

# The Advocate

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of the Idaho State Bar  
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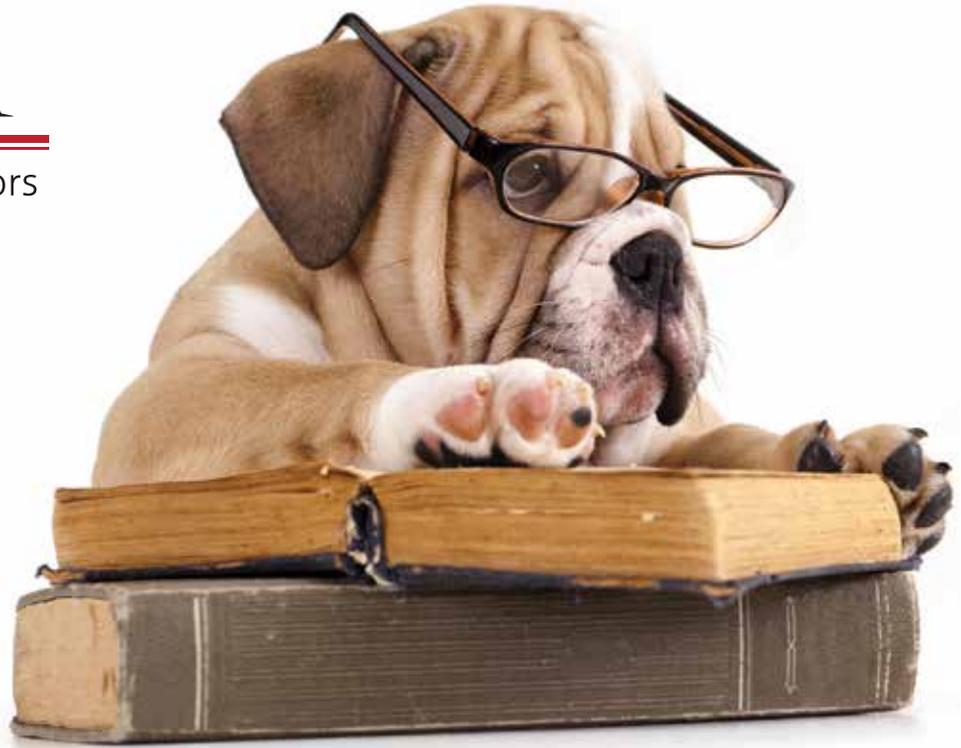
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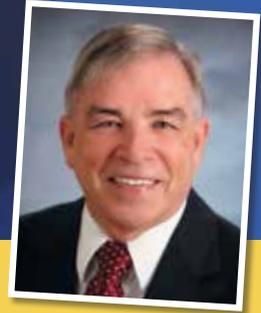
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# The Advocate

The Official Publication of the Idaho State Bar  
59 (5), May 2016

## Section Articles

- 24** Welcome From the Intellectual Property Law Section  
*Allison C. Parker*
- 25** A Move Towards Globalization Provides a New Tool to Defend Against Infringement: The Rise of the IPR  
*Kammie Cuneo*
- 28** The Drive For Autonomous Vehicles: Idaho's Race to Catch Up  
*Marcus E. Johnson*
- 32** Art Ownership Requires an Understanding of Moral Rights  
*Jennifer Pitino*
- 38** Don't Let the TTAB Decide Your Next Infringement Dispute  
*Steve Wieland*
- 41** The USPTO's Rocky Mountain Regional Office: Supporting Innovation Throughout the Rockies  
*Allison C. Parker*
- 48** Listing the Canons of Construction  
*Stephen Adams*
- 53** De Facto Demise of the Locality Rule  
*E. Lee Schlender*
- 58** Beyond the Basics: Typographic Symbols in Writing  
*Tenielle Fordyce-Ruff*
- 70** Idaho Military Legal Alliance Hosts Free Veterans Wills Clinics  
*Capt. Stephen A. Stokes*
- 72** The Ambrose Team Triumphs in a Warm-up for Nationals  
*Dan Black*

## Photographers!

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

## Columns

- 14 President's Message, *Trudy Hanson Fouser*  
22 Executive Director's Report, *Diane K. Minnich*  
46 ABA Delegate Report, *Deborah A. Ferguson*

## News and Notices

- 13 Continuing Legal Education (CLE) Information  
17 Licensing Cancellations  
17 Discipline  
19 Letter to the Editor  
20 News Briefs  
23 ISB/ILF Committees Volunteer Opportunities  
44 Idaho Court of Appeals and Idaho Supreme Court  
45 Cases Pending  
60 Classifieds  
62 In Memoriam  
64 Of Interest  
74 Idaho State Bar 2016 Annual Meeting



## On the Cover:

Power County Magistrate Court Judge Paul Laggis took this photo in late June, 2014, on Mount Borah, Idaho's tallest peak. He gave the following account:

"I thought it would be a good idea for the local judges to climb Mt. Borah, so, Judges Dunn, Axline, Thomsen, and I made the attempt. Things went pretty well until the infamous "snow bridge" that was impassable so Axline and I stopped there at about 11,800 feet. The flower was spotted much lower along the trail. The striking color and beauty of this flower drenched in morning dew caught my eye in what is, otherwise, an incredibly arid and gnarly landscape. It always amazes me that plants like this can survive in hostile environments such as this."

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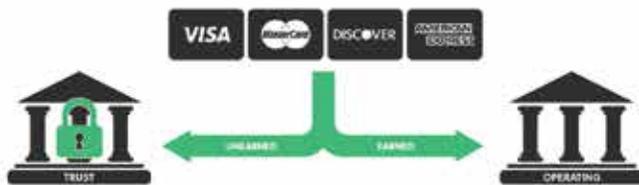


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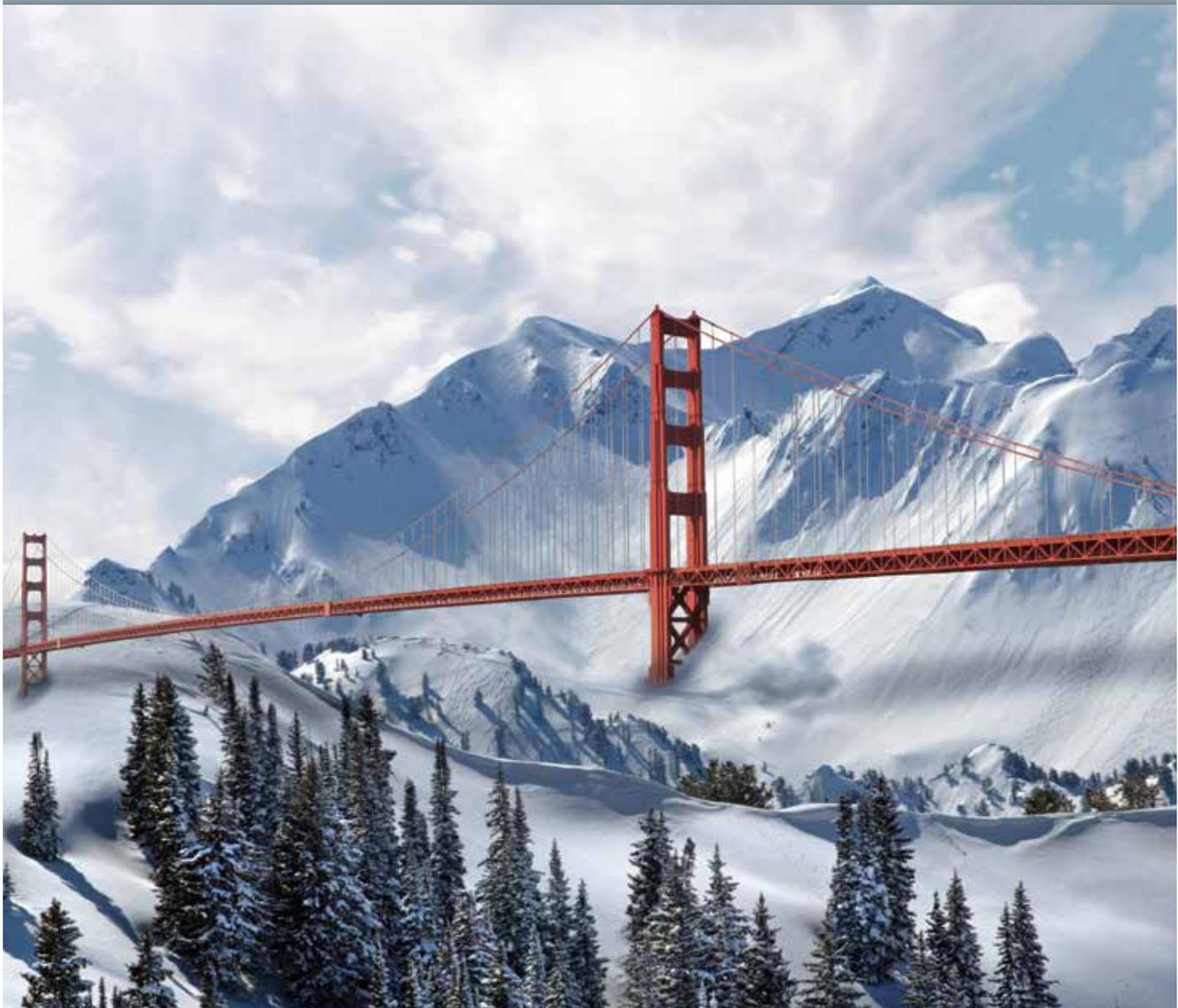
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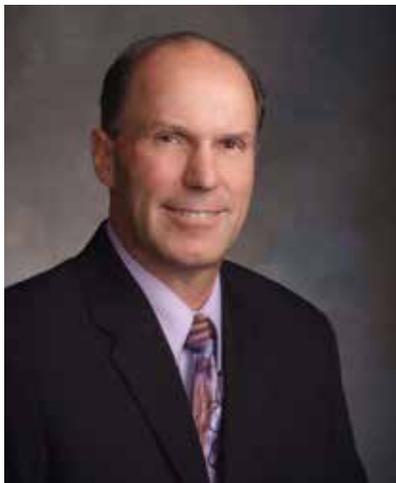
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### June

**June 2**

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**June 17**

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### Improving the Public Perception of Lawyers

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

In my last two columns, I talked about the Commission's effort to improve the public perception of lawyers. We have reviewed the great work that attorneys are doing in the community to improve public perception of lawyers.

The ISB will be recognizing the good work that lawyers do in our community for several reasons:

1. We need to acknowledge each other, and recognize each other as excellent citizens and a wonderful legal community. By this recognition, perhaps lawyers can continue to treat each other with respect, if not admiration, to encourage us to improve our own attitude towards the Bar. Perhaps this improvement will be reflected in our own representations to the non-legal community about lawyers, and thus incrementally improving the public perception of lawyers.
2. Encouraging good works helps build collegiality and a common sense of public purpose among lawyers.
3. Gathering information about the good works of lawyers will help in any public forum where we can present the image of lawyers in a positive light.
4. Encouraging good works and community service in the legal community will help individual lawyers and firms by improving morale, productivity, and a sense of community.

---

Encouraging good works and community service in the legal community will help individual lawyers and firms by improving morale, productivity, and a sense of community.

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#### **Acknowledging our contributions**

In the February column, I began by citing some anecdotal evidence of good works being performed in the community by different lawyers, and statistics on pro bono and volunteer work through the Bar. Many of you saw the survey that the Bar released seeking to gather even more information on community service efforts of Idaho lawyers. We received 375 responses. Some of the responses are fairly surprising. Here is a little quiz to see how well you can identify lawyer responses:

1. What was the #1 category of focus for community organizations that lawyers are involved in? What was #2? #3?
2. What percentage of responding attorneys spend over 15 hours a month volunteering in community activities?
3. How many distinct community entities were represented in the entities for which attorneys volunteer?

4. What percentage of Idaho lawyers support community organizations through financial contributions?

Check the end of this article for the responses, they might surprise you!

#### **Acknowledging and building community**

How many of the lawyers that were mentioned in the February article were lawyers that you have had contact with? When you learned of their contributions, did it improve your perception of them? As humans, we cannot help but be affected in our perceptions of people when we see them acting on behalf of others. Research in the corporate world has consistently shown the perception and image improves when a company encourages public and community service.<sup>1</sup> Being a good citizen helps lawyers to form better opinions of legal colleagues in addition to helping the public to better understand the lawyer as public servant.

## Improving our public perception

Highlighting and publicizing the community service aspect of lawyers' lives can only help to improve the public perception of lawyers. The Bar is preparing a Lawyers Serve Report, which will serve as a platform to help the public better understand the contributions of lawyers to society. We will also seek to publicize the good works of lawyers through efforts to alert the media to our public service. We will spread the message on social media. This type of public presentation of a community service focus has helped companies like HP in their public perception.

## Improving firm morale

Many companies now encourage joint volunteer projects and community service because they have found that this is better for the company as well as improving the morale of employees. A UnitedHealthCare Survey<sup>2</sup> in 2013 found that 76% of employees who volunteered felt better about their employer because of their community involvement. Community projects also increase the bond with co-workers. One research study found that 79% of people prefer to work for a socially responsible company.<sup>3</sup>

People who volunteer, according to the United Health Care study, feel better emotionally, mentally, and physically. According to a University of Georgia study<sup>4</sup>, employee volunteering is linked to greater workplace productivity and satisfaction. Those who volunteered gave more time and effort to their jobs, were more willing to help out colleagues, talked more positively about their companies and were less likely to waste time on the job. What community service projects does your firm engage in, as a firm? Let us know what you are doing, and how it is helping within your firm.

## Answers to the quiz

Since we know lawyers are often naturally competitive, some of you may have just skipped the rest of the article to get to the quiz answers, so be sure to go back and read the rest once you see the answers.

1. For volunteering, education/school was # 1, and spiritual/religious and professional associations tied for #2. In financial contributions, education/school was again #1, spiritual/religious #2 and social service was #3.
2. 21.74% of attorneys spent over 15 hours a month on community activities. 73.62% spent 1-15 hours a month.
3. Over 200 distinct entities were represented.
4. 86% of Idaho lawyers supported community organizations through financial contributions. 62.1% contributed \$1000-\$24,999 in 2015, and 3.4% contributed over \$25,000.

## So, to continue the conversation

Who are the attorneys in your community who are offering selfless gifts of time or treasure to make our communities better and help those who need assistance? How do these stories inspire you to spread the word about what a great legal community we have here in Idaho? We are eager to hear about these stories and next month I will write about

A UnitedHealthCare Survey<sup>2</sup> in 2013 found that 76% of employees who volunteered felt better about their employer because of their community involvement.

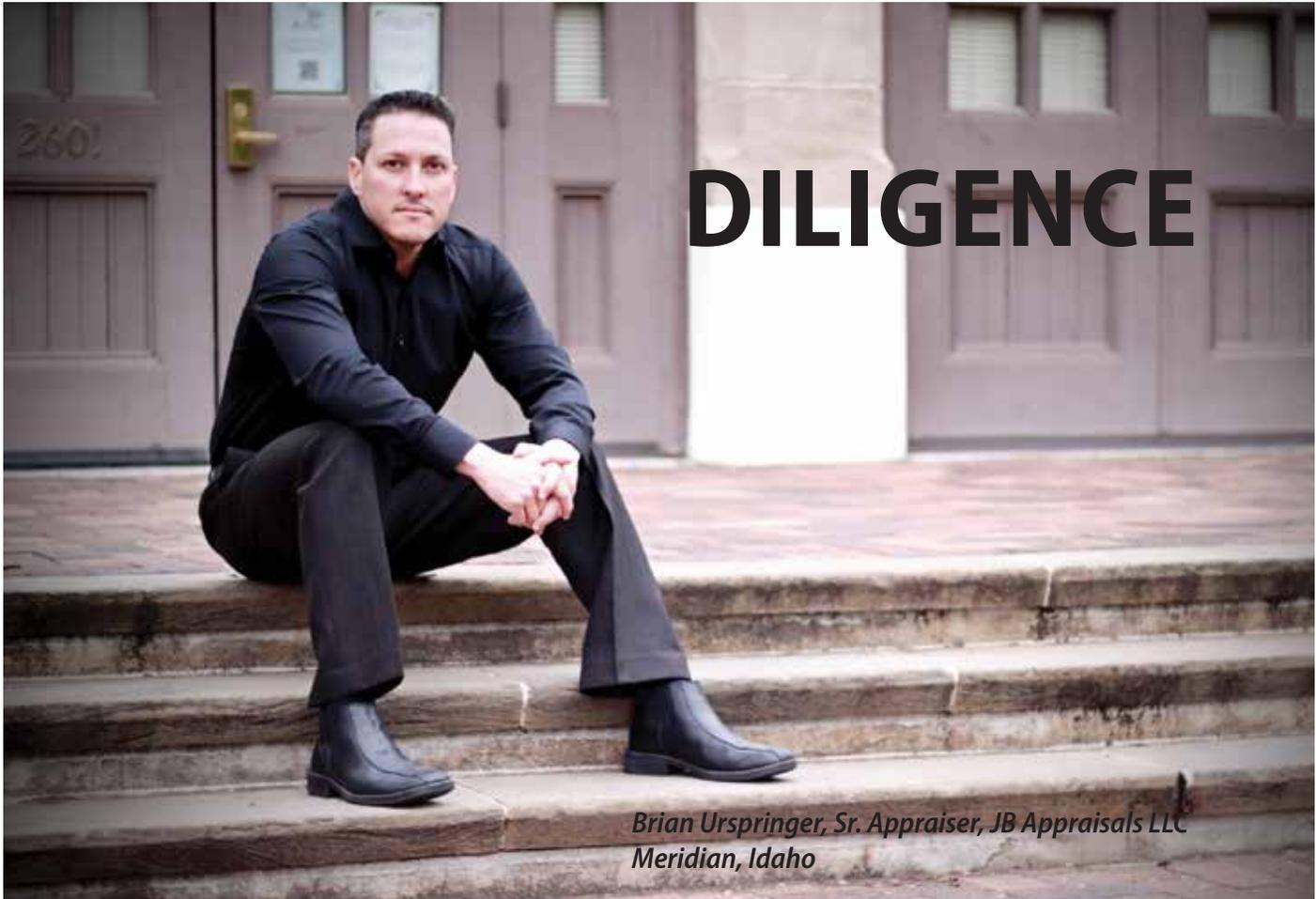
more of the great contributions you all are making! Contact me at [tfouser@gfidaholaw.com](mailto:tfouser@gfidaholaw.com) if you have ideas about reshaping the perception of Idaho lawyers.

## Endnotes

1. <http://www.businessinfocusmagazine.com/2012/10/the-importance-of-business-reputation/>
2. <http://www.unitedhealthcaregroup.com/~media/UHG/PDF/2013/UNH-Health-Volunteering-Study.ashx>
3. <http://www.conecomm.com/research>
4. <http://news.uga.edu/releases/article/uga-study-finds-volunteering-increases-workers-job-performance/>

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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## LICENSING CANCELLATIONS

### Order to cancel license to practice law for non-payment of 2016 license fees

The Commissioners of the Idaho State Bar by and through their Executive Director have filed with the Clerk of this Court evidence that the following named attorneys have not paid the 2016 Idaho State Bar license fees required by Idaho Bar Commission Rule 305(b)(2) and have not given notice of resignation from the practice of law to the Idaho State Bar and this Court;

NOW, THEREFORE, IT HEREBY IS ORDERED that the LICENSE TO PRACTICE LAW IN THE STATE OF IDAHO of the following named persons be, and hereby are, CANCELED FOR FAILURE TO PAY THE 2016 IDAHO STATE BAR LICENSE FEES:

BRIAN JOHN BEAN; JEFFERY LOGAN BUTLER; ERIN RUTH CHRISTISON; SASHA DAWN COLLINS; MICHAEL JAMES DORAZIO; JONATHAN MURDOCH DUKE; GREGORY JAMES EHARDT; MITCHELL KURT FIELDING; DAVID TIGHE GLUCK; MICHAEL JAMES GRIFFIN; ROBYN L. HELMLINGER; JOHN POTTER HOWARD; PAUL HENNING JOHNSON; DAVID CLARENCE JOHNSTON; MICHAEL THOMAS JOLLEY; THERESA LYNN KEYES; CARL EDWARD LARSON; KIM ELIZABETH LONDON; JOHN M. MCCALL; RONALD EUGENE MUMFORD; DAVID G. PEÑA; RYAN DANIEL POULSON; EDWARD MICHAEL PRIGNANO; BENJAMIN CALVIN RICE; RODNEY WILLIAM RIVERS; NANCY GROSKINSKY SCHWARTZ; BRIAN T. SHAW; STEVEN WILLIAM SHAW; SARA CATHERINE SIMMERS; JOSHUA LANGE SMITH; RYAN WILLIAM SUDBURY; DARCY ANN JAMES SWETNAM; GEOFFREY D. TALMON; DAVID BOYD THOMAS ; ROBERT JOHN UEBELHER; and LUCINDA WEISS.

IT FURTHER IS ORDERED AND NOTICE IS HEREBY GIVEN, that the persons listed above are NO

LONGER LICENSED TO PRACTICE LAW IN THE STATE OF IDAHO, unless otherwise provided by an Order of this Court.

IT FURTHER IS ORDERED that Bar Counsel of the Idaho State Bar is directed to distribute, serve, and or publish this Order as provided in the Idaho State Bar Commission Rules.

Dated this 2<sup>nd</sup> day of March, 2016.

By Order of the Supreme Court  
Jim Jones, Chief Justice

### Order granting petition for reinstatement as active member in the Idaho State Bar

IN THE MATTER OF THE PETITION FOR REINSTATEMENT AS ACTIVE MEMBER IN THE IDAHO STATE BAR: DAVID G. PEÑA,

1. On March 2, 2016, this Court issued an ORDER TO CANCEL LICENSE TO PRACTICE LAW FOR NON-PAYMENT OF 2016 LICENSE FEES wherein DAVID G. PEÑA was removed from the list of attorneys entitled to practice law in the State of Idaho.

2. On March 7, 2016, the Idaho State Bar advised this Court that Petitioner DAVID G. PEÑA had met all requirements to be reinstated to *ACTIVE STATUS*, **effective until March 15, 2016**.

3. A Petition for Reinstatement was filed by DAVID G. PEÑA on March 7, 2016. Therefore, good cause appearing,

IT HEREBY IS ORDERED that the petition be, and hereby is, GRANTED and DAVID G. PEÑA shall be reinstated to *ACTIVE STATUS* for 2016, **effective until March 15, 2016**, and the Idaho State Bar is hereby directed to issue an Active Attorney License upon receipt of this Order.

DATED this 8<sup>th</sup> day of March, 2016.

For the Supreme Court  
Stephen W. Kenyon, Clerk

## DISCIPLINE

### David G. Peña

(Suspension, Withheld Suspension and Probation)

On February 26, 2016, the Idaho Supreme Court issued a Disciplinary Order suspending attorney David G. Peña from the practice of law for a period of two (2) years, with all but

six (6) months of that suspension withheld, effective March 15, 2016. The Disciplinary Order included an 18-month disciplinary probation upon Mr. Peña's reinstatement. The Idaho Supreme Court found that Mr. Peña violated I.R.P.C. 1.2(a) [Failure to abide by client objectives], I.R.P.C.

1.3 [Failure to act with reasonable diligence and promptness], I.R.P.C.

1.4 [Failure to reasonably communicate] and I.R.P.C. 5.3 [Failure to make reasonable efforts to ensure a nonlawyer employee's conduct was compatible with the lawyer's professional obligations].

