The Advocate

Official Publication
of the Idaho State Bar
Volume 55, No. 11/12
November/December 2012

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The Advocate

The Official Publication of the Idaho State Bar
55 (11/12), November/December 2012

Section Articles

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

Columns

News and Notices

On the Cover

"Teton Storm." The cover photograph was taken by Monte Stiles in Teton National Park. In April 2011, Monte left the U.S. Attorney's Office in order to devote his full attention to drug education efforts in Idaho and elsewhere, as well as motivational speaking and training. More information can be found at www.montestiles.com and www.montestilesphotography.com.

Section Sponsor

This issue of *The Advocate* is co-sponsored by the Employment and Labor Law Section and the Workers' Compensation Section.

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Special thanks to the November/December editorial team: Brent T. Wilson and Judge Kathryn A. Sticklen.

The Advocate

Official Publication of the Idaho State Bar

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The Advocate (ISSN 05154987) is published the following months: January, February, March, April, May, June, August, September, October, November, and December by the Idaho State Bar, 525 W. Jefferson Street, Boise, Idaho 83702. Subscriptions: Idaho State Bar members receive *The Advocate* as part of their annual dues payment. Nonmember subscriptions are $45 per year. Periodicals postage paid at Boise, Idaho.

POSTMASTER: Send address changes to:
The Advocate
P.O. Box 895
Boise, Idaho 83701

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Upcoming CLEs

November

November 5
Prosecutorial Decision-Making – Politics, Ethics and Scope of Discovery
Sponsored by the Idaho Law Foundation
12:30 – 1:30 p.m. (MST)
Telephonic Conferencing
1.0 CLE credits of which .25 is Ethics

November 12
Effective Assistance of Counsel: Providing It, Challenging It and Defending It
Sponsored by the Idaho Law Foundation
12:30 – 1:30 p.m. (MST)
Telephonic Conferencing
1.0 CLE credits **(RAC)**

November 13
Intersections Between Legal Ethics and Judicial Ethics by Court of Appeals Judge Karen Lansing
Sponsored by the Professionalism and Ethics Section
8:30 – 9:30 a.m. (MST)
Law Center, Boise / Statewide Webcast
1.0 CLE credits of which 1.0 is Ethics **(RAC)**

November 16
Headline News – Idaho Falls
Sponsored by the Idaho Law Foundation
8:30 a.m. – 3:45 p.m. (MST)
Hilton Garden Inn, Idaho Falls
6.0 CLE credits of which 1.0 is Ethics **(RAC)**

November 19
Judges and Lawyers: Common Ethics Issues
Sponsored by the Idaho Law Foundation
12:30 – 1:30 pm
Telephonic Conferencing
1.0 CLE credit **(RAC)**

November (Continued)

November 26
The Vanishing Trial, Getting to "Yes" and the Whole Loaf of Bread
Sponsored by the Idaho Law Foundation
12:30 – 1:30 p.m. (MST)
Telephonic Conferencing
1.0 CLE credit

November 30
Headline News – Post Falls
Sponsored by the Idaho Law Foundation
8:30 a.m. – 3:45 p.m. (PST)
Templins, Post Falls
6.0 CLE credits of which 1.0 is Ethics **(RAC)**

December

December 7
Headline News – Nampa
Sponsored by the Idaho Law Foundation
8:30 a.m. – 3:45 p.m. (MST)
Nampa Civic Center, Nampa
6.0 CLE credits of which 1.0 is Ethics **(RAC)**

December 14
Representing Persons from Diverse Backgrounds in Idaho's Judicial System
1:00 – 4:15 pm (MDT)
Law Center, Boise / Statewide Webcast
3.0 CLE credits

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

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President's Message

Into the Future...

Molly O'Leary
President, Idaho State Bar Board of Commissioners

I recently had the opportunity to grab a cup of coffee with Allison Blackmun, a member of the 2011 graduating class of the University of Idaho College of Law. I had previously met Allison when she participated in a panel discussion on intergenerational differences in the workplace – a topic I've been reading, hearing and thinking about quite a bit this past year.

Allison is an associate in the litigation practice group in Stoel Rives' Boise office. Prior to joining Stoel Rives, Allison served a Semester in Practice externship in the chambers of the Honorable Lynn B. Winmill, U.S. District Court for the District of Idaho, Boise and worked for two years in the Boise office of URS Corp., where she assisted the human resources office with talent retention. She graduated summa cum laude from the College of Idaho in 2006, with major degrees in Creative Writing, Sociology and Spanish. I think it's safe to say Allison is "no slouch."

And yet, Allison and those of her generation – the so-called "Millennials" – are vocally questioning the current business model for practicing law. On the surface, some of the Millennials' points of view can sound like just so much self-centered, wide-eyed naiveté. But, if my conversation with Allison is any indication, I think it behooves the Boomer generation to pay attention to the perspectives of the upcoming leaders of our profession.

The so-called Millennial Generation is generally viewed as that group of people born between 1981 and 2000, although there are no universally agreed upon dates. The Millennial Generation is sometimes referred to as Generation Y because it follows Generation X, whose birth dates span the years from 1966 to 1981. Millennials may also be referred to as "Echo Boomers" because the older ones are typically the children of the Baby Boomer generation (born between 1943 and 1965).

The chart below[1] shows, in a nutshell, how the Boomers and the Millennials stack up in terms of workplace behavior and values.

According to Matt Zamzow, Director of Training at Birkman International, a Houston-based human resources and leadership consultant, "When the younger generation and the older generation work together they see these differences and they automatically attribute judgments to them because they are unfamiliar. However, much of it is lack of understanding. Understanding each generation's key formative environments and values, as well as their workplace strengths and struggles are the first step in building more efficient and cohesive workforce teams."[2] In light of the fact that the Millennials are essentially the offspring of the Boomers, perhaps rather than passing judgment on one another, we ought to sit down to break bread together and pass the butter.

Because of Allison's pre-law work experience wrestling with talent-retention

Generation	Organizational Behavior	Workplace Strengths	Workplace Struggles
BOOMERS **1943 - 1965** The largest generation in the United States and typically grew up amid economic prosperity, suburban affluence and strong nuclear families with stay-at-home moms.	Tend to be optimistic, ambitious, competitive, and focus on their personal accomplishments. They believe in working long hours and expect the younger generations to adopt this approach. They have ruled the workplace for years and are comfortable in the culture they created.	• Team perspective • Dedicated • Experienced • Knowledgeable • Service-oriented	• Nontraditional work styles of Generations X and Y • Technology replacing human interaction • Sharing praise and rewards • Balancing work and family • Uncomfortable with conflict, reluctant to go against peers
MILLENNIALS **1981 – 2000** Were raised at the most child-centric time in our history. Due to the great deal of attention and high expectations from parents, they are confident and may appear cocky.	They are typically team-oriented, and work well in groups, as opposed to individual endeavors. Also, they're used to tackling multiple tasks with equal energy, so they expect to work hard. They're good multi-taskers, having juggled sports, school and social interests growing up.	• Optimistic • Able to multi-task • Tenacious • Technologically savvy • Driven to learn and grow • Team oriented	• Respectful communication • Functional literacy • Need supervision and structure, especially with people issues • Reject the concept of "paying dues"; expect immediate input

issues at URS, a "Fortune 500" company that has offices in 50 countries in addition to Idaho, she is especially sensitive to the need for management (typically Boomers) to have a good understanding of the employees they are grooming to be their successors and who, not coincidentally, reflect the up-and-coming client base of today's companies. The same need applies to the Bar's leadership as it looks to the Millennials as its future leaders.

Allison describes herself and those of her generation as hard workers who are interested in learning to work "smarter" but not necessarily in order to bill more hours and make more money. Instead, she says, Millennial lawyers want to harvest any resulting efficiencies and invest them in quality-of-life pursuits such as their families and community service. And, while she "gets" that clients typically expect their attorneys to be available at the drop of a hat, she questions whether that level of accessibility requires traditional suit-and-stockings face time instead of mobile access from wherever the client's attorney happens to be. She notes that, while her predecessors in the 80s were focused on shattering the so-called glass ceiling, her peers – male and female – are questioning all cultural assumptions about the practice of law.

In looking at both generations' characteristics, there is much common ground: they both tend toward optimism; they are both team-oriented; while Boomers are described as knowledgeable, Millennials are driven to learn and grow; and, where Boomers are deemed to be dedicated workers, Millennials are described as tenacious. As for workplace differences, even those can be seen as an opportunity for both generations to turn each other's "Workplace Struggles" into shared "Workplace Successes." For instance, Millennials' non-traditional work styles could be an opportunity for Boomers to rethink the business-as-usual approach to delivering services and, in the process, help resolve their own struggle with the ever-elusive work-life balance. While Millennials may need to view face-to-face interaction with their peers and supervising attorneys as an opportunity to "learn and grow" instead of an inefficient use of time, Boomers should leverage the Millennials' facility with digital communication tools as an opportunity to learn how to reach out to the next generation of clients. Rather than seeing Millennials' need for regular feedback and assurance as a weakness, Boomers might consider turning that quality into an opportunity to educate the Millennials on how they can be more effective team players. Millennials, in turn, might see any perceived shortcomings in their Boomer colleagues' communication style as a vote of confidence in their inherent ability rather than as a withholding of praise.

Allison and her peers are our future leaders. Maybe instead of viewing the Millennials' desire to be part of the conversation before they've "paid their dues" as naïve, it's time for the Boomer generation to dust off its "question authority" mantra and join the Millennials in questioning the relevance of today's status quo to the future of our profession.

Endnotes

1 How Do Generational Differences Impact Organizations and Teams? http://www.birkman.com/news/BMI_GenerationsPart1.pdf at p. 4

2 Id. at p. 3.

About the Author

Molly O'Leary *represents business and telecommunications clients throughout Idaho, and is a managing member of Richardson & O'Leary, PLLC, in Boise (www.richardsonandoleary.com). In addition, Ms. O'Leary serves as a commissioner from the Fourth District on the Idaho State Bar Board of Commissioners, and on the statewide advisory council for the Idaho Small Business Development Center. You can follow her on Twitter: @BizCounselor.*

DAVID E. RAYBORN (Reinstatement)

On September 24, 2012, the Idaho Supreme Court issued an Order Granting Petition for Transfer to Active Status reinstating Pocatello, Idaho attorney David E. Rayborn to the practice of law in Idaho. Mr. Rayborn had previously been on disability inactive status since September 18, 2008 by order of the Idaho Supreme Court which was a result of a stipulated resolution to a formal charge disciplinary case pending against him. Pursuant to the Supreme Court's September 18, 2008 Order, Mr. Rayborn was not allowed to apply for reinstatement for five years retroactive to September 12, 2006, the date on which he voluntarily transferred from active to inactive status.

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

ERIC J. SCOTT (Public Reprimand)

The Professional Conduct Board of the Idaho State Bar has issued a Public Reprimand to Boise lawyer Eric J. Scott, based on professional misconduct. The Professional Conduct Board Order concluded a disciplinary proceeding that was initiated with a complaint filed on June 29, 2012. On September 24, 2012, a Hearing Committee of the Professional Conduct Board conducted a hearing on the Idaho State Bar's Motion to Deem Admissions for Failure to Answer and for Imposition of Sanction. Mr. Scott chose not to answer due to a parallel contempt case with criminal implications. Following that hearing, the Hearing Committee entered its Order. That Order concluded that Mr. Scott violated I.R.P.C. 8.2(a), by making a statement concerning the qualifications or integrity of a judge that a reasonable attorney, considered in light of all his professional functions, would not have made under the circumstances.

Mr. Scott represented a criminal defendant charged with possession of an open container and battery. Magistrate Judge Thomas Watkins was assigned to the case. Following Judge Watkins' decision denying defendant's pre-trial motions, Mr. Scott filed a motion to withdraw as defendant's counsel. In that motion, Mr. Scott argued that Judge Watkins erroneously applied a subjective test rather than an objective test in analyzing whether the defendant was in custody. Judge Watkins stated that the test for determining whether a suspect was in custody "is a subjective one and the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation."

Mr. Scott described this statement of the test as "stunningly nonsensical" and stated that "[w]ith all due respect to this Court, this statement makes no sense."

Regarding the open container charge, Mr. Scott argued that Judge Watkins erroneously concluded that the defendant admitted to an officer that he had consumed alcohol in a public theater. Mr. Scott concluded that motion by stating, in part:

> The Court's errors in this case were so inexplicable and so great in number that Counsel has formed the belief that this Court is:
> (a) lazy;
> (b) incompetent;
> (c) biased;
> (d) prejudiced; or
> [(e)] all or some of the above.
>
> With all due respect, Counsel simply cannot escape this belief. There is no explanation for this Court's 'finding' of a 'fact' that did not exist. It would be understandable if this Court overlooked a fact, but this Court made up a fact. It just so happens that this Court made up facts to the advantage of his former employer, the Boise City Prosecutor's Office. Therefore, this Court is either biased toward them, prejudiced against Counsel, too lazy to actually listen to the recording of the relevant interview, or too incompetent to reach the correct conclusion from the facts. Therefore, Counsel lacks faith in this Court's ability to objectively and competently serve as a fact-finder in this case.
>
> For the reasons set forth above, Counsel also has no faith in this Court's ability to competently and objectively interpret the law in this case. The Court's stunningly nonsensical statement of the 'test' for determining custody speaks for itself. . . .

Following a hearing, Judge Watkins denied the motion to withdraw and Mr. Scott was served with a written charge of contempt. Following a hearing, Mr. Scott was found guilty of contempt, a matter that is currently pending on appeal. The defendant in the underlying case was acquitted of the battery charge and the open container charge was dismissed after the state rested its case.

The public reprimand also includes that Mr. Scott be placed on probation on the condition that he complete a one-year mentoring program facilitated by the Idaho State Bar. Mr. Scott voluntarily began the mentoring program before the disciplinary case was filed.

The public reprimand does not limit Mr. Scott'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.

DAVID C. JACQUOT (Resignation in Lieu of Discipline)

On September 27, 2012, the Idaho Supreme Court entered an Order accepting the resignation in lieu of discipline of Coeur d'Alene attorney, David C. Jacquot. The Idaho Supreme Court's Order followed a stipulated resolution of a disciplinary proceeding that related to the following conduct.

On April 15, 2008, a federal grand jury in California indicted Mr. Jacquot on two counts of filing false income tax returns. On August 16, 2010, Mr. Jacquot was arraigned in California on three federal counts of Transportation of a Minor to Engage in Criminal Sexual Activity.

In March 2012, following two mistrials in the sexual misconduct case, Mr. Jacquot pleaded guilty to one count of filing a false tax return and one count of Travel with Intent to Engage in Illicit Sexual Activity. In the tax case, he was sentenced to time served and ordered to pay restitution and serve one year of supervised probation. In the sexual misconduct case, he was sentenced to time served and ordered to serve 25 years of supervised probation.

The Idaho Supreme Court accepted Mr. Jacquot's resignation effective September 27, 2012. By the terms of the Order, Mr. Jacquot may not make application for admission to the Idaho State Bar sooner than five years from the date of his resignation. If he does make such application for admission, he will be required to comply with all bar admission requirements found in Section II of the Idaho Bar Commission Rules and shall have the burden of overcoming the rebuttable presumption of "unfitness to practice law."

By the terms of the Idaho Supreme Court's Order, Mr. Jacquot's name was stricken from the records of the Idaho Supreme Court and his right to practice law before the courts in the State of Idaho was terminated on September 27, 2012

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

ALPS launches two products to address cyber fraud

The Attorney's Liability Protection Society (ALPS), has launched two products to address cyber fraud — Cyber Response and ALPS Law Firm Protect (EPLI).

ALPS Cyber Response addresses client data and case files. With advances in technology, firms have more options for storing client data. Document management software, cloud data storage, smart phones and tablets create their own kinds of exposure. ALPS Cyber Response is designed specifically for attorneys, offering a single-stop, real time breach response solution.

ALPS Law Firm Protect (EPLI), is a product addressing claims arising from employment practices complaints. An EPLI policy offers protection against claims and lawsuits that are brought against a business, its officers or directors, or its employees and managers. Most standard business insurance policies don't specifically cover employment practices liability, and claims against employers are on the rise.

ALPS takes a preventative approach not simply to mitigate claims, but to help foster the betterment of the legal profession. ALPS is offering its Cyber Response and Law Firm Protect (EPLI) policies as an integral part of its insured firms' "lines of defense," but ultimately both ALPS and the firms it insures want to avoid claims altogether.

Through live CLE events, webinars and online education, ALPS is working to help all attorneys identify and safeguard their firms against cyber-security breaches. It is also building awareness of the inherent risks of being an employer. ALPS helps firms understand how to properly manage those risks by adhering to the best employment practices and the steps they can take to protect their firm.

For more information, visit protectionplus.alpsnet.com.

Third District, Nampa Rotary team up to help schools

The Rotary Club of Nampa and Third District Bar Association have teamed up to help students in light of the recent Nampa School District supply crisis. One of the biggest needs listed by the district in a recent wish list was copy paper. The Rotary Club and Bar Association accepted reams or boxes of 8 ½-by-11 white copy paper on behalf of the district from Sept. 14 to Oct. 12.

Med-Mal panel members sought

The Idaho State Bar seeks attorneys from the Idaho Falls area and Lewiston area interested in serving as a panelist for Medical Malpractice hearing panels. Pursuant to Idaho Code Section 6-1002, the Board of Commissioners appoints attorney panelists to the medical malpractice pre-litigation hearing panels. Preferably, candidates should not practice in the area of medical malpractice. If you would like information about the time commitment, duties, etc., contact the Board of Medicine at (208) 327-7000. If you are interested in serving as a panelist, please contact Diane Minnich by Nov. 30, at dminnich@isb.idaho.gov.

Notice of class action lawsuit from Family Law Section

A class action lawsuit in the matter of *Pascavage v. Office of Personnel Management* is now pending in the U.S. District Court for the District of Delaware. Under this settlement, existing or former clients of family law practitioners may be entitled to benefits through the Federal Employees Group Life Insurance (or "FEGLI") program.

By order of United States Magistrate Judge Mary Pat Thynge, the Family Law Section Chair has been requested to promptly disseminate the class action settlement notice to members of the Idaho State Bar Family Law Section; therefore, the Settlement and Docket regarding this matter are available for general review.

To review the settlement details, go to the U.S. Office of Personnel Management website, and search for OPM Class Action Docket.

Young lawyers target fight hunger with donations

It is time once again for the Young Lawyers Section's Attorneys Against Hunger event, slated for Nov. 5 through 9. The annual event collects money for the Idaho Food Bank. The Young Lawyers Section asks for your support in making this year's campaign even more successful in fighting hunger in Idaho.

The Idaho Food Bank helps ensure that families throughout Idaho have enough food, and provides breakfast to children. Through its careful management and buying power it is able to stretch every dollar to maximize the amount of food it provides. The Section made it a goal to keep the cost of the event to a minimum and last year about 90% of all of the money raised went directly to the Food Bank.

Last year, the Young Lawyers challenged members of the Bar and the Bench to live on the daily allowance - $4.30 - given to the average individual on Food Stamps in Idaho for one week. Participants will again gather their pledges and spend one week with the Young Lawyer's Section living on a restricted diet. Participants can find out more about the rules of the Challenge at: http://www.idahoyounglawyers.org/. A financial contribution in one of the following tiers will go a long way toward fighting hunger for Idaho residents.

- Premier Sponsor – $500

Logo or name on webpage, printed flyers, mailings, and in *The Advocate.*

- Barrister – $200

Smaller logo or name on mailings and in *The Advocate*

- Advocate – $125

Mentioned in *The Advocate*.

On Nov. 9, we invite everyone to celebrate our week at Old Chicago. We can add up all of the pledges, sponsorships and contributions to present a grand total to the Idaho Food Bank. Thank you for your time and past support of this great cause. It is a great opportunity to help Idahoans in need. Please feel free to contact Mark Coonts, Chair of the Young Lawyer's Section, at mcoonts@gmail. Please contact him to get your logo on our materials as soon as possible.

Lawyers' identities being used for fake websites and solicitations

A recent scam has surfaced in which the identify of a Texas attorney, who had not practiced in years, was used for a fake law firm website using the attorney's maiden name, former office address, and portions of her professional biography.

Other attorneys have complained about the use of their names and professional information to solicit legal work.

All attorneys should be on the alert to this scam. If you become aware of the same or a similar situation involving your name and/or law firm, you should immediately report the incident to local authorities, your state bar, and the FBI at the Internet Crime Complaint Center. Additionally, be sure to closely monitor your credit report or bank accounts to ensure that your identity is not the only thing being stolen. If you have been a victim of an Internet scam or have received an e-mail that you believe was an attempted scam, please file a complaint at www.IC3.gov.

