Project (CCP) at Yale Law School.

**Cultural cognition: How does culture shape the way people view adjudicatory facts?**

Although the CCP hasn’t quite captured the attention of the mainstream like nudge theory, it lends an interesting and unique perspective to the practice of law.<sup>18</sup> The CCP is an interdisciplinary group of scholars who study how cultural values shape the public’s perception of risk and related policy beliefs. Cultural cognition is the tendency of individuals to conform their beliefs about disputed matters of fact (e.g., whether global warming is a serious threat; whether the death penalty deters murder; whether gun control makes society more safe or less) to values that define their cultural identities.<sup>19</sup> Cultural Cognition theory draws on a group grid worldview scheme created by anthropologist

Mary Douglas and political scientist Aaron Wildavsky, as provided in the chart above.<sup>20</sup>

The CCP works to characterize people’s cultural worldviews within the grid and then study how having the particular set of values shape one’s perceptions of risk or policy-consequential facts.<sup>21</sup> The CCP is made up of a variety of subprojects, one of which is the Cultural Cognition of Law Project (CCLP). Under the CCLP, scholars are studying how adjudicatory fact-findings are influenced by cultural values.<sup>22</sup>

We all know that people come with their own experiences and biases. A person’s experiences and biases may be pivotal to a case when the person is a judge or a member of the jury in an adjudicatory proceeding. The judge or jury must determine contested issues of fact “like whether protestors blocked an abortion clinic entrance or whether a motorist fleeing police put innocent life at risk.”<sup>23</sup> The CCLP seeks to examine how culture plays a part in the way in which the fact finder perceives the facts of the case.

Studies done by scholars under the CCLP have found that when people must make inferences about facts that they cannot directly observe, the cultural lens through which people

view facts shapes them in a way that reflects their group commitments. Culture is what shapes that lens, and as a result, that person will interpret the evidence in ways that align with their cultural values.<sup>24</sup>

Why do people interpret facts in a way that is in harmony with their culture? CCP scholars would say that individuals who share formative identities “face strong psychological pressure to fit their perceptions of how the world *does* work to their shared appraisals of how the world *should* work: forming beliefs at odds with their core values exposes them to dissonance and risks putting them in conflict with others whose opinions of them affect both their material and emotional wellbeing.”<sup>25</sup> Cultural cognition is a form of identity preservation and protection.

A 2008 CCLP experimental study conducted by Dan Kahan, a professor at Yale Law School and a prolific member of the CCP, confirmed the impact of cultural cognition in a controversial acquaintance-rape case. In *Commonwealth v. Berkowitz*<sup>26</sup>, the victim repeatedly told the defendant “no,” but did not physically resist his sexual advances. The defendant admitted that the victim repeatedly said no, but that she did so while moaning in a passionate manner.<sup>27</sup>

The Pennsylvania Supreme Court held that a man could not be found guilty of forcible rape when there was a lack of “forcible compulsion” as required by Pennsylvania law.<sup>28</sup> The 1994 *Berkowitz* case was controversial and stoked the flames of the decades-old debate over acquaintance-rape: How much force should be required to prove rape?<sup>29</sup>

Dr. Kahan used cultural cognition to examine the debate over rape law reform by conducting a mock juror study with a diverse national sample of 1,500 Americans 18 years or older.<sup>30</sup> The subjects read a vignette of

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In instances where there are questions of fact surrounding controversial topics like acquaintance rape, a fact finder’s cultural worldview may reign supreme.

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facts patterned on *Berkowitz*, which included the uncontested fact that the victim said “no.”<sup>31</sup> The subjects were then randomly assigned to one of five groups.<sup>32</sup>

The first group was not furnished a definition of rape.<sup>33</sup> The second group was provided with the common law definition of rape that requires the man to use force or the threat of force and knows that the woman does not consent.<sup>34</sup> The third group was provided a strict liability definition that required the man to use force or the threat of force without the consent of the woman.<sup>35</sup> The definition also pointed out that a mistaken belief that the woman consented is not a defense.<sup>36</sup>

The fourth group was given a definition of rape that if the man had sex with a woman without her consent, with consent requiring overt action instead of a mental subjective mental state.<sup>37</sup> Finally, the fifth group was given a definition of rape where the man was guilty if he engaged in intercourse with the woman without her consent and that she hadn’t consented if she communicated by actions or words, including the word ‘no.’ If the man knew that the woman said “no” a mistaken belief that woman consented was not a defense.<sup>38</sup>

The subjects then stated their views of the key facts and the correct verdict. The major finding was that

a hierarchical worldview (think back to the grid above), as opposed to an egalitarian one, persuaded individuals to perceive that the defendant reasonably understood the victim as consenting to sex, even though she repeatedly said, “no.”<sup>39</sup> Gender alone did not influence responses to guilty.<sup>40</sup>

The influence of gender was conditional on culture: Hierarchical older women were more likely to favor acquittal.<sup>41</sup> This was mostly the case regardless of which definition of rape, if any, the subjects in the study were asked to apply.<sup>42</sup> Why would this be? “Saying ‘no’ but meaning ‘yes’ is conceived of by those who subscribe to traditional gender norms as a strategy some women use to evade the stigma these norms visit on women who engage in casual sex.”<sup>43</sup>

The results of the study show that, in instances where there are questions of fact surrounding controversial topics like acquaintance rape, a fact finder’s cultural worldview may reign supreme, regardless of the law the fact finder is asked to apply.

Understanding the types of instances where a person will view adjudicatory facts in a way that favors their cultural worldview rather than in the way prescribed by a law may inform practitioners how to structure litigation. The 2008 acquaintance-rape study by CCLP member Dr.

Kahan, together with other CCLP studies, not only provide interesting insight into the human condition, but may provide legal practitioners with important perspective in terms of how the fact finder(s) in certain cases may perceive adjudicatory facts and the law.

## Conclusion

Behavioral science can inform policy making and in the practice of law. Concepts like the popular nudge theory have helped governments become more efficient and increase access to government programs. And the lesser-known Cultural Cognition Project can serve as a tool for attorneys to gain insight into how judge or jury might perceive issues of fact.

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April Lea Pope is counsel for Battelle Energy Alliance, LLC, the managing and operating contractor for the Idaho National Laboratory. Her practice focus is on environmental, safety, and health and export compliance. The opinions in this article are those of the author and do not reflect the opinions or position of Battelle Energy Alliance, LLC.



# Mindfulness: Increase Professional Satisfaction, Decrease Stress, and Renew the Dynamism of Your Practice With Simple Exercises and Focused Perspective

Clare Freeman

**W**hat are you thinking about right now? As you hold *The Advocate* in your hands, what thoughts are running through your head? Perhaps it's that looming deadline for your next appellate brief. Maybe your afternoon hearing on that motion for summary judgment keeps ping-ponging between your ears. Your lower back may be sending a twinge down the back of your leg. You're thinking about how much you don't want to have to clear snow out of the driveway when you get home tonight. And that darn, leaky garage window. Oh, it's the daughter's dance recital tomorrow. Can't forget that. Should get a little bouquet to present to her afterward....

Stop. Sit back in your chair. Inhale. Do that now. Shut those eyes. Inhale three times. Count the breaths. Don't worry. This article will still be here when you come back. So really: sit back and breathe those three breaths.

OK, now let's try that breathing again, but with a little more direction. This time, sit back in your chair — erect, feet grounded hip-distance apart, hands resting gently on your thighs. If you're in high heels, slip them off. Just for a moment. Let your feet "spill" across the floor. You're going to inhale and exhale three times with your eyes closed. Focus your attention on the darkness of the space behind your eyes. On the inhale, mentally say "re," and on the exhale, mentally say "lax." "Relax." Let your shoulder blades "melt" downward. There is only this breath. Not the last breath. Not the next breath. Not all those concerns that were blooming in the fertile and



The author takes a few moments at work to practice mindfulness meditation.

brilliant soil of your mind earlier. Just this breath. So try that — breathe three breaths like that. Enjoy the darkness. Enjoy the release of your upper back. Enjoy the stillness.

## What is mindfulness?

These meditative exercises arise from mindfulness practices. Over the last few years, the media has been abuzz with talk of mindfulness, meditation, and the "mind-body connection." Discussion has ranged from New Age to clinical. Proponents range from celebrities and professional athletes to corporate moguls to doctors. But sometimes it is hard to pin down exactly what "mindfulness" means, and it may be even harder to discern why we, as lawyers, should care.

Mindfulness may be defined as intentionally paying attention to the present moment in a very particu-

lar, non-judgmental way. It could be called the art of "witnessing," of being as fully aware as possible of one's external and internal landscapes. Mindfulness practices can help still that busy mental chatter. Mindfulness practices can help us live fully in the space before us, and they can be a means through which we can return to an appreciation of our physical senses. One could say that mindfulness can remind us to consciously and intentionally write our autobiographies each day.

Psychiatrists, psychologists, cognitive scientists, and other neurological and behavioral experts use the term, "interoception" as "the material me." Interoception relates to how a person perceives bodily feelings that determine mood, a sense of well-being, and emotions. Interoception is to the internal world what proprioception is to the external world. Mindfulness practices tap into the

idea of interoception and help us become more acquainted with our inner sensations, feelings, emotions, preoccupations, and needs and aversions.

Interoception relates to our experience of pain, temperature, itch, sensual touch, muscular and visceral sensations, what is called vasomotor activity (blood-vessel activity), hunger, thirst, and what some call “air hunger.” Through mindfulness practices, including meditation, mindful walking, mindful eating, contemplative movement (things like certain schools of yoga and tai chi), and breathing exercises, we can become much more aware of what we are actually, truly feeling. We can tap into subconscious concerns and bring them into our conscious sphere. We can know ourselves better.

Mindfulness is simply a set of practices and a life perspective that encourage deep introspection, inner stillness, and intense self-awareness. While many Eastern philosophies espouse mindfulness practices and these practices are often associated with Buddhism, these practices are not inherently Buddhist or Eastern. Contemplative meditative practices — mindfulness practices — are found in just about every major religious tradition. They are also found in secular institutions: hospitals, clinics, the locker rooms of professional sports teams.... America has a long tradition of mindfulness practices. One need look no farther than Thoreau’s *Walden* to find that tradition.

### **A quick glimpse at the science**

With mindfulness practices, we can increase focus, attention, a sense of peace, and non-reactivity. Researchers at the University of Wisconsin have used functional magnetic resonance imaging (fMRI) technology to track changes in brain function in veteran mindfulness

practitioners and meditators: Buddhist monks.<sup>1</sup> This work has shown that meditation and mindfulness practices increase focus and decrease emotional reactivity. Meditation was associated with activation in multiple brain regions implicated in monitoring, engaging attention, and attentional orienting.

For example, emotional-sound stimuli produced less amygdala activity in expert meditators than in novices, suggesting that advanced levels of concentration may be associated with a significant decrease in emotionally reactive behaviors — behaviors

Meditation practice can cultivate efficient mechanisms for engaging and disengaging from target stimuli in response to the demands of a task.



that are incompatible with concentration stability. Likewise, one potential long-term effect of what is called open-monitoring meditation (a classic mindfulness practice) may be reduction in the propensity to “get stuck” on a target stimulus. This meditation practice can cultivate efficient mechanisms for engaging and disengaging from target stimuli in response to the demands of a task. This open-monitoring meditation can also assist in integrating distributed neural processes into highly ordered affective and cognitive functions.

In 2009, the Journal of the American Medical Association (JAMA) published the results of a 2007-2008 study that focused on analyzing the effects of mindfulness practices on physician burnout.<sup>2</sup> The study’s authors had expressed concern that up to 60% of practicing physicians reported symptoms of burnout. These symptoms included emotional exhaustion, a sense of depersonalization, a decreased sense of personal accomplishment, decreased empathy, issues of mood disturbance, and decreased conscientiousness and emotional stability. At the close of the study, the authors concluded that participation in a mindfulness program created short-term and sustained improvement in well-being and attitudes toward patient-centered care.

The JAMA for internal medicine published a review of studies in 2014, conducted to measure the efficacy of mindfulness for improving markers of well-being, especially those associated with stress reactions.<sup>3</sup> This review weeded through over 18,000 citations and found 47 that met its strict criteria. Review of these 47 qualified studies indicated that meditation could improve anxiety issues, depression, and pain. The review also, realistically, concluded that meditation is not the only way to improve well-being. It did find that the efficacy of meditation may be comparable to that of antidepressants in some circumstances. Essentially, the review concluded that meditation can reduce the negative effects of psychological stress; it is not a cure-all, but it is a tool for the arsenal.