## DISCIPLINE

The Idaho Supreme Court's Order followed a stipulated resolution of a disciplinary proceeding that related to Mr. Peña's representation of three clients in separate matters. In the first matter, Mr. Peña represented a client *pro bono* in a collection case. Mr. Peña failed to forward payments made by the client to the creditor as part of a negotiated settlement, failed to inform the client that the creditor had filed a motion to reconsider dismissal of the case based on the client's alleged failure to make payments, and failed to inform the client of the hearing on the motion to reconsider or to appear at the hearing on the client's behalf. Mr. Peña refunded all payments made by the client to his office and the collection case was settled. In the second matter, Mr. Peña represented an incarcerated client on a rider program seeking to transfer her anticipated probation term from Idaho to Utah. Mr. Peña filed a Notice of Appearance and discovery request, but thereafter failed to communicate with the client or perform any further services. The Court ultimately declined to order probation for the client and Mr. Peña refunded the client's \$750 fee payment. In the third matter, Mr. Peña represented a client in a felony controlled substances case. Mr. Peña failed to respond to the client's requests for case updates and copies of relevant discovery and other documents. The client ultimately pleaded guilty under a plea agreement negotiated by Mr. Peña.

Mr. Peña will serve an 18-month probation following his reinstatement, subject to the conditions of probation specified in the Disciplinary Order. Those conditions include that Mr. Peña will serve the period of withheld suspension if he admits or is found to have violated any of the Idaho Rules of Professional Conduct for which a public sanction is imposed for any conduct during his

probation period. During his probation, Mr. Peña must continue treatment with his health care provider and ensure that treatment reports are provided by the health care provider to Bar Counsel on a quarterly basis.

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

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### **Theresa A. Martin** (Suspension)

On February 26, 2016, the Idaho Supreme Court issued a Disciplinary Order suspending attorney Theresa A. Martin from the practice of law for 90 days. The 90-day suspension period had previously been withheld under a June 19, 2013 Disciplinary Order issued by the Court in a separate formal charge case. That Order included a two-year disciplinary probation with a condition providing that a 90-day suspension would be imposed if Ms. Martin was found to have engaged in professional misconduct that resulted in a private sanction. Ms. Martin stipulated to the imposition of the 90-day suspension based on conduct during her disciplinary probation that resulted in a private sanction.

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

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### **Royce B. Lee** (Public Reprimand)

The Professional Conduct Board of the Idaho State Bar has issued a Public Reprimand to Idaho Falls attorney Royce B. Lee, based on professional misconduct.

The Professional Conduct Board's Order followed a stipulated resolution of an Idaho State Bar disciplinary proceeding in which

Mr. Lee admitted that his conduct violated Idaho Rules of Professional Conduct 1.4 [Failure to reasonably communicate with a client].

The formal charge case related to Mr. Lee's representation of a client who was hospitalized for serious mental health issues. A court order had previously awarded that client primary physical custody of her 16-year-old son (M), with joint legal custody of M awarded to the client and her ex-husband. Despite that court order, the client and her adult daughter decided that M should relocate to Las Vegas to live temporarily with the daughter. The adult daughter conveyed that decision telephonically to Mr. Lee and represented that there was tension between M and his father and that M refused to go to his father's house. Mr. Lee prepared and faxed to the hospitalized client a temporary Power of Attorney that purportedly granted the daughter temporary custody of M and the power to make health care and educational decisions for M. The client executed the Power of Attorney and, without notice to or authorization from M's father, M relocated to Las Vegas to reside with the client's adult daughter. M's father learned of the relocation shortly thereafter and petitioned the Court for a temporary restraining order and temporary custody order. The Court entered the temporary restraining order, ordered that the Power of Attorney was annulled and vacated and, after hearing, entered a temporary order granting sole legal and physical custody of M to the father.

The public reprimand does not limit Mr. Lee'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.

**Idaho law changed to help estate planning**

Dear Editor,

Governor Otter signed Senate Bill 1314 on March 16, 2016. The law allows people to name “friends” as trustees of their trusts, effective July 1, 2016.

An example helps illustrate the reason for this legislation. Assume John and Mary have minor children at home in Twin Falls. Their families live on the east coast. They have a life-long friend Joe who lives close by and knows their family well. Joe has strong financial skills. John and Mary want to name Joe as their alternate personal representative in their Wills in the event both are deceased. That works and Joe is eligible to serve as personal representative under Idaho Code Section 26-3205(13)(a). John and Mary also want to create a trust in their Will for their minor children until the children attain age 25. Because of Joe’s knowledge of the children and his strong financial skills, they also would like Joe to serve as trustee of the trust for the children. While that seems to make good sense, Idaho Code Section 26-3205 (before Senate Bill 1314) does not allow Joe to act as trustee unless he either has a trust charter (which requires, among other things, a min-

imum of \$1,500,000 of paid-in capital) or he is a relative of John and Mary, has an existing attorney-client or certified public accountant-client relationship with John and Mary or has another specified exemption.

As an estate planner, I was concerned about this restriction. While I understood that the Idaho Department of Finance was not devoting any manpower to enforcing this provision, I was concerned that an unhappy beneficiary might try to disqualify/remove the friend as trustee. One of my personal standards is to try to be the person to address a problem and not just complain about it. I helped raise awareness of the issue on the List Serv of the Tax Section of the Idaho State Bar in 2012. I discussed it with members of the Idaho Legislature and the Idaho Department of Finance in 2013. I turned to the Trust and Estate Professionals of Idaho (TEPI) that same year. TEPI is headed by Robert Aldridge and it devotes countless volunteer hours trying to improve Idaho law. I sat through two years of TEPI committee meetings until we were able to reach consensus late last summer, using language I crafted. One of the concerns was that “undesirable” persons might use the exemption allowing friends to act as trustees by advertising their services. We addressed that concern by restricting

friends to individuals who do not engage in trust business as defined in Idaho Code 26-3203(30). That provision largely says trust business “means the holding out by a person to the public by advertising, solicitation or other means that the person is available to perform any service of a fiduciary. . . .” With the wording in place, the Idaho Bankers Association sponsored the legislation. Trent Wright, Trent Wright, President & CEO of the IBA; Joseph Jones, Deputy Attorney General assigned to the Department of Finance, and I all testified in favor of Senate Bill 1314. It passed the Idaho Senate and House without a dissenting vote.

Returning to the example and how Senate Bill 1314 would apply, Joe would not be eligible to serve as trustee of the trust created under John and Mary’s Will if Joe was holding himself out to the public as available to act as a trustee. That seems fair because in that circumstance Joe should obtain a trust charter.

In summary, as of July 1, 2016, estate planning clients will have more flexibility on being able to name a friend as trustee. It has taken four years to achieve this flexibility and I am very pleased that all Idaho citizens will soon benefit.

*John McGown, Jr.  
Hawley Troxell Ennis & Hawley LLP  
Boise*

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## College to offer Master of Laws Degree this fall

The State Board of Education has approved for the University of Idaho College of Law to begin offering a Master of Laws (LL.M.) degree in fall 2016. The LL.M. is a postgraduate law degree where students gain expertise in a specialized area of law. International students who have a first law degree from a foreign country will be able to choose an emphasis in democracy, justice and the American legal system, natural resources and environmental law, business law and entrepreneurship or litigation and alternative dispute resolution.

## Access to Justice FUND Run/Walk on June 18

The 3rd annual Access to Justice FUND Run/Walk will be held at 10 a.m. on Saturday, June 18, at Fort Boise Park. This non-competitive family and dog-friendly 5k run/walk raises funds and awareness for the Access to Justice Idaho Campaign, which raises funds to provide support for the three principal providers of free civil legal services for poor and vulnerable Idahoans: DisAbility Rights Idaho, Idaho Legal Aid Services, and the Idaho Volunteer Lawyers Program.

All registration fees will go to the Access to Justice Idaho Campaign. Please contact Whitney Fouser at [wfouser@gfidaholaw.com](mailto:wfouser@gfidaholaw.com) if you are interested in being a race sponsor or volunteer. Race information - [http://isb.idaho.gov/ilf/aji\\_campaign/aji\\_fundrun.html](http://isb.idaho.gov/ilf/aji_campaign/aji_fundrun.html)

## Position for Lawyer Representative open

The Judges of the United States District and Bankruptcy Courts for the District of Idaho will soon ap-



Photo by Dan Black

The North Junior High Choir performs on March 31 for the friends and families of those attorneys who died in the previous year. The memorial is an annual tradition at the Idaho Supreme Court.

point a Lawyer Representative to serve on the Ninth Circuit Conference of the U. S. Courts for a three-year term to replace Howard Burnett. Idaho's other current Lawyer Representatives are Lori Nakaoka and Nicole Hancock.

The Board of Judges follows the Lawyer Representative Selection Plan based upon current bar membership, which ensures statewide representation. This plan calls for selection of lawyer representatives as follows: 2017 – 1st or 2nd District; 2018 – 4th District; 2019 – 6th or 7th District; 2020 – 3rd or 5th District; 2021; 2022 – 4th District and repeat above.

Based upon the plan, this year's lawyer representative must come from the 1st or 2nd District.

Applicants should meet the requirements below:

1. Be a member in good standing of the Idaho State Bar and be involved in active trial and appellate practice for not less than 10 years, a substantial portion of which has been in the federal court system;
2. Be interested in the purpose and work of the Conference, which is to improve the administration of the federal courts, and be willing and able to actively contribute to that end;
3. Be willing to assist in implement-

ing Conference programs with the local Bar; and

4. Be willing to attend committee meetings and the annual Ninth Circuit Judicial Conference.

To apply, submit a letter (via email) setting forth experience and qualifications, no later than July 15, 2016, to the following: Elizabeth A. Smith, Clerk of Court, [clerk@id.uscourts.gov](mailto:clerk@id.uscourts.gov)

The Board of Judges will then select three applicants for referral to the Idaho State Bar, who will make the final selection by July 27, 2016, or as soon thereafter as possible.

## Additional reading at *The Advocate Extra* online

While many people know this magazine can be found online, [http://isb.idaho.gov/member\\_services/advocate/advocate.html](http://isb.idaho.gov/member_services/advocate/advocate.html), supplemental material is presented at *The Advocate Extra* page, [http://isb.idaho.gov/member\\_services/advocate/advocate\\_extra.html](http://isb.idaho.gov/member_services/advocate/advocate_extra.html).

The current *Advocate Extra* page includes a catalogue of recent President's Messages pertaining to bullying in the profession, as well as an expanded version of The Idaho Canons of Construction, which appears in this issue courtesy of its compiler, Stephen Adams.

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## Executive Director's Report

### ISB/ILF Volunteer Opportunities/Access to Justice Idaho

Diane K. Minnich  
Executive Director, Idaho State Bar

#### Volunteer opportunities

Member participation is vital to the success of the Idaho State Bar and Idaho Law Foundation. The commitment of lawyer and non-lawyer volunteers enables ISB and ILF to provide programs and services to the public and bar members. We thank those of you who continue to serve the legal profession through volunteer service. We encourage those of you who have not had the opportunity to volunteer to give it a try. As many of you already know, volunteer service offers many benefits and rewards.

Each year, the Commissioners of the Idaho State Bar (ISB) and the Idaho Law Foundation (ILF) Directors recruit attorneys interested in serving on a committee or volunteering their time to assist with ISB and ILF programs and activities.

Time commitments vary with each committee or program activity depending on the function and meeting schedule. Committee assignments are based on interest, geographic distribution, areas of practice and other committee assignments or ISB/ILF involvement.

Many attorneys are also involved in one of the 21 Sections of the Bar, District Bar Associations, providing pro bono service through the Idaho Volunteer Lawyers Program, or participating in Law Related Education programs such as the High School Mock Trial program or lawyers assisting with student civic education.

More information on the committees and other volunteer oppor-

tunities is available on our website: [www.isb.idaho.gov/general/volunteeropportunities](http://www.isb.idaho.gov/general/volunteeropportunities)

If you are interested in serving as a volunteer, please email me your preferences. If you have questions about the opportunities available please review the information on the ISB website or contact me at [dminnich@isb.idaho.gov](mailto:dminnich@isb.idaho.gov).

#### Access to Justice Idaho

Access to Justice Idaho (AJI) is a fundraising campaign that benefits the clients of Idaho Legal Aid Services, the Idaho Volunteer Lawyers Program, and DisAbility Rights Idaho. The AJI mission is to provide more civil legal services to vulnerable Idahoans with limited or no resources.

The following are examples of programs and activities that AJI contributions support.

**Idaho Legal Aid Services (ILAS)** will use AJI funds to represent some of Idaho's most vulnerable low income Idahoans. This includes guardianships and conservatorships for incapacitated adults and minor children who have been abused, neglected or abandoned.

Family members caring for loved ones with advanced cognitive decline often seek help as they try to get a family member onto Medicaid to cover nursing home costs or want to assist with medical, housing, or financial matters, but are at an impasse due to a lack of legal authority. Grandparents and other caregivers frequently contact ILAS as they step forward to protect children who are

Committee assignments are based on interest, geographic distribution, areas of practice and other committee assignments or ISB/ILF involvement.

exposed to unhealthy living conditions or who have been abandoned.

ILAS will also use funds to represent low income domestic violence and sexual assault victims in divorce cases. Many domestic violence victims, often with children, are left to handle the divorce process alone. For many, navigating this process is too stressful, frustrating, or overwhelming so they quit and do not get the legal remedies they desperately need.

**DisAbility Rights Idaho (DRI)** will use the AJI funds to obtain access to health care and in-home assistance for people with disabilities in order to prevent institutionalization or to help them move out of institutions and live in the community. DRI will also use the funds to assist people with mental illness to gain access to mental health treatment and community support to avoid hospitalization and involvement with the criminal justice system. AJI support will provide representation

to people with disabilities to contest guardianships when the guardian is abusive, neglectful, or inappropriate. The funds will also be available to supplement DRI's efforts to address issues of abuse and neglect in nursing homes and other facilities for people with disabilities.

**Idaho Volunteer Lawyers Program** (IVLP) will use AJI funds to supplement the services offered by ILAS in the family law area to assist victims of domestic violence in custody and custody modification cases, as well as in divorce proceedings. Also, IVLP will use funds to represent parents seeking protection orders or custody arrangements to

protect children where there is documented abuse or neglect.

IVLP will also use funds to provide representation for petitioners and protected persons in guardianships of all kinds. For example, AJI funds will allow IVLP to recruit competent counsel for parents to petition for guardianship over a developmentally disabled child who has reached the age of majority. IVLP volunteers can help parents continue to care and advocate for their child and assure the adult child's rights are protected.

Often the civil legal needs of low income people do not fall into the permissible categories of traditional funding sources. With AJI funds, IVLP can continue to match vol-

unteer attorneys with low income Idahoans who have diverse legal needs. Examples include those who have been victims of fraudulent contracts, are being illegally evicted, or need to obtain a certificate of live birth when no birth certificate was created.

Donations to AJI will help more Idahoans get the civil legal help they need. In its first two years, AJI raised more than \$355,000 to help Idahoans in need. Our goal for 2016 is \$250,000. We are asking attorneys, judges, and concerned citizens to help us reach our goal.

Donations can be sent to Access to Justice Idaho c/o the Idaho Law Foundation. For more information please contact [ginawhitney@idaholgalaid.org](mailto:ginawhitney@idaholgalaid.org).

## ISB/ILF Committees Volunteer Opportunities

For information on the specific duties and responsibilities of specific committees visit the ISB website "under 'About Us.:'"

Please let us know if you are interested in contributing to the activities of the Idaho State Bar and the Idaho Law Foundation by serving on one of the committees, or participating in one of the programs listed below. Please indicate your 1st, 2nd, or 3rd choice.

### Idaho State Bar Volunteer Committee Interest

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_

### Idaho Law Foundation Volunteer Committee Interest

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_

I would like more information about the Bar Sections.

I would like more information about the District Bar Associations.

I would like more information about participating in the ILF's Law Related Education Programs such as Mock Trial, or Lawyer in the Classroom.

I am interested in providing pro bono service through the ILF's Idaho Volunteer Lawyers Program.

Name: \_\_\_\_\_ Firm: \_\_\_\_\_

City: \_\_\_\_\_ Email: \_\_\_\_\_

Have you previously participated as a member of an ISB and/or ILF Committee?

No     Yes – Most recent committee assignment(s) \_\_\_\_\_

**Please return this form to:**  
**ISB/ILF Committees**  
**P.O. Box 895**  
**Boise, ID 83701**  
**Or email your committee interests to [dminnich@isb.idaho.gov](mailto:dminnich@isb.idaho.gov)**

# Welcome From the Intellectual Property Law Section

Allison C. Parker

**T**he Intellectual Property Law Section is pleased to sponsor this month's issue of *The Advocate*. As Chair of the Section, I am honored to report on the Section's upcoming events and to introduce the excellent articles written by Section members.

This year, we are proud to once again offer our Intellectual Property Law Scholarship to a Concordia Law or University of Idaho College of Law student who has demonstrated significant interest in the practice of intellectual property law. We will provide application instructions to Concordia and University of Idaho once we officially announce the scholarship for the year. Additionally, we will offer a CLE at this year's Annual Meeting of the Idaho State Bar entitled "Not Small Potatoes: Branding and the Lanham Act." Rhett Barney, trademark and copyright attorney with Lee & Hayes in Spokane, and Mike

Gilmore, Deputy Attorney General, will present on the Lanham Act, trademarks, certification marks, and the value of a brand and why it's worth protecting.

In this issue, you will find an article by Kammie Cuneo offering an overview of Inter Partes Review — a procedure conducted by the Patent Trial and Appeal Board — and corresponding practice pointers. Marcus Johnson addresses the rise of autonomous vehicles and the effect this technology could have in Idaho. Jennifer Pitino provides insight into the moral rights of authors of public works. Steve Wieland examines the implications of *B&B Hardware v. Hargis*, a United States Supreme Court case holding that certain Trademark Trial and Appeal Board decisions can have a preclusive effect on district court actions. Finally, my profile of the United States Patent and Trademark Office's Rocky Mountain Regional Office in Denver explores the benefits this office offers to Idaho practitioners and students. On behalf of the

Intellectual Property Law Section, I hope you find these articles helpful and engaging.

To those attorneys and students practicing or interested in intellectual property law, I encourage you to join the Intellectual Property Law Section. The Section meets at noon on the third Thursday of February, April, June, August, October, and December at the Law Center in Boise. Members from throughout the state join telephonically and lunch is available for those who participate in person. Free CLE credit is offered at most meetings based on presentations covering a wide array of topics relevant to the intellectual property practitioner.

Recently, those topics have included reviews of United States Supreme Court intellectual property decisions and a case study of the copyright case *Huntsman v. Soderbergh*. If you are interested in joining the section, please do not hesitate to contact me or any other council members to learn more about the benefits of participation.

## Intellectual Property Law Section

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# A Move Towards Globalization Provides a New Tool to Defend Against Infringement: The Rise of the IPR

Kammie Cuneo

In 2011, the Leahy-Smith America Invents Act, (AIA), became the biggest change to patent law since 1837. The AIA changed not only the criteria for inventorship but also the ability to challenge issued patents by creating new *inter partes* review processes. Historically, the United States has always recognized the economic and public utility served by patents. President James Madison recognized the power that patents had to “promote the Progress of Science and useful Arts” in the Constitution. Over the centuries, law and economics have both changed, becoming more interconnected and global in nature. Innovation, and the legal regimes which encourage it, are not confined solely to the United States, neither are their presumed economic benefits. Governments around the world have developed their own patent systems, and the economic reach of innovation spans the world.

With this increasing globalization, the United States has moved towards harmonizing its patent system with other global powers. Finally, in 2011, Congress passed the AIA,<sup>1</sup> which was designed to streamline and harmonize America’s patent system, bringing it more into alignment with the standards and procedures followed by the rest of the world.

One significant element of this reform was the creation of new post-grant review processes. Post-grant review allows the United States Patent Office, (PTO), to reevaluate the validity of an issued patent. The new post-grant review became effective in September of 2012 and takes two forms. One form, the *inter partes* review (IPR), applies to the majority of existing patents. The other, post-

grant review, applies only to patents issued after March 2013.

This article intends to familiarize the reader with the IPR procedure and illuminate its utility as a defensive tool in patent infringement cases. The article sets forth the IPR process generally, provides some statistics on filings, and discusses certain ramifications of the IPR pertaining to an invalidity defense.

## How we got here

Patent litigators know that invalidity is an indispensable defense to patent infringement. The validity of an asserted patent can be challenged in district court offensively or defensively. But bringing this challenge at the PTO, instead of in court, has particular advantages such as reduced cost, reduced time, and increased probability of success. As most patent practitioners are aware, before AIA, a party could have challenged the validity of a patent at the PTO through the *inter partes* reexamination process. AIA has now replaced reexamination with the new IPR. Starting on September 16, 2012, the PTO no longer accepted requests for *inter partes* reexamination, but instead accepts IPRs.<sup>2</sup> Any petitioner, other than the patent owner, can

The validity of an asserted patent can be challenged in district court offensively or defensively.

challenge the validity of a patented through the new IPR process. And while IPR may seem suspiciously similar to the former *inter partes* reexamination, it is a more powerful tool, armed with a spectrum of discovery features more resembling civil litigation than PTO practice.<sup>3</sup>

## The IPR process

IPRs are initiated by filing a petition to the newly instituted Patent Trial and Appeal Board (PTAB).<sup>4</sup> The IPR petition may request to cancel one or more claims of a patent as unpatentable on certain grounds. The grounds are limited to those raised under 35 USC §102 or §103 and only on the basis of prior art consisting of patents or printed publications. The PTAB may grant the petition as to one or more claims in the petition. If so, a trial is instituted for those claims. Following the grant, a scheduling order is issued and discovery procedures are set — similar to federal practice. The decision to grant the petition is within the purview of the Commissioner, through PTAB, and is not appealable.

By granting the IPR petition, the PTAB narrowly tailors the proceedings by identifying the claims on trial and the prior art grounds at issue.

At the conclusion of the trial, PTAB issues a final determination on the patentability of the tried claims. The final determination brings with it a range of ramifications including certain estoppel.

As with other PTO review procedures, including the former *inter partes* reexamination process, the evidentiary standard for patentability remains the preponderance of evidence in the new IPR process. And the final determination of the PTAB is appealable to the Federal Circuit. But contrary to the former *inter partes* reexamination, whose grant required the raising of a “substantially new question of patentability,” the standard for the grant of an IPR petition has been elevated to a “reasonable likelihood that the petitioner would prevail.”

### Statistics on filings

Since the institution of the IPR, the patent bar has filed a surprisingly large number of requests. What’s more, a surprising large number of these requests have been granted. Statistics provided by the PTAB indicate that, since the institution of the AIA, approximately 2,600 petitions have been filed, with only 786 petitions denied. Of the filed requests, about half (1,287) have been sent to the PTAB for trial, with the remain-

ing terminated for other reasons including settlement by the parties.<sup>5</sup>

In 72 percent of completed trials,<sup>6</sup> the PTAB held that all claims for which IPR was instituted were invalid. (A staggering number for patents that have already been examined and issued by the same agency.) In 14 percent, the board held that some of the claims remained valid, and in the remaining 14 percent, the board held that the patent was wholly valid. The 72 percent statistic establishes IPR as an attractive alternative to civil litigation. Moreover, the IPR is, in ways, more permissive than litigation and no more limiting.

### IPR as a tool against patent infringement

The IPR procedure is designed to allow parties greater flexibility in putting forward their case, subject to the guidance of PTAB judges through procedural and substantive rulings. In the IPR petition, as in litigation, the petitioner sets forth constructions for the claims. PTAB will ultimately construe the claims. But unlike in litigation, PTAB construes the claims using the broadest reasonable construction standard — a much lower bar to a finding of invalidity.