Bankruptcy judgeship opportunity

The U.S. Courts, 9th Circuit, Eastern District of Washington, announces a judgeship vacancy. The annual salary is $160,080/year. A full announcement and application can be found at judgeship.ce9.uscourts.gov, or contact personnel@ce9.uscourts.gov.

The applications are due at 5 p.m., Dec. 6, 2012.

Photo courtesy of IPTV

At the Idaho Public Television Studio in Boise panelists talk about human rights in Idaho as part of a celebration associated with the award-winning documentary produced by IPTV called "The Color of Conscience." The film earned producer Marcia Franklin an ABA award earlier this year. The event included a discussion in the studio and at four remote locations around Idaho. The event was also eligible for CLE credits for those who attended.

JUDICIARY HONORS ITS FRIENDS AND ITS OWN

Diane K. Minnich
Executive Director, Idaho State Bar

A few weeks ago, the Idaho judiciary held its Annual Conference in Boise. As part of the conference, the judiciary honors those judges and individuals who have made significant contributions to the Idaho judicial system. This year, the Kramer Award was presented to Children and Family Courts Coordinator Viki Howard, the Granata Award to District Judge John Stegner, and longtime Idaho Senator Denton Darrington was honored for his commitment to improving Idaho's judiciary.

The Kramer Award is named for the late Idaho District Judge Douglas D. Kramer. The Kramer Award has been presented annually since 1986 to the person who best displays excellence in judicial administration in character and action.

This year's recipient, Viki Howard serves as the statewide coordinator for Children and Families in the Court. Viki has devoted 25 years to working with families in the courts as a mediator, case manager, educator and administrator. Viki was among the first to use mediation, parent education and case coordination services in Ada County child custody cases. These models are now used statewide. She was nominated for her long-term commitment to enhancing the administration of justice for the benefit of children and families in Idaho. We were fortunate to have Viki as a member of the Idaho Volunteer Lawyers Program staff in the mid 90's.

The Granata Award is named for the late 5th District Judge George Granata. The award has been presented annually to the Idaho trial court judge who best exemplifies professionalism evidenced by Judge Granata during his more than 20 years of judicial service.

The 2012 award recipient is District Judge John Stegner. Judge Stegner, a graduate of the University of Idaho College of Law, has served as a district judge since 1997. He is currently serving as the 2nd District Administrative Judge for the second time. He has served on numerous judicial committees and commissions, has presided over Latah County Drug Court, and serves as a lecturer at the University of Idaho College of Law. Justice Joel Horton, Chair of the awards committee, commented that Judge Stegner truly exemplifies the qualities that Judge Granata brought to the bench and to the administration of justice. He is committed to the highest levels of professionalism and a worthy recipient of this award.

Special recognition

Senator Denton Darrington is concluding 30 years of service in the Idaho Legislature. For almost 24 years, he served as chairman of the Senate Judiciary and Rules Committee. The Idaho judiciary honored Senator Darrington for his distinguished career as a leader in keeping Idaho at the forefront of judicial administration. Through his service in the Idaho legislature, Senator Darrington became an expert on the judicial branch of state government. During his tenure as the chairman of the Senate Judiciary and Rules Committee he was involved in virtually every piece of legislature dealing with the judiciary. Senator Darrington was a friend to judiciary, not because he supported every legislative effort or idea that the judiciary developed, but because he respected the role of the judiciary and understood its importance as the third branch of government. Senator Bart Davis spoke at the event; he stated that the judiciary trusted Senator Darrington because they could.

Senator Darrington was a friend to judiciary, not because he supported every legislative effort or idea that the judiciary developed, but because he respected the role of the judiciary . . .

Senator Darrington explained that when he took over the Judiciary and Rules Committee he knew that building a relationship with the judiciary was important. He set out to understand the judicial system and build a positive relationship with Idaho's judiciary, which he accomplished.

Idaho dignitaries were featured in a video expressing their gratitude to Senator Darrington. If my memory is

correct, it included comments by all but one former chief justice and all but one of the Idaho governors that are still living. Each one commented on Senator Darrington's impact as an Idaho legislator, his expertise, and his sense of fairness and respect for others.

The bar does limited work with the legislature. When we have legislation, it comes before the Senate Judiciary and Rules Committee. I was always impressed with Senator Darrington's respect for the public and other legislators, regardless of their views or whether he agreed with their opinions. He understood that he represented the people of Idaho and individuals deserved to be heard. He was gracious and respectful to those that came before his committee, regardless of who they were or what they represented.

Senator Darrington was truly humbled by the recognition and comments by so many of his colleagues and friends. He said that leaving the legislature will be difficult; it was a way of life for 30 years. He wanted to leave a legacy, which he did through his service in the Idaho legislature. However, the legacy he is most proud of is his family.

We will miss Senator Darrington. I extend my thanks to him for his service, his commitment to improving Idaho's judiciary and his friendship. I wish him many happy hours with his family and friends.

He said that leaving the legislature will be difficult; it was a way of life for 30 years.

2012 District Bar Association Resolution Meetings

District	Date/Time	City	Location
First Judicial District	November 7 at Noon	Coeur d'Alene	Ameritel Inn, 333 Ironwood Avenue
Second Judicial District	November 7 at 6 p.m.	Moscow	Best Western University Inn, 1516 Pullman Road
Third Judicial District	November 1 at 6 p.m.	Nampa	Masonic Event Center, 320 11th Ave S Ste 203
Fourth Judicial District	November 2 at Noon	Boise	The Grove Hotel, 245 S Capitol Blvd.
Fifth Judicial District	November 13 at 6 p.m.	Twin Falls	Twin Falls Center for the Art Building, 195 River Vista Place
Sixth Judicial District	November 14 at Noon	Pocatello	Juniper Hills Country Club, 6600 S. Bannock Hwy
Seventh Judicial District	November 15 at Noon	Idaho Falls	Colonial Theater, 450 A Street

Welcome From the Employment & Labor Law Section and the Workers' Compensation Section

D. John Ashby
Bradford S. Eidam

This issue of *The Advocate* is co-sponsored by the Employment and Labor Law Section and the Workers' Compensation Section of the Idaho State Bar. Our goal is to provide the Bar with a strong mix of articles addressing recent developments in the law governing employers and employees in addition to some historical context to the present Idaho Workers' Compensation Act.

The first three articles address hot topics in employment law. Leslie Hayes and Sally Cooley address the legal implications of social media in the workplace. Their article discusses how employers can protect their legitimate interests without infringing on employees' rights with regard to social media. Robert White's article explains several preventative measures employers can take to minimize liability for workplace decisions. John Hughes analyzes recent Department of Labor regulations that impact virtually every employer that maintains a retirement plan, including 401(k) plans, covered by the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

The next three articles address the law of workers' compensation. Tom High addresses the role of the Industrial Special Indemnity Fund in encouraging employers to hire workers who suffer from permanently disabling conditions and the rules which govern its responsibilities to pay benefits. John Greenfield's article discusses the substantial undertaking in the late 1960's to modernize the Idaho workers' compensation laws, creating the Act as we know it today. And, in recognition of the 25th anniversary of the creation of the Workers' Compensation Section, Dan Bowen, Glenna Christensen and Alan Hull will honor prominent members of the Bar by acknowledging their contributions to the development of Idaho workers' compensation law.

We encourage all who are interested to join one or both of our sections. The Employment and Labor Law Section meets the fourth Wednesday of the month at the ISB offices in Boise. Many members participate by teleconference, and lunch is provided to those who attend in person. Most meetings include a half-hour CLE on a topic related to employment law.

The governing council for the Workers' Compensation Section meets quarterly by teleconference and invites any interested member to participate. The general business meeting and election of officers is held during the annual seminar on the second Friday of March in Sun Valley.

On behalf of the Employment and Labor Law Section and the Workers' Compensation Section, we hope you enjoy the articles in this issue of *The Advocate* and find them both relevant and helpful.

About the Authors

D. John Ashby *is a partner with Hawley Troxell Ennis & Hawley LLP, where he represents employers in all areas of employment law. He maintains a litigation practice in state and federal courts with an emphasis on employment law consultation and defense.*

Bradford S. Eidam *is a sole practitioner in Boise representing persons seriously injured at work or due to the fault of another. He is a certified workers' compensation specialist, a past chairman of the Workers' Compensation Section (two times) and a past president of the Idaho Trial Lawyers Association.*

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Social Media - Striking the Balance Between Employer and Employee

Leslie Hayes
Sally J. Cooley

Social media is constantly changing and has become a popular topic in multiple areas of the law. Specifically in the employment realm, the conversation has focused on how employers regulate their employees' online conduct, whether employees have been subjected to unlawful action for their online conduct, and what other changes and developments have occurred that will tweak the advice that attorneys give to employer clients. The majority of the enforcement action has occurred through the National Labor Relations Board (NLRB), which will be the primary focus of our article. Additionally, this article will address broad social media issues that have arisen, provide guidance on how to determine when employees may be reprimanded for online conduct, and suggest how employers can strike an appropriate balance in order to protect legitimate company interests without infringing on their employee's protected rights.

Engaging in searches or monitoring current employee activity online could constitute "unfair surveillance" in violation of the NLRA.

What basic regulations should I be aware of?

What is Social Media: The NLRB has defined social media as "various online technology tools that enable people to communicate easily via the internet to share information and resources[,] . . . [including,] text, audio, video, images, podcasts, and other multimedia communications."[1] Practically speaking, social media includes websites such as Facebook, Twitter, MySpace, and blogs.

Employers are primarily concerned with employee social media use because it: (1) costs time and company resources; (2) creates the potential for defamation; (3) may cause a breach confidential information, trade secrets, copyright, and proprietary information; and (4) may violate some other regulatory requirement (i.e., HIPAA, Security Regulations). With constant access to technology, employees have many avenues to engage in social media both while at work and during their personal time.

Regulating Employee Online Conduct: Most of the developments in this area of law have been through enforcement actions by the NLRB through the National Labor Relations Act (NLRA). The NLRA generally applies to all private employers.[2] It protects employees who attempt to "improve terms and conditions of employment or otherwise improve their lot as employees through channels outside of the immediate employee-employer relationship."[3] The NLRA also makes it unfair for an employer to "interfere with, restrain, or coerce employees in the exercise of [NLRA] rights."[4] If an employer's policy or rule "would reasonably tend to chill employees in the exercise of their [NLRA] rights[,]" then it is a violation of the NLRA.[5] The inquiry used by the NLRA is important, because despite the fact that the policy does not expressly restrict protected activity, the policy may still violate the NLRA if the policy can reasonably be construed *by employees* to prohibit protected activity.[6]

The NLRB looks at two avenues when investigating an allegation that an employee's discharge is a violation of the NLRA. First, the NLRB looks at whether the employer's policies are in violation of the NLRA; second, the NLRB looks at whether the employee's discharge is in violation of the NLRA. Regardless of whether a policy is overbroad, an employee's discharge is not a violation of the NLRA if the employee was not engaged in protected concerted activity.

Requesting or Seeking Information Online about Employees or Prospective Employees: Several states, such as Maryland and Illinois, have enacted laws that prohibit employers from requesting employees' or potential employees' social media passwords. Federal legislation may soon follow suit. A new bill introduced in the House of Representatives would make it illegal for employers to require employees or job candidates to provide their social media passwords. The Social Networking Online Protection Act (SNOPA), H.R. 5050,[7] would prohibit employers from requesting or requiring a job candidate or current employee to provide the passwords for personal email, private accounts or social networking sites. SNOPA seeks to prevent employers who demand such access to discipline, discriminate, or deny employment to candidates or employees who refuse to provide such passwords.

A second piece of legislation, the Password Protection Act of 2012 (PPA), S.3074 and H.R. 5684, was introduced in both the Senate and the House. It would also prevent employers from compelling job candidates and/or current employees into sharing information from their social networking accounts.[8] The PPA would amend current law to prohibit employers from coercing any person to authorize access to a protected computer or discharging, disciplining, or discriminating against any person for failing to authorize access to a protected computer or from retaliating against any person who has filed a complaint or instituted a proceeding related to the above prohibition. Currently neither SNOPA nor PPA has been passed into law; however, employers should not pursue this method of information gathering.

Additionally, employers frequently inquire about searching for publically available social media information for employees and prospective employees. Employers should tread carefully when choosing to do so. Engaging in searches or monitoring current employee activity online could constitute "unfair surveillance" in violation of the NLRA. Whether an employer representative who is also "friends" with an employee constitutes "surveillance" in violation of the NLRA is a gray area of the law.[9] As for searches of prospective employees, employers should

conduct any online searches at the same stage that they conduct a background check. The representative that conducts the search should not be a key decision-maker and only relevant information from the search should be passed along (i.e., race, national origin, sexual orientation,[10] religion, political affiliation, etc. are not relevant to the decision-making process).

Other areas of the law to be aware of in providing advice to clients on social media matters include Federal Trade Commission regulations,[11] state anti-discrimination laws, and the Stored Communications Act.[12]

Reprimanding employees for online conduct

Most of the enforcement action against employers that have disciplined employees for online conduct has occurred through the NLRB. In an advice memorandum issued by general counsel in August 2011 and January 2012, the NLRB provided examples of when it is permissible and impermissible under the NLRA to discipline an employee for online conduct. These examples suggest the following checklist for advising employer clients about social media issues and adverse employment actions: (1) are the comments related to the workplace; (2) did other employees join the conversation; (3) is the comment related to concerns that the employee has previously raised; and (4) is the conversation purely personal?

Importantly, the use of expletives and other inappropriate language will not make discharge appropriate. The NLRB has repeatedly stated that it is the message that is being conveyed and not the choice of language that is important.

The preceding checklist may be used as part of an analytical process to help employers identify the important issues and engage in a thorough analysis as to whether the employee's actions constitute protected concerted activity or whether the employee may be reprimanded for a violation of company policy.

Striking the appropriate balance – Protecting of employers and the rights of employees

Drafting a good social media policy is about carefully balancing the employer's concerns against the employee's protected rights. A good policy will put an employee on notice of the expectation, but still permit protected activity. The NLRB has examined social media policies and

Case Studies Show Importance of Checklist

The following is a sample analysis of two separate examples of employers reprimanding employees based on social media use. The checklist will be used to analyze whether the employees in these examples may be reprimanded for online conduct. These examples are taken from the NLRB advice memorandum, which offers several additional fact patterns that are illustrative of how the NLRB analyzes these cases.

Bartender: A bartender ("Bartender") was upset about a tip sharing policy and complains on Facebook that it "sucked," that s/he had not had a raise in five years, and that customers were all "rednecks" and s/he "hoped they choked on glass as they drove home drunk."

Snowstorm: A series of comments on Facebook from an employee, the first of which consisted of profanity and a statement that she could handle jokes, but did not want to be told she was less of a person because she was female. This was posted in response to a comment from a manager about how he knew the women would not come into work on the day of a snowstorm. The employee's friend who witnessed the sexist remark replied online and was terminated a week later for an unrelated reason. In response to Snowstorm's emotional reaction over the termination of her friend, the president of the company counseled her to not get involved. The employee then posted a series of comments on Facebook and was subsequently terminated because her comments showed she continued to be involved after coaching and the president noted that the company did not appreciate her comment about the manager the prior week.

Are the comments related to the workplace?

It is clear that there must be some tangential relationship to the workplace for the conduct to be protected. If the comment is related to the workplace, is it more specifically related to the terms and conditions of employment (staffing issues, workload, promotional events, wages, etc.)?

Both Bartender and Snowstorm made comments related to the workplace.

Did other employees join the conversation?

Other employees may either join the conversation in-person or online. Comments that seek to elicit input from other employees or group action will most likely be protected regardless of whether other employees join the conversation. This inquiry also looks at the types of comments that other employees post; in other words, are they in agreement with the commenter or are they "hang-in-there"-type remarks?

Bartender did not have co-workers respond to his post and s/he did not discuss the post with co-workers the following day. Snowstorm had one response from a co-worker to her original post.

Are the comments related to concerns that the employee has previously raised?

If the employee is bringing concerns that were previously raised at work to an online forum, then the comment is more likely to be protected. However, concerns that have been raised and addressed by the organization may not render protection to the social media discussion. Similarly, an employee who has raised concerns that were not legitimate and was warned that his/her online comments are inappropriate will most likely not be protected.

Bartender had raised similar concerns in the past. Snowstorm had previously e-mailed her supervisor and an HR assistant with a complaint about the original sexist remark, but had not received a response to her e-mail. Snowstorm was advised that her emotional response was not appropriate and that she should remain uninvolved with her friend's termination.

Is the conversation purely personal?

Online comments that are purely personal and only tangentially mention the workplace are not protected unless the employee is discussing the terms and conditions of employment. Comments made for personal amusement or individual rants about the workplace are not protected activity.

Both Bartender and Snowstorm's posts seem relatively personal. Bartender is complaining about conditions of the workplace as they relate to him/her. Snowstorm's original post is not purely personal, but her subsequent posts about her emotional response at work have a personal feel.

Conclusion reached by the NLRB: The NLRB found that Bartender's termination was proper because Bartender made the post without the intent to engage group activity and that the post was made for purely personal reasons. As to Snowstorm's termination, the NLRB found that Snowstorm's original post was protected activity and her subsequent responses and "coaching" to not get involved constituted unfair interference and an attempt to prevent employees from engaging in protected concerted activity. In other words, the company attempted to prevent Snowstorm from raising her concerns about the workplace online and never allowed Snowstorm's concerns to develop into a conversation about the terms and conditions of her employment.

identified provisions that are appropriate and provisions that are too broad and infringe on employee rights. The following discussion focuses on how to strike the appropriate balance between employer-protection and employee-rights.

Inappropriate policies that infringe on an employee's protected rights:

• *Non-Disparagement Policy*: A rule that prohibited "[m]aking disparaging comments about the company through any media, including online blogs, other electronic media or through the media[,]" is broad enough to reasonably be construed to restrict protected activity.[13]

• *Code of Conduct Policy*: A code of conduct policy that prohibits insubordination or other disrespectful conduct, including inappropriate conversations is overly broad because "disrespectful conduct" and "inappropriate conversations" would reasonably be construed by employees to preclude protected activity.[14]

• *Social Media Policy*: A policy that prohibits an employee from engaging in unprofessional communication that could negatively impact the employer's reputations or interfere with employer's mission or unprofessional/inappropriate communication regarding members of the employer's community is a violation of the NLRA.[15]

Appropriate policies that are sufficiently tailored to meet the company's need without infringing on the employees' protected rights:[16]

• *Promotional Content*: The NLRB found a policy did not interfere with protected activity where the policy is labeled "Promotional Content" and included a preface explaining that "special requirements apply to publishing promotional content online[,]" including a definition that promotional content is content "designed to endorse, promote, sell, advertise, or otherwise support the employer and its products and services" and includes a reference to the FTC requirements.[17] The policy then went on to restrict social networking activities from referring to employer by name and publishing any promotional content.[18] It further required that while engaging in personal social networking, an employee must indicate that they were only expressing their personal views and not the views of the employer.[19] This policy is sufficiently tailored to only restrict online activity as far as necessary to comply with other regulations.

Avoid overbroad language and blanket prohibitions, such as, "avoid harming the image and integrity of the company" or "no disparaging or defamatory comments about the employer are permitted."

• *Protecting Confidential Information*: The NLRB has also stated that the protection of confidential, proprietary, and regulatory information is proper if it is narrowly tailored to fit that purpose. For example, a company may restrict social networking so that it is unrelated to the company *if necessary* to ensure compliance with securities regulations.[20] It can further restrict disclosure of confidential/proprietary or other information that is restricted from disclosure pursuant to another law (for example, protected health information).[21] The NLRB emphasizes that as long as the policy clearly establishes that these restrictions are to ensure compliance with other laws or protect customers, and they cannot be reasonably read to restrict protected activity, then the restriction is proper.[22]

• *Anti-Discrimination Policy*: This next example highlights the NLRB's stance that "a rule's context provides the key to the 'reasonableness'" of the construction.[23] A policy that prohibits "discriminatory, defamatory, or harassing web entries about specific employees, work environment, or work-related issues on social media sites" encompasses protected activity and is improper.[24] However, the NLRB has approved a policy that "prohibit[s] the use of social media to post or display comments about coworkers or supervisors or the Employer that are vulgar, obscene, threatening, intimidating, harassing, or a violation of the Employer's workplace policies against discrimination, harassment, or hostility on account of age, race, religion, sex, ethnicity, nationality, disability, or other protected class, status, or characteristic."[25]

• *"Savings Clause:"* In several instances, the NLRB has stated that a "savings clause" is a useful tool to prevent a broad policy from being a violation of the NLRA by expressly stating that the policy does not restrict protected activity. However, a savings clause that is written too narrowly or ambiguously is not effective.[26] An example of an ineffective "savings clause" is one that allows an otherwise prohibited activity "when discussing terms and conditions of employment *in an appropriate manner*." Specifically, the NLRB found that the language that requires the discussion to be conducted in an appropriate manner, "was insufficient to cure the ambiguities in the rule and remove the chill upon [protected rights]."[27]

The NLRB's May 2012 advice memorandum contains specific guidelines for employers to use in drafting a social media policy that does not chill the exercise of NLRA rights.[28] Additionally, the following guidelines may be used to consider when drafting a social media policy:

• Avoid overbroad language and blanket prohibitions, such as, "avoid harming the image and integrity of the company" or "no disparaging or defamatory comments about the employer are permitted."