### **Mindfulness practices for attorneys**

As attorneys, these practices are especially beneficial. First, they can hone our brains to help us achieve peak performance. We can become sharper, more effective trial attorneys

and appellate advocates through mindfulness practices. Second, these practices mitigate the unique stressors we face as attorneys. Unfortunately, we are 3.6 times more likely to be depressed compared to the general population.<sup>4</sup>

Almost 70% of lawyers are likely candidates for alcohol-related problems at some point in their careers. In the State of Washington, for example, a third of the lawyers have reported they were depressed.<sup>5</sup> The American Bar Association (ABA) has reported that 50% to 75% of disciplinary actions and 60% of malpractice claims stem from lawyers' stress-related mental-health issues or chemical dependency or a combination of both.<sup>6</sup> Likewise, the ABA has reported that "most" lawyers, regardless of practice sector, feel dissatisfaction with their practices.<sup>7</sup>

As discussed above, mindfulness practices can combat this dissatisfaction and the stressors that lead to alcohol and substance issues and can increase the quality of our client representation. As the JAMA showed for physician burnout, mindfulness practices can increase our professional satisfaction and improve client interaction. These practices can mitigate depression and make us feel more grounded and fulfilled.

In terms of peak performance, Phil Jackson was known for his "Zen" approach to coaching when he led the Chicago Bulls to the pinnacle of basketball in the '90s.<sup>8</sup> These mindfulness practices can clear and hone the mind, improve communication, heighten efficiency, and, as shown by the University of Wisconsin study, increase focus. The mindful attorney will communicate with clients more effectively, respond concisely and presciently even in high-stress situations, and offer a grounded, less reactive presence.

So how do we get there? What are some of the practices? It starts with breathing. For any of these exercises,

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These mindfulness practices can clear and hone the mind, improve communication, heighten efficiency, and, as shown by the University of Wisconsin study, increase focus.

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a quiet space is ideal, but not essential. Mindfulness is about accepting your circumstances as they are: if it's a little noisy, so be it. You can notice the ambient sounds and then simply let them pass out of your focus. If silence bothers you, soft, non-lyrical, non-emotional music may be nice. Most of these exercises involve shutting the eyes; if having your eyes shut bothers you, however, simply lower your gaze and focus it on a spot before you. If you can create a "mindfulness corner" in your office, a place slightly away from your usual work station, one that may be free of clutter, practicing in that space regularly will help trigger the mind to go into a mindful state when you set up to practice in that space.

### **Cell-phone meditation**

Put your phone on airplane mode or "do not disturb," so there will be no calls or sounds of arriving emails or texts. Set your timer for six minutes. You're going to take that comfortable, grounded seat we discussed at the beginning of this article. Feet will rest on the floor, hip-distance apart. Hands can rest softly on the thighs with the palms either up or down (palms up offers a nice little external rotation for the arms, which may create a nice muscular "opening"). You'll shut your eyes and focus on the darkness behind your eyelids.

You're simply going to sit and

breathe for six minutes, until your cell-phone alarm alerts you to bring yourself back to your office — you'll simply let your eyes open softly, take a few more breaths, and return to work. If your mind wanders during the six minutes, and it will, it may be helpful to count softly to yourself or repeat a word like "relax" with each breath. You can use the counting or repetition of the word as an anchor for your mind.

If your mind continues to wander, even with these measures (and it will!) simply notice the wandering, note the distracting thought, and return to your counting or your word. There is no expectation here. There is nothing to achieve. There is no prize for being still and breathing. Simply sitting for six minutes is its own reward. So accept the sensations, distractions, and antsy-ness you experience at the moment, note them, and continue sitting and breathing. In this way, we are training our minds to slow down and focus. Try taking a six-minute "time out" like this in the morning, around noon, and in the mid-afternoon.

### **Mindful eating**

Even if you don't have time for a lunch break, take 10 minutes and sit somewhere outside your office and consume your food in silence and with complete attention. Do not look at your phone. Do not review

a file. Do not rehearse in your mind what you will say to the judge at that hearing later. Simply eat. Smell your food. Taste your food. Chew your food. Consciously. It can be difficult, but take yourself off autopilot and let yourself become absorbed in the simple, mundane task of eating. If your mind wanders (and it will!) describe your experience in your head. You might say something like, “I taste an orange” or “I am eating very hot ravioli” or even “you know, I do not like the taste of this salad dressing.” Narrate your experience to help your mind settle into it.

### Mindful walking

Whether you are walking down the hall to the restroom or walking several blocks to court, resolve to do it mindfully. Let your gaze soften to the spaces in front of you. Feel your heel strike the ground. Feel yourself roll over your foot. Feel your next heel strike the ground. Inhale deeply — all the way into the lowest lobes of your lungs. Exhale completely, feeling your bellybutton draw into your spine, pressing the air out. Let your breath and the feel of your feet on the ground be your only focus. If your mind wanders, return your focus to the next heel to strike the ground.

### Mindfulness resources

If you’d like to explore mindfulness and/or begin to use mindfulness practices in your life and legal practice, there are, of course, innumerable resources on-line. You can search for a “mindfulness-based stress-reduction program” in your area. These programs are mindfulness-education programs that started at the University of Massachusetts Medical School and are now available nationwide. Many yoga studios offer mindfulness and meditation programs. Bookstores are full of mindfulness

publications. You might want to try:

- *Wherever You Go, There You Are* by Jon Kabat-Zinn. A professor emeritus at the University of Massachusetts’s medical school, Jon Kabat-Zinn is a pioneer in the modern mindfulness movement and his programs and books are excellent resources for those seeking to explore mindfulness practices. In *Wherever You Go, There You Are*, the reader receives a neat, concise reference on mindfulness and meditation, one suitable for practitioners of all levels.
- *Work* by Thich Nhat Hanh. A Buddhist monk, Thich Nhat Hahn is considered a leader in the modern mindfulness movement. His *Work* offers practical exercises for people seeking ways to bring mindfulness practices into their professional lives. The book is slim and accessible with a variety of tips and ideas that take little effort to implement and may change the way the reader perceives his or her professional life.

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Exhale completely, feeling your bellybutton draw into your spine, pressing the air out.

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Clare Freeman began her practice with the Office of the Federal Public Defender. She now does legal and research and writing through her company Mistral Research and Writing, L.L.C. She teaches mindfulness and contemplative movement, and is a 500-hour registered yoga teacher and yoga therapist. You can find her at [www.researchandwritingsupport.com](http://www.researchandwritingsupport.com).



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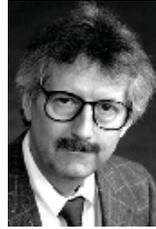
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Joel D. Horton

**Regular Spring Term for 2016  
2<sup>nd</sup> Amended  
1/21/16**

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, 4 and 12  
Coeur d'Alene ..... April 6 and 7  
Lewiston ..... April 8  
Boise ..... May 6, 9 and 11  
Idaho Falls ..... May 4  
Pocatello ..... May 4, 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 2016 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 March 2016**

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

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

1<sup>st</sup> Amended  
1/27/16

**Friday, April 1, 2016 – BOISE**

8:50 a.m. *Wright v. Ada County* ..... #42999  
10:00 a.m. *State v. Taylor* ..... #42774  
11:10 a.m. *State v. Leary* ..... #43097  
1:30 p.m. *Doe v. Doe (2015-25)* ..... #43796

**Monday, April 4, 2016 – BOISE**

8:50 a.m. *Gerdon v. Con Paulos* ..... #43234  
10:00 a.m. *Rangen v. IDWR* ..... #43370  
11:10 a.m. *North Snake Ground Water v. Rangen* ..... #43564  
1:30 p.m. *Senior Iguana's v. ISP* ..... #43158

**Thursday, April 7, 2016 – COEUR d'ALENE**

8:50 a.m. *Shephard v. Shephard* ..... #42938  
10:00 a.m. *Wieble v. Safeway* ..... #43135  
11:10 a.m. .... \*OPEN\*

**Friday, April 8, 2016 – LEWISTON**

8:50 a.m. *State v. Rios* ..... #43017  
10:00 a.m. *State v. Pratt* ..... #43383  
11:10 a.m. .... \*OPEN\*

**Tuesday, April 12, 2016 – BOISE**

8:50 a.m. *State v. Huffaker* ..... #43643  
10:00 a.m. *Kantor v. Kantor* ..... #41946  
11:10 a.m. *Kantor v. Kantor* ..... #42980  
1:30 p.m. *Doble v. Interstate Amusements* ..... #42744

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

1/13/16

**Thursday, March 10, 2016 – BOISE**

9:00 a.m. *State v. Melling* ..... #42666  
10:30 a.m. *Payne v. State* ..... #42858

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

There are no oral arguments scheduled at this time in April for the Court of Appeals.

**OFFICIAL NOTICE  
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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

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<p><b>5th Judicial District</b> <i>Twin Falls</i> Judge Bevan Judge Stoker</p>	<p><i>Caribou - Soda Springs</i> Judge Brown - Caribou Judge Presiding/Visiting - Caribou</p> <p><i>Franklin - Preston</i> Judge Hamn Judge Presiding/Visiting - Franklin</p>

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**Idaho Supreme Court and Court of Appeals**  
**NEW CASES ON APPEAL PENDING DECISION**  
(Updated 1/1/16)

**CIVIL APPEALS**

**Attorney fees and costs**

1. Did the district court err in assuming jurisdiction to reverse its pre-appeal judgment awarding Cummings his attorney fees, and in further deciding to award Northern Title its pre-appeal attorney fees?

*Cummings v. Stephens*  
S.Ct. No. 43081  
Supreme Court

2. Did the district court err in finding this case involved a commercial transaction under I.C. § 12-120(3) when there was no transaction of any sort between Bryan Trucking and Gier?

*Bryan Trucking v. Gier*  
S.Ct. No. 43461  
Supreme Court

**Declaratory judgement**

1. Did the trial court err in holding that the Joint Powers Agreement complies with Article VIII, Section 3 of the Idaho Constitution?

*City of Sandpoint v. Independent Highway District*  
S.Ct. No. 42517  
Supreme Court

**Easements**

1. Did the court err in determining the plaintiff had an ingress and egress easement by implication across the defendants' real property?

*Capstar Radio Operating Co. v. Lawrence*  
S.Ct. No. 42326  
Supreme Court

**Family law**

1. Did the court err in denying the amended petition for declaration of parentage?

*In the Matter of the Declaration of Parentage and Termination of Parental Rights of: Jane Doe II (2015-25)*  
S.Ct. No. 43796  
Supreme Court

2. Whether there was a material, permanent and substantial change in circumstances to support a custody modification.

*Reynolds v. Lunders*  
S.Ct. No. 43345  
Court of Appeals

**License suspension**

1. Whether the court erred in finding the record contained substantial evidence to support the hearing officer's determination that tests for alcohol concentration were conducted in accordance with the requirements of I.C. § 18-8004(4).

*Peterson v. Idaho Transportation Dept.*  
S.Ct. No. 43374  
Court of Appeals

**Liens**

1. Did the district court err by holding as a matter of law that North Idaho Resorts had no vendor's lien against the Trestle Creek property?

*Union Bank, N.A. v. North Idaho Resorts, LLC*  
S.Ct. No. 42467  
Supreme Court

**Post-conviction relief**

1. Did the court abuse its discretion when it denied McCabe's motion for appointment of post-conviction counsel?

*McCabe v. State*  
S.Ct. No. 42856  
Court of Appeals

2. Did the court err in denying relief on Ciccione's claim that trial counsel was ineffective for failing to present the report of his psychological evaluation as mitigation evidence at sentencing?

*Ciccione v. State*  
S.Ct. No. 43075  
Court of Appeals

**Summary judgment**

1. Did the court err in granting Union Bank's motion for summary judgment based on JV's Subordination Agreement?

*Union Bank v. JV L.L.C.*  
S.Ct. No. 42479  
Supreme Court

2. Did the court err in granting summary judgment to the City of Idaho Falls and Officer Steele on the basis they were immune from liability?