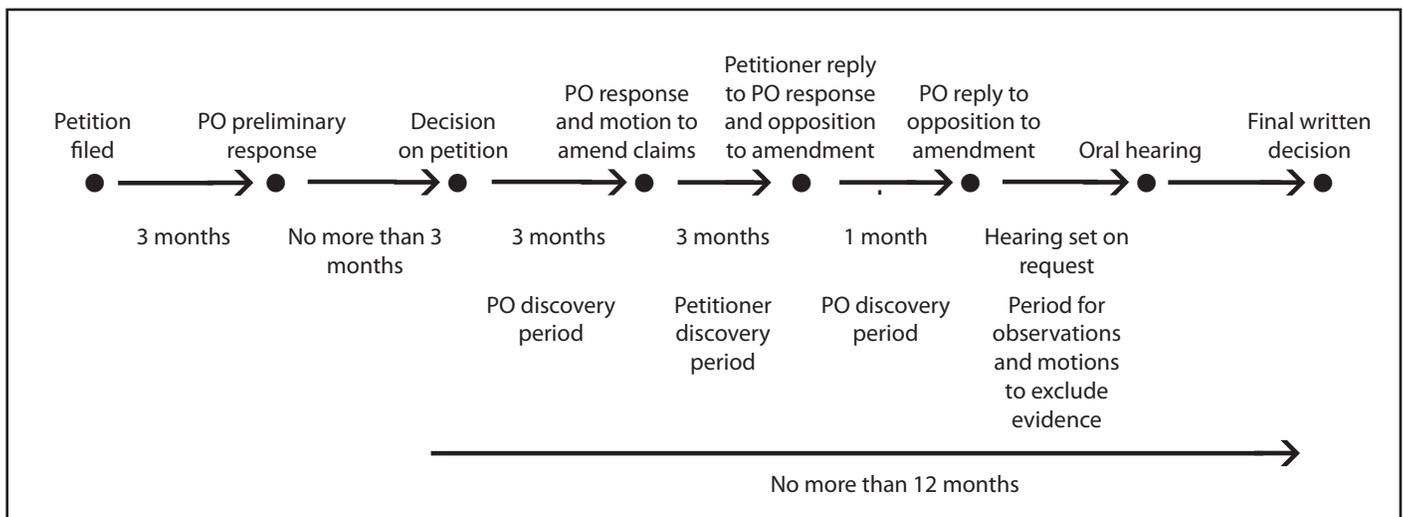
Also, IPRs are relatively expedient: the PTO is required to render a

final determination of patentability no later than one year after the grant of the IPR petition.<sup>7</sup> Below is a general timeline of the procedure.<sup>8</sup>

Additionally, despite the over \$27,000 required to file a petition, the cost of an IPR remains generally less than the cost of litigation in federal courts.

One of the most significant advantages of the IPR is the lower evidentiary standard, a preponderance of evidence, for invalidating a patent claim as compared with the clear and convincing evidence in district court. Patents in district courts bear a presumption of validity, which must be rebutted by clear and convincing evidence. Not so at the PTO. Coupled with the broader claim construction applied by the PTAB, the road to invalidity becomes much shorter through IPR, perhaps as evinced by the 72 percent invalidity rate.

The IPR procedure creates certain estoppel, but the impact of this estoppel is not necessarily more than that caused by litigation, in a majority of cases. A petitioner in an IPR may not request or maintain a subsequent proceeding before the PTO with respect to any challenged patent claim on any ground that was raised or reasonably could have been raised in the IPR. Similarly, a petitioner in an IPR, or the real party



in interest or privity of the petitioner, may not assert in certain actions that a claim is invalid on any ground that the petitioner raised or reasonably could have been raised in the IPR.<sup>9</sup> Nevertheless, had the invalidity challenge been brought in court, estoppel and issue preclusion would have attached in any case. Moreover, if the IPR petition is denied, the petitioner is not barred from bringing suit in district court.

Other limitations to filing an IPR hardly impact its utility as a defensive tool in litigation. For example, an IPR will not be instituted where the petitioner has already brought a civil action challenging the validity of the patent. Nevertheless, a counterclaim by a defendant does not constitute such civil action, and the defendant can still petition to institute an IPR on any patent claims asserted against him. Moreover, if a patent owner files a civil action against an IPR petitioner alleging infringement of a patent claim by that petitioner, no stay of the IPR proceeding will be instituted.

The virtues of IPR as an alternative to litigation do come with a “small” cost. During an IPR proceeding, a patent owner is given the opportunity to amend the claims at issue, presenting a reasonable number of substitute claims for potentially invalid claims. Should those amended or substitute claims be accepted and finally issued at the conclusion of the proceeding, intervening rights similar to those arising under 35 USC § 252<sup>10</sup> attach to the newly issued claims. The significance of such rights, however, would greatly depend on the particulars of the dispute and should be weighed against the reduced burden and reduced cost to invalidate the claims through an IPR proceeding.

## Conclusion

Given the short-term trends in IPR filings and their potential in-

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If a patent owner files a civil action against an IPR petitioner alleging infringement of a patent claim by that petitioner, no stay of the IPR proceeding will be instituted.

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terplay with patent litigation, it is advisable for litigators, as well as the Patent Bar, to take note of this new procedure. Filing an IPR following each allegation of infringement may yet become the new normal.

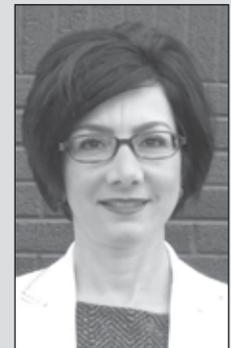
## Endnotes

1. Leahy-Smith America Invents Act (the AIA), Public L. No. 112-29, 125 Stat. 284 (2011).
2. For a patent issued from an application filed prior to November 29, 1999, the statutory *inter partes* reexamination option is not available, only the *ex parte* reexamination is available as a reexamination option. 37 CFR § 1.510 *et seq.*
3. IPR is similar to the *inter partes* review process in that it allows a third party to request reconsideration of allowability for one or more issued claims on prior art grounds from the PTO. The standard of review is a preponderance of evidence. IPR is different from the *inter partes* practice on procedural grounds and substantive grounds. Some salient differences are, *inter alia*, IPR does not require that the question of patentability

be “new,” allows for expanded discovery tools such as expert and lay testimony, permits flexible response times, and provides expanded motion practice.

4. PTAB replaced the former Board of Patent Appeals and Interferences (“BPAI”).
5. <http://www.uspto.gov/sites/default/files/documents/2016-01-31%20PTAB.pdf>.
6. Of the cases sent to the board, 495 were terminated before their hearing, 361 settled, 14 were dismissed, and 120 were subject to a request for adverse judgment. The remaining 792 were seen through to the trial.
7. The one-year period can be extended by up to six months upon showing of good cause.
8. 77 Fed. Reg. 48756, 48757 (Aug. 14, 2012).
9. In actions that constitute litigation arising out of 28 USC § 1338 or constitute a proceeding before the International Trade Commission under § 337 of the Tariff Act of 1930.
10. Similar to those applicable to reissue claims.

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# The Drive For Autonomous Vehicles: Idaho's Race to Catch Up

Marcus E. Johnson

Over the past few years, the automotive and technology industries have made significant advancements in expanding a typically human experience, driving, into an entirely technological capability. Tech companies have pushed the envelope further by creating autonomous vehicles that can operate and navigate on our roadways with no human input. As vehicle automation technology advances toward complete vehicle autonomy and vehicles become increasingly connected, the legal community anticipates substantial legal issues and developments pertaining to such technology in preparation.<sup>1</sup>

Autonomous vehicles (AVs) have the potential to fundamentally alter transportation systems by increasing traffic efficiency and avoiding crashes caused by human error. Since AVs are driven entirely by the technology, the vehicles can be programmed to avoid accidents by, for example, driving safely even if the driver is intoxicated and obeying all other traffic laws. Ideally, removing the human element should make transportation much safer and more efficient but the potential magnitude of AVs' impact is unproven due to the technology not yet being released commercially.

A few states have recently established laws in an attempt to ensure the safe operation of AVs on their highways. Since there is currently no federal regulation on autonomous technology use, state regulations play an important role in furthering development of this technology. Idaho has attempted to enact legislation to join these states, although such legislation has yet to pass, and was inactive during the 2016 legislative session. Currently, autonomous technology innovations are severely

outpacing legislation designed to allow for its use. It is time to accept the autonomous vehicle whirlwind, and assist in these safety and technological advancements through state legislation. This article discusses the impending deployment of this new technology, and the regulations both state, and federal, that will effect the deployment. However, it may be helpful to begin with a definition of autonomous vehicle.

## What is an autonomous vehicle?

In order to fully analyze the regulation of autonomous vehicles, we must first understand what it means to identify an autonomous vehicle. Each state's AV legislation includes a statutory definition of what qualifies. However, as a general definition, an AV is a vehicle that incorporates technology that enables the motor vehicle to be operated without any control or monitoring by a human operator. The National Highway

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Traffic Safety Administration (NHTSA) issued a Preliminary Statement of Policy Concerning Autonomous Vehicles,<sup>2</sup> which broke the technology down into four levels of automation present in the vehicles, each increasing the amount of autonomy the car has, and decreasing the amount of driver control.<sup>3</sup>

## So You Know the AV Scale. . .<sup>4</sup>

### Level 0

The vehicle has no automated technology offered, and only the driver is in control of the vehicle — i.e. a vehicle built before cruise control was available.

### Level 1

Function-specific automation is integrated with the vehicle, where the driver can cede single functions for the vehicle to operate — i.e. allowing cruise control to stabilize speed for the driver.

### Level 2

Further combines automated functions that are designed to work in unison to relieve the driver of multiple vehicle functions at once — i.e. inte-

grated adaptive cruise control with lane-centering function that handles two functions simultaneously.

### Level 3

Includes automation that enables the driver to cede full control of all functions while the technology takes complete control but that requires the ability for the driver to resume control of the vehicle when warranted.

### Level 4

Includes full self-driving automation, and does not require any functions from the driver other than navigation input. Level 4 can be operated even without any persons in the vehicle, and does not include a steering wheel or pedals to give the driver the ability to take control.

Vehicles equipped with AV technology that allow the driver to cede all driving functions of the vehicle are the focal point of novel AV legislation, as this technology is not currently on the market. Notably, there are two types of AVs that autonomously operate all driving functions — one that allows human operation when not in AV mode, and one that is incapable of non-autonomous operation.

### **Where does current technology stand?**

In 2013, when NHTSA released its statement defining the levels of AV technology, it described AVs that require human operation in certain situations as the highest level of AV technology in existence.<sup>5</sup> NHTSA stated it was not aware of any AVs capable of being driven without features allowing for human operation if desired, or in the event of AV malfunction.<sup>6</sup> General Motors is currently testing AV technology capable of interchanging between human and autonomous operation,<sup>7</sup> but the ability for drivers to resume control has caused significant issues. AVs lacking features allowing human operation have avoided these issues. Thus, many AV manufacturers have eliminated all features for human drivers and have designed AVs entirely operated by AV technology.<sup>8</sup> Google is currently testing over 50 AVs lacking a steering wheel, and such AVs have driven over 2 million miles with no human control on the roads in California, Texas, and Washington State.<sup>9</sup> Even with over 2 million recorded autonomous miles, Google's AVs have been involved in only 17 accidents — all of which were caused by human error.<sup>10</sup>

The actual timing of technology and its commercial introduction is uncertain, as it is very dependent on how quickly the technology is able to be proven safe for public use.<sup>11</sup> NHTSA's statement in 2013 predicted the technology being 10 to 20

years away from production.<sup>12</sup> The current position of AV technology has showed this prediction incorrect. Some analysts have attempted to forecast likely timelines. Morgan Stanley anticipates further penetration of human-incorporated AVs by 2017,<sup>13</sup> while Google has claimed AVs requiring no human input will be available by 2020.<sup>14</sup> With NHTSA's prediction misjudging the technology, NHTSA is now being forced to prepare long before the agency had originally planned to become involved and has admitted that a widespread deployment is nearly feasible.<sup>15</sup>

Even with over 2 million recorded autonomous miles, Google's AVs have been involved in only 17 accidents — all of which were caused by human error.<sup>10</sup>



### **Federal government's role**

The federal government has yet to regulate the use of autonomous vehicles. NHTSA initially made statements that the regulation of use and testing of AV technology is best completed at the individual state level.<sup>16</sup> However, NHTSA has since altered this stance to increase efficiency in the transportation sector.<sup>17</sup> This likely comes from AV manufacturers' concerns over their inability to manufacture a car that meets safety requirements in all fifty states, if a patchwork of state safety requirements is permitted.

Discrepancies in state AV regulations has become a hot-button topic as of late, to the point that Volvo issued a press release concerning the matter.<sup>18</sup> Volvo Cars CEO Håkan Samuelsson noted the lack of a single set of rules means car makers cannot conduct credible tests to develop cars that meet all 50 states' different safety guidelines.<sup>19</sup> U.S. Transportation Secretary Anthony Foxx responded with a press release at the 2016 Detroit Auto Show, outlining a \$3.9 billion transportation proposal by President Obama to allow for federal regulation of standard safety features required to help accelerate the deployment and adoption of safe AVs.<sup>20</sup> This proposal came in recognition of recent and monumental advances in the technology over the last few years and stressed the important role AVs will play in our society in the near future.<sup>21</sup>

President Obama's proposal includes a list of milestones that the U.S. DOT is committed to meeting by the end of 2016. By July, NHTSA will develop and propose model policy to help states advance this new era of safety in a way that is consistent between states and with nationwide policy on AVs.<sup>22</sup> Also, NHTSA will propose best-practice guidance to industry on establishing principles of safe operation for AVs at all levels of increasing autonomy.<sup>23</sup> By creating these regulations, NHTSA is attempting to help AV manufacturers implement safety innovations within the scope of the Federal Motor Vehicle Safety Standards, which will be updated to accommodate the AV technology.<sup>24</sup>

The current federal motor vehicle standards regulate only the minimum safety features all motor vehicles are required to have in order to operate on the highways.<sup>25</sup> Thus, now that NHTSA has stated they plan to provide federal safety regulations for AVs, it follows that NHTSA will regulate only the minimum safety features required to operate

AV technology safely. These procedures will provide the manufacturers with the predictability they need to successfully deploy the technology,<sup>26</sup> while leaving the states the freedom to decide how the technology is used on their highways, and who is capable of using the technology on state highways.

### Current state of legislation

Only a few states — Nevada, Florida, California, and Michigan — have already enacted legislation to regulate the various uses of AVs on state highways. Idaho is not included in this group. While some states have only allowed for AV testing, few have pushed for broader legislation that would include the public use requirements.

In June 2011, Nevada became the first state to authorize the operation of automated vehicles on public roads and is considered the front-runner state.<sup>27</sup> Nevada took a more futuristic approach to its legislation — allowing for testing AVs and preparing for commercialization, as well.<sup>28</sup>

Before testing an AV on a Nevada highway, the AV must meet many safety requirements. These include the ability for the driver to assume control if the AV technology fails, and an electronic data recorder to record data of malfunctions in the event of a crash.<sup>29</sup>

The most prominent part of Nevada's legislation is the requirement that the state's DMV adopt timely regulations to implement AV operation.<sup>30</sup> This includes requiring a driver's license endorsement,<sup>31</sup> and drivers' completion of an AV certification course prior to operating AVs on the highways. These regulations allow for privatization of the required AV certification courses, and they create a bridge between allowing mere testing AVs, and their commercialization for public use.

The three other states — Florida, California, and Michigan — have

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In order to test AVs in the state, the Idaho bill would have required the driver to be affiliated with the testing entity and to be capable of taking immediate manual control of the vehicle in the event of technology failure.<sup>36</sup>

taken a less progressive approach to their legislation regarding AVs. Florida and Michigan put very few limits on testing AVs, although they explicitly do not allow for use beyond testing.<sup>32</sup> California limits AVs capable of being tested to those which possess a steering wheel and allow operator control. California's law has been widely criticized by Google, which is unsurprising considering the fact that Google's AVs do not meet these criteria.<sup>33</sup>

Thus, each state has taken a slightly different approach to legislation for AVs. Nevada is considered the front runner due to its widespread allowances for testing and preparation for commercializing the technology. This will likely prove economically beneficial, as AV companies such as Tesla have become attracted to the framework.<sup>34</sup>

### Idaho's drive for AV legislation

Although Idaho has not enacted AV legislation, it is not due to some legislators' lack of trying. In the first Idaho Legislative session of 2015, Senator Bert Brackett and Representative Steve Hartgen introduced Senate Bill No. 1108, which was intended to facilitate and provide for the operation of AVs in the state of Idaho for testing purposes.<sup>35</sup>

This bill had some requirements similar to the state legislation described above. In order to test AVs in the state, the Idaho bill would have

required the driver to be affiliated with the testing entity and to be capable of taking immediate manual control of the vehicle in the event of technology failure.<sup>36</sup>

However, Google's head of state legislative affairs, Ron Barnes, wrote Senator Brackett a letter expressing concerns that the legislation was too restrictive — by requiring that a driver have the ability to take control of the vehicle.<sup>37</sup> Barnes believes this mandate would stifle innovation and remove the potential benefits of AV technology from those unable to take control — i.e., the elderly or disabled.<sup>38</sup> Ultimately, the Senate agreed the bill was too restrictive and voted to send the bill to committee to be amended to have less restrictive language, which has yet to be done. In the 2016 Idaho Legislative session, there was no action taken to advance AV legislation.

### Conclusion

Idaho is in a fortunate position to significantly advance itself into a very isolated group of states that are prepared for the impending deployment of vehicles equipped with AV technology. With the framework statute drafted, and the legislative intent to lessen the restrictions on AVs, Idaho has the opportunity to join states that are preparing for, and aiding in the progression of, the impending technology. Once other states start following this lead, and

once testing is uniformly accepted, the multitude of AV manufacturing companies and federal programs will have the necessary resources to quickly perfect the technology. AV technology has already outpaced all involved, but unanimous testing, without control restrictions such as those Idaho may soon enact, will fast-track the technology to commercialization — the ultimate goal for the Autonomous Vehicle.

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28. *Id.*

29. *Id.* § 482A.070.

With the framework statute drafted, and the legislative intent to lessen the restrictions on AVs, Idaho has the opportunity to join states that are preparing for, and aiding in the progression of, the impending technology.

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31. *Id.* § 482A.200.

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# Art Ownership Requires an Understanding of Moral Rights

Jennifer Pitino

In addition to private collectors and corporations, municipalities and state entities are often avid collectors of art. The City of Boise, for example, invests 1% of the total cost of all eligible capital improvement projects to fund public art in the City.<sup>1</sup> The City's Department of Arts and History curates more than 500 works in an ever-growing art collection, while also providing advocacy, education and support for the arts within the City.<sup>2</sup>

Despite the prolific collection of art in both the private and public sectors, little attention seems to be focused on the moral rights of the artists. It is important for collectors of art, especially municipalities and other state actors to understand the legal implication of moral rights in order to safely navigate the art world, particularly public art.

## The history of moral rights

The term "moral rights" derives from an 18<sup>th</sup> century French legal concept (*le droit moral*) of the non-economic, spiritual and personal interests which exist in creative works, independent of the artist's copyright interests.<sup>3</sup> The underlying theory of moral rights arose from the belief that in creating a work of art, the artist injects his or her spirit into the work. Consequently, moral rights dictate that the integrity of the work should be protected and preserved as a moral service to the artist.<sup>4</sup>

Moral rights are a relatively new concept in the United States. The first protection of moral rights did not occur until California enacted the 1979 California Art Preservation Act. Four years later, New York State followed suit enacting the Artist's Authorship Rights Act. Several oth-

Despite the relatively new protections enacted within the United States, many European countries have offered moral rights protection since the late nineteenth century.

er states have since similarly passed moral rights statutes.<sup>5</sup>

Despite the relatively new protections enacted within the United States, many European countries have offered moral rights protection since the late nineteenth century. In 1886 eight European countries adopted the Berne Convention for the Protection of Literary and Artistic Works.<sup>6</sup> The Berne Convention provides for the protection of artists' moral rights.<sup>7</sup> More than 100 years would pass before the United States would become a signatory to the Berne Convention.<sup>8</sup> A year after signing the Berne Convention, Congress enacted the 1990 Visual Artists Rights Act ("VARA"), establishing nationwide protection of artists' moral rights.<sup>9</sup>

## Moral rights recognition within the U.S.

Section 106A of the U.S. Copyright Act contains the VARA regulations protecting moral rights.<sup>10</sup> Copyright protects the property right (economic) interests of the artist, whereas moral rights safeguard the artist's personal and reputational interests in the work.<sup>11</sup> Though seemingly separate moral rights are inextricably connected to copyright as they only attach to *copyrightable*

works of visual art.<sup>12</sup> VARA automatically vests moral rights with authors of "works of visual art." Works of visual art comprise a narrowly defined class of art limited to: paintings, drawings, prints, sculptures,<sup>13</sup> as well as exhibition photographs produced in a limited edition of 200 copies or less, signed and consecutively numbered by the author.<sup>14</sup> Works of visual art do not include posters, maps, globes, charts, technical drawings, diagrams, models, applied arts, motion pictures or other audiovisual works, books, magazines, newspapers, periodicals, data bases, electronic information or publications, advertising or merchandising, or any works made for hire.<sup>15</sup>

VARA creates two categories of moral rights: the right of attribution and the right of integrity.<sup>16</sup> The right of attribution establishes the artist's right: 1) to claim authorship of their work; 2) to prevent their name being accredited to works of visual art which they did not create; and 3) to prevent the use of their name as the author of works of visual art in the event that the work becomes so distorted, mutilated or modified that attribution would prejudice the honor or reputation of the artist.<sup>17</sup> The right of attribution also allows authors of works of visual arts to protect their privacy by publishing

their work anonymously or pseudonymously.<sup>18</sup>

The right of integrity affords two protections.<sup>19</sup> First an author of a visual work of art may prevent the intentional distortion, mutilation or modification of his or her work where such action would prejudice his or her reputation.<sup>20</sup> Secondly, an author may prevent the intentional or grossly negligent destruction of a work of visual art which is of recognized stature.<sup>21</sup>

### Limitations of moral rights in the U.S.

There are limitations to moral rights under VARA. As mentioned above, moral rights only attach to *copyrightable* works. In *Kelley v. Chicago Park District*, the court found that an artist-designed flower garden in a city was not “fixed in a tangible medium of expression ... from which [it] can be perceived, reproduced or otherwise communicated” and thus not copyrightable.<sup>22</sup>

Additionally, moral rights cannot be sold, transferred or bequeathed,<sup>23</sup> and terminate upon the death of the artist.<sup>24</sup> When the work is the creation of multiple artists, the moral rights expire upon the death of the last surviving artist.<sup>25</sup> Although this is the general rule, some states have extended the duration of moral rights to life plus 50 years.<sup>26</sup>

Likewise, moral rights do not apply to work made for hire.<sup>27</sup> Under the Copyright Act a “work made for hire” is defined, in relevant part, as “a work prepared by an employee within the scope of his or her employment.”<sup>28</sup> The Copyright Act however, neglects to define either the term “employee” or “scope of employment.”<sup>29</sup> In *Community for Creative Non-Violence v. Reid*, the U.S. Supreme Court, in the absence of statutory definitions, relied on agency principles and set forth 13 factors to consider when determining whether a work is made for hire.<sup>30</sup>

The Second Circuit Court of Appeals applied these factors in determining whether a sculpture was a work made for hire.<sup>31</sup> The Court found that although the artists had complete artistic freedom in the design and creation of the sculpture and executed the work with great skill, they were nonetheless acting as employees rather than independent contractors. In reaching its determination that the sculpture was a work made for hire, the Court focused on several factors, including: the owner assigned other artistic projects to the plaintiffs to complete; the owner

Courts have generally relied upon expert testimony in order to determine the “recognized stature” of a work of visual art.<sup>37</sup>

paid the artists; social security taxes, worker’s compensation and unemployment insurances, and provided other benefits such as paid vacations and life and health insurance.<sup>32</sup>

Though the right of attribution appears broad, there are several limitations. VARA specifically exempts natural deterioration caused by the passage of time.<sup>33</sup> Additionally, deterioration resulting from conservation or public presentation, including damage caused by lighting or placement, does not amount to distortion, mutilation or modification to the work, unless due to gross neg-

ligence.<sup>34</sup> This limitation protects galleries, museums and other entities that publicly display visual art.

