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Official Publication
of the Idaho State Bar
Volume 56, No. 9
September 2013

ETHICS REVIEW

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- pages 23, 26, 29

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5:30 p.m. (MDT) | Boise Centre | Boise, Idaho

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3:30 p.m. (PDT) | Student Union Ballroom | Moscow, Idaho

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For more information on this year's agenda and speaker,
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The Official Publication of the Idaho State Bar
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On the Cover:

The cover photo of snow geese and this photo of a flock was taken by Cindy Embree, the Office Administrator for Evans Keane LLP. This March, Cindy and her twin sister Christine Lewis went to Summer Lake Wildlife Refuge in Oregon to view the annual bird migration and take photos. Many thousands of snow geese and numerous breeds of waterfowl, shorebirds and birds of prey converge on the refuge. Cindy is a director of the non-profit, Idaho Domestic Bird Rescue & Sanctuary, Inc., along with her sister, and her 22-year-old son, Brandon Embree. The sisters and Brandon also volunteer as rescuers for the Ruth Melichar Bird Center in Boise.

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This issue of *The Advocate* is sponsored by the Professionalism & Ethics Section and the Idaho legal History Society.

Editors:

Special thanks to the September editorial team: Anna E. Eberlin, Susan M. Moss, Daniel J. Gordon, T. Hethe Clark, Tenielle Fordyce-Ruff.

October issue's sponsor:

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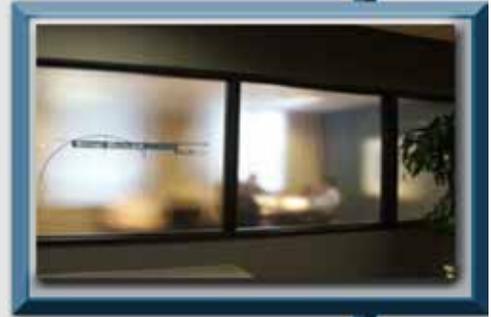
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Mr. Lamer received his law degree and Master of Urban Planning at the University of Kansas. His practice will continue to focus on land use, real estate, and construction litigation. He is a member of the American Institute of Certified Planners, a LEED accredited professional, and a former Planning Commissioner for the Lawrence-Douglas County (Kansas) Metropolitan Planning Commission



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ISB/ILF Upcoming CLEs

September

September 12

New Negotiated Rulemaking Requirements and Other APA Updates
Sponsored by the Government and Public Sector Lawyers Section
The Law Center, 525 W. Jefferson – Boise / Statewide Webcast
3:30 p.m. (MDT) with a reception to follow
1.0 CLE credits

September 18

Representing Your First or Next Social Security and SSI Disability Claimant
Sponsored by the Idaho Law Foundation
The Law Center, 525 W. Jefferson – Boise / Statewide Webcast
9:00 a.m. (MDT)
2.0 CLE credits **RAC**

October

October 2

CLE Program Video Replay
Sponsored by the Idaho Law Foundation
The Law Center, 525 W. Jefferson – Boise
8:30 a.m. (MDT)
3.0 CLE credits of which 1.0 is Ethics **RAC**

October 3

Idaho Practical Skills Seminar
Sponsored by the Idaho Law Foundation
Boise Centre, 850 W. Front – Boise
8:00 a.m. (MDT)
6.5 CLE credits of which 2.0 is Ethics **RAC**

October (continued)

October 11

The Changing Face of Family Law Practice in Idaho
Sponsored by the Family Law Section
The Coeur d'Alene Resort, 115 S. 2nd Ave. – Coeur d'Alene
9:00 a.m. (PDT)
6.25 credits of which 1.0 is Ethics

October 18

The Changing Face of Family Law Practice in Idaho
Sponsored by the Family Law Section
The Red Lion Pocatello, 1555 Pocatello Creek Rd. - Pocatello
9:00 a.m. (MDT)
6.25 credits of which 1.0 is Ethics

October 25

The Changing Face of Family Law Practice in Idaho
Sponsored by the Family Law Section
The Riverside Hotel, 2900 W. Chinden - Boise
9:00 a.m. (MDT)
6.25 credits of which 1.0 is Ethics

***RAC** — These programs are approved for Reciprocal Admission Credit pursuant to Idaho Bar Commission Rule 206(d).

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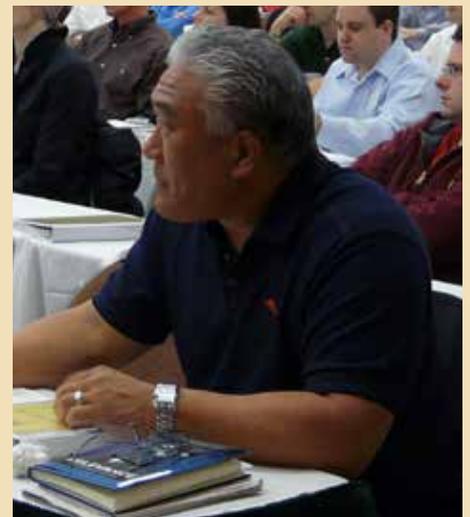
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Basque Country Trip Stirs Reflections of American Lifestyle

*William H. Wellman
President, Idaho State Bar
Board of Commissioners*

From late June into July, my wife Debbie and I traveled to the Basque Country in Spain. On the whole the trip gave us the opportunity to compare cultural differences and priorities.

Our entire family went along — three adult children, two sons-in-law and Joaquin, our 14-month-old grandson.

My son-in-law, Kepa, is a Basque descendant. His father came to America at the age of 25. Two of Kepa's uncles are lifelong residents there. One lives a few kilometers outside the city of Gernika and the other near Pamplona.

On our first Saturday we experienced the “fiestas,” or “festivals” of Belendiz, a town near Gernika. “Tio” Juan Ignacio, Kepa's uncle, presides in the community clubhouse called a “Txoko.” The clubhouse is similar to our fraternal and social clubs. After greetings with friends and neighbors we set out to experience the games. The Basque people take pride in their games and bring the traditions to Boise when Jaialdi comes every five years.

Our festival experience was hands-on after one of the official matches. The young men from our family entered into the tug of war

It was in San Sebastian that I had the conversation with Kepa that marked an epiphany on the trip. I remarked that there is a difference between the American lifestyle that causes us to be in a such a hurry most of the time as compared to the slower manner in the Basque Country.



against a fully trained and outfitted local team. Nothing was ordinary. The host team carefully laid a ribbon of about 100 feet of specialty rubber mats for proper foot traction. The five inch thick rope was cured in the “warm up” to prevent a rope failure under the tension of the pull. The spectators cheered the athletes from close range. The good natured Basques took it easy on the visiting team and we all retired for the day.

Along the coast north of Gernika we visited the quaint ultra-laid-back villages of Bakio, Elantxobe, and Ea. Bakio is a traditional fishing town while Elantxobe is an old pirate port where the homes are built precariously upon the steep cliffs facing the ocean. Ea provides a very secluded inlet with ancient bridges built by Romans along the way to the ocean.

A little further east along the Bay of Biscay sits Leketio which was hosting its summer festival. One of the

highlights was the swim race in the harbor where the participants were some 20 or more young girls that braved cold ocean waters to prove their bravery and skill. Lifeguards were ready on watercrafts if needed.

By the time we reached Donostia-San Sebastian, it was fully apparent that babies — especially the ones in strollers — were included in all that goes on in the community. Parks and sidewalks were packed with these strollers and thankfully we had a sturdy one for our Joaquin.

Donostia-San Sebastian is a city larger than Boise that attracts visitors from around the world to enjoy the fine beaches, predictable surf, and historic old town famous for its culinary treasures known as “pintxos.”

It was in San Sebastian that I had the conversation with Kepa that marked an epiphany on the trip. I remarked that there is a difference between the American lifestyle that



causes us to be in a such a hurry most of the time as compared to the slower manner in the Basque Country. The Basques eat the “menu del dia” or meal of the day in mid-afternoon and converse at length. I found the Basque people to be less self-conscious and frankly more fun to be with. Kepa put it simply, “We Americans live to work; the Basques work to live.”

The expression of this simple life concept was on display at our last destination — The Festival of San Fermin in Pamplona. “Tio” Jesus and his wife Bego squired us through the magnificent walled old city of Pamplona that swells to over 2 million visitors during the festival.

After we had toured the route the bulls follow through town to the bullfight arena, we settled down at Jesus’s club for a late meal that lasted well into the night.

My experience in Spain has me reflecting on some things about Americans and American life. Americans generally are status oriented and attention seekers. We try to outdo each other and in doing so push our relationships into a competition rather than a friendship.

We mistake comfort for happiness. What I mean is that we think

I found the Basque people to be less self-conscious and frankly more fun to be with. Kepa put it simply, “We Americans live to work; the Basques work to live.”

acquisitions will make us happy but really only give us comfort. To achieve happiness takes effort. It requires active steps to confront fears, tackle difficult situations and take on difficult conversations.

Comfort is easy. We buy things and enlarge our holdings. But are we happy with the results? I tend to think we are blinded by the complacency of our self absorption and that leads me to worry about the generations that follow. If you think I’m crazy, then ask yourself, “what have I done lately to make my community

a better place?” Write me at wellman-williamh@qwestoffice.net

About the Author

William H. Wellman is a solo practice attorney in Nampa. Mr. Wellman has his BA from Miami University in Oxford, Ohio ‘74 and JD from West Virginia University College of Law ‘79. He has been the contract public defender in Owyhee County since 1986. His wife Debbie is a custody mediator and licensed counselor. They are parent to three adult children, all living in Boise.



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DISCIPLINE

KARL W. KIME

(Withheld Suspension)

On July 19, 2013, the Idaho Supreme Court issued a Disciplinary Order suspending Coeur d'Alene attorney Karl W. Kime from the practice of law for a period of one year, with the entire one year withheld and placing him on disciplinary probation.

The Idaho Supreme Court found that Mr. Kime violated Idaho Bar Commission Rule 505(b) [Conviction of a Serious Crime]. The Idaho Supreme Court's Disciplinary Order followed a stipulated resolution of an Idaho State Bar disciplinary proceeding and related to the following circumstances.

In June 2012, Mr. Kime was charged with felony driving under the influence. He pled guilty to that charge and was sentenced in Septem-

ber 2012. The Court suspended the sentence and placed Mr. Kime on supervised probation for two years. In October 2012, Mr. Kime violated his probation. The Court revoked Respondent's probation, imposed the sentence and retained jurisdiction. In April 2013, after Respondent completed a 90-day treatment program through the Correctional Alternative Placement Program, the Court held a review hearing, suspended the sentence, and placed Mr. Kime on supervised probation through April 3, 2015. Since mid-April 2013, Mr. Kime has not tested positive for alcohol or controlled substances.

The Disciplinary Order provides that Mr. Kime's one-year suspension is withheld subject to the terms and conditions of probation, through April 3, 2015, which include: avoidance of any alcohol or drug-related criminal acts or traffic violations; a

program of random urinalysis, with provision that if Mr. Kime tests positive for alcohol or other tested substances or misses a random urinalysis test, without prior approval, the entire withheld suspension shall be immediately imposed; and if Mr. Kime admits or is found to have violated any of the Idaho Rules of Professional Conduct for which a public sanction is imposed for any conduct during his period of probation, regardless whether that admission or determination occurs after the expiration of the probationary period, the entire withheld suspension shall be imposed.

The withheld suspension does not limit Mr. Kime'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.

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Third District Bar Association holds second annual bowling fundraiser

Kerry Michaelson and Yecora Leaphart-Daniels from the Third District Bar Association helped organize a bowling fundraiser June 29 along with Legal Aid staff. About 50 people attended the event and enjoyed an afternoon of bowling. The event raised \$1,700 for Idaho Legal Aid.

Several local lawyers and law firms sponsored the event including Yost Law; White, Peterson, Gigray, Rossman, Nye and Nichols; Michaelson Mediation and Law; David Kerrick; Andrew Thomas; Lovan, Roker and Rounds; and DeFord Law. The Third District Bar Association also made a large donation to Idaho Legal Aid.

The money will help Idaho Legal Aid's Caldwell office continue to provide free legal assistance to low-income people in the Third District.

Bellwood Lecture to feature Morris Dees

The 2013 Sherman J. Bellwood Lecture will feature the national civil rights lawyer, Morris Dees. The lecture is entitled, "With Justice for All in a Changing America" and will take place on Oct. 8 at 3:30 p.m. in the University of Idaho Student Union Ballroom. A reception and comments from Mr. Dees are also planned in Boise for Oct. 7 at 5:30 p.m. at the Boise Centre.

Mr. Dees is the co-founder and chief trial counsel for the Southern Poverty Law Center. His career spans four decades of groundbreaking civil rights cases brought around the country. Mr. Dees is known in Idaho for the work his Center did



Morris Dees

spearheading the legal initiatives to remove the Aryan nation's presence in Northern Idaho.

Mr. Dees was named one of the 100 most influential lawyers in America by the National Law Journal in 2006. He founded the Intelligence Project, which monitors hate groups and develops legal strategies for protecting citizens from violence prone groups. He also developed an educational program called "Teaching Tolerance," which is used in more than 80,000 schools nationwide.

Both the Moscow and Boise programs are free and open to the public.

Patrick D. Costello retires from UI

The University of Idaho College of Law recently said good-bye to visiting professor Patrick D. Costello. During his time as visiting professor, Costello supervised the General Practice/Domestic Violence Clinic, co-supervised the Mediation Clinic, and taught Trial Advocacy. In previous years he taught Professional Responsibility, The Lawyering Process (Pre-trial Civil Procedure), Tax Clinic and Pro Se Clinic.

Professor Costello was a member of the Supreme Court's "Protecting Children Committee" and coauthor of the "Idaho Protocol for Protecting Children of High Conflict Divorce." In addition, he compiled the "Idaho Benchguide and Clerk's Manual" CD-ROM, published by Westgroup for the Idaho judiciary. He plans to enjoy retirement in Coeur d'Alene.



Patrick D. Costello

Hawley Troxell recognized for exemplary workplace practices

Hawley Troxell has been honored with the 2013 Alfred P. Sloan

Award for Excellence in Workplace Effectiveness and Flexibility for its use of flexibility and other aspects of workplace effectiveness as a strategy to increase business and employee success.

This prestigious national award, part of the When Work Works project administered by Families and Work Institute (FWI) and the Society for Human Resource Management (SHRM), recognizes employers of all sizes and types in Idaho and across the country. The other companies in Idaho receiving this award are: Northwest Lineman College, KPMG (Boise), and Treasure Valley Hospice. The recipients will be recognized in October or November, the date has not yet been determined.

Workplace flexibility — such as flextime, part-time work and compressed workweeks — has been demonstrated to help businesses remain competitive while also benefiting employees.

Sandra Day O'Connor to speak at Boise conference

The Andrus Center for Public Policy will present "Transforming America: Women & Leadership in the 21st Century" on Sept. 4-6 at Boise State University. This conference will focus on accomplishments of women leaders from business, government, science, the media and other fields to gain their unique perspectives on women in leadership positions.

Speakers will discuss what former Supreme Court Justice Sandra Day O'Connor, conference keynote speaker, has called the opportunity for all women "to earn respect, responsibility, advancement and remuneration based on ability."



Justice Sandra Day O'Connor



2013 Award Recipients

Diane K. Minnich
Executive Director, Idaho State Bar

The Idaho State Bar and Idaho Law Foundation are fortunate for the support and commitment of hundreds of volunteers each year. As I have mentioned many times, these volunteers are responsible for providing many of the service and programs offered by the bar and foundation. Each year, lawyers and non-lawyers are selected by the Board of Commissioners to receive awards for their commitment, service and the leadership they provide to the legal profession and the public.

More information about the award recipients is included in the 2013 Awards brochure, which is posted on the ISB website: www.isb.idaho.gov.

Distinguished lawyers

The 2013 distinguished lawyers, Dwight Baker, Blackfoot, and Walter Bithell, Boise were featured in the August issue of the Advocate. These lawyers were selected for this award for their exemplary conduct, professional excellence and many years of dedicated service to the profession, their clients and the public.



Service awards

Service award recipients are selected for their outstanding service

Each year, lawyers and non-lawyers are selected by the Board of Commissioners to receive awards for their commitment, service and leadership they provide to the legal profession and the public.

to the profession through their volunteer commitment to the bar, foundation or community. Some details about them can be found on the Idaho State Bar website.

- John Glenn Hall*, Boise
 - Ryan P. Henson, Nampa
 - Ernest A. Hoidal, Boise
 - Dawn Justice*, Boise
 - Thomas M. Vasseur, Coeur d'Alene
 - Jonathan M. Volyn, Pocatello
- * Non lawyer

Outstanding young lawyer

This award represents a young lawyer who has provided service to the bar, foundation and community as well as exhibiting leadership qualities and professional excellence.

- Scott E. Randolph, Boise

Section of the year

This award recognizes a Section's outstanding contribution to the bar, its area of practice, the profession, and the community.

- Litigations Section

Professionalism awards

Lawyers who receive the professionalism award reflect the highest standards of professionalism as lawyers and community leaders. At least one recipient is selected from each judicial district.

- 1st – John M. Adams, Coeur d'Alene
- 1st – William F. Boyd, Coeur d'Alene
- 2nd – Ronald J. Landeck, Moscow
- 3rd – Hon. Gregory M. Culet, Nampa
- 4th – Scott D. Hess, Boise
- 4th – Debora K. Kristensen, Boise
- 5th – James C. Meservy, Jerome
- 6th – David P. Gardner, Pocatello
- 7th – Charles A. Homer, Idaho Falls

Denise O'Donnell Day pro bono awards

Pro bono award recipients donate generously of their time, expertise and resources to provide legal services to low income Idahoans.

- 1st – Jay Q. Sturgell, Coeur d’Alene
- 2nd – Charles E. Kavis, Moscow
- 3rd – Matthew K. Shriver, Nampa
- 4th – Audrey L. Numbers, Boise
- 4th – Victoria M. Loegering & Kristen A. Ocker, Boise
- 4th – Erika Birch, Boise
- 5th – Paula B. Sinclair, Twin Falls
- 6th – Peter M. Wells, Pocatello
- 6th – R. Bradley Willis, Pocatello
- 7th – Aaron Crary, Idaho Falls

The distinguished lawyer, service, outstanding young lawyer, section of the year and Advocate awards were presented at the Annual Meeting in July. The professionalism and pro bono awards will be presented at the local resolution meetings in November.

Advocate awards

Best Issue: Diversity Section and the Idaho Women Lawyers Sponsor, January 2013

Best Article: Ritchie Eppink, January 2013, “The Joke’s On Us: Pausing to Reflect on the 50th Anniversary of Gideon v. Wainwright.”

Best Cover Photo: Tom Dial’s picture of the Tetons with a river and forest in the foreground, and Monte Stiles’ artful capturing of a heavy snowfall among aspen trees in the Teton area.

The distinguished lawyer, service, outstanding young lawyer, section of the year and Advocate awards were presented at the Annual Meeting

in July. The professionalism and pro bono awards will be presented at the local resolution meetings in November.

The Bar also honors those members who have reached 50, 60 and 65 years of professional service and judges that have retired during the last year.