*Barber v. City of Idaho Falls*  
S.Ct. No. 42513  
Court of Appeals

3. Under statutory law, which requires proof of damage to maintain a claim under I.C. § 45-1205, did the court err in holding that EEF's loss of its right to participate in the short sale to protect its security interest was insufficient to constitute "damages"?

*Eagle Equity Fund v. TitleOne Corp.*  
S.Ct. No. 42850  
Supreme Court

4. Where the case was pending in federal court at the time the motion to amend was filed, did the district court err in rejecting the federal court's determination under federal law that the action against the medical defendants was deemed filed as of the date the motion to amend was filed?

*English v. Taylor*  
S.Ct. No. 42947  
Supreme Court

5. Whether the district court erred in granting summary judgment for the defendants on the basis of res judicata.

*Matthews v. Sallaz*  
S.Ct. No. 43311  
Court of Appeals

6. Whether the trial court should have denied EMI's motion for partial summary judgment on plaintiff's direct negligence claim against it.

*Morrison v. St. Luke's Regional Medical Center*  
S.Ct. No. 42625  
Supreme Court

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1. Whether the Director's Final Order constitutes a taking of Rangen's property without just compensation in violation of Article I, Section 14 of the Idaho Constitution and the Fifth Amendment of the U.S. Constitution.

*Rangen, Inc. v. Idaho Dept. of Water Resources*  
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Supreme Court

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**Double jeopardy**

1. Was Weatherly twice placed in jeopardy for the same offense when he was convicted and sentenced for both the greater offense of grand theft of a financial transaction card and the lesser included offense of possession of a financial transaction card?

*State v. Weatherly*  
S.Ct. No. 42777  
Court of Appeals

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1. Does requiring an 18-year-old to register as a sex offender due to his conviction for enticement of a child over the internet violate his right to equal protection under the law?

*State v. Beck*  
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**Idaho Supreme Court and Court of Appeals**  
**NEW CASES ON APPEAL PENDING DECISION**  
**(Updated 1/1/16)**

**Evidence**

1. Did the court err when it admitted evidence that Ybarra was being investigated for unrelated crimes?

*State v. Ybarra*  
S.Ct. No. 42653  
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2. Was the evidence presented sufficient to support Pelland's conviction for grand theft by possession?

*State v. Pelland*  
S.Ct. No. 42554  
Court of Appeals

3. Did the court abuse its discretion when it permitted the State to cross-examine Hoy about his prior conviction and the fact he was on probation for that conviction?

*State v. Hoy*  
S.Ct. No. 42572  
Court of Appeals

4. Was there substantial evidence to support the jury's verdict finding Kralovec guilty of battery on a jailer?

*State v. Kralovec*  
S.Ct. No. 42760  
Court of Appeals

**Jurisdiction**

1. Did the district court err in denying Villafuerte's motion to dismiss in which he argued the State of Idaho lacked jurisdiction to prosecute him for failing to register as a sex offender because he had moved to another state?

*State v. Villafurete*  
S.Ct. No. 42766  
Supreme Court

**Probation terms**

1. Whether the district court erred in denying Cheatham's motion to modify the firearm condition of his probation.

*State v. Cheatham*  
S.Ct. No. 43263  
Court of Appeals

**Prosecutorial misconduct**

1. Did the prosecutor commit misconduct during closing argument such that it amounted to fundamental error?

*State v. Villanueva, Jr.*  
S.Ct. No. 42217  
Court of Appeals

**Restitution**

1. Did the court err in concluding it had exceeded its authority in ordering restitution since it was not mentioned in the plea agreement?

*State v. Keys*  
S.Ct. No. 42915  
Court of Appeals

2. Did the court err when it concluded the State is entitled to costs of prosecution under I.C. § 37-2732(k) only if the State suffers economic loss and that it does not suffer an economic loss in "routine drug cases"?

*State v. Harer*  
S.Ct. No. 43241  
Court of Appeals

3. Did the court err in determining that I.C. § 37-2732(k), which allows the court to order restitution for costs incurred by law enforcement agencies investigating the violation, is constitutional?

*State v. Kelley*  
S.Ct. No. 43403  
Court of Appeals

4. Did the court abuse its discretion by ordering Burggraf to pay his ex-wife restitution in the amount of \$500, the deductible amount subtracted from insurance proceeds, because the vehicle he crashed was community property?

*State v. Burggraf*  
S.Ct. No. 42491  
Court of Appeals

**Right to counsel**

1. Did the district court err when it failed to conduct an inquiry of Munts' pro se motion for substitute counsel?

*State v. Munts*  
S.Ct. No. 42582  
Court of Appeals

**Search and seizure –  
suppression of evidence**

2. Did the court err by granting Melling's motion to suppress evidence found in a lockbox and by determining Melling's denial of ownership did not demonstrate he relinquished any privacy interest in the contents?

*State v. Melling*  
S.Ct. No. 42666  
Court of Appeals

3. Whether the district court erred in denying Simpson's motion to suppress statements that he alleged were coerced by officers after overbearing his will.

*State v. Simpson*  
S.Ct. No. 42809  
Court of Appeals

4. Did the district court err by affirming the magistrate's denial of Smith's motion to suppress on the basis the warrantless entry fell under the exceptions of exigency and consent?

*State v. Smith*  
S.Ct. No. 43092  
Court of Appeals

5. Did the court err when it denied Kraly's motion to suppress and found his initial encounter with police was consensual and that his subsequent detention was justified by reasonable suspicion?

*State v. Kraly*  
S.Ct. No. 42580  
Court of Appeals

6. Did the district court err in affirming the magistrate's denial of Bailey's motion to suppress the breath test results that Bailey claimed were unreliable and involuntary?

*State v. Bailey*  
S.Ct. No. 42622  
Court of Appeals

7. Did the district court err in granting Rios' motion to suppress test results of a blood draw and in finding Rios' refusal to sign a consent form was a *per se* revocation of his implied consent to submit to evidentiary testing?

*State v. Rios*  
S.Ct. No. 43017  
Supreme Court

**Sentence review**

1. Did the court err in denying Stephenson's Rule 35 motion to correct an illegal sentence in which he argued his conviction and sentence impermissibly placed him in jeopardy for a second time for the same offense?

*State v. Stephenson*  
S.Ct. No. 42998  
Court of Appeals

2. Did the court err when it denied Alvarez credit for time served as a condition of probation when the law did not provide for credit at the time his probation was revoked?

*State v. Alvarez*  
S.Ct. No. 43094  
Court of Appeals

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



## Idaho Courts

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Chief Justice Jim Jones  
Idaho Supreme Court

### State of the Judiciary

#### Address

January 20, 2016

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**M**r. President, President Pro Tem Hill, distinguished members of the Idaho Senate, my colleagues on the Supreme Court and Court of Appeals, fellow Idahoans.

Mr. Speaker, distinguished members of the Idaho House of Representatives, my colleagues on the Supreme Court and Court of Appeals, fellow Idahoans.

It is a privilege and pleasure to appear before you today to report on the state of the Idaho judiciary. I must admit to having a warm spot in my heart for this august body, because I served as legal counsel for the Idaho Legislature for eight years in the 1980s. You were never, well let's say rarely, a difficult client. But, be that as it may, I can tell you that the Idaho judiciary is doing well and looking forward to continuing improvement in the future.

#### **Odyssey into the future**

One of the exciting developments since my good friend Roger Burdick addressed you last year, is the implementation of the Odyssey case management system. As you will recall, in 2014 the Court presented you with a comprehensive five-year business plan to replace the

Along with the transition to electronic filing, the courts will implement a service that simplifies the filing process for self-represented litigants.

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existing and outmoded ISTARs case management system with a state of the art system from Tyler Technologies. With legislative approval and funding, the Court has been working with Tyler on a pilot project to implement the system in Twin Falls County.

The system went live in Twin Falls on June 22. It was a massive undertaking because it not only required transition of the entire computerized management system, but also entailed a tremendous amount of extra work in scanning existing and incoming records. According to Tyler, the Twin Falls County pilot implementation was one of the smoothest in the company's history. Twin Falls County now has a modern 24/7 web-based case management system for use by judges, court clerks, and numerous governmental agencies, such as the adult misdemeanor probation office, the State Police, and juvenile corrections.

In addition, a portal was deployed with the system to replace the Supreme Court's data repository,

which will allow users to make case, party and hearing searches, as well as electronic payments.

Starting on November 9, voluntary electronic filing was made available to all attorneys in Twin Falls County. That allows parties to submit electronic documents to the court at any time, from any place, resulting in significant efficiencies for attorneys, clerks and judges. Electronic filing was made mandatory for Twin Falls County on January 11 and it appears to be working very well.

Along with the transition to electronic filing, the courts will implement a service that simplifies the filing process for self-represented litigants. Idaho's Court Assistance Office has been recognized nationally for its interactive forms and hands-on assistance to pro se litigants. The new service is being developed for pilot, and in conjunction with Odyssey, will guide the increasing number of self-represented individuals through the process of filing divorce, civil protection, small claims, child

support and custody, and other common types of pro se cases.

The success of the Twin Falls pilot project was accomplished by a dedicated IT staff at the Supreme Court, led by Kevin Iwersen, as well as truly remarkable work by the Twin Falls County Clerk's office. This was all made possible by the action of this body in funding \$4.85 million in FY15 and \$2.18 million in FY16. This year, the Court is asking for an additional \$2 million, which will be the third of five one-time appropriations for Odyssey.

The other source of revenue you provided for the Odyssey transition was an increase of the court filing fees going into the technology fund. We are carefully monitoring the implementation and operational aspects of the project to make sure that the ongoing funding is adequate to meet the needs of the new system. That is because the FY15 revenue received by the technology fund from filing fees was 1.8% below projections and it appears projections will not be met in FY16.

The Court is preparing for the delivery of Odyssey to Ada County in the early summer of this year. Because of the lessons learned in Twin Falls County and the substantially greater scale and complexities involved with Ada County, deployment was extended by several months. Subsequent deployments throughout the rest of the State will greatly benefit from lessons learned in Twin Falls and Ada Counties.

### **Problem-solving courts**

Thanks to the support of the Legislature, Idaho's problem-solving courts are functioning well and have the capacity to expand. These courts are operated by magistrate and district judges, who dedicate af-

ter-hours service to assist defendants in addressing drug, alcohol, mental health, and domestic abuse issues. By treating the causes of these problems, research shows that we can reduce crime rates, and the attendant costs of recidivism on families and society.

I would like to share a typical problem-solving court intervention with you.

One graduate noted that she had entered Mental Health Court from jail several years ago. She said: "I was a very bitter and angry person and

These courts are operated by magistrate and district judges, who dedicate after-hours service to assist defendants in addressing drug, alcohol, mental health, and domestic abuse issues.

set out to make everyone around me the same way. I was my own worst enemy. I was a hard case. . . . I hated everyone on the ACT team. They were all out to get me, all they wanted was to see me fail." She related that she eventually came around to an understanding that the various members of the team were actually concerned about her well-being and working to help her be successful. She said: "The

most frightening thing was standing in front of the judge every week. . . . I never thought I would stand in front of a judge and know he actually cares about me and my well-being, know he is looking out for what is best for me as a person." She related how she completed the program, got back with her husband, kids and family, gained self-respect and got a good job that she enjoys. She said, "None of this would have been possible without each of the team member's dedication to my recovery."

An area of expanding coverage for problem-solving courts is providing help to veterans. There are now Veterans Treatment Courts in six of Idaho's seven judicial districts. With our all-volunteer military, many people do not realize the serious problems faced by some returning veterans. When I was attending a public meeting during my tenure as Attorney General, I was approached by a young man who looked like he had been through really tough times. He said he had seen me on television, saying something to the effect that I was proud to be a Vietnam veteran. He had served in Vietnam but it never occurred to him that it was anything to be proud of. He said that he never told people about having served in Vietnam because he was ashamed of it. He told me he finally understood that he should take pride in having served his country. It brought home the alienation and despair experienced by some of my fellow vets.

Returning veterans of each war have their own sets of experiences and problems. However, they generally involve drug or alcohol abuse, abuse of family members, suicidal thoughts or actions, and the like. Veterans Treatment Courts are addressing these issues and there has been

an increasing need for those courts. They don't condone criminal conduct by veterans, but give them the guidance and support they need to get their lives back on track.