The right to prevent the destruction of works of visual art is limited to works of “recognized stature.”<sup>35</sup> The statute however, neglects to define “recognized stature,” leaving it to the courts to define.<sup>36</sup> Courts have generally relied upon expert testimony in order to determine the “recognized stature” of a work of visual art,<sup>37</sup> although at least one court has relied upon letters and news articles to establish a piece as a work of recognized stature.<sup>38</sup>

Lastly, Section 113 of the Copyright Act limits moral rights for works which are incorporated into or made a part of a building in a manner where such work cannot be removed without resulting in destruction, distortion, mutilation or modification. If such works were installed prior to 1990 or installed after 1990 and with the written consent of the artist expressly acknowledging such condition, then moral rights of integrity do not apply.<sup>39</sup>

If, however, the work is incorporated into a building in such a manner that it may be removed without its destruction, distortion, mutilation, or modification, then moral rights apply, though with a significant caveat.<sup>40</sup> Such moral rights are forfeited if the building owner has made a diligent, good faith attempt to contact the artist without success or has provided written notice to the artist of the owner’s intention to remove the work and the artist fails to either remove the work or pay for its removal within 90 days of receipt the notice.<sup>41</sup> An owner will be presumed to have made a diligent and good faith attempt to contact the artist if the owner sent notice by registered mail to the artist’s most recent address recorded with the Register of Copyrights.<sup>42</sup>

## Remedies for moral rights violations

Under VARA, an artist has a cause of action even if his or her work is not registered with the United States Copyright Office.<sup>43</sup> Remedies available for violations of moral rights are the same as civil remedies available for copyright infringements and may include injunction, impoundment, damages (actual or statutory), as well as costs and reasonable attorney's fees.<sup>44</sup> Statutory damages range from a \$750 to a \$30,000, increasing to \$150,000 for willful infringement and decreasing to \$200 for inadvertent infringement.<sup>45</sup>

At first blush it may seem that the statutory damages remedy as it applies to moral rights would be the best route for an injured artist because proving actual damages and profits may be difficult to establish. However, the \$150,000 ceiling for monetary recovery may be inadequate for the mutilation of a fine work of visual art by a noted artist whose works may sell for significantly larger sums than the statutory remedy cap.

## Purchasers of real property must consider moral rights

Moral rights may be easily recognizable when directly purchasing a work of visual art, but are often overlooked when purchasing land or structures with existing works of art. For example in *Martin v. City of Indianapolis*, the City of Indianapolis purchased land for an urban renewal project.<sup>46</sup> The land contained a large pre-existing sculpture. Both the artist and the prior property owner notified the City of Indianapolis about the sculpture and their desire to move the work elsewhere rather than have it destroyed. The Indianapolis mayor assured the artist that he would be notified in the event the work was to be removed and further stated that he had referred the pro-

Public and private entities alike would be well advised to both catalogue existing visual art associated with real property and employ extra diligence when acquiring real property or structures.

posal to move the sculpture to City staff for review and advice. Thereafter, without notice to the artist or former property owner, Indianapolis demolished the sculpture. The artist sued under VARA and the court of appeals upheld the district court's finding in the artist's favor awarding statutory damages in the maximum amount allowed for a non-willful statutory violation.<sup>47</sup>

Although the facts of this case suggested that the City acted willfully, the Court denied the plaintiff enhanced statutory damages finding that the City's actions were a "bureaucratic failure within the City government" and that "VARA rights were unknown to the City."<sup>48</sup> However, other courts may not be willing to accept ignorance as an acceptable defense. Public and private entities alike would be well advised to both catalogue existing visual art associated with real property and employ extra diligence when acquiring real property or structures.

## Moral rights and graffiti

The concept of public art continues to evolve and may now include works which are accessible to the public, regardless of whether these pieces were officially commissioned by public or private entities.<sup>49</sup> Graffiti art has become a prime example of this changing view of what constitutes public art.

In recent years, internationally famous graffiti artists such as Banksy, Shepard Fairey, and Invader have proved influential in the growing acceptance of graffiti as art. But whether appreciated or not, graffiti meets the VARA definition of a work of visual art.<sup>50</sup> Moreover, graffiti paintings are protected under copyright because they are, "original works of authorship fixed in any tangible medium of expression...from which they can be ... perceived, reproduced or otherwise communicated."<sup>51</sup> Interestingly, while the graffiti artist has a copyright in his work, he does not receive copyright protection in the underlying medium, which thus allows the property owner the right to keep or destroy the work as the property owner sees fit.<sup>52</sup> Graffiti artists have become aware of these protections and have sought enforcement of their copyright interests in their works.<sup>53</sup>

In one recent case, graffiti artists sued to enjoin the destruction of their works under VARA.<sup>54</sup> The Plaintiffs (Cohen and several other graffiti artists) had numerous works of visual art located upon a complex of industrial buildings commonly referred to as 5Pointz.<sup>55</sup> Plaintiff Cohen, with the permission of the property owner, became the curator of what graffiti art could be added to the site.<sup>56</sup> The 5Pointz graffiti art gained acclaim for its high-end

works by internationally renowned artists with Cohen conducting regular tours of the site, often sold out months in advance.<sup>57</sup> The owner decided to demolish the building to develop two apartment complexes, which led to the request for an injunction to prevent the demolition.<sup>58</sup> The owner defended the claim asserting that he had only granted plaintiffs temporary permission.<sup>59</sup>

The court found that VARA rights protect only a work of visual art and not the underlying medium (i.e. the building.)<sup>60</sup> In weighing the factors for granting a preliminary injunction,<sup>61</sup> the Court found that at least some of the graffiti art at 5Pointz was of “recognized stature” and consequently presented “a sufficiently serious question going to the merits to make them fair ground for litigation.”<sup>62</sup>

However, the Court ultimately determined that the plaintiffs could not meet the burden for an injunction for several reasons. First, the plaintiffs could be monetarily compensated for their art and their works could live on through photography, from which the plaintiffs could thereby reproduce, display, sell or make derivative works.<sup>63</sup> The Court also found that since the graffiti art was spread throughout all five buildings and the new apartment buildings which would replace the site included low income housing and 3,300 square feet of exterior wall to be made available for new art, that the hardship and public interest tipped in favor of the defendant.<sup>64</sup>

It is noteworthy that the Court mentioned in its decision that the building owner gave permission for the installation of graffiti art without obtaining VARA waivers from the artists and that “he stood to benefit economically from all of the attention that had been drawn to the site as he planned to market the new buildings’ residences.”<sup>65</sup> The Court further noted that since “VARA pro-

pects even temporary works from destruction, defendants are exposed to potentially significant monetary damages if it is ultimately determined after trial that the plaintiffs’ works were of ‘recognized stature.’”<sup>66</sup> The 5Pointz graffiti artists are currently seeking monetary damages for the destruction of their artwork.<sup>67</sup> The outcome of this lawsuit may provide additional guidance to public and private entities which have graffiti artwork on their properties.

In the case of works which will be incorporated into a building, the purchaser should ensure that the artist has provided written consent acknowledging that his work may eventually be removed.



### **How can you best protect your client purchasing or acquiring art?**

VARA protected moral rights can be waived.<sup>68</sup> VARA waivers must be in writing, signed by the artist, and “specifically identify the work, and uses of that work, to which the waiver applies.”<sup>69</sup> VARA waivers only apply to a work or uses expressly identified within the waiver.<sup>70</sup> Collectors would be well advised to seek specific VARA waivers in the purchase agreements for works of visual art. Additionally, in the case of works which will be incorporated into a building, the purchaser should ensure that the artist has provided written consent acknowledging that his work may eventually be removed

from the building and be destroyed, distorted, mutilated or modified as a result.<sup>71</sup>

Entities acquiring buildings or real property should be particularly mindful as to whether that purchase will include works of visual art. Artwork appurtenant to the property may require particular contract provisions protecting the purchaser’s ability to dispose of or alter the property.

### **Endnotes**

1. Boise City Code §1-25-01.
2. The Boise City Department of Arts and History was created in 2008 and replaced the Boise City Arts Commission which was established in 1978 for the purpose of advising and assisting the City Council in development, coordination, promotion and support of the arts in the City.
3. *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 81 (2<sup>nd</sup> Cir. App. Ct., 1995).
4. *Id.*
5. *Id.* at 82.
6. “WIPO Administered Treaties.” WIPO RSS. [http://www.wipo.int/treaties/en/ShowResults.jsp?treaty\\_id=15](http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=15)
7. “Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886).” WIPO RSS. <http://www.wipo.int/treaties/en/ip/berne/>
8. *Helmsley-Spear, Inc.*, 71 F.3d at 82 (citing H.R.Rep. No. 514, 101<sup>st</sup> Cong., 2d Sess. 7 (1990), reprinted in 1990 U.S.C.C.A.N. 6915, 6917 (“After almost 100 years of debate, the United States joined the Berne Convention...[C]onsensus over United States adherence was slow to develop in large part because of debate over the requirements of Article 6bis [moral rights].”)
9. Stephanie C. Ardito. “Moral Rights for Authors and Artists: In light of the Tasini ruling, is the next step to advocate for legislation?” Info Today Vol. 19, Issue 1. Pg. 2, (January 2002), available at: <http://www.infotoday.com/it/jan02/ardito.htm>.
10. See 17 U.S.C. §106A.
11. Ardito at pgs. 1-2.
12. *Kelley v. Chicago Park District*, 635 F.3d 290, 299 (7<sup>th</sup> Cir. Ct.App. 2011).

13. See 17 U.S.C. §101(1) (For a print or sculpture to qualify as a “work of visual art” for VARA protections there are additional limitations. All VARA protected prints must be in a limited edition of 200 copies or fewer and must be signed and consecutively numbered by the author. All VARA protected sculptures in a multiple cast, carved or fabrication must be in a limited edition of 200 copies or fewer and must be consecutively numbered and bear either the signature or mark of the author.)

14. 17 U.S.C. §101(2).

15. 17 U.S.C. §101(2)(A) and (B).

16. 17 U.S.C. §106A(a); *Cort v. St. Paul Fire & Marine Ins. Companies, Inc.*, 311 F.3d 979, 984 (9<sup>th</sup> Cir. Ct.App. 2002).

17. 17 U.S.C. §106A(a)(1)-(2); *Mass. Museum of Contemporary Art Foundation, Inc. v. Buchel*, 593 F.3d 38, 54-55(1<sup>st</sup> Cir. 2010).

18. Eric M. Brooks. “Tilted Justice: Site-Specific Art and Moral Rights after U.S. Adherence to the Berne Convention.” *California Law Review*. Vol. 77, Issue 6. December 1989. Pg. 1436.

19. 17 U.S.C. §106A(3)(A)-(B).

20. 17 U.S.C. §106A(3)(A).

21. 17 U.S.C. §106A(3)(B).

22. *Kelley*, 635 F.3d at 302.

23. Jeffrey Cunard. “Moral Rights for Artists: The Visual Artists Rights Act.” *CAA News*. Vol. 27, No. 3. Pg. 7. (May/June 2002), available at: <http://www.colleg-eart.org/ip/vara>.

24. 17 U.S.C. §106A(d)(1); In practical terms this means that if a person were to draw a moustache on a Jeff Koons’ statue it would be a violation of his moral right of integrity, but if that same person were to draw moustaches on Roy Lichtenstein’s iconic pop art paintings there would be no violation to his moral rights since he passed away in 1997.

25. 17 U.S.C. §106A(d)(3).

26. Brian Angelo Lee. “Making Sense of ‘Moral Rights’ in Intellectual Property.” *Temple Law Review*. Vol. 84. 2011. pg. 90 (“Those ‘death plus fifty’ states are California, Connecticut, Massachusetts, New Mexico, and Pennsylvania. CAL. CIV. CODE § 987(g)(1); CONN. GEN. STAT. ANN. § 42-116t(d)(1) (West 2011); MASS. GEN. LAWS ANN. ch. 231, § 85S(g); N.M. STAT. ANN. § 13-4B-3(E); 73 PA. CONS. STAT. ANN. § 2107(1) (West 2011)”).

27. 17 U.S.C. §101 “work made for



hire”(2)(B); see also *Helmsley-Spear, Inc.*, 71 F.3d at 85.

28. 17 U.S.C. §101 “work made for hire”(1).

29. See *Helmsley-Spear, Inc.*, 71 F.3d at 85.

30. 490 U.S. 730, 751-52, 109 S.Ct. 2166, 2178-79, L.Ed.2d 811 (1989)(The thirteen factors the *Reid* court considered in determining whether a work was made for hire included: 1) the hiring party’s right to control the manner and means by which the product is accomplished; 2) the skill required; 3) the source of the instrumentalities and tools; 4) the duration of the relationship between the parties; 5) whether the hiring party has the right to assign additional projects to the hired party; 6) the extent of the hired party’s discretion over when and how long to work; 7) the method of payment; 8) the hired party’s role in hiring and paying assistants; 9) whether the work is part of the regular business of the hiring party; 10) whether the hiring party is in business; 11) the provision of employee benefits; 12) the location of the work; and 13) the tax treatment of the hired party.)

31. See *Helmsley-Spear, Inc.*, 71 F.3d at 85-88.

32. *Id.* at 86-88.

33. 17 U.S.C. §106A(c)(1).

34. 17 U.S.C. §106A(c)(2).

35. 17 U.S.C. §106A(a)(3)(B).

36. Jeffrey Cunard. “Moral Rights for Artists: The Visual Artists Rights Act.” at pg. 7.

37. *Id.*

38. *Martin v. City of Indianapolis*, 192 F.3d

608, 612-13 ( 7<sup>th</sup> Cir. 1999).

39. 17 U.S.C. §113(d)(1)(A)-(B).

40. 17 U.S.C. §113(d)(2).

41. 17 U.S.C. §113(d)(2)(A)-(B).

42. 17 U.S.C. §113(d)(2)-(3).

43. *Helmsley-Spear, Inc.*, 71 F.3d at 83(citing 17 U.S.C. §§411, 412)(Copyright registration is not required to bring an action for infringement of VARA rights, or to secure statutory damages and attorney’s fees.)

44. 17 U.S.C. §§ 502, 504; see also *Buchel*, 593 f.3d at 48.

45. 17 U.S.C. § 504(c)(1)-(2).

46. 192 F.3d at 611.

47. *Id.* at 610 and 614.

48. *Id.* at 614.

49. Christian Ehert. “Mural Rights: Establishing Standing for Communities Under American Moral Rights Laws.” *Pittsburg Journal of Technology, Law & Policy*, Vol. 10. (Fall/Spring 2010). Pg. 3.

50. 17 U.S.C. §101 (“A ‘work of visual art’ is ... a painting, drawing, print or sculpture.”)

51. 17 U.S.C. §102(a).

52. Kathryn Dacheille. “Vandals or Van Gogh’s? Copyright Law and Graffiti Art.” Published 2014. Pg. 3, available at: <http://creativeartsadvocate.com/vandals-or-van-goghs-copyright-law-and-graffiti-art/>.

53. See e.g. *David Anasagasti v. American Eagle Outfitters, Inc.*, 1:14-cv-05618-ALC, (S.D.N.Y. 2014)(Clothing company American Eagle Outfitters sued by graffiti artist

Anasagasti for using his works as a backdrop for advertising photo shoot.); Bill Donahue. "American Eagle, Street Artist Settle Copyright Suit." Law 360. (December 2, 2014), available at: <http://www.law360.com/articles/600542/american-eagle-street-artist-settle-copyright-suit>.

54. *Johnathan Cohen v. G&M Realty, L.P.*, 988 F.Supp.2d 212 (E.D.N.Y. 2013).

55. *Id.* at 218.

56. *Id.* at 218-19.

57. *Id.* at 219.

58. *Id.* at 220.

59. *Id.* at 223. Other evidence at hearing supported defendant's claim that permission to use the building for graffiti art was temporary.

60. *Id.* at 225-26.

61. *Id.* at 225 (quoting *Salinger v. Colting*, 607 F.3d 68, 79 (2d Cir. 2010) (Court noted that that a preliminary injunction could not issue unless the plaintiffs demonstrated "either (a) likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the [p]laintiff's favor." If so,

the court may only issue the injunction if the plaintiff is able to demonstrate irreparable harm absent the injunction. This requires the court to consider the actual injury the plaintiff will suffer if he/she loses the preliminary injunction but ultimately prevails on the merits; do remedies such as monetary damages adequate to compensate for that injury. Additionally, the court must consider the balance of hardships between the parties and also ensure that the public interest is not disserved by the court's decision.)

62. *G&M Realty, L.P.*, 988 F.Supp.2d at 226

(quoting *Salinger*, 607 F.3d at 79.)

63. *G&M Realty, L.P.*, 988 F.Supp.2d at 226-27.

64. *Id.* at 227.

65. *Id.*

66. *Id.*

67. *Jonathan Cohen v. G&M Realty, L.P.*, 2015 WL 118712 (E.D.N.Y.2015).

68. *Kelley*, 635 F.3d at 300.

69. *Id.*; see also 17 U.S.C. §106A(e)(1).

70. 17 U.S.C. §106A(e)(1).

71. 17 U.S.C. §113(d)(1)(A)-(B).

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# Don't Let the TTAB Decide Your Next Infringement Dispute

Steve Wieland

One of the Trademark Trial and Appeal Board's (TTAB) main functions is to decide whether a registrant's or applicant's mark is likely to cause confusion with another party's mark.<sup>1</sup> Last year, the U.S. Supreme Court ruled that TTAB decisions on likelihood of confusion can be binding in court under the doctrine of "issue preclusion." Because of this potentially binding effect, it may be best practice to treat TTAB proceedings as if they are federal court proceedings.

## Issue preclusion — A little background

Federal common law governs whether a judgment from a prior proceeding is binding in federal court.<sup>2</sup> We often think of *res judicata* when evaluating how a judgment will affect subsequent proceedings, but *res judicata* is an umbrella term for different but related concepts: claim preclusion and issue preclusion.<sup>3</sup> Claim preclusion bars a party from relitigating the very same claim, even if the subsequent litigation involves new or different issues. *Taylor v. Sturgell*<sup>4</sup> states that "issue preclusion, in contrast, bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, even if the issue recurs in the context of a different claim."

In other words, where a court finally determines an issue in one case that is essential to its judgment, a litigant cannot raise the issue again in another lawsuit. For example, if one court enters a judgment finding a likelihood of confusion between two marks, neither party can ask a different court to reevaluate the likelihood of confusion as to the same marks.<sup>5</sup>

The Court held that the TTAB decision on likelihood-of-confusion could have preclusive effect on a court so long as the ordinary issue preclusion elements otherwise apply.

Because a decision by one court can bind a party in subsequent litigation in another court, issue preclusion can be both a powerful offensive and defensive weapon. However, until 2015, it was not settled nationwide whether TTAB decisions could be binding in a subsequent federal court action. This often gave parties a second bite at the apple if they were disappointed with how the TTAB weighed the likelihood-of-confusion factors between the two marks in trademark registration proceedings.

## SCOTUS decides that TTAB decisions can have preclusive effect

In 2015, the Supreme Court decided *B&B Hardware, Inc. v. Hargis Industries, Inc.*,<sup>6</sup> a case that slowly gained notoriety within the IP blogosphere over the past year. In *B&B Hardware*, one company with a registration for SEALTIGHT opposed the other's attempt to register SEALTITE. Although they were apparently not competitors, both companies manufactured metal fasteners in their respective industries and disagreed over who should have the right to assure customers of the seal created by their metal fasteners (and the tightness of it).

After a round of discovery, including depositions, the TTAB concluded that SEALTITE, when applied to the products described in the application, would be confusingly similar to SEALTIGHT and refused the registration. Although a party unhappy with a TTAB decision can seek *de novo* review in the Federal Circuit or, in some cases, a district court,<sup>7</sup> the SEALTITE applicant chose not to seek review. At the same time the TTAB proceedings were pending, the two manufacturers were also litigating an infringement suit in federal court. Naturally, the prevailing SEALTIGHT owner wanted the TTAB decision to have preclusive effect in that litigation, but the district court refused and the Eighth Circuit affirmed that decision.

The Supreme Court rejected various constitutional arguments, including that an administrative body could bind an Article III court, and that the Federal Circuit's likelihood-of-confusion test differed materially from that of the Eighth Circuit. Then, the Court held that the TTAB decision on likelihood-of-confusion could have preclusive effect on a court so long as the ordinary issue preclusion elements otherwise apply. This holding was significant because the TTAB and the courts analyze likelihood of confusion differently.

In litigation, how the parties *actually use* the marks in commerce is at issue. But in a registration proceeding the TTAB compares only generally the marks, goods, and channels of trade as they appear *in the parties' registrations or applications*.<sup>8</sup> Thus the Court further held that, for issue preclusion to apply, the TTAB must have been confronted with usages materially similar to those confronting the court in an infringement suit.<sup>9</sup> Justice Ginsburg underscored this point in a brief concurrence, noting that many times issue preclusion will not apply because "contested registrations are often decided upon a comparison of the marks in the abstract and apart from their marketplace usage," while marks in infringement suits are compared based on actual use in the marketplace.<sup>10</sup>

### What B&B Hardware means for trademark lawyers and their clients

1. *Consider Fighting TTAB Proceedings as if They Are Part of an Infringement Suit.* If the TTAB decides that two marks are or are not confusingly similar, its decision can potentially foreclose positions you will want to take in later infringement suits. Mark owners may want to expend more energy and resources in an opposition or cancellation proceeding, such as by investing in an expert witness or consumer survey, to avoid an undesirable agency outcome. Carefully compare the marks' real-world usage with those in the applications and registration certificates to determine what resources to expend before the TTAB.

2. *Consider Appealing More TTAB Decisions.* To avoid a nasty issue-preclusion surprise in court, it may also be worth appealing an unwanted TTAB determination to the Federal Circuit or to a district court.

One related practice note: if you are the party pursuing an alleged infringer and the TTAB issues an unfavorable ruling, you can undo the ruling on appeal. Offer to settle with the defendant and, in return, ask to stipulate that the reviewing court order the TTAB to vacate the unwanted decision. The TTAB may be reluctant to do so, but is bound to comply.<sup>11</sup> This will at least prevent a precedential ruling from sitting out there if you anticipate other similar infringers may come along.

In a registration proceeding the TTAB compares only generally the marks, goods, and channels of trade as they appear *in the parties' registrations or applications*.<sup>8</sup>

3. *TTAB Decisions on Other Issues Also Have Preclusive Effect in Court.* Of course, the TTAB decides questions other than likelihood-of-confusion, and those decisions can make or break a later infringement claim. These decisions may include whether a mark:

- functions as a mark (if a mark is, for instance, merely ornamental it cannot be protected);<sup>12</sup>
- is functional (functional marks cannot be protected);<sup>13</sup>
- is generic (generic marks cannot be protected);<sup>14</sup>

- is descriptive (thereby requiring secondary meaning to be protected);<sup>15</sup> or
- has priority of use.<sup>16</sup>

Just how potent issue-preclusion may be can be seen in some recent rulings. In one case, a judge in the District of Maryland dismissed an infringement suit on a Rule 12(b)(6) motion because the TTAB had already determined that the defendant was the mark's priority owner.<sup>17</sup> In another case, a court granted summary judgment to the *plaintiff* on a fraud claim because the TTAB already held the defendant had committed fraud on the United States Patent & Trademark Office in a previous registration proceeding.<sup>18</sup>

4. *Issue Preclusion Applies to the TTAB, Too.* Remember that issue preclusion runs in both directions. If a federal court decides an issue, such as likelihood of confusion, and issue preclusion elements otherwise apply, the TTAB is bound by that decision.<sup>19</sup> Plan accordingly.

5. *When Defending Against Issue Preclusion, Fight All the Elements.* As noted above, TTAB decisions do not automatically bind federal courts. In addition to determining whether the TTAB decided the same "issue," examine the other elements of an issue-preclusion theory. The Ninth Circuit's test for issue preclusion requires that:

- (1) there was a full and fair opportunity to litigate the issue in the previous action;
- (2) the issue was actually litigated in that action;
- (3) the issue was lost as a result of a final judgment in that action; and
- (4) the person against whom collateral estoppel is asserted in the present action was a party or in privity with a party in the previous action.<sup>20</sup>

Any one of these elements could be missing, and if so, the court must revisit the issue anew.