• Clarify where a specific policy provision does not restrict protected activity.

• Define terms that are not understood by lay people (example "concerted activity").

• Provide specific examples of prohibited conduct.

• Do not restrict all postings and photographs of employer's name, trademark or logo because it interferes with an employee's right to picket and protest employer policies.

• Require employees to comply with certain regulations and laws as long as the requirement is narrowly tailored (example: FTC regulations, anti-discrimination poli-

cies, confidential and proprietary information).

- Avoid using overbroad provisions prohibiting employees from discussing and disclosing information regarding their own terms and conditions of employment;
- Do not prohibit employees from "friending" co-workers.
- A "savings clause" will not necessarily save you if it does not cure prior ambiguities or is otherwise too narrowly tailored.

Conclusion — The only constant is change

Since the NLRB's first major case addressing this issue, social media has remained a changing landscape. Like every other avenue of the law, the best approach is to identify the patterns and "hot issues," advise employers accordingly, and remain current on the topic.

Specifically, the NLRB found that the language that requires the discussion to be conducted in an appropriate manner, "was insufficient to cure the ambiguities in the rule and remove the chill upon [protected rights]."[27]

Endnotes

[1] OM 11-74, NLRB Office of the General Counsel, (January 2012).
[2] 29 U.S.C. § 151.
[3] 29 U.S.C. § 157.
[4] 29 U.S.C. § 158.
[5] OM 11-74, NLRB Office of the General Counsel, p. 4, (January 2012) (citing *Layfayette Park Hotel*, 326 NLRB 824, 825 (1998)).
[6] OM 11-74, NLRB Office of the General Counsel, p. 4, (January 2012) (citing *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004)).
[7] The bill went to committee on April 27, 2012.
[8] The PPA was referred to committee on May 9, 2012.
[9] We do know, however, that a blanket provision that discourages employees from "friending" each other is an overbroad violation of the NLRA. OM 12-59, NLRB Office of the General Counsel, p. 9, (May 2012).
[10] Although sexual orientation is not yet a protected class in Idaho, we do not recommend any form of discrimination in the hiring process.
[11] 16 C.F.R. § 255.5 (Example 8), which regulates unfair advertising on the internet.
[12] 18 U.S.C. § 2701 *et seq*., which regulates the unauthorized access of electronic communications.
[13] OM 11-74, NLRB Office of the General Counsel, (January 2012).
[14] *Id*., at 10.
[15] *Id*., at 12.
[16] For a more detailed policy that is NLRB approved *see* OM 12-59, NLRB Office of the General Counsel, pp. 19-24, (May 2012).
[17] OM 11-74, NLRB Office of the General Counsel, pp. 17-18, (January 2012).
[18] *Id*., at 17.
[19] *Id*.
[20] *Id*.
[21] *Id*.
[22] *Id*.
[23] *Id*., at 16.
[24] *Id*.
[25] *Id*.
[26] OM 11-74, NLRB Office of the General Counsel, (January 2012).
[27] *Id*., at 8.
[28] The Board uses a two-step inquiry to determine if a policy provision would have a "chilling" effect: (1) whether the provision explicitly restricts Section 7 protected activities; or (2) whether the provision is ambiguous in its application to Section 7 activity, and does not contain limiting language or context that would clarify to employees that the provision does not restrict Section 7 rights. *See University Medical Center*, 335 NLRB 1318, 1320-1322 (2001), *enf. denied in pertinent part* 335 F.3d 1079 (D.C. Cir. 2003).

About the Authors

Leslie Hayes *is an associate at Farley Oberrecht where her practice focuses on employment law, health care, and general civil defense. She is interested in social media issues and strives to stay updated on changes and trends in that area of the law. She serves as the Vice-Chair for the Employment and Labor Law Section and actively participates in Idaho Women Lawyers.*

Sally J. Cooley *is a Deputy State Appellate Public Defender. The opinions and advice contained herein do not represent the views of the State of Idaho or the State Appellate Public Defender's Office.*

A Reminder to Employers About Preventative Measures

Robert B. White

Reviewing the "hot topics" in employment law for 2012 and 2013 revealed there are new and developing issues regarding existing workplace laws (obesity as a disability, workplace bullying, social networking in the workplace, and retaliation against family members of employees). Workplace law may also be significantly impacted by who controls The White House and Congress following the November elections. The economy and the fluctuating workforce also present a number of challenging issues for employers including an increase in the number of issues raised before state and federal agencies and the courts (EEOC charges have increased 25% in the four years ending in 2010). While it is interesting to speculate about the effect of these elements of society on workplace law, it is ultimately difficult to predict. What is not difficult to predict is the effectiveness of well established protective measures employers can engage to minimize the risk of perhaps the most predictable result of ignoring laws governing the workplace: litigation.

This article is intended to provide a non-comprehensive, hopefully practical, reminder of the most common preventative measures employers can take to minimize liability for workplace decisions. Ideally, each employer would undergo a comprehensive employment practices audit that includes a review of pre-employment practices (recruiting, interviewing, pre-employment testing, background checks, job offers, etc.), practices during the employment relationship (orientation, employee policies, training, performance appraisals, investigations, etc.), and practices leading up to and following employment separation (employment termination, reductions-in-force, separation agreements, unemployment claims, etc). When employers in a challenging economy seek to reduce costs, recommendations to conduct such an audit fall on deaf ears. While seemingly elementary in nature, the following measures are most frequently needed (and often missing) when issues in the workplace arise.

Employee policies and investigations: The employee handbook[1]

Employers' perceptions of employee handbooks range from "we don't want an employee handbook because we don't want to be bound by a bunch of rules," to "we want to incorporate every situation we have encountered since we began our business." Neither approach effectively accomplishes the objectives of an employee handbook. An effective employee handbook is short and uses simple, straightforward language. The primary objectives are to: (1) establish and maintain the at-will employment relationship, (2) reserve the affirmative defenses applicable to employment practices, (3) establish the employer's expectation for employees, and (4) provide notice to employees where there is a legal obligation to do so.

To establish the Faragher/Ellerth defense, the employee handbook must include a policy prohibiting discrimination and harassment.

It is well established that employment in Idaho is presumed to be at-will. That is, unless the employee is hired for a fixed term or the employer limits the reasons for discharge, the employer or the employee can end the employment relationship at any time, for any lawful reason.[2] The employee handbook is a good place to establish and reinforce this presumption by stating the employment relationship is at-will, that nothing in the employee handbook is intended to change the at-will nature of the relationship, and that no statement by an individual in the company can change the nature of the at-will relationship. To avoid negating the at-will employment relationship, the employee handbook should avoid inclusion of policies promising employment for any specific period of time, such as the first 90 days or until a project is completed. Additionally, the employee handbook should avoid any limitation on the employer's right to terminate the employment relationship, such as discharging employees only "for cause," or implementing a progressive discipline policy that requires the employer to provide employees with a verbal warning, written warning, or both, prior to terminating the employment relationship.

The second objective of the employee handbook is to reserve the employer's affirmative defenses in potential litigation. In 1998 the United States Supreme Court established an affirmative defense to supervisor harassment if the employer exercised reasonable care to prevent and correct promptly any harassing behavior, and the employee unreasonably failed to take advantage of the preventive or corrective opportunities provided by the employer.[3] This affirmative defense, known as the *Faragher/Ellerth* defense, was recently applied in Idaho in the context of a college student's claims of harassment by an instructor.[4]

To establish the *Faragher/Ellerth* defense, the employee handbook must include a policy prohibiting discrimination and harassment. The policy should define discrimination and harassment, explain the complaint procedure, indicate the employer will investigate and take appropriate remedial action when allegations of discrimination and harassment have been verified, and prohibit retaliation against any employee that opposes discrimination or harassment or participates in an investigation of discrimination or harassment. The employer must train all employees regarding the policy to maintain the *Faragher/Ellerth* affirmative defense.

The employee handbook also provides the employer an opportunity to establish its expectations of the employees. Policies which establish employer expectations include attendance and punctuality policies, timekeeping policies, technology use and privacy policies, social networking policies, and vacation and sick leave policies. Each policy should clearly establish the employer's expectations of the employee and the consequences of failure to adhere to the expectations. For example, attendance, punctuality, and timekeeping policies should establish the essential nature of being present at work, on time, and completing the records necessary for payroll purposes. Technology use, social networking, and privacy policies should establish that computers and telephones

are for business purposes only, and the employee does not have an expectation of privacy when using company technology. While there is no obligation to provide employees with vacation or sick leave, the employee handbook should establish employee eligibility, accrual, and use of vacation or sick leave should the employer decide to provide such benefits. The employee handbook should also include its policy regarding payment, if any, of accrued but unused vacation upon separation from employment.

Finally, the employee handbook is an appropriate location to provide employees information required by law. Examples of employer required notices include pay periods and paydays, Family Medical Leave (for employers with 50 or more employees), and workplace safety requirements. A review of all required notices is beyond the scope of this article but can be obtained from the websites of the Idaho Department of Labor (http://labor.idaho.gov), the Idaho Human Rights Commission (http://humanrights.idaho.gov/), and the United States Department of Labor (http://www.dol.gov/).

It is essential the employee handbook be distributed (preferably on a periodic basis) and a record be kept of its distribution to each employee. It is also imperative the employer enforce the policies in a consistent manner, and not establish practices which ignore its policies or are inconsistent in their application. Employers must be reminded that inconsistent application of the policies in the employee handbook not only creates frustration among employees, but exposes the organization to potential liability.

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Investigations

The employer's policies often obligate the employer to conduct an investigation of alleged wrongful conduct. Yet by the time many employers engage counsel they have already made a conclusion regarding the alleged conduct, have taken action against the accused employee, and have been served with a charge of discrimination or complaint. In doing so, the employer may have failed to compile the documentation to support the reasons for the action taken (only to find later it does not exist), and has failed to obtain the accused employee's version of events (possibly discovering information inconsistent with its conclusion). Failure to conduct a meaningful investigation may cause Idaho Human Rights Commission investigators, courts, and juries, to conclude the accused employee was treated unfairly – if not unlawfully. In addition to providing the employer with an affirmative defense in litigation, a thorough independent investigation provides the alleged victim and the accused an opportunity to be heard. The employer also obtains an objective review of the facts, a record of such facts, and the opportunity to reflect more meaningfully on the circumstances before making a decision.

Briefly, an investigation should be conducted by an individual who can objectively review the facts. The purpose of the investigation is to determine: (1) whether the facts as alleged occurred, and if so (2) whether it constitutes a violation of the employer's policies or the law. The investigation should include a review of pertinent documents and interviews of individuals with direct knowledge of the facts. The investigation should be sufficiently documented to allow the investigator to recall the details months or years later. The employer's decision to take action should then be consistent with the results of the investigation.

Documentation of performance evaluations

There is no law that requires an employer routinely evaluate an employee's performance, document performance evaluations, or document employee discipline. However, one of the most highly disputed issues in employment cases involves the former employee's claim that he or she was an excellent employee who never received a formal write-up. This is generally countered by the employer's claim the employee never met expectations, and should have been discharged long before the decision was made. From the employer's perspective (or at least its attorney's) the negative impact of no documentation regarding performance is surpassed only by the presence of documentation depicting the employee as satisfactory – despite unequivocal claims by the employer of poor performance.

The problem described above is solved with documentation of periodic, honest, and accurate performance evaluations. Employers should conduct the performance evaluations based on the employee's actual job duties by obtaining information from those who directly supervise the employee. The evaluation should be supported by objective observations and not unsupported opinion. The employer should review the evaluations in light of other evaluations to eliminate internal biases for tough graders. Finally, documentation of the evaluation should reflect the issues in the evaluation were reviewed with the employee.

This process accomplishes two objectives. First, employees are periodically provided information regarding their performance. If honest and accurate, the employee is not surprised when an adverse employment action is taken. An employee that believes he or she has been treated fairly is less likely to cause problems. Second, the employer has documented the employee's history and is more likely to make fair and objective decisions. The documentation also provides the employer a better opportunity to defend itself in a subsequent action.

Review circumstances prior to employment termination

Employers must be reminded the at-will employment relationship can be terminated at any time for any *lawful* reason. Employers generally call to have their attorney confirm the reasons for ending the employment relationship are permissible, such as being consistently late, or failing to complete work on time. The employer's focus is on what the employee has done to cause the employer a problem. However, failure to understand the context of the employment termination is essential to evaluating the risk of making the decision. Several steps should be taken before any decision is final.

First, confirm the at-will nature of the relationship. Review the employee handbook, any contracts or agreements between the employer and employee, and the employer's practices to ensure the employee has not been hired for a specific

term (such as one year) and the employer has not limited its ability to terminate the employment relationship (such as firing employees only for good cause). Ensure the employer is not acting in a manner inconsistent with established polices, agreements, or practices.

Second, review the employee's history, including performance evaluations, promotions, awards, and salary history. Compare the employer's stated reason for the employment termination with the history (or lack thereof). It is not uncommon for the stated reason to be inconsistent with the history – making defense of the decision difficult. For example, the employer may state the reason for terminating the employment relationship is poor performance. However, if the performance reviews have not been conducted, and the employee has been given pay increases or a promotion, the stated reason is not consistent with the employee's history. Inquire further to ensure the employer is presenting the real reason for the employment termination. Any inconsistency will be held against the employer in a subsequent dispute.

Third, determine how the employer has responded to similar circumstances in the past. If other employees have engaged in the behavior giving rise to the proposed employment termination and received less severe consequences, make sure the employer can articulate why this situation is different. This is particularly true if the employees that have engaged in the behavior are of different classes identified by Title VII (race, color, national origin, religion, and sex), the Americans with Disabilities Act, or the Age Discrimination in Employment Act (people over 40 years old). Ensure the employer responds consistently to employee conduct.

Fourth, review the employee's recent activity. Inquire specifically as to whether the employee has engaged in (or threatened to engage in) protected activity. Examples of protected activity include complaining of unlawful discrimination or harassment, participating in an investigation of unlawful discrimination or harassment, or opposing or reporting unlawful activity such as noncompliance with regulations governing the employer (such as safety or pay issues). An employment termination that follows shortly after an employee has engaged in protected activity will invite a lawsuit. The timing alone will likely get the employee past summary judgment on a retaliation claim.

Finally, weigh the information obtained in steps one through four. Make an evaluation of whether the employer's reason for the employment termination withstands the smell test in light of the circumstances. If so, advise the employer to inform the employee of the reasons for the employment termination when notification is given. Employers frequently want to avoid this discussion and, since it is an at-will employment relationship, simply tell the employee they are fired. Providing an explanation of the reasons for the employment termination can be beneficial. Employees that understand the decision are less likely to pursue further action. Failing to give a reason for the employment termination can also come back to haunt the employer. When the employer explains the reasons for the employment termination in a subsequent dispute, the fact that the reason was not originally provided leaves the employer open to allegations the reason offered in the dispute was fabricated to cover up a wrongful reason for the employment termination. At the end of the day the employer is likely to be evaluated by state and federal agencies, the courts, and a jury on whether the employee was treated fairly. Employers that treat employees fairly have a much better chance of avoiding a subsequent dispute, or prevailing if one is inevitable.

The battle for unemployment benefits

The time, expense, and distraction to operations involved in an employment termination inevitably leaves the employer frustrated. This frustration is exacerbated when the employer receives the claim for unemployment benefits shortly after the employee leaves. Not only did we pay this awful employee to underperform when he was here, he now wants to get paid to not work at all – is the cry of the former employer.

Employers should carefully consider spending their time and effort in a battle over unemployment benefits. The Idaho legislature has declared that the general welfare of its citizens requires unemployment reserves be used for workers who are unemployed through no fault of their own.[5] "Through no fault of their own" means a former employee is entitled to receive unemployment benefits unless the he or she voluntarily left the job (without good cause), or was discharged for employment related misconduct.[6] This standard is different from the standards for wrongful discharge based on breach of contract, public policy, discrimination, or retaliation.

The initial response to the Department of Labor is signed by an official of the company, documents produced in response to the claim are provided to the claimant and his or her attorney, hearings are conducted informally yet the witnesses are under oath, and the rules of evidence are loosely applied. Moreover, a hard fought battle over unemployment often causes the former employee to pursue the matter further.

As a result, an employer should carefully consider if it can prevail under the unemployment claim standard, and whether they want to spend the time, effort, and money to oppose a claim that results in the employee mitigating potential damages for a wrongful discharge claim. If the employer decides to fight the battle, an eye should be kept on the potential use of information in subsequent actions. Statements and witness testimony should be prepared in a manner consistent with the position the employer will take in further defense of their decision to terminate the employment relationship is necessary.

Conclusion

Reading this article may cause the reader to thank the author for pointing out the obvious, request the last 15 minutes of his or her time be somehow returned, or at a minimum, request the author no longer refer to himself in the third person. However, implementation of the basic measures discussed will lead to the fair treatment of employees and minimize the risk employment decisions will result in litigation.

Endnotes

[1] As mentioned, this article is not intended to comprehensively provide an explanation of all policies that should or could be included in an employee handbook. Instead, the author seeks to relay the information most useful to those advising employers on workplace matters and specifically disclaims the impression that the policies listed are all-inclusive.

[2] *Mitchell v. Zilog, Inc.*, 125 Idaho 709, 874 P.2d 520 (1994).

[3] *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998).

[4] *Johnson v. North Idaho College*, 153 Idaho 58, 278 P.3d 928 (2012).

[5] Idaho Code § 72-1302.

[6] Idaho Code § 1366(5).

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New ERISA Fee Disclosures Rules: Are Your Clients Compliant?

John C. Hughes

Compliance with the regulations require effort by both service providers and plan fiduciaries.

The Employee Retirement Income Security Act of 1974, as amended ("ERISA") is the federal law that governs the vast majority of private employer retirement plans in the United States. The law was passed in an effort to ensure workers retirement security. ERISA has been amended many times since its passage and there exists a massive body of regulations that has developed under it. As such, ERISA and the myriad associated regulations are of significant concern to private employers who maintain retirement plans (which is most employers) and their advisors.

The Department of Labor ("DOL") recently issued regulations that impact virtually every employer that maintains a retirement plan covered by ERISA. This includes most common qualified plans such as 401(k) plans.

These new regulations require that parties ranging from plan service providers to employers that maintain plans make certain written disclosures related to ERISA-regulated plans. This article discusses several aspects of the new rules; however, the take away point is simple — it is critical that employers/plan fiduciaries obtain, review, and assess the new required disclosures from their service providers. *If this is not done, penalties will apply and employers/fiduciaries will be in breach of their duties to plan participants and will be engaging in prohibited transactions (as will those businesses providing services to the plan).*

The basic requirement of the regulation is for service providers to furnish information to employers about the services being provided to their plans and the compensation that the service providers receive for those services. Surprisingly (or perhaps not), this has long been a mystery in many cases. The regulations are commonly referred to as the "service provider fee disclosure regulations" or the "408(b)(2) regulations" (referring to the section of ERISA under which the regulations were issued). As a result of these regulations, those service providers that must make the disclosures are businesses that provide administrative services and/or investment services to retirement plans.

The DOL has stated it believes changes in the way services are provided to retirement plans has increased complexity and made it difficult for plan sponsors and fiduciaries to understand the services for which they are paying. The changes generally involve services being provided in a "bundled" manner (where various service providers are compensating one another or compensation comes from other sources such as through a mutual fund investment). Despite these complexities, ERISA requires that fiduciaries act prudently and solely in the interest of the plan's participants when selecting and monitoring service providers and investments. The DOL states in commentary preceding the proposed regulations that "[f]undamental to a plan fiduciary's ability to discharge these obligations is the availability of information sufficient to enable the plan fiduciary to make informed decisions about the services, the costs, and the service provider."[1]

Prohibited transactions and the preexisting requirements

The furnishing of services by a service provider to a plan will generally result in a prohibited transaction under both ERISA and the Internal Revenue Code (the "Code"). Prohibited transactions trigger the automatic imposition of potentially significant taxes and penalties.

To get around this, there has long been a regulatory exemption from the prohibited transaction rules for contracts or arrangements between a service provider and a plan. The exemption applies if: (1) no more than reasonable compensation is paid for the services, (2) the services are necessary for the establishment or operation of the plan, (3) the contract or arrangement is reasonable, and (4) the plan may terminate the contract or arrangement without penalty on reasonably short notice. Without this exemption, no person or entity would be able to provide services to a plan.