Problem-solving courts have made an impact. From 1998 through the end of FY15, problem-solving courts have graduated sixty-six hundred individuals. During that same timeframe, 344 drug-free babies were born to female participants.

### Senior judge funding

There is one thing that the Court would like to have addressed in the current session regarding drug court funding. The drug court fund is a dedicated fund that was established in 2003 as an ongoing source of funding for the problem-solving courts. During the height of the financial crisis several years ago, the judiciary participated in funding reductions, which included shifting some other court services to this fund to reduce the burden on the State budget. One such expense was the shift of \$865,000 for senior judge costs to the drug court fund.

Now that State finances have stabilized, it is prudent to transfer the funding responsibility for senior judges back out of the drug court fund, and we are asking that you do so. That will stop the drain on the fund for functions not related to drug and mental health courts and assure a stable source of revenue to operate the senior judge program.

During FY15, senior judges worked a total of 3,040 days, which is the equivalent of approximately 14 additional judgeships. Utilization of senior judges allows the court system to call on experienced and talented judges to fill in in areas where they are needed. This gives the Court flexibility and it saves the taxpayers

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Within the next five years,  
more than half of our district judges  
will be eligible to retire.

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a great deal of money. Senior judges are compensated only for the days that they actually serve and they receive 85% of the daily salary of an active judge. Continuation of the program with a sound funding base is essential to the administration of justice through the court system.

### Judicial recruitment

In 2014, the Legislature increased judicial salaries, particularly for district judges. This was in response to a relatively small salary differential between magistrate judges and district judges and difficulty in recruiting candidates for district judge positions. Within the next five years, more than half of our district judges will be eligible to retire. That will require a significant number of new judicial appointments, so we will need to continue aggressive recruitment efforts.

When a vacancy occurs in a district judgeship, the Idaho Judicial Council considers applications from those seeking the position and submits a list of 2 to 4 names of qualified candidates to the Governor for appointment. From 2000 to 2013, the Judicial Council acted on 43 vacancies, sending a list of 4 names to the Governor for 13 of the vacancies, 3 names for 19 vacancies, and 2 names for 11 vacancies. Those numbers in-

dicated a rather lukewarm interest in district judgeships. Survey information disclosed that experienced lawyers were reluctant to apply for district judgeships because of the low salary and grueling workload. District judges are often required to work nights and weekends to keep up with their caseload and to perform additional functions such as operating problem-solving courts.

From July 1, 2014, the effective date of the salary increase, to January 7, 2016, the Judicial Council has acted on 6 district judgeships. That produced 4 names for 3 vacancies and 3 names for the other 3. As Chief Justice, I participated in the last 2 interview sessions and I can tell you that we had a number of good candidates for both. In fact, there were more qualified candidates than we could submit to the Governor for a vacancy in Canyon County. I can't say that this increased interest in district judge positions can be attributed entirely to the salary increase, but I do believe it played a large part.

In appreciation of the 2014 salary adjustment, the Court did not request a change in compensation last year. This year, we have included a 1% salary increase placeholder in our budget for calculation purposes, and are requesting an increase commensurate with the percentage level

of CEC other state employees receive, both for judges and court personnel.

### Public defense reform

In 2013 the Legislature began consideration of means to fulfill the State's responsibility to provide an adequate defense for indigent persons accused of crime. As Justice Burdick noted in his address to this Chamber last year, the Idaho Supreme Court ruled in 1923 that indigent defendants in Idaho are entitled to adequate counsel to defend them from criminal charges at public expense.

You have established a Public Defense Reform Interim Committee to consider means to fulfill this responsibility, as well as providing for a Public Defense Commission. Both the Interim Committee and the Commission have devoted efforts to arriving at an appropriate answer to this serious problem.

The design of the system and the means for funding it are within the discretion of the Legislature. I was pleased last week to hear Governor Otter propose that the State commit significant financial resources to providing an appropriate answer. The Court stands ready to assist in any reasonable manner. We do not want to appear to be advocating how public defenders should be selected and managed, since they are persons who necessarily appear before the courts on a frequent basis. Therefore, the Court's role must be advisory in nature.

And, I can provide some advice based on my experience as Attorney General in the 1980s. Then, as now, the Attorney General's office handled virtually all criminal appeals for the State. Unlike now, when virtually all appeals by indigent crimi-

nal defendants are handled by the State Appellate Public Defender, in the 1980s such appeals were handled by contracted county public defenders or in some areas by private attorneys appointed by the judiciary. I can tell you it was less than ideal. Some defendants received an adequate defense at trial, and on appeal, while others clearly did not. The Appellate Public Defender has remedied the problem at the appellate level, but the problems still exist in places at the trial court level. Consequently, a number of cases come before the ap-

Some defendants received an adequate defense at trial, and on appeal, while others clearly did not.



pellate courts where errors have occurred in the trial court, issues were missed, the defense was inadequate, and deficiencies must be remedied by sending cases back for further proceedings. This is an unnecessary drain on the criminal justice system. In order to ensure uniformity and a consistent level of competence at the trial court level, it appears to me that a regional or statewide approach is

prudent. The appellate defender system works well in that regard and it should be considered as a model at the trial court level. However, this is a matter within the purview of the Legislature and I wish you well in providing an appropriate response.

### Guardianship and conservator

The Idaho Courts continue to make strides in enhancing protections for some of Idaho's most vulnerable — those under court-ordered guardianship or conservatorship. These are cases in which the court grants an individual or entity the authority and obligation to make personal or financial decisions for a minor child or incapacitated adult. In FY15, more than 2,600 financial reports, reflecting over \$367 million in assets under the care of a conservator, were reviewed for signs of fraud or mismanagement. In addition, this past year the judiciary launched a pilot guardianship monitoring program to develop effective practices for court monitoring of guardianship cases. These efforts have already resulted in a 20% increase in the number of annual guardianship reports filed with the courts in participating districts, greatly improving the courts' ability to monitor and protect minor children and incapacitated adults.

### Statewide language access

The Idaho Constitution and other laws require that courts be open and accessible to every person. As part of this obligation, Idaho courts have to provide language access services for non-English speakers. Additionally, the state, and local governments, must communicate effectively with people who have communication disabilities.

In order to comply with the law, the Court is seeking funding for a state-wide language access manager to provide language access services to all Idaho courts. The Court is also asking for funding to supplement certified court interpreter services in the Third and Fourth Districts, as well as funding for video remote interpreting services to provide interpretation by laptop computer, thereby avoiding the cost of having to have interpreters appear in person in court proceedings.

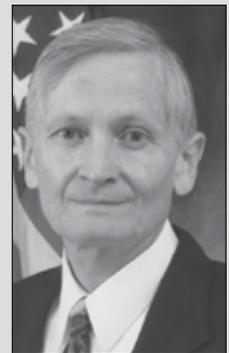
**Thanks for your support**

The court system in Idaho has provided remarkable service to Idaho citizens in the past and is looking forward to continually improving those services into the future. That has been made possible by the help we have received from the Leg-

islature and I would particularly like to thank Senator Patti Anne Lodge and Representative Rich Wills, and their committees, for their dedicated help. I also extend great thanks to interim Administrative Director of the Courts, senior Justice Linda Copple Trout, and her deputy director, senior Judge Barry Wood, for their tireless efforts. I should tell you that

the Court is in the process of commencing a nation-wide search for a replacement for Justice Trout, as we have no intention of confining her to involuntary servitude long into the future, although we appreciate the fine work she has been doing for the courts. Thanks to all of you for maintaining a good and mutually beneficial relationship with your court system.

*An Idaho native, Jim Jones grew up on his family's farm in Eden. He attended Northwestern University School of Law in Chicago, receiving his law degree in 1967. He served in Vietnam and came home to work under U.S. Senator Len B. Jordan. He practiced law in Jerome from 1973 to 1982, when he was elected as Idaho Attorney General. After his second term, he built a law practice in Boise, which he maintained until being elected to the Idaho Supreme Court in 2004. He was re-elected in 2010.*



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# What Disclosures? An Amendment to Rule 26 Changes When Treating Physicians Must File Written Expert Disclosures

Pat Fackrell

**T**reating physicians often serve as key witnesses in tort litigation. With treating physicians' expertise and specialized knowledge, Idaho courts have frequently permitted them to testify as expert witnesses, thereby assisting parties in proving complex and disputed legal issues. Idaho R. Civ. P. 26 formerly required treating physicians to file written expert disclosures before they could provide expert testimony, no matter the testimony's content.<sup>1</sup> However, a recent amendment to Rule 26 limits its applicability and permits treating physicians to provide expert testimony without filing written expert disclosures under some circumstances.

Rule 26 became effective in its amended form on July 1, 2014.<sup>2</sup> Until that time, Rule 26 treated all expert witnesses equally by requiring them to file written expert disclosures before testifying.<sup>3</sup> In contrast, Rule 26, as amended, now contemplates two types of expert witnesses and exempts some experts from filing written expert disclosures. Rule 26's first type of expert witness is one who has been retained or specially employed to provide expert testimony, or who is an employee of the party and whose duties involve regularly providing expert testimony. Examples of this type of expert witness include a doctor hired to perform an independent medical examination in preparation for litigation, an engineer retained to conduct a study in preparation for litigation, or an accident reconstructionist hired to reconstruct the accident giving rise to the injury in preparation for litigation. Rule 26's second type of expert

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As classic expert witnesses, retained experts must file written expert disclosures meeting Rule 26's detailed requirements.<sup>9</sup>

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witness is one who has knowledge of facts not acquired in preparation for litigation, and who has not been retained or specially employed to provide expert testimony.<sup>4</sup> Examples of the second type of expert witness include a treating physician, a police reconstructionist, an in-house engineer, or an in-house accountant.<sup>5</sup> Accordingly, Rule 26, as amended, distinguishes between retained and non-retained experts.<sup>6</sup>

When elaborating on Rule 26's July 2014 amendments, Idaho's advisory committee explained that a primary purpose underlying the distinction between retained and non-retained experts is to facilitate treating physicians' testimony. The advisory committee acknowledged that "[i]t is often very difficult to get a treating physician to cooperate in providing the information currently required under this rule."<sup>7</sup>

More specifically, "[m]any treating doctors simply do not want to be involved in the process and some try to impose barriers to dissuade participation by, for example, charging extraordinary amounts of money for meetings."<sup>8</sup>

To facilitate treating physicians' testimony, Rule 26, as amended, sets forth different disclosure require-

ments for retained and non-retained experts. Retained experts are treated as "classic expert" witnesses. As classic expert witnesses, retained experts must file written expert disclosures meeting Rule 26's detailed requirements.<sup>9</sup> In contrast, non-retained experts are witnesses who, though permitted to provide expert testimony, are not required to file written expert disclosures. Non-retained experts instead need only provide a statement of the subject matter and a summary of the facts and opinions of their testimony.<sup>10</sup> Although Idaho appellate courts have yet to construe Rule 26, as amended, other jurisdictions with similar rules have dubbed non-retained experts as "hybrid experts" in recognition that they are permitted to testify on specialized knowledge to facts personally observed but remain exempt from the written expert disclosure requirement.<sup>11</sup>

The distinction between retained and non-retained experts set forth in Rule 26, as amended, closely tracks the Federal Rules of Civil Procedure. Like Idaho's Rule 26, Fed. R. Civ. P. 26 distinguishes between retained and non-retained experts. Moreover, Federal Rule 26's written expert dis-

closure requirement applies only to “witnesses retained or specially employed to provide expert testimony in the case or one whose duties as the party’s employee regularly involve giving expert testimony.”<sup>12</sup> As the Federal Rules’ advisory committee made clear, “[t]he requirement of a written report . . . applies only to those experts who are retained or specially employed to provide such testimony in the case or whose duties as an employee of a party regularly involve the giving of such testimony.”<sup>13</sup> Thus, a “treating physician, for example, can be deposed or called to testify at trial without any requirement for a written report.”<sup>14</sup> Nearly analogous to Idaho’s Rule 26, as to non-retained experts, Federal Rule 26 requires them to provide a statement of the subject matter and a summary of the facts and opinions of their testimony.<sup>15</sup>