50-year attorneys

- James Robert Bennetts, Challis
- Fred Kennedy, Sun Lakes, AZ
- Robert L. Magnuson, Spokane, WA
- Craig B. Marcus, Boise
- Michael E. McNichols, Lewiston
- W. Anthony Park, Boise
- Hon. Jesse R. Walters, Jr., Boise

60-year attorneys

- Thomas A. Mitchell, Coeur d’Alene
- Gerald W. Olson, Pocatello
- William C. Roden, Boise
- Archibald W. Service, Pocatello

65-year attorney

- Jack B. Furey, Challis

Retiring judges

- Hon. Gaylen L. Box, Pocatello
- Hon. David E. Day, Boise
- Hon. Renae J. Hoff, Nampa
- Hon. A. Lynn Krogh, Payette
- Hon. John P. Luster, Coeur d’Alene
- Hon. Steve C. Verby, Sandpoint

2013 District Bar Association Resolution Meetings		
District	Date/Time	City
First Judicial District	Monday, November 4 at Noon	Coeur d’Alene
Second Judicial District	Monday, November 4 at 6 p.m.	Lewiston
Third Judicial District	Thursday, November 14 at 6 p.m.	Nampa
Fourth Judicial District	Thursday, November 14 at Noon	Boise
Fifth Judicial District	Wednesday, November 13 at 6 p.m.	Twin Falls
Sixth Judicial District	Wednesday, November 13 at Noon	Pocatello
Seventh Judicial District	Tuesday, November 12 at Noon	Idaho Falls

Welcome from the Professionalism & Ethics Section

Gene A. Petty

The Professionalism and Ethics Section is pleased to co-sponsor this issue of *The Advocate* with the Idaho Legal History Society. Our Section's mission is to preserve and enhance the level of ethics, civility, and professionalism in the practice of law and to raise the public's perception of our profession. Each year our Section is involved in several exciting programs that fulfill this mission. We invite you to join us.

Every August, our Section co-sponsors the 1L Professionalism and Ethics Orientation Programs in partnership with the law schools at the University of Idaho and Concordia University. These programs bring distinguished lawyers, judges, and bar commissioners from around the state to the law school campuses to serve as mentors to the law students. The mentors teach students the importance of professionalism and ethics in our profession. Both programs are underwritten by our loyal and generous donors. This year we wish to thank the following organizations for their donations: the Real Property Section, the Fourth District Bar Association, the Government and Public Lawyers Section, the Litigation Section, Taxation, Probate and Trust Law Section and the Business and Corporate Law Section.

These programs bring distinguished lawyers, judges, and bar commissioners from around the state to the law school campuses to serve as mentors to the law students.

Our Section frequently holds monthly CLEs on timely professionalism and ethics issues. We invite you to join us the first Tuesday of each month at noon at the Law Center or through teleconference.

In June of each year, we host the Golfing for Ethics CLE at the Fourth District Bar Association's Spring Fling. While golfing, participating lawyers answer challenging ethics questions; prizes are given to the team that scores the highest. It is a debate-provoking program.

I want to thank Brad Andrews, Larry Hunter, Jodi Nafzger, Mark Fucile, and Angela Schaer Kaufmann for writing articles and the Idaho Legal History Society for co-sponsoring this issue with us. I also want to

express appreciation to the members of the Editorial Advisory Board for all the work they put into this and every issue of *The Advocate*.

About the Author

Gene A. Petty is a Deputy Prosecuting Attorney in the Civil Division of the Ada County Prosecuting Attorney's Office where he handles a wide-variety of civil litigation. He is Chair of the Professionalism and Ethics Section, Treasurer of the Litigation Section, and member of the Steering Committee of the Idaho Academy of Leadership for Lawyers. He received his law degree from Loyola University Chicago School of Law.



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Outsourcing: From Here to There

Mark J. Fucile

The recently adopted “Ethics 20/20” amendments to the American Bar Association’s Model Rules of Professional Conduct were the product of a special commission appointed to assess the Model Rules in light of continuing developments in law practice since the last comprehensive review of the professional rules over a decade ago. A key facet of the Ethics 20/20 amendments addresses outsourcing of both legal and support services.

“Outsourcing” in law practice is nothing new. Contract lawyers are a ready example of outsourced legal services that firms have used for many years. Local file storage vendors are an equally ready example of support services that have also long been outsourced. What has changed more recently, however, is that technology now allows us to outsource legal and support services literally across the world rather than simply down the street. Today’s contract lawyer, for example, may be someone we only interact with electronically. Similarly, our documents may now be stored “in the cloud.” The impact of technology on outsourcing hasn’t changed our fundamental duties. But, it has certainly sharpened the focus.

In this article, we’ll first survey the fundamental duties that have long been at the core of outsourced legal or support services. Next, we’ll examine how the ABA’s Ethics 20/20 amendments approach those duties in the context of today’s technology-driven practice environment.

Fundamental duties

It is important to underscore at the outset that although we can outsource services, we cannot outsource our ethical and fiduciary duties to

The impact of technology on outsourcing hasn’t changed our fundamental duties. But, it has certainly sharpened the focus.

our clients. RPCs 5.1 and 5.3 address our ethical responsibilities for supervising lawyers and staff who work with us — whether in-house or outsourced. *Podolan v. Idaho Legal Aid Services, Inc.*,¹ in turn, touches on supervisory duties in the civil liability context. ABA Formal Ethics Opinions 88-356 and 95-398 applied these supervisory concepts to domestically outsourced legal and support services and ABA Formal Ethics Opinion 08-451 did the same for services outsourced internationally. Summing up these authorities, we remain responsible to our clients regardless of whether a particular service — legal or support — is performed directly by our firm or an outside vendor working with us.

In the outsourcing context, three core duties often come into play: competence; loyalty as reflected in the conflict rules; and confidentiality.²

Competence

RPC 1.1 sets the regulatory benchmark for competent representation and *Stephen v. Sallaz & Gatewood, Chtd.*,³ applied the same standard for legal malpractice liability: “In order to provide competent representation, an attorney must use the ‘legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.’”⁴ ABA Formal Ethics Opinion 08-451 highlights both the central compo-

nents of the duty of competence when outsourcing and the difficulties posed when the service provider is geographically distant:

“The challenge for an outsourcing lawyer is, therefore, to ensure that tasks are delegated to individuals who are competent to perform them, and then to oversee the execution of the project adequately and appropriately. When delegating tasks to lawyers in remote locations, the physical separation between the outsourcing lawyer and those performing the work can be thousands of miles, with a time difference of several hours further complicating direct contact. Electronic communication can close this gap somewhat, but may not be sufficient to allow the lawyer to monitor the work of the lawyers and non-lawyers working for her in an effective manner.”⁵

Loyalty

ABA Formal Ethics Opinion 88-356, the first opinion from the ABA dealing comprehensively with outsourced legal services, put potential conflicts front and center: “It is clear that a temporary lawyer who works on a matter for a client of a firm with whom the temporary lawyer is temporarily associated ‘represents’ that client for purposes of Rules 1.7 (governing current client conflicts) and

1.9 (governing former client conflicts).⁶ The potential conflict problem is twofold. First, by their nature, contract lawyers ordinarily work for more than one law firm. Second, their personal conflicts may be imputed to the law firms with whom they are working.⁷ Although court decisions are not uniform,⁸ conflicts imputed to the hiring firm flowing from outsourced lawyers (or staff) at least create the risk of potential disqualification. Further, the Idaho Supreme Court in *Blough v. Wellman*,⁹ made clear that a violation of the conflict rules reflects a breach of the fiduciary duty of loyalty and, therefore, a firm with an unwaived conflict may also be exposing itself to a civil damage claim.

Confidentiality

The duty of confidentiality can come into particularly sharp focus when outsourcing because we are relying on a non-lawyer vendor to understand and comply with our bedrock obligation to our clients. ABA Formal Ethics Opinion 95-398 put it this way:

“[A] lawyer retaining . . . an outside service provider is required to make reasonable efforts to ensure that the service provider will not make unauthorized disclosures of client information. Thus when a lawyer considers entering into a relationship with such a service provider he must ensure that the service provider has in place, or will establish, reasonable procedures to protect the confidentiality of information to which it gains access[.]”¹⁰

Ethics 20/20 amendments

Addressing the inevitable evolution of law practice, the Ethics 20/20 Commission issued a number of reports on discrete topics, including outsourcing, that were forwarded to the ABA House of Delegates in support of recommended amendments

New Comment 8, in turn, places an obligation on a lawyer using technology to keep current on both the benefits and risks of the particular technology involved.¹³

to the ABA Model Rules and the accompanying comments. Report 105C addresses outsourcing generally, Report 105F discusses associated conflict check information and Report 105A focuses on related confidentiality issues.¹¹ The ABA House of Delegates approved the Ethics 20/20 Commission’s recommendations in these areas at its 2012 annual meeting and they have now been added to the ABA Model Rules. Like the earlier ABA ethics opinions, the amendments dealing with outsourcing focus on competence, conflicts and confidentiality. By being part of the Model Rules themselves, however, the amendments more directly incorporate the principles involved into what the Idaho Supreme Court in *Stephen* noted is essentially the standard of care for both regulatory and liability purposes.

Competence. The Ethics 20/20 amendments address two baseline elements of the duty of competence in outsourcing through two new comments to ABA Model Rule 1.1. New Comment 6 notes that a hiring firm should “ordinarily” consult with the client involved regarding the need to use an outsourced lawyer and should evaluate whether the professional rules and other standards in the outsourced lawyer’s location are consistent with the duties of the hiring firm.¹² New Comment 8, in turn, places an obligation on a lawyer using technology to keep cur-

rent on both the benefits and risks of the particular technology involved.¹³ Similar comments (as amended Comment 1 and new Comments 3 and 4) were added regarding supervisory duties for outsourced services under ABA Model Rule 5.3.¹⁴

Conflicts. The Ethics 20/20 amendments do not directly alter the principal conflict rules, ABA Model Rule 1.7 on current client conflicts, and ABA Model Rule 1.9 on former client conflicts. Importantly for both contract lawyers and hiring firms, however, the Ethics 20/20 amendments do confirm that lawyers are normally allowed to share information necessary for conflict checks when a lawyer is associating with a firm. The amendments include a new provision in the confidentiality rule — ABA Model Rule 1.6(b)(7) — and accompanying comments (new Comments 13 and 14)¹⁵ that facilitate this key risk management function.

Confidentiality. The Ethics 20/20 amendments amplify two comments to the ABA Model Rule 1.6: Amended Comments 18 and 19, which are aptly titled: “Acting Competently to Preserve Confidentiality.”¹⁶ The amended comments underscore that we as lawyers bear the ultimate responsibility for taking reasonable precautions to protect our clients’ confidentiality. The amended comments also highlight that, although particular steps will vary with the

circumstances and the relevant sensitivity of the information involved, this duty extends to both our selection and supervision of outsourced legal and support services. Further, the amended comments explain that they apply to two common electronic elements of practice today — data storage and communications.¹⁷

The amended comments underscore that we as lawyers bear the ultimate responsibility for taking reasonable precautions to protect our clients' confidentiality.

Summing up

As both the human and technological sides of our practices have become more “virtual,” the recent Ethics 20/20 amendments offer important guidance on how we can continue to meet our fundamental duties of competence, loyalty, and confidentiality.

Endnotes

1. 123 Idaho 937, 854 P.2d 280 (1993).
2. This is not intended to be an exclusive list. For example, issues can arise on properly billing for outsourced legal and support services. ABA Formal Ethics Opinion 00-420 discusses billing for outsourced legal services and ABA Formal Ethics Opinion 93-379 addresses billing for outsourced support services.
3. 150 Idaho 521, 526, 248 P.3d 1256 (2011).
4. Quoting RPC 1.1; emphasis omitted.
5. ABA Formal Ethics Opinion 08-451 at 3.
6. ABA Formal Ethics Opinion 88-356 at 2.
7. RPC 1.0(c) defines the term “firm” relatively elastically. ABA Formal Ethics

Opinion 90-357 addresses “of counsel” designations in particular.

8. *Compare Lord Elec. Co. Inc. v. Titan Pacific Const. Corp.*, 637 F. Supp. 1556 (W.D. Wash. 1986) (no disqualification) with *People v. Speedee Oil Change Systems, Inc.*, 980 P.2d 371 (Cal. 1999) (disqualification ordered).

9. 132 Idaho 424, 426, 974 P.2d 70 (1999).

10. ABA Formal Ethics Opinion 95-398 at 2.

11. These reports and other Ethics 20/20 Commission materials are available on the ABA's web site at: http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html.

12. ABA Model Rule 1.1, Cmt. 6.

13. ABA Model Rule 1.1, Cmt. 8.

14. ABA Model Rule 5.3, Cmts. 1, 3-4.

15. ABA Model Rule 1.6, Cmts. 13-14.

16. ABA Model Rule 1.6, Cmts. 18-19.

17. ABA Formal Ethics Opinions 99-413 and 11-459 deal with electronic communications in detail. Closer to home, Oregon and Washington both recently

issued ethics opinions addressing cloud computing: OSB Formal Ethics Opinion 2011-188 (2011); and WSBA Advisory Opinion 2215 (2012). They are available on the respective bar web sites at www.osbar.org and www.wsba.org.

About the Author

Mark Fucile of *Fucile & Reising LLP* handles professional responsibility, regulatory and attorney-client privilege matters and law firm related litigation for lawyers, law firms and legal departments throughout the Northwest. He is a past chair of the Washington State Bar Rules of Professional Conduct Committee, is a past member of the Oregon State Bar's Legal Ethics Committee and is a member of the Idaho State Bar Litigation and Professionalism & Ethics Sections and is a co-editor of the WSBA's *Legal Ethics Deskbook* and the OSB's *Ethical Oregon Lawyer*. He can be reached at 503.224.4895 and Mark@frllp.com.



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Idaho to Consider Following ABA on Electronic Communication, Outsourcing and Confidentiality

Larry C. Hunter

Bradley G. Andrews

In 2009, the President of the American Bar Association (ABA), Carolyn Lamm, empowered a commission to review the Model Rules of Professional Conduct¹ (the “Rules”), the latest version of which had been approved by the ABA in 2001 (and, in large part, adopted in Idaho in 2004). The purpose of the review was to ascertain whether developing conditions in the practice of law necessitated changes or additions to the Model Rules of Professional Conduct. The particular areas of concern were, in broad terms, electronic communications, outsourcing, and confidentiality.

The commission — “Ethics 20/20” — met, sent out drafts, solicited comments, held public meetings, and made presentations to the ABA House of Delegates, (the “House”). In short, they spent a lot of time and well-directed energy reviewing the existing rules and determining what, if any, changes should be made.

The commission decided that without adding any new rules, the existing Rules were sufficient but with some well-placed modifications. In August 2012 and February 2013, they formally recommended a series of changes to the House. With minor changes, these were adopted. Many of these adopted changes affect the Idaho Rules of Professional Conduct², (I.R.P.C.).

The Idaho State Bar, (ISB), Professionalism and Ethics Section (the “Section”) reviewed the changes and will make a recommendation to the ISB Board of Commissioners that certain amendments and comments to the I.R.P.C. be considered

The Idaho State Bar, Professionalism and Ethics Section reviewed the changes and will make a recommendation to the ISB Board of Commissioners that certain amendments and comments to the I.R.P.C. be considered for adoption during the 2013 Roadshow.

for adoption during the 2013 Roadshow — the details of the Section’s recommendation will be posted on the Idaho State Bar website. The purpose of this article is not to address each individual proposed amendment, but to summarize the core issues highlighted above. The Model Rules and its recent amendments can be found on the ABA’s website.³

Confidentiality and digital information

A primary issue addressed by amendments is the effect of new technology (e.g., cloud computing, tablets, and smart phones) on attorneys’ confidentiality obligations. The starting point, naturally, is a proposed comment to Rule 1.1, Competence. It requires lawyers keep abreast of changes in technology and their associated risks and benefits as a matter of competency.

The next amendment proposes to add a new subparagraph (c) to Rule 1.6, Confidentiality of Information. It requires a lawyer to make reasonable efforts to protect client confidences from inadvertent or unauthorized access or disclosure. The proposed Comment to that Rule clarifies that an inadvertent or unauthorized disclosure of confidential information does not constitute

a violation of Rule 1.6 if the lawyer has made reasonable efforts to prevent the access or disclosure. That comment also identifies factors to be considered in determining the reasonableness of the lawyer’s efforts. Those factors include, but are not limited to:

- the sensitivity of the information,
- the likelihood of disclosure if additional safeguards are not employed,
- the cost of employing additional safeguards,
- the difficulty of implementing the safeguards,
- the extent to which safeguards adversely affect the lawyer’s ability to represent clients.

The final confidentiality issue raised by new technology relates to an amendment to Rule 4.4, Respect for the Rights of Third Persons. It clarifies that within the scope of our obligation to notify the sender that we received inadvertently sent documents, electronic information is included. That minor revision merely reflects current practice under I.R.P.C. 4.4.

Developing the business: Communications

The amendments also address the role of technology in client develop-

ment, legal marketing, and communications. Several changes address these topics.

Preliminarily, the Section will recommend that Idaho adopt Model Rule 1.18(d) into the I.R.P.C. Subparagraph (d) permits a lawyer who has received disqualifying information from a prospective client, to continue representation if:

(1) the affected client and the prospective client have given their informed consent confirmed in writing;

(2) or the lawyer who received the information took reasonable measures to avoid exposure of more disqualifying information than was reasonably necessary to determine whether to represent the prospective client;

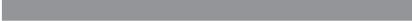
(3) and the disqualified lawyer is timely screened from participation in the matter, with written notice of the screen to the prospective client.

The permissibility of representing a person adverse to the prospective client, if properly screened, is consistent with the concept of screening permitted by I.R.P.C. 1.10, relating to the lateral movement of lawyers.

The proposed Comment to Rule 1.18 offers guidance to lawyers about how to use new forms of Internet-based marketing, such as pay-per-click ads and social networking sites, without inadvertently creating a prospective attorney-client relationship.

The proposed amendments also include amendments to the Comment to Rule 7.2, Advertising. Those proposed amendments are designed to clarify how the prohibition against paying others for a “recommendation” applies to online lead generation services. The proposed Comment clarifies that a communication is a recommendation if it endorses or vouches for a lawyer’s credentials, abilities, competence, character, or other professional qualities. It also clarifies that a lawyer may pay

In the new Model Rules, the use of paralegals and other non-legal assistance was an area of concern.



others for generating client leads, such as Internet-based client leads, as long as:

(1) the lead generator does not recommend the lawyer;

(2) any payment to the lead generator is consistent with Rules 1.5(e) and 5.4;

(3) the lead generator’s communications are consistent with Rule 7.1.

The proposed amendments also clarify the language of Rule 7.3, Solicitation of Clients. That proposed amendment clarifies that the Rule’s prohibitions apply to anyone, not just “prospective clients.” The proposed amendment also seeks to amend the Comments to that Rule to define solicitation as “a targeted communication initiated by the lawyer that is directed to a specific person and offers to provide, or can reasonably be understood as offering to provide, legal services,” as opposed to communications with the general public.