For example, although the TTAB has generally adopted the Federal Rules of Civil Procedure, its proceedings do not afford parties all of the same opportunities to present evidence as in litigation. Specifically, TTAB proceedings allow only deposition testimony.<sup>21</sup> If a party cannot fully and fairly present its case without live testimony, issue preclusion might not apply. However, a litigant cannot avoid issue preclusion simply because TTAB procedures are less generous than the Federal Rules. Instead, the Supreme Court held that issue preclusion will apply unless “there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation.”<sup>22</sup>

## Conclusion

The *B&B Hardware* decision clarified how TTAB decisions affect proceedings outside the registration process. Attorneys must consider *B&B Hardware* when engineering cohesive litigation, registration, opposition, and cancellation strategies. Patent lawyers also should pay attention to what effect, if any, *B&B Hardware* has on USPTO rulings in their area.<sup>23</sup>

## Endnotes

1. The TTAB applies a multi-factor likelihood-of-confusion-test from *In re E. I. DuPont DeNemours & Co.*, 476 F.2d 1357, 1361 (C.C.P.A. 1973).
2. *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 507 (2001).
3. *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008).
4. *Id.*
5. See *Hansen Beverage Co. v. Nat'l Beverage Corp.*, 493 F.3d 1074, 1077 (9th Cir. 2007) vacated as moot, 499 F.3d 923 (9th Cir. 2007) (determining whether issue preclusion prevented a party from liti-

TTAB proceedings allow only deposition testimony.<sup>21</sup>  
If a party cannot fully and fairly present its case without live testimony,  
issue preclusion might not apply.

- gating the issue of likelihood of confusion between two marks).
6. 135 S. Ct. 1293 (2015).
7. 15 U.S.C. § 1071.
8. *B&B Hardware*, 135 S. Ct. at 1307.
9. *Id.* at 1308.
10. *Id.* at 1310 (Ginsburg, J., concurring).
11. For a very recent example of this strategic maneuver, see *Board of Trustees of the University of Alabama v. Houndstooth Mafia Enterprises LLC*, in which a district court judge pummels the USPTO (with words) for refusing the judge's order to vacate a ruling adverse to the University of Alabama. No. 7:13-CV-1736, 2016 WL 706022 (N.D. Ala. Feb. 23, 2016).
12. See Trademark Manual of Examining Procedure §§ 1202.03 and 1202.03(a) (setting forth tests for deciding whether the overall “commercial impression” of a device functions as a mark).
13. 15 U.S.C. § 1052(e)(5); *Tie Tech, Inc. v. Kinedyne Corp.*, 296 F.3d 778, 782 (9th Cir. 2002).
14. *Rudolph Int'l, Inc. v. Realys, Inc.*, 482 F.3d 1195, 1197 (9th Cir. 2007).
15. *Id.* at 1197–98.

16. *Sengoku Works Ltd. v. RMC Int'l, Ltd.*, 96 F.3d 1217, 1219 (9th Cir. 1996) (“It is axiomatic in trademark law that the standard test of ownership is priority of use.”).
17. *Ashe v. PNC Financial Servs. Grp., Inc.*, No. PWG-15-144, 2015 WL 7252190, at \*6 (D. Md. Nov. 17, 2015).
18. *Nationstar Mortgage, LLC v. Ahmad*, No. 1:14-cv-1751, 2015 WL 9274920, at \*5 (E.D. Va. Dec. 17, 2015).
19. *B&B Hardware*, 135 S. Ct. at 1305–06.
20. *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1050 (9th Cir. 2008)
21. Trademark Trial and Appeal Board Manual of Procedure § 703.01.
22. *B&B Hardware*, 135 S. Ct. at 1309 (quotation omitted). The Supreme Court went on to state that a party trying to avoid issue preclusion must make a “compelling showing of unfairness.” *Id.* (quoting Restatement (Second) of Judgments § 28, cmts. g & j).
23. See *Contentguard Holdings, Inc. v. Amazon.com, Inc.*, No. 2:13-CV-1112-JRG, 2015 WL 5996363, at \*1–2 (E.D. Tex. Oct. 14, 2015) (discussing what effect, if any, *B&B Hardware* has on patent disputes).

After working as a clerk with the Idaho Supreme Court and as an associate with Hawley Troxell Ennis & Hawley LLP, in 2015 **Mr. Wieland** co-founded Wieland Perdue PLLC in Boise. Mr. Wieland practices commercial and corporate litigation, e-commerce, alcoholic beverage, and IP law.



# The USPTO's Rocky Mountain Regional Office: Supporting Innovation Throughout the Rockies

Allison C. Parker

**A**s part of a push to modernize the United States Patent and Trademark Office (USPTO), the federal agency responsible for granting U.S. patents and registering trademarks, the Leahy-Smith America Invents Act (AIA) required the USPTO to establish three or more regional offices throughout the country within three years of its enactment in 2011.<sup>1</sup> The USPTO had already announced that it would open a regional office in Detroit. In 2012, following a nationwide needs and capacity assessment, the USPTO announced three additional regional office locations — Dallas, Denver, and Silicon Valley. Thus, with the regional offices, the USPTO would maintain physical operations outside of the Washington D.C. metropolitan area for the first time in the agency's over 200-year history.

David Kappos, then Director of the USPTO, stated that “[b]y expanding our operation outside of the Washington metropolitan area . . . , we are taking unprecedented steps to recruit a diverse range of talented technical experts, creating new opportunities across the American workforce,” and that “[t]hese efforts, in conjunction with our ongoing implementation of the America Invents Act, are improving the effectiveness of our IP system, and breathing new life into the innovation ecosystem.”<sup>2</sup>

In Denver, the Rocky Mountain Regional Office opened on June 30, 2014 and began training its first class of patent examiners that July. Now, Denver hosts a full office of examiners as well as 19 Patent Trials and Appeals Board (PTAB) judges. Russ Slifer, former Chief Patent Counsel of Micron, served as Denver's first Director. In January of this year,

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Denver hosts a full office  
of examiners as well as 19 Patent Trials  
and Appeals Board (PTAB) judges.

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Molly Kocialski succeeded him when he accepted an offer to become the USPTO's Deputy Director in Alexandria, Virginia. With over 20 years of experience in intellectual property law, Director Kocialski was most recently Senior Patent Counsel for Oracle America, Inc. in Denver. Throughout her career, she has managed intellectual property litigation, patent prosecution dockets, post-grant PTAB proceedings, and patent investigations. A recognized leader in the intellectual property community, Director Kocialski brings technological savvy and a passion for the Rocky Mountain Region to the Denver Office.

Along with the other regional offices, the Rocky Mountain Regional Office works to achieve the following objectives:

1. increase outreach activities to better connect patent filers and innovators with the Office;
2. enhance patent examiner retention;
3. improve recruitment of patent examiners;
4. decrease the number of patent applications waiting for examination; and
5. improve the quality of patent examination.<sup>3</sup>

As part of its outreach goal, the Rocky Mountain Regional Office is working to make the benefits of the USPTO's presence in Denver apparent to Idaho practitioners. Not only does the Rocky Mountain Regional Office have an impact on the efficiency of patent examination procedures, it also provides valuable resources for Idaho patent attorneys, patent agents, and law students. Among those resources are the Patent Pro Bono Program and the Patent Experience Extern Program.

## Patent pro bono programs

As a result of the America Invents Act, the USPTO has worked with intellectual property law associations in various states to develop patent pro bono programs throughout the country. In addition to offering free services to inventors, these pro bono programs provide significant opportunities for patent attorneys to volunteer, and for law students to gain hands-on experience in patent prosecutions. Although not all patent attorneys are partnered with students, such mentorship is encouraged. To participate in a pro bono program, inventors must demonstrate that they earn less than a specified income threshold — usually 300% of

the federal poverty level — and must also demonstrate knowledge of the patent system. Such knowledge can be demonstrated by having a patent application on file or by successfully completing the USPTO's on-line certificate training course.

Currently, 18 regional pro bono programs serve all 50 states. Idaho is served by the California Inventors Assistance Program (CIAP), which also serves Oregon, Washington, Nevada, Arizona, Montana, Alaska, and Hawaii. The California Lawyers for the Arts administers the CIAP and offers malpractice insurance coverage to in-house counsel and government attorneys offering volunteer services.<sup>4</sup> Idaho attorneys and law students who wish to provide patent pro bono services are encouraged to contact the CIAP.<sup>5</sup>

### Patent experience extern program

For students, the USPTO offers the Patent Experience Extern Program (PEEP), through which students may work as externs within the Patent Office. Although the PEEP traditionally required that participants complete their externships in Alexandria, students may now extern in the Rocky Mountain Regional Office as well as in the other regional office locations.

As externs, students are exposed to different aspects of the USPTO and its mission. In Denver, externs work alongside PTAB judges and patent examiners to obtain a practical working knowledge of the patent process. During their externships, students may have the opportunity to review patent applications, research technology and prior art, draft office actions, and prepare written legal positions on issues from intellectual property to petition decisions. Throughout the years, University of Idaho law students have participated in the PEEP and report gaining significant insight into the

USPTO's inner workings. Two of those students went on to become full-time examiners in Alexandria, which only strengthens Idaho's relationship with the USPTO.

### Additional resources

In addition to the programs and services described above, the USPTO Rocky Mountain Regional Office offers facilities for conducting patent searches and conducts a host of workshops, trainings, and conferences. Furthermore, traveling to the Rocky Mountain Regional Office allows for in-person interviews with

In Denver, externs work alongside PTAB judges and patent examiners to obtain a practical working knowledge of the patent process.

Denver-based examiners and for use of interview rooms with videoconferencing capabilities to connect with examiners in Alexandria. Fi-

nally, starting this year, practitioners will be able to attend PTAB proceedings in Denver.

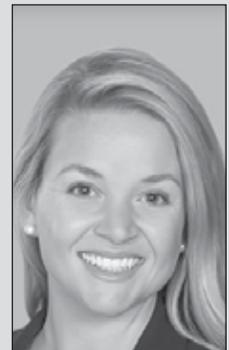
### Conclusion

In just a short period of time, the Rocky Mountain Regional Office already offers significant benefits to Idaho attorneys, law students, and inventors. As the Rocky Mountain Regional Office continues to develop, this tremendous resource will become even more valuable to Idaho practitioners.

### Endnotes

1. Leahy-Smith America Invents Act, Pub. L. No. 112-29, § 23(a), 125 Stat. 284 (2011).
2. Press Release, United States Patent and Trademark Office, U.S. Commerce Department to Open Four Regional U.S. Patent Offices That Will Speed Up the Patent Process and Help American Businesses Innovate, Grow, and Create Jobs (July 2, 2012), [www.uspto.gov/about-us/news-updates/us-commerce-department-open-four-regional-us-patent-offices-will-speed-patent](http://www.uspto.gov/about-us/news-updates/us-commerce-department-open-four-regional-us-patent-offices-will-speed-patent)
3. Pub. L. No. 112-29 at § 23(b).
4. BAR ASS'N OF SAN FRANCISCO, PRO BONO RESOURCE GUIDE 14 (2015), *available at* <http://www.sfbar.org/forms/barristers/pro-bono-resource-guide.pdf>.
5. The CIAP can be contacted through the California Lawyers for the Arts website ([www.calawyersforthearts.org/](http://www.calawyersforthearts.org/)) or by calling (888) 775-8995.

Allison Parker is a registered patent attorney at Hawley Troxell where she is a member of the firm's Patent and Emerging Technology Law team. She joined Hawley Troxell after clerking for the Honorable Jim Jones and is the Chair of the Intellectual Property Section.



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### OFFICIAL NOTICE SUPREME COURT OF IDAHO

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

#### Regular Spring Term for 2016 3rd Amended 2/18/16

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.

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

### OFFICIAL NOTICE COURT OF APPEALS OF IDAHO

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

#### Regular Spring Term for 2016 1st Amended – 2/18/16

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

By Order of the Court  
Stephen W. Kenyon, Clerk

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

### Idaho Supreme Court Oral Arguments for May 2016

2/16/16

#### **Wednesday, May 4, 2016 – POCATELLO**

8:50 a.m. *Doe v. Doe* (2016-05) ..... #43651  
10:00 a.m. *English v. Taylor* ..... #42947  
11:10 a.m. *Parks v. Safeco Ins.* ..... #43376

#### **Friday, May 6, 2016 – BOISE**

8:50 a.m. *Jeffcoat v. IDOC* ..... #43161  
10:00 a.m. *Wilson v. King* ..... #43086  
11:10 a.m. *Harper v. Phed Invest.* ..... #42864

#### **Monday, May 9, 2016 – BOISE**

8:50 a.m. *State v. Villafurete* ..... #42766  
10:00 a.m. *State v. Jones* ..... #42664  
11:10 a.m. *State v. Svelmoe* ..... #43181

#### **Wednesday, May 11, 2016 – BOISE**

8:50 a.m. *Jordan v. Dean Foods* ..... #43281  
10:00 a.m. *Eagle Equity v. Title One* ..... #42850  
11:10 a.m. *Doe v. Doe* (2016-01) ..... #43774

### Idaho Court of Appeals Oral Arguments for May 2016

3/11/16

#### **Thursday, May 19, 2016 – BOISE**

9:00 a.m. *State v. Herreman-Garcia* ..... #42941  
10:30 a.m. *Fortin v. State* ..... #43334  
1:30 p.m. *State v. Luna* ..... #43520

#### **Tuesday, May 24, 2016 – BOISE**

9:00 a.m. *State v. Garcia-Rodriguez* ..... #42730  
10:30 a.m. *Secured Investment Corp. v. Myers Exec. Bldg* ..... #43402

### Idaho Court of Appeals

**May 6, 2016**

**LAW DAY**

**Borah High School**

6001 W. Cassia Street, Boise, ID 83709

2/25/16

#### **Friday, May 6, 2016 – BOISE**

9:00 a.m. .... \*OPEN\*  
10:00 a.m. *State v. McNutt* ..... #42429

**Idaho Supreme Court and Court of Appeals**  
**NEW CASES ON APPEAL PENDING DECISION**  
**(Updated 4/1/16)**

**CIVIL APPEALS**

**Attorney fees and costs**

1. Whether the district court erred in awarding attorney fees and costs to Treasure Valley Seed under a prevailing party theory or under I.C. § 12-121.

*Smith v. Treasure Valley Seed Company, LLC*  
S.Ct. No. 42596  
Supreme Court

2. Whether the district court erred in awarding Silver Creek prejudgment interest and attorney fees.

*Silver Creek Seed, LLC v. Sunrain Varieties, LLC*  
S.Ct. No. 43078  
Supreme Court

3. Did the district court err when it concluded the transaction between the Eyers and IFG was a commercial transaction even though the gravamen of the Eyers' complaint was in tort, not contract?

*Eyer v. Idaho Forest Group*  
S.Ct. No. 43532  
Supreme Court

**Derivative action**

1. Whether the district court erred in denying as a matter of law the joint motion to dismiss derivative claims and in finding as a matter of law that respondents had properly asserted a derivative claim on behalf of Source 1 against Hodge.

*Prehn v. Hodge*  
S.Ct. No. 42465  
Supreme Court

**Evidence**

1. Did the district court err in admitting records under the business records exception to the hearsay rule?

*Portfolio Recovery Associates v. MacDonald*  
S.Ct. No. 43346  
Supreme Court

**Post-conviction relief**

1. Did the district court err in finding Nava's attorney did not render deficient performance with respect to advising on the impact of his plea and sentence on his immigration status as a lawful permanent resident?

*State v. Cosio-Nava*  
S.Ct. No. 43389  
Supreme Court

**Procedure**

1. Did the district court err in denying Myers' motion to set aside default judgment?

*Secured Investment Corp. v. Myers Executive Building*  
S.Ct. No. 43402  
Court of Appeals

2. Whether the district court erred in dismissing Estay's complaint with prejudice.

*Estay v. Northwest Trustee Service, Inc.*  
S.Ct. No. 43162  
Supreme Court

**Property**

1. Did the district court err in characterizing the Hills as innocent recipients of a benefit as recognized in Restatement (Third) of Restitution and Unjust Enrichment Section 65?

*Harrentsian v. Hill*  
S.Ct. No. 43627  
Supreme Court

**Quiet title**

1. Did the district court err in granting partial summary judgment and refusing to consider issues of fact as to the intent of the parties regarding the Temporary Easement?

*Kirk v. Wescott*  
S.Ct. No. 42593  
Supreme Court

2. Did the district court err by granting an easement through Thornton's residential property for the benefit of a parcel belonging to Clark?

*Thornton v. Pandrea*  
S.Ct. No. 42332  
Supreme Court

**Summary judgment**

1. Did the district court err by determining the lease and option to purchase were unenforceable under the statute of frauds?

*Hoke v. NeYada, Inc.*  
S.Ct. No. 43343  
Supreme Court

2. Whether the district court erred when it granted summary judgment to Syringa Surgical Center, LLC, by finding that appellants did not allege any negligent conduct by Dr. Allen at the time of or during Waino's surgery at the Surgical Center.

*Shatto v. Syringa Surgical Center, LLC*  
S.Ct. No. 42958  
Supreme Court

**Torts**

1. Whether the district court erred in denying the motion for directed verdict on DTC Group's claim for tortious interference with contract.

*Drug Testing Compliance Grp. v. DOT Compliance Serv.*  
S.Ct. No. 43458  
Supreme Court

**CRIMINAL APPEALS**

**Due process**

1. Did the State violate Nelson's right to a fair trial by committing multiple acts of prosecutorial misconduct during closing argument?

*State v. Nelson*  
S.Ct. No. 42984  
Court of Appeals

**Evidence**

1. Did the district court err when it granted the State's motion in limine to exclude evidence of the Intoxilyzer malfunctioning?

*State v. Cruz-Romero*  
S.Ct. No. 42994  
Court of Appeals

2. Should this court vacate Neyhart's conviction for lewd conduct with a minor because there was insufficient evidence to support the conviction?

*State v. Neyhart*  
S.Ct. No. 42923  
Court of Appeals

**Motion to dismiss**

1. Did the district court err by using an erroneous legal standard to reverse the magistrate's denial of the motion to dismiss made pursuant to I.C. § 18-8004(2)?

*State v. Luna*  
S.Ct. No. 43520  
Court of Appeals

**Right to counsel**

1. Did the district court deny Daly his Sixth Amendment right to counsel and abuse its discretion when it denied his motion to continue so he could retain different counsel?

*State v. Daly*  
S.Ct. No. 43549  
Court of Appeals

**Search and seizure – suppression of evidence**

1. Did the district court err by granting the motion to suppress and by finding the initial stop was not supported by reasonable suspicion?

*State v. Garcia-Rodriguez*  
S.Ct. No. 42730  
Court of Appeals

2. Did the district court err when it denied Ross' motion to suppress and found he had no standing to challenge the search of the vehicle?

*State v. Ross*  
S.Ct. No. 42968  
Court of Appeals

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



ABA Report: Where are the Country Lawyers?

Deborah A. Ferguson
Idaho Delegate
to ABA House of Delegates

The American Bar Association House of Delegates met on February 8, as part of 2016 Mid-Year Meeting in San Diego, California.

I attended as your Idaho State Bar Delegate, along with Jenn Jensen. Jenn is Idaho's first Young Lawyer Delegate. She is a member of the ISB Young Lawyers Section, and was selected as our Young Lawyer Delegate by the Board of Commissioners.

Paulette Brown, the first African American woman to lead the ABA, addressed the House of Delegates about her priorities. One of President Brown's goals as ABA President is to reach all 50 states, meeting with attorneys and at Boys & Girls Clubs across the country. We are very excited to welcome her to Idaho to speak at our Annual Meeting in Boise, July 14 at the plenary session.

The Honorable David L. Gilbertson, Chief Justice of the Supreme Court of South Dakota, also gave his remarks as the President of the Conference of Chief Justices. Chief Justice Gilbertson talked about availability of attorneys to people in the rural areas. As a lifelong resident of a rural county, the issue is of personal interest to him, as it is in every state, such as Idaho, with rural counties.

He noted that while much attention has been paid in the area of economic status and person classifications, scant attention has

been paid to the issue of geography. Rural areas are fast becoming seas of justice denied. To do nothing to reverse this course is a guarantee to increased failure of the legal system in rural areas until it ceases to function.

South Dakota has passed a law that will pay a stipend to a lawyer who agrees to practice in a rural area for five years the cost of that lawyer's legal education at in-state tuition rates. In just two years it has proven successful with 17 counties contracted for participation in the program. He indicated that other states are investigating alternatives which, hopefully, will also bear fruit.

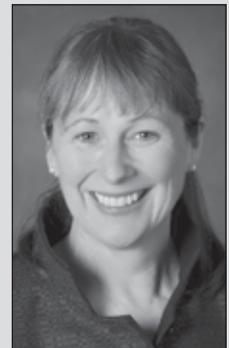
The House of Delegates agenda was especially interesting this year, and several resolutions were passionately debated. In particular, Revised Resolution 105 was the focus of attention. Resolution 105 urges each state's highest court be guided by the Model Regulatory Objectives when they assess the court's existing regulatory framework and any other regulation they may choose to develop concerning non-traditional legal service providers, such as LegalZoom.

Rural areas are fast becoming seas of justice denied.

I look forward to the ABA Annual Meeting in San Francisco in August 4-9, along with our Young Lawyer delegate, Jenn Jensen. I will report back to the Bar on the events of that meeting.

The ABA has an astounding 3,500 entities under its umbrella that provide value in innumerable ways. Certain benefits for attorneys can be provided only by a national professional association. The ABA advances individual lawyers in their careers, and it also advances the profession. If you are not currently an ABA member, I urge you to join.

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



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*Bannock - Pocatello*  
Judge Brown - Bannock  
Judge Presiding/Visiting - Bannock

*Bear Lake - Paris*  
Judge Brown - Bear Lake  
Judge Presiding/Visiting - Bear Lake

*Caribou - Soda Springs*  
Judge Brown - Caribou  
Judge Presiding/Visiting - Caribou

*Franklin - Preston*  
Judge Brown - Franklin  
Judge Hunt  
Judge Presiding/Visiting - Franklin

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# Listing the Canons of Construction

Stephen Adams

**T**he first day of my first job out of law school, I was handed a stack of papers about eight inches tall, and was told to read them over. These papers included sample Complaints, Answers, discovery requests, a few sample motions, and some other things. While most of this was helpful (and admittedly, a bit overwhelming), there is one thing in that stack that I have used over and over again throughout the years: a list of statutory construction principles, along with case cites. I have not been able to figure out who created this list, but whoever created it deserves to be given great credit.

I don't know whether such checklists are common, but I thought it would be worthwhile to share the wealth. Below is a list of canons of construction based primarily on Idaho caselaw (based in part on the list I was given). This list is by no means exclusive or comprehensive. It is designed primarily to be a quick checklist for use by practitioners. The first few are general principles of statutory construction, followed by a number of specific canons. At the end are some canons that apply to specific areas of law. Due to length, only the list of canons (with relevant citations) is provided here. A version of this article with expanded commentary can be found at [http://isb.idaho.gov/member\\_services/advocate/advocate\\_extra.html](http://isb.idaho.gov/member_services/advocate/advocate_extra.html).