The foregoing similarities between Idaho Rule 26 and Federal Rule 26 were intentional. Idaho’s advisory committee explained that a purpose behind Idaho Rule 26’s July 2014 amendments was to ensure that Idaho courts construe Rule 26 “[s]imilar to the federal rule.”<sup>16</sup> That purpose is consistent with the Idaho Supreme Court’s intent. The Court has clarified that, “part of the reason for adopting the Federal Rules of Civil Procedure in Idaho, and interpreting our own rules adopted from the federal courts as uniformly as possible with the federal cases, was to establish a uniform practice and procedure in both the federal and state courts in the State of Idaho.”<sup>17</sup>

Given the foregoing similarities between Idaho Rule 26 and Federal Rule 26, it is likely that a treating physician need not file written expert disclosures under the Idaho Rules if testifying to facts observed and opinions formed in the course of treatment. By the same token, a

treating physician very likely must file written expert disclosures when testifying beyond the scope of facts observed and opinions formed in the course of treatment. To be sure, Idaho appellate courts have not yet construed Rule 26, as amended. But even so, under the very similar Federal Rule, there is little doubt that a “treating physician is only exempt from Rule 26(a)(2)(B)’s written report requirement to the extent that his opinions were formed in the course of treatment.”<sup>18</sup> Thus, where treating physicians seek to opine

Thus, a “treating physician, for example, can be deposed or called to testify at trial without any requirement for a written report.”<sup>14</sup>



on conclusions reached outside the scope of treatment, they must file written expert disclosures.<sup>19</sup>

While treating physicians are likely now exempt from filing written expert disclosures when testifying to facts observed and opinions formed in the course of treatment, the boundaries of this exemption remain unclear. Absent guidance from Idaho appellate courts, these boundaries may become disputed when treating physicians seek to testify to causation, a key issue for which expert testimony is often necessary. Most jurisdictions that recognize

the distinction between retained and non-retained experts hold that causation is part and parcel of a treating physician’s ordinary course of treatment and therefore permit treating physicians to opine on causation without filing written expert disclosures.<sup>20</sup> In contrast, other jurisdictions allow treating physicians to provide causation testimony without filing written expert disclosures on a case-by-case basis if it can be determined that the treating physician’s opinion on causation was “not acquired or developed in anticipation of litigation or for trial.”<sup>21</sup> Still other jurisdictions hold that causation is beyond the course of ordinary treatment and require treating physicians to file written expert disclosures before testifying to causation.<sup>22</sup> Which approach Idaho appellate courts will adopt remains to be seen. Caution instructs, however, that a party whose treating physician seeks to testify on causation should ensure the treating physician files written expert disclosures.

That Idaho appellate courts have yet to construe Rule 26’s distinction between retained and non-retained expert witnesses is understandable because Rule 26 has only existed in its amended form since July 2014. Nonetheless, because the purpose of discovery is to enable parties “to prepare for trial and to reduce the possibility of surprise in the trial,”<sup>23</sup> Rule 26’s distinction between retained and non-retained experts makes sense, at least insofar as the distinction concerns treating physicians. In contrast to a retained expert, a treating physician’s opinions are generally ascertainable by reviewing medical reports documented in the course of treatment.<sup>24</sup> Indeed, a treating physician’s “involvement usually stems from his profession, thereby making his expertise obvious. His opinions largely are ascertainable,

therefore, and useful to any party who seeks them.”<sup>25</sup>

In sum, Rule 26, as amended, facilitates treating physicians’ testimony by exempting them from filing written expert disclosures under some circumstances. Although Idaho appellate courts have not yet addressed the scope of this exemption, it is likely that treating physicians need not file written expert disclosures when testifying to facts observed and opinions formed in the course of treatment. Anything more, however, will likely require treating physicians to file written expert disclosures.

## Endnotes

1. Idaho R. Civ. P. 26(b)(4)(A) (2013).
2. Idaho R. Civ. P. 26(b)(4)(A) (2015).
3. Idaho R. Civ. P. 26(b)(4)(A) (2013).
4. Idaho R. Civ. P. 26(b)(4)(A) (2015); see also Idaho R. Civ. P. 26(b)(4)(A) advisory committee note (Jan. 28, 2014).
5. *Id.*
6. Idaho R. Civ. P. 26(b)(4)(A) advisory committee note (Jan. 28, 2014). The advisory committee recognized that non-retained experts may, like retained experts, require a fee for their testimony. But that fee alone does not convert non-retained experts “into experts retained in anticipation of litigation . . .” *Id.*
7. *Id.*
8. *Id.*
9. Written expert disclosures must contain: “[A] a complete statement of all opinions to be expressed and the basis and reasons therefore; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; any qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.” Idaho R. Civ. P. 26(b)(4)(a)(1)(i).
10. Specifically, non-retained experts

must provide: “[A] statement of the subject matter on which the witness is expected to present evidence under Idaho Rule of Evidence 702, 703 or 705, and a summary of the facts and opinions to which the witness is expected to testify.” Idaho R. Civ. P. 26(b)(4)(a)(1)(ii).

11. *E.g., Pralle v. Milwicz*, 324 P.3d 286, 292-93 (Alaska Sup. Ct. 2014); *Norris v. Fritz*, 270 P.3d 79, 82-88 (Mont. Sup. Ct. 2012).
12. Fed. R. Civ. P. 26(a)(2)(B).
13. Fed. R. Civ. P. 26(a)(2)(B) advisory committee note (1993).
14. *Id.*
15. Non-retained experts must provide a statement containing the following: “(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and (ii) a summary of the facts and opinions to which the witness is expected to testify.” Fed. R. Civ. P. 26(a)(2)(C).
16. Idaho R. Civ. P. 26(b)(4)(A) advisory committee note (Dec. 6, 2013).
17. *Hoopes v. Deere & Co.*, 117 Idaho 386, 389, 788 P.2d 201, 204 (Idaho Sup. Ct. 1990) (quoting *Chacon v. Sperry Corp.*, 111 Idaho 270, 275, 723 P.2d 814, 819 (Idaho Sup. Ct. 1986)).
18. See, e.g., *Goodman v. Staples the Office Superstore, LLC*, 644 F.3d 817, 826 (9th Cir. 2011).
19. *Id.*; see also *Meyers v. Nat’l R.R. Passenger Corp. (Amtrak)*, 619 F.3d 729, 735 (7th Cir. 2010) (“[A] treating physician who is offered to provide expert testimony as to the cause of the plaintiff’s injury, but who did not make that determination in the course of providing treatment . . . is required to submit an expert report in accordance with Rule 26(a)(2).”).

20. *E.g., McCloughan v. City of Springfield*, 208 F.R.D. 236, 242 (C.D. Ill. 2002) (explaining that treating physicians may testify to causation, diagnosis, and prognosis without providing written expert disclosures).

21. *E.g., Brown v. Best Foods*, 169 F.R.D. 385, 387 (N.D. Ala. 1996).
22. *E.g., Widhelm v. Wal-Mart Stores, Inc.*, 162 F.R.D. 591, 594 (D. Neb. 1995) (finding that the plaintiff attempted to circumvent Rule 26’s written expert disclosure requirement by seeking to have her treating physicians testify to causation).
23. See *Lester v. Salvino*, 141 Idaho 937, 940, 120 P.3d 755, 758 (Idaho Ct. App. 2005) (citing *Smith v. Big Lost River Irrigation Dist.*, 83 Idaho 374, 383, 364 P.2d 146, 151 (Idaho Sup. Ct. 1961)).
24. *Schreiber v. Estate of Kiser*, 989 P.2d 720, 725 (Cal. Sup. Ct. 1999) (“[T]reating physicians] can be identified early in the litigation through interrogatories, production of the plaintiff’s medical records, and completion of case questionnaires which by statute expressly ask for information regarding ‘treating physicians.’”).
25. *Norris v. Fritz*, 270 P.3d 79, 83 (Mont. Sup. Ct. 2012) (“The abundant information available through a party’s medical records negates claims of unfair surprise from a treating physician’s testimony.”); see also *Drew v. Lee*, 250 P.3d 48, 55 (Utah Sup. Ct. 1999) (“[A] party may depose a treating physician to discover the content of the physician’s testimony and may subpoena medical records to learn additional information about the physician’s treatment of the patient. These tools will eliminate unfair surprise at trial and will likely lead to more information than could be gleaned from an expert report.”).

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# Why You Should Never Say Never to Malpractice Insurance — The True Cost of ‘Going Bare’

Mark Bassingthwaighte

I will admit I honestly don’t understand why a lawyer would ever decide to not buy a malpractice policy; but many lawyers do just that and the reasons I hear are many. Some try to justify their decision by declaring that malpractice premiums are beyond affordable. They’ll tell me “just look at what Docs have to pay.” Others have decided that if they ever get sued they’ll just declare bankruptcy in order to avoid the loss. Then there are those who choose to self-insure thinking that the premium savings will more than offset any possible loss. I’ve even had attorneys tell me they’ve chosen to protect their assets in others ways. And then there’s this one. “Having a malpractice policy simply invites claims. No insurance means no one will ever sue me because there’s no deep pocket.” I just shake my head over the naivety of that belief.

As lawyers we are to protect the interests of our clients. In addition, lawyers and those in their employ can and will make a mistake from time to time. None of us are perfect. In fact, even good lawyers who do great work can still get sued. It happens. We’ve handled such claims. The question, however, is this. Should a significant misstep ever occur on one of your client matters, what might the fallout be? Think about the answer as a member of our learned and honorable profession. Clearly if and when a significant misstep occurs, the client will be harmed in some fashion. Now put yourself in the client’s shoes and ask yourself who should be held responsible particularly if a financial loss is part of the equa-

tion? You know darn well what the answer is. After all, if a lawyer representing you on a personal injury matter blew a statute that resulted in a lost opportunity for any kind of recovery you would expect to be made whole and you know it. You see, insuring for malpractice isn’t about protecting yourself. It’s about protecting your clients should something go wrong and that’s the way it’s supposed to be.

Now let’s talk about a few specifics. While numbers vary between the states and over time, approximately 4-5% of lawyers practicing in the U.S. will face an allegation of malpractice in any given year. Yes, it’s true that a significant number of these allegations will resolve without any loss being paid; but this doesn’t mean the claim has no impact. Time and money are going to be in play. Claims can easily take 6 to 24 months to resolve and defense costs on a claim with any merit at all can break that \$100,000 mark before you know it. But that’s not all. Lawyers who are sued often see their income drop for a period of time, particularly if they’re self-insured and forced into devoting precious time defending themselves or if the situation has made it into the local news. Making matters worse, if the claim becomes something of a topic among the local bar and part of the story is that the involved lawyer is bare, it’s pretty much a given that good referrals from other lawyers are going to drop off.

Next, let’s discuss the affordability issue. While I get that the term



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Even good lawyers who do great work can still get sued. It happens. We’ve handled such claims.

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“expensive” is relative to one’s financial reality, legal malpractice policies are nowhere near as expensive as some medical malpractice policies. In addition, the initial premium is going to be much less than what lawyers who have been in practice and insured for a number of years will be charged. This is simply due to the fact that coverage will start from the date a policy is first purchased because you can’t buy coverage for work you’ve done in the past. In other words, newly insured lawyers have limited exposure because they don’t have a substantial amount of covered legal work under their belts yet. The odds of a covered claim arising from a newly insured practitioner are going to be much lower than those for a lawyer who has been insured and in practice for ten years or more. Yes premiums will rise for a period of years as the newly insured lawyer does more

and more work, but all things being equal, it should stabilize about six years in.

Finally, let's take the "It's the right thing to do" argument off the table for a moment and just focus on the financial risks and realities in order to address those who buy into the de facto self-insure approach. If you count yourself as a member of this group, are you religiously setting aside whatever you would have spent on premiums to deal with an allegation of malpractice? All I can say is that I've never come across a situation where that was happening; and truth be told, unless that pool is well into the six digits it's not going to be enough to put on a good defense let alone cover a sizeable loss. Leverage those dollars and buy a policy. You will never be able to build a pool of funds in the small firm self-insure model that comes close to the amount of cover-

age (not to mention peace of mind) that those same dollars could buy. But of course, we can't take the "it's the right thing to do" argument off the table because we are professionals who still have the privilege of self-regulation and our rules require that we protect the interest of our clients. The most cost effective way to do so is through the purchase of an appropriate level of malpractice coverage.

Unless that pool is well into the six digits it's not going to be enough to put on a good defense let alone cover a sizeable loss.