Outsourcing: Competence and scope

The proposed amendments also address issues relating to retaining or contracting with other lawyers, or outsourcing. The proposed amendments to the comments to Rule 1.1, Competence, address the circumstances under which a lawyer may retain or contract with other lawyers

outside the lawyer’s own firm in the provision of legal services to a client. It provides that the lawyer:

(1) should ordinarily obtain informed consent from the client;

(2) must reasonably believe that the other lawyer’s services will contribute to the competent and ethical representation of the client;

(3) and should consult with the client and with each other about the scope of their respective services.

That issue is also addressed in the proposed amendments to Rules 5.3 and 5.5.

New employment: Confidentiality and disclosure

The final general issue relates to lawyer mobility and changing jobs, addressed in the amendment to Rule 1.6(b), Confidentiality of Information. The amendment states a lawyer may permissibly reveal confidential information to detect and resolve conflicts of interest arising from the lawyer’s change of employment, or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege, or otherwise prejudice the client.

The amendments also propose new Comments to Rule 1.6, which discuss the disclosure of information for detection of conflicts in greater detail and provides additional guid-

ance to lawyers addressing a change of employment or change in the composition or ownership of a firm. Similarly, they propose a slight revision to the Comments to Rule 1.17, Sale of a Law Practice, to incorporate by reference Rule 1.6(b)(7), and to clarify that the permissible disclosure of confidential information also applies to negotiations between a seller and a prospective purchaser, prior to disclosure of information relating to the specific representation of an identifiable client.

Using non-attorney assistance

In the new Model Rules, the use of paralegals and other non-legal assistance was an area of concern. There is clarification regarding the use of non-lawyers outside of the firm in Rule 5.3. Comment 2 to that Rule was revised and made Comment 1, and there are new Comments 3 and 4. The new comments require the attorney to make reasonable efforts to ensure that the services of non-lawyers outside the firm are provided in a manner that is compatible with the lawyer's obligations and the client's expectations. The Rule formerly contained the word "assistants" in the title and that has been changed to "assistance" to emphasize the broad range of help that attorneys and law firms outsource, including the retention of investigative services, document management companies, and internet-based storage for client information, as well as attorneys, paralegals and word processors.

There were additional recommendations adopted by the House which are not included in the proposed changes in Idaho due to a lack of immediacy or the fact that current rules are adequate. Recommendations not sought in Idaho include new model rules on practice pending admission and admission by motion, and limited admissibility of foreign lawyers.

The fruit of the Ethics 20/20's labor is filtering into state's ethics rules around the country.



The fruit of the Ethics 20/20's labor is filtering into state's ethics rules around the country. Idaho attorneys are encouraged to examine the ABA Model Rules,⁴ the modifications, and look for the proposed language for amending the I.R.P.C., which will be publicized later this fall on the ISB website, (www.isb.idaho.gov), and through the weekly E-Bulletin.

Endnotes

1. http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html
2. <http://isb.idaho.gov/general/rules/irpc.html>
3. http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html, as of Aug. 1, 2013.
4. *Id.*

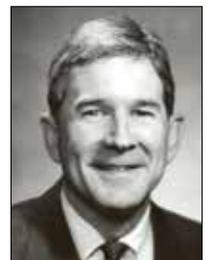
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Larry C. Hunter of *Moffatt Thomas Barrett Rock & Fields, Chtd.* is currently the Idaho State Delegate to the ABA House of Delegates and serves on the Nominating Committee and the



Steering Committee of the Nominating Committee. He was a member of the Idaho State Bar Commission and served as president in 2004. He received the Bar's Professionalism Award in 2009. Mr. Hunter has been practicing law for 37 years and is currently limiting his practice for new cases to Alternative Dispute Resolution and Administrative Law. He was a member of the Board of the Boise Philharmonic for 10 years and served as the President of that Board in 2007-2008.

Bradley G. Andrews was selected Bar Counsel of the Idaho State Bar in March 2003. He is general counsel to the Board of Commissioners and chief disciplinary counsel. Prior to that, Mr. Andrews was a partner with Jones, Gledhill, Hess, Andrews, Fuhrman, Bradbury & Eiden in Boise. His practice emphasized civil litigation and business transactions. Before entering private practice, Brad was an Idaho Deputy Attorney General and clerked for United States District Judge Harold L. Ryan. He is a former President of the Boise Youth Amateur Hockey Association, a former President of the Idaho Shakespeare Festival and a current member of the Festival's Advisory Board of Trustees. He serves as the Risk Manager for the Idaho Amateur Hockey Association and coaches the Boise High hockey team.



Keeping Pace With a Technology-Driven Profession

Jodi Nafzger

Ready or not, Idaho is going paperless. At the Idaho State Bar 2013 Annual Meeting in Coeur d'Alene, the Idaho Supreme Court previewed the new statewide judicial case management system which is expected to roll out in the next 36 months.¹ The Idaho Supreme Court's Technology Committee, comprised of judges, trial court administrators, attorneys, court clerks, and other specialists provided a preview of a new digital court management system that will make a reality technology tools like electronic filing, judicial workbench, public access portals, and video conferencing.

The subject of integrating technology into your practice is a broad theme. This article is by no means a how-to. The focus of this article is on the professional responsibility of lawyers to be technologically competent and to provide affordable legal services and how the two responsibilities might intersect.

Idaho Supreme Court's new judicial case management system

In mid-2012, the judiciary undertook the challenge to develop a new judicial case management system to replace the current Idaho Statewide Trial Court Automated Records (ISTARS) system. The Technology Committee's work has focused on creating a reliable statewide network with wireless connectivity, statewide forms, a court management system that allows for self-scheduling and event-driven automation, and electronic filing. While courts have been migrating to paperless systems since the late 90s, judges are often still heavily dependent on paper inside the courtroom. Previously, software solutions haven't been able to pro-

The Technology Committee's work has focused on creating a reliable statewide network with wireless connectivity, statewide forms, a court management system that allows for self-scheduling and event-driven automation, and electronic filing.

vide a comparable experience. Using the latest technology, the new statewide system is designed to empower judges to control case information efficiently and securely right from the bench and provide attorneys with case tracking features, electronic data sharing capabilities, automated notifications and subpoenas, and the creation of an integrated and confidential record.

So while some of us can't use terms like "E-discovery," "client portals," "document assembly," and "virtual law office" in a coherent sentence, we must be prepared for the reality that technology is redefining the practice of law. The critical lawyering tasks — gathering, managing, and presenting information—are dominated by improved case management systems. Attorneys cannot simply pass the responsibility for electronically stored information to their client's information technology department. In this new E-discovery world, the failure of an attorney to be technologically competent can have serious consequences for the client.

ABA model rules expand the duty of competence

In 2009, the American Bar Association (ABA) created the Commission on Ethics 20/20 to conduct a plenary review and assessment of the

ABA Model Rules of Professional Conduct. One of the Commission's primary goals is to evaluate particular ethical issues raised by changing technology.² Technology-related issues can affect a lawyer's duties under the current rules, but the Commission is taking a closer look at the rapid pace of technological change and issues of lawyer competence.

Last August, the Commission proposed an amendment to ABA Model Rule 1.1 which expands a lawyer's responsibilities to include "keeping abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology...*"³ Additionally, discovery rules include "electronically stored information" and information contained in "data storage devices" in the list of initial and upon request disclosures which require that attorneys involved in litigation discovery keep up to date with technology and E-discovery law.⁴

As an illustration, in *Qualcomm Inc. v. Broadcom Corp.*,⁵ the United States District Court for the Southern District of California awarded over \$8M in sanctions against Qualcomm's attorneys for its failure to produce 46,000 documents of electronically stored information that would have changed the outcome of the case. The Court admonished the attorneys for a violation of the Federal Rule of Civil Procedure that

requires parties to respond to discovery in good faith. The Court pointed to the Advisory Committee's explanation: "[I]f primary responsibility for conducting discovery is to continue to rest with the litigants, they must be obliged to act responsibly and avoid abuse."⁶ The Court's concerns were heightened in this age of electronic discovery when attorneys may not physically touch and read every document within the client's custody and control. For the current "good faith" discovery system to function in the electronic age, the Court opined "that attorneys and clients must work together to ensure that both understand how and where electronic documents, records and emails are maintained and to determine how best to locate, review, and produce responsive documents. Attorneys must take responsibility for ensuring that their clients conduct a comprehensive and appropriate document search."⁷

The lawyer's duty to safeguard client confidentiality

A lawyer must also act competently to protect the confidentiality of clients' information.⁸

As I work on this article using the public network at Thomas Hammer Coffee House, I am reminded of the significance of this rule. The availability of sensitive client documents through electronic means that could be accessed or intercepted by other users raises issues of confidentiality. We know that keeping up with the changes in the law is difficult enough. A New Jersey ethics opinion suggests that just "keeping up" is not all a lawyer must do: "Whether a particular system provides reasonable protective measures must be 'informed by the technology reasonably available at the time' to secure data against unintentional disclosure."⁹

At a minimum, attorneys should create a virtual private network in or-

Attorneys cannot simply pass the responsibility
for electronically stored information to their client's information
technology department.

der to connect securely to a remote network and protect against general internet traffic.¹⁰ An insightful and user-friendly overview of other technology protocols to safeguard confidential information can be found in an article entitled *Protecting Client Data: 11 Steps to Take When Using Technology*¹¹ by Peter Roberts, the Practice Management Advisor in the Law Office Management Assistance Program of the Washington State Bar.

Professional responsibility to provide affordable legal services

In addition to the duties of competency and confidentiality, the Commission is examining how advances in technology can increase or enhance the opportunities for lawyers to improve access to justice.¹² Lawyers are challenged to utilize technology to make available affordable legal services to underserved individuals. William E. Hornsby, Jr., staff counsel at the ABA, regularly writes and speaks about the intersection of technology and legal practice. Hornsby suggests that the American legal system falls short of providing access to justice for all.

Legal needs studies show that people often do not recognize when they have a problem for which there is a legal solution and therefore do not seek out lawyers or the justice system to provide assistance with their

problems. Some assert that the costs of legal services are beyond the means of many people. While that is true for the poor in some areas of law, both the marketplace and specific programs, such as lawyer referral [programs], provide affordable legal services for many types of legal matters. For many, it is not affordability but lack of engagement that causes people to forego legal solutions. Technology has addressed efficiencies in the legal process, once again driving down costs, but has not fulfilled its potential for creating engagement.¹³

Law schools have a unique opportunity to enlist the power of modern information technology to bridge the crucial gap in affordable legal services. In January, the Center for Computer-Assisted Legal Instruction (CALI®)¹⁴ selected six law schools to develop a course as part of the Access to Justice Clinical Course Project. Participating law schools include Columbia Law School, Concordia University School of Law, CUNY School of Law, Georgetown University Law Center, University of North Carolina School of Law, and University of Miami School of Law. These hybrid clinical courses are designed to teach law students how to use and deploy technology tools to lower barriers to justice for low-income, self-represented litigants.

Students will use A2J Author® to build user-friendly web-based document assembly tools called A2J Guided Interviews® that will allow users to complete pleadings or other legal documents by answering a series of easy-to-understand questions. By building documents that perform some of the tasks that lawyers do, future lawyers gain insight into emerging technologies at the center of modern law practice and also develop core competencies across a range of new and traditional lawyering skills including empathy and client-centered professionalism.¹⁵

The A2J Clinic at Concordia Law is a collaborative project with Idaho Legal Aid Services and builds on the already comprehensive work of Idaho's Court Assistance Office (CAO). CAOs are located in the county seat in each of the judicial districts, and officers are onsite to provide access to court approved forms and to review forms before they are filed, but a growing number of pro se litigants are accessing the forms online. The CAO website was revised and launched in April 2013 to meet the high demand for services and better facilitate access to court information and forms.¹⁶ Idaho's CAOs are using document assembly programs and interactive tools for problem assessment to encourage and facilitate access to justice to meet the demand for fast, accurate, and logical navigation of the court system online. The Court Assistance Office reports the past two years have shown the highest historical number of requests with 56,763 in FY2012 and 60,614 in FY 2011.

Paving the way for paperless

With the increasing use of E-discovery and paperless judicial systems, members of the legal profession must consider new methods for managing the overwhelming volume of information and be compe-

tent with the emerging technologies at the center of modern law practice. It is also increasingly clear that law schools must teach the technology of law practice. The ABA Model Rules of Professional Conduct call for law school curriculum which familiarizes aspiring lawyers with important technology tools. With practical skills training in the use of effective technology tools, the next generation of lawyers can bring an enhanced mastery of business and technology processes into their law firms, government agencies, and public interest organizations and improve the practice of law and the provision of affordable legal services.

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11. Westlaw 36 No. 2 ABALPRAC 48 (2010).
12. ABA COMMISSION ON ETHICS, p. 8.
13. William E. Hornsby, Jr. presented on the topic "Gaming the System: Approaching 100% Access to Legal Services Through Online Games," at the CALI Conference on June 15, 2013.

By building documents that perform some of the tasks that lawyers do, future lawyers gain insight into emerging technologies at the center of modern law practice.

14. CALI® is a nonprofit consortium of law schools whose mission includes promoting "access to justice through the use of computer technology."

15. Ronald W. Staudt & Marc Lauritsen, *Justice, Lawyering and Legal Education in the Digital Age*, May 8, 2013. A2J Clinic projects are modeled on Staudt's Justice & Technology Practicum at IIT Chicago-Kent College of Law.

16. Patricia Tobias, Administrative Director of the Courts, *Court Assistance Office Report to Governor C.L. "Butch" Otter & the 1st Regular Session of the 62d Idaho Legislature*.

About the Author

Jodi Nafzger is an Assistant Professor and Director of Experiential Learning & Career Services at Concordia University School of Law. She is a member of the governing board of the Professionalism and Ethics section of the Idaho State Bar, serves on the Idaho Pro Bono Commission and the Fourth District Pro Bono Committee, was appointed by the City Council to the Boise City Ethics Commission in 2013, and is a recent graduate of the Idaho Academy of Leadership for Lawyers.



Introducing the Attorneys for Civic Education (ACE) Committee: Helping Idaho Gain a Greater Understanding of Civics

Angela Schaer Kaufmann

As I write this article, Independence Day is fast approaching, and with it, a reminder of just how special our system of democracy really is. For all of this nation's disagreements and even diametrically opposed views, our system of government functions remarkably well. Yet, we seem to be failing to teach many young people in our country about this system that has served us so well.

This article is an invitation to Idaho attorneys to combat this failure by joining the Attorneys for Civic Education (ACE) committee.

The need for civic education

Just a few weeks before Election Day in 2012, former Supreme Court Justice Sandra Day O'Connor authored an Op-Ed piece for the *San Francisco Chronicle* on the importance of civic education. She argued that "[w]e need intelligent and engaged citizens. This country faces daunting economic and policy challenges. . . . How best can we equip our children and our children's children to tackle the challenges that they will inherit? We must equip them by teaching them the knowledge and skills of informed and engaged citizenship."¹

Why is Justice O'Connor so concerned about civics education, particularly for our young people? In 2012, Xavier University's Center for the Study of the American Dream released a study in which native-born U.S. citizens took the civics portion of the naturalization test required to become a citizen.² While the pass rate for immigrants was reported to be 97.5 percent, one in three citizens born in this country failed.³ Among the questions missed:

"I don't believe there is any problem of American politics in American public life which is more significant today than the pervasive civic ignorance of the Constitution of the United States and the structure of government."⁸

— Former Supreme Court Justice David Souter

- How many amendments does the U. S. Constitution have? (7% answered correctly)
- The Federalist Papers supported the passage of the U.S. Constitution. Name one of the writers. (8% answered correctly)
- When was the Constitution written? (9% answered correctly)
- What is the rule of law? (15% answered correctly)
- The House of Representatives has how many voting members? (16% answered correctly)
- What are two rights in the Declaration of Independence? (18% answered correctly)
- Who was President during World War One? (21% answered correctly)
- Under the U.S. Constitution, some powers belong to the states. What is one power of the states? (23% answered correctly)
- What does the judicial branch do? (25% answered correctly)⁴

Similarly, Justice O'Connor noted that "[o]n the last nationwide civics assessment test, two-thirds of students scored below proficiency. Only about one-third of Americans can name the three branches of government, let alone describe their role in our democratic system. Less than one-fifth of high-school seniors

— citizens who might be eligible to exercise their franchise for the first time this November — can explain how citizen participation benefits democracy."⁵ It seems Justice O'Connor had good reason to worry that even as America prepared to vote just a few weeks after her Op-Ed piece was published, "we are failing to impart the basic knowledge that young people need in order to become effective citizens and leaders when they are of voting age."⁶ Former U. S. Supreme Court Justice David Souter has added, "I don't believe there is any problem of American politics in American public life which is more significant today than the pervasive civic ignorance of the Constitution of the United States and the structure of government."⁷

What is the role of attorneys in civic education?

As attorneys, it may be tempting to shake our heads in wonder and continue on with our lives, muttering under our breath about the sorry state of the American knowledge base. After all, this is not our problem — we attorneys are guardians of the judicial system, not the entire system of government.

But wait — the lead-in paragraph to Rule 6.1 reminds us that "[e]very

lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of *pro bono publico* legal services per year.”⁸ Less often discussed, but no less important, is the critical role attorneys play in government and legal education. Rule 6.1(b)(3) reminds us that a lawyer should “provide additional legal services through: . . . participation in activities for improving the law, the legal system or the legal profession.”⁹

The Idaho State Bar and its members have taken that rule to heart, and demonstrated their commitment to civic education through the Law Related Education (LRE) committee and program. Of course, there is always more to be done, particularly in times of ever-shrinking budgets and competition for funds. Edith Pacillo, Jodi Nafzger and Danielle Quade saw that need, and as their legacy project for the Idaho Academy of Leadership for Lawyers (IALL), created the ACE committee, which is housed within the Public Sector and Government Lawyers Section of ISB.

Before discussing the ACE committee’s early activities, it is important to emphasize that the ACE program will *not* be competing with the existing and outstanding ISB programs such as LRE and the Citizens’ Law Academy. During the initial ACE steering committee meeting held in June 2013, committee members agreed that ISB and Idaho Law Foundation (ILF) programs such as LRE (including the Idaho High School Mock Trial Competition and Law Day), Lawyers in the Classroom and Citizens Law Academy are successful programs, and the intent of the ACE committee is to work closely with ISB and ILF to support and enhance those programs.

The steering committee has identified two programs that together provide civics education to a wide range of Idaho schoolchildren: We The People and Project Citizen.

We The People and Project Citizen

The ACE committee has drawn together a group of attorneys who have agreed to serve on a steering committee to further guide the development and implementation of the program. The steering committee has identified two programs that together provide civics education to a wide range of Idaho schoolchildren: We The People and Project Citizen. Both are programs of the Center for Civic Education (CCE), and each is described in turn below.

We The People

We The People is based on high school, middle school, and upper elementary school curriculum provided by the CCE. The program enhances students’ understanding of the institutions of American constitutional democracy and encourages students to apply those principles to contemporary society and events. In Idaho, We The People is organized by Troy Hamilton, a Wendell High School teacher.

At the elementary level, the program has included elementary showcase events where the schools come together and showcase their knowledge to their parents and the community. At the high school level, the program includes a competition featuring a simulated congressional hearing in which students testify

before a panel of volunteer judges from the community. High school students participate in regional and state competitions, making presentations and answering unscripted questions posed by the judging panel. The top performing team attends the national competition held in April in Washington, D.C.