The new requirements

The new regulations impact this exemption by further defining the meaning of a "reasonable" contract or arrangement. In order for service contracts and arrangements between a "covered plan" and a "covered service provider" to be considered "reasonable" under the new rules, the service provider must disclose specified information to a "responsible plan fiduciary."[2]

A responsible plan fiduciary is a fiduciary with authority to cause the plan to enter into, extend, or renew a contract or arrangement.[3] If the plan is not a covered plan or the service provider is not a covered service provider, the disclosures are not required. A covered plan is generally any plan covered by ERISA.[4] This includes most nongovernmental plans (which is not to say that as a general matter of state law, imposed fiduciary duty and prudence, governmental plans need not follow these rules anyway). Covered plans do not include plans with no employees, "top hat" plans, SEPs, SIMPLEs, IRAs, and some Code Section 403(b) plans.

A covered service provider is a service provider who expects to receive $1,000 or more in compensation in connection with services provided to the plan and who falls into one of the following categories:

- *Fiduciaries and Registered Investment Advisors*. Those who provide services as a fiduciary under Section 3(21) of ERISA or as an investment advisor registered under the Investment Advisers Act of 1940 or any state law. This category also includes a third subcategory, which consists of those who provide services as a fiduciary to an investment contract, product, or entity that holds plan assets and in which the plan has a direct equity investment.[5]
- *Platform Providers*. Those who provide recordkeeping or brokerage services to an individual account plan that permits participants to direct the investments of their accounts if a "designated investment alternative" will be made available through a platform or similar mechanism in connection with those services. The

regulations define a designated investment alternative as an investment alternative designated by the plan into which participants may direct the investment of plan assets.[6]

• *Services for Indirect Compensation*. Those who provide accounting, actuarial, appraisal, banking, consulting, custodial, insurance, investment advisory, legal, recordkeeping, securities or other investment brokerage, administration, valuation, or other services if they receive indirect compensation. Indirect compensation is compensation received by an entity other than the plan or the employer.[7]

The required disclosures

Covered service providers must disclose in writing to the responsible plan fiduciary descriptions of or statements regarding:

• The services to be provided;

• If applicable, a statement that the service provider (and/or affiliate or subcontractor) will provide or reasonably expects to provide services as a fiduciary or as an investment advisor registered under the Investment Advisors Act of 1940 (or any state law);

• Direct compensation that the service provider (and/or affiliate or subcontractor) expects to receive;

• Indirect compensation that the service provider (and/or affiliate or subcontractor) expects to receive;

• Compensation that will be paid among related parties and its affiliates and/or subcontractors;

• Compensation that the service provider (and/or affiliate or subcontractor) reasonably expects to receive upon termination of the contract or arrangement; and

• The manner in which the compensation will be received by the service provider (and/or affiliate or subcontractor).[8]

There are additional, more detailed, disclosures for those covered service providers who provide recordkeeping services and also for service providers who act as fiduciaries to investment products or entities that hold plan assets in which the plan is invested.[9]

Not surprisingly, given the DOL's keen interest in plan expense related issues (and the substantial amount of ongoing litigation regarding plan related fees), there is much more detail than is discussed above.

Plan fiduciaries and service providers should have already acted

Compliance with the regulations require effort by both service providers and plan fiduciaries. The consequences of noncompliance primarily consist of the imposition of excise taxes and penalties associated with prohibited transactions and the risk of liability for fiduciary breaches (*i.e.*, personal liability for losses resulting from the breach).[10] Notwithstanding, there is potential relief available to plan fiduciaries in narrow instances where the service provider refuses to make the necessary disclosures.[11]

Notwithstanding, there is potential relief available to plan fiduciaries in narrow instances where the service provider refuses to make the necessary disclosures.[11]

In order to comply with these new ERISA rules, plan fiduciaries should:

• Identify all providers of plan services;

• Determine those who are covered service providers under the new rules;

• Contact those entities and request that they make the required disclosures;

• Analyze the information that is disclosed by those providers and ensure it meets the DOL's conditions; and

• Follow up as appropriate if the disclosures are deficient or otherwise noncompliant.

The compliance deadline was July 1, 2012. To the extent the foregoing was not accomplished additional and/or different actions are required. Monitoring and disclosure is required on an ongoing basis as services or costs change.

Observations regarding compliance efforts

A review of many disclosures revealed the following:

• Most covered service providers waited until the last minute to provide their disclosures in June 2012.

• The transparency of the various disclosures covered a broad spectrum. Some were clear and forthcoming, others were convoluted and potentially overbroad.

• Many covered service providers asserted as part of the disclosures that their disclosures comply with the law. Of course, it would not be prudent for a plan sponsor employer to rely on such a representation (particularly, since most providers state very clearly (and appropriately) in their contracts that they are not providing legal advice).

• Many service providers failed to recognize (or affirmatively disputed, typically erroneously) their covered service provider status.

• There were particular deficiencies with respect to descriptions of indirect compensation received by service providers. Indirect compensation is that compensation received from a source other than the plan or the employer. For example, some plan service providers are paid by the investment companies in which the plan assets are invested.

• It is important to recognize that an independent assessment of reasonableness by employers is still required. There are varying methods of assessing reasonableness.

• Some disclosures were straightforward, some deficient, some *status quo* making the fiduciary work to connect the dots, which may or may not satisfy the regulations.

• Additional guidance is expected from the DOL further interpreting the regulations (some if which may have been issued by the publication date of this article).

• The DOL will be reviewing plans to identify noncompliance with these regulations. It has hired many agents in the last few years and has stepped up other more general audit efforts seemingly as training ground in enforcing the fee disclosure regulations. The DOL has stated that this is a priority.

• The Assistant Secretary of the Employee Benefits Security Administration has been vocal and unwaivering in her comments regarding the fee disclosure regulations.

• There has been extensive litigation over plan fees in recent years. The issuance of these regulations will likely increase the number of actions against employers because they provide a roadmap for identifying instances of noncompliance or the payment of fees that are allegedly not reasonable.

• There are related "participant-level fee disclosure"/"404a-5" regulations that also must be complied with this year. These regulations require plan sponsor employers to make disclosures regarding fees and investment directly to plan participants in plans where participants have the right to direct the investment of their individual accounts. The first compliance deadline for this related set of regulations was August 30, 2012 (the earliest due date for "annual" notices to be provided to plan participants). A second is November 14, 2012 (the first due date for the new "quarterly" notices to be provided to plan participants).

Conclusion

In summary, the ERISA Section 408(b)(2) service provider fee disclosure regulations are of paramount concern to most employers and their advisors. Compliance with these new rules will require affirmative action on the part of employer plan sponsors and noncompliance may prove very costly and time consuming.

The consequences of noncompliance primarily consist of the imposition of excise taxes and penalties associated with prohibited transactions and the risk of liability for fiduciary breaches.

Endnotes

1 72 Fed. Reg. 70988.
2 29 C.F.R. § 2550.408b-2(c).
3 29 C.F.R. § 2550.408b-2(c)(1)(viii)(E).
4 29 C.F.R. § 2550.408b-2(c)(1)(ii).
5 29 C.F.R. § 2550.408b-2(c)(1)(iii)(A).
6 29 C.F.R. § 2550.408b-2(c)(1)(viii)(C).
7 29 C.F.R. § 2550.408b-2(c)(1)(viii)(B)(2).
8 29 C.F.R. § 2550.408b-2(c)(1)(iv).
9 29 C.F.R. § 2550.408b-2(c)(1)(iv)(E) and (F).
10 ERISA Sections 406 and 409(a).
11 29 C.F.R. § 2550.408b-2(c)(1)(ix).

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The "ISIF," What is it, and Who Cares?

Thomas B. High

The State of Idaho Industrial Special Indemnity Fund ("ISIF") is a statutory creature created by the Idaho Legislature in 1971[1]. The "ISIF" is not to be confused with the Idaho State Insurance Fund ("SIF") or with the International Society of Information Fusion ("ISIF"), the Information Society Innovation Fund ("ISIF") or the International School of Investment and Finance ("ISIF") (go ahead, look 'em up.) The real "ISIF," or at least the one we are going to talk about today, deals with Idaho worker's compensation cases. It provides incentive for employers to hire workers who have pre-existing impairments and protects employees in the event of a subsequent injury in the workplace.

The creating statute is relatively simple. The devil, as we all know, is in the details. The statute provides:

> §72-332 **Payment for second injuries from industrial special indemnity account**
>
> (1) If an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by an injury or occupational disease arising out of and in the course of employment, and by reason of the combined effects of both the pre-existing impairment and the subsequent injury or occupational disease or by reason of the aggravation and acceleration of the pre-existing impairment suffers total and permanent disability, the employer and surety shall be liable for payment of compensation benefits only for the disability caused by the injury or occupational disease including scheduled and unscheduled permanent disabilities and the injured employee shall be compensated for the remainder of his income benefits out of the industrial special indemnity account.

The Idaho Supreme Court, in *Wernecke v. St. Maries School Dist.,*[2] noted the purpose and goal of the ISIF. It said:

> The purpose of establishing ISIF was to relieve an employer of the burden of paying for total permanent disability compensation to an employee rendered totally and permanently disabled because of a pre-existing handicap coupled with a subsequent industrial injury. (Citation omitted) The goal was to encourage employers to hire handicapped people by reducing the employer's obligation to pay for industrial accidents in the amount it would pay to an employee who had not been previously handicapped. (147 Idaho at 285)

The mere existence of prior medical records showing frequent visits to a physician did not establish a "manifest" pre-existing condition in Toelke v. State, Indus. Special Indem. Fund.[10]

In *Dohl v. PSF Indus., Inc.,* [3] the court noted that the goal of the ISIF was to encourage employers to hire older and partially disabled workers and spread that risk of hiring among all employers. In other words, as an employer you will only pay for the injuries or diseases you cause and not for the pre-existing medical problems of your worker if that worker becomes totally and permanently disabled while employed by you. It is, essentially, Idaho's version of "Hire the Handicapped."

There are four elements to a claim against the ISIF. The elements are:

(1) A pre-existing physical impairment
(2) The impairment must be manifest
(3) The impairment must constitute a subjective hindrance to employment
(4) The impairment must combine with the industrial injury or disease to render the worker totally and permanently disabled.[4]

What do you have to prove to perfect a claim against the ISIF? The statute requires first that your worker have a permanent physical impairment from any cause, i.e. from a congenital condition, problem, injury or disease. Subpart (2) defines "permanent physical impairment" by referencing I.C. §72-422. That section references a "permanent impairment" as any anatomic or functional abnormality or loss after there has been maximum medical rehabilitation and the condition is considered stable or non-progressive at the time of evaluation. Subpart (2) of IC §72-332, however, does note that such impairment must be of such seriousness to constitute a hindrance or "obstacle to obtaining employment."

The second element is that the condition must be "manifest." Some conditions are simply self evident. Prior finger amputations were plain to see, and thus "manifest," in *Adams v. Murphy dba Boise Valley Pump & Well Drilling & ISIF*[5]. (However, foreshortened and webbed fingers were not a manifest impairment in *Hoye v. DAW Forest Products, Inc.*[6] Looks alone are not the total story. In *Oldworker v ISIF,*[7] the Idaho Industrial Commission ("the Commission") found that a below the knee amputation was a manifest pre-existing condition even though the worker had functioned well with a prosthesis for 20 years until his final injury. In *Aaron v Hide Co. and ISIF,*[8] the Commission found that claimant's pre-existing epilepsy, which caused independent accidents, was clearly manifest.

Even though a condition has clearly pre-existed the industrial injury, that alone does not make it "manifest." Where a pre-existing neck injury was found to not be permanent, the court in *ASARCO, Inc. v Industrial Special Indem. Fund,*[9] declined to find liability on ISIF. Likewise, the mere existence of prior medical records showing frequent visits to a physician did not establish a "manifest" pre-existing condition in *Toelke v. State, Indus. Special Indem. Fund.*[10] In *Dye v Meadow Gold Dairies & ISIF,*[11] the Commission found that a traumatic brain injury which had been undiagnosed and was not disabling until after the industrial injury, was not a manifest impairment for purposes of ISIF liability.

The third element is that the pre-existing condition must be a hindrance to employment. Whether the pre-existing condition is a hindrance or obstacle, however, is interpreted subjectively. The condition must be an actual hindrance to potential earning capacity of the worker making the claim, not a hypothetical worker. *See Roberts v. Asgrow Seed Co.,*[12] (the worker must have had the condition somehow hinder his ability to work or be hired.)

A worker who modified the way he worked because of a pre-existing injury before he had the industrial accident had a "subjective hindrance" in *Greenfield v*

Moo Brew, Inc. and ISIF.[13] A worker who continued working a regular job without any limits was found to not suffer from a pre-existing condition which was a "subjective hindrance" in *Dursteler v Basic American Foods and ISIF.*[14] The worker need not have a full appreciation of the underlying disorder, but only must be aware that the condition is present and impairing, s*ee Garcia v. JR Simplot Co.*[15] Essentially, you must show that the worker was previously injured or had some disease process which caused the worker to modify, limit, or alter the manner in which he performed his employment before the industrial accident occurred or industrial disease became apparent.

The final element of an ISIF claim is that the limitation from the pre-existing condition has "combined with" the limitation from the industrial injury or disease to render the worker totally and permanently disabled. You must show that it is the combination of the pre-existing condition and the industrial condition which precludes the worker from employment.

In *Stewart v State of Idaho Industrial Special Indemnity Fund,* [16] the Commission found that the conditions caused by the industrial accident and subsequent medical problems caused the worker to be totally and permanently disabled. The industrial injury limitations did not have to combine with any pre-existing condition in order to be total and permanent and therefore, the ISIF was not responsible. In *Whitaker v First Interstate Bank,*[17] where the accident alone coupled with non-medical factors combined to cause total permanent disability, again the ISIF was not responsible. Likewise in *Brisson v Hale,*[18] the cervical vertigo caused by the industrial accident was the sole cause of the worker's total and permanent condition and the ISIF was held not responsible.

Alternatively, a pre-existing condition alone may be sufficient to find an employee totally and permanently disabled without combining with the injuries from an industrial accident. In *Hamilton v Ted Beamis Logging & Constr.,*[19] the court found that the prior disability rendered the worker total and permanent even before the second injury ever occurred and, thus, ISIF could not be responsible. *See also Redman v State Indus. Special Indem. Fund.*[20]

In addition to the combination between pre-existing and industrial disabilities, that combination, in order to invoke ISIF liability, must render the claimant "totally and permanently" disabled. "Total disability" has been defined by the court as the "inability to sell one's services in a competitive market."[21] There are two methods by which a claimant may establish permanent total disability.

The first method is to establish that the various medical impairments, together with nonmedical factors, combine to total 100% disability. Once such a conclusion has been reached there is no further need for the Commission to continue and total and permanent disability has been established. *See Hegel v Kuhlman Bros., Inc.*[22] Nonmedical factors considered in this evaluation include age, sex, education, training, usable skills, and the economic and social environment. [23] Even though a worker may have a combination of ratings that are very high, that, alone, if less than 100%, will not render him totally and permanently disabled. In *Boley,* the claimant was rated at 85% whole man impairment, and yet, not total and permanent.

The second method to prove total and permanent disability is for the worker to demonstrate that he is an "odd lot," *Mapusaga v. Red Lion Riverside Inn.*[24] Workers can prove that they are "odd lot" in one of three ways:

1. By showing that they have attempted other types of employment without success;

2. By showing that either they individually, or through vocational counselors or employment agencies working on their behalf, have searched for work and have been unsuccessful; or

3. By showing that any effort to find suitable employment would be futile.

Lethrud v. Industrial Special Indem. Fund;[25] *Huerta v. School Dist. 431.* [26] Once "odd lot" status is established the burden of proof shifts to the ISIF to show suitable regular employment is available to the worker.

Why go through all of this to prosecute a claim against the ISIF? Once a finding has been made that the worker is totally and permanently disabled, and it is because of a pre-existing condition combining with an industrial accident, the Commission will apportion between the employer and the ISIF under the *Carey* formula*, see Carey v Clearwater County Road Dept.*[27] The employer will pay benefits to the worker for its percentage of 500 weeks of benefits assessed by the Commission. Thereafter, the ISIF will pay benefits to the worker until he dies, which could well exceed the 500 weeks of compensation under the workers' compensation statutes.

As I noted at the beginning of this article, the enacting legislation of the ISIF is relatively simple. It's in the details, however, that a practitioner can get tripped up.

Once "odd lot" status is established the burden of proof shifts to the ISIF to show suitable regular employment is available to the worker.

If you think you have an ISIF case and you haven't ever filed one before, work with someone who has handled such a claim in the past. That person can help keep you and your worker from stumbling.

Endnotes

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5 97 IWCD 20 P. 9918
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8 2004 IIC 0001 1-04
9 127 Idaho 928, 908 P.2d 1235 (1996)
10 134 Idaho 491, 5 P.3d 471 (2000)
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13 2005 IIC 0848 12-05
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15 115 Idaho 966, 772 P.2d 173 (1989)
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20 138 Idaho 915, 71 P.3d 1062 (2003)
21 Hamilton, 127 Idaho at ,889 P.2d at .
22 115 Idaho 855, 771 P.2d 519 (1989)
23 Hamilton Need page cites
24 Mapusaga v. Red Lion Riverside Inn, 113 Idaho 842, 748 P.2d 1372 (1987)
25 126 Idaho 560, 887 P.2d 1070 (1995)
26 116 Idaho 43, 773 P.2d 1130 (1989)
27 107 Idaho 109, 686 P.2d 54 (1984)

About the Author

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The Recodification of the Idaho Workers' Compensation Act (1969-71)

John F. Greenfield

The only wholesale recodification of the Idaho workers' compensation law took place over a two-year period between 1969 and 1971. The recodification resulted in hundreds of changes, large and small, to the original act passed by the Idaho legislature in 1917. This was no small feat given the fact that our workers' compensation act encompasses no less than one and one-half volumes of the Idaho Code.[1]

Some of the changes had become necessary because of natural phenomena that had not existed in 1917, like the advent of chronic inflation which began to emerge in the 1960's. Other changes were needed to correct flaws that slowly revealed themselves after lawyers, industrial commissioners and Idaho Supreme Court justices began working with the original law.

The recodification was a lengthy and serious undertaking. It was accomplished by an *ad hoc* committee of in-state experts on workers' compensation mainly representing business and labor interests.[2] Their efforts vastly improved this crucial law, which governs the redress of industrial injuries for every employer and employee in the state of Idaho.

The work of the Recodification Committee officially went into effect on January 1, 1972. While the act has been amended from time to time since that date, the main framework of the recodified law remains intact. As a result, the Idaho workers' compensation system is viewed as fair, efficient and stable by *both* employers and employees. This is truly important because Idaho employers and employees are the principal objects of the act.

It is noteworthy that the Idaho law is constantly being studied by surrounding states for clues as to how they can improve their own workers' compensation systems. Essentially, our statute is regarded by other jurisdictions as something of a model act. These admirers need to know that the strength of our modern workers' compensation act emanates from a broad-based bipartisanship, exercised 40 years ago on a massive scale by the men of good will who served on the Recodification Committee.

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The original Idaho Workers' Compensation Act of 1917

The *original* Idaho workers' compensation act was enacted in 1917 after a primal series of negotiations between the forces of business and labor within the state of Idaho. The creation of the Idaho act was contemporaneous with the creation of other workers' compensation laws across the country. Nearly all of these statutes were enacted around the turn of the 20th century.

The birth of American workers' compensation followed an earlier wave of workers' compensation legislation in Europe. These laws included the 1897 British act to which American drafters paid particular attention as we hammered out our own systems on a state by state basis. This is because workers' compensation would replace Anglo American tort jurisprudence which had developed, over centuries, in the common law of both the United Kingdom and the United States. The exchange of *common law* tort remedies for *statutory* workers' compensation systems presented similar drafting issues for both nations.

Workers' compensation legislation was necessitated by new economic and workplace realities created by the Industrial Revolution of the 1800's. When people started getting their hands cut off in machines instead of merely blackening their thumbnails with hammers, negligence was difficult to prove in either direction. Moreover, proof of fault was seen, by employers and employees alike, as less important than the medical and vocational restoration of the injured worker.

Negligence-based tort remedies were soon regarded as "inconsistent with modern industrial conditions."[3] Here, I quote from the seminal portion of the original Idaho workers' compensation act in which the 1917 Idaho legislature "withdrew" industrial injuries "from private controversy." By saying this the legislature meant that it was withdrawing the legal redress of workplace injuries from the negligence-based law of torts. It was simultaneously replacing the tort system with a workers' compensation system, citing to its "police and sovereign power" under the Idaho State Constitution as authority for doing these things.[4]

A different way of compensating industrial injury was clearly needed. The common law tort system, with its litigious aspects of fault, negligence, and damages proved in jury trials, was unworkable when it came to the redress of industrial injury. For one thing, the tort system could not guarantee immediate and reasonable medical treatment for an injured worker without requiring him to prove that his injury was his employer's fault, but immediate medical treatment without proof of fault was seen as an imperative. So was a systematic method of immediately compensating wage loss, regardless of fault.