*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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# A Quick Reference: Tricky Prepositions and Confusing Adjectives

Tenielle Fordyce-Ruff

I'll admit it: This month's column is a little bit for my students (and newer law grads). It seems that about this time each year my students start to notice that they struggle with certain prepositions and adjectives.

So as I begin to deal with these issues in my class, it occurred to me that it might be helpful to my readers to have the same type of quick guide. This month we'll cover the most common preposition and adjective mistakes, and some tips for remembering their correct usage.

## Tricky prepositions

As anyone who has had to learn English as a second language can tell you, preposition usage is idiomatic. There are no rules that govern preposition usage, yet a change in the preposition can change the meaning of a sentence.

Before we get too far into tricky prepositions, let's go back to the basics for a moment. Prepositions are "words or phrases that link an object and an antecedent to show the relationship between them"<sup>1</sup> While some words can function as both a preposition and another part of speech, prepositions always have an object.

*She skied down the hill.* (preposition)

*She sat down.* (adverb)

*He kept the rental skis behind the counter.* (preposition)

*As he looked behind, he crashed.* (adverb)

But back to tricky prepositions. Sometimes writers will pick a preposition based on how it sounds to her ear or because it sounds "right." Indeed, all language shifts, and prepositions aren't the exception. Here are some of the more common tricky prepositions.

The length of these prepositions can help you remember which to use — the more you know, the longer the preposition should be.

## Into/In to

If you're not sure whether to choose *into* or *in to*, here is a simple trick. If you can answer the question, "where?" then use *into*. *Into* shows motion toward a place.

*She walked into the ski shop.* (Where did she walk?)

If you could write *in order to*, then use *in to*.

*She called in to set up ski lessons.* (She called *in order to* set up ski lessons.)

## Think of/Think about

This tricky pair is more nuanced. One choice suggests a specific choice and the other suggests pondering over something for a while.

*He was thinking of a number between one and ten.* (specific choice)

*He was thinking about going to law school.* (pondering)

Here is my trick to remember which is which for this pair: *Of* is short, like making a quick decision. *About* is longer, like pondering options.

## Ask for/Ask to

The difference in this pair comes from whether the request is for an object or an action. If the request was for a noun (the object), then use *ask for*.

*She asked for new snowshoes for her birthday.* (snowshoes = object)

If the request is for an action, use *ask to*.

*She asked to hike on her birthday.* (hike = action)

To remember this difference, remember that actions are verbs, and all verbs have a "to" form.

## Heard of/Heard about

This is another nuanced pair of prepositions. *Heard of* suggests that you were aware of something; *heard about* suggests you know more details.

*I've heard of ski joring.* (I understand this sport exists.)

*I've heard about a ski joring competition in Wood River.* (I've learned more details.)

The length of these prepositions can help you remember which to use — the more you know, the longer the preposition should be.

## Confusing adjectives

No wonder writers get confused with certain adjectives. Many of the confusing pairs sound similar and function very similarly, although some have very different meanings. The correct usage can depend on understanding the noun in the sentence.

So a bit of basics on nouns: Nouns can be divided into two groups: mass nouns and count

nouns.<sup>2</sup> Mass nouns cannot be broken into individual units, while count nouns can. Count nouns also take a plural form, while mass nouns don't.

*I would like more hot chocolate to help warm up.* (mass noun)

*I need a cup of hot chocolate.* (count noun)

*The lodge served over two hundred cups of hot chocolate.* (count noun)

### Many/Much

These two adjectives sound similar, function in a similar manner, and mean similar things. But they cannot be used interchangeably. Use *much* with mass nouns and singular nouns. Use *many* with plural nouns. Here's an example.

*I didn't have much coffee this morning.*

*I don't have much time for hobbies.*

*But I have many interests.*

### Few/A Few

These two sound even more similar than the previous pair, but these are almost opposites. *A few* conveys a positive quantity, although it denotes a small number. *A few* can only be used with count nouns. *Few* represents a negative quantity or shortage.

*Jill has a few friends.*

*Jenny has few friends.*

### Little/A little

More almost opposites: *little* and *a little* represent negative and positive quantities. *Little* expresses a diminutive size or a negative quantity. *A little* emphasizes how small the amount is. Always use *a little* with mass nouns.

*Chad is little.*

*Marsha had little interest in writing.*

*There is a little wine left.*

*Would you like a little more?*

### Each/Every

Use *each* with individual or separate items — count nouns. Use *every* when referring all individual things in a group or with an amount when describing the frequency of actions.

*The tickets are \$20 each.*

*Each student received a handout.*

*The hotel assures every guest of personal attention.*

*Tenielle wishes to go to the mountains every weekend.*

### Farther/Further

*Farther* (root word far) is always used for distance, and *further* (think furthermore) implies a metaphorical advancement.

*How much farther is the trailhead?*

*Further topics will be covered next issue.*

In casual speech and writing there is little usage difference between these two. That is not yet the case in more formal writing.

### Last /Latter/Latest

While these sound very similar, they each have different meanings. *Last* is the opposite of first.

*Read the first and last chapters.*

*Latter is the antithesis of the former.*

*Of the two choices, she prefers the latter.*

*Latest* means the most recent.

*The latest innovations were astounding.*

### High/Tall

*High* is used to define an object's position from the ground, including bridges, planes, shelves, and horizontal objects.

*The Perrine Bridge is exceptionally high.*

*Tall* describes the size or height of vertical items, such as people and buildings.

*The author of this column is very tall.*

### Conclusion

I hope you enjoyed these tips. I'm off to contemplate topics for my next article.

### Sources

- *The Chicago Manual of Style*, 247-49 (16<sup>th</sup> ed. 2010).
- *Commonly Confused Adjectives with Examples*, available at [http://www.grammar.net/adjectives\\_pairs#sthash.pEwZpw7U.dpuf](http://www.grammar.net/adjectives_pairs#sthash.pEwZpw7U.dpuf).

### Endnotes

1. *The Chicago Manual of Style*, 247 (16<sup>th</sup> ed. 2010).
2. For more on the difference in these types of nouns, see my January 2012, *Confusing Word Pairs*, *The Advocate* (January 2012).

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on Civil Procedure, Field and Kaplin (1953); Idaho Trial Handbook by Lewis (1995); and, Handbook of Evidence for the Idaho Lawyer by Bell, Second Edition (1972)

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# MEMORIAL CEREMONY

Honoring deceased Idaho Judges and Attorneys

Thursday, March 31, 2016 - 10:00 a.m.

Idaho Supreme Court Building

## JUDGES

Hon. Jim Raymond Doolittle  
Hon. Craig Charles Kosonen

## RESIDENCE CITY

Caldwell  
Osburn

## DECEASED

February 2, 2015  
October 1, 2015

## ATTORNEYS

Susan M. Hepburn  
Brett Ira Johnson  
Theodore O. Creason  
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Reid Kay Larsen  
Chad Anthony Campos  
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Patricia Bridge Urquhart  
Barbara J. Richart  
William Edward Little  
Kenneth Lloyd Pursley  
John Arthur Church  
Christopher Arthur Clinton Smith  
Deanna Sue Solomon Flammia

## RESIDENCE CITY

Sandpoint  
Boise  
Lewiston  
Pocatello  
Firth  
Idaho Falls  
Boerne, TX  
Coeur d'Alene  
Lewiston  
Boise  
Seattle, WA  
Boise  
Portland, OR  
Las Vegas, NV  
Fruitland  
Portland, OR  
Payette  
Caldwell  
Boise  
Lewiston  
Salmon  
Coeur d'Alene

## DECEASED

February 2, 2015  
February 10, 2015  
April 8, 2015  
April 15, 2015  
April 21, 2015  
April 22, 2015  
May 1, 2015  
May 2, 2015  
May 15, 2015  
June 6, 2015  
June 22, 2015  
June 30, 2015  
July 5, 2015  
August 3, 2015  
September 5, 2015  
September 18, 2015  
September 23, 2015  
October 15, 2015  
October 21, 2015  
November 11, 2015  
December 4, 2015  
December 16, 2015

## IN MEMORIAM

### Christopher Arthur Clinton Smith

1956 - 2015

Christopher Arthur Clinton Smith of Salmon, Idaho, passed away unexpectedly on December 4, 2015, at his home in Ketchum, Idaho, at age 59. Memorial services were held in Ketchum in January, and another one is planned for Salmon in May.



Christopher Arthur  
Clinton Smith

### Gerald W. (Jerry) Olson

1925 - 2016

Gerald W. (Jerry) Olson, 90, passed away at his home on January 20, 2015.

Jerry was born to Hazel Wilson Olson and Alma Olson on September 17, 1925 in Pocatello. Since his father was employed by Union Pacific Railroad, the family moved to various locations in order to survive the depression.

After Pearl Harbor he enlisted in the Navy just before his 18th birthday. When he returned to Pocatello, he enrolled at the University of Idaho Southern Branch as part of the VA program. It was soon renamed "Idaho State College." He graduated in 1950 with a political science pre-law degree, married Glenna who and departed to Washburn University in Topeka, Kansas, where he received his J.D. in 1953. He was a member of Delta Theta Phi Law Fraternity and qualified for the Law Review Board his senior year.

He started private practice in 1953. He served as Pocatello city attorney from 1957 to 1979 and special counsel to the city from 1979 to 1990. In private practice, he special-

ized in corporate and estate planning. A highlight in his career was testing a two-thirds majority vote for property bond elections before the Idaho Supreme Court, which upheld the two-thirds majority rule.

Jerry was Idaho chairman for the National Institute of Municipal Law Officers and organized and chartered the first Pocatello Estate Planning Council. He was a member and past president of the Sixth District Bar Association. He served as Idaho chairman of the Local Government Section of the American Bar Association and was the Idaho State Bar delegate to the House of Delegates of the American Bar Association from 1980 to 1985. He also served as the state delegate to the American Bar Association from 1986 to 1992.

He served as a commissioner of the Idaho State Bar from 1973 to 1975. He was a past member of the Academy of Hospital Attorneys, co-founder and a life fellow of the Idaho Law Foundation, a life fellow and past state chairman of the American Bar Foundation and a retired fellow of the American College of Trust and Estate Counsel.

In 1996, Jerry was honored by the Idaho Bar Association as Idaho's Distinguished Lawyer of the Year.

Jerry served as a director or president of the Pocatello Chamber of Commerce, Pocatello Golf and Country Club, assisted with its reorganization as the Juniper Hills Country Club, Kiwanis, Idaho State Civic Symphony, Idaho State University Museum Foundation, Idaho State University Alumni Association, was co-founder and past president of the Pocatello Medical Center Foundation – and most importantly, served on the Idaho State University Foundation for 24 years.

He received ISU's William J. Bartz Award and the President's

Medallion for long-time service and support. He was a member of the governor's select committee on taxation and served 10 years as co-chairman of the YMCA youth-legislature. In 1986, the Pocatello Legal Secretaries made him "Boss of the Year."

Jerry worked diligently on ISU's Centennial Celebration by raising funds for the Stephens Performing Arts Center. As a proud veteran, Jerry wanted military honors. When the grass turns green, the family is planning a spring military service. Arrangements are under the direction of the Cornelison Funeral Home, Pocatello.

He died just four months after his wife of 65 years, Glenna, had passed away. Together, they had three children, Diane Olson Lee (Jim), Janine Olson Lopez (Bob) and Gerald David Olson; four grandchildren; and eight great-grandchildren. His sister, Nancy Van Kampen, resides in Logan, Utah.



Gerald W. (Jerry)  
Olson

### D.C. Carr

1953 - 2016

On January 23rd, D.C. Carr ended his life. He was half a world away in Cambodia, and a few weeks shy of his 63rd birthday. D.C. Carr was born on February 7, 1953, in Lebanon, Indiana. By the time he was a young adult, he and his two surviving sisters had buried their father, mother and a sister. Those traumas would not stop him from living large, but they left an indelible mark on his soul.

Excelling at basketball, D.C. attended Indiana State University on a basketball scholarship. After col-

## IN MEMORIAM

lege, he taught English in Indiana and then turned his love of teaching towards wilderness expeditions for the National Outdoor Leadership School (NOLS).

He taught leadership, mountaineering and technical climbing skills for eight years at the NOLS program, working in remote locations around the globe. He left NOLS in his 30's to pursue a career in law. D.C. graduated from the University of Wyoming College of Law in 1991.