The program delivers. Research shows that students score substantially higher on civics knowledge than their peers and college students who did not have the specialized training.¹⁰ Alumni are more likely to understand, engage and vote in the political process. We The People teachers had higher ratings on the measures of traditional democratic rights and responsibilities and civic engagement than teachers who did not participate.¹¹

Project Citizen

Project Citizen is for middle and high school students. It engages students in monitoring and influencing public policy. Students work in groups to identify a public policy issue, research its causes, and propose solutions. Students document the results in a detailed written portfolio with visual aids. In Idaho, Project Citizen is organized by Dan Prinzing, the Executive Director of the Idaho Human Rights Education Center (IHREC).

One study on the effectiveness of Project Citizen found many ben-

efits.¹² For instance, students participating in Project Citizen believe they can make a difference in their communities and develop a greater understanding of public policy. The National Staff Development Council singled out Project Citizen for its high level of student participation, cultivation of higher-order thinking skills and portfolio-based assessment strategies, and its value to the professional development of teachers.

In the Idaho program, students historically presented their portfolios in an in-person, statewide forum. Other student presenters and judging panels made up of three community volunteers would ask follow-up questions of each group. The statewide forum would include a keynote speaker and luncheon. As discussed below under “Need,” this aspect of the program has been discontinued due to funding cuts.

The need

For approximately 25 years, the CCE received funding from Congress via the U. S. Department of Education and provided textbooks and professional training to teachers nationwide. In 2010, the CCE funding was cut completely. As a result, schools are now responsible for purchasing the necessary textbooks and covering all travel expenses for statewide and national We The People competitions. Additionally, the mandatory teacher training sessions have been reduced to one per year, located in Boise, and the travel budget to assist teachers in attending the training has been cut. In addition, IHREC no longer conducts the in-person statewide portfolio showcase for Project Citizen due to its own budget cuts.

Director Prinzing estimates that \$10,000 per year would enable

For instance, students participating in Project Citizen believe they can make a difference in their communities and develop a greater understanding of public policy.

IHREC to restore the showcase component of the program. Meanwhile, Mr. Hamilton estimates that \$12,000 per year would enable We The People to restore its travel budget and have more than one teacher seminar per year around the state. Mr. Hamilton reports that the travel and training budget cuts have hit rural schools especially hard. The additional funding would also allow We The People to restore the elementary showcase event in the Meridian School District, which is open to all school districts and has typically attracted 300 5th grade students.

ACE proposes to help

ACE’s current focus is on providing funding to restore these programs. By doing so, ACE has the potential to impact dozens of middle school students who are currently unable to participate in the currently discontinued statewide Project Citizen showcase. Also, ACE has the potential to impact hundreds of high school, middle school, and elementary students by helping to restore We The People’s travel and training budgets.

In addition to direct funding, the programs described above rely heavily on volunteers. We The People needs 15-18 volunteers to run the statewide competition. Project Citizen needs five volunteers to run a

showcase. In several states, bar associations run these programs, and bar members make up the majority of the volunteers. In Idaho, the Idaho State Bar focuses its understandably limited civic education resources on the mock trial program, and We The People and Project Citizen are not well-known among bar members. ACE’s goal is to raise awareness and recruit volunteers to assist with these programs.

In June, the ACE Committee founders met with a number of Idaho State Bar members, this author included, who have volunteered to serve on the ACE Steering Committee. We are working toward an inaugural signature event in September, to further introduce the committee and its mission to the Idaho State Bar. The Committee welcomes any and all attorneys to participate in the development and implementation of the means and methods of supporting and furthering civics education in Idaho.

Conclusion

To be sure, the United States is a politically engaged country, with its citizens rarely shying from the free, vigorous and open debate that is the hallmark of a democracy. Nevertheless, as Justice O’Connor aptly stated “the fundamental skills and knowledge of citizenship are not handed

down through the gene pool. They must be taught and learned anew by each generation.”¹³ The ACE Committee is dedicated to being engaged in that teaching process.

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About the Author

Angela Schaer Kaufmann is a Deputy Attorney General in the Natural Resources Division of the Office of the Attorney General. An Idaho native, Angela began her legal career as a law clerk for Justice Cathy Silak of the Idaho Supreme Court. Following her clerkship, and prior to joining the Office of the Attorney General, she was in private practice for nine years. The opinions expressed in this article are those of the author and do not reflect the opinions or position of the Attorney General's Office of the State of Idaho.



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Bar Counsel and the Judicial Council — A Brief History

Hon. Michael J. Oths

Discipline of lawyers and judges in Idaho is the province of our Supreme Court. The process for investigating complaints has developed through the years and parallels the growth of the bar and bench. This article is a brief overview of the evolution of those disciplinary systems.

Early years: The bar secretary

The Idaho State Bar was created in 1923, and the first Bar Commissioners were appointed that year. For many years, the entire administrative business of the Bar was conducted by an Executive Secretary, with some clerical assistance.¹ Typically, the Executive Secretary, or Bar Secretary, was a practicing lawyer. Complaints about lawyers were screened by the Bar Secretary and referred to the Bar Commission, if necessary. Often, the Secretary would intervene by calling the complained-of lawyer and attempting to address the problem.

In the days of a much smaller bar, many issues were resolved through informal Bar Commission intervention. The Bar Secretary might be dispatched to have a sit-down with the lawyer to resolve the problem. For example, the minutes occasionally note that a client had sought intervention on a fee dispute and the Bar Commissioners would simply decide whether the fee complaint had merit.²

Discipline of lawyers was conducted mostly on an *ad hoc* basis, in that the most serious complaints about lawyers were heard by the Bar Commissioners, acting as the discipline committee. If discipline was recommended, the Commission forwarded the recommendation on to the Supreme Court.

If a lawyer was called to answer for a serious discipline complaint, there was no formal process for pre-

The Clark Commission report was a scathing indictment of the largely informal methods used to process lawyer discipline complaints, calling the situation “scandalous.”

sentation of evidence or a trial. The lawyer simply appeared before the Commission (often in a hotel room) and addressed the disciplinary complaint. The disciplinary rules adopted by the Commissioners in 1925 included the following due process standards:

Rule 36. The Committee on Discipline shall conduct the hearing in such manner as shall best arrive at the truth of the charges or defense, and shall be entitled by itself or by any of its members to interrogate witnesses.

Sam Griffin was the first Bar Secretary, serving from the Bar’s creation in 1923 until his death in 1951. Paul Ennis, Tom Miller and Jim Lynch followed, and Frank Elam was the last of the traditional Bar Secretaries. These were practicing lawyers who administered bar functions part-time. Boise lawyer Jim Lynch served as Bar Secretary in the 1960s. While many of the processes used a half-century ago might seem a bit informal in today’s world, Mr. Lynch notes that because of its statutory roots, delegation of some degree of decision making to the Bar Secretary was part of the legislative framework.

Full-time counsel

Some larger states began the move toward full-time discipline

Growth in Bar Complaints

Fifty years ago in December 1963, the Bar Commission minutes include individual discussion of every one of the 22 matters pending with the Bar Secretary, including dismissed complaints and fee disputes.

In contrast, in 2012 Bar Counsel’s Office received around 1,500 inquiries about lawyer conduct. The office opened 54 fee arbitration files, 40 trust account overdraft files, 21 Client Assistance Fund files, and 15 unauthorized practice of law files.

counsel in the late 1950s. In 1965, counsel from several states met to form the National Organization of Bar Counsel (NOBC), which now includes members from all American jurisdictions, as well as from Canada and Australia.

In 1969, the Idaho Bar Commissioners hired the first non-lawyer Executive Director, Maxine McGee, at the princely sum of \$700 per month. Perhaps because the Executive Director was now a non-lawyer, and certainly due to the growth of the Bar, it eventually became necessary to conduct investigation and prosecution of lawyer complaints on a paid basis.

Nationally, the evolution to full-time, paid discipline staff gained

momentum with the 1970 publication of what is known as the “Clark Commission Report.” Retired U.S. Supreme Court Justice Tom Clark chaired an ABA Commission to survey and report on the state of lawyer discipline in the United States. The Clark Commission report was a scathing indictment of the largely informal methods used to process lawyer discipline complaints, calling the situation “scandalous.”

Rules of conduct

As the approach to retaining paid bar counsel evolved, so too did the rules governing lawyer conduct. The American Bar Association has authored model disciplinary rules for many years, dating back to the first set of guidelines, in 1908.

The ABA published its Model Code of Professional Responsibility (MCPR) in 1969, which was soon adopted in Idaho. Although the MCPR was a leap forward from earlier codes, it was still a confusing mixture of disciplinary rules and aspirational guidelines. Only with the adoption of Model Rules of Professional Conduct (MRPC), issued in 1983, did the ABA complete the transition to a discipline code that involved rules, rather than suggestions.⁴ Idaho adopted the MRPC in 1986, and my first CLE program was as co-presenter with Don Burnett (then a judge on the Idaho Court of Appeals and now the Interim President of the University of Idaho) on the newly adopted *Idaho Rules of Professional Conduct*, based on the MRPC. Those rules were in effect for nearly two decades. In 2002, the Bar Commission appointed an “Ethics 2000 Commission,” for which I served as reporting secretary. That committee conducted an in-depth study of the *new* ABA Model Rules of Professional Conduct, with an eye toward implementation in Idaho. After nearly two years, the Idaho

Also in 1976, the Bar Commission hired the first compensated Bar Counsel to investigate and prosecute discipline cases.

Supreme Court adopted the current version of the *Idaho Rules of Professional Conduct*.

Idaho retains bar counsel

In 1976, the Idaho State Bar adopted a new system, creating three regional hearing committees for discipline complaints and agreeing to pay several lawyers to act as prosecutor. The regional hearing committees consisted of two lawyers and a non-lawyer — the same essential structure that continues to this day.⁵

Also in 1976, the Bar Commission hired the first compensated Bar Counsel to investigate and prosecute discipline cases. Current ISB members Tony Cantrill and John Rowe were the first to serve in that role and handled a number of cases, while maintaining their private practices. The volume of work was sufficient enough that in June 1977, the Commissioners hired John Rowe as the first full-time Bar Counsel. In that original incarnation, Bar Counsel was considered an assistant to the bar executive. The bar offices were located in an old house, at Second and State Streets in Boise. Bar Counsel’s entire support staff was a shared secretary.

Bar Commission minutes indicate that Bar Counsel began attending the Commission meetings and serving as legal counsel, in addition to handling discipline complaints.

Growth in Idaho State Bar

The explosion in the number of bar members can be illustrated by several numbers. Starting in 1925, newly-admitted lawyers began receiving “bar numbers.” Through 1940, that number had not reached 400. Lawyers admitted in 1960 were still receiving triple-digit bar numbers.³ I was admitted in 1986 and was assigned bar number 3515. The next lawyer admitted in Idaho will be in the 9200s. In 1970, Idaho had 724 lawyers; by 1980, the number had nearly tripled, to 1,837. Today, there are close to 6,000 ISB members.

Mr. Rowe, now recently retired from a practice in Scottsdale, Arizona, recalls spending a week at the offices of the California Bar, studying the processes used in that state. One of the ideas he brought back was a fee arbitration program.

Mark Downing succeeded John Rowe as Bar Counsel, serving for about two years.

Linda (Holdeman) Edwards was Bar Counsel from 1979 to 1981, as the office was still finding its way.⁶ She recalls a number of exotic “characters” with complaints about lawyers, one of whom was a full-blown split personality, capable of switching back-and-forth between personae in mid-conversation. She also recalls

that a complainant termed the Bar's role in a complaint as "appearing, re-appearing, co-appearing, and disappearing."⁷

Barbara Miller was Bar Counsel from 1981 to 1986, which was the longest tenure to that time.

I was hired by the Bar Commission, in 1986, at age 28, with three years of experience as a small-county prosecutor. I was clearly advised by the Bar Commissioners that "Bar Counsel is not a career-type position — it is a transitional position." I was the only lawyer. The office had one clerical assistant, shared by Bar Counsel's Office and also serving as Clerk to the Professional Conduct Board. The ultimate disposition of *any* discipline complaint required the counter-signature of a discipline committee member. That practice changed early in my tenure as Bar Counsel, reflecting the increased volume of inquiries about lawyer conduct. The rules for processing discipline complaints were also cumbersome. After the three-person panel heard and decided the case, it was next sent to an intermediate appellate body, consisting of six lawyers and three non-lawyers. The logistical difficulties of scheduling a hearing before a nine-person panel are obvious, meaning cases could take quite a long time to reach the Supreme Court.⁸

My "transitional" period lasted for 17 years. By that time, Bar Counsel included assistant counsel, with full-time paralegals and administrative assistants.

In 2003, current Bar Counsel Brad Andrews became the sixth lawyer to serve in that role. He came to the Bar with more than 20 years of experience, having been a partner in a well-respected Boise law firm. Today, Bar Counsel's Office consists of three lawyers, two paralegals and two clerical assistants.

Nationally, the trend toward career bar counsel positions continues,



Idaho State Bar file photo

The offices for the Idaho State Bar at Second and State streets in the 1970s.

with many senior NOBC members having been with their agencies for 30 or more years.

Court reform and creation of the judicial council

Just as the lawyer discipline process has evolved, the system for judicial selection and discipline has developed over the years.

Into the mid-1960s, the Idaho court system consisted of a mish-mash of probate courts, justice courts, police courts and other forums for dispute resolution. A strong movement emerged for court reform, with an eye toward standardizing the judicial structure throughout the state.

The central engine for court reform in Idaho was a "Committee on Courts," formed in 1965, to propose a comprehensive plan for court reform.⁹ In 1971, after many twists and turns, that effort eventually resulted in the abolition of the old forms of court and the creation of the magistrate division of the district court. Former Bar Secretary Tom Miller chaired the Committee on Courts. He recalls that it was coun-

The two principal jobs for the Judicial Council were — and are — to act as a nominating body for vacancies in the district and appellate courts and to act as a judicial disciplinary body.

terintuitive that in the debate about which forms the courts should take, the lawyers were generally in favor of retaining the county court system, while the lay members were in favor of conversion to a magistrate division.

An earlier product of Idaho's Committee on Courts was the Judicial Council, created in 1967. The two principal jobs for the Judicial Council were — and are — to act as a nominating body for vacancies in the district and appellate courts and

to act as a judicial disciplinary body, pursuant to Rule 2 of the *Rules of the Idaho Judicial Council, General Rules of Procedure*.

Prior to creation of the Judicial Council, mid-term judicial vacancies were filled by the governor. While governors typically sought input from local bar associations on district judge appointments, it was a courtesy, not a requirement. Under the Judicial Council system, the Council screens nominees, and then sends two to four names to the governor, who must select from amongst those names.

The seven-member Council consists of three citizens appointed by the governor, plus three Idaho State Bar members (two lawyers and a district judge) nominated by the Bar Commission, subject to confirmation by the Senate Judiciary Committee. The Chief Justice is an *ex officio* member and chair of the Council.

Two original members of the Judicial Council included Tom Miller and future Idaho Supreme Court Justice Robert Huntley.

Judicial discipline

Bob Hamlin served as the Judicial Council's Executive Director for 30 years, from the early 1980s until recently. He noted two major developments in the evolution of the Council. In the early 1980s the Council empowered the Executive Director to issue both formal and informal ethics advice to Idaho judges. Current Executive Director Jim Carlson reports that he will issue 60 to 80 opinions this year, most of them of the informal variety.

The second major change was the 1990 transfer of responsibility for discipline of magistrate judges to the Council. Once Idaho's magistrate judges were added, the number of judges within the Council's disciplinary jurisdiction more than tripled.

The Council is drafting rules to provide clearer guidance on how complaints are to be processed, along with more specific guidelines as to the range of sanctions available and the factors to be considered in imposing sanctions.

The Council annually receives 100 to 125 inquiries about judges' conduct, with only about 40% of those stating sufficient basis to warrant opening a complaint.

Judicial conduct concerns serious enough to warrant a full hearing before the Council are rare, and those that do result in a hearing and disciplinary recommendation from the Council are rarer still. Most often, when the Council recommends a public form of discipline, the judge will choose to resign in lieu of formal Supreme Court action. Such resignations occur at a rate of fewer than one per year, although Bob Hamlin can recall as many as four in one particularly active year.

There are only two reported Idaho Supreme Court decisions concerning judicial discipline in the nearly half-century since the creation of the Council. The first came in the early 1990s, causing the Court to comment:

This is the first occasion the Court has had to address the procedures and standards the Court follows in considering the discipline, removal, or retirement of a judge since the enactment of I.C. § 1-2103 in 1967 and the ratification of art. 5, § 28 of the Idaho constitution in 1968.

Chief Justice Roger Burdick has seen the Council evolve over the

years. In his days as a magistrate judge, he served as President of the Magistrates Association when an *ex officio* Magistrate member was added. This occurred around 1990, when discipline of magistrate judges became a Council function. Now, as Idaho's Chief Justice, he serves as chair of the Council. His observation is that the Council has developed more precise methods of screening judicial applicants over the years.

Proposed changes

Both the Judicial Council and the Supreme Court are currently studying updates to the respective rules of procedure. The Council is drafting rules to provide clearer guidance on how complaints are to be processed, along with more specific guidelines as to the range of sanctions available and the factors to be considered in imposing sanctions.

The Court is also studying rules that would clarify the process for presentation of contested discipline cases that come before it.

Bar Counsel and the Judicial Council serve important public roles for Idaho. Both provide a valuable public service to clients and other participants in Idaho's courts. Their evolution is a reflection of the growth of the bench and bar in our state and of an increased attention to the accountability to be expected from lawyers and judges.¹⁰

Endnotes

1. Bar Secretary was and is a statutory position. See I.C. §3-407.
2. Today, the Idaho State Bar has a formal process for fee arbitration. Approximately fifty cases a year are referred to the fee arbitration committee.
3. Boise lawyer Allen Derr, admitted in 1959, was fond of telling people that his bar number was "911."
4. One of the key players in the adoption of the MRPC was Boise lawyer Eugene C. Thomas, who would shortly thereafter become the only Idahoan to serve as President of the American Bar Association.
5. Some of the lawyers who served on the first regional discipline committees include Joe Anderson of Idaho Falls, Gerald Olson of Pocatello, future federal judge Harold Ryan, and Don McLenahan.
6. She is now a law professor at University of Nevada, Las Vegas, having previously taught at Mercer and at NYU. Her husband Dan Edwards, a former ISB member, is the current Episcopal Bishop of Nevada.
7. Ms. Edwards also related an entertaining Cumer Green story. After due con-

sideration (and as all of Cumer's friends will appreciate) I can't find a way to even paraphrase it, so it will go unwritten. R.I.P., Cumer.

8. The intermediate appellate board was a trade-off for having non-lawyers involved in disciplinary decision making, intended as a safety valve before cases proceeded to the Supreme Court. Non-lawyers have ultimately shown to be highly valuable members of the discipline process, some of them having served for many years.

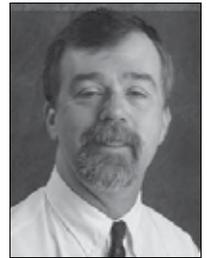
9. Many of the key players from the court reform effort are names well-known to the current bar, including Tom Miller, Jim Lynch, Harold Ryan, Charles McDevitt, and Ray Rigby. An excellent reference on this and other subjects related to the judiciary is *Justice for the Times*, by Carl Bianchi. (Idaho Law Foundation 1990).