1. Where the language of a statute is plain and unambiguous, courts give effect to the statute as written, without engaging in statutory construction.<sup>1</sup>

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The Legislature is presumed to have full knowledge of judicial decisions and existing caselaw.<sup>22</sup>

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2. “Only where the language is ambiguous will this Court look to rules of construction for guidance and consider the reasonableness of proposed interpretations.”<sup>2</sup>

3. Courts, “determine legislative intent by examining not only the literal words of the statute, but also the reasonableness of proposed constructions, the public policy behind the statute, and its legislative history.”<sup>3</sup>

4. Legislative history can be a guide for statutory construction.<sup>4</sup>

5. Extrinsic aids may be used to interpret an ambiguous statute.<sup>5</sup>

6. “When the language of a statute is ambiguous, [Courts] must consider the social and economic results which would be effectuated by a decision on the meaning of the statute.”<sup>6</sup>

7. Statutes should be given a, “reasonable and practical interpretation, in accord with common sense.”<sup>7</sup>

8. *Stare decisis* applies to statutory construction.<sup>8</sup>

9. Grammatical rules apply to statutory construction.<sup>9</sup>

10. *Ejusdem Generis*: “Where general words follow the enumeration of particular class of persons or things,

the general words will be construed as applying only to things of the nature enumerated.”<sup>10</sup>

11. *Noscitur a Sociis*: “[A] word is known by the company it keeps.”<sup>11</sup>

12. “Constructions that would lead to absurd or unreasonably harsh results are disfavored.”<sup>12</sup>

13. “In determining the ordinary meaning of a statute effect must be given to all the words of the statute if possible, so that none will be void, superfluous, or redundant.”<sup>13</sup>

14. Courts, “cannot insert into statutes terms or provisions which are obviously not there.”<sup>14</sup>

15. Courts are generally unwilling to correct errors or unanticipated consequences of a given statute.<sup>15</sup>

16. “*Expressio unius est exclusio alterius*.”<sup>16</sup>

17. If terms are defined in a statute or act, that definition controls construction of those terms.<sup>17</sup>

18. Words used in one place in a statute usually have the same meaning in every other place in the statute.<sup>18</sup>

19. The words “may” or “should” as used in a statute are permissive. The words “shall” and “must” are mandatory — except when they are not.<sup>19</sup>

20. Singular includes plural and vice versa, male includes female and vice versa, etc.<sup>20</sup>

21. The Legislature is presumed to have full knowledge of judicial decisions and existing caselaw.<sup>21</sup>

22. Courts, “presume the legislature was aware of those statutes previously enacted when passing new legislation.”<sup>22</sup>

23. Statutes adopted from other jurisdictions may be given the meaning adopted by the other jurisdiction.<sup>23</sup>

24. Modification of a statute indicates an intent to change the meaning of the statute.<sup>24</sup>

25. “The legislature is presumed not to intend to overturn long established principles of law unless an intention to do so plainly appears by express declaration or the language employed admits of no other reasonable construction.”<sup>25</sup>

26. Statutes should be reasonably construed to avoid implied repeal.<sup>26</sup>

27. Statutes should be reasonably construed, if possible, to avoid a constitutional conflict.<sup>27</sup>

28. If two statutes are irreconcilable, the later in date controls.

29. If two statutes address the same subject, the more specific statute controls over the general statute.<sup>28</sup>

30. Statutes are not retroactive unless there is a clear intent for them to be retroactive indicated by the legislature.<sup>29</sup>

31. Statutes should be construed *in pari materia*.<sup>30</sup>

32. When construing two separate statutes that deal with the same subject matter, the statutes should be construed harmoniously, if at all possible, so as to further the legislative intent.<sup>31</sup>

33. The Courts have the final say in construing statutes and determining legislative intent.<sup>32</sup>

34. Agency interpretation of a statute may not conflict with legislative intent.<sup>33</sup>

35. “[S]tatutes granting privileges or relinquishing rights are to be strictly construed.”<sup>34</sup>

36. Worker’s compensation statutes are construed in favor of the employee.<sup>35</sup>

37. Courts can consider consequences and effects when construing criminal statutes.<sup>36</sup>

The general rule appears to be that the most reasonable interpretation of a statute is the one that will likely be adopted by the Court, as it is the likeliest intent of the legislature.

In conclusion, the general rule appears to be that the most reasonable interpretation of a statute is the one that will likely be adopted by the Court, as it is the likeliest intent of the legislature. These canons are in place simply to help determine what is reasonable under the circumstances.

#### Endnotes

1. *In re Adoption of Doe*, 156 Idaho 345, 349, 326 P.3d 347, 351 (2014). See also *In re Winton Lumber Co.*, 57 Idaho 131, 63 P.2d 664, 666 (1936) (“Other rules of con-

struction are equally potent, especially the primary rule which suggests that the intent of the Legislature is to be found in the ordinary meaning of the words of the statute. The sense in which general words, or any words, are intended to be used, furnishes the rule of interpretation, and that is to be collected from the context; and a narrower or more extended meaning will be given, according as the intention is thus indicated.”); *Sweeney v. Otter*, 119 Idaho 135, 138, 804 P.2d 308, 311 (1990); *State v. Olivas*, 158 Idaho 375, 347 P.3d 1189, 1193 (2015); *Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 893, 265 P.3d 502, 506 (2011). Statutory authority for this principal interpretation issue is found in Idaho Code § 73-113.

2. *Stonebrook Const., LLC v. Chase Home Fin., LLC*, 152 Idaho 927, 931, 277 P.3d 374, 378 (2012). See also *State v. Olivas*, 158 Idaho 375, 347 P.3d 1189, 1193 (2015); *Porter v. Bd. of Trustees, Preston Sch. Dist. No. 201*, 141 Idaho 11, 14, 105 P.3d 671, 674 (2004); *In re Adoption of Doe*, 156 Idaho 345, 349, 326 P.3d 347, 351 (2014); *Bonner Cty. v. Cunningham*, 156 Idaho 291, 295, 323 P.3d 1252, 1256 (Ct. App. 2014); *Hamilton ex rel. Hamilton v. Reeder Flying Serv.*, 135 Idaho 568, 572, 21 P.3d 890, 894 (2001).

3. *State v. Olivas*, 158 Idaho 375, 347 P.3d 1189, 1193 (2015). See also *State v. Hickman*, 146 Idaho 178, 184, 191 P.3d 1098, 1104 (2008); *The Senator, Inc. v. Ada Cty., Bd. of Equalization*, 138 Idaho 566, 570, 67 P.3d 45, 49 (2003); *Lopez v. State*, 136 Idaho 174, 178, 30 P.3d 952, 956 (2001); *State v. Quick Transp., Inc.*, 134 Idaho 240, 244, 999 P.2d 895, 899 (2000).

4. See *Liefeld v. Johnson*, 104 Idaho 357, 367, 659 P.2d 111, 121 (1983); *Gillihan v. Gump*, 140 Idaho 264, 268, 92 P.3d 514, 518 (2004) (abrogated on other grounds by *Gonzalez v. Thacker*, 148 Idaho 879, 231 P.3d 524 (2009)); *Mix v. Gem Inv'rs, Inc.*, 103 Idaho 355, 357, 647 P.2d 811, 813 (Ct. App. 1982); *Meyers v. City of Idaho Falls*, 52 Idaho 81, 11 P.2d 626, 629 (1932); See, e.g., *In re Verified Petition for Writ of Mandamus*, No. 43169, 2015 WL 7421342, at \*20 (Idaho Nov. 20, 2015) (Eismann, J., concurring).

5. See *State v. Moore*, 111 Idaho 854, 856, 727 P.2d 1282, 1284 (Ct. App. 1986); *Local 1494 of Int'l Ass'n of Firefighters v. City*



(Ct. App. 1995); *City of Sandpoint v. Sandpoint Indep. Highway Dist.*, 126 Idaho 145, 150, 879 P.2d 1078, 1083 (1994).

22. *State v. Betterton*, 127 Idaho 562, 563, 903 P.2d 151, 152 (Ct. App. 1995). See also *State v. Perkins*, 135 Idaho 17, 21, 13 P.3d 344, 348 (Ct. App. 2000). See also *State v. Long*, 91 Idaho 436, 441, 423 P.2d 858, 863 (1967).

23. See *Sun Valley Land & Minerals, Inc. v. Burt*, 123 Idaho 862, 868, 853 P.2d 607, 613 (Ct. App. 1993); *Doe v. Durtschi*, 110 Idaho 466, 473, 716 P.2d 1238, 1245 (1986) (fn. 2); *Liefeld v. Johnson*, 104 Idaho 357, 367, 659 P.2d 111, 121 (1983). See also *Intermountain Bus. Forms, Inc. v. Shepard Bus. Forms Co.*, 96 Idaho 538, 541, 531 P.2d 1183, 1186 (1975) (“Idaho’s statute is modeled after the Illinois ‘long arm’ statute. Thus, we may look to the decisions of the Illinois court on point for persuasive guidance.”); *Chacon v. Sperry Corp.*, 111 Idaho 270, 273, 723 P.2d 814, 817 (1986) (adopting federal interpretation of the federal rules for the Idaho Rules of Civil Procedure).

24. See *Dohl v. PSF Indus., Inc.*, 127 Idaho 232, 237, 899 P.2d 445, 450 (1995). See also *Saint Alphonsus Reg’l Med. Ctr. v. Gooding Cty.*, 159 Idaho 84, 356 P.3d 377, 382 (2015) (quoting *Nebeker v. Piper Aircraft Corp.*, 113 Idaho 609, 614, 747 P.2d 18, 23 (1987)); *Lincoln Cty. v. Fid. & Deposit Co. of Maryland*, 102 Idaho 489, 491, 632 P.2d 678, 680 (1981).

25. *George W. Watkins Family v. Messenger*, 118 Idaho 537, 540, 797 P.2d 1385, 1388 (1990) *abrogated on other grounds by Verska v. Saint Alphonsus Reg’l Med. Ctr.*, 151 Idaho 889, 265 P.3d 502 (2011). See also *State v. Owens*, 158 Idaho 1, 343 P.3d 30, 39 (2015); *Burns Holdings, LLC v. Madison Cty. Bd. of Cty. Comm’rs*, 147 Idaho 660, 666, 214 P.3d 646, 652 (2009); *Doolittle v. Morley*, 77 Idaho 366, 372, 292 P.2d 476, 481 (1956).

26. See *Seiniger Law Offices, P.A. v. State ex rel. Indus. Comm’n*, 154 Idaho 461, 465, 299 P.3d 773, 777 (2013); *Callies v. O’Neal*, 147 Idaho 841, 847, 216 P.3d 130, 136 (2009); *Tetzlaff v. Brooks*, 130 Idaho 903, 904, 950 P.2d 1242, 1243 (1997).

27. *State v. Olivas*, 158 Idaho 375, 380, 347 P.3d 1189, 1194 (2015) (quoting *Grice v. Clearwater Timber Co.*, 20 Idaho 70, 117 P. 112, 114 (1911)). See also *Ida-*

*ho State AFL-CIO v. Leroy*, 110 Idaho 691, 698, 718 P.2d 1129, 1136 (1986). See also Idaho Code § 73-101.

28. Canons 28 and 29 are often quoted together. See *Beehler v. Fremont Cty.*, 145 Idaho 656, 658, 182 P.3d 713, 715 (Ct. App. 2008); *Arthur v. Shoshone Cty.*, 133 Idaho 854, 861, 993 P.2d 617, 624 (Ct. App. 2000); *Roe v. Harris*, 128 Idaho 569, 572, 917 P.2d 403, 406 (1996) *abrogated on other grounds by Rincover v. State, Dept’ of Fin., Sec. Bureau*, 132 Idaho 547, 976 P.2d 473 (1999); *Tomich v. City of Pocatello*, 127 Idaho 394, 400, 901 P.2d 501, 507 (1995); *State v. Gamino*, 148 Idaho 827, 829, 230 P.3d 437, 439 (Ct. App. 2010); *State v. Betterton*, 127 Idaho 562, 564, 903 P.2d 151, 153 (Ct. App. 1995).

29. See *Gailey v. Jerome Cty.*, 113 Idaho 430, 432, 745 P.2d 1051, 1053 (1987); *Guzman v. Piercy*, 155 Idaho 928, 938, 318 P.3d 918, 928 (2014); *Wheeler v. Idaho Dep’t of Health & Welfare*, 147 Idaho 257, 262, 207 P.3d 988, 993 (2009). See also *State v. Owens*, 158 Idaho 1, 6, 343 P.3d 30, 35 (2015); *Sanders v. Bd. of Trustees of Mountain Home Sch. Dist. No. 193*, 156 Idaho 269, 273, 322 P.3d 1002, 1006 (2014) for a discussion of retroactive caselaw.

30. See *City of Sandpoint v. Sandpoint Indep. Highway Dist.*, 139 Idaho 65, 69, 72 P.3d 905, 909 (2003); *Saint Alphonsus Reg’l Med. Ctr. v. Elmore Cty.*, 158 Idaho 648, 653, 350 P.3d 1025, 1030 (2015) (quoting *Grand Canyon Dories v. Idaho State Tax Comm’n*, 124 Idaho 1, 4, 855 P.2d 462, 465 (1993)); *Meyers v. City of Idaho Falls*, 52 Idaho 81, 11 P.2d 626, 629 (1932).

31. See *State v. Seamons*, 126 Idaho 809, 811-12, 892 P.2d 484, 486-87 (Ct. App. 1995); *State v. Thiel*, 158 Idaho 103, 110,

343 P.3d 1110, 1117 (2015); *State v. Doe*, 147 Idaho 326, 329, 208 P.3d 730, 733 (2009); *State v. Callaghan*, 143 Idaho 856, 858, 153 P.3d 1202, 1204 (Ct. App. 2006); *Edwards v. Indus. Comm’n of State*, 130 Idaho 457, 461, 943 P.2d 47, 51 (1997); *Kaseburg v. State, Bd. of Land Comm’rs*, 154 Idaho 570, 577, 300 P.3d 1058, 1065 (2013).

32. See *J.R. Simplot Co. v. Idaho State Tax Comm’n*, 120 Idaho 849, 853, 820 P.2d 1206, 1210 (1991) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60, 73 (1803)); *Mulder v. Liberty Nw. Ins. Co.*, 135 Idaho 52, 57, 14 P.3d 372, 377 (2000).

33. See *J.R. Simplot Co.* 120 Idaho at 861-62, 820 P.2d at 1218-19. See also *A & B Irr. Dist. v. Idaho Dep’t of Water Res.*, 154 Idaho 652, 653-54, 301 P.3d 1270, 1271-72 (2012); *A & B Irr. Dist. v. Idaho Dep’t of Water Res.*, 154 Idaho 652, 653-54, 301 P.3d 1270, 1271-72 (2012); *Hood v. Idaho Dep’t of Health & Welfare*, 125 Idaho 151, 154, 868 P.2d 479, 482 (1994).

34. See *Pocatello v. State*, 145 Idaho 497, 501, 180 P.3d 1048, 1052 (2008) (citing and quoting from *Caldwell v. United States*, 250 U.S. 14, 20, 39 S. Ct. 397, 398, 63 L. Ed. 816 (1919)).

35. See *Davaz v. Priest River Glass Co.*, 125 Idaho 333, 337, 870 P.2d 1292, 1296 (1994); *Wernecke v. St. Maries Joint Sch. Dist. No. 401*, 147 Idaho 277, 282, 207 P.3d 1008, 1013 (2009).

36. See *State v. Yager*, 139 Idaho 680, 690, 85 P.3d 656, 666 (2004); *State v. Webb*, 76 Idaho 162, 167, 279 P.2d 634, 636-37 (1955); *State v. Herrera*, 152 Idaho 24, 28, 266 P.3d 499, 503 (Ct. App. 2011).

Stephen Adams is a staff attorney for Judge Lynn Norton in Ada County. He is extraordinarily proud of his wife (who graduated from law school and passed the bar in 2015) and three daughters.



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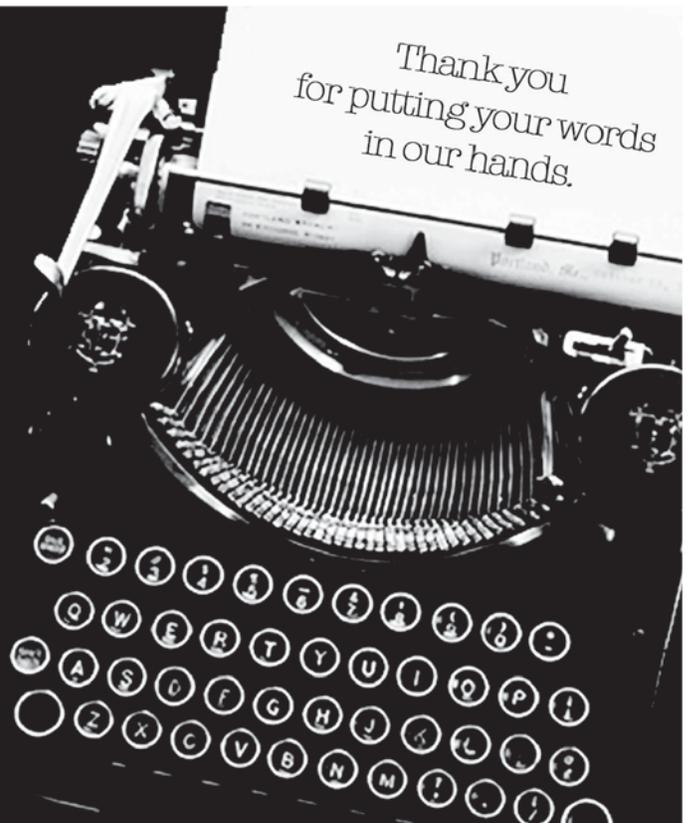
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*The spoken word perishes; the written word remains.*



# De Facto Demise of the Locality Rule

E. Lee Schlender

In the article “Moving Towards a Workable Definition of ‘Community’ after *Bybee v. Gorman*”; Advocate, (January 2016) Authors Marvin M. Smith and Austin T. Strobel tackle the never-ending turmoil created by the 1976 Idaho Malpractice Act. The common law standard for medical negligence was simple: the “reasonable man” standard, which had been applied to medical litigation for centuries and was the law of Idaho prior to the “insurance crisis” of 1976. State legislatures jumped when alarms were raised by skyrocketing medical costs.

The solutions advocated by the U.S. Chamber of Commerce and insurance industry were caps on damages, locality rules making it more difficult to sue doctors, limiting punitive damages, pre-trial screening, limits on attorney’s fees and certificate of merit requirements. An alleged “disparity” of available medical services was also considered as needing remedial legislation. Small community doctors could be held to the standards of city doctors with unfair results.<sup>1</sup> In sum, a stranglehold on litigation was advocated as the solution. Bench and bar were overnight put to the task of interpreting and applying vague statutory schemes with serious constitutional ramifications, including violation of due process and equal protection guaranteed by the Fourteenth Amendment and Art. I, §§ 2, 13 and 18 of the Idaho Constitution.<sup>2</sup>

In the past 40 years retrospective studies by major commissions and foundations concluded that the “crisis” was non-existent; it was simply a profit-driven campaign.<sup>3</sup> However, the legislative damage had been done. Unraveling the mess is glacially progressing in Idaho and

Bench and bar were overnight put to the task of interpreting and applying vague statutory schemes with serious constitutional ramifications, including violation of due process and equal protection.

other states that adopted the “locality rule”: the standard of care is empirical, what is practiced in each city or county.

## The tilted windmill of medical sovereignty

The favoritism of bench and bar toward physicians is reflected in our culture and legal decisions throughout the United States, and gained strength in the 21st century, with one court holding that “[w]e cannot ignore this time honored sympathy between doctor and patient.”<sup>4</sup> Similarly, the Vermont appellate court recognized “this powerful trust that a patient may have in his physician’s professional judgment and hold that, where a juror is a current patient of a defendant-doctor in a malpractice suit, it is reversible error to deny a challenge for cause made against that juror.”<sup>5</sup>

One commentator noted that “[m]edicine is also, unmistakably, a world of power where some are more likely to receive the rewards of reason than are others... In America, no one group has held so dominant a position in this new world of rationality and power as has the medical profession.”<sup>6</sup> Even ancient

philosophers have weighed in, with Plato noting that “[a] sick man loves a physician because he is sick.”<sup>7</sup> The Roman philosopher Lucius Annaeus Seneca queried this favoritism: “Why then, are we so much indebted to these men? Not because what they sold us is worth more than we paid for it, but because they have contributed something to us personally.”

The esteem and admiration showered upon medicine smoothed the road, and in part, accounts for the deference of the Idaho courts to conservative lower court opinions in the cloak of judicial discretion.

## Judicial frustration

District Judge Duff McKee opined in *Keyser v. Garner*<sup>8</sup>, that how to qualify an expert in a medical negligence case “has plagued the bench and trial bar since the enactment of Idaho’s statutory structure requiring proof of the actual knowledge of the local standard of care.” Over one hundred Supreme Court opinions, hundreds of summary judgment motions and untold hours of judicial time have been devoted to this issue. The author’s numerous Supreme Court cases are an example of how a singular attorney responded. It has not stopped.<sup>9</sup>

In 1988, however, the Idaho Supreme Court chastised trial judges who were granting summary judgment on the basis of plaintiff's experts not being knowledgeable of the local standard of care: "We take this occasion to express our disapproval of what appears to be a growing practice among trial courts of this state dismissing medical malpractice cases at the summary judgment point on the basis the Plaintiff's expert witnesses are not sufficiently familiar with the standard of care to be expected from defendant-physicians."<sup>10</sup>

Nevertheless, trial judges continued to be convinced that they were protecting physicians from ruin. Coming to the defense of doctors was and is understandable; every human loves his doctor. It was predictable judges would see themselves as saviors of a most sacred profession; the flood of summary judgment decisions was the result. However, rumblings could be heard. In *Dulaney v. St. Alphonsus Regional Medical Center*,<sup>11</sup> in a vigorous dissent, Justices Kidwell and Schroeder, hardly flaming liberals, attacked appellate opinions that utilize an overly strict and parochial methodology to deter and bar a serious possible medical malpractice situation from being litigated...in *Hoene v. Barnes*, 121 Idaho 752, 828 P.2d 315 (1992), this Court noted that I.C. §§ 6-1012, -1013 should not be utilized to shield physicians from suit in malpractice cases...there is no indication in I.C. §§ 6-1012 and 6-1013 that the legislature intended to grant this immunity from suit. . . .<sup>12</sup>

The Court's admonition fell on deaf ears; the stream of summary judgments and appeals increased. Not recognized or considered was the cost in human suffering, waiting years for reversal of the ruling and a jury trial.

### Role of the attorney

Note should be made that the hardships created by the locality rule are compounded when expert affidavits are poorly prepared; medical litigation is extremely complex. Attorneys need not be specialists before they can handle a medical lawsuit; the only requirement is a license to practice law. As a result, the judge needs but often does not receive expert affidavits that properly address the standard of care. In fact, the Idaho Supreme Court admonished attorneys to craft the affidavits of experts more carefully to reduce

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the number of summary judgment motions erroneously granted.<sup>13</sup>

There is assistance and training available to attorneys: ABA approved board certification is provided by the American Board of Professional Liability Attorneys.<sup>14</sup> While eliminating the locality rule will certainly make the attorney's work easier, the need for attorneys well versed in medical law will remain.

### National standardization

In their article, Smith and Strobel contend the locality rule is required in medical malpractice cases

since there is a continued disparity between similarly situated Idaho physicians and hospitals in terms of facilities and availability of cutting edge medical equipment...smaller regional hospitals and practitioners that still do not have *the most up to date facilities, specialized in highly trained staff, and equipment...* in light of these continued disparities, the community standard of health care practice still has a place in Idaho.

First, carefully note that Smith and Strobel expressly omit *physician training, education and certification* as categories of disparity. Second, while there may be some "smaller regional hospitals" without cutting edge technology, they are the exception, not the rule. The Idaho Supreme Court has recognized this standardization of medicine, regardless of the size of the community or the availability of medical facilities: "The point is that in the present medical care environment, there are a variety of ways that a medical malpractice plaintiff may be able to establish a local standard of care as being synonymous with a regional or national standard."<sup>15</sup>

Uniformity is now more prevalent than being an exception. Smith and Strobel are correct; uniformity eliminates the need for a locality rule save those few cases that center on "facilities and equipment;" hardware so to speak. It follows that in all medical cases not involving issues of bricks and mortar the locality rule is obsolete and should be abandoned. If cutting edge medical facilities are needed such as specialized hospitals and staff to treat cancer, complex diseases, pathology, rarified surgery and other complexities, the Treasure Valley/ Coeur d'Alene / Pocatello-Idaho Falls hospitals meet that need. The geographical area commonly served (community) by these regional health centers extends from North to South Idaho. There is scant dis-

parity between the “facilities and equipment” between our regional centers. If a rural doctor or hospital lacks specialized facilities they are a phone call or helicopter ride away. The standard of care will center only on proper referral and consultation. The expert can familiarize himself with the standard by talking with a doctor knowledgeable of the facilities and equipment available, easily determined regardless of overlapping service areas that are subject to change as new facilities are built.