For the next 25 years he worked in the Ada County Public Defender's office and then in private practice. He served on the Idaho State Bar's Advocate Editorial Advisory Board, was also a faculty member of the Citizens' Law Academy and a member of the Idaho Criminal Defense Bar.

Due to all of his capital criminal work, D.C. was one of the first lawyers in Idaho to become death-penalty qualified. He believed it was paramount to present a vigorous defense in order to protect a defen-

dant's right to a fair and impartial trial. "Protecting the rights of the most vulnerable," he would say, "enables the rule of law to protect us all."

D.C. was also not afraid of new pursuits. In middle age, he picked up a nine iron and taught himself how to golf. There were fleeting moments when he fancied becoming a pro. He was also a marathon runner, bicycle racer, and master swimmer. He competed in numerous triathlons and was a top finisher in his age group at Ironman Canada (Penticton) and Ironman Coeur d'Alene. Three years ago, in 2012, he decided to close the law books and resume his travels. Some of his favorite places in the world included Thailand, Indonesia, Nepal, and Cambodia where he traveled with his companion, Jamie, and later by himself. He



D.C. Carr

loved meditation retreats and yoga, and singled out monasteries for lodging during his travels.

A great orator in and out of a courthouse, D.C. could quote Martin Luther King, JFK and Jimi Hendrix in equal measure. And while he was never one to accept any particular religion in total, he once said that Jesus was one of his heroes. Why? His answer was simple: "Because he didn't care what people thought and he lived to spread love."

The impact of his love is reflected in his 14-year-old daughter. "There are simply too many reasons why I love you," she said in her recent letter to him. On January 27, 2016, D.C. Carr was given last rites in Cambodia by Buddhist Monks Nary and Deung. In lieu of flowers, contributions can be made to the Idaho Suicide Prevention Hotline in his name: <https://www.idahosuicideprevention.org/donate/>

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**Parsons Behle & Latimer names new managing shareholder for Boise office**

BOISE – Raymond J. Etcheverry, chairman and CEO of Parsons Behle & Latimer, announced that Brook B. Bond has been named managing shareholder of the firm’s Boise office. Bond assumes the leadership role from John N. Zarian, who has served in this position since 2011.



Brook B. Bond

“John was a moving force in the rapid growth and success of the firm in Idaho over the last four years,” said Etcheverry. “We are grateful for his leadership, and I think it goes without question that he will continue to play an integral role in the future success of the firm.”

“I truly have enjoyed serving as managing shareholder, but this is a good time to rotate the position to new leadership,” said Zarian. “Brook was one of the original shareholders in the Boise office and I know him to be a solid leader. I know the entire organization looks forward to working with him to continue building on the successes of the Boise office and the firm.”

Bond’s practice focuses on complex business, insurance, environmental and commercial litigation. He represents corporations and individuals in a variety of industries including technology, energy, construction, agriculture, mining, transportation, insurance and multi-level marketing. He graduated from the University of San Diego with a J.D. degree in 1989, and from the Univer-

sity of California – Davis with a B.S. degree in genetics in 1986. Bond is admitted in Idaho and California.

**Hawley Troxell Board of Partners re-elects Paula L. Kluksdal for another term**

BOISE - Hawley Troxell is pleased to announce that partner Paula L. Kluksdal, and the firm’s first woman to serve on the Board of Partners has been re-elected to a 4-year term. Additionally, the board also includes Steven W. Berenter, Brad P. Miller, Thomas J. Mortell and Nicholas G. Miller who serves as managing partner.

Paula is also co-chair of the firm’s banking practice group. Her practice entails real estate and finance, and she represents a wide variety of lenders and borrowers in the documentation and due diligence necessary for securitized lending, compliance with Idaho’s commercial lending regulations, loan documentation, and collection. She has extensive experience in the negotiation and drafting of legal opinions on commercial lending laws. She actively represents various municipalities and 501(c)(3) borrowers in the negotiation, documentation, and compliance in connection with public finance transactions.

Paula has been recognized as: Idaho Business Review’s Leaders in Law, Partner, 2015; Idaho Women Lawyers, Setting the Bar award recipient, 2014; Idaho State Bar, Outstanding Service award recipient, 2011; Women’s and Children’s Alliance, Tribute to Women & Industry (TWIN) Committee Chair, 2011; Idaho Business Review, Women of the Year award recipient, 2008; Women & Children’s Alliance, Tribute to Wom-

en & Industry (TWIN) award recipient, 2007; Idaho Partners Against Domestic Violence, Grapes Against Wrath Executive Committee Chair, 2005-2014; Idaho Business Review, Accomplished Under 40 award recipient, 2002; Faculty Award of Legal Achievement, 1997; IOLTA Scholarship, 1997; and Alumni Award for Excellence, University of Idaho, 1996.



Paula L. Kluksdal

**New face at Cantrill Skinner Lewis Casey & Sorensen**

BOISE - Cantrill Skinner Lewis Casey & Sorensen, LLP announces the addition of Associate Tyler H. Neill to the firm. Mr. Neill’s practice includes civil litigation, insurance and construction defect defense, bankruptcy, business law, criminal law, estate planning and social security appeals.

Tyler received his law degree from the University of Idaho College of Law in 2007. He received an M.S. in Education/Sport Psychology from University of Idaho in 2008. Mr. McNeil was previously a partner with Merrill & Merrill, Chartered, in Pocatello and served as the University of Idaho Athletic Department’s Associate Compliance Director from 2007 – 2011.



Tyler H. Neill

David W. (Tony) Cantrill is now Of Counsel with the firm Cantrill

## OF INTEREST

Skinner Lewis Casey & Sorensen, LLP. Mr. Cantrill was a founding member of the firm in 1980. He was recently appointed Executive Director of the Idaho Judicial Council. Mr. Cantrill received his law degree from the University of Idaho College of Law in 1970. He is a current member of the Defense Research Institute and is a Fellow of the American College of Trial Lawyers.



David W. (Tony) Cantrill

### Concordia Law announces its 'Leaders in Action' awards

BOISE – Two significant leaders in Idaho, Ted Epperly, M.D. and the Hon. Edward Lodge will be honored at the nonprofit Concordia University School of Law's Fourth Annual Leaders in Action Awards on Friday, March 11.

The awards acknowledge two statewide leaders – one in law and one in education – who have made significant contributions to improving the State and the lives of Idahoans.

This year's 2016 Leaders in Action are: Ted Epperly, M.D., Professor of Family Medicine, University of Washington School of Medicine and CEO, Family Medicine Residency of Idaho, for his leadership in education; and the Hon. Edward Lodge, Senior Judge, U.S. District Court for Idaho, for his leadership in law.

Dr. Ted Epperly is the President and CEO of the Family Medicine Residency of Idaho, a large federally

qualified Teaching Health Center comprised of seven clinics, three family medicine residency programs, and four fellowships.

Dr. Epperly served as the past President and Board Chair of the American Academy of Family Physicians (AAFP). He is a current member of the ACGME Board of Directors that has responsibility of all residency and fellowship training for over 120,000 residents and fellows of all specialties in the United States.

He currently serves as the Governor-appointed Chairman of the Board for the Idaho Healthcare Coalition that is in charge of helping transform healthcare for the state of Idaho. Dr. Epperly is a member of multiple other boards of directors and the president of several non-profit organizations. He has published over 50 articles and book chapters and he is a staunch supporter of family medicine education, research, and both rural and underserved health care. His book *Fractured: America's Broken Health Care System and What Must Be Done To Heal It* provides insight to the U.S healthcare system.

Judge Edward J. Lodge began his public service as a judge when he was selected to serve as a Probate Judge in 1963. Two years later, he was appointed by the governor as the youngest state district court judge in Idaho. He served as District and Administrative Judge for the Third Judicial District of Idaho for nearly



Dr. Ted Epperly

23 years. In January of 1988, he was chosen to be a United States Bankruptcy Judge for the District of Idaho.

In 1989, he was nominated by President George H. W. Bush to serve as a United States District Judge for the District of Idaho. Judge Lodge's nomination was confirmed and he began his tenure as a United States District Judge on December 1, 1989. Judge Lodge served as the Chief Judge for the District of Idaho from 1992 -1999. He was selected to serve on the Ninth Circuit Judicial Council and was elected as Chair of the Conference of Chief District Judges.

### Karin D. Jones elected partner at Stoel Rives LLP

SEATTLE — The law firm of Stoel Rives LLP is pleased to announce that Karin D. Jones was elected to the firm's partnership, effective January 1. Jones is a graduate of the University of Idaho College of Law (J.D., 2003). She is admitted to practice by the state bars of Washington and Idaho.

Jones focuses her practice on employment law in the firm's Seattle office, providing advice to employers and representing them in litigation before administrative agencies and the state and federal courts. Her practice also extends to health care and natural resources litigation, among other types of general civil litigation.



Hon. Edward J. Lodge



Karin D. Jones

**UI official makes diversity list**

BOISE - Michael Satz, associate vice president and executive officer of University of Idaho Boise, was named a Leader in Diversity in the fall 2015 issue of National Jurist. The magazine selected 20 leaders nationwide based on their efforts to further diversity in legal education.



Michael Satz

Satz was the UI College of Law's first black associate dean and interim dean. He is chairman of the U of I College of Law's Diversity and Human Rights Committee and co-founded the Diversity Mentor's group, in which students and faculty of diverse backgrounds meet to discuss issues.

**Breck Seiniger appointed to U.S. local rules committee**

BOISE - Wm. Breck Seiniger, Jr. has been appointed to the United States District Court Advisory Committee on Local Rules by order of United States District Judge B. Lynn Winmill. Mr. Seiniger is a 1978 graduate of the University of Idaho College of Law. Mr. Seiniger recently completed two terms on the Idaho Supreme Court Civil Rules Committee, and maintains a general litigation practice. Mr. Seiniger was also recently appointed as General Counsel for the West Ada School District.



Wm. Breck Seiniger Jr.

**Attorneys Mike Baldner and Jon Bauer named partners**

BOISE - Hawley Troxell is pleased to announce attorneys Mike Baldner and Jon Bauer have been elected to the firm's partnership. Baldner and Bauer are both transactional attorneys.

Baldner is a real estate and business lawyer focusing on complex high value real estate and business transactions, and related litigation.

Bauer is a business attorney focusing on general business counseling, corporate formalities, real estate, estate planning, business formations, commercial transactions, and financing of capital assets, equipment, operating loans, lease financing and other forms of financing. Prior to joining Hawley Troxell in July, 2014, Baldner and Bauer were partners at Meuleman Mollerup, LLP law firm.



Mike Baldner

Baldner started his law career as an associate with Meuleman Mollerup, LLP. Subsequently he worked for Albertsons, Inc. holding positions such as Director of Real Estate and Director of Project Development before he returned to Meuleman Mollerup in 2004. Baldner received his J.D. from the University of Idaho College of Law.

Bauer practiced law at an international law firm located in Boston, Massachusetts before moving to Boise. He is licensed in Idaho and Massachusetts. Bauer is very active in the legal and local business community. He is a member of the Board of Trustees of the Idaho Technology

Counsel and recently finished a four-year term on the Board of Directors and the Executive Committee of the Idaho Botanical Garden. In 2007 Jon graduated from the Boise Metro Chamber of Commerce's two-year "Leadership Boise" program. Bauer received his J.D. from Benjamin N. Cardozo School of Law in New York, New York.



Jon Bauer

**Amber Myrick joins Parsons Behle & Latimer's Boise office**

BOISE - Parsons Behle & Latimer is pleased to announce Amber R. Myrick has joined the firm's Boise office as Of Counsel. A member of the firm's corporate transactions and securities department, Myrick concentrates her practice on estate planning, tax planning, wills and trusts, and business succession planning.

Myrick is admitted to practice law in Idaho, Washington and Oregon. She received her J.D. in 1994 from Gonzaga University, and a Bachelor's of Business Administration degree in accounting from the same institution in 1991. Additionally, Myrick earned a Master's of Law (LL.M) degree in taxation from the University of Florida College of Law in 1995. Prior to joining the Parsons Behle & Latimer, Myrick was a partner at the tax and estate planning firm of Thornton Byron LLP in Boise, Idaho.