10. The author would like to thank the following people who took time to be interviewed for this article: Brad Andrews, Albert Bell, Hon. Roger Burdick, Tony Cantrill, Jim Carlson, Dan Edwards, Linda Edwards, Bob Hamlin, Jim Lynch, Tom Miller, and Diane Minnich.

The Court is also studying rules that would clarify the process for presentation of contested discipline cases that come before it.

About the Author

Michael J. Oths was Idaho's Bar Counsel from 1986-2003. He has served as a magistrate in Boise since 2003. The reader's forgiveness is sought for the occasional first-person reference but they are hard to avoid, given that my personal experience covers about half the existence of the Office of Bar Counsel.



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Welcome from the Idaho Legal History Society

Susie Boring-Headlee

Thank you for your continued support of the Idaho Legal History Society (ILHS). The ILHS was organized in 2005 in order to preserve, and promote the public's knowledge of and interest in Idaho's legal history. Our mission is to collect and preserve records, oral histories, and other items of interest involving Idaho's legal history.

Every organization is only as successful as its leadership, and participation by its membership; and we are fortunate to have a strong board of directors from every part of the state, consisting of historian Judy Austin of Boise; Pocatello Attorney Ron Kerl; Judge Ronald E. Bush, U.S. Federal Court, Boise; Coeur d'Alene Attorney Scott Reed; and Boise Attorney Larry Westberg. Additionally, our Officers are State District Judge Ronald Wilper, serving as President; Ernie Hoidal, Vice-President, and J. Walter Sinclair, Stoel Rives, who recently was elected Treasurer.

Our Board and Officers have been working diligently with the ILHS Oral History Committee in producing a comprehensive listing of oral histories that can be reviewed by the public at the Idaho History Center in Boise. For instance, Samuel D. Hay's (son of the Territorial Attorney General) oral history relates his boyhood memories of one of the first cabins

near Lardo (now McCall). Ben Oppenheim's oral history describes his work as one of the first attorneys most involved with Worker's Compensation law in Idaho. And, Willis Sullivan's oral history relates his law school years at Harvard where one of his professors was Felix Frankfurter (later a U.S. Supreme Court Justice).

The oral histories provide researchers a wonderful glimpse into Idaho's rich legal history, and we are grateful for the continued support of Diane Minnich and Mahmood Sheikh of the Idaho State Bar, where oral history interviews of a number of attorneys and judges at the Idaho State Bar's annual meetings have been conducted over the past several years.

The Idaho Legal History Society is currently in the midst of a very ambitious project to research, write and publish a history of the practice of law in Idaho, beginning in the territorial days through the present. This project is called "Tents to Towers: 150 years of Legal Practice in Idaho." The ILHS hired local historian Claudia Druss to research and draft the book, and board member and Idaho historian Judy Austin and local attorney Deb Kristensen are assisting. Our group has focused in particular on developing the importance of the federal court system in Idaho, the State Constitution and the significant role of lawyers at

Our Board and Officers have been working diligently with the ILHS Oral History Committee in producing a comprehensive listing of oral histories that can be reviewed by the public at the Idaho History Center in Boise.

the convention, and the emergence of water and environmental law in Idaho. In addition, the book will contain interesting "Stories of the Bar," which will ensure that the tone of the book is warm and engaging. Look for publication in 2014!

About the Author

Susie Boring-Headlee currently serves as the Federal Pro Bono Coordinator and ADR Coordinator. She spent 12 years at the Ninth Circuit Court of Appeals, where she completed a two-year capital case management plan for Judge Arthur Alarcón. She is married to Paul Headlee, and they enjoy gardening, hiking with their yellow lab Benelli, and riding their Harley Davidson.



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Legal History, Civic Literacy and a Liberal Arts Education: Building Blocks for Civic Participation

David Adler

A Constitutional Democracy, which rests on the principle of self-governance, expects of its citizens the acquisition of educational tools and skills that differ from those found in other political systems.

A closed society on the order say, of the former Soviet Union, or any other totalitarian regime for that matter, has little interest in what Americans regard as a traditional liberal arts education: promotion of intellectual inquiry and critical thinking, as well as training in such fields as history, philosophy, government, the humanities and literature, among others.

In those nations that have imposed an iron curtain, and rendered self-government all but a distant dream, there is neither interest nor utility in an educational system that would clothe its citizens with knowledge that would facilitate challenges to an all-powerful state. Accordingly, expression of opinions and exploration of intellectual perspectives at odds with the views and values of The State, not to mention challenges to its policies and programs, are prohibited.

In an Orwellian World, authority is unchallenged; censorship and suppression are in full sprint, and freedom of thought, freedom of inquiry and freedom of speech are in forced retreat.

By contrast, citizens of the United States are invited and encouraged to critique and challenge governmental programs, policies and actions. The invitation to criticize government is grounded in the fundamental principles of the Declaration of Independence, the First Amendment of the Constitution and the premises of patriotism. The cornerstone of the Declaration of Independence — that just governments derive their legiti-

The acquisition of the tools, skills and education necessary for the citizenry to perform its duties as Madisonian Monitors must be a priority, in Idaho and across America.

macy from the consent of the governed — exalts the views, values and wishes of the people and the fundamental choices that they make about the nature, role and authority of the government that they would create.

The First Amendment's guarantee of Freedom of Speech enshrines in the Constitution the critical importance of public commentary as a means of identifying and correcting flaws in governmental actions and programs.

The premises of patriotism, in turn, provide a vital platform for citizens to criticize their government. The American founders, perhaps the greatest dissidents in the history of the world, given their sustained criticism and protests of the English government, championed the opportunity and, in their view, the responsibility, of citizens to critique, challenge and improve policies that they believed to be misguided. Love of one's country, they believed, compelled committed citizens, as James Madison explained in Federalist No. 51, to hold government accountable and to persuade it to obey the law.

The acquisition of the tools, skills and education necessary for the citizenry to perform its duties as Madisonian Monitors must be a priority, in Idaho and across America. The traditional arena for the study of the foundations of civic participation

has been a liberal arts education. Indeed, promotion and effectuation of the fundamental premise of our system — government based on the consent of the governed — presupposes a citizenry that is equipped to monitor government, analyze information about programs, policies and laws, and engage in reasoned critiques of governmental actions, precisely the province of the liberal arts. The curriculum of a liberal arts education is vital to the success of the American political system which, the founders agreed, rests on a citizenry that is informed, alert and active. Informed public dialogue is integral to the goal of governmental accountability.

Legal history as a foundation for civic participation

The American tradition of skepticism of governmental actions is as old as the republic. The Framers of the Constitution were keen students of history and they culled from their broad readings the lesson that kings and despots and tyrants often abused their powers to serve their own personal interests — political, pecuniary, personal and otherwise. The founders had cut their teeth on the political axiom that power corrupts and concluded that few, indeed, could withstand the temptations of power.

They rejected the notion of human infallibility and were suspicious of motives when power was exercised. James Iredell, one of the most acute political theorists of the founding era, a delegate to the North Carolina Ratifying Convention and a future member of the first United States Supreme Court, spoke for his generation when he observed: “Nothing is more fallible than human judgment[,]” a fundamental philosophical insight reflected in the Framers’ embrace of separation of powers and checks and balances.¹

That skepticism of the exercise of governmental power led Thomas Jefferson to declare: “It is jealousy and not confidence which prescribes limited constitutions to bind down those whom we are obliged to trust with power. Our Constitution has accordingly fixed the limits to which, and no further, our confidence will go. In questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution.”²

Accordingly, the founders erected a political system built upon the planks and pillars of the doctrines of separation of powers, checks and balances and the enumeration of powers, as structural mechanisms for confining government within the four corners of the Constitution.

The Framers’ enthusiasm for constitutional checks and balances — “chains” with which to fetter governmental power — remains unrivaled in world history. But, as James Madison pointed out in *Federalist No. 51*, they relied on the people to scrutinize government policies and programs and to expose unconstitutional actions, including those that entailed the abuse and usurpation of power. After all, Madison reasoned, who more than “we the people” had a greater interest in preserving the republic that they, themselves, had sanctioned and embraced?

The letters, treatises and essays represented virtual tutorials and seminars on the knowledge that advocates of republicanism and constitutionalism should possess.

But what kind of citizen could rise to the responsibilities of policing governmental actions and superintending adherence to the Constitution? What sort of training, experience and knowledge could properly equip Americans to fulfill the demands and expectations of citizenship? The literature of the founding period is rich with advice to those who would seek to maintain constitutional principles and provisions.

Again and again, letters written in the colonial period in the run up to the American Revolution asserted the value of studying history, philosophy and government. From the colonial period forward, the names of outstanding English political theorists and activists — John Trenchard, James Gordon and John Milton, and James Harrington, Algernon Sidney and John Locke — were paraded across the pages of treatises and essays as writers to be read and studied by those eager to preserve republican principles. The names of Coke, Vattel and Montesquieu represented a treasure trove of knowledge for those eager to grasp the principles of constitutionalism.³

The letters, treatises and essays represented virtual tutorials and seminars on the knowledge that advocates of republicanism and constitutionalism should possess. They advanced learned treatments of the principles of constitutionalism, including some of the oldest roots

which traced to Magna Carta and propositions about due process of law and the rule of law. The rule of law, particularly as it was memorialized in the words of the magisterial Sir Edward Coke, came to be viewed as the chief mechanism for corraling the powers of the legislature and bringing an errant executive to heel.

They explained in clear, succinct prose the elements of the Social Contract Doctrine that would refine the tenets of liberalism — then and now — and distinguish the public from the private realms.

The emergence in the 17th Century English Civil Wars of the Doctrine of Natural Rights, heralded by those who sought to check the exercise of the King’s Prerogative and exalt individual liberties, was seized by the American colonists a century later to check the powers of Parliament and King in their own revolution. Such was the power of the timeless principles of natural rights.

The literary explosion surrounding the American Revolution and the works that accompanied and explained the evolution of thinking about constitutionalism and constitutions in the newly crowned United States, from the mid-seventies to 1787, featured seminal thinking about the most important principles of law and political science. The attention of readers was focused on the much discussed topic of sovereignty, the repository of the ultimate

legal and political authority in a nation. American colonists, seeking to trim the authority of Parliament, rejected the concept of parliamentary authority and sought to displace it with the vague contours of “popular sovereignty.” But American minds, as great and creative as any, were out-racing their reasoning processes, and, for a time, they abandoned the concept. In the period of the Articles of Confederation, states were characterized as sovereign but when the delegates gathered in Philadelphia, they replaced state with popular sovereignty as the organizing principle of American Constitutionalism. Along the way, considerable writing was focused on the critical conceptual distinctions between the contrasting views of the British and the Americans on what, exactly, a constitution was.

There was, it seemed, too little time during the critical period from the Declaration of Independence to the Constitutional Convention for adequate thought about every topic, but American minds grappled with changing conceptions of representation, the emergence of federalism and a great novelty, judicial review. These vast writings were essentially efforts to instill in newly-minted American citizens what we today would call “civic literacy” — a working knowledge of the great historical events and debates that have shaped our nation, a conceptual understanding of the intellectual doctrines that have defined and re-defined the politics of our nation, comprehension of the roles and powers of the three branches of government, and familiarity with the principles of the Constitution and the Bill of Rights.

At bottom, the founders held the belief that the future of the nation hinged on the availability of an informed electorate, grounded in the principles of republicanism.

Does our educational curriculum provide sufficient content to equip today’s students with the tools, skills and knowledge that they require to learnedly and effectively perform their duties as citizens?

The constitution and civic education today

“[L]egal history,” Justice Felix Frankfurter remarked, “still has its claims”⁴ Frankfurter’s observation is particularly true of constitutional law issues which often are perennial since they involve the proper repository of authority. Thus, Justice Horace Gray may not have exaggerated greatly when he observed that “all questions of constitutional construction” are “largely . . . historical question[s];” a view embodied in the works of Coke, Blackstone, Holdsworth and a host of distinguished legal historians who ventilated thorny issues with insights from the past.⁵ In law, as with “civic literacy” in a Constitutional Democracy, the past remains not only relevant, but compelling.

Two questions confront Idaho and, indeed, the entire nation. Is there, frankly, sufficient respect for the value of a liberal arts education that generates the kinds of citizens and leaders capable of sustaining the founders’ experiment in republicanism and self-governance? Does our educational curriculum provide sufficient content to equip today’s students with the tools, skills and knowledge that they require to learnedly and effectively perform their duties as citizens?

The short but candid answer to the first question is that Americans today underappreciate the impor-

tance of education in the areas of history, government, philosophy and the humanities. There is no denying the tremendous importance to our nation of the fields of science, technology, engineering and mathematics, but the liberal arts are often treated as poor, unwanted step-children. That should not become the norm.

Increasing numbers in our country tend to view American colleges and universities as a luxury or an extravagance in our time that does not warrant the considerable costs incurred. It is entirely understandable that parents sending children to a university will express concerns about the costs of a college education and the availability of jobs that will pay adequate salaries to permit repayment of loans. But the tendency to view our universities as a vocational enterprise or a technical or trade school, designed merely to provide skills and training necessary to land a job, ignores the great, historic function of a university as an intellectual setting where students, especially those enrolled in liberal arts programs, are given the opportunity to develop the very problem-solving skills that will make them attractive to employers in the business world.

It is sometimes overlooked, moreover, that great leaders in America and around the world have been products of a liberal arts education. It is hardly possible to do justice to the number of leaders in the Roman

Republic and the Athenian Democracy who studied history, philosophy and the arts and proceeded to shape and influence the discussions that the Western World has and had about the nature and purposes of government. From Alexander the Great, who was tutored by Aristotle, to Winston Churchill, who remains one of the most insightful and brilliant political leaders, not to mention a gifted writer, to such distinguished American presidents who were reared in the liberal arts tradition — Thomas Jefferson, James Madison, the self-educated Abraham Lincoln, Theodore Roosevelt, Woodrow Wilson and Franklin D. Roosevelt, among others — the link between liberal arts and the promotion and maintenance of our Republic is clear.

As it stands, Idaho's secondary curriculum provides a sufficient number of classes in the fields of history and government for students to become reasonably grounded in the requirements of civic literacy. Of course, personal prejudice would always welcome yet another class that focused on the Constitution and the skills necessary to become an active participant in American politics. The question confronting every instructor, from high school to college, is the question of omission. What materials, owing to time constraints, will and will not be shared with students? Routine reviews of curricular content by teachers and school officials are important to insure the promotion of civic literacy.

At all events, our students ought to possess knowledge critical to the maintenance and perpetuation of the Republic. They should be conversant, at a minimum, in the roots and principles of American Constitutionalism, knowledgeable enough to articulate the virtues and values of the Doctrine of Checks and Balances and grounded in the prescriptions

As Hamilton wrote in Federalist No. 1, in 1787 the great question inherent in the proposed Constitution was whether it was possible to create a system in which the people could govern themselves through reasoned deliberation and debate, or whether they must forever suffer the imposition of government upon them.

and implications of the Social Contract Doctrine. They should possess, moreover, a working knowledge of the allocation of powers to the three branches of government, a firm grasp of the historic purposes of the Bill of Rights and, perhaps above all, an appreciation of the importance and value of dissent in American politics. In the end, the aims of civic literacy would be greatly advanced if they could explain and, dare it be said, embrace the role and responsibility of the citizenry as expressed by Justice Louis Brandeis who, in 1927, in *Whitney v. California*⁶, justly observed: "Those who won our independence believed that the final end of the State was to make men free to develop their faculties, and that, in its governance, deliberative forces should prevail over the arbitrary... [T]hat the greatest menace to freedom is an inert people; that public discussion is a political duty."

Promoting the experiment in self-governance

We would do well to recall that for the founders the creation of the Republic represented an experiment, and that there was no guarantee that it would succeed. In fact, in the early years there was considerable doubt that the American experiment in republicanism would succeed where other republics had failed. The key, as expressed in the writings of George

Washington, Alexander Hamilton and James Madison, lay in the accountability of the government to the governed. As Hamilton wrote in Federalist No. 1, in 1787 the great question inherent in the proposed Constitution was whether it was possible to create a system in which the people could govern themselves through reasoned deliberation and debate, or whether they must forever suffer the imposition of government upon them.

For the founders, it was necessary to avoid the mistakes of the ancient Romans and Athenians; indeed, the history of the ancients haunted Americans. The fear of failure was great, and it produced widespread anxiety in the early years and throughout the 19th Century, particularly because the American experiment carried the weight of the world; in fact, Lincoln characterized it at Gettysburg as "the last, best hope for mankind."

The potential failure of the American Dream, rhapsodized in the words of Jonathan Winthrop, as a "Shining City Upon the Hill," raised grim prospects for the success of republicanism throughout the world. The historical importance of Hamilton's question in the first Federalist essay was not lost on those engaged in discourse about the roles and responsibilities of the citizenry. It should remain a vital subject of discussion in our time.

Endnotes

1. 4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 120 (Jonathan Elliot ed. 1836).
2. Quoted in CHARLES WARREN, CONGRESS, THE CONSTITUTION AND THE SUPREME COURT 153 (1925).
3. "I give to my son, when he shall arrive to the age of fifteen years, Algernon Sydney's works,--John Locke's works,--Lord Bacon's works,--Gordon's Tacitus, --and Cato's Letters. May the spirit of liberty rest upon him!" "Last Will and Testament of Josiah Quincy, Jr., 1774." Quoted in BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 22 (1967). For an insightful discussion of the influences on the founders, see, generally, BAILYN, 22-54; TREVOR COLBOURN, THE LAMP OF EXPERIENCE: WHIG HISTORY AND THE INTELLECTUAL ORIGINS OF THE AMERICAN REVOLUTION (1965).
4. *Federal Power Commission v. Natural Gas Pipeline Co. of America*, 315 U.S. 575, 609 (1942).

5. *Sparf v. United States*, 156 U.S. 51, 169 (1895) (Gray, J., dissenting). For discussion of the role that history has played in Supreme Court decisions, see Alfred H. Kelly, *Clio and the Court: An illicit Love Affair*, 1965 SUP. CT. REV. 119, 122 (1965); Martin S. Flaherty, *History 'Lite' in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995).
6. *Whitney v. California*, 274 U.S. 357, 375 (1927).

About the Author

David Adler is the Director of the Andrus Center for Public Policy at Boise State University, where he holds appointment as the Cecil D. Andrus Professor of Public Affairs. He is an Adjunct Professor of Law in the College of Law at the University of Idaho, where he teaches courses on the Constitution and the Supreme Court. The author of several books and many articles, Adler has lectured nationally and internationally

For the founders, it was necessary to avoid the mistakes of the ancient Romans and Athenians; indeed, the history of the ancients haunted Americans.

on the Constitution, the Presidency and the Bill of Rights. His scholarly works have been invoked by Democrats and Republicans in all three branches of the federal government, and cited in federal court decisions.



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Lawless Idaho: *The People v. John Williams*

Dennis C. Colson

On March 4, 1863, Congress passed “An Act to Provide a Temporary Government for the Territory of Idaho,” the Organic Act. The purpose of the Organic Act was to bring the law to Idaho: statutes, prosecutors, courts, prisons. However, according to the judgment of the Territorial Supreme Court in *The People v. John Williams* (1866), instead of bringing the law to Idaho, the Organic Act created a period of lawlessness lasting from the creation of the Territory until February 4, 1864, when the first Territorial Assembly passed “An Act Concerning Crimes and Punishments.”