Clearly, a no-fault insurance program was the answer. Contributory and comparative negligence would be irrelevant in a no-fault system. Also irrelevant to such a system would be traditional tort damages for pain and suffering. The return of the injured employee to work as soon as possible would be the policy, as would vocational rehabilitation when necessary to this objective. Remuneration for permanent loss of wage-earning capacity would also part of the new system. By contrast, punishing the employer for his negligence in causing an employee's accident would *not* be a component of the new system.

It must be understood that none of these changes would have occurred had leaders of business and organized labor not agreed to them and been proactive in their enactment. When the two main "stakeholders" of Idaho industry joined together in the spirit of compromise to get it done, it got done. They took it upon themselves to develop the Idaho workers' compensation system, drafted the act, arranged for its introduction in the 1917 Idaho legislature, and pressed for the legislation's passage.

Virtually all forms of "social insurance" feature government-mandated insurance coverage that is viewed by a political majority as benefiting the public as a whole. This is true, in the United States, of Social Security and Medicare. It is also true of workers' compensation. A major difference between the first two programs and workers' compensation is that the latter involves private insurance coverage. Employers pay the premiums as a cost of doing business. Employees enjoy the coverage, knowing that they have traded tort remedies for it. These workers are willing to make the trade so long as the medical treatment and maintenance level wage-loss benefits are "sure and certain."[5] Usually, if not always, this is the case.

In America, workers' compensation was adopted on a state by state basis. This may have been because the economies of the various states were somewhat different, or because the tort remedies that workers' compensation would replace were more oriented to state than national law. In any event, the United States has never seen fit to adopt a national workers' compensation system.

The recodification

1. The Organization of the Recodification Committee in 1969

Idaho's original workers' compensation act of 1917 worked pretty much as intended but, after about 50 years, serious cracks were identified by both business and labor. At this point in 1969, the two stakeholders agreed to modernize and recodify the statute. They approached legislative leadership and arranged for a recodification process under the nominal auspices of the Idaho Legislative Council. The Legislative Council, composed exclusively of state senators and representatives from both political parties, agreed to sponsor such a recodification.

The Legislative Council chose a chairman, then effectively bowed out of the process and let the Recodification Committee do its work. The chairman of the Recodification Committee was E.B. Smith, a Boise lawyer who was also a former chief justice of the Idaho Supreme Court. Justice Smith was the only member of the Committee who was paid by the State of Idaho. The other members of the Committee, all of whom represented various factions of either business or labor, were compensated for their time by those private interests. Only one member of the Committee was a sitting legislator and he appears to have been paid by his private clients.

Idaho's original workers' compensation act of 1917 worked pretty much as intended but, after about 50 years, serious cracks were identified by both business and labor.

Justice Smith personally recruited the members of the Recodification Committee. Each of these members represented important sectors of either business or labor, and each of them had significant knowledge of, and experience in, Idaho workers' compensation law.

The Committee members representing business included Samuel Kaufman, a Boise lawyer and sitting Republican state senator. Mr. Kaufman officially represented self-insured employers on the Committee. Such large employers included J.R. Simplot Co., Boise Cascade, Potlatch Corporation, FMC Corporation, the Amalgamated Sugar Company, Albertson's, Inc. and a dozen others. Mr. Kaufman had previously represented these kinds of self-insured employers in his legal practice, but he had also defended private sureties.

Business was also represented by Glenn A. Coughlan, another Boise lawyer who practiced workers' compensation defense. His largest client was the Idaho State Insurance Fund, a quasi-private carrier which insured nearly half of all employers in Idaho (now over 70%).

Lawrence G. Sirhall was the manager of the state's largest private workers' compensation insurance carrier, the Industrial Indemnity Co. He represented the interests of *all* private sureties on the Committee. Mr. Sirhall would later be appointed to the three-person Industrial Commission where he served for many years as the commissioner from the world of business.

Labor interests on the Recodification Committee were represented by Robert W. MacFarlane, the president of the Idaho State AFL-CIO. Also representing labor was George A. Greenfield, a Boise claimants' lawyer and a former state chair of the Idaho Democratic Party.

Important consultants to the Committee's factions included John W. Barrett, a Boise defense attorney who assisted business interests. Paul C. Keeton, a veteran claimants' lawyer from Lewiston, was of service to labor interests. It was an impressive, experienced group, and extremely well-rounded.

2. The Work of the Committee

From the beginning, it was recognized by Justice Smith and the Recodification Committee members that they should utilize the work of a bi-partisan national think-tank on workers' compensation as a template for Idaho's recodification. The group was known as the Council of State Governments. It was headquartered in Washington, D.C., and was partially composed of national figures from business and labor. The national committee's chairman was Arthur Larson, a Duke University law professor who was generally recognized as the foremost authority on workers' compensation in the United States. The venerable Larson treatise on workers' compensation bears his name.

The Council of State Governments had analyzed most of the knotty problems that were arising in workers' compensation throughout the country by the late 1960's. The Council drafted a Model Act, painstakingly addressing these modern problems. Each section of the Model Act was accompanied by explanatory comments. Access to the pristine language of the Model Act helped the Idaho recodifiers immensely, mainly because every statute in a workers' compensation law interrelates with other statutes in the same act.

Among the most serious problems facing the Idaho Recodification Committee was chronic monetary inflation. This phenomenon began to infect all American and European monetary systems in the years following World War II. When chronic inflation crept into the woodwork, it immediately began to devalue the wage loss schedules in every workers' compensation act. Workers continued to suffer workplace injuries, but were getting less in workers' compensation benefits because of inflation.

At first, the Idaho legislature dealt with the problem by periodically raising

the benefit schedules. This cumbersome process proved unsatisfactory. The Idaho legislature only met every two years in those days, and some of its legislators actually equated raises in workers' compensation benefits with raising taxes. Business and labor leaders soon recognized that a permanent cost-of-living mechanism was needed to automatically adjust the schedules each year. The Idaho recodifiers devised a permanent cost-of-living adjustment mechanism for the "wage loss" benefit schedules. Their new "COLA" would be tied to the annual increase (or theoretical decrease) in Idaho's average weekly state wage.

Another deep-seated problem was of a kind that was rooted in the original act but was not appreciated until practitioners and judges had worked with the original statute for several years. It involved the definition of the word "accident." The definition of a compensable industrial "accident" in the original law required an injured worker to identify, with complete precision, the *time when* and the *place where* his accident had occurred. This definition led to many inequities.

Both business and labor leaders came to recognize, after some years, that an "accident" should be "reasonably" identified as to time and location, rather than "precisely" identified as to time and location. This change had been recommended by the Council of State Governments and had been drafted into its Model Act.

Idaho's Recodification Committee would secure this change in our definition of "accident." The change eliminated defenses based on a worker's inability to identify, with absolute precision, something that could not always be identified with such precision. For example, a workman might be finishing a floor on his hands and knees, subjecting his knees to trauma over the course of several hours and causing serious soft tissue injury to one of his knees necessitating surgery. Prior to the recodification, that worker was stymied. Unable in such a situation to identify precisely *when* and *where* his accident occurred he could not establish a valid workers' compensation claim, as the Idaho Supreme Court formally determined in decisions interpreting the old "accident" rule.[6]

The recodified definition of the word "accident" compelled the Idaho Supreme Court to find compensability in such cases, and in similar cases – where an individual went to work without a disc herniation, participated for a day or so in work which could easily cause a disc herniation like driving a front end loader (or hyster) with bad springs in the seat, then realized, at the end of the workday, that a gradual pain he began suffering that day in his low back (or neck) was due to a freshly herniated lumbar (or cervical) disc. Such cases were obviously work-related but they had been found non-compensable prior to the recodification. After the recodification, such injuries were determined to be compensable – bringing the law into conformance with the realities of the workplace as well as modern medicine.[7]

After the recodification, such injuries were determined to be compensable – bringing the law into conformance with the realities of the workplace as well as modern medicine.[7]

A third problem involved inadequate "death benefits" for the widows and widowers of workers killed on the job. These benefits were insufficient for the grieving spouse as well as the dependent children of the deceased. Remarkably, the recodification's needed increase in death benefits went into effect just 5 months before some 91 miners died in the legendary Sunshine Mine disaster in the Coeur d'Alene mining district on May 2, 1972. The Sunshine Mine widows never would have made it otherwise. Pre-recodification death benefits had not been enough to feed a family. Post-recodification death benefits provided surviving spouses and dependent children with sufficient (if bare-bones) death benefits and burial expenses.

Another sweeping change in the recodified statute involved occupational diseases. Prior to the change, the only *compensable* occupational diseases were those contained on a short list residing in the occupational disease section of the Idaho workers' compensation statutes. The recodified law retained the original list but added a proviso that the list was not to be deemed exclusive.[8] Any non-listed disease that could be medically linked to one's work was now equally compensable. The architects of the recodification specifically noted, in its amendment to the statute, that since new industrial toxins were constantly being invented, and then used (and sometimes misused) in the modern workplace, the law must recognize this fact of life.[9]

Hundreds of other changes were made to the law but the above-discussed examples reflect the range and depth of the recodification process. Later changes to the act, like the 1997 amendment that finally repealed the provision excluding farm workers from the Idaho workers' compensation system, were discussed by Recodification Committee members but were left to another day. At the time of the recodification, there was insufficient political resolve to repeal this racist exclusion which denied workers' compensation coverage to tens of thousands of the hardest working people in our society. Without the recodification, however, the average Latino farm worker might have been better off under the tort system.

The recodification

By 1971, the Recodification Committee had organized recommendations for literally hundreds of legislative improvements to the law. The Committee placed its proposed legislation in a comprehensive component known as an "omnibus bill." The Committee then presented the omnibus bill, containing all of its recommendations in a single package, to the 1971 legislature. Because the recodification was officially sponsored by the Idaho Legislative Council, because the Recodification Committee members were recognized experts in workers' compensation, and especially because the proposed legislative changes recommended by the Committee represented a carefully crafted compromise by the chief stakeholders of the workers' compensation system itself, i.e., business and labor, the legislature had absolutely no interest in tinkering with the bill.

The omnibus bill was signed in 1971 by Governor Cecil D. Andrus, a Democrat who had just been elected chief executive in November 1970. The recodification process had commenced two years earlier under a Republican Governor, Don Samuelson. The recodification is a profound example of a bipartisan undertaking.

In only 40 years, such bipartisan problem solving, nationally and statewide, has sadly vanished. If they seek to move Idaho forward in the coming years, today's political leaders would do well to study the 1969-1971 recodification of the Idaho Workers' Compensation Law.

Endnotes

[1] Volumes 11 and 11A, Idaho Code.

[2] The proceedings of the Recodification Committee are lodged, somewhat organized, at the Idaho Legislative Reference Library on the first floor of the Idaho Capitol Building. The Legislative Reference Library is maintained by the Idaho State Legislature and not the Idaho Supreme Court, although both libraries are open to the public.

[3] *1917 Idaho Session Laws, Chapter 81, Part I, Section 1(b)*; later codified at *Idaho Code Section 43-902*; now codified, since 1972, at *Idaho Code Section 72-201*. *See*, discussion of Justice Raymond L. Givens in *Arneson v. Robinson*, 59 Idaho 223 at 239, 82 P.2d 249 (1938).

[4] It should be of interest to the bench and bar that the "seminal" portion of the Idaho workers' compensation act was phrased somewhat differently in the original 1917 version than it is today. The problems with handling industrial injury under the tort system were painfully obvious in 1917. Accordingly, the drafters of the new workers' compensation act chose to discuss these problems in the seminal portion of the act itself, possibly to ensure passage. By the time of the 1972 recodification, 50 years later, the long running operation of the workers' compensation system had alleviated those concerns. This evidently negated the need for the Recodification Committee to discuss them when restating the "seminal" statute in recodification at *Idaho Code Section 72-201*. The two versions of the seminal statute are set forth below. The italicized portion of the original act does not exist in the recodified act.

"The Common Law System governing the remedy of workmen against employers for injuries received in industrial and public work is inconsistent with modern industrial conditions. *The administration of the common law system in such cases has produced the result that little of the cost to the employer has reached the injured workman and that little at large expense to the public. The remedy of the workman has been uncertain, slow and inadequate. Injuries in such employments formerly occasional have become frequent and inevitable.* The welfare of the State depends upon its industries, and even more upon the welfare of its wage workers. The State of Idaho, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for injured workmen and their families and dependents, is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as is otherwise provided in this Act, and to that end all civil actions, and civil causes of action for such personal injuries, and all jurisdiction of the courts of the State over such causes are hereby abolished, except as in this Act provided." *1917 Idaho Session Laws, Chapter 81, Part I, Section 1(b). [The original statute]*. (Emphasis added.)

"The common law system governing the remedy of workmen against employers for injuries received and occupational diseases contracted in industrial and public work is inconsistent with modern industrial conditions. The welfare of the state depends upon its industries and even more upon the welfare of its wage workers. The state of Idaho, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for injured workmen and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as is otherwise provided in this act, and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this law provided." *Idaho Code Section 72-201. [The present statute]*.

[5] Id.

[6] *See*, i.e., *Carlson v. Batts*, 69 Idaho 456, 458, 207 P.2d 1023 (1949).

[7] *Wynn v. J.R. Simplot Co*., 105 Idaho 102, 666 P.2d 629 (1983); *Stevens-McAtee v. Potlatch Corp.*, 145 Idaho 325, 179 P.3d 288 (2008).

[8] *Idaho Code Section 72-438.*

[9] Id.

About the Author

John F. Greenfield *is a senior Boise claimants' attorney and is associated with The Huntley Law Firm. He has practiced before the Idaho Industrial Commission and the Idaho Supreme Court since 1974, exclusively representing injured workers. He has served, at the request of the Idaho State AFL-CIO, on advisory committees to the Office of the Governor and the Idaho Industrial Commission since 1983. His father, George A. Greenfield, enjoyed a similar career from 1949 until his death in 1987, and was a member of the Recodification Committee of 1969-71.*

These Individuals Shaped Idaho's Workers' Compensation System

Introduction

The Idaho workers' compensation system has evolved in rather significant ways since its inception. That evolution was brought about not only by statutory changes but also, and perhaps more importantly, by the work of the many attorneys who represented the parties before the Idaho Industrial Commission during the decades since the system began. In this article, we attempt to remember just a few of the historic personalities who helped shape this system. Unfortunately, it is not possible to discuss all of them in the limited amount of space available for the article. This, then, is a remembrance of just a few of the historical personalities who have played a significant role in creating the system that now protects injured workers, as well as employers, in this state.

Photo by Idaho Industrial Commission

The 1987 Idaho Industrial Commission (from left to right) are Lawrence G. Sirhall, Sr., Will S. Defenbach and Gerald A. Geddes.

Will S. Defenbach
Gerald A. Geddes
Lawrence G. Sirhall, Sr.

By R. Daniel Bowen

Will S. Defenbach was born May 13, 1926, in Lewiston, and died March 1, 2001, in Boise. Mr. Defenbach, the lawyer representative of the Industrial Commission, graduated from the University of Idaho Law School, practiced in Boise and Moscow, and served several years in the Idaho legislature before beginning his 22-year tenure with the Industrial Commission. He was appointed in 1968 and retired on December 31, 1990. Mr. Defenbach was known for his wit, his love of the law, and his political savvy. He loved new cars and liked the *per diem* he received driving them all across Idaho to attend hearings.

Lawrence G. Sirhall, Sr. was born February 1, 1916, in Canyon City, Colorado, and died in Boise on September 9, 2003. He enjoyed a distinguished career as a claims adjuster, culminating in his position as claims manager for Industrial Indemnity in Boise. He was appointed to the Industrial Commission in 1972 and served until his retirement on December 31, 1988. Mr. Sirhall, silver-haired and dapper, always appeared in a formal suit. He was charming and gracious unless you were an errant adjuster called into his office for a private meeting over a claims handling issue. Mr. Sirhall rarely volunteered his opinion, but when he did, one best pay attention.

Born in Texas, Gerald A. Geddes cut his teeth in the union movement in the 1930s. By the end of the 1960s, he was working as the business manager for the electrician's union out of Pocatello when asked to serve on the Industrial Commission as the labor representative. Appointed in 1969, he served 24 years, until his retirement on January 13, 1993. Blessed with a Texas drawl and a folksy, disarming way about him, Mr. Geddes almost always got his way, with his way almost always being the right way.

These three men early on became good friends. Their collegiality spilled over to the courtroom. As a result of their approach to the dispensation of justice, workers' compensation practitioners to this day make up one of the most friendly and professional sections of the bar. Many of us who have been legal adversaries for over 30 years consider ourselves good friends. Much of what we have become and the way we deal with each other in day-to-day practice stems from what we observed watching Mr. Geddes the labor rep, Mr. Sirhall the industry rep, and Mr. Defenbach the attorney interact with each other and with lawyers who appeared before them.

Early on, these gentlemen learned firsthand how important the business of the Industrial Commission could be when the Sunshine Mine caught fire on May 2, 1972. All three commissioners, assisted by a secretary and a benefits consultant, traveled to North Idaho to meet with the families of the 91 miners who died in order to console the survivors, explain the benefits of the system, and help process claims. This was an experience all three talked about in later years. It was an experience that taught them what the stakes were–what the impact of an industrial injury can be on workers and their families.

All three commissioners, assisted by a secretary and a benefits consultant, traveled to North Idaho to meet with the families of the 91 miners who died in order to console the survivors, explain the benefits of the system, and help process claims.

From the beginning, the three commissioners decided that whatever differences they had would remain between themselves. They never expressed a difference of opinion with one of their colleagues in public and, to my knowledge, none of the three ever authored a dissent during their years together.

The three were of like mind that the workers' compensation system needed to balance the needs of workers, medical providers, and employers. They worked diligently to this end, securing where they could the maximum benefits and coverage for workers in the state of Idaho, keeping in mind the need to maintain a system that was efficient and cost effective, keeping premiums low in order to keep Idaho competitive. They did not see themselves as representing distinct constituencies. They saw themselves working in harness to advance the system as a whole.

In their early years, they inherited a system where hearings were conducted pretty informally. It was not uncommon for the three of them to hold court in a motel room in Lewiston with the parties, Paul Keeton, and Jack Barrett, shoehorned in one small room with all three commissioners. Paul and Jack would bring 10 to 20 files with them, and 5 hours later there was a good chance that everybody would walk out of that room and have a cocktail together, having disposed of all the cases one way or another.

As the money involved in the system increased, and hence the stakes, so did the complexity of the evidence presented and the arguments made. The commissioners, in response, recognized the need to put into place formal rules of procedure to govern the hearing resolution process. When confronted with this challenge, the Industrial Commission invited a number of practitioners to meet and put together a set of rules that would govern their appearances before the Commission. The committee concluded its work (a process that took one day by the way), and the Industrial Commission adopted the proposed rules without changes, as I recall. The rules, largely unmodified, are still used today. To an outsider, some of the rules we adopted, particularly as to post-hearing depositions, may seem unusual, but they reflect the realities of day-to-day practice before the Industrial Commission and have proven to be of service in the system over the intervening years.

Only one of these men was an attorney. Nonetheless, I learned more about the practice of law and how to conduct myself as a lawyer from these three gentlemen than anyone else I have encountered in my 32 years of practice. They taught attorneys to proceed in a professional manner. They taught the value of civility and humility. They routinely, where necessary, rejected the technical in favor of the equitable and the practical. They were not above arm-twisting to effect a settlement, but the lawyer whose arm was being twisted could always take solace in knowing that his adversary on the other side was receiving the same treatment at the same time. I don't know anybody who did not like these three men or who thought that they somehow were treated unfairly when they appeared before them. When you consider that somebody lost in every case they decided, that's pretty remarkable. They weren't much for technical rules of evidence, and I tend to think that maybe our district courts could benefit from the Industrial Commission's approach. When objections were made, I can remember Mr. Geddes looking up as though deep in thought, then overruling the objection, advising he felt that the matter "goes to the weight." I think it was the only response he ever had to an objection, and you know, it worked pretty darn well.

They did not see themselves as representing distinct constituencies. They saw themselves working in harness to advance the system as a whole.

John W. Barrett

By Glenna M. Christensen

A transplanted North Dakota cowboy who became one of Idaho's most respected lawyers, John W. "Jack" Barrett was a straight shooter in and outside the courtroom — honest and a believer in doing the right thing.

Over a legal career that began when he joined Moffatt Thomas in 1959 after graduating from the University of Idaho law school and which continued until his death in 2011, Jack distinguished himself as trial lawyer, counselor to insurance companies, and the dean of Idaho's worker's compensation bar. A corporate client of Jack's described him as an exceptional attorney in the grandest of legal tradition—honest, fair, tough, thoroughly prepared and consummately skilled in his craft with a reputation for balance and fairness. And it was that reputation for balance and fairness, along with his honesty and skill that led to the broad influence Jack had within Idaho's legal community.