Amber R. Myrick

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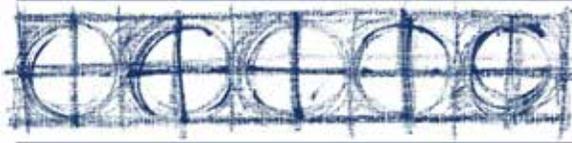


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## Veterans Legal Clinics: Protecting the Rights of Idaho's Service members

Dana M. Herberholz

**O**n March 4, 1865, President Lincoln delivered his second inaugural address to a weary nation ravaged by war. In his closing remarks, and in a plea for recovery and unity, President Lincoln called upon the nation “[t]o care for him who shall have borne the battle and for his widow, and his orphan.” Although the president would be assassinated within weeks, his words would live on to become the official motto of the Department of Veterans Affairs.<sup>1</sup>

More than 150 years have passed since President Lincoln’s immortal words, but the needs facing our veterans are as pressing as ever. These include well-publicized needs such as physical care, treatment for post-traumatic stress disorder, homelessness, and substance abuse. But often overlooked are the wide variety of legal needs that our veterans, servicemembers, and military families face due to their unique circumstances.

As part of its commitment to our veterans, Parsons Behle & Latimer has partnered with the Idaho Volunteer Lawyers Program (IVLP) and the Idaho Military Legal Alliance (IMLA) in providing free legal advice and counseling to our veterans, servicemembers, and military families at monthly pro bono clinics in Boise.

Several Parsons Behle attorneys have volunteered at these clinics assisting participants with a wide

Fortunately, there are several opportunities for Idaho attorneys and law students to get involved, including volunteering at a pro bono clinic.

range of legal issues, including modifying parenting plans, bankruptcy counseling, real estate advice, reinstatement of driving privileges, and assistance with disability claims, among others.

Pro bono clinics are also offered in Caldwell, Pocatello, and Lewiston, and in the past six months, these clinics have served more than 60 veterans and servicemembers. IMLA, in conjunction with committed community partners, is hoping to establish clinics in Twin Falls, Mountain Home, and the Seventh Judicial District in 2016.

Although the clinics are designed primarily for legal advice, many of those who take advantage of the clinics need advice of a non-legal nature. For example, at a recent clinic an elderly Veteran and his wife met with a Parsons Behle attorney to discuss the reinstatement of the Veteran’s driving privileges after those privileges were rescinded following a number of automobile accidents. As the attorney continued

to visit with the couple, it became clear that they did not come to the clinic in need of legal assistance. Instead, the Veteran’s wife sought confirmation from a source she knew her husband would accept as authoritative and trustworthy that he should no longer drive. As the attorney gently explained the situation to the elderly Veteran, his demeanor softened noticeably, and he volunteered that he would no longer drive. His wife expressed sincere relief.

With Idaho’s aging population of more than 130,000 VA-registered veterans, 10,000 currently-serving active duty and national guard members, and with more of our men and women deploying and returning home, our veterans and servicemembers are in increasing need of legal assistance and counseling. Fortunately, there are several opportunities for Idaho attorneys and law students to get involved, including volunteering at a pro bono clinic. No special training is required and



attorneys of all backgrounds and specialties are welcome and encouraged to participate.

On February 5, 2016, Parsons Behle participated in and hosted a luncheon for the 2016 Idaho Military Legal Alliance Strategic Planning Conference at the Idaho Law and Justice Learning Center in Boise. The purpose of the day-long session was to identify ways to improve the quality and reach of legal services available to the men and women who are serving or who have served our country.

Idaho lawyers and law students who are interested in volunteering at a pro bono clinic or oth-

erwise helping our veterans and servicemembers with their legal needs are encouraged to contact Anna Almerico, Program Director, Idaho Volunteer Lawyers Program at [aalmerico@isb.idaho.gov](mailto:aalmerico@isb.idaho.gov) or

Captain Stephen Stokes, Attorney Advisor to The Adjutant General at [Stephen.a.stokes.mil@mail.mil](mailto:Stephen.a.stokes.mil@mail.mil).

**Endnotes**

1. <http://www.va.gov/opa/publications/celebrate/vamotto.pdf>



Dana Herberholz is a shareholder in the Boise office of Parsons Behle & Latimer. He focuses his practice on intellectual property litigation with a particular emphasis on patent litigation.



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## The Mock Trial Future is Now!

Celeste Miller

**N**ational High School Mock Trial is upon us. First, the Idaho competition gets underway in late February, culminating with the state semifinal and final in Boise, March 16 to 18. Then, in May Idaho's championship team will head to the 2016 National High School Mock Trial Championship... in Boise! The Idaho Law Foundation is hosting this premier civic education event on May 12-14. Hundreds of champion high school mock trial advocates will be here with family, teachers and lawyer coaches to vie for the National title.

About three years ago, I joined a dedicated group of staff and volunteers who were determined to bring the National High School Mock Trial Championship to Boise. Our overall goal was to share the national mock trial competition with Idaho and share Idaho with the national mock trial community.

Now we are 100 days away from the 2016 National High School Mock Trial Championship, and I am impressed with all that our Host Committee has accomplished. We have hotel and courtroom space. We have created a beautiful website as the online hub for all event activities (check it out at [www.2016nationalmocktrial.org](http://www.2016nationalmocktrial.org)). We have planned great social events for teams, their families, and volunteers. And of course, we have been working diligently to raise the funds necessary to make all of this happen.



Broad-based community support we have received showcases Idaho's generous hospitality and enthusiasm for this event. We are grateful for the donations of time and treasure that have come from divisions of federal, state and county government, corporate foundations, local non-profits, law schools, lawyer groups, law firms, and individuals. Thanks to our donors, we only have \$10,000 left to raise towards our fundraising goal. If you have not yet chipped in, please consider making a small contribution towards our event! We are looking for 200 attorneys to make a donation of \$50 each so we can reach our "peak." You can make an online donation on our website by clicking the "Donate" button at the top of the home page.

Our other big-ticket indicator of community support has been volunteerism.

To make it all happen we need to fill over 500 volunteer slots. We are about half way there, but we can still assign lawyers to judge competition rounds and other community members to staff the whole event, further demonstrating Idaho hospitality. You can sign up to volunteer on our website by clicking the

Hundreds of champion high school mock trial advocates will be here with family, teachers and lawyer coaches to vie for the National title.

"Volunteer" button at the top of the home page.

If you are interested in volunteering but are new to mock trial, you can warm up by helping out at one of Idaho's competition rounds in February or March. Please contact Carey Shoufler at (208) 334-4500 or [cshoufler@isb.idaho.gov](mailto:cshoufler@isb.idaho.gov) for more information about the Idaho competition rounds.



Please consider joining us to be a part of this epic event as a judge volunteer, a site volunteer and/or a donor. If you have ever tried a case, testified or served as a juror you will NOT want to miss seeing these champion students put the best among us lawyers to shame with the budding talent, work ethic and heart they bring to this competition. You will get a peek into the future by observing the pool of national leaders taking shape during and through their participation in National High School Mock Trial.

Below are Ms. Miller's answers to questions about National H.S. Mock Trial:

**What does NMT look like?**

A sea of high school students looking like junior lawyers and witnesses from all regions and backgrounds converging on the courthouse with family, teachers and lawyer coaches ready to try cases and move through the rounds.

**Is the courthouse chaotic?**

No – there is a distinct buzz and lots of activity, but competition rounds have staggered start times, and Ada County officials have planned for the event down to many fine details.

**But what does it really look like on site?**

Inside teams of six will try cases (2 or 3 lawyers and three witnesses per side) under modified Federal Rules of Evidence. Each round takes about 2 hours, with one judge presiding and a panel of three scoring jurors (lawyers) deciding issues and outcomes.

Lawyers and judges from all over Idaho and the country will preside over or score the trials.

**What is the case about?**

It will be a secret until April 1 when it will be uploaded to: [www.2016nationalmocktrial.org](http://www.2016nationalmocktrial.org). We can tell you that the fictional case is based on familiar Idaho historical and cultural experiences.

**How do teams advance in the competition?**

The teams are power-matched after each of four rounds based on their scores. Two teams emerge for a fifth and final round early Saturday evening. Last year's champion (and this year's team to beat) was from an all-female high school in Omaha Nebraska.

**Will they have any fun while visiting Boise?**

They will! There are social events planned for the evenings, one on the Basque block, Friday the 13th in City Center Park, and a final Gala on Saturday at the Center on the Grove with Awards, deserts and dancing.

**Who judges the trials?**

Judging and scoring gives volunteers front row seats to the action

and an eye on the future as these skilled and hardworking students have already begun shaping the state of justice, civics and democracy for their generation. Lawyers and judges from all over Idaho and the country will preside over or score the trials. For most this will be a first-time experience with National Mock Trial, but many are veterans of the event who support it and participate often.

As one judge who recently volunteered said, "Mock trial students are so well-prepared they have even schooled me on evidence rules!"

**How is this event funded?**

Good question!

Most who travel here (students, family, teachers, coaches and volunteers) will pay all of their own travel expenses. Many will arrive a few days early or stay after the event to see more of Idaho. The Idaho Law Foundation funding campaign to raise about \$120,000 is primarily to feed the students, judges and site volunteers during the competition. Donated funds also provide case materials, awards, and local enter-



tainment such as Boise Rock School and Basque dancers.

**Have all the necessary funds been raised?**

Almost!

The legal and broader communities are excited for us to host this premier civic education event in the City of Trees, and they have been extremely generous in supporting it. We still need about \$10,000 to reach the goal and ensure success!

**Are all the volunteer jobs taken?**

Almost!

Judging and event volunteer slots are filling up, but we can still use your time and talents.

**How can I donate or sign up to volunteer?**

Go to:

[www.2016nationalmocktrial.org](http://www.2016nationalmocktrial.org) where you will find tabs and user friendly navigation to join the team bringing National High School Mock Trial to Boise this May!

**What motivated you to work on bringing this event to Boise?**

Throughout the first National Mock Trial I attended in 1998, I was struck by the talent, guts and hard-work that so many teenagers demonstrated by competing at the highest level in this event. As it concluded at the Saturday night Gala, and all the participants were gathered in one place – kids again – laughing, dancing, talking slang – my coaching colleague, George Breitsameter (also a Host Committee Member), and I said to each other at once, “We have to bring this to Boise.” And so we are.



Photo by Dan Black

High school students share a few comments before competing in the Idaho Mock Trial competition. For most schools Mock Trial is an extra-curricular activity that helps them learn about the law, the courts, the role of law and lawyers and of course their ability to do critical thinking under pressure.

**Celeste Miller** is a 1980 graduate of the University of Idaho School of law. After serving as a law clerk to a trial judge in Kansas City, Mo., Ms. Miller embarked on a litigation practice in Boise. She was as Associate at Givens Pursley for six years before joining the U.S. Attorney’s office in 1987. As an Assistant U.S. Attorney Ms. Miller litigated matters on behalf of the United States for 25 years in both the civil and criminal divisions of the office.

Beginning while in private practice and throughout her career with the Department of Justice, Ms. Miller has been involved in numerous aspects of Idaho’s Mock Trial program. She has often judged competition rounds (including at two National competitions), served on and chaired the Idaho Law Foundation’s Law Related Education Committee, and she coached three state championship mock trial teams from Bishop Kelly High School, taking those teams to National High School Mock Trial Championships around the country.

Ms. Miller now practices at the firm of McDevitt & Miller LLP in Boise, and she is a member of the Host Committee that is facilitating the National High School Mock Trial Championship to be held in Boise in May 2016.



TAKE SOME  
STUDENTS  
TO COURT.



Interested in judging or coaching mock trial? The Idaho Law Foundation invites you to participate in the 2016 Idaho High School Mock Trial Competition. For more information visit our website or contact Carey Shoufler at (208) 334-4500 or [cshoufler@ish.idaho.gov](mailto:cshoufler@ish.idaho.gov).



NOT  
BECAUSE YOU  
HAVE TO.  
BECAUSE YOU  
WANT TO.

IDAHO HIGH SCHOOL MOCK TRIAL



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





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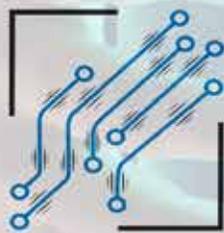
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*We will not rest* 

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