Smith and Strobel tacitly agree with Professor Marc D. Ginsberg as to the uniformity of learning and training of Idaho doctors:

Does Idaho need the locality rule? Is Idaho a place where frontier medicine is practiced such that it is deserving of a rule similar to, if not more strict than, that born in the 1800s? The answer to both questions is “no.” With more than 2,500 board certified physicians in Idaho, if the locality rule was designed to protect physicians due to uneven access to medical knowledge in rural, remote or other areas of the United States, the reason for that protection is long since ceased to exist.<sup>16</sup>

Was partially abolishing the locality rule the argument Smith and Strobel intended to make or did they simply unconsciously acknowledge the reality that defining the geographical limits of hospital technology is all that can be justified? Regardless of intention, they narrowed the categories of potential disparities, adding real value to this body of law, pointing out the overlooked but genuine distinction between standardization of physician qualifications and rapidly changing medical technology.

The next step by Smith and Strobel was addressing these remaining differences with evidentiary limitations.

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Drawing a circle with a five mile diameter around the “licensed general hospital nearest to where the alleged negligent care was provided” mandates that only doctors familiar with practices in that specific area will be qualified to advise experts as to the standard of care.

### Drawing a circle

Clearing the decks so to speak before analyzing the “circle solution” requires applying the deductive principle that the conclusion (apply geometry to areas of disparity) rests upon a valid premise; the need for redefining what constitutes a community cannot be supported if the disparity does not exist. Indeed, the absence of genuine disparity defeats rather than supports using tools such as boundaries, especially if they are artificial; plopping down a circle with no factual difference between what is inside of it and what is external. The missing valid premise; that proven disparities exist, can be the end of the argument. Logically that is the case, but if limited disparity in *medical technology* is presumed to exist, then the “circle solution” must be examined for merit.

Drawing a circle with a five mile diameter around the “licensed general hospital nearest to where the alleged negligent care was provided” mandates that only doctors familiar with practices in that specific area will be qualified to advise experts as to the standard of care, making it a near certainty that a plaintiff will not find a doctor who will talk to the out-of-state expert since the doctor pool has been drastically diminished. More questions are raised than answered: can the local doctor be simply knowledgeable of the

standard within the circle or must he or she live within it? Smith and Strobel suggest that the local doctor must “practice” within the circle. How are we to define what “practice” means? Perhaps having privileges at the hospital is a criterion, but many specialists do not send patients to hospitals. Also, what about specialists from different cities in the state that have irrefutable knowledge of statewide standards but do not have an office or clinic in the town where the alleged malpractice occurred?

The *Bybee* court concluded that whether or not a particular geographical area constitutes a “community” that is “ordinarily served” for patients requires definitional flexibility that is “entirely consistent with the discretionary nature of the decision confronting a trial judge addressing a challenge to the admissibility of a medical expert’s testimony.<sup>17</sup> *Bybee* recognizes the reality that the geographical areas served by hospitals are indistinct and frequently overlap. In urbanized areas, several hospitals can be within 15-20 miles of one another and all be within what would be termed the community that is “ordinarily served.” That is precisely the case in the Treasure Valley and the multiple hospitals of the St. Luke’s and St. Alphonsus systems that overlap from Caldwell to Mountain Home.

## Conclusion

In 1968 Professor Jon Waltz predicted that “the locality rule, long in the process of shrinking, will gradually disappear almost completely,” stressing that the character of the community was only one factor to be taken into account in determining a medical standard. Waltz concluded that:

[t]he collapse of the local rule is a welcomed example of the law’s processes of self-refinement. If the rule were ever justifiable, it clearly is not now...one is compelled almost inexorably to the conclusion that the locality rule’s patchwork approach is more a child of the legal profession than of the medical, a tactically advantageous principle to be clung to apologetically by one segment of the trial bar until the courts, sensing that it is no longer rooted in reality, take it away... The locality rule will pass unlamented by all but a handful of lawyers and a few substandard medical practitioners.<sup>18</sup>

Unfortunately, Professor Waltz was not prescient.

The locality rule rewards provincial medicine; if all the doctors in a community are ignorant or even willfully dismissive of medical advances there is no reason to change. Sub-standard medicine is embedded into the corpus of the case. As Attorney Jeremiah Quane enjoys telling it: Under Idaho law if the doctors in Boise treat a broken leg by hitting the patient in the head with a hammer, that is the standard of care. His structural metaphor is harsh but valid. Is the bench and bar forever tasked with deciding what is the “local” standard; what is a “community;” what hospital “ordinarily serves” a town or county? If the premise is accepted that there are no alternatives, *Bybee v. Gorman* is as good as it will get; leaving it to the notorious “battle of the experts.”

*Bybee v. Gorman* and Smith and Strobel invite continued erosion of the locality rule; the Supreme Court has strived to mitigate the damage done, short of revisiting and overruling *Jones vs. Board of Medicine* (which should happen if the locality rule remains the law). The standard prior to 1976 was and is good law followed by most states. An exception for variations in medical technology can be written into future legislation.

The locality rule rewards provincial medicine; if all the doctors in a community are ignorant or even willfully dismissive of medical advances there is no reason to change.

Opposition to remedial legislation has come from the trial bar as well as the insurance industry, which obviously has a vested interest in doctors perceiving they are threatened and thus willing to pay exorbitant amounts for malpractice premiums. The institutionalized culture of “deny and defend” is toxic. The reporting of errors and openly discussing how to improve patient safety is not promoted; there is an unacceptable toll on physicians who live in fear of litigation which even if settled, must be reported to the dreaded National Practitioner Data Bank. Tort reform legislation was and is a failure; malpractice premiums continue to skyrocket. An opportune future for medicine and law

should include early disclosure of errors, safe harbors for those who adhere to expected clinical guidelines, aggressive use of mediation and what should be foremost, patient well-being and safety. Rather than “deny and defend,” the response to medical error should be admit, learn and mediate. Frivolous and meritless cases should be aggressively defended. Litigation should be a last resort rather than the first step. Then and only then will malpractice litigation be what it should be; a rarity rather than a mainstay of trial practice and appeal.

The author wants to *thank* Angela Kaufman of the Editorial Board and Joseph F. Brown M.D.J.D. for their invaluable editing assistance.

## Endnotes

1. *Buck v. St. Clair*, 108 Idaho 743, 746, 702 P.2d 781, 784 (Idaho 1985).
2. See, *Jones v. State Board of Medicine*, 97 Idaho 859, 555 P.2d 399 (1976) (holding that constitutional protections were not impaired).
3. Schlender, E. Lee; *Malpractice and the Locality Rule: Stuck in the Nineteen Century*; Vol.44. Idaho Law Review 631 (2008); For an excellent comprehensive analysis see, Sloan and Chepke, *Medical Practice*, MIT press (2008); Boehm G., *Debunking medical malpractice myths: unraveling the false premises behind “tort reform”*. Yale J Health Policy Law and Ethics 2005 Winter 5(1): 257-69; Thomas Baker *The Medical Malpractice Myth*, (University of Chicago Press (2005).
4. *Grey v. Sherwood*, 436 So.2d 836 (Ala. 1983).
5. *Jones v. Shea*, 532 A.2d 571 (Vt. 1987)
6. Paul Starr, “The Social Transformation of American Medicine” Perseus Books Group 1982.
7. Plato in *Lysis* (217 AD).
8. *Keyser v. Garner*, 129 Idaho 112, 922 P.2d 409 (1992).
9. *Shane v. Blair*, 139 Idaho 126, 75 P. 3d 180 (2003); *Mains v. Cach*, 143 Idaho 221, 141 P. 3d 1090 (2006); *Theriat v. AH Robins Co., Inc.*, 108 Idaho 303, 698 P. 2d 365 (1985); *Edmunds v. Kraner*, 142 Idaho 867, 136 P. 3d 338, (2006); *Higuera v. Hiestand*, 128 Idaho 700, 918 P.2d 284 (1996); *Leaz-*

*er v. Kiefer*, 120 Idaho 902, 821 P. 2d 957 (1991); *Pearce v. Ollie*, 121 Idaho 539, 826 P. 2d 888, (1992).

10. *Clarke v. Prenger*, 114 Idaho 766, 760 P. 2d 1182 (1988).

11. *Dulaney v. St. Alphonsus Regional Medical Center*, 137 Idaho 160, 45 P. 3d 816 (2002)

12. *Dulaney*, 137 Idaho at 170-71, 45 P.3d at 826-829.

13. *Ramos v. Dixon*, 144 Idaho 32, 156 P.3d 533 (2007).

14. Schlender, "Specialization; the New Reality?" *Idaho Trial Lawyers Journal* (2005).

15. *McDaniel v. Inland N.W. Gr-Idaho LLC, Renal Care*, 144 Idaho 219, 159 P. 3d 856 (2007).

16. Mark Ginsberg. *The Locality Rule Lives! Why? Using Modern Medicine To Eradicate An "Unhealthy" Law*, 6100 *Drake Law Review* 321 (2013). This author made the same argument in 2008; E.Lee Schlender, *Malpractice and the Idaho Locality Rule: Stuck in the Nineteenth Century* Schlender, 44 Idaho L. Rev. 361 (2008). See also:

Monique C. Lillard, *The Standard of Care for Health Providers in Idaho*, 44 Idaho

L.Rev. 295 (2008); Kelley Ann Porter Note, *Dulaney v. Saint Alphonsus Regional Medical Center: Reconstructive Surgery for Plaintiffs' Medical Nightmare- A Call for Reform of the Local Standard of Care*, 38 Idaho L.Rev. 597, 620-25 (2002).

17. *Bybee*, 157 Idaho at 177, 335 P.3d at 22 (also discussing *Ramos v. Dixon*, 144 Idaho 32, 156 P.3d 533 (2007)).

18. Jon R. Waltz, *The Rise and Gradual Fall of the Locality Rule in Medical Malpractice Litigation*, *DePaul Law Review*, Vol.18 (summer 1969) (citing Prosser on Torts, 166-67 (3<sup>rd</sup> Ed. 1964)).

The institutionalized culture of "deny and defend" is toxic.



E. Lee Schlender has been a trial lawyer since 1967 and is a board certified medical malpractice specialist, American Board of Professional Liability Attorneys. He was sole counsel for over 100 Idaho Supreme Court civil appeals, the most in Idaho's history. His latest book is *Negligence Law and Practice for the Patient's Lawyer* (2014) available widely. He works at Schlender-Brown PLLC, which specializes in medical and catastrophic injury cases.



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# Beyond the Basics: Typographic Symbols in Writing

Tenielle Fordyce-Ruff

Last week my students finished their major assignment for the spring semester. As we were working on proofing and editing, one student asked me when to use § and when to use “section.” I quickly explained the rules, but I’m so used to the legal writing conventions about § that I was almost shocked by the question.

Later it dawned on me that other writers might also be confused about when or how to use typographic symbols in their writing. So this month’s column will cover general advice about using symbols, as well as specific advice about using common symbols.

## General advice

Writers use typographic symbols to help the reader instantly recognize what information she is conveying. Compare these sentences:

*Legal writers use some symbols almost ninety-nine percent more than any other type of writer.*

*Legal writers use some symbols almost 99% more than any other type of writer.<sup>1</sup>*

Indeed, the use of an unfamiliar symbol would only serve to confuse the reader. For instance, I saw this symbol in my Word program, ¶, but I have no idea what it means or how to use it. Seeing it in a brief would confuse and frustrate me. So unless you know a reader will instantly recognize a symbol, don’t use that symbol. Conversely, if you know the use of a common symbol will help convey your meaning more easily, please use it.

Of course, never use a symbol to begin a sentence!

¶ 17 of the contract provided for liquidated damages.



This just looks odd and would jar the reader (as well as violate grammar rules). Instead, write out the word the symbol stands for.

*Paragraph 17 of the contract provided for liquidated damages.*

## Section and paragraph symbols: § and ¶

These symbols appear so frequently in legal writing that legal readers instantly recognize them. They are so recognizable, in fact, that their use facilitates understanding at least as much as the written version. Nonetheless, there are a few rules to follow when using § and ¶.

First, always use a hard space between the symbol and the number that follows it.

*The student alleged the charter school was a state actor pursuant to § 1983.*

*Pay particular attention to ¶ 17 of the contract.*

Second, double the symbol to pluralize it.

*The Americans with Disabilities Act addresses public accommodations in §§ 12181-12189.*

---

If you know the use of a common symbol will help convey your meaning more easily, please use it.

---

*The opinion dealt with retaliation in ¶¶ 45-56.*

Note, however, that the double-creates-a-plural doesn’t apply to subsections. Instead, use a single § to refer to multiple subsections within one section.

*The ADA defines public accommodations in § 12181(7)(a)-(l).*

## Other symbols used with numbers: \$, ¢, °, and %

Like § and ¶, the symbols for dollar, cents, degree, and percentage are at least as easily understood than their written counterparts. So to aid the reader's comprehension, use the symbols in text. Do not, though, use a space between these symbols and the numbers.

*I spent over \$800 for a new paddleboard.*

*I paid 99¢ for ice water.*

*It was a 90° day.*

*I was able to play on only about 50% of the sunny days.*

There are a few exceptions to this preference for symbols. First, if the number begins the sentence or should be written out, also write out the word the symbol stands for.

*Eight hundred dollars was a great price for the paddleboard.*

*Ninety-nine cents was too much to pay for water.*

*Ninety degrees seemed hot after a week of rainy spring days.*

*One hundred percent of my family loves water sports.*

Second, if the number is used imprecisely, write it and the word the symbol stands for out.

*Seventy-degree weather isn't uncommon in May.*

Finally, if you're writing about a range, repeat the symbol.

*Paddleboards range \$400 to \$1200.*

*Kayak sales increase 25%—30% after the first hot day in the spring.*

## Trademark and copyright symbols: ™, ®, and ©

Protected marks do not have to be identified with an intellectual-property symbol every time the mark is reproduced.

These symbols are becoming more common, but they still have very specific uses in formal writing. Indeed, the @ should be used only in email addresses.

*Google Docs™ is a useful, web-based processing program.*

Instead, capitalize the trademarked word without using a symbol.

*Google Doodles have become popular.*

Also, the copyright symbol, ©, should not appear in text. Instead, use it only in the copyright notice line.

© 2015 Google Inc. All rights reserved. Google and the Google Logo are registered trademarks of Google Inc.<sup>2</sup>

## Other common symbols: @ and &

These symbols are becoming more common, but they still have very specific uses in formal writing. Indeed, the @ should be used only in email addresses.

*You can reach me at tfordyce@cu-portland.edu.*

Likewise, & should not be used in text unless referring to a business name that uses the symbol.

*Johnson & Johnson  
Sears, Roebuck and Co.*

## Conclusion

I hope this month's column didn't make you go #\*%&#! That is, of course, the final use of symbols that you should avoid in legal writing.

## Source

- Bryan A. Garner, *The Redbook: A Manual on Legal Style* § 6 (2d ed. 2006).

## Endnotes

1. I made this statistic up, but I've never seen a § or a ¶ in fiction, a newspaper, or a magazine, so it seems true!
2. <https://www.google.com/permissions/trademark/our-trademarks.html>, last visited Mar. 22, 2016.

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



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## IN MEMORIAM

### **G. Michael Lee** 1943 – 2016

CHALLIS — G. Michael Lee, 72, passed away on January 31, 2016, at his home. He was born on March 27, 1943 in Boise, the eldest of three sons to Earl and Ann (Bermeosolo) Lee. Michael grew up in Boise. The family moved to California because his father was an actor.

He joined the U.S. Navy in 1964 and served during the Vietnam conflict. He was honorably discharged in 1967. He attended Northwest Missouri State College and UCLA School of law. Upon graduation from law school, he worked at a Beverly Hills law firm for a few years before moving to Moscow, where he passed the Idaho Bar Exam. He joined the Ellison M. Matthews law firm in Boise in 1975, and was a public defender for Ada County, and also had a thriving private law practice.

He met Jon Miller in 1978, and together Michael and Jon decided they had had enough of the big city and moved to Challis in August, 1981. He opened his law firm with his partner Charles Roos. Roos soon became the Magistrate Judge and Michael continued at his firm until his retirement last year. During his time in Challis, in addition to his private practice, he served as both public defender and prosecuting attorney.

Michael is survived by his wife, Jon, of Challis, Idaho; daughter, Lisa Rylen (Simon) Feeney of Portland, Oregon; son, Jason Noble (Barbara)



G. Michael Lee

Lee of Portland, Oregon; grandchildren; two brothers, Robert Earl (Laurie) Lee of Boise, Idaho, and Scott (Debra) Lee of Challis, Idaho. He was preceded in death by his parents.

### **Thomas B. High** 1952 - 2016

TWIN FALLS — Thomas B. High passed away at home on March 27 after a seven-month battle with bile duct cancer. Through all the treatments and medical issues, Tom fought this cancer with courage and strength.

Tom was born on August 24, 1952, in Twin Falls, the second child of Bob and Shirley High. He grew up in Twin Falls, working on the family farm in summers with his brothers. Tom attended the University of Utah, graduating in 1973 with a B.S. in Psychology, and spent a year in the graduate Psychology program at the University of Tennessee. He met and married his wife Patty in April, 1976, and graduated from the University of Idaho School of Law in 1979.

Tom was a practicing attorney, a partner with Benoit, Alexander, Harwood, High & Mollerup until the time of his death. His law firm was his second home and family. Bob and Bren were his sounding board, and advisors when needed, Sharon and Kathy kept the “home” fires burning.

Tom was an active member of the Idaho State Bar, teaching many CLE’s and serving on committees.



Thomas B. High

He loved mentoring young lawyers. He was a past president of the Fifth District Bar Association, the Idaho Association of Defense Counsel, and a Board of Governor Member of the International Society of Barristers. He was a current member of the American College of Trial Lawyers, and the American Board of Trial Advocates. He served on the University of Idaho Foundation, and was an attorney representative to the Idaho Federal Court.

Tom is survived by his wife Patty, his daughter Colene (Stephen) Saffar-Fashandi, his son Scott (Amber) High, a granddaughter, his siblings, Ken (Janis) High, Steve (Lisa) High, Janet (Chris) McIntosh, and Doug (Kim) High. He was preceded in death by his parents, Bob & Shirley High.

Tom served on the boards of The Twin Falls School District Education Foundation, and Magic Valley Rehabilitation Services, both dear to his heart.

### **Timothy Scott** 1972 - 2016

DENVER — Timothy Daniel Scott was born on October 19, 1972 to Ronald O. Scott, Jr and Valerie K. Scott in Pocatello, ID. He died on March 18, 2016 of natural causes. Tim was greatly loved and respected.

Tim attended Idaho State University where he earned his Bachelor’s and MBA degrees. He received his law degree from the University of Idaho College of Law and L.L.M. in Taxation from the University of Washington. He was the Managing Director of the Sussex Law Group in Denver where he was named a Five Star Tax Manager.

## IN MEMORIAM

Tim was a trusted advisor to his clients with a unique business expertise that provided sophisticated tax, business, and estate planning. He was a member of the Washington, Idaho and Colorado Bar.



Timothy Scott

Tim's greatest love and joy was his family. He adored his loving wife and friend of 19 years, Jamie Webb. His two sons, Carter and Brixton were his pride and joy. He is further survived by his parents Ronald Scott, Valerie Scott, siblings Katherine Rees and Michael Scott, and many other relatives and friends.

### **James B. Lynch** 1932 - 2016

BOISE — James B. Lynch, age 84, died at home in Boise, Idaho on March 15, 2016.

Jim was born January 19, 1932 in Denver, Colorado to James J. and Elizabeth Lynch. He attended Boise Junior College, where he obtained

his AA degree in 1952. He attended the University of Idaho, obtaining his BS degree in 1954 and his LLB in 1956. He was a member of the Sigma Chi Fraternity.



James B. Lynch

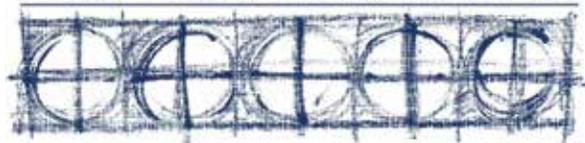
Jim married JoAnn McGuire at St. John's Cathedral on December 28, 1963. Jim served in the U.S. Air Force from 1958-1960 as a Judge Advocate and was stationed in Okinawa and Kansas. He began his law practice at Moffatt, Thomas in 1961 and served as Executive Secretary of the Idaho State Bar from 1963-1966. He practiced in the law firm of Coughlan, Imhoff, Christiansen & Lynch, which later became Imhoff & Lynch. That firm then became Lynch, Moore, Baskin and Parker. He was Chairman of the Idaho State Bar Court Reform Committee in the early 1970's. Jim and his good friend, Tom Miller, traveled to Bar Associations throughout the state in achieving enactment of lower court reorganization, which he considered one

of his greatest professional achievements. He also served as Chairman of the Idaho State Bar Alternative Dispute Resolution Section, and as President of Inns of Court from 2005-2006. He was licensed to practice in Idaho as well as the Ninth Circuit Court of Appeals, the U.S. District Court, and the U.S. Supreme Court.

Jim was an avid golfer, and enjoyed many rounds of golf with good friends Tom Miller, Jack Barrett, Jack Rhoads, Larry Locuson, and others. In addition to golf, he enjoyed fly fishing, camping, skiing, backpacking and mountain climbing. Jim and JoAnn enjoyed many golf trips with Jo and Tom Miller and Linda and Larry Locuson, and traveled to Ireland, England, Switzerland, the Virgin Islands, Mexico, Australia, New Zealand, and took an Alaska cruise.

Jim is survived by his wife, JoAnn; daughters, Kate Lynch and Ann Erwin and son-in-law, Jeff; brother, Pat Lynch; sister-in-law, Alice Cronin; grandchildren and numerous nieces and nephews.

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Gerald W. Olson

**Professor Angelique EagleWoman to become law dean in Canada**

MOSCOW — University of Idaho College of Law Professor Angelique EagleWoman has been selected to be dean of the Bora Laskin Faculty of Law at Lakehead University in Thunder Bay, Ontario. Professor EagleWoman, a member of the Sisseton-Wahpeton Dakota Oyate of the Lake Traverse Reservation, will be the first indigenous woman to head a law school in Canada.



Angelique EagleWoman

Professor EagleWoman joined the College of Law in 2008 and was instrumental in the development and success of its Native Law Program. Professor EagleWoman served as the advisor to the Native American Law Student Association and is the co-advisor to the Multicultural Law Caucus. She created and is the coordinator of the Native American Law Advisory Council for the University of Idaho Native Law Emphasis program.

Professor EagleWoman has been the recipient of several awards while at the University of Idaho. Most recently, Professor EagleWoman was selected as the 2016 Dr. Arthur Maxwell Taylor Excellence in Diversity Award Recipient.

**Bankruptcy Moot Court Team wins “Best Brief” at National Competition**

MOSCOW — University of Idaho College of Law sent two teams to the Annual Duberstein Bankruptcy Moot Court Competition in New York City at St. John’s University School of Law. Over 50 teams com-

pete in this prestigious moot court competition. The team with Brandon Holt, Henry Stegner and Steven Atkinson won the Best Brief award at the competition. This team also advanced to the top 16 round of arguments for the third consecutive year.

Team advisors include Ford Elsaesser from Sandpoint and Noah Hillen from Boise. Financial support for the Bankruptcy team came from the Idaho State Bar Commercial Law and Bankruptcy Section, Judge Jim Pappas, Ford Elsaesser and Noah Hillen.

**DeFriez opens solo practice**

MOSCOW — Brian M. DeFriez announces the full-time opening of his research and writing firm — Idaho Legal Drafting. Brian works with law firms and government entities across the state. You can find a list of services on his website: [www.idaholegal-drafting.com](http://www.idaholegal-drafting.com).

Brian earned his juris doctorate from Western Michigan-Coolley in 2008. He worked as a partner at Idaho Law Group, LLP, until opening a part-time contract practice in 2012. Brian is currently writing a PhD dissertation on the impact of litigant briefs on Idaho court decisions.