John W. Barrett

Jack served a six-year term on the Idaho Judicial Council. Well known for his knowledge and expertise in workers' compensation law, he was a consultant to the interim legislative committee which drafted the 1971 recodification of the workers' compensation law. He later served as the first chairman of the Idaho Industrial Commission Advisory Committee, and remained active with the committee in various roles. In 2012 the Workers' Compensation Section of the Idaho State Bar created an award recognizing the Idaho lawyer who represents the best professional qualities in that area of practice. The initial award was presented to Jack Barrett.

Judges and legislators also relied on Jack's expertise. Former Idaho Supreme Court Justice Robert Bakes recalled: "To the extent to which the Idaho Supreme Court has gotten the law right, it is substantially the work of Jack Barrett. In his presentation he always started with the basic, and then moved to the more specific. He always refreshed the court's understanding of workers' compensation and then analyzed the specific facts of his case with the basic law."

Jack's standing with the court could also lead to interesting encounters with the justices by lawyers in other cases — even by Jack's own law partners. Richard C. Fields tells of being part way through an argument before the court when Justice Shephard inquired if he were still a partner of Jack Barrett. Following an affirma-

tive response, Justice Shephard noted that Barrett had argued the opposite point of view on the same issue that morning and asked how that squared with his position. Fields gamely responded that the cases were factually distinguishable. Apparently they were, as both arguments were successful.

Legislators often would ask Jack to appear at committee hearings when workers' compensation bills were being considered to answer questions about the impact of the bill. Each session, he would also present a basic overview of workers' compensation to the germane committees. And he frequently would assist legislators and other parties with the drafting of workers' compensation legislation.

Paradoxically for someone for whom politics was not a pleasured activity, the acme of Jack's career, in the view of many of his closest colleagues, came out of a political act.

For many years, Jack decried the inherent injustice of an Idaho Code provision that exempted farm workers from coverage under the workers' compensation law. For many years his efforts to persuade policy makers to correct that injustice went nowhere. But people with a sense of right like Jack's don't give up. Eventually a critical mass developed inside and outside government in favor of repeal of the exemption. Jack lent his efforts to the drafting of the Farm Workers' bill and was invited to address the legislative committee to which the bill was sent. After Jack's comments, the bill was sent to the house floor with a do-pass recommendation, and eventually became law.

Of Jack's presentation to the committee, a partner later wrote: "In my legal career I have not seen a more moving or compelling statement than the speech given by Jack. It combined intellect with heartfelt emotion. The arguments were forcefully delivered; the feelings were gracefully conveyed. The room was standing room only, but you could have heard a pin drop."

Doing the right thing, however, wasn't something Jack reserved for big things. It was part of who he was all day every day — someone who treated others decently and gave freely of himself. Collegiality was a hallmark of Jack's. It didn't matter how fiercely a case was argued, the case stayed in the courtroom. Brad Eidam recalls trying a case with Jack in which a number of witnesses were called and feelings ran high. An hour after the hearing ended, Jack and Brad were on the golf course. Although Jack and Justice Stephen Bistline rarely saw eye to eye, they were friends outside the courtroom, and the same was true for many other courtroom adversaries.

Doing the right thing, however, wasn't something Jack reserved for big things. It was part of who he was all day every day — someone who treated others decently and gave freely of himself.

Jack frequently received calls from attorneys who had questions or needed help concerning a workers' compensation case. Those calls came from new and experienced attorneys, claimant's attorneys and defense attorneys. It didn't matter. Jack always took time to answer questions.

He also mentored young attorneys, both within his firm and in other forums, such as the American Inns of Court to which he belonged and in which he was active until his death.

Jack's concern for others is also reflected in his effort to establish an Idaho chapter of Kid's Chance, a national organization dedicated to providing educational opportunities for needy children of parents seriously injured or deceased parents as a result of work-related injuries. Jack researched the organization, and then obtained approval from the Industrial Commission Advisory Committee to establish "Kids' Chance of Idaho, Inc." Jack secured nonprofit status for the corporation and campaigned within the workers' compensation community for support.

In 2006, Jack received the Idaho State Bar Professionalism Award. The award is given to those who, for a lifetime, have exemplified for members of the legal profession the epitome of what it means to be a lawyer and who, by doing so, have brought honor and distinction upon themselves and the profession as a whole.

In conjunction with that award, Jack wrote a brief statement about professionalism. He said, "The most important traits of any lawyer that exemplify professionalism are uncompromising integrity, complete honesty and exhibiting civility in all dealings with the court, adversaries and clients."

There is no better epitaph for that straight shooter from North Dakota.

Paul Keeton
John Tait

By Alan K. Hull

No article remembering historic personalities who have contributed significantly to the development of the current Idaho workers' compensation system would be complete without remembering the contributions of Paul Keeton and John Tait of the firm of Keeton & Tait of Lewiston. After graduation from the University of Michigan, College of Law, Paul Keeton was admitted to the State Bar in 1940. He practiced law in St. Maries with his uncle, William D. Keeton, a future justice of the Idaho Supreme Court and then became assistant attorney general assigned to the State Insurance Fund from 1943 to 1945. In 1944, he also served as legislative counsel and on May 4, 1945 he opened his office in Lewiston, Idaho, where he practiced for 60 years, passing away in 2005 at the age of 92. During his career, Paul argued more than 80 cases before the Idaho Supreme Court, many of which involved worker's compensation claims and a number of those significantly expanded the rights of injured workers in this state.

Following graduation from Vanderbilt University Law School in 1974, John Tait began a 35-year partnership in the firm of Keeton & Tait. During their years of practice, both of them pursued many different areas of the law but they always fought tirelessly for the rights of injured workers resulting in significant increased benefits for these individuals. John continued in that practice until his untimely death at the age of 65 in February of 2012.

In the *Hatley* case,[2] Mr. Keeton represented the widow of a truck driver killed on Lolo Pass. Shortly before his accident, the truck driver stopped at a truck stop where he fueled his truck, ate dinner and visited with the proprietress. She testified at the hearing before the Industrial Commission that he seemed normal. Later,

when his body was tested, his blood alcohol level was .117. The claim was denied. At the hearing, the employer produced evidence from a toxicologist that at that blood level, his actual reactions would vary depending on many factors but the consumption of food would slow the absorption of alcohol. The Idaho Industrial Commission granted benefits.

On appeal, the Idaho Supreme Court affirmed and granted full benefits, which could have been reduced due to intoxication. The Court relied on Idaho Code § 72-208(2), which states that when an employee is killed on the job it is presumed in the absence of substantial, competent evidence to the contrary that the injury or death was not occasioned by the employee's intoxication. With that presumption and the testimony of the proprietress, the Court concluded that the widow was entitled to full benefits. This case has been seminal in allowing claimants to avoid the reduction or now loss of benefits due to intoxication when killed on the job.

Mr. Keeton presented the injured worker in *Callantine v. Blue Ribbon Linen Supply.*[4] This case is cited more often by the Idaho Industrial Commission than perhaps any other case. It is found in most of their decisions even though it was less than one and a half pages in length. The court stated:

Paul Keeton

> A claimant in a workmen's compensation cause has the burden of proving compensable disablement, caused by an accident arising out of and in the course of his employment. His proof must establish a probable, and not merely a possible, connection between cause and effect to support his contention that he suffered a compensable accident.[5]

After 30 years, this same standard remains today. The court also went on to state that the Industrial Commission is the arbiter of conflicting evidence and if the commission's determination is supported by substantial and competent, though conflicting, evidence, the Court will not disturb the findings on appeal.

The case of *Mike Malueg*[6] has had a great impact upon the workers' compensation cases, and significantly benefitted injured workers since it was decided in 1986. The facts are rather significant and you should read the actual decision. The court concluded in that case that an injured worker who has a light duty release but is still in the period of recovery is entitled to total temporary disability benefits (the income benefits payable during the time of recovery) from the time of the accident until such time as the employer has provided suitable light duty work that meets with the doctor's limitations, or it is clearly shown there is suitable light duty work available in the community. The court also made it clear that the job offer must be reasonable and it must be feasible for the claimant to take the work. Utilizing this decision, injured workers are now protected until they can either go back to work for their time of injury in suitable light duty work or they receive their final medical release from their physicians.

John Tait was also instrumental in the workers' compensation system. While not handling nearly as many appeals to the Supreme Court as his partner, he was a steady and strong voice for the injured workers. He never hesitated to go after the employer and surety when he thought his clients were not being treated fairly, and was known for his vigorous representation of his clients. In the case of *Painter v. Potlatch,*[7] the Idaho Supreme Court found for Potlatch on the basis that the findings of the Industrial Commission were supported by substantial, competent evidence. Potlatch argued that the appeal was not reasonably well grounded in fact or law and therefore did not meet the standards of Idaho Appellate Rule 11.1. In rejecting this contention, the Court ruled that the appeal arose as a result of John Tait's vigorous representation of his client which the Court said was perhaps overzealous. However, it found no persuasive indication that the appeal was taken for any improper purpose and flatly denied any thought of sanctioning Mr. Tait for pursuing this matter on behalf of his clients.

John Tait

John Tait not only worked tirelessly before the Idaho Industrial Commission on behalf of his clients, he also was a member of the Commission's Advisory Committee and took a leading role in that committee, as well as being chairman of the Idaho State Bar Workers' Compensation Section where, more than any other chairman, he pursued the interests of the injured workers of the state of Idaho.

Endnotes

1 Future articles will be submitted discussing noteworthy individuals whose contributions were extremely significant and in one way or another contributed to developing the system to its present status.

2 The authors would like to thank Michael McPeek, attorney of Boise, Idaho, and William (Bill) Fitzgerald, attorney of Lewiston, Idaho, for their help in this article.

Mr. McPeek was a long-time associate of both Mr. Barrett and Ms. Christensen and his help in editing that information was instrumental to Ms. Christensen.

Mr. Fitzgerald was a long-time friend of John Tait and Paul Keeton. He is now very ably representing Mr. Tait's former clients. The information he supplied was most helpful and if anyone wants to know more about these two rather remarkable attorneys, they are urged to contact Mr. Fitzgerald.

3 *Hatley v. Lewistown Grain Growers, Inc.,* 97 Idaho 719, 552 P.2d 482 (1976).

4 *Callantine v. Blue Ribbon Linen Supply,* 103 Idaho 734, 653 P.2d 455 (1982).

5 103 Idaho at 734, 653 P.2d at 455.

6 *Malueg v. Pierson Enterprises,* 111 Idaho 789, 727 P.2d 1217 (1986).

7 *Painter v. Potlatch Corp.,* 138 Idaho 309, 63 P.3d 435 (2003).

About the Authors

R. Daniel Bowen *has dedicated his practice to insurance defense, including worker's compensation.*

Glenna M. Christensen *graduated from Brigham University School of Law in 1978. She worked at Moffatt Thomas from 1978 until 2009 when she retired. Her practice focused on worker's compensation.*

Alan K. Hull *is a graduate of the University of Idaho, as well as the University of Idaho, College of Law, where he was editor in chief of the Federal Law Review. He is a founding partner in the Boise law firm of Anderson, Julian & Hull, where his practice primarily focuses on representation of employers and sureties before the Idaho Industrial Commission in matters involving worker's compensation claims.*

OFFICIAL NOTICE
SUPREME COURT OF IDAHO

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

3rd AMENDED - Regular Fall Terms for 2012

Boise ..... August 20, 22, and 24
Twin Falls ..... August 28 and 29
Boise ..... September 17
Coeur d'Alene, Moscow, and Lewiston .....
..... September 19, 20, and 21
Boise ..... November 1 and 2, ~~5~~
Pocatello (Idaho State University) ~~Idaho Falls~~ .....
..... November 7
Rexburg (Brigham Young University - Idaho) .....
..... November 8
Idaho Falls ~~Pocatello (Idaho State University)~~ .....
..... November 9
Boise ..... December 3, 5, 7, 10, and 12

By Order of the Court
Stephen W. Kenyon, Clerk

NOTE: The above is the official notice of the 2012 Fall Terms of the Supreme Court of the State of Idaho, and should be preserved. A formal notice of the setting of oral argument in each case will be sent to counsel prior to each term.

OFFICIAL NOTICE
COURT OF APPEALS OF IDAHO

Chief Judge
David W. Gratton
Judges
Karen L. Lansing
Sergio A. Gutierrez
John M. Melanson

3rd AMENDED - Regular Fall Terms for 2012

Boise ..... August 9, 21 and 23
Boise ..... September 18 and 20
Boise ..... October 16, 18 and 25
Boise ..... November 13, 15 and 20
Boise ..... December 11 ~~and 13~~

By Order of the Court
Stephen W. Kenyon, Clerk

NOTE: The above is the official notice of the 2012 Fall Terms of the Court of Appeals of the State of Idaho, and should be preserved. A formal notice of the setting of oral argument in each case will be sent to counsel prior to each term.

Idaho Court of Appeals
Oral Argument for November 2012

Tuesday, November 13, 2012 – BOISE
9:00 a.m. State v. Buhler ..... #38362-2010
10:30 a.m. State v. Sanchez, Jr. ..... #38655-2011
1:30 p.m. State v. Pfeiffer ..... #39022-2011

Thursday, November 15, 2012 – BOISE
9:00 a.m. State v. Round ..... #38963-2011
10:30 a.m. State v. Baker ..... #39181-2011
1:30 p.m. Medical Recovery Services v. Bonneville Billing ...
..... #39408-2011

Tuesday, November 20, 2012 – BOISE
10:30 a.m. State v. Pulsifer ..... #39416-2011
1:30 p.m. State v. Bartlett ..... #38589-2011

Idaho Court of Appeals
Oral Argument for December 2012

Tuesday, December 11, 2012 – BOISE
10:30 a.m. John Doe v. Jane Doe **TELEPHONIC** .....
..... #40282-2012

COURT INFORMATION

Idaho Supreme Court
Oral Argument for November 2012

Thursday, November 1, 2012 – BOISE

8:50 a.m. State v. Phillip James Morgan ..... #38305-2010

10:00 a.m. Two Jinn, Inc. v. Dept. of Insurance #38759-2011

~~11:10 a.m. Jack L. Garrett v. Thelma V. Garrett *VACATED*.....#38971-2011~~

Friday, November 2, 2012 – BOISE

8:50 a.m. State v. Dunlap (Death Penalty Review) ..... #32773-2006/37270-2010

10:00 a.m. State v. Abraham Scraggins, Jr. ..... #38212/38213-2010

11:10 a.m. Joseph Henry v. Dept. of Correction (Industrial Commission) ..... #39039-2011

Wednesday, November 7, 2012 – ISU (Pocatello)

8:50 a.m. Allen F. Grazer v. Gordon A. Jones ... #38852-2011

10:00 a.m. State v. Joan Michelle Anderson (Permissive Appeal) ..... #38950-2011

11:10 a.m. Habib Sadid v. Idaho State University (Industrial Commission) ..... #38549-2011

Thursday, November 8, 2012 – BYU-IDAHO (Rexburg)

~~8:50 a.m. Robert Day v. Wal-Mart Stores, Inc. *VACATED*..... #38730-2011~~

10:00 a.m. Michael Stapleton v. Jack Cushman Drilling & Pump ..... #39198-2011

11:10 a.m. Buku Properties, LLC v. Raoel H. Clark ..... #38561-2011

Friday, November 9, 2012 – IDAHO FALLS

8:50 a.m. Judy Nield v. Pocatello Health Services ..... #38823-2011

10:00 a.m. Craig E. Peterson v. Wesley J. Gentillon ..... #38878-2011

11:10 a.m. Ida-Therm, LLC v. Bedrock Geothermal, LLC .... #39108-2011

Idaho Supreme Court
Oral Argument for December 2012

Monday, December 3, 2012 – BOISE

8:50 a.m. State v. Native Wholesale Supply Company ..... #38780-2011

10:00 a.m. State v. Richard Lee Brown (Petition for Review) ..... #39434-2011

Wednesday, December 5, 2012 – BOISE

8:50 a.m. Hasan Icanovic v. State ..... #38477-2011

10:00 a.m. Boise Mode, LLC v. Donahoe Pace & Partners .... #39229-2011

11:10 a.m. D. Richard Linford v. State Farm Fire & Casualty ..... #39059-2011

Friday, December 7, 2012 – BOISE

8:50 a.m. St. Luke's Magic Valley Regional Medical Center v. Luciani ..... #39315-2011

10:00 a.m. Altrua Healthshare, Inc. v. Bill Deal #39388-2011

11:10 a.m. Buckskin Properties, Inc. v. Valley County ..... #38830-2011

Monday, December 10, 2012 – BOISE

8:50 a.m. IDHW v. John Doe (2012-05)*EXPEDITED* ..... #40246-2012

10:00 a.m. Robert Terry Johnson v. State (Petition for Review) ..... #39433-2011

11:10 a.m. Reynolds v. Trout Jones Gledhill .... #38933-2011

Wednesday, December 12, 2012 – BOISE

8:50 a.m. Parkwest Homes v. Residential Funding Real Estate ..... #38919-2011

10:00 a.m. State v. Darin William Parton ..... #37940-2010

11:10 a.m. Employers Mutual Casualty Co. v. David Donnelly ..... #38623-2011

Idaho Supreme Court and Court of Appeals
NEW CASES ON APPEAL PENDING DECISION
(Updated 10/1/12)

CIVIL APPEALS

Contempt
1. Whether the district court erred in finding the Keanes in contempt of the court's Order Affirming Arbitration Awards.

Keane v. Bald, Fat & Ugly, LLC
S.Ct. No. 39451
Supreme Court

Employment law
1. Did the district court err in granting summary judgment on Hatheway's age discrimination claims, including disparate treatment, hostile work environment, and constructive discharge, under the Idaho Human Rights Act?

Hatheway v. Board of Regents of the Univ. of Idaho
S.Ct. No. 39507
Supreme Court

License suspension
1. Did Platz meet his burden to show that the evidentiary tests were not administered in accordance with I.C. § 18-8004 pursuant to I.C. § 18-8002A(7)?

Platz v. Dept. of Transportation
S.Ct. No. 39805
Court of Appeals

2. Was the Department Hearing Examiner's decision upholding the administrative disqualification of Platz's commercial driving privileges supported by sufficient evidence?

Platz v. Dept. of Transportation
S.Ct. No. 39806
Court of Appeals

Medical assistance recovery
1. Whether the court erred in its application and interpretation of I.C. § 56-218, refusing to allow the Department's claim against assets which had been community property, but had become the separate property of the Medicaid recipients' spouse.

Dept. of Health & Welfare v. Wiggins
S.Ct. No. 38604
Supreme Court

Post-conviction relief
1. Did the court err in denying post-conviction relief on the claim Johnson was denied effective assistance of counsel when counsel failed to elicit from the defense expert his opinion that latent prints found on the tools of the murders were fresh prints.

Johnson v. State
S.Ct. No. 38769
Supreme Court

2. Did the court err in dismissing Barcella's successive petition for post-conviction relief after an evidentiary hearing?

Barcella v. State
S.Ct. No. 39520
Court of Appeals

3. Did the court err when it summarily dismissed Cavanaugh's ineffective assistance of counsel claim?

Cavanaugh v. State
S.Ct. No. 37706
Court of Appeals

Quiet title
1. Were the district court's findings of fact sufficient to support the conclusion that an implied boundary line agreement replaced the line stated in the parties' deeds?

Sims v. Daker
S.Ct. No. 39760
Supreme Court

Summary judgment
1. Whether there exist genuine issues of material fact to preclude summary judgment on Taft's claim for negligent entrustment of imputed liability under I.C. § 49-2417.

Taft v. Jumbo Foods, Inc.
S.Ct. No. 39364
Supreme Court

2. Whether the district court erred in converting the motion to dismiss to a motion for summary judgment before discovery enabled Edwards to acquire information to resist the motion.

Edwards v. Mortgage Electronic Registration Systems
S.Ct. No. 38604
Supreme Court

3. Whether the court erred in granting summary judgment and misapplied the principles of law governing judicial estoppel.

Mowrey v. Chevron Pipe Line Co.
S.Ct. No. 39346
Supreme Court

Termination of parental rights
1. Did the court and/or the Department of Health and Welfare deny Doe his statutory rights under the Child Protection Act, thereby denying him a meaningful and adequate opportunity to work a case plan and reunify with his son?

Dept. of Health & Welfare v. Doe (2012-05)
S.Ct. No. 40246
Supreme Court

2. Whether there was sufficient evidence to support the court's conclusion that termination was in the best interests of the children, that Jane Doe had abandoned her children by failing to maintain a normal relationship and that such abandonment was willful.