On Sunday morning, June 4, 1865, George Wilson was traveling the road from Placerville towards Centerville in Boise County. Wilson was an unmarried 33-year-old native of Ireland. Discharged from the Oregon Calvary in February, he made his way to a claim on Granite Creek in March. During his stay in Placerville, Wilson had displayed a considerable amount of gold dust as he made purchases around town.

Shortly after passing the toll-gate on the Centerville road, George Wilson was waylaid, beaten around the head, then killed with a shot behind the left ear. All that remained of Wilson’s gold were a few grains in the bottom of a pocket.

L. Moulton and Fred Curzoni were musicians also traveling towards Centerville on that Sunday morning, looking for work. They stopped at the toll-gate for a drink of water.

Proceeding on, they had the misfortune of coming upon the robbery of George Wilson as it was happening. The minstrels dropped their violin and banjo in the road and turned to retreat, but both were shot in the back and through the heart.

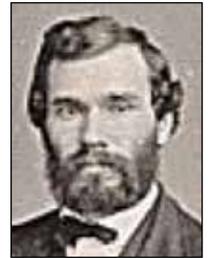
The minstrels dropped their violin and banjo in the road and turned to retreat, but both were shot in the back and through the heart.

This article was originally printed in the *Idaho Landscapes* magazine, the publication of the Idaho State Historical Society.

A posse of 1,200 quickly organized and began a pursuit after the perpetrators, but soon lost the trail. Many suspected that John Williams (alias Burke, alias Welch), Charles Kimball, and his brother-in-law Ned Elwood had committed the crime.

Based on an overheard conversation between Williams and Elwood, the three were arrested. Justice Calloway convened an examination of the defendants in Centerville. A large crowd took an interest. The evidence against the prisoners was entirely circumstantial, but the feeling against them was intense and dangerous; locals formed a vigilante committee. The prisoners waived any further examination, Justice Calloway committed them to the county jail, and in the middle of the night the three were taken to Idaho City. A Boise jury acquitted Williams, Kimball, and Elwood of the murder charge. However, in July, the Grand Jury returned an indictment charging Williams with a different crime, highway robbery. For reasons unknown, the indictment alleged the crime was committed during the month of September, 1863.

John R. McBride was Chief Justice of the Territorial Supreme Court. Born in Franklin County Missouri in 1833, McBride migrated to Oregon in 1846. In 1854 he was elected superintendent of common schools for Yamhill County. Two years later he was admitted to the bar and began practicing law. McBride won election



Hon. John R. McBride

as a Republican to the Oregon Senate in 1860, and to Congress in 1862. He was there when Idaho Territory was created. McBride failed to win re-election to Congress in 1864, and in 1865 President Abraham Lincoln appointed him to the Idaho Territorial Supreme Court.

Pursuant to the Organic Act and territorial statutes, the Chief Justice also presided over the Third District Court sitting in Idaho City. S.A. Merritt, counsel for John Williams, filed a motion claiming that his indictment had to be quashed because there was no valid federal or territorial statute punishing the crime of highway robbery at the time alleged in the indictment, September 1863.

Merritt argued that Congress regularly provided in statutes creating territories that the law of the antecedent territory continued until

altered by the legislature of the new territory. Congress failed to include such a clause in Idaho's Organic Act. Therefore, according to Merritt, there was no law until the first Idaho Territorial Assembly adopted one on February 4, 1864.

Chief Justice McBride agreed, quashed the indictment, and ordered Williams set free. The District Attorney, C.B. Waite, appealed the ruling to the Territorial Supreme Court.

The first session of the Territorial Supreme Court did not convene until July, 1866. The *People v. John Williams* was one of the first appeals considered. C.B. Waite's brief did not address the question of whether there was any law adequate to punish crimes committed before February 1864. He argued there were sufficient grounds for sustaining his appeal without going into that question.

Waite tried to avoid the question by arguing that it was necessary only to prove that the crime occurred at some time before the indictment was issued in July, 1865, and that because there had been no trial, it was not possible for the Court to know whether the crime occurred before or after February, 1864.

Chief Justice McBride, joined by Associate Justice Cummins, held that the time of the alleged crime was material, and that for the purpose of this motion, the facts as stated in the indictment must be taken as true.

District Attorney Waite stated in his brief to the Court that he had intended to dismiss the appeal but changed his mind when he learned that in a habeas corpus case brought in Boise County, *People v. Owens*, Justice McBride had entered an order freeing Owens unless the ruling in *Williams* was reversed. Owens had been convicted of murder in the second degree in Boise County and was the third prisoner incarcerated in the territorial prison.

After Justice McBride had ordered his release,
Williams waited until night to leave the jail,
fearing vigilantes. And for good reason.

Waite further argued that Williams had long ago been set at liberty, meaning that no suit was pending. The fact that Williams had been set at liberty did not impress the Chief Justice. He opined that "the District Attorney has the right, if he chooses, to dismiss the appeal; but to prosecute the appeal, and deny the effect of its design, is certainly not allowable."

Why was District Attorney Waite no longer pursuing the indictment against Williams? After all, he was charged by territorial statutes with the obligation to prosecute those indicted by the grand juries; furthermore, he earned a \$50 fee for each conviction of a felony punishable by death. Waite was no longer interested because Williams was dead; killed by vigilantes. After Justice McBride had ordered his release, Williams waited until night to leave the jail, fearing vigilantes. And for good reason. He had not proceeded 20 rods before he was attacked by several men who were lying in wait. He received some blows, but managed to make it back to the jail because the assailants were afraid to fire their guns for fear of disturbing the neighborhood.

Several hours later, Williams made a second attempt to get away. He succeeded by avoiding the public roads and traveling on foot westward toward Umatilla, Oregon. After safely passing through the Grande Ronde Valley, Williams took a public conveyance. The stage stopped at a station called Pelican Ranch in the

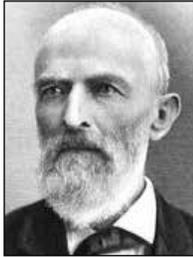
Blue Mountains. While the driver was in the station, a couple of shots were heard. Williams was found dead, pierced by two bullets. No effort was made to find those who had carried out the execution.

Chief Justice McBride rejected all of Waite's arguments and went to the heart of the issue: Was there any law in Idaho in September, 1863? The answer depends upon the meaning of "law." The Chief Justice subscribed to the command or positive philosophy of law. John Austin's *The Province of Jurisprudence Determined* (1832) is the landmark discussion of this philosophy. Austin was trying to distinguish law from religion, morals, and customs. He thought that "Every positive law, or every law simply and strictly so called, is set, directly or circuitously, by a sovereign person or body, to a member or members of the independent political society wherein that person or body is supreme."

Chief Justice McBride was unable to find anything in Austin's law which would support a prosecution of Williams. There was no positive law set by a supreme body to the citizens of Idaho Territory. Congress had repealed the laws of the old territory when the new was created. It was not possible to extinguish the old sovereignty and yet insist the old law had vitality. "It would be to extinguish the fountain and insist upon the rivulet continuing its flow." It would be like "cutting off the source

of life and affirming continued vitality.” The Act adopted by the Territorial Assembly in February 1864 was law, but could not be applied to events that happened before it was adopted. The Court was “therefore of opinion that there was no statute punishing the offense charged in this indictment at the time it was alleged to have been committed.”

Justice Milton Kelly dissented. Kelly was born into a family of Irish immigrants in up-state New York in 1818. He attended Lewiston Academy in New York, and after graduation began teaching. After several years of teaching he read law, then moved to Ohio and on to Wisconsin where he was admitted to the bar in 1845. Kelly left Wisconsin for California in



Hon. Milton Kelly

1861, and in the fall of 1862 arrived in the Boise Basin leading a pack train hauling foodstuffs and mining supplies. Kelly won election to the first session of the Idaho Territorial Assembly in 1863 as a fiscally conservative Republican Unionist. The swelling Democratic majority in the Basin cost Kelly re-election in 1864.

Recommended by territorial delegate to Congress William Wallace, in one of his last official acts, Kelly was appointed by President Abraham Lincoln to the Idaho Territorial Supreme Court on April 14, 1865. Kelly left the Court in 1870, and then purchased the Idaho Tri-Weekly Statesman which he published for the next 20 years.

Justice Kelly found two sources of law which would support the indictment against John Williams. He first held that the law of the old territory was not repealed by the creation of Idaho. However, the most compelling source of law in his view was the common law. The English common law which came to the American

shores on the Mayflower developed in judicial opinions which are in turn based upon ancient traditions of the people. Sir William Blackstone published his four-volume Commentaries on the Law of England between 1776 and 1770. It has been said that the Commentaries “rank second only to the Bible as a literary and intellectual influence on the history of American institutions.”

For Justice Kelly, the common law was “ever living, ever active, and ever operative.” It was “the basis upon which we maintain liberty, and the only living power upon which liberty can be made perpetual.” The common law “fills up every wide space which the Statute Law cannot occupy.” Kelly thought that “we live in the midst of the Common Law, we inhale it at every breath, imbibe it at every pore; we meet with it when we wake and when we lay down to sleep; when we travel and when we stay at home.”

Justice Kelly thought that the majority opinion would “with a single stroke override all the philosophy, reason, and precedent upon which human governments have been established.” He thought “We might as well blow out all the lights which have shed such a lustre upon human jurisprudence, and resolve ourselves back into that chaotic condition from which civilization first emerged.”

Justice Kelly’s jurisprudence is the vigilante’s jurisprudence. The law is

Justice Kelly’s jurisprudence is the vigilante’s jurisprudence.
The law is in the people; not on the books.

in the people; not on the books. Justice Kelly was later accused of being an active member of the Boise City Vigilantes during the summer in which he wrote his dissent in Williams. The charge was never proven, but that may be because of the secret nature of the Boise City Vigilantes. Chief Justice McBride, on the other hand, knew nothing of the organization of the vigilance committee, knowledge of its formation having been concealed from him. The Chief Justice was known to be particularly opposed to lynch law. Though McBride was unaware of the vigilantes, they had been active.

Indeed, the Williams case must be seen in the context of the Boise Basin vigilante movement of the 1860s. Vigilante justice prevailed in Idaho City in 1865.

Ferdinand Patterson suffered the same fate as Williams. Patterson was charged with the murder of Sumner Pinkham, an ardent abolitionist, and the first sheriff of Boise County. At the time of his death, Pinkham was Chairman of the Republican Territorial Committee. Patterson was a notorious gambler and a bitter secessionist. There was personal animosity between Pinkham and Patterson.

Discussion of the murder at once became a partisan contest. In a mining camp of 12,000 people equally divided between those who were friends of the Union and those who were rebels at heart, the controversy was more about whether one par-

ty or the other should triumph in the conviction or acquittal, rather than the guilt of the accused. After one of the most extraordinary trials in Idaho's history, the secessionists won and Patterson was found "not guilty." Apparently Patterson's doom was decided on the day that the jury declared his innocence. He immediately left Idaho City for Walla Walla. Several weeks later, Patterson went into a barber shop for a shave. When the barber stepped into an adjoining room for some hot water, a sharp report was heard. Re-entering the room, the barber saw a man leaving by the side door, and Patterson sitting upright in the chair with a fatal gunshot wound in the head. An Irish miner named Donahue was suspected of the shooting but was allowed to escape from jail and never punished.

The vigilante movement swept Boise City the spring of 1866, just before the Supreme Court convened the first session there. In early April, the Boise Vigilantes broke into the guardhouse at Fort Boise where John C. Clark was held. There were 20 vigilantes armed and disguised so they would not be recognized by the other prisoners or the guards. Clark was charged with murdering Reuben Raymond. Clark's body was found the next morning hanging from a temporary gibbet of three poles just outside of town. A short time later, David Updyke and Jake Dixon were hung by the Boise Vigilante Committee. David Updyke was anti-Union and had recently been elected sheriff. He was also accused by the vigilantes of many crimes, including "threatening the lives and property of an already outraged and suffering community."

The vigilante committees in the Boise Basin had strong proponents and opponents. One of the strongest critics was H.C. Street, editor of the Idaho World, published in Idaho City. Street argued that the vigilan-

The vigilante committees were controlled by the more radical Republicans in the territory, while their targets were Democrats and others with anti-Union views.

tes were no better than the alleged criminals they were executing.

"[T]he Vigilantes placed themselves in the same category with their victim. If he was guilty, so were they. If he placed himself beyond the law, and beyond mercy, so have they. His guilt is their guilt. The crime of one is no greater than that of the other."

Street also thought the vigilantes were about politics, not law and order. "The whole thing is a political movement. Defeated at the ballot box through two successive elections, with defeat staring them in the face at a third, they have thrown off the thin guise and openly adopt the tactics of the bawney (sic) muscle."

The vigilante committees were controlled by the more radical Republicans in the territory, while their targets were Democrats and others with anti-Union views.

James Reynolds, a pro-Union Republican and editor of The Idaho Tri-Weekly Statesman published in Boise, took the opposite view. Reynolds, predecessor to Justice Kelly at the newspaper, shared Kelly's views on vigilantism. Reynolds not only wrote in support of the vigilantes, he was one of the principal leaders of the Boise City Vigilante Committee, a member of the three-person executive committee that decided who should be banished, and who should be hung. He penned the vigilante warnings found on the bodies of Clark, Updyke, and Dixon. Reynolds claimed the Statesman had always

opposed crime, while the World was an apologist for it. "The course of the Statesman has been ... to denounce crime in all its most hideous exhibitions.... The World has just as invariably apologized and defended criminals"

Reynolds argued the right of self-protection was justification for the vigilante committees. "The courts being but a farce to enable criminals to escape ... people have ceased to feel that life is protected by the law; ... that punishment follows the crimes; and hence good men who would gladly let the law take its course if it could be enforced, feel that they must protect themselves."

On the surface, Chief Justice John R. McBride held in *The People v. John Williams* that John Williams could not be prosecuted for the crime he allegedly committed in September 1863 because at that time Idaho was lawless. However, beyond the opinion lies a different and more interesting story.

The case was not really about indicting John Williams; he was dead and could not be prosecuted. The case was really about George Owens, who was serving time in the territorial prison. After the Williams case was decided, Owens was released from the territorial prison by order of the Court. So was Elijah Willey, who was also serving time in the prison for a murder committed at the same time.

However, *The People v. John Williams* was too late to save Christo-

pher Lower, James Romain and David Renton. The three were indicted for murdering Lloyd Magruder and four others in October 1863. They were tried and convicted during January 1864 in Lewiston, while the Territory's first Legislative Assembly was meeting there. Milton Kelly was in town representing Boise County, and assisted in the prosecution of the case. The three were hung by the neck until dead on March 4, 1864, long before there was a Territorial Supreme Court where an appeal could be taken. According to McBride's interpretation, this hanging, frequently referred to as Idaho's first legal execution, was not legal at all, for Lower, Romain, and Renton had not really committed a crime in what was at the time a lawless territory.

But Idaho was not really lawless. It might have been that Idaho

But Idaho was not really lawless. It might have been that Idaho had no law as understood by John Austin, but it had common law justice executed by vigilante committees.

had no law as understood by John Austin, but it had common law justice executed by vigilante committees. However, in the case of John Williams it should be described as vigilante injustice. Chief Justice McBride reported years later in his reminiscences that he had learned from the prosecutor of Williams that the crime had in fact been committed by another.

About the Author

Dennis C. Colson is the James E. Wilson Professor of Law Emeritus at the University of Idaho College of Law and the author of "Idaho's Constitution: The Tie that Binds."



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1st AMENDED - Regular Fall Term for 2013

Idaho Falls August 21
Pocatello August 22 and 23
Boise August 27 and 28
Coeur d'Alene September 11 and 12
Moscow September 13
Boise September 27 and 30
Boise November 1, 4 and 6
Twin Falls November 6, 7 and 8
Boise December 2, 4, 5, 9 and 11

By Order of the Court
Stephen W. Kenyon, Clerk

NOTE: The above is the official notice of the 2013 Fall Term for the Supreme Court of the State of Idaho, and should be preserved. A formal notice of the setting of oral argument in each case will be sent to counsel prior to each term.

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COURT OF APPEALS OF IDAHO**

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Judges
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1st AMENDED - Regular Fall Term for 2013

Boise August 13, 15, 20, and 22
Boise September 10, 12, 17, and 19
Eastern Idaho October 7, 8, 9, 10, and 11
Boise October 15, 17, 22, and 24
Boise October 8, 10, 17, and 22
Boise November 12, 14, 19, and 21
Boise December 10 and 12

By Order of the Court
Stephen W. Kenyon, Clerk

NOTE: The above is the official notice of the 2013 Fall Term for the Court of Appeals of the State of Idaho, and should be preserved. A formal notice of the setting of oral argument in each case will be sent to counsel prior to each term.

**Idaho Supreme Court
Oral Argument for September 2013**

Wednesday, September 11, 2013 – COEUR D'ALENE

8:50 a.m. *Robert Siegarth v. Opportunity Management Co.* #39445-2011
10:00 a.m. *William P. Teurlings v. Mallory E. Larson* #40502-2012
11:10 a.m. *John M. Hoch v. Rob Vance* #39788-2012

Thursday, September 12, 2013 – COEUR D'ALENE

8:50 a.m. *Janice Blizzard v. John Paul Lundeby, M.D.* #39774-2012
10:00 a.m. *Sky Canyon Properties v. The Golf Club at Black Rock, LLC* #39831-2012
11:10 a.m. *Bremer, LLC v. East Greenacres Irrigation District* #39942-2012

Friday, September 13, 2013 – MOSCOW

8:50 a.m. *John Gustav Block v. City of Lewiston* #39685-2012
10:00 a.m. *Dennis Lyle Akers v. Marti Mortensen* #39182-2011
11:10 a.m. *Dennis Lyle Akers v. D.L. White Construction* #39493-2011

Friday, September 27, 2013 – BOISE

8:50 a.m. *Christopher F.F. Hopper v. Suzanne E. Swinnerton* #39077/39078/39079-2011
10:00 a.m. *Billy J. Bringman v. New Albertson's, Inc.* (Industrial Commission) #40232-2012
11:10 a.m. *Liberty Northwest Insurance v. Spudnik Equipment Co.* #39957-2012

Monday, September 30, 2013 – BOISE

8:50 a.m. *State v. Carey Mitchell Baker* #39877-2012
10:00 a.m. *Jeffrey J. Black v. Idaho State Police* #39822-2012
11:10 a.m. *State v. Matt Eugene Ruck* #39830-2012
1:30 p.m. *John Doe v. Jane Doe* (EXPEDITED) #41149-2013

**Idaho Court of Appeals
Oral Argument for September 2013**

Tuesday, September 10, 2013 - BOISE

1:30 p.m. *State v. Peterson* #39643-2012

Thursday, September 12, 2013 – BOISE

10:30 a.m. *State v. Iverson* #40359-2012
1:30 p.m. *State v. Sunday* #39169/39170-2011

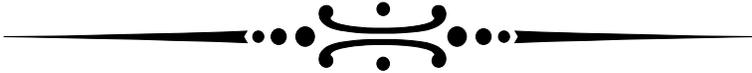
Tuesday, September 17, 2013 – BOISE

9:00 a.m. *State v. Bergerud* #39284/39286-2011
10:30 a.m. *State v. Osterhoudt* #39287-2011

Thursday, September 19, 2013 – BOISE

1:30 p.m. *Lopez v. State* #39739-2012

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**Idaho Supreme Court and Court of Appeals
NEW CASES ON APPEAL PENDING DECISION
(Updated 7/1/13)**

CIVIL APPEALS

Contract

1. Did the court correctly interpret the 1983 ground lease language regarding the rent?

Pocatello Hospital v. Quail Ridge Medical Investors

S.Ct. No. 40566
Supreme Court

Evidence

1. Did the trial court commit reversible error by ruling that certain statements made by Portneuf employees were inadmissible hearsay?