Brian M. DeFriez

**Leah Shotwell promoted at Foley Freeman PLLC**

MERIDIAN — Foley Freeman PLLC is pleased to announce Ms. Leah Shotwell has become a partner in the firm. Ms. Shotwell is a 2008 graduate of Gonzaga University, graduating Magna Cum Laude and

a 2010 graduate of the University of Idaho College of Law. She has been associated with Foley Freeman since April 2012.

Leah’s practice is concentrated in the area of family law including divorce, child custody and support issues, modification and property classification and contempt proceedings. She also practices in the areas of adoption and guardianship. She is an Idaho Supreme Court-approved family mediator.



Leah Shotwell

**Mark Orlor promoted at Powers Tolman Farley**

BOISE — Powers Tolman Farley, a litigation firm with offices in Boise and Twin Falls, is pleased to announce the selection of Mark Orlor as a partner in the firm. Mark graduated from the University of Idaho College of Law in 2006 where he also served on the Idaho Law Review. He has degrees in biology and history from the University of Montana and is a native of Billings, Montana.



Mark Orlor

Mark has practiced with the partners in the Boise office since 2006 and has a depth of experience in all litigation matters, particularly cases involving traumatic injury to the spine and brain. Mark also provides key advice and counsel to the firm’s clients in the trucking business.

**Holland & Hart expands in Boise**

BOISE — Associates Chris McCurdy and Lauren Prew have joined Holland & Hart’s Boise office to further develop the firm’s growing Commercial Litigation and Corporate practices.



Chris McCurdy

Chris McCurdy focuses his practice on litigation, assisting clients to find efficient, cost-effective, and practical solutions to a wide range of commercial disputes. His courtroom experience includes dozens of bench trials, numerous jury trials, and multiple state court appeals from briefing through oral argument. Prior to joining Holland & Hart, McCurdy served as deputy prosecutor at the Ada County Prosecutor’s Office. McCurdy also clerked for Chief Justice Roger S. Burdick of the Supreme Court of Idaho. He received his B.S. from the University of Idaho and his J.D. from Duke University School of Law.

Lauren Prew helps guide companies through the numerous stages of the corporate lifecycle, from entity selection and formation to financing and capitalization, corporate reorganization, and a variety of merger and acquisition transactions. Her experience includes working with client businesses of all sizes from early stage start-ups to large public companies.



Lauren Prew

She has regulatory and transactional experience

working with healthcare industry clients, including physicians, healthcare entities, biotechnology, and biomedical companies. Prior to joining Holland & Hart, Prew practiced at Jackson Walker LLP in San Antonio, Texas. She received her B.A. from Texas A&M University and her J.D. from Michigan State University College of Law.

**Don Burnett set to retire**

MOSCOW — At the end of the spring semester, Don Burnett will formally retire from the University of Idaho. Don first joined the UI in 2002 as dean of the College of Law. This position brought him back to his home state after he spent 12 years at the University of Louisville School of Law as dean and professor. In addition to his 12 years as dean of the UI College of Law, Don served as interim president of the University of Idaho from 2013-14. For the past two years, he has been at the College of Law as faculty.



Don Burnett

Don’s professional career has been one of service to his profession and to the communities in which he has lived. The College of Law celebrated Don’s service to the UI at events in Moscow and Boise, where he was commended for his work setting a standard of excellence for future lawyers.

**Forrest R. Goodrum joins Sperry Law Office**

BOISE — Sperry Law Office, PLLC, is pleased to announce that Forrest R. Goodrum has joined the firm “of counsel.” Forrest will be advising and

assisting the firm in a wide range of matters from commercial transactions to complex business litigation. Forrest earned his J.D. from Rutgers Law School in 1971.



Forrest R. Goodrum

Forrest practiced in New Jersey for over 20 years, both in private practice and later as Vice-President and General Counsel of Lincoln Federal Savings. Forrest’s discovery of Idaho while on vacation prompted an immediate move to Idaho to practice law while pursuing his favorite pastimes of fly fishing and bird hunting. In 1992, he was admitted to the Idaho Bar. Forrest has extensive experience in Business Law, Commercial Litigation, Collections, Banking & Finance, Real Estate & Project Development, Construction Law, Bankruptcy (Creditors), Estate Planning and Probate, and Alternate Dispute Resolution.

**Nicholas Earns place in professional colleges**

BOISE — Moffatt Thomas President, Christine E. Nicholas, has been inducted into both the American College of Real Estate Lawyers (ACREL) and the American College of Mortgage Attorneys (ACMA).

The American College of Real Estate Lawyers (ACREL) is a premier organization of U.S. real estate lawyers. Admission is by invitation only after a rigorous screening process. ACREL’s distinguished, nationally-known lawyers have been



Christine E. Nicholas

elected to fellowship for their outstanding legal ability, experience and high standards of professional and ethical conduct in the practice of real estate law.

The American College of Mortgage Attorneys (ACMA) is the leading organization of counsel in the United States, Canada and the Americas for distinguished practitioners in the field of mortgage law and real estate finance. The state of Idaho has just two ACMA members, both of whom are partners in the Moffatt Thomas law firm.

Christine E. Nicholas is a Shareholder and President of the Board of Directors of the Idaho law firm, Moffatt Thomas. Christine is a seasoned business, real estate and finance attorney whose experience includes domestic and international transactions for large and small clients.

Christine has been recognized by leading legal associations and other groups including the 2009 Burton Award for Legal Excellence; Woman of the Year Leadership Award, Boise Chapter; National Association of Women Business Owners, 2009; and Tribute to Women in Industry (TWIN) Award, Women's and Children's Alliance, Boise, Idaho, 2000.

**Givens Pursley LLP  
welcomes Smith, Blakeley**

BOISE — Givens Pursley LLP is pleased to announce that Jason J. Blakeley and Jamie Caplan Smith have joined the firm as associate attorneys.

Ms. Smith's practice focuses on complex commercial real estate transactions and mortgage financing. She received her Juris Doctor from the Benja-



Jamie Caplan Smith

min N. Cardozo School of Law in 2013 and a Bachelor of Arts cum laude in Psychological and Brain Sciences in 2009.

Jason Blakely received his J.D. from the University of Notre Dame in 2014 and his B.A. in English from the University of San Francisco in 2004. Prior to joining the firm, he clerked for the Honorable Justice Daniel T. Eismann of the Idaho Supreme Court.



Jason Blakely

**Stoel Rives welcomes Randy Hill**

BOISE — The law firm of Stoel Rives LLP is pleased to announce that Randolph J. Hill has joined the firm's Corporate Practice Group in the Boise office. Randy will provide his clients with advice and counsel in a wide range of areas of the law, including mergers & acquisitions, project finance, energy and infrastructure development, joint ventures and others.

Randy has nearly 35 years of experience in the full range of business matters. His experience as senior executive officer and in-house counsel for private industry, combined with his years as a corporate attorney in private practice, give him a well-rounded understanding of complex business issues.

Prior to joining Stoel Rives, Randy served as Chief Legal Officer for the energy, infrastructure and industrial construction division of AECOM (formerly Washington Group In-



Randolph J. Hill

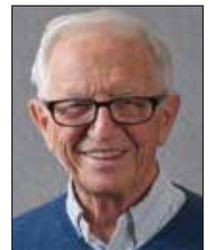
ternational and then URS through successive mergers).

**Archie W. Service retires**

POCATELLO — Service & Spinner, Attorneys and Counselors at Law, wish to acknowledge the retirement of senior member Archie W. Service. Mr. Service was born in Pocatello and attended Pocatello High School. After service in the Navy during World War II, Mr. Service attended the University of Idaho, Southern Branch, (ISU) for two years and then completed his undergraduate degree at Stanford University. He obtained his law degree from the University of Idaho in 1950.

Some of Mr. Service's accomplishments include being a recipient of the 2012 Idaho State Bar Professionalism Award; past president of the Sixth District Bar Association; recipient of the Sixth District Bar Professional Award; a member of Phi Alpha Delta; chairman of the Lava Hot Springs Foundation from 1959-1964; president of the Pocatello Estate Planning Council, 1973-1974; treasurer of the Bannock Memorial Hospital Board of Control, 1978-1979; chairman of the Idaho State Board of Health and Welfare, 1979-1980; a Fellow in the American College of Trust and Estate Council, 1986-2006; a director of the Downey State Bank; a founder and director of the Idaho State Tax Institute; and past president of the Juniper Hills Country Club.

Mr. Service was active in the practice of law and the legal and civic community for over 65 years and leaves behind an accomplished and stellar career. The firm wishes him all the best in his retirement.



Archie W. Service

**Firm opens an office in rural Idaho**

SODA SPRINGS — Kumm & Reichert, PLLC is proud to announce the opening of a new office in south-east Idaho. The Soda Springs office primarily serves Caribou County and Bear Lake County while also extending its services to Franklin County and Oneida County. While the firm has provided its services to these communities for years, the new office allows the firm to provide more representation for criminal defense, family law, personal injury, and general civil clients.

All three of the firm’s Pocatello attorneys will practice and be available through the Soda Springs office, which is located at 61 E. First Street.

Kelly Kumm is the firm’s managing partner and has practiced law in Idaho since 1984 after graduating from the University of Idaho College of Law. Kumm primarily represents defendants charged with serious felonies, including white collar crimes and drug conspiracies. He has obtained numerous acquittals in lengthy, complex trials.

Shane T. Reichert began his legal career in Wenatchee, Washington after graduating from Gonzaga University School of Law. There he focused on criminal defense, personal injury and workers’ compensation cases. Reichert continues to focus on criminal defense, personal injury and family law after joining the firm in March 2011 and partnering with Kumm in 2012.

Stratton P. Laggis is an associate attorney and has been with the firm since March 2014. Laggis graduated from the University of Idaho College of Law in 2013. Laggis focuses primarily on criminal defense, family law, and personal injury, as well as a variety of other civil areas.



From left, the attorneys at the new Soda Springs office are Stratton P. Laggis, Shane T. Reichert, and Kelly Kumm.

**Heidi Morrison joins Racine Olson**

POCATELLO — Heidi Buck Morrison has joined Racine Olson Nye Budge & Bailey as an associate attorney in Racine Olson’s Pocatello office. Heidi’s practice focuses on bankruptcy and creditor’ rights, litigation, family law, and estate planning.

Ms. Morrison is licensed to practice law in both Idaho and Washington and has successfully argued cases to the Ninth Circuit Court of Appeals and Washington appellate courts as well as state, federal, and bankruptcy trial courts.

Prior to joining Racine Olson, Ms. Morrison practiced in Seattle with a nationally recognized mortgage banking law firm. She obtained a B.A. in Journalism and Political Science from the University of Montana and earned a J.D. from Seattle University School of Law where she graduated cum laude in 2009. Heidi was born and raised in Pocatello and is happy to have settled permanently in Pocatello with her husband and daughter. Heidi can be reached at



Heidi Buck Morrison

208-232-6101 or hbm@racinelaw.net.

**Thomas D. Smith joins Service & Spinner**

BANNOCK COUNTY — Service & Spinner, Attorneys and Counselors at Law, is pleased to announce the addition to the firm of Thomas D. Smith, who is an established attorney in southeastern Idaho.

Thomas’s practice areas include representing public and private entities, appeals, administrative law, professional licensing matters, probate, estate planning, guardianships and conservatorships, family law, child custody mediation, and parenting coordination. Thomas currently serves on the Professional Conduct Board with the Idaho State Bar, and he previously served as the chair and treasurer of the Sixth District Bar Family Law Section. Prior to attending law school, Thomas was a police officer, district attorney investigator, and coordinator of the Bannock County Juvenile Drug Court. Tom can be contacted at Service & Spinner, (208) 232-4471.



Thomas D. Smith

## OF INTEREST



Legal Director Kelli Ketlinski, (center) resigned her position this spring, but is still volunteering at the Idaho Volunteer Lawyers Program. Another regular face at the IVLP office is former IVLP Legal Director Mary Hobson, (left). The program's new Legal Director is Sue Pierson.

Photo by Dan Black



Photo by Dan Black

The graduating 2016 class of Idaho Academy of Leadership for Lawyers gather around the base of the Lincoln statue next to the Idaho Capitol Building. The class explored leadership topics from several angles, drawing on the expertise of presenters and seminar workshops targeting professional development. The class, including members of the IALL steering committee, are, from left: Hon Rick Carnaroli, Andrea Courtney, April Pope, Robert Taylor, Matthew McGee, Julie Stomper, Teri Jones, Patrick Geile, Jamila Holmes, Michael Porter, Joe Pirtle, Brenda Bauges, Nicole Hancock, Mahmood Sheikh, Amanda Breen, Will Fletcher, Amber Ellis, Gene Petty.

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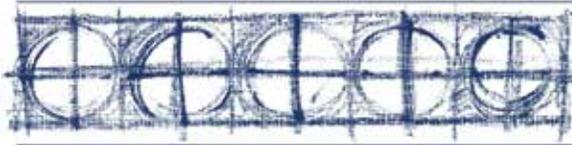
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## Idaho Military Legal Alliance Hosts Free Veterans Wills Clinics

Capt. Stephen A. Stokes

**T**he Idaho Military Legal Alliance, in cooperation with a variety of community partners, has begun to host free, one-day wills clinics for Idaho's veterans, servicemembers, and dependents. Critical community partners supporting these events include volunteer attorneys and law students from the Second, Fourth, and Sixth Judicial Districts, Concordia University School of Law, the University of Idaho College of Law, the Idaho State University Veteran Student Services Center, Army OneSource, and the Boise VA Medical Center.

The Idaho Military Legal Alliance has conducted four wills clinics to-date: two in Boise on October 30, 2015 and on February 26, 2015; one in Pocatello on March 31, 2016; and one in Moscow on April 2, 2016. During these free, one-day events, volunteer attorneys and law students met with veterans, servicemembers, and dependents to prepare simple estate plans, which included a simple will, durable power of attorney for healthcare, a living will, and a durable general power of attorney. To date, clinic volunteers have executed over 74 simple estate plans.

According to a survey conducted by the National Institute of Aging and the University of Michigan, many Americans, especially those over 50, do not have a will. This can lead to confusion, delay, frustration, and increased legal costs to one's heirs after death. By hosting these events, the Idaho Military Legal Alliance hopes to provide veterans, servicemembers, and their depen-



Photo by Capt. Stephen A. Stokes

Attorney volunteers take time to offer free legal advice to military veterans. This event was held in Pocatello. The Idaho Military Legal Alliance has organized a series of clinics to help veterans with their end-of-life documents.

dents with the peace of mind that comes from having a good estate plan.

The mission of the Idaho Military Legal Alliance is to provide increased access to, and diversity of pro bono or reduced-fee legal services for Idaho's military population. Since 2013, the Idaho Military Legal Alliance has been working with community partners to establish free, monthly legal clinics on a permanent basis around the state. Current clinics occur in Boise, Caldwell, Pocatello, Lewiston, and Coeur d'Alene, and the Alliance has plans for more regional clinics by the end of 2016. The Alliance's wills clinic effort augments the work of these monthly general legal advice clinics by providing critical estate planning

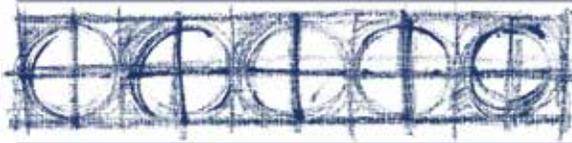
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Since 2013, the Idaho Military Legal Alliance has been working with community partners to establish free, monthly legal clinics on a permanent basis around the state.

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services that exceed the scope of a 30-minute consultation.

Detailed information about each of IMLA's on-going military legal clinics is as follows:



**Boise Veterans Clinic**

- Location: Boise VA Medical Center, 500 W. Fort St., Boise Idaho 83702
- Contact: Josh Bode, LCSW – 208-422-1064 joshua.bode@va.gov; Sarah Kearney, LCSW – 208-422-1000 x 3500 sarahkearney@va.gov
- Time: Second Friday each month from 2:00 p.m. to 4 p.m.

**Idaho State University  
Veterans Legal Clinic**

- Location: Idaho State University Veteran Student Services Center, ISU Student Union Building 3<sup>rd</sup> Floor, 921 S. 8<sup>th</sup> Ave., Pocatello, Idaho 83201
- Contact: Sy Williams, MSW, at 208-232-6214; Rich Diehl at 208-234-6148
- Time: The 3<sup>rd</sup> Wednesday of the month from 5:30 p.m. to 7 p.m.

**Canyon County Clinic**

- Location: Idaho Department of Labor, 4514 Thomas Jefferson St., Caldwell, Idaho
- Contact: Josh Bode, LCSW – 208-422-1064 joshua.bode@va.gov; Jessica Cafferty, Canyon County Court Assistance Officer, 208-454-7455
- Time: Last Wednesday each month from 1:30 p.m. to 4 p.m.

**Lewiston Veterans Clinic**

- Location: Brammer Building, 1225 Idaho Street, Lewiston, Idaho
- Contact: Robert Wakefield (COL Ret.) – 208-882-5939 – robertwakefield@gmail.com; Sunil Ramalingam – 208-885-7947 – sunilr@uidaho.edu

Critical legal assistance is being delivered thanks to the tireless efforts of energetic volunteers around the state.

- Time: First Wednesday each month from 6 p.m. until 8 p.m.

**Coeur D'Alene Veterans Clinic**

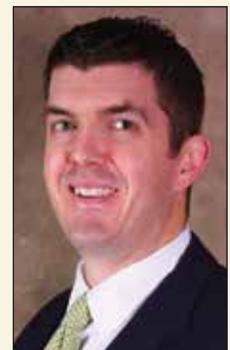
- Location: American Legion Post 143, 1138 E. Poleline Ave., Post Falls, Idaho
- Contact: Anne Solomon – 208-667-3561; Cassandra Rzpa, FAC Specialist, Idaho Joint Military Family Programs, 208-272-7532; 888-344-1198
- Time: Last Wednesday of each month from 3 p.m. until 5 p.m.

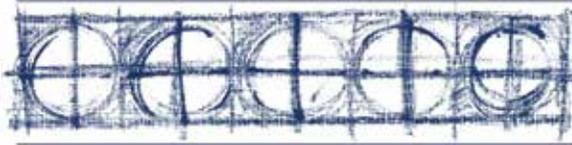
The Idaho Military Legal Alliance would like to thank all of the organizers, community partners, volunteer attorneys and law students, and the Idaho State Bar and Law Foundation for their continued

support of the Alliance's programs. Critical legal assistance is being delivered thanks to the tireless efforts of energetic volunteers around the state.

The Alliance will be holding additional veteran wills clinics on May 20, 2016 at the Boise VA Medical Center and on September 10, 2016 at Gowen Field in Boise. To volunteer at these wills clinics or at any of the Alliance's general legal advice clinics around the state, or if your local pro bono commission is interested in the Idaho Military Legal Alliance sponsoring a wills clinic in your community, please contact Anna Almerico at 208-334-4500 or Steve Stokes at 208-272-3573. Or, for more information, visit IMLA's Facebook page at: [https://m.facebook.com/idahomilitarylegalalliance/?ref=content\\_filter](https://m.facebook.com/idahomilitarylegalalliance/?ref=content_filter).

*Stephen A. Stokes is Attorney Advisor to The Adjutant General, Idaho National Guard. After clerking for the Hon. Ronald E. Bush, he worked in private practice from 2006 until 2014, when he joined the Idaho National Guard full-time. CPT Stokes was commissioned as a Judge Advocate in 2009 and deployed to Iraq in 2010-2011 with the 116th Cavalry Brigade Combat Team. Currently, he is involved with the Idaho Military Legal Alliance and the ISB Pro Bono Commission.*





## The Ambrose Team Triumphs in a Warm-up for Nationals

**T**he Ambrose School has been a perennial competitor at the regional and state competition, and took first place by defeating its rival, Logos School, from Moscow. This year, 19 Idaho teams were joined by a team from Helena, Montana, which participates because their state lacks a program.

In 2015 it was Logos School that beat The Ambrose School, and in 2014 Ambrose beat Logos. This year both teams will advance to the national competition, which is being held for the first time in Boise. Normally, one school advances from each state, but this year's competition came up one team short.

The rules state that when there is an uneven distribution of teams, the host state may field a second team. This annual event draws judges and lawyers who are self-proclaimed "mock trial junkies" from around the nation who enjoy watching the arguments. And, it draws teams from as far away as the Northern Mariana Islands, Guam and South Korea.

David Goodwin, the coach for The Ambrose School said, "The road to the championship was long. First, we had to advance from the 2016 regional competition held in Caldwell. We defeated Capital and Centennial high schools, as well as our own "B" team, which was the secondary team from Ambrose. We took first place in the southern regional.

"In the state quarter finals, we defeated Coeur d'Alene and Lake



Photo by Amy Nordby

From left to right are: Mock Trial Coach David Goodwin, Reagan Good, Philip Cutler, Leah March, Noah Pauls, Alethea Chaney, Eric Wilford, Samantha Baran, Noah Good, and Assistant Coach Alan Burrow.

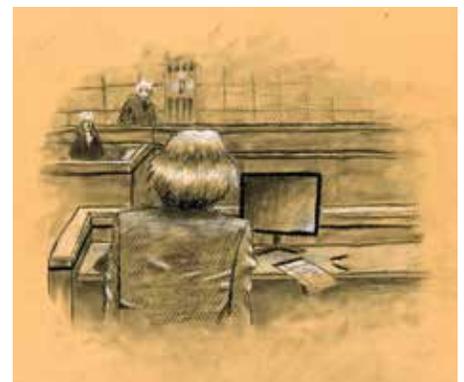
City from the North, as well as Logos School in Moscow's 'B' team, and a team from Helena, Montana. We entered the semi-finals as one of the top contenders, having lost no ballots from judges in the earlier regional or state competitions. Ambrose defeated Mountain Home in the semi-finals 3-0 to face Logos school in Moscow for the final round in the Idaho Supreme Court. We defeated Logos with the narrowest of margins — 2 ballots to 1, with only one point separating the two teams for the victory?"

Mock Trial is a high-energy competition where teams of seven to nine students construct a court case out of documents provided to both sides. The teams use strategy, rhetorical skills, argument, and examination skills to battle for a win in any given round.

The program is organized and promoted by the Idaho Law Foundation, and relies on attorney volunteer coaches and advisors.

— Dan Black

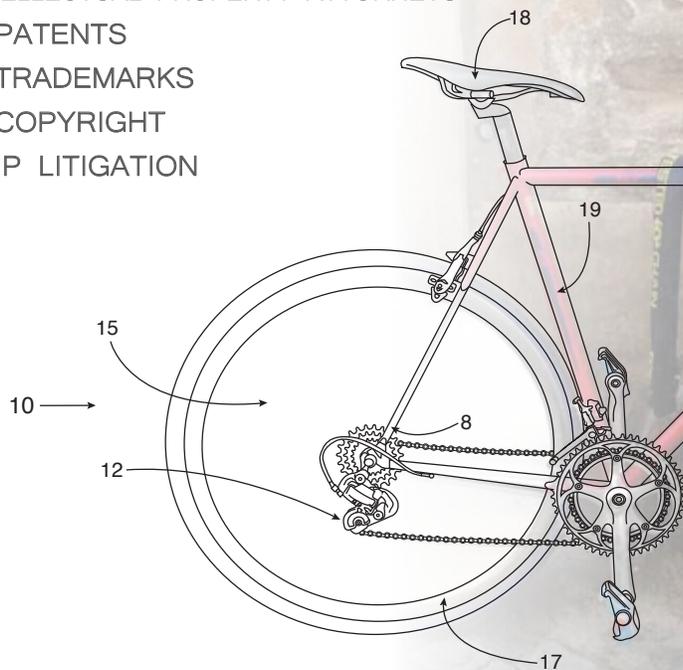
For the first time the National Mock Trial Championship will be held in Boise on May 12-14, at the Ada County Courthouse, which will provide courtrooms for over 46 teams from the more than 50 states and territories.



This is the artwork produced by Capital High School student Logan Fialkowski who won the state competition among courtroom artists attending the high school Mock Trial Competition this spring in Boise.

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

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