Doe v. Jane (2012-08) Doe
S.Ct. No. 40282
Court of Appeals

Vexatious litigation
1. Whether the Administrative District Judge erred in declaring Telford a vexatious litigant and requiring her to comply with prefiling conditions before commencing new *pro se* litigation in the Idaho courts.

Telford v. Nye
S.Ct. No. 39497
Supreme Court

CRIMINAL APPEALS

Dismissals
1. Did the district court err when it concluded the testimony presented during the preliminary hearing did not establish probable cause to believe McLellan committed the crime of video voyeurism?

State v. McLellan
S.Ct. No. 39102
Court of Appeals

Idaho Supreme Court and Court of Appeals
NEW CASES ON APPEAL PENDING DECISION
(Updated 10/1/12)

Evidence

1. Did the court err by allowing the State to present expert testimony regarding the long term effects of sexual abuse on children?

State v. Aguilar
S.Ct. No. 38068
Court of Appeals

2. Did the court err in allowing Branam's statements to Ward to be introduced under I.R.E. 801(d)(2)(B) as an adoptive admission by Moses despite a lack of foundation?

State v. Moses
S.Ct. No. 38871
Court of Appeals

3. Was their sufficient evidence to support Elias' conviction for unlawful penetration by a foreign object?

State v. Elias
S.Ct. No. 39139
Court of Appeals

Instructions

1. Did the variance between the jury instructions and the facts alleged in the charging document rise to the level of fundamental error?

State v. Day
S.Ct. No. 39044
Court of Appeals

Pleas

1. Did the district court abuse its discretion in denying Maxim's motion to withdraw her guilty plea?

State v. Maxim
S.Ct. No. 39209
Court of Appeals

Probation revocation

1. Did the district court abuse its discretion when it revoked Alcala's probation?

State v. Alcala
S.Ct. No. 38882
Court of Appeals

Sentence review

1. Whether the district court abused its discretion in considering victim impact evidence from a person who was not a victim of Shackelford's crimes.

State v. Shackelford
S.Ct. No. 39398
Supreme Court

Summarized by:
Cathy Derden
Supreme Court Staff Attorney
(208) 334-3867

Federal Court Corner

A Behind the Scenes Look into the Consolidated District and Bankruptcy Clerk's Office

Libby Smith

It is hard to believe that in December, I will have served as the Clerk of Court/Court Unit Executive (CUE) for the U.S. District and Bankruptcy Court for three years. It took very little time for me to adopt the great state of Idaho as my home. Idaho truly is a "flower in the middle of the desert," which is how my father described it during a recent visit from Michigan. Certainly the beauty of this state, with its many miles of pristine rivers, gorgeous mountain ranges and vast blue skies played a large part in my decision to apply for my current position as Clerk of Court. However, from a professional standpoint, I was primarily drawn to Idaho due to the unique organizational structure and culture of the Idaho Federal Court system.

Idaho is one of only four consolidated District and Bankruptcy Courts in the country. The District and Bankruptcy Court Clerk's Offices have been consolidated since 1985, which has naturally facilitated the creation of a shared administrative and operational environment between the two court units. Our consolidated structure — particularly the shared administrative services environment — is getting a lot of attention these days within the federal judiciary. This is likely due to the efficiencies we are able to achieve — some of which provide true monetary savings and others simply make sense in terms of supporting the consolidated Court's mission, and our belief in, "doing what's best for the District of Idaho." I think it is important for people, particularly the legal community, to understand how our court is structured. Therefore, I am providing a bit of history and sharing a behind the scenes description, beyond what you might typically see in a courtroom or at the intake counter in the District of Idaho.

Our consolidated structure — particularly the shared administrative services environment — is getting a lot of attention these days within the federal judiciary.

Court governance

Governance of the consolidated Courts after 1985 has been, and remains, a collective and collaborative process. The Chief District Judge, Chief Bankruptcy Judge, and Chief Magistrate Judge meet regularly and work together to set policy, articulate goals, provide direction to the Clerk and the Chief U.S. Probation Officer (also known as the Court Unit Executives (CUEs), as well as address administrative and operational issues as they arise. Decisions are collectively made on the basis of what is best for the District as a whole.

In addition to collective Chief Judge management, certain issues and matters require the input from and concurrence of the Board of Judges, which are composed of all District Judges (currently two), Bankruptcy Judges (two), and Magistrate Judges (two active and two recalled). Such a governance model has proven effective given the culture and history in the District, as well as the willingness of all Judges to fully commit to the collective decision-making process. In addition to the Court's eight judicial officers (plus two resident Court of Appeals Judges), we currently have 125 Clerk's Office, Probation Office and Chambers staff located throughout the district, supporting each of the three court units. The CUEs report to the three Chief Judges (District, Bankruptcy and Magistrate) with whom they meet regularly to discuss administrative and operational issues. The CUEs also participate, along with their three Chief Deputies, in Board of Judges' and other committee meetings.

Shared administrative services

In 2004, the Clerk's Office and the consolidated Probation and Pretrial Services Office (Probation Office) began sharing Financial and Human Resources (HR) staff who provide services to all court units. The CUEs have oversight of the shared staff and jointly approve all hiring and disciplinary actions for those staff. The CUEs work together on district wide administrative (non-operational) policies and procedures and conduct joint staff meetings regarding administrative matters. A Chief Deputy of Administration reports jointly to both CUEs and oversees the day to day administrative functions for the three court units. These shared functional areas include finance, procurement, budget, space & facilities, security, human resources (HR), audit/internal controls, training, and some information technology (IT) functions. The supervisors working in the shared administrative areas (IT Managers and a Financial Supervisor) report to the Chief Deputy of Administration and belong to both the Clerk's Office and Probation Office's management teams. More specific information regarding the shared administrative services areas is provided below.

Information technology

The IT Department for the District and Bankruptcy Courts have been combined for over 20 years, and staff from within the Court IT Department support

all nationally and locally developed IT systems and provide services such as courtroom technology support, network management and a host of other functions for the District and Bankruptcy Courts. Although the Court and Probation IT Departments are not combined, many technological functions, systems and projects are shared between the two departments.

Financial services

For more than 20 years finance, procurement, budget, internal controls, and space & facility services have been combined for the District and Bankruptcy Courts. Eight years ago the Probation Office staff performing those functions joined with the Clerk's Office's staff to create a Financial Services Department serving all court units. All budgetary, procurement, financial and space & facilities functions are allocated functionally, rather than by court unit. This allows the work to be accomplished with fewer employees, while at the same time serving multiple court units.

Human resources

For the past eight years all court units have utilized the services of a combined HR Department which, at present, consists of one HR Specialist. This individual provides HR support to the judges and employees from all court units. For example, the HR Specialist fingerprints employees and creates ID cards, performs leave management, coordinates performance management, onboarding, benefits counseling, recruiting, training, employee relations, and other functions.

Court operations

The District and Bankruptcy Court share operations management staff that includes a Chief Deputy of Operations, two Divisional Office Managers (one each in Pocatello and Coeur d'Alene),

In 2004, the Clerk's Office and the consolidated Probation and Pretrial Services Office (Probation Office) began sharing Financial and Human Resources (HR) staff who provide services to all court units.

and a Court Services Supervisor who is located in Boise. In addition, a Jury Administrator is located in Boise, and coordinates and oversees jury functions and works with jury clerks in all locations throughout the District. The Clerk's Offices in the four court locations are combined, and the Intake staff in all locations handle both District and Bankruptcy cashiering functions, process mail, as well as assist the public, attorneys and others with both District and Bankruptcy Court questions. Several Courtroom Deputies have been trained to support the District, Bankruptcy and Magistrate Judges. The District and Bankruptcy Courts share Electronic Court Recording (ECR) staff who have been trained to support both District and Bankruptcy Court proceedings. The District of Idaho has established Generalist Clerk positions, which allow staff to provide a broad range of support (e.g., intake, docketing, case administration, etc.) to both the District and Bankruptcy Courts. Very few of the Operational staff work exclusively for one court unit.

I am very proud to be a part of the Idaho Federal Court system for many reasons which, to elaborate upon, would take much more space that I've been allotted for this article. In this day of ever-tightening budgets and cost containment, it is encouraging to know that the Judges, Court Unit Executives and all of the employees within the District of Idaho are continually seeking ways to more efficiently and effectively fulfill our statutory responsibilities and the Court's mission in serving the public in the state of Idaho.

This philosophy also helps position us to address future budget challenges.

About the Author

Libby Smith *has served as the Clerk of Court for the United States District and Bankruptcy Court for the District of Idaho since December 2009. Ms. Smith received a Master of Science in Business Information Technology (Summa Cum Laude) and a Bachelor of Business in Business Administration (Magna Cum Laude) from Walsh College in Troy, Michigan, graduating with honors. She is a 2010 graduate of the Federal Court Leadership Program and is currently enrolled in the Michigan State University Judicial Administration program. Ms. Smith is also a 2004 recipient of the Oakland County Bar Association's Liberty Bell Award. Ms. Smith resides in Boise with her husband and has two grown children who live in Michigan.*

Licensing and MCLE Compliance

Annette Strauser, *Membership, Licensing, MCLE and Computer System Administrator*

Licensing and MCLE licensing changes

Recent changes to Section III of the Idaho Bar Commission Rules should be kept in mind as you prepare for your 2013 licensing:

- Attorneys who were affiliate members prior to July 1, 2012 are now inactive members. It is the same status with a new name.
- The Idaho agent requirement for nonresident attorneys has been eliminated.
- Senior status is now available to members over the age of 72 who are not practicing law.
- The licensing late fee for active and house counsel members is $100.
- The MCLE extension fee is $100.
- Attorneys who do not intend to meet the licensing or MCLE requirements may now voluntarily resign their license.
- Attorneys whose licenses are cancelled for noncompliance with the licensing or MCLE requirements will have one year to get their license reinstated.

2013 licensing packets

The 2013 licensing packets will be mailed in mid November. The licensing deadline is February 1, 2013. Your payment and paperwork must be received in our office by that date. Postmarked is not enough. If your licensing is not received by February 1, you must also pay the appropriate late fee - $100 for active and house counsel members and $25 for inactive and emeritus members. The final licensing deadline is March 1, 2013. All licensing fees and paperwork must be received by that date. If your licensing is not complete by March 1, your name will be submitted to the Idaho Supreme Court for cancelation of your license.

Paying online

Attorneys or their firms may complete the licensing paperwork and pay their fees online. Payments can be made by credit card or check. There will be an additional, minimal fee for paying by credit card. Information on how to access the portal will be included in the licensing packets and will be emailed to the membership. A link to the portal will also be on our website at www.isb.idaho.gov once the licensing packets have been mailed. Please note, the only way to pay by credit card is through the online licensing program.

MCLE compliance

If it is your year to report your mandatory continuing legal education (MCLE) credits, you will receive a MCLE certificate of compliance in your licensing packet. The deadline for obtaining the required MCLE credits is December 31, 2012. However, the certificate of compliance does not have to be submitted until the February 1 licensing deadline.

You must have at least 30 Idaho approved MCLE credits (of which at least two must be approved ethics credits) by the end of your reporting period. Check your attendance records on our website at www.isb.idaho.gov. Remember, only Idaho MCLE-approved courses can be used to meet the MCLE requirements. Approved courses appear on your attendance records if we received verification from the sponsor that you attended the course. If you attended courses that do not appear on your attendance records, use the "Search Approved Courses" page on our website to verify they are approved. As long as the course has been approved for Idaho MCLE credit and we have not already received the attendance list, you may simply add the course to your certificate of compliance before signing it. Most certificates have written additions.

There will be many courses offered in November and December. We post a list of upcoming approved courses on our website. We also have a library of DVDs and CDs available for rent and we have online courses available. Information about the rental programs and online courses is on our website.

Online courses are a great way to get MCLE credits on demand. They are video and audio streaming versions of our courses that are available at your convenience 24 hours a day. They are an easy way to complete additional MCLE credits as the deadline nears. Visit our website to see the available courses.

Remember, the limit for self-study credits is 15 per reporting period. If you take an online recorded course, it will always be considered self-study. Watching a DVD or videotape is self-study if you watch it on your own. If you can get at least one other Idaho attorney to watch a DVD or videotape with you, it is not considered self-study.

There will be many courses offered in November and December. We post a list of upcoming approved courses on our website.

If, despite your best efforts, you do not think you will be able to complete the MCLE requirements by the December 31 deadline, you can request an extension until March 1, 2013. To get the extension, pay the $100 MCLE extension fee with your licensing or send us a separate written request with the extension fee. Credits earned during the extension period will be counted toward your reporting period that ends in 2012. Your certificate of compliance should not be submitted until the requirements have been met. However, the rest of your licensing must be submitted by the February 1 deadline to avoid the licensing late fee. The deadline for submitting your completed certificate of compliance is March 1, 2013. If you have not completed the MCLE requirements by March 1, your name will be given to the Idaho Supreme Court for cancelation of your license.

Questions

We want to make the licensing process as easy and trouble-free as possible. If you have questions or need more information, please contact us at (208) 334-4500.

For licensing and MCLE information, contact Annette Strauser (astrauser@isb.idaho.gov) in the Licensing/MCLE Department.

If you are interested in renting a DVD, CD or video/audio tape, contact Beth Conner Harasimowicz (bconner@isb.idaho.gov) in the Member Services Department.

For more information on licensing, MCLE, the list of upcoming courses, the list of rental programs and online courses, etc. – visit our website at www.isb.idaho.gov.

Back to the Basics: Subject and Verb Agreement

Tenielle Fordyce-Ruff

While legal writers must often express difficult ideas, the key to better writing can be as simple as remembering the basics. Sure we all want to write a beautiful sentence. But if your sentence contains a basic error the reader will likely be distracted and miss your eloquence. And, while some things appear simple or basic, they can become more complex. Like subject/verb agreement.

Here's the grammar primer for this month: Subjects and verbs must match in number. Singular subjects take singular nouns; plural subjects take plural nouns. Easy right?

For simple sentences, agreement usually isn't a problem. You can depend on how the sentence sounds to ensure your subject and verb agree.

The professor ***requires*** *all students to be in class prior to its start time.*

Here the singular subject *professor* takes a singular verb ***requires***. Easy! That just sounds correct (an onerous if you're in my class).

Legal writers need to create more complex sentences, so relying on our ears won't always steer us in the right direction. Agreement becomes trickier when subjects become more complex, and writers need to understand some basic agreement rules.

Subjects joined by "and"

For instance, subjects joined by "and" are plural.

Incorrect: *His wife and child* **was** mentioned in the will.

Here the subject is plural *His wife and child*, but the verb is singular ***was***. Remember, when subjects are joined by "and" they take a plural verb. This is true even when the individual subjects are singular (like wife and child).

Correct: *His wife and child* **were** mentioned in the will.

To ensure you have created a correct sentence, substitute "they" for subjects joined by "and." You would never write, "*They was mentioned in the will*."

Seemingly compound subjects

Some subjects appear to be plural, but they aren't. For example, sometimes the parts of a subject joined by "and" make up one idea. In those instances, use a singular verb.

Correct: *His wife and beneficiary* **received** his whole estate.

Likewise, some subjects are joined to other nouns with prepositions like "together with," "as well as," "along with," "but not," "in addition to," and others. In those cases, the subject is still singular.

Incorrect: The *students,* but not the professor, **wants** the class to end early.

Correct: The *professor,* but not the students, **insists** that class begins on time.

Also correct: The *professor*, along with the students, **wants** a break.

Subjects joined by "or" or "nor"

Subjects can also create problems when multiple subjects are joined by "or" or "nor." In those instances, the verb must match the number of the second half of the subject.

Incorrect: The child's grandmother or *her older sisters* ***has been caring*** *for her since her parents started law school.*

Correct: The child's grandmother or *her older sisters* ***have been caring*** *for her since her parents started law school.*

Also correct: The child's older sisters or *her grandmother* ***has been caring*** *for her since her parents started law school.*

Legal writers need to create more complex sentences, so relying on our ears won't always steer us in the right direction.

So, when you see a subject joined by "or" or "nor" simply read only the second half of the subject to hear if the sentence sounds correct.

Subject and verbs separated by other words

Agreement is also tricky when other nouns come between the subject and the verb. In these instances, writers will sometimes match the verb to the other nouns instead of to the subject. This can be especially tricky when the words between the subject and noun are joined by "and" or contain numbers .

Incorrect: A *panel* comprising two judges and two professors **were** introducing time management skills.

Here the subject is singular: a *panel*. It must take a singular verb.

Correct: A *panel* comprising two judges and two professors **was** introducing time management skills.

Collective nouns as subjects

Many writers get tripped up when faced with a collective noun as a subject. When a collective noun acts as a single unit, the collective noun takes a singular verb.

Incorrect: The *jury* **deliberate** on a verdict.

In this example, the *jury* is acting as a single unit, so the plural verb **deliberate** is incorrect.

Correct: The *jury* **deliberates** on a verdict.

When members of a collective noun act as separately, though, the subject takes a singular verb.

Incorrect: A *number* of students **was** late.

Correct: A *number* of students **were** late.

So, the choice of a singular or plural noun can change the meaning of your sentence — the verb tips the reader to whether the group is acting as a whole or if each member is taking individual action. For instance, both "the faculty is divided on a tardy policy" and "the faculty are divided" could be correct. Whether the action was collective or individual would determine the correct verb form.

Money, distance, and measurements as subjects

Measurements as subjects tend to take singular verbs. This is true even when the measurement is plural is form but singular in meaning.

Incorrect: *Thirty* minutes **are** too late to receive credit for the class.

Correct: *Thirty* minutes **is** too late to receive credit for the class.

Many writers get tripped up when faced with a collective noun as a subject. When a collective noun acts as a single unit, the collective noun takes a singular verb.

Verbs and then subjects

Sometimes, writers like to switch the normal word order. Subjects and verbs must still agree in number, however, when the verb comes before the subject.

Incorrect: *Set forth above **is** a summary and examples of attendance policy.*

Here the subject is plural *a summary and an analysis*, but the verb is singular *is*.

Correct: *Set forth below **are** a summary and examples of attendance policy.*.

Indefinite pronouns as subjects

Indefinite pronouns don't refer to a specific person or thing. A few indefinite pronouns can take either a singular or a plural verb, depending on context: "none," "all," "most," "some," "any," and "half."

Correct: *All* her readers **became** better writers.

Other indefinite pronouns tend to take singular verbs: "all," "any," "anybody," "anyone," each," "either," "everybody," "everyone," "everything," "neither," "nobody," "no one," "none," "somebody," "someone," and "something."

Incorrect: *Everyone* who read her column better **understand** subject-verb agreement.

Correct: *Everyone* who read her column better **understands** subject-verb agreement.

Conclusion

Now that you understand the basics of subject-verb agreement, and can steer clear of these pitfalls. Your readers won't be distracted and you can spend your time crafting complex and eloquent sentences.

Sources

[1] Anne Enquist & Laurel Currie Oates, *Just Writing: Grammar, Punctuation, and Style for the Legal Writer* at 184-87 (3d ed. 2009).

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@rainey-lawoffice.com.*

Business and Commercial Litigation in Federal Courts, 3rd Ed.

A. Dean Bennett

BOOK REVIEW

In 1998, the American Bar Association Section of Litigation, together with West Group, published *Business and Commercial Litigation in Federal Courts*. It was a comprehensive 80-chapter, six-volume series that proved to be an invaluable resource to lawyers practicing in federal court. Stephen R. Thomas, Gerald T. Husch, and John C. Ward reviewed the First Edition in the *Advocate* with glowing accolades. In 2005, the American Bar Association Section of Litigation and Thomson West published the Second Edition, a 96-chapter, eight-volume series. Craig L. Meadows reviewed that edition in the *Advocate* providing the treatise his enthusiastic endorsement.

In 2011, Robert L. Haig, a distinguished member of the New York Bar, practicing with Kelley Drye & Warren LLP in New York, as the Editor-in-Chief, again assembled the most experienced and respected judges and practitioners in the country to prepare the Third Edition of the treatise. Like the previous two editions, the Third Edition provides practical and useful analysis and commentary regarding the practice of law in the federal courts of the United States. Mr. Haig conservatively estimates that these authors have invested more than $60 million of their own time to create this comprehensive resource. The Third Edition consists of 130 chapters that are contained in 11 hardbound volumes and one CD-ROM.

In the Third Edition, I found detailed and useful information regarding nearly every conceivable topic, issue, and procedural step or strategy a lawyer would use in federal court practice. At the end of most chapters the authors provide practice aids, including practice checklists, form complaints, form answers with affirmative defenses, form interrogatories, form requests for production, and in some chapters, jury instructions.

This publication is unique in that there is no other treatise or book on commercial litigation specific to federal courts. No other resource combines the detailed treatment of federal civil procedure with the substantive law regularly encountered by commercial litigators. Indeed, the treatise contains 63 substantive law chapters that cover subjects commonly encountered in commercial cases, including securities, antitrust, banking, contracts, insurance, sale of goods, intellectual property, professional liability, business torts, and many other areas of the law.