Van v. Portneuf Medical Center

S.Ct. No. 38793
Supreme Court

Habeas corpus

1. Did the court err in denying Sittre's habeas petition and finding that her sentences had been calculated correctly?

Sittre v.

Central Records Sentencing Specialist
S.Ct. No. 40484
Court of Appeals

Liens

1. Did the district court err in finding that Teufel's claim of lien did not have priority over Credit Suisse's mortgages?

Credit Suisse AG v. Teufel Nursery, Inc.
S.Ct. No. 40234
Supreme Court

Post-conviction relief

1. Whether the court erred when it summary dismissed Jonas's successive petition for post-conviction relief on different grounds than those provided in the notice of intent to dismiss.

Jonas v. State
S.Ct. No. 40382
Court of Appeals

2. Did the court err in dismissing Snowballs' petition on the basis it was untimely?

Snowball v. State
S.Ct. No. 40089
Court of Appeals

3. Did the court commit reversible error in the summary dismissal of Macik's untimely petition?

Macik v. State
S.Ct. No. 40321
Court of Appeals

4. Whether reviewed under I.C. § 19-2719 or the Uniform Post-Conviction Act, has Sivak failed to establish his successive petition is timely because his double jeopardy claim should have been raised in his initial direct appeal, during his first post-conviction case, or is premature because he has not been resentenced.

Sivak v. State
S.Ct. No. 40583
Court of Appeals

Procedure

1. Did the court err in entering judgment dismissing the case for inactivity?

Morgan v. Demos
S.Ct. No. 40170
Supreme Court

Summary judgment

1. Whether the court erred as a matter of law in finding that an agency relationship existed between Webb and Edged in Stone, Inc., where such determinations are for the trier of fact.

Edged in Stone, Inc. v. Northwest Power Systems, LLC.
S.Ct. No. 40463
Supreme Court

Termination of parental rights

1. Whether the court erred in finding Doe abandoned the minor child without sufficient evidence to meet the standard of proof and erred in finding the acts that constitute abandonment were willful.

John Doe v. Jane (2013-14) Doe
S.Ct. No. 41149
Supreme Court

2. Did the magistrate court err in finding aggravating circumstances and did this finding wrongfully deprive Doe of the assistance of the Department of Health and Welfare as she was working on her case plan?

Department of Health & Welfare v. Jane (2013-15) Doe
S.Ct. No. 41213
Supreme Court

CRIMINAL APPEALS

Due process

1. Did the prosecutor commit misconduct, rising to the level of fundamental error, when he used inflammatory language in closing argument calculated to appeal to the passions and prejudice of the jury?

State v. Devan
S.Ct. No. 39853
Court of Appeals

Evidence

1. Was the evidence presented at trial sufficient to support McNeil's conviction for voluntary manslaughter?

State v. McNeil
S.Ct. No. 39881
Court of Appeals

2. Was there sufficient evidence to support the jury verdict finding Degnan guilty of possession of methamphetamine?

State v. Degnan
S.Ct. No. 40315
Court of Appeals

Juror challenge

1. Did the state violate Ornelas' and Juror Number 24's rights to equal protection when it used its peremptory challenges to only strike men from the jury and deliberately removed Juror Number 24 because he was male?

State v. Ornelas
S.Ct. No. 39876
Court of Appeals

**Idaho Supreme Court and Court of Appeals
NEW CASES ON APPEAL PENDING DECISION
(Updated 7/1/13)**

Probation revocation

1. Did the court abuse its discretion by revoking probation and denying a Rule 35 motion?

State v. Chippewa
S.Ct. No. 40562
Court of Appeals

2. Did the court err in denying Kingsley's motion to suppress and in finding Kingsley was not illegally detained?

State v. Kingsley
S.Ct. No. 39917
Court of Appeals

Speedy trial

1. Did the court err in denying Tinoco's motion to dismiss because the delay in bringing him to trial violated the speedy trial guarantee protected by I.C. § 19-3501 and the United States and Idaho Constitutions?

State v. Tinoco
S.Ct. No. 39659
Court of Appeals

Restitution

1. Did the court abuse its discretion when it included civil attorneys' fees as part of the restitution awarded in the criminal proceedings?

State v. Hurlles
S.Ct. No. 39219
Court of Appeals

Sentence review

1. Did the court abuse its discretion when it revoked probation, or, alternatively, when it did not reduce Jorgensen's sentence *sua sponte*?

State v. Jorgensen
S.Ct. No. 40338
Court of Appeals

Substantive law

1. Did the district court err in determining that AM-2201 was a controlled substance under Schedule I of the Idaho Uniform Controlled Substances Act as it existed at the time?

State v. Alley
S.Ct. No. 40428
Court of Appeals

**Search and seizure –
suppression of evidence**

1. Did the district court err when it denied Tappin's motion to suppress because the officers did not have reasonable suspicion to lawfully expand the traffic stop for investigation into drug activity, and thus his consent to a search was ineffective?

State v. Tappin
S.Ct. No. 40377
Court of Appeals

2. Did the court abuse its sentencing discretion when it sentenced Widmyer to a 156 day jail sentence upon a guilty plea to misdemeanor injury to child?

State v. Widmyer
S.Ct. No. 39954
Court of Appeals

2. Did the court err in granting Ruggiero's motion to dismiss the charge of preparing false evidence after erroneously concluding that his alleged acts were protected by the First Amendment?

State v. Ruggiero
S.Ct. No. 40175
Court of Appeals

3. Did the court abuse its discretion when it failed to reduce Pasborg's sentence *sua sponte* upon revoking probation?

State v. Pasborg
S.Ct. No. 40184
Court of Appeals

**Summarized by:
Cathy Derden
Supreme Court Staff Attorney
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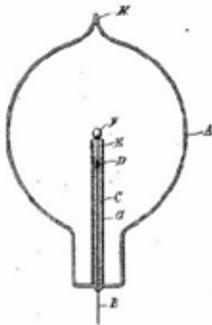
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Ten Steps to Build Better Briefs: Part I

Tenielle Fordyce-Ruff

Each month, I sit down to write about writing. I do this because I believe that every attorney wants to become a better writer. Many of my tips and suggestions apply to any type of legal writing. This topic is different. This time, I want to focus on how to construct a better brief.

The task I set for myself is big. At the end of the day, constructing a better brief can be done in ten (easy) steps — some focusing on sentences, some on paragraphs, and some on the entire brief. Here is the breakdown:

The sentence

1. Omit surplus words
2. Use action verbs in the active voice
3. Keep it simple

The paragraph

4. Discuss a single idea
5. Use topic sentences to introduce that idea
6. Use specific details to support that idea
7. Introduce, integrate, and analyze quotations

The brief

8. Explain your thesis
9. Use a roadmap
10. Use transitions to explain the connections between ideas

That's a lot of information — all of it good — but a lot. So, I'm going to break this topic into two. This month, I will stick to sentence-level tips and start paragraph-level tips. Next month, I will finish up with writing better paragraphs and brief-level tips.



Sentence level

I'm sure we have all read truly elegant prose — sentences crafted so beautifully they sing. While not every sentence in our written work needs to create this feeling in the reader, we can make each sentence in a brief better by omitting surplus words, using strong verbs and active voice, and using straightforward language.

1. Omit surplus words

Every sentence has two kinds of words: working words and glue words. The working words do the heavy lifting in the sentence, conveying the meaning to the reader. Working words include nouns, action verbs, adjectives, and adverbs.

The glue words hold the sentence together, making sure it is proper and grammatical. Glue words include articles, modals, and weak verbs.

If a sentence has too many glue words in comparison to the number of working words, though, the sentence is weak. In the following

We can make each sentence in a brief better by omitting surplus words, using strong verbs and active voice, and using straightforward language.

example, the working words are underlined.

A trial by jury was requested by the defendant in his answer.

This sentence has twelve words, but only five are working words. Rewriting it to change the ratio makes it a much stronger sentence.

The defendant answered and requested a jury trial.

This sentence has eight words and five are working words.

So, one of the easiest ways to improve your sentences is to make sure the ratio of glue words to working words isn't too high.

2. Use action verbs in the active voice

Sentences can also be bogged down when the real action and actors are buried.

The process of making the determination of whether to charge Smith is being undertaken by the prosecutor.

The subject of the sentence is *process* and the verb is *making*. But the real actor isn't the process and the real action isn't making. The real action is hidden in the noun *determination*. The sentence's structure doesn't quickly tell the reader who is doing what (it's the prosecutor).

Crisp sentences, on the other hand, use strong action verbs and use the actor as the subject of the sentence.

The prosecutor is deciding whether to charge Smith.

In this example, the real actor and action are unburred.

To create this kind of crispness in your writing make the actor the subject and use verbs, not nouns, to express the real action in the sentence. You will write crisper sentences, and frequently you will write shorter sentences.

3. Keep it simple

Finally, sentences can get bogged down when the words are abstract. This is particularly dangerous in legal writing because legal concepts are complex. Combining complex ideas and abstract words can leave the reader searching for your meaning.

The water was impacted by his rod, whereupon a polluting effect was achieved. The consequent toxification

Great writing is organized and walks the reader through the organization. It shows the reader your thought process and helps create a convincing legal argument.

reduced the conditions necessary for the sustenance of the indigenous population of aquatic vertebrates below the level of viability. Olfactory discomfort standards were substantially exceeded, and potability declined. Social, economic, and political disorientation were experienced to an unprecedented degree.¹

While that may sound like an environmental impact report, it really describes Moses inflicting a plague on Egypt. Using more concrete words helps the reader move through the action and understand what's happening.

He lifted up the rod and smote the waters of the river. . . and all the waters that were in the river were turned to blood. And the fish that were in the river died; and the river stank, and the Egyptians could not drink the water of the river; and there was blood throughout the land of Egypt.²

Legal writers don't often get to describe a plague, but removing words like *basis, situation, consideration, facet, character, factor, degree, aspect,* and *circumstance* and replacing them with more concrete words can help the reader readily grasp the meaning.

Paragraph level

Of course, great writing isn't simply a string of strong sentences. Great writing is organized and walks the reader through the organization. It shows the reader your thought process and helps create a convincing legal argument. Here are the first two paragraph-level tips: discuss a single idea using a familiar pattern and use topic sentences.

4. Discuss a single idea using a familiar pattern

In addition to complex legal concepts, legal writing is dense. Thus, simply constructed paragraphs are even more important in briefs than in other kinds of writing. Every time you construct a brief, you are asking the reader to follow a specific thought process about very complex ideas and arguments. Let's not make this any harder than it has to be.

Once the ideas are formed into paragraphs, however, you also need to present the ideas in a familiar pattern. Most paragraphs in legal writing should be constructed in a "V" shape. In other words, start the paragraph with the most general discussion and move to more specific support for the topic.

5. Use topic sentences to introduce that idea

Finally (for this month), the first sentence of a paragraph should indicate the topic for that paragraph. Good topic sentences summarize the idea developed in the paragraph. This summary helps the reader understand the argument in the paragraph and its overall place in the analytical structure of the brief. Good topic sentences also unify ideas that might appear unrelated to the reader. They make the point of the paragraph clear by taking vaguely connected ideas and drawing an explicit connection for the reader.

Consider this paragraph: How are these cases related?

*In Red v. Black, 5-year-old Johnny Black broke a windshield while throwing rocks. The court held him to a standard of conduct of a reasonable person of like age, intelligence, and experience under like circumstances. Similarly, a 12-year-old was held to a child's standard of care for his negligence in swinging a badminton racquet and hitting a teammate. However, the same court held an 8-year-old to an adult standard of care when the infant defendant injured a spectator while driving a go cart on a golf course. That decision was affirmed two years later when an adult standard was applied to an 11-year-old girl who shot another child with an arrow during archery practice.*³

Would it be easier to see the connection if the paragraph included this topic sentence?

*Infants are held to a child's standard of care for damages occasioned by their tortious acts, except when those infants engage in adult activities involving dangerous instruments for which adult skills are required.*⁴

Now that you can really see the value of topic sentences, make sure that you take the widest part of the "V" to tell the reader what to expect.

Next month, we will finish the last five tips for better briefs. I know you're excited!

Sources

- Justin Reich, *Ten Things I Teach About Writing*, at http://blogs.edweek.org/edweek/edtechresearcher/2013/07/ten_things_i_teach_about_writing.html?cmp=ENL-EU-VIEWS2 (last visited July 11, 2013).
- Richard C. Wydick, *Plain English for Lawyers*, 9-12 (4th ed. Carolina Academic Press 1998).
- Anne Enquist & Laurel Currie Oates, *Just Writing: Grammar, Punctuation, and Style for the Legal Writer*, 34-35; 114-115 (3d ed. Wolters Kluwer 2009).
- Helene S. Shapo, Marilyn R. Walter, & Elizabeth Fajans, *Writing and Analysis in the Law*, 209-210 (5th ed. Foundation Press 2008).

Good topic sentences summarize the idea developed in the paragraph. This summary helps the reader understand the argument in the paragraph and its overall place in the analytical structure of the brief.

Endnotes

1. Richard C. Wydick, *Plain English for Lawyers*, 59 (4th ed. Carolina Academic Press 1998).
2. *Id.* at 58 (quoting Exodus 7:20-21).
3. Helene S. Shapo, Marilyn R. Walter, & Elizabeth Fajans, *Writing and Analysis in the Law*, 210 (5th ed. Foundation Press 2008).
4. *Id.*

About the Author

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 Rainey Law Office, a boutique firm focusing on civil appeals. You can reach her at tfordyce@cu-portland.edu or tfr@raineylawoffice.com.



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IN MEMORIAM

Philip Henry Robinson 1946 - 2013

Philip Henry Robinson was born in Sandpoint to Daniel W. and Lorna Robinson and died April 29, 2013 in Tucson, Ariz. from complications of esophageal cancer.



Philip Henry Robinson

Philip grew up on the Robin Hill dairy farm and worked there from his early days. During college he worked summers for the state parks department at Priest Lake and Round Lake State Parks. Phil enjoyed hunting, fishing, and boating on Lake Pend Oreille, loved to cook for large family gatherings. He even took cooking classes while on family vacations.

He received a BS degree from the University of Idaho in 1968 and his

JD from the University of Idaho College of Law in 1970 and was sworn in as an attorney. He then joined the Navy JAG program and was initially stationed in Rhode Island. While in the Navy he served as a US Navy Judge Advocate General (JAG) and left as a lieutenant commander. He returned to Sandpoint in 1976 to begin his law practice.

Phil had a full life of service and voluntarism. He was a founding member of the Children at Risk-Bonner County Protocol Team, a founding member of the Sundance Drug Task Force, and former president of the Idaho Prosecuting Attorneys' Association.

He served as a deputy Prosecutor for Bonner County from 1977-1981, was elected Prosecutor of Bonner County from 1982-1993 and again from 1997 until 2009. He then served as Chief Deputy until his retirement in 2012. Phil also served

as a City Prosecutor for Sandpoint, Priest River and Bonners Ferry.

He served as special (appointed) prosecutor for cases in Boundary and Kootenai counties, taught classes on the law to law enforcement agencies and the legal community. He taught P.O.S.T. certified classes, taught at Lewis and Clark College and North Idaho College in Sandpoint.

Phil is survived by his wife of 43 years Carol; daughter Amy (Chris) Kovarcik and granddaughters Caitlin, Bryana, Naomi; son Mike (Ilene) Robinson and granddaughters Lindsey and Darby; twin sister Anita Robinson M.D. and husband Chris Kutteruf M.D.; brother Dan (Elaine) Robinson, Jr. and several nieces and nephews.

Memorials may be made to the Lorna and Dan Robinson Scholarship Endowment at the University of Idaho Foundation.



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Mr. Pirtle elected chair of Litigation Section

Elam & Burke, P.A. is pleased to announce that Joseph N. Pirtle was recently elected Chairperson of the Litigation Section of the Idaho State Bar. Mr. Pirtle joined Elam & Burke in 2005 and became Shareholder in 2013. His practice emphasizes civil litigation, with a focus on commercial and business litigation, and insurance defense.



Joseph N. Pirtle

Hawley Troxell welcomes return of Nicholas Taylor

Hawley Troxell is pleased to welcome Nicholas Taylor back to the firm as an associate attorney in the corporate and finance groups. Taylor was previously with the firm for six years and returned on August 5. His practice involves corporate, mergers and acquisitions, securities and banking, and intellectual property and internet. He represents a variety of corporate entities, lenders, and investment firms regarding equity and debt financing transactions, securities regulations, banking and lending regulations, and corporate governance issues.



Nicholas Taylor

“It is clear that I belong here. This is a phenomenal firm that does great work for its clients and on top of that, it’s just a nice place to work and full of great people,” said Taylor.

He is actively involved in the Boise community, primarily through Boise Metro Chamber of Commerce’s Boise Young Professionals and Kickstand, a local non-profit program dedicated to connecting, inspiring, and supporting local entrepreneurs.

Matthew C. Andrew returns to Goicoechea Law Offices

Goicoechea Law Offices – Nampa, LLP is pleased to announce the return of Matthew C. Andrew to the firm. Matthew worked for the firm prior to his service in the United States Marine Corps as a Judge Advocate. As a Marine lawyer, he practiced military and operational law, was the in-house counsel for a 10,000-member unit, and advised officers on a variety of legal issues in combat and at home. Matthew is a 2007 graduate of the Creighton University School of Law where he was a member of the Mock Trial Team and Legal Clinic.



Matthew C. Andrew

Holland & Hart welcomes Jason Prince

Holland & Hart LLP is pleased to announce the addition of Jason Prince to the firm’s Commercial Litigation and Export Control/Trade Sanctions practices. Prince is a partner based out of the firm’s Boise office.



Jason Prince

He represents businesses in liti-

gation, arbitration, mediation, and negotiation throughout the United States, specializing in complex jurisdictional and e-discovery issues.

In addition, Prince advises U.S. and international clients on U.S. federal laws and regulations governing global business. He has significant experience with the U.S. Foreign Corrupt Practices Act (FCPA) and global anti-bribery compliance matters. He also has advised businesses on export controls, trade sanctions, and international commercial agreements throughout the world, including in Asia, Canada, Europe, Latin America and Oceania.

Prince is the chair of the Idaho District Export Council, a member of the Local Civil Rules Committee of the U.S. District Court for the District of Idaho and an advisory council member of the International Section of the Idaho State Bar.

He holds a J.D. from the University of Notre Dame Law School, an M.Phil. from the University of Cambridge and a B.A. from Davidson College.

Rex Blackburn elected Vice President of Uniform Law Commission

Rex Blackburn, an attorney in Boise, has been re-elected to serve a two-year term as Vice President of the Uniform Law Commission (ULC). Mr. Blackburn was elected Vice-President at the 122nd Annual Meeting of the Uniform Law Commission which recently concluded in Boston, Massachusetts. Mr. Blackburn is Senior Vice President and General Counsel of Idaho Power.



Rex Blackburn



Photos by Dan Black

William H. Wellman of Nampa, left, in accepting the gavel as the new President of the Idaho State Bar Board of Commissioners, thanks outgoing president Paul W. Daugharty of Coeur d'Alene during the Annual Meeting in Coeur d'Alene.

Annual Meeting Strikes a Glamorous Pose — Lakeside

A good-natured crowd took in the awards dinners, CLEs, keynotes and camaraderie that define the Idaho State Bar's Annual Meeting. This year, the ISB held its conclave at the Coeur d'Alene Resort, with its floating green, fine dining, superb views and lakeside walkways, ferry cruises and oversized desserts.

Immediate Past President Paul Daugharty, who lives in Coeur d'Alene, quipped that his hometown was obviously the best place to hold the Annual Meeting. The event is moved on a rotation - lawyers from all parts of the state make the same hometown claim.

Deputy Executive Director Mahmood Sheikh said "Coeur d'Alene's vibrant and energetic environment truly enhanced this year's Annual Meeting."

From the start, longtime friends and new acquaintances mingled – socialization being a top priority. A

Where were you on
July 17-19, 2013?

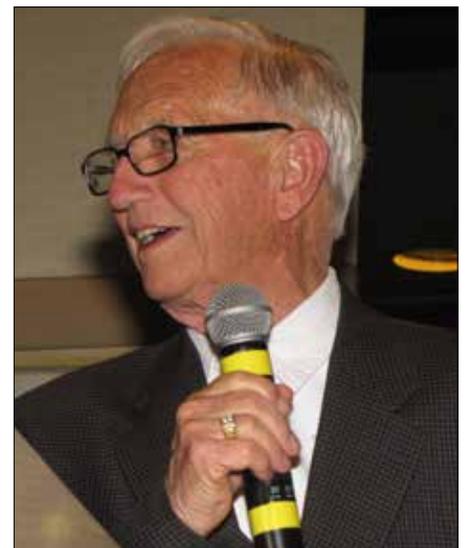
July sun on the lakeside deck pushed people under the resort's signature blue tarps, where cheerful close quarters set the tone for the event. As the sun set on Wednesday, lawyers and their guests fanned out to their seats for the most prestigious award given to an Idaho Lawyer – the Distinguished Lawyer Award.

Inside jokes, heartfelt gratitude and a genuine respect for the practice of law prevailed during the presentations. With humility, Distinguished Lawyer Award Winners Dwight E. Baker of Blackfoot and Walter H. Bithell of Boise both gave credit to their mentors, to the core values they learned and to their peers who came to honor them.

Sunshine ruled all three days, as attendees juggled CLEs with N. Idaho attractions and catching up

with friends in and around the resort. Attendance was solid, with 247 attorneys and judges, along with 150 spouses and guests.

The Annual Meeting is organized by the ISB Member Services Depart-

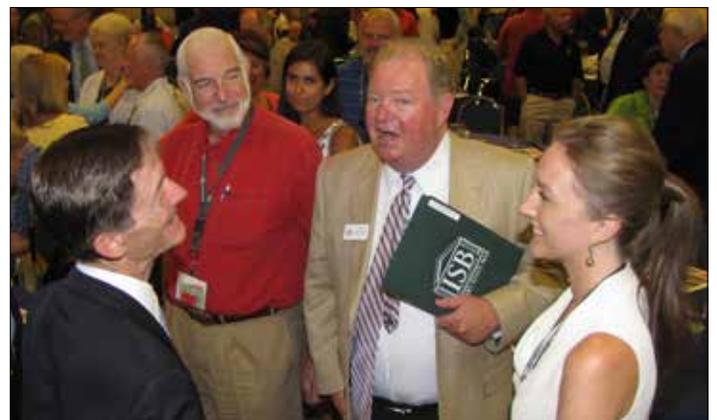


Pocatello attorney Archie Service offers a few remarks while being honored as an attorney for 60 years.



Above, left: John G. Hall, a non-attorney recipient of the ISB Service Award, was honored for his assistance designing the Classroom at the Law Center to better webcast CLEs and conduct teleconferencing. At the same table, David Bogie gets his camera ready. **Above right,** volunteers with the Idaho State Bar stand with several dozen emergency toiletry kits assembled by Annual Meeting attendees.

Lower Left: Chefs with the Coeur d'Alene Resort check the prime rib as fresh salmon stay warm under the lights. **Lower right:** Bruce Reed, left, accepts well-wishes after delivering his keynote address at the Annual Meeting. Holding the folder is ISB Commissioner Robert T. Wetherell and standing to his left is his brother Hon. Mike Wetherell and standing in the far right is Robert's daughter, Marie Wetherell.



ment, and outgoing president Paul W. Daugharty thanked Sheikh, Executive Director Diane Minnich and the ISB staff. He then presented the gavel to incoming president William H. Wellman.

Vendors presented their services in the exhibitor hall/ registration room, where coffee, breakfast and snacks brought attorneys and exhibitors together.

A community service project was organized and carried out by about 20 volunteers between events. They put together emergency personal care boxes for women who come to a N. Idaho domestic violence shelter. The director of the shelter expressed his thanks, as dozens of assembled

care boxes and donated toiletries were packed up and taken away.

Several Sections held meetings and gave their own awards. The Diversity Section honored Linda Pall of Moscow with its Justice for All Award, noting her longtime commitment to human rights, diversity and equality. Stephen Beer of Boise was honored with the Family Law Section's Award of Distinction.

"The support of the Sections added great value to our overall programming," Sheikh said.

The First District Bar Association sponsored the 50/60/65 Years of Practice reception, which was punctuated with lively good humor from Mr. Wellman and the recipients

themselves. A total of 12 attorneys were recognized.

The Advocate Awards, Service Awards and Section of the Year Awards were presented and presenters reflected briefly on what it means to do good work in their careers and the community. The Outstanding Young Lawyer Award was accepted by Scott E. Randolph, as his wife and his two pre-school children looked on. The kids, dressed for the occasion, behaved perfectly.

Next year's Annual Meeting will be held July 16-18 at the Shoshone-Bannock Hotel & Events Center at Fort Hall near Pocatello.

The sponsors and exhibitors for the 2013 Annual meeting are listed on page 81 of the August 2013 Advocate.

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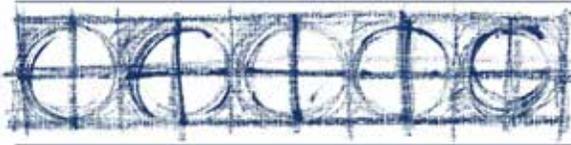


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Volunteering is Good for You (and Those You Help)

Volunteer attorneys know one secret to keeping a good attitude. Now the cat is out of the bag. A recent study conducted by the United Health Group concludes, “people who volunteer feel better - physically, mentally and emotionally.”

The report on volunteerism states, “People who volunteer manage their stress better and feel a stronger connection to their communities.”

The Idaho Volunteer Lawyers Program couldn’t agree more. The Idaho Law Foundation program helps match attorneys with those in need; identifying and prioritizing requests for pro bono service in communities across Idaho and creating rewarding experiences for attorneys who volunteer.

One opportunity to do good and feel better is the new Veterans Legal Clinic. Volunteer attorneys in the Treasure Valley are stepping up to provide advice and counsel to veterans and active military personnel each month at the Boise Veterans Administration.

Joshua Bode, LCSW, and Veterans Outreach Coordinator, described the Clinic as meeting a “major need” of veterans. Since it began three months ago, this clinic has provided the opportunity for over 40 veterans and active military to speak with an attorney about the various legal issues impacting their lives.

Volunteer lawyers, recruited through the Idaho Volunteer Lawyers Program, have provided legal advice to veterans and even assisted in completing paperwork needed to

resolve legal issues. Bode described the response from the participants:

“The feedback has been impressive! The veterans who have attended the legal clinic have walked away pleased and satisfied with the legal advice they have received and many have been able to resolve issues completely. The collaboration between the Idaho Volunteer Lawyers Program and the Boise Veterans Administration has led to a productive partnership that addresses the various legal issues veterans are seeking assistance with.”

If you would like to get involved and learn more about this or other volunteer opportunities in Idaho please complete the IVLP pledge form found on the Idaho State Bar’s website at: http://www.isb.idaho.gov/pdf/ivlp/ivlp_pledge.pdf

Idaho Law Foundation Releases 2013 Annual Report

The Idaho Law Foundation recently released its 2012-2013 annual report. This report contains information about ILF programs, including Idaho Volunteer Lawyers Program, Law Related Education, Continuing Legal Education, and Interest on Lawyers’ Trust Accounts. It also includes a financial statement for the period ending December 31, 2012.

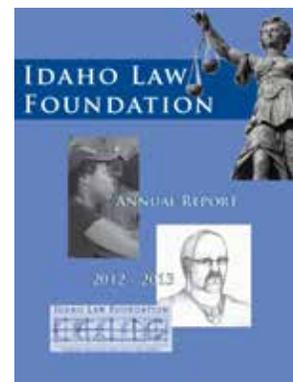
In the period from July 1, 2012 to June 30, 2013 many attorneys and others gave generously of their time and treasure to the Idaho Law Foundation and its programs, including:

- 838 volunteers

- 651 donors (including donations to the Law Foundation and its programs as well as donations to the Access to Civil Justice Fund)

Some of the Law Foundation’s accomplishments for 2012-2013 include:

- **Idaho Volunteers Lawyers Program** provided legal services in 597 cases.
- **Law Related Education** submitted a bid for and was chosen to host the *National High School Mock Trial Championship* in 2016.
- **The IOLTA Grant Program** granted \$160,000 to community programs in all parts of Idaho.



- **Continuing Legal Education** increased attendance at live, in-person CLE by 15.02%.

A copy of the annual report has been mailed to people and organizations that made donations to ILF between July 1, 2012 and June 30, 2013.



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presents

The Changing Face of Family Law Practice in Idaho

Friday, October 11, 2013
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The Coeur d'Alene Resort
115 S. 2nd Street

Friday, October 18, 2013
Pocatello
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Boise
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Program Agenda

8:30 a.m. **Registration**

8:50 – 9:00 a.m. **Welcome and Introductions**

9:00 – 10:00 a.m.
The Convergence of Bankruptcy and Divorce: What Every Family Law Practitioner Needs to Know Part I

10:00 – 10:15 a.m. **Break**

10:15 – 11:15 a.m.
The Convergence of Bankruptcy and Divorce: What Every Family Law Practitioner Needs to Know Part II

11:15 a.m. – 12:30 p.m.
A Game Plan to Resolve High Conflict Custody and Divorce

12:30 – 1:00 p.m. **Lunch (Included with registration.)**

1:00 – 2:00 p.m.
Case Law Update

2:00 – 3:00 p.m.
Custody Evaluators and Admissibility of Experts

3:00 – 3:15 p.m. **Break**

3:15 – 4:15 p.m.
Domestic Abuse and the Family Law Practitioner

4:15 p.m. **Program Adjourns**

The Family Law Section



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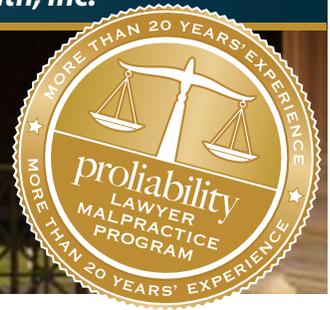
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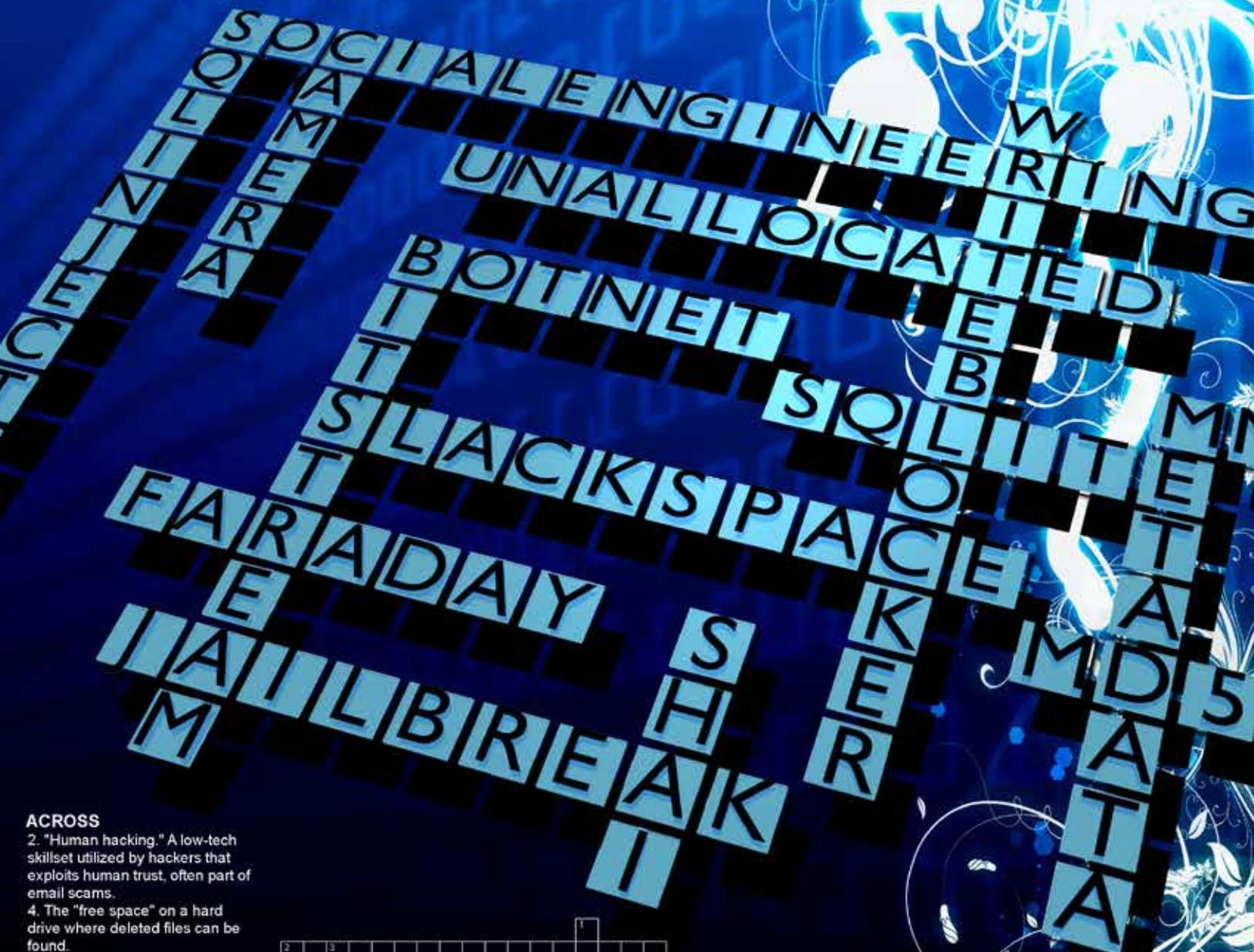
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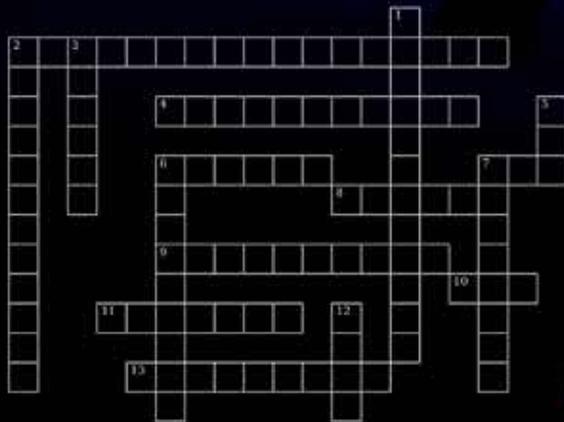
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2. "Human hacking." A low-tech skillset utilized by hackers that exploits human trust, often part of email scams.
4. The "free space" on a hard drive where deleted files can be found.
6. A type of "virus-network" that utilizes infected victims for combined computing, DDOS attacks, and more.
7. Format of cell-phone picture messages.
8. On Android devices, databases of evidentiary value are stored in this format.
9. Extra space at the end of a file where deleted data can exist.
10. Algorithm used to ensure evidence integrity; the "data fingerprint."
11. Type of container used to shield seized mobile devices from radio waves.
13. Verb: to gain administrative access on an iOS device.



DOWN

1. Hardware device used to ensure that evidence drives are not contaminated during acquisition.
2. A common web vulnerability where a hacker executes malicious code to alter a database.
3. The first piece of hardware a forensic examiner reaches for when responding to a computer-crime.
5. Text message format, limited to 160 characters.
6. Term for forensic disk images containing every bit of an evidence drive.
7. "Hidden" data such as date-time stamps and GPS coordinates, often part of picture files.
12. Newer type of cryptographic hash, also used to verify evidence integrity.

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Amanda Knox



BSU Professor Greg Hampikian and Amanda Knox



HELP THE IDAHO INNOCENCE PROJECT CONTINUE TO MAKE A DIFFERENCE

In 2010 Dr. Greg Hampikian, forensic biologist, BSU professor, and Director of the Idaho Innocence Project went to Italy to gather evidence in the Amanda Knox case. For the next two years, he and the team at the Idaho Innocence Project performed research and experiments to evaluate DNA in the case. "The DNA evidence was so clear. All of the DNA gathered from the room where the murder occurred included just two people, the victim and Rudy Guede. Guede was in the Italian criminal database, had committed similar break-ins with a knife, and had fled the country shortly after the murder. The case against Amanda Knox and her former boyfriend Raffaele Sollecito was started before the DNA was evaluated. But the DNA should have changed all that." Hampikian and the BSU team also focused on the DNA evidence gathered by the government that implicated Knox and Sollecito. Hampikian's conclusions about the government's evidence did not prevail at Knox's trial and she was convicted. The BSU team continued to work on the case. Knox spent more than four years in prison, until an appellate court's appointed experts agreed with Hampikian, and freed her and Sollecito. Recently, the

Italian Supreme Court sent the case back for another review. The team at the Idaho Innocence Project is once again working with Knox, who is home in Seattle.

The Idaho Innocence Project has helped exonerate eight wrongly convicted people in the United States since 2005 and is presently litigating two Idaho cases as well as assisting other projects across the world on DNA cases.

Ever wish that you could make more of a difference? I certainly do. However, despite the pride we all take in our work, the press of professional and personal life can make it hard to pick up the lance and fight injustice in other fields of the law. The work of the Idaho Innocence Project can make us proud of the work that we all do, despite a system about which people seem increasingly cynical.

We can all play a part by supporting the heroic work that the Idaho Innocence Project performs. I urge my fellow lawyers to contribute generously, and **I have pledged to match a portion of the contributions that The Idaho Innocence Project receives within the next thirty days.**

Wm. Breck Seiniger

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