The 34 new chapters included in the Third Edition are worthy of mention to give you some idea of the breadth of this work.

They include: Internal Investigations; Comparison with Commercial Litigation in State Courts; Coordination of Litigation in State and Federal Courts; International Arbitration; Crisis Management; Pro Bono; Regulatory Litigation with the SEC; Derivatives; Commodities and Futures; Medical Malpractice; Reinsurance; Consumer Protection; Licensing; Occupational Safety and Health Claims; Interplay Between Commercial Litigation and Criminal Proceedings; Money Laundering; Foreign Corrupt Practices Act; Expert Controls; Alien Tort Statute and Torture Victim Protection Act; False Claims Act; Administrative Agencies; Government Contracts; Tax; Project Finance and Infrastructure; Sports; Entertainment; and Information Technology.

It was not realistic for me to attempt to review the 96 chapters carried forward and updated from the Second Edition or the 34 new chapters of the Third Edition. Therefore, I thoroughly reviewed a handful of chapters, both old and new, to get an understanding of their organization and content. And I have provided below a short synopsis of two chapters that seem particularly timely and relevant to Idaho attorneys practicing in federal court.

Comparison with commercial litigation in state courts

Daniel E. Reidy, a partner in the Chicago office of Jones Day, authored Chapter 10, Comparison with Commercial Litigation in State Court. This chapter identifies a number of discrete issues that attorneys and their clients should consider in deciding whether to litigate a case in federal or state court. The detailed commentary is relevant to plaintiffs counsel in deciding where to bring a lawsuit in federal court and it is equally relevant to defense counsel in deciding whether to attempt to remove a lawsuit to federal court.

The chapter addresses, among other topics, recent amendments to the federal rules regarding inadvertent disclosure in discovery, recent changes to the federal rules regarding expert witness discovery obligations, rules regarding the timing, sequence, and scope of discovery, the complexities and availability of third-party discovery by subpoena, the standards of provisional remedies such as preliminary injunction or temporary restraining order, the import of federal versus state evidentiary rules, including the applicability of *Daubert* or *Frye* to challenge expert witnesses.

Electronically stored information

The Honorable Shira A. Scheindlin, a United States District Court judge for the Southern District of New York, and Jonathan M. Redgrave, a founding partner of Redgrave LLP and the Editor-in-Chief of The Sedona Principles, authored Chapter 25, Discovery of Electronic Information. The chapter contains 85 separate sections addressing nearly every aspect of the discovery of electronic information. This area of practice is ever changing, thus it is significant that all of the sections are timely, with citations to rules, discussion of current cases, and advice to counsel and clients requesting or producing electronically stored information.

Specific topics include identification of the various sources of electronically stored information; pre-litigation strategies to reduce the burdens and risks of discovery; the scope and mechanisms for the preservation of electronic information; media and formats used to preserve information; the proportionality test, document production cost sharing and cost shifting; form of production; spoliation and sanctionable conduct. Further, the practice aids include form documents such as a Sampling Order and a Rule 502 Inadvertent Production Order, a checklist for identifying custodians (who to ask, what to ask, and how to ask), and checklists for performing an investigation of a hardware environment, an investigation of back-up systems and archives, and an investigation of applications.

About the Reviewer

A. Dean Bennett *is an associate in the law firm of Holland & Hart. His practice areas include complex commercial litigation and employment law. He is a former law clerk to the Honorable Steven S. Trott of the Ninth Circuit Court of Appeals.*

NEW ADMITTEES
Admitted 10/04/12 and 10/05/12

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Ballard, Ryan Adam
Beckham, Edward Brandon
Beecroft, B. Joseph
Berrett, Brandon Taylor
Bilodeau, Katheryn Anne
Binnall, Jesse R.
Boswell, Tatyana S.
Bower, Jeffrey W.
Boyd, Adam P.
Boyle, Shawn D.
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Jimenez, Roxana Angelica
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Karel, V. Renee
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Kennedy, Kersti Harter
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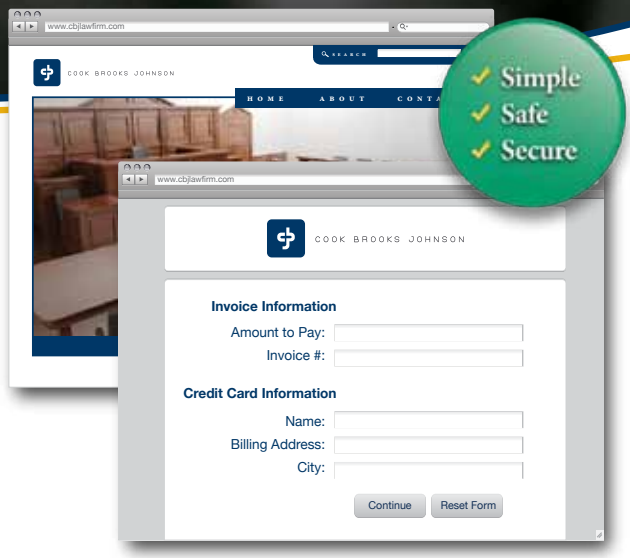

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Shockley joins Jones Gledhill Fuhrman Gourley

Jones Gledhill Fuhrman Gourley, P.A. is pleased to announce that its former partner, Rob H. Shockley, has rejoined the firm as Of Counsel. Prior to rejoining the firm, Rob served as Vice President of Risk Management and General Counsel for Engineered Structures, Inc. and also served as Vice President of General Contractors Insurance, Ltd.

Rob H. Shockley

Rob has been a member of the Idaho State Bar since 1993 and will continue to focus his practice on the representation of general contractors, construction managers, subcontractors and designers on multiple subjects including contract review and drafting, payment disputes, lien and bond claims, warranty and construction defect claims, general liability matters, state licensing issues, OSHA citations and EPA matters.

Mr. Shockley graduated with Honors in 1990 from Boise State University with B.A. in Political Science/Social Science. He received his J.D. from the University of Idaho College of Law in 1993. Mr. Shockley can be reached at (208) 331-1170 or rshockley@idalaw.com.

Judge John Stegner earns prestigious Granata Award

Second District Judge John Stegner of Moscow was named this year's recipient of the Granata Award. A member of the Idaho judiciary since 1997, he served as the administrative judge from 2002 to 2006 and currently serves in that capacity.

Hon. John Stegner

Judge Stegner is a member of the Criminal Justice Commission, Civil Jury Instructions Committee, Civil Rules Advisory Committee, Drug Court and Mental Health Court Committee, Evidence Rules Advisory, Legislative Review Team (District Judges), and the Felony Sentencing Committee. He is very involved in all types of mediation and has presided over drug court in Latah County since January 2002.

Judge Stegner received his B.A. from Whitman College and his J.D. from the University of Idaho College of Law.

After graduating he clerked for Judge Ryan on the federal bench and spent a year travelling around the world before entering private practice.

Judge Stegner grew up in Grangeville. He is a frequent lecturer at the University of Idaho College of Law, teaching about evidence, and serves as a judge for the school's moot court competitions. He is a founding member of the Second District's Ray McNichols American Inns of Court.

Viki Howard wins Kramer Award

This year's Kramer Award recipient, Viki Howard, has worked for the Idaho Courts serving as Statewide Children and Families in the Courts Coordinator for the Administrative Office of the Courts since 1998. Viki has 25 years working with families in the courts as a mediator, case manager, and educator.

Viki Howard

She works with family courts to develop guidelines for parent education, supervised access and family assessments. Viki currently serves on the Idaho Volunteer Lawyers Program Policy Council, the Domestic Assault and Battery Evaluators Board, and for over 15 years has been a member of the Association of Family and Conciliations Courts.

In 2006, Viki received the Public Sector Recognition Award from the Idaho Council on Domestic Violence and Victim Assistance. She received an Idaho State Bar Award in 2007 for outstanding service in family law matters.

Viki's accomplishments are numerous. She was among the first to pioneer the use of mediation, parent education, and case coordination services in Ada County child custody cases – all of which are now implemented statewide.

Through her work in the CFCC, she has been involved with developing services that benefit the courts and litigants.

Schmitz and Jorgensen join Anderson, Julian & Hull LLP

The law office of Anderson, Julian & Hull LLP, is pleased to announce that Randall L. Schmitz and Andrew S. Jorgensen have joined the firm.

Randall L. Schmitz joined the firm as a senior associate in July. He received his B.S. in Business Economics at Willamette University in 1993. He received his J.D. degree from Willamette College of Law and his MBA from the Atkinson Graduate School of Management in 1997. Mr. Schmitz holds an "AV Preeminent" rating from Martindale-Hubbell. He practices general construction law, labor law, products liability, insurance defense and commercial litigation, as well as construction litigation.

Randall L. Schmitz

Andrew S. Jorgensen joined the firm as an associate in July. Mr. Jorgensen attended Brigham Young University for a Master of Arts degree in American Literature. In 2011 he earned his Juris Doctorate degree, summa cum laude, from the University of Idaho. His practice involves education law, insurance defense, commercial transactions, personal injury litigation, and construction law.

Andrew S. Jorgensen

Chief Justice Burdick honors pro bono efforts

Writing on behalf of the Idaho Supreme Court and the Pro Bono Commission, Chief Justice Roger Burdick has written an Op-Ed piece sent to the state's media to mark National Pro Bono Week, Oct. 21-27. He gives special attention to the Idaho Volunteer Lawyers Program:"In 2011, more than 716 attorneys, working in association with the program, provided more than 16,000 hours of volunteer attorney assistance to more than 1,224 low-income individuals and families, including legal representation in more than 555 state and federal court cases, amounting to free legal services valued at over $2,516,475."

I work hard to take care of my *own* family — who's going to pay for dad's nursing home?

"My brother and sister and I love our dad very much and we don't want to move him. But it has become dangerous. Last week he left food on the stove and caused a small fire. And he should *not* be driving. But where are we going to come up with $8,000 a month? We can't afford that, even split three ways!"

Thanks to the miracles of modern medicine and healthier lifestyles, seniors are living longer than ever before. Unfortunately, many are outliving their own ability to care for themselves. The average nursing home cost in Idaho is $84,000 per year.

The legal and financial challenges posed by extended old age can only be answered on an individual basis by an attorney whose practice is concentrated on Elder Law, Medicaid, VA, and Estate Planning. Whether planning ahead or in a crisis, we can provide help when one of your clients — or a loved one — is faced with long-term care needs.

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Built by Your Generosity

Susan P. Weeks

Generosity. This is one of the first words that come to mind when I think of Idaho attorneys. Through all my years on the Idaho Law Foundation's Board of Directors, I have witnessed the generosity of Idaho attorneys time and time again. We ask you to take on a pro bono case for Idaho Volunteer Lawyers and you say yes. We invite you to judge for the Idaho High School Mock Trial Competition and you step forward, without hesitation.

You are the cornerstone of our mission to help the profession serve the public. Last year, 838 attorneys gave of your time to volunteer for one of the Foundation's programs. Another 659 of you gave of your treasure to ensure we are able to continue to financially support our important programs.

In partnership with attorneys like you, Idaho Law Foundation programs have a stellar record of achievement. Idaho Volunteer Lawyers Program continued to increase access to civil legal services. Law Related Education was able to assist Idaho students in understanding the law while fostering positive attitudes about the work of lawyers and the role of the law in our democratic society. Here are a few examples of what we were able to accomplish with your support.

- Legal services for 555 cases, impacting 1,224 low-income family members were organized by Idaho Volunteer Lawyers Program.
- 220 high school students were able to participate in the Idaho High School Mock Trial Competition.
- 510 Idahoans, referred by the Court Assistance Offices received answers to their general legal questions through the Legal Resource Line.
- 7,000 high school seniors received our Turning 18 in Idaho booklet and better understand their rights and responsibilities as they reach the age of majority.

As we move into 2013, there's so much more we plan to undertake. Idaho Volunteer Lawyers Program expects to continue expanding pro bono to meet the legal needs of emerging businesses and people facing foreclosure. Law Related Education hopes to launch the Women & the Law curriculum and the New American Law Academy for Idaho's refugee communities. We are so excited about what these projects can do for Idaho's citizens, but know we won't be able to realize these objectives without your continued support.

As I realize how much you already do, I can't help but think sometimes how much more we could achieve if all Idaho attorneys were willing to give just a little bit more. And that's what I'm asking you now.

If you are already a donor to the Idaho Law Foundation, will you consider increasing your donation this year? If you have never made a donation to the Law Foundation, will you consider making your first gift this year? Would you consider a gift of $100 or more? Of course, we welcome and appreciate all gifts at whatever level. I'm just asking that each and every one of you give this year at a level meaningful to you. Can I count on you this year to help us build our Foundation?

There are many ways to donate to the Idaho Law Foundation. Inside this edition of the Advocate, you will find a donor card. You can fill out and return the card to the Foundation. You can donate online at www.idaholawfoundation.org by clicking the Donate Now button on the home page. And, of course, you can also include a donation through a designation on your 2013 Licensing Form.

If you need additional information about the Idaho Law Foundation, please contact Carey Shoufler, the Foundation's Development Director, at (208) 334-4500 or cshoufler@isb.idaho.gov. She will be happy to answer any question you may have.

If you have never made a donation to the Law Foundation, will you consider making your first gift this year?

As I close, there's another word I would like to share with you. Grateful. Every day I am grateful to be a part of an organization like the Idaho Law Foundation that does so much to help our profession serve the public. I am grateful for the continued support of attorneys like you who allow us to realize this important mission.

Thank you for your support. As we enter the holiday season, I would like to wish you and your family all the joy, happiness, and goodwill of the season.

About the Author

Susan P. Weeks *is the President of the Idaho Law Foundation. Susan Weeks graduated from the University of Idaho in 1986 with a Bachelors in Business Finance Cum Laude. She graduated from the University of Idaho College of Law School in 1990 Cum Laude. Ms.Weeks has extensive experience in business law, corporate law, municipal law, real estate law and commercial and civil litigation. Ms. Weeks serves as corporate counsel for numerous businesses in their general legal matters and municipal counsel for several governmental bodies. She also has an extensive background in all facets of civil litigation, including contract disputes, commercial claims, landlord/tenant matters and real estate issues. She has represented clients in cases heard by the Idaho Supreme Court and the 9th Circuit Court of Appeals.*

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In the Interest of Change and IOLTA

Carey Shoufler, *Idaho Law Foundation Development and Law Related Education Director*

Idaho Law Foundation staff and volunteers have spent the last several months working with the Idaho's Bankers Association and Idaho financial institutions to educate them about the new rate comparability rules and work with them to find the most efficient ways to implement these rule changes.

On July 1, 2012, by order of the Idaho Supreme Court, Idaho joined more than 30 other states that have already adopted IOLTA rate comparability rules to optimize income for IOLTA grants. These rule changes were part of last year's resolution process and passed with 87% of the vote. As the Law Foundation works to implement the changes brought about because of rate comparability, it's important to once again review what the changes are, why they came to be, and how they will impact Idaho attorneys.

Simply put, rate comparability requires attorneys to place their IOLTA accounts at one of the financial institutions that have been approved by the Idaho State Bar. An approved financial institution is one that agrees to pay the highest interest rate generally available at that institution to other customers when the IOLTA account meets the same minimum qualifications.

The move to rate comparability was driven by three main reasons:

1. Fairness: There is no justification for treating IOLTA accounts any differently than non-IOLTA accounts that meet the same requirements.
2. Predictability: The rule change standardizes reporting and the means for determining the rates of interest paid, providing for future revenue predictability for IOLTA grants.
3. Increased Revenue: IOLTA funds provide legal services to the poor, support law related education, offer scholarships and student loans, and improve the administration of justice.

The need for IOLTA funds for essential and worthwhile programs has grown far beyond the interest currently earned on IOLTA accounts, particularly in these difficult economic times. The increased interest earned from rate comparability will help bridge the gap between growing needs and available revenue.

Most Idaho attorneys are probably looking for the answer to one simple question: How will these rule changes impact me? For the vast majority of attorneys the answer is: They won't. Most attorneys will not even know a change has occurred. There are many reasons attorneys will not be affected, including:

- Attorneys not engaged in private practice or who do not handle client trust funds do not have to have IOLTA accounts.
- Rate comparability does not apply to other types of attorney accounts such as business checking or savings.
- Rate comparability does not apply to trust accounts created for specific clients.
- Two of the options for rate comparability (treating IOLTA accounts like non-IOLTA accounts and paying 70% of the Federal Funds Rate) do not require a change in the attorney-financial institution relationship.

There is a very small percentage of Idaho attorneys who will have to make some changes as a result of rate comparability. Such circumstances include:

- One of the options for financial institutions is to create a new type of account. Under that option, an attorney may be asked to sign a new IOLTA agreement.
- While the experience of other states has shown it to be rare, there is a possibility that a financial institution may chose not to participate under the new IOLTA rules. In that event, unless the attorney receives an exemption from the Bar, the attorney will need to move the IOLTA account to a different financial institution.

Idaho Law Foundation staff and volunteers have spent the last several months working with the Idaho's Bankers Association and Idaho financial institutions to educate them about the new rate comparability rules and work with them to find the most efficient ways to implement these rule changes. In September, all financial institutions that currently hold IOLTA accounts were asked to sign new agreements declaring that they wish to continue holding IOLTA accounts under the new comparability rules.

As signed agreements are received, the Idaho State Bar and Idaho Law Foundation will update the list of approved financial institutions. A link to the most current list will be available on the Bar and Foundation's website.

If you have any questions about IOLTA or the rule changes, contact Carey Shoufler at cshoufler@isb.idaho.gov or (208) 334-4500.

Idaho Volunteer Lawyers Program Manager Anna Almerico, left, works with Janie Mendez, center and Martha Alejandre at a workshop for immigrants in Nampa this fall. The Deferred Action for Childhood Arrival program allows young people brought to the United States to go through a legal process for work authorization and legal status. IVLP co-hosted the event at the Hispanic Cultural Center. Anna and IVLP counselor Iris Grimaldo assisted eight attorneys, who aided more than 40 young people at the event, which went from 8 a.m. to 8 p.m.

Lawyers Could Face Hefty Fees for Easily Fixable Credit Card Error

Changes in the law regarding the reporting of credit card transactions have the potential to negatively impact IOLTA accounts and lead to ethical violations by lawyers. Pursuant to the Housing Assistance Tax Act of 2008, credit card processing companies are required to verify and match each merchant's federal tax identification number and his or her legal name with those found on file with the IRS. An EXACT match is required.

For the purposes of this requirement, lawyers who accept credit card payments are considered "merchants." If there is NOT an exact match between the information provided to the credit card processing company and the information on file with the IRS, there are serious consequences, including:

- Beginning January 2013, the IRS will impose a 28% withholding penalty on all credit card transactions, including those that the lawyer directs to her IOLTA account.
- If client funds that should be in the IOLTA account are withheld due to the lawyer's failure to act and thus are not available to the client on demand, ethical issues are raised.

If there is NOT an exact match between the information provided to the credit card processing company and the information on file with the IRS, there are serious consequences.

The credit card processing company should have received information from the IRS if a mismatch occurred and already notified the lawyer of the problem. However, it is not known if all processing companies have provided such notice. Steps lawyers can take now to avoid an ethical violation in 2013:

- Contact the credit card processor to determine that a match occurred.
- Correct mismatches if informed of one.

Pro Bono Champions Sought to Help Those Facing Foreclosure

The Idaho Volunteer Lawyers Program is looking for volunteers to assist with a new pro bono project designed to provide advice and counsel concerning the benefits and limitations of filing for bankruptcy for those who are facing foreclosure of their home.

IVLP asks for a contribution of time for a consultation. Volunteers will not be asked to represent anyone unless the volunteer and client agree to work together after the initial consultation.

The ISB Commercial Law and Bankruptcy Section Governing Council voted unanimously at October's Governing Council meeting to support this initiative. If interested, contact Anna Almerico at IVLP at (208) 334-4510 ext. 1870 to get involved in this project.

IVLP asks for a contribution of time for a consultation.

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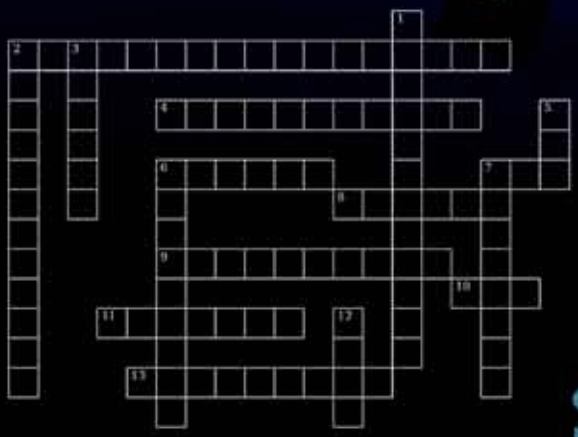
ACROSS